

Department of  
**CRIMINAL JUSTICE TRAINING**

KENTUCKY JUSTICE AND PUBLIC SAFETY CABINET

2009



*Leadership is a behavior, not a position*

CASE LAW UPDATES  
SECOND QUARTER

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



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



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

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

# KENTUCKY

## PENAL CODE - SELF DEFENSE

### Wines v. Com.

2009 WL 1830805 (Ky. 2009)

**FACTS:** Brashear and Wines were long-time friends and socialized frequently. On April 14, 2005, in Louisville, Brashear asked Wines if he and another friend, Langan, could come to Wines's home and purchase some marijuana. Wines, however, became angry, accused Langan of being police and ordered Brashear not to come to the house. Later that evening, Brashear and Langan were visiting Brashear's sister, who lived a few doors from Wines, as well as the home of another friend who lived across the street from the sister. Brashear heard Wines start "calling him names and inviting him to fight." Brashear walked towards Wines's house and the two "exchanged insults." Wines went to the end of his driveway and dared Brashear to step onto the property. Brashear denied that he did so, but later stated that Wines struck him on the head with a nunchuka. Police were called and Wines was arrested. The first grand jury did not indict Wines for assaulting Brashear.

During Wines's brief stay in jail for the assault, he wrote to Hamilton concerning several matters. Hamilton was a drug dealer who kept certain "supplies" at Wines' house, and he also had a key to the house. Nelson, Hamilton's girlfriend, began spending time with Wines, and eventually began to divide her time between the two. Hamilton entered Wines's house twice in May, 2005 and attacked Nelson. On June 12, 2005, he came to the house and called to Nelson to come out to talk to him. Wines called police, but Hamilton left before their arrival. Wines confronted Nelson and told her to choose between the two men, but Nelson said she would never completely leave Hamilton. "Wines allegedly grew furious and declared that he would kill his former friend."

At about 4 a.m., Hamilton came back to the house. Eventually, during a confrontation, Wines stabbed Hamilton multiple times, killing him.

Wines was arrested for the homicide. During the next term of the grand jury, he was indicted both on that offense as well as the earlier assault. He moved to sever the two cases for trial but was denied. Wines was convicted of murder and assault and appealed.

**ISSUE:** May the prosecution offer evidence (probable cause) to refute a claim of immunity under KRS 503?

**HOLDING:** Yes

**DISCUSSION:** Wines "claimed self-defense in both cases, each of which ended with an unarmed 'friend' of Wines either injured or dying within feet of Wines's residence." In the situation with Brashears, Wines argued that he believed Brashear had a knife and that he struck him because of that threat. In the

Hamilton case, in contrast to what Nelson stated, Wines claimed Hamilton came up on the porch and forced his way inside the house and beat Wines. However, in both situations, there was also evidence “tending to show that Wines planned to use self-defense as a pretext for a premeditated attack.” “Nelson testified that Wines told her he was lodging the police complaints to make Hamilton look like the aggressor, so that when he finally did kill Hamilton he would get off.” The Court agreed that the crimes “reflected a common scheme and each provided evidence that the other crime had been similarly planned to appear as an act of justified self-defense.”

The Court further agreed that despite the changes made in KRS 503 subsequent to the events, that the substantive changes to the law were not retroactive. However, the Court held that the immunity provision, which was procedural, could be applied to this case. However, the Court agreed that Wines was not entitled to immunity, as the prosecution had produced sufficient evidence to refute his claim to it.

Finally, the Court agreed that admitting the tape-recorded statement made by Nelson to investigating officers was hearsay, but further agreed that it was admissible as an excited utterance under KRE 803(2). The Court looked to the eight factors to be used to consider if a specific statement qualified:

(i) lapse of time between the main act and the declaration, (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.<sup>1</sup>

In addition, Det. Sherrard (Louisville Metro PD) had testified that he interviewed Nelson in the back of his car about two hours after the murder and that she was “crying and hysterical.” Her statement was, the Court concluded, a “spontaneous outpouring under the influence of her distress.”

After addressing several other issues, the Court upheld Wines’s conviction.

**Rodgers v. Com.**  
**285 S.W.3d 740 (Ky. 2009)**

**FACTS:** On Aug. 21, 2004, McAfee, Palmore, and Eubanks were having a barbecue in the backyard of McAfee’s home. Rodgers and Eddings, who knew Eubanks, joined them late that evening. Everyone talked, listened to music, and possibly drank some beer and smoked some marijuana. Shortly after midnight, an argument arose between McAfee and Rodgers. Palmore tried to intervene. Eubanks, who had gone into the house, returned to find the argument ongoing; she joined Palmore in urging Rodgers to leave. Rodgers “apparently backed out of the backyard and along the side of the house toward the front.” When he was almost to the front, “both men shoved the women aside and, according to Palmore and Eubanks, Rodgers produced a gun and fired several shots at McAfee.” (The number was disputed.) Eddings then approached and “fired two additional shots at the prone McAfee” - although Palmore testified that McAfee was still standing when Eddings shot him from the rear. Rodgers and Eddings fled and McAfee died.

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<sup>1</sup> Souder v. Com., 719 S.W.2d 730 (Ky. 1986).

Both Eddings and Rodgers were arrested. Both gave statements to Det. Whelan (Louisville Metro PD). Rodgers admitted to the shooting, but claimed that McAfee was the aggressor, that the gun was McAfee's and that he'd wrestled it away from McAfee. He stated the first shot was an accident and that he then fired at McAfee to "deter McAfee's assault." (Det. Whelan testified as to his statements to her, but "limited her testimony to Rodgers's admissions without his self-defense qualifications." She testified as to his self-defense claims on cross.)

Rodgers was convicted of first-degree manslaughter, and Eddings' faced retrial as his jury could not reach a decision.

**ISSUE:** What is the burden of proof for a claim of immunity under KRS 503?

**HOLDING:** Probable cause

**DISCUSSION:** The first issue the Court addressed was the argument that the joint trial of the two men was unfair, because statements against each other were partially admitted. The Court agreed that in this case, the error, if any, was harmless.

The primary issue in this case, however, was the application of the 2006 changes to KRS 503 (with respect to self-defense) to an offense that occurred in 2004. Rodgers claimed that he was entitled to immunity under the new law, but the Court agreed that the new law cannot be applied retroactively. In addition, the Court agreed that the statute did not specify "who bears the burden of proof or what standard of proof applies," and the trial court "imposed on the Commonwealth a directed verdict standard." The Court agreed the Commonwealth met that standard because of conflicting testimony from the two women who were at the scene.

Further, the Court agreed that the statute itself indicated that "probable cause" was the standard, and that not only law enforcement, but the "prosecutor and the courts may also be called upon to determine whether a particular defendant is entitled to KRS 503.085 immunity."

The Court noted:

Thus, in order for the prosecutor to bring charges or seek an indictment, there must be probable cause to conclude that the force used by the defendant was not fully justified under the controlling provisions or provisions of KRS Chapter 503. Similarly, once the matter is before a judge, if the defendant claims immunity, the court must dismiss the case unless there is probable cause to conclude that the force used was not legally justified.

Further:

Because immunity is designed to relieve a defendant from the burdens of litigation, it is obvious that a defendant should be able to invoke KRS 503.085(1) at the earliest stage of the proceeding. While the trial courts need not address the issue sua sponte, once the defendant raises the immunity bar by motion, the court must proceed expeditiously. Thus a defendant may invoke KRS 503.085 immunity and seek a determination at the preliminary hearing in district court or, alternatively, he may elect to await the outcome of the grand jury proceedings and, if indicted, present his motion to the circuit judge. A defendant may

not, however, seek dismissal on immunity grounds in both courts. Once the district court finds probable cause to believe that the defendant's use of force was unlawful, the circuit court should not revisit the issue. In the case of a direct submission or where a defendant has elected to wait and invoke immunity in the circuit court, the issue should be raised promptly so that it can be addressed as a threshold motion.

Finally:

The sole remaining issue is how the trial courts should proceed in determining probable cause. The burden is on the Commonwealth to establish probable cause and it may do so by directing the court's attention to the evidence of record including witness statements, investigative letters prepared by law enforcement officers, photographs and other documents of record. Although Rodgers advocates an evidentiary hearing at which the defendant may counter probable cause with proof "by a preponderance of the evidence" that the force was justified, this concept finds no support in the statute. The legislature did not delineate an evidentiary hearing and the only standard of proof against which a defendant's conduct must be measured is the aforementioned probable cause. We decline to create a hearing right that the statute does not recognize and note that there are several compelling reasons for our conclusion.

First, the pretrial evidentiary hearings that are currently conducted, such as suppression hearings, do not involve proof that is the essence of the crime charged but focus instead on issues such as protection of the defendant's right to be free from unreasonable searches and seizures, right to be represented by counsel and right to *Miranda* warnings prior to giving a statement. Similarly, a competency hearing addresses the state of the defendant's mental health and his ability to participate meaningfully in the trial. Neither of these hearings requires proof of the facts surrounding the alleged crime. An evidentiary hearing on immunity, by contrast, would involve the same witnesses and same proof to be adduced at the eventual trial, in essence a mini-trial and thus a process fraught with potential for abuse. Moreover, it would result in one of the elements of the alleged crime (no privilege to act in self-protection) being determined in a bench trial. In RCr 9.26 this Court has evinced its strong preference for jury trials on all elements of a criminal case by providing specifically that even if a defendant waives a jury trial in writing, the court and the Commonwealth must consent to a bench trial. Thus, where probable cause exists in criminal matters the longstanding practice and policy has been to submit those matters to a jury and we find no rational basis for abandoning that stance.

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

*NOTE: The issue of using a co-defendant's statement during a joint trial is a matter for the prosecutor, but officers must be aware of limitations in how they might repeat such statements. Repeating a prohibited statement may cause a mistrial.*

## PENAL CODE - RECKLESS HOMICIDE

### Prater v. Com.

2009 WL 1424022 (Ky. App. 2009)

**FACTS:** On May 21, 2004, Prater was involved in a one-car wreck that resulted in the death of her son, Jayven. The 2-year-old was not in a child safety seat at the time. Prater tested positive for prescribed medications, including Tramadol, Methadone and Zoloft, but not for alcohol.

Prater was indicted on charges of reckless homicide and convicted. She then appealed.

**ISSUE:** May an impaired parent be charged with Reckless Homicide for the death of a child not secured in a car seat?

**HOLDING:** Yes

**DISCUSSION:** Prater argued that the jury should have been instructed that "failure to place the child in a child restraint system was not to be considered as reckless conduct." Specifically, she argued that since KRS 189.125(3) does not permit that information to be used as contributory negligence in a civil case, that it should "likewise not be admissible in a trial of a criminal case. " The Court looked to Com. v. Mitchell, but unlike the decision in that case, it concluded that it could admit such evidence if there were other factors indicating reckless conduct. In Prater's case, there was evidence that she was "driving too fast, had drugs in her system, and was inattentive."

The Court upheld the admission of the information concerning the safety seat, but vacated the judgment due to the improper introduction of other prejudicial evidence.

## PENAL CODE - POSSESSION OF BURGLARY TOOLS

### Graves v. Com.

285 S.W.3d 734 (Ky. 2009)

**FACTS:** Graves and Smith were arrested "within a few feet of the Backspin Sports Bar .. In Lexington soon after it was broken into in December 2007." A number of items were damaged in the break-in. Smith pled guilty to burglary, as he was carrying stolen goods when stopped, but Graves claimed to have only run into Smith, and that he was "merely taking Smith where he could sell the stolen goods." However, Graves was also carrying items taken in the break-in, as well as a "flathead screwdriver, and a pocket knife."

An eyewitness placed Graves as an actual participant in the burglary.

Graves was convicted and appealed.

**ISSUE:** May ordinary tools be considered burglary tools?

**HOLDING:** Yes

**DISCUSSION:** Graves argued that he should have gotten a directed verdict for possession of burglary tools, as there was insufficient proof that the screwdriver was actually used in the break-in, in that there was “merely a possible inference that the screwdriver used was a burglary tool.”

The Court agreed that many of the tools used by burglars “are not peculiarly designed for that purpose.”<sup>2</sup> KRS 511.050 also provides a description that means that “almost all burglar tools will have a legitimate, noncriminal purpose.” However, the statute also notes that conviction is “appropriate only after proof of the existence of circumstances which leave no reasonable doubt as to the possessor’s criminal intention or knowledge of another’s intent.”

The Court agreed that there was “more than a mere scintilla of evidence that” the screwdriver was involved in the crime, and that was sufficient for the jury to have found such was the case.

Graves’s conviction was affirmed.

## **PENAL CODE - POSSESSION OF A FIREARM BY A CONVICTED FELON**

**Boyd v. Com.**

2009 WL 1256912 (Ky. App. 2009)

**FACTS:** Boyd was a passenger in a vehicle stopped by Kentucky Vehicle Enforcement officers, in Boone County. During a subsequent vehicle search, a handgun was found in the back seat. All three men were felons, so all three were charged. Boyd pled guilty at arraignment and took responsibility for the weapon. After some discussion and a second hearing, the charges against the other two were dismissed.

Boyd then moved for acquittal at trial and requested the suppression of the statements he’d made earlier. He was convicted and appealed.

**ISSUE:** Must the prosecution prove that a weapon is operable to charge a felon with its possession?

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

**DISCUSSION:** Boyd argued that no proof was introduced concerning the operability of the firearm, but the Court ruled that such proof was not required by the statute. Instead, the condition of the weapon could be pled as an affirmative defense to be raised by the defendant. Further, the Court ruled that his admission to owning the weapon was made in open court, not during plea negotiations, so that information was properly admitted.

Boyd’s conviction was affirmed.

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<sup>2</sup> Com. v. Riley, 232 S.W. 630 (1921).

## PENAL CODE - BURGLARY

### Askew v. Com.

2009 WL 875059 (Ky. App. 2009)

**FACTS:** On May 28, 2007 Officer Copeland (Paducah PD) spotted Askew "removing windows, doors and wiring from a dilapidated house." Askew initially stated he had a right to be there, but later stated he thought the house was vacant and condemned. He was charged with burglary, theft and criminal mischief, and was eventually convicted. He then appealed.

**ISSUE:** Is a dilapidated vacant house a building for purposes of burglary?

**HOLDING:** Yes

**DISCUSSION:** Askew argued that a "condemned, dilapidated, and vacant house" was not a building under KRS 511. The Court, however, disagreed, and found that it was a building, although not a house.

Askew's conviction was affirmed.

## PENAL CODE - DOMESTIC ASSAULT

### Lisle v. Com.

2009 WL 1811105 (Ky. App. 2009)

**FACTS:** Lisle was involved in an assault with his live-in girlfriend in Fayette County. Lisle was arrested for fourth-degree assault, third offense, a felony, and a violation of an existing no unlawful contact DVO. He was convicted of both, along with a PFO I and appealed.

**ISSUE:** Must earlier assault charges proven to involve a qualified domestic victim be used to enhance a later domestic violence assault charge?

**HOLDING:** Yes

**DISCUSSION:** Lisle argued that his criminal history did not indicate his previous assault offenses had been with a family member (or girlfriend). The Court agreed that the statute, KRS 508.032, required that such proof of such a prior conviction (specifically, that it involved one of the covered parties) is an essential element to make the offense a felony in Kentucky. In this case, only one of the cases presented clearly indicated it was with a live-in girlfriend, the other was ambiguous.

Lisle's conviction for felony fourth-degree assault was overturned.

**Nathem v. Com.**  
**2009 WL 1025100 (Ky. App. 2009)**

**FACTS:** On Oct. 15, 2004, a Vehicle Enforcement officer stopped Nathem for a “routine safety inspection of the commercial vehicle he was operating.” The officer “noticed the smell of marijuana coming from the truck.” Nathem gave written consent allowing a search and the officer found marijuana and a pipe. Nathem was charged and sought dismissal, arguing the officer lacked jurisdiction to make that type of arrest. The Court denied the motion and Nathem was convicted. He appealed.

**ISSUE:** May Vehicle Enforcement officers make arrests for drugs found during lawful vehicle searches?

**HOLDING:** Yes

**DISCUSSION:** The court noted that Vehicle Enforcement officers are authorized under KRS 281.765. The Court further noted that Howard v. Transportation Cabinet, Com. of Ky also permits such officers to enforce the law with respect to any violation “relating to motor vehicles and boating....”<sup>3</sup> The Court found that the initial stop was within the scope of authority of the officer and that the “presence of drugs in a commercial vehicle certainly raises safety concerns.”

The Court upheld Nathem's conviction.

## **DOMESTIC VIOLENCE**

**Faught v. Faught**  
**2009 WL 1705129 (Ky. App. 2009)**

**FACTS:** David Faught was the subject of an EPO, then a DVO, taken out by his sister-in-law, Gloria Faught, with the allegation being that he “threatened her with physical harm.” He did not appear at the DVO hearing, later claiming to have had car trouble. The DVO ordered him to have no contact with his sister-in-law. The following month, he was arrested for allegedly violating the DVO. Faught was granted a rehearing and the previous 3-year no contact order was reduced to 1-year. David Faught then appealed.

**ISSUE:** Is a sister-in-law a member of a subject's immediate family?

**HOLDING:** Yes

**DISCUSSION:** David argued that he was not a member of Gloria's immediate family. However, the Court quickly concluded that KRS 403.720(2) included a sister-in-law (married to Faught's brother) was within the degree of “consanguinity or affinity within the second degree.”

David also argued that Russell Circuit Court was not the proper venue, because the alleged acts occurred in Pulaski County, but the Court agreed that it was proper to file in the victim's usual county of residence.

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<sup>3</sup> 878 S.W. 2d 14 (Ky. 1994).

Finally, Faught argued that Court failed to rule on his request for a return of his personal property, but the Court agreed that the Court had told Faught to “prepare a list of items for the sheriff to give Gloria and Charles so the property could be returned.”

