

Department of
CRIMINAL JUSTICE TRAINING

KENTUCKY JUSTICE AND PUBLIC SAFETY CABINET

2008



Leadership is a behavior, not a position

CASE LAW UPDATES
THIRD QUARTER

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



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 questions concerning legal issues in law enforcement. Questions can now be sent via e-mail to the Legal Training Section at

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

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NOTE:

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

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

KENTUCKY

PENAL CODE - ROBBERY

Gamble v. Com.

2008 WL 3551174 (Ky. App. 2008)

FACTS: On Feb. 8, 2007, Lindgren and Dowdy were working as tellers at a Lexington bank. At about 11:30 a.m., Lindgren saw a man “with his head and face covered enter the bank and immediately pushed her silent alarm.” He approached Lindgren and gave her a note and a plastic bag - the note read “This is a robbery. I have a gun. Quietly empty your drawer fast.” He then repeated the demands verbally. She began to do so, giving him first “small bills from the front” but he demanded “bigger bills.” She included a dye pack as well. The man told her “You just saved your life” and left the bank. Neither of the women ever saw a gun.

Det. Duane responded quickly. He spotted a man wearing a black hoodie (rather than the reported brown plaid jacket) who reported seeing a “young person wearing a brown plaid jacket fleeing behind the post office with pink smoke trailing behind him.” Det. Duane radioed to have someone come and speak with the man in the black hoodie, and went to investigate the report. However, he quickly determined the report was “not valid” and returned, but discovered that no other officer had made contact with the man in the hoodie. Det. Duane was able to track him, using footprints in the snow, to an apartment building. There, Det. Duane waited. A few minutes later, the man emerged, “wearing different clothing.” Det. Duane approached him and asked why he’d changed clothes, and he stated that “his clothing had gotten wet from the snow. Det. Duane asked the man, now identified as Gamble, “if they could step into his apartment and Gamble agreed.”

When they entered, Det. Duane saw a bag of clothes, including a headband, gloves and a toboggan, and discovered that they were dry, “which negated Gamble’s statements that the clothes were wet.” He took Gamble to the bank and looked at surveillance photos, and “recognized the headband on the robber as the one in Gamble’s apartment.” The jacket was found in a trashcan along with the dye pack and some of the money.

Officers returned to the apartment, and received consent to search by an aunt. They found over \$3500 under the couch. Gamble was charged with First-Degree Robbery. Gamble admitted to having been the robber, but denied ever having had a gun. He was, however, ultimately convicted of First-Degree Robbery. Gamble appealed.

ISSUE: Does a deadly weapon (or dangerous instrument) have to be visible to justify the charge of First-Degree Robbery?

HOLDING: No

DISCUSSION: Gamble argued that he was entitled to a directed verdict on the charge of First-Degree Robbery because the prosecution failed to prove he had either a deadly weapon or dangerous instrument at the time of the robbery. The Court, however, noted that it had previously, in *Mitchell v. Com.*, held that

“a reference to a gun and a demand for money were sufficient” to support a conviction for First-Degree Robbery.¹

Gamble’s conviction was upheld.

ARREST

Case v. Com.

2008 WL 2779374 (Ky. App. 2008)

FACTS: On Oct. 24, 2006, Morris, of the McLean County Cabinet for Health and Family Services (CHFS) responded to a complaint involving drug usage in Case’s home, that he shared with Daugherty. Deputy Wilkerson (McLean County SO) went along to assist in the home visit. Deputy Wilkerson also had a warrant for Daugherty. Morris contacted Newman, Case’s parole officer, about their suspicions, and Newman also “had previously received several anonymous phone calls indicating there was drug activity” at the home. (Case’s parole was related to drug charges.) Newman accompanied Morris and Deputy Wilkerson on the visit.

When they arrived, Henderson, Case’s son, answered the door and told them he didn’t believe his father was home. (Both of Case’s vehicles were in the driveway.) Deputy Wilkerson asked about Daugherty, and Henderson stated “she was present, but that the officers could not come in without a search warrant.” Deputy Wilkerson “responded that he could come in because he had an arrest warrant,” and he and Newman entered.

As Daugherty was being arrested, the officers spotted a joint, a pipe and pills on the dresser. Newman also noticed a closed door with a light on behind it, and a shadow under the door. Newman called out Case’s name and he responded to “give him a minute.” Newman opened the door and found Case sitting on the toilet and apparently trying to hide something in his hand. Newman saw a syringe and black bag, later found to contain methamphetamine. In searching the room, Newman and Wilkerson found more syringes and drug paraphernalia under the bed.

Case was charged, and appealed. When that was denied, he took a conditional guilty plea, and appealed.

ISSUE: Is an entry justified when officers have an arrest warrant for one of the residents?

HOLDING: Yes

DISCUSSION: Case argued that the initial entry was unjustified, and that “the search of his residence was not authorized by the arrest warrant for Daugherty. The Court noted that the “United States Supreme Court has held that an arrest warrant founded on probable cause carries with it the limited authority to enter a residence where the subject of the warrant lives when there is reason to believe the suspect is within.”² When Henderson agreed that Daugherty was there, the entry was proper.

¹ See 231 S.W.3d 809 (Ky. App. 2007).

² Payton v. New York, 445 U.S. 573 (1980).

Case also argued that the search was not based upon reasonable suspicion, let alone probable cause. He agreed that a "parole officer can conduct a warrantless search if he has reasonable suspicion that there is a violation of a condition of parole, but argued that Newman lacked this, as Case's "recent drug screens had all been negative."

The court found that Case's "status as a parolee diminished his expectation of privacy."³ The Court agreed that the probation officer had a reasonable belief that Case was "engaged in illegal activity" and that the search was thus valid.

The Court found the denial of the motion to suppress was appropriate, and upheld Case's plea.

SEARCH & SEIZURE - ID

Ervin v. Com.

2008 WL 3165901 (Ky. App. 2008)

FACTS: In Nov., 2006, "Ervin was standing near a pay phone ... in Lancaster ... when she was approached by Garrard County Sheriff's Deputy Keith Addison." He asked if she needed help, and she replied that she was simply trying to get a ride. He parked nearby and watched her. Suspicious, the deputy pulled up to her again and asked her "if she was having any luck finding a ride." She said she was not. He asked her for ID, and asked her if she had any warrants, which she denied. He asked if she'd ever been arrested, and she admitted that she had. She gave him consent to search her person, and he found nothing. She gave him permission to search her purse, but admitted that there was a crack pipe inside. He found the pipe, along with other items suggestive of crack use, and confiscated them. Because Ervin agreed to work with the police, however, she was not arrested.

However, for reasons unexplained by the opinion, a warrant was later issued, and she was arrested three weeks later. She requested suppression, which the court denied. Ervin took a conditional guilty plea, and appealed.

ISSUE: Does asking for ID make an encounter a "seizure?"

HOLDING: No

DISCUSSION: Ervin argued that her "encounter with Addison constituted a seizure for Fourth Amendment purposes," particularly when he asked her for ID. The Court, however, disagreed, finding that officers "may pose questions, ask for identification, and request consent to search luggage - provided they do not induce cooperation by coercive means."⁴ In this case, the Court found nothing to suggest that "Addison coercively obtained Ervin's consent to the searches." The Court agreed her consent to the search was voluntary, and upheld her plea.

³ Griffith v. Wisconsin, 483 U.S. 868 (1987).

⁴ See Drayton v. Ohio, 536 U.S. 194 (2002).

SEARCH & SEIZURE - SEARCH WARRANT

Scott v. Com.

2008 WL 2955413 (Ky. App. 2008)

FACTS: Prior to Oct. 13, 2005, Det. Gootee (Louisville Metro PD) received information that Scott was trafficking at his apartment on Lee Street. A CI told him that Scott "stored cocaine at both of the apartments at that address and moved the cocaine back and forth between them." A warrant was requested on Oct. 13, and indicated "among other things that the informant had seen a large quantity of cocaine at Scott's address "in the last 24 hours." The detective also stated that he had seen Scott using both the front and side doors at that address.

The warrant was issued, and executed on Oct. 22. When no one responded to their knock on the downstairs apartment door after 20 seconds, the door was battered open. Scott, Smith and a third person were found in that apartment. Scott fired one shot, but no one was injured, and Scott dropped the gun when he realized they were police. He offered no other resistance. Smith, however, kicked out an AC unit and fled, but was quickly captured. He had "jettisoned" a large quantity of drugs, apparently. Drugs were found in the other apartment, however, and Scott was charged. (Apparently Scott controlled both apartments.)

"Scott testified at his suppression hearing that his weight in October, 2005 at the time of the search was 470 pounds and that he was suffering from three hernias. He testified that his "physical condition prevented him from negotiating the steps between his apartment and the other apartment in the duplex." He claimed that he hadn't been in the other apartment since August, and that he only left his own apartment occasionally. Smith claimed ownership of some of the drugs found in the apartment, but did not testify because he had disappeared.

ISSUE: May an officer's verbal statement be used to correct a defect in a warrant?

HOLDING: Yes

DISCUSSION: Scott first argued that the affidavit was stale, given that the warrant was not issued until 9 days after the information was provided. Det. Gootee testified that the 24 hours before mentioned in that affidavit referred to 24 hours before the warrant was prepared, not Oct. 13. The trial court found that the officer's statement cured any defect in the warrant.

The Court found that the trial court was correct in denying Scott a hearing to challenge the warrant.

Pride v. Com.

2008 WL 4092872 (Ky. App. 2008)

FACTS: On Nov. 9, 2006, KSP sought a warrant to authorize searching Pride's home in Union County. The warrant was based on the statement of a CI which indicated that Pride told the informant more than one year earlier that Pride had "240 marijuana plants and priced the marijuana at \$600 per quarter pound." However, the informant did not know exactly where the plants were located.

Det. McKinney confirmed Pride's home address and found convictions for drug trafficking. Det. McKinney later confirmed the informant's credibility. Further, a detective had gotten "24 months of utility records for Pride's residence and two similar residences" in the area and found Pride's usage to be "substantially greater than the similar residences."

The warrant was executed on the same day and they found 26 pounds of loose marijuana, a quantity of packaged marijuana, along with items used to grow marijuana.

Pride was indicted and sought suppression. Pride challenged the staleness of the informant's information, and also challenged the validity of the electricity survey - arguing that one of the comparison homes was vacant and the other was occupied by an elderly couple. (In contrast, he had 3 children at home, outdoor lighting and a hot tub.) The trial court denied the motion. Pride took a conditional guilty plea, and appealed.

ISSUE: May stale information be used to support probable cause for a search warrant?

HOLDING: No (but see discussion)

DISCUSSION: First, the Court examined the assertion that the CI's information was stale - in that it indicated that "more than one year earlier that Pride possessed 240 marijuana plants." It concluded that statement, standing alone, did not establish probable cause. Next, the Court looked to the electrical usage. The testifying detective admitted he did not know anything about the two residences chosen for comparison, he had simply selected them "during the drive-by." The Court agreed that both homes would use less electricity than Pride's home. The Court noted that Pride's usage "fell within the range that KU⁵ would reasonably anticipate for the residence." (Further expert witness testimony confirmed that.)

Although the Court agreed that KSP detectives would not be held to know what the electrical expert might know, the Court found that "the comparison of Pride's electrical usage with that of the other two homes was not so compelling as to establish probable cause."

The Court found that the evidence was insufficient to support the issuance of the search warrant, and reversed the trial court's decision to deny the suppression motion.

Cabbil v. Com.
2008 WL 3875641 (Ky. App. 2008)

FACTS: On Dec. 20, 2004, Det. Doyle (Louisville Metro PD) received a CI tip that a described person, named Junne, was trafficking out of a specified apartment. The CI was considered reliable by that detective. The CI stated that he or she had been in the apartment in the previous 24 hours and "had seen illegal drugs packaged for sale."

Det. Doyle initiated surveillance. She watched a person enter the apartment and leave in a short time. That person was stopped for reckless driving and found to be in the possession of drug paraphernalia and heroin residue. He admitted to having gone to the apartment to buy drugs, had bought drugs from "Junne" and had bought from him before. He also stated he had seen a "quantity of heroin packets for sale."

⁵ Kentucky Utilities, the electricity provider.

Det. Doyle completed a search warrant, listing "Junne Crawford" as the subject of that warrant. She later testified that she knew of another dealer by that name, and that he and Cabbil were not the same person. She had mistakenly included "Crawford" on the affidavit. The warrant was issued, and authorized the search of the apartment and a specific vehicle. Det. Doyle was unable to identify the signature of the judge on the warrant, but testified that she had, in fact, personally witnessed a district court judge sign that warrant.

After getting the warrant, they located the vehicle (and Cabbil) and swooped down on it - using multiple vehicles to box in the suspect vehicle. Cabbil, however, drove his car into one of the police vehicles. He was extracted from the car and upon searching, the officers found packaged heroin

Cabbil was **indicated**, took a conditional guilty plea, and appealed.

Comment [D1]: indicted

ISSUE: Does a search warrant for a car cover the occupants as well?

HOLDING: Yes

DISCUSSION: Cabbil first argued that the search warrant was invalid, as he was "not named as a subject of the search and because the listed age was incorrect." The trial court had found that Det. Doyle simply made a mistake by adding the Crawford name, and was accurate enough, even though the age provided was wrong. (Cabbil was 57, but the subject was described as "in his 40s.") He further argued that since he was stopped some 3 miles from the house that the warrant did not cover him, but the Court noted that the warrant in this case also specifically covered the vehicle he was driving. Further, because Cabbil was in the car when it was stopped, the search warrant covered his person as well.

Finally, although it was unfortunate that Det. Doyle could not recall who had signed the warrant, the lengthy delay between the issuance of the warrant and the hearing mitigated her inability to remember such details.

Cabbil's plea was upheld.

SEARCH & SEIZURE - CONSENT

Green v. Com.
2008 WL 2696928 (Ky. App. 2008)

FACTS: On March 3, 2006, Officer Wilhoite⁶ passed Green's vehicle and noticed it had "excessively dark window tint." He turned and followed Green as he drove into an apartment complex and parked. Officer Wilhoite ran the tag, and learned that Green (the owner of the car) had a suspended OL. As Green got out and walked toward the building, Wilhoite "approached Green and asked if the two could talk." He had not turned on his emergency lights. Green acknowledged that the tint was too dark and said he would get it fixed. Officer Wilhoite testified at the later suppression hearing that he "became suspicious of other criminal activity because Green appeared nervous during their conversation and was 'blading' his

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⁶ The opinion says Officer Wilhoite is a "Franklin County Police Officer" - it is not clear whether he is a deputy sheriff or a Frankfort city police officer.

body.”⁷ The officer asked about illegal drugs or weapons, and Green denied having anything. Green consented to a search, but before Officer Wilhoite could start to do so, “Green began ‘searching himself’ by putting his hands into his pockets and pulling out items” - unfortunately, he pulled out a bag of marijuana. Officer Wilhoite then handcuffed Green and continued searching, finding cocaine.

Realizing that the situation had “turned into something more serious,” Wilhoite turned on his video camera. He read Green his Miranda warnings, and Green agreed that he understood the rights. Wilhoite asked Green “whether he thought his window tint was too dark, and Green replied that it was.” He also asked if he consented to a search, and about the marijuana and cocaine found, and Green apparently agreed as well, although his responses were inaudible and his back was to the camera. He then “turned around and asked for a lawyer.”

Green stated, later, that he did not consent to the search and the officer “pushed up on his pockets causing the marijuana to fall to the ground.” Green also stated that after he was arrested, the officer “told him they were going to go in front of his police cruiser camera, and Officer Wilhoite explained to him what he was supposed to say.”

At the suppression hearing, the trial court agreed that the stop was legal, as it resulted from both the illegal tint and the suspected suspended OL. It further held that the search was pursuant to a valid consent. Green took a conditional guilty plea and appealed.

ISSUE: Is an apparently uncoerced confession admissible?

HOLDING: Yes

DISCUSSION: Green argued that his consent, if any, was coerced, and that he was confused by the “dress rehearsal” just before Wilhoite turned on the camera. The Court noted that the trial court was in the best position to judge credibility of witnesses, and it chose to believe Wilhoite over Green. There was no inconsistency in Wilhoite’s testimony, and the video showed Green agreeing that he had given consent.

The Court upheld the trial court’s decision not to suppress.

Bentley v. Com.
2008 WL 2696149 (Ky. App. 2008)

FACTS: On June 15, 2005, Deputy Hale and Officer Harrison⁸ “visited Bentley’s camper trailer after there had been a complaint of methamphetamine manufacturing on the property and to serve an outstanding warrant on Bentley’s girlfriend, Rachel Lantos.” At that location, they found a center driveway leading to a house on one side and a trailer on the other. There was a “garbage pile ... behind the home and adjacent to the trailer.” When the officers arrived, they both smelled ether. Officer Harrison found the property owner, Bentley’s mother, at the home, bedridden. Her daughter, Mills, later confirmed that her mother agreed to a search of the property.

⁷ The Court found it necessary to refer to the videotape to understand the meaning of “blading.”

⁸ Although the case does not indicate the officer’s agency, the crime took place in Laurel County.

The officers searched the property. In the garbage pile, they found “components typical to methamphetamine manufacturing: a camp fuel can, a linseed oil can, a denatured alcohol can, a plastic bottle, lithium strips removed from batteries, a plastic cap with a tube inserted that acts as a gas generator, coffee filters, paper towels, blister packs, a cold pill box, and a Pyrex baking pan from which samples were taken that later tested positive for methamphetamine and pseudophedrine.” Bentley was charged with manufacturing methamphetamine, and Lantos arrested on the outstanding warrant, for possession of methamphetamine. Three others at the location were charged with respect to manufacturing, as well.

Bentley requested suppression, arguing that the search was warrantless and unlawful. The trial court denied the request following a hearing. At trial, Lantos testified that they were, in fact, cooking methamphetamine when the police arrived. Bentley claimed to not live in the trailer, which his sister confirmed.

Bentley was convicted, and appealed.

ISSUE: Is a consent from an invalid, who is otherwise mentally competent, valid?

HOLDING: Yes

DISCUSSION: Bentley continued to argue, on appeal, that the search was unlawful. The court found however, that the “arresting officers had training and experience in investigating methamphetamine labs.” Both were quite familiar with the smell and the items associated with methamphetamine labs. In addition, the Court found that despite “being elderly and recently out of the hospital, Ms. Bentley was able to communicate with and understood the officers.” The trial court agreed her consent was valid.

Bentley’s conviction was affirmed.

Logan v. Com.
2008 WL 3165761 (Ky. App. 2008)

FACTS: Sometime during June, 2006, Officers Danta and Francis⁹ visited Logan’s home, investigating a burglary. They asked Logan and his roommate, Perry, if they could search the apartment. However, Logan later contended that “his permission was limited to a search for a DVD/VCR combination” but the officers disagreed, claiming that they “made it clear to Logan that they were also searching for jewelry.” “During the search, Logan made several comments to the officers that they would not find a DVD/VCR combination in certain objects” - comments that he later claimed “constituted a request to cease the search.” The officers found two medication bottles hidden in the couch cushions, but Logan had a prescription matching only one of the bottles.

Logan was charged with possession of controlled substances in both the first and third degrees. He requested suppression and was denied. Logan took a conditional guilty plea, and appealed.

ISSUE: Is failure to object to an ongoing search (as exceeding the scope) tacit approval for the search?

⁹ From an unnamed Boyd County agency.

HOLDING: Yes

DISCUSSION: Logan argued that the officers “were limited by the consent” and that they “exceeded the scope of the consent that was given.” The officers contended that they were given a “general consent” to search. The trial court had found that Logan “had several very specific opportunities to object to the search and did not” and that “Logan’s failure to discontinue the search after the officers began searching small spaces negated the testimony that he was unaware the officers were search for something other than a DVD player.”

The Court agreed that the trial court’s findings were without error, and upheld the plea.

SEARCH & SEIZURE - VEHICLE STOP

Duncan & Stephens v. Com.
2008 WL 4091038 (Ky App. 2008)

FACTS: On Sept. 13, 2006, the arresting officer (in Clark County) was on patrol “when he noticed a white Thunderbird in front of him at a stop sign.” The officer testified later that the “occupants were ‘all over the vehicle’ so he decided to follow the car.” (The Court noted “that the officer did not testify that the occupants’ movement in the vehicle created a traffic hazard, i.e. occupants changing seating positions in a moving vehicle.”) As they entered I-64, the officer “pulled up alongside the vehicle and observed Stephens ‘slumped over’ against the passenger door frame.” As it moved from I-64 to the Mountain Parkway, and after he spoke to his supervisor¹⁰, the officer caught up with the Thunderbird and made a traffic stop.

The officer asked the driver (Duncan) for his license, and learned that he was driving on a suspended OL. Duncan was arrested and secured. The officer then had Stephens get out, and realized she was intoxicated. However, he did not arrest her until another officer arrived. The officer searched the car and found nothing. Over the next 50 minutes, “the officer repeatedly asked Stephens to hand over the drugs, threatened her with arrest, and even told her that he had ‘four troopers on the way with a dog, and when they get here, they are going to give you a good enema.’”¹¹ Eventually, Stephens confessed that she had Oxycontin in her clothing. She was then given Miranda warnings.

At the hearing, the trial court reviewed the cruiser video, and then found the officer had probable cause to make the stop. As such, the evidence found incident to the arrest was upheld. Duncan and Stephens appealed.

ISSUE: Is a sleeping passenger sufficient justification to make a traffic stop?

HOLDING: No

DISCUSSION: The Court noted that its “review of the record reveals that the officer never articulated any violation of law to provide grounds to stop the vehicle.” The officer reasoned that he was concerned about

¹⁰ The officer’s statement to the supervisor was “I got behind a vehicle from Illinois, a white Thunderbird. It’s a nice one, with two black guys in it and there’s a girl slumped over in the passenger seat...there’s a white girl slumped over in the passenger seat, I just don’t like it. I think they’re running drugs.”

¹¹ The entire arrest, and these statements, were captured by the officer’s video camera.

the movement in the vehicle and that he “feared for Stephen’s safety because she appeared to be ‘passed out.’” The Court found this insufficient to justify the stop, even under reasonable suspicion.

The Commonwealth argued that the “stop was legal based on the community caretaking function articulated in Cady v. Dombrowski.”¹² Our court addressed the applicability of the community caretaking function in Poe v. Commonwealth,¹³ The Court did not agree that it was unusual for vehicles to “have a sleeping passenger.” It stated that “[a]bsent some indication of distress from the passenger, allowing the officer to stop a vehicle with a sleeping passenger is questionably an infringement upon ... Constitutional rights.” “For the stop of the vehicle to have been proper, the officer must have had specific and reasonable facts leading to a reasonable belief that a citizen is in need of assistance.”

Further, the movement in the car was not enough to support the stop. The case was vacated and remanded back to the trial court for further proceedings.

Varvel v. Com.
2008 WL 2779889 (Ky. App. 2008)

FACTS: On June 2, 2006, at about 1:12 a.m., Deputy Crabtree (McCracken County SD) noticed Varvel “driving with a non-functioning taillight.” He signaled Varvel to stop, and Varvel did. He explained the reason for the stop and asked for Varvel’s, and his passenger’s, OLs. He also asked for proof of insurance. As Deputy Crabtree was checking the IDs, Varvel got out (with permission) and fixed the taillight. Deputy Crabtree asked Varvel where he was going, and Varvel told him he was going home from Wal-Mart. Realizing the direction of travel was wrong, Crabtree “inquired further.” Varvel then admitted “he was actually on his way to an adult bookstore.” Deputy Crabtree asked for permission to search, but the record was unclear as to whether that was before or after he returned the licenses. Varvel declined permission. The deputy, a K-9 handler, ran his dog around the car, and the dog alerted. Eventually, a white powder, which was cocaine, was found in the passenger’s purse, but Varvel claimed ownership.

Varvel was arrested, and requested suppression. When that was denied, he appealed.

ISSUE: May suspicion developed during a traffic stop justify the extension of the traffic stop?

HOLDING: Yes

DISCUSSION: Varvel did not contest that the initial reason for the stop was valid. However, Varvel argued that once the purpose of the stop was complete, he should have been released. The Court noted that “[a]lthough there is no Kentucky case law directly on point, the Sixth Circuit Court of Appeals has noted that ‘once the purpose of the traffic stop is completed, a motorist cannot be further detained unless something that occurred during the stop caused the officer to have a reasonable, articulable suspicion that criminal activity was afoot.’”¹⁴ The Commonwealth countered with its assertion that “Deputy Crabtree did not need reasonable, articulable suspicion to detain Mr. Varvel for the dog sniff because the short detention

¹² 413 U.S. 433 (1973).

¹³ 169 S.W.3d 54 (Ky.App.2005).

¹⁴ U.S. v. Smith, 263 F.3d 571 (6th Cir. 2001) quoting U.S. v. Hill, 195 F.3d 258 (6th Cir. 1999).

of the dog sniff did not unreasonably expand the scope of the lawful detention.”¹⁵ However, in this case, the deputy did not issue a traffic citation for the offense, since it was corrected immediately. Although the Court was careful to state that it was not finding, “that once an officer tenders a license back to the driver of a vehicle the lawful purpose of a traffic stop is [always] complete.” In this case, however, “under the current set of facts, it is apparent that Deputy Crabtree had resolved the initial purpose of the stop when he tendered the licenses back to Mr. Varvel.” Further “[s]ince it is apparent from Deputy Crabtree’s testimony that he had fulfilled the lawful purpose of the traffic stop when he handed back the licenses, Deputy Crabtree did indeed need reasonable, articulable suspicion that criminal activity was afoot to lawfully detain Mr. Varvel further and conduct the dog sniff.”

