

Department of  
**CRIMINAL JUSTICE TRAINING**

KENTUCKY JUSTICE AND PUBLIC SAFETY CABINET

2007



*Leadership is a behavior, not a position*

**CASE LAW UPDATES  
FIRST QUARTER**



John W. Bizzack, Ph.D.  
*Commissioner*



Department of  
**CRIMINAL JUSTICE TRAINING**

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**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](mailto:docjt.legal@ky.gov)**

- ▶ Questions concerning changes in statutes, current case laws and general legal issues concerning law enforcement agencies and/or their officers 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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## **NOTES:**

**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](mailto: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.**

**While many of these cases involves multiple issues, only those issues of interest to Kentucky law enforcement officers are reported in these summaries. In addition, a case is only reported under one topical heading, but multiple issues may be referenced in the discussion. Readers are strongly encouraged to share and discuss the case law and statutory changes discussed herein with agency legal counsel, to determine how the issues discussed in these cases may apply to specific cases in which your agency is or may be involved.**

**Non-published opinions may be included in this update and will be so noted, see below for specific caveats regarding these cases. Cases that are not final at the time of printing are not included. When relevant opinions are finalized, they will be included in future updates. As such, each update may include cases that were decided earlier, but were held for finality.**

**All quotes not otherwise cited are from the case under discussion. Certain cases, because they appear so often and in cases not specific to their topic matter, do not have their citations included in the footnotes. Their full citations are:**

**Miranda v. Arizona, 384 U.S. 436 (1966)**

**Terry v. Ohio, 392 U.S. 1 (1968)**

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

## **NOTES REGARDING UNPUBLISHED CASES**

### **FEDERAL CASES:**

*Unpublished Cases carry a "Fed. Appx." Or Westlaw (WL) only citation.*

*Sixth Circuit cases that are noted as "Unpublished" or that are published in the "Federal Appendix" carry the following caveat:*

*Not Recommended For Full--Text Publication*

### **KENTUCKY CASES:**

*Unpublished Cases carry the Westlaw (WL) citation.*

*Kentucky cases that are noted as "Unpublished" carry the following caveat:*

*Sixth Circuit Rule 28(g) limits citation to specific situations. Please see Rule 28(g) before citing in a proceeding in a court in the Sixth Circuit. If cited, a copy must be served on other parties and the Court.*

### **UNPUBLISHED CASES**

*Unpublished opinions shall never be cited or used as authority in any other case in any court of this state. See KY ST RCP Rule 76.28(4).*

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# *Case Law Updates*

## *First Quarter, 2007*

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### *KENTUCKY*

#### *PENAL CODE - DEFINITIONS*

##### Smith v. Com.

2007 WL 287822 (Ky. App. 2007)

**FACTS:** On Oct. 12, 2003, Waterson and Pelphrey were watching Waterson's son riding a four-wheel on their property in Breathitt County. Waterson' spotted several men, trespassing. He told them to leave, and all but Anthony Smith did so. Waterson and Smith struggled, and Anthony Smithleft toward his father's home - Elmer, Sr. Eventually, Anthony, Elmer, Sr. and Elmer, Jr. returned to the scene. Elmer, Sr. was driving and his two sons were in the back, "wielding a stick and claw hammer, respectively."

When they arrived, "the Smith clan allegedly began attacking Waterson." Elmer, Sr. struck Waterson with a four-foot carpenter's level. Pelphrey intervened, and he was struck as well. Elmer, Sr. ran to the truck and got a gun, and he told his sons to get into the truck. The Smiths fled the scene.

Elmer, Sr. was incited on two charges of second-degree assault, and one of wanton endangerment. He was convicted, and appealed.

**ISSUE:** May a carpenter's level be considered a dangerous instrument, if used in a manner that causes injury?

**HOLDING:** Yes

**DISCUSSION:** Elmer argued that there was insufficient evidence to show that "he used or threatened to use an instrument in a manner capable of causing death or serious physical injury to Waterson." Both Waterson and Pelphrey testified to their injuries, which included bruising and lacerations, and explained how they received them. The level was apparently not entered into evidence, and Smith argued that because of that, the "jury could not properly consider whether it was a "dangerous instrument" as contemplated under the statute. The Court found, however, that Pelphrey described the level as being "made of wood and aluminum" and that Elmer, Sr. "had swung it like a baseball bat when attacking Waterson." The Court found it was clearly appropriate for the jury to conclude that the level was a dangerous instrument, even without seeing it.

Smith's conviction was affirmed.

## ***PENAL CODE - DEFENSES***

### **Litton v. Com.**

**2007 WL 541916 (Ky. 2007)**

**FACTS:** On the day in question, Litton, Chapman, V.D. and other people attended a party. Litton, among others, was drinking beer. "Litton and Chapman flirted and engaged in physical horseplay during the party" that became rough. As the party broke up, Litton stated his intent to engage in sex with Chapman. Later, allegedly, Chapman did invite him to her apartment and they had sex, but during that encounter, allegedly, "Chapman twisted Litton's nipple" and he pushed her away. She fell and was injured, and ultimately, she died from those injuries. At the autopsy, it was discovered that she had "numerous bruises and lacerations and several broken ribs" and she died from a laceration to her liver that caused her to bleed to death.

Meanwhile, V.D. was awakened by a sensation of being choked. Her attacker told her that he'd "kidnapped" her from the party, raped her and forced her to perform fellatio. When she protested, she was punched, and again raped. The attacker, at some point, identified himself as Litton, and told V.D. that he had "killed the girl downstairs ... because she didn't give him what he wanted." Eventually it became light enough for her to actually identify Litton, and Litton sent her downstairs (to Chapman's apartment) to get a cigarette. At that time, she saw Chapman's body. V.D. managed to convince Litton that she would not tell, and he threatened to kill her if she did so. Finally, he left, and V.D. immediately reported the rape and the murder.

Litton initially denied involvement, but eventually blurted out that he didn't mean to kill Chapman. He stated he tried to burn his bloody clothes, and the officers did discover the burned clothing nearby. Physical evidence linked Litton to sexual assaults on both women. Litton was indicted on murder, rape, sodomy and tampering with physical evidence – and was eventually convicted of everything except the sodomy. He appealed.

**ISSUE:** Is anger sufficient to require a jury instruction for "extreme emotional disturbance?"

**HOLDING:** No

**DISCUSSION:** Among other issues, Litton raised his voluntary intoxication as a defense, and argued that the jury should have been instructed as to that defense. The Court noted, however, the "evidence showing mere intoxication is insufficient to require an intoxication instruction" – instead, that defense requires a showing that the defendant was "so drunk" that they did not know what they were doing. The evidence did not support that degree of intoxication, and the Court found that the trial court did not err when it refused to give such an instruction.

Litton also argued that he was entitled to an instruction on "first-degree manslaughter under extreme emotional disturbance" – because "Chapman twisted his nipple during their sexual encounter." To justify such an instruction, the Court noted that "there must be evidence that the person had a temporary state of mind 'so enraged, inflamed, or disturbed as to overcome one's judgment, and to cause one to act uncontrollably from the impelling force of the extreme emotional disturbance rather than from evil or

malicious purposes.”<sup>1</sup> In this situation, the Court noted, that “at most, Litton became angry when Chapman twisted his nipple.” That was insufficient to justify an instruction for EED, especially given that he agreed she had done it to him earlier, during horseplay, and that he did not react violently at that time.

Litton’s convictions were upheld.

## ***PENAL CODE – THEFT BY UNLAWFUL TAKING***

### **Evans v. Com.**

**2007 WL 625371 (Ky. App. 2007)**

**FACTS:** Evans was charged with theft by shoplifting from an Elizabethtown Wal-mart on April 7, 2003. Allegedly he entered the store with an item, and was given a pink sticker by the door greeter to identify it as an item brought into the store. However, he did not proceed to customer service, as instructed, and the door greeter brought Evans to the attention of the security guard, Skaggs. Skaggs followed him back to the automotive department, where he placed a power washer in a shopping cart. Skaggs placed his pink sticker on the power washer, and then went to the customer service counter with it. Evans was able to obtain a refund for the purchase price, getting a gift card in the amount of \$317.96 (\$299.96 for the item and \$18.00 in sale tax). Skaggs then told Evans there was a “problem with his return” and took him to the back of the store, where Skaggs told Evans what she had witnessed.

Skaggs had Evans sign an acknowledgement that he was barred from Wal-mart, and contacted the police. Officer Baker responded, arrested Evans and eventually took him to jail.

At trial, Evans testified, along with his girlfriend, Billingsley, that he’d never returned at item at Wal-mart, something the Commonwealth was able to refute. The jury was instructed on both felony and misdemeanor theft, and Evans was convicted of felony TBUT. He appealed.

**ISSUE:** Is an item valued at less than \$300, when the tax places the total refund as over \$300, sufficient to charge with felony theft?

**HOLDING:** Yes

**DISCUSSION:** Evans argued that he did not, in fact, deprive Wal-mart of any property, because he had the gift card in his possession for only a short time, nor did he make any attempt to redeem it. The Court, however, quickly upheld the jury’s decision to convict Evans for felony theft.

### **Wilson v. Com.**

**2007 WL 29448 (Ky. App. 2007)**

**FACTS:** Wilson was indicted on three counts of receiving stolen property: a utility trailer with a log splitter, an ATV and a lawn tractor. Each item was allegedly worth over \$300. The owner of the utility trailer/log splitter testified that their value, together, was over \$2400, and that he received them back in essentially the same condition as they were when stolen. The owner of the ATV testified that it was worth

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<sup>1</sup> McClellan v. Com., 715 S.W.2d 464 (Ky. 1986).

approximately \$7,800, and that when he got it back, it had been “ridden quite a bit” and was “covered in mud.” The owner of the lawn tractor did not receive her item back, however, because her insurance company had already paid her for its value, but testified that it was worth over \$300.

Wilson argued at trial that “the Commonwealth had failed to establish the value of any of the property at the time it came into Wilson’s possession.” The trial court concluded, however, that the “jury could determine the value of the stolen items.” Wilson was convicted.

**ISSUE:** Must a witness testify as to the value of a stolen item during trial?

**HOLDING:** Yes

**DISCUSSION:** The Court noted that in this case, there was sufficient testimony that the utility trailer/log splitter and the ATV were in essentially the same condition, and had not “substantially depreciated” at the time Wilson came into possession of it. However, the Court agreed that the “evidence relating to the” lawn tractor “was not sufficient for the jury to make an informed decision as to its value.” That victim did not “testify as to when she purchased the lawn tractor, to its original purchase price, or to the amount she received from her insurance company.” The jury was given no information as to “whether the lawn tractor was in working order” nor was it given “sufficient descriptive testimony” or photos to “make a reasonable inference as to its value.” Although an owner may give an opinion as to value, they must provide a “factual basis” for their opinion.

The Court upheld the convictions for the utility trailer/log splitter and the ATV, but reversed the conviction for the lawn tractor.

## ***PENAL CODE – WANTON ENDANGERMENT***

**Prater v. Com.**  
**2007 WL 625081 (Ky. App. 2007)**

**FACTS:** On Nov. 9, 2003, at about 7 p.m., McGinnis was driving westbound on the Mountain Parkway in Magoffin County. He saw a white Crown Victoria (later discovered to be driven by Prater) approaching him, “going eastbound ... on the shoulder of the westbound lane” at about 50-55 mph. McGinnis was forced to swerve to the left, and Prater then hit him, causing McGinnis’s vehicle to spin. Prater struck another vehicle, driven by Evans (and occupied as well by his wife and two children), head-on. Hurley, in yet another vehicle, struck the Evans’ vehicle. McGinnis and Hurley were uninjured, but all of the members of the Evans family suffered injuries. Ashley, the 12-year old daughter, became a paraplegic and further, due to abdominal injuries had to have a colostomy and can no longer eat solid foods. She is also unable to attend school.

Troopers McCarty and Dials (KSP) responded. They interviewed Prater at the hospital, and did an HGN test. They believed she was intoxicated on drugs or alcohol, and later testing indicated that she had, in her possession, two oxycodone tablets, three carisoprodol (Soma) tablets and a broken tablet of alprazolam (Xanax) Her blood testing showed a “therapeutic level of Xanax” and there was a suggestion of other drugs in her urine testing, including possibly hydrocodone or oxycodone.

Prater was indicted on First-Degree Assault, Second-Degree Wanton Endangerment, and DUI, along with related charges. (The DUI charge was later amended to a second offense.) She was eventually convicted on most of the charges, and appealed.

**ISSUE:** Is evidence of drug impairment sufficient to charge an individual with a wanton offense?

**HOLDING:** Yes

**DISCUSSION:** The Court noted that the Assault and Wanton Endangerment charges both involve “an element of wanton conduct.” Prater argued, however, that her behavior was, at worst, negligent, not wanton. She also noted that there was little proof of intoxication, but the troopers had testified as to her performance on the HGN test and her “inability to conduct a conversation, slurred speech, glassy eyes and lethargic mannerisms.” There was no indication that she’d suffered acute trauma in the wreck, as to account for her behavior. Trooper McCarty testified that the evidence at the scene clearly indicated she’d been driving on the westbound shoulder. The Commonwealth also showed that she “had traces of at least two drugs in her system that could impair driving.” That was sufficient to “establish that Prater engaged in wanton conduct and not just civil negligence.”

Prater’s convictions were affirmed.

### ***PENAL CODE - IMPERSONATING***

**Buckman v. Com.**  
**2007 WL 858815 (Ky. 2007)**

**FACTS:** In the late summer of 2002, “three unusual robberies began in Louisville which had the unusual feature of having the perpetrators pose as policemen in order to subdue the victims before robbing them.” In the first case, the victims were approached by two men, driving a vehicle with police lights, and they were robbed at gunpoint. In the second case, a man with a badge around his neck tried to force entry into an apartment, and eventually, the victims were persuaded to come outside, “where they spotted a white Crown Victoria with tinted windows and police lights.” They were robbed at gunpoint. The same day, a victim in a nearby apartment complex was approached by a similar vehicle, and the man who emerged ordered them to the ground. In both instances, the victims were able to immediately stop a real police officer and report the theft, and in the second case, the officer pursued the Crown Victoria and captured one of the two occupants. The second occupant, Buckman, got away initially, but was apprehended in another state.

The owner of the Crown Victoria, Ohlgschlager, reported that the first victim’s car, which was taken in the robbery, was behind her apartment building, and stated that she had purchased the Crown Victoria and the lights for her boyfriend, apparently the first suspect, Hirschauer. Buckman’s girlfriend, Sanders, lived with Ohlgschlager, and she gave a statement that incriminated Buckman. Sanders was later arrested with Buckman, and did not appear at Buckman’s trial.

However, the trial court permitted Sanders’ taped statement to be admitted against Buckman. He was eventually convicted of multiple counts of robbery, impersonating an officer and theft. Buckman appealed.

**ISSUE:** May an individual be charged with multiple counts of impersonating a peace officer during a single criminal occurrence?

**HOLDING:** Yes

**DISCUSSION:** The Court noted that Sanders' statements were admitted "pursuant to KRE 804(b)(5), a hearsay exception which allows testimony normally excluded by the hearsay rule where the statement is offered against a party that has engaged or acquiesced in wrongdoing that was intended to, and did, procure the unavailability of the witness." The Court noted that Crawford<sup>2</sup> "expressly admitted" such statements as subject to "the rule of forfeiture by wrongdoing ... extinguishes confrontation claims on essentially equitable grounds." There was evidence presented that Sanders' absence was procured by Ford, on behalf of Buckman. (Buckman denied any connection to Ford, but the prosecution showed that Buckman was the father of Ford's child and that she had come to court with him previously.) The Court found that Buckman was not "unduly prejudiced with respect" to the use of the Sanders' tape, and found there was no error in admitting it.

Buckman argued that it was inappropriate to charge him with three counts of impersonating a peace officer during a single occasion of robbery. The Court stated, however, that an offense is committed "each time [the perpetrator] intends to pass himself off as a member of law enforcement to another." Buckman impersonated an officer to each of three victims, while robbing each of them, and as such, it was appropriate to charge him for each of those three victims.

Buckman also argued that it was improper to charge him with both Robbery and Theft, and the Court agreed, finding that convicting him on both was a violation of double jeopardy. The Theft charge was dismissed.

Buckman's convictions, except for the Theft charge, were upheld.

## ***PENAL CODE – RECEIVING STOLEN PROPERTY***

### **Riley v. Com.**

**2007 WL 867637 (Ky. App. 2007)**

**FACTS:** On Jan. 26, 2004, Deputy Adams, (Kenton Co. SO), received a call for assistance from Lakeside Park officers. Those officers had "received an anonymous complaint that a car was being driven slowly in a suspicious manner in the Lakeside Park area." By the time Deputy Adams arrived, the vehicle was stopped, in front of a "dark house." The officers could see "two open, forty-ounce bottles of beer on the front floorboard on the passenger's side" and footprints in the snow leading from that door to the rear of the house. The vehicle was still occupied by the driver, Bravard. Bravard agreed to a search, which yielded several electronic items that were later identified as having been stolen from parked cars in the area. Bravard was arrested, and she implicated Bobby and Stanley Riley in the thefts. Bobby Riley was arrested for complicity in receiving stolen property.

At trial, Bravard testified that she had been driving around with the Rileys, looking for "Mike's house." She recalled Bobby tossing some items in the back seat, but didn't recall any of the stolen items as she had

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<sup>2</sup> 541 U.S. 36 (2004)

been “resting her head on the steering wheel due to an earlier head injury.” She had also, apparently, made a statement on the night of her arrest that “the Rileys were in the area breaking into vehicles, stealing items and placing the stolen items into her vehicle.” Riley was ultimately convicted, and appealed.

**ISSUE:** May victims testify as to the value of their stolen property?

**HOLDING:** Yes

**DISCUSSION:** Riley argued that the “Commonwealth failed to prove that he had placed the stolen items in Bravard’s car, and that it failed to introduce testimony identifying the property found in the car as the same property that was stolen from the victims.” The Court noted that the “essential elements of a crime may be proven by circumstantial evidence.”<sup>3</sup> The Court further noted that a business card from one of the victims was found within the bag that contained a laptop computer, a DVD drive and a label maker. There was also information in the compact disc player case that included the ID of the owner. As such, it was reasonable for the jury to find that the items were stolen from the stated victims. In addition, the Court agreed that the victims’ stated values for the property was sufficiently detailed to establish the value of that property – and that it was not necessary “for the witnesses to provide information as to the brand of the items, the time of the purchase or the purchase price.”

Riley also argued that there was insufficient proof that the crime actually occurred in Kenton County. The court noted that the fact that the original call was from the Lakeside Park police, and that the call was answered by a Kenton County deputy sheriff, was sufficient to prove the crime occurred in Kenton County.

### ***PENAL CODE – FLEEING AND EVADING***

#### **Perry v. Com.**

2007 WL 290399 (Ky. App. 2007)

**FACTS:** On Dec. 6, 2004, Deputy Stevens (Pulaski Co. SO) was patrolling when he spotting Perry “driving in the opposite direction.” Deputy Stevens believed Perry’s operator’s license was suspended, so he attempted a traffic stop. Perry, however, speeded up, and Stevens pursued. When they reached a dead end on the road, “Perry jumped out of his car and ran toward the lake.” A passenger in the vehicle, Gregory, “immediately surrendered to Deputy Stevens.” Gregory gave the deputy a bag of methamphetamine. Perry was later captured and arrested.

Both men were charged with trafficking, and Perry was further charged with first-degree fleeing and evading and PFO. Perry was acquitted of the trafficking charge, but convicted on the other two charges. Perry appealed.

**ISSUE:** Is leading an officer on a high-speed chase, on narrow country roads, sufficient to charge with First-Degree Fleeing and Evading?

**HOLDING:** Yes

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<sup>3</sup> Johnson v. Com., 184 S.W.3d 544 (Ky. 2005)

**DISCUSSION:** Perry argued that his actions were not sufficient for the first-degree offense, in that the Commonwealth lacked sufficient evidence that his actions put anyone at “substantial risk of serious physical injury or death.” The deputy had testified that the road in question, Edgewater Road, had a speed limit of 25 miles per hour, and that it was a “narrow country, road, barely two lanes wide, a road that is not safe at high speed.” Perry argued that Stevens’s statements were in conflict with what he had told the Grand Jury, but that information was not placed before the judge at trial.

The appellate court, however, even accepting the statement from Stevens’ grand jury testimony that was later entered into the record, was “not persuaded that there [was] a substantial inconsistency between the deputy’s statements.” Perry also argued that his vehicle (described as sporty) could handle the curving road better than the “cumbersome police cruiser.” Gregory statements also supported that Perry was “flying” and that Gregory was “pretty scared” by Perry’s driving. The Court noted that the jury was well aware that “Gregory may have had an incentive to” bolster his earlier statements as to Perry’s speed, and chose to believe him anyway.

Perry argued that he couldn’t have been attempting to flee, as he drove down a dead-end road, forgetting, apparently, that he tried to flee on foot, and further argued that his conduct put no one at risk. The Court noted that “[n]o evidence was presented that there was any automobile or pedestrian traffic in the road, that the road was populated, that he had disregarded any traffic signals or stop signs, or that he was driving under the influence of drugs or alcohol.” However, the court found that the testimony of the two eyewitnesses sufficient for the jury to find that “Perry’s conduct created a substantial risk of serious physical injury to himself, to his passenger, to Deputy Stevens, or to any drivers or pedestrians who might have come along the roadway.”

Perry’s conviction was affirmed.

*NOTE: Although not raised as an issue in this case, there is an anomaly in Fleeing & Evading Police (KRS 520.095/100) that requires that the subject in the first degree be fleeing from a police officer, and in the second degree, to be fleeing from a peace officer. This might become an issue when the officer is not a police officer, but is a peace officer, as deputy sheriffs have been held to be.*

## ***PENAL CODE – RAPE***

**Patton v. Com.**  
**2007 WL 29377 (Ky. App. 2007)**

**FACTS:** On July 11, 2001, the 16-year-old female victim, J.M. “was dropped off at the Magoffin Ccounty Courthouse” to perform community service for a juvenile offense. Patton, a custodian, was her supervisor. On the day in question, J.M. claimed that Patton forced her to have sexual intercourse, but “Patton maintained the intercourse was consensual.” After the prosecution’s case was presented, Patton moved for a directed verdict in his favor, arguing that there was insufficient evidence to prove forcible compulsion. J.M. testified that Patton asked her if she wanted to have sex with him, to which she replied no. Later that day, she claimed that she and Patton went into the jury room and that he “pinned her against the wall with his hands.” She testified that she told him to stop, but that he got her down on the ground, held her down, and had intercourse with her. She told Patton she had to go to the bathroom and left the room, and told her cousin, Ray, that she’d been raped. However, she stayed at the courthouse and was sitting next to Patton when her father arrived to pick her up. She testified that she had told no one of the

rape that day, because Patton had threatened to hurt her if she did. She told her mother about it the next day. Patton, however, testified that J.M. had initiated the sexual conduct and that her only concern was that she not get pregnant.

The Court denied the motion and ultimately, Patton was convicted of First-Degree Rape. He appealed.

**ISSUE:** Is the testimony of a sexual assault victim sufficient to prove that the offense occurred?

**HOLDING:** Yes

**DISCUSSION:** Patton argued that J.M.'s testimony should have been disregarded as she lacked credibility, and that her testimony was not enough to prove forcible compulsion. The Court, however, looked to Fletcher v. Com.<sup>4</sup> and Com. v. Suttles<sup>5</sup> to find that a "rape victim's testimony alone was sufficient to support the conviction.

Patton's conviction was affirmed.

### ***PENAL CODE - INCEST***

Jones v. Com.

2007 WL 288280 (Ky. App. 2007)

**FACTS:** Jones was accused of Incest because he had a sexual relationship with his stepdaughter, who was 20 years old at the outset. (The relationship had apparently lasted from 1996 through 2003.) Jones argued that the Incest statute did not proscribe such a relationship, when the parties are both adults. However, he was advised to, and did plead guilty, but later appealed for a new trial.

**ISSUE:** Is a sexual relationship between a stepfather and an adult stepdaughter incest?

**HOLDING:** Yes

**DISCUSSION:** Jones argued that the Incest law only applied when the relationship involved a "child" - someone under 18. The Court, however, found that the purpose of the statute was to "prohibit sexual intercourse between persons within certain proscribed degrees of relationship to each other." Using the common definition of a stepchild, the Court concluded that it was appropriate to "interpret 'stepchild' broadly as meaning a son or daughter of one's wife or husband" and that it "encompass[ed] both an adult and minor child of one's wife or husband." In addition, the Court noted that the penalty section of the Incest law had been recently revised, and "specifically recognized that incest committed by two consenting adults constituted a Class C Felony." That provision assisted the Court in "discerning legislative intent and purpose."

Jones' conviction was affirmed.

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<sup>4</sup> 80 S.W. 3d 424 (Ky. 2002)

<sup>5</sup> 63 S.W.2d 780 (1933)

## ***PENAL CODE - ESCAPE***

### **Chatman v. Com.**

**2007 WL 29403 (Ky. App. 2007)**

**FACTS:** Chatman was on parole for drug trafficking. On May 26, he met with his parole officer, Huggins. Chatman had previously taken a drug test, and it had come back as "dirty." Huggins had already made arrangements to have an officer at the office that day to take custody of Chatman for the violation.

Huggins told Chatman about the results of the test and that he would be going back to jail. The officer joined the two men as they left. Chatman was "not restrained in any fashion." Officer Mayfield asked Chatman "whether he would cause them any trouble" and Chatman had responded that he would not. As they left the building, Officer Mayfield was in front of Chatman, and Huggins behind. When they reached the street, Chatman ran, and was captured several blocks away by another officer. He was subsequently charged with Second-Degree Escape and his parole violation, and eventually convicted.

Chatman appealed the Escape conviction.

**ISSUE:** May a person being taken back to jail for a parole violation, who is not restrained but who runs away, be charged with Escape?

**HOLDING:** Yes

**DISCUSSION:** Chatman argued that he did not believe he was actually in custody, or under arrest, because he had not been restrained. As such, he could not be considered to have escaped. The evidence indicated that he ran immediately upon leaving the building, and that "he did not stop while being chased" – and that indicated that "he believed he was escaping from something." The Court looked to the definition of escape, and determined that "Chatman was clearly in custody at the time he ran away."

Chatman's conviction was affirmed.

## ***RESTITUTION***

### **Linde v. Com.**

**2007 WL 121860 (Ky. App. 2007)**

**FACTS:** On Jan. 24, 2004, KSP officers pursued Linde through Boone and Gallatin counties. The chase ended when Linde struck several KSP cruisers and injured one of the troopers. He was indicted in Boone County in multiple charges related to the incident. During plea negotiations, Linde agreed to restitution in the amount of \$18,437.01.

After serving several months, Linde sought shock probation, and was denied. Some months later, he contested the restitution order, arguing that his insurance carrier had paid for at least some of the damages, and that KSP may have also received compensation from its own carrier. As such, Linde argued, he "should be relieved of any obligation to pay restitution" because KSP would then be unjustly enriched by being twice compensated for the same damages.

**ISSUE:** May a person be required to pay restitution even if the damages are already paid for by insurance?

**HOLDING:** Yes

**DISCUSSION:** The Court noted that Linde had adequate prior notice and opportunity to object to paying the restitution, since he was aware from the beginning that KSP had made a demand for payment from his insurance company, and further knew that some money had, apparently, already been paid. With "reasonable diligence" at the time of his plea negotiations, he could have discovered how much had been paid.

Linde's motion was denied.

**Fiedler v. Com.**  
**2007 WL 625139 (Ky. App. 2007)**

**FACTS:** Micro-Med was burglarized twice, on Feb. 27 and March 2, 2005. Fiedler pled guilty to involvement only in the second burglary. In addition to sentencing, Fiedler and her co-defendants were involved in proceedings to determine how much restitution was owed.

As a result of the burglaries, Micro-Med spent over \$11,000 repairing the damage and adding security features, such as new doors, to its building. The trial court found Fiedler, and her co-defendants, liable for not only the actual losses, including the initial damage and what had been actually stolen, but also for the improvements that the company undertook, as well as the additional, temporary security that was in place until the improvements could be made. Fiedler appealed the restitution order.

**ISSUE:** May security improvements made after a break-in be claimed as restitution?

**HOLDING:** No

**DISCUSSION:** The Court agreed that the improvements to the building made as a result of the break-ins were not "direct, out-of-pocket losses" for which she could be ordered to pay restitution. Requiring her to pay restitution in that amount would be an "additional punishment" to which Fiedler could not be subjected under KRS 533.030(3).

The case was remanded back to the trial court for further proceedings.

## ***DOMESTIC VIOLENCE***

**Taylor v. Houchens**  
**2007 WL 190246 (Ky. App. 2007)**

**FACTS:** On Aug. 27, 2005, Houchens obtained an EPO against Taylor. Taylor and Houchens were never married, but did have a child in common. On that day, she "received an allegedly upsetting phone call from Taylor." On Sept. 6, the court issued a DVO, upon Houchens's assertions that "Taylor threatened her with

bodily harm and that he had been stalking her.” Taylor admitted the telephone call, but denied any threatening statements..

Taylor appealed the issuance of the DVO.

**ISSUE:** Does the issuance of a DVO require some evidence that an unlawful act might be repeated?

**HOLDING:** Yes

**DISCUSSION:** Taylor asserted, first, that Houchens could not have been in any fear from his telephone call, because he made the call from Minnesota. (Taylor was a long-distance truck driver and only in Christian County for a few days at a time, twice a month.) The only witness, to part of the conversation, interpreted the “statement as simply a rude comment.” The stalking claim, apparently, was because Taylor “knew that she had gone to the courthouse to obtain an” EPO – but Taylor stated he learned of it from his attorney.

The Court noted that there was “evidence, albeit weak, to support the family court’s finding that Taylor placed Houchens in fear of imminent physical injury, but there is no evidence, such as a pattern of similar conduct, to suggest that a similar act, or any other act of domestic violence, might occur again.” As such, the Court concluded that “there was no evidentiary basis for the issuance of the DVO” although it admitted that the case was a close call, and reversed the issuance of the DVO.

## ***DUI - INTOXILYZER***

### **Lewis v. Com.**

**217 S.W.3d 875 (Ky. App. 2007)**

**FACTS:** On the day in question, Officer Gordon (Carrollton PD) arrested Lewis for DUI. At trial, he testified as to “his certification to operate the Intoxilyzer and as to the steps he took before conducting the test ....” He specifically testified “regarding the initial air blank test, the calibration test which registered .082, the second air blank test, and finally Lewis’ actual test on which he registered .118. In addition, the Court admitted the test printout, which reflected the time and the results of the five checks done by the Intoxilyzer.

During cross examination, Gordon was questioned about “whether any aspect of the GAC test reflected an alcohol simulator analysis,” to which Gordon replied that “such information had not been discussed or provided in his training.”

Lewis moved to have the results of the test struck, because no aspect of the test reflected the “alcohol simulator analysis” as required by Com. v. Roberts<sup>6</sup> and the relevant regulation.<sup>7</sup> However, he was convicted, and then appealed.

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<sup>6</sup> 122 S.W.3d 524 (Ky. 2003)

<sup>7</sup> 500 KAR 8:030

**ISSUE:** Is the ambient air blank test on the Intoxilyzer the alcohol simulator analysis required by state regulation?

**HOLDING:** Yes

**DISCUSSION:** The Court reviewed the regulation which required, as one of the steps, an “alcohol simulator analysis.” The Court noted that the five steps involve three “ambient air blank tests” which are “designed to insure that no lingering alcohol remains in the testing chamber.” The calibration check, the second step, involves having a “solution having a known alcohol concentration of .08 ... introduced into the machine’s testing chamber to check its calibration.” The Court found that part of the test is the “alcohol simulator analysis” required by the regulation, and that the printout properly recorded each of the steps in the test.

