Department of
Criminal Justice Training

Kentucky Justice and Public Safety Cabinet

2011

Case Law Updates
Fourth Quarter

Kentucky Court of Appeals
Kentucky Supreme Court
Sixth Circuit Court of Appeals

John W. Bizzack, Ph.D.
Commissioner

Department of
CRIMINAL JUSTICE TRAINING
KENTUCKY JUSTICE AND PUBLIC SAFETY CABINET

KENTUCKY
LEADERSHIP
INSTITUTE
Leadership is a behavior, not a position

The Leadership Institute Branch of the Department of Criminal Justice Training offers a Web-based service to address questions concerning legal issues in law enforcement. Questions can now be sent via e-mail to the Legal Training Section at

docjt.legal@ky.gov

Questions concerning changes in statutes, current case laws and general legal issues concerning law enforcement agencies and/or their officers acting in official capacity will be addressed by the Legal Training Section.

Questions concerning the Kentucky Law Enforcement Council policies and KLEFPF will be forwarded to the DOCJT General Counsel for consideration.

Questions received will be answered in approximately two or three business days.

Please include in the query your name, rank, agency and a daytime phone number in case the assigned attorney needs clarification on the issues to be addressed.

DOCJT.KY.GOV

Advanced Individual Training and Leadership Branch

J.R. Brown, Branch Manager
859-622-6591 **JamesR.Brown@ky.gov**

Legal Training Section

Main Number **859-622-3801**
General E-Mail Address **docjt.legal@ky.gov**

Gerald Ross, Section Supervisor
859-622-2214 **Gerald.Ross@ky.gov**

Carissa Brown, Administrative Specialist
859-622-3801 **Carissa.Brown@ky.gov**

Kelley Calk, Staff Attorney
859-622-8551 **Kelley.Calk@ky.gov**
Thomas Fitzgerald, Staff Attorney
859-622-8550 **Tom. Fitzgerald@ky.gov**
Shawn Herron, Staff Attorney
859-622-8064 **Shawn.Herron@ky.gov**
Kevin McBride, Staff Attorney
859-622-8549 **Kevin.McBride@ky.gov**
Michael Schwendeman, Staff Attorney
859-622-8133 **Mike.Schwendeman@ky.gov**

NOTE:

General Information concerning the Department of Criminal Justice Training may be found at http://docjt.ky.gov. Agency publications may be found at http://docjt.ky.gov/publications.asp.

In addition, the Department of Criminal Justice Training has a new service on its web site to assist agencies that have questions concerning various legal matters. Questions concerning changes in statutes, current case laws, and general legal issues concerning law enforcement agencies and/or their officers can now be addressed to docjt.legal@ky.gov. The Legal Training Section staff will monitor this site, and questions received will be forwarded to a staff attorney for reply. Questions concerning the Kentucky Law Enforcement Council policies and those concerning KLEFPF will be forwarded to the DOCJT General Counsel for consideration. It is the goal that questions received be answered within two to three business days (Monday-Friday). Please include in the query your name, agency, and a day phone number or email address in case the assigned attorney needs clarification on the issues to be addressed.

KENTUCKY

PENAL CODE – KRS 509 - KIDNAPPING EXEMPTION

Fields v. Com., 2011 WL 5881620 (Ky. 2011)

FACTS: D.E., age 16, was a special education student at Hazard High School. In March, 2009, he was befriended by "Robert," who asked D.E. to meet him at the library. Eventually they met up with "Eric" and went to a local apartment. There they found two undressed men drinking and watching a "porn video." D.E. was sexually abused and was then told he was free to leave, but the men in the apartment also pointed a knife at him and threatened him if he told anyone.

Later that same month, D.E. was picked up by Robert again and taken to a different apartment, where he was forced inside and sodomized at knifepoint. He was again threatened if he told anyone, and further, that the men would "stab his aunt" who D.E. apparently lived with in Hazard.

"The allegations came to light during a discussion about students stealing [D.E.'s] lunch money." As the discussion evolved, Capt. East "began to suspect that something had happened to D.E." at the apartment complex. He recognized the description of "Robert" as possibly being Fields. Capt. East confirmed that Combs and Walker lived in the apartment identified by D.E. At that apartment, the police found a backpack owned by Fields, which contained a "distinctive knife" that D.E. later testified was the knife used against him. Although D.E. did not identify Fields in a photo array, he did identify the other two men. D.E. later identified Fields as "Robert" during the trial, however.

Combs eventually admitted that he was "involved in an incident with D.E," in which he claimed he was also forced by the others to participate. Ultimately Fields was convicted of Sexual Abuse by complicity as well as Rape and Sodomy, both as a principal and by complicity, along with Kidnapping. He appealed.

ISSUE: Does restraint during a sexual assault justify a kidnapping charge as well?

HOLDING: No (but see discussion)

DISCUSSION: Fields argued that the Kidnapping conviction, based upon the second incident, should have been barred by KRS 509.050 – the "kidnapping exemption." The Court agreed that in that instance, D.E.'s "restraint did not being until almost immediately prior to the sexual assault." The Court agreed that the force did not exceed that necessary to commit the Rape and Sodomy. The Court agreed that the charge should not have been presented to the jury.

The Kidnapping conviction was vacated and the case remanded for sentencing reconsideration.

PENAL CODE – KRS 511 – BURGLARY

Mason v. Com., 2011 WL 5880945 (Ky. 2011)

FACTS: During 2008/09, Mason and Broadnax "had an on-again/off-again romantic relationship." Broadnax lived in a townhome in Paducah that was solely in her name. Mason stayed there some nights and kept some belongings there. However, Broadnax stated Mason did not have a key and did not stay there when she was at work. Instead she would drop him off at his sister's and pick him up on her way home. Mason did use the address for employment and other purposes. In November, 2009, they agreed to end their relationship and she packed up his belongings and took them to his sister's home. On the evening on November 18, Mason "repeatedly called" her and threatened her. At about 3:30 a.m. the next morning, she heard glass breaking. She found Mason in her apartment and they struggled. He proceeded to choke her and punch her. Eventually he passed out and she called the police. She was found to have multiple facial injuries.

Officer Rowley interviewed Mason and he admitted he had restrained her but denied hitting her. He admitted he knew at that time, he had no right to be there. He was charged with Assault and Burglary. (However, his strategy at the subsequent trial was to show he lived there at the time and thus could not have committed burglary.) He conceded the assault. However, he was convicted of both charges and appealed.

ISSUE: Does an assault following immediately upon a break-in justify a charge of burglary?

HOLDING: Yes

DISCUSSION: The Court noted that at the time Mason entered, "he did not have a key, and all of his belongings were at his sister's house." The evidence indicated he was angry and believed Broadnax was cheating on him. He had made threats and upon entering, he "rushed up the stairs and immediately attacked" her. The Court agreed it was reasonable to believe that he had "formed the intent to assault" prior to entering or "prior to remaining unlawfully."

The Court affirmed his conviction.

PENAL CODE – KRS 514 – IDENTITY THEFT

Goss v. Com., 2011 WL 6003851 (Ky. App. 2011)

FACTS: Goss was charged with using her daughter's identity to file tax returns. There was also evidence that she obtained credit accounts in her former husband's name in the same time period. She was convicted and appealed.

ISSUE: Is proof linking a person to fraudulent applications necessary to prove identity theft?

HOLDING: Yes

DISCUSSION: Goss argued that the Commonwealth did not prove each and every element that that she

stole Garrison (her ex-husband's) identity but she did not specify which elements were not met. The Court reviewed the record and agreed that while Goss "conceivably could have committed this crime, there was a complete lack of proof directly linking Goss to the credit applications." Although circumstantial evidence could support a conviction, "the evidence must amount to more than conjecture and speculation."

In addition, while she "had the opportunity" to file the false return, there was no proof that linked her to the "filing of the 2007 tax return." Although Goss did reside previously at the address where the tax documents were addressed and some of Goss's personal identifiers were used, the court did not find that to "remotely rise to a sufficient quantum of evidence to support" the conviction. The Court found that there seemed to be no effort to go beyond the speculation to prove the case against Goss.

Goss's convictions were reversed.

PENAL CODE – KRS 520 – ESCAPE

Lawton v. Com., 354 S.W.3d 565 (Ky. 2011)

FACTS: In July, 2007, Lawton was released from jail in Fayette County into home incarceration (HIP) to care of his ill mother. He was to wear an ankle bracelet and could only leave his mother's home with permission and he was only permitted to take her to doctor's appointments. On August 21, his caseworker received a notification that the transmitter was "open." The caseworker went to the home the next day and retrieved the device, but did not find Lawton. He was finally located and arrested on October 2. Lawton claimed he'd been working during that time to pay his mother's medical bills and his own child support.

Lawton was convicted of Escape 2nd. Lawton appealed.

ISSUE: Is removing a HIP device an Escape 2nd?

HOLDING: Yes

DISCUSSION: Lawton argued that the proper charge should have been Escape 3rd. The Court reviewed the statutes in question and agreed that under the HIP agreement, Lawton's mother's home was a detention facility. The Court did not agree that previous rulings on the issue argued otherwise simply because the suspects in those cases were both convicted of felonies, while Lawton was only incarcerated originally for a misdemeanor.

However, due to an error in the jury instructions, the Court reversed the conviction and remanded the case for a new trial.

PENAL CODE – KRS 524 – TAMPERING

Haynes v. Com., 2011 WL 5245207 (Ky. App. 2011)

FACTS: In October, 2007, Haynes shot Rodriguez, in Barren County. Haynes took the body to a nearby lake and threw it in. The coroner later attributed Rodriguez's death to a gunshot wound but noted

that drowning might have been a contributing factor. Haynes was charged with murder, but eventually convicted of Manslaughter 2nd and Tampering with Physical Evidence. He later moved to vacate the Tampering conviction.

ISSUE: Is Tampering a separate offense from homicide, when the charge arises from the disposal of a body?

HOLDING: Yes

DISCUSSION: Haynes argued that the Tampering charge "should have been treated as a lesser-included offense of the charge of manslaughter, because both arose from the same act – throwing Rodriguez's body into the lake." The Court, however, noted that "the two crimes require entirely different elements of proof." The Court noted that the evidence of Haynes' transporting the body and cleaning out the truck later (caught on videotape), sufficiently proved the Tampering charge. His argument that the actions took place before a grand jury was convened and as such, "he could not have known that official proceedings were about to or had been instituted."

The Court affirmed the denial of the motion to vacate the Tampering charge.

ADULT ABUSE

Buchanan v. Com., 2011 WL 5105455 (Ky. App. 2011)

FACTS: During a two month period in 2008, in McCracken County, Buchanan appropriated approximately $20,000 of her mother's funds using a power of attorney. She "deceived and intimidated her mother in an effort to retain control of her mother's financial affairs." In January, 2009, Buchanan was indicted for violating KRS 209, the Adult Protection Act. She claimed it was unconstitutionally vague but was convicted. She appealed.

ISSUE: Is KRS 209 impermissibly vague?

HOLDING: No

DISCUSSION: The Court noted that "in order to survive a challenge of void for vagueness, a statute must define a criminal offense with such specificity and certainty that ordinary people can understand what particular conduct is prohibited in such a manner as to prevent arbitrary and discriminatory enforcement." Buchanan argued that there was no evidence "that her mother suffered mental or physical dysfunction sufficient to trigger the protections of the act." The Court noted that the charge applies when there are "limitations severe enough to prevent the vulnerable adult from managing her own affairs." In this case, Buchanan's mother clearly needed assistance to manage her affairs during her convalescence from brain surgery, as she was either hospitalized or receiving care at a nursing facility. The Court noted that witnesses stated that "Buchanan denied her mother any opportunity to collect and review her financial materials on her own" and told her mother she could sell the house and car. And ultimately, Buchanon confessed that "she had indeed misused her mother's resources." Although there were people to whom her mother could have complained, not doing so did not indicate acquiescence.

The Court upheld her conviction.

DOMESTIC VIOLENCE / FAMILY ISSUES

C.H. v. Cabinet for Health and Family Services, 2011 WL 5419734 (Ky. App. 2011)

FACTS; In April, 2010, a petition was taking alleged C.H. (Mother) with permitting N.H. to be absent and tardy for too many days. The principal had been in contact with Mother and had discussed the matter with her. Six of the absence days were due to head lice. At a hearing, the Court agreed that Mother had neglected the children's education. She appealed.

ISSUE: Does a failure to ensure a child regularly attends school constitute neglect?

HOLDING: Yes

DISCUSSION: Mother argued that the Commonwealth had failed to prove that N.H. suffered actual harm as a result of the Mother's conduct. The Court looked to an earlier decision and agreed that the child's absence from school was sufficient to threaten N.H.'s welfare and violated the child's "fundamental right to education instruction."[1] The Court agreed that it was reasonable to expect a parent to ensure the child's attendance at school and her inability to do so constituted neglect.

The Clark Circuit Court's decision was affirmed.

Mays v. Calvert, 2011 WL 6146878 (Ky. App. 2011)

FACTS: Calvert filed for a DVO on behalf of her minor children alleging her stepfather (Mays) had sexually abused the minor children (age 3 and 10). The trial court ordered the DVO. Mays appealed.

ISSUE: Is testimony at a DVO hearing protected from use as a companion criminal proceeding?

HOLDING: Yes

DISCUSSION: May argued that he was told that "any testimony he provided (during the DVO hearing) could be used against him in a companion criminal proceeding" and as such, he did not testify. However, KRS 403.780 provides that such testimony (in a case involving the same parties) is not admissible in any such criminal proceedings. Although the objection was not properly preserved, the Court agreed that "under these unique circumstances," a "manifest injustice resulted from the" error and Mays was entitled to an evidentiary hearing on the issue.

The Court allowed the EPO to stand but vacated the DVO and remanded the case for further proceedings.

Tuttle v. Shrout, 2011 WL 4861878 (Ky. App. 2011)

FACTS: On Jan. 3, 2011, Shrout filed for an EPO in Clark County against Tuttle. The family court denied the EPO, finding no indication of an immediate and present danger. However, the Court did

[1] M.C. v. Com., 347 S.W.3d 471 (Ky. App. 2011).

summon Tuttle to a DVO hearing pursuit to KRS 403.745. Following the hearing, the Court issued a DVO for one year against Tuttle. He appealed.

ISSUE: Does a DVO require that an EPO be entered first?

HOLDING: No

DISCUSSION: Tuttle first argued that because the court did not enter an EPO, it could not issue a DVO. The Court noted the difference between an EPO and a DVO and agreed that even if the trial court does not issue an EPO, it must still hold a DVO hearing. Issuance of a DVO does not require the "presence of an immediate and present danger."

The Court affirmed the issuance of the DVO.

Deckard v. Weston, 2011 WL 5419714 (Ky, App. 2011)

FACTS: On June 3, 2010, Weston filed for a DVO against her half-brother, Deckard. The incident in question occurred at a local party where their mother was undergoing surgery, and the parties argued over who would hold a hospital-issued pager intended to keep them posted as to their mother's surgical status. Allegedly, Deckard physically threatened Weston over her holding the pager.

At the hearing, Deckard did not deny their disagreeable relationship and that he'd physically threatened Weston, but argued that a DVO was unwarranted as the two had "minimal contact" and "do not live in the same household." The Court issued the DVO and Deckard appealed.

ISSUE: Do half-siblings who do not reside together qualify as family members under KRS 403?

HOLDING: No

DISCUSSION: The Court noted that the two are "half-siblings who did not reside together." As such the Court agreed that they did not qualify as family members under KRS 403.720 and reversed the issuance of the DVO.

DRIVING UNDER THE INFLUENCE

Com. v. Bilbrey, 2011 WL 5105376 (Ky. App. 2011)

FACTS: On June 13, 2008, Deputy Guffey (Clinton Co SO) testified that he responded to a complaint about a vehicle being driven down the center of the road that had "almost run at least two other vehicles off the road." He was provided information about the truck and that it was trying to turn around at a specific location. The deputy located a vehicle matching the description some minutes later and found "Bilbrey slumped over in the driver's seat with his head down." He saw an open beer can and Bilbrey, apparently asleep. The engine was running and the parking lights were on. Deputy Guffey pounded on the truck's window and Bilbrey finally responded, getting out and appearing unsteady and dazed. Deputy Guffey tried to do an HGN but Bilbrey said he was "too drunk" to do a balancing test. He was arrested and refused an Intoxilyzer.

Bilbrey moved for suppression, arguing he was not in control or operating the vehicle at the time of the arrest. The Court denied his motion and he was ultimately convicted. He was denied further motions and he appealed. The Court of Appeals reversed the conviction, finding that the Commonwealth had not proved that he was in control at the time. The Commonwealth moved for discretionary review.

ISSUE: Can a sleeping subject be found guilty of DUI?

HOLDING: Yes (but see discussion)

DISCUSSION: The Court found the Deputy Guffey's "testimony was clear, concise and thorough" and found no reason to doubt his veracity. The Court looked to previous cases, in particular Wells v. Com., in which courts had found that the defendant had not been proven to be in control.[2] Looking to the Wells factors, the Court noted that the first was "whether the defendant was asleep or awake." Deputy Guffey had indicated he believed Bilbrey was asleep. However, the second factor, that the engine was running, suggested Bilbrey had operated the vehicle while intoxicated. The evidence indicated the vehicle had been driven just minutes before and the Court found it "improbable that in the nine minutes Bilbrey was parked at the Spring Creek Bridge he consumed so much alcohol that he was unable to perform or failed multiple standard field sobriety tests." Logically, Bilbrey was intoxicated prior to arriving at the location where he was arrested. "Bilbrey was the only person in the vehicle and no other persons were in the vicinity."

