

Department of
CRIMINAL JUSTICE TRAINING

KENTUCKY JUSTICE AND PUBLIC SAFETY CABINET



Leadership is a behavior, not a position

Case Law Updates

Fourth Quarter, 2007



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Commissioner



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KENTUCKY

PENAL CODE - ROBBERY

Hamilton v. Com.

2007 WL 3226196 (Ky. 2007)

FACTS: On Aug. 29, 2004, Porter was delivering a pizza in Jefferson County, when he was accosted by a man who demanded his money. When Porter refused, the “man produced a knife and began stabbing Porter about his upper body through the window of the car.” Porter handed over all the cash he had, but the man continued to stab Porter, for a total of 12-13 times. Porter finally “managed to drive himself toward the front of the apartment complex and call 911, and gave a short description of the robber, his vehicle and a partial plate. Porter made a “photo pack identification” of Hamilton, and also later identified him at trial.

Hamilton was stopped, later that same night, for a traffic offense, and a chase ensued. During the search of his vehicle, incident to the arrest, the “police found two knives and \$44.00 in cash.” Hamilton was charged with Robbery, Assault and PFO. He was eventually convicted of both Robbery and Assault, in the First Degree, and the PFO charge. Hamilton appealed.

ISSUE: Is a steak knife a “deadly weapon?”

HOLDING: Yes

DISCUSSION: Hamilton argued that the jury instructions provided “did not require a jury finding that the knife used in the crime was a deadly weapon.” The Court noted that:

KRS 500.080(4)(c) defines a "deadly weapon" as "[a]ny knife other than an ordinary pocket knife or hunting knife." In *Thacker*, 194 S.W.3d at 291, the Court adjudged that it was harmless error to withhold from the jury the determination of whether the weapon used by the defendant was a deadly weapon where there was little doubt that the jury would have found the 22-caliber revolver was a deadly weapon.¹ In the case at bar, the victim testified that the knife used to stab him looked like a steak knife. Porter described the knife as being very sharp and

¹ *Thacker v. Com.*, 194 S.W.3d 287 (Ky. 2006).

having a long thin blade, about six to eight inches in length. Neither of the two knives that were discovered in Hamilton's vehicle, which were displayed to the jury, appeared to be a pocket knife or a hunting knife.

The Jefferson County Circuit Court decision was affirmed.

SEARCH & SEIZURE - ANONYMOUS TIPS

Com. v. Telle (Judge, Marshall District Court) and Stuber 2007 WL 3317540 (Ky. App. 2007)

FACTS: On May 7, 2006, a tipster at the Marshall County Hospital contacted local police about a possible drunk driver. As a result, Officer Daniel, the responding officer, found an apparently unoccupied car, meeting the tip's description. However, as he observed, some 15 minutes later, the car left the lot. Officer Daniel followed, but witnessed no traffic violations. He stopped the vehicle and spoke to the driver - "Officer Daniel smelled the odor of alcohol and administered a breathalyzer test." When Stuber failed, he was arrested.

Stuber requested suppression, arguing that the tip, which came from the ER, did not identify the person who called and that there was "no information as to whether the caller was a health care provider, staff or a mere bystander." The vehicle, however, was specifically identified, but there was no prediction as to what the vehicle might do, and nothing was shared that "could not be ascertained by casual observation." The officer had "made no attempt to locate the reporting source or conduct any inquiry at the hospital."

The trial court found in favor of Stuber, and that "there was no reasonable suspicion to stop the vehicle." The Commonwealth requested a Writ of Prohibition from the Circuit Court, requesting that the trial court be prohibited "from enforcing an order to suppress evidence from a traffic stop which resulted in a charge of DUI."

ISSUE: Is an informant that cannot be identified considered anonymous?

HOLDING: Yes

DISCUSSION: The primary issue in this case revolves around how the original tip was characterized. Stuber argued that that tip was anonymous and non-predictive, and therefore it lacked sufficient credibility upon which to base a stop. The Commonwealth, however, argued that the tipster, although not specifically identified, was identifiable, since it came from a hospital telephone.²

The appellate court, however, while agreeing that "if callers can be potentially identified at the time the officer receives the information, then they are not truly anonymous," noting that a "caller from a hospital could be any number of people" The Court equated it more with the facts of Collins v. Com.,³ which held that "[a]nonymous descriptions of a person in a certain

² See Com. v. Kelly, 180 S.W.3d 474 (Ky. 2005).

³ 142 S.W.3d 113 (Ky. 2004).

vehicle or location, though accurate, do not carry sufficient indicia of reliability to justify an investigative stop.”

As the Court found that the caller was not identifiable and was thus truly anonymous, the Court agreed with the trial court that “there was no reasonable suspicion to perform the investigatory stop and the evidence acquired from it was properly suppressed.”

The writ of prohibition was denied and the suppression upheld.

ARREST

Conner v. Com.
2007 WL 4355467 (Ky. App. 2007)

FACTS: On June 15, 2005, Det. Gilbert (Paducah PD) was provided information from a CI about a drug transaction involving Ahmad. Ahmad had “approached [the CI], showed him a quantity of cocaine, and offered to sell the drugs to him.” Gilbert made arrangements for the transaction to be completed.

The next day, the CI and Det. Gilbert went to the designated location, a convenience store where Ahmad worked. Ahmad told Det. Gilbert that “he did not have any drugs in his possession but that his contact would soon arrive with a delivery” and instructed them to wait in their car. A few minutes later, Ahmad came out and asked for the money, but was refused because he did not yet have the drugs.

After a short time, the pair reentered the store, and “Gilbert told Ahmad that he did not expect to wait to purchase drugs.” Ahmad called his contact again, and the pair left to wait in their car again. In a few minutes, a vehicle appeared, which the CI identified as a vehicle ... belonging to a drug dealer.” Conner, the passenger in the drug dealer’s car, got out and entered the store, exiting in a few moments. Ahmad came out and showed the two men crack cocaine, and an exchange was made. At Gilbert’s signal, other officers moved in to arrest both Ahmad and Conner, who was driving the suspect vehicle. (In a subsequent search, they found a handgun in Conner’s trunk.)

Conner was indicted, and moved for suppression, arguing that the arrest was not valid. Conner was tried on the gun charge, which had been severed from the drug charges, and was convicted, and subsequently took a conditional guilty plea to the drug charges. Conner then appealed.

ISSUE: May an officer make an arrest for a felony crime, even though the officer did not directly witness the exchange of drugs, but infers it through strong probable cause?

HOLDING: Yes

DISCUSSION: The Court agreed that “the police must have probable cause to believe that

a defendant committed a crime before they can effect an arrest.”⁴ Probable cause may be satisfied, at least in part, on a tip, if the “informant is a reliable source and that substantial parts of the information furnished were confirmed by police before the arrest.”⁵ In this case, the Court reviewed the facts and noted that although the officers did not directly witness Conner commit a crime, they had sufficient probable cause to make the arrest and search Conner’s trunk under the Carroll doctrine.

SEARCH & SEIZURE

Com. v. Black

2007 WL 3226213 (Ky. 2007)

FACTS: On Oct. 22, 2002, Lexington officers “received an anonymous tip that a black male riding a purple bicycle was selling drugs across from a Speedway at the corner of Georgetown Street and Glen Arvin” - and was “wearing a blue denim jacket and blue jeans.” The caller stated that the “drugs were inside a newspaper the man was carrying.”

Officer Lewis responded and found a man meeting the description. The two made eye contact as Officer Lewis passed, but he lost sight of the individual as he turned around. He found him again, a short distance away. Officer Lewis knew the suspect, Black, and “called him by name, and told him that there had been a complaint about him selling drugs.” At Officer Lewis’s direction, Black put the newspaper on the ground, and during an ensuing struggle, “the newspaper was knocked around and cocaine spilled out of it.” Black was arrested.

Black was indicted for possession and PFO. Black moved for suppression, which was denied, and he took a conditional guilty plea. He then appealed. The Kentucky Court of Appeals concluded that the trial court should have suppressed the drugs, and that “the anonymous tip did not create reasonable suspicion of criminal activity necessary to support a forcible investigatory stop.” The Commonwealth appealed.

ISSUE: May a corroborated anonymous tip provide reasonable suspicion for an investigator stop?

HOLDING: Yes

DISCUSSION: The Commonwealth argued that the “Court of Appeals failed to consider other circumstances relevant to the reasonable suspicion inquiry” and that the “totality of the circumstances gave Officer Lewis reasonable suspicion to stop [Black].” The Commonwealth pointed to the fact that:

- Officer Lewis found [Black] in an area known for illegal drug sales and other crime;
- Officer Lewis recognized [Black] from previous encounters; and
- [Black] began to take evasive action upon observing Officer Lewis.

⁴ Patterson v. Com., 630 S.W.2d 73 (Ky. App., 1981).

⁵ Faught v. Com., 656 S.W.2d 740 (Ky. 1983).

The Court noted that it was “well-settled that investigatory stops are permissible if the officer has reasonable and articulable suspicion that a violation of the law is occurring.” The Court agreed that “anonymous tip may provide the reasonable suspicion necessary to justify an investigatory stop.”⁶

In reviewing the facts, the Kentucky Supreme Court found that the officer had sufficient reasonable suspicion to make the stop, and reversed the decision of the Court of Appeals.

Fitzpatrick v. Com.
2007 WL 3037747 (Ky. App. 2007)

FACTS: On the day in question, Lt. Hunt (Somerset PD) received a dispatch about an anonymous tip that a black male, named Keith, was “selling drugs out of Room 263 of the Budget Inn.” Lt. Hunt and Officer Bolin proceeded to that location, followed shortly afterward by Officers Stephens and Estep. Keith Fitzpatrick, a black male, answered the knock, and the officers asked if they could enter. Lt. Hunt detected the odor of marijuana when he entered. They explained their presence and Officer Bolin asked for consent to “look around” the room. Lt. Hunt noticed a marijuana roach in the ashtray on the nightstand and arrested Fitzpatrick. They also found cocaine, \$3,000 in cash, marijuana and rolling papers.

Fitzpatrick requested suppression, arguing that he did not give the officers consent, and that he was never given his Miranda warnings. The Court denied his request for suppression and the case went to trial. He was convicted of Trafficking in a Controlled Substance and related charges, and appealed.

ISSUE: Does a “knock and talk” require articulable suspicion?

HOLDING: No

DISCUSSION: Fitzpatrick argued that, because “the officers failed to corroborate the anonymous tip before going to the hotel to question him,” that it was unlawful. The Court, however, upheld the officers’ actions as a lawful “knock and talk” which required no reasonable articulable suspicion.” The Court agreed Fitzpatrick had an expectation of privacy in his motel room, but noted that there was no indication that the officers “in any way compelled Fitzpatrick to open the door ‘under the badge of authority.’” He was essentially free to ignore the officers’ presence at his door.

With regards to the search of his room, the Court stated that the “law does not require that [a defendant] be advised of his Miranda rights or that he had a right to refuse the search.” Fitzpatrick did not complain that the officers threatened him or coerced him in any way to give his consent to the search.” He knew why they were there prior to giving consent, and he was, by his own admission, not under the influence of any drug or other intoxicating substance at the time.

⁶ Alabama v. White, 496 U.S. 325 (1990); Stewart v. Com., 44 S.W.3d 376 (Ky. App. 2000).

Fitzpatrick's conviction was upheld.

SEARCH & SEIZURE - ABANDONED PROPERTY

Edmonds v. Com.

2007 WL 2998270 (Ky. App. 2007)

FACTS: On March 15, 2006, Officers Johnson and Blank (Lexington PD) were patrolling a HUD housing project on foot. As they came around a corner, they spotted "several individuals" in front of a vacant apartment. Most of the individuals fled, but Edmonds "remained on the porch of the apartment." Officer Johnson approached him and turned on his flashlight; Edmonds "stood up, said an obscene word, made a throwing motion, and began to walk away." Officer Johnson later testified that he "heard something soft hit the window of the adjacent apartment." Officer Johnson arrested Edmonds for Criminal Trespass, and then proceeded to the place where he'd heard the item drop. He found a baggie containing approximately 1 gram of marijuana. Edmonds was further charged with Possession of Marijuana and Tampering with Physical Evidence. (Edmonds claimed that he'd thrown a bottle cap, instead.)

Edmonds moved for suppression, and the trial court denied his request. Edmonds took a conditional guilty plea and appealed.

ISSUE: Are drugs found, after an officer witnesses a suspect tossing them away, admissible against the suspect?

HOLDING: Yes

DISCUSSION: Edmonds argued that his initial arrest, for Criminal Trespass, was unlawful, because Officer Johnson had stated that "he could not recall whether or not there were any 'No Trespassing' signs on the building at which [Edmonds] was located." Without such signage, Edmonds could not have known he didn't belong there. The Court, however, noted that the officer had stated there were signs in the area, and that the building "was part of a housing project that was being demolished." The officers also knew which apartments had already been vacated in anticipation of the demolition. As such, they knew that Edmonds did not belong at the apartment where he was found.

In fact, the Court noted, the discovery of the marijuana was not connected to the arrest. The marijuana was found, instead, because Officer Johnson witnessed [Edmonds] throw an item - and "[t]hese are two separate acts and not equated to one another." Since it was found not on Edmonds' person, but where he had abandoned it, he had abandoned any expectation of privacy in the package.

