

Department of
CRIMINAL JUSTICE TRAINING

KENTUCKY JUSTICE AND PUBLIC SAFETY CABINET

2011



Leadership is a behavior, not a position

CASE LAW UPDATES
SECOND QUARTER

KENTUCKY COURT OF APPEALS
KENTUCKY SUPREME COURT
SIXTH CIRCUIT COURT OF APPEALS



John W. Bizzack, Ph.D.
Commissioner





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.



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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 503 - USE OF FORCE

J.L. (Mother) v. Com., 2011 WL 1434905 (Ky. App. 2011)

FACTS: During the summer, 2008¹, Daughter, age 15, was dating a boy of which her mother did not approve. Daughter and Son (age 13) had been sneaking boyfriend into the house at night. On June 9, Mother found boyfriend, covered with blankets, lying in Daughter's bed early one morning. Daughter, who had been in the shower, returned to room and found Mother with the phone in her hand – Mother asked "who was in the bed." The Daughter replied, "A boy." Mother told Daughter to leave the room, shut and locked the door behind her. Daughter tried to get back in but was unable to do so. Mother called Louisville Metro 911 and "reported that an intruder was in her home" and shot boyfriend in the leg. LMPD responded and arrested Mother.

Both Daughter and Son were eventually remanded to the custody of their father. At the removal hearing, the Court found the children to be abused or neglected. The Court "rejected Mother's argument that she could reasonably believe[] that Boyfriend was an intruder." The children were ordered removed and Mother appealed.

ISSUE: If a belief that a person is an intruder is unreasonable, is a use of force still justified under the "Castle Law?"

HOLDING: No

DISCUSSION: The record included testimony as to how the shooting traumatized Daughter and Son, but Mother argued that the shooting was self-defense under KRS 503.055 – the "Castle Doctrine." The Family Court found that it was unreasonable for Mother to believe the boy was an uninvited intruder.

The Court agreed that removal was appropriate under the circumstances.

Com. v. Bushart, 337 S.W.3d 666 (Ky. App. 2011)

FACTS: On January 7, 2007, Bushart was staying with his girlfriend, Boyd, in Graves County. Clapp, who had previously dated Boyd and had recently assaulted her, showed up. (Evidence suggested she had sent him a text message that night indicating she still loved him, but she later testified she did so to "prevent any future violence from occurring.")

Clapp told a friend that "Boyd had called him and told him she wanted him back." Clapp entered through a garage door that was broken but he knew how to remove the item securing it. Boyd and Bushart heard someone entering the house and Bushart told Boyd to call for help. Bushart left the room and Boyd heard two gunshots. (Bushart claimed to have only fired one shot, but two wounds were found on Clapp's body, one in the front and one in the back.) Clapp died. Bushart was found to be in possession of marijuana and had an unnamed controlled substance in his system.

¹ The opinion improperly gave the year as 1998.

Bushart was indicted for Reckless Homicide. Bushart claimed immunity under KRS 503.085 – for self-defense. The trial court analyzed the record and determined “Bushart had the right to use deadly force against Clapp and that the facts did not in any way rise to a showing of probable cause that Bushart was not entitled to the immunity provided” by state law.

The Commonwealth appealed.

ISSUE: May an affidavit be used to prove immunity under KRS 503?

HOLDING: No

DISCUSSION: The Commonwealth argued that the trial court should not have used Bushart’s affidavit in awarding him immunity. The Court agreed that “there was at least some evidence that the victim may have thought he was on the property lawfully and was not intending to break in to Boyd’s home.” By considering his affidavit without the opportunity for the Commonwealth to cross-examine him as to the reasons for his belief, the Court erred.

The Decision of the trial court was vacated and the case remanded for a “probable cause determination” in which the affidavit was not considered.

PENAL CODE - KRS 507 - MURDER

Gabbard v. Com., 2011 WL 2112562 (Ky. 2011)

FACTS: On June 8, 2009, Gabbard was operating his semi-cab on U.S. 27, near Butler. He lost control and collided with an oncoming vehicle, killing the driver, who happened to be the Commonwealth’s Attorney for that area. Witnesses at trial testified that Gabbard was speeding and weaving. Unopened cans of beer were found at the scene and in his truck and ultimately, testing indicated a blood alcohol of between .19 and .21. (He admitted to having had possibly as many as 16 beers that day, while driving.) Gabbard was charged with Wanton Murder and ultimately convicted. He appealed.

ISSUE: Is intoxication a defense to wanton murder?

HOLDING: No

DISCUSSION: The Court noted that Gabbard had driven his “massive semi-tractor at a high rate of speed in the on-coming lane of a two-lane highway.” They agreed that he could be deemed to “have disregarded that risk both consciously and presumptively.” Gabbard admitted that he realized he was intoxicated during the trip and continued to drive, having done so before without mishap. He “presumptively disregarded the grave risk of death he was creating when, by driving in excess of fifty-five miles-per-hour on the wrong side of the road, he created the imminent risk of killing someone and was unaware of that risk solely by reason of his voluntary intoxication.”

The Court agreed that the proof for a wanton murder case does not include evidence that the driver “was mean-spirited or that he in any way intended the death he caused.” It is sufficient if it can be shown that

the driver “consciously created a grave risk of death so devoid of justification that it may reasonably be thought to reflect an extreme indifference to the value of human life.” Intoxication is not a defense and provides “no justification for risky behavior.”

Gabbard’s conviction was affirmed.

PENAL CODE – KRS 511 - BURGLARY

Lewis v. Com., 2011 WL 2416598 (Ky. App. 2011)

FACTS: On January 3, 2006, Lewis entered an open Walgreen’s Pharmacy in Louisville. He had a hooded sweatshirt pulled up around his face and demanded OxyContin and another drug. Lewis claimed to have a gun. The store had been robbed in a similar fashion a few weeks prior. Apparently the police were summoned as they arrived while the robbery was ongoing. They found a knife with an open blade in Lewis’s pocket.

Lewis was indicted on a variety of charges. He was acquitted of robbery but convicted of burglary. He requested a directed verdict on that charge, and was denied. He then appealed. As a result of the recent decision of Wilburn v. Com.,² which “related to burglaries committed in public places where the burglar had a license to enter, and what events would trigger the revocation of that license.” In Wilburn, the Court “also expressly overruled Merritt v. Com., holding that the definition of a “deadly weapon” in the context of a robbery adopted in Merritt was irreconcilable with the language of the statutes now in effect.”³ Since one issue in this case related to Merritt, the Court agreed to review the earlier decision.

ISSUE: If one commits a crime in an open business, is that the functional equivalent of being told to leave?

HOLDING: Yes

DISCUSSION: The Court agreed that although Lewis “lawfully entered” an open premises, that once “he acted inconsistently with the business purposes of the pharmacy,” his license to be there was automatically revoked. The Court agreed with the trial court that Wilburn did not require that he be “personally ordered to leave” – and in fact that the Wilburn court had agreed that when the manager shot at Wilburn, that was “the functional equivalent” of being told to leave. It specifically held that when a defendant perpetrated a crime, it served as “by obvious implication, the revocation of his license to remain in the dwelling or building.”

In addition, although the Court overruled Merritt, it permitted a jury instruction that “any object intended by its user to convince the victim that it is a pistol or other deadly weapon, and does so convince him, is one.” The Court found nothing to indicate that the decision was intended to be retroactive

² 312 S.W.3d 321 (Ky. 2010).

³ 386 S.W.2d 727 (Ky. 1965).

PENAL CODE – KRS 514 - THEFT OF IDENTITY

Mills v. Com., 2011 WL 1706545 (Ky. App. 2011)

FACTS: Mills was detained by Wal-Mart loss prevention for theft. Officer McConnell (Louisville Metro PD) responded and was told by Mills he had no ID. After being warned about providing false information, he gave the officer “personal information that belonged to the victim” – his brother, David. David was ultimately charged with the theft and ultimately told the officer that Mills had done it before.

Mills was charged with Theft of Identity by information. He took a conditional guilty plea and appealed.

ISSUE: If one gives a false identity to avoid detection, is that a Theft of Identity?

HOLDING: Yes

DISCUSSION: Mills argued that he should have been prosecuted on the offense of Giving a Peace Officer a False name (KRS 523.110) rather than Theft of Identity (KRS 514.160). The Court agreed he provided false information to “avoid detection.” The Court noted that the prosecutor’s decision to proceed on the felony charge was properly supported by Crouch v. Com.⁴ The Court differentiated the two, noting that Mills agreed to be charged by information for the Theft of Identity.

The Court upheld the plea.

DOMESTIC VIOLENCE

Goodrich v. Goodrich, 2011 WL 1598781 (Ky. App. 2011)

FACTS: On July 28, 2009, Pasqualina Goodrich was given a DVO by Hardin County. That DVO required Everett Goodrich to remain 500 feet away from her and her family/household. On April 9, 2010, she alleged that he had entered her residence (formerly the marital residence) and removed items when she was not home. Everett agreed that he had done so but argued he had not violated the order because no one was home. The trial court interpreted “household” to include the physical residence⁵ and noted Everett had previously sought permission from the court to enter the home to retrieve belongings. He was found to have willfully violated the DVO and held in contempt. Everett appealed.

ISSUE: If someone subject to a DVO enters the prohibited location when the other party isn’t there, is that still a violation?

HOLDING: Yes

DISCUSSION: The Court agreed that the DVO “specifically prohibited [Goodrich] from having ‘any contact’ with Pasqualina.” It was clear Goodrich understood that to mean that he could not enter the home

⁴ 323 S.W.3d 668 (Ky. 2010).

⁵ See Lynch v. Com., 74 S.W.3d 711 (Ky. 2002).

without the leave of the court. Such conduct "may be construed as intimidation and potentially disrupt[ive to] Pasqualina's life and sense of security."

The Court upheld the contempt order.

SEARCH & SEIZURE – SEARCH WARRANT

Dumas v. Com., 2011 WL 2112560 (Ky. 2011)

FACTS: Dumas returned a work cell phone after he was fired. During the process of deleting contact information and other items on the telephone, the owner "discovered a disturbing picture electronically stored on it of a young girl posing suggestively and wearing adult-styled lingerie." The phone was given to the McCracken County Sheriff's Department, which turned the phone over to Marshall County because that was where Dumas lived. Marshall County obtained a search warrant for Dumas's residence.

Computer, A/V equipment, compact discs, images and e-mail were seized. Ultimately Dumas was indicted on multiple counts of distributing matter portraying a sexual performance by a minor and possession of the same. Additional charges were placed in a superseding indictment. Dumas requested suppression

The affidavit stated:

Affiant has been an officer in [the Marshall County Sheriff's Department] for a period of 7 years and 10 months . The made in [his] capacity as an officer hereof. On Wednesday, April 18, 2007, at approximately 3:16 PM, Affiant received information from/observed : Affiant received information from Detective David Shepherd of the McCracken County Sheriff's Department Det. Shepherd sent an [e-mail] with an attached photo that was found on a camera phone that was once possessed by Dumas. The photo was of a young girl, who appeared to be between the ages of 6 & 8, wearing adult-type lingerie. Specifically, the girl had on a garter belt, panty hose, lace panties, and what appeared to be a [brassiere]. The [child's] upper thighs and midriff are exposed in the photo and she is posing in a provocative manner. Detective Shepherd showed Affiant the phone with the photo on April 23, 2007 .

Acting on the information received, Affiant conducted the following independent investigation : Affiant learned that this phone had been issued to Dumas as a part of his employment . . . [Affiant learned that Dumas was fired on April 13, 2007, and turned the phone in to his employer who contacted law enforcement] . . . Affiant learned that Dumas was permitted to have the phone in question with him at all times Affiant has reasonable and [probable] cause to believe, and believes, grounds exist for issuance of a Search Warrant based on the aforementioned facts, information, and circumstances, and prays a Search Warrant be issued, that the property (or any part thereof) be seized and brought before the Court and/or retained subject to order of said Court.

The deputy requested to seize the following:

any and all devices capable of taking and/or storing electronic photographs, including but not limited to, computers, web cams, hard drives, CD/storage disks, thumb drives, flash drives, VHS tapes, DVD's, magazines, photographs, PDA's, phones with digital cameras, film negatives, 35 mm

films, photographs stored in [e-mail] and/or computer servers. Also any and all information which could identify minor child in photograph described in Affidavit on page 2.

Dumas argued that since the detective testified that he did not consider the photo to be pornographic and because he became known to McCracken, rather than Marshall County deputies, it made the affidavit untruthful. The trial court rejected the argument

ISSUE: If a search warrant affidavit contains a sufficient statement of facts to support probable cause, is it valid?

HOLDING: Yes

DISCUSSION: Dumas argued that the search warrant affidavit “contained intentionally or recklessly false statements and omitted facts.” Essentially, an affidavit “must include a statement of facts sufficient to support a finding of probable cause.” The affidavit included an “explicit description of the location to be searched” and a detailed list of items sought. The informants are not named but their identity is clearly indicated.

The Court agreed the warrant was sufficient and affirmed the trial court’s decision. The Court also agreed that the two charges, while similar, did not violate double jeopardy and that the charge was not overbroad. .

Dodson v. Com., 2011 WL 1434667 (Ky. App. 2011)

FACTS: On October 11, 2007, Louisville Metro officers sought and received a search warrant for Dodson’s apartment. Drug trafficking was suspected and in fact, heroin, a firearm and other items were found. Dodson was indicted. On the morning of trial he moved for suppression but was denied. At trial, officers testified as to what was found, and in particular, a loaded handgun was on the windowsill behind the headboard of the bed. Sgt. Nunn testified as an expert that drug dealers often kept weapons near their bed in case of a drug-related robbery. Other witnesses testified that the heroin and the weapon belonged to a prior resident of the apartment.

Dodson was acquitted of trafficking but convicted of possession of the heroin, enhanced by the presence of the firearm. He appealed.

ISSUE: Does a CI also involved in criminal activity invalidate a search warrant?

HOLDING: No

DISCUSSION: Dodson argued that the warrant affidavit was unreliable, as it was based on the statement of an informant who was also involved in criminal activity. However, the Court noted “in cases involving identifiable informants who could be subject to criminal liability if it is discovered that the tip is unfounded or fabricated, such tips are entitled to a greater ‘presumption of reliability’ as opposed to the tips of unknown ‘anonymous’ informants who theoretically have ‘nothing to lose.’”⁶ Further, “[s]tatements against the

⁶ Com. v. Kelly, 180 S.W.3d 474 (Ky. 2005).

informant's penal interest also increase the degree of veracity that a court may attribute to the statements."⁷ The Court discounted his assertion that the CI did not even actually exist and upheld the warrant.

The Court noted that KRS 218A.992 allows for an upgrade of an offense when a person is in possession of a firearm in *furtherance* of a drug offense. In Com. v. Montague, the Kentucky courts had ruled that "there must be a nexus between the underlying offense and the possession of the firearm."⁸ Dodson argued that it was not proven that the gun and the heroin were connected as they were in different parts of the apartment. The Court disagreed, however, ruling that even if Dodson was not convicted of trafficking, that the amount of heroin was shown to be substantial -worth approximately \$4,000, constituting over 200 doses and that the weapon could still be present in order to protect the drugs from being stolen. However, because the jury instructions did not include the proper language to require the jury to make the finding, the Court vacated the enhancement of the conviction and remanded the case.

Beckham v. Com., 2011 WL 2119337 (Ky. App. 2011)

FACTS: On August 11, 2008, Deputy Kappes (Boone County SD / Northern Kentucky Drug Strike Force) got a warrant for Beckham's home, which also authorized the search of Beckham, Reynolds and a white Cadillac registered to Beckham. Deputy Kappes surveilled the property and saw two men at the back of the mobile home. Kappes approached, asked if Beckham was there and was told "he just left." He saw a pickup leave the scene and tried to get someone to stop it. One of the other officers recognized Beckham in the vehicle and got a deputy to stop the vehicle, about a mile away. Deputy Kappes immediately went to the scene.

Beckham admitted to having marijuana, cash and other items on his person. He was arrested and returned to the home, where more contraband was found. Beckham was indicted on drug-related charged and requested suppression. It was denied, with the Court finding the warrant valid and Beckham's detention valid under Parks v. Com.⁹ The Court agreed that the stop "was proper because Beckham was detained in close proximity to his home immediately after he left the residence."

Beckham took a conditional guilty plea and appealed.

ISSUE: May a subject whose home is being searched some distance away be seized?

HOLDING: No

DISCUSSION: The Court agreed that generally, a search warrant "does not authorize the off-premises detention of the owner or occupant of the premises to be searched."¹⁰ However, Michigan v. Summers, created a limited exception to "detain the occupants of the premises while a proper search is conducted."¹¹ However, the Court agreed that none of the factors in Summers that justified the detention were present in the case as there was no indication that Beckham was fleeing (or even aware of the impending search), that he "posed a safety risk," or that he was "needed to assist in the search of the residence." (The Court

⁷ Lovett v. Com., 103 S.W.3d 72 (Ky. 2003).

⁸ 23 S.W.3d 629 (Ky. 2000).

⁹ 192 S.W.3d 318 (Ky. 2006).

¹⁰ Parks.

¹¹ 452 U.S. 692 (1981).

noted that “Kappes may well have sought to detain Beckham for those reasons, but these facts were simply not elicited at the hearing.”

The Court reversed his conviction with respect to the evidence seized as a result of the stop.”

Prewitt v. Com., 341 S.W.3d 604 (Ky. App. 2011)

FACTS: On April 1, 2009, Officer Komara (Lexington PD) was working with Fed Ex when she spotted a suspicious package. It had handwritten labels, was sent from an individual to an individual, was from a Texas border city with the return address being a Mailbox Store, was sent overnight priority and had no signature required. It was destined for a Lexington location known for drug activity. The package was presented to a drug dog which alerted on the package. They obtained a search warrant and found 18 pounds of marijuana, packaged in six bundles. Officers went to the delivery address the next day and learned that the occupants claimed no knowledge of the recipient (Brizeuela). The occupant allowed a search of the home and found no indication of drug use.

During the same time, Fed Ex tried to deliver another package but learned that the address was incorrect. Noting its similarity to the first package, it too was presented to a drug dog, which alerted, and it was found to contain 18 pounds of marijuana. A person called to check about picking up the package, so it was resealed. At about 4:30 p.m., Prewitt arrived to pick it up and was promptly arrested. She told the officers she was picking it up for a friend, who was outside and lo and behold, they found Perez, who had been at the first address they'd visited. Perez admitted knowing what the packages contained, but claimed Prewitt did, as well.

Prewitt was indicted. She requested suppression, which was denied. She then took a conditional plea to facilitation to trafficking, and appealed.

ISSUE: What is the standard for holding a package for a dog sniff?

HOLDING: Reasonable suspicion

DISCUSSION: Prewitt argued that Officer Komara had not reasonable suspicion to detain the first package and that detention tainted the seizure of the second package. The court agreed that both packages were seized, albeit for just a short time, to permit the drug sniff. The Court also agreed that sealed mail is protected by the Fourth Amendment, but held that only reasonable suspicion is required to briefly detain a package for further investigation.¹² Although the Sixth Circuit had not adopted the Postal Service's drug package profile, it had relied on many of the same factors to find a package suspicious.

The Postal Service's "drug package profile" targets packages based on: (1) the size and shape of mailing; (2) whether the package is taped to seal all openings; (3) whether the mailing labels are handwritten; (4) whether the return address is suspicious, e.g., the return addressee and the return address do not match, or the return address is fictitious; (5) unusual odors coming from the package; (6) whether the city of origin and/or city of destination of the package are common "drug source" locales; and (7) whether there have been repeated mailings involving the same sender and addressee.

¹² U.S. v. Alexander, 540 F.3d 494 (6th Cir. 2008).

The Court agreed Officer Komara had reasonable and articulable suspicion to detain the first package and detained it only so long as necessary to present it to the drug dog.

Prewitt argued that the second warrant was fatally flawed because it was effectively a cut and paste from the first one and some errors were made during the process. The Court found that stripped of the inaccuracies, however, it still had sufficient information to establish probable cause for the search warrant.

Prewitt's plea was affirmed.

SEARCH & SEIZURE – STANDING

Greene v. Com., 2011 WL 3360676 (Ky. App. 2011)

FACTS: On the day in question, Officer McFarland (Winchester PD) stopped a vehicle in which Greene was a passenger for an equipment violation. The driver was upset over "trouble with her boyfriend" and he noted that Greene was "very nervous." He found no problems with the driver's record, so he gave her a warning. He asked for consent to search the car, which she gave. Officer McFarland asked Greene to get out of the car and both he and Officer Thompson told him "several times to keep his hands visible." When he failed to do so, Officer McFarland frisked him. Greene admitted he had marijuana and was handcuffed. In addition to marijuana, Officer McFarland also found crack cocaine. (The driver admitted she'd gotten marijuana in exchange for a ride from Greene.)

