

Department of
CRIMINAL JUSTICE TRAINING

KENTUCKY JUSTICE AND PUBLIC SAFETY CABINET

2008



Leadership is a behavior, not a position

CASE LAW UPDATES
FOURTH QUARTER

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



John W. Bizzack, Ph.D.
Commissioner





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

docjt.legal@ky.gov

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

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

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

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



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NOTE:

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

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

KENTUCKY

PENAL CODE - DEFINITIONS - SERIOUS PHYSICAL INJURY

Howard v. Com.

2008 WL 4822290 (Ky. App. 2008)

FACTS: On March 31, 2005, Howard collided with Miller's car. Miller suffered a punctured lung from broken ribs. The injury was treated before it became a serious health threat. Miller also suffered damage to his spleen which resulted in internal bleeding that healed on its own.

Howard was found to have a BA of .32. She was charged with DUI and First Degree Assault. She was convicted, and appealed.

ISSUE: Is an injury that could have been serious or life-threatening but for prompt treatment, still considered a serious physical injury?

HOLDING: Yes

DISCUSSION: Howard argued that the facts did not indicate that Miller suffered a serious physical injury. The testimony indicated that either injury was "potentially life threatening" but that his actual injuries (because of prompt treatment) were "not so serious as to have created a substantial risk of death."

The Court found that the fact that "[Miller] was fortunate in that his injuries did not progress and become more serious does not negate the fact that at the onset there was a substantial risk of death...." The Court found it reasonable for the jury to conclude that Miller suffered a serious physical injury. Howard's conviction was affirmed.

PENAL CODE – KIDNAPPING

Martindale v. Com.

2008 WL 4691800 (Ky. 2008)

FACTS: Martindale was arrested for fighting with his ex-girlfriend at her home in Daviess County. He allegedly struck her at least twice during the fight. Martindale was charged with Kidnapping, Burglary, AI and PFO. At trial, the Kidnapping charge was amended from "intent to accomplish or to advance the commission of a felony or felonies, that being burglary and assault," to instead being committed with the intent to "inflict bodily injury or to terrorize the victim." The amendment was made over Martindale's objection.

Martindale was convicted, and appealed.

ISSUE: May the subsection concerning the motive behind a Kidnapping charge be amended at trial?

HOLDING: Yes

DISCUSSION: The Court ruled that the amendment did not result in an additional or different offense being charged. The change simply added another subsection to the basic charge, and “no additional evidence was required to prove the amended offense.” Martindale’s defense was not prejudiced and it did not affect his ability to prepare a defense, since he was aware of the underlying facts of the case.

Martindale’s conviction was upheld.

PENAL CODE – CRIMINAL TRESPASS

D.E., a child under eighteen v. Com.
271 S.W.3d 539 (Ky. App. 2008)

FACTS: D.E., along with other juveniles, was accused of throwing rocks at a house and damaging the siding. Lincoln County authorities charged the juveniles with both Criminal Trespass and Criminal Mischief. D.E. was convicted, and appealed.

ISSUE: Is throwing rocks at a property a trespass?

HOLDING: No

DISCUSSION: D.E. argued that throwing rocks, but never setting foot on the property, did not constitute a trespass. The Court agreed and reversed the conviction for Trespass.

PENAL CODE - ASSAULT

Fields/Fugate/Lucas v. Com.
2008 WL 4683001 (Ky. App. 2008)

FACTS: McClain was attacked in the Letcher County Jail. He was placed in a cell with others with which whom he’d “had conflicts.” McClain was struck. Lucas pulled down his pants and threatened to sodomize him. Campbell exposed himself and “talked about McClain fellating him,” “while Fugate and Lucas pushed McClain’s head toward Campbell’s penis.” (There was some minor contact.) Fields was also in the cell and kept McClain trapped. This happened a second time a few hours later. Finally, McClain was able to alert the guards and was taken to the hospital. There, he was x-rayed and told that “nothing was broken.” However, when he was released and sought further treatment, he learned that he had a “fractured and dislocated condyle, a hinge-like bone structure at the upper end of the jaw near the ear.” He underwent surgery, and a “titanium plate and screws were used to secure the bone.”

Fields, Lucas and Fugate were tried, and ultimately convicted of attempted Sodomy and complicity to commit Second-Degree Assault. They were convicted of Sexual Abuse and Assault and appealed.

ISSUE: Is a fractured jaw, requiring surgery, a serious physical injury?

HOLDING: Yes

DISCUSSION: The three defendants argued that the jury should have been instructed on Fourth Degree Assault. The Court noted that the elements of the offense charged and instructed was when the defendant is accused of “intentionally caus[ing] serious physical injury to another person.” The Court however, found that under the circumstances, it did not “believe that the jury could have found that the assault caused McClain to suffer an injury other than a serious physical injury.”

After addressing several other issues, the convictions of the three men were affirmed on both charges.

PENAL CODE - CRIMINAL MISCHIEF

Johnson v. Com.

2008 WL 4822250 (Ky. App. 2008)

FACTS: On November 11, 2006, Hayden was involved in a collision with Johnson, in Caneyville. After the wreck, everyone got out to inspect the damage. Hayden told Johnson and Stewart (Johnson's passenger), that she was hurt, but instead of helping, Johnson and Stewart tried to get their vehicle to move. When it proved impossible to drive off, they removed the license plate from their vehicle and fled on foot.

Deputy Darst (Grayson County SO) responded. He was told by a bystander that the two men they were pursuing were hiding behind the elementary school. The deputy found the men behind the elementary school, prompting them to jump the fence. With Darst in pursuit, they fled, eventually parting company. Stewart jumped in a creek, but finally surrendered. Darst had to go into the creek to arrest him and in doing so, his radio and taser were damaged. Johnson was captured later, found to be intoxicated and numerous beer cans were found in his vehicle. However, because more than two hours had passed, he was not given a breath test.

Johnson was charged with numerous offenses, including Criminal Mischief for the damage to Darst's equipment. He was convicted, and appealed.

ISSUE: May an individual be charged with criminal damage to property committed by a co-conspirator?

HOLDING: Yes

DISCUSSION: Johnson argued that since Darst's equipment was damaged while he was chasing Stewart, that he (Johnson) couldn't be found guilty of Criminal Mischief involving that equipment. The Court, however, agreed that since he was chasing both, that both could be complicit in the damage.

In addition, Johnson argued that a “prior consistent statement” was elicited from Deputy Darst, and was inadmissible. Specifically, he'd been asked if Hayden's description of what had happened in the wreck was consistent with his observations of the damage to the car. The Court found that this was not a prior

consistent statement, but merely an explanation that his training and experience supported Hayden's statement.¹

The decision of the trial court was affirmed.

DRUGS

Saxton v. Com.

2008 WL 4822519 (Ky. App. 2008)

FACTS: Saxton was indicted on multiple counts of Trafficking in a Controlled Substance, including one within 1,000 yards of a school in Graves County. The offense in question, regarding the school, was a controlled buy at a hotel between Saxton and police informants. Saxton was convicted, and appealed.

ISSUE: Does KRS 218A.1411 require the defendant to know of the proximity of the school?

HOLDING: No

DISCUSSION: Saxton argued that KRS 218A.1411 requires that he must traffick knowing that he was near the school. The Court, however, concluded that the statute was silent as to the necessary mental state. Further, the Court disagreed that Saxton was entrapped when the transaction was arranged by the police and that the location was selected intentionally, stating that his choice to engage in the transaction was his own.

Saxton's conviction was upheld.

DOMESTIC VIOLENCE

Oglesby v. Lockett

Oglesby v. Oglesby

2008 WL 4822580 (Ky. App. 2008)

FACTS: Lockett was Alishia Oglesby's ex-husband and they shared joint custody of their son, M.L. Oglesby was currently married to John Oglesby, with whom she had two sons, M.O. and D.O., but a divorce petition had been filed. On Feb. 4, 2008, John Oglesby filed a DV petition against Alishia, on behalf of himself and his children alleging both physical and mental abuse. The next day, Lockett filed a petition on behalf of both he and his son, claiming that Alishia was not taking care of M.L. At the time, Alishia had moved to Clarksville, TN, from Hopkins County, with all of the children.

A hearing was held on both petitions. The Court granted a DVO to both Lockett and John Oglesby. Alishia Oglesby appealed.

ISSUE: Is a DVO based upon a child's misconduct (allegedly due to inattention of the parent) appropriate?

¹ The introduction of such statements is normally prohibited by the Kentucky Rules of Evidence.

HOLDING: No

DISCUSSION: Oglesby argued that the DVO on behalf of John Lockett and M.L. was inappropriate, because there was no evidence of domestic violence. M.L. “excessively missed school and used drugs” while in his mother’s custody because she had left him with a friend for several days. She did admit that M.L. had fought with his father, John Lockett. The Court concluded that no domestic violence had occurred involving either John Lockett or M.L. and denied the entry of a DVO on their behalf.

With respect to John Oglesby and their two children, however, the Court concluded that domestic violence had occurred, and upheld the issuance of the DVO in that case.

DUI

Litteral v. Com.

2008 WL 5102145 (Ky. App. 2008)

FACTS: On the day in question, Officer Combs (Lexington PD) arrested Litteral for DUI. At the jail, he explained the testing and offered Litteral his right to attempt to contact an attorney during the 20 minute required observation period. Litteral tried to contact his sister, an attorney, all the while “Officer Combs remained in close proximity”.

Litteral requested suppression of the BA test results and was denied. Eventually, Litteral took a conditional guilty plea and appealed.

ISSUE: May an officer stay close to a DUI suspect while they are attempting to contact an attorney, during the waiting period prior to a breath test?

HOLDING: Yes

DISCUSSION: The Court reviewed the history of the DUI and implied consent law. The Court noted that the taking of such samples is not a “critical stage[] of a prosecution” and that as such, a suspect is not entitled to an attorney being present anyway.² In 2000, the Court noted that the Kentucky General Assembly “added a very limited right to attempt contact with an attorney.” The Court found that “Litteral’s only complaint is that he was unable to consult privately with his attorney.” The Court found that the legislature crafted the language purposefully and that the “statute specifically avoids creating a right to have counsel present”. “If ... private consultation was intended, the Legislature could easily have granted that right.”

The Court stated it believed:

... the Legislature was mindful of the requirement, which it previously incorporated into the legislation, that breathalyzer testing be permitted “only after a peace officer has had the person under personal observation at the location of the test for a minimum of twenty (20)

² Newman v. Hacker, 530 S.W.2d 376 (Ky. 1975). See also Elkin v. Com., Dept. of Transp., Bureau of Vehicle Regulation, 646 S.W.2d 45 (Ky. App. 1982)

minutes.” KRS 189A.103(3)(a). The purpose of this observation period is to assure that the test “subject shall not have oral or nasal intake of substances which will affect the test.” 500 KAR 8:030 Section 1(1). Considering that our Courts previously held the test subject was entitled to no contact with legal counsel, we believe the Legislature intended only to allow such right as would not infringe upon the Commonwealth’s need to obtain accurate evidence regarding a violation of KRS 189A.010.

The Court noted that “Officer Combs’ presence was mandated by KRS 189A.103(3)(a) to assure the accuracy of the test.”

Litteral’s plea was upheld.

Rowe v. Com.
2008 WL 4754923 (Ky. App. 2008)

FACTS: Rowe was tried for DUI in Campbell County. During her trial, she objected to an exhibit concerning the “calibration of the breathalyzer machine before and after Rowe was tested.” Her objection was overruled; she was convicted and appealed.

ISSUE: Is it necessary that a BA technician (as opposed to operator) appear on court?

HOLDING: No

DISCUSSION: The Court reviewed its earlier decision in Com. v. Wirth, in which it set forth, the following standard for BA evidence:

- (1) That the machine was properly checked and in proper working order at the time of conducting the test.
- 2) That the chemicals employed were of the correct kind and compounded in the proper proportions.
- 3) That the subject had nothing in his mouth at the time of the test and that he had taken no food or drink within fifteen minutes prior to taking the test.
- 4) That the test be given by an operator who is properly trained and certified to operate the machine.
- 5) That the test was administered according to standard operating procedures.

Provided that the standards are met, the Court found it is not necessary to call the technician to court. The Court also looked to Com. v. Walther³, in which the Court reexamined its earlier decisions in light of Crawford v. Washington.⁴ In that case, the Court concluded that “the technician’s role was ministerial and the technician had no identifiable interest in whether the certifications produced evidence favorable or adverse to the defendant.” As such, Crawford did not apply.

Rowe, however, questioned the admissibility of the records under KRE 803(8) - the public records exception to the hearsay rule - because it excludes investigative reports. The Court concluded that the

³ 189 S.W.3d 570 (Ky. 2006),

⁴ 541 U.S. 36 (2004),

records are admissible under either KRE 803(6) - the business records exception, or KRE 803(8), public records and reports.

Rowe's conviction was affirmed.

DUI

McCreary v. Com.

2008 WL 4601231 (Ky. App. 2008)

FACTS: On the night in question, Officer Toth (Franklin PD) spotted a car parked beside an empty building. Concerned, he pulled behind the vehicle and turned on his emergency lights. Officer Toth found McCreary sitting behind the wheel. The engine was turned off and the keys were in McCreary's pocket. Officer Toth observed that McCreary had trouble getting the window rolled down and that there were two half-empty wine bottles in the back seat. McCreary refused any field sobriety tests.

Officer Toth arrested McCreary and he later refused a breath test at the jail. Ultimately, McCreary was charged with DUI, third offense. After a second trial, since the first jury deadlocked, McCreary was convicted. He appealed.

ISSUE: Is a person found sleeping in a vehicle with the vehicle turned off in violation of DUI?

HOLDING: No

DISCUSSION: McCreary argued that the evidence was insufficient to charge him with having physical control of a motor vehicle, an element of DUI. The Court looked to the Wells' factors.⁵ The Court noted that they could not be sure if McCreary was asleep (as he claimed). The Court agreed, however, that the evidence indicated that the vehicle was turned off and the keys pocketed, which weighed in McCreary's favor. Officer Toth agreed that McCreary was "bothering no one" where he was parked. McCreary claimed to be waiting to sell some CB radios and that he'd been parked, when arrested, for about four hours. He also had alcoholic beverages in the car, another factor that weighed in McCreary's favor. Finally, McCreary indicated that it was his intent to stay where he was until he sobered up, although he agreed that was not his initial intention when he parked the car.

McCreary's conviction was reversed.

Pemberton v. Com.

2008 WL 4530906 (Ky. App. 2008)

FACTS: Pemberton was arrested on Dec. 28, 2004, in Mercer County, for DUI. When he was stopped, the officer later testified that he smelled the strong odor of an alcoholic beverage, that Pemberton had "glassy red eyes and that he failed a series of field sobriety tests." He was taken to the hospital for

⁵ Wells v. Com., 709 S.W. 2d 847 (Ky. App. 1986); see also Harris v. Com., 709 S.W.2d 846 (Ky. App. 1986), White v. Com., 132 S.W.3d 877 (Ky. App. 2003), Blades v. Com., 957 S.W. 2d 246 (Ky. 1997). The Court noted that although Wells predated the current version of KRS 189A.010, that its reasoning was still applicable.

blood and urine tests. The blood indicated an alcohol concentration of .07 and the urine indicated that he had the byproduct of marijuana in his system.

At the suppression hearing, a KSP chemist testified that the presence of cannabinoid metabolites at the level tested indicated ingestion of marijuana sometime within 36 hours before the sample was taken." He could not "state when within that 36-hour period Pemberton had ingested marijuana or whether Pemberton was intoxicated from using marijuana at the time he was driving."

Pemberton requested suppression of the urine test and when that was denied, he took a conditional guilty plea. He then appealed.

ISSUE: Is evidence of the presence of marijuana in one's urine evidence of some degree of intoxication?

HOLDING: Yes

DISCUSSION: The Court quickly agreed that the evidence provided by the urine test, showing "Pemberton had ingested marijuana within 36 hours of driving is a useful fact in the determination of whether or not he was driving while impaired." The "weight to be assigned to that evidence is a matter for the jury to decide."

The Court upheld Pemberton's plea.

ARREST

Spencer v. Com.
2008 WL 4531374 (Ky. App. 2008)

FACTS: On June 19, 2004, Trooper Sandlin (KSP) responded to a shots fired call in Breathitt County. He and Dep. Gabbard (Breathitt Co. SO) proceeded to the area and while on the way, received a description of a vehicle believed to have been involved. They passed a vehicle matching the description and initiated a traffic stop. Trooper Sandlin got Napier, the driver, out of the vehicle for questioning. He also observed Spencer, a passenger. Napier denied any involvement in the shooting and Sandlin began to frisk him. Sandlin noticed "Spencer making unusual movements with her hands close to her body as if she were trying to hide something on her person." When Trooper Sandlin discovered that the wrong plates were on Napier's vehicle, he arrested him and secured him in his cruiser. He then had Spencer get out. Suspicious that she'd been hiding the gun used in the shooting, he questioned her. She admitted to having two pills in her underwear, so he arrested her and searched Napier's vehicle. Nothing was found. Sandlin did not search Spencer at that time.

Trooper Sandlin transported the couple to the scene of the shooting where Napier was identified. Napier was charged with the shooting.

Spencer was taken to jail and searched by a female jailer who found the two pills, along with other pills and thirteen packages of cocaine. Spencer was given his Miranda rights and ultimately charged with various

drug offenses. She was indicted and requested suppression. When that was denied, she took a conditional guilty plea and appealed.

ISSUE: Is an admission that one has unidentified concealed pills on one's person sufficient to justify an arrest?

HOLDING: Yes

DISCUSSION: Spencer argued that the trooper lacked probable cause to make the initial arrest. The Court agreed that "Spencer's initial detention ripened into an arrest when she was placed in the police cruiser and transported to jail" since a "person's involuntary transport to a police station for questioning is "sufficiently like arres[t] to invoke the traditional rule that arrests may constitutionally be made only on probable cause."⁶ The trooper agreed that he considered Spencer to be under arrest at the time.

The court stated that "[t]o determine whether a police officer had probable cause to arrest an individual, we must examine the events leading up to the arrest, and then decide whether these facts, when viewed from the standpoint of 'an objectively reasonable police officer,' created probable cause for the arrest."⁷ Further, Kentucky courts have held that "probable cause for an arrest exists 'when a reasonable officer could conclude from all the facts and circumstances that an offense is being committed in his presence.'"⁸

The Court was convinced "that Spencer's incriminating admission that she had hidden two pills in her underwear justified her arrest for possession of a prescription controlled substance not in its original container." Simply the fact that they were concealed "permitted the reasonable inference that the pills were controlled substances." As such, her arrest was lawful and the subsequent search was incident to a lawful arrest.

Further, the Court had no legal concerns about the trooper's failure to search Spencer before their arrival at the jail, as the law does not require that such searches be done immediately upon arrest.

SEARCH & SEIZURE – TERRY

Rountree v. Com.

2008 WL 4601285 (Ky. App. 2008)

FACTS: In the evening of August 28, 2005, Rountree purchased two packages of an OTC medication containing pseudophedrine. (He purchased a total of 96 pills containing 5.7 grams of pseudophedrine.) He showed his OL and signed the required log. Immediately thereafter, another man attempted to purchase a similar medication, but he did not have an OL and the sale was refused. Rountree's purchase was within the limit both of Kentucky law and Walgreens' policy (6 grams).

Walgreens then reported the transactions to Elizabethtown PD. Officers did a record check and learned that Rountree drove a maroon vehicle registered in Hart County. Det. Edwards located the maroon vehicle

⁶ Kaupp v. Texas, 538 U.S. 626 (2003).

⁷ Ornelas v. U.S., 517 U.S. 690 (1996).

