

Department of
CRIMINAL JUSTICE TRAINING

KENTUCKY JUSTICE AND PUBLIC SAFETY CABINET

2009



Leadership is a behavior, not a position

CASE LAW UPDATES

FIRST 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 - ASSAULT

Campbell v. Com.

2009 WL 737004 (Ky. 2009)

FACTS: Campbell, along with several other inmates, attacked McClain. Medical examination revealed that his mandible (his jaw) was fractured, and he ultimately has surgery to repair the damage. Campbell was convicted of involvement in the Second-Degree Assault, among other charges, and he appealed.

ISSUE: Is an injury that requires surgery and a lengthy recovery period, although unlikely to prove fatal, a "serious physical injury?"

HOLDING: Yes

DISCUSSION: Among other issues, Campbell argued that he was entitled to an instruction for Fourth Degree Assault. The Court reviewed the injury, which "required a long and complex surgery involving metal plates and screws," including the opinion that McClain was never at a reasonable risk of death from the injury. The Court agreed that there was "unrefuted evidence of the prolonged impairment of the function of McClain's jaw." As such, an instruction on Fourth Degree Assault was inappropriate.

Campbell's conviction was affirmed.

Allison v. Com.

2009 WL 275840 (Ky. App. 2009)

FACTS: Allison and Graves got into a physical confrontation, and Graves "suffered a blow-out fracture of the orbit of her right eye that caused the floor of the orbit to be pushed down into her maxillary sinus." She underwent surgery and repairs were made. Allison was charged with Second-Degree Assault, among other charges. She was convicted and appealed.

ISSUE: May a set of keys be considered a dangerous instrument?

HOLDING: Yes

DISCUSSION: Allison argued that Graves's injury was not a "serious physical injury" under Kentucky law. The question concerned whether her injury "created a 'prolonged impairment of health.'" The Court reviewed that even six months later, Graves continued "to occasionally experience double vision." The Court, however, noted that it did not have to make that decision, since Graves also testified that "Allison repeatedly struck her in the face while holding a set of keys and while Graves' arms were being held." As such, the Court agreed that the keys could be considered a dangerous instrument."

Allison's conviction was affirmed.

PENAL CODE – CRIMINAL POSSESSION OF A FORGED INSTRUMENT

Hill v. Com.

2009 WL 722973 (Ky. App. 2009)

FACTS: In April, 2007, a bartender in Lexington received what he believed to be two counterfeit \$20 bills from the same person. He called the police and they agreed the bills were forged. Hill was identified and arrested. As he was being removed from the bar, he “surreptitiously dropped more bills on the floor,” an act witnessed by the bouncer, Bonds. During this time, Hill escaped, but was quickly recaptured. The bills that were dropped were also found to be counterfeit.

Hill was indicted, tried and convicted, on charges including Criminal Possession of a Forged Instrument and Tampering with Physical Evidence. He then appealed.

ISSUE: Is behavior sufficient to prove that a suspect knew that currency was forged?

HOLDING: Yes

DISCUSSION: First, Hill argued that the prosecution presented no evidence that he “knew the bills were forged or that he intended to defraud Main Street Live when he purchased drinks with counterfeit money.” The Court gave credence to the bartender’s testimony that Hill paid for his second drink with a fresh \$20 bill, rather than change from the first one. Further, he was seen to be discarding similar bills and he ran from police during the arrest. The Court agreed that flight is admissible to indicate guilt.

The Court further found that the bouncer’s testimony was credible, even though the officer escorting Hill did not see him drop the bills. Bonds’s testimony did not contradict the officer or another witness, as both agreed they did not specifically see him drop the money.

Hill’s conviction was affirmed.

PENAL CODE – ROBBERY

Birdsong v. Com.

2009 WL 102849 (Ky. App. 2009)

FACTS: On June 21, 2005, a man “rushed into the [Fifth Third Bank, Lexington].” He slammed open the door and screamed at the tellers to open the drawers. He then grabbed the money, jumped over the counter and fled. Witnesses to the crime described “a lot of noise and pandemonium including the robber knocking over a computer monitor upon jumping over the counter.”

Birdsong was arrested and eventually confessed. He was charged with Second-Degree Robbery and eventually convicted. He appealed.

ISSUE: Do loud demands for money constitute force for a Robbery charge?

HOLDING: Yes

DISCUSSION: Birdsong argued that there was no force (under the statute) to justify the charge of robbery. The Court noted that Birdsong's actions, including placing a bandana over his face and his "loud, vocal demands for money constituted a threat of immediate use of physical force upon the clerk."

Birdsong's conviction was affirmed.

PENAL CODE - ESCAPE

Webster v. Com.
2009 WL 50495 (Ky. App. 2009)

FACTS: On May 29, 2007, Kenton County jail inmates were taken to a 10th floor recreation yard, which was enclosed by chain link fencing. During that time, a "fellow inmate hoisted Webster up in the southwest corner of the recreation area where Webster cut a hole in the chain-link fence." He ran across the roof outside the fencing and was later discovered having fallen into an elevator shaft. (The elevators were turned off due to the Memorial Day holiday.) He was charged with Second-Degree Escape and convicted. He then appealed.

ISSUE: Is a suspect found outside a secured area of a jail, but still within the actual building, considered to have escaped?

HOLDING: Yes

DISCUSSION: Webster argued that he was not "outside the detention facility when he was found," when he was "found inside the elevator shaft (in the unsecured part of the building) and not outside the building." The Court noted that he was in an area where he was not permitted to be and that "but for the holiday, offices would have been open, and Webster could have endangered members of the public."

Webster's conviction was affirmed.

PENAL CODE - KIDNAPPING EXEMPTION

Griffith v. Com.
2009 WL 277333 (Ky. App. 2009)

FACTS: On October 19, 2006, in Hardin County, "Griffith repeatedly struck his wife, Michelle, in an attack that spanned more than one hour." The couple had been involved in marital counseling for the preceding year but Griffith had become "increasingly jealous and paranoid." On the night in question, when Michelle had arrived home with the children, Griffith had activated a tape recorder and they began to argue, with Griffith finally forcibly holding her down and lecturing her. The fight escalated to the assault. When Griffith left the room to get a gun, Michelle escaped to a neighbor's home and called the police. Griffith eventually surrendered to the police and the tape recording was introduced as evidence.

Griffith was convicted of Second-Degree Assault and Unlawful Imprisonment. He appealed.

ISSUE: Is holding someone down and lecturing them, prior to an actual assault, sufficient to charge Unlawful Imprisonment as well?

HOLDING: Yes

DISCUSSION: Griffith argued that the Unlawful Imprisonment charge was inappropriate, since the "interference with Michelle's liberty was integral to the assault charge." Under KRS 509.050:

A person may not be convicted of unlawful imprisonment in the first degree, unlawful imprisonment in the second degree, or kidnapping when his criminal purpose is the commission of an offense defined outside this chapter and his interference with the victim's liberty occurs immediately with and incidental to the commission of that offense, unless the interference exceeds that which is ordinarily incident to commission of the offense which is the objective of his criminal purpose.

To determine if this "kidnapping exemption" exists, the Court developed a "three-prong test to ascertain the applicability of the exemption."

First, the underlying criminal purpose must be the commission of a crime defined outside of KRS 509. Second, the interference with the victim's liberty must have occurred immediately with or incidental to the commission of the underlying intended crime. Third, the interference with the victim's liberty must not exceed that which is ordinarily incident to the commission of the underlying crime. All three prongs must be satisfied for the exemption to apply.¹

Using this test, the Court found that the two crimes were separate and distinct. As such, Griffith's conviction for Unlawful Imprisonment in addition to Assault was affirmed.

PENAL CODE – FLEEING AND EVADING

Carroll v. Com.

2009 WL 160450 (Ky. 2009)

FACTS: Carroll visited the home of Landrum and DeArmond on December 31, 2006. He arrived on foot and borrowed DeArmond's car to get home. Landrum, who was drunk, accompanied him. On the way to Carroll's home, however, Trooper Jewell (KSP) tried to make a traffic stop for speeding. When the trooper attempted the stop, Carroll sped up, and "veered left off the highway onto a narrow, country road." Trooper Jewell later testified that Carroll was driving erratically and that he ultimately lost control and hit a ditch. Carroll fled on foot, leaving Landrum in the passenger seat. Trooper Jewell eventually found Carroll hiding in the woods, some distance from the car, by using a thermal imaging device. Carroll admitted to using methamphetamine and tested positive.

¹ Wood v. Com., 178 S.W.3d 500 (Ky. 2005)

At trial, Carroll argued that Landrum was driving and introduced testimony to that effect. However, he was convicted and appealed.

ISSUE: Is driving at a high rate of speed on a narrow country road sufficient to prove a risk to officers and others?

HOLDING: Yes

DISCUSSION: Carroll argued that the evidence was insufficient to support a finding that he was under the influence of methamphetamine at the time, and that as such, there was insufficient evidence of the risk of his fleeing to the trooper or others, including Landrum. The Court, however, noted that all of the evidence indicated he was driving at a high rate of speed on a narrow, country road, and that he disregarded numerous traffic laws. The Court found sufficient evidence to support the assertion that he was impaired.

Carroll's conviction was affirmed.

PENAL CODE – ASSAULT IN THE THIRD DEGREE

Smith v. Com.

2009 WL 637193 (Ky. App. 2009)

FACTS: Smith was charged with Third-Degree Assault when, while at the Allen County Detention Center, he picked up a chair and threw it at Officer Zalla (Fish & Wildlife). He was convicted of attempted assault and appealed.

ISSUE: Is a reckless state of mind sufficient to charge Third-Degree Assault?

HOLDING: No

DISCUSSION: Smith argued that the instructions given to the jury provided that he could be convicted for "recklessly attempting to assault a police officer." The Court looked to the language of KRS 508.025 and agreed that it was not possible to attempt a reckless act, since an attempt requires a conscious objective.

Smith's conviction was reversed.

PENAL CODE – TAMPERING

Alexander v. Com.

2009 WL 485058 (Ky. App. 2009)

FACTS: On July 14, 2007, Officer McCloud (Radcliff PD) was on a special traffic patrol. He spotted Alexander driving, without his seat belt fastened. Officer McCloud followed Alexander into the driveway of a nearby residence. When Alexander got out of the car, the officer ordered him to go back to the vehicle and get into it. McCloud approached, and "noticed a strong odor of alcohol" about Alexander. Under questioning, Alexander admitted to having been drinking. He was asked about his license and vehicle paperwork, but he stated that the truck was borrowed. At some point, McCloud watched Alexander empty

his pockets and place things in the glovebox, but since the doors were locked, he could not immediately stop Alexander. (He did order Alexander to stop, however, but he did not comply.) Once Alexander stashed all the items, he got out, and McCloud gave him FSTs. During that same time, he learned Alexander had a suspended OL. McCloud arrested Alexander, searched him and secured him in the cruiser.

McCloud searched the truck, finding, in the center console where Alexander had placed items, his wallet and a gift card, along with crack and a crack pipe. He found other crack-related paraphernalia elsewhere in the car. (During this time, Officer McCloud's in-car video picked up several comments from Alexander, when McCloud could be seen to have found an incriminating item.) Alexander eventually denied knowing anything about the items at trial, and that the officer forced him to get into the car. He "essentially claimed that Officer McCloud was fabricating the entire incident."

Alexander was eventually convicted of PFO, possession of a controlled substances and tampering with physical evidence. He appealed.

ISSUE: Is a person in control of a motor vehicle in constructive possession of drugs found in the passenger compartment?

HOLDING: Yes

DISCUSSION: Alexander argued that he could not be found in "possession" of the crack cocaine because he did not own the vehicle, nor did he have "actual physical possession of the substance" or exercise "actual dominion or control over it." Because KRS 218A does not define possession, the Court looked to the ordinary meaning of the term.² Further, the Court noted, the "person who owns or exercises dominion or control over a motor vehicle in which contraband is concealed, is deemed to possess the contraband."³

The Court agreed that since he had, at the least, constructive possession of the cocaine, Alexander's conviction was affirmed.

PENAL CODE – UNLAWFUL USE OF ELECTRONIC MEANS

Filzek v. Com.
2009 WL 414462 (Ky. App. 2009)

FACTS: Filzek was charged in Fayette County as a result of "four conversations he had on the internet and telephone with an undercover police detective posing as a fourteen-year-old girl named Joy." Filzek was charged with four counts of violating KRS 510.155. He took a conditional guilty plea and appealed.

ISSUE: Are separate contacts with an underage subject sufficient to charge with multiple counts of Unlawful Use of Electronic Means?

HOLDING: Yes

² Pate v. Com., 134 S.W.3d 593 (Ky. 2004).

³ Leavell v. Com., 737 S.W.2d 695 (Ky. 1987).

DISCUSSION: Filzek first argued that the “peace officer provision” of the statute violated the First Amendment because “no actual child was involved in his communications and that the statute punishes mere belief.” The Court, however, noted that the U.S. Supreme Court had recently held the “[o]ffers to engage in illegal transactions are categorically excluded from First Amendment protection.”⁴

Filzek also argued that four counts constituted double jeopardy “because they were part of an ongoing course of conduct.” The court looked to KRS 505.020 and concluded that each contact was a separate and discrete act, and that each could be prosecuted as a separate act.

Filzek’s conditional guilty plea was affirmed.

PENAL CODE – SEXUAL PERFORMANCE BY A MINOR

Little v. Com.

272 S.W.3d 180 (Ky. 2008)

FACTS: During a search of Burke’s work locker, an employer found pornographic materials involving children. They contacted the Pikeville PD, and the PD investigated further and did a search (pursuant to a warrant) of Little’s home. There, they found a number of other items of child pornography. His wife, Crystal, looked at the material and identified their daughter, K.B., along with Little and Little’s daughter and son, C.L. and D.L. She did not recall the children having been at their home, but the background was the Burke living room.

Little was arrested, but nothing was found in his home. The children were in the custody of Little’s ex-wife and visitation was now supervised. She knew of only one visit to the Burke home, and after that visit, Little’s unsupervised visitations were terminated.

The three videotapes found during the search of Burke’s home were introduced against Little. The tape, which included amateur splicing, showed the children in their underwear, and included photos of the Burke child with and without underwear under her dress. In some of the video, Burke can be seen touching her stomach and leg, and the child trying to cover her face. There was also video of the two female children in the bath, with male voices in the background. Another video showed Little helping them bathe and focuses on their naked genital regions, and yet another in which Little is tossing the girls up in the air while Burke filmed their bare buttocks and genitalia. In the third video, KB is shown on the couch with a male hand trying to position her and spread her legs apart for the camera, and at one point, she is filmed nude.

Little testified in his own defense, characterizing the video as “family situations.” He claimed Crystal Burke was present during the bathtub incident, but had “stepped out.” He denied knowing upon what Burke was focusing, and stated he’d never seen the videos. He admitted that bringing the children to the Burke home violated the terms of his visitation rights.

Little was eventually convicted on various counts of using a minor in a sexual performance, and promotion a sexual performance by a minor. He appealed.

⁴ U.S. v. Williams, --- U.S. --- (2009)

ISSUE: Are Using a Minor in a Sexual Performance, and Promotion of a Sexual Performance by a Minor two separate charges for double jeopardy considerations?

HOLDING: Yes

DISCUSSION: Little argued that the two charges constituted double jeopardy. The Court applied the Blockburger test, which requires that it compare the applicable statutes to determine “whether each provision requires proof of a fact which the other does not.”⁵

In this case, although there was an overlap in elements, the Court concluded that Little was prosecuted for multiple, separate offenses and for separate victims. The Court found no double jeopardy claim.

Little also argued that there was no evidence of his intent to sexually exploit the children, and that he could not be held responsible for what Burke filmed. The Court reviewed the specific evidence against Little, and found it “wholly unbelievable that Little would not be aware Burke was filming the child’s genital area given the vantage point Burke must have assumed in order to capture the video.” The Court found that a reasonable jury could conclude that Little intended his actions. He allowed his daughter to be filmed in the nude, at one point.

Finally, Little objected to the introduction of the entire videotape, which included spliced footage of unknown persons. The Court applied KRE 401 and 403, and concluded that the videotapes, in their entirety, were relevant to show that Little was complicit with Burke in the filming, and his intent could be inferred from his actions.

Little’s convictions were affirmed.

FORFEITURE

Johnson v. Com.
277 S.W.3d 635 (Ky. App. 2009)

FACTS: Johnson was convicted of trafficking in cocaine and the court ordered the forfeiture of a large amount of cash found during the arrest. He appealed the forfeiture.

ISSUE: Is cash found in close proximity to unlawful controlled substances presumed to be subject to forfeiture?

HOLDING: Yes

DISCUSSION: The Court noted that two wallets, one with \$4,300 in cash and the other with \$3,000, were found in a hole in the box springs in Johnson’s bed. A sock in his suitcase held \$390. The cocaine was found in his clothing near the bed.

⁵ Blockburger v. U.S., 284 U.S. 299 (1932); Polk v. Com., 679 S.W.2d 231 (Ky. 1984).

The Court looked to KRS 218A.410(j), which provided a rebuttable presumption that all money found in close proximity to controlled substance are connected to the drugs. Further, in Osborne v. Com., the Court stated:

On examination of the foregoing statute, it is apparent that any property subject to forfeiture under (j) must be traceable to the exchange or intended violation. This requirement exists without regard to the presumption which appears later in the statute. Without such a requirement, the statute would mandate forfeiture of property which was without any relationship to the criminal act and would be of dubious constitutional validity under Sections 2, 11, 13, 26 and possibly other sections of the Constitution of Kentucky. With such a requirement, however, the General Assembly is entitled to great latitude to create presumptions. Recognizing the difficulty of proof with respect to showing a connection between currency and drug transactions, the General Assembly created a presumption whereby currency found in close proximity to controlled substances was presumed to be forfeitable subject to the right of the owner to rebut the presumption. While the presumption would, at first blush, appear to dispense with the requirement of traceability, we believe the two must be construed harmoniously so as to give effect to the intention of the General Assembly. The Commonwealth may meet its initial burden by producing slight evidence of traceability. Production of such evidence plus proof of close proximity, the weight of which is enhanced by virtue of the presumption, is sufficient to sustain the forfeiture in the absence of clear and convincing evidence to the contrary. In practical application, the Commonwealth must first produce some evidence that the currency or some portion of it had been used or was intended to be used in a drug transaction. Additional proof by the Commonwealth that the currency sought to be forfeited was found in close proximity is sufficient to make a *prima facie* case. Thereafter, the burden is on the claimant to convince the trier of fact that the currency was not being used in the drug trade.⁶

The Court agreed that the money was subject to forfeiture, noting that the denominations (100, 50 and 20 dollar bills) suggested drug trafficking. Johnson introduced evidence that he had received \$4,500 from a family member to buy a vehicle. However the Court agreed that Johnson had not “rebutted the presumption by clear and convincing evidence and in ordering the forfeiture of the cash.”

The Court upheld the forfeiture order.

DUI

Smith v. Com.
2009 WL 276794 (Ky. App. 2009)

FACTS: Smith was indicted in Jefferson County on November 1, 2005, charging him with a DUI that occurred on October 24, 2005. On the date of the indictment, he’d had three convictions, but the third conviction actually occurred after the DUI for which he was charged. (The offense on October 24, 2004

⁶ 839 S.W.2d 281 (Ky. 1992).

"was his third chronological citation for DUI but his fourth conviction, due to his subsequent June 2005 citation and conviction.") He took a conditional guilty plea and appealed.

ISSUE: Does the date of a citation or a conviction control for subsequent DUI charges?

HOLDING: Conviction

DISCUSSION: The Court quickly determined that the date of conviction, not the date of citation, which controlled.⁷ As such, the enhancement for the fourth DUI was appropriate.

Smith's conditional guilty plea was affirmed.

SEARCH & SEIZURE - CONSTRUCTIVE POSSESSION

Miller v. Com.

2009 WL 160370 (Ky. 2009)

FACTS: On June 29, 2004, Trooper Bowles (KSP) was dispatched to the home of Miller and Parker to investigate a strong chemical odor. He tracked the odor to an outbuilding and trash can on the property, and found a "fuel container and several starter fluid cans, both considered precursors of methamphetamine production." Bowles and other troopers approached and knocked, and found a note directing visitors to the side door.

The troopers entered an outbuilding and found a "recently active methamphetamine lab." They also found anhydrous ammonia in an inappropriate container, and a "finished cook of methamphetamine." There were also security lights and cameras around the residence. Trooper Bowles went to get a search warrant, and the remaining troopers secured the scene. During that time, a vehicle recognized as possibly being driven by Parker drove by. Troopers made a traffic stop; they discovered that Parker was driving and Miller was a passenger. Parker's keychain included a key to the outbuilding, and the tag for that key had both Parker's and Miller's name and phone number.

Parker and Miller were brought back to the residence and told of the search warrant. Miller questioned why the lights were on at the house. He stated that he left the outbuilding locked most of the time, and that his key to the building had disappeared previously. Inside the house, the troopers found methamphetamine and paraphernalia, television monitors hooked up to the security cameras and a police scanner. They found night vision goggles in the vehicle, as well.

Miller was charged, and ultimately convicted, of possession of the anhydrous in the unapproved container, manufacturing methamphetamine, possession of methamphetamine and possession of paraphernalia. He appealed.

ISSUE: Does having a key to a building constitute constructive possession of the contents of that building?

HOLDING: Yes

⁷ Royalty v. Com., 749 S.W.2d 700 (Ky. App. 1988)

DISCUSSION: The Court agreed that convictions for manufacturing methamphetamine and possession of methamphetamine constituted double jeopardy, and dismissed the latter. (However, the possession of anhydrous was not double jeopardy when coupled with the manufacturing methamphetamine, under the Blockburger⁸ test.) However, the Court agreed that Miller was in constructive possession of the lab, since he had access to a key to that building.