Greene was charged and moved for suppression, arguing that the traffic stop was unlawful. The Court denied the motion. The Court agreed that asking for consent at the end of the stop was appropriate and that it was reasonable to have Greene step out. Greene "drew attention by himself by being nervous and putting his hands in his pockets." The Court noted that "it was swayed by the officer's testimony" and found his concern for his safety to be credible.

Greene took a conditional guilty plea and appealed.

ISSUE: Does a passenger have standing to object to the search of a vehicle in which they are riding?

HOLDING: No

DISCUSSION: The Court first concluded that Greene did not have standing to object to the search of the actual vehicle. The Court further agreed that the traffic stop was not unduly extended by the officer's request to search the vehicle.

Greene's plea was affirmed.

SEARCH & SEIZURE – TERRY

Shelton v. Com., 2011 WL 1515288 (Ky. App. 2011)

FACTS: On July 8, 2008, Graves County deputy sheriffs, along with members of the Pennyrile Narcotics Task Force, executed a search warrant on a “suspect drug house” in Mayfield. Three suspects were named on the warrant, but not Shelton. In the affidavit, Deputy Workman stated that he had received information from a reliable CI that crack cocaine had been purchased from the three named subjects on several occasions. However, when they arrived Shelton was in the backyard. He was detained and frisked by Deputy Halsell, who “felt something in Shelton’s front pocket.” He removed a baggie of crack cocaine. Shelton was arrested for possession.

Shelton moved for suppression. At the hearing, Deputy Halsell testified that “for routine safety reasons, every time he detains someone, he pats down that person” for a weapon. Deputy Halsell also stated that it was “common knowledge” that drug houses have weapons and that he had been told there might be a lookout at the residence. The Court recounted the testimony, during with the deputy admitted he did not know what the item was, but that anytime he feels something, he believes it might be a weapon. The Court denied the suppression.

Shelton took a conditional guilty plea, and appealed.

ISSUE: May an item that is arguably a weapon to be removed from a pocket during a Terry frisk?

HOLDING: Yes

DISCUSSION: First, the Court looked at the detention and frisk. The Court agreed that simple proximity to others “independently suspected of criminal activity” does not give sufficient cause to frisk the person.¹³ The Court also looked to U.S. v. Vite-Espinoza, in which a subject found in the back yard of a home being searched pursuant to a search warrant were found.¹⁴ The Court agreed the stop and the frisk were both appropriate under the circumstances, as Deputy Halsell “had a reasonable and particularized basis for conducting a pat-down of Shelton.”

However, the Court continued, when he reached into Shelton’s pocket, he exceeded the scope permitted by Terry. In Minnesota v. Dickerson, the Court stated, the frisk was “strictly limited to that which is necessary for the discovery of weapons which might be used to harm the officer or others nearby.”¹⁵ This ruling was supported by the Kentucky courts in Com. v. Crowder.¹⁶ The case turned on whether Deputy Halsell could reasonably believe the item was a weapon and the Court looked to U.S. v. Strahan.¹⁷ In that case, one of the items felt was a money clip, which “provided rigidity to the bulge,” and that encouraged the Court in that case to accept that it *might* have been a weapon. In this situation, however, the Court found insufficient evidence to support the deputy’s contention that “the object he felt was a weapon” as he indicated he “had no idea what it was.” No testimony was elicited “regarding what the object felt like in Shelton’s pocket or why he had reason to believe that the object was possibly weapon [sic].”

The Court overturned the denial of the suppression motion and remanded the case for further proceedings.

¹³ Ybarra v. Illinois, 444 U.S. 85 (1979).

¹⁴ 342 F.3d 462 (6th Cir. 2003).

¹⁵ 508 U.S. 366 (1993).

¹⁶ 884 S.W.2d 649 (Ky. 1994).

¹⁷ 984 F.2d 155 (6th Cir. 1993).

Smith v. Com., 2011 WL 2553945 (Ky. App. 2011)

FACTS: On March 10, 2009, Buckner's vehicle was shot at by an unknown person in a red car. At about the same time, a person was reported to be entering the Hazard Wal-Mart, apparently angry and armed. Since the direction of travel was appropriate, Captain East and Officer Campbell (unknown agency) went to the Wal-mart; they were met by Sgt. Napier and Officer Combs. They found a red vehicle and blocked it in – inside they could see a shell casing and a bottle of tequila.

Captain East went into the store and found a man matching the description of the tip at the gun counter. He was told the man had already been frisked. When the officers left the store, a woman driving through the parking lot pointed at Smith, who had also exited. (Although the Court did not discuss this issue, it seems to have been presumed that she had some knowledge of what had occurred.) Captain East asked Smith to come to him and told him to raise his arms – Sgt. Napier immediately spotted a pistol. They searched the vehicle, upon consent, and found ammunition.

Smith was indicted for CCDW, wanton endangerment and related charges. He requested suppression and was denied. He took a conditional guilty plea and appealed.

ISSUE: May a Terry stop be based on credible information from an anonymous informant?

HOLDING: Yes

DISCUSSION: The Court reviewed the encounter under the Terry standard. The Court agreed that although the witness was anonymous, that it was credible, and that others also pointed him out as possibly carrying a firearm. They also saw him headed toward the vehicle they had already identified as suspect. The Court agreed the officers "had a reasonable, articulable suspicion that Smith was involved in the shooting."

Smith's plea was upheld.

Barber v. Com., 2011 WL 2587260 (Ky. App. 2011)

FACTS: Police received a tip through dispatch that drugs and guns would be found at an address in Covington. Officer Mangus and Warner went to the address and were invited inside. The occupants gave consent to search and signed a waiver. Officer Mangus went to the kitchen while Officers Warner and Ewell remained in the front part of the house. While Officer Mangus was in the kitchen, Barber and an unknown person entered through a side door. When Officer Mangus greeted them, Barber fled out of the house. He was intercepted by Officer Warner and fought, but was handcuffed. He was wearing his pants low with his boxers exposed. When they attempted to search him, he kept "adjusting something at the back of his pants and kept his legs together." They forced his legs apart and Officer Winship pulled his boxers out and down so they could check the area, and found a plastic bag with 8 grams of crack cocaine.

He requested suppression and was denied. He was eventually convicted and appealed.

ISSUE: May an officer do a more extensive search of a person when it is based on probable cause?

HOLDING: Yes

DISCUSSION: Barber argued that the search went beyond the bounds of a Terry frisk and “amounted to an improper strip search.” The Court agreed the officers “had probable cause to conduct a search of Barber’s person” and that it was reasonable to believe that he was concealing weapons or other contraband. Terry was not a factor because the officers had more than reasonable suspicion but instead had probable cause. The Court did not find what was done to be a strip search, even though it agreed that phrase was not defined clearly in the law.

Barber’s conviction was affirmed.

SEARCH & SEIZURE – HOTEL ROOM

Blades v. Com., 339 S.W.3d 450 (Ky. 2011)

FACTS: On March 23, 2009, Deputy Crabtree (McCracken County SO) stopped Brokaw’s vehicle. He learned it was uninsured and requested consent to search; she agreed. He found marijuana and methamphetamine paraphernalia in a bag. Blades, a passenger, admitted ownership of the items and was arrested. Deputy Vallelunga arrived and aided in the search; he found blister packs of pseudoephedrine and a hotel room key. Apparently, because of Blades’ arrest, he was unable to return to the hotel and check out. After “lunch-time,” the hotel manager allowed the officers to search the room without a warrant and a number of other drug-related items were found. Blades was convicted and appealed.

ISSUE: Does a hotel guest have an expectation of privacy after their rental period ends?

HOLDING: No

DISCUSSION: The Court began by agreeing that guests do “enjoy a reasonable expectation of privacy in hotel rooms.”¹⁸ However, once their “rental period has expired or been lawfully terminated, the guest does not have a legitimate expectation of privacy in the hotel room or in any article therein of which the hotel lawfully takes possession.”¹⁹

Blades’ conviction was affirmed.

SEARCH & SEIZURE – KNOCK AND TALK

Beckham v. Com., 2011 WL 1598735 (Ky. App. 2011)

FACTS: On April 25, 2009, Deputies Boggs and Whalen (Boone County SD) were on bike patrol in a trailer park. They detected the odor of marijuana around a specific trailer and saw that the inner door was open but the outer, screened storm door was closed. The deputies investigated and believed that trailer to be the source, so they conducted a knock and talk. As they approached, the odor grew stronger. Beckham responded to the knock, speaking to them through the screen. They saw his eyes were “bloodshot and dilated.” Beckham refused to come outside or let the deputies come inside. He asked to

¹⁸ Stoner v. California, 376 U.S. 483 (1964).

¹⁹ U.S. v. Allen, 106 F.3d 695 (6th Cir. 1997).

speak to his lawyer and Boggs told him "that was fine," but that he would be detained while they got a search warrant. He fled back into the trailer and the deputies feared he was getting a weapon or destroying evidence. Boggs kicked in the storm door and pursued, finding Beckham in the living room, "stuffing items into his pockets." They saw marijuana and drug paraphernalia in plain view and detained Beckham until they could get a warrant. During the subsequent search, they found additional contraband. Beckham was charged and indicted for trafficking and related offenses.

Beckham moved for suppression, which was denied. Beckham took a conditional guilty plea and appealed.

ISSUE: Is a knock and talk a police-created exigency?

HOLDING: Yes

DISCUSSION: Beckham argued that the exigencies in this case were created by the deputies, contending that the "knock and talk" alerted him and caused the subsequent actions. Beckham "asserts that there was no danger of evidence being destroyed until the deputies knocked on the door and advised him that they smelled marijuana." The Court looked to the case of King v. Com.²⁰ in which the Kentucky Supreme Court "addressed police-created exigency." Following the precedent in that case, the Court agreed that the "knock and talk procedure" created an exigency and that the entry by the deputies was improper. The Court found the deputies had "sufficient evidence of [sic] obtain a search warrant prior to approaching Beckham's residence" and that it was "improper for them to then conduct a knock and talk."

The Court reversed the denial of Beckham's motion to suppress and vacated his conviction.

NOTE: *The holding in this case is called into question by the U.S. Supreme Court decision which overturned the Kentucky ruling in Kentucky v. King.*

SEARCH & SEIZURE - VEHICLE EXCEPTION

Sullivan v. Com., 2011 WL 1900289 (Ky. App. 2011)

FACTS: On April 16, 2009, while patrolling an area in which there had been numerous complaints of drug activity, Detectives Page and Smoot (Lexington PD) saw a vehicle legally parked. Det. Page saw a man counting money, and also saw a digital scale and a green leafy substance. He drove up alongside the car and saw a bag of marijuana beside the driver's right leg. The detectives approached the car from opposite sides – with Det. Page seeing a passenger with money, marijuana and a digital scale. Both men were taken out of the car. Det. Smoot then also saw the suspect items. During a vehicle search, Det. Page found marijuana on the scale and 240 grams in the Ziploc bag, as well as 4.2 grams in a candy bag. Sullivan, the driver, was arrested.

Sullivan moved for suppression, arguing the officers lacked reasonable suspicion to do a Terry stop. The trial court ruled that Det. Page "was lawfully in a position where he could observe contraband in plain view." Sullivan took a conditional guilty plea for trafficking and appealed.

²⁰ 302 S.W.3d 649 (2010).

ISSUE: Does probable cause justify the search of a vehicle for contraband without a warrant?

HOLDING: Yes

DISCUSSION: Sullivan argued that the information available to the detectives was “insufficient to establish reasonable suspicion to search his car.” Sullivan pointed to conflicting statements made by the detectives between the indictment and the suppression hearing. The Court agreed there “were some minor inconsistencies in the record,” but that the decision on the credibility of a witness was up to the Court. The Court further agreed that Dunn v. Com. “permits police to search a legally stopped automobile where probable cause exists that evidence of a crime will be found in the vehicle.”²¹ In both areas from which Det. Page testified he saw the contraband, he was “legitimately in a position where he could and did observe evidence of a drug crime.”²² Once he did so, he was “authorized to search the vehicle under the automobile exception pursuant to the plain view exception.”²³

Sullivan’s plea was affirmed.

SEARCH & SEIZURE – VEHICLE STOP

Gill v. Com., 2011 WL 1900319 (Ky. App. 2011)

FACTS: On March 3, 2009, Det. Masterson (Lexington PD) saw a vehicle matching an ATL that had just been sent for a shooting suspect. He pulled alongside and believed the driver matched the description of the shooting suspect, so he maneuvered to get the license plate information from the car. The vehicle began changing lanes for no apparent reason. The license plate came back to Octavia Taylor. Another alert came out, identifying the suspect vehicle as a Toyota Tercel – he was following a Camry. He continued to follow because of the evasive driving and as they entered I-75, the vehicle was going 20 miles under the speed limit.

Det. Masterson decided to stop the vehicle but waited until it reached a better location. The vehicle exited at Man O’ War Blvd and the detective initiated the stop – at which point the driver “accelerated at a high rate of speed and ran a stop sign.” Det. Masterson saw a bag thrown from the window. Gill was pulled over and eventually, the discarded baggie was found. It contained cocaine.

Gill was indicted on possession of the cocaine, fleeing and evading and related offenses. He moved for suppression, arguing the stop was improper. When that was denied, he took a conditional guilty plea and appealed.

ISSUE: Does extremely slow driving justify a vehicle stop?

HOLDING: Yes

DISCUSSION: Gill argued that officer lacked sufficient cause to stop the car, but the Court disagreed.

²¹ 199 S.W.3d 775 (Ky. App.2006).

²² Com. v. Banks, 68 S.W.3d 347 (Ky. 2001).

²³ Hazel v. Com., 833 S.W.2d 831 (Ky. 1992).

Further, at the time Gill tossed the cocaine, abandoning the contraband, he had not yet yielded to the officer's authority and stopped his vehicle. The Court upheld the plea.

SEARCH & SEIZURE - VEHICLE - GANT

Torrez v. Com., 2011 WL 1327129 (Ky. App. 2010)
(Previous opinion withdrawn)

FACTS: On May 28, 2008, Trooper Boyles (KSP) stopped a vehicle driven by Torrez. Torrez did not speak English and did not produce a license. He was arrested for DUI and secured. Trooper Boyles searched the car for ID, found none, but did find a package of marijuana in excess of five pounds. Torrez was charged and sought suppression. When that was denied, he took a conditional guilty plea, and appealed.

ISSUE: Is a search for ID in a vehicle justified under Gant?

HOLDING: No

DISCUSSION: The trial court originally upheld the vehicle search under New York v. Belton, which was in effect at the time.²⁴ Following his plea, however, Arizona v. Gant was decided, and because the case was still pending appeal, it was necessary to reevaluate the plea under now current law.²⁵ The Court found that "neither of Gant's justifications to search the vehicle are satisfied." The Court noted that while the trooper "arguably could have had reason to believe the vehicle contained evidence of the offense of arrest, i.e., evidence of recent alcohol consumption" that the trooper stated his reason for searching was for identification. "Allowing Trooper Boyles to use the justification of searching for Torrez's identification would lend to precisely the type of police entitlement the Gant court sought to dissuade."

Torrez's conviction was reversed.

NOTE: *Although final, the holding in this case is called into question by the recent U.S. Supreme Court case of U.S. v. Davis.*

Noffsinger v. Com., 2011 WL 1327415 (Ky. App. 2011)

FACTS: On August 8, 2009, Officer McGehee (Central City PD) spotted a non-illuminated license plate on a vehicle driven by Hornsby. Noffsinger was riding as a passenger. Hornsby received a citation for the offense. However, during the stop, the officer noticed that "Noffsinger seemed nervous and appeared to be impaired" He was "nervous and fidgety" and his "eyes appeared large and were wide open." Officer McGehee knew Noffsinger was a drug user and asked him to get out of the car. As he did so, the officer "noticed a spoon inside a clear plastic bag, which was located between the door and the passenger seat" - Noffsinger picked it up. The spoon appeared to be scorched on the bottom. Officer McGehee asked if he'd used drugs and Noffsinger admitted to having done so the day before. He

²⁴ 453 U.S. 454 (1981).

²⁵ See Griffith v. Kentucky, 479 U.S. 314 (1987) ("failure to apply a newly declared constitutional rule to criminal cases pending on direct review violates basic norms of constitutional adjudication").

displayed a syringe mark on his arm upon request. He then took a syringe from his sock and something from his pocket and placed the item from his pocket into his mouth. Because possession of drug paraphernalia is an offense, the officer had probable cause for an arrest. (The item in his mouth turned out to be cotton.) Eventually, the officer found a dollar bill with white residue in his pocket. During a vehicle search, Officer McGehee found Xanax and a hydrocodone tablet and Noffsinger admitted all belonged to him.

Noffsinger was charged with possession and requested suppression. When that was denied, he took a conditional guilty plea and appealed.

ISSUE: Does the discovery of drug paraphernalia justify a further vehicle search under Gant?

HOLDING: Yes

DISCUSSION: The Court agreed, first, that the traffic stop was properly justified by the minor traffic offense. Once the officer made the arrest for drug paraphernalia, properly seen in plain view, the Court agreed that the subsequent search was justified under Arizona v. Gant.²⁶ The Court detailed every step of the encounter and noted that the “facts demonstrate the reasonableness of Officer McGehee’s eventual arrest” and subsequent vehicle search.

The Court upheld the plea.

INTERROGATION - MIRANDA

Witt v. Com., 2011 WL 1515414 (Ky. App. 2011)

FACTS: On January 10, 2009, Durham’s home in Jackson County was invaded and his house robbed while he was held at gunpoint. Fortunately, he was relatively unharmed. Sheriff Fee responded to the call for help. He detailed the items taken during the robbery and a previous burglary, including a weapon. Sheriff Fee developed information that indicated Witt may have been involved. Sheriff Fee found Witt at a friend’s apartment on January 13; Witt confessed to the robbery and was taken to the station. Before they left the apartment, however, Witt produced several silver dollars taken in the robbery. Sheriff Fee asked no more questions but did advise Witt of his Miranda rights. Witt had not been formally arrested when placed in the vehicle. Witt claimed he did not get Miranda warnings until he arrived and was shuttled between the jail and the sheriff’s office several times, and that Det. Peters (KSP) was the first to give him Miranda warnings. Witt gave a statement to Det. Peters in which he agreed Sheriff Fee had given him Miranda warnings. He then gave a full confession to the robbery.

Witt was indicted. He requested suppression, which the Court denied, finding Witt’s assertions to not be credible. He was convicted and appealed.

ISSUE: Is Miranda required when an adult subject is not in custody, but is being interrogated?

HOLDING: No

²⁶ 129 S.Ct. 1710 (2009).

DISCUSSION: First, the Court noted that Miranda “is expressly limited to situations involving custodial interrogation.” The Court agreed Witt was being interrogated but ruled Witt was not in custody while still at the apartment and on the trip to the station. The Court found “no threatening behavior or presence which would indicate to Witt that he was not free to leave at this time.” Rather, he volunteered the information when asked a simple question – “would you like to tell me about it?” He was free to simply say nothing at that time. With respect to the recorded statement, Witt “clearly acknowledged” he’d received Miranda warnings and that he understood them. He attempted to raise a question-first Seibert issue, but since he’d not done so previously, the Court found it to be untimely.²⁷ However, since it was “largely cumulative” anyway, the Court found no error at all.

Witt’s convictions were upheld.

SUSPECT IDENTIFICATION

Thornton v. Com., 2011 WL 2436755 (Ky. App. 2011)

FACTS: In Louisville, on December 8, 2008 Thornton and an accomplice robbed Hampton at gunpoint. The pair (and a third accomplice) were apprehended later, following a second robbery. After that robbery, the victim was taken to identify suspects (including Thornton) who had been stopped a short distance away in a vehicle that matched a description given by the victim. He identified all three occupants. Thornton was charged and requested suppression of the suspect identification and a statement made. When that was denied, he took a conditional guilty plea and appealed.

ISSUE: Is a less than detailed description of a suspect still sufficient to support an identification?

HOLDING: Yes

DISCUSSION: Thornton argued that the show-up identification was inherently suggestive and that the trial court “improperly applied the five factors the Supreme Court specified in Neil v. Biggers.²⁸” The trial court had noted that the victim did not adequately identify the three robbers because he did not provide a description of hair or other distinguishing factors (which were, in fact, present). He did immediately and positively identify the occupants upon being presented with them and the show-up was within an hour of the robbery. What identification he did provide, however, was completely accurate, with respect to clothing, in particular. Smith was slightly intoxicated but the Court did not find that to be an issue in that he was coherent. While a more detailed description might have made the identification more compelling, the lack did not present an insurmountable problem.

