

Department of
CRIMINAL JUSTICE TRAINING

KENTUCKY JUSTICE AND PUBLIC SAFETY CABINET

2009



Leadership is a behavior, not a position

CASE LAW UPDATES
FOURTH QUARTER

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



John W. Bizzack, Ph.D.
Commissioner





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

docjt.legal@ky.gov

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

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

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

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



DOCJT.KY.GOV

Leadership Branch

J.R. Brown, Branch Manager
859-622-6591

JamesR.Brown@ky.gov

Legal Training Section

Main Number
General E-Mail Address

859-622-3801
docjt.legal@ky.gov

Gerald Ross, Section Supervisor
859-622-2214

Gerald.Ross@ky.gov

Carissa Brown, Administrative Specialist
859-622-3801

Carissa.Brown@ky.gov

Christy Cole, Office Support Assistant
859-622-3745

Christy.Cole@ky.gov

Kelley Calk, Staff Attorney
859-622-8551

Kelley.Calk@ky.gov

Thomas Fitzgerald, Staff Attorney
859-622-8550

Tom.Fitzgerald@ky.gov

Shawn Herron, Staff Attorney
859-622-8064

Shawn.Herron@ky.gov

Kevin McBride, Staff Attorney
859-622-8549

Kevin.McBride@ky.gov

Michael Schwendeman, Staff Attorney
859-622-8133

Mike.Schwendeman@ky.gov

NOTE:

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

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

KENTUCKY

PENAL CODE - FIREARMS

Sanders v. Com.

2009 WL 3231472 (Ky. App. 2009)

FACTS: On August 31, 2007, Hickman County sheriff's deputies, along with Officer Meshew of Probation and Parole, executed an arrest warrant at Sanders' home in Clinton. His girlfriend allowed them to search the house, which was within 1,000 yards of a local high school and elementary school. They deputies found marijuana, paraphernalia and a loaded handgun, with extra ammunition. Sanders was indicted. At trial, Sheriff Turner (Hickman County) testified about the gun. The girlfriend testified that it was hers and that she'd brought it to the house because she'd discovered Sanders had been arrested and would not be home. Sanders asked that the firearms enhancement to the drug charges be dropped. He was, however, convicted and appealed.

ISSUE: Is it necessary to prove a firearm inoperable for the firearms enhancement?

HOLDING: No

DISCUSSION: Sanders argued that the prosecution failed to offer any evidence that the gun "was operable and capable of firing a projectile." The Court looked to Campbell v. Com., and found that for a firearm enhancement, the "inoperability of a firearm is an affirmative defense for which the defense has the burden of proof."¹ As such, it was Sanders' responsibility to prove its inoperability.

Sander's conviction was affirmed.

PENAL CODE - BURGLARY

Olbert v. Com.

WL 3400287 (Ky. App. 2009)

FACTS: Olbert was arrested for burglarizing his next door neighbor's house, in Kenton County, while she was away. The victim testified that Olbert had agreed to keep her dog overnight but that she did not give him a key to the house. When she returned, she found a window in the garage broken out and blood and fingerprints inside. The burglar had "ransacked" her bedroom and taken money, jewelry and prescription medications." When she next saw Olbert, "he had a fresh cut on his thumb."

Officer Petry (unidentified Kenton County agency) responded. The officer asked Olbert if he would come downtown to have his fingerprints taken and compared. He agreed, but stated he needed to tell his mother where he was going. However, once he went inside the house, he refused to come out and thus wasn't arrested until the police obtained a warrant. He was linked to the burglary through fingerprints and DNA.

¹ 260 S.W.3d 792 (Ky. 2008)

(He claimed that that evidence was as a result of him assisting the victim in cleaning up glass from a previous break-in.)

Olbert was indicted, convicted and appealed.

ISSUE: Is proof of a housebreaking sufficient to satisfy intent for a burglary charge?

HOLDING: Yes

DISCUSSION: Olbert argued that he was entitled to a jury instruction on trespass. The Court, however, noted that previous courts had “long recognized that, in burglary cases, the “proof of the act [of housebreaking] creates the inference of criminal intent.”²

Olbert's conviction was affirmed.

Clubb v. Com.

2009 WL 4723175 (Ky. App. 2009)

FACTS: On March 14, 2007, Kirby spotted two people cutting a fence at a neighboring business, enter and begin loading items into a truck. He called for police, who found Clubb and Shouse, “loading a lawnmower into Shouse’s truck.” The officers found copper wire and other items belonging to the business. They discovered over items in the truck belonging to another nearby business, as well.

Both were arrested. Shouse pled guilty, but Clubb went to trial, and was convicted.

ISSUE: Is a warehouse a building for burglary purposes?

HOLDING: Yes

DISCUSSION: Clubb argued that the warehouse from which some of the items were taken was not a building for purposes of a burglary. The Court looked to other cases, and noted that similar storage areas were considered buildings. As such, the Court properly considered the structure to be a building.

Clubb also argued that it was not proven that she did not have permission to enter the property, but the Court noted that a padlock securing the fence had been cut and a hole had been cut in the first building. A witness had watched the pair actually cut the fence at the second property. That was sufficient to prove Clubb did not have permission to enter the property.

Clubb's conviction was affirmed.

² Patterson v. Com., 65 S.W.2d 75 (Ky. App. 1933).

PENAL CODE - ARSON

Vincent v. Com.

2009 WL 3486774 (Ky. App. 2009)

FACTS: Vincent was accused of burning a trailer belonging to a third party, Lindsey, but he argued that it actually belonged to his mother, Poteet. (He also argued Poteet and another person conspired to burn the trailer and that he had nothing to do with it.) He and Poteet were charged, and eventually convicted, of second-degree arson. Vincent appealed.

ISSUE: Is actual ownership of a property material in an arson case?

HOLDING: No (but see discussion)

DISCUSSION: The Court failed "to see why the ownership of the trailer would be material in this case." The jury, apparently, found that the trailer was not destroyed for a lawful purpose, so it was immaterial if Poteet agreed.

Vincent's conviction was affirmed.

NON-PENAL CODE - UNLAWFUL MEANS

Clark v. Com.

2009 WL 5125009 (Ky. App. 2009)

FACTS: Between March 17 and April 20, 2007, Clark (age 47) allegedly contacted a girl by email that he thought was 16, after seeing her photo on MySpace. She did not respond to his overture, so he sent her five more emails, telling her she was beautiful and asking her to be his friend on MySpace. The girl reported what occurred to her mother, who contacted the Owensboro PD. An officer responded and read the four undeleted messages on the girl's account. He then obtained information as to Clark's identity from his own MySpace page.

The officer opened an email account in the girl's name and posing as the girl, responded to Clark. Multiple live chat sessions and emails ensued, over the course of a month. These were printed out and introduced as evidence. Within the first few days of the contact, Clark asked her (actually the officer) her bra size. Clark also learned that the girl was 15. He told her "repeatedly how gorgeous and sexy she was and that he was in love with her." She replied in kind. He asked if she wanted to shower with him and that he liked virgins. He repeatedly asked for pictures, including X-rated ones. The girl chatted about having sex once she turned 18, and expressed a concern that he might actually be chatting with a police officer.

Clark was eventually charged and convicted, of violating KRS 510.155, Unlawful Use of Electronic Means to Induce a Minor to engage in sexual or other prohibited activities. He was convicted and appealed.

ISSUE: Is the Unlawful Means statute unconstitutionally vague in what it prohibits?

HOLDING: No

DISCUSSION: Clark first argued that the offense was unconstitutionally vague. The Court, however, found that Clark clearly knew his behavior, asking for pictures of the girl's genitals, was unlawful, because he "suddenly did not remember requesting them." Further, the Court found that the statute only prohibits the use of electronic means to engage in already unlawful activities - child pornography. As such, it was not overbroad.

The Court also noted that he was not entrapped by the officer's actions, in that he made multiple attempts to contact a minor and that he quickly moved into making unsolicited sexual comments to her.

Clark's conviction was affirmed.

DUI - PBT

Hoppenjans v. Com.
299 S.W. 3d 290 (Ky. App. 2009)

FACTS: At Hoppenjans' trial for DUI, the arresting officer mentioned that he refused to take a PBT. Hoppenjans made a timely objection and asked for a mistrial, which the trial court denied. The judge did admonish the jury to disregard the testimony, and the court legally presumes that a jury will follow such admonitions. Hoppenjans was convicted of DUI, and appealed to the Circuit Court, which also affirmed. He further appealed.

ISSUE: Is the mention of a PBT improper in trial testimony?

HOLDING: Yes

DISCUSSION: The Court noted that the improper testimony came in during direct examination when the "prosecutor asked the arresting officer to describe the traffic stop of Hoppenjans." The officer described his "performance on various coordination tests," and was then prompted by "what did you do next?" The officer then "discussed the PBT and Hoppenjans's refusal to take the test."

The Court concluded that the trial court had no reason to find that the jury would have failed to follow the admonition. However, it noted that the "holding in this matter should not be construed as an approval of the admission of this type of evidence." Kentucky law is clear that such evidence is prohibited³ and "prosecutors and police officers participating in DUI cases should be fully aware of these rules." Further, the Court noted "this type of error should be easily avoidable with proper preparation of witnesses."

Hoppenjans's conviction was affirmed.

Tejeda v. Com.
2009 WL 4060176 (Ky. App. 2009)

FACTS: On November 20, 2006, Officer Curry (KVE) learned of an accident on I-75, in Laurel County. He spotted a vehicle of which he'd earlier received a complaint, a white Mustang, "maneuvering

³ KRS 189A.100(1); KRS 189A.104(2).

around road debris and eventually stalling.” A truck assisted in pushing the vehicle off the highway. Officer Foster went to investigate and the driver, Tejada, explained his car had run out of fuel. Officer Foster agreed to call for a wrecker and returned to where Curry was working the wreck.

He told Foster that “he thought he had detected the smell of alcohol on Tejada’s breath.” Officer Currey went to check and eventually “administered several field sobriety tests which Tejada was either unable to complete or ‘failed.’” Tejada agreed that he had been drinking when approached but denied having been drinking prior to running out of fuel. He was arrested for DUI.

Tejada moved for suppression. The trial court agreed that he had not been in “actual physical control of an operable vehicle” and therefore could not be convicted of DUI. His charges were dismissed. The Commonwealth appealed and the Circuit Court agreed that the matter was one for the jury to decide. Tejada appealed.

ISSUE: Is a decision about whether a vehicle is in control of the driver a matter for the jury?

HOLDING: Yes

DISCUSSION: The Court ruled that the issue was whether the officers had the right to make an investigatory stop of the vehicle. The Court agreed they did, and although the “timing of the alcohol consumption” could be debated, the facts before the officers supported probable cause that “Tejada had operated the vehicle while under the influence.” As such, it was proper for the case to go to the jury and remanded the matter back to the trial court for further proceedings.

DVO

Cissell v. Cissell

2009 WL 3672835 (Ky. App. 2009)

FACTS: Edward and Alice Cissell divorced in 2007. Following the divorce, Alice moved to Louisville. Alice filed for an EPO in 2007. A DVO was entered against Edward and included the requirement that he not own any firearms during the duration of the order. In 2008, Edward requested a modification of the order to permit him to possess weapons issued by the military. The family court denied it and he appealed.

ISSUE: May harassment/harassing communications be considered “crimes of domestic violence?”

HOLDING: Yes

DISCUSSION: Cissell contended that federal law permitted the family court to exempt him from the ban against possession firearms, and that previous convictions for harassment (against Alice) and harassing communications (against his sister-in-law) did not qualify as crimes of domestic violence. He also apparently pled guilty to several other misdemeanors.

The Court agreed that Cissell “should not have access to firearms” and supported the ban in the DVO.

ARREST

Shannon v. Com.

2009 WL 3320590 (Ky. App. 2009)

FACTS: On November 21, 2006, Paducah PD officers went to Shannon's home to arrest her daughter. When Shannon answered the door, the officers asked about the daughter and she gave "inconsistent answers." She then shut the door. Unsure as to whether the daughter was there, the officers "repeatedly rang the doorbell and knocked on the door." Shannon "yelled profanities." They told Shannon to calm down and lower her voice, and stop using the profanities, but she continued. The officers then attempted to arrest Shannon. (Apparently at some point, she reopened the door.) As an officer attempted to handcuff her, Shannon ran back inside, followed by the officers. She continued to resist and yell and struck one of the officers in the face. She was ultimately arrested, and indicted, on a variety of charges, including third-degree assault.

Shannon was convicted, and appealed.

ISSUE: May a person be guilty of Disorderly Conduct inside their own home?

HOLDING: Yes

DISCUSSION: Shannon argued that her arrest was illegal. Officer Orazine had testified that "Shannon's yelling and cursing was so loud that it echoed off of nearby homes and caused people in the neighborhood to look and see what was happening." He agreed that the handcuffing and the assault took place inside the home, however. A witness for Shannon indicated that Shannon was not on the porch and that the "incident took place inside Shannon's home." He agreed she was yelling, but testified that he did not believe the yelling could have been heard across the street.

The trial court had ruled that the arrest was lawful "because her unruliness had created a disturbance in the neighborhood, irrespective of whether she was outside or inside the home." The appellate court agreed that once she had committed disorderly conduct, there was "nothing inappropriate in the subsequent pursuit and arrest of Shannon by the officers."

Shannon's conviction was affirmed.

SEARCH & SEIZURE - CONSENT

Pike v. Com.

2009 WL 3672925 (Ky. App. 2009)

FACTS: On February 1, 2008, KSP received a tip from KDOT that an employee would be driving a state Transportation vehicle at a specific location. Further, the tipster indicated that the individual would be intoxicated, going to a specific location and would have drugs in a black duffel bag. KSP notified the Garrard County Sheriff's Department and Deputy Addison proceeded to the scene. He found a state truck and observed it commit several traffic offenses. He stopped the truck and found Pike to be driving. Dep. Addison noted the "odor of alcohol and bubble gum." Pike admitted he'd been drinking some beer and that

he was going to buy methadone. Pike denied certain parts of the tip, however. Addison asked for consent to search the truck and was denied. The deputy stated he would seek consent from KDOT and Pike retrieved and handed over a container of methadone, from a black duffel bag. He was arrested and more drugs and items were found during the search.

Pike was charged, and moved for suppression. It was denied. Pike took a conditional guilty plea and appealed.

ISSUE: Is telling a subject that consent to search would be sought from another lawful party improper coercion?

HOLDING: Yes

DISCUSSION: The Court found the only issue to be whether Pike “voluntarily abandoned the bottle of methadone” or whether it was “obtained from him by means of improper coercion.” Kentucky courts had previously held that “where a motorist is initially stopped for a valid purpose and subsequently gives consent to a search of his vehicle, the voluntariness of his consent is the only issue to consider for purposes of the Fourth Amendment.”⁴ Pike argued that the “threat” to contact KDOT was coercive, but the Court noted that Addison’s statement was correct, he could seek consent from KDOT for the search. (Pike was aware, apparently, that the tip came from a KDOT supervisor.) In Henson v. Com., the Court had held “that the mere stating of matters of fact does not constitute coercion in the objective, legal sense.”⁵

The Court upheld the denial of the motion to suppress.

Parks v. Com.
2009 WL 3399880 (Ky. App. 2009)

FACTS: On May 14, 2007, McGehee and Chambers, Muhlenberg County SD special deputies, were assigned to watch anhydrous tanks at a local farm, due to a theft problem. They left that location shortly before 1 a.m. and “observed a truck stopped on a side road next to the highway.” They saw two men and knew that this fit the pattern for previous thefts from the tanks. McGehee got out to talk to the men while Chambers checked on the license plate. One of the two men was Parks.

The men stated that their vehicle had broken down on their way to visit a girl in Livermore. They appeared nervous and would not make eye contact. McGehee looked in the vehicle and saw a “hose with a connector valve wrapped in black electrical tape” on the floorboard. He knew this hose suggested anhydrous thefts. He had both men step to the rear and saw a black air tank with no hose in the bed of the truck. He also noted that the “valve ... had turned a dark green color” - and again, McGehee knew that indicated the tank had held anhydrous and that such tanks are often painted a dark color to conceal them.”

The two men were detained and other officers arrived. He asked Parks for consent to search the truck, but Parks denied it was his truck. He later stated that the truck was his but had been in the shop, and might contain things that “might not belong to him.”

⁴ Com. v. Erickson, 132 S.W.3d 884 (Ky. App. 2004).

⁵ 20 S.W.3d 466 (Ky. 2000).

Deputies Albro and Nantz arrived. The truck was searched, although there was dispute as to whether Parks had given consent. Deputy Nantz, however, indicated the Parks was under arrest at the time. Pseudophedrine pills, lithium batteries tubing and a hose that tested positive for anhydrous ammonia were found.

Parks was indicted for manufacturing. He moved for suppression, contending he did not give consent. The Court denied the motion. He took a conditional guilty plea and appealed.

ISSUE: Does a valid arrest supersede a questionable consent?