Finally, the Court agreed it was proper to admit the testimony of Trooper Bowles concerning the relevance of the night vision goggles, and how they were connected to the theft of the anhydrous ammonia.

Miller's convictions for everything but the possession of methamphetamine were affirmed.

SEARCH & SEIZURE – SEARCH WARRANT

Rich v. Com.
2009 WL 484969 (Ky. App. 2009)

FACTS: On September 8, 2008, Sheriff Riddle (Clinton Co. SO) received information from a CI had personally observed Rich and another person bringing cocaine to Rich's residence. The Sheriff (and deputies) "had observed heavy traffic in and out of Rich's mobile home for the past several months." Further, "[v]isitors to Rich's residence would stay a few minutes and then leave."

The sheriff sought a search warrant on Sept. 8 and it was promptly executed. They found numerous items of drugs and paraphernalia. He moved for suppression which, after a hearing, the trial court denied. Rich was convicted on several charges and appealed.

ISSUE: Is an indication that an informant had given reliable information multiple times sufficient to prove that reliability?

HOLDING: Yes

DISCUSSION: The Court reviewed the video of the suppression hearing, and noted that Sheriff Riddle had "testified that the CI had provided reliable information leading to successfully warrants and arrests four to five times in the last two to three years." The Court agreed that the information (based upon an investigation) was sufficient and upheld the denial of the suppression motion.

Rich's convictions were affirmed

Girton/Bartlett v. Com.
2009 WL 427229 (Ky. 2009)

FACTS: On November 9, 2005 Jiminez was murdered at this home in Louisville. Bartlett and Girton, who had met only a few days before the murder, had just moved into an apartment with Morgan. On the day of the murder, they ended up near Jiminez's apartment, driving a friend's car. Bartlett was

⁸ Blockburger v. U.S., 284 U.S. 299 (1932)

driving, and claimed that when they stopped in front of Jiminez's building, Girton got out and entered the building. He could see Girton "tussling" with another man and he heard a shot, followed by Girton running out and getting into the car. Girton claimed that Jiminez had robbed him some weeks before, and that when he spotted him, he "suddenly decided to retaliate." When he confronted Jiminez, he tried to stab Girton, and Girton shot him. However, testimony indicated that Jiminez had only been in the U.S. for some ten days. Testimony conflicted as to what happened with the weapon. When pressed, "each young man admitted that the other, at least, had had robbery in mind." Witnesses led the police to the car, which then led to a search warrant for Morgan's apartment. They found a handgun, ammunition, marijuana and crack cocaine, among other items. Bartlett and Girton were charged with murder. At trial, Girton told an entirely different story, essentially, that he was driving and that Bartlett was the assailant. Girton claimed that since he was a juvenile, it was agreed he would take responsibility, presuming that his punishment would be less severe. However, when he was tried as an adult, he testified that he was not willing to take the risk of a life sentence for something he had not done. (Witnesses at the scene could not positively identify the shooter.)

Ultimately both were convicted of First-Degree Robbery and Second-Degree Manslaughter, along with other charges. Both appealed.

ISSUE: Should a warrant state the time and date of the underlying crime, if applicable?

HOLDING: Yes

DISCUSSION: Both defendants argued that their custodial statements should have been suppressed "on the ground that they derived from an illegal search of Morgan's apartment," and that the warrant "was based on an inadequate showing of probable cause."

The warrant stated, in relevant part, that Harris, the girlfriend from whom they'd obtained the car, said that:

... she was at 1523 Oneida [Morgan's apartment] last night and [met her friend, "J .R.," also known as James Girton. She stated that James moved into the listed address which is leased to Harrison Morgan. Ms. Harris stated that Mr. Girton and his friend, a black male who goes by "Polo," left in her car to go to the store between 1810 and 1840 hours and they returned at approximately 1910 hours.

They argued that because the "affidavit fails to state explicitly the date and time of the shooting," it "must be deemed a stale crime, evidence of which was not likely to be found at Morgan's apartment." They also claimed that the "affidavit fails to establish Harris's reliability...." The Court agreed that a "warrant affidavit that fails to include enough temporal information to permit the magistrate to assess its staleness is inadequate as a matter of law."⁹ However, the Court noted that it was "true that in her description of the crime the requesting officer omitted the date, a detail that should have been included," but further stated that "[w]arrant applications are often prepared in haste, however, and, as noted above, are to be assessed not according to rigid technicalities but in a practical, common-sense manner taking into account the application as a whole." The combination of the date of the application and Harris's reference to "last night," implied that was when her "car had been seen speeding away from the scene of the crime."

⁹ *U.S. v. Hython*, 443 F.3d 480 (6th Cir. 2006).

Further, the Court stated:

Although not a model of clarity, perhaps, the affidavit adequately conveyed to the issuing judge when the crime occurred and permitted him to determine that the officer's information was not stale.

The Court also noted that Harris was not an anonymous informant, but that the officers "knew [her] identity and questioned her in person" and the information she provided was corroborated by witnesses to the crime.

Bartlett and Girton also argued that there was no evidence that the shooting took place in the context of a robbery or attempt at theft. The Court, however, concluded that a rational jury could conclude that the "pair's coordinated getaway from the scene that Bartlett and Girton rode through the Arcadia apartments [indicated they were] looking for someone to rob...."

They also argued that the admission of mention of the drugs found during the search was improper. The trial court had "permitted the arresting officers to itemize during their testimony what was seized as part of the description of the arrest," but did not permit them to elaborate on it. The jury had been admonished that the gun was not the murder weapon and Morgan admitted the gun and the cocaine were his. The Court agreed that the admission of the gun and the uncharged drugs (the marijuana) was improper, but found it to be harmless error.

Finally, Bartlett complained that a detective's statement that he would tell the prosecutor that he cooperated was an inducement because it made an "improper promise of leniency." The Court, however, noted that it was clear that the "detective promised Bartlett nothing but to tell the prosecutor that he had cooperated," which was proper.¹⁰

Bartlett's and Girton's convictions were affirmed.

SEARCH & SEIZURE - CONSENT

Rivers v. Com.

2009 WL 103273 (Ky. 2009)

FACTS: Rivers was developed as a suspect in a firearms theft, although the informant's details were sketchy. Lexington officers followed up on October 4, 2007, and corroborated some of the information. They did a knock and talk and found Jackson, Rivers' girlfriend, and her mother present. Jackson stated the apartment was hers and that Rivers stayed there occasionally.

Officer Gibbons explained why they were there and asked Jackson for consent to search for the guns. She was reluctant, but did consent. The officers found a handgun under the mattress in the bedroom, and Jackson explained that Rivers had purchased the gun from a neighbor. (Officers were able to confirm the purchase later.) They found a small safe under the bed, and Jackson stated that her "boyfriend has some personal use in there" - or "something to that effect." Officer Gibbons asked her if she knew the

¹⁰ Peak v. Com., 197 S.W.3d 536 (Ky. 2006).

combination and “she just started typing it in.” Inside they found two boxes of ammunition and 37 grams of powder cocaine.

Although testimony conflicted, Officer Gibbons later testified that he had stepped outside and made a call about getting a search warrant for the apartment. He stated that he believed he had probable cause to do so even prior to the visit, but did not seek one because they had gotten consent. Jackson’s mother, Carolyn, testified that the officers walked in when the door was opened and that her daughter “did not immediately consent” and that the officers talked to her for some time, getting her “upset and crying.” She testified that Sheena (her daughter) had told the officers that they needed to get a search warrant, and that “then they made a call and she assumed they were having a search warrant brought to the house.” Her daughter asked her advice about permitting the officers to search, and she advised that if she hadn’t seen the guns, she should let them search. She agreed that Sheena Jackson did consent.

The Court upheld the admission of the evidence from the search. Rivers took a conditional guilty plea and appealed.

ISSUE: Does a lessee of an apartment have apparent authority to consent to a search of locked containers inside that apartment?

HOLDING: Yes

DISCUSSION: Rivers argued that the search was “illegal because Sheena’s consent was a product of coercion, police lying, and deceptions.” He had argued at the trial court that Sheena did not have the authority to consent to the search of his personal property, but did not argue that at the appellate level. However, the Court elected to address the issue, and quoted at length from Com. v. Nourse¹¹ to find that “Sheena clearly had the authority to give consent for police to search the apartment. She did not limit her consent to a particular area, and her knowledge of the combination for the safe indicated she had common authority over it. (Or at the least, for the officers to believe that she did.) Further, the Court found no reason to question the trial court’s decision that the consent was voluntary.

Rivers conditional guilty plea was upheld.

SEARCH & SEIZURE – ARREST WARRANT

Solomon v. Com.

2009 WL 276755 (Ky. App. 2009)

FACTS: On March 21, 2007, Sgt. Williams (unnamed Campbell County area agency) observed Solomon walking along a county road, apparently hitchhiking. Sgt. Williams told him hitchhiking was illegal and offered him a ride. He asked to see Solomon’s ID, which he later explained was because “he wanted to run a background check ... for safety purposes before voluntarily giving him a ride.” He learned there was an active warrant, so he arrested him and took him to jail. There, he was searched and a contact lens case with cocaine was found. He was then charged with possession of a controlled substance. (He was not charged for hitchhiking.)

¹¹ 826 S.W.3d 329 (Ky. 1992).

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

ISSUE: Does the existence of an active arrest warrant supersede any impropriety for the stop?

HOLDING: Yes

DISCUSSION: Solomon argued that the officer lacked reasonable suspicion to stop him, because “Sgt. Williams mistakenly believed that all hitchhiking is illegal.” (In fact, the Court noted, Kentucky law only prohibits standing in the roadway, and that it does not “prohibit soliciting a ride while standing in grass along a roadway.” The Court, however, stated that it was “not persuaded that a stop occurred even though Sgt. Williams testified that had Solomon run away or refused to answer his questions,” he would have believed a criminal act was occurring. The Court found “no indication that Sgt. Williams intended to arrest or detain Solomon for the violation” he believed was occurring. The Court agreed that the offer was a “gesture that a reasonable person would likely construe as friendly and helpful rather than a restraint of freedom.”

Finally, the Court held that “regardless of whether a stop occurred, the knowledge that Solomon had an active bench warrant acted as an intervening event that would validate Solomon’s arrest.”¹² The Court found that such an “intervening act ... dispelled any prior wrongdoing or misjudgment” of the officer involved.

Solomon’s conditional guilty plea was upheld.

SEARCH & SEIZURE – EXIGENT CIRCUMSTANCES

Hollon v. Com.

2009 WL 276528 (Ky. App. 2009)

FACTS: On the day in question, KSP dispatchers “received four separate 911 calls within a short time.” The female caller “did not give very much information and was screaming in apparent distress.” The dispatchers were able to piece together information suggesting her location, and Trooper Rawlins was sent to investigate. Trooper Rawlins asked Sheriff Dunn for assistance, as he was new to the area, and the sheriff found a likely location that matched the description. They ended up at the Hollon residence.

There, they found two men working outside, and one immediately “went behind a small outbuilding, apparently desiring to avoid the officers.” Hollon remained outside but refused to give them permission to search. The trooper, however, “proceeded to search the house and surrounding buildings limiting his search to locations where a distressed woman might be found.” Inside the house, he found marijuana in plain view. He then obtained a search warrant, and ultimately, KSP found “a sophisticated marijuana cultivation operation and 325 marijuana plants.”

Hollon was indicted for cultivating marijuana. He requested suppression but was denied. He took a conditional guilty plea and appealed.

ISSUE: Does an emergency permit an exigent search of a residence?

¹² See Baltimore v. Com., 119 S.W.3d 532 (Ky. App. 2003); Hardy v. Com., 149 S.W.3d 433 (Ky. App. 2004).

HOLDING: Yes

DISCUSSION: The Court ruled that the four telephone calls that led the trooper to Hollon's home, which fit the general description given by the distressed caller. (His own statements indicated that the caller might have been his girlfriend, who had left the property, but in fact, the distressed woman was later located.) The Court found that the search had not been a pretext, and that they had investigated each house along the suspect road. The troopers properly limited their search to their original reason for being there, waiting for a warrant to search further.

The Court also noted that Todd v. Com. is an exception to the search warrant requirement that occurs "when officers reasonably believe that someone inside a home is in need of immediate assistance."¹³ The Court noted that the "facts [that] arose subsequent to the issuance of the warrant ... have no bearing on the officers' reasonable belief, at the time of the warrantless search, that they might locate a woman in need of assistance in Hollon's home."

Hollon's conditional plea was affirmed.

SEARCH & SEIZURE - TERRY

Bailey v. Com.
2009 WL 276715 (Ky. App. 2009)

FACTS: On February 8, 2006, Officers Heselschwerdt and Final (Louisville Metro PD) were "called to an apartment complex that was located in what was known to be a 'high-crime' area." The apartment owner had given LMPD permission to enforce the no trespassing law on the property. As they arrived, the officers spotted Bailey "sitting in a vehicle that had been backed into a parking space." The engine was running, but the car had "multiple flat tires, and its driver's side window was rolled down even though it was cold outside."

The officers drove around the complex for 15-20 minutes, and returned to find Bailey still in the vehicle. Officer Final parked in front, and approached to see if Bailey "who was watching a DVD" was alright and if he lived at the complex. As the officers approached, Bailey tried to get out, but was ordered back into the vehicle. He told the officers that he did not live in the complex, but was visiting a relative. He was unable to identify which apartment, however. He had no ID, but gave the officers his personal information. Officer Final noted the smell of marijuana from the vehicle. Bailey had no outstanding warrants and the vehicle information was also clear, although the license tag had expired.

"While Officer Final was checking the VIN, Officer Heselschwerdt took Bailey to the back of the vehicle and asked him if he could pat Bailey down for weapons in the interest of officer safety." Bailey refused, but he was patted down anyway, and the officer "felt hard rock-like objects in Bailey's" pants pocket. The rocks were confirmed to be crack cocaine that were individually packaged, for a total of 4.5 grams of crack cocaine (in 7 rocks) and less than a gram of powder cocaine. Marijuana was also found. The vehicle was searched and nothing was located.

¹³ 716 S.W.2d 242 (Ky. 1986).

Bailey was indicted on charges relating to controlled substances. He moved for suppression and was denied. He was convicted on most of the charges and appealed.

ISSUE: Is it a seizure to keep someone from walking away for a few minutes?

HOLDING: Yes

DISCUSSION: Bailey argued that the evidence should have been suppressed as the “fruit of an unconstitutional stop” because the officers lacked reasonable suspicion to detain and search him. The Court noted that although Officer Final’s parking of his cruiser in front of Bailey’s vehicle would normally be a seizure, that it was not the case in this situation because the vehicle itself was essentially unmovable. However, the Court found that Bailey “was obviously seized when he attempted to get out of the vehicle but was instructed by the police to get back in since he was clearly not free to leave the scene at that time.” The Court reviewed the information available to the officers at the moment and agreed it was a close decision, but noted that officers may certainly approach someone and pose a few questions under the circumstances. However, once Officer Final smelled the marijuana, he then “had probable cause to search Bailey on grounds independent from those relating to the original basis for the stop.”¹⁴ The “intervening circumstance was sufficient to dissipate any ‘taint’ that might have been caused by prior unlawful conduct on the part of the police.”¹⁵

Bailey also argued that Det. Seelye’s testimony, “concerning the criminal practices of drug dealers and traffickers” was improper. The Court, however, agreed that the detective easily qualified as an expert in drug trafficking, based upon his training and experience.

After addressing several other issues, Bailey’s conviction was affirmed.

SEARCH & SEIZURE - ROADBLOCK

Rassman v. Com.
2009 WL 722721 (Ky. App. 2009)

FACTS: On Dec. 21, 2004, Rassman was arrested for DUI as a result of a KSP roadblock in Carroll County. He moved for suppression, arguing that the roadblock was unconstitutional, but the trial court denied him. He took a conditional guilty plea and appealed.

ISSUE: Should an officer be aware of their agency’s guidelines for roadblocks?

HOLDING: Yes

DISCUSSION: Rassman’s first argument was “that the arresting officer failed to comply with the systematic plan established by the KSP¹⁶ for roadblocks,” since that trooper “did not have any knowledge of whether media announcements were made prior to the roadblock, did not know “which officer was in

¹⁴ See Dunn v. Com., 199 S.W.3d 775 (Ky. App. 2006).

¹⁵ Wilson v. Com., 37 S.W.3d 745 (Ky. 2001).

¹⁶ General Order OM-E-4.

charge of the roadblock” and “whether or not all cars were stopped.” He also “was unable to articulate the relation of the roadblock to public safety or traffic violations problems at the roadblock’s location.” The Court, however, concluded failure to “comply with technical precision to each roadblock guideline is not fatal to the constitutionality of the roadblock.” The Court noted that Rassman’s assertions were taken out of context from the transcript, and that in fact, the trooper did provide enough detail to confirm that the roadblock was undertaken with the approval of KSP supervisors.

Rassman’s conditional guilty plea was upheld.

Kilburn v. Com.
2009 WL 484981 (Ky. App. 2009)

FACTS: On September 10, 2005, the Perry County Sheriff’s Office set up a traffic checkpoint. It was “intended primarily to be a sobriety checkpoint.” Initially, Deputy Sheriffs Sparkman and Smith were present and Deputy Miller was to arrive later. Sheriff Wooton had approved the checkpoint earlier that day.

Kilburn was one of the first stops, made when the deputies were stopping every car. They learned he was driving on a suspended OL and he was arrested. His vehicle was searched incident to the arrest, and they found drugs, a concealed handgun and a throwing knife.

The Perry County Sheriff’s Office had specific guidelines for such checkpoints, including a list of 26 pre-designated locations. The checkpoint location at issue was not one of the locations listed, however.

Kilburn was indicated for trafficking, carrying a concealed weapon and promoting contraband. He moved for suppression, arguing the checkpoint was illegal. That was denied, the Court finding the checkpoint to be lawful. Kilburn took a conditional guilty plea and appealed.

ISSUE: Is a roadblock location approved in advance by a commanding officer appropriate?

HOLDING: Yes

DISCUSSION: Kilburn argued that by not following its own procedures, the Sheriff’s Office violated his constitutional rights. The Court looked to Buchanon¹⁷ for guidance and found that the location of the checkpoint, approved in advance by the Sheriff, was proper.

Kilburn’s conditional guilty plea was affirmed.

SEARCH & SEIZURE - VEHICLE STOP

Durbin v. Com.
2009 WL 153005 (Ky. App. 2009)

FACTS: On June 3, 2006, Durbin and his wife, along with Durbin’s cousin, Willie, were stopped by the Hardin County Narcotics Task Force. Det. Thompson later testified that he’d received a call from a

¹⁷ Com. v. Buchanon, 122 S.W. 3d 565 (Ky. 2003).

pharmacist that “two people with the same last name, who were from out of town, had just purchased pseudophedrine.” (This indicated they might be “pill shoppers,” who go to several different locations to buy legal amounts of pseudophedrine, “in order to accumulate a sufficient quantity to manufacture methamphetamine.”) Det. Thompson testified about how Elizabethtown is attractive because of its proximity to I-65 and the number of pharmacies on the “ring road around the town.”

With a distinctive vehicle description, Det. Thompson called several other pharmacies and located the vehicle at a Rite Aid. They followed the vehicle to another pharmacy, and Det. Thompson was contacted by that pharmacy to report that “three people from out of town had purchased pseudophedrine.”

Det. Alaman stopped the vehicle and checked the ID of the occupants. He obtained consent to search from the driver (Willie Durbin) and found numerous packages of pseudophedrine, both opened and unopened.

Durbin was charged with complicity to purchase methamphetamine precursors. He moved for suppression and was denied. He then took a conditional guilty plea and appealed.

ISSUE: Is a reasonable articulable suspicion of criminal activity sufficient to justify a traffic stop?

HOLDING: Yes

DISCUSSION: Durbin argued that the vehicle stop was based, improperly, “simply on the basis of information provided by an unnamed pharmacist that two people with the same last name purchased legal amounts of pseudophedrine.” Further, he noted that it was likely that people from neighboring counties would come to Hardin County for medical attention and supplies.

However, the Court noted there was “considerable additional evidence to support a reasonable suspicion that the individuals in the Blazer were engaged in illegal activity.” The Court summarized the experience of the two detectives, the information they received from multiple sources and their own observations as to the multiple stops made by the vehicle. (The Court acknowledged that the pharmacist wasn’t really an anonymous tip, but ruled that it wasn’t a crucial determination anyway.) The Court found that the officers had a “reasonable, articulable suspicion that warranted” the traffic stop.

Durbin’s conditional guilty plea was affirmed.

INTERROGATION

Galloway v. Com.
2009 WL 276524 (Ky. App. 2009)

FACTS: On January 31, 2005, “Galloway and the victim returned from visiting friends where Galloway had been drinking.” The victim had also been drinking. During the evening, they had a discussion which upset the victim, but “they soon got past that and the victim initiated sexual contact.” However, the victim’s version of the event was much different - she testified that they got into an argument and that he beat her and made her sit outside naked in the cold. He then allowed her back inside but burned her and forced her to engage in anal sex. She eventually went to a neighbor’s house, and was

taken to a hospital where she was treated for the beating. A test confirmed the sexual contact. She then went to a shelter.

However, several months later, they reconciled and began living together. "Both knew the police were looking for Galloway because of the reported attack." When Galloway threatened her again, she called the police and he was arrested.

During the trial, a deputy began to testify that he had transported Galloway and that during the drive they had a conversation. Counsel immediately objected and the trial court conducted a hearing to determine if Galloway's statements should be suppressed. The trial court determined that there was no Miranda violation and allowed the deputy to continue to testify.