⁸ Com. v. Fields, 244 S.W.3d 128 (Ky. App. 2008).

at a local Walmart. He watched Rountree leave the store in the car and stop to pick up another man. He did not know, at the time, whether they'd made a purchase at the store.

Officers made a traffic stop nearby and questioned Rountree about his purchase at Walgreens. He admitted to having purchased such medication and that he used methamphetamine. There were "multiple packages of allergy pills in the car." A subsequent search revealed pills sufficient to total 94 grams, lithium batteries, solvents and incriminating receipts. A small amount of methamphetamine and hydrocodone were also found.

Rountree was arrested and moved for suppression. When that was denied, he took a conditional guilty plea and appealed.

ISSUE: Is information that a person has purchased a large, but legal, quantity of pseudophedrine under suspicious circumstances sufficient to justify a traffic stop?

HOLDING: Yes

DISCUSSION: The Court noted that at issue was whether the information the officers had at the time of the stop was enough to meet the standard of reasonable suspicion.

As found by the trial court herein, when Rountree's car was stopped, the police had information that he had purchased two boxes of allergy pills and that another man who appeared to be with him had unsuccessfully attempted to make a similar purchase. The police did not know the identity of Rountree's automobile passenger but they could have reasonably inferred that the man with Rountree in his car was the same man who had unsuccessfully attempted to purchase pseudophedrine a short while earlier from Walgreens. It is worth reiterating that the decisive inquiry is whether the police possessed a reasonable suspicion at the time they stopped Rountree's vehicle.

The Court concluded that the information was sufficient to be considered reasonable suspicion. Further, the evidence visible at the time of the traffic stop, coupled with Rountree's admission, was enough to justify the warrantless search.

Rountree's plea was upheld.

Black v. Com.

2008 WL 4952107 (Ky. App. 2008)

FACTS: On April 6, 2007, Officer Nunn (Bellevue PD) was dispatched to an armed robbery that had just occurred. He was nearby and as he drove to the scene, he spotted "two black men running toward him" and away from the scene. He had been given the information that two black men were involved. As they drew near, they slowed to a walk and Nunn got out approaching them on foot. One of the two, Black, did not respond to Nunn's command to stop and show his hands, but instead, "maneuvered between two parked vehicles and then stopped." Nunn drew his weapon and ordered Black to place his hands on one of the vehicles, which he apparently did. Black was handcuffed and frisked, while the second man was detained by another officer. The officers searched nearby and found a small handgun. The victim's belongings were recovered from Black.

Black was charged as an accomplice to First-Degree Robbery and moved for suppression. The trial court denied the motion and he took a conditional guilty plea. Black then appealed.

ISSUE: May a combination of lawful, yet suspicious, behaviors justify a Terry stop?

HOLDING: Yes

DISCUSSION: Black argued that "Officer Nunn lacked adequate cause to detain him on the street" and that invalidated any subsequent actions. He argued that the "officer's suspicion was based upon his race coupled with an allegation made by an unreliable, anonymous tipster," and that the "tip lacked the requisite predictive information that would justify" the stop.

The Court, however, disagreed, noting that Nunn spotted "two black males running from the area where the robbery had occurred and the suspects were last seen." The lateness of the hour and the fact that the streets were otherwise empty of pedestrian traffic, coupled with Black's initial refusal to show his hands, all added to the reasonable suspicion required to make the stop. The Court stated that the "circumstances unequivocally gave rise to an objectively reasonable and articulable suspicion," and that the "investigatory stop was fully justified." Further, his demeanor provided Nunn with adequate cause to do a frisk, and his use of handcuffs during the encounter did not "exceed the bounds of a Terry stop-and frisk."

The Court upheld the denial of the suppression motion.

SEARCH & SEIZURE - FRISK

Strange v. Com.
269 S.W.3d 847 (Ky. 2008)

FACTS: On April 11, 2005, Officers Hall and Olivares (Lexington PD) were patrolling an area known for prostitution and drug activity. Shortly after 11 p.m., they spotted a van and a payphone, with Strange nearby. "Both officers testified that they routinely stopped to question everyone out at that time of night in that neighborhood." After turning around, they found Strange talking to the van driver and separated the pair. Officer Hall took Strange and he reported that he "seemed nervous." Strange stated he was visiting a family friend who had been ill. Officer Hall spotted a bulge in Strange's pants pocket and did a frisk. Satisfied that the item wasn't a weapon, he asked Strange what the object was - Strange said he didn't know. Strange let Hall remove the object, an unmarked medicine container with 12 Oxycontin and 5 Xanax. Strange was arrested.

Strange requested suppression and was denied. He took a conditional guilty plea and appealed. The Court of Appeals affirmed the trial court's decision and Strange further appealed.

ISSUE: Is the routine stopping of individuals, without particularized suspicion, late at night, permitted?

HOLDING: No

DISCUSSION: The Court reviewed the trial record and ruled that the actions of the officers constituted a seizure, in that Officer Hall stated that they “separated” the two men. His testimony “established beyond dispute that he took control of [Strange] and expected compliance.”

Further:

A reasonable person, in a high crime neighborhood late in the evening, would not and should not reasonably feel free to resist a police officer's order to move. Citizens are encouraged to comply with reasonable police directives, and the police should be permitted to expect reasonable compliance with reasonable demands. Appellant was directed to move over to the police cruiser, and he apparently did so promptly and peacefully. His passive compliance with the policeman's order cannot convert that order into a request which Appellant, or any citizen, should feel free to resist.

The Court then discussed whether the officers had sufficient reasonable suspicion to justify the seizure. The Court noted that the only facts presented were that Strange “was in a public area known for criminal activity, late at night, standing near a pay phone that has sometimes been used in drug transactions” and that he apparently approached a nearby van when the officers appeared. The remaining factors did not occur until after the initial seizure. However, nothing indicated that he approached the van because of the presence of the officers. “The officers gave no explanation of Appellant's movement to distinguish it from any other action he might have made, sinister or innocent,” merely characterizing it as “evasive.”

The Court stated:

We recognize that police officers have training and experience that may enable them at times to see suspicious behavior that goes unnoticed to the untrained eye. That training and experience, however, should enable them to articulate the factors that aroused their suspicion. That has simply not been done here.

The Court did not question the officers talking to individuals who are “out at that time of night” and agreed that “[d]oing so may be a good police practice.” The Court continued, “when the police take control over a citizen's person and limit the movement of that citizen, as they did with [Strange], the Fourth Amendment is involved and they must be able to articulate the grounds for their suspicion.”

The Court found the seizure unlawful and ordered that the suppression should have been granted. The case was remanded for further proceedings.

SEARCH & SEIZURE - CONSENT

McGee v. Com.
2008 WL 4889633 (Ky. App. 2008)

FACTS: On Dec. 12, 2006, Dep. Kitchens (Logan County SO) responded to a disturbance at the Eddings home. When he arrived, Eddings told him that McGee and Howitt had trespassed and “threatened to assault him.” They left before Kitchens' arrival, but Eddings provided a vehicle description.

Dep. Kitchens encountered McGee a few hours later and made a traffic stop. As he approached, he smelled marijuana. Kitchens did a frisk, with consent, and found nothing. He received no response to his request to search, so he explained that McGee didn't have to consent and that the deputy could have a drug dog come to the scene. McGee then consented. He found four "roaches" and methamphetamine, among other items. McGee was arrested, but his passenger, Howitt, was not.

McGee requested suppression and was denied. He was subsequently convicted and then appealed.

ISSUE: Is a statement that a drug dog will be called to the scene coercion?

HOLDING: No

DISCUSSION: McGee contended that his consent was improperly coerced by Kitchens' threat to call for a K-9 unit. He further stated that Kitchens had no reason to suspect there might be drugs in the car. The Court found that the prompt arrival of the dog did not impermissibly lengthen the stop - which lasted approximately 8 minutes from stop to arrest.

McGee's conviction was affirmed.

SEARCH & SEIZURE - ANONYMOUS TIP

Mulazim v. Com

2008 WL 5102219 (Ky. App. 2008)

FACTS: On Oct. 17, 2006, White called for assistance from the Lexington PD. In response, Officer Hyer went to White's home, where he was told that Mulazim was driving in East Lexington, had a gun, and was searching for White's son, Philip, in order to hurt him. He had allegedly stabbed Philip the night before. White gave Hyer the information she had, including a partial plate on Mulazim's car. White reported she had received the information "from a third party who did not wish to be named or involved." (The identity of the individual was learned some time after Mulazim's arrest.)

Sgt. Webb located Mulazim and tried to stop him. Mulazim fled from his car but was later arrested. Sgt. Webb spotted a gun under the seat. Mulazim was charged with a variety of crimes, including one for possession of the gun since he was a convicted felon. He moved for suppression, but was denied. Mulazim took a conditional guilty plea and appealed.

ISSUE: Is a tip from an unknown, but identifiable, individual anonymous?

HOLDING: No

DISCUSSION: Mulazim argued that because the "source of the information ... was completely unknown to the officer at the time of the stop; the tip from Francis [White] was the equivalent of an anonymous tip." He stated that "anonymous information does not become more reliable simply because it has been fed through an identified conduit." The Court agreed that "Francis's tip contained only identifying information, described little predictive information as to Mulazim's behavior, and came primarily from an informant with an unidentified source, who provided no concrete basis for the information." However, the Court did not

agree that she was “unaccountable or that the source of the information was truly anonymous.” The Court noted that while there was a “strong presumption the ultimate source of the information” could be discovered if necessary, since the officers were aware that [White] knew the name of the informant.

Finally, the Court noted that the earlier stabbing added a degree of urgency that created an articulable reasonable suspicion sufficient to justify the stop.

Mulazim’s plea was upheld

SEARCH & SEIZURE - PLAIN FEEL

Barnes v. Com.

2008 WL 4683219 (Ky. App. 2008)

FACTS: On March 24, 2007, Officer Perkins (Lexington PD) was dispatched to investigate drug trafficking. When he arrived, he found two men sitting in the stairwell of the apartment building. One of the men, Barnes, stood up as the officer approached, and Officer Perkins immediately realized he was intoxicated.

The men stated they’d come from Apt. 19, the suspect apartment. Barnes appeared “extremely nervous and evasive.” When asked to produce ID, Barnes “kept taking his hands in and out of his pockets in a furtive manner” and continued to do so even when asked to keep his hands out of his pockets. Perkins, concerned for safety, frisked Barnes.

During the frisk, he noted two bulges that the officer believed, from his training and experience, “were likely to be narcotics.” Perkins arrested Barnes and gave him Miranda warnings. He searched Barnes, finding scales, plastic bags with both powder and crack cocaine, marijuana and cash. He was also found to have ingested cocaine and was taken to the hospital.

Barnes was indicted on trafficking and related charges and moved for suppression. The trial court denied the motion. Barnes took a conditional guilty plea and appealed.

ISSUE: May an arrest be made when an officer “feels” contraband during a frisk?

HOLDING: Yes

DISCUSSION: The Court quickly concluded that all of Officer Perkins’ actions were proper and that the drugs were located during a “plain-feel” search. (Note: Barnes was apparently arrested prior to the removal of the drugs.)

Barnes’ plea was upheld.

SEARCH & SEIZURE - ROADBLOCK

Campbell v. Com.

2008 WL 4998829 (Ky. App. 2008)

FACTS: On Dec. 14, 2006 Deputies Conley and Addison (Garrard Co. SO) were conducting a "vehicle safety checkpoint." During that time, they stopped Campbell and requested his license, proof of insurance and registration, which he provided. Dep. Conley asked Campbell if he'd been drinking, to which he agreed, and he was asked to get out of the car. Dep. Conley conducted field sobriety tests and upon Campbell failing the tests, arrested him. The deputies abandoned the checkpoint and transported Campbell to jail. (The checkpoint required at least two deputies to operate.)

Campbell requested suppression, which was denied, then took a conditional guilty plea, and appealed.

ISSUE: Is a checkpoint that is stopped after a DUI arrest (because of a lack of officers to continue the checkpoint) still lawful?

HOLDING: Yes

DISCUSSION: Campbell argued the checkpoint was improper "because the deputies had no plan to continue the checkpoint after the first arrest, there were no written procedures regarding the checkpoints, a supervising officer did not make the decision to set up the checkpoint or even approve one, there were no media announcements regarding the checkpoint, there was not an officer in charge of the checkpoint, and the purpose of the checkpoint was to detect any violation of the law." Dep. Conley, however, testified that they had pre-identified the location as appropriate for a checkpoint and that the Sheriff had given them permission to do it that day. Both deputies were in uniform and their cruisers were marked and lit up. They stopped every motorist and the stops were brief. The checkpoint ended "because it was no longer logistically possible to maintain."

The Court found the checkpoint and the arrest valid and upheld the plea.

SEARCH & SEIZURE - APPROACH

Richards v. Com.

2008 WL 4755238 (Ky. App. 2008)

FACTS: On July 12, 2006, Officer Miranda approached Richards and a companion - they were sitting in a car kissing. He asked them their purpose and they stated they were waiting for someone. The passenger produced ID, but the driver (Richards) could not, and was further unable to give valid information as to his name and date of birth. (He gave a false name at the time.) After being warned, he gave his correct name and admitted he was the subject of outstanding warrants. Richards was arrested and asked if there was "anything in the vehicle that police should know about before it was searched." Richards did not respond. Officer Miranda searched and found 1.7 grams of crack cocaine in the driver's seat. When Officer Miranda began to handcuff the passenger, Richards admitted to possessing the cocaine.

Richards requested suppression and was denied. He took a conditional guilty plea and appealed.

ISSUE: Does an approach on foot require reasonable suspicion?

HOLDING: No

DISCUSSION: Richards argued that Officer Miranda lacked even reasonable suspicion to approach the vehicle, and that as such, any evidence should be suppressed. The Court ruled that “the Fourth Amendment was not implicated when Officer Miranda approached Richards’ vehicle, asked him general questions, and requested identification.” Officer Miranda approached on foot and did not have his emergency lights activated or his gun drawn. Further, the Court ruled that since Kentucky law requires that drivers provide their operator’s licenses to officers upon request, when Richards failed to do so, further detention was appropriate. Once Richard told him that he had warrants, the officer had probable cause to arrest. The evidence was then discovered pursuant to the valid arrest.

Richards argued that Miranda was required to notify him immediately of his rights and did not do so. However, because Richards was in custody, but not under interrogation at the time, the Court ruled that the warnings weren’t necessary.

Richards’ conviction was affirmed.

VEHICLE STOP – CONSENT

Com. v. Outland
2008 WL 4822541 (Ky. App. 2008)

FACTS: On July 21, 2007, McCracken County deputies stopped Outland’s car for speeding and failing to signal. She was already under surveillance as a result of an investigation. The deputies gave her a warning ticket and then asked her to get out. Additional deputies arrived and the whole process lasted between 15-30 minutes. Outland consented to a search of her car, as long as it “didn’t take too long.” The deputies found a marijuana roach in the car, additional marijuana, methamphetamine and a pipe on her person. She was arrested and later indicted on drug charges.

Outland requested suppression. The trial court agreed that her detention lasted too long after the ticket was issued and that the deputy lacked any reasonable suspicion to extend the stop. The Commonwealth appealed.

ISSUE: May a consent given during an arguably unlawful detention still be considered valid, if given voluntarily?

HOLDING: Yes

DISCUSSION: The Court noted that in a “remarkably similar” case, also out of McCracken County, the court had held that “when consent is given during detention not justified by reasonable suspicion, the sole question for purposes of the Fourth Amendment is the voluntariness of the consent and not the lawfulness

of the detention.”⁹ As before, the Court found no reason to decide that her consent was not voluntary and that was the only basis on which to suppress the evidence.

The Court reversed the McCracken trial court’s decision and remanded the case for trial.

INTERROGATION

Edmonds v. Com.

2008 WL 5264321 (Ky. App. 2008)

FACTS: On or about Nov. 27, 2004, Officers Brand and Noel (Lexington PD) responded to a robbery call from a local shopping center. On the way to the call, they spotted Edmonds, who matched the description of the robber. He was stopped, handcuffed and given Miranda. Edmonds “vehemently denied that he was the robber.” The officers transported him to the store for a show-up and the clerk identified Edmonds. The time lapse was between 30-45 minutes. Edmonds was arrested.

Det. Cain, the detective on call, met with Edmonds, while the patrol officers were completing paperwork. The officers could not see Cain and Edmonds, but could hear part of the conversation inside the interrogation room. They stated that they never heard Edmonds “make a request for an attorney, state that he wanted to remain silent or any admission made by [Edmonds].” The interview lasted only about ten minutes and ended with raised voices. Edmonds later claimed Cain called him a liar and pushed him backwards so that his head hit the wall, and made threatening statements to him. (The patrol officers agreed that there was “obvious anger” between the two.)

Officers Brand and Noel then took Edmonds to jail. The next day the patrol officers met with Edmonds again, gave him Miranda, and found him “relaxed and calm.” Noel left the room, and Brand engaged Edmonds in conversation. He was also secretly recording the conversation. He “apologized” for Cain’s conduct - in an attempt to establish a rapport and get a confession. Edmonds stated he wanted to talk to an attorney about filing charges against Cain. He made no request to stop the questioning or that he wanted an attorney for the pending criminal case.

Edmonds later moved to suppress the statements made in the second interview. The trial court made specific fact findings concerning the interchange between Cain and Edmonds, and agreed that Edmonds was pushed during the interchange, but not injured, and that Cain had used threatening language. The Court found that Officers Brand and Noel “‘scrupulously honored’ Edmonds’ constitutional rights in the second interview the day after Detective Cain’s interview.”

The Court denied the motion to suppress, and Edmonds appealed.

ISSUE: Is a confession given the day after an alleged assault by an officer, to a different crime, valid?

HOLDING: Yes

DISCUSSION: Edmonds urged the Court to find that his confession, given the day after the interrogation

⁹ Com. v. Erickson, 132 S.W.3d 884 (Ky. App. 2004).

by Cain, and given to two other officers, was coerced and thus should be suppressed. The Court looked to the three criteria set forth in Henson v. Com.¹⁰ to decide the issue. First the Court agreed that Cain's alleged behavior was objectively coercive, but that the coercion did not overbear Edmonds' will nor was Cain's behavior the "crucial motivating factor" leading to the confession made the following day.

The Court affirmed the trial court's decision not to suppress the confession.

Thomas v. Com.

2008 WL 5051573 (Ky. 2008)

FACTS: Thomas became a suspect after evidence indicated that he had murdered his father. When he learned he was wanted for questioning, he contacted his brother, who then picked up Thomas and took him to the police station in Bullitt County. After questioning, he was ultimately convicted of Murder, Theft, and Burglary. He appealed.

ISSUE: Is a person who arrives voluntarily at a police station for question, who is not otherwise controlled, in custody?

HOLDING: No

DISCUSSION: Thomas argued that he was in custody when he arrived at the police station. The Court looked to the facts and noted that he was not under arrest. He was escorted to the bathroom, but that was pursuant to a policy that individuals could not roam about the facility unaccompanied. The Court agreed he was not in custody before he was given Miranda warnings.

He further argued that the officer's statements were inconsistent and contradictory in that the time sequence was confusing. Both officers, however, "testified with certainty as to the sequence of events, and that [Thomas] was read his Miranda rights directly after implicating himself in the burglary," but "neither could verify the exact times each of these events took place." The Court, however, agreed the officers' testimony was adequate.

With respect to the burglary charge, Thomas was accused of entering a detached garage and stealing items to pawn. Although Thomas was a resident of the home and therefore arguably had privilege to enter the garage, the evidence indicated he entered the garage after murdering his father. The Court agreed that his "license and authorization to be on the property was terminated upon his father's death." In addition, he had to pick the lock to enter. The Court agreed that burglary was an appropriate charge.

Thomas's conviction was affirmed.

Benjamin v. Com.