HOLDING: Yes

DISCUSSION: The Court agreed that the facts supported the assertion that Parks did give Deputy Albro consent, although, it noted, it would have been better to have Dep. Albro testify to that himself. (Apparently only Deputy McGehee testified.) Parks attempted to “salvage his possession by contending that he was coerced into consenting” because he was detained for an hour and handcuffed and several officers were present. Finding that argument unpreserved before the trial court, the Court found that even if they assumed valid consent was not given, that the police had probable cause to arrest Parks. As such, search incident to arrest applied and the search was valid.

Parks’s plea was upheld.

SEARCH & SEIZURE -ROADBLOCKS

Bauder v. Com.
299 S.W.3d 588 (Ky. 2009)

FACTS: On December 26, 2005, at about 11 p.m., Bauder was stopped by Trooper Gibson for DUI, in Parksville. KSP had set up a roadblock, but had placed “no markings or signs to notify the public in advance of the roadblock.” As Bauder approached, he “came to an abrupt stop within one hundred feet of the checkpoint and made a turn onto” a side road. He used that road to circumvent the roadblock, as the road eventually reconnected with the main road.

Trooper Gibson followed Bauder and stopped him. He smelled alcohol and noted that Bauder appeared to be intoxicated, but did not identify any other traffic offenses prior to the stop. He agreed he stopped Bauder solely because he avoided the roadblock. Trooper Gibson later testified that he found that a driver “turning away from a roadblock” is “generally indicative of the operator of that vehicle either driving while intoxicated or driving on a suspended license.”

Bauder moved for suppression, which the trial court denied. Bauder took a conditional guilty plea to DUI and appealed.

ISSUE: Is the coming to an abrupt stop before reaching a roadblock sufficient reason to make a traffic stop?

HOLDING: Yes (but see discussion)

DISCUSSION: Bauder argued that the troopers had no “articulable and reasonable suspicion” that he had “violated the law prior to the stop.” The Court couched the stop as investigatory, and compared it to the one done in Steinbeck v. Com.⁶ In both cases, the sole reason for the stop was the officer’s belief that the individual was attempting to avoid the roadblock. The Court stated it would “wait for another day to determine if the act of making a turn around itself raises a specific and articulable fact sufficient to give rise to reasonable suspicion.” The Court applied the “totality of the circumstances” approach and noted that “officers may draw on their own experience and specialized training to make inferences from, and deductions about, the cumulative information available to them that might well elude an untrained person.”⁷ The split second decisions made by officers must be seen “through the prism of each officer’s own training and experience.” The Court agreed “there are a multitude of reasons why a driver may avoid a police roadblock, many of which may be completely innocent.”

Under the situation as related by the officer, Bauder “came to an ‘abrupt’ stop” shortly before the roadblock, and then turned onto a side road. He could see the roadblock, and would have observed there was no line leading to the roadblock, so any delay would have been minimal.

The Court upheld Bauder’s plea.

SEARCH & SEIZURE - TERRY STOPS

Milsap v. Com.

2009 WL 3321016 (Ky. App. 2009)

FACTS: On August 29, 2006, LMPD officers were on detail in Beecher Terrace, a high crime housing project. Officers familiar with the complex were on foot, in plainclothes, but identifiable as officers by badges and green wristbands. At about 2:45 a.m., they spotted Milsap riding a bicycle between the buildings and they did not recognize him as a resident. They saw him spot a marked patrol car and turn away. He had a “deer in the headlights look” when he spotted the officers on foot. Because the area was posted against trespassing, they decided to stop and question him about his presence.

He stopped on demand and denied living in the complex. He also agreed he was not visiting anyone. He got off the bicycle on demand and stated, when asked, that he had some “dope” (crack cocaine) and a knife. He was charged with possession of a controlled substance and related offenses.

Milsap moved for suppression and was denied. He was convicted of possession at trial, but acquitted of trespass. He appealed.

ISSUE: May innocent factors, taken together, be considered reasonable suspicion?

HOLDING: No

DISCUSSION: Milsap argued that “riding his bicycle in a common area of Beecher Terrace did not constitute criminal trespass and was insufficient to provide reasonable suspicion to justify an investigative

⁶ 862 S.W.2d 912 (Ky. App. 1993).

⁷ U.S. v. Arvizu, 534 U.S. 266 (2002).

stop.” The Court, however, noted that he was in a posted no trespassing area and was not recognized as a resident. His evasive behavior upon spotting the cruiser was also critical. “Although any of these factors alone may seem innocent, when taken as a whole, these facts clearly gave the officers reasonable suspicion to believe criminal activity was afoot.” The Court upheld the stop.

The Court also addressed an issue related to the chain of custody of the cocaine, since there was, apparently, some confusion as to the handling of the evidence. The Court, however, found the chain of custody was sufficiently proven.

Finally, the Court found that the initial questioning took place before he was in custody, and that “merely being told to alight from his bicycle” would not place a reasonable person in the belief that they were in custody. They did not restrain his “freedom of movement to an extent equated with a formal arrest.” As such, the officers were not obligated to give him Miranda warnings prior to questioning him.

Milsap’s conviction was upheld.

SEARCH & SEIZURE - VEHICLE STOPS

Brown v. Com.

2009 WL 3786445 (Ky. App. 2009)

FACTS: On March 1, 2008, Officer Peterson (Lexington PD) was flagged down by a motorist. She reported that she had been approached by a man on foot, and that she was often so approached when she traveled through the area on the way to work. The officer testified to “many complaints about nightly drug activity and loitering in the area,” and further that many transactions involved a seller in a vehicle and a buyer on foot. He compared it to a drive-thru restaurant window.

Officer Peterson called for backup and went to investigate. He found a dark SUV parked and watched a subject (Adams) approach it on foot, stay a minute, leave and return to the SUV. When they approached, Adams walked away. When they got closer, Adams ran. They saw him toss what they believed to be a gun, and later recovered a BB pistol. (Adams admitted it was his.) They frisked him and found no other weapons. They did not do a full search, because they did not believe they could do so at the time. They allowed him to leave. The SUV also left. The officers were alerted to another SUV, a Blazer, and when it passed them, they got the license number. Another officer stopped the Blazer and Brown was found to be driving. A drug dog made a positive hit, and Officer Peterson found a piece of crack in the console and an open can of beer on the floorboard.

Brown was arrested and indicted. He moved for suppression and was denied. He took a conditional guilty plea and appealed.

ISSUE: Does allowing a subject to walk around dissipate the reasonable suspicion that they are involved in something criminal?

HOLDING: No

DISCUSSION: Since Brown only contested the “propriety of the stop,” the only question before the Court was “whether officers had a sufficient reasonable, articulable suspicion that criminal activity was afoot when they engaged in a Terry-style detention of Brown.” The Court reviewed the facts and concluded that even through the officers allowed Adams to walk about, that did not “dissipate their reasonable and articulable suspicion about the SUV being involved in a drug crime.” The Court found the officers to be “careful and conservative in their actions.” The Court upheld Brown’s plea.

SEARCH & SEIZURE - BACK SEAT OF CRUISER

Smoot v. Com.

2009 WL 3231459 (Ky. App. 2009)

FACTS: On July 22, 2007, Officer Stratton (Lexington PD) was patrolling when he spotted a car with an expired tag. He made a stop. Smoot was driving and the officer discovered Smoot had two outstanding arrest warrants. He made the arrest and searched Smoot’s person. Officer Stratton also searched the car and found marijuana in the glove compartment.

Smoot was transported to jail and booked. Officer Stratton then searched his rear seat area and a “piece of pink plastic fell from the top of the rear seat.” It was found to contain cocaine. Smoot was then charged with both the cocaine and the original charges. He was convicted and appealed.

ISSUE: May a subject be charged for drugs found in the back seat of an officer’s car, following a transport?

HOLDING: Yes

DISCUSSION: Smoot argued that it was incorrect to infer that the cocaine belonged to him, simply because he was the person being transported at the time. The Court noted that it was “well established that the jury is free to draw reasonable inferences from the evidence.” The officer had testified as to Smoot’s actions in the back seat and that he had searched the area after his previous transport. The court found it was appropriate for the jury to believe the cocaine belonged to Smoot.

Smoot’s conviction was affirmed.

SEARCH & SEIZURE - APPARENT AUTHORITY

Miles v. Com.

2009 WL 3231378 (Ky. App. 2009)

FACTS: On July 4, 2007, Miles’s girlfriend, Due, “went to the Newport Police station and reported that Miles has assaulted her.” She also stated that he kept a gun at the residence. Officer Fangman accompanied her back to her home and entered with her. Officer Fangman found Miles sitting at a computer desk, with a scale and marijuana. He smelled marijuana, as well. Miles gave the officer consent to open several lock boxes, where he found more drugs.

Miles was indicted and moved for suppression, which was denied. He was tried, convicted and appealed.

ISSUE: May an officer enter a residence when a person with apparent authority to do so gives consent?

HOLDING: Yes

DISCUSSION: Miles claimed that “Officer Fangman unlawfully entered his residence because Due did not have the authority to invite him.” The Court noted that Due told the officer she lived there and “used her key to unlock the door.” Miles did not object to their entry, but argued that “Due no longer had common authority because she was in the process of moving out.” The Court found it reasonable for the officer to believe “that Due had common authority over the residence and the authority to consent to his entrance.”

Miles also argued that the marijuana and other items were illegally seized, but the Officer stated they were in plain view. “Under this exception to the warrant requirement, law enforcement officials may seize evidence without a warrant when the initial entry was lawful, the evidence was inadvertently discovered, and the incriminating nature was readily apparent.”⁸ The Court agreed the seizure was proper. Finally, Miles argued that he didn’t give consent to search the locked boxes, arguing that “it is unreasonable to believe that a man would consent to a search of an item containing contraband.” However, the Court noted that “although it may seem unwise, it is not uncommon.” The Court found the officer’s testimony credible and supported the conclusion that Miles did give consent.

Mile’s conviction was affirmed.

SEARCH & SEIZURE - STALE WARRANT

Sherrard v. Com.
2009 3321391 (Ky. App. 2009)

FACTS: On April 19, 2007, Harrison County (IN) SD notified the Meade County SD that “two individuals were purchasing items used in the manufacture of methamphetamine.” They provided a license plate that was traced to Sherrard. Det. Stout (actually Shout) opened an investigation. He tried to do a trash pull several times, but the trash had not been placed at the curb for pickup. He was finally successful on October 18th. Det. Shout found a number of items consistent with drug use and used the information to get a search warrant. Sherrard was indicted and requested suppression. He was convicted and appealed.

ISSUE: May stale information in a warrant be rehabilitated by the inclusion of more current information?

HOLDING: Yes

DISCUSSION: Sherrard argued that the warrant “lacked probable cause and was based upon an affidavit that included stale information.” The Court agreed the tip, standing alone, was stale, but it had been corroborated by a more recent trash pull and a list of the items collected. In Ragland v. Com., the Court had ruled that “otherwise stale information may be rehabilitated if it is corroborated by recently obtained

⁸ See Com. v. Hatcher, 199 S.W.3d 124 (Ky. 2006).

information.”⁹ The Court agreed it was reasonable for the judge to find “that criminal activity was still occurring based upon the items found in the trash pull.”

Sherrard also argued that the “affidavit failed to provide a nexus between the place to be searched and the evidence sought.”¹⁰ The Court noted that in this case, “a relationship between the evidence sought and the place to be searched was established by items from the trash pull which contained Sherrard’s name and address.”

Sherrard’s conviction was affirmed.

Tillman v. Com.
2009 WL 3321207 (Ky. App. 2009)

FACTS: Tillman’s home was searched by Lexington police. They found marijuana, hydrocodone, ecstasy and Xanax throughout the house. The hydrocodone was found in large pharmacy bottles. A variety of other items connected to drug trafficking were found. He was indicted and tried. He admitted possession of the pills but claimed they were for his personal use and that of his wife. He was convicted on some of the charges and appealed.

ISSUE: May admittedly stale warrant information be corroborated by more recent information?

HOLDING: Yes

DISCUSSION: Tillman argued that the evidence in the warrant was stale. The Court agreed that the age of the information was important, but also noted that “probable cause may still be found where recent information tends to corroborate the dated information stated in the affidavit.”¹¹ The Court reviewed the affidavit and noted that had the warrant been based solely on the 2006 information included in the affidavit, it would have been “too stale to support the search warrant.” However, the officers had done an independent investigation on the day of the search and learned that there was marijuana in the house, which corroborated the earlier information, validating the affidavit.

Tillman further argued that the warrant only permitted the officers to search for marijuana, since that was the only drug mentioned by name. However, the affidavit did note that each time he’d been arrested previously, he’d had drugs in addition to marijuana, and as such, the magistrate was entitled to infer that unlawful amounts of prescription drugs or ecstasy would be discovered, as well.

Finally, Tillman argued that since they did not test all the hydrocodone, they couldn’t convict him based upon the untested pills. (1,000 of the 3,440 found were tested and all found to be hydrocodone.) The Court noted that he admitted his addiction to hydrocodone and that a proper random selection of the available pills were made. The Court found it proper to admit the untested pills, as well.

Tillman’s conviction was affirmed.

⁹ 191 S.W.3d 569 (Ky. 2006)

¹⁰ U.S. v. Carpenter, 360 F.3d 591 (6th Cir. 2004).

¹¹ Ragland v. Com., 191 S.W.3d 569 (Ky. 2006).

SEARCH & SEIZURE - SEARCH WARRANT

Neeley v. Com.

2009 WL 3878069 (Ky. App. 2009)

FACTS: On January 10, 2008, Lexington PD received information that methamphetamine manufacturing was possibly occurring in a specified hotel room. The informant stated that two people had asked him about getting Sudafed and that one of the individuals had been trying to make multiple purchases of the product. They were able to "lure" one of the suspects from the room. He agreed to the officer accompanying him back to the room. There, Neeley opened the door and the officers saw items they believed indicated manufacturing. Officer Hall got a search warrant and found a lab.

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

ISSUE: May an officer's observations validate an unproven CI?

HOLDING: Yes

DISCUSSION: Neeley argued that "Officer Hall's affidavit in support of the search warrant was based on unreliable informants, a lack of experience and proper training, and mere speculation." The Court, however, noted that:

Officer Hall's search warrant affidavit stated that the truck dispatcher provided police with specific information regarding the manufacturing of methamphetamine. Police were able to lure Barber to a public street where he permitted them to follow him back to his hotel room. These types of consensual encounters between police and citizens do not trigger constitutional scrutiny. When Barber obtained access to his room, police observed what they reasonably believed to be a methamphetamine lab. While Neeley contends that the items and substances could have been non-criminal, the trial court properly found that Officer Hall's observations established probable cause of criminal activity.

Further, the Court agreed that "Officer Hall's total observations supported his belief that the hotel room contained evidence of a crime" and that "despite of the lack of information regarding the informant, Officer Hall's personal observations provided probable cause to support the issuance of the search warrant."

The trial court's decision was affirmed.

SEARCH & SEIZURE - REQUEST FOR ID

Caldwell v. Com.

2009 WL 4251141 (Ky. 2009)

FACTS: On April 21, 2006, Officer Canup (Paducah PD) was dispatched to a call of gambling. At the location specified, he found two men walking and Caldwell riding a bike next to them. Officer Canup approached the three in his vehicle (without emergency equipment activated), got out, and asked if they

could “hang around a second.” He asked if they had been shooting dice, which they denied. He then asked who had the dice, and one of the subjects “displayed dice to him.” Officer Canup asked for ID and Caldwell produced a license. (The other two simply identified themselves verbally.) He ran the three for possible warrants, none were present, but Canup was told Caldwell had a “drug history.”

Canup asked Caldwell if he had any drugs on him, and whether he would consent to a search. Caldwell turned to walk away and dropped a joint on the ground. When the officer asked if it was, in fact, a joint, Caldwell attempted to flee. He was captured and arrested. During a search incident of his person, officers found crack cocaine and almost \$1500 in cash.

Caldwell was charged, and sought suppression. The trial court denied the request and Caldwell was convicted of several charges. He then appealed.

ISSUE: Is asking for identification (alone) a seizure?

HOLDING: No

DISCUSSION: The Court identified the sole issue as whether Caldwell was seized by Canup’s request that he stay at the scene and produce ID. The Court ruled that the first interaction was not a “seizure implicating the Fourth Amendment” as the officer displayed no emergency equipment, was alone, “brandished no weapon, and did not use language indicating that compliance with his request was compulsory.” The officer requested, but did not demand, ID, and requests for ID are not a Fourth Amendment seizure.¹² His questions about the dice “did not change the consensual nature of the encounter.”¹³

Further, the court noted, the seizure occurred only after Caldwell “began walking away, dropped contraband on the ground, and ran.” The Court upheld the denial of the motion to suppress.

INTERROGATION - CUSTODY

Bassham v. Com
2009 WL 3526647 (Ky. 2009)

FACTS: Bassham allegedly raped R.S. on October 18, 2005, in Louisville. He was indicted, convicted and appealed.

ISSUE: Does the finding of drugs create a custody situation?

HOLDING: Yes (but see discussion)

DISCUSSION: Bassham argued that statements he made to an officer, prior to his arrest, were nonetheless made while he was in custody. The statements were made prior to Bassham being advised of his Miranda rights and concerned “whether he had been at the Regency Trailer Park on the night of the crime.” The statement was made after the officer stopped Bassham, by use of his lights and siren, while

¹² I.N.S. v. Delgado, 466 U.S. 210 (1984).