Lewis’ conviction was upheld.

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## ***DUI - FSTs***

### **Bridgers v. Com.**

**2007 WL 121846 (Ky. App. 2007)**

**FACTS:** On Oct. 25, 2000, Trooper Crumpton (KSP) saw a vehicle, driven by Bridgers, cross the centerline of Hwy 55 twice, and then cross the fog line twice, near Taylorsville. Trooper Crumpton then made a traffic stop. He had Bridgers perform the following field sobriety tests: the one-leg stand, the walk-and-turn, the horizontal gaze nystagmus (HGN) and the preliminary breath test. Bridgers’ performance on the FSTs led to Crumpton arresting him for DUI, and following a search, he was further charged with possession of marijuana and drug paraphernalia (a pipe). Bridgers registered a 0.129 on the Intoxilyzer.

Bridgers was convicted of all charges, and appealed.

**ISSUE:** Does an officer have to be qualified as an expert to testify as to the results of field sobriety tests?

**HOLDING:** No

**DISCUSSION:** Bridgers argued that the field sobriety test evidence “was technical in nature and therefore subject to the trial court’s gate-keeping function” as discussed in Daubert v. Merrell Dow Pharmaceuticals.<sup>8</sup> Bridgers relied upon a Maryland District Court case, which held that FSTs could not be used to “prove a specific blood alcohol content” and that officers could give only “lay opinion testimony” concerning their observations of the performance of the test.

The Court noted that the trial court did not require the Commonwealth to prove the “field sobriety testing was scientifically valid,” but did require them to show that the “tests were properly carried out by Trooper Crumpton.” The Court viewed the videotape. Bridgers complained that the walk-and-turn was done incorrectly, because the “ground where Bridgers was required to perform the test was not level” – but the Court “held that Bridgers could address that objection through cross-examination.” (However, it did not

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<sup>8</sup> 509 U.S. 579 (1993)

come up again, because Crumpton noted that Bridgers actually passed that test.) The Court noted that it had previously held that FSTs are admissible and the officers “may offer both lay and expert testimony that a [subject] was intoxicated.”<sup>9</sup>

Bridgers also complained that although Crumpton testified about the Intoxilyzer and stated that it was working, the Commonwealth did not “offer any evidence concerning the machine’s maintenance records.” At the time of the trial, the Court noted that the case of Wirth v. Com. established the “foundation requirements for the introduction of breath tests results.”<sup>10</sup> However, the Court had since revisited Wirth and clarified that the Commonwealth could satisfy the requirements “by relying solely on the testimony of the operator so long as the documentary evidence, i.e. the service records of the machine and the test ticket produced at the time of the test, are properly admitted.” In this case, “the service records of the machine were not introduced.” However, the Court found that while this was an error, it was a harmless error “in light of the other testimony indicating Bridgers was intoxicated.”

The Court further noted that breath testing “has been existence for a long time” and while perhaps not flawless, “has sufficient reliability to be admissible.” Requiring detailed testimony as to the science of the test “would only serve to confuse the jury.”

Finally, Bridgers argued that there was no evidence that he was subjected to the breath testing within two hours of the stop, but the Court noted that the videotape showed the “time and date of the stop and arrest” and that the test ticket also marked that time and date.

Bridgers’ conviction was affirmed.

## ***METHAMPHETAMINE***

### **Roadhouse v. Com.**

**2007 WL 490974 (Ky. App. 2007)**

**FACTS:** On Feb. 8, 2005, Sweeney’s parole officers “decided to check whether he was compliant with his curfew.” Officers Gray and Galloway “noticed several cars in the yard and a bright light in the garage when they arrived.” Sweeney answered the door and he apparently agreed to the officers checking the garage. When the two officers approached the garage, they “smelled a strong chemical odor which became noticeable at a distance of eight to ten feet.” At that time, “[t]heir eyes began to water and they felt a burning sensation in their throats.”

Once the garage door was open, the officers “saw a methamphetamine lab which appeared to be in use.” Roadhouse and Ogle were “standing beside the equipment wearing disposable face masks” and were startled by the entry. Both men were arrested. In particular, “Galloway noted that Roadhouse seemed to be under the influence and exhibited sores on his face characteristic of people who ingest lithium.” The two officers were not trained in lab entry, and called for assistance.

All three men were indicted on manufacturing methamphetamine, possession anhydrous ammonia in an unapproved container with intent to manufacture, and possession of methamphetamine; Sweeney

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<sup>9</sup> See Kidd v. Com. 146 S.W.3d 400 (Ky. App. 2004) and Com. v. Rhodes, 949 S.W.2d 621 (Ky. App. 1996)

<sup>10</sup> 939 S.W.2d 78 (Ky. 1996)

eventually pled guilty and testified against his accomplices. Sweeney admitted to using methamphetamine, but denied being a part of the manufacturing. Roadhouse and Ogle testified that they were not part of the manufacturing, but had been hidden and/or locked in the garage so that the parole officers did not see them. Roadhouse was convicted, and appealed.

**ISSUE:** Is the testimony of a knowledgeable officer sufficient to prove that a substance is anhydrous ammonia?

**HOLDING:** Yes

**DISCUSSION:** Roadhouse argued that the Commonwealth failed to prove beyond a reasonable doubt that he possessed anhydrous ammonia. He further argued that being convicted for two Class B felonies led to a longer sentence than he would have gotten with a single conviction. In this case, the anhydrous ammonia was apparently stored in a "garden sprayer," and was, in fact, never actually tested by a chemist or the crime lab because of its "extremely dangerous nature." The prosecution relied instead upon the testimony of Sgt. Hill, of the Louisville Metro PD, who had been a team member in the "dismantling of at least fifteen clandestine labs." Sgt. Hill described in detail the local protocols in place to handle a clan lab and how the "garden sprayer had been modified by drilling holes and attaching PVC pipes with shut-off valves and plastic tubing" and contained a quantity of liquid. In fact, the chemical process described resulted in the actual manufacture of anhydrous ammonia by, in effect, a distillation process.

The Court looked to the case of Fulcher v. Com., which stated the testimony of an officer that a particular liquid substance was anhydrous ammonia was sufficient to prove that fact.<sup>11</sup>

The Jefferson Circuit Court judgment was affirmed.

**Brooks v. Com.**  
217 S.W.3d 219 (Ky. 2007)

**FACTS:** As a result of a lab found in his residence, Brooks was tried and convicted of both manufacturing methamphetamine and trafficking in methamphetamine, along with related charges. He argued that conviction on both was inappropriate double jeopardy.

**ISSUE:** May an individual be convicted of both manufacturing methamphetamine and trafficking in methamphetamine?

**HOLDING:** Yes

**DISCUSSION:** The Court found it necessary to review the history of the statutes specific to methamphetamine. Prior to 1998, methamphetamine was simply included in with the rest of the Schedule I and II drugs, and manufacturing was included with trafficking. However, later changes excluded manufacturing methamphetamine from the general trafficking statute, making them two separate offenses. After much discussion concerning the rules of statutory construction, the Court concluded that it was not double jeopardy to charge or convict him of both.

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<sup>11</sup> 149 S.W.3d (Ky. 2004)

Brooks' conviction was affirmed.

## ***SEARCH & SEIZURE – CARROLL***

### **Jasper v. Com.**

2007 WL 625350 (Ky. App. 2007)

**FACTS:** Upon receiving information from a CI that Jasper was selling crack, officers in Fayette County "set up a controlled drug buy." When Jasper arrived, the officers "stopped his automobile and searched him and his vehicle." They found marijuana and 15.8 grams of cocaine. They also engaged in a "knock-and-talk" at his residence and found scales and razor blades.

Jasper was indicted, and requested suppression. When that was denied, he took a conditional guilty plea and appealed.

**ISSUE:** May officers search a person found in a vehicle, when doing an lawful search under the vehicle exception search (Carroll)?

**HOLDING:** Yes

**DISCUSSION:** The Court reviewed the suppression hearing, during which only one witness, Detective Patrick, testified.<sup>12</sup> The Court agreed "with the circuit court that the stop and search of Jasper's vehicle and his person was justified by the automobile exception to the warrant requirement" which "allows police officers to stop and search vehicles if they have probable cause for doing so."<sup>13</sup> The court concluded that, since Jasper showed up as planned, that he "showed up to complete the planned drug deal." As such, the Court agreed that the officers "had authority to stop the vehicle and search it without a search warrant."

Jasper further argued that "a search pursuant to the automobile exception to the search warrant requirement does not extend to the person." However, earlier case law indicated that Kentucky had found otherwise.<sup>14</sup> However, the court concluded that even if such a search was not permitted under the automobile exception, that it "was admissible under the inevitable discovery rule" as the search of the vehicle uncovered marijuana, which would have led to Jasper's arrest, and they would have then discovered the cocaine during a search incident to arrest.

Jasper's plea was affirmed.

### **Prather v. Com.**

2007 WL 543394 Ky.App.,2007

On April 11, 2005, members of the Buffalo Trace Narcotics Task Force in Mason County spotted Prather driving. Agent Fegan was familiar with Prather and suspected that he might be driving on a suspended license. He called via radio to confirm that fact. Officer Hamm, Maysville PD, also knew Prather's history and pulled him over. Prather produced a license, but Officer Hamm was able to confirm that Prather's

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<sup>12</sup> The opinion identified Detective Patrick as being a member of the "Fayette County Police Department."

<sup>13</sup> Estep v. Com., 663 S.W.2d 213 (Ky. 1983)

<sup>14</sup> Dunn v. Com., 199 S.W.3d 775 (Ky. App. 2006)

license was suspended. Prather was then arrested. Officers, including Agent Fegan, searched the passenger compartment and found ammunition and pieces of wood that appeared to be from a shotgun stock. Prather denied having a key to the trunk.

Prather was taken to jail, and when searched, the officers found a bag of cocaine and a trunk key. The key was taken back to the scene, where the vehicle remained, and they used the key to access the trunk. Inside, they found digital scales with a white residue and a handgun. Eventually, the vehicle was taken to impound.

Prather was charged, and requested suppression. The trial court found that the search of the passenger compartment was a proper search incident to arrest and that there was further probable cause to search the trunk. Prather then took a conditional guilty plea, and appealed.

**ISSUE:** Is knowledge that a driver's license is likely suspended sufficient reason to make a traffic stop?

**HOLDING:** Yes

**DISCUSSION:** The Court quickly found that "Officer Hamm's knowledge that Prather's license had been suspended was sufficient to satisfy the Terry standard" and that the stop was therefore justified. In this case, the officer had valid reason to suspect that Prather's license was suspended. Prather argued that most people are not arrested for that offense, but are, instead, only cited, but the Court noted that since the license had been suspended for Prather's prior failure to appear on a speeding ticket, an arrest was appropriate.

With regards to the trunk search, the Court concluded that at the time of the search, the officers knew Prather was a convicted felon and that they had found ammunition and pieces of a wooden stock inside the passenger compartment, and that cocaine had been located during the booking search. The Court found that sufficient to justify the search of the trunk.

Prather's plea was upheld.

## ***SEARCH & SEIZURE – VIDEOTAPING***

### **Dao v. Com.**

**2007 WL 419548 (Ky, App. 2007)**

**FACTS:** Dr. Dao was charged with multiple counts of complicity in obtaining a controlled substance (hydrocodone) by fraud. During the course of the investigation, officers involved in the investigation had set up video surveillance of a hotel room rented by Dao for a meeting with an informant. Dao argued at trial that he had a "legitimate expectation of privacy because he had paid for the room" and that the evidence should have been suppressed. The trial court denied the suppression motion and Dao was eventually convicted. Dao then appealed.

**ISSUE:** Is videotaping done with the consent of one of the participants a violation of privacy?

**HOLDING:** No

**DISCUSSION:** The Court noted that the "surveillance was done with the knowledge and consent of [the informant] and that under Kentucky law, that was not eavesdropping. The Court affirmed the judgment.

Jackson v. Com.  
2007 WL 541931 (Ky. App. 2007)

**FACTS:** On Sept. 19, 2001, a paid informant of the Paducah PD met with Jackson and bought cocaine. Prior to this transaction, a Paducah officer was positioned with a video camera in a location that would permit him to capture the transaction, and the informant, and his car, was outfitted with an audio transmitter. Officers parked nearby so that they "could hear and record the" transmission. After several attempts, the transaction was made.

Jackson was indicted, and eventually, convicted. He appealed.

**ISSUE:** Is a warrant needed for audio and visual recording of a drug transaction done outside, in the public view?

**HOLDING:** No

**DISCUSSION:** Jackson argued that the officers should have obtained warrants "for their audio and video recordings." However, the Court noted, the "Fourth Amendment is not implicated by disclosures voluntarily made to others, such as Jackson's statements to the informants, or by activities carried on within a public place, such as the street outside Jackson's residence." Further, if the "electronically recorded conversations" have been approved by a party to the conversation, they are not in violation of the federal Crime Control Act.

Jackson's conviction was affirmed.

## ***SEARCH & SEIZURE – TERRY***

Com. v. Scalf  
2007 WL 625357 (Ky. App. 2007)

**FACTS:** On the day in question, Scalf was "stopped as he walked down a Covington city street in an area known to be a 'high drug area'" Officer Mears later testified that "he and another officer were standing on the sidewalk watching a car being towed when Scalf approached on foot." He and Scalf "engaged ...in conversation." Mears asked Scalf where he was going, and Scalf replied that he was going to a friend's house, but he could not give a name or address, other than Alex and a general direction. "Officer Mears stated that because Scalf appeared to be 'tap dancing around answers,' he became suspicious and asked him if he 'had anything on him' and for permission to search him." Scalf consented, and Mears found heroin in Scalf's back pocket. Scalf, of course, stated that "the officers jumped out of a squad car and started searching him without engaging him in conversation or asking for consent."

The trial court agreed that Scalf's detention was a seizure and that the "officers were unable to demonstrate 'specific and articulable facts which gave rise to reasonable suspicion' justifying the detention." The Court noted that the officers "were aware that [Scalf] had no outstanding warrants and continued their interrogation" beyond the point the court considered reasonable. The trial court found that it was reasonable that Scalf believed he was not free to go, and suppressed the evidence.

The Commonwealth appealed.

**ISSUE:** Are officers permitted to approach someone in public and ask questions?

**HOLDING:** Yes

**DISCUSSION:** The Commonwealth argued that officers are free to "approach anyone in public, engage them in conversation, ask a limited number of routine questions followed by a question about possession of contraband and a request to search." The Court noted that the trial court apparently accepted "Mears' version of the events," rather than Scalf's, but provided no reasons as to why it believed that a reasonable person in his position would not have felt free to end the encounter and leave. The Court looked to Bostick<sup>15</sup> for guidance, and concluded that a "seizure does not occur simply because a police officer approaches an individual and asks a few questions."

The Court concluded that the original encounter did not constitute a seizure and remanded the case back to the trial court for further proceedings.

**Shields v. Com.**  
**2007 WL 866464 (Ky. App. 2007)**

**FACTS:** On Aug. 31, 2004, Officer Sutherland (Owingsville PD) noticed a broken window at a local business. He called for backup and did a "quick check of the building." Officer Everman arrived, and together, they "determined the office had been burglarized." Officer Sutherland drove around the area seeking suspects, and "spotted a car backing out of the parking lot at a doctor's office." The car did not immediately turn on its headlights. Officer Sutherland did not recognize the car, and when he pulled up behind it, he discovered "the license plate partially obscured by mud." He initiated a traffic stop.

When Sutherland approached, he found Browning in the driver's seat and Shields in the passenger seat. Both stated they had gone to the parking lot to have sex. "At that point, Officer Everman arrived at the traffic stop, and he asked Shields to step to the rear of the car for a field interview." There, "Everman noticed Shields's shoes were covered with mud and grass." He frisked Shields "for safety and proceeded to pull \$291.00 in cash from Shields's left pants pocket." Upon being asked, Shields pulled out more cash and checks from his other pocket. The couple was taken to the office for more questioning, and eventually, they were both arrested.

It was learned, during the investigation, that one of the checks was written to the business next to the one that initially found to have been burglarized. After Shields was arrested, the officers learned that business had also been burglarized. Shields was charged with burglary and PFO, and he moved to suppress the evidence found during the frisk. The trial court ruled "that the officers had reasonable suspicion to initiate

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<sup>15</sup> Florida v. Bostick, 501 U.S. 429 (1991); see also Florida v. Royer, 460 U.S. 491 (1983), U.S. v. Drayton, 536 U.S. 194 (2002)

the traffic stop and complete a protective pat down of Shields for the officers' safety." Eventually, Shields was convicted, and he appealed.

**ISSUE:** Is time of night a factor that might justify a pat-down?

**HOLDING:** Yes

**DISCUSSION:** Shields argued that the initial traffic stop was unlawful, and further, that the pat down went beyond the scope of what could be done during such a stop. The Court first addressed the traffic stop, and found that at the least, Browning was violating Kentucky law by having a partially obscured license plate. That alone justified the stop. With regards to the pat down, the Court noted that while it "recognize[d] the delicate balance of governmental intrusion versus private interest in any search and seizure case, [it is] keenly aware of the dangers facing police officers during an investigatory stop." The officers were alone on the street in the early morning hours, preparing to do a "face-to-face interview at close range." The Court found that sufficient to justify the pat down. Finally, the Court looked at the seizure of the cash, which Shields argued was "not justified by the plain feel doctrine." The Court stated the "Officer Everman instinctively and instantaneously removed the lump from Shields's pocket as a matter of protecting the officers' safety."

The decision of the Bath Circuit Court was affirmed.

## ***SEARCH & SEIZURE – TIPS***

### **Patterson v. Com.**

**2007 WL 541923 (Ky. 2007)**

**FACTS:** At about 1 a.m., on Sept. 11, 2003, Detective Gosney (Louisville Metro PD) noticed Patterson outside a bar on Frankfort Ave. Patterson was trying to enter the bar, which "appeared to be closed at the time." Detective Gosney followed Patterson as he walked away with another man. The two men "split up in an alley" and Detective Gosney continued to follow Patterson. At one point, he lost sight of Patterson, but he stayed in the area.

About 20 minutes later, a burglar alarm was activated at a nearby business. When Gosney responded, with other officers, they found a "broken window, blood and a shoe print." Gosney resumed his search for Patterson.

Approximately 20-30 minutes later, Gosney stopped to refuel his vehicle. While doing so, he spotted Patterson, who went behind a Rally's and then reappeared a few minutes later. Gosney confronted him at the door to the gas station and identified himself as an officer. Gosney asked where Patterson had been, but got no answer, and he noticed fresh cuts on Patterson's right arm and forehead. Gosney summoned officers at the scene of the burglary and confirmed that blood had been found, and that the pattern of Patterson's shoe print was similar to the prints found at the scene.

Detective Gosney "handcuffed Patterson and performed a pat down search." He found bulges in Patterson's pockets which "sounded metallic and asked him about the contents. Patterson "suggested that

the detective remove the items." From the pockets, Gosney withdrew "eight watches, one watchband, one bracelet and one coin pendant" – and he immediately arrested Patterson.

While Patterson was taken to the police station, Gosney and Officer Scott searched the area behind the Rally's and found a zippered case contained a pistol in the bushes.

Detective Horn photographed and then released Patterson, believing that he was not under arrest. He hoped, however, to "obtain more evidence" that might connect Patterson with the burglary. At about 10 a.m., a burglary was discovered to have occurred at a nearby business, and it was learned that the items stolen included several watches and a .25 caliber pistol in a suede case. The owner identified the items retrieved from Patterson as items that were stolen.

On Sept. 15, Detectives. Horn and Walker arrested Patterson for Third-Degree Burglary (the first burglary) and First-Degree Burglary, on the second location. He was subsequently released on bond.

On Oct. 21, another business in the area was burglarized, and a small amount of cash and a jacket were taken. Detective Walker identified the burglar, from the videotape, as Patterson. They tried to locate him, and left a card asking him to contact them. Patterson did so, but did not appear as he agreed to do. He was arrested, again, on Oct. 29, pursuant to a warrant.

Eventually, he was convicted on the burglary charges, and took a conditional guilty plea on a charge of possession of a firearm by a convicted felon. Patterson appealed.

**ISSUE:** Is suspicious, but not obviously illegal, behavior, late at night, sufficient to perform a frisk?

**HOLDING:** Yes

**DISCUSSION:** Patterson argued that Detective Gosney "lacked the sufficient 'reasonable suspicion' to perform a pat down for weapons." The Court quickly agreed, however, that given what Detective Gosney knew, "he could reasonably suspect Patterson of being armed" – thus justifying the frisk. Further, when he detected the bulge, "Patterson actually invited him to reach in and take out what was in his pockets." Thus, the Court agreed, he gave consent for the search of his pockets.

After disposing of other issues, the Court upheld Patterson's conviction.

**Howes v. Com.**  
**2007 WL 625276 (Ky. App. 2007)**

**FACTS:** On the day in question, an officer in Magoffin County received a tip that Howes, an employee of a local business, had in her possession controlled substances that she had stolen from that place of business (a home health care facility). The tipster described her vehicle and plate number. The officer made an investigatory vehicle stop, and eventually, Howes was arrested and took a conditional guilty plea. Howes appealed.

**ISSUE:** May a tip from an anonymous (but identifiable) informant be considered reliable?

**HOLDING:** Yes

**DISCUSSION:** The Court noted that the “tipster in this case was an identifiable citizen informant” – although he did not provide his name he did give his place of employment and “basis of knowledge of the crime.” The call was made to the officer’s cell phone, which provided a further way to identify the tipster. The Court further noted that the “tipster was simply a concerned citizen, not a paid police informant.” The court looked to Com. v. Kelly, for guidance, and agreed that “tips from identifiable citizen informers regarding contemporaneously observed criminal acts constitute a sufficient basis for a peace officer to conduct an investigative stop of the identified suspect.” Although Howes attempted to characterize the tip as anonymous, the Court noted that “the tip had inherent indicia of reliability, as the tipster would have known that he could be held accountable for making any false criminal allegations.”

The Court upheld the stop and the denial of the suppression motion. Howes’ conviction was affirmed.

## ***SEARCH & SEIZURE – VEHICLE STOPS***

**Deboy v. Com.**  
214 S.W.3d 926 (Ky. App. 2007)

**FACTS:** On April 29, 2003, Deboy was spotted driving by a Williamsburg officer. The officer had stopped Deboy a few months previously and believed that he was driving on a suspended operator’s license. Along with Deboy, two passengers were in the vehicle, “including Daniel Brown, Deboy’s girlfriend’s son.” Deboy was arrested for driving on the suspended license and searched. During that time, the officer “noticed ‘a lot of movement in the vehicle from the other two passengers.’”

The arresting officer removed the passengers from the vehicle and patted them down, and then proceeded to search the vehicle. He found three handguns, all loaded, one under the front driver’s seat, one under the front passenger’s seat and one under a blanket in the back seat. All three occupants were charged with CCDW, and Deboy was additionally for possession of a handgun by a convicted felon.

Brown was called to testify. He stated that he had borrowed Deboy’s car earlier on the day in question and had placed the weapons where they were found, and that he “failed to remove them before returning the vehicle to Deboy.” Deboy claimed that he had no knowledge of the guns.

Deboy was convicted, and appealed.

**ISSUE:** Is knowledge that a driver’s license is suspended in the recent past sufficient to justify a traffic stop?

**HOLDING:** Yes

**DISCUSSION:** Deboy first claimed that the traffic stop was illegal because the officer lacked “reasonable suspicion” that Deboy was “engaged in criminal activity.”<sup>16</sup> Deboy argued that Collier v. Com. supported his argument that the “prior record of a suspect can never, standing alone, justify a Terry stop.”<sup>17</sup> However, the Court noted, “the officer did not stop Deboy because of his prior record” but instead, “the officer made

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<sup>16</sup> See Simpson v. Com., 834 S.W.2d 686 (Ky. App. 1992)

<sup>17</sup> 713 S.W.2d 827 (Ky. App. 1986)

the stop because he believed that Deboy was committing the offense of driving on a suspended license.” The Court noted that other appellate courts (outside Kentucky) “have consistently held that an officer’s knowledge that a driver’s license was suspended at some relatively recent time is sufficient to create reasonable suspicion of unlawful activity and support an investigatory stop of the vehicle.” Given that the officer had stated that he’d known that Deboy’s license was suspended for a relatively short period of time, less than “several months,” the Court found no error in the trial court’s “determination that reasonable suspicion existed for the officer to make the stop.”

Deboy then argued that the “Commonwealth did not prove he had knowledge the handguns were in the vehicle” and that in fact, the “uncontroverted evidence was that he did not have such knowledge.” The Commonwealth argued that “the evidence was sufficient because it proved Deboy had constructive possession of at least the handgun under his seat.” The Court noted that previous case law had created the general rule that “[t]he contents of an automobile are presumed to be those of one who operates it and is in charge of it, and this applies particularly where the operator is also the owner....”<sup>18</sup>

The Court found that “Deboy was the owner and operator of the vehicle, and the handgun was found under the seat where he had been sitting,” and upheld his conviction.

### Geary v. Com.

2007 WL 543632 (Ky. 2007)

**FACTS:** On Feb. 19, 2004, at about 1:40 a.m., Deputy Thomas (Union Co. SO) noticed a car parked at Doug’s Tanning World in Waverly. Because a number of break-ins had occurred in the area in the past, the deputy decided to investigate and pulled in near the suspect vehicle.

When Deputy Thomas first spotted Geary, Geary was “out of the parked car, apparently getting a soft-drink” from a vending machine. Deputy Thomas spoke to Geary, and Geary “seemed overly nervous while talking to him.” Geary returned to his car and Deputy Thomas approached the vehicle on foot.

As Deputy Thomas approached the vehicle, “he could smell propane.” The driver, Burden, told Deputy Thomas “that they were coming from Evansville and going to Madisonville.” Deputy Thomas was suspicious “because he did not think it made sense for them to be going through Union County if they were headed to Madisonville.” He noted that Burden was “so nervous that he was shaking.”

Deputy Thomas asked if they had any “burglary tools with them, such as pliers.” They denied it, although he “could see a pair of channel-lock pliers laying in the backseat next to another passenger, Jerry Oakley.” When asked for identifying information, Oakley gave a false name and address, but provided the correct information when challenged. Deputy Thomas had Oakley get out and sit on the ground. When he patted him down, he found Oakley to be carrying a walkie-talkie and a torch lighter, both suspicious because such radios are commonly used during the theft of anhydrous ammonia and the lighters are “used to heat pipes to smoke methamphetamine.” Thomas had Burden get out of the car and asked him about burglary tools. Burden gave permission for a search of the trunk. Inside, Thomas “found a propane tank with a loosened valve, an air tank with a discolored brass valve, and a garden hose with a plastic fitting taped to it.” (The brass fitting had turned to a bluish-green color, an indication that it had been exposed to anhydrous

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<sup>18</sup> Dixon v. Com., 149 S.W.3d 426 (Ky. 2004)

ammonia.) The trunk also contained a large duffle bag that “would make it easier to carry the propane tank.”

Thomas told the three men that he knew there was a place with anhydrous a mile away and that he would be checking that site. He expressed his concern for safety. Oakley replied that “No, we haven’t got any, yet.” Thomas took this reply as an admission that they had planned to steal anhydrous ammonia.

Geary, along with the others, was eventually convicted of conspiracy to theft of anhydrous ammonia with intent to manufacture methamphetamine, and PFO 2<sup>nd</sup>. He then appealed.

**ISSUE:** May the presence of a vehicle at a closed business in the middle of the night support an investigatory stop?

**HOLDING:** Yes

**DISCUSSION:** The Court noted that the Circuit Court had “concluded that the totality of the circumstances [as detailed above] justified the investigatory stop made by Deputy Thomas.” “The time and location of the stop, along with the behavior of [Geary] and the presence of the pliers abundantly warranted Deputy Thomas’s suspicion.” The stop was based on a reasonable articulable suspicion and the Court found the motion to suppress was properly denied.

The Court further upheld the conspiracy conviction, finding that the information provided was sufficient to suggest “an agreement among all participants” and that “conspiracy may be and is often proven by circumstantial evidence.”

Geary’s conviction was affirmed.

**Durham v. Com.**  
**2007 WL 1192037 (Ky. App. 2007)**

**FACTS:** On Oct. 22, 2003, Officer Davis (Springfield PD) “observed a vehicle driving erratically.” When Officer Davis checked on the plate, he learned that it was both expired and belonged to a different vehicle, so he stopped it. Hensley was driving the vehicle, with Durham as the passenger. When Hensley opened the window, Davis “detected a strong smell emanating from the car and saw eight cans of starter fluid in the back seat” and a “yellow bucket with white residue in it.” Believing he might be seeing a “rolling methamphetamine lab,” Officer Davis called for assistance, and Deputy Davis (Washington Co. SO) responded.

When the two occupants of the car got out, the officers realized it wasn’t a lab, but only a leaking can of starter fluid. They got consent to search, however, and found a “black bag wedged out of view between the driver’s seat and the console separating the two front seats” that contained methamphetamine, marijuana, rolling papers and a strip of foil. On the passenger side floorboard, they found “numerous battery casings stripped from lithium batteries, strips of lithium and related paraphernalia.” Both occupants of the car were arrested, and each was indicted on trafficking in methamphetamine, possession of methamphetamine and related offenses.

Hensley took a plea prior to trial, and agreed to testify against Durham. At trial, however, Hensley did not appear. Durham requested a directed verdict, arguing that there was no evidence linking him with the contraband found in the vehicle. (In addition, he argued that the “Commonwealth failed to provide discovery concerning a statement allegedly made by Hensley in which he admitted that the black bag was his” although other evidence seemed to indicate that the admission related to the starter fluid and other items that were in immediate view.) The Court denied the motion, and Durham was convicted of possession of the contraband. Durham appealed.

**ISSUE:** May a passenger be considered in constructive possession of contraband found in a vehicle?

**HOLDING:** Yes

**DISCUSSION:** The Court noted that “Kentucky law recognizes the concept of constructive possession with respect to drugs and contraband.”<sup>19</sup> Usually, with vehicle passengers, the “general rule is that “[t]he person who owns or exercises dominion or control over a motor vehicle in which contraband is concealed, is deemed to possess the contraband.”<sup>20</sup> However, the Court stated, “[t]his does not mean, however, that contraband found in an automobile cannot be ‘constructively’ possessed by someone other than the owner or driver.” The Court agreed that the bag was accessible to Durham, as the passenger, and that further evidence was found on the passenger floorboard.

With regards to the statement, the Court noted that the defense counsel was actually present when Hensley made it. As such, there could be no Brady<sup>21</sup> violation for failure to disclose exculpatory evidence to the defense. The trial court’s decision to deny the directed verdict was upheld.

## ***SEARCH & SEIZURE - PLAIN VIEW***

### **Hallum v. Com.**

219 S.W.3d 216 (Ky. App. 2007)

**FACTS:** On Jan. 27, 2004, as a result of a specific complaint, Finnerty, a CPS investigator, requested help from the Hopkins Co. SO to go to the Hallum’s home. In particular, the tip stated that the Hallums were involved in methamphetamine and marijuana.

Upon arrival, Finnerty and the deputies were admitted and eventually gained entry to a room where Finnerty spotted items she knew indicated methamphetamine manufacture. She pointed the items out to Deputy Bean, who was with her in the room for her safety, and he then took over. Deputies Bean and Troutman stayed at the house while Deputy Crick went to get a search warrant.

When Crick returned and the warrant was executed, the deputies found numerous items indicating methamphetamine manufacturing. Eventually, “Finnerty unsubstantiated most of the referral because the children were supervised and they did not appear to be hungry.” She noted that the problems with the

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<sup>19</sup> Burnett v. Com., 31 S.W.3d 878 (Ky. 2000); Pate v. Com., 134 S.W.3d 593 (Ky. 2004); Hargrave v. Com., 724 S.W.2d 202 (Ky. 1986).