The trial court had found that the dog sniff was appropriate because: “(1) Mr. Varvel appeared nervous, (2) Mr. Varvel was driving in a direction opposite of his stated destination, and (3) Mr. Varvel changed his previously stated travel plans.” The Court found that most citizens are nervous when being stopped by the police, and discounted that factor, further acknowledging that there was no evidence before it as to how Deputy Crabtree sensed Varvel was, in fact, nervous. With respect to the discrepancy in his original stated travel plans, the Court also found it understandable that Varvel was embarrassed about his destination, and it was a “normal reaction to want to avoid telling the officer” where he was actually going.

The Court did not find that the circumstances met the necessary standard to maintain the stop, and remanded the case back with an order that the evidence be suppressed as the fruit of the poisonous tree.

Com. v. McKinney & Prater
2008 WL 4091679 (Ky. App. 2008)

FACTS: On April 27, 2006, Det. Bradley (UK PD) received an anonymous tip “regarding possible drug activity at some apartments on campus.” The caller contacted him again, several hours later, and arranged to talk to Det. Bradley in person. The caller, Wickstrom, and his girlfriend, Lea, told Det. Bradley that Lea lived with McKinney and that both McKinney and her boyfriend, Prater, were using drugs, and that the circumstances indicated they might be trafficking.

Lea gave consent to search her own bedroom and the apartment common areas. Det. Bradley, along with Det. McPhearson, went to the complex, and Wickstrom directed them to a “blue car containing a man and a woman.” Det. Bradley followed the car, and later stated he believed the driver recognized him as police, because he “sped through the parking lot at a high rate of speed.” Both officers chased the suspect vehicle and Bradley was able to get it stopped. Det. Bradley drew his weapon because he was concerned that the driver (Prater) was making suspect movements. Both occupants were ordered out of the car and patted down. He visually checked the car for weapons.

Det. McPhearson ran his drug dog, Gus, around the car, and Gus alerted. They found cocaine in McKinney’s purse - but she claimed it was placed there by Prater. Marijuana was also found. McKinney was given her Miranda rights and she waived them, although she later claimed she hadn’t been given those rights.

Both filed motions to suppress, and both were granted that suppression by the trial court. The Commonwealth appealed.

¹⁵ See Johnson v. Com., 179 S.W. 3d 882 (Ky. App. 2005).

ISSUE: May information from an identified informant support a traffic stop?

HOLDING: Yes

DISCUSSION: The Commonwealth argued that “there was reasonable suspicion to make an investigatory stop of the vehicle based upon the citizen informants’ and the officer’s observations.” Further:

The Commonwealth outlines multiple factors which it claims gave Bradley a reasonable and articulable suspicion that McKinney and Prater had committed or were about to commit a crime. Those factors are: Lea said she knew McKinney and Prater used cocaine; Bradley verified that Lea roomed with McKinney; Lea and Wickstrom stated that there was a high volume of people in and out of the apartment; Lea and Wickstrom stated that McKinney and Prater had exchanged duffel bags that morning; Lea and Wickstrom witnessed McKinney and Prater with plastic baggies the day of the arrest; Lea and Wickstrom had stated that McKinney and Prater drove a blue car before Bradley encountered McKinney and Prater; Wickstrom indicated to Bradley that the blue car leaving the apartment parking lot was that belonging to McKinney and Prater, and the driver of the car acted suspiciously, as if trying to avoid an encounter with the police, by leaving the apartment parking lot at a high rate of speed.

In addition, the informant was identified, and thus entitled to a “greater presumption of reliability” than an anonymous informant. The Court agreed that the officers had reasonable suspicion to make the stop.

Further, the Court agreed that the dog sniff was justified, given that the lapse of time between the stop and the utilization of the dog was “no more than two minutes.” Once Gus detected drugs, the officers had “probable cause to search making a search warrant unnecessary.”

However:

The Commonwealth next argues that there were also grounds for a valid traffic stop and that it does not matter whether the stop was pretextual. In support of its finding that the traffic stop was not valid, the trial court cited several reasons: the speed bumps in the apartment parking lot would have precluded speeding; Bradley failed to initiate his vehicle’s emergency equipment at the time he alleges that Prater sped away from him; the time of day and high volume of traffic most likely made speeding difficult if not impossible; McPherson was unable to get any closer to Bradley than five to six cars away due to the heavy traffic; Bradley failed to request personal identification, registration or insurance from Prater or McKinney; and Bradley failed to issue a citation for speeding, fleeing or evading, or excessive window tinting (McKinney acknowledged excessive window tinting). The trial court is vested with the discretion to determine the credibility of witnesses and draw reasonable inferences from their testimony. *Com. v. Whitmore*.¹⁶ We hold that substantial evidence supports the trial court’s findings that this was not a valid traffic stop.

¹⁶ 92 S.W.3d 76, 78 (Ky. 2002) see also RCr 9.78.

Finally, the Court found that the issue of the Miranda warnings was not actually resolved by the trial court. Since the case was being remanded back, that issue was also returned to the trial court for additional findings.

The Court vacated part of the judgment, but affirmed that the stop was valid as a Terry stop, and that the evidence found as a result of the stop should not have been suppressed.

Taylor v. Com.
2008 WL 2779885 (Ky. App. 2008)

FACTS: On July 11, 2006, Det. Ford (Lexington PD) “participated in a ‘buy and ride’ drug purchase.” Undercover officers were fitted with a recording device to capture any transactions. A female approached and the officer asked for \$20 worth of cocaine. She told him to wait and approached Taylor, who gave her crack cocaine. When the officer gave her the money, she took that money to Taylor.

Taylor got into his car and drove away. He was stopped by Officer Murdock, ostensibly for “making a left turn without using his turn signal.” Murdock was able to get Taylor’s identification in this way. Taylor was eventually indicted, and moved to suppress, arguing that the “evidence of his identity obtained as the result of his traffic stop, asserting that the stop was a violation of his constitutional rights.” The trial court denied his motion to suppress, and Taylor took a conditional guilty plea. He then appealed.

ISSUE: Are stops based on minor traffic offenses lawful?

HOLDING: Yes

DISCUSSION: Taylor argued that he did use his turn signal, as required, and that the stop was improper. The Court found Murdock to be more credible, and found that the “non-use of a turn signal was a reasonable purpose for stopping Taylor.”

Taylor’s plea was upheld.

Stigall v. Com.
2008 WL 4182363 (Ky. App. 2008)

FACTS: On the evening in question, Officer Lynn (Lexington PD) was on patrol at the Coolivan complex, investigating residents’ complaints of drug activity. He approached a suspicious vehicle (a truck), surrounded by a group of people. When he approached, the truck pulled away and the group dispersed. Lynn realized that neither of the two occupants of the truck were wearing a seatbelt. He called for backup and followed. When his backup caught up to him, Officer Lynn turned on his blue lights and pulled over the vehicle. Stigall (the driver) and the passenger were still not wearing seatbelts

Lynn asked Stigall for his license and proof of insurance, and Stigall stated his license was suspended. Upon checking, Lynn learned Stigall’s license had been suspended for DUI. Stigall was arrested (as well as getting a warning citation for the failure to wear a seatbelt). During the search incident to the arrest, Lynn found cocaine and a crack pipe, and charged him, but those charges were dismissed in the trial court. He was indicted on the suspended license, however, as well as PFO 2. Stigall requested suppression, and was denied. He took a conditional guilty plea, and appealed.

ISSUE: Does failure to wear a seat belt justify a traffic stop?

HOLDING: Yes

DISCUSSION: Stigall argued that Lynn lacked sufficient reasonable suspicion to justify the traffic stop, as he observed nothing criminal. He characterized the seat belt charge as pretextual, and equated it to the situation in Garcia v. Com., a traffic stop for a cracked windshield.¹⁷ However, the Court noted that the cracked windshield in question did not actually violate the law, whereas Stigall's failure to wear the seatbelt was, in fact, a primary offense, although at the time, it was prior to the date for which it could be charged as such. However, the Court noted that traffic stops for the offense were permitted. Lynn properly gave Stigall a warning citation for the offense.

The Court further found that pretext stops, under Whren v. U.S.¹⁸, had already been upheld as valid by Wilson v. Com.¹⁹ Stigall's plea was upheld.

EVIDENCE / TRIAL PROCEDURE - MISSING EVIDENCE

Warren v. Com.
2008 WL 2941126 (Ky. App. 2008)

FACTS: Warren was involved in a fight with the victim, Smith - that fight proved fatal. Warren was interviewed by Det. Murrell (KSP) at the Cynthiana PD. Warren admitted involvement in the fight, but claimed he acted in self defense. Det. Jaskowiak did not find any injuries on Warren's head, as he had claimed. He took photos of Warren's body, but the lab returned the photo card indicating that the "film was blank due to a camera malfunction" - it apparently did not advance. Warren was not taken to the hospital for further examination.

Warren was indicted on First-Degree Manslaughter. He was eventually convicted of Reckless Homicide, and appealed.

ISSUE: Does all missing evidence require a missing evidence instruction?

HOLDING: No

DISCUSSION: Warren first argued that he had been entitled to a "missing evidence instruction" because of the photos. The Court noted that "a 'missing evidence' instruction is designed to cure any due process violation attributable to the absence of exculpatory evidence by a less onerous remedy than dismissing or suppressing relevant evidence."²⁰ Missing evidence instructions are only necessary when the Commonwealth's failure to preserve or collect evidence was intentional and "the potentially exculpatory nature of the evidence was apparent at the time it was lost or destroyed." Thus, absent the

¹⁷ 185 S.W.3d 658 (Ky. App. 2006).

¹⁸ 517 U.S. 806 (1996).

¹⁹ 37 S.W.3d 745 (Ky. 2001).

²⁰ Estep v. Com., 64 S.W.3d 805-810 (Ky. 2002).

Commonwealth's engagement in some degree of "bad faith," a defendant is not entitled to a missing evidence instruction."

In this case, through no fault of the detective, no photos were available. Finding no bad faith, the court found no reason for the instruction to have been given.

Warren's conviction was affirmed.

EVIDENCE / TRIAL PROCEDURE - VIDEO

Morris v. Com.

2008 WL 2696889 (Ky. App. 2008)

FACTS: On June 6, 2006, Morris entered a Louisville convenience store and left without paying for items. An employee, Taylor, followed him outside. Morris turned toward him, lifted his shirt to display a gun, and Taylor returned to the store. He called Louisville Metro PD.

Det. Nauert obtained a copy of the surveillance video, on CD. He recognized Morris, and prepared a photo pak to present to Taylor. On June 26, Taylor was unable to initially make an ID, but after watching the surveillance video, he identified Morris. Morris was arrested for First-Degree Robbery.

During trial testimony, Det. Nauert stated "as Mr. Taylor said, he turned, raised his shirt, showed him what he believed was a handgun. That's where he used the threat of physical force." [Nauert] was making that testimony as the video played, in effect, narrating it.

ISSUE: —May officers narrate a video of which they have no personal knowledge, during _____ testimony ___ in court?

HOLDING: No

DISCUSSION: Morris argued that the "detective's testimony was improper because the trial court allowed him to narrate the video although he did not have first-hand, personal knowledge of its contents." The court, however, ruled that "[p]olice are permitted to give simultaneous commentary on crime scene surveillance footage."²¹ That "testimony, however, is limited to video footage within their knowledge and experience." In this case, the detective had no personal knowledge, and such narration was improper.

Morris also argued that the detective "gave improper expert testimony when he opined that Morris showed a "threat of force," which is an element of first-degree robbery." The Court agreed that although police are often permitted to testify as experts, that "Detective Nauert's testimony was outside the realm of permissible police expert testimony." Again, the testimony was ruled improper. The Court also agreed that his statement "improperly bolstered" Taylor's testimony, in that it "directly referenced and supported Taylor's testimony."

²¹ Mills v. Com., 996 S.W.2d 473 (Ky. 1999).

However, the Court concluded that the mistakes were not so egregious as to warrant a mistrial, given that the jury was able to actually watch the video and make their own conclusions - finding that "the video footage is such damaging evidence that it renders the detective's statement significantly less harmful."

Morris also objected to the introduction of Taylor's identification, because it was made after he was able to watch the surveillance footage. The trial court found it permissible, even though "Taylor's memory was only refreshed by the surveillance footage." The Court concluded it led to a "low risk of misidentification."

Morris's conviction was affirmed.

EVIDENCE / TRIAL PROCEDURE - TESTIMONY

Henson v. Com.
2008 WL 3890041 (Ky. 2008)

FACTS: On July 23, 2004, Deputy Kennedy²² was the first on the scene to a serious crash. He found Henson "lying on the ground about two feet away from the driver's side of the blue Pontiac with his feet at the driver's side door." That door was open, but the passenger door, on the same side, was closed. Deputy Kennedy saw a number of beer cans, some full and some empty scattered about, and a cooler containing beer was found in the car. Four occupants in the car, including Henson, the driver, were seriously injured; Stephens was killed. Henson, the driver, was found to have a BA of .27.

Det. Rice, also of the Sheriff's Office, responded to the scene because it was a fatal accident. He was briefed about "what was known about the accident up to that point." As the accident reconstructionist for the agency, he prepared a "fatal summary" - which he was required to complete within a few hours of the wreck. In that summary, he indicated that Henson had been ejected through the driver side window and suffered severe injuries as a result.

Later, however, he concluded that Henson had gotten out of the vehicle on his own, and his actual final report reflected that conclusion. At trial, the issue of the initial report was brought up as being mistaken, because the driver-side window was not broken and was halfway down, leaving insufficient room for Henson's body to have been ejected. Det. Rice testified that he learned after the time he wrote the final report that there was a witness to the actual wreck, and that witness provided him information that was not incorporated by amendment in the final report. That testimony triggered an objection, because the witness statements were not provided to the defense during discovery, and thus came as a surprise. The Court denied the defense argument, saying that they had an opportunity to cross-examine Det. Rice about why he hadn't amended his initial report to reflect the change of opinion. Det. Rice stated that he didn't think Henson's position was significant to the actual cause of the wreck.

²² Although the opinion states that the deputy is a member of the "Shelbyville Sheriff's Department," the context indicates he is with the Shelby County Sheriff's Office.

Henson was charged, and ultimately convicted, of Manslaughter (Second-Degree), Assault, DUI and related offenses. He appealed.

ISSUE: Is an officer required to disclose non-exculpatory oral statements?

HOLDING: No (but see note)

DISCUSSION: Henson argued "RCr 7.24(2) authorizes "pretrial discovery and inspection of official police reports, but not of memoranda, or other documents made by police officers and agents of the Commonwealth in connection with the investigation or prosecution of the case, or of statements made to them by witnesses or by prospective witnesses (other than the defendant)." In Lowe v. Com., the Court stated that the RCr 7.26(1) provides that:

[T]he attorney for the Commonwealth shall produce all statements of any witness in the form of a document or recording in its possession which relates to the subject matter of the witness's testimony and which (a) has been signed or initialed by the witness or (b) is or purports to be a substantially verbatim statement made by the witness. Such statement shall be made available for examination and use by the defendant.²³

The Court noted that the prosecution had no written or recorded statement from Baxter, the witness, but he was included in the witness list. The Court noted, however, that in Yates v. Com., it had held that the Commonwealth had no duty to advise the defendant of information from the officer not contained in his written report.²⁴ In that case, the omitted information was not exculpatory, and in fact, the information in the case at bar was not exculpatory, either.

Henson's conviction was affirmed.

NOTE: *Officers should, however, ensure that the prosecutor is aware of any such statements made by witnesses.*

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EVIDENCE / TRIAL PROCEDURE - AUDIO RECORDINGS (HEARSAY)

Moore v. Com.
2008 WL 3890039 (Ky. 2008)

FACTS: Moore was on trial for the beating death of Blakey, in Lee County. During the investigation, Det. Devasher (KSP) interviewed Moore. Initially, Moore claimed to have been passed out during the assault by others on Blakey, but eventually, he changed his story. During the interview, Det. Devasher repeatedly accused Moore of lying. This tape, in its entirety, was eventually played for the jury. The Court admonished the jury that the statements made by the trooper were "not made for the truth of what is being said in them."

Moore objected, but was denied. Eventually he was convicted, and appealed.

²³ See Lowe v. Com., 712 S.W.2d 944 (Ky. 1986).

²⁴ See 958 S.W.2d 306 (Ky. 1997).

ISSUE: May officers accuse a suspect of lying during an interrogation?

HOLDING: Yes

DISCUSSION: The Court agreed that “an interrogator’s recorded statements that suggest a suspect is lying may be retained ‘in the version of the interrogation recording played for the jury’” because these comments “provide a context for the answers given by the suspect.”²⁵ The Court properly gave a limited admonition to that effect. Further, the Court agreed that Det. Devasher’s statements “are a legitimate, even ordinary, interrogation technique, especially when a suspect’s story shifts and changes.”

After resolving other issues, the Court upheld Moore’s conviction.

Manns v. Com.
2008 WL 3890350 (Ky. 2008)

FACTS: On Feb. 9, 2005, Det. Combs, an undercover officer, encountered Manns. They met in Salyersville, and Manns “agreed to help the detective obtain some oxycodone.” The two, along with a CI, got into the detective’s car, and drove to Williams’ residence. Manns was given money, met with Williams, and they entered the house together. When Manns emerged a few minutes later, he leaned in and showed two oxycodone pills and named a price. He also offered morphine. The detective had observed Williams hand the pills to Manns. Manns also offered marijuana. The entire transaction was audiotaped.

They met again some two weeks later, and again, a transaction was completed, involving morphine. Again, the transaction was recorded.

Subsequently, Manns was indicted for drug trafficking and related charges. When he was convicted, he appealed.

ISSUE: May tapes that include statements from a non-testifying CI be admitted?

HOLDING: Yes (but see discussion)

DISCUSSION: Among other issues, Manns argued that the admission of the recordings were improper. He argued that the first tape “contained hearsay from the non-testifying confidential informant, and that it included unrelated, inflammatory subject matter and an unidentified male voice.” The trial court had found that the objected statements were “not hearsay since they were not being offered to prove the truth of the matter asserted.” The Court found the situation to be analogous to that in Norton v. Com.,²⁶ and found that the tapes “were not entered into evidence for the purpose of proving the truth of any statement contained therein.” The Court upheld the decision of the trial court. Finding no prejudice in the admission of the conversations, which included Manns, the Court upheld the admission of the tape.

Further, Mann argued that the prosecution provided the tapes in an “untimely” manner. (In fact, copies of the tapes had been provided to Mann’s first lawyer, who apparently did not send them to Mann’s second

²⁵ Lanham v. Com., 171 S.W.3d 14 (Ky. 2005).

²⁶ 890 S.W.2d 632 (Ky. 1994).

lawyer.) When new copies were provided, they were found to be of poor quality, and yet another set, of better quality, were sent. The Court found that there was no discovery violation.

Manns' conviction was affirmed.

EVIDENCE / TRIAL PROCEDURE - EXPERT WITNESS

Ward v. Com.

2008 WL 2779531 (Ky. App. 2008)

FACTS: On Jan. 10, 2006, Ward was involved in a collision with Dixon. Dixon "suffered multiple traumatic injuries and died en route to the hospital." Ward failed a field sobriety test given by a KSP trooper and was arrested for DUI. He was given Miranda warnings and told the trooper that he thought he had the green light. (All other evidence indicated it was red.) He admitted to having had "two mixed alcoholic beverages at his office before he left work." Further evidence in the car indicated that Ward had a BA of .13, and had Valium, Darvocet, Ambien, Paxil, Inderal and hydrocodone in his system, and that, at the least, he'd probably taken 4 ½ Darvocet in the hours preceding the wreck.

Ward was indicted on wanton murder. He sought dismissal of that charge, and the lesser-included offense of second-degree manslaughter. That was denied, and he was convicted of the latter offense. Ward then appealed.

ISSUE: May officers testify as experts in matters within their experience?

HOLDING: Yes

DISCUSSION: Ward challenged the constitutionality of the homicide statutes, but that was denied. (Specifically, the Court found that the statutes are clear that "voluntary intoxication can lead to conduct that is considered 'wanton' under" the Kentucky Penal Code.)

Ward also argued against the testimony of Det. Crum, a 19-year veteran of KSP. The trooper testified that he had extensive training in traffic issues, and he was "asked about his experience with intoxicated drivers and how alcohol affects a person's ability to perceive and react while driving." Over Ward's objections, Crum was allowed to testify. Ward resumed his argument on appeal, that because Crum was not presented to the trial court as an expert witness pursuant to Kentucky Rules of Evidence (KRE) 702 and because the court failed to make any findings of fact concerning his qualifications to render the expert opinions to which he testified."

The Court noted that "[e]xpert opinions from police officers based upon their training and experience are frequently admitted almost as a matter of routine." Further, "[t]hese opinions are deemed to be

distinguishable 'from the more extensive and complex knowledge required for testimony by traditional experts, such as accident reconstructionists and forensic pathologists.'"²⁷ The Court agreed that "where proffered testimony does not require applying "any theories, processes, or methods of novel or controversial origin," a witness's 'actual experience and long observation' are sufficient to qualify him as an expert in the relevant subject area."²⁸ As such, '[p]olice officers enjoy wide acceptance as expert witnesses based on their professional experience and training alone.'" In this case, Crum offered testimony as to the basis of his developed expert opinions on impaired driving.

In addition, the Kentucky "Supreme Court has recognized that police officers may render opinions regarding the general relationship between a blood-alcohol percentage and a person's level of intoxication - even when an officer has not personally observed the defendant in question."²⁹ Ward's conviction was affirmed.

EVIDENCE / TRIAL PROCEDURE - HEARSAY

Gilliam v. Com.
2008 WL 4291544 (Ky. 2008)

FACTS: Gilliam was accused of assaulting his mother, causing lacerations and contusions. When emergency personnel and her daughter responded, they found her sitting on the porch in a blood soaked nightgown, "cold, hungry and thirsty." She told the EMT that "her oldest son [Gilliam] had beat her up." She also told her daughter that "James beat me up, threw me out of the trailer, and tried to kill me." Medical evidence indicated her injuries were severe.

As a result of "Alzheimer's disease and her worsening dementia," the mother was unable to testify. The statements were introduced against him, and Gilliam was convicted of several charges, including First-Degree Assault. Gilliam appealed.

ISSUE: Are excited utterances admissible, even though they are hearsay?

HOLDING: Yes (but see discussion)

DISCUSSION: The Court first looked at the daughter's testimony. The trial court had admitted her testimony as an excited utterance, an exception to the usual rule prohibiting hearsay. Looking at it from the perspective of Crawford v. Washington, the Court found the statement to be nontestimonial and made during an "ongoing emergency." Thus, it was admissible under Crawford. Under the hearsay rule, KRE 801 and 802, the Court found that an excited utterance is "[a] statement relating to a startling event or condition made while the declarant was under the stress of excitement caused by the event or condition."

This Court, in Jarvis v. Commonwealth, set forth factors for determining whether a statement is an excited utterance: (i) lapse of time between the main act and the declaration, (ii) the opportunity or likelihood of fabrication, (iii) the inducement to

²⁷ Allgeier v. Com., 915 S.W.2d 745 (Ky. 1996).

²⁸ Kurtz v. Com., 172 S.W.3d 409 (Ky. 2005).

²⁹ Jewell v. Com., 549 S.W.2d 807 (Ky. 1977).

fabrication, (iv) the actual excitement of the declarant, (v) the place of the declaration, (vi) the presence there of visible results of the act or occurrence to which the utterance relates, (vii) whether the utterance was made in response to a question, and (viii) whether the declaration was against interest or self-serving .

Applying those factors, the Court found that admitting the statement made to the daughter was appropriate, in that it was made when the mother was "in close proximity to the place where the incident took place" and when "she was scared and visibly shaken by the incident."

With respect to the statement made to the EMT, the Court found that there was "no ongoing emergency" at that time, and as such, was testimonial. In addition:

Even were we to accept the argument that the statement is nontestimonial, as it was made to an EMT and not in response to an interrogation by a police officer during an investigation, we find it does not fall within any hearsay exception. Contrary to the trial court's conclusion, we do not find the statement qualifies as a statement for purposes of medical treatment or diagnosis under KRE 803(4).

Finally, however, the Court concluded that although the statement to the EMT's was erroneously admitted, it was harmless error. Gilliam's conviction was upheld.

EVIDENCE / TRIAL PROCEDURE – CRAWFORD

Langley v. Com.
2008 WL 746462 (Ky. 2008)

FACTS: On Oct. 5, 2005, Det. Duvall (Henderson PD) met with a CI regarding a controlled drug buy from Langley. Det. Duvall, who knew Langley's voice, listened in as the CI set up the deal with Langley. Duvall "understood that the [CI] would need \$100 to buy" methamphetamine from Langley. Detectives Duvall and Adams met with the CI, searched his person and car, and equipped the CI with a video recording unit. He was given the money and set out to do the buy.

