

Department of
CRIMINAL JUSTICE TRAINING

KENTUCKY JUSTICE AND PUBLIC SAFETY CABINET



Leadership is a behavior, not a position

Case Law Updates

Third Quarter, 2007



John W. Bizzack, Ph.D.
Commissioner



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The Leadership Institute Branch of the Department of Criminal Justice Training offers a Web-based service to address legal issues in law enforcement. Questions are answered through the Legal Training Section.

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- ▶ Questions concerning changes in statutes, current issues concerning law enforcement agencies and other matters will be answered by the Legal Training Section.
- ▶ Questions concerning the Kentucky Law Enforcement Standards Board will be forwarded to the DOCJT General Counsel.
- ▶ Questions received will be answered in approximately 10 business days.
- ▶ Please include in the query your name, rank, and agency in case the assigned attorney needs clarification.

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

In addition, the Department of Criminal Justice Training has a new service on its web site to assist agencies that have questions concerning various legal matters. Questions concerning changes in statutes, current case laws, and general legal issues concerning law enforcement agencies and/or their officers can now be addressed to docjt.legal@ky.gov. The Legal Training Section staff will monitor this site, and questions received will be forwarded to a staff attorney for reply. Questions concerning the Kentucky Law Enforcement

Council policies and those concerning KLEFPF will be forwarded to the DOCJT General Counsel for consideration. It is the goal that questions received be answered within two to three business days (Monday-Friday). Please include in the query your name, agency, and a day phone number or email address in case the assigned attorney needs clarification on the issues to be addressed.

Case Law Updates

Third Quarter, 2007

KENTUCKY

PENAL CODE - WANTON ENDANGERMENT

Towe v. Com.

2007 WL 2404506 (Ky. 2007)

FACTS: On May 10, 2005, Towe had been drinking, He went to a farm to pick up some materials, accompanied by his girlfriend, Daniels. They ran into McMillen and Mason, who were drinking beer. They began to converse, and then began to argue. McMillen asked Towe to leave, and Towe did so, but returned 20 minutes later. He shot McMillen and pointed his gun at Mason, who ran. Towe left, and Mason returned to assist McMillen. When KSP arrived, McMillen was being put into an ambulance, but was able to explain what had occurred. McMillen survived, but “suffered horrendous pain and permanent impairment.”

Towe was found after an extensive search, and his weapon was located nearby. He was eventually charged and convicted of assault and wanton endangerment, along with tampering with physical evidence. Towe appealed.

ISSUE: Is pointing an apparently loaded weapon at someone sufficient to charge Wanton Endangerment?

HOLDING: Yes

DISCUSSION: Towe challenged the sufficiency of the evidence against him for each of the charges. First, with regards to the tampering charge, Towe argued that his “girlfriend took the gun from him and hid it.” However, given the facts, the Court found it “not unreasonable for the jury to conclude that [Towe] shot McMillen with the pistol, ran from the scene, and was later found hiding in a barn.” Even if his girlfriend took the gun, “it could be inferred that such was done at his request or with his acquiescence.” Next, with regards to Wanton Endangerment, Towe argued that simply pointing the gun at Mason, without verbal threats, was insufficient to prove Wanton Endangerment. The court, however, found that Mason had no reason to doubt, given what had already happened, that the gun was loaded and that McMillen intended to shoot him. Finally, with regards to the Assault charge, the court found that even though the evidence had provided no motive, and even though he claimed self-defense, that the evidence was clear that he intentionally shot McMillen.

Towe’s conviction was upheld.

PENAL CODE - ARSON

Johnson v. Com.
2007 WL 2742735 (Ky. 2007)

FACTS: Johnson was convicted of manslaughter and arson in the death of Connor. (The specific facts are not important for the issue.) He was convicted, and appealed.

ISSUE: Does First Degree Arson require that someone actually be alive inside the building?

HOLDING: No

DISCUSSION: Among other issues, Johnson argued that the “admission of hearsay evidence from Officer Tim Russell regarding whether Connor was alive when he reached the hospital” was improper. Russell had testified that Connor was hooked up to a heart monitor at the hospital, suggesting, at least, that he was still alive when the fire was set. (The Court did admonish the jury that the question of whether Connor was alive or dead at the hospital was not within Russell’s qualification to make.)

The Court noted, however, that the statute does not require that someone be alive, only that the defendant “has to believe someone was alive inside of the house.” Other testimony indicated

that Connor, who died ultimately from blows to the head, did survive at least until the fire was initially set, and that Johnson himself, was surprised the Connor had died.

The Court did not render an opinion as to whether the testimony was improperly admitted, but did agree that any error was corrected by the trial court's admonishment about it.

Johnson's conviction was affirmed.

PENAL CODE - ROBBERY

Hobson v. Com.

2007 WL 2343761 (Ky. App. 2007)

FACTS: On July 11, 2005, Hobson tried to buy goods from an Ashland Wal-Mart with a credit card that had been reported stolen. The cashier notified management. Officer Schoch, Ashland PD, was already at the store for an unrelated matter, and went with the manager to the register. Officer Schoch spoke to Hobson, who "twice attempted to pass himself off as the owner of the credit cards" - even showing the officer an OL that matched the cards. Officer Schoch warned him that it was a "crime to lie to a police officer" and Hobson changed his story, stating that the card owner was his cousin and he had permission to use the card.

Officer Schoch asked if they might call the cousin, and Hobson agreed, accompanying the officer and the manager toward the loss prevention office. (The goods and the card were left at the register.) As they reached the office, however, Hobson fled through the "buggy" door. Officer Schoch chased him, and they scuffled. Officer Schoch suffered a badly broken ankle as a result. With the assistance of security, however, Hobson was apprehended.

Hobson was charged with Robbery in the First Degree and related charges. He was convicted of Robbery and pled guilty to the other charges. He appealed the Robbery conviction.

ISSUE: Does an injury (to an officer or third party) caused during an escape from a Theft convert the case into a Robbery?

HOLDING: Yes

DISCUSSION: Hobson argued that the "brief period between the attempted theft and the injury to Officer School" should have been construed as "two separate events" - effectively a Theft and then an Assault, not a Robbery. The Court, however, agreed with the precedent set in Williams v. Com.¹ In that case, the Court found that the "force used was in the course of committing the theft because it happened during the escape stage" - just as in this case. Hobson then argued that he didn't use force aggressively, with an intent to harm, but the Court, again, found that was not part of the elements of Robbery, only that force be used.

Hobson's conviction was affirmed.

¹ 639 S.W.2d 786 (Ky. App. 1982).

PENAL CODE - FLEEING AND EVADING

Foley v. Com.

233 S.W.3d 734 (Ky. App. 2007)

FACTS: On April 6, 2005, Officer Thompson (Radcliff PD) spotted Foley “driving erratically.” Since Thompson was driving an unmarked car and was not in uniform, he simply followed until Foley “pulled his vehicle over to the side of the road and stopped.” Officer Thompson placed a blue light on his dash and put on “some type of police vest,” but as he approached Foley’s car on foot, Foley “drove away at a high rate of speed.” Officer Thompson then pursued Foley, joined in by Officer Skees in a marked unit. They got onto I-65, left Hardin County and entered Bullitt County. Officers from Bullitt County placed stop sticks and were able to get the vehicle stopped. Bullitt County arrested Foley, but turned him over to the Radcliff officers to be returned to Hardin County.

Foley was charged with a number of traffic offenses, in particular, Fleeing and Evading in both Bullitt and Hardin Counties. Specifically, he pled guilty to second-degree fleeing and evading in Bullitt County, and was indicted in Hardin County for first-degree fleeing and evading, DUI and related charges.

Foley argued that the two fleeing and evading charges constituted double jeopardy, and that both were as a result of a “continuing course of conduct.” Hardin County denied the motion to dismiss its charge and Foley was convicted. He then appealed.

ISSUE: Does a continual flight constitute a single act of Fleeing and Evading, even if it crosses into another county?

HOLDING: Yes

DISCUSSION: Foley argued that being convicted in two separate counties, under two charges, of Fleeing and Evading for the same course of conduct, violated the double jeopardy clause. The Court agreed that the statute was “intended to punish a specific act, failing to disobey (sic) a direction given by a police officer.”² However, the Court concluded, “regardless of how many police officers may be considered to have given an order to stop,” the flight is a “single continuous act.” The Court noted that application of this rule to this particular statute (KRS 520.095) is one of first impression, the simple fact was that Foley “drove without interruption from Hardin County into Bullitt County.” “His continued disregard constituted a single event without any sufficient break in conduct and time, and thus cannot be parsed into separate and distinct offenses.”

Foley’s conviction for First Degree Fleeing & Evading in Hardin County was reversed.

PENAL CODE - POSSESSION OF A FIREARM BY A CONVICTED FELON

² Obviously, the Court meant to say “obey.”

Crew v. Com.

2007 WL 2069804 (Ky. App. 2007)

FACTS: On January 14, 2006, Crew was stopped by Trooper Lawson (KSP) and Deputy Sheriff Luttrell (Casey County) for failure to come to a complete stop at an intersection. Trooper Lawson explained the reason for the stop and requested Crew's OL.

Luttrell ran the license, and as Trooper Lawson returned to the vehicle, "he noticed the driver's side window was now closed, but the driver's side door was ajar." He pulled the door open and "immediately noticed a handgun sticking out of the side compartment of the door." He later testified that Crew reached for the gun but the trooper was able to "secure the gun himself."

Trooper Lawson gave the gun to the deputy, who confirmed it was not, apparently stolen. Crew was arrested on numerous charges, including possession of the firearm. (Apparently, the officers were already aware that Crew was a convicted felon.) The trooper asked Crew why he had the gun and he explained it was for protection.

At trial, Crew's long-time housemate testified that the gun was hers, even though it was registered to Crew, and that Crew was driving her car when he was stopped. In addition, she claimed the gun was hers and that she carried it routinely.

Crew was convicted, and appealed.

ISSUE: Is a gun found in a vehicle owned by someone other than the driver sufficient to charge for possession of the gun?

HOLDING: Yes

DISCUSSION: Crew argued that the prosecution failed to prove that "he had actual knowledge of the handgun's presence in the vehicle" and that "he was not even aware that the gun was there." He noted that "it was dark outside, the car was dark inside, the handgun was black, and the handgun was located in the side compartment of the door."

However, the Court noted that credibility "has since time immemorial been a question for the jury."³ The court upheld Crew's conviction

PENAL CODE - ASSAULT/RESISTING ARREST

Simpkins v. Com.

2007 WL 2686785 (Ky. App. 2007)

FACTS: McCracken County (Paducah) officers were called to a "report that Simpkins had violated a DVO and was in the area of the woman's apartment" that had taken out the DVO. The

³ *Bush v. Com.*, 457 S.W.2d 497 (Ky. 1970); *Gillispie v. Com.*, 279 S.W. 671 (Ky. 1926); *Webb v. Com.*, 904 S.W.2d 226 (Ky. 1995).

officers found Simpkins within 500 feet of the apartment” - within the prohibited space. When Simpkins saw the officers, he “began to walk away.” They ordered Simpkins to stop, and he did so, and the officers arrested him. He was handcuffed, but as he was being walked to the cruiser, Simpkins kicked one of the officers. He also “wedged himself against the roof and floor of the [cruiser], refusing to be placed inside” but the officers were finally able to get him into the back seat. He kicked at one of the officers, “striking him in the chest but causing no injury.” The officers warned the jail staff about Simpkins’ actions, and he “then shouted out that he would do it again and went on to say he was going to return and kill the occupant of the apartment.”

Simpkins was charged with violating the DVO, Terroristic Threatening, Assault in the Third Degree and Resisting Arrest, and was convicted on all charges. He then appealed.

ISSUE: May a suspect be charged with both Resisting Arrest and Assault in the Third Degree?

HOLDING: Yes

DISCUSSION: Simpkins argued first that he couldn’t be convicted of Assault because he caused no injury to the officer, but the Court quickly pointed out that actual injury isn’t required for the Third Degree form of Assault. Next, the Court quickly concluded that his actions “were well within the behavior prohibited” under Resisting Arrest. Simpkins argued that it was double jeopardy, however, to be charged with both, but the Court noted that the “charges did not arise from the same conduct.” The Resisting Arrest elements were satisfied “before he was finally placed in the police vehicle” while the “actions which supported the Assault charge, attempting to kick the officer in the face and striking him in the chest, occurred after the officers had succeeded in arresting him and had placed him in the vehicle.” The two charges also each “require proof of an element that the other does not.”⁴

The McCracken Circuit Court decision was affirmed.

PENAL CODE - DEFENSES

Harley v. Com.

2007 WL 2460710 (Ky. App. 2007)

FACTS: On Sept. 4, 2004, Officer Johnston (Lexington PD) was dispatched to an armed robbery at a convenience store. The assistant manager, Jent, reported that a black male, in dark clothing, on a bicycle, robbed him at gunpoint of the deposit, containing \$8,000. Jent had instructed the clerk to call the police while he attempted to follow the robber, who “ducked into some bushes and disappeared.”

Officer Johnston canvassed the area, when he was approached by a man who asked if the officer was “looking for someone wearing dark clothes and carrying a gun.” Officer Johnston was directed to a location where a man had run inside an apartment. Officer Johnson approached

⁴ Blockburger v. U.S., 284 U.S. 299 (1932); Com. v. Burge, 947 S.W.2d 805 (Ky. 1997).

and knocked, and King answered the door. King told him that “Harley had run in through the front door and was upstairs in her daughter’s bedroom.” King and her children were removed, and Officer Johnston ordered Harley to come downstairs and he eventually did so, dressed in a tee shirt and boxer shorts. He said he had been sleeping, but he was “sweating profusely.” He was handcuffed and given Miranda rights. Officer Johnston retrieved, from the room where Harley had been, “dark colored clothing, two .22-caliber handguns and over \$8,000 in cash” as well as cocaine in the pocket of the clothing.

Jent came to the apartment and identified Harley as the robber.

Harley was brought to trial. He claimed, on the stand, that he committed the robbery under duress by Stubblefield, because he owed Stubblefield money. The jury was instructed as to duress and choice of evils, but Harley was convicted of both Robbery and Possession of a Controlled Substance. He then appealed.

ISSUE: Is an affirmative defense (such as duress) the purview of the jury to decide?

HOLDING: Yes

DISCUSSION: Harley argued that the duress defense meant that he could not be convicted of Robbery, that it effectively negated the charge and required that he be acquitted. The Court, however, quickly agreed that such a defense was the sole purview of the jury to decide, and that it had done so.

Harley’s conviction was affirmed.

FORFEITURE

Hardin v. Com.
2007 WL 2744383 (Ky. App. 2007)

FACTS: On Jan. 24, 2004, Hardin’s home was searched by Spencer County officers, pursuant to a warrant. The officers found methamphetamine, items related to a lab and a gun. Hardin was arrested, and during the search of his person, almost \$2,500 in cash found, contaminated with a white powdery substance.

Hardin was indicted on trafficking, manufacturing meth and possession of a firearm. He pled to amended charges (Possession of a Controlled Substance and Possession of Meth Precursors) and the firearms charge was dismissed. Hardin then sought to retrieve the cash, and was denied, with the trial court ordering forfeiture pursuant to KRS 218A.410. Hardin appealed.

ISSUE: Is cash found in close proximity to an illegal drug rebuttably presumed to be subject to forfeiture?

HOLDING: Yes

DISCUSSION: The Court reviewed the law, and acknowledged that the Commonwealth bears the burden of proof in a forfeiture case. To meet that burden, the Commonwealth was required to show a “slight evidence of traceability.” In other words, it “must produce some evidence that the property sought to be forfeited is somehow traceable to the illegal drug activity.” The statute provides for a “rebuttable presumption” when the property is found in “close proximity” to the illegal drug.”

The Court found that the facts clearly provided that traceability, adding that Hardin’s arrest took place in January, and his only lawful employment was with a lawn mowing business. Once the burden shifted to Hardin, he was then required to show by “clear and convincing evidence” that there was another, lawful, source for the income, which he claimed was going to be used to pay a child support arrearage.

The Court upheld the forfeiture.

Gray v. Com.
233 S.W.3d 715 (Ky. App. 2007)

FACTS: On Feb. 19, 2005, Gray was stopped by Dep. Madden (Webster Co. SD), “following several calls complaining of a van driving erratically.” Gray, the driver, refused to take a sobriety test, but did give consent to a search of the van. Dep. Madden found drug paraphernalia, including a hemostat with a roach, rolling papers and scales, among other items. He also found several packages of methamphetamine, marked by weight, pills (oxycontin and methadone), Sudafed and lithium batteries, along with a firearm (with the serial number defaced) in an open console. He found more marijuana and meth on Gray’s person, and about \$1,500 in cash.

Gray was indicted, and convicted, on various offenses. He appealed the court order requiring forfeiture of the cash.

FACTS: Is cash found in close proximity to an illegal drug rebuttably presumed to be subject to forfeiture?

HOLDING: Yes

DISCUSSION: Gray argued “that the forfeiture was improper because there was no connection between the money and the charged offenses since the money was not shown to have been” exchanged in the sale of illegal drugs.” He claimed that the money “originated from a cashed money order given to him by his girlfriend.” (The trial court had refused to admit a photocopy of the money order into evidence.)

The Court agreed that the “considerable amount of money found on Gray coupled with the large amount of drugs found in Gray’s van ... leads to a reasonable conclusion that Gray had used or, at the very least, intended to use the currency in an illegal drug transaction.”

The Court upheld the forfeiture.

SEARCH & SEIZURE - TERRY

Bankston v. Com.

2007 WL 2744616 (Ky. App. 2007)

FACTS: At about 8:16 p.m., on Nov. 30, 2005, “a black male approached Ellen Hollon in a Kroger store parking lot” in Lexington. They struggled and he snatched her purse, and then left in a black car. Lexington officers arrived and they were advised as to the description of the car and a possible plate.

Det. Richardson learned that several days after the crime, a white female tried to pass one of Hollon’s checks at another Kroger. The woman left when asked for ID, but the surveillance video showed her driving a black vehicle, similar to the one described in the robbery. She sported an obvious black eye. He also learned that Hollon’s credit cards had been used at several stores in the days between the robbery and Dec. 3, and obtained video that showed the same female, along with two black males.

On Dec. 8, Det. Richardson was working on another case when he drove through a parking lot, and spotted a white female getting out of a black Chevy Cavalier with a plate number only one number different than the one originally reported. Kenneth Bankston, a black male, was in the passenger seat. Det. Richardson stopped the vehicle and officers approached the pair. Bankston was removed from the car, patted down, and asked for ID. The officer dealing with the female reported that she had a black eye, and Det. Richardson recognized her from the video. He gave her Miranda warnings and explained the investigation. The female, identified as Denise Bankston, started to cry and stated that she would answer questions, but not in the parking lot. They got into a cruiser and she admitted that her husband, Kenneth, had stolen Hollon’s purse.

Det. Richardson arrested Kenneth Bankston. Unsure whether Bankston had been given Miranda warnings, so the detective gave them to him. He then questioned Bankston, and Bankston made incriminating statements. A stolen checkbook (for a different person) was found in the car.

Bankston was indicted on multiple charges of Robbery, Theft, Fraudulent Use of a Credit Card and PFO. Bankston moved to suppress his statement, which the trial court denied. Bankston took a conditional guilty plea, and appealed.

ISSUE: May officers have a passenger get out of a car during a Terry stop?

HOLDING: Yes

DISCUSSION: Bankston claimed he was seized when the officers had him get out of the car and that the officers lacked sufficient cause to do so. The Court found, however, that the officers had adequate reasonable suspicion and that the “investigatory stop was justified at its inception, and the scope of the detention was rationally related to the circumstances under which it was initiated.”

The Court upheld the denial of the suppression motion.

SEARCH & SEIZURE - PROBATION & PAROLE

Elliott v. Com.

2007 WL 2562726 (Ky. App. 2007)

FACTS: On Aug. 5, 2004, Det. Schardein (Louisville Metro PD) assisted Officer Williams (Probation & Parole) on a home visit to a probationer, Clay. They found approximately 80 grams of cocaine and cash. While they were taking Clay into custody, Elliott knocked on the door. Det. Schardein answered the knock and spotted “digital scales consistent with drug involvement and a cell phone in Elliott’s left hand.” He brought Elliott inside, and saw “something consistent with cocaine residue on the digital scales.” Upon checking, he found that Elliott was already on probation, and Det. Schardein contacted his probation officer, Stiles. Stiles reported that Elliott lived at a different address.

Williams decided to go to that address, with Elliott, and follow up. At that point, Elliott was already in handcuffs, and Williams testified later that she had already decided to arrest Elliott for violating his probation, “associate[ing] with a convicted felon” and “possessing drug paraphernalia.”

When they arrived, Elliott explained that he lived at the house with his father and pointed out their respective bedrooms. The officers found a gun in Elliott’s bedroom, and crack cocaine on the water heater. Finally, Elliott stated that “I don’t even live here” and told the officers that his car was at his girlfriend’s house “where he sometimes resided.”

Since Officer Stiles had that address in the file as a previous address, the officer’s proceeded there. The manager indicated that Elliott stayed there frequently and let the officers into the apartment. There, they found bindles of crack cocaine as well.

Elliott was charged. He moved to suppress the evidence from the two residences and was denied. He then took a conditional guilty plea to trafficking, and appealed.

ISSUE: May a residence be searched pursuant to the probationer’s status even after the probationer is taken into custody?

HOLDING: Yes

DISCUSSION: Since it was undisputed that Elliott was on probation at the time, the trial court looked to the policy and procedure from Kentucky Corrections. That dictated that such searches may be done on the “less stringent standard of reasonable suspicion.”⁵ Elliott argued that once he was in custody, that the officers lacked the authority to search his residence.

⁵ Wilson v. Com., 998 S.W.2d 472 (Ky. 1999).

However, the Court disagreed, and found that the “authority to search a parolee/probationer’s residence is not lost when the parolee is taken into custody.”

Elliott’s plea was upheld.

SEARCH & SEIZURE - EXIGENT ENTRY

McDaniel v. Com / Stokes v. Com. **2007 WL 2812586 (Ky. App. 2007)**

FACTS: Lexington officers were dispatched to a “possible domestic disturbance.” Officer Masterson arrived first, and heard a “man yelling and a woman crying in an upstairs apartment.” He waited for Officer Richardson, who arrived in moments. They then approached, knocked, and announced. The sounds inside stopped, “except for the sound of a woman whimpering.” The officers knocked for some minutes, until “they heard what sounded like a firearm being prepared for use.” They retreated and spoke to a neighbor, who told them “that a fight had been going on for a couple of hours and that someone in the apartment had been ‘bounced around the walls.’” Sgt. Richmond arrived, and the officers continued to talk to the neighbor, whereupon Richmond and Masterson returned to the apartment door.

The officers continued to hear a woman whimpering and continued to pound, for an estimated five to ten minutes. Stokes finally opened the door; she “appeared to be shaken and upset but told the officers that she was alone in the apartment and did not know why the police had been called.” Sgt. Richmond asked her to step into the hallway and told her what the other officers had heard. Sgt. Richmond “noted a silhouette of a man in the rear of the dimly lit apartment” and Stokes admitted that McDaniel (her boyfriend) was inside. Sgt. Richmond ordered McDaniel “to come out and show his hands.” The officers entered, handcuffed him and patted him down. McDaniel was “uncooperative and belligerent” but the sergeant told him that he would stay handcuffed until they “could satisfy themselves that the apartment was safe.” As they entered, they “smelled marijuana smoke.”

Officer Curtsinger, who had been at the rear of the building, also came in and looked around the living room. He spotted a baggie in a trash can that the officers agreed contained cocaine. The officers went back to speak to Stokes and told her what they had smelled, and asked about drugs or weapons. She showed them some joints in an ashtray in the bedroom, but refused consent to search the rest of the apartment. She was arrested for possession. McDaniel “stated that he was responsible for any illegal substances” but also declined permission to search. He too, was arrested. The officers obtained a search warrant and searched, finding cocaine and a firearm with ammunition. Stokes and McDaniel were charged with trafficking and related charges.

Each requested suppression, and the court denied that motion. Both took conditional guilty pleas and appealed. Their cases were consolidated, and the initial reviewing court ordered that the trial court “adequately address the effect of the thirty-minute time lapse from the time the officers arrived until the time they conducted the warrantless search of the apartment” stating that “[a] determination of this time-lapse issue is critical because it appears to be the essence of exigent circumstances that there was the lack of time to obtain a warrant without thwarting the

arrest or making it more dangerous.” On remand, the trial court found that “the fact the officers arrived at the scene thirty minutes before they entered the apartment does not negate the existence of the exigency in this case.” The trial court concluded that:

[T]he officers fear for their and Stokes’ safety occurred when Stokes opened the door and the officers saw the man in the back of the dim apartment in which they had heard a gun being prepared for use twenty minutes before. At the moment McDaniel was slow to cooperate, the officers decided that there was a sufficient chance of danger to necessitate their entry into the apartment. The officers’ failure to seek a warrant or enter the apartment earlier does not negate the fact that when the door was opened the officers and Stokes were in a potentially hostile and dangerous situation and the officers acted reasonably under the circumstances, as they existed at the time of entry. These circumstances included the accumulation of evidence obtained over that 30 minute time period as well as the new circumstances presented to them once Stokes opened the door. The officers were then in reasonable fear that they must enter and subdue McDaniel in order to protect Stokes and themselves from possible harm. Therefore, the thirty-minute time lapse had no effect on the exigency of the circumstances and the officers could constitutionally enter the apartment under the exigent circumstances exception to the warrant requirement of the 4th amendment.

Stokes and McDaniel then appealed a second time.

ISSUE: Does a 30-minute delay negate the “urgency” needed to make an exigent entry?

HOLDING: No

DISCUSSION: The Court began its analysis by noting that the “Commonwealth relies on the safety exigency, which permits officers to make a warrantless entry into a residence ‘when they reasonably believe that a person within is in need of immediate aid,’ or where there is an immediate need to protect or preserve life or prevent serious injury.”⁶ Stokes and McDaniel, however, argued that the officers had sufficient time to get a warrant. The Court agreed that the “thirty-minute delay tends to undermine the argument that an immediate exigency existed,” but the Court noted that the “issue is significant only because the reasonableness of the officers’ actions must be judged at the point they made the warrantless entry.” Only when the door was opened did the officers acquire “new information which heightened the urgency of the situation” - “Stokes’ distressed appearance and her clearly false statement that no one else was in the apartment” when they spotted McDaniel standing in the “darkened back bedroom.”

Considering that new information, along with what they had already learned, the officers were justified in entering the apartment. Further, the Court agreed that the Plain View doctrine permitted the seizure of the baggie. The officers were lawfully in the apartment, and identified the baggie as likely containing cocaine residue.

⁶ *Mincey v. Arizona*, 437 U.S. 385 (1978); *Causey v. City of Bay City*, 442 F.3d 524 (6th Cir. 2006).

Both argued, also, that they were unlawfully detained, but the Court found that the officers “had a reasonable basis to believe that McDaniel had engaged in domestic violence and may be armed.” As soon as they entered, the officers smelled marijuana. Stokes further gave a “voluntary and uncoerced consent to the search” prior to being arrested.

The Fayette Circuit Court’s decision was affirmed.

Washington v. Com.
231 S.W.3d 762 (Ky. App. 2007)

FACTS: On the day in question, Officer Cobb (Lexington-Fayette PD) was working with other officers to conduct a ‘buy-bust’ operation at an apartment complex....” As part of the operation, an informant parked his truck near the building, and Officer Givens parked his car so he could have visual contact with the informant’s vehicle during the transactions. Other officers, including Cobb, were positioned nearby as well.

At about 9:50 p.m., Givens radioed that a transaction had taken place and the three other officers responded to the parking lot. As Cobb drove to the scene, he heard the suspect described as entering the hallway of a particular building, but after Cobb got out of his car, Givens radioed the exact apartment the suspect had entered. (But, “by this time, Cobb was too far away from his car radio to hear this information.”)

As the officers entered the hallway, they heard a door slam shut, and they “smelled a strong odor of burnt marijuana.” They believed the odor to be coming from a specific apartment, and that that apartment door had just been opened and shut, because of the “strong odor of marijuana surrounding it.” They knocked and announced. Cobb then “heard movement inside the apartment and feared that evidence might be destroyed if they did not immediately enter the apartment.” The officers kicked in the door and swept the apartment, finding narcotics and cash. The three occupants, including Washington, were arrested. Shortly afterward, and probably because Givens did, in fact, know which apartment the original suspect had entered, the apartment across the hall was searched. The original suspect was “discovered and arrested.”

Washington was indicted for trafficking in controlled substances and marijuana. She (and the other two occupants) moved for suppression, arguing that the search of her apartment was illegal. Washington eventually took a conditional guilty plea to “criminal facilitation to trafficking” and appealed.

ISSUE: May officers enter if they have a reasonable believe that evidence will be destroyed?

HOLDING: Yes

DISCUSSION: Washington argued that the warrantless search was “unsupported by probable cause and an exigent circumstance.” The Court noted that Cobb’s testimony was “knowledgeable, clear and consistent,” even though Washington was able to point out “inconsistencies between Cobb’s written post-incident report and his suppression hearing

testimony.” The Court found that the officers’ reasons for entering Washington’s apartment were justified due to Cobb’s reasonable belief that evidence might be destroyed if they delayed.⁷ The Court continued:

In providing a context of when the danger of the destruction of evidence is imminent, the U.S. Supreme Court held that it is reasonable to permit police to secure the location without a warrant where police action literally must be ‘now or never’ to preserve evidence of a crime.⁸ Given the details listed by Cobb, the court found that the “officers were in a situation where they reasonably believed that evidence of a serious crime might be destroyed, they properly disregarded the warrant requirement to prevent the possible destruction of evidence.”⁹

Washington’s plea was upheld.