Hampton, the first victim, made an identification based upon two separate photo-paks. He picked out the robbers (Thornton and Page) quickly. Thornton complained that the detective did not specifically state that the suspect may not be in the photo-pak, but the Court found that to be unnecessary and upheld the identification. Thornton also complained that it was improper to admit a statement he made during custodial interrogation. However, the Court found no reason to believe he was not properly advised of his rights and there was no indication the statement was not given voluntarily. There was no recording made

²⁷ Missouri v. Seibert, 542 U.S. 600 (2004).

²⁸ 409 U.S. 188 (1972).

of the initial interrogation, and the detective admitted Thornton was “a bit tired.” The Court found that “simply saying that he was tired, without more, is not enough to negate the officer’s testimony that the statement was not coerced and was knowingly and intelligently made.”

The Court upheld the conditional plea.

Barnes v. Com., 2011 WL 1900342 (Ky. App. 2011)

FACTS: On May 24, 2009, Manning arrived at a Lexington home to water plants and feed the cat. She spotted a man inside the home who had broken in and when he saw her, the man retreated back into the house. She called 911. Manning did not see the man again but described him to responding officers, stating, among other things, that he wore black-rimmed glasses. The next day, she was shown a photo pak, in which none of the subjects wore glasses but was unable to make an ID. A few weeks later, officers in the area noticed a man who met the description Manning had given, and he obtained a name (Barnes) and information that Barnes lived in the area. Det. Wolff (Lexington PD) learned that Barnes had an outstanding warrant and arrested him. He presented a photo pak to Manning that included a photo of Barnes and she identified him “without hesitation.”

Barnes was charged with Burglary and PFO. He moved for suppression of the identification, which the trial court denied. At trial, Manning testified about the photo-pak ID. She also identified a larger, color photo of Barnes, taken on the same day (by the detective) as the smaller photo used in the lineup. It was unclear when she saw the larger photo, however. She also made an in-court identification of Barnes. Barnes was convicted and appealed.

ISSUE: Are minor errors in a description fatal to a later identification?

HOLDING: No

DISCUSSION: The Court noted that even presuming that the showing of the larger photo was “unduly suggestive,” that it did not constitute reversible error. The Court looked to the five factors in Neil v. Biggers²⁹ and noted that: she was able to get a good look at the intruder and that she “spent a few highly focused seconds” trying to recognize him. She explained discrepancies in her initial identification (as to height) – explaining that she was several steps below him and only perceived he was relatively short for a male. She also mistook his age, believing him to be younger than he actually was, and did not see his tattoos. She also thought his glasses were black when they were brown. She expressed some confusion about the presence of facial hair, with the Court noted that facial hair is an ever-modifiable feature. Her rapid identification in the second photo-pak, following an earlier viewing in which she made no identification, was reliable. Finally, her initial identification was within three weeks of the crime.

The Court concluded that the evidence did not “suggest a likelihood of misidentification.”

The Court affirmed Barnes’ conviction.

TRIAL PROCEDURE / EVIDENCE – REDACTION OF CONFESSION

²⁹ 409 U.S. 189 (1972).

Huber v. Com., 2011 WL 1900176 (Ky. App. 2011)

FACTS: On November 1, 2008, Huckabee was awakened by his wife because she saw a strange vehicle near their cabin in Jackson County. Huckabee, retired KSP, went out and found Huber taking items from a metal storage building. (He also heard someone else running away.) He detained Huber and held him at gunpoint until daylight, and then took him to an area where Huckabee could get cell phone service. KSP Trooper Morris met them. Huber admitted to taking several items, which Huckabee valued at \$350. He later gave a recorded confession to the burglary, but not to another burglary under investigation. All of the property was recovered and the confession was played for the jury.

He was convicted and appealed.

ISSUE: Must admissions to unrelated crimes always be redacted from a confession?

HOLDING: No

DISCUSSION: With respect to the admission of his unredacted confession, which included statements about another theft, the Court agreed that it would be “nearly impossible” to redact the references to the other theft and would destroy the context. In addition, following the offense, but before Huber stood trial, Kentucky raised the threshold for felony theft from \$300 to \$500. Hubert argued he should have been sentenced for a misdemeanor rather than a felony, as a “mitigated punishment.” However, Huber never asked that the new law be applied to his case, as required.

The Court upheld the conviction.

TRIAL PROCEDURE / EVIDENCE – EXPERT TESTIMONY

Masden v. Com., 2011 WL 1706754 (Ky. App. 2011)

FACTS: Masden was arrested for selling pills to an informant working with KSP. KSP’s crime lab tested the pills and found them to be methadone and Masden was charged with Trafficking in the First Degree. He then appealed.

ISSUE: Is methadone a narcotic under the KRS?

HOLDING: Yes

DISCUSSION: Masden argued that methadone was a Schedule II non-narcotic drug and that the charge should have been a Second-Degree offense. At trial, a crime lab technician testified that it was a narcotic, justifying the First-Degree. The Court noted that KRS 218A.010(23) defined narcotic and indicated any substance “chemically equivalent” to an opiate (as methadone is) is a narcotic. (The Court noted “if opiates are narcotics, and methadone is an opiate, then methadone is a narcotic by statutory definition.”) In addition, in Sanders v. Com., Kentucky had elected to find that even though “cocaine might not scientifically or technically be a narcotic, our legislature has nonetheless exercised its prerogative to treat” it so.³⁰ The Court also noted that federal law and other states’ laws treated methadone as a narcotic.

³⁰ 663 S.W. 2d 216 (Ky. 1983).

The Court found that an expert witness was unnecessary and upheld the conviction

Edwards v. Lumbley, 2011 WL 2436752 (Ky. App. 2011)

FACTS: On December 29, 2008, Edwards and Lumbley were involved in a collision in Paducah. Edwards sued Lumbley, claiming he had caused the crash. Deputy Shaw (McCracken County SO) described the damage to both vehicles as minor and neither vehicle had to be towed. At the civil trial, "Deputy Shaw testified consistently with his report regarding the accident." However, he did not recall how he came to the conclusions in his report, nor did he know what information he received from either party prior to filing it. He agreed that he had no real recollection of the crash and that the day of the accident had been "particularly busy."

The Jury found that Edwards had failed to prove Lumbley was negligent. Edwards appealed.

ISSUE: Are all officers qualified to testify as experts in motor vehicle accident causation?

HOLDING: No

DISCUSSION: During a pre-trial Daubert³¹ hearing the Court had ruled the deputy "was not qualified as an expert capable of reconstructing motor vehicle accidents." As such, he was not able to state his opinion that Lumbley was at fault. The deputy had testified that he had no training as an accident reconstructionist and that he had received no training beyond what he received in "basic." The Court noted that Kentucky "holds that simply being a member of the police force does not qualify an individual to give opinion evidence as an expert."³² However, "a police officer must qualify as an expert by virtue of special training and/or experience."³³ In this case, however, Deputy Shaw did not have any particular training or experience that qualified him to render an opinion on the cause of the collision.

The decision was affirmed.

TRIAL PROCEDURE / EVIDENCE – PRIOR BAD ACTS

Guilyard v. Com., 2011 WL 1515379 (Ky. App. 2011)

FACTS: On July 23, 2007, O'Brien, a CI with the Northern Kentucky Drug Strike force, did a controlled drug buy with Guilyard. The agents fitted her with a recording device but did not search her because her clothing was too tight to conceal anything, but they did search her purse, shoes and car. During the transaction, Reese, O'Brien's ex-boyfriend showed up. She made the transaction (for cocaine) and she and Reese left together. She later met with the agents and turned over the cocaine.

Guilyard was indicted for trafficking, and subsequently convicted. He appealed.

ISSUE: Are statements regarding prior drug trafficking activities admissible?

³¹ Daubert v. Merrell Dow Pharmaceuticals, Inc., 509 U.S. 579 (1993).

³² Southwood v. Harrison, 638 S.W.2d 706 (Ky. App. 1982).

³³ Ryan v. Payne, 446 S.W.2d 273 (Ky. 1969).

HOLDING: No

DISCUSSION: At trial, Guilyard objected to the admission of comments by O'Brien as to his reputation for buying and selling drugs, claiming it to be a violation of KRE 404 and 405. The Court agreed that the evidence should not have been admitted. The Court agreed, as well, that the recorded conversation should not have been admitted in its entirety over Guilyard's objections – in the recording he bragged about his drug activities, which suggested "prior bad acts." The Court concurred that the majority of the recording was "irrelevant to the charged offense and was extremely prejudicial in that it served no purpose other than to imply that [Guilyard] was a bad person."

Guilyard's conviction was vacated and the case remanded.

Knee v. Com., 2011 WL 1706612 (Ky. App. 2011)

FACTS: On February 4, 2008, EMS responded to the home of Cotton's mother in Princeton. They found an infant, Ethan, who was eventually declared dead at the hospital. Knee and Cotton (the parents) were interviewed and Knee admitted he'd given Ethan a bottle to stop him from crying. The baby could not breathe through his nose due to congestion and Knee stated he pressed the bottle into the baby's mouth. He further admitted that when Ethan stopped crying, he "thought he might be dead, but that he could feel a faint heartbeat." He left the child and went outside; Cotton and her mother later found Ethan to be not breathing.

The first EMS crew member on scene later testified that Ethan was not breathing when he arrived. Dr. Ross, at the ER, testified that "baby formula was aspirated from his lungs after Ethan was intubated." He believed the baby had been dead for several hours before his arrival at the hospital.

At trial, a tape of the interrogation was introduced which had been sanitized of any references to other "bad acts" by Knee. The Commonwealth, however, argued that his prior criminal history should have been introduced to rebut his defense of an accidental death. The Court found redaction to be a problem and left it to Knee to decide whether to play the entire tape or not use the tape at all. Knee objected but did use the tape and the jury was admonished about using the tape only for the purpose of the case at bar. He was convicted and appealed.

ISSUE: If statements concerning other criminal activities are not introduced to prove criminal disposition, might they be admissible?

HOLDING: Yes

DISCUSSION: Knee wanted to introduce, in defense, that he was "intimidated and coerced during the police interrogation" – and the Commonwealth argued that his position could not be "presented to the jury without the playing of the full interrogation tape" to refute the defense. The court agreed that the prior bad acts "were not being introduced by the Commonwealth to prove Knee's criminal disposition" and as such, it was not error to admit the entire tape.

Knee's conviction was affirmed.

Mullikan v. Com., 41 S.W.3d 99 (Ky. 2011)

FACTS: Mullikan lived with his parents in Maysville. After Fields moved in next door, Mullikan “became strangely paranoid that Fields was trying to harm him.” On September 18, 2008, a state trooper picked up a bottle of water from Mullikan which he “claimed tasted funny.” Later that day, Mullikan attacked Fields from behind. Mullikan got “the worse of it” after Fryman intervened. Mullikan believed Fryman was conspiring with Fields. Mullikan ran into Field’s home and grabbed a sword, and then ran from the house “swinging the sword at both Fields and Fryman.” As the police arrived, he ran to his parents’ home, where he was ultimately arrested. He fought with the officers, as well.

Mullikan was indicted for Wanton Endangerment, Burglary, Assault (on the officer) and Terroristic Threatening. He was convicted and appealed.

ISSUE: Are passing comments about a defendant having served time in jail enough to invalidate a conviction?

HOLDING: No

DISCUSSION: In addition to a number of other issues, Mulliken argued that two officer witnesses commented on his “prior stints in jail” and another case. However, most of these references were elicited by Mullikan and not the prosecution. They “were brief and likely of little effect in light of the overwhelming evidence against” him. With respect to the Assault charge, in which he spit at an officer, the Court agreed that there was no proof of physical injury. But, the Court agreed that the Attempt was sufficient under that charge.³⁴

The Court upheld the conviction but did reverse the penalty phase for unrelated errors.

Ruby v. Com., 2011 WL 2553314 (Ky. App. 2011)

FACTS: On Oct. 7, 2007, Officer Marzheuser (Kenton County PD) spotted a speeding vehicle and stopped it. The driver could not produce an OL so she had him step out. She observed that his speech was slurred, that he was sweating and that his demeanor “was not correct.” She called for a drug K-9, but in the meantime, he consented to a search of the car. Officers found a variety of items, including methamphetamine and two firearms. He was arrested and indicted for Trafficking and related charges. Following that arrest, he was arrested for DUI in Indiana.

At trial, she testified that he denied that he owned the truck and that he failed all but one FST. Officer Inman, the K-9 handler, testified that his dog alerted on the methamphetamine and further about the actual search. Ultimately he was convicted and appealed.

³⁴ Although Assault in the Third Degree (KRS 508.025) limits application of spitting to when the victim is a jailer/corrections officers, in this case, the Court appeared willing to accept an Attempt charge.

ISSUE: Is a statement about a subject's involvement in a subsequent similar case admissible?

HOLDING: No

DISCUSSION: At trial, the prosecution introduced evidence of Ruby's "subsequent arrest for drug trafficking." The Court noted that under KRE 404(b) "evidence of other crimes, wrongs, or acts is inadmissible to establish the character of a defendant in order to show action in conformity therewith." However, it might be admitted for other purposes, "such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident." In this case, an Indiana trooper testified about a traffic stop he made on Ruby for speeding. Ruby again denied ownership of the truck and again the trooper found drugs in the vehicle, in a bag Ruby agreed belonged to him. The trial court allowed its admission to be "used to determine Ruby's knowledge or absence of mistake or accident."

The Court agreed that Kentucky holds to a strict construction of the rule "because the admission of collateral criminal acts carries a significant degree of potential prejudice against a defendant."³⁵ Applying the "three critical factors, relevance, probativeness, and prejudice," the Court concluded that the trooper's testimony should have been excluded. The Court agreed it might be relevant, but given that there was no testimony that the substance found during the Indiana stop was, in fact, illegal drugs, the Court did not find it probative. At best, it was an "allegation of uncharged crimes."³⁶ With respect to the third factor, however, "there is universal agreement that other crimes evidence is inherently and highly prejudicial to a defendant."

The Court agreed the admission of the Indiana offense was improper and reversed his conviction.

TRIAL PROCEDURE / EVIDENCE – HEARSAY

Stigall v. Com., 2011 WL 2438377 (Ky. 2011)

FACTS: On April 4, 2007, Stigall, age 16, was "hanging out" at his mother's house in Louisville. He was accused of raping L.E., the 5-year-old daughter of a family friend that day. The victim was examined and shown to have genital injuries consistent with a sexual assault. She admitted in an interview that Stigall was her assailant. Stigall was indicted on Rape and Sexual Abuse charges and ultimately convicted. At the trial, the detective indicated that the victim testified consistently throughout the investigation. Stigall appealed.

ISSUE: Is a comment that a victim's statement was consistent improper?

HOLDING: No (but see discussion)

DISCUSSION: Among other issues, Stigall argued that a portion of the investigator's testimony "improperly bolstered L.E.'s testimony." However, the Court noted that the detective "did not repeat any of L.E.'s out-of-court statements" but "rather, she merely stated her opinion that there were no striking inconsistencies" in L.E.'s claims. However, at best, the Court concluded it was only indirect bolstering and of minimal impact in light of the other evidence of guilt.

³⁵ Bell v. Com., 875 S.W.2d 882 (Ky. 1994).

³⁶ The Indiana case was not yet concluded.

The Court affirmed his conviction.

Gatewood v. Com., 2011 WL 2112566 (Ky. 2011)

FACTS: On March 17, 2006, Jackson later testified, she heard two shots and saw Gatewood fire the second shot, killing Vargas. She saw Gatewood later that day and he told her that he'd shot Vargas. Gatewood was charged with murder, robbery and related charges. He was convicted of murder and appealed.

ISSUE: Is a statement made four hours after the fact admissible as a "present sense impression?"

HOLDING: No

DISCUSSION: Among other issues, Gatewood contested the trial court's refusal to admit a statement given by McPherson (a witness) through a detective witness. McPherson was interviewed four hours after the shooting, and as such, the Court agreed it could not be admitted as a "present sense impression." In prior cases, the Court had declined to accept a statement given 7 minutes after an incident as such, and neither qualified as the "immediately thereafter" required under KRE 803(1). An inconsistent statement by one witness could not be used to impeach the testimony of another witness, which is what the prosecution was trying to do. The trial court correctly recognized it as hearsay and denied its admission, finding it "nothing more than a pretext for violating the hearsay rule."

The Court affirmed Gatewood's conviction.

Alford v. Com., 338 S.W.3d 240 (Ky. 2011)

FACTS: S.A. accused Alford, her mother's boyfriend, of sexual abuse spanning years. S.A. was age 3 when Alford entered the household. Alford and S.A.'s mother ultimately had 2 children together. S.A. and another sibling, W.A., shared a biological father and had visitation with him. In 2001, when S.A. was 13, she told a stepsister and her stepmother that Alford was sexually abusing her. She was taken for an exam and no evidence was found. She was interviewed by Det. Slack (KSP), as was W.A. She stayed with her father and did not return to her mother's home. She was re-examined 2 months later and found to have evidence of sexual contact.

Alford was charged with Rape and Sodomy. At trial, S.A. detailed numerous acts of sexual assault. She stated she told no one about the abuse because she was afraid of what Alford would do to her or her family. Her mother testified that she never heard or saw anything indicating sexual abuse or assault and noted that they lived in a small trailer with thin walls. She agreed, however, that she was not always at the trailer. W.A., however, testified that the story was the result of a plan by their father so that S.A. could come to live with him. Det. Slack testified as to his interview with the victim.

Alford was convicted of Sodomy and Sexual Abuse, but not Rape. He appealed.

ISSUE: May a detective repeat a victim's statement in testimony?

HOLDING: No

DISCUSSION: Alford argued that the both Det. Slack and Dr. Hayden (who examined S.A.) repeated inadmissible hearsay. The Court agreed that “there is no hearsay exception for statements made by an alleged victim of sexual abuse to a police detective.”³⁷ The Court agreed that the case turned on S.A.’s credibility and that the extensive use of hearsay unfairly bolstered S.A.’s credibility. When combined with the inadmissible hearsay of Dr. Hayden, who “read extensively from his interview’ with her, it rose to the level of error. The Court noted that the “identity of the perpetrator is rarely, if ever, pertinent to medical diagnosis or treatment.”³⁸ However, statements about what was done to her is admissible under KRE 803(4). During his testimony, Dr. Hayden “basically repeat[ed] the allegations to which S.A. had already testified, including statements that had no relevance to medical diagnosis and treatment.” The extensive, inadmissible hearsay testimony by Dr. Hayden was highly prejudicial and unfairly bolstered the credibility of S.A.”

The case was reversed and remanded for further proceedings.

TRIAL PROCEDURE / EVIDENCE – EVIDENCE

Brunson v. Com., 2011 WL 2162682 (Ky. App. 2011)

FACTS: On June 15, 2005, Officer Lingenfelter (Hopkinsville PD) was dispatched to a loud music complaint from a vehicle. He passed Brunson and heard “very loud music” coming from his car. Officer Lingenfelter turned around and initiated a traffic stop – Brunson continued on into a parking lot, however. He caught up with Brunson as he was “attempting to back into a parking space” and told him to stop the car. Officer Lingenfelter found Brunson to have “blood-shot eyes,” “was shaky and nervous and had an odor of alcohol.” A PBT registered .043. Captain Meyers arrived and they discussed why he would have such a low PBT and yet do so poorly on field sobriety tests given. Thinking that he was under the influence of drugs, Captain Meyers retraced the route and found a “large Ziploc bag containing ten smaller baggies of marijuana.” More small baggies were found in the car along with a gun, drug paraphernalia and money.”

Brunson with charged with trafficking near a school, fleeing and evading, tampering with physical evidence carrying a concealed weapon, disorderly conduct, DUI, and related minor charged. He was convicted on most of the charges and appealed.

ISSUE: Can circumstantial evidence support that a particular item was thrown from a suspect vehicle?

HOLDING: Yes

DISCUSSION: Brunson argued that the trafficking charge was improper because there was no evidence he had thrown anything from the car. The Court noted that Officer Lingenfelter testified that he would have been unable to see anything being tossed from the passenger window. Captain Meyers testified that the “Ziploc bag was dry even through the grass around it was wet with dew” and that “he concluded that it could not have been on the ground for very long.” The Court agree that was “sufficient circumstantial

³⁷ Smith v. Com., 920 S.W.2d 514 (Ky. 1995).