Faught’s conviction was affirmed.

## DUI

### Little v. Com. 2009 WL 1110336 (Ky.2009)

**FACTS:** On Aug. 9, 2004, Little collided with a car driven by Sosh, in Meade County. Sosh, her toddler son and another individual in her car were all injured. Little was also injured and transported to the hospital, “but his blood was not drawn until three hours had passed since the accident.” The results were .29% at that time.

Witnesses agreed that Little had been drinking prior to the wreck but were unable to agree as to how much. Other witnesses also noted his erratic driving. Deputy Robinson (Meade Co. SO) found beer cans both inside and outside the truck. He was, of course, unsure of Robinson’s degree of intoxication at the scene.

Little was eventually indicted on numerous charges related to the wreck; He stood trial. He was convicted and appealed.

**ISSUE:** May blood tests taken three hours after a wreck be introduced in evidence in a KRS 189A.010(b) prosecution?

**HOLDING:** Yes

**DISCUSSION:** Little first argued that it was inappropriate to introduce his four prior convictions for DUI, which occurred between 1995 and 1997. The trial court admitted the convictions under KRE 404(b), as “prior bad acts” that indicated “his intent, knowledge, and absence of mistake regarding driving while intoxicated.” The Court, however, found that the introduction of the evidence was error, noting that in Com. v. Ramsey, it had held that “previous DUI convictions do not fall within either the exceptions outlined by KRE 404(b) or those recognized by this Court.”<sup>4</sup> The Court agreed that the evidence was “unduly prejudicial” and should not have been admitted.

The Court also noted that the injuries sustained by the passenger in Sosh’s car were not serious, a bloodied nose, a cut lip and a cut on her knee. Some year later, she suffered another problem with her knee, but the Court noted no connection between that problem and the wreck. The Court agreed, however, that if the problem with her knee had been proven to have been caused by the wreck, it “could qualify as a serious physical injury because it is reoccurring and does affect the use of her right leg.” As such, the charge of first-degree assault was not appropriate in this case.

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<sup>4</sup> 920 S.W.2d 526 (Ky. 1996).

The Court did find it was appropriate to charge Little with First-Degree Wanton Endangerment with respect to another car he forced off the road. (The driver was uninjured.) Since the evidence indicated he had been drinking before that occurred, the charge was valid.

Finally, the Court agreed it was appropriate to allow the introduction of the blood tests, taken 3 hours after the crash. Little argued that it was error because "KRS 189A.010(2) prohibits the admission of blood tests taken over two hours from the initial arrest to be used to determine blood alcohol levels as evidence for a prosecution under KRS 189A.010(1)(a) or (e)." However, "KRS 189A.010(2) clearly states that blood tests taken after two hours are admissible in prosecutions under KRS 189A.010(1)(b) or (d)." Since the case was proceeding under (b), the admission of the results was not error.

Little's conviction was overturned because of the KRE 404(b) issue.

**Mattingly v. Com.**  
**2009 WL 1098111 (Ky. App. 2009)**

**FACTS:** On Sept. 2, 2007, a KSP trooper spotted Mattingly "driving a golf cart with a mixed drink in her hand" on a private road in Grayson County. She admitted drinking an alcoholic beverage and failed several FSTs. She was arrested and charged with DUI and having an open container of alcohol in a motor vehicle.

She moved to dismiss, arguing that the golf cart was not a motor vehicle under KRS 189A.010 and that it was not operated on a public highway. The trial court denied the motion and she took a conditional guilty plea. She then appealed.

**ISSUE:** Is a golf cart a motor vehicle for purposes of KRS 189A.010?

**HOLDING:** Yes

**DISCUSSION:** Mattingly continued her argument that a golf cart was not a motor vehicle. Since KRS 189A.010 does not give a specific definition for motor vehicle, Mattingly argued that the Court should use the definition under KRS 189.010(19) which indicates a motor vehicle "is a motorized transportation agent used for the purpose of transporting people or property over or upon the public highways of the Commonwealth." Because golf carts were not legally driven on the public roadways at the time, she claimed the definition did not include golf carts.

The Court, however, stated that since the definition in KRS 189 "was for the use of that term as used in that chapter and not necessarily as used in KRS Chapter 189A," it must instead "go to the common usage and approved usage of the term." The golf cart had motors and rubber tires and was being operated on a private road in a subdivision. That road was shared with vehicles and by driving on the road, she was placing others in danger.

The decision of the trial court was affirmed.

**Fields v. Com.**  
**2009 WL 875327 (Ky. App. 2009)**

**FACTS:** On Dec. 6, 2006, Nicholasville officers were sent to investigate a disturbance in a local parking lot. They found Fields “yelling, screaming and shouting profanities at other individuals.” She was arrested for DUI, resisting arrest and disorderly conduct.

At trial, a witness testified that when she arrived at the restaurant, she saw Fields’ SUV in a handicapped parking place. She thought the vehicle was preparing to back out of the space because the “brake lights and back-up lights were illuminated.” She waited, but the vehicle did not back up, so she parked. When the witness got out, she could hear the SUV running. Two of the witness’s passengers testified to the same information. Officer White (Nicholasville PD) testified that when he arrived, Fields was out of her car and very belligerent. He believed her to be very “extremely intoxicated.” As he and Officer Resor arrested her, she struggled and pulled away from him, flailing her arms. Eventually, they got her into custody.

Fields was convicted, and appealed.

**ISSUE:** Is evidence that a vehicle is running proof that the driver is in physical control of it?

**HOLDING:** Yes

**DISCUSSION:** With respect to the DUI, Fields argued that she was not operating or in physical control of her vehicle. She explained that when she used the remote keyless entry to unlock her vehicle that the lights would come on automatically. She claimed she never started the vehicle. The Court looked to the four factors in Wells v. Com.<sup>5</sup> and found that the prosecution had presented sufficient information that the vehicle was, in fact, running, particularly since that feature of the car would have only illuminated the lights for about 40 seconds, a much shorter time than the witnesses claimed. Further, this indicated that she intended to drive the vehicle.

Fields’ conviction was affirmed.

**Wilson v. Com.**  
**2009 WL 960750 (Ky. App. 2009)**

**FACTS::** On Aug. 16, 2006, Officer Goodwin (Middlesboro PD) made a traffic stop of Wilson after Wilson backed out of a driveway, squealing and spinning tires. When Officer Goodwin approached, he “smelled alcohol.” Wilson failed all but one FST, and took a PBT which indicated the presence of alcohol.

Officers Goodwin and Greene searched the car and found syringes and cocaine residue. Wilson refused blood and urine testing at the hospital. He was indicted on numerous traffic related charges. Eventually Wilson was convicted of most of the charges, including DUI. He appealed.

**ISSUE:** May a PBT be mentioned as a Field Sobriety Test?

**HOLDING:** Yes

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<sup>5</sup> 709 S.W. 2d 847 (Ky. App. 1986).

**DISCUSSION:** During Officer Goodwin's testimony, he described the FST's he performed and also mentioned the PBT. He stated the PBT detected the presence of alcohol, and Wilson objected at that time. The officer was cross-examined using the Standardized Field Sobriety Testing and Reference Guide, which included PBTs.

The Court reviewed the statute, KRS 189A.194, and agreed that testimony concerning the PBT detecting the presence of alcohol was not evidence to prove guilt. The Court found it was not error to admit the mention of the PBT, however, as one of several FSTs.

Further, the Court found that the introduction of evidence of cocaine residue was also admissible, as Kentucky subscribes to the "any amount" test, rather than the "usable quantity" approach.

Wilson also argued that the officer's comment on his "bruised and scarred" arms was inappropriate, but the court concluded that its introduction was, at best, harmless error.

Wilson's conviction was affirmed.

**Litteral v. Com.**  
**282 S.W.3d 331 (Ky.App. 2009)**

**FACTS:** On the day in question, Officer Combs (Lexington PD) arrested Litteral for DUI and took him to the jail. There, he explained Litteral's rights, and Litteral called his sister, an attorney, during the waiting period. "Officer Combs remained in close proximity to Litteral while he was attempting to communicate with his attorney."

Litteral took a conditional guilty plea and appealed.

**ISSUE:** Does an arrested DUI subject have a right to confer privately with an attorney prior to taking the Intoxilyzer?

**HOLDING:** No

**DISCUSSION:** Litteral argued that the test results should have been excluded because he did not have the opportunity to consult privately with his attorney. The Court reviewed the history of the implied consent law, and concluded that the statutory right "described is very circumscribed" and does not create a right to have counsel present or to consult privately with an attorney - and if the Legislature intended to create such a right, it could easily have done so. (The Court further noted that another statute required that the officer personally observe the subject for 20 minutes.) The Court continued:

We are convinced that the purpose of this very circumscribed right of access to counsel was to allow independent confirmation of the information conveyed by the law enforcement officer - and then only in a way that does not impact the accuracy of the test itself.

The Court also agreed that inability to actually make contact with an attorney did not relieve the person from an obligation to submit to the test.

Litteral's plea was upheld.

## ARREST

### Robey v. Com.

2009 WL 875054 (Ky. App. 2009)

**FACTS:** On Jan. 20, 2007, Robey was spotted by a Providence officer "as he staggered down the side of the road across from his house." He admitted to having been drinking. He refused a breathalyzer and the officer told him he was under arrest. Robey stated that he didn't think so, and that he wasn't in the road.

Robey's neighbor drove up, and Robey tried to hand the neighbor a small black case from his pocket. The officer took the case and secured Robey. The officer discovered the case contained digital scales and a baggie containing white powder, later determined to be cocaine.

Robey was charged with a variety of offenses. He moved for suppression and was denied. He took a conditional guilty plea and appealed.

**ISSUE:** Is someone staggering and stumbling close to a roadway subject to arrest?

**HOLDING:** Yes

**DISCUSSION:** The Court ruled that the officer certainly had "reasonable articulable suspicion that Robey was publicly intoxicated given his staggering and stumbling close to the highway." As such, he was at great danger to himself and others. The evidence indicated that he was not on private property at the time, apparently he was on the shoulder of the road in the easement.

The denial of the motion to suppress was affirmed, as was Robey's plea.

## SEARCH & SEIZURE - TERRY

### Thomas v. Com.

2009 WL 1348875 (Ky. App. 2009)

**FACTS:** On Jan. 2, 2006, Officers Casper, Campbell and Green (Louisville Metro PD) were working on a special detail in the Park Hill area. They set up a position so they could watch what was occurring in the courtyard, known as "the chute." It was later "uncontroverted that the area was dimly lit and the officers could not see exactly what was taking place in the courtyard from their initial vantage point." They did see Thomas standing in the courtyard, two men approach him, and then leave. They did not see any exchange take place and could not tell if there had been any conversation.

The officers approached Thomas, and asked for ID to verify his address, since that area was posted against trespassing. Thomas had no ID, but agreed to a frisk. However, when the officers started to do so, Thomas bolted. The officers followed, tackling him. They handcuffed Thomas and searched him, finding 24 pieces of crack cocaine. Officer Casper later testified that "he recalled Thomas saying that he ran from

them because he believed there was a bench warrant for his arrest," but Thomas was mistaken. Casper believed that statement was made "while they were still on the ground." Thomas also allegedly stated that he would "kick [the officer's] a\*\*" if he wasn't restrained. Thomas was charged with criminal mischief for tearing Officer Campbell's pants.

Thomas gave a different recitation of the facts, and claimed he ran when he was grabbed and pushed against a fence. The trial court, however, "found that the credibility of the officers outweighed that of Thomas as to the sequence of events that occurred that evening."

Thomas was charged with trafficking and related offenses. He requested suppression and was denied. He took a conditional guilty plea and appealed.

**ISSUE:** Is running when confronted by the police reasonable suspicion to continue a detention?

**HOLDING:** Yes

**DISCUSSION:** The court found the nature of the area and the behavior of the individuals on a winter night led to a reasonable suspicion that crime "might be afoot." The Court agreed that the officers had sufficient reasonable suspicion to stop him, and Thomas's flight exacerbated the suspicions. The Court agreed that Thomas was seized and was "not free to leave the scene once he could not show the officers that he was in the neighborhood legitimately." The Court found that requesting ID was appropriate, under the circumstances, and that the frisk was also justified.

Further, when Thomas made the decision to run, it "changed the initial Terry stop into a situation where the officers had probable cause to search his person and formally arrest him even absent the discovery of the torn pants that led to the criminal mischief charge."<sup>6</sup> The nature of what was found in his pockets was "immediately apparent" and justified a further search, which revealed the crack cocaine.

Finally, Thomas argued that Officer Casper, the only officer to testify, was a new officer, lacking the experience needed for him to make such judgments. However, the Court found that there was no indication that Officers Campbell and Green "were similarly inexperienced," and "Officer's Casper's relative inexperience was mitigated by the other officers who were also present."

The Court affirmed the denial of the motion to suppress, and affirmed his plea.

**Martin v. Com.**

**2009 WL 1811532 (Ky. App. 2009)**

**FACTS:** Lt. Weathers (Lexington PD) was patrolling in plainclothes when he noticed men trying to "flag him down." He suspected drug activity so he called Det. Smoot and other narcotics officers to investigate. Det. Smoot found 7 people at the location. He noticed Martin, specifically, when he tried to "shove something in his pocket." Martin ran when Det. Smoot tried to stop him. Smoot caught him, and Martin threw away some objects. Martin was arrested for fleeing and evading and given Miranda.

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<sup>6</sup> Illinois v. Wardlow, 528 U.S. 119 (2000).

Smoot searched Martin and found a piece of paper “he believed to be a drug-debt list” and \$5321 in cash. He also found 3 grams of crack cocaine, 9.6 grams of powder cocaine and a set of digital scales in the area where he’d seen Martin throw items. Martin gave consent to search his vehicle and the officers found \$18,000 in cash hidden in a black shaving kit. Martin admitted the money was “drug money” and named his supplier. He offered to testify in exchange for leniency.

Martin later moved for suppression, but was denied. He was convicted of fleeing and evading, as well as trafficking, and related charges. He then appealed.

**ISSUE:** Does fleeing from an officer who is trying to talk create reasonable suspicion sufficient for a Terry stop?

**HOLDING:** Yes

**DISCUSSION:** The Court reviewed the circumstances, and whether Smoot had reasonable suspicion to engage in a Terry interaction with Martin. The Court agreed that Smoot made “reasonable inferences” about what Martin was doing, and that “Martin instantly created reasonable suspicion justifying a Terry stop upon taking flight.”<sup>7</sup>

Martin’s conviction was affirmed.

**Tillman v. Com.**  
**2009 WL 1424017 (Ky. App. 2009)**

**FACTS:** On July 6, 2006, a Lexington officer spotted Tillman riding a bicycle. He knew that Tillman had outstanding warrants and believed Tillman was trying to evade him. He eventually apprehended him, and advised Tillman “that he was not under arrest, but was being detained while the officer confirmed the existence of the warrants.” When the officer did confirm them, he arrested Tillman. He searched and found 4 grams of crack cocaine, and Tillman was charged with trafficking, as well.

Tillman moved for suppression and was denied. He took a conditional guilty plea and appealed.

**ISSUE:** Is knowledge of outstanding warrants sufficient to support a Terry stop?

**HOLDING:** Yes

**DISCUSSION:** Tillman argued the stop was unlawful because the officer was “out to get him,” and that he was stopped solely because of the officer’s animosity towards him. He noted that he was stopped before the officer verified the warrants.

The Court quickly disagreed and affirmed Tillman’s plea.

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<sup>7</sup> Id.

## SEARCH & SEIZURE - CONSTRUCTIVE POSSESSION

### Cantrell v. Com

288 S.W.3d 291 (Ky. 2009)

**FACTS:** On January 27, 2006, the Johnson County SO got a tip that a meth lab was operating in a trailer on property owned by Cantrell's father. The deputies went to the scene. When Deputy Wyatt arrived, he spotted Cantrell and Dalton "climbing out an open window and running away." Both were inadequately dressed for the cold weather and Dalton was shoeless. Deputy Mayes also saw them and both were captured. Both deputies recognized the odor of ammonia on their persons.

Cantrell gave permission to search the trailer. "A strong caustic odor permeated the air around the residence," and as they entered, the deputies "encountered a foggy haze and more of the strong caustic odor which had been detected outside." The Court continued, "in fact, one of the officers began coughing so much because of the fumes that he had to be treated at the local hospital." They later discovered all the chemicals and equipment necessary for the manufacture of methamphetamine. They also discovered another individual, unconscious inside, and a surveillance camera set up on the driveway.

Cantrell was convicted of complicity and appealed.

**ISSUE:** Does fleeing from a house trailer connect a suspect to that trailer and to everything found inside?

**HOLDING:** Yes

**DISCUSSION:** Cantrell argued that the evidence "failed to connect him to the trailer." The Court noted that Cantrell "was climbing out a window of the trailer and attempting to flee when officers arrived on the scene." The Court also noted the pair were "unseasonably dressed when they were apprehended" and that he "led the officers to believe the trailer was his home." The consent form he signed indicated he was "giving them consent to search 'the home of Brent Cantrell'" and his truck was parked at the trailer. In fact, his initial motion to suppress indicated that the trailer was "his home." As such, there was sufficient evidence that he was connected to the trailer.

Cantrell's conviction was affirmed.

### Taylor v. Com

2009 WL 1160263 (Ky. App. 2009)

**FACTS:** On the day in question, a bicycle officer was patrolling through a park when he spotted Taylor sitting at a picnic table. The officer saw Taylor "take something out of his sock and put it by his feet." The officer approached and asked for ID; Taylor "became belligerent." The officer spotted a pipe on the ground near Taylor, and charged him with drug paraphernalia. Since the pipe contained cocaine, a charge of possession was added.

Taylor was convicted and appealed.