SEARCH & SEIZURE - PLAIN VIEW

Marshall v. Com.

2007 WL 2744431 (Ky. App. 2007)

FACTS: On August 14, 2002, Officers Baxter and Rundles (Paducah PD) were patrolling. They saw Huff, Marshall and another man known to Officer Baxter only as Sierra, walking together. Officer Rundles believed that a bench warrant had been issued for Huff’s arrest so they stopped the car and approached the three men. While Officer Rundles talked to Huff, Officer Baxter talked to Sierra and Marshall. Baxter had had previous interactions with Marshall concerning alcohol and Marshall’s having been barred from the property where the officers encountered the men. Officer Rundles noticed Huff talking oddly, without opening his mouth, and saw him swallow something. Officer Rundles made Officer Baxter aware that Huff had swallowed something and said something to the effect that Baxter should see if the other two men had anything. Baxter noticed that Marshall appeared nervous and kept putting his hands in his pockets. Baxter asked Marshall if he could search him for drugs, and Marshall replied that he did not have any drugs and did not want to be searched. Baxter then told Marshall that he knew that his life had been threatened in that neighborhood, and asked Marshall if he could pat him down for weapons. Marshall denied that he had weapons, but consented to the pat-down. Baxter patted Marshall down from the front, then turned him around to pat him down from the back. When he did so the rear pocket of Marshall’s baggy pants gaped open and Baxter could see a prescription pill bottle in Marshall’s open pocket. Baxter asked Marshall what was in the pill bottle and Marshall said that the bottle did not belong to him, it belonged to Huff, and told Baxter to take the bottle out and give it to Huff. When Baxter removed the bottle he could see that it contained what appeared to be rocks of crack cocaine. Marshall was arrested.

Marshall requested suppression, and was denied, finding that when Baxter was performing the pat-down, under consent, the “pill bottle came into Baxter’s plain view.” Marshall took a conditional guilty plea, to trafficking and appealed. On his first round of appeals, the appellate

⁷ *Posey v. Com.*, 185 S.W.3d 170 (Ky. 2006); *Com. v. McManus*, 107 S.W.3d 175 (Ky. 2003).

⁸ *Roaden v. Ky.*, 413 U.S. 496 (1973); see also *Schmerber v. California*, 384 U.S. 757 (1966).

⁹ *U.S. v. Banks*, 540 U.S. 31 (2003).

court reversed and remanded the denial of the suppression motion, finding that the Circuit Court “did not find that the incriminating character of the pill bottle was immediately apparent to Officer Baxter when he saw it.” The Circuit Court followed the appellate court’s instructions and rendered a holding that noted that Marshall gave Baxter permission to remove the pill bottle and that when he did so, Baxter saw the contents and recognized them immediately as contraband. Once again, the trial court suppressed Marshall’s motion, and once again, Marshall appealed.

ISSUE: May items found during plain view be handled, without the specific consent of the holder?

HOLDING: Yes (but see discussion)

DISCUSSION: Marshall first argued that his consent was involuntary, in that he had already denied Baxter permission to search his person for drugs. The Court, however, did not agree, as it found no “coercive circumstances, such as force, intimidation, etc.” Next, he argued that since the patdown was only for weapons, it was inappropriate for Baxter to handle the pill bottle, which was obviously not a weapon. The Court noted that since the pocket gaped open, Baxter easily saw the bottle, and since he did not seize it at the time, the fact that it wasn’t immediately incriminating was immaterial. Marshall consented to the removal of the bottle, even instructed that it be done, and at that point, the contents were “immediately apparent.” At that time, the seizure became lawful.

The denial of Marshall’s request to suppress was affirmed.

SEARCH & SEIZURE - CARROLL

Morton v. Com.
232 S.W.3d 566 (Ky. App. 2007)

FACTS: On the day in question, Morton was driving in Maysville. Officer Hord was behind him. Morton made a turn without signaling and then, approximately a mile later, was seen weaving from side-to-side. Hord made a traffic stop.

Hord requested Morton’s documents but Morton was unable to produce the proof of insurance required. Hord called in via radio to check Morton’s OL status, and while waiting, permitted his drug dog to sniff the exterior. The dog alerted on the trunk and the driver’s side door.

Hord told Morton that the dog had alerted on the car, and asked for consent to search. Morton refused. Hord then had him step out, and conducted what “Hord characterized as a pat down search.” During that search, he located an item, which was discovered to be a folded bill containing crack cocaine. Morton was arrested.

Once he was indicted, Morton moved for suppression, which was denied. Morton took a conditional guilty plea, and appealed.

ISSUE: May a driver be searched pursuant to a positive drug dog alert on the vehicle?

HOLDING: Yes

DISCUSSION: Morton argued that the search of his person was unlawful “because it was unsupported by reasonable suspicion of a weapon nor justified as a search pursuant to the automobile exception.” Morton “readily concede[d] that probable cause existed to search his vehicle because of the drug dog’s alerts,” but claimed that the “search of his person was not authorized under the automobile exception as a result of his mere presence within the vehicle.”

The Court concluded that its “precedents permit[ted] such a search under the facts of this case.” The Court equated the case to Dunn v. Com.¹⁰ in which it held that the “strong smell of marijuana emanating from Dunn’s vehicle provided probable cause to search the vehicle, all items contained therein, and the vehicle’s occupants.” The Court noted, in particular, that “Morton was the driver and lone occupant of the vehicle.” As such, the Court concluded “that a positive canine alert, signifying the presence of drugs inside a vehicle, provides law enforcement with the authority to search the driver for drugs but does not permit the search of the vehicle’s passengers for drugs unless law enforcement can articulate an independent showing of probable cause as to each passenger searched.”

Hord also argued that the frisk should have been “strictly limited to uncovering objects that can reasonably be believed to be weapons.”¹¹ The Court agreed that “Hord’s subjective justification for seizing the drug evidence does not pass constitutional muster,” the Court found that the officer did, in fact, have probable cause to search Morton for drugs because of the dog’s alert of his vehicle.

The Mason Circuit Court’s decision is affirmed.

SEARCH & SEIZURE - ARREST

Brooks v. Com.

2007 WL 2687400 (Ky. App. 2007)

FACTS: Officer Florence (Lexington PD) was patrolling when he noticed Brooks and another individual standing at an intersection in a high-crime area. Officer Florence pulled up, got out of his car and asked the two men their names and where they lived. Both produced ID and stated that they lived nearby.

Officer Florence believed one of the men, Brooks, was “intoxicated because he was slurring his words and had bloodshot, watery eyes.” Officer Florence examined Brooks’ hands, with his consent, and noted “distinctive burn marks on Brooks’s thumb and index finger.” Brooks admitted that he’d smoked cocaine about an hour before. At that point, Officer Florence told

¹⁰ 199 S.W.3d 775 (Ky. App. 2006).

¹¹ Baltimore v. Com., 119 S.W.3d 532 (Ky. App. 2003).

Brooks that while “he was not under arrest at the time” ... he (Florence) “had charges and ... [he] would be detained if he attempted to leave.” He continued checking and discovered that Brooks had an outstanding warrant. Brooks tried to run, but Officer Florence quickly apprehended and arrested him.

Officer Florence found no contraband during a search incident to the arrest, but while taking him to jail, saw Brooks moving around quite a bit. When they arrived at the jail, Florence searched the back seat and found a small baggie of crack cocaine. Brooks was eventually indicted on a variety of charges.

Brooks requested suppression, which was denied. He took a conditional guilty plea, and appealed.

ISSUE: Is an outstanding warrant enough to make a seizure lawful in retrospect?

HOLDING: Yes

DISCUSSION: Brooks argued that the original detention was not sufficiently supported by reasonable suspicion, and that “Florence then proceeded to unlawfully interrogate him without a Miranda warning.” The Commonwealth, however, argued that “the discovery of the outstanding warrant for Brooks’s arrest was an intervening circumstances that cured any possible earlier taint resulting from Florence’s conduct.” The Court cited to Birch v. Com. for the proposition that “[t]he outstanding arrest warrant was an independent, untainted ground for the arrest.”¹²

Brooks’ conviction was affirmed.

SEARCH & SEIZURE - INCIDENT TO ARREST

Fain v. Com.

2007 WL 2743430 (Ky. App. 2007)

FACTS: On July 13, 2005, Fain was parked outside a Shell station in Lexington. Officer Pearson (Lexington-Fayette PD) pulled in and noticed the car, and “immediately became suspicious of the vehicle’s location due to the recent number of convenient [sic] store robberies throughout Fayette County.” Pearson ran the plate and discovered that the owner (Fain) had an arrest warrant. He called for backup, and Officer Seabolt arrived to assist. Fain was arrested.

Officer Pearson began to search the car while Officer Seabolt took Fain to jail. During that search, Officer Pearson found a “driver’s license with his photograph that listed a name other than Fain’s.” At Pearson’s request, Seabolt returned Fain to the scene, and Fain was given his Miranda rights. He was “asked whether he wanted to talk about the fraudulent driver’s license, to which he stated that he did not.” Continuing the search, the officers found “three more fraudulent driver’s license as well as forced checks.”

¹² 203 S.W.3d 156 (Ky. App. 2006).

Fain was charged with Criminal Possession of a Forged Instrument. He requested suppression, and was denied. Fain took a conditional guilty plea to some of the charges. He then appealed.

ISSUE: Is a search incident to arrest of a vehicle justified following an arrest for non-payment of fines?

HOLDING: Yes

DISCUSSION: Fain argued “there was no justification for Officer Pearson to search his vehicle after he was arrested pursuant to a warrant for the nonpayment of fines” - contending that “the arrest was not for an offense justifying a search of his automobile.” The Court noted, however, that “one well-recognized exception to the warrant requirement is a search incident to an arrest, which the trial court relied upon when overruling Fain’s motion to suppress.” The Court noted that, in New York v. Belton¹³, the Supreme Court had “established a ‘bright-line’ rule permitting the search of an automobile incident to the arrest of an occupant for the purpose of establishing clear guidelines for police officers to follow in the performance of their duties.”¹⁴

Fain argued that the ruling in Clark v. Com.¹⁵ made such searches invalid when for “minor traffic violations” that do not normally result in an arrest, and asked that the Court equate this to his arrest for nonpayment of fines.

The Court, however, noted that, in this situation, “Officer Pearson had a duty to arrest [Fain] once he determined the warrant was valid” and that “[i]t was not up to his personal discretion whether to arrest Fain.” The Court quickly dismissed Fain’s argument and found the search to be valid.

Fain further argued that “once he was placed in Officer Seabolt’s police cruiser, he was no longer a threat to the safety of the officers or the public” and that made the search invalid. Again, the Court dismissed the argument that the “search was not contemporaneous because it was not conducted until he was being transported to jail.”

The denial of Fain’s motion to suppress was upheld.

SEARCH & SEIZURE - K9

Stewart v. Com.

2007 WL 2460716 (Ky. App. 2007)

FACTS: On Nov. 11, 2005, Officer Givens (Lexington PD) saw a vehicle, with loud music, traveling through a high crime area. He pulled over the vehicle and as he approached, he found the driver, Stewart, “trembling and nervous.” Officer Givens called for Officer

¹³ 453 U.S. 454 (1981).

¹⁴ The Belton rule “was adopted by the Kentucky Supreme Court and remains the law applied to searches of automobiles incident to an occupant’s arrest.” Com. v. Ramsey, 744 S.W.2d 418 (Ky. 1988).

¹⁵ 868 S.W.2d 101 (Ky. App. 1994).

Grayhouse, a canine officer, to come to the scene. As they waited, Givens had Stewart get out and proceeded to get the necessary information to write a citation. Officer Grayhouse arrived in 5-8 minutes, and walked his dog around the car. The dog alerted, and eventually, the officers found 15 grams of cocaine and a quantity of marijuana. Givens arrested Stewart.

Stewart was indicted on charges of trafficking in cocaine and marijuana. He moved for suppression, arguing that the stop was unlawful and that “Givens unnecessarily prolonged the stop to allow the canine officer to arrive.” The Fayette Circuit Court denied the motion, Stewart took a conditional guilty plea, and appealed.

ISSUE: May a drug dog provide probable cause for a vehicle search?

HOLDING: Yes

DISCUSSION: Stewart agreed that Officer Givens had a legitimate reason for the original stop, but argued that “he may not be detained without cause for the sole purpose of giving the canine officer time to arrive. He also argued that a positive dog hit “did not give rise to probable cause supporting a vehicle search.” The Court, however, quickly determined that the “brief period of detention lasted no longer than was necessary to achieve the purpose of the stop.” Stewart argued that “entering Stewart’s personal information into a computer to look for outstanding warrants” was inappropriate, but the court dismissed that assertion. Further, the Court found that Johnson v. Com. had clarified that a dog alert is probable cause in Kentucky sufficient to uphold probable cause.¹⁶

Stewart’s conviction was upheld.

SEARCH & SEIZURE - CURTILAGE/CONSENT

Leach (James & Karen) v. Com.
2007 WL 2069818 (Ky. App. 2007)

FACTS: On April 15-16, 2005, The “West Kentucky Crimestoppers in McCracken County received anonymous tips” concerning the Leaches, stating that they were “dealing drugs, specifically cocaine, methamphetamine and marijuana, out of their house.” On April 22, Det. Carter and Dep. Riddle (McCracken Co. SO) went to the house to investigate. The tipster had “stated that the [Leaches] would not answer the front door to the home, but would come to the back door.” Det. Carter later testified that Dep. Riddle “had advised him that he (Riddle) had been to the residence before on a previous domestic call and that ‘everyone’ at the house on that occasion used the back door to enter and exit the house.” Notably, however, the opinion states that the information did not indicate “whether these people were all members of the Leach family.” Because of that information, however, the officers “immediately went around to the back door and knocked without first attempting entry via the front door.”

¹⁶ 179 S.W.3d 882 (Ky. App. 2005).

The opinion also notes that “to reach the back door, the officers had to walk down a driveway, pass a number of parked vehicles and go behind the house to a position not visible from the street.” In addition, the “back yard was ringed with an overgrowth of trees and bushes and had a garage in one corner” and “the parked vehicles and vegetation ... conceal the rear of the house completely from the street.”

When they reach the back door, they found the screen door closed but the interior back door open. Det. Carter “smelled the odor of marijuana.” When he knocked, “someone from inside yelled ‘come in.’” They did not enter however, and eventually James Leach came to the door. Det. Carter explained why they were there, but Leach denied any involvement in drug activity. He told the officers that he had a friend inside, and the detectives asked that the friend also come to the door. When he did so, both men were given Miranda warnings.

Det. Carter told the two that he had smelled marijuana coming from inside, and Leach admitted that there was a little marijuana and guns in the house, and that his wife was in the bedroom. The deputies detained the two men and requested consent, which Leach gave. He took them “through the house, pointing out the marijuana and guns.” He would not, however, let him enter his son’s room. Eventually, the deputies got a search warrant and found, in that room, more marijuana, paraphernalia and firearms.

Both of the Leaches were charged. They both moved for suppression, arguing that the “initial search of the house was improper because no warrant had been issued and there was no applicable exception to the warrant requirement.” They contended that the deputies “were illegally on the property when they smelled the marijuana because the back door of the house is part of the curtilage” which is a “protected private area ... not subject to a general search absent a properly issued warrant or an appropriate exception to the warrant requirement.” Their argument was essentially that the “presence of the officers in the protected area was inherently coercive, rendering Mr. Leach’s consent invalid.”

The trial court denied the motion, concluding that the deputies were lawfully at the back door and that the back door was “open for public use.” Both took a conditional guilty plea, and appealed.

ISSUE: Is the back door of a home part of the protected curtilage?

HOLDING: Yes

DISCUSSION: First, the Court addressed the issue of whether the back door was, in fact, open to the public. Using the same case upon which the trial court based its decision, Cloutier v. Com.¹⁷ the Court re-examined the issue of curtilage, stating that:

Curtilage is a protected part of an individual’s property under the 4th Amendment of the United States. It is given protection because it is an extension of the home and can be used for intimate activity associated with the home.¹⁸ The United

¹⁷ 679 S.W.2d 827 (Ky. App. 1984).

¹⁸ Oliver v. U.S., 466 U.S. 170 (1984).

States Supreme Court outlined four factors to be considered in determining whether property fell within the curtilage of one's home. The four factors to be considered are: "the proximity of the area claimed to be curtilage to the home, whether the area is included within an enclosure surrounding the house, the nature of the uses to which the area is put, and the steps taken by the resident to protect the area from observation by people passing by."¹⁹ When this test is applied to the facts found in the case at bar, it is clear that the Leach's back door is undeniably part of the curtilage. The back door was concealed from the public roadway by the house itself, vehicles parked in such a manner as to conceal the back yard, and tall trees, shrubbery and the garage from the three remaining sides of the back yard. Additionally, as noted by counsel in the Appellant's brief, the back yard was being used to grow marijuana, which is a use certainly meant to be concealed from passersby. (We note that apparently the officers did not notice the marijuana plants located in pots on a table in the back yard until after the search warrant was obtained.) A cursory glance at the photos in the record establish that there was no pathway and the back yard of the property was not otherwise impliedly open to the public which would allow it to fall under the Cloar exception stated above.

Generally speaking, no reasonable member of the public would believe that a back door not visible to the casual observer would be open to him. There could be circumstances where members of the public could think that a back door would be open to the public. For example, if the front door is somehow inaccessible or there is no response to attempts to contact the inhabitants via the front door.²⁰ In this case, all we have to suggest that the back door is impliedly open to the public is an anonymous tip and the hearsay statement of one of the police officers that on a previous occasion he had been at the house and noticed that "everyone" used the back door to enter and exit. There was no testimony that those who used the back door included the public or even when this previous visit took place. Considering that the officer's previous visit to the residence was in response to a domestic disturbance, it is logical, without more information, to assume the only people involved were members of the family and that no members of the public were seen using the back door. We cannot in good conscious deem a back door to be impliedly open to public use based on an uncorroborated anonymous tip and the single previous experience of one of the officers.

In the case at bar, the Court found that the officers admitted they did not try the accessible front door, and concluded that the officers were improperly on the curtilage. Further, the Court found that because of that illegality, the "consent was not valid when given" because it was not voluntary and was coercive.

The Leach's pleas were reversed and the case remanded.

¹⁹ U.S. v. Dunn, 480 U.S. 294, 301 (1987).

²⁰ See, e.g., Warner v.State, 773 N.E.2d 239 (Ind. 2002) (police who received no response at front door properly went to side door).

SEARCH & SEIZURE - VEHICLE STOPS

Berry v. Com.

2007 WL 2405084 (Ky. App. 2007)

FACTS: On July, 7, 2005, Officer Mott (Richmond PD) received information from a CI that Berry was in Richmond to sell drugs. He was given specific information about Berry's vehicle. Mott shared that information with other officers, and further, told them that Berry had been previously arrested under federal drug charges. They spotted and began following the vehicle, during two stops at two different addresses. Finally, Det. Morris, seeing Berry make a turn without signaling, requested that a marked unit (Officer Eaves) stop the vehicle.

Eaves started writing the citation for the traffic offense, while Officer Stidham asked Berry for consent to search his person. Berry agreed, but Stidham found nothing. Berry denied permission to search his vehicle, however. Stidham told Berry he was calling for a drug dog, and while they waited, Officer Eaves completed the citation and gave it to Berry. After waiting 15-20 minutes, Berry gave consent to search, but Stidham elected to wait for the dog. When the dog arrived, it alerted on the driver's side of the vehicle, and during a subsequent search, the officers found "six plastic baggies containing white residue with one containing a small amount of cocaine." Approximately 22 minutes elapsed between the initial stop and the alert. "

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

ISSUE: May officers delay a traffic stop to wait for a drug dog if they have separate, reasonable suspicion that the driver is involved in illegal drug activity?

HOLDING: Yes

DISCUSSION: Berry argued that he was "illegally detained after the initial traffic stop had concluded" and as such, that any evidence found must be suppressed. Looking to Illinois v. Caballes, the Court distinguished this case by noting that this "was not a simple traffic stop," but something more.²¹ It found it more closely analogous to U.S. v. Davis,²² in that Berry was already identified by a CI as a likely drug trafficker, and the behavior the officers observed corroborated that characterization. As such the "police had reasonable, articulable suspicion to believe Berry's vehicle might contain evidence of drug trafficking."

Berry's plea was affirmed.

McIver v. Com.

2007 WL 2285406 (Ky. App. 2007)

FACTS: On March 5, 2004, Det. Smoot (Lexington PD) spotted McIver, and believed that his license was suspended. (He had stopped him previously and found his license to be

²¹ 543 U.S. 405 (2005).

²² 439 F.3d 345 (6th Cir. 2005); see also Garcia v. Com., 185 S.W.3d 658 (Ky. App. 2006).

suspended.) Smoot followed McIver and watched as he picked up an individual and drive to a nearby home. Det. Smoot, who was in an unmarked car, contacted a marked unit to make the stop. When the marked unit did so, McIver fled. During some point of the chase, McIver stopped briefly to let his passenger get out. When McIver was caught, and his vehicle searched, the officers found marijuana and heroin. (A search of the passenger revealed cocaine.)

McIver was indicted on trafficking, criminal syndication, possession of a firearm, flee/evading, operating on a suspended OL and without insurance. McIver moved for suppression and was denied. He took a conditional guilty plea to some of the charges and appealed.

ISSUE: Does the seizure of a driver in a motor vehicle occur when the individual actually stops the vehicle?

HOLDING: Yes

DISCUSSION: McIver argued that the officers “lacked reasonable suspicion of criminal activity” to justify making a Terry stop. Specifically, he argued that the information known to Det. Smoot, that his OL had been suspended 4 months previously, was stale. He also claimed that he was seized when the officers tried to make the stop. The Court, however, looked to Taylor v. Com.²³ and found that a seizure does not occur until the individual actually submits to the officer’s authority. The Taylor Court had “pointed out that a police officer’s justification for initially attempting to stop the defendant was immaterial once the defendant failed to yield.” Once he failed to stop, the officers had sufficient cause to charge him with fleeing and evading, and suppression was not warranted.

McIver’s plea was upheld.

SUSPECT ID

Sullivan v. Com.

2007 WL 2744435 (Ky. App. 2007)

FACTS: On Aug. 23, 2004, just before 6 a.m., “Dooley was keeping vigil in the labor and delivery room” of a Louisville hospital, “awaiting the birth of her grandson.” Sullivan entered and they spoke for a few minutes, then he apologized, punched her in the face and ran away with her purse. Dooley alerted the nurses, who called security with a description of the suspect. A security guard spotted Sullivan “coming out of a loading dock area.” Since he matched the description, the guard followed him and watched him discard objects. (These items were later found to be from Dooley’s purse.) The guard stopped Sullivan and asked him to wait for police, and he did so.

²³ 125 S.W.3d 216 (Ky. 2003).

Sullivan initially denied having been in the hospital, but admitted, after hearing discussion of a surveillance camera, that he'd been in the nursery to look at the babies. Dooley was brought down to the scene and "she positively identified him as her assailant." Her purse was later found in the stairwell leading to the loading dock – the same one where he was spotted.

Sullivan was arrested, indicted, tried and convicted on robbery charges. He appealed.

ISSUE: Are show-ups, done within minutes of the crime, permitted?

HOLDING: Yes

DISCUSSION: Sullivan argued that the show-up identification was improper. The Court reviewed the guidelines for show-ups and agreed that Kentucky courts required that a claim of undue suggestiveness must be scrutinized "by examining the totality of the circumstances in light of five factors enumerated by the United States Supreme Court in Neil v. Biggers.²⁴" Those factors include: "1) the opportunity of the witness to view the criminal at the time of the crime, 2) the witness's degree of attention, 3) the accuracy of the witness's prior description of the criminal, 4) the level of certainty demonstrated by the witness at the confrontation, and 5) the length of time between the crime and the confrontation."

The Court applied the factors to the case at hand. The Court found that Dooley had adequate time and opportunity to see Sullivan clearly, she was awake and alert enough to later describe him accurately, she accurately described Sullivan, she "never wavered in her identification" and "took extra time" in making the identification and finally, less than thirty minutes separated the crime and the identification.

Sullivan's conviction was upheld.

INTERROGATION

Buttrey v. Com.

2007 WL 1789985 (Ky. 2007)

FACTS: On Jan. 9, 2003, Trooper Baxter (KSP) pulled over a vehicle with an expired registration. The driver, McNew got out and walked back to the trooper's cruiser, while McNew's son and Buttrey stayed in the car. Trooper Baxter then walked up to the car, opened the door and asked Buttrey, in the front passenger seat, for ID. The trooper immediately noted a "chemical odor in the car." Trooper Baxter put McNew through a sobriety test and asked him if

²⁴ 409 U.S. 188 (1972).

there was anything illegal in the car. McNew admitted that there “might be a ‘cook’ in the car.” The child and Buttrey both began to get out, and Trooper Baxter “got the child out of the car” and ordered Buttrey to put his hands on the roof. Buttrey, however, acted “restless” so Trooper Baxter tried to handcuff him. However, Buttrey ran away.

Trooper Baxter arrested McNew and took the child into protective custody. He searched Buttrey’s jacket, which he’d left behind, and the passenger area of the car. The record indicated that “extensive evidence” of methamphetamine was found in the car, and the Buttrey’s jacket contained two cell phones and other evidence of methamphetamine. The evidence regarding a lab was recovered, primarily, from the front seat. In particular, Trooper Baxter found a cooler that was being used actively to produce methamphetamine.

Buttrey was indicted, and fled to Indiana. When captured there, troopers went to Indiana and transported him back to Laurel County. During that five-hour trip, Buttrey “made several incriminating statements.” At trial, Trooper Baxter indicated that although they did not give Buttrey his Miranda rights, neither did they attempt to take any statements from him. He stated that Buttrey was “talkative” and engaged in conversation with the troopers, including a discussion of how he had broken his leg, which was in a cast.

Buttrey “volunteered a statement identifying where he had hidden after escaping on the night of the traffic stop, and that he made “further incriminating statements involving methamphetamine.” Specifically, he admitted that he was among the first people in the county to cook meth and that “current cooks did not know how to safely do it and would ‘blow themselves up.’”

Prior to trial, Buttrey requested suppression, but was denied. He was convicted of multiple offenses and appealed.

ISSUE: Are volunteered statements admissible?

HOLDING: Yes

DISCUSSION: Buttrey argued that the statements made during the trip must be excluded because of their failure to give him Miranda warnings. However, the Court noted that the “duty to warn ... does not attach absent custodial interrogation.” As the prosecution conceded that he was in custody, interrogation remained the only issue.

The Court reviewed the facts, and found that there was no evidence that Buttrey made his “objectionable statements in reaction to questions or actions of the troopers.” He did not assert that “the transporting state troopers attempted to question him, to bait him into talking, to appeal to his conscience or emotions, or to use any other method to elicit incriminating responses from him” Even though Trooper Baxter agreed that it was reasonable to think Buttrey might make incriminating statements during the long ride, the Court found that “[w]ithout more, the circumstances of the drive’s duration cannot be characterized as anything other than normally attendant to a transportation for extradition.”

The Court found that the “statements were voluntary” under Wells v. Com. and Rhode Island v. Innis.

Next, Buttrey argued that “Trooper Baxter’s testimony about the statements [he] made during extradition should have been excluded” as evidence of prior bad acts (prohibited under KRE 404) as they referenced only his experience in manufacturing and knowledge of illegal acts. The trial court had concluded that the “statements were relevant to prove [Buttrey’s] knowledge and intent – both of which [were] material elements of the crime.” The “fact that these statements were voluntarily given by [Buttrey] to law enforcement officers against his own interest len[t] significant trustworthiness to them since [Buttrey] clearly had expertise in manufacturing methamphetamine and had no apparent motive to fabricate the statements.” The Court found it was appropriate to permit the statements.

The Laurel County decision was affirmed.

Emerson v. Com.

230 S.W.3d 563 (Ky. 2007)

FACTS: Emerson’s mother, Vickie Monroe “owned and operated a tavern,” in Jefferson County, along with her husband, Emerson’s stepfather. Emerson told his girlfriend, Decker, “that his mother wanted Monroe (her husband) murdered” ... and “was putting pressure on him to do something about it.” He told Decker that his mother had given him money to find someone to commit the murder, but that “he was thinking of doing it himself.” He asked Crews (who was apparently connected to the girlfriend) to “obtain a gun to kill Monroe” - and a rifle was purchased from Wal-Mart by Hill, another friend.

Approximately a month later, Monroe was murdered in the early morning hours. Emerson picked up Crews and they rode around. At some point, Emerson stopped the car and Crews took a rifle from the trunk and threw it off the road. However, a witness was driving past and reported it to the police. The two men were stopped and after being questioned, were permitted to drive off.

At about 6 a.m., Emerson told Decker that he “had shot and killed Monroe and made it look like a robbery.”

Emerson became a suspect, but initially denied involvement when questioned by Det. Davis. He was interviewed, agreed to and took a polygraph, and was interviewed a second time. In the second interview, he admitted ‘that he had hired a black man to kill Monroe, and buy and dispose of the gun.’ At that point, apparently, he was given his rights under Miranda.

Emerson was indicted for complicity in the murder and tampering with physical evidence. Prior to trial, he requested suppression, but was denied. He was convicted, and appealed.

