

# *Case Law Updates*

## *Second Quarter, 2007*

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### *KENTUCKY*

#### *PENAL CODE - PROSTITUTION*

##### Hood v. Com.

230 S.W.3d 596 (Ky. App. 2007)

**FACTS:** Hood owned and operated the Hawaii Spa, in Jefferson County. In May, 2003, a prostitute was arrested at the spa. Some months later, another officer was solicited by a different prostitute at the same location. Both Wha (the prostitute in the second case) and Hood were arrested, and the premises search yielded cash and a large number of condoms.

Hood was charged with promoting prostitution, and convicted. He then appealed.

**ISSUE:** May two incidents of prostitution, at different times, be considered together for a charge of promoting prostitution?

**HOLDING:** Yes

**DISCUSSION:** Hood argued that it was improper to aggregate "two instances of prostitution activity which occurred nine months apart" and that the statute required that the acts of prostitution (for the purpose of a promoting prostitution charge) required the acts to occur on the same day. The Court, however, found no such intent on the part of the statute and quickly upheld the conviction.

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

##### McGregor v. Com.

2007 WL 1804331 (Ky. App. 2007)

**FACTS:** On Aug. 27, 2003, Officer Waskey (Russell PD) pulled over a vehicle bearing "improper license plates" that was crossing the center line. He had both the driver and front seat passenger get out, while McGregor, in the back seat, was instructed to stay in the car. Waskey later testified that he told McGregor to stop "moving around" but that later, he saw "McGregor moving around an item between his feet." He had McGregor get out, and Waskey then found a "loaded, holstered 9 mm pistol and an extra magazine on the vehicle floorboard where McGregor had been seated."

Eventually , McGregor was charged and convicted with being a felon in possession. He appealed.

**ISSUE:** May a subject be found criminally responsible for a gun found the area where they are sitting in a car, in a vehicle they do not own?

**HOLDING:** Yes

**DISCUSSION:** McGregor argued that “no reasonable juror could find him guilty of possessing the gun which was located on the back seat floorboard, as he owned neither the gun nor the vehicle in which it was found.” Waskey testified, however, that the gun was right at McGregor’s feet, and that there was trash under the seats that would have prevented the gun being slid from the front to the back of the vehicle.

After disposing of other arguments, the Court affirmed McGregor’s conviction.

### ***PENAL CODE - THEFT***

#### **Lee v. Com.**

**2007 WL 1300988 (Ky. App. 2007)**

**FACTS:** On April 3, 2003, Lee allegedly stole power tools valued at \$450 from a vehicle owned by Dan Volls Mechanical Service. He was indicted, and tried. He was convicted, and appealed.

**ISSUE:** May an owner-witness testify as to the value of stolen items?

**HOLDING:** Yes

**DISCUSSION:** Lee argued, among other issues, that the Commonwealth failed to prove that the stolen items were valued at more than \$300, as required for a felony conviction. Apparently both a witness and the driver of the vehicle from which the items were taken testified as to the items. Lee contended, however, that their testimony concerning the value of the items were “merely speculation” and that the prosecution was required to do more. The Court noted that Gerth, who vehicle driver possessed the tools, “described both tools in detail,” explained the age of each item, and the price he had paid for each. He also estimated the current resale value. The witness, who was a hardware store manager, also estimated the prices and agreed that Gerth’s estimates were fair.

The Court noted that it was “well-established that ‘the testimony of the owner of stolen property is competent evidence as to the value of the property.’”<sup>1</sup> The Court found no reason to question the jury’s decision that the items were worth, together, more than \$300.

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<sup>1</sup> Com. v. Reed, 57 S.W.3d 269 (Ky. 2001).

## ***PENAL CODE - THEFT BY FAILURE TO MAKE REQUIRED DISPOSITION***

### **Com. v. Perry**

219 S.W.3d 720 (Ky. 2007)

**FACTS:** Taylor arranged with Perry to get a replacement engine for her vehicle. On Feb. 25, 2004, Taylor gave Perry the \$375 agreed upon for the engine. Perry, however, never actually bought an engine, so Taylor asked that the money be returned. Perry failed to do so, so Taylor went to small claims court on the matter and obtained a judgment.

Perry was then charged with Theft by Failure to Make Required Disposition of Property.<sup>2</sup> Taylor was the only witness, and the Court dismissed the case, finding that the relationship between the two was debtor and creditor and controlled by Com. v. Jeter.<sup>3</sup> The Court ruled that criminal charges were inappropriate awarded a directed verdict. The prosecution sought a certification on the law on the question.

**ISSUE:** May a person who fails to purchase an agreed-upon item, for a third person, be criminally charged for failure to do so (when they also fail to return the money)?

**HOLDING:** Yes

**DISCUSSION:** The prosecution argued that Perry “had specifically agreed to use the funds to purchase the engine from a third party and then misapplied the funds” but she countered that the “purchase of the engine was incidental to the underlying service agreement to install the engine.” The Court reviewed similar cases, and found that the facts were sufficiently similar to other cases in which criminal charges were found to be appropriate.

The Court ruled in favor of the prosecution on the certification of the law.

## ***PENAL CODE - ESCAPE***

### **Shanks v. Com.**

2007 WL 1193351 (Ky. App. 2007)

**FACTS:** On Feb. 15, 2005, Lexington PD officers were “conducting an undercover ‘buy/bust’ operation” [targeting] street level drug dealers.” Det. Ridener approached Shanks and solicited \$20 worth of crack cocaine; Det. Patrick remained in the car. Adams, at Shanks’ request, handed Det. Patrick a package of cocaine, Ridener paid him, and the officers left.

Det. Ridener then directed other officers to arrest the pair, and Officer Ford approached Shanks and told him that he was being arrested. Shanks started to back away, and Det. Maynard took Shanks to the ground. Det. Maynard told Officer Ford to pepper spray Shanks, but the spray hit Maynard instead. Shanks broke free and fled. (Adams had already escaped.) The officers chased Shanks and caught him,

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<sup>2</sup> KRS 514.070.

<sup>3</sup> 590 S.W.2d 346 (Ky. App. 1979).

and in the melee, Officer Shannon was struck in the face by Shanks. Eventually, however, Shanks was successfully apprehended.

Shanks was charged with a number of offenses, included assault on Shannon and escape. He argued for a directed verdict on the charges, which the trial court refused. Shanks appealed.

**ISSUE:** Is handcuffing a single hand sufficient custody to justify a charge of escape?

**HOLDING:** Yes

**DISCUSSION:** First, Shanks argued that the assault charge was not warranted because no evidence was presented that he actually intended to injure Officer Shannon, and that no evidence indicated that he actually caused any injury to that officer. The evidence indicated that two of the officers testified that the blows were intentional, and in addition, Officer Shannon introduced photos of bruises and abrasions around her eyes, and indicated that she suffered from dizziness intermittently for a week. That was sufficient to prove the intent and the injury. (However, the Court noted that the statute also prohibits an attempt, and as such, no proof of injury was even required.)

With regards to escape, Shanks argued that he was never actually in custody, and that, at most, his conduct constituted resisting arrest. The Court concluded that the "restraint imposed by Detective Maynard by handcuffing one of Shanks' hands was sufficient to constitute 'custody' for the purposes of the escape conviction." As such, the Court agreed that the escape charge was supported by the evidence.

Next, Shanks contended that a statement by Det. Ridener that "street level drug dealers 'cause a lot of problems' such as robberies and violence in the community." Shanks' attorney had objected to the statement, but the trial court had declined the requested mistrial. The appellate court agreed that his "brief statement was admissible as an explanation to the jury of why the police conduct such operations."

Shanks' conviction was affirmed.

## ***SEARCH AND SEIZURE - TERRY***

### **Blair v. Com.**

**2007 WL 1720133 (Ky. App. 2007)**

**FACTS:** On Jan. 14, 2005, Lexington Metro PD officers were patrolling in a high crime area of town in response to "citizen complaints of loitering and drug activity." Officer Greathouse "observed two persons acting suspiciously" ... and one "walked away when he noticed the officer's patrol car." Officer Greathouse spotted the same two men on a nearby road and called for assistance to observe the pair. Officers Dean and Huddleston arrived to assist, and when one of the subjects got into a car and drove away, they followed. When the officers realized the car had an expired registration plate and that the car failed to signal a turn, they elected to make the traffic stop. However, before they could do so, the vehicle pulled over and the driver got out, leaving the door ajar. The officers, wearing plainclothes but with badges around their necks and ball caps with police insignia, got out and chased the driver. They verbally identified themselves, repeatedly. Officer Huddleston spotted the runner (Blair) drop an item, later found to be a set of digital scales. Finally, Officer Hammond tased Blair and he fell to the ground, sustaining minor

injuries. Blair continued to fight, and eventually, was tased a second time. The officers were finally able to take Blair into custody, and he was charged on traffic offenses, driving on a suspended OL and resisting arrest. They found 7.2 grams of cocaine, cash and paraphernalia on his person. He was eventually charged with trafficking and the traffic offenses.

Blair moved for suppression, arguing that the officers had, at best, only reasonable suspicion and that the seizure was unlawful. The trial court overruled the motion; Blair took a conditional guilty plea and appealed.

**ISSUE:** May independently innocent factors be considered together in making a Terry stop?

**HOLDING:** Yes

**DISCUSSION:** Blair argued that "his interaction with the police officers was in violation of the Fourth Amendment," particularly Terry. In addition, because Blair also "alleged the use of excessive force in effectuating his search and seizure," the Court looked to the "'reasonableness' standard elucidated in Graham v. Connor<sup>4</sup>."

The Court noted that much of the incident was not in dispute, and focused only upon the issues that were. Blair argued that he was unclear of the identity of the individuals chasing him, and argued that he did not know they were officers. However, the Court concluded the trial court had taken all of the testimony into account, and declined to disturb its decision regarding that issue.

Next, the Court discussed whether the officers had sufficient reasonable suspicion to take action. The Court detailed the observations made by the two officers noting that "[w]hen taken individually, and in isolation from the totality of the evidence, many of these factors could be characterized as being indicative of innocent conduct." However, under U.S. v. Arvizu, the Court had held that officers were permitted "to 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."<sup>5</sup> The Court found that "the totality of the evidence in the case sub judice clearly indicates the officers did, in fact, have a particularized and objective basis for suspecting [Blair] was engaged in criminal activity" and thus the original stop was justified.

With regards to the struggle, the Court noted that although Blair stated he was offering only passive resistance to his arrest, that the Court could "find no way of how wrestling oneself from the firm grasp of a police officer can be termed as 'passive resistance' or 'simple nonsubmission.'" In addition, his "continued flight down a darkened street toward a heavily traveled roadway created an escalating risk of physical injury to himself, the pursuing officers, and any motorist or bystander who happened along his path." That would also have justified the officers' belief that Blair would not respond to a citation, necessitating a custodial arrest. Once he was arrested, a search incident to arrest was justified.

Finally, the Court looked to the use of force, with Blair arguing that tasers should be eliminated as deadly weapons. In a footnote, however, the Court noted that there is "no controlling, nor even persuasive, authority to support this proposition" and that "[n]o published cases from Kentucky state courts mention the

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<sup>4</sup> 490 U.S. 386 (1989).

<sup>5</sup> 534 U.S. 266 (2002).

word "taser", and the few Sixth Circuit federal cases in which the term is referenced are civil suits filed by prisoners concerning allegations of civil rights violations." Although Blair argued that he posed no threat, the Court noted that "[a]n officer involved in the day-to-day service of protecting the public must always be mindful of the possibility that a suspect is armed and dangerous, along with the many other inherent dangers involved in law enforcement." Blair further argued that he did not "flee" from the officers, but that he was "unaware of the officers' true identities and because they allegedly did not properly convey their intentions in ordering him to stop, he argues that his act of running was entirely proper under the circumstances." Even if he failed to comprehend that they were, in fact, officers, that failure might be "best ... explained by [Blair's] decision to run from the officer immediately upon exiting his vehicle." Blair "evidenced that he was actively resisting being arrested when he wrenched himself from the grip of Officer Huddleston."

The Court found that the "officers wisely utilized their training and the professional tools provided to them when presented with this tense situation that [Blair], himself, created." The Court found no indication that any jurisdiction classifies tasers as deadly weapons, "nor that their use should be discontinued." The Court concluded that the "force employed was reasonably proportionate to the difficult, tense, and uncertain situation Officer Huddleston and Officer Hammond faced and did not constitute excessive force" even if it was "an unpleasant experience."

The Fayette Circuit Court decision was affirmed.

**Sallee v. Com.**

**2007 WL 1229405 (Ky. App. 2007)**

**FACTS:** On Nov. 10, 2004, at 1:08 a.m., Officer Gentry (Shelbyville PD) spotted a car "backed into a parking lot." He saw two individuals who appeared to be slumping down and trying to be out of sight. Gentry entered the lot and shone lights on the car, but by that time, the second occupant had left. The driver, Sallee, was out of the car and walking away. She indicated the passenger had "gone into a nearby residence."

Sgt. Lewis, responding as back-up, knocked on the back door of the home, and the occupant denied knowing Sallee. She first claimed to have no ID, but when pressed, produced an operator's license, and retrieved the insurance and registration from the car. She remained near the passenger side.

Gentry became suspicious and asked her to move away from the car. He "searched the passenger side for weapons." He spotted a bulge under the floor mat - lifting it, he found a baggie of cocaine. Sallee was arrested and Gentry searched her car further, finding additional contraband. Marijuana was found on her person at the jail.

Sallee was arrested on numerous drug related charged and took a conditional guilty plea. She then appealed.

**ISSUE:** May a vehicle be frisked prior to the occupants being frisked?

**HOLDING:** Yes

**DISCUSSION:** First the Court agreed that the original stop was valid under Terry, as Gentry has sufficient reasonable suspicion that Sallee was involved in some illegal activity. Next, Sallee argued that because Gentry did not frisk her first, before investigating the bulge under the floor mat, that he “did not feel sufficiently threatened” as to justify the search of the car. The Court noted, however, that “Sallee was standing next to an open vehicle” - an area under her direct control. The Court looked to Dockstader v. Com.<sup>6</sup> and found that the search that revealed the cocaine was “constitutionally permissible.”

Sallee’s plea was upheld.

**Strange v. Com.**  
**2007 WL 1196538 (Ky. App. 2007)**

**FACTS:** On April 11, 2005, at about 11 p.m., Officer Hall (Lexington PD) was patrolling an area known for drug activity. He spotted Strange walking toward a pay phone, and when Strange noticed the officer, he “abruptly changed direction and began walking towards a nearby vehicle instead.” Hall turned into the lot to speak to Strange, accompanied by Officer Olivares. Olivares addressed the driver of the van, while Hall spoke to Strange. During the conversation, Hall noticed a bulge in Strange’s pocket, and did a patdown. He determined it wasn’t a weapon, but asked Strange what he was. Strange denied knowing what it was and “gave the officer permission to remove the item.” Hall discovered it to be an “unmarked prescription drug bottle with twelve Oxycontin and five Xanax pills inside.” Strange was arrested and charged.

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

**ISSUE:** May an investigatory stop be based upon reasonable suspicion?

**HOLDING:** Yes

**DISCUSSION:** Strange first argued that the “officers did not have a reasonable articulable suspicion that criminal activity had occurred or was about to occur prior to approaching Strange in the parking lot.” The Court noted that Hall had identified the area as one with high drug activity, and that the pay phone was used to arrange prostitution transactions. The Court found that the totality of the circumstances, including Strange’s evasive actions, and the conflicting answers given by Strange and the driver of the van, were more than adequate to justify the stop.

Strange’s plea was upheld.

***SEARCH AND SEIZURE - EXIGENT ENTRY***

**Causey v. Com.**  
**2007 WL 1196587 (Ky. App. 2007)**

**FACTS:** On Nov. 11, 2005, the Lexington Fire Department responded to a fire at Causey’s sister’s home. (Causey shared the residence.) A firefighter “was instructed by the Incident Commander to search the second floor for human life and for extension of the fire.” This search was “in accordance with

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<sup>6</sup> 802 S.W.2d 149 (Ky. App. 1991).

standard firefighting protocol.” Two firefighters opened a closet door and found 66 marijuana plants under a plastic sheet. They reported what they had found to the IC who then reported it to Lexington police. Officer Bastian seized the plants and subsequently, Causey was arrested.

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

**ISSUE:** May contraband found during a search by firefighters be used to support an arrest?

**HOLDING:** Yes

**DISCUSSION:** The Court looked to Hazelwood v. Com.<sup>7</sup>, in which the Court had “addressed a similar situation and found a warrant to be unnecessary.” In that case, the Court stated that :

... the entry and seizure by police must be strictly limited and enumerated several factors that must be satisfied in order for a warrantless seizure to be permissible in these circumstances: (1) the firefighters must be legitimately on the premises; (2) the discovery of the evidence must be inadvertent; (3) the police must enter only at the request of the firefighter; (4) the seizure must be limited to evidence in plain view and be inadvertently discovered by the firefighter; (5) no further search and seizure is performed; and (6) the search and seizure is accomplished within a reasonable time.

Causey further argued that the plants were not in plain view to the firefighters, but the Court quickly agreed that a “thorough search of the entirety of the closet was a legitimate firefighting function.” They were not searching for contraband, but it was appropriate for the firefighters to take action on contraband they found.

The Fayette Circuit Court decision was affirmed and the plea upheld.

## ***SEARCH AND SEIZURE - CONSENT***

### **Gordon v. Com.**

**2007 WL 1532706 (Ky. 2007)**

**FACTS:** A series of burglaries occurred in Carroll, Henry and Owen between Oct. 6 and Nov. 1, 2004. During the burglaries, jewelry, cash, change and handguns were taken, but no long guns, although they were available. The same day as one of the burglaries, Gordon and Marshall were videotaped at a Kroger store, using a Coin Star machine, and it could be seen that the change was in two distinctive containers taken during that burglary. The victim, suspecting that this might have occurred, was permitted to watch the surveillance video and spotted the pair. The victim, Kinman, contacted the Sheriff’s office, and the Sheriff requested the store contact the office should the pair return.

Sure enough, following the Nov. 1 burglary, the pair returned to the store, and the store manager contacted the Sheriff. Sheriff Maiden arrived as they left the store and recognized them from the tape. He watched Gordon, who had the cash, hand some of it to Marshall. Sheriff Maiden stopped them and kept them from

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<sup>7</sup> 8 S.W.3d 886 (Ky. App. 1999).

leaving, and questioned them about their activities. Jewelry and gloves were visible in the vehicle. The Sheriff obtained an arrest and a search warrant.

A variety of items were found in the car, in particular, items from several of the break-ins. They went to Gordon's address, as listed on his OL, and were told he was living with his sister. They went to that address and received consent to search, finding more items from the break-in. At Marshall's home, again they got consent from Marshall's sister, who actually rented the apartment and shared it with her brother, and found more items from the burglaries.

Both were charged with multiple counts of burglary and receiving stolen property. Gordon moved for suppression, and was denied, and the case went to trial. Gordon was convicted, and appealed.

**ISSUE:** May a primary tenant consent to the search of an entire apartment?

**FACTS:** Yes

**DISCUSSION:** Gordon argued that his sister lacked capacity to consent to a search of the room he occupied in the apartment she rented. The opinion noted that room had no door, only a curtain, and that the three (sister, boyfriend and Gordon) shared a "common possessory interest" in the apartment and that each had authority to grant consent to search the entire residence. The Court noted that it had "previously determined that third-party consent will be considered valid where a reasonable police officer faced with the prevailing facts would reasonably believe that the consenting party had common authority over the premises to be searched."<sup>8</sup>

The Court found that the "sister's rights as primary tenant of the premises were at least co-extensive with [Gordon], as a person merely staying with her, if not superior to [Gordon's]. In Sarver v. Com., the Court had "held that third party consent was valid from the person who paid rent on the residence to be searched and who claimed to have dominion over it."<sup>9</sup> Further, in Colbert v. Com., the Court had "held that a parent as homeowner could consent to the search of the bedroom of [an] adult child, who did not contribute rent or have an agreement with his mother for exclusive control of his room."<sup>10</sup> The Court has interpreted that opinion to state that a "separate bedroom occupied by a family member, not contributing rent, is not considered to be beyond control of the head of the household."

However, even if the Court found differently, it noted that it "would still consider the search to be valid." The officers could reasonably believe that Gordon's sister "could consent to a search of the entire apartment." Next, Gordon argued that it was improper to permit "'extensive' evidence from Sheriff Maiden that items found in [Gordon's] car were burglary tools" and that the Court should have admonished "the jury that the sheriff was speculating about those items." However, the Court noted that defense counsel had objected to the characterization, and that the objection was sustained. Further objections concerning the Sheriff's description of each item, which included a lug wrench, a screwdriver, a brake spoon and finger cots. The Sheriff had been permitted during testimony to speculate about the usage of each item, and the Court agreed that "Sheriff Maiden should not have been allowed to characterize the items found in the car as burglary tools."

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<sup>8</sup> Com. v. Nourse, 177 S.W.3d 691 (Ky. 2005); U.S. v. Gillis, 358 F.3d 386 (6th Cir. 2004).

<sup>9</sup> 425 S.W. 2d 565 (Ky. 1968).

<sup>10</sup> 43 S.W.3d 777 (Ky. 2001).

The Court concluded that the Sheriff's improper testimony was harmless as regards the conviction for receiving stolen property. However, the "burglary convictions present a more difficult question." There was no direct evidence placing Gordon at the scene - no witnesses, no fingerprints. The tools in question "were the sort that could reasonably be found ... in the trunk of any car." The "only evidence that tied [Gordon] to the burglaries was the sheriff's improper, speculative testimony that the tools found in [Gordon's] car were not only burglary tools but were also the tools used to commit one of the burglaries."

The Court reversed the burglary convictions but upheld the conviction for Receiving Stolen Property

**Berry v. Com.**

**2007 WL 1520031 (Ky. App. 2007)**

**FACTS:** On April 27, 2005, Officer Duane (Lexington-Fayette PD) stopped the vehicle in which Berry was a passenger, for a minor traffic violation. The driver was arrested because his OL was suspended. Officer Hicks arrived, and Berry was ordered to get out, to allow the officers to do a search of the vehicle. Officer Duane asked to do a patdown, and Berry agreed.

Officer Hicks began to search the vehicle, and found a firearm under the driver's seat. Officer Duane continued searching Berry, who "became loud, boisterous, and fidgety as Officer Duane moved his hand up Berry's right thigh." He located a "large, hard, and unknown object" and asked Berry what it was, but "Berry responded by yelling, screaming, and making vulgar comments." Berry tried to pull away. As this continued, and people in the area exhibited alarm at Berry's conduct, Officer Duane decided to arrest Berry for Disorderly conduct. He determined the lump was cocaine, but it required the jail staff to cut through his clothing to retrieve it. A bag containing 17.8 grams of cocaine was retrieved, along with \$766 in cash.

Berry was indicted on trafficking in a controlled substance and disorderly conduct. He took a conditional guilty plea, and appealed.

**ISSUE:** May a consent be used to do a patdown?

**HOLDING:** Yes

**DISCUSSION:** The Court noted that the trial court had "expressly found Berry had, in fact, voluntarily consented to Officer Duane's request to perform a patdown search for weapons." The court found "no evidence of coercion, duress, deceit, or other bad act on the part of law enforcement to induce Berry to give his consent." Berry further argued that "Officer Duane exceeded the scope of the consent when he reached through several layers of Berry's clothing" but the court noted that "this increased scrutiny occurred only after Officer Duane had determined to arrest him for disorderly conduct." Once Berry was under arrest, a full search was justified.

Berry's plea was upheld.

## ***SEARCH AND SEIZURE - CRIME SCENE***

### **Robinson v. Com.**

**2007 WL 1300967 (Ky. App. 2007)**

**FACTS:** In July, 2003, Robinson and Blackburn lived together, outside of Inez. On July 12, Blackburn's family gathered to celebrate her birthday, but she did not appear as expected. They asked Dep. Fitzpatrick (Martin Co. SO), who was also the son of Blackburn's landlord, to check on her. Fitzpatrick got a key and went to the residence, accompanied by another deputy. After the deputies knocked and checked on the windows, they entered. Eventually, they ended up in the attic and "immediately sensed the foul odor of decay." They found Blackburn's body under a "heap of curtains" and surrounded by blood.

The deputies left and notified their office, which in turn, notified KSP. Det. Bowman (KSP) arrived, entered with the deputies, viewed the body and "arranged to have it removed." One of the detectives "used a saw to cut out a small section of the wall at the bottom of the attic stairway which appeared to bear a blood hand print." The opinion noted that "[n]othing else was removed from the residence until the officers had obtained a search warrant."

Robinson, who was immediately the primary suspect, was eventually arrested. He requested suppression, which was denied. He took a conditional guilty plea of manslaughter, and appealed.

**ISSUE:** May officers enter a residence to check on the welfare of a resident?

**HOLDING:** Yes

**DISCUSSION:** Robinson argued that the warrantless entries violated his rights and that all evidence, including the body, should have been suppressed. The Court noted that other courts have found an exception to permit officers to enter and "render emergency aid" and to search for a missing person, when it is "reasonable to believe that a missing person may be in imminent danger and also reasonable to believe that the residence is the most likely place either to find the person or to gain evidence of the person's whereabouts." <sup>11</sup> The Court found that "[p]eople do not fail to attend their own birthday dinners without offering some explanation, and in any event we decline to say that family members must miss their loved one for some minimum amount of time before they may become legitimately concerned about that missing person's welfare." For example, "[a]n absence that would not be particularly worrisome in one case might be alarmingly out of character for another."

Next, the Court found that Det. Bowman's entry to view the body, and its removal, did not violate any constitutional provisions either. Blackburn's body was "certainly plain-view evidence that had been discovered in the course of legitimate emergency activities." The Court did acknowledge that the removal of the hand print might have been unlawful, but that did not taint the removal of the body.<sup>12</sup>

Robinson's conviction was upheld.

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<sup>11</sup> See Hughes v. Com., 87 S.W.3d 850 (Ky. 2002).

<sup>12</sup> Although the Court did not note, the warrant would have mitigated the unlawful removal of the handprint, as it could have been removed under the provisions of the warrant. Thus, it was inevitable discovery.

## ***SEARCH AND SEIZURE - CONSTRUCTIVE POSSESSION***

### **Sallee/Waddell v. Com.**

**2007 WL 1192088 (Ky. App. 2007)**

**FACTS:** On Dec. 21, 2004, Det. Perkins (KSP) received a call from a CI, Martir. He related details of a transaction he'd witnessed at Waddell's house. As a result, Perkins submitted the following affidavit:

*That at approximately 10:30 p.m. on December 21, 2004, the Affiant did have a telephone conversation with the a [sic] confidential informant at which time the confidential informant informed Affiant that on December 22, 2004, he (confidential informant) along with a male subject entered the hereinafter described premises. The confidential informant observed the male subject purchase one (1) gram of methamphetamine from a female subject known to the confidential informant as Terrie Lott, 503 North Second Street, Central City, Kentucky. That the confidential informant informed the Affiant that the substance that the male subject purchased was methamphetamine.*

Det. Perkins and Savage executed the warrant the next day, finding Waddell, Sallee, Ricks and three others in the house. The three unidentified individuals were permitted to leave. Det. Savage explained the warrant to Waddell and gave her Miranda warnings. Waddell told Det. Savage that there "might be marijuana or methamphetamine in a filing cabinet in her bedroom" and in deed, both were found, along with paraphernalia and a large amount of cash. Sallee admitted to have drugs in his room, and again, the drugs were found.

All three parties were arrested and eventually indicted. Ricks pled guilty, but Waddell and Sallee proceeded to trial. Both requested suppression of the evidence. In particular, they noted that the affidavit indicated that the CI witnessed a purchase on December 22, but that the CI informed Perkins of it on December 21. The detective explained that it was simply a typographical error. They also argued that Perkins failed to "independently investigate Martir's tip." At the hearing, Perkins related that Martir was very reliable and had participated in numerous cases. The trial court denied the motion.

During pretrial preparation, Martir was brought in as a witness, although previously, he had not been identified. Martir claimed to the prosecutor that he had never been inside the house nor had he witnessed a drug transaction, and the prosecutor notified the defense of these claims. As a result, at a subsequent hearing, Sallee and Waddell claimed that Perkins "included fabricated statements in the affidavit." Perkins reiterated that the affidavit was reflective of what he was told by Martir at the time. Martir testified that he did not go inside, but that a friend, Tabb, had been permitted inside.

The Court declined to change its decision, and both defendants were convicted. They appealed.

**ISSUE:** Is evidence found in constructive possession of a subject sufficient to justify a charge?

**HOLDING:** Yes

**DISCUSSION:** Among other issues, Waddell argued that she was not in possession of the drugs for which she was charged. The prosecution countered that the evidence was, however, in her "constructive

possession" as it was "subject to [her] dominion and control." The appellate court agreed that it was appropriate to deny Waddell's motions to suppress.

Next the Court concluded that although the truth of Martir's statement was questionable, that "Perkins had reason to believe Martir's statement." Even though Martir's testimony contradicted that given by the detectives, the trial court had concluded that the detectives were credible. The Court agreed that the "good faith exception applied and ... the search warrant was valid." The Court concluded that although the detectives did little to corroborate the warrant, that the totality of the circumstances supported probable cause.

The convictions were affirmed.

## ***SEARCH AND SEIZURE - WARRANTS***

### **Drake v. Com.**

**222 S.W.3d 254 (Ky. App. 2007)**

**FACTS:** On March 25, 2005, at about 9 p.m., Sheriff Simon and Dep. Durst (Grayson County SO) went to Drake's trailer home to serve civil process. Because the front door lacked a porch, they went to the rear. There, they "smelled the odor of ether and ammonia coming from around the deck and the back door" and spotted a "twenty-ounce HCL generator under the deck." They recognized the odor as indicating a methamphetamine lab. Simon stayed at the trailer while Durst went for a warrant.