<sup>20</sup> Leavall v. Com., 737 S.W.2d 695 (Ky. 1987).

<sup>21</sup> 373 U.S. 83 (1963).

house, which included an illegal electrical hookup, could have been remedied without the children being removed from the household.

Hallum was arrested, and indicted. He moved to suppress the evidence on the grounds that the "evidence was not seized pursuant to a valid search warrant," as it was discovered prior to the issuance of the search warrant. The trial court found that the deputies were there for a valid reason, and were invited in, and denied the motion to suppress.

A side issue that arose during the trial was that the home was incorrectly identified by address on the warrant. However, the deputies conferred with the Commonwealth's attorney prior to the seizure of any evidence, and were told that because the GPS coordinates were correctly noted on the warrant, as well as an accurate description, that the warrant was valid. Hallum did not raise the issue on appeal.

Hallum was convicted on various charges relating to the methamphetamine, and appealed.

**ISSUE:** May officers accompany a social worker on a site visit, and take action based upon evidence found in plain view?

**HOLDING:** Yes

**DISCUSSION:** The Court noted that pursuant to Kentucky law, Finnerty was obligated to investigate the complaint she received. She properly reported the matter to the local officers. She asked for, and received, consent for the party to enter when they arrived. When Finnerty indicated that she needed to look through the entire house, Hallum did not object, but permitted her to enter the room where the lab materials were held. Hallum did not refuse to allow the deputy to accompany her. In fact, the deputy did not seize anything while in the room, but properly waited until he got a search warrant. In addition, additional evidence found in the kitchen was also admissible, as it was found when Deputy Bean went to that room get a drink for one of the children. (He spotted a "corner bag" - which the Court found to be "immediately apparent" as contraband.)

The Hopkins Circuit Court's decision was upheld.

## ***SEARCH & SEIZURE – ROADBLOCKS***

### **Hurley v. Com.**

**2007 WL 29431 (Ky. App. 2007)**

**FACTS:** On May 10, 2004, shortly after midnight, "Hurley was stopped at a roadblock in Laurel County. Sgt. Walker (KSP) later testified that Hurley was fidgety and had glassy eyes with dilated pupils. Upon questioning, Hurley admitting to having taken methamphetamine and Lortab. He was arrested for DUI. Deputy Hamblin (presumably of the Laurel County SO) then took his drug dog and went over Hurley's vehicle. The dog alerted and the officers found methamphetamine in the vehicle.

Hurley later denied having taken methamphetamine and Lortab on the day he was arrested (although admitted to having taken both prior to that day) and denied knowledge of the methamphetamine in the

vehicle. "The vehicle belonged to his mother and Hurley was just one of numerous individuals who had access to the vehicle."

Hurley moved for suppression, arguing that the presence of the dog indicated that the "roadblock was conducted for the express purpose of locating and seizing drugs." The prosecution countered with evidence that the purpose of the roadblock was "traffic safety" and that the dog simply accompanied the officer whenever he was on duty. Trooper Walker stated that the purpose of the roadblock was to "check driver's licenses, registration, proof of insurance and to look for any other safety violations." The Laurel Circuit Court denied the suppression motion.

Hurley was conviction of Possession of a Controlled Substance and DUI. He appealed.

**ISSUE:** May a roadblock be established for traffic safety reasons?

**HOLDING:** Yes

**DISCUSSION:** The Court noted that "[a]utomobile checkpoints or roadblocks must be deemed reasonable in order to comply with the Fourth Amendment."<sup>22</sup> Such roadblocks may not "be conducted for the primary purpose of uncovering evidence of ordinary criminal wrongdoing."<sup>23</sup>

In this case, the roadblock was in accordance with KSP policies and procedures. The dog was with Deputy Hamblin simply because the dog always was, and noted that the "drug dog did not exit the cruiser while the checkpoint was being conducted, and was only used to search Hurley's vehicle after Hurley was arrested."

Hurley raised the decision in Com. v. Buchanan<sup>24</sup> in defense of his position, and the Court quoted extensively from that opinion. Using factors outlined in that opinion, the Court concluded that the checkpoint was "minimally invasive and permitted under the law."

The Laurel Circuit Court's decision to deny the motion to suppress, and Hurley's conviction, were affirmed.

**Smith, Bruin, Hendricks and Conner v. Com.**  
**219 S.W.3d 210 (Ky. App. 2007)**

**FACTS:** On June 18, 2005, after an event at the Kentucky Speedway near Warsaw, KSP set up a checkpoint in Grant County. This roadblock was part of the "Hundred Days of HEAT Campaign" which was intended to reduce traffic-related fatalities during the summer months.

Sgt. Miller set up the roadblock pursuant to KSP policy and chose from a pre-approved list of locations. A press release was sent out statewide concerning the campaign and media announcements were made. Trooper Mills was in charge of the specific checkpoint at issue.

The checkpoint was set up with visibility in mind, to ensure that oncoming motorists would be forewarned. Every vehicle was stopped, until such time as Trooper Mills believed "that it was no longer safe for the

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<sup>22</sup> Michigan Dept. of State Police v. Sitz, 496 U.S. 444 (1990).

<sup>23</sup> City of Indianapolis v. Edmond, 531 U.S. 32 (2000).

<sup>24</sup> 122 S.W. 3d 565 (Ky. 2003)

motorists due to the backed-up traffic caused by the checkpoint." At that time, the checkpoint was shut down and traffic was allowed to thin out, at which time the checkpoint was restarted. Entire groups of vehicles were apparently stopped at a time and the "vehicles were not chosen randomly for a stop, and there was no exercise of discretion involved in choosing which vehicles from the group to stop."

Smith, Bruin, Hendricks and Conner were all stopped at the checkpoint during the course of the day, and all four were charged with DUI. Each moved for suppression, arguing that the "discretionary decisions made by Trooper Mills to stop and restart the checkpoint multiple times" rendered the checkpoints unconstitutional. A joint hearing was held on the issue, and the trial court denied the motions.

All four took conditional guilty pleas, and appealed. At their appeal of right to the Grant County Circuit Court, the Court noted that the procedures were "entirely reasonable," and the case was remanded back to the trial court. The four then requested discretionary review by the Kentucky Court of Appeals.

**ISSUE:** May a checkpoint be stopped and started, for traffic related reasons, and still be found to be lawful?

**HOLDING:** Yes

**DISCUSSION:** The Court noted, as a start, that "stopping motorists at a traffic checkpoint constitutes a seizure under the Fourth Amendment of the United States Constitution." From that point, however, "the question then becomes whether the seizure was reasonable." The Court noted that checkpoints for traffic related reasons, including sobriety checkpoints, are constitutional, so long as the "officers were not permitted to exercise their discretion while conducting the checkpoint."<sup>25</sup>

Further:

For a checkpoint to be constitutional, it must be executed pursuant to a systematic plan, and the officers conducting the stop should not be permitted to exercise their discretion regarding specifically which vehicles to stop.

The Court found that in this situation, the checkpoint was done properly, and was constitutional. Specially, Trooper Miller's decision to "stop and restart the checkpoint multiple times" was done for an appropriate reason.

The Grant Circuit Court's decision was affirmed.

## ***SUSPECT IDENTIFICATION***

**Pritchard v. Com.**  
2007 WL 80035 (Ky. App, 2007)

**FACTS:** On July 1, 2002, Pritchard allegedly "approached a young woman as she was getting into her car as a Shell Five Star market, in Elizabethtown." He reached into the car, struck her in the face and stole her wallet, which was lying on the seat. Officers quickly responded and searched at the nearby motel,

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<sup>25</sup> Delaware v. Prouse, 440 U.S. 648 (1979)

and encountered Van Winkle, the suspect's girlfriend. She gave them her room number and they proceeded there, where they got a consent to search the room.

The officers found \$119 in cash under the mattress, and also found clothing matching the description given by the victim. They also saw, outside the open bathroom window, a "clear plastic bag containing the victim's wallet." After giving the victim a few minutes to calm down, she was taken to the motel, and she identified Pritchard and the clothing.

Van Winkle testified later that Pritchard ran in, tossed the wallet at her and told her he'd gotten it from a "fat bitch at the store" and proceeded into the bathroom. Wanting nothing to do with a robbery, Van Winkle left the room.

Pritchard was convicted of First-Degree Robbery, and appealed.

**ISSUE:** Is a suspect entitled to have counsel present during a show-up?

**HOLDING:** No

**DISCUSSION:** Pritchard appealed on several issues, most of which were quickly dismissed. One issue of note, however, was Pritchard's argument that the victim's identification of him was flawed, "on the grounds that he was not afforded the opportunity to have an attorney present when that identification was made." The Court noted, however, that "Kentucky law is well established that it is not necessary for the police to delay such a 'show-up' identification in order to allow the suspect to have counsel present."<sup>26</sup>

Pritchard's conviction was affirmed.

**Wallace v. Com.**  
**2007 WL 541934 (Ky. 2007)**

**FACTS:** On the day in question, allegedly Wallace and another man entered Horton's apartment and robbed Horton and six of his guests. They were armed and wearing ski masks and "demanded that everyone present empty their pockets and relinquish all of their money." One of the female guests was physically assaulted and thrown to the ground and two others were struck. Horton and another guest, however, were able to subdue the two men when they became distracted.

When the ski masks were removed, one of the perpetrators was a friend of one of the partygoer's cousins, who was expected at the party but who had not yet arrived. The man admitted the cousin "had sent them." One of the men, later identified as Wallace, escaped before the police arrived, but the other man, Durflinger, was arrested.

Sgt. Hellinger (Louisville Metro PD) put together a photo pack that included Wallace. Three witnesses identified Wallace as the man who had fled from the scene. A warrant was issued but Wallace could not be located. More than five months later, however, Wallace turned himself in. Durflinger took a plea that involved testifying against Wallace. Wallace was convicted, and appealed.

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<sup>26</sup> Savage v. Com., 920 S.W.2d 512 (Ky. 1995); Stidham v. Com., 444 S.W.2d 110 (Ky. 1969)

**ISSUE:** May photos in a photo pack be somewhat different from the photo of the suspect, and still be acceptable?

**HOLDING:** Yes

**DISCUSSION:** Wallace objected to the trial court's decision that the "out-of-court photo pack identifications" were admissible. The Court analyzed the situation under the precepts of Neil v. Biggers.<sup>27</sup> First, the Court discussed whether the "identification procedure was suggestive." In this case, Sgt. Hellinger identified Wallace as a suspect and used his photo to generate a photo pack from a computer program – with the computer randomly selecting five other photos based upon parameters set by the officer. Wallace agreed, but asserted that the parameters were not sufficiently specific. (Apparently the parameters included race, age, height and weight.) Wallace argued that there were "prominent disparities between his photo and the others in the pack – in that he "had a thinner face, more facial hair and a darker skin tone than four of the other men in the photos." The trial court recognized the "minor deviations" but overall found that the photo pack was acceptable.

The appellate court reviewed the photo pack as well, and found that the "trial court's characterization of the dissimilarities as minor deviations" was not so erroneous as to warrant reversal on that issue.

In addition, Sgt. Hellinger "recounted details of Durflinger's pre-trial statement and, in so doing, improperly bolstered Durflinger's testimony through prior consistent statements." Such testimony is generally impermissible under KRE 801A(a)(2). However, the Court found that the statements "were details that had not been elicited from Durflinger or that Durflinger did not recall during his testimony," not totally new information. (In addition, Wallace had not objected to the admission of the statements, which limited the ability of the appellate court to rule.)

Wallace's conviction was affirmed.

## ***EVIDENCE - MISCELLANEOUS***

### **Bowman v. Com.**

**2007 WL 542709 (Ky. App. 2007)**

**FACTS:** On April 11, 2005, Sheriff Cox (McLean Co.) was investigating "a propane tank found in a roadside ditch in a rural part of" his county. He "concluded that it contained anhydrous ammonia." Sheriff Cox staked out the property and about at 1:30 a.m. the next morning, he and two of his deputies "witnessed a pickup truck approach the tank." Two passengers got out and hoisted the tank into the truck and then got back into the truck and drove away. The officers stopped the vehicle and arrested all of the occupants. Bowman, one of the passengers, was searched, and the deputy found a "hollowed out pen casing, similar to that used to smoke methamphetamine." Eventually, testing confirmed that the tank contained anhydrous ammonia and the pen casing "had methamphetamine residue."

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<sup>27</sup> 409 U.S. 188 (1972)

Bowman was indicted on possession of drug paraphernalia and possession of anhydrous in an unapproved container with the intent to manufacture methamphetamine." All four defendants were tried together. Bowman was convicted and appealed.

**ISSUE:** Does constructive possession have to be exclusive possession?

**HOLDING:** No

**DISCUSSION:** Bowman argued that the Commonwealth had "failed to prove that he knew of the tank's contents or that he possessed the tank." The Court found that circumstantial evidence, as was in this case, could be used against a defendant, and that it was a jury decision if it was sufficient to support a conviction. In this case, the common meaning of possession included both "actual or constructive" possession, and it did not need to be exclusive possession. "Two or more persons may be in constructive possession of drugs or contraband at the same time."<sup>28</sup> The evidence presented that the tank reeked of anhydrous was sufficient to prove that Bowman knew it contained the substance, particularly when coupled with his possession of the pen casing.

The decision of the McLean Circuit Court was affirmed.

### ***EVIDENCE - MISSING EVIDENCE***

#### **Hill v. Com.**

**2007 WL 858812 (Ky. 2007)**

**FACTS:** Around May 5, 2004, Leitchfield PD officers went to the Whitehead home, but they found only Hill there. The officers spotted drug paraphernalia and went to get a search warrant. They found a number of items used in trafficking in methamphetamine, as well as a set of scales inside a bag with male clothing and "court papers" with Hill's name. The officers did not, however, take the papers into evidence, but only the scales found inside the bag.

Hill was indicted. Prior to trial, Hill attempted to have any mention of the papers excluded from the trial, but was unsuccessful. Hill was convicted, and appealed.

**ISSUE:** Must all evidence be collected?

**HOLDING:** No (but see discussion)

**DISCUSSION:** Among other issues, Hill argued that he was denied due process because the police did not "collect the court papers found in the bag with the scale" and that this indicated "bad faith." He implied "that the court papers would have been collected if they did not contain exculpatory evidence" and that a "missing evidence instruction" should have been given. The Court, however, found that there was nothing to indicate the papers were, in fact, exculpatory and as such, that such an instruction was not required.

Hill's conviction was affirmed.

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<sup>28</sup> Pate v. Com., 134 S.W.3d 593 (Ky. 2004)

## *EVIDENCE – BRADY*

### Bobbitt v. Com.

2006 WL 2708534 (Ky. 2007)

**FACTS:** On April 2, 2004, a Dollar General store in Louisville was robbed. Shortly after it closed, the manager, Clarkson, locked the doors and collected the cash, placing it on top of the safe until the time-delay lock opened. A cashier, Robinson, told Clarkson that “she saw money lying outside on the sidewalk.” Robinson unlocked the door to retrieve the money, and a masked man came in and grabbed Clarkson. She told him where the money was and he released her. Clarkson then triggered the silent alarm from the office. Clarkson was also able to observe Robinson “hide behind a jewelry case” during the robbery. Over \$5200 was taken.

Detectives Arnold and Colebank (Louisville Metro PD) arrived and took a statement. Clarkson reported that “Robinson acted suspiciously that day and she received several phone calls at work, including one from her boyfriend, Kinnard.” She further stated that the robber’s voice sounded like Kinnard’s. Upon being questioned, Robinson admitted having a role in the robbery, and that Bobbitt, a friend of Kinnard, “had approached her about setting up a robbery.” She claimed the robbery was done without Kinnard’s knowledge. She claimed the robbery was supposed to have occurred earlier in the day, in a slightly different manner, and that “she did not know he would enter wearing a ski mask and take the cash.”

The detectives searched Robinson’s room, which she shared with Kinnard at his mother’s home. They found, on the front porch of the house, a sweatshirt and headband matching that worn by the suspect. Inside the bedroom, they found handguns, spent shell casings and “three bindles of crack cocaine.”

Robinson was charged with the robbery, and Kinnard charged with trafficking and possession of the firearm, since he was a convicted felon. (The opinion gives no indication as to why he was not charged with the robbery, since Clarkson had apparently identified his voice as that of the robber’s.)

Once they learned that Bobbitt had an outstanding warrant, the officers tried to arrest him. However, he “did not surrender and a foot chase” ensued, which resulted in Bobbitt suffering an injury and needing emergency medical care. Detective Arnold questioned Bobbitt about the robbery, and he admitted that he knew about it, but denied any involvement. Eventually, he too was arrested, and he and Robinson were both indicted for complicity to robbery.

Robinson pled guilty to facilitation to robbery and agreed to testify. The night before her scheduled appearance to testify, however, she contacted Detective Arnold and “admitted that Kinnard had planned the robbery.” She stated that Bobbitt had been recruited to assist, but that she didn’t know which of the two men actually committed the robbery. As a result, the trial was continued for two weeks. Upon learning that Kinnard had already pled guilty, Bobbitt moved to continue the trial, but was denied.

At trial, Robinson testified that Kinnard had actually done the planning and execution of the robbery, and that Bobbitt was originally supposed to come into the store and commit the actual crime. However, Bobbitt “got spooked” because Clarkson had seen his face, earlier, and refused to do so. (Robinson admitted that

she had lied previously because she was in a relationship with Kinnard, had a child by him, and profited by the robbery.)

Bobbitt was convicted of complicity, and appealed.

**ISSUE:** Are defendants entitled to the entire available videotape of a criminal incident?

**HOLDING:** Yes

**DISCUSSION:** Among other issues, Bobbitt argued that his case was compromised because he was originally only provided (in discovery) with the “robbery time zone” of the surveillance tape. Apparently the Commonwealth had only an edited version of the tape, and provided that to the defense, although the investigator maintained, in his possession, the entire tape. Bobbitt only learned of the “afternoon portion” of the tape the day before the trial, and that video “showed a person coming to the window of the Family Dollar and walking away” - evidence that corroborated other witness testimony. Bobbitt argued that portion of the videotape should be excluded, because the prosecution “had failed to properly disclose that portion of the tape.” The trial court had permitted the introduction of the entire tape. However, the appellate Court stated that “the Commonwealth cannot claim ‘no foul’ because the detective had it” because “Detective Arnold was an agent doing investigation for the Commonwealth and therefore, the Commonwealth had a duty, pursuant to the court’s discovery order, to make it available or provide the [Bobbitt] with a complete surveillance video.”<sup>29</sup> The Court, however, found that in view of the fact that two witnesses testified as to the incident, the evidence was cumulative and found the trial court’s error to be harmless.

Bobbitt’s conviction was affirmed.

*NOTE: In another case, however, the missing evidence might, in fact, be crucial to the defense, and its lack would then seriously compromise the investigation. Investigators should ensure that the file held by the prosecutors reflects all of the evidence in a case.*

## ***EVIDENCE – PHOTOS***

### **Beckner (Hatcher) v. Com. 2007 WL 778632 (Ky. App. 2007)**

**FACTS:** On Nov. 6, 2003, Tankersly and Sexton went to Allen Hatcher’s home in Edmonson County, and knocked on the door. They were greeted by Gross. Sexton left the house for a few minutes, and upon returning, found Tankersly talking to Paula Beckner<sup>30</sup> (who later apparently married Allen Hatcher) and saw a “large quantity of marijuana” next to Beckner. Shortly afterward, Hatcher ordered Tankersly from the premises at gunpoint and began cursing at him. Eventually, Hatcher shot Tankersly in the leg. Sexton ran outside, but then came back to pull Tankersly from the house. As he was trying to do so, “Hatcher walked up to Tankersly and shot him in the head.” Sexton dragged Tankersly to the car and sought help, but Tankersly died the next day.

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<sup>29</sup> Anderson v. Com., 864 S.W.2d 909 (Ky. 1993); Akers v. Com., 172 S.W.3d 414 (Ky. 2005)

<sup>30</sup> To avoid confusion, although Paula Beckner was also named Hatcher by the time of the trial, Beckner will be used throughout in the summary.

Sexton brought police back to the scene, several hours after the shooting. During a search, they found evidence that someone had tried to remove blood from the carpet. They also found marijuana, methamphetamine and cocaine, along with paraphernalia.

Beckner and Gross fled to Elizabethtown, where they spent the night. They turned themselves in to the police the next day.

Beckner, Hatcher and Gross were indicated on murder, trafficking and related charges. They were tried together, and Beckner was acquitted of the homicide charge but convicted on the trafficking charges. Beckner appealed.

**ISSUE:** May autopsy photos of a victim be admitted at trial?

**HOLDING:** Yes

**DISCUSSION:** Beckner argued that the admission of the autopsy photos of the victim was improper. The photos were taken by a KSP detective who was present at the autopsy, and “none showed any post-mortem manipulation or significant natural changes to [Tankersly’s] body.” The Court agreed the photos were properly admitted to show that the shooting was done deliberately, rather than in self-defense, as Beckner claimed, and were “not unduly gruesome.”

After disposing of several other unrelated issues, the Court upheld Beckner’s conviction.

### ***EVIDENCE – CRAWFORD***

**Com. v. Hartsfield**  
**2007 WL 29385 (Ky. App. 2007)**

**FACTS:** On April 22, 2003, a Fayette County Grand Jury indicted Hartsfield on three counts each of first-degree rape and sodomy, and of PFO. One of the victims, Buford, however, died before trial.

Following Buford’s death, Hartsfield requested that the counts involving her be dismissed, alleging that admitting Buford’s statements to third parties would be hearsay. The Court denied that motion, and the Commonwealth sought clarification “as to the admissibility of these statements.” One statement involved “a statement made to a ‘sexual assault nurse examiner’ (a SANE nurse)” ... “during the course of Buford’s examination and treatment for rape at the University of Kentucky Medical Center.” The other statement in question were made by Buford “immediately after the alleged rape” when she told two witnesses, one her daughter, that “he raped me.”

The trial court ruled that all of the statements would be inadmissible, because “Hartsfield’s right to cross-examine Buford would be violated by their admission.” As a result, the two counts involving Buford were dismissed, and Hartsfield pled guilty to sexual misconduct against the other two victims.

The Commonwealth appealed.

**ISSUE:** Are statements made to a SANE nurse during the course of treatment nontestimonial, and therefore admissible?

**HOLDING:** Yes

**DISCUSSION:** The Commonwealth argued that the statements made to the SANE nurse were “admissible under the KRE 803(4) ‘medical treatment or diagnosis’ exception to the hearsay rule.” It further argued that the statements are not “testimonial” and thus are not prohibited under Crawford v. Washington.<sup>31</sup> The Court agreed that the statements “fall squarely within the ... exception,” are not “testimonial, and are thus admissible.”<sup>32</sup>

With regards to the other statements, made immediately after the alleged rape, the Court agreed that such statements qualified as “excited utterances under KRE 803(2) and therefore are not subject to the prohibition against hearsay.” In Ernst v. Com., the Court had developed the “criteria to determine whether a statement is an excited utterance ....”<sup>33</sup> “The factors to be considered include the lapse of time involved, the likelihood of and inducement for fabrication, the actual excitement of the declarant, the place of declaration, and so forth.”<sup>34</sup> In this case, the Court concluded that Buford’s exclamation to the passerby witness and to her daughter both satisfied the Ernst criteria.

The Court reversed the suppression order and remanded the matter for further proceedings.

**Heard v. Com.**  
**217 S.W.3d 240 (Ky. 2007)**

**FACTS:** On the day in question, Heard got into a fight with Angel Saunders, the mother of Heard’s infant daughter. Heard had attempted to visit Angel at her grandmother’s home, but the grandmother, Sara Saunders, would not admit him. Later, after the grandmother left the house, Heard kicked in the door, assaulted Angel and took the child with him.

When Sara Saunders returned home, she called the Lexington-Fayette PD, and Officer Gilbert responded. Angel Saunders had already admitted to her grandmother that Heard was her assailant, and further admitted it to Officer Gilbert. At some point, Heard called his own cell phone, which he had left behind, and spoke to an officer and a paramedic. Heard hung up and called back on the house phone, and the officers listened in as he spoke to Sara Saunders and to a paramedic. Heard admitted that he had struck Angel with his fists, but denied having struck her with a gun, as was alleged.

Angel was taken to the hospital, and the child was located with Heard’s mother.

At trial, however, Angel Saunders refused to testify and did not respond to a subpoena. She “recanted her previous incriminating statements in an affidavit.” Heard was convicted of criminal trespass and assault. He requested a judgment of acquittal or a new trial based upon Angel’s recantation, but the trial court denied it. He then appealed.

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<sup>31</sup> 541 U.S. 36 (2004)

<sup>32</sup> See also Meadows v. Com., 178 S.W.3d 527 (Ky. App. 2005)

<sup>33</sup> 160 S.W.3d 744 (Ky. 2005)

<sup>34</sup> Id.

**ISSUE:** May statements of a witness who does not testify be admitted through third-parties?

**HOLDING:** No

**DISCUSSION:** Heard argued to the Court of Appeals that his "Sixth Amendment right to confront his accuser" was violated by the court's admission "into evidence the victim's out-of-court statements made through Officer Gilbert and Dr. Wicker...." The Court of Appeals agreed that "portions of Officer Gilbert's testimony were improperly admitted in light of" ... Crawford v. Washington,<sup>35</sup> but found that the improper testimony was simply cumulative and thus not reversible error. The Supreme Court reviewed the issues raised by the Crawford challenge.

"Officer Gilbert was permitted to repeat what Angel had told him about the attack [Heard] made on her, events that had already occurred" During that discussion, she related no "information bearing upon the safety or whereabouts of her child" nor was there an "ongoing emergency." Angel was "safely in the presence of one or more police officers and the statements concerned violations of law." As such, the statements "were clearly testimonial and they should not have been allowed into evidence." However, the court then had to decide if the erroneous admission was harmless or not.

Heard argued that the following statements were improperly admitted and not harmless:

- 1) [Heard] had called and asked [Angel] if her grandmother was gone;
- 2) [Heard] showed up a few minutes after the call and threatened to kick in the door;
- 3) [Heard] did kick in the door;
- 4) [Heard] hit Angel in the head with a gun;
- 5) Angel refused to let go of the child;
- 6) when Angel did let go, [Heard] grabbed the child; and
- 7) [Heard] pointed a gun at Angel and said he would have shot her if the gun were not broken.

The Court concluded that while parts of the testimony was cumulative to that given by Sara Saunders, the Court could not "in good conscience declare that this erroneously admitted testimony was harmless beyond a reasonable doubt."

The Court reversed the conviction for Second-Degree Assault and remanded the case for a new trial. The Court further noted that, however, Dr. Wicker's testimony was properly admitted pursuant to the "medical treatment exception to the hearsay rule and that it was possible that Sara Saunder's testimony might be admissible as an excited utterance," but that would be for the trial court to determine.

**Cross v. Com.**

**2007 WL 121823 (Ky. App. 2007)**

**FACTS:** On April 9, 2001, at about 2 a.m., Cross returned to Clarkson's apartment, where he had been the day before. Later that day, about at 4:45 p.m., he called for a cab. At 6:12 p.m. a neighbor of Clarkson called police to report that a "large black man whom she did not know had broken down her back door,"

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<sup>35</sup> 541 U.S. 36 (2004)

choked her until she became unconscious, taken prescription medications and money and left in Yellow Cab #786.

Meanwhile, in the cab, "Cross began rustling through a black fanny pack bag." He asked the cab driver if he was familiar with drug names found on prescription bottles in the fanny pack. As a result of the police report, Yellow Cab dispatch asked the cab driver, via the radio, for his destination. Cross became nervous, told the cabdriver to stop, paid his fare and got out. The cabdriver later turned over to police a cell phone he found in the cab.

Officer Schmidt responded to the victim, and interviewed neighbors. The description of the intruder was provided to possible witnesses, and "Clarkson knew from the description that it was Cross." During that time, the recovered cell phone, now in the possession of the police, "rang constantly" - and one of the "saved numbers matched the number of ... Clarkson's apartment." The next day, "ten bottles of the victim's medications" were recovered "near the original cab destination." The medication was documented and returned to the victim. Clarkson and Stovall (her roommate) were given the nickname of the suspect; they identified the nickname as belonging to Cross, and "provided a physical description of him which matched the description given by the victim."

Cross was arrested. He gave a statement that he purchased the medications from Stovall's teen-age son, but admitted that the intruder was "probably him."

Cross was indicted on charges of robbery and burglary, and other related charges. Prior to trial, the victim died, from unrelated causes. Cross was convicted on some of the charges. However, prior to the resolution of his appeals, the Court decided the case of Davis v. Washington, and Cross renewed his appeal based upon issues resolved in that case.

**ISSUE:** Are statements made during a 911 call admissible under Crawford v. Washington?

**HOLDING:** Yes

**DISCUSSION:** The Court noted that in this case, the victim called 911 and reported what had occurred, and that this call "was made in the immediate wake of [Hear'd's] intrusion into the victim's home. The Court quoted extensively from Davis, and concluded that "when the 911 call is made to seek emergency assistance - it is nontestimonial and the confrontation clause is not implicated." The call in question "was without any aforethought of giving a statement for later use against Cross in a court proceeding." As such, the content of the 911 call was properly admitted and Cross's conviction was affirmed.

## ***INTERROGATION***

**Hudson v. Com.**  
2007 WL 858809 (Ky. 2007)

**FACTS:** On the day in question, police and EMTs in Fayette County were called to an "unresponsive child." CPR was performed. However, the child died. According to the medical examiner the child died from a liver laceration that resulted in internal bleeding and had suffered "blunt impacts to the head, trunk and

extremities." A responding officer, however, "noticed that Hudson, who remained at the residence, was nervously repeating, 'I didn't do anything wrong, I wouldn't hurt a kid.'" The officer gave Hudson his Miranda warnings. Upon questioning, Hudson appeared remorseful and told the officer that he had given the child some medication earlier in the day, let her lie down and later found her unresponsive.

Hudson was taken in for further questioning. He was arrested on an unrelated warrant. The next day, detectives interviewed him again, and during that time, he made incriminating statements. He was charged in the child's murder.

Hudson moved to suppress the statements made during the second interview, arguing that he was coerced into making statements. Following a hearing, the trial court denied the motion.

Hudson took a conditional plea to homicide, and appealed.

**ISSUE:** Is physical and emotional vulnerability sufficient to make a confession involuntary?

**HOLDING:** Depends upon circumstances

**DISCUSSION:** The Court reviewed the circumstances under which the confession was made. Hudson argued that the officers "implied promises of leniency," which the officers denied. Hudson's allegations were vague and Hudson "point[ed] to no explicit promises of lenient treatment for his confession." The Court found those vague suggestions of promises unconvincing and that they did not make his statement involuntary.

Hudson also claimed that he was physically and emotionally vulnerable as a result of personal circumstances. However, "Hudson ha[d] not demonstrated a level of physical and emotional stress that would render him unable to make a voluntary decision." (He claimed to having been in pain from a recent surgery, and having been emotionally upset due to family deaths.) However, the Court found nothing to indicate that Hudson was in such a state as to render his statements involuntary.

Hudson's conviction was affirmed.

## ***INTERROGATION***

**Edmonds v. Com.**  
**2007 WL 29400 (Ky. App. 2007)**

**FACTS:** On Nov. 27, 2004, the Super Dollar Store in Lexington was robbed by a man (allegedly Edmonds) who "demanded money from the clerk and threatened him with a pocket knife." Officers Brand and Noel responded and promptly arrested Edmonds "who matched the description of the robber" nearby. They took Edmonds back to the store "where the clerk identified him as the perpetrator." (Prior to the show-up, Edmonds had been given his Miranda warnings.) Edmonds was taken to the police department and interviewed by Detective Cain, but he denied the crime. The next day, Officers Brand and Noel, however, interviewed him again, and Edmonds confessed.