¹³ Florida v. Bostick, 501 U.S. 429 (1991); Florida v. Royer, 460 U.S. 491 (1983).

Bassham was riding his bike, and upon learning his name, connecting him to the rape. Bassham had already been patted down (after the officer removed a partially visible knife) and had admitted to having marijuana and Xanax, which the officer also confiscated.

The trial court decided that Bassham was not in custody at the time, but the appellate court ruled that since the drugs had been found prior to the statement in question, it was reasonable for Bassham to believe he was in custody at the time. He was “standing between two officers in front of a police car” and illegal drugs had already been removed from his person. The Court looked to the Lucas factors and concluded that since he’d already been touched twice, his belief was reasonable. The officer’s questions were intended to “elicit an incriminating response.”¹⁴ However, ultimately, the Court concluded the error was harmless.

On a side note, the Court also concluded that it was appropriate for the jury to conclude the knife in Bassham’s pocket was concealed as it only became visible when he leaned over riding his bicycle.

Bassham’s conviction was affirmed.

Cecil v. Com.
297 S.W. 12 (Ky. 2009)

FACTS: Cecil was accused of raping a young niece (under 12) and his sister-in-law (who was 14 at the time). As part of his investigation, Det. Judah (Louisville PD) interviewed Cecil. He denied having any contact with the niece, but did admit to sex with the sister-in-law, who he insisted “seduced him and forced herself upon him.” He was indicted and the charges with each victim were severed. He was convicted of the first sexual assault and then took a conditional plea to the other charge. He appealed.

ISSUE: Is a person who comes in for a voluntary interview in custody?

HOLDING: No (unless the situation changes)

DISCUSSION: Cecil first argued that his statements to Det. Judah were taken without benefit of Miranda warnings. Det. Judah had testified, at a suppression hearing, that Cecil had come in for a voluntary interview and that he was told he could leave at any time. Det. Judah was alone during the interview. Cecil left the police station after the interview and was arrested four days later. The Court agreed that the circumstances were such that Cecil could not be considered to have been in custody during the interview, as such, suppression was not warranted.

In addition, Cecil had moved to apply the “rape shield” law - KRE 412(b)(1)(C), with respect to admitting information concerning the (niece) victim’s sexual conduct during a time where she had run away, which was following the rape by Cecil.. When she returned, she admitted to having been forced into sex during her absence. Cecil argued that was reason for her to fabricate the allegations against him, since she might fear having gotten pregnant or a STD. The Court agreed that it was appropriate for the trial court, which had taken an avowal from the victim outside the presence of the jury concerning the matter, to exclude the evidence from the jury.

¹⁴ Com. v. Lucas, 195 S.W.3d 403 (Ky. 2006).

The Court also agreed that the forensic interview did not improperly bolster the victim's testimony. Cecil's conviction (and plea to the second victim) was upheld.

TRIAL PROCEDURE / EVIDENCE - PRIOR BAD ACTS

Isom v. Com.

2009 WL 4060474 (Ky.App. 2009)

FACTS: In September, 2006, Isom was arrested in connection with theft of mail from Lexington residences. A few weeks later, he was identified as a suspect in the cashing of a check from another piece of stolen mail. Eventually, he pled guilty to numerous charges related to the theft, as well as a single count of criminal possession of a forged instrument for the check (in which he scratched out the initial payee's name and substituted his own). Some months later, Isom was identified as a suspect in another, virtually identical theft. In his trial for the second check, the prosecution gave notice that it intended to use the first conviction as evidence. The trial court agreed that it amounted to a "signature crime" and that it would be admitted. Isom took a conditional guilty plea, and appealed.

ISSUE: May signature crimes be introduced in trials of other similar crimes?

HOLDING: Yes

DISCUSSION: The court noted that introducing the evidence was done to "establish a course of conduct, modus operandi, or signature crime." KRE 404(b) provides that generally, evidence of other crimes is not admissible, but that it can be admitted if it is "strikingly similar" to the current charged offense. The Court agreed that Isom's two check-related arrests both involved him scratching out the payee's name and substituting his own and then using his OL as ID to cash the check. The Court agreed that "proof that Isom had committed a similar crime was therefore relevant to prove the requisite intent by showing a 'plan, knowledge ... or absence of mistake or accident' and what therefore was properly admissible."

Isom's conviction was affirmed.

TRIAL PROCEDURE / EVIDENCE -VIDEO

White v. Com.

2009 WL 3165547 (Ky. 2009)

FACTS: White was involved in an altercation with his girlfriend in 2007. Paducah officers responded and captured him. He fought with several of the officers and was Tased. When the effect of the Taser wore off, he became combative and began cursing, as he was detained in the back of the cruiser. "The video apparently depicts White vehemently cursing and issuing verbal threats for the next twenty minutes, the entire time it took to transport him to the police station."

Among other offenses, White was charged with Third-Degree Assault. Due to an error, they amended the charges late to include the Fourth-Degree offense against his girlfriend. He was convicted of both charges and appealed.

ISSUE: May video of a transport be used to prove the state of mind of the subject?

HOLDING: Yes

DISCUSSION: White argued that the admission of the video of his conduct following his arrest “was so inherently prejudicial as to outweigh whatever probative value it may have had.” The Court had only permitted the introduction of the first few minutes of the video, stating that it was “relevant evidence tending to prove White’s state of mind at the time of the offenses.” The appellate court agreed that the recording and the “steady stream of White’s curses and threats” gave credence to the testimony of the police and the girlfriend.

After disposing of White’s arguments concerning the mistake on the indictment, the Court upheld his conviction.

TRIAL PROCEDURE / EVIDENCE - TESTIMONY

Sizemore v. Com.
2009 WL 4251685 (Ky. 2009)

FACTS: John Sizemore was charged with the beating murder of Gerald Sizemore (apparently no relation). Manchester PD received tips that led them to John Sizemore’s home. His brother, Eugene, who lived next door, indicated there had been a fight at John Sizemore’s home and officers found broken glass and blood. John Sizemore answered the door and allowed officers inside. They seized several items and noted that Sizemore exhibited some injuries.

John Sizemore agreed to go to the station and make a statement. He stated Gerald had showed up bleeding and said he’d been in a fight, and that he was drinking and “snorting Xanax.” Gerald became highly aggressive and John Sizemore got him out of the house. (John also stated he was intoxicated at the time and really wasn’t sure what had happened.) More items were seized the next day, pursuant to a warrant. John Sizemore was arrested. He gave another statement, in which he admitted striking Gerald with either an ashtray or a barbell, and that he shoved him out the door. The police, not believing that Sizemore had told everything, interviewed him again, and he stated that his brother and another individual had come to his aid and that two of the men had beaten and stomped Gerald outside. He also stated that they’d tried to clean up the scene afterward.

All four men were indicted but Sizemore’s trial was severed. He was found guilty of complicity to commit murder and appealed.

ISSUE: Is it appropriate to refer to a defendant’s prior criminal history in trial?

HOLDING: No

DISCUSSION: Among other issues, Sizemore argued that it was inappropriate to allow the introduction of “his admission to police that he had just gotten out of a Minnesota prison prior to or during 2007.” The Court agreed the statement was irrelevant and as such, it should have been redacted. However, it disagreed the error was so prejudicial that its admission should have caused a mistrial..

Sizemore's conviction was affirmed.

Jackson v. Com.

2009 WL 3526660 (Ky. 2009)

FACTS: In 2006, Johnson was a CI for the Owensboro PD, making drug buys. On June 23, he called Green to buy crack cocaine. He inadvertently called her at her mother's residence, Jackson (Green's mother) answered and he asked for Green, identifying himself as "Junior." Through Jackson, he asked for a "50" - and a meeting was arranged.

When Green arrived at the meeting place, Johnson exchanged \$50 for crack cocaine. At his request, Green then dropped him off a few blocks away. Jackson was not present. Green was not arrested at the time but the PD did a trash pull at Jackson's residence, a few weeks later. They found "baggies that appeared to have cocaine residue." They obtained a search warrant and when executing it, found Jackson asleep, with her husband, Duwayne. The officers found a purse on Jackson's side of the bed which contained crack cocaine, a digital scale and mail addressed to the Jacksons. A second purse contained Jackson's ID and cash. Additional baggies were found in the bedroom and more cocaine was found in the kitchen. Numerous baggies, with corners missing were found around the house.

Jackson denied that drug trafficking was occurring in her house; Duwayne admitted the baggies and marijuana found in the house were his. Jackson was indicted on trafficking charges and eventually convicted. She appealed.

ISSUE: Is it appropriate to refer to a defendant's prior criminal history?

HOLDING: No

DISCUSSION: Among other issues, Jackson argued for a mistrial after one of the officers mentioned her "prior jail file" and "previous history with the police." The Court agreed his statement was improper and offered an admonition, which the defense counsel refused. Since the Court had already decided to reverse the conviction on other, unrelated grounds, he chose to remind the parties that it was improper to refer to a defendant's prior criminal history, except under very specific circumstances.

Finch v. Com.

2009 WL 4251136 (Ky. 2009)

FACTS: Chambers was working as a CI for the Graves County Sheriff's Department. He worked with Det. Workman to set up a buy at Runyon's home - the detective searched him and gave him cash to buy crack cocaine. He was also fitted out with a recording device. When he got to Runyon's home, however, Runyon was not there - but Finch was. Finch offered to get him the cocaine. Finch left and returned a short time later with the drug.

Finch was indicted and convicted. He then appealed.

ISSUE: May a witness be impeached with a prior inconsistent statement of another witness?

HOLDING: No

DISCUSSION: Finch argued that the testimony given by Chambers at trial contradicted the testimony he gave at a preliminary hearing. However, the Court noted that Chambers' counsel was mistaken, as Chambers didn't testify at the preliminary hearing, only Workman did. The contradiction, if any, was between Chambers and Workman – and impeachment of one witness with the prior inconsistent statement of another witness is not allowed. Instead, "inconsistencies between different witnesses' testimony has to be shown by directly eliciting the varying and contradictory testimony of the witnesses." If Chambers had testified before Workman, it would have been permitted to point out the inconsistency and ask Chambers to explain it, although it is improper to flatly characterize the testimony of another witness as a lie.¹⁵

Finch's conviction was affirmed.

TRIAL PROCEDURE / EVIDENCE - DISCOVERY

Thorpe v. Com.
Ky. App. 2009

FACTS: Thorpe (and her children) lived with her mother, Goldsmith, who has Alzheimer's disease. Thorpe took care of Goldsmith's prescriptions, which included one for Percocet. In September, 2007, Goldsmith left Maysville to live with her son in Lexington and the son had her prescriptions transferred. However, Thorpe asked the doctor to give her a new prescription for her mother, for the Percocet, and he contacted the Maysville PD. At their request, he agreed to give her the prescription, and when she arrived to pick it up, officers were waiting and arrested her.

At trial, Thorpe argued that she didn't know that Goldsmith wasn't going to return to Maysville. She was convicted and appealed.

ISSUE: Does the prosecution have a legal duty to disclose inculpatory statements it plans to use at trial?

HOLDING: Yes

DISCUSSION: At trial, the court permitted the admission of testimony from Thorpe's sister-in-law concerning a telephone call in which Thorpe begged Goldsmith to return to Maysville. At question was Thorpe's knowledge that her mother had permanently relocated to Lexington. The Commonwealth failed to furnish the defense with the information, as required under RCr 7.24(1). The prosecution argued that the information must be incriminating as the time it was made, not just as revealed to do so in the context of the trial. In this case, since what is issue was Thorpe's "*mens rea*,"¹⁶ whether she *knew* that her mother had *permanently relocated* to Lexington – and thus whether she intentionally concealed the change in circumstances from the doctor." However, the Court noted, the Commonwealth used "*that precise statement to incriminate Thorpe*," and noted that the "contradiction is patent." "It went directly to the issue of mens rea, having the ability either to inculcate or to exculpate her." As such, the Commonwealth "had a duty to disclose its intent to use the statement."

¹⁵ See Moss v. Com., 949 S.W. 2d 579 (Ky. 1997)

¹⁶ Mental state

The Court also disagreed with the trial court's admission of testimony concerning Goldsmith's poor physical condition when she arrived in Lexington, which might have proved highly prejudicial since she was charged with a crime related to that. That testimony might have "outweighed and overshadowed the scant evidence" of Thorpe's intent to fraudulently obtain a controlled substance.

The Court agreed that some of such issues can be corrected by an admonition to the jury, but found in this case, "an admonition would have been insufficient to 'unring the bell' of inadmissible evidence." The Court found the trial to be fundamentally unfair and reversed her conviction.

Moore v. Com.
2009 WL 3406706 (Ky. App. 2009)

FACTS: Moore was indicted for driving a vehicle at a high rate of speed, through a checkpoint, on December 22, 2007, in Fleming County. Officers pursued. The driver was able to flee on foot but they were able to apprehend the passenger, Teter, who owned the vehicle. She was arrested and gave a statement that Moore was driving.

However, that statement was not provided to the defense prior to trial, as required under the Kentucky Rules of Criminal Procedure 7.24 and 7.26. (After the Commonwealth was asked about it, it was learned that the county attorney was in possession of it.) However, since the defense counsel didn't ask for any particular relief, the judge took no action.

Moore was convicted and appealed.

ISSUE: Must oral inculpatory statements be provided to the defense?

HOLDING: Yes

DISCUSSION: The appellate court agreed that it was "clear that the Commonwealth failed to comply with the trial court's discovery order." However, the Court did not find that the defense was prejudiced by the error, and three officers also identified Moore as the driver. Further, defense counsel was aware of the statement "well before trial" – although they did not see it. "Considering these unique facts," the Court did not find reversal to be warranted.

Moore's conviction was affirmed.

TRIAL PROCEDURE / EVIDENCE - WITNESS CREDIBILITY

Brown v. Com.
2009 WL 4723195 (Ky. App. 2009)

FACTS: Brown was convicted for trafficking on the basis of the testimony of an officer and a CI. The Officer, Det. Wright, (unidentified Wayne County agency), testified that a CI had to agree to certain terms, such as random drug testing, random searches, and agreeing not to use drugs. He would also check for local criminal activity information, but did not do a complete background check or see if the CI

was considered truthful. Williams, the CI, came to Wright's attention, apparently because of her involvement with the Lake Cumberland Area Drug Task Force.

Williams made a buy of hydrocodone from Brown on September 14, 2006. She bought four pills with money provided by the officer. A recording was made of the transaction but it was "essentially inaudible." At trial, the detective admitted he had not asked Williams to undergo any drug testing nor did he search her residence. He did not do a strip search of her person and admitted that she could have hidden pills on her person.

Williams testified that she had made buys for both Wright and the Task Force and that she "felt some pressure to act quickly because she thought delaying might jeopardize her deals" with both. Brown denied that Williams had approached him about buying drugs but that he refused.

Brown was ultimately convicted and appealed.

ISSUE: Is the issue of credibility of a witness a matter for the judge or the jury?

HOLDING: The jury

DISCUSSION: The Court began by noting that "judging the credibility of witnesses is a matter for the jurors, not for a court." There have been cases where a court has ruled upon the credibility of witness, but only when their "testimony asserted the occurrence of physically impossible or inconceivable events." The Court agreed that certain facts might "bring into question the veracity of Williams's testimony; however, they do not rob it of all credibility." The Court upheld the denial of Brown's motion for a directed verdict, and upheld his conviction.

TRIAL PROCEDURE / EVIDENCE - JURY INTERACTION

Muncy v. Com.
299 S.W.3d 281 (Ky. App. 2009)

FACTS: At Muncy's trial for drug trafficking in Bell County, the Court permitted a detective to "assist in replaying portions of the recordings during jury deliberations." Muncy questioned the jocularity of the officer's interaction with the jury and that he was "laughing and joking with them." This behavior occurred in open court and was not objected to by Muncy's attorney. He was convicted and appealed.

ISSUE: Is jury interaction by an officer-witness improper?

HOLDING: Depends upon the circumstances

DISCUSSION: The Court looked to the case of Remmer v. U.S., the "seminal case on inappropriate juror contacts." However, it determined that since no private communication occurred, and there was no other conduct that was so troublesome that it unduly prejudiced the decision of the jury, it did not violate Mundy's rights.

Muncy's conviction was affirmed.

TRIAL PROCEDURE / EVIDENCE - STOLEN PROPERTY

Singleton v. Com.

2009 WL 3321333 (Ky. App. 2009)

FACTS: In March, 2005, sections of copper guttering began to disappear from a Louisville elementary school. A school investigator discovered that Singleton has sold copper gutters to Freedom Metals during the relevant time frame. He asked the manager to let him know if Singleton returned with more copper. On Oct. 1, more guttering was stolen, and later that day, Singleton appeared at Freedom Metals. The investigator asked the manager to buy the metal and hold it for him.