When Durst returned with the warrant, the two officers executed it, finding methamphetamine related items. Drake was indicated on a variety of charges. He requested suppression, which was denied. Drake then took a conditional guilty plea, and appealed.

**ISSUE:** Does the odor of ether constitute sufficient probable cause for a search warrant?

**HOLDING:** Yes

**DISCUSSION:** Strange argued that the odor detected was insufficient to support probable cause. The Court noted that although Kentucky did not yet have law directly on point, that other jurisdictions "have held that odor either alone or in conjunction with other facts and circumstances can provide probable cause.

The Court upheld the denial of the suppression motion, and accepted the plea.

### **Crum v. Com.**

**223 S.W.3d 109 (Ky. App. 2007)**

**FACTS:** Trooper Cure was approached during a call in Pike County by a bystander, Dora Crum. She told the trooper that her estranged husband (James Crum) had several pounds of marijuana at his home. Deputy Sheriff McCoy, also at the scene, heard the statement and told the trooper that he'd heard rumors that Crum was dealing and that he'd gotten information from Dora Crum in the past.

Trooper Cure got a search warrant, and searched the home, finding the marijuana. Crum argued that the search warrant was insufficient, and should be suppressed, but the Court found that at the least, the trooper had sufficient good faith to justify the search. Crum appealed.

**ISSUE:** Must a search warrant detail the items to be seized, to be valid?

**HOLDING:** Yes

**DISCUSSION:** The Court reviewed the "good faith" rule in U.S. v. Leon.<sup>13</sup> The Court reviewed the affidavit in question, noting that:

The affidavit presented to the Commissioner in this case was drafted on a form provided by the Administrative Office of the Courts and reiterates at two places that the affiant has reasonable and probable grounds or cause to believe the statements made in the affidavit. The description of the property to be searched describes with adequate particularity where it is located. However, this is where the particularity stops. As Appellant complains, the thing to be seized is described only as "illegal contraband," the informant is not named, and the officer's reason for believing the informant to be reliable is not stated. The affidavit states that the officer's independent investigation consists of "information" that was received from a deputy sheriff without stating the nature of that information. On the whole, it is impossible to tell the basis of the officer's knowledge or exactly what he is looking for. The affidavit is thus so lacking in indicia of probable cause that any warrant issued on it must likewise be lacking.

...

Testimony before the trial court indicated that the officer did know more, and could have put more information in the warrant. Nonetheless, the warrant is facially deficient because it does not adequately describe the thing to be seized. "Illegal contraband" can be any number of things. In fact, this term is so broad that Trooper Cure actually checked every box on the affidavit form, including one which indicated he was looking for stolen property. Subsequent to a search under such a warrant, an officer could testify that whatever was found was indeed what he meant by "illegal contraband." Such an affidavit is so lacking in indicia of reliability that the officer's good faith reliance cannot be deemed reasonable. Failing to describe with particularity the thing to be seized invites a finding that the other reasons why evidence may still be excluded under Leon and Crayton also apply. Additionally, it differs from simply omitting evidence and facts about how the officer obtained information or what may have been observed as a basis for requesting the warrant.

Failing to state what the object of the search is amounts to requesting permission to go on a fishing expedition. While the requesting officer may indeed be acting in good faith, no one's home should be searched without a specific object of the search being stated. For this reason, failing to name the thing to be seized is not covered by the "good faith" justification for a search on a warrant issued by a judicial officer that lacks probable cause.

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<sup>13</sup> 468 U.S. 897 (1984); Crayton v. Com., 846 S.W.2d 684 (Ky. 1992).

The other deficiencies alleged by the Appellant do not rise to the level of failing to state the object of the search, and standing alone could not overcome the good faith justification .

The appellate court disagreed with the trial court and the conviction was reversed.

**Fulcher v. Com.**

**2007 WL 1536854 (Ky. 2007)**

**FACTS:** On July 24, 2001, Russellville PD received a call that two white men had robbed a boy and fired a shot at him. Various agencies responded. During the search for the assailant, officers "noticed a number of people standing the [Fulcher's] yard..." When those individuals saw the marked cars, they "immediately ran into the woods behind the residence." The officers chased, and spotted two marijuana plants and the smell of ammonia coming from the Fulcher residence. They knocked, but received no answer, so officers left to get a search warrant. While other officers waited at the scene, Fulcher "emerged from the residence claiming to have been asleep." The officers kept Fulcher outside until the warrant was executed. The people who had run into the wood eventually returned to the house and, with the exception of one, were arrested. During the search, officers found a great deal of evidence of methamphetamine manufacturing, which was detailed in the lower court opinion, and which included an altered propane tank. Fulcher was charged accordingly.

On August 1, one of the persons arrested filed a complaint against Fulcher, stating that Fulcher had threatened to kill him. Fulcher was served with search warrants, and while there, the officers found the same propane tank that they'd observed the week before and disabled. They also smelled ammonia/ether. Once again, they got a warrant and once again, found evidence of manufacturing, which included a clear liquid which they diluted and poured out onto the ground. (At the time, that was an acceptable way to dispose of the substance, and was, in fact, the way it is used in agriculture.)

On his first pass through the court system, Fulcher was convicted on a variety of charges, but some of the charges were overturned. On his second trial, he was once again convicted, and once again, he appealed.

**ISSUE:** May evidence be identified by odor alone in a search warrant request?

**HOLDING:** Yes

**DISCUSSION:** First, Fulcher argued that the August 1 search warrant was not adequately supported by probable cause, in particular because the presence of the altered propane tank was used to support both warrants, even though it had been disabled during the service of the first warrant, and because it is "not illegal to possess ether or mason jars containing clear liquid." The Court agreed that the issue of the propane tank might have been misleading, but found that there was no bad faith on the part of the deputy who obtained the warrant. Although the Court would have preferred that the affidavit "been more accurate and clear," the Court found "evidentiary value in the propane tank's presence..." However, even discounting the propane tank, the Court found sufficient remaining facts to support the affidavit, noting that "[w]hile it is not illegal to possess ether, it is simply not a chemical that is typically emanating from or found in most residential households" and is "widely known to be a key ingredient in methamphetamine manufacture."

With regards to the clear liquid in the jars (used to support the charge of having the anhydrous in improper containers), Fulcher challenged the officers' testimony that the liquid was anhydrous, which they identified "based on smell alone." One of the deputies testified that they discarded the material at the scene because they believed that there were no tests available, although the opinion notes that the tank's contents were tested and found to be ammonia, although the test could not distinguish between aqueous (household) ammonia and anhydrous (pure) ammonia. The Court, however, found that his complaints about the lack of testing might be valid, but were not sufficient to render his conviction invalid.

Fulcher's convictions were upheld.

**Bowen v. Com.**  
**2007 WL 1784016 (Ky. App. 2007)**

**FACTS:** On January 25, 2002, Bowen's home in Russell was searched by Fivco Area Drug Enforcement (FADE) Task Force officer, pursuant to a search warrant. The affidavit read, as follows:

*A concerned citizen that they had observed on numerous occasions and particularly on weekends, a high volume of traffic going to and from the BOWEN residence. Persons would enter the residence, stay only a short period of time, and exit the residence.*

*Acting on the information received, affiant conducted the following independent investigation:*

*On or between the dates of January 15th, 2002, and January 18th, 2002, officers of the FADE Task Force conducted surveillance at the residence of MARCUS BOWEN located at 100 Crestview Road, Russell, Kentucky. BOWEN was observed leaving the residence in a 1995 GEO Prism, bearing [sic] Kentucky registration 993-GBM, where surveillance was maintained by FADE officers to a location in Greenup County where BOWEN delivered a quantity of Cocaine to a known drug dealer; that in turn sold the Cocaine to a FADE undercover detective. During the course of another transaction, prior to the aforementioned date, the known drug dealer stated to a COOPERATING WITNESS that MARCUS BOWEN delivered the Cocaine that the COOPERATING WITNESS had purchased. This conversation was overheard and tape-recorded by FADE officers. BOWEN was identified by FADE detective DAVID SMITH on both of the aforementioned occasions.*

Officers found drug-related items, including cocaine and marijuana and drug paraphernalia. Bowen moved for suppression and when that denied, he took an Alford plea. He appealed.

**ISSUE:** May corroborated but stale information be used to support a warrant?

**HOLDING:** Yes

**DISCUSSION:** Bowen first argued that portions of the warrant "were stale and materially false." He noted that the original anonymous tip was from a citizen some seven months prior to the warrant request. Following that tip, the officers set up several successful controlled buys, thereby corroborating that tip. The information obtained during the buys "provided a sufficient nexus between the anonymous tip from the concerned citizen and Bowen's residence." As such, even excluding the tip, the Court found sufficient probable cause to support the warrant.

Bowen's plea was upheld.

**Rowe v. Com.**

**2007 WL 1532334 (Ky. 2007)**

**FACTS:** On the day in question, Robin and Tammy Hylton were shot by a sniper while riding their ATV in a remote part of Eastern Kentucky. After they were both wounded, the assailant walked up and shot Tammy a second time. Robin called 911 and while he was on the phone, the assailant returned, and proceeded to beat him and try to shoot him. The weapon, however, was empty, and the assailant fled on an ATV.

Witnesses arrived at the scene and tried to assist the couple. Trooper Merlo arrived. Robin provided some details about the assault. Trooper Sturgill also arrived and interviewed a number of people who had arrived. He gave the names to Det. Howard, but he did not make a supplemental report about the content of the interviews.

One witness, however, placed Rowe near the scene, and riding a red Kawasaki ATV, as described by Robin. A short time later, Rowe went to the Silcox home and tried to sell them guns and a cell phone – they declined the guns but did buy the phone. Next, Rowe went to his girlfriend's home, she later testified that he had removed his coveralls and she saw he was covered with blood, down to his underwear. Her mother corroborated the information. The girlfriend saw him rinse a pistol of hair and blood. He told her that he'd been attacked by two men on ATVs and that he'd fired a shot during the melee.

Det. Howard investigated and eventually, Robin identified Rowe from a photo lineup. Det. Howard obtained a search warrant, looking for the ATV and guns/ammunition. They did not find a weapon matching the description of the gun used, but did find an ATV "in a shed on adjoining property." However, the location used a different address from that listed on the warrant. The ATV was taken to the post and examined, with DNA testing showing that the blood was Robin Hylton's. Other blood was found on the vehicle that was a combination of Hylton and Rowe's blood.

Rowe was arrested, indicted and eventually convicted on murder and attempted murder charges. He appealed.

**ISSUE:** Is an item seized pursuant to a search warrant from an outbuilding that has an actual address different from the warrant admissible?

**HOLDING:** Yes

**DISCUSSION:** Rowe argued that the seizure of the ATV was improper because it was actually located at an address different from that on the warrant. Even though the shed was located on property owned by someone else, the warrant did authorize a search of all outbuildings. Rowe's father, who owned the property for which the search warrant was drawn, gave consent to the search of the shed where the ATV was found. The legal owner had apparently given permission for the Rowe's to store items in the shed. As such, the Court found that Rowe's father had, if not actual, at the very least apparent authority to consent to the search. The officer who executed the search stated that he was "unaware at the time that the shed was

located at a different address.” The Court found that the troopers acted in good faith and upheld the search.

Rowe also argued that he was entitled to a mistrial because Trooper Sturgill did not produce information relating to the individuals he interviewed at the scene. Trooper Sturgill had stated that “none of these people had witnessed the shooting or professed to know of any other relevant information” and as such, he had simply recorded their names for follow-up, if necessary. He provided the information to the investigating officer, but did not include “this information in a supplement to the official KSP investigative report.” The investigator had noted in his report, which was available to Rowe, that Trooper Sturgill had “interviewed passers-by” and as such, Rowe was “on notice” about the issue and could have followed up with Trooper Sturgill. There simply was no Brady<sup>14</sup> issue, and in fact, there was “no reasonable probability that” the information “would have affected the outcome of the trial.”

After addressing several other issues, Rowe’s conviction was upheld.

**Pate v. Com.**

**2007 WL 1536851 (Ky. 2007)**

**FACTS:** On Sept. 17, 2002, Sgt. Lilly (KSP) was “tasked to execute an arrest warrant on” Pate. Outside the residence, Sgt. Lilly saw “ a black pressure tank sitting outside [Pate’s] door with what appeared to be a green corroded fitting on the top and a section of pipe with a valve welded to the bottom.” Sgt. Lilly explained at trial, later, that he had been trained to notice such corrosion as a “sign that the tank has been used to hold anhydrous ammonia.”

Pate’s wife, Kathy, answered the knock. Sgt. Lilly explained his purpose for being there, and she stated that Pate was not home. He asked to enter to check, and Kathy Pate agreed. When Sgt. Lilly entered, he saw numerous items that suggested the presence of a methamphetamine lab. He asked her what the “stuff” was, and she replied that it was what her husband used to cook methamphetamine. Sgt. Lilly called for assistance and seized the evidence. Sgt. Lilly found Pate in a nearby apartment and made the arrest. Pate complained about the items being taken from his apartment and “blurted out that the officers would find no methamphetamine residue on the items.”

Both Pates were indicted, and Kathy Pate agreed to testify about her husband. Pate was convicted, and appealed.

**ISSUE:** May items related to methamphetamine manufacture be seized without a warrant?

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

**DISCUSSION:** First, Pate argued that the seizure of the equipment from his apartment violated his rights, and that Kathy Pate’s consent was coerced. The Court quickly found that Sgt. Lilly’s actions were appropriate and that he had simply asked for entry to check for Pate. The trial court found her “consent was voluntary and not coerced.” Next, Pate argued that Sgt. Lilly had no right to seize the items and that the “plain view exception to the warrant requirement is inapplicable since the incriminating character of the

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<sup>14</sup> Brady v. Maryland, 373 U.S. 83 (1963).

items was not ‘immediately apparent.’”<sup>15</sup> The Court found that Sgt. Lilly’s experience made the character of the items spotted immediately recognizable as the equipment necessary for a meth lab - making them immediate subject to seizure.<sup>16</sup> Pate further argued that the items inside opaque plastic containers would not have been obvious, but the Court found that the seizure was justified under the “risk of danger to police or others” rationale.<sup>17</sup> Finding the extreme risk of items connected to methamphetamine labs, the Court noted that the seizure was justified, even though no toxic chemicals was ultimately found.

Pate also argued that the trial court erred in permitting Kathy Pate to testify against her husband, under KRE 504. However, the Court noted that the “marital privilege” does not apply when the “spouses conspired or acted jointly in the commission of the crime charged.” Kathy Pate pled guilty to facilitation to manufacture and “was very knowledgeable about the equipment, its purpose, and what [Pate] was doing with it ....” She pled guilty to a lesser offense to avoid a conviction on the great. Kathy Pate’s testimony was admissible.

Pate’s conviction was affirmed.

## ***SEARCH AND SEIZURE - CARROLL***

### **Young v. Com.**

**2007 WL 1519523 (Ky. App. 2007)**

**FACTS:** On Jan 25, 2006, Officer Harvey (Greenville PD) stopped Young for failing to signal a turn. He was the driver in a vehicle occupied by three other individuals. When Harvey approached, he immediately smelled anhydrous ammonia, and he quickly learned that the driver (Young) had a suspended operator’s license. Believing Young was intoxicated, he subjected Young to a field sobriety test, which he failed. Young was arrested for DUI and searched.

The officers then searched the vehicle, finding evidence of methamphetamine manufacture. One of the passengers was arrested for possession of drug paraphernalia, for a syringe found in his vicinity. While the officers were searching the vehicle, the Sheriff noted that the arrested passenger (also named Young) was moving around in the back of the cruiser where he’d been secured, and they found Sudafed pills scattered around.

Not having found the source of the anhydrous odor, one of the officers went to get a search warrant for the car. When the warrant was executed, they found additional items related to methamphetamine manufacturing. The passenger later admitted to their involvement in making meth.

Young (the driver) took a conditional guilty plea, and appealed.

**ISSUE:** Is the odor of anhydrous ammonia sufficient to constitute probable cause for a Carroll search?

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<sup>15</sup> Hazel v. Com., 833 S.W.2d 831 (Ky. 1992); Coolidge v. New Hampshire, 403 U.S. 443 (1971).

<sup>16</sup> Texas v. Brown, 460 U.S. 730 (1983).

<sup>17</sup> See U.S. v. Atchley, 474 F.3d 840 (6<sup>th</sup> Cir. 2007); U.S. v. Plavcak, 411 F.3d 655 (6<sup>th</sup> Cir. 2005); U.S. v. Bishop, 336 F.3d 623 (6<sup>th</sup> Cir. 2003).

**HOLDING:** Yes

**DISCUSSION:** Young argued that the search of the passenger compartment was unlawful. Apparently the trial court had justified it under the automobile exception (a Carroll search). The court quickly agreed that Harvey's detection of the anhydrous odor was sufficient evidence to permit the search. The Court quickly discounted Young's assertion that exigent circumstances were needed for such a search.<sup>18</sup> The Court had agreed, in the alternative, that the search was justified as incident to Young's arrest and again, since at least one of the occupants was arrested, the search was also justified under that theory.

The conviction was affirmed.

### ***SEARCH AND SEIZURE - PLAIN VIEW***

#### **Gay v. Com.**

2007 WL 1201700 (Ky. App. 2007)

**FACTS:** On Jan. 19, 2004, the Berea PD received a call about an abandoned vehicle. Officers responding to the scene found a "truck with a flatbed trailer parked in the turn lane." They found Gay asleep behind the wheel, and awakened him. At that same time, one of the officers saw "two motorcycles in plain view without license plates on the trailer." He obtained the VIN numbers, which were found, also in plain view, on the motorcycle frame. The motorcycles were found to have been stolen; Gay was arrested. During a search of his person, the officers also found drugs.

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

**ISSUE:** Is information found in plain view a Fourth Amendment search?

**HOLDING:** No

**DISCUSSION:** The Court quickly noted that since the VIN numbers were in plain view, that the officers did not even engage in a search protected by the Fourth Amendment. As such, the suppression motion was properly denied and the conviction was upheld.

#### **Smith v. Com.**

2007 WL 1784088 (Ky. App. 2007)

**FACTS:** On May 20, 2005, Officer Greathouse (Lexington PD) was patrolling on bicycle with fellow officers at about 9 a.m. The officers spotted "Smith standing outside the driver's side of a maroon Expedition which was parked on the street." They watched as Smith "[o]n at least four occasions," place "his hand in his pocket," pass "something to the driver with his closed fist," take "something from the driver, and then" return "his closed fist to his pocket." Other individuals approached the vehicle during this time.

Two of the officers approached the vehicle and instructed those around the vehicle to put their hands on the vehicle. Smith ran, chased by Officer Greathouse. Smith jumped fencing and dashed into an

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<sup>18</sup> Adams v. Com., 931 S.W.2d 465 (Ky.App. 1996).

apartment building. The officer circled to the front of the building, and when Smith tried to get out through an upstairs window and saw the officer, he went back inside. Officer Greathouse heard banging and yelling and ran inside. The maintenance man stated that "someone had kicked in an apartment door and run inside." Upon demand, however, Smith came outside. "Upon searching the apartment which Smith had entered, Greathouse for marijuana and generic Xanax. (The apartment was vacant.)

Smith was charged for the drugs and requested suppression. When that was denied, Smith took a conditional plea. He then appealed.

**ISSUE:** Is a subject who is running (and who has never been caught) seized under the Fourth Amendment?

**HOLDING:** No

**DISCUSSION:** Smith argued that the drugs should have been suppressed. First, he contended that he was seized when the officers approached the group. However, the Court noted that he did not comply with Greathouse's "show of authority" but instead, ran. As such, he was not seized until he actually submitted - when he came out of the apartment building and put his hands up.

Next, the Court considered whether Greathouse had probable cause to make the arrest. Given the facts available to the officer, the Court concluded that he had sufficient probable cause to make the arrest. Even though Greathouse admitted that "when he initially approached Smith on his bike, he intended to take Smith into custody for either dealing narcotics or criminal trespass," the Court noted that "an officer's subjective intent is irrelevant except insofar as it may have been conveyed to the detainee."

The Circuit Court's decision was affirmed.

## ***VEHICLE STOPS***

**Lindquist v. Com.**  
**2007 WL 1720144 (Ky. App. 2007)**

**FACTS:** On Nov. 10, 2002, Troopers Witt and Bunch (KSP) "were traveling in separate police cruisers on a secluded gravel road." Witt spotted a "new-model van" some fifty yards off the road, with its lights on. Because there were no other buildings nearby, and it was late, the troopers approached the van on foot. They found Lindquist, with a bloody arm and partially undressed, under circumstances that made it clear he had been injecting IV drugs, with a small bag of white powder in the cup holder. Witt arrested Lindquist for possession of cocaine.

Lindquist later stated that while he was in the area, it would not have been possible for the troopers to have seen any drugs in plain view, and that he did not have blood on his arm. He requested suppression, but was denied. He then took a conditional guilty plea, and appealed.

**ISSUE:** Is it appropriate to order individuals out of a vehicle?

**HOLDING:** Yes

**DISCUSSION:** First, the Court discussed whether Trooper Witt had reasonable suspicion to require Lindquist out of his van. Given the information available to the troopers at the time, Lindquist's condition and a syringe found by Bunch on the ground nearby, the Court found that it was, in fact, reasonable for Witt to do so. Once Lindquist stepped out of the van, Witt had the cocaine in plain view, which justified the arrest.

The Whitley Circuit Court's judgment was affirmed.

**Perry v. Com.**

**2007 WL 1300985 (Ky App. 2007)**

**FACTS:** On the night of the arrest, Perry had stopped his car on the Hal Rogers/Daniel Boone Parkway. Officer Collett, KVE came along and stopped to see if he needed help. But, as Collett pulled in, Perry took off into traffic. Collett made a traffic stop to determine if Perry was impaired. Collett cited Perry for careless driving and asked Perry if he'd "take anything that might impair his driving." Perry produced three Percocet pills from his pocket. Collett gave him field sobriety tests, which he failed, and arrested Perry for DUI and possession of a controlled substances. During the subsequent search, Collett found 13 bags of cocaine.

Perry was indicted, and requested suppression, arguing that Collett lacked even reasonable suspicion to stop him. When that was denied, Perry took a conditional guilty plea, and appealed.

**ISSUE:** May an officer stop a vehicle to determine if a driver who had been parked along the road is alright?

**HOLDING:** Yes (fact-specific)

**DISCUSSION:** Perry argued that he had, apparently, been "improperly subjected to multiple stops in close proximity, and he was unduly detained at the scene." He also argued that Collett's in car video did not support Collett's version of events, but it was not made a part of the record. As such, the appellate court could not use it. The Court concluded that Collett's testimony supported the original stop and as such, the ensuing arrest and search were lawful as well.

The Laurel Circuit Court decision was affirmed.

**Wade v. Com.**

**2007 WL 1536858 (Ky. 2007)**

**FACTS:** On Sept. 11, 2005, Wade was a passenger (in his own vehicle) when they "came upon a safety checkpoint." Trooper Burton asked the driver, Stewart or his OL and insurance card. Stewart originally gave Burton a false name, but then admitted he did not have an OL nor did he know his SSN. Wade offered his license and explained the vehicle belonged to him.

Trooper Burton realized that Stewart was intoxicated, proved it with FSTs, and arrested him. Cocaine and paraphernalia was found during the search incident, on Stewart's person. The troopers summoned a dog to check the vehicle. Burton was asked to get out, and was patted down. During that patdown, the trooper

found over \$5,000 in cash, in various pockets, which Wade explained was intended to buy a vehicle.<sup>19</sup> Trooper Combs arrived, with Rex, who quickly alerted to the trunk. There, the troopers found more drugs. The stop lasted no more than 15 minutes.

Wade, who had an "extensive criminal history" was arrested for possession of the drugs. He was convicted, and appealed.

**ISSUE:** Must officers permit an owner-nondriver of a vehicle to immediately leave after the nonowner-driver is arrested?

**HOLDING:** No

**DISCUSSION:** Wade argued that the delay at the checkpoint was too long, and in particular, that once Stewart was arrested, he (Wade) should have been permitted to leave. The Court, however, noted, that Stewart's arrest justified the search of the vehicle, and that the dog sniff took place contemporaneously with that lawful search. The Court noted that the "additional minute or two" it took for Rex to alert upon the vehicle was immaterial, and that they had "legitimate reasons to extend the stop even beyond the search of the passenger compartment of the vehicle." In particular, the Court noted that the vehicle was actually not titled to either man, although Wade did, in fact own it, as title had not yet been transferred.

The Court found that the officers "diligently pursued their investigation and did not pretextually or impermissibly stall the stop for the sole purpose of allowing a canine unit to sniff the vehicle." Wade's conviction was affirmed.

**Dixon v. Com.**

2007 WL 1519351 (Ky. App. 2007)

**FACTS:** On Oct. 17, 2001, Det. Duvall and Officer Seibert (Henderson PD) were sitting in their separate vehicles, talking, when they spotted Dixon driving down the street. Duvall knew that Dixon's license was suspended, so the two officers proceeded to make a traffic stop. As Dixon got out, Seibert saw him toss a plastic baggie to the ground. Det. Duvall secured Dixon, and they officers retrieved the baggie, finding that it contained crack contained. During the search of the vehicle, they found a note that reflected money transactions, and was later used to support a trafficking charge.

Dixon was charged, requested suppression and was denied. He then appealed.

**ISSUE:** Is knowledge that the driver of a vehicle has a suspended OL sufficient to justify the stop of that vehicle?

**HOLDING:** Yes

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<sup>19</sup> In a footnote, the Court noted that: "Although not challenged by Appellant, it is questionable whether police lawfully seized money from Appellant during the pat down search for weapons." See Minnesota v. Dickerson, 508 U.S. 366 (1993) (items may be seized during a pat down search for weapons only if the item could reasonably be a weapon or if the item's incriminating character is immediately apparent by touch or feel); Com. v. Whitmore, 92 S .W.3d 76 (Ky. 2002) ("The purpose of the limited [pat down] search is not to discover evidence of a crime, but to allow the officer to pursue the investigation without fear of violence.")

**DISCUSSION:** Dixon argued first that the officers lacked probable cause to stop, and then search, his vehicle. The Court noted that Duvall's knowledge that Dixon's license was suspended, the initial stop was adequately supported by that observation, even though Dixon had apparently stopped the car in a parking lot by the time they caught up with him. Officer Seibert's witnessing of Dixon dropping a suspicious baggie, and its subsequent investigation, more than sufficed to support his arrest. From there, the search incident of the vehicle was appropriate, and justified the discovery of the paper.

Dixon's conviction was upheld.

## ***SUSPECT ID***

**Greenwell v. Com.**  
**2007 WL 1532658 (Ky. 2007)**

**FACTS:** On June 5, 2003, Willett went to the lake with her family. They left and as Willett "was packing things into her car to go home" she "noticed a man approaching with a shotgun pointed at her." She spoke to him but he didn't respond. Willett got into her vehicle and tried to leave, but he "appeared at the door of the vehicle and demanded the keys." She refused, but he snatched the keys. She tried to get a second set, but the man "repeatedly ordered her out of the car." He finally shot her twice, wounding her seriously. "Willett played dead" and the man "disappeared into the woods." She called for help, and police and EMS arrived. She described the man as a "relatively tall white male with a large building, wearing blue jeans and a bandana." The investigating "officers took photographs and recovered two spent cartridges outside the driver's side car door" and then released the car to Willett's family. They took the car to be cleaned, and the "person who detailed the car found one live ammunition round under the passenger seat."

Greenwell became a suspect and Det. Snow "assembled a photo lineup." The photo he used was a year-old jail booking photo in which Greenwell had a "bandana on his head. Det. Snow found five other photos, added a bandana to each photo and "made a black and white copy of the six-man photo array." Willett "identified Greenwell as a possible suspect, but then stated that another subject more closely resembled her assailant." Greenwell was arrested on another charge, and "Snow then assembled a new photo array" - using Greenwell's new booking photo - "with the subjects portrayed in color." "However, none of the subjects in the first photo array - other than Greenwell - were included in the second photo array." When presented with the photos, "Willett immediately identified Greenwell as her assailant."

Following his arrest, "Greenwell moved to suppress the out-of-court identification, and Willett's in-court identification, claiming an unduly suggestive procedure." The trial court denied the motion and admitted the evidence. Greenwell further sought a "missing evidence jury instruction" because he was not given the opportunity to examine the car prior to it being cleaned, but again, he was denied.

Greenwell was convicted, and appealed.

**ISSUE:** Is it a problem to offer a witness two different photo arrays, with only the identified subject in both?

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

**DISCUSSION:** The Court first discussed the issue of the photo lineup. The Court noted that:

There are no allegations that Detective Snow influence Willett's decision or that Greenwell's picture was overtly distinct from the other subjects in either photo lineup. It is troubling, however, that Detective Snow replicated only Greenwell's picture in the second photo lineup. Our concern is heightened by the fact that Willett was unable to make a definitive identification during the initial photographic lineup. Although she did indicate from the first photo lineup that the man who shot her resembled Greenwell, she also pointed to another man's picture and said that his face looked more like the man who had shot her. Only when presented with the second photographic lineup that included Greenwell - but none of the other subjects from the initial lineup including the man she had earlier identified - did Willett conclusively identify Greenwell as her assailant.