**ISSUE:** Is contraband found near a subject, but in a public place, in constructive possession of that subject?

**HOLDING:** Yes (depending upon circumstances)

**DISCUSSION:** Taylor argued that the “discovery of contraband in a public location, as opposed to a private place, greatly diminishes the weight of the permissible inference from an individual’s close physical proximity to contraband.” The Court looked to Maryland v. Pringle<sup>8</sup>, and ruled that although Taylor “was in a public place, the crack pipe was subject to his immediate control.” There was also “available factual inference that the officer had observed Appellant’s actual possession of the pipe immediately before it was dropped to the ground.”

Taylor’s conviction was affirmed.

## SEARCH & SEIZURE - VEHICLE STOPS

McCloud v. Com.  
286 S.W.3d 780 (Ky. 2009)

**FACTS:** On the day in question, Officer Royse (along with others from the Louisville Metro PD) was doing surveillance from an unmarked van when he spotted a “Ford Bronco pull into a parking space near them.” A female from that van got out, made a payphone call, got back into the Bronco, and then again emerged to make another call. Shortly thereafter, a red Grand Prix arrived and parked between the van and the Bronco. Royse recognized the vehicle, as its owner had been arrested previously, but the owner wasn’t in the vehicle. The female got back out of the Bronco and went to the passenger side of the Grand Prix.

Royse spotted the Grand Prix driver holding what appeared to be a chunk of crack cocaine, so he pulled the van to block the two other vehicles. Royse ordered the driver, McCloud, out of the vehicle. Royse saw what he believed to be another piece of crack fall from McCloud’s waist area, so he arrested McCloud and gave him Miranda warnings. Royse searched McCloud, finding more crack cocaine.

Royse then searched the Grand Prix, and found a loaded handgun, cocaine and marijuana, the latter being in “ironically, a duffle bag bearing an anti-drug slogan.” McCloud agreed the bag was his. Royse found a digital scale and \$6,450 (in a “personal safe”) in the car, and McCloud also agreed, upon being asked, that they belonged to him.

McCloud was indicted on various drug and weapons charges. (He was a convicted felon.) McCloud moved to suppress and was denied. He was convicted on most of the charges. (The carrying of the weapon by a convicted felon was severed from the rest of the charges.) McCloud appealed.

**ISSUE:** Is the witnessing by an experienced officer of a drug transaction sufficient to make a vehicle stop?

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<sup>8</sup> 540 U.S. 366 (2003).

**HOLDING:** Yes

**DISCUSSION:** The Court reviewed the findings regarding the suppression motions. First, the Court agreed that Arizona v. Gant<sup>9</sup> did not affect the finding in the case. The Court stated that it was “reasonable for Royle to believe that McCloud’s vehicle contained evidence of the offense of arrest,” so if his arrest was lawful, so was the vehicle search.

The Court agreed that Royle, “who was experienced in narcotics recognition and interdiction, observed McCloud holding what Royle believed, based upon his training and experience, to be crack cocaine.” As such, Royle had probable cause for the arrest, even though he did not see a specific transaction take place.

The later searches (of McCloud’s person and the Grand Prix) “flowed naturally and permissibly from the probable cause-supported arrest of McCloud.”

The Court also rejected his “Miranda-based argument regarding the statements he made concerning his ownership of the incriminating safe and duffle bag found in the Grand Prix.” Royle gave McCloud the standard warnings “from a card Royle had in his possession.” Royle did not invoke his right to silence or to counsel. McCloud argued that “there was an insufficient record to show that he was informed of his full panoply of Miranda rights and had knowingly chosen to waive them.” The Court upheld the denial of the suppression of the searches.

The Court agreed that “[p]erhaps it would have been better practice for the Commonwealth to ask Royle the specific language he used in informing McCloud of his constitutional rights.” However, the Court continued, the circumstances inferred the McCloud was properly informed and waived his rights, and the Court affirmed that his statements were properly admitted.

Finally, the Court agreed that Det. Bowling’s testimony regarding elements of the drug trade was also proper, as he was “unquestionably an experienced, qualified law enforcement officer.” Further, the Court agreed that his “type of testimony” was representative of the type of testimony for which a Daubert<sup>10</sup> hearing was not necessary. As such, the trial court did not err “when it permitted Bowling to render his opinions without first holding a formal Daubert hearing.

McCloud’s convictions were affirmed.

**Jefferson v. Com.**  
**2009 WL 1562870 (Ky. App. 2009)**

**FACTS:** On June 22, 2006, Det. Barth and a partner (Louisville Metro PD) were patrolling when they passed an SUV with an Ohio license plate on the front and a Kentucky license plate on the rear. The driver said he did not have his license in his possession and gave his name as Deon Taylor, but his passenger, interviewed separately, said the driver’s name was Mike. Jefferson was arrested for not having the license and for giving a false name. The car search revealed marijuana and a handgun.

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<sup>9</sup> 129 S.Ct. --- (2009)

<sup>10</sup> Daubert v. Merrell Dow Pharmaceuticals, Inc., 509 U.S. 579 (1993).

Jefferson was indicted and moved for suppression. The Court denied the suppression. Jefferson took a conditional guilty plea and appealed.

**ISSUE:** Is mismatched plates sufficient to make a traffic stop?

**HOLDING:** Yes

**DISCUSSION:** Jefferson argued that there was no reasonable suspicion to stop the vehicle as there was "nothing criminally suspicious" about the dual plates. Det. Barth responded that the presence of two different plates indicated the vehicle (or the plates) might have been stolen. The Court agreed that the trial court's decision was supportable. The Court found no reason to find that Barth should have been qualified as an expert in stolen cars to admit his opinion.

Jefferson's plea was upheld.

## **SEARCH & SEIZURE - PROBATIONERS**

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

**2009 WL 1451931 (Ky. 2009)**

**FACTS:** Dep. Tidwell (McCracken County SO) went to Riley's farm to serve warrants unrelated to his action. He saw Riley with a female and also saw sores on Riley that he "associated with methamphetamine use." He asked for consent to search the property, which Riley refused. Riley was taken into custody on the original warrants. He was interviewed by Carter and admitted to prior methamphetamine use. Carter told Wilson that he'd received tips that Riley was dealing in illegal drugs and asked permission to search. Riley gave consent, but limited it to the "field and woods located behind his residence."

Riley's probation officer was able to get Riley to admit to current methamphetamine use, and he further admitted that there might be drug-related items on the property. A variety of items were found around the property, including items used to manufacture methamphetamine.

Riley was indicted on charges of trafficking and manufacturing methamphetamine. He moved to suppress and was denied. Riley was then convicted and appealed.

**ISSUE:** Does a search under probationer conditions include other outbuildings in the curtilage?

**HOLDING:** Yes

**DISCUSSION:** The Court reasoned that the search was appropriate under both his consent, and the subsequent search by his probation officer, based upon reasonable cause. Further, the Court agreed that searching for a methamphetamine lab was justified as an exigent circumstance. Finally, the Court agreed that the outbuildings within the curtilage were covered under the probation exception.

Riley's conviction was upheld.

## SEARCH & SEIZURE - SEARCH WARRANT

### Bunch v. Com.

2009 WL 960784 (Ky. App. 2009)

**FACTS:** On Nov. 13, 2006, officers executed a search warrant on Scholar's Marshall County home. They discovered a camper inhabited by Bunch and Childress but the warrant did not specifically include the camper. Bunch and Childress, who were apparently outside when the officers arrived, went into the camper, and Det. Mighell knocked on the door. Childress answered and was told there was a warrant for his arrest. While Mighell was talking to Childress, he saw a piece of foil "folded in a manner consistent with the use of methamphetamine." Det. Mighell heard a noise in the bathroom, and ordered the occupant to come out. Bunch did so and Mighell read Miranda to both of them. Both refused consent to search the trailer.

Bunch was detained for 9 hours, but no evidence was seized from her. Police got a warrant and seized a number of items from the camper and Childress's automobile.

Bunch was indicted and moved for suppression. She took a conditional guilty plea and appealed.

**ISSUE:** May a search which is independent of a legally problematic detention still be valid?

**HOLDING:** Yes

**DISCUSSION:** The Court agreed that while her "detention might be problematic," that the search was completely independent of her detention. As such, suppression of the evidence found in the camper was admissible and her plea was upheld.

### Deaton v. Com.

2009 WL 875317 (Ky. App. 2009)

**FACTS:** On July 12, 2006, officers of the Northern Kentucky drug strike force and the ATF prepared to execute a search warrant at the Keyhole Lounge in Bromley, Kentucky. Officer Kappes later testified about the briefing and noted he was "stacked first" on the entry team – the first officer into the building. His task was to "make his way directly to the back of the establishment to a door marked 'private.'" When he and his team did so, they found the door locked, and "Kappes kicked the door open and entered the small room." He found Deaton and two other people. When he identified himself, one of the others "tossed a bag of pills across the room."

Deaton was handed back to one of the ATF agents, who searched him and found a small case that he believed contained controlled substances. Deaton was arrested.

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

**ISSUE:** Is a person found immediately involved in a drug offense subject to a full search under probable cause?

**HOLDING:** Yes

**DISCUSSION:** Deaton argued that the “personal search was not authorized by the terms of the search warrant and that the arresting officers did not have probable cause to search him.” The Court agreed that a “full, warrantless search of an individual’s person must be supported by probable cause.”<sup>11</sup>

The Court reviewed the facts, and noted that when Kappes entered the room, yelling police, the occupants appeared to be “involved not only in conversation but in a narcotics transaction as well,” since one of the subjects threw a container of pills “across the room in reaction to the sudden and unexpected appearance of the law enforcement officers.” Based upon Kappes’ experience, his belief that there was probable cause to do a full search was appropriate.

Deaton’s plea was upheld.

*NOTE: Although the case did not present it in this way, presumably even though the search preceded the formal arrest, the probable cause that supported the search also supported the arrest, prior to the drugs being found on his person.*

**Beckam v. Com.**

**284 S.W.3d 547 (Ky. App. 2009)**

**FACTS:** In Jan., 2007, the owner of a car rental company in Meade County, contacted police concerning Beckam. The owner told Trooper Stout (KSP) that a vehicle rented by Beckam had been returned, after a week, with a “large amount of alleged drug residue, its back seat had been removed and damaged, and the spare tire had been removed.” He had then rented another vehicle, kept it 2 days, and returned it again with a large amount of drug residue inside. A field test of the residue indicated positive for marijuana. The trooper took possession of an electronic scale that had been found in one of the vehicles. At the time, Beckam had possession of yet another car from the company.

Trooper Stout learned that Beckam had a lengthy criminal history involving drugs. He sought a search warrant for Beckam’s home, the rented vehicle, Beckam’s wife’s car, and both Beckam and his wife. The ensuing search resulted in the discovery and seizure of many items.

Beckam was arrested and moved for suppression. When that was denied, he went to trial and was convicted. Beckam then appealed.

**ISSUE:** Is evidence that a person is involved in drug trafficking sufficient to show a nexus for their home, as well?

**HOLDING:** Yes

**DISCUSSION:** The Court agreed that the “conditions of the two rental cars permitted the inference that Beckam might be involved in drug trafficking” and that previous case law also “permitted the inference that evidence of Beckam’s drug trafficking might be found at his home.”<sup>12</sup>

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<sup>11</sup> Ybarra v. Illinois, 444 U.S. 85 (1979); Illinois v. Gates, 462 U.S. 213 (1983); Whisman v. Com., 677 S.W.2d 394 (1984).

<sup>12</sup> Moore v. Com., 159 S.W.3d 325 (Ky. 2005).

The Court further agreed that any minor errors made in the affidavit (such as precisely where the scale was found) did not invalidate the warrant.

Beckam's conviction was affirmed.

## SEARCH & SEIZURE - MISCELLANEOUS

**Burton v. Com.**  
2009 WL 875081 (Ky App. 2009)

**FACTS:** On Dec. 28, 2006, Officer Mayes (Vehicle Enforcement) was patrolling in Lexington when he spotted a vehicle with its high beams on. He recognized this as a traffic offense and also a "generally accepted indicator of driver impairment." He made a traffic stop.

Officer Mayes obtained the information on the driver and then "directed his attention to the passengers," later indicating that "it was his custom to ask for identification from any and all passengers during a traffic stop."

Burton originally identified himself by another name and twice gave a wrong Social Security number. Eventually, Trooper Palmer (KSP) arrived. Burton was warned that it was illegal to give a false name, but insisted that he had given correct information. Trooper Palmer was also unable to confirm his identity. Burton finally admitted he had outstanding warrants and was arrested.

The officers searched the area where Burton was sitting and found a small amount of marijuana. They expanded their search and found six pounds of marijuana in the car. They also found \$1400 in cash.

Burton moved for suppression and was denied. He was convicted and appealed.

**ISSUE:** Does the discovery of a valid warrant negate any taint caused by a possibly unlawful detention taken earlier by officers?

**HOLDING:** Yes

**DISCUSSION:** Burton argued the officers "lacked the authority to question him about his identity since it was not reasonably related to the circumstances that justified the traffic stop and because the officers had no reasonable, articulable suspicion that he was engaged in any criminal activity." He further argued that the evidence found should have been excluded as the fruit of a poisoned arrest.

The Court however, looked to Baltimore v. Com., and agreed that even if Burton was initially, unlawfully detained, that the "discovery of the outstanding warrant for his arrest was sufficient to dispel any taint associated with the allegedly unlawful seizure."<sup>13</sup>

The Court upheld the denial of the motion to suppress.

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<sup>13</sup> 119 S.W. 3d 532 (Ky. App. 2003).

## INTERROGATION:

### Flick v. Com.

2009 WL 1451923 (Ky. 2009)

**FACTS:** On May 20, 2005, Flick allegedly shot and killed Wittich in Lexington. Flick was still there when two other men arrived and they subdued him and held him for police. As he was injured in the fight, Flick was taken to the hospital and examined. Officer Shirley (Lexington PD) accompanied Flick and gave him Miranda warnings when they arrived. Flick agreed that he understood and Officer Shirley asked basic booking information questions, which Flick answered.

Det. Brotherton arrived and talked to Flick, and he “was able to develop an elaborate kidnapping story.” When the detective told Flick he didn’t believe his story, Flick invoked his right to remain silent. Brotherton honored that, immediately ceasing the interview. Flick was then transferred to jail. The next morning Det. Brotherton went to the jail. After a few questions, Flick invoked his right to counsel but continued to speak a bit more.

Flick was charged with murder and related offenses. Flick moved to suppress the statements he made, but the Court denied it. Ultimately he was convicted and appealed.

**ISSUE:** Are statements made while undergoing medical treatment for non-serious injuries voluntary?

**HOLDING:** Yes

**DISCUSSION:** Flick argued that this statements at the hospital were not made voluntarily because he was being treated at the hospital. The Court, however, noted that his injuries were not severe, which set it apart from prior cases cited by Flick in support of his position. With respect to the statements at the detention center, the Court agreed that Det. Brotherton had, as required, “scrupulously honored” Flick’s request to remain silent.<sup>14</sup>

The Court reviewed the factors as outlined by Mosley:

First, he was initially advised of his rights at the hospital, and orally acknowledged those rights. Second, when Appellant informed Detective Brotherton that he no longer wanted to talk to him, Brotherton did not question Appellant further, nor did he pressure him to change his mind. Third, the amount of time which lapsed between Appellant’s refusal to talk at the hospital and when he was questioned at the detention center was far more than a short lapse of time. Lastly, there is no evidence that Detective Brotherton had coerced Appellant into talking with him at the detention center.

The Court upheld the trial court’s decision and Flick’s conviction.

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<sup>14</sup> Michigan v. Mosley, 423 U.S. 96 (1975).

**Coleman v. Com.**  
**2009 WL 1110314 (Ky. 2009)**

**FACTS:** In mid-July, 2006, Wortham insulted and threatened Coleman's mother. Coleman learned of it and told his friends. A few days later, Coleman and Claybourne were driving through Lexington when they spotted Wortham, on foot. They enlisted the aid of Walker to "get" Wortham. Walker decided to bring along a shotgun. They confronted Wortham. Coleman shot him and Wortham died.

A friend of Coleman's, Alcorn, disposed of the gun. A tip led investigators to Coleman and Walker, who denied any involvement, and the "investigation stalled." In Feb. 2007, Alcorn and Walker gave statements concerning their involvement with the crime. Coleman was arrested pursuant to a warrant. The officer urged Coleman to confess, but he denied any involvement. He was handcuffed and given his Miranda rights. On the way to the station, Coleman invoked his rights to an attorney. As he was placed in a cell, the detective told Coleman that if he wanted to change his mind and talk, he should knock on the cell door. A few minutes later, he showed a photo of Alcorn to Coleman, who indicated he recognized him. Moments later, he agreed to waive his Miranda rights and talk.

Coleman requested suppression and was denied. Coleman was eventually convicted and appealed.

**ISSUE:** Is showing an incriminating photo to a subject "interrogation?"

**HOLDING:** Yes

**DISCUSSION:** Coleman argued that the reading of Miranda was faulty, and further, that the "detective's confronting him with the Alcorn photo amounted to continued questioning in the face of his request for counsel."<sup>15</sup> (Apparently the detective did not read the warnings from a card, as the list given in the opinion was incomplete.) The Court disagreed with the first.<sup>16</sup> However, the Court agreed that the detective's actions were inappropriate, and that his actions in showing the photo were actions intended to elicit an incriminating response. But, the Court continued, the error was harmless and did not contribute to his ultimate conviction.

Coleman's conviction was affirmed.

**Steele v. Com.**  
**2009 WL 1348199 (Ky. App. 2009)**

**FACTS:** On Nov. 7, 2006, Steele robbed Sun of his vehicle in Lexington. Steele then drove the vehicle to Fort Wright, where he abandoned it. That same morning, Officers Spaniard and Martin (Fort Wright PD) responded to a suspicious persons call at a local shopping center and found Steele and a companion, Rachel. Steele was arrested for carrying a concealed weapon and Sun's wallet was found in his backpack. He was given his Miranda warnings, invoked his right to silence and asked for a lawyer.