³⁸ Garrett v. Com., 48 S.W. 3d 6 (Ky. 2001).

evidence” to support the jury’s conclusion that the marijuana belonged to Brunson. (As such, that also supported the tampering charge – that he threw it out the window.)

Brunson’s conviction was affirmed.

TRIAL PROCEDURE / EVIDENCE - BRADY

Williams v. Com., 2011 WL 1327133 (Ky. App. 2011)

FACTS: Williams worked as a physician at a pain management clinic in Lewis County. He worked about 2 ½ days a week and a witness said Williams saw about 200 patients a day (which he disputed). In 2001, the Lewis County SO began receiving complaints about the clinic, related to traffic and improper prescribing. A joint investigation, along with CHFS and the Attorney General, was begun. Several CI’s, including Brothers, posed as patients.

On May 2, 2001, Brothers went to the clinic, was briefly assessed and completed a report that stated she “was in pain, had difficulty sleeping, and had been in a motor vehicle accident a few years prior.” She brought no medical records with her. During her brief office visit with Williams, he asked her a few questions but did no physical examination. (He did touch her back “which caused her to flinch.”) He gave her Vicodin and Anaprox and ordered a MRI and blood work. At her next visit, on July 9, she brought fake records to the clinic, none of which indicated she’d had any sort of injury. Williams saw her briefly and gave her Vicodin, Anaprox and Valium. On a third visit, on August 7, 2001, Williams asked her about the MRI and Brothers’ stated she did not know what an MRI was. He renewed the prescriptions and again wrote her an order for an MRI. On her last visit, on September 5, she stated she felt “real good” and Williams renewed the prescriptions for Vicodin and Valium.

Williams was charged with unlawfully prescribing the controlled substances and was ultimately only convicted for the Vicodin prescription written on September 5. During the trial, Journey, one of the clinic owners, testified. The defense learned that the day before he testified he had pled guilty in connection to a related federal prosecution. The Commonwealth was aware of the plea deal but had not disclosed it, because, the prosecutor stated, he was unaware there was anything in it related to testifying in Williams’s case - and in fact, Journey stated he did not agree to testify as part of the plea deal.³⁹ Williams appealed.

ISSUE: Does Brady apply to evidence the Commonwealth does not have?

HOLDING: No

DISCUSSION: Williams argued that allowing Journey to testify violated Brady⁴⁰ and that refusing to give him access to the plea agreement for cross-examination violated Crawford.⁴¹ With respect to Brady, the Court ruled that the outcome of the case would not have been different even if Journey had not testified. The court noted that “the Commonwealth cannot be expected to turn over information which it simply does not have.” With respect to Crawford, the Court noted this was not a case involving testimonial hearsay, but

³⁹ Neither the prosecution or the defense were given the plea deal paperwork as it was sealed. The judge was only able to obtain it upon an agreement to maintain its confidentiality, although a sealed copy was preserved for appellate review.

⁴⁰ 373 U.S. 83 (1963).

⁴¹ 541 U.S. 36 (2004).

a Confrontation Clause issue instead. The Court noted that the “the Confrontation Clause guarantees an *opportunity* for effective cross-examination, not cross-examination that is effective in whatever way, and to whatever extent, the defense might wish.”⁴² The Court noted that he was told what was in the agreement by the trial judge, who had viewed it. Any failure in not having the actual document was harmless.⁴³

Williams’ conviction was affirmed.

CIVIL LITIGATION

Stephens v. McCullough,⁴⁴ 2011 WL 1515235 (Ky. App. 2011)

FACTS: Richard McCullough, age 14, lived with his mother and her boyfriend. He also stayed with his grandmother and she took him to many appointments and events. Dewayne, the boyfriend, “did not participate in child rearing activities” but did tell Richard not touch his firearms. He did, however, obtain a handgun for Richard. Richard hunted with Dewayne and went to the range with him.

On July 25, 2006, Richard’s mother told his grandmother that he was staying with a friend, but the grandmother found Richard and friends at his mother’s home. She ordered them all to leave the house. Erin Stephens was not with the group at that time, but joined them later and they all returned to the home. Richard obtained Dewayne’s loaded firearm from a nightstand. Ultimately, Richard shot Erin in the hand, apparently unintentionally.

Erin Stephens, through her mother sued Richard and Dewayne, as well as Richard’s mother and grandmother.” The grandmother was dismissed from the action initially, and subsequently, both Richard’s mother and Dewayne were also dismissed. Stephens appealed the dismissals.

ISSUE: Is dismissal of a civil case appropriate when there are many issues of material fact left unanswered?

HOLDING: No

DISCUSSION: The Court agreed the dismissals were improperly granted, as there remained “too many issues of material facts” to grant summary judgment at this time. The Court agreed that a jury could find Richard’s mother and mother’s boyfriend negligent in his supervision and further noted that since “Dewayne was instrumental in teaching Richard how to properly use firearms, he assumed the duty to suitably instruct and supervise Richard.”

The Court reversed the summary judgment in favor of the mother and boyfriend.

Brantley v. Bell & Coomes, 2011 WL 1598723 (Ky. App. 2011)

FACTS: On February 5, 2005, in the early morning hours, KSP received a 911 call from the Buschkoetter home in Daviess County. Trooper Bell, along with a local deputy arrived first. They spotted

⁴² Delaware v. Fensterer, 474 U.S. 15 (1985).

⁴³ Chapman v. California, 386 U.S. 18 (1967).

⁴⁴ The correct spelling is McCullough, but was incorrectly listed by the Court.

Gerald Buschkoetter in the garage, clad only in underwear. When he spotted the two, he ran into the house and down the steps into the basement. Jamie Brantley (aka Buschkoetter, Gerald's wife) was also present; she advised the officers that Gerald had two loaded handguns and had fired shots inside the building. She told the two that he was bipolar and that he'd attacked her the year before, had tried to suffocate her and had gotten out of his car on the highway and laid down in the lane of travel.

Trooper Bell began to communicate with Gerald, backed up by Trooper Coomes. Trooper Bell finally convinced Gerald to come out of the bathroom where he was barricaded. He emerged violently, however, and was armed with both guns and waved them in their general direction. The troopers did not believe he was aiming at them and did not use force against them. He then started flinging shoes in their direction. They exchanged a pair of pants for his putting down the guns, but he was still close by them. After an hour of discussion, however, they saw him pick up one of the handguns and point it at them and at that time, both troopers fired. They went to him and retrieved a revolver from under his body. He died from two gunshot wounds.

Brantley filed suit against the troopers and other parties, on both her behalf and the behalf of their child, claiming wrongful death and loss of consortium. The Court dismissed all claims except the claims against the two in their individual capacities. She also filed an action under the state Board of Claims. The Board denied that claim, however, and that was not appealed. With respect to the lawsuit, the trial court dismissed the action against the troopers, ruling that their actions were "discretionary and within the scope of their authority, they had acted in good faith in their dealings with Gerald, and they were thus entitled to qualified immunity." Brantley appealed.

ISSUE: Must evidence be in the record to be considered in refuting a summary judgment motion?

HOLDING: Yes

DISCUSSION: Brantley argued that there were, in fact, genuine issues of material fact, but had made no attempt to add affidavits or other information to the official record. Bell and Coomes alleged that while there were disputed issues of fact, they were not relevant to the ultimate issue, whether their use of deadly force was reasonable. The Court agreed that Brantley had sufficient time, during the pendency of the action, to put additional evidence on the record, and chose not to do so.

The summary judgment was affirmed.

Martin, Sapp and Motley v. O'Daniel, 2011 WL 1900165 (Ky. App. 2011)

FACTS: In March, 2006, O'Daniel (retired KSP) purchased a vehicle from Godsey. Shortly after the sale, he took it for an oil change and learned the engine was not original to the vehicle. He began an investigation, believing he'd been defrauded, and with the help of a KSP detective, Riley, learned that the VIN plate had also been replaced. Det. Riley then impounded the car on the presumption that it was stolen. In fact, it had been stolen in 1981 and as a result, "Det. Riley believed that State Farm [which had paid out on the claim in 1981] was the titular owner of the 1975 Corvette." O'Daniel, who was also insured by State Farm, communicated with the company about the car. One State Farm representative stated the insurance company wasn't interested in pursuing its claim, but another representative stated that they were.

O'Daniel continued to explore how he could get a proper title to the car and hired an attorney. He spoke to Det. Riley who stated, perhaps in jest, that he would crush the car before returning it to O'Daniel. Ultimately, O'Daniel sought to get the car titled through Jessamine County but when the local County Clerk sent the paperwork to the DOT, the DOT contacted KSP. KSP opened a criminal investigation and Sgt. Motley and Det. Martin were assigned, under the supervision of Lt. Col. Sapp.

Since, at the time, O'Daniel was working for the Justice Cabinet, the Cabinet asked KSP to "transfer the investigation ... to another police department." Only after some additional discussion did the matter get transferred to the Jessamine County Sheriff's Office. However, ultimately, KSP presented the evidence to the Franklin County Commonwealth's Attorney, who declined to prosecute. However, a special prosecutor did present the matter to a grand jury, which indicted O'Daniel. He was acquitted and brought suit against the 4 KSP troopers for malicious prosecution. Riley was dismissed, but the Circuit Court denied a motion for qualified immunity in favor of the other three. Motley, Sapp and Martin appealed.

ISSUE: Does qualified immunity apply to an intentional tort?

HOLDING: No

DISCUSSION: O'Daniel put forth various allegations against the three defendants. The Court noted that the allegation of malicious prosecution includes by its key element, malice, and that alone "negates a public employee's claim to qualified immunity." The trial court determined that he had produced sufficient evidence to go forward with the claim, and the appellate court agreed. Since Yanero stated that qualified immunity only applies to negligence claims and since malicious prosecution is an intentional tort, qualified immunity did not apply.

The Court agreed that that the three defendants were not entitled to qualified immunity.

EMPLOYMENT – AGE DISCRIMINATION

Wells v. City of Bowling Green, 344 S.W.3d 141 (Ky. App. 2011)

FACTS: Wells worked as an officer for Bowling Green from 1976 to 2006. In 2006, the Bowling Green police chief gave notice of his intention to retire and the commission decided to follow a process whereby they would select an interim who would not be eligible for the position permanently, but that process was never formally approved.

Wells, a deputy chief, knew of the prohibition as well as the local policy that required hazardous duty personnel to retire no later than the month they turned 57. He would turn 57 in December, 2007. After discussing the matter with the City Manager, he decided to accept the position. He did not apply for the permanent position as he was occupied with studies at the time. When a new chief was appointed in November, 2006, Wells chose to retire immediately.

A year later, Wells filed an age discrimination complaint, arguing that he was dissuaded from applying because he'd been told that the city only wanted candidates who could work 8-10 years. Following

procedural discussion, the Court agreed that since he did not even apply, he could not maintain an action and dismissed the claim. Wells appealed.

ISSUE: Must a person apply for a position in order to claim age discrimination related to the application requirements for the position?

HOLDING: Yes

DISCUSSION: The Court agreed that since he did not apply, his claim could not go forward. (In fact, he agreed that his studies were a factor in his decision not to apply at the time.) Because he failed to follow the steps necessary to prove his claim, the dismissal was upheld.

City of Madisonville v. Barnes, 2011 WL 2555417 (Ky. App. 2011)

FACTS: On November 15, 2006, Barnes worked as a police officer for Madisonville. He suffered serious injuries when struck by a car while on duty. After two years, he was able to return to work, in early 2008. He filed a claim under worker's comp for future medical benefits, even though at that point, he did not have a permanent impairment rating. The Administrative Law Judge, at a hearing, agreed and awarded the benefit. The City appealed.

ISSUE: May future medical benefits be awarded in a worker's comp case even if the subject does not have a permanent impairment/disability ranking?

HOLDING: Yes

DISCUSSION: Madisonville argued that since he was able to return to full status, no medical benefits should be awarded in the future. Barnes argued that he continued to suffer knee and back pain and may need additional treatment in the future.

The Court agreed that KRS 342.020(1) does not require a permanent impairment or disability rating, or eligibility for permanent income benefits. The Court agreed the pain was sufficient to constitute a disability and that future benefits were warranted under the facts.

SIXTH CIRCUIT

SEARCH & SEIZURE – PLAIN VIEW

U.S. v. Carmack, 426 Fed.Appx. 378 (6th Cir. 2011)

FACTS: On May 23, 2005, officers in Kentucky got a search warrant on Carmack's residence, as a result of a counterfeit money used to place an order in other state. They seized several items not listed on the warrant, including more than 25 credit cards issued to Carmack and members of his family. They also seized a sawed-off shotgun in the back seat of a car some 20-25 feet from the residence and which they had to walk by to approach the residence. (Carmack's wife said the vehicle, which was inoperable, was parked on the street some distance away and had been so parked for around a year.)

Carmack was charged with possession of the weapon, among other charges not at issue in this opinion. He requested suppression of the weapon, which was denied. Carmack took a conditional guilty plea and appealed.

ISSUE: May a unlawful weapon be removed from a vehicle, when the police have a search warrant for the residence to which it is connected?

HOLDING: Yes

DISCUSSION: The Court first agreed that the officer that saw the weapon was clearly under the province of plain view and readily recognized it as illegal. With respect to lawful access, to remove it from the vehicle, the Court agreed that they "were executing a valid search warrant on the property where the weapon was observed" – as the Court chose to believe the officers as to where the vehicle was physically located.

The trial court decision was affirmed.

SEARCH & SEIZURE – REASONABLE EXPECTATION OF PRIVACY

U.S. v. Lanier, 636 F.3d 228 (6th Cir. 2011)

FACTS: Lanier rented a hotel room in Benton Harbor, Michigan. A few minutes after the check-out time, a maid entered and saw a large quantity of drugs (cocaine and a scale). The manager called police and allowed them access about a half-hour after the check-out time, which was actually before the usual grace period which would have deactivated the keycard.

When Lanier returned, he was arrested. He requested suppression and was denied. He took a conditional plea and appealed.

ISSUE: Does a hotel guest have an expectation of privacy when they have left items in a room after the check-out time?

HOLDING: No

DISCUSSION: The Court noted that while he may have had a subjective expectation of privacy in the room, he did not have an objective one. The Court noted that a hotel guest has only an expectation of privacy during the time they are lawfully in possession of the room, a “predetermined period of occupancy.” The Court agreed, however, that a regular practice of allowing guests to stay past check out might modify that expectation, but that did not apply in this case as Lanier had made no practice of delaying his departure from that hotel.⁴⁵ Further, once being discovered to be using the room for unlawful purposes, it was appropriate for any privacy interest to immediately end.

Lanier’s plea was upheld.

SEARCH & SEIZURE - SEIZURE

U.S. v. Gross, 624 F.3d 309 (6th Cir. 2011)

FACTS: On November 15, 2007, Officer Williams (Cuyahoga Metro Housing Authority PD) was patrolling a public housing project known for high crime. He spotted a vehicle legally parked, with the engine running, with no driver. He saw a “barely-visible passenger who was slumped down” in the passenger seat. He found no outstanding warrants or issues against the registered owner. The passenger reacted to the spotlights of the police vehicle by “sitting up abruptly and then slumping down further in his seat.” Williams approached the passenger side on foot. The officer spotted the passenger (Gross) through the closed window and Gross “then cracked the door.” Williams asked why Gross was there and he said he had been “over [at] his girlfriend’s house.” The officer noted an open bottle of cognac on the console. Gross said he had no ID but could go into the house for it. He gave the officer his name, DOB and SSN. When Officer Williams ran the information, he learned Gross had an outstanding warrant for a CCDW charge. He arrested Gross, frisked him, but did not do a thorough search. He transported him to the jail, where Gross was searched and sent through a metal detector. It went off, but despite repeated passes through the machine, they could not find the source. He was taken into a holding area where he asked to use the restroom and was permitted to do so.

A short time later, officers discovered a firearm near the toilet. He was the only inmate from the street that had access to that area that day. While still incarcerated, he was advised of the investigation and given Miranda. He waived his rights and said that he knew who brought it in but that he did not own it. The officers requested his consent for a DNA test, but he refused. They got a search warrant and collected the sample via an oral swab. Evidence from the gun proved to be a match.

Gross was charged with being a felon in possession and moved for suppression. When that was denied, he took a conditional guilty plea and appealed.

ISSUE: Does an officer approaching someone in a public place and asking questions constitute a stop?

⁴⁵ See U.S. v. Allen, 106 F.3d 695 (6th Cir. 1997).

HOLDING: No

DISCUSSION: The Court first discussed the “stop” – but noted that in fact, he was not stopped. In U.S. v. Drayton, the Court held that law enforcement officers do not violate the Fourth Amendment “by approaching individuals in public places and asking questions.”⁴⁶ They may ask for consent so “long as the police do not convey a message that compliance with their request is required.”⁴⁷ Gross argued that by parking behind the car, he was blocked in by the officer’s vehicle and not free to leave. The Court agreed.⁴⁸ The prosecution argued that Officer Williams was fulfilling his duty under the community caretaking doctrine.⁴⁹ The Court noted that “any purported community-caretaking function in this instance could have been accomplished through a consensual encounter rather than an investigative stop.” The Court agreed the stop evolved into an unlawful seizure.

However, the Court noted that the “significant length of time between the unlawful seizure of Gross and his voluntary confession while in lawful police custody on an outstanding arrest warrant counsels a finding of attenuation in this case as to the confession.” In other words, even if he was unlawfully seized, enough time passed between the stop and his voluntary confession that he did, in fact, bring in the gun, that the confession was not fatally tainted.

The Court further noted that it had “not previously considered whether the discovery of a valid arrest warrant may serve to dissipate the taint of an unlawful detention.” The Court was highly reluctant to rule that the discovery of the warrant cured the taint of the stop, since to do so would suggest that an officer could randomly stop people in hopes of finding a warrant.

The Court concluded:

Finally, we consider the purpose and flagrancy of the official misconduct. As to flagrancy, while it is disheartening that Williams had once before blocked in a car in a similar manner, it was not until our recent decision in See,⁵⁰ decided after the events in this case, that it would have been clear to Williams that his methods were decidedly an investigatory stop and not a consensual encounter. As to purpose, Williams did not have a lawful purpose for his stop, nor was he, as the officers were in Green,⁵¹ seeking evidence against a third-party. He also did not, as in Williams,⁵² “immediately [ask] several questions related to criminal activity other than trespassing.”. While Williams’s actions could be interpreted to have been “in the hope that something might turn up,” unlike in Shaw⁵³ or Brown,⁵⁴ there is not sufficient evidence in the record to show that Officer Williams “knew [he] did not have

⁴⁶ U.S. v. Drayton, 536 U.S. 194 (2002),

⁴⁷ U.S. v. Peters, 194 F.3d 692 (6th Cir. 1999).

⁴⁸ The same officer was the subject of a similar case previously, U.S. v. See, 574 F.3d 309 (6th Cir. 2009).

⁴⁹ See U.S. v. Koger, 152 F. App’x 429 (6th Cir. 2005); U.S. v. Williams, 354 F.3d 497 (6th Cir. 2003).

⁵⁰ U.S. v. See, 574 F.3d 309(6th Cir.2009).

⁵¹ U.S. v. Green, 111 F.3d 515 (7th Cir. 1997).

⁵² U.S. v. Williams, 354 F.3d 497 (6th Cir. 2003).

⁵³ U.S. v. Shaw, 464 F.3d 615 (6th Cir. 2006).

⁵⁴ Brown v. Illinois, 422 U.S. 590 (1975).

probable cause.”⁵⁵. Accordingly, the purpose and flagrancy of Williams’s actions do not weigh heavily in the attenuation determination.

However, the Court found that the possession of the weapon was not sufficiently attenuated, although the DNA swab and confession were, and reversed the suppression motion with respect to the firearm.

SEARCH AND SEIZURE – WARRANT

U.S. v. Adkins, 429 Fed.Appx. 471 (6th Cir. 2011)

FACTS: In early July, 2007, Following the corroboration of a controlled substance by a CI, Agent McNamara (Tennessee Bureau of Investigation) prepared an affidavit for a search warrant for Adkins’ home.

The relevant portion of the affidavit is as follows:

[Your affiant] met with [the informant] . . . on July 6, 2007, and that [the informant] provided information regarding illegal activity, to wit: Gary Adkins was selling methamphetamine in Hamelin County.

The [informant] state[d] that Gary Adkins routinely distributes methamphetamine from 5957 Old White Pine Road[,] Morristown, Tennessee. On July 6, 2007, [the phone call was to arrange the purchase of ½ ounce of methamphetamine from Gary Adkins for the price of \$1,000.00. Once [the informant] made contact with Gary Adkins, Adkins instructed [the informant] to call back in fifteen minutes.