The Court expressed concern that the identification was influenced by Willett's possible recognition of Greenwell from the earlier array. By excluding the other man she had identified, it conveyed the message that her "tentative selection" of that other man was not correct. However, although the Court stated that "using multiple photo arrays in which only the suspect's photograph appears in each is bad practice and will be subjected to heightened scrutiny" that in this case, the "practice did not open the door to misidentification or infringe Greenwell's right to a fair trial." In this situation, the Court noted that there were "substantial differences in the two photos of Greenwell" and as such, "its inclusion ... did not constitute an unduly suggestive procedure." The Court "was convinced that [Willett] was attentive and "her description ... matched Greenwell in all material respects." The Court upheld the identification.

With regards to the missing evidence issue, the Court noted that there was no indication of bad faith, and that while it was "true that having the car detailed may have destroyed potentially exculpatory evidence, there [was] no evidence that the car was detailed at the behest of the Commonwealth." The investigators took photos of the vehicle, which were provided to Greenwell. The Court agreed that the denial of an instruction about missing evidence was appropriate.

Greenwell's conviction was affirmed.

**Leach v. Com.**  
**2007 WL 1452570 (Ky. App. 2007)**

**FACTS:** Leach was accused in four different incidents (involving five victims) on two days, in which he robbed high school students. Although he did not show a weapon, he threatened to beat up, choke or kill the students if they did not give him money. The last victim immediately reported the robbery to a patrolling officer, Sgt. Webb, who got a description of the robber. Leach was "ultimately spotted and [taken] into custody." The last victim identified Leach in a show-up. Det. Horn put together photo packs to show to three victims, each of whom identified Leach. Det. Walker, working on the first case, realized that his case was similar to Det. Horn's and showed the photo pack to his victim, who also identified Leach..

Leach was indicted for second-degree robbery. He was eventually convicted, and appealed.

**ISSUE:** Is it important to tell the suspect that they have, in fact, been identified by a witness?

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

**DISCUSSION:** First, Leach argued that his verbal threats did not constitute “force” for purposes of robbery. The Court reviewed the testimony of the victims, and quickly agreed that the verbal threats were clearly force.

Next, Leach argued that the introduction of evidence of “prior bad acts” under KRE 404 was inappropriate, but the prosecution claimed that the evidence was necessary because those acts (the series of robberies) were inextricably intertwined with the crimes for which Leach was being tried.”<sup>20</sup> The Court noted that the trial court went to great lengths to balance the interests of the two sides and had properly cautioned the prosecution about precisely how much information of the other acts could be shared.

Finally, Leach argued that he was not told that one of the victims had identified him at the police station. The trial court held a suppression hearing on the matter, and following the hearing, elected to admit the testimony. The Court found this to be a “reasonable response” to the motion and upheld the admission.

Leach’s convictions were upheld

## ***INTERROGATION***

### **Cummings v. Com.** **226 S.W.3d 62 (Ky. 2007)**

**FACTS:** Cummings was arrested by Louisville PD officers in September, 2002. “He waived his Miranda rights and detectives began questioning him.” He then invoked his right to counsel, and the officers immediately stopped the questioning and turned off the tape recorder. Det. Arnold stayed with Cummings, while Det. Duncan left the room.

Det. Arnold later testified that Cummings “initiated conversation with him.” Det. Arnold told Cummings that “he did not know if he could talk with him since [Cummings] had already asked for an attorney.” When Cummings insisted he wanted to talk, Det. Arnold advised him again of his Miranda rights. “None of this exchange was tape-recorded.” Dets. Duncan and Wilfong listened from outside the room, and Det. Duncan instructed Det. Wilfong to go back and question Cummings about other rapes in which he was a suspect. “The tape recorder was eventually turned back on and [Cummings] made incriminating statements.”

Cummings requested suppression, eventually, and Dets. Duncan and Arnold testified as to the above. Cummings stated, however, that while the tape recorder was off, Det. Duncan “threatened him and his family.”

The trial court denied the motion, finding no evidence of any “coercion, threat, or discomfort” in the transcript. Cummings took a conditional guilty plea, and appealed.

**ISSUE:** May a suspect re-initiate interrogation after asking for an attorney?

**HOLDING:** Yes

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<sup>20</sup> Leach was apparently a defendant in another case Det. Horn was investigating.

**DISCUSSION:** The Court started its review by noting that “[i]n order to use statements, whether exculpatory or inculpatory, made by a defendant subjected to custodial interrogation, the prosecution must demonstrate that [Cummings] was advised of his Fifth Amendment rights, including the right to remain silent and the right to an attorney.” If the waiver “knowing, voluntary, and intelligent,” the statement may then be admitted. Further, “[o]nce an accused has expressed a desire to deal with the police only through counsel, he is not subject to further interrogation by the authorities until counsel has been made available to him, unless the accused himself initiates further communication, exchanges, or conversations with the police.”<sup>21</sup>

In this case, the Court found no indication that Cummings’ waiver was coerced in any way, and the transcript supported the assertions by the detectives as to what occurred. Once the Court determines that the “inquiries or statements were intended to initiate a conversation with authorities” and that the defendant gave a “voluntary, knowing, and intelligent” waiver of his right to counsel, the information was admissible.<sup>22</sup>

Cumming’s plea was upheld, but it was remanded for sentencing errors.

**Morrison v. Com.**  
**2007 WL 1575305 (Ky. App. 2007)**

**FACTS:** Morrison was arrested on May 14, 2003, and taken to the Fayette County Detention Center. He was placed in a holding cell. When he became combative, Officer Blair, who had dealt with him before, responded. Blair later related that Morrison has asked him to get him in the back (presumably the regular cells) because he was tired, and volunteered that he’s “robbed some places.” Blair questioned him about the places he had robbed or “hit” and Morrison described two robberies in detail. A jail supervisor overheard the statements and contacted Lexington PD.

Several days later, Det. Sarrantonio brought Morrison in for questioning, and gave him his Miranda warnings. Morrison agreed to talk and confessed to both robberies, providing numerous details. He was later identified by a witness in a photo lineup.

Morrison was indicted, and moved for suppression, arguing that Blair had improperly questioned him. The trial court agreed to admit the first statement, but stated that “Blair should not have gone forward with his questioning of Morrison after this initial statement” and that those replies would be suppressed. It declined to suppress the confession made to Det. Sarrantonio, however. Morrison took a conditional guilty plea, and appealed.

**ISSUE:** May an unsolicited statement, prior to being given Miranda warnings, be admitted?

**HOLDING:** Yes

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<sup>21</sup> Edwards v. Arizona, 451 U.S. 477 (1981).

<sup>22</sup> Oregon v. Bradshaw, 462 U.S. 1039 (1983).

**DISCUSSION:** Morrison argued that his statement to Det. Sarrantonio should have been excluded as a "fruit of the poisonous tree" of the original tainted questioning. The Court, however, found the "voluntary statement was sufficiently severable from the tainted and suppressed interchange that followed." Since he had been properly given his Miranda warning before he confessed, the Court found the confession to be properly admitted. The court noted that there was "no exchange between Morrison and Blair" but that, "[i]nstead, Morrison literally blurted out that he had 'robbed some places' in an unsolicited, unprompted statement -- perhaps because he had been drinking." However, "[r]egardless of the reason for his boasting or foolhardiness, whichever the case may be, he himself boldly made the statement." Blair was not interrogated in the usual meaning of the word, nor was there any coercion and at best, the comments occurred in the "course of casual conversation." The passage of time between the unwarned statement and the warned interrogation, six days, eliminated any possible taint, and in addition, the second statement took place in a different place and was with a different law enforcement officer.

The Fayette Circuit Court decision was affirmed.

### ***TRIAL PROCEDURE***

#### **Randolph v. Com.**

**2007 WL 1192028 (Ky. App., 2007)**

**FACTS:** On Jan. 31, 2000, Randolph (age 18) and a friend (age 15) were riding ATVs. They "decided to find a car and drive around town." The juvenile was aware of a person who left their keys in their car, and they stole the Ford LTD, with Randolph driving and the juvenile acting as the lookout. They drove around Wayne County and eventually into Clinton County. They found a Camaro by the side of the road and they stopped - Randolph got inside that car. A KSP trooper drove past, and the juvenile took off in the original stolen vehicle. The trooper pursued that vehicle and radioed the local PD to check on the Camaro. Both were subsequently arrested.

Randolph was indicted in Clinton County for Theft and RSP, as well as unlawful transaction with a minor. The juvenile testified against him at trial. Eventually Randolph was convicted on attempt to commit theft (the Camaro), RSP (the Ford) and UTM. Randolph appealed.

**ISSUE:** Should officers avoid mentioned (in testimony) prior interactions with the defendant?

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

**DISCUSSION:** Among numerous issues, Randolph argued that the court erred by permitting the jury to hear inadmissible testimony from the investigating officer. That officer, who was involved in Randolph's arrest, mentioned that he had recognized Randolph "from other cases that [he] ... had with him in the past." Randolph argued that a mistrial was needed. The Court found that the statement did not necessarily imply that Randolph had a criminal history and that no matter what, a mistrial was too extreme a remedy.

Randolph's conviction was affirmed.

**Moore v. Com.**  
**2007 WL 1192005 (Ky. App. 2007)**

**FACTS:** Moore was tried and convicted on sexual abuse. (The facts of the substantive case are immaterial to the issue.) He appealed.

**ISSUE:** Is there such a concept as “investigative hearsay?”

**HOLDING:** No

**DISCUSSION:** Among other issues, Moore argued that he suffered substantial prejudice as a result of hearsay testimony from the investigating detective. Det. Patrick testified concerning information told to him by the juvenile victim. The Court noted that “[u]nder certain circumstances, a police officer may testify about information furnished to him during an investigation.” However, it further noted that “there is no such concept as investigative hearsay.”<sup>23</sup> The prosecution argued that the “testimony was permissible because it was offered to explain subsequent action taken by the officer.” The Court disagreed with this contention, particularly because the officer “went into great detail about what the victim told him during the interview.” However, the Court concluded that the error was sufficient to overturn the case on that issue.

Next, Moore argued that the Court erred in permitting the investigator “to testify that sexual abuse does not always result in physical evidence detectable in a medical exam.” Moore contended that certain of the detective’s testimony “concerned specialized medical testimony” and that he had not been qualified as an expert on the issue. The test for such cases is whether the judge abused his discretion in permitting the testimony. The Court looked to Sargent v. Com.<sup>24</sup> and Martin v. Com.<sup>25</sup> and concluded that unlike those two cases, the detective in this matter was testifying concerning “medical findings, and he was not qualified to testify as a medical expert.” The Court looked to R.C. v. Com.<sup>26</sup>, as well, and found that like the social worker in that case, Det. Patrick was not sufficiently qualified to give testimony about the matter in question.

The prosecution countered with the argument that the defense opened to door to such testimony, but the Court concluded that the error was enough that it may have prejudiced the case.

The Scott Circuit Court’s decision was reversed and the case remanded for further proceedings.

**Abell v. Com.**  
**2007 WL 1192455 (Ky.App. 2007)**

**FACTS:** On April 30, 2005, Abel met with his ex-wife in the park, they were to meet about money he believed she had taken from him. His girlfriend, Hardwick, saw him sitting there and stopped to talk, and she left about 2 p.m. During their discussion, she gave him a “few cigarettes.”

Officer Garrett, who was off-duty, saw “Abell hand a baggy to Hardwick.” He could not identify what was inside, but thought a drug transaction had transpired. He contacted Officer Miller. Officer Miller decided to

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<sup>23</sup> Sanborn v. Com., 754 S.W.2d 534 (Ky. 1988).

<sup>24</sup> 813 S.W.2d 891 (Ky. 1991).

<sup>25</sup> 170 S.W.3d 374 (Ky. 2005).

<sup>26</sup> 101 S.W.3d 897 (Ky. App. 2002); see also Hellstrom v. Com., 825 S.W.2d 612 (Ky. 1992).

follow Abell when he finally left, and contacted Trooper Woodrum to assist. Officer Miller stopped Abell, explained his suspicions and “patted Abell down.” Officer Miller found 10 Klonopin<sup>27</sup> pills in Abell’s pocket and arrested him.

Trooper Woodrum and Officer Allen searched Abell’s truck and found a CD case containing baggies, cash, rolling papers and scales under the driver’s seat. Hardwick pulled up to find out what was going up. The officers detected the odor of marijuana and asked her about it: she admitted to having been smoking it. She was subsequently arrested as well.

The officers got a search warrant for Abell’s home and found marijuana seeds, pills and other items. Abell was eventually convicted on a variety of charges, and appealed.

**ISSUE:** Should an officer avoid mentioning prior criminal information about a defendant?

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

**DISCUSSION:** Officer Garret was asked by Abell’s counsel about why he had contacted Officer Miller, and he explained that “he believed that Abell was engaged in a drug deal.” When pressed for further information, Garrett explained that they had “got[ten] a lot of complaints on him for trafficking drugs.” The prosecutor then “asked Garrett about the nature of the complaints the police had received regarding Abell.” Garrett’s reply was as follows:

... the department got “complaints that he is a drug trafficker and, um, just from different people that comes and tells me that knows him that we need to watch him more often, you know, closer, and, uh, one of our Officers have arrested him with drugs before.”

At that point, he was told to “stop answering the question” and the judge admonished the jury to ignore his last statement. Abell stated that the officer should consider the potentially prejudicial effect of the statement and overturn the conviction. However, the Court concluded that there was no “manifest injustice” and that it must presume that the admonition to the jury was successful in mitigating the harmful effect of the officer’s statement.

Abell’s conviction was affirmed.

**Farris v. Com.**  
**2007 WL 1159624 (Ky. 2007)**

**FACTS:** Farris was accused of shooting and killing his housemate, Cumbers. He was subsequently indicted for murder. During the trial, Det. Day was to testify as to his “opinion that the murder weapon has misfired,” but the defense counsel argued that he was not a firearms expert. The prosecution agreed, and the Court “ruled that Day should limit his testimony to the actions he undertook at the scene and the observations he made.” However at the trial, when asked “if he made any observations about the live rounds he removed from the revolver, Day testified that the markings on the rounds indicated that they were misfires.” (Day had found “one empty chamber, two expended cartridges, and three live rounds in the gun.) When Farris’s counsel objected, the prosecution stated it would present later testimony on the issue

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<sup>27</sup> Clonazepam, a Schedule IV controlled substance.

from a firearms expert. Upon request, the prosecution “established from Day that he did not perform further testing on the revolver.”

Warren Mitchell, a KSP firearms expert, later testified that the three rounds indicated they had misfired. Eventually Farris was convicted of Murder.

**ISSUE:** Should officers be aware of prior motions that would limit their testimony?

**HOLDING:** Yes

**DISCUSSION:** Farris objected to Day’s improper testimony, but the Court agreed with the prosecution that the remedial action requested was sufficient. Farris had not requested an admonishment or other curative action as a result of the statement and as such, could not raise the issue on appeal. Given Mitchell’s later testimony, the Court found that any error was harmless.

The conviction was upheld.

**Hill v. Com.**  
**2007 WL 1302643 (Ky. App. 2007)**

**FACTS:** On Nov. 8, 2004, Officer Kuriger (LMPD) was told by two women that “a strange acting man had been bothering them.” Shortly thereafter, Officer Kuriger found Hill in the vicinity, matching the description. As Kuriger approached, the individual (Hill) “became belligerent and began backing away from the police car.” Kuriger, believing Hill was “mentally disturbed” patted him down for weapons. Kuriger removed an object, later found to be an ID bracelet from Hill’s pocket, and Hill then “turned around and punched the officer in the face.” During the struggle, Hill “attempted to grab Officer Kuriger’s gun from its holster.” Bystanders assisted Kuriger subdue Hill, and he was arrested. A crack pipe was recovered from Hill’s person during the subsequent search.

Hill was indicted on a variety of charges, and subsequently convicted on most. He appealed.

**ISSUE:** May a mention that a defendant is represented by a public defender objectionable?

**HOLDING:** Yes

**DISCUSSION:** Hill appealed on the issue that he failed to appear on the second day of his trial. He had been late returning from lunch on the first day, and the Court, concerned that he might not appear, offered to “house him in the county jail to ensure he was rested, sober and ready for trial in the morning.” (He had apparently missed several pretrial hearings, as well.) He refused, asking instead for money to get a room at the Salvation Army. The Court gave him money and reminded him of the importance of being at trial on time. Nonetheless, he was, in fact, not present the next morning and the Court concluded he was “voluntarily absent.” The Court concluded the case and sent it to the jury, and Hill did arrive while the jury was deliberating. He told the Court he’d been turned away from the Salvation Army and sent to the VA hospital for a TB test, which was where he’d been all morning.

The Court agreed with the trial court that his history, combined with no evidence that he’d been “involuntarily detained” at the VA hospital, was reason to deny his demand for a mistrial.

Hill also argued that he was prejudiced by Officer Kuriger's identification of him, in the courtroom, when Officer Kuriger mentioned that he (Hill) was "sitting right next to the public defender" - implying that the jury would equate "indigence with criminality" or assume he couldn't get a private attorney. The Court found that the fleeting reference was not sufficient to justify a mistrial either, even if otherwise improper, and affirmed the conviction.

**Smith v. Com.**

**2007 WL 1378485 (Ky. App. 2007)**

**FACTS:** On June 10, 2004, Gray awoke to the sound of five gunshots nearby, from a parking lot of his go-kart track in Laurel County. However, because the building alarm did not go off, and because gunshots were common in the area, he did not call anyone

Later, a body, identified as Abe Smith, was found in that area and spent shell casings and live rounds were recovered. The victim's vehicle, found on a distant road, also had a spent casing. As a result of investigation, Brian Smith was identified as a potential suspect. He turned up later at the London KSP post, complaining that he was being followed. He had in his possession two sticks of dynamite and some crystal meth. KSP contacted the Laurel County Sheriff's Office.

Det. Phelps questioned Smith, and he stated that he'd been in the parking lot with the victim when another man pulled up and began shooting at them. Despite his "version of events" however, he was indicted on theft (of the victim's vehicle) and murder. He was convicted of first degree manslaughter, and appealed.

**ISSUE:** Might confronting a witness about suspected perjury be objectionable?

**HOLDING:** Yes

**DISCUSSION:** Among other issues, Smith argued that one of his witnesses was confronted by one of the investigating detectives and "coerced" into changing his testimony. The witness had alleged that the detective approached him and stated that he "had lied in his deposition" and that if he lied on the witness stand, he would be charged with perjury. As a result, apparently, the witness altered his testimony. The Court noted that although a witness may be informed of the "penalties for committing perjury, such warnings may not be emphasized to the extent that they coerce the witness not to testify." This prohibition extends to law enforcement as well.<sup>28</sup> The Court agreed that the detective's action raised constitutional concerns. However, because the error was to some extent corrected by the jury being made aware of what had happened, the Court found that the jury had an opportunity to evaluate the effect on the witness. When balanced against overwhelming evidence of Smith's guilt, the Court found the error to be harmless.

Smith's conviction was upheld.

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<sup>28</sup> U.S. v. Thomas, 488 F.2d 334 (6<sup>th</sup> Cir. 1973); See also Webb v. Texas, 409 U.S. 95 (1972).

**Com. v. Bussell**  
**226 S.W.3d 96 (Ky. 2007)**

**FACTS:** Bussell was convicted in 1991 of robbery and murder, in Christian County, and was sentenced to death. He appealed on procedural matters related to the trial, and was awarded a new trial. The Commonwealth appealed.

**ISSUE:** May the failure to produce reports prior to trial potentially cause a mistrial?

**HOLDING:** Yes

**DISCUSSION:** Bussell won a new trial on his argument that the prosecuted failed to “disclose all police reports and statements of witnesses expected to testify.” The opinion summarized the content of the reports and discussed the need to determine if the “evidence withheld was material” and would meet “the standard of reasonable probability of a different result at trial.”<sup>29</sup> The Court concluded the “while not every police report discussed during the evidentiary hearing was exculpatory ..., the cumulative effect of the information contained in those reports certainly suggested a reasonable probability that had the information been disclosed, the outcome of [the] trial would have been different.” Kyles instructed that a prosecutor has a “duty to learn of any favorable evidence known to ... the police.” The information contained in the reports could have been used by Bussell to “develop a rational defense.”

The Court agreed that it was appropriate for the Circuit Court to conclude that the failure to disclose the reports materially affected the ultimate of the trial, and upheld the decision to award a new trial.

***EVIDENCE***

**Keeling v. Com.**  
**2007 WL 1789750 (Ky. 2007)**

**FACTS:** On June 23, 2004, Keeling was involved in a wreck, and a passenger in his car, Kinney, “lost his right arm” as a result. Evidence at the scene indicated that Keeling had crossed the center line and collided with another car. Approximately an hour and a half after the wreck, Keeling’s BA was .09 for alcohol, and later tests indicated he had Propoxyphene (Darvocet) and Hydrocodone (Lortab) in his system as well.

A few days before the trial, the “Commonwealth produced a report written by Officer John Parks” in which he expressed his opinion as to the cause of the crash. Although Keeling had the measurements and raw data collected by Parks for nearly a year, Parks’ “analysis and opinion were not disclosed prior to the report.” Keeling requested a continuance to have time to check with another accident reconstruction expert, but he was denied.

The Commonwealth agreed to “concede to excluding all portions of the report which had not previously been disclosed” to “avoid postponing the trial.” The trial court agreed that was an appropriate remedy.

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<sup>29</sup> See Kyles v. Whitley, 514 U.S. 419 (1995).

Keeling was convicted of DUI and 2<sup>nd</sup> degree wanton assault. He appealed.

**ISSUE:** May trace levels of impairing medications be used to prove unlawful intoxication?

**HOLDING:** Yes

**DISCUSSION:** First, the appellate court agreed that “there was no longer any legitimate reason to grant a continuance” once Parks’ conclusions and opinions were excluded from evidence. Next, the court agreed that driving while intoxicated constituted a wanton act. (In an odd twist, Kinney, the injured passenger, testified that he did not believe Keeling was too intoxicated to drive, and that the wreck was caused by the other driver.) However, the Court agreed that the evidence indicated that Keeling was both intoxicated and the driver at fault in the collision.

Finally, Keeling challenged the amount of the drugs found in his system, which the chemist conceded were “trace” amounts, and argued that they were not enough to support a conclusion that he was under the influence of those drugs at the time of the wreck. However, the Court found that a low level at a later time certainly supported the jury finding that he was under the influence of the drugs, particularly when combined with alcohol.

Keeling’s conviction was affirmed.

**Wyatt v. Com.**  
**219 S.W.3d 751 (Ky. 2007)**

**FACTS:** Det. Garland, Murray PD, was given information by Ferguson that his drug dealer, Wyatt, “had mentioned something to him about ‘taking out’ Detective Donald Bowman, a member of the Tri-county Drug Task Force.” He agreed to act as a CI, and was given money to buy Lortabs. He was “instructed to follow up on her comment about Detective Bowman.” The CI was wired in an attempt to get a recorded statement. He was successful in buying the drugs and reported Wyatt had spoken again of “wanting to kill Detective Bowman and his partner.” However, the audio equipment did not work.

The investigation continued with officers arranging for Ferguson “to introduce an undercover officer to [Wyatt] as an assassin.” Agent Thielhorn (ATF) was the “assassin - friend from Chicago.” They met with Wyatt. Wyatt got into the car and they discussed the issue, but much of the audio recording attempted that day “proved to be inaudible.” Agent Thielhorn, however, later related what was discussed. Wyatt admitted she had no money, but agreed to provide the gun (a sawed-off shotgun) for the crime. They discussed an acceptable payment, and Thielhorn suggested that Lortab pills would be an adequate substitution for cash. After negotiation, they agreed upon a down payment of 100 pills. Wyatt provided a description of the intended victims and vehicles. Upon further negotiation, however, a “final purchase price was never agreed upon or even suggested.” Thielhorn gave Wyatt his phone number, and they parted.

Wyatt never called, and never responded when Thielhorn tried to reach her. A week later, Wyatt was arrested and charged with “murder for hire” - Criminal Solicitation to Murder.

At trial, one of the intended victims discussed Wyatt's presumed motive, an investigation of her children for drug trafficking. Neither Wyatt nor Ferguson testified at trial. As noted, the audio recordings were essentially inaudible and useless in proving any incriminating statements by Wyatt.

Wyatt was convicted, and appealed.

**ISSUE:** Is entrapment a valid defense when the suspect is not the "prime mover" in committing an offense?

**HOLDING:** Yes

**DISCUSSION:** Among other issues, Wyatt argued that she was entitled to a jury instruction on entrapment. The Court noted that if the evidence is sufficient to, at least, suggest entrapment as an issue, an instruction should have been given. Entrapment is a factor when there is evidence that the defendant "was induced or encouraged to engage in [the criminal] conduct by a public servant or by a person acting in cooperation with a public servant seeking to obtain evidence against him for the purpose of criminal prosecution; and [a]t the time of the inducement or encouragement, he was not otherwise disposed to engage in such conduct."<sup>30</sup> The court reviewed several cases in which entrapment was an issue. In applying the precepts to the case at bar, the Court noted that "Thielhorn suggested the means, the payment method and quantity, and Ferguson urged [Wyatt] to provide a weapon." Wyatt did not appear to "have been the prime mover." As such, the Court decided "there was sufficient evidence to constitute inducement or encouragement on the part of Agent Thielhorn and confidential informant Ferguson." At that point, the prosecution was obliged to prove, beyond a reasonable doubt, "that the defendant was disposed to commit the criminal act prior to first being approached by government agents."

In this situation, there was no criminal history on the part of Wyatt concerning such crimes. Her daughter was videotaped stating that "her mother had told her that Ferguson was the one who was planning the murder of the two officers." The primary evidence that Wyatt originated the plan "was through the hearsay testimony of police witnesses who relayed statements made by the non-testifying, confidential informant, Ferguson." Wyatt's response to the plan was "at best, ambivalent or equivocal."

In addition, the Court addressed testimony from Thielhorn and agreed that the testimony constituted "conclusions of law" and his interpretations of the law on solicitation. The Court elected to reverse the conviction and remand the case for further proceedings.

**Payne v. Com.**

**2007 WL 1378514 (Ky. App. 2007)**

**FACTS:** Payne had allegedly been involved in the rape of his then 16-year-old daughter, in 1998 and 1999. His daughter had provided a detailed statement to a KSP investigator and a social worker concerning the abuse. Payne was approached at a local cemetery - they had received a call that "he was there and could be suicidal" - and he confessed to the rape. He provided a written confession. He repeated that confession two days later, to the KSP investigator and the social worker.

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<sup>30</sup> KRS 505.010.

At trial, however, the victim “completely recanted her accusations against her father” and that she had given it because “the state trooper threatened her that if she did not give it, she would be taken from home.” The trooper and the social worker testified to the contrary. Payne testified, stating that he confessed only because he believed if he did not, the children would be removed from the home.

Payne was convicted, and appealed.

**ISSUE:** Is a confession given by an intoxicated subject admissible?

**HOLDING:** Yes

**DISCUSSION:** Among numerous other issues, Payne argued that his confession was involuntary because “it was the result of mental duress and alcohol intoxication.” The Court noted that a “confession is voluntary unless, under the totality of the circumstances, [his] ‘will has been overborne and his capacity for self-determination critically impaired.’”<sup>31</sup> To decide, the Court must look to “both the ‘characteristics of the accused and the details of the interrogation.’”<sup>32</sup>

Since Payne did not allege any improper conduct on the part of the officers, the court looked to Payne’s personal characteristics. Payne had been an officer for several years, he testified that he knew what questions he would be asked. He “signed a statement waiving his rights.” Although he was under the self-induced influence of alcohol, the court noted that he even appeared to have a plan, confessing in order to keep his children from being taken away from his wife, and this indicated that “his thinking was somewhat logical” by his own admission. The Court found the confession to be voluntarily given.

After resolving other issues, the Hickman Circuit Court’s decision was upheld.

### Cleary v. Com

2007 WL 1454335 (Ky. App. 2007)

**FACTS:** On Feb. 18, 2002, Troopers Fugate and Miller (KSP) were patrolling Knott County. The troopers drove past Cleary’s home. They noticed a pick-up truck in the driveway, and they pulled into the driveway. Evelyn Cleary was outside the vehicle, with her hands resting on the window frame. As the troopers got out of the car, they notice Cleary “drop something inside the truck.” They believed that Cleary was handing Mosley (in the truck) “an Oxycontin tablet” while Cleary claimed that “Mosely already had the pill and was asking where she could acquire more.”

Trooper Miller questioned Mosley, who admitted to having “two partially smoked marijuana cigarettes in her ashtray.” As the trooper seized those, he “noticed a pill in the floorboard of the truck” which turned out to be Oxycontin. Mosley admitted she’d come to the house to buy the drug for \$50, and showed the trooper the money.

Trooper Fugate was inside the Cleary house, talking to Cleary and her husband. Both denied any involvement with drugs. Miller entered with the pill, and they searched the home, with Mr. Cleary’s consent, but found no further contraband. Evelyn Cleary was arrested.

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<sup>31</sup> Soto v. Com., 139 S.W.3d 827 (Ky. 2004).

<sup>32</sup> Schneekloth v. Bustamonte, 412 U.S. 218 (1973).

During the trial, Officer Fugate stated that “he had received prior complaints about” Cleary “selling controlled substance pills.” The defense requested a mistrial, arguing that it had not been “given notice that these prior bad acts were going to be introduced.” The prosecutor stated that “he was not even aware of any prior complaints” and that he wasn’t attempting to elicit such testimony from the witness. The judge admonished the jury to ignore the statement.

Eventually Cleary was convicted, and appealed.

**ISSUE:** Are statements concerning “prior bad acts” admissible?

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

**DISCUSSION:** The Court concluded that although the trooper’s statement should not have been admitted, as it was an improper indication of “prior bad acts,” that the admonition provided by the judge was sufficient. The Court decided that “one isolated bit of testimony was not sufficiently prejudicial” as to warrant a mistrial.

Cleary’s conviction was affirmed.