ISSUE: Is a person who agrees to come to the police station for an interview in custody for Miranda purposes?

HOLDING: No

DISCUSSION: Among other issues, Emerson argued that his statements should have been suppressed. The Court noted, however, that the “evidence indicates that Detective Davis set up an interview with [Emerson] because he had been at the murder site in the early morning hours when the murder took place.” The detective “had no information as to who had shot Gerald Monroe, and [Emerson] was not in custody.” During the interview, Emerson “agreed to take a polygraph.” He was told he could leave his cell phone in the interview room, and he claimed that “he no longer felt free to leave because his cell phone was in the other room.” As a result of discrepancies in his statements to the examiner, Det. Davis questioned him further, and that was when he made his admission. After being given his Miranda rights, he signed a waiver and a confession. He showed police where the gun had been discarded and eventually gave another statement in which he admitted, specifically, shooting Monroe.

The trial court had ruled that he “was not in custody when the interviews began and could have left the police station at any time.” The court looked to Stansbury v. California, to find that Miranda is only required when “there has been such a restriction on a person’s freedom as to render him ‘in custody.’”²⁵ Emerson argued that since he admitted he was “driving his mother’s Lincoln, he was with Justin Crews, and they were in another county” that this information was incriminating, since he knew that a witness had reported the actions of the occupants of such a car. He also “thought the police knew about his disposal of the weapon.” The Court, however, noted that “his ‘knowledge’ and suspicions are nothing more than the product of a guilty conscience.” The Court further stated that Emerson “came to the detective’s office voluntarily, was not monitored, was permitted to go to the restroom alone, and was told he was not in custody.” He chose to leave the cell phone in the other room, and he could have retrieved it and left at any time prior to his admission.

The Court also quickly dismissed his argument under Missouri v. Seibert,²⁶ and that since he wasn’t in custody, Miranda wasn’t required, and thus, Seibert didn’t apply.

The Court affirmed the finding of guilt, but remanded for further proceedings on sentencing, as it held that the jury instructions regarding mitigation were flawed.

U.S. v. Parrent

2007 WL 2405085 (**Ky. App. 2007**)

FACTS: On May 16, 2005, Officer Wilkins (Lexington PD) responded to a burglary in progress. As he arrived, he found Parrent and a woman, Napier, in the custody of a civilian. Officer Wilkins learned from the victim, Sutherland, that he had found his front door damaged when he arrived home, and spotted the couple “walking down the street carrying items that Sutherland recognized as belonging to him.” Sutherland chased the pair, caught up with them and held them for police. Eventually, the pair was arrested. Parrent was found to have two prescription bottles belonging to Sutherland in his possession, while Napier had a watch that Sutherland identified as belonging to him.

²⁵ 511 U.S. 318 (1994); Watkins v. Com., 105 S.W.3d 449 (Ky. 2003).

²⁶ 542 U.S. 600 (2004).

Parrent was transported to jail and given his Miranda warnings. He confessed that he had burglarized Sutherland's home. He was indicted, and moved for suppression. When that was denied, he took a conditional guilty plea and appealed.

ISSUE: May an intoxicated subject waive Miranda rights?

HOLDING: Yes

DISCUSSION: Parrent argued that he was "too intoxicated to understand his Miranda rights." Officer Wilkins, however, had testified that Parrent "was coherent during the questioning and that he observed absolutely nothing to indicate that [Parrent] had been drinking." Parrent stated that he and Napier had shared a twelve-pack of beer prior to the burglary. He recalled being given his rights, but argued that he did not understand them, and that he confessed only to protect Napier.

Parrent argued under Hill v. Anderson that "[w]hen a suspect suffers from some mental incapacity, such as intoxication ... and the incapacity is known to interrogating officers, a 'lesser quantum of coercion' is necessary to call a confession in question."²⁷ The Court, however, agreed that the officer "had no indication that [Parrent] was intoxicated at the time of his confession." The Court stated, with acerbity, that Parrent's argument that he did not understand his rights "somewhat disingenuous in light of the fact that he was also charged with being a first-degree persistent felony offender" and as such "[c]learly, [Parrent] had knowledge of the criminal justice system and his rights thereunder."

The denial of the motion to suppress was upheld.

EVIDENCE

Mattingly v. Com.
2007 WL 2404481 (Ky. 2007)

FACTS: On March 20, 2004, Nick Hall, a nephew of Archie Hall, the owner of the property in question, contacted the Grayson County Sheriff's Office "to an odor of ether on the Hall farm." Officer Payton, Kentucky Fish & Wildlife, responded with the deputy sheriffs. Officer Payton had been suspicious of Mattingly's actions regarding the farm, and since his own property was adjoining the Hall farm, he was "allowed to hunt and fish on the Hall farm in return for keeping an eye on the place." They met the complainant, Nick Hall, at the property. The gate to the structure and the buildings was locked, but they were able to determine that "entry had been made to the farmhouse through a window" and they observed a "disassembled methamphetamine lab" inside. They eventually recovered a long list of items connected with such labs, although they found no methamphetamine or ether.

Several years before, the owner of the property had contacted law enforcement after finding "burnt places and coffee filters on his farm." A search resulted in nothing further being found,

²⁷ 300 F.3d 679 (6th Cir. 2002).

but apparently, he was found in possession of lab components in a contemporaneous vehicle stop.

After the officers left the farmhouse, Officer Payton observed Mattingly stopped on a road nearby. He had been found to have components of a lab in his vehicle.²⁸

Mattingly was indicted and requested suppression. He objected to the admission of “prior bad acts”²⁹ - specifically, Officer Payton’s testimony about his prior involvement with a meth lab on the Hall property. The trial court, however, found that the same equipment was found in both labs would make the evidence admissible, particularly what it described as “custom container fittings” which it noted to be a “form of fingerprinting in and of itself.”

At trial, a number of officers testified about methamphetamine production. Mattingly was convicted, and appealed.

ISSUE: May an officer testify (within limits) about items found on a suspect’s property previously?

HOLDING: Yes

DISCUSSION: Mattingly argued that Officer Payton should not have been permitted to testify about the earlier incident, and the similarity between the items found in that situation and the items found in the case at bar. The Court noted, however, that the trial court was very careful in limiting Officer Payton’s testimony only to the “identical unique items found during both incidents” and properly admonished the jury about how to use the information.

The Court found the testimony was properly admitted and affirmed the conviction.

Nellum v. Com.

2007 WL 2404485 (Ky. 2007)

FACTS: On December 12, 2004, at about 5:18 a.m., Martin, a cab driver, received a call to pick up a passenger. Martin drove the passenger to the address provided, and when they arrived, Martin was directed to drive a block further. There, the passenger “put an arm around Martin’s head and a knife to his throat” and robbed him. Once he tossed his money into the back seat, Martin pushed the knife away. The robber “jabbed” him in the shoulder with the knife and fled. Martin saw the robber go to a house, knock on the door, and then flee down a nearby walkway.

Newport PD officers responded and took the victim to the station, where he was interviewed by Det. Boyers. He was then treated for minor injuries.

The residents of the home where the robber had knocked were interviewed. One resident, Ewing, explained that her uncle, Elstock, who lived with her, had gone to White Castle around 4

²⁸ Editor’s Note: The summary of what occurred in the two instances is conflated in the opinion, and is somewhat confusing. It is unclear whether Mattingly was twice found with lab components in his possession, or only once.

²⁹ KRE 404(b)

or 5 a.m. As he left, he found Nellum standing outside, and she asked if she could use the phone, which was permitted, and for a ride home. Elstock took her to the area where ultimately, Martin picked up his passenger. Elstock then apparently returned home, only to hear a knock at the door a little later, right before he actually left again to go to the White Castle. There was no one there when he finally got to the door.

Martin identified Nellum in a photo lineup, and Ewing also did so. Martin further identified her in an actual lineup. Nellum was then indicted, and convicted, of Robbery in the First Degree and PFO. She appealed.

ISSUE: May a witness's testimony be bolstered by an officer?

HOLDING: Yes

DISCUSSION: Nellum argued that a police officer was permitted, in testimony, to bolster Martin's testimony. Martin testified that he was robbed by a female, but the defense introduced the police report in which he stated he was robbed by a male. Det. Boyers, however, testified that he had been told by Martin that the suspect was a black female who weighed between 250 and 300 pounds and who was "unshaven, with shadowing on the face or a five o'clock shadow." (Martin explained his confusion in the robber's gender, explaining that the robber had at one point denied being female, stating that "I'm not a ma'am, I'm a sir.")

The Court, however, found that the "prior consistent statement that Martin had previously identified the robber as a female to Boyers was admissible under KRE 801A(a)(2) as a statement offered to rebut the implied charge of recent fabrication."

Nellum also objected to Boyers' response, to a question by the prosecutor, as to whether Nellum had "any discoloration on the right side of her face." Boyers indicated that he saw "some darkness" in that area. The Court, however, found that the "jurors could see for themselves" and while it was improper to ask the question, the answer was harmless error.

Nellum's conviction was affirmed.

Debruler v. Com.
231 S.W.3d 752 (Ky. 2007)

FACTS: At about 7:25 a.m., in Owensboro, C.B., age 10, left to walk to school. On the way, she was grabbed by a man who tried to carry her off, but she "managed to free herself by slipping out of her overcoat." She saw the man climb over a fence and flee the scene. She was able to say he was Caucasian, but he was wearing a mask and gloves, which prevented further identification. She did, specifically, see that he wore "black work boots with yellow and black laces."

Shortly thereafter, less than a mile away, Riney was leaving a bakery when a man demanded her keys and tried to grab her purse. She screamed and resisted. Bystanders called police and

followed the attacker, until he was arrested. Both bystanders and Riney identified Debruler as Riney's attacker.

Officers Morgan and Howard (Owensboro PD) brought police dogs to the scene of C.B.'s attempted abduction, some seven hours after the incident. Capt. Thompson had acquired two items of Debruler's clothing, a sweatshirt and a jacket, "for use in the tracking." Officer Morgan's dog, Bady tracked the scent to the entrance of the alley, where the scent apparently faded. Officer Howard's dog, Denise, also lost the scent at the same location.

Debruler was charged with Kidnapping (for C.B.), Robbery (for Riney) and on being a PFO. He was convicted of all charges, and appealed.

ISSUE: Is evidence of scent tracking by trained dogs admissible?

HOLDING: Yes

DISCUSSION: First, Debruler claimed that the tracking evidence should not have been admitted because the trial court denied his request for a Daubert³⁰ hearing, arguing that such evidence is "scientific testimony." The Court discussed whether "testimony from a trained dog-handler concerning the use of canine scent tracking" is "scientific expert testimony." The Court noted that the officers "did not testify as to any scientific technique, theory or methodology" or provide any "scientific explanation of a dog's ability to track a scent." Their testimony was limited to their observations and their interpretation of their observations "based on experience and training." As such, the Court held that "the practice of using trained dogs to track a human scent lacks the hallmark of scientific knowledge" needed for a Daubert hearing, and as such, it wasn't required or even advisable.

However, the Court held that "certain foundational requirements must nonetheless be met in order to ensure reliability." The Court looked to Pedigo v. Com.³¹ for precedent, finding that case to "set forth the foundational requirements for admitting dog-tracking, or "bloodhound" evidence. In Pedigo, the court took "judicial notice of the use of canines in scent tracking" noting that:

It is a matter of common knowledge, of which courts are authorized to take notice, that dogs of some varieties (as the bloodhound, foxhound, pointer, and setter) are remarkable for the acuteness of their sense of smell and for their power of discrimination between the scent they are first laid on and others which may cross it.

The court, however, realized that such bloodhound evidence is "overly persuasive" to the jury stating that "[t]he very name by which the animal is called has a direct tendency to enhance the impressiveness of the performance." As such, the Court "enumerated very specific and detailed foundational requirements for the admittance of such testimony:"

³⁰ Daubert v. Merrell Dow Pharmaceuticals, Inc., 509 U.S. 579 (1993).

³¹ 103 Ky. 41 (1898).

[I]n order to make such testimony competent, even when it is shown that the dog is of pure blood, and of a stock characterized by acuteness of scent and power of discrimination, it must also be established that the dog in question is possessed of these qualities, and has been trained or tested in their exercise in the tracking of human beings, and that these facts must appear from the testimony of some person who has personal knowledge thereof. We think it must also appear that the dog so trained and tested was laid on the trail, whether visible or not, concerning which testimony has been admitted, at a point where the circumstances tend clearly to show that the guilty party had been, or upon a track which such circumstances indicated to have been made by him.

Later Kentucky cases had followed that precedent.³² The Court found, however, that in this case, the Commonwealth had met the standard and “provided sufficient foundation for admission of the testimony” in that the officers had produced information as to the bloodline of each dog, as well as records of their initial training, their ongoing training and certifications.³³

Debruler argued that the passage of time, and purported contamination, by the presence of other officers walking through the scene, rendered the information inadmissible. However, both officers specifically testified that the dogs could follow trails several hours old, and that both dogs displayed the ability to discriminate among multiple, overlapping tracks.³⁴ Although agreeing that the passage of time and the presence of competing scents might adversely affect the dog’s ability to track, that went only to weight and that could be addressed during cross-examination.

Debruler also challenged how the scent evidence was obtained and handled, but again, the Court noted that went to weight and credibility, not to inadmissibility.”

Debruler also argued that the prosecution erred in not producing the dog’s records prior to trial, but the Court noted that the defense was well aware that the dogs were part of the case and they failed to request the records. The Rules of Criminal Procedure does not specifically require prior production of such records.

Debruler’s conviction was affirmed.

NOTE: *Early Kentucky case law on tracking dogs almost universally identifies the dogs as bloodhounds, a specific breed. However, this case suggests that the Court will accept other breeds of dogs as being capable of doing scent-discriminatory tracking as well.*

Anderson v. Com.
231 S.W.3d 117 (Ky. 2007)

³² Blair v. Com., 204 S.W.67 (1918); Brummet v. Com., 92 S.W.2d 787 (1936); Daugherty v. Com. 168 S.W.2d 564 (1943).

³³ From the opinion, it appears that Denise was certified in tracking by the Owensboro PD and that Bady was certified by the United States Police Canine Association.

³⁴ Bullock v. Com., 60 S.W.2d 108 (1933) upheld evidence admitted even though the bloodhounds in the case were not brought to the scene for some 18 hours after the crime, and Meyers v. Com., 240 S.W. 71 (1922) upheld a trail that was seven hours old.

FACTS: On Nov. 20, 2003, Ruby Dean was dressing when she heard men in her home. She “grabbed her pistol” and went out in the hallway. However, she did not have her glasses on, so she could only state that she saw three men. They left, after being challenged. It was later determined that six guns were missing from the house and that several tools and two go-carts were missing from a barn.

Dep. Whitenack (Anderson Co. SO) linked Blaylock and Nation to the theft, and questioning of the pair “led to an investigation concerning [Anderson’s] involvement in both burglaries.” Both eventually pled guilty, and eventually testified as to Anderson’s involvement as well. During the trial, Dep. Whitenack was asked to “describe the meeting between himself and [Anderson]. He quoted that when he asked Anderson about the burglary, he stated “do you think I’m stupid, I just got out of prison for the same thing. I’m not saying anything, I’m going to ride this one out.” Anderson’s attorney objected, under KRE 404(b), but the judge overruled because he had not objected to a similar statement made by Blaylock during his testimony.

Anderson was convicted, and appealed.

ISSUE: Is evidence of “prior bad acts” by the suspect admissible?

HOLDING: No (usually)

DISCUSSION: Anderson argues that Whitenack’s statement denied him a fair trial, as it suggested “prior bad acts.” The Court noted that “generally, proof of another crime unconnected with the crime for which the defendant is being prosecuted is not admissible” but that there are exceptions to that general rule. The Court noted that “the prosecution did not elicit the statement of the past criminal act to prove motive, intent, knowledge, plan or scheme, or absence of mistake or accident” - all of which would have qualified as an exception to the general rule. The Court held that the testimony was improperly admitted.

However, because the Court found that the evidence against Anderson was overwhelming, including three eyewitnesses, two of whom were co-conspirators. As such, the Court affirmed his conviction despite the error.

Baker v. Com.
234 S.W.3d 389 (Ky. App. 2007)

FACTS: On April 18, 2004, Dets. Spicer and Burch, UNITE, were working in Breathitt County. They approached Baker’s wife, standing by the side of the road, and asked if “she had anything to sell.” She stated her husband (James Baker) might have some Percocet and to return later, and they agreed to so.

Later that day, the detectives met with Daniel, a “cooperating witness.” After confirming that she was “clean,” by searching her and her car, they sent her off to meet with Baker’s wife. The officers arranged to meet at the Baker residence about pills.

Burch and Daniel left to make the buy, with Spicer following. They met the Bakers, and they drove about 2 more miles to an “isolated, graveled area.” Baker’s wife left the car, and Baker then offered to sell two Percocets. The transaction was completed and the Bakers were dropped off at their home.

On January 21, 2005, Baker was indicted on one count of Trafficking in a Controlled Substance and was tried a year later. He was found guilty, and appealed.

ISSUE: Are informal statements subject to the Confrontation Clause?

HOLDING: No

DISCUSSION: Baker argued that it was error to allow the “tape-recorded statements made by [Daniel] to be played to the jury since she was unavailable for cross-examination at trial.” The questioned statement involved Daniel’s voice on the tape recording made by Burch, as at the end of the transaction he had summarized on tape what had occurred and Daniel had chimed in with comments.

The Commonwealth argued that the “statements were admissible as non-hearsay” because it was not being offered “to show what happened.”³⁵ The trial court permitted the tape recording to be played. The Court looked to its precedent in Norton and agreed that it was appropriate to rely upon that case law as the statements were “essentially non-hearsay.” However, the Court agreed that Baker raised some “legitimate hearsay arguments suggesting that the statements present a hybrid issue as to their quasi-hearsay/non-hearsay nature.” The Court distinguished this case from Norton, noting that “while the contested statements in Norton occurred simultaneously with the drug buy, those at issue here were recorded after the transaction had taken place.” (In effect, Burch was making an audio memo of what had occurred, and “Daniel’s comments presented her version of what she had witnessed and bolstered Detective Burch’s account of events.”)

The Court noted that the statements did not fit any of the “enumerated hearsay exceptions” in the KRE. In light of the ramifications created by Crawford v. Washington,³⁶ and further explained by Davis v. Washington³⁷, the “Confrontation Clause applies only to testimonial statements and has no bearing on non-testimonial hearsay.” Since it was undisputed that Daniel was unavailable, the sole question was whether her statements were “testimonial in nature.” The Court stated that her statements were a “declaration or affirmation” that were intended to show what had occurred during the drug buy, and directly reflected that Baker was involved. The Court noted that “Daniel’s statements were an after-the-fact account of criminal conduct raises concerns.”

The Court continued:

Daniel’s statements in this case are clearly a description of past events - albeit very recently past. They were not made in the context of an ongoing emergency,

³⁵ See Norton v. Com., 890 S.W.2d 632 (Ky. App. 1994).

³⁶ 541 U.S. 36 (2004).

³⁷ 547 U.S. --- (2006).

and they were not made during the actual course of the drug buy as it was occurring. The statements undoubtedly implicated Baker as being involved in criminal activity. These facts, taken together, suggest that the statements were testimonial in nature.³⁸

The Court found that the “fact that the statements were not made in response to questioning does not necessarily render them non-testimonial.” Given the purpose of the recording, the Court found that “any objective witness would reasonably believe that this recording would be available for use at a later trial.”

Next, the Crawford/Davis Court had emphasized that the circumstances must be “sufficiently solemn and formal” in order to “qualify as testimonial for purposes of the Confrontation Clause.” Davis emphasized that the “solemnity of even an oral declaration of relevant past fact to an investigating officer is well enough established by the severe consequences that can attend deliberate falsehood.”

In this case, the Court concluded that “Daniel’s statements to Detective Burch were not sufficiently formal to implicate the Confrontation Clause” as they were “unprompted, unsolicited, and spontaneous and were not the result of any prompting from Burch.” Because Burch was directly involved, he “had full knowledge of what had occurred.” “Daniel was not telling him anything that he did not already know.”

The Court was persuaded that any possible error in allowing the jury to hear the statements was harmless, and upheld the conviction.

Beavers v. Com.

2007 WL 2285801 (Ky. App. 2007)

FACTS: On June 1, 2003, Trooper Cruz saw Beavers speeding, and went in pursuit. Beavers did not stop voluntarily, but eventually his car began to smoke heavily, he lost control, and the vehicle stopped. Cruz found an open alcoholic beverage container, marijuana, rolling papers and hemostats. Beavers was charged, in Hardin County, with fleeing and evading, possession of marijuana and paraphernalia, DUI, reckless driving and related charges.

Beavers received a public defender (PD), but during that same time, the PD and the Commonwealth Attorney were quarrelling over unrelated matters. Beavers’ trial was finally held in October, 2005, and the jury convicted him on a number of the charges. Beavers got a new attorney and moved for a new trial, which was denied, he then appealed.

ISSUE: Are suspects entitled to photos taken of the scene of their offense?

HOLDING: Yes

DISCUSSION: Beavers alleged that the prosecution “failed to turn over pictures taken of Beavers’ vehicle taken the night of his arrest. Previously, the prosecution denied that any such

³⁸ See Heard v. Com., 217 S.W.3d 240 (Ky. 2007).

photos existed, but Beavers argued that the videocam indicated that an unidentified state trooper took photographs of the scene. Both Trooper Cruz and Trooper Warrell denied any knowledge of photos. (Beavers did receive the videotape, however, which was how he was aware of the possible photos.)

The Court agreed that there was a factual issue about photographs, but found that there was no indication that the photos would have helped in his case. In any event, the Court found that Trooper Cruz had sufficient cause to search the vehicle, and would have found the items, which Beavers disputed were in plain view, as the trooper claimed, anyway.

Beavers' conviction was upheld.

EMPLOYMENT - DISCIPLINE

Gardner v. Hickman

2007 WL 2563405 (Ky. App. 2007)

FACTS: Gardner was hired as a police officer, by the City of Hickman, in August, 1999. The following year, he arrested Gilkey for possession of marijuana. At a suppression hearing in the case, Gardner testified that a urine sample, taken at the arrest, had been destroyed. However, that was not the case, and the County Attorney believed Gardner had committed perjury. As a result of this belief, and because Gardner had refused to provide the name of certain CIs who were potentially involved in "allegations that Gardner had misused the City's drug fund," the County Attorney had requested KSP conduct an investigation.

At the same time, the County Attorney told the City Manager that he would not accept any citations or arrests made by Gardner during the pendency of the investigation. The City Manager then suspended Gardner without pay, on April 23, 2002. On June 17, Gardner was arrested on charges of Perjury and Tampering with Physical Evidence, and the City Manager filed administrative charges against Gardner under KRS 95.765. At the administrative hearing, the Board of Commissioners voted to find him guilty of inefficiency and fire him. However, Gardner was never indicted on the criminal charges.

Gardner appealed the administrative decision. The trial court upheld Hickman's motion, which argued that their decision was not arbitrary and was supported by the facts. Gardner further appealed.

ISSUE: May an officer accused of criminal acts be fired, even if they are never actually indicted on the criminal offense?

HOLDING: Yes

DISCUSSION: Gardner argued that the County Attorney's actions were outside his scope of authority. The court noted that although his "instructions were not binding on the Circuit Clerk" that the "Clerk was able to make the informed decision that accepting Gardner's

paperwork would only waste the court's time." The Court noted that any testimony given by Gardner when a charge of Perjury was pending would likely have been dismissed by the court.

Further, the Court noted that the Board had asked the County Attorney for information, but that it was reiterated that the County Attorney was not the Board's attorney. The decision of the Board was affirmed.

Cole v. City of Florence
2007 WL 2744428 (Ky. App. 2007)

FACTS: Cole started working for the Florence PD in 1997. Sometime after that, officers were issued laptops that served as Mobile Data Terminals (MDTs) - which included email for intradepartmental communication.

In 2002, the department screened messages for inappropriate content, and five officers were found to have misused the system. Cole was charged with having sent "embarrassing, indecent, profane and obscene communications." (Some of the messages used profane/obscene language, some "disparaged other police departments.")

The five officers were "asked to write a letter explaining their inappropriate messages." Four did so, "acknowledging their wrongdoing and expressing contrition." "Cole, however, defended his messages as within the scope of legitimate police business, and did not express contrition." He later agreed that "his letter could be construed as 'sarcastic.'"

Chief Kaufman offered the four officers reprimands and counseling, which they apparently accepted. Cole was given a one-day suspension, and he filed a grievance, to be heard before the City Council.

At the hearing Chief Kathman recommended that Cole be terminated, stating that "he believed Cole's messages were worse than the other four officers, and that the other officers had demonstrated contrition, whereas Cole had not." The City Council concluded that Cole was guilty of misconduct and terminated him. Cole appealed to the Boone circuit Court, which affirmed Cole's dismissal. Cole filed a further appeal.

ISSUE: May officers who commit the same essential misconduct be punished differently?

HOLDING: Yes

DISCUSSION: Cole argued that the City Council "acted arbitrarily in determining that Cole violated the rules and regulations of the police department." It is the "function of the hearing body" in such cases to decide "first, whether the officer has violated the rules and regulations of the department and if so, second, it must exercise its discretion in imposing a

penalty.” Only the first is subject to judicial review, as “public policy requires that the matter of punishment and discipline of a police officer be left to the city.”³⁹

The record indicated that Cole admitted sending the messages in question, and it is not in dispute that Florence PD had a policy in place prohibiting such messages. The Court reviewed the text of the questionable messages and agreed that they violated the policy. As such, the City Council did not act arbitrarily.

Although Cole’s punishment was different from his fellow officers, the record indicated that he did not acknowledge his misconduct, and in fact, exacerbated it, when he wrote what he later agreed was a “sarcastic” letter, in response to an order to write a letter of apology. Cole argued that he was disciplined for exercising his right to have a review board. Of course, the Court noted, had Cole cooperated in the informal disciplinary review and accepted responsibility for his actions, he would not have been before the City Council at all.

Further, Cole argued that since the Unemployment Board found that Cole was not discharged for misconduct, that he had to be terminated for exercising his right to a hearing. However, the Court found that unemployment proceedings are not held to the same standard and the “principles of res judicata do not apply in relation to an unemployment benefits proceeding.”

The decision of the Boone Circuit Court was upheld.

OPEN RECORDS

Capitol Resources/Capitol Publishing v. Dept. of State Police 2007 WL 2332716 (Ky. App. 2007)

FACTS: In August, 2005, Capitol Publishing made an Open Records request to KSP for “unredacted copies of traffic accident reports from Boone, Campbell, Fayette, Jefferson and Kenton counties.” Capitol “gathers and publishes information in various print and internet publications throughout the United States.” KSP complied with its initial requests, but KSP became suspicious when it received payment for copies, a FedEx Air transmittal form (to return the copies) and six additional records requests in short order. It inquired into Capitol’s contention that it was a news-gathering organization and the owner signed a statement as to the purpose of the request. KSP requested more information in support of Capitol’s contention that it was a news-gathering organization, which Capitol provided. KSP concluded, following an investigation, that Capitol was not, in fact, gathering news but was furthering a private business interest. KSP then denied the pending requests, until such time as Capitol satisfied KSP’s concern about its purpose. (KSP further stated that even if they provided the reports, personal information would be redacted.)

Capitol appealed the refusal, and the Franklin Circuit Court found that “there was substantial evidence to support KSP’s conclusion that Capitol was not a news-gathering organization and, even if it was, KSP had the authority to redact the requested records.”

³⁹ City of Columbia v. Pendleton, 595 S.W.2d 718 (Ky. App. 1980); Stallins v. City of Madisonville, 707 S.W.2d 349 (Ky. App. 1986).

Capitol appealed.

ISSUE: Is publishing data on a website that charges for access sufficient to prove a “news-gathering” purpose?

HOLDING: Yes (but see discussion)

DISCUSSION: The Court reviewed the history of the Open Records Act. It also reviewed the history of KRS 189.635, whereby all vehicle accidents are required to be reported to KSP. Those reports include certain private data, such as birth dates and addresses. The need for an amendment, to protect that data, quickly became evident, as “middle-man” businesses quickly began to tap into that data. As such, the statute was modified to limit the data that was required to be produced. Despite legal challenges, the statute stood.

Capitol argued that KSP was required to release the data, and then, if the data was used for prohibited purposes, KSP could pursue civil remedies. The Court, however, found that “KSP, as the custodian of the records, is the gate-keeper of the records” and it is “its duty to keep the accident reports from those who will use them for the purpose of directly or indirectly soliciting accident victims.”

The Court defined “news gathering” as “the act of obtaining information with the intent to publish or disseminate it to the public.” The Court noted, specifically, that “[s]imply because a news organization disseminates news via the internet or by a less conventional communication method, it is no less newsworthy and is entitled to the same First Amendment protection.” Despite KSP’s contention that the accident reports were not newsworthy, the Court found that it was not within their purview to make that decision.

However, the Court held that Capitol “is not entitled to the requested accident reports unless it intended to use them *solely* for the purpose of publishing or broadcasting the news and not for a commercial purpose.” The Court looked to the definition of “commercial purpose” in KRS 61.870(4) - which “makes no reference to internet news; this omission, however is simply a consequence of the non-existence of the internet when the statute was enacted and the failure to amend it to encompass all methods of communicating the news.” The Court concluded that “[b]ecause the internet is so well-recognized as a method of communicating information,” it is now included in the exemptions under KRS 61.870. Merely because Capitol intended to publish the data on its web site limited to paid subscribers does not mean it is not a news gathering organization.