The [informant] called back in fifteen minutes and was informed by Gary Adkins that he would not be able to meet [the informant], but he would send someone else to meet [the informant] at the Hardee’s on highway 25E Morristown, Tennessee. Shortly after [the informant] contacted Gary Adkins, surveillance . . . TBI [Agent] Jim Williams, observed a green Dodge pick[-]up truck . . . registered to Gary Adkins travel from 5957 Old White Pine Road to the parking lot of Hardee’s on highway 25E Morristown, Tennessee. Your affiant placed a digital recording device on the [informant’s] person. Your affiant and [the informant] drove from the Hamblen County jail parking lot to the Hardee’s on Highway 25E Morristown, Tennessee. During the travel to the Hardee’s the [informant] placed a call to Gary Adkins stating [the informant] was going to be late arriving at the Hardee’s and to confirm the description of the vehicle the [informant] was to meet with. [The informant] was informed the person the [informant] was to meet with was at the Hardee’s parking lot and driving a green pick[-]up truck.

Upon arrival at the Hardee’s on 25E Morristown, Tennessee, the [informant] got into the green pick[-]up truck with an unknown white male. After a short meeting with the unknown male, the [informant] returned to your affiant’s vehicle and turned over to your affiant a red shop cloth containing a small plastic baggie that contained a crystal like substance, which field tested positive as methamphetamine. Your affiant and [the informant] returned to the

⁵⁵ U.S. v. Shaw, *supra*.

Hamblen County Jail. Once the green Dodge pick[-]up truck left the parking lot of the Hardee's it was observed by surveillance . . . returning to 5957 Old White Pine Road[,] Morristown, Tennessee.

Adkins arrived during the search and was given his Miranda warnings. He proceeded to tell the agents where additional methamphetamine would be found on the property, along with a large amount of cash and two firearms. He was indicted on drug charges, as well as weapons charges for having the guns in furtherance of drug trafficking. He moved for suppression, arguing that the search warrant affidavit did not establish probable cause.

The District Court found the warrant affidavit to be adequate and Adkins proceeded to trial. He was convicted and appealed.

ISSUE: Is corroboration required of a CI previously found to be reliable?

HOLDING: No

DISCUSSION: Adkins argued that the search warrant affidavit was “was based only on a general statement by an unidentified confidential informant with no indicia of reliability and contained insufficient corroborating evidence.” The Court agreed that “independent corroboration of a confidential informant’s story is not a *sine qua non* to a finding of probable cause.” The Court required only “substantial independent police corroboration” when a CI was not yet known to be sufficiently reliable. In this case, the details of the controlled substance purchase and its connection to the residence, were adequately spelled out in the affidavit, even though it did not discuss the reliability of the informant. It did, however, detail the officer’s “first-hand observations of contraband” linked to Adkins’ home and the Court found that sufficient.

Adkins further argued that statements he made to police following the search and his arrest should be suppressed, because they were made close in time to an illegal search. The Court quickly dismissed that argument as well. The District Court’s decision was affirmed.

SEARCH & SEIZURE - CONSENT

U.S. v. Lucas, 640 F.3d 168 (6th Cir. 2011)

FACTS: On December 18, 2007, Det. Burbrink (Louisville Metro PD) received information from another officer that a reliable CI had told the officer that Lucas was growing marijuana at his home. Dets. Burbrink and Lainhart did a knock and talk at the back door. They were invited inside and immediately smelled burned marijuana. Det. Burbrink explained the purpose of his visit and stated he would only give Lucas a citation if Lucas had drug paraphernalia or a small amount of personal use of marijuana. Burbrink saw a marijuana pipe in plain view and asked about other similar items; Lucas produced rolling papers, pipes and marijuana residue (“shake”) but stated there was nothing else in the house. The tone of the exchange was described as “conversational.” Three more detectives arrived during the discussion.

Burbrink asked Lucas to sign a consent to search form, but Lucas hesitated. Burbrink explained they had probable cause to get a search warrant. Sgt. Lainhart began a protective sweep in anticipation of getting the warrant. Lucas gestured and asked Burbrink “what do I have to sign?” Burbrink verbally reviewed the form with Lucas and advised him he could stop the search at any time. Lucas signed the consent form about 10 minutes after the officers first arrived.

The officers searched the bedroom first, since they were told by the CI that was where the growing operation was located. They found a number of marijuana plants in the closet, “individually potted and named.” They also found a camera sitting nearby and Lainhart knew that growers often take “bragging” photos. He reviewed the photos in the camera and found several to show marijuana use. They did not search a computer located in the bedroom. In the living room, they found a laptop computer that had a chart documenting the growth of the marijuana in the closet and other notes that suggested a grow operation. Lainhart asked Lucas if the laptop was password protected and was told it was not. “Lucas did not object to a search of his laptop, or claim that a search would exceed the scope of his consent to search, or try to withdraw his consent to search.”

Lucas admitted to learning about marijuana growing on the Internet, that he shared tips with others and that he cloned plants to re-sell. Lainhart did not find anything incriminating on the hard drive, but noticed a thumb drive inserted into the USB port. He accessed that drive and found child pornography. He stopped searching after reviewing a few images and told Burbrink that Lucas was under arrest. He contacted Crimes Against Children Unit (CACU) for assistance. Burbrink handcuffed Lucas and Lucas told him “I have a problem.” Burbrink told him to hush and wait for CACU, giving him chips, a drink and allowed him to smoke. Dets. McNamara and Wampler arrived and were told what had occurred. McNamara detected the faint odor of marijuana but did not believe Lucas was intoxicated, finding him very cooperative.

Det. McNamara secured a second consent, getting permission to “seize and examine the computer, computer media, and peripheral equipment.” After collecting the evidence, Lucas was taken to the station. He was given Miranda and waived his rights. He admitted during the subsequent questioning that he gave consent. Two days later, Det. McNamara got a search warrant for the computers already seized, to permit a forensic examination even if Lucas thought to withdraw his consent. More than 900 images and 300 minutes of video were recovered, including a number of videos depicting child rape.

Lucas was charged and eventually took an conditional guilty plea on the pornography charges. He then appealed.

ISSUE: Does a general consent to search cover a laptop computer?

HOLDING: Yes

DISCUSSION: The Court first noted that a knock and talk is a “legitimate investigative technique aimed at achieving a suspect’s consent to search.”⁵⁶ The Court pointed out that Lucas was a college educated man who invited the officers in and conversed with them. The officers, very

⁵⁶ U.S. v. Thomas, 430 F.3d 274 (6th Cir. 2005).

early on, had sufficient probable cause to search and Burbrink's statement that they would seek a warrant "was a proper statement that did not taint the subsequent search."⁵⁷

Lucas argued he was coerced by the presence of five officers, Burbrink's promise he would write a citation when in fact they were looking for a grow operation, and other reasons. The Court did not find that his initial hesitation, and later acquiescence, indicated coercion. Instead, the Court found his agreement to be an indication that he understood the gravity of his situation and that he decided to cooperate.

With respect to the scope of the search and whether the laptop was within the scope of the consent. The Court agreed it was not necessary to get a separate consent for every closed container within the covered area.⁵⁸ Although this line of cases had not been previously applied to the search of a personal computer located in a private residence, but noted that a "general consent to search reasonably includes permission to search any container that might hold illegal objects."⁵⁹ Sgt. Lainhart reasonably believed he would find further narcotics related evidence in the computer. Lucas was only a few feet away and did not object to the search. The trial court made an analogy between the "search of Lucas's non-secure laptop to the search of a closed, unlocked container." However, the Court noted that its decision in this case "should not be read as a grant of broad authority to the police to open a suspect's non-secured computer and examine at will all of the electronic files stored there." It had cautioned in another case that the authority to search a residence does not necessarily extend to consent to search all closed containers stored in a specific area. The Court shared a concern that computers were "not an exact fit" to other containers because computer contained so much highly sensitive items. The Court had recently held that individuals to have "a reasonable expectation of privacy in the content of emails stored, sent, or received through a commercial internet service provider."⁶⁰ Sgt. Lainhart properly stopped the search once he confirmed the presence of child pornography while searching for drug-related evidence.

Lucas's plea was affirmed.

SEARCH & SEIZURE – TERRY

U.S. v. Galaviz, 645 F.3d 34 (6th Cir. 2011)

FACTS: On December 27, 2006, at about 2:45 a.m., a woman in Bridgeport, Michigan called 911 to report she'd just been robbed at gunpoint. She and her sister were upset and could not describe the vehicle beyond it being a "white car." Dispatch put out the information to officers as a "white vehicle." Over the next few minutes, officers called out that they were investigating various white cars in the area.

Deputy Webber (Saginaw County SO) was monitoring the radio and was in the area. He spotted a white Lincoln Town Car stopped at a traffic light. Thinking it might be the correct vehicle, he came

⁵⁷ U.S. v. Salvo, 133 F.3d 843 (6th Cir. 1998).

⁵⁸ Florida v. Jimeno, 500 U.S. 248 (1991); U.S. v. Garrido-Santana, 360 F.3d 565 (6th Cir. 2004).

⁵⁹ Canipe.

⁶⁰ U.S. v. Warshak, 631 F.3d 266 (6th Cir. 2010).

in behind the vehicle, which then “accelerated away from” him. He believed it to be speeding. It made several turns and then parked in a residential driveway. Deputy Webber followed and blocked it in. When the deputy got out of his car, the driver, Galaviz, “was already out of his car and walking toward the front door of the house.” The deputy realized that the man looked Hispanic, rather than black, as was put out in the radio transmission. He ordered Galaviz to return to the car but he continued toward the house. When he reached the door, he began kicking and yelling for admission. Galaviz refused to get on the ground and Webber drew his Taser. Someone opened the door and Galaviz began to enter – the deputy later indicated he wasn’t sure if someone inside actually opened the door. He fired the Taser. At this point, Galaviz screamed but was apparently already in the house, as Webber entered with the consent of the residents after him. He was told Galaviz fled out the back door but eventually he was found hiding in the basement.

Officers outside spotted “part of a handgun sticking out from under the front seat.” Once it was unlocked, they retrieved a revolver. Because Galaviz was a convicted felon, he was indicted for having possession of the weapon. He requested suppression, which was denied. Galaviz took a conditional guilty plea and appealed.

ISSUE: Is evidence that a subject was involved in a robbery sufficient to do a Terry stop?

HOLDING: Yes

DISCUSSION: The Court focused on whether the initial Terry stop of the vehicle was lawful and properly supported by specific and articulable facts that Galaviz might have been involved in the robbery. The Court agreed that he had reasonable suspicion to stop Galaviz’s vehicle and investigate whether it was involved. However, it noted that once he realized that Galaviz did not meet the description of the robbers, the “reasonableness of the suspicion was undermined.” However, the Court noted it did not need to reach the question, which was close, as to whether the reasonable suspicion was revived by Galaviz’s actions because the discovery of the gun was not the “fruit of the poisonous tree.”⁶¹ The gun was discovered by backup officers before Webber even located Galaviz and not as a result of his detention. Certainly it was found as a result of the initial pursuit, but that did not taint the seizure of the gun. The Court justified their finding the gun under the plain view doctrine, noting that a “motorist has ‘no legitimate expectation of privacy shielding that portion of the interior of an automobile which may be viewed from outside the vehicle by either inquisitive passersby or diligent police officers.’”⁶² Looking at photos, the Court agreed that the car was close enough to the house to be possibly considered within the protected curtilage.⁶³ However, “given the characteristics of the driveway, it found it was not the case because it was not enclosed by a fence and the car was “parked directly abutting the public sidewalk.” Nothing separated the driveway from that public area. The Court ruled that the officers did not need a warrant to enter the driveway where the car was parked.

In addition, because it is illegal in Michigan to carry a firearm in a car without a license, which made it immediately apparent to be contraband. The Court justified the entry into the car to seize the weapon under the Carroll (vehicle) exception

⁶¹ Wong Sun v. U.S., 371 U.S. 471 (1963).

⁶² U.S. v. Campbell, 549 F.3d 364 (6th Cir. 2008).

⁶³ U.S. v. Jenkins, 124 F.3d 768(6th Cir. 1997).

The Court affirmed the denial of the motion to suppress, and upheld the plea.

SEARCH & SEIZURE – K-9

U.S. v. Dyson, 639 F.3d 230 (6th Cir. 2011)

FACTS: Following a vehicle crash in Lockland, Ohio, passengers were seen removing items from one of the wrecked vehicles to another vehicle. Responders to the crash smelled raw marijuana in the crashed vehicle. Dyson was the operator of the second vehicle, a Nissan Maxima. Officers moved in on that vehicle when it was parked at a gas station. Upon being asked, Dyson, who was nearby, agreed it was his vehicle. A drug dog, Bear, was taken around the vehicle and alerted at several points.

Officer Lyons requested consent to search, and Dyson agreed, albeit without enthusiasm. As they opened the hood, with Dyson's help, Dyson grabbed a towel-wrapped firearm and ran from the scene. Officers pursued and he was arrested. A second gun was found inside the vehicle. Because he was a convicted felon, Dyson was charged for possession of the guns. Dyson sought suppression, which the Court denied, finding the initial stop was enough to justify the dog sniff, and the positive alert gave probable cause, "obviating the need for consent." Dyson took a conditional guilty plea and appealed.

ISSUE: May a police dog sniff an unoccupied vehicle?

HOLDING: Yes

DISCUSSION: The Court found that since Dyson's vehicle "was unoccupied and parked in a publicly accessible lot at the time the dog sniff was performed" not even reasonable suspicion was required for the sniff. Second, even if reasonable suspicion was needed, the circumstances clearly provided it. The court found no indication that Dyson was ever actually detained prior to running, but again noted that detention might have been appropriate under the circumstances.

The Court upheld the denial of the motion to suppress and his plea.

SEARCH & SEIZURE – PEDESTRIAN STOP

U.S. v. Stittiams, 417 Fed. Appx. 530 (6th Circ. 2011)

FACTS: On October 9, 2007, Stittiams went to a friend's home, in Millington, TN, to have his hair cut. Ten others had gathered near the residence, some to get their hair cut, others to play cards. Some of the individuals began fighting and police were summoned.

Officers arrived. Stittiams walked away, supposedly to take possession of some clippers so they did not disappear. Officer Gonzalez called to him and told him to stop, Stittiams ignored him initially. Eventually, however, he raised his hands and walked toward the officers. He admitted, upon being asked, that he had a gun in his waistband. Officer Gonzalez walked him to his cruiser

and cuffed him, apparently arresting him. Eventually, because Stittiams was a convicted felon, he was charged for the weapon. He moved for suppression and was denied. He took a conditional guilty plea and appealed.

ISSUE: May a subject walking away from the scene of a reported “armed disturbance” be lawfully detained?

HOLDING: Yes

DISCUSSION: The Court noted that the only issue before it was “whether Gonzalez lawfully stopped Stittiams.” The Court agreed that a stop did not occur until Stittiams acceded to the demand to stop and as such the only facts that could be considered would be those known to the officer at that time. The Court agreed, however, that Officer Gonzalez had sufficient cause to seek to detain Stittiams for investigation – as he knew the nature of the area (high crime and a location where multiple calls had occurred), a call about an “armed disturbance” at the location, and Stittiams was the only one who walked away and that he did not stop when initially asked to do so. The Court equated the case to Illinois v. Wardlow, which justified detained a fleeing subject.⁶⁴ The Court noted that the actions could only be viewed from the officer’s standpoint, not what Stittiams may have actually been intending to do. The Court agreed that simply walking away was not enough to justify the stop, but that coupled with the other underlying circumstances, in this case, it was appropriate.

Stittiam’s plea was upheld.

SEARCH & SEIZURE – VEHICLE STOP

U.S. v. Smith, 421 Fed. Appx. 572 (6th Cir. 2011)

FACTS: On the day in question, a Mansfield (Ohio) police officer followed Christopher Smith (Steven’s brother) in his vehicle. When Christopher turned without signaling, the officer stopped him. He and his passenger (Steven) got out when requested, but then Steven fled on foot. Christopher consented to a vehicle search and the officer found a handgun on the passenger-side floorboard. Christopher stated it was Steven’s gun.

Steven, a convicted felon, was charged with the possession. He requested suppression, which was denied. He took a conditional guilty plea and appealed.

ISSUE: Does probable cause of a traffic offense justify a stop?

HOLDING: Yes

DISCUSSION: Steven argued that a turn signal was not required for the turn, and thus the stop was flawed. The Court agreed that probable cause was required to “justify stops for completed

⁶⁴ 528 U.S. 119 (2000).

misdemeanor traffic violations.”⁶⁵ The Court agreed that the District Court’s decision that the traffic stop was valid was proper.

The Court affirmed the plea.

U.S. v. Cooper, 431 Fed. Appx. 399 (6th Cir. 2011)

FACTS: “Cooper’s troubles began with a traffic stop.” Officers Sauterer and Taylor⁶⁶ drove past several people sitting in a silver Toyota. When they ran the plate, they discovered the vehicle was listed as red and the officers later testified that such a discrepancy suggested a stolen vehicle. They approached to investigate. As Taylor approached the passenger side, he later testified, Cooper “appeared agitated, looked around nervously, and hid his hands.” Cooper admitted to having marijuana. He was told to get out and Taylor “retrieved the marijuana from Cooper’s pocket.” As Taylor began a patdown, Cooper admitted he had a gun. Cooper was handcuffed and the gun fell to the ground.

Cooper was charged with possession of the firearm, as he was a felon. He moved for suppression, arguing that the officer’s knowledge about the area and the other facts were not sufficient to support the stop. The District Court agreed the “officers lacked reasonable suspicion to initiate the seizure.” The evidence was suppressed and the Government appealed.

ISSUE: Is an officer’s training and experience a factor in the reasonable suspicion for a stop?

HOLDING: Yes

DISCUSSION: First, the Court look to whether “there was a proper basis for the stop” by “examining the totality of the circumstances.” It looked to “whether the law enforcement officials were aware of specific and articulable facts which gave rise to reasonable suspicion.” It also looked to “whether the degree of intrusion ... was reasonable related in scope to the situation at hand.” The Court noted that neither party challenged the second part of the assessment, it would focus on the first part - whether they had reasonable suspicion at the outset.

The Court noted:

The district court began its Terry-stop analysis on the right track. First, as the district court found, the officers’ testimony established that the stop occurred in a high-crime area. The officers described a specific, circumscribed location—a particular intersection—and noted the frequency of car thefts and other crimes in that area.⁶⁷ This factor properly fits into the officers’ reasonable-suspicion calculus.⁶⁸ And, second, along with the high-crime-area

⁶⁵ U.S. v. Simpson, 520 F.3d 531 (6th Cir. 2008).

⁶⁶ Unidentified Ohio agency.

⁶⁷ U.S. v. Caruthers, 458 F.3d 459 (6th Cir. 2006).

⁶⁸ U.S. v. Johnson, 620 F.3d 685 (6th Cir. 2010).

feature, the district court acknowledged that the officers observed a discrepancy between the color of the vehicle and its registration information.⁶⁹

However, the Court “ended its analysis too soon.” The Court found it necessary to give “due weight” to the officers’ experience, as “an officer’s specialized training and experience may permit him to make inferences from and deductions about from the cumulative information available to him that ‘might well elude an untrained person.’”⁷⁰ The Court concluded that the officers did have sufficient reasonable suspicion to uphold the initial seizure and reversed the suppression.

U.S. v. Aguilera-Pena, 426 Fed. Appx. 368 (6th Cir. 2011)

FACTS: In November, 2007, Corp. Smith (Romulus, MI, PD) stopped Pena for “improper lane use.” Federal agents had asked him to make the stop as they were investigating Pena for drug trafficking. Smith asked him several questions about drugs and money in the car, Pena denied any contraband or money but failed to maintain eye contact with Smith. He gave consent to search the car. Corp. Smith had Pena get out, frisked him and then searched the trunk and passenger compartment. Agent McCanna arrived and secured Pena. During questioning, Pena admitted there was contraband in the car and that he’d been paid to drive the car from Oregon to Detroit and back. At this point, about six minutes had passed.

Agent McCanna knew that was a common transport practice and believed he had probable cause to search. The vehicle was taken to a nearby public works garage for further search, and Pena was taken along as well. A drug dog alerted to the console and they found \$410,000, 175 grams of heroin and a handgun. Pena was arrested. He requested suppression, which was denied. He took a conditional plea and appealed.

ISSUE: Is questioning during a traffic stop permitted when it does not appreciably extend the length of the stop?