**Marcum v. Com.**  
**2007 WL 1519345 (Ky.App. 2007)**

**FACTS:** On Aug. 19, 2003, Sheriff Fee (Jackson County) “was near Marcum’s property when he detected the odor of ether.” As an experienced officer, Sheriff Fee recognized that chemical to be associated with methamphetamine manufacturing. He could see, “from his vantage point,” “lye, a cooler, a fuel can, and” a container being used to capture the vapor from a chemical reaction.” He left the area and returned later that evening with two officers, who “also recognized the odor of ether” and observed the items. The officers agreed what they observed was evidence of methamphetamine manufacturing.

The next day, Sheriff Fee got a search warrant and they returned to the property. They seized “all necessary equipment and most chemicals required” to make methamphetamine. Marcum was charged, and eventually indicted, on a variety of drug offenses. Marcum moved for suppression of the evidence, which was denied.

Shortly after the search warrant was executed, “several items seized from Marcum’s property were disposed of by law enforcement in normal refuse containers.” Other items classified as contaminated and/or hazardous materials were “sent to an incinerator for destruction.”<sup>33</sup>

Upon discovery, Marcum requested to inspect the items listed on the search warrant return. Because the evidence in question had been destroyed, Marcum argued that the charges should be dismissed. At the conclusion of the hearing, the Court denied Marcum’s motion, but did reserve ruling on a “missing evidence instruction” until the trial, which never occurred. Eventually, Marcum took a conditional plea of guilty and appealed.

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<sup>33</sup> These actions were taken pursuant to KSP’s policy for destruction of such items.

**ISSUE:** Is destruction of evidence prior to trial necessarily done in "bad faith?"

**HOLDING:** No

**DISCUSSION:** The Court first addressed the issue of the destruction of the evidence. "Marcum argue[d] the Commonwealth's destruction of some of the seized evidence prior to his having an opportunity to inspect, sample, or test the items was fatal to its maintaining charges against him." The Court looked to other cases and noted that "the Due Process Clause is implicated only when the failure to preserve or collect the missing evidence was intentional and the potentially nature of the evidence was apparent at the time it was lost or destroyed."<sup>34</sup> The Court, however, also noted that, in Collins v. Com.<sup>35</sup>, Kentucky law held that "there is no denial of Due Process absent a showing of bad faith on the part of law enforcement or the Commonwealth in their failure 'to preserve evidentiary material of which no more can be said than it could have been subjected to tests, the results of which might have exonerated [Marcum] ...."

The Court noted that there was no argument but that the items were intentionally destroyed before being subjected to any testing, but stated that a list of the items, along with photographs, were provided during discovery. Although the Court noted that "better practice would have required such reference sampling" or "notice to Marcum of its intent to destroy the items with a reasonable opportunity for him to perform his own" tests, but that it found "no evidence of bad faith on the part of law enforcement, nor [did the Court] find any showing that the evidence destroyed held obvious potentially exculpatory value evident at the time of destruction."

The Court found that such policies requiring destruction "are necessary to ensure the safety of law enforcement officials." The Court found no indication that there was any rush to destroy the evidence and no indication that the "results of the testing might have exonerated Marcum, particularly in light of the totality of the evidence against him."

Further the Court noted that since Marcum pled guilty, it would not render an opinion on the trial court's failure to give the jury a "missing evidence" instruction.

**McKee v. Com.**  
**2007 WL 1536852 (Ky. 2007)**

**FACTS:** On Dec. 17, 2004, "Anthony and Michelle Wenrick, along with Michelle Wenrick's daughter, Shephanie [sic] Moore, traveled from Nicholasville to Jackson to visit Michelle's brother who was in the hospital." They then decided to visit Michelle's mother, who lived in Morgan County. Stephanie rode with Michelle's nieces who claimed to know the way, but eventually, the driver admitted to being lost and the Wenricks took the lead. Unfortunately, the Wenricks then encountered a vehicle "in their lane without its headlights on." Anthony, driving, was unable to avoid a head-on collision. Michelle was transported and died as a result, and Anthony was injured.

Sgt. Noble (Jackson PD) responded, finding a "male and a female conversing with each other in an overturned Toyota." He did not request an accident reconstructionist because he did not realize the

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<sup>34</sup> Estep v. Com., 64 S.W.3d 805 (Ky. 2002).

<sup>35</sup> 951 S.W.2d 569 (Ky. 1997); Arizona v. Youngblood, 488 U.S. 51 (1988).

seriousness of the wreck at the time. While the couple was being extricated, Sgt. Noble approached the other vehicle, determined that the driver was uninjured, and requested that he take a field sobriety test. The driver, McKee failed, so he was arrested and taken to the hospital. His BA was found to be .18.

McKee was indicted on Wanton Murder, Assault and DUI, and eventually convicted. He appealed.

**ISSUE:** May hospital medical records be used to prove intoxication?

**HOLDING:** Yes

**DISCUSSION:** McKee argued that it was improper for the prosecution to state that Anthony's medical records indicated he was intoxicated. The record indicated that there had been testimony about McKee's BA, and the forensic analyst had agreed that hospitals use a different standard in measuring blood alcohol. (It was a simple matter to convert the numbers, however.) During closing, the prosecutor had noted that Anthony's records probably indicated the hospital standard and that, if converted, would have indicated a negligible amount of alcohol. McKee argued that the evidence was highly prejudicial to him, as it undercut his defense theory that Anthony was also DUI and "could have been the cause of the wreck."

The Court noted that all of the evidence indicated that the prosecutor was correct and that the BA was noted using the hospital standard.

McKee's conviction was sustained.

**Grey v. Com.**  
**2007 WL 1532661 (Ky. 2007)**

**FACTS:** "On or about the evening of February 7, 2003, Grey was involved in an altercation outside of a club in Lexington, Kentucky." Several shots were fired and Grey responded by shooting into a crowd, killing Henderson and wounding three other men. He then "threw his gun into a local reservoir."

Grey was indicted and went to trial. On the last day of the trial, Grey was notified that a "small caliber bullet had been found a few days after the shooting on top of a three-story building near the crime scene" – in fact, directly behind where Grey testified he had stood. The bullet had been turned in to the Lexington PD and subsequently destroyed. Outside the presence of the jury, officers testified about the "finding and destruction of the bullet," and Grey requested a mistrial. The Court denied it, "finding that there was nothing exculpatory about the missing bullet because both Grey and the Commonwealth freely admitted another person fired a gun at the scene and that the Commonwealth did not act in bad faith."

Grey was convicted, and appealed.

**ISSUE:** Must a missing evidence instruction be given whenever evidence is, in fact, destroyed?

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

**DISCUSSION:** The Court agreed with the trial court that "[i]n order for lost or destroyed evidence to be a violation of due process 'the evidence must either be intentionally destroyed, or destroyed inadvertently

outside normal practices.”<sup>36</sup> Grey presented no evidence as to either, and at best, only speculated that the might be “potential exculpatory value” in the bullet. Grey further pressed that “he should have at least received a missing evidence instruction on the bullet.” Again, the Court found that the trial court was correct in not giving such an instruction.”<sup>37</sup>

Grey's conviction was affirmed.

**Carter v. Com.**  
**2007 WL 1378406 (Ky. App. 2007)**

**FACTS:** On July 21, 2002, Meade, his family and a friend were fishing in Fleming County. While they were at the river, Meade was drinking and used a .22 pistol to target shoot. When the family returned home, they went to visit a neighbor. While there, two men, Calvin and Richard Carter, arrived, drunk, and entered the neighbor's trailer home.. Meade and Calvin Carter did not like each other, as Calvin had been an informant in a criminal drug case involving the owner of the trailers rented by Meade and the neighbor. After a verbal exchange, Calvin and Richard Carter left and found Meade standing in the yard. Meade struck Calvin in the chest and they began to fight. Richard then cut at one of the other men, and Calvin cut Meade on the neck. Gun shots rang out, but there was dispute as to whether the shots were fired before or after Meade was cut.

As the Carters fled, Meade fired at the vehicle. He fell to the ground and another man took the gun and continued firing. Calvin or Richard fired back and drove away, later wrecking the car.

Meade died. KSP began investigating and Calvin told the trooper what had happened, and showed him where he'd disposed of the knife. Carter was indicted for murder, but claimed self-protection and that Meade was trying to kill him. He gave his version of the fight. Eventually, Calvin Carter was convicted on reckless homicide and appealed.

**ISSUE:** May evidence of “prior consistent statements” be admitted as an exception to the hearsay rule?

**HOLDING:** Yes

**DISCUSSION:** Carter argued that the “investigative hearsay evidence” provided by Det. Bowling was improperly admitted, in that the detective “improperly repeated statements on the witness stand” made by the other man who fired at Carter. The Court had permitted the testimony because Carter had “attempted to show that [the man] told the jury a story which differed from what he told Detective Bowling two years earlier” and that the prosecution needed to rebut that claim. The Court agreed it is proper to admit testimony that “another witness ha[d] made prior consistent statements” when that issue is challenged.

After addressing several other issues, the Court upheld the conviction.

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<sup>36</sup> Tamme v. Com., 759 S.W.2d 51 (Ky. 1988).

<sup>37</sup> See Estep v. Com., 64 S.W.3d 805 (Ky. 2002).

## ***CIVIL - FALSE IMPRISONMENT***

### **Dunn v. Felty**

**226 S.W.3d 68 (Ky. 2007)**

**FACTS:** On Nov. 7, 1999, Dunn and his wife were at home, asleep, when they were awakened by neighbors arguing. When Dunn looked out, he saw police cars, and he was concerned that something may have happened to his stepdaughter. He went outside, "wearing sweatpants and flip-flops and a short-sleeved shirt pulled up on his arms but not yet pulled over his head."

He spotted Officer Felty running up the stairwell and asked if he was there about his stepdaughter. Dunn later alleged that "without provocation, Officer Felty lost his composure and pulled the shirt, which Dunn was still in the process of putting on, off of Dunn's arms." They struggled, with Felty allegedly pinning Dunn to the wall, choking him and striking him. Another officer arrived and together, they handcuffed Dunn. Dunn was arrested and remained in custody until that early evening. (The original call was domestic violence at another apartment.)

Dunn was charged with harassment, menacing and resisting arrest. On April 24, 2000, he was acquitted of two of the charges and received a directed verdict on the third. Dunn filed suit on April 4, 2001, against Officer Felty, the other officers and the City of Louisville, on claims of false imprisonment, excessive force, malicious prosecution, outrageous conduct and failure to train/supervise. Most of the claims were dismissed for failure to file in a timely fashion, within the statute of limitations. The few remaining claims went to the jury, which found in favor of the officers and the city.

Dunn did not appeal the jury verdict, but did appeal the dismissal.

**ISSUE:** What is the statute of limitations for a civil lawsuit under state law in Kentucky?

**HOLDING:** One year (for most claims)

**DISCUSSION:** The parties agreed that the statute of limitations for both false imprisonment and excessive force is one year.<sup>38</sup> However, the question arose as to when the statute began to run - whether when the cause of action accrued, the date of the arrest, or when the defendant was acquitted. The Court noted that an officer is "liable for false imprisonment unless he or she enjoys a privilege or immunity to detain an individual." The Court noted that for false imprisonment, the statute of limitation begins to run when the "alleged false imprisonment ends." The Court found that once he was arraigned, and was held pursuant to legal process, his false imprisonment actually ended. Since "favorable termination of criminal proceedings is not an element of false imprisonment," it was not necessary for Dunn to wait to file his lawsuit until his criminal proceedings ended. As such, the false imprisonment claim was time-barred and properly dismissed. The Court further noted that while a false imprisonment claim, once filed, may be stayed until the criminal case is concluded, it still accrues on the date of the arrest.

However, the malicious prosecution claim was not time-barred. The Court noted that this case "illustrates the point at which false imprisonment terminates and malicious prosecutions begins and eventually

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<sup>38</sup> KRS 413.140.

accrues. That claim arose when Dunn was arraigned, and “accrued upon a favorable termination of the criminal proceedings against him.”

With regards to the excessive force claim, the court found that the cause of injury accrues at the time of injury, in this case, on the date of the arrest. Like the false imprisonment claim, it may be stayed until the end of the criminal case, but it is still subject to the statute of limitations.

The Court agreed that both the false imprisonment and the excessive force claims were time-barred.

## ***OPEN RECORDS***

### **Skaggs & The Trixie Foundation v. Tri-County Animal Shelter 2007 WL 1785449 (Ky. App. 2007)**

**FACTS:** Skaggs requested, pursuant to the Kentucky Open Records Act, information from the Tri-County Shelter in Greenup County. The operator of the shelter, Grubbs, “was not willingly forthcoming with the requested information.” Eventually, the trial court ordered that he produce the materials, and he did, in fact, produce some documents in response to the request.

Skaggs, who was “unhappy with the information supplied by Grubbs,” requested that the court find Grubbs in contempt, which it did, following a hearing. Grubbs apparently produced more information, but Skaggs was still unsatisfied and again asked for another order. This time, the trial court found that Grubbs had complied “to the best of his ability.” Skaggs then appealed.

**ISSUE:** May an agency be required to produce records under the Open Records Act?

**HOLDING:** Yes

**DISCUSSION:** Skaggs complained that Grubbs’ responses “were either not believable or lacking altogether.” As such, they constituted contempt. The Court noted, however, that the trial court had questioned Grubbs extensively and “found that Grubbs was a “terrible record keeper and ... a cantankerous witness” but that he had complied “to the best of his ability in view of his shoddy record-keeping.”

The decision of the trial court was upheld.

### **WLEX Communications v. Lexington-Fayette Urban County Government 2007 WL 1300976 (Ky. App. 2007)**

**FACTS:** On April 27, 2004, a WLEX reporter requested a copy of an April 27, 2004, 911 call concerning a student with a medical problem on a school bus. Within a few days, the LFUCG Division of police denied the request, citing that the telephone call was made by a juvenile whose privacy it was required to protect and because in fact, the call had been transferred to the Division of Fire and, as such, the PD did not have a dispatch record.

Two months later, LFUCG learned that the reporter had appealed the decision to the OAG and the OAG requested a copy of the disputed recording. LFUCG replied that the request had been denied pursuant to Bowling v. Brandenburg.<sup>39</sup> The LFUCG argued that the release of such information “could not only have an adverse effect upon the person ... who placed the disputed call but that it could also be expected to have a chilling effect upon citizens’ use of the 911 system.” It offered instead a summary of the call.

During this time, LFUCG apparently realized that in fact, the Division of Police did have a record, since officers were dispatched to the scene. As such, LFUCG sent a copy of the summary to WLEX. Further, in a later letter, dated July 7, LFUCG noted that “it could not provide a copy of the 911 call recording as requested by that office because the computer-generated material had been destroyed -- pursuant to a regular retention schedule -- nearly two weeks before LFUCG received any indication that WLEX would challenge its decision.”

On September 9, 2004, the OAG issued a decision indicating that the request had been improperly denied, but did not find that LFUCG had “willfully concealed a public record.” LFUCG immediately appealed the decision, arguing that the OAG had “erred in concluding that it had improperly withheld the contents of the 911 recording from public disclosure.” The trial court granted summary judgment to LFUCG, and the case was appealed by WLEX.

**ISSUE:** Are 911 call recordings subject to disclosure under the Open Records Act?

**HOLDING:** Yes

**DISCUSSION:** WLEX argued that the 911 call recording was not exempt from disclosure and that the “juvenile caller’s privacy interest” was minimal. WLEX agreed that “[s]ince the recording no longer exists, [the Court] clearly cannot compel LFUCG to produce it for public inspection.” The appellate court, however, noted that since there is no “present, ongoing controversy,” it was unable to review the matter, since a decision to reverse the judge’s order would have no effect.

The Court did, however, decide to discuss the Bowling issue. It noted that the holding in that case required a “determination of whether the public has the right to examine particular materials as balanced against individual privacy rights” and “necessarily entails a case-by-case, fact-specific inquiry to determine whether the individual involved has a reasonable expectation of privacy -- and if so, whether that expectation of privacy supersedes the interests of public disclosure of the requested materials *under the circumstances*.”<sup>40</sup> The Court found no reason to formally overrule Bowling, however.

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<sup>39</sup> 37 S.W.3d 785 (Ky. App. 2001).

<sup>40</sup> Emphasis in original.

## ***SIXTH CIRCUIT COURT OF APPEALS***

### ***CIVIL WRITS***

#### **Revis v. Meldrum**

489 F.3d 273 (6<sup>th</sup> Cir. Tenn. 2007)

**FACTS:** As a result of a money judgment awarded against Revis in the Anderson County, TN, courts, Emerson (the winning plaintiff) requested and received writs of execution against real and personal property Revis owned in Roane County.

The writ stated:

*You are hereby commanded to take from the property of Nathaniel Revis including in [sic] property listed below the sum of \$678,807.32 . . . to satisfy the judgment obtained by the plaintiffs . . . . You are further commanded to pay such monies, when collected, into the Court and you shall make return as to how you have executed this writ within the time allowed by law.*

The writs were then forwarded to Dep. Eaton at the Roane County Sheriff's Office. He reviewed them, and unsure as to what to do, he asked the County Attorney. The County Attorney advised him that the "writs were valid court orders and were 'to be obeyed as stated on their faces.'"

On Oct. 18, 2004, at 6:25 a.m., Dep. Eaton and others went to Revis's residence, along with a representative of the creditor. A private moving company packed the contents of the house and moved the items, including valuable artwork, to a storage facility. In addition, the locks were changed on the house. Revis was escorted from the home and told he could not return.

Revis also alleged that Eaton searched him, apparently to determine that he wasn't "removing cash from the premises. (Eaton contended that he "simply asked Revis if he had any cash on him, and that Revis responded by showing him his wallet, which contained three dollars." The money was not taken from him.)

Seven days later, Revis posted an appeal bond and his property was returned. He then filed suit against all parties, including the Sheriff's Office defendants. After extended procedural litigation, the Sheriff's Office defendants were dismissed because the court found that they had committed no constitutional violation. Revis appealed.

**ISSUE:** Does a civil order to seize personal property from a location extend to evicting the occupant of the location, as well?

**HOLDING:** No

**DISCUSSION:** Revis agreed that the seizure of his property was proper, but argued that it was improper to search him and to evict him from the residence. The appellate court noted that the judgment was "silent concerning who is entitled to possess Revis's residence, and it provide[d] no notice to Revis that he was subject to summary eviction." Further, "an individual's immediate loss of possession of his or her home

plainly has greater adverse consequences than the loss of artwork or even a portion of an individual's wages." The Court noted that while exigency might justify the seizure of personal property, that "such concerns typically do not arise in connection with real estate." The levy of an execution upon real estate does not serve to transfer title or to affect the actual ownership of the property. The Court concluded that Dep. Eaton was not permitted to levy an "execution upon a residence by evicting the owner without postjudgment notice and the opportunity to be heard."

Finding that Dep. Eaton did violate Revis's constitutional rights, the Court moved on to determine if Dep. Eaton was, nonetheless, entitled to qualified immunity. The Court reviewed Tennessee law on such writs, and noted that there was no settled law on the issue. The Court noted that the law "most likely was intended to do nothing more than direct the sheriff to give notice [to the occupant] that the property was subject to sale and return the writ." However, the language on the face of the writ suggested that the was to take the property from Revis. The County Attorney gave Eaton no specific direction except to order him to obey the writ. Taking all of the information together, the Court found that a reasonable officer may not have realized that such actions violated Revis's rights, and as such, he was entitled to qualified immunity.

The Court quickly dismissed that claim concerning the personal search, agreeing with the District Court that Eaton's version was more credible.

Revis also argued that Roane County bore liability for failing to properly train Eaton, but the Court found that "Eaton ... acted properly by seeking legal advice as to how to execute the writ." The County's failure to communicate recent changes in Tennessee court rules concerning such writs did not amount to deliberate indifference, and dismissed that allegation as well.

## ***SEARCH & SEIZURE***

### **U.S. v. Dotson**

**2007 WL 1748137 (6<sup>th</sup> Cir. Tenn. 2007)**

**FACTS:** On April 15, 2004, the Marlows left their home in Clinton, Tennessee. When they returned home that afternoon, they discovered they had been burglarized and various items were missing, including personal checks, a rifle, a handgun with ammunition, DVDs, an air pistol and four Bibles. Dotson's fingerprints were found on an empty ammunition box left behind.

The next day, Dotson and another man purchased cell phones with one of the checks at a local Target. Suspicious of the transaction, the loss prevention officer checked and learned the check had been stolen. When police arrived, they were directed to where the men had gone, elsewhere in the shopping plaza.

Police found Crowl, the second man, sitting in the car, and Dotson then emerged from the Shoe Carnival and returned to the car. Officer Dyer told them he had some questions for them, and they agreed to sit in the patrol car. Both were given Miranda warnings, but denied having passed the stolen check. The loss prevention officer, Gurgel, arrived and identified both men.

Officer Dyer then removed Dotson from the car, "conducted a full pat-down search" and placed him under arrest. During that second search, the officer "found one crumpled Marlow check in Dotson's pants pocket." After the two men were removed from the car, "Officer Dyer searched under the back seat of the

patrol car and found a checkbook containing Marlow's checks" and an ID card with Dotson's photo but Marlow's name.

Dotson refused consent to search the car, but Dyer searched, finding a loaded pistol that matched with the list of items taken from the Marlow home, along with an ammunition box and more checks.

Dotson was charged with being a convicted felon in possession of a firearm and related charges. He moved for suppression but was denied. At trial, he admitted to having taken the checks and used them, but denied any involvement with the weapons. He claimed that Crowl had taken the guns and ammunition and hidden them in the car. Dotson was convicted, and appealed.

**ISSUE:** Must an arrest be made prior to the search incident to the arrest?

**HOLDING:** No

**DISCUSSION:** Dotson argued that a search warrant was required to search his car. The prosecution argued three different exceptions that permitted the search: search incident to Dotson and/or Crowl's arrest, the "automobile exception (a Carroll search), or "inevitable discovery of the evidence in a later inventory search." The Court elected to justify the search on the first, search incident to arrest, and thus found it unnecessary to discuss the remaining theories.

The Court noted that under the precepts of Thornton<sup>41</sup>, "so long as either Dotson (the driver) or Crowl (the passenger) was a 'recent occupant' of the car when arrested, the search of the car was permissible. Further, the Court noted that the trial court had been "concerned that the search occurred before Crowl's arrest, but, in this context, that timing [was] immaterial; so long as Officer Dyer had probable cause to arrest Crowl, no formal custodial arrest was necessary before a search incident to arrest could occur."<sup>42</sup>

Dotson's conviction was affirmed.

## ***SEARCH & SEIZURE - EXIGENT ENTRY***

### **U.S. v. Buckmaster**

**485 F.3d 873 (6<sup>th</sup> Cir. Ohio 2007)**

**FACTS:** On May 14, 2004, Madison Township (Ohio) Fire Dept. was called to a fire, and found heavy smoke showing. They evacuated the building's residents, including Buckmaster, his spouse and his tenants. They found the fire burning in the bedroom and extinguished the blaze in the headboard of the waterbed. During the process, the waterbed itself ruptured. Water seeped down through the walls and the firefighters placed tarps to try to contain the damage.

Sgt. Byers, of the MTPD, was also present. He was a qualified firefighter and arson investigator and knew the department had received complaints about Buckmaster setting off fireworks. He told the fire chief, who

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<sup>41</sup> Thornton v. U.S., 541 U.S. 615 (2004).

<sup>42</sup> U.S. v. Montgomery, 377 F.3d 582 (6<sup>th</sup> Cir. 2004).

questioned Buckmaster about it. Buckmaster admitted there were fireworks in the house, but stated that they were not close to the scene of the fire.

Sgt. Byers and Officer Perko (a firefighter and more experienced fire investigator) went to the scene to start the investigation. Since they had to wait for the water to be cleared from the room, they “decided instead to check the residence for high carbon monoxide levels and for ‘other possible dangers to the structure from the fire.’” They used a hand-held meter to check throughout the house, including the basement. At one point, they found “substantial amounts of water draining through to the basement” and requested more tarps. As they entered the furnace room, they found, in plain view, large boxes marked as explosives - they were, in fact, commercial grade fireworks. Ultimately, 1,250 pounds of explosives were found. Buckmaster was charged under federal law that prohibited the possession of such fireworks without the appropriate licenses.

Buckmaster requested suppression, and was denied. He took a conditional plea, and appealed.

**ISSUE:** May firefighters go through a house incident to a fire and act upon what they see?

**HOLDING:** Yes

**DISCUSSION:** Buckmaster complained that the two officers “violated his Fourth Amendment rights when they opened the door to, and subsequently entered, his basement furnace room.” Buckmaster relied upon Michigan v. Tyler<sup>43</sup> and Michigan v. Clifford<sup>44</sup> In support of his assertion that the entry was unlawful. He argued that since the officers were not looking for the cause of the fire at the time they found the fireworks, that the “search of the remaining portions of the house, not for fire causation evidence, but for carbon monoxide levels, was per se unreasonable.”

The Court however, stated that although both Tyler and Clifford were arson cases, that the “two cases say little ... about the often more common, and more obvious, reason that fire officials may remain in a fire-damaged residence; namely, to make sure the residence is safe for its inhabitants to return to.” Further, this “might require that the fire officials inspect portions of the house for electrical or structural damage; or it may require that they make sure the house is free of high carbon monoxide levels.”

Madison Township pointed to “not one, but two ... specific exigencies” justifying the actions of the two officers. First, the water coursing through the walls “created a continued danger of electrical shorts.” They took appropriate action to ensure the safety of the residents, and they were not required to “obtain a warrant nor the express permission of the homeowner in order to alleviate such dangers....” In addition, MT argued that it was critical to check for high carbon monoxide levels throughout the house. However, since the “firefighters working on the first and second floors had removed their breathing devices prior to the Byers/Perko sweep - . . . it was obvious to most of those present that carbon monoxide levels were in the acceptable range.” In addition, large fans had already been placed to clear the smoke well before the pair arrived to investigate.

The Court concluded, however, that “[o]xymoronic and unfortunate as it may seem, Buckmaster appears to have been done in by a burning waterbed.” That fire, and the necessary deluge of water, justified the

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<sup>43</sup> 436 U.S. 499 (1978).

<sup>44</sup> 464 U.S. 287 (1984).

"local fire officials' warrantless search of many of the rooms of the house - including the furnace room in which the explosives were found in plain view - to ensure that the water was cleaned up and no such damage had occurred."

The Court affirmed the denial of the suppression motion, and upheld his plea.

## ***SEARCH & SEIZURE - SEARCH WARRANTS***

### **U.S. v. Robbins**

**2007 WL 1875079 (6<sup>th</sup> Cir. Ohio 2007)**

**FACTS:** In early 2005, Toledo drug task force police officers became aware that "Robbins was selling drugs out of his home." Det. Awls requested a search warrant, based upon a search warrant that detailed the information the officers had concerning Robbins' operation. That information included a great deal of information from a CI, and included a request to do a night search.<sup>45</sup> However, the search took place in an afternoon, and the officers found both powder and crack cocaine, marijuana, paraphernalia, guns and currency. As a result of the search, Robbins was indicted on multiple federal drug-related counts.

Robbins moved to suppress, arguing that the search warrant lacked sufficient probable cause, that the magistrate had stale information and that the warrant was not executed in a timely manner.

Upon being denied, Robbins took a conditional plea, and appealed.

**ISSUE:** May a warrant be founded upon a CI's reliable hearsay evidence?

**HOLDING:** Yes

**DISCUSSION:** First, Robbins argued that the warrant was not supported by probable cause. The Court noted that an affidavit "need not reflect the direct personal observations of a law enforcement official and may be based on a confidential informant's hearsay, so long as the issuing judicial officer is reasonably assured that the informant was credible and the information reliable."<sup>46</sup> The information shared by Det. Awls was sufficient to convince a judge of the CI's credibility, since Det. Awls made it clear that he knew the identity of the CI and has worked with him, successfully, in the past. Independent corroboration was only necessary when the CI is not adequately shown to be reliable and believable.

Next, Robbins argued that the officers did not follow the dictates of the warrant, in that they searched in the afternoon rather than at night. However, due to a defect in the way he argued the point, the Court found that the warrant was executed timely, within the three day window permitted, even though it took place in the afternoon rather than at night.

After disposing of unrelated issues, the Court upheld his plea agreement.

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<sup>45</sup> Apparently a requirement under Ohio state law.

<sup>46</sup> U.S. v. Williams, 224 F.3d 530 (6<sup>th</sup> Cir. 2000).

**U.S. v. Lord**  
**230 Fed.Appx. 511 (6<sup>th</sup> Cir. Tenn. 2007)**

**FACTS:** On Feb. 23, 2004, Agent Allen (ATF) was contacted by a “concerned citizen” concerning that individual’s belief that “Lord, a convicted felon, was in possession of a firearm.” On June 8, 2004, Agents Allen and Weaks went to Lord’s home and “represented to Lord that they were real estate investors interested in purchasing his house.” Lord agreed to let them inside and they “engaged in a visual inspection of the interior, including Lord’s bedroom closet.” Seeing a “soft long-gun case,” Agent Weaks “grabbed the case, and identified what felt like a shotgun or rifle.”