The Court found that the "fruit of the poisonous tree doctrine does not apply to this case" and upheld the denial of the suppression motion.

SEARCH & SEIZURE - PLAIN SMELL

Bishop v. Com.

237 S.W.3d 567 (Ky. App. 2007)

FACTS: On Jan. 4, 1996, Officer Reed (Berea PD) “received information from Anthony Kelley that Bishop had stolen a license plate from a vehicle belonging to Kelley’s mother.” Kelley also reported that “Bishop might be involved in the manufacture of methamphetamine at an undisclosed location.” Reed discussed the matter with other officers and they all three went to where Bishop’s car was located.

At about 3:30 a.m., the officers arrived at the apartment complex. They found the suspect vehicle and checked, and confirmed that the plate on that vehicle actually belonged on a vehicle registered to Kelley’s mother. Officer Puckett noticed that the trunk lid on the car was open a few inches. They went to the apartment occupied by Bishop’s girlfriend, Stamper, and asked about the car, advising her “that they were investigating some vandalism.” Bishop came out in response to their inquiry, and they arrested him. Officer Puckett returned to the suspect vehicle, and “noticed a strong chemical smell coming from the open trunk and suspected a methamphetamine lab.” He lifted the trunk lid and confirmed that the two jars, inside, “were being used to produce methamphetamine.”

Bishop was charged with manufacturing methamphetamine and theft of the plate. He argued for suppression, but was denied. He took a conditional guilty plea and appealed.

ISSUE: Might plain smell justify an exigent search?

HOLDING: Yes

DISCUSSION: Although the Court agreed that, as a general rule, warrantless searches are unreasonable, it noted that Kentucky had followed other courts in recognizing the “plain smell” doctrine as an offshoot of the “plain view” doctrine.⁷ Further, the Court recognized as an exception when there is a “risk of danger to police or others.”⁸ The Court agreed that the officers had “legitimate concern for public safety since methamphetamine production, an inherently dangerous act, was occurring in a public place.” Bishop, however, argued that since the officers had at least a suggestion that he might be involved in doing so, they had an obligation to seek a warrant. The Court, however, disagreed, and quickly upheld the trial court’s decision.

SEARCH & SEIZURE - COERCION

Jagers v. Com.

2007 WL 2893023 (Ky. App. 2007)

⁷ Cooper v. Com., 577 S.W.2d 34, 36 (Ky.App. 1979) (overruled on other grounds by Mash v. Com., 769 S.W.2d 42, 44 (Ky. 1989)).

⁸ U.S. v. Atchley, 474 F.3d 840, 850 (6th Cir. 2007). See Chambers v. Maroney, 399 U.S. 42, 90 S.Ct. 1975, 26 L.Ed.2d 419 (1970).

FACTS: Jagers, Dupin and Botto “were in the parking lot of the Elizabethtown Kroger.” Police arrived in response to a call from the store that Dupin “had just purchased a large quantity of matches from the store and placed them in [Jagers’] jeep.” (“Dupin was apparently know to be involved in the manufacture of methamphetamine by local law enforcement” and the “striking plates on the matchboxes contain a major ingredient for making methamphetamine.”) Det. Turner arrived next and got consent to search the vehicle, where he “found the matchboxes and packets of yeast, another ingredient used in the manufacture of methamphetamine.” Det. Turner then got consent from the occupants and found contraband on Botto. He asked Jagers if he would come to the station and talk, and Jagers agreed, “but stated he would first need to pick up his two children.” (He and Botto were the parents of the children.) Turner had another officer follow Jagers, and he and the children then came to the station.

Jagers claimed that he and the children were in the room when the questioning began, and that Det. Turner then asked him to sign a consent form for the search of his house. He claimed he told Jagers to get a search warrant. According to Jagers, Det. Turner then stated:

We can do this the easy way or the hard way. The easy way is for you to sign the form and the hard way is we will have to wait as long as it takes to get a search warrant and in the meantime I am going to have your sons taken and turned over to the custody of the state.

Det. Turner denied having made such “threats” and that Jagers was “cooperative and immediately signed the consent form:

Jagers requested suppression, and the trial court “did not make a finding as to whether or not the alleged coercive statement was made, but reasoned that even if the statement was made, it was not coercive because it was true.” The Court denied the motion to suppress. Jagers took a conditional guilty plea, and appealed.

ISSUE: Can a true statement be coercive?

HOLDING: No

DISCUSSION: The Court quickly found that since the mother of the children was already in custody, and that Jagers could be held in custody while a search warrant was obtained, “the children would have had no immediate guardian to take care of them.” In that situation, the “only solution would have been to place the children into state custody until further arrangements could be made.” Thus, even if Jagers did make the statement, it could not be “considered coercive because it was true.”

The denial of the motion to suppress was upheld, as was the plea.

SEARCH & SEIZURE - PLAIN VIEW

Conley v. Com.

2007 WL 2998437 (Ky. App. 2007)

FACTS: On Jan. 1, 2006, Officer Perkins (Lexington PD) was patrolling when he spotted fireworks being launched from Conley's back yard. He approached the house and introduced himself, and "told Conley that he would be confiscating the illegal fireworks." Conley agreed to meet Perkins at the front door to surrender the fireworks.

When Conley opened his front door, however, Officer Perkins later testified that "he was overwhelmed by the strong odor of marijuana." He could see, from the front porch, "what he identified as marijuana inside a Mason jar on a coffee table in the residence" and a "glass pipe next to the Mason jar." Conley "appeared nervous, jittery and evasive" and kept looking back into the house during their discussion. His physical appearance (bloodshot watery eyes and non-reactive pupils) also suggested to Perkins that he'd been smoking marijuana. When asked, Conley initially denied it, but finally admitted that he'd done so.

Conley attempted to retreat back into the house and close the door, but Perkins blocked the door with his foot. Perkins entered to seize the marijuana he saw, and then spotted more evidence.

Officer Gale arrived, and the two officers "conducted a protective sweep of the home based on Conley's earlier nervous behavior." As Officer Gale entered the living room, "Conley began to cry." He agreed that more marijuana would be found in the house, and in fact, the officers "discovered a number of marijuana plants growing in a bedroom of the house." They did not, however, find anyone else there.

Officer Perkins went to get a search warrant, and eventually, 164 plants and assorted items associated with cultivating marijuana were found.

Conley was charged and indicted, and requested suppression. When that was denied, he took a conditional guilty plea, and entered.

ISSUE: May an officer seize items in plain view, if the officer reasonably believes the items will be destroyed?

HOLDING: Yes

DISCUSSION: Conley argued that the officers were not justified in entering his residence and seizing evidence. However, the Court, quoting extensively from Posey v. Com., summarized the plain view doctrine.⁹ The Court quickly found that the evidence was in plain view, from a position where Officer Perkins was legally entitled to be. Further, Officer Perkins had probable cause to believe the substance was marijuana, and from Conley's behavior, that he would attempt to destroy it if given the chance.

With respect to the protective sweep, the Court found that anything found during that sweep was immaterial to the justification for the ultimate search, under the search warrant. Officer Perkins already had "more than enough to establish probable cause for the search warrant." Although

⁹ 185 S.W.3d 170 (Ky. 2006).

information from that sweep was included in the warrant affidavit, the Court found that even if that information was redacted, there was sufficient probable cause to justify the search warrant.

The Court upheld the denial of Conley's motion to suppress.

NOTE: Conley also argued that he had a right to possess marijuana for personal use under a "privacy" provision, but the Court quickly dismissed that argument as well.

PLAIN VIEW

Fried v. Com.

2007 WL 4292112 (Ky. App. 2007)

FACTS: On November 14, 2005, Detectives Smoot and Hart, and Sgt. Ensminger (Lexington PD) went to Fried's home. They had received a tip that drug trafficking was occurring and that "there was heavy traffic to and from the residence and that people would only stay for short periods of time." The officers did a "knock and talk" and at some point, they entered, told Fried why they were there and asked for consent to search. Fried stated he would have to call his father, who apparently owned the house. The Court noted that "during this time, the officers and [Fried] remained in the foyer area and did not venture further into the house."

Fried called his father, who told Smoot, by phone "not to search the house and to wait until he arrived." Hart, however, spotted a marijuana stem on a table, pointed it out to the other officers and "proceeded to retrieve the stem." The officers then "secured the scene until a search warrant was obtained."

Fried was charged, indicted and took a conditional guilty plea following an unsuccessful suppression motion. Fried then appealed.

ISSUE: May the sighting of a marijuana stem be sufficient probable cause for a search warrant?

HOLDING: Yes

DISCUSSION: The Court quickly dispensed with the argument that Fried did not consent to the entry and there was "insufficient evidence that the marijuana stem was in plain view." Finding that the issue "boiled down to one person's word against another's - the Court chose to defer to the trial court in its decision to believe the officers over Fried, as the judge "was in the best position to decide whose testimony was more reliable and credible."

With regard to the actual warrant, Fried "claim[ed] that the stem was so far away from the foyer of the house that its incriminating nature was not immediately determinable and that the seizure of the stem was unlawful." The Court, however, noted that the officers were "initially invited in and the stem was in plain view" from the foyer (although not in the foyer itself), that the "stem could be used as probable cause for a warrant." The trial court had found that the first two elements of plain view had been satisfied - that the officers were lawfully in a position to see the

item, and that they immediately recognized the item as contraband. The Court did agree with Fried that the actual seizure was unlawful, because the officers did not have consent to enter the room where the stem was located (apparently the living room). However, since the stem was not used to obtain the search warrant, but instead, the officers only used their observation of the stem, which was “legally made.” The Court acknowledged that Det. Hart’s “years of experience with drugs and marijuana in particular” was enough to support his assertion that he recognized the stem as contraband.

To sum, the court stated:

If the stem was unlawfully seized, it could have been suppressed at trial; however, the viewing of the stem was done properly and could be used as support for the search warrant.

The Court found the warrant to be valid and all evidence collected as a result to have been legally obtained. Fried’s plea was affirmed.

Perkins v. Com.
237 S.W.3d 215 (Ky. App. 2007)

FACTS: On Feb. 16, 2004, KSP “received an anonymous call from a woman who alleged that Perkins had stashed a large amount of cocaine, marijuana, and pills under his bed in the back bedroom of his house.” She also claimed to have been at the house and “seen him cutting a block of cocaine on a coffee table in the living room.” KSP had received other complaints about Perkins before.

At about 8:30 that evening, Troopers Miller, Sims and Banks went to “conduct a ‘knock and talk’ visit.” Malcolm Perkins, 15 or 16 years old, answered the door, and indicated to the troopers that his father was in his bedroom. They asked if he minded if they spoke to Perkins, and Malcolm “invited the officers to enter and then directed them towards Perkins’s bedroom.” The door to the bedroom was open and Perkins was “sitting on his bed eating a sandwich.”

Trooper Miller introduced himself and explained the reason for the visit. Perkins said that he no longer sold drugs, upon being told that he wouldn’t be arrested immediately if he was honest with the trooper. Perkins gave them some cocaine that was in his pocket; he indicated that it was only for personal use. Perkins gave consent to search the house, and opened a safe that contained over \$9,000 in cash, cocaine, pills and a set of scales. The troopers did not continue the search and left, as promised.

Perkins was duly indicted on Possession of a Controlled Substance and related charges. A few days later, the Grand Jury issued a superseding indictment on Trafficking, instead. He moved for suppression, and was denied. He was eventually convicted on Possession of a Controlled Substances and related charges, and appealed.

ISSUE: May a 15 year old give consent for entry?

HOLDING: Yes

DISCUSSION: Perkins argued that the evidence from the “knock and talk” should have been suppressed, because it was based upon the initial consent of his juvenile son. The Court, however, that “Malcolm had the apparent authority to consent to their entry into the residence.” The Court found that the troopers had sufficient good faith to accept that Malcolm had the authority to admit them to the house.¹⁰

Next, Perkins argued that “knock and talks” were unlawful. But, the Court noted, “[m]any courts - including ... [the] federal Sixth Circuit - have recognized the legitimacy of ‘knock-and-talk’ encounters at the home of a suspect or another person who is believed to possess information about an investigation.” In addition, the troopers “made no effort to coerce or to deceive Malcolm into granting them entry.” Perkins, further, did not object to their presence or revoke the consent given by his son.

Perkins also argued that since the troopers knew they were looking for drugs, they should have gotten a warrant. The Court noted that since they were working simply from a tip, that the “probable cause was not so clearly established as to preclude the reasonableness of a knock-and search visit.”¹¹

Perkins’ conviction was affirmed.

VEHICLE STOPS

Kirby v. Com.
2007 WL 2998326 (Ky. App. 2007)

FACTS: On Feb. 3, 2006, at approximately 8:19 p.m., a Flemingsburg officer “saw a ‘dark colored car’ travel through an intersection without stopping for a red light.” Since the officer was facing the oncoming car, and the light on his side was red, he “surmised that the light was red for the vehicle traveling toward him and the driver had failed to stop.” Since it was dark, he could not identify the “make, color or model of the vehicle” but could describe the “face of the vehicle” - the pattern of headlights and parking lights along with a bright reflective item in the middle of the car which he thought may have been a license plate.