HOLDING: Yes

DISCUSSION: Pena argued that the traffic stop was unreasonably extended and that the questioning during the stop was improper. The Court, however, stated that asking “extraneous questions” is not improper so long as the questioning does “not unnecessarily prolong the detention, and the detainee’s responses are voluntary and not coerced.”⁷¹ Asking for consent is not improper either, even if the subject is detained.⁷² The Court found the questioning was minimal and did not extend the traffic stop unduly. His admission, only minutes into the stop, that he was hauling contraband “gave the officers probable cause to further detain Pena.” The Court affirmed the denial of the motion to suppress.

⁶⁹ U.S. v. Caro, 248 F.3d 1240 (10th Cir. 2001).

⁷⁰ U.S. v. Arvizu, 534 U.S. 266 (2002).

⁷¹ U.S. v. Everett, 601 F.3d 484 (6th Cir. 2010).

⁷² Ohio v. Robinette, 519 U.S. 33 (1996).

SEARCH AND SEIZURE – PRE- GANT VEHICLE STOP

U.S. v. Sain, 421 Fed. Appx. 591 (6th Cir. 2011)

FACTS: On January 15, 2009, Sgt. Beaver (Jackson, TN, PD), received a BOLO for Sain. He was wanted for a domestic assault. He was reportedly driving a red Ford Mustang and the plate was provided, along with the information that he was possibly armed with a handgun.

Sgt. Beaver spotted the car and called for backup. He approached Sain at a gas pump. After his identity was confirmed, Sain was arrested. Officers searched the vehicle while Sain was detained nearby. The hatchback was opened by Beaver, using keys provided by Sain. He found a backpack, with a handgun and ammunition, in that area.

Sain was indicted for possession of the weapon, as he was a convicted felon. He moved for suppression, which was denied. He took a conditional guilty plea and appealed.

ISSUE: Is a hatchback considered accessible to the driver during a vehicle search?

HOLDING: Yes

DISCUSSION: The Court reviewed the case under the precepts of Arizona v. Gant. However, it also noted that under New York v. Belton, that a hatchback or wagon was accessible to the driver and thus subject to search. In U.S. v. Pigo, the court held that Belton covered all areas “reachable without exiting the vehicle” as the hatchback was.⁷³

Further, recently, the court had held in U.S. v. Buford that suppression of the evidence “is not warranted so long as, at the time of search,” the officer was working under valid precedent at the time.⁷⁴ The Court agreed that pre-Gant case law should have been applied and the suppression was not warranted, even though the officer chose to unlock the hatchback rather than crawl into it from the passenger compartment.

The Court upheld the denial of the motion to suppress.

42 U.S.C. §1983 – TRAINING

Harvey v. Campbell County, Tennessee, Sheriff McClellan and Deputy Scott, 2011 WL 1789955 (6th Cir. 2011)

FACTS: On December 23, 2005, Deputy Lowe began a vehicle pursuit of Harvey. Within minutes, Lowe shot and killed Harvey. Lowe stated that Harvey had a knife and refused to stop or

⁷³ 855 F.2d 357 (6th Cir. 1988).

⁷⁴ 632 F. 3d 264 (6th Cir. 2011).

put it down, and that he shot Harvey in self-defense. That proved to be untrue, however. Lowe ultimately admitted that he planted the knife and was fired for tampering. He was later convicted of three felony charges. Harvey (the victim's wife) filed suit on her own behalf, and that of her minor son, against Lowe, the former Sheriff and Chief Deputy, and the County. Lowe was unable to be served and the court dismissed him. It ultimately gave summary judgment to the remaining defendants by finding that they had adequately screened him. However, it allowed the case to go forward on the issue of training and ruled against McClellan and Scott's demand for qualified immunity.

All parties appealed.

ISSUE: Is the plaintiff responsible for identifying training inadequacies in a case based upon a training deficiency?

HOLDING: Yes

DISCUSSION: The Court noted that the plaintiffs' claim relied solely on the allegations within the complaint "without any supporting factual evidence." The Court noted that the "plaintiffs must show three elements: (1) that Lowe's training was inadequate to prepare him for the tasks that officers in his position must perform; (2) that the inadequacy persisted due to the County's deliberate indifference; and (3) that the inadequacy is closely related to or actually caused the plaintiffs' injury."⁷⁵ The Court discussed "deliberate indifference" – finding it to be a "stringent standard of fault, requiring proof that a municipal actor disregarded a known or obvious consequence of his action."⁷⁶ However, "mere allegations that an officer was improperly trained or that an injury could have been avoided with better training are insufficient to make out deliberate indifference." No evidence was presented that support a finding that either McClellan or Scott were involved in the shooting or that they showed any indifference to training needs, and even if they did, the finding would be against them in their official, not personal, capacities.

The Court reviewed Lowe's personnel record, which indicated he was certified in 2004 as a law enforcement officer and was given the sheriff's office use of force policy. The Court noted that "it was manifestly *not* the defendants' duty to show that Deputy Lowe's training was adequate; it was plaintiffs' burden to show that such training was *inadequate*." There was no evidence on the record of "prior misuses of deadly force that could be deemed to have put McClellan and Scott on notice of any deficiency in training."

The Court ruled McClellan and Scott were entitled to summary judgment on the issue of training.

42 U.S.C. §1983 – ARREST

Kuslick v. Roszczewski, 419 Fed. Appx. 589 (6th Cir. 2011)

FACTS: In March, 2008, someone wrote a threat on a high school bathroom wall in Hale, Michigan. Det. Roszczewski (Michigan State Police), investigated and ultimately began looking at

⁷⁵ Plinton v. County of Summit, 540 F.3d 459 (6th Cir. 2008).

⁷⁶ Connick v. Thompson, 131 S.Ct. 1350 (2011) (quoting Bryan County, 520 U.S. at 410).

Sarah Kuslick as a suspect. He obtained a search warrant for handwriting samples. Sarah and her parents appeared at the Post to comply. (Although an adult, Sarah was developmentally disabled.) Kuslick did not want to leave Sarah, her daughter, alone as she produced the samples but was told she had to remain in the hallway. Initially she was close enough to hear and see what was going on, but was then instructed to go around the corner; she refused. Lt. Lesneski ordered her to leave the building and again, she refused. At the same time, Sarah was producing the 30-plus samples requested. She finished and as they left, Kuslick and Lesneski continued to argue, with Lesneski pulling and /or pushing her toward the door.

Roszczewski obtained a criminal complaint against Kuslick, accusing her of obstructing him in his duties. The charge was dropped when the Michigan court determined she'd done nothing to obstruct the execution of the warrant. Kuslick filed suit under 42 U.S.C. §1983 claiming wrongful arrest and malicious prosecution. The District Court denied Roszczewski's motion for summary judgment and he appealed.

ISSUE: Is the question of a statement being materially false for the Court to decide in a qualified immunity determination?

HOLDING: Yes

DISCUSSION: Roszczewski argued that even if his allegedly false statement was removed from his statement supporting the arrest warrant – that she frustrated the service of his warrant – that probable cause still existed for his arrest. The Court noted, however, that the warrant “accused Kuslick of obstructing Roszczewski, not the other troopers, and the allegedly falsified statement constitutes the one factual allegation actually linking Kuslick to any obstruction of Roszczewski's execution of the warrant.” (Although they were initially told about 30 samples were needed and Sarah actually produced more than that, he put in his statement that he actually needed 100.) The Court noted that the case “turns on materiality” – and whether a false statement is material is a question for the court, initially, in a qualified immunity analysis.⁷⁷ He argued that her refusal to comply with the orders given was obstruction under Michigan law. However, since he argued he was obstructed, not the other troopers, and because he was able to complete the execution of his warrant by collecting the needed samples, that was immaterial. The Court concluded - “telling lies to a magistrate in order to concoct probable cause is no technical violation of the law, and qualified immunity surely does not require us to countenance such behavior, if indeed a jury concludes that is what occurred here.”

The denial of summary judgment was affirmed.

Thurmond v. Wayne County (Michigan), 2011 WL 2270901 (6th Cir. 2011)

FACTS: On April 15, 2004 Troopers Bunk and Seibt (Michigan SP) tried to pull over a speeding vehicle. The suspect was injured in the process and captured. He did not have ID but identified himself as Shomarie Thurmond. He provided other identifiers that matched that identity. Thurmond also had an outstanding warrant from Wayne County so he was turned over to that agency, while the troopers got warrants for crimes related to the initial chase. Thurmond did not

⁷⁷ Vakilian

appear in court and a bench warrant was issued. However, as was later learned, in fact, the suspect was Labaron Thurmond, Shomarie's cousin.

Almost a year later, the real Shomarie Thurmond was arrested and taken to the MSP Detroit post. He was arraigned the next day. He made no "protestations of mistaken identity" at that time, but apparently told transporting troopers that he was not the person they wanted. He provided information that his cousin was the guilty party. Trooper Bunk, however, identified Thurmond as the person who had committed the crime. Ultimately, however, the case against Thurmond was dismissed.

Thurmond filed suit under 42 U.S.C. 1983 against various parties, claiming issues in the discovery process. After much procedural and discovery issues, the Court granted summary judgment in favor of most of the defendant officers and Thurmond appealed.

ISSUE: Is a warrant facially valid until shown to be otherwise?

HOLDING: Yes

SCUSSION: The Court noted that the arrest warrant was facially valid and that "mere detention ... in the face of repeated protests of innocence" was not necessarily unconstitutional. Over time, of course, it might be, but not initially. In fact, with respect to the deputy sheriffs who were named, Thurmond never protested his innocence and most had only passing contact with him. The Court, however, ordered the federal court to either exercise jurisdiction over his state law claims or return it to the state court system.

The Court did not, however, agree that the troopers who were aware of his protestations were, at this stage of the proceedings, entitled to immunity and allowed the case to go forward.

Huckaby v. Priest (and others), 636 F.3d 211 (6th Cir. 2011)

FACTS: Barton and Pierce (married) lived in Southgate, Michigan. In August, 2003, they entertained a visitor, Huckaby for a few weeks. She packed up her car on September 2, intending to return home. A neighbor, Johnson, called the Southgate police, believing she was witnessing a breaking and entering. Officers Priest and Fobar responded. They found Huckaby standing just inside the house and gestured to her to come to them; she met them on the front porch. They asked her who owned the house. (They differed on her response to the question.) She was placed in Fobar's car while the officers went to investigate, entering through the door left open by Huckaby. There, they encountered Barton, who was dressed, and Pierce, in pajamas. The police told them why they were there, and Barton identified themselves as the owners and asked the officers to leave. The police asked for ID to prove their ownership, and both pointed to family pictures hanging nearby. They insisted on more ID and Barton asked to go upstairs to get it.

Pierce asked the officers not to go to her bedroom. As she turned to say something to Barton, Officer Fobar "grabbed her leg and pushed her down the steps, allowing Priest to slip by her and follow Barton up the stairs." (The officers contested this statement.) Additional officers arrived, and one was instructed to watch Pierce, who was then in the living room. Priest and Fobar came downstairs with Barton in cuffs, stating he'd "pulled a gun." All three were taken to the local station,

with the two women booked for possible burglary. They were released later that day. (The opinion does not state the disposition of any case against Barton.) All three filed suit under 42 U.S.C. §1983. Ultimately, the Court agreed the officers were not entitled to qualified immunity with respect to Pierce's claims but that they were with respect to Huckaby's claims. Appeals followed.

ISSUE: In a qualified immunity case, must the facts be analyzed in the light most favorable to the plaintiff?

HOLDING: Yes

DISCUSSION: With respect to Pierce, the Court "identified a number of disputed material facts which made qualified immunity inappropriate." The Court stated that the officers "refuse to concede the facts in the light most favorable to Pierce," which is the required standard in such cases. Huckaby argued that the officers lacked probable cause to hold her for five hours, and the Court agreed, in her case, that the District Court's dismissal of her action was premature and not construed in the light most favorable to her. Specifically, the Court alerted "the district court that there is a distinction between the reasonable suspicion required to detain a suspect under Terry v. Ohio and the showing of probable cause required to support a warrantless arrest."

The Court ruled the case would go forward and qualified immunity was not granted.

42 U.S.C. §1983 - TASER

Lee v. Metropolitan Government of Nashville and Davidson County, 432 Fed. Appx. 435 (6th Cir. 2011)

FACTS: On September 22, 2005, Lee attended a concert at a Nashville lounge. When he got too close to the stage, he was escorted out of the building. He refused to leave the premises, however, and engaged in "strange behavior." Nashville police responded, including Officer Brooks, who arrived first. Lee approached the officer's car. Brooks found Lee's responses to his questions incoherent and that when he asked for ID, Lee "kind of lunged" at him. He initially complied with Brooks' orders but then jerked away. Brooks used OC spray and Lee "took off running." He stopped when ordered, but again ran away. By this time, Lee had stripped off his clothing and was nude and eventually, he fell. As other officers arrived to assist, Brooks struggled with Lee. Officer Mays used his Taser, which brought Lee to the ground, but he was not incapacitated. He was eventually tased multiple time, but it wasn't clear "how many of the activations actually resulted in the Taser delivering electricity to Lee" as in the struggle, he may have dislodged the probes. The officers "had difficulty subduing Lee because he was struggling while naked and sweaty" and he had managed to get partially under a vehicle. They were able to get one handcuff on him before he broke away and ran at Mays, who then drive-stunned him. One of the other responding officers, Scruggs, noted that he heard Mays' Taser "making "loud popping and crackling" sounds and believed that indicated it was activated but did not "have a connection with the target." Lee "came at" Scruggs who also tased him, after warning. Lee got up "almost immediately" and again, Scruggs tased him twice more, to no effect.

Mays, who had reloaded his Taser with a new cartridge, deployed it again, but Lee pulled out the probes. Scruggs, who had also reloaded, went to Lee, who was on the ground, and tased him again, "because he wanted to give the officers an opportunity to subdue Lee before he got back up." However, he kept getting back up. Finally, upon being tased again, "Lee fell back, hitting his head on an SUV's step bar." Even on the ground, however, Scruggs drive-stunned Lee twice more, because he continued to struggle and was difficult to hold. It took three officers to hold his arms to handcuff him.

Officer Cregan knelt on Lee's back, but later testified that he saw no indication Lee was having trouble breathing. As an ambulance arrived, Lee appeared to pass out. When he was rolled over, his lips were blue. The first paramedic on scene, Hitchcox, saw that he was not breathing and began CPR. They were unable to defibrillate him because he was not in a shockable rhythm. He was transported, but was eventually declared brain dead and life support was withdrawn.

An autopsy indicated he had marijuana and LSD in his system; his death was attributed to excited delirium. Medical experts opined that he died from metabolic acidosis, triggered by the Taser jolts and the oxygen deprivation.

Lee's parents sued on behalf of his estate. The case was removed to federal court. TASER was dismissed from the case and seven of the officers were granted summary judgment. Only Mays, Scruggs and Cregan remained in the case and the excessive force claims under 42 U.S.C. §1983 proceeded to trial. The jury found in favor of the officers and Lee's estate appealed.

ISSUE: Must an agency pass on training advisories regarding the proper use of TASERs?

HOLDING: Yes

DISCUSSION: With respect to the officers dismissed prior to trial, Lee argued that it was possible one or more of them could be found liable for "failing to act to prevent the use of force" by others. The Court agreed, but noted that since the jury found that the three primary officers did not use excessive force, the other officers could not be found liable. With respect to TASER, sued under product liability, the Court noted that TASER had issued a detailed warning with respect to multiple Taser shocks with a person at risk of excited delirium less than three months prior to Lee's death. For procedural reasons, the Court did not address whether the warning was adequately conveyed, however, but simply dismissed the claim.

The Court moved on to the trial issues. The Court found that evidence relating to Lee's drug use and prior criminal history was properly admitted. The Court refused to question the credibility determinations made by the jury and the trial court. The Court did not agree that Nashville could have been found liable for excessive force due to the collective action of the officers, even if no single officer was liable for it, because this theory was not brought up during the trial. The Court further disagreed that Nashville was negligent in training as it had made an attempt to instruct officers to take advantage of the "window of opportunity" immediately after a Taser shock. In fact, Nashville had issued emails and at the time of Lee's death, had no reason to believe that the email reminders to officers was insufficient to address the issue.

The Court affirmed the decision of the District Court.

42 U.S.C. §1983 – UNLAWFUL ENTRY

Pritchard (and others) v. Hamilton Township Board v. Trustees, 424 Fed. Appx. 492 (6th Circ. 2011)

FACTS: On August 8, 2007, Lt. Braley (Hamilton Township PD) held a public meeting to discuss underage drinking and a specific alcohol-involved crash. The parents of that juvenile believed their son had alcohol at the Prichard's' home on the night of the accident. They also stated they had seen "kids laying in the front yard" previously. They told Lt. Braley that the Pritchards were planning another party, on August 10, and that they suspected "there would be underage drinking at the party." Lt. Braley met with Chief Richardson and Lt. Johnson the next day to discuss the issue and they developed a plan to monitor the event. Lt. Johnson also ensured that Ohio Liquor Control agents would be available.

For most of the evening, the officers monitored the party, seeing nothing unusual. On his last pass at 11:45 p.m., they planned to stop at midnight, Lt. Braley saw "four individuals in the side yard," one of whom "appeared to be intoxicated and was yelling very loudly." As it was very dark, he could not describe them beyond saying that the voice was male. He reported the information to Lt. Johnson but took no further action as he was not in uniform. Allegedly, later that night, Lt. Johnson, Chief Richardson and Officer Gilbert discussed the party, having had no complaints at all. Lt. Johnson instructed Officer Gilbert to have his wife make an "anonymous noise complaint" – even though they lived some distance away. He did so, and ultimately, Officer Gilbert and another officer were dispatched to the party.

What happened next was in dispute. Mary Pritchard stated she met Officer Gilbert at the front door and that he "brushed past her and went immediately to her backyard, at which point a few people in the backyard took off running. Gilbert pursued them, and by her count, 22 officers "stormed" around both sides of the house. Christman, the man Gilbert elected to chase, recalled seeing about 10 officers "swarm" onto the property. Christman ran for about 30 seconds, fell and was apprehended and was held for about 40 minutes. Christman was underage and admitted to drinking alcohol – he was cited for underage drinking and disorderly conduct and released to his father, who was also at the party. (Because Ohio, like Kentucky, permits an underage juvenile to drink with the parent's permission, the charges were dismissed.⁷⁸)

Lt. Braley allegedly threatened Pritchard, saying he could take her house and would tell her son's football coach – witnesses described a "'chaotic' scene with officers yelling, acting aggressively, and threatening to use their tasters on people." Clark, also at the party, began to use his cell phone to record the party. He was told, after a few minutes, to stop recording, and he did. However, he opened his phone a few minutes later and was arrested for disorderly conduct. (Lt. Johnson later maintained they were concerned the recording "might reveal the identity of undercover liquor control agents if it was disseminated online.") Those charges were ultimately dismissed as well.

A few days later, Pritchard received information anonymously that indicated the noise complaint originated with an officer's wife and that the officers conspired to raid the party. Pritchard,

⁷⁸ Kentucky has a similar provision in Unlawful Transaction with a Minor in the Third Degree, KRS 530.070.

Christman and others filed suit under 42 U.S.C. §1983. The Court denied summary judgment under federal and state law to the defendant officers on allegations under the Fourth Amendment (unlawful search of the property and unlawful arrest), civil conspiracy, false arrest, malicious prosecution and emotional distress. The defendant officers appealed.

ISSUE: Is entry into a backyard (curtilage) permitted without an exigency?

HOLDING: No

DISCUSSION: Taking each claim individually, the Court noted that under the Fourth Amendment has “reach beyond the walls of the home.” The Court noted that under U.S. v. Dunn, it decided whether an area is within the curtilage, the Supreme Court had provided four factors: “[1] the proximity of the area claimed to be curtilage to the home, [2] whether an area is included within an enclosure surrounding the home, [3] the nature of the uses to which the area is put, and [4] the steps taken by the resident to protect the area from observation by people passing by.”⁷⁹ Even if unfenced, the backyard is part of the curtilage.⁸⁰ Even if Officer Gilbert’s version was taken as truth, that he entered to do a knock and talk, the Court agreed that such a technique was permitted “so long as the encounter does not evolve into a constructive entry.” The Court found no exigent circumstance to justify going into the backyard – he claimed it was justified by Christman running, but Pritchard and Christman argued that he entered the backyard and precipitated the chase. Lt. Johnson further argued that he arrived because of Gilbert’s call for help, yet the facts suggest that Johnson was present apparently as Christman was apprehended after only a brief chase.