The Circuit Court placed the “burden of proof on KSP to support its denial of Capitol’s requests” particularly in the face of Capitol’s affidavit as to the purpose of the request, which would place the affiant at risk of perjury charges if found to be, in fact, untruthful.

The Court vacated the summary judgment and remanded the case for further proceedings, including further discovery.

SIXTH CIRCUIT COURT OF APPEALS

DRUG TRAFFICKING

U.S. v. Stafford

232 Fed.Appx. 522, 2007 WL 2128187 (6th Cir. 2007)

FACTS: In November 2004, the Memphis PD learned that Stafford “might be selling methamphetamine from a warehouse he leased.” They had an informant make a controlled buy, and when that was successful, they got a search warrant for his warehouse. The officers executing the warrant were unable to get an answer to their knock, and when they entered, the noticed a “strong chemical smell,” dominated by ammonia. They discovered two different labs, one to create anhydrous ammonia, and the other to manufacture meth, inside the warehouse. They also found lab waste in a bag with a bail bond letter addressed to Stafford. Outside, they found a Winnebago camper that contained methamphetamine, a large amount of cash and several firearms, among other items.

Four days later, an officer pulled over a vehicle Stafford was driving. The officer spotted a bag of ammonium nitrate (which can be used to make anhydrous ammonia) and paint thinner, and an assortment of other items related to methamphetamine manufacturing. He was arrested, and more items, including a copy of the search warrant, were also found. He was indicted on methamphetamine related federal charges and eventually convicted. Stafford appealed.

ISSUE: May weapons found in close proximity to illegal drugs be used to enhance the drug charge?

HOLDING: Yes

DISCUSSION: Stafford argued that there was insufficient evidence to convict him of “possessing a firearm in furtherance of a drug-trafficking crime.” Federal law requires that a weapon “must ‘promote or facilitate’ the underlying crime, requiring ‘a specific nexus between the gun and the crime charged.’”⁴⁰ The Court noted that the three weapons found, a pump shotgun and two pistols, did not “suggest an innocent purpose, such as hunting or antique collecting.” The guns were loaded, and Stafford had the weapons illegally, as he was a convicted felon. One pistol was found within two feet of a large quantity of methamphetamine and cash. The other weapons were also “easily accessible.” Even though Stafford was not at the warehouse when the weapons were found, the court found that the law made no distinction.

After disposing of other procedural issues, the Court upheld Stafford’s conviction.

⁴⁰ U.S. v. Mackey, 265 F.3d 457 (6th Cir. 2001).

SEARCH & SEIZURE - TERRY

U.S. v. Johnson

2007 WL 2492450 (6th Cir. 2007)

FACTS: On June 15, 2003, at 1:25 a.m., Officers Richardson and Johnson (Detroit PD) were sent to an address about gunshots. When they arrived, they spoke to a nearby resident, Robertson, who denied having heard shots. However, they continued to investigate.

Some minutes later, they were sent to a “hit and run” call to assist EMS. When they arrived, the officers found a “severely damaged and inoperable vehicle and no driver or passengers.” They found blood in the interior and evidence that an occupant had hit the windshield. Because the ignition had been torn out, they suspected it was a stolen car. A caller concerning the wreck had indicated that the driver had “bailed out” of the vehicle, but they did not provide a description of that person.

The officers went to a nearby liquor store, and a person there, unidentified, stated that a person with a bleeding head wound had gone back in the direction of the wreck. They found a person, Johnson, who fit the description provided. Johnson “appeared to be intoxicated, injured, and disoriented” and claimed to have been “jumped.” They believed, however, that he had been the driver of the abandoned vehicle and detained him both to question him and to get medical treatment for him.

Johnson was patted down before being taken back to the nearby accident scene, pursuant to departmental policy. Officer Richardson located something that he believed to be a gun, and in fact, it was a gun. He found a second gun in Johnson’s waistband. Johnson refused treatment, so he was taken to the station, but there, the desk supervisor sent him to the hospital.

Eventually, Johnson admitted to having been in an accident, and that he was the driver of the vehicle found at the scene of the hit and run - but was not, apparently, the stolen car.

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

ISSUE: May officers detain an injured subject for an investigation?

HOLDING: Yes

DISCUSSION: The Court analyzed the stop, and noted that “[o]bservations leading to an ‘inarticulate hunch’ that criminal activity is afoot are insufficient to justify a detention, but reasonable suspicion requires considerably less than proof of wrongdoing by a preponderance of the evidence.” In this case, the Court found that the totality of the circumstances was sufficient to justify the officers seeking, and ultimately stopping a possibly injured subject who had left the scene of an accident.

With regards to the frisk, the Court found that “the officers did not merely suspect [Johnson] of fleeing the scene of the hit-and-run accident, the officers reasonably suspected [Johnson] of being the driver of a stolen automobile involved in a hit-and-run accident.” Even though they later learned he was not the driver of the stolen vehicle, all that was important was what they knew “at the time of the detention.”

The government had further argued that the frisk was justified under the departmental policy, but because the Court had already justified the frisk under other reasons, they “decline[d] to discuss the justification for a pat-down pursuant to a department policy standing alone for all individuals placed in a police vehicle.”

Both the stop and the frisk were justified, and the court affirmed the denial of the motion to suppress.

SEARCH & SEIZURE - WARRANT

U.S. v. Perry

2007 WL 2566052 (6th Cir. 2007)

FACTS: On Feb. 6, 2003, officers in Harrison, Michigan, executed a search warrant at a particular address. While there, they arrested Perry and Kenny in a pole barn, after, apparently, finding a “partitioned area that contained a methamphetamine manufacturing lab.” They also found 60 weapons on the property.

Det. King had prepared the affidavit, and had explained that “much of the information came from an interview with a named informant.” The informant stated that she had received meth from Kozma while in a relationship with him, and had helped purchase numerous items for the lab. She had identified his associates, Perry and Kenny, as assisting in the lab.

Perry was charged, and moved for suppression. He was convicted on multiple counts, and appealed.

ISSUE: Must an informant’s motives for talking to the police be included in the affidavit?

HOLDING: No

DISCUSSION: Perry argued that the information provided by the informant was unreliable because King provided scant corroboration and the informant’s motives for talking to the police were omitted. The Court noted that the observations made by the informant were not so remote in time as to be stale and that her status as a “suspect in an arson investigation” and her “romantic involvement with Kozma” did not make her statements less reliable.

The denial of the suppression motion was upheld.

U.S. v. Braden

2007 WL 2781148 (6th Cir. 2007)

FACTS: Trooper Goodall (KSP) responded to a domestic disturbance call at the Lilly home, and found the pair under the influence of drugs. “Sarah Lilly claimed people lurked under the house: Charles Lilly heard noises, saw the floorboards moving, and thought armed men were pulling a freezer out from under the house.” They admitted to having smoked crystal meth, and Sarah showed the trooper her remaining supply. She told the trooper that she traded drugs with Hugley, in exchange for cleaning his trailer. She reported having seen “other drugs and weapons in that trailer.” She could not give the trooper an address, but went with him and identified the specific trailer.

Trooper Goodall prepared a search warrant affidavit, which was duly signed. Eighteen grams of crystal meth and thirteen firearms were found in the search. Although Lilly had named Hugley as the resident, in fact, Braden lived there, and he was arrested as a result of the search. Braden requested suppression and was denied, and he appealed.

ISSUE: Is it necessary to reveal the full extent of a witness’s intoxication in a warrant affidavit?

HOLDING: No (but see discussion)

DISCUSSION: Braden argued that he was entitled to a Franks hearing “to examine whether Goodall concealed from the magistrate the severity of Sarah Lilly’s intoxication.” The Court noted that although “Goodall’s affidavit includes no allegedly false statements, courts read Franks as targeting alleged omissions of information from affidavits as well.⁴¹ The Court found no indication that “Goodall omitted the extent of Lilly’s intoxication ‘with an intention to mislead’” and further that the affidavit did include that Lilly had admitted to smoking crystal meth and that she appeared to be impaired.

Braden also complained that the affidavit did not indicate when Lilly saw the drugs and weapons – but the Court noted that the fact that “Lilly had not yet exhausted the drugs supplied to her at the trailer” at least suggested that her observations were recent.

The denial of Braden’s motion to suppress was upheld.

U.S. v. Bethal
2007 WL 2286541 (6th Cir. 2007)

FACTS: In August 2000, the Louisville PD were investigating a series of “gang-related drive-by shootings.” In one of the incidents, on July 31, members of the “Victory Park Crips” shot at a car occupied by McCurley, Moore, Burks and Williams. Two of the four were members of the “Old Southwick Bloods,” Burks and Williams were unharmed and were later arrested for “an alleged retaliatory shooting.” “Moore was injured, and McCurley, who apparently was not connected with the gang conflict, was killed.” Williams identified the men involved in the shooting as Taylor, two Parkers (related) and Bethal.

⁴¹ Mays v. City of Dayton, 134 F.3d 809 (6th Cir. 1998).

Earlier in the year, Williams and Burks were shot at, and Williams injured. Later, in 2002, “members of the Crips, including DeShawn Parker, attempted to shoot Williams and Burks” and succeeded in injuring Burks’s grandmother. Burks and Williams were known to have fired at Taylor and another man, Shobe.

The shooting that triggered this case, however, occurred when a drive-by shooting occurred in August 2000, and two houses, two cars and an innocent bystander were hit. Johnson identified the shooters as Taylor, the two Parkers, Bethal and Coffey. An assortment of shell casings, of different calibers, were found in the vicinity of the shootings.

A named informant, Wright, told officers that Williams and Burks had claimed credit for shooting Taylor and Shobe, and that the Parkers sold marijuana and kept guns and drugs at their grandmother’s house. She also told them that on July 31, one of the Parkers had told her that he was going to “get” Williams and Burks that night.” He later expressed dismay at having been unsuccessful. One of the Parkers had offered the informant money to “set up” the pair, so he could arrange their murder.

On Oct. 5, 2000, Det. Tarter (Louisville PD) “prepared an affidavit detailing these and other facts gleaned from the investigation of the various shootings, in support of a search warrant for Bethal’s residence.” At trial, the prosecution conceded “that the affidavit, which was eight pages in length, was used to obtain search warrants for multiple residences, not just Bethal’s.” Specific to Bethal, the affidavit stated that “(1) a witness claimed Bethal was among the shooters in the incident wherein LaKnogany McCurley was killed, (2) another witness maintained that Bethal was with the shooters in an incident occurring on Cedar Street, (3) a statement from detective Tarter that he was given a list of gang members containing Bethal’s name, and (4) Bethal’s current address.” Also in the affidavit, there was information linking guns and drugs to another residence, one occupied by the Parkers, but included no such statement linking contraband to Bethal’s residence.

The warrant was signed, authorizing police to search for handguns and ammunition, along with “all contraband, other drugs, and evidence of gang affiliation.” They found only crack cocaine and almost \$3,500 in cash. Bethal was indicted on possession and federal distribution charges related to the drugs. He requested suppression, arguing that the warrant was insufficient. The District Court granted the motion because it “failed to ‘establish the requisite nexus’ between the place to be searched and the evidence sought” and further, that the good faith exception did not save the evidence because “a ‘reasonably well trained officer’ would not have believed that the ‘bare bones’ affidavit established probable cause.” The United States appealed.

ISSUE: Must a warrant contain a clear link between the items to be sought and the location to be searched?

HOLDING: Yes

DISCUSSION: The Court stated by noting that “[i]n order to establish probable cause to search, a warrant request must ‘state a nexus between the place to be search and the evidence

sought.”⁴² The Court is expected to consider “whether the totality of the circumstances supports a finding of probable cause.” Looking at the affidavit, the Court found that “a place may not be searched merely because a criminal suspect resides there.” The Court reviewed a number of earlier cases on the issue – all of which suggested that the fact that a property owner is suspected of a crime is insufficient to “create probable cause” in itself.⁴³

The Court noted that “[i]n this case, the affidavit only contained information connecting [Bethal] to two shootings; it did not include any facts connecting him to drugs or to weapons at his home other than his alleged status as a gang member and known acquaintance of the Parkers who reportedly kept drugs and guns in their residence” elsewhere. The Court agreed that the “affidavit did not provide a sufficient factual basis from which a magistrate could draw a reasonable inference that Bethal kept drugs or weapons at his home” although the information available did provide sufficient information for an arrest warrant for Bethal.

The Court noted that although “suspects identified as drug dealers routinely keep drugs at home,” “persons accused of murders often dispose of the guns utilized in the crime soon afterward.” The Court stated that the affidavit “provided no indication that at the time of the search, Bethal was still participating in gang-related shootings, or was seen carrying a gun.” As such, “[b]ecause the affidavit fails to establish any relationship between Bethal’s residence and the fair probability that weapons and drugs would be found there, no probable cause existed to support the issuance of the search warrant as to these items.”

Moving to the good faith argument, the Court stated that this “exception to the exclusionary rule permits the admission of evidence obtained from the execution of an invalid search warrant except:

- (1) when the warrant is issued on the basis of an affidavit that the affiant knows (or is reckless in not knowing) contains false information; (2) when the issuing magistrate abandons his neutral and detached role and serves as a rubber stamp for police activities; (3) when the affidavit is so lacking in indicia of probable cause that a believe in its existence is objectively unreasonable; [or] (4) when the warrant is so facially deficient that it cannot reasonably be presumed to be valid.⁴⁴

The District Court had considered this to be an instance of a “bare bones affidavit” – or one that “merely ‘states suspicions, beliefs, or conclusions, without providing some underlying factual circumstances regarding veracity, reliability, and basis of knowledge.’”⁴⁵ This affidavit “failed to contain a minimally sufficient nexus between the illegal activity (drive-by shootings) and Bethal’s home” and that “[i]n fact, it established no connection whatsoever.”

The Court did elect to address the issue of the search warrant for “gang indicia” which Bethal claimed was unlawful, as gang membership, in itself, is not illegal. The Court however, noted that other circuits had upheld such searches, when the authorization specifically details the types

⁴² U.S. v. Van Shutters, 163 F.3d 331 (6th Cir. 1998).

⁴³ See, specifically, U.S. v. Frazier, 423 F.3d 526 (6th Cir. 2005) and U.S. v. McPhearson, 469 F.3d 518 (6th Cir. 2006).

⁴⁴ U.S. v. Laughton, 409 F.3d 744 (6th Cir. 2005) citing U.S. v. Leon, 468 U.S. 897 (1984)

⁴⁵ U.S. v. Weaver, 99 F.3d 1372 (6th Cir. 1996)

of items sought. This warrant, however, did not provide such necessary details and, as such, was invalid.

Bethel further argued that the affidavit “contained recklessly false information because Detective Tarter, the affiant, did not ‘verify these tipsters who identified him’ as involved in some of the shootings.”⁴⁶ The Court found that although there were some discrepancies in statements made by some of the witnesses, that there was no indication that Tarter’s statements in the affidavit were made with reckless disregard of the truth.

The Court affirmed the suppression of the evidence.

SEARCH & SEIZURE - PROBATIONER

U.S. v. Herndon

501 F.3d 683 (6th Cir. 2007)

FACTS: In November 2001, Herndon was convicted of sexual exploitation of a minor. He was released on probation the next year, and was placed under certain conditions by the Tennessee Board of Probation and Parole. One of those conditions ordered him to not have computer Internet access without prior written authorization, and that he consents to his officer checking his computer at any time for evidence of such activity.

Some time later, Herndon met with his probation officer, Harrien, who inquired about his employment status. “Herndon assured him that he was looking for a job ‘and that he had actually been on the Internet seeking employment.’” Given the terms of Herndon’s probation, this “alarmed Harrien.”

On Feb. 4, 2003, Harrien and a fellow probation officer, Burden, went to Herndon’s home. When Harrien asked about the computer, Herndon took them to his bedroom, a converted garage. Harrien checked the computer’s Internet history and discovered a “number of files with female names in the filenames but was unable to access any of the files because the necessary drive was missing.”

“Harrien then loaded and ran prescan, also referred to as presearch software, on Herndon’s laptop. Prescan software provides information on the source of images contained on a computer, by, for instance, including a web address in the file name, or indicating that a file is stored in a temporary Internet cache file. It also allows a user to inspect the contents of a computer’s drives for different types of images. In this case, it permitted Harrien to discover a number of thumbnail images stored on Herndon’s computer. Although Harrien was certain that the images were pornographic, he could not conclusively establish whether the images involved adults or children. During the scan of the C-drive on Herndon’s laptop, Burden alerted Harrien to the presence of an external hard drive placed at the foot of the bed, plugged into the wall, but unconnected to the laptop computer. Harrien connected the hard drive to the laptop computer, and a scan of the material on that drive revealed multiple thumbnail images that Harrien identified as child pornography.”

⁴⁶ Franks v. Delaware, 438 U.S. 154 (1978)

Harrien contacted his supervisor, who sent officers to the scene. The uniformed officers arrested Herndon. Det. Cooley (Nashville, TN, PD) later testified that upon his arrive, he saw, on the computer, “twelve images of a prepubescent female in different sexual positions.” They seized the laptop and additional hard drives, and after obtaining a search warrant, was able to determine that the drives contained approximately 58,000 images and 3,000 videos of child pornography.”

Herndon was indicted on charges related to child pornography. He requested suppression, and the trial court suppressed the evidence of the “written materials relating to the subject of pedophilia discovered on Herndon’s computer but denied the motions to the pornographic images and videos discovered on the computer.” Herndon also argued that the consent to search his computer extended only to his probation officer, not to the police officer, and that the officer’s viewing and seizure of the computer was unlawful. The trial court denied that motion, “citing the plain view exception to the Fourth Amendment’s warrant requirement.”

Herndon took a conditional plea, and appealed.

ISSUE: May probation officers, with reasonable suspicion that a probationer is violating a condition, search their computer?

HOLDING: Yes

DISCUSSION: The Court noted that, under U.S. v. Knights, that it found that it was appropriate to search when “an officer has reasonable suspicion that a probationer subject to a search condition is engaged in criminal activity, there is enough likelihood that criminal conduct is occurring that an intrusion on the probationer’s significantly diminished privacy interests is reasonable.”⁴⁷ The Court quickly found that search was within the agreement Herndon signed. It was proper for Harrien to check any and all drives for evidence that Herndon had been on the Internet. Herndon’s mention of having been on the Internet was sufficient to create “reasonable suspicion to believe that Herndon was violating his probation.” The Court found Harrien’s search to be lawful.

Herndon further argued that the images should have been suppressed “because they were unlawfully seized by members of the Nashville Police Department.” The government argued that the images were in plain view when the officers arrived. Det. Cooley had testified that he saw, when he arrived, screen shots on the laptop of young girls. He testified that he did not manipulate the computer at all, he simply seized it. The Court agreed that he “did not take any additional steps to see the pictures.” The Court agreed that the photos were lawfully within Cooley’s plain view when he arrived, having been located by Harrien.

The denial of the suppression was upheld, and his plea affirmed.

SEARCH & SEIZURE - KNOCK & ANNOUNCE

⁴⁷ 534 U.S. 112 (2001).

U.S. v. Perkins
2007 WL 2692326 (6th Cir. 2007)

FACTS: On June 2, 2003, Shelby County SO (Memphis, TN) deputies executed a search warrant at a residence. Deputy Bartlett, who obtained the warrant, testified that the dwelling was a “small, three bedroom house and that they approached it in a van.” He knocked and announced, six times, which took about 30 seconds. They heard a commotion inside and when no one opened the door, they forced entry.

Inside, they found several people, including Perkins. She was handcuffed and questioned about drugs in the house, and she admitted there was marijuana under her pillow and cocaine in the nightstand. The officer found those items, along with a handgun. She was asked about ID, and stated it was in her purse, and in retrieving that, the officer found another handgun. She was given her Miranda warnings and then admitted the weapons were hers.

Perkins moved for suppression, arguing the officers did not knock and announce. The trial court found that, despite the testimony of one of the house occupants that the officers did not do so, that Dep. Bartlett’s testimony was more credible.

Perkins was charged with possession of a gun, as she was a felon. At trial, ATF agent Roland testified about the guns, a Walther pistol and a Colt revolver, both manufactured outside Tennessee. Perkins was convicted, and appealed.

ISSUE: Does a failure to knock and announce require suppression of evidence found?

HOLDING: No

DISCUSSION: The Court quickly found that the knock-and-announce rule was satisfied. Further, even if the officers did not knock-and-announce, the Court found that under Hudson v. Michigan, suppression of the evidence is not necessary.⁴⁸

Perkins’s conviction was upheld.

SEARCH & SEIZURE - CONSENT

U.S. v. Ayoub
498 F.3d 532 (6th Cir. Mich. 2007)

FACTS: On Aug. 11, 2004, DHS Agent Howe received information from Puzai that his half-brother, Ayoub, “was engaged in drug activity at Ayoub’s parents’ house” in Dearborn, Michigan. (His parents were out of the country at the time.) Agent Howe contacted Officer Cosenza (Dearborn PD) to arrange for surveillance, and during that surveillance, Ayoub was

⁴⁸ See also U.S. v. Johnson, 488 F.3d 690 (6th Cir. 2007).

seen at the house. As he left the home, officers made a traffic stop, but found nothing during a consent search.

Puzai told the officers that his sister (Ayoub's half-sister) Atoui, was "in control of the home and had a key." The investigating officers went to her home, and talked with her, at least partially with the assistance of her daughter as translator, and obtained her consent after confirming that she was the caretaker. She signed a consent form and gave the officers a key. They found a quantity of paraphernalia, two handguns and a pound of marijuana. Ayoub arrived as they were searching and, after waiving his rights, admitted to possession of the drugs and the handguns.

Ayoub was indicted on federal charges for possession of the guns (he was a convicted felon) and for intent to distribute the marijuana. He moved for suppression, which was denied. He was eventually convicted, and appealed.

ISSUE: May a caretaker give consent to search a property?

HOLDING: Yes

DISCUSSION: Ayoub argued that the search was improperly because Atoui "lacked authority to consent to the search" or, in the alternative, that she did not give consent voluntarily. First, the Court concluded that Atoui did have actual authority over the home as the appointed caretaker; she also lived nearby. Ayoub, who apparently also had a key, "asserted possessory interest in the home" sufficient to eliminate "Atoui's authority to consent to the search." The Court noted that "Ayoub never denied consent," even though he was present during at least part of the search.

The Court noted, however, that it found:

... it curious that the officers never asked Ayoub for consent to search, though they had every opportunity—especially when they pulled him over as he left the house. Indeed, one might suspect that the officers believed that Ayoub would deny consent and they instead went to Atoui, even though she may have had a lesser possessory interest in the home. Worse, the officers failed simply to get a search warrant, which—given the information they possessed before the consent search—they had ample time to secure. That would have been the preferred course in light of the Fourth Amendment's strong partiality to searches conducted pursuant to a warrant.

Nonetheless, the Court stated that the U.S. Supreme Court "recently made clear that a consensual search will stand where a potential objector, such as Ayoub, never refused consent—even if he was available."⁴⁹

Next, the Court looked to the voluntariness of Atoui's consent. Although she apparently spoke some English, her 16-year-old daughter apparently assisted a little with translation as did Puzai, who was also present. The officers testified that "Atoui understood what the officers were saying and did not appear upset or distraught" even though her English was broken. The Court

⁴⁹ Georgia v. Randolph, 547 U.S. 103 (2006).

quickly found that “Atoui’s consent was voluntary and unequivocally, specifically, and intelligently given.”

On a different note, Ayoub argued that it was improper to have admitted statements by an officer that “he participated in four controlled buys of marijuana from Ayoub at his home and then executed a search warrant there” on a particular date. That search was successful in that a large quantity of marijuana, cocaine and a weapon were found, and Ayoub admitted to owning what was found. Ayoub argued that this testimony concerned “prior bad acts” and was thus inadmissible under FRE⁵⁰ 404(b). The Court, however, noted that the similarity to what was found in the current search made it admissible in that “prior drug-distribution evidence is admissible to show intent to distribute.”⁵¹

The Court upheld the decisions of the U.S. District Court, and Ayoub’s convictions.

SEARCH & SEIZURE - PROTECTIVE SWEEP

U.S. v. Edgeron

2007 WL 2050844 (6th Cir. 2007)

FACTS: On April 14, 2004, Edgeron surrendered to Detroit officers outside his girlfriend’s apartment, where he had been staying. They had arrived in response to a tip that Edgeron was armed and dealing in marijuana. Edgeron had exited the apartment with two other men, and none were “armed or carried any contraband.” Edgeron was arrested, pursuant to a warrant.

The officers “then made a brief warrantless entry into the home under the auspices of a ‘protective sweep’” - apparently finding nothing. The leaseholder/girlfriend arrived and gave consent to search. She did not know, at the time, that the officers had gone briefly through the house. During that second search, the officers found a quantity of marijuana and a hidden handgun. Edgeron was further charged with a variety of offenses as a result of what was found.

Edgeron moved for suppression, claiming that the search was done with warrant or valid consent. When that was denied, he took a conditional guilty plea, and appealed.

ISSUE: Does a protective sweep require that officers suspect someone in the house might be a danger to them?

HOLDING: Yes

DISCUSSION: The Court noted that a “protective sweep of a residence, conducted after an arrest has been made outside the residence, is justified only if the officers can demonstrate an articulable basis for their reasonable believe ‘that *someone else inside the house* might pose a danger to them.’”⁵² The prosecution argued that the “police had an articulable fear because one

⁵⁰ Federal Rules of Evidence.

⁵¹ U.S. v. Jenkins, 345 F.3d 928 (6th Cir. 2003).

⁵² U.S. v. Colbert 76 F.3d 773 (6th Cir. 1996).

officer saw movement inside the house before Edgerson surrendered and because the tip contained information that Edgerson was armed.” However, the Court found that they did not show “any articulable facts that would lead to the rational inference of a threat *after* Edgerson had surrendered, unarmed.”

The Court found that the initial sweep was unlawful, but found that Manley’s consent was not tainted by that earlier improper search, however, and as such, that the evidence was admissible.

Edgerson’s plea was upheld.

SEARCH & SEIZURE - PLAIN VIEW

U.S. v. Garcia

496 F.3d 495 (6th Cir. Mich. 2007)

FACTS: Garcia, and others, were involved in a “large-scale plan to transport and distribute mass quantities of marijuana.” One of the shipments was destined for Birch Run, Michigan. On November 30, 2002, during an investigation of the conspiracy, officers were doing surveillance of several of the men who were staying at a local hotel, by “listening through cracks in the adjoining doors, monitoring individuals entering the room, and reviewing phone records.” They heard several incriminating statements. When two of the men left the hotel, in a Suburban, the officer attempted to follow as they traveled about, meeting with others and buying “industrial” supplies. On December 2, Ovalle and Canales checked out of the hotel, expressing concern that “too many people were asking too many questions.”

That same morning, Garcia and Rodriguez arrived at the Bay City airport and got a ride on the hotel courtesy van to the hotel, claiming that their boss (Ovalle) was staying there. The manager authorized the ride and notified Officer Berent of what had occurred. Although Ovalle had checked out, he returned to pick up the two men. During that same time, Officer Berent had gotten approval to make an investigative stop of the Suburban. Shortly after Ovalle picked up the two men and their luggage from the hotel, officers “executed a ‘felony stop’ of the Suburban.” A number of officers were involved in the stop, with weapons drawn, and ordered the five men in the vehicle to “exit the vehicle, walk backwards towards the officers, and get down on their knees.” The men were handcuffed, frisked and secured in police vehicles. During his frisk, Garcia’s pager was removed, and it was eventually admitted as evidence in his trial. The men were formally arrested later that day.

During the stop, a police canine sniffed the vehicle and made several “hits.” The officers used that information to get a warrant, and when the vehicle was eventually searched, they found “miscellaneous papers, luggage, briefcases, power tools, a high-capacity scale, and more than \$25,000 in cash.” Specifically, in luggage identified by its tag as belonging to Garcia, they found two bundles of \$5,000 each, wrapped in green plastic. In a tractor-trailer found in the parking lot of the hotel that Ovalle had moved to, they found over 3,000 pounds of marijuana hidden behind a false wall.

During that same time frame, Officer Fowler (San Antonio, TX, PD) was also investigating Garcia and his wife. Shortly after Garcia's arrest in Michigan, he received an anonymous tip that cocaine could be found at the Garcia home. Officer Fowler got a warrant to search the home, specifying only cocaine, and an arrest warrant for Susana Garcia. Officer Fowler was accompanied by other San Antonio officers, along with DEA and IRS agents, to conduct the search. They found "small amounts of cocaine and marijuana at the residence and seized hundreds of documents." The documents included "crumbled pieces of notebook paper displaying various mathematical calculations," and "documents from the file cabinets located in the master bedroom" - "receipts and other financial records showing the vast discrepancy between the Garcias' reported income and their yearly expenditures." Approximately 20 of those documents were eventually introduced against Garcia at trial.

Garcia and others were charged with conspiracy. Garcia was convicted, but that first conviction was overturned for procedural reasons. In 1998, he was re-charged, and after a number of procedural issues were resolved, the prosecution went forward. In 2002, he requested suppression of the items found during the arrest and during the search. The trial court denied the first and partially granted the second. In 2003, he was convicted, and appealed.

ISSUE: May documents (in plain view) be seized during a search under a warrant that lists only drugs?