The recording captured the entire time from the CI's departure until his return. The first 18 minutes were the informant driving through Henderson. He arrived, stopped the car, walked out and "got into the passenger side of a car while Langley got into the driver's side. After 30 seconds, the two got back out. Although there was "no discussion regarding drugs, as the informant was exiting the car, Langley can be seen gathering some money and placing the bills in the console between the front seats of the car." The CI met up with Duvall and Adams and gave them a plastic bag of methamphetamine. Adams asked the CI "who gave him the drugs." The CI told him "Jermaine" [Langley]. In response to another question, he also told the officers the location of the buy.

Based on the video and an affidavit from Adams, Langley was arrested for first-degree trafficking. He was eventually indicted. The CI refused to testify, but the videotape was introduced through the testimony of the two detectives. Langley was convicted, and appealed.

ISSUE: Are incriminating statements made by a CI, who knows they are being recorded, potentially testimonial?

HOLDING: Yes

DISCUSSION: Langley argued that admitting the videotape, when he did not have the opportunity to cross-examine the CI, whose voice is heard on the tape, was a violation of the Confrontation Clause.³⁰ The Court noted that the “videotape of which Langley complains contains few statements made by the confidential informant.” The Court further agreed that other courts had “found that since a confidential informant is aware that his statements are being recorded in order to foster criminal prosecution, the informant’s recorded statements may be ‘testimonial’ as the Supreme Court has employed that term.” However, other courts have specified that “if the informant’s statements are made as part of an ‘integrated conversation’ with the defendant and are introduced not to prove their truth but to place the defendant’s statements into context, then the statements are not hearsay and their admission does not violate the Confrontation Clause.” The Court concluded that the “portion of the videotape that shows the [CI] engaged in a transaction with Langley was admissible even though the informant did not testify at trial.”

However, the CI’s “statement to Detective Adams after the alleged drug transaction, however, did constitute testimonial hearsay and should have been redacted from the video.” The case law “has been clear that accusatory statements elicited by law enforcement officers in non-emergency situations are testimonial.”³¹ However, the Court decided that, in the light of the other evidence against Langley, the admission of the final part of the tape was harmless error.

Further, the Court agreed that the videotape was properly authenticated by the two detectives, setting a proper foundation for its admission under KRE 901(a). Duvall testified that he retrieved it from the CI and immediately took the unit to the station and downloaded it. It was a “continuous feed with no stops or interruptions” of 32 minutes.

Finally, the Court addressed confusion related to the copy of the videotape used at trial. The material had originally been provided to Langley, in discovery, on two CDs. It was played at trial, however, from a DVD. The total length of the material on the two CDs was 37 minutes, but the video shown at trial was 32 minutes. The prosecution stated that when the unit was downloaded originally, it produced three segments, one lasting 27 minutes and 5 seconds, and two that were 5 minutes and 52 seconds, each. However, the two short segments were actually duplicates, so when the material was played for the jury, the prosecution did not play that segment twice. Langley had requested a spoliation instruction because of the discrepancy in the times, but the trial court refused it because he could not demonstrate that there was any difference in the two videos.

The Court noted that although “Langley’s version is split between two CD-ROMs and the order of the segments is reversed on his second CD-ROM, the fact remains that all the segments are identical copies and portray the exact same sequence of events.” Since the Court found “no indication that the video evidence was destroyed or missing,” a spoliation (or missing evidence) instruction was not appropriate.

³⁰ See *Crawford v. Washington*, 541 U.S. 36 (2004).

³¹ *Davis v. Washington*, 547 U.S. 813 (2006).

Langley has also argued that the phone call (which was set up as a three way call with the CI's knowledge) and the videotaping were both eavesdropping , but the Court found no indication that the CI, who was party to both, did not consent. As such, neither was unlawful.

Langley's conviction was affirmed.

EVIDENCE / TRIAL PROCEDURE - DISCOVERY

Williams v. Com.
2008 WL 4291603 (Ky. 2008)

FACTS: Williams was charged with First-Degree Trafficking and PFO 2. These charges arose after a CI, wearing a wire, taped a transaction in which Williams sold the CI crack cocaine. The tape was played at trial. Notably, "[n]ear the end of the nearly hour-long recording, the informant asked Williams if he "could get an 'o' [ounce] on Sunday." Williams did not reply to this request on the tape, and he did not object to the statement at the time the audiotape was played for the jury.

Williams was eventually convicted, and appealed.

ISSUE: Is a defendant entitled to the entire tape of an encounter, in discovery?

HOLDING: Yes

DISCUSSION: Williams argued on appeal that "although the Commonwealth had provided him with a copy of the recording of the alleged drug sale during the discovery process, the copy he received did not contain the informant's last-minute request about a future transaction." As such, it was a surprise that he was unable to be prepared for at trial. (The trial court had ruled that he should have objected when it was presented, and that failure to do so waived any further objection to it.)

The Court ruled that although he had been entitled to the entire tape, the failure to receive that small portion at the end did not mean that the entire taped conversation was inadmissible. Williams' conviction was upheld.

NOTE: *Officers who provide such recordings (audio/video) to prosecutors should ensure that what they are reproducing is, in fact, the entire recording.*

Olson v. Com.
2008 WL 746651 (Ky. 2008)

FACTS: On June 6, 2002, Diane Snellen (Olson's mother) "was found stabbed to death in her home in Georgetown." Olson, Dressman (Olson's boyfriend) and Crabtree were accused of involvement in the murder. Specifically, it was believed that the three conspired to kill Snellen for her life insurance policy

and because she disapproved of Olson's relationship with Dressman. Olson was convicted of complicity to murder, and appealed on several issues.

ISSUE: Is testimony as to one's personal observations (and conclusions from those observations) admissible?

HOLDING: Yes

DISCUSSION: Olson appealed on a number of issues, but only a few of relevance to law enforcement. In particular, she argued that testimony from several people, including a detective and a coroner, that she "showed little emotion" when interviewed about her mother's death, "should have been excluded as irrelevant under KRE 402 because people grieve differently...." She also stated that it might be "unduly prejudicial, confusing or cumulative under KRE 403. The Court, however, found that while it may not be probative of guilt, such evidence of "lack of mourning suggests a high degree of indifference to her mother's life." Further, it was clear that the witnesses were simply testifying as to their observations.

Olson also argued that it was error to admit a "camera videotape" of an officer pulling over Olson, when they saw her car "after her mother reported her missing." The officer "admonish[ed] her for treating her mother badly by running away." He also discussed the smell of marijuana in the car with Olson and Dressman. Although they admitted to recent drug use, a search revealed no contraband. The officer then "let Dressman go and ...escort[ed Olson] to her home." Later in the video, the officer is seen talking to Olsen and Snellen and scolding her for "disrespecting her mother," and stating that "her actions caused him to lose time he could have instead spent with his" child. The Court found the entire video to be relevant and admissible.

SUSPECT ID

Burrell v. Com.
2008 WL 3890049 (Ky. 2008)

FACTS: On September 14, 2004, in Lexington, Burrell robbed, shot and killed Cason, a convenience store cashier, and tried to kill two others. He was apprehended after still photos from the surveillance video were broadcast locally, and evidence implicating him in the murder was found in his possession. In addition, one of the two witnesses provided a description to the police, and later that same evening, the witness picked Burrell out of a photo array. (Five of the photos were from a corrections database, Burrell's photo was his booking photo taken upon his arrest.) Burrell was convicted, and appealed.

ISSUE: Is an identification made following the distribution of a surveillance video admissible?

HOLDING: Yes

DISCUSSION: Burrell argued that the photo identification was impermissibly suggestive because the witness had viewed the video prior to making the identification, that he knew an arrest had been made, that only six photos were presented, and that the "photographs differed in ways that tended to single out Burrell."

The detective used great care to ensure that the photos in the array matched the witness's earlier description, even going so far as to ensure that all the photos depicted a man wearing glasses. However, the detective that showed him the photos stated that "an arrest had already been made in the case," but did tell the witness that the "person being investigated may or may not be in the line-up." He instructed the witness to take his time, to give the number of the photograph he identified and to explain his level of certainty to the officer." The witness had selected Burrell's photo and indicated that he was "110% positive" that Burrell was the robber. The trial court had found the photo array was not impermissibly suggestive.

The Court also found the array to be permissible, even if arguably suggestive in some ways. Applying the Biggers factors, the Court stated that:

In this case, Comley stated that he got a good look at the defendant during the robbery, described him fairly accurately on the 911 call and to the investigating officers, claimed to be 110% positive that the man in the photograph was the robber, and picked Burrell out of the photographic line-up only twenty-four hours after the robbery occurred. Even if the photographic array had been found to be unduly suggestive, Comley's testimony would still be admissible because the totality of the circumstances indicates that his identification of Burrell was reliable.

Burrell's conviction was affirmed.

Hearn v. Com.
2008 WL 3890035 (Ky. 2008)

FACTS: On August 27, 2002, Kiphart and Hearn apparently met at a convenience store in Jefferson County. An hour later, Kiphart's body was found in a local cemetery; he had been shot in the back and head. During the resulting investigation, Gary Hearn, Javon Hearn's half brother, gave police several statements that incriminated Javon. Gary stated that he was in the area of the cemetery that day, and witnesses placed a vehicle similar to one owned by Gary Hearn at that location. Gary claimed he saw Javon driving Kiphart's car, and asked him about it; the vehicle was "well-known in the neighborhood because of its speakers, stereo system, and expensive rims." He learned that Javon had run into Kiphart and wanted to steal the car, and that he had lured Kiphart to the cemetery stating he'd hidden drugs there. During the robbery, he claimed he accidentally shot Kiphart in the back, and decided to kill him to avoid criminal charges.

Kiphart's car was located, minus its rims, stereo, speakers, CDs and cell phone. Gary claimed he was asked to help strip the car, and that he got in exchange several of the items to hold. A witness in the complex identified Javon, but not Gary, as one of the men stripping the car. When Gary was stopped and arrested, he was in possession of some of the missing items. Gary's claim to have not seen the body in the cemetery and to have "randomly" encountered Javon after the murder was considered suspect, when coupled with his possession of the stolen items.

On September 3, Javon learned he was a suspect, and turned himself in. He waived Miranda and agreed to talk to Det. Fulmore. He initially denied knowing Kiphart, but later admitted he'd talked to Kiphart about his car. He claimed to have spent most of the day with his girlfriend, but his girlfriend later denied having

seen him that day. Det. Fulmore told him that “the police had him on video tape at [the convenience store]” and with that, he confessed to much of what had occurred, even mentioning the removing of the tires from Kiphart’s car. Eventually, Javon mentioned that “I should have asked for a lawyer.”

Both Gary and Javon Hearn were charged with murder. The two were tried separately, with Gary going first. During Gary’s trial, the prosecution’s theory was the both men were involved, although Gary may not have been the person that actually shot Kiphart. The prosecution sought to portray Gary as a liar, and during closing, the “prosecutor elaborated extensively on why Gary was untrustworthy.” Gary was eventually convicted of Facilitation to Murder, First Degree Robbery and Tampering with Physical Evidence. In exchange for a sentencing deal, Gary agreed to give a new statement and to testify truthfully at Javon’s trial. He then claimed that after Javon told him what had happened, he went to see the body. He then assisted with stripping the car and holding some of the property. Essentially, at Javon’s trial, the prosecution portrayed Gary as truthful. The defense, however, noted that Gary had something “hanging over his head” - his sentencing. Javon was eventually convicted of Murder, First Degree Robbery and Tampering with Physical Evidence. Gary was sentenced in accordance with his agreement, in fact, he received an even better deal than his initial agreement.

Javon Hearn appealed.

ISSUE: Is a statement suggesting that a photo array includes a photo of the suspect fatal _____ to a _____ subsequent identification?

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HOLDING: No

DISCUSSION: Most of Javon Hearn’s appeal centered on issues not relevant to law enforcement; instead, it centered on the prosecution using different theories on Gary’s involvement during the two trials. However, Hearn objected to a photo lineup presented to one of the witnesses who saw Kiphart’s car being stripped. The witness spoke only Spanish, so the lineup was done with the assistance of a Spanish-speaking officer, who did nothing but interpret. The witness was presented with two different photo packs, one containing a photo of Gary Hearn, the other a photo of Javon Hearn. (Officer Jones, the investigator, knew the suspects, but Officer Ortiz, the interpreter, and the witness did not.) The witness was not able to identify Gary, but did identify Javon. He was not able to identify Javon at trial, however. The Court ruled that the witness’s inability to make the identification at trial went to the weight of the evidence only, not to its admissibility.

Hearn argued that the “procedures employed by Detective Jones were unduly suggestive, because Detective Jones asked Baez to identify the man he saw near Kiphart’s car.” This implied that “the photo pack contained a picture of a suspect.” The Court agreed “that suggesting that a witness should ‘identify the person he saw’ is not an ideal, or even a desirable, police procedure.” However, a police officer’s implication that the suspect is included in the photo pack or lineup is one factor to consider in determining whether the procedures are suggestive.” This single mistake is not enough to render the entire identification improperly suggestive, since “additional factors cut against [Hearn’s] argument that the photo pack was suggestive.” Because the Court did not agree that the photo pack was suggestion, it was unnecessary to “consider where the identification was reliable under Neil v. Biggers.” The Court noted that “the procedures used by the police, while not perfect, [did] not rise to the level of being suggestive.” The Court upheld the admission of the witness’s prior identification of Javon Hearn.

Javon Hearn's conviction was upheld.

Martindale v. Com.
2008 WL 3890037 (Ky. 2008)

FACTS: On May 21, 2004, Wells, Burden, Avery and Meredith all decided to play basketball one evening, in Louisville. Wells placed his car keys and cell phone under the goal, and they began to play. Within two minutes, an "older male stranger" - Martindale - approached. Wells told the man he could play in the next game. Martindale then picked up Wells' cell phone, and Wells asked for it back. Martindale demanded money for its return, to which Wells replied he had none. Martindale then pulled a gun and pointed it at Wells, still demanding money. The other three men scattered. Wells told Martindale that he could keep the phone, but insisted he had no money. Finally, Martindale tossed the phone back and put away the pistol. The four men hurried to their cars and Martindale followed, still asking for money. He told the men they "should expect this if [they came] into [that] neighborhood" and told them they shouldn't call the cops. He also tried to shake Wells' hand. Burden noted a tattoo on Martindale's arm. Eventually, the four men left in two cars and went to Wells' apartment, a few minutes away.

Burden's father was a civilian employee of the Louisville Metro Police Department, so they called him. Burden's father then contacted officers via his radio. The younger Burden described their assailant by clothing and other features, and the information was immediately conveyed to responding officers. Officer Downs spotted Martindale, matching the description, in the area. She pulled up nearby and Martindale ran. Downs ran in pursuit, eventually joined by Officer Martin. Officer Martin captured Martindale and frisked him, finding no gun but only several bullets. They retraced the chase and found a loaded pistol, wrapped in the blue shirt he had been carrying when first spotted by Downs.

Burden's father told the four friends to return to the scene. Officer Tanner interviewed them, and all four agreed that Martindale, who was sitting handcuffed in a cruiser, was the assailant. They also noted he was no longer wearing the same shirt (the blue shirt) that he'd had on earlier. Only fifteen minutes, at most, passed between the robbery and the identification. "As police took [Martindale] into custody, he asked 'How can it be a robbery? I didn't get anything.'"

Martindale was indicted on several charges, include First-Degree Robbery. He was convicted, and appealed.

ISSUE: Is a suggestion, prior to a showup, that the suspect has been caught fatal to the identification?

HOLDING: No

DISCUSSION: Martindale argued that the show-up was done improperly, in that the police suggested to the witnesses "that they had caught the perpetrator." The Court concluded that the trial court erred in not providing Martindale with the requested suppression hearing, to which he was entitled. The Court reviewed the show-up, and agreed that the "procedures employed by the police were suggestive," as in fact, all show-ups are inherently suggestive, so they further applied the Biggers' factors: "1) the opportunity to view, (2) the witness's degree of attention, (3) the accuracy of prior descriptions, (4) the level of certainty at confrontation, and (5) the time between the crime and the confrontation."

With respect to the factors, the Court found that the witnesses had more than ample time to view Martindale. They paid close attention, as they were all directly involved in the robbery. Burden accurately described Martindale to his father, who passed on the description to the responding officers. All four men were “very certain” of their identification. And finally, no more than 15 minutes passed between the crime and the show-up. Finally, the identification is corroborated by other evidence, including, in particular, his own statement. The Court agreed that although suggestive, their identification was inherently reliable.

After resolving several other issues, the Court upheld Martindale’s conviction.

Jones v. Com.
2008 WL 4601237 (Ky. 2008)

FACTS: On Jan. 11, 2006, a CI made arrangements to buy drugs from Daniels. The CI met with Det. Salyer, received money and a recording device, and set out to meet Daniels. As the CI met with the dealer, Jones “approached the vehicle and asked them what they needed.” Daniels told Jones what the CI wanted, and they “drove away to complete the sale.” Jones then sold the CI an Oxycodone tablet, broken into halves. They all returned to the meeting place, but Daniels later testified that he and the CI “drove to a secluded area where they both ingested Oxycodone.” (The CI testified that only Daniels had taken the drugs.) After the CI was returned to her car, she met with the detective and turned over the Oxycodone. She identified Jones as the seller, and described him.

On April 4, the CI went to the Harlan area KSP post and looked at photos, compiled from her description of Jones. (The detective had compiled a “stack of over twenty photographs of potential suspects.”) The informant recognized a number of the photos as drug dealers, and specifically identified Jones as the person from whom she’d bought Oxycodone.

Jones was indicted and arrested on drug trafficking charges. Jones was eventually convicted, and appealed.

ISSUE: Does the inclusion of other people familiar to the witness in a photo array make the subsequent identification inadmissible?

HOLDING: No (but see discussion)

DISCUSSION: Jones argued that the photo array was “clearly suggestive” and thus inadmissible. Further, he argued that the process followed by the trial court in the suppression hearing was incorrect. Although the Court agreed with Jones’s later assertion, it noted that since Jones thoroughly questioned both officers about the details of the photo array and the identification, [it could not] say that this improper procedure amounts to reversible error.” The Court found that the identification procedures was not so suggestive as to give rise to a very substantial likelihood of irreparable misidentification....” The detective noted that the photos shown to the CI had no writing or other identifying marks on them. He had properly excluded photos that the detective had compiled from other sources, and that he did not believe had dealings with the CI. (“Unfortunately, the photo array was neither entered into evidence nor made part of the record.”) The Court agreed the photo array was “neutral” and was, overall, not so suggestive as to make it inadmissible.

Jones's conviction was affirmed.

Van Diver v. Com.
2008 WL 3890171 (Ky. 2008)

FACTS: On Feb. 17, 2005, Johnson, a Meijer cashier in Florence, saw a man from a distance (later identified as Van Diver) "pick up two DVD players and put them in his cart." Johnson became suspicious and followed the man through the store. Johnson lost site of him, however, and enlisted another employee to assist him in locating the man. Johnson then spotted Van Diver leaving the store, and when verbally challenged, Van Diver continued to his car. Johnson approached and saw him placing the DVD players in the trunk.

Johnson tried to get the items, but Van Diver first verbally threatened, and then struck, Johnson. Johnson thought Van Diver was holding a mallet. Purnell, the other employee, saw the assault.

Johnson retrieved one of the players as Van Diver got in and tried to start the car. He called for help, via cell phone, and provided a description of the car and the plate. That car was registered to Van Diver. Van Diver drove to a nearby parking lot, sat for a few minutes and then drove away. The car was found at a nearby Biggs' store, and the police spotted Van Diver nearby. When Van Diver saw the officers, he went back into the store, where he was eventually arrested.

He was returned to the Meijer's and Johnson identified him as the assailant. A DVD player was found in the trunk of the car, which was impounded, and a mallet found on the floorboard. Cocaine and a crack pipe was also found in the car.

Van Diver was charged with First-Degree Robbery and drug charges. He was convicted, and appealed.

ISSUE: Is a suggestive identification necessarily inadmissible?

HOLDING: No

DISCUSSION: Van Diver argued that the in-court identification was "tainted by an impermissibly suggestive show-up." Pursuant to Neil v. Biggers, the Court noted that:

Thus, there is a two-part test for determining whether a pretrial confrontation violates due process. First, we ask whether the pretrial identification procedure was impermissibly suggestive. If it was not, then evidence of the out-of-court identification is admissible. However, if the pretrial confrontation was suggestive, then we proceed to the second part of the test. In the second part, we must "assess the possibility that the witness would make an irreparable misidentification [at trial], based upon the totality [of] the circumstances and in light of the five factors enumerated in Neil."

In this case, the Court found that Johnson's identification, although suggestive, was reliable, in that it clearly met the Biggers' factors.

Van Diver's convictions were affirmed.

INTERROGATION

Allen v. Com.

2008 WL 3164785 (Ky. App. 2008)

FACTS: On February 26, 2004, Officer Smith and another officer (Louisville Metro PD) responded to a landlord-tenant dispute. When the officers arrived, they found the main door open, but the screen door closed, and they smelled marijuana. They were admitted after knocking.

Inside, they found 8-10 people and marijuana on the table. The officers asked the occupants to identify themselves. Allen later stated that he refused to give his name and the officers only learned it by "searching a bag he was holding that contained a prescription bottle with his name on it." Once they learned Allen's name, the officers further learned there was an out-of-state warrant for him. He was handcuffed and the bag further searched, and "[v]arying amounts of narcotics were found inside the bag." One of the other occupants told Officer Smith that Allen had a gun, and upon further search, they found a gun "under the cushion of the couch where Allen had been sitting."

The officers discussed "which of the individuals in the house would be taken to jail." The female tenant was told she would be going to jail because the drugs were found in her home. "Purportedly in an attempt to protect the woman, Allen told officers that the drugs in the residence were his and that only he should go to jail."

Allen was indicted for trafficking and firearms charges. He moved for suppression, but was denied. Allen then took a conditional guilty plea, and appealed.

ISSUE: Does a "threat" to a third party make a confession coerced?

HOLDING: No

DISCUSSION: Allen argues that the incriminating statements he made to police should be suppressed because they were elicited from him without a prior Miranda warning. He contended "that the comments of the police to the female tenant threatening to take her to jail were in effect a form of interrogation because he may have felt pressured to claim the drugs were his in an attempt to assist the tenant who was protesting her innocence." The trial court had ruled that the "incriminating statements were made voluntarily and not as the result of any interrogation by the police officers." The Court agreed that there was "no indication that the officers should have known that their remarks to the female tenant were reasonably likely to elicit such an altruistic response from Allen, nor is there any indication that they should have been perceived as such by Allen."

The denial of the motion to suppress was upheld.

White v. Com.

2008 WL 2780269 (Ky. App. 2008)

FACTS: On Feb. 6, 2006, White was contacted by Det. Johnson (Lexington PD) and asked if he would come to the station to be interviewed concerning a child sexual assault. White agreed, and "was

apprised of his right not to answer questions and to have an attorney present." He talked to the detective for some 90 minutes, and during the interview, changed his story from an initial denial to admitting the allegation.

White later argued that "shortly after the interview began, he requested that he be allowed to get an attorney and to come back later." Det. Johnson stated that "though White did mention an attorney, he did not request one and expressly stated that he wished to continue voluntarily."

White was eventually indicted, and took a conditional guilty plea to a lesser sexual offense.

ISSUE: Is a statement taken at the police station always custodial?

HOLDING: No

DISCUSSION: Among other issues, White argued that his statement at the station should have been suppressed. The Court noted that "White was not in custody when he made the statement at issue." The Court agreed that Detective Johnson stated at the suppression hearing that White came to the police station voluntarily; that he was apprised of his rights and was not under arrest; and, that he did not request an attorney and never stated that he wished to stop speaking with the detective. Since "the Fifth Amendment rights protected by Miranda attach only after a defendant is taken into custody," there was no error.³²

White's plea was upheld.

Moore v. Com.
2008 WL 3890168 (Ky. 2008)

FACTS: In July, 2005, in Jefferson County, Burch was accosted, beaten and robbed of his vehicle. During that same time frame, a convenience store nearby was also robbed. In both cases, the crimes were immediately brought to the attention of Louisville officers, and information was provided about the robber. (Burch's stolen car was apparently used in the second robbery.) Officer Lipsey spotted Moore, presumed to be the robber, and eventually he and Officer Mattingly apprehended Moore. Witnesses at the convenience store, and Burch, both identified Moore from a photo pack, and Burch's DNA was found on Moore's clothing.

Moore was indicted on two counts of robbery and related charges. He was convicted, and appealed.

ISSUE: Are spontaneous statements (not in response to interrogation) admissible?

HOLDING: Yes

DISCUSSION: The Court noted that "[w]hen Moore was arrested, he was not immediately advised of his rights under Miranda v. Arizona." When Moore was placed in the back of the police car, another officer approached and asked, "Is this the guy that did the robbery?" The arresting officer testified at the suppression hearing that the question was not directed to Moore. Nevertheless, following the question

³² See Wilson v. Com., 199 S.W.3d 175 (Ky. 2006).

Moore blurted out three statements: "I didn't rob a store," "All I was in was a car," and "All I did was kick him." The trial court had agreed that "Moore was in custody but that he was not being interrogated because the officer's question was not directed toward Moore" As such, the Court found it voluntary, and admissible. Moore argued that, since "he was handcuffed in the back seat of a police cruiser at the time of the question, ... that the question contained an implicit accusation that was likely to elicit an incriminating response." The Court found, however, that "officers are not required to cease routine discussions among themselves simply because a suspect has been arrested."