266 S.W.3d 775 (Ky. 2008)

FACTS: Benjamin was charged with the murder of his wife. After her body was discovered, Benjamin turned himself in to the Mayfield PD. The day after his arrest, on September 4, 2004, he asked to speak to Det. Jackson. His taped interview, up to the point he requested counsel and the interview

¹⁰ 20 S.W.3d 466 (Ky. 1999).

terminated, was admitted at trial. Two days later, he again asked to speak to Det. Jackson. (The facts of the actual crime are immaterial.) On Sept. 7, he once again asked to speak to Det. Jackson and asked to see his wife's body. He confessed to the murder and was subsequently taken to the funeral home to view the body. He confessed there, a second time. He was eventually convicted, and appealed.

ISSUE: Is a discussion on potential penalties (including the death penalty) coercion?

HOLDING: No

DISCUSSION: Benjamin argued that his confessions were involuntary and the "product of coercive police activity" - in part because there was discussion that he could face the death penalty. The Court, however, agreed that there was nothing coercive about the officer's actions, "or their truthful, non-coercive advisement of potential penalties." In both cases, Benjamin had initiated the contact and had waived his rights.

In addition, at trial, Det. Jackson testified, repeating two statements made by Debra Brown, the mother of the initial suspect, a drug dealer about whom the victim had provided information. In both cases, the trial court had admonished the jury that the statements were hearsay and that they were to disregard the statements.

The Court found no issues of concern with the police conduct, although the conviction was reversed for other, unrelated, reasons.

TRIAL PROCEDURE / EVIDENCE

Lynn v. Com.

2008 WL 4530901 (Ky. App. 2008)

FACTS: On Sept. 25, 2006, the Henderson PD got an anonymous tip that the tipster had spotted drugs at a specified residence. When they arrived, the officers found Lynn outside. He gave consent to search the residence and the officers found methamphetamine, marijuana and drug paraphernalia. During the search, the officers heard Lynn tell his wife to claim that the drugs were hers.

Lynn was charged and eventually tried. He argued for suppression, but Court denied his motion. Lynn was convicted and appealed.

ISSUE: Is failure to provide an inculpatory oral statement by the defendant to the defense fatal to the case?

HOLDING: No

DISCUSSION: The Court quickly concluded that this was a "knock-and-talk" situation, and that such interactions were appropriate investigative tools. Further, Lynn argued that "the presence of two police cars and two uniformed officers at his home created a coercive and confrontational atmosphere whereby he did not voluntarily consent to the search of his home." The Court found that the presence of the officers did not "create a coercive environment."

Lynn also argued that the trial court erred in admitting his statement to his wife - "Tell them everything is yours. I can't take another charge." Specifically, he argued that the second portion of the statement was not provided to the defense until the day of trial, in violation of Brady v. Maryland.¹¹ The Court found that the statement was not a violation of Brady, since it was not exculpatory, but that the failure to provide the statement instead violated RCr 7.24 and RCr 7.26 which required that the Commonwealth has a duty to disclose all inculpatory statements it plans to introduce.¹² The prosecution stated that the officer who received the statement was not interviewed prior to that day, and as such, the prosecutor did not know the entire statement. The Court stated, however, that "[t]he Commonwealth cannot choose to wait until the day of trial to interview a witness and then disclose previously unknown evidence."

The case was reversed because of the violation of the rule and remanded for a new trial.

NOTE: *The case emphasizes the need for all officers at the scene to document all oral statements, both inculpatory and exculpatory, and ensure that they are provided to the prosecutor.*

Rice v. Com.
2008 WL 4683074 (Ky. App. 2008)

FACTS: On April 14, 2007, Officers Warner and Winship (Covington PD) were on foot patrol in the Jacob Price Housing Project. At about 4 a.m., they spotted a man (Rice) "looking into various mail boxes." When the officers caught up to him, he was "crouched on a concrete pad with his arm extended behind a garbage can." The officer drew his weapon and ordered Rice to show his hands and he "brandished a fully-loaded .45 caliber pistol." They ordered him to drop the gun, but instead, he ran. Rice threw the gun down as he fled. Rice was caught and arrested, Officer Winship went back and retrieved the gun, along with a black bandana that was nearby.

Rice was convicted of being a felon in possession of a firearm and appealed.

ISSUE: May an officer who is also a witness be selected to sit at the prosecution table?

HOLDING: Yes

DISCUSSION: Rice argued that it was improper to allow Officer Warner to remain at the prosecution table during the trial, in violation of KRE 615. The court, however, ruled that the officer

¹¹ 373 U.S. 83 (1963)

¹² RCr 7.24 (1) provides: Upon written request by the defense, the attorney for the Commonwealth shall disclose the substance, including time, date, and place, of any oral incriminating statement known by the attorney for the Commonwealth to have been made by a defendant to any witness, and to permit the defendant to inspect and copy or photograph any relevant (a) written or recorded statements or confessions made by the defendant, or copies thereof, that are known by the attorney for the Commonwealth to be in the possession, custody, or control of the Commonwealth, and (b) results or reports of physical or mental examinations, and of scientific tests or experiments made in connection with the particular case, or copies thereof, that are known by the attorney for the Commonwealth to be in the possession, custody or control of the Commonwealth.

RCr 7.26 (1) provides: Except for good cause shown, not later than forty-eight (48) hours prior to trial, the 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.

qualified for the exemption, as he served as the advisor to the Commonwealth during the proceeding. As such, he was not subject to the separation of witnesses rule.

Next, the Court found the introduction of the black bandana was appropriate, as such “bandanas are commonly worn by gang members to identify themselves as such and are sometimes used to mask the identity of bandits.”

The court found that in this case, the introduction of the evidence did not unduly prejudice Rice.

Rice’s conviction was affirmed.

Barnett v. Com.
2008 WL 4889638 (Ky. App. 2008)

FACTS: On June 13, 2006, Troopers Greene and Pace “employed Crystal Money to conduct [a] drug buy” as part of an undercover operation by KSP. She contacted Barnett, who agreed to sell her two methadone tablets and an ounce of marijuana. Crystal Money was searched by the troopers, given money to make the buy and hooked up to a video and audio recorder.

Money drove to the location, followed by the troopers. Barnett and his wife, Bowling, approached Money’s car, and told her they only had one methadone table (having crushed and snorted the other) and that they would get the marijuana for her in an hour. She gave Bowling the money for the marijuana and the single methadone pill and waited for the pair to return with the other, agreed-upon drugs, but they never came back.

Barnett was eventually indicted. He was convicted and appealed.

ISSUE: May tapes of another party in a drug transaction be introduced against someone not present on the tape?

HOLDING: Yes

DISCUSSION: Barnett argued that he was not involved in the transaction, and that he never appears on any recording of the transaction. He was tied to the transaction only by Money’s testimony. Concerns about her credibility (as a paid informant) were held by the trial court to be properly the purview of the jury to decide. Further the court ruled that introduction of the audio and video surveillance tapes were proper, but that, “the recordings are ambiguous regarding any drug transaction, and that neither depicts any involvement by him.” The Court, however, found it was appropriate to introduce the recordings, particularly since Barnett and Bowling were co-defendants and the tapes clearly showed Bowling’s involvement in the alleged drug transaction.

Barnett’s conviction was affirmed.

McIntosh v. Com.
2008 WL 2167894 (Ky. 2008)

FACTS: McIntosh, his girlfriend (Slaughter) and a cousin (Banks) lived in Indiana but frequented Bowling Green. During the winter of 2004-05, McIntosh and Slaughter lived in Bowling Green and had concocted a plot to rob a local bank. On Feb. 4, Banks borrowed a car and took McIntosh and Slaughter from their car, parked nearby, to the bank they decided to rob. Banks checked inside and then left, signaling the pair to proceed. Banks went into the pharmacy next door.

Slaughter later testified that they went inside, wearing masks, and robbed the bank with a BB gun. They couple fled the bank in their car and rendezvoused with Banks at another location, where his girlfriend was to drive them to Indianapolis. She backed out, and eventually, the couple drove to Indiana on their own.

Banks was caught on the pharmacy camera, "behaving suspiciously," and was questioned by Bowling Green PD. He implicated Slaughter and McIntosh. The subsequent investigation led to their arrest. At trial, Slaughter testified at length and in detail about the plot, and "Banks's testimony was hardly less damaging." At the time of McIntosh's trial, Banks had already pled guilty. At trial, initially, Banks denied any knowledge of the bank robbery, but the prosecution "then began laying the foundation for the introduction of Banks's prior statements to the police by asking him if he had not told them a series of details about the robbery." Banks tried to "plead the Fifth" - but the judge reminded him that he had waived that by his guilty plea. Banks then "reverted to his lack of recollection," although he did deny that he had "ever told anyone that he served as a lookout for the robbers."

The prosecution then was permitted to "play for the jury two video recordings of Banks being interrogated by the police...." They were introduced as "prior inconsistent statements."¹³ Banks was no more forthcoming on cross-examination, and McIntosh contended that his "unresponsiveness rendered him essentially unavailable for cross examination" and that his hearsay statements should not have been admitted.¹⁴

Banks was eventually convicted and appealed.

ISSUE: Does a witness who appears, but does not respond to questioning, violate Crawford?

HOLDING: No

DISCUSSION: The Court agreed that Banks's statements were inculpatory to McIntosh and thus testimonial under Crawford. However, the Court further agreed that since Banks was actually present at trial, even though he did not effectively respond to questioning, that his "inability or refusal to recall the events recorded in a prior statement or the events surround the making of the statement does not implicate the Confrontation Clause." Further, under Owens, the courts have held that a witness satisfies the appearance for cross-examination "if he willingly takes the stand, answers questions in whatever manner, and exposes his demeanor to the jury, thus giving the defense an opportunity to address the witness's prior testimonial statements."¹⁵ The Court found that Banks unwillingness to talk did not violate Crawford.

¹³ KRE 801A

¹⁴ Crawford v. Washington, 541 U.S. 36 (2004).

¹⁵ See U.S. v. Owens, 484 U.S. 554 (1988).

The court also upheld the evidence discovered during the search of McIntosh's motel room, which McIntosh argued was based upon stale information. The search warrant was applied upon March 4, a month after the bank robbery, and some two weeks after another incriminating event occurred. The Court did not find the passage of time a concern.

McIntosh's conviction was upheld.

Arevalo v. Com.
2008 WL 5051611 (Ky. 2008)

FACTS: On March 14, 2006, Lexington PD officers responded to a shooting call. The 911 caller was a neighbor who had heard the gunshots. They found Pedro Lilly dead inside his car, shot four times. Carmella Arevalo, Lilly's paramour, was at the scene, screaming, in Spanish, "Josue shot my Pedro." She later stated she looked outside after the gunshots and saw her son, Josue Arevalo, running towards his own car. Other witnesses came forward and agreed they'd seen the same thing, although no one saw the actual shooting or saw Arevalo with a weapon. Another acquaintance testified that Arevalo had approached him in late 2005, looking for a gun, and that he bore Lilly animosity because he believed Lilly had sexually assaulted him while he was drunk and passed out. He told several people that he wanted to kill or hurt a specific individual, although he apparently never gave a name. Others testified that they had seen Arevalo with a gun prior to the shooting.

Arevalo denied shooting Lilly, but police found a gun that matched the bullets in Lilly's body was found at Arevalo's home.

Arevalo was indicted, tried, and convicted of murder. He appealed.

ISSUE: May an officer translate at trial?

HOLDING: Yes (but see discussion)

DISCUSSION: First, the Court addressed Arevalo's contention that Officer Bueno's translation (played for the jury) of statements made by Arevalo and the witness should not have been admitted, and that instead, a court-appointed translator should have been used. (Officer Bueno is a native Spanish speaker.) Arevalo did not question Bueno's abilities, specifically, but argued that since he was an officer, he was not unbiased, nor was he under oath at the time. The Court noted that Arevalo's statement was not presented as in-court testimony but as an admission by a party under KRE 801A(b). Officer Bueno was, of course, under oath during his actual testimony.

The Court further addressed the issue under KRS 30A.400 and KRS 30A.405. The first requires that when a person is "detained in police custody, who cannot communicate in English, [they] shall be provided an interpreter prior to any interrogation or taking of a statement from that person." Such statements are only admissible if made "in the presence of a qualified interpreter." The latter requires that such interpreters be qualified, impartial and able to use specialized vocabulary, if appropriate. However, Arevalo did not raise this statute in his appeal. Further, he didn't allege that any part of the translation was incorrect.

Next, when Carmella Arevalo was questioned at trial about her statement that her son had shot Lilly, she claimed she did not remember the statements. The prosecution then used her prior statement to impeach her testimony, pursuant to KRE 801A(a)(1). He argued that she should have been allowed to review the tape before it was played to the jury. The Court agreed with the trial court's decision not to permit the review.

Next, the 911 call from a neighbor was introduced into testimony. Arevalo argued that there were other voices on the tape, in the background (specifically, a female screaming and crying) that could not be identified and that these speakers could not be cross-examined. The Court noted, however, that none of what was being said was understandable, and that even if it was, it was Carmella's voice and thus both what she and the neighbor said, were admissible under the "excited utterance" exception to the hearsay rule.¹⁶ The Court agreed that it was admissible under that exception of the hearsay rule, as the call was made as the immediate aftermath of a sufficiently startling event.

The Court further upheld the "prior bad act" testimony of Arevalo's threat's against Lilly and his efforts to get a gun.

Arevalo's conviction was affirmed.

Suggs v. Com.
2008 WL 4822244 (Ky. App. 2008)

FACTS: "On August 6, 2001, Franklin Police Officer Scott Wade was patrolling in the Breckinridge Street area of Franklin, Kentucky, where drug activity was known to occur." Officer Wade observed Roscoe Clark, a known drug user, approach 528 Breckinridge Street on his bicycle, enter the residence, and reappear shortly thereafter. Clark failed to obey several traffic signals while riding his bike and was stopped by Officer Wade. As Officer Wade approached him, Clark placed a small bag of marijuana in his mouth. When asked about the drugs, Clark stated that he had purchased the marijuana from a black male at the Breckinridge Street residence who was wearing a white t-shirt and a blue or black hat. After arresting Clark, Officer Wade obtained a search warrant for the 528 Breckinridge Street residence.

Suggs was arrested as a result of the subsequent search, and charged with Trafficking in Marijuana within 1,000 yards and PFO. He was convicted and appealed, arguing that "Officer Wade made false statements in his affidavit to obtain the search warrant for the residence where [Suggs] was arrested." The motion was supported by a videotape of Clark's arrest, "which he argued proved that Officer Wade coerced Clark into claiming he purchased the marijuana from" Suggs. (The videotape was from Officer Wade's patrol car camera.) The trial court had "found no material discrepancies between Officer Wade's statement in his affidavit and his testimony at the suppression hearing and trial" and refused a full evidentiary hearing on the issue. (Clark admitted having purchased the marijuana at the search warrant location.)

ISSUE: Must video evidence be produced to the defense?

HOLDING: Yes

¹⁶ KRS 803(2).

DISCUSSION: The Court noted that the burden was on Suggs to “show that both a reasonable certainty exists as to the falsity of the challenged testimony and that the conviction probably would not have resulted had the truth been known.” The Court agreed that Suggs had “failed to meet either prong.” Officer Wade had agreed that Suggs’ clothing “did not match the description given by Clark.” He stated that Suggs was searched incident to arrest, because he was “observed removing a large quantity of marijuana from his person.”

On a side note, Suggs also claimed that the Commonwealth violated Brady¹⁷ by withholding the videotape. However, the “video tape of Clark’s arrest was not produced because the Commonwealth was not aware of its existence.” Notwithstanding, the Court noted that it failed “to perceive how the tape would have exonerated” Suggs.

Suggs’ conviction was affirmed.

Clark v. Com.
2008 WL 4692347 (Ky. 2008)

FACTS: Clark was charged with sexually abusing his daughter - the abuse starting when the child was about 9 years old. Det. Combs (KSP) investigated and Clark was ultimately charged with a variety of offenses, including rape, sodomy and incest. The case was tried in 2006, in Butler County, and Clark was convicted on many of the charges. (Some of the crimes had occurred in Ohio County, as well.)

Clark was convicted of multiple offenses and appealed.

ISSUE: May a case be lost because an officer vouches for the veracity of another witness?

HOLDING: Yes

DISCUSSION: Clark objected to the introduction of an audiotape of his interrogation with Det. Combs, in which the “the jury not only heard Clark’s responses to Officer Combs’s questions, but also heard Officer Combs’s interrogation technique, which involved disclosing his opinion to Clark about the truthfulness of L .C.’s allegations.” He argued that “the introduction of Officer Combs’s statements constituted reversible error because Officer Combs was permitted to vouch for the truthfulness of L.C., another witness at trial.”

The Court agreed, ruling that the trial court should have redacted “Combs’s statements regarding his belief in [the victim’s] veracity and his ability to tell who is and who is not telling the truth.”

The Court reversed Clark’s conviction.

Benton v. Com.
2008 WL 4692361 (Ky. 2008)

FACTS: Benton was suspected of involvement in a bank robbery. One of the items of evidence ultimately used against him was DNA recovered from cigarette butts, found in a vehicle, which was

¹⁷ 373 U.S. 83 (1963)

abandoned after the robbery. (The vehicle had been stolen from West Virginia.) The truck was impounded and stored at a body shop owned and operated by a deputy, but since there were no keys to the vehicle, it was not itself locked. The records were unclear as to exactly when cigarettes butts, a cigarette pack and palm prints were collected from the truck, but it was established to have been between July 12 and July 29, 2004.

Benton was implicated by a witness, who stated she had been picked up by Benton and his wife in a vehicle that matched the stolen truck, and that Benton had told her the vehicle was stolen from West Virginia. She also overheard discussion about a bank robbery, cash, and guns.

When arrested, officers found a large amount of cash under Benton's car seat, although none matched the serial numbers of the money from the bank. They also found receipts for numerous items, including the new vehicle he was found driving.

He was indicted and eventually convicted of conspiracy to commit Robbery, RSP and PFO. He appealed.

ISSUE: Must a chain of custody be perfect for the evidence to be admitted?

HOLDING: No

DISCUSSION: Benton argued that his request to suppress the DNA evidence from the cigarette butts should have been upheld, since "it was never established when the cigarette butts were removed from the vehicle and that the body shop where the truck was impounded was not a secure location as to preclude tampering."

The deputy sheriff/owner testified that the truck was kept inside until released by the Johnson County Sheriff, and that customers were not allowed into the shop. Of course, the shop was locked after hours. The Court found that the chain of custody was sufficiently established, even if not perfect. There was no indication of tampering and no requirement that the "proponent of proffered evidence eliminate all possibility of tampering." Any gaps "go toward the weight of the evidence rather than its admissibility."

On a side note, Benton argued that there was insufficient proof that the vehicle was worth more than \$300, but the Court accepted the deputy's statement (as a body shop owner) that any vehicle in running condition was worth more than that amount.

Benton's conviction was affirmed.

Claxton v. Com.
2008 WL 5191192 (Ky. App. 2008)

FACTS: On the day in question, Dep. Foley (Whitley Co. SO) responded to a 911 call. He found Teresa Claxton lying outside with her face swollen and bruised. He found blood on a nearby car, the ground, and the sidewalk. Kevin Claxton, her husband, was inside and the deputy found him to be under the influence of some substance. The deputy took a number of photos, which were later admitted at trial.

Also at trial, Dep. Foley testified that he did not believe Teresa's injuries could have been due to a fall, and that they were severe. A paramedic also testified that it looked like Teresa had hit her face on the

“concrete several times.” He stated that she was unresponsive and had difficulty breathing, and that he could not intubate her because of swelling.

Kevin Claxton was charged. He claimed her injuries were due to multiple falls and that he’d tried to drag her inside, unsuccessfully. He was convicted of First Degree Assault and appealed.