Just before the trial, Edmonds requested suppression of the statement he gave to the two officers, arguing that the statement was taken in violation of his Fifth Amendment right against self-incrimination. During the hearing, the court noted that the interview between Edmonds and Detective Cain resulted in a loud argument, although the two arresting officers, who were outside the room, were not aware of the details of that argument. At the second interview, the next day, the two arresting officers once again gave Edmonds his Miranda warnings, and he indicated that he understood them. During that discussion, which Brand was taping, unbeknownst to Edmonds, Brand apologized for Detective Cain's behavior – which Brand admitted was a subterfuge to gain rapport with Edmonds. During the discussion, Edmonds did state that he wanted to speak to an attorney, for the purposes of making a complaint against Cain, who he alleged assaulted him in the interview room, but not for the purposes of the robbery charge.

The trial court concluded that the officers had, in fact, “scrupulously honored Edmonds' rights and had not coerced his confession.” Edmonds took a conditional guilty pleas to second-degree robbery, and appealed.

**ISSUE:** Does a statement from a suspect that they have “nothing to say” constitute an invocation of a suspect's right to silence?

**HOLDING:** Not necessarily

**DISCUSSION:** First, Edmonds argued that he had invoked his right to remain silent during the interrogation by Detective Cain, and that Noel and Brand had failed to honor that invocation when they reinitiated the interrogation the next day. For the purposes of ruling, the Court accepted that he had invoked the right. (However, the Court noted that in Furnish v. Com., it had ruled that the statement allegedly made by Edmonds, that he had “nothing else to say” was not an invocation, but instead, a denial of any knowledge of the crime.<sup>36</sup>)

The Court looked to Mills v. Com.<sup>37</sup> to decide the matter. In Mills, the Court identified factor that the Mosley Court “relied upon in determining that police officers had scrupulously honored the defendant's right to cut off questioning. These factors included:

- (1) Mosley was carefully advised of his rights prior to his initial interrogation, he orally acknowledged those rights, and signed a printed notification-of-rights form;
- (2) the detective conducting the interrogation immediately ceased questioning Mosley after he invoked his right to remain silent and did not resume questioning or try to persuade Mosley to reconsider his decision;
- (3) Mosley was questioned about a different crime more than two hours later at a different location by a different officer; and
- (4) Mosley was given a fresh set of Miranda warnings prior to the second interrogation.

The Court did not, however, make these factors “exclusive or exhaustive,” nor did they elevate any factor as being more important than the others. The “Mosley analysis is to be approached on a “case-by-case basis,’ examining all the relevant factors.” In applying those factors to the case it bar, the Court noted that Edmonds was given, and understood, his Miranda rights, that Detective Cain did not continue to question him after he stated he had nothing to say, and that “the second interrogation took place about twenty-four

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<sup>36</sup> 95 S.W.3d 34 (Ky. 2002)

<sup>37</sup> 996 S.W.2d 473 (Ky. 1999); see also Michigan v. Mosley, 423 U.S. 96 (1975)

hours later at a different location and by different officers.” Unlike Mosley, however, the “second interrogation was in relation to the same crime.” The Court found nothing indicating that the officers sought to “undermine [Edmond’s] resolve to remain silent” and found no error in the trial court’s ruling upholding the admission of his statements.

Next, the Court addressed whether “his confession during the second interrogation was involuntary” as the “result of police coercion.” Edmonds argued that Cain’s actions the day before had made him more susceptible to “confessing the following day.” He stated that he was afraid, if he didn’t confess, that he’d be locked up with Cain again, and that Cain would hurt him. In Henson v. Com., the Court discussed police coercion.<sup>38</sup> The trial court had not addressed the allegations made against Cain, other than stating that “if true,” Cain’s conduct “was inexcusable” and found that the factors surrounding Edmond’s confession removed any taint that was possible from that first interrogation. However, the Court of Appeals noted that if the events did occur as alleged by Edmonds, which included a statement that Edmonds would be sent to prison where he would be sexually assaulted, as well as alleged physical contact made by Cain, could constitute impermissible coercion.<sup>39</sup>

As such, the Court concluded that it was “necessary to remand to the trial court for findings of fact as to what occurred during the interrogation to Detective Cain on November 27, 2004” and did so.

**Dehart v. Com.**  
**2007 WL 419629 (Ky. App. 2007)**

**FACTS:** On Aug. 29, 2003, “acting on a reliable tip that marijuana was growing on the property, police officers from multiple agencies drove to Bee Hive, Kentucky” in Perry County. Lt. Napier saw “Tim Halcomb leaning into the vehicle and holding out what appeared to be a plastic baggie containing marijuana.” When they spotted the officer, Halcomb and others ran. Detective Hurt caught up with Halcomb “in a chicken coop located a few feet from the road.” Near that chicken coop, Detective Smoot saw Dehart sitting on a four-wheeler. When the officers came near, “Dehart immediately slammed the lid to a wooden box that was attached to the front of his four-wheeler.” Detective Smoot “searched the box and found several pills as well as four rolled-up sandwich baggies, each containing several grams of marijuana.”

Just a few feet from the coop, the officers saw “eight maturing, tended marijuana plants growing in a cultivated patch” and a “wide path that ran behind the coop through a creek and leading to Dehart’s double-wide trailer.” Dehart gave consent to search the trailer, but no evidence was found. Dehart denied who owned the coop, but at trial, presented witnesses who stated that a “homeless man named Carter Couch lived in the chicken coop in the summer of 2003.” The Mizes owned the real property and lived some “three hundred feet” away – they testified that Dehart was given permission to build the coop and that he and his friends had “built onto the structure many times.”

Dehart was initially indicted for offenses relating to possession of the drugs and the marijuana found his four-wheeler, and he pled guilty to those charges. He was subsequently indicted for cultivating marijuana and PFO. On the trial on those charges, the prosecution notified the court that it intended to introduce evidence surrounding the charges. There was, apparently, confusion on the part of the Court as to what

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<sup>38</sup> 20 S.W.3d 466 (Ky. 1999)

<sup>39</sup> See also Arizona v. Fulminante, 499 U.S. 279 (1991) and Hager v. Com., 189 S.W.2d 867 (1945).

exactly was found in the box, as the court noted that it knew about the pills, but not about the marijuana. The Court agreed to the admission of that evidence under KRE 404(b) – “prior bad acts”- “as relevant to show Dehart’s plan to grow the marijuana and then sell it.”

Dehart was convicted, and appealed.

**ISSUE:** May testimony that an individual is involved in trafficking (but who is not charged for that offense) be admitted in a trial for cultivation of marijuana?

**HOLDING:** No

**DISCUSSION:** Dehart argued that testimony by Detective Hurt that he was involved in trafficking was highly prejudicial, as he was not charged with trafficking in this case, only with cultivation. Detective Hurt was called as a defense witness, but the court allowed “the Commonwealth to disclose the evidence on cross-examination.” The Court had previously “agreed to a limiting admonition to include that no party would suggest the four baggies were for sale” – but the prosecution then promptly did that, through Detective Hurt’s testimony. The Court agreed that Dehart was unfairly prejudiced by the introduction of the possession of marijuana, packaged in a way that suggested sale. Although not clearly stated in the opinion, apparently the issue of the marijuana was never discussed during Dehart’s plea on the other charges.

The Court reversed Dehart’s conviction and remanded the case for a new trial.

**Bell v. Com.**  
**2007 WL 288809 (Ky. App. 2007)**

**FACTS:** The Bells and their daughter, Jennifer, lived in McCracken County. Jennifer suffered from physical and mental handicaps that require constant medical attention. As such, nurses/respiratory therapists from Lifeline were employed to assist the Bells in caring for Jennifer and were scheduled to work 16 hours a day.

R.W. was working the day shift during June, 2003. During that shift, Bell was usually home, but his wife, Jean, was not. R.W. alleged that during that time, Bell began to make sexually suggestive comments to her. On June 15, while R.W. was attending to Jennifer, “Bell came into the room and began discussing his sex life” and then left the room. He returned and “bent over towards the floor near R.W.” – she thought he was adjusting the air mattress. Instead, Bell “grabbed the lower part of R.W.’s leg from behind and began moving his hand up towards her genital region.” After a struggle, and during which time he was able to grab her crotch area, R.W. was able to free herself. Bell then left the room again.

R.W. remained in the home until a delivery person arrived, who walked her to her car. She left the premises and met her husband at his workplace, told him what happened, and then drove to Lifeline to tell her supervisor, Allison.

R.W. was charged with Sexual Abuse. At trial, three other nurses testified that they had been subjected to unwanted, inappropriate contact by Bell. Allison testified that when she confronted Jean Bell about it, she didn’t deny it, but instead suggested that the woman had enjoyed it.

Bell argued that the women were retaliating against him for complaints they had made to Lifeline. However, he was convicted, and appealed.

**ISSUE:** May “course of conduct” evidence be admitted as a prior bad act?

**HOLDING:** Yes

**DISCUSSION:** Among other issues, Bell argued that it was improper to admit testimony concerning his alleged “prior bad acts” with the other nurses.<sup>40</sup> Such evidence is proscribed “to prove the character of a person in order to show action in conformity therewith,” subject to exceptions such as those listed in the rule. It may, for example, be permitted, under criteria as listed in Bell v. Com.<sup>41</sup> and which includes three separate inquiries: 1) relevance, 2) probativeness, and 3) prejudice. The Court applied the criteria and concluded that the testimony was intended to show “that Bell’s actions were part of an on-going course of conduct.” Each involved similarly-situated victims, and “involved Bell taking the victim by surprise and inappropriately touching her.” Such “course of conduct” evidence is permitted, and its relevance and probative value outweighs its certain prejudicial impact.

Bell’s conviction was affirmed.

**Wright v. Com.**  
**2007 WL 79061 (Ky. App. 2007)**

**FACTS:** On June 8, 2004, Wright and Hurt allegedly were involved in a drive-by shooting in Covington in which Heard was seriously injured. Hurt and Allen were feuding, and allegedly, Hurt drove near where Heard and Allen were standing and his passenger fired in Allen’s direction, striking Heard.

Hurt and Wright were tried together, and several witnesses identified the vehicle as Hurt’s. However, none of the witnesses knew Wright and they could not identify him positively as the passenger. There was also “conflicting testimony concerning the passenger’s race and appearance.” Hurt, however, identified Wright as his passenger, and stated that they went to Covington only to “fist-fight” with Allen and that when “he saw how many people were present he decided to postpone the fight.” At that point, he stated, “Wright produced a handgun and started shooting.”

Wright, however, stated that he’d been in Cincinnati playing basketball, and that Hurt was just trying to pin the crime on him because he was a juvenile.

Officer Manson, Cincinnati PD, testified that Wright had admitted to him that he’d been in Covington that evening. Manson had arrested Wright and given him his Miranda warnings, and at that point, Wright “denied any involvement in the shooting.” Manson “counseled him to be truthful” and Wright then said he had been in Covington, but had not been involved in the crime. Manson told the investigating Commonwealth’s Detective, but the information had been “inadvertently omitted from the detective’s file and from the materials produced during discovery.” During trial, the detective recalled Manson’s statement.

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<sup>40</sup> KRE 404(b)

<sup>41</sup> 875 S.W.2d 882 (Ky. 1994) – note, not the same defendant.

Wright argued that it was a violation of his Miranda rights and the discovery rule, and demanded suppression of “any further reference to it.” The trial court denied it, however, and Manson was eventually called as a rebuttal witness by Hurt.

Eventually, the jury convicted Wright of First-Degree Assault and Hurt of complicity. Wright appealed.

**ISSUE:** Are potentially exculpatory statements absolutely required to be documented and provided to the defense?

**HOLDING:** Yes

**DISCUSSION:** Wright argued that the failure of the Commonwealth to produce Officer Manson’s report was a violation of such a magnitude that a new trial was required. The statement, although innocuous and not incriminating in itself, clearly contradicted Wright’s “trial strategy” – that he was in Cincinnati that night. The Court agreed that the Commonwealth’s failure to disclose the statement, and then introducing it at trial, “misled defense counsel with respect to critical evidence and induced Wright to rely upon a defense he might not otherwise have asserted or asserted in the same way.” The Court concluded that the “fairness of Wright’s trial was undermined and its outcome thrown into reasonable doubt by the Commonwealth’s failure to timely disclose Wright’s potentially incriminating statement to his arresting officer.

Wright’s conviction was reversed.

### ***INTERROGATION – MIRANDA***

#### **Tellez v. Com.**

**2007 WL 625278 (Ky. App. 2007)**

**FACTS:** On Sept. 21, 2004, Detective Welch, and other officers, went to the “Kentucky Horse Training Center in Lexington and asked Tellez to come with them to answer some questions concerning allegations of two counts of sexual abuse.” Tellez was arrested and taken to the Lexington PD. Detective Welch gave Tellez his Miranda rights, in English, and initially, Tellez indicated that he did not understand. After being asked again “whether he understood that he had a right to an attorney, Tellez responded that he did.”

Tellez was indicted, and moved for suppression, arguing that he did not understand his rights. At the hearing, Tellez stated that he was a Mexican citizen, but had been in the U.S. for close to twenty years, and that he spoke and wrote “a little” English. He testified, through an interpreter, that he did not understand that he had a right to an attorney. Detective Welch testified that he believed that Tellez understood his questions and that Tellez responded to his questions, in English. (Detective Welch did, apparently, have some Spanish language training as well.)

The trial court found that Tellez made a knowing, voluntary and intelligent waiver of his rights, and denied the suppression. Tellez took a conditional guilty plea, and appealed.

**ISSUE:** May a defendant’s claim that he lacked sufficient English to knowingly waive rights be refuted by evidence to the contrary?

**HOLDING:** Yes

**DISCUSSION:** The appellate court reviewed the trial court's findings, and found that its decision was "supported by substantial evidence." The court noted that "Tellez even wrote apology letters to the two victims in English and that Detective Welch could understand the letters." The Court upheld the guilty plea.

### ***TRIAL PROCEDURE***

**Warren v. Com.**  
**2007 WL 541918 (Ky. 2007)**

**FACTS:** On March 19, 2003, Hunter was visiting the Park Hill neighborhood to buy a Buick from Camp. He found Camp and others shooting dice, but Hunter did not want to play and did not want the men to know he was "carrying a wad of money." He paid for the vehicle, leaving it in the parking lot. Later that same day, Hunter returned driving a Cadillac, and began to work between the two cars, apparently exchanging wires. He was talking to Camp at the time. When Camp stopped talking, Hunter looked up and saw two men, standing near the car, wearing hoodies.

The man standing nearest to Hunter pointed a handgun at him and demanded money. When Hunter didn't respond immediately, he demanded money and the keys. Coleman showed up to help Hunter, but Hunter, "conscious of the weapon, told Coleman that it was okay, that he would give them his money and for Coleman not to try to fight them."

Coleman was made to lie on the ground, but Hunter was forced into the trunk of the Buick. The men apparently eventually fled in the Cadillac. "The robber's knowledge that both were his cars made Hunter believe that he was set up by someone in the neighborhood." Eventually, the fire department was needed to get Hunter out of the trunk.

Hunter was able to get a name for the perpetrator, Warren, who he had seen around the neighborhood. Using that information, Detective Keeling put together a photo pack, and Hunter promptly identified Warren as the robber. (The second man was never identified.) Another witness, Miller, also identified Warren as the robber.

Warren was indicted on First-Degree Robbery and Unlawful Imprisonment for Hunter, and First-Degree Wanton Endangerment for Coleman, as well as PFO 2<sup>nd</sup>. During the course of the trial, Detective Keeling, the primary investigator, was asked whether he was "confident" that the right person was arrested, to which he agreed that he was. Eventually, Warren was convicted, and appealed.

**ISSUE:** May an officer offer an opinion in testimony as to guilt or innocence?

**HOLDING:** No

**DISCUSSION:** Among other issues, Warren argued that testimony obtained from Detective Keeling was an expression of opinion, rather than of fact. Although Warren conceded that expert witnesses may offer opinions, he "observ[ed] that the detective was not testifying as an expert on the matter." The Commonwealth argued that lay witnesses are permitted to give opinion testimony under KRE 701, but the

Court noted that “KRE 701 does not present an open forum for lay witnesses to express any opinion.” A lay witness’s testimony is “limited to those [observations or inferences] which are both rationally based on the perceptions of the witness and helpful to an understanding of the witness’ testimony or the determination of a fact in issue.” In this case, the detective’s opinion “was not based on his own perceptions, but based on his assessment of the perceptions of others as told to him.” It was inappropriate for him to offer an opinion on guilt or innocence.

However, although the court found that Detective Keeling’s “testimony served improperly to reinforce Hunter’s eyewitness identification,” it was harmless error when combined with other admissible testimony proffered at trial.

Warren’s conviction was affirmed.

**Powers v. Com.**  
**2007 WL 29397 (Ky, App. 2007)**

**FACTS:** In the early morning hours of May 20, 2002, Powers, “drove through the drive-through at Fresh Liquors in Lexington and asked to cash a payroll check belonging to his female passenger whom he represented to be Janet Daum, the payee on the check.” The manager, Ledford, noticed that there “were already two signatures in the endorsement area of the check” and became suspicious. He asked the couple to come inside and endorse the check in front of him. The woman “had no identification and asked Powers what name she was supposed to sign on the check.” Ledford told Powers that he would also need to sign the check and show ID, and after Powers did so, Ledford told them to wait. He then went to another room and called the police.

Officer Richards (Lexington-Fayette PD) arrived and found Powers and the woman, who claimed to be Janet Daum, and he interviewed them separately. Richards called the restaurant that had issued the check, and obtained a description of the payee (Daum) that did not match the female in the store. (She turned out to be Joyce Villareal.) Richards arrested both for Second-Degree Forgery and other charges. Villareal pled guilty and testified against Powers, who was ultimately found guilty..

Powers appealed.

**ISSUE:** May repeating a witness’s prior consistent statement be considered improper bolstering?

**HOLDING:** Yes

**DISCUSSION:** Powers argued that some of Richards’s testimony “improperly bolstered the testimony of Joyce Villareal.” In particular, the Court noted an exchange in which Richards gave a longer reply to a question that was a yes/no question, but the defense counsel did not object, nor ask for a admonishment. Powers argued that what Richards repeated was an inadmissible “prior consistent statement of Villareal’s which improperly bolstered her testimony to” the same effect, at trial. The trial court admitted that Richards’ testimony was improper, but that it “did not rise to the level of palpable error” warranting a reversal. The appellate court agreed, noting that the defense counsel chose not to make an issue of Richards’ testimony, and instead “chose to downplay the testimony and proceed with his questioning.” (The Court further noted that the defense counsel had “aggressively impeached the credibility of Villareal at trial.”)

The Court further distinguished this case by noting that in other cases in which bolstering became an issue, the testimony was that of the victim of the crime, not a co-defendant's.

Ultimately, the Court concluded that the "outcome of the case would have been the same even had the improper testimony of Officer Richards had not been offered or had defense counsel objected to the testimony." The other evidence presented against Powers was very strong, and the Court affirmed his conviction.

**Stone v. Com.**  
**2007 WL 29373 (Ky. App. 2007)**

**FACTS:** On July 8, 2004, Stone, along with Deck, Holbeck and two men named Ursry, "engaged in a physical confrontation with Lamartez Griffin and three of his companions." The fight began when one of the Ursrys "attempted to attack" Gray, who was with Griffin, and Gray responded by striking Ursry "knocking him down several time." Gray and two other men fled, leaving Griffin alone. Griffin struck the other Ursry with a "large beer bottle" and Stone then "pulled a knife and confronted Griffin." Griffin was, according to Stone, still "armed with the jagged remnants of the shattered beer bottle." Griffin advanced, and "Stone claims that he then stabbed Griffin in self-defense." Griffin fell to the ground and Stone and his companions fled. Griffin was transported by EMS but died from a single stab wound.

Louisville Metro PD officers quickly identified and located Stone and his friends, and they were brought in for questioning. One of the Ursrys (the one initially involved in the fight) refused to give a statement, but the other four men "each gave voluntary recorded statements." Stone claimed self-defense, and further stated that he didn't actually stab Griffin, but that "Griffin had impaled himself on Stone's outstretched knife." Eventually all five men were indicted for murder, with Stone and Holbeck further charged with tampering with physical evidence.

All five men were tried jointly. The prosecution anticipated that none would testify and the Commonwealth "sought to introduce redacted versions of each defendant's recorded statement" and over defense objections, were permitted to do so. Stone demanded a separate trial, arguing that his Sixth Amendment rights would be violated "since his codefendants could choose not to testify, and, if they did not testify, the Commonwealth would introduce their redacted statements." Stone would not, then, have the opportunity to cross-examine his codefendants. Stone also objected the to introduction of the redacted version of his own statement because, he claimed, "it materially misrepresented what he actually said." The Court, however, refused to allow Stone to be tried separately and overruled all of his objections.

During the trial, and most important to the appeal, the Commonwealth "introduced the redacted statement of Stone's codefendant, Richard Holbeck." In that statement, the Commonwealth had "removed any reference to the fight between Edwin Ursry and George Gray, removed any reference to Griffin's assault upon Jeremy Ursry and removed any reference to the stabbing." Detective Duncan was questioned about his interview with the men, and the prosecutor elicited information from him about portions of the statement that had been removed, to which the defense attorney objected. The Court, however, ruled that the testimony could be admitted. In short, the prosecutor argued that since Holbeck had stated that "Griffin had backed up that Stone did not stab Griffin in self-defense."

Deck and the two Ursrys were acquitted, Holbeck acquitted of murder but convicted of the tampering charge. Stone was convicted of First-Degree Manslaughter and tampering. He then appealed.

**ISSUE:** May redacted versions of a non-testifying codefendant be introduced against another defendant at trial?

**HOLDING:** No (as a general rule)

**DISCUSSION:** Stone argued that Crawford v. Washington prohibited the use of testimonial statements at trial “unless the declarant is unavailable to testify at trial and the defendant had a prior opportunity to cross-examine the declarant.” He further argued that Crawford applies “to the introduction of a redacted statement of a non-testifying codefendant...” He insisted “that the statement directly incriminated him by undermining his claim of self-defense.” Further, under Bruton v. U.S., “a state deprives a criminal defendant of his rights as guaranteed by the Confrontation Clause of the Sixth Amendment when the state introduces at a joint trial a non-testifying codefendant’s statement which implicates the defendant, even if the trial court instructs the jury to only consider the statement against the codefendant who made it.”<sup>42</sup> The Court also noted that in Richardson v. Marsh,<sup>43</sup> the Court did permit, however, the “admission of a non-testifying codefendant’s confession with a proper limiting instruction when, as here, the confession is redacted to eliminate not only the defendant’s name, but any reference to his existence.”

In the case at bar, even though the statements were properly redacted, at trial, Duncan’s testimony “directly contradicted and directly implicated Stone even though his name was not mentioned because, prior to soliciting this statement – a statement that the Commonwealth had properly redacted – the Commonwealth’s Attorney had played for the jury Stone’s redacted statement in which stone stated that, immediately after Griffin shattered the beer bottle on Jeremy Ursry’s head, Griffin advanced on Stone and Stone stabbed him.” Duncan’s testimony was then solicited to refute Stone’s statement, for the purpose of incriminating Stone, and that “nullified the effect of redacting Holbeck’s statement.”

(Stone also argued that the jury instructions were defective because they “lacked language that Stone had no duty to retreat...” However, the Court found that the instructions were adequate.”

The Court reversed the conviction and remanded the case to the Jefferson County Circuit Court for further proceedings.

**Jenkins v. Com.**  
**2007 WL 706843 (Ky. App. 2007)**

**FACTS:** On Oct. 8, 2003, Jenkins was paired with J.S., age 8, and B.F., age 6, as part of the Big Brothers program. They went swimming at a recreation center in Versailles. A lifeguard noticed “what she considered to be inappropriate conduct by Jenkins while playing with the boys in the pool.” Other lifeguards also became concerned and two of the male guards followed the trio back into the locker room. They saw Jenkins go into “a single small shower” stall, and “all three were naked.” When the three stayed in the shower “an inordinately long time,” they called the police.

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<sup>42</sup> 391 U.S. 123 (1968).

<sup>43</sup> 481 U.S. 200 (1987).

The officers separated the three, B.F. was taken home and J.S. was taken for questioning. Ultimately, both boys were interviewed multiple times, and as a result, Jenkins was indicted on First-Degree Sexual Abuse, with J.S. as the victim, and as a result of further interviews, First-Degree Sodomy charges were also brought.

At the trial, Jenkins tried to introduce expert testimony from Dr. Campbell, "concerning improper questioning techniques" that might result in "unreliable reporting by child witnesses." After a lengthy hearing, the trial judge excluded Campbell's testimony. Eventually, Jenkins was convicted, and appealed.

**ISSUE:** May a defendant request the admission of an qualified expert witness upon a matter critical to the defense?

**HOLDING:** Yes

**DISCUSSION:** Jenkins argued that the Dr. Campbell should have been permitted to testify concerning child witness testimony. In Stringer v. Com.<sup>44</sup> and Meadows v. Com.,<sup>45</sup> the Court had ruled that such testimony may be appropriate, depending upon the specific circumstances of each case. Because, in this case, the "trial judge's determination as to the inadmissibility of the evidence was predicated upon his belief that it amounted to impermissible comment upon a witness's testimony, he made no findings as to the factors required by KRE 702. That rule permits such testimony if 1) the witness is qualified to render an opinion on the subject matter, 2) the subject matter satisfies the requirements of Daubert<sup>46</sup> and 3) the subject matter is relevant and 4) the opinion will be of assistance to the trier of fact (judge or jury). The Court remanded the case back to the trial court for specific findings on those issues.

**Powers v. Com.**  
**2007 WL 625360 (Ky. App. 2007)**

**FACTS:** Prior to Sept. 16, 2003, Powers had been dating Toro. Even though they had broken up, Powers still had a key to Toro's apartment and was in contact with her. On that evening, Toro went out with Webb and told him that "someone had been stalking her, but she did not identify the person." When they returned from the date, Toro asked Webb to look through her apartment.

"Webb went inside and began checking rooms" and when he opened the bedroom door, "Powers came from behind the door and began hitting him on the head with a hammer." After Toro screamed that she and Webb were just friends, Powers finally stopped. He had the couple sit down, and he continued to waive the hammer and threaten Webb. Webb asked to leave, and after promising not to call the police, Powers let him leave. (He told Webb that he would kill both of them if Powers did so.)

Upon leaving the apartment, Webb "flagged down a passing police car."<sup>47</sup> The responding officers encountered Powers walking Toro at knifepoint toward a nearby trailer park. He ran away, and told the "pursuing officers to shoot him or he was going to kill them." When captured, he had the hammer and the

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<sup>44</sup> 956 S.W.2d 883 (Ky. 1997)

<sup>45</sup> 178 S.W.3d 527 (Ky. App. 2005)

<sup>46</sup> Daubert v. Merrell Dow Pharmaceuticals, Inc., 509 U.S. 579 (1993)

<sup>47</sup> The responding agency was later identified as the Radcliff PD.

knife in his possession. He “later gave a statement to the police admitting to the attack on Toro and Webb.”

Powers was eventually indicted, tried and convicted on various charges relating to the attack. He appealed.

**ISSUE:** May an unintentional use of evidence that was to be excluded result in a mistrial?

**HOLDING:** Yes (but see discussion)

**DISCUSSION:** Powers argued on appeal that the officer that took his statement threatened to charge him with attempted murder if he invoked his right to an attorney. However, the officer denied it completely, and the trial court found the officer more credible than Powers. The appellate court found no reason to overturn the trial court’s decision.

Powers also argued that he was entitled to a mistrial after the officer “read a portion of his statement that had been excluded.” Apparently the original statement included “I don’t know why I do things like this” – and the parties had agreed that portion would be redacted (removed) and would be read to the jury as “I don’t know why I did this.” However, the officer read the original statement rather than the modified version. The mistake led to Powers requesting a mistrial, which the trial court denied, instead giving the jury an admonition and correcting the statement. The appellate court agreed that a mistrial was unnecessary, noting that there was no indication that the officer “intentionally read the original portion of the statement.”

Powers’ conviction was affirmed.

*NOTE: Although the use of the excluded evidence did not result in a mistrial in this case, officers should be aware of any such exclusions or limitations on the introduction of evidence. In another case, the error might have resulted in the case being mistried.*

**Moore v. Com.**  
**2007 WL 1192005 (Ky. App. 2007)**

**FACTS:** In February or March of 1996, A.S. was allegedly abused by her stepfather, Moore. A.S. was approximately 5 or 6 years old when her mother left her, and her younger siblings, alone with Moore. A.S. was lying on her mother’s bed when, she alleged, “Moore came into the bedroom and touched [her] under her nightgown and underclothes” and “inserted his fingers in her vagina.” A.S. did not tell her mother about it until 1998, however. At that time, A.S. and her mother met with Detective Patrick (Scott County) and a representative of CFC to discuss the matter, and a taped statement was taken. After a year-long psychiatric evaluation, Detective Patrick taped a second statement.

On Jan. 24, 2000, Detective Patrick obtained a warrant for Moore, charging him with First-Degree Sexual Abuse. He was subsequently convicted, and appealed.

**ISSUE:** May an officer describe, in testimony, what the officer was told by a third party?

**HOLDING:** Yes (but see discussion)

**DISCUSSION:** Among other issues, Moore argued that Detective Patrick's "testimony describing what A.S. told him during his interview about the alleged sexual abuse was impermissible hearsay, because it served only to bolster the testimony of A.S." The Court noted, however, that "[u]nder certain circumstances, a police officer may testify about information furnished to him during an investigation." However, in Sanborn v. Com.,<sup>48</sup> the Court emphasized that "there is no such concept as investigative hearsay." In this case, Detective Patrick "explained what he did after his interview with the victim and how this case came to court," and then "went into great detail about what the victim told him during the interview." Although the Court found that it was, effectively impermissible hearsay, the Court did not find that it likely affected the end result of the case.

Moore also complained that Detective Patrick was permitted "to testify that sexual abuse does not always result in physical evidence detectable in a medical exam." The Court agreed that Detective Patrick was not qualified to talk about "medical findings" as he was not qualified as a medical expert. Because the responses he gave could have affected the jury's decision, the Court reversed the decision of the Scott Circuit Court and remanded the case for further proceedings.

**Hibbitt v. Com.**  
**2007 WL 706855 (Ky. App. 2007)**

**FACTS:** On April 15, 2004, Hibbitt and his girlfriend, Pratt, "were drinking and smoking marijuana at the home they shared in Bowling Green." Her children were asleep elsewhere in the house. The couple "became embroiled in a heated argument that eventually escalated into a physical confrontation." At some point, apparently, Pratt "threw a dumbbell at Hibbitt after he received a telephone call from an ex-girlfriend." Later that evening, Hibbitt squirted gasoline on Pratt while she was sitting on the floor folding clothes." She went to wash it off, and somehow, the gasoline ignited and Pratt was severely burned. "Hibbitt maintained that the ignition was accidentally caused by his lit cigarette." Detective West, KSP, testified that it would have been impossible to ignite the gasoline by the ambers [sic] of a lit cigarette" and that it had to have been "caused by an open flame such as a lighter." West is a certified fire and explosion investigator and further testified that he used the National Fire Protection Association (NFPA) protocol 21 to guide his investigation. Eventually, Hibbitt was convicted of Second-Degree Assault and Wanton Endangerment. He appealed.

**ISSUE:** Is an arson investigator's testimony admissible as expert testimony, even though they do not have all of the details involving a particular situation?