On July 15, Agent Allen requested a search warrant. The affidavit, in relevant part, stated as follows:

*On February 23, 2004, I received information from a concerned citizen regarding Robert Lord illegally possessing firearms. The concerned citizen stated Robert Lord was a convicted felon who possessed a shotgun and a pistol. I received pictures via email from the concerned citizen displaying Lord possessing a shotgun and a revolver. I later determined through NCIC that Robert Lord was convicted of a felony in 1992. On June 8, 2004, ATF agent Brian Weaks and I, in an undercover capacity, went to Robert Lord's residence. Agent Weaks and I posed as real estate investors since Lord's residence was for sale. Agent Weaks and I were invited inside the residence by Lord. Once inside the residence, Agent Weaks observed a soft long-gun case in Lord's master bedroom closet. Agent Weaks grabbed and squeezed the soft case and felt a hard object that appeared to be a rifle or a shotgun. On July 6, 2004, ATF agent Gray Lane and I interviewed the concerned citizen regarding the previous information given to me concerning Robert Lord. I was informed by the concerned citizen that he observed guns either in Lord's truck or house on at least four occasions. I was informed by the concerned citizen that Lord tried to persuade the concerned citizen to buy a small pistol for him (Lord) because Lord stated that he could not purchase a firearm due to his federal criminal record.*

Agent Allen received his search warrant, and it was executed the next day. The agents discovered a shotgun and a revolver. Lord waived his rights and confessed at the scene.

Lord was indicted on two counts of illegal possession of the firearms. He requested suppression, arguing that the search was unlawful. The District Court ruled that Lord had “consented to the officers’ entry, and the agents’ deception concerning their identities did not negate that consent.” Further the Court held that “Weak’s probing of the gun case did not constitute a prohibited search.”

Lord took a conditional guilty plea, and appealed.

**ISSUE:** Does a consent to search a location automatically carry consent to handle storage containers?

**HOLDING:** No

**DISCUSSION:** The Court quickly agreed that “Lord allowed Agents Allen and Weaks into his home,” and found no reason to disagree that “Lord consented to the inspection of his bedroom closet.” Even though

the "agents secured entry by misrepresenting their identities, their deceit does not negate Lord's consent to entry."<sup>47</sup>

Next, the Court discussed the investigation of the gun case. The Court noted that it had found in the past that "in ascertaining the scope of a consent to search," it considered what "the typical reasonable person [would] have understood by the exchange between the officer and the suspect."<sup>48</sup> As such, it rejected the contention that Lord's consent for the agents to look into the closet would extend to "the handling of closed storage containers in the closet." Although the prosecution argued good faith to justify the search, assuming that it was, in fact, improper, the Court found that the "independent source doctrine [was] a more appropriate basis" on which to argue the legality of the search. Under that doctrine, the "presence of unlawfully secured information in a search warrant affidavit does not necessarily make a subsequently obtained warrant invalid," if the Court found that there was sufficient information to support the affidavit after purging it of the tainted information.

In evaluating probable cause, the Court was required to consider "whether there were reasonable grounds to believe at the time of the affidavit that the law was being violated on the premises to be searched."<sup>49</sup> With regards to the "concerned citizen," the Court looked for the "recognized indicia of informant reliability" which would include "a detailed description of what the informant observed first-hand, or the willingness of the informant to reveal his or her name."<sup>50</sup> When that information is weak in the affidavit, the Court would then look for evidence that the "police confirmed the information provided by such an informant." Although the affidavit did little to support the reliability of the citizen, it did not indicate the individual's name or provide any information that would support the belief the individual was truthful and reliable, the Court found that "the individual spoke with law enforcement agents on at least two occasions and provided detailed accounts of Lord's unlawful possession of a firearm" and provided the agent with a photo of Lord possessing a firearm. The informant's information was further supported by Weaks' observation of a gun case in the closet, even though, of course, it would be impossible to know that a gun was actually inside.

The Court concluded "that there was adequate information in the affidavit, stripped of any reference to material gleaned from Agent Weak's unlawful handling of the gun case," to sustain the affidavit and to support probable cause for the search. Lord's plea was affirmed.

### U.S. v. Lengen

2007 WL 1748159 (6<sup>th</sup> Cir. Ohio 2007)

**FACTS:** Cleveland officers had Langford and Lengen under surveillance for drug dealing, and they had two warrants on Langford. They observed Langford and Lengen leaving Lengen's home together, in a vehicle.

Officers made a traffic stop when Lengen ran a stop sign. They asked Langford to step out, and spotted a bag of marijuana on the floor. They had Lengen get out and patted him down. They also found a loaded gun under the driver's seat, and found a scale and a baggie of cocaine on Langford.

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<sup>47</sup> U.S. v. Pollard, 215 F.3d 643( 6<sup>th</sup> Cir. 2000) ; U.S. v. Baldwin, 621 F.2d 251 (6<sup>th</sup> Cir. 1980).

<sup>48</sup> U.S. v. Garrido-Santana, 360 F.3d 565 (6<sup>th</sup> Cir. 2004).

<sup>49</sup> Mays v. City of Dayton, 134 F. 3d 809 (6<sup>th</sup> Cir. 1998).

<sup>50</sup> U.S. v. McCraven, 401 F.3d 683 (6<sup>th</sup> Cir. 2005).

Det. Graves obtained a search warrant. During service, the officers found weapons, methamphetamine, cocaine, marijuana and packaging materials. They also found \$25,000 in cash. During the search, Lengen was seated first in the kitchen, handcuffed. He asked to be moved to a specific chair in the living room, and when they checked that area, the officers found a loaded, small caliber handgun on the floor.

Lengen was indicted and charged. He argued for suppression and also for the identity of the confidential informant. He was convicted and appealed.

**ISSUE:** May the entire passenger compartment be searched pursuant to the arrest of a passenger?

**HOLDING:** Yes

**DISCUSSION:** First, Lengen argued that the initial stop and search were unlawful. The Court found that the traffic violation was a perfectly appropriate reason to make the traffic stop, and noted that one of the officers had testified that Lengen pled no contest to the violation and paid a fine.

Next, the Court found that the officers were entitled to arrest Langford on the outstanding warrants. When they found the marijuana, it was further appropriate to arrest Lengen, as the driver. Next, with the arrests, the officers were entitled to search the entirety of the passenger compartment. Lengen contended that he could not be arrested because "he could not be tied to any illegality other than the minor traffic violation." (Langford "admitted ownership of all the drugs and drug paraphernalia discovered at the time of the stop.") With regards to the weapon, for which he was charged, Lengen stated the weapon was not concealed, but the officers had testified that the weapon was found "underneath the driver's seat."

The Court found the stop and the arrest to be lawful.

Next, Lengen argued that the "affidavit failed to establish a connection between the alleged criminal activity and the residence to be searched." The Court noted, though, that the traffic stop corroborated the CI's statement that Lengen kept a loaded gun under the driver's seat," and that finding marijuana and cocaine on Lengen's passenger corroborated the CI's statement that Lengen had marijuana and cocaine at the house. The Court concluded "that the reliable information about the defendant offered by the informant, in conjunction with the observations of the police and the evidence seized as a result of a legal traffic stop, provided the probable cause necessary ...."

Finally, he argued that the warrant did not satisfy the "particularity requirements." However, the Court noted that the warrant described the real property in sufficient detail, but that it "also sufficiently detailed the items the police could seize." In addition, the Court quickly discounted Lengen's claim that the search warrant for the residence did not extend to the safe within his bedroom closet, finding that it was appropriate to look anywhere the contraband could be hidden.

The Court also agreed it was proper to refuse to disclose the identity of the confidential informant. Since "no actual drug transaction occurred between [Lengen] and the confidential informant," and because the officers independently verified the information provided by the CI, the CI was not essential to determining Lengen's guilt.<sup>51</sup>

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<sup>51</sup> See KRE 508.

Lengen's convictions were affirmed.

## ***SEARCH & SEIZURE - TERRY***

### **U.S. v. Wright**

**220 Fed.Appx. 417 (6<sup>th</sup> Cir. Tenn. 2007)**

**FACTS:** Officer Offenbacher (Knoxville PD) was patrolling an area "known for drug activity, prostitution, and violent crime" when he spotted a woman leave an apartment building and get into the passenger side of a car. The car, driven by Wright, then crossed "the parking lot with its headlights off toward an alleyway at the rear of the building." Offenbacher followed and saw the passenger open the trunk to permit another person to place a "long, tubular bundle, which looked like a rifle, in the trunk." The car proceeded on and the lights were turned on. Offenbacher followed, passing the third person, who spotted Offenbacher and "jog[ged] away from the police car." Offenbacher continued following, activated his lights and called for backup. Officer Taylor arrived as Wright handed over his Tennessee operator's license and a Florida vehicle registration.

Wright acknowledged, upon being asked, that the item placed in the trunk was a rifle, but denied having any other weapons. Offenbacher asked Wright to step out and patted him down, finding what he recognized as ammunition (for a pistol, not a rifle). Wright stated it was for a weapon he had at home. Wright denied knowing anything about the rifle, but agreed to allow the officer to check the rifle's serial numbers. It was discovered to be a "loaded, ready-to-fire SKS assault rifle with a bayonet attached." Taylor then searched the passenger compartment and found a loaded, .390 cal. handgun, which matched the ammunition found.

Wright was found to be a convicted felon, and was charged with possession of the weapon. He requested suppression, which was denied. He took a conditional guilty plea and appealed.

**ISSUE:** Does placing a person in a police vehicle make a stop no longer a Terry stop?

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

**DISCUSSION:** The Court quickly determined, first, that Offenbacher had a legally sufficient basis to stop the car because he had a reasonable suspicion that criminal activity had occurred or was about to occur." Further, because of the area of the stop, and the almost certain belief that there was a rifle in the trunk, the court found that the frisk, both of Wright's person and of the passenger compartment was also appropriate. (Wright did not raise the issue of the legality of Offenbacher reaching into his pockets to retrieve and identify the ammunition as such.)

Wright also argued that since the officer did not read him Miranda warnings when initially placing him into the police cruiser. The court noted, however that "merely placing an individual in a police car does not automatically transform a Terry stop into a formal arrest."<sup>52</sup> The court found that the "purpose of the questioning after the stop was to quickly confirm or dispel the officer's suspicion of criminal activity." The questioning took place "near an apartment complex, a non-coercive location." The questioning was for less

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<sup>52</sup> U.S. v. Bradshaw, 102 F.3d 204 (6<sup>th</sup> Cir. 1996).

than 15 minutes. Because the Court found that Wright was not in custody while being questioned, the Court held that Miranda was not required.

Wright's conditional guilty plea was affirmed.

**U.S. v. Molina**

**226 Fed.Appx. 523 (6<sup>th</sup> Cir. Tenn. 2007)**

**FACTS:** On January 1, 2005, in the early evening, Cleveland (Tenn) officers "received a call from a victim of a drive-by shooting" giving a description of the vehicle and the passengers in the vehicle. The caller stated that shots had been fired at him and his young stepson. Lt. Tyson arrived in the area within a minute of the call, passing a vehicle matching the description on the way. Because the vehicle matched the description, a "small, black Nissan," he stopped the vehicle, even though the tinted windows prevented him from seeing inside the vehicle and identifying the occupants.

As Tyson approached, Molina stepped out. The other occupant, a female, stayed inside. Tyson quickly learned that Molina's license was suspended. Tyson asked for permission to search the car and was refused. Lt. Tyson then arrested Molina, and when another officer, Trehitt, arrived, Officer Trehitt began to search the vehicle. He spotted a "firearm in plain view in Bergeron's purse," seized the gun, "handcuffed Bergeron, and began questioning her." Bergeron told the officer that she'd bought the gun for Molina two weeks before and that Molina shot at the two victims. She also testified that a third person had been in the vehicle during the shooting. After he shot at the two subjects, she stated, Molina "forced her to take the gun and hide it in her purse" when he spotted Tyson.

Molina was charged. At trial, Bergeron testified consistent with her earlier statement, but acknowledged under cross-examination that she had sent Molina a letter "stating that the police coerced her into stating that he had been the shooter" and giving detailed information about the officers allegedly threatening her with jail if she didn't make a statement implicating Molina. She explained that she had been coerced into writing the letter by Molina's mother and that her statement to the officers was true. The 12-year-old stepson identified Molina as the driver and the shooter and related what he recalled of the shooting.

Molina was convicted, and appealed.

**ISSUE:** May an item found in the possession of a third-party be used to support a conviction for a different individual?

**HOLDING:** Yes

**DISCUSSION:** Molina argued that Tyson lacked sufficient reasonable suspicion to make the initial stop of the vehicle. The Court looked to U.S. v. Hurst,<sup>53</sup> noting the similarities in the facts in that the questioned vehicle "'roughly' matched the description of the [suspect's] car and ... the car was observed at a 'location consistent with the time needed to travel from' the location in question. Despite the fact there were some discrepancies, the court concluded that Officer Tyson had adequate and specific information sufficient to justify the stop.

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<sup>53</sup> 228 F.3d 751 (6<sup>th</sup> Cir. 2000).

Molina also argued that there was insufficient evidence to support his conviction for constructive possession of the weapon" given that it was found in Bergeron's purse. Although the Court acknowledged that Bergeron's credibility was questionable, that was the purview of the jury. The jury found sufficient evidence to impute constructive possession, and the Court did not overturn that decision.

Molina's conviction was affirmed.

**U.S. v. Campbell**  
**486 F.3d 949 (6<sup>th</sup> Cir. Ohio 2007)**

**FACTS:** On July 22, 2005, at about 10:30 p.m., Officer Salser (Boardman Township, OH) was patrolling in an area that had been plagued with break-ins and car thefts. He was behind a vehicle, driven by Campbell, when it turned into the parking lot of a closed business. Officer Salser watched the occupant (Campbell) get out of the car, talking on his cell phone, and walk toward the road. He followed as that individual walked into the parking lot of another business across the street, also closed.

Officer Salser then drove into that lot and parked, and notified dispatch as to what he was doing. He did not run the other vehicle's plate at that time. Officer Salser then approached Campbell on foot and asked if he was OK. Campbell explained that he was trying to pick up his girlfriend from work and didn't know how to get to her location. Officer Salser spoke to the woman on the phone, got the name of the business, obtained the address from dispatch and provided it to Campbell.

Officer Salser then asked Campbell for his ID, "just to log that [the officer] talked to him." Campbell replied that he lacked ID, although Campbell later stated that he had stated that he "didn't have anything on [him]" Officer Salser asked for, instead, his name, DOB and SSN. Officer Salser later testified that Campbell appeared nervous and put up his hands, stating that he didn't "want any trouble." Again, Salser pressed him for identification.

Campbell gave his name as Steven Morris and gave a year of birth a year earlier than his actual birthdates. He told the officer he didn't know his SSN. When dispatch was unable to verify the information, Salser believed that Campbell lacked an Ohio operator's license. (Campbell later explained that he sometimes went by Morris because that was his father's last name, although he carried his mother's last name.)

Campbell became even more nervous, even walking in circles. When another officer arrived, Salser asked Campbell if he could "pat him down for weapons. Campbell put his hands behind his back and Salser proceeded to do so. Officer Salser "felt a bulge in Campbell's left front pocket" - and when asked, Campbell identified it as money. He asked about the bulge in the other pocket, and Campbell stated that "he did not know what was in there." Campbell agreed to the item being removed and it turned out to be marijuana.

Salser arrested Campbell and proceeded to do a more thorough search, finding \$862 in cash in his pants pocket and a loaded handgun under the driver's seat of the car. Upon booking, it was discovered that Campbell had an outstanding warrant from New York, as well.

Campbell was federally charged for possession of the handgun, and moved for suppression, arguing the original stop was improper. The trial court agreed to the suppression, and the prosecution appealed.

**ISSUE:** Does simply asking for ID constitute a seizure?

**HOLDING:** No

**DISCUSSION:** The Court elaborated on what constituted a seizure - and focused on whether a reasonable person would feel free to walk away from the encounter.<sup>54</sup> Even if a encounter is consensual at the outset, to elevate it to a Terry stop, the officer must "have a reasonable suspicion of criminal activity" or, of course, probable cause for an arrest, to continue the seizure.

In this case, the prosecution argued that "Officer Salser had 'reasonable suspicion' to stop Campbell on the parking lot and conduct a pat down for weapons when the officer first approached him" and in the alternative, that he actually had probable cause to arrest when Campbell stated he lacked ID and that he was not actually seized until he admitted that he lacked such identification.

The Sixth Circuit noted that in Florida v. Bostick, the Supreme Court had ruled that "no seizure occurs when police ask questions of an individual, [and] ask to examine the individual's identification, ... so long as the officers do not convey a message that compliance with their requests is required."<sup>55</sup> As such, the Court ruled that Officer Salser's first request for ID did not constitute a seizure.

Next, the Court noted that Officer Salser had "observed Campbell driving a car and shortly thereafter asked to see his identification." Since he was unable to produce an operator's license, he had committed an offense under Ohio law. As such, a warrantless misdemeanor arrest was permissible, and that arrest was valid.

Finally, the court upheld the search of the vehicle as lawful as an inventory, since presumably the vehicle would not have been permitted to stay in the business parking lot.<sup>56</sup>

The suppression was reversed and the case remanded for further proceedings.

**Mitchell v. U.S.**  
**233 Fed.Appx. 547 (6<sup>th</sup> Cir. Tenn. 2007)**

**FACTS:** On Jan. 3, 2007, Memphis (TN) PD received a call about shots being fired by "six black males in dark clothing" at an apartment complex close to the police precinct. Officers Flagg and Grafenreed both responded, quickly, and found Mitchell, alone. Mitchell was alone, but matched the general description of the shooters. The officers approached him on foot and asked if he'd heard shooting and if he had a gun. Mitchell agreed that he had a gun, and Officer Flagg located it and secured it, putting Mitchell in the patrol car. The weapon was a fully loaded revolver and not stolen, so Mitchell was cited and released. However, since he was a felon, he was later indicted for being in possession of the weapon. He took a conditional guilty plea, and appealed.

**ISSUE:** Is a request to search automatically so coercive as to invalidate the search?

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<sup>54</sup> See Florida v. Royer, 460 U.S. 491 (1983).

<sup>55</sup> 501 U.S. 429 (1991).

<sup>56</sup> This search would likely have also been permitted as under search incident to arrest, as it has been extended in Thornton.

**HOLDING:** No

**DISCUSSION:** Mitchell argued that he was improperly stopped by the officers. The Court noted, however, that a “request to search does not transform the initial questioning into a seizure.”<sup>57</sup> The Court agreed that the officers’ approach was consensual and that the officers did not display physical force or a show of authority, they did not have their weapons drawn or their squad car lights on, in fact, they were on foot. The Court further agreed that the frisk was appropriate, given that Mitchell acknowledged he had a weapon on his person. The trial court had found that the stop wasn’t even a Terry stop, but was simply a consensual stop. Even though the initial description was vague, the Court agreed the initial contact was appropriate, and that it did not elevate to a seizure until they frisked him. Since the frisk was justified, it, too, was proper.

Mitchell’s conviction was upheld.

### ***SEARCH & SEIZURE - HOT PURSUIT***

#### **U.S. v. Johnson**

488 F.3d 690 (6<sup>th</sup> Cir. Ohio 2007)

**FACTS:** On July 22, 2003, Cincinnati PD officers were watching a house, investigating narcotics complaints. Officer Dews observed a number of people on the front porch, including Johnson, and was familiar with one of them from previous arrests. Officer Dews observed several transactions take place with people who stopped by. He conveyed what was going on to other officers, and officers moved in on the house. Johnson then ran into the house. Officers Dukes and Hudson followed him, finding him hiding in a closet. Upon being challenged, Johnson tossed a gun out of the closet and eventually surrendered. He was arrested.

Johnson was indicted on trafficking and gun possession charges, and moved to suppress the evidence. The trial court denied the motion and Johnson was convicted. He appealed.

**ISSUE:** Is “hot pursuit” an exigent circumstance?

**HOLDING:** Yes

**DISCUSSION:** Johnson argued that the officers were required to knock and announce before entering the residence, and that their alleged “hot pursuit” was not a sufficient exigency to excuse that. The Court looked to U.S. v. Santana,<sup>58</sup> however, and found that the facts were almost identical in this case. The court found there was “no reason to believe that [Johnson] would answer a knock” and would be futile. The Court found the entry to be justified.

Johnson also argued that Officer Dews should not have been permitted to give his expert opinion that the conduct he observed was drug trafficking, and that Johnson was “in charge,” since he had not been qualified as an expert. Apparently the trial court certified Johnson as an expert, which adds a “note of approval” to the jury. The Court questioned the process, but since the defense did not object at the time,

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<sup>57</sup> U.S. v. Baro, 15 F.3d 563 (6<sup>th</sup> Cir. 1994).

<sup>58</sup> 427 U.S. 38 (1976).

found that it was not error to have considered the officer an expert. "Courts generally have permitted police officers to testify as experts regarding drug trafficking as long as the testimony is relevant and reliable."<sup>59</sup> The Court found that Officer Dews "told the jury what he saw and what it meant to him as viewed through the lens of his expertise."

Johnson's convictions were affirmed, although his case was remanded for sentencing errors.

## ***SEARCH & SEIZURE - GUESTS***

### **U.S. v. Ponder**

**2007 WL 1805770 (6<sup>th</sup> Cir. Ohio 2007)**

**FACTS:** On Sept, 24, 2004, police were called to the scene where shots had been fired, and upon arrival, they found the owner of a "bloodied, vandalized vehicle with smashed windows." He stated that "two brothers had vandalized his vehicle and threatened him with a gun." He offered to take the officer to where he believed the brothers would be found, and they did so. Arriving, they found two men, identified as the assailants, on the porch, and one immediately ran inside. The officers took the man remaining on the porch (Andre Ponder) into custody. At the time, "his hand was wrapped in cloth and bleeding." They asked permission to search the house for Kenya Ponder, the other brother, and Kenya's girlfriend "refused to allow the police to enter without a warrant." However, she told officers that if they were going in anyway, she wanted to remove her children, who were asleep inside. The officers entered and searched. They found two guns in the dryer, but no Kenya - he was eventually found in an neighbor's house. It turned out the house belonged to Kenya.

Andre was indicted on being a felon in possession. He requested suppression, arguing that he was an "overnight guest" in his brother's home, thereby having standing. However, the trial court refused to suppress the evidence, finding the entry and search to be justified by "exigent circumstances."

Ponder took a conditional guilty plea, and appealed.

**ISSUE:** Does hot pursuit justify an exigent entry into a house?

**HOLDING:** Yes

**DISCUSSION:** The prosecution initially argued that Ponder lacked standing in his brother's home, since he "was only a visitor there and, therefore, had no reasonable expectation of privacy." The Court agreed with Ponder, however, that "an overnight guest ... has a reasonable expectation of privacy that will support standing."<sup>60</sup> The Court accepted that the evidence was sufficient to support Ponder's claim that he was such a guest.

Moving on to the search, the Court stated that the "relevant inquiry is whether the facts are such that an objectively reasonable officer confronted with the same circumstances could reasonably believe that

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<sup>59</sup> U.S. v. Lopez-Medina, 461 F.3d 724 (6<sup>th</sup> Cir. 2006).

<sup>60</sup> Minnesota v. Olson, 495 U.S. 91 (1990).

exigent circumstances existed.”<sup>61</sup> It is the prosecution which bears the burden of proving the “existence of a legitimate exigency,” however.<sup>62</sup> The government claimed that the entry was justified because of the immediate “risk of danger to police or others”<sup>63</sup> as judged at the “moment of the warrantless entry by the officers.”<sup>64</sup> The Court reviewed previous cases that had discussed the issue, and determined that the officers on the scene “could reasonably have concluded that the circumstances posed an immediate risk of harm, either to themselves or others” as they knew that the allegation was that both brothers had weapons and had fired them less than an hour before.

Ponder argued that it was “well-established that police officers are not free to create exigent circumstances to justify their warrantless searches.”<sup>65</sup> The Court found no indication, however, that the officers had done so, instead, it noted, “it appears that they were properly conducting an ongoing investigation that had begun just a few hours earlier.” The Court found that the “exigent situation naturally arose when they observed Kenya flee into the house.”

Ponder’s plea was upheld.

## ***SEARCH & SEIZURE - INVENTORY***

### **U.S. v. Tackett**

**486 F.3d 230 (6<sup>th</sup> Cir. Tenn. 2007)**

**FACTS:** On June 21, 2004, Tackett’s “vehicle ran off the road and flipped over in Hardin County, Tennessee.” Tackett later claimed that he crawled away from the wreck scene with a backpack and a computer bag. A passerby stopped and assisted Tackett, calling for police and medical assistance, and stayed with him. Tackett “fell in and out of consciousness, yet he seemed worried about a dark-colored bag sitting on the ground nearby.” Deputy Franks opened the bag and discovered silencers and an illegal firearm, for which Tackett was later charged.

At trial, there was dispute as to precisely when the bag was opened, in that a trooper had allegedly already recovered a legal firearm from Tackett, who had a permit. Tackett suggested the officers were searching for firearms after finding that gun. The officers claim to have found the illegal weapons before the legal gun was discovered. In addition, the officers stated they have a “universally applicable policy of inventorying all items following an accident.” (Tackett alleged that they violated this policy by releasing one of his bags to a co-worker, but no proof was put forward to that effect.)

Tackett requested suppression, but the trial court denied it, “concluding that ‘the Fourth Amendment simply did not require Deputy Franks to choose between giving the backpack to a stranger, leaving the backpack on the road, or putting the backpack in his car or at the station without knowledge of the backpacks’ [sic] contents.”

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<sup>61</sup> See U.S. v. Williams, 354 F.3d 497 (6<sup>th</sup> Cir. 2003); Ewolski v City of Brunswick, 287 F.3d 492 (6<sup>th</sup> Cir. 2002); Welsh v. Wisconsin, 466 U.S. 740).

<sup>62</sup> U.S. v. Lewis, 231 F.3d 238 (6<sup>th</sup> Cir. 2000).

<sup>63</sup> U.S. v. Johnson, 22 F.3d 674 (6<sup>th</sup> Cir. 1994).

<sup>64</sup> U.S. v. Killebrew, 560 F.2d 729 (6<sup>th</sup> Cir. 1977).

<sup>65</sup> U.S. v. Campbell, 261 F.3d 628 (6<sup>th</sup> Cir. 2001); U.S. v. Morgan, 743 F.2d 1158 (6<sup>th</sup> Cir. 1984).

Tackett was convicted, and appealed.

**ISSUE:** May an inventory search be done, pursuant to an “understood” policy, on items left behind, outside of a vehicle, at the scene of a wreck?

**HOLDING:** Yes

**DISCUSSION:** The Court discussed the background of the inventory search doctrine, noting that “[o]ne recognized exception to the warrant requirement permits law enforcement officers to conduct inventory searches, including the contents of closed containers, so long as they do so pursuant to standardized procedures.”<sup>66</sup> In addition, officers have “an established caretaking role” to the public.<sup>67</sup> However, “officers must conduct a permissible inventory search in good faith, not as a pretext for criminal investigation.”<sup>68</sup> When officers conduct an inventory search, however, they “do not enjoy their accustomed discretion; they simply follow the applicable policy.”<sup>69</sup> The Court ruled, however, that “[n]onetheless, officers may exercise some ‘judgment based on concerns related to the purposes of an inventory search’; for example, they may decide to open particular containers if they cannot determine the contents.” Simply because they suspect they may find contraband “does not invalidate an otherwise proper inventory search.”<sup>70</sup>

Tackett raised three reasons to find that the inventory exception did not apply in this situation. First, he argued there was insufficient proof of a policy, but the court found that officers “testified at length” about their reliance on a “standard policy of inventorying all personal items and opening containers, with aims of attributing property ownership, protecting property, and preventing false claims.” The Court noted that a written policy is not essential, so long as the “existence and contours of the policy” are sufficiently proved.<sup>71</sup> Second, he argued that his privacy interest in the bag outweighed the officer’s “interest in opening the bag.” The Court looked to U.S. v. Markland for guidance, in finding that it was the duty of officers “to protect citizens’ property and prevent crimes” and to protect themselves, and that justified inventory searches.<sup>72</sup> Third, Tackett referred to Tennessee law and claimed that it prohibited such inventories unless relatives were present. However, the Court found that a breach of state law, in the absence of a federal constitutional violation, was not sufficient to bring a federal action.

The decision of the trial court was affirmed.

## ***SEARCH & SEIZURE - CONSENT***

**U.S. v. Grayer**  
**232 Fed.Appx. 446 (6<sup>th</sup> Cir. Tenn. 2007)**

**FACTS:** On Nov. 25, 2003, Officer Cunningham (unnamed Tennessee agency) stopped a vehicle for driving without headlights. He learned that the vehicle had been reported stolen. The driver, Faulkner,

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<sup>66</sup> Colorado v. Bertine, 479 U.S. 367 (1987).

<sup>67</sup> South Dakota v. Opperman, 428 U.S. 364 (1976).

<sup>68</sup> Bertine, *supra*.

<sup>69</sup> Florida v. Wells, 495 U.S. 1 (1990).

<sup>70</sup> U.S. v. Lumpkin, 159 F.3d 983 (6<sup>th</sup> Cir. 1998).

<sup>71</sup> See U.S. v. Player, 201 F.App. 331 (6<sup>th</sup> Cir. 2006).

<sup>72</sup> 635 F.2d 174 (2d Cir. 1980).

indicated he had borrowed the car from Grayer, who lived within just a few doors of the stop. Cunningham cuffed Faulker, secured him in the cruiser and searched the car, finding ammunition in the trunk - a box of .40 caliber bullets with ten rounds missing.

When additional officers arrived, Officer Cunningham and another went to Grayer's door, with other officers nearby. A man who identified himself as Grayer answered the door, and Cunningham asked him to step outside. When he acknowledged ownership of the vehicle, he was arrested, searched and placed in the cruiser.

The officers went back to the house and sought entry from the woman who answered the door, Clay. Officer Cunningham recognized Clay as the caretaker of the home, as the homeowner was away in prison, and she signed a written consent form permitting the officers the search the house. Upon being asked about weapons, Clay "hesitantly took the officers" to a location in the house and pointed out a .40 caliber handgun.