ISSUE: Is testimony based upon personal perception admissible?

HOLDING: Yes

DISCUSSION: Claxton argued that the deputy’s testimony was “improper opinion testimony” and thus error. The Court looked to KRE 701¹⁸ for guidance, and found that his testimony was, in fact, “rationally based on Deputy Foley’s perceptions....” The statements were also “helpful to a clear understanding of [his] testimony and the facts at issue” as they “explained the scene as he found it and what actions he and others took.” His testimony was proper lay witness testimony.

There was also a question about the actual severity of Teresa’s injuries, and the Court agreed that “direct medical testimony” would have been useful to prove such. However, the Court agreed that the indirect evidence provided was sufficient to prove that she did, in fact, suffer a serious physical injury.

Claxton’s conviction was upheld.

Byrd v. Com.
2008 WL 5051612 (Ky. 2008)

FACTS: On March 17, 2007, Reed left his car running when he stopped at a convenience store in Lexington. The car was promptly stolen, and Reed, with a friend who happened to be at the store, went in pursuit of it. Reed called 911. They lost the car and returned to the gas station to meet with the police. An ATL was put out on the radio. Officer Cliffson quickly found the car, which was occupied by a single person. When he turned on his lights and approached, the car was driven away, and a high-speed pursuit ensued.

The driver (Byrd) lost control and spun out. The officers ordered him out of the car, and Byrd “followed the orders and began yelling that the Devil was chasing him.” He tried to get back in the car, but was seized, handcuffed and searched. He was “very intoxicated” and was eventually taken to the hospital for a blood test. Reed was never asked to identify the person who stole the car and Byrd did not match the description initially given (Hispanic).

Byrd was convicted of Theft, DUI and related traffic charges. He was convicted, and appealed.

ISSUE: Are comments concerning a defendant’s choice to remain silent admissible?

¹⁸ If the witness is not testifying as an expert, the witness’ testimony in the form of opinions or inferences is limited to those opinions or inferences which are:

- (a) Rationally based on the perception of the witness,
- (b) Helpful to a clear understanding of the witness’ testimony or the determination of a fact in issue, and
- (c) Not based on scientific, technical, or other specialized knowledge within the scope of Rule 702.

HOLDING: No

DISCUSSION: During direct testimony, Officer Cliffson testified about the pursuit. Specifically, he stated, under questioning:

- Q: After you got him out of the car, he was unable to walk on his own and he had slurred speech . What did you do at that point?
A: At this point we called EC--Emergency Care was already en route. And at this point he decided to become uncooperative and unresponsive to any questions or anything that was asked of him.
Q: Emergency Care? Is that the ambulance?
A: Yes, ma'am.
Q: Okay. So the ambulance was called?
A: Yes, ma'am.
Q: And what do you mean he was uncooperative?
A: He wouldn't answer any questions--

Byrd's counsel objected, arguing that he had a right not to speak, but the judge ruled that he did not have a right not to identify himself, and allowed the testimony to stand. Following the objection, the testimony continued:

- Q: At this point the defendant's out of the car?
A: Yes, ma'am.
A: Yes, ma'am.
A: No, ma'am.
Q: Okay. Did he make statements about the devil chasing hint?
A: Yes, ma'am.
A: Yes, ma'am.
Q: Okay. And what happened once the ambulance arrived?
A: We hadn't got any information out of him. Name, address, anything of that sort. EC, they need the information as well, so they'll attempt and a lot of times people will talk to EC and not the police for some reason .

Again, an objection was made, concerning the officer's testimony about his experience with such cases. Again, it was overruled.

More testimony:

- Q: So sometimes they will answer the ambulance but not you all?
A: Yes, ma'am.
Q: Okay. And what happened at that point?
A: He still continued on if he would answer anything about Jesus and the devil chasing him.
Q: Okay. And where did you all go at that point?
A: To the EC buggy that was staged on the side of the highway itself
Q: Okay, so the ambulance on the side of the highway?

- A: Yes, ma'am.
- Q: And where did you all go once- Did you ride in the ambulance?
- A: Yes, ma'am.
- Q: And where did you all go?
- A: We went to UK ER.
- Q: Okay. And when you got to the University of Kentucky Emergency Room, did you request that the defendant's blood be taken?
- A: Yes, ma'am.
- Q: Okay. Tell us about that process.
- A: It's standard implied consent form. We're to read it whether the person is cooperative or not. And then part of the implied consent is if they are unresponsive, acting unresponsive, the state of Kentucky implies consent, so therefore we can--in this situation we opted to take the blood test.
- Q: Okay. And implied consent, that just, is that like a form that tells you have the right not to take the test?
- A: Yes, ma'am.
- Q: And the consequences of not taking the test?
- A: Yes, ma'am.
- Q: Okay. So you read that to the defendant?
- A: Yes, ma'am.
- Q: Okay. And after you read him the implied consent, what happened at that point?
- A: He was still playing the unresponsive game.
- Q: Okay. And is-

Again, the defense counsel objected, to the officer's statement that Byrd's behavior was a "game." After a lengthy bench conference, the judge again overruled the objection.

Byrd argued that this testimony improperly commented his failure to speak, which was his right. The Court agreed that "[w]hile the U.S. Supreme Court has never directly addressed whether that rule also extends to the use of a defendant's silence while he is in custody, this Court has so extended the privilege, ruling that the prosecution 'may not comment on post-arrest silence as evidence of guilt.'"¹⁹ However, the Court has held that the Fifth Amendment is not ordinarily implicated by questions about a person's identity.²⁰

In this case, however, the initial question and some of the officer's answers generically discussed [Byrd's] refusal to answer questions posed by the officer and medical personnel. To this extent, the testimony and questioning were improper comments on [Byrd's] Fifth Amendment right.

The Court concluded that it was improper to admit the testimony, but in this case, specifically, the Court found that the error was harmless because the evidence of Byrd's guilt was otherwise so overwhelming.

¹⁹ Green v. Com., 815 S.W. 398 (Ky. 1991).

²⁰ Hibel v. Sixth Judicial Dist. Court of Nevada, Humboldt County, 542 U.S. 177, 191 (2004).

Davis v. Com.
2008 WL 4531372 (Ky. App. 2008)

FACTS: On Nov. 13, 1998, at about 6:30 p.m., Cox was shot and killed in front of his residence in Jefferson County. Just before the murder, he was talking to his brother on a cell phone and told his brother “that a vehicle was driving slowly up and down his street, and that he was going to see what the driver wanted.” Cox was found dead shortly thereafter, shot seven times. His ex-wife, Levy, lived with him, but was out of state at the time.

A neighbor, Rice, saw part of the event, and observed “a thin person entering a pickup truck in Cox’s driveway.” He then saw the person shoot Cox several times. He also believed that the shooter tried to load the vehicle into the truck, unsuccessfully. (Apparently, the vehicle used by the shooter was an ATV or something similar.)

Davis was developed as a suspect, as he had a relationship with Levy. He gave a taped statement to police that detailed his activities on the day of the murder. The investigation centered around Davis’s rental of a truck on the day of the murder, which was returned later that evening.

Davis was indicted, and subsequently convicted, of Murder and Tampering with Physical Evidence. Following the trial, his attorney made an open records request, and “discovered various documents which were not included in the voluminous discovery disclosures provided to the defense prior to trial.” He filed for post-conviction relief based upon alleged Brady violations. The trial court denied the motion after a hearing, and he appealed.

ISSUE: Is the production of all documents and records to the defense required?

HOLDING: Yes

DISCUSSION: Davis argued that “that the Commonwealth violated the exculpatory evidence disclosure requirements contained in Brady v. Maryland²¹ by failing to give the defense (1) a handwritten statement prepared by Christina Levy; (2) notes prepared by Detective Sergeant Michael Doughty critiquing the Levy statement; (3) a letter from Christina to Detective Eddie Robinson; (4) a letter from Levy to Davis; and (5) police notes and memos concerning the investigation.”

The “duty to disclose exculpatory evidence is applicable regardless of whether or not there has been a request by the accused.” That duty “encompasses impeachment as well as other exculpatory evidence.”²²

The Court looked at each item of evidence. First, it discussed the handwritten chronology prepared by Levy, concerning her relationship with Davis. From that chronology, Det. Doughty made 19 pages of notes. Eventually Levy produced a second, shorter, typewritten version, which was provided to Davis and was admitted at trial. Davis argued that the original document, and the notes, would show the extent of Doughty’s coaching of Levy’s testimony. The Court found the Commonwealth’s explanation persuasive, and noted that since Davis admitted most of the acts described, and because the material was

²¹ 373 U.S. 83 (1963)

²² U.S. v. Bagley, 473 U.S. 667 (1985)

“substantially, if not entirely, incorporated into the typewritten version,” that the “impeachment value of the undisclosed material is highly questionable.”

Further, under RCr 7.24(2), the Court ruled that it was “questionable whether the Commonwealth had a duty to produce the Doughty notes.”²³

Next, the Court discussed the “five-page letter Levy wrote to lead detective Eddie Robinson during the course of the investigation,” concerning a proposal that she try to meet with Davis, “presumably in an attempt to obtain incriminating admissions.” In the letter, she referred to the detective by his first name. The Court concluded that it was not of such sufficient significance that it would have likely led to a different result. Evidence presented to the jury made it clear that Levy was a cooperating witness.

Another letter, from Levy to Davis, was also argued, with Davis stating that the letter was exculpatory in that it indicated that Levy was not afraid of Davis and that she wanted to see him. (Levy stated it was drafted as part of the plan to have her make contact with Davis, a plan that wasn’t completed.) The Court concluded it was not exculpatory.

Next, the Court discussed the police notes and memos. One of the notes documented the finding of a bullet in the rental car the next day, although the notes called that date into question. (The notes indicated that the bullet was found in March, and that it was investigated in May of the following year after the murder.) Other memos were also found to be immaterial to the ultimate outcome of the case.

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

NOTE: *Although some documents may be withheld, all documents should be provided to the prosecution.*

Cleary v. Com.
2008 WL 4754833 (Ky. App. 2008)

FACTS: On February 18, 2002, Troopers Fugate and Miller (KSP) were patrolling Knott County. They drove past Cleary’s house and saw her walk toward Mosley, who was sitting in a pickup truck in Cleary’s driveway. Because the area was known for drug trafficking, they decided to investigate further and “pulled into the driveway.” They observed Cleary appear to drop something into the truck as they got out of their respective cruisers.

Trooper Miller talked to Mosley, who admitted she had two marijuana roaches in the ashtray. He seized them, along with a pill later identified as Oxycontin, found on the floorboard. Mosley admitted she’d come to buy that tablet, but Cleary later stated that Mosley already had the pill and was seeking more.

²³ (2) On motion of a defendant the court may order the attorney for the Commonwealth to permit the defendant to inspect and copy or photograph books, papers, documents or tangible objects, or copies or portions thereof, that are in the possession, custody or control of the Commonwealth, upon a showing that the items sought may be material to the preparation of the defense and that the request is reasonable. This provision 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). (Emphasis added).

Trooper Fugate was inside, during this time, talking to Cleary and her husband about drug trafficking. They searched the house with Mr. Cleary's consent. They found no other contraband, but arrested Evelyn Cleary for trafficking.

Evelyn Cleary was arrested, tried and convicted. She then appealed.

ISSUE: Should an officer avoid mentioning "prior bad acts" of the defendant when testifying?

HOLDING: Yes

DISCUSSION: During the trial, Trooper Fugate testified:

Prosecutor: I know it has been better than three years ago, but to the best of your recollection, can you tell the jury the substance of the conversation, or whatever you did, when you were inside the defendant's residence?

Officer Fugate: Well, we basically had, um, I told her that we had received complaints on them for selling controlled substance pills.

The defense counsel objected and asked for a mistrial, arguing that they had not been given proper notice of the introduction of such "prior bad act" evidence.²⁴ The prosecutor had stated that he wasn't aware of the prior complaints, and was surprised by the trooper's mention of them at trial. The Court concluded that in this instance, the trial court's decision to admonish the jury to ignore the comment "concerning a single, isolated bit of improper testimony" cured the error, however. The Court distinguished the facts in this case from that in Gordon v. Com., during which an officer testified that Gordon was a "drug dealer" and that he was "suspected ... of selling drugs at [a] particular location" - when those were not the crimes, specifically, for which he was on trial.²⁵

On a related issue, the Court also disagreed that it was necessary for the trial court to have excluded two jurors for cause, when each of those potential jurors had specific ties to law enforcement. Each had indicated they could be fair and impartial.

Cleary's conviction was affirmed.

Sullivan v. Com.
2008 WL 4691944Ky. 2008

FACTS: Sullivan (and accomplices) were charged with a series of break-ins that took place in Meade County. The investigation uncovered security footage that showed two men, one of whom was wearing a "hat depicting a marijuana leaf." Follow-up led police to Sullivan. Sullivan was eventually convicted, and appealed.

ISSUE: Are comments about a suspect's silence during questioning admissible?

HOLDING: No

²⁴ Under KRE 404(b) such evidence is admissible only under limited circumstances.

²⁵ 916 S.W.2d 176 (Ky. 1995).

DISCUSSION: At trial, Deputy Robinson (Meade Co. SO) stated that his questioning of Sullivan “did not last very long at all” and that Sullivan “didn’t offer a whole lot of cooperation.” When the testimony drew an objection, the trial court ruled that Robinson “could testify as to what [Sullivan] said, but he could not testify as to what [Sullivan] did not say, and that Robinson could not suggest that Sullivan was uncooperative due to his silence.” The Court agreed that the testimony eventually given, however, was properly admitted.

Sullivan’s conviction was affirmed.

FORFEITURE

Estate of Duncan v. Com.
2008 WL 5191507 (Ky. App. 2008)

FACTS: In 1991, the Duncans (Christopher and Rhonda) were indicted in Hancock County on drug charges. At the time of their arrest, the Hancock County SO seized 25 long guns. Christopher Duncan died in 2001, before the criminal charges were resolved. His estate moved to have the guns returned, but no ruling was returned. In the meantime, Rhonda entered a pretrial diversion, in which she agreed to forfeit all seized property to the sheriff’s office. In 2004, the Court ordered the guns to be so forfeited. The estate objected to the forfeiture.

In 2006, the Court of Appeals reversed the trial court’s decision permitting the forfeiture. In subsequent proceedings, and upon a motion to actually return the weapons, the trial court denied the motion, arguing that Rhonda Duncan’s agreement supported the forfeiture of the guns. (Rhonda and her two children were the actual heirs to the estate, and thus, she and her children would regain ownership of the guns.)

ISSUE: Is property owned by a deceased individual required to go through probate court?

HOLDING: Yes

DISCUSSION: The Court found that at the point Duncan died, the sheriff’s office “lost all authority to retain the property.” Further, only the District Court has the jurisdiction to handle estate issues. Finally, the Court noted, many of the guns had already been sold, and lacking any information as to the date of the sale, the Court noted that the sheriff’s office might have been in contempt of the appellate court’s earlier ruling.

The Court found that the estate was entitled to the proceeds of the sale of the guns and to the return of any guns still in the possession of the Commonwealth.

CIVIL LITIGATION

Hunt, Sword & Pikeville Police Dept. v. Lawson 2008 WL 4691052 (Ky. 2008)

FACTS: Lawson claimed that on the night in question, he encountered Officer Hunt (Pikeville PD) at a convenience store. Hunt spoke to him. Lawson returned to his car and Officer Hunt called to him to "hold on." Officer Hunt put Lawson in the front of his cruiser. Sgt. Sword arrived and parked in the lot.

Officer Hunt arrested Lawson for a robbery that had occurred a year before. He placed Lawson in custody and searched the car, removing certain items. Officer Hunt and Sgt. Sword had Lawson get out of the car, and told him "they were mistaken as to the arrest warrant," but that he was now under arrest for DUI, Possession of Marijuana and Possession of Drug Paraphernalia. He was given FSTs, which he claimed he passed. He also agreed to the testing of blood and urine samples.

Lawson was eventually acquitted and ten months later, he filed suit against the officers and the department, alleging false arrest and malicious prosecution. The defendants argued that the statute of limitations required the dismissal of the action, and further, that the officers had probable cause to make the arrest. In affidavits, Officer Hunt stated that Lawson failed both verbal FSTs, and refused to do any agility tests because of physical infirmities. Once he was searched, the marijuana and rolling papers were found, resulting in additional charges. Officer Hunt further stated that he took Lawson to the hospital for testing but that he refused. (No breath test was requested, according to the citation.)

Sgt. Sword's affidavit indicated that he knew Lawson was a suspect in the robbery and that he had spotted Lawson at the store. He also stated that he had witnessed Lawson driving.

Lawson's sworn response indicated that he'd never been taken to the hospital. Following the entry of the response, the Court issued a summary judgment motion in favor of the defendant officers. The Court of Appeals found that all claims that accrued on the date of the arrest were barred by the statute of limitations, and affirmed the summary judgment on all of the claims except the malicious prosecution. That claim accrued on Lawson's acquittal and thus was timely filed. The appellate court was not persuaded that the submitted affidavits "eliminated all genuine issues of material fact presented in Lawson's pro se complaint." That claim was remanded for further proceedings.

The defendant officers appealed the decision.

ISSUE: Must a case be permitted to go forward (at least initially) when the parties put forth two opposing claims of fact?

HOLDING: Yes

DISCUSSION: The Court discussed the claim of malicious prosecution and recognized that it was generally disfavored by the law. To succeed in such a claim, the plaintiff was required to satisfy six basic elements:

- 1) the institution or continuation of original judicial proceedings ... administrative or disciplinary proceedings,
- 2) by, or at the instance, of the plaintiff,
- 3) the termination of such proceedings in defendant's favor,
- 4) malice in the institution of such proceeding,
- 5) want or lack of probable cause for the proceeding, and
- 6) the suffering of damage as a result of the proceeding.²⁶

In this case, the Court noted, only the fifth element was an issue. The Court looked at the evidence before it, the affidavits and the citation, and noted, specifically, that the affidavit indicated that Hunt had "administered a field breath test that showed that Lawson had consumed alcoholic beverages, but the accompanying citations said that a breath test was not requested."²⁷ However, the Court concluded that despite that discrepancy, Hunt had sufficient evidence to prosecute Lawson for DUI.

The Court noted, however, that since Lawson's motions were sworn in front of a notary, and raised "almost completely opposite version of the facts surrounding Lawson's arrest," that there was a sufficient issue of material fact for trial.

The Court affirmed the decision of the lower court to permit the malicious prosecution claim to go forward.

²⁶ Raine v. Drasin, 621 S.W.2d 895 (Ky. 1981).

²⁷ The Court apparently did not comprehend the difference between a PBT and an official breath test.

Sixth Circuit

POSSESSION

U.S. v. Williams

2008 WL 4790140 (6th Cir. 2008)

FACTS: On August 3, 2008, Officer Chambers stopped a truck for a minor equipment failure. He learned that both occupants (Williams, the driver, and Green, a passenger) had outstanding warrants. A drug dog also alerted on the vehicle and a search revealed marijuana. Another officer arrived and he searched the vehicle, finding a handgun behind the passenger seat. When questioned, Williams stated the gun belonged to his girlfriend, Hayes. There were conflicting statements from the officers and Williams as to what Williams told them about the gun. Hayes later testified that the gun was hers - but she was proven to have lied as to the reason she allegedly inadvertently left the gun in the truck.

Williams was convicted on possession of the gun and the marijuana. He appealed.

ISSUE: Is constructive possession of a firearm by a felon unlawful?