The officers did not further question him, but did take Steele and his companion to the police station. During that same time, Sgt. Knight found Sun's vehicle and identified it as stolen. Steele, at the station,

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<sup>15</sup> Edwards v. Arizona, 451 U.S. 477 (1981)

<sup>16</sup> See Oregon v. Elstad, 470 U.S. 298 (1985); California v. Prysock, 453 U.S. 355 (1981)

was permitted to go outside with Officer Martin to smoke, and he talked about “family, God and whether Rachel had talked.” He then said he wanted to talk to an officer. He was brought back in to talk to Sgt. Knight who restated Steele’s rights and recorded the conversation. Eventually, Steele gave a written confession to having stolen the car.

Steele was charged and requested suppression. The trial court denied the motion and Steele took a conditional guilty plea. He then affirmed.

**ISSUE:** Does an invocation of counsel require that counsel be immediately provided?

**HOLDING:** No

**DISCUSSION:** Steele argued that “his confession was not voluntarily, knowingly and intelligently given as required by Johnson v. Zerbst.<sup>17</sup>” He complained that he was “coerced because he “asked for an attorney and one was not provided to him; he made his statement while handcuffed to a metal pole in the interview room of the Fort Wright police station without any means of contacting an attorney; and Sgt. Knight threatened him with a federal charge of carjacking.” The Commonwealth countered that his statement was voluntary because he “initiated the conversation and the police merely listened.”

The Court noted that the “only proof offered ... confirms that the Fort Wright officers strictly followed Edwards because they did not attempt to question Steele once he asserted his right to remain silent and have an attorney present.” All proof offered indicated that Steele initiated the conversation. Further, the Court noted, “Miranda does not require that counsel be provided to an accused simply because he request an attorney,” but only that such counsel be available before further questioning. Since the officers did not intend to interrogate, there was no requirement that Steele be allowed to contact an attorney.

The Court affirmed the decision to deny the motion to suppress and affirmed the conviction.

**Meade v. Com.**  
**2009 WL 875034 (Ky. App. 2009)**

**FACTS:** Meade was identified as a suspect in two break-ins that occurred in Pike County. Meade denied any involvement and was interviewed by Trooper Newkirk (KSP). Although Meade initially wanted an attorney, he eventually admitted to participating in the first, but not the second, break-in. After he was indicted, he requested suppression of the statement, arguing that he had been denied his right to an attorney. The trial court ruled that he had voluntarily waived that right, and further, that his intoxication did not invalidate the waiver. Meade took a conditional guilty plea and appealed.

**ISSUE:** Is an invocation of the right to counsel negated when the subject gives a valid waiver of that right?

**HOLDING:** Yes

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<sup>17</sup> 304 U.S. 458 (1938).

**DISCUSSION:** The Court agreed that Meade did, in fact, properly invoke his right to an attorney.<sup>18</sup> He was not provided with counsel or the opportunity to seek counsel. However, the Court agreed, Meade's responses could be admitted "on finding that he (a) initiated further discussions with the police, and (b) knowingly and intelligently waived the right he had invoked."

The Court also agreed that Meade initiated further conversation with the trooper by commenting on something said by another state trooper at the scene concerning the offense.<sup>19</sup> The Court ruled that Meade validly waived his right to counsel by his statement - "f\*\*\* the lawyer" and continued to speak with Trooper Newkirk. Finally, the Court found that Meade's intoxication was not so severe as to invalidate his statements.

Meade's plea was affirmed.

## TRIAL PROCEDURE & EVIDENCE

**Morrow v. Com.**  
286 S.W.3d 206 (Ky. 2009)

**FACTS:** In 2002, Morrow, a former special deputy in McCreary County and a part-time deputy jailer in Whitley County, became involved with Tapley. Tapley was a confidential informant with KSP and there was a surveillance camera at his home to "capture staged drug transactions." When Morrow was identified as being connected with drug trafficking, it was suggested Tapley "pursue [Morrow] as a possible target."

As such, Tapley visited Morrow under the pretense of discussing an antique car restoration. Tapley complained of pain and asked if Morrow (or his brother, Ernie) could get him anything – Ernie was known to have cancer and had pain medications.

"Over the course of the next several days, Tapley vigorously pursued [Morrow] and his brother, calling repeatedly and stopping by [Morrow's] house on more than one occasion." Eventually, Morrow facilitated a drug transaction between Ernie and Tapley. The Morrows went to Tapley's home. Morrow waited outside while Ernie went into Tapley's garage. Morrow, however, was called in to calculate the price of the transaction, an exchange of Oxycontin.

Some months later, Morrow was charged with complicity to traffic and Ernie was charged with first-degree trafficking. Ernie eventually took a plea agreement.

At trial, Morrow presented alternate defenses of entrapment and that he was actually conducting an independent undercover drug investigation of his own. He was, however, convicted, and then appealed.

**ISSUE:** Does presenting an alternative defense prevent a subject from also raising an entrapment defense?

**HOLDING:** No

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<sup>18</sup> Dean v. Com., 844 S.W.2d 417 (Ky. 1992); Smith v. Illinois, 469 U.S. 91 (1984).

<sup>19</sup> See Oregon v. Bradshaw, 462 U.S. 1039 (1983).

**DISCUSSION:** The sole issue on appeal was whether the trial court should have tendered an instruction on entrapment to the jury. It had refused to do so, based upon prior Kentucky case law that held that an instruction on entrapment was not appropriate when the subject was presenting an alternative defense as well.

With respect to the entrapment, the Court agreed that Tapley was a paid CI, and that it was Tapley who “first broached the issue of whether [Morrow] could supply him with Oxycontin and that all subsequent conversations between the Morrow brothers and Tapley were initiated by Tapley.” The Court also agreed there was “ample testimony ... that Tapley was quite persistent in his efforts” with both of the Morrow brothers. With that evidence, the burden shifted to the Commonwealth to prove that Morrow “was predisposed to engage in the criminal act prior to inducement by the government or its agent.” The Court agreed that Morrow “had never been in any trouble prior to his arrest.” He had initially denied to Tapley that he was involved with drugs and his name had not appeared on a list submitted by Tapley previously concerning “people he knew had involvement in the drug trade in the community.”

The Court noted that the “x-factor” in this case was that Morrow claimed to be “engaged in an independent drug investigation under the auspices of garnering future employment” as he was involved in the election campaign for Sheriff Perry. He claimed he had begun to gather evidence on Tapley and wanted Tapley to believe that Morrow was involved with drugs so that he could make buys in the future.

The Court noted that the “crux of the present matter” was whether Morrow’s “assertion that he was engaged in the transaction for purposes of an independent criminal investigation preclude him from alternatively asserting that he was entrapped.” The Court reviewed the prior history of the entrapment defense in the federal courts<sup>20</sup> and agreed that although Morrow admitted his involvement in the transaction, that he did deny “one or more elements” of the offense” and as such he was entitled to having the defense at least instructed to the jury.

The Court ruled that a “criminal defendant may properly deny one or more elements of a criminal offense and alternatively claim the affirmative defense of entrapment *if* sufficient evidence is introduced at trial to warrant instructing the jury as to the defense.” In this case, the agreed that although the trial testimony was in conflict, that there was sufficient evidence to warrant the instruction.

Morrow’s conviction was reversed.

**Vincent v. Com.**  
**281 S.W.3d 785 (Ky. 2009)**

**FACTS:** In 2005, officers in Edmonson County began an investigation of allegations that Vincent had sexually abused his granddaughter, C.V. Two of his daughters, J.H. and A.M. asserted that he had also sexually abused them as children, subjecting them to sexual abuse, rape, sodomy and incest. He was indicted on multiple counts against the three victims.

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<sup>20</sup>Mathews v. U.S., 485 U.S. 58 (1988); Sorrells v. U.S., 287 U.S. 435 (1932); Sherman v. U.S., 356 U.S. 369 (1958).

At trial, each victim testified to multiple offenses over a period of years, although none could specify the exact number of times each occurred. Out of 294 initial counts, eventually 29 counts were actually presented to the jury.<sup>21</sup> He was convicted on all counts and appealed.

**ISSUE:** Is a brief comment that a person “chose not to speak” to police enough to warrant a mistrial?

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

**DISCUSSION:** Vincent argued that the overcharging was an attempt by the prosecution to bias the jury. Although the Court agreed that it would not “condone an intentional, baseless tenfold overcharging of criminal counts,” in this case, Vincent was not entitled to relief on that account.

Vincent also argued that he had been entitled to a mistrial when “a testifying officer” made a “reference to his exercising his right to remain silent.” The officer had described his interview with the victims, and that he then went to talk to Vincent, who “chose not to speak” to him in reference to the crime. The prosecutor had argued, in response to Vincent’s objection, that the reference was inadvertent. The judge offered to admonish the jury on that respect, which Vincent declined. The Court agreed that the “prosecution did not intentionally elicit reference to Vincent’s refusal to speak to police” and found the reference was “isolated and brief” and did not compromise his right to a fair trial.

Vincent also argued that the investigating officer “testified that the alleged victims ‘disclosed years of rape, sodomy[,] and incest’” by Vincent. Vincent did not object to the testimony. The Court agreed that the officer’s statement may have been hearsay but that the “admission of the police officer’s very brief summary of what the alleged victims told him” was not error, particularly “given the victims’ graphic testimony that followed.” As such, any “erroneous admission of ‘investigative hearsay’” did not rise to the level of error.

Vincent’s conviction was affirmed.

***NOTE:** Although the officer’s statements did not cause the verdict to be overturned in this case, officers must be very cautious not to comment on a suspect’s decision to remain silent or to repeat hearsay.*

**Kreps v. Com.**  
286 S.W.3d 213 (Ky. 2009)

**FACTS:** Kreps and his wife, Renee, became the guardians for A.S. Some months after that, Renee was involved in a serious crash and lived in a rehab center, while A.S. continued to live with Kreps and visit with her mother. On July 1, 2005, about a year after A.S. moved in, a social worker, Timmons, received an anonymous tip that A.W. was pregnant by Kreps. She contacted Dep. Drew (Graves County SO) and Dep. Drew went to try to interview Kreps. No one was home, but they learned from Gibbs that Renee was still in rehab and that Kreps, A.S. and her mother were on a houseboat. Gibbs also claimed that he was “romantically involved with Kreps.”

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<sup>21</sup> Due to family circumstances, there was confusion as to how many of the incidents actually occurred in Edmonson County.

They interviewed Renee, who denied there was an inappropriate relationship and also interviewed Kreps, A.S. and her mother. All denied the relationship or that A.S. was pregnant. Her mother, however, removed her from Kreps' boat and took her to stay with other friends. The mother then deceived A.S. into believing that A.S. was pregnant, but creating a false pregnancy test. A.S. admitted having sex with Kreps, but denied it again upon learning of the deception.

The friends learned of this and reported the situation to the McCracken County SO. Dep. Drew followed up and A.S. finally made a detailed statement admitting the sexual relationship. Kreps also, subsequently confessed.

Kreps was indicted on both Rape 2 and Rape 3, since A.S. had turned 14 during her time with the Kreps. He recanted his confession. However, he was convicted and appealed.

**ISSUE:** Is an officer who is acting as an intermediary with the prosecutor involved in "plea negotiations?"

**HOLDING:** Yes

**DISCUSSION:** Kreps argued that his statement to the police should not have been admitted as "it was made during the course of a plea discussion with the prosecutor and prohibited by KRE 410." The trial court "acknowledged that the interrogating officers told Kreps that "they couldn't promise anything, but they could relate the fact of his cooperation, and they could make recommendations to the prosecutor's office" However, the trial court admitted the statements. The Court of Appeals, however, noted that Officer Drew was in contact with the prosecutor by telephone and acted as an intermediary between the two both in negotiating the downgrade of the charges and in trading information concerning A.S.' s mother.

The Court found it was "reasonable for Kreps to expect that he and the Commonwealth were negotiating a plea based on the totality of the circumstances."

The Court reversed Kreps's convictions.

## **TRIAL PROCEDURE/EVIDENCE - MISSING EVIDENCE**

### **Skaggs v. Com.**

**2009 WL 1830807 (Ky. 2007)**

**FACTS:** Skaggs was involved with Boyd in the repossession of a vehicle in Elizabethtown. Later in the night, after disputed events, Skaggs took Boyd to the hospital and she was "declared dead from multiple blunt force head injuries and ligature strangulation." Skaggs was interviewed twice and eventually indicted, in March, 2005, of Boyd's murder. The Commonwealth prosecuted under the theory that Skaggs had fabricated a story of an abduction to conceal the murder. He was convicted and appealed.

**ISSUE:** Does returning a stolen vehicle to its rightful owner, thereby preventing a suspect from investigating it for evidence, require a missing evidence instruction?

**HOLDING:** No

**DISCUSSION:** The Court noted that, after interviewing Skaggs, officers obtained a search warrant for the van he was driving. They found a “significant amount” of blood on both the inside and outside of the van. The vehicle was taken to the Elizabethtown PD office for further examination. Four days later, KSP thoroughly examined the van and collected a great deal of evidence. The vehicle was then returned to its owner, the company for which Skaggs worked. Skaggs argued that returning the vehicle “essentially destroyed” evidence before he had an opportunity to examine it and had requested a “missing evidence” instruction. The Court had refused his demand and specifically found “there was no bad faith on the part of the police in giving the van back to the company.”

The Court agreed that the “intentional destruction of exculpatory evidence” is a Due Process violation that required either dismissal of the case, exclusion of the Commonwealth’s evidence or a missing evidence instruction.<sup>22</sup> In Estep v. Com., the Court clarified what constitutes a Due Process violation and when a “missing evidence” instruction is warranted:

First, the purpose of a “missing evidence” instruction is to cure any Due Process violation attributable to the loss or destruction of exculpatory evidence by a less onerous remedy than dismissal or the suppression of relevant evidence. . . . Second, the Due Process Clause is implicated only when the failure to preserve or collect the missing evidence was intentional and the potentially exculpatory nature of the evidence was apparent at the time it was lost or destroyed. None of the above precludes a defendant from exploring, commenting on, or arguing inferences from the Commonwealth’s failure to collect or preserve any evidence . It just means that absent some degree of “bad faith,” the defendant is not entitled to an instruction that the jury may draw an adverse inference from that failure.<sup>23</sup>

At a hearing, Det. Norris (KSP) stated that it is procedure to return such property to its owner and it is decided on a case by case basis. In this case, the company needed the vehicle to conduct its business. In this case, the Court found that there was no bad faith and that he wasn’t entitled to either exclusion or an instruction.<sup>24</sup>

Skaggs’ conviction was affirmed.

## **TRIAL PROCEDURE/EVIDENCE - HEARSAY**

**Stanley v. Com.**  
2009 WL 1348157 (Ky. App. 2009)

**FACTS:** Stanley was arrested and tried for Complicity to First-Degree Robbery. At trial, the investigating detective testified as to the “statements made by the victim.” She was convicted and appealed.

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<sup>22</sup> Sanborn v. Com., 975 S.W.2d 905 (Ky. 1998),

<sup>23</sup> 64 S.W.3d 805 (Ky. 2002).

<sup>24</sup> See also Coulthard v. Com., 230 S.W.3d 572 (Ky. 2007).

**ISSUE:** May an officer testify as to what an informant told him?

**HOLDING:** No

**DISCUSSION:** The Court noted that the only witness during the case in chief was the detective. He testified as the robbery of one of his informants, who was identified by name. When he questioned Stanley about the alleged robbery, she produced a knife which was apparently the weapon used in the robbery. She also confessed. Stanley argued that the detective was improperly permitted to testify as to what the informant told him, which constituted hearsay. (She also argued that her confession was uncorroborated, if that statement was excluded, under RCr 9.60, but the Court elected to rule on the hearsay issue and found that dispositive. The Court did agree, however, that had it not already planned to overturn the conviction on another issue, that the confession would have been excluded.) The Court addressed the issue as one that falls under Crawford v. Washington<sup>25</sup> and its progeny, and agreed that the detective's testimony was hearsay. As such, the testimony should have been excluded, and without that testimony, "the evidence presented by the Commonwealth lacked the corroboration necessary under RCr 9.60 to withstand the directed verdict motion" made by Stanley.

Stanley's conviction was reversed.

## **TRIAL PROCEDURE/EVIDENCE - DISCOVERY**

### Tate v. Com.

2009 WL 1451928 (Ky. 2009)

**FACTS:** Tate was charged with rape and sexual abuse based upon allegations by his stepdaughters - E.G. and D.F. The Court in that case issued an order requiring that the Commonwealth was to provide any statements from any witnesses to the defense, at least 60 days in advance of trial, "if the statement is in the form of a document or recording in its possession which relates to the subject matter of the witness' testimony." In addition, the order required the production of any exculpatory evidence. The Commonwealth provided notes from interviews from the two girls but did not provide the "actual video-recorded statements."

A few weeks prior to trial, Tate requested copies of the tapes. On the first day of the trial, he "complained that the video copies provided by the Commonwealth were of poor audio quality and he requested new copies." Two days later, the statements were provided on DVD. Two days after that, when the jury was seated, Tate requested dismissal, "arguing that the Commonwealth violated the Order regarding discovery." The trial court denied Tate's motion for dismissal, finding no reason to believe that the information concerning the statements was not in the material that was provided earlier, negating any element of surprise. His motions were denied and he was convicted,. He then appealed.

**ISSUE:** Is a defendant entitled to discovery in a timely manner, prior to trial?

**HOLDING:** Yes

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<sup>25</sup> 541 U.S. 36 (2004).