The school investigator (a sworn officer) and Officer Kessinger (Louisville Metro PD) went to inspect the copper. They arrested Singleton and took him to the station. (Officer Kessinger later stated that he didn't believe that an arrest warrant was served, but that Singleton was brought in on "open charges" and that he had to be interviewed before actual charges were filed.) Singleton waived his rights and gave a statement, claiming to have gotten the gutters from a man (Rob). The agreement was that Singleton would sell it and they would divide the proceeds. He admitted that he suspected the guttering has been stolen as he'd heard a reward had been offered relating to the theft.

Singleton was indicted on several counts of felony theft. He requested suppression of his statement, which the trial court denied. He was ultimately convicted only on two separate counts of receiving stolen property and related PFO offenses. He then appealed.

ISSUE: Must recovered stolen property be proved to actually be the stolen property in a specific case?

HOLDING: Yes

DISCUSSION: Singleton argued that the prosecution failed to present adequate proof that the copper guttering he sold was that stolen from the school. The Court noted that the question of the identification of copper had come up before, but in that case, the prosecution had produced details that linked the theft to the copper. In this case, however, despite the fact that the copper gutters had identification numbers, there was no attempt to compare or match that information with the guttering that remained at the school. There was also no attempt to match the amount stolen with the amount sold. The Court noted that it was within the "Commonwealth's ability in this case to determine the amount of stolen guttering and to ascertain any unique characteristics that would have connected the copper sold by Singleton to the copper stolen from" the school. In addition, no evidence (beyond hearsay) was presented as to the value of the guttering sold, to prove whether it was a felony. (A handwritten estimate by a third party was introduced by the investigator, but the Court ruled that was inadmissible hearsay.)

Singleton's conviction was overturned.

TRIAL PROCEDURE / EVIDENCE - MEDICAL TESTIMONY

Warner v. Com.

2009 WL 3672887 (Ky. 2009)

FACTS: Warner was indicted in 2007 for a rape and burglary that occurred in Lexington in 1988. (Apparently a print recovered from the scene was matched to him in 2005.) In January, 2006, Lt. Curless got a search warrant to obtain DNA from Warner and he appeared on his own to provide the sample. Lt. Curless specifically told him he was not under arrest. (He was also given Miranda, but that would have been unnecessary.) He was allowed to leave following the interview. Warner moved for suppression, following his indictment and was denied. Warner was convicted and appealed.

ISSUE: May medical testimony be admitted in court?

HOLDING: In some circumstances

DISCUSSION: Warner argued first that testimony by the doctor who treated the victim should have been excluded at trial. (The elderly victim died before Warner's arrest.) The Court agreed, however, that the testimony was admissible under KRE 803(4), since the testimony related to what the victim told him and was for the purposes of medical treatment. The Court noted that the information from the victim was not legally "testimony" so the rules under Crawford¹⁷ and Davis¹⁸ did not apply in this case. Under such circumstances, state hearsay rules control. The Court agreed that Warner's "right of confrontation was not violated by allowing" the doctor's testimony.

Warner also argued that the information he gave to Lt. Curless should have been suppressed. However, the Court agreed that although the officer was "trying to elicit information from Warner," the court found that the situation was not custodial. The Court noted that even though Warner contended that he said "he thought he needed a lawyer," just the "mere mention" of a lawyer "was not sufficient to require officers to stop questioning a suspect."¹⁹

Warner's conviction was affirmed.

TRIAL PROCEDURE / EVIDENCE - GIGLIO

Burruss v. Com.

2009 WL 3526663 (Ky. 2009)

FACTS: On February 2, 2004, Det. Tucker (Campbellsville PD) met a CI to make a controlled buy of hydrocodone. The CI stated he'd bought the pills from a man he didn't know, at the house and that he'd seen him previously at the home. By checking the plates at the house, the detective was able to determine the subject was likely Burruss. The CI later identified his operator's license photo.

¹⁷ Crawford v. Washington, 541 U.S. 36 (2004)

¹⁸ Davis v. U.S., 512 U.S. 452 (1994).

¹⁹ Id.

Burruss was charged with trafficking. He moved for suppression of the identification and was denied. He was convicted and appealed.

ISSUE: May evidence of a witness's lack of truthfulness be introduced to impeach testimony?

HOLDING: Yes

DISCUSSION: Burruss first argued that he should have been permitted to cross-examine the CI about a pass conviction for giving a false name to a police officer. The trial court refused to allow the questioning, finding that it did not fall under KRE 609, and that "evidence of a witness' conviction for a crime could not be introduced unless it was a felony." Burruss argued it should have been admitted under KRE 608(b) as it indicated he had a "character for untruthfulness." The appellate court agreed it should have been admitted, as the misdemeanor offense was directly connected to truthfulness. The case relied solely on the CI's testimony and his character was, therefore, material. As such, the error was not harmless and reversal was warranted.

Although the Court had already determined the case would be reversed, it discussed several other issues to provide guidance to the trial court. The Court reviewed the assertion that the photo identification was unduly suggestive, using the factors set forth in Neil v. Biggers.²⁰ The Court agreed that the CI could clearly see the person and that he paid attention. The description the CI provided matched Burruss. The identification occurred shortly after the crime and the CI was confident in his identification. The Court found the identification reliable. However, the court agreed that it was inappropriate for the detective to testify that "the CI was a reliable informant whose work had resulted in numerous convictions," as that was inadmissible character evidence.²¹

Burruss's conviction was reversed and the case remanded.

***NOTE:** Although the case did not reference Giglio v U.S.²² directly, the concept that a witness's character for untruthfulness can be used to impeach their testimony flows from it. The Giglio doctrine may also be used to impeach the testimony of an officer - witness who has a history (criminal or otherwise) of untruthfulness.*

In addition, although it is critical to indicate such information as how a CI has been reliable in previous cases in a search warrant affidavit, it is inappropriate to mention that at trial, as it would be considered bolstering the witness's character.

²⁰ 409 U.S. 188 (1972).

²¹ Note that although such evidence should be included in a warrant based upon a CI, it is not appropriate to testify to such at trial.

²² 405 U.S. 150 (1972)

TRIAL PROCEDURE / EVIDENCE - CRAWFORD

Coleman v. Com.

2009 WL 3526657 (Ky. 2009)

FACTS: On the day in question, Kenton-area police were dispatched to a 911 call “in which the caller alleged that an unidentified person was brandishing a gun.” Chipman, at the scene, “urged them to hurry to the rear entrance, where they spotted [Coleman] through a window in the door and shouted at him to show his hands.” They saw him delay slightly, lean down and partially out of sight, and then raise his hands. They had the impression Coleman “had dropped something when he leaned down.”

The officers entered, handcuffed Coleman, and secured four other individuals in the apartment. They found a loaded gun (in a container) where Coleman had been standing. One officer picked up the gun and another unloaded it, with his bare hands. Coleman denied any knowledge of the gun.

As Coleman was a convicted felon, he was charged with possession of the gun. At trial, there was dispute as to why Coleman was at the apartment, and what had occurred there. Coleman was convicted and appealed.

ISSUE: May an officer repeat what a non-testifying witness said during testimony?

HOLDING: No

DISCUSSION: Coleman argued that he was denied his right to confront witnesses when the court allowed for “various hearsay statements of persons present in the apartment through a police officer” in violation of Crawford v. Washington.²³ The opinion recited at length several instances of such testimony. In summary, the officer repeated “several hearsay statements during the course of his testimony: that [Coleman] had a gun, that [Coleman] pointed that gun at multiple people, that [Coleman] was angry and shouting.” The statement concerning the gun was “repeated multiple times.”

The Court noted:

The rule from Crawford ... is simple: “a witness’s testimony against a defendant is ... inadmissible unless the witness appears at trial or, if the witness is unavailable, the defendant had a prior opportunity for cross examination.”²⁴ Under this rule, the statements admitted against [Coleman] are paradigmatic violations of the Confrontation Clause. First, the witnesses did not give testimony at trial. Second there is no indication that the witnesses were unavailable; in fact, it appears from the record ... that the witnesses were present in the courthouse under the prosecution’s subpoena, but simply were not called to testify. Third, the statements were untested by cross-examination.

The only question then is whether the statements were testimonial. The statements in this case clearly were. Statements made in response to police questioning following a crime are testimonial in nature.

²³ 541 U.S. 36 (2004).

²⁴ Melendez-Diaz v. Massachusetts, 129 S.Ct. 2527 (2009)

The Court reached the only possible conclusion - that Coleman's rights were violated. Further, the "very point of Crawford is that confrontation bars the introduction of a witness's statements through other witnesses in lieu of direct testimony." If the witnesses are available, it is the responsibility of the prosecution to call them to the stand and "directly elicit their testimony."

Finally, since the evidence against Coleman was scant, otherwise, without the hearsay statements it is certainly reasonable that a jury would not have convicted. Coleman's conviction was reversed.

Jackson & Moffett v. Com.
2009 WL 3526653 (Ky. 2009)

FACTS: Jackson and Moffett were members of a group that were involved in robberies and burglaries in the Louisville area, in 2005. During one of the burglaries, a woman was raped and sodomized. Both men were tried together; other members of the group took pleas and testified against the pair. They moved to sever their trial, arguing that the prosecution would "introduce statements of codefendants in violation of Crawford v. Washington."²⁵ The trial court ruled that the statements could be "sufficiently redacted in accord with Richardson v. Marsh."²⁶

At trial, both were convicted on a multitude of charges and appealed.

ISSUE: Does a redacted statement violate Crawford?

HOLDING: No

DISCUSSION: Jackson argued that the "introduction of redacted statements made during a police interrogation" of Moffett was improper. He also contended it was improper to allow "other codefendants" "to testify about statements Moffett made to them." He claimed that "redacting the testimony of a non-testifying codefendant is not a valid substitute for confrontation and cross-examination" and that Crawford "implicitly overrules Richardson."

The court noted that Bruton v. U.S. held that "in a joint trial, the confession of one codefendant, which implicates both defendants, may not be introduced despite the court's limiting instruction that the confession be considered only against the confessing defendant."²⁷ Richardson modified that rule, finding that actual redaction could be used. However, the Court was "left with the issue of whether Crawford forbids the introduction of a redacted statement in compliance with the Richardson guidelines."

The Court looked to other circuits, and to the Kentucky decision of Rodgers v. Com. to conclude that redaction is a sufficient way to avoid "any Sixth Amendment or Bruton violation."²⁸ The Court analyzed the various statements, and ruled that all were properly admitted.

²⁵ Supra.

²⁶ 481 U.S. 200 (1987).

²⁷ 391 U.S. 123 (1968).

²⁸ 285 S.W.3d 740 (Ky. 2009).

Jackson also argued that a number of charges were presented against him “without victim testimony” at all. Sixteen of the victims “had their identities established solely through the testimony of police officers.” The Court, however, disagreed “that the officers’ testimony should be barred on either confrontation or hearsay grounds.” The Court noted that the “Confrontation clause does not bar the use of testimonial statements for the purpose other than establishing the truth of the matter asserted.”²⁹ The Court noted that in each case where “the victim’s identity was established solely through police testimony, the Commonwealth introduced ample evidence to support each count.”

After addressing a number of other issues, the Court upheld their convictions.

TRIAL PROCEDURE / EVIDENCE - HEARSAY

Todd v. Com.

2009 WL 3526650 (Ky. 2009)

FACTS: On the day in question, Monjure was strangled to death in Woodford County and her friend, Patricia, with whom she was living, was stabbed in the neck with a barbecue fork. Both Patricia and another witness eventually identified Todd as the assailant and picked him out of a photo array. Det. Thompson had developed Todd as a suspect and had recovered a pair of shorts from his home. Todd’s wife had also given her a bloody tee-shirt she had found in the washing machine. Blood testing linked him to Patricia’s assault.

At trial, he claimed that he had been present and had sex with Monjure, but that another man had committed the assaults. He fled because he didn’t want to be blamed. Todd was convicted and appealed.

ISSUE: May hearsay be presented to explain why an officer took a specific action?

HOLDING: Yes

DISCUSSION: Todd complained about the admission of several hearsay statements made by another witness in the house. The witness, although 19, had Down’s Syndrome. Allegedly, the witness gave Todd’s name to the detective. Her recorded statements were not admitted, but the officer referenced them in her testimony. Prior to the trial, it was agreed that the statements would not be admitted, and that the name would only be brought in to explain why Det. Thompson focused on Todd. When the statements by that witness were blurted out by Patricia, the Court offered an admonition to the jury.

The Court concluded that the matter was handled properly and upheld Todd’s conviction.

NOTE: *Although this case was not reversed, officers are strongly cautioned against the use of hearsay, and any such statements should be cleared by the prosecutor before testimony.*

²⁹ Tennessee v. Street, 471 U.S. 409 (1985).

TRIAL PROCEDURE / EVIDENCE - JOURNAL

Ashley v. Com.

2009 WL 3785848 (Ky. App. 2009)

FACTS: Ashley stood trial for Rape and Sodomy, both in the third degree, for his actions while an elementary school teacher in Harlan County. His victim was a 14-year-old, 8th grade student. He was ultimately convicted, and appealed.

ISSUE: Is a victim's journal admissible as a present sense impression?

HOLDING: No

DISCUSSION: Ashley objected to the introduction of certain emails sent from an anonymous account which did not actually connect with Ashley. The victim testified that she received them from Ashley and that he "acknowledged to her that he sent them." The emails were actually not admitted by the court, but the jury was exposed to them during an accidental showing to the jury of the testimony of a witness, that also picked up the bench conferences during which the judges and attorneys discussed the emails at length. The Court agreed that alone was sufficient to overturn the conviction. (One email that did include Ashley's name as the sender was properly admitted.)

The Court also considered whether other items were improperly admitted, including the victim's journal which detailed the sexual abuse. The Court found that the journal was not admissible as a present sense impression under KRE 803(1) because of the lapse in time between the occurrence and the victim's writing in the journal. The Court did agree that testimony from another female student concerning Ashley's conduct towards her, which was very similar to the way he interacted with the victim in this case, was admissible as a "prior bad act" under KRE 404(b)(1).

The Court reversed Ashley's conviction and remanded it for a new trial.

EMPLOYMENT - CONTRACT

Waters v. City of Pioneer Village

299 S.W. 3d 278 (Ky. App. 2009)

FACTS: Waters was hired as a police officer for Pioneer Village and signed a contract to the effect that he would stay for two years starting from his academy completion date. The contract provided that if he breached the contract, he would be expected to repay what it cost the city to send him to the academy, as well as other undefined costs.

Waters graduated on July 2, 2004 and became a park ranger with the Kentucky Department of Parks on December 13, 2004. Pioneer Village sued both Waters and the Dept. of Parks for approximately \$15,000 under KRS 70.290. Parks was dismissed because as a state entity it was entitled to sovereign immunity. The case was transferred from Franklin to Bullitt County and tried, but Waters did not appear. The judgment was set aside on his assertion that he was not given notice of the suit, but eventually the Court rendered judgment for Pioneer Village.

Waters appealed, arguing that the statute does not permit reimbursement to be sought from him personally (but only from his employing agency) and that the amount was not correctly calculated.

ISSUE: May an officer be required to pay back an employment contract, if their new employing agency is exempt from suit?

HOLDING: Yes

DISCUSSION: The Court reviewed the statute, and noted that as yet, there had been no case law to interpret it. To construe a statute, the court must be “guided by the two paramount rules of statutory construction, that is, that words must be afforded their plain, commonly accepted meaning and that statutes must be construed in such a way as to carry out the intent of the legislature.” Since Pioneer Village could not seek reimbursement from Parks, if the court construed that its exclusive remedy was against the employing agency, it would be left with no way to “recover its investment in Waters.” The Court found that interpretation to not carry out the intent of the legislature to allow agencies to recoup training costs.

The Court also found that the City had presented adequate evidence to support the amount it claimed in training Waters. The Court upheld both the verdict and the judgment amount.

Sixth Circuit

ARREST WARRANTS - PROTECTIVE SWEEP

U.S. v. Archibald

589 F.3d 289 (6th Cir. 2009)

FACTS: Archibald was on probation on April 29, 2006, when Metro Nashville police arrived at his residence to arrest him for violations. Sgt. Fidler had also checked his background and learned that Archibald was a higher risk because of his violent background. They tried knocking with no response, but the officer at the front door indicated that he could hear someone moving around inside and eventually heard a male voice. After some ten minutes, the door was opened and Archibald was pulled out by the officer at the door. Officer Nielson, at the door, was inside the house momentarily and could see some walls and obstructions behind which someone could hide. Sgt. Fidler and another officer entered to do a "short protective sweep."

While inside, Sgt. Fidler spotted white powder and paraphernalia. No other person was found and no further incriminating evidence spotted. They secured the premises and obtained a search warrant. A firearm was found, triggering an additional charge, since Archibald was a convicted felon.

Archibald moved for suppression, arguing that the officers had no reason to believe there was anyone else in the apartment. When that was denied, Archibald took a conditional guilty plea and appealed.

ISSUE: May officers do a protective sweep when they have no reason to believe anyone else is in the house?

HOLDING: No

DISCUSSION: The Court began by noting that "it is well-settled that arrest warrants are not search warrants."³⁰ The Supreme Court had "identified two types of warrantless protective sweeps of a residence that are constitutionally permissible immediately following an arrest."