Galloway was convicted of Assault and Sodomy and appealed.

ISSUE: Is a conversation with a subject under arrest sufficient to require Miranda warnings?

HOLDING: No

DISCUSSION: The deputy "acknowledged that he never provided Galloway with any Miranda warnings." He also stated that they "did engage in idle conversation" however." The Court reviewed the versions of the conversation and agreed that "[w]hile it is true that Galloway was in custody during this conversation," it could not "hold that the conversation met the level of interrogation so as to require suppression."

After resolving several other issues, Galloway's conviction was affirmed.

INTERROGATION - QUARLES

Carver v. Com.
2009 WL 160438 (Ky. 2009)

FACTS: On or about April 15, 2006, Deloe found Carver at the home of Witcher, her boyfriend, "slumped over in a chair when she returned from the Allen County Fair demolition derby." When she approached Carver, "he jumped up exclaiming that he did not break into anyone's house." She called Witcher, who "returned home to confront the then unknown intruder" and they fought. (Carver later testified that Witcher had given him a ride and that they were both heavily intoxicated.

Deloe called for help, and Officer Ford and Sgt. Cooke (Scottsville PD) were dispatched. They found Carver "conscious, but face down in the yard, having been physically beaten by Witcher." Carver was secured, and the officers later testified that he was "out of control and combative at the scene." For that reason, he wasn't frisked at the time. The officers found a window air conditioner knocked out and on the ground and several other items scattered around, and both Witcher and Deloe testified that the items were not that way earlier in the evening. Carver also kicked out a window of a police car.

Carver was taken to the hospital and was unhandcuffed for x-rays. He then produced a knife and flourished it. He finally surrendered the knife, which was identified at trial "as a type of a steak knife."

Deloe testified that it belonged to her, but Carver argued that “he found the knife on the table he had knocked over at the hospital.” Sgt. Cooke testified that Carver had said that Cooke “needed to have his boy [Officer Ford] check me a little better before he puts me in the car.”

Carver was indicted for Burglary, CCDW and related charges. He was convicted and appealed.

ISSUE: Are statements made in an emergency situation subject to Miranda?

HOLDING: No

DISCUSSION: Among other issues, he argued that “the statements he made at the hospital regarding the knife he brandished were inadmissible at trial because they were made before receiving the Miranda warnings. (The admission raised the Burglary charge from Second Degree to First Degree.) The Court addressed the statement under the public safety exception, noting that his possession of the knife “at the hospital created a safety risk to ... staff, patients police officers and himself.”¹⁸ In such situations, the Court stated the police “in potentially dangerous situations can ask questions which are necessary to establish safety but may not ask questions which are designed to elicit testimonial evidence from the suspect.” The Court found no reason to question Cooke’s initial question as to “what was he doing with the knife “ to be anything other than an “attempt to immediately diffuse a dangerous situation.”

However, the Court also found that while Carver was “technically in police custody ... he was not in an inherently oppressive interrogation atmosphere.” His lack of direct response to the question indicated that he “was not succumbing to the inherent pressure of police custody.”

The Court found that the evidence indicated he had the gun during the burglary. After resolving other issues, Carver’s conviction and sentence was affirmed.

Taylor v. Com.
276 S.W.3d 800 (Ky. 2008)

FACTS: On Dec. 29, 2003, Buckner was shot and killed in Louisville. Witnesses identified the suspect as brothers, and the police found the two (Raymond and Timothy Taylor) near the suspect vehicle. They captured Raymond and continued to search for Timothy. They tracked him, with a tip, to a nearby house and entered with the consent of the owner. They found Timothy and took him to a Louisville Metro Police Department office. Timothy spoke to Detectives Lawson and Schraut, and Taylor waived his Miranda rights.

Timothy Taylor then confessed that he shot Buckner. Both Taylors were jointly charged with murder and the cases were severed. Timothy Taylor was tried first and was convicted. (Raymond subsequently pled guilty.) Timothy Taylor appealed.

ISSUE: Is a technical violation of KRS 610.200 and .220 sufficient to require the suppression of a statement?

HOLDING: No

¹⁸ U.S. v. Quarles, 467 U.S. 649 (1984).

DISCUSSION: Taylor argued, among other issues, that his confession was inadmissible because the police violated KRS 610.200(1) and KRS 610.220(2) during his detention, and that he did not properly waive his Miranda rights.

The Court agreed that the officers had sufficient probable cause to make the arrest. The Court also found that the police had spoken to the Taylor's mother at her residence and transported her to the local substation for her protection. They explained what had happened and she gave consent to search her home and vehicle. She was notified when Timothy Taylor was arrested and was informed of the charges against both boys.

The Court agreed that although she was not notified immediately, but several hours later, the "fact remains that the police had made efforts to contact her and keep her apprised of the situation." The Court found that the confession was voluntary, and "can still be admissible even though the police did not adhere to the statutory provisions of the juvenile code."¹⁹ (KRS 610.200)

With respect to KRS 610.220, the Court found that Taylor was taken into custody at 3:41 p.m. Det. Schraut contacted the juvenile detention facility less than an hour later, but the CDW was not available. He asked that the CDW be paged at 5:33, and spoke to the CDW at 5:45 p.m. He requested, and received, a two hour extension. He requested and received a second extension at 7:22. At 9:45 p.m., Timothy was transported to the detention facility. The Court noted, however, that "even without considering the document," that a failure to strictly follow the provisions of KRS 610.200 does not automatically make a confession inadmissible."²⁰ The Court noted that once Timothy was identified as a minor, he was immediately advised of his Miranda rights, and received them a second time approximately an hour later. He signed a waiver, and actually received Miranda a third time, before his confession was recorded. The Court found his confession voluntary and admissible.

The Court also noted that Taylor was "calm, aware of the consequences of his actions, and interested in helping himself by cooperating." He "was offered food, drinks, cigarettes and bathroom breaks."

Timothy Taylor's conviction was affirmed.

SUSPECT IDENTIFICATION

Carter v. Com.
2009 WL 414356 (Ky. App. 2009)

FACTS: Carter and two accomplices (also part of the motion to suppress) were captured following a robbery. Two witnesses were "driven past" the cruiser where the three were "handcuffed and seated on the ground" and they identified the three as the robbers. They were indicted.

All three moved for suppression, which the trial court denied. Carter took a conditional plea and appealed.

ISSUE: Are the five Biggers factors critical in assessing the reliability of a show-up identification?

¹⁹ Murphy v. Com., 50 S.W.3d 173 (Ky. 2001)

²⁰ Shepherd v. Com., 251 S.W.3d 309 (Ky. 2008).

HOLDING: Yes

DISCUSSION: The Court reviewed the testimony from the identification. The two witnesses had described the two male suspects, by race, gender, weight and approximate age, and gave specific details on their clothing. The female was described in less detail. Office Ruzzene (Lexington PD) spotted the suspects and Officer Goldie assisted in capturing the three. Officer Ruzzene returned to pick up the witnesses. One of the witnesses stated that “Carter was the man who wielded the knife; however, the knife was actually found in the possession of Weathers.” One of the two witnesses identified the robbers primarily by their clothing.

The opinion noted that Officer Ruzzene made the stop approximately 20 minutes following the dispatch and that the showup was about 12 minutes later. The Court agreed that viewing the three suspects, sitting on the ground, handcuffed and surrounded by officers is inherently, and extraordinarily, suggestive.

The Court then reviewed the Biggers factors:

- (1) the opportunity of the witness to view the criminal at the time of the crime;
- (2) the witness’s degree of attention;
- (3) the accuracy of the witness’s prior description of the criminal;
- (4) the level of certainty demonstrated by the witness at the confrontation; and
- (5) the length of time between the crime and the confrontation.

The Court noted that both witnesses “had good opportunities to view the group.” When the robbery was committed, one of the witnesses “focused his attention on the events and circumstances surrounding the attempted robbery.” It “has been held that a witness’s attention during traumatic experience is presumed to be acute.”²¹ The descriptions given by the two witnesses “were very similar” and “each accurately remembered specific details concerning what the robber was wearing.” The group’s composition (two black males and one white female) added to the “accuracy element of the description.” The witnesses were relatively certain (one more so than the other), “enough to amount to a positive identification.” Finally, the length of time that elapsed, and the short distance away where the suspects were caught, “favor[ed] the identification.” All five factored “weigh heavily in favor of the reliability of the identification.”

The Court upheld the denial of the suppression motion and Carter’s conviction was affirmed.

Waller v. Com.
2009 WL 276601 (Ky. App. 2009)

FACTS: On December 29, 2002, Officer Langley (Lexington PD) was off-duty and shopping when she “observed a man removing tools from the back of a truck and loading them into a maroon” vehicle. She followed the man in her patrol car and got another look at his face, and recorded the vehicle license plate. She lost him on New Circle Road.

Officer Langley returned to the store and interviewed the truck’s owner, Post, “who gave a detailed description of the items that had been stolen and their value.” She ran the plate and learned that Waller

²¹ Levasseur v. Pepe, 70 F.3d 187 (1st Cir. 1995).

owned the vehicle. Officer Langley located Waller and interviewed him. He admitted ownership of the vehicle but denied having been at the Best Buy store. She recognized him, however. Waller gave Officer Langley (and Officer Egbert) consent to search but the tools were never recovered.

Waller was indicted for Theft and PFO. He requested suppression, claiming that Langley's identification had a "low indicia of reliability." The trial court denied the motion and he was convicted. He absconded prior to sentencing but was finally sentenced in 2007. He then appealed.

ISSUE: May a police officer be both an eyewitness and an investigator in the same case?

HOLDING: Yes

DISCUSSION: Waller claimed that Langley's identification was insufficient to support his conviction. Langley argued the case under the Biggers²² factors, but the Court noted that Officer Langley was an eyewitness who did not "identify Waller with the aid of suggestive police procedures." He attacked her initial description of the suspect as slim, which Waller was not, but the Court agreed with the decision "to leave the credibility of the identification in the hands of the jury." Langley's "role as both the eyewitness to the crime and the investigating officer does not detract from the reliability of her identification."

The Court also noted that the victim's testimony that the tools were valued at more than \$300 was sufficient, particularly when provided in detail to the jury, as was done in this case.²³

Waller's conviction was affirmed.

TRIAL PROCEDURE / EVIDENCE

Reed v. Com.

2009 WL 735884 (Ky. 2009)

FACTS: Reed was charged, along with several others, in Rowe's murder in Magoffin County. During the course of the trial, a bailiff overheard a witness tell another that a few years before the murder, Reed had threatened Rowe. The bailiff passed it on to the prosecutor, who immediately notified the court and the defense attorney that he would be questioning the witness about the matter. The defense attorney objected, under RCr 7.24 and RCr. 7.26. The court allowed the defense attorney the opportunity to question the witness before she took the stand, but she was allowed to testify at trial. He was convicted at trial and appealed.

ISSUE: Is the defense entitled in discovery to unrecorded inculpatory statements made by the defendant or others?

HOLDING: Yes

DISCUSSION: Reed argued that the admission of such testimony "unfairly surprised and prejudiced him and "amounted to 'trial by surprise.'" The Court, however, noted that the Commonwealth was only

²² Neil v. Biggers, 409 U.S. 188 (1972); Savage v. Com., 920 S.W.2d 512 (Ky. 1995).

²³ Com. v. Reed, 57 S.W.3d 269 (Ky. 2001)

required to disclose evidence under RCr 7.24 such oral statements that it was aware of, and in this case, it was not aware of the statement and disclosed it immediately upon discovery.²⁴ In addition, RCr 7.26 was not violated since the statement was never recorded in any way. The Court agreed that its admission was not error.

Reed also argued that the admission of the testimony of several individuals, include police, that improperly bolstered another witness's "prior out of court statements which were consistent with her trial testimony" was appropriate. The Court, however, noted that one of the detectives did not introduce any hearsay, but simply confirmed ... "that [the witness's] version of the incident remained essentially the same throughout the investigation." Further, the fact that her statements remained the same after a grant of immunity as it was before was credible and worthwhile evidence.

Reed's conviction was affirmed.

NOTE: Although in this case, the statements were admitted, it is absolutely critical that any oral inculpatory statements that are to be used at trial be provided to the defense in discovery.

Dalton v. Com.
2009 WL 735882 (Ky. 2009)

FACTS: Dalton and several others were accused of robbery and murder. Three of the co-conspirators accepted plea deals. Dalton was convicted of Robbery and Complicity to Murder. She took a conditional sentencing agreement and appealed.

ISSUE: Is repeating a non-inculpatory statement made by a co-defendant hearsay?

HOLDING: No

DISCUSSION: During the trial, one of the investigators "was allowed to testify about his interrogation of the non-testifying co-defendant, Ricky King." The Court noted that also it was characterized as an error under Crawford v. Washington. In fact, "it actually lies at the intersection of Crawford and Bruton.²⁵" The Court, however, found that neither applies, "because the statements do not inculcate Dalton." They are, however, hearsay, and "[a]s no exception to the hearsay rules applies in this situation," it was error to admit the testimony.²⁶ But again, it was harmless error because the testimony did not inculcate Dalton.

Dalton's conditional sentencing agreement was affirmed.

Cuzick v. Com.
276 S.W.3d 260 (Ky. 2009)

FACTS: On Dec. 16, 2006, Officer Sapp (Nicholasville PD) was driving his marked car, but off-duty. He spotted Cuzick driving recklessly and he "turned on his lights, turned on the in-car camera, and began pursuit." He caught up with Cuzick and got out, but Cuzick fled. Sapp continued the chase, "traveling

²⁴ Stone v. Com., 418 S.W.2d 646 (Ky. 1967).

²⁵ Bruton v. U.S., 391 U.S. 123 (1968).

²⁶ KRE ; RCr 9.24.

parallel to [Sapp] in the correct lane and with a spotlight trained on [Sapp's] car." Officer Faddasio and Corporal Fleming arrived and the "three patrol cars fell in line in a high-speed chase" that "continued for approximately three to four miles and reached speeds in excess of eighty-five (85) miles per hour, during which time [Cuzick] was driving erratically and weaving from side to side." Sapp tried to do a "rolling roadblock" with no success. Eventually Cuzick's car began to smoke and he coasted to a stop. The officers exited with guns drawn and ordered him to get out. He was on the cell phone and "ignored the officers' orders." The officers forcibly removed him. They noted a "strong smell of alcohol" and he continued to resist.

Cuzick was charged with Fleeing and Evading, Resisting Arrest, DI and related charges. He was convicted and appealed.

ISSUE: May officers narrate a video in which they played a part?

HOLDING: Yes

DISCUSSION: Cuzick argued that the Court "should not have allowed two police officers to narrate videos played during their trial testimony - the substance of the videos having been captured from cameras mounted in their cruisers...." During Corporal Fleming's testimony, he responded to the prosecutor's questions "describing the images on the video from his perspective as they happened." The Court found that the "fulcrum of the matter" rested upon "whether the witness has testified from personal knowledge and rational observation of events perceived and whether such information is helpful to the jury." The Court noted such witnesses "may not 'interpret' audio or video evidence." In this case, the court found that the "testimony was explicative of the officer's perception of the events occurring on the video as they perceived them during the police chase and provided further elucidation of matters of police procedure, etc., which were not readily identifiable from the video standing on its own."

Further, the Court found it was not improperly cumulative to play both videos because each showed information critical to the charges.

After resolving several other issues, Cuzick's conviction was affirmed.

Stuckey v. Com.

2009 WL 160618 (Ky. 2009)

FACTS: During the course of Stuckey's trial on an assortment of felony charges, Det. Polin (Louisville Metro PD) "testified about a phone conversation he had with [Stuckey]." Stuckey claimed that the prosecutor had not disclosed the phone call "when the officer told the prosecutor on the morning of trial about the call," which the Commonwealth conceded.

ISSUE: Must oral incriminating (inculpatory) statements be provided to the defense in discovery?

HOLDING: Yes

DISCUSSION: The Court noted that the “Commonwealth had a continuing duty to provide discovery”²⁷ and was required to turn over “any oral incriminating statement known by the attorney for the Commonwealth to have been made by a defendant to any witness....” The conversation was considered “evidence of flight (and thus evidence of guilt).” The Court agreed that evidence of flight was relevant and admissible.

The Court noted that”

Though on appeal the Commonwealth relies on Brady v. Maryland, the statement at issue in this case is inculpatory, and thus subject only to the discovery rules.²⁸ Under these rules, however, the Commonwealth’s purported justification that it only brought up the conversation on re-direct examination does not change the fact that it was evidence offered by the Commonwealth in violation of the discovery rules . This Court passed upon the same issue recently in Chestnut v. Commonwealth where “[t]he Commonwealth assert[ed] that even if the failure to disclose the statements was a discovery violation, the statements could be used in rebuttal.” This Court responded, “the duty of discovery imposed by RCr 7.24(1) to disclose incriminating statements does not end at the close of the Commonwealth’s case in chief. Rebuttal does not offer a protective umbrella under which prosecutors may lay in wait.”²⁹.

In Chestnut, this Court read RCr 7.24 in line with its plain meaning and held that an incriminating oral statement by a defendant does not have to be written down in order to be subject to discovery. (“[W]e find that it is apparent from a reading of the language of the rule that RCr 7.24(1) was intended to apply to both oral and written statements, which were incriminating at the time they were made .” . Therefore, the “nondisclosure of a defendant’s incriminating oral statement by the Commonwealth during discovery constitutes a violation of the discovery rules under RCr 7.24(1), since it was plainly incriminating at the time it was made.” This is clearly the case here, since part of the Commonwealth’s case relied on evidence of Appellant’s flight. However, the analysis does not end here ; “[t]he United States Supreme Court has held that a discovery violation serves as sufficient justification for setting aside a conviction when there is a reasonable probability that if the evidence were disclosed the result would have been different.”

However, in this situation, the defense had made a timely objection, so the jury did not hear the substance of the telephone call, only that it was made. As such, although the discovery rules were violated, there was no need for a mistrial.

The Court also found that the victim in the case, McPherson, suffered a gunshot wound in both legs that broke one, and which required surgery. McPherson also required a “surgical nail and screws, he was using a walker, and he was sent to a rehabilitation center.” The Court agreed that it was a “prolonged impairment of health” that a reasonable jury could believe he may have [trouble healing] from at his age.”

After resolving several other issues, Stuckey’s conviction was affirmed.

²⁷ RCr 7.24(8).

²⁸ 373 U.S . 83 (1963),

²⁹ 250 S.W.3d 288 (Ky. 2008),

Miles v. Com.
2009 WL 160435 (Ky. 2009)

FACTS: On February 27, 2005, Teasley, a Club 502 bouncer, “was shot and killed outside the club as he attempted to clear the parking lot after the club had closed.” Earlier that same evening, Miles and Teasley had an altercation and Teasley’s wife testified that Miles had threatened Teasley. Officer Hill (Louisville Metro PD) had observed part of the fight, but not the actual shooting, and testified that the man he saw running from the shooting was the same man Teasley had fought with earlier. He had lost the suspect during the chase.

Items collected at the crime scene included a black toboggan hat and a cell phone. The hat tested negative for Miles’s DNA. Miles was identified, however, and charged with murder, but wasn’t tried until December, 2006. Much of the delay was spent waiting for the DNA results from the hat. Miles was convicted of Murder and related charges. He appealed.

ISSUE: Is a delay caused, in part, by the decision to wait for DNA evidence, automatically a violation of speedy trial provisions?

HOLDING: No

DISCUSSION: Miles argued that the lengthy delay was a violation of his speedy trial rights, but the court noted that they were waiting for the DNA tests, “which could prove to be either inculpatory or exculpatory.” During the wait, Miles’s counsel agreed the hat was vital evidence, but began protesting the delay in April, 2006.

At trial, however, despite the prosecution’s initial insistence that the hat was crucial evidence, it chose to continue the prosecution and did obtain a conviction. The lead investigator testified that the hat had no relevance, and the prosecution emphasized that point in closing. On the opposite side, the “negative DNA results on the hat were a large part of Miles’ defense.”

The Court found that Miles was not overly prejudiced by the delay and Miles’s conviction was affirmed.

Rice v. Com.
2009 WL 275860 (Ky. 2009)

FACTS: Rice stood trial for two counts of Assault on the Third Degree, along with other charges, and was convicted. He then appealed.

ISSUE: Should testifying officers avoid contact with each other during a trial?

HOLDING: Yes

DISCUSSION: Rice argued, among other things, that “it was error to allow a second police officer to testify.” The police officer had apparently been in the courtroom prior to testifying, but the Court recognized that “no one had invoked the rule requiring what is commonly termed separation of witnesses.”

The Court continued:

When Officer Litton finished testifying, he was seen entering a restroom in the company of another police officer. The second officer was scheduled to testify next. Officer Litton was first, however, brought before the trial court and questioned about any interaction with the other officer. Officer Litton indicated he told the other officer that he, Officer Litton, was not doing a very good job testifying. There was no indication that any testimony was specifically discussed.

No objection was made to the officer's testimony.

The Court noted, also, that a juror had reported to the court that "he had heard a man talking earlier in the morning about 'clothes line.'" "It was presumed this referred to a method sometimes used by police officers and others to tackle a person. The second officer used the term during his testimony, and Rice argued that was "evidence of some form of coaching or collusion by Officer Litton when they were in the restroom."

The Court found no error in Rice's allegations and upheld the conviction.

Sloan v. Com.

2009 WL 102950 (Ky. App. 2009)

FACTS: Sloan was arrested for Theft with respect to stolen tires. During his arrest, his vehicle was searched and several receipts "from the sale of wheels, tires, and other items to a recycling center" were found. The last receipt was dated for some 2 days before the theft in question. The prosecution "gave notice that it intended to introduce the receipts into evidence." Sloan objected, but the court denied the motion. Sloan took a conditional guilty plea and appealed.