**HOLDING:** Yes

**DISCUSSION:** Hibbitt argued that West's testimony was improperly admitted because his "expert testimony ... did not satisfy the relevancy requirement of the Daubert<sup>49</sup> analysis." In Stringer v. Com., the "Kentucky Supreme Court set forth a four factor test to determine whether expert testimony is admissible: (1) the witness is qualified to render an opinion on the subject; (2) the subject matter satisfies the requirements of Daubert v. Merrell Dow Pharmaceuticals, Inc. [cite omitted]; (3) the subject matter satisfies the test of

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<sup>48</sup> 754 S.W. 534 (Ky. 1988)

<sup>49</sup> Daubert, supra.

relevancy in KRE 401, subject to the balancing requirement of KRE 403; and (4) the opinion will assist the trier of fact pursuant to KRE 702.”<sup>50</sup>

Hibbitt agreed the Detective West was an expert and that his methodology was reliable, but challenged the relevancy of his opinion because “West did not know the precise amount of gasoline on Pratt’s clothes or the exact ambient temperature of the room” and because he “did not apply his methodology to the facts of this case.”

The Court agreed with the trial court, however, finding that “Hibbert’s complaints go to the weight of West’s testimony rather than its admissibility.”

After resolving other issues, the Court affirmed Hibbert’s conviction.

## ***CIVIL LIABILITY***

**Caudill v. Stephens**  
**2007 WL 625348 (Ky. App. 2007)**

**FACTS:** On the day of the incident, Caudill “held two men at gunpoint in his residence [in Rowan County] and called the police because he believed that the men were planning to commit theft.” However, the responding officers “freed the two men and instead arrested Caudill for unlawful imprisonment.” Caudill was released when he appeared in court, and the trial court determined that “no probable cause existed to believe he had committed a crime.”

Following his release, Caudill sued the three arresting officers, but the court granted summary judgment in the officers’ favor. Caudill appealed.

**ISSUE:** Is an officer’s decision concerning the existence of probable cause a discretionary duty?

**HOLDING:** Yes

**DISCUSSION:** The court outlined the standard to be met in such lawsuits. The Court noted that either the officer must be shown to have breached a ministerial duty or that the officer “acted in bad faith while conducting a discretionary act.”<sup>51</sup> As such, if an officer makes a mistaken but “good faith judgment call” the officer is protected by qualified immunity.

Caudill argued that a “peace officer’s probable cause determination and decision to arrest is always a ministerial act that does not enjoy qualified immunity.” However, the Court found more persuasive the view “that a peace-officer’s on-the-spot probable cause determination, as well as his decision whether to arrest, is an inherently discretionary act.”<sup>52</sup> Since Caudill did not “allege specific facts indicating that the officers’ mistaken arrest was made with malice or bad faith,” the Court found that the decision was a discretionary one and that qualified immunity was appropriate.

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<sup>50</sup> 956 S.W.2d 883, 891 (Ky.1997).

<sup>51</sup> Yanero v. Davis, 65 S.W.3d 510 (Ky. 2001)

<sup>52</sup> Jeffers v. Heavrin, 10 F.3d 380 (6<sup>th</sup> Cir. 1993)

## ***EMPLOYMENT***

### **Dickman v. Lexington-Fayette Urban County Gov't** 2007 WL 779193 (Ky. App. 2007)

**FACTS:** On Jan. 26, 2004, Dickman was hired as a probationary firefighter for LFUCG Div. of Fire. At orientation, he received a handbook that indicated that he would be serving a 12-month probationary period.

After graduation from the training academy, Dickman was assigned to a fire station, where he apparently served without incident until Nov., 2004, receiving two good performance evaluations. However, in November, he received “two Coaching and Counseling Plans for his failure to follow certain rules.” Dickman apparently neglected to “to take certain items of his firefighter gear with him when he traveled to other fire stations and left equipment at those stations when he departed.” On Dec. 15, he again left items behind. Later that day, just a few weeks before the end of his probationary period, the Fire Chief fired Dickman.

Dickman filed suit, alleging breach of contract and denial of due process. The Circuit Court eventually granted summary judgment in favor of LFUCG. Dickman appealed only the due process claim.

**ISSUE:** Are probationary employees entitled to the same due process rights as regular employees?

**HOLDING:** No (but see discussion)

**DISCUSSION:** The Court noted that KRS 95.450(1) details the due process rights of a firefighter in an urban-county government.<sup>53</sup> That statute requires a specific process to be followed in disciplining or terminating a firefighter. However, the Court had previously acknowledged that “probationary employees are exempt” from the statute, and the probation “has been expressly approved as a legitimate ‘process for evaluation of a potential member’ of the department.”<sup>54</sup> Such employees have no “vested rights or vested interests to permanent appointment by virtue of their temporary service.”<sup>55</sup>

Dickman, however, argued that by ordinance, LFUCG provided him with “certain due process rights which were denied upon his termination.” He argued that the ordinance entitled him to a hearing and that his previous work evaluations indicated that “he was meeting the applicable work standards.” The Court, using the ordinary rules of construction, concluded that it was obviously the intent of the legislature to create two classes of firefighter, permanent and probationary, at that a probationary firefighter is a “true at-will employee.”

The Court noted that because of the “rather imprecise language” in the ordinance, that Dickman’s argument was not totally baseless. However, the Court noted that even if it agreed with Dickman, sufficient cause existed to justify his termination. Dickman had failed to protect certain items of valuable equipment, including a portable radio, and had further failed to report that the radio was destroyed until the fire

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<sup>53</sup> Only Lexington-Fayette holds the status of an urban-county government, pursuant to KRS 67A.

<sup>54</sup> Rottinghaus v. Board of Comm’rs of the City of Covington, 603 S.W. 2d 487 (Ky. App. 1979)

<sup>55</sup> Louisville Professional Fire Fighters Ass’n v. City of Louisville, 508 S.W.2d 42 (Ky. 1974)

apparatus was on another run, where it was apparently needed. He also left behind necessary items of personal protection equipment. His termination followed another instance of the conduct for which he'd previously been counseled.

The Court upheld the decision of the Fayette Circuit Court and upheld Dickman's firing.

# *SIXTH CIRCUIT COURT OF APPEALS*

## *SEARCH & SEIZURE – ARREST*

### Franklin v. Miami University

214 Fed.Appx. 509, 2007 WL 62706, 2007 Fed.App. 0018N ( 6<sup>th</sup> Cir. Ohio 2007)

**FACTS:** On Feb. 28, 2002, Franklin, a custodian at Miami University, was cleaning restrooms. Because he preferred to have no one else inside while he was doing so, he posted signs directing people to other restrooms. However, one of his coworkers, Johnston, entered the restroom anyway.

Franklin complained to his supervisor, Collopy, about it. Johnston came by and the two got into a verbal argument that escalated into verbal threats. "Franklin eventually returned to work, and Johnston called the Miami University Police Department and 'requested police assistance.'"

Officer Fox arrived, and questioned Johnston and Collopy. Both stated that Franklin had made threats before, and had a "hot temper." After more discussion, and consulting with his commanding officer, Officer Fox arrested Franklin for criminal menacing, less than an hour after the initial encounter.

Although the opinion does not state exactly what happened with the disposition of the criminal case, apparently it was dismissed. Franklin then filed suit against the university and the responding officers, including Fox. The District Court granted summary judgment to all of the defendants except for the claim of false arrest against Officer Fox and two other officers who assisted him. The officers appealed that denial.

**ISSUE:** Must an officer actually talk to a suspect about allegations before making an arrest?

**HOLDING:** No

**DISCUSSION:** The Court stated that the issue in this case whether "whether the officers possessed 'reasonably trustworthy information ...sufficient to warrant a prudent man in believing' that Franklin violated Ohio's criminal-menacing statute."<sup>56</sup> The Court noted that the "undisputed record" shows that Franklin did just that. The Court reviewed Officer Fox's investigation and found it more than adequate to support probable cause for the charge, despite Franklin's argument over the specific language he claims to have used in the "threat." The Court further disagreed with Franklin's view that because the officers did not interview him, they did not do a sufficient investigation, finding that it was unnecessary for Fox to have spoken to Franklin before actually arresting him. The court noted that "Franklin had no license to threaten physical harm to Johnston" – no matter how the disagreement occurred between the two.

Finding that the officers had sufficient probable cause to make the arrest, and thus, that there was no false arrest, the Court reversed the trial court's decision and awarded summary judgment in favor of the officers.

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<sup>56</sup> Beck v. Ohio, 379 U.S. 89 (1964)

## ***SEARCH & SEIZURE – EXIGENT ENTRY***

**Ferguson v. Unicoi County, Tenn.**  
2007 WL 881527 (6<sup>th</sup> Cir. Tenn. 2007)

**FACTS:** On the day in question, Erwin (Tenn.) PD officers “received a tip from a reliable informant that [a] fugitive [they sought] was in [a] dwelling.” They put the building under surveillance, and subsequently, the tipster called back to tell them that the “fugitive had left.” However, since the officers had “checked out the only vehicles seen leaving the dwelling, they concluded that this information was erroneous and that the fugitive, therefore, was still inside.”

The officers contacted the Sheriff, who arrived on scene. They made several requests to enter, but “those requests were refused.” The Sheriff contacted the county prosecutor who advised “that an entry was justified but that the search should be limited to only those areas where a person could be found.” The officers entered, conducted a brief search, during which time the occupants, including Maria Ferguson, could have left at any time. The entire process took about 45 minutes.

Several of the individuals in the house at the time of the search then sued, under 42 U.S.C. §1983. The U.S. District Court awarded summary judgment to the defendant officers, and Ferguson, and others, appealed.

**ISSUE:** May a belief that a fugitive is hiding in a specific location justify an exigent entry?

**HOLDING:** Yes

**DISCUSSION:** The Court quickly agreed with the trial court that 1), the initial traffic stop was justified under Terry and 2) that the “officers had an objectively reasonable belief that the fugitive might be hiding inside.”<sup>57</sup> In fact, it noted, the “search was conducted in the least intrusive manner possible under the circumstances.”

The U.S. District Court’s decision was affirmed.

*NOTE: Although the entry was approved in this situation, if officers have reason to believe an individual is in a location not listed on the arrested warrants, officers are advised to consider obtaining a search warrant for the fugitive at that location, if time permits.*

## ***SEARCH & SEIZURE – WARRANTS***

**U.S. v. Head**  
216 Fed.Appx. 543, 2007 WL 414276, 2007 Fed.App. 0098N (6<sup>th</sup> Cir. Ohio 2007)

**FACTS:** In Jan., 2004, the Akron PD were told by a CI that Head was selling crack from his residence, and the CI subsequently made several controlled buys. On March 29, a search warrant was issued, based upon an affidavit that a controlled buy had been made within the previous three days. The affidavit, read, in part:

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<sup>57</sup> Brigham City v. Stuart, 126 S.Ct. 1943 (2006)

On March 30, “officers in unmarked police cars set up surveillance on [the residence] in order to execute the search warrant.” Since Head’s car was in the driveway, they believed him to be at the house. Just before they expected to execute the warrant, Head “unexpectedly left in a Jeep Cherokee.” Since the agency’s policy was that stops were not made in unmarked cars, they tried to get a marked vehicle to stop him. However, one was not available, so the officers in the unmarked cars followed him. When he stopped at a gas station, about a mile from the house, the officers decided they could effect the stop safely, and they approached and handcuffed him. He was brought back to his house so that the officers could execute the warrant, and he was permitted to secure his dogs. The search yielded a firearm, money, cell phones and a substantial amount (29 grams) crack cocaine.

During the stop, the officers gave Head his Miranda warnings, and he waived them. He told them he had forgotten about the gun – he had denied having any weapons in the house earlier. He agreed his fingerprints were probably on the gun. He further incriminated himself by arguing that the crack cocaine was “small time.”

Head was indicted, and he argued for suppression concerning his statements. The motion was denied, and eventually, he was convicted on several of the charges. Head appealed.

**ISSUE:** May officers stop an individual who is leaving a house for which they have a search warrant, and hold that individual during the execution of the warrant?

**HOLDING:** Yes

**DISCUSSION:** First, Head argued that the officers did not have the authority to go after him and bring him back to the residence during the search. He attempted to distinguish his situation from Michigan v. Summers,<sup>58</sup> arguing that because he was a distance from the house, and “no longer on the ‘premises,’ the stop was improper. The Court noted, however, that the Summers holding had been extended in U.S. v. Cochran,<sup>59</sup> which permitted the police to follow an individual from a house for which a search warrant was being executed and bring him back to the house. In that case, the court found that the focus was not on “geographic proximity” but was on whether the individual was detained as soon as practicable after departure.

In this case, the court agreed that he was stopped as soon as he could be safely detained and held that the stop was not a violation of Head’s Fourth Amendment rights. His conviction was affirmed.

**U.S. v. Miller/Ramsey**  
**2007 WL 930425 (6<sup>th</sup> Cir. Tenn. 2007)**

**FACTS:** On Nov. 27, 2002, Deputy Wilson (Monroe Co. TN SD) “obtained a search warrant from a state court judge for the residence of Ernest and Mary Miller, who lived on property owned by Ernest and his mother.” The affidavit stated that the pair had pleaded guilty the previous week to criminal drug charges, apparently as a result of the discovery of drugs found at the home the previous year. The affidavit further stated that a CI had seen methamphetamine and firearms inside the home in September, and that Ernest

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<sup>58</sup> 452 U.S. 692 (1981)

<sup>59</sup> 939 F.2d 337 (6<sup>th</sup> Cir. 1991)

had spoken of manufacturing methamphetamine, and that within 72 hours prior to Nov. 27, the CI had again seen methamphetamine along with the items needed to create a lab. In addition, Ernest had spoken of having explosives on the property. The CI had proven to be credible in the past, Wilson stated.

In the early evening of Nov. 27, sheriff's deputies executed the warrant, and found the Millers, Mary's daughter Samantha Moreno and Phyllis Ellison. While searching Ernest, they found methamphetamine, ammunition and over \$900 in cash. They found many items used in manufacturing meth in the home, along with long guns and handguns and a vast amount of ammunition. In Mary's purse they found a shopping list and receipts indicating the purchase of a number of items needed to manufacture methamphetamine. The receipt suggested that Samantha may have actually made the purchases.

Deputy Vittatoe, assigned to secure the rear of the home, spotted Ramsey, who he recognized, "come out of a shed located behind the trailer." When Vittatoe challenged him, Ramsey ran, and was able to evade capture. Vittatoe returned to look inside the shed, and saw a working lab. Because of the strong fumes, the officers waited to don appropriate protective gear, and then entered.

The Millers, Moreno, Ramsey and another individual who arrived during the search, Bivens, were all indicted on a variety of charges related to methamphetamine manufacturing. They appealed.

**ISSUE:** Is a shed generally included in a search warrant for the residence?

**HOLDING:** Yes

**DISCUSSION:** First, Ernest Miller argued that the search warrant "did not identify the items to be seized with sufficient specificity and that the officers' search of the shed behind the trailer exceeded the warrant's scope." The Court, however, agreed with the trial court that the search was valid, because the shed was within the breadth of the search warrant and because Miller did not have standing to complain.

Miller also argued that the "supporting affidavit failed to establish that the CI was reliable and that his information was current. He had requested the identity of the CI, but was refused by the trial court. The Sixth Circuit agreed that he had not made the necessary showing that the CI's identity was essential for a fair trial, and that the trial court's decision was correct.<sup>60</sup>

**U.S. v. Rice**  
**478 F.3d 704 (6<sup>th</sup> Cir. Ky. 2007)**

**FACTS:** As a result of an ongoing investigation involved the FBI, FBI Agent Wenther sought a wiretap order. That wiretap resulted in evidence that led to indictments against Rice and others. Rice, then sought to suppress the information gained as a result of the wiretap, and the District Court agreed, further agreeing that there was no good faith exception that could save the evidence. The prosecution appealed.

**ISSUE:** Is a warrant that is material deficient able to be "saved" by the good-faith exception?

**HOLDING:** No

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<sup>60</sup> Roviaro v. U.S., 353 U.S. 53 (1957); U.S. v. Moore, 954 F.2d 379 (6<sup>th</sup> Cir. 1992)

**DISCUSSION:** First, the Court discussed the Wenther affidavit and summarized it, as follows:

All normal avenues of investigation have been carefully evaluated for use or have been attempted with minimal results. The traditional investigative techniques utilized thus far have included the use of confidential sources (against known members of the Shawn B[ullitt] organization), obtaining toll records for other phone lines and for the target telephone, and physical surveillance. Also closely considered, but not deemed likely to success for reasons set forth below, include the use of undercover agents, use of a Federal Grand Jury, the serving of search warrants, interviews of subjects or associates, and the use of "trash pulls."

The Court reviewed whether the officers actually did the actions claimed, or suggested, by the affidavit. The trial court found that the issuing judge "would mistakenly think that agents had conducted physical surveillance" when in fact, there was no evidence that they had done so. Wenther testified, at the hearing, that "they had no specific information on whether Rice carried a firearm."

In another part of the affidavit, Wenther claimed that a confidential informant was not available, or alternatively, was unable, to gain any information about the organization, but in fact, it appeared that the government failed to take "any steps to develop such a source." Further, the "district court found inadequate the generic information included regarding how drug traffickers normally operate" rather than how Rice specifically operated.

With regards to the use of pen register and telephone toll analysis, the Court noted that the affidavit "mainly focused on 'general language about the usefulness of pen registers in general.'" It did note that the pen register identified that Rice had been in contact with other individuals linked to drug trafficking. The other techniques mentioned, which were not attempted, all "suffer[ed] from the same problem" - they addressed the problems in general rather than how they were not possible or useful in this particular case.

The District Court had found that the warrant, particularly the statement about physical surveillance, were made so recklessly that "it could not afford the same deference ordinarily due to an issuing judge's determination." The District Court also noted that "[o]ther than some uncorroborated thoughts and opinions there is no evidence that any other investigative technique was ever used or even seriously considered." In addition, the Court "found that the government was using the wiretap in a forbidden manner - as the first step in its investigation against Rice."

Finally, the Court concluded that the affidavit, once "reformed for its factual deficiencies" was not able to meet the minimum requirements for a valid warrant, and upheld the District Court's suppression of the evidence.

The Court also reviewed whether the warrant was valid under the good-faith exception laid out by U.S. v. Leon.<sup>61</sup> It concluded that Leon does not apply to warrants that are improperly issued under Title III - the wiretap provisions.<sup>62</sup> The relevant federal statute provides that exclusion of the evidence is the appropriate legal remedy for an improperly-issued warrant. "The statute is clear on its face and does not provide for any exception" and as such "[c]ourts must suppress illegally obtained wire communications."

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<sup>61</sup> 468 U.S. 897 (1984)

<sup>62</sup> See 18 U.S.C. §1983

The decision of the trial court, to suppress the “fruits of the wiretap” was affirmed.

## ***SEARCH & SEIZURE – CONSENT***

### **U.S. v. Howard**

216 Fed.Appx. 463, 2007 WL 177890, 2007 Fed.App. 0057N (6<sup>th</sup> Cir. Ky. 2007)

**FACTS:** On Sept. 5, 2001, KSP received information from Agent Brock, (BATF) that he had information that Howard, a convicted felon, “was shooting a gun in his backyard.” KSP troopers went to the house but found that Howard was not home. They asked Howard’s wife if there was a gun in the house, to which she replied no, and she permitted them to search the house. They found a .22 rifle in the closet, and Mrs. Howard admitted that she, her husband, and another individual had fired the rifle. The rifle was seized at that time.

On Sept. 14, 2001, Agent Brock, and others, returned to the house and searched again, finding ammunition but apparently no guns. Brock interviewed Howard, and Howard admitted having fired a shotgun, but not the rifle that was found.

Eventually, both of the Howards were charged with being felons in possession, and Mrs. Howard pled guilty and agreed to testify. Howard attempted to get the rifle and the ammunition suppressed, with no success.

Howard was convicted, and appealed.

**ISSUE:** Must officers actively seek permission from an absent spouse in order to search a residence, when consent has been obtained from the spouse that is present?

**HOLDING:** No

**DISCUSSION:** Howard first argued that the consent given by his wife for the first search, the one that produced the rifle, was invalid because she was intoxicated (on drugs) at the time. The Court found no reason, however, to invalidate her consent and suppress the rifle.

Further, the Court did not find it necessary to suppress the consent under Georgia v. Randolph, in that the case “does not require the police specifically to determine whether [Howard] was present in the home before conducting the search after they obtained Lila Howard’s consent.”<sup>63</sup>

The Court also held that although the search warrant affidavit did not “go into great detail about the confidential source’s past reliability” that it did provide sufficient corroboration to support the CI’s information. The Court agreed with the trial court that the warrant was adequately supported by probable cause.

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<sup>63</sup> 126 S.Ct. 1515 (2006)

Finally, the Court found that a statement made by Howard to Agent Brock, who had gone to the jail where Howard was being held to collect fingerprints and photos, was spontaneous and voluntary, and thus admissible.

After addressing a number of other procedural issues, Howard's conviction was affirmed.

**Pratt v. U.S.**

**214 Fed.Appx. 532, 2007 WL 186496, 2007 Fed.App. 0050N, 6<sup>th</sup> Cir. Ohio, 2007**

**FACTS:** On Sept. 24, 2003, a number of officers when to Pratt's mother's home to find and arrest Pratt. "Pratt lived with his mother in the upper flat of a duplex she owned" and he "did not pay rent for the single bedroom he occupied."

Pratt's mother stated she was the sole leaseholder (in fact, she was the owner) and that Pratt "stayed there." She told the officers Pratt was not there, but she signed a consent form permitting a search of the premises.

In the course of the search, the officers "came upon Pratt's locked bedroom door." Pratt's mother later testified that she had free access to the room, and there was dispute as to whether she provided a key, but somehow, the agents gained access. They found a gun and ammunition. Because Pratt was a felon, he was subsequently charged for possession of the gun. Pratt moved for suppression, arguing his mother did not have authority over his bedroom, but the District Court denied the motion. Pratt appealed.

**ISSUE:** May a parent give consent to search an adult child's locked bedroom?

**HOLDING:** Yes

**DISCUSSION:** The court noted that a "warrantless search does not violate the Fourth Amendment when a person who possesses common authority over the premises with the suspect consents to the search."<sup>64</sup> "Typically, all family members have common authority over all of the rooms in the family residence,"<sup>65</sup> but that may be refused by proof that one family member has "clearly manifested an expectation of exclusivity" over an area. However, the Court agreed that "[m]ere possession or non-possession of a key at the time of a search is not dispositive in determining whether a co-occupant has common authority over an enclosed space."<sup>66</sup>

The Court found that because Pratt's mother owned the residence and admitted she had access, and because "Pratt did not even contribute rent," that Pratt's mother had actual authority to consent to the search. (And even if she did not, she clearly had apparent authority to do so.

Pratt's conviction was affirmed.

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<sup>64</sup> U.S. v. Matlock, 415 U.S. 164 (1974)

<sup>65</sup> U.S. v. Clutter, 914 F.2d 775 (6<sup>th</sup> Cir. 1990)

<sup>66</sup> Illinois v. Rodriguez, 497 U.S. 177 (1990); U.S. v. Gillis, 358 F.3d 386 (6<sup>th</sup> Cir. 2004)

## ***SEARCH & SEIZURE – BODY EVIDENCE***

### **U.S. v. Bean**

214 Fed.Appx. 568, 2007 WL 177898, 2007 Fed.App. 0060N, 6<sup>th</sup> Cir. Tenn. 2007

**FACTS:** Under federal law, as a prisoner in the federal system, Bean was required to submit a DNA sample as a condition of his supervised release. Bean contended that such sampling was a violation of his rights under the Fourth and Fifth Amendments. The District Court's order to provide the sample was appealed.

**ISSUE:** May a prisoner be required to submit a DNA sample as a condition of a supervised release?

**HOLDING:** Yes

**DISCUSSION:** The Court found that the DNA Act, which provided for the collection of samples to be included in the Combined DNA Index System (CODIS) was constitutional under the Fourth Amendment, pursuant to the Court's decision in U.S. v. Conley.<sup>67</sup> With regards to the Fifth Amendment claim, the Court noted that "blood-test evidence, although potentially incriminating, is neither testimony nor evidence relating to any communicative act and therefore" ... is admissible.<sup>68</sup>

The Court affirmed the order which required Bean to submit to compulsory DNA sampling.

## ***SEARCH & SEIZURE – TERRY***

### **U.S. v. Ivy**

2007 WL 870386, 6<sup>th</sup> Cir. Tenn., 2007

**FACTS:** On Feb. 10, 2005, Ivy was in a gas station parking lot in Memphis (TN). Memphis PD had been asked by the owner to patrol the lot on occasion, especially around a detached building on the lot that housed unused restrooms. While doing so, Officer White spotted Ivy, standing between a utility trailer and the detached building, and he turned his patrol car into an adjacent lot. "White saw that Ivy was carrying a golf club and another object that turned out to be a pill bottle." White called out to Ivy to come to him, but instead, "Ivy walked away from White and around the trailer." White could see underneath or through the trailer and "saw Ivy drop the pill bottle, pick it up and drop it again." White located and picked up the bottle and saw that it "contained what appeared to be crack cocaine." Doing a patdown, White located what he believed to be a gun, but he waited for backup to arrive before actually retrieving the gun from Ivy's pants pocket.

Ivy was charged with possession of a firearm by a convicted felon. He moved for suppression, but was denied. Ivy was then convicted, and appealed.

**ISSUE:** Are suspects seized when they stop pursuant to a command to do so?

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<sup>67</sup> 453 F.3d 674 (6<sup>th</sup> Cir. 2006)

<sup>68</sup> See Schmerber v. California, 384 U.S. 757 (1966)

**HOLDING:** Yes

**DISCUSSION:** The Court concluded that Ivy was not seized when White first called to him, because Ivy “did not comply with White’s assertion of authority.” Further, once he abandoned the pill bottle, by dropping it, , “White was free to look inside the bottle and the discovery of the crack was not the result of an unconstitutional seizure.”

Once “Ivy did comply with White’s command to stop, he was seized for Fourth Amendment purposes; however, this seizure did not violate the Fourth Amendment under Terry v. Ohio<sup>69</sup>.” The Court noted:

The totality of the circumstances supports White’s investigative stop of Ivy: White was familiar with the area and the fact that the manager of the gas station had previously complained of criminal activity in the very location where Ivy was loitering; White had previously observed criminal activity near the detached building; Ivy was loitering near the detached building with a golf club and a pill bottle in his hands; Ivy attempted to walk away from White when White asked Ivy to ‘come here’; and Ivy dropped the pill bottle before complying with White’s command to stop.

Once the officer found the crack, the search leading to the finding of the gun was also lawful. Ivy’s conviction was affirmed.

*NOTE: Although the Court consistently referred to the search that led to the gun as a “protective pat-down,” its opinion suggests that the Court considered the search to be justified as a search incident to arrest, following the officer’s discovery of the crack cocaine in the pill bottle.*

### U.S. v. Bearden

213 Fed.Appx. 410, 2007 WL 79012, 2007 Fed.App. 0033N, 6<sup>th</sup> Cir. Tenn. 2007

**FACTS:** On April 16, 2004, FBI and local officers searched North Tire, owned by Chambers, pursuant to Chambers’ consent. Prior to the search, they had tape recordings of conversations between Chambers and a CI, in which Chambers told the CI that his employees were armed, including an employee who was a convicted felon. When the officers arrived to do the search, they found two men, Bearden and Scott, standing near a work bay, and the officers seized the men and patted them down. During that search, found a gun in Bearden’s belt. The work bay area was posted, with the sign saying that the area was for employees only. When they discovered his criminal history, as a felon, he was arrested. (Apparently Bearden was not an employee, however, but a customer.)

Bearden argued that his seizure, and subsequent search, were unconstitutional, but the trial court denied his motion to suppress. The trial court reviewed the matter under Ybarra v. Illinois, and noted that “officers searching premises pursuant to the consent of the owner ‘have the right to frisk persons who are present to find weapons that the officer pursuing the consent to search reasonably believes or suspects, or is in the possession of the person the officer has approached or found on the premises.”<sup>70</sup>

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<sup>69</sup> 392 U.S. 1 (1968)

<sup>70</sup> 444 U.S. 85 (1979)

**ISSUE:** Is it reasonable for an officer to believe that an individual found in the work area of a business is an employee of that business?

**HOLDING:** Yes

**DISCUSSION:** Because Bearden was found in an area apparently limited to employees, the Court found it was reasonable to think that he was an employee, even though he was, in fact, dressed somewhat differently from the others in the area. In addition, the Court reviewed the facts under Michigan v. Summers, and noted "that a warrant to search for contraband founded on probable cause implicitly carries with it the limited authority to detain the occupants of the premises while a proper search is conducted."<sup>71</sup> The Court further had no problem frisking and handcuffing the individuals present there, given the information available to the officers.

The Court found that his initial detention was reasonable under both Terry and Summers. Because the officers had reason to believe that employees were armed, it was further reasonable for the men to be frisked. It was reasonable, given where Bearden was located, that he was confused with an employee. The frisk was reasonable, and contrary to Ybarra, the officers had reason to believe that persons on the premises were, in fact, armed.

Bearden's conviction was affirmed.

**Center for Bio-Ethical Reform, Inc. v. City of Springboro**  
**477 F.3d 807 (6<sup>th</sup> Cir. Ohio, 2007)**

**FACTS:** On June 10, 2002, Harrington, Patch and Henkel were employees and/or volunteers of the Center for Bio-Ethical Reform, Inc. (CBR). On that day, Harrington and Patch each drove trucks emblazoned with "graphic images of first-term aborted fetuses" along with contact information for the CBR, and Henkel drove as escort vehicle, a Crown Victoria, equipped with a video camera and a shotgun. All wore protective gear, including body armor. They were driving in the area near Dayton, Ohio. At the end of the day, they parked the vehicles at a farm, having already obtained permission from the property owner to do so. However, they became concerned when they got to the location, because they weren't sure that the trucks could clear overhanging tree branches.

During that time, Officer Clark stopped Patch, having noticed that the trucks were blocking the main road and causing a back-up. "Clark asked Patch if the trucks were lost or needed assistance" and asked about his cargo. Patch told him the vehicles were "billboard trucks" and that they were campaigning against abortion. Clark later described Patch as behaving in an "extremely nervous" manner. Clark then left. However, he contacted Lt. Barton "to determine if [the men] were participating in some sort of government exercise." He was directed to talk to Detective Parker and explain what he had witnessed. Within minutes Parker and Clark met up, along with another officer, Walsh. Apparently, the dispatcher, who relayed Clark's message to Parker, had mistakenly announced that the men had "assault weapons" as opposed to assault gear (body armor and helmets). When Clark realized the error, he corrected it with dispatch.

Detective Parker contacted Agent Morris, of the Dayton FBI office, and told him of the pictures on the trucks. "Purportedly concerned about domestic terrorism targeting abortion doctors and clinics," Morris

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<sup>71</sup> 452 U.S. 692 (1981)

decided to "grab a couple of guys and ... come by ... and find out who these people were or what they were doing." Parker recounted later that he was told to "prevent [the men] from leaving." During this time, other officers, Kuhlman, Piper and Hubbard arrived but "without specific direction" to do so.

In the meantime, the men had located an alternate location to park the trucks for the night, and they covered the sides of the trucks with tarps. They drove to the parking lot, followed by two police cars. (Because Harrington was better at maneuvering the large vehicles, he pulled the first truck out and then turned it over to Patch, and then went back to drive the other truck.) However, Henkel, in the escort vehicle, had been stopped, blocked in and surrounded by five officers. Some twenty minutes into the encounter, Henkel was ordered to stay away from the escort vehicle. At about 7 p.m., two hours after he was originally stopped, "officers asked Henkel for permission to search the escort car, and he said that he could not give permission as it wasn't his car." When asked again, "with greater force," he directed them to talk to Harrington. When they asked a third time, "more forcefully," Henkel said the only thing in the car that was his was a bag, and they could do what they wanted. After searching the car, at about 7:45 to 8 p.m., he was told by an unidentified FBI agent that they were going to "kick him loose" after which they got his name and other identifying information. He was released after about 15 minutes and went in search of the other two men. "At no time did the officers tell Henkel why he was not free to leave."