Further, the Court found that the show-up identifications made by the convenience store witnesses were, as all show-ups are, suggestive, but since he confessed, it was a moot point."

However, the Court did reverse the first-degree robbery charge of the convenience store because Moore did not display any item purporting to be a weapon, in fact, he held a flashlight. "In Merritt v. Com., [the] court held that 'any object that is intended by its user to convince the victim that it is a pistol or other deadly weapon and does so convince him is one.'"³³ Since the victim in that case did not necessarily believe the item was, in fact, a deadly weapon, the case did not meet the requirements of Merritt.³⁴

Moore's conviction for First-Degree Robbery with respect to Burch was affirmed, but his conviction for the convenience store robbery was reversed and remanded.

Shearer v. Com.
2005 WL 2323302 (Ky. App. 2008)

FACTS: While investigating a taxi robbery in Fayette County, Det. Stowers was told, by accomplices, that Shearer was involved. He interviewed Shearer at the jail, where he had been for six days incarcerated on unrelated charges. Shearer told Det. Stowers that he was bipolar and suffered from OCD³⁵, and that he'd done LSD in the past. He was on no medications at the time.

Det. Stowers gave Shearer his Miranda warnings, and Shearer agreed to talk. He agreed to his involvement, but stated he could not remember much of what happened because he was on LSD and mescaline at the time. He did admit to having held a knife on the driver and asking him for money, but insisted he had protected the driver from any mistreatment.

Shearer was charged, and made an oral motion to suppress the confession, claiming to have been "extremely intoxicated" at the time. The written motion, however, alleged that he suffered from an unmedicated mental illness. The motion was denied and he took a conditional guilty plea to Second-Degree Robbery. He then appealed.

ISSUE: Does an alleged mental condition make an interrogation "coercive?"

HOLDING: No

³³ 386 S.W. 2d 727 (Ky. 1965).

³⁴ The Court noted that the Merritt rule had led to "potentially confusing and, at times, seemingly contradictory results" and that it merited "further analysis" to decide its "continuing viability," that this was not the case in which to do it.

³⁵ Obsessive-compulsive disorder.

DISCUSSION: The Court noted that Shearer had identified “no coercive activity on the part of the police.” However, the Court noted that “. . . a defendant’s mental condition, by itself and apart from its relation to official coercion, should [n]ever dispose of the inquiry into constitutional ‘voluntariness’.”³⁶ . . . The Court stated that:

The three criteria the trial court uses to assess voluntariness are: “1) whether the police activity was ‘objectively coercive’; 2) whether the coercion overbore the will of the defendant; and 3) whether the defendant showed that the coercive police activity was the ‘crucial motivating factor’ behind the defendant’s confession.”³⁷

The Court noted that the only evidence of Shearer’s mental illness was his own assertion that he’d been so diagnosed in the past. He also offered no proof as to “how prior use of hallucinogenic drugs would thereafter render a person incapable of ever giving a voluntary statement to police.”

The Court agreed that the trial court’s decision not to suppress his statement was correct, and upheld his plea.

Dunson v. Com.
2008 WL 4367835 (Ky. App. 2008)

FACTS: Dunson was charged with First-Degree Rape and Sexual Abuse in Fayette County, with the victim being his girlfriend’s daughter. She was under 12 at the time. He confessed, but requested suppression of the statement. That was denied. He eventually took a conditional guilty plea to Second-Degree Rape. He appealed.

ISSUE: Is a statement about a trial’s effect on the suspect’s children coercive?

HOLDING: No

DISCUSSION: Dunson argued that, although he signed a Miranda wavier, that the officer “used his son and step-son to manipulate him into confessing.” (He stated the officer told him that his “children’s lives would be miserable and he would not be able to see them again,” the officer stated that he said that a “confession would minimize stress on the victim.”) The Court found that the “dispositive inquiry becomes whether the officer’s brief references to Appellant’s children and the victim constituted credible threats or psychological coercion sufficient to overcome Appellant’s will.”³⁸ The Court agreed that it “is true that coercion may be psychological as well as physical, particularly where it consists of credible threats of violence or of an offer of protection from physical harm in exchange for a confession.”

However, the Court found that the interaction was not coercive.

Dunson also argued that after he confessed, “the officer directed him to write a letter of apology to the victim.” When he “started writing a letter merely questioning the victim’s allegations, the officer tore it up and informed Appellant that it was not an apology.” The officer contradicted that claim, which left the

³⁶ Colorado v. Connelly, 479 U.S.157 (1986).

³⁷ Henson; Morgan v. Com., 809 S.W.2d 704 (Ky. 1991).

³⁸ Arizona v. Fulminante, 499 U.S. 279 (1991); Allee v. Com., 454 S.W. 2d 336 (Ky. 1970).

determination on credibility to the trial judge. The Court agreed that the trial judge's decision to favor the officer's statement to be within the court's proper discretion.

Dunson's plea was upheld.

SHERIFFS

Jones v. Cross/Spradlin 260 S.W.3d 343 (Ky. 2008)

FACTS: On Sept. 3, 2000, Deputy Cox (Barren County SO) "went to execute an arrest warrant on an evasive David Price." He requested help from Troopers Cross and Spradlin (KSP). As the three proceeded north on Hwy 740, they learned that Price was "approaching from the opposite direction." Apparently, the road had been blocked because Price "abandoned his vehicle and fled on foot into a grassy field." The troopers pursued him on foot, while the deputy pursued him into the field in his cruiser. "As Trooper Cross caught Price, Deputy Cox ran his cruiser over Trooper Cross, leaving tire tracks on his uniform." He also struck Trooper Spradlin, who was injured, but not Price.

Troopers Spradlin and Cross (along with Cross's wife) sued both Deputy Cox and Sheriff Jones, in their individual and official capacities, for negligence. (Deputy Cox, however, is not part of this opinion, nor is the issue of Sheriff Jones's individual liability.) The trial court ruled that Sheriff Jones had official immunity for the tortious acts of his deputy, and that KRS 70.040³⁹ does not serve to legally waive that immunity. The case was appealed, and the Kentucky Court of Appeals "agreed that a sheriff is entitled to immunity when sued in his official capacity unless said immunity is waived." However, it found that the statute in question did serve to waive that immunity, although it declined to "address the constitutionality of said statute." Sheriff Jones appealed that ruling.

ISSUE: Does a sheriff in his official capacity (the office of sheriff), have immunity for tortious acts of his deputy, and if so, does KRS 70.040 waive that immunity?

HOLDING: Yes and Yes

DISCUSSION: The Court agreed that since the county is a political subdivision of the state, it is "cloaked" with sovereign or governmental immunity. As the "chief law enforcement officer of the county," the sheriff "has absolute official immunity at common law for torts (by him or his deputies) when sued in his official capacity."⁴⁰ The Court, however, noted that "the next question is whether KRS 70.040 waives that immunity." The plain meaning of the statute "clearly imposes liability on the sheriff in his official capacity

³⁹ 70.040 Deputy's acts and omissions -- Liability for.

The sheriff shall be liable for the acts or omissions of his deputies; except that, the office of sheriff, and not the individual holder thereof, shall be liable under this section. When a deputy sheriff omits to act or acts in such a way as to render his principal responsible, and the latter discharges such responsibility, the deputy shall be liable to the principal for all damages and costs which are caused by the deputy's act or omission.

⁴⁰ Yanero v. Davis, 65 S.W.3d 510 (Ky. 2001).

for acts committed by his deputies.” Finding that the “plain language of KRS 70.040 leaves no room for any other reasonable construction than a waiver of the sheriff’s official immunity (the office of sheriff) for the tortious acts or omissions of [deputy sheriffs],” the Court affirmed the decision of the Court of Appeals.

(A concurring opinion found that, unlike other county officials, that the sheriff had always been liable for the acts and omissions of deputy sheriffs, even absent said statute. The concurring opinion noted that historically, in a line of cases back to Britain, the sheriff had always been legally responsible for those he employs)

EMPLOYMENT

Henderson County Sheriff’s Dept. v. Evans 2008 WL 2697171 (Ky. App. 2008)

FACTS: On August 31, 2004, Evans was a civil process server for the Henderson County Sheriff’s Office. As she was serving papers that day, she was assaulted, robbed and believed to have been raped.⁴¹ As a result of the assault, she remained mentally unable to work, although physically, she had recovered. Her doctor affirmed that she could not return to work as a process server, nor could she work at any job “that would require her to interact consistently with the public due to the unpredictability of her panic attacks.” He rated her with a permanent functional impairment of 85%. An independent medical evaluation rendered the opinion that her disability was only 10% and that if she “could conquer her unresolved fears, perhaps she might be employable in alternate work.” A vocational study indicated that she had lost a substantial amount of future earnings capacity as a result of the assault, as well.

At a hearing, the ALJ ordered the Sheriff’s Office to pay Evans \$236.21 a week as long as she remained disabled, and further found that she was totally occupationally disabled. She was also awarded continuing medical benefits. The Sheriff’s Office appealed the award.

ISSUE: Does an individual need objective medical findings to be considered totally disabled?

HOLDING: No

DISCUSSION: The Sheriff’s Office argued that there were no “objective medical findings,” to support the ALJ’s decision that Evans was totally disabled as a result of the attack. The Court found that the ALJ’s reliance on the testimony of Evans, and of her doctor, was appropriate, particularly in that the doctor’s testimony was accepted by the Sheriff’s Office for other purposes. Even the Sheriff’s Office expert opined that he doubted that Evans would ever recover to the extent that she could work in any job that required interaction with the public. Further, the Court found it appropriate to accept the testimony of the vocational expert.

The findings of the ALJ were affirmed.

⁴¹ She was unconscious at the time, but the evidence suggested rape.

Sixth Circuit

ARREST

U.S. v. Hardin

539 F.3d 404(6th Cir. TN 2008)

FACTS: In June, 2008, Hardin's "federal supervised release" was revoked, and a federal arrest warrant was issued for him. On Aug. 29, 2005, Officer Kingsbury (Knoxville PD) got a tip that "Hardin might be staying with a girlfriend at her apartment," but the CI didn't know the exact apartment number, only its approximate location in the building. The CI also described the car Hardin was driving.

Officers Kingsbury and Tarwater went to the building and decided that Apartment 48 was the correct apartment. They talked to the manager, who stated that Hardin had not leased an apartment and that he had never seen him on the property. The tenant of that apartment was a woman named Reynolds. (It was later stipulated that Hardin did stay there overnight, on occasion.)

When the officers explained Hardin's criminal background, the manager became "worried about Hardin's potential presence" in the complex. Kingsbury told the manager to use the ruse of checking for a water leak to confirm if Hardin was there. They watched on CCTV as the manager went to the apartment, opened the door with a key, called out "Maintenance" and entered. Hardin was there, and on the phone with Reynolds at the time. At Reynolds' direction, Hardin allowed the manager in to check the bathroom for the purported leak. The manager then left the apartment and told the officers that Hardin was there.

Officers then entered the apartment and took Hardin into custody. They found a firearm under the couch cushion where he was sitting. Officer Turner, doing a sweep of the apartment, also found two more guns under the couch. Finally, they found cocaine, marijuana and \$2,000 in cash on Hardin's person.

Hardin was indicted on drug and firearms charges, and requested suppression. He contended that the "officers lacked probable cause to believe that he was present in the apartment where he was staying as a guest." After a hearing, the magistrate judge recommended that the motion to suppress be denied, in that the manager was not acting as an agent of the police at the time. The trial judge agreed, and also noted that the apartment manager had an "independent business duty to enter the apartment" - a legal concern for the welfare of the other tenants.

Hardin was convicted, and appealed.

ISSUE: May a civilian be asked, as the agent of the police, to determine if someone is inside before serving an arrest warrant?

HOLDING: No

DISCUSSION: The Court discussed whether the "proper standard for evaluating the quantum of proof required for police officers to enter a residence to execute an arrest warrant" was reasonable suspicion or probable cause. In Payton, which involved a warrantless arrest, the Court used both the phrases "reason

to believe⁴² and probable cause to describe the standard. The government argued that the Pruitt standard should prevail; in that case the Court held that “a lesser reasonable belief standard, and not probable cause, is sufficient to allow officers to enter a residence to enforce an arrest warrant.”⁴³ Hardin, however, contended that Pruitt had overlooked U.S. v. Jones, in which the court found that “government officials cannot invade the privacy of one’s home without probable cause for the entry.”⁴⁴ Instead, the Court concluded that neither case actually answers the question involved in the case at bar. In this case, the Court focused not on the standard, but on whether the apartment manager was acting as an agent of the officers. The Court concluded that it was clear that the manager was, in fact, acting directly as the agent of the officers, even the officers involved that the decision for the manager to enter the apartment “was ‘without a doubt’ the officers’ idea. (Kingsbury stated that they “sent” the manager to check.) Because of that, the information gained by the manager’s unlawful entry could not be used in deciding if the officers had sufficient cause to believe Hardin was present.

Stripping the case of the manager’s information, the Court then had to consider whether the information from the “CI alone established sufficient reason to believe that Hardin was inside” the apartment. The Court found that the information did not even meet the lesser standard of reasonable cause, let alone probable cause, in that the CI provided “relatively limited information” about Hardin’s location. The fact that the apartment manager did not recognize Hardin as even a guest was in contrast with the CI’s vague information. Even if the officers had sufficient belief that he was an occasional visitor, they had “essentially no evidence to indicate that Hardin was then inside the apartment.”

The government also argued that the “manager’s search of [the apartment] was legal due to consent obtained through the use of the ‘ruse.’” The Court found that the purported investigation of a water leak, something a tenant would be hard-pressed to deny entry for, “invalidated any possible consent.” In fact, the Court noted, the manager “simply used his own key and entered the unit.”

The Court concluded:

In sum, we conclude that whether Payton involves a probable-cause standard or a lesser reasonable-belief standard remains an open question in our circuit, to be settled in an appropriate case. Further, we hold that the apartment manager in this case was acting as an agent of the government and that the officers’ remaining information failed to establish even a reasonable belief that Hardin was inside Apartment 48.

The Court concluded that the search was unlawful, and that the additional charges for the guns and the drugs must be reversed.

⁴² Payton v. New York, 445 U.S. 573 (1980).

⁴³ U.S. v. Pruitt, 458 F.3d 477 (6th Cir. 2006)

⁴⁴ 641 F2d 425 (6th Cir. 1981).

SEARCH & SEIZURE - SWEEP SEARCH

U.S. v. Lanier (Walter)
2008 WL 2744601 (6th Cir. OH 2008)

FACTS: On July 12, 2005, members of Cleveland's (Ohio) SWAT team, along with Det. Ezzo, went to Agnes Lanier's residence to execute an arrest warrant for Keith Lanier, Walter Lanier's uncle. Agnes told them that Keith was not present but allowed them to enter. Pursuant to the stated procedures, the officers handcuffed those present in the house and brought them together. Once the house was secured, the detective with the warrant was to come inside to identify the named individual.

Following that process, Officer Richardson found Walter Lanier asleep, woke him and handcuffed him. He saw a gun "protruding from [Lanier's] pillow" and body armor in the corner. After Lanier was taken from the room, the officer found ammunition under the mattress, which was, in this case, sitting directly on the floor, without a frame. (The officer later stated that it was "common practice" to always search under mattresses to ensure that no one is hiding underneath" and that someone could hide in a set of box springs.)

Walter was charged with possession of the firearm, he was a convicted felon, and the body armor, both under federal law.⁴⁵ He requested suppression, and the Court agreed to suppression of a confession (not discussed in the body of the opinion) but denied suppression of the seized evidence, the gun and the ammunition. Lanier took a conditional guilty plea, and appealed.

ISSUE: May officers sweep a residence while serving an arrest warrant?

HOLDING: Yes

DISCUSSION: The Court noted that, although "an arrest warrant is not a search warrant,"⁴⁶ that when executing arrest warrants, "officers may 'as a precautionary matter and without probable cause or reasonable suspicion, look in closets and other spaces immediately adjoining the place of arrest from which an attack could be immediately launched.'"⁴⁷ The Court limited that search "only to a cursory inspection of those spaces where a person may be found."⁴⁸

The Court agreed that the weapon, and the body armor, were both in plain view, despite Walter Lanier's contention that they were not. Further, the Court noted that the trial court had "credited Officer Richardson's testimony about looking underneath the mattress and box springs as part of his protective sweep." That Court further stated that:

While it is logical to question whether or not there is a substantial probability that one would be hiding under a box spring lying on the floor, Officer Richardson testified that such a procedure is "common practice," and that there is "plenty of room" for someone to hide under a box spring.

⁴⁵ 18 U.S.C. §931.

⁴⁶ U.S. v. Jones, 641 F.2d 425 (6th Cir. 1981).

⁴⁷ Maryland v. Buie, 494 U.S. 325(1990).

⁴⁸ Id.

In addition, the Court found at least one other federal court had found looking under a mattress sitting directly on the floor was reasonable.

The Court affirmed the decision of the trial court.

SEARCH & SEIZURE - VEHICLE FRISK

U.S. v. Shank

2008 WL 4273129 (6th Circ. OH 2008)

FACTS: On May 2, 2003, in the late afternoon, Officers Mullins and Barrett (Dayton, OH, PD) were patrolling near a housing complex known for high crime and drug activity. They spotted a Cadillac with windows so darkly tinted as to be illegal. They could tell that the driver was the sole occupant, and apparently male, but that was all. The officers did a traffic stop, and the vehicle stopped in the roadway, rather than pulling to the curb. The officers approached. The driver stated he did not own the car, and that he had no identification, but identified himself as Shank.

Shank was asked to get out, and was frisked, the officers finding only a "wad of cash." They had him sit in the patrol car while they confirmed his identity, and he became "argumentative and nervous." He complied, however. As Barrett operated the in-car computer, Mullins was checking the tint in the window. Barrett confirmed that Shanks had a valid OL, and began writing citations for the window tint and other minor offenses. A resident approached and asked that the cars be moved, as they were blocking access. Mullins got into Shanks' car to move it, and he checked the "lunge area" - the places a driver could easily reach. He found a firearm in the glove box and a small amount of crack cocaine in the console. They also realized that Shanks had been associated with a drug distribution network in the past. Shanks was placed under arrest.

Shanks sought suppress, and was denied. He took a conditional guilty plea, and appealed.

ISSUE: May officers frisk a car when they have reasonable suspicion there may be weapons inside?

HOLDING: Yes

DISCUSSION: Shanks first argued that the presumed tint violation was insufficient to support the stop, but the Court quickly dismissed that contention. The Court also agreed that Barrett was still writing the citations when Mullins went to move the car. The Court, however, noted that the most substantial argument was whether Mullins had cause to search the car. The Court examined the situation as a Long frisk, making the analogy that since Shanks was not under arrest, and "would presumably have approached the Cadillac to leave only moments after their traffic violation tickets had been completed and issued to him."

The Court observed that the record showed that the officers had reasonable, articulable suspicion based upon the following:

(1) a man was observed driving a car with windows tinted so as to make it extremely difficult to detect movement of any occupants within, a violation of Ohio law; (2) the immediate area, notably the housing development the car was entering, was well-known for violent crime including shootings and considerable drug distribution activity; (3) the driver, when approached, was found not wearing a seatbelt, a second violation of Ohio law; (4) the car the man was driving did not belong to him; (5) the man had no driver's license nor any other form of personal identification or vehicle registration, a third violation of Ohio law; (6) the man verbally identified himself with a name that was soon recognized as belonging to a person having past association with cocaine dealing activities; (7) the officers knew that the distribution of drugs often involves weapons possession and use; and (8) the man appeared increasingly nervous, agitated and uncooperative upon being frisked and asked to sit briefly in the police vehicle.

The Court found that "[t]here is ... no known numerosity of facts, a minimum of which must be gleaned in sifting the circumstances in order to 'total up' and justify ... that the officer had reasonable suspicion to frisk or search pursuant to Terry." In this case, the Court found that the "combined circumstances here permitted the officers to reasonably suspect that Shank presented a danger and might have gained immediate control of a weapon if he approached the car."

The Court found the frisk (and the admission of the subsequent evidence) to be justified, and affirmed the plea.

SEARCH & SEIZURE – WARRANT

U.S. v. Fowler
535 F.3d 408 (6th Circ. KY 2008)

FACTS: Fowler was a member of the Louisville Outlaw Motorcycle Club. On Nov. 5, 2002, BATF officers in Louisville got a search warrant for Fowler's residence. They decided it would be safer to initiate the search when the Fowlers (husband and wife) were not home, so they waited until they were observed leaving, on Nov. 7. Officers made a traffic stop on the vehicle, and Jason Fowler was "taken out of the car." He was told about the search warrant and asked if he'd like to be present. He said that he would, so he was transported back to the house in the squad car. He agreed to be handcuffed for the trip. He was left in the car during the search, which "turned up various firearms and a small quantity of methamphetamine." At some point he was brought into the house and interviewed by Agent McMahan. He was given his rights, and he stated that he didn't know if he needed his attorney. The Agent told Fowler that was his decision to make. Ultimately, Fowler waived his rights and spoke to the agents about what they had found. He got a phone call during that time, from someone who wanted to deliver methamphetamine. Fowler arranged for the delivery later that day, and the two men delivered 1484 grams (approximately 53 ounces).

Fowler was indicted, and eventually convicted on RICO, firearms and drug charges. He appealed.

ISSUE: Does an indication that an officer has used a CI for some time indicate that person is credible?

HOLDING: Yes

DISCUSSION: Fowler argued that the “warrant was not supported by probable cause because it was issued on the basis of information provided by a [CI] of unknown reliability.” The Court, however, while noting that “the affidavit does not explicitly vouch for the [CI’s] credibility,” it did state that the agent had worked with the CI for some time. From that, “[o]ne can logically infer ... that the confidential informant was credible and reliable.” In addition, the affidavit indicated that the agent “had independently verified much of the information provided by the [CI].” He argued that the omission that the CI was involved in “ongoing criminal activity” damaged the CI’s veracity, but the Court noted that the affidavit did indicate that the CI “had sold methamphetamine to Fowler.” Further, the Court noted that “it is no surprise that most confidential informants are engaged in some sort of criminal activity,” and it “would unduly hamper law enforcement if information from such persons were considered to be incredible simply because of their criminal status.”

The Court also addressed Fowler’s assertions that his post-arrest statements should have been excluded. The court found neither a Sixth Amendment nor a Fifth Amendment violation. There was no Sixth Amendment violation because at the time he was questioned, there had been “no adversarial judicial proceedings ... initiated against Fowler at the time he was questioned ...” Further, when he was given Miranda, he waived his rights, and there was no indication that his statements, or his waiver, were coerced or involuntary. He claimed that the government had promised leniency, but he produced “nothing other than his own assertions to prove the existence of such false promises.” Officers involved in the case, from both Kentucky and Indiana, testified that no promises of leniency were made. Since at this stage of the proceeding, the presumption must be with the government’s position, the trial court’s findings “can only be reversed if they are clearly erroneous.”

The Court upheld Fowler’s conviction, but remanded the case back for resentencing because of errors in that process.

SEARCH & SEIZURE - STATE WARRANT

U.S. v. Franklin
2008 WL 2611337 6th Cir. (TN) 2008

FACTS: On Oct. 19, 2005, Officer Dyer (Jackson, TN, PD) was seeking a search warrant for Franklin’s home. He could not find a judge in Madison County (where Jackson is located), because of a judge’s conference, but he was able to find a Henderson County judge. That judge agreed to sign the warrant, and it was clearly indicated that he was a General Sessions judge from Henderson, signing under “interchange” - which apparently indicated a form of mutual aid between judges. However, it was later argued at a suppression hearing that the judge did not properly sign the warrant, as he wasn’t sitting by interchange nor was he in the county at the time he signed. The trial court found that the Henderson judge had the authority to sign the warrant. Franklin was charged with weapons offenses as a result of the subsequent search.

Franklin took a conditional guilty plea, and appealed.

ISSUE: Is a warrant that is invalid under state law, but which meets the minimum requirements under federal law, valid for federal purposes?

HOLDING: Yes

DISCUSSION: The Court noted that the actual legality, or illegality, of the warrant was immaterial, since the case was being tried in federal court. The Court found that “the warrant ... was granted in compliance with the requirements of the Fourth Amendment,” and as such, “the warrant was valid.” The Court found that the only Constitutional requirement of a warrant is that it be issued by a “neutral and detached magistrate.” Nothing suggests that the Henderson judge was not such.

The Court found the warrant was valid under federal law, and its possible invalidity under state law was immaterial.

SEARCH & SEIZURE – WARRANT DETENTION

U.S. v. Wagner

2008 WL 3271461 (6th Cir. OH, 2008)

FACTS: Around Sept. 3, 2006, the BATF, with the help of a CI, “arranged for a controlled buy of crack cocaine from Wagner.” The CI also stated that he had seen Wagner with guns, identified him in a photo, and gave them his address and vehicle information. The agents independently corroborated the information, as well.

Around Sept. 6, the CI made another, recorded, buy from Wagner of crack cocaine.

On Sept. 8, BATF requested a warrant, and on Sept. 13, they went to Wagner’s apartment to execute it. They “encountered Wagner in the parking lot, stopped him, and ordered him back into the apartment.” They “handcuffed Wagner and detained him for the duration of the search, which turned up a .38-caliber revolver, ammunition, a 16-gauge sawed-off shotgun, and miscellaneous drugs and drug trafficking paraphernalia.”