ISSUE: Are receipts of prior transactions admissible of proof of motive?

HOLDING: Yes

DISCUSSION: The Court noted that the reason for the introduction of the receipts was to support the prosecution's argument that "Sloan knew that he could receive cash for the tires as well as demonstrate motive and intent." The Court agreed that such information was "relevant to show Sloan's motive for stealing the tires." The Court ruled the evidence was properly admitted and upheld the plea.

Sloan's conditional guilty plea was affirmed.

Justice v. Com.

2009 WL 563510 (Ky. App. 2009)

FACTS: Justice was charged with manslaughter in the drowning death of her 5-year-old developmentally delayed son, Joshua. Following the discovery of the child's body, in a neighbor's pool, the police "knocked repeatedly" on her door, and then "began beating the siding of the trailer with their batons to get an answer." She answered the door after some ten minutes of pounding and the officers believed she had been asleep.

Justice was taken to the hospital, and “gave inconsistent statements concerning the events leading up to the drowning.” She refused a request to search her trailer, refused to give blood or urine samples to determine if she was intoxicated, and invoked her right to an attorney and to remain silent. She was eventually indicted.

After a lengthy trial, she was convicted of Second-Degree Manslaughter and appealed.

ISSUE: Is testimony about a defendant’s silence or choice to exercise their “rights” admissible?

HOLDING: No

DISCUSSION: First, Justice argued that the statement by Det. Hayes (Pikeville PD) that she had refused to consent to giving a biological statement was improperly admitted and the Court agreed.³⁰ Her “passive refusal to consent to give biological samples is ‘privileged conduct which cannot be considered as evidence of criminal wrongdoing.’”

In addition, Det. Hayes stated that “Justice had exercised ‘her rights.’” Although the statement was ambiguous as to what “rights” the officer was referring to, the Court noted that the “Commonwealth is prohibited from introducing evidence or commenting in any manner on a defendant’s silence once that defendant has been informed of her rights and taken into custody.”³¹ Although this occurred prior to Justice being informed of her rights and having been placed into custody, the Court noted that “the giving of a Miranda warning does not suddenly endow a defendant with a new constitutional right. The right to remain silent exists whether or not the warning has been or is ever given.”³² As such, the comment was improperly admitted.

Justice also complained about numerous witnesses who testified as to her “prior bad acts” concerning her neglect regarding her son. The Commonwealth had sought to have such evidence admitted under KRE 404(b), and the trial court had permitted it. The Court concluded that only two of the witnesses testified to matters of relevance during the time period in question, but the remaining acts occurred well before the date of Joshua’s death. The Court found that the “prior bad acts (one incident of which occurred 14 years before Joshua’s death) were not useful in proving any material fact that was in actual dispute - the touchstone for admissibility of prior bad acts.” The Commonwealth argued the cumulative evidence showed that she had “the propensity to neglect her children” and that the drowning was not a “one-time fluke.”

Justice’s conviction was reversed and the case remanded back, with instructions that the testimony of the officers also be cautioned in any further prosecution. The Court noted that their errors were not sufficient, in themselves, to have overturned the conviction, but addressed the errors so that they would not be repeated.

Jackson v. Com.
2009 WL 160431 (Ky. 2009)

³⁰ See Deno v. Com., 177 S.W.3d 753 (Ky. 2005).

³¹ Romans v. Com., 547 S.W.2d 128 (Ky. 1977).

³² Green v. Com., 815 S.W. 2d 398 (Ky. 1991).

FACTS: In September, 2006, Lowe, a CI, told police he could make a drug buy in the Victoria Square area of Newport. This location was known as a “high drug traffic area.” He placed a call from the police station to Jackson, his cousin; the call was recorded and the buy was arranged.

Lowe met officers near Victoria Square, where he was searched, wired and given cash. He met with Jackson and allegedly a transaction was made. The substance exchanged was confirmed to be 1.77 grams of crack cocaine. Jackson was arrested, but no drugs or money was found. While Jackson was in jail, he placed a call to Lowe that later resulted in a charge of intimidating a witness.

Lowe testified at trial and interpreted the telephone call recording. However, he could not make out the tape made from the wire. Officer Brown “purported to interpret portions of the ‘drug buy’ tape.” Jackson was ultimately convicted of trafficking and appealed. (He was acquitted of the intimidation charge.)

ISSUE: May officers “interpret” a recording because parts of the recording are inaudible?

HOLDING: No

DISCUSSION: Jackson argued that the interpretation of the two tapes was inadmissible. With respect to the first tape, Lowe testified “not merely ... from his recollection,” but was actually interpreting what was said, something which had previously been found to be inadmissible.³³ However, the Court found that Lowe’s testimony was improper, but not necessarily fatally inadmissible.

With respect to Officer Brown’s testimony, however, the Court found that the officer did not have personal knowledge of the matter, as required by KRE 602, and that his testimony was hearsay, as well. The case “hinges almost entirely upon the testimony and credibility of Lowe,” and the improper testimony of Officer Brown, which made that testimony “highly pivotal to the Commonwealth’s case.”

Jackson’s conviction was reversed and the case remanded.

Stanaford v. Com.
2009 WL 153108 (Ky. App. 2009)

FACTS: Stanaford was stopped for speeding in Ballard County. He admitted there was marijuana in the car, but insisted it belonged to a hitchhiker he’d picked up, McGee, who fled the car during the stop. Stanaford was ultimately charged with the speeding offense, possession of marijuana and the felony possession of drug paraphernalia charge, as a second offense.

Stanaford went to trial and an officer mentioned that he was charged with “drug paraphernalia second,” which suggested that he had been previously found guilty of “at least one prior offense of possession of drug paraphernalia.” (Such testimony is improper because the jury may convict “because the defendants has been shown to be a person who has committed such crimes in the past.”³⁴ The Court agreed that the statement was improper, but concluded that since the jury had heard the actual charges, and because it was an accident (rather than intentional), it was harmless error and made no difference in the ultimate determination of the case.

³³ Gordon v. Com., 916 S.W.2d 176 (Ky. 1995).

³⁴ Stacy v. Manis, 709 S.W.2d 433 (Ky. 1986).

Stanaford's conviction was affirmed.

Ellis v. Com.
2009 WL 153108 (Ky. App. 2009)

FACTS: On March 21, 2007, Ellis set out to meet a man to sell a handgun. As he was walking home, not having found the man, Ellis was passed by a truck driven by Travis. He stated the truck swerved as if to hit him and that Ellis spit on the truck's windshield. Travis got out of the truck and allegedly grabbed a two-by-four and threatened Ellis. (Travis claimed that he grabbed the board because Ellis had brandished a firearm.) Travis drove away and contacted police.

Officer Lewis (Glasgow PD) found Ellis and stopped him. "Upon seeing the handgun, Officer Lewis ordered Ellis to lie on the ground with his hands away from the weapon." He was ultimately arrested. The officers examined the handgun and removed the magazine. A bullet fell from the chamber that was found to be a "Winchester copper-jacketed hollow-point, but someone had driven a steel nail or pin into the core." Other bullets in the magazine appeared the same.

During Ellis's trial in Barren County, Officer Lewis was permitted "to testify about the characteristics of restricted ammunition and the bullets at issue in [this] case." He argued that Lewis was not an expert in the ammunition and should not have been permitted to so testify.

Ultimately, Ellis was convicted on a number of charges, including possession of the restricted ammunition. He appealed.

ISSUE: Is it the court's discretion to accept a witness as an expert?

HOLDING: Yes

DISCUSSION: The Court agreed that "expert testimony was necessary to identify the bullets as restricted ammunition." However, the Court further stated that the discretion lies with the trial court whether to accept someone as an expert under KRE 702, and that "[w]hile an expert witness must have some knowledge of the area, the fact that a witness is not a specialist in a particular field goes more to the weight to be given his testimony than to its admissibility or the competence of the witness to qualify as an expert." The Court observed that "for the most part, Officer Lewis merely described the bullets found in Ellis's gun." Further, "[h]is testimony on such purely factual matters did not require expert knowledge." The Court agreed that allowing the officer to testify as an expert was proper.

Ellis also argued that permitted an officer to testify as to what was found during a search of his father's home was improper. (Ellis lived in the basement of the home.) The officer stated they found a loaded shotgun, ammunition, bandoliers, detonation cord and a hand grenade, among other items. The trial court had agreed the testimony was improper since it was not relevant to the charged offenses, but refused to a mistrial. Instead, the judge admonished the jury to disregard the evidence.

The Court stated that although it did "not approve of the Commonwealth's attempt to introduce this evidence," because it was "clearly irrelevant to the charged offenses and highly inflammatory," it found no reason to believe the jury could not follow the admonition.

Ellis's conviction was affirmed.

Slaven v. Com.
2009 WL 276765 (Ky.App.,2009)

FACTS: During the course of the prosecution of Slaven for homicide, the evidence storage room of the Hazard PD was allegedly burglarized. The handgun and other evidence in Slaven's case were apparently stolen, but quickly recovered. After Slaven was convicted, he took a collateral appeal, arguing that his attorney did not investigate the alleged theft, nor did trial counsel raise the issue as affecting the integrity of the evidence.

ISSUE: Is the chain of custody absolutely critical in items such as weapons, which have a serial number?

HOLDING: No

DISCUSSION: The Court rules that there was no evidence that the brief theft, if it did occur, would have had any effect on the integrity of the gun as evidence, as it was identified by its serial number. The Court noted that a "perfect chain of custody need not be established so long as there is evidence that there is a reasonable probability that the evidence in question has not been tampered with or altered."³⁵ Further, "the integrity of weapons or similar items of physical evidence, which are clearly identifiable and distinguishable, does not require proof of chain of custody under KRE 901(a)."

Slaven also argued that admitting a statement that he did not respond to an inquiry was improper, but the court noted that "not every isolated instance referring to post-arrest silence will be reversible error."³⁶

Slaven's conviction was affirmed.

Hartsfield v. Com.
277 S.W.3d 239 (Ky. 2009)

FACTS: Following her assault, M.B., the victim of a sexual assault, ran from her home and encountered a passerby. She "was crying and yelled, 'he raped me; he raped me.'" She then ran to her daughter's house and told her daughter the same thing. She was taken to a hospital and examined by a Sexual Assault Nurse Examiner (SANE). She related the details of the assault to the nurse, during the exam.

Hartsfield was charged with rape and sodomy. Before the trial, however, M.B. died, and was thus not available to testify. Hartsfield moved for dismissal, arguing that the statements from the three lay witnesses were inadmissible hearsay. Following a hearing, the trial court agreed, granted the motion and dismissed the charges. Hartsfield took a conditional guilty plea to other charges and the Commonwealth appealed. The Court of Appeals reversed the trial court "on the belief that all of the statements were covered by hearsay exceptions and, in particular, that the statements to the SANE nurse did not run afoul of the

³⁵ Rabovsky v. Com. 973 S.W.2d (Ky. 1998).

³⁶ Wallen v. Com., 657 S.W.2d 232 (Ky. 1983).

Confrontation Clause because they were not made by M.B . for the purpose of causing the nurse to testify on her behalf.

Hartsfield appealed.

ISSUE: May a SANE nurse testify as to a victim's statements during an exam?

HOLDING: No

DISCUSSION: The Court looked to Crawford v. Washington, and noted that the "threshold examination to determine a Confrontation Clause violation is whether the proffered out-of-court statement was *testimonial*." If the hearsay is nontestimonial, the Court deferred to the statements to develop their own rules regarding hearsay.

Taking each witness in turn, the Court agreed that the interview "by the SANE nurse bears more similarity to a police interview. The Court stated:

The SANE nurse was acting in cooperation with or for the police. The protocol of SANE nurses requires them to act upon request of a peace officer or prosecuting attorney. 24 A SANE nurse serves two roles: providing medical treatment and gathering evidence.²⁵ SANE nurses act to supplement law enforcement by eliciting evidence of past offenses with an eye toward future criminal prosecution. The SANE nurse under KRS 314.011(14) is made available to "victims of sexual offenses," which makes the SANE nurse an active participant in the formal criminal investigation. We believe their function of evidence gathering, combined with their close relationships with law enforcement, renders SANE nurses' interviews the functional equivalent of police questioning.

Further, the "nurse's interview was not to provide help for an ongoing emergency but, rather, for disclosure of information regarding what had happened in the past." The Court agreed that the trial court was correct in refusing to admit the testimony of the nurse because they were testimonial statements.

However, the Court agreed that the statements from the other two witnesses were not testimonial, as they were excited utterances made to purely lay witnesses unconnected to law enforcement. The statements were "spontaneous and unprompted by questioning." They "were not formal, not delivered to law enforcement or its equivalent, and were in the nature of seeking help for an emergency (even though it was not ongoing)"

The Court noted that:

The eight factors to consider in determining if a statement is an excited utterance are : (i) lapse of time between the main act and the declaration [the only factor considered here], (ii) the opportunity or likelihood of fabrication, (iii) the inducement to fabrication, (iv) the actual excitement of the declarant, (v) the place of the declaration, (vi) the presence there of visible results of the act or occurrence to which the utterance relates, (vii) whether the

utterance was made in response to a question, and (viii) whether the declaration was against interest or self-serving.³⁷

Finally, although the Court agreed that the later statement to M.B.s daughter was less clear, as more time had elapsed, the evidence indicated the M.B. “was still upset and excited” at the time she made the statement.

Hartsfield conditional pleas were overturned and the case was remanded for further proceedings.

Blevens v. Com.
2009 WL 103155 (Ky. App. 2009)

FACTS: Blevens was tried for burglary. Part of the evidence against him was provided by Sheriff Riddle (Clinton Co. SO), who called back a telephone that had made several calls to the home the morning of the break-in. He testified that he “recognized that the mail message greeting was recorded by” Blevens. Sheriff Riddle was “well acquainted with Blevens and had conversed with him many times both in person and the telephone.”

Blevens was convicted of Burglary and appealed.

ISSUE: Is a person giving a voice identification for someone they know required to be an “expert?”

HOLDING: No

DISCUSSION: Blevens argued that the prosecution should have provided a pretrial notice “of its intent to have the Sheriff make the in-court identification.” He argued this was a type of “expert” testimony. The Court ruled that KRE 901(b)(5)³⁸ does not require that a witness be qualified as an expert to give a voice identification opinion.

Blevens’ conviction was affirmed.

OPEN RECORDS

Marshall County, Kentucky (E-911 Division); V. Paxton Media Group, LLC D/B/A WPSD-TV
2009 WL 153206 (Ky. App. 2009)

³⁷ Souder v. Com., 719 S.W.2d 730 (Ky. 1986)

³⁸ (a) General provision. The requirement of authentication or identification as a condition precedent to admissibility is satisfied by evidence sufficient to support a finding that the matter in question is what its proponent claims.

(b) Illustrations. By way of illustration only, and not by way of limitation, the following are examples of authentication or identification conforming with the requirements of this rule:

4 Kentucky Rules of Criminal Procedure.

5 Kentucky Rules of Evidence.

....

(5) Voice identification. Identification of a voice, whether heard firsthand or through mechanical or electronic transmission or recording, by opinion based upon hearing the voice at any time under circumstances connecting it with the alleged speaker.

FACTS: The parties stipulated that on September 12, 2006, the Marshall County Sheriff's office responded to a 911 call alleging that shots had been fired in a residence on Cumberland Road in Gilbertsville. The bodies of an estranged married couple were found at the residence. On September 13, WPSD-TV identified the deceased and reported that the deaths apparently resulted from a murder/suicide. However, the sheriff's office declined to identify a third person who was in the house but not a suspect in the deaths. The next day, WSPD requested a copy of the 911 call from the Marshall County 911 agency, and the County Attorney (on their behalf) denied it, stating that its "disclosure would constitute a clearly unwarranted invasion of personal privacy as defined in Bowling v. Brandenburg,"³⁹

WSPD filed an action. The trial court rejected Marshall County's claim that Bowling creates a blanket exemption for the nondisclosure of 911 tapes," and "granted WPSD-TV's motion for summary judgment." Marshall County was ordered to comply with the open records request. Marshall County appealed.

ISSUE: May a dispatch agency be required to release a 911 tape under Open Records?

HOLDING: Yes

DISCUSSION: "First, Marshall County asserts that the trial court erred by failing to find that KRS 61.878(1)(a) and Bowling preclude public disclosure of a copy of the 911 call.

The Court disagreed, ruling that:

Kentucky's Open Records Act is set out in KRS 61.870 to KRS 61.884. KRS 61.878(1) provides in pertinent part: The following public records are excluded from the application of KRS 61.870 to 61.884 and shall be subject to inspection only upon order of a court of competent jurisdiction . . . :

(a) Public records containing information of a personal nature where the public disclosure thereof would constitute a clearly unwarranted invasion of personal privacy;

. . . .

(l) Public records or information the disclosure of which is prohibited or restricted or otherwise made confidential by enactment of the General Assembly[.]

KRS 61.878(4) directs that "[i]f any public record contains material which is not excepted under this section, the public agency shall separate the excepted and make the nonexcepted material available for examination."

The Court stated that:

[It was] not persuaded by either claim since here, unlike Bowling, the 911 caller was neither an alleged victim of domestic violence nor subject to future threats from the alleged domestic violence perpetrator. Possibly, speculation regarding the victim's relationship with the caller may subject the caller to some embarrassment in the community. However, that fact alone is insufficient to prevent the release of the requested 911 call information, as

³⁹ 37 S.W.3d 785 (Ky.App. 2000).

being of such a personal nature as to amount to an unwarranted invasion of personal privacy, especially since the record shows that even before the information was formally requested by WPSD-TV, the caller was identified publicly by name through other sources.⁴⁰

Moreover, although as in Bowling no criminal charges resulted from the 911 call, the situations are not comparable since the absence of charges below reflects only on the fact that the alleged perpetrator was dead, and not on the absence of evidence to support a prosecution of a viable claim against a living defendant as in Bowling. The caller's privacy interest and possible desire to avoid embarrassment therefore did not lessen the public's right to know the contents of the 911 tape recording, and the release of the record of the call was not prohibited on this ground.

The Court also ruled that although Automatic Location Information (ALI) could not be revealed, under KRS 65.752, that was not a bar to releasing the remainder of the information. If the record would contain such information, it could simply be redacted.

The decision of the trial court, ordering the release, was upheld.

⁴⁰ Palmer v. Driggers, 60 S.W.3d 591, 598 (Ky.App. 2001).

Sixth Circuit

Constructive Possession

U.S. v. Jordan

308 Fed.Appx. 990 (6th Cir. 2009)

FACTS: On Jan. 15, 2004 Rhea County (Tennessee) deputy sheriffs executed a search warrant at Jordan's home. They recovered eight firearms, most found close to marijuana, scales, cash, ammunition and brass knuckles. Jordan was indicted for being a felon in possession of a firearm. He moved for suppression and was denied. He then took a conditional guilty plea and appealed.

ISSUE: Is a gun found near a defendant in his "constructive possession?"

HOLDING: Yes

DISCUSSION: The Court agreed that the evidence indicated that "Jordan possessed firearms in furtherance of his marijuana business," because it was "strategically located so that it is quickly and easily available for use."⁴¹

Jordan's conditional plea was affirmed.

SEARCH & SEIZURE - WARRANT

U.S. v. Wilson

307 Fed.Appx. 880 (6th Cir. 2009)

FACTS: Wilson, a drug trafficking suspect, lived in a two family dwelling with two front doors – one leading to a first floor unit and the other to a second floor unit. Officer McKay (Detroit PD) observed several buys being made from the first floor windows and others on the porch. McKay got a search warrant for the entire property.

Later that day, the apartment building was searched. Wilson was found in the lower apartment and he was detained. Drugs and a gun were found and Wilson was indicted. Wilson requested suppression, due to errors on the search warrant. The Court denied the suppression and Wilson was convicted. He then appealed.

ISSUE: Does a mistake in a warrant invalidate the warrant?

HOLDING: No

⁴¹ See U.S. v. Mackey, 265 F.3d 457 (6th Cir. 2001).

DISCUSSION: Wilson argued that the warrant was defective, “because it inaccurately stated that the location had a single common entrance.” The Court, however, noted that “[a]n error in description does not, however, automatically invalidate a search warrant.”⁴² The Court noted, however, that the warrant did have enough detail that it was “unlikely to lead to an unauthorized or mistaken search” because it stated the search was the “lower portion of the dwelling.” The affiant officer was part of the search and briefed her fellow officers prior to the search, and she also participated in the search.

The Court found the “warrant was particular enough to be valid under the Fourth Amendment” and upheld the denial of the suppression motion. Wilson’s conviction was affirmed.

U.S. v. Gunter
551 F.3d 472 (6th Cir. 2009)

FACTS: On January 20, 2006, a federal magistrate signed a warrant to search Gunter’s home, property and vehicles. As a result of the evidence found during the search, Gunter was convicted of drug trafficking and related charges. He appealed.

ISSUE: May a warrant infer, rather than prove specifically, that drug evidence will be found at a drug dealer’s residence?

HOLDING: Yes

DISCUSSION: The Court reviewed the lengthy search warrant affidavit, which detailed, among other things, a “number of recorded and unrecorded conversations where the [CI] discussed the distribution of large quantities of cocaine” with other conspirators. Gunter argued that the magistrate had relied upon hearsay evidence to issue the warrant, in some cases involving a confidential informant, and upon the investigator’s conclusions after the investigator listened to the recorded phone conversations. The Court found that both were insufficient to support probable cause.