Lt. Braley was apparently not present in the backyard, only the side yard, which may have not been in a private area. However, the Pritchards argued that he was involved in the planning of the raid and was responsible for Officer Gilbert under the doctrine of supervisory liability. Absent Lt. Braley’s actions, “no police officers would have ever entered their property.” The Court agreed a jury could find that “Lt. Braley not only encouraged or condoned the actions of Officer Gilbert, but that Officer Gilbert’s actions were a direct result of Lt. Braley’s planning and acts.” Finally, it was not disputed that Chief Richardson did not enter the property, but noted there was a showing that he failed to action, and thus condoned, the unlawful plan, and thus made him potentially liable.

With respect to the arrests, the Court agreed that “an officer cannot look only at the evidence of guilt while ignoring all exculpatory evidence”⁸¹ nor make “hasty, unsubstantiated arrests with impunity.” The Court found nothing in Ohio law that explained why it was reasonable to arrest Clark, even if he was intoxicated, as there was no reason to believe his recording of the indicated presented an immediate risk of physical harm to anyone. With respect to Christman, the Court found nothing to indicate why running from the police constituted disorderly conduct. They knew he was drinking but also knew that his father was present at the party with him, and they could not “simply turn a blind eye toward potentially exculpatory evidence known to them.”⁸² The officers

⁷⁹ U.S. v. Dunn, 480 U.S. 294 (1987); Oliver v. U.S., 466 U.S. 170 (1984) (quoting Boyd v. United States, 116 U.S. 616 (1886))

⁸⁰ Jacob v. Twp. of West Bloomfield, 531 F.3d 385 (6th Cir. 2008); Widgren v. Maple Grove Twp., 429 F.3d 575 (6th Cir. 2005).

⁸¹ Everson v. Leis, 556 F.3d 484 (6th Cir. 2009).

⁸² Ahlers v. Schebil, 188 F.3d 365 (6th Cir. 1999).

argued they were unaware that the law made an exception in this case, The Court agreed that “knowledge of [a] statute is imputed to the police officers” and the Court found “no reason to hold that it would be reasonable for an officer to be ignorant of the very statute that he is enforcing.”

The Court continued:

At first blush it might seem unduly harsh to have an expectation that law enforcement officers should know the intricacies of criminal statutes, but this position finds support in other areas of the qualified immunity doctrine that regularly impute knowledge of statutes and case law to officers. Indeed, it is a touchstone of qualified immunity doctrine that “a reasonably competent public official should know the law governing his conduct.”⁸³ For instance, we impute knowledge of state-law definitions and state-court interpretations of a statute to police officers when we decide whether an officer could reasonably conclude that probable cause exists under a given set of circumstances.⁸⁴ Likewise, we impute knowledge of clearly established constitutional case law to police officers when we state that the “binding precedent from the Supreme Court, the Sixth Circuit, the district court itself, or other circuits that is directly on point,” places a law enforcement official “on notice that [his] conduct violates established law.”⁸⁵

In a footnote, the Court noted that:

Indeed, an ignorance of the law defense—especially when the law is clear— in the qualified immunity context “might foster ignorance of the law or, at least, encourage feigned ignorance of the law.”⁸⁶ Permitting an officer to be ignorant of the law would also draw a stark contrast with our long tradition of imputing knowledge of criminal statutes to the general public.⁸⁷

The Court also agreed that there was sufficient evidence at this state to permit the Prichards and other parties to go forward with the conspiracy claim. The Court also agreed that under Ohio law, the jury could find malice or bad faith in the officers’ actions

The Court upheld the denial of summary judgment and permitted the case to move forward.

⁸³ Harlow v. Fitzgerald, 457 U.S. 800 (1982).

⁸⁴ Kennedy, 635 F.3d at 215–16; Logsdon v. Hains, 492 F.3d 334 (6th Cir. 2007).

⁸⁵ Holzemer v. City of Memphis, 621 F.3d 512 (6th Cir. 2010) (quoting Hope v. Pelzer, 536 U.S. 730 (2002)); see also Leonard v. Robinson, 477 F.3d 347 (6th Cir. 2007) (imputing knowledge of First Amendment principles to an officer, and holding that probable cause did not exist because the officer should have known that the defendant’s conduct was protected by the Constitution, even though it was probably prohibited by the statute); Robinson v. Bibb, 840 F.2d 349 (6th Cir. 1988) (noting that we expect a reasonably competent officer to know the law governing his conduct but suggesting that it might be unfair to impute knowledge of a case to an officer only four days after the case is decided).

⁸⁶ Glasson v. City of Louisville, 518 F.2d 899 (6th Cir. 1975).

⁸⁷ See e.g., Bryan v. U.S., 524 U.S. 184 (1998) (noting that the traditional rule is that “ignorance of the law is no excuse” for a defendant’s criminal conduct).

42 U.S.C. §1983 – USE OF FORCE

Marmelshtein v. City of Southfield, 421 Fed. Appx. 596 (6th Circuit, 2011)

FACTS: On or around December 13, 2004, Southfield (Michigan) PD received an anonymous complaint that there was drug activity at or near Marmelshtein's home. Detective Bauman drove by and checked the license plate of the only vehicle there, discovering it belonged to the oldest son of the family and that he'd had a previous misdemeanor marijuana possession charge. Detectives Bauman and Simerly did a trash pull and located marijuana "residue." Bauman obtained a search warrant for the home.

Late on the afternoon of December 13, they went to execute the warrant. The officers and the Marmelshteins differed on what happened next, with the Marmelshtein's contending the officers broke down the front door without announcing. Officer Jagielski stated he knocked, waited ten seconds and then used the ram. Officer Swart tossed in a flash-bang. The team was "dressed completely in black helmets and hoods covering their faces, goggles covering their eyes, and tactical vests covering their bodies."

As they entered, Jagielski saw Leonid Marmelshtein, age 69, run at them, yelling and screaming. Officer Jagielski ordered Marmelshtein to get down but he did not comply, so he and Sgt. Lask forced him to the floor and handcuffed him. (Marmelshtein stated he went toward the "masked men" not aware they were law enforcement, and that they threatened to kill him and "drove him to the ground.") Photos corroborated head and facial bruising. Arlene (his wife) fled out the back door and another team member tossed a "second flash-bang grenade through a side window into her general vicinity." She was stopped outside, handcuffed and brought back inside the house. Officers found .16 grams of marijuana on Marc, the oldest son's, dresser. Leonid was charged with a variety of minor offenses and ultimately pled no-contest only to disorderly conduct. The remaining charges were dismissed. Marc Marmelshtein took a guilty plea to misdemeanor possession of marijuana.

The Marmelshtein's filed suit under 42 U.S.C. §1983 for excessive force, false arrest and malicious prosecution (for Leonid only), unreasonable execution of a search warrant, and a claim against the city based upon training. The defendants moved for summary judgment, arguing that Leonid's plea undermined his claim for false arrest and malicious prosecution, and the Court agreed. The Court, however, allowed the excessive force claims and search warrant claims to go forward, noting that "no reasonable law enforcement officer would have considered a confused and elderly couple to be capable of producing the kind of tense and rapidly evolving uncertain situation which would require ten police officers to make split-second decisions including the use of two 'flash-bang' grenades." The defendant officers appealed that decision.

ISSUE: Does a plea (or conviction) under one charge serve to defeat an excessive force claim related to the arrest?

HOLDING: No

DISCUSSION: The Marmelshteins maintained “that they neither resisted nor refused to follow the defendant officers’ directives once it became readily apparent to them that these individuals were police officer and detectives” The Court agreed that Leonid’s plea to one charge was not dispositive of the use of force or search warrant issue and that his failure to immediately follow orders did “not give the officers license to use disproportionate force to subdue him.”⁸⁸ The Court agreed, further, however, that the District Court should have assessed the action of each officer individually, since, specifically, only two officers took direct action about Leonid.

With respect to the warrant, the Court agreed that a “search of seizure may be invalid if carried out in an unreasonable fashion,” even if the warrant itself is valid.⁸⁹ The Court noted there was an issue as to whether the officers properly knocked and announced and whether it was reasonable to use flash-bangs.⁹⁰ However, because that latter right, to be free of flash-bangs, had not been clearly established at that time, the Court agreed the officers were entitled to summary judgement and reversed that ruling.

The Court allowed the two issues discussed above to go forward.

Blosser v. Gilbert, Carpentier and Lloyd, 422 Fed. Appx. 453 (6th Cir. 2011)

FACTS: On December 27, 2005, Blosser found the keys to a pickup truck outside a veterinary clinic. He took the truck without the owner’s permission, but quickly realized it had OnStar. He then abandoned the vehicle, returned to where he had left his own vehicle and drove away. A short distance away an officer attempted to pull him over, but Blosser sped away, failed to stop at several stop signs and went the wrong way down a street. He struck two emergency response vehicles, finally spinning out when he hit a police cruiser. Officers Gilbert and Capentier approached with guns drawn and gave “conflicting commands.” Ultimately, Gilbert “grabbed his arm and pulled it through the window.” At some point he complained of pain in his left arm and was taken for evaluation, where it was discovered a tendon was torn. (There was a related claim against the jail for failure to obtain the appropriate follow-up treatment for the injury.)

Blosser argued that the two officers used excessive force, with Gilbert and Carpentier arguing for qualified immunity. The District Court found in favor of the officers and Blosser appealed.

ISSUE: Is it lawful to forcibly remove someone through a window following a high speed chase?

HOLDING: Yes

DISCUSSION: In looking at the situation under objective reasonableness, the Court agreed that the officers acted to “neutralize a perceived threat by physically removing [Blosser] from his vehicle” following a car chase. Although the stop began with a traffic offense, it changed when Blosser initiated a high speed chase involving evasion and reckless driving. His actions made it reasonable for the officers to be concerned about the possibility of a weapon, or even that he

⁸⁸ Accord Cabrera v. City of Huntington Park, 159 F.3d 374 (9th Cir. 1998).

⁸⁹ Zurcher v. Stanford Daily, 436 U.S. 547 (1978).

⁹⁰ See Hudson v. Michigan, 547 U.S. 586 (2006).

would use the car against them. (The Court agreed that the problem with removing from the car likely was because of the steering wheel, but noted that the “officers could reasonably have perceived [it] as purposeful resistance.”) Further, even though it was later understood that Blosser had an arm injury, handcuffing him at the time was reasonable since it was likely not obvious to the officers at the time.

The Court upheld the qualified immunity.

Jones v. Yancy, 420 Fed. Appx. 554 (6th Cir. 2011)

FACTS: On April 8, 2006, Jones was in a one-vehicle wreck in Memphis, Tennessee. Jones left the scene with a bystander so that he could call his brother. He did not report the crash, but by the time he returned, a police service technician (presumably a tow truck) had arrived. Jones was unable to produce his OL. Officers Yancy and Walker arrived and also requested his OL, and again, he was unable to find it in the car. He was handcuffed. He was also, allegedly, pepper-sprayed, beaten and taken to the ground, although he told them he could not “get down on his knees due to a preexisting injury.” He claimed to have multiple injuries from the encounter. A witness supported Jones’s assertions.

Jones filed suit under 42 U.S.C. §1983 against the two officers, claiming excessive force. The Court concluded that under Jones’s assertions, he “was the victim of an unprovoked attack that resulted in his being pepper sprayed and slammed into the patrol car well after he was in handcuffs.” Because of the factual dispute between the parties, the Court found the officers not entitled to summary judgment.

ISSUE: Does the submission of facts indicating a violation of a constitutional right defeat a qualified immunity motion?

HOLDING: Yes

DISCUSSION: The Court agreed that there was no legal issue submitted to review, and that the facts “as alleged by Jones” indicated the possibility, even the likelihood, of the violation of a clearly established right. The presence of an unrelated and presumably unbiased witness indicated he was not disorderly.

The Court permitted the case to go forward.

Bletz v. Gribble and Denny, 641 F.3d 743 (6th Cir. 2011)

FACTS: On May 3, 2005, Deputy Denny (Ionia County Michigan, SO) looked over a list of outstanding warrants for Saranac residents. Deputy Denny saw a bench warrant for Zachary Bletz, who lived with his parents in that town. He verified the warrant and set out, with Deputy Gribble, to execute the warrant. They arrived about 11:40 p.m. and parked near the house. They saw only a light or TV in a second floor bedroom, the rest of the house was dark. They approached and knocked. The residents did not hear the knocking, but the dog inside started to bark. Zachary came to investigate and saw the officers in the back yard. When told he was under arrest, he was apparently cooperative. However, since he was wearing slippers, they discussed the need to get

shoes for him. Zachary wanted to go inside to get shoes, but was told the officers would have to go with him. He walked inside and tried to close the door, but Officer Denny forced the door open. As they entered, Officer Denny saw a “long-haired man” standing inside and pointing a gun. Denny and Gribble both took cover and yelled at him to put the gun down. There was dispute as to whether they identified themselves as officers. The man, homeowner Fred Bletz, had poor vision and hearing, and was without glasses or hearing aid. Bletz repeatedly asked – who are you – to the officers. When he did not drop his weapon, Officer Gribble shot Bletz four times and he died as a result. Bletz did not fire. Gribble claimed that Bletz was pointing the weapon at him, which Zachary denied – Denny did not see anything. The officers went into the house, secured Zachary and kicked the unloaded gun from Bletz’s hand. Kitti, Zachary’s mother came in and was also placed on the floor and secured. Zachary was arrested. Kitti was not arrested but was held in a police vehicle for some time. Both were released later that night.

The Bletzs filed suit, based upon their own claims as well as a claim on behalf of Fred Bletz. The Court determined the officers were not entitled to summary judgment under the Fourth Amendment claims, and they appealed.

ISSUE: Is entering a darkened home without announcing unreasonable?

HOLDING: Yes

DISCUSSION: The Court looked at the situation in the light most favorable to the plaintiffs, who argued that the entry by the officers into a “darkened residence without announcing themselves in the middle of the night” was unreasonable. In addition, the Court considered whether the “events leading up to a shooting are legitimate factors.” In cases “where the events preceding the shooting occurred in close temporal proximity to the shooting, those events have been considered in analyzing whether excessive force was used.”⁹¹ The Court chose to look “only at the facts alleged by [the Bletzes] in the moment immediately preceding the shooting.” The Court noted that Zachary said his father was lowering the weapon at the time of the shooting. Further, the officers were some distance from Bletz and near a breezeway, and could have retreated to relative safety. The Court agreed that it was appropriate to deny qualified immunity to Gribble at this stage of the proceeding.

However, the Court found that Deputy Denny, who did not fire his weapon or was otherwise in a position to supervise Deputy Gribble, was entitled to qualified immunity.⁹²

With respect to the actions taken against Kitti Bletz, the Court agreed she was seized. The officers argued that they “needed to secure the scene of the shooting and conduct an investigation.” The officers failed “to adequately explain why it was necessary to keep her both handcuffed and locked in the back of a police car for three hours when there was no evidence to suspect her of a crime or that she would present a continued safety risk.” The Court further agreed that “law enforcement officers were fairly on notice regarding the constitutional violations inherent in subjecting an

⁹¹ Claybrook v. Birchewell, 274 F.3d 1098 (6th Cir. 2001); Dickerson v. McClellan, 101 F.3d 1151 (6th Cir. 1996); Livermore ex rel. Rohm v. Lubelan, 476 F.3d 397 (6th Cir. 2007).

⁹² See Bruner v. Dunaway, 684 F.2d 422 (6th Cir. 1982).

innocent bystander to a detention that was excessive both in duration and in the manner it was carried out.”

The Court allowed the case to go forward on these issues.

Neal and Harris v. Melton and Hull, 2011 WL 2559003 (6th Cir. 2011)

FACTS: On April 25, 2008, Deputy Sheriff Hull and Sheriff Melton (Overton County, TN) were riding together. Deputy Dial received a call of an individual selling drugs from a vehicle and relayed the report. Hull and Melton spotted the vehicle and did a license plate check, which reported that the plate was expired and apparently belonged on a different call. Deputy Hull initiated a traffic stop and from that point, the call was recorded on video as well.

Hull spotted an item being thrown from the car and Melton heard something hit the windshield, but the video did not catch anything. Harris, driving the vehicle, turned into a driveway and stopped. Neal was in the passenger seat and Lexus (their child) was in a safety seat in the back. Harris provided the paperwork and her license to Hull and found the registration was, in fact, valid. After he confirmed that, Hull released his dog, Solomon, to sweep the area around the vehicle – the dog alerted twice. Harris stated she was unaware of any drugs. Deputy Hull asked both Harris and Neal to get out while he searched the car. Solomon was returned to the police cruiser.

However, as Neal got out, Solomon got out of the cruiser, “trotted toward the Cadillac and entered the now-open front passenger car door.” Solomon was able to get into the back seat where Lexus was secured and Neal protested. Melton grabbed Neal and pulled him from the car while Hull moved to secure the dog again. Neal and Harris later claimed the Solomon “attacked” the child and scratched her. Neal also argued that Melton slammed him against the car, but the video did not corroborate that claim. After a search of the car produced no drugs, the couple were permitted to leave – the entire incident took about 22 minutes.

Harris and Neal sued under 42 U.S.C. §1983, claiming that the stop and the search were unlawful, that Melton used excessive force against Neal and that the dog was also excessive force. The court denied qualified immunity and the defendant officers appealed.

ISSUE: May a subject vehicle be briefly detained for a dog sweep?

HOLDING: Yes

DISCUSSION: Addressing first the force claim, the Court agreed that Neal had standing, even though he was the passenger. The Court agreed that the video indicated that Melton’s use of force was reasonable, as Melton was permitted to “reduce any threat of harm by using a minimal amount of force to ensure that Neal did not impede Hull’s effort to remove Solomon from the vehicle.” The Court dismissed that claim. The Court further noted that there was no indication that Hull intended to seize anyone with the use of the dog, which meant there was no Fourth Amendment violation.

With respect to the initial traffic stop, the Court agreed the initial stop was properly supported. The question, however, is whether they had sufficient reasonable suspicion to extend the stop to permit the dog to sweep the vehicle. The defendant officers argued that the vehicle matched the one

suspected of being used to traffic and that items were thrown from the car after the emergency equipment was activated. The Court agreed that was sufficient to justify the extended detention. Since Solomon was on scene, they were “able to limit the additional time necessary to complete the sweep.” Using a drug dog was the least invasive way to achieve the permitted end. Finally, the Court agreed that the search, based upon Solomon’s positive alert, was supported by probable cause.⁹³

The Court reversed the denial of summary judgment.

42 U.S.C. §1983 – SEARCH

Thornton v. Fray (and others), 429 Fed. Appx. 504 (6th Cir. 2011)

FACTS: On February 14, 2007, a number of Flint, Michigan police officers went to execute a warrant to arrest Pugh and search his residence, which he shared with Thornton. A few hours before, officers spotted KT (Thornton’s 15 year old son) leave the residence and they seized him briefly. They released him after questioning. At about 7 p.m., they executed the warrants. There was dispute as to whether the officers knocked and announced, but in any event, when they entered, Thornton was seized, handcuffed and forced to remain seated on the floor until the search was complete. However, since at the time she was dressed only in a nightgown and without underwear, she was forced to remain in a position where the “lower part of her body [was] fully exposed” to everyone, including her children. The three younger children, ages 12, 11 and 9, were brought downstairs, including the female child who was escorted out of the bathroom by a male officer. The oldest boy returned during the search and was also secured. (The 3 younger children were not handcuffed, but the oldest boy was.) They were detained for approximately two hours and then released.

Thornton sued on her own behalf and behalf of her minor children under 42 U.S.C. §1983 and the Fourth Amendment. The defendant officers requested summary judgment and were denied. They appealed that denial.

ISSUE: Is it reasonable to hold occupants of a house being searched pursuant to a warrant?

HOLDING: Yes

DISCUSSION: The Court addressed the claims individually. The Court agreed that it was reasonable, with a search warrant, to “detain the occupants of the premises for the duration of the search.”⁹⁴ During such a detention, under Muehler v. Mena, “officers may use reasonable force – including handcuffs – for the duration of the search.”⁹⁵ The Court agreed that in this situation, with an arrest expected for a murder suspect, the use of force and display of weapons was reasonable. All claims related to those actions should be properly dismissed.

⁹³ U.S. v. Diaz, 25 F.3d 392 (6th Cir. 1994).

⁹⁴ Michigan v. Summers, 452 U.S. 692 (1981); U.S. v. Fountain, 2 F.3d 656 (6th Cir. 1993); U.S. v. Bohannon, 225 F.3d 615 (6th Cir. 2000).

⁹⁵ 544 U.S. 93 (2005).

However, the Court noted that the seizure of KT, hours before the search, by Officers Villereal and Lash, and forcing him into a van at gunpoint, “could not reasonable be deemed to fall within the rule.” The two officers involved in that incident were not entitled to qualified immunity.