The Court agreed that "Deputy Guffey had a reasonable believe that Bilbrey had operated his truck while intoxicated." The court reversed the Circuit Court's decision and reinstated the District Court's decision.

Hunter v. Com., 2011 WL 5600618 (Ky. App. 2011)

FACTS: By February 1, 2010, Hunter had already been convicted of four separate DUI offenses. As such, he was indicted for driving on an OL suspended for DUI at that time and for a 4th offense DUI, as well has an aggravator for having refused a breath test. KRS 189A.010 established the penalty "by counting the number of DUI offenses for which the defendant has been convicted in the preceding five years." Hunter argued that the indictment incorrectly used the dates of the actual offenses rather that the dates of his prior convictions. (By doing so, a DUI was included that otherwise would not have been.)

The trial court overruled his motion and he took a conditional guilty plea. He then appealed.

ISSUE: For counting prior DUIs, do you count between the first and last offense or the convictions?

HOLDING: Offenses

DISCUSSION: The Court reviewed the record and the statute and noted that the statute specifically stated that the "period shall be measured from the dates on which the offenses occurred." The Court found the calculation was correct and upheld his plea.

[2] 709 S.W.2d 847 (Ky. App. 1986).

Hill v. Com., 2011 WL 4633351 (Ky. App. 2011)

FACTS: On July 4, 2009, Sgt. Messer (Cold Springs PD) saw a vehicle "driving erratically." He stopped the vehicle and asked the driver (Hill) for his OL; Hill responded that his license was suspended. Officer Love arrived and it was decided Love would do FSTs to determine if Hill was intoxicated. He did several "in-car" tests and then asked Hill to get out. Hill refused and took off in his vehicle. Following a short pursuit, he crashed and was quickly captured and arrested. He was given an Intoxilyzer test at the station and he was found to be .175.

Hill was indicted on charges of Wanton Endangerment 1st, Fleeing and Evading 1st, Operating on a suspended license and other charges.[3] At the trial, Officer Love was permitted to testify about the testing and maintenance of the Intoxilyzer 5000, to which Hill objected that Love should not have been permitted to read what someone else (the KSP technicians) had written. (Love had read this information from the log book kept with the instrument.) The Court disagreed and Hill was convicted. He appealed.

ISSUE: Is an Intoxilyzer log testimonial?

HOLDING: No

DISCUSSION: Hill argued that the "lab technician's report was testimonial" and because he had not had the chance to cross-examine the technician, who was also not available at trial, that the evidence should have been excluded. That issue had previously been addressed in Com. v. Walther[4] and that Court had agreed that such records were not testimonial, and "thus their admissibility is not governed by Crawford."[5]

The Court upheld the admission of the testimony as well as his conviction.

SEARCH & SEIZURE – PLAIN VIEW

Stevens v. Com., 354 S.W.3d 586 (Ky. App. 2011)

FACTS: On June 28, 2007, Deputy Smith (McCreary County SO) got a call from Spradlin that "he had located a [motorcycle] that had been stolen from his grandfather" several days before. Spradlin had located it on Stevens' property. Deputy Smith and Sheriff Skinner, along with two other deputies, went to Stevens' property near the Kentucky-Tennessee state line. They entered the property through his driveway and spotted the motorcycle parked in an open shed. No one was home when they arrived. They later agreed that the motorcycle could not be seen from the road.

Deputy Smith entered the shed and confirmed that the serial number matched that of the stolen motorcycle. Stevens arrived a short time later and told the Sheriff he'd purchased it at a flea market. He and the Sheriff left the premises, and the deputies remained, subsequently getting permission from his wife to search the remainder of the property while waiting for the Kawasaki to be removed. At that time, a stolen four-wheeler was located and also removed. Stevens was ultimately charged with receiving stolen property for both items. He moved for suppression and the trial court agreed that the search was improper,

[3] There was no indication in the record that he was charged or convicted of DUI, however.
[4] 189 S.W.3d 570 (Ky. 2006).
[5] Crawford v. Washington, 541 U.S. 36 (2004).

holding that the viewing of the motorcycle was permitted under open fields, but that the subsequent search to identify it was not proper – considering the deputies agreed they could have sought a search warrant based upon the information they had. Although the Court suppressed the evidence found in that search, it did admit the admission of the four-wheeler, however. Stevens took a conditional guilty plea and appealed.

ISSUE: Is a seizure valid when the contraband items is viewed from a place where the officers do not have the legal right to be?

HOLDING: No

DISCUSSION: The Court agreed that the "officers were not where they had a right to be when they initially observed the Kawasaki [motorcycle]." The Court noted that it seemed to be located in the curtilage (in a shed) and not in the open fields and agreed that suppression was proper of that item. The Court recognized, however, that a "subsequent consent to search may dissipate the taint of a prior illegality."[6] The Court found that the subsequent consent was voluntary and "not the product of coercion or duress." The consent occurred some three hours after the motorcycle was found and given by someone who was not present when the first search was done. She "expressed a desire to cooperate with the officers." In fact, she conferred with her husband by phone before signing the consent form.

Further, although the Court agreed the deputies should have gotten a warrant, their "conduct was not abusive or flagrantly in appropriate," and they arguably believed their actions were justified under plain view.

The Court upheld the second search and the plea.

Chavies v. Com., 354 S.W.3d 103 (Ky. 2011)

FACTS: A KSP trooper, driving through his neighborhood, "spotted a man standing in the garage of a for-sale house and an unfamiliar car pulling out of its driveway." He stopped the car, driven by Chavies, for failure to wear a seatbelt and reckless driving. Because a warrant was discovered, Chavies was arrested. The trooper returned to the house, with a key provided by the realtor, and searched the house. Hurley was found hiding in a closet. He admitted that he was making and using methamphetamine in the house and that Chavies had stolen specific items. The troopers looked through the window of Chavies' car and saw items matching what had been stolen. They searched the car and found more items and a mobile meth lab.

Chavies was indicted for Burglary, Manufacturing Methamphetamine, Receiving Stolen Property and related charges. Chavies moved for suppression and was denied. He was convicted of most of the charges and appealed.

ISSUE: Is inadvertent discovery required under the plain view doctrine?

HOLDING: No

DISCUSSION: Chavies first argued that the initial traffic stop was invalid because it was not based upon any reasonable suspicion of criminal activity. The trooper had testified that he followed Chavies and

[6] Baltimore v. Com., 119 S.W.3d 532 (Ky. App. 2003).

realized he wasn't wearing a seat belt. When Chavies spotted the trooper, "he jerked back into the main road." The Court agreed there was sufficient reason to make the stop. With respect to the search of the car without a warrant, the Court looked to the plain-view exception. The Court reviewed the usual three elements but noted there was "some confusion … concerning a potential fourth element to the plain-view exception-inadvertent discovery by the police." In Horton v. California, the Court had noted that "even though inadvertence is a characteristic of most legitimate 'plain-view' seizures, it is not a necessary condition."[7] However, in Hunt v. Com.,[8] the Court had "included the inadvertent discovery element in the plain-view exception analysis." But the Court concluded that Hunt did "not signal a reversion in Kentucky law back to requiring" it. The items in question were in containers that were appropriate for the items (a laptop bag and the original box for the stolen lights). In addition, under the automobile exception, it was absolutely appropriate to search the vehicle for more stolen items, even though Chavies was in custody at the time, as they had sufficient probable cause to believe the car contained evidence of criminal activity. Further, the Court agreed that Hurley was not an unreliable anonymous tipster.

Chavies also challenged his conviction for Manufacturing Methamphetamine, but the Court quickly found that the trooper's training and experience adequately supported his testimony that Chavies had a mobile meth lab in the vehicle.

Chavies' convictions were affirmed.

SEARCH & SEIZURE – CONSENT

Casey v. Com., 2011 WL 1196704 (Ky. App. 2011)

FACTS: Casey was identified in a suspect in drug trafficking in Newport. Officers went to the apartment shared by Gillespie and Casey. The lease was in Gillespie's name and she paid the rent. Gillespie consented to a search, and in fact, asked that the officers search as she did not want anything illegal in the apartment. A ledger of drug transactions was found in a dresser, along with Casey's ID and men's clothing.

Casey was convicted, and appealed, after having been denied suppression.

FACTS: May a lessee, who is a co-inhabitant of a residence, give consent to search the bedroom furnishings in a room they share with the suspect?

HOLDING: Yes

DISCUSSION: Casey argued that the search of the dresser was improper and that Gillespie "could not effectively give the police permission to search areas that were used or possessed only by Casey because they were exclusively within his control." The Court noted that it has repeatedly been held that the test for whether third party consent is valid is, "whether a reasonable police officer faced with the prevailing facts reasonably believed that the consenting party had common authority over the premises to be searched."[9] The Court found it "entirely reasonable for the agents searching Gillespie and Casey's apartment to

[7] 496 U.S. 128 (1990).
[8] 304 S.W.3d 15, 27 (Ky. 2009).
[9] Com. v. Nourse, 177 S.W.3d 691 (Ky. 2005)

assume that Gillespie could consent to the search of the dresser." It was in a shared bedroom and not locked or otherwise secured.

The Court upheld the search, although the conviction was reversed for other, unrelated, reasons.

SEARCH & SEIZURE – TERRY

Jackson v. Com., 2011 WL 6003887 (Ky. App. 2011)

FACTS: On the day in question, Officer McMinoway (Lexington PD) was on patrol. Just before 1 a.m., he noticed a lone vehicle, a van, in a nightclub parking lot. Jackson was in the driver's seat and Henderson was standing outside the van with his hands near the window. The officer saw some type of contact. When Henderson saw the officer, he "quickly pulled his hands away from the window and abruptly walked away from the van."

The officer believed he'd just witnessed a "hand-to-hand drug transaction." He circled around and returned and noted that the van was leaving and that Henderson was now in the vehicle as well. The officer made a traffic stop and found Jackson to be "perspiring heavily, his hands were shaking, and he was very hesitant when answering basic questions." Jackson could not define his relationship with Henderson, nor did he identify him by name. When he reached for the glove box, the officer found his movements odd and ordered him from the car. Outside, Jackson "repeatedly put his hands into his pockets despite Officer McMinoway's warnings to the contrary." The officer frisked him and "felt a lump in [Jackson's] pocket and heard the crumpling sound of a plastic baggy." He immediately recognized it as contraband and in fact, it was 8.2 grams of cocaine in individual packages.

Jackson was indicted for Trafficking and related offenses. He moved for suppression and was denied. He took a conditional guilty plea and appealed.

ISSUE: Is extreme nervousness and a lack of knowledge about one's passenger sufficient for a Terry stop?

HOLDING: Yes

DISCUSSION: The court reviewed the facts known to the officer at the time (as listed above) and agreed that the officer did possess a reasonable suspicion of criminal activity. As such, the initial interaction was proper. The Court also agreed it was appropriate to 1) get Jackson out of the vehicle and 2) frisk him, based upon a reasonable belief he was armed in dangerous. Finally, the Court found it proper to seize the contraband since the officer immediately recognized its character.[10]

The Court upheld Jackson's plea.

[10] Com. v. Marshall, 319 S.W.3d 352 (Ky. 2010).

INTERROGATION

Qualls v. Com., 2011 WL 5105150 (Ky. App. 2011)

FACTS: In March, 2008, a 12-year-old girl was forcibly raped by Qualls in Hardin County. She did not report the rape for 17 days but when she did so, a warrant was issued. Qualls was arrested in Grayson County. Elizabethtown officers went to Grayson County to interview him, and they allegedly "insinuated that if Qualls would admit that he had engaged in consensual intercourse with the victim, he would receive a light sentence – possibly parole." He admitted that he had sex with her one time, but later stated that he had "only penetrated her digitally."

At trial, portions of the interview, including Qualls' admissions, was presented. He was convicted and appealed.

ISSUE: Are suggestive comments during an interrogation permitted?

HOLDING: Yes

DISCUSSION: Qualls argued that when he was not permitted to play the recording of the interview in its entirety, his right to present a complete defense was violated.[11] The Court, however, found that Qualls was given "ample opportunity to explain the circumstances of his confession to the jury." The Court noted that some of the recording was excluded because of KRE 412 (the Rape Shield Law), which "prohibits introducing evidence of the victim's past sexual behavior or inclinations." A recent case had ruled that a balancing act was necessary with KRE 403, "which provides that evidence is inadmissible if it is more prejudicial than probative."[12]

The Court further noted that "there was no evidence so support [the detectives'] suggestive comments" and implied that "their remarks were only utilized as an interrogation technique." The Court found no reason to believe that the remarks "were more prejudicial than probative." He had ample other opportunity to testify "that he felt pressured to confess." The victim testified in detail about what had occurred "while Quall's account of the events was vague and kept changing throughout his testimony. Further the victim contracted the same STD as had one of Quall's sexual partners. Qualls was permitted to enter his primary defense that sex would have been impossible due to the size of his penis and as such, his rights to present a complete defense were not violated.

Qualls' conviction was affirmed.

TRIAL PROCEDURE / EVIDENCE – CONFRONTATION CLAUSE

Martin v. Com., 2011 WL 682639 (Ky. 2011)

FACTS: On March 11, 2009, Martin was living with her children in Lexington. On that day, she went to the maintenance man, Wilburn (who lived across the hall) and asked him to fix her bathroom fixtures. Wilburn went to the apartment and Martin "shot and killed him." She "gave several irrational

[11] KRE 106, the "rule of completeness."
[12] Mayo v. Com., 322 S.W.3d 41 (Ky. 2010).

explanations" to the police for the shooting. During one of the interviews, about 12 minutes into it, she "indicated that she wanted an attorney." They stopped the interview after "attempting to determine where [Martin] wanted her children to be taken." She was then placed in a holding cell. A short time later, she knocked on the door and "asked Detective Iddings to come back and talk to her because she wanted to tell him the whole story." He did not, however, "continue the interview because [Martin] had invoked her right to an attorney." She was indicted for Murder and Wanton Endangerment. At trial, the defense suggested that the investigators "intentionally directed [Martin] away from irrational responses during the interview" so that the prosecution "could later argue that she had fabricated them." Det. Iddings was challenged by the defense with the question "You are aware that even if a suspect says they want an attorney, they can voluntarily reinitiate on their own?" That statement was objected to and the objection upheld. She was convicted (but found mentally ill) and appealed.

ISSUE: Is it permitted to question a subject who reinitiates after invoking Right to Counsel?

HOLDING: Yes

DISCUSSION: Martin argued that "her right to confrontation was unconstitutionally restricted by the trial court's ruling." The Court agreed that the restriction was improper as the "legal requirements of a proper investigation and interrogation of a criminal defendant are within the purview of an investigative detective." In this case, however, the Court agreed that a response to the question was unnecessary, as the question "contained, in itself, the fact that after a suspect requests an attorney, police may continue the interview if the suspect reinitiates the questioning." The point also "came across through the questioning concerning the detectives' strategy for interviewing" Martin and even that the places where "steering was evident were read aloud during cross-examination." The Court agreed that the error was harmless since the defense was able to introduce their point.

On an unrelated note, Martin argued that permitting the jury to make cell phone calls during a break in the trial was improper, since it was during a "critical stage of the trial" and she should have been there. The Court noted that the jury had been properly admonished not to discuss the trial and there was no indication that any jury did so during their calls home. The "mere fact that jurors made cell phone calls does not create the presumption that they spoke about the case." Further, this was done during planning for dinner which was not a critical stage. Jurors had previously been admonished not to use their phones to access social media or watch the news and absent evidence to the contrary, they "are presumed to have followed the admonitions."

Martin's conviction was affirmed.

TRIAL PROCEDURE/EVIDENCE – RELEVANCY

Shaffer v. Com., 2011 WL 5316738 (Ky. 2011)

FACTS: C.C., age 7, accused Shaffer (her uncle) of sodomy during a July 2005 visit to her grandmother's (Kathy's) home in Adair County. Every summer, C.C. and J.C. (her brother) would visit their grandmother for several weeks. When C.C. told her grandmother that Shaffer had touched her while she was taking a bath, Kathy Shaffer notified the police. C.C. later alleged that Shaffer had sodomized her during a time when they'd been alone in the home. He was indicted. At trial, Devon (Shaffer's younger

brother) testified that he'd been sent by Shaffer to a nearby convenience store on that date. At the time he left, Shaffer had been wearing only boxers and had an erection. A few days later, Kathy Shaffer had Shaffer removed from the house after an apparently unrelated argument.

At some point, Devon and C.C. went Shaffer's new home (a trailer across the street) to take a shower, and Devon witnessed some suspicious activity between the two. C.C. told him at the time that Shaffer had "touched her."

A "cursory exam" was done shortly after the incident and some physical symptoms were discovered. Shaffer was charged with sodomy because of an allegation of apparent anal intercourse but an exam to confirm that had occurred had not occurred because C.C. was "crying and resistant" to an examination. (The nurse indicated that C.C. did not report any bleeding, however.) Originally, C.C. was brought to the health center "complaining of frequent and difficult urination." When asked, she reported that Shaffer had "touched her in her 'privates' and stuck something hard in her 'butt.'" (The nurse was not a SANE, but had testified as to extensive coursework in pediatrics which had also covered sexual abuse.) At trial, the nurse "speculated that it was possible" that the child had "confused her 'butt' and vagina" and admitted she could not be sure her symptoms were "caused by sexual trauma."

Shaffer was convicted and appealed.

ISSUE: Is irrelevant testimony inadmissible?