The Court, however, noted that the “affidavit does support an independent determination of probable cause” because it indicates that the “informant had provided accurate and reliable information each time he was used in the past.” Further, the informant “provided detailed information” which were “corroborated by independent police investigations, including surveillance of meetings and review of telephone records.” The court agreed that this was “enough information to establish the informant’s reliability.”

The Court then looked to the “veracity, reliability and basis of knowledge for” Banks, one of the co-conspirators. The Court agreed that Banks “had nothing to gain by implicating Gunter in the context of a drug deal that was surreptitiously recorded and that implicated Banks as well.” And again, an independent police investigation corroborated Banks’s statements.

Gunter also argued that the affidavits “fail to establish a proper nexus between his residence and the criminal activity at issue.” Although the residence was only mentioned in passing, the Court agreed that the evidence indicated that “Gunter was engaged in repeated purchases of [large amounts of] cocaine.” As such, “it was reasonable to infer that evidence of illegal activity would be found at Gunter’s residence.”⁴³

⁴² U.S. v. Pelayo-Landero, 285 F.3d 491 (6th Cir. 2002).

⁴³ U.S. v. Jones, 159 F.3d 969 (6th Cir. 1998).

After resolving several other issues, the Court found that the warrant was sufficient. Gunter's conviction was affirmed.

U.S. v. Paull

551 F.3d 516 (6th Cir. 2009)

FACTS: In 2004, Paull was developed as a suspect on charges of trafficking in child pornography. Agent Hagan (ICE) obtained a search warrant on Paull's Ohio residence. Paull was present during the execution of the search warrant and the agent explained to him that "he was not under arrest" and that they were only going to execute the warrant. She asked if he wanted to give his side of the story, but he declined. During the search, a large number of printed images of child pornography, along with computer disks, were found in a garbage can - the still images totaled over 3,700 photos. Video was also found. Agent Hagan showed Paull the evidence and stated that she no longer needed to speak with him. She then left the room. "Paull immediately requested to speak with her and she returned to the kitchen."

Agent Hagan reiterated he was not under arrest, but gave him his Miranda warnings. Paull took responsibility for the items found in the garage and then provided a written confession.

Paull was indicted for possession of the child pornography and moved for suppression both on the issue of the search warrant and the confession. When that was denied, he took a conditional guilty plea and appealed.

ISSUE: May a warrant for child pornography reference events that are remote in time to the date the warrant is requested?

HOLDING: Yes

DISCUSSION: First, Paull argued that the warrant was stale, because the affidavit "relied on events that were" at least 13 months prior. The Court agreed that as a rule, the facts supporting the warrant must occur in close time proximity to the issuance of the warrant. The Court noted that in the case of child pornography, previous courts "have reasoned that because the crime is generally carried out in the secrecy of the home and over a long period, the same time limitations that have been applied to more fleeting crimes do not control the staleness inquiry for child pornography."⁴⁴

Further:

The affidavit in this case alleged that Paull subscribed to child pornography websites and that he continued to do so over the course of two years. Paull argues that these allegations are too generalized and remote to provide probable cause against him at the time of the search. But he does not dispute that the affidavit alleges that he was subscribing and downloading images from multiple sites. This makes the habits of similarly situated

⁴⁴ U.S. v. Wagers, 452 F.3d 534 (6th Cir. 2006).

consumers of child pornography relevant.⁴⁵ For instance, one of the websites to which Paull subscribed was described as an “onlinesharing-community” that was “created specifically for sharing child pornography collections.” The affidavit’s expert description of the barter economy in child pornography provides context for that subscription: Paull was likely involved in an exchange of images and he therefore is likely to have a large cache of such images in order to facilitate that participation. Moreover, while Paull last purchased a subscription thirteen months prior to the search, the record is silent regarding how long it was for or whether it had indeed expired at the time of the search. In light of the nature of the crime, these allegations are sufficient to establish a fair probability of on-going criminal activity.

In addition, the Court noted that even if the warrant did not technically suffice, it was more than enough to meet the Leon “good faith” exception.⁴⁶

The Court also agreed that the warrant was not overbroad in that it permitted the search of the garage, as the Court noted that the law “presumes the opposite, that ‘a warrant for the search of a specified residence or premises authorizes the search of auxiliary and outbuildings within the curtilage.’”⁴⁷

The Court found the search to be proper.

Paull also argued that his oral and written confessions were obtained in violation of his Miranda rights. The Court noted that the officer’s version of the discussion was found more credible than Paull’s, and upheld the decision of the trial court.

Paull’s conviction was affirmed.

U.S. v. Higgins
557 F.3d 381 (6th Cir. 2009)

FACTS: In 2005, a Jackson, TN officer developed information about drugs being sold in Madison County, Tennessee. Investigator Carneal (Madison County SO) prepared an affidavit, to wit:

Henderson Police Department (Chester County) regarding a traffic stop conducted in that jurisdiction in which Officer Phil Willis of the Henderson Police Department recovered a large amount of cocaine and cocaine base.

Officer Willis stated that he stopped a suspect for driving under the influence. Officer Willis informed Sgt. Carneal that the suspect had approximately 15 grams of powder cocaine, along with 26 grams of cocaine base. (Both substances field tested positive for cocaine). The suspect also had two additional passengers in the vehicle. All three individuals were separated and interviewed separately at the Chester County Sheriff’s Department. The driver of the vehicle, whose name has been disclosed to the Judge, stated he picked up the cocaine from a location in Madison County and gave an address of 1336 Campbell Street, Apartment

⁴⁵ See Lacy, 119 F.3d at 746 n.6 (“The affidavit in this case contained sufficient evidence that [the defendant] had downloaded computerized visual depictions of child pornography to provide a foundation for evidence regarding practices of possessors of such pornography.”).

⁴⁶ U.S. v. Leon, 468 U.S. 897 (1984).

⁴⁷ U.S. v. Watkins, 179 F.3d 489 (6th Cir. 1999)

5, Jackson, Tennessee, as the pick up location for the narcotics. He also identified the person selling the narcotics as Oliver Higgins. This information was corroborated by both passengers of the vehicle who stated they rode with the driver to the Campbell Street location. Officers from Metro Narcotics did transport the driver of the vehicle to the Campbell Street address to confirm the exact location of the transaction. Officers with the Metro Narcotics Unit corroborated the address given by the driver of the vehicle, along with the description of a motorcycle which belonged to Oliver Higgins. Officers with Metro Narcotics did identify the motorcycle as belonging to Oliver Higgins and which was located at 1336 Campbell Street, Apartment 5, Jackson, Tennessee. The driver stated he had purchased narcotics from this location previously and had purchased the cocaine in his vehicle on September 9, 2005 from Oliver Higgins. A check of the criminal history of Oliver Higgins showed two prior felony convictions for narcotics trafficking in Hardin County, Tennessee, in 1990 and 1998.

The judge signed the warrant and the officers found crack and powder cocaine, money, a gun, and various paraphernalia. Eventually, Higgins was charged in federal court. He requested suppression of the evidence and of statements he made. His motion was denied and he went to trial. He was convicted and appealed.

ISSUE: Should a warrant specifically attest to an informant's reliability?

HOLDING: Yes

DISCUSSION: Higgins argued that the affidavit was deficient in several respects. First, he argued that the affidavit "did not attest to the informant's reliability." The Court agreed that:

... the fact that the informant was known to the affiant and issuing magistrate and admitted a crime does not alone provide probable cause. In addition to providing scant information about the informant's reliability, the "corroboration" included in Carneal's affidavit does little to reinforce the informant's assertions. The affidavit states that the other passengers in the car confirmed the informant's statement, but it does not say whether they did so unprompted or if the police asked them whether the drugs had come from Higgins's apartment. The affidavit states that the police corroborated the fact that Higgins lived at the stated location, owned the motorcycle parked outside, and had a drug-related criminal history, but none of these facts supports the informant's assertion that he had purchased drugs from Higgins at this location the previous day.

In addition, the affidavit does "not assert that the informant had been inside Higgins's apartment, that he had ever seen drugs or other evidence inside Higgins's apartment, or that he had seen evidence of a crime other than the one that occurred when Higgins allegedly sold him drugs." Absent that, the Court agreed, "the affidavit fails to establish the necessary nexus between the place to be searched and the evidence sought."⁴⁸

The Court agreed the warrant did not provide sufficient probable cause. However, the Court noted, it must also look to the good faith exception, and stated that:

⁴⁸ U.S. v. Van Shutters, 163 F.3d 331 (6th Cir. 1998).

United States v. Leon⁴⁹ modified the exclusionary rule so as not to bar from admission evidence seized in reasonable, good-faith reliance on a search warrant that is subsequently held to be defective. Where an officer's reliance on a warrant is objectively reasonable, the Supreme Court held, no additional deterrent effect will be achieved through the exclusion from evidence of the fruits of that search. However, the good-faith exception is inapposite in four situations: (1) where the issuing magistrate was misled by information in an affidavit that the affiant knew was false or would have known was false except for his reckless disregard for the truth; (2) where the issuing magistrate wholly abandoned his judicial role and failed to act in a neutral and detached fashion, serving merely as a rubber stamp for the police; (3) where the affidavit was nothing more than a "bare bones" affidavit that did not provide the magistrate with a substantial basis for determining the existence of probable cause, or where the affidavit was so lacking in indicia of probable cause as to render official belief in its existence entirely unreasonable; and (4) where the officer's reliance on the warrant was not in good faith or objectively reasonable, such as where the warrant is facially deficient.

The Court agreed that "[t]here is no evidence that Carneal included false information in the affidavit; there is no evidence that the magistrate acted as a partisan rubber stamp; the affidavit is weak, but it is not bare bones, and this court's precedents are not so clear as to make it "entirely unreasonable" to find probable cause based on such an affidavit; and there has been no showing that the warrant was so obviously deficient that official reliance on it was objectively unreasonable."

The Court agreed that the warrant was no so deficient that it failed to satisfy the good faith exception and that it was appropriate for the warrant to be admitted.

Higgins's conviction was affirmed.

U.S. v. Keith
559 F.3d 499 (6th Cir. 2009)

FACTS: On March 29, 2006, at about 1:45 a.m., Officers Ripberger and Stephens (Newport PD) were assisting with an unrelated arrest. They were "standing n a corner next to multiple marked police cars with their lights flashing." About 150 feet away was "Big Daddy's," a liquor store, on the opposite corner of the intersection. They could see two sides of the building. Although they were not surveilling the building, they could see the store clearly. The officers knew that the store "sold certain items that could be used to smoke crack cocaine, including filters and glass vials." Officer Ripberger considered the parking lot to be a "high drug trafficking crime area."

As the watched, they spotted a man on foot (Crawford) approach a vehicle at the drive-through window.⁵⁰ Keith was in the driver's seat. They spoke for a few moments. The car pulled away, drove across the parking lot in the front of the store, turned again and drove down the side, which was out of the sight of the officers. The officers knew there was a parking area and a dumpster in that location. The Court noted that although the officers spoke of Keith going behind the building, in fact, he was on the side. Crawford

⁴⁹ Supra.

⁵⁰ Although the officers were uncertain if the vehicle left before approaching the window, the court accepted that Keith did not leave before getting to the drive-through window and presumably making a purchase.

walked in the same direction, looking back at the officers. Both Crawford and Keith's vehicle were out of the officers' sight for "just a few seconds." The officers suspected a drug deal or an exchange of alcohol, so they followed.

Officer Ripberger stopped Keith "based solely on his suspicion that some kind of criminal activity had occurred in the few seconds that the officers had lost sight" of the pair. (He observed no traffic violation.) He checked Keith's OL and discovered it to be suspended, and also saw marijuana in plain view. Upon searching the car, he found a gun, and a later body-cavity searched revealed a small amount of cocaine. (Officer Stephens had also stopped Crawford and finding nothing, let him go.)

Keith was charged with drug and weapons charges. He requested suppression and was denied. Keith then took a conditional guilty plea and appealed.

ISSUE: Is simply acting "suspicious" sufficient to justify a Terry stop?

HOLDING: No

DISCUSSION: Keith argued that the undisputed facts did not provide sufficient cause to make the initial stop. The Court noted that a "Terry stop is permissible only if law enforcement officers had a 'particularized and objective basis for suspecting the particular person stopped of criminal activity.'"⁵¹ Further, the officer must be "aware of specific and articulable facts which gave rise to reasonable suspicion."⁵² Just looking suspicious in a high drug trafficking area was not enough.⁵³ Further, "an officers must not act on an 'inchoate and unparticularized suspicion or hunch,' but [on] the specific reasonable inferences [] which he is entitled to draw from the facts in light of his experience."⁵⁴

The Court reviewed the facts of a number of similar cases for guidance. The Court noted that Officer Ripberger found nothing odd about Keith's presence at the store, as it was a "kind of a popular place." The officer had not, apparently, "actually made drug-related arrests in the parking lot or witnessed drug transactions there in the past." The Court gave little weight to his belief that it was odd for someone to approach a driver at a drive-through window, as it was based only upon his own, personal experience." In addition, the Court found it unremarkable that Crawford looked over to the "nearby police cars with flashing lights at that time of the night," as even the prosecutor conceded "that he, too, would likely have looked over toward the spectacle on the opposite corner." The Court found that the behavior of the two men was "more ambiguous than the examples of 'evasion' that have contributed to findings of reasonable suspicion in other cases."⁵⁵

The Court was "not convinced that the manner in which Keith and Crawford" acted or their presence at the store was sufficient to create "reasonable suspicion of criminal conduct." The officers witnessed no even arguable illegal acts. The totality of the circumstances and the "sequence of events [were] insufficient to provide the officers with reasonable suspicion that a crime had been committed."

⁵¹ U.S. v. Cortez, 449 U.S. 411 (1981)

⁵² U.S. v. Davis, 514 F.3d 596 (6th Cir. 2008).

⁵³ Brown v. Texas, 443 U.S. 47 (1979); Illinois v. Wardlow, 528 U.S. 119 (2000)

⁵⁴ U.S. v. Urrieta, 520 F.3d 569 (6th Cir. 2008),

⁵⁵ U.S. v. Patterson, 340 F.3d 368 (6th Cir. 2003)

The Court reversed the decision to deny Keith's motion to suppression and remanded the case for further proceedings.

U.S. v. Brown

310 Fed.Appx. 776 (6th Cir. 2009)

FACTS: On January 17, 2006, at about 8 p.m., Officer Carson (Memphis, TN, PD) was patrolling. She noticed Brown and another person in a convenience store parking lot; Brown was carrying an open bottle of beer. She approached them in his car "intending to warn them to take their loitering and drinking elsewhere." The individual with Brown responded politely, but "Brown, however, immediately began to act suspiciously." He did not respond verbally, avoided eye contact, and turned to walk away as if he had not heard her. He also "placed his hand over the back right pocket of his pants and left it hovering there."

Becoming suspicious, Officer Carson got out of her vehicle, "instructed Brown to place his hands on a nearby vehicle and spread his legs, and conducted a pat-down for officer safety." She found nothing and asked Brown about ID. He told her it was in his back right pocket, and she told him she was going to remove it so he could provide ID. As she reached for it, Carson spotted a gun. "Carson immediately handcuffed Brown, retrieved the weapon, called for back-up, placed Brown in the back of the squad car, and had dispatch run a check on both Brown and the weapon." Finding Brown had an outstanding warrant, she arrested him

Brown was indicted for possession of the of gun, as he was a convicted felon. Brown moved for suppression, and was denied, with the Court noting that carrying the open container violated local ordinance which justified the investigation.

Brown was convicted and appealed.

ISSUE: Does an officer need reasonable suspicion to approach and speak to a subject?

HOLDING: No

DISCUSSION: First, the Court reviewed whether the stop was based upon reasonable suspicion. The Court noted that all "that is required to justify a Terry-level search or seizure is 'some minimal level of objective justification.'"⁵⁶ The Court found "nothing objectionable about Officer Carson's initial contact with Brown and his companion in the parking lot." In fact, the Court noted, the officer "did not need reasonable suspicion of criminal activity to justify her approaching Brown and the other individual for the purpose of telling them to take their activities elsewhere." Further, "[i]n this case, not only was Brown free to leave, but Officer Carson told him to do so." The "consensual nature of this interaction did not change merely by virtue of Officer Carson's asking Brown his name." The Court agreed, as well, that Officer Carson had reasonable suspicion that "Brown was engaging in legal wrongdoing," given that "objective circumstances justified the stop, an issue that does not turn on the state of mind of the individual officer." The Court cited a "number of particularized and objective bases for suspecting wrongdoing: Brown's loitering in the parking lot; the time of night (after 8 pm); the fact that she had made numerous arrests in that same parking lot; Brown's failure to respond to or make eye contact with her; Brown's attempting simply to walk away rather than respond; and Brown's placing his hand over his back-right pocket as he walked away."

⁵⁶ INS v. Delgado, 466 U.S. 210 (1984).

Brown contended that the “pat-down was illegal” ... because – as Officer Carson testified – she conducted it as a matter of course, and she did not indicate that she had any belief that Brown was dangerous. He also argued that the “removal of the wallet was illegal because it amounted to a search, and Officer Carson had neither probable cause nor consent to justify the search.” The Court, however, supported her “reasonable belief that her safety was in jeopardy: it was late at night, she was alone, Brown was acting nervously and evasively, and, as the district court found, Brown made a furtive gesture towards his back pocket as he tried to leave the scene.” The Court agreed the patdown and the removal of the wallet was “out of concern for her own safety, and [the] ‘search’ was no broader than necessary to ensure that Brown did not have access to any weapon.”

Brown’s conviction was affirmed.

U.S. v. Bell
555 F.3d 535 (6th Cir. 2009)

FACTS: On February 1, 2006, Trooper Roberts and Sgt. Helton (Ohio State Highway Patrol) were monitoring traffic. At about 12:57 p.m., they clocked Bell going 80 mph in a 65 mph zone and stopped him. When asked for his documents, Bell told the trooper that the vehicle was a rental. He explained the reason for his travel, and Trooper Roberts later testified that his story “sounded rehearsed” because “he repeated that story several times” in essentially the same way. Bell also kept his cell phone on his lap and didn’t make eye contact with the trooper. Trooper Roberts later stated that Bell was “overly cooperative,” which he found abnormal, and that he found Bell “very deceptive.” While waiting for the computer check, the two troopers discussed Bell’s actions. After about three minutes, they summoned a police drug dog to the scene. Sgt. Helton advised Trooper Roberts to have Bell get out of the car “so that they would not have to worry about doing so when the dog handler arrived.”

They learned that the car was rented to another person and that the agreement indicated that additional drivers could not be added without prior approval. When asked, Bell stated that his girlfriend rented the vehicle and had gotten permission over the phone for Bell to drive.

During the time they were waiting for the computer check, Trooper Farabaugh arrived with the drug dog. After consultation, Trooper Roberts approached Bell’s vehicle and had him step out so that Roberts could give him a warning for the speeding. He explained the drug dog was just “working the area” and would be allowed to “run around [the] car.” The trooper later explained that had the dog not been available, he would have continued to attempt to contact the rental company.

About 12 minutes into the stop, the dog started to sniff the car and within a minute, the dog alerted. The troopers searched the trunk and found four packages of crack cocaine.

Bell was arrested and indicted. He moved for suppression of the evidence and the statements, arguing that the troopers “impermissibly extended the length of the detention without reasonable suspicion of drug activity.” When that was denied, Bell took a conditional guilty plea and appealed.

ISSUE: May officers detain subjects during a traffic stop to do computer checks?

HOLDING: Yes

DISCUSSION: Bell did not contest that that speeding stop was lawful, but argued that the troopers “unlawfully exceeded the purpose of the initial stop without reasonable suspicion of further criminal activity.” The Court agreed that troopers did not have “reasonable suspicion of drug activity,” but ruled that was not needed because they “did not improperly extend the duration of the detention to enable the dog sniff.”

The Court found the reasons enumerated by the troopers for the stop to be weak, at best. However, the Court found that the trooper could “lawfully detain the driver of a vehicle until after the officer has finished making record radio checks and issuing a citation, because this activity ‘would be well within the bounds of the initial stop.’”⁵⁷ The Court agreed that it was, in fact, shorter than the average traffic stop.

The Court agreed that he was detained no “longer than reasonably necessary for the Officers to complete the purpose of the stop in this case.” The troopers were “waiting for the results of the background check,” so “any time that the Officers spent in pursuing other matters while the background check was processing, even if those matters were unrelated to the original purpose of the stop, did not extend the length of the stop.” The trooper was writing the citation when the dog alerted. The Court found the inquiry about Bell’s right to operate the car was “within the purpose of the initial stop.”

The Court found that it simply could not “conclude that an officer violates the Fourth Amendment merely by asking a driver to exit a vehicle to effect a dog sniff when doing so does not extend the duration of the stop and does not cause the officer unreasonably to deviate from the purpose of the initial stop.”

The Court upheld the denial of the motion to suppress the conditional guilty plea was affirmed.

SEARCH & SEIZURE - CONSENT

U.S. v. Mitchell

2009 WL 87474 (6th Cir. 2009)

FACTS: On Dec. 2, 2002, Lt. Clark and Officers Dickerson and Nelson (Memphis, Tenn. PD) traveled to an address to execute a federal arrest warrant. Lt. Clark, at the back of the address, observed a vehicle pull in, and he hid to “be able to see if the subject of the arrest warrant was in the car.” He saw Mitchell “push something towards the console.” He ordered Mitchell out of the car and saw that the object Mitchell had tried to hide was a bag of cocaine.