**DISCUSSION:** Tate argued that he was prejudiced by the late discovery and that he believed they contained exculpatory evidence. The Commonwealth contended that Tate “knew of the existence of the video-recorded statements ... due to the written discovery turned over in March 2007” - some six months prior to the trial date. The Commonwealth stated “that it is not their protocol to make copies of video-recorded statements for the defendant until they are requested by the defense.”

The Court agreed “that the Commonwealth did not violate the Order by not turning over the victims’ video-recorded September 2006 statements prior to sixty days before trial.” The Court disapproved of the Commonwealth’s stated reasons for its “protocol” - that directly contradicted the judge’s order. However, the Court also disapproved of Tate’s tactic to wait until the jury was impaneled (thus invoking double jeopardy) to raise the issue, particularly since he had notice of the existence of the recordings some six months earlier, and had copies, albeit apparently faulty ones, two weeks prior to the trial. Further, Tate could have asked for a continuance to review the tapes, but did not do so.

Tate’s convictions were affirmed.

## **TRIAL PROCEDURE/EVIDENCE – EXPERT WITNESS**

### **Mills v. Com.**

**2009 WL 1705605 (Ky. App. 2009)**

**FACTS:** Mills allegedly stole a vehicle in July 25, 2006. The vehicle turned up in early September, having been involved in a collision in Monroe County. Several nearby residents responded to the crash to offer assistance, and one recognized Mills. Several witnesses stated they did not know if Mills, who was staggering and stumbling was drunk or had been injured in the crash. However, Mills managed to leave the scene. The driver of the other car died in the crash.

Trooper Dubree (KSP) found a cell phone at the scene and linked the phone to Mills’s mother. Mills was arrested two days later at his mother’s residence. He was taken to the hospital and he told the nurse that he’d been involved in a wreck two days before. The Trooper interviewed him at the hospital, and he admitted having been in the wreck and having left the scene. He denied having been drinking that night, however.

Mills was indicted on a variety of charges, including “murder by use of motor vehicle”, theft, assault and DUI. He was ultimately convicted of Manslaughter in the Second Degree, DUI and related charges. He appealed.

**ISSUE:** Is it up to the jury as to which expert to believe?

**HOLDING:** Yes

**DISCUSSION:** Mills argued that the prosecution’s theory that he had failed to yield to the other car was supported by Trooper Young, “who had very little experience to that of his expert,” who testified otherwise. The Court, however, noted that it was up to the jury to decide which expert to believe, and the trooper was corroborated by the surviving passenger in the vehicle struck by Mills.

Mills's conviction was affirmed.

## TRIAL PROCEDURE/EVIDENCE – TESTIMONY

### Hines v. Com.

2009 WL 874512 (Ky. App. 2009)

**FACTS:** Hines was charged with the rape of R.C., age 15. At trial, Det. Hammon (KSP) among others, was permitted to testify concerning prior consistent statements made by the victim. Hines was convicted and appealed.

**ISSUE:** Is it error to comment on a subject's refusal to consent to a search?

**HOLDING:** Yes

**DISCUSSION:** KRE 801A(a)(2) prohibits the admission of testimony "merely to bolster a witness." The Court agreed that the admission was improper, but because it had not been objected to at trial, different rules of court stated that the injustice must be manifest in order for the verdict to be overturned. The Court agreed that the admission did not seem to substantially affect the result of the trial.

In addition, with respect to Det. Hammond's testimony that he could not get a pubic hair analysis because Hines's refused, the court noted that no warrant or court order was ever requested to obtain such samples. The Court agreed that Hines had a legitimate right to refuse consent to a warrantless search and that it was improper to present his refusal as evidence of guilt.

Although each of the errors in the trial might not have risen to the level of manifest injustice, the Court agreed that the cumulative effect was sufficient to warrant the overturning of Hines's conviction.

## TRIAL PROCEDURE/EVIDENCE – POLYGRAPH

### Boyd-Mahmoud v. Com.

2009 WL 960721 (Ky. App. 2009)

**FACTS:** The facts of the case revolve around a lengthy custody battle originating in Hardin County. It culminated in the prosecution of Boyd-Mahmoud for custodial interference. During the trial, the Court permitted the introduction of a polygraph taken by Mohey (the child's father) which indicated he did not sexually abuse the child. Boyd-Mahmoud was convicted and appealed.

**ISSUE:** Is it error to admit the results of a polygraph that indicated a third party did not do something?

**HOLDING:** Yes

**DISCUSSION:** The Court noted that the results of the polygraph were admitted to refute Boyd-Mahmoud's claim that she fled the state because of Mohey's sexual abuse of their daughter. The Court agreed that as a rule, such results were not admissible in Kentucky courts. The Court, however, agreed that it was error

to allow the introduction of the polygraph results in this instance. The Court found that “the ban on introducing such evidence remains strong and uncorrupted in Kentucky” because “[p]olygraph exams are considered too unreliable for any purpose and simply too prejudicial to be admitted.”

The Court reversed the conviction.

## **TRIAL PROCEDURE/EVIDENCE – CBLA**

**Bowling v. Com.**  
2008 WL 4291670 (Ky. 2009)

**FACTS:** Bowling was charged in two separate murders, both which occurred during gas station robberies. In each case, the victims were shot. He was convicted and sentenced to death, but sought numerous appeals.

**ISSUE:** Is CBLA evidence reliable?

**HOLDING:** No

**DISCUSSION:** At trial, the court permitted testimony from an FBI expert concerning the “chemical composition of bullets found at all three gas stations with bullets found at Bowling’s residence, a process known as CBLA (comparative bullet lead analysis).” That testimony indicated that all three bullets were identical in composition. However, since that trial, the “reliability of CBLA has been seriously undermined.” The Court noted, however, that the CBLA evidence was simply cumulative and that there was also proof that all of the bullets were fired from a gun recovered at another location, a gun that was also strongly linked to Bowling.

The Court affirmed Bowling’s conviction.

## **TRIAL PROCEDURE/EVIDENCE – TESTIMONY ON CHARGES**

**Searight v. Com.**  
2009 WL 1108862 (Ky. 2009)

**FACTS:** On May 16, 2007, Sgt. Combs (Lexington PD) “observed [Searight] leaning into a vehicle that was stopped in the road and blocking traffic.” He later testified that he saw Searight “reach into the vehicle and draw his hand back out, holding a small object.” Sgt. Combs activated his emergency equipment, opened his door and “called over” to Searight. Searight fled, and Sgt. Combs pursued him on foot, “across two parking lots and over multiple fences but eventually lost sight of him.” Searight was finally found hiding in a nearby trash can, was arrested and searched.

Officer Burnette did a pat-down, and found nothing. Searight was wearing only baggy shorts and shoes at the time. Burnette was then secured in the back of Burnette’s car.

The Court noted:

The car had been detailed and vacuumed earlier that day and no one else had been in the back seat since the cleaning. While sitting in the car, [Searight] began moving around in an unusual manner, lifting himself off the seat. The officers became suspicious and removed [Searight] from the car for another search. When he exited the vehicle, the officers noticed a bag containing 683 milligrams of cocaine lying on the seat. [Searight] immediately denied possession of the bag. The officers did not observe any hair or residue on the bag.

Searight was indicted on charges relating to the drugs, and he was eventually convicted. He then appealed.

**ISSUE:** is testifying concerning non-indicted offenses improper?

**HOLDING:** Yes

**DISCUSSION:** Searight argued that he should have received a mistrial because Sgt. Combs testified that he charged Searight with trafficking in crack cocaine, since the grand jury declined to indict on that charge. As such, he argued that the “jury had been tainted and that he had been harmed irreparably by the testimony.” The Court had refused his objection at trial, instead giving an admonition to the jury to consider only the charges for which he was actually standing trial. The Court found “no reason why the jury would have been unable to follow the trial court’s admonition.”

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

## **TRIAL PROCEDURE/EVIDENCE – SANE**

### **Harris v. Com.**

**2009 WL 1108860 (Ky. 2009)**

**FACTS:** On Sept. 14, 2006, in Kenton County, Harris sexually assaulted and impaled his girlfriend, Karen, with a broom handle, causing horrific internal injuries. Harris claimed the impalement was an accident. During the course of the trial, Hundley, a sexual assault nurse examiner (SANE) testified that she interviewed Karen about her injuries, some hours after the fact, and after treatment had begun. Her testimony was admitted and eventually Harris was convicted. He then appealed.

**ISSUE:** May a medical professional testify as to statements by a victim, unrelated to their medical treatment?

**HOLDING:** No

**DISCUSSION:** Harris argued that the statements made by Karen to Hundley “were inadmissible under KRE 803(4) because the identity of her assailant was unnecessary for her medical treatment.” As such, its admission was error. However, because Karen testified at trial, herself, as to the identity of her assailant, its admission was considered harmless.

Harris’s conviction was affirmed.

## TRIAL PROCEDURE/EVIDENCE – REPORT

### Muquit v. Com.

2009 WL 961126 (Ky. App. 2009)

**FACTS:** Muquit was convicted of first-degree rape, first-degree burglary and other charges, in Kenton County. He was convicted, and appealed.

**ISSUE:** Is an inconsistency between testimony and reports fatal to a case?

**HOLDING:** Not necessarily

**DISCUSSION:** Muquit argued that there was an inconsistency between the victim's statements, the police reports and the actual charges. Specifically, the initial police report indicated that the victim stated that her "assailant 'was unable to maintain an erection and therefore did not penetrate her ...." At trial, however, the victim stated there was slight penetration, thereby justifying the rape charge. (Muquit was also charged with sodomy, but was acquitted of that charge.) For strategic reasons, however, his counsel chose not to impeach the victim's testimony with her prior inconsistent statement. He did, however, question Det. McGuffey about it, as he also changed his testimony between the preliminary hearing and the grand jury, as well, apparently in accord with the victim's change.

The Court, however, noted that the change was nothing "more than a clarification due to further investigation" and that there was "no evidence of perjury."

Muquit's conviction was affirmed.

## TRIAL PROCEDURE/EVIDENCE – PRIOR BAD ACTS

### Freeman v. Com.

2009 WL 875446 (Ky. App. 2009)

**FACTS:** Freeman and Thomas (his girlfriend) were indicted on a variety of drug charges, resulting from a search of their McCracken County apartment. (Freeman gave consent to search after Thomas was arrested in another state for trying to buy methamphetamine.)

The Commonwealth gave notice (pursuant to KRE 404(b) ) that it would seek to introduce evidence of their trip to "prove motive, opportunity, intent, preparation, plan, knowledge, or identity, or absence of mistake or accident." Freeman's defense was that he did not know the drugs were at his home and he moved to restrict the admission of such evidence. The trial court allowed the evidence to be admitted and Freeman was convicted. He then appealed.

**ISSUE:** Is evidence indicating someone's knowledge admissible?

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

**DISCUSSION:** The Court noted that such evidence is admissible “if offered not to show a defendant’s propensity to commit a crime, but for some other purpose such as knowledge.” To prove Freeman’s complicity, it was essential that the Commonwealth prove “intent and knowledge” on his part.

The Court found no error in its admission, and upheld the conviction.

## **SUSPECT IDENTIFICATION**

**Finch v. Com.**  
2009 WL 1811547 (Ky. App. 2009)

**FACTS:** Finch was indicted for six counts of first-degree robbery, for offenses that occurred in a six-week period in 2005 in Louisville. Three of the victims chose Finch from a photo-pak. Finch moved to suppress, which was denied. He then took a conditional plea of one-count of second degree robbery. He then appealed.

**ISSUE:** Is a photo-pak, in which the suspect photo is different from the remaining photos, inherently suggestive?

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

**DISCUSSION:** The Court reviewed the photo-pak, which contained “six photographs on one piece of paper.” Finch argued that the witnesses that identified him all stated he’d been wearing a hoodie, and that his was the only photo in the pak that had the individual wearing a hoodie. The rest were wearing t-shirts. He also argued that the “non-sequential simultaneous photographs shown by an officer who knew the suspect was included in the array and presentation of the array by an officer who knew that [Finch’s] photo was in the array” was “inherently suggestive.”

The Court disagreed, however, that the identifications were made by victims who had been robbed at gunpoint, and that “each victim undoubtedly paid a high degree of attention” to the robber. The “factors weigh heavily in favor of reliability.”

Finch’s plea was upheld.

## **CIVIL**

**Morgan v. Bird**  
289 S.W.3d 222 (Ky. App. 2009)

**FACTS:** In April, 2007, Bird reported actions of her neighbors (the Morgans) that she believed constituted child abuse and neglect - specifically, she observed their toddler drinking from a beer can. The observation triggered an angry reaction from the neighbor. Bird contacted her son, Officer Bird (Williamsburg PD) and reported what had occurred. Officer Bird contacted CHFS and he and the social worker (Bryant) arrived within the hour. Both investigated the incident, and during the course of the investigation, Officer Bird followed Felicia Morgan (the child’s mother) and Bryant into the house, and

eventually into the bedroom. Bryant noticed a pill bottle with a scratched off label and he was told conflicting stories about what it contained.

Eventually, Bryant decided to place the child with a grandmother while the parents obtained drug tests. Eventually, after passing tests and agreeing to a child "plan," the couple regained custody of the child.

The Morgans then sued all parties involved, as well as the City of Williamsburg, alleging that the child was removed from their home based upon a "false, unsubstantiated report" and that such actions violated various rights. The trial court dismissed the action and the Morgans appealed.

**ISSUE:** Is a good faith report of child abuse protected by immunity?

**HOLDING:** Yes

**DISCUSSION:** First, the Court addressed the immunity provisions in KRS 620.030, which provides for both the requirement to make a report when a child is being abused or neglected, and provides for immunity for an individual who, in good faith, does so. The Court found no reason to doubt that Bird acted in good faith or that Bird lied about what she saw. Her report to her son, a law enforcement officer in the jurisdiction, was also proper under the statute.

Further, the Morgans assert that Officer Bird "acted in bad faith by not investigating the alleged bad faith report of neglect ... before reporting it to CHFS and that the City and its Council members were negligent in supervising and training Officer Bird." The Court quickly agreed that the officer "properly followed the guidelines outlined in KRS 620.030 for reporting a claim of neglect to CHFS." The Court further noted that Bird did not illegally search the Morgan home, as alleged, but instead simply followed the social worker through the home. His observations did not factor into Bryant's determination to seek a temporary alternative placement for the child. In fact, the Court noted the "prompt investigation and replacement of the child at issue in the instant case was a well executed illustration of the intent and framework of KRS 620.030."

The Court upheld the dismissal.

## **EMPLOYMENT - DISCIPLINE**

### **Cromer v. Lexington-Fayette Urban County Government** **2009 WL 961102 (Ky. App. 2009)**

**FACTS:** Cromer was dismissed for misconduct as a Lexington police officer in 2007. He appealed that action, arguing violations of KRS 95.450 and KRS 15.520, which provides "administrative due process protections in connection with a disciplinary proceeding."

**ISSUE:** Must KRS 15.520 and KRS 95.450 be read together?

**HOLDING:** Yes

**DISCUSSION:** Specifically, Cromer argued that the charges against him should have been dismissed because he was not provided a hearing before the Council within sixty days of the Form 111 complaints. (Apparently that form was the document used by Lexington police in making such charges.)

The Court reviewed the provisions of KRS 15.520(1)(h)(8) and how it interacts with KRS 95.450, which applies to urban-county governments (Lexington-Fayette County Urban County Government). Since both apply, the Court reasoned, a proper reading “may only be obtained by juxtaposing these two statutes.” Under 15.520, an “officer must be given a hearing within 60 days of being suspended and upon a ‘charge being filed.’” He claimed that the charge was filed when he was served with the Form 111 complaints, which, although it does not include the word “charge” does serve as charging documents to initiate discipline. However, the Court noted, although 15.520 does not elaborate upon how charges are to be filed, KRS 95.450 does, and requires that such charges be filed with the “clerk of the legislative body.” Because his hearing did occur within 60 days of that occurrence, the Court agreed that his hearing was timely.

Further, Cromer argued that Charges I-VII were initiated as the result of Form 111s filed by two specific officers, who were not summoned to the hearing. (Under 15.520, that would require the dismissal of such charges.) The Court however, noted that although they were not officially notified, they were both present, and the Court agreed that dismissal was not warranted. Finally, Cromer argued that Charge VIII, which related to insubordination, should have been dismissed because the agency did not comply with KRS 15.520(1) during his interrogation, which occurred while he was on FMLA leave, and in which he did not receive a 48 hour notice. Instead, he was contacted verbally and ordered to appear for an interrogation the same day. The Court, however, noted that the statute did not mandate dismissal, but instead permitted the exclusion of the information gained if the officer was materially prejudiced. In this case, the Court found no reason to find that was the case.

After addressing several other issues, the Court upheld Cromer’s dismissal.

## **MISCELLANEOUS**

**Tobar v. Com.**  
**284 S.W.3d 133 (Ky. 2009)**

**FACTS:** Tobar was charged with violating the Kentucky sex offender registry, by failing to notify Kentucky of his address change. Through a combination of circumstances, Tobar had become homeless - and did not notify his probation officer that he had left his previous place of residence.

Eventually, he was indicted, and moved to suppress the indictment because, he argued, he could not register a change in address when he had no address. The trial court denied him, but allowed him to take a conditional guilty plea and appeal.

**ISSUE:** Must a homeless sex offender register as to their homeless status?

**HOLDING:** Yes

**DISCUSSION:** Tobar argued that the statute was “void for vagueness” as it gave no guidance to individuals in his situation. The Court, however, ruled that the statute was not vague, but required only that an individual must report a change in location. Since he didn’t at least attempt to report, he could not raise an “impossibility” defense.

The Court noted that the statute had changed somewhat since this case arose, and declined to opine upon how the changes might have changed their opinion.

Tobar’s plea was affirmed.