HOLDING: Yes

DISCUSSION: On appeal, Shaffer argued that the symptoms the nurse discussed where irrelevant and inadmissible because the alleged crime was sodomy. The Court reviewed a number of evidentiary rulings and noted that it was not proper to limit the defense cross-examination of the nurse-witness in questioning whether the symptoms were consistent with the allegations. Given the specifics, however, the Court ruled the error to be harmless.

Shaffer also argued against a recording of his interview with Det. Atwood, along with a transcript, being provided to the jury. The defense agreed the transcript was accurate (after certain portions had been redacted). The Court agreed it was proper for the jury to be provided the transcript, which was not admitted into evidence nor were they allowed to have it in the jury room.

Shaffer's conviction was affirmed.

TRIAL PROCEDURE/EVIDENCE – RULE 7.24

Day v. Com., 2011 WL 5865433 (Ky. 2011)

FACTS: Hargrove was killed, in Hopkins County, in June, 1991 – the actual day was in dispute because of a delay in the finding of the body. "Her body was found riddled with multiple stab wounds and dumped into a water-filled pit in an abandoned strip mine." The murder remained unsolved for many years, but ultimately, Day's ex-wife, Karen Campbell, admitted she'd given Day a false alibi for the day in question. Day had previously been linked by finger and palm prints to the scene. Day was indicted. At trial, it was

revealed that Day and Hargrove had a relationship and Campbell had been absent from home for several evenings prior to the killing. When confronted, on the day of the apparent killing, Day admitted to Campbell he'd been with Hargrove but denied any relationship.

That evening, Campbell called Hargrove and Hargrove also denied a relationship with Day. Campbell demanded Day stop seeing Hargrove, however, and threatened to leave him and take the house and business. She later admitted she went to bed and "could not account for Day's whereabouts from the time she went to bed until early the next morning." She knew Day left the house about 6 a.m. the next morning claiming he needed to check on Hargrove, as he feared she might have "done something to herself." He later reported he was at her house and that he'd found a lot of blood. Despite Day's denial about having touched the front door, his prints were found there. (The door had allegedly been cleaned the day before.)

Day objecting during the trial, bringing up a number of alleged trial errors. First, he argued that the case should have mistried because the prosecution failed to disclosed a statement made by one of the witnesses, Forbes. She had "made three different statements to the police and prosecution during the investigation … about a conversation she had with Hargrove the morning before the murder." The statements were inconsistent with respect to Hargrove's connection with Day. The defense was not given information about the third statement, made several days before the trial, in which Forbes claimed specifically that Day was "Hargrove's paramour" and that the "break-up was imminent." (Previously she had not provided Day's name.) The first time the defense heard this information was when Forbes testified. Forbes agreed that the written statement provided did not contain everything she had told the detective and that she signed it anyway.

The defense argued that the prosecutor had failed to comply with the discovery request for witness statements but declined to argue the issue on hearsay grounds. At conference, the trial court declined a mistrial but did voice "a concern with police sandbagging if police intentionally left out some information provided in their witness statements." (The detective who took the statement had died in the interim.)

Day was convicted and appealed.

ISSUE: Does Rule 7.24 cover statements made by the victim to a witness?

HOLDING: No

DISCUSSION: The Court looked at each argument in turn. The Court found that the prosecution did not violate RCr 7.24 because the incriminating statement in question was not made by the defendant to a witness, but by the victim to a witness. Subsection 2 of the rule covers written or recorded statements of witnesses, but did not cover notes and such in connection with the investigation involving other witnesses. Further, the statements are not covered by RCr 7.26, either, as it only requires pretrial disclosure (not less than 48 hours before) of documents and recordings. The Court did not believe the statement fell within the scope of the rule.

However, the Court noted that the defense made discovery motions requesting "statements by any witness that were inconsistent with other statements made by the same witness." Day argued that Forbes's statement was inconsistent and as such, should have been disclosed. Although the Court agreed that the two statements were not inconsistent, the Court noted "there is a fundamental difference between a statement that "Sheila was seeing a married man," and a statement that "Sheila was seeing Dale Day and

planned to break up with him that night." The court agreed that the failure to disclose was fatally prejudicial because "Day went into trial with one theory of his case only be surprised by essential information that the Commonwealth had failed to disclose."

The Court mistried the case and reversed it, also holding that because the jury did acquit Day of Murder, he could not be retried on that charge. He could, however, be retried for Manslaughter.

Tramble v. Com., 2011 WL 6004369 (Ky. App. 2011)

FACTS: In February, 2009, the Cincinnati postal inspector, O'Neill, was investigating marijuana transportation. She was focusing on Cottrell, and through him, she learned of Tramble. On August 31, 2009, Deputy Kappes (Boone County SO / Northern Kentucky Drug Strike Force) contacted her about a call from Arizona concerning a package coming via FedEx to a Crescent Springs address. Deputy Kappes learned that the address was a UPS store and that the box was in Tramble's name. They obtained a warrant, collected and opened the package, finding it contained 5 pounds of marijuana. The package was returned to the UPS store and a local officer posed as the clerk. Tramble arrived, signed for and received two packages, the second was also discovered to also contain marijuana. She was apprehended leaving the store and admitted that she knew the packages contained marijuana. She also stated she was to deliver the packages to Cottrell, in Ohio.

Although Tramble was cooperative, the inspector "could not make arrangements with the Cincinnati Police Department for a 'sting' to incriminate Cottrell." Tramble was charged with Trafficking and Conspiracy and was ultimately convicted only of Trafficking. She appealed.

ISSUE: Must oral statements be disclosed to the defense?

HOLDING: Yes

DISCUSSION: Tramble argued that evidence of an oral statement she made was not properly turned over the to the defense in compliance with discovery demands and pursuant to RCr 7.24. The original trial date was postponed, but a few weeks before the new trial date, "the Commonwealth provided defense counsel with Inspector O'Neill's report which contained an incriminating oral statement made by Tramble." Over objection, the Inspector was allowed to testify as to the statement, in which Tramble acknowledged that she knew the packages contained marijuana.

The Court agreed that the Commonwealth violated 7.24 and noted that it failed to see how the prosecution was not aware of the statement. The "disclosure was mandated by the rule" and a "plain reading" of the rule reveals "that disclosure is not limited to only those statements made to agents of the Commonwealth as asserted by the Commonwealth but encompasses all those statements made to any witness within the knowledge of the Commonwealth." The Court agreed that the trial court erred in not addressing the violation, but did find the error was harmless because it was simply cumulative to the testimony of other witnesses.

Tramble also argued that it was improper to allow witnesses for the Commonwealth to "reference any mailings containing marijuana to Tramble's residence in Ohio, for which the Commonwealth did not provide the required notice under KRE 404(c)." The Court reviewed the provisions of KRE 404 and agreed it was improper not to exclude references to "prior uncharged criminal activity." However, because Tramble did

have the opportunity to challenge its admission, albeit unsuccessfully, prior to the trial, the Court upheld the trial court's decision.

However, due to comments made by the prosecutor during closing arguments, that referenced the uncharged crimes noted above, the Court agreed that Tramble was unfairly prejudiced and reversed her conviction.

Matthews v. Com., 2011 WL 6004369 (Ky. App. 2011)

FACTS: On June 6, 2008, Covington PD officers did a knock and talk at 4:30 at a local residence. Matthews answered the door and told the officers he did not live there but was simply watching the house. They asked for permission to search. He reiterated he did not live there but did consent to the search. They found marijuana and cash and "decided to conduct a protective sweep of the house." They then found several baggies of cocaine. The officers wanted to do a full search and conferred with the Commonwealth Attorney, who spoke to Matthews in person. He concluded that Matthews' consent was sufficient. During the subsequent search, the officers found a handgun and body armor. Matthews was charged for the drugs and for the weapon, since he was a convicted felon. The charges were bifurcated and he was convicted for possession of the drugs. He took a plea agreement on the weapons charge. Matthews then appealed.

ISSUE: Must the defense object to statements not previously disclosed in order to seek a mistrial on the issue?

HOLDING: Yes

DISCUSSION: Matthews argued that he should have been given a requested mistrial because the Commonwealth's Attorney (Sanders) "testified regarding statements Matthews made to him at the time of the search even though these statements were not provided during discovery as required by Kentucky Rules of Criminal Procedure (RCr) 7.24." Specifically, he admitted to Sanders that he could provide names of people selling from the residence but also that he was afraid to do so. Matthews claimed that his claim "to be afraid was not disclosed by the Commonwealth during discovery." However, Matthews did not object to the statement, nor did he ask that the jury be admonished about the statement and as such, a mistrial was not warranted.

In addition, he argued that a statement by Officer Lusardi was improper, as it had been agreed "that officers could only testify in general terms that they were conducting an investigation." However, the officer testified that the knock and talk was part of "an investigation of narcotics use in the area." The Court found that Lusardi's statement did not unduly prejudice Matthews' case nor did it warrant a mistrial.

Finally, Matthews contended that the evidence seized should have been suppressed because he did not own the residence and "lacked the requisite authority to consent to a search of same." The Court noted that his argument was "legally self-refuting" – since if he did not own or control it, he did not have a reasonable expectation of privacy in the residence. However, the facts indicated that it was reasonable to believe that "Matthews possessed common authority over the residence, thus validating his consent to search the residence."

Matthews' conviction was affirmed.

TRIAL PROCEDURE / EVIDENCE – EXPERIMENTS

Hickey v. Com., 2011 WL 5880947 (Ky. 2011)

FACTS: Hickey was an employee of Meijer in Fayette County. Believing his employer was not treating him with compassion because of his wife's difficult pregnancy, he began to steal from the store. Eventually, Hickey ignited a trashcan which caused the store to be evacuated. The subsequent fire, aggravated by its proximity to pool chemicals, resulted in damage of approximately $382,000. He was terminated for the thefts and an investigation began as to his involvement with the fire. He confessed to the police that he set the fire and that he intended to use it as a distraction to allow him to get stolen items out of the store.

Hickey was charged, and convicted of, Arson 1st. He appealed.

ISSUE: May experiments be done on a smaller scale than the actual incident?

HOLDING: Yes

DISCUSSION: Hickey argued that it was improper to allow Captain Ward (the fire investigator) to testify as to his training on "recognizing signs of deception when conducting an interview." However, the Court noted, he did not testify to whether he believed that Hickey had, in fact, been deceptive. As such, the Court found the error, if any, to be harmless.

Next, Hickey argued it was improper to admit a video of an experiment on a controlled burn into evidence. The Court noted that "experiment evidence is generally admissible if it bears upon a material issues and if the proponent establishes a sufficient similarity between the conditions of the experiment and those of the event in question."[13] The Court noted that the test only has to be substantially similar if it was intended to "replicate the event or accident involved in the litigation." It is not critical when it is "offered for the purpose of merely demonstrating a scientific principle, empirical finding, or similar phenomenon." In this case, it was offered to show how quickly the pool chemicals would burn and the "popping" and "mini-explosions" that were likely to result. The experiment was on a much smaller scale than the actual fire but that was appropriate for the purpose for which it was done.

The Court affirmed his conviction.

TRIAL PROCEDURE / EVIDENCE – HEARSAY – BUSINESS RECORDS

Long v. Com., 2011 WL 6826377 (Ky. 2011)

FACTS: When K.M. was 14, her mother, Lisa, began to live with Long. Shortly thereafter, Long began to have "illegal sexual contact" with K.M. Long and Lisa married but the sexual activity continued with K.M. During that time, K.M. and Long exchanged a number of text messages of a sexual nature. Eventually K.M. ran away from home and revealed what was occurring. Long was indicted for incest, Rape 3rd and Sodomy 3d.

[13] Rankin v. Com., 327 S.W.3d 492 (Ky. 2010).

At trial, K.M.'s father testified that he paid for her cell phone and had access to the customer account. When K.M. revealed the abuse, he accessed the account and discovered that approximately 1,500 cell phone messages had been exchanged. Over Long's objection, he was permitted to testify about the number of messages. Long was ultimately convicted and appealed.

ISSUE: Must business records be introduced by a proper custodian of the records?

HOLDING: Yes

DISCUSSION: The Court agreed that "it is self-evident that cell phone account records are business records and, therefore, may be admitted only if the standards for the admission of business records are complied with." These standards include the authentication required by KRE 901 as well as the hearsay rules. In Hunt v. Com.[14] the Court addressed those requirements, emphasizing the need to show that "they are what their proponents claim." In this case, the Commonwealth sought to introduce the records not through the actual custodian of the records but through an unqualified witness who lacked any knowledge of how the records are prepared or kept. As such, the Court agreed it was improper to introduce the records. However, because evidence of the numerous text messages was well-established through other evidence, the error was harmless.

Further, the court agreed it was appropriate for the victim to testify that she believed the messages were from Long since they came from his cell number. (This testimony actually violated a pre-trial order that indicated she could only testify that they came from his number.) The Court agreed that the testimony was proper opinion testimony under KRE 701 since it was "rationally based on K.M.'s perceptions."

The Court upheld Long's conviction.

TRIAL PROCEDURE / EVIDENCE – CHAIN OF CUSTODY

Ramey v. Com., 2011 WL 6826204 (Ky. 2011)

FACTS: Ramey was charged with the murder of Jerry Eldridge at his home in Alma (Calloway County). A number of other charges were placed as well, as the murder occurred in the context of a home invasion. Part of the evidence against Ramey was a pair of gloves. One of the pair was found near Eldridge's body and was linked by DNA to Ramey. The other glove, however, was found by one of the victims, lying in the road. Since she believed "it might be evidence, [she] stopped and, using a hair brush, picked it up." She immediately handed it over to a state trooper stationed at the home, nearby. Blood on the glove matched to Eldridge.

At trial, Ramey objected to the introduction of the glove, arguing it was not adequately authenticated. Since the "gloves themselves are readily identifiable and impervious to change" and because there was an adequate foundation placed supporting their admission, the trial court admitted the gloves, even though the witness that found the second glove apparently did not identify it at trial.

ISSUE: Must the chain of custody be perfect?

[14] 304 S.W.3d 15 (Ky. 2009).

HOLDING: No

DISCUSSION: The court noted that the chain of custody was "nearly complete" and that there sufficient evidence presented to provide a "reasonable assurance of both identity and integrity – that they were the same gloves found and that their condition "had not materially changed subsequent to the crime." The gloves "were handled with care and soon after being found were packaged separately and secured."

The Court also addressed an issue of a witness mentioning that Ramey might have been involved in a burglary in the area just prior to the murder. He argued that it was improper evidence under KRE 404(b) and the Court agreed it was improperly admitted, as it did not meet any of the exceptions for this kind of evidence.[15] However, the Court found the error to be harmless and not serious enough to have affected the outcome of the trial.

The Court upheld the conviction.

TRIAL PROCEDURE / EVIDENCE – RULE OF COMPLETENESS

Rapone v. Com., 2011 WL 588091 (Ky. 2011)

FACTS: On April 27, 2008, M.M.'s mother left M.M. (age 4) and her brother in Rapone's care. At about noon, M.M.'s cousin came back and found the door locked and the brother playing outside. She found this unusual and knocked repeatedly. Rapone unlocked the door and admitted her, he was wearing only pajama pants. M.M. was wearing panties and a jacket. When told to get dressed, M.M. went to get her clothes, which were in her mother's room. Again, this was unusual. M.M. went with her aunt to her grandmother's apartment and M.M. complained of painful urination. Upon inspection, her genitals were found to be red and swollen.

M.M. was taken by her mother to the ER and the child was subsequently interviewed by Cox, a Marshall County social worker and Det. Hilbrecht (Marshall County SO). Although the child's language was "coarse," they determined that Rapone had in fact raped the child. Forensic examination confirmed injuries.

M.M.'s apartment was searched and evidence was found. However, Rapone had fled and was eventually extradited back to Kentucky from Pennsylvania. He confessed to sexual contact but denied intercourse. However, he was indicted for Rape and ultimately convicted. He appealed.

ISSUE: Is a party entitled to have an entire recording entered into evidence?

HOLDING: Not necessarily

DISCUSSION: Among other issues, Rapone objected to the redaction of certain parts of his recorded statements, while introducing the remainder of it. He argued that such redactions violated the "rule of

[15] KRE 404(b) does recognize two exceptions, one when the prior bad act evidence is "offered for some other purpose, such as proof of motive . . . ," and the other if the prior bad act evidence is "so inextricably intertwined with other evidence essential to the case that separation of the two (2) could not be accomplished without serious adverse effect on the offering party."

completeness" in KRE 106. The Court, however, agreed that the redacted statements were simply an attempt to introduce the possibility of alternative perpetrators without having to face cross-examination. The Court ruled the redaction proper.

Rapone also objected to the admission of the statement given by the doctor witness with respect to what M.M. told him, because it was "not given for medical diagnosis or treatment." However, because the defense did not properly object to the statement being admitted, the Court declined to rule on it, beyond agreeing that it was improper to permit the doctor to identify Rapone. The Court agreed that the testimony was harmless.

Rapone's conviction was affirmed.

TRIAL PROCEDURE / EVIDENCE – AUDIOTAPE

Rowe v. Com., 2011 WL 5599412 (Ky. App. 2011)

FACTS: Rowe was charged for the murder of Tammy Hylton (and the assault / attempted murder of her husband, Robin) in Pike County. During the initial investigation, information about 10-15 people who were in the immediate area was given to the lead investigator but there was no report as to the content of interviews with the individuals. Rowe came under suspicion and he was ultimately identified by Robin from a photo lineup. (Other physical evidence also linked him to the crimes.) He was convicted and appealed.

ISSUE: Is the transcript of an audiotape newly discovered evidence?