“Mitchell denied living at the apartment, but his keys matched the lock on the door.” Lt. Clark was called away, so Deputy Sheriffs Ballard and Trammell came to assist. Two women arrived, and Rush, one of the women, identified herself as the resident of the apartment and “stated the Mitchell was her boyfriend.” Ballard told her about the drugs, and she agreed, both verbally and by written consent, to allow the deputies to search the apartment. They found two loaded handguns and a substantial amount of crack and powder cocaine. Immediately next to where the cocaine was found, they also found a digital scale, ammunition and Mitchell’s Social Security card.

⁵⁷ U.S. v. Wellman, 185 F.3d 651 (6th Cir. 1999); U.S. v. Bradshaw, 102 F.3d 204 (6th Cir. 1996).

Mitchell was given Miranda warnings and waived. He admitted owning one of the guns (and having borrowed the other from a relative) and to owning the drugs.

At the subsequent suppression hearing, Powell, a public defender's investigator, testified that he interviewed Rush and that she claimed that she only consented to the search because the officers "threatened to get a search warrant and take her children from her."

Mitchell was indicted and convicted. He appealed.

ISSUE: Is a consent invalid because it was made after a "threat" to get a search warrant?

HOLDING: No

DISCUSSION: Mitchell argued that Rush's "consent was not voluntary because it was allegedly made under duress." The trial court, however, found that the District Court had sufficiently reviewed the matter and made a valid finding that the consent was voluntary.

Mitchell also argued that it was improper to admit testimony regarding an incident that occurred 14 months after the case at bar. The trial court had permitted the "evidence of the subsequent incident for the limited purpose of establishing Mitchell's specific intent to distribute the drugs in the instant case," and issued limiting instructions to that effect. The Court agreed that "[b]ecause specific intent was an element of the charged offenses, and because the district court properly limited the scope of the evidence to this element, the district court did not abuse its discretion in ruling that the evidence was relevant and admissible for this limited purpose."

Mitchell's conviction was affirmed.

U.S. v. Young
2009 WL 822634 (6th Cir. 2009)

FACTS: On March 8, 2006, Young was summoned to the Carroll County (TN) Sheriff's Department "by ATF agents as a ruse to allow agents to execute an arrest warrant in a controlled environment." He arrived with his wife and small child, and he was separated from them. He was told by ATF agents that he was under arrest pursuant to a warrant. He was given Miranda and told he was being arrested for being a felon in possession of a firearm. He immediately "asserted that he was not a drug dealer and repeated this statement throughout the questioning with the agents."

He was asked for consent and allegedly gave verbal consent. He agreed there was a firearm in a truck on his property and agreed that the agents could retrieve it. He was also told that he would be taken to the house to get the gun and his medication, and that he would be taken before the magistrate judge. At some point, he signed a consent. They retrieved the gun and searched the house. No drugs were found, but they did find ammunition.

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

ISSUE: May a person in custody give consent?

HOLDING: Yes

DISCUSSION: Young argued that his consent was invalid as it was not voluntary. The Court found that the events were “nonconfrontational, [Young] was treated fairly, and the discussion was brief.” Even though Young “might have been scared and upset, the facts do not suggest the experience rose to the level of duress.” The Court agrees that Young had “limited education, he had previous engagements with law enforcement, ... and thus he was not unfamiliar with his Constitutional rights.” Further, the “record does not suggest [Young] felt powerless to prohibit the search.”

The Court agreed that Young “voluntarily consented to the search of his property.” Young’s conditional plea was affirmed.

SEARCH & SEIZURE - VEHICLE STOP

U.S. v. Jemison

310 Fed.Appx. 866 (6th Cir. 2009)

FACTS: On June 23, 2006, Officer Slatkovsky (Cleveland PD) “heard loud music coming from an approaching vehicle.” He pulled over the vehicle, and when Jemison, the driver, reached into a console, the officer spotted a handgun. Jemison showed a suspended OL, but stated that he had paperwork that permitted him to drive. He was unable to produce the paperwork.

Jemison was arrested and given Miranda warnings. The officer retrieved the gun and found a “plastic bag containing pills of unknown origin.” He decided to tow the car and during an inventory, he found an illegal amplifier and a “zipped bag” in the trunk. He found cocaine in the bag.

Jemison later denied that his music was too loud and that he opened the console in the officer’s presence. Two days after the arrest, he was questioned about the drugs and essentially admitted to its possession.

He was indicted and eventually convicted. He then appealed.

ISSUE: Is a traffic stop based upon a reasonable mistake in belief about a statute permissible to admit evidence found during the stop?

HOLDING: Yes

DISCUSSION: Jemison argued that the stop was invalid because he had committed no offense, and that the officer “could not point to the law for the ticket he issued.” He pointed to U.S. v. Goodwin, in which a Kentucky officer did not issue a citation for the purported offense and could not “identify any local ordinance or Kentucky statute” that indicated Goodwin was “engaged in a traffic violation at the time of the stop.”⁵⁸ In that case, the evidence was suppressed. The Court, however, indicated that in this situation, the officer properly identified a valid ordinance and described why he believed Jemison was in violation of that ordinance.

⁵⁸ U.S. v. Goodwin, 202 F.3d 270 (6th Cir. 2009)

With respect to the inventory, the Court found that the officers may do such inventory searches when they are “pursuant to standardized procedures.”⁵⁹ Jemison argued the bag was locked but presented no evidence to that effect. No policy was introduced, but neither did Jemison request such production. The officer testified as to the parameters of the agency’s policy and the Court agreed the search was valid.

Finally, Jemison argued that his right to remain silent was violated when he was questioned by a second officer, some time after his arrest. Jemison argued that his decision to remain silent after the arresting officer gave him Miranda was an invocation, but the court found no authority that suggested that “mere silence” was such an invocation. The Court agreed it was not error to admit his later, incriminating statement.

Finally, the Court upheld the admission of expert testimony from an experienced narcotics officer about drug trafficking.

Jemison’s conviction was affirmed.

U.S. v. Gregory
311 Fed.Appx. 848 (6th Cir. 2009)

FACTS: Gregory argued that the search warrant obtained against him by BATF officers included errors that invalidated it. The first search warrant affidavit included a statement that:

Special Agent Moore stated that numerous named law enforcement officers conveyed to him that Gregory had a long criminal history, including convictions for drug trafficking, possession of prohibited firearms, and aggravated burglary, and was once involved in a “shootout” with a police officer who was investigating him. Gregory was reputed to be a “a major drug dealer” who “always keeps a large supply of guns.” His neighbors, including a police officer who lived across the street and another officer who resided in the same neighborhood, consistently observed “suspicious activity” at his home. The officers witnessed: people pulling up to the residence, which has a high privacy fence, and throwing a plastic bag over the fence. A short time later, another plastic bag will come back over the fence from Gregory’s residence. The car will then leave and the officers have observed on several occasions, Gregory come out from the house as the car starts to drive away and look around the area. Many of the individuals engaging in this activity were “known by law enforcement officials to be users of illegal drugs.”

The second warrant was not at issue.

In the third affidavit, for a storage unit Gregory leased, the information from the first affidavit was restated, along with the results of that search warrant. (Officers seized fifteen guns, most loaded, and including a fully loaded machine gun and a large amount of ammunition. One of the guns was apparently stolen. In addition, they found a large amount of Oxycontin and marijuana, and bomb making literature.) In addition, the affidavit indicated that the media attention from the first warrant had brought forth a number of witnesses that indicated that more guns might be stored elsewhere. The department located the leased unit, and the owner of the storage unit location stated that the lease agreement allowed him to enter if there

⁵⁹ Florida v. Wells, 495 U.S. 1 (1990); U.S. v. Tackett, 486 F.3d 230 (6th Cir. 2007).

was any information that indicated the contents might be harmful. He cut off the lock and found guns and bomb-making materials. Law enforcement officers “secured but made no entry into the unit” at that time. A drug dog alerted on the exterior of the unit. “Witnesses consistently confirmed that they saw firearms and illegal drugs in Gregory’s house and that he carried a gun with him all the time.” He “bragged that he had enough firearms ‘to start an army.’” At that time, they obtained the warrant.

A search of the unit revealed an “impressive” collection of guns - approximately 190, along with a vast amount of ammunition and other “unconventional warfare devices.”

Gregory moved for suppression of the evidence located as a result of the first and third warrants, claiming the investigator “secured the search warrants through deception and unreliable information.” The Court denied the motion, and further denied a Franks hearing. Gregory was convicted and appealed.

ISSUE: May old information be included in an affidavit to provide context?

HOLDING: Yes

DISCUSSION: With respect to the first warrant, Gregory argued that his “alleged prior criminal history” should not have been considered, and that the information in the affidavit was stale and unreliable. The Court found that Gregory’s argument “erroneously conflate[s] the sufficiency of the evidence” to a higher standard than is actually required. The old information in the affidavit was provided simply to supply “context to the more current information.” The Court found the affidavit to be “truthful and thorough.”

With respect to the third affidavit, the Court disagreed that it was “based on a prior illegal warrantless search of that unit.” Gregory argued that the officers manipulated the owner and manager “to perform an act that law enforcement could not,” and thus “illegally circumvented the warrant requirement.” The Court found that the information known to the officers was enough to almost require that the unit be examined and secured.

The Court upheld the admission of the results of the warrants. Gregory’s conviction was affirmed.

U.S. v. Muhammad
2009 WL 605333 (6th Cir. 2009)

FACTS: On May 7, 2003, Officer Jones (Memphis, TN, PD) was dispatched to “investigate a group of young men who were loitering outside the apartment complex and playing loud music” at the Pershing Park Apartments. The area had experienced loitering and burglary problems. As Officer Jones and another officer arrived, in separate cars, he spotted three young men in the parking lot and instructed them to “stay where they were.” One, Muhammad, walked toward the building, despite commands not to do so, and entered. Jones could see him through glass doors, and watched Muhamma go up the stairs, bend over, and then return to where Officer Jones was located. Officer Jones frisked Muhammad, apparently finding nothing. He then went to the location where he’d seen Muhammad bend over and found a .22 pistol on the landing.

Officer Jones questioned Muhammad, and he admitted (after waiving his rights) that he had possessed the weapon and was a convicted felon. Officer Jones cited him, and Muhammad was later formally charged and indicted on the offense. He moved for suppression but was denied. Upon conviction, he appealed.

ISSUE: Does a series of suspicious, albeit non-criminal, actions satisfy reasonable suspicion for a stop?

HOLDING: Yes

DISCUSSION: Muhammad first argued that the initial stop violated the Fourth Amendment. The Court reviewed what Officer Jones knew at the time of the stop and agreed that he had “a reasonable basis to suspect that Muhammad was involved in criminal activity.” The Court detailed the information shared in the initial call, Jones’s personal observations at the scene, and Muhammad’s evasive behavior. Further, the Court upheld the admission of his inculpatory statements.

Muhammad’s conviction was affirmed.

SEARCH & SEIZURE - USE OF KEYS

U.S. v. Stewart
2009 WL 530116 (6th Cir. 2009)

FACTS: Stewart was stopped (on foot) by Officer Jones (Metro Nashville PD) because of suspicious behavior. He provided his name and OL, and Jones found no outstanding warrants. Although some of the information Stewart provided was inconsistent, Jones allowed him to “move away.” Officer Jones then contacted other officers for aid, and they searched the area where Stewart was observed in suspicious behavior. They found a baggie that contained crack cocaine, and evidence indicated it hadn’t been there long. Officer Jones found Stewart, arrested him and searched him, finding a set of keys. Stewart denied the keys were his and said “that he did not know to whom they belonged.” Another officer went in search of a vehicle that matched the keys and found a white Impala. The key unlocked the trunk, but the officer did not open it. He confirmed the keys also worked on the door, but again, did not open it.

Residents where the car was parked denied ownership of the vehicle. Officers congregated there and a drug dog was brought to the car. The dog alerted to the car and a search uncovered powder cocaine, marijuana and a loaded weapon, along with other information pointing to Stewart. After being given Miranda and being told what was found in the car, Stewart admitted everything was his.

Stewart was indicted and eventually took a conditional guilty plea. He then appealed.

ISSUE: May officers check to see if a set of keys in the possession of a suspect fit a particular car?

HOLDING: Yes

DISCUSSION: The Court found, first, that there was probable cause to arrest Stewart, based upon the evidence available to the officers at the time.

Stewart also argued that the officers lacked cause to “seize his keys and use them to unlock the Impala.” The Court found the search of his person, which revealed the keys, to be valid. His denial of any

knowledge of the keys further justified their seizure, as that suggested that he was lying and that the vehicle associated with the keys might contain contraband.

With respect to the officer's use of the keys, the Court noted:

"[t]he mere insertion of a key into a lock, by an officer who lawfully possesses the key and is in a location where he has a right to be, to determine whether the key operates the lock, is not a search."⁶⁰

The officers, properly, did not actually search the car until the drug dog made a positive alert, which then gave them probable cause to search the entire car. Finally, Stewart's "incriminating statements were made after he was advised of his Miranda rights."

Stewart's conditional guilty plea was affirmed.

SEARCH & SEIZURE - TERRY

U.S. v. Craig

306 Fed.Appx. 256 (6th Cir. 2009)

FACTS: On August 14, 2007, Webb, a Veteran's Hospital employee in Johnson City, Tennessee, spotted two men loitering near the employee parking lot. She was aware that several vehicles had been stolen from the lot in the preceding months. Finding their attire (shorts and tank tops) and lack of employee ID cards suspicious, she watched one man remove an item she believed to be a tool box from a vehicle and tuck the item under his shirt. She called the VAMC police, who put out an "all call." Within a minute, two marked police vehicles arrived at the lot, where Webb was still watching the suspects. She had watched them get into a specific vehicle and pointed that out to the arriving officers. The two men tried to leave, and the officers' "suspicions were aroused by the unusual, seemingly evasive route taken by" the vehicle. One of the officers finally got them to stop, and he "could see what he considered to be unusual items inside, including a police scanner, ties covered by a tarp, and various tools in the passenger-side floorboard." He stated later that both displayed "extremely nervous demeanor[s]."

One of the suspects, Jerry Craig, stated he was a veteran doing physical rehab, but indicated the wrong building. Both Jerry and Bradley Craig were arrested and separated. Jerry Craig gave consent to search the vehicle, stating that he owned it.

The search "yielded two loaded pistols, one on the passenger floorboard and the other within reach of the driver's seat." They also found "ammunition, automotive key cutters, blank automotive keys and lock cores, wheels and wheel covers that did not match" their vehicle, and "other stolen property." They were given Miranda and arrested for possession of the firearms on the federal VAMC property.

Both Craigs moved for suppression of the evidence found. The District Court ruled against them, so they both took a conditional guilty plea and appealed.

⁶⁰ U.S. v. Salgado, 250 F.3d 438 (6th Cir. 2001).

ISSUE: Does reasonable suspicion, without an observation of overtly criminal acts, support a Terry stop?

HOLDING: Yes

DISCUSSION: Both argued that the officers “lacked reasonable suspicion that criminal activity was afoot.” The Court reviewed the standard and noted that reasonable suspicion is considered under the totality of the circumstances, and can be “gleaned from the investigating officer’s own direct observations, dispatch information, directions from other officers, and the nature of the area and time of day during which the suspicious activity occurred.”⁶¹ “Furtive movements made in response to a police presence” is also a factor.⁶² Finally, reliable tips are also valuable. The Craigs argued that the stop was based on the “vague ‘gut instinct’ of a citizen informant,” which was then “embellished in a police dispatch and misreported to the officers.” Webb admitted that “she did not see [the Craigs] do anything overtly illegal.”

The Court, however, found that the observations of Webb and the officers, “when considered along with the dispatch and other contextual considerations, supplied the requisite reasonable suspicion for the stop.”

Webb’s conditional guilty plea was affirmed.

42 U.S.C. §1983 - MEDICAL CARE

Bertl v. City of Westland 2009 WL 247907 (6th Cir. 2009)

FACTS: On March 1, 2004, a Westland (Michigan) PD officer arrested Bertl for DUI – he had a blood alcohol of 0.26. He was arraigned and the court noted that he was shaking. He explained he had not had his medication since the day before. The trial court considered that he was suffering from delirium tremens (D.T.s) or alcohol withdrawal.

Later that same day, sheriff’s transport officers arrived to pick up prisoners, including Bertl. They made a stop at another police department and noted that “Bertl could not clearly respond to questions.” Because they could not transport ill prisoners, they returned him to the Westland PD.

The next day, another sheriff’s office⁶³ arrived to pick up Bertl. The deputies were told that he “had delirium tremens, but that he had taken his medicine recently and obtained medical clearance for the transfer.” During the trip, however, “Bertl became increasingly delusional.” Upon arrival, he had to be carried, and one of the deputies told his supervisor that he might need medical attention. A nurse was called.

Later testimony from prisoners indicated that “Bertl visibly suffered from a severe medical condition,” and that he “appeared unconscious and unresponsive and that he shook uncontrollably.” The nurse did not enter the cell, refusing to evaluate him until he’d been dressed in “prison clothes.” The guards were told to change his clothes and then bring him to the clinic.

⁶¹ See Dorsey v. Barber, 517 F.3d 389 (6th Cir. 2008).

⁶² U.S. v. Caruthers, 458 F.3d 459 (6th Cir. 2006).

⁶³ It is not clear from the opinion why both the Isabella County Sheriff’s Department and the Wayne County Sheriff’s Department would both be picking up prisoners from the same location.

When the guards attempted to do so, they realized he'd stopped breathing. Prison medical staff did CPR and he was transported by ambulance to the hospital. He was pronounced dead at that time.

Bertl's estate representative filed suit under 42 U.S.C. 1983, against the City of Westland and other defendants. The case was removed from state court to federal court. During various proceedings, various defendants were dismissed, leaving only the nurse (Thomas) still a party to the lawsuit.

Bertl appealed some of the dismissals.

ISSUE: Is a lack of response to an obvious medical need actionable?

HOLDING: Yes

DISCUSSION: Thomas objected to the use of certain hearsay statements (including statements by prisoners and other officers) in the summary judgment motion, citing Sixth Circuit precedent. Bertl argued it was appropriate because the information would be "presented in an admissible form at trial." The Court stated that the only issues before it were whether Thomas "violated Bertl's constitutional or statutory rights, and whether those rights were clearly established at the time of Thomas' alleged misconduct."

The Court agreed that "deliberate indifference to the medical needs of prisoners" is a violation of the Eighth Amendment. There is both an objective and subjective component to the analysis. The Court agreed that the objective element is met when the "medical need is sufficiently serious when it is obvious to a lay person."⁶⁴ The Sixth Circuit had "recognized that delirium tremens constitutes a serious medical need."⁶⁵ With respect to the subjective element, the Court found that Thomas was aware of facts that "could infer that a substantial risk of harm existed, and that she also drew that inference." Further, she did not comply with "stated jail policy" which required her to have called for a doctor immediately based upon the symptoms observed. The Court found that in the face of Bertl's "glaring symptoms," Thomas's failure to take appropriate action could constitute deliberate indifference to Bertl's serious medical need.

Finally, the Court held that the right to medical care was clearly established, and upheld the denial of summary judgment on behalf of Nurse Thomas.

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

FACTS: On April 19, 2003, Everson was at the Northgate Mall in Hamilton County, Ohio. Deputy Sheriff Wittich (Hamilton County, Ohio, SO) and another, unknown, deputy were working security at the mall. Everson suffered an epileptic seizure and, allegedly, the deputies "physically agitated and attacked him," even though they knew he was having a violent seizure. When he came out of the seizure, he told the deputies he was "an epileptic and that their conduct was likely to cause him to suffer another seizure." However, he claimed, they "assaulted him, including hogtying him, and took him into custody." He requested medical care, but was denied. He was charged, but the charges were later dismissed.

⁶⁴ Blackmore v. Kalamazoo County, 390 F.3d 890 (6th Cir. 2004).

⁶⁵ Speers v. County of Berrien, 196 F.App'x 390 (6th Cir. 2006).

He also claimed that although he advised the detention center of his epilepsy, no one from the medical staff saw him or treated him, and that he suffered multiple seizures during his stay. He remained at the jail from Saturday night through Monday morning. The deputies later claimed he became violent, both with them and with EMS.

Everson sued the Sheriff, the deputies and Northgate Mall, among others, under 42 U.S.C. §1983, and the Americans with Disabilities Act (ADA).

For procedural reasons and because of a change in counsel, Everson was permitted to file responses later than would normally be allowed. The defendants appealed.

ISSUE: May an officer ignore evidence of a medical condition?

HOLDING: Yes

DISCUSSION: The defendants argued that it was improper for the court to “refuse to resolve a question of qualified immunity raised before discovery is closed, but must instead determine whether qualified immunity is proper or whether further discovery is necessary to resolve the question.”⁶⁶ The Court noted that “questions of qualified immunity should be resolved ‘at the earliest possible stage in litigation,’ or else the ‘driving force’ behind the immunity – avoiding unwarranted discovery and other litigation costs – will be defeated.”⁶⁷

The Court agreed that it was appropriate to permit an appeal of the trial court’s refusal to rule, and its decision to extend discovery without a specific assertion from Everson as to what he hoped to discover.

First, the Court addressed the claims against Sheriff Leis. The allegations against the Sheriff was that the Sheriff failed to train his employees (at the jail) to provide proper medical care. The Court, however, agreed that the claim was never properly asserted that claim, and further, that §1983 liability “must be premised on more than mere respondeat superior.” A failure to train requires that a supervisor “either encouraged the specific incident of misconduct or in some other way directly participated in it.” Since Everson made “no specific allegations of a failure to train by Sheriff Leis,” the court found that the Sheriff was entitled to qualified immunity on the claim against him, personally.

With respect to Deputy Wittich, Everson claimed that the deputy permitted an employee of the Northgate Mall to illegally search him when he was looking for some form of identification. In fact, Everson’s claim did not even make it clear he was trying to place a claim for the illegal search against Deputy Wittich in the first place.