## SIXTH CIRCUIT

### SEARCH & SEIZURE – SEARCH WARRANT

#### U.S. v. McNally

327 Fed.Appx. 554 (6<sup>th</sup> Cir. 2009)

**FACTS:** On March 29, 2004, Wood went to the FBI to report that she thought her former live-in boyfriend, McNally, was involved with child pornography. They had ended their relationship the month before and had protection orders against each other. McNally's worked for a photo studio and took photos of young children. She reported that she had found a computer directory entitled "child kiddie" but was unable to access it "because it was electronically locked." She said he spent a great deal of money on pornography and she had seen a number of photos of underage girls posing in sexual situations. She also reported he owned "voyeur videos and Japanese animated pornographic videos" and that he wanted her to wear school-age outfits.

Agent Coburn sought search warrants for McNally's studio and home. They found child pornography at his home, but not the studio. They specifically did not find a computer file named "child kiddie."

McNally requested suppression and a Franks hearing, alleging that the agent included false information in the affidavit. Specifically, Coburn had included language that the "strangled and struck" Wood. The Court ruled that there was no evidence that was the case, and that it was a false statement. However, the Court ruled that even excluding that information, there was still sufficient probable cause to justify the search.

Wood took a conditional guilty plea, and appealed.

**ISSUE:** Must an informant in a search warrant be identified to the magistrate?

**HOLDING:** No

**DISCUSSION:** McNally contended that the "affidavit failed to establish probable cause to search his residence because the complainant is never identified or disclosed to the magistrate, and there [was] no independent corroboration." The Court, however, ruled that the informant had a relationship with McNally and "provided substantial and credible detail." Further, Coburn verified a great deal of the information provided.<sup>26</sup> The Court found that Coburn's reliance on Wood was not inappropriate.

McNally's plea was upheld.

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<sup>26</sup> See U.S. v. Tuttle, 200 F.3d 892 (6<sup>th</sup> Cir. 2000).

U.S. v. Berry  
565 F.3d 332 (6<sup>th</sup> Cir. 2009)

**FACTS:** In 2005 the Bay Area Narcotics Enforcement Team (BAYANET), a Michigan task force, was investigating drug dealing involving Hoskins. They discovered that another known dealer, Berry, was living in the same duplex as Hoskins - which was significant because the terms of his parole required him to notify his probation officer of a change of address and Berry had not done so.

Upon investigation, officers observed Berry at that address and also learned that he listed that address on his OL and other official records. His landlord knew him by another name, but identified his photo and said he'd lived there for three years.

Officers decided to arrest Berry. On April 29, 2005, at about 10 p.m., they spotted him drive in. They arrested him as he got out and searched the car. They found a number of rocks of crack cocaine on the floorboard in front of the driver's seat. They sought a search warrant for his side of the duplex.

Part of the affidavit read as follows:

*It has been my personal experience and I have been so informed by many other Police Officers whom I know to be truthful . . . that persons present in the residence or on the property (or entering or leaving the residence or property) where a search warrant for controlled substances is being executed oftentimes conceal controlled substances on their persons (this can be because they are selling or buying the substances or in an attempt to conceal the substances from the Police search); that vehicle's [sic] parked on the premise of places where controlled substances are found or sold oftentimes contain controlled substances . . . . It has further been my experience that people dealing and using controlled substances will oftentimes use the motor vehicles to store and transport controlled substances . . . . Furthermore, I know from my training and experience that people who sell drugs often possess firearms for the purpose of protecting themselves and the drugs from thefts or searches.*

*I have previously been told by a confidential informant (CI) that Lee Henry Berry was living at the residence described in paragraph 3 above. Additionally, the CI pointed the residence out to me. I have also checked the Secretary of State computer via the LEIN system and found that Lee Henry Berry's operator's license address is listed as 1228 Asbury Ct, Saginaw, Michigan, which is also the address listed for various vehicle [sic] which he is listed as owning. Furthermore, Officer Wayne Stockmeyer of the Bay City Police department contacted Sugi Ponnampalam, the owner of the premises described in paragraph 3 above. She stated that she is the owner of 1228 Asbury Ct, and that she is currently renting the residence to an individual she knows as Alvin King, an older black male, and he pays \$675 per month cash for renting the unit. Officer Stockmeyer showed Sugi Ponnampalam a photograph of Lee Henry Berry, and she identified the photograph as being the person she knows as Alvin King, the renter of the duplex. She said that she has owned the dwelling for about 3 years and that the person she knows as Alvin King has lived there the entire time.*

*I know that Lee Henry Berry was convicted of delivery or attempted possession with intent to deliver less than 50 grams of a mixture containing cocaine approximately 2/23/2000,*

*before Honorable William J. Caprathe, Bay County Circuit Judge, and that he was sentence[d] to lifetime probation. I have talked with his probation office[r], Steve Marshall, who informed me that according to the Probation Department's records, Lee Henry Berry lists his residence as being in the City of Bay City. I also know by having seen a listing of the "special conditions" of Lee Berry's probation that he is required to "Notify the probation officer immediately of any change of address or employment status." Steve Marshall told me that Lee Berry has never reported that he lives in Saginaw Township. During the evening hours of April 29, 2005, Lee Henry Berry was arrested by Officer Stockmeyer and officers from the Bay Area Narcotics Enforcement Team (BAYANET) for violating probation. The arrest took place outside of the residence described in paragraph 3 above after he was seen arriving in a car. Officer Stockmeyer told me that Lee Berry was the driver and only occupant of the car. Officer Stockmeyer also told me that as part of the search incident to arrest he found a number of rocks of what appeared to be crack cocaine on the floor of the car under where Lee Berry was sitting. Stockmeyer told me that he field tested the crack cocaine and it tested positive for the presence of cocaine.*

The warrant was signed, authorizing the officers to search for (1) cocaine and other controlled substances; (2) residency documents and similar items showing the identity of the persons residing there; and (3) a long list of standard drug-search items, including scales, packaging materials, sales ledgers, currency, and firearms. They found a number of items, and Berry was indicted on drug and firearms charges.

Berry moved for suppression, claiming the "warrant was invalid on its face," because it failed to "establish the requisite nexus between" the duplex and drug activity. Berry was subsequently convicted of most of the charges. He then appealed.

**ISSUE:** Does drug activity near a suspected drug dealer's home provide probable cause that drugs will be found at the home?

**HOLDING:** Yes

**DISCUSSION:** Berry argued that the warrant lacked probable cause because officers had no information that there were any drugs in the house and because he had no access to the house following his arrest. The Court noted that to "meet the nexus requirement of probable cause, 'the circumstances must indicate why evidence of illegal activity will be found in a particular place.'"<sup>27</sup>

The Court noted "a defendant's status as a drug dealer, standing alone, does not give rise to a fair probability that drugs will be found in defendant's home."<sup>28</sup> However, "there is support for the proposition that status as a drug dealer plus observation of drug activity near defendant's home is sufficient to establish probable cause to search the home."<sup>29</sup> The Court agreed that the warrant in this case established probable cause as it made numerous mentions of Berry's connection to drug dealing at or near his home.

Berry's conviction was affirmed.

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<sup>27</sup> U.S. v. Carpenter, 360 F.3d 591 (6<sup>th</sup> Cir. 2004).

<sup>28</sup> Frazier

<sup>29</sup> U.S. v. Miggins, 302 F.3d 384 (6<sup>th</sup> Cir. 2002); U.S. v. Blair, 214 F.3d 690 (6<sup>th</sup> Cir. 2000); U.S. v. Jones, 159 F.3d 969 (6<sup>th</sup> Cir. 1998); U.S. v. Caicedo, 85 F.3d 1184 (6<sup>th</sup> Cir. 1996).

**U.S. v. Clements**  
**2009 WL 1789573 (6<sup>th</sup> Cir. 2009)**

**FACTS:** In his affidavit, Det. Cudo stated that “within the past 72 hours, he had met a confidential reliable informant (‘CRI’),” whom Affiant Cudo considered reliable based upon his participation in several prior controlled purchases of narcotics, which led to the issuance of search warrants and drug-related arrests. The CRI informed Affiant Cudo that he had gone with an “identified black male” to the Cleveland home. The black male went inside the home to purchase a multi-ounce quantity of cocaine and allegedly made the purchase. In addition, he “stated that the CRI informed him that they could arrange for a controlled purchase using the black male as ‘middleman.’” They arranged for a controlled purchase, which led them to the house in question, where he observed the black male enter and leave the home in question, and sell the drugs to the CRI. The continued to observe the property and saw “a moderate amount of vehicle traffic.”

Clements moved for suppression, and was denied. He then appealed.

**ISSUE:** Does a warrant based upon the purchase of drugs by a subject in a home provide probable cause to search the home?

**HOLDING:** Yes

**DISCUSSION:** Clements argued that the affidavit may have provided probable cause to search the black male subject, but not to search the home. The Court, however, quickly concluded that the affidavit provided sufficient probable cause to search the home.

Clements also argued that his right to silence had been violated at trial. Specifically, he claimed that Officer Baeppler (who booked Clements into jail) improperly testified that Clements became belligerent and refused to answer his questions during booking. The Court ruled that “refusing to answer routine biographical questions do not create or imply guilt.” Such questioning is not considered interrogation, and refusal to answer such questions do not incriminate the individual for the crimes charged.

The Court agreed that a mistrial was not warranted.

**U.S. v. Manjate & Lewis**  
**327 Fed.Appx. 562 (6<sup>th</sup> Cir. 2009)**

**FACTS:** Lewis was arrested following a traffic stop by Sgt. McCaw (Wyoming, Michigan, PD) on February 17, 2005. Sgt. McCaw pulled over Lewis’s vehicle for a traffic violation. Lewis was further detained by the officer because he developed suspicion that the occupant was involved in drug trafficking, since he had left a known drug house in the early morning hours, was visiting a known drug dealer, and Lewis gave short answers and avoided eye contact.

In a separate contact, Lewis’s apartment was searched pursuant to a warrant and a handgun was found. He admitted he was involved in drugs and that he possessed the gun, but later argued that there was no evidence that he “possessed the gun in furtherance of drug trafficking.”

Lewis was indicted, convicted, and appealed.

**ISSUE:** Is a gun found in close proximity to drugs and cash presumed to be seizable under a warrant?

**HOLDING:** Yes

**DISCUSSION:** Lewis argued that all of McCaw's information could also have an innocent explanation. The Court, however, noted that "circumstances comprising a particularized and objective basis for reasonable suspicion need not be uncommon or especially unique."<sup>30</sup>

With respect to the gun, the Court agreed with the trial court that although the gun was unloaded, it was found in close proximity to cash and drugs and to ammunition. Such proximity permitted a jury to infer that the gun was intended for that purpose.

The Court upheld the denial of the motion to suppress and upheld the introduction of the weapon.

**U.S. v. Roberson**  
**2009 WL 1649194 (6<sup>th</sup> Cir. 2009)**

**FACTS:** In a warrant to search Roberson's girlfriend's home, Officer Fangman (Hamilton County Regional Enforcement Narcotics Unit - RENU) set out the following:

*On February 20, 2007, law enforcement authorities received information from a "confidential" [sic] source alleging that Roberson was manufacturing and trafficking in large amounts of crack cocaine from a specific address, 3665 Hillside Avenue, in Cincinnati, Ohio. The tipster gave a physical description of Roberson, stated that Roberson used a blue Cadillac to facilitate his drug trafficking operation, and indicated that Roberson lived at the single-family residence with Shaunte Martin. The source further stated that Roberson had, in the past, transported large amounts of cocaine to this address, where he allegedly manufactured cocaine and crack cocaine and prepared it for further distribution. The tipster claimed that he/she had been in the residence within the past 72 hours and observed Roberson in possession of a quantity of crack cocaine and with several dogs and guns inside the residence to provide protection for his drug trafficking operation. The tipster stated that he/she was familiar with the appearance of crack cocaine due to past contacts with crack cocaine drug abusers and traffickers.*

*Officer Fangman, with over nineteen years of law enforcement experience, nine of which were spent as a narcotics investigator, was assigned to investigate the tip and, if warranted, to prepare an application for a search warrant of 3665 Hillside Avenue.*

*On the same day that the tip was received, Officer Fangman began an investigation to verify the information. A check of public records revealed that ownership of the residence, as well as utility service, was in the name of Shaunte Martin. The check also showed a prior utilities account in the name of Shaunte Martin at 5457 Hillside Avenue, identified as the prior address of Roberson. Officer Fangman's review of criminal records indicated that Roberson had a 1995 felony drug trafficking conviction, a 1995 resisting arrest conviction, and a 1998 corrupting a minor with drugs conviction.*

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<sup>30</sup> U.S. v. McCauley, 548 F.3d 440 (6<sup>th</sup> Cir. 2008)

Officers began surveillance, and noted a great deal of heavy traffic at the home. They did a trash pull and discovered incriminating information related to drugs.

The affidavit information, however, "contained two inaccuracies" - the CI was actually an anonymous source and he misstated the color of the suspect Cadillac. The search warrant was signed and executed and the information found led to Roberson's arrest.

Roberson moved for suppression on the basis of the false statements and was denied. He offered evidence that the alleged tipster had not been in the home within the previous 72 hours. The Court held a hearing at which the witness concerning the tipster testified that she believed she knew the identity of the tipster, but admitted that she did work during the day and had no knowledge of who might have been in the house while she was away. Officer Fangman acknowledged his error. The Court, however, found that even redacting the questioned material, that there remained sufficient credible information to support the warrant.

Roberson took a conditional guilty plea, and appealed.

**ISSUE:** May information be redacted from a warrant and the warrant remain valid?

**HOLDING:** Yes

**DISCUSSION:** Roberson argued that the "redacted affidavit" did not establish probable cause to search the home. The Court agreed with the reasoning of the trial court and ruled that even removing the information did not render the warrant invalid. Specifically, the Court found that the officers corroborated the information provided by the tipster and established a nexus between the place to be searched and the evidence sought.

Roberson's plea was upheld.

## **SEARCH & SEIZURE – VEHICLE STOP**

### **U.S. v. Davis**

**326 Fed.Appx. 351 (6<sup>th</sup> Cir. 2009)**

**FACTS:** On January 13, 2006, at about 0210, Davis was driving outside Detroit, Michigan. Officer Griffin (Wesland, MI, PD) spotted a Tweety-Bird air freshener hanging from the rearview mirror so he stopped him for a violation of Michigan law, which prohibits dangling items that obstruct the view of the driver.

Davis admitted he did not have a license and he was arrested. During the search of the vehicle, the officer found a stun gun, cash, an open bottle of cognac and baggies containing more than 23 grams of cocaine base. He also found a gun, which Davis had told him was in the car.

Davis, a felon, was charged for the gun and the drugs. He requested suppression but was denied. Davis took a conditional guilty plea, and appealed.

**ISSUE:** Is a traffic stop for a minor traffic offense permitted?

**HOLDING:** Yes

**DISCUSSION:** The Court agreed that given the broad scope of the Michigan statute, the stop was legally justified. The decision of the trial court was affirmed.

**U.S. v. Jones**  
**562 F.3d 768 6<sup>th</sup> Cir. 2009)**

**FACTS:** On Nov. 29, 2006, Det. Mattingly (Louisville Metro PD) was patrolling a high drug crime area in Louisville. He watched a vehicle stop in front of a suspect house. One of the passengers, Jones, got out and went into the house - which turned out to be his mother's house. Jones emerged and got back into the car. Believing what he saw was "flagging," Mattingly pulled up in front to block the vehicle in and Det. McKinney arrived to assist in the stop. Both were in unmarked cars, but McKinney turned on his emergency lights.

Jones jumped out of the back seat. Mattingly identified himself and told Jones to stop, and Jones did. He frisked Jones and found two handguns, the second of which was reported stolen. He also found marijuana on Jones's person, and in the vehicle. Jones was arrested and eventually charged with possession of the gun. (He was a felon.) He moved for suppression and the trial court agreed, but it did not release Jones, apparently in anticipation of further criminal charges. Both sides appealed.

**ISSUE:** Is suspect (although ultimately innocent) behavior sufficient to support a vehicle stop?

**HOLDING:** Yes

**DISCUSSION:** The Court stated, "the manner in which officers Mattingly and McKinney originally approached the Nissan is not suggestive of a consensual encounter." Further, "a warrantless 'seizure' had occurred at the time the Nissan was hemmed in by the unmarked police vehicles." The Court noted, in a footnote, that the record indicated that the occupants did not necessarily understand that they were dealing with law enforcement officers.

The Court agreed that once Jones submitted, he was seized. The Court disagreed with the trial court, however, and ruled that it "should have considered all of Mattingly's observations up to the moment when Jones finally yielded to the unambiguous show of police authority." The Court noted that although flagging was not actually occurring, the behavior of the Nissan's occupant was certainly consistent with it. Further, the trial court ignored Mattingly's observation of a bulge in the front of Jones's sweatshirt (where one of the guns was hidden) and his other actions. The Court found those to be "critical observations, suggesting the possible presence of a firearm in a confrontational setting, and calling for an immediate show of authority to neutralize potential danger and conduct further investigation."

The Court reversed the order to suppress the evidence and remanded the case back for further proceedings.

**U.S. v. Lopez**  
**567 F.3d 755 (6<sup>th</sup> Cir. 2009)**

**FACTS:** On September 27, 2006, Trooper Cromer (KSP) clocked Lopez driving 106 mph on I-75 in Rockcastle County. He chased and eventually arrested Lopez for reckless driving. After securing Lopez in the back of the cruiser, Trooper Cromer searched the passenger compartment of the car and found 73 grams of crack, scales and a loaded handgun.

Lopez was charged under federal law for drug trafficking and possession of the firearm while trafficking. He moved for suppression and the trial court denied the motion. Lopez took a conditional guilty plea and appealed.

**ISSUE:** Is a search of vehicle following an arrest permitted?

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

**DISCUSSION:** The Court quickly agreed that driving at such a high rate of speed constituted reckless driving and that the arrest was therefore valid.