Grayer was advised of his Miranda rights and questioned. He admitted to possession the vehicle, the ammunition and the pistol. Faulker was released, but Grayer was arrested. Grayer requested suppression, was denied, and he took a conditional guilty plea. Grayer then appealed.

**ISSUE:** May a caretaker consent to the search of an entire residence?

**HOLDING:** Yes

**DISCUSSION:** First, Grayer argued that Clay lacked authority to consent to the search of the bedroom where the pistol was found, and that the officers, "when confronted with an 'ambiguous situation,'" are required to inquire further. The Court, however, found the situation was not ambiguous but that Clay had clear authority to give consent. There was no indication that Grayer had exclusive control over the bedroom which was apparently unlocked, in fact, apparently Clay claimed to occupy it and the room contained her personal belongings.

Grayer also argued that the officers "constructively entered" the house when they forced him from his home. The court, however, noted that nothing prevents officers from talking to residents and asking them to come outside, as long as the request is noncoercive. The Court found that "none of the hallmarks of constructive entry were present: (1) drawn weapons; (2) raised voices; (3) coercive demands; or (4) a large number of officers in plain sight." Only two officers went to the door and asked him to step outside. The Court found that argument must fail.

Next, the Court noted that "no level of suspicion was required before the officers approached the resident and questioned Grayer, or whomever happened to answer the door." Further, officers may initiate a "purely consensual encounter" ... without an objective level of suspicion. The Court found "these so called "knock and talk" consensual encounters as a legitimate investigative procedures so long as the encounter does not evolve into a constructive entry." As such, the initial approach was appropriate, and once Grayer admitted that he possessed the stolen vehicle, the officers had sufficient probable cause to arrest.

The Court upheld Grayer's plea.

## ***SEARCH & SEIZURE - TIPS***

### **U.S. v. Graham**

**483 F.3d 431 (6<sup>th</sup> Cir. Ohio 2007)**

**FACTS:** On Sept. 13, 2003, Officers Halburnt and Malson (Dayton, OH, PD) were patrolling when they discovered a vehicle illegally parked outside a residence. The driver's door was open. The officers approached on foot and saw a male driver and a female passenger. Officer Halburnt saw the male (Graham) "dip his shoulder, as if he was putting something under the seat." Halburnt told the driver to keep his hands on the steering wheel, and asked if he realized the car was illegally parked. Halburnt asked for ID, which Graham was unable to provide. He stated, however, that his name was Tony Graham.

Earlier that evening, Halburnt had heard a broadcast from Officer Stivers "to the effect that it was possible that Tony Graham was armed and was planning to shoot someone at" the address where the vehicle was parked. Graham stepped out of the car, upon request, and walked back to the police cruiser with Halburnt. Halburnt told Graham that he "was going to pat him down" and that Graham would then "have to sit in the back of the cruiser." Graham refused both and "began to walk away." Halburnt and Malson attempted to grab Graham, but he resisted and struggled with the two officers. Halburnt sprayed him with OC and Graham stopped resisting - he was handcuffed, frisked and placed in the cruiser. (The opinion notes that the handcuffing and restraint in the cruiser were "solely for the purpose of officer safety" and that he was not under arrest at the time.)

Returning to Graham's vehicle, Halburnt found a firearm under the driver's seat. Halburnt gave Graham his Miranda warnings, and Graham admitted to keeping the firearm "for protection." Graham was a convicted felon, so he was charged and indicted for his possession of the weapon.

Halburnt moved for suppression. Because there was no evidence presented "establishing the reliability of Stivers' statement," the Court viewed it as an anonymous tip. Using the precepts of Alabama v. White, the Court found that Stivers' broadcast "contained information which predicted Graham's future behavior" - that he would be found at a particular address. Once the officers learned that the male driver was, in fact, Tony Graham, the tip was further considered predictive, and coupled with the "dipping motion" "was sufficient to establish reasonable suspicion that Graham was armed and dangerous, and therefore, the search did not violate Graham's Fourth Amendment rights." The District Court denied the motion; Graham took a conditional guilty plea, and appealed.

**ISSUE:** May a vehicle be the subject of a Terry frisk?

**HOLDING:** Yes

**DISCUSSION:** Graham argued that the officers lacked "probable cause to stop him for a parking violation." He further contended that "even if the stop was lawful, the searches of his person and the vehicle were not supported by reasonable suspicion ...."

The Court quickly put aside one of the government's assertions, that "once an individual is legitimately stopped, for any reason, police who receive an otherwise unreliable tip have carte blanche to perform a protective search of the person (or his effects). However, in reading Florida v. J.L., the Court noted that

“a person who has already been legitimately stopped’ refers to a person who was already lawfully stopped for the same reasons that serve as the basis for the protective sweep” and that there “[c]learly must be some nexus between the criminal conduct of which the police suspect the defendant and the aim of the protective sweep - the most obvious example arising where they suspect him of illegally carrying a gun.” The Court found it “hard to imagine how suspicion of a parking violation, by itself, could ever justify a protective search of a suspect’s person.” The Court noted that:

While the officers ... were completely within their rights to carry out their duties related to the parking violation, with respect to investigating any *other* crimes, they were bound by the same constitutional limitations that they would have been had they encountered Graham while he was doing nothing illegal at all.

The Court emphasized that the “Supreme Court has *never* authorized a protective sweep on anything less than reasonable suspicion that a suspect was armed and dangerous.” The Court noted that had the search been based only on an unreliable tip, it would have been suppressed. However, in this case, the Court stated that there was a clear traffic violation, and as such, the traffic stop was lawful. In assessing the legality of the frisk, the Court had to “determine whether the anonymous tip and the furtive movement observed by Halburnt, when considered together, support[ed] a reasonable suspicion that Graham was armed and dangerous.” The Court looked to its earlier cases involving tips<sup>73</sup> and concluded that the combination of the two facts were sufficient to justify the frisk. The Court further agreed that, under Michigan v. Long, “if an officer possesses a reasonable suspicion that a suspect is armed and dangerous, he may conduct a brief protective sweep of the suspect’s vehicle, so long as that search is constrained to places where a weapon may be hidden.” As such, once the frisk of Graham’s person was justified, a brief sweep of his car was also justified.

Graham argued that since he was secured in the cruiser at the time of the sweep, it could not be justified, but the Court noted that at the time, “Graham was merely detained, but not under arrest.” Had they not checked the car, and “simply let him go, Graham would immediately have had access to the weapon once he reentered the car.” Finally, the Court agreed that it was reasonable for Halburnt to rely upon information provided by another officer, presuming that officer’s information source is credible.

The denial of Graham’s motion to suppress was affirmed.

**U.S. v. Cohen**  
**481 F.3d 896 (6<sup>th</sup> Cir. Ky. 2007)**

**FACTS:** On Dec. 17, 2004, at about 4:52 a.m., Officers Koenig and Pender (Jeffersontown PD) were dispatched on a “trouble run” - a 911 hang-up call. As Officer Pender approached the house, in a subdivision cul-de-sac, he spotted a vehicle leaving the area. Officer Pender stopped that vehicle, and Officer Koenig arrived within moments and pulled in front of the suspect vehicle.

Cohen, the driver, stepped out, but got back in the car when Officer Pender got out of his cruiser and approached. Officer Pender told him the reason for the stop, and asked him for his documents, but Cohen said “just shoot me, just shoot me.” Officer Pender and Koenig conferred at the rear of the car about what to do.

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<sup>73</sup> Florida v. J.L., 529 U.S. 266 (2000); Alabama v. White, 496 U.S. 325 (1990).

Cohen got out and approached the officers with his hands up. When Pender again explained why he'd stopped Cohen, Cohen recited his operator's license number. While the officers were checking his information, they suggested that they sit in Officer Pender's car, with Cohen in the back seat, and Cohen agreed.

Within a few moments, the dispatcher asked Koenig, via code, if he was alone. After turning down Pender's radio, Koenig was told that Cohen might be wanted on an Indiana probation violation. He was also told that Cohen had an outstanding DVO. When asked, Cohen stated that he was on parole. Officer Hutchinson passed by, and he was asked to stay as well. Within a short time, the officers learned the Cohen's license was suspended and that there was a arrest warrant out of Indiana. By 5:27 a.m., he was under arrest.

Officer Koenig found ammunition in the passenger compartment, and a handgun matching the ammunition in the trunk. Eventually Cohen was indicted on federal charges of being in possession of the weapon and ammunition, and he sought suppression. The trial judge granted the motion to suppress and the prosecution appealed.

**ISSUE:** May a vehicle stop be justified solely by a 911 hang-up call that occurs in the vicinity?

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

**DISCUSSION:** The Court stated by noting that, under the Fourth Amendment, an officer "may make an investigative stop of a vehicle only if the officer" has articulable reasonable suspicion that a crime is afoot." The Court reviewed the facts known to the officers at the time, and concluded that the facts were not sufficient to provide reasonable suspicion. It equated the "911 hang-up call, standing along without follow-up calls by a dispatcher or other information, is most analogous to an anonymous tip." Although such tips "are not irrelevant in evaluating the totality of the circumstances," they "should be given little weight." The Court continued:

Citizens call 911 for many different reasons. A citizen may call 911 in order to report an emergency, be it criminal activity, a fire, or a medical emergency, but someone may also call 911 because he or she misdialled another number, accidentally activated a speed dial feature, or wished to pull a prank on the authorities. Thus, without any information from the caller, the silent 911 hang-up call was the equivalent of an anonymous 911 report that there might be an emergency, which might or might not include criminal activity, at or near the address from which the call was made. In that sense, the silent 911 hang-up call could be said to have suggested the possibility of, among other things, a limited "assertion of illegality," but, absent any observed suspicious activity or other corroboration that criminal activity was afoot, Officer Pender had no way of determining whether the silent 911 hang-up call was reliable in even that limited possible assertion.

In addition:

The silent 911 hang-up call also did not provide a description of Cohen or his car and thus did not identify any determinate person. The quick response of Officers Pender and Koenig made it possible to limit those potentially related to the silent 911 hang-up call to those

people and vehicles within four minutes of the area surrounding Wooded Glen Court, and the early hour limited the number of people in that general area, but those limitations still fall short of identifying a determinate person.

Although other courts had found that such calls have more reliability, the court found that the “virtually complete lack of information conveyed by the silent 911 hang-up call and the total absence of corroborating evidence indicating that criminal activity was afoot” meant that the call carried little weight in such evaluations.

The Court held that the stop was not supported by reasonable suspicion, and affirmed the trial court’s decision to suppress.

### ***SEARCH & SEIZURE - WHREN***

#### **U.S. v. Marshall**

**233 Fed.Appx. 436 (6<sup>th</sup> Cir. Ky. 2007)**

**FACTS:** In 2003, Marshall rented property in Robards. The property owner contacted the Henderson County Sheriff’s Office after “smelling a strong chemical odor coming from the outbuilding located on the property.” Det. Book met with the property owner, who then also related that she had watched two men leave the property in Marshall’s truck with the bed loaded with trash bags.

Det. Book and Dep. Keller went to the property and knocked, getting no answer. The property owner led to the officers to the outbuilding, and pointed out an exhaust fan that Marshall had installed. Det. Book spotted Marshall’s truck start to pull in, but then leave. Dep. Keller stated that he had seen a similar vehicle at a dumpster nearby when he’d been on his way to the scene. Book contacted a deputy in the area, Broshears, and directed him to “stop the vehicle for questioning.”

Dep. Broshears spotted the vehicle, and noted that it had “an expired Illinois license plate sticker.” He verified the plate and attempted to stop the vehicle, but it sped off. However, the driver (Marshall) stopped the vehicle within a few minutes. Broshears arrested Marshall for driving without a license, failure to produce evidence of insurance, driving under the influence, and expired tags. Det. Book came to the scene. Bruce, the passenger, told him that they’d discarded several garbage bags. Book located the described bags and found they contained gallon jars. They were field tested and found the jars contained ammonia and naptha, evidence of methamphetamine manufacturing.

They returned to the rental property and secured it. They found another jar and bags similar to those found in the dumpster, near the carport in plain view. Book obtained a search warrant and it was executed that evening.

Marshall took a conditional guilty plea on various methamphetamine related crimes and appealed.

**ISSUE:** Is an expired license decal sufficient cause for a traffic stop?

**HOLDING:** Yes

**DISCUSSION:** Marshall contended that “Broshears did not have probable cause or a reasonable, articulable suspicion to stop his vehicle” and as such, the evidence must be suppressed. He challenged “Broshears’ credibility, arguing that the truck had a trailer hitch, which made it impossible for the officer to see the expired license plate sticker.” He noted that the radio transmission just prior to the stop had Broshears calling in the tag number but not mentioning that it was expired.

The Court found Broshears more credible than Marshall and further noted that “[s]ince driving with expired tags constitutes probable cause to stop a vehicle,” the stop was permitted.<sup>74</sup>

Marshall also argued that the officers were searching the outbuildings prior to getting a warrant, based upon a “photograph of the outbuilding taken in daylight with its door open.” He noted that the warrant was not obtained until 8:30 p.m., and that it was dark then. Book, however, testified that the photos were actually taken after the search warrant was executed, including some taken the next day, despite the fact “all of the disks containing photographs are dated the 18<sup>th</sup>.”

Marshall’s plea was upheld.

## ***SEARCH & SEIZURE - CONSTRUCTIVE POSSESSION***

### **U.S. v. Arnold**

**486 F.3d 177 (6<sup>th</sup> Cir. Tenn. 2007)**

**FACTS:** On Sept. 19, 2002, at about 7:43 a.m., Gordon called 911 and reported the following:

*I need police ...Me and my mama's boyfriend got into it, he went in the house and got a pistol, and pulled it out on me. I guess he's fixing to shoot me, so I got in my car and [inaudible] left. I'm right around the corner from the house.*

Gordon further identified the boyfriend as Joseph Arnold, a recently released convicted felon (for murder).

Officers arrived in minutes, and Gordon got out of her car and approached them. She was later described as extremely upset, hysterical and crying. She described Arnold’s weapon as a “black handgun.” While officers were still there, Arnold arrived; he was a passenger in Gordon’s mother’s car. Gordon immediately pointed him out and again stated that he had a gun. Arnold got out of the vehicle and the officers patted him down, finding nothing. Gordon’s mother gave consent for the officers to search the car, and they found a “black handgun inside a clear, plastic bag directly under the passenger seat where Arnold had been sitting.”

Arnold was charged with being a felon in possession of a firearm. However, at trial, Gordon did not appear. The trial court ruled that the prosecution could use a redacted (edited) recording of the 911 call, excluding the reference to his felon status, and that Gordon’s statements were an exception to the hearsay rule, as they were “excited utterances.”

Arnold was convicted, and appealed.

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<sup>74</sup> Whren v. U.S., 517 U.S. 806 (1996).

**ISSUE:** May a subject be held criminally responsible for a weapon found under their seat, and which has allegedly been in their hand just prior to the arrest?

**HOLDING:** Yes

**DISCUSSION:** In this appeal, the first issue was whether Arnold could be considered to be in possession of the firearm in question. The Court noted that clues from Gordon's description of the weapon she alleged Arnold pointed at her indicated the weapon was a semiautomatic pistol and that it had a round in the chamber, as she indicated that Arnold had "pulled back the slide" during their encounter. It was found within easy reach of Arnold.

The Court noted that "possession may be proved by direct or circumstantial evidence."<sup>75</sup> Although the gun was found in a plastic bag, and lacked any fingerprints, the Court found that it was reasonable for the jury to find that Arnold had possessed it. It was unreasonable to expect that Gordon could give precise details about the gun she alleged Arnold brandished in her direction, and nothing required that a witness should be able to do so under the circumstances.

Next, Arnold challenged "three out-of-court statements -- the 911 call, Gordon's initial statements to police officers upon their arrival at the crime scene and Gordon's statement to officers upon Arnold's return to the scene -- under the excited-utterance exception to the hearsay rule." Under the Federal Rules of Evidence, a court may admit such statements "for the truth of the matter asserted when they 'relat[e] to a startling event or condition made while the declarant was under the stress of excitement caused by the event or condition."<sup>76</sup> To satisfy this exception, the party must show: an "event startling enough to cause nervous excitement"; "the statement must be made before there is time to contrive or misrepresent" and; "the statement must be made while the person is under the stress of the excitement caused by the event."<sup>77</sup> The Court then applied these rules to each of the statements in question.

First, the Court noted that Gordon's statements to the 911 operator satisfied all three prongs of the analysis. The only question might be the immediacy of the threat, but the Court noted that several cases upheld statements "made after the starting event but well within the traumatic range of it." The Court further noted that other evidence corroborated Gordon's degree of upset, including her "distraught demeanor personally observed" by the responding officers. The Court found the statement to be properly admitted.

Second, the Court analyzed Gordon's statements to the responding officers. Again, it noted that the officers had described her degree of upset, that she was "crying," "hysterical," "visibly shaken and upset," and that she had described the threat made to her. These statements came perhaps no more than 20 minutes following her initial call to 911. The Court found the statement to be properly admitted.

Third, the Court analyzed Gordon's statement, identifying Arnold, when he arrived back at the scene. The trial court had found the statement to be within the same time frame as the original emotional trauma that captured Gordon's earlier statement to the officers." In addition, the Court stated that "the unexpected

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<sup>75</sup> *U.S. v. Craven*, 478 F.2d 1329 (6<sup>th</sup> Cir. 1973).

<sup>76</sup> Federal Rule of Evidence 803(2) is mirrored by Kentucky Rule of Evidence 803(2).

<sup>77</sup> *Haggins v. Warden, Fort Pillow State Farm*, 715 F.2d 1050 (6<sup>th</sup> Cir. 1983).

appearance of the victim's assailant independently suffices to establish a startling event followed by an understandably excited verbal response."

Arnold had also challenged the three statements under the Confrontation Clause of the Sixth Amendment. Although the case was originally decided prior to Crawford v. Washington, on hearsay exception grounds, the Crawford decision forced the Court to examine the facts under the Confrontation Clause, as well.

First, the Court again looked at the 911 call, and noted that the facts were a "close analogy" to the statements made in Davis v. Washington.<sup>78</sup> The Court did "not doubt that Gordon sought protection from an ongoing emergency." The "911 operator's handling of the call shows that she was trying to" get information to assist in resolving the emergency. The trial court had acknowledged the fear in Gordon's voice and stated that the "primary purpose and effect of the 911 operator's questioning was to resolve the crisis, with the questions and answers coming in spite of, not because of, the possibility of a later criminal trial." She was close to the scene when she made the call, apparently from a cell phone in her car, and she stayed close by until the police arrived and she returned to the house. The Court found that the exigency was ongoing and that the 911 call was admissible.

Second, the Court again reviewed Gordon's initial statements to the responding officers. Although in some cases, a witness's statements to officers "will be testimonial because the presence of the officers will alleviate the emergency," the Court found that not to be the case here. Arnold was still "at large," he was not aware of the 911 call, "and for all Gordon (or the officers) knew Arnold remained armed and in the residence immediately in front of them or at least in the nearby vicinity." Gordon began talking, and was "crying and ... screaming," before officers had a chance to even ask a question. The Court found that the "distress that the officers described in her voice, the present tense of the emergency, the officers' efforts to calm her and the targeted questioning of the officers as to the nature of the threat, all of which suggested that the engagement had not reached the state of a retrospective inquiry into an emergency gone by." The primary question the officers asked of her in those first moments was concerning the appearance of the gun. It was also a way, the Court noted, to test the authenticity of what she was saying, rather than an interrogative, as well as to determine if the gun was a threat to the officers themselves. The Court found it absolutely credible that officers would seek this information, for their own safety and the safety of the public. "To the extent [the officers] made inquiries at all, they never strayed from asking questions clarifying the extent of the emergency and obtaining information necessary to resolve it," in contrast to the situation in Hammon.<sup>79</sup> The Court concluded the statements at that time were nontestimonial and admissible.

Third, the Court again reviewed the statements Gordon made when Arnold "suddenly returned to the scene." Her exclamation identifying Arnold as the assailant was not prompted by officer questioning. It was not a "statement prepared for court." It, too, was nontestimonial and admissible.

Finally, the Court noted that Gordon's staying near the house, although not at the house, was reasonable under the circumstances and the "quickest route to making contact" with the police, and did not indicate that the emergency was diminished.

The Court concluded by asking whether the Confrontation Clause issue in Crawford, which "restricts the admission of testimonial statements," "continue to place any restrictions on the admission of nontestimonial

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<sup>78</sup> 126 S.Ct. 2266 (2006).

<sup>79</sup> Hammon v. Indiana, co-cited with Davis v. Washington, *supra*.

statements?" The Court noted that Davis answers the question by stating that the Confrontation Clause is "solely concerned with testimonial hearsay," and that it is appropriate to leave the question of the admissibility of nontestimonial hearsay to federal and state rules of evidence.

The Court concluded that all of Gordon's challenged statements were properly admitted, and affirmed Arnold's conviction.

**U.S. v. Cobbs and King**  
**233 Fed.Appx. 524 (6<sup>th</sup> Cir. Mich. 2007)**

**FACTS:** Cobbs and King were arrested on federal drug trafficking charges., along with a variety of weapons charges. At trial, Lt. Belcher, supervisor of the drug task force, "testified as an expert and fact witness." As such, he testified that he was "familiar with the tools of the trade used in illegal narcotics trafficking." He explained how drugs were packaged and how cocaine is smoked. He further stated that the "pre-wrapped quantities" were "sufficient for seven or eight doses." He also testified that the digital scales found were critical to the drug trafficking trade, and that the police scanners found were used to "monitor police activity in their areas" and that the guns found were used to intimidate and to protect the proceeds.

Another witness, Romanowski, testified concerning the firearms seized at the residence. He explained that the AR-15 found had been converted to permit it to "operate as a fully automatic machine gun." Another firearm had its serial number obliterated.

Following a great deal of testimony about the case, both were convicted and appealed.

**ISSUE:** May a person be held to be in possession of firearms found in their bedroom that they share with another person?

**HOLDING:** Yes

**DISCUSSION:** Among other issues, King denied any involvement with the firearm that bore a defaced serial number, even though she shared the bedroom where it was found. The Court found that a "jury could reasonably find that the firearm was placed there and constructively possessed by Cobbs, the other person who had dominion and control over the room." The "scraped-down serial number was located on the back of the handle of the firearm, in the plain view of anyone who handled it." Even though it was not possible to tell from simply looking at the weapon that it had been converted, the Court noted that the evidence indicated that the weapon was modified after it was purchased, and that Cobbs was the only owner of the weapon.

The Court found that the weapon was found in constructive possession of both Cobbs and King for the entire period of time, and upheld the conviction.

**Drew v. Parker**  
**2007 WL 1748135 (6<sup>th</sup> Cir. Tenn. 2007)**

**FACTS:** On June 16, 1995, Capley was working at a market in West Nashville. Earlier that same day, she had spotted Drew purchasing a bottle of wine and spoke to him briefly. At the market, she was

waiting on a woman when Drew joined the line. Capley had just opened a new bundle of cash, approximately \$2,000 and added it to the drawer. When she opened the drawer, Drew “reached over the counter and took a handful” of cash. Capley screamed and chased Drew from the market. The owner, Sigley, did not see the actual robbery but witnessed Drew, with money in his hand, running from the store. Two other witnesses joined Capley in chasing Drew to a “nearby field that surrounded an abandoned grain silo.”

Officer Burnette responded to the call. Capley described the thief as a “black male wearing a white-colored shirt and blue jeans.” Sigley described him as wearing a “light-colored shirt and dark pants, and stated he had a “very identifiable face” and had “that he had stood in line for at least a couple of minutes, which provided a good opportunity to look at him.”

After a lengthy search, Officer Burnette found Drew hiding. Drew was a black male, wearing a white shirt and dark pants, and had \$260 in 20-dollar bills in his pocket. Officer Burnette arrested Drew and brought him back to the market, where the officer “asked each witness to walk by the police car and determine if they could identify the man in the car.” Each witness independently identified Drew. However, it was noted that it was believed that approximately \$2,000 in 20-dollar bills was taken in the robbery.

Drew was indicted and argued that the “showup identification was impermissibly suggestive and as tainting any subsequent in-court identifications.” However, the trial judge, relying on Neil v. Biggers,<sup>80</sup> denied Drew’s motion to suppress. Eventually, Drew was convicted, and appealed. After a complicated series of proceedings, the Sixth Circuit accepted the case on a habeas petition.

**ISSUE:** Is a suggestive, but reliable, identification admissible?

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

**DISCUSSION:** The Court reviewed the law on showup identification and noted that “even if the confrontation is suggestive, an identification will be admissible if it is reliable.” He argued that the officers “inappropriately played to the witness’s fears’ because as far as the witnesses knew, [Drew], who apparently had reason to hide from the police, would be released absent their identification.” He also argued that the identification “failed to satisfy the reliability criteria of Biggers” by questioning the degree of attentiveness of the two witnesses prior to the crime. The Court, however, noted that both women did have at least a few minutes to view the suspect, and that they both identified the thief’s clothing and Sigler described his face in detail. He complained that the description was “fairly vague,” but again, the Court discounted that. The Court noted that the witnesses were both very confident in their identification, another factor in Biggers, and also cited the short time frame, two hours, between crime and identification. The Court found no reason to find that delay to be significant.

Drew’s conviction was affirmed.

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<sup>80</sup> 409 U.S. 188 (1972).

## ***42 U.S.C. §1983 - ARREST***

### **Fox v. Desoto**

**489 F.3d 227 (6<sup>th</sup> Cir. Ky. 2007)**

**FACTS:** On Sept. 2, 2002, Fox was an IRS Special Agent traveling from Louisville to Chicago. He was authorized to travel with a weapon and had been screened. However, before he could be introduced to the Captain, as required by regulation, he got into a “verbal exchange” with other passengers. Apparently they objected to him blocking the aisle while trying to fit his carry on luggage into the overhead bin, and he cursed at them. The flight attendant told the Captain what had occurred and they ordered Fox off the flight. He was escorted to the Ground Security Coordinator (GSC), as he demanded.

Officers DeSoto and others responded to the gate area, but Fox refused to speak to anyone or identify himself until the GSC arrived. He would not talk to Miller, who also arrived to ask him about luggage, and later denied that Miller identified herself to him as the GSC. Officer DeSoto tried to get Fox to accompany him to a more private location. When Fox stiffened and reached for his right side, DeSoto took him to the floor and handcuffed him. Fox was slightly injured as a result. DeSoto removed Fox’s weapon, ID and ammunition. Fox was arrested for Disorderly Conduct and Resisting Arrest, both charges later being dismissed by the trial court.

Fox filed suit against DeSoto and the Regional Airport Authority, under 42 U.S.C. §1983. The Court dismissed all claims and Fox appealed.

**ISSUE:** Do false arrest claims under 42 U.S.C. §1983 fall under a one-year statute of limitations?

**HOLDING:** Yes

**DISCUSSION:** The court discussed, first, whether the action was time-barred and outside of the statute of limitations. The federal court uses the individual state law statutes of limitation, which for Kentucky would be one year for each, and for the false imprisonment and false arrest claims, would accrue on the date of the arrest. The Court found that the case was untimely filed.

With regards to Fox’s claims that the seizure was inappropriate under the Fourth Amendment, the Court looked to the facts. The Court found that it was appropriate for DeSoto to believe that Fox was engaging in Disorderly Conduct. As such, the seizure was appropriate. With regards to the injury sustained, and his excessive force claim, the Court found the “force used by DeSoto to effectuate the arrest was objectively reasonable under the circumstances.” In both claims, summary judgment was appropriate.

The Court dismissed the remaining claims as well, and judgment was entered in favor of DeSoto and the RAA.

## ***42 U.S.C. §1983 - SPECIAL RELATIONSHIP***

### **Draw/Ricks v. City of Lincoln Park 491 F.3d 550 (6<sup>th</sup> Cir. Mich. 2007)**

**FACTS:** On Oct. 8, 2001, during an illegal drag race, a bystander, Jones was struck by a car and killed and other individuals, including Draw and Ricks, were injured. Four officers from Lincoln Park were present during the race, although it actually took place just outside their city, in Detroit. Allegedly, the officers made no attempt to stop the race but instead, at least tacitly encouraged it.

A number of different legal proceeding sprang from the crash. The estate of the deceased bystander had already sued the officers and lost, because the officers had no reason to believe she was “in any more danger than any other citizen in the area that evening” nor did they create the danger.<sup>81</sup> The Court found that the claims of Draw and Ricks “were indistinguishable from those rejected” in the earlier case, and also dismissed the action. Draw and Ricks appealed.

**ISSUE:** Are officers liable for injuries to bystanders to a dangerous situation that they did not cause?

**HOLDING:** No

**DISCUSSION:** The Court began its discussion by noting that although the theory under which this case has been pressed - the “direct injury” theory, is different from that of the earlier case, the facts are the same. The Court concluded, however, that ultimately it did not matter the theory, that the officers were still not liable for the injuries to the bystanders.

The District Court’s decision to award summary judgment to the defendants was affirmed.

## ***42 U.S.C. §1983 - CONSTRUCTIVE EVICTION***

### **Cox v. Drake 2007 WL 1804357 (6<sup>th</sup> Cir. Ohio 2007)**

**FACTS:** In December, 2001, Rachael Cox rented a home in Deer Park, Ohio, from Nabors. Cox later admitted that her former husband, Johnny Cox, stayed with her on occasion and that they shared crack cocaine a number of times, and that other acquaintances would join them as well. (Cox denied she ever bought or sold drugs herself.)

On Nov. 10, 2003, Cox became ill after using crack and called her mother for help. Her mother called 911 and Deer Park officers, in particular Officer Drake, along with EMS, arrived. Cox was taken to the hospital for treatment and no arrests were made. This incident, however, according to Cox, “was the impetus for” her to “stop using drugs, and she joined AA.” She alleged, however, that Officer Drake and other Deer Park officers began to harass her and her friends.