Wagner, a convicted felon, was indicted on various weapons offenses. Wagner requested suppression, and when that was denied, he took a conditional guilty plea. He then appealed.

ISSUE: May a resident be detained during the execution of a search warrant?

HOLDING: Yes

DISCUSSION: Wagner argued that his detention, during the execution of the search warrant, was unconstitutional. (He claimed he was “arrested” “in the parking lot of his apartment complex without probable cause.”) The Court stated that “[w]hen officers execute a search warrant at a suspect’s home, they enjoy an implicit, limited authority to detain the occupants at the premises – even with handcuffs – without making an arrest.”⁴⁹ Further, “[a]n officer’s right to detain a suspect who is in the process of leaving his home when the officer arrives to execute a valid search warrant is not limited by the suspect’s geographic proximity to the house; rather, police may detain a suspect as soon as is practicable under the

⁴⁹ Muehler v. Mena, 544 U.S. 93 (2005).

circumstances.⁵⁰ In Wagner's case, the Court found the situation was a detention, not an arrest, and that there was "no violation of the Fourth Amendment arising out of these events."

Wagner's plea was upheld.

SEARCH & SEIZURE - TERRY STOP

U.S. v. Pearce & Johnson
531 F.3d 374 (6th Circ. OH 2008)

FACTS: On Jan. 14, 2005, Cleveland PD and Cleveland Metro Housing Authority "were conducting a special detail in the area surrounding ... housing projects in northeast Cleveland." The investigation focused on the Mount Carmel Deli because of increased drug trafficking and a shooting in that area.

At about 8:15 p.m., Johnson (driving) and Pearce (the passenger) parked across the street from the Deli. Officer Shaughnessy, of the CMHA, arrived to do a "planned police sweep" of the street, and parked just behind the Johnson car. He saw Pearce "leaning slightly forward" as Johnson was getting out. Johnson, spotting Shaughnessy, "kind of hunched over a little bit, and he stuck his right hand into the small of his back at his waistline" – as he backed away from the officer and toward the front of the car. Thinking he was reaching for a gun, "Officer Shaughnessy immediately drew his own gun and ordered Johnson to show his hands and walk toward the police cruiser."

Other officers arrived, including CPD Officer Svoboda. When Johnson did not comply with Shaughnessy's orders to "show his hands," Officer Svoboda "also drew his gun and advanced toward Johnson." Johnson continued to keep his hands at his back, out of sight. Eventually, with the addition of the second officer, however, "Johnson complied ... and moved toward Officer Shaughnessy who began to frisk Johnson in search of weapons." During the frisk, he "recovered nine small plastic bags containing marijuana."

Officer Svoboda walked toward the car, which was not occupied. (At some point, Pearce had also gotten out.) Glancing inside, he saw "a magazine or clip from a gun laying on the passenger floorboard." Svoboda shouted "gun" and Shaughnessy immediately handcuffed Johnson. (Pearce was being detained by other officers at the time.) They searched the car and found two handguns, one each under both the driver's and passenger seats. Ammunition and cocaine were also found in the car.

Johnson admitted he owned one of the guns, the one found under the driver's seat, both to Officer Shaughnessy and later to Agent Arone (BATF). Pearce did not admit to owning either gun. Both men were charged for the guns, as both were convicted felons. Both men filed for suppression, and were denied. Both were convicted of being felons in possession. Both then appealed.

ISSUE: May an individual be searched when they exhibit behaviors that suggest they may be _____ carrying a weapon?

HOLDING: Yes

⁵⁰ U.S. v. Cochran, 939 F.2d 337 (6th Cir. 1991).

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DISCUSSION: Johnson (and Pearce) argued that the original contact was an unlawful seizure. The Court reviewed the history of the issue and applied it to the admitted facts in the case. The Court found the "brief investigatory detention of Johnson" was permitted, as "Officer Shaughnessy's observations provided a sufficient basis for temporarily detaining Johnson to determine whether or not he was actually engaged in wrongdoing." Officer Shaughnessy did not stop Johnson because of his appearance in the suspect area, in fact, he didn't stop him at all. He did respond to Johnson's own behaviors that "reasonably suggested that he might be carrying a weapon." (The government did not argue that Officer Shaughnessy's drawing his weapon constituted a seizure.) The Court found that the officer has reasonable suspicion to both stop Johnson and to "conduct a protective pat-down to ensure that Johnson was not carrying any weapons." The Court did not address (as Johnson did not, apparently raise the issue) as to whether it was reasonable for the officer to immediately recognize the marijuana as contraband. The Court noted that any evidence uncovered during the encounter was properly admitted, as well.

Both convictions were affirmed.

SEARCH & SEIZURE - CARROLL

U.S. v. Crumb

2008 WL 2906770 (6th Cir. OH, 2008)

FACTS: In the early morning hours of Jan. 27, 2007, Officer Duffy (Lindale, Ohio, PD) saw a vehicle on I-71 speeding and "weaving on and off the shoulder." Officer Duffy (along with Auxiliary Officer Mahon) made a traffic stop. Officer Duffy approached and spoke to Scott, the driver, and noticed the "odor of marijuana emanating from the vehicle." He spotted a "partially smoked marijuana cigarette in an ashtray in the vehicle's center console." Duffy asked both men in the vehicle (Scott and Crumb, the passenger) for ID and also asked for the joint. Both complied.

Crumb was found to have two outstanding arrest warrants, so Duffy got him out of the vehicle and patted him down.⁵¹ He found a small bag of marijuana and a small electronic scale. Duffy was handcuffed and secured in the cruiser. Duffy had Scott get out, and realized he had "alcohol on [his] breath." He patted Scott down and found a bag containing smaller bags of marijuana and a speed loader. Scott was secured in the cruiser as well.⁵² The officers searched the car and found a loaded revolver on the driver's side of the vehicle. Scott was formally arrested and given Miranda warnings, and he refused to make any statement.

Duffy continued to search the car and found crack cocaine between the console and the driver's seat; Officer Mahon found Ecstasy scattered on the passenger side. They also found, in the trunk, another large bag of marijuana and a pistol. Crumb admitted ownership of the firearm in the trunk.

Both men were charged with possession of the firearms and the drugs, both being convicted felons. They moved for suppression, which the trial court denied. Crumb appealed.

ISSUE: May a marijuana cigarette found inside a car support a Carroll search?

⁵¹ Although the opinion called it a pat-down search, it was apparently a full search incident to arrest.

⁵² The opinion suggests that Duffy and Mahon may have been in separate vehicles.

HOLDING: Yes

DISCUSSION: Crumb argued that once the visible joint was seized, that no further search of the vehicle was supported by probable cause. (Although the court didn't say, specifically, Crumb was presumably most interested in suppressing the firearm found in the trunk, for which probable cause would have been needed.)

The Court summarized his argument as having two prongs - whether the initial stop was properly supported by reasonable suspicion, and whether the "subsequent search of the vehicle was supported by probable cause." As Crumb did not raise the first issue, the Court did not address it.

The Court first looked as to whether "Officer Duffy's detection of marijuana in the vehicle, by itself, provided the necessary probable cause to conduct a lawful search of the vehicle." Like the trial court, the Court looked to U.S. v. Garza for direction.⁵³ The Court emphasized that Garza affirmatively stated that "marijuana odor - and only the marijuana odor - ... provid[ed] probable cause to search the interior of the truck" in that case. Subsequent Sixth Circuit cases have followed that precedent.⁵⁴ This is also consistent with the line of cases that have held that a trained drug-detection dog will provide the requisite probable cause for a Carroll search.

The Court stated that "[i]t is clear that upon smelling the marijuana odor and seeing the marijuana cigarette, the police officers had reasonable grounds to believe that further evidence of a crime may be found inside the vehicle." The Court upheld Crumb's plea.

U.S. v. Richardson
2008 WL 2967811 (6th Cir. TN, 2008)

FACTS: ——— At about noon, March 30, 2004, Det. Forrester (Collierville, TN, PD) was told by a CI that a "man possessing approximately nine ounces of crack cocaine would arrive" at a specified local motel that evening. With the approval of the detective, the CI made arrangements to make a buy. The CI had worked with the detective before and had proved reliable. He also provided a detailed description of both the man and his vehicle.

At about 5 p.m. that evening, officers began surveillance at the motel. The CI (with Det. Forrester) made several calls to the subject. At about 7:30 p.m., a vehicle matching the CI's description pulled into the motel, drove to the back and parked. By chance, it was only a few spaces from one of the officers doing surveillance. The officers pulled to that car and approached, with weapons drawn. Richardson (the driver) opened the door, and the officers immediately detected a "very strong odor of marijuana."

Det. Cardelli, whose car was parked only a few spaces away, later testified that Richardson's car was not completely blocked in; it could have driven away but it would have been a "tight fit." He stated that they intended only to talk to Richardson and detain him for investigation. Richardson did not immediately exit, when ordered, but did, eventually. Det. Cardelli "grabbed [Richardson's] arm as he was getting out of the car. Richardson fit the description provided by the CI. Noticing "large bulges" in several of Richardson's

⁵³ See 10 F.3d 1241 (6th Cir. 1993).

⁵⁴ U.S. v. Puckett, 422 F.3d 340 (6th Cir. 2005); U.S. v. Foster, 376 F.3d 577 (6th Cir. 2004); U.S. v. Elkins, 300 F.3d 638 (6th Cir. 2002).

pockets, Cardelli patted him down and, in both pockets, felt "hard objects." He found a quantity of crack cocaine, marijuana and a wad of cash.

Richardson was placed on the ground and handcuffed. Inside the car, they found scales and a box of plastic sandwich bags. He was indicted for the drugs, and requested suppression. Richardson took a conditional guilty plea, and appealed.

ISSUE: Does the odor of marijuana justify a Carroll search?

HOLDING: Yes

DISCUSSION: Richardson argued that he was seized without probable cause, and that the scope of the search "exceeded the scope of a Terry stop and pat-down without proper justification." The Court, however, found that the CI's tip was sufficient, particularly its prediction as to when and how Richardson would arrive at the motel, to support a Terry detention. Once the officers detected the odor of marijuana, they had sufficient probable cause to search the entire car. The Court also found that Det. Cardelli's representation of the situation, particularly that Richardson "was handcuffed only after the drugs were found in his front pants pocket, was credible." By the time that occurred, Cardelli had already properly frisked and located items that could be weapons, particularly since the CI had stated that he believed the subject might be armed. (The Court placed emphasis on the fact that "[e]very other detail provided by the CI occurred just as the CI had predicted.") Further, Det. Cardelli's seizure of the drugs- "before he concluded that [Richardson] was not armed, did not violate the Fourth Amendment for him to seize the drugs discovered during the pat-down."

Richardson's plea was upheld.

SEARCH & SEIZURE – TRAFFIC STOP

U.S. v. Farmer

2008 WL 3820512 (6th Cir. OH 2008)

FACTS: In April, 2006, two Beachwood PD investigators had staked out a hotel. While there, they saw four people, Farmer, his son, Brinkley and Brinkley's girlfriend, engaging in drug trafficking. They had arrived in two vehicles with out of state plates, and Brinkley had gotten a room for cash. They carried in luggage and then left in one car. The officers, who were actually there on another matter, checked with the desk and got Brinkley's name. They learned he'd been arrested in North Carolina on drug trafficking and weapons charges.

The four returned to their room. Brinkley then emerged, walked to one of the vehicles, removed two white plastic bags, and went to sit in the other vehicle, a van. A VW arrived, and Brinkley went to that car and got inside with both bags. He got out a few minutes later with only one bag and went back into the hotel.

Within a short time, the four came back out with their luggage, and got back into the two cars. The remaining bag went into a sedan driven by Farmer, along with a pit bull that was removed from the van and placed in the sedan as well. Brinkley and his girlfriend left in the van, and the Farmers left in the sedan.

The officers asked that the Ohio State Police (Sgt. Helton) stop Farmer's vehicle, because it had the bag. Sgt. Neff and Trooper Belcher, having been told what was going on, caught up to the caravan. Observing Farmer's vehicle drift over the fog line, Neff made the stop. He also called for a canine.

Neff collected Farmer's documents and spoke to the Beachwood investigators. During that time, after approximately 15 minutes, the drug canine arrived. It alerted to Farmer's trunk. Inside, the investigators found the bag, containing 3 kilos of cocaine.

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

ISSUE: May officers make a traffic stop based on representations from other officers?

HOLDING: Yes

DISCUSSION: Farmer argued that the stop, and the delay waiting for the drug dog, were both illegal. Although the trial court had apparently ruled in favor of the prosecution because of the minor violation, the Sixth Circuit chose to resolve the matter "solely on the reasonable suspicion that arose from Farmer's conduct at the hotel." (The Court was able to do this because the record contained sufficient information on the issue, and the facts had either been "addressed by the district court or [were] uncontested.")

The Court reviewed the facts, and agreed that the "uncontroverted facts gave rise to something more than an 'unparticularized suspicion or hunch' that Farmer's vehicle carried drugs," equating the information to the similar case of U.S. v. Perez.⁵⁵ Farmer noted that the troopers who made the stop had not observed the conduct at the hotel, nor had they spoken directly to the Beachwood officers. However, the Court found that the trooper "relied on dispatched information collected by Sergeant Helton in the call from the officers on stakeout." The Court found this perfectly reasonable.⁵⁶ The stop was conducted in a timely fashion, and the brief delay for the drug dog was defensible.

The Court found the stop, and ultimate seizure, lawful. Farmer further argued that the failure to preserve the radio communications related to the stop was in bad faith and a due process violation. (The tapes had been overwritten pursuant to the usual routine, because the agencies weren't notified to preserve them, even though Farmer had, apparently gotten a court order to preserve the tapes.) The Court found nothing sinister about the error, and the Court did not even sanction the government for its failure.

Farmer's plea was upheld.

SEARCH & SEIZURE – INEVITABLE DISCOVERY

U.S. v. Alexander

540 F.3d 494 (6th Cir. OH 2008)

FACTS: On April 5, 2006, Det. Cook, (East Cleveland PD) was a canine handler working parcel interception at the airport. He had worked at that task for 25 years, and pulled a half dozen package, on

⁵⁵ 440 F.3d 363 (6th Cir. 2006).

⁵⁶ Dorsey v. Barber, 517 F.3d 389 (6th Cir. 2008); U.S. v. Hensley, 469 U.S. 221 (1985).

average, a day, for additional scrutiny. He later testified he found about 150 packages a year containing unlawful drugs.

On the day in question, he spotted an express package with a signature waiver that looked unusual. He later stated that drug couriers often waive the signature of the receiving party, and that they often use express. Both the origination and the destination locations aroused his suspicion as well. In particular, he noted that the sender was supposed to be a company, but that the information was handwritten, and that the sender did not include a telephone number, which was the norm for businesses. He found the package to be "dense" - heavy with respect to its size - when he picked it up.

Cook checked the sender's address, finding it to be nonexistent. He subjected the package, along with other mail, to a dog sniff, and the dog alerted to the package. He contacted the federal postal inspector, Cernelich, who got a warrant. The package was opened, and found to contain two bricks of cocaine. Cernelich arranged for a controlled delivery to Alexander (the recipient's) home, after substituting coffee creamer for most of the cocaine. (Only 500 grams remained in the package.) A transmitter was also included that would indicate that the package had been opened.

At noon the next day, Cernelich posed as a mail carrier and delivered the package, handing it to Alexander's wife, Loretta. The package was opened 15 minutes later, triggering an entry by a joint DEA - Shaker Heights police team that executed the warrant.

Officer Ansari entered, finding Loretta and Alexander's mother in the living room. He handcuffed the pair. Loretta denied having received the package. The officers searched, finding a loaded handgun, more than \$1,000 in cash and mailing receipts. Det. Ford found Alexander in the basement, and brought him upstairs at gunpoint.

Ansari later testified that he saw Alexander enter the living room, without cuffs, and approach Agent Harper (DEA) in an aggressive manner. Ansari "moved to take Alexander down to the ground." Harper agreed that Alexander had approached and used profanity. The three men struggled for some seconds, and eventually, Alexander was handcuffed. (Ansari also stated that he did not see Det. Ford.) Ansari then took Alexander outside, and "admitted that he did not read Alexander his Miranda rights and told Alexander to admit where the cocaine was." (A neighbor, who witnessed them outside stated that Alexander asked repeatedly for a lawyer, which Ansari denied.)

Alexander did not calm down, so Ansari "swept his feet out from under him" and forced him to sit on the ground. At that point, he later testified that he gave Alexander Miranda warnings and again asked about the drugs. Ansari told him that if he showed them where the drugs were located, Alexander would be the only person arrested, and that they were then directed to the basement where the drugs were hidden.

Alexander claimed, however, that he was handcuffed before he was brought from the basement, and that Ansari assaulted him, threw him to the ground and choked him. He also claimed he was kicked in the chest multiple times and that the other officers present ignored what was happening.

Ansari was taken to jail, and eventually, to the hospital. Photos showed bruising to his back and chest but not his face. He filed a complaint with the DEA and took a polygraph, but the results are not given in the opinion. Alexander was indicted on drug trafficking and related charges and requested suppression. He also asked for discovery relating to the misconduct investigation and was denied.

The trial court denied the suppression order, finding that Cook's inspection of the package was appropriate, and that the drugs found at the home would have been found even if Alexander had not produced them, under inevitable discovery. The Court did find that Ansari's testimony was not credible and that there was no Miranda form in the file - and suppressed Alexander's statements. The Court did not rule on the issue of the alleged beating, except to find that Ansari's alleged violation, by interrogating after Alexander had asked for a lawyer, would normally require suppression as fruits of the poisonous tree. However, the evidence was not suppressed, again, because of inevitable discovery.

Alexander took a conditional guilty plea, and appealed.

ISSUE: May you still use inevitable discovery to admit evidence that would have been found, subject to a valid warrant, even if the evidence was initially found because the suspect was beaten by the police?

HOLDING: Yes

DISCUSSION: First, Alexander argued that Cook had no reasonable suspicion to single out the package for additional scrutiny, invalidating the eventual warrant. The Court, however, found that sealed packages, while given a great deal of protection, were not immune from examination. The Court found that Det. Cook's suspicions were properly articulated and that the Postal Service's drug courier profile was defensible, agreeing that many of its factors were reasonable. The short delay before the dog confirmed Cook's suspicions did not invalidate the ensuing search.

However, Alexander also argued in the alternative that Ansari's beating precluded application of the inevitable discovery doctrine. The Court noted that it had found, in the past, that "the inevitable discovery exception to the exclusionary rule applies when the government can demonstrate either the existence of an independent, untainted investigation that inevitably would have uncovered the same evidence or other compelling facts establishing that the disputed evidence inevitably would have been discovered."⁵⁷ Although the burden to prove this is on the government, Alexander had conceded that the police would have found the cocaine pursuant to the warrant. The Court found that "the government cannot be made worse off because of the misconduct than it would have been if the misconduct had not occurred."⁵⁸ Further, the Court noted that in this case, there were other methods available to deter police misconduct, such as a lawsuit, administrative discipline or even criminal charges.

The Court upheld Alexander's plea.

SEARCH & SEIZURE – K-9

U.S. v. Torres - Ramos
536 F.3d 542 (6th Cir. 2008)

FACTS: On May 26, 2004, at about 11 a.m., Trooper Coverstone (Ohio State Police) stopped a van for speeding in Shelby County. It bore Washington plates. The trooper asked the driver, Reynaga, to get

⁵⁷ U.S. v. Kennedy, 61 F.3d 494 (6th Cir. 1995).

⁵⁸ Brown v. Illinois, 422 U.S. 590 (1975).

out. She produced the van's registration, but stated she did not have her OL on her person. Trooper Coverstone asked her about the van's owner, her travel companions and her travel plans. She was nervous and failed to answer basic questions fully. (Specifically, she claimed her Aunt Paula owned the van, but she did not know her last name, claiming she had recently married.)

She went back to the van to get her license as the trooper was checking the van's ownership. Reynaga returned and handed over her California license, along with the license of one of her passengers, Servin. The trooper took Reynaga back to his car and placed her inside. He also asked for a drug dog to be dispatched.

Coverstone began to question Servin, the passenger. His responses differed materially from Reynaga's. As they spoke, the trooper noticed the "strong odor of an air freshener," leading him to believe they were trying to cover up the smell of a narcotic. He learned from dispatch that Servin had a criminal history. He also contacted the DEA⁵⁹ and learned that the owner of the van (Paul Demechor) was the subject of a current wiretap.

Some 35 minutes into the stop, Trooper Gilman and Emir (his drug dog) arrived. Emir alerted on the van. The troopers removed everyone, including another defendant, Torres-Ramos, from the van and secured them. They found 9 kilos hidden in the vehicle. Trooper Coverstone gave Servin his Miranda warnings, and asked if he would help with a controlled delivery. Servin agreed and the plan was devised.

The delivery was made, and as the recipients left the scene, Trooper Coverstone made a traffic stop and arrested the occupants, "based upon his supervisor's determination that probable cause existed for their arrests."

Reynagos, Servin and Torres-Ramos were all arrested, and demanded suppression of the drugs found in the van. The trial court determined that none of the three had an expectation of privacy in the van, and also concluded that "Coverstone had reasonable suspicion that criminal activity was afoot, thereby permitting him to extend the scope of the initial traffic stop." Servin and Torres-Ramos took conditional guilty pleas; while other defendants in the case went to trial and were convicted. They all appealed.

ISSUE: Is the reliability of a drug dog's training and performance a matter for the jury to decide?

HOLDING: Yes

DISCUSSION: The Court agreed that passengers do not have a reasonable expectation of privacy in a vehicle,⁶⁰ but also noted that passengers "may still challenge the stop and detention and argue that the evidence should be suppressed as fruits of illegal activity."⁶¹ As such, the court found that the passengers had standing to contest the stop, but further found that Trooper Coverstone had sufficient reasonable suspicion both for the initial stop, and to extend the stop. The Court evaluated the stop in detail, however, noting that the "issue of when the traffic stop ended is complicated by the fact that Coverstone never began writing a speeding ticket" – he later testified that he intended only to warn the driver. Torres-Ramos and Servin argued that the traffic stop was over when Coverstone called for K-9, but the trial court disagreed.

⁵⁹ From the context, he apparently contacted EPIC – the El Paso Intelligence Center.

⁶⁰ Illinois v. Rakas, 439 U.S. 128 (1978).

⁶¹ U.S. v. Ellis, 497 F.3d 606 (6th Circ. 2007).

The trial court had reasoned that it was appropriate for Coverstone to continue to investigate the ownership and lawful possession of the van. Once he detected the inconsistencies between the stories, it was appropriate to further extend the stop.

The Sixth Circuit, however, found that the traffic stop ended when “Coverstone put Reynaga in his patrol car, which occurred immediately after he called for the canine unit.” The Court carefully analyzed everything Coverstone knew at that time, and agreed that the trooper had reasonable suspicion that the possession of the van might be unlawful, since it was 1,000 miles from “home,” and the driver could not recall how she’d gotten the van initially, which was less than a week before. The Court agreed there was sufficient reasonable suspicion to extend the stop. The details that developed justified the extension of the stop.

The defendants also argued that the dog, Emir, was “insufficiently reliable to establish probable cause to search the car.” They argued that “Ohio’s canine certification process is fundamentally flawed.” The Court reviewed the information that was put before the trial court on the issue, included the testimony of the handler as to Emir’s training and record, as well as testimony from an expert witness that questioned the training protocol under which Emir was certified. The Court concluded that although the expert witness might have a better protocol, that Emir’s training indicated he was sufficiently reliable to justify the search.

The convictions of Torres-Ramos and Servin were affirmed.

SEARCH & SEIZURE - PLAIN VIEW

U.S. v. Williams

2008 WL 3271251 (6th Cir. 2008)

FACTS: On Sept. 28, 2003, Sgt. Gibbons (Dyer County, TN, SO) responded to a domestic call at Williams’ mobile home. As he arrived, he saw Taylor, Williams’ girlfriend leaving. (He recognized her from prior calls.) Taylor told him that she and Williams had fought over his infidelity, and that “Williams threw her over a counter in the kitchen.” She stated she’d escaped from the house and that Williams had followed her with a knife, and that she’d “then tried to run over Williams with her car,” but was unsuccessful, instead striking his car.

Gibbons arrested Taylor for “aggravated domestic assault” and placed her in the cruiser. She stated that if she was going to jail, so was Williams, and told Sgt. Gibbons that there were drugs in the house. He summoned a sheriff’s office investigator, who proceeded to the scene, joining two other officers who were already there, talking to Williams. Williams stated that Taylor shouldn’t be going to jail, as he was the one that hit her. So, Williams was arrested.

Sgt. Gibbons told Taylor that he needed to enter the house to take pictures, and she handed over the keys. Inside, he saw, in plain view, marijuana and cocaine. Investigator McCreight got a search warrant, but he did not include Gibbons’ observations, only Taylor’s assertions that there were drugs in the house. In the ensuing search, they found more cocaine and marijuana, and a firearm.

Williams, a convicted felon, was indicted on weapons and drug charges, under both state and federal law. He requested suppression and was denied. Williams was convicted, and appealed.

ISSUE: May a search be based upon consent from someone with “apparent authority?”