HOLDING: No (but see discussion)

DISCUSSION: The Court first addressed the stop of the Suburban and Garcia's frisk. The District Court declined to suppress either the items found in Garcia's luggage or the pager, holding, in particular, that the "pager was properly seized pursuant to a Terry patdown." The Sixth Circuit found that the stop was properly supported by reasonable suspicion in that the officers had "specific and articulable facts" that justified that suspicion. Next, the Court looked at the canine sniff and whether it "exceeded the permissible scope or duration of the investigatory stop." The Court noted that "[a]n investigatory detention must be temporary and last no longer than is necessary to effectuate the purpose of the stop."⁵³ In addition, the "scope of activities conducted during an investigatory stop 'must reasonably be related to the circumstances that initially justified the stop.'"⁵⁴ Since the officers "reasonably suspected" the men of "illegal drug trafficking," using the dogs were "directly related to investigating this suspicion." The sniff was "permitted within a half hour of the stop" and the Court noted that it had previously upheld a "thirty-five minute wait for the canine unit."⁵⁵

The Court upheld the denial of the suppression for the items seized from the vehicle.

Next, the Court addressed the seizure of the pager. Garcia argued "that Terry does not justify the seizure of his pager because Terry permits only the seizure of items that reasonably appear to be weapons, not other evidence of crime." The Court quickly agreed with Garcia that the pager was improperly seized, but concluded that "the pager would inevitably have been lawfully

⁵³ U.S. v. Davis, 430 F.3d 345 (6th Cir. 2005), quoting Florida v. Royer, 460 U.S. 491 (1983).

⁵⁴ U.S. v. Richardson, 949 F.2d 851 (6th Cir. 1991).

⁵⁵ See U.S. v. Orsollini, 300 F.3d 724 (6th Cir. 2002).

discovered” and as such, it was appropriate for the trial court to deny suppression. The Court elaborated on the issue, and explained that given what the officers knew or reasonably believed, the frisk was justified, but noted that the prosecution “did not elicit testimony from the seizing officer claiming that he mistook the pager for a weapon, and even assuming that the officer knew that the concealed object was a pager, it is clear that a pager is not contraband.” As such, the seizure could not be justified under Terry. However, under the rule of inevitable discovery, and the fact that discovery of cash in Garcia’s luggage and other evidence in the Suburban, Garcia was lawfully arrested, and as a result of that arrest, he would have been searched. The pager would then have been seized as “evidence of his involvement in drug trafficking.”⁵⁶

The Court then moved on to the search in San Antonio, of Garcia’s residence. The Court noted that the “warrant authorizing the search of Garcia’s residence [was] for cocaine and nothing more.” Nonetheless, the officers “seized over a hundred documents from” the house.” Garcia argued that the officers indulged in an “invalid ‘general search’ by flagrantly disregarding the limits of the search warrant” and that the seizure was “not within the plain view doctrine exception to the warrant requirement.” However, because Garcia “couch[es] his argument as a challenge to the extent of the officers’ seizure, rather than the scope of their search,” that his argument on the “general search’ must fail, noting that the search warrant for drugs would permit officers to search virtually “every area of the house.”

However, the Court felt differently about the items actually seized. “The warrant in this case did not authorize the search for or seizure of document or drug paraphernalia, and the officers therefore cannot rely on the warrant to authorize their seizure of the documents.” The Court noted that the trial court had “meticulously reviewed each of the proffered documents, finding that most of them were lawfully seized pursuant to the “plain view” exception to the warrant requirement, but rejecting some that were not.” Garcia, however, argued that none of the documents were subject to the “plain view” doctrine. The Court commended the trial court’s “painstaking and conscientious attempt to resolve [the] issue, but” agreed with Garcia “that the documents seized from his residence did not come within the plain view doctrine.”

The Court noted that under Coolidge v. New Hampshire⁵⁷, that there must be four factors satisfied for the plain view doctrine to apply:

- 1) the object must be in plain view;
- 2) the officer must be legally present in the place from which the object can be plainly seen;
- 3) the object’s incriminating nature must be immediately apparent; and
- 4) the officer must have a right of access to the object.

Garcia argued that since the second and the fourth factors were not satisfied, the seizure was unlawful. The Court quickly discounted the second factor, finding that the officers (both state and federal) were all lawfully present. However, the third factor proved more troubling. The Court noted that Horton stated that the “seizure of an item in plain view ‘is legitimate only where

⁵⁶ See Nix v. Williams, 467 U.S. 431 (1984).

⁵⁷ 403 U.S. 443 (1971); see also Horton v. California, 496 U.S. 128 (1990) and U.S. v. McLevain, 310 F.3d 434 (6th Cir. 2002).

it is immediately apparent to the police that they have evidence before them.”⁵⁸ Officer Fowler had stated that they found it “necessary to look through Garcia’s papers and envelopes to ensure that they did not contain small packets of cocaine, but he acknowledged that it was unnecessary to read the documents in executing the search for cocaine.” (The DEA agent, however, “expressly testified that he read and reviewed every document that he thought might contribute to his federal investigation of Garcia.”)

The Court stated that the “‘immediately apparent’ requirement is a vital constraint on the plain view doctrine exception to the Fourth Amendment warrant requirement.” The court found the restraint “necessary to prevent officers from using the plain view doctrine as a means to extend a particularized search authorized by Fourth Amendment principles into an unlawful exploratory search.” The Court concluded that the “criminal nature of most of the documents seized by Officer Fowler and Agent Belton was not immediately apparent” since “[n]either the intrinsic nature nor the appearance of most of the documents gave the officers probable cause to believe that they were associated with criminal activity.” In addition, “the officers did not, as a result of the ‘instantaneous sensory perception’ recognize the incriminating nature of most of those documents.” The items were, on their face, “lawful and innocuous items” and the officers had to “undertake ‘further investigation’” in order to make their criminal nature clear.

The Court concluded that certain items should have been suppressed, including a map with locations circled, financial records, invoices and receipts. The “notebook paper” which “displayed scribbled mathematical calculations” was a closer call. The Court noted, however, that instead of saying that he immediately recognized the incriminating of the paper, which was found in a container that reeked of marijuana, he had to ‘closely examine’ the paper to determine its incriminating nature.”

The court found that the “close inspection of the documents constituted a further search unsupported by probable cause and thus [it] violated the Fourth Amendment.” However, ultimately, the Court found that given the wealth of other information against Garcia, the error in admitting the documents was harmless and upheld his conviction.

SEARCH & SEIZURE - SEARCH INCIDENT TO ARREST

U.S. v. Black

240 Fed.Appx. 95, 2007 WL 2426487 (6th Cir. 2007)

FACTS: On Sept. 16, 2004, Officers Ragland and Offenbacher (Knoxville, TN, PD) were patrolling in a “high crime area.” As they drove through a public park, they “noticed a car with its driver’s side door open parked on a public road in a parking spot cut out from the road.” Ragland, who was driving, stopped behind the car and turned on his high beams and saw someone moving in the back seat, like they were hiding something. Ragland later testified that he also believed the car was parked illegally because the park was closed.

⁵⁸ Horton, supra.

The two officers approached the car on foot and spoke to Black, the driver. Ragland “noticed a tremendous odor of alcoholic beverage coming from inside of the car.” Black said that he and his passenger, his girlfriend, had been arguing and were there to cool off.

As Black reached for the ignition, Ragland asked both of the occupants for their OL. He checked both, and quickly learned that Black’s license was suspended. Ragland continued questioning the pair, and finding their “answers to be unsatisfactory,” he got Black out of the car for some “one-on-one” questioning. He patted Black down, finding nothing.

Finally, Black admitted that his real reason for being in the park was to have sex with his girlfriend. Ragland asked for consent to search, and “Black’s girlfriend interjected, ‘do you have probable cause.’” Offenbacher then got the girlfriend out to talk to her.

After further discussion, Ragland later testified, “based on their time working together,” Offenbacher knew that Ragland was going to arrest Black. Offenbacher began searching the car and found a handgun in the passenger compartment. Both of the occupants were handcuffed, and Black was secured in the cruiser.

The next day, ATF agents interviewed Black. He told the agents that he had gotten the gun from a friend, and had handled it, so his fingerprints were on the gun. He was eventually charged and indicted with being a felon in possession. He moved to suppress both the guns and his statement, both of which were denied. Black took a conditional plea, and appealed.

ISSUE: May a search incident to arrest precede the formal arrest?

HOLDING: Yes

DISCUSSION: Black first argued that he was seized, unconstitutionally, when Ragland took his OL back to the cruiser. The Court agreed that when an officer takes a driver’s OL and walks away with it, “no reasonable motorist would feel free to drive away, as this would require the motorist to either drive without a license or abandon his or her car.”⁵⁹

The court found, however, that there “were several facts, that, when viewed in their totality, gave rise to reasonable suspicion.” The strong odor of alcohol, combined with evidence that Black was the driver, indicated that he might be violating the law. Combined with the vehicle’s location and the time of night, Ragland’s suspicion was justified. Further, the Court agreed that it was appropriate for Ragland to check the status of Black’s OL, especially when being done during a lawful detention “because he was under investigation for driving under the influence.”

Next, the Court found that Offenbacher’s search of the vehicle was justified on two separate grounds – both as search incident to arrest and under the “automobile exception” – a Carroll search. The Court agreed that the “search may precede a ‘formal arrest’ so long as the officers had probable cause to arrest prior to the search and the arrest ‘followed quickly on the heels of the challenged search.’”⁶⁰ At the time of the search, the officers already had sufficient probable

⁵⁹ Florida v. Royer, 460 U.S. 491 (1983).

⁶⁰ Rawlings v. Ky., 448 U.S. 98 (1980); U.S. v Montgomery, 377 F.3d 582 (6th Cir. 2004).

cause to make an arrest. Alternatively, it was justified as a Carroll search, as “Ragland had already smelled alcohol in the car and Black had retrieved an unsealed bottle of alcohol (cognac) from the car.” In either case, Offenbacher’s search was justified.

Finally, Black argued that he had not received Miranda warnings when being questioned by the ATF agents. However, both agents that he had, in fact, been given his Miranda rights, and had refused to sign a form, but had stated that he “was willing to talk to the agents.”

The denial of Black’s motions to suppress was upheld, and his conviction affirmed.

SEARCH & SEIZURE - TIPS

Campbell v. Stamper/Lee 2007 WL 1958629 (6th Cir. 2007)

FACTS: On Oct. 3, 2004, “an unidentified 911 caller notified the Kentucky State Police that a man was on the side of the road pointing a .22 rifle at passing motorists.” Troopers Stamper and Lee were dispatched to investigate. They found “Campbell leaning on a guardrail next to the highway” with a rifle propped up next to him. They drew their weapons, ordered Campbell to move away from the gun and to lie down on the pavement. He was frisked and handcuffed. However, after questioning Campbell, the troopers concluded he had done nothing illegal and he was released.

Campbell filed suit against the troopers, under 42 U.S.C. §1983. The troopers requested summary judgment, and trial court granted it. Campbell then appealed.

ISSUE: May a corroborated anonymous tips support an investigatory stop?

HOLDING: Yes

DISCUSSION: The Court looked at the facts known to the troopers, and found that there could “be little doubt that Stamper and Lee had reasonable suspicion to support their investigatory stop.” Further, “[t]hey had every reason to suspect that Campbell could be the individual identified by the 911 caller.” Campbell cited Florida v. J.L.⁶¹ and Alabama v. White⁶² for the premise that an anonymous tip was not, in itself, sufficient to make reasonable suspicion. The Court, however, stated that “[w]hile not inaccurate, Campbell’s argument oversimplifies the inquiry” and “ignore[ed] critical factual distinctions.” In this case, Campbell was found “standing by the side of a public inquiry, where pedestrian traffic is hardly commonplace” and matched the original complaint.

During oral argument, Campbell conceded that the troopers had sufficient reasonable suspicion to justify the original stop. However, he challenged the “degree of force” the troopers used against him. The Court noted that “police officers may draw their weapons and use handcuffs

⁶¹ 529 U.S. 266 (2000).

⁶² 496 U.S. 325 (1990).

without offending the Fourth Amendment if they reasonably believe that a suspect is armed and might pose a danger to them as they conduct their investigation.”

The court upheld the decision of the trial court.

SEARCH & SEIZURE - CONSTRUCTIVE POSSESSION

U.S. v. Newland

2007 WL 2404512 (6th Cir. 2007)

FACTS: On Sept. 3, 2004, Officer Vass (Columbus, Ohio, PD) went to Newland’s restaurant (R & N Barbeque) to do a business check. He asked about illegal parking in the business lot, and indicated a green Ford Taurus. Newland replied that vehicle belonged to him.

Vass learned that Newland’s OL was suspended. The next week, while he was patrolling, he saw Newland leave the restaurant, get into the car, and drive away. Vass requested other officers stop the vehicle, and Officers Pappas and Weir did so. They requested Newland’s OL, but Newland was unable to locate it, providing instead his Social Security card. As Newland searched, Officer Pappas became interested in a blue duffel bag in the passenger compartment. Once they confirmed that Newland’s OL was suspended, Officer Pappas asked Newland to get out of the car. Instead, Newland drove away, and then jumped out of the car and ran, with Pappas in foot pursuit. (Officer Weir stayed with the car and its three passengers, a woman and two children.) Officer Pappas brought Newland back to the car, and realized the blue bag was missing. He backtracked and found the bag discarded along Newland’s flight path.

The bag, once retrieved, was found to contain two guns, a Desert Eagle and a TEC-9 with a 30-round magazine. He also found two small baggies of marijuana and a large amount of cash. The trunk revealed much more marijuana and various paraphernalia.

Newland was indicted on federal charges relating to drugs and his possession of the firearms, as he was a convicted felon. He was convicted at a bench trial, and appealed.

ISSUE: Is constructive possession sufficient to charge with Unlawful Possession of a Handgun by a convicted felon?

HOLDING: Yes

DISCUSSION: Newland argued that he did not legally “possess” the firearms. However, the Court found sufficient evidence to support the jury’s decision that Newland did, in fact, at least constructively, if not actually, possess the firearms. The Court agreed that “[a]lthough ‘mere proximity’ to a gun is insufficient to establish constructive possession, evidence of some other factor – including connection with a gun, proof of motive, a gesture implying control, evasive conduct, or a statement indicating involvement in an enterprise – coupled with proximity – may suffice.” The Court noted the he had a motive (drug trafficking, protection), threw the bag

out of the moving car, where it was found in a front yard on the driver's side of the vehicle, evidencing control, and he had connection with the gun – stating that “only Newland would be large enough [of the people in the vehicle] to handle the Desert Eagle.”

The Court also found that the guns were “strategically located so that [they] were quickly and easily available for use.”

Newland's conviction was upheld.

FORFEITURE

U.S. v. Jones

502 F.3d 388 (6th Cir. 2007)

FACTS: On Oct. 7, 2004, Alice and Woodrow Jones were charged with distributing marijuana, conspiracy and related federal crimes. As part of this, the U.S. sought forfeiture of their real property in Laurel County, Kentucky. They eventually pled guilty to certain of the charges and admitted having received drugs at their home.

At the subsequent forfeiture hearing, Jones testified that she owned the mobile home in question, had moved it from another property, and that it could easily be moved again. Clark, Jones' mother, testified that she had previously owned the real property on which the mobile home was placed, and that she had given the real property to Alice Jones as a wedding present, and that the deed had transferred on Nov. 5, 2003. The ATF agent testified that although he could not prove it, he believe that the Jones had received multiple packages of marijuana as part of the conspiracy, via UPS. Other co-conspirators charged claimed that to be the case, and that they had met at the Joneses' residence to plan the crime. The agent testified the conspiracy continued until March, 2004.

The District Court ordered forfeiture, and the Joneses appealed.

ISSUE: Is a mobile home considered separate from the real property where it is placed?

HOLDING: Yes

DISCUSSION: The government claimed that the Joneses “engaged in criminal activity on her property before and after she received title.” Jones argued that any deliveries, if in fact made, were made before the title was transferred to her, by her mother.

The Court, however, declined to hold “that an individual's property is subject to forfeiture based on the criminal acts of others” and that the U.S. “failed to prove a connection between the” property “after Nov. 5, 2003 and any crime for which Jones pled guilty. The forfeiture of the real property was overturned.

Because the mobile home was not listed in the indictment, and because it could be easily removed from the real property in question, the Court further held that the mobile home was not subject to the forfeiture order.

42 U.S.C. §1983 - ARREST

Willis v. Neal

2007 WL 2616918 (6th Cir. 2007)

FACTS: In 2003, Willis was a Florida pilot and trying to accumulate sufficient flying hours to qualify as a commercial pilot. Another pilot, John Marshall, asked her to go with him on a flight to Dayton, Ohio, and she agreed to do so. On Oct. 7, they boarded the plane, along with two others. Willis thought they were going to Dayton on a business deal, but Marshall knew they were going for a money-laundering deal. In fact, it was an undercover operation involving an informant, McMillon. McMillon and Marshall “had concocted a money laundering scheme involving jewelry and cash, and the exchange was to take place at the Dayton airport.” McMillon knew that there would be others in the plane, but he had been assured that they “knew to keep their mouths shut” - and he further knew that Marshall would be armed.

Federal Task Force and local officers met the plane, specifically Chief Huth (Dunlap PD), Sheriff Hitchcock, (Sequatchie County SO), and Sheriff Neal (Rhea County SO), along with other deputies and officers. Prior to the plane’s arrival, Smith conducted a briefing and explained what they knew, and divided the officers into two teams - one to secure the people on the plane and the others to do backup and secure the plane itself.

When the plane arrived, Willis, Jack Marshall (John’s son) and Robertson went into the terminal, while John Marshall remained on the plane. Sequatchie deputies followed and had them sit down. Some 30 minutes later, Sheriff Hitchcock entered and told Willis and the others to “remove their personal belongings.” Some 15 minutes later, an officer entered and ordered them, at gunpoint, to get down. They were permitted to get up some minutes later. They were not told why they were being held. Eventually, they were all taken to the Rhea County jail.

Sheriff Neal was not present until after Willis had been taken away, but his Chief Deputy, Argo, arranged for the transport. (He was assigned to the team that secured the plane.) Chief Huth, also, did not participate directly in Willis’s detention.

When she arrived at the jail, her handcuffs were removed but she was leg-shackled. Willis asked repeatedly to use the restroom (which was where she was headed when the plane first landed) but was denied. Finally, after being interviewed, she was permitted to use the restroom and was required to change into a jail uniform. She was not permitted, however, to use the phone. She was apparently charged, but all charges were dismissed in January, 2004.

Willis sued a number of law enforcement officers, including the officers named above, under both 42 U.S.C. §1983, as well as under state law claims. The defendant officers requested summary judgment, and after parsing out the various claims, dismissed everyone but Hitchcock outright, and awarded Hitchcock qualified immunity.

Willis appealed.

ISSUE: May probable cause be developed based upon the collective knowledge of numerous officers?

HOLDING: Yes

DISCUSSION: The Court quickly concluded the Willis's detention and arrest was adequately supported by probable cause. The Court found that "probable cause may be established from the collective knowledge of the police rather than solely from the officer who made the arrest."⁶³ The court found that since the two federal agents did have sufficient probable cause, that the local officers were justified in following their lead and direction. Since Willis was admittedly the co-pilot in a private plane, and had been identified as Marshall's girlfriend (although apparently she was not), it was reasonable for the officers to conclude that she was a party to the scheme.

The District Court's decision was affirmed.

Logsdon v. Hains/McShane
492 F.3d 334 (6th Cir. 2007)

FACTS: Logsdon was a long-time, active member of the pro-life movement. He engaged in "sidewalk counseling and peaceful protest outside abortion clinics in and around Cincinnati, Ohio." In the past, he had been charged and convicted with criminal trespass, and admitted that he had, on occasion, "crossed the property line of the abortion clinics to communicate with clinic patients and hand them literature."

On Oct. 28, 2003, Logsdon was outside the Cincinnati Women's Services (CWS) clinic. He "hung on a sign on the neighboring property's fence." Apparently a patient complained about the sign and Jackson, a CWS employee, removed the "sign from the fence and 'walked toward the CWS clinic with the intention of destroying it.'" Logsdon demanded the sign be returned, "to no avail." Logsdon "walked onto CWS property and took back his sign from Jackson" and then "promptly return[ed] to the public sidewalk." Jackson called the police.

Officers Hains arrived and arrested Logsdon for criminal trespassing and disorderly conduct. Hains did not have a warrant and did not witness the offense. Further, Officer Hains "refused to listen to a witness's account of the incident, admonishing her to 'tell it to the judge.'" Logsdon took a bench trial, and was acquitted of disorderly conduct, but convicted of criminal trespassing. Upon appeal, his conviction for criminal trespass was overturned, with the appellate court ruling that Logsdon 'was privileged to enter CWS property to retrieve his sign.'

On June 18, 2004, Logsdon was counseling "clinic patients and protested on the public sidewalk near CWS." He spoke at length with a patient, though the chain link fence – Logsdon was standing in an adjacent public park. CWS complained of trespass and Officer McShane

⁶³ Collins v. Nagle, 892 F.2d 489 (6th Cir. 1989).

responded, and “placed [Logsdon] under arrest for criminal trespass.” Again, the officer was not present and did not witness the alleged offense, and again, did not listen to a witness’s account. After several proceedings, Logsdon’s case was dismissed.

Logsdon filed suit under 42 U.S.C. 1983 against the two officers. They moved for dismissal, which ultimately the trial court granted. Logsdon appealed.

ISSUE: May officers ignore potentially exculpatory evidence when making an arrest?

HOLDING: No

DISCUSSION: The Sixth Circuit discussed the standard for a lawful arrest. An arrest requires that the police have probable cause, and noted, in particular, that an officer “need not ‘investigate independently every claim of innocence.’”⁶⁴ However, the Court noted, the “initial probable cause determination must be founded on ‘both the inculpatory and exculpatory evidence’ known to the arresting officer.” Further an officer “cannot simply turn a blind eye toward potentially exculpatory evidence.”⁶⁵ The Court noted that an officer’s authorization to make a particular arrest depends upon state law. In both cases, the officers refused to listen to a witness at the scene. The Court found the officers “did not act as ‘prudent officer[s]’ and their conclusions cannot be deemed ‘reasonable.’” Instead, “potentially conflicting explanations from these eyewitnesses would have informed [the officers’] probable cause analyses, giving them reason to question the reliability of reports that [Logsdon] had committed criminal trespass.” The Court stated that a “warrantless arrest should follow consideration of the totality of the circumstances reasonably known to the arresting officers.” Officers who are “initially assessing probable cause to arrest may not off-handedly disregard potentially exculpatory information made readily available by witnesses at the scene.” Even assuming that CWS constituted a “reliable source,” the Court found that the officers “deliberately disregarded available evidence, and consequently, failed to reasonably formulate probable cause.”

The Court found that the officers “lacked probable cause to arrest [Logsdon] and, therefore, that they violated [Logsdon’s] Fourth Amendment rights.”

However, that is not the end of the analysis. The Court found that there had “been no sea change in body of law since [Logsdon’s] arrest, and that as such, the officers were not protected by qualified immunity.” The Court reversed the trial court’s dismissal of the Fourth Amendment claims.

Logsdon also alleged that the actions taken against him were in retaliation for his First Amendment protected speech. Logsdon “averred that he engaged in anti-abortion protest and counseling from the public sidewalk and public park adjoining the CWS property, both quintessentially public fora.” The facts, as alleged by Logsdon and essentially undisputed, indicated that each officer “removed [Logsdon] from the public for a, thereby causing him to cease his protest and counseling....” Logsdon put forward a arguable claim that the actions were

⁶⁴ *Gardenshire v. Schubert*, 205 F.3d 303 (6th Cir. 2000).

⁶⁵ *Ahlers v. Schebil*, 188 F.3d 365 (6th Cir. 1999); *Fridley v. Hughes*, 291 F.3d 867 (6th Cir. 2002).

based upon the content of his speech. The Court found that the “contours of the First Amendment public forum doctrine are sufficiently clear.” If he was arrested because of the content of his speech, the officers “acted in violation of the First Amendment in ways that should have been clear to a reasonable officer.” The Court also reversed the dismissal of Logsdon’s First Amendment claims, but stated, specifically, that it “express[ed] no opinion as to whether [Logsdon] will ultimately succeed on his claim following discovery.”

The Court also reversed the summary judgment on the First Amendment claim.

42 U.S.C. §1983 – ARREST

Peet/Spencer v. City of Detroit

502 F.3d 557 (6th Cir. 2007)

FACTS: On April 27, 2000, Officers Petersen and Howard (Detroit PD) responded to a shots fired call at a local restaurant. There, they found Byrd, suffering from a gunshot wound that proved to be fatal. Nearby, they found McGlory, shot multiple times in the legs.

That same night, Anderson gave a statement. Anderson was at a gas station near the restaurant when he was robbed. Anderson jumped in his car, and as he was fleeing, he heard two gunshots. He was able to give a description of two black males, including the clothing they were wearing, but could not describe the third person involved. Bracey, who was also robbed that night, had accompanied McGlory to the restaurant, described what had occurred that night, and gave descriptions of three black men. Bracey directed police to a girl who worked at the restaurant, Wilson. She gave a statement about the events that led up to the shooting – she had been sitting outside, with Byrd. She stated that one of the robbers had given her a telephone number earlier that night, and that two of the men had ordered food.

Officers located Spencer using the telephone number they’d been given by Wilson. Although the record does not indicate, the opinion notes that apparently Spencer led them to Peet. Officer Amos collected Peet and told him that he was not under arrest, but “nevertheless handcuffed him and drove him downtown in a police car, despite his protestations and his preference to be driven by family members.”

Peet and Spencer were put into separate line-ups. Wilson identified the pair as the shooter’s accomplices. Warrants were obtained for both, and they were held over at a preliminary hearing on first degree murder charges. However, at subsequent line-ups, McGlory and Bracey were unable to identify the pair, or link them to the crime. No fingerprints were found in Byrd’s vehicle that matched any of the alleged robbers.

The men were eventually acquitted. They filed suit against the officers, claiming an unlawful arrest, under 42 U.S.C. §1983. The U.S. District Court dismissed the cases against the officers, and Peet and Spencer appealed.

ISSUE: Must officers release a suspect as soon as they have potentially exculpatory evidence?

HOLDING: No

DISCUSSION: The Court found that the “police had probable cause to believe that Spencer had robbed Reed Byrd at Coney Island” given the information he had been provided. “Wilson’s eye witness statement is trustworthy information justifying a reasonable belief that” Spencer and Peet were involved in the robbery. The Court agreed that there were minor differences in the descriptions of the robbers, given by the various witnesses, but found that “their differences were minor and are of the sort to be expected when different eye witnesses recollect the same event.”

Spencer argued that “the police had a duty to release him from jail the moment that new, exculpatory evidence came to light.” However, the Court found no authority to support the premise that there is a “court-ordered requirement on police to release suspects the moment sufficiently exculpatory evidence emerges.” The Court found that “[s]uch a rule would give investigators the responsibility to reevaluate probable cause constantly with every additional witness interview and scrap of evidence collected.” Further, the “strength of evidence against a suspect may frequently change.”

As the case was properly decided by the trial court, upholding the probable cause to arrest both Peet and Spencer, the Court found in favor of the City, as well.

42 U.S.C. §1983 - WARRANT

Elliot v. Lator

497 F.3d 644 (6th Cir. Mich. 2007)

FACTS: Just after midnight on Feb. 21, 2004, Anderson “placed a 911 call to report that he had been robbed at gunpoint.” Troopers Lator and Taylor were dispatched. Anderson explained that the robbery “stemmed from a financial dispute over an engine repair job that he had promised but never delivered.” The troopers were led to suspect Fox and McClure, and contacted the Clare County Sheriff’s Department and the Bay Area Narcotics Enforcement Team (BAYANET), a multi-jurisdictional drug task force. From these agencies, the learned of several likely locations where the pair might be located. Trooper Lator learned from a Det. Wilson, of BAYANET, that McClure and his family had lived at a particular address in Harrison, Michigan and that this was a possible residence for him. (Later, Det. Wilson testified that his information “was neither firsthand nor did he know whether it was recent or more than a year old.”

In fact, that address was the home of Steve and Glenda Elliot and their three children.

Trooper Lator prepared the following search warrant:

Your Affiant, Trooper Joshua Lator, is a Trooper with the Michigan State Police based at the Mt. Pleasant Post for the last 5 ½ years.

Your Affiant is part of an ongoing investigation in the armed robbery of Andrew Charles Anderson by William Raymond Fox and Ronald William McClure II on or about 02/21/04 at approximately 2200 hours in the City of Harrison, Clare County, Michigan.

As a result of the information gained through this investigation Felony Warrants have been issued for both William Raymond Fox and Ronald William McClure II for Armed Robbery.

Anderson stated to your Affiant that McClure had an on going dispute with him over the purchase of an engine. Anderson stated McClure approached him in the home of Joshua Kerns, 445 N. Fourth St., City of Harrison, Clare County, State of Michigan and demanded that he “make the deal right”. Anderson reported that McClure told him he knew he had \$600.00 in cash. Anderson stated that Fox then entered the room revealing a black hand gun tucked in his waistband. Anderson stated that Fox said “Don’t make me rob you.” Anderson stated he was in fear for his life and felt he was being robbed at gun point. Anderson stated he gave McClure five (5) twenty dollar bills from his pocket.

Through the course of this investigation your Affiant has learned that Ronald McClure II sometimes stays at 655 N. First St., City of Harrison, Clare County, State of Michigan.

Trooper Lator received his warrant, and proceeded to execute it on February 22, even though by that time, both of the suspects had already been arrested.