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<sup>81</sup> Three of the officers, however, “pleaded no contest to criminal charges of neglect of duty.”

Officer Drake later admitted that there was an initiative in the department to “watch the house” and that the Chief had approved that decision. Among cited incidents, Officer Drake pulled over Johnny Cox, who was driving Rachael’s car, because of a non-illuminated license plate. He asked to search the car, but was refused. Drug dogs, called from a nearby town, found nothing. A few months later, Officer Drake pulled over the couple because Cox had not paid the ticket from the first stop, and arrested Johnny Cox. Rachael Cox agreed to allow the officer to search. During that time, she claimed that Officer Drake “remarked that she was in a lot of trouble and that the police” were going to talk to her landlord “about all the trouble” she was causing.

Later that day, Rachael Cox and Officer Drake met, during which time that they told her they had a “total of 16 separate 911 calls [that] had been placed by her neighbors concerning incidents at the residence.” Cox claims that Drake stated that he was going to tell the landlord that “her house might be subject to abatement procedures if Rachael Cox was not evicted” but Drake denied having done so. She claims she offered to be tested, but that Drake was insistent.

On March 20, 2004, Officer Drake met with the landlord and told her about the “volume of phone calls the police had received related to” Cox’s home. The landlord was unaware of the calls and had had little problems with Cox other than occasional late payments. Drake told the landlord that “she could not continue to rent to somebody who is known to be involved in drug activity under Ohio’s abatement procedure law.” His suggestion to “do something about this” was taken as a recommendation that she evict Cox, although Drake denied that he intended that.

Nabors gave Cox a notice that she was to leave the premises in three days. The landlord told Cox that she was doing it because the “police said I had to.” Cox alleged that Drake called her and told her she had to leave and asked for the date she would be leaving. She moved within the month.

Cox then filed a lawsuit against Drake, alleging that he deprived her of certain rights. She eventually added the police chief and the city as defendants as well. They moved for summary judgment, which the District Court granted, noting that Drake did not deprive her of any possessory property interest.

Cox appealed.

**ISSUE:** May officers be held liable for an eviction that they encouraged?

**HOLDING:** No

**DISCUSSION:** Cox argued that Officer Drake (and the other defendants) violated her Fourteenth Amendment rights “by depriving her of the use and enjoyment” of the house she rented “without a predeprivation hearing.” First, the Court quickly determined that she did have a protected property interest, as the valid leasehold tenant of the property. Next, the Court noted that “[w]hen a state actor is actively involved in an unlawful eviction, a deprivation occurs which triggers procedural due process rights even if post-deprivation proceedings are available that may be used as a remedy. Again, the Court agreed that she was not offered a hearing.

Finally, however, the Court had to determine if an eviction actually occurred, especially given that Cox vacated voluntarily before a formal eviction proceeding was started. Even though Officer Drake was not physically present when she was asked to leave, or when she left, Cox argued that his actions forced her

landlord to evict her from the premises. However, the Court found that “it was ultimately her decision to comply with the notice” and not fight the eviction threat.

The Court concluded that the Cox’s deprivation was not as a result of state action, and affirmed the dismissal of the case.

### ***42 U.S.C. §1983 - AND NEGLIGENCE***

#### **Mitchell/Foster v. McNeil**

**487 F.3d 374 (6<sup>th</sup> Cir. Tenn. 2007)**

**FACTS:** On Feb. 18, 2004, Daniel Mitchell, age 12, was struck by a vehicle. That impact threw him into the path of another vehicle, which also struck him. The combination of the two impacts proved fatal.

Upon investigation, it was learned that a Memphis PD officer owned the vehicle, and that it was being driven by McNeil, a police informant, who had permission to drive it. Moore’s parents later learned that it was not uncommon for officers to loan their vehicles to informants in exchange for information. Supervisory staff was aware of the practice.

Mitchell’s estate representatives filed suit against the McNeil, the officer--owner, various supervisory staff and the City of Memphis alleging both state negligence claims and liability under 42 U.S.C. §1983. Specifically, they claimed the practice of encouraging officers to loan their vehicles was unconstitutional, and that the agency failed to properly investigate the death. The case was removed to federal court, which granted the defendants’ motion to dismiss, and which then returned the case to state court. Mitchell’s estate representative appealed.

**ISSUE:** Is a policy of officers loaning vehicles to informants inherently unlawful?

**HOLDING:** No

**DISCUSSION:** The Court addressed the first theory, and accepted, for purposes of argument, that the claim that officers had a custom of loaning such vehicles to informants. It further accepted that “this is a strange policy, one that the city, its agencies and employees do not defend on its merits (except to say that it does not exist).” The Court noted, however, that the policy:

... without more does not state a cognizable due process claim. For one, while plaintiffs allege that the policy placed individuals in danger, they never allege that the policy did so intentionally or recklessly. For another, even the most well-reasoned, insightful and far-sighted of law enforcement policies may place the public in danger. Consider a policy that says police should not fire their weapons at an armed and dangerous, fleeing suspect when the suspect enters a crowded area. Much as that sensible policy would protect many individuals from harm, it also would place other individuals (though fewer individuals) at risk.

The Court further found nothing "inherently dangerous" in the practice, finding nothing that would make it more likely that the individual would have a collision. There was nothing that indicated that the informant was impaired in any way. In addition, the court noted that:

If, as plaintiffs allege, it shocks the judicial conscience for the police "to provide automobiles to informants with known histories of drug and alcohol use," then it would surely shock the same conscience to permit the police (1) to look the other way when informants buy and sell drugs and guns illegally in the course of a sting operation or (2) to enable that work by supplying the drugs and guns for them. But these and other, far-more-dangerous practices are a reality of the gray world of police-informant interactions, a form of cooperation that appears to be an indispensable feature of respected law-enforcement work. While we doubt that the City of Memphis has ever made it a practice to use only Eagle Scouts (or like-minded citizens) as its informants, we have little doubt about the limits of such a policy and little doubt about whether it would break open as many drug distribution rings as a policy that tolerates the use of criminals as the city's informants.

The Court next noted that there "is not statutory or common law right, much less a constitutional right, to an investigation" and in addition, that the investigation afterward had nothing to do with the accident itself.

The Sixth Circuit agreed with the trial court that the plaintiffs had failed to state a cause of action and affirmed the dismissal of the federal claims.

## ***42 U.S.C. §1983 - USE OF FORCE***

### **Roberts v. Corporal Manigold**

**2007 WL 1732903 (6<sup>th</sup> Cir. Mich. 2007)**

**FACTS:** When Roberts brought his children back from a weekend visit, his ex-wife, Parr, became angry with him and struck him with the telephone. Parr used another telephone to call 911 as Roberts left the house. He tried to call his attorney with no success. He called Parr later and found Officer Potts at the house. She instructed him to come back to the house if he wanted to make a statement. When he did so, he found Potts, along with Officers Stricklen and Webb, waiting. He "felt threatened by the officers and attempted to keep his distance from them." Roberts' phone rang and he thought it might be his lawyer, so he answered it. "As he answered his phone, he kept walking backward until, fearing for his safety, he turned and ran."

The officers pursued him on foot, and Stricklen tried to tase him. As Roberts felt the initial shock, he pulled out the prong and continued to run. "After Roberts fell face-down into a snow bank, Webb, a 225-pound former running back at the University of Michigan, a lesser Big 10 power, pinned him by holding his leg on top of Robert's back." "Although Webb had Roberts completely pinned, Stricklen repeatedly used her taser on Roberts." Webb later admitted that "he would have been able to subdue Roberts without Stricklen's assistance."

Roberts was charged with domestic assault, but was acquitted. He then sued the City (Birmingham) and the officers for excessive force, under 42 U.S.C. §1983, along with several state law issues. The officers

moved for summary judgment, and the District Court dismissed Webb and Potts, but not Stricklen and the City. The remaining defendants appealed.

**ISSUE:** Is unnecessary use of a TASER a constitutional violation?

**HOLDING:** Yes

**DISCUSSION:** The Court reviewed “facts and circumstances of other recent excessive force cases” to “guide [its] inquiry.” The Court concluded that Roberts’ claim, that “Stricklen needlessly used an electroshock weapon on him,” could convince a “reasonable jury”... “ that Stricklen used unnecessary and gratuitous (and thus excessive) force in violation of Roberts’s clearly established Fourth Amendment right.” As such, Stricklen was not entitled to qualified immunity at this stage of the proceedings.

**Bougress v. Mattingly**  
482 F.3d 886 (6<sup>th</sup> Cir. Ky. 2007)

**FACTS:** On Jan. 3, 2004, Officer Mattingly (Louisville Metro PD) “was involved in a drug-sting operation” with other officers. They were planning to “stage a drug transaction” in a parking lot of a convenience store. Other officers were monitoring Mattingly both visually and via a wire transmitter. As Mattingly sat in his car, various individuals approached him, offering to sell him narcotics. Among them was Michael Newby. (The Court noted a conflict between what Mattingly stated, that he believed that Newby had a gun because “Newby lifted his shirt up and jumped back from the car window,” a movement he identified as a “security check,” and what his behavior indicated, as he did not use a code word to indicate that “he thought he was in danger.”)

As Mattingly was focused on Newby, other suspects reached into his car and took some of the money Mattingly had visible, and ran away. Mattingly got out of the car, to discover their direction of travel, but he still did not radio any information that indicated he needed help or that Newby was armed. When he got out, however, he saw Newby, nearby, picking up a \$20 bill. Mattingly tried to arrest Newby, and they struggled. Newby broke free and ran directly away from Mattingly, and towards three eyewitnesses sitting in a vehicle and in view of the convenience store manager. Mattingly fired three shots at Newby, striking him all three times in the back. Newby ran around the building and sat down; Mattingly and Officer Thomerson approached him. At no time did Mattingly tell Thomerson that Newby was armed. When another officer approached Newby to handcuff him, again, Mattingly failed to warn that officer of any potential weapons, nor did he do so after Newby struggled during the handcuffing.

Newby died shortly thereafter of his injuries, and was found to be carrying a gun in his waistband.

Newby’s estate representative, his mother, Bougress, filed suit under 42 U.S.C. §1983. Mattingly requested, and was denied, qualified immunity, and he filed an interlocutory appeal with the U.S. Court of Appeals for the Sixth Circuit.

**ISSUE:** Is simply stating that one feared that a subject had a weapon sufficient to justify shooting that subject as they were running away?

**HOLDING:** No

**DISCUSSION:** The Court began its analysis by stated that it was “crucial for the purposes of this inquiry to separate Officer Mattingly’s decision-points and determine whether each of his particular decisions was reasonable.” The Court identified two separate decisions, the decision to arrest Newby and the decision to shoot Newby. The Court quickly found that Mattingly has probable cause to arrest Newby.

The Court next stated that the “question of whether Mattingly’s second decision was reasonable is the nub of this case.” It noted that the “relevant time for the purposes of this inquiry is the moment immediately preceding the shooting” and that the Court “must focus whether Officer Mattingly had probable cause to believe that Newby posed a serious danger to [Mattingly] or to others *while Newby was running away.*” Looking at the facts, as presented, the Court found it “clear that Mattingly did not have probable cause sufficient to open fire.” The Court found that “[t]oo much evidence throws doubt on Mattingly’s bare assertion that he suspected that Newby had a weapon” and that Newby’s only suspected crimes “were dealing crack and physically resisting arrest.”

The Court recognized that Mattingly (or other officers) believing an individual was dealing drugs, and that drug dealers “usually carry guns” was insufficient justification for a use of deadly force. Instead, the Court noted, Mattingly would have needed to provide a “particularized and supported sense of serious danger about a particular confrontation” to justify such a use of deadly force.

Newby’s second alleged crime was “resisting arrest and fleeing the scene.” Again, those actions, “without evidence of the employment or drawing of a deadly weapon, and without evidence of any intention on the suspect’s part to seriously harm the officer” is not enough to justify deadly force. (It would, of course, justify some degree of force.) Mattingly made no attempt to warn Newby that he might shoot, as required when feasible, and “[n]othing indicate[d] that a warning was unfeasible.” Simply, a “suspect’s flight on foot, without more, cannot justify the use of deadly force.”

The Court reviewed a number of cases offered by Newby in support of his actions, but the Court distinguished each from the facts of this case. The Court stated that it must “acknowledge that in challenges to official action, particularly police action in the heat of the moment, courts must be careful to avoid unduly burdening officers’ ability to make split-second decisions.” In addition, “[e]ffective policing requires that courts accord police officers a certain latitude to make mistakes.” In this case, the Court noted, “there seem[ed] to be little doubt that Mattingly was flustered and nervous” and noted that the members of the Court “might well have been nervous in his situation.” However, the “legal standard ... is objective” and “[e]ven a split-second decision, if sufficiently wrong, may not be protected by qualified immunity.”

The Court found that based upon the facts presented, and looking at the situation in the “light most favorable to Bougness” as the Court is required to do at this state of this type of a proceeding, the Court found that “Mattingly lacked probable cause to believe Newby posed a serious danger to him or to the public.”

Once a constitutional violation is noted, the Court’s “next step is to determine whether the right at issue was clearly established on the date of the shooting.” A rights violation might be excused under qualified

immunity if the actor “reasonably misapprehends the law governing the circumstances.”<sup>82</sup> The Court listed the facts as known to Mattingly, stating that Newby was:

1. present at a crack deal;
2. uttered no threatening remarks toward Mattingly or anybody else.
3. never drew a weapon;
4. struggled with Mattingly in order to flee;
5. did not reach for Mattingly’s gun;
6. did not fire Mattingly’s gun at Mattingly’s foot;
7. broke free from Mattingly and ran away, facing away from Mattingly; and
8. was shot three times in the back.

Under the situation as outlined, the Court found that “no reasonable officer could have thought he had probable cause to use deadly force against Newby.”<sup>83</sup> The Court quoted from Tennessee v. Garner, stating that:

The use of deadly force to prevent the escape of all felony suspects, whatever the circumstances, is constitutionally unreasonable. It is not better that all felony suspects die than that they escape. Where the suspect poses no immediate threat to the officer and no threat to others, the harm resulting to from failing to apprehend him does not justify the use of deadly force to do so. It is no doubt unfortunate when a suspect who is in sight escapes, but the fact that the police arrive a little late or are a little slower afoot does not always justify killing the suspect.

Where the officer has probable cause to believe that the suspect poses a threat of serious physical harm, either to the officer or to others, it is not constitutionally unreasonable to prevent escape by using deadly force. Thus, if the suspect threatens the officer with a weapon or there is probable cause to believe that he has committed a crime involving the infliction or threatened infliction of serious physical harm, deadly force may be used if necessary to prevent escape, and if, where feasible, some warning has been given.<sup>84</sup>

The Court recognized that although reasonable minds can differ as to the legality of deadly force in a particular situation, “there are obvious cases in which an officer should have been on notice that his conduct violated constitutional rights, despite the generalized nature of that Court’s pronouncements of constitutional standards.”<sup>85</sup>

In this case:

Mattingly and Newby struggled, perhaps over a gun, perhaps not. Newby fled, maybe posing a serious risk to Mattingly or to others, maybe not.

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<sup>82</sup> Malley v. Briggs, 475 U.S. 335 (1986); Brousseau v. Haugen, 543 U.S. 194 (2004).

<sup>83</sup> Tennessee v. Garner, 471 U.S. 1 (1985).

<sup>84</sup> Id.

<sup>85</sup> Hope v. Pelzer, 536 U.S. 730 (2002) .

Because of the factual disputes, however, the Court found that it could not resolve such doubts on an interlocutory appeal of a denial of qualified immunity. The Court noted that Mattingly's rebuttals to Bougness' arguments "rest[ed] on suppositions - that the gun was drawn during the struggle and that Newby tried to take it from him - that" the Court could not "accept at this state" of the proceeding.

Finally, the Court ruled that Mattingly was not entitled to "state-law official immunity" on the state claims in the case. The allegations suggest that Mattingly "violated clearly established federal constitutional law and thus were taken in bad faith" and that was sufficient to deny such immunity at this stage.

The Court upheld the denial of qualified immunity and request for summary judgment, and remanded the case for continued proceedings.

**Lewis v. Adams County**  
**2007 WL 1228644 (6<sup>th</sup> Cir. Ohio 2007)**

**FACTS:** On July 9, 2002, at about 7:30 a.m., Lewis drove to Copher's house, a short distance from Lewis' home, and asked Copher to make a telephone call to Lewis' employer and "to tell them that he would not be at work that day." He also told Copher that he and his wife were getting a divorce. Instead of calling, however, Copher delivered the message personally while he was doing errands in town. He returned to his home and at about noon, Copher "showed up again."

When Copher came outside, Lewis told Copher to call 911 and report that he had shot people who were moving "stuff" out of his house. Copher understood that one of the person that was shot was Copher's wife, Teresa. Copher later testified that Lewis's "eyes were red and his speech was like he had done it." Lewis left, "telling Copher that he was going back to his house." Copher watched him turn in that direction.

Lewis called 911:

Copher: Yes ma'am my name is David Copher and Everett Lewis just cam[e] up here and said that he has 2 victims uh 2 victims up there where he lives at I guess he shot 'em or somethin.

Dispatcher: Two victims?

Copher: That's what he told me to say.

Dispatcher: What's his name?

Copher: Everett Lewis lives out there on Barrackman Road.

. . .

Dispatcher: He shot 'em

Copher: He said he did, he told me not to come up near the truck.

Dispatcher: Where's he at now?

Copher: He just left, he's driving an orange and white Dodge pick up truck, looks like (I can't make it out) but I don't know. He's been going through a divorce type thing.

Dispatcher: Ok did he say he was going back to the . . .

Copher: He said he was going to try to work something out. I don't know what he's going to do. He's driving slow so apparently he's going back up there. I don't know, he shot 'em I guess. I don't know what to do go over there or stay here.

. . .

Dispatcher: Sir, did he go back toward his house or which way did he go?

Copher: Yeah he said he was going back toward his house so he just told me to call 911.  
Dispatcher: You don't happen to know his phone number or anything else do ya?  
Copher: His phone been disconnected.  
Dispatcher: Disconnected.  
Copher: I let him use my phone yesterday to call the Sheriff he said something about getting a restraining order.  
Dispatcher: Ok, and did he say who he shot?  
Copher: He didn't say anything he just said he had two victims laying on the ground so I don't know what . . .  
Dispatcher: Ok we'll get somebody right up there.

After receiving Copher's call, the dispatcher immediately alerted the police and officers were sent to Lewis's house to investigate.

Copher then had a second conversation with a 911 dispatcher that was not transcribed. During that conversation, Lewis reappeared at Copher's house. He asked Copher whether he had called 911 and whether the police were coming. He also told Copher that he had hostages in his house, and he warned Copher that no one should come within 100 yards of the house. Lewis was yelling, appeared to have been drinking, and appeared "mad at something." Although the dispatcher could not understand exactly what Lewis was saying, she could hear that he "was agitated" and sounded angry. Lewis then left again. As he left, the wheels on his truck were spinning and throwing gravel. Copher relayed to the 911 dispatcher that Lewis had told him there were three hostages in the house and that no one should come within 100 yards of the house.

At approximately 1:05 p.m. Copher had his third conversation with a 911 dispatcher, during which the following exchange occurred:

Copher: The first time he showed up he was kinda calm about it. The second time he was kinda pissed so apparently he said he's got three of them in the house.  
Dispatcher: Adams County to 14 be advised he had stated that there was three at the house.  
(background noise)  
Dispatcher: These were the three victims or just three people?  
Copher: The first time he said there's two victims in the yard.  
Dispatcher: Two in the yard?  
Copher: and I said what happened he said I shot 'em  
Dispatcher: Ok hang on  
Copher: Then he said, he came back the second time and said I've got three of them in the house and anybody who comes within 100 yards I'm gonna shoot 'em.  
Dispatcher: Ok hang on one second . . . Adams County to 14  
14 - 14  
Dispatcher: Be advised there was two in the yard shot and then he comes back and the guy said three in the house.  
(Background noise)  
Dispatcher: Be advised he had three in the house this is from the 911 caller.  
Dispatcher: 100 yards

Copher: He said don't come ya know once your in the driveway or get up in the driveway or apparently he can get a shot out I don't know.

Dispatcher: Ok but how far is that?

Copher: Well he said don't come within 100 yards of the house.

Dispatcher: Ok . . . Adams County to 14 be advised 100 yards of the residence.

Copher: He has guns there he's a deer hunter.

Dispatcher: He has several guns.

Copher: Uh I know he's I've heard a shot gun that he had. I don't know what he shot 'em with but I was in the house so he does deer (noise)

Dispatcher: Yeah but he does have weapons, he is a hunter. He does have weapons. He is a hunter.

. . . .

After each call, dispatch relayed the information given to the responding officers. After one call, Det. McCarty told dispatch to roll the Special Response Team. Eventually a total of seven officers responded, included the Sheriff. Dep. Sheeley arrived first, and waited, as instructed, for fellow deputies to arrive, and as he did so, he "saw Lewis's orange pickup truck approaching from the other direction, turn into the driveway and head toward the house" although, because of a rise, Sheeley could not see the house itself. As additional officers arrived, Sheeley attempted to find a point "from which to observe the Lewis property." Although he could see part of the scene, he could not see the yard, but he did observe Lewis come out, get into his truck, do "donuts" in the yard and drive through the road where the officers were waiting. Sheeley radioed this information as he "headed back there himself."

Lewis came within sight of the officers and stopped, and "began yelling at the officers." However, they could not understand him. He reached back "into the truck and pulled out a rifle and pointed it at the officers through the driver's door window." They ordered him to drop the weapon, but instead, he got back in and "began backing up rapidly toward his house." Four of the deputies pursued him back up the driveway, and when they caught up to him, he was already out of the truck. He held his rifle low, pointing it toward the vehicle and sidestepped rapidly towards the porch. The deputies continued to order him to put the weapon down, but he ignored them.

At this point, the deputies later testified, Lewis got to the porch and tried to enter, and "then stopped and aimed his rifle directly at the officers." (The plaintiff, Lewis's estate representative, argued that "whether or not Lewis was actually on the porch when he was shot, and whether or not Lewis was actually his rifle at the officers at the time he was trying to enter the house, are disputed facts.")

Immediately, all four deputies "fired (virtually simultaneously) at Lewis." As Lewis went down, Dep. Cooley "ran up onto the porch and moved Lewis away from his gun, while another officer took possession of the gun." Deputies entered the house looking for hostages and/or shooting victims, but found no one.

The autopsy indicated that Lewis was shot twice, with the "fatal gunshot wound . . . from back to front, right to left, and slightly downward, with the entrance in the right lateral chest and the projectile" remaining in the left side of his chest. The other gunshot was to the left buttock and the trajectory was essentially level.

The estate representative sued, arguing that the fatal shooting violated Lewis's rights. Six Adams County law enforcement officers, including the Sheriff, were sued along with other government entities, and all of

the officers requested summary judgment. The Court dismissed the federal claims and the state claims without prejudice. The estate appealed.

**ISSUE:** Is great deference given by the court to an officer's on-the-spot judgment at a scene?

**HOLDING:** Yes

**DISCUSSION:** The Court stated by noting that “[u]nder the Fourth Amendment, ‘the reasonableness of a particular seizure depends not only on *when* it is made, but also on *how* it is carried out.’” In addition, the Court found that “[t]he reasonableness’ inquiry in an excessive force case is an objective one: the question is whether the officers’ actions are ‘objectively reasonable’ in light of the facts and circumstances confronting them, without regards to their underlying intent or motivation.”<sup>86</sup> Finally, “[t]he reasonableness inquiry ‘requires careful attention to the facts and circumstances of each particular case, including the severity of the crime at issue, whether the suspect poses an immediate threat to the safety of the officers or others, and whether he is actively resisting arrest or attempting to evade arrest by flight.’”

The Sixth Circuit, in Burchett v. Keifer, also stated that the “standard contains a built-in measure of deference to the officer's on-the-spot judgment about the level of force necessary in light of the circumstances of the particular case”<sup>87</sup>and, of course, “must be judged from the perspective of a reasonable police officer on the scene.”

“Certain specific rules apply” to a use of deadly force, and it is “only constitutionally permissible if ‘the officer has probable cause to believe that the suspect poses a threat of serious physical harm, either to the officer or to others....”<sup>88</sup>

The estate argued that the District Court ignored conflicting evidence as to how Lewis died, and as such, its decision was improper. The Court noted that the forensic expert opined “that the physical evidence in the case was not consistent with the individual officers’ statements as to how the shooting occurred.” The expert, Dehus, stated that:

For Mr. Lewis’s wounds to have occurred while he was standing on the front porch, he would had to have been facing the northwest corner of the porch at the time they[sic] side wound was inflicted and would had to have been facing the front door at the time the wound to the buttocks was inflicted. Therefore, his back would have been towards the officers based upon their reported locations and the location of the fired cartridge casings. Diagram # 1 shows the probable trajectory of the bullet that struck Mr. Lewis in the right side and his position at the time of that shot. Diagram # 2 shows the probable trajectory of the bullet that struck Mr. Lewis in the left buttocks and his position at the time he was struck by that bullet. Considering these positions, it is the opinion of this examiner that it is highly unlikely that Mr. Lewis could have been pointing the rifle at the deputies at the time that they discharged their weapons.

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<sup>86</sup> Graham v. Connor, 490 U.S. 386 (1989); Tennessee v. Garner, 471 U.S. 1 (1985); St. John v. Hickey, 411 F.3d 762 (6<sup>th</sup> Cir. 2005).

<sup>87</sup> 310 F.3d 937 (6<sup>th</sup> Cir. 2002).

<sup>88</sup> Graham; see also Sample v. Bailey, 409 F.3d 689 (6<sup>th</sup> Cir. 2005).

He further stated that from the trajectory, Lewis was either not actually on the porch, as the deputies claimed, or that the "deputies were firing from an extremely high position."

The Court discussed whether Dehus's statement raised a genuine issue of fact that could not be resolved by summary judgment. First, they addressed the argument as to whether Lewis was completely turned to face the deputies when they fired at him. The Court mentioned two problems with the estate's argument - that nowhere did the deputies actually claim Lewis was facing them, only that "the upper portion of his body was turned toward them." Thus, the Court found no conflict in this evidence.

Next the Court looked as to whether there was any conflict in the assertion that Lewis was pointing his rifle at the deputies when they fired. The Court noted although Dehus stated otherwise, the testimony of the four officers, with the corroboration by the medical examiner, upheld their assertion that Lewis was, in fact, pointing the gun at him. "One expert's opinion that it is 'highly unlikely' that Lewis was pointing his rifle at the officers in the face of the consistent deposition testimony from all of the officers at the scene and the opinion of the medical examiner that the physical evidence was consistent with the officers' testimony is simply not enough to take the issue to the jury."<sup>89</sup>

Finally, the Court looked at the estate's assertion that Lewis was not actually on the porch when shot. It noted that "[g]iven that all of the blood was on the porch, [it] did not see how a reasonable jury could conclude that Lewis was not himself on the porch at the time he was shot."

Finally, the estate faulted the trial court for not crediting its two assertions - that the individual officers' failure to "verify, in her words, the 'preposterous' telephone calls by David Copher" and the "'indiscriminate' shooting into Lewis's residence" - should be found in its favor. The estate claimed that the "'ludicrous' phone calls" were "from a paranoid schizophrenic" but the Court noted that there was simply no evidence that the responders had any reason to know of Copher's alleged mental condition if, in fact, it even existed.

The estate also argued that "her police practices expert, Ken Katsaris" had given the opinion that the failure to verify the call made the use of force "unquestionably objectively unreasonable and excessive," but the Court noted that "an expert opinion that merely expresses a legal conclusion is properly ignored."

Next, the estate argued that the physical evidence of bullet damage through the windows of the house negated the deputies stated belief that there were hostages in the house, and that it was unlawful to use deadly force to prevent Lewis from entering his house when they believed there were no hostages. The Court noted that the jury would have to "believe that all of the officers were lying and that they simultaneously and without conversation all knew that there weren't any hostages but decided to fire anyway" and that "to infer from the bullet locations that the officers were shooting indiscriminately and, therefore, that they didn't really believe that there were hostages inside, is simply not a reasonable inference given the other evidence in the record."

In conclusion, the court reviewed what the deputies knew at the time and found that "taking the uncontroversial facts as stated by the district court and drawing all plausible inferences in the plaintiff's favor, whether the shooting was objectively reasonable," there was sufficient cause for the deputies to objectively believe that the deputies' actions were appropriate. The Court affirmed the trial court's grant of summary judgment.

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<sup>89</sup> Demerrell v. City of Cheboygan, 206 Fed. Appx. 418 (6<sup>th</sup> Cir. 2006); Boyd v. Baeppler, 215 F.3d 594 (6<sup>th</sup> Cir. 2000).

**Cabaniss v. City of Riverside**  
**231 Fed.Appx. 407 (6<sup>th</sup> Cir. Ohio, 2007)**

**FACTS:** On May 21, 2004, Cabaniss was visiting a friend, Fugate. During the visit, Cabaniss become extremely intoxicated, began vomiting and became belligerent and destructive. Fugate took him outside to sober up, but Cabaniss then went to a neighbor's house and continued his destructive behavior. His behavior became more erratic and disruptive and a neighbor called 911.

Officer Crane, arriving first, found Cabanniss on the ground, "acting agitated," and asked Fugate if Cabaniss was diabetic. Fugate explained what had happened, and the neighbors also contributed information, saying, variously, that Cabanniss had "freaked out" and "was kind of a space cadet." Officers Naff and Carlton arrived. One asked if Cabaniss was suicidal, and Fugate related that he had "jumped out of cars" in the past and that he was "probably suicidal." The officers tried to question Cabaniss, but he was unresponsive and began to spit at the officers as they tried to assist him. Carlton threatened to "kick his teeth in" if he did so again, and after he did, in fact, spit at them, the officers handcuffed Cabaniss and arrested him for Disorderly Conduct. As they walked Cabaniss to the car, he continued to spit and threaten the officers verbally.