The Court agreed that Everson “never clearly made out an excessive-force claim in his complaint.” Everson agreed he did not recall much of what occurred during his seizure, while the deputy cross-asserted that Everson was violent toward the deputies and the EMS personnel.

The Court found that Deputy Wittich was “immune from personal liability” on the excessive-force claim.

⁶⁶ Skousen v. Brighton High School.

⁶⁷ Pearson v. Callahan,

Everson did clearly allege claims of false arrest and malicious prosecution. A false arrest claim requires a showing that the “police lacked probable cause.”⁶⁸ That requires that the officer have “reasonably reliable information that the suspect has committed a crime.”⁶⁹ In addition, however, “in obtaining such reliable information, an officer cannot look only at the evidence of guilt while ignoring all exculpatory evidence,” but must instead, “consider the totality of the circumstances, recognizing both the inculpatory *and* exculpatory evidence, before determining if he has probable cause to make an arrest.” Also, “[p]olice officers may not ‘make hasty, unsubstantiated arrests with impunity,’ nor ‘simply turn a blind eye toward potentially exculpatory evidence known to them in an effort to pin a crime on someone.’”⁷⁰

The deputy argued that Everson’s verbal threats and physical assaults on mall personnel, the deputies and the EMS crew clearly met the elements of assault and disorderly conduct. The Court, however, noted that once he emerged from his seizure, there was no evidence that Everson was physically or verbally abusive. The deputy knew that Everson was suffering from an epileptic seizure and thus his actions were not made while he was fully conscious of his actions. Further, Ohio law required that an officer make a diligent effort to determine if a subject is suffering from diabetes or epilepsy before making a decision about charging with a crime. However, the law does not indicate that the arresting officer must refrain from making an arrest under such conditions and the Court concluded that the deputy was entitled to qualified immunity because the law was not clear

After declining to address several other issues, the Court ruled in favor of the Sheriff and Deputy Wittich on the claims that had become ripe for review at the time, leaving in abeyance those claims for which they had not yet sought qualified immunity.

42 U.S.C. §1983 - ARREST

Flowers v. City of Detroit 306 Fed.Appx. 984 (6th Cir. 2009)

FACTS: On April 20, 2004, Detroit police officers responded to a shooting, finding Smiley dead with a gunshot wound to the head. Detectives Newman, Staples, Fisher and Jackson were assigned to investigate the homicide.

They spoke to Rounds, who was at the apartment when Smiley was shot. She gave a false name and later admitted she did so because she had outstanding warrants. She stated that Smiley let two men inside, one man named Steve and another she did not see and did not know. They went into a bedroom and she heard a bang. The two men emerged, threatened her, forced her into a bedroom at gunpoint, stole items and then left. She further stated that Flowers had spent the night at the apartment, but left early to go to work.

The investigators visited Flowers at work and, according to Flowers, ordered him to go with them to the police station to assist in the investigation. He told the officers he was at home with his fiancée, Sharon Jackson, at the time of the murder and agreed he’d spent the night at the apartment.

⁶⁸ Fridley v. Horrichs, 291 F.3d 867 (6th Cir. 2002).

⁶⁹ Gardenhire v. Schubert, 205 F.3d 303 (6th Cir. 2000).

⁷⁰ Ahlers v. Schebil, 188 F.3d 365 (6th Cir. 1999).

Rounds later stated that she had lied about not being able to identify the second man, and admitted it was Flowers. She claimed he had threatened to kill her. Learning that the police had surrounded his home, Flowers and Jackson went to the police station, and Flowers was arrested. Jackson was willing to provide an exculpatory statement, but the investigators did not get a written statement from her. Flowers was arrested. The warrant request did not “mention Rounds’ previous statement, nor Jackson’s offer to give a statement that she was with Flowers at the time of the murder.”

At trial, Rounds did not appear, and the trial court dismissed the murder charges.

Flowers sued the four detectives, and other parties, under 42 U.S.C. §1983, in state court, and the case was removed to federal court. The District Court granted the motion for summary judgment in favor of the officers and Flowers appealed.

ISSUE: Does simply leaving out potentially exculpatory evidence make a warrant invalid?

HOLDING: No

DISCUSSION: The Court looked at whether they were precluded from “challenging the state court’s determination of probable cause at a preliminary examination hearing.”⁷¹ The Court agreed that a “state court determination of probable cause did not preclude a subsequent malicious prosecution claim where the plaintiff alleged that ‘the defendant-officers had knowingly supplied the magistrate with false information in order to establish probable cause.’”⁷² In Hinchman v. Moore⁷³ and Peet v. City of Detroit⁷⁴ the court agreed that the “exception to the usual preclusive effect of a state court probable cause determination applies when there is evidence of a ‘police officer’s supplying false information to establish probable cause.’”

However, the Court observed that Rounds’ previous statement, which was brought out at the preliminary hearing, did not make her, necessarily, a false witness.

Flowers also argued that the failure to mention that Jackson was willing to give a statement made the warrant “false and incomplete.” He also maintained that the investigator should have included information provided by another witness that she saw two men leaving in a light blue truck. Although the Court agreed that “in determining probable cause police officers may not ‘simply turn a blind eye toward potentially exculpatory evidence known to them in an effort to pin a crime on someone,’ simply ‘leaving out of a warrant request the fact that the accused’s fiancée is willing to offer an alibi does not otherwise negate probable cause.’”⁷⁵ The Court noted that “[a]lthough in some cases material omissions from a warrant request may be so egregious as to make it ‘false’ for purposes of establishing probable cause,” that the evidence in this case did not support such a finding.

The Court found that Flowers was precluded from relitigating the existence of probable cause and affirmed the District Court’s judgment.

⁷¹ See Darrah v. City of Oak Park, 255 F.3d 301 (6th Cir. 2001).

⁷² Id.

⁷³ 312 F.3d 198 (6th Cir. 2002)

⁷⁴ 502 F.3d 557 (6th Cir. 2007).

⁷⁵ Ahlers v. Schebil, 188 F.3d 365 (6th Cir. 1999); Coogan v. Wixon, 820 F.2d 170 (6th Cir. 1987).

Evans v. City of Etowah
312 Fed. Appx. 767 (6th Cir. 2009)

FACTS: In August, 2004, Evans's son, Noble was arrested. He was required to live with Evans in Etowah, Tennessee, as a condition of his pretrial release and to call his bonding agent daily from her home.

In October, 2005, he failed to appear at a court proceeding and a bench warrant was issued. The bonding agent (which was outside Tennessee) talked to Officer Nelms (Etowah PD) about arresting Noble on the warrant. They also mentioned to Nelms that "Evans had lied to them about Noble's whereabouts, stating that Noble was not at her home." (They had gotten a call from Noble that originated from Evans's home.)

On November 22, 2005, Officers Nelms and Crawford went to the Evans home to arrest Noble. When they arrived, Evans looked out and later stated that she went to load a rifle – as she did not apparently recognize the pair as officers. When they identified themselves, she laid down the weapon and headed to the door, but they "kicked in the door before she could open it, which caused her to fall backwards onto the floor." She stated that they shined a light into her eyes and "repeatedly yelled 'where is he?'" When they told her who they were looking for, she called for Noble to come out, which he did. He was arrested, as was Evans.

Nelms, however, stated that he "knocked on the door several times and announced that he was from the police, but there was no response from inside the house." When someone finally did respond, Nelms stated that he would force the door if necessary, but the door was "opened without incident." After denying the Noble was there, she finally admitted that he was in the house. Noble was found in a bedroom closet and arrested.

Evans was charged as an accessory after the fact under state law, but the grand jury did not indict. She filed sued on multiple grounds, but the only relevant charge was under 42 U.S.C. §1983 for unlawful arrest. The defendant officers requested summary judgment but the trial court denied it, finding that Evans's account showed no intent to hinder the officers in arresting Noble. Nelms and Crawford appealed.

ISSUE: May an officer ignore all exculpatory evidence when making an arrest?

HOLDING: No

DISCUSSION: The Court reviewed the Tennessee statute for the necessary elements to have made the arrest. The Court agreed that the "facts occurring prior to [Nelms and Crawford's] arrival at Evans's home [did] not support probable cause to arrest Evans as an accessory." (The Court noted that Noble was required to live at Evans's home, but not necessarily that he be there all of the time.) Counsel for the officers conceded that "these facts do not support probable cause or an intent to hinder arrest or actions taken upon that intent." As such, the Court looked to the "facts occurring after [the officers'] arrived at Evans's home" and found that the additional facts "do not provide enough additional evidence to create probable cause for arrest."

The Court elaborated that a delay in answering the door "does not alone support intent to harbor because there are numerous legitimate reasons for a delay." That "Noble was in a dark room is not indicative of Evans's intent to harbor, especially given that it was nighttime and that, under these facts, Evans

cooperated with the police.” The Court noted, specifically, that “[A]n officer cannot look only at the evidence of guilty while ignoring all exculpatory evidence.”⁷⁶

Further, the Court agreed that, construed in Evans’s favor, as required at this point, the facts indicated that the officers violated Evans constitutional rights. The Court found that Evans had produced enough facts to permit the case to go forward for further discovery and trial.

42 U.S.C. §1983 - EXCESSIVE FORCE

Wolfanger v. Laurel County, Ky **308 Fed.Appx. 866 (6th Cir. 2009)**

FACTS: On Oct. 15, 2005, Lee Wolfanger was shot by Laurel County Deputy Sheriff Poynter. Deputy Poynter was responding to a 911 call placed by Wolfanger’s wife, Linda. She had “become alarmed after Lee Wolfanger, who had left the house following a minor family dispute, refused to come back inside.” She told the dispatcher that he was armed with a handgun, was depressed, on pain medication and that she believed he might be a danger to himself or to others.

Dep. Poynter arrived alone, and was directed by Mindy, Lee’s daughter to where Lee was standing. Dep. Poynter asked Mindy to return to the house and ordered Lee to drop the weapon. Lee told the deputy to “get off his land” and something else, unintelligible. He then pointed the gun at the deputy, who fired one shot and struck Lee in the abdomen. Arriving officers found both a gun and a quad cane near where Lee fell. Lee Wolfanger subsequently died.

Linda Wolfanger filed suit under 42 USC §1983, alleging excessive force and a violation of the Americans with Disabilities Act. The Court awarded summary judgment to Poynter, upon his motion, and Wolfanger appealed.

ISSUE: Is simply speculation sufficient to overturn a summary judgment?

HOLDING: No

DISCUSSION: Linda and Mindy Wolfanger alleged that Lee Wolfanger was holding a cane shortly before he was shot and thus could not have been pointing a gun with that same hand. The Court, however, noted that “pictures in the record show the quad cane could stand on its own or be looped over the arm” and thus, “Lee Wolfanger could have both the gun and the cane on the right side of his body” at the same time. The Court found that the use of deadly force “was unfortunate, but not unreasonable.”

The Court affirmed the dismissal of the action.

Sulfridge & Davis v. Huff & Moore **313 Fed.Appx. 820 (6th Circ. 2009)**

⁷⁶ Gardenhire v. Schubert, 205 F.3d 303 (6th Cir. 2000).

FACTS: On April 5, 2004, Davis drove Sulfridge to a Knoxville Wal-Mart. Sulfridge waited in the car and Davis went into the store. Sulfridge left the car at some point to look for Davis, but returned when she could not find him. Davis finally emerged and got into the driver's seat. At that point, stories diverged.

Sulfridge later testified that a uniformed individual (Knox County Deputy Sheriff Huff) came to the driver's side of the car and was "yelling and cussing" at Davis, "acting crazy," "in a rage" and began "banging his gun on the car and on the window of the car." Davis began to back the car out of the space and Huff walked with the car and yelled that if they didn't stop he would shoot. Davis stopped and put up his hands, but Deputy Huff fired a shot. The car rolled forward and Huff shot a second time. She stated that Huff was always at the side of the car and that she did not believe the car touched him.

Huff's account, however, was the Sulfridge saw him at the side of the car before Davis started backing, and that she told Davis to "give back the merchandise and to stop." Davis then backed out and stopped. Huff stated that Davis then drove forward and back again, and struck Huff on the left thigh, and then drove forward again. Huff had to jump out of the way and then fired two shots.

Davis drove to a nearby location, got out of the car and laid on the ground. Sulfridge got out and realized that Davis had been struck at least once. Officers arrived and ordered Sulfridge to the ground. She stated she complied but was kicked in the leg and told to roll over. She was taken into custody and questioned, but released to the hospital. Davis was also arrested and taken to the hospital, and the car was seized and towed.

Davis was indicted and pled guilty, eventually, to one count of assault and one of theft. Both Sulfridge and Davis sued, in separate cases, in both state and federal court but all four claims were consolidated in federal court. (The federal court eventually denied jurisdiction over the state claims.) The defendant officers, including Huff, requested summary judgment. The Court refused to grant summary judgment to Knox County or to Huff and Huff appealed.

ISSUE: Does the fact that a defendant pled guilty to assault mean that an officer's use of force in the same encounter was reasonable?

HOLDING: No

DISCUSSION: The Court addressed whether Huff met the standard to be awarded qualified immunity. The Court listed the following factors to determine if an officer's actions are reasonable:

- 1) the severity of the crime at issue;
- 2) whether the suspect poses an immediate threat to the safety of the officers or others; and
- 3) whether the suspect is actively resisting arrest or attempted to evade arrest by flight.⁷⁷

The Court continued:

The legal reasonableness of Huff's actions involves several questions of fact, including: (1) the circumstances that led to Davis backing the car out of the parking spot; (2) whether and how Officer Huff was struck by Sulfridge's car; (3) whether Davis threatened Huff by

⁷⁷ See Sigley v. City of Parma Heights, 437 F.3d 527 (6th Cir. 2006)

pointing the vehicle at Officer Huff; (4) when and from where Officer Huff fired his first shot; (5) whether Davis drove the car toward Officer Huff after the first shot; and (6) when and from whether Office [sic] Huff fired his second shot.

The Court found it could not “resolve whether and to what extent Davis posed a continuing threat both to Officer Huff and the public” and as such, could not, at this point, “conclude that Officer Huff’s use of force was reasonable as a matter of law.”

The Court also noted, however, that simply because Davis pled guilty to aggravated assault against Huff, that did not necessarily mean that “Officer Huff acted reasonably in employing deadly force during the encounter.” The Court stated:

To be sure, Plaintiffs may prevail on their claims against Officer Huff if they can show that the shots fired by Huff were not made in self-defense or in defense of others because Davis no longer posed a threat of harm at the time of the shootings.”

The Court declined to address issues raised in Sulfridge’s case because they weren’t presented for the District Court’s consideration.

The Court affirmed the denial of qualified immunity and remanded the case for further proceedings.

INTERROGATION

Fleming v. Metrish
556 F.3d 520 (6th Cir. 2009)

FACTS: In 1999, York was found murdered in woods in Michigan. He had been shot twice. The following month, Fleming was identified as a suspect to Det. Lesneski, and he agreed to speak to the officer. Fleming stated that he knew the victim and had picked him up as a hitchhiker and dropped him off near the murder site.

The police obtained a search warrant for Fleming’s home and farm buildings. Fleming was cooperative and showed the officer where illegal drugs would be found. Det. Lesneski gave Fleming his rights and asked if Fleming would speak to him, but Fleming adamantly refused. Fleming was arrested for the drugs and secured in a cruiser. The search of the property continued.

About an hour later, Fleming was removed to another vehicle, where he would sit with Officer Clayton for about two hours. Fleming and the officer “engaged in small talk,” until Lesneski returned, smiling. The police had found the murder weapon.

Officer Clayton told Fleming “that things did not look good for him and that ‘maybe he needed to do the right thing.’” (There was dispute as to the actual words.) A few minutes later, Clayton asked Fleming if he wanted to speak with Det. Lesneski and he agreed to do so. Det. Lesneski stated that when he entered the van, “Fleming began to weep.” Lesneski moved the van, so that other could not see Fleming crying. After a few minutes to “get his head straight,” Fleming confessed. He asked if the police had found the gun and Lesneski agreed that they had.

Det. Lesneski later stated that “he let Fleming speak without interruption until he was finished.” He gave Fleming his Miranda rights and questioned Fleming further about the murder. An hour later, he repeated his confession and it was recorded at the police station, after he received Miranda a third time.

Fleming was indicted and requested suppression. The Court denied the motion, and Fleming stood trial. At trial, Fleming denied he had specifically confessed in the van. He also argued that he had killed York in self-defense. After conviction, he appealed. After exhausting his state court remedies, he sought federal habeas. The District Court ruled that Fleming’s right to silence was violated. He then appealed.

ISSUE: May statements made after an invocation to remain silent be admitted?

HOLDING: Yes (but see discussion)

DISCUSSION: The Court reviewed whether Fleming was interrogated by Officer Clayton as they say in the van. Looking to Rhode Island v. Innis, the Court defined interrogation as not just “express questioning, but also ... any words or actions on the part of the police (other than those normally attendant to arrest and custody) that the police should know are reasonably likely to elicit an incriminating response from the suspect.”⁷⁸ The Court noted that Officer Clayton’s brief admonitions did not rise to the level of interrogation.

Next, the Court looked to whether statements will be admissible when made “after the person in custody has decided to remain silent depends under Miranda on whether his ‘right to cut off questioning’ was ‘scrupulously honored.’”⁷⁹ The Court elaborated by noting that the police could violate this by “refusing to discontinue the interrogation upon request or by persisting in repeated efforts to wear down his resistance and make him change his mind.”

Factors favoring a finding that the police have scrupulously honored a defendant’s rights include where “[1] the police ... immediately ceased the interrogation, resumed questioning only after [2] the passage of a significant period of time and the provision of a fresh sense of warnings, and [3] restricted the second interrogation to a crime that had not been a subject of the earlier interrogation.” The District Court “did not think that the police waited long enough before ‘questioning’ Fleming a second time about the murder,” and noted that “Fleming did not receive fresh Miranda warnings before Clayton made his comment.” In addition, the interrogation was on the same crime that was the subject of the previous interrogation.

The Court concluded that Fleming’s statements were not taken in violation of Mosley. The police were permitted “to present new information to a suspect so that he is able ‘to make informed and intelligent assessments of [his] interests.’”

The Court reversed the District Court’s decision and remanded the case with instructions to deny Fleming’s petition.

Raedeke v. Trombley
2009 WL 751096 (6th Cir. 2009)

⁷⁸ 446 U.S. 291 (1980).

⁷⁹ Michigan v. Mosley, 423 U.S. 96 (1975).

FACTS: Raedeke was arrested by Officer Van Keuren (Flint, MI, PD). When he was asked by the officer if he knew why he was being arrested, he nodded his head yes and said “but I was doping and drinking when I did it.” He was eventually convicted and appealed.

ISSUE: Is the response to a statement by an officer not intended to get an incriminating response admissible?

HOLDING: Yes

DISCUSSION: Raedeke argued that his statement upon arrest should not have been admitted, because he had not yet been given Miranda when the officer asked if he knew why he was under arrest. The trial judge, however, had concluded that the officer made a statement, rather than a question, to the effect of “you know what you are under arrest for.” The Court agreed that “Van Keuren’s remark was not designed to elicit a response from Raedeke.”

Raedeke’s conviction was affirmed.

Garner v. Mitchell
557 F.3d 257 (6th Cir. 2009)

FACTS: Garner was convicted of five counts of murder, during the course of a burglary and arson. He appealed.

ISSUE: Is a person of apparently near-average background competent to waive Miranda rights?

HOLDING: Yes

DISCUSSION: Garner argued that his waiver of Miranda rights was improper because he was unable to understand the consequences of waiving those rights. The Court noted that the “police officers took care to ensure that Garner understood the warnings and waiver before he signed the form.” The Court noted that “Garner had the capacity to understand the criminal nature of his actions and the consequences of his actions.” (Garner started the fire to cover up evidence of the burglary, believing that he may have left fingerprints that would lead to his arrest.)

The Court further noted that “Garner appeared ‘perfectly normal’ and ‘very coherent’ to the interrogating officers,” and, in a competency report, the psychologist “stated that Garner ‘appeared to be of near average intelligence by observation,’ ‘appeared to be able to understand all questions and material presented to him,’ and that ‘his expressive language abilities were intact.’” As such, the Court stated, “even if Garner’s mental capacity [IQ of 76], background [troubled upbringing], age [19] and experience [poor education] did somehow prevent him from actually understanding the Miranda warnings – and the evidence indicates that they did not – the officers questioning Garner had no way to discern the misunderstanding in Garner’s mind.”

The Court agreed that officers are not free to “disregard signs or even hints that an interrogation suspect does not understand” warnings, however. In this case, the Court reviewed the various reports (and the tests upon which the reports were based) of psychologists who examined Garner. Although “mental

capacity is one of many factors to be considered" in determining whether a Miranda waiver is valid, "that factor must be viewed alongside other factors, including evidence of the defendant's conduct during, and leading up to, the interrogation." "Garner's conduct, speech, and appearance at the time of interrogation indicated that his waiver was knowing and intelligent, notwithstanding his diminished mental capacity." The Court observed that "at no time did Garner exhibit any outwardly observable indications that he did not understand the warnings or the circumstances surround his interrogation."

Garner's conviction was affirmed.

U.S. v. Panak
552 F.3d 462 (6th Cir. 2009)

FACTS: In 2006, DEA investigators visited Panak's home, doing an investigation of her dentist employer's illegal use and distribution of hydrocodone. At the end of the interview, which lasted less than an hour, they "thanked [her], left her house and did not contact her again for some time." Over a year later, she was indicted for her involvement in the crime. She moved for suppression, and the District Court granted her motion. The United States appealed.