Because of hilly terrain, the officer acknowledged that he did lose sight of the vehicle for a couple of seconds, but stated that “he could at all times see the glare of the headlights.” When it got closer, he identified the front reflective block as an out-of-state license plate. He stopped the car and found that Kirby was driving. When Kirby could not produce a valid OL and appeared to be under the influence, the officer glanced into the car with his flashlight. He saw two blue

¹⁰ The Court looked to other state’s opinions in reaching the conclusion that “a high-school-aged child may be presumed to have at least some authority to allow entry into a home.”

¹¹ The Court distinguishes the facts of the instant case from the case submitted by Perkins - U.S. v. Chambers, 395 F.3d 563 (6th Cir. 2005).

pills which turned out to be oxycodone. Upon searching the car, the officer found “additional drugs and drug paraphernalia.” Kirby was arrested.

For his defense, Kirby had a videotape made of the scene, during which it could be seen that the officer would have lost sight of the suspect vehicle for some 9 seconds. However, the officer testified that the suspect vehicle was going at least 10 miles faster than the vehicle used in the videotape. Kirby moved for suppression. When that was denied, he took a conditional guilty plea, and appealed.

ISSUE: Does losing sight of a suspect vehicle for a few seconds negate the cause for a stop?

HOLDING: No

DISCUSSION: The court stated that the “question is not actually whether the officer had the right to stop a vehicle but whether he had the right to stop Kirby's vehicle. It is a question of identity.” The Court found that “the officer had a solid basis to believe that a traffic violation had occurred.” The officer was confident that he had stopped the correct vehicle.

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

Simpson v. Com.
2007 WL 4355528 (Ky. App. 2007)

FACTS: On Sept. 24, 2006, Trooper McWhorter, along with other officers, was “conducting a safety road check in Muhlenberg County.” He spotted a “vehicle approach a stop sign a short distance from the roadblock” and sit for approximately two minutes. The driver of that vehicle eventually turned right, away from the roadblock. Trooper McWhorter decided to follow. As he did so, he saw the “vehicle weaving in the lane, back and forth from the center line to the fog line” and that the rear plate was not illuminated. Believing the driver might be intoxicated, he made a traffic stop. He found the driver, Simpson, “swearing and grinding his teeth” and suspected that Simpson might be on methamphetamine. Simpson failed several FSTs, and admitted that he “was a habitual user of methamphetamine, marijuana and Xanax.” McWhorter was arrested.

Trooper McWhorter found a locked box in the search incident to arrest. Simpson provided the key to the box and inside, the trooper found 23 grams of methamphetamine and other items.

Simpson requested suppression, arguing that the stop was unlawful. The trial court denied the motion, finding the trooper's reason for the stop justified. Simpson took a conditional guilty plea, and appealed.

ISSUE: Is following a vehicle that evades a roadblock permissible?

HOLDING: Yes

DISCUSSION: Simpson argued that “there was no evidence that he was operating the car in violation of the law.” The Court found that the “testimony of Trooper McWhorter constitute[d] substantial evidence to support the trial court’s” decision, including his reason for originally following the vehicle. The appellate court agreed that there was sufficient reasonable suspicion to support the original stop. Simpson’s plea was upheld.

Kelly v. Com.
2007 WL 4292131(Ky. App. 2007)

FACTS: Mark Kelly (Patrick Kelly’s brother) rented a home in Grayson County. On Aug. 16, 2006, the landlord’s son, Childress, reported to Trooper White (KSP) that “he smelled a strong chemical odor coming from the house” and that he suspected methamphetamine was being produced. Childress further reported that the windows were covered with sheets, that there was a window fan pulling air from the house and that the burn pile in the yard contained lighter fluid containers. Childress also stated that Patrick acted paranoid and sat on top of the house with binoculars.

Trooper White learned that there were outstanding warrants for Mark Kelley’s arrest, and went to execute the warrant. Trooper White, two other troopers and a deputy sheriff approached the house. Trooper White, in the front, “noted a slight chemical odor, which he identified from his experience as the smell of ether.” The two officers in the back of the house “smelled a strong chemical odor.” Trooper White knocked and an unidentified individual opened the door, and quickly slammed it shut. The officers could hear people running, and through an uncovered window, saw a woman “pouring a liquid down a sink.” The troopers, believing evidence was being destroyed entered. They smelled a “very strong chemical odor” and saw other items they knew to be connected with manufacturing. Mark Kelly was not in the house, but Patrick Kelly and three others were - all were arrested. The home was secured and a search warrant was obtained.

Patrick Kelley was arrested on numerous counts related to the manufacturing operation and to the possession of guns found inside the house. One of the other defendants requested suppression and Patrick Kelley joined in that motion. Following a hearing, the Court denied the motion, finding that there were exigent circumstances that permitted the entry.

Kelly took a conditional guilty plea to the drug charges, and appealed.

ISSUE: Does an arrest warrant for a resident of a house justify an entry?

HOLDING: Yes

DISCUSSION: The Court found that the warrants for Mark Kelly “gave the officers the lawful authority to enter the residence for the purpose of locating and arresting Mark Kelly.” Once inside, the evidence “at issue was in plain view.” Once they secured the residence and removed the occupants, they left the house and obtained a search warrant.

Even though the Court upheld the entry based upon the warrant, the Court also agreed that there was sufficient evidence to support the entry on exigent circumstances as well.

Kelly's plea was upheld.

SEARCH & SEIZURE - TIPS

Hampton v. Com.

231 S.W.3d 740 (Ky. 2007)

FACTS: At about 4 a.m., on April 30, 2005, Officer Woodward (Bowling Green PD) received a tip about possible drug activity at a residence. The tip "came from a man riding a bike in the neighborhood, who had previously provided tips to beat officers." They did not know his name, but Officer Woodward knew that his tips were generally reliable. Officers Woodward and Eversoll, along with additional officers, went to the location to investigate. As they approached the car from a block away, on foot, they spotted 8-10 people emerge and get into cars. Hampton was one of those individuals. Hampton got into the rear passenger seat of one of the cars just as Officer Eversoll opened that door. Eversoll saw Hampton "put something in his shoe, though he could not identify the object." He ordered Hampton out. After several minutes, Hampton agreed to a search and Eversoll found a crack pipe in the shoe. Hampton was arrested. At the jail, and despite his denial that he had any further contraband, a second crack pipe was found in his pocket. Both had cocaine residue.

Hampton was charged with Possession of a Controlled Substance, Promoting Contraband and PFO. He was found guilty, and appealed.

ISSUE: May a frisk be slightly expanded (into more of a search) when the officer actually sees contraband being hidden on a suspect's person?

HOLDING: Yes

DISCUSSION: Hampton first argued that the officers lacked reasonable suspicion to stop him, and that Eversoll's "opening of the car door without first asking him to step out of the car exceeded his authority during the Terry stop." Hampton argued that the tip was not a sufficient reason to make the stop. Although the Court agreed to some extent, it did not find that the tip in question was not an anonymous tip, but more akin to a citizen informant, "whose tip inherently bears more indicia of reliability than that of a purely anonymous informant." The Court described "citizen informant [as] tipsters (sic) who have face-to-face contact with the police or whose identity may be readily ascertained." Even if the officer does not know the individual's actual name, such tips are generally accorded more credibility.¹²

However, in this case, the tipster gave no information specific to Hampton, "much less describe him or his vehicle." Nothing in the tip connected Hampton to anything illegal. However, the officers did have additional information, as the house had previously been the "subject of some

¹² Com. v. Kelly, 180 S.W.3d 474 (Ky. 2005); Com. v. Priddy, 184 S.W.3d 501 (Ky. 2005).

surveillance” by the local drug task force, and “it was not unknown to them as a possible site of ongoing crime.” In fact, the officers described the people leaving as “running” or “hurrying.” The Court found that to be sufficient to uphold at the least, a Terry stop. Even granting that “such an event alone would not necessarily justify the officer’s belief” that a crime was occurring, when all of the information was combined, “the situation takes on an entirely new - and suspicious - light.” The Court found that the “convergence of those events gives rise to more than a nebulous and inchoate suspicion of criminal activity, and would lead a reasonable officer to conclude that the people had been involved in drug activity at the house and were then attempting to leave the scene of the crime.” The Court upheld the stop.

Moving to the issue of opening the car door, the Court, while noting that in some cases that might be inappropriate, that “it is not clear that such a wait-and-see approach is always the best method.” The Court found little difference between this and the “practice of ordering drivers to step out of their cars during short investigatory stops.”¹³

Next, it addressed the voluntariness of Hampton’s consent to search, especially because Hampton was apparently handcuffed at the time. Hampton complained that he was “in pain and that Officer Eversoll refused to uncuff him unless he consented to a search.” He claimed he consented only to a pat-down, not a search that would reveal the item he knew to be hidden in his shoe. (Officer Eversoll claimed that Hampton was “argumentative and belligerent and was cuffed for that reason, although he admitted he had asked for consent several times before Hampton agreed.)

In addition, the Court held that the consent was not actually needed, given the nature of the investigation, and that, although the search went beyond the usual scope of a frisk, it was still appropriate. Specially, the Court stated that “[w]hen an officer sees a suspect stow an object in an item of clothing, such as a shoe, where it could not be revealed by a mere pat-down, a broader search may be allowed if concern about safety is sufficiently high.” Since a dangerous item, such as a knife, could be concealed in a shoe, it was “not unreasonable for the officer to slightly expand the scope of the pat-down to include reaching into the shoe to determine the nature of the object hidden there.”

Hampton’s conviction was affirmed.

SEARCH & SEIZURE - WARRANT

Hampton v. Com.

2007 WL 4355617 (Ky. App. 2007)

FACTS: On June 9, 2006, Officer Cobb (Lexington PD) was patrolling in an area “known for narcotics trafficking and prostitution.” At about 2 a.m, he “noticed a brown automobile parked on the side of the road in front of a tractor-trailer rig.” Officer Cobb pulled alongside and saw Hampton, the driver, “looking down in into his lap.” Cobb “motioned for Hampton to roll down his window” but instead, Hampton opened the door and started to step out. “Hampton

¹³ Pennsylvania v. Mims, 434 U.S. 106 (1977).

yelled to Officer Cobb that everything was okay and then sat down in the car and closed the door.” Officer Williams arrived. Officer Cobb decided to investigate further and backed up so he could shine his spotlight on the car. As Cobb stepped out of his cruiser, Hampton started the vehicle and drove off.

Officer Williams followed and signaled, using his emergency light, for Hampton to pull over. Hampton turned into the parking lot of a local motel and “sped to the rear of the lot.” He then jumped out and “ran toward a wooded area and drainage culvert bordering the parking lot.” Both officers followed and captured him. When they returned to the vehicle, Cobb spotted white powder on the ground near the open door. The officers found 3 baggies of crack cocaine and a digital scale when searching the car.

Hampton was arrested, and eventually indicted, on multiple counts of trafficking and related charges. He requested suppression, arguing that Officer Williams was wrong in following him, and that his car was illegally searched. The Court disagreed.

Hampton took a conditional guilty plea, and appealed.

ISSUE: Does a suspect’s departure, before an officer has concluded an investigatory traffic inquiry, constitute flight that justifies a vehicle stop?

HOLDING: Yes

DISCUSSION: The Court reviewed the standards for first, the investigatory stop. The Court disagreed with Hampton that Cobb’s “suspicions were extinguished at the conclusion of their brief encounter.” The Court agreed that simple presence in a high crime area is not enough, but noted that, in Illinois v. Wardlow,¹⁴ that “officers are not required to ignore the relevant characteristics of a location in determining whether the circumstances are sufficiently suspicious to warrant further investigation.” The Court quickly concluded that the officer “had a reasonable articulable suspicion that Hampton was engaging in criminal activity at the time of the investigatory stop.”

Hampton argued that the encounter was over when “he told the officer everything was okay” but the Court noted “that Hampton unilaterally ended the encounter with Officer Cobb.” In fact, the Court agreed that “Hampton’s evasive behavior obviously increased the officer’s suspicions that criminal activity was afoot.” As such, the court found that the “officers properly followed Hampton and attempted to stop his vehicle to continue their investigation.”

With respect to the search, the Court agreed that the search was justified on a combination of the plain view and the Carroll doctrines. When Officer Cobb “found what appeared to be crushed crack cocaine on the ground,” it was “objectively reasonable” for the officer “to suspect that additional contraband [crack cocaine] was located inside the car.” Further, the Court justified the seizure of the scales under the plain view, even though it was arguably “covered” by an “opaque plastic cover.” However “Officer Cobb reiterated that he was familiar with the type of scale and

¹⁴ 528 U.S. 199 (2000).

the small cover attached to it” and it was reasonable for the officer to seize an item he immediately recognized as drug paraphernalia.

MISCELLANEOUS

Robbins v. Com.

2007 WL 4277959 (Ky. App. 2007)

FACT: On January 27, 2006, Officer Hill, of the “Lincoln County Police Department” sat as a grand juror in Robbins case. Robbins was indicted. He moved to quash the indictment because, he argued, “Hill was a law enforcement officer who was a comrade of, and was therefore predisposed to believe, the law enforcement officers who testified before the grand jury, had outside knowledge of the cases, and is related to the prosecutor.”

The trial court held a hearing and denied the motion. Robbins took a conditional guilty plea, and appealed.

ISSUE: May a law enforcement officer sit as a member of a grand jury?