The first type allows officers to "look in closets and other spaces immediately adjoining the place of arrest from which an attack could be immediately launched."³¹ The second type of sweep goes "beyond" immediately adjoining areas but is confined to "such a protective sweep, aimed at protecting the arresting officers[.]" The first type of sweep requires no probable cause or reasonable suspicion, while the second requires "articulable facts which, taken together with the rational inferences from those facts, would warrant a reasonably prudent officer in believing that the area to be swept harbors an individual posing a danger to those on the arrest scene." The Supreme Court also "emphasize[d]" that this second kind of sweep is "not a full search of the premises," but "extend[s] only to a cursory inspection of those spaces where a person may be found" and should last "no

³⁰ See Steagald v. U.S., 451 U.S. 204 (1981)

³¹ Maryland v. Buie, 494 U.S. 325 (1996)

longer than is necessary to dispel the reasonable suspicion of danger and in any event no longer than it takes to complete the arrest and depart the premises.”

In this case, the Court noted, the government agreed that the “challenged protective sweep occurred incident to an in-house arrest and involved an area immediately adjoining the place of Archibald’s arrest.” However, it argued the case under the second category, “which requires ‘articulable facts’ supporting the presence of another person who might pose a potential danger to the arresting officers.” It was the government’s burden to argue the case under the proper provision. The Court however, noted that the protective sweep would have failed under that provision as well, as Archibald was taken into custody at the threshold. The officers “did not see any other individuals, weapons, or other contraband when they looked inside the doorway.” Archibald was pulled outside and handcuffed. The sweep did not just encompass the adjoining room but apparently the entire house. The Court noted, “by extending the scope of the protective sweep, the officers ran the risk of exposing themselves to more danger.”

The prosecution tried to argue the justification under the second Buie category with the following:

(1) of defendant’s prior arrests for violent crimes; (2) the “particular vulnerability” of the officers; (3) Archibald’s delay in responding to the knocking and announcement by Nielsen; (4) “noises from inside defendant’s residence”; and (5) Archibald’s arrest and the protective sweep occurred simultaneously.

Taking each in turn, the Court found that Archibald’s “own dangerousness is not relevant” when the officers were thinking about someone else inside the house - Archibald’s prior history was irrelevant.³² Prior cases offered in support of the government’s position involved “strong circumstantial evidence that potentially dangerous criminal accomplices might be present.” The officer’s concern about being in the “fatal funnel” because of their inability to see beyond certain visual obstructions does not change their burden. Further, it noted if “entry in a ‘fatal funnel’ poses a greater risk to law enforcement, the prudent course of action would have been to back away from the door, not proceed through it.” Archibald’s long delay in coming to the door caused the officer at the door to testify about what he heard, but the court focused on language that suggested the officer heard only one person inside. The Court noted that “lack of knowledge as to whether others were in a home necessarily failed the Buie standard” as to do otherwise “creates an incentive for the police to stay ignorant as to whether or not anyone else is inside a home in order to conduct a protective sweep.” Finally, the Court simply dismissed any justification under the fifth provision.

The Court reversed the lower court’s decision and remanded the case.

SEARCH & SEIZURE - CONSENT

U.S. v. Stanley

2009 WL 3644634 (6th Cir. 2009)

FACTS: Although the opinion did not give specific facts, apparently Stanley was arrested under a warrant at his girlfriend’s apartment. The girlfriend apparently gave consent to a search, and Stanley, although present, did not object or revoke the consent. He was given Miranda and invoked those rights and argued that should have been interpreted as an “express refusal of consent to search.”

³² See U.S. v. Colbert, 76 F.3d 773 (6th Cir. 1996).

Stanley requested suppression. The District Court ruled that the girlfriend's consent was sufficient to permit the officers to search the apartment, where incriminating items were located (apparently, from the charges, guns and cocaine). Stanley appealed.

ISSUE: May officers search pursuant to a consent by a co-occupant?

HOLDING: Yes

DISCUSSION: The Court started by noting that an "arrest warrant allows officers to enter the suspect's home if there is 'reason to believe' that the suspect is within the home."³³ The officers had a lawful arrest warrant and investigation had "demonstrated that Stanley frequently stayed overnight in [the girlfriend's] apartment." They had observed him arrive the night before and his vehicle was still there the next morning, when the warrant was executed. As such, they had "reason to believe" he was there. Once they entered, the officers observed marijuana in glass vials and immediately recognized it as contraband. Once they seized it, the crack cocaine, "situated directly under the vials," was in plain view and likewise subject to seizure.

Stanley also argued that there was also a knock and announce violation but the District Court ruled that the officers did knock and announce. They only forced entry after waiting a reasonable time and getting no response from inside.

The District Court's ruling to allow the evidence was upheld.

SEARCH AND SEIZURE - VEHICLE STOPS

U.S. v. Bonilla

2009 WL 4906906 (6th Cir. 2009)

FACTS: In 2007, Bonilla was driving through Ohio in a vehicle with Colorado tags. Deputy Sheriff Bemis (Montgomery County TN SD) stopped him for following a truck too closely, at approximately 4:01 p.m. Bemis had been contacted by a Ohio State Highway Patrol trooper about Bonilla, and was told the trooper "had been following Bonilla for sixteen miles and observed suspicious activities," specifically, driving 10 miles under the limit, looking nervous and driving a large vehicle with out of state plates. Bemis did not observe any traffic offenses, however.

Dep. Bemis ordered Bonilla to get out. Bonilla explained he was going to Columbus on vacation. Bonilla consented to a patdown. Bonilla also stated that the passenger was his girlfriend, but he "could not recall her last name and [said] had only known her for a little while." Bemis retrieved Bonilla's ID from the car and spoke to the passenger. Bonilla then "recalled his passenger's last name and said that he had known her for three years." The passenger stated they were going to Columbus to visit friends. Bemis found Bonilla's story to be nonsensical and decided he would have his K-9 do a "free-air" sniff.

At about 4:07, Bonilla was allowed to lean against the deputy's car while Bemis wrote the ticket and checked Bonilla's information. He also called for backup. The computer check took approximately 8

³³ Payton v. New York, 445 U.S. 573 (U.S. 1980).

minutes, at which point Bemis apparently began to start writing the ticket and another form. At 4:23, backup arrived. "Bemis ceased writing the ticket, removed the passenger from the Avalanche, and placed Bonilla and the passenger in separate police vehicles." Bemis later claimed that it usually took 30-35 minutes to write an out-of-state driver a traffic ticket. He ran his dog around the car and the dog alerted. A subsequent search revealed 10 kilos of cocaine.

Bonilla was charged with federal drug trafficking offenses. He moved to suppress, and was denied. Bonilla then took a conditional guilty plea, and appealed.

ISSUE: May a person be detained (by being placed in a cruiser) prior to the officer having reasonable suspicion?

HOLDING: No

DISCUSSION: Bonilla argued that "Bemis did not have probable cause to effectuate the traffic stop." The Court stated that "probable cause is satisfied when the facts and circumstances within the officer's knowledge, based on reasonably trustworthy information, are sufficient to warrant a man of reasonable caution to believe that an offense has been or is being committed."³⁴ In this case, Bemis had articulated a valid reason for the stop and his testimony was credible.

Bonilla also argued that "Bemis lacked the reasonable suspicion of criminal activity required to detain him based on suspicions of illegal drug activity."

The Court noted that:

Here, we know the scope of the traffic stop was exceeded at some point because the stop culminated in the arrest of Bonilla for transporting drugs in his vehicle. Thus, we must determine the point at which the original purpose of the traffic stop - writing the traffic citation - ceased and the detainment of Bonilla and his passenger began. Once the scope and duration of the stop is determined, we then focus on whether Bemis had a reasonable and articulate suspicion that criminal activity was afoot at the time of Bonilla's detention.

The Court agreed that "requesting a driver's license, registration, rental papers, running a computer check thereon, and issuing a citation do not exceed the scope of a traffic stop for a speeding violation."³⁵ Further, having the driver get out is also permitted.³⁶ "Moreover, 'the use of a well-trained narcotics-detection dog' during a traffic stop does not, in itself, infringe any constitutionally protected privacy interests."³⁷ Once the dog hit on the vehicle, "Bemis had the reasonable suspicion necessary to seize Bonilla and search his vehicle."

The Court looked to two recent cases to determine "when the purpose of a traffic stop turns into a detainment." In Torres-Ramos, the court stated that when the driver was placed in the back of the patrol

³⁴ U.S. v. Davis, 430 F.3d 345 (6th Cir. 2005); U.S. v. Bradshaw, 102 F.3d 204 (6th Cir. 1996).

³⁵ U.S. v. Hill, 195 F.3d 258 (6th Cir. 1999); U.S. v. Diaz, 25 F.3d 392 (6th Cir. 1994).

³⁶ Arizona v. Johnson, 129 S.Ct. 781 (2009); Pennsylvania v. Mimms, 434 U.S. 106 (1977).

³⁷ Illinois v. Caballes, 543 U.S. 405 (2005).

car, he was detained, since a usual traffic stop does not require that action.³⁸ In U.S. v. Blair, once the officer had all the information necessary and yet returned to the subject's car two minutes later and told Blair a dog would be called to the scene, the Court had "held that the remainder of the stop required reasonable suspicion and was in violation of the Fourth Amendment."³⁹

The Court concluded that once Bemis placed the two in separate cruisers, the purpose of the original stop was over. "At this point, the officer's actions ceased being reasonable related in scope to the initial stop, and any concerns of the original traffic stop were overshadowed by the officer's suspicions of the contents of the vehicle." For that, he would require reasonable suspicion - "at the moment he stopped writing the ticket for the traffic violation and began pursuit of the drug investigation."⁴⁰ The Court reviewed the information provided to Bemis, both as individual elements and collectively. Individually, the evidence was very weak. Collectively, also, the case lacked "any strong indicators of criminal conduct other than minor actions by Bonilla that are generally present when a driver is pulled over."

The Court concluded that since "no reasonable suspicion was present at the inception of the detention on suspicion of transporting drugs, the detention was an unlawful seizure." The Court discounted the short period of time Bonilla was detained before the drugs were found, finding it irrelevant "since Bemis lacked reasonable suspicion to do so" at all.

Bonilla's plea was reversed and the case remanded.

U.S. v. Carr

2009 WL 4795861 (6th Cir. 2009)

FACTS: On August 29, 2006 Madison County (TN) officer approached a vehicle (Tahoe) in a car wash bay. The plainclothes officers "parked their unmarked Ford Explorer facing the Tahoe, flashed the emergency lights on their vehicle, and then got out of their vehicle and advanced toward the Tahoe on foot." They arrested Carr (alone in the vehicle) and did a warrantless search of the vehicle, finding over \$11,000 in cash, crack cocaine, marijuana, hydrocodone and a loaded handgun. They found a further \$7,800 in cash on his person.

Carr was indicted, and moved for suppression. Lt. Carneal testified at the hearing that Carr's "vehicle attracted his attention and raised suspicions in his mind because: (1) it was parked in a car wash bay at night, and no one was washing it; (2) the car wash was located in a high-crime area; and (3) the car wash itself was known as a meeting place for drug dealers. The Court denied the suppression. Carr took a conditional guilty plea, and appealed.

ISSUE: Must a vehicle stop and detention be supported by reasonable suspicion?

HOLDING: Yes

DISCUSSION: The Court reviewed case law on the issue and found that it was "clear that there are two relevant questions in this case, both fact-dependent and neither decided with sufficient clarity by the district

³⁸ U.S. v. Torres-Ramos, 536 F.3d 542 (6th Cir. 2008).

³⁹ 524 F.3d 740 (6th Cir. 2008).

⁴⁰ U.S. v. Garrido, 467 F.3d 971 (6th Cir. 2006).

court. The first is whether the initial contact between the police and the defendant was a Terry stop or a consensual encounter." In this case, it would depend upon whether the police had blocked in Carr's vehicle, and Lt. Carneal had stated they did not. Another factor is the use of emergency lights and whether they were used simply to identify themselves. The testimony indicated that they simply turned them on and off once.

However, the Court noted, there was some question as to "whether the stop was supported by reasonable suspicion." The facts in this case were unclear on this matter, as well, and the Court reversed the decision and remanded it back to the trial court for further proceedings, to clarify the issues at hand.

SEARCH & SEIZURE - WARRANT

U.S. v. Robinson

2009 WL 3735868 (6th Cir. 2009)

FACTS: Following three uncontrolled drug buys, observed by undercover officers, Sevierville (TN) police sought a warrant for the address. Robinson was present at the time and charged as a result of the items found there. He moved for suppression, asserting that the warrant included false statements and omitted material facts. The warrant, in its entirety, read:

- 1. I am a Special Agent with the State of Tennessee Fourth judicial district Drug and Violent Crime Task Force. I have been employed by the Pigeon Forge Police Department for approximately 6 years, the past 2.5 years of which I have been assigned to the Drug Task Force During the past 11 years as an officer and Drug Task Force Agent I have been involved with or participated in approximately 300 narcotic investigations. I have worked in an undercover capacity to purchase narcotics and gain intelligence. I have executed search warrants, conducted surveillance of drug transactions, seized evidence, arrested suspects, interviewed suspects and conferred with Local, State, and Federal Prosecutors and other Law Enforcement Officials in my community regarding narcotic investigations, and as a result, gained considerable experience.*
- 2. On October 27, 2004, while in an undercover capacity, I purchased cocaine from an individual. During that undercover drug transaction after the individual was given money by me, Drug Task Force Agents followed the person to 1828 Norlil road Sevierville, Tennessee. The individual then brought back what was believed to be Cocaine from the residence.*
- 3. On November 04, 2004 while in an undercover capacity, I purchased cocaine from the same individual. During that undercover drug transaction after the target was given money by me, Drug Task Force Agents followed the person to 1828 Norlil road Sevierville, Tennessee. The individual then brought back what was believed to be Cocaine from the residence.*
- 4. On November 05, 2004 a third undercover drug transaction was conducted from the same individual. The individual was followed to 1828 Norlil Road Sevierville, Tennessee. The individual then brought back what was believed to be cocaine from the residence.*
- 5. The white powder substance in the above three occasions field tested positive for cocaine.*

6. Based on above intelligence, surveillance, experience and training, Affiant David L. Joyner believes that illegal narcotics and drug proceeds are in the residence of 1828 Norlil road Sevierville, Tennessee. The residence to be searched has a physical address of: 1828 Norlil Road Sevierville, Tennessee.

7. I request to search the above mentioned residence, including outbuildings and vehicles for: narcotics, packaging materials used to package and preserve narcotics, weighing devices . . . and other documentation which reflect narcotic sales, weapons, which are used as protection devices in the illegal drug trade, illegal drug proceeds and surveillance equipment. All of these items constitute contraband; property used, or intended to be used in commission of a drug offense in violation of the laws of the State of Tennessee.⁴¹

The trial judge denied the suppression. Robinson was convicted, and appealed.

ISSUE: Will the omission of facts from a search warrant affidavit always invalidate the warrant?

HOLDING: No (but see discussion)

DISCUSSION: The Court noted that although officers testified during the hearing, they failed to include in the affidavit that a CI had arranged for and participated in the buys, and that the CI, rather than an officer, “handed the buy money to Thomas.” Robinson argued that “several crucial facts’ were excluded - “1) there was no mention of the participation of the female confidential informant (CI) who actually conducted the buys; 2) there was no mention that the “individual” dealing with the female CI, the seller, was not searched to make sure that he did not already have drugs on him; and 3) there was no reference to the fact that the “individual” was not searched to make sure he did not possess any significant amount of money.” He further argued that the omissions misled the judge, but the Court disagreed. The Court quoted from the magistrate judge’s report and recommendation at length, which included information both from the affidavit and the suppression hearing, and agreed that while certain of the information was lacking, it was still sufficient for the judge to find a substantial basis for concluding that criminal evidence would be found. The Court found that its “conclusion does not change when the involvement of the CI is added to the equation; nor is it undermined by the fact that the buys were not ‘controlled.’”

The Court affirmed the denial of the motion to suppress.

SEARCH & SEIZURE - REASONABLE EXPECTATION OF PRIVACY

U.S. v. Adams

583 F.3d 451 (6th Cir. 2009)

FACTS: At about 1:30 a.m., on May 15, 2006, Adams and others were gathered in a motel room in Nashville, TN. The room was registered to Bond, who had rented it on a weekly basis between March 3 and June 2. The gathering drew the attention of Sgt. Eby, on patrol, as he saw a lot of foot traffic around the room. He asked for backup to do a knock and talk. About the time backup arrived, one of the visitors noticed the police cars gathering and alerted the others in the room. A few minutes later, Sgt. Eby and Officer Valiquette knocked and someone opened the door. Bond, who was in the room, identified himself as the registered guest and stepped outside to talk to the officers.

⁴¹ Errors in original.

When the door was initially opened, the officers noticed signs of drug activity. Bond agreed to a search. Sgt. Eby searched while the officer watched the guests. Sgt. Eby spotted a jacket lying on the floor in the gap between the bed and the wall and asked who it belonged to - no one claimed it. He looked in the pockets and found a gun, along with a crack pipe and crack cocaine. After further questioning, the ownership of the jacket was narrowed to two men, Adams and Lymon. Once he was given Miranda rights, Adams denied possession of the jacket or the gun.