ISSUE: Is an interview that occurs at home custodial?

HOLDING: No (barring additional circumstances)

DISCUSSION: The U.S. argued that at the time of the interview, Panak was not in custody. The court reviewed the facts, and agreed that the interview "did not rise to the level of a custodial interrogation," since it took place in her home. Even accepting that Panak may have already been a suspect at the time, the concerns that triggered the Miranda decision were simply not implicated in an interrogation of this nature, at a person's home. The Court agreed that if, for example, the individual was handcuffed at home, it would be custodial, and that the "number of officers, the show of authority, the conspicuous display of drawn weapons, the nature of the questioning all may transform one's castle into an interrogation cell," are all also factors that could serve to do so.

"This interrogation, however, did not cross that line and retained a non-custodial hue throughout." Although she knew her employer was in trouble, she was never threatened with arrest, "never told ... that she was in trouble, never told ... that she was a suspect and never told .. that she was potentially subject to criminal penalties." She even answered follow-up questions a few months later, by telephone. The Court agreed that she was never told that she "need not answer their questions or could end the interview at will," but the Court did not find that dispositive.

Panak argued that she never "invited" the investigators in, but only "let" them in, but the court found that they "plainly did not force their way in against her wishes but entered only after she allowed them to do so." The Court also stated that while "Panak may well have felt some internal pressures to answer the investigators' questions," that the "question in the end is not whether the individual felt pressure to *speak* to the officers but whether she was forced to *stay* with them."

Since the Court found that was not the case, the District Court's decision was reversed, and the case remanded for further proceedings.

U.S. v. Kellogg
306 Fed.Appx. 916 (6th Cir. 2009)

FACTS: The U.S. Marshals were seeking Kellogg on an arrest warrant. They located Kellogg and took him into custody. Kellogg gave consent to a search of the apartment where he was staying, and told them where drugs and a gun would be found. When he was asked whether the money from a specific bank robbery was in the apartment, “Kellogg responded that the drawer was not in the residence because” he had already gotten rid of it. They did recover a number of items related to that robbery, however.

Kellogg was taken to the Chattanooga FBI office, and at some point, signed a waiver of his Miranda rights. Kellogg was indicted on drug trafficking charges and moved for suppression. He argued that he was on Xanax when he gave the consent and therefore was not “in my right frame of mind to waive my rights” at the time. The trial court denied his motion.

ISSUE: Is asking consent to search an interrogation?

HOLDING: No

DISCUSSION: First, Kellogg argued that since he claimed to be under the influence of Xanax, that his consent was invalid. The Court, however, found that the evidence was that he was “coherent and appropriately responsive” and that as such, he was not coerced.

Kellogg also argued that because he was not given his Miranda warnings “prior to asking for his consent to search,” that anything found had to be suppressed. The Court found that asking to search is not an interrogation under the law, because that request is not “likely to elicit an incriminating response.” The questions about the location of the gun and the money, however, were likely to do so, and the Court noted that it was not clear as to whether he’d been given his Miranda warnings prior to that question being asked. The Government, however, had claimed that the question was proper under the “public safety exception” to Miranda.⁸⁰ The Court ruled that the situation was not sufficient to prove there was any immediate danger from the presence of the gun in the apartment. Further, the questioning concerning the money was clearly improper,.

Kellogg also argued that the in-court identification of him, as the robbery, was improper because it was not done in response to a question by the prosecutor. The Court, however, found it sufficiently reliable to be presented to a jury, which could then make a credibility determination on its own.⁸¹

The Court reversed the case, however, because of the admission of his responses to the statements concerning the drugs in his apartment.

⁸⁰ Quarles

⁸¹ See Neil v. Biggers, 409 U.S. 188 (1972)

FORFEITURE

Jones v. Whittaker

2009 WL 633195 (6th Cir. 2009)

FACTS: On Feb. 12, 2004, Deputy White (Logan County SO) stopped Jones for weaving and having a non-illuminated license plate. Another deputy found a quantity of marijuana in the vehicle. Jones was arrested for DUI, resisting arrest and possession of marijuana, among other offenses. He was indicted and requested suppression. Eventually the case was dismissed, on June 30, 2006, but the Commonwealth requested a civil forfeiture of several assets owned by Jones and his sister. The Court, however, determined it did not have jurisdiction and dismissed the action.

Jones filed suit under 42 U.S.C. 1983, just under one year following the dismissal of the forfeiture action, claiming false arrest, malicious prosecution, defamation and, against the sheriff and the county, negligent training and supervision, along with related claims. The deputies claimed the statute of limitations had run and the trial court eventually agreed. Despite Jones' argument that the statute of limitations did not begin to run until the end of the civil forfeiture action, the Court ruled that the civil forfeiture was not part of the criminal case but is, instead a separate action.

Jones appealed.

ISSUE: Is a civil forfeiture part of the criminal proceedings?

HOLDING: No

DISCUSSION: Jones only argument on appeal was that his malicious prosecution claim did not accrue until the civil forfeiture proceeding ended. The Court noted that Kentucky law was clear in that the forfeiture was a separate, civil, in rem, proceeding against the property and not part of the criminal proceeding. (Kentucky law had also made it clear that the forfeiture was not double jeopardy.) In fact, other individuals in addition to Jones were parties to the case, specifically his sister, who shared ownership of some of the property and the bank holding the mortgage. The Court noted that although a criminal conviction is necessary for a successful forfeiture, it does not make it part of the criminal proceedings.

The Court agreed that the case was time-barred and dismissed the lawsuit.

EVIDENCE/TRIAL PROCEDURE

U.S. v. Neeley

308 Fed.Appx. 870 (6th Cir. 2009)

FACTS: Neeley was charged with criminal conspiracy related offenses. Two federal officers gave a "combination of opinion and fact testimony, although neither was formally qualified by the court as an expert." The first, Agent Hughes, currently of the DEA and formally of the INS, testified as to his experience with illegal narcotics. He detailed the investigation and addressed the significance of certain evidence that was found. Agent Woosley, an IRS CID agent for over 18 years, described his education

and experience in his field. He “offered opinion testimony” as to the value of certain transactions, and provided definitions for numerous terms. Neeley was convicted, and appealed.

ISSUE: Must officers be formally qualified as experts to so testify?

HOLDING: No (but see discussion)

DISCUSSION: Neeley complained that the Court had failed “to perform its ‘gatekeeper’ function ... when it permitted [the agents] to give opinion testimony without making a formal finding on the record that they were qualified as experts under” FRE 702.⁸² The Court had “specifically addressed the issue of formally qualifying police officers as experts” in *U.S. v. Johnson*.⁸³ In that case, the Court had recommended that “the proponent of the witness should pose qualifying and foundational questions and proceed to elicit opinion testimony.”

The Court noted that the agents possessed “obvious qualifications,” and that it was unnecessary for the Court to “conduct a formal inquiry in the qualifications of a witness before allowing expert testimony.” In the Sixth Circuit, the Court had “regularly allow[ed] qualified law enforcement personnel to testify on characteristics of criminal activity, as long as appropriate cautionary instructions are given, since knowledge of such activity is generally beyond the average layman.”⁸⁴

Neeley also argued that it was error to allow Agent Hughes “to testify as both a fact and expert witness without giving the jury a cautionary instructions regarding his dual role.” The Court had previously ruled that the jury might be confused by this and that the court must “take care to assure that the jury is informed of the dual roles of a law enforcement officer as a fact witness and an expert witness, so that the jury can give proper weight to each type of testimony.”⁸⁵ Neither did the prosecutor “delineate the transitions between the examination of the officer as an expert witness and questions relating to his role as a fact witness.”⁸⁶

The Court found that the instructions given about the dual role was sufficient and Neeley’s conviction was affirmed.

U.S. v. Miller

2009 WL 792842 (6th Cir. 2009)

FACTS: During Miller’s trial, the Court permitted someone other than the actual fingerprint analyst to testify concerning the matter. (The officer in charge of the lab testified as to the results, using the report prepared by the analyst.) Miller was convicted and appealed.

ISSUE: May an officer testify using the report of a fingerprint analyst?

⁸² *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993); *Kumho Tire Company v. Carmichael*, 526 U.S. 137 (1999).

⁸³ 488 F.3d 690 (6th Cir. 2007).

⁸⁴ *U.S. v. Swafford*, 385 F.3d 1026 (6th Cir. 2004).

⁸⁵ *U.S. v. Thomas*, 74 F.3d 676 (6th Cir. 1996).

⁸⁶ *U.S. v. Cobbs*, 233 Fed. Appx. 524 (6th Cir. 2007)

HOLDING: Yes

DISCUSSION: The Court admitted the report under the business records exception to the Rule of Evidence.⁸⁷ The Court noted that Miller's counsel actually asked several of the complained-upon questions, that he could not complain of the responses. In addition, "because the out-of-court statements were offered by, not against, the accused, the Confrontation Clause" did not apply. Finally, the Court noted that the testimony from the actual analyst would have added nothing beyond what the laboratory supervisor was able to provide.

Miller's conviction was affirmed.

Fossyl v. Milligan/Watson
2009 WL 692163 (6th Cir. 2009)

FACTS: Miligan and Watson were allegedly involved in the death of Fossyl, in 1977. The investigation went cold but was reopened in 2000 when a new sheriff was elected. Watson submitted to a polygraph, and while both parties later stipulated that the actual results of the polygraph was inadmissible, the Court did admit statements made by Watson before and after the test was performed. Both men were sued by Fossyl's estate, and a judgment was rendered against them for wrongful death and related claims. Both appealed.

ISSUE: Is the mention of a polygraph inadmissible in a civil case?

HOLDING: No (but see discussion)

DISCUSSION: The Court agreed that in Ohio, the results of a polygraph examination are not generally admissible. However, the Court noted that Watson "voluntarily submitted to the polygraph and questioning." As such, the Court noted that had the polygraph not been mentioned, the jury would have been confused about the time frames and may have believed that he had been "railroaded by law enforcement authorities, when there is no evidence to support this."

After resolving a number of other issues, Watson's conviction was affirmed.

Adkins v. Wolever
554 F.3d 650 (6th Cir. 2009)

FACTS: Adkins, a state prisoner in Michigan, sued Officer Wolever (a state prison corrections officer) for assault. Before the lawsuit was filed, an investigator had reviewed Polaroid photos of the injuries and video of the area where the assault allegedly occurred. The material was requested in discovery, but the originals could not be located – having been either lost or destroyed. (Adkins did receive black and white copies of the photos.)

Adkins requested a spoliation instruction to the jury, asking that the jury be told that "it could presume that the missing video and color photographic evidence would be favorable to Adkins." The District Court,

⁸⁷ FRE 803(6).

however, applying Michigan law, denied the request, because Michigan “required Adkins to demonstrate that the spoliated evidence was under Wolever’s control, which it undisputedly was not.”

ISSUE: Is federal law to be applied when decided upon sanctions for spoliation of evidence?

HOLDING: Yes

DISCUSSION: The Court noted that the Sixth Circuits “application of state law to spoliation sanctions in federal question cases finds its origins in Welsh v. U.S.”⁸⁸ The Court observed, however, that “other circuits apply federal law for spoliation sanctions.” The Court agreed that was the proper way to do it, and remanded the case for the trial court “to decide if Wolever should be subject to any form of spoliation sanctions despite the fact that he was not the prison records custodian.”

U.S. v. Buffington

310 Fed.Appx. 757 (6th Cir. 2009)

FACTS: During Buffington’s trial, Officer Nanney (McKenzie, Tenn PD) was permitted to testify “regarding the police surveillance of Officer Cunningham’s attempted undercover purchase of firearms.” He testified he heard a conversation between another officer and Buffington over a wire, and corroborated that officer’s earlier testimony.” He also testified on cross that they had found unidentified fingerprints on a recovered stolen weapon, but did not test for trace evidence, and repeated information he had received from Buffington’s wife.

Buffington was eventually convicted on weapons charges and appealed.

ISSUE: Is a violation of the Confrontation Clause always fatal to a case?

HOLDING: No

DISCUSSION: The Court agreed that Mrs. Buffington’s “statement was testimonial because she provided Officer Nanney with the information about the blankets and sleeping bag [found wrapped around the weapons] in the context of a police interrogation.”⁸⁹ Further, “because the statement at issue pertains to the question of whether Buffington possessed the firearms, it goes to the heart of the Government’s case.”⁹⁰

However, the Court concluded that, given the wealth of other evidence against Buffington, the admission was harmless error and did not materially affect the verdict.

Buffington’s conviction was affirmed although the case was sent back for re-sentencing for unrelated reasons.

⁸⁸ 844 F.2d 1239 ()

⁸⁹ See Crawford v. Washington, 541 U.S. 36 (2004).

⁹⁰ U.S. v. Martin, 897 F.2d 1368 (6th Cir. 1990)

EMPLOYMENT - NAME CLEARING HEARING

Garner v. City of Cuyahoga Falls 311 Fed.Appx. 896 (6th Cir. 2009)

FACTS: Garner served as a city inspector and also as a reserve police officer. During a public event, he drew the attention of a vendor to a safety hazard in his area and instructed him to correct the problem. Later that evening, after Garner had returned to the festival grounds in his police uniform, the vendor asked Garner's police commander about his "authority and employment status" and complained Garner was "picking on him." Garner explained his side to the supervisor. He left the grounds for other reasons, and when he returned, he was told to meet with the vendor and another police supervisor. A verbal altercation ensued, with Garner trying to explain the serious nature of the hazard involved.

Following this incident, the Mayor allegedly "commended a campaign to terminate him." Various city officials became involved and allegations were made against Garner. Garner was fired on December 18, 2006. Following that time, various citizens allegedly told Garner that they had heard he was "stealing city time."

Garner filed suit and argued that he had not "been afforded an appropriate name-clearing hearing." The federal court ruled in favor of the defendants on federal claims, and refused to exercise state court jurisdiction. Garner appealed.

ISSUE: Is a terminated employee entitled to a name-clearing hearing if they meet the legal criteria for one?

HOLDING: Yes

DISCUSSION: Garner's first allegation was that the defendant city officials "made false and public allegations against Garner that impaired his good name, reputation, honor and integrity and terminated him without a name-clearing hearing." The Court agreed that it "is well established that a person's reputation, good name, honor and integrity are considered liberty interests protected by the due process clause of the Fourteenth Amendment."⁹¹ Further, in the "public employment context, 'where a nontenured employee shows he has been stigmatized by the voluntary, public dissemination of false information in the course of a decision to terminate his employment, the employer is required to afford him an opportunity to clear his name."⁹²

In that respect, Ludwig v. Bd. of Trs. Of Ferris State Univ., instructs that five elements must be satisfied to establish that a plaintiff was deprived of a liberty interest entitling him to a name-clearing hearing:

First, the stigmatizing statements must be made in conjunction with the plaintiff's termination from employment. Second, a plaintiff is not deprived of his liberty interest when the employer has alleged merely improper or inadequate performance, incompetence, neglect of duty or malfeasance Third, the stigmatizing statements or

⁹¹ Bd. of Regents v. Roth, 408 U.S. 564 (1972); Chilingirian v. Boris, 882 F.2d 200 (6th Cir. 1989).

⁹² Burkhart v. Randles, 764 F.2d 1196 (6th Cir. 1985).

charges must be made public. Fourth, the plaintiff must claim that the charges made against him were false. Lastly, the public dissemination must have been voluntary.⁹³

In addition, Brown v. City of Niota adds a sixth element: "once a plaintiff has established the existence of all five elements, he is entitled to a name-clearing if he requests one."⁹⁴ Failure to make the request is fatal to the case.⁹⁵

The Court noted that Garner never specifically asked for a hearing and that therefore he could not argue the lack of the hearing.

The Court also discussed Garner's First Amendment rights, and whether his speech was protected. Looking to Garcetti v. Ceballos,⁹⁶ the Court agreed that "a public employee's right, in certain circumstances, to speak as a citizen addressing matters of public concern" was protected.⁹⁶ That decision is up to the court to decide, but further, the Court noted "when public employees make statements pursuant to their official duties, the employees are not speaking as citizens for First Amendment purposes, and the Constitution does not insulate their communications from employer discipline."⁹⁷

Because Garner's speech was made directly as a result of his professional responsibilities and as such, "not constitutionally protected under the teaching of Garcetti," the trial court's ruling was affirmed.

EMPLOYMENT - POLYGRAPH

Luty v. City of Saginaw 2009 WL 331621 (6th Cir. 2009)

FACTS: During a secret police department supervisors' meeting in 2005, Chief Cliff "voic[ed] his frustration with the council's action" in cutting the budget. A transcript "came to light and was publicized at a subsequent city council meeting." The recording was not authorized. The "transcript accurately reflected [the Chief's] somewhat intemperate comments at the supervisor's meeting, including his references to certain council members as 'idiots' and 'morons'"

The unauthorized recording violated the agency's policy, so the chief called another meeting. At that meeting, all of the command staff "agreed to submit to investigative testing in order to clear themselves of participation in the secret taping." The process would be in two phases, with a limited number of the officers to be tested by polygraph. This part of the investigation was "not officially compelled."

Although she initially agreed, Luty later decided not to participate in the testing, including the polygraph. As part of the IA investigation, it was learned that Luty had "secretly tape-recorded conversations with fellow officers on at least two prior occasions" and the policy was created because of these, and possibly other, incidents involving Luty.

⁹³ 123 F.3d 404 (6th Cir. 1997).

⁹⁴ 214 F.3d 718 (6th Cir. 2000).

⁹⁵ Quinn v. Shirley, 293 F.3d 315 (6th cir. 2002).

⁹⁶ 547 U.S. 410 (2006).

⁹⁷ Id.

The IA report indicated that although Luty was the prime suspect in the taping, that because of a lack of direct evidence, they could not be sure. Chief Cliff decided that Luty was, in fact, the perpetrator, and later agreed that he considered her refusal to participate in the testing in reaching that conclusion. The Chief recommended, and the City Manager agreed, to demote her to sergeant for one year.

A year later, Luty was restored to her rank, and several additional incidents arose that led to reprimands and suspension. Luty filed suit, arguing violations the First Amendment and the state workers' disability compensation act. The trial court jury found for the defendants and Luty appealed.

ISSUE: Is a refusal to participate in a process an expressive action protected by the First Amendment?

HOLDING: No

DISCUSSION: Luty complained that the city's "adverse employment action" violated her First Amendment protections. The Court noted that the First Amendment protects "only ... conduct that is 'inherently expressive.'" The Court found it "difficult - if not impossible - to detect any particular message emanating from Luty's conduct in refusing to undergo the scan test or polygraph." The Court agreed her conduct did not amount to protected speech.

However, even had it been found to be speech, the Court noted that "determining whether a public employer has violated the First Amendment by firing a public employee for engaging in speech," It must first "ascertain whether the relevant speech addressed a matter of public concern."⁹⁸ That is decided by the "content, form, and context of a given statement, as revealed by the whole record."⁹⁹ The "public concern test" was further refined by the emphasis "that the court must determine the focus, point, purpose and intent of the speech in question or the 'communicative purpose of the speaker."¹⁰⁰

Speech is of public concern if it "involves issues about which information is needed or appropriate to enable members of society to make informed decisions about the operation of their government." By contrast, when the employee speech "cannot fairly be considered as relating to any matter of political, social" or community interest, government officials enjoy wide discretion in the management of their offices.

In this case, Luty's "speech" was "of no public concern whatever and, therefore, is not protected by the First Amendment" - relating as it did to an "internal police department matter." Although "some internal police policies may be a legitimate focus of community interest," the Court could not "discern an issue of public concern." As such, it was unnecessary to move on to the "Mount Healthy question."¹⁰¹

The jury verdict was upheld.

⁹⁸ Farhat v. Jopke, 370 F.3d 580 (6th Cir. 2004).

⁹⁹ Connick v. Myers, 461 U.S. 138 (1983).

¹⁰⁰ Farhat, *supra*.

¹⁰¹ Mount Healthy City School District Board of Education v. Doyle, 429 U.S. 274 (1977), which involves employment cases.

DISCIPLINE

U.S. v. Williams

2009 WL 579332 (6th Cir. 2009)

FACTS: Williams was a Nashville PD officer on April 30, 2003. On that date, Officer Cecil (Nashville PD) asked Williams to assist him in arresting a drug dealer. Before making a traffic stop, however, Cecil told Williams that he “intended to steal drugs from the drug dealer, not arrest him.” Williams “protested, but did nothing to stop Officer Cecil and did not report the theft.”

A year and a half later, in late 2004, Nashville PD received information about the theft and opened an internal investigation. Williams was interviewed on April 13, 2005. He admitted the traffic stop, but stated that they’d searched the car and the subject, and found neither money nor guns. “Shortly thereafter, however, [Williams] went to [IA], recanted his story, and told the truth – or at least got closer to telling the truth.” The DEA became involved and Williams “gave inconsistent statements to DEA agents as well,” telling them initially that Cecil told him after the fact. He admitted the truth after failing a polygraph.

Williams was indicted on several counts and moved for suppression. He moved for suppression and was denied. He was eventually convicted only of misprision of a felony. He appealed.

ISSUE: Does the Fifth Amendment protect an employee when they lie?

HOLDING: No

DISCUSSION: Williams argued that the “Fifth Amendment gave him the right to refrain from reporting it.” The Court noted, however, that his conviction “did not stem from his silence.” “Instead, [Williams] was convicted because when he chose to speak he lied to the authorities.”¹⁰²

Williams also tried to raise a Garrity issue, but because he failed to raise the issue at the trial level, the Court declined to consider it.

Williams’ conviction was affirmed.

¹⁰² Brogan v. U.S., 522 U.S. 398 (1998); U.S. v. Apfelbaum, 445 U.S. 115 (1980).

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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).