HOLDING: Yes

DISCUSSION: The Court reviewed the acceptable reasons to disqualify a juror, as listed in KRS 29A.080. Unlike petit (or trial) jurors, members of the grand jury may not be challenged for bias, nor are they subjected to voir dire.¹⁵ The Court found no reason to disqualify Officer Hill based upon his occupation.

Robbins’ plea was upheld.

Com. v. Gonzalez

237 S.W.3d 575 (Ky. App. 2007)

FACTS: On May 28, 2005, Officer Reyna (Louisville Metro PD) spotted Gonzalez driving erratically on the Outer Loop. Officer Reyna stopped the car and he then “smelled a strong odor of alcoholic beverages about Gonzalez and observed two coolers containing beer in the car as well as an open alcoholic beverage container.” Gonzalez failed the field sobriety tests and admitted to having been drinking that day. He was charged with DUI, Reckless Driving, No Seat Belt and not having insurance. Robbins posted bond and was release.

The first pretrial hearing was on July 6, and Officer Reyna appeared, as required. Gonzalez, however, was not present, supposedly because he could not get off from work. A second date was set, on Aug. 24. Officer Reyna received a subpoena for that date. On July 25, he requested a continuance because he was called to military active duty for a year. However, it also stated he would be “available for court” on October 4, 2005 and a phone number was provided.

¹⁵ See Partin v. Com., 168 S.W.3d 23 (Ky. 2005).

The Aug. 24 hearing went on as scheduled, and the defense counsel moved to dismiss the charges because of Officer Reyna's absence. The trial court, however, continued the case to Nov. 7. However, the record does not indicate if the subpoena was ever served, and the officer did not appear on Nov. 7. The prosecutor admitted that she had no contact with the officer, although a phone message had supposedly been left. The trial court dismissed the charges, "saying, 'the officer has to make some effort, I mean some.'"

The Commonwealth appealed, and the Circuit Court noted that the prosecution was obviously not ready for trial (because of the officer's absence, apparently) but that the Commonwealth could file new charges. The Commonwealth further appealed.

ISSUE: May a case be dismissed because the arresting officer is on military duty?

HOLDING: No (but see discussion and note)

DISCUSSION: The Court noted that the trial court dismissed the charges on the mistaken belief that Officer Reyna had made no attempt to communicate with the court. The prosecutor could have avoided this error by bringing to the court's attention the "court continuance request" submitted by Officer Reyna in late July 2005. This document explained Officer Reyna had been called to active military duty for one year but also stated he would be available for court on October 4, 2005.¹⁶ Upon the filing of the court continuance request, the prosecutor could have asked that a pretrial conference, or trial, be scheduled for Tuesday, October 4, 2005, when Officer Reyna would have been available." In the alternative, they could have arranged for the officer to have been deposed, and his testimony secured in that manner.

The dismissal of the charges was reversed and the case remanded.

NOTE: **Officers who are called up to military duty should ensure, however, that the prosecutors (both state and federal) on any pending cases are kept informed as to their status.**

DOMESTIC VIOLENCE

Randall v. Stewart
223 S.W.3d 121 Ky. App. 2007

FACTS: Randall and Stewart dated for about a year and a half. On May 17, 2006, Stewart went to Randall's apartment in Louisville to have a discussion, and told Randall, at that time, that "she did not want to see him anymore." Randall allegedly grabbed her and they struggled, with Randall attempting to suffocate Stewart. Neighbors heard the struggle and went to her aid, and the police were called. Responding officers did not make a report or arrest Randall, but did advise Stewart to get an EPO, which she did.

¹⁶ It is unclear in the opinion why the officer would be available on that particular date, given that the continuance request indicated he would be called up for a year.

On May 30, at the DVO hearing, Randall moved for dismissal, arguing that Stewart did not have standing to get a DVO. Stewart testified that they did not live together, but that Randall spent, on the average, two nights a week at Stewart's home and kept toiletries there, but not clothing. The Jefferson County Family Court judge found that relationship sufficient to give Stewart standing for a DVO.

Randall appealed.

ISSUE: Is a dating relationship sufficient to qualify for a DVO?

HOLDING: No

DISCUSSION: Randall used Stewart's own testimony, and applied the precepts of Barnett v. Wiley, to argue that they did not live together and that Stewart lacked standing to get a DVO.¹⁷ The court reviewed the statute, and agreed that the issuance of the DVO was improper. (The Court further encouraged, however, the General Assembly to take up the issue of dating couples.)

NOTE: The case does not indicate whether criminal charges for the assault were sought against Randall.

EVIDENCE

Allen v. Com. Ky. App. 2007

FACTS: On Jan. 24, 2006, a CI, working under Det. Melton (Franklin Co. SO), "contacted Allen and arranged for the purchase of one-half ounce of crack cocaine." Det. Melton drove the CI to the location, after searching him and fitting him with a recording device. Allen arrived and made the exchange, with the CI giving the money to Allen but obtaining the cocaine from an unidentified passenger in Allen's car. The CI then handed the crack cocaine over to Det. Melton, who forwarded it to the KSP crime lab. Allen was eventually convicted on charges of Trafficking in a Controlled Substance and PFO. Allen appealed, arguing that the slight difference in weight for the cocaine submitted to the lab required the suppression of the cocaine evidence.

ISSUE: Does a slight discrepancy in the amount of a drug between the officer and the crime lab seriously impact the case?

HOLDING: No

DISCUSSION: Allen argued that there was no indication that he trafficked in cocaine, in that the "unidentified passenger, not him, ... possessed and transferred the package to the CI."

¹⁷ 103 S.W.3d 17 (Ky. 2003).

The Court, however, noted that “[w]hile it may not have been Allen’s hands that held the package at the time it was given over to the CI, he was nonetheless integral in the transaction.” Allen also argued that the chain of custody was deficient, since there was a slight discrepancy in the amount recorded by Det. Melton and the amount recorded by the crime lab. The Court, however, found that there was indication that the chain of custody was flawed.

Allen’s conviction was affirmed.

TRIAL PROCEDURE

Kim v. Com.

2007 WL 2892999 (Ky. App. 2007)

FACTS: Kim, and C.S.P. “were involved in a romantic relationship.” On Jan. 8, 2004, Kim spotted C.S.P. returning from Rough River, and followed her until she stopped. He accused her of cheating on him, and she drove away. He caught up with her and blocked her “entrance to her subdivision.” C.S.P. fled toward a nearby restaurant, but Kim caught her and forced her into the car. He struck her multiple times and sexually abused her. She was able to call 911, however.

Kim was indicted on Sexual Abuse in the First Degree, Unlawful Imprisonment in the Second Degree, Stalking and Assault in the Fourth Degree. He was convicted on the Sexual Abuse and Assault charges, and appealed.

ISSUE: Must an officer take care in mentioning other “bad acts” possibly committed by a defendant during trial (before a jury)?

HOLDING: Yes

DISCUSSION: Kim argued that he should have been granted a mistrial because of statements made by one of the detectives during his trial. The detective had been asked by Kim’s attorney (during cross-examination) “whether [Kim] was born in the United States.” The detective had replied that “she was unsure but that [Kim’s] mother owned a grocery store and that [Kim] possessed a motor vehicle operator’s license, which was suspended.” Upon objection, the judge instructed the jury to ignore the detective’s comment. The Court found that the admonition was sufficiently curative and that a mistrial was not needed.

Next, the Court addressed a statement made by that same detective “concerning his discussion with [Kim] about other ‘instances’ with C.S.P. The detective had questioned the victim prior to talking to Kim and mentioned that there was some indication that they had previous confrontations. The Court, however, found the statement to be ambiguous and not necessarily an indication of “prior bad acts.”

The Court agreed that a mistrial was not necessary and upheld the trial court’s decision.

EVIDENCE - EXPERT WITNESS

Salvers v. Com.

2007 WL 2994591 (Ky. App. 2007)

FACTS: W.M., a 14-year old female, was allegedly raped by the father of one of her friends, Salyers. The alleged rape took place following Salyers providing alcohol to the two girls. When W.M. returned home the next day, she told her mother about the assault, and her mother took her to “Hope’s Place” to be examined. A sexual assault nurse examiner (SANE) performed the exam, and subsequently, Salyers was indicted on first-degree Rape. At trial, the nurse, Napier, was called to testify. Salyers objected that she had not been qualified as an expert, and the trial court held a Daubert¹⁸ hearing. Napier detailed her training and experience and indicated she had been certified as a Kentucky SANE, and that she maintained that certification by taking continuing education classes. She then testified concerning her exam of W.M. and that she had used dye to detect small, fresh tears indicative of sexual assault. She testified that she relied upon her training and experience to perform the exam and reach that conclusion.

The Court concluded that she was appropriately qualified as an expert and that the methods she used “were not novel and were generally accepted by the medical community.” The nurse was permitted to testify in front of the jury as to her findings.

In addition, the Court introduced testimony from the KSP Crime Lab that semen was found on W.M.’s tank top, consistent with Salyers’ exemplar.

Salyers was convicted, and appealed.

ISSUE: May a qualified Sexual Assault Nurse Examiner be considered an expert witness?

HOLDING: Yes

DISCUSSION: The court found that Napier’s training and continued experience qualified her to testify as an expert witness. The Court noted that:

To aid trial courts, the Supreme Court set forth a list of factors that trial courts should consider in determining the admissibility of expert testimony: 1) whether the theory or technique was based on scientific methodology; 2) whether the theory or technique has been subjected to peer review and publication; 3) the known or potential rate of error regarding the theory or technique; and 4) the degree of acceptance in the relevant scientific community.

Salyers argued that a proposed expert must meet all of the factors, but the Court noted that “the Daubert Court stated clearly that the factors constituted neither a definitive checklist nor a test” and that the list was “only meant to be helpful, rather than definitive, and it recognized that not all of the factors would necessarily apply every time a party challenged the reliability of expert

¹⁸ Daubert v. Merrell Dow Pharmaceuticals, Inc., 509 U.S. 579 (1993).

testimony.”¹⁹ Napier’s experience and training, and thus her testimony, were sufficiently reliable and thus admissible.

Salyers’ conviction was affirmed.

EVIDENCE

Powell v. Com. 237 S.W.3d 570 (Ky. App. 2007)

FACTS: Powell was convicted in Kenton County on complicity to commit first-degree robbery and PFO. During the trial, one of the officers testified that he “watched a certain car that he suspected was used by the robbery suspects.” He stated that a woman who had been walking up and down the street, paying particular attention to the car in question, eventually approached him and told him that she believed the car belonged to her.” (The car had been loaned to a friend and not returned as expected.) A second officer also testified that the woman had identified the car as hers, as well. Powell appealed. (The facts of the case are irrelevant to the issue.)

ISSUE: Are statements hearsay if the declarant also testifies to the statements?

HOLDING: No

DISCUSSION: Powell argued that the testimony of the officers, in repeating what they were told by the woman, constituted “investigative hearsay.” The Court, however, quickly concluded that since the woman (Johnson) actually testified, that the “officers’ testimony was merely cumulative of Johnson’s testimony” - and further noted that Powell did not object to the testimony.

Powell’s conviction was affirmed.

Slater v. Com. 2007 WL 2998433 (Ky. App. 2007)

FACTS: On June 17, 2005, Det. Fagan (Buffalo Trace Gateway Narcotics Task Force) “conducted video and visual surveillance from a concealed location on Fourth Street in Maysville....” That area was known for criminal drug activity. Det. Fagan watched “Slater conduct a hand-to-hand transaction with a female and also observed him approach passenger cars and lean into the window, after which the cars would drive away.” He saw him go to some nearby bushes several times and bring out what appeared to be drugs and to count money.

Det. Fagan directed other officers to the bushes, where they found a “brown bag that contained a large plastic bag containing a quantity of marijuana and several small ‘dime’ bags.” No one else had been observed in the area. Slater was arrested, and eventually indicted.

¹⁹ Kumho Tire Co., Ltd. V. Carmichael, 526 U.S. 137 (1999)

Slater was convicted of Trafficking within 1000 Yards of a School and PFO 2nd. He appealed.

ISSUE: Should an officer/witness narrate a video being shown in court?

HOLDING: Probably not (see discussion)

DISCUSSION: Slater argued that Det. Fagan's mention, during his testimony, that he "recognized Slater from previous incidents," "implied that [Slater] must have recently committed a drug crime." However, since the objection had not been made in a timely manner, the Court elected not to address the error.

Next, Slater argued that the detective "violated the court's order that he not narrate the video as the jury was watching it." The Court, however, concluded that while this was an error, that it was not require a mistrial, as Slater requested, as the jury had been admonished appropriately to disregard Det. Fagan's comment.

Slater's conviction was affirmed.

TRIAL PROCEDURE

Cotton v. Com.

2007 WL 2893409 (Ky. App. 2007)

FACTS: On Nov. 25, 2003, Officers Howard and Moss (Harlan County) made a traffic stop of Cotton, "because they observed the license plate on his vehicle was expired." When Officer Howard approached the car, however, "he detected a strong scent of marijuana emanating from the interior" and from "Cotton's person." In addition, "Cotton was unsteady on his feet and failed a field sobriety test." He admitted to having smoked marijuana at home earlier. Cotton was arrested and searched, and the officers found cocaine in baggies, empty baggies and \$200 in cash.