HOLDING: No

DISCUSSION: Rowe argued that he should have a new trial based upon the 911 tape that had been "enhanced by an expert who discovered new words on it." The trial court denied the motion because Rowe did not submit transcripts and affidavits with the tape and the tape itself was not "newly discovered evidence" as it had been used at the trial. Rowe could not show "that the newly discovered evidence could not have been discovered earlier with due diligence, that it was material, and that it would likely have changed the outcome of the trial." The Court noted that the jury did not need an expert to listen and interpret the tape for them nor was the enhanced audio critical to the case. The Court affirmed Rowe's conviction.

TRIAL PROCEDURE / EVIDENCE – HEARSAY

May v. Com., 2011 WL 5316761 (Ky. 2011)

FACTS: A father heard that his daughter, C.M., age 14, was sexually involved with May, age 47. C.M. agreed that May had persuaded her to have sex with him. May was indicated for Rape 3d, Unlawful Transaction with a Minor, 1st and Sodomy 1st. The Rape charges were dismissed and the case when to trial. May was convicted of Unlawful Transaction and Sodomy 3d and appealed.

ISSUE: Is the admission of a perpetrator's name, by a doctor, admissible?

HOLDING: No

DISCUSSION: Among other issues, May contended it was improper for the Court to allow C.M.'s doctor to testify that she told him that May was the perpetrator. The issue was not preserved at trial but the Court discussed the issue, holding that "statements describing the general character or cause of an injury for purposes of medical diagnosis or treatment are admissible as an exception to the hearsay rule." Usually, the name of a perpetrator is not permitted under this rule. However, because C.M. had already heard testimony that C.M. had sex with May, the court found the error to be harmless.

The Court also addressed the issue of bolstering via prior consistent statements. The investigating officer testified first as to what C.M. had told him and those statements were substantially similar to what C.M. later stated. The Court agreed that the "officer's statements were inadmissible hearsay" under KRE 801A(a). However, the statement did not precisely mirror her testimony and in fact, a reasonable juror could have picked upon on certain inconsistencies. With respect to her father's testimony, it was not introduced simply to prove that they had sex, but also to explain "how he was informed of the sexual contact" and why he contacted the police.

Finally, the Court agreed that statements as to exactly what had occurred were admissible, because it was important for the doctor to know in order to treat her correctly.

After addressing a number of other issues, the Court upheld May's conviction.

TRIAL PROCEDURE / EVIDENCE – BOOKING PHOTOS

Franklin v. Com., 2011 WL 4633527 (Ky. App. 2011)

FACTS: On the day in question, the victim had a large amount of cash in her possession. Two men broke in and robbed her at gunpoint. She called 911 after they left and also flagged down a police car. Sgt. Laythem, in uniform but in an unmarked car, heard the report and spotted two men nearby who matched the physical description. The two men separated and one of them ran, so Sgt. Laythem got out of the car and eventually pursued him. He turned out to be Franklin and was arrested for Fleeing and Evading and ultimately, Robbery.

Franklin was convicted and appealed.

ISSUE: Is it necessary to provide a booking photo in discovery?

HOLDING: Yes

DISCUSSION: Franklin argued that it was improper to exclude his booking photo at trial because he contended that his physical appearance at that time was much different from the dispatch in clothing and age. The Commonwealth had objected arguing that it had not been provided in discovery as required, but the defense noted that it was in the possession of the Louisville Metro Corrections Dept. The Court agreed that such notification "is not only to inform the Commonwealth that it has the photograph, as it should be aware, but rather to inform the Commonwealth that the defendant is aware of the photograph."

The Court further agreed that based upon other evidence, including that Franklin had the exact amount of money, in the same denominations, as the victim said were stolen, that any error in not admitting the photo was harmless.

Franklin also argued that the Commonwealth failed to disclose the name of a potential eyewitness. Sgt. Laythem had never been able to interview the eyewitness, a neighbor, but indicated the name in the report. The Court agreed that the prosecution was obligated to provide exculpatory information, but nothing in the case indicated that was, in fact, the case with this witness. The Court found the objection to be unpreserved and noted that defense counsel did not avail themselves of a continuance to try to interview the neighbor.

Franklin's conviction was affirmed.

TRIAL PROCEDURE / EVIDENCE – PRIOR BAD ACTS

Campanell v. Com., 2011 WL 6109609 (Ky. App. 2011)

FACTS: In December 2008, in Bullitt County, Knore reported the theft of a number of metal items. Det. Stump (Mt. Washington PD) investigated and discovered that the disappearance of the property "appeared to coincide with the frequent and unexplained appearance of a city water truck." He connected the truck with Campanell and knew he was a "scrapper" – the detective had previously arrested Campanell for stealing scrap material. He also knew Campanell was on probation for a theft in another county. Det. Stump went to an outbuilding of the apartment building where Campanell lived and looked inside through an open door and a window. The detective spotted "items which fit the description of stolen property and called Knore to the site."

Det. Stump and Cook got Campanell's written consent to search the outbuilding and found a number of items connected with the water company and "not readily obtainable by the public at large." Campanell agreed the items belonged to the water department so Det. Stump contacted Campanell's supervisor there. The supervisor, Thicke, responded to the site and confirmed that Campanell should not have had possession of the items.

Campanell was charged with the misdemeanor theft of Knore's property and pled guilty. He was also charged with felony receiving stolen property for the water department items, along with PFO. He pled not guilty and went to trial. At the trial, Campanell stated that he intended to restore the property to the water company and that he'd taken the items off his city-issued truck so that he could use the truck on a personal project, "which he also admitted was impermissible." However, he stated he never intended to permanently keep the items in question.

Campanell was convicted and appealed.

ISSUE: May prior bad act evidence be admitted for purposes other than to prove the defendant committed the crime in question?

HOLDING: Yes (but see discussion)

DISCUSSION: Before the trial, the Commonwealth gave notice that it intended to offer "other crimes" evidence under KRE 404(b) concerning how the Knore investigation led the detectives to finding the water company property. (It did not intend to introduce evidence of his prior convictions and in a motion in limine, agreed not to try to do so.) However, during cross-examination, Det. Stump was asked if he knew Campanell prior to the case and whether he objected to Campanell being employed by the water department. Stump agreed to both but was not given an opportunity to explain. At sidebar, the Commonwealth asked for the opportunity to allow Stump to explain because his credibility had been impeached by the questioning. The Court permitted a line of questioning that would indicate that Campanell had been involving in unlawful scrapping previously. After another serious of questions that suggested Stump had a bias against Campanell, the Court allowed testimony about Campanell's prior conviction but gave the jury an admonition that the information was only to be considered with respect to Stump's alleged bias.

The Court agreed that the testimony was properly admitted to explain why Stump took the actions he did, "especially important in light of the fact that … no one had ever report that [water company] property stolen." The Court found it appropriate to introduce evidence that "Stump's police work, not his bias, put him in a position to see the water department's property in the outbuilding." The trial court carefully limited its use in an admonition and further, Campanell admitted to being a convicted felon.

Campanell's conviction was affirmed.

Reed v. Com., 2011 WL 5600577 (Ky. App. 2011)

FACTS: Officer Paige received information concerning a crime occurring at a Fleming County trailer. He obtained a search warrant. When no one answered, he, and other officers forced their way in, finding a rifle, marijuana and drug paraphernalia.

Reed arrived at the trailer during the search. He was arrested and charged for the items found, including the rifle as he was a convicted felon. At trial, Reed moved for a continuance, claiming that Adams, a key witness, could not get to the courthouse for financial reasons. The judge offered to have a deputy sheriff pick her up but Reed did not know her address. (At a preliminary hearing, Adams had testified that she owned the rifle but that she'd had Reed move the weapon to his home.) The Court denied his motion for a continuance. Reed claimed that he did not live in the trailer in question but actually rented it to Adams. The officers present at the search testified that Reed claimed ownership of the drugs. "Reed was permitted to play the video of Adams' previous testimony before the jury." He was convicted and appealed.

ISSUE: Is prior bad act evidence admissible when intended to prove something other than the defendant's propensity to commit the crime?

HOLDING: Yes

DISCUSSION: Reed argued that it was improper to allow the testimony regarding the marijuana and drug paraphernalia, in a trial focused on the firearm charge, as it was a "prior bad act" under KRE 404(b). The Court agreed, however, that when Reed raised, as a defense, that he did not live in the trailer, that it was appropriate to show that he claimed ownership of other illegal items found in the trailer. The Court upheld the admission of the testimony.

With respect to the continuance, the Court agreed that there was no prejudice in not delaying the trial. The Court offered reasonable alternatives to Reed's demands and he was permitted to show Adams' prior testimony to the jury. The Court upheld his conviction but did agree to the reversal of a demand for court costs because Reed was indigent.

OPEN RECORDS

Eplion v. Burchett, 354 S.W.3d 598 (Ky. App. 2011)

FACTS: Eplion was in the Boyd County Jail for over a year and was then transferred to the Little Sandy Correctional Complex. In 2006, he filed an open records case with the jail. Eplion did not get a response in the legal time frame so he appealed to the OAG. The response of the jail to that appeal indicated that the records in question were generated during the administration of a prior jailer and that they could not locate any records from that time frame. The response indicated confusion as to who the proper custodian of such records would be.

The OAG informed the current jail administration that the records "belonged not to the past or present jailers as individuals, but to the agency, and that they had an obligation to maintain the records amassed by their predecessors." The KDLA completed training with the officials with respect to their responsibilities. Eplion appealed to the Boyd Circuit Court requesting the records and payment of penalties for the delay. In a hearing, the jail "represented that they had made efforts to locate the records but were unable to do so." They offered to contact the former jailer about it. The Court ruled that they could not produce the records but that a fine was not appropriate under the circumstances. Eplion appealed.

ISSUE: Does the reason for an Open Records request apply with respect to penalties when the government entity fails to produce records?

HOLDING: No

DISCUSSION: The Court noted that when the denial of records is in "willful disregard" of the ORA, penalties are within the trial court's discretion. Despite procedural issues with the record, the Court agreed that apparently, the records in question simply didn't exist, despite diligent searches by the current administration. The Court agreed the Eplion was correct "that many of these records should exist, or at least should have existed at one time, and perhaps were improperly destroyed."

However, the Court noted that once that was determined, it was incorrect to find no relief for Eplion at all. The Court noted that Eplion wanted the records to attack his conviction (on an assertion of his counsel being ineffective) and the trial court apparently assumed that attempt would be unsuccessful. However, the Court noted, "nothing in the Act conditions an individual's right to obtain public records on his purpose in seeking those records." Further, simply finding that the records do not exist does not end the jail's obligation to Eplion. The Court agreed he was entitled to a "written explanation for their nonexistence."[16] Given that the jail offered to undertake further investigation, it was improper for the Court not to include that as part of the final order, since it was unclear that the "officials ever actually did what they offered to do,

[16] 10-ORD-078.

and in the absence of a court order, they could not be forced to do so." Eplion was entitled to a judgment ordering a written explanation at the least.

The Court further noted that the "only basis upon which penalties may be awarded is a finding that the officials' noncompliance with the Open Records Act was willful." However, because Eplion did not raise that issue, the Court declined to address it on appeal.

The Court ordered the trial court to render a judgment as indicated.

CIVIL

Davis v. City of Winchester, 2011 WL 5105441 (Ky. App. 2011)

FACTS: On October 5, 1996, Officers Craycraft and Stone (Winchester PD) were patrolling downtown in plainclothes. (They were responding to complaints of unruly behavior that would stop when an officer arrived in a marked car.) Davis was visiting the "Fishin' Hole," a bar owned by his wife. Following a pool tournament there, during which he drank 1-2 beers, he walked to another location, Barn's Bar, where he drank several more beers. He and Salyers decided to walk back to the first bar via an alley. During that time, the officers "heard loud, boisterous voices laced with profanity coming from Wall Alley" and saw "Davis and Salyers staggering towards them." Officer Craycraft asked their identity and Davis explained he was the co-owner of the Fishin' Hole. The officers later testified that Davis's speech was slurred and that he appeared "manifestly intoxicated." When the radio crackled in Craycraft's pocket, Davis asked if the two were officers, they agreed and showed badges. Salyers then "smiled and walked into the bar." Davis challenged them, asking how he was to know that they were "real" officers, and Officer Craycraft then called for a prisoner transport, having already decided to arrest Davis. Davis "used profanity to express his view of their circumstances" and walked to his bar entrance. The officers, who had actually not arrested the pair as yet, followed Davis, waiting for the marked unit to respond. As they went into the door, "Davis swung his arm around, striking Officer Craycraft in the chest with a closed fist, knocking him off balance." All three began to struggle and eventually Davis was secured.

Davis claimed that he was not swinging at the officer, however, but simply pointing to a sign that required officers to provide identification before entering the bar. The struggle attracted a crowd and the officers called for additional help. Officer Vaught arrived and took custody of Davis. The police ordered the bar shut down for the night. At the jail, Davis complained about an injured thumb and threatened to kill the officers who had injured him. He was ultimately charged with Alcohol Intoxication, Disorderly Conduct, Resisting Arrest, Terroristic Threatening, Assault 3rd and operating a disorderly retail establishment. All of the charges were dismissed and Davis filed a civil lawsuit against the City of Winchester and the officers, claiming malicious prosecution, excessive force and unlawful arrest. A jury found in favor of the defendants and Davis appealed. Ultimately, the Kentucky Supreme Court reversed the ruling on the malicious prosecution charge and remanded it back for a new trial.

Eventually, the case reached a second trial and again, the jury found in favor of the defendants. Davis appealed.

ISSUE: Are officers liable for false arrest if they can support any criminal charge based upon the evidence?

HOLDING: No

DISCUSSION: Davis argued that a jury instruction provided that he could prevail only if the officers "did not have reasonable grounds to believe the Plaintiff committed *any* one of the crimes." He sought a different charge to the jury, but the Court found the issue to be moot, as the jury clearly found that the officers did not act with malice at all. The Court found it to be "self-evident that malice is a necessary element of the offense of malicious prosecution."

The Court upheld the jury verdict.

MISCELLANEOUS

Com. v. Peters, 353 S.W. 3d 592 (Ky. 2011)

FACTS: In February, 2008, Peters was charged with DUI. At arraignment, her counsel requested a pretrial conference and specifically, the presence of the arresting officer. The Commonwealth objected to requiring the presence of the officer. The trial court subsequently entered an order that required the production of the witness, noting that having the prosecuting witness present at pretrial conferences expedites the disposition of such cases. The Commonwealth requested a writ of prohibition from the Shelby Circuit Court to prevent the enforcement of that order, and the Circuit Court agreed that the "Commonwealth's prosecution would suffer irreparable harm under" that requirement. Upon appeal, the Court of Appeals overturned the writ, finding no evidence of irreparable harm and the Commonwealth appealed.

ISSUE: May the court order a witness to attend a pretrial conference?

HOLDING: Yes

DISCUSSION: The Kentucky Supreme Court equated the order to one which permitted requested discovery and reviewed the criminal pretrial procedure cited by both sides. Under RCr 7.14, the defense is entitled to a number of items under discovery and both RCr 7.10 and RCr 7.20 permit the taking of criminal depositions prior to trial, particularly when a witness may be unavailable for trial. However, this is tempered by the right of the witness to refuse to be interviewed once compelled to attend. Because the initial order required the presence of the witness to be interviewed, it exceeded what the rules permitted, but, nothing, it continued, prohibited an order to require the witness to simply be physically present. In this case, because many prosecutors will not agree to a plea bargain without the presence of the arresting officer, it might be necessary to facilitate the process.

The reversal of the writ was itself reversed, but the court noted it was entirely proper to order the officer to be present, it was simply improper to order the officer (or other witness) to be present for the purpose of being interviewed.

SIXTH CIRCUIT

SEARCH & SEIZURE – CONSTRUCTIVE POSSESSION

U.S. v. Montague, 438 Fed.Appx. 478, 2011 WL 4950057 (6th Cir. 2011)

FACTS: Montague was a passenger in a vehicle, riding with two others. "Montague was riding in the backseat with a white towel or bandana around his face, which, along with a missing rear-view mirror, drew the attention of Officer Wallace of the Memphis Police Department." In several recent robberies, the perpetrator had been described as having "a white towel or bandanna wrapped around his face." During the stop, the officer "saw Montague repeatedly reach down between his legs while seated in the vehicle, despite repeated instructions to stop doing so." Other officers testified to Montague's behavior. As he was removed from the car, Officer Wallace (and the other officers) saw a handgun in plain view on the floorboard when Montague had been sitting.

Montague was charged and convicted, of being a felon in possession of a firearm, but he was acquitted of knowingly possessing a stolen firearm. He was convicted and appealed.

ISSUE: Is evidence that a person knows of the location of a gun evidence of constructive possession?

HOLDING: Yes

DISCUSSION: Montague argued against a finding that he possessed the firearm. However, the Court noted that "actual or constructive possession is sufficient to give rise to criminal liability under [18 U.S.C.] § 922(g)."[17] The Court agreed that "mere physical proximity to a gun is insufficient proof of constructive possession."[18] However, the Court agreed that in this case, there was sufficient evidence, given where it was located and three officers witnessing him "repeatedly reach[ing] down in the direction of the floorboard as if to conceal something." (Other evidence corroborated this belief.)