With respect to the alleged failure to knock before entering, the Court agreed that the officers lacked any exigent circumstances to justify entering without knocking. Those officers involved in the entry were thus not entitled to qualified immunity on that claim. (The officers, however, disputed, claiming they did knock, but with such a disputed claim, summary judgment cannot be granted.) Finally, with respect to Thornton’s claim about not being allowed to dress or cover up, was also improper and that all officers involved in that matter were not entitled to qualified immunity on that claim.

As noted above, some claims were permitted to go forward and the remainder dismissed.

Tindle v. Enochs, 420 Fed. Appx. 561 (6th Cir. 2011)

FACTS: In 2006, Deputy Tindle (Wayne County, MI) was in charge of the execution of a search warrant on 20075 Fenmore and the house next door. Two undercover officers approached the house to attempt to make a drug buy. They were turned away and notified Deputy Enochs by radio of such. They reported that a “blue car had pulled into the driveway” and that three men were probably leaving in that car. Tindle, apparently, was leaving from a house that shared a common driveway with 20075. The vehicle in which he left was stopped and he was pruned out and handcuffed, and eventually taken back to 20075 with the others in the other. He was detained for 2-3 hours and then released with a misdemeanor loitering charge.

Tindle filed suit against Enochs under 42 U.S.C. §1983, along with state law claims, in Michigan state court. Deputy Enochs removed it to federal court and claimed qualified immunity. The District Court granted it in part and denied it in part and both appealed from adverse decisions.

ISSUE: Is a mistake in judgment defensible under 42 U.S.C. §1983?

HOLDING: Yes

DISCUSSION: The Court noted that Tindle bore the burden of proving “both that, viewing the evidence in the light most favorable to [Tindle], a constitutional right was violated and the right was clearly established at the time of the violation.”⁹⁶ In this case, the Court agreed that Tindle did not prove that any constitutional right was, in fact, violated. The Court found the detention reasonable under Michigan v. Summers,⁹⁷ noting that the “exception has since been extended to include residents and non-residents of a house subject to a search warrant that leave or arrive at or near the time of the search warrant’s execution.” The Court agreed it was reasonable for Deputy Enochs to believe that “her pre-arrest detention of Tindle was constitutional” and that he’d “left a house targeted by a search warrant.” He even conceded he’d left a house with a common driveway to the target house. Tindle could not prove his case based on “grounds for speculation”

⁹⁶ Chappell v. City of Cleveland, 585 F.3d 901 (6th Cir. 2009).

⁹⁷ 452 U.S. 692 (1981).

that Enochs misread the situation. The immunity standard provides “ample room for mistaken judgments.” Even though he protested, initially, that he was not inside the suspect house, the Court agreed that an officer “is under no obligation to give any credence to a suspect’s story nor should a plausible explanation in any sense require the officer to forego arrest pending further investigation.”⁹⁸

The Court concluded Tindle could not prove the Enochs violated his constitutional right and agreed that Enochs was entitled to qualified immunity.

42 U.S.C. §1983 - ARREST

Martin v. Schutzman, 426 Fed. Appx. 384 (6th Cir. 2011)

FACTS: Schutzman worked as a Villa Hills police officer and a building inspector. Martin was a Villa Hills city council member. When Martin was informed the Schutzman was billing more than 30 hours a week for inspections, he suspected that Schutzman might be doing inspections while also on the clock for the police department. Schutzman became angry and threatened to sue Martin’s sister, who was somehow involved in the situation. Martin then became involved in a personal estate issue that resulted in a criminal complaint for theft. The case was referred through the Villa Hills PD to Schutzman, who opened an investigation. Det. Schutzman forwarded his investigation to the Kenton County prosecutor and Martin was charged with forgery. When it was learned that Martin was actually entitled to the money he had taken, through the estate, the criminal case was dismissed.

Martin sued Schutzman and the prosecutor, claiming false arrest and “retaliatory and malicious prosecution.” The District Court granted summary judgment and Martin appealed.

ISSUE: If an arrest is later proved invalid, will the lawsuit be successful?

HOLDING: Not necessarily.

DISCUSSION: The causes of action required that Martin prove a lack of probable cause.⁹⁹ The Court reviewed the elements of forgery and found Martin to be “barking up the wrong tree.” The Court agreed that Martin had engaged in deception and found it reasonable for the police to believe he had violated the law, based upon the evidence available at the time. (In fact, he had not violated the law, even though he did falsely endorse checks.) The Court concluded that “probable cause existed at the time of the arrest” and upheld the summary judgment.

Graves v. Bowles, 419 Fed. Appx. 640 (6th Cir. 2011)

FACTS: Graves was arrested by KSP on August 15, 2007 on a warrant by the Glasgow police, for a robbery in Glasgow a few days earlier. The next day, however, they learned he was not the robber, as the same robber had just committed a robbery in Paducah. Graves was

⁹⁸ Criss v. Kent, 867 F.2d 259 (6th Cir. 1988).

⁹⁹ Hartman v. Moore, 547 U.S. 250 (2006); Kennedy v. City of Villa Hills, 635 F.3d 210 (6th Cir. 2011); Fox v. DeSoto, 489 F.3d 227 (6th Cir. 2007).

released and filed suit against Glasgow, 6 Glasgow Officers and 11 KSP troopers, claiming excessive force and wrongful arrest under 42 U.S.C. §1983. He also sued bank employees. The District Court gave summary judgment to all defendants and Graves appealed.

ISSUE: Is a high degree of force justified to serve a warrant?

HOLDING: Yes (but see discussion)

DISCUSSION: The Court reviewed the claims. First, the Court reviewed the claim of wrongful arrest and determined that Glasgow PD and KSP both had probable cause to believe Graves was the robber when they obtained the warrant. He was identified by multiple people, including a relative and a former landlord, from surveillance photos from the bank. He was identified in photo paks by bank employees.¹⁰⁰ Graves found fault with the investigation, but the Court noted that it “must ask what the police actually knew [at the time of the arrest] and Graves cannot refute the identifications.” The Court found the wrongful arrest claim must fail.

With respect to the force claim, he argued that KSP “unreasonably used excessive force when they deployed a ‘flash-bang’ device that broke the rear windshield of his car, surrounded his car with weapons drawn, broke two of his car windows, forcibly removed him from his car, and handcuffed him.” He also argued that Glasgow was at fault for using KSP’s Special Response Team to serve the warrant, which both groups should have known was unnecessary since he had complied earlier with a request to come in for questioning. The court agreed that police had the right to use “some degree of physical coercion or threat” to make an arrest, and how much was reasonable would depend upon “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.”¹⁰¹

The Court noted, however, that the original robbery suspect was armed and that Graves had “brandished a gun in a recent domestic disturbance, and had been involved in prior assaults.” He had previously been unwilling to surrender in other matters, and knew he used drugs and could thus be unpredictable.¹⁰² When KSP surrounded the car, he did not comply with the orders of the team, which justified the breaking of the car windows. “His refusal to comply with orders and unexpected motion toward his console” gave the SRT reason to believe he might be reaching for a gun.

The Court recognized “that his event was in no way pleasant or cordial,” but found the use of force reasonable based upon what the KSP knew at the time. Finally, because the case against the Glasgow officers was dismissed, the case against the City of Glasgow must also be dismissed. The Court upheld the dismissal of all law enforcement defendants.

¹⁰⁰ *Ahlers v. Schebil*, 188 F.3d 365 (6th Cir. 1999).

¹⁰¹ citing *Tennessee v. Garner*, 471 U.S. 1 (1985)).

¹⁰² *Dudley v. Eden*, 260 F.3d 722 (6th Cir. 2001)

TRIAL PROCEDURE / EVIDENCE - CONSTRUCTIVE POSSESSION

U.S. v. Leary, 422 Fed. Appx. 502 (6th Cir. 2011)

FACTS: On May 15, 2008, Leary was arrested after police found three guns and a substantial amount of cocaine in an apartment he shared with Luhman. Leary argued that although he shared the apartment and the bedroom with Luhman, that two others frequently stayed at the apartment. However, Lughman testified that she had seen Leary with weapons at the apartment and that on the day in question, she had sought help from the police to get the guns out of the apartment. They ultimately sought consent to search the apartment from Leary, who agreed, and the guns and drugs were found.

He argued at trial there was insufficient evidence to find he “constructively possessed the drugs and that he constructively possessed the guns in furtherance of a drug trafficking crime.” His motions were denied and he was convicted. He then appealed.

ISSUE: Must there be a connection between drugs and guns to charge for the presence of the guns?

HOLDING: Yes

DISCUSSION: The Court noted that the evidence was sufficient that the guns were being used to further a drug trafficking scheme. Witnesses testified that the quantity of the drug and the way they were presented was more than usually seen in personal use. It was located on his side of the closet, under his hats. The cash in his possession upon arrest was mostly 20 dollar bills, the usual sale amount, and he did not have a legitimate job. In addition, no paraphernalia was found at the apartment. The Court agreed that guns and drugs found in close proximity could be used to support the assertion that the guns were used to further the drug trafficking, but that in this case, mere proximity was not sufficient, since they were in a storage place, in a duffel bag, not readily accessible. In addition, the amount of drugs was not so substantial as to indicate major trafficking. The guns were not in a “strategic location” in the apartment and two were not loaded, nor was there a “specific nexus” between the guns and the drugs. The guns were not on his person nor could they readily be seen.

The Court affirmed the drug trafficking conviction, but not the gun possession charges.

U.S. v. Bradford, 418 Fed. Appx. 390 (6th Cir. 2011)

FACTS: On May 18, 2006, Bradford and his girlfriend were asleep in her home on Flint, Michigan. The police awakened them serving a drug-trafficking search warrant. Under the mattress, they found a loaded handgun and drug-dealing paraphernalia. Bradford, a convicted felon, was indicted for the possession of the weapon. He was convicted and appealed.

ISSUE: Is a gun under a mattress logically connected to someone who slept in the bed?

HOLDING: Yes

DISCUSSION: Bradford challenged his connection to the weapon, since it was found under the mattress of his girlfriend's bed, in her apartment. However, the prosecution proved he stayed at the house many times over the previous months and he jointly owned a car with the girlfriend. He also kept many personal items in the bedroom. The gun was found next to items used in drug distribution and he was proven to be connected to drug trafficking. (Bradford was supposed to be living at another address, by the terms of his probation, but his aunt testified he did not live with her.)

The Court upheld his conviction.

TRIAL PROCEDURE / EVIDENCE - CRAWFORD

U.S. v. Boyd, 640 F.3d 657 (6th Cir. 2011)

FACTS: On January 6, 2007, in Knoxville Tennessee, Newsom and Christian were carjacked, Christian was raped and both were murdered. Newsom's body was initially found, but not Christian's. Christian's abandoned vehicle was found and inside, police found Davidson's fingerprint. He lived a short distance from where the car was located. Officers executed a search warrant on his home and found Christian's body in the trash can in the kitchen. Semen on the body eventually linked Davidson to the crime as well.

Police initiated a manhunt for Davidson. Through investigation, they discovered Davidson and Boyd had made a number of phone calls. They found Boyd and stopped his car, but he denied, initially, knowing Davidson. He then said he wasn't going to do time in jail for Davidson and told them where he was hiding. He admitted Davidson was in a house they had broken into. The house was vacant, and inside, the police found and arrested Davidson and seized clothing, a cell phone and other evidence. Boyd returned to the Knoxville police voluntarily and recounted what Davidson had told him of the crimes and admitted to having assisted Davidson even though he knew of the crimes.

Boyd was charged with being an accessory after the fact and misprision, because he had assisted Davidson in his actions after the crime. At trial, he moved to exclude portions of his recorded interview in which he described what he'd been told by Davidson, arguing they were inadmissible hearsay and violated the Confrontation Clause, but the trial court ruled that they were "non-hearsay offered to prove Boyd's knowledge rather than the truth of the matter asserted." Boyd was ultimately convicted and appealed.

ISSUE: Is it appropriate to use an incriminating statement made to a third party when not being used to prove that he had, in fact, committed the crime?

HOLDING: Yes

DISCUSSION: The Court agreed that the statements were admissible because the charges required that Boyd "had knowledge of a crime." The jury was instructed to use the information "only for the purpose of determining Boyd's notice and knowledge of Davidson's involvement in the

carjacking” - not to determine that he had, in fact, committed the crime. The Court noted it did not violate Crawford, either, because “to constitute a Confrontation Clause violation, the statement must be used as hearsay - in other words, it must be offered for the truth of the matter asserted.”¹⁰³ In addition, in the context in which they were offered, to a companion, a “reasonable person in Davidson’s position would not have anticipated the use of the statements in a criminal proceeding.”¹⁰⁴

Boyd’s conviction was affirmed.

TRIAL PROCEDURE / EVIDENCE - CONFRONTATION CLAUSE

U.S. v. Jackson, 425 Fed. Appx. 476 (6th Cir. 2011)

FACTS: Jackson was the target of a drug investigation in Hamilton County (Chattanooga), Tennessee. Deputy Sheriff Langford had arranged for a controlled buy from Jackson at a hotel room. Following the buy Jackson was apprehended and was found to have the “buy money” as well as a quantity of powder cocaine. Several months later, the cooperating witness in the buy was accused of murdering another person. The prosecution moved to have any mention of that later crime excluded from the trial and stated they would not be using the witness at trial. Only a video of the transaction would be used along with the deputy’s testimony and lab evidence.

Following the deputy’s testimony, the Court agreed that cross-examination about the witness would be excluded. The deputy was questioned about the source’s motivation, which was initially for help with legal problems but eventually the source was simply paid.

Jackson was convicted and appealed.

ISSUE: Is it a violation of the Confrontation Clause for a source not to appear at trial?

HOLDING: No

DISCUSSION: Jackson argued that his right to confront the witness was violated because he was not permitted the cross-examination and because the source did not appear at trial. The Court agreed that simply limiting cross-examination was not inappropriate. The fact that the source was charged with a crime months after the event did not factor into the deputy’s use of the informant. Although the source appeared in the video, which was presented without sound, the source was not a witness because they did not testify.

Jackson’s conviction was affirmed.

¹⁰³ U.S.v. Davis, 577 F.3d 660 (6th Cir. 2009).

¹⁰⁴ Crawford v. Washington, 541 U.S. 36 (2004).

TRIAL PROCEDURE / EVIDENCE - TESTIMONY

U.S. v. Smith, 427 Fed. Appx. 413 (6th Cir. 2011)

FACTS: On January 20, 2009, at about 3 p.m., Sgt Drew (Cleveland Metropolitan Housing Authority – CMHA – PD) was watching a video feed from surveillance cameras. He observed Smith and Banks having an argument, during which Smith grabbed Banks and prevented her from walking away several times. Drew sent officers to intervene. Det. Ovalle and Gomillion responded and found the pair still arguing. When Smith spotted them (still some distance away) he stopped arguing and “directed Banks to walk away with him” and away from the officers. Both officers pursued. The pair turned a corner and were briefly out of sight, but when Ovalle caught sight of them again, he saw Smith being given keys by Banks and then run to an apartment building. He ordered Smith to stop. As they pursued him up the stairs, both noted Smith making motions toward his waistband. Ovalle grabbed him and quickly located a handgun.

Because Smith was a felon, he was charged with the possession of the gun. He requested suppression, which was denied. He then took a conditional guilty plea and appealed.

ISSUE: May a Court decide to whom to give credibility in a trial?

HOLDING: Yes

DISCUSSION: Smith argued that because the trial court believed that Ovalle could not have seen Smith fumbling with the keys in the stairway, that it should have rejected all of Ovalle’s testimony. The Court, however, that Ovalle’s testimony was corroborated, in large part, by the video, and that Gormillion testified consistently with Ovalle. Smith also argued that it was incredible that Ovalle would wait until he got him outside the building to frisk him (as he did) if he truly believed Smith had a weapon, but the Court agreed that was entirely credible, as it was certainly the “best course of action” ... “to take Smith to an open area where other responding officers would easily find them” before searching him further.

Further, the Court agreed that the officers has reasonable suspicion to initiate the stop, given the observed dispute and Smith’s reaction, described as abrupt, furtive and evasive, to the approach of the officers. His movements toward his waistband could reasonably be believed to mean he was reaching for his weapon and the officers were justified in taking immediate control.

The Court affirmed the denial of the suppression motion and his conviction.

COMPUTER CRIME

U.S. v. Bowling, 427 Fed. Appx. 461 (6th Cir. 2011)

FACTS: In May, 2007, Bowling took approximately 82 photos of himself with his girlfriend’s 7-year-old daughter. They depicted Bowling in sexual contact with the girl and the girl “engaged in lascivious exhibition of herself.” He contended all the photos were taken on one occasion. He admitted sexual contact with her, including oral sex. Det. Peters testified about the photos at the

sentencing hearing, noting that the girl was wearing different clothing in some of the photos. He testified “that the images were stored electronically on a computer disc seized” at the house and that the “images were organized in separate folders, which indicated the photos were taken on “separate dates, ranging from May 9, 2007, to May 17, 2007.” Each individual folder of images depicted the girl in the same clothing. Photos of Bowling with a 16-year-old who also lived in the house were found in the computer files as well.

Bowling was convicted and his sentence reflected the above situation. Bowling appealed his sentence.

ISSUE: May time-stamped photos be used to prove a pattern of conduct?

HOLDING: Yes

DISCUSSION: Bowling argued there was insufficient proof that he “engaged in a pattern of activity” with the girl “on more than one occasion.” The Court agreed, however, that the evidence indicated that he’d been engaged in prohibited sexual contact with the girl on multiple occasions. Further, although he claimed that he downloaded the photos all at one time, the time stamps indicated the folders were created over the time range discussed.

The court upheld the penalty enhancement based upon the multiple contacts.

FIRST AMENDMENT

Saieg v. City of Dearborn, 641 F.3d 727 (6th Cir. 2011)

FACTS: Every year, a number of people attended the Arab International Festival in Dearborn, Michigan. The police department was in overall charge of the festival. Businesses in the event area were permitted, with special permits, to sell goods on the sidewalks, businesses outside the area were permitted to purchase an information table. Businesses who wished to distribute material were required to do so from a “fixed location” – rather than walking around. Anyone leafleting was subject to arrest after being warned. The intent of this policy was to keep the sidewalks clear and traffic flowing. The immediate festival area was surrounded by an outer perimeter which served to provide for crowd control and parking. The restriction on leafleting applied in that area as well. Saieg, of the Arabic Christian Perspective, planned for members of the organization to distribute leaflets and talk one on one with attendees. The Police Chief told him he could not do so and provided the organization with a table, instead, at no cost. Saig, however, believed that his evangelism would be less successful if he could not approach Muslim attendees directly.

Saieg and the organized filed suit prior to the 2009 festival, against the City and the police chief, under the First Amendment. They were unable to get an injunction, however, and distributed leaflets from a fixed location that year. The trial court ultimately held that the restriction “was a valid time, place, and manner restriction” and that Saieg had ‘alternative channels of communication, even though they are not his preferred channels.” The process is content neutral and “serves a substantial government interest” of maintaining foot traffic flow. Upon appeal, the

Sixth Circuit permitted Saieg to distribute materials in the outer perimeter. That order was only in effect for the 2010 festival. Saieg requested a permanent injunction.

ISSUE: May a content-neutral regulation still be unlawful?

HOLDING: Yes

DISCUSSION: The Court discussed whether the streets and sidewalks in the outer perimeter “were functioning as traditional public for a or limited public for a during the Festival.” The Court noted that if a particular rule is “content-neutral,” the test is intermediate scrutiny. The Court agreed that the restriction in this case was content-neutral. The Court agreed that it was appropriate for businesses to have use of the sidewalk space in front of their location.

The next test is whether the restriction serves a substantial government interest. The City argued that the restriction was to enhance traffic flow in the area and minimize disorder. However, the Court noted that other activities that were permitted on the sidewalk which eroded the government’s purported interest. The City admitted that leafleteers had never posed any problems before, and the Court noted that the tables were actually “more obstructive.” Further, the Court found “concerns about crowd control ... to be exclusively conjectural.” Finally, the Court found the restriction on leafleting in the outer perimeter to not be “narrowly tailored” to further the objective of the government. The Court noted that “mere speculation about danger” is “not an adequate basis on which to justify a restriction of speech. At most, he might attract a few listeners on the sidewalk.

The Court concluded that the “restriction on *pedestrian* leafleting is substantially broader than necessary to further the interest in *vehicular* traffic control and parking.” The Court agreed, however, that it did provide an alternative means of communication. The Court found that the methods did not provide for a substantial governmental interest and granted the permanent injunction.