Cotton admitted to being an addict, and after being given Miranda warnings, Cotton admitted that he'd gotten the drugs in Lexington because they were cheaper there, and that he'd been convicted of drug possession in the past. He submitted to blood and urine samples, which showed cocaine, cannabinoid and hydrocodone.

Cotton was indicted of trafficking and DUI. Trial commenced in March, 2006. Officer Howard read directly from his police report about the events that took place on November 25, 2003." In addition, "Officer Howard even read the portion of his report where Cotton admitted to having previously been convicted of drug possession." The defense objected and the Court admonished the jury to ignore the reference to his prior record.

Cotton was convicted and appealed.

ISSUE: May an officers error is testimony be "cured" by a judge's admonition to the jury to ignore an improper statement?

HOLDING: Yes

DISCUSSION: Cotton argued that the officer's testimony was a violation of KRE 404(b) and that he was entitled to a mistrial. The Court reviewed the trial court's ruling, and found that was no showing that the jury was unable to follow the admonition, the effect of the inadmissible evidence was devastating to Cotton, or that the inclusion of the statement was deliberate, "inflammatory" or "highly prejudicial." The officer had "never divulged whether the conviction was a felony, just that Cotton had stated that he had a prior conviction."

Further, Cotton testified that he had had been using drugs prior to the stop, thereby negating any prejudice that might be the result of Officer Howard's testimony.

Cotton's conviction was upheld, but the case was remanded for re-sentencing.

SIXTH CIRCUIT COURT OF APPEALS

SEARCH & SEIZURE

U.S. v. Wilson
506 F.3d 488 (6th Cir. 2007)

FACTS: On January 9, 2006, Deputies Moore and Jones (Lake County, Tennessee, SD) passed a car traveling in the opposite direction, bearing Kentucky plates. They noted that neither driver (Michael Jones) or Wilson were wearing seat belts, so the deputies made a traffic stop.

By the time the deputies walked up, both men were wearing seat belts. The driver produced a license with a Memphis address, but told Deputy Moore that he lived in Tiptonville, nearby. The driver "began talking and rambling and, in response to a question by Moore, ultimately admitted having served federal time on a gun charge." Both occupants were "acting extremely nervous."

Officer Moore checked the registration on the car and attempted to run both driver's licenses. He learned that the vehicle was registered to neither of the men, and asked for proof of insurance and a registration. Both men searched diligently for the paperwork, and the driver (Jones) was also talking on the cell phone. When told to end the call, Jones did so, but then told Wilson that "They're coming." Ultimately, the men were unable to find the documents requested.

Officer Moore asked for consent to search the car and the driver gave consent. Both men got out, on request, and "Officer Moore explained to Wilson that he needed to pat him down for the officer's safety." As he patted Wilson, "a package wrapped in gray duct tape fell from one of Wilson's pant legs and landed on the ground." The package was later found to contain 18 ounces of cocaine.

Moore tried to handcuff Wilson, who fought and escaped. Jones (the driver) also resisted arrest. Wilson broke free and "jumped into a car belonging" to someone who had "arrived at the scene

in response to Jones's cell-phone call." Wilson, upon being captured later, admitted that the cocaine belonged to Jones and that he'd given it to Wilson to hold when they were stopped.

Both men were indicted on possession, and both requested suppression on the basis of an unreasonable search and seizure. The trial court denied Jones' motion but granted it for Wilson, finding that "Officer Moore 'had a reasonable belief that Wilson was armed and dangerous before conducting the pat-down search.'" The government appealed.

ISSUE: Does the Sixth Circuit recognize the "automatic companion" principle in Terry frisks?

HOLDING: No

DISCUSSION: The Court reviewed the standard for a pat-down frisk under Terry. Both parties cited U.S. v. Bell,²⁰ "in support of their respective arguments." Bell involved the frisk of a passenger. In that case, the Court upheld Bell's frisk, but "declined to adopt a so-called 'automatic companion' rule whereby any companion of an arrestee would be subject to a 'cursory pat-down' reasonable necessary to give assurance that they are unarmed," stating that Terry had "not been eroded to the point than an individual may be frisked based upon nothing more than an unfortunate choice of associates."

Looking at the specific facts of this case, the Court concluded that the car was initially pulled over for a minor traffic infraction. Further "[i]f anything, the admission [of the previous gun charge] 'suggests cooperation with authorities, not resistance.'" Although "Wilson's proximity to Jones was relevant," it was "not dispositive."

Looking to the facts presented by the government, the Court found that the fact that Wilson did not own the car was simply immaterial, as "[m]ost passengers do not own the vehicle in which they are riding." Next, Jones' statements did not reflect upon Wilson, and gave no indication that a passenger might be armed (and in fact, was not). Last, with regard to Wilson's nervousness, even one of the officers testified that "it was fairly common for people to be nervous when he pulled them over." Nervousness is simply not enough for a Terry frisk.²¹

The Court concluded that "the government can point to no specific and articulable facts to justify the pat-down of Wilson on the basis of a reasonable suspicion that he was armed and dangerous." The trial court's decision was affirmed.

SEARCH & SEIZURE - TERRY

U.S. v. Wilson

2007 WL 3101409 (6th Cir. 2007)

FACTS: On July 27, Nease, a drug task force agent, arranged for a drug purchase from Smith through Newton, a CI. Nease and Widener, another agent, followed Newton to the

²⁰ 762 F.2d 495 (6th Cir. 1985)

²¹ See U.S. v. Mesa, 62 F.3d 159 (6th Cir. 1995).

location, a gas station. They saw Smith's vehicle parked next to Wilson's vehicle. (They were not speaking to each other at the time, but they were only a few feet from each other.) Nease walked between the two cars, and Smith greeted him by name. Wilson reacted to the introduction, appeared to be "hiding something or stuffing something...."

Widener approached Wilson's car. He knew him from a previous investigation and he did a "light pat-down of [Wilson's] pockets," finding nothing. He did see, "protruding from the center console of Wilson's vehicle, the top of a cellophane baggy."²² Widener "'immediately' went into the vehicle console 'to retrieve what [he] believe[d] to be narcotics.'" Widener testified later that his experience and training indicated that the baggy contained narcotics and that he knew that Smith was a user and Wilson the seller of illegal drugs.

Wilson was arrested, and during the search incident, the officer found a "Copenhagen snuff can containing a smaller amount of powder cocaine." Widener later testified that "the officers advised Wilson of his rights verbally." He told Wilson he could "pick and choose" which questions he answered, "and a conversation commenced." He told the officers he was worried about being on probation and "offered to secure two kilos of cocaine for the officers if they helped him avoid prison." Wilson was arrested on federal charges.

Wilson moved for suppression, "on the ground that Widener neglected to provide him with a full recitation of his Miranda rights." The trial court ruled that the frisk was justified, and that further, the vehicle search was "justified in conducting a protective search of Wilson's vehicle following his Terry stop."

Wilson was convicted, and appealed.

ISSUE: May a Terry frisk be extended to the interior of a vehicle?

HOLDING: Yes

DISCUSSION: Wilson did not challenge the original Terry stop and pat down, but argued, instead, "that Widener lacked the necessary cause to inspect the interior of his vehicle." The Court looked to Michigan v. Long, finding that a Terry frisk could be extended to the interior of a vehicle, even though the pat-down did not reveal a weapon.²³ Wilson argued that "an officer undertaking a search of a vehicle's interior pursuant to a Terry stop must possess an additional measure of reasonable suspicion before proceeding to inspect the car." However, the Court stated that "when a police officer compels the exit of an individual from a vehicle in order to conduct a Terry frisk - based upon his believe that the individual is potentially dangerous - that officer remains vulnerable to the possibility that the individual, if not arrested, will be free to retrieve any weapons within his car."

The Court found that Widener's additional frisk of the car was reasonable. When he found contraband other than weapons in plain view, in a location he was otherwise permitted to search, the officer was justified in seizing that contraband.

²² Later found to contain 17.7 grams of cocaine base.

²³ 463 U.S. 1032 (1983).

Wilson argued that the officers failed to “inform him fully of” his Miranda rights, but the Court accepted Widener’s testimony that he did, in fact, provide those rights before questioning.

Wilson’s conviction was affirmed.

SEARCH & SEIZURE - CARROLL

U.S. v. Smith

510 F.3d 641 (6th Cir. 2007)

FACTS: On March 18, 2005, two “suspicious packages” arrived at a UPS facility in Romulus, Michigan. UPS contacted the DEA, which obtained a search warrant and opened the packages, finding about three kilos of cocaine. UPS made the delivery, and Green was arrested. Green agreed to cooperate with the subsequent investigation, and contacted Wilson, for whom the packages were ultimately intended. The officers found two cell phones in Wilson’s possession, and Smith’s telephone number was found in the address book. On March 18 and 19, 11 phone calls were exchanged between the two telephone numbers.

The DEA and Michigan authorities began an investigation of Smith. A drug trafficking suspect told investigators that Wilson was the source of Smith’s drug supply, and that that Smith possessed over \$30,000 in stolen cash, guns and clothing. Another defendant told the investigators that Smith was a major distributor, that he had seen Smith in possession of a kilo of cocaine and he identified one of his dealers by name. Yet another informant, Farmer, told about multiple vehicles that Smith had purchased, for cash, and explained that he lived with a named female and had “numerous weapons.” He also stated that Smith did not have a job. The DEA confirmed that Smith had three vehicles, as had been described, registered to him, that none had outstanding liens, and that he lived in the identified location. (He subsequently moved to the address at issue.)

Det. Smith, of the Michigan drug task force working with the DEA, was able to set up a CI to make purchases from Smith’s organization. The CI delivered purchase money to Smith’s home, although he was not at the house at the time. The drugs were picked up at another location, however. Another transaction also took place at that third location, and although the CI did not see Smith, he did see one of his vehicles. On a third trip, the CI expected to see Smith, but was told that Smith had left, as he suspected he was under investigation. A final transaction took place at a street location. The investigators doing surveillance could not see the driver of the suspect vehicle, although it was one of Smith’s vehicles, but the CI stated that Smith directly sold him the cocaine from that vehicle.

On October 25, 2005, one of the state detectives “received an anonymous tip informing him that Smith had received a large shipment of cocaine” and had it at his home address, on Albert. The detective was provided with the description and plate number of a fourth vehicle, also determined to be registered to Smith, and found it at the stated location. On October 27, Det. Lewkowski got a search warrant for the home, and discussed the execution of that warrant with

the DEA, particularly as regards what they would seize in forfeiture. In particular, they agreed to seize all vehicles registered to Smith.

In the search warrant affidavit, Det. Lewkowski detailed the facts, as above. The warrant authorized the search of the Albert residence and all vehicles on the premises. They found three vehicles on the premises at the time of the search. When they executed the warrant, officers found over \$17,000 in cash, but not the marked money that had been exchanged during the last transaction. The money was found hidden around the residence in odd places. Plastic baggies were found to contain cocaine residue, and three “semiautomatic guns were found in the residence, as well as a Taser device, expensive jewelry, and valuable electronic equipment.” Some of these items were seized for later forfeiture.

Just prior to the execution of the warrant, one of the vehicle, a green Pontiac, was moved to the street. The keys and the registration had both been found in the house, and the officers searched that vehicle, finding a large quantity of cocaine, both powder and crack, a hand mixer and digital scales. One of the scales had Smith’s prints. “Lewkowski testified that the WEMET has a policy regarding the inventorying of vehicles that are seized for forfeiture: officers must complete a form describing any property found in the vehicle that is not attached to the vehicle.”

Smith was indicted on both drug and weapons charges. He moved for suppression of the evidence seized from the residence and the car, and of statements he made during the interrogation. The trial court denied the suppression finding first that the warrant was valid, and also that even though the vehicle, since it was not on the premises was not covered by the warrant, was validly searched “pursuant to both the automobile exception and the inventory exception to the warrant requirement.”

Smith was convicted, and appealed.

ISSUE: May officers search a vehicle without a warrant, but with probable cause?

HOLDING: Yes

DISCUSSION: The Court reviewed the decision of the trial court. First, the Court reviewed the requirements for a valid vehicle exception search, noting that “police officers may conduct a warrantless search of a vehicle if they have ‘probable cause to believe that the vehicle contains evidence of a crime.’”²⁴ To match that determination, the Court looked to the “objective facts known to the officers at the time of the search.” Such probable cause “may come from a confidential informant’s tip, when sufficiently detailed and corroborated by the independent investigation of law enforcement officers.”

The Court looked to the following facts to find that probable cause:

- (1) the car was previously seen on the premises but was slightly off the premises when searched;
- (2) the keys to the car were found inside Smith’s residence;

²⁴ Smith v. Thornburg, 136 F.3d 1070 (6th Cir. 1998); U.S. v. Lumpkin, 159 F.3d 983(6th Cir. 1998).

- (3) Smith was a co-owner of the car;
- (4) Smith and his confederates were alleged to have “moved about when disposing of controlled substances by way of vehicles”;
- (5) Smith and his confederates sold controlled substances out of vehicles;
- (6) a significant amount of cash was found at Smith’s residence;
- (7) there was a history of drug dealing on the premises;
- (8) residue was found in baggies in trash pulls at the residence;
- (9) guns were discovered in the residence; and
- (10) there were “other indicia of a lifestyle” that would suggest drug dealing.