The opinion later noted that:

The search of plaintiffs’ residence does not appear to have been a resounding success. To the contrary, plaintiffs allege that Lator and Taylor and other officers (1) failed to wait between knocking at and breaking down the door; (2) entered the home with weapons drawn and yelled for Steve and Glenda Elliot and their three young children to get down on the floor; (3) handcuffed Steve Elliot; (4) stepped on the hand of Glenda Elliot; (5) destroyed plaintiffs’ furnishings and threw their beds around; and (6) held the family at gunpoint, and kept Mr. Elliot handcuffed, throughout the entire 45-minute search of the home. The search of plaintiffs’ home revealed two registered firearms, neither of which was connected in any way to the prior night’s robbery. No evidence of criminal conduct was discovered, and accordingly, no charges were filed against any Elliot family member in connection with the incident.

The Elliots filed suit, arguing that Troopers Lator and Taylor violated their federal constitutional rights, and also violated certain rights under Michigan state law. The troopers moved for summary judgment, arguing that even if the warrant was faulty they should be protected by the

Leon⁶⁶ good-faith exception. (They did not, notably, request that motion be based upon qualified immunity.)

The U.S. District Court found that the search warrant was not supported by probable cause and that, further, it was so “lacking in indicia of probable cause as to render official belief in its existence unreasonable.” The Court ruled in favor of summary judgment in favor of the Elliots, and further ruled that the troopers “used excessive force” against members of the family, particularly noting that the suspected assailants were already in custody. The Court noted, in particular, that there was “an absence of any evidence that any [of the Elliots] behaved in a way that would have triggered any concerns for the safety of the officers or others on the premises.” However, the Court declined to give summary judgment in their favor, instead, finding that since several important issues are disputed, it was appropriate to allow the case to go forward.

The Troopers took a collateral appeal of the denial of qualified immunity and summary judgment.

ISSUE: Are claims of unlawful seizure and excessive force separate?

HOLDING: Yes

DISCUSSION: The Court first addressed the issue on procedural grounds, finding that the troopers did not actually file a motion for qualified immunity and summary judgment, but simply responded to a motion of the Elliots by “claiming” qualified immunity. In an odd twist, if the Court overturned the trial court’s decision finding summary judgment for the Eliotts, and essentially ending the case in their favor, the troopers might, in fact, be subjected to “additional trial proceedings”

The Court also noted that the troopers did not challenge the trial court’s decision on the excessive force claim, which it found inexplicable. The Court suggested that the troopers “believe that if they are accorded qualified immunity with respect to the unreasonable seizure claim, then it should follow that they be immune from the excessive force claim as well.” However, that Court stated that was “not so.” It further noted that “[t]he two claims are related, to be sure, but they are not inseparable, nor does the outcome of one dictate the outcome of the other.” The Court continued:

For example, even if the troopers had a squeaky clean warrant to search the Elliots’ home (or even if, under the circumstances, they were entitled to reasonably rely on a not-so squeaky- clean warrant), they still could have violated the Elliots’ constitutional rights during the *execution* of the search warrant. The mere facial validity of the warrant, or indeed the officers’ reasonable reliance on it, would not shield them from liability for all actions taken pursuant to that warrant.

The trial court had noted that the troopers could have limited their liability in this case by moderating their actions while serving the warrant, but they chose not to do so. Even if the

⁶⁶ U.S. v. Leon, 468 U.S. 897 (1984).

Court found in their favor on the search warrant issue, they would still face trial on the excessive force issue, because they failed to even raise an appeal to the issue.

The Sixth Circuit declined to exercise jurisdiction over the appeal, and returned the case to the U.S. District Court for further proceedings.

U.S. v. Ellis
497 F.3d 606 (6th Cir. Ohio 2007)

FACTS: At about 3:23 a.m., on April 16, 2004, Trooper Topp (Ohio State Highway Patrol), spotted a truck, traveling on I-71, weaving and crossing the center line multiple times. He ran the plate and pulled over the vehicle.⁶⁷ The driver, a white male in his early 70s, was the registered owner of the vehicle, Arthur Daugherty. He admitted to being a little sleepy and did not appear to be under the influence.

The Trooper then spoke to the passenger, who denied having a license or knowing his SSN. He provided a name and birthdate. The Trooper asked the driver to get into the back seat of the cruiser, and later explained he did so to explore further the possibility that the driver might be intoxicated. During the six minutes of questioning, Daugherty admitted that the passenger had paid him some money to transport him to Cleveland, and that he did not recall the passenger's name. Trooper Topp continued to ask questions about the passenger. At one point the tape malfunctioned and picked up several minutes later, with the trooper continuing his questioning in the same vein. He returned to the suspect vehicle at 3:34 a.m. to continue question the passenger, who gave him an address and stated he had a valid Michigan license.

Trooper Topp ran checks through both Michigan and Ohio, with no success. The tape inside the cruiser recorded no audio during that time. At about 3:45 a.m., a canine unit arrived and Topp asked Daugherty for consent to search the truck. The trooper received a verbal consent, but not written because he lacked the proper form. During a search he find an "oily rag containing contraband under the passenger seat" but nothing else. Daugherty followed Topp back to the police station, and was eventually released without charges. The passenger, who turned out to be Ellis, made a phone call on a cordless telephone during this time at the station, in which he made incriminating statements that were recorded.

Ellis was charged on federal drug trafficking charges related, apparently, to the cocaine found in the vehicle. Upon Ellis's motion, however, the trial court granted his request to suppress the evidence found at the traffic stop and from the telephone conversation. The government appealed.

ISSUE: May a stop be longer than usual if the officer has a continuing suspicion they are trying to resolve?

HOLDING: Yes

DISCUSSION: The government argued whether Ellis had "standing to challenge the

⁶⁷ Much of what is related is from the cruiser's videocam, and the times are as indicated by the video.

search and seizure” given that he was a passenger in the vehicle. The U.S. Supreme Court had recently held that “a passenger of a motor vehicle possesses the same standing of the driver to challenge the constitutionality of a traffic stop.”⁶⁸ The Court noted that the “pivotal issue is whether ... the scope and duration of the detention transformed this legal traffic stop into an unconstitutional seizure.” The trial court had found that the stop was lawful, but the extended detention, 22 minutes, was sufficient to render it unlawful.

The appellate court, however, noted that:

Recently, in United States v. Garrido,⁶⁹ we upheld, as constitutional, an hour-long safety inspection of a vehicle following a lawful traffic stop. First, we surveyed our previous decisions in this area:

Compare United States v. Richardson,⁷⁰ (concluding that the motorists’ nervousness, their allegedly conflicting explanations of travel plans, and the movement of one from the back to the driver’s seat did not suffice to create a reasonable suspicion); [United States v.] Townsend,⁷¹ (finding that ten factors, including dubious travel plans, three cell phones in the car, and the driver’s history of weapons offenses, did not rise to the level of a reasonable suspicion); and [United States v.] Smith,⁷² (concluding that nine factors, including the stoned appearance of one vehicle occupant, food wrappers in the car, and the nervousness of the occupants, did not establish a reasonable suspicion); with United States v. Davis, 430 F.3d 345, 355-56 (6th Cir. 2005) (holding that a driver’s meeting with a known drug dealer justified continued detention until a drug-sniffing dog could arrive, but that additional detention after the dog failed to alert was unreasonable); [United States v.] Hill,⁷³ (concluding that eight factors, including a dubious explanation for a cross-country trip, nervousness, and the cash rental of a U-Haul, justified continued detention); and United States v. Erwin,⁷⁴ (holding that eight factors, including the lack of registration and any proof of insurance, and the nervousness and criminal record of drug violations of the driver, sufficed to justify continued detention).

Then, we analyzed the eight factors relied upon by the government for establishing reasonable suspicion for the hour-long seizure. Although each factor was innocuous, separately, we held that their combination, in total, amounted to reasonable suspicion of criminal activity.⁷⁵

In the present case, the seizure prior to the consent to search was not prolonged, but lasted only twenty-two minutes. A large portion of this detention was

⁶⁸ Brendlin v. California, --- U.S. --- (2007)

⁶⁹ 467 F.3d 971 (6th Cir. 2006).

⁷⁰ 385 F.3d 625 (6th Cir. 2004).

⁷¹ 305 F.3d 537 (6th Cir. 2002).

⁷² 263 F.3d 571 (6th Cir. 2001).

⁷³ 195 F.3d 258 (6th Cir. 1999).

⁷⁴ 155 F.3d 818 (6th Cir. 1998) (en banc).

⁷⁵ Garrido, supra.

necessitated by the purpose of the initial stop and the need for the trooper to identify the occupants of the vehicle and determine the driver's ability to safely operate the vehicle. In obtaining the driver's driving license and vehicle registration, Trooper Topp was justified in asking the occupants general questions of who, what, where, and why regarding their 3:23 a.m. travel.⁷⁶

The Court further noted that, very early in the stop, Ellis gave Trooper Topp a name he was unable to confirm. The Court detailed the information known to Trooper Topp, as follows:

Thereafter, reasonable suspicion existed for the further brief detention of an additional eight minutes and twenty-one seconds (3:36:39 to 3:45) based on the combination of the following factors: (1) Trooper Topp's inability to confirm Ellis's false alias; (2) Daugherty's response of "not that he knew of" to Topp's question of whether the vehicle contained drugs or anything illegal; (3) Daugherty's lack of knowledge of defendant's name; (4) Daugherty's lack of knowledge where he had been in Cleveland; (5) Ellis's lack of knowledge of his social security number; and (6) the discrepancy regarding how much money Ellis paid Daugherty for the trip. While a prolonged detention may not have been justified, we conclude that, under these circumstances, the additional detention of eight minutes and twenty-one seconds for further investigation of Trooper Topp's reasonable suspicions was lawful and not a violation of defendant's Fourth Amendment right to be protected "against *unreasonable* searches and seizures."⁷⁷ U.S. CONST. amend. IV (emphasis added).

Ultimately, the court found that the "given the totality of the circumstances," the extended detention was appropriate. And, since the items originally suppressed were, in fact, found as a result of a lawful stop, the items found should have been admitted.

Meals v. City of Memphis (Tenn.)
493 F.3d 720 (6th Circ. 2007)

FACTS: On Jan. 18, 2002, James Meals was driving in Memphis with his son, also named James and his grandson, William Meals. At about 6:30 that evening, Officer King was running radar when she spotted a vehicle, driven by Harris, "pass her going in the opposite direction at a high rate of speed." Officer King made a U-turn and followed, but without her lights or siren initially. She stated later she intended to catch up with the vehicle and make a traffic stop. Harris continued on, increasing his speed. (One contention at trial was whether Officer King was pursuing or following, with the distinction being that she did not run her lights and siren.)

Witnesses later related that they saw the Harris vehicle, with the marked Memphis unit right behind, just prior to the vehicles reaching an intersection. Both cars turned onto another, busy,

⁷⁶ Hill, *supra*; Erwin, *supra*.

⁷⁷ United States Bill of Rights, Fourth Amendment.

commercial street, without stopping. Harris was actually driving the wrong way when they entered the intersection, but crossed over the grass median into the correct lane. They entered another intersection, on the green light according to witnesses, and Harris crossed over into opposing traffic again, striking the Meals' vehicle almost head on. The two adult Meals, and Harris, were all killed - 8 year old William Meals was permanently paralyzed as a result.

Aundrey Meals, William's mother, filed suit on behalf of the estate, against Memphis, Officer King and the Police Director, arguing violations of the Fourteenth Amendment, failure to train, and violations of Tennessee negligence law as well. The District Court dismissed Officer King and held a Daubert hearing on the testimony of Dennis Waller, an expert for the Meals on "police policy, practice, and procedure." The District Court later agreed, at the City's request, to exclude part of his testimony, finding that some of his opinions, specifically, testimony that the "continued pursuit of the Harris vehicle by Officer King was a significant causal factor in the increasingly reckless driving behavior of Mr. Harris." However, the order dismissing Officer King was withdrawn and the case was set for trial.

The City requested summary judgment, and the Court agreed to dismiss the police director and claims under the Fourth Amendment, finding that it is "not implicated in police pursuit claims because a police pursuit or an unintentional collision does not amount to a 'seizure.'"⁷⁸ It refused to dismiss the training issue, since the parties both had experts with countervailing views, and refused to dismiss the negligence issue because there were controverted facts.

A variety of appeals followed.

ISSUE: Does the violation of an agency policy automatically lead to liability?

HOLDING: No

DISCUSSION: Officer King (through the City) argued that it was an error for the District Court to "consider the unauthenticated documents and unsworn statements attached to the [Meals'] memorandum ... because they [did] not meet the requirements of the" Federal procedural rules. Officer King also argued that she was entitled to qualified immunity. The Meals' representative argued that the documents (the City's pursuit policy and all witness statements) were, in fact, all properly introduced. Further, the estate representative argued that Officer King was not performing a [protected] discretionary function and intentionally misused her vehicle in the pursuit.

The Court quickly determined that all of the documents were properly entered into the record. The Court next noted that as of the date of the chase, that "it was clearly established that a police officer's conduct during the course of a high-speed pursuit could violate the substantive due process rights of persons injured during the pursuit."⁷⁹ In Sacramento v. Lewis, the Court found that a "plaintiff must prove that the police officer's conduct 'shocks the conscience' to be actionable - and a high-speed chase "with no intent to harm suspects physically or to worsen their legal plight do not give rise to liability...."

⁷⁸ See Sacramento v. Lewis, 523 U.S. 833 (1998).

⁷⁹ Id.

The Court found no reason to believe that Officer King had any inappropriate motive or ill will toward Harris or anyone else. Even though she allegedly violated the City's pursuit policy, the court was "compelled to conclude, despite the tragic results stemming from Officer King's violation of the City's policy, that the facts in the present case do not make out a substantive due process violation" under the Lewis criteria. Because she did not violate the constitutional rights of the plaintiffs', there was no basis for liability against the City either.

The Court reversed the denial of qualified immunity in King's favor, and in the City's favor, and remanded the case for further proceedings.

SEARCH & SEIZURE - PROPERTY CHECK

Taylor v. Michigan Dept. of Natural Resources 502 F.3d 452 (6th Cir. 2007)

FACTS: On Feb. 20, 2003, Officer Rose (a Michigan conservation officer) was investigating a claim of illegal fencing. He found no violation, but since the house on the property appeared to be vacant, he elected to check on it. Officer Rose found no one home, looked into the windows of the house and the garage, and shook the doorknobs. He had noticed tire tracks and footprints leading into the property. (He knew the house was only occupied part of the year.) Officer Rose noted, later, that he'd found the open curtains at the house odd, since in his experience, people generally closed the curtains when they were away from home.

Rose left his card, requesting a call, and when the owner returned, he contacted Rose. Rose explained he'd been on the property, but did not tell him, specifically, that he'd conducted a "property check." However, the owner, Taylor, discovered what Rose had done when he reviewed his security videotapes, and he contacted the Michigan Department of Natural Resources to complain. The Director "replied ... that the officer's conduct was proper and that law enforcement officers customarily conduct property checks."

Taylor sued, seeking nominal damages, under 42 U.S.C. §1983. He argued that the officer had unlawfully searched his property. The trial court dismissed the case, granting summary judgment to Officer Rose and the department, and Taylor appealed.

ISSUE: Is a brief, visual inspection of a rural property a search?

HOLDING: No

DISCUSSION: Taylor argued that the trial court was wrong in "concluding that Officer Rose's conduct did not constitute a search." The Sixth Circuit agreed, finding significant that "Officer Rose merely conducted naked-eye observations sans technological enhancements, that he was there in the daytime, for only about five minutes and that "he left a business card behind to notify the owner of his presence." Officer Rose "engaged in only a brief, minimally intrusive visual inspection." Officer Rose had "twenty-plus years of experience as a conservation

officer,” and was familiar with DNR custom, which dictated that “conditions consistent with a wintertime break in of a potentially-seasonal home warranted a brief protective check.”

The Court found that Officer Rose’s actions did not violate the Constitution, and as such, it upheld the dismissal of the action.

SEARCH & SEIZURE - OPEN FIELDS

Johnson v. Weaver
2007 WL 2780914 (6th Cir. 2007)

FACTS: On the day in question, Officers Weaver and Wolgemuth (Ohio Dept. of Natural Resources) were investigating a possible “out-of-season kill.” (A deer check-in station had reported the “delivery of a gun-shot carcass during Ohio archery season.”) They started their investigation by paying a visit to the identified hunter, MacIntosh.

When they arrived at his home, “they found their investigation immediately stalled by the locked gate and ‘No Trespassing’ signs a quarter mile up the driveway.” MacIntosh was a resident on property owned by Johnson - and Johnson promptly appeared, told the officers that MacIntosh was not there and that the officers must leave. The discussion escalated, and the officers arrested him.

Johnson was taken to jail, and the officers returned, with another officer (Tunnell), and found MacIntosh at home. MacIntosh told them that Johnson was his stepfather. MacIntosh first claimed he had shot the deer with a bow, but Weaver, knowing that not to be the case, “suggested that MacIntosh show them the scene of the kill.” They passed through the barns and walked the fields, and found a 12-gauge shotgun shell some 75 feet from a “bloody spot on the grass.” At that point MacIntosh admitted that Johnson shot the deer and wrote out a statement to that effect.

Using that statement, the officers got a search warrant for both houses, finding, among other things, the shotgun that matched the expended shell.

Johnson sued under 42 U.S.C.§1983, complaining that his Fourth Amendment rights had been violated. The District Court awarded summary judgment to the officers, and Johnson appealed.

ISSUE: Is a driveway part of the open field?

HOLDING: Yes

DISCUSSION: Johnson argued that “the officers trespassed when they defied his order to stay out and nevertheless proceeded up the driveway.” The Court, however, noted that “[w]hile it is axiomatic that the Fourth Amendment protects the home and its curtilage, the ‘land immediately surrounding and associated with the home,’ ... it is equally clear that this protection does not extend to the home’s neighboring open fields because those areas ‘do not protect the

setting for those intimate activities that the [Fourth] Amendment is intended to shelter.”⁸⁰ The Court found that the “driveway constitutes an ‘open field,’ and that “Johnson [could hold] no reasonable privacy expectation in it, and his efforts to shield that area from any manner of unwelcome guest prove inconsequential.”⁸¹ The Court agreed that the officers trespassed, but noted that Oliver held that “this state-law violation is of no constitutional moment.”

Even though Johnson was present and refused to allow them entry, the Court found this to be no more than a subjective expectation of privacy, and that further, the officers knocking on MacIntosh’s door was permitted as well, even though Johnson owned the house.

Johnson also argued that the officers also searched his barns. Taking as true that they did so, even though the officers denied it, the court found that MacIntosh’s consent was at least apparently valid, since he was related to the owner and the deer tag listed the Johnson farm as his address. The barns, as a storage and garage location, was a common usage area, and were apparently either not locked or MacIntosh had a key.

The Court found that even though Georgia v. Randolph⁸² would now indicate that Johnson’s refusal would supersede MacIntosh’s, the state of the law, “at the time of the challenged conduct” permitted the officers to accept MacIntosh’s consent as valid.

Finally, even though the warrant affidavit had several incorrect details, the Court concluded that it was sufficiently accurate to make constitutional muster. Further, even though the search “lasted an hour and included looking through private areas such as bedroom drawers and medicine cabinets,” even after the officers located the shotgun and the shotgun shells, the court agreed that “more shotgun shells could be hidden elsewhere.”⁸³

The Court upheld the search.

42 U.S.C. §1983 - USE OF FORCE

Summerland v. County of Livingston (Michigan)

240 Fed.Appx. 70, 2007 WL 2426463 (6th Cir. 2007)

FACTS: On Oct. 5, 2002, at approximately 6:30 p.m., Deps. Smyth and Marino (Livingston Co. SO, Mich) “responded to a 911 call that a man placed a large sign in his front yard that read “no police you be shot.” Dep. Smyth first stated he would not go, not believing it to be a “police matter” – but Sgt. Williams told him “that there was a mentally disturbed individual living on the property” and that Smyth needed to go check on his status and intentions.

⁸⁰ U.S. v. Oliver, 466 U.S. 170 (1984); Hester v. U.S., 265 U.S. 57 (1924).

⁸¹ U.S. v. Rapanos, 115 F.3d 367 (6th Cir. 1997) explaining that the “presence of fences, closed or locked gates, and ‘No Trespassing’ signs on an otherwise open field . . . has no constitutional import.”

⁸² 126 S. Ct. 1515 (2004).

⁸³ See Brindley v. Best, 192 F.3d 525 (6th Cir. 1999).

When the deputies arrived, they found Rinesmith in the window of his mobile home. Smyth tried to enter the property by unwinding a chain around the gate, but “Rinesmith began yelling from his window for the officers to stay out of his yard.” Smyth retreated.

Dep. Marino contacted Rinesmith, by phone, and he complained about being beaten up by two Livingston County deputies two weeks earlier, when he was taken for psychiatric treatment. He agreed to toss the information for his psychiatrist to Marino, who passed it to Smyth to try to contact. Over the next hour, more deputies arrived, including Dept. King, “whose presence profoundly agitated Rinesmith.” (He thought Dep. King had been the one that handcuffed him two weeks before.) Rinesmith tossed his cell phone out, terminating communication, and moved out of sight.

A short time later, Rinesmith returned to the window with what appeared to be a gun.⁸⁴ Dep. Marino took cover. Another deputy, Novara, also believed Rinesmith had a gun. About 7:30 p.m., Rinesmith came out of the mobile home with what appeared to be a handgun. Novara yelled “gun” to alert the other deputies, as Rinesmith moved away from them. Dep. King, who was now in that area, yelled “Livingston County Sheriff’s Department.” Rinesmith turned toward King and took up a “kneeling stance.” King and others, including a neighbor, later testified that they all thought Rinesmith had a gun.

King ordered Rinesmith to “drop the object” and Rinesmith told them to “shoot him.” He sat down and laid an object on the ground that appeared to be a small wooden shovel, but King stated that he did not think it was the same object that he believed to be a gun.

Dep. Smyth finally got Dr. Wang, the psychiatrist, on the phone and they tried to get Rinesmith to talk to him. Rinesmith had gotten up, and moved in the direction where Marino and Novara were standing. One witness testified that Dep. Smyth was chasing Rinesmith, and that his “hands were together as if he were holding a gun” and that he was going to “shoot the officers.” However, Dep. Marino and Novara stated that Rinesmith charged them with what appeared to be an axe, not a gun. Dep. Marino yelled at him to stop and drop it, and then fired twice. Dep. Novara also fired twice at him. “Rinesmith was not given any verbal warning that deadly force would be used.” Dep. King did not see the shooting, but he testified that he heard the commands.

After Rinesmith was shot, Deps. Marino and Novara approached him and moved three objects away from him – a shovel, a metal L-shaped bracket and a plastic framing square. They testified that they turned his body over and that he was breathing. They called EMS but did not render first aid. (King, at least, had first aid training and had some supplies in his car, but stated that he did not believe that first aid would have helped.) Rinesmith died on the scene.

Summerland filed suit on behalf of Rinesmith’s estate, against the County and the deputies involved, on a variety of claims, including those under 42 USC §1983. The deputies moved for, and received, summary judgment under qualified immunity. She appealed.

⁸⁴ Most of the facts from this point come from a neighbor who videotaped the events.

ISSUE: Is the fact that an armed individual is mentally ill a factor in making a deadly force decision?

HOLDING: No

DISCUSSION: The Court first addressed the excessive force claim against Dep. Novara and Dep. Marino. Under the qualified immunity standard, the Court must first consider whether the facts indicate that a constitutional violation occurred. There was no dispute that Rinesmith was “seized” under the Fourth Amendment when he was shot. As such, the Court had to decide if their use of force was objectively reasonable. To be reasonable, the suspect must have posed a “threat of serious physical harm, either to the officer or to others.” The estate representative argued that Rinesmith was simply running from Dep. Smyth, when he was shot by the other deputies. Dep. Smyth, however, denied this, contending that he was still talking to Dr. Wang when the shots were fired.

The Court agreed that this was a disputed fact, but held that it was not a material fact. The Court found that either way, Rinesmith posed a threat to Novara and Marino, no matter whether he was believed to be holding a gun or an axe. Summerland argued that because Marino was about 24 feet from Rinesmith, and Novara approximately 35 feet, when the shots were fired, that Rinesmith could not have posed a threat to them with the axe. The Court, however, noted that Rinesmith had already demonstrated aggression by his actions, by brandishing what appeared to be a shotgun, and by charging towards the deputies. As such, they had to make a “split-second judgment” – and “faced all this in the dark.”

The Court further noted that the deputies lacked any “probable cause to arrest Rinesmith for any crime.” “Yet,” the Court stated, “it is unclear why this matters.” Even if that was true, “this would not have given Rinesmith a free pass to threaten the deputies with ‘serious physical harm.’”

Summerland was correct in stating that “[t]he diminished capacity of an unarmed detainee must be taken into account when assessing the amount of force exerted.” “Notably,” the Court stated, the cases quoted by Summerland “involved mentally disturbed individuals who were unarmed.” In contrast, “Rinesmith ... was armed with (and aiming) what the deputies perceived to be an axe and witnesses perceived as a gun.” Unfortunately, “Rinesmith’s diminished capacity did not make him any less of a serious threat to the deputies in light of these other circumstances.”⁸⁵

Finally, she argued that the deputies failed to warn Rinesmith that they would use deadly force against him. They ordered him to stop and displayed weapons, “giving Rinesmith a definite (though not verbal) warning of the probable result.”⁸⁶

The Court concluded that the shooting was justified because Rinesmith posed a serious threat to the deputies. As such, it was unnecessary to move to the second prong in the analysis, and the Court found that the case was properly dismissed.

⁸⁵ Untalan v. City of Lorain, 430 F.3d 312 (6th Cir. 2005)

⁸⁶ Rhodes v. McDannel, 945 F.2d 117 (6th Cir. 1991)

The Court elected to discuss the state negligence claims. Summerland argued that King's "failure to notify the other deputies that Rinesmith was unarmed is clearly reckless in light of the circumstances present that evening." In fact, the Court found no evidence that King did know that, and as such, could not be responsible for not sharing the information.

Finally, Summerland argued that "Livingston County provided inadequate training to the deputies in apprehending mentally disturbed individuals." The Court found no evidence that supported the claim, however.

The Court affirmed the District Court's decision.

Williams v. City of Grosse Pointe Park
496 F.3d 482 (6th Cir. Mich. 2007)

FACTS: On Aug 17, 2003, Officer Miller and Sgt. Hoshaw (Grosse Pointe Park PD) learned of a "citizen report that three individuals in a green Dodge Shadow were tampering with cars." The officers located a vehicle matching the description, driven by Williams and containing two other occupants. They pursued the vehicle, and at about 7:14 p.m., "Hoshaw positioned his cruiser in front of the Shadow in order to block its path, while Miller's cruiser continued to approach from the rear."⁸⁷ In trying to escape, Williams backed the Shadow into Miller's cruiser. At the same time, Hoshaw had approached the car and "stuck his gun in the driver's side window, pointing his weapon at Williams's head." Williams again attempted to flee, accelerating and navigating around Hoshaw's cruiser, by driving over the curb and onto the sidewalk. Since Hoshaw was still holding onto the vehicle in some way, he was knocked down. Miller fired several rounds at the car, striking Williams in the back of the neck and leaving him paralyzed. Less than 60 seconds elapsed from the time Hoshaw stopped in front of the cruiser and the point that Miller fired.

Williams filed suit under 42 U.S.C. §1983, contending a violation of his Fourth Amendment rights. The U.S. District Court awarded summary judgment to Miller and the city, finding that there was no violation, and Williams appealed.

ISSUE: Is deadly force appropriate against someone who appears to be driving a vehicle in an aggressive manner?

HOLDING: Yes

DISCUSSION: The Court began its discussion as it must always do so in cases of this nature, by examining "whether, after considering the facts in the light most favorable to [Williams], a rational jury could find that Miller's use of deadly force against Williams was objectively unreasonable." The Court looked to the recent case of Brousseau v. Haugen for the standard, quoting that:

⁸⁷ Most of the factual information as to what occurred was gained from the video camera in Miller's cruiser. Later in the opinion, the Court notes that the times indicated by the camera, while apparently slightly out of sync with the actual time, would be what they would use to describe the sequence of the events.

... [T]he constitutional question . . . is governed by the principles enunciated in Tennessee v. Garner and Graham v. Connor. These cases establish that claims of excessive force are to be judged under the Fourth Amendment's "objective reasonableness" standard. Specifically with regard to deadly force, we explained in Garner that it is unreasonable for an officer to "seize an unarmed, nondangerous suspect by shooting him dead." But "[w]here the officer has probable cause to believe that the suspect poses a threat of serious physical harm, either to the officer or to others, it is not constitutionally unreasonable to prevent escape by using deadly force."⁸⁸

Further, the Court quoted from Graham v. Connor, in that "[t]he 'reasonableness' of a particular use of force must be judged from perspective of a reasonable officer on the scene, rather than with the 20/20 vision of hindsight."⁸⁹ The Court stated that "[t]his determination should also be made "in light of the facts and circumstances confronting [the officers], without regard to their underlying intent or motivation." The Court agreed that it was "not for the court to substitute its own personal notion of the appropriate procedure for those decisions made by police officers in the face of rapidly changing circumstances."⁹⁰ Quoting from the Freland case, the Court noted that "[w]hat constitutes 'reasonable' action may seem quite different to someone facing a possible assailant than to someone analyzing the question at leisure." The Court found the "mandate in Graham to be quite clear:

... [t]he calculus of reasonableness must embody allowance for the fact that police officers are often forced to make split second judgments – in circumstances that are tense, uncertain, and rapidly evolving – about the amount of force that is necessary in a particular situation.