HOLDING: Yes

DISCUSSION: The trial court had ruled that Taylor had apparent authority to give consent for the officers to enter the house, and that the officers acted in good faith on her representation that she had the ability to give consent. The trial court had also upheld the warrant. On appeal, Williams abandoned the issue of the authority, and focused on his assertion that the search warrant did not provide sufficient probable cause. The Court agreed that “probable cause existed within the four corners of the affidavit to support issuance of the search warrant for the drugs” - even excluding “extraneous statements made by officers (apparently to the judge) regarding their observation of drugs in plain view.”

The Court noted that it had held in the past that “[w]hen a witness has seen evidence in a specific location in the immediate past, as is willing to be named in the affidavit, the totality of the circumstances presents a substantial basis for conducting a search for that evidence.”⁶² In addition, the seizure of the gun was appropriate, since the officers knew Williams was a convicted felon. (Thus, the nature of the contraband, the gun, was immediately incriminating.)

The Court upheld the denial of the suppression.

SEARCH & SEIZURE - COMPUTER CRIME

U.S. v. Hodson
2008 WL 4273085 (6th Cir KY 2008)

FACTS: On Oct. 7, 2005, Det. Passano (Passaic County, NJ, SD) was online under a false persona, searching for sexual predators. He represented himself as a 12-year -old boy. He was contacted by an individual and they traded instant messages (IMs) for almost an hour. The individual provided personal information, which included that he was an adult male who lived in Kentucky, and also that “he was a homosexual who favored young boys” and that he liked looking at his own two boys (8 and 11) naked. He also claimed to have had sex with a 7 year old nephew. He “expressed his desire to perform oral sex on the presumptive” 12 year old (Passano) and “his willingness to travel to New Jersey to do so.”

Det. Passano subpoenaed AOL and got back information that led to Hodson, who lived in Middlesboro, Kentucky. He contacted Det. Pickrell of KSP, who verified some of the information, including that Hodson had only one child and no known nephews. On Jan 19, 2006, she prepared an affidavit “based entirely on the AOL information, the internet conversation and her partial substantiation thereof” for a search warrant for Hodson’s residence. The warrant specifically requested:

Any and all computers, hard drives, zip drives, data bases, software, diskettes, floppy disks, CDs, printers and/or any other electronic devices and/or their components of any kind capable of printing, recording, storing, transferring and/or disseminating documents, notes, calculations, schedules, spread sheets and/or any other information and/or data of any kind including any and all books or manuals that may contain sexually explicit

⁶² U.S. v. Pelham, 801 F.2d 875 (6th Cir. 1986)

reproductions of a child's image, voice, or handwriting. Including sexually explicit photographs, negatives, slides, magazines, movies, videotapes, audiotapes, and picture or computer generated image or picture, whether made or produced by electronic, mechanical or other means of sexually explicit conduct or visual depiction of a child including undeveloped film or videotape and data stored on computer disk or by electronic means which is capable of conversion into a visual image or material relating to children that serves a sexual purpose for a given individual. Including toys, games, drawings, fantasy writings, diaries, souvenirs, sexual aids, manuals, letters, books about children, psychological books on pedophilia and ordinary photographs of children.

Visually explicit images, whether on paper or its equivalent stored in electronic, magnetic or other computer formats including such images as stored within computer storage devices and other computer media depicting any child known or reasonably believed to be under the age of 18 years of age, in which the child is actually or by simulation engaged in any act of sexual intercourse with any person or animal; Actually or by simulation engaged in any act of sexual contact involving the sex organs of the child and the mouth, anus and sex organs of the child and the sex organs of another person or animal; Actually or by simulation engaged in any act of masturbation; Actually or by simulation portrayed as being the object of, or otherwise engaged in, any act of lewd fondling, touching, caressing involving another person or animal; Actually or by simulation engaged in any act of excretion or urination within a sexual context; Actually or by simulation portrayed or depicted as bound, fettered, or subject to sadistic, masochistic, or sadomasochistic abuse in any sexual context; or depicted or portrayed in any pose, posture or setting involving a lewd exhibition of the unclothed genitals, pubic area, buttocks or, if such person female, a fully or partially developed breast of a child.

Computer Systems, including, but not limited to system components, input devices, output devices, data storage devices, data transmission devices and network devices; and Computer media; and Other material relating to computer systems and the internet including, but not limited to, documentation, operating system software, application or access program disks, manuals, books, brochures, or notes; and Computer access codes, usernames, log files, configuration files, and passwords; and any and all evidence related to ownership, control or use of the safe deposit box, files, logs, and accounts.

I am further requesting authorization to remove the computer system(s), and related computer peripherals, storage devices, software and media to an off-site controlled environment to perform the search for the items described above.

The Court later found it significant that "that this depiction of the "places to be searched and things to be seized" describes and directs a search for evidence of child *pornography*, with nary a hint of child *molestation*."

The affidavit also included Det. Pickrell's probable cause for the affidavit. Again the Court noted that "the statement of probable cause contains no information whatsoever with regard to Hodson's engaging in any aspect of child pornography, or any basis for believing that individuals who engage in child molestation are likely also to possess child pornography."

Det. Pickrell's request was granted, and the search resulted in the seizure of "two computers, a web cam, a DVD, a CD, a floppy disk, four VHS tapes, and an envelope containing miscellaneous papers." Upon later investigation, "forensic experts searched the hard drives of the two computers and discovered, buried in the hard drives, between ten and 50 pictures of child pornography that had been downloaded on December 6, 2002, but which had later been deleted and were, as of that time, inaccessible to Hodson. None of the images were of Hodson's son and no evidence was seized or subsequently discovered that would support any charge against Hodson of child molestation." Hodson was, however, charged for the possession of the child pornography. He moved for suppression. That was denied upon recommendation of the magistrate judge. Hodson took a conditional guilty plea, and appealed.

ISSUE: Is a warrant solely for child pornography valid when the suspect is believed to be engaged only in child sexual abuse, with no indication of child pornography being involved?

HOLDING: No

DISCUSSION: Hodson argued that the information in the affidavit was stale, that there was no nexus between the probable cause and the place to be searched, and between the evidence and any connection to child pornography. The trial court found that the inference between an individual's interest in children as sexual partners and that individual's possession of child pornography was reasonable.

The magistrate judge had agreed that "on the whole, the warrant was defective because there was neither probable cause to search for child pornography nor a molestation-pornography nexus, but that the officer's good faith excused this defect." The Sixth Circuit panel agreed that it was "beyond dispute that the warrant was defective for lack of probable cause - Detective Pickrell established probable cause for one crime (child molestation) but designed and requested a search for evidence of an entirely different crime (child pornography)." As such, the Court discussed whether the Leon⁶³ good faith exception applied in this case "whether the faceless, nameless "reasonably well trained officer" in the field, upon looking at this warrant, would have realized that the search described (for evidence of the crime of child pornography) did not match the probable cause described (that evidence would be found of a different crime, namely, child molestation) and therefore the search was illegal, despite the magistrate's decision to the contrary."

The Court concluded that such an officer would have realized that the warrant was invalid - and that "it was unreasonable for the officer executing the warrant in this case to believe that probable cause existed to search Hodson's computers for child pornography based solely on a suspicion — albeit a suspicion triggered by Hodson's computer use — that Hodson had engaged in child molestation." Even though Det. Pickrell had "specialized, subjective knowledge about these kinds of criminal offenses," such subjective good faith was not sufficient.

The Court reversed the denial of the motion to suppress, and remanded the case to the trial court for further proceedings consistent with the decision.

⁶³ J.S. v. Leon, 468 U.S. 897 (1984)

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INTERROGATION - MIRANDA

Coomer v. Yukins, Warden
533 F.3d 477 (6th Cir. 2008)

FACTS: On May 16, 1996, Coomer and Adams (together with their toddler) lived in Clawson, Michigan. On that day, finding that their rent and day-care payments were overdue, they decided to commit a robbery. Later that day, they encountered and strangled Iverson, and stole two checks, which were cashed later that day. On Dec. 30, the police learned that Coomer had called a friend and told him that Adams had beaten her, and that she was at the home of another friend, Krawczyk. Dawson went to see her and she told him about the murder, and that she had not known that Adams was going to commit murder in addition to the robbery. She stated she hadn't reported it because Adams was holding her involvement in the crime over her. Krawczyk had called the police about the assault, however, and when they arrived, Coomer explained that Adams "had beaten her and left in a stolen truck." On the way to the police station, Coomer told Krawczyk about the murder and that she was worried about being arrested. She stated that Adams had told her he would take all the blame, however, so that she would be free to raise their child.

Adams was arrested for domestic assault that same day. In the meantime, apparently, Dawson had told his lawyer what he knew about Coomer and the lawyer contacted the police. That night, police went to Coomer's apartment, arriving at about 11:45 p.m. Later testimony indicated that 9-11 officers arrived, both uniformed and plainclothes, but there was conflicting testimony about the positioning of marked cars. Coomer later stated that she'd had no prior contact with police and that she'd used alcohol and marijuana that day, but not, apparently, to the extent that she appeared intoxicated. There was no indication that she'd been told she'd been arrested, but neither was she told that she was not. (Two officers stated they specifically told her that she was not under arrest and that they would leave if she asked.) Coomer was 20 years old, had graduated high school and had been an excellent student. There was also conflicting testimony about the degree of freedom she'd been given, but she did know that one of the officers was the lead officer in the homicide investigation.

Coomer later stated that she did not feel coerced, and there was indication that she was weeping while giving her statement, indicating remorse. She did ask that the officers remain quiet, because her son was sleeping, and offered refreshments. She confessed to her involvement in the murder, and the decision noted that "[f]ew questions were asked of her; most of her oral statements were offered in a continuous narrative over the next thirty minutes." She followed that up with a written statement, which was excluded by the trial court. The lead investigator asked her to accompany them to the station and she was allowed to arrange for a sitter. She was transported by two officers and was provided with a soda and cigarettes. When they arrived, the lead investigator told her she "was now in custody" and he gave her Miranda warnings. She waived her rights and repeated her confession, adding details.

Ultimately, both Coomer and Adams were tried, and Coomer was convicted of murder and kidnapping. The state court dismissed the kidnapping charge. She appealed the murder conviction to the Michigan Supreme Court, and was denied. Coomer then filed a habeas corpus petition, arguing that her Miranda rights were violated. The District Court denied the petition, and she appealed.

ISSUE: Is a statement given in one's own apartment, in the presence of multiple officers, custodial?

HOLDING: No (but see discussion)

DISCUSSION: Coomer argued that the oral confession given at her apartment was unlawful. The trial court had found that since Coomer was in her own apartment, in the presence of at least one officer she knew, and that the questioning was "minimal and brief," that a reasonable person would not have believed they were in custody. The Sixth Circuit applied the Salvo⁶⁴ factors, and agreed that the trial court was correct. The statement made at the apartment was properly admitted and Miranda was not required.

The Court then looked to the oral confession made at the police station. Coomer had argued that the second confession was tainted by the unlawful first confession, which the Court had upheld. Again, the Court noted that the statement was not "obtained illegally or involuntarily" and in fact, she had been given, and waived, her Miranda rights. Even though the trial court had not admitted her written statement, the Court found that there was no indication, given the lapse of time, "the "absence of coercive police conduct; the change in location; the voluntary nature of her first oral statement that immediately preceded the unlawful written confession; and her waiver of rights at the police station." (The Court essentially ignored the trial court's decision to exclude the written statement, and the opinion is not clear on why Michigan actually did so.)

The denial of Coomer's writ was upheld.

EVIDENCE / TRIAL PROCEDURE – SPOILIATION

U.S. v. Branch
537 F.3d 582 (6th Cir. 2008)

FACTS: On March 5, 2003, Officer Colston (Oldham County PD) encountered Branch and Patterson, while Colston was taking a break at a local convenience store. His suspicions were aroused when the pair "seemed to actively avoid him." He followed the pair when they drove north on I-71, finally stopping them for speeding. Colston requested the vehicle documents from Branch, the driver. Branch gave him the rental agreement, which was "overdue by several weeks." He also got Patterson's license. Colston noted that although both claimed to be from New York, their licenses were from Florida (Patterson) and Tennessee (Branch). Colston returned to his car, wrote up a warning cite, ran checks on both and called for backup. He then went back to the stopped vehicle and asked Branch to get out, whereupon, he later testified, "Branch's level of nervousness "just shot through the ceiling all of a sudden." Colston returned Branch's documents along with the warning citation.

Colston told Branch he was free to leave, but asked him if "he would mind staying to answer a few more questions." Branch agreed and related a story as to why he and Patterson were together. He got consent

⁶⁴ In U.S. v. Salvo, 133 F.3d 943 (6th Cir. 1998), the Court considered the following factors in determining if an individual was in "custody": 1) the purpose of the questioning; 2) whether the place of the questioning was hostile or coercive; 3) the length of the questioning; and 4) other indicia of custody such as whether the suspect was free to leave or to request the officers to do so; whether the suspect possessed unrestrained freedom of movement during questioning; and whether the suspect initiated contact with the police or voluntarily admitted the officers to the residence and acquiesced to their request to answer some questions.

from Patterson to search, since Patterson had rented the car. Colston's narcotics dog "became excited and signaled its alert to the scent of narcotics at several places on the car." Colston searched, finding a bag containing just shy of \$10,000 in cash.

Officers Colston and Campbell patted down the two men, and Colston found a "large unusual hard object" at Branch's waist. Branch told him that the item was cocaine. Colston handcuffed Branch and found that the item was a kilo brick. Branch was given Miranda, and admitted that he was transporting the cocaine to sell.

The entire encounter was captured on Colston's patrol video recorder, but when he reviewed the recording, he discovered that there was no audio track. He believed that the tape had no evidentiary value and turned it in for reuse.

Branch was indicted for possession with intent to distribute, and requested suppression based upon the destruction of the videotape. When that was denied, he took a conditional guilty plea, and appealed.

ISSUE: Is the failure to preserve potentially exculpatory evidence always "bad faith?"

HOLDING: No

DISCUSSION: The Court addressed several issues. First, the Court concluded that the factors upon which Colston depended to make the stop were adequate to support that stop. (The Court stated, specifically, that while none of the factors were dispositive, individually, that "viewed in their totality, they create a reasonable suspicion that illegal activity was afoot.") The Court further supported the frisk, but did not elaborate. The Court found that Colston's seizure of the cocaine was also appropriate, even if it was not, arguably a weapon, since when asked about it, Branch replied "Man, it's cocaine, just take it." At that point, Colston had probable cause to seize the contraband.

Branch also argued that Colston's failure to preserve the tape violated his right to have "material exculpatory evidence" so preserved. If the tape was, in fact, materially exculpatory, such destruction would violate the right to due process "regardless of whether the government acted in bad faith."⁶⁵ "Constitutional materiality means that the evidence possesses both "an exculpatory value that was apparent before the evidence was destroyed and ... [is] of such a nature that the defendant would be unable to obtain comparable evidence by other reasonably available means."⁶⁶ Just because an officer is negligent, or even grossly negligent, does not constitute bad faith.⁶⁷ Since Branch argued only that the tape might be "potentially useful" exculpatory – he did not argue that it was materially exculpatory evidence. Therefore, the standard to decide the due process issue is whether Colston destroyed the tape in bad faith, and since the trial court decided that, at most, the destruction was negligent, the Court found the destruction was not in bad faith.

Branch's conviction was affirmed.

⁶⁵ California v. Trombetta, 467 U.S. 479 (1984); Youngblood v. Arizona, 488 U.S. 51 (1988); U.S. v. Wright, 260 F.3d 568 (6th Cir. 2001); U.S. v. Jobson, 102 F.3d 214 (6th Cir. 1996).

⁶⁶ Youngblood, *supra*.

⁶⁷ Wright, *supra*.

EVIDENCE / TRIAL PROCEDURE - SPONTANEOUS UTTERANCE

Smith v. U.S.

2008 WL 2622657 (6th Circ. (Mich) 2008)

FACTS: On Dec. 10, 2003, Detroit officers executed a search warrant on a home. Sgt. Spencer, in charge, announced their presence, and saw, through a window, that Smith was running. The officers then forced the door and entered.

Officer Salazar found Smith in the bathroom. He brought her back to the front room and handed her off to other officers to secure. He then continued to search. Officer Bradford found cocaine, packaged for distribution, in the area from which Smith ran. Another officer, Carson, found a loaded weapon under the couch. Sgt. Spencer found a large amount of cash on Smith's person. When the gun was found, Smith stated that the "gun was there because she had gotten robbed a couple of days ago at the house" and that she had gotten it from her "supplier." Sgt. Spencer repeated this statement in court, but agreed he had not included this statement in his initial written report.

Smith later argued that the statement was made as a result of an interrogation, but the prosecution characterized it as an "excited utterance." Smith also argued that the prosecution should have disclosed this statement during discovery, because it was inculpatory.

The trial court found the statement was an excited utterance, and not discoverable under the federal rules. Smith was convicted of weapons and drug charges, and appealed.

ISSUE: Must an oral statement made by a suspect be provided in discovery?

HOLDING: No (in federal court)

DISCUSSION: The Court noted that, according to the Federal Rules of Criminal Procedure, Rule 16(1)(1)(A):

"[u]pon a defendant's request, the government must disclose to the defendant the substance of any relevant oral statement made by the defendant, before or after arrest, in response to interrogation by a person the defendant knew was a government agent if the government intends to use the statement at trial."

Noting that this rule only applied to statements made in response to an interrogation, the Court found that Smith's statement was not made as a result of interrogation but was, instead, a spontaneous statement, and ruled that the statement need not have been disclosed.

After resolving several other issues, the Court upheld the convictions.

NOTE: *It is critical, however, to note that Kentucky's Rules of Criminal Procedure on the issue is somewhat different. Kentucky specifically requires that ALL incriminating oral statements made by the defendant (or other witnesses) be documented and provided to the defense.*

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42 U.S.C. §1983 – ARREST

Parson v. City of Pontiac
533 F.3d 492 (6th Circ. 2008)

FACTS: On April 7, 2004, in the early morning hours, Frantz was shot twice in the chest as he was working at his Pontiac firehouse. The initial investigation indicated that the shooter “knocked on the northwest door [of the firehouse] and when the fireman opened it he was shot twice in the chest.” Two detectives followed Frantz to the hospital, but were unable to immediately speak to him because he was in surgery. A number of firefighters were interviewed, including the firefighter that initially found Frantz, and he related what Frantz had told him. Frantz had specifically indicated he did not know the shooter.

Detectives also interviewed Parsons’ ex-girlfriend, who had told another friend that she suspected Parsons had done the shooting. She indicated that Parsons, who had been dismissed from the Fire Department, was angry about his termination. She indicated he had expressed suicidal thoughts and that he carried a gun. She tried to call Parsons while at the police station, with no success. With Parsons so implicated, the detectives focused their investigation on him.

The detectives questioned a number of firefighters about Parsons. There was no indication that Frantz had behaved inappropriately during the termination process, nor was there any indication he held any particular animus to Frantz, who was not involved in the termination. Another firefighter, however, agreed that he had thought of Parsons as a suspect because the shooter had come to the back door around shift change, something off-duty firefighters would often do. Holmes also tried to contact Parsons, with no success. However, Parsons called him back while he was at the police station, and Holmes told him about the shooting. They arranged to meet at a local restaurant.

Officers were dispatched to the location, and found Parsons in his car. Believing him to be armed, they approached cautiously and pulled him from the car. He was frisked, handcuffed and taken to the station, where he was given Miranda. After consulting with a family friend, also an attorney, Parsons refused to waive his rights. He was booked on charges of attempted murder before the end of the day.

Officers executed a search warrant on his home and found four guns, but none of those guns were linked to the shooting. Parsons’ attorney told them to speak to Parsons’ current girlfriend, Evans, who gave them detailed information as to Parsons’ whereabouts early that morning when the shooting had occurred, which included Parsons and Evans being present at another local police station, on an unrelated matter, where he was actually caught on surveillance video.

The next day, Frantz was able to speak. Frantz stated he did not know the shooter, and provided a description. He did not believe the shooter was Parsons, however, mainly because of a height differential. They also learned at that time that the shooter had knocked on the kitchen window, not the door, which was the practice of arriving firefighters who did not have a key. Further interviews were held, and the police also tried to arrange a polygraph for Evans, Parsons’ girlfriend and alibi witness.

On April 9, Parsons was released, although he was still being evaluated as a suspect. Parsons was never formally charged. Parsons then sued the City of Pontiac, Det. McKinney and other unnamed officers for violations of his Fourth Amendment rights, as well as state claims. The defendants filed for summary judgment, and in the process, Parsons also filed an amended complaint, naming another detective as well. Ultimately the Court gave summary judgment to all defendants, and Parsons appealed the dismissal with respect to the individual officers, only.

ISSUE: Does an arrest always require probable cause?

HOLDING: Yes

DISCUSSION: The Court addressed Parsons' false arrest claim. The Court stated that the first question was whether the two detectives "had probable cause to arrest Parsons." That decision had to be "made based on the totality of the information that was known to the detectives at the time of the arrest." The Court reviewed the information concerning the detectives' knowledge prior to the arrest, and noted that some of the information upon which they claimed to base their decision was not known to them at the time of the arrest. (Specifically, the Court noted the difference between someone banging on the door, which anyone might do to summon a firefighter, and the knocking on the window, which was "firefighter protocol." They were not aware that the latter was in fact the method used until long after Parsons was arrested.) Further, McKinney's report on the day of the shooting included information that they did not get until they spoke to Frantz the following day.

The Court examined each piece of information known to the detectives at the time of the arrest, and concluded that although they "certainly had information that was sufficient to support their questioning of Parsons as a potential suspect," they did not have probable cause to make the arrest. Finding that there was a constitutional violation, the Court moved on to the second part of the equation, whether the right was clearly established, and whether the detectives' actions were objectively reasonable. The Court quickly found that the law regarding arrests, and the absolute need for probable cause, was clearly established. In this situation, the "problem is not that they ignored exculpatory evidence in arresting a suspect ..., but that a genuine issue of material fact exists as to whether they possessed sufficient inculpatory evidence to reasonably believe that Parsons shot Frantz." As such, the Court concluded that the decision to award qualified immunity for the two detectives was in error.

The case was reversed and remanded for further proceedings.

42 U.S.C. §1983 – MALICIOUS PROSECUTION

Kinkus v. Village of Yorkville, Ohio
2008 WL 3820555 (6th Circ. 2008)

FACTS: On Sept. 18, 2004, a flood occurred in Yorkville. Streets were closed due to the rising flood, including the one on which Kinkus's residence was located. (Kinkus was both a town council member and a ranking officer in the fire department.) Kinkus's vehicle was blocking the road, contrary to the emergency parking rules and barricades, and Officer Popp (Yorkville PD) and Firefighter Bailey approached to learn the reason why.

Kinkus, who was with the vehicle, later stated that Officer Popp asked him how long the vehicle was going to be parked, and he replied “[u]ntil the freaking water goes down.” Kinkus also complained to Bailey that no one at the firehouse would help his daughter because they claimed to be too busy. More words were exchanged, with Kinkus asking Popp “if he had a ‘f---cking’ problem” and stating that he was on “my g-- d-- street.”

Popp and Bailey left. There was later a dispute as to whether Kinkus was ever actually ordered to move the vehicle. Popp and Bailey claimed Kinkus used profanity, which Kinkus denied. Popp discussed the matter with the police chief, who asked why he hadn’t charged Kinkus at the time. Popp “explained that he was afraid of losing his job as a result of Kinkus’s threats.” The chief “assured ... him that his job was secure.” Popp completed a report and a criminal complaint and forwarded it to the local prosecutor for review. The prosecutor issued a complaint against Kinkus for Disorderly Conduct.⁶⁸ At bench trial, the judge found that Kinkus did use profanity, but that his words did not “constitute ‘fighting words.’” Kinkus was acquitted.

Kinkus then sued Popp, Anderson (the chief) and Yorkville, arguing malicious prosecution, First Amendment retaliatory prosecution against Popp and Anderson, and municipal liability against Yorkville. The trial court had found against Popp and Anderson, stating specifically that Popp lacked probable cause to charge Kinkus and that Kinkus’s statements were protected by the First Amendment. It further found that Popp and Anderson were not entitled to qualified immunity.

Popp and Anderson appealed.

ISSUE: May an officer who submits a truthful complaint, but does not do more to initiate an arrest, be sued for Malicious Prosecution?

HOLDING: No

DISCUSSION: First, Popp argued for qualified immunity on the malicious prosecution claim, because there was no Fourth Amendment violation initially. The Court agreed, because Popp did not actually make the decision to charge Kinkus, the prosecutor did, and there was no indication that anything Popp told the prosecutor was less than truthful.⁶⁹ The facts were fully litigated at Kinkus’s criminal trial, and even though he was acquitted, there was enough admitted against him that the Court could find probable cause. The Court found that Popp was entitled to summary judgment on that claim.

With respect to the retaliatory prosecution claim against Popp and Anderson, again, the Court found no constitutional violation. The one-month lapse in time between the offense and the prosecution does not suggest animus. Again, the Court found that even under Kinkus’s version of the facts, there was no constitutional right violated.

Because there was no valid claims against Popp or Anderson, there was also no valid claim against Yorkville, and that claim too, was dismissed.

⁶⁸ Ohio’s Disorderly Conduct charge is essentially identical to Kentucky’s.

⁶⁹ *Skousen v. Brighton High Sch.*, 305 F.3d 520 (6th Cir. 2002).