With respect to the search, however, the Court noted that at the time of the arrest, New York v. Belton<sup>31</sup> was controlling law and that the search was permitted. However, the Court noted:

But the Supreme Court has since changed the law. In Arizona v. Gant<sup>32</sup>, the Court held that “[p]olice may search a vehicle incident to a recent occupant’s arrest only if the arrestee is within reaching distance of the passenger compartment at the time of the search or it is reasonable to believe the vehicle contains evidence of the offense of arrest.”

The Court concluded that the Gant standard was not met in the case at bar, because Lopez was secured in the patrol car at the time of the search. Further, “[t]here was no reason to think that the vehicle contained evidence of the offense of arrest, since that offense was reckless driving.”

As such, the Court agreed that the search violated the Fourth Amendment under Gant, and reversed the conviction. The case was then remanded to the trial court for further proceedings.

**U.S. v. Hunter**  
**Slip Copy, 2009 WL 1491464 (6<sup>th</sup> Cir. 2009)**

**FACTS:** On April 12, 2007, at about 1300, Det. Dill (Shelby Co. TN, SO) received information from a CI that Hunter “would be transporting a large quantity of methamphetamine” in a specific area and in a specific vehicle. Det. Dill later testified that the CI had provided good information in 6 or 7 earlier situations. Det. Dill informed local officers of the tip but did not attempt to get an arrest warrant. That evening several officers established surveillance. At about 2150, they spotted Hunter in the area in the identified vehicle.

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<sup>31</sup> 453 U.S. 454 (1981)

<sup>32</sup> 556 U.S. ---, decided April 21, 2009.

Det. Simonsen made a traffic stop and Hunter stopped his vehicle in the traffic lane. Det. Simonsen and Mays approached. Simonsen explained the reason for the stop, a cracked windshield, and asked him to get out of the car so that the officers could get out of traffic - it was a two lane road. Hunter refused. Realizing that the car was not in park, Simonsen called for other officers to "step it up" because he thought Hunter was getting ready to run. Other officers arrived and blocked Hunter in.

Hunter was ordered out at gunpoint, but still refused, and "Simonsen and Mays physically removed him from the car." Simonsen grabbed Hunter's shorts to "pull them up" and a clear bag fell to the ground. They searched Hunter and found another similar bag in his groin area, and a small amount of marijuana. The substance in the clear bag appeared to be methamphetamine. Hunter was arrested, but he was never cited with the original traffic charge.

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

**ISSUE:** May a credible informant's tip provide reasonable suspicion for a traffic stop?

**HOLDING:** Yes

**DISCUSSION:** First, the Court looked as to whether the CI's tip provided, at least, reasonable suspicion to make the stop.<sup>33</sup> The Court agreed that the tip did provide the requisite level "particularized and objective basis" for suspecting Hunter of illegal activity. It was appropriate for the Court to accept Det. Dill's statement that the informant had proved credible in the past, even though he could not recollect details of prior dealings, since the information correctly predicted Hunter's whereabouts at a time in the future. As such, the Court need not consider whether the cracked windshield was a separate basis for the stop.

The Court, however, noted that that did not end the inquiry. Once the purpose for a stop has been completed, the "motorist cannot be further detained unless something that occurred during the stop caused the officer to have a reasonable, articulable suspicion that criminal activity was afoot."<sup>34</sup> The Court agreed that the detective was justified in ordering Hunter from the car.<sup>35</sup> Once he was removed, and the drugs fell to the ground, the Court ruled that his seizure, and subsequent arrest, was justified under Plain View.

The Court upheld Hunter's plea.

## SEARCH & SEIZURE – KNOCK AND ANNOUNCE

### U.S. v. Roberge 565 F.3d 1005 (6<sup>th</sup> Cir. 2009)

**FACTS:** Det. Brumley got a warrant for Roberge's home after his daughter "told him that Roberge 'cooks' methamphetamine in their basement." The judge waived the usual knock and announce requirement, upon proof that Roberge had firearms and had been "mentally unstable." He was charged with manufacturing and possessing firearms while involved in drug trafficking.

<sup>33</sup> See Delaware v. Prouse, 440 U.S. 648 (1979).

<sup>34</sup> U.S. v. Richardson, 385 F.3d 625 (6<sup>th</sup> Cir. 2004).

<sup>35</sup> See Pennsylvania v. Mimms, 434 U.S. 106 (1977); U.S. v. Wilson, 506 F.3d 488 (6<sup>th</sup> Cir. 2007).

In serving the warrant, officers found Roberge asleep in his bed with a loaded assault rifle nearby. They found numerous items connected to methamphetamine manufacturing. The daughter, who was apparently young, gave a detailed description at trial of what she had observed in the house.

Roberge requested suppression and was denied. Following his conviction, he appealed.

**ISSUE:** Is suppression the remedy for a violation of knock-and-announce?

**HOLDING:** No

**DISCUSSION:** Roberge argued that the affidavit contained materially false information that supported the waiver of the knock and announce requirement. However, the Court noted, as ruled in Hudson v. Michigan, "suppression is not a remedy for violation of the knock-and-announce rule."<sup>36</sup> T

After ruling on a number of other issues, the Court upheld Roberge's conviction.

## 42 U.S.C. §1983 - SELECTIVE ENFORCEMENT

### Wiley v. Oberlin Police Department 2009 WL 1391532 (6<sup>th</sup> Cir. 2009)

**FACTS.** In August, 2003, Howard had a heart attack. His "ex-fiancee," Wiley, had possession of his car, wallet, credit cards and bank book and had possessions in his house at the time. Another woman, Hougland called his "ex-live-in-girlfriend," told Walsh, the Oberlin City prosecutor, that "she wanted Howard's things and wanted Wiley out of his house." "She persuaded Walsh to cause Wiley's arrest so that she could lock her out of Howard's house."

Wiley alleged that "Walsh instructed the Oberlin Police Department to arrest her for driving under a suspended license." "Hougland and Howard's children used this opportunity to lock Wiley out of Howard's house, without a legal eviction proceeding, and [stole] her belongings." The officers took the car she was driving, and some of her belongings, and she never got them back. She also claimed the OPD "failed to properly investigate her claim of stolen property."

Wiley also claimed that several other prosecutions were initiated, but the record included conflicting information as to the resolution of the charges in those cases.

Wiley filed suit against various defendants, including members of the police department, the prosecutor and the city, under 42 U.S.C. §1983. The trial court eventually dismissed all charges, and she appealed.

**ISSUE:** Does a selective enforcement action require the subject be part of a protected group?

**HOLDING:** Yes

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<sup>36</sup> 547 U.S. 586 (2006).

**DISCUSSION:** The Court broke apart the various claims and addressed each in turn. First, the Court agreed that the City (and the officers involved) had probable cause to stop her for the suspended license, since one of the officers knew that was the case. (He also verified the suspension through their computer records system before the stop.) The Court noted that any other motivations for the stop were irrelevant.<sup>37</sup>

With respect to an earlier charge, the Court agreed that the officers also had probable cause to have arrested Wiley for a domestic assault against Howard, although that case was eventually dismissed, apparently because Howard did not appear. The Court also agreed her arrest for a protective order was valid. As such, the prosecutor had probable cause to pursue a criminal action against Wiley

The Court looked at the assertion of selective enforcement, in which the state actor must initiate prosecution against a person belonging to a protected, identifiable group, must have a discriminatory purpose and which did have a discriminatory effect. They do so by showing that similarly situated persons were not prosecuted. Since Wiley asserted that she was targeted because of her personal relationships, they court found no constitutional violation

With respect to the City of Oberlin, because Wiley could not prove a case against any individual defendants, the case against the city failed.

With respect to the allegedly stolen items, both against Houghland and the police, the Court ruled that Ohio law must be applied, rather than federal law.

The Court upheld the dismissal of the federal claims, and remanded the state claims back to Ohio.

**Garner v. Grant**  
**2009 WL 1391521 (6<sup>th</sup> Cir. 2009)**

**FACTS:** On the day in question, Karlie Garner (age 11 months) got out through an open sliding door at the family home. Her mother, Lisa, later claimed that she “zoned out” for about 10 minutes and discovered her gone. The child was found in the backyard pool and was eventually pronounced dead.

Det. Grant interviewed Lisa and Craig Garner at the hospital. Craig told the officer that he'd previously scolded Lisa about leaving the door cracked (which was done for the benefit of the cat), although that statement was later disputed.

The “contested phrase” was included in the report the officer forwarded to the prosecutor. Eventually, Lisa Garner was charged with involuntary manslaughter and second-degree child abuse. The prosecutor later stated that “he would have been ‘highly unlikely’ to have recommended a warrant had Craig’s statement not included the contested phrase.” However, even after Craig testified and disputed the statement, the Michigan court found probable cause and bound Garner over for trial.

Garner was acquitted and filed suit against Grant. The trial court granted summary judgment to Grant, and Garner appealed.

**ISSUE:** Does a finding of probable cause negate a wrongful arrest claim?

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<sup>37</sup> Whren v. U.S., 517 U.S. 806 (1996).

**HOLDING:** Yes

**DISCUSSION:** Garner alleged that Grant caused her wrongful arrest, but the Court noted that the “existence of probable cause, therefore, negates an essential element of a § 1983 suit alleging “deprivation of constitutional rights under color of law.”<sup>38</sup> Further, “[p]robable cause to justify an arrest means facts and circumstances . . . that are sufficient to warrant a prudent person, or one of reasonable caution, in believing, in the circumstances shown, that the suspect has committed, is committing, or is about to commit an offense.”<sup>39</sup> The Court agreed with the trial court that even without the contested statement, Det. Grant had sufficient cause to support a charge of manslaughter against Garner. The Court also addressed the issue from a due process viewpoint, and concluded that Det. Grant’s alleged actions did not “shock the conscience,” nor were they likely to have affected the result of any criminal action against Garner.

The summary judgment was affirmed.

## INTERROGATION

### U.S. v. Hunter

2009 WL 1617886 (6<sup>th</sup> Cir. 2009)

**FACTS:** On Jan. 1, 2006, Cincinnati officer responded to a shots fired call. They received a description of the shooter and Sgt. Frazier saw Hunter, who met the description standing next to a vehicle that also matched the description given. He watched Hunter place something in the car and then walk away. He also saw 20-30 other people, many running, in the area. Officer Finley seized and handcuffed Hunter, gave him Miranda warnings and placed him in a police car. Looking into the car, Sgt. Frazier saw an AK-47, which Hunter denied was his. They also recovered a revolver, a shotgun and apparently a second AK-47 from the grass, and found shell casing from various weapons.

Buck (Hunter’s girlfriend) was in the vehicle; she was also arrested. Officer Finley told her that she might be charged with a federal offense for the AK-47, although in fact, no federal charges were warranted under the situation. (The weapon was apparently a legal semi-automatic and Buck was not a convicted felon.) The pair were transported separately, but questioned in the same room. Sgt. Frazier reiterated the threat of federal charges. He also told Hunter his hands would be tested for gunshot residue and asked him if he’d used fireworks as that would affect the test. Hunter agreed that he had used fireworks earlier that day, whereupon Frazier told him the test could differentiate between the two.

After the test, Hunter asked to speak to Frazier and told him that he didn’t want Buck to go to jail and that he’d fired the weapon. He stated he’d bought the weapon earlier the day and had placed black tape upon it for decoration.

Hunter was indicted for being a felon in possession of a firearm. He moved for suppression, and was denied. Hunter took a conditional guilty plea, and appealed.

**ISSUE:** Is a threat against a third party enough to cause a confession to be coerced?

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<sup>38</sup> Sutkiewicz v. Monroe County Sheriff, 110 F.3d 352 (6<sup>th</sup> Cir. 1997)

<sup>39</sup> Michigan v. DeFillippo, 443 U.S. 31 (1979).

**HOLDING:** No

**DISCUSSION:** Hunter argued that his confession was coerced by the threat to his girlfriend. The Court agreed that a “credible threat” was sufficient to make a confession coerced, either to the suspect or a third party.<sup>40</sup> The Court looked to the three requirements in *U.S. v. Mahan*: 1) the police activity was objectively coercive; 2) the coercion in question was sufficient to overbear the defendant’s will; and 3) the alleged police misconduct was the crucial motivating factor in the defendant’s decision to offer the statement.<sup>41</sup> In this case, the Court found that none of the prongs were met. The Court agreed that the officers may have legitimately believed that they could charge Buck, as it was noted that a semi-automatic weapon (legal) cannot be readily distinguished by observation from an automatic weapon (illegal without a federal permit). The Court further agreed that although Hunter was mildly mentally retarded, he had experience in the criminal justice system and that the residue test affected his decision more than the threat to his girlfriend.

The Court found Hunter’s confession to be voluntary, and upheld the plea.

**Zagorski v. Bell**  
**326 Fed.Appx. 336 (6<sup>th</sup> Cir. 2009)**

**FACTS:** Zagorski was indicted for the murders of Dotson and Porter. He was convicted and received the death penalty. Tennessee affirmed his convictions and sentence, and he sought post-conviction relief in the federal courts. The District Court refused his petition and he appealed.

**ISSUE:** If a subject requests to speak to an officer, on their own initiative, is that sufficient to waive his rights to silence and to counsel?

**HOLDING:** Yes

**DISCUSSION:** Among other issues, Zagorski claimed that the police took statements from him after the invoked his rights to counsel and to silence. The Court noted that after he invoked, that he sent notes to Det. Perry, who returned to the jail to speak to him, but Zagorski alleged that his statements (which were a confession) were “inadmissible because they resulted from ‘coercive police activity.’”<sup>42</sup> He claimed that he had “been incarcerated under oppressive conditions, kept in isolation, and deprived of exercise or sunlight.” The Sheriff, however, indicated that he had attempted to escape and had attempted to commit suicide, and the additional security was because of that. The Court noted that “Zagorski requested to speak with Detective Perry on his own initiative and insisted on confessing even though the detective advised him to speak with his lawyer first..”

Further, the Court stated:

An accused, “having expressed his desire to deal with the police only through counsel, is not subject to further interrogation by the authorities until counsel has been made available

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<sup>40</sup> *Arizona v. Fulminante*, 499 U.S. 279 (1991); *U.S. v. Finch*, 998 F.3d 416 (6<sup>th</sup> Cir. 1999); *U.S. v. Johnson*, 351 F.3d 254 (6<sup>th</sup> Cir. 2003).

<sup>41</sup> 190 F.3d 416 (6<sup>th</sup> Cir. 1999).

<sup>42</sup> *Jackson v. McKee*, 525 F.3d 430 (

to him, unless the accused himself initiates further communication, exchanges, or conversations with the police.”<sup>43</sup> But the accused’s statement may be admitted nevertheless if an Edwards initiation occurs; that is, the statement is admissible “when, without influence by the authorities, the suspect shows a willingness and a desire to talk generally about his case.”<sup>44</sup> Zagorski did not just express a voluntary willingness “to talk generally about his case”—he insisted on giving Detective Perry specific details. As a result, the state court decision was neither contrary to, nor involved an unreasonable application of clearly established Federal law.

The Court ruled the statements admissible, and upheld the denial of his writ of habeas corpus.

### U.S. v. Clay

320 Fed.Appx. 384 (6<sup>th</sup> Cir. 2009)

**FACTS:** Clay, a Tennessee prison officer, brought a gun in the facility where she worked (Bass Correctional Complex) and attempted to pass it to an inmate in a jar of peanut butter. The inmate who discovered the ruse reported the attempt to another correctional officer and turned over the weapon, which was traced back to Clay. Clay was questioned, and when she said she wanted a lawyer the interview stopped. She reinitiated the conversation a little later and eventually, she admitted to bringing the gun in for an inmate.

Clay was charged, convicted, and appealed.

**ISSUE:** Is an interview at a workplace coercive?

**HOLDING:** No

**DISCUSSION:** Clay argued that her statements should have been suppressed because “(1) the investigators unlawfully detained her, (2) they unlawfully interviewed her after she invoked her right to counsel, and (3) she involuntarily waived her Miranda rights.” The Court agreed that at the time she admitted owning the gun, the “encounter was only an investigatory interview, not an arrest.” Further, “There was no evidence of coercion, and the questioning had only been taking place for a short time in the relatively non-threatening environment of a conference room at Clay’s workplace. The scope and nature of the interview was entirely reasonable given that a gun had been found in the prison in an area where Clay had worked.” The Court noted that “Because the encounter was still an investigatory Terry stop when Clay provided additional incriminating statements giving rise to probable cause, any subsequent arrest that may have occurred was lawful.”

The Court further agreed that her request to “talk to them again,” opened her up to further questioning, and in fact, she was specifically asked if she wanted to reinitiate the interview. The Court agreed that she “knowingly and intelligently waived her rights,” and that there was no coercion. The Court agreed that a statement that her fingerprints were found in connection to the gun was false, but held that simply leading a suspect to believe such information was not coercive.

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<sup>43</sup> Edwards v. Arizona, 451 U.S. 477 (1981)

<sup>44</sup> United States v. Whaley, 13 F.3d 963 (6<sup>th</sup> Cir. 1994).

Clay's conviction was affirmed.

## TRIAL PROCEDURE/EVIDENCE - HEARSAY

U.S. v. Rodriguez-Lopez  
565 F.3d 312 (6<sup>th</sup> Cir. 2009)

**FACTS:** On Oct. 13, 2006, a DEA agent arranged to buy heroin from Robles-Manguia, in the parking lot of a Louisville shopping center. Both Robles and another man were arrested. Robles admitted, at the scene, that he had intended to sell 56 grams to the agent, and that the other man, Lopez, was the lookout. Lopez "insisted that he knew nothing about any drug deal and denied that he had been circling the parking lot." During the discussion, Lopez's cell phone rang repeatedly. Agent Perryman answered each time, and each time, the caller requested heroin.

Lopez moved for exclusion of the cell phone calls. The trial court agreed they were inadmissible hearsay and the government appealed.