Adams was taken to a patrol car, where the interrogation continued. Finally, at about 4:15, after the officer told him security video showed him wearing the jacket, Adams confessed to possessing the gun. The officer completed a "gun questionnaire form" that Adams signed, but certain boxes indicating that Miranda rights had been given and/or waived were not checked.

Adams, a felon, was indicted for possession of the gun and moved for suppression. When that was denied, he was convicted and appealed.

ISSUE: If a person doesn't acknowledge ownership of an item, when asked, do they retain an expectation of privacy in it?

HOLDING: No

DISCUSSION: The Court started its analysis with the search of the jacket. It noted that Bond, the renter, had a "legitimate privacy interest in the room and thus, the authority to give consent to the officers to search the room for contraband." As such, the question was whether Adams "retained a sufficient expectation of privacy in the jacket." The Court noted that when no one claimed the jacket, "any privacy interest was effectively abandoned...." The jacket was not in Adams' possession and the officer had already gone through other clothes scattered on the floor. The Court distinguished the jacket from the footlocker in U.S. v. Chadwick, and also noted that the "law regarding search and seizure of closed containers has evolved since Chadwick was decided."⁴² Once the officer picked up the abandoned jacket, he was justified, under officer safety, to search further, when he noted its unusual weight. The Court upheld the search.

With respect to Adams' confession, the Court agreed that even though no written waiver was executed, that "Adams knowingly and voluntarily waived his Miranda rights." There was no indication he did not understand the rights and he continued to talk and "subsequently made incriminating statements." The Court agreed that despite the confusion over the form, the evidence indicated Adams waived his Miranda rights implicitly by continuing to talk to the officer.

The Court upheld the denial of the motion to suppression.

⁴² 433 U.S. 1 (1977); California v. Acedvedo, 500 U.S. 565 (1991).

COMPUTER CRIME

U.S. v. Lay

583 F.3d 436 (6th Cir. 2009)

FACTS: Lay was accused of inducing a 15-year-old girl to engage in sexual conduct. He had made arrangements to travel to Ohio (where she lived) and had booked a hotel room and laid out explicit plans for the encounter. Most of the communication occurred via cell phone, but some had occurred initially via a computer exchange. Lay was arrested when he arrived in Ohio for his liaison, after her mother had discovered the plot and had given consent to the police to record the later calls.

Lay took a guilty plea, but argued that several of the sentencing enhancements were inappropriate.

ISSUE: Does a meeting that takes place via a computer subject the defendant to charges relating to the computer?

HOLDING: Yes

DISCUSSION: Lay argued that “none of the conversations relating to the trip to Ohio occurred on a computer.” He had, however, booked his flights and hotel online, and had apparently scanned photos, despite his claim that he didn’t know much about computers. Further, the evidence indicated that they had initially met “through the use of a computer.” The Court noted that “enticement does not require crude specification of intent.” The computer communication only ceased after Lay began plying the victim with gifts, “including the phone that replaced the computer as a means of communication.”

Lay’s sentence was upheld.

U.S. v. Frechette

583 F.3d 374 (6th Cir. 2009)

FACTS: On Nov. 26, 2007, ICE agents learned that Frechette had paid \$80 for a one-month-subscription to a site that provided child pornography in January of the same year. (The agents had viewed the “splash” page that welcomed visitors to buy a membership.) Frechette used a PayPal account which was funded by his debit card and that account was only used once for this purpose. Further, the agents noted the IP address was registered to his home address, which he shared with his mother. In his warrant, the agent “stated that based on his experience, evidence of the storage of child pornography is often present on the computer hard drives of consumers of child pornography - sometimes in multiple locations on the hard drive, some of which they may not even be aware of.”

Also in the warrant was a notation that Frechette was on the Michigan sex offender registry at that address, and the “probation office, the postal service, and the department of motor vehicles” also confirmed that to be his address.

The agent requested and obtained a search warrant, and child pornographic images were found on his computer on April 8, 2008. He confessed and was indicted. He then moved for suppression, and the trial court suppressed the evidence, finding that the information on the subscription was stale and further, that

the affidavit lacked a “link between the factual basis and the conclusion that there was a fair probability that evidence of a crime would be found at the defendant’s home or on the computer.” The Government appealed.

ISSUE: Is stale information in an affidavit as critical in a child pornography case?

HOLDING: No

DISCUSSION: The Court noted, initially, that “stale information cannot be used in a probable cause determination.”⁴³ In the drug trade, the Court agreed, information that is 16 months old is usually considered stale - because drugs are usually sold and consumed in a prompt fashion.” However, “with respect to images of child pornography, however, the answer may be no because the images can have an infinite life span.”

In analyzing whether information is stale, this court considers the following factors:
(1) the character of the crime (chance encounter in the night or regenerating conspiracy?),
(2) the criminal (nomadic or entrenched?),
(3) the thing to be seized (perishable and easily transferrable or of enduring utility to its holder?), and
(4) the place to be searched (mere criminal forum of convenience or secure operational base?).⁴⁴

Applying the facts to the case at hand, the Court concluded:

1. Character of the Crime. As we have explained on multiple occasions, child pornography is not a fleeting crime. And “because the crime [of child pornography] is generally carried out in the secrecy of the home and over a long period, the same time limitations that have been applied to more fleeting crimes do not control the staleness inquiry for child pornography.”⁴⁵ Indeed, in U.S. v. Frechette, the search warrant approved was based on an affidavit that included evidence of the defendant’s subscription to a child pornography web site that was purchased thirteen months before the actual search.⁴⁶ Moreover, here the agent stated that in his experience evidence of child pornography downloading often remains on a computer for lengthy periods of time.⁴⁷

2. The Criminal. The affidavit clearly established that the defendant was not nomadic. Indeed, all of the evidence indicated the defendant lived in the same house for the entire sixteen months in question.

⁴³ U.S. v. Spikes, 158 F.3d 913 (6th Cir. 1998).

⁴⁴ U.S. v. Abboud, 438 F.3d 553 (6th Cir. 2006).

⁴⁵ U.S. v. Paull, 551 F.3d 516, 522 (6th Cir. 2009) (citing U.S. v. Wagers, 452 F.3d 534, 540 (6th Cir. 2006)).

⁴⁶ *Id.* at 522-23 (citing U.S. v. Lacy, 119 F.3d 742, 746 (9th Cir. 1997) (upholding search for child pornography based on evidence that the defendant subscribed to a similar web site ten months prior to the search)).

⁴⁷ See U.S. v. Williams, 544 F.3d 683, 686 (6th Cir. 2008) (holding that courts may give “considerable weight to the conclusion of experienced law enforcement officers regarding where evidence of a crime is likely to be found” (citing U.S. v. Bethal, 245 F. App’x 460, 465 (6th Cir. 2007))); see also Wagers, 452 F.3d at 540 (“[E]vidence that a person has visited or subscribed to web sites containing child pornography supports the conclusion that he has likely downloaded, kept, and otherwise possessed the material.” (citing U.S. v. Martin, 426 F.3d 68, 77 (2^d Cir. 2005); U.S. v. Froman, 355 F.3d 882, 890-91 (5th Cir. 2004))).

3. The Thing to be Seized. Unlike cases involving narcotics that are bought, sold, or used, digital images of child pornography can be easily duplicated and kept indefinitely even if they are sold or traded. In short, images of child pornography can U.S. v. Frechette have an infinite life span.⁴⁸ (“Images typically persist in some form on a computer hard drive even after the images have been deleted and, as ICE stated in its affidavit, such evidence can often be recovered by forensic examiners.”⁴⁹)

4. The Place to be Searched. The place to be searched in this case was the defendant’s residence, which is clearly a “secure operational base.”⁵⁰ (holding that the crime of possession of child pornography “is generally carried out in the secrecy of the home and over a long period.”⁵¹)

The Court agreed that all of the Abboud factors indicated that the evidence was not stale. However, that did not end the analysis, because the court then had to determine whether the magistrate judge “had a substantial basis to conclude that probable cause existed.”⁵² The Court agreed that the facts indicated “that there was a fair probability that evidence regarding illegal images of child pornography could be found on a computer located at” Frechette’s home address. Specifically, the Court agreed that someone who paid for a subscription would use it and “to hold otherwise would defy logic.”

The Court reversed the suppression of the evidence.

TRIAL PROCEDURE / EVIDENCE - MULTIPLE STATES

U.S. v. Jackson

2009 WL 3447261 (6th Cir. 2009)

FACTS: During 2005, Jackson and another man were involved in a string of Ohio armed robberies. They committed one robbery during the same time frame in Kentucky. He was arrested in Ohio and confessed to all of the robberies. He was indicted on both. The Kentucky federal indictment included the actual robbery and two related firearms charges. He pled guilty in Ohio and was sentenced. However, approximately a year later, in 2007, he moved for estoppel on the Kentucky charges, believing that they were subsumed in the Ohio plea agreement. The District Court reviewed the matter and denied the claim. Jackson also objected to the Kentucky charges being treated as unrelated to the Ohio charges, for sentencing consideration, which again, the court denied. He eventually pled guilty to amended Kentucky charges and received a sentence to run consecutively with the Ohio sentence.

Jackson then appealed.

ISSUE: May a person be given immunity in one state for crimes occurring in another state?

HOLDING: No

⁴⁸ See U.S. v. Terry, 522 F.3d 645, 650 n.2 (6th Cir. 2008)

⁴⁹ Lacy, *supra*.

⁵⁰ Paull, *supra*.

⁵¹ Wagers, *supra*.

⁵² U.S. v. Gardiner, 463 F.3d 445 (6th Cir. 2006.)

DISCUSSION: Jackson argued that the Ohio plea agreement repeatedly referenced the Kentucky robbery, that the same weapon was used, and detailed the commission of the Kentucky robbery in sequence with the Ohio robberies. The Court, however, noted that the Ohio indictment did not include the Kentucky offense, and nowhere did the government agree not to prosecute on the other charges. In fact, it specifically did not bind other U.S. Attorney's offices in other districts.

As for his argument that all of the robberies were part of a common scheme or plan, but the court stated that his "actions amounted to [nothing] more than a crime spree," and that the commission of one of the robberies did not require the commission of any of the other, and that nothing more than a common modus operandi connected the crimes. The Court agreed they were not legally related.

Jackson's appeal was dismissed.

TRIAL PROCEDURE / EVIDENCE - CRAWFORD

U.S. v. Cheung
2009 WL 3415980 (6th Cir. 2009)

FACTS: In 2006, Cheung owned a restaurant in Crescent Springs, along with his cousin, Shi. He left the operations to Shi, but did come to the restaurant on occasion. In 2007, local police and ICE opened an investigation concerning a "suspiciously large number of people living in a single-family home" owned by Shi. They observed a van picking up people there every day, taking those individuals to the restaurant and returning them after it closed. The same pattern was observed at another restaurant owned by Cheung, in Florence.

On Oct. 16, 2007, the van was stopped by police and 4 of the occupants determined to be illegal immigrants from Mexico. The police also searched the house and found another illegal alien there. The ICE agent proceeded to the restaurant and was directed to speak to Cheung. Cheung was unable to provide required documents for the employees and it was also discovered that no unemployment taxes had been paid for the five people in question. (During the time, they also located a sixth illegal alien, who lived at another location, working for Cheung.)

Cheung was eventually convicted of conspiring to harbor illegal aliens, and appealed.

ISSUE: Is Crawford an issue in testimony concerning the status of an illegal alien?

HOLDING: No (but see discussion)

DISCUSSION: Cheung argued that the agent's testimony at trial concerning the status of each of the aliens reflected information from the absent aliens, and played a videotape of one of the aliens who had been deposed prior to deportation, in violation of Crawford v. Washington.⁵³

With respect to the agent's testimony, the court looked to U.S. v. Cromer, which "lawyers for the government and the defense have made a habit over the last few years of citing" for its definition of testimonial. However, the Court noted that while its definition might be appropriate in non-interrogation

⁵³ 541 U.S. 36 (2004)

settings, it was not the way the U.S. Supreme Court defined it in Davis v. Washington.⁵⁴ (Cromer involved a confidential informant, while Davis was in the context of a governmental investigation or interrogation.) The Court noted that Davis should have been argued in this case, not Cromer. With respect to the video deposition, the Court permitted the witness to be deposed and he was cross-examined by defense counsel, prior to his deportation a few days before trial.

The Court found no harm occurred because of the admission of the video deposition, in particular because he was acquitted of charge specifically relating to that individual. All of the evidence concerning the charge on which he was convicted came from other sources. (And the Court noted, some of the evidence in that video deposition actually supported his claim of non-involvement in the conspiracy.)

The Court upheld Cheung's conviction.

TRIAL PROCEDURE / EVIDENCE - CONFRONTATION CLAUSE/HEARSAY

Jensen v. Romanowski 590 F.3d 373 (6th Cir. 2009)

FACTS: In 1989, Jensen had pleaded no contest in a sexual assault case and had waived any right to confront his accuser, a 13 year old girl. In 2001, he was again charged with a similar offense, this time with an 11-year-old girl. Lt. Wolter, who investigated the earlier offense was called to the stand and testified at length about that earlier case, including "detailed hearsay testimony regarding his conversation with the 1989 complainant." Jensen was convicted.

Jensen appealed for habeas relief. The District Court agreed that Lt. Wolter's testimony violated the Confrontation Clause and that the error was not harmless. Jensen's relief was granted and the prosecution appealed.

ISSUE: Is hearsay evidence admissible?

HOLDING: No (but see discussion)

DISCUSSION: The Court noted that although Jensen did make several admissions about the 1989 case, that Lt. Wolter's testimony brought out details that would not otherwise have been in front of the jury. The Court discussed the Confrontation Clause, noting that the Sixth Amendment "generally provides a criminal defendant with the right to physically face and cross-examine witnesses testifying against him."⁵⁵ To determine if a constitutional error occurred, the Court must look to whether the error created a "substantial and injurious effect" under Brecht v. Abrahamson.⁵⁶ To help determine that, the Court looked to the factors laid out in Delaware v. Van Arsdall.⁵⁷ "Those factors include: (1) the importance of the witness' testimony in the prosecution's case; (2) whether the testimony was cumulative; (3) the presence or absence of evidence corroborating or contradicting the testimony of the witness on material points; (4) the extent of cross examination otherwise permitted; and (5) the overall strength of the prosecution's case."

⁵⁴ 547 U.S. 813 (2006).

⁵⁵ Pennsylvania v. Ritchie, 480 U.S. 39 (1987).

⁵⁶ 507 U.S. 619 (1993).

⁵⁷ 475 U.S. 673 (1986).

The Court looked to each case for guidance and concluded that Lt. Wolter's testimony was important to the case, since the prosecution relied on similarities to the first case to prosecute the second. In fact, the jury was so instructed. It did not find that the testimony was cumulative, since it provided new facts, but it did serve to bolster other evidence. It did not specifically corroborate or conflict with other evidence in the case. There had been no opportunity to cross-examine the earlier victim. Finally, without the testimony, the prosecution's case was "substantial but not overwhelming." Even with his own admissions and past convictions, there was not a compelling case against Jensen.

Using the Van Arsdall factors, the Court concluded that Lt. Wolter's testimony did materially impact the jury's verdict. The Court upheld the grant of habeas in Jensen's favor.

U.S. v. Presley
2009 WL 3294875 (6th Cir. 2009)

FACTS: Presley was involved in a drug trafficking scheme involving the use of his trucking company. He was indicted, tried and convicted. He then appealed.

ISSUE: Is all testimony repeated by a non-declarant inadmissible?

HOLDING: No

DISCUSSION: Presley argued that the prosecutor "elicited inadmissible hearsay statement from a testifying DEA agent, Tenprano. One statement involved Missouri authorities telling the agent that one of Presley's co-conspirators had been arrested with a large amount of marijuana. Then, again, a year later, the same authorities told the agent that a second person was transporting a large quantity as well. The individual in that case told the Missouri authorities that "the marijuana was intended for Mr. Presley." As a result, the DEA attempted to do a controlled delivery. The Court, however, noted that the "statements were not offered to prove their truth," but simply to "provide background evidence for his description of the enforcement actions taken by the DEA with respect to" Presley. As such, they did not violate the Confrontation Clause.

With respect to another statement, the agent repeated information provided by a local sheriff's deputy that did a traffic stop in order to identify subjects in a vehicle - the Court agreed it was, technically, hearsay because it was intended to prove that a particular individual was in the car. However, since they could have simply called the sheriff to provide the same information, the court did not find it to be error that would justify a reversal.

For unrelated reasons, the Court affirmed the conviction but vacated the sentencing.

TRIAL PROCEDURE / EVIDENCE - BRADY

Webb v. Mitchell

586 F.3d 383 (6th Cir. 2009)

FACTS: Webb was convicted in Ohio of the aggravated murder of his son, Michael. The state courts affirmed his conviction, so he took a federal habeas corpus appeal. The U.S. District Court denied the motion, and he further appealed.

ISSUE: Is all failures to disclose reports a violation of Brady?