42 U.S.C. §1983 - USE OF FORCE

Reed v. City of Cleveland
2008 WL 2743748 6th Cir. (OH) 2008

FACTS: On Jan 18, 2004, "Mays (driver) and Robinson (passenger) picked up food at a Burger King restaurant." They parked to eat their food.

Officers Clark and Rose were dispatched on a report of drug activity, with a specific address and vehicle description provided. They parked behind the identified car, which was Mays' car, and saw the two men inside. Further, Mays matched the description of a person supposedly involved in drug trafficking.

Officer Clark requested that dispatch check the plate. The officers saw "furtive movements" - further described as "people turning back, looking at you, then reaching down in a downward motion continuously." Both officers got out of the car and approached with guns drawn.

Mays was ordered out and was handcuffed by Rose. Clark ordered Robinson out, but Robinson then "took off running down the street." Clark chased him, tackled him and a struggle ensued.

Four witnesses later testified as to the struggle- Mays, Clark, Rose and Mathis, the resident of the house where it occurred.

Officer Clark, for his part, stated that Robinson managed to get on top of him and punched him in the face. He also testified that, during the struggle, Robinson reached for the gun in Clark's holster. As they wrestled over the gun, Clark acknowledged that he fired a single gunshot at Robinson. The latter was killed by a single bullet to the chest. Clark claimed that he shot Robinson because he feared for his life and the lives of others.

On the other hand, Mathis testified that she saw "every bit" of the struggle between Officer Clark and Robinson and the eventual shooting of Robinson. She claimed that Robinson was never on top of Clark and that she did not see Robinson punch Clark. Furthermore, she stated that Robinson neither wrestled with Clark, tried to get away, nor reached for Clark's gun. Mathis instead said that she saw Robinson put his hands up in the air when Clark tackled him onto his back, and that Clark had his knee on Robinson. In contrast to Clark's own admission and Officer Rose's testimony, Mathis said that Rose (who ran over to the two men after ensuring that Mays's handcuffs were secure), and not Clark, actually shot Robinson. Mathis explained that her basis for saying that Rose fired the fatal shot is the way Rose handled his gun immediately after she saw Robinson slump to the ground.

Reed (the representative of Robinson's estate) sued the officers and the City of Cleveland, in state court, and the City immediately removed the case to federal court. All three defendants moved for summary judgment - the officers, specifically, requesting qualified immunity.

The trial court dismissed the City as a defendant, but refused qualified immunity for the two officers, finding that there were “genuine issues of material fact existed as to (1) which officer shot Robinson, and (2) whether the officer who shot Robinson reasonably believed that the latter posed a threat to the officer or to the public.” Clark, however, had already conceded that he actually shot Robinson. The officers appealed.

ISSUE: May factual disputes be resolved in an interlocutory appeal of a denial of qualified immunity?

HOLDING: No

DISCUSSION: The court reviewed the law on qualified immunity. Reed argued that the trial court did not “have jurisdiction over Officer Clark’s appeal because Clark is disputing the district court’s factual findings rather than its legal conclusions.” With that, the Court agreed, and further stated that “[d]espite Clark’s repeated attempts to characterize the qualified-immunity claim before [it] as a purely legal question, his arguments ‘in fact rely on [his] own disputed version of the facts, not the facts as alleged by [Reed].’”

Specifically:

Clark’s claim (broken down into several different arguments) is essentially that Mathis’s testimony must be discredited in its entirety because it conflicts with other evidence and is therefore totally unreliable. In particular, he contends that (1) Mathis’s belief that Officer Rose fired the fatal shot is refuted by the coroner’s report showing that the shot was fired within a quarter inch of Robinson’s chest, and (2) Mathis’s testimony that she did not see Robinson grab Clark’s gun “does not mean that it did not, in fact, happen.

Further:

Officer Clark’s reading of Mathis’s testimony (i.e., that she simply did not see what happened) ignores Mathis’s own repeated statements that she watched “every bit” of the incident and that Robinson immediately raised his hands in the air after being tackled by Clark. This conflicting interpretation of the record constitutes precisely the type of impermissible resolution of a disputed fact that is inappropriate in evaluating a claim of qualified immunity, and that, in the context of a denial of such a claim, deprives [the Court] of jurisdiction to review Clark’s claim in the first instance.

The Court found that “Mathis’s eyewitness testimony calls into question not only who shot Robinson but, more importantly, whether the force used was reasonable under the circumstances.” To find in Clark’s favor, the Court would have to “ignore or discount the testimony in the record that contradicts [Clark’s] own factual account.” That, the Court is not permitted to do.

The Court dismissed the interlocutory appeal.

Slusher v. Carson & Terry
540 F.3d 449 (6th Circ. 2008)

FACTS: On May 13, 2004, Deputies Carson and Terry (Shiawassee, Mich, SO) were dispatched to the home of Dr. Waite to assist him in recovering personal property allegedly hidden by his wife, in defiance of a divorce decree and property order. The order permitted Waite to enter property owned by Linda and Benjamin Slusher, with the assistance of peace officers, to reclaim two tractors. The deputies met Waite at his home and they accompanied him to the Slusher property, nearby. Ben Slusher reviewed the order and went to get the two tractors, followed by Carson. Linda Slusher emerged from the house and Ben asked that they let her look at the order as well.

Waite asked Terry to accompany him to search for other items of property, but Linda objected, stating that the order did not permit Waite to search the barns. Slusher and Waite argued. Carson asked Linda Slusher to hand back the court order, which she was still holding, and she said she hadn't finished reading it. Carson told her that she'd had sufficient time and asked for it back. Slusher "retracted her hand" when Carson reached for it. She asked if she could make a copy, and Carson refused. "At this point, Carson made another attempt to retrieve the order, and in the process pulled her arm down with one hand and used his other hand to grab her right hand, which was holding the order." She claimed he twisted her fingers, and she "yelled out that Carson was gripping her 'bad hand.'" She claimed to have a medical condition in that hand and that Carson's actions caused her to lose the use of that hand for several months.

Ben Slusher drove the tractors to Waite's property and the deputies left. Slusher called 911 and reported that she'd been "assaulted by an officer and wanted to file a report." The two deputies returned, and allegedly, "began laughing and ... told Slusher that they could arrest her for assaulting them." Slusher went to the ER.

The next day, she went to the Sheriff's Office and spoke to the Sheriff. She claimed that he also "laughed at her, refused to take pictures of her injuries, threatened her with arrest, and would not allow her to make a report." She was contacted several days later by Internal Affairs, and was asked to make a statement. However, she told IA that "she was concerned that criminal charges might be filed against her, and that she would only meet with IA with an attorney. She alleged he refused that condition, so they did not meet. IA's report indicated that the deputies "acted well within the use of force continuum guidelines."

Slusher filed suit under 42 U.S.C. §1983, alleging excessive force under federal law, and stated claims of assault and battery. She further sued the Sheriff's Office for failure to supervise and train the deputies, and that they "failed to investigate complaints and discipline officers, and had an 'unwritten policy or custom of discouraging citizen's complaints, or threatening to arrest citizens [sic] who state their intention to file a complaint.'" (She later tried to amend her complaint to add allegations concerning the search, but that was denied.)

The defendants moved for summary judgment, which was granted. Slusher appealed.

ISSUE: Does an alleged medical condition make a use of force unreasonable, after the fact?

HOLDING: No

DISCUSSION: First, the Court reviewed the use of force allegations. The Court noted that "at a minimum, Slusher's liberty was restrained when Deputy Carson grabbed her right hand...." She was not free to go at

that moment. However, the Court then evaluated whether the seizure was reasonable, and looked at “Carson’s decision to use force from the perspective of an objective officer.”⁷⁰ The Court noted that:

The officers were aware that Waite believed he needed their help in reclaiming his tractors, as this could readily be inferred by Waite’s decision to obtain a court order that provided for officer assistance. Thus, once Slusher became agitated and pulled the order away from Carson, it was reasonable for the officers to conclude that a brief show of force might be necessary to ensure she complied with their orders.

In a footnote, the Court also noted that her assertions of a medical condition affecting her hands was immaterial, as there was no indication that the deputies were aware of this. The Court found no indication that the “officers used more force than was necessary.” As such, there was no constitutional violation and it was unnecessary to go further.

In addition, the Court found Slusher had “presented no evidence that the county maintained policies or customs that would have caused her injury.”

The Court affirmed the summary judgment.

42 U.S.C. §1983 - MEDICAL CARE

Cain v. Irvin

2008 WL 2776863 (6th Cir. KY 2008)

FACTS: On June 17, 2005, Cain’s boyfriend at the time, Wilson, was at a Russell Springs shopping center that was a “popular gathering place for young people.” Cain joined him later that evening, and arrived intoxicated. Another of Wilson’s former girlfriends arrived, Harris, and the two women got into a verbal argument. Wilson then struck Cain with a variant of brass knuckles (called a “fist pack”) after she “screamed at Wilson and twice slapped him in the face.” Wilson left the scene.

Cain was assisted to a friend’s car by two male friends, Hardin and Sigward. Hardin wanted to take her to the hospital, but she refused, she was, instead, “preoccupied with finding somebody to ‘beat up’ Wilson.” She went looking for an old boyfriend to “go after” Wilson. (Cain stated that she only wanted to find the old boyfriend, McGowan, “so that he could drive her to the hospital.”)

Police were dispatched regarding the fight. Officer West, and then Chief Irvin, arrived. Officer West was directed to the hospital to find Cain, but he reported, at about 10 p.m., that she had not arrived. The officers finally found her at the Pizza Hut where McGowan worked. All of the witnesses agreed that Cain’s “speech was slurred and that she had trouble maintaining her balance.” Cain later stated that “Irvin mocked her demeanor during” this meeting. Cain told them that she’d taken Lortab and Xanax earlier that day, as prescribed. Irvin found her eyes to be “non-reactive” to light, which he believed was an indication that she was impaired on some controlled substance. She began to stumble, and Irvin grabbed her by the shirt. Witnesses later supported that Irvin asked her if she needed medical treatment, and she refused. (Cain stated that Irvin refused her request for medical treatment, but witnesses support Irvin’s claim.) Cain

⁷⁰ Dunigan v. Noble, 390 F.3d 486 (6th Cir. 2004).

agreed that although she characterized “Irvin’s maneuver [to be] aggressive,” she admitted he “did not in any way strike or touch her, beyond preventing her from falling down.”

Irvin noticed a plastic bag “hanging out of” Cain’s pockets. When asked about it, she turned it over, and they found it to contain “prescription pills outside of their original prescription container.” She was arrested for public intoxication and possession of the medication (Lortab, Schedule III and Xanax, Schedule IV) outside their proper containers.

Officer Taylor took Cain to the Russell County jail, but she was eventually transferred to Adair County as the local jail did not house women. Cain listed only her back, for which she took the medication, as a medical problem, and the Jailer testified that she did not “appear to need medical attention.” (The Uniform Citation, conversely, did indicate that she had visible swelling of her left eye.) She was permitted to make a phone call before they left Russell County. During the transport, the transport officer noticed the injury and when she was refused at the Adair jail because of the injury, took her to the hospital in Columbia. From there, she was sent to Louisville, but was ultimately found to have a non-serious injury and given eye drops. She was released to her father.

Cain sued Irvin and Russell Springs, arguing both federal and state claims. The trial court awarded summary judgment to the defendants, and Cain appealed.

ISSUE: Does a brief delay in medical care, that does not worsen the injury, constitute excessive force?

HOLDING: No

DISCUSSION: The Court quickly agreed that Irvin had probable cause to arrest Cain. Although she suggested that her “behavior was the result of head trauma” - the Court noted that “this explanation would not account for why witnesses observed [Cain] unable to stand and walking” irregularly at the shopping center. However, even accepting Cain’s explanation for her “apparent disorientation,” the Court found that it was unnecessary to decide if she was “*actually* intoxicated, but rather whether Irvin had probable cause *to believe* that Cain was intoxicated.” The Court found that Irvin did, in fact, have that probable cause and was justified in making the arrest. In addition, she had “voluntarily handed [pills] over to police, and was unable to produce a prescription.” As such, he had cause to arrest her for the possession charge, as well.

The Court, forced at this stage of the proceeding to accept Cain’s version as true, next had to decide if her claim to having been refused medical care was, in fact, justified. The Court, although finding that she may have met the subjective prong of the Farmer⁷¹ test, when she allegedly told Chief Irvin that she was in pain and needed medical care, concluded that she did not satisfy the objective prong, which was that a reasonable officer would have perceived her need for such care. In Napier⁷², the Court found that “when a plaintiff complains of an unreasonable delay in receiving medical care, she must present medical evidence to establish the detrimental effect of the delay” by “plac[ing] verifying medical evidence in the record...”

⁷¹ Farmer v. Brennan, 511 U.S. 825 (1994).

⁷² Napier v. Madison County, Ky., 238 F.3d 739 (6th Cir. 2001).

The Court found that her injury “was not one that obviously necessitated a doctor’s care,” even if it was apparent to the officers. The Court stated that the “obviousness test is whether a layperson would perceive the need for immediate medical assistance.” She suffered only a delay of two hours before she received care, and that brief delay proved to make no difference in her medical care.

The Court found in favor of Irvin and the City on the federal claims, and dismissed the state claims, as well.

42 U.S.C. §1983 - HANDCUFFING

Dixon v. Donald

2008 WL 4148515 (6th Cir. TN 2008)

FACTS: Prior to 2005, Dixon had maintained certain private roads near his home. He had stopped maintaining them because of health issues for some time, as he was “severely disabled” and receiving disability benefits from the VA. By 2005, the roads had fallen into serious disrepair, so he resumed working on them in April of that year. Edwards, another property owner who possessed easement rights to the road, demanded that Dixon (and others) stop work because “she owned the road and [Dixon] was trespassing.” He “explained to her that there was an easement and right-of-way jointly owned by all residents.” In response, she “became irate and began cursing and threatening Dixon and others....” She called the Blount County Sheriff’s Department, and a deputy was sent in response. The deputy “stated that he could not settle the dispute” and advised Dixon to get an attorney. Dixon did so, and that attorney “advised him that his maintenance of the roads was legal and he could continue the road maintenance.”

Two days later, on April 19, two members of the Edwards family came out “onto the road” and demanded that he stop the work. They blocked his tractor by standing in the road, and stated they had called the sheriff’s office again. Dixon managed to drive around them.

Officer Donald arrived. He spoke to the Edwards, who reasserted their claim. He approached Dixon and Dixon showed him the deed. “Donald looked at the deed and asked if it was ‘signed by a judge.’”⁷³ Both Edwards (Donna and Helen) claimed that Dixon tried to run them over with the tractor and that she was “in fear of her life.” Officer Donald arrested Dixon for aggravated assault. Dixon argued that he had not assaulted or threatened them, and that he had witnesses, but “[a]llegedly, Donald refused to talk to any of the witnesses or pay any attention to [Dixon’s] story.”

When Donald began to handcuff Dixon, Dixon explained his injury and asked that he be handcuffed in front. Again, [a]llegedly, Donald took a cursory look at his visible injuries and sarcastically said that Dixon “looked fine sitting on the farm tractor.” He handcuffed Dixon in back, and Dixon later claimed this caused an injury to his shoulder. Dixon was placed in the cruiser with the windows up and the air conditioning off for about 20 minutes. He ended up being charged with Disorderly Conduct, but that charge was eventually dismissed by the court.

Dixon sued Officer Donald, Sheriff Berrong and the Edwards. Donald and Berrong requested summary judgment. The trial court awarded Berrong summary judgment, but denied Donald’s request for summary judgment. Donald appealed.

⁷³ Deeds would not be expected to be signed by a judge, as they are not court orders.

ISSUE: May an officer ignore an obvious injury when making a decision as to how to handcuff a subject?

HOLDING: No

DISCUSSION: Using the standard two part test, the Court first looked to whether Dixon had properly claimed a violation of a constitutional right - in this case, specifically, if Donald lacked probable cause for the arrest and if he committed excessive force by handcuffing Dixon behind his back, despite his injury.

Addressing the handcuffing issue first, the Court agreed that "an officer does not have to credit everything that an arrestee tells him during the course of a handcuffing," and that he didn't have to handcuff Dixon in front just because Dixon asked for that. However, in this case, "Dixon has significant and obvious injuries to his torso." (The Court was apparently provided with photographs of these injuries, which involved extensive scarring.) The Court concluded this was a fact question, and as such, must be put before a jury.

However, since Dixon did not put forward any evidence regarding the second claim, regarding the probable cause issue, the Court declined to address it.

The Court agreed that the right to be free from excessive force, relating to a handcuffing, was clearly established, and allowed the case to go forward on that claim.

| 42 U.S.C. §1983 - INJURED NON-SUSPECTS

Schneider v. Franklin County, Ohio 2008 WL 2967645 (6th Cir. OH 2008)

FACTS: On Nov. 14, 2003, Schneider and her boyfriend, Jones, had been at a Hilliard, Ohio, bar since late the previous afternoon. Earlier that same evening, the Franklin County Sheriff's Office "had received a complaint of a suspect driving a Cadillac who was dealing drugs in the vicinity of the bar" – and the couple had arrived in a Cadillac that was parked in the bar's lot. Two officers, Burns and Strayer, of the "Special Investigations Unit" went to stake out the lot, and two uniformed deputies, Meister and Wetzer, were on patrol in the area as well.

After 1 a.m., the couple left the bar. "Schneider was noticeably intoxicated and slipped and fell on her way to the car, injuring her right ankle." Her friends helped her to the car, and she removed her shoes and socks to check her ankle. Jones drove out of the parking lot and down a service road – he was then pulled over by the two uniformed deputies, at the request of the detectives. Specifically, Burns asked that they "stop the car and identify the occupants" by "find[ing] a violation." The stop was purportedly made for speeding.

The deputies approached the vehicle, asked for ID, and administered a field sobriety test to Jones, which he passed. He was placed in the cruiser while Deputy Meister checked his information, and he told the deputy that Schneider was injured. Deputy Wetzel obtained Schneider's ID, and told her to get out of the car – she "told him that she could not get out because of her hurt ankle." Deputy Meister later testified that Schneider's ankle was "very dislocated," "pretty gruesome" and had a "deformity." Deputy Wetzel

yelled at her to get out of the car, and Schneider later testified that she “felt compelled” to do so. As she did so, “she immediately fell to the ground and broke her ankle.”

Schneider sued the deputies and Franklin County under 42 U.S.C. §1983. The officers requested summary judgment based upon qualified immunity, and were denied. They took an interlocutory appeal of the denial.

ISSUE: May an officer order an obviously injured non-suspect out of a vehicle, when doing so will likely worsen the injury?

HOLDING: No

DISCUSSION: The Court began – “in order to prevail on a civil rights claim under 42 U.S.C. §1983, a plaintiff must establish that a person acting under the color of state law deprived her of a right secured by the Constitution or laws of the United States.” Defendants (in this case, the officers) may raise the “defense of qualified immunity, which shields government officials from ‘liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known.’”⁷⁴ To determine qualified immunity, the Court uses the two pronged test outlined in Saucier v. Katz – 1) whether, considering the allegations in a light most favorable to the party injured, a constitutional right has been violated, and 2) whether that right was clearly established.”⁷⁵

First, the Court looked at Deputy Meister’s traffic stop. The Court concluded, from the facts presented, that it was impossible for the Cadillac to have actually been speeding in excess of 60 mph on the service road. Since speeding was the purported reason for the stop, the Court agreed that “the violations did not occur and Schneider’s constitutional rights were violated.”⁷⁶ The Court further noted that “Meister’s reliance on Burns’ direction was inappropriate, and that “a seizure conducted in reliance on a dispatch is proper only if the law enforcement officer who issued the information possessed the necessary reasonable suspicion.”⁷⁷ The Court found the denial of qualified immunity for Meister to be correct.

With respect to Wetzel, the Court agreed that officers “may order passengers out of the car pending completion of the stop.”⁷⁸ However, Schneider’s claim did not concern the “legality of the order, but the officers’ alleged unreasonableness in forcing her to exit her car despite clear medical injuries” and a claim that they “should have realized that ordering her out of her car would have caused her to further injure herself.” The Court agreed that although she was not, apparently, under arrest, that “[s]ince the officers had taken the driver of her car into custody and began to issue verbal commands, Schneider would not have felt free to leave the scene and thus was in [de facto] custody.” “This custody created a ‘special relationship,’ and thus the officers owed a duty of care to Schneider”⁷⁹ once she was in their custody. Further, it agreed, that “the police officers affirmatively acted in a way that exposed her to harm,” although it noted that it was unclear on Meister’s role, if any, on ordering her out. The Court also found that the violation qualified under the “state-created danger” exception, in that the deputies (the “state”) required her to do something that “placed her specifically at risk.”

⁷⁴ Smoak v. Hall, 460 F.3d 768 (6th Cir. 2006); Harlow v. Fitzgerald, 457 U.S. 800 (1982).

⁷⁵ 533 U.S. 194 (2001).

⁷⁶ U.S. v. Ferguson, 8 F.3d 385 (6th Cir. 1993).

⁷⁷ Smoak, *supra*.

⁷⁸ See Maryland v. Wilson, 519 U.S. 408 (1997).

⁷⁹ See Stemler v. City of Florence, 126 F.3d 856 (6th Cir. 1997).

Moving to the second prong, the Court found that although it is generally appropriate to order a passenger from the car, that the deputies “should have known this did not give them the power to order a non-violent, non-threatening woman with a serious injury out of a car where the exit threatened to further compound the injury.” The Court agreed that qualified immunity was inappropriate for this claim, as well.

The Court upheld the denial of qualified immunity.

42 U.S.C. §1983 - HECK BAR

Harper v. Jackson

2008 WL 3315058 (6th Cir. KY 2008)

FACTS: On July 31, 2003, Officer Jackson (Paducah PD) responded to a call from a Wal-Mart security officer, “who reported that Harper had purchased methamphetamine precursors.” Harper was detained for four hours while Jackson sought a search warrant. Officers Jackson and Young eventually searched the Harper home, and ultimately charged Harper with the possession of methamphetamine precursors, trafficking in marijuana and use/possession of drug paraphernalia. Harper further argued that he was handcuffed and denied the right to speak to an attorney.

Harper pled guilty to reduced drug charges. He then filed suit under 42 U.S.C. §1983, arguing that the officers violated his Fourth Amendment rights by detaining him and searching his home. The trial court granted summary judgment for the officers, “concluding that a judgment in Harper’s favor would necessarily impugn the validity of Harper’s outstanding guilty-plea convictions because the defendants discovered the marijuana and drug paraphernalia during the contested search.”⁸⁰

ISSUE: Does a conviction always require a lawsuit related to the arrest be dismissed?

HOLDING: No

DISCUSSION: The Court discussed the “Heck bar” - which “precludes a [plaintiff’s] use of §1983 to collaterally attack an outstanding conviction.” As such, the Court had to consider “the question of whether success on Harper’s claim would necessarily imply the invalidity of his convictions....” The Court concluded that in this case, the “fact that a Wal-Mart security employee notified the police of Harper’s purchase establishes that even if [the court] were to conclude that the officers illegally detained Harper, success on the §1983 claim would not necessarily impugn his conviction because the resulting discovery of the marijuana and drug paraphernalia would have inevitably occurred regardless of the detention.” Since the court concluded that “even if the warrant were unlawfully obtained, the police acted in good faith reliance on the warrant issued by a neutral magistrate, and thus the evidence could have been admitted to secure Harper’s conviction.”⁸¹

The Court reversed the trial court’s dismissal and allowed the case to go forward.

⁸⁰ See Heck v. Humphrey, 512 U.S. 477 (1994).

⁸¹ See U.S. v. Leon, 468 U.S. 897 (1984)

42 U.S.C. §1983 - AGENCY POLICY

Mann v. Helmig
2008 WL 2744570 (6th Cir. Ky 2008)

FACTS: Prior to May 16, 2005, Mann and his former girlfriend were involved in a domestic situation - during which time the Kenton County District Court had issued (and re-issued) a Domestic Violence Order. Mann had argued that he and the petitioner, Wagner (his sister), were not "intimate partners" under 18 U.S.C. §922(g), and as such, the assumption that someone against whom a DVO has been entered has a federal prohibition against possessing firearms was inaccurate in cases such as his. As a result of this argument, the Court had amended the order against him to read that he "may" be prohibited from doing so.

On May 16, 2005, with the DVO still in effect, "the Boone County Sheriff's Department received a call reporting gunshots at [Mann's] residence." Deputy Combs responded, and met Mann at the door. Mann explained he had been target shooting in his backyard. He showed the weapons to Combs, and Combs left. When he returned to his car, he was told that the complainant, Mark Mann, Mann's brother, wanted to talk to him. He went next door and explained to Mark Mann, his wife and another woman that it was legal for Mann to be firing a weapon, and was only then told about the DVO.

Deputy Combs returned to Mann's home, and found that Mann had continued to shoot at targets. Mann complied when told to unload the weapon and put it down. They discussed the DVO, and Mann showed him the Amended DVO with the non-mandatory language.

Deputy Combs, unsure what to do, tried to contact the county attorney's office, to no avail. He reached an Assistant Commonwealth's Attorney, and was told that Mann "was not permitted to possess firearms if he was subject to an active DVO." Mann turned over six guns and ammunition, and Deputy Combs placed them into the property room. ("Sometime thereafter, the Boone County Sheriff's office informed [Mann] that he could come retrieve the guns," but he did not do so.)