Further:

The reasonableness of a particular use of force "requires careful attention to the facts and circumstances of each particular case, including:" (1) "the severity of the crime at issue," (2) the immediacy of the threat posed by the suspect to the officers or others, and (3) whether the suspect is "actively resisting arrest or attempting to evade arrest by flight.

Looking to the facts of the case at bar, the Court noted that "

At the point Miller fired his weapon, he was faced with a difficult choice: (1) use deadly force to apprehend a suspect who had demonstrated a willingness to risk the injury of others in order to escape; or (2) allow Williams to flee, give chase, and take the chance that Williams would further injure Sgt. Hoshaw or an innocent civilian in his efforts to avoid capture. Moreover, Miller had only an instant in which to settle on a course of action. Under the circumstances, we

⁸⁸ 543 U.S. 194 (2004).

⁸⁹ 490 U.S. 386 (1989).

⁹⁰ Smith v. Freland, 954 F.2d 343 (6th Cir. 1992)

cannot say that Miller acted unreasonably, nor do we believe that a rational juror could conclude otherwise.

Looking at the situation from Millers's perspective the Court found that:

From Miller's perspective, Williams: (1) was undeterred by having a weapon pointed at his head; (2) acted without regard for Hoshaw's safety; (3) was obviously intent on escape; and (4) was willing to risk the safety of officers, pedestrians, and other drivers in order to evade capture. Miller had no way of knowing whether Williams might reverse the Shadow, possibly backing over Hoshaw, or cause injury to other drivers or pedestrians in the area. As a consequence, Miller elected to fire his weapon in order to prevent Williams's potentially causing someone injury. That Williams may not have *intended* to injure Hoshaw or anyone else is immaterial. From Miller's viewpoint, Williams was a danger, and he acted accordingly. Turning to the factors identified in *Graham*, Williams was suspected of car theft, a felony. Hoshaw, having been knocked to the ground, was in immediate danger from the Shadow. While there are no pedestrians or vehicles in the immediate field of view of the camera in Miller's cruiser there can be no question that Williams's reckless disregard for the safety of those around him in attempting to escape posed a threat to anyone within the vicinity. Finally, Williams was actively avoiding arrest, apparently doing all he could to evade capture by the police. While the suspected crime was a nonviolent property offense, the immediate threat Williams posed to Hoshaw and other drivers and pedestrians and the fact that Williams elected to flee both suggest that Miller's chosen use of force to apprehend Williams was reasonable.

The Court stated that previous cases in the Circuit had held that officers who reasonably believe, "in the face of a rapidly unfolding situation," that a "suspect poses a serious physical threat either to the police or members of the public" may use deadly force.⁹¹

In a strong dissent, longer than the prevailing opinion, dissenting justices noted that Sgt. Hoshaw agreed that there was no reason to believe that Williams, or anyone else in the vehicle, was armed, or that Williams actually intended to strike him or run over him. He also agreed that once the Shadow pulled away, it was no further risk to him unless "it went into reverse." The dissenting justices also noted that Williams' flight, rather than showing that he was not intimidated by the police, could instead be interpreted as a "clear sign of intimidation", fleeing from Hoshaw's display of a weapon. The dissenting opinion noted that the video showed Hoshaw rolling away from the Shadow, not being dragged by it, although it agreed that it wasn't possible to know "precisely what Miller saw and where he saw it from"

However, the majority prevailed, and Court affirmed the summary judgment in favor of Officer Miller and Grosse Point Park.

Murray-Ruhl v. Passinault
2007 WL 2478584 (6th Cir. 2007)

⁹¹ See *Dudley v. Eden*, 260 F.3d 722 (6th Cir. 2001); *Scott v. Clay County*, 205 F.3d 867 (6th Cir. 2000).

FACTS: On Sept. 5, 2003, Murray and Conklin attended a party at a friend's home. They agreed to drive two young women home, Rodriguez and Straub and to that end, "Conklin dropped off Murray and Rodriguez at Uncle Buck's bar, where Murray had parked his truck earlier in the evening, then left to take Straub home."

As Murray left the lot, he saw Deputies Passineault and Jenkins (Shawassee County SO) drive by in their patrol car. "In a moment of panic, presumably because he had violated his parole by driving across adjacent parking lots and pulling into an alley that opened into a parking lot for nearby businesses." He and Rodriguez then ducked down to hide. Alerted to the erratic driving, the officers followed and found the truck, and parked directly behind it. Thinking it was unoccupied, they began to search the area. As they passed the truck, however, "Murray started the truck's engine."

From that point, the facts were disputed. The officers claimed that Murray "accelerated directly toward Passinault," trapping him between the truck and a "pole barn." Passinault claimed to have ordered the driver to stop, and that he was ignored. As the truck came close to him, Passinault fired his "first shot at the driver." "But immediately after the shooting and for some days afterward, he reported that he had been hit by the truck and injured – even going so far as to call for an ambulance to come to the scene because he needed medical attention." However, the Court noted, "that version of the facts turned out to be a complete fabrication."⁹² Passinault continued shooting after the truck passed him, "claiming later that he believed that the driver might be heading toward his partner, Jenkins, who was on foot somewhere in the area" and because he "was concerned for the safety of other officers who had been summoned to the scene and for the public in general." (The vehicle was not moving fact, however, and there were no other people around at the time.)

It was later determined that Passinault fired 12 shots, of which two or three struck Murray. The vehicle stopped in a ditch some distance down the road, with "Murray slumped over the wheel, dead."

Because Rodriguez was an eyewitness, the "plaintiff was able to offer a significantly different version of events." She stated that Murray was not trying to strike Passinault, but to move "toward the only exit available to him" – the only way out of the alley. Rodriguez also claimed that Passinault yelled for them to stop once and immediately fired his weapon, and that all remaining shots, after the first shot, were fired as the truck was moving away. "She testified, in fact, that she saw Passinault running after the truck as he continued shooting at it."

The plaintiff also notes that the first shot could not have been the one that incapacitated, and eventually killed, Murray, because "he was able to operate the truck's gas pedal for some distance after passing Passinault" and because the autopsy indicated the fatal shot entered from the rear. In addition, although Passinault justified continuing to shoot by stating that he believed Jenkins, among others, was in danger, Jenkins later testified that "he was not in the truck's path

⁹² Although the Court all but accused Passinault of lying in his assertion that he had been struck by the moving vehicle, in fact, such perceptions are not unusual under such circumstances.

and that he never felt in danger of being struck by the vehicle.” Finally, the plaintiff argued that “despite the officers’ suspicions that [Murray] might have committed a crime of some sort, the most serious offense they actually saw him commit was a traffic violation.”

Murray’s estate representative, his mother, filed suit on behalf of the estate against the Passinault, Jenkins and Shiawassee County, as well as the Sheriff. The deputies moved for summary judgment on the basis of qualified immunity, and the District Court granted that motion, holding that Passinault “acted reasonably when he shot and killed Murray and, alternatively, because the plaintiff failed to identify a clearly established right that was violated in the course of her son’s death.”

The Plaintiff appealed the order.

ISSUE: Is shooting at an apparently unarmed subject after they no longer pose a direct threat to another person a constitutional violation?

HOLDING: Yes

DISCUSSION: The Court looked at the facts, and applied the two pronged analysis required in Saucier v. Katz. First, the Court looked to whether the officers’ actions “violated a constitutional right.” With regards to Passinault, the Court agreed that an officer might use deadly force to protect themselves or another, and that his shooting must be viewed solely from his perspective at the time. The court agreed that “if Passinault had fired a single shot as the truck came at him - or even as it passed close to him” - that the Court might agree with the decision of the trial court. However, “one fact glaringly obvious from the record is that Passinault emptied his weapon at the vehicle, reloaded it, and fired at Murray perhaps as many as a dozen times even after the truck has passed by him and ,thus, after Passainult could reasonably believe that it imposed a threat to himself or - if Deputy Jenkins is to be believed - to his partner.” And, “[i]t was one of these ‘after shots’ that proved to be fatal.” The decisions rests completely upon whose version of the facts is the most truthful, and that is the purview of the jury, not the Court.

The court had previously held, in Smith v. Freland, that “a car can be a deadly weapon.”⁹³ However, that does not mean that every time a vehicle is involved that deadly force is appropriate. In this case, the Court found that there was a dispute, in fact, as to “whether the officer could reasonably have believed that anyone’s life was endangered by Murray as he attempted to flee in his truck.” As such, the Court agreed, it was arguable that Murray’s rights were violated.

However, that does not finish the analysis. The court next looked to whether that right was clearly established at the time. The Court looked to Brosseau v. Haugen⁹⁴ and Smith v. Cupp⁹⁵, in respect to how other courts had looked at “police shootings in the context of vehicular flight.”

⁹³ 954 F.2d 343 (6th Cir. 1992).

⁹⁴ 543 U.S. 194 (2004).

⁹⁵ 430 F.3d 766 (6th Cir. 2005).

The court concluded that the right was clearly established that shooting is not justified when the suspect presents no clear risk to the officers or others, as was the case in this shooting.

The Court also looked at Jenkins' actions. Although the Court agreed that "[u]nder well-established Sixth Circuit precedent, a police officer may be responsible for another officer's use of excessive force if the officer "(1) actively participated in the use of excessive force, (2) supervised the officer who used excessive force, or (3) owed the victim a duty of protection against the use of excessive force."⁹⁶ Only the last would seem to possibly apply to Jenkins. In Bruner v. Dunaway, the court had held that "a police officer who fails to act to prevent the use of excessive force may be held liable when (1) the officer observed or had reason to know that excessive force would be or was being used, and (2) the officer had both the opportunity and the means to prevent the harm from occurring."⁹⁷ However, in this case, it was apparent that "Jenkins lacked sufficient time to act to prevent Passinault's use of excessive force."

The Court affirmed the trial court's decision in favor of Jenkins, but reversed its decision with respect to Passinault.

Green v. Taylor

239 Fed.Appx. 952, 2007 WL 2478663 (6th Cir. 2007)

FACTS: On Aug. 27, 2002, at about 1:14 a.m., Officer Clayton (Cleveland, OH, PD) saw a vehicle make a "quick turn." He learned from dispatch that the vehicle had been reported stolen or was suspected in a crime. Another officer joined him, and the two managed to stop the suspect vehicle. As Officers Taylor and Baeppler got out of the second unit, the suspect vehicle, driven by Hoyle, took off, almost hitting Officer Taylor.

At this point, the pursuit was on. Within three minutes, Hoyle made an abrupt turn, he claimed, later, to be avoiding a head-on collision with yet another officer. Taylor called out on the radio that the occupants were "bailing" - as he knew the alley was a dead-end. However, Hoyle continued on and struck a fence. Baeppler pulled up behind the vehicle and he and Taylor approached, with guns drawn. Baeppler, at the driver's door, was ordering the occupants to show their hands, but they did not do so. Taylor ended up "pinned between the vehicle, the fence, and the patrol car" as the suspect vehicle "lurched backward." Baeppler shot the driver in the face. At some point, Taylor was hit by the suspect vehicle and fell, and he, too, attempted to shoot the driver. Both of his shots struck Mason (the front seat passenger) in the back.

Michael, a back seat passenger, told a different version, supported by the testimony of Hoyle and others. Hoyle stated that the engine was running but that he did not put the car in reverse. Further, he stated, he could not get out of the car because the doors were locked. Michael stated that he raised his hands and that the car did not back up, and that the officers moved the suspect vehicle backward after the shooting, but prior to crime scene photos being taken.

Sears witnessed the shooting from a nearby vacant lot. He stated that one of the officers "fell on one knee" and that was when the other officer (Baeppler) started shooting. He testified that he

⁹⁶ Turner v. Scott, 119 F.3d 425 (6th Cir. 1997).

⁹⁷ 684 F.2d 422 (6th Cir. 1982).

did not believe the vehicle was running or that it moved backwards. He also claimed “that he saw two officers move the vehicle away from the pole and scratch the front of the patrol car with a chisel” and that “a sergeant yelled at the officers for moving the car.”

The Internal Affairs report found that Taylor was standing on the passenger side of the vehicle, and that he had become pinned. Taylor admitted that the police vehicle had been moved, “because another officer mistakenly believed that the patrol car needed to be moved to allow EMS access to the suspects” but that the suspect’s vehicle had not been moved.

The evidence indicated that the entire incident occurred in less than 4 minutes, and Hoyle, eventually, pled guilty to involuntary manslaughter in Mason’s death. Green (on behalf of Mason’s estate) filed suit against Cleveland and a number of officers. The District Court granted summary judgment against all of the defendants except Taylor and Baepler. It concluded that Baepler was entitled to qualified immunity on the shooting claim, but that there was a issue of fact regarding the claim of intentional spoliation⁹⁸ of the evidence. The Court denied qualified immunity for Taylor, finding genuine issues of material fact regarding whether the Pontiac reversed and whether Taylor was standing when he fired.

Taylor appealed.

ISSUE: May an officer use deadly force when they are not faced with a serious risk of harm to themselves or to another?

HOLDING: No

DISCUSSION: The Court reviewed the use of force, and stated, at the outset, that “only in rare instance may an officer seize a suspect by use of deadly force.”⁹⁹ Further, [t]here are three factors that courts should consider in determining whether an officer’s actions were reasonable under the Fourth Amendment: “(1) the severity of the crime at issue; (2) whether the suspect posed an immediate threat to the safety of the police officers or others; and (3) whether the suspect actively resisted arrest or attempted to evade arrest by flight.”¹⁰⁰ However, “[t]hese factors are not an exhaustive list, as the ultimate inquiry is ‘whether the totality of circumstances justifies a particular sort of seizure.’”¹⁰¹

The Court found that Taylor’s use of force was questionable. Green had presented evidence that challenged Taylor’s description of the events, sufficient to overcome his demand for qualified immunity. The Court found that it was possible that a jury would find that there was no immediate threat to the officers, given that the chase was over, the suspect vehicle was trapped and the patrol cars blocked its escape.

⁹⁸ The intentional destruction of a document (or other item) or an alteration of it that destroys its value as evidence.

⁹⁹ *Livermore v. Lublan*, 476 F.3d 397 (6th Cir. 2007).

¹⁰⁰ Citing *Graham v. Connor*, 490 U.S. 386, 396 (1989); *Smoak v. Hall*, 460 F.3d 768 (6th Cir. 2006).

¹⁰¹ *Id.* (quoting *St. John v. Hickey*, 411 F.3d 762, 771 (6th Cir. 2005)).

The Court further found that the “right not to be shot unless a suspect poses an immediate threat to the officers or others” was clearly established at the time of the shooting.”

The court affirmed the trial court’s decision.

U.S. v. Cody

498 F.3d 582 (6th Cir. Tenn. 2007)

FACTS: In February, 2004, two robberies occurred in Greene County, Tennessee, one involving a bank. Cody quickly became a suspect, along with his wife, Linda, and his son, Marshall. Cody was arrested, and made several statements. A few weeks later, he was taken from jail to the hospital, and escaped, “assaulting and seriously injuring several hospital employees and a corrections officer in the process.” He was captured within the day, and the gun he had stolen from the corrections officer was retrieved.

Cody was charged with the robberies, tried, and rapidly convicted. He appealed.

ISSUE: Does intoxication invalidate a confession?

HOLDING: No

DISCUSSION: Cody argued that the statement he made at the Greene County SO, following his arrest, should be suppressed because they were “not ‘voluntary’ in light of the suicidal tendencies that he was experiencing, and that he voiced, at the time. The Court, however, noted that the U.S. Supreme Court had “explicitly declined to hold that ‘a defendant’s mental condition, by itself and apart from its relation to official coercion, should ever dispose of the inquiry into constitutional ‘voluntariness.’”

Cody also argued the admission of his statement in which he expressed “a desire to commit suicide” was improper. The trial court had considered it to be an admission of guilt in the underlying crime, as he referenced his inability to “live in prison” in the suicide threat. Previous courts had found that a suicide threat is a “form of flight” and such statements are admissible.

Further, Cody argued that the Greene County investigators had “collected two videotapes from a convenience store’s surveillance cameras with the hope that they would help to reveal the identity of the Green [sic] County Bank robbers.” However, the tapes were apparently never logged as evidence and could not be found. An investigator stated that they had been found to have been of no evidentiary value. Cody argued that the failure to preserve the tapes was in bad faith.¹⁰² The Court, however, found that not to be the case, in that the tape in question would not have directly involved the robbery in the bank, but only the possible disposal of some of the dye-stained money.

Cody’s conviction was affirmed.

¹⁰² See Arizona v. Youngblood, 488 U.S. 51 (1988).

SUSPECT ID

U.S. v. Walters/Johnson 2007 WL 1958626 (6th Cir. 2007)

FACTS: On June 13, 2003, Johnson and Askew robbed a bank in Monroe, Michigan. Mayhue drove the getaway car. Over \$34,000 was taken. On July 16, Johnson, Walters, Mayhue and Calloway robbed a bank in Ann Arbor of over \$17,000. In both situations, it was later alleged that Johnson was the planner of the robberies.

However, as they left the scene of the Ann Arbor robbery, Officer Stipe stopped the vehicle they were driving, a similar vehicle having been described as being involved in the robbery. However, because the getaway driver had been identified as a black female, and Mayhue was not black, and because the two robbers were hiding in the trunk, the officer permitted them to leave. However, he did record the license plate, and later determined that the “car was registered to ... Walter’s ‘God auntie.’” She later testified that he actually owned the car, but that it was registered to her because he “had outstanding tickets and did not have a driver’s license.”

That same evening, Calloway was seen with a large amount of cash, and eventually Johnson (and his co-conspirators) were indicted. His co-conspirators pled guilty; Johnson and Walters were convicted. Both appealed, although Walters appealed only his sentence.

ISSUE: Does a suggestive photo lineup taint a later identification by a co-defendant?

HOLDING: No

DISCUSSION: “Johnson argued that his attorney should have been present when Askew identified a photo of Johnson at Askew’s post-arrest interview, and that the photo lineup was unduly suggestive.” The Government, however, stated that “it had only asked Askew to identify the surveillance photograph” from the first robbery ... “and that there was no legal authority for the idea that a suggestive photo lineup taints a defendant’s identification of his co-defendants.” He argued essentially the same issue against a photo lineup identification made by Calloway. (Apparently Calloway knew Johnson only by a nickname, and he was “shown a number of photos of people known by the police to use the nickname” and he “had picked out Johnson from among those photos.”)

The Court, however, noted that since “both Askew and Calloway ... knew what Johnson looked like” and that “they were unlikely to misidentify him when shown the photo array.”

The Court upheld Johnson’s conviction.

U.S. v. Moore/Guizar/Ocegueda/Herod 240 Fed.Appx. 699, 2007 WL 1991060 (6th Cir. 2007)

FACTS: Moore, Guizar, Ocegueda and Herod were all participants in a conspiracy to distribute cocaine in Chicago, along with several others. One of the conspirators, Pena-Santiago, used a borrowed Plymouth Breeze to drive to Memphis, Tennessee, to pick up the drugs. There, he and Guizar met with Herod and transferred the cocaine to the Breeze.

Unfortunately, now, the men had too much cocaine, and they met with Herod again, trying to get rid of some of it. However, they could not reach an agreement at that time. They met with him again, that night, and unloaded some of the cocaine at Herod's home. The next day, they purchased equipment to package the cocaine for sale, and they did so, with 12-15 kilos placed in the gas tank of Guizar's truck and 7 kilos hidden in the Breeze. Pena-Santiago was supposed to deliver his load to Nashville, then restock and return to Chicago. During that time, a weapon was left in Herod's garage.

However, on the way to Nashville, on July 12, Pena-Santiago was stopped for speeding. He consented to a search of the vehicle and they found the drugs. However, at the urging of the officers, he called Zamora and told him that they had not found the drugs but that he'd been arrested for marijuana found in the vehicle and that the vehicle was impounded. He told Zamora that the police would not release the vehicle to anyone but the registered owner, and that he needed money to get a hotel room. (Several calls made during the time were recorded.)

Zamora contacted Lopez-Benitez and told him to go pick up the car, and he did so, along with Alvarez-Garcia and another man. When they arrived at the hotel, ostensibly to pick up Pena-Santiago, they were arrested.

In the meantime, Moore contacted Griffin, and instructed him to pick up Guizar and to bring him to Mississippi, where Moore lived. That night, the police searched Griffin's home and found incriminating evidence, including an old piece of mail with Moore's information.

On July 28, 2004, a number of individuals (including the 4 defendants in this case) were indicted with a variety of federal drug trafficking charges, involving a conspiracy to distribute cocaine. They were all convicted. The four named appealed.

ISSUE: Is using a single photo during a photo identification process always too suggestive?

HOLDING: No (but see discussion)

DISCUSSION: Among other issues, Herod complained that Pena-Santiago "should not have been allowed to identify him in court because the identification was the result of an 'unnecessarily suggestive' identification procedure." To succeed, the Court noted that the "defendant must show two things - that the pretrial procedure was 'unduly suggestive' and that there was insufficient 'independent indicia of reliability.'"¹⁰³ Essentially, the challenged procedure consisted of the DEA agent working with Pena-Santiago to "identify locations and witnesses and to sort through the scope and extent of the conspiracy." Although he could not identify Herod by name, as he'd never heard it, he was able to connect Herod with the house

¹⁰³ Thigpen v. Cory, 804 F.2d 893 (6th Cir. 1986).

where he had been. Several times during the investigation, the agent would take a folder, containing a single photo, and ask Pena-Santiago if he recognized the person, and if so, how he knew him. He was able to identify a number of the photos he was shown, but not all. He identified several different photos of Herod during the process.

The Court agreed that “although identifications arising from single-photograph displays may be viewed in general with suspicion,” that in this case, it was not improper.¹⁰⁴ The fact that Pena-Santiago went through “this procedure many times,” that it was, “to some extent, the functional equivalent of a large photograph array.” In addition, Pena-Santiago had “extensive contacts with Herod.” The Court upheld the identification procedure, and ultimately the convictions.

Ferensic v. Birkett

501 F.3d 469 (6th Cir. 2007)

FACTS: Ferensic was identified by the two elderly victims of a robbery, as one of two perpetrators. They had described the perpetrators and a sketch had been made. An officer recognized Ferensic from the sketch and prepared a photo array, including his photo, but only one of the two victims could identify him. They both identified him at a live lineup and when he was present at his preliminary hearing. These identifications were the only evidence that Ferensic was involved, but he was indicted.

Prior to the trial, Ferensic filed a motion that he intended to use an expert witness in suspect identification, but failed to share the expert’s report in a timely manner, as required by the court. (Apparently the expert did not submit the report early enough to meet the court’s deadline.) As a result, the expert was excluded from the trial.¹⁰⁵

Ferensic was convicted and appealed through the state system. When the conviction was upheld, he request habeas from the federal courts. The District Court found that the exclusion of the expert, and another witness, substantially impacted Ferensic’s ability to present a defense, since the evidence against him was based solely on multiple eyewitness identifications. The expert’s testimony “would have informed the jury of *why* the eyewitnesses’ identifications were inherently unreliable.” The Government appealed.

ISSUE: Is expert testimony on eyewitness identification admissible?

HOLDING: Yes

DISCUSSION: The Sixth Circuit noted that the “significance of Dr. Shulman’s testimony cannot be overstated.” The Court stated that “eyewitness misidentification is ‘the single most

¹⁰⁴ See Manson v. Brathwaite, 432 U.S. 98 (1977).

¹⁰⁵ The expert had previously testified “that several factors, such as divided attention, stress, passage of time, photo arrays, collaboration of witnesses, and social conformity, affect memory. He noted that crime produces stress, which makes high resolution (detailed) memory of faces difficult. He opined that the guns carried by the robbers in this case were the most distracting factor, because a person’s attention is directed to a weapon. “Sticky attention” to a weapon reduces the ability to recall details and leads to inaccurate identification. ... In addition, gaps in memory are filled in by world knowledge, post-event information, inferences, and talking to other witnesses.

important factor leading to wrongful convictions in the United States.” The decision of the District Court, to grant the habeas, was affirmed by the Sixth Circuit.

TRIAL PROCEDURE

U.S. v. Sales

2007 WL 2618365 (6th Cir. 2007)

FACTS: On July 9, 2003, a CI informed Romulus (Michigan) officers that he had bought marijuana from Sales two days before, at his residence. While there, he had spotted a number of long guns and handguns - Sales was a convicted felon. He then participated in a controlled buy with Sales at the request of the PD, using PD money.

The next day, Romulus officers, along with ATF, executed a search warrant and found a number of weapons, ammunition, cash and marijuana. In particular, one of the loaded handguns, and an unloaded shotgun, was within 15 feet of the bulk of the marijuana.

Sales was arrested and given his Miranda warnings. He admitted to owning the weapons and the marijuana, and that he'd been selling it since he was 13. He admitted that he knew it was illegal to possess the guns, but claimed that he needed them for “home protection.”

Several charges were placed against Sales relating to the weapons and the ammunition, and he was convicted on all counts. He then appealed.

ISSUE: Is a defendant entitled to the identity of an informant?

HOLDING: It depends

DISCUSSION: Sales argued that the search warrant used at his home was invalid, lacking probable cause, “because the underlying affidavit lacked indicia of the veracity and reliability of the CI.” The Court reviewed the requirements for a warrant using a CI as part of its probable cause.

The court noted that it had decided that “[w]hile independent corroboration of a confidential informant’s story is not a *sine qua non*¹⁰⁶ to a finding of probable cause in the absence of any indicia of the informant’s reliability, courts insist that the affidavit contain substantial independent police corroboration.”¹⁰⁷ However, “[s]o long as the issuing judge ‘can conclude independently that the informant is reliable, an affidavit based on the informant’s tip will support a finding of probable cause.’”¹⁰⁸ The Court agreed that although the affidavit does not contain facts that would support the CI’s reliability, the precaution the officer took in setting up the controlled buy “adequately corroborated the CI’s information” and supported the warrant.

¹⁰⁶ “without which it could not be.”

¹⁰⁷ U.S. v. Frazier, 423 F.3d 526 (6th Cir. 2005).

¹⁰⁸ U.S. v. Coffee, 434 F.3d 887 (6th Cir. 2006). See also U.S. v. Bennett, 905 F.2d 931 (6th Cir. 1990).

Sales also sought disclosure of the identity of the CI, “arguing that the CI played an active role in the criminal activity.” The prosecutor, however, represented “to the court that he did not intend to use anything that happened between the” CI and Sales at trial. As such, the trial court denied Sales’ request to learn the CI’s identity. The appellate court noted that the “government has the privilege ‘to withhold from disclosure the identity of persons who furnish information of violations of law to officers charged with enforcement of that law.’”¹⁰⁹ It further commented that it “usually den[ie] disclosure when the informer was not a participant, and instead, ‘was a mere tipster or introducer.’”¹¹⁰ (Notably, “Sales was not charged for the events occurring during the controlled purchase made by the CI, but rather for the possession of the drugs and firearms the police located during the search of Sales’s residence.”)

Sales’s conviction was affirmed.

U.S. v. Powers
500 F.3d 500 (6th Cir. 2007)

FACTS: On Sept., 2004, a “Source of Information” (SOI) told a task force¹¹¹ that Powers was “trafficking in significant quantities of cocaine.” The task force set up a sting operation targeting Powers. The SOI arranged to purchase two kilos, and the SOI traveled to the location of the transaction, along with Officer Cochran, who was undercover. Officer Patti was nearby, doing surveillance.

The SOI exchanged cell calls with Powers, which were recorded. At the time, Powers was trying to obtain the amount of drugs requested, and he also identified his vehicle. They eventually met and before the transaction took place, Powers was arrested. A kilo of cocaine was found in the van.

Three witnesses testified, Officers Cochran and Patti, and a DEA agent involved in the sting. “During their testimony, Officers Patti and Cochran offered information learned from and statements made by the SOI, some of which were direct quotes from the SOI and some of which represented information that the officers learned only through their interactions with the SOI.” The trial court ruled that the statements were admissible because “it found that, in general, these statements were ‘not offered for the truth of the matter stated.’”¹¹² The Court had divided the “objectionable material learned from the SOI” into “three main categories: (1) background information on the Defendant – i.e., that Defendant was a well-known cocaine dealer – ostensibly admitted to show why the officers undertook the sting operation; (2) the SOI’s identification of the white van as Defendant’s vehicle; and (3) the SOI’s identification of Defendant.”¹¹³

Powers was convicted, and appealed.

¹⁰⁹ *Roviaro v. U.S.*, 353 U.S. 53 (1957).

¹¹⁰ *U.S. v. Sharp*, 778 F.2d 1182 (6th Cir. 1985).

¹¹¹ Drug Enforcement Agency (DEA), Michigan State Police and Detroit Police Department.

¹¹² And as such, were not hearsay.

¹¹³ The opinion quoted the officers’ statements extensively.

ISSUE: Is information from a SOI/CI offered through another witness always in violation of the Confrontation Clause?

HOLDING: No

DISCUSSION: Powers argued that the trial court erred in admitting the statements made by the officers, repeating what had been said by the CI, who did not testify. The Court reviewed the Crawford/Hammon/Davis trilogy of Confrontation Clause, and further using U.S. v. Cromer, noted that it had previously “held that a CI’s statements were testimonial and that therefore the district court erred in admitting them at trial.” In fact, the Court noted that, given “what CIs do and the purposes for which law enforcement uses them, statements by CIs are generally testimonial in nature.” However, The Court noted that this was “not to say that every CI’s statement offered through a police officer at trial amounts to a Confrontation Clause violation.” Information “provided merely by way of background,” or information provide “to explain simply why the Government commended an investigation, is not offered for the truth of the matter asserted and, therefore, does not violate a defendant’s Sixth Amendment rights.”