The Court affirmed his conviction but remanded for sentencing issues

SEARCH & SEIZURE – SEARCH WARRANT

U.S. v. Moore, 661 F.3d 309 (6th Cir. 2011)

FACTS: On October 25, 2008, the Shelby County (TN) Sheriff's Office received information from a CI that "Little Toe" had been selling cocaine from a stated location in Memphis. Det. Sathongnhoth applied for a search warrant, which "contained mostly boilerplate language concerning Det. Sathongnhoth's experience in law enforcement and the traditional behavior of drug dealers, but did specify the apartment and the items to be searched for, namely "Cocaine, Drug Records, Drug Proceeds, Drug Paraphernalia." The seller was described in general. Further, the warrant contained the following:

---

[17] U.S. v. Schreane, 331 F.3d 548 (6th Cir. 2003).
[18] U.S. v. Arnold, 486 F.3d 177 (6th Cir. 2007).

> On October, 25, 2008 Det. Sathongnhoth did speak with a reliable informant who has given information in the past in regards to narcotics trafficking resulting in two seizures of narcotics[.]The reliable informant stated that he/she has been at the above described residence within the past five (5) days of October 25, 2008 and has seen the above described storing and selling cocaine at the above named address.

The search warrant was issued and executed. Drugs, guns, a scale and almost $3,000 in cash were found. Moore was arrested. He waived his rights and admitted owning the drugs and one of the guns. As he was a felon, he was indicted on being a felon in possession of a firearm. Moore moved for suppression, arguing that the search warrant was insufficient. At a hearing, Det. Sathongnhoth provided "further corroborating information to support the warrant." (It was also noted that there was a slight error in one of the statements made in the warrant.) The Court denied the motion to suppress. Moore requested reconsideration or a Franks[19] hearing. Again, he was denied. Moore took a conditional guilty plea and appealed.

ISSUE: Is a search warrant that includes information on the CI's reliability and basis of knowledge sufficient?

HOLDING: Yes

DISCUSSION: The Court began by simply stating "the search warrant was valid." On its face, the warrant "contained enough information for there to be a 'substantial basis' on which the magistrate could conclude that probable cause existed to search the residence."[20] The warrant identified "a reliable informant and establishes that informant's basis for knowledge that drugs or drug paraphernalia will be found at the residence in question." The Court reviewed warrants with similar wording and found that they have overwhelmingly been upheld. The detective had properly included information concerning the CI's "reliability and basis for knowledge." The time frame (5 days) was short enough to presume that drugs would still be found at the location and the affidavit "established a proper nexus" between the residence and the crime. However, the Court conceded that "the affidavit was minimal" and even the prosecution conceded that:

> [T]his was not a model affidavit. It was not written in detail, it did not name the informant and the informant was not named to the magistrate, there was no specific amount of cocaine, and there should have been more in this affidavit . . . . This detective had more information, he could have put it in the affidavit, I don't have any reason to know. . .why he didn't . . . . If it were up to me these warrants would be drafted differently. . . .

However, despite its shortcomings, the Court agreed the warrant was sufficient and it affirmed the decision of the trial court, upholding Moore's conviction.

SEARCH & SEIZURE – FRANKS HEARING

U.S. v. Davidson, 2011 WL 6415056 (6th Cir. 2011)

[19] Franks v. Delaware, 438 U.S. 154 (1978).
[20] Illinois v. Gates, 462 U.S. 213 (1983).

FACTS: In 2008, officers executed a search warrant at Davidson's home. They found several loaded firearms, ammunition, scales and cocaine. Davidson later argued that the affidavit used to get the search warrant "contained intentionally false statements and material omissions in violation of Franks v. Delaware.[21]" Davidson was charged with drug and firearms offenses.

The trial court had denied the Franks hearing and Davidson was convicted. He then appealed.

ISSUE: Is some proof that a search warrant affidavit contains falsities required for a Franks hearing?

HOLDING: Yes

DISCUSSION: To justify a Franks hearing, the defendant must "make a substantial preliminary showing" that "the affidavit contained false statements made knowingly and intentionally or with reckless disregard for the truth, or that the affiant engaged in deliberate falsehood or disregard for the truth in omitting information, or the finding of probable cause was ultimately dependent on either the false statement or the material omission." In this case, the Court reviewed all the alleged errors and omissions and ruled that the uncontested part of the affidavit had sufficient facts to support the warrant.

The Court agreed that a Franks hearing was not warranted in this case and upheld Davidson's conviction.

SEARCH & SEIZURE – WARRANTLESS ENTRY

O'Neill (James and Angela) v. Louisville / Jefferson County Metro Government, 662 F.3d 723 (6th Cir. 2011)

FACTS: In October, 2008, the O'Neills found themselves with a litter of American bulldog puppies. They advertised the puppies for sale and sold four of them. Two women, later discovered to be undercover Louisville Metro Animal Services officers visiting the O'Neills on the pretense of buying a puppy. Once they looked at the puppies the pair went outside to discuss the matter. Within moments, James O'Neill answered a knock at the door and found "several uniformed LMAS officers on the front step accompanying the purported buyers." They demanded O'Neill's breeder's license, which he did not have and which ultimately was determined by the Court not to be required under the circumstances. The officers told him they could confiscate the dogs. "Without a warrant or the consent of the O'Neills (in fact, over their specific objection), the LMAS officers immediately entered the O'Neills' home and took all the dogs to the LMAS facility."

The O'Neills went to retrieve the two adult dogs and 7 puppies the next day. They were told that the adult dogs would have to be altered before release, all dogs would have to be microchipped and they would have to buy a breeder's license. Director Meloche insisted he had the right to do all of these things but that he would drop the fines and fees from $3,000 to just over $1,000. They paid the money and the dogs were returned, after having been neutered and chipped. They "were never provided with any written notice of any alleged violations of the animal-control ordinance in connection with the impoundment." During their short stay, the dogs "contracted various infections that required expensive veterinary treatment" and the puppies were sold at less than normal market value.

[21] 438 U.S. 154 (1978).

The O'Neills filed suit under 42 U.S.C. §1983 arguing an unlawful search and seizure and a failure of due process. The trial court dismissed their claims and the O'Neill's appealed.

ISSUE: May a person who has left a location they originally entered legally give consent to someone else to enter the same location?

HOLDING: No

DISCUSSION: The Court first quickly concluded, upon a reading of the ordinance in question, that the O'Neills did not need a breeder's license, as they were not in the business of breeding their dogs, this was the first (and the last) litter they would have.

With respect to the search, the trial court had relied on the "doctrine of consent-once-removed"[22] to justify the "warrantless second entry by the uniformed officers." The Court agreed the initial entry by the two undercover officers was lawful as they entered with consent, although under a ruse.[23] They had opened their home, in a limited way, to those seeking to look at the puppies. They found the O'Neills to be "barking up the wrong tree" when they argued that such a subterfuge was not allowed. However, the Court agreed that since the "undercover officers left the premises" before the second entry that the trial court's reliance on the consent-once-removed was misplaced. Further, the other officers did not enter in support of the undercover officers, as they'd already left the premises. The Court concluded that "one consensual entry" does not thereafter permit officers to "enter and exit a home at will." They entered only after, and over, the O'Neills objected. And, in fact, they never even intended to effect an arrest but only to cite. The Court agreed that there was a valid Fourth Amendment claim on the issue.

With respect to the due process claim, the Court agreed that the O'Neills were entitled to "notice of the charges and a meaningful opportunity to contest the evidence."[24] The language of the ordinance suggested that they had to have been given a citation before the animals could be impounded but "none was in fact issued." The confrontation with Meloche "lacked all the elements required" to be a violation notice." The Court agreed that the circumstances "as here alleged have an under-the-table, improper air about them." Although the Court did not accuse Meloche of "personally pocketing the money," it noted that it had "the feel of a pseudo-shakedown that is not at all akin to a plea agreement, " since "if it were a plea agreement, what charges were the O'Neills pleading guilty to?" Meloche also threatened the O'Neills with arrest, suggesting criminal charges, but the case was only civil in nature. The Court agreed that the O'Neills had a valid due process claim as well.

The Court further reinstated the state law claims of trespass for further reconsideration in conjunction with the federal claims. Since the trial court did not look at qualified immunity, the Court remanded the case back with instructions to consider that issue, in light of established law, if appropriate.

SEARCH & SEIZURE – TERRY

U.S. v. Beauchamp, 659 F.3d 560 (6th Cir. 2011)

---

[22] See U.S. v. Romero, 452 F.3d 610 (6th Cir. 2006).
[23] See Maryland v. Macon, 472 U.S. 463 (1985).
[24] Morrison v. Warren, 375 F.3d 468 (6th Cir. 2004).

FACTS: At about 2:30 a.m., on February 15, 2008, Officer Fain (Covington PD) was patrolling a housing project. Police were saturating the area due to complaints of drug activity. Officer Dees was patrolling separately. Dees noticed Beauchamp talking to another subject and when Beauchamp saw the officer he "hurriedly walked away without making eye contact." Dees radioed Fain and told him to stop the "suspicious subject" but "the basis for this label was never explained."

Officer Fain spotted Beauchamp several blocks away. He approached him by cruiser and "parked by the subject." Beauchamp walked behind a fence. Officer Fain called to him to stop and Beauchamp complied. He also complied with Fain's order to walk back around the fence and come to him. The officer noted that Beauchamp "seemed very nervous, visibly shaking, wide-eyed and scared." His pants had dropped to the lower part of his thighs, and "his legs were shaking." He gave vague responses to Fain's questions. Officer Cook arrived and stood by. Officer Fain frisked Beauchamp and found nothing. Officer Fain asked for consent to do a full search and Beauchamp agreed; the officer found $1,300 in cash and a cell phone. Because Beauchamp's pants were hanging so low, his boxers were exposed and the officer "pulled out his boxers and saw a piece of plastic sticking up between his butt cheeks." He believed it to contain drugs – it was later found to be 18 individually wrapped pieces of crack cocaine.

Officer Dees arrived at some point, and recognized Beauchamp from "previous encounters." Once the bag was spotted, there was a struggle, but eventually Beauchamp was apprehended. Beauchamp was charged with distribution of the crack cocaine. He moved for suppression and was denied. He took a conditional guilty plea and appealed.

ISSUE: Is a person targeted for a stop "seized?"

HOLDING: Yes

DISCUSSION: The Court discussed the moment when Beauchamp was actually seized and determined that it was when he submitted to Fain's order. The court agreed that his prior contact with Dees could be used to determine "whether an encounter was coercive or consensual." Beauchamp's contacts with the two officers "would suggest to a reasonable person that the officers were targeting [him] and there he would not feel free to leave." The Court differentiated this from a situation where the offices would merely approach an individual "on the street or in other public places and put[] questions to them if they are willing to listen."[25] In this case, "Officer Fain targeted Beauchamp by driving up to him after he had already walked away from another officer and, as Beauchamp continued to walk away, specifically instructed him to stop and to change the direction in which he was going."

The Court then looked at whether the stop was appropriate under Terry as an investigatory detention. The trial court found that the totality of the circumstances consisted of five facts: "Beauchamp was: (1) recognized by an officer from previous encounters; (2) at 2:30 in the morning; (3) in a housing project that was the source of many drug complaints; (4) with another individual; and (5) he hurriedly walked away from a police officer while avoiding eye contact." The second and third factor could not, without more, be used to find reasonable suspicion, but could be "considered in the totality of the circumstances." The first did not actually occur until after the seizure. The fourth is simply "not probative of criminal activity" as the officers observed nothing that suggested a drug transaction had occurred. And finally, the fifth "similarly does not

[25] U.S. v. Drayton, 536 U.S. 194 (2002).

give rise to the level of independent suspicion." The Court noted he did not run away, but simply walked away, and "it is clear that walking away from an officer does not create … a reasonable suspicion."[26] The Court continued, stating that "the ambiguity of Beauchamp's conduct may be susceptible to many different interpretations, but that does not render it suspicious." Finally, many of the factors mentioned (his nervousness, evasive answers and low pants) only became obvious after he was actually seized, and reasonable suspicion "cannot be justified by facts that become apparent only after a seizure."[27] The Court agreed the seizure was illegal.

With respect to the consent, the Court looked to whether it was tainted by the prior unlawful conduct. The Court agreed that "police coercion vitiated any consent Beauchamp may have given in this case, and thus consent could not have been made freely or voluntarily." The Court continued, stating that a "scared, defenseless man is not in a position to say no to a police officer whose hands are still on or just removed from his body while another officer is standing just a few feet away."[28] The Court found that the consent was not valid, and that the consent was not sufficiently attenuated to cure that unlawful conduct.

The trial court's decision was reversed and the case remanded.

SEARCH AND SEIZURE – VEHICLE STOP - GANT

U.S. v. Dame, 2011 WL 6382084 (6th Cir. 2011)

FACTS: In September 2008, Det. Conley (unidentified Kentucky agency) learned that Dame was transporting methamphetamine in western Kentucky. He tried to buy meth from a CI, but Dame told the CI that he needed to borrow the informant's vehicle to pick up a "load." With the permission of the CI, the officers put a GPS tracking device on the SUV. Dame drove to Atlanta. He was intercepted by officers on his return trip, having been "clocked" for speeding. He did not stop when Officer Holliman turned on his lights, but "quickly sped up and changed lanes." Holliman followed him for two miles, with lights and sirens, before Dame pulled over. Dame denied a request to search. Holliman had Dame and his passenger get out and examined the interior visually, seeing "several pieces of methamphetamine." (The opinion noted that one or the other officer at the scene may have entered the car.) The drug dog arrived and alerted and the car was searched. Methamphetamine and paraphernalia were found.

Dame was indicted. He moved for suppression under Gant,[29] but was denied. He took a conditional guilty plea and appealed.

ISSUE: Is a pre-Gant search legal?

HOLDING: Yes

DISCUSSION: Dame argued that using a GPS to monitor his movements was a violation of his Fourth Amendment right to privacy. He also argued that the traffic stop was unsupported by any traffic infraction.

---

[26] Florida v. Royer, 460 U.S. 491 (1983); see also U.S. v. Patterson, 340 F.3d 368 (6th Cir. 2003)
[27] U.S. v. McCauley, 548 F.3d 440 (6th Cir. 2008).
[28] Schneckloth v. Bustamonte, 412 U.S. 218 (1973).
[29] Arizona v. Gant, 556 U.S. 332 (2009)

The Court noted that the trial court had ruled that there was a traffic infraction and that the officer's "account of the chase was credible."

With respect to the search, at the time, Gant was not on the books, and under Davis,[30] the search was legal. Dame's conditional plea was affirmed.

SEARCH AND SEIZURE – VEHICLE STOP - VIN

U.S. v. Samuels, 2011 WL 6275912 (6th Cir. 2011)

FACTS: On March 14, 2010, Trooper Jesse (Ohio State Patrol) noticed a SUV with darkly tinted windows paralleling him. He said it was "blatantly obvious" that the front windshield was unlawfully tinted, in violation of Ohio law. The SUV dropped back, but the trooper pulled over, allowed it to pass and then made a stop.

Trooper Jesse approached on the passenger side. Samuels seemed very nervous. The trooper noted that the vehicle had been repainted and there was damage to the dashboard. He tested the windows and confirmed they were tinted too heavily. He returned to his car to write the citation and run Samuels through records. He returned to the car to check the "public VIN" – on the dashboard and noted that it did not appear to be properly attached, so he opened the car door to check the one located in the door. It did not match the "public VIN." The license plate did match the vehicle and was registered to Samuels, however.

He called for backup so that he could seek out the secondary VIN numbers hidden in various locations. He was suspicious that the condition of the vehicle suggested it might be used for drug trafficking. Trooper Landers responded, and had a drug dog with him, arriving while Jesse was writing the citation. (Trooper Jesse did not call specifically for the dog, but apparently knew Landers would be the likely backup.) Trooper Landers had Samuels get out, he was frisked and secured in Jesse's car.

The search took 6 minutes and was limited to areas where a VIN might be located, but none were found. Hondo, the drug dog, took a pass around the car and alerted to the gas tank cover. The entire duration of the stop, to this point, was 23 minutes. With the positive alert, Samuels was given his Miranda rights and the entire vehicle searched. They found marijuana residue throughout the vehicle, along with baggies and a handgun. (Eventually, the vehicle was confirmed not to have been stolen.) Since Samuels was a convicted felon, he was arrested for the firearm. He moved for suppression, which was denied, with the trial court finding the stop justified.

Samuels took a conditional guilty plea and appealed.

ISSUE: Is looking for a VIN within the bounds of a traffic stop?

HOLDING: Yes

[30] 131 S.Ct. 2419 (2011).

DISCUSSION: The Court noted that a vehicle stop ""is more akin to an investigative detention rather than a custodial arrest, and the principles announced in Terry v. Ohio apply to define the scope of reasonable police conduct."[31] The Court (and Samuels) agreed that the initial stop was valid but Samuels argued that "the expanded scope of the stop to include identification of the vehicle was unjustified." The Court agreed that checking the VIN was within the traffic stop, as well.[32] The Court also noted that the factors noted by the trooper, collectively, gave rise to reasonable suspicion warranting more investigation, but agreed that some of the factors should have little weight.

Looking to the duration and scope of the ensuing search, the Court agreed that the short extension of time, between the end of the contraband search and the end of the drug sniff, was sufficiently supported by the facts, in particular, signs that the vehicle had been reconfigured to hide contraband.

The Court affirmed the denial of the suppression motion.

SEARCH AND SEIZURE – VEHICLE STOP- CARROLL

U.S. v. Arnold, 442 Fed.Appx. 207, 2011 WL 4975252 (6th Cir. 2011)

FACTS: On March 13, 2008, a tipster contacted the Jackson (Michigan) Narcotics Enforcement Team (JNET) about Arnold selling crack cocaine. He was reported to be "driving up and down Francis Street sellind drugs out of his burgundy mid-1980s Monte Carlo" and at the Sunoco station on the corner. He was also reportedly "spending time" at a nearby address. The same tipster had previously reported him and he was already under surveillance. JNET had corroborated that he was "on parole, used three different addresses to distribute drugs, and drove a burgundy Ford Expedition."