At the least, the Court agreed, the facts were sufficient to provide probable cause to be taken as part of the seizure. In particular, the Court noted that Smith owned a number of vehicles, many of which had been observed in transporting drugs. Even though the officers “had no information or evidence regarding the specific car searched - the green Pontiac Grand Am.” They did, however, “have evidence of Smith using other vehicles to transport drugs or transact drug deals.” In addition, it had been on the premises until just prior to the execution of the warrant, and they knew the vehicle was registered to Smith and his girlfriend. By the time they searched the vehicle, they had been told by an informant that he had received a large shipment of cocaine, and had already found plastic baggies with cocaine residue in the residence. Since they had not yet found the quantity of cocaine they were expecting, they believed that there was a “fair probability” that the drugs were in the vehicle.

Smith argued that the automobile exception did not apply, because the vehicle was not mobile. The police had the keys and both owners of the vehicle. The Court however, noted that “both this court and the Supreme Court have reiterated on numerous occasions that the automobile exception is justified not only by the exigency created by the ‘ready mobility’ of vehicles, but also by the lesser expectation of privacy operators have in their vehicles.”

The court found that the evidence from the vehicle was properly seized, and upheld the trial court’s decision.

The Court also noted that the search could also have been upheld as an inventory search despite Smith’s argument that the Michigan task lacked a policy authorizing the seizure.

At the suppression hearing, however, Lewkowski established the existence of a WEMET inventory policy regarding vehicles seized for forfeiture. Lewkowski testified that, pursuant to the WEMET policy, officers must complete a form indicating any property found in the vehicle. The detective agreed that it was the WEMET’s “standard operating procedure” to do a full search of a vehicle taken into custody. “Whether a police department maintains a written [inventory] policy is not determinative, where testimony establishes the existence and contours of the policy.”²⁵

²⁵ U.S. v. Tackett, 486 F.3d 230, 233 (6th Cir. 2007) (accepting officers’ testimony as proof of inventory policy).

Since it was clear that the vehicle was seizable as “forfeitable contraband” and that the detective testified as to the inventory policy, the Court found it was properly seized and searched.

Turning to the residence, the Court found that even though the CI was not identified to the judge, the “affidavit amply describes the reliability of the CI.” In particular, the Court looked to U.S. v. Allen.²⁶

In Allen, this court, sitting en banc, sought to clarify Sixth Circuit law “regarding the necessary requirements for the issuance of a search warrant based on uncorroborated information from an informant.” The court noted that there is no general proposition “that a CI’s information must always be independently corroborated by police, or that an affidavit must in every case set out and justify a CI’s expertise in identifying the particularities of the criminal activity alleged.” The court explained that an affidavit should be “judged on the adequacy of what it does contain, not on what it lacks, or on what a critic might say should have been added.”

In this case, the Court found that “numerous factors ... compensate for the CI’s lack of personal observation of cocaine” at the Smith residence. The CI had proved credible in previous cases. The Court upheld the warrant and the search of the residence pursuant to the warrant.

U.S. v. Stuart
507 F.3d 391 (6th Cir. 2007)

FACTS: On March 25, 2003, Hale was stopped for speeding by a Michigan officer. A “gallon-sized bag of marijuana” was in his car, and he was arrested. Hale spoke to officer Costley, of the Jackson Narcotics Enforcement Team. Hale stated that he had gotten the marijuana from Stuart, that he regularly bought marijuana from him, and that he’d seen “an additional ten pounds” at Stuart’s home. Costley got a search warrant, describing the events surrounding the traffic stop and Hale’s statements. The warrant was approved that same day, and when it was executed, the officers seized four pounds of marijuana, scales, body armor and an array of weapon. Stuart was indicted.

Stuart sought suppression, “[r]elying on a difference between the date of the warrant (March 25) and the date of the incident report (March 23). He claimed that the officers forged “documents in order to cover up the fact that the search occurred before the officers had a warrant.” Stuart offered an affidavit from his girlfriend to the effect that the search occurred on March 23. The government “provided several documents—five officer activity logs, a towing report, a condemnation document, dispatch logs, canine search documentation, fingerprint records and a booking report—showing that the search occurred on Tuesday, March 25.”

The trial court refused to entertain the motion, and eventually, Stuart was convicted. He appealed.

ISSUE: Is a mistake on a warrant sufficient to overturn it

²⁶ 211 F. 3d 970 (6th Cir. Tenn. 2000).

HOLDING: No

DISCUSSION: Stuart argued that the error entitled him to a hearing under Franks.²⁷ The Court stated that “Stuart fails to come to grips with the fact that he did not make a threshold showing that the warrant affidavit contained deliberately or recklessly false information.” The Court found nothing to indicate that Costley “made any deliberately false or reckless claims in the affidavit.” Further, the Court that “Hale’s post-arrest statements to support a warrant application” was appropriate. The Court found nothing to show that Costley’s actions were done recklessly or with “malicious intent.”

After disposing of several other issues, the Court affirmed his conviction.

U.S. v. Grubbs
506 F.3d 434 (6th Cir. 2007)

FACTS: On Oct. 4, 2001, KSP executed a search warrant at Grubbs’ home in Four Mile, during an investigation into stolen automobiles. During that search Mae Grubbs and her two adult sons, Paul and Ernest Grubbs, were present. Paul lived at the home, and Ernest (the defendant in this case) lived out of state but stayed at the home when he was visiting his family.

During the search, Paul admitted to possession of a handgun, which was under his pillow. Ernest, when visiting, slept on the couch.

The next summer, Paul and Ernest Grubbs were indicted on charges involving stealing vehicles, tampering with VINs and operating a “chop shop.” Ernest was also charged with being a felon in possession as a result of weapons found during the search. He pled guilty to the charges related to the vehicles, but went to trial on the weapons charges. At that trial, a neighbor, Jones, had testified regarding an altercation a month or two before the search during which Ernest had “threatened him with a handgun.” There was no testimony that specifically linked the weapon found at the house with the gun allegedly used in the fight - Jones admitted that he could not be sure it was the same gun although it “looked like it.”

Ernest Grubbs was convicted of possessing his brother’s handgun, and appealed.

ISSUE: May a person be charged with a handgun found in the home where they are simply visiting?

HOLDING: No (but see discussion)

DISCUSSION: Although the Court noted that, under 18 U.S.C. §922(g)(1), an individual “may be convicted based on either actual or constructive possession of a firearm.” The Court noted:

²⁷ Franks v. Delaware, 438 U.S. 154 (6th Cir. 1978).

In the instant case, the Government does not argue that Grubbs had physical control over the nine millimeter handgun found under his brother Paul's mattress at the time of the arrest. Nor is there any basis for concluding so: the Government presented no evidence that Grubbs had immediate access to the weapon. The mere fact that the police arrested Grubbs in the same house where they found a handgun is, without more, insufficient to support a conviction for actual possession.

With respect to constructive possession, the Court noted that "it is without question that "[p]resence alone' near a gun . . . does not 'show the requisite knowledge, power, or intention to exercise control over' the gun to prove constructive possession."²⁸ It is also insufficient to show that a "defendant possessed a firearm at some unidentified point in the past" - the evidence must prove that they possessed a specific, named weapon.

The Court speculated on the sort of situations that might satisfy the requirement for constructive possession, but concluded that no jury "could conclude that Grubbs constructively possessed the Beretta nine-millimeter handgun." He did not own the house, he did not sleep in the same room where the gun was found, and he visited only occasionally, and no witnesses tied him specifically to the gun listed in the indictment. At most, the witness indicated that "Grubbs might have possessed some dark-colored handgun that was never recovered."

Grubbs' conviction was reversed and an order requiring his acquittal was entered.

EVIDENCE - CRAWFORD

U.S. v. Gibbs 506 F.3d 479 (6th Cir. 2007)

FACTS: In Aug., 2005, the Muskegon County (Mich.) Sheriff's Department and Michigan State Police "were investigating a series of burglaries in Muskegon County." Gibbs and Miel became suspects; both were convicted felons currently on parole. Det. Sowles (Sheriff's Dept.) and Trooper Coon (MSP) "interviewed Gibbs at the office of his parole agent on August 10, 2005.

Gibbs denied that he was involved in the burglaries but did provide some information on the location of some of the guns, information he claimed to have gotten from Miel. He denied that there were any guns at his mother's home, where he was living. The parole agent, Cole, told Gibbs and the investigators that he had received a tip that Gibbs might have some long guns in his bedroom. He told Gibbs he would be doing a search, and asked Gibbs what he might expect to find. Gibbs told Cole that there was a pistol on a shelf near the bed, but denied that he possessed or attempted to sell any firearms.

As expected, the parole agents found the handgun, along with a quantity of ammunition, knives and other items. Gibbs, now in jail, called a friend Barrett, and stated "well, they got me - they

²⁸ U.S. v. Arnold, 486 F.3d 177 (6th Cir. 2007); U.S. v. Birmley, 529 F.2d 103 (6th Cir. 1976).

got that pistol at my house.” He told Barrett to contact his sister or his girlfriend and “ask them to claim the gun as theirs.”²⁹

Gibbs was indicted of being a felon in possession. He stipulated everything except “actual or constructive possession of the firearm.” He was convicted, and appealed.

ISSUE: Does testimony offered solely as background violate the Sixth Amendment?

HOLDING: No

DISCUSSION: Gibbs argued that the officers “violated the district court’s pretrial order” by testifying regarding his involvement in “various home invasions” in the area. Trooper Coon had testified as to how they came to be questioning Gibbs about what might be found in his bedroom, over objections by Gibbs. Gibbs also objected to the trial court permitting Miel “to testify that he had seen other guns in Gibbs’ bedroom. Det. Sowles and Trooper Fiats also testified about their involvement in the investigation of the home invasions and how that led them to Gibbs. The Court found that the statements, even if admitted in error, were not unduly prejudicial and were harmless.

Gibbs argued, also, that the “out-of-court statement by ... a fellow parolee, through the testimony of Agent Cole” was improperly admitted. Cole had testified that the parolee had given him a tip that “Gibbs had some long guns hidden in his basement bedroom.” Gibbs argued that this statement “was improperly admitted hearsay in violation of the Confrontation Clause of the Sixth Amendment.” The government did not contest that the statement was “testimonial in nature” - as discussed in U.S. v. Cromer.³⁰ However, the government contended that it was not legally hearsay, but “instead testimony offered simply as background evidence.”³¹ Cole testified as to the tip “solely as background evidence to show why Gibbs’s bedroom was searched” - and that his alleged possession of long gun “did not bear on Gibbs’s alleged possession of the .380 Llama pistol with which he was charged.” Again, the Court found that the evidence was only a “minuscule part of his overall testimony” and that the error, if any, was harmless.

Gibbs’s conviction was affirmed.

U.S. v. Chisom

249 Fed.Appx. 406, 2007 WL 2860896, (6th Cir. Tenn. 2007)

FACTS: On June 27, 2005, a Tennessee Highway Patrol Trooper stopped a Cadillac that he believed had windows tinted too dark for Tennessee law, and that had run a red light. Chisom, the only occupant, jumped out and fled, but the trooper finally caught up to him and they struggled. A police dog arrived as Chisom broke free, but the dog bit him and stopped the chase. Chisom was treated for the bite and booked under the name Jackie J. Williams, the name

²⁹ The call was recorded.

³⁰ 389 F.3d 662 (6th Cir. 2004) citing Crawford v Washington, 541 U.S. 36 (2004).

³¹ U.S. v. Martin, 897 F.2d 1368 (6th Cir. 1990).

on the Alabama OL he carried. The Cadillac was searched and a loaded .38 was found under the driver's seat.

Chisom had posted bond and been released before it was learned that his real name was Chisom, and that he had an outstanding California warrant. Two days later, the Marshal's Service searched his apartment, finding ammunition that matched the weapon, bloody items, photos of Chisom with the Cadillac and service records on the car. He was arrested the next day at another location.

Chisom was indicted for possession of the weapon and ammunition. He was found guilty and appealed.

ISSUE: May a person be considered the constructive owner of a vehicle they do not own, for purposes of searching said vehicle?

HOLDING: Yes

DISCUSSION: The Court quickly concluded that "Chisom constructively possessed the loaded revolver found underneath the driver's seat of the Cadillac," even though the car was legally titled to another person and that other people drove it. The Court agreed that "Chisom was, in fact, the true owner of the Cadillac and that he kept the title in a friend's name because he did not have a valid driver's license." He had paperwork in his home related to the car and was the sole occupant when stopped. His dominion over the weapon was sufficient to indicate that the "exercised dominion over the Cadillac when it was stopped" and thus had constructive possession of the weapon. Even though Chisom's sister testified that the weapon belonged to her, and that Chisom did not know it was in the Cadillac, the Court found the evidence sufficient to indicate that it was reasonable to believe that he did.

Chisom's convictions were affirmed.

U.S. v. Mackey
249 Fed.Appx. 420, 2007 WL 2859717 (6th Cir. Ohio 2007)

FACTS: On May 25, 2004, Dayton PD officers searched an apartment after surveilling it for some 30 minutes. During that time, they saw 4-6 people enter and stay a brief time before leaving, but did not see Mackey enter or exit. At 9 p.m., the team knocked and announced and then, upon "hearing individuals running inside the apartment, broke down the common door to the building and entered the apartment that they were authorized to search."