During that same time, Harrington and Patch, observing that they were being followed by officers who were apparently running with emergency lights, pulled over into a subdivision. A number of police cars surrounded the trucks. Officer Peagler approached the passenger side of Patch's vehicle, and he then walked around to the driver's side. Walsh had also approached, and had Patch get out. He was questioned as to his identity and the contents of the truck, and later, an FBI agent also inspected his ID. Clark approached Harrington's vehicle, had Harrington get out, and obtained ID.

Harrington later stated that he waited "for three hours." During that time, he "repeatedly asked Walsh why they could not leave" and she replied that she was waiting on direction from a supervisor. Walsh later agreed that the men weren't free to leave. The men were not handcuffed, placed into police vehicles or ordered to the ground.

Harrington agreed that he had verbally consented to a search of the trucks, but felt that he was "compelled to do so given the 'show of force.'" He further reluctantly agreed to a search of the bag, believing, as the officers suggested, that by permitting them to search the cab, he had already given consent to the search of the bag. (It was mentioned several times that various officers had their holsters unsnapped or had their hands on their sidearms.) At two different points, they had the two men raise the tarps and they took pictures of the side of the trucks.

Another FBI agent approached them and obtained Harrington's ID, and upon being asked why they were being held, told Harrington not to speak to him unless the agent spoke to him first. Harrington was permitted to call his attorney on his cell phone, but when Harrington gave Patch a camera, "one of the FBI agents purportedly grabbed the camera from Patch." Harrington was questioned "about CBR, the purpose of the trucks, and whether they had firearms in the trucks." One of the agents "indicated that once Harrington 'settled down' and conveyed the group's purpose in a calm and 'cordial' fashion, 'any concern [he] had was dispelled' and [the men] 'were let go.'"

The men were released sometime after 8:30 p.m.

Following the incident, Chief Herdt (Clearcreek Township PD) directed Piper, one of his officers, to draft a “simple memo” that did not mention the names of the officers present to document what had happened. He perceived that it was “an FBI investigation” but later agreed that he did anticipate a lawsuit as a result of the incident. He specifically told Piper not to open a case file.

The men, and the organization, filed a lawsuit in Feb., 2003, alleging violations of the First, Fourth and Fourteenth Amendments. Upon motion by the Defendants, the officers and their municipal agencies (Clearcreek and Springboro), and the FBI agents, were awarded summary judgment.

Harrington, Patch and Henkel, and the CBR, appealed.

**ISSUE:** May a lengthy detention ripen into a de facto arrest, and if without probable cause, support a lawsuit for a false arrest?

**HOLDING:** Yes

**DISCUSSION:** The Plaintiffs alleged that the Springboro PD had an “unwritten rule” that once the FBI is summoned, the case becomes theirs. (The same allegation was not made about Clearcreek, however.) As such, the Court upheld the summary judgment in favor of the two municipalities.

The Court also quickly disposed of the claims against the federal officers.

The Court then moved on to the lawsuit against the individual municipal officers. The Plaintiffs alleged that they were “stopped and detained ... in retaliation for the message expressed on the sides of the trucks and have consequently chilled their free expression.” The trial court had found that the stop was motivated by public safety concerns, and that the officers were thus entitled to qualified immunity.

The Sixth Circuit, however, using the process described in Saucier v. Katz, first looked at whether the officers violated a constitutional right.<sup>72</sup> In a First Amendment case, the Court evaluates the “exercise of free speech under the framework” set forth in Mount Healthy City Sch. Dist. Bd. of Educ. v. Doyle.<sup>73</sup> First, the “plaintiff must show that (1) he was participating in a constitutionally protected activity; (2) defendant’s action injured plaintiff in a way ‘likely [to] chill a person of ordinary firmness from’ further participating in that activity; and (3) in part, plaintiff’s constitutionally protected activity motivated defendant’s adverse action.”<sup>74</sup> In this case, the Court agreed that the First Amendment protects the display of signs concerning abortion, even if offensive to the viewer.<sup>75</sup> All parties agreed that the men were engaging on protected speech.

Next, the Court evaluated whether the officers’ actions chilled the speech of the three men. The Court noted that Clark told Parker about the photos on the truck when he “contacted him to describe the encounter” and further, that Parker told Morris, of the FBI, about the photos. The officers apparently admitted having taken photos of the truck during the stop. Harrington testified that one of the officers talked to him about the graphic photos and about how children might see them and be upset by them. With this information before it, the Court then had to determine if the stop would have occurred, and/or been so

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<sup>72</sup> 533 U.S. 194 (2001)

<sup>73</sup> 429 U.S. 274 (1977)

<sup>74</sup> See also Block v. Ribar, 156 F.3d 673 (6<sup>th</sup> Cir. 1998); Thaddeus-X v. Blatter, 175 F.3d 378 (6<sup>th</sup> Cir. 1999)

<sup>75</sup> See Hill v. Colorado, 530 U.S. 703 (2000); Terminiello v. City of Chicago, 337 U.S. 1 (1949)

lengthy, but for the protected speech, and it would then fall to the defendants to “bear the burden of proving that both the investigative stop and the rather lengthy detection would have taken place absent Plaintiffs’ constitutionally protected activity.” Although the Court agreed that the initial stop was justified, the Court noted that the “prolonged detention” “presents quite a different question in view of the fact that the initial searches revealed nothing to justify further detention.”

Finding that the Plaintiffs’ exercise of their First Amendment right at least in part triggered the police actions, the court next looked to whether that First Amendment right was clearly established, such that the officers would reasonably understand that they were violating that right. The Court quickly found that the officers should have been aware of the contours of that right, and that “government actions may not retaliate against an individual for the exercise of protected First Amendment freedoms.”

The Court reversed the summary judgment in favor of the officers on the First Amendment claim.

Moving on to the Fourth Amendment claims, the Court engaged in the same analysis. The Court concluded that “the otherwise unobjectionable Terry stop ripened into an unconstitutional seizure in light of the undue and unjustifiable length of the stop.” The court agreed that “[n]o ‘reasonable person’ in Plaintiffs’ position would have felt ‘free to leave’ given the ‘show of official authority’” at the two locations. Walsh’s statement corroborated that Harrington and Patch, at least, were not free to leave, and the “significant number of law enforcement personnel – officers from two local police stations and later, the FBI” present further supported that view. The Court agreed that Clark’s observations of the men “driving box-style trucks while dressed in body armor and Kevlar helmets, accompanied by a vehicle modeled to look like a law enforcement car” and in a “post- 9/11 and post-Oklahoma City bombing context, at a time when law enforcement officers were in a heightened state of alert to fight would-be terrorists.” However, in this case, the “detention ultimately ripened into an ‘arrest’ probable cause.” “In evaluating an investigative detention, courts consider not only the length of the stop, but also ‘whether the police diligently pursue their investigation,’ and whether they ‘could have minimized the intrusion.” Looking to the totality of the circumstances, the court noted that the detention did not “reasonably relate in scope to the circumstances which justified the interference in the first place” and “far exceeded the limited purpose of the stop.” Even balancing the governmental interest with the men’s individual liberty interest, the Court noted the men were “subjected ... to the public indignity of being personally detained” and they were “effectively held ... for three hours, ... in front of neighbors and onlookers who had stopped to assess the situation.” The Court further stated that the men were “decidedly not free to leave during that three hour period.”

In U.S. v. Davis, the court had “admonished that absent probable cause, officers may not detain citizens once their suspicions, however reasonable initially, have been dispelled in order to conduct a second search of the same nature.”<sup>76</sup> The Court stated that to “delay Plaintiffs for the purpose of enabling the FBI to arrive at the scene to conduct effectively the same investigations ... ‘served no investigatory purpose.’” The Court concluded that the Plaintiffs’ Fourth Amendment rights were violated by the detention. (However, the Court did agree that the consent to search, given during the detention, was valid – and was effectively moot because nothing incriminating was found during the search anyway.)

In summary, the Court overturned the granting of summary judgment and qualified immunity in favor of the local officers, holding that “cases had long put reasonable officers on notice of the permissible bounds of conduct in executing Terry-type stops.”

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<sup>76</sup> 430 F.3d 345 (6<sup>th</sup> Cir. 2005)

## ***SEARCH & SEIZURE – BUIE***

### **U.S. v. Stover/Hinton**

474 F.3d 904, 6<sup>th</sup> Cir. 2007

**FACTS:** Stover was arrested as a result of his involvement in a drug conspiracy that ranged from Texas to Ohio. As a result of the investigation into the conspiracy, Hinton was arrested and his house searched. During the course of clearing the house, officers found a crawl space off the garage filled with marijuana plants, and in another room, a handgun was found in plain view. The officers eventually got a search warrant for the property and seized a number of items, including drugs and more firearms. Eventually, both Hinton and Stover were convicted on drug trafficking charges, Both appealed.

**ISSUE:** May officers search all areas of a house where a person may hide during the course of a sweep search in conjunction with an arrest?

**HOLDING:** Yes

**DISCUSSION:** Hinton argued that the search that resulted in the discovery of evidence was invalid, in that the house was searched after he was arrested. The officers had an arrest warrant, but did not have a search warrant, but did “clear the house” following Hinton’s arrest. They did so because there was a second vehicle, owned by a local criminal, parked in the driveway, and they were “concerned that there was another adult in the house.” Hinton argued that “the original search exceeded the permissible scope of a protective sweep under Maryland v. Buie.”<sup>77</sup>

The Court agreed that the plants were not located in “immediately adjoining” spaces or rooms to the location of the arrest. However, the Court found the car in the driveway to be of utmost importance, as that indicated that the driver could be visiting Hinton, even though the property was a duplex. Further, it was “undisputed that the crawl space could hold a person” and such a space makes a “good hiding place for a dangerous individual.”

After resolving several other issues, Stover and Hinton’s convictions were affirmed.

## ***SEARCH & SEIZURE – VEHICLE STOPS***

### **U.S. v. Sanford/Hill**

476 F.3d 391, 6<sup>th</sup> Cir. Tenn. 2007

**FACTS:** On Feb. 25, 2005, at about 4:30 p.m., Deputy Pruitt (McMinn Co. Tenn., SD) was patrolling I-75 when he noted a vehicle going a little under the speed limit. The car came up behind a slower-moving truck and slammed on the brakes, being unable to change lanes due to traffic in the other lane. Pruitt then activated his lights and stopped the vehicle.

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<sup>77</sup> 494 U.S. 325 (1990)

Deputy Pruitt approached the driver's side, and upon request, received a New York learner's permit, the vehicle registration and insurance documentation, from Hill. Pruitt noticed "approximately fifteen air fresheners hanging on the turn-signal lever of the steering column" and later testified that indicated to him that the occupants might be trying to "disguise the odor of narcotics." He asked the passenger, Sanford, for identification, and Sanford was unable to provide it. Pruitt asked Hill to get out of the car so that he could question the occupants separately.

Hill told Pruitt that the pair were returning from a basketball game in Atlanta, and he was unable to identify his passenger beyond a nickname. Sanford, however, stated they'd been to Atlanta to "find 'women'" and that he hadn't been to a basketball game in years. He also only knew the driver by a nickname.

Deputy Pruitt called for assistance from Officer Johnson, who arrived in minutes, along with his drug-sniffing dog. Hill consented to a search of the vehicle. Deputy Pruitt patted him down, as well, finding several cell phones and a pager, along with a roll of \$20 bills. He had Sanford get out and also patted him down. When the deputy felt a bulge in Sanford's pants pocket, "Pruitt asked Sanford if the bulge was marijuana" – to which Sanford agreed. Johnson began to search the car, and at that point, Hill ran away.

Shortly after the deputies found 8 kilograms of power cocaine in the car, Hill was captured. Both men were arrested under federal drug trafficking charges. They sought to suppress evidence found in the traffic stop, and were denied. Eventually, both were convicted and both appealed.

**ISSUE:** May officers make a traffic stop on a vehicle that briefly comes up very close behind another vehicle on the highway?

**HOLDING:** Yes

**DISCUSSION:** The Court noted that the legal standard for traffic stops in the Sixth Circuit is the "reasonable suspicion standard" when the "suspected violation is a criminal offense rather than a civil infraction."<sup>78</sup> In this case, the "suspected violation" was a "misdemeanor traffic offense" and as such, must be "analyzed under the standard of reasonable suspicion rather than probable cause." However, the Court concluded that "Pruitt had probable cause to stop Hill for a traffic violation." The Court continued, stating that the "crux of this case is a question of law – whether Pruitt had probable cause or reasonable suspicion to believe that [Tennessee law] was violated when defendants' vehicle was momentarily following another vehicle within a distance of ten feet while traveling 65 miles-per-hour and a third vehicle was passing in the passing lane." The Court agreed that the deputy's "ulterior motivations, if any, are irrelevant."<sup>79</sup> The trial court had found Pruitt's testimony credible. The court looked to U.S. v. Valdez<sup>80</sup>, noting that since that case is unpublished, it is "not precedentially binding under the doctrine of stare decisis" but can be considered for "persuasive value only." Using that case as guidance, the Court concluded that the distance between the vehicles, ten feet, created a substantial, albeit momentary, danger "when both vehicles are traveling at interstate speeds." (The Court also referenced U.S. v. Garrido<sup>81</sup>, a recently decided Kentucky case on a similar issue.)

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<sup>78</sup> Gaddis v. Redford Twp., 364 F.3d 763 (6<sup>th</sup> Cir. 2004)

<sup>79</sup> Whren v. U.S., 517 U.S. 806 (1996)

<sup>80</sup> 147 Fed.Appx. 591 (6<sup>th</sup> Cir.2005)

<sup>81</sup> 467 F.3d 971 (6<sup>th</sup> Cir. Ky. 2006)

The Court ruled “that Pruitt had probable cause to believe that a traffic violation had occurred and therefore was justified in making the initial stop of Hill’s vehicle.” The Court affirmed the convictions.

**Nelson v. Riddle/Moore**

**2007 WL 570231, 2007 Fed.App. 0129N, 6<sup>th</sup> Cir. Ky. 2007**

**FACTS:** In the evening hours of Aug. 21, 2002, Nelson left his parents’ home in Trigg County, near Cadiz, “to visit friends and shop at the Wal-Mart in Hopkinsville.” After midnight, on Aug. 22, he was returning home via U.S. Hwy 68, westbound.

At about 1:30 a.m., Nelson passed Officers Riddle and Moore, who were parked in separate patrol cars, apparently off on the shoulder of Hwy 68. (One of the two officers had a civilian ride-along with him.) As Nelson passed, “Moore told Riddle that he did not think Nelson’s car had a license plate” and both officers thought that the vehicle lacked the required illumination over the license plate.<sup>82</sup>

Riddle followed Nelson as he pulled off Hwy 68 onto a side road. Riddle later “estimated that he caught up to Nelson within three quarters of a mile from the offices’ original parked position.” He observed Nelson “cut the curve” and Riddle activated his lights and siren, “radioed to his dispatcher that he had initiated a pursuit” and he noted that “Nelson was failing to stop.” (Later, Chief Alexander stated that “a police siren can clearly be heard in the background of the radio communication between Officer Riddle and the dispatcher.”) Riddle later testified that “he had reached dangerously high speeds while chasing Nelson.”

The chase continued as Nelson made several turns, and at one point, “Nelson’s tail lights ... went out, as if Nelson had purposefully switched them off.” Moore joined the chase. Finally, “Nelson pulled into his parents’ driveway ... and he “jumped out of the car, threw both arms into the air and yelled ‘what?!’” Riddle later testified that Nelson might have been under the influence of something, as he “was slow to react to verbal commands and had bloodshot eyes.” He passed one Field Sobriety Test but failed another, and also failed the horizontal gaze nystagmus (HGN) test.” Riddle arrested Nelson for DUI and Fleeing and Evading in the First Degree. The citation indicated that the initial stop was attempted for a license plate violation, but that the reason for the stop escalated to “reckless driving, fleeing or evading police, and DUI suspicion.” Blood was drawn and later proved “negative for alcohol or narcotics.”

Nelson however, testified that he saw the two police officers and that “he did not see emergency lights on the police cars until he got out of his car and Riddle shouted at him.” “Nelson was placed in ‘deferred prosecution’ for six months, and at the end of that period, no further crimes having been committed, the Trigg County Attorney dismissed the charges against him.”

Nelson then sued the two officers, and they moved for summary judgment. The District Court denied that motion, finding that there was “a genuine issue of material fact as to whether Riddle had probable cause to stop Nelson’s vehicle.” The Court noted that “it is not clearly established in a particularized sense that a police officer violates probable cause standards by arresting a motorist for failing to stop when signaled to do so.” The officers appealed.

**ISSUE:** Is an individual’s “subjective awareness” or the officer’s objective observation of conduct the appropriate standard on which to judge probable cause?

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<sup>82</sup> KRS 186.170

**HOLDING:** The officer's objective observations

**DISCUSSION:** The Court noted that "ultimate fact in this case was ... whether and when [the officers] signaled [Nelson] to stop." The Court noted, however, that "Nelson never unequivocally stated that the emergency lights were not on prior to the time he got out of his car and Riddle shouted at him, but consistently couched his answers in terms of his 'subjective awareness,' which as [the officers] assert is irrelevant in assessing what a reasonably objective police officer would have believed."

The Court found that "Nelson did not meet his burden of showing that the [officers were] not entitled to qualified immunity." The Sixth Circuit reversed the order by the District Court, denying the officers qualified immunity, and remanded it back to that court to do so.

### ***42 U.S.C. §1983 - FIRST AMENDMENT***

#### **Leonard v. Robinson**

477 F.3d 347, 2007 Fed.App. 0051P, 6<sup>th</sup> Cir. Mich. 2007.

**FACTS:** On Oct. 15, 2002, Thomas and Sarah Leonard attended a township board meeting. The Leonards had been involved in a dispute with the Township that resulted in a lawsuit that involved Police Chief Abraham, over a towing contract. Officer Robinson, Montrose PD, was ordered to attend the meeting as well, in the hopes that he might be able to arrest Sarah Leonard.

During a public part of the meeting, Sarah addressed the council about how her business had been affected by their actions. Thomas Leonard was then recognized and spoke, and during his statements, he used a profanity. Officer Robinson then took Leonard outside and charged him with using the obscenity - that citation was later voided and dismissed.

Leonard sued Robinson claiming battery, false arrest and false imprisonment. Robinson demanded qualified immunity and demonstrated the Michigan laws that Leonard allegedly violated. Leonard argued, in turn, a "First Amendment retaliation theory." The U.S. District Court dismissed the case, finding that Robinson had probable cause to arrest Leonard for statutes that had not yet been specifically found unconstitutional, although other, similar statutes had been. Further, the trial court found that there was no connection between Leonard's protected speech and his arrest.

Leonard appealed.

**ISSUE:** May an officer be held liable for charging pursuant to a state statute that had not yet been held to be unconstitutional, when the content of said statute had been addressed by a relevant U.S. Supreme Court decision?

**HOLDING:** Yes

**DISCUSSION:** The Court reviewed the Michigan criminal statutes. The Court noted that the U.S. Supreme Court, in Cohen v. California, had ruled that the use of a "single four-letter expletive" could not be

a “criminal offense.”<sup>83</sup> The Court found that “[p]rohibiting Leonard from coupling an expletive to his political speech is clearly unconstitutional.”<sup>84</sup> Further, the Court found that a statute that prohibited disturbances at public meetings was unconstitutionally overbroad.

The Court stated that:

We conclude that the statute is unconstitutional as applied by the district court because the procedural posture of the case permits a finding that Leonard merely advocated an idea. This conclusion is based upon First Amendment jurisprudence that is decades old. In light of this, and of the prominent position that free political speech has in our jurisprudence and in our society, it cannot be seriously contended that any reasonable peace officer, or citizen, for that matter, would believe that mild profanity while peacefully advocating a political position could constitute a criminal act. The facts in this case could lead a reasonable factfinder to conclude that the circumstance of Leonard’s arrest for disturbing the peace were devoid of any indicia of disruption or contention.

Finding that no reasonable officer would consider themselves to have probable cause to ‘arrest a recognized speaker at a chaired public assembly based solely on the content of his speech (albeit vigorous or blasphemous) unless and until the speaker is determined to be out of order by the individual chairing the assembly. As such it was error for the District Court to grant the officer qualified immunity. Further, the court found that it was possible to find that the arrest was in “retaliation for constitutionally protected conduct.”

The grant of summary judgment was reversed.

## **42 U.S.C. §1983 – SPECIAL RELATIONSHIP**

### **Carver v. City of Cincinnati**

**474 F.3d 283, 2007 Fed.App. 0026P, 6<sup>th</sup> Cir. Ohio 2007**

**FACTS:** On the day in question, in 2005, Cincinnati police and EMS personnel “responded to a 911 call for a suspected cardiac arrest.” Upon arrival, the EMS crew “found Sandra Smith-Sandusky dead on the floor” and Carver “lying on a couch in the same room.” The police, considering the area a crime scene, cleared everyone out, taking the keys away from a roommate who was present. Carter was either “asleep, unconscious, or passed out.” The officers searched the apartment and found various pill bottles, including one containing Oxycontin.

The responders apparently made no attempt to treat Carver. At some undetermined point, Carver died.

Carver’s estate representative filed suit under 42 U.S.C. 1983, alleging that the responders “knew or should have known that Smith-Sandusky had overdosed” ... and “was in imminent danger because he had also overdosed on drugs.” The named officer defendants requested qualified immunity and summary judgment, but the trial court denied it, “holding that they unreasonably cut off access to medical care for Carver without providing an adequate alternative.” The officers appealed.

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<sup>83</sup> 403 U.S. 15 (1971)

<sup>84</sup> Chaplinsky v. New Hampshire, 315 U.S. 568 (1942); Miller v. California, 413 U.S. 15 (1973)

**ISSUE:** May officers be held to be liable for an individual's death, when they exercised no control over the individual and did not deny anyone else the ability to render aid?

**HOLDING:** No

**DISCUSSION:** The Court began by noting that the officers had "no general duty to aid Carver." There are two exceptions to that general rule – the "custody exception" and the "state created danger exception."

With regards to custody, the Court noted that the "mere fact that the police exercise control over an environment is alone insufficient to demonstrate that a person is seized."<sup>85</sup> In addition, the Court "found it persuasive that the state officers were not the cause of [Carver's] unconscious state." At no point did the officer place any physical restraint on Carver – "his incapacity ... was self-induced." As such, the Court agreed that the custody exception was inapplicable.

The Court also agreed that the state-created danger exception did not apply. The Court found that the "officers did not discourage aid to the plaintiff and no one had attempted to rescue or render aid to [Carver]."<sup>86</sup> In particular, the Court noted that there was no allegation that he "died while the officers were inside the apartment with him."

The Court found that qualified immunity was appropriate for both the police officers and the EMTs and remanded the case to the trial court for further proceedings on that accord.

*NOTE: In a case where the plaintiff's representative does provide some proof that the officers did prevent or discourage an attempt to render aid by other parties, such as EMS,, the case might be decided differently.*

### **Hudson, Estate of v. Hudson**

**475 F.3d 741, 2007 Fed.App. 0039P, 6<sup>th</sup> Cir. Tenn. 2007**

**FACTS:** Prior to August, 2001. Jennifer Braddock had received "three protective orders against James Hudson, the father of her son, because Hudson repeatedly abused Braddock." Some time in August, 2001, while the third of those orders was in effect, "Hudson broke into Braddock's home and threatened her." Despite a call, the Memphis PD apparently made little to no attempt to locate Hudson. Eventually, however, Hudson was apparently arrested, as the record indicates that he was convicted of various offenses and sentenced to a week in jail. During the next two years, Braddock made several calls for assistance alleging violations of the protective order, but no action was taken. Ultimately, Hudson "broke into her home, killed her and two of her friends, then turned the gun on himself and committed suicide."

Pamela Davis, Braddock's mother, filed suit on behalf of Justin Hudson, Braddock's son with Hudson, against Susan Hudson, James' sister, the Memphis PD and a number of Memphis officers, alleging federal and state law violations. Two of the officers requested summary judgment based upon qualified immunity, and the District Court denied their motion, finding that "their actions were not discretionary under Tennessee law." The officers then commenced an interlocutory appeal.

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<sup>85</sup> Ewolski v. City of Brunswick, 287 F.3d 492 (6<sup>th</sup> Cir. 2002)

<sup>86</sup> Beck v. Haik, 377 F.3d 624 (6<sup>th</sup> Cir. 2004)

**ISSUE:** May officers be found liable for failing to take actions on an alleged violation of a protective order?

**HOLDING:** No

**DISCUSSION:** The Court reviewed the defense of qualified immunity and noted that officials may assert the defense “in all but the narrow class of circumstances in which they perform ‘ministerial’ functions where the relevant law ‘specif[ies] the precise action that the official may take in each instance,’ thereby eliminating discretion.”<sup>87</sup> The District Court had focused on the “compulsory ‘shall’ in the Tennessee statute” but the Sixth Circuit noted that such “seemingly mandatory statutes ... and police discretion coexist frequently.”<sup>88</sup> The Court pointed out that even such mandatory statutes still require that the officers have probable cause – even noting, in a footnote that “it would be difficult .. to square the Tennessee statute with the Fourth Amendment if it allowed for arrests without probable cause.” As such, the Court held that officers “may avail themselves of the qualified immunity defense” in such cases.

Once the Court concluded that the defense was available, it moved on to considering “whether they are entitled to it.” The Court noted that as a “general principle, state actors cannot be held liable for private acts of violence ...”<sup>89</sup> However, the Court recognizes “two exceptions to this rule: (1) when the state has a special relationship to the victim, and (2) when the state creates the danger that led to the victim’s harm.”<sup>90</sup> Further cases have illustrated that “a protection order does not create a special relationship between police officers and the individual who petitioned for that order.” The Court agreed, as well, that this case, the plaintiff could not be successful under the “state-created-danger theory” either, as that requires an “affirmative act” by the officers involved.<sup>91</sup>

The Court mentioned that it had previously addressed the question for Kentucky in Howard v. Bayes, and found that such statutes do not create a “protected property interest under the Due Process Clause.”<sup>92</sup> “Imbuing these restraining orders with constitutional property value, protected by the Due Process Clause, would needlessly interfere with Tennessee’s choice of how to allocate the resources necessary to enforce its domestic violence laws.”

Because the failure to arrest Hudson offended “neither the procedural nor substantive prongs of the Fourteenth Amendment’s Due Process Clause,” the Court found it unnecessary to go to the second step in the Saucier<sup>93</sup> analysis. The Court reversed the lower court’s denial of summary judgment and remanded the case back to the trial court with instructions to grant the motion.

### Koulta v. Merciez

477 F.3d 442, 2007 Fed.App. 0078P, 6<sup>th</sup> Cir. Mich. 2007

**FACTS:** At about 3 a.m., on Sept. 13, 2002, “Lucero drove her 1991 Buick through a red light at 63 miles per hour and broadsided Sami Koulta’s” vehicle, fatally injuring Koulta. Lucero was charged with second-

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<sup>87</sup> Davis v. Scherer, 468 U.S. 183 (1984)

<sup>88</sup> Town of Castle Rock v. Gonzales, 545 U.S. 748 (2005)

<sup>89</sup> DeShaney v. Winnebago County Dep’t of Soc. Servs., 489 U.S. 189 (1989)

<sup>90</sup> Jones v. Union County, 296 F.3d 417 (6<sup>th</sup> Cir. 2002)

<sup>91</sup> Kallstrom v. City of Columbus, 136 F.3d 1055 (6<sup>th</sup> Cir. 1998).

<sup>92</sup> 457 F.3d 568 (6<sup>th</sup> Cir. 2006)

<sup>93</sup> Saucier v. Katz, 533 U.S. 194 (2001)

degree murder and pled guilty. Later facts in the opinion noted that Officer Merciez and other officers had been called to “an ‘unwanted’ person” – called in by Lucero’s former boyfriend’s mother, as Lucero had arrived, intoxicated, hoping to reconcile with him. Lucero was apparently trying to climb a trellis at the house. The officers ordered Lucero to leave, but “did not cite her for having expired license plates, did not conduct any investigation into her driving record and did not administer a sobriety test.” Lucero finally left, and drove toward a neighboring city and approximately 12 minutes later, was involved in the collision with Koulta. The Sterling Heights officer who responded observed that she “smelled strongly of alcohol, slurred her speech, had red, watery eyes and had urinated on herself.” She was found to have a blood alcohol of .11.

“After learning that several police officers employed by the City of Center Line had confronted Lucero minutes prior to the action,” Lucero’s estate representative filed a lawsuit under 42 U.S.C. §1983 because the officers permitted “the inebriated Lucero to continue to drive.” The trial court denied summary judgment in favor of the defendant officers, and the officers filed appealed.

**ISSUE:** May officers be found liable for permitting an impaired driver to leave a scene?

**HOLDING:** No

**DISCUSSION:** The Court began its analysis by noting that “[a]s with many claims of this type, this one involves equal doses of private-party foolishness, governmental incompetence (assuming, as [it] must, the truth of the allegations) and public anguish.” The Court noted, however, that the government is not required to “protect the life, liberty, and property of its citizens against invasion by private actors.”<sup>94</sup> The Court evaluated the situation under the “state-created danger” theme, and found that the officers took no affirmative acts that placed Koulta in any danger different from that of the general public. The Court agreed that the officers’ actions may have been negligent, but that would not be a federal cause of action. Although the officers allegedly told Lucero to go home, in fact, all they required her to do was leave the property where she was unwanted,” she could have asked them for help in getting home or driven away and stopped, and waited to sober up before continuing to drive. The Court concluded that “Lucero’s admitted proclivity to drink and drive that evening placed Koulta (and other people using the roadways) in as much danger before the officers arrived as afterwards.” Nothing that the officers did placed Koulta in any special danger from Lucero.

The Court reversed the trial court’s denial of summary judgment.

### ***42 U.S.C. §1983 – PPCT***

**Griffith v. Coburn**  
473 F.3d 650, 6<sup>th</sup> Cir. 2007

**FACTS:** On the day in question, Benton Township (Ohio) officers went to the Partee home to serve a warrant on Arthur Partee. Originally, Partee’s mother had visited the police station, seeking help in handling Arthur, who was “acting strangely.” The officers did not believe that he was a danger to himself,

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<sup>94</sup> DeShaney v. Winnebago County Dep’t of Soc. Servs., 489 U.S. 189 (1989)

but upon finding that he had an outstanding warrant, they agreed to go and arrest him so that he could be evaluated. Mrs. Partee admitted Officers Bradshaw and Sutherland to her home.

Partee was sitting on the couch, staring at the TV, when they arrived. The officers spoke to him, telling him of the warrant, but he did not respond. The officers moved the coffee table to better reach him and a struggle ensued. Eventually, Partee “lay handcuffed and face down on the ground.” His mother, who was nearby the entire time, feared that he was “in trouble at that point” and “implored the officers to help him.” They initially said that he was “faking” or “playing possum,” but finally turned him over and tried to get a response from him. Realizing he was not breathing, they started CPR and EMS responded. Partee was pronounced dead.

The autopsy indicated that he died from “asphyxia associated with physical restraint.” Another doctor agreed that the cause of death was the “improper application of a neck restraint” that would have to have been maintained for 2-3 minutes.

The officers later detailed the struggle. Sutherland stated that during the fight, he felt Partee’s hand on his holstered gun and that Partee was unable to partially unsnap the holster. Sutherland then used a “vascular neck restraint” for a few seconds and was able to get control of Partee. He also stated that when he realized that Partee was having trouble breathing, the officers initiated appropriate medical care. Bradshaw’s recitation of the facts were essentially the same.

The District Court awarded all defendant officers summary judgment, finding that “the use of the vascular neck restraint under the circumstances was not objectively unreasonable” because it was in response to Partee’s actions.

Partee’s estate administrator appealed.

**ISSUE:** Is the use of a vascular neck restraint appropriate when the subject does not demonstrate any physical threat to the officers?