HOLDING: No

DISCUSSION: Webb argued that Ohio violated his rights because it failed "to disclose a police report issued five days after the fire."⁵⁸ The report suggested another possible suspect in the arson fire which resulted in Michael's death. Although the issue was not raised in the state court proceedings, the federal court "excused his procedural default and reviewed the claim on the merits because Webb did not learn of the police report until federal habeas discovery."

The Court reviewed the elements of a Brady claim, stating:

A Brady claim contains three elements: (1) the evidence 'must be favorable to the accused' because it is exculpatory or impeaching; (2) the State must have suppressed the evidence, whether willfully or inadvertently, and (3) the evidence must be material, meaning 'prejudice must have ensued' from its suppression."⁵⁹

To sum up, the key question must be - "did the failure to turn over the police report prejudice Webb's case?" The Court looked at the record and found that the police report did not satisfy the standard because Webb's argument as to what actually occurred (taking the information in the report as true) rested not only on "a precarious chain of inferences," but also on a "flimsy foundation." Key pieces of evidence directly linked Webb to the fire. The evidence in the report is "equivocal and does not 'markedly' strengthen" Webb's theory that the other subject set the fire.⁶⁰

Webb also argued that had he had the report, he could have impeached "the thoroughness of the police investigation." The Court noted that "any impact the suppression (withholding) had on Webb's trial preparations is irrelevant, however; 'only the effect on the trial's outcome matters.'"⁶¹

Webb's conviction was affirmed.

⁵⁸ Brady v. Maryland, 373 U.S. 83 (1963).

⁵⁹ Strickler v. Greene, 527 U.S. 263 (1999).

⁶⁰ Kyles v. Whitley, 514 U.S. 419 (1995).

⁶¹ Wilson v. Parker, 515 F.3d 682 (6th Cir. 2008).

TRIAL PROCEDURE / EVIDENCE - PRIOR BAD ACTS

U.S. v. Wheeler

2009 WL 3377925 (6th Cir. 2009)

FACTS: On June 15, 2006, Athens, GA law enforcement notified Memphis, TN police that Wheeler was wanted in connection with an armed robbery. They gave specific information concerning his vehicle and his destination. They found Wheeler and Finley (his girlfriend) in the described vehicle at the apartment. Finley owned the car and gave consent to search it, and the police found a sawed-off shotgun in a bag in the passenger compartment.

Wheeler was indicted on weapons charges. In anticipation of trial, he moved to exclude any "prior bad acts" evidence regarding the robbery in Athens; the prosecution countered that it was admissible to prove knowledge and intent under FRE 404(B). The Court denied Wheeler's motion. At trial, the prosecution presented testimony that put Wheeler in possession of a sawed-off shotgun less than 24 hours before his arrest and the jury was given a limiting instruction as to the purpose of the testimony.

Wheeler was convicted, and appealed.

ISSUE: May evidence of prior offenses be admitted?

HOLDING: Under some circumstances

DISCUSSION: Although the case at bar was not to determine whether the robbery in fact occurred, the Court agreed there was sufficient evidence for a jury to "reasonably conclude" that the robbery had taken place and that Wheeler was involved.

The problem arose in that the trial court apparently admitted the evidence "for the purpose of proving identity and absence of mistake," rather than the government's purpose to "show knowledge and intent."

The Court continued:

Evidence of other acts is probative of a material issue other than character if (1) the evidence is offered for an admissible purpose, (2) the purpose for which the evidence is offered is material or 'in issue,' and (3) the evidence is probative with regard to the purpose for which it is offered.⁶²

Further:

The "government's purpose in introducing the evidence must be to prove a fact that the defendant has placed, or conceivably will place, in issue, or a fact that the statutory elements obligate the government to prove."⁶³

⁶² U.S. v. Carney, 387 F.3d 436 (6th Cir. 2004).

⁶³ U.S. v. Merriweather, 78 F.3d 1070 (6th Cir. 1996).

Unfortunately, the Court ruled that the trial court erred in its purpose, because the case did not present any issue of absence of mistake or identity. Wheeler's sole defense was that he didn't know about the gun in the car. However, the Court found that the evidence would have been properly admitted to show Wheeler's knowledge. Further, the instructions were adequate to address the purpose for which it was being admitted – "to prove Wheeler knowingly possessed the firearm."

Wheeler's conviction was affirmed.

42 U.S.C. §1983 - MEDICAL NEED

Spears v. Ruth & City of Cleveland

589 F.3d 249 (6th Cir. 2009)

FACTS: In Feb., 2006, Officer Ruth (Cleveland PD) was dispatched to a call of a man (McCargo) "running up and down the street, hallucinating and otherwise behaving bizarrely." McCargo told Officer Ruth that he'd smoked crack. EMS was summoned but decided he didn't need transport – although it was later disputed whether Ruth told them of McCargo's behavior prior to their arrival. It was also unclear whether he "affirmatively refused medical treatment or remained silent when asked if he needed help." McCargo was arrested for public intoxication and transported. He kicked violently at least once in the vehicle. At the jail, he was "rocking back and forth stating don't let the dogs get me." The nurse checked him and apparently cleared him for admission. Again, there was dispute as to whether the jail personnel was told that McCargo had been smoking crack and that one of the EMT's "had noticed something white in McCargo's mouth."

McCargo continued to hallucinate. He was placed in a restraint chair, "for his own safety," and Tased to "relax his muscles." He was restrained for over three hours, during which time he appeared calm. When he was released, he "began to shake and spit up blood and then became unconscious." He was taken to the hospital and lapsed into a coma, and died eleven months later.

At the time that Officer Ruth encountered McCargo, two conflicting police department policies regarding the transportation of individuals for medical services existed. One policy instructed police who encountered detainees exhibiting signs of 'excited delirium' to transport them to the hospital for treatment, making no provision for officers to engage the services of an EMS vehicle instead. However, Police Chief Wes Snyder's concurrent written memorandum prohibited his officers from transporting any individual to the hospital in a police vehicle for medical services.

McCargo's estate argued that the police prevented Officer Ruth from taking McCargo directly to a hospital and contributed to his death. The policy did provide some instruction on how to recognize excited delirium, but it wasn't clear whether Officer Ruth had been trained on the policy.

The estate sued and the defendants moved to dismiss. Both the City of Cleveland and Officer Ruth were denied dismissal and both appealed.

ISSUE: Does evidence that EMS did not recognize a medical need absolve the officer who also failed to recognize that need?

HOLDING: Yes

DISCUSSION: With respect to Officer Ruth, the Court noted that “several factual disputes exist[ed] regarding how obvious McCargo’s symptoms actually were to Officer Ruth, the EMTs, and jail officers.” However, since both the EMS crew and the nurse “presumably had a greater facility than the average layperson to recognize an individual’s medical need,” and both believed he didn’t need to go to the hospital, the Court agreed it would not have been obvious to Officer Ruth. As such, they found that they had not proved the “obvious existence of a sufficiently serious medical need.”

Further, the Court did not find that his alleged failures to share information with the EMTs and the jail rose to the level of a constitutional violation, and that he was deliberately indifferent to McCargo’s needs. As such, Ruth was entitled to qualified immunity.

Arnold v. Lexington-Fayette Urban County Government
2009 WL 3837655 (6th Cir. 2009)

FACTS: In mid-August, 2005, Cornett was jailed for public intoxication. A few hours later, he had slipped into a coma, and died in a hospital a few days later. His estate filed suit against a number of parties, including LFUCG employees who had contact with Cornett. The defendant employees requested summary judgment, which the District Court denied. They then took an interlocutory appeal.

ISSUE: Must the Court look at the actions of each individual defendant in a medical needs case, before dismissing them from the action?

HOLDING: Yes

DISCUSSION: The Court noted that in a qualified immunity action, it is necessary to do a “individualized assessment of the actions of each defendant,” before making a decision.⁶⁴ In this case, it was not done. Claims of this nature, a “deliberate indifference to serious medical needs,” during a pretrial detention, must be evaluated under the Fourteenth Amendment, rather than the usual Eighth Amendment analysis. Claims under the Fourteenth Amendment have both an objective and subjective component. First, objectively, Cornett’s estate would have to show that he did, indeed, have a “serious medical need that would have been obvious to a layperson.” Next, subjectively, it would have to be showed that the specific “official being sued subjectively perceived facts from which to infer substantial risk to the prisoner, that he did in fact draw the inference, and that he then disregarded the risk.”⁶⁵

During the course of Cornett’s incarceration, each of the named defendants had contact with him, and were allegedly indifferent to his serious medical needs. However, the District Court did not “address the *individual* culpability of each” of the defendants. In order for liability to attach, “he or she must have known of Mr. Cornett’s serious medical need and knowingly disregarded the substantial risk that it entailed.” The Sixth Circuit tasked the trial court with determining what each of the defendants “knew about Mr. Cornett’s condition, when he or she knew it, and what, if anything, he or she did to address it.” Under procedural law

⁶⁴ Phillips v. Roane County, Tenn., 534 F.3d 531 (6th Cir. 2008).

⁶⁵ Comstock v. McCrary, 273 F.3d 693 (6th Cir. 2001)

requirements, for this type of action, any “contested material facts” must be resolved, at this point, in favor of Cornett’s estate.

The judgment was vacated and the case remanded.

42 U.S.C. §1983 - MISTAKEN IDENTITY

Flemister v. City of Detroit 2009 WL 4906904 (6th Cir. 2009)

FACTS: On November 2, 2004, Sanders was arrested by Detroit PD. However, he gave his name as Anthony Flemister and also gave Flemister’s birth date. (Flemister and Sanders are cousins.) Sanders did not appear for arraignment and a felony arrest warrant was issued under the name of Flemister, of course. Flemister learned of this when he was stopped twice by police outside of Detroit. In both instances, he was detained only a few hours and then released, “because the Detroit police declined to come and take him into custody.”

Because he was applying for a job that required a criminal background check, Flemister decided to get it straightened out. Unfortunately, instead he was arrested, booked and fingerprinted on the outstanding warrant. He complained of the mistake, to no avail. His mother contacted several officers, including the officer involved in the original arrest and “gathered enough information ... to figure out that it was Sanders who had used [Flemister’s] identity when he was arrested.” Several days later, after he was transferred to the Wayne County Jail, Flemister continued to protest and ask that they look at the fingerprints or the photo from the original arrest. A few days later, when he was brought to a preliminary hearing, the charges were dismissed because the investigating officer realized he was not the correct subject.

Flemister filed suit against Detroit and a number of Detroit police department employees, as well as against Wayne County and several individual jail deputies, under 42 U.S.C. §1983. The defendants all moved for summary judgment, after limited discovery, and the trial court concluded that Flemister’s “constitutional rights were not violated and that he could not prevail on his state law claims,” either. Flemister appealed.

ISSUE: May some mistaken identity cases not be constitutional violations?

HOLDING: Yes (see discussion)

DISCUSSION: “To establish a §1983 claim against an individual or municipality, the plaintiff must identify a right secured by the Constitution or laws of the United States and the deprivation of that right by the person acting under color of state law.”⁶⁶ Flemister “did not challenge the validity of the warrant,” but instead, “alleged a constitutional violation of the kind articulated in Baker v. McCollan.”⁶⁷ In that case, the Court “suggested that ‘mere detention pursuant to a valid warrant but in the face of repeated protests of innocence will after the lapse of a certain amount of time deprive the accused of ‘liberty ... without due process of law.’” In Baker, the Court noted that the Constitution did not guarantee that “only the guilty will be arrested.” The Court noted that the “question of how long such a mistaken-identity detention must be for it to implicate a constitutional due process right was not resolved by the Court in Baker.” (In that case,

⁶⁶ West v. Atkins, 487 U.S. 42 (1988).

⁶⁷ 443 U.S. 137 (1979).

the subject was held for approximately 7 days.) As in Baker, Flemister argued that the mistake could have been immediately cleared up if someone would have checked the fingerprints and photo and the trial court agreed that it was “troubling that a comparison was not made sooner.” In a case after Baker, Gray v. Cuyahoga County Sheriff’s Dept., the subject was held for 41 days, and that was considered sufficient to press a claim.⁶⁸ Two other cases considered 12 and 30 days, respectively, to be sufficient.

The Court agreed that this case is “materially indistinguishable from Baker,” and as such, found there was no constitutional deprivation of rights. The Court upheld the dismissal of the federal and the state claims.

42 U.S.C. §1983 - USE OF FORCE

Hanson v. City of Fairview Park (Ohio) 2009 WL 3351751 (6th Cir. 2009)

FACTS: At about 6:15 p.m., Officer Brewer (Fairview Park, OH, PD) was dispatched to a call of “a male out of control trashing the house.” The officer found a vehicle crashed into the house with a car driven through the garage door. He found Hanson there - walking about in an agitated manner and beating on a workbench with two clubs. The officer called out to the subject and Hanson approached him, “walking ‘briskly’ with two golf clubs in his hands.” Officer Brewer said that Hanson raised the clubs and said, “I’m coming for you.” Brewer tried to retreat but was trapped by the crashed car. He was unable to retreat further so he shot three times, killing Hanson.

Hanson’s wife filed suit against the officer and the city. During discovery other witnesses and neighbors, however, questioned whether Hanson had anything in his hands. The trial court ruled that “whether or not Mr. Hanson used golf clubs in threatening Officer Brewer was relevant in analyzing the reasonableness of Officer Brewer’s use of deadly force.”

Officer Brewer requested summary judgment and was denied. He then appealed.

ISSUE: May disputed facts be addressed in a summary judgment decision?

HOLDING: No

DISCUSSION: The Court noted that “where an order denying qualified immunity turns on a pure question of law, it may be appealed immediately.” Further, it stated that the “fact-bound nature of an excessive force claim makes [the] inquiry even more problematic.” Each case requires close attention to the “facts and circumstances” and an examination of the totality of the circumstances. In this case, the case resolves on whether Hanson posed a legitimate risk to Officer Brewer. The Court agreed that under Brewer’s assertion of the facts the shooting was justified, but under the facts as presented by the other witnesses, it likely was not. With such a disputed set of facts, qualified immunity could not be awarded at this time.

⁶⁸ 150 F.3d 579 (6th Cir. 1998).

42 U.S.C. §1093 - QUALIFIED IMMUNITY

Morrison v. Bd. of Trustees of Green Township 583 F.3d 394 (6th Cir. 2009)

FACTS: On October 30, 2002, Tika Morrison (Amanda's sister) "called 911 and reported that nineteen-year-old Amanda had a knife and was threatening suicide." Dep. Hopewell (Hamilton County SO) responded and found Amanda sitting outside, alone, in front of a neighbor's home. Amanda told him she'd left her house after an argument with her mother, Cynthia, in which she had stated "I could just kill myself." Officer Celender (Green Township PD) arrived, and went to talk to the family, at Dep. Hopewell's request. He did so and returned to tell Amanda "they would have to take her to the hospital for a psychiatric evaluation, pursuant to Ohio law." At that point, he later stated, Amanda got up and ran toward her home. Amanda, however, later stated that she "announced to the officers that she was going back inside, and simply walked away, thinking the police had finished with her."

At that point, "Officer Celender tackled Amanda from behind and handcuffed her hands behind her back." Her mother emerged from the house and "ran over to where Amanda was lying face down and noticed that the handcuffs were pinching Amanda's skin, causing her skin to turn black and blue." Both Cynthia and Amanda asked the officer to loosen the cuffs and he refused. He later stated he did check the cuffs to make sure they were not too tight. The officer admitted that "Amanda was entirely compliant with his directions while she was handcuffed and that at no point did she attempt to struggle or flee." Amanda did admit to screaming, but said she did so from pain because her ankle was injured when she was tackled.

Other officers arrived, as well as Dennis Morrison, Amanda's father. The officers blocked Dennis from going to his daughter. Paramedics treated Amanda's injured ankle. Dennis stated that while "he was calm during the confrontation, the officers testified (in the lower court decision) that he repeatedly charged them in a hostile manner and, thus, was taken down to the ground by the police and placed under arrest." Amanda was taken to the hospital and released later the same day.

Amanda, Cynthia and Dennis Morrison sued all parties involved, under 42 U.S.C. §1983, claiming excessive force and related issues. All defendants moved for summary judgment, and the lower court granted all parties that relief, with the exception of Officer Celender on Amanda's claim of excessive force, in particular with respect to her claim that "he failed to loosen [the] handcuffs and he repeatedly pushed Amanda's head into the ground after she had been handcuffed and subdued." Celender appealed the denial of qualified immunity.

ISSUE: Is bruising a sufficient injury to prove a use of force excessive?

HOLDING: Yes

DISCUSSION: The Court first reviewed the standard required for qualified immunity, specifically:

A defendant enjoys qualified immunity on summary judgment unless the facts alleged and the evidence produced, when viewed in the light most favorable to the plaintiff, would permit a reasonable juror to find that: (1) the defendant violated a constitutional right; and

(2) the right was clearly established.⁶⁹ The Supreme Court recently considered whether to abandon the Saucier two-prong test in Pearson v. Callahan.⁷⁰ The Court preserved the test but decided it was no longer mandatory to follow the prongs in order.⁷¹ A right is “clearly established” if “[t]he contours of the right [are] sufficiently clear that a reasonable official would understand that what he is doing violates that right.”⁷² Thus, the relevant inquiry is “whether it would be clear to a reasonable officer that his conduct was unlawful in the situation he confronted.”