They found Murray and Mackey standing near the sink, and "found a loaded gun - with certain distinctive characteristics - in the sink, just inches beneath Mackey's hands, and loose marijuana, packaged marijuana, plastic baggies, and digital scales on the counter next to him, well within an arm's reach." He was patted down and a cell phone was found in his pocket. They handcuffed Mackey and put him on the floor, with the cell phone nearby. During the search, the cell phone "rang approximately five to seven times and each time, "the screen displayed a picture of a handgun on top of a pile of money and marijuana." The gun in the photo appeared to be the

same gun recovered from the sink, and the marijuana was “packaged similarly to the marijuana found on the kitchen counter.”

One of the officers testified that “in his expert opinion, the apartment was set up for the sole purpose of selling illegal narcotics,” as it was well barricaded, sparsely furnished, lacked appliances, and that a doorman collected money as people entered. In addition, the maintenance employee testified that “every time he entered the apartment, he saw guns and narcotics everywhere.”

Mackey was indicted for being a felon in possession, and in trafficking in marijuana. He moved to exclude the pictures on his cell phone - including the photo that came up when the phone was ringing. The trial court concluded “that sufficient evidence linked the phone to [Mackey], that the gun displayed in the picture might be the same gun that was found in the sink, and that the marijuana bags displayed in the picture were similarly packaged to the bags found on the kitchen counter.”

Mackey was convicted, and appealed.

ISSUE: May photos in a cell phone be used to prove ownership of an item depicted in the photos on that telephone?

HOLDING: Yes

DISCUSSION: The court found that there was sufficient evidence that “Mackey had either actual or constructive possession of the firearm in the sink.” It was not necessary to prove that Mackey had just placed it in the sink or was attempting to pick it up, in either event, he could be considered to be in actual possession. Although other cases had indicated that “mere presence near a firearm” was insufficient to prove possession, in this case, the gun was easily within Mackey’s reach, was inches from his hands and in an apartment used for drug trafficking. In U.S. v. Newsom, the Court had agreed that proximity plus other relevant factors were sufficient to prove constructive possession.³² (The same logic was applied to the marijuana.)

With respect to the photos and other evidence found in the phone, the court found that the gun in the photo appeared to be identical to the gun in the sink, as it “had some very distinctive features.” Mackey also argued that the chain of custody was flawed and that “the phone actually belonged to his sister, not to him.” The prosecution, however, “introduced data from the phone - including names from the phone book, incoming and outgoing calls stored in the phone’s history, and the date on which the pictures of the gun was [sic] taken” - showing that “Mackey possessed and used the phone on the day the picture of the gun was taken.” The court found the evidence from the phone was relevant and admissible.

Mackey’s conviction was affirmed.

U.S. v. Barry-Scott
2007 WL 3129723 (6th Cir. 2007)

³² 452 F.3d 593 (6th Cir. 2006).

FACTS: Between Jan. 27, 2003 and April 21, 2003, Westin, a CI, made controlled buys from Barry-Scott at her residence. Westin was supervised by Officer Solic (Austin Township PD). Eventually, Officer Solic detailed the buys in an affidavit and Judge Durkin signed the warrant.³³ The search resulted in the discovery of cocaine base and \$9,000 in cash. An additional \$1,500 was found in Barry-Scott's bra. Apparently present at the time of the search was Cornell Kennedy, the "boyfriend of Barry-Scott's adult daughter, Akia Hutchins."

Barry-Scott was indicted. She argued for suppression of "certain testimonial statements." She requested a writ of habeas corpus ad testificandum³⁴ for Kennedy, who was in custody in Nebraska, seeking information as to "statements against interest" at the time of the search. Her counsel never made any attempt to interview Kennedy, however, so they had no idea whether Cornell would testify or not, and the trial court eventually refused to allow him to be brought to the trial without that information.

Barry-Scott also argued that Officer Solic's testimony concerning the controlled buys should be excluded, because Westin could not be found. The trial court permitted the officer "to testify about the investigation upon which the search warrant was based, what Solic personally heard and observed during the transactions, and the procedures employed for the controlled buys." She also argued that the search warrant was invalid because the judge who signed it had represented her in the past. The Court, however, found that the affidavit provided sufficient probable cause and denied all of the suppression motions.

Barry-Scott was convicted, and appealed.

ISSUE: May officers provide hearsay testimony as background?

HOLDING: Yes (but use caution)

DISCUSSION: Barry-Scott argued that her right to confrontation witnesses was violated because "Westin, the [CI], was not called to testify." The prosecution countered that Officer Solic's testimony was "not offered for the truth of the matter asserted but rather only as background as to how the investigation developed." The Court reviewed the issue, and found that "[s]ome of the out-of-court statements about which Barry-Scott complains do not present Confrontation Clause problems because they are not hearsay because the declarant's testimony was not being used for the truth of the matter asserted." Officer Solic testified as to statements that he, himself, heard and they "were not being offered for the truth of the matter that drugs were being purchased." Other statements, however, "were testimonial in that they were given to police as part of interrogation or questioning of Westin following the buy transactions." The Court noted that "Crawford clearly holds that statements resulting from police questioning are testimonial." "The only purpose of the statements by Westin to the police officers was that those statements be used against the accused in investigating and prosecuting the crime." As such,

³³ Durkin had represented Barry-Scott and her husband "on similar but unrelated charges" when he was in private practice.

³⁴ A court order to produce a prisoner in custody so that they might testify in another's case.

“Westin’s statements to the officers fit the definition of testimonial out-of-court statements as established in Crawford and Johnson.”³⁵

The Court noted that Solic testified that he saw a car registered to Barry-Scott drive up to Westin, and, after Westin entered the car, the officer heard Westin talking with Barry-Scott about purchasing crack cocaine. Westin’s statement thus placed Barry-Scott at the scene of the second controlled purchase.”

However, the Court was troubled by several of the statements admitted by the trial court, as they did “appear to have been proffered to prove the truth of the matter asserted, rather than simply as background.” The Court found that “there being no question that Barry- Scott did not have an opportunity to cross examine the confidential informant, the statements should have been excluded, and Barry-Scott’s Sixth Amendment right to confrontation was violated.” However, the Court found any error was harmless.

With regards to the warrant, Barry-Scott argued that the judge was aware of her prior drug activities, but the trial court’s decision in that regard was upheld. (In particular, the Court noted that the officers were unaware of the judge’s connection to Barry-Scott, and an “alleged bias thus could not have impacted the officers’ activity.”)

Barry-Scott’s conviction was affirmed.

U.S. v. Ferguson
2007 WL 3226194 (6th Cir. Tenn. 2007)

FACTS: In April, 2004, Officer Harrison (West Tennessee Violent Crime and Drug Task Force) interviewed a CI who had previously given him good information that resulted in five felony convictions. The CI provided information about Ferguson, including “(1) that Ferguson went by the alias “Slow”; (2) that Ferguson had a prior conviction for a drug offense; (3) that Ferguson used a green, boxy Chevrolet or Buick in his drug trafficking; and (4) the location of Ferguson’s residence.” Further, the CI stated that he had personally witnessed “Ferguson sell cocaine from the residence within the last five days.” Harrison confirmed much of the information provided by the CI.

On April 23, Harrison got a search warrant, and that afternoon, it was executed. They seized “cocaine, marijuana and 10.8 grams of crack cocaine” along with “drug-trade items.” Ferguson was charged accordingly.

Ferguson requested suppression, arguing on the basis that the officers failed to “knock and announce” prior to entering. One of the officers who was on the team testified that they did knock and announce, and that someone replied “I’m coming” but the second time, the sound appeared to be from farther away. Harrison testified that more than 25 seconds elapsed between the first knock and the “order to breach the door.” One of Ferguson’s neighbors testified that the entry took place about a minute after the officers arrived. Another witnesses stated that they delayed only ten seconds - but he admitted that he’d been drinking that day. Yet another witness

³⁵ See Cromer, supra .

estimated ten seconds between their arrival and the witness hearing the officers kick the door. He, also, had been drinking.

The trial court found that the officers “did not need to wait very long before entering Ferguson’s home.” The Court denied the motion to suppress. Ferguson eventually took a conditional suppression motion and appealed.

ISSUE: Does a failure to knock and announce prior to entering require suppression of the evidence?

HOLDING: No

DISCUSSION: The Court agreed that “[t]he idea that the police must announce their presence before entering a residence is a common-law principle “‘embedded in Anglo-American law.’”³⁶ Further, the purposes of the knock and-announce rule are to reduce the potential for violence, diminish the destruction of property, and serve as “a recognition of the individual’s right to privacy in his [or her] house.”³⁷ The rule is part of American law both in case law as well as federal law (for federal agents) and in some states, part of state statute. Although previously, a failure to knock and announce might result in suppression, recently, in Hudson v. Michigan,³⁸ the Court had found differently. The Court found, in that case, that suppression of the evidence “was not the appropriate remedy.” Although it had not yet been applied in a federal case, Hudson involved a state warrant, the Court found that suppression was not an appropriate remedy.

In addition, Ferguson argued that there was insufficient evidence that the informant was reliable. The Court concluded that the issuing chancellor had a substantial basis to conclude that there was probable cause to believe that a search of Ferguson’s residence would yield evidence of criminal conduct.” Since Harrison did not name the informant, the officer attested to the confidential informant’s prior successful assistance five previous times and also discussed his own efforts at corroborating elements of the confidential informant’s tip. These two factors combine to provide a substantial basis for the issuing chancellor’s probable-cause determination.”

Ferguson also contended the information provided was general, “not explicit and detailed ... of any wrongdoing.” The Court, however, found that it had “never required the level of detail that Ferguson demands.” Further, it stated that “although the [CI] did not provide certain specifics, he did claim to have seen a drug sale within five days of his tip.” That was sufficient to corroborate the tipster’s reliability.

Ferguson’s conviction was affirmed.

SEARCH & SEIZURE - WARRANT

³⁶ Wilson v. Arkansas, 514 U.S. 927 (1995); Miller v. U.S., 357 U.S. 301 (1958).

³⁷ U.S. v. Bates, 94 F.3d 790 (6th Cir. 1996).

³⁸ 547 U.S. 586 (2006).

U.S. v. Kenny
505 F.3d 458 (6th Cir. Mich. 2007)

FACTS: On Feb. 6, 2003, officers in Harrison (Michigan) executed a search warrant. They found Kenny, and his son, Christopher Perry, hiding in a pole barn on the property, and the pole barn also contained a methamphetamine lab. Also on the property, they discovered sixty weapons. As a result, Det. Stoppa got a search warrant for Kenny's home, based in part on items found in the search of the first property. The search of Kenny's residence resulted in the discovery of guns and items needed to manufacture methamphetamine.

Kenny was charged with possessing firearms, as he was a felon. (The opinion does not explain if he was also charged with methamphetamine-related offenses.) He moved for suppression and he was convicted. He appealed.

ISSUE: Do items found in a barn on a person's property provide sufficient probable cause for a warrant for the residence, as well?

HOLDING: Yes

DISCUSSION: Kenny argued that the warrant for his home did not provide probable cause that illegal items would be found at that location. The Court looked to U.S. v. Miggins, in which the Court held "that a sufficient nexus existed to search the residence of a known drug dealer after he had been arrested for possession of cocaine."³⁹ Further, in U.S. v. McPhearson, the Court had explained that, the inference that a drug dealer keeps evidence of wrongdoing in her residence can be drawn permissibly, if as in Miggins, the affidavit had "the independently corroborated fact that the defendants were known drug dealers at the time the police sought to search their homes."⁴⁰

The Court stated that even though Kenny did not have an arrest record as a drug dealer, there was "substantial evidence ... that Kenny was engaged in manufacturing methamphetamine." He was initially arrested at the same location of a lab "under circumstances suggesting he was responsible for the operation." The court found that a "manufacturer's residence is as likely to contain drug paraphernalia such as recipes, ingredients, and records of sales as that of a dealer."

The Court upheld the search, and for that reason, his conviction as well.

U.S. v. Popham
250 Fed.Appx. 170, 2007 WL 2935844 (6th Cir. 2007)

FACTS: On Sept. 12, 2004, just before sunrise, Trooper Veltman (Michigan State Police) "walked through the woods until he came to the fenced property" owned by Popham and his wife, Crane. Trooper Veltman had gotten a tip from a CI that the pair were growing marijuana. In fact, a search in 2000 had produced evidence of that, but the evidence found during that search had been suppressed.

³⁹ 302 F.3d 384 (6th Cir. 2002).

⁴⁰ 469 F.3d 518 (6th Cir. 2006).

Trooper Veltman spotted the shape of marijuana plants inside a greenhouse. He obtained a search warrant that same day. The warrant covered a mobile home located on Popham's property, in addition to all outbuildings, vehicles, and persons at the property. The warrant also provided for the seizure of all controlled substances and firearms used in the trafficking of controlled substances. The search warrant was executed on September 14, 2007 and led to the seizure of 143 marijuana plants and several firearms, in addition to numerous possessions.

Popham was indicted on federal charges relating to the marijuana and guns found on the property. Both he and Crane requested suppression. The trial court found that the "warrant was overbroad in part but upheld the seizure of the marijuana plants and firearms." Popham took a conditional guilty plea, and appealed.

ISSUE: Does the elimination of a substantial part of a search warrant affidavit necessarily invalidate the warrant?