HOLDING: Yes

DISCUSSION: The Court stated:

Possession under § 922(g)(1) may be either “actual” or “constructive.” Actual possession requires that the defendant have “immediate possession or control” of the firearm, but “[c]onstructive possession exists when a person does not have possession but instead knowingly has the power and the intention at a given time to exercise dominion and control over an object, either directly or through others.”²⁸ Although constructive possession may be proven if the defendant merely had “dominion over the premises where the firearm is located,”²⁹ “[p]resence alone near a gun . . . does not show the requisite knowledge, power, or intention to exercise control over the gun to prove constructive possession.”³⁰ Thus, “other incriminating evidence, coupled with presence, is needed to tip the scale.”

These requirements give effect to the purposes behind felon-in-possession laws: “[A] felon is no less dangerous when he arms his associates in a criminal endeavor than when he arms himself.” (“Had [the defendant] said to one of his co-conspirators – ‘You hold this gun that I’ve bought but never touched, because I’m a felon and I don’t want to be charged with being a felon in possession, if we are caught’ – this would not negate his possession of it.”). And “intention . . . to exercise . . . control” over a firearm sweeps in situations where a felon, without directly coming into contact with a gun, keeps one close at hand for possible future use.³¹

²⁸ U.S. v. Craven, 478 F.2d 1329, 1333 (6th Cir. 1973).

²⁹ U.S. v. Gardner, 488 F.3d 700, 713 (6th Cir. 2007).

³⁰ U.S. v. Arnold, 486 F.3d 177, 183 (6th Cir. 2007).

³¹ Muscarello v. U.S., 524 U.S. 125 (1998) (concluding that phrase “carries a firearm” “during or in relation to” a “drug trafficking crime” encompasses person who knowingly keeps a firearm in his vehicle’s locked glove box).

The Court agreed that "Williams's argument ... amounts to no more than the claim that the government's case against him was entirely circumstantial." The Court found that the jury's decision was supported by their verdict and upheld the conviction.

ARREST

U.S. v. Williams

2008 WL 5046416 (6th Cir. 2008)

FACTS: On June 2, 2006, Sgt. Holstein received a phone call from a reliable informant, relating his observation of what he believed was prostitution activity in Covington. The area was known for prostitution and drug trafficking. The caller described a man and a woman, and that the male was driving a specific vehicle.

Sgt. Holstein went to the location and found two people matching the description given. He recognized the woman as a "known prostitute and crack user". Sgt. Holstein did not recognize the male by name, but had seen him before with a man named Jackson. He did not observe a transaction but did see the man embrace the woman. Sgt. Holstein watched as the man approached a vehicle matching the description given. He also saw the woman, Hensley, put something in her mouth and believed she was hiding contraband. Sgt. Holstein confronted her and ordered her to empty her mouth, and she did so, revealing a small bag of crack. He asked where she'd gotten it but she remained silent.

Hensley was arrested and transported. The transporting officer, Officer Warner, had dealt with her before and had a rapport, so he tried to get more information. Finally, she told him she'd gotten the cocaine from "Shorty."

Upon further investigation, Sgt. Holstein believed he'd identified Shorty as Williams and verified it with a booking photo. The next day, the informant told him that he'd spotted the man back in the same area and Sgt. Holstein immediately proceeded to the scene. He found the man again and made a stop and an arrest. He found contraband on the search incident to arrest.

Williams was indicted, but argued that the officers lacked probable cause to arrest him. The trial court denied his motion to suppress the evidence. Williams took a conditional guilty plea, and appealed.

ISSUE: Is an unnamed, but known, informant considered anonymous?

HOLDING: No

DISCUSSION: The Court began:

We have identified three categories of informants: (1) named informants; (2) confidential informants (who are known to the police but not to others); and (3) anonymous informants (who are unknown to everyone).³² While an informant's "veracity, reliability and basis of

³² See U.S. v. Ferguson, 252 F. App'x 714, 720-21 (6th Cir. 2007)/

knowledge are all highly relevant in determining the value of his report, these elements [are] not [] understood as entirely separate and independent requirements" that we must systematically apply to every case.

The Court noted that known informants are "inherently more credible because law enforcement can potentially hold the informant accountable for providing false information." The Court found both Hensley and the CI (who Holstein knew) as providing "reasonably trustworthy information."

He next argued:

... that Sergeant Holstein made insufficient efforts to corroborate the information he received from Hensley and the informant. The record, however, is replete with examples of Holstein's corroboration. Specifically, he corroborated almost every detail of the informant's report, including the location of the alleged sale, the specific descriptions of the male and female involved in the suspected transaction, and the make and model of defendant's vehicle. He also independently observed what he believed was a drug transaction, testimony the district court found highly credible.

At the time this crime occurred, Sgt. Holstein "possessed seventeen years of law enforcement experience, all of which were spent in a department specializing in narcotics interdiction. He did a great deal of independent investigations corroborating the information provided. The Court agreed that Sgt. Holstein had sufficient probable cause to make the arrest.

Williams' conviction was affirmed.

SEARCH & SEIZURE – PRE-ARREST

Pillow v. City of Lawrenceburg, TN 2008 WL 4790144 (6th Cir. 2008)

FACTS: On May 17, 2006, Officer Russ (Lawrenceburg, TN, PD) was patrolling when he "heard loud music coming from Eddie Pillow's vehicle." Officer Russ made a traffic stop and asked Pillow to get out of the car. While waiting for the license check to come back, Officer Russ asked for consent to search the car and was denied. Although the license check came back showing that Pillow's license was valid and that he was not wanted, Officer Russ called for a K-9 to search the car. Russ went back to write up a citation for the loud music, but realized he didn't have the proper forms, and had to call for another officer to provide the forms. The forms arrived and he was still writing out the citation when the K-9 arrived and began to search.

The dog alerted on the front passenger-side door, and the officers searched the car. The dog also alerted on the driver's seat, so Officer Russ searched Pillow. (The extent of that search was disputed by the parties.) Nothing was found and Pillow was released with a citation.

Pillow filed suit under 42 U.S.C. §1983 against Russ and the City, arguing that "Russ's behavior was the product of a pattern and practice on the part of the Lawrenceburg Police Department." The trial court gave summary judgment to the city, but not to the officer. Russ appealed that denial.

ISSUE: Is an intrusive personal search, not a frisk, justified absent an arrest?

HOLDING: No

DISCUSSION: First, the Court found the traffic stop was a reasonable seizure, based upon the loud music. Next, the Court found the exterior dog sniff was reasonable, as Officer Russ did not “unduly prolong the length of the stop” and that the alert occurred before Russ had completed writing the citation. The court found that “it suffices that a good-faith delay of at most a few minutes to get a proper citation form does not unduly prolong a stop for Fourth Amendment purposes.” The Court reversed the denial of summary judgment on Russ’s behalf on that issue.

The Court, however, did agree that Pillow has a claim with respect to the personal search. If the search occurred as Pillow claimed, the Court agreed it could not be justified as a Terry frisk, nor could it be justified as a search incident to arrest. As such, the court affirmed the denial of summary judgment on that claim alone and allowed the case to proceed.

SEARCH & SEIZURE – CIVILIAN SEARCH

U.S. v. Richards
2008 WL 4935965 (6th Cir. 2008)

FACTS: Richards was the lessee of a storage unit in Clarksville, Tennessee. On February 21, 2000, an employee (Berg) discovered the lock had been cut on the unit, so he entered (as permitted by the lease) to determine what had happened. He opened a suitcase inside the unit and found child pornography. The owner of the storage company was notified. He told Berg to put another lock on it and that he (the owner) would investigate further when he returned to town. When Weir, the owner, arrived some days later, he inspected the unit and confirmed what Berg had found. He called his attorney, who instructed him to call the police.

On March 2, the police were called and Officer Outlaw responded. Weir escorted the officer to the unit and unlocked the door, Outlaw looked inside and “Weir lifted the lid of the suitcase,” showing Outlaw what he’d found. Weir left the unit unlocked and other officers also inspected the unit, but did not exceed the scope of the search originally made by Berg and Weir.

Det. Crabbe, who had viewed the material, got a search warrant that evening, and the officers searched the unit completely. Additional child pornography was found, so they further obtained a warrant for Richards’s apartment, where more illegal pornography was found. The FBI took over the case and charged Richards.

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

ISSUE: May officers search in the same areas that a civilian search has already revealed contraband?

HOLDING: Yes

DISCUSSION: Richards argued that he was not in constructive possession of the material because Berg replaced the cut-off lock with one to which Richards lacked a key. The Court, however, found that Berg was simply following standard protocol when he did so.

Richards also argued that the officers committed an impermissible search, but the Court found that the lawful private search “may be followed by a government search under certain circumstances.”³³ In this case, the Court found that the initial search by the storage unit owner/employee was permitted, and that Outlaw and the other officers, “merely confirmed what was found by the private searchers and, therefore, did not violate any Fourth Amendment protections.” With those observations, the officers properly obtained a warrant to search further.

Richards’ plea was affirmed.

SEARCH & SEIZURE - WARRANT

U.S. v. Taylor

2008 WL 4997498 (6th Cir. 2008)

FACTS: On August 31, 2006, Grand Rapids (MI) officers obtained a search warrant on Taylor’s home. In her affidavit, Officer O’Brien, who had 13 years of experience, 11 in the Vice Unit, related the following:

In this regard your affiant met with a reliable and credible informant 1523 who indicated from personal knowledge that cocaine could be purchased at the above described premises. This informant from personal knowledge is familiar with the characteristics of cocaine, [and] the manner in which cocaine is used and sold in the community. When your affiant met with the informant, the informant directed your affiant to the above described premise[s]. The informant had been at the above described premises within the last 48 hours and observed a quantity of cocaine being sold there. The cocaine as described by the informant is being sold for various amounts of US currency.

The cocaine is easily concealed on or about the person. When the informant left the premise[s], there were additional amounts of cocaine on the premises being offered for sale. The person(s) selling the cocaine is/are described as: B/M, Marious Taylor, 5’9”/165, 4-25-78. Your affiant has known the informant one month. The informant has made 4 controlled purchases of controlled substances. All of these controlled purchases tested positive for the controlled substance that was purchased. The informant has supplied information on 5 drug traffickers in the community said information having been verified by your affiant through police records, personal observations, other police officers, and other reliable informants.

Officers found crack cocaine, a scale, cash and a firearm, and Taylor was indicted on federal weapons and drug trafficking charges. Taylor requested suppression and was denied. He then took a conditional guilty plea and appealed.

³³ See U.S. v. Jacobsen, 466 U.S. 109 (1984); U.S. v. Williams, 354 F.3d 497 (6th Cir. 2003).

ISSUE: Is simply stating that a CI has proved reliable in the past sufficient?

HOLDING: Yes (but see discussion)

DISCUSSION: Taylor argued that the information supporting the affidavit was not corroborated and that the informant was not shown to be reliable. Although the Court agreed that “[c]orroboration of an informant’s tip through the officer’s independent investigative work can be a critical factor in some cases in determining whether an affidavit based on a confidential informant’s tip provides a substantial basis for finding probable cause, such as where the affidavit is merely a boilerplate form.” However, it was not critical that every statement be corroborated for the affidavit to be upheld. The Court noted that Sixth Circuit precedent “clearly establishes that the affiant need only specify that the confidential informant has given accurate information in the past to qualify as reliable.”³⁴

Further, the Court noted that the “informant was not an anonymous source whose statements required independent corroboration, but rather was a person known to the affiant officer.” The Court agreed that the informant’s short, but successful, career also gave it an indicia of reliability.

He also argued that the affidavit failed to establish that drugs would be found in the residence, but the Court noted that the affidavit stated that “the informant stated from personal knowledge that cocaine could be purchased at the residence” and that he was quite familiar with cocaine. The informant identified that he’d been at the residence in the previous 48 hours and had observed cocaine being sold.

The Court found that the “affidavit in the instant case was not a ‘bare bones’ affidavit.” The affidavit did more than simply state suspicions, or conclusions; it provided some underlying factual circumstances regarding veracity, reliability, and basis of knowledge.” Further, it “included information that an informant who had personal knowledge about the characteristics of cocaine and the manner in which it is used and sold, and who had participated in controlled purchases of controlled substances which tested positive for the substances purchased, had personally observed cocaine being sold at the defendant’s residence within the forty-eight hours preceding the issuance of the warrant.” The Court found a “clear nexus between the illegal activity and the premises to be searched.”

The Court upheld Taylor’s plea.

SEARCH & SEIZURE - CARROLL

U.S. v. Roberts

2008 WL 4963107 (6th Cir. 2008)

FACTS: Roberts was identified as a drug dealer by an informant, who set up a buy from him. When Roberts arrived at the appointed location, Officer Escalante seized him and patted him down. He then secured Roberts in a cruiser and approached Roberts’ vehicle, and looked in the window. He saw a plastic grocery bag that appeared to contain bundles of cocaine. He arrested Roberts. The officer then used Roberts’ car keys to retrieve power and crack cocaine from the vehicle.

³⁴ U.S. v. Greene, 250 F.3d 471, 480 (6th Cir. 2001); see U.S. v. Allen, 211 F.3d 970, 976 (6th Cir. 2000)(en banc)(noting that affiant could attest “with some detail” that the informant provided reliable information in the past).

Roberts was charged and requested suppression. Roberts was convicted and appealed.

ISSUE: May contraband in plain view support a Carroll search?

HOLDING: Yes

DISCUSSION: The Court addressed the search as a Carroll, or “automobile exception” search.³⁵ The Court reviewed the information available to the officer, including what he observed in plain view and ruled that the officer had sufficient probable cause to search the car.

The Court upheld the suppression and Roberts’ conviction was affirmed.

SEARCH & SEIZURE

U.S. v. McCauley
548 F.3d 440 (6th Cir. 2008)

FACTS: On June 19, 2006, Dep. Phillips (Montgomery County SO, Ohio) was dispatched to recover a stolen vehicle in Dayton. While he was there, a vehicle pulled up behind him, with a couple inside. One of the occupants, Mitchell, was hysterical and crying and told the deputy that a “man she knew had just chased her with a gun.” She identified his car and that he lived on a nearby street. Dep. Phillips put out a dispatch with the information he had been given.

Officer Helthinstine (Five Rivers Metro Parks ranger) heard the broadcast, and being nearby, stopped on the street where the suspect was believed to live. A few seconds later, a vehicle matching the description drove by and the officer chased the vehicle until it pulled into a driveway and into a garage. Before the door closed behind the vehicle, the officer spotted a black male (McCauley) get out. The man ignored the officer’s demands to stop and went into the house.

The garage door opened a few seconds later, and Denise McCauley got out on the driver’s side. She identified the man who’d gone inside as her husband, Thomas. McCauley emerged from the house and approached the officer, yelling and cursing. Officer Helthinstine held him at gunpoint until back-up arrived and arrested McCauley.

Det. Snyder arrived and got consent from Denise McCauley to search the house. He and Officer Helthinstine entered, and immediately saw narcotics sitting in plain view on top of a bar. She also gave consent for another officer to search the vehicle, stating that she owned the car, and they found a firearm on the back seat.

McCauley admitted, under questioning, to possessing the gun, and was indicted, as he was a felon. He requested suppression and was denied. He took a conditional guilty plea and appealed.

ISSUE: Is a person seized when a gun is pointed at them?

³⁵ Carroll v. U.S. 267 U.S. 132 (1925)

HOLDING: Only if they submit

DISCUSSION: First, the Court discussed the initial seizure and noted that it did not occur until McCauley submitted to a show of authority. Officer Helthinstine had, at the time of the actual seizure, more than adequate reasonable suspicion to support that seizure. The Court specifically noted that the original sketchy information was enhanced by McCauley's actions in fleeing the scene.

Further the Court agreed that Denise McCauley gave valid consent, as it was both voluntary and by someone with authority over the house and vehicle. (She was described by the officers as cooperative.)

McCauley's plea was upheld.

U.S. v. Horne

2008 WL 4949133 (6th Cir. 2008)

FACTS: On October 2, 2005, Officers Weigand and Schaible (Cincinnati PD) approached a building known to them as a high crime location. The building was posted against trespassing and the officers were authorized by the owner to enforce the law. They spotted a group of people in the breezeway and Weigand called to them to leave if they didn't live there. Horne, one of the group, ducked behind one of the girls standing there. Weigand approached him and asked him if he lived there, and Horne said he did not. Weigand asked if he had "anything" on his person: Horne denied it and told him he could check. Weigand patted him down, but when he got to Horne's waist, "Horne suddenly collapsed to the ground." Weigand got him up and continued, finding a "hard metal object in Horne's waistband. Thinking it was a gun, Weigand handcuffed Horne, and he then found a revolver in the suspect location. Horne was given Miranda rights and transported and he was questioned inside the car about the gun. He admitted having bought it for protection. He was searched at the jail and cocaine base was found in two locations on his person.

Horne later testified that he lived in the apartment building, but the evidence indicated otherwise. Horne, a felon, was charged with a variety of weapons and drug offenses, and requested suppression. When that was denied, he took a conditional guilty plea, and appealed.

ISSUE: Does an officer need reasonable suspicion to ask for consent?

HOLDING: No

DISCUSSION: Horne argued that the officers lacked reasonable suspicion for a Terry stop. The Court initially found that the consent to search was valid, negating even the need for reasonable suspicion for a Terry, but also found that the officers did have reasonable suspicion. The Court pointed to "several 'specific and articulable facts'" - that the area was a hot spot for drug and gun activity, it was late at night, and Horne acted strangely.

Further, the Court stated:

Under the totality of the circumstances standard, "[e]ven if each specific fact relied upon by the authorities to make a Terry stop would not be a basis for suspicion when considered in isolation, the reasonable suspicion necessary to support an investigatory stop can still be

found when it is based upon an assessment of *all* circumstances surrounding the actions of a suspected wrongdoer”³⁶

Further, the Court noted that Weigand’s frisk was appropriate and justified.

Horne’s plea was upheld.

VEHICLE STOP

U.S. v. Jones

296 Fed.Appx. 473, 2008 WL 4556689 (6th Cir. 2008)

FACTS: Jones was the passenger in a vehicle stopped by a Tennessee deputy sheriff for a traffic infraction. (His wife was the driver.) Jones was subsequently arrested for distribution of methamphetamine as a result of items found during a K-9 search. He requested suppression and was denied. Jones took a conditional guilty plea and appealed.

ISSUE: Is it permitted to call for a drug dog on a traffic stop, as long as the stop is not unduly delayed awaiting its arrival?

HOLDING: Yes

DISCUSSION: Jones argued that the traffic stop was “impermissibly extended” to give time for a drug canine to arrive. The court noted that the “record [was] undisputed that the sheriff’s deputy was in the process of writing a warning citation to the driver of the car ... but did not sign and issue it.” He told the driver that “he would issue a warning citation if a records check of her license revealed no outstanding warrant or criminal history” but he had not received a response from dispatch when she told him he could “look through the vehicle but not search it.” The trial court also noted that the couple gave inconsistent answers to a question about their travel plans. The Court agreed that “the deputy had not finished writing the warning citation and the license check had not been completed” when the dog gave a positive alert for drugs on the vehicle. Further, the court noted, only six minutes had passed, and the deputy’s actions during that time were “reasonable related to the purpose of the stop.”

The Court upheld the plea.

U.S. v. Campbell

549 F.3d 364 (6th Cir. 2008)

FACTS: At about 7:30 p.m., on February 15, 2005, Officer Brady (Memphis, TN, PD) observed a vehicle “parked in a dark secluded area under a viaduct.” That road was a dead-end and not an area to be used for parking. Officer Brady described the spot as one known for drug sales, prostitution and other crimes. She saw two occupants in the car. She checked the plates and learned that they were “not on file.”

³⁶ U.S. v. Garza, 10 F.3d 1241 (6th Cir. 1993)

Officer Brady called for backup and illuminated the car. The driver started the car and tried to leave, but stopped when Brady activated the siren. Officer Brady approached and asked their purpose - the driver stated that she was there conversing with a co-worker but the passenger stated he was there for sex. The driver produced ID, but the passenger, Campbell, stated he had no ID. The driver was asked to get into the squad car while Officer Brady checked on her ID.