**HOLDING:** No (but see discussion)

**DISCUSSION:** The Court measured Sutherland’s actions:

... in light of testimony regarding the training that he received in use of the neck restraint tactic. Although the Township had no written policy on the use of neck restraints, Officers Sutherland and Bradshaw both completed a police academy program that included certification in “Pressure Point Control Tactics,” including neck restraints, taught by a certified instructor. The sole publication used in this training was the statewide standard and had been reviewed and accepted by the Michigan Law Enforcement Training Council, and the instructor had little discretion to stray from this manual. The training pertinent to neck restraints included reading the manual, in-class discussion, and hands-on training. Over several days the students practiced the technique on people of different sizes and in different situations.

The manual instructed students that “vascular neck restraints are justified when the officer’s attempt at lower forms of subject-control have failed, or when the officer believes

that lower forms of subject control would not be successful,” and that the restraint “is designed to control high levels of resistance.” The instructor likewise trained students on when “[t]his ... high use of force” is appropriate. The certified trainer explained that the neck restraint is a technique that is to be used in situations such as where someone is being “violent” or assaulting an officer: “You wouldn’t use this technique on someone who is just sitting there, and saying I’m not going; I’m not going to leave, you wouldn’t use this force on someone who is not attacking you or anything. You’re going to use this, again, for someone who is highly agitated, who is violent.”

Police tactics are classified along a “force continuum” and, according to the certified instructor, the vascular neck restraint falls toward “the harder or the more violent part” of this continuum, probably beyond pepper spray, at the “point where you are using batons, or ... tasers.” Police Chief Coburn attested that he is absolutely certain that Officers Sutherland and Bradshaw had pepper spray on their persons when they arrested Partee and that they additionally should have had night sticks.

As such, the Court continued:

In light of the evidence about the neck restraint’s position on the force continuum and the undisputed fact that Partee never actually had possession of Officer Sutherland’s gun, let alone threatened anyone with it, we can only conclude that a jury could find Officer Sutherland’s use of the neck restraint unreasonable, particularly in light of the mandate “[i]n this circuit ... that a Fourth Amendment seizure must be effectuated with ‘the least intrusive means reasonably available.’”<sup>95</sup>

The Court also noted that the officers knew that they were dealing with an individual who was “experiencing some sort of mental or emotional difficulty.” The Court concluded that “it is clear that Partee posed no threat to the officers or anyone else” and that as such, the use of the neck restraint was inappropriate.

The Court found that the grant of summary judgment to Officer Sutherland was inappropriate at this time, reversed it, and remanded the case back for further proceedings.

## ***42 U.S.C. §1983 – ARREST***

### **Boykin v. Van Buren Township**

**479 F.3d 444, 2007 Fed.App. 0098P, 6<sup>th</sup> Cir. Mich. 2007**

**FACTS:** On April 12, 2004, Boykin went to a Meijer store in Belleville, Michigan. Through an odd sequence of events, the loss prevention officer believed that Boykin committed a retail fraud involving a drill. (In fact, he did not.) He and a colleague intended to stop Boykins, but were unable to do so before he reached his car. So, they contacted the local PD, Van Buren Township, and reported that they suspected Boykin (the driver of the car) had committed a crime. The officers were able to determine Boykin’s address, and Officers Harrison and Hayes went to the Boykin home. Boykin answered the door and the officers explained what they had been told. They verified Boykin’s description with the loss prevention officers. Eventually, they told Boykin that he would be arrested.

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<sup>95</sup> United States v. Sanders, 719 F.2d 882, 887 (6th Cir.1983)

Boykin told the officers that he was contacting a lawyer, and “instructed his wife to videotape subsequent events.” He maintained his innocence. His wife was allowed to go look for the receipt for the drill. Eventually, however, Boykin “stepped outside and was taken into custody and handcuffed.” The officers took him to the garage, where his wife was still searching. At some point, Boykin learned precisely what he was accused of doing. The officers located the bag which contained two drills, and Boykin told the officers to bring the bag along. They were not, however, able to find the receipt, and eventually, Boykin went along with the officers to go back to the store.

Back at Meijer’s, the loss prevention officers confirmed Boykins was the suspect. After much discussion amongst the officers, Boykin realized why they suspected he had committed retail fraud, and he “then explained his actions at the register to Officer Hayes and asked that his story be confirmed with the cashier.” Eventually, the cashier confirmed that Boykins had, in fact, properly purchased two drills. The loss prevention officers apologized, as did Officer Hayes. During the interim, Boykin’s wife had arrived. Hayes told him he was free to leave, but Boykin asked him to drive him back home and release him there, so that his neighbors would witness it and realize that he had not actually been arrested.

Boykin claimed he did not explain his actions initially because the officers did not tell him what he was accused of, and when he did realize what had occurred, Boykin claimed, “the officers cut him off every time he attempted to give an explanation.”

Boykin filed sued against the Meijer defendants and the Van Buren Township defendants. He made claims under 42 U.S.C. §1983, against Van Buren Township and its officers, alleging false arrest and imprisonment and assorted other issues. The District Court awarded summary judgment to the Van Buren officers, and Boykin appealed.

**ISSUE:** May officers take action based upon the statements of loss prevention officers?

**HOLDING:** Yes

**DISCUSSION:** The trial court found that the Van Buren officers had probable cause to arrest Boykin, as they were depending upon the information provided to them, through dispatch, from the Meijer loss prevention officers. The Court agreed that it was questionable whether probable cause actually existed, but stated that “this is a question that Meijer and its security guards must answer” and that the “Van Buren Township police officers cannot be held liable - at least not on grounds of unconstitutionally arresting an individual without probable cause - for an error, assuming there was one, wholly attributable to Meijer employees.” In fact, the “officers were relayed first-hand information about a suspect theft at a major local retail store” and they likely “receive[d] such calls with relative frequency and there would have been no reason for them to doubt the veracity of the information they received, especially in light of the facts they were able to corroborate once they spoke with Boykin.”

Because the officers committed no constitutional violation, any claim against the township also failed, and the Court upheld the dismissal of the lawsuit against the government defendants. However, the Court noted that the result might well have been different had Boykin argued his case differently, and had argued instead that an unlawful warrantless arrest occurred at his home, in violation of Payton v. New York.<sup>96</sup> The

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<sup>96</sup> 445 U.S. 573 (1980)

Court noted that it would have been more appropriate, and legal, for the officers to have gotten a warrant against Boykin. In particular, the Court noted that several statements by the officers indicated that they were prepared to enter Boykin's home, without his permission and that that constituted a "constructive entry" into the house.

The Court upheld the dismissal of the claims against the officers and Van Buren Township. (The Meijer defendants, however, were kept in the lawsuit, for other reasons.)

## ***42 U.S.C. §1983 – USE OF FORCE***

### **Eggerson v. Hessler**

**2007 WL 579545, 2007 Fed.App. 0121N, 6<sup>th</sup> Cir. Mich. 2007**

**FACTS:** In June, 2003, the U.S. Marshal's Office in Grand Rapids, developed information on the location of Leon Dandredge, wanted on multiple parole violations and for whom they had an outstanding warrant. Deputy Marshal Hessler confirmed through multiple sources that Dandredge was in the Muskegon area and that "Dandredge knew he was being sought and was actively eluding arrest." Dandredge actually spoke to Detective Nader, a local police officer, who was looking for him on state charges, and asked if the "feds" were looking for him, which Nader confirmed. Dandredge told Nader "he would turn himself in on a date certain" but he did not do so. Nader informed Hessler of the conversation.

On Aug. 20, 2003, Hessler and Groenveld, his partner, learned that Dandredge might be hiding at his girlfriend's home in Muskegon, and they went to investigate. Henderson, the girlfriend, answered the door and told them that Dandredge was not there, but allowed them to search.

As they entered the basement, Hessler announced their presence loudly, and he drew his weapon. In the dimly lit basement, there was a small laundry room, cluttered with piles of clothing. They did not find Dandredge, but as they were leaving, they became suspicious of an "abnormally large pile of clothing in the laundry room and decided to investigate further." As Hessler "reached for a blanket atop a large pile of clothes" ... "Dandredge bolted upright, lunging upward at Hessler out of the pile of clothing." Fearing that he'd been intentionally ambushed, Hessler "fired one shot at Dandredge" as he stepped backwards. The gunshot struck and killed Dandredge. Dandredge was unarmed.

Eggerson, Dandredge's estate representative, filed suit under a Bivens<sup>97</sup> action, the equivalent for federal officers to an action under 42 U.S.C. §1983. The District Court granted summary judgment for both Groenveld and Hessler. The appeal was filed, however, against Hessler only.

**ISSUE:** May expert witnesses be used by a plaintiff in a use of force lawsuit to present theories as to what the deceased subject was doing?

**HOLDING:** No (but see discussion)

**DISCUSSION:** The Court noted the issue was whether there were material facts that "contradict Hessler's version of events." In the District Court proceeding, Eggerson had presented two pieces of evidence to

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<sup>97</sup> Bivens v. Six Unknown Fed. Narcotics Agents, 403 U.S. 388 (1971)

refute Hessler's – that her expert witness had stated that Dandredge was not "violently attacking" Hessler at the time, and Groenveld's deposition, in which he said that "Dandredge was sitting on his buttocks with his legs straight out in front of him immediately after he was shot." In addition, there was "blood spatter analysis setting the height of the bloodletting injury at 35 inches" and that contradicted Hessler's deposition testimony as well. The District Court, however, completely discounted the expert's affidavit as conclusory and lacking in any "process of reasoning" or "inferential process" he relied on in making his conclusions." It also found that the plaintiff had mischaracterized Groenveld's testimony. Finally, it noted that the plaintiff also theorized from the blood-spatter evidence and that their conclusion was "no more than a theory and does not establish a factual basis for the" theory. The plaintiff only theorized that Dandredge was attempting to surrender and that was "belied by the fact that he never made a sound in response to the marshals' repeated invitations that he do so."

The Sixth Circuit viewed the facts in the light most favorable to Dandredge, and concluded that "when Hessler neared Dandredge's hiding space, Dandredge silently and forcefully bolted upward in a movement that could be perceived as an attack, and that Hessler, reasonably perceiving it as such, fired out of a concern for his own safety." The Court could not "say that the use of deadly force was unreasonable" and affirmed the decision of the District Court.

### Livermore v. Lubelan

476 F.3d 397, 2007 Fed.App. 0056P, 6<sup>th</sup> Cir. Mich. 2007

**FACTS:** Crosslin and Rohm operated a campground in Cass County, Michigan, where, it was alleged, they "advocated the legalization of marijuana" and sponsored events "to espouse their views." Upon receiving complaints about the activities, the sheriff's department began an investigation. Pursuant to a search warrant, the deputies discovered a marijuana growing operation. After further charges and proceedings, and after failing to appear as ordered in court, on Aug. 31, 2001, the pair "set fire to the outbuildings [at the campground] and barricaded themselves in their residence." The sheriff's office called for help from the Michigan State Police (MSP) Emergency Services team "to resolve the standoff." "Crosslin confronted the arriving police officials armed with a gun and refused them permission to enter his property."

Later than evening, Crosslin fired upon a news helicopter, as well. The MSP team, commanded by Lt. Ellsworth arrived, along with the FBI, on Sept. 1. On Sept. 3, Crosslin and Peoples, who was apparently with the pair, left the residence and walked to a nearby farm, where "they broke in and stole supplies." On their way back to the campground, Crosslin was fatally shot by an FBI agent and Peoples was arrested.

In the wee hours of Sept. 4, the MSP team began a negotiation with Rohm, who agreed to surrender at 7 a.m. if he would then be allowed to speak with his son. The negotiator agreed. At about 6 a.m., however, the residence began to burn, apparently set on fire by Rohm. At about 6:30 a.m., Rohm, armed with a rifle, emerged and hid in trees behind the house.

MSP team members Homrich, Bower and Ellsworth approached him in a Light Armored Vehicle (LAV). Because the vehicle was plated with steel, radios did not work inside, so "Homrich and Bower were placed in open hatches in the roof of the LAV, exposed from their mid-torsos to the tops of their heads." Lt. Ellsworth "identified himself via a loudspeaker and directed Rohm to surrender..." They could not see Rohm, however, because of the smoke and the predawn darkness.

However, snipers (including Lubelan) nearby were able to see Rohm, and Lubelan “observed Rohm in a crouched or kneeling position, holding his rifle at waist level and turning his torso back and forth as if looking for someone.” He believed that Rohm was “tracking the LAV as it moved.” Believing that Rohm was “pointing his gun toward an exposed officer in the LAV,” Lubelan shot, and fatally wounded, Rohm.

Livermore, Rohm’s mother and estate representative, filed suit against Lubelan, for killing Rohm, and Ellsworth, for “negligently ... creating the circumstances that led to Rohm’s death.” The officers requested summary judgment, and the trial court denied the motion. The officers then filed an interlocutory appeal of the denial.

**ISSUE:** Is a use of force decision judged on the split-second decisions made by the officers immediately preceding that use of force?

**HOLDING:** Yes

**DISCUSSION:** The Court noted that the District court had found certain “issues of fact” that caused them to deny the request for summary judgment. The Court, however, elected to review those facts to establish whether Ellsworth and Lubelan were, in fact, entitled to summary judgment.

With regards to Lubelan, the Court found that he “acted reasonably in firing at Rohm.” The Court noted that Livermore’s expert witness had found that the “first – and ultimately fatal – bullet fired by Sgt. Lubelan hit the rifle stock of Rohm’s gun before entering Rohm’s chest” – thereby proving that Rohm was holding the rifle at the time. Further, the Court noted that despite Livermore’s assertions, her expert did not support her allegation that the Rohm was not an immediate threat to the officers. Sgts. Homrich and Bower had made statements to the effect that they were informed after they left the hatch and went down into the LAV (and were thus protected) that Rohm had been shot – which Livermore asserted meant that the two officers were not at risk when Rohm was shot. The Court stated, however, that the statements “only suggest that [the officers] were inside the LAV when they learned that Rohm had been shot; they are silent as to whether the officers had been exposed at the time Sgt. Lubelan fired at Rohm.”

In addition, the Court agreed that “in determining whether Rohm posed a threat of serious harm at the time he was shot, [it] must focus on Sgt. Lubelan’s perspective.”<sup>98</sup> The Court quickly concurred that “Lubelan had probable cause to believe that Rohm posed a serious threat to the officers in the LAV – particularly Sgt. Homrich – due to his proximity to the LAV while armed with a rifle, his prior violent behavior, and his continued refusal to surrender and face arrest.”

The Court held that Sgt. Lubelan was entitled to qualified immunity and reversed the trial court’s decision.

With regards to Ellsworth, Livermore had presented evidence from a “law enforcement practices expert” that Ellsworth’s orders “were reckless and contributed to the use of excessive force.” The Court noted that under Sixth Circuit precedent, the “proper approach” ... “is to view excessive force claims in segments.”<sup>99</sup> The Court noted that under Dickerson v. McClellan:

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<sup>98</sup> Smith v. Freland, 954 F.2d 343 (6<sup>th</sup> Cir. 1992), quoting from Graham v. Connor, 490 U.S. 386 (1989)

<sup>99</sup> Gaddis v. Redford Twp., 364 F.3d 763 (6<sup>th</sup> Cir. 2004)

The time-frame is a crucial aspect of excessive force cases. Other than random attacks, all such cases begin with the decision of a police officer to do something, to help, to arrest, to inquire. If the officer had decided to do nothing, then no force would have been used. In this sense, the police officer always causes the trouble. But it is trouble which the police officer is sworn to cause, which society pays him to cause, and which, if kept within constitutional limits, society praises the officer for causing.<sup>100</sup>

In “[a]pplying the segmented analysis here,” the Court concluded that “[a]ll of the actions concerning Lt. Ellsworth ... occurred in the hours and minutes leading up to” the shooting, and that “Dickerson instructs [the Court] to focus on the ‘split-second’ judgments made immediately before” the shooting.” As such, the Court reversed the decision denying Lt. Ellsworth summary judgment as well.

The Court also noted that claims under negligence against the officer under Michigan state law were also not supported.

**Ontha v. Rutherford County (Tenn.)**  
2007 WL 776898, 6<sup>th</sup> Cir. Tenn. 2007

**FACTS:** On March 18, 2003, Deputy Emslie was given four warrants for an “Asian male named Tony Kanjanabout.” He was provided with information about Kanjanabout’s place of employment and his vehicle. Deputy Emslie, along with Deputy Morrow, went to an apartment where Kanjanabout might be found. After about a half-hour, they spotted a “white compact car” - similar to the vehicle Kanjanabout was known to drive - arrive. An Asian male, later found to be Ontha, got out. Ontha “appeared to match the description and photograph” of Kanjanabout, and Emslie drove closer to confirm. Ontha got back in the car, and Emslie turned on his lights and “gave a short burst of its siren,” but instead of stopping, Ontha accelerated and pulled out. Eventually, Ontha ended up back in the parking lot.

At the lot, although the precise sequence of events were disputed, apparently Ontha drove in reverse out of the lot. Emslie pursued and although Emslie said he also drove in reverse, eyewitnesses placed the patrol car driving forward in a normal manner, which placed the drivers facing each other. However, Ontha stopped suddenly, and Emslie tried to avoid a collision by braking and swerving. At some point Ontha ended up outside his vehicle, and he was struck by Emslie’s patrol car. (However, another witness testified that Emslie actually chased Ontha, who was on foot.) In any event, Ontha was “pinned between the hood of [Emslie’s] cruiser and [a telephone pole].” Ontha was given emergency medical treatment, but died some hours later.

Ontha’s parents sued the deputies, the sheriff, and the county. The defendants requested summary judgment, based upon qualified immunity.

**ISSUE:** May a passenger officer be held liable for actions taken by the driver of the vehicle in which they are riding?

**HOLDING:** No

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<sup>100</sup> 101 F.3d 1151 (6<sup>th</sup> Cir. 1996), quoting from Plakas v. Drinkski, 19 F.3d 1143 (7<sup>th</sup> Cir. 1994)

**DISCUSSION:** First, the Court looked to the claims against Sheriff Jones as an individual. The Sheriff was not personally involved in the incident, so the only claim against him would have to be premised on supervisory liability. In a claim under 42 U.S.C. §1983, supervisory liability must be based upon actions by the supervisor that “either encouraged the specific incident of misconduct or in some other way directly participated in it.”<sup>101</sup> Because the agency did not have a specific policy prohibiting striking a running individual with a patrol car, “this lack of training served as implicit authorization” for Emslie’s actions. They did not contend, however, that this was “part of a pattern of comparable violations.” As such, any claims against Sheriff Jones individually must fail.

With regards to Deputy Morrow, there was no dispute that Morrow was simply a passenger in the car that struck Ontha. The Court agreed that he could not be held responsible for Emslie’s actions in driving the car. Even had he recognized what Emslie was going to do, there was no time for Morrow to intervene in the time frame available. The Court did, however, permit the case to go forward on the issue of Morrow’s dragging Ontha to the curb, apparently by the collar, while Ontha was “moaning in pain.” There was “no indication that Ontha faced any danger if he had been left at the side of the road until emergency medical personnel arrived at the scene.”

The Court awarded Morrow partial summary judgment. This case did not address claims made against Deputy Emslie.

#### ***42 U.S.C. §1983 – FALSE ARREST***

##### **Wilson v. Morgan**

477 F.3d 326, 67 Fed.R.Serv.3d 283, 2007 Fed.App. 0050P, 6<sup>th</sup> Cir. Tenn. 2007

**FACTS:** On Aug. 8, 1998, Officer Walker (Knoxville, Tenn. PD) was dispatched to a disturbance and the Emert residence. He was told by Emert’s son, Mike Blizzard, that an identified woman (Judy Wilson) had fired into the house and left the scene with a male and a female, leaving a bag containing weapons behind. In addition, a handgun was missing. Blizzard provided a license plate number, which came back to a Jeep registered to a “D. Wilson.” The officers went to search for the individuals involved.

The officers spoke to Emert on the phone several times, and he indicated that he might not want to press charges. After getting a call from Judy Hurt (one of the plaintiffs) Emert told Walker to “slow it down.”

At the location where the vehicle was registered, officers initially arrested three people, Brian Davis, Judy Hurt and Donna Wilson, and they did a protective sweep of the house. They were released after questioning, and they found that the house had been searched. They were never charged. (In fact, the person who fired the shots was Hurt’s daughter, Angel Olsen, and Wilson and Davis has simply gone to collect her.)

The three filed suit against a number of parties, including Officer Walker. They claimed that they were “arrested without probable cause in violation of their Fourth Amendment rights.” The magistrate judge dismissed the claims against most of the parties, and the plaintiffs appealed. (It should be noted that neither Lett nor Walker were parties to the appeal, having been dismissed.)

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<sup>101</sup> Shehee v. Luttrell, 199 F.3d 295 (6<sup>th</sup> Cir. 1999)

**ISSUE:** Must officers explore all possible claims in exculpation before taking action on a criminal charge?

**HOLDING:** No

**DISCUSSION:** The Court identified the issue in this case as “whether the police have a duty under the federal Constitution to investigate for potentially exculpatory evidence” and noted that it has been “asked and answered” The Court noted that after “the evidence was fully developed ... it was clear that the officers at the Fair Drive location [where the vehicle was registered] did not know the exculpatory evidence known to the officers at Emert’s ... residence.”

The court noted that the information available to the officers “was sufficient to lead a prudent officer to conclude that Wilson and Davis had committed an offense” and that a reasonable juror could only conclude that the officers had probable cause to make the arrests on “any one of several crimes...” Although Officer Walker and Detective Lett came into possession of “potentially exculpatory facts,” there was “no evidence, however, that Lett or Walker shared the allegedly exculpatory evidence with the arresting officers at the Fair Drive location.”

The Plaintiffs argued that “the officers needed to consider the totality of the circumstances, including both inculpatory and exculpatory evidence, before deciding whether there was probable cause to arrest.” However, the Court agreed that “[o]nce probable cause is established, an officer is under no duty to investigate further or to look for additional evidence which may exculpate the accused.”<sup>102</sup> Further, though, “that while officers cannot ‘turn a blind eye’ to potentially exculpatory evidence in making the initial probable cause determination, officers are not required to believe the plaintiff’s alibi or investigate it before determining that probable cause to arrest exists.” The Court did not find it appropriate, as the plaintiffs argued, to require the officer to “make a separate probable cause determination at each step of the arrest.”

The Court looked separately at the justification for doing an “protective sweep” under Maryland v. Buie,<sup>103</sup> “even though the arrests were made outside of the residence.” The Court noted that there was some indication that there might be someone else in the house. The officers maintained that they had looked only for that which could be seen in plain view, but the plaintiffs argued that “items had been moved, indicating that the officers had exceeded the scope of a plain-view search.” The Court noted that the Sixth Circuit had already “explicitly rejected plaintiffs’ position that an arrest outside a residence renders a protective sweep invalid per se.”<sup>104</sup> Because the officers had reason to believe someone else was in the house, as at least one suspect and one gun were unaccounted for, the Court found that the protective sweep was justified.

After addressing a number of other issues, the Court affirmed the trial court’s decision.

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<sup>102</sup> See Ahlers v. Schebil, 188 F.3d 365 (6<sup>th</sup> Cir. 1999)

<sup>103</sup> 494 U.S. 325 (1990)

<sup>104</sup> U.S. v. Colbert, 76 F.3d 773 (6<sup>th</sup> Cir. 1996)

## ***42 U.S.C. §1983 – QUALIFIED IMMUNITY***

**Gill v. Pontiac Police Officers Lochicchio and Main**  
2007 WL 579666, 2007 Fed.App. 0148N, 6<sup>th</sup> Cir. Mich. 2007

**FACTS:** Gill “alleged that when he was stopped for a traffic violation, he ‘cooperated entirely’ with the officers’ instructions but that, despite his cooperation, the defendants ‘threw [him] to the ground, beat him, kicked him, punched him and caused severe and debilitating injuries.’” The officers, however, “claimed qualified immunity and moved for summary judgment, contending that contrary to the allegations in the complaint, the videotape of the arrest recorded by a camera mounted on their patrol car showed that [Gill] was not compliant and that his resistance to their orders was the basis for their use of force to the extent necessary to effect Gill’s arrest.”

The District Court denied the officers’ motion, holding that the “striking[s] [after the plaintiff was on the ground]” could not be determined to be objectively reasonable, given the information available to them.” The officers took an interlocutory appeal.

**ISSUE:** Does a videotape always, definitively, show what actually occurs at a scene?

**HOLDING:** No

**DISCUSSION:** The Sixth Circuit noted that when “there is a dispute of fact such as the one described” in this case, the Court lacked “jurisdiction to review the question of qualified immunity on interlocutory appeal.” The officers’ argument that the “videotape shows conclusively what happened during the arrest” had to fail because the Court’s “review of the videotape indicates that the disputed contact between the plaintiff and the officers was obscured by the date and time stamp on the tape itself.” As such, the “tape does not establish conclusively what [the officers] contend,” that their force was appropriate.

The Court dismissed the appeal for lack of jurisdiction.

## ***42 U.S.C. §1983 – MEDICAL CARE***

**Hollenbaugh v. Maurer/Rotolo/Johns**  
2007 WL 843802, 6<sup>th</sup> Cir. Ohio, 2007

**FACTS:** On May 27, 2003, at about 5 p.m., Hollenbaugh and Brewer “were involved in a minor traffic accident [with another party] in Wooster, Ohio.” Officer Rotolo responded and found Brewer sitting in the driver’s seat and Hollenbaugh in the passenger seat of the U-Haul they occupied, but the other driver told the officer that they believed the two had switched seats after the wreck. Rotolo suspected there was alcohol involvement, but could not tell for sure, so he allowed Brewer and Hollenbaugh to leave.

About an hour later, Officer Rotolo went to Brewer’s home to “continue his investigation.” Brewer directed him upstairs to find Hollenbaugh, who she had confirmed was actually the driver, and he found Hollenbaugh sick. He claimed to have vomited and had diarrhea, and stated that he “had the flu.” He also claimed that his chest hurt. Rotolo put Hollenbaugh through several field sobriety tests. Hollenbaugh

agreed that he'd had a couple of beers, and "he appeared to be swaying and could not keep his balance." Rotolo later admitted that Hollenbaugh told him multiple times that "he was ill."

Rotolo arrested Hollenbaugh and transported him to the jail. Hollenbaugh was taken through booking, where he told several jail officers that he "had the flu, was going to be sick, and wanted to go to the hospital, and he had slurred speech." Later testimony indicated that he "passed out or slumped down a couple of times" and that Rotolo and others had to support him. One of the jail personnel provided him with a waste can should he vomit, as he claimed he might do. He did not respond to the majority of the booking questions, including those concerning medical history. At one point, jail officer Ott "observed Hollenbaugh lying flat on his back on the floor and heard him" claim that his chest hurt. She tried to get a blood pressure reading but was unable to do so because Hollenbaugh was "flailing his arm." Ott claimed that Hollenbaugh was "awake but incoherent." In the BAC room, the officers attempted to get him to take a breath test, but "Hollenbaugh did not respond to the breath test instructions, and the officers recorded this as a refusal to submit to the test."

Hollenbaugh was eventually taken to a holding cell, and a jail command officer recommended that he be placed on a 15 minute observation schedule. (This was apparently not done, however.) During the ensuing hours, Hollenbaugh was observed in his cell by several jail officers. Two of the officers stated that Hollenbaugh told them he thought he had blood poisoning and that "he needed to go to the hospital." Two jail guards admitted they told him that he was sick because of his alcohol consumption. Inmates in the cell with him claimed that he "vomited, including blood, throughout the evening" and that they were unable to get the officers to respond.

The next morning, Hollenbaugh was found dead, and the coroner later reported that he died between 11:30 p.m. and midnight, "from cardiac arrest caused by coronary artery disease."

Hollenbaugh's estate brought suit under 42 U.S.C. §1983, claiming that if the defendant officers and Wayne County "had sought medical treatment for Hollenbaugh, he would not have died" and that they were deliberately indifferent to his condition. The District Court dismissed the county and some of the defendant officers, but refused to dismiss Rotolo and the jail personnel (Ott, Butler, Johns and Johnson) who had been most closely involved with Hollenbaugh. Those defendants appealed the denial of qualified immunity.

**ISSUE:** May an officer who is aware that a prisoner claims to be ill, and who displays obvious symptoms of illness, be entitled to qualified immunity for failing to obtain appropriate medical care for that prisoner?

**HOLDING:** No

**DISCUSSION:** The Court reviewed the standard for qualified immunity, and quickly agreed that all of the involved officers were state actors. Next, the Court agreed with the trial court that "Hollenbaugh's claims of improper denial of medical care fell under the Fourteenth Amendment" and that it was a constitutionally protected right. Further, a "claim of deliberate indifference to medical needs has both objective and subjective components." First the objective inquiry is whether the "alleged deprivation is sufficiently serious" as to pose a serious risk of harm to the detainee. The second inquiry is whether the officers

involved “had a ‘subjectively culpable state of mind in denying’” medical care, and that they “knew of and disregarded a substantial risk of serious harm to [the detainee’s] health and safety.”<sup>105</sup>

The Court addressed the subjective component for each officer individually. The court agreed that Rotolo, who had extensive contact with Hollenbaugh, and who he knew claimed to be ill, was not entitled to qualified immunity. With regard to Deputy Jailer Ott, the Court found that she also had sufficient information as to have realized that Hollenbaugh was in serious medical need. Deputy Jailers Butler and Johns, who assisted with transporting Hollenbaugh to the BAC room and who tried to get a blood pressure and pulse from him at various points, also had sufficient information to have realized Hollenbaugh’s extreme medical need. The Court further found that Capt. Johnson, a jail commander, also had sufficient contact with Hollenbaugh, although admittedly much less contact than the other defendants, to have realized his need.

Finally, having quickly decided that the requirement to provide medical care was clearly established, the Court upheld the decision of the District Court.

### Cooper v. County of Washtenaw

2007 WL 557443, 2007 Fed.App. 0118N, 6thCir. Mich. 2007

**FACTS:** On March 3, 2003, Morton pled guilty to misdemeanor crimes, and was released on his own recognizance, to return for sentencing on April 3. However, he failed to appear, and a bench warrant was issued. He was arrested on June 3 by the Dearborn police, and transferred to the Ann Arbor police. During that “exchange, Morton attempted to escape and was caught.” He became “violent toward the arresting officers and toward himself” and on the way to Ann Arbor, he “banged his head on the safety glass of the patrol vehicle and stated that he wanted to kill himself.” Concerned, the officer transported him instead to a hospital, for psychological evaluation. He was found to be positive for cocaine and his blood alcohol was .363, and the hospital concluded that his behavior was as a result of his intoxication. He was released to be arraigned.

“At the arraignment, Morton once again reacted violently when he was told he would not be released while he awaited his sentencing hearing in a few days.” He was physically restrained, and the judge ordered that he be placed on suicide watch. Officer Watchowski (Ann Arbor PD) was present during the hearing, but later stated that he did not hear that order, but did agree that he would have normally received a paper copy of the court disposition of the case, and that he would likely have read it. The Ann Arbor PD returned Morton to the jail, to await sentencing.

Deputy Raciti booked Morton at the jail that day, and placed him on suicide watch, pursuant to the order. Morton was given a flimsy paper gown<sup>106</sup> and placed into an observation cell, where he remained until he was returned to the courthouse on June 12, for sentencing. He had been medically evaluated during his state and “cleared of all alcohol/narcotic withdrawals” a few days earlier.

Officers Watchowski and Lawrence arrived to transport Morton back to Court. They asked about Morton’s condition and were assured that he was fine, and “alright to be transported.” At some point, allegedly, the

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<sup>105</sup> Garretson v. City of Madison Hts., 407 F.3d 789 (6<sup>th</sup> Cir. 2005); Watkins v. City of Battle Creek, 273 F.3d 682 (6<sup>th</sup> Cir. 2001); Farmer v. Brennan, 511 U.S. 825 (1994)

<sup>106</sup> The gown was referred to as a “bam-bam” gown, as it resembled the outfit worn by Barney on The Flintstones.

two transport officers were informed that Morton was on suicide watch, but they later claimed not to recall that. The two officers knew, however, that he was in the paper gown when they arrived, and he was allowed to change from that into a jail medical uniform, which was a white tunic and pants.