HOLDING: No (see discussion)

DISCUSSION: The court noted that "[i]t is beyond question that the portion of Veltman's affidavit that relied on a March 2000 search pursuant to a flawed warrant could not present a substantial basis for probable cause." The trial court had also disregarded information from an unnamed informant. However, since, the trial court had already excised that from its consideration, the Court had to look at "whether the untainted portions of Veltman's affidavit present[ed] probable cause." The trial court had found, and Popham had conceded that "Trooper Veltman's personal observations alone would establish probable cause to search the premises, provided that they are true and not themselves tainted by illegal action."

Specifically, Popham questioned the apparently admitted problem with visibility that Veltman had in seeing the plants in the greenhouse. However, the appellate court found that the trial court had made a determination as to credibility, and that the trooper's personal observations were sufficient to support probable cause.

Popham also argued against the scope. The trial court "upheld the warrant's description of the places to be searched, but held that portions of the warrant describing the items to be seized were flawed." Popham argued that the inclusion of structures in addition to the greenhouse made the warrant "impermissibly broad." Popham pointed to Maryland v. Garrison,⁴¹ for the concept that large marijuana plants would not be found in a residence, but the Court noted that such plants suggested a business operation, and that documents, weapons and cash would likely be found "in more than one structure on the property, including the residence." The Court stated "[i]n short, because there was probable cause to believe Popham was running a marijuana business, the scope of the search properly included the other structures within the curtilage."

The Court agreed that the portion of the warrant that "authorized the seizure of '[a]ny and all ... items of value' that were proceeds of or used to facilitate" the business was overbroad, but found

⁴¹ 480 U.S. 79 (1987).

that the trial court had already settled that issue by severing that portion of the warrant from the rest.⁴²

The court found that the “trooper’s affidavit underlying the search warrant contained untainted evidence that the affiant had personally observed marijuana” and the Court found that was sufficient probable cause to support the warrant.

Popham’s conviction was affirmed.

U.S. v. Stuckey
2007 WL 3037286 (6th Cir. Mich. 2007)

FACTS: Stuckey was involved in the murder of Darbins, a former Detroit police officer who had been indicted in a cocaine trafficking operation. Darbins had attempted to shoot an informant, but missed, and he was eventually charged for that attempt. On Aug. 6, 1996, Stuckey murdered Darbins, which was witnessed, and later testified to, by Felder. Felder and Murrie assisted Stuckey in wrapping the body and disposing of it in an alley, where it was found the next morning.

On Sept. 6, 2002, federal agents arrested Stuckey, who was wanted, in Lawrenceville, Georgia. Also in the apartment they found a large amount of cash and jewelry along with a marijuana roach in plain view. Agent Lockhart (DEA) applied for a search warrant, covering apartment, curtilage, and vehicles, and listed the only item to be seized was marijuana. The agents, however, also seized “a blue knapsack filled with paperwork (including the rap lyrics listed below), correspondence, [and] at least one address book,” marijuana, jewelry, a designer purse cellular phones and assorted clothing.

Stuckey was charged with numerous federal offenses. He moved for suppression of the evidence found during the search, arguing that the “discovery of a single marijuana cigarette did not suggest that other contraband was located in the apartment” and that “the search exceeded the scope of the search warrant because the warrant permitted only a search for marijuana, whereas the federal agents conducted a “Free For All” and seized other items that were not marijuana.” The Government contended that:

- (1) Stuckey failed to establish standing to challenge the search because he had no reasonable expectation of privacy in someone else’s apartment;
- (2) the search warrant was supported by probable cause;
- (3) the agents who executed the search relied in good faith on the warrant;
- (4) the evidence seized was in plain view; and
- (5) the search of the vehicle was proper under the automobile exception to the warrant requirement.

The Court ruled against suppression, finding that Stuckey did not have sufficient standing to challenge the search, and that his status as being on “supervised release” required only reasonable suspicion.

⁴² See U.S. v. Blakeney, 942 F.2d 1001 (6th Cir. 1977).

Among other evidence eventually introduced against Stuckey were “handwritten rap lyrics composed by Stuckey, which the Government argued were akin to a confession:”

I expose those who knows; Fill they bodys wit ho[l]es; Rap em up in blankit; Dump they bodys on the rode.” The lyrics also repeatedly referred to killing and retaliating against “snitches.

Stuckey was convicted, and appealed.

ISSUE: Does an occasional sublessee have the same right of privacy in a location as the primary lessee?

HOLDING: No (not quite as much)

DISCUSSION: The Court found that the search was valid “because two factors, in combination, reduced Stuckey’s expectation of privacy.” Further, it stated that “[a]n individual may only claim the protection of the Fourth Amendment if he has a legitimate expectation of privacy in the premises being searched.” “First, he was in the apartment only for a brief period, and was using it to aid in the progress of his flight from authority. Second, he lacked the degree of privacy expected by a person who is not on supervised release.”

The Court agreed that Stuckey had a closer relationship to the apartment in this case was “closer to that of a motel patron or an apartment sublessee than to a business visitor” since he had paid the lessee to stay at the apartment, and also kept personal items there,” and he slept there. However, his status reduced his expectation of privacy. Even though the conditions of his “supervised release conditions did not authorize the search, the fact that Stuckey was subject to supervised release itself lessened Stuckey’s expectation of privacy.” The Court found no reason to suppress the evidence.

With respect to the introduction of the rap lyrics, the Court agreed that they were “properly admitted as party admissions” and did not agree that they should be excluded as “irrelevant, improper evidence of prior bad acts.” The Court found them relevant, since they discussed “killing snitches” in specific ways that precisely matched “what the Government accused Stuckey of doing to Darbins in this case.” They were admissible as prior statements “admissible to show knowledge, preparation, plan and arguably modus operandi.”

Stuckey’s conviction was affirmed.

VEHICLE STOPS

U.S. v. McGuire
2007 WL 4322164 (6th Cir. 2007)

FACTS: On July 3, 2005, just before 1 a.m., Officer Capps “was on routine patrol” in Kenton County. He spotted a vehicle “parked at the very end of a driveway that led up a long

hill to a home.” It did not appear to be running and did not have its headlights on - it had two occupants. Officer Capps pulled in behind the vehicle and later agreed that there was “no way that the vehicle could leave.” He found the situation suspicious because of prior break-ins in the area and because of its position in the driveway. When the vehicle was opened, either by rolling down the window or opening the door, Capps could not recall, he “detected ‘a faint odor of marijuana coming from inside the vehicle.’” He asked the driver, McGuire, for a license or other ID, but McGuire had nothing. Neither did the passenger, a female who Capps learned later was 15. Capps used McGuire’s name, DOB and SSN to check, and learned that he had no outstanding warrants.

Continuing to smell marijuana coming from the car, Capps asked McGuire to get out. The teen passenger admitted that the couple had smoked marijuana earlier. Capps searched the vehicle and found marijuana and crack cocaine in the center console. Capps arrested McGuire. Capps searched the trunk and found a pistol.

McGuire was charged under federal law with possession of the cocaine with intent to distribute and with possession of the firearm - he was a convicted felon. McGuire requested suppression, claimed that the “warrantless seizure of his person and the subsequent search of his vehicle were unjustified.” The trial court found that “McGuire was not ‘seized’ by Officer Capps until after the law enforcement official smelled marijuana” Once Officer Capps smelled marijuana, he “possessed probable cause for a warrantless search.”

McGuire took a conditional guilty plea, and appealed.

ISSUE: Is it permissible to block in a vehicle (preventing its movement) during a Terry stop?

HOLDING: Yes

DISCUSSION: Although the trial court had found that the initial contact was a “consensual encounter,” the Court found that “the touchstone of any inquiry into the validity of a warrantless detention of an individual continues to be simply whether ‘the person to whom questions are put remains free to disregard the questions and walk away.’”⁴³ Because the police car blocked the McGuire vehicle into the driveway, the Court found that it was not consensual. However, the Court next looked to whether the encounter could be categorized “as an investigative detention.”

The Court found that “[i]n this case, there is little doubt that Officer Capps had not only articulable, but also reasonable, suspicions that McGuire might have been engaged in criminal activity.” Even though there were potentially innocent reasons for McGuire’s presence in the driveway, it was reasonable for Capps to suspect that some criminal activity might well be in progress. He was “justified in briefly detaining the occupants of the parked car to determine their intentions” and once he detected the odor of marijuana, the arrest was justified.

The Court upheld the denial of the suppression of the evidence.

⁴³ U.S. v. Mendenhall, 446 U.S. 544 (1980).

U.S. v. Walton
2007 WL 4395577 (6th Cir. 2007)

FACTS: On October 21, 2003, Officer Fisher (a Tennessee Drug Task Force) spotted a vehicle that was following a tractor-trailer too closely. He fell in behind it and noted that the license plate was partially blocked. He effected a traffic stop at about 7:38 a.m. Officer Fisher found Walton driving, and Larry White, Walton's uncle, as the passenger.

Officer Fisher explained the reason for the stop and requested Walton's OL. He also asked him to step out and come to the rear of the vehicle. Since Walton's OL was from Texas, he asked if they'd been driving all night. Walton stated that he and his uncle had taken turns, that they were on the way to New York for a fashion show and would then be going to a wedding in Philadelphia.

Fisher then went to speak to White and asked for the registration. When White opened the glovebox, Fisher saw a "1/4 inch stack of cash." White stated that they were going to New York for a wedding. He also told Officer Fisher that he did not have an OL. Officer Fisher used his cell phone to check on both Walton and White. While waiting for a call back, Officer Fisher told Walton, who appeared to be cold, to wait in the patrol car. There, Walton stated that his sister was who was getting married (which was a different couple than that claimed by White) and denied traveling with a large amount of money. Officer Fisher allowed Heidi, his drug dog, to run around the car, but she did not alert.

Dispatch called back and told Fisher that Walton had been arrested on trafficking charged and was "usually armed." Officer Fisher stated that the dispatcher did not tell him that Walton's license and registration were clear. (The Court later noted that since the call records indicated that the only information available to the dispatcher concerned Walton's license and registration, nothing else, that it would find that was the only information provided to Walton.")

Fisher, however, told Walton the dispatcher was "having difficulty verifying the vehicle registration" and asked for consent to search. Walton agreed and signed a consent to search form. Officer Utley, who had arrived, and Officer Fisher began to search the vehicle, when dispatch called back with additional information related to drug charges (of which Walton was acquitted) and weapons charges, of which he was convicted. White also had weapons and drug convictions on his records. Officer Fisher shared this information with Utley and they continued to search.

In the back of the vehicle, a SUV, Fisher found five heavy, solid, gift-wrapped boxes. Walton stated they contained "computers and dishes." They also found about \$1,500 in cash over the visor, apparently the same money that had been in the glove box previously. Walton refused a

request to unwrap the boxes, so Fisher ran Heidi around the packages. She alerted to the packages, and all were found to contain cocaine.

Walton took a conditional guilty plea, to trafficking in cocaine, and appealed.

ISSUE: May an officer extend a stop as long as reasonable suspicion continues?

HOLDING: Yes

DISCUSSION: The Court noted that the “only significant issue” was whether Officer Fisher improperly continued the stop once he learned that Walton’s license, and the vehicle registration, were valid. The Court noted that the request to search came 1 minute and 18 seconds after he terminated the call with dispatch. Although he did mislead Walton by his statement that dispatch was having trouble, the Court found that the length of time was reasonable to continue the detention. Specifically, the Court found it was appropriate for Officer Fisher to use his knowledge and experience to extend his reasonable suspicion, and noted that a “totality of the circumstances analysis prohibits us from discounting certain factors merely because, separately, they could potentially have ‘an innocent explanation.’”⁴⁴

The Court reviewed a number of earlier cases on vehicle stops and reasonable suspicion, and found that in this case, “after the purposes of the traffic stop were fulfilled, the brief, continued detention was justified based on reasonable suspicion of criminal activity.”

Walton’s conviction was sustained.

U.S. v. Dukes
2007 WL 4395627 (6th Cir. 2007)

FACTS: On April 11, 2006, Trooper Jacks (Ohio Highway Patrol) was observing highway traffic. At about 4 p.m., he saw a vehicle “traveling at an abnormally slow speed (53 mph)” - far under the 65 mph permitted for cars. Trooper Jacks followed the vehicle, and observed three traffic violations, two of which were following too closely. He made a traffic stop.

When Dukes, the driver, opened her purse, Trooper Jacks noticed a bag of marijuana residue. He arrested Dukes and searched the car, finding a quantity of cocaine in the spare tire compartment. In an unusual twist, the video recording of the stop captured a conversation Trooper Jacks had, by phone and his response to a question:

Following too close. She drove by us, so we saw her comin’, we checked her speed [speaking to another officer] what was it, 50, as she was going by us? [Other officer answers “53”] – 53 as when she went by us, you know, just *obvious*, so I got behind her and a semi pulled out – I couldn’t get anything on her other than she was driving down about 45 miles per hour, 55 at the most, 55. Then a truck pulled out from a rest area, and she got behind it, so – following too close violation.

⁴⁴ U.S. v. Arvizu, 534 U.S. 266 (2002)

(In addition, “Jacks also alleged that Dukes’s rigid position in the car, with her hands in the 1 ten-and-two position, along with Dukes’s failure to look at the police as she drove by, constituted suspicious behavior.” The trial court noted that was insufficient reason alone on which to base