Deputy Watson went to the scene and found a vehicle matching the description and a group of people standing near its open trunk. He did not see Arnold, however. A little later, they found the car parked at the identified address and "soon afterwards," spotted Arnold driving on Francis.

The officers met with the informant and arranged a controlled buy, with the officers listening in. They arranged a meeting a little later and he was stopped on the way. Arnold was uncooperative while being frisked and was arrested for disorderly conduct. JNET officers searched the car, finding nothing in the passenger compartment. They did find crack and powder cocaine in the trunk, along with a scale and baggies. They found the Expedition in his girlfriend's possession. They also got a warrant for the girlfriend's apartment, where he'd been living recently, and found drug-related contraband and two handguns.

Arnold, a felon, was charged for the guns and the drugs. He moved for suppression and was denied. He then took a conditional guilty plea and appealed.

ISSUE: Is a vehicle exception search lawful?

HOLDING: Yes

---

[31] U.S. v. Hill, 195 F.3d 258 (6th Cir. 1999).
[32] New York v. Class, 475 U.S. 106 (1986).

DISCUSSION: The Court looked at the situation under the vehicle exception (Carroll) search.[33] The court noted that a "warrantless vehicle search for contraband" is lawful if the officers have probable cause and such a determination "requires an examination of the totality of the circumstances." In this case, the Court agreed the officers had probable cause to stop and search his vehicle and more particularly, that it would likely be in the trunk. What was found further supported the warrant for the place where he'd been living, as well.

Arnold's plea was affirmed.

42 U.S.C. §1983 – QUALIFIED IMMUNITY

Bennett v. Krakowski, 2011 WL 5604055 (6th Circ. 2011)

FACTS: On October 22, 2008, Officer Urbiel (Dearborn, Mich, PD) was dispatched to an address to respond to a "possible car theft in progress. Abdallah reported that he saw a described subject try to get into two vehicles and then walk to another location and try to get into two more vehicles. When his mother, who also witnessed it, pounded on her window, the suspect ran away and met up with another person.

Officer Urbiel drove through the area trying to locate the suspect and came across a person who met the description, walking with Bennett. He drove around trying to "get a better look at them" and saw the pair standing in front of a house. He radioed the location to other officers and Corp. Garrison, Corp. Morse and Officer Isaacs responded. Corp. Leveille positioned his car to assist Officer Urbiel. As three of the officers approached the pair, "they took off running." The officers ordered them to stop but they kept running. After several blocks, Corp. Leveille grabbed Bennett in a "bear-hold." Officer Krakowski and Kostiuk tried to help but Bennett "curled up on the ground, refusing to put his hands up" but instead tried to crawl away. After more struggling and warnings, Officer Krakowski tasered Bennett in the back. More struggles ensued but finally, with the help of several more officers, they were able to handcuff Bennett.

Bennett's version, however, was "drastically different in several respects." He stated he was just "chilling outside around the porch" at a friend's home when he saw the police car and went in the backyard for a minute. When he returned he "saw and heard a police dog attacking his friend" Graham. He said he ran because he was afraid of the dog. Bennett claimed he stopped running when told to do so, however. He claimed to take no aggressive actions toward the officers. His friend, Graham, corroborated his assertions. Bennett had been charged with relatively minor charges, and ultimately, those charges were dropped. He filed suit under 42 U.S.C. §1983. The officers claimed qualified immunity. The Court ruled in favor of the officers on some claims and in Bennett's favor in others, and all appealed.

ISSUE: Must a motion for qualified immunity accept all material assertions of fact made by the plaintiff?

HOLDING: Yes

DISCUSSION: Bennett argued that the finding that denied qualified immunity to the officers was correct because the officers based "their claim for immunity on disputed factual findings" Looking to the record,

[33] Carroll v. U.S., 267 U.S. 132 (1925).

the Court agreed, "clearly demonstrate[d] that they are relying on disputed issues of facts." The brief submitted by the officers took little account of Bennett's assertions. As such, the Court did not have jurisdiction to award qualified immunity to the officers.

The Court affirmed the denial of qualified immunity at this stage of the proceeding.

42 U.S.C. §1983 – SEARCH WARRANT

Wheeler v. City of Lansing, 660 F.3d 931 (6th Cir. 2011)

FACTS: Prior to January 31, 2008, Officer Wirth (Lansing PD) and Deputy Sharp (Eaton County SD) began working to investigate a series of home invasions that crossed jurisdictional lines. Officer Wirth arrested Brown for the break-ins and he implicated Adams, Wheeler's boyfriend. Wheeler was already under investigation as her car had been linked to the crimes.

The officers drove Brown to the apartment and he identified Wheeler's apartment, where Brown said he'd taken stolen property. They made a note of the location but mistakenly thought the street name was Mapletree Court – it was actually Endicott Court. That mistake was only discovered as the property ultimately seized was being logged. Another officer made contact with the apartment manager who agreed to provide a key when they got a search warrant. Sharp and Wirth worked with an assistant prosecutor to write the search warrant and Sharp signed it. However, confusion later arose as while the property found was alleged to have been taken in 19 home invasions, but the narrative detailed only the two in which Brown had admitted to being a participant. They obtained the warrant and proceeded to execute it.

The warrant detailed the property sought as follows:

> Proof of ownership and/or occupancy, evidence of home invasions that have occurred in Eaton and Ingham counties in November 2007-January 2008, including but not limited to personal property (shotguns, long guns, computer and stereo equipment, cameras, DVD players, video game systems, big screen televisions, necklaces, rings, other jewelry, coin collections, music equipment, car stereo equipment) taken in approximately nineteen [sic: list ends abruptly]

They seized "three cameras, a power adapter cord for a laptop computer, three gold bracelets, a gold chain, gold earrings, a gold ring, two watches (one Eddie Bauer and one Rolex), a radio, a laptop computer, a nineteen-inch television, a Playstation, a Gameboy, a video camera, a car stereo, silver certificates, an energy bill addressed to Stella Wheeler, and a bill addressed to Michael Adams."

Wheeler was apparently never charged and filed suit against various parties in state court. The case was removed to federal court, and only the City and Wirth remained as defendants. The defendants moved for summary judgment and the District Court granted the motion. Wheeler appealed.

ISSUE: Must a warrant affidavit specifically identify property to be seized?

HOLDING: Yes

DISCUSSION: Wheeler argued that the "(1) the warrant affidavit failed to establish probable cause to seize certain items listed in the warrant, and (2) the warrant failed to describe with particularity some of the items to be seized, listing instead generalized categories of items despite the officers' knowledge of more details." The Court agreed with the trial court that Wirth was entitled to qualified immunity on the first. The Court agreed that the affidavit, while flawed, was sufficient to support the officer's belief that it was valid. However, the Court agreed with Wheeler that the property description was fatally flawed as it "only listed broad categories of property to be seized." The officers had detailed information of the property that had been stolen, such as brands and such, but did not include that information on the warrant. "The warrant to search Wheeler's apartment listed broad categories of stolen property, providing no basis to distinguish the stolen items from Wheeler's own personal property." Many of the items listed were commonly found in households and two cameras (Kodak) taken were not brands listed in any of the reports as stolen. The Court ruled that a reasonable officer should have recognized that such general categories violated the "Fourth Amendment's specificity requirement." In particular, "Campbell makes clear that when dealing with common items that can be possessed legally, like all of the property included in the warrant to search Wheeler's apartment, specificity is especially important."[34]

The court ruled that the case could go forward with Wirth as a defendant.

42 U.S.C. §1983 – FALSE ARREST

Haley v. Elsmere (Ky) Police Department, 2011 WL 6275914 (6th Cir. 2011)

FACTS: On August 12, 2007, Haley went to the American Legion post. He drank some beer and had a shot. He had earlier taken Percocet. He felt ill, so he took the shot outside and squatted by his car. His friend, Ellis, parked beside him. Officer Markesberry, responding to complaints about problems in the area in the past, was on patrol and had been asked to pay special attention to the parking lot. He noticed Haley squatting and called out to dispatch that he was investigating. Officer Robinson responded as backup.

Officer Markesberry asked Haley what he was doing, as Haley had a piece of plastic that seemed to have a white powdery substance on it. Haley said that he had no drugs and upon request, pulled items from his pockets, including tissue. He denied the white powder was drugs. Officer Markesberry accused him of being drunk, which Haley denied. (Markesberry later said that Haley was unsteady, had bloodshot eyes and smelled of alcohol, which Haley's friend denied.) Markesberry arrested Haley and charged him with alcohol intoxication, public intoxication, disorderly conduct and assault – but Haley was not convicted.

Haley brought suit under 42 U.S.C. §1983. The only issue on appeal was the denial of qualified immunity for Markesberry on the unlawful arrest claim.

ISSUE: Must all facts in a qualified immunity demand be viewed from the perspective of the plaintiff?

HOLDING: Yes

[34] U.S. v. Campbell, 256 F.3d 381 (6th Cir. 2001).

DISCUSSION: The Court began by noting that in this type of case, the defendant "must be prepared to overlook any factual dispute and to concede an interpretation of the facts in the light most favorable to" Haley. It agreed that this is challenging and noted that "if the defendant drifts into advancing his own version of the facts, we may simply ignore his straying from the path, focusing instead only on the plaintiff's facts and the purely legal argument."[35] In this case, the Court agreed to "ignore Markesbery's tendency to stray from Haley's version of the facts, and address only the question of whether, on Haley's facts, Markesbery is entitled to qualified immunity on the unlawful arrest claim."

The Court noted that it had to ignore, at this point, the testimony by the officers that Haley appeared intoxicated as it was contradicted by Haley's evidence (through his friend) that he was not. The Court looked to the alcohol intoxication statute[36] and found it objectively unreasonable to believe the Haley was in violation of it, particularly since Haley offered to take a breathalyzer and was denied. (At this stage, the officer noted that he did have probable cause for arresting Haley for having an open container, but he had not raised this issue previously so the court discounted it.)

The Court noted that Markesberry "wisely advances no argument that the right [to be free from unlawful arrest] was not clearly established." The Court upheld the denial of qualified immunity.

42 U.S.C. §1983 – USE OF FORCE

Cole (Alan, Jordan, and Vincent) v. City of Dearborn, 2012 WL 247947 (6th Cir. 2011)

FACE: The Coles, along with Bradley and others, went to a movie in Dearborn, Michigan. After the movie, they went to a restaurant but were refused service because some of the party was under 21. As the six walked back to their car, they were confronted by Dearborn police. A short time before, a security guard in the area had reported an armed robbery that had taken place in the immediate area, with two of the suspects matching the description and clothing of Alan and Vincent Cole. The guard had further stated that he was watching the suspects on camera and he gave specific directions to the dispatcher which was relayed to the responding officers.

Officers Villemaire and Michalski instructed the group to "make their hands visible and to lie down on the ground, and according to the Coles, they immediately complied." The officers stated that it took several commands and up to 15 seconds for compliance. While on the ground, the officers contended that Vincent "began to slide his hands underneath his chest" and stopped only when they instructed him to do so. The officers agreed that the men "were not actively resisting and were not physically aggressive."

The officers handcuffed and frisked the men, as other officers arrived. When asked, Jordan Cole stated that none of the men had a gun. Alan Cole alleged that one of the officers "stomped on his back and held his boot on his neck," causing a minor injury. Alan and Jordan Cole complained of similar handling. At some point, and after searching the area and not finding a gun, the victims were brought to the scene and confirmed the men were not the robbers. The Coles were released, having been held for 15-20 minutes.

[35] Kirby v. Duva, 530 F.3d 475 (6th Cir. 2008) Livermore ex rel Rohm v. Lubelan, 476 F.3d 397 (6th Cir. 2007).
[36] KRS 222.202.

The Coles returned home, and their mother later stated that one had a footprint on his back and another had minor facial injuries. They were treated at home for back and neck pain and missed some school and work.

The Coles filed suit under 42 U.S.C. §1983 for unreasonable search and seizure and excessive force. The trial court granted the officers qualified immunity for the search and seizure claims but denied it with respect to the force claims. The officers appealed that denial.

ISSUE: Is a use of force excessive when committed after a subject is subdued?

HOLDING: Yes

DISCUSSION: The Court noted that it had "repeatedly held that 'the use of force after a suspect has been incapacitated or neutralized is excessive as a matter of law.'"[37] The Court noted that the record, so far, indicated that at the time the force was allegedly applied, "the Coles and their companions were laying passively on the ground." The Court agreed that the officers may have felt threatened because they were outnumbered but they "failed to offer amy reason why the amount of force allegedly employed here was required under these particular circumstances." Although the plaintiffs "could not identify which officer engaged in what behavior," it was agreed that Officers Villemaire provided cover and Officer Michalski began the handcuffing. It could be inferred that both officers were "directly involved in the excessive force" alleged. Further, even if force can only be alleged against one of the officers, the other "would still have a duty to intervene to protect the Coles from excessive force."

The Court agreed that the denial of qualified immunity was appropriate for the initial two officers, but reversed the denial (and thereby granted) summary judgment to the sergeant who arrived only after the force had allegedly been committed.

Bozung v. Rawson, 439 Fed.Appx. 513, 2011 WL 4634215 (6th Circ. 2011)

FACTS: On June 6, 2007, Bozung, a neighbor and a friend of the neighbor drove to a grocery in Bozung's truck. (Bozung agreed to let the friend drive the truck since he was unable to drive at the time due to a suspended OL.) They were stopped by Officer Rawson (DeWitt Township PD) "because Officer Rawson considered the rosary hanging from Bozung's rear-view mirror to be a vision obstruction." The "unknown driver" stopped the car in the middle of the street and promptly fled the scene. He was never apprehended. When Rawson came back after a brief, unsuccessful pursuit, "he observed Bozung, who had moved over into the driver's seat, slowly driving the vehicle into the parking lot of the apartment complex." Bozung later denied, as Rawson claimed, that he was ordered to stop the vehicle.

Bozung was later found to have a BA of .18% and had urinated on himself. Rawson confirmed Bozung was the owner and discovered he had an outstanding misdemeanor warrant. Rawson told him he was under arrest.

Bozung later claimed that he complied with Rawson's order to get out of the vehicle but told Rawson that "he was disabled and could not physically comply with the orders [he gave] quickly." He said "Officer

[37] Baker v. City of Hamilton, 471 F.3d 601 (6th Cir. 2006) (denying qualified immunity where plaintiff was struck after surrendering to police); see also, e.g., Shreve v. Jessmine County Fiscal Court, 453 F.3d 681 (6th Cir. 2006)

Rawson began kicking the inside of Bozung's legs." He claimed he told the officer of his age and medical issues, which included a recent total hip replacement and a fractured left ankle that had been repaired with a plate and screws. He claimed Rawson then took him to the ground and handcuffed him. At some point, Officer Wilson (Capitol Region Airport Authority) arrived and participated in the arrest, but because Bozung was on the ground, he could not say precisely what Wilson did. Bozung suffered from cuts to the face, a broken thumb and permanent spinal cord injuries. Two witnesses corroborated parts of Bozung's story.

Officer Rawson denied much of the above, including kicking Bozung's legs apart. He asserted that he was never told, nor had an reason to suspect, that "Bozung was physically unable to comply with the orders or that he was disabled." He conceded that when he asked Bozung to put his hands behind his back, Bozung was gripping the bed of the truck, and stated "wait, wait" or "I am, I am" in response. He did not "characterize Bozung's non-compliance as active resistance." He believed, when he seized Bozung, that he was pulling away, so he took Bozung to the ground and handcuffed him, and due to his injuries, transported him to the hospital.

Officer Wilson agreed that he thought Bozung was trying to pull away. He was holding onto Bozung's other arm to assist and was taken to the ground as well by Rawson's maneuver. He assisted in handcuffing Bozung but denied ever placing his foot on Bonzung's neck as was alleged.

Bozung filed suit against the officers and DeWitt Township under 42 USC §1983, alleging excessive force and failure to train. He also brought claims under state law. The District Court found Rawson's actions reasonable and awarded him summary judgment under qualified immunity. Bozung appealed.

ISSUE: Is a use of force appropriate when a subject is uncooperative?

HOLDING: Yes

DISCUSSION: With respect to Officer Rawson, the Court noted that in deciding if a use of force is excessive, the court should "pay particular attention to 'the severity of the crime at issue, whether the suspect poses an immediate threat to the safety of the officers or others, and whether he is actively resisting arrest or attempting to evade arrest by flight.'" The Court acknowledged that Rawson "had very limited knowledge about Bozung," but knew he'd been drinking, that the driver fled the scene and ultimately, that Bozung was the subject of a warrant. However, he also knew that the warrant was for a misdemeanor, but it was unclear on the record at what point he knew that fact. The Court noted that Rawson had not, as yet, been able to search him and would not know if Bozung had a weapon. The Court agreed that although "'Bozung was cooperative and was not boisterous, combative, or disrespectful,; there was a growing crowd forming at the scene, and Officer Rawson needed to be concerned about his safety and the safety of others." Finally, Bozung acknowledged, indirectly, that he'd been told to put his hands behind his back and had stated several minutes passed before he was taken to the ground, and that if in fact one of the officers did place a knee on his back, it was during the handcuffing, not after.

The decision of the District Court was affirmed.