The backup officers arrived and approached the vehicle. Officer Kosso found Campbell "slouched down in the passenger seat with his hands out of sight, as if attempting to avoid detection." He also asked Campbell for ID, which again, Campbell denied having in his possession. Officer Kosso ordered Campbell out of the car and frisked him, finding a "large bulge" in a front pocket which he believed was drug contraband. He removed a "large baggy that contained seven individually wrapped bags of marijuana" - packaged in a way consistent with resale. Officer Kosso arrested Campbell and then did a full search, finding identification in his jacket pocket.

During this time, Officer Brady was still checking on the driver's information. Officer Quinn searched the vehicle and found a loaded handgun under the passenger seat. The driver was allowed to leave. Campbell, a felon, was indicted on possession of the gun and for the marijuana. He sought suppression, and was denied. He was convicted and appealed.

ISSUE: Is a search of a vehicle appropriate when the passenger is arrested?

HOLDING: Yes

DISCUSSION: Campbell first argued that the frisk exceeded the boundaries of Terry v. Ohio, because the purpose of the stop had already been resolved at that time. He also argued that there was nothing to indicate he was "armed and dangerous or that there was a threat to the officers' safety" at the time. The Court, however, concluded that the original stop was appropriate, given the information available to Officer Brady at the time. The Court then examined the frisk, and also concluded that a "reasonably prudent person in [the] circumstances would be warranted in believing that his safety or that of others was in danger." As such, the frisk was appropriate, and further, that the officer found the contraband during a legitimate plain-feel search, based upon his training and experience.

The Court also found that the detection of the weapon was proper under plain view during a search incident to arrest.

The Court affirmed Campbell's conviction.

U.S. v. Smith
549 F.3d 355 (6th Cir. 2008)

FACTS: On March 22, 2005 KSP did a controlled buy of crack cocaine from Smith, in Lexington. About a month later, an informant told KSP that Smith was traveling to Hazard with more crack in his possession. The troopers enlisted the aid of a second informant to wait with a trooper and to identify Smith's vehicle, if he arrived in Hazard. (The two sources were an unmarried couple, and the first source was considered a highly reliable informant.) The second source identified the vehicle, driven by Smith, and the troopers made a traffic stop on that vehicle for a minor infraction.

Trooper Miller approached the car. He spoke to the pair, and noticed that the zipper of Smith's pants was down and that Smith was "tugging and pulling" at his crotch. Trooper Miller got consent to search, and walked his K-9, Balco around the exterior of the vehicle. Campbell, the passenger, told Miller that the drugs were on Smith's body, something Campbell later denied.

Miller walked Balco near Smith and the dog's demeanor indicated that he had found drugs. Smith would not consent to a search of his person.

Both men were transported to the post. Det. Fugate sought a search warrant. The affidavit stated:

Affiant has been an officer in the aforementioned agency for a period of 10 years and the information and observations contained herein were received and made in his capacity as an officer thereof.

On the 25 day of April, 2005, at approximately 0800 a.m., affiant received information from: A KSP cooperating witness who state they received information that Terrence T. Smith was traveling to Hazard Kentucky on the same with [sic] at least one ounce of "Crack" Cocaine.

Acting on the information received, affiant conducted following independent investigation: On 03-22-05, units from the Hazard HIDTA Drug Task Force, purchased two ounces of "Crack" Cocaine From Terrence T. Smith using a No. 07-5377 United States v. Smith cooperating witness. Terrence T. Smith has (2) two drug related arrest [sic].

The warrant was issued and a quantity of crack cocaine was found hidden inside Smith's underwear.

Smith was indicted on federal trafficking charges and moved for suppression. The trial court agreed that the warrant did not establish probable cause, but stated that the "Leon good faith exception saved the evidence from suppression."³⁷ The Court upheld the arrest and found that he was properly searched under the search incident to arrest.

Smith took a conditional guilty plea and appealed.

ISSUE: Is a lengthy handcuffing, and removal to another location, an arrest?

HOLDING: Yes

DISCUSSION: The Court reviewed the facts available to Trooper Miller when he made the arrest.

1. A controlled buy of crack cocaine from Smith took place on March 22, 2005, involving Source A.
2. On the day of the traffic stop, according to Source A, Smith was supposed to be on the way to Hazard, transporting drugs.
3. Smith's vehicle was identified upon entry into Hazard by Source B.
4. Source A and B had a long track record of reliability.

³⁷ U.S. v. Leon, 468 U.S. 897 (1984).

5. After the stop, Smith's pants were unzipped and he was "tugging and pulling" at his crotch; on the basis of his experience, Miller knew that drug traffickers commonly hide contraband in the crotch area.
6. Passenger Campbell informed Miller that Smith had drugs hidden in his crotch area.
7. Miller's search of the vehicle based on Smith's consent yielded no drugs, but Balco changed his "demeanor" when sniffing Smith's crotch, and a similar demeanor change when sniffing Smith's seat in the car.

The Court agreed, also, that despite Trooper Miller's assertion to the contrary, "handcuffing Smith and transporting him to a police post, where he remained handcuffed for at least an hour and a half," was an arrest. However, the court found there was sufficient probable cause to justify that arrest and the fact that the trooper chose not to thoroughly search him at the time was immaterial. Further, the "fact that KSP officers made an effort to obtain a search warrant [did] not compromise the lawfulness of the search."

The denial of the suppression motion and the subsequent plea was affirmed.

U.S. v. Gross/Wilkins
550 F.3d 578 (6th Cir. 2008)

FACTS: On May 8, 2006, Gross and Wilkins were pulled over by Deputy Ritter (Hamilton County, TN, SO). Deputy Ritter was on "interdiction duties" at the time. He later related that "his attention was drawn to [the vehicle they were occupying] because the occupants had leaned back or were 'slouching' in their seats, so that their heads were positioned behind the center post of the vehicle." He followed and noted a minor traffic infraction - a straddling of lanes. Deputy Ritter stopped the vehicle.

Ritter and two other deputies searched the vehicle, finding a kilo of cocaine. Gross and Wilkins were both arrested. They argued for suppression, but the trial court found that the traffic stop was supported by probable cause. Both took a guilty plea and appealed.

ISSUE: Is a slow lane change sufficient to support a traffic stop?

HOLDING: No

DISCUSSION: The Court found that what the deputy "described is essentially a slow lane change: the vehicle straddled two lanes for a few seconds while changing from one lane to the other, in an area where the highway began a steep incline and changed from two to three lanes." The Court reviewed another tape, put into evidence, which showed an unrelated vehicle doing the same thing and ruled that the lane change did not amount to a violation of the statute.

Because the Court found that the traffic stop was improper, all evidence found as a result of the stop should have been suppressed. The convictions were reversed and the case remanded.

U.S. v. Boyett
295 Fed.Appx. 781, 2008 WL 4488803 (6th Cir. 2008)

FACTS: On May 29, 2006, officers took an armed robbery report from Jones and Brown. They stated that a man known to them only by a nickname (Juvenile) and a first name (Larry) had robbed them

at gunpoint. They identified his vehicle in detail and immediately reported it. A few days later, Lt. Massey, who had reviewed the report, spotted a vehicle matching the description and recognized the driver as Larry Boyett. He knew that Boyett had been involved in a road rage incident and that he had felony charges pending.

Lt Massey called for backup and followed Boyett into a parking lot. He did a high risk stop and secured Boyett and his passenger, holding them at gunpoint until backup arrived. Both subjects were frisked and secured in separate cars. The officers searched the vehicle, finding a handgun, and Boyett, a felon, was indicted on that charge.

Boyett moved for suppression, arguing that the initial robbery report was unreliable. The trial court, however, found that it was, and further, that the scope of the search, which revealed the weapon, was also reasonable. Boyett took a conditional guilty plea and appealed.

ISSUE: Does approaching a car at gunpoint, handcuffing occupants and securing them in a cruiser automatically convert a stop into an arrest?

HOLDING: No

DISCUSSION: The Court agreed with the trial court that the report was properly issued and based upon articulable and detailed facts. Lt. Massey's stop, therefore, was reasonable. The Court also justified the search, which revealed the weapon, as being within the scope of a vehicle frisk.³⁸

Finally, the Court disagreed with Boyett's assertion that the stop was an "arrest." The Court found that "approaching the car at gunpoint, handcuffing Boyett and his passenger, and then placing them in squad cars during the search was reasonably related to the situation at hand."

Boyett's plea was affirmed.

SEARCH & SEIZURE - WARRANT

U.S. v. Williams

544 F.3d 683 (6th Cir. 2008)

FACTS: On July 23, 2004, Officer Stewart (Detroit PD) sought a search warrant. In it, he alleged that "(i) Williams [the suspect] resided in the upper level apartment at 4900 Tarnow Street; (ii) Williams possessed two firearms, a .25 caliber handgun and a .45 caliber handgun; (iii) one month prior to the warrant application, Williams used a .45 caliber handgun to rob five pounds of marijuana from a drug trafficker; (iv) Williams was arrested for carrying a concealed weapon on June 26, 2004; and (v) Williams was recently arrested for possession of a stolen vehicle where a gun was found in the vehicle."

The warrant was executed later that day, and the officers found Williams in an upstairs apartment with his door open. They saw him "cutting crack cocaine on a table." The officers entered, made the arrest and searched, finding a "short-barreled shotgun and cocaine base."

³⁸ Michigan v. Long, 463 U.S. 1032 (1983).

Williams was indicated on drug and weapons charges and moved to suppress. When that was denied, Williams took a conditional guilty plea and appealed.

ISSUE: May a judge infer a nexus between a drug dealer's home and his possession of weapons, when they have been observed in possession of firearms?

HOLDING: Yes

DISCUSSION: Williams argued that the "warrant application did not establish a nexus between the targeted handguns and the residence [to be searched]." The Court agreed with the trial court, however, stating that Williams overlooked "the Government's logical, and indeed legally correct, assertion that 'it is reasonable to suppose that some criminals store evidence of their crimes, in their homes, even though no criminal activity or contraband is observed there.'" The Court found that the demonstrated firearms activity supported the search warrant for the suspect's home. The Court agree it was appropriate for a judge to "infer a nexus between a suspect and his residence" - depending upon the nature of the crime and the suspect items. The fact that the assertion was that Williams "possessed multiple guns" made it reasonable that he might keep at least one handgun at his home. The informants indicated only two reasonable locations where he might store guns, his home and his car, and since he was arrested in his car, without both guns, it was reasonable that one of the guns was at his home.

The Court further agreed the officer's testimony was consistent with the information provided in the warrant and that the informants' information both supported the warrant and was corroborated by the officers.

INTERROGATION

Thompkins v. Berghuis (Warden)
547 F.3d 572 (6th Cir. 2008)

FACTS: On February 22, 2001, Thompkins was interrogated by Det. Helgert on suspicion of involvement in a shooting that had occurred over a year before. (He had been identified as a suspect, but not located until then.) Helgert later testified that Thompkins was given his Miranda warnings but that he refused to sign the form. Thompkins was described as non-communicative and it was noted that he remained substantially silent during the almost three hour interrogation, responding only with occasional nods and "I don't knows." Thompkins showed a little more emotion when Helgert took a "spiritual tac[k]" – and he responded to a question as to whether he'd asked God for forgiveness in the shooting in the affirmative. Thompkins refused, however, to put anything in writing.

Thompkins later requested suppression, which the trial court denied, and was convicted. He sought habeas relief.

ISSUE: Is remaining silent under questioning an implied invocation of the right to remain silent?

HOLDING: Yes

DISCUSSION: Thompkins argued that "he had effectively invoked his right to remain silent by" being so uncommunicative. (In fact, Helgert had agreed to a question by the defense that Thompkins "had

consistently exercised his right to remain substantively silent for at least two hours and forty-five (45) minutes.”)

The Court reviewed the evolution of the law on the invocation of the right to remain silent. The Court also reviewed the state record and noted that the few responses Thompkins gave demonstrated that the interrogation was “very, very one-sided” as described by Officer Helgert. “Most revealing, three times Thompkins’s counsel asked Helgert variations of a question regarding whether Thompkins remained silent during the first two-plus hours of the interrogation, and each time Helgert confirmed that Thompkins had done so.” The Court found no “course of conduct indicating waiver.”

The Court agreed that Thompkins had not waived his right to remain silent “by in fact remaining substantively silent for nearly three hours.”

The Court upheld the habeas writ and ordered Michigan to release him unless the state court commended a new trial within 180 days.

Doan v. Carter
548 F.3d 449 (6th Cir. 2008)

FACTS: Doan was accused of the murder of his girlfriend. At trial, her family and friends were permitted to “testify as to statements made to them by Culberson concerning alleged physical abuse by Doan.” Doan was convicted of the murder and appealed.

ISSUE: Is testimony by non-officer witnesses, about statements made by third parties, governed by Crawford?

HOLDING: No

DISCUSSION: Doan argued that the admission of the testimony violated his Confrontation Clause rights, even though his conviction occurred prior to the decision in Crawford v. Washington.³⁹ The Court, however, ruled that the majority of the statements Doan complains of were not testimonial, and thus not in violation of Crawford. The Court, however, noted that in Giles v. California, the Court had found that “statements to friends and neighbors about abuse and intimidation would be excluded, if at all, only by hearsay rules’ because they are not testimonial within the meaning of the Confrontation Clause.” The only statement that the Court agreed might violate Crawford was also found not to have been prejudicial.

Doan also claimed that certain evidence was withheld that was exculpatory and that it should have been produced to him under Brady v. Maryland.⁴⁰ Specifically, the prosecution failed to tell him that a jailhouse informant had provided information pursuant to a reward offer, but the Court noted that his counsel was aware that the reward had been offered. Doan also argued that information concerning a number of witnesses was not shared with him, and that information about those witnesses could have been used to impeach their testimony. The Court found that in fact, the defense had impeached those witnesses, with varying degrees of success, and that much of the information Doan complained of was as inculpatory as it was exculpatory.

³⁹ 541 U.S. 36 (2004)

⁴⁰ 373 U.S. 83 (1963).

Doan's habeas petition was denied.

U.S. v. Rocha
2008 WL 4963194 (6th Cir. 2008)

FACTS: During an investigation, Rocha was taken into custody by ICE. Rocha later testified that he was told that if he "was willing to cooperate with [ICE]" he wouldn't be arrested." He agreed that he later signed a Miranda waiver form, but stated "that it was his understanding that he was signing that form as a 'trade' for not getting arrested." He claimed to have been told that if he cooperated, he wouldn't need an attorney. The agents disputed that they'd made any such promises. (Further, it was noted that "Rocha was never handcuffed, that the agents told Rocha he was not under arrest at that time, and that Rocha rode in the front seat of the agents' car to and from the police station.")

Rocha was convicted and appealed.

ISSUE: Is a statement given after Miranda warnings coercive, absent unusual circumstances?

HOLDING: No

DISCUSSION: Rocha argued that his inculpatory statements should have been suppressed - claiming they were involuntary "because his 'will was ... overborne by illusory promises' by the agents, to the effect that he would not be arrested if he cooperated with them." The Court agreed that "[p]olice promises of leniency . . . can be objectively coercive," rendering a confession involuntary.⁴¹ But "[a]ny statement given freely and voluntarily without any compelling influences is, of course, admissible in evidence."

The Court found that:

Rocha's inculpatory statements were freely and voluntarily given. As an initial matter, Rocha does not argue that he was in custody when he gave the statements. To the contrary, he admits that he agreed to go with the ICE agents to the bureau station that they told him he was not under arrest, that he was never handcuffed, and that he rode in the front seat of the agent's car to and from the station. The "compulsion inherent in custodial surroundings" was absent, therefore, and the preinterrogation warnings mandated by Miranda were not required. Moreover, Rocha concedes that the agents read him his Miranda rights, and that he signed a waiver of- rights form, indicating that he was willing to answer questions without a lawyer present.

Rocha's conviction was upheld.

Franklin v. Bradshaw
545 F.3d 409 (6th Cir. 2008)

FACTS: Franklin, 16, was identified and questioned as a participant in a murder. He was given his rights and signed the form. He denied he was in the area and offered an alibi. However, further

⁴¹ U.S. v. Johnson, 351 F.3d 254, 261 (6th Cir. 2003).

investigation placed him at the scene and he was identified by a witness as the shooter. Franklin was questioned again, two days later. The state appellate court summarized his statement at that time as follows:

The videotaped interrogation begins at 12:32 p.m. [Franklin] is informed of the charges lodged against him. [Franklin] is then asked if he remembers his rights as they were explained to him when the officers questioned [Franklin] the day before when he signed a *Miranda* card. Appellant is again advised that he has the right to remain silent, to end the questioning at any time, and to have counsel present. [Franklin] never invokes any of his rights. At 12:34 p.m., the officers ask [Franklin], "do you understand your rights," and he answers "yes, sir." The officers ask [Franklin], "do you want to tell us your side of the story." [Franklin] answers "no." [Franklin] never states during the questioning that he wishes to remain silent, however he does put his head down and avoid eye contact with the officers. The officers inform [Franklin] that they know he was at the scene because a number of witnesses place him there. [Franklin] denies being at the scene and states "how you going' to tell me where I was, I know where I was." The officers ask [Franklin] "did you fire any shots?" [Franklin] answers, "I didn't kill nobody." The officers ask [Franklin] "was it your gun?" [Franklin] answers, "I never had no gun," and states "I'm not lying to you." The officers ask [Franklin] "is that your response, i[s] that what you're going with," and [Franklin] responds, "I ain't did nothing."

The trial court had admitted the statement, over objection. Following his conviction and unsuccessful state appeals, Franklin filed for habeas in the federal courts.

ISSUE: Is a single negative response enough to unambiguously invoke the right to remain silent?

HOLDING: No

DISCUSSION: The Court noted that the critical question was whether Franklin invoked his right to remain silent during the interview. The Court noted that the right must be asserted unambiguously, otherwise, "questioning need not cease." (The same standard applies to invocation of the right to counsel.) In this case, the Court found that Franklin's single negative response to being asked if he wanted to "tell his side of the story" was not sufficient to unequivocally assert his right to remain silent, nor was his failing to raise his head or look at the officers significant.

Franklin's conviction was affirmed.

Davie v. Mitchell (Warden)
547 F.3d 297 (6th Cir. 2008)

FACTS: Davie was charged, and eventually convicted, of "a bloody and gruesome series of crimes [which occurred] on the morning of June 27, 1991," and which resulted in the beating and shooting deaths of two people and the attempted murder of a third. He was arrested promptly, given his *Miranda* warnings and transported to the police station. At 9:05 a.m., upon arrival at the station, he was given his rights again, initialed the form but refused to sign the waiver. He was not interrogated. He was given the rights again about an hour later, made a few comments, but refused to speak to the officers. Again, the interview ended. At about 12:15 p.m., he was questioned a third time and provided some information, but he did not

confess. He stopped talking at 12:35 p.m. At about 2 p.m., he asked to speak to Det. Vingle, and Vingle arrived and gave him Miranda warnings once more. At that time Davie confessed. At no time did Davie ask for an attorney.

Davie was convicted and sentenced to die. He appealed under a habeas writ, arguing that his Miranda rights had been violated.

ISSUE: Does a defendant effectively waive a previously invoked right to remain silent by asking to speak to a particular officer about the crime?

HOLDING: Yes

DISCUSSION: The Court reviewed the actions of the Ohio courts, which equated the situation to that considered in Oregon v. Bradshaw. In that case, the Court “concluded that authorities could speak to a defendant, without depriving him of his rights, when the defendant asked ‘Well, what is going to happen to me now?’ even though the defendant had previously invoked his right to counsel.”⁴² As in that case, Davie “evinced a willingness to discuss the investigation without influence by authorities” – asking, specifically, to speak to a particular officer about the matter. In the interim, he’d had contacts with various officers and exchanged comments, but the Court did not find these contacts to be improper attempts to reinstate an interrogation.