A Court must review the “subject event in segments when assessing the reasonableness of a police officer’s actions.”⁷³ As such, the Court noted that it “must make separate qualified immunity determinations for each of the two grounds offered by Amanda for excessive use of force: (A) Officer Celender’s refusal to loosen her handcuffs; and (B) Officer Celender’s pushing of her face into the ground while she was handcuffed.”

First, the Court looked at the handcuffing, and noted there was precedent for holding that the “Fourth Amendment prohibits unduly tight or excessively forceful handcuffing during the course of a seizure.”⁷⁴ To prove such a case, the “plaintiff must offer sufficient evidence to create a genuine issue of material fact that: (1) he or she complained the handcuffs were too tight; (2) the officer ignored those complaints; and (3) the plaintiff experienced “some physical injury” resulting from the handcuffing.”⁷⁵ The Court agreed the first two elements were clearly met. The Court noted that there was evidence, apart from Amanda and Cynthia’s statements” that there were marks on her wrist - as the paramedics observed them. The Court disagreed with the officer’s contention that bruising and marks were not enough to constitute a “physical injury.” The Court agreed that enough evidence was presented to deny qualified immunity on the handcuffing issue and upheld the trial court’s decision on that matter.

With respect to the pushing, The Court noted that the “use of force after a suspect has been incapacitated or neutralized in excessive as a matter of law.”⁷⁶

The Court began:

First, Officer Celender essentially argues that the government interest in maintaining officer safety outweighed Amanda’s interest in avoiding force when he pushed her face into the ground. Notably, Officer Celender does not allege that he engaged in this conduct because Amanda threatened officer safety, as he concedes that Amanda was totally compliant while she was handcuffed and that at no point did she attempt to struggle or flee while restrained.⁷⁷ Rather, he claims Amanda’s relatives represented the threat due to Amanda’s “disorderly and inciteful screaming [, which was] likely to escalate an already tense conflict.” However, taking the facts as Amanda asserts them, Amanda screamed out

⁶⁹ See Morrison v. Bd. of Trustees of Green Twp.

⁷⁰ 129 S.Ct. 808 (2009)

⁷¹ Cincinnati, 521 F.3d 555, 559 (6th Cir. 2008) (citing Saucier, 533 U.S. at 201).

⁷² Anderson v. Creighton, 483 U.S. 635 (1987).

⁷³ Phelps v. Coy, 286 F.3d (2002).

⁷⁴ Kostrzewa v. City of Troy, 247 F.3d 633 (6th Cir. 2001).

⁷⁵ Lyons v. City of Xenia, 417 F.3d 565 (6th Cir. 2005).

⁷⁶ Baker v. City of Hamilton, 471 F.3d 601 (6th Cir. 2006).

⁷⁷ Most of this information comes from depositions taken in the case.

of pain and anguish over the ankle injury she suffered when Officer Celender tackled her, rather than to incite her family to violence against the officers. Moreover, although Officer Celender identifies Dennis, Amanda's father, as a particular source of concern because of Amanda's screaming and offers Dennis' arrest as definitive proof of the volatility of the situation, Dennis flatly denied that he was "excited" when he initially approached the officers. Dennis alleged he was escorted away from Amanda merely because he objected when the officers told Amanda that she did not have a right to speak with the paramedics about her injury. According to Dennis, he "made no aggressive actions" before Deputy Hopewell wrestled him to the ground and handcuffed him. Amanda's testimony buttresses the notion that the police instigated the altercation with Dennis, which resulted in him being taken into custody, as she alleged that Officer Celender reacted without provocation to Dennis' appearance on the scene, exclaiming, "Shit, it's the father. Get him." Cynthia and Tika offer further support, claiming Dennis did not appear "upset" nor was he acting "angry," "belligerent," "aggressively," or "nasty" when confronting the officers.

While Officer Celender also cites a safety concern created by the presence of Cynthia and Tika, the record is completely unresponsive of this contention. None of the witnesses in the proceedings below alleged that Cynthia or Tika threatened the officers or behaved in a hostile manner. To the contrary, the pair maintained they refrained from yelling or screaming at the officers when protesting the officers' treatment of Amanda and complied with police orders to leave the scene after Dennis was taken into custody. Officer Celender himself acknowledged that he was not "concerned" about Cynthia or Tika when Dennis was confronting the officers, as "[t]hey weren't pushing their way in. They weren't trying to hit me or her, anything outrageous. I think they were standing off to the side and protesting what was going on."

As such, the Court found that there was no indication that a "threat to officer safety existed" and summary judgment was not warranted. Although Officer Calender asserted that a requirement for at least a de minimis injury should exist, the Court noted that there was no requirement of injury under this type of claim. Further, the Court noted, "gratuitous violence' inflicted upon an incapacitated detainee constitutes an excessive use of force, even when the injuries suffered are not substantial."⁷⁸ As in Pigram, Amanda argued that "Officer Celender applied force to her head when she posed no threat to officer safety." The Court noted that "such antagonizing and humiliating conduct is unreasonable under the Fourth Amendment, regardless of the existence of injury." Further finding that right to be clearly established, the Court affirmed the denial of summary judgment on the two claims presented by Amanda. (The Court had earlier refused to consider the initial tackling to be excessive force and that issue was not appealed.)

42 U.S.C. §1983 - ARREST

Conner v. Southfield (MI) Police Department 2009 WL 3232100 (6th Cir. 2009)

FACTS: On Sept. 5, 2005, Southfield PD officers stopped a speeding vehicle. Rodney Conner was driving and his wife, Terri, was the passenger. The officers found the vehicle on a stolen database and Terri agreed that although it had been stolen, it had subsequently been recovered. She had documents to

⁷⁸ Pigram ex rel. Pigram v. Chaudoin, 199 F. App'x 509 (6th Cir. 2006).

that effect. The officers then discovered Rodney Conner had a valid arrest warrant and he was arrested. Searching the car, they found a gun under the center console. Both Conners were arrested for the weapon.

At the station, Terri Conner was questioned about her husband's possession of the gun, as the detective, Pieroni, thought he might be involved in drug trafficking. She claimed he threatened to implicate her in other crimes if she didn't say the gun belonged to her husband. Eventually both were released from custody.

Terri Conner sued the Southfield PD and Pieroni under 42 U.S.C. §1983, alleging that she was unlawfully arrested and unreasonably detained. Eventually the PD was dismissed from the action. However, it refused to grant Pieroni summary judgment, apparently because "Conner alleged that Pieroni knew she was not guilty of anything." Pieroni appealed.

ISSUE: May an officer be sued for false arrest when the officer did not actually make the arrest?

HOLDING: No

DISCUSSION: First, the Court noted that no claim under illegal arrest can be made against Pieroni, because "he was not present at the arrest and he did not make the decision to arrest." In any event, however, there was sufficient probable cause to arrest her for the charge, because it was hidden in her car and she did not have a license for it. Further, Conner did not assert, and the facts did not indicate, that "Pieroni was responsible for the decision to keep her in custody." His only action was interviewing her.

Because the Court found no constitutional violation, there was no need to decide whether the right was clearly established. The judgment of the lower court was reversed and Pieroni accorded qualified immunity.

Denton v. Rievley
2009 WL 3789913 (6th Cir. 2009)

FACTS: On September 9, 2006, Officer Rievley (Dayton, TN, PD) responded to a domestic violence call. Brandon Denton (the victim) had gone to the jail to complain about an assault by his father (Roy) and his brother (Dustin). Rievley saw marks on Denton's neck, consistent with strangulation, and abrasions on his arms and face. (He confirmed that Denton did not have the marks when he was dropped off at the home by a co-worker.) Rievley and other officers proceeded to the Denton home.

Roy met the officer at the door and Rievley "smelled alcohol." He also saw broken eyeglasses lying on the porch. He decided to arrest both men and grabbed Roy as he turned away. Officers entered in search of Dustin, finding him after a short search. Roy later claimed that "he was standing three feet inside his home and never crossed the threshold" - and that he was dressed only in "sleeping shorts." He maintained that "Rievley forced his way across the threshold and arrested him inside the home."

Roy and Dustin Denton both filed suit against Rievley, under 42 U.S.C. §1983 and various state claims. The District Court found that the officer had probable cause to arrest Roy, but that he was not entitled to summary judgment because (viewing it from Denton's version of the facts) "Rievley had arrested Denton inside his home without a warrant." Further, the Court noted, any reasonable officer would have known of

clearly established law prohibiting warrantless in-home arrests.” The Court did, however, grant summary judgment on the claim of excessive force and assault.

Rievley appealed.

ISSUE: May an individual be arrested in their home for a domestic violence assault if the officer lacks a warrant?

HOLDING: No (but see discussion)

DISCUSSION: The Court agreed that the doorway, itself was a public place, but noted that Denton argued that he never “left his home nor exposed himself to public view.” Since there was “no consent or exigency justifying Rievley’s entrance into [the] home, Denton’s arrest violated Payton.⁷⁹”

Rievley argued that Tennessee law preferred an arrest in a domestic violence case. The Court, however, noted that arrest was not mandated and the law was “silent on whether its preference for arrest applies inside a home when an officer lacks consent or exigent circumstances.” The Court did not find that Tennessee law permitted such arrest “in light on long-standing Supreme Court precedent holding that such arrests violate the Fourth Amendment.”

The Court upheld the denial of summary judgment in favor of the officer with respect to the entry.

42 U.S.C. §1983 - PURSUIT

Jones v. Byrnes

585 F.3d 971 (6th Cir. 2009)

FACTS: On Jan. 23, 2006, Officers Byrnes and Lentine (Redford Township PD) were on patrol; Officer Lentine was driving. At about 5 a.m., they received a call on an armed robbery at a convenience store and that two black males were fleeing on foot. As they approached the store, the officers saw a Ford Taurus driving at a high rate of speed, on a “well-known escape route used in previous crimes in that area.” They suspected it was the getaway car and tried to pull it over. Instead of stopping, however, it accelerated. During the chase, the vehicle ran red lights and stop signs, with the officers following. The in-car video showed the “driver and passenger of the Taurus throwing objects out of the windows at various points during the chase.” Four miles into the chase, the headlights on the Taurus were turned off but it continued its flight. About two miles further, the Taurus ran a red light and struck Jones, who was on his way to work. Jones died.

Jones’s estate filed suit against the officers. The officers requested and were granted, summary judgment on the basis of qualified immunity. Jones’s estate appealed.

ISSUE: Is a police pursuit that does not shock the conscience permissible?

HOLDING: Yes

⁷⁹ Payton v. New York, 445 U.S. 573 (1980).

DISCUSSION: The Court reviewed the law of qualified immunity. In particular, it noted that the U.S. Supreme Court had abandoned the requirement in Saucier v. Katz⁸⁰ to follow a rigid, two-step, sequential process to make the determination. Instead, in Pearson v. Callahan, the court had recognized that the “sequential mandate was cumbersome and often forced courts to decide constitutional questions unnecessarily, and also recognized that the sequential mandate was impossible to force on any given judge’s thought process.”⁸¹ It permitted the use of the Katz process if appropriate in the case, but no longer required it. It left it to the decided courts “which of the two prongs of the qualified immunity analysis should be addressed first in light of the circumstances in the particular case at hand.” (The Court noted, however, that “because Pearson left in place Katz’s core analysis, all pre-Pearson case law remains good law.”)

Since this case involved a police chase, the Court looked to Sacramento v. Lewis, and discussed the “shocks the conscience” standard it set. In that case, the Court noted that “[a] police officer deciding whether to give chase must balance on one hand the need to stop a suspect and show that flight from the law is no way to freedom and, on the other, the high-speed threat to everyone within stopping range, be they suspects, their passengers, other drivers, or bystanders.” The Court also applied Lewis in Meals v. City of Memphis.⁸² Notably, in both cases, the officers were accused of having violated department policy during the chase. In Meals, the court had reversed the jury finding in favor of the plaintiffs and ruled that there “was no evidence of an intent on the officer’s part to harm the fleeing suspect or to worsen his legal plight.” The Court “specifically rejected the argument that the officer’s multiple violations of departmental policy at the very least raised a question of fact from which one could infer malice on the officer’s part.”

Using this analysis, the Court noted that the underlying offense in this case (armed robbery) was actually more serious and “tilts the balance much further towards continuing a dangerous chase than does chasing transgressors of the traffic laws.” As such, if Lewis and Meals, which did involve traffic offenses, did not shock the conscience, than neither could this case do so. (In a footnote, as well, the Court made reference to Scott v. Harris⁸³, stating that although that case was brought under the Fourth Amendment rather than the Fourteenth Amendment, that the “point still rings true.” In that case, the Court noted that it was “loath to lay down a rule requiring the police to allow fleeing suspects to get away whenever they drive so recklessly that they put other people’s lives in danger... The Constitution assuredly does not impose this invitation to impunity-earned-by-recklessness.”)

Although unnecessary in the decision, the court also noted that even if there was a violation of a constitutional right, it certainly was “not clearly established at the time of the incident that actions of that sort crossed the constitutional line. In fact, no cases existed at the time of the opinion, in any circuit, that would give guidance to the officers as to what *would* shock the conscience, just what *would not*.”

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

⁸⁰ 533 U.S. 194 (2001).

⁸¹ 129 S.Ct. 808 (2009).

⁸² 493 F.3d 720 (6th cir. 2007).

⁸³ 550 U.S. 372 (2007).

EMPLOYMENT - FIRST AMENDMENT

Wolfe v. Jarnigan

2009 WL 4885258 (6th Cir. 2009)

FACTS: Wolfe was a Hamblen County (TN) deputy sheriff. He was chief detective until he crashed his car, which put him into a coma. He eventually pled guilty to driving while impaired in the wreck and resigned. He was rehired by Sheriff Purkey as a jail deputy in 2005 and soon asked to go back to patrol status. The Sheriff told him he would have to wait for a year to be considered for that assignment.

In 2006, Jarnigan ran against Purkey, on a platform of eliminating mismanagement and reducing liability, and cited the rehiring of Wolfe as an issue. Jarnigan won the race. Wolfe, of course, openly supported Purkey. After the election, Wolfe tested for a patrol deputy slot, and consistently scored the highest, but the civil service rules allowed the Sheriff to choose between the top five scoring applicants. He did offer to promote Wolfe to jail sergeant if he would take the test, but that would have made him “temporarily ineligible for a patrol position” so he declined.

Wolfe claimed that “Jarnigan told him on several occasions that he would have received the promotion but for his support of Purkey in the election.” However, despite his alleged attempts to do so, Wolfe was never able to catch this on tape, instead, he did catch on tape that he wasn’t being promoted because he “had betrayed the public trust and promoting him would hurt Jarnigan’s re-election chances.”

Wolfe filed suit under 42 U.S.C. §1983, raising a First Amendment retaliation claim. Jarnigan moved for summary judgment, which was denied. He appealed.

ISSUE: Is it critical to present an affirmative defense in an initial answer to a complaint?

HOLDING: Yes

DISCUSSION: The Court began:

To prove retaliation, a plaintiff must show (1) that he engaged in protected conduct; (2) that the defendant took an adverse action against the plaintiff that ‘would deter a person of ordinary firmness from continuing to engage’ in the protected conduct; and (3) that the adverse action ‘was protected at least in part by the plaintiff’s protected conduct.’⁸⁴

If the plaintiff is successful in overcoming all three hurdles, the burden then shifts to the defendant to “prove the harmlessness of the retaliation.” In other words, “even if Jarnigan had an impermissible motive, he would have taken the same adverse action against Wolfe ‘in the absence of the protected conduct,’”⁸⁵ Jarnigan focused his appeal on the last question. However, he did not present this defense to the trial court - “not in his answer, not in his motion to dismiss, not in his motion for summary judgment.” Instead, he “challenged Wolfe’s ability to satisfy the third prong of the prima facie case, arguing that Wolfe never showed that Jarnigan’s promotion decision was motivated in part by Wolfe’s support of Purkey.”

⁸⁴ Sowards v. Loudon County, 203 F.3d 426 (6th Cir. 2000).

⁸⁵ Mt. Healthy City Sch. Dist. Bd. of Educ. v. Doyle, 429 U.S. 274 (1977).

Because it was not raised in the trial court, “Jarnigan forfeited the right to raise it on appeal.” The trial court did not have the opportunity to base its decision on the “Mt. Healthy defense.” In addition, Jarnigan never formally addressed an issue with a belated affidavit from Wolfe, by asking that it be struck from the record or otherwise not considered.

Finally, Jarnigan argued that he could not be sued as an individual “for official acts taken as Hamblen County Sheriff.” The Court, however, noted that “Jarnigan is subject to suit under §1983 only because he acted under color of state law, and the critical factor that makes him subject to suit under §1983 cannot simultaneously insulate him from liability.”⁸⁶

The Court affirmed the lower court’s decision.

⁸⁶ Hafer v. Melo, 502 U.S. 21 (1991); see also Edelman v. Jordan, 415 U.S. 651 (1974).