Mann filed suit under 42 U.S.C. §1983 against the Sheriff, arguing violations of the Second, Fourth, Fifth and Fourteenth Amendments, and also sued under Kentucky law for conversion." (The court noted that Mann intentionally sued Helmig only in his official capacity.) The trial court ruled in favor of the Sheriff, finding that Mann did not show that "this single, isolated incident was part of any pattern of unconstitutional conduct by Boone County, or that it was otherwise taken pursuant to any County policy or custom." (The Court also dismissed the Kentucky claim.)

Mann appealed.

ISSUE: Is a policy of consulting a prosecutor, and depending upon their advice in a questionable situation, constitutional?

HOLDING: Yes

DISCUSSION: The essence of Mann's argument was that Deputy Combs confiscated the weapons "pursuant to a policy of the Boone County Sheriff's Department." The Court noted that the legal definition of the term "policy" is that it is a "word [that] generally implies a course of action consciously chosen from among various alternatives."⁸² The policy, as identified by Mann, was that deputies would "follow the advice of the County or Commonwealth Attorney when a deputy was unsure" about how to "deal with a certain situation." (The Court noted some confusion as to Mann's actual argument - in certain points of the brief, he seemed to be arguing that the policy of seizing the firearms was actually at issue.)

The Court agreed with Tuttle that if one goes back far enough into any given situation, a policy could likely be found that "caused the alleged constitutional violation." The Court found there to be "simply ... too tenuous a connection between the policy of contacting and following the advice of the County or Commonwealth Attorney and the injuries sustained by Mann." The Court found no "affirmative link between the 'policy' and the confiscation of Mann's firearms and ammunition."

The Court found instead that the "proximate cause of Mann's alleged constitutional injuries was either the ambiguity of his DVO, the erroneous advice of the Commonwealth Attorney, or, less directly, the inability of Deputy Combs to contact Mann's attorney." The Court concluded that the "policy of consulting with the Commonwealth Attorney is clearly not itself unconstitutional," even though it led, in this case, to a mistake. The Court found that "Mann cannot simply rely on one incident to satisfy his burden."

The Court addressed Mann's second argument, briefly, and found that since Mann did not sue the prosecutor that issued the opinion, "their decisions cannot be challenged" in this case.

The trial court's summary judgment was affirmed.

42 U.S.C. §1983 – COLOR OF LAW

McGuire & Ryan v. City of Royal Oak (Michigan) 2008 WL 4428841 (6th Cir. 2008)

FACTS: On August 9, 2003, McGuire and Ryan were traveling by bus from Canada to Clarkston, Michigan to attend a concert. At the end of the concert, Threlfall was assaulted by members of the group with McGuire and Ryan. McGuire got off the bus to break up the fight, but Ryan was asleep on the bus. (McGuire later denied knowing exactly who had assaulted Threlfall.)

Royal Oak officers Warner and Gale, off-duty, were also in attendance. They claimed "to have seen the assault occur and the perpetrators board the bus." They told the bus driver not to leave and waited for the Oakland County Sheriff to arrive. When the deputies arrived, they identified themselves and assisted in the investigation. They ordered McGuire off the bus and told him that "if he did not identify the men who assaulted Threlfall, they would pin the crime on him and 'throw the book at him.'" Gale escorted Ryan off the bus and identified him as one of the attackers. Based upon their claim, later reiterated in written

⁸² Oklahoma City v. Tuttle, 471 U.S. 808 (1985).

statements, McGuire and Ryan were arrested for assault. The charges were subsequently dropped when evidence indicated clearly that they had not committed the crime.

McGuire and Ryan sued the officers and the City of Royal Oak, under 42 U.S.C. §1983, claiming Fourth Amendment violations, along with state claims of false arrest, gross negligence and related assertions. The defendants moved for summary judgment based upon qualified immunity and Michigan's intergovernmental immunity law. The trial court refused the summary judgment, and the two officers appealed.

ISSUE: May officers who take action off-duty be working "under color of law?"

HOLDING: Yes

DISCUSSION: The officers argued for immunity, stating that they were not acting under color of law when they took the actions. The Court noted that there was "abundant evidence" that they "acted under color of state law" because they "purport[ed] to exercise official authority."⁸³ They "repeatedly identified themselves as police officers, and they leveraged this authority to disperse the crowd around Threlfall and to detain the bus they believed to contain his assailants." This is inconsistent with the actions of private citizens, and "consistent with the duty imposed upon them by the Royal Oak Police Department standards of conduct."

The Court stated that in a malicious prosecution claim, an allegation that a prosecution was based "upon an officer's having 'fabricated evidence and manufactured probable cause'" is sufficient to state a claim.⁸⁴ Since the information provided by the two officers, later proved to be false (although not necessarily malicious) was the basis for the prosecution, the Court agreed it was inappropriate to dismiss the case at this stage. The Court found ample evidence that the two "acted with gross negligence in singling out McGuire and Ryan and [actively] furthering their prosecution. The evidence indicated that they did not, in fact, "know the identity of the assailants and yet repeatedly testified against McGuire and Ryan in spite of this." As such, the Court agreed that the state claim of gross negligence could also go forward.

42 U.S.C. §1983 - SEARCH

Jacob v. Township of West Bloomfield 531 F.3d 385 (6th Cir. Mich. 2008)

FACTS: On the day in question, Killian, a housing inspector for West Bloomfield, Michigan, responded to complaints at Jacob's property. Specifically, he was responding to inoperable vehicles and other items that had been sitting in the yard for so long that grass had grown up around them, which was a violation of local land use ordinances.

Pursuant to the established process, Jacob was sent a number of notices. When he did not respond, criminal charges were filed. Jacob pled guilty and agreed to 14 days to clean up the property. (By agreement, if he did not take action, he would be sentenced to thirty days in jail.)

⁸³ See Parks v. City of Columbus, 395 F.3d 643 (6th Cir. 2005).

⁸⁴ Spurlock v. Satterfield, 167 F.3d 995 (6th Cir. 1999); Adams v. Meliva, 31 F.3d 375 (6th Cir. 1994).

Three weeks later, Killian “entered the curtilage of [Jacob’s] property without a warrant” and concluded that Jacob’s had not yet complied. While Jacob was serving time, Killian entered again, and again concluded he was not in compliance, and continued to do so after Jacob was released.

Jacobs filed suit under 42 U.S. C. §1983, arguing that Killian “violated the Fourth Amendment when he entered the property to inspect it without a warrant.” Killian requested qualified immunity, but the trial court found that he was “not entitled to qualified immunity with respect to [Jacobs’s] Fourth Amendment claims.”

In a prior appeal, the Sixth Circuit had ruled that claims for “searches occurring prior to [Jacobs’s] guilty plea and incarceration were precluded by Heck v. Humphrey.⁸⁵ The case had been returned to the trial court to decide whether Killian’s “intrusion upon the property constituted a Fourth Amendment search under Widgren v. Maple Grove Township.⁸⁶ Killian appealed on the issue of whether the trial court “properly held that Widgren does not preclude [Jacobs’s] claim.”

ISSUE: Do criminal investigations on private property, done by government inspectors, rather than officers, require a search warrant?

HOLDING: Yes

DISCUSSION: The Court noted that the Fourth Amendment provides a “strong shield against [criminal] investigations” that intrude upon one’s private property.” However, since administrative or regulatory searches are “generally less intrusive than one which could potentially lead to criminal sanctions,” such investigations that intrude upon property are “accordingly more likely to be tolerated under the Fourth Amendment.” The Widgren case “considered this distinction between criminal and merely administrative investigations.” In this case, the Court found the situation distinguishable, because Killian “did not enter [Jacob’s] property for a purely administrative purpose.” Instead, there was a very real threat that the intrusion would result in incarceration, and was done at the specific direction of a local prosecutor.

Killian argued that the search was not intrusive - he did not, for example, search inside the house. However, the Court noted that Killian “specifically targeted his investigation of [Jacob] after receiving a complaint about the conditions on [Jacob’s] property, and he continued to single-out [Jacobs] for continuing intrusions as [Jacob] failed to comply with the land use ordinance.” Further, the Court found that even though the search was brief and not overly intrusive, that did not mean that the search did not violate the Fourth Amendment.

Having determined that the search did violate the Fourth Amendment, the Court moved to the second prong – “whether or not this rule was ‘clearly established’ at the time of the violation.”⁸⁷ The Court found that the search in this case was to “search for evidence of a crime for which [Jacob] had already faced criminal sanctions.” It certainly was for a law enforcement purpose, and there seemed to be no justification for the warrantless entry. That Killian was not a law enforcement officer “matter[ed] little, as it is clearly established that a government official does not have to carry a badge and gun to be subject to the restrictions of the Fourth Amendment.”

⁸⁵ 512 U.S. 477 (1994).

⁸⁶ 429 F.3d 575 (6th Cir. 2005).

⁸⁷ See Saucier v. Katz, 533 U.S. 194 (2001).

The Court agreed that qualified immunity was not appropriate in this case, and permitted the case to go forward.

FIRST AMENDMENT

Phelps-Roper v. Strickland
539 F.3d 356 (6th Cir. OH 2008)

FACTS: Since 1957, Ohio has had a statute regulating the picketing of funerals and funeral processions. It was amended in 2006 to cover the time from one hour before, to one hour after, the service, for a distance of 300 feet, including the procession.

Phelps-Roper, a member of the Kansas-based, Westboro Baptist Church, along with fellow church members, have engaged in picketing at the funerals of American soldiers. Their picketing included signs containing offensive messages. Phelps-Roper sued, challenging the validity of the statute, claiming that she wished to continue to protest in Ohio but feared prosecution under the statute.

The trial court found the provision regarding the actual procession to be “unconstitutionally overbroad” in that it created a “floating buffer zone” that moved with the procession. It upheld the remainder of the statute, however, finding it to be a constitutional limitation on freedom of speech. Phelps-Roper further appealed.

ISSUE: Is a protest-prohibition valid when it is content-neutral?

HOLDING: Yes (but see note)

DISCUSSION: The Court discussed whether the statute was a “content-neutral regulation of the time, place and manner of speech” of the plaintiff. The Court found that the restriction applies “equally to all demonstrators, regardless of viewpoint” - as it makes “no reference to the content of the speech.” As it is content-neutral, the “appropriate test is intermediate scrutiny.” Under that standard, “the government may impose reasonable content-neutral restrictions on the time, place, or manner of protected speech, provided the restrictions: (1) ‘serve a significant government interest;’ (2) are ‘narrowly tailored;’ and (3) ‘leave open ample alternative channels for communication of the information.’”⁸⁸

The Court agreed that the funeral protest provision served an important governmental interest, because the funeral attendees are “‘captive’ to the message” which was an “unwanted communication.” The Court equated the “individuals mourning the loss of a loved one” to those cases in which it held that individuals had a right to privacy in their home, and upon entering medical facilities. Despite Phelps-Roper’s argument to the contrary, the Court found that although funeral attendance is voluntary, it is a “deep tradition and social obligation” that compels attendance at such funerals. It is not so simple to simply “avert ...eyes” from an unwanted and offensive communication. The court found the statute to be narrowly tailored to 300 feet - and “restricts picketing or other protest activities that are directed at a funeral or burial service.” The Court noted that “Phelps-Roper is not silenced during a funeral or burial service, but must merely stay 300 feet away within a brief window of time, outside of which she may say what she wants, wherever she wants, and when she wants, with no limitation on the number of speakers or the noise level,

⁸⁸ Ward v. Rock Against Racism, 491 U.S. 781 (1989).

including the use of amplification equipment, and no limitations on the number, size, text, images or placards.”

The Court also agreed that the size of a funeral necessitates a larger buffer zone than would be reasonably expected for protection of a single residence, and that Ohio’s other, existing, laws were insufficient to protect funeral attendees not just “from physical acts, but from the harmful psychology effects of unwanted communication when they are most captive and vulnerable.” The Court agreed that Phelps-Roper had sufficient alternative channels of communication, even if it was not “her best means of communication.”

The prohibition relating to funeral protests was upheld.

NOTE: Kentucky has a similar statute that is still under challenge.

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Greenwell v. Parsley
541 F.3d 401 (6th Cir. KY 2008)

FACTS: In September, 2005, there was an article in the Louisville newspaper indicated that Greenwell was running for Sheriff in Bullitt County. At the time, Greenwell was a deputy sheriff. The current Sheriff, Parsley, brought Greenwell to the office and stated, “See in the paper here where you’re trying to take my job.” Parsley sent Greenwell out while he conferred with his attorney, and subsequently fired Greenwell. Greenwell later maintained that he was fired not just for running for the office, but because he “had spoken out on a matter of public concern, namely, the operation of the sheriff’s department.” (Greenwell had indicated in the article the changes he’d like to make in the department.)

“In the end, neither man was elected sheriff – as Parsley lost in the primary, and Greenwell lost in the general election.”

Greenwell sued, arguing that Parsley had violated his First Amendment rights. The trial court granted summary judgment to Parsley. Greenwell appealed.

ISSUE: May an elected official fire someone who files to run against them?

HOLDING: Yes

DISCUSSION: The Court reviewed the issue under the precepts of Carver v. Dennis, in which a County Clerk had fired a deputy who had announced an intention to run for the office.⁸⁹ In that case, the court noted that the “First Amendment protects the right of public employees to speak out on matters of public concern,” but that does not extend “to candidacy alone.”⁹⁰ The Court noted that “[t]he First Amendment does not require that an official in [an employer’s] situation nourish a viper in the nest.” In this case, Greenwell was terminated as soon as Parsley learned of his candidacy, and the fact that Parsley “highlighted certain implied criticisms of the department in the newspaper account does not transform this case into one of political speech.”

The Court found nothing to “believe the conclusion that the termination was because of the candidacy.”

⁸⁹ 104 F.3d 847 (6th Cir. 1997)

⁹⁰ See Connick v. Myers, 461 U.S. 138 (1983)

The dismissal was affirmed.

COMPUTER

Warshak v. U.S.
532 F.3d 521 (6th Cir. OH 2008)

FACTS: Warshak was the “president and sole owner of Berkeley Premium Nutraceuticals, Inc.” That company became the target of a federal investigation focusing on money laundering and related offenses. Investigators requested a search warrant for his “internet service providers - NuVox Communications and Yahoo! - to turn over Warshak’s account information,” including email. This request was pursuant to the Stored Communications Act (SCA), 18 U.S.C. §2791 et seq. The provision of that law (the “compelled-disclosure”) gives “different levels of privacy protection based upon whether the e-mail is held with an electronic communication service or a remote computing servicing and based on how long the e-mail has been in electronic storage.” E-mails that have been stored for less than 180 days require a warrant. For those being held in a “remote computing service” or those that are 181 days or more old may be obtained with a warrant, an administrative subpoena or a court order. Under §2703, a court with jurisdiction may give such an order if “specific and articulable facts showing that there are reasonable grounds to believe that the contents of a wire or electronic communication, or the records or other information sought, are relevant and material to an ongoing criminal investigation” is provided. In addition, under the SCA, the government may request (in the order) a “delay notice in 90-day increments” if good reason is shown for the delay - otherwise, the government must notify the subject of the court order.

In Warshak’s case, the Court granted the court order and also granted the delay. It further permitted several additional delays of notification. Approximately a year after the order was granted, the government gave Warshak notice. He then sued, arguing that the original order “violated the Fourth Amendment on its face and as applied because the searches were based on a showing of less than probable cause and were not supported by a warrant.” The District Court granted an injunction, further ordering that the government not use such orders to search email accounts within the area covered by the court, until a hearing could be held.

A few months later, Warshak was indicted, and in February, 2008, he was convicted. The government appealed the issuance of the injunction.

ISSUE: Is the SCA constitutional?

HOLDING: Yes

DISCUSSION: The Court addressed the issue as to whether this particular issue was ripe for adjudication. The Court noted that it was unlikely that Warshak, himself, would be the subject of further searches, since he was convicted. It noted that the issue in this case was whether “permitting the government to search e-mails based on ‘reasonable grounds’ ... is consistent with the Fourth Amendment, which generally requires ‘probable cause’ and a warrant in the context of searches of individuals, homes, and perhaps most analogously, posted mail?” The Court found that the “answer to that question will turn in part on the expectations of privacy that computer users have in their e-mails - an inquiry that may well shift over time,

that assuredly shifts from internet-service agreement to internet-service agreement and that requires considerable knowledge about ever-evolving technologies.” In this case, the Yahoo! Account agreement indicated that the government could receive the information in the account upon request. (Other agreements, with different providers, however, may make different promises to users.) The Court stated that the “Fourth Amendment is designed to account for an unpredictable and limitless range of factual circumstances, and accordingly, it generally should be applied after those circumstances unfold, not before.” Further, “[l]itigation by hypothetical becomes particularly risky in the face of ever-evolving and ever-more-complicated technology.”

The Court noted that:

The Stored Communications Act has been in existence since 1986 and to our knowledge has not been the subject of any successful Fourth Amendment challenges, in any context, whether to §2703(d) or to any other provision.”

The Court directed the dismissal of Warshak’s claim.

EMPLOYMENT - USERRA

Petty v. Metropolitan Government of Nashville - Davidson County
538 F.3d 431 (6th Cir. TN 2008)

FACTS: In 1991, Petty was hired as a Nashville police officer. He was also, and had been for some time, a member of the Army Reserve. By 2002, Petty was a police sergeant. He had also been approved to work off-duty.

In 2003, Petty’s unit was mobilized to go to Iraq. He properly notified his agency, and he stopped working on Nov. 30, 2003, preparatory to deployment. While he was in Iraq, in June or July, 2004, during an inspection of quarters, Petty was found to have a still, which was being used to make wine. (There was a dispute as to why he had the still, but that is immaterial to the summary.) Petty (a military officer) was charged under the UCMJ⁹¹, where he was accused of having the still and having provided alcohol to enlisted personnel. Petty elected to resign rather than face court martial, and the charges were ultimately dismissed. His discharge was listed, on his DD-214 as “under honorable conditions (general).”

Upon his return, in February, 2005, Petty requested reinstatement with the Nashville PD. The PD had a “return-to-work process” for officers that had been away for an extended period of time, “regardless of the reason for their separation.” For those returning from military service, a authorization to obtain military records was required. In addition, in a required questionnaire, Petty explained that he had faced military charges while in Kuwait, but did not detail what had occurred. He was, notably, not paid for the approximately 3 weeks between February 28, the date of his request, and March 21, his first day back at work. He was not returned to his previous position as a patrol sergeant, but was given a desk job.

The Department (through OPA) began an investigation as to whether Petty was truthful in his return to work paperwork. The OPA determined that any charges against him on that respect were unfounded.

⁹¹ Uniform Code of Military Justice.

However, Metro informed him that POST (the state training agency) “did not accept his discharge.” The agency continued its investigation, “troubled by the disconnect between [Petty’s] description of the events leading to his discharge and the severity of his punishment.” It was then that they discovered that the copy of the DD-214 he submitted was, allegedly, altered, in that it was missing a “a few boxes at the bottom” - which listed the reason for his separation as “in lieu of trial by court martial.” Petty admitted that he enlarged the form, and that by doing so, he inadvertently eliminated the boxes. During that same time frame, Petty had filed suit, and he alleged that the follow-up investigation was in retaliation for that suit. From Oct. 10, 2005, on, Petty was assigned to a desk job answering calls from the public, a position traditionally staffed by officers “facing discipline or who are otherwise ‘disempowered.’” In addition, he was denied the opportunity to return to his off-duty job.

Petty complained that Metro violated his rights under the Uniformed Services Employment and Reemployment Rights Act (USERRA), by delaying his return to work, subjecting him to the process, not returning him to his previous position, and denying him the ability to work off-duty. Eventually, the trial court found in favor of Metro on all issues, and Petty appealed.

ISSUE: May an agency place additional requirements on an officer seeking reemployment after _____ returning from military leave?

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HOLDING: No

DISCUSSION: The Court reviewed the principles of USERRA and noted that it was intended to be “broadly construed in favor of its military beneficiaries.” Various sections of the statute specifically cover the issues presented by Petty’s case. With respect to the “delay in rehiring,” the Court found that Petty satisfied his requirements by properly notifying his employer of his military deployment, and that it lasted less than five years. In addition, he properly requested reinstatement, and he was separated from the service under honorable conditions. Metro argued that by submitting the allegedly “altered” DD-214, he did not submit the required documentation, and that the document was thus void.

The Court found that the document he provided was sufficient, and further, that his authorization permitted Nashville to have “unfettered access” to all of his military records. (The Court noted that it was not, necessarily, agreeing that such a waiver could be required.) As such, Nashville was not permitted to delay his return to work

Specifically, the Court noted that:

It is of no consequence here that Metro believes it is obligated to “ensure that each and every individual entrusted with the responsibility of being a Metropolitan Police Officers is still physically, emotionally, and temperamentally qualified to be a police officer after having been absent from the Department.” In USERRA, Congress clearly expressed its view that a returning veteran’s reemployment rights take precedence over such concerns.

The Court noted that Petty’s separation from the service was honorable, which qualifies him for rehiring. USERRA does permit a “for cause” termination, after rehiring, if appropriate. Further, the Court found that Metro’s return to work practices, although neutral, and not discriminatory toward veterans, in that they apply to all officers returning, are in violation of USERRA in that they add additional prerequisites to such officers.

Next, the Court addressed the position to which Petty was assigned. The Court quickly concluded that once he qualified for reemployment, "Metro had no basis on which to question his qualifications." The Court noted that "[a]bsent unusual circumstances, reemployment must occur within two weeks of the employee's application for reemployment." Metro took three weeks to rehire Petty, and did not return him to an equivalent position. The Court stated that "Metro cannot defeat the 'prompt reemployment' guarantee .. by engaging in never-ending investigations into Petty's qualifications." The Court noted that, in fact, Metro never proved Petty was disqualified, in that it apparently never actually finished the investigation. (Apparently Petty left the police department of his own accord.)

The Court did not, however, elect to discuss the issue relating to the off-duty work, under USERRA, citing the fact that the request wasn't made until 10 months following his return and that it was not part of normal employment benefits. However, it did address it as potential discrimination. The Court questioned Metro's assertion that because Petty was under investigation, he fell under their policy of denying off-duty work privileges to officers under investigation. The trial court had found that a legitimate reason. However, the Court noted that "failure to consider Metro's motivations for launching the investigation had triggered the policy's application to Petty in the first place."

The Court found that because the second investigation was triggered by a continuing concern about Petty's "conduct in service," it was inappropriate to use that investigation to deny him benefits.

The Court reversed the earlier decisions and found in favor of Petty.

EMPLOYMENT - DISCRIMINATION - ADA

Tucker v. State of Tennessee 539 F.3d 526 (6th Cir. TN 2008)

FACTS: Lauren and Blake Tucker, a married couple, are deaf mute. On Feb. 29, 2004, Savannah (TN) police "received a call regarding a domestic dispute at the home of Donna Spears, Lauren's mother." Blake had arrived from Alabama to pick up Lauren and their small child from Spears' home, and a disagreement had arisen. A neighbor called the police.

Officers realized they had a communication problem, and they used a pen and paper to get information from Lauren. After a written discussion, Lauren apparently agreed to leave with Blake. However, as they were leaving, Blake got into a fight with a neighbor, Judy Crotts. Officer Pope saw Blake both strike and push her. Officer Pope struggled with, and then arrested, Blake, for resisting arrest, disorderly conduct, and assault - both on the neighbor and on the officer himself. Odis Tucker, Blake's uncle, also deaf mute, tried to interfere and was also arrested.

Both men were taken to jail, and they requested a TDD/TTY telephone. That was not available, so instead, they relayed information through an operator, who then apparently typed it into a TDD/TTY, so that they could communicate with Blake's mother, Vonnie. They were released the next day. Communication was also an issue at their initial appearance, because there was no sign language interpreter immediately available. They were given a card to read, with their rights, and they each pled not guilty, in writing. Both eventually took plea agreements, and later argued that they believed they had no choice because the court was unable to provide sign language interpretation.

The Tuckers filed a civil rights action, arguing that the "City Police discriminated against them in violation of the ADA by failing to provide a qualified sign language interpreter or other such reasonable accommodation (during their arrest following the domestic disturbance call.) They also complained of the lack of the accommodation at the jail and in court, as well. The police, and the other defendants, sought and received summary judgment dismissal of the action, and appealed. Specifically, with respect to the city police, the Court found that they were not performing an activity covered by the ADA. The Tuckers appealed.

ISSUE: Does the ADA require an interpreter when a deaf-mute is being arrested?

HOLDING: No

DISCUSSION: The Court reviewed the provisions of the ADA, and concluded that the exigent circumstances of an arrest precludes the necessity to have an interpreter. The actual arrest of the two took place as a result of a situation that the police observed, and for which it was appropriate to arrest, disability or not. In fact, the Tuckers conceded that the police were able to effectively communicate with them, by means of a pen and paper. Further, the Court found no evidence that the presence of any auxiliary aids, such as an interpreter, would have changed the situation. The Court concluded that "even if the arrest were within the ambit of the ADA, the district court correctly found that the City Police did not intentionally discriminate against Blake or Odis Tucker because of their disabilities in violation of the ADA."

After resolving the issues against the remaining defendants (the county and the jail), the Court affirmed the dismissal of the case against all parties.

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NOTES

While many of these cases involve 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)
Neil v. Biggers, 409 U.S. 188 (1972)*

Most language in italics in the body of the summary is directly from an search warrant affidavit, and all errors are from the original.

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).