Cabaniss did not cooperate when placed in the vehicle and after struggling with him, the officers gave up trying to seat belt him in. When EMS personnel arrived, Cabaniss was evaluated by a paramedic, Kronenberger. Cabaniss threatened Kronenberger (and his family) verbally and refused to permit the paramedic to touch him. Based upon Cabaniss smelling "strongly of alcohol," Kronenberger "assumed Cabaniss' behavior was due to extreme intoxication." Cabaniss was returned to the car and Kronenberger questioned bystanders about what had occurred. He was told, by someone, that Cabaniss had a "mental problem" - but he did not interpret that as meaning that Cabaniss was "actually mentally unwell."

At one point, Carlton retrieved Cabaniss' ID and challenged Cabaniss' claim that he'd been in Vietnam, as he was born in 1960. Cabaniss began kicking in the back seat of the car, which Carlton initially ignored. However, it was soon pointed out by another officer that Cabaniss' actions were damaging the prisoner shield and that it was beginning to crack. Carlton warned Cabaniss that he would spray him with OC if he did not stop. When Cabaniss did not stop, Carlton sprayed him. He then drove Cabaniss to the nearby station to decontaminate him. There Carlton was assisted by Crane and Naff, using a hose to rinse off the residue, and Cabaniss told them that the "water had been soothing and he was feeling better." He asked to stand up outside the cruiser, was told not to do so, but then did it anyway. He "fell down in the process" and Carlton was too slow to catch him. "Cabaniss fell to the ground and hit his head on the concrete."

Crane summoned Kronenberger, who was also at the station. Kronenberger treated Cabaniss and he was transported to the hospital, but he eventually died from his head injury.

Cabaniss' estate representative filed suit against the officers and the EMS personnel, claiming excessive force, failure to train and deliberate indifference, among other matters. The U.S. District Court dismissed all of the claims under summary judgment. The estate representative appealed.

**ISSUE:** Are officers legally responsible for an accidental injury sustained by a person under arrest?

**HOLDING:** No

**DISCUSSION:** The Sixth Circuit first analyzed the excessive force claim, which was further broken down by the use of the pepper spray and then the use of the water hose. The Court noted that as a “general rule,” it had “held that the use of pepper spray is excessive force when the detainee ‘surrenders, is secured, and is not acting violently, and there is no threat to the officers or anyone else.’” The “logical corollary” to this, however, is that pepper spray may be appropriate when the subject is acting in such ways. Given the uncontested facts, that Cabaniss was unsecured in the back seat and banging his head on the shield, and combined with the information that suggested he might be suicidal, the Court found that “Carlton had every reason to fear that Cabaniss posed a real threat to [at least] his own safety and needed to be subdued.” The Court further noted that the claim regarding the water hose was without merit as there was no indication it was used with force and that there was even a suggestion that Cabaniss enjoyed it.

Next, the Court discussed the allegation that the officers were deliberately indifferent to Cabaniss’ medical needs. It noted that the claim was actually “not entirely clear,” but concluded that the claim was that the officers and the paramedics knew that he was intoxicated and potentially suicidal and let him fall. However, the Court stated, his intoxicated state was not the proximate cause of his death, but instead, he “died as a result of an accident that may have been facilitated by his intoxication.” Further “Cabaniss would not have suffered his fatal fall but for the fact that he acted contrary to the warnings of Defendants, which relieves them of responsibility for being the proximate cause of his death.” Once he fell, the officers sought immediate medical assistance. The Court interpreted the claim as that the officers failed “to properly monitor a detainee who they knew to have exhibited suicidal tendencies,” but the Court required that required more than “simply failing to adequately protect a detainee while exerting one’s best efforts to do so.”

Finally, the Court addressed the failure to claim allegation against the City of Riverside. The Court found no constitutional issues on the part of the individual officers and as such “if the agents of a municipality have violated no constitutional right, the municipality can never be liable under §1983 for a failure to train.”

The Court upheld all of the dismissal of the claims against the defendant officers and the City of Riverside under both state and federal law.

## ***42 U.S.C. §1983 - SEARCH & SEIZURE***

### **Duncan v. Jackson**

**2007 WL 1836176 (6<sup>th</sup> Cir. Tenn. 2007)**

**FACTS:** On Dec. 26, 2002, the FBI received information that Davis, wanted for bank robberies committed in Georgia, might be with a friend in Tennessee. Agent Healy was assigned to investigate, and he, in turn enlisted Sheriff Burnett and Chief Jackson to assist. Davis was believed to be driving a white van, and a white van was located in the friend’s driveway. Healy also showed a photo of Davis to a couple who were leaving the premises and they agreed that he was on the property.

The officers searched the premises, arguably on consent although that was disputed. They did not find Davis. The property was owned by the Duncans, who were present, and also present during the search were another woman and three men. Three of the men were in the garage. Healy later testified that the woman “gave permission for them to conduct a security sweep for the suspect,” but Loretta Duncan

testified she did not give consent, but was “simply directed to call everyone into the kitchen.” The man and woman inside the house were sent outside, where they were corralled by Chief Jackson. Two of the men (apparently one from the garage) were handcuffed. The woman was eventually permitted to go back inside for a child. Sheriff Burnett spoke to one of the men, who he stated, later, gave consent for a search, but again, that man denied giving consent.

Once they determined that Davis was not present, everyone was released and the officers left the premises. The search took between ten and thirty minutes.

Many of the occupants then sued the various officers under 42 U.S.C. §1983. Eventually, all of the claims against the FBI were dismissed, and the Court granted summary judgment on all claims against the local defendants, except for claims of unlawful search and seizure and state law claims of trespass. Chief Jackson and Sheriff Burnett appealed the denial of qualified immunity on their behalf.

**ISSUE:** If a local officer actively assists federal agents in a search, may the local officer be held liable if that search and/or seizure is flawed?

**HOLDING:** Yes

**DISCUSSION:** First, the Court noted that only the Duncans, husband and wife, had standing to file suit, as only they would have a “reasonable expectation of privacy” in the home. However, since the issue of consent was disputed by the parties, the Court did not have jurisdiction to resolve those factual issues. The Court was then brought to the question of “whether there [was] evidence of a direct connection between the actions of either Chief Jackson or Sheriff Burnett and the search of the premises.”

Looking at each of the officers, the Court determined that Chief Jackson was “not involved in the investigation or the decision to search the premises, and did not personally participate in the search of the premises.” As such, he was entitled to qualified immunity and dismissal from the suit. With regards to Sheriff Burnett, however, the evidence supported the assertion that Sheriff Burnett was actively involved in the search, spoke to the occupants and entered the garage to contain suspects. He was not entitled to qualified immunity.

Moving to the detention of the suspects, the Court noted that Chief Jackson was involved in detaining two of the parties by handcuffing (only one of whom was a party to the suit) The Court found that if the search was valid, Chief Jackson’s detention of the parties was appropriate - but that it could not determine, at this stage, whether the search was in fact valid. As such, it affirmed the denial of Chief Jackson’s summary judgment on the part of those particular plaintiffs. The same applied to Sheriff Burnett, who had direct contact with only a couple of the plaintiffs - albeit different plaintiffs than Chief Jackson. Because there was a factual dispute, summary judgment was not justified.

The Court affirmed, partially, the decision, and permitted the case to go forward against Chief Jackson and Sheriff Burnett.

**McGraw v. Madison Township**  
**231 Fed.Appx. 419 (6<sup>th</sup> Circ. Ohio 2007)**

**FACTS:** On June 7, 2003, Calandra showed up at McGraw's door, "unshaven, with 'glassy eyes,' and a strong odor of alcohol." Yelling and profanity ensued between the two men and McGraw reached for an unloaded pellet gun and pointed it at Calandra. Calandra screamed for someone to call the police and a neighbor did so.

Officers Ackerman, Boerner and Kirk were dispatched a call on an assault and that one of the men "was believed to have a gun." Officer Ackerman arrived and found no one around at first, but found the complainant eventually. She reported what had occurred. At some point Calandra told Ackerman that McGraw had struck him. (Ackerman also stated that Calandra told him "that McGraw was a convicted felon who kept guns in his house" but Calandra later denied it.) The officers ran a check on McGraw and learned that although he'd been arrested for a felony, he had not been convicted. They also did a background check on Calandra, but they did not search his vehicle.

The officers set up a perimeter around McGraw's house and asked for help from nearby agencies. The dispatcher tried to call the house, with no success. Sgt. Byers arrived and took charge.

Some 20 to 40 minutes afterward, McGraw walked out and headed toward his vehicle. The officers drew their weapons and approached McGraw, ordering him to the ground. He complied. One of the officers handcuffed him and assisted him to stand up. He was placed in a cruiser and eventually taken to jail. After questioning McGraw, and he admitted using the air pistol to threaten Calandra, officers searched his home and found the item.

McGraw was indicted on assault and menacing, but eventually pled guilty to disorderly conduct. He filed suit against various police officer defendants. The U.S. District Court denied the defendant's request for summary judgment on the basis of qualified immunity, and they appealed.

**ISSUE:** May an allegation that one person threatened another person (not witnessed by police) justify an arrest, without further investigation?

**HOLDING:** No

**DISCUSSION:** The Court sorted out issues related to the numerous individual defendants, including the Chief of Police. The Court refused to review some of the issue, but did address the denial of qualified immunity on the part of the officers involved. The defendants argued that they had sufficient exigent circumstances to justify their specific actions. The Court looked to U.S. v. Saari and noted that just as in this case, Saari was "peaceably occupying his home when the officers arrived, and there was no proof that anyone was being threatened inside."<sup>90</sup> The Court reviewed several other cases, and found that there was no ongoing breach of the peace and that the evidence indicated that the altercation had ended.

The Court did not question the appropriateness of the officers establishing a perimeter, or even seizing McGraw and frisking him. The Court agreed, however, that the evidence did not support McGraw's arrest or the subsequent search of his home.

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<sup>90</sup> 272 F.3d 804 (6<sup>th</sup> Cir. 2001).

The Court affirmed the denial of summary judgment and allowed the case to go forward.

### ***42 U.S.C. §1983 - SEARCH & SEIZURE - VEHICLE STOP***

#### **Humphrey v. Mabry**

**482 F.3d 840 (6<sup>th</sup> Cir., Ohio, 2007)**

**FACTS:** On Dec. 10, 2002, a little before 10 p.m., Columbus PD officers were dispatched on a “man with a gun” call. The suspect vehicle was identified as a “grey PT cruiser” being driven by a black male. (Two separate dispatches, transcribed in the opinion, identifies the color of the vehicle as grey.) The dispatch also provided a detailed description of the alleged driver, who was known to the reporting party.

During that same time frame, Humphrey was returning from work in his “bright blue PT Cruiser.” Around 10:30 p.m., he came across a roadblock, being operated by Officers Mabry and George, and he stopped in the line of traffic. “To his surprise, Officers Mabry and George approached, drew their guns, pointed them at the car and yelled at Humphrey to get out.” As he began to do so, Mabry “grabbed Humphrey roughly by the wrist,” pulled him from the car and patted him down. Humphrey told them he had an injured thumb as they started to handcuff him, and they left that hand free. Officer George quickly searched the car and found nothing, and within a few minutes, they learned that Humphrey was not the suspect they’d been earlier told about, allegedly driving a similar vehicle. (The opinion noted that Humphrey, although a black male, differed in appearance a great deal from the description of the suspect, and further, that he was wearing a visible City of Columbus ID badge around his neck.) The actual suspect was apprehended some 20 minutes later.

Humphrey filed suit under 42 U.S.C. §1983 against the officers and the City of Columbus, alleging violations of his Fourth Amendment Rights and alleging, further, a “failure to train” the officers involved. The officers requested qualified immunity, which the U.S. District Court denied on the claims of “unlawful seizure and excessive force.” The officers filed an interlocutory appeal.

**ISSUE:** Do acknowledged mistakes made during an incident negate a finding of qualified immunity?

**HOLDING:** No

**DISCUSSION:** Using the “two sequential questions” required in deciding upon a qualified immunity defense, the Court first asked whether the facts alleged established a violation of Humphrey’s civil rights. The Court reviewed the standards both for an investigative stop and for a use of force, reasonableness, and concluded that Humphrey had made the threshold assertion that a constitutional violation occurred. The court concluded that “the Columbus police violated Humphrey’s Fourth Amendment rights when they misidentified his car, stopped him at gunpoint, forcibly seized him and restrained him, albeit briefly.”

Finding that the first question was answered in the affirmative, the Court moved to the second question, whether the right allegedly violated was “clearly established.” The Court noted that such inquiries must be “undertaken in light of the specific context of the case,” and that if reasonable officers could differ on the appropriateness of a particular action, that an officer was entitled to qualified immunity.

In this case the alleged “constitutional violations [were] based on the *collective* knowledge of a number of police officers....” The Court continued, stating that “where individual police officers, acting in good faith and in reliance on the reports of other officers, have a sufficient factual basis for believing that they are in compliance with the law, qualified immunity is warranted, notwithstanding the fact that an action may be illegal when viewed under the totality of the circumstances.” The Court looked to several cases in which officers relied upon communications from other officers, and in which officers asserted the good faith defense.

First, the Court reviewed the facts surrounding the allegedly unreasonable search and seizure claim against Mabry and George. The Court noted that there was conflicting information concerning whether the suspect was in a vehicle or on foot, the direction of travel of the vehicle, the license number, and other details. Humphrey’s vehicle was identified from a helicopter involved in the search. The officers sought out details, as well, double-checking the license number originally dispatched, which turned out to be mistaken. The Court agreed that it was “possible to fault Officers Mabry and George for seizing a bright blue PT Cruiser,” despite the multiple reports that the suspect vehicle was dark grey. The Court found that the officers, although mistaken, were reasonable in their belief that they should investigate Humphrey’s vehicle.

With regards to the excessive force claim against the two officers, the Court noted that the officers reasonably believed the subject in the car was armed, and approved the officers holstering their guns once they realized they were meeting no resistance from Humphrey. The Court also approved the care they took not to aggravate his existing hand injury by handcuffing him. The officers noted that they did not catch all of the preceding transmissions, but instead “were focused on the information most immediately transmitted to them - that there was a dangerous man with a gun in the PT Cruiser which they had stopped.” They quickly released him when they confirmed he didn’t match the description. The Court found that the officers “could have reasonably believed that they were acting lawfully under the circumstances” and has such, were entitled to qualified immunity.

Next, the Court reviewed the situation as it relates to Officer Wheeler, the officer in the helicopter who identified Humphrey’s vehicle as the suspect vehicle. The Court noted that Wheeler had stated that “from his vantage point, Humphrey’s blue PT Cruiser looked dark grey” and that it was in the “limited geographic area where he had just been instructed to look.” The Court agreed that Wheeler’s identification of the vehicle was “perhaps unreasonable,” and that “Officer Wheeler’s mistakes were unfortunate, and that they fall short of the ideal standards of diligence expected of officers searching at night by helicopter for suspects in vehicles in a large city.” The Court did not, however, find Wheeler’s mistakes “so egregious that [it] would characterize them as plain incompetence or mistakes no reasonable officer would make in the circumstances.” The Court found that Wheeler was also entitled to qualified immunity.

The court found that the officers “individual mistakes were reasonable mistakes understandably committed in good faith while performing their job in a potentially dangerous situation.” The Court reversed the denial of qualified immunity, but noted that the case against the City for failure to train and related claims was not affected by this decision, and could continue.

## ***SIXTH AMENDMENT***

### **Van Hook v. Anderson 488 F.3d 411 (6<sup>th</sup> Cir. Ohio 2007)**

**FACTS:** In 1985, Van Hook was arrested in Ft. Lauderdale, Florida on suspicion of a horrible murder that had occurred two months earlier, in Cincinnati. The Florida officers who arrested him gave him Miranda warnings. Van Hook initially agreed to talk, but then stated “[m]aybe I should have an attorney present.” Believing that he was asking for a lawyer, the officers did not further question him.<sup>91</sup>

Cincinnati PD Det. Davis arrived in Ft. Lauderdale to transport Van Hook back to Ohio. At that time, Van Hook did not yet have an attorney. Det. Davis talked to him about the extradition and told Van Hook that they “had a lot to talk about” but that Van Hook would have to initiate any discussion. Van Hook stated that his mother had told him to tell the truth (something the detective already knew), and that he wanted to talk. He was given his Miranda rights, waived them and then gave a “full and graphic confession.”

Van Hook was indicted on murder and robbery. He moved to suppress the confession, but the Court noted that although he had invoked his right to counsel, he had initiated the discussion with the police. The Ohio Court admitted the confession. He claimed temporary insanity in the homicide, but the jury both convicted him and recommended capital punishment.

Van Hook appealed through the state courts and the federal courts, and through a lengthy process, and several changes in procedural law.

**ISSUE:** May a third party tell police that a suspect (who has invoked counsel) wishes to talk to them?

**HOLDING:** Yes

**DISCUSSION:** Van Hook argued that his confession should have been suppressed under Edwards v. Arizona.<sup>92</sup> The Court agreed that a “confession [must] be voluntary to be admitted into evidence.”<sup>93</sup> Further, the Court stated that:

The rule of Edwards embodies two independent inquiries: First, courts must determine whether the accused actually invoked his right to counsel. . . . Second, if the accused invoked his right to counsel, courts may admit his responses to further questioning only on finding that he (a) initiated further discussions with the police, and (b) knowingly and intelligently waived the right he had invoked.)

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<sup>91</sup> The Court noted that: “In 1985, the officers did not have the benefit of the Supreme Court’s decision in Davis v. United States, 512 U.S. 452 (1994), when the Court made clear that a suspect in custody must “unambiguously request counsel,” *id.* at 458, and that “maybe I should talk to a lawyer” is not an unequivocal request, *id.* at 462. In 2007, Van Hook’s statement might well not have sufficed to require that questioning be stopped. The officers did, however, understand Van Hook to have asked for a lawyer, and stopped any further questioning of him based on his statement.”

<sup>92</sup> 451 U.S. 477 (1981).

<sup>93</sup> Dickerson v. U.S., 530 U.S. 428 (2000)..

The Court noted that the gravamen of Van Hook's claim is that he did not, under the law initiate "further discussions of the police." It stated that if the record had shown that "Det. Davis - unprompted - initiated the discussion, the confession would likely have to be suppressed." The Court framed the question - that the "facts in this case required [the Court] to resolve first the legal question whether a suspect can initiate discussions with police through a third party." He argued that only the suspect "himself" can "communicate a willingness and a desire to talk with the police."

The Court, however, found "no sound justification for reading the statement from Edwards that the suspect 'himself' must initiate a discussion to imply the suspect, and only the suspect, can inform the police he wants to talk."

### ***EVIDENCE - PRIOR BAD ACTS***

#### **U.S. v. Thomas**

**223 Fed.Appx. 447 (6<sup>th</sup> Cir. Tenn. 2007)**

**FACTS:** On Nov. 4, 2003, Carter was a teller a Chattanooga credit union. A black male, whom she described specifically, gave her a sack to fill with money. She gave him \$487 and he fled. The black and white video camera captured a photo of a man in a striped shirt. A few days later, Carter identified Thomas as the robber, and further identified him at trial.

Thomas was included in the photo lineup because Officer Hennessee, of the Chattanooga PD, recognized him in the surveillance video. Officer Hennessee testified at trial that "he had previously observed or had contact with Thomas on ten different occasions." Eventually Thomas was convicted and appealed.

**ISSUE:** Is evidence of "prior bad acts" always inadmissible?

**HOLDING:** No (see discussion)

**DISCUSSION:** Among other issues, Thomas argued that Officer Hennessee's testimony should not have been admitted "because it allowed the jury to infer that Thomas was someone who was in frequent trouble with the law." The government, however, argued that the testimony was "not evidence of prior bad acts (which would be admissible), rather it [was] admissible background evidence."

The Court discussed background (*res gestae*) evidence and noted that it consisted of "those other acts that are inextricably intertwined with the charged offense of those acts, the telling of which is necessary to complete the story of the charged offense."<sup>94</sup> In this case, the "challenged testimony" was presented to explain how Officer Hennessee recognized Thomas - and he specifically did not indicate how he knew Thomas, only that he had "observed Thomas several times." The Court concluded it was proper background testimony.

Thomas' conviction was affirmed.

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<sup>94</sup> U.S. v. Hardy, 228 F.3d 745 (6<sup>th</sup> Cir. 2000).

## ***EVIDENCE - EXPERT WITNESS***

### **U.S. v. Harvey**

2007 WL 1339837 (6<sup>th</sup> Cir. Tenn. 2007)

**FACTS:** On Feb. 9, 2004, Det. Ashburn (Hamilton Co. Sheriff's Office, OH) searched Harvey's home, pursuant to a warrant. The items searched related to methamphetamine production. Det. Ashburn testified at trial as an expert in methamphetamine trafficking. Harvey was convicted, and appealed.

**ISSUE:** May officers testify as expert witnesses?

**HOLDING:** Yes (if properly qualified)

**DISCUSSION:** The only issue in controversy in the appeal was whether the methamphetamine found in the search was for personal use or was to be trafficked. Harvey objected to Det. Ashburn's testimony, as an expert witness, on that issue. The court noted, in U.S. v. Bender, that police officers were permitted "to testify as expert witnesses about criminal activity since knowledge of such activity is generally beyond the understanding of the average layman."<sup>95</sup> The Court detailed Det. Ashburn's credentials, which included 13 years of law enforcement experience and 4½ years of narcotics investigations including 100 methamphetamine cases. Det. Ashburn "testified that he had observed notations made with prices charged for drug amounts in other investigations and that the note found in [Harvey's] wallet was consistent with such records." In addition, Det. Ashburn noted the "significance of coffee filters containing methamphetamine residue at [Harvey's] residence" and Harvey argued that this evidence was irrelevant in proving distribution. The Court agreed, however, that the evidence was indicative of an intent to distribute quantities of the drug.

The Court concluded that the trial court was correct in admitting Det. Ashburn's expert testimony.

## ***TRIAL PROCEDURE - ENTRAPMENT***

### **U.S. v. Summers**

238 Fed.Appx. 74 (6<sup>th</sup> Circ. Ohio 2007)

**FACTS:** In 2004, Summers was released from prison under the supervision of Whaley, an Ohio parole officer. Because the authorities wanted to keep track of Summers, and were concerned about his involvement in another situation, Whaley directed him to Hughes to gain employment. (Summers was required to maintain employment as a condition of his parole.) Summers did not know, however, that Hughes was also a "paroled felon working as a confidential information for the" BATF, although Whaley, who also supervised Hughes, was aware of the arrangement.

Summers did go to work for Hughes, but quit because he had not been paid as expected. Summers did tell Hughes, however, that he "wanted to acquire a snow plow" and Hughes set up a deal whereby Summers would get a snowplow from Hughes' BATF handler, in exchange for firearms. The BATF agent sent up the

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<sup>95</sup> 265 F.3d 464 (6<sup>th</sup> Cir. 2001)

transfer and taped the exchange of a shotgun and \$100 cash for the snowplow. Summers also spoke about "future gun transactions" involving a variety of weapons.

Summers was indicted on federal weapons charges. At trial, Summers requested a jury instruction on entrapment, which the trial court denied. Upon conviction, Summers appealed.

**ISSUE:** Must a defense of entrapment be proved by the defendant?

**HOLDING:** Yes

**DISCUSSION:** The Court discussed the entrapment defense, noting that a "valid entrapment defense requires proof of two elements: (1) government inducement of the crime, and (2) lack of predisposition on the part of the defendant to engage in the criminal activity." To justify the instruction, the defendant must present evidence "to support both elements of the defense." The Court quoted U.S. v. Pennell, which stated that its "central inquiry in entrapment cases is whether law enforcement officials implanted a criminal design in the mind of an otherwise law-abiding citizen or whether the government merely provided an opportunity to engage in criminal activity."<sup>96</sup> Simply presenting an opportunity to commit a crime is not entrapment.

In this case, the Court agreed that "Summers presented insufficient evidence to prove his lack of predisposition to engage in criminal activity." The evidence presented indicated his willingness to engage in illegal firearms transactions, and he also admitted having done so in the past. Although Hughes may have arranged the transaction, "merely presenting Summers with an opportunity to traffic guns he admitted possessing does not constitute entrapment."

## ***EMPLOYMENT***

**Currie v. Haywood County, TN**  
234 Fed.Appx. 369 (6<sup>th</sup> Cir. Tenn. 2007)

**FACTS:** On Feb. 28, 2002, Currie contacted the Haywood County Sheriff's Office concerning a medical emergency. Dep. Rogers responded. He returned to Currie's home later and, Currie alleged, began to touch her in a sexual manner. She told him to stop and to leave, but he continued his advances. After more touching, he finally left.

Currie reported what had occurred, the next day, to Sheriff Russell. He sent Currie to a female investigator and referred the matter to the Tennessee Bureau of Investigation. Rogers was fired and charged with official misconduct, to which he subsequently pled guilty.

Currie filed suit against the agency, allegedly that "her constitutional rights were violated when Rogers sexually assaulted her while on duty." After several procedural issues were resolved, the case was tried.

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<sup>96</sup> 737 F.2d 521 (6<sup>th</sup> Cir. 1984); see also U.S. v. Nelson, 922 F.2d 311 (6<sup>th</sup> Cir. 1990), U.S. v. Khalil, 279 F.3d 358 (6<sup>th</sup> Cir. 2002) and Mathews v. U.S., 485 U.S. 58 (1988).

Rogers was found individually liable, but the Sheriff's Office was found not liable and further, that its training and policies were adequate.

Currie appealed.

**ISSUE:** Does an employee committing a crime, while on duty, always result in a finding of liability against their agency?

**HOLDING:** No

**DISCUSSION:** The Court noted that it had already been "well established" that a government employer could not be held liable because it employees someone who commits a tort or a crime, and that it could not be liable under "respondeat superior." In particular, the Court noted that even Rogers acknowledged that he understood that what he had done was wrong. Further, the Court noted that simply because Rogers had committed a sexual assault, there was no indication that any program in place earlier would have caught and identified such traits. (Rogers had self-identified some time earlier that he had been diagnosed with a bipolar disorder, and had been given some time off, but had returned to duty following a doctor's release.)

The Court affirmed the dismissal of the government defendants.

### ***PRIVATE OFFICERS***

**Lindsey v. Detroit Entertainment, LLC**  
484 F.3d 824 (6<sup>th</sup> Cir. Mich. 2007)

**FACTS:** Seven different individuals were detained, over a period of time, by private security officers employed by a Detroit casino. (The accusations are immaterial to this summary.) As a result, the plaintiffs filed suit against the casino under 42 U.S.C. §1983, and also requested class action status, arguing that the named Plaintiffs represented "a class of similarly situated individuals" of between 75 and 750 individuals who were detained under the same accusation.

The Casino requested summary judgment, which was eventually granted. (The Court also denied class-action status, for procedural reasons.) The Court agreed that the plaintiffs could not demonstrate that the casino security personnel's actions "constituted state action."

The Plaintiffs appealed.

**ISSUE:** May private officers licensed as "private peace officers" be considered to be taking state action when making arrests?

**HOLDING:** Yes

**DISCUSSION:** The Court stated by stating that "[d]rawing a line between private and governmental conduct preserves an area of individual freedom by limiting the reach of federal law, avoids the imposition of liability on a state for actions outside its control, and assures that constitutional standards are invoked

only when the state is responsible for the conduct about which the plaintiff complains.”<sup>97</sup> “However, ‘[a] private actor acts under color of state law when its conduct is ‘fairly attributable to the state.’”

The Court looked to the tests developed in Chapman v. Higbee, Co.<sup>98</sup> The first test is the “public function” test, the second is the “state compulsion” test and the third is the “symbiotic relationship or nexus” test. The Court determined that in this situation, using the public function test was most appropriate. The Court looked to its recent decision in Romanski v. Detroit Entertainment, L.L.C.<sup>99</sup>, and determined that because the private security guards in that case were “endowed by [Michigan] law with plenary police powers that they are de facto police officers, they may qualify as state actors under the public function test.” Although their arrest powers were limited to the hours in which they were actually working, when in uniform, and to the premises, the Romanski Court ruled that they were state actors when acting as police officers.<sup>100</sup> However, in this case, none of the security guards involved were so licensed under Michigan law, and as such, they were not state actors.

The Court affirmed the summary judgment in favor of the Casino.

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<sup>97</sup> Brentwood Acad. v. Tenn. Secondary School Athletic Assoc., 531 U.S. 288, 295 (2001).

<sup>98</sup> 319 F.3d 825 (6<sup>th</sup> Cir. 2003)

<sup>99</sup> 265 F.Supp.2d 835 (E.D. Mich. 2003)

<sup>100</sup> Kentucky has a similar provision to license private peace officers, called Special Local Peace Officers, found at KRS 61.360.

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NOTES

*While many of these cases involves multiple issues, only those issues of interest to Kentucky law enforcement officers are reported in these summaries. In addition, a case is only reported under one topical heading, but multiple issues may be referenced in the discussion. Readers are strongly encouraged to share and discuss the case law and statutory changes discussed herein with agency legal counsel, to determine how the issues discussed in these cases may apply to specific cases in which your agency is or may be involved.*

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*All quotes not otherwise cited are from the case under discussion. Certain cases, because they appear so often and in cases not specific to their topic matter, do not have their citations included in the footnotes. Their full citations are:*

*Miranda v. Arizona, 384 U.S. 436 (1966)*

*Terry v. Ohio, 392 U.S. 1 (1968)*

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