**ISSUE:** Are all repeated out-of-court statements hearsay?

**HOLDING:** No

**DISCUSSION:** The Court noted that there was no evidence as to exactly what the callers said, but stated that "whatever their grammatical mood, the statements are not hearsay because the government does not offer them for their truth." Certainly, "the fact that [Lopez] received ten successive solicitations for heroin is probative circumstantial evidence of his involvement in a conspiracy to distribute heroin."

The Court stated:

And the fact that out-of-court statements are being used to support a material inference does not by itself make them hearsay; it makes them relevant.

The Court reversed the decision to exclude the evidence and remanded the case for further proceedings.

## TRIAL PROCEDURE/EVIDENCE - BRADY

Willis v. Jones  
2009 WL 1391429 (6<sup>th</sup> Cir. 2009)

**FACTS:** Willis was charged, and eventually convicted in 1993, for an armed robbery that resulted in a death. Some time later, in post-conviction appeals, he learned that critical evidence had been withheld from him. He filed for habeas relief, arguing "newly discovered evidence." Following a lengthy procedural process, he reached the present court.

**ISSUE:** Is a late appeal based upon newly discovered evidence permitted?

**HOLDING:** Yes

**DISCUSSION:** Although the prosecution argued that Willis's appeal was not timely, the Court agreed that Willis had shown "due diligence because he had no reason to know that the state had not disclosed Brady evidence." Specifically, the state had withheld information concerning an unidentified palmprint connected with the scene, because "Willis could have used it to impeach the credibility of the investigating officer who subsequently denied that the record existed."

The Court continued:

Brady's requirements of disclosure apply to "impeachment evidence as well as exculpatory evidence," apply even if the accused does not ask for the evidence, and apply regardless of the good faith of or even knowledge of the prosecution that police have the evidence. <sup>45</sup> In Strickler, the Supreme Court held that the habeas petitioner had shown cause to excuse procedural default of his Brady claim because, where the petitioner had no reason to believe at the time of trial that the state had withheld *Brady* evidence, the petitioner was entitled to rely on the state's duty to disclose.

The Court reversed the decision to have the trial court reconsider Willis's petition to the extent that he claims relief based on the untimely disclosure of the record.

### U.S. v. Mellies

2009 WL 1391539 (6<sup>th</sup> Cir. 2009)

**FACTS:** On June 21, 2004, "while Mellies was out of town, his wife, Lisa, voluntarily provided the Dickson County Sheriff's Office in Charlotte, Tennessee, with a laptop computer and 47 compact discs, many of which contained child pornography. Mrs. Mellies consented to a search of the home she shared with her husband and fourteen-year-old son from her prior marriage." That search revealed a space where it was apparent a computer had been located. The officers got a warrant for Mellies and he was arrested when he returned home.

Detective Buddy Tidwell conducted a forensic examination of the electronic evidence. In all, approximately 11,000 images, hundreds of movies, and stories ranging from the "high dozens to low hundreds" depicting child pornography were found on the laptop and approximately 23 CDs. While most of the child pornography was stored on the CDs, approximately 493 images were saved on the laptop. The pictures and movies depicted vaginal, anal, oral, and digital penetration, as well as bondage and torture, of children. Most of the files and folders storing the child pornography had innocuous names, although some were sexually explicit and referred to children. The majority of the files were password-protected. Each CD containing child pornography was marked with a written symbol. Tidwell estimated that it would have taken months to download the thousands of images and hundreds of video files of child pornography, zip the images into files, and name the "hundreds and hundreds of directories" storing them.

Further:

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<sup>45</sup> Strickler v. Greene, 527 U.S. 263 (1999).

Tidwell also testified that he was "reasonably certain," based on "the totality of the evidence and everything that I have examined," that defendant Mellies was responsible for collecting the child pornography. According to Tidwell, "the vast majority of the activity that occurred on [the] laptop [was] attributable" to defendant Mellies because "it's very seldom that I would encounter a piece of media or a body of media like this that is so devoid of multiple users or so devoid of other explanations. I mean . . . an overwhelming amount of evidence in this laptop points to a single owner/user." Tidwell based his conclusions on several discoveries. <sup>3</sup>Detective Tidwell testified that "YUIATTA" and "YUI02" were references to the Three Stooges, one of whom often used the catch phrase, "Why, you, I oughta . . ." <sup>4</sup>Defendant was previously employed by PAL Health Technologies, and a large number of documents found on the laptop related to that company.

The laptop stored hundreds of documents, including cover letters, résumés, and fax cover sheets, as well as 1,199 emails and five email addresses that were all associated with defendant Mellies, except a single email message that was signed by Lisa Mellies and one document written by her son. The laptop's operating system and various software found on the computer were registered to defendant, and the computer was named "YUI02."<sup>3</sup> There were no other registered users or owners of software. From January 18, 2001, until July 15, 2004, the user names associated with the Mellies' internet account were "YUI02" and "WyattPal,"<sup>4</sup> and the contact person on the account was defendant. From May 24, 2004, through June 20, 2004, the account connected to the internet 68 times, for a total of 120 hours, and downloaded 1.6 gigabytes of information, or more than one-third of the entire amount of space available on the laptop.

Hidden archives on the computer indicated that the "images and video files on the CDs were once located on the laptop."

Mellies was convicted, and appealed.

**ISSUE:** Does law enforcement have a responsibility to preserve all potentially exculpatory evidence?

**HOLDING:** No

**DISCUSSION:** Mellies argued that his rights were violated because the government destroyed "potentially exculpatory fingerprint evidence and a computer." During the investigation, the "government scrubbed and washed (resurfaced) the CDS, therefore destroying potentially exculpatory fingerprints." Further, a Gateway computer was lost or destroyed, which he alleged could have "solved mysteries" in the case.

The Court noted:

The Supreme Court has stated that the Due Process Clause does not impose upon the police "an undifferentiated and absolute duty to retain and to preserve all material that might be of conceivable evidentiary significance in a particular prosecution."<sup>46</sup> The parties agree that where, as here, the basis for defendant's due process complaint is that the

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<sup>46</sup> Arizona v. Youngblood, 488 U.S. 51 (1988).

government failed to “preserve evidentiary material of which no more can be said than that it could have been subjected to tests, the results of which might have exonerated” him,<sup>47</sup> he must show: “(1) that the government acted in bad faith in failing to preserve the evidence; (2) that the exculpatory value of the evidence was apparent before its destruction; and (3) that the nature of the evidence was such that the defendant would be unable to obtain comparable evidence by other means.”<sup>48</sup> Mere negligence, even gross negligence, by the government in failing to preserve potentially exculpatory evidence does not establish the required bad faith.<sup>49</sup>

Tidwell also noted that he was in a dilemma, because the only way to read the CDs was to clean the surface, and that doing so did not affect any prints on the non-data side. The Court concluded that the “exculpatory value of the evidence was not apparent before its alleged destruction” as it was purely speculative that the CDs even contained fingerprints, and if so, that they would be exculpatory.

With respect to the missing computer, the Court also concluded that its exculpatory nature was speculative, and would not have offset the incriminating evidence at trial.

Mellies conviction was affirmed.

## TRIAL PROCEDURE/EVIDENCE – IDENTITY OF INFORMANT

### U.S. v. Hudson

325 Fed.Appx. 423 (6<sup>th</sup> Cir. 2009)

**FACTS:** Hudson was charged on the basis of information provided by a CI to a Shelby County (TN) officer. That information was used to obtain a search warrant, and the officers found a variety of drugs, money and guns. Hudson was indicted, and filed a motion to disclose the informant’s identity, as well as a Franks hearing, accusing the detective of including false statements in his affidavit.

The trial court denied the motions, although it did hold a hearing . Hudson took a conditional guilty plea, and appealed.

**ISSUE:** Must an informant’s identity be revealed?

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

**DISCUSSION:** The Court agreed that it is “well-established that the government is privileged not to reveal the identity of informants, ... and thus a defendant bears the burden of showing how disclosure of an informant’s identity would substantively assist his defense.”<sup>50</sup> It is then up to the trial court to do an in camera review to decide if the identity should be disclosed. In this case, the court did so, and concluded that the identity need not be revealed.

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<sup>47</sup> U.S. v. Wright, 260 F.3d 568 (6<sup>th</sup> Cir. 2001) (quoting Youngblood, 488 U.S. at 57),

<sup>48</sup> Monzo v. Edwards, 281 F.3d 568 (6<sup>th</sup> Cir. 2002).

<sup>49</sup> Wright, *supra*.

<sup>50</sup> Roviaro v. U.S., 353 U.S. 53 (1957); U.S. v. Moore, 954 F.2d 379 (6<sup>th</sup> Cir. 1992).

With respect to the CI, the Court agreed that the information provided was sufficient to find probable cause, although it agreed that “the better practice would have been for [the detective] to have provided in the affidavit more of the detail that he in fact provided in the hearing.”

Hudson’s plea was upheld.

## EMPLOYMENT - FIRST AMENDMENT

### Miller v. City of Canton

319 Fed.Appx. 411 (6<sup>th</sup> Cir. 2009)

**FACTS:** Miller (and Fowler) alleged that the City of Canton Police Department discriminated against them because of their race. Miller (a white officer and president of the union) had issued a press release alleging that Chief McKimm discriminated against black officers. (Fowler was a black officer allegedly aggrieved by the discrimination.) As a result of the press release, Miller was suspended for 60 days, but he was eventually given back pay and benefits for that time. Miller filed an EEOC complaint and eventually sued, arguing retaliation. Fowler was one of four black officers who had allegedly received discriminatory disciplinary actions, including a recommendation for termination that was eventually reduced by an arbitrator. He also filed an EEOC complaint and then filed suit.

The District Court magistrate recommended both Fowler’s and Miller’s cases be dismissed, finding that they did not sustain their initial burden of proof. They appealed.

**ISSUE:** Is an officer who makes a statement of public interest that is not part of his position to make protected by the First Amendment?

**HOLDING:** Yes

**DISCUSSION:** The Court noted that for a government employee to “establish a *prima facie* case of retaliation under 42 U.S.C. §1983, a plaintiff must show that (1) the plaintiff engaged in constitutionally protected speech; (2) the public employer subjected the plaintiff to adverse action; and (3) the adverse action was motivated by the protected speech.”<sup>51</sup> To determine if the speech is, in fact, constitutionally protected, Miller must first show that the speech involved a matter of public concern and that the speech was made outside the duties of employment. Matters of public concern include “any matter of political, social or other concern to the community” and do, of course include allegations of racial discrimination and police corruption. Further, Miller’s speech was not connected directly to his public employment - “the press release fell outside of Miller’s official duties as a police officer.”

The Court agreed that Miller passed both threshold tests, so the Court was required to “engage in the balancing test set forth in” Pickering v. Bd. of Education.<sup>52</sup> That test required the Court to balance the interests of the citizen-employee with the government’s interest, and the “weight given to the governmental interests varies depending on the nature of the protected speech.” The stronger the public concern, the greater the burden on the government to show that the speech was detrimental to the public interest. In

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<sup>51</sup> Scarborough v. Morgan County Bd. of Educ., 470 F.3d 250, 255 (6th Cir. 2006); Miller v. Admin. Office of the Courts, 448 F.3d 887, 894 (6th Cir. 2006) (citing Banks v. Wolfe County Bd. of Educ., 330 F.3d 888, 892 (6th Cir. 2003).

<sup>52</sup> 391 U.S. 563 (1968).

this case, the Court found that Canton had put forth no evidence that the press release caused any workplace disruption or interfered with the function of the police department. The Court agreed that Miller's speech was protected by the First Amendment.

Next, the Court moved on to consider his retaliation claim, in which he was required to prove that the City acted adversely against him because of his speech. Adverse action means "an injury that would likely chill a person of ordinary firmness from continuing to engage in [the protected] activity."<sup>53</sup> The Court agreed that his suspension was an adverse action, and the City had not contested that "took disciplinary action against Miller because of the press release, although it maintains that the contents were not protected." As such, the Court agreed that "Miller had made out a prima facie case of retaliation under §1983." The Court reversed the summary judgment claim in favor of the City.

With respect to Fowler, the Court ruled that he had not made out a case to show that he was treated differently from similarly situated white officers, however, nor was he able to made a connection between any protected activity and an adverse action. As such, the summary judgment for the City against Fowler was upheld.

## EMPLOYMENT

### Hollimon v. Shelby County Government 325 Fed.Appx. 406 (6<sup>th</sup> Cir. 2009)

**FACTS:** Starting in Oct., 1987, Hollimon was a Shelby County (TN) police officer. She was fired in 2002 for several reasons, including a challenge to a department policy requiring officers to work at least one holiday a year, failing to report to work on an assigned holiday, calling a radio talk show while on duty to complain about the department and leaving her squad car during a lunch break and taking an extended break. She refused to turn in her handgun and ID, and upon refusing, was also charged with disregarding an order. She filed an EEOC complaint and was issued a right to sue letter, but did not immediately file suit. After a hearing, her termination was finalized.

She filed suit, and the trial ensued. The Court found in her favor, ruling that the reasons for her discharge were pretextual. The County sued.

**ISSUE:** May an officer succeed in a discrimination action when it is shown that a policy is being enforced selectively?

**HOLDING:** Yes

**DISCUSSION:** The Court found that there was sufficient evidence to support the trial court's decision. Although "Hollimon did not find an employee who violated each of the policies she (allegedly) did, she put in sufficient evidence showing that, when other similarly situated employees violated many of the same policies, the county either looked the other way or did not bother to enforce the policy."

The Court affirmed the lower court's decision.

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<sup>53</sup> Nair v. Oakland County Cmty. Mental Health Auth., 443 F.3d 469, 478 (6th Cir. 2006).

**Lentz v. City of Cleveland**  
**2009 WL 1563433 (6<sup>th</sup> Cir. 2009)**

**FACTS:** Lentz, a Cleveland police officer, was guarding the home of the Mayor-elect in 2001. “He observed a station wagon proceed erratically down the street and abruptly stop behind his squad car. As Lentz approached, the car backed up, hit a tree, and Lentz somehow ended up on its roof. To get the car to stop as it drove toward an intersection—with him on top—Lentz fired fourteen rounds through its roof, injuring the black juvenile driver.” Following the shooting, he was assigned to “police gymnasium duty pending an investigation and it is the lengthy duration of this assignment that spurred Lentz’s complaint—he spent 652 days on gym duty, much longer than the time typically served by officers involved in shootings.” The deadly force investigation team completed its investigation and referred it to the prosecutor, which submitted it to the grand jury. However, Lt. Klimak withdrew the case and held the file for five months before returning it to the prosecutor. It was submitted to the grand jury, which declined to indict on an assault charge, but which did indict on a minor falsification of information allegation. That charge was eventually dismissed.

The police department, however, filed disciplinary charges - “(1) violating the “use of force” policy; (2) lying about the shooting; and (3) failing to notify dispatch before approaching the vehicle.” Lentz conceded the last and the department dismissed the others. He was finally, 22 months after the shooting, reinstated and given back pay.

Lentz filed suit in federal court, and the case went to trial. The jury found the defendants (the City of Cleveland, and connected parties) “discriminated and retaliated against Lentz.” The City appealed.

**ISSUE:** May officers prove discrimination by showing that they were treated differently from officers of another race similarly situated?

**HOLDING:** Yes

**DISCUSSION:** The Court noted that Lentz presented extensive evidence about gym duty, department charges, and the experiences of other officers.” He also “employed circumstantial evidence to link his unique treatment to a discriminatory motive: African-American officers involved in shootings served much shorter gym details—the longest, 254 days, was less than half Lentz’s assignment. Defendants seek to discredit that evidence by arguing that those officers had different experiences, but “similarly situated” only requires comparability in ‘all relevant respects,’ not congruent experiences.”<sup>54</sup> The Court agreed that since “[m]any of these officers participated in automobile-related shootings and received gym duty assignments while under investigation,” they fit the requirements of similarly situated. The Court also agreed that the city’s “nondiscriminatory reasons were pretextual.” Specifically, Lt. Klimak’s taking the file back, further delaying the resolution, and the Safety Director’s “concerns with race relations and his desire to avoid ‘another Cincinnati,’ referring to large-scale race riots.”

Further, “five officers with the longest gym details were white officers who shot black suspects.”

Moreover, Lentz offered evidence that City officials discussed handling shootings of black suspects “with care” to avoid “civil unrest”; that Draper met with the Cleveland NAACP President, who expressed race

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<sup>54</sup> Ercegovich v. Goodyear Tire & Rubber Co., 154 F.3d 344 (6<sup>th</sup> Cir. 1998).

relations concerns; and that officials discussed the Cincinnati riots. The court even admitted news clips and a summary of television coverage of the shooting to highlight its "high profile" nature. Given this evidence, the jury could reasonably conclude that Defendants' espoused reasons were a pretext for the City's discriminatory decision to treat Lentz more harshly than it would similarly-situated black officers.

With respect to the municipal liability, the Court agreed that the jury had sufficient evidence to support the jury's decision that "City policymakers either discriminated against him or ratified a subordinate's decision to do so."

Finally, the Court agreed that Lentz suffered retaliation for his initial complaint. "To establish a prima facie case of retaliation, a plaintiff must demonstrate that: (1) the plaintiff engaged in protected activity; (2) the protected activity was known by the defendant; (3) the defendant took "materially adverse" action against the plaintiff; and (4) the protected activity and adverse action were causally connected."<sup>55</sup> Specifically, Lentz produced evidence that the Safety Director "personally ratified the departmental charges while aware of the EEOC grievance."

After dealing with a number of other issues under appeal and cross-appeal, the Court upheld the verdict against the City, but remanded the case for a retrial on actual damages.

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<sup>55</sup> Abbott v. Crown Motor Co., Inc., 348 F.3d 537 (6<sup>th</sup> Cir. 2003)

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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).*