The Court noted that “Cromer plainly establish[ed]” that the second and third of the categories” constituted “Confrontation Clause violations.” It further stated that “[b]ecause the SOI’s identification of both the van and Defendant were testimonial, out-of-court statements, offered to establish the truth of the matters asserted, and Defendant was not provided an opportunity to cross examine the SOI, Defendant’s Sixth Amendment confrontation right was violated.” However, the Court found that, although the trial court erred in admitting the statements, that the error was harmless.

Powers’ conviction was affirmed.

U.S. v. Hearn
500 F.3d 479 (6th Cir. 2007)

FACTS: In early, 2004, Jackson-Madison County (Tennessee) officers “learned from confidential informants that Hearn possessed large amounts of illegal drugs that he intended to sell at an upcoming rave party in Nashville.” The officers set up surveillance and, on March 18, followed Hearn, who was in his vehicle, and tried to stop it. As they did so, “an unidentified white object, which appeared to be the top of a pill bottle,” hit the police car. Hearn stopped, and consented to a search of the car. The officers found a semi-automatic weapon and a guitar case which contained documents belonging to Hearn, marijuana and pill bottles containing over 300 pills, some of which were identified as Ecstasy. With that, they were able to get a search warrant for his home, where they found ammunition for the weapon.

Hearn was indicted on federal drug trafficking charges. Hearn moved to suppress “statements by confidential informants because the introduction of the informants’ statements would violate Hearn’s constitutional rights to confront witnesses against him.”¹¹⁴ The government agreed not to use any statements to prove specific elements of the charged offenses, intending only to “use

¹¹⁴ Crawford v. Washington, 541 U.S. 36 (2004).

the informants' statements to show why authorities initiated the stop that led to the discovery of the contraband." The trial court permitted the use of the CI statements in a limited way.

However, at trial, two witnesses "provided more expansive explanations, which implicated Hearn in a manner unlike that of any other evidence." One of the officers "testified that he stopped Hearn because he learned" from a [CI] "that Mr. Hearn had large amounts of ecstasy and marijuana [and] was going to be leaving to take the narcotics to a rave party in Nashville." Another officer testified that Hearn was investigated because an informant told him that Hearn was going to sell a large quantity of MDMA¹¹⁵ pills at a rave party. He also linked the drugs to Hearn's residence and car.

Hearn was convicted, and appealed.

ISSUE: May officers broadly testify as to statements made by a non-testifying CI?

HOLDING: No

DISCUSSION: The Court started by noting that "the government's conduct in this case makes clear that it introduced the confidential informants' statements, at least in part, to establish possession with intent to distribute and firearms-possession in furtherance of drug trafficking." The prosecution asked "broad, open-ended questions" and made no attempt to ensure "through narrow questioning or otherwise, that the officers did not testify as to the details of the confidential informants' allegations."

The Court agreed that "[a]dmission of the confidential-informant statements, therefore, violated Hearn's right to confront witnesses against him." The Court found "no conceivable reason, besides implicating Hearn, for the officers to testify that a confidential informant told them that Hearn placed the drugs in his car and was driving to Nashville to sell them." The CI's statements went to the "heart of the government's case" and that meant that the admissions were not harmless.

Hearn's convictions were reversed and the case remanded.

FIRST AMENDMENT

Helms v. Zubaty

495 F.3d 252 (6th Cir. Ky. 2007)

FACTS: On July 15, 2004, Helms went to the office of the Gallatin County Judge-Executive, Zubaty, to complain about a "proposed county payroll tax." She learned from Chipman, the receptionist, that Zubaty was out of town. Chipman, who knew Helms, agreed to let her sit in the office for a while, and Helms "launched into a criticism of the proposed tax" and proceeded to get "kind of worked up" about it.

¹¹⁵ Ecstasy.

Baker, another county official, returned from lunch and heard Helm's railing about the tax, and stating that she wasn't going to leave the office until she got her money back. When he heard her call Zubaty a foul name, he "walked out into the reception area and asked Helms to leave, telling her she was disrupting the office." He stated that he could not return necessary phone calls due to her loud conduct.

When Helms refused, Baker called 911 to report a "disruptive person." Officer Caldwell (Warsaw PD) responded, and Chipman explained what had occurred. After further discussion, and Helms' continued refusal to leave, Caldwell arrested her for 2nd Degree Criminal Trespass.

Helms was acquitted, and filed suit against Zubaty, Baker and Caldwell, along with the Police Chief and Mayor of Warsaw. The District Court granted all defendants summary judgment and Helms appealed.

ISSUE: Is a government official's office suite a "nonpublic forum" for First Amendment purposes?

HOLDING: Yes

DISCUSSION: The Court started its analysis by noting that the "Supreme Court has recognized the government's need to maintain its property for the use to which it is lawfully dedicated." In the past, the Court "has identified three types of fora: the traditional public forum, the designated public forum, and the nonpublic forum." Simply because a "property is owned or controlled by the government" does not make it a public forum under the First Amendment. Even though Zubaty had stated that his office was "always open to the public" the Court did not find that converted the space to a "public forum" and subject to "prolonged sit-ins, particularly when the public official with whom the citizen wishes to speak is not there."

The Court concluded that the space in question was properly considered a nonpublic forum.

Next, the Court found that the "government may lawfully restrict speech in a nonpublic forum so long as the restrictions are viewpoint neutral and reasonable in light of the purpose served by the forum." Baker's testimony "that he was unable to work while she sat talking loudly and swearing outside his door" were sufficient reasons to ask "Helms to leave the office."

On a side note, Helms argued that Caldwell's mention of the "payroll tax" as the reason for her arrest colored the arrest unlawful, but Caldwell testified that he had no idea of the reason for the actual dispute, but that simply he was acting because of Baker's complaints. Helms argued that because she was "not yelling and did not present a physical threat," she was not committing an offense. The Court agreed that Caldwell had probable cause to make the arrest, since "[c]riminal trespass concerns *presence*, not behavior." She refused several lawful orders to leave, including two from Caldwell.

The trial court's decision was affirmed.

Wilson v. Johnson (University of Tennessee)
2007 WL 1991057 (6th Cir. 2007)

FACTS: On Feb. 13, 2003, Wilson was a student at the University of Tennessee. He went to the university's Art and Architecture Building to make several large posters to protest the Iraq war. He hung the banners, one inside and two outside, on the building. He also painted "NO WAR" on the buildings, in yellow paint. Officer Cummings, of the university's police department, arrested Wilson for vandalism, public intoxication and evading arrest.

Wilson admitted to his actions. Chief Yovella was told what had happened, but not told, specifically, of the content of the banners. He told the officers to collect the banners as evidence, but when they returned, they discovered a janitor had already removed the signs. No other signs, hung by other persons, were removed.

The graffiti created by Wilson was removed, as well, but no other graffiti on the building was apparently touched. At the time of the incident, numerous messages painted on walls and posted signs were on display in apparent violation of the stated University policies. (Some signs were permitted, with faculty approval, but not graffiti.) The university later stated that "removal of offending items was prioritized based upon how noticeable or intrusive the offending items were."

Wilson argued that because other graffiti and signs had been tolerated, he did not realize it wasn't permitted and was, in fact, criminal.

Wilson sued the officers, and the university, under the First, Fourth and Fourteenth Amendments. The defendants requested, and received summary judgment, with the trial court finding that Wilson's actions were "vandalism not protected by the First Amendment" and because there was no evidence that the banners were removed because of the message they conveyed. It did not address the arrest issue, because he had pled guilty to charges related to that claim.

Wilson appealed.

ISSUE: Is a university building, not otherwise designated as a public for, a nonpublic fora?

HOLDING: Yes

DISCUSSION: The Court stated that although political speech is protected, that it is not "equally permissible in all places and at all times."¹¹⁶ The court found that the buildings involved were not traditional public fora, and as such, the Court had to decide if they were "designated public for or nonpublic fora." Wilson argued that because the university had tolerated "expressive painting and the hanging of banners" on the buildings, he could not be found to have committed vandalism. However, the Court noted that the university had a clear policy to the contrary, although it did not regularly enforce the prohibition. As such, there was no indication that the university intended to create a designed public fora. That meant that the area was considered a nonpublic fora, and that as such, the "government may control access

¹¹⁶ Cornelius v. NAACP Legal Def. and Educ. Fund, Inc., 473 U.S. 788 (1985).

‘based on subject matter and speaker identity so long as the distinctions drawn are reasonable in light of the purpose served by the forum and are viewpoint neutral.’ Wilson argued that the policy was facially reasonable and viewpoint neutral, but argued that the policy was applied to him in a discriminatory way, because his banners and graffiti were removed promptly while others were left in place. The Court, however, found that the university’s reasons for removing his material was valid. Further, the Court found that it was reasonable to take content into consideration, and that signs concerning student events and such were appropriate for the area.

Further, the Court noted that the individuals that were aware of the content of the banner were not those who ordered their removal, and that those who ordered the removal were apparently unaware of the actual content of the banners and graffiti. As such, the Court found that the removal did not violate Wilson’s rights.

The trial court’s decision was affirmed.

EMPLOYMENT

Weisbarth v. Geauga Park District 499 F.3d 538 (6th Cir. 2007)

FACTS: Weisbarth was hired as a part-time park ranger with the Geauga Park District (Ohio) in 1997 and became full time in 2003. She later became the park’s official canine handler. At about that same time, the Ranger Department began to suffer from “serious morale and performance problems.” A consultant was hired to evaluate the department, and as part of this process, he rode along with Weisbarth. During that ride, they discussed a “letter of counseling” that she had received, and she told him she intended to write a rebuttal. He told her that would be “unwise” and “contrary to ‘team efforts.’” He asked questions, and she claimed that she attempted to answer the questions honestly. The consultant reported her comments, characterizing them as evidence that she disliked all of her co-workers.

Weisbarth later claimed that her statements caused the consultant to consider her a “source of friction” and that he “developed a ‘strategy’ for getting her fired.” Shortly thereafter, Weisbarth had a family crisis that required a sudden departure, which she apparently failed to report to her supervisors. The GPD ordered her to be psychologically evaluated and she was found to be unfit – although another psychologist, provided by the union, found the opposite. A third psychologist agreed with the first and Weisbarth was fired in September 2004. Weisbarth claimed that this firing was in retaliation for her “allegedly protected speech” during the ride-along.

Weisbarth filed, and won, in a grievance hearing. The arbitrator suggested they work out a separation agreement, and the record is silent as to Weisbarth’s employment status at the time of this opinion.

Weisbarth filed suit under 42 U.S.C. §1983, claiming violations of her First Amendment rights. The District Court developed a number of occurrences, both before and after the ride-along, that “caused the deterioration of Weisbarth’s relationship with the GPD.” Eventually, the District Court dismissed her complaint, and she appealed.

ISSUE: Is it a violation of the First Amendment to discipline an employee for statements made in their line of work?

HOLDING: No

DISCUSSION: The Court limited its evaluation of the appeal to the First Amendment issues. The Court noted that previous cases had held that to meet the threshold, the employee “must have spoken as ‘citizen’ and must have ‘address[ed] matters of public concern.’”¹¹⁷ During the pendency of the action, the Court decided Garcetti,¹¹⁸ and the District Court “apparently concluded that Weisbarth’s talk with [the consultant] was not explicitly part of her official job description as a park ranger.” The District Court “expressed concern that ‘expanding’ Garcetti to preclude First Amendment protection in this case would permit employers to hire consultants to ‘solicit statements from employees that then could be used against the employee.’” However, the District Court found that even if it did occur pursuant to her official duties, “the speech simply did not address a matter of public concern.”

The Sixth Circuit reviewed the lower court’s decision. It determined that because Weisbarth was speaking as a ranger, she was not speaking as a citizen. It was the consultant’s job to interview Weisbarth about morale and performance issues. Weisbarth argued that this was not part of her official job duties as a park ranger – but the Court concluded that, pursuant to Garcetti, such statements owed their “existence to [her] professional responsibilities.” The Court looked, specifically, to the recently decided case – Haynes v. City of Circleville.¹¹⁹

The Sixth Circuit noted “an additional policy concern about dismissing Weisbarth’s claim based on Garcetti,” however. The Court feared that “[s]uch a holding” ... “would permit government employers to solicit statements from employees on any range of personal or political issues – ostensibly pursuant to their official duties – and then use those statements against them.”

The Sixth Circuit, however, found that “[a]lthough firing Weisbarth based on her assessment of department morale and performance may seem highly illogical or unfair, the relevant question is whether the firing violated her free-speech rights under the First Amendment.” The Garcetti Court had noted that there were other checks in place to protect employees who report wrongdoing, such as whistleblower statutes. “Thus,” the Court noted, “although taking action against a public employee for speech made pursuant to official duties might give rise to antidiscrimination, whistleblower, or labor-contract claims, it does not violate the First Amendment.”

The District Court’s decision was affirmed.

EMPLOYMENT - RETALIATION

Denhof/LeClear v. City of Grand Rapids (Michigan)

¹¹⁷ Connick v. Myers, 461 U.S. 138 (1983); Pickering v. Bd. of Educ., 391 U.S. 563 (1968).

¹¹⁸ Garcetti v. Ceballos, --- U.S. --- (2006).

¹¹⁹ 474 F.3d 357 (6th Cir. 2007).

494 F.3d 534 (6th Cir. 2007)

FACTS: Denhof and LeClear, both female officers with Grand Rapid, Michigan, PD, were both plaintiffs in a lawsuit filed in Jan., 2001, in which nine female officers “claimed gender discrimination, retaliation and harassment in connection with their employment.” As a result of that lawsuit, later that year, they claimed that they were subjected to ongoing retaliation for the lawsuit. The trial judge, however, denied their requested injunction, as he “cast doubt on the veracity of all Denhof’s allegations and labeled her story of being followed a ‘gross exaggeration.’”

Shortly after that hearing, Chief Dolan asked about a “fitness for duty” evaluation for Denhof, as certain of her statements during the proceeding could be read as a threat against other members of the department. She was placed on paid leave and eventually, Denhof was found to be “unfit for duty” by the department psychologist. She, however, countered with other evaluations that disagreed with the first evaluation, and which found her “fit for duty.” The City, however, converted her to unpaid leave and eventually terminated her, for her alleged failure to agree to treatment. (Denhof argued, however, that she had never been told that she needed treatment by anyone, and that the department psychologist had refused to talk to her when she arrived at his officer with her attorney.) Over the next several months, three psychologists (one of the department’s and two of her own) argued over her need for treatment and/or medication. Eventually, she was allowed to stay on unpaid status, and she worked part-time at several jobs, including as a part-time officer in a city some 90 minutes from her home.

LeClear was also a Grand Rapids officer. She had been involved in an on-duty shooting and was eventually found to have symptoms of Post-Traumatic Stress Disorder (PTSD), for which she received treatment. As a result of the reports from that treatment (which the city received as discovery in the ongoing lawsuit), the City requested a fitness for duty exam. (There were, apparently, no obvious issues with her job performance.) She was ordered to undergo the evaluation and placed on paid leave. The department psychologist doubted that she had PTSD but instead, diagnosed her with a Personality Disorder. As a result, she was switched to unpaid leave. She submitted the reports of her own doctors (the same doctors that evaluated Denhof), both of whom found her fit for duty. She was ordered to report to the department psychologist for treatment options. When she arrived with her attorney (as Denhof had), the doctor “cracked the door to his office just wide enough to tell LeClear that he did not have any treatment recommendations for her and that her appointment had been cancelled.” He filed a report a few weeks later suggesting psychotherapy, which he seemed to indicate could be provided by her own doctors. However, her own doctors disagreed and dispute the department psychologist’s recommendations. One of the doctors specifically found her fit for duty. She also ended up working part-time for the same agency as Denhof.

Both officers sued for retaliation. At trial, the jury returned a verdict in their favor, ordering \$1 million in damages and back/front pay. Despite that verdict, however, the Court ordered a judgment as a matter of law in favor of the City. The officers appealed.

ISSUE: Is reliance upon a doctor’s recommendation always reasonable?

HOLDING: No

DISCUSSION: The Court discussed how a plaintiff might establish a retaliation case. It noted that “[t]o establish a case under the burden shifting method, a plaintiff must show: 1) she was engaged in a protected activity, 2) the employer was aware of the protected activity, 3) she suffered an adverse employment action and 4) there is a causal connection between the protected activity and the adverse employment action.”¹²⁰ When the plaintiff makes this case, the burden then goes to the employer to “provide a legitimate, non-discriminatory reason for the challenged action.” Once that is done, the burden goes back to the plaintiff to “show by a preponderance of the evidence that the [employer’s] stated reason 1) has no basis in fact, 2) did not actually motivate the adverse action or 3) was insufficient to motivate the adverse action.” One defense for the employer is that they took actions based upon an “honest belief” in a third party’s recommendation, such as the department psychologist in this case.

In this case, the trial court found that the chief reasonably relied upon the psychologist’s recommendations. However, the appellate court found that that a jury could conclude that reliance was unreasonable. It specifically noted that the doctor’s recommendations in writing seem to indicate that he was predisposed to find her unfit for duty, as he stated that he could not see how Denhof could continue with the department. In particular, the Court noted that even though the Chief stated that Denhof was a “danger to herself and others,” in Dec., 2001, he waited six weeks before taking her off the streets.¹²¹ His motives were also called into question by his delay to take the department psychologist’s recommendation to send LeClear for evaluation with a PTSD specialist, and a jury “could have reasonably concluded that [the Chief’s] actions were inconsistent with his professed motivations.”

The doctor’s refusal to talk to the officers, when they arrived with legal counsel, even when that counsel was going to wait outside the office, also indicated that the City’s reliance on his advice was misplaced. The Court noted that the officers were both told they would be terminated before they were given any treatment options, and in the case of Denhof, when she was specifically told she’d refused treatment, when in fact, she hadn’t been offered any. The court found “that the city was proceeding without all the facts, and certainly provided the jury a basis to conclude that the city’s goal in this entire process was to terminate the plaintiffs in retaliation for this lawsuit.”

The court also noted that the city failed to respond when both officers submitted reports from their own doctors, and when they continued to work with those doctors, as ordered. (Both doctors filed reports that no treatment was recommended and there was “nothing wrong with them.”) The city allowed both officers to remain suspended without pay and its “lack of response provided a more than sufficient basis for the jury to conclude that the city was not acting out of concern for its employees, but instead was doing whatever it needed to do to prevent the plaintiffs from returning to work.”

¹²⁰ *Singfield v. Akron Metro. Hous. Auth.*, 389 F.3d 555 (6th Cir. 2004).

¹²¹ There was a similar delay in suspending LeClear.

The court reversed the trial court, but reduced the compensatory for each officer to \$350,000 - as the jury's decision was actually in excess of what the officers requested. The Court upheld the awards for front and back pay, however.

EMPLOYMENT - SEXUAL HARASSMENT

Larocque v. City of Eastpointe (Michigan)

2007 WL 2426441 (6th Cir. 2007)

FACTS: Larocque was a civilian employee of the Eastpointe PD, working as a part-time Code Enforcement Officer. She reported to and was supervised by a sworn chain of command, and her immediate supervision was provided by whichever administrative officer was on duty at the time.

In the fall of 2003, Larocque stated that she was sexually harassed by members of the PD, in the building. In one case, she overheard two officers making sexual comments about her. She became upset and left work, claiming illness. A week later, a police corporal asked her why she had left, and she told him. He stated he would speak to the officer, but did not.

About two months later, Larocque claimed that she spoke to the officer who had made the sexual comments, while they were both in their respective vehicles in the parking lot. She claimed the officer made comments about her sexual history with other officers, and that she was trying to ruin another officer with whom he claimed she had a sexual relationship. She reported that incident to another corporal, but he took no action.

However, apparently a report of some type did occur, because a few days later, the Chief called a meeting with Larocque and two officers he assigned to investigate the problem. Larocque was instructed to put her complaints in writing. The officers investigated the allegations using a variety of sources. They eventually concluded that her first complaint couldn't be proven or disproven, either way, and that the second was not supported by videotape.¹²² (At some point, Larocque stated she'd given them the wrong date for the second occurrence.) One of the investigators did state that the immediate supervisors did fail to properly follow up on her reports.

In July, 2004, Larocque was charged with misconduct and terminated, the allegations being that "she had made false verbal and written reports about the conversation she'd alleged with the officer in the parking lot." Following a hearing, her termination was upheld.

Larocque filed suit, alleged sex discrimination and a hostile work environment. The trial court found in favor of the City, and she appealed.

ISSUE: May an employee bring an action for retaliation, if adverse action against the employee appears to be related to a complaint?

HOLDING: Yes

¹²² The investigators apparently reviewed security videotape of the parking lot where the interchange had taken place.

DISCUSSION: The Court began with reviewing the standard for an employee to make a “prima facie case of hostile work environment based on sexual harassment by a co-worker.”

- (1) [the plaintiff] was a member of a protected class;
- (2) [the plaintiff] was subjected to unwelcome harassment;
- (3) the harassment complained of was based upon sex;
- (4) the harassment unreasonably interfered with the plaintiff’s work performance or created a hostile or offensive work environment that was severe and pervasive; and
- (5) the employer knew or should have known of the charged sexual harassment and failed unreasonably to take prompt and appropriate corrective action.¹²³

The Court found that the first three elements were undisputed. Larocque did not argue that the harassment affected her job performance, and in fact, she had a “solid performance record.” The Court found that she did not “establish that a reasonable person would consider the environment objectively hostile.” The hallway comments, in the first incident, were not directed to her and there was no indication that the officers involved knew she was close by - and appeared to be “no more than a mere utterance.”

The second incident also, did not “demonstrate an objectively hostile environment.” She did not work with the officers in question daily, only when the occasional call would bring them to the same location. Even accepting that the officer made an “offensive utterance” to her, it did not rise to the level of a physical or verbal threat.

As such, the Court found that the City’s was properly entitled to summary judgment.

However, Larocque also argued that the City retaliated against her. To make a prima facie case on that cause of action,

- ... a plaintiff must show that:
- (1) he/she engaged in a protected activity;
 - (2) the defendant had knowledge of the protected conduct;
 - (3) the defendant took an adverse employment action against the plaintiff; and
 - (4) a causal connection existed between the protected activity and the adverse employment action.¹²⁴

Again, the burden then shifts to the employer, to make a “legitimate, nondiscriminatory reason for the employer’s actions.” The burden goes back to the employee to demonstrate pretext. In this case, the Court found that Larocque made a prima facie case of retaliation, as she had reported “perceived sexual harassment to her supervisor.” However, the Court found that the City’s reason for the termination was reasonable, that she had been dishonest in making the

¹²³ *Fenton v. HiSAN, Inc.*, 174 F.3d 827, 829-30 (6th Cir. 1999).

¹²⁴ *Weigel v. Baptist Hosp. of East Tennessee*, 302 F.3d 367,381 (6th Cir. 2002) (applying the factors from *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802 (1973), to a retaliation claim).

second claim. The Court found that Larocque did not successfully rebut that claim, and upheld the summary judgment for the City on the retaliation claim.

EMPLOYMENT - HOSTILE WORK ENVIRONMENT

Austion v. City of Clarksville (Tenn.) 2007 WL 2193597 (6th Cir. 2007)

FACTS: In 1991, Austion, an African-American male, began working for the Clarksville, Tenn. PD. During the ensuing years, Austion became a K-9 handler, but was demoted due to performance deficiencies, in 1998. In 2001, an officer, never identified, hung a noose at a workstation at the PD, where it hung until another officer complained to the NAACP - and they intervened on behalf of the officers.

In Sept, 2001, Austion sought promotion to sergeant. Austion met the requisite test scores, but the Chief denied the promotion, citing performance and motivation issues. Eight others were promoted, including three African-American officers. Austion was promoted to detective in March, 2002, and again applied for a sergeant's position, in May. This time, a Caucasian officer was promoted. A few months later, Austion filed for discrimination with the EEOC, and the EEOC issued a right to sue letter.

In Jan, 2003, Austion's sergeant put him in for a written commendation. When that was not processed, the sergeant asked about it, and was told that the "commendation was delayed because Austion 'was going through some things right now.'" The sergeant interpreted that "comment to imply that the commendation was delayed because of Austion's EEOC charge."

During that same time, Capt. Brooks, the command officer that made the comment, circulated a letter that defending the chief, and which tagged the employees who had filed complaints as "complainers" and "disgruntled employees." Several officers contacted the Human Resources Director, who instructed the Chief to stop the distribution of the letter, but the Chief refused.

In May, 2003, the Chief told Austion, among others to "remove potentially offensive items from the workplace." Austion, specifically, was told to remove a figurine of a "tribesman on a motorcycle." A few days later, Austion went to the Chief about rumors involving himself (Austion) and the Chief "told him he was not allowed to talk unless he was given permission." The Chief was accompanied by his entire command staff, and made a number of comments. (Unbeknownst to the Chief, Austion was taping the interaction.) Austion filed another action with the EEOC, and they again gave him a right to sue letter.

In Oct. 2003, Austion's on-call schedule was changed, which required, essentially, Austion to work from 8 a.m. until 4 p.m., and then to remain on call until 3 a.m. In Sept., 2004, Austion was suspected of firing shots at an officer's home - a Caucasian officer who had supported Austion and others - in an effort to "support their hostile work environment claims." Austion was ordered to submit his weapon for testing. (Apparently, no match was found.)

Austion sued, and eventually, the case went to trial. Austion introduced evidence “that supervisory officers used racial slurs throughout the department.” CPD hired consultants to evaluate and “neutralize any racial hostility in its workplace.” The jury found that Clarksville bore liability for demoting Austion in 1998, failing to promote him in 2001/02, creating a hostile work environment and retaliating against Austion for protected activity.” Clarksville appealed.

ISSUE: May a change in schedule constitute a retaliatory action?

HOLDING: Yes

DISCUSSION: The Court found that some of the claims were untimely filed, but found that the hostile work environment claim and the retaliation claim, was, in fact, filed in time. In that type of case, he could reach back and use the other claims as background evidence to support it, as well.

The Court found that the “collective import of all these incidents - most of which both Austion and CPD had knowledge of - provide adequate evidence for the jury to infer that a racially hostile work environment existed and that Austion was subjectively affected by this environment.” The Court found the evidence to be “somewhat meager,” but not so meager that a jury could not reasonably accept it.

Further, the Court found that Austion’s change in on-call schedule, as well as their targeting him in the shooting (apparently unproven) was an adverse job action sufficient to suggest retaliation.

The court reversed the judgments originally rendered on the issues deemed untimely, but affirmed the hostile work environment and retaliation claims, along with the awards for those cases.

EMPLOYMENT - FIRST AMENDMENT

See v. City of Elyria
502 F.3d 484 (6th Cir. 2007)

FACTS: See started work as a patrol officer for the Elyria PD in 1993. In April, 2001, “See contacted the FBI to report alleged illegal or immoral activity within the police department.” Three other officers, including a lieutenant, also discussed the allegations with the FBI. “No official resolution of See’s complaint to the FBI has ever been issued, and no charges have ever been filed.”

In September 2001, “See was charged with several rule violations concerning a citizen complaint” as well as issues with his behavior concerning that complaint. The Chief, Medders, who was involved in the allegations put before the FBI, recommended a 45 day suspension. Following a hearing, the Director suspended See for 30 days. See filed a grievance, and the suspension was reduced to 15 days. Six months later, charges were brought against him for insubordination, and Medders recommended termination. The Director upheld the termination. See again grieved the action and the “arbitrator found that See had engaged in insubordination,

but because See ultimately performed his duties, he did not violate rules against unbecoming conduct and unsatisfactory performance.” The arbitrator reduced the punishment to 30 days and See was reinstated.

See filed suit against the City and Chief Medders, claiming violations of his First and Fourteenth Amendment rights.¹²⁵ Medders and the City requested summary judgment and the trial court partially granted that demand, but denied summary judgment “with respect to complaint to the FBI” and “on the retaliation claims to that extent.” Medders appealed.

ISSUE: Is an employee’s sharing matters of public concern protected under the First Amendment?

HOLDING: Yes

DISCUSSION: The Court reviewed the standard for First Amendment claims involving public employees and found that “as a matter of law, See engaged in constitutionally protected activity.” The matters that See discussed with the FBI “were matters of public concern as they involved alleged corruption in police department investigations, grand jury procedures, funding, and dealing with the press.” The Court noted that “[s]tatements exposing possible corruption in a police department are exactly the type of statements that demand strong First Amendment protections.” The Court further noted that there was no “evidence – and Medders does not assert – that See’s statements to the FBI were, in fact, deliberately or recklessly false and, therefore, outside First Amendment protections.” The Court found “no evidence that See’s complaints to the FBI actually impeded the police department’s general performance and operation or affected loyalty and confidence necessary to the department’s proper functioning.”

The Court found that See “sufficiently alleged conduct by Medders that, if proven true, would constitute a violation of his well-established First Amendment rights.” Further, the Court found that such rights were, in fact, well-established. The Court affirmed the trial court’s denial of summary judgment.

¹²⁵ See’s wife also filed suit, claiming loss of consortium.

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NOTES

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)

NOTES REGARDING UNPUBLISHED CASES

FEDERAL CASES:

Unpublished Cases carry a “Fed. Appx.” Or Westlaw (WL) 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).