Further, the Court found there to be no violation even though Davie refused to sign the waiver form, since he verbally expressed a willingness to talk, nor did the Court require that officers go further to explain that such statements could be used against the defendant, even though they did not sign the form.

In addition, the Court did not find the situation violated Michigan v. Mosley.⁴³ In that case, the Court upheld “a confession that followed a cutoff of questioning” (invoking the right to silence), finding that “police are not indefinitely prohibited from further interrogation so long as the suspect’s right to cut off questioning was ‘scrupulously honored.’”

The Court examined the specific facts of the case. The Court found three separate attempts by officers to speak to Davie, over five and a half hours. At each interaction, he was again given Miranda warnings and when he refused to talk, the Court found “no evidence ... that the officers engaged in any other conduct to persuade Davie to change his mind.” Davie unquestionably initiated the discussion with Vingle that led to the conviction.

The Court upheld the admission of the confession.

⁴² 462 U.S. 1039 (1983).

⁴³ 423 U.S. 96 (1975).

42 U.S.C. §1983 - SCHOOL

S.E. (Next friend of A.E.) v. Grant County Board of Education 544 F.3d 633 (6th Cir. 2008)

FACTS: On the last day of the school year, May 26, 2005, A.E. received her medication (Adderall) at lunch, as usual, from the school nurse. She had four pills left at that time and the nurse gave them to her in the original container to take home.⁴⁴ A.E. did not want to take them at that time but was required to do so. She was cautioned not to share them with anyone else. During an end of the school day movie, another student asked her about the container and pressured A.E. to give her one. Finally, A.E. did so.

The school administration learned of this after school was out for the year, from the parent of the other child, and contacted A.E.'s mother. (A.E. had already told her mother what had occurred that day.) They were told A.E. would be interviewed by a deputy sheriff, but that did not occur over the summer break. When school resumed, the Assistant Principal (Lacey) discovered that there had been no investigation. He had A.E. come in and write a statement, but she later claimed she was unaware it would be given to law enforcement. (It was given to the SRO, Deputy Osborne, who ultimately charged A.E. with Trafficking.) A week later, the Assistant Principal brought in both students and asked them what occurred, A.E. did not speak. He gave both girls a one-day suspension and told them that they would be "subject to a six-month probation through the juvenile justice system." A.E. was summoned to a juvenile court proceeding and given a choice of diversion or formal proceedings. She chose diversion.

A.E. filed suit against the Board of Education and other various parties, under 42 U.S.C. §1983, claiming a variety of issues. The trial court rendered summary judgment in favor of all defendants. The plaintiff appealed.

ISSUE: May a school official turn over an incriminating student statement, not taken at the request of an officer, to law enforcement?

HOLDING: Yes

DISCUSSION: The Court first looked to whether the acceptance by A.E. of a diversion program triggered the Heck⁴⁵ bar regarding claims under the Fourth and Fifth Amendments. The Court noted that Spencer v. Kemna meant that "where the plaintiff was neither convicted nor sentenced" and was not eligible for habeas corpus, the Heck bar did not apply.⁴⁶

With respect to the Fourth Amendment issue, A.E. argued that Lacey seized her at the "behest of police" and that as such, he was "acting in conjunction with law enforcement." They emphasized that the statement was never placed in her school file but was taken solely for the purpose of being shared with law enforcement. Lacey, however, testified that he had not spoken to Deputy Osborne about it prior to his taking of the statements, and pointed to numerous decisions "holding that the sharing of the results of rule violation investigations with law enforcement did not make the school officials agents of law enforcement."

⁴⁴ A.E. is bi-polar and has Attention Deficit Hyperactivity Disorder (ADHD). Adderall is a Schedule II non-narcotic medication.

⁴⁵ Heck v. Humphrey, 512 U.S. 477 (1994)

⁴⁶ 523 U.S. 1 (1998); see also Cummings v. City of Akron, 418 F.3d 676 (6th Cir. 2005)

The Court found, however, that Lacey was not acting at the behest of Deputy Osbourne, and further, did not violate A.E.'s Miranda rights for that reason, also.

The Court upheld the summary judgment in favor of the defendants.

42 U.S.C. §1983 - USE OF FORCE

Whitehead v. Bowen

2008 WL 4935970 (6th Cir. 2008)

FACTS: On March 17, 2005, at about 8:40 a.m., a Pioneer Valley PD (Kentucky)⁴⁷ made a traffic stop of a vehicle, in which Whitehead was a passenger. The officer arrested Whitehead when he learned that there were outstanding warrants for him. During the arrest, Whitehead suffered a broken wrist.

One year later, Whitehead sued Officer Bowen under 42 U.S.C. §1983. Officer Bowen denied having had any contact with Whitehead on that date and stated that he was not involved in any way with the arrest. (He had been in court on an unrelated matter only a few minutes after the alleged arrest.) Instead, Officer Bowen indicated that Chief Elliott was the arresting officer.

The trial court granted summary judgment on Bowen's behalf. Whitehead replied that he had not had sufficient time to conduct discovery to refute Bowen's assertion. The Court, however, stood by its original decision and Whitehead appealed.

ISSUE: May claims made changing the theory of a case be made after summary judgment is initially granted?

HOLDING: No

DISCUSSION: On appeal, Whitehead argued that although Elliott may have been the arresting officer (as was indicated on the citation), Bowen "assisted the Chief in making the arrest and injured Whitehead while doing so." The Court, however, ruled that the time to raise such assertions was long past and affirmed the decision of the trial court.

Schreiber v. Moe and City of Grand Rapids

2008 WL 4791359 (6th Cir. 2008)

FACTS: The following is taken from the trial court's recitation of the facts:

On November 1, 2002 at approximately 3:39 p.m., the Grand Rapids Police Department emergency communications center received a 911 call from an anonymous caller reporting a domestic dispute between Schreiber and his 15-year-old daughter, Sarah. . . . The dispatch operator labeled the incident a "Priority 2." The Grand Rapids Police Department Manual of Procedures provides that a Priority 2 call involves the potential for physical harm against a person present at the scene. At approximately 3:46 p.m., Officer Moe was dispatched to the Schreiber's home to check on the situation. While enroute he received a

⁴⁷ Note, there is no such agency in Kentucky, this is presumed to be from other evidence to be the Pioneer Village PD.

message from the dispatch operator explaining that it was a Priority 2 call involving the welfare of a 15-year-old girl and that an anonymous caller “thinks she is getting beat.” Schreiber does not dispute that, prior to Officer Moe’s arrival, he and his daughter were involved in a “heated” discussion. The argument was the culmination of Sarah’s recent rebellious behavior. Schreiber acknowledges that during the argument, he took the phone away from Sarah and “threw it on the floor because she wouldn’t hang up.” It is not clear from the record, but at some point prior to Officer Moe’s arrival, Sarah telephoned a social worker at Catholic Social Services, Cindy Musto. Musto explained that she spoke with Schreiber in an effort to calm him down, however, during their conversation; he continued to yell and threaten his daughter. Schreiber left the phone after hearing a knock at the door.

The knock on the Schreiber’s door was Officer Moe. Officer Moe arrived at Schreiber’s residence shortly after being dispatched to the location. Upon his arrival, Officer Moe heard screaming coming from the residence: “I could hear a male voice inside screaming profanities at an unknown person.” When Officer Moe knocked on the apartment door, a young boy, James Schreiber Jr., opened the door. When the door opened, Officer Moe could see Schreiber screaming at someone but could not see the target of his invective. Officer Moe was also not able to see Sarah. According to Officer Moe, he asked Schreiber’s son if Sarah was okay, however, before the boy could answer, Schreiber came to the door, yelling profanities, and demanding to know why Officer Moe was there. Schreiber then profanely told Officer Moe that he was not permitted in the apartment. Officer Moe informed him that he was going to check on Sarah’s welfare. Despite Schreiber’s repeated, belligerent objection to the entry, Officer Moe entered the apartment because he “was deeply concerned that his (Schreiber’s) daughter was not okay and she may be injured and he may have assaulted her.” Officer Moe conceded that Schreiber did not invite him into the home.

After entering the residence, Officer Moe located Sarah in the living room and observed that she was crying and upset. Despite Officer Moe’s arrival, both Schreiber and his daughter continued to argue and curse at each other. Officer Moe described the situation as “chaos” and “basically a barrage of profanities” and threats between Schreiber and his daughter. Schreiber also continued to yell at Officer Moe, calling him a “Neo Nazi” and “pig.” He also continued to demand that Officer Moe leave his home or obtain a search warrant. In light of the situation, Officer Moe requested immediate back up from an additional officer.

At some point during the early stages of the situation, Officer Moe talked to Musto on the telephone. Officer Moe claims that Schreiber’s wife handed him the phone and indicated that Musto would explain the situation. Schreiber does not dispute that Officer Moe spoke with Musto on the telephone. Musto identified herself and explained that she was concerned for Sarah’s safety. After suggesting that Sarah be taken to a teen shelter, Musto ended the phone call with Officer Moe. Upon the arrival of Officer Matthew Veldman on the scene, Officer Moe attempted to run a file check on Schreiber and asked Schreiber’s wife if she had a personal protection order against him. During this time, Schreiber continued to yell at Officer Moe and demand that he leave. Schreiber also asked if he could leave the living room to use the bathroom. Officer Moe refused to allow

Schreiber to leave the living room. According to Schreiber, Officer Moe said that he would not allow Schreiber to leave because he might have a gun in another room. Schreiber also asserts that Officer Moe pushed him back onto the couch when he attempted to stand up and leave.

Although Officer Moe would not allow Schreiber to go to another room in the apartment, Schreiber did go outside on a second-story balcony to relieve himself. When Schreiber exited the apartment onto the balcony, Officer Moe closed the sliding glass door behind him. Schreiber maintains that Officer Moe locked the door and was laughing at him from inside the apartment. Schreiber, however, concedes that he did not see Officer Moe lock the door. Nevertheless, Schreiber became incensed, used more profanity, and demanded that Officer Moe open the door. When Officer Moe did not open the door, Schreiber ripped off the screen door, grabbed a lawn chair and struck the glass door three times, causing the door to completely shatter into the apartment.

The parties tell slightly different versions of the ensuing events. Schreiber acknowledges that he was "out of control" when he broke the sliding glass door, however, he contends that he walked into the apartment and was immediately grabbed by Officer Moe and thrown to the glass-covered floor. Schreiber could not recall if he said anything as he walked through the door. Schreiber also denies that he tried to strike Officer Moe during the incident. He also claims that when he landed face down on the floor, Officer Moe was on top of him, rubbed his face in the glass and punched him in the face and side, at least twenty times. Although Schreiber denies that he attempted to strike Officer Moe, he concedes that while the two men were on the ground he continued to use profanity and insult Officer Moe.

Officer Moe asserts that when Schreiber broke through the door he immediately charged at Officer Moe. Officer Moe maintains that Schreiber struck him at least seven or eight times and that, during the struggle, he brought Schreiber to the ground amidst the glass. Although Officer Moe denies that he pushed Schreiber's face into the glass, he does concede that he hit Schreiber at least six times. He maintains that these punches were necessary to defend himself from Schreiber's attack. While the two men were struggling on the ground, Officer Veldman prevented two of Schreiber's children from jumping on Officer Moe's back. Officer Moe also claims that he struggled with Schreiber on the ground for about two minutes before he was able to control him and apply handcuffs.

After Schreiber was handcuffed, Officer Moe escorted him to his police car. While en route, Schreiber cursed at Officer Moe and spit blood in his direction. Schreiber claims that when Officer Moe placed him in the police car, he kicked Schreiber five times in the ribs. Officer Moe denies this accusation. While in the police car, Schreiber continued to scream and spit blood. He also told Officer Moe that he had AIDS. Schreiber did not have AIDS, but, by his own admission, lied to Officer Moe to "piss him off."

Schreiber was taken to a local hospital where he was treated for three facial lacerations as well as bruises and swelling around each eye. Although he complained of rib pain, medical personnel did not discover a fracture. According to Officer Moe, while he was transporting Schreiber to the hospital, Schreiber threatened to kill him, have someone else injure him,

or sue him. On December 16, 2003, Schreiber plead no contest in state court to a misdemeanor offense of attempting to assault, wound, resist, obstruct, oppose, or endanger a police officer in violation of MICH. COMP. LAWS §§ 750.81d(1), 750.92.

Thereafter, Schreiber filed suit against Officer Moe and the City of Grand Rapids under 42 U.S.C. §1983 seeking damages for alleged constitutional violations. The trial court granted summary judgment to Officer Moe and the City on Schreiber's allegations concerning warrantless entry, false arrest, illegal imprisonment and excessive force, finding that they were barred by Heck v. Humphrey.⁴⁸ They allowed the case to go forward on Schreiber's assertion that Officer Moe had kicked him when he was in custody.

The remaining claim was set for pretrial conference, but Schreiber's counsel failed to attend, and also failed to submit mandated pretrial orders. The Court considered the case abandoned and dismissed the remaining claim.

Schreiber appealed.

ISSUE: May a case be dismissed simply because plaintiff's counsel misses a schedule pretrial conference?

HOLDING: No

DISCUSSION: The Sixth Circuit criticized the trial's decision to dismiss the case, as it did not investigate why counsel had failed to submit the order or missed the date. (Schreiber's attorney claimed it was a calendaring error.) The Court found that the dismissal was an abuse of discretion on the part of the trial court and reversed the dismissal of Schreiber's remaining claim of excessive force.

Vance v. Wade
546 F.3d 774 (6th Cir. 2008)

FACTS: On June 10, 1999, at about 6 p.m., "the Bristol (TN) Police Department simultaneously executed seven search warrants for gambling machines at various locations in the city." Captain Wade was in charge. Det. Breuer was the team leader for a search at Tooties Restaurant, in which Vance had an interest.

When Vance arrived, he found people standing outside, along with several police cars. He entered and found Det. Breuer, who told him "we're closed." Vance identified himself and asked about a search warrant and Det. Breuer directed another officer to show a copy to Vance.

Vance later claimed that Breuer "was screaming at him to sit down" and that he told the detective that the document wasn't a search warrant. When a phone began to ring, Breuer prevented Vance or anyone else from answering it - Breuer later explained that it wasn't common practice to permit that. Vance claimed he demanded to use the restaurant phone to call a lawyer but that he was not permitted to do so, because he wasn't under arrest. (He then asked to be arrested so that he could do so.) Breuer and Vance then faced off.

⁴⁸ Supra.

Breuer and another officer, Perrin, conferred, and decided to call Captain Wade back to the location because Vance was interfering with them. (Vance agreed he'd been told to sit down several times and that he did not do so.)

When Wade returned, he immediately handcuffed Vance and walked him out of the restaurant. (Vance claimed that was done roughly.) He was seated in a police car with the door open. After further discussion with Breuer, Wade returned and "crammed" Vance into the vehicle.

Specifically, at deposition, Vance claims that when Wade returned to the vehicle, he said "[g]et in there," and pushed Vance into the car, "cramm[ing] my head down on my shoulder." Vance testified that Wade "took his hand and put [it] on my shoulder and he twisted the upper trunk all the way around. Then he ran out of reach so he swapped hands and put his hand there to give him more leverage. And then he took this hand and he crammed my head down on my shoulder." Vance stated that "at that time I was hung. My hips were hung in the vehicle. I couldn't break loose. Finally they broke loose, thank the Lord. My hips broke loose and I fell face forward into the floorboard. My knees were right on the running frame of the car" Vance then testified that Wade "just took the door and shut it up like that and pushed my body in there" and that while the door did not close on his legs, instead "[t]he door pushed them in, crammed me in there."

Vance was left in the car for some 10 to 15 minutes, in the heat, and was ignored by another officer sitting in the car. After he was able to "right himself" in the back seat, he told the officer in the car that the cuffs had cut off feeling in his hands and that he was in pain from recent back surgery. The officer spoke to Breuer and Wade, and Breuer returned and removed the handcuffs.

Vance later claimed injuries to his back and neck, but he did not seek medical aid from the officers at the time. A family member photographed his hands but the photos showed only a small bruise and no lacerations or blood. The only medical evidence was an unsworn report from late 2001.

Vance filed suit under 42 U.S.C. §1983 against the city and the two officers, but because his criminal charges were pending, the suit was stayed. Once he was convicted, and appeals related to his criminal case were exhausted, the lawsuit was allowed to proceed.

Bristol, Wade and Breuer moved for summary judgment. The magistrate judge agreed that there was a constitutional violation, similar to the case of Lyons v. City of Xenia,⁴⁹ but found Wade to be entitled to qualified immunity. Vance appealed.

ISSUE: Is force used at some time after the arrest arguably reasonable, when the suspect is handcuffed and not resisting?

HOLDING: No

DISCUSSION: The Court looked at each of Vance's assertions. With respect to the claim that he was excessively handcuffed and mishandled, the Court noted that "Wade took prompt corrective action upon

⁴⁹ 417 F.3d 565 (6th Cir. 2005)

learning of Vance's complaints." (The Court noted that Vance did not sue the auxiliary officer who initially ignored his struggles and complaints in the back seat.)

The Court moved on to Vance's claims regarding the time he was escorted to the car and allegedly crammed into the cruiser. The Court agreed that, as alleged, Wade's actions were a constitutional violation. Applying the analysis in Saucier v. Katz, the Court found that Wade was not entitled to qualified immunity. Specifically, because the assertion was that "Wade escorted [Vance] to a police vehicle, left that scene for several minutes, and then returned to Vance and forcibly crammed him into the floorboard," the Court noted that there was no urgency that might possibly excuse Wade's actions. The Court found "time delay" to be the "decisive factor that render this case substantially different than Saucier." Although the Court agreed it was reasonable to handcuff Vance and remove him from the scene, the force used against him was "well after" Vance was secured and removed, and after the scene was defused, since Wade was "cooperatively sitting handcuffed in the back of a police vehicle for several minutes"

The Court reversed the grant of summary judgement and remanded the case regarding Wade back for further proceedings.

Dunn v. Matatall and Porter
549 F.3d 348 (6th Cir. 2008)

FACTS: On May 5, 2006, Dunn was arrested by Officer Matatall and Sgt. Porter (Southfield, MI, PD). The Sixth Circuit looked to the recitation of the facts given by the trial court, which used Officer Matatall's in-car video as timestamps:

The recording, which is about fifteen and a half minutes long, begins at 2:30:53. At about 2:31:29, Matatall turned on his flashing lights along with a few siren bursts to initiate the traffic stop while Plaintiff was making a right turn onto a residential street. (2:31:29-47.) Matatall reported over the radio that "the vehicle is not stopping." (2:31:58.) He then sounded the siren until Plaintiff eventually stopped almost two minutes later. (2:32:04-2:33:48.) Plaintiff failed to stop at the first stop sign he encountered. (2:32:06-10.) Plaintiff then crossed to the other side of the street to pass another vehicle as Matatall announced his speed at fifty miles per hour. (2:32:10-18.) Plaintiff at that point ran through a second stop sign at [what appears to be around the same speed], and then accelerated noticeably[.] (2:32:20-23.) Plaintiff continued, passing another vehicle driving in the opposite direction and executing a number of turns while Matatall verbally recorded his speed at forty-five miles per hour. (2:32:24-33:15.) Plaintiff ran a third stop sign and encountered a more commercial area that Matatall announced as eastbound on 7 Mile Road. (2:33:16-22.)