42 U.S.C. §1983 – FAILURE TO TRAIN

Morningstar v. Worthy and City of Detroit, 2011 WL 6382735 (6th Cir. 2011)

FACTS: On April 14, 2005, Troopers Morningstar and Maylone were driving through Detroit when they spotted a man in a crosswalk with his pants down and wearing an oversized coat. He was "arguing with someone on the sidewalk." As Trooper Morningstar stopped to investigate and got out, the man, "looking deranged and angry" came toward him with his hands concealed. The trooper gave commands to him to stop which were ignored. Morningstar fired a single shot, fatally wounding the man (Eric Williams), "a homeless person known to local law enforcement." Forensic evidence indicated his body was tilted forward when he was hit, "possibly lunging or charging ahead." Williams was not armed.

At the same time, Officers Wheatley and Bryson (aka Mix) were also responding to the call involving Williams. Wheatley was familiar with Williams and suspected that he was involved in the matter. The entire incident was captured on the vehicle mounted camera, but there was no sound.

All four officers wrote reports. The two troopers indicated that Morningstar "had ordered Williams to stop before firing his gun." The two Detroit officers, however "neither mentioned where Morningstar told Williams to stop." (Both indicated that they simply might not have heard Morningstar.) Three other witnesses "provided statements saying that Morningstar ordered Williams to stop several times before firing the fatal shot." The investigating prosecutor filed second-degree murder and related charges against Morningstar. At a preliminary hearing, with only Wheatley testifying as a fact witness, the judge bound Morningstar over for trial. Ultimately, Morningstar went to trial and was totally acquitted.

Morningstar filed suit against a number of parties, including Wheatley and the City of Detroit. (Mix was also sued, but that claim was dismissed.) The claims against Wheatley included gross negligence and malicious prosecution based upon his allegedly false testimony. (The Court noted that his actual testimony during the hearing was protected by absolute testimonial immunit, but that he was not immune for the "alleged falsification of his incident report and false statements to the prosecutor.")

At the civil trial, a forensic video analyst dissected the individual frames and established that the two Detroit officers were still in their vehicle when the shooting occurred. They could not have heard anything because "they had loud music on the radio and their windows were closed." The analyst also noted that at the time, DPD had a new digital recording system that "had difficulty capturing rapid motion and bright light, which sometimes resulted in an inaccurate depiction of actual events."[38] Following this incident, DPD updated its policies and training. "Morningstar used this testimony to argue that the City's failure to offer proper training in the use of digital equipment led officers to rely on inaccurate visual records to establish probable cause and to exploit flaws in the system to fabricate testimony and cover up lies." The only witness called in Wheatley's defense was the original prosecutor, Donaldson, who stated he did not make the decision to prosecute only based upon Wheatley's statements but on the totality of the evidence against Morningstar.

Ultimately, the jury awarded Morningstar $500,000 in damages. Wheatley appealed, arguing that "under the doctrine of testimonial immunity, he was not civilly liable for statements made at the preliminary examination." The Court agreed and granted his motion to reverse the judgment. Morningstar appealed.

ISSUE: Is it proper to hold officers liable for charges brought by the prosecutor?

---

[38] The opnion discussed the difference between the analog and digital video systems and the analyst specifically pointed out what he was seeing in the recording and how it should be interpreted.

HOLDING: No

DISCUSSION: The Court addressed the procedural issues surrounding the alleged waiver of the defense of testimonial immunity and agreed it was appropriate for the trial court to address it in a post-verdict motion. The Court agreed that the immunity stood with respect to Wheatley's testimony at the hearing.

With respect to the gross negligence claim, Morningstar alleged that Mix and Wheatley's "false or misleading statements led" to his criminal charges. Since the prosecutor testified that many things led to the charges, the court agreed that Morningstar could not prove that Wheatley's statements were the proximate charge of his indictment. In the malicious prosecution claim, he alleged that Wheatley (and Mix) "lied to initiate the criminal case against him." Since the argument on this claim is the same on that in the gross negligence claim, the Court agreed that Morningstar could not make that proof. Nothing suggested that the two Detroit officers "actively pressed for Morningstar to be prosecuted, or that they participated in the investigation." The Court agreed that claims in that respect must fail.

Against Detroit, Morningstar pursued a failure to train assertion under 42 U.S.C. 1983 against Detroit, particularly with respect to truthfulness and the ability to use the in-car video system. To make such a claim, "a plaintiff must show that: (1) the training program is inadequate to the tasks that the officers must perform; (2) the failure to train evidences a deliberate indifference to the rights of persons with whom the officers come into contact; and (3) the deficiency is "closely related to" or "actually caused" the injury."[39] The Court noted that although some of the "factual inaccuracies" could have "been caused by glitches in the image-capture system, which the officers internalized when they reviewed the recording, thus tainting their recollection of the event." The court found no evidence that the injury of which Morningstar complained "was a known or obvious consequence of failing to train officers to use the in-car video system." The expert noted that "it is common practice for police departments adopting a new technology to issue policy guidelines before the new system is implemented." In addition, the expert noted that anyone familiar with the system would have known its deficiencies, but there was no indication the city "had actual knowledge of the system's shortcomings before April 2005" – nor that even if they knew of the "system's technological flaws, there is no evidence that they also knew the training policy needed updating."

The Court upheld the motion in favor of Wheatley.

INTERROGATION

U.S. v. Delaney, 443 Fed.Appx. 122, 2011 WL 5838942 (6th Cir. 2011)

FACTS: In 2002, Delaney started computer chatting with Schmidt, who claimed to be 18. (She was, in fact, 12 or 13 at the time.) The continued to chat via instant messaging for some time. In 2004, they met in person at a local mall. At the time, Delaney was 32 and Schmidt was 14. They then met as planned at Schmidt's home in Grand Rapids, Michigan, for sex; photos were taken. In August, 2004, Schmidt's mother saw Schmidt get into a car and asked where she was going, she said she was going to Detroit.

[39] City of Canton v. Harris, 489 U.S. 378 (1989); Plinton v. Cnty. of Summit, 540 F.3d 459 (6th Cir. 2008).

She left with Delaney, who was driving the car. Her mother searched Schmidt's address book and located her daughter at Delaney's home and ordered her to come home. Eventually Schmidt did.

On September 2, 2004, Officer Veen (Walker, Michigan, PD) saw Delaney and Schmidt together, in a vehicle, at 1 a.m., in a church parking lot. Schmidt admitted to being 14 but Delaney insisted he thought she was 18. Officer Veen arrested Delaney and Schmidt was taken home. Delaney was apparently released, because in November, Schmidt and a female friend "met Delaney and took more pictures." She admitted to again having sex with Delaney. In October, 2003, in addition, Det. Weise (Wyandotte PD) entered into a computer chat with someone with the same screen name as Delaney about having sex with "her" five year old daughter. In 2007, Agent Emmons (FBI) also engaged in chat with that screen name, and discussed "her" minor children – the chatter "stated he was interested in young girls 10 and older." She then deferred to another investigator, Det. Findlay (Macomb County) who was taking the lead role and engaging in chats with him about "family love" – a term used by people interested in sex with children. They discussed at length what he wanted.

When they exchanged cell phone numbers, "Detective Findlay obtained a search warrant for the Defendant's cell phone subscriber information." She also got information from Yahoo about his subscriber information. They arranged a meetup at an undercover apartment, where Delaney was detained and his camera phone seized. He claimed that he went to the apartment to find out if the person was real and that he'd planned to "turn her into the authorities." He stated that "he probably would have taken the five-year-old girl to breakfast, and although he had a 'kink,' he did not like girls that young."

A subsequent searched resulted in the seizure of a lot of computer information and photos. The various chats were found as were the photos taken by Schmidt. A agent knowledgeable about computers found no evidence of the hacking Delaney suggested might have planted the photos. Kelly, another computer expert, testified about what he had found on a laptop in Delaney's possession, which had previously been used by someone else.

Delaney was arrested and transported. Agent Eby testified later that he gave Delaney his Miranda rights on the way, and that Delaney remained silent for a time. He "then indicated that he knew his rights and began to talk." Delaney said he asked for a lawyer several times, which the agents denied. He was further questioned at the station by Agent Clark and they discussed "cooperation points" which would reduce his sentence. He claimed "that he said that he should be talking to an attorney, but the agents told him that there would be time for that later." He was given a Miranda form and Delaney stated that he was told that if he refused to sign, Clark would "take away his cooperation points." Delaney signed the waiver. When he was shown photos of Schmidt, he again mentioned a lawyer, but never followed up and continued to talk.

He was charged and requested suppression, arguing he'd asked for a lawyer seven times. The District Court denied his motion, finding his "assertion that he unambiguously invoked his right to counsel on numerous occasions" to not be credible. Ultimately he was convicted and appealed.

ISSUE: Are promises that an officer will inform the prosecutor of cooperation coercive?

HOLDING: No

DISCUSSION: Delaney argued that his statements were not voluntary because he was not given his complete Miranda rights (but only an abbreviated version) and because the threat to deny his cooperation

points was coercion. The Court agreed that "involuntary or coerced confessions are inadmissible at trial."[40] The Court stated the "three requirements for a finding that a confession was involuntary due to police coercion: (i) the police activity was objectively coercive; (ii) the coercion in question was sufficient to overbear the defendant's will; and (iii) the alleged police misconduct was the crucial motivating factor in the defendant's decision to offer the statement."[41] The Court agree that "promises to inform a prosecutor of cooperation do not, *ipso facto*, render a confession coerced."[42] The Court noted that the statements, as alleged, were intended to get Delaney to talk, but "they were not false" and were within the bounds of "permissible promises of possible leniency." As such, the Court agreed the statements were "not the result of illegitimate police coercion, and thus were voluntary."

With respect to the right to counsel argument, the Court agreed that "the police must immediately stop questioning a suspect if he invokes his right to counsel."[43] However, it must be unambiguous.[44] The Court looked to prior cases, in which it held the words "maybe" and "I think" to suggest ambiguity, to agree that his requests were not unambiguous. As such, he did not actually invoke his right to counsel.

Finally, he had argued that admission of his Internet chats that discussed uncharged cases, the three "instant messaging conversations with three undercover police officers," was improper under FRE 404(b) – prior bad acts. The Court noted that the rule allows the introduction of other acts evidence to show identity, "provided they are 'of sufficient distinctive similarity' with the charges in the indictment to 'create a pattern or modus operandi.'"[45] The Court noted that his interactions followed the same pattern as he followed with Schmidt, and that he used the same screen name. It also confirmed his knowledge and intent with respect to the crimes charged. Further, the chats contained "few graphic details."

Delaney's conviction was affirmed.

TRIAL PROCEDURE / EVIDENCE – MALICIOUS PROSECUTION

Offineer v. Kelly, 2011 WL 6415115 (6th Cir. 2011)

FACTS: Offineer was accused of the sexual assault of his 11-month-old niece. It was noted during the questioning (when he was already incarcerated for an unrelated offense), Offineer was acting in a very bizarre manner. The detective ultimately terminated the interview because he believed that Offineer was either mentally unstable or on drugs. He acted in the same manner in a subsequent interview. The prosecutor, Haddox, agreed that Kelly's bizarre statements were of great concern but did not recall how much detail he had actually been provided about Offineer's conduct.

---

[40] Lego v. Twomey, 404 U.S. 477 (1972).
[41] U.S. v. Mahan, 190 F.3d 416 (6th Cir. 1999).
[42] U.S. v. Stokes, 631 F.3d 802,
[43] Edwards v. Arizona, 451 U.S. 477 (1981).
[44] See Davis v. U.S., 512 U.S. 452 (1994).
[45] U.S. v. Allen, 619 F.3d 518 (6th Cir. 2010)

A criminal compliant was initiated by the prosecutor and Kelly filed it with the court. (Haddox implied that he'd never had an officer refuse to do so, and in fact, he implied "that Kelly could have been disciplined had he not filed the complaint.) The paperwork filed by Kelly did not include some of the details he verbally shared with Haddox that included inconsistencies in Offineer's statements.

Kelly spoke to Offineer's family and his parents indicated that he was bipolar and supposed to be on medication, but that they did not believe he was currently doing so. It was concluded that the assault happened on May 20, 2006, as being the most consistent with the facts as available.

At the grand jury, both the doctor and Kelly testified. Kelly testified that he was aware of Offineer's mental illness but did not explain that there was a lack of certainty as to when the alleged assault actually occurred. He also stated that the details of some of Offineer's statements called into question his ability to actually confess, although he was pressed by the grand jurors about certain details. The grand jury was "clearly concerned" by his statements and the validity of his confession.

Offineer was indicted but was found incompetent to stand trial. Following a year of treatment, he was considered competent and went to trial. He was acquitted, however, after his confessions were ruled to be inadmissible. Corey sued the investigator, Kelly, for malicious prosecution and for withholding exculpatory evidence. Kelly moved for summary judgment, which was denied. He appealed.

ISSUE: Is an officer liable for malicious prosecution if they had probable cause for the arrest?

HOLDING: No

DISCUSSION: In a malicious prosecution claim, the Court noted, qualified immunity is given "if either (1) he did not "make, influence, or participate in" the decision to prosecute Corey, or (2) probable cause otherwise justified the prosecution decision." Since the trial court had already concluded the Kelly was sufficiently involved in the decision to prosecute, the trail court agreed that there are "disputed issues of material fact" at this stage of the proceeding. However, the Court noted, "because probable cause was present, Corey's (Offineer's) malicious-prosecution claim is foreclosed," and qualified immunity was appropriate. Even agreeing that Kelly did not provide the full context of the statements and removing those statements from consideration, the Court agreed that there was sufficient probable cause as the file documents clearly indicated that Offineer could be involved.

The Court quickly discounted a Brady claim as well. Offineer claimed a violation of Brady because Kelly did not give Haddix exculpatory material prior to the decision to submit the case to the grand jury. However, because he was ultimately acquitted, it was immaterial in the trial.

The Court reversed the decision to deny Kelly qualified immunity and the case was remanded.

TRIAL PROCEDURE / EVIDENCE – EXPERT

U.S. v. Dodson, 2011 WL 6144312 (6th Cir. 2011)

FACTS: Sandoval and Abernathy were involved in a "large drug-dealing operation." Dodson met them through motorcycle racing and was eventually drawn into helping with "drug-related tasks." On March 13, 2006, Officer Randolph (a local TN officer) made a traffic stop and found 5 kilos of cocaine, the driver "was arrested and cooperated." He was a hired courier and led officers to "Abernathy's stash-house." Officers returned later and two officers attempted to do a knock-and-talk at the house. As they approached they encountered Abernathy and saw several other people gathered inside. They escorted Abernathy inside where he was frisked – they found a "gun, two cell-phones and car keys." They collected all the occupants and asked who owned the house, no one responded. Officer Birch went to the back of the house and found Dodson and Sandoval, who also denied knowing who owned the house; they were brought to join the others.

Because they could not determine who owned the house, they "duly obtained a warrant" and searched the house. They found mail addressed to Dodson in one of the bedrooms, along with a shotgun which was also attributed to him. At some point, he claimed the keys that were in Abernathy's possession and a key to the house was found on it, but he claimed Abernathy had put it there.

Later in the investigation, the officers got cell phone numbers for all the parties and did a "link-analysis" to determine how often one phone called another, finding numerous contacts between the parties.

At trial, Officer Randolph was asked how common it was for "drug dealers to register cars in others' names." He agreed it was common with cars, firearms and cell phones. Agent Colllins also testified about the "nature and purposes of stash-houses, drug dealers' use of weapons and other equipment, and the street value of cocaine." However, neither officer was identified as an expert. The Court did specifically state, however, after foundational questioning, that "Collins could give opinion testimony on 'narcotics dealers.'"

Dodson was convicted and appealed.

ISSUE: May an officer be both a fact and expert witness?

HOLDING: Yes

DISCUSSION: Among other issues, Dodson claimed that the jury should have been given a "dual-role" instruction on Randolph and Collins' testimony. He did not object so the matter was reviewed under plain error. The Court noted that the trial court "did not identify either law-enforcement officer as an expert." In fact, by not drawing "special attention to the witnesses' status as law-enforcement officers," the Court found the jury instructions appropriate.

Dodson's conviction was affirmed.

TRIAL PROCEDURE / EVIDENCE – BRADY

Jeffries v. Morgan, 2011 WL 599524 (6th Cir. 2011)

FACTS: McKee was murdered in February, 1995, in Shelbyville. Jeffries had been nearby and was questioned about his whereabouts. He had already been identified as a suspect. He was arrested shortly

afterward and gave a statement, along with finger and palmprints for identification. At trial, the majority of the testimony was to explain the forensic evidence, as blood matching the victim was found on Jeffries' shoe, and his palmprint matched that on the victim's glasses. Other evidence, however, went unmatched. Jeffries "no longer disclaimed all knowledge of the crime" but testified that he had tripped over her body when he was cutting through the yard and then ran home "in terror." (He explained he did not tell his parents because they were already upset with him and he would have had to admit he'd been drinking.)

Jeffries was convicted and his appeals through the Kentucky system affirmed that conviction. However, post-trial developments provided a new avenue for challenge. As a result of an unrelated investigation, another person had been implicated in the murder, someone who had been briefly under suspicion during the investigation. (He had been excluded based upon an uncorroborated alibi.) His name was not provided to Jeffries' trial counsel who had requested a list of everyone who had been questioned in connection with the crime. (One item, a tip to the new suspect's probation officer, was provided.)

Jeffries sought a new trial, claiming the failure to disclose violated Brady v. Maryland.[46] The trial court denied the motion for a new trial but did order a grand jury investigation into Dillon. Although his alibi was seriously challenged, he was not indicted.