The officers later testified that Morton appeared normal and that they'd conversed with him on the way. Morton accepted his sentence of 93 days calmly. He was placed in a holding cell, and left, "for a little over an hour unsupervised." When the transport officers returned, they discovered Morton "had hanged himself with his shirt in the cell."

Morton's legal representative (Cooper) sued, claiming the officers had shown "deliberate indifference to the suicidal tendencies of Morton." Watchkowski and Lawrence later "admitted that suicide risk was a major concern when inmates were seen wearing bam bam gowns, but they further testified that other reasons were equally possible for the gown." Deputy Raciti, also a defendant, agreed that there were other reasons for the gown, and other reasons for such individuals to be placed in observation cells. The trial court noted that at most, the officers were negligent, and that their actions did not rise to the level of deliberate indifference required for such a federal lawsuit. The Court noted that even though the two Ann Arbor officers had "observed enough indicia of suicidal behavior to have drawn the inference" that he was, in fact, suicidal, there was no proof "that they had actually drawn the inference." The allegation against Ann Arbor and Washtenaw County that they failed to properly train their officers failed because there was no allegation that the "County and the City themselves engaged in the constitutional violation."

The District Court awarded summary judgment to all of the defendants. Cooper (on behalf of Morton's estate) appealed.

**ISSUE:** Are suicidal tendencies considered to be a serious medical need?

**HOLDING:** Yes

**DISCUSSION:** The Sixth Circuit agreed that Morton was a convicted prisoner at the time of his suicide, and thus entitled to certain rights under the Eighth Amendment, and that such rights included a "right to medical care for serious medical needs, including psychological needs." The question, therefore, was whether there "exist[ed] a triable issue of fact over whether Defendants discharged their constitutional responsibilities while Morton was in custody."

The Court started its assessment by noting that the Eighth Amendment "prohibits mistreatment only if it is tantamount to 'punishment' ... that "unnecessarily and wantonly inflict[s] pain." The Court agreed that "suicidal tendencies are considered 'serious medical needs'" for the purposes of this analysis." The court noted that "[t]here are two distinct prongs of the deliberate indifference standard: An objective component and a subjective component." The medical need "must be, objectively, sufficiently serious"<sup>107</sup> and the Court agreed that a risk of suicide satisfies that requirement. The "subjective component actually has three prongs embedded within it." "First, the plaintiff must show that the official subjectively perceived the facts that gave rise to the inference of the risk," that "the official actually drew the inference, and, importantly, not just that he or she should have done so." The last prong is that the "plaintiff must show that the official consciously disregarded the perceived risk."<sup>108</sup> In Farmer, the Court "indicated that the line between these

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<sup>107</sup> Farmer v. Brennan, 511 U.S. 825 (1994)

<sup>108</sup> Id.

two concepts is marked by actual knowledge” and equated it to “criminal recklessness.” In a situation involved a risk of suicide, the “officials will necessarily be accused of a failure to act, which usually falls in the domain of negligence.”<sup>109</sup>

The Court reviewed the law of qualified immunity and applied it to the facts and the individual defendants. With regards to Officer Watchkowski, the Court noted that he had “perceived enough facts to give rise to an inference of the risk [of suicide], which is the first prong of the subjectivity component for deliberate indifference.” The Court further agreed that it could reasonably infer that “Watchkowski was on notice that Morton was a suicide risk.” The Court agreed that the law was clearly established that one under a risk of suicide was entitled to appropriate treatment and supervision. As such, the Court found that qualified immunity, and summary judgment, was inappropriate “with respect to Defendant Watchkowski.”

However, the Court found no reason to believe the Officer Lawrence, the other transport officer, “had no actual knowledge that Morton was on suicide watch.” He may have observed clues, but it noted that “the record is replete with other explanations for each of those observations besides the suicide watch explanation.” The fact that apparently “Watchkowski violated Ann Arbor security procedures by not at least checking on Morton after the requisite thirty minutes” could not be imputed to place liability on either officer, since a “violation of internal policy does not ipso facto give rise to a presumption of unconstitutionality.” As such, “Lawrence was properly granted summary judgment.”

Next, the Court moved on to Deputy Raciti. The Court noted that there was no doubt that she knew that Morton was on suicide watch, and there was at least strong evidence that she failed to specifically inform the two Ann Arbor transport officers of that fact. Since there was no indication that Deputy Raciti knew that Officer Watchkowski had attended the arraignment, “it would be illogical to relieve ... Raciti of her duty to warn Morton’s transport officers that he was a suicide risk so that they could continue to closely observe him.” In addition, even if she did know, it was questionable if she “should have assumed ... Watchkowski knew Morton was still on suicide watch on June 12, 2003.” The Court found that sufficient questions remained that it would be possible for a jury to find that she “acted with deliberate indifference toward Morton” and thus, that “summary judgment was inappropriate” at this time.

With regards to the two government entities, the Court found that summary judgment was inappropriate for the City of Ann Arbor, and that the trial court must further determine whether a jury could “conclude that Watchkowski’s deficient behavior can be fairly characterized as a ‘city policy.’” Washtenaw County, however, was dismissed from the action, for other reasons.

In sum, the Sixth Circuit affirmed the summary judgment in favor of Officer Lawrence and two of the jail officers who played minor roles, and in favor of Washtenaw County. It reversed the summary judgment in favor of Officer Watchkowski and the City of Ann Arbor, however, and remanded that part of the case back to the District Court for further proceedings.

**Cabaniss v. City of Riverside**  
**2007 WL 1047588, 6<sup>th</sup> Cir. Ohio 2007**

**FACTS:** On May 21, 2003, Kevin Cabaniss was visiting his friend, Fugate, at Fugate’s house. During the visit, Cabaniss was drinking heavily and became very intoxicated. He was “vomiting uncontrollably” and

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<sup>109</sup> Id.

becoming "belligerent and destructive" so Fugate took him outside. Once outside, Cabaniss walked next door and "broke the glass in an outside lamp." The police arrived in response to a 911 call.

Officer Craine (Riverside PD) arrived first and saw "Cabaniss lying on the ground, clenching his fists and 'acting agitated.'" He was told what had already happened, and that Cabaniss "had freaked out" and "was kind of a space cadet"

Officers Naff and Carlton arrived and were told by Craine what he had already learned. Fugate told the officers that in the past, Cabaniss had "jumped out of cars" and agreed that he might be suicidal. The officers tried to question Cabaniss, who spit at them. Carlton allegedly told Cabaniss that if he did that again, "Carlton would 'kick his teeth in.'" When Cabaniss did so, the officers "flipped [him] onto his stomach, handcuffed him, and placed him under arrest for disorderly conduct." On the way to the car, Cabaniss continued cursing at them and telling them that he had been in Vietnam and that he would kill them." He would not cooperate with being belted into the car, by sliding out of their grasp, and they gave up, letting him sit unrestrained in the car.

EMS paramedics, Kronenberg and Smith, arrived and let Cabaniss out of the vehicle, and explained they were there to help him. Cabaniss cursed at Kronenberger and threatened him "and his family." He would not let the paramedic examine him. Kronenberger did note, however, that Cabaniss "smelled strongly of alcohol" and attributed his behavior to his intoxication. Cabaniss was placed back into the car.

Kronenberger questioned others at the scene, and learned that Cabaniss "has a mental problem" but he did not that that he was "actually mentally unwell." Eventually, Kronenberger, Smith and Naff all left. Carlton was able to get identification from Fugate. When Carlton challenged Cabaniss about his claim to have been in Vietnam, Cabaniss having been born in 1960, Cabaniss began kicking the backseat. Because the kicks were "wimpy" and could not damage anything, Cabaniss made no attempt to stop him, nor did he do anything until Cabaniss began "hitting his head on the plexiglass window that separated Cabaniss from Carlton" and also pushed against it with his feet. When the window began to crack, Carlton warned him to stop. Carlton warned Cabaniss that he would spray him with OC if he didn't stop, and eventually, he did so. Carlton took Cabaniss to the station to decontaminate him, and used a hose to rinse off the OC. Cabaniss apparently said that the water was soothing, and he asked if he could "stand up outside the cruiser." The officers (Craine and Carlton) told him not to do so, but "he tried to stand anyway and fell down in the process," hitting his head. The officers called Kronenberger, who was apparently inside the station, and he began treatment immediately. Cabaniss "ultimately died as a result of swelling on his brain as a result of the blow to his head."

Cabaniss's estate filed suit under 42 U.S.C. 1983, and eventually, the District Court dismissed all claims. Cabaniss's estate representative appealed with respect to four of the claims, for excessive force, deliberate indifference, failure to train and state law claims over which the District Court had exercised supplemental jurisdiction.

**ISSUE:** May officers be held liable for an accidental fall by a prisoner?

**HOLDING:** No

**DISCUSSION:** The Sixth Circuit took each of the claims in turn. With regards to the Fourth Amendment excessive force claim, Cabaniss's representative argued that the "officers used excessive force both in

using a water hose on Cabaniss and in using pepper spray on him.” The Court noted, however, that “Cabaniss enjoyed being rinsed with the hose.” The Court noted that since Carlton was the only officer that used the OC, he was the only proper party. Although use of OC may be considered to be excessive, depending upon the circumstances, in this case, even the facts admitted by his estate representative indicated that the officers had sufficient reason to believe the “Cabaniss posed a real threat to his own safety and needed to be subdued.”

With regards to the deliberate indifference claim, the Court addressed it as a “claim of a violation of a detainee’s Eighth Amendment right to be free from treatment that ... amounts to cruel and unusual punishment.” The claim seemed to be based on the “general argument that because the officers and paramedics knew that Cabaniss had exhibited suicidal behavior and was intoxicated, his accidental fall resulted from deliberate indifference.” The Court noted that “being intoxicated is not the type of obviously serious medical need” that would satisfy this type of claim. In fact, “Cabaniss would not have suffered his fatal fall but for the fact that he acted contrary to the warnings of [the officers], which relieves them of responsibility for being the proximate cause of his death.” Even the claim that Cabaniss might be suicidal cannot be supported, as he was under observation by the officers, who tried to catch him as he fell, and they summoned paramedics to attend to him immediately. (In fact, there was some allegation that he may have pounded his head on the pavement intentionally.)

It was also alleged that Kronenberger should have “fully inspected Cabaniss” at the initial scene, and had him taken to the hospital rather than the PD. However, there was no assertion as to “precisely what was wrong with Cabaniss that Kronenberger would have discovered with a fuller examination.” The Court declined to “engage in speculation” as to what might have been.

The Court further found no indication that the City of Riverside failed to train its officers and EMS personnel sufficiently.

The Court concluded that “no constitutional rights [had] been violated by any of the individual Defendant agents of the City of Riverside” and upheld the summary judgment and dismissal of all parties.

## ***INTERROGATION - MIRANDA - QUARLES***

### **U.S. v. Williams**

**483 F.3d 425 (6<sup>th</sup> Cir. Tenn. 2007)**

**FACTS:** On the day in question, Officer Jackson and other Memphis (Tenn.) PD officers went to arrest Williams. When the officers arrived, they knocked on Williams’ door but the man who responded did not look like the photo they had of Williams. (He was, in fact, Williams, however.) The man offered to retrieve his ID, which was in the pocket of his pants, on the floor. The officers then entered the room and asked if anyone else was there, and if “he had any weapon.” The man stated that was “an old gun under his bed” - specifically, under the mattress. Jackson handcuffed Williams while another officer retrieved a sawed-off shotgun from that location. (Williams, however, stated that he was placed in a chair in the hallway, and that the officers searched his room. He claimed the officers never asked him for ID.)

The District Court opinion had internal inconsistencies and was “not wholly clear as to whose account it credited.” However, it did grant Williams his request to suppress the gun, and the government appealed.

**ISSUE:** May the public safety exception (under New York v. Quarles) permit a subject in custody to be questioned about firearms before being given Miranda?

**HOLDING:** Yes

**DISCUSSION:** The Court noted that under the usual rule of Miranda, statements made during a custodial interrogation may not be used unless the Miranda warnings are given. "However, when officers ask 'questions necessary to secure their own safety or the safety of the public' as opposed to 'questions designed solely to elicit testimonial evidence from a suspect,' they do not need to provide the warnings required by Miranda." In this case, the government argued that the "statement [about the gun was] admissible under the public safety exception announced in [New York v.] Quarles."<sup>110</sup>

A Quarles evaluation:

... takes into consideration a number of factors, which may include the known history and characteristics of the suspect, the known facts and circumstances of the alleged crime, and the facts and circumstances confronted by the officer when he undertakes the arrest. For an officer to have a reasonable belief that he is in danger, at minimum, he must have reason to believe (1) that the defendant might have (or recently have had) a weapon, and (2) that someone other than police might gain access to that weapon and inflict harm with it. The public safety exception applies if and only if both of those two conditions are satisfied and no other context-specific evidence rebuts the inference that the officer reasonably could have perceived a threat to public safety.

In this case, the Court could not determine whether the officers would have had reason to believe "that someone other than police could access the weapon and inflict harm with it." Because the facts had not been adequately developed in the prior proceedings, the Court was not able to determine if Williams was restrained or unrestrained. If he was restrained, the Court noted, there could be no objective concern that someone might access a weapon, but had he been unrestrained, the Court acknowledged, the Quarles exception might apply. The Court stated that "[a]n officer may rely on the public safety exception only if he has a objectively reasonable belief that he is in danger."

The case was remanded to the District Court to permit it to "make the factual finding necessary to determine whether the public safety exception applies."

## ***EVIDENCE***

### **U.S. v. Kenney**

**2007 WL 579539, 2007 Fed. App. 0122N, (6<sup>th</sup> Cir. Mich. 2007)**

**FACTS:** On the day in question, Kaye, a ferry deck hand, tipped off the federal authorities that Kenney might be smuggling in aliens from Canada.<sup>111</sup> (He had observed Kenney previously with a number of

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<sup>110</sup> 467 U.S. 649 (1984)

<sup>111</sup> The Harsens Island ferry links the island to the United States mainland, less than a mile away, and only a short distance from the Canadian border.

people in her car, and on Nov. 6, he paid particular attention, and saw her leave with no more than one other person in her car, but return with six passengers in her car.) Kaye contacted the Clay Township, Michigan, police, and they “met the ferry on the dock at the mainland site.

Shortly afterward, Border Patrol agents arrived and questioned everyone in the vehicle. They conducted an “immigration check” on the passengers, and determined that while Kenney and her boyfriend, Wright, also in the car, were U.S. citizens, the remainder of the passengers were not, with one being from Jamaica and the remainder from India. (The Jamaican originally claimed to be a U.S. citizen, from Florida, but that was apparently quickly proven to be false.) Kenney originally told the agents that she had been bowling earlier, and then had gone to a bar on the island, and that the Jamaican man was “her cousin’s boyfriend” but later described him as “a friend.” She claimed to have picked up the other four people as a “favor for another friend.” However, Wright’s account was different, in that he said they had gone straight to the island and had not been at a bowling alley. At trial, later the agent “related this conversation over a hearsay objection by defense counsel, but the objection was summarily overruled on the basis of the co-conspirator exception.” The Jamaican man, finally identified as Dennis Jackson, claimed that Kenney was giving him a lift to his girlfriend’s house.

Determining that the stories were inconsistent, Agent Geoffrey arrested Kenney, Wright and Jackson. In an interview a few days later, Kenney admitted that she had been knowingly smuggling and detailed the “smuggling operation.” One of the Indiana passengers also provided a great deal of information, and explained that he’d made arrangements through a broker to be picked up by, ultimately, Kenney, and that when Kenney saw the police on the dock, she had “motioned for them to duck down.”

Kenney was convicted, and appealed.

**ISSUE:** Are non-hearsay statements subject to Crawford v. Washington?

**HOLDING:** No

**DISCUSSION:** The Sixth Circuit noted that the District Court had ruled “Wright’s out-of-court statement was admissible as the declaration of a co-conspirator.” Although doubting that the two were actually involved in a conspiracy, the Sixth Circuit concluded that the statement was not hearsay under FRE 801(c) “because it was not offered to prove that the declarant did not go bowling on November 6, but only that he said as much.” Such “non-hearsay” does not “implicate any Sixth Amendment concerns such as those raised in Crawford v. Washington.”<sup>112</sup>

The Sixth Circuit affirmed the decision of the trial court.

### U.S. v. Mooneyham

473 F.3d 280, 72 Fed. R. Evid. Serv. 213, 2007 Fed.App. 0009P, (6<sup>th</sup> Cir. Tenn. 2007)

**FACTS:** This case “stemmed from an undercover investigation undertaken jointly by the Tennessee Bureau of Investigation and law enforcement agencies in North Carolina” that originally focused on someone else, McMahan. Eventually, the undercover agent involved learned that the supplier for McMahan was Mooneyham, and they obtained a search warrant for his home.

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<sup>112</sup> 541 U.S. 36 (2004)

Unfortunately, the search did not go as planned. Mooneyham's property was searched, but nothing was found, but they did find cocaine in a wooded area where Mooneyham had gone earlier in the day. Fingerprints on the bag tied the drugs to Mooneyham.

Both Mooneyham and McMahan were indicted on drug trafficking. Mooneyham fled while on bond following a mistrial, but was captured later. During his second trial, he objected to the admission of evidence seized from his property and the admission of "several tape-recorded statements made by McMahan in conversation with" the undercover agent. The Court however, denied the motion.

Eventually, Mooneyham was convicted, and appealed.

**ISSUE:** May statements of a co-conspirator be admitted?

**HOLDING:** Yes (but see discussion)

**DISCUSSION:** With regards to the tape-recorded statements, Mooneyham argued that they "were admitted in violation of his Sixth Amendment right of confrontation." Since McMahan did not testify, he contended that the admission violated the rule in Bruton v. U.S., "which prohibits the introduction of statements made by a non-testifying, co-defendant that implicates the defendant because they would deprive the defendant of the right to confrontation."<sup>113</sup> However, the Sixth Circuit agreed that the statement was properly admitted under the Federal Rules of Evidence, Rule 801 (d)(2)(E), which permits such statements when "offered against a party that is made by a co-conspirator during the course of an in furtherance of that conspiracy" and which are then classified as a "non-hearsay statement." The Court noted that the two were clearly in a conspiracy and that the statement was intended to convince a customer (the agent) of the reliability of his supply.

However, the Court also examined the "question of admissibility under Crawford v. Washington."<sup>114</sup> Because the statements were not made to someone known to be an officer, they could not be testimonial, and therefore, were not prohibited under Crawford.

After addressing a number of other issues, Mooneyham's conviction was affirmed.

**Bonnell v. Mitchell**

**212 Fed.Appx. 517, 2007 WL 62628, 2007 Fed.App. 0014N, (6<sup>th</sup> Cir. Ohio 2007)**

**FACTS:** On Nov. 28, 1987, Hatch, Birmingham and Bunner shared an apartment in Cleveland, Ohio. At about 3 a.m. that morning, Hatch answered a knock on the door, and when he opened it, Bonnell entered. Bonnell "uttered an expletive" at Bunner and then shot him twice, at close range. Hatch, who had seen the shooting, ran to Birmingham's room and told him what had happened, and during that time, two more shots were fired. Hatch fled to call for EMS and Birmingham went to the kitchen, where the shooting had occurred.

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<sup>113</sup> See 391 U.S. 123 (1968)

<sup>114</sup> 541 U.S. 36 (2004)

There, Birmingham saw Bonnell pounding Bunner in the face, and noted "bullet holes in Bunner's body." Birmingham physically ejected Bonnell from the apartment.

At about 3:40 a.m., Cleveland officers saw a vehicle being driven backwards on the street where the shooting had occurred, with its headlights off. They tried to stop the vehicle and a chase ensued. During that time, the officers lost sight of the vehicle for only moments, saw only the driver in the vehicle, and saw no indication that anyone had gotten out. Following a crash, the officer removed the driver, Bonnell. Officers Stansic and Kukupa arrived about the same time, but were immediately called away to respond to the shooting.

Officers Stansic and Kukupa quickly realized that the description of the shooter matched the individual being held at the crash scene. They transported Birmingham to the hospital, where Bonnell was being treated for injuries sustained in the crash, and he identified Bonnell.

Forensic evidence indicated that a weapon found along the chase route, which the officers had retraced, was a match for the bullets recovered from Bunner's body and the shell casings found at the shooting scene.

Bonnell was charged and tried for murder and burglary. He was convicted, and the judge, following the jury's recommendation, sentenced Bonnell to death. He then appealed.

**ISSUE:** Does the rule regarding the disclosure of exculpatory evidence (Brady) apply when the defendant is, in fact, aware of the witnesses described in the challenged evidence?

**HOLDING:** No

**DISCUSSION:** Bonnell first argued that the "prosecution withheld from him police investigative reports that contained information that would have led the jury to a different verdict than the one it ultimately rendered." In particular, he argued that he should have been given the results of "gunshot residue tests performed on Bonnell's jacket and hands." The report on the jacket was presented at trial, and the results were negative, but the witness testified that did not, necessarily, mean that he did not fire a weapon. There was no indication that any tests were actually done on Bonnell's hands, although they were bagged at one point. However, the Court noted that the defense was able to make the argument at closing and thus, any error was not likely to have affected the jury's decision.

In addition, Bonnell argued that the police reports would have established other individuals as possible assailants. Again, the Court found that there was no evidence that placed those other individuals at or near the scene, and that Bonnell was aware that the other individuals existed and could have done his own investigation. (In fact, one of these individuals actually testified at the trial.) Further, Bonnell argued that "the prosecution suppressed reports that would have established the existence of conflicting statements given to the police by [Birmingham and Hatch], that conflicting statements were originally given to the police by these individuals, and that Hatch may have gotten "favorable consideration in a pending assault case" for her testimony. He also argued that the "suppressed investigative reports" would have considered two other individuals as suspects, and captured evidence that would have "deflected a finding of guilt" from Bonnell. Again, however, both of the individuals testified and thus were available for cross-examination.

Next, Bonnell argued that two of the officers involved in the chase that resulted in his arrest “gave slightly different accounts of the starting point of the chase and mistakenly testified at trial that no police reports of the chase were prepared.” The Court concluded that the differences were trivial, at best. The reports in question, which surfaced during discovery, were not prepared by the officers in question, but by “individuals with no first-hand knowledge of the situation being described.”

The Court agreed that no Brady<sup>115</sup> violations occurred, and affirmed the denial of the writ of habeas corpus.

## ***FIRST AMENDMENT***

### **Gaughan/Raddell v. City of Cleveland**

212 Fed.Appx. 405, 2007 WL 29175, 2007 Fed.App. 0002N, (6<sup>th</sup> Cir. Ohio. 2007)

**FACTS:** On Dec. 27, 2003, Gaughan was a protester in front of an abortion clinic in Cleveland, Ohio. Previously the group had obtained a recording of an 911call from the clinic on behalf of a patient who had suffered a medical emergency as a result of an abortion. On the day in question, “Gaughan played the recording on an audio cassette player while standing near the rear of the abortion clinic.” A few weeks later, a clinic employee filed a complaint against him, alleging criminal trespass and a violation of an Cleveland ordinance prohibiting playing such audio equipment in public in such a way as to annoy listeners, and a warrant was issued. The next day, on January 24, 2004, again, Gaughan played the recording, and at that time, Cleveland PD arrested him on the warrant.

In due course Gaughan pled guilty to the criminal trespass charge and paid a fine and the other charge was dismissed. Gaughan continued to play the recording at further protests, in the presence of officers who took no action against him. However, on Nov. 13, “Gaughan played the recording while standing on a public sidewalk across the street from the rear of the clinic.” The officers told him that neighbors had complained and threatened to charge him under the Cleveland ordinance. Gaughan moved around to the front of the clinic, again on the sidewalk, and continued to play the recording. He was cited, and again, at a later date, the charge was dismissed.

On Feb. 2, 2005, Gaughan and Raddell filed sued against Cleveland, alleging that the ordinance violated their Constitutional right to free speech, and that the ordinance was “unconstitutionally vague and overbroad on its face and as applied.” The U.S. District Court dismissed the case, and Gaughan and Raddell appealed.

**ISSUE:** Are ordinances void when they provide sufficient notice as to the conduct that is prohibited, and that conduct is not constitutionally protected?

**HOLDING:** No

**DISCUSSION:** Gaughan and Raddell first argued that the ordinances were “void for vagueness” in that they did not provide “fair notice of the standard of conduct for which the citizen is to be held accountable” and gave police “an unrestricted delegation of power which leaves the definition of its terms to [them].”

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<sup>115</sup> Brady v. Maryland, 373 U.S. 83 (1963)

The Court engaged in a lengthy discussion of such “anti-noise ordinance[s]” and noted that the Ohio state courts had previously examined a similar Cincinnati ordinance and concluded that the “objective reasonable person” was the appropriate standard to use in assessing whether “fair notice of the conduct prohibited” existed. (The Court found the statutes to be extremely similar in language.) Gaughan and Raddell argued that the use of the term “annoy” in the statute made the ordinance impermissibly subjective and thus, vague. The court, however, disagreed, finding that the imposition of the reasonable person standard added sufficient specificity that the ordinance was not impermissibly vague.

In applying the statute to the specific parties, the Court concluded that the ordinances in question were sufficiently clear as to provide notice that the alleged conduct was prohibited. The ordinances were content-neutral, in that they prohibited all amplified speech that was annoying, no matter the content. In addition, the ordinances in question are “narrowly tailored” and appropriately regulate by “time, place, or manner” the protected speech. The Supreme Court has held that protecting the public from unwelcome noise is a legitimate public interest, justifying government regulation.<sup>116</sup> Finally, the Court agreed that the parties have alternative channels for communication, as required.

The Court concluded that “[i]n sum, the Cleveland Ordinances survive all three hurdles of the overbreadth test, and they are not facially overbroad.” The Court further upheld Gaughan’s two arrests (albeit dismissed) as valid under the ordinances.

The Sixth Circuit upheld the dismissal of the lawsuit in favor of the City of Cleveland.

## ***EMPLOYMENT - FIRST AMENDMENT***

### **Haynes v. City of Circleville**

474 F.3d 357, 25 IER Cases 1050, 2007 Fed.App. 0037P, (6<sup>th</sup> Cir. Ohio 2007)

**FACTS:** In 1996, Circleville PD created a canine unit. Haynes became a canine handler, and he and the agency had a “separate employment agreement to cover Haynes’s duties as a canine handler.” During the course of over three years, he generally spent 12 hours a week, on average, training with the dog, and 28 hours as a patrol officer. When he worked overtime, he was paid for it.

In 2000, Haynes resigned to serve overseas with the State Department, and returned the next year. He was rehired as a patrol officer and, according to Haynes, was also the administrator of the canine unit and a handler. In 2003, the police chief reduced the approved training time to only once every three weeks, and that the handlers were limited to eight hours, including travel time, to the training facility.

Haynes wrote a long memorandum detailing his concerns about the new training plan. The Chief offered him the choice of working within the parameters or resigning. During the same time frame, Haynes was called in to work a little early, and refused to do so. Haynes was then relieved of his duties as a canine handler, and ultimately, placed on administrative leave. Shortly thereafter, he was ordered to report for a psychological examination, and refused to do so until he’d sought the advice of an attorney.

On March 12, 2003, two days after his canine equipment had been collected, Haynes notified the Chief that he intended to file a grievance, but the record does not reflect whether this was, in fact, done. Eventually,

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<sup>116</sup> Ward v. Rock Against Racism, 491 U.S. 781 (1989)

a settlement was proposed whereby Haynes would no longer be a canine handler, but would continue as a patrol officer. Haynes argued that his memorandum was not intended to be insubordinate, but to cover him should problems arise later. Haynes was terminated on March 26, 2003.

Haynes filed suite under Ohio whistleblower law, as well as claiming a “retaliatory discharge based on the exercise of his First Amendment rights.” The case was removed to federal court, and the defendants requested summary judgment. The U.S. District Court refused to grant qualified immunity to Chief Gray, and he appealed.

**ISSUE:** Is a memorandum to the Chief of Police protected under the First Amendment?

**HOLDING:** No

**DISCUSSION:** The Court noted that there is a “three-step test for analyzing a public employee’s claim of First Amendment retaliation.” First, it was necessary to show that the “speech at issue was protected” in that it both “touches on a matter of public concern” and that “his interest in the speech outweighs the government’s countervailing interest in promoting the efficiency of the public service it provides as an employer.” Next, Hayes must demonstrate “that his termination by Chief Gray ‘would chill an ordinary person in the exercise of his First Amendment rights.’” Last, Haynes “must present sufficient evidence to create a genuine issue as to whether his speech was a substantial or motivating factor in the employer’s decision to discipline or dismiss.”

This case began before the decision in Garcetti v. Ceballos, which held that “when public employees make statements pursuant to their official duties, the employees are not speaking as citizens for First Amendment purposes, and the Constitution does not insulate their communications from employer discipline.”<sup>117</sup>

As a result of that case, the Court concluded that “Haynes ... has no First Amendment cause of action even if Chief Gray did fire him as a direct result of either the memo or the ill-fated ‘Christmas gift.’”<sup>118</sup> Haynes speech was directly connected to his “official duties as a police officer” and as such, no “constitutional violation took place.”

The decision of the District Court was reversed, and the case was remanded with instructions to the trial court to dismiss the First Amendment claims.

## ***EMPLOYMENT***

### **Currie v. Haywood County, Tennessee 2007 WL 1063277, 6<sup>th</sup> Cir. Tenn. 2007**

**FACTS:** On Feb. 28, 2002, Currie called 911 from her mother’s residence, for her brother, who had overdosed. Deputy Rogers was the first to arrive. He checked on the brother, who was unresponsive, and stayed with Currie and her mother, Powell, until EMS arrived. (Currie and Rogers had previous contact, as the result of an automobile accident.)

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<sup>117</sup> 126 S.Ct. 1951 (2006)

<sup>118</sup> Haynes packaged up his agency-provided canine gear in a box wrapped in Christmas paper when he was ordered to return it.

Because Currie did not have a telephone, other than the cell phone, Rogers offered to return and update Currie on her brother's condition, and Currie agreed. When Rogers returned, he told her that her brother was going to be taken to another hospital, and then, allegedly, began to touch Currie inappropriately. He told Currie that he would leave if she kissed him, and she refused, but agreed to hug him. After further contact, which included Rogers picking up Currie, he finally left.

Currie reported the situation to the Haywood County Sheriff, who directed her to a female investigator, and to the Tennessee Bureau of Investigation (TBI). Eventually Rogers was fired and charged with official misconduct.

Currie filed suit against Rogers and the Sheriff's Office, alleging that "her constitutional rights were violated when Rogers sexually assaulted her while on duty." Eventually, the District Court partially denied summary judgment (on behalf of the Sheriff's Office), regarding the office's policies and procedures, but granted summary judgment on behalf of the office on the issue of its deliberate indifference in retaining Rogers as an employee. Following a bench trial, the Court found that Rogers was individually liable, but that the county and the Sheriff's Office bore no liability.

Currie appealed the decision with regards to the Sheriff's Office.

**ISSUE:** Is an agency liable for failing to have policies that state that an employee may not commit a criminal actual (sexual abuse) against a member of the public?

**HOLDING:** No

**DISCUSSION:** Currie argued that Haywood County should have been subject to liability because its "lack of policies or procedures regarding sexual harassment failed to equip law enforcement officers with specific tools to handle recurring situations" and that they do not indicate that it is a violation of agency policy to sexually harass members of the public. In addition, Currie argued that Rogers had previously notified the Sheriff that he was bipolar, and was allowed to return to work after some time off, and after getting a release from his doctor.

The Court, however, quickly concluded that the information available to the Sheriff's Office was insufficient to place any liability upon it.

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