On 7 Mile, Plaintiff began to slow somewhat in the left lane and slowly pulled over to the right and stopped driving. (2:33:35-55.) Matatall instructed Plaintiff to place the car keys outside of the car and to drop the keys, which Plaintiff did onto the roof of the car through his open window. (2:33:55-34:15.) Matatall then exited his car and approached the rear passenger side of Plaintiff's car with a flashlight in one hand and his gun in the other. (2:34:16-21.) Using the flashlight, Matatall took a few seconds to briefly examine Plaintiff's vehicle from the passenger side and re-holster his gun. He then walked up to the driver's side window, telling Plaintiff not to move his hands. (2:34:21-26.) Matatall attempted to

open the driver's door, instructed Plaintiff to unlock the door and grabbed one of Plaintiff's hands. (2:34:26-29.) Plaintiff unlocked the door; Matatall opened it and began to attempt to remove Plaintiff from the car. (2:34:29-31.) At that moment, Porter pulled up and came to an abrupt stop in his police car, parking at an angle in front of Plaintiff's car. (2:34:31-36.) As Porter parked, Matatall struggled with Plaintiff, ordering him with a raised voice to get out of the car. (*Id.*) Plaintiff yelled that his seatbelt was preventing him from exiting ("my seatbelt; my seatbelt"). (2:34:36-39.) Matatall told Plaintiff to get his hands in the air. (2:34:39-40.) In the meantime, Porter stepped out of his car and rapidly approached Plaintiff's door from the front of the car, leaving the door between Porter and Matatall. (2:34:40-44.) Porter briefly—for about one second—pointed his firearm in Plaintiff's direction and then put the gun away and walked around the open door to assist Matatall, who at this point was grabbing Plaintiff's hands or wrists; Porter stood now on the other side of Matatall, between Matatall and the camera. (2:34:44-46.) Plaintiff said "okay" and "I'm coming, I'm coming" as his belt was apparently now unfastened and together Defendants pulled Plaintiff out of his car. (2:34:46-49.) Plaintiff was somewhat bent over at the waist as Defendants pulled him out, clutching his wrists or forearms as they forced him between them out and onto the street. (*Id.*) As he was being pulled from both sides while still bent over, Defendant Matatall [seems to have] lost his grip on Plaintiff's right wrist while Defendant Porter maintained his grip on the other side. Plaintiff then twisted or spun slightly around on his left foot, [apparently] lost balance and fell hard on his right side, landing with his back to the camera. (2:34:47-50.) Plaintiff remained on the ground as Defendants handcuffed him. (2:34:50-[35:]13.) Plaintiff exclaimed a few times, saying he was a "sick man," "you broke my hip" and asking the officers to feel where the bone was "sticking out." (2:34:55-35:30.)¹ Within a few seconds, Matatall assessed Plaintiff's injury and called for medical help over the radio. (2:35:31-34.) The remaining several minutes of the video show additional officers on the scene who, along with Defendants, search Plaintiff's pockets, ask him why he ran and announce that medical help is on the way.

Dunn's suffered a fractured femur during the arrest, and claimed to have a permanent disability as a result of the injury.

Dunn sued the officers and Southfield under 42 U.S.C. §1983 for excessive force. The officers moved for qualified immunity and summary judgment, and the trial court agreed, finding that the officers' actions were objectively reasonable under the circumstances. Because the trial court concluded that the officers did not violate Dunn's rights, it did not move on to decide whether the officers were entitled to qualified immunity. Instead, the case was dismissed outright.

Dunn appealed.

ISSUE: Is the initial decision concerning whether force is reasonable the decision of the judge?

HOLDING: Yes

DISCUSSION: Dunn conceded that the video was an "accurate account of the events surrounding the arrest," but argued that the decision as to whether it depicted excessive force "should be answered by a jury." The Court noted that at this state, it was required to look at the facts and to draw "all inferences in favor of the nonmoving party to the extent supportable by the record," and then to make the decision as a

“pure question of law.” The Court noted that Scott v. Harris “instructs [the Court] to determine as a matter of law whether the events depicted on the video, taken in the light most favorable to Dunn, show[s] that the Officers’ conduct was objectively reasonable.”

Using that standard, the Court concluded that the officers “acted reasonable in attempting to neutralize a perceived threat by physically removing Dunn from his vehicle after he led Officer Matatall on a car chase and then appeared to refuse the Officers’ commands to exit the car.” Neither officer could be expected to know “what threat Dunn may have posed.” The Court agreed that Dunn’s statement that he was “coming” might have “indicate[d] that he had decided to exit the vehicle on his own, only seconds elapsed between the time the seatbelt was unfastened and when Dunn was pulled out of the car, giving the Officers little opportunity to fully comprehend whether Dunn had finally decided to become compliant.” The Court quoted Sgt. Porter, who stated “at what point do we then trust this resistant person to suddenly say, okay, I give up.”

The Court decided that “given the heightened suspicion and danger brought about by the car chase and the fact that an officer could not know what other dangers may have been in the car, forcibly removing Dunn from the car to contain those potential threats was objectively reasonable.” The fact that Dunn was seriously injured as a result is irrelevant to the determination that the force used was, in fact, justified.

The grant of summary judgement in favor of the officers was affirmed.

SUSPECT IDENTIFICATION

U.S. v. Smead

2008 WL 4963074 (6th Cir. 2008)

FACTS: On November 9, 2006, the U.S. Bank in Tallmadge, OH, was robbed. Morrow was the teller. She “complied with the robber’s demands, and the robbery lasted less than one minute.” Morrow gave a description of the robber as a “white male around the age of sixty-five, of medium height and build” and further described his clothing in detail. There was no record, however, that she described his “facial characteristics.” The FBI developed Smead as a suspect and put together a photo array that included his OL photo, along with five nulls. (The agent stated he depended upon Morrow’s physical description as well as the physical characteristics on Smead’s license. He also tried to get photos with similar shirt collars.)

The photo-array was presented to Morrow. The agent told her that he wasn’t sure that any of the photos indicated the robber. Morrow identified Smead as the robber. Further investigation also led to Smead’s wife identifying him in a video, even though his face was not visible – apparently recognizing him from specific clothing he was wearing at the time. After further investigation, Smead was indicted on bank robbery. He requested suppression of Morrow’s identification, which the trial court denied. In preparation for trial, Smead requested admission of the testimony of Dr. Fulero, an expert in the field, to “provide the jury with an explanation of the psychological aspects of making eyewitness identification.”

At trial, Morrow and the FBI agent were extensively cross-examined about the identification, particularly with respect to comments Morrow made that added several physical characteristics to her description of the robber, but that weren’t included in the written statement.

The Court conducted a hearing to determine whether Dr. Fulero's testimony could be presented. Dr. Fulero described his "reconstructive theory of memory," which the court concluded was "well accepted and . . . peer reviewed." As such, the court found it reliable. The Court also agreed that the "theory that the confidence in identification does not correlate to its accuracy" is also reliable, as there is, at best, only a weak correlation between the two. That testimony was admitted under FRE 702. The Court, however, was "less sure" about admitting testimony as to the "procedures used to create and administer the photographic lineup." Dr Fulero stated that he intended to discuss that "eyewitness evidence is only as good as the methods that are used to collect it." For example, "sequential presentation, double blind presentation, the appropriate instructions, and the construction of the spread itself" are all techniques that can reduce the frequency of erroneous identifications." The Court did not permit that testimony.

Dr. Fulero was permitted to testify that "information people get about an event after it happens can actually become part of their memory of the initial event." He "also testified that, during the acquisition stage of memory, exposure time to a suspect's face can affect the accuracy of an eyewitness' memory" and concerning "detail salience, explaining that human attention 'is geared toward things that somehow stand out'" during complex events."

However, Smead was convicted. He then appealed.

ISSUE: May a court limit expert testimony to specific theories or issues?

HOLDING: Yes

DISCUSSION: The Court discussed the application of FRE 702 to this case. That rule of evidence, which mirrors KRE . . . , "provides that, '[i]f scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue,' then "a witness qualified as an expert . . . may testify . . . if (1) the testimony is based upon sufficient facts or data, (2) the testimony is the product of reliable principles and methods, and (3) the witness has applied the principles and methods reliably to the facts of the case."

Rule 702 requires a district court, when presented with potential scientific expert testimony, "to determine whether the evidence 'both rests on a reliable foundation and is relevant to the task at hand.'"⁵⁰ This Court has interpreted Daubert to require district courts to engage in a two-step inquiry.⁵¹ A district court first must determine "whether the reasoning or methodology underlying the testimony is scientifically valid and . . . whether that reasoning or methodology properly can be applied to the facts in issue." In the second step, a district court should ensure that the "proposed expert testimony is relevant . . . and will serve to aid the trier of fact," and also determine whether the testimony "fit[s]."

The Court concluded, however, that "because the jury heard substantial testimony from Dr. Fulero regarding several potential problems with eyewitness identifications, and also heard cross-examination regarding the suggestiveness of the photo-array lineup, it is unlikely the additional testimony of Dr. Fulero regarding lineup procedures would create a "reasonable doubt that did not otherwise exist."

⁵⁰ U.S. v. Langan, 263 F.3d 613, 620 (6th Cir. 2001) (quoting Daubert v. Merrell Dow Pharms., Inc., 509 U.S. 579, 597 (1993)).

⁵¹ U.S. v. Smithers, 212 F.3d 306, 313 (6th Cir. 2000).

In this case, the Court concluded that the trial court's decision to limit the testimony was appropriate and affirmed the conviction.

Tipton v. Carlton
2008 WL 5397785 (6th Cir. 2008)

FACTS: On Jan. 9, 1991, Blair assisted Officer Graves (Maryville PD) in creating a composite sketch of an individual who had attacked Blair. Blair then went to the Blount County Sheriff's Dept. to view a photo line-up, prepared by Det. Mercks. Tipton's photo was in the pack because he'd been independently identified as a suspect in the robbery. The photo used was 8 years old, however, and Blair's identification was qualified. (The actual photo array was not available for review because it had been lost by defense counsel.) Blair subsequently identified Tipton in person.

Tipton and co-defendant were convicted on various state and federal charges. He requested habeas relief.

ISSUE: Does the size of a photo impermissibly taint a photo array?

HOLDING: No

DISCUSSION: The Court reviewed the identification process, which had been upheld by the state court. That court had noted that the photo of Tipton was "significantly larger than the other pictures," but found that insufficient to find that the array was unduly suggestive. However, the Court noted, even if it was improper, the pretrial identification was reliable under the Biggers'⁵² factors.

The Court noted that:

Blair's state court testimony demonstrates she both had, and took, the opportunity to view Tipton's face at the time of the crime. Blair viewed Tipton for three to five seconds while facing him at close range while sitting on his lap. A security light aided her viewing. The totality of the circumstances does not indicate, as Tipton argues, that Blair's attention was distracted by fatigue and fear during this three to five second viewing. One day after escaping from her assailants, Blair was able to describe Tipton's facial features to Officer Graves, who sketched a composite drawing.

Within that same 24-to-48-hour period, Blair identified Tipton's photo in the January 9, 1991 photo array even though the photograph was eight years-old. It is not surprising that, although Blair "believed that was him," she would like to see Tipton "in person to make sure." Taken in full context, Blair testified:

Q. Now, describe for us what happened at the photo line-up. When you were presented with these pictures, what did you do?

A. [by Blair] I looked at them very carefully, wanted to make sure that I chose the right person. I didn't want to choose a picture that was not the right person, so I took my time. I looked very carefully. And I now know that I did pick Mr. Tipton's picture. And I told the officer that I believed that was him, but I would like to see him in person to make sure.

⁵² Neil v. Biggers, 409 U.S. 188 (1972)

Tipton also argued that the prosecution withheld favorable evidence. "Such a violation requires proof of three elements: (1) the evidence was favorable to the accused; (2) the evidence, intentionally or unintentionally, was suppressed by the government; and (3) resulting prejudice."⁵³

Tipton argued that four documents had been improperly withheld:

- (1) a January 17, 1991 Case Progress Report prepared by Maryville Police Detective McCulloch;
- (2) a February 1, 1991 Case Progress Report prepared by Detective McCulloch;
- (3) a February 15, 1991 investigative report written by FBI Special Agent Bentley; and
- (4) an April 9, 1991 investigative report prepared by an unidentified FBI Special Agent.

The trial court had ruled that the documents were neither exculpatory nor material, however, and the Sixth Circuit agreed.

The Court affirmed the dismissal of Tipton's petition.

TRIAL PROCEDURE/EVIDENCE - BRADY

Owens v. Guida, Warden
549 F.3d 399 (6th Cir. 2008)

FACTS: Owens was charged with hiring a third party to kill her husband, which he did. She was arrested and convicted. Following unsuccessful state appeals, she requested habeas corpus on a number of issues, including that the prosecution failed to turn over evidence that indicated her deceased husband had a paramour.

ISSUE: Does Brady apply to evidence held by the law enforcement agency but which is never provided to the prosecutor?

HOLDING: Yes

DISCUSSION: Among other claims, Owens argued that the state failed to turn over "sexually suggestive cards and love notes between Ronald (her husband)" and another woman, and "police reports that discussed these notes and summarized an interview with [the woman] in which she admitted the affair." The prosecution had denied the claim because it found that the notes were not exculpatory and that she could have put on other evidence about the affair.

The Court noted that the notes were taken to the police station, and that eventually, upon the woman's request, were turned back over to the woman. The police had "checked with an unknown city attorney, who said that the letters were irrelevant...."

The Court noted that:

⁵³ Jamison v. Collins, 291 F.3d 380 (1995).

When Owens filed her request, the prosecution told the court that it had turned over “everything we have in the way of any kind of physical evidence.” While this may have been technically true because the prosecutors never handled the letters, it was not true for purposes of Brady. Brady’s disclosure requirement includes not just information in the prosecutor’s files, but “information in the possession of the law enforcement agency investigating the offense.”⁵⁴. These letters were at one time in police possession, but whether by accident or on purpose, those letters were never shown to Owens.

The Court, however, found that there was a “longstanding, commonsense belief in our culture that people who kill their spouses, because of infidelity, are not as morally culpable as other murderers.” As such, the Court agreed that mitigation might have kept her from the death penalty. However, the Court state, such cases all occurred in the heat of passion,” killing took place immediately, in person, and upon discovery of the infidelity instead of weeks later, in cold blood, and second hand through a hired killer.”

Balancing the information available, the Court found that the state court followed a reasonable interpretation of Brady, and upheld Owens’ conviction and sentence.

U.S. v. Ross
2008 WL 4888993 (6th Cir. 2008)

FACTS: At about 1:30 a.m., on the day of Ross’s arrest, Officers Dettmer and Hanes (Cincinnati, OH, PD) passed Ross’s car, headed in the opposite direction. They heard loud music from the car so Officer Dettmer stopped Ross to cite him for violating a noise ordinance. As the officer approached, he “detected the odor of marijuana” from the vehicle. He took Ross’s license and vehicle information and returned to tell Hanes what he had learned. Dettmer went back to the car and asked Ross if he “had anything in the car that he wanted to turn over voluntarily.” Ross handed over a small bag of marijuana. Dettmer asked him about the paper bag on the back seat and Ross handed that over also - it contained four separately wrapped packages of marijuana. Ross was removed from the car and handcuffed. Officer Hanes, searching, found two more bags of marijuana in the glove compartment, as well as a revolver and a scale. Ross also had marijuana on his person.

Ross was arrested on state charges and eventually fined for possession of the marijuana. However, he was also charged in federal court for possession of the gun, as he was a convicted felon. He moved for suppression of the evidence and statements he made at the time. (Ross had made a statement, captured by the cruiser video recorder, in which he admitted that “everything in the car” was his.) The Court denied his motions.

At trial, Ross’s brother claimed that the gun and the marijuana in the glove compartment were his and were in the car without Ross knowing about them. As a result of his testimony, a Cincinnati officer sought an arrest warrant for the brother, based upon his sworn testimony.

Ross, however, was convicted, and appealed.

ISSUE: Does a conviction in state court invalidate a federal charge on the same evidence?

⁵⁴ Jamison v. Collins, 291 F.3d 380, 385 (6th Cir. 2002).

HOLDING: No

DISCUSSION: First, the Court ruled that Ross's state court convictions did not invalidate his federal court case and that he was not subjected to double jeopardy. Further the Court found that the officers did not make a pretextual stop based upon Ross's appearance (a "black man driving a nice car") and ruled that when "an officer has probable cause to conduct a traffic stop, he or she may do so regardless of a subjective motivation for the stop."⁵⁵

Further, the Court ruled that extending the stop based upon Dettmer's perception that he smelled raw marijuana was also permitted and that it was appropriate for the jury to find him credible. The Court also found that his "post-Miranda admission" that the contents of the car belonged to him was not subject to suppression."

Ross's conviction was affirmed.

MISCELLANEOUS

Manley v. Paramount's Kings Island
299 Fed.Appx. 524, 2008 WL 4764121 (6th Cir. 2008)

FACTS: On October 16, 2004, Goins visited Paramount's Kings Island (PKI) with friends. She left her purse in a cubicle provided for that purpose before riding on a roller coaster. Manley did the same thing. After leaving the ride, Manley retrieved her belongings and went to a nearby restroom - at the same time Goins discovered her purse was missing. A friend of Goins recalled that sometimes stolen property is discarded in the restroom, so they headed there. Once they arrived, they called Goins's cell phone, and "[a]mazingly, a phone began to ring from one of the stalls, and two young children also in the bathroom started 'looking nervously.'" Eventually, Manly emerged from the stall and Goins's friend noticed that "there was a square bulge in Manley's sweatshirt, as if she were concealing something."

Goins and friend followed Manley as she left the restroom, and "saw her go behind a kiosk with a child." When the two checked the area, they found Goins's empty purse. Goins confronted Manley and demanded her belongings and Manley "denied knowing anything." She went with her family toward the exit. Goins's friend "had enlisted a PKI security guard to investigate." The guard shined his light toward Manley, who fled with her family through the parking lot. The guard caught up with them, and again, Manley "professed her innocence." Other guards arrived and Manley was questioned, but not "touched, searched, or arrested." She eventually left of her own accord. PKI continued to investigate, using video footage, which "showed Manley pointing to the purse and a juvenile believed to be her daughter taking the purse and leaving with Manley." Eventually, a warrant was issued, but the charges were dismissed. (This opinion does not indicate why.) Manley then sued PKI for her detention, but the trial court dismissed the action. Manley then appealed.

ISSUE: May private security guards be government actors under certain circumstances?

HOLDING: Yes

⁵⁵ Whren v. U.S., 517 U.S. 806 (1996).

DISCUSSION: Although the Court agreed that the guards (who are apparently considered government actors under Ohio law) seized Manley, the Court found that the evidence against Manley was more than adequate to support their actions. The guards had information from identified subjects and Manley also ran when they approached her. The Court noted that “[c]oupled with other facts—in this case, the statements of two other patrons—evasive conduct indisputably justifies a brief detention.” Manley argued that the stop exceeded the bounds of a Terry stop, but the Court agreed that “[t]here is no per se rule as to how long a stop may last without exceeding the limits of Terry.”⁵⁶ The evidenced indicated the stop took only a few minutes, although Manley contended otherwise, based on the indication that the report was not generated until an hour and half after the reported stop.

Further, the Court noted, the guards did not arrest Manley, but presented the information to the local prosecutor. Although not raised in the case, the Court agreed there was adequate probable cause to support the arrest based upon the warrant generated by the prosecutor. The Court noted that “the law is clear: an arrest grounded in probable cause does not become invalid simply because the charges are later dropped or the defendant is acquitted.”⁵⁷

The Court agreed the PKI guards “had a reasonable suspicion of Manley when detaining her in the parking lot and probable cause when PKI filed a criminal complaint leading to her arrest.”

⁵⁶ U.S. v. Sharpe, 470 U.S. 675 (1985)

⁵⁷ Williams v. Cambridge Bd. of Educ., 370 F.3d 630 (6th Cir. 2004)

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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)

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).