Jeffries sought a habeas petition, which was denied. He was permitted to appeal on the Brady claim.

ISSUE: Is the failure to interview another viable suspect a Brady violation?

HOLDING: No

DISCUSSION: The Court ruled that the "failure to disclose the fact and contents of the Dillon interview was not a Brady violation because the suppression does not undermine confidence in the outcome of the trial." The Court agreed that "the investigators' ready acceptance of Dillon's alibi may have bolstered the defense's argument that the police's exclusive focus on Jeffries caused them to ignore viable leads in the case." His counsel had been able to get in that Jeffries was their primary suspect and that the Court had looked no further. The Court noted that the interview of the other suspect would have been only cumulative. However, Jeffries argued that had they had an actual alternative suspect, his defense theory would have been more solid. But, the Court noted, his claim is "substantially undercut by the police notes that were disclosed, which contained the probation officer's tip that Dillon had been seen in the area near the time of the offense." That tip should have triggered more investigation. His knowledge of the tip precluded a Brady violation finding.

The District Court's denial of the petition was affirmed.

Jalowiec v. Bradshaw, 657 F.3d 293 (6th Cir. 2011)

FACTS: Lally was found murdered in a Cleveland cemetery, having been both shot in the head and beaten. Lally was a witness in a criminal case against Raymond (father) and Danny (son) Smith. Jalowiec and Raymond Smith were charged for Lally's murder – at the time of Jalowiec's trial, Smith had already been convicted and sentenced to death.

[46] 373 U.S. 83 (1963).

During the trial, Michael Smith, another son, testified that he had been present at Lally's murder but did not participate. Jalowiec was convicted and petitioned through habeas corpus, arguing, among other issues, that the prosecution withheld evidence about statements made by state witnesses and information concerning "plea bargains and other inducements for testimony" from those witnesses. The trial court denied habeas for both procedural and substantive reasons. Jalowiec appealed.

ISSUE: Must evidence be of material importance to be disclosable under Brady?

HOLDING: Yes

DISCUSSION: Jalowiec argued that the prosecution withheld "evidence of prior inconsistent statements made to the police by various state witnesses as well as plea-agreement deals, grants of immunity, and other inducements given to such witnesses." However, procedurally, the court agreed that his "Brady claim concerning the prosecution's nondisclosure of prior statements by these witnesses was not, by virtue of the claims asserted in the [petition] properly exhausted." The Court elected to review the evidence, however, for "materiality and prejudice."

> To make a Brady violation, the Court noted, Jalowiec must prove "that (1) evidence favorable to the defense, (2) was suppressed by the government, and (3) the defense was prejudiced." To be material, the court would need to find that "there is a reasonable probability that, had the evidence been disclosed, the result of the proceeding would have been different." The trial court had agreed that a statement given by Danny Smith was material as it "tended to exonerate" Jalowiec, but that its suppression was harmless. The Court agreed that although this appears contradictory, that it was not so material as to warrant overturning the verdict. With respect to statements given by other witnesses, the Court found much the same.

In each case, the Court agreed that the statements should have been disclosed, but ruled that none would have created a "reasonable probability" that the results of the trial would have been different. With respect to offers of leniency and immunity made to witnesses (and family members of witnesses), the court agreed that it was relevant, but again, not sufficiently material so as to overturn the verdict.

The Court did, however, note that the "sheer number of undisclosed, potentially exculpatory items in this case suggests a troubling disregard by the prosecution of its Brady obligation, which [it did] not condone." The Court agreed that much of what was not disclosed had potential impeachment value but was not necessarily Brady exculpatory material. The Court noted, too, that such damaging evidence should be viewed in a cumulative manner, and in this case, the undisclosed material "would have been of marginal value to Jalowiec."

The denial of Jalowiec's petition was affirmed.

TRIAL PROCEDURE / EVIDENCE – PRIOR BAD ACTS

U.S. v. Qualls, 2011 WL 5865440 (6th Cir. 2011)

FACTS: During Qualls trial for drug trafficking, the Court admitted evidence of prior controlled buys (for which he was not on trial) as background evidence. The drugs for which he was tried were found in a

home, while the controlled buys were made from a vehicle. He was ultimately convicted of drug trafficking and possession of a firearm, and appealed.

ISSUE: Is evidence of uncharged acts admissible?

HOLDING: It depends

DISCUSSION: The Court found his argument to be a "distinction without a difference." Both situations involved the distribution of cocaine base out of a residence over a few days. Further, under Rule 404(b), "other acts" evidence is admissible when (1) there is sufficient evidence that the "other acts" took place; (2) the evidence has a proper purpose identified in Rule 404(b); and (3) the evidence is not substantially more prejudicial than probative."[47] The Court agreed there was sufficient evidence that Qualls was involved in the buys and that the evidence at the house belonged to him. The controlled buys corroborated the charges that he was distributing from the house. The Court agreed the evidence was not unduly prejudicial and upheld Qualls's conviction.

TRIAL PROCEDURE / EVIDENCE - HEARSAY

U.S. v. Johnson, 443 Fed.Appx. 85, 2011 WL 4585234 (6th Circ. 2011)

FACTS: Martha Johnson lived alone in her trailer in Tipton County, Tennessee. She owned a large farm and a local bar and her net assets was in excess of a million dollars. One of her two sons, Billy Johnson, worked with her on the farm and at the bar. Prior to July 22, 1999, the two argued over the "use and possible development of the acreage" she owned, and those arguments became heated. Just prior to her murder on the above date, she was heard to make comments about disinheriting her sons.

Thomas later testified that Billy Johnson offered him $10,000 to murder his mother. He refused, but again, Johnson made the offer. (A deputy corroborated his statement, saying that Thomas had told the Sheriff's Office of the approach, as he was in jail at the time for burglarizing Martha Johnson's trailer.) Lawrence, who worked at the farm, also testified he'd been approached about committing a murder. Winberry, who was later convicted of the murder, also testified that he committed the crime for money, to be paid by Billy Johnson, and detailed the arrangements. He then committed the murder. He was ultimately implicated in the crime by his then-girlfriend, who also testified that he told her he'd committed the crime at the behest of Billy Johnson.

Ultimately, Johnson inherited the entire estate, having convinced the other heirs that the property was worthless. He also received insurance proceeds. He was charged in federal court on several interstate commerce issues, using the mail and traveling in interstate commerce to commit a murder for hire.[48] He was convicted and appealed.

ISSUE: May a conspiracy to commit murder extend past the actual murder?

HOLDING: Yes

---

[47] U.S. v. Bell, 516 F.3d 432(6th Cir. 2008) (citing U.S. v. Lattner, 385 F.3d 947 (6th Cir. 2004)).
[48] 19 U.S.C. 1958 (several subsections).

DISCUSSION: Johnson contended "that statements made by Winberry to Haynes Johnson regarding her demands for "hush money" following the murder, and statements made by Winberry to Ricky Elrod involving the Defendant's failure to pay the remaining $45,000 owed for the murder, were improperly admitted by the district court under Fed. R. Evid. 801(d)(2)(E)." He argued that "Winberry could not be considered a co-conspirator after the murder when the conspiracy to murder ended with the murder itself."

To admit the hearsay statements of a co-conspirator (introduced through his girlfriend) "the government must show by a preponderance of the evidence that: (1) a conspiracy existed, (2) the defendant against whom the hearsay is offered was a member of the conspiracy, and (3) the statements were made during the course and in furtherance of the conspiracy." The Court noted that the conspiracy did not end with the murder, but included "integrally, … the post-murder payment of $45,000 to Winberry from [Johnson] garnered from Mrs. Johnson's life insurance proceeds." (Winberry did not received the balance of payment.) The Court agreed that the hearsay statements made to the three witnesses were properly introduced.

Further, the court agreed that the "introduction of prior statements by Winberry to Haynes Johnson, and by Haynes Johnson to her friend Peggy Sue Jackson." Such statements are admissible under the Federal Rules of Evidence if:

> (1)both the initial witness and the corroborating witness testify and are subject to cross-examination; (2) the opposing party must at least imply recent fabrication or improper influence or motive by the initial witness; (3) the proponent must offer a prior consistent statement that is consistent with the initial witness' challenged in-court testimony; and, (4) the initial witness' prior consistent statement must have occurred prior to the time he or she had motive to fabricate."

The Court agreed that the statements in question qualified for admission and that there was no evidence of recent fabrication by the witnesses. Further, the Court found statements from other witnesses, concerning comments made by Martha Johnson and which indicated "a breakdown in the relationship between mother and son." The Sixth Circuit had previously noted that:

> "when a statement is offered to prove neither the truth nor falsity, there is no need to assess the credibility of the declarant. The significance lies entirely in the fact that the words were spoken. Thus, the statement does not fall within the Rule 801(c) definition of hearsay nor would the purposes of the hearsay rule be served by treating it as hearsay."[49] The statements were properly admitted for the "significance of the verbal exchange itself." Information about the mis-administration of the estate was also properly admitted as it suggested a motive.

Johnson's conviction was affirmed.

CHILD PORNOGRAPHY

U.S. v. Oufnac, 443 Fed.Appx. 85, 2011 WL 4585234 (6th Cir. 2011)

FACTS: Oufnac and McKichan met online. Oufnac lived in New Orleans and McKichan lived in Bad Axe, MI. MiKichan moved to New Orleans with her daughter to live with Oufnac. She discovered he

[49] U.S. v. Dandy, 998 F.2d 1344 (6th Cir. 1993) (quoting U.S. v. Hathaway, 798 F.2d 902 (6th Cir. 1986)).

would spent 4 hours a day on the computer but told her it was "none of her business" what he was doing. Between February and August, 2005, she found an image of child pornography in a folder named "pictures." That same folder had pictures of her daughters. She confronted Oufnac, but he said he was "holding it for evidence" in another case. She asked him to delete it but never confirmed that it was in fact deleted.

All three moved to Michigan. There he set up three separate user accounts on the computer, where before there had been only one. He began to password protect his account but McKichan was given the password. McKichan's brother and niece would also use the computer when visiting.

Because their work schedules were different, the pair did not spend a lot of time together. She again brought up the "lengthy computer usage time" but again he refused to tell her what he was doing. In October, 2007, she found more images of child pornography in his protected account, including the image she'd seen initially. She followed his internet history and found details of searches for incest and child sexual activity. She also found an unlabeled CD with many photos of child pornography and later he claimed to have destroyed it, showing her a broken CD.

McKichan ended their relationship but continued to live with him. He changed his password but "sometimes forgot to log off and his account remained open for use by anyone" during that time. McKichan began dating Gillig, a Michigan child protective services worker. She told him about the child pornography and he convinced her to notify the police; she did so. Detective Knoblock (Bad Axe PD) got a search warrant. During the search, Oufnac admitted there was child porn images on the computer but alleged they were fake. He then asked for an attorney. He later expressed his upset that McKichan had reported him. They confiscated his electronics and did a forensic exam. A number of images were located on the computer and CDs.

Oufnac was indicted on possession of child pornography and related charges. He was convicted and appealed.

ISSUE: Does the location of child pornography images on a personal password-protected computer support a conviction for knowing possession of those images?

HOLDING: Yes

DISCUSSION: Oufnac argued that at least four other people had access to his computer and therefore, he could not be held responsible for the images. The Court noted that the "presence of multiple computer users does not preclude a finding that only one of the computer users knowingly possessed the child pornography computer images." There was "ample other evidence" that the images belonged to him alone, given where they were specifically located. Their labeling flagged them as potential pornography and they were found in his "personal 'My Documents' file within … his password-protected user account."

Further, his admission alone was sufficient to support his conviction as he "freely and directly admitted" that he had it on his computer and viewed it. Finally, "where images of child pornography exist on one's personal computer or in one's personal files, the jury may infer that the individual knowingly possessed the images." The sheer number, their location and their titles all supported the jury finding that he possessed the images.

Oufnac's conviction was affirmed.

U.S. v. Richards, 659 F.3d 527 (6th Cir. 2011)

FACTS: Richards came under investigation as a "sophisticated pornography entrepreneur, operating at least a dozen websites" that included both adults and minors involved in pornographic activities. He kept several computers at his home in Nashville, Tennessee, but also used servers in California that contained approximately a terabyte of information. Shortly after he assumed control of a named website, he uploaded through his home IP child pornography to that site. Much of the uploaded material involved a minor, Lombardi, who had a relationship with Richards for five years, starting when the minor was 14. Shortly before Lombardi's 18th birthday, Richards created a website that featured homosexual pornography, but "purposefully waited until Lombardi turned" 18 to launch it. The relationship ended and Lombardi gave all rights to photos used on the site to Richards. Likewise, another website, featuring apparently both adults and minors in same-gender sexual activities, was also controlled by Richards.

FBI agents executed a search warrant on two California servers, identified as BlackSun and Hurricane Electric. A forensic examiner went over the servers and found the material on one of two hard drives. Ten days later, Richards was arrested. Search warrants were executed on his current home and on a home to which he was moving. Computers and cameras, along with related items, were seized.

Richards was charged with distribution of child pornography. He moved for suppression of the information obtained from the commercial servers that contained the website material. After testimony from the examiner, the Court denied the motion, finding that searching the entire server (rather than just the folders that purportedly served the suspect websites) was appropriate given that material could be virtually anywhere on the server.

Richards was convicted and appealed.

ISSUE: Is it lawful to seize an entire computer server?

HOLDING: Yes

DISCUSSION: Richards argued that searching the entire server was not permitted under the warrant as submitted. The Court agreed that "particularity requirement may be satisfied through the express incorporation or cross-referencing of a supporting affidavit that describes the items to be seized, even though the search warrant contains no such description." Further, the Court noted, "the cases on particularity are actually concerned with at least two rather different problems: one is whether the warrant supplies enough information to guide and control the agent's judgment in selecting what to take; and the other is whether the category as specified is too broad in the sense that it includes items that should not be seized."[50] Richards argued that the language was overbroad. The court, however noted that "analogizing computers to other physical objects when applying Fourth Amendment law is not an exact fit because computers hold so much personal and sensitive information touching on many private aspects of life.... [T]here is a far greater potential "for the 'intermingling' of documents and a consequent invasion of privacy

[50] U.S. v. Upham, 168 F.3d 532 (1st Cir. 1999).

when police execute a search for evidence on a computer."[51] The Court agreed that it struggled with balancing, as a subject could easily "hide, mislabel, or manipulate files to conceal" crimes, and as such, a "broad, expansive search of the hard drive may be required." In other words, searching computers is a unique problem.

The Court agreed that "While officers must be clear as to what it is they are seeking on the computer and conduct the search in a way that avoids searching files of types not identified in the warrant, ... a computer search may be as extensive as reasonably required to locate the items described in the warrant based on probable cause."[52]

Further, it stated:

> … it is folly for a search warrant to attempt to structure the mechanics of the search and a warrant imposing such limits would unduly restrict legitimate search objectives. One would not ordinarily expect a warrant to search filing cabinets for evidence of drug activity to prospectively restrict the search to "file cabinets in the basement" or to file folders labeled "Meth Lab" or "Customers." And there is no reason to so limit computer searches. But that is not to say methodology is irrelevant.

In the course of a search, officers have been permitted to do a cursory examination of paper documents to determine if "they are, in fact, among those papers authorized to be seized."[53] So long as the officers are looking for "evidence explicitly authorized in the warrant, it is reasonable for the executing officers to open the various types of files located in the computer's hard drive in order to determine whether they contain such evidence." The Court had little problem with extending that authority to the examination of computer servers. The warrant in question properly identified the servers and although in hindsight, it proved unnecessary to search the entire server, there was no way for the officers to know how they would need to search the computer servers. Prior to the search, the officers did not know who had rights of access, and how the directories were organized.

The Court upheld the search of the computer server and also Richards' conviction.

MISCELLANEOUS

Lowe v. Swanson (Stark County Sheriff), 663 F.3d 258 (6th Circ. 2011)

FACTS: Lowe was charged in Ohio for sexual offenses with his 22-year-old stepdaughter. There was no allegation of force, but the conduct was categorized as what would be considered in Kentucky to be incest. He argued that the conduct was clearly one where the offense was intended to apply to children, not adults. He further argued that the "statute was unconstitutional as applied to him because the government had no legitimate interest in regulating sexual activity between consenting adults." The trial court disagreed and ultimately he pled no contest, He was classified as a sex offender. He appealed; the

[51] U.S. v. Walser, 275 F.3d 981 (10th Cir. 2001)
[52] U.S. v. Burgess, 576 F.3d 1078 (10th Cir. 2009).
[53] Andresen v. Maryland, 427 U.S. 463 (1976).

Ohio appellate courts affirmed his conviction, finding that he lacked a "constitutionally protected right to engage in sex with his stepdaughter."

Lowe filed for habeas corpus relief in the federal courts, "arguing that the Ohio Supreme Court unreasonably applied federal law as clearly established by the Supreme Court in" Lawrence v. Texas.[54] The Sixth Circuit agreed to review the case.

ISSUE: Are incest statutes constitutional?

HOLDING: Yes

DISCUSSION: The Court reviewed similar cases in other circuits, focusing on the level of scrutiny required to decide such cases. The Court found that the Ohio courts did not unreasonably apply precedent and that Lawrence "did not address or clearly establish federal law regarding state incest statutes." Further, "Unlike sexual relationships between unrelated same-sex adults, the stepparent-stepchild relationship is the kind of relationship in which a person might be injured or coerced or where consent might not easily be refused, regardless of age, because of the inherent influence of the stepparent over the stepchild."

Lowe's conviction was affirmed.

[54] 539 U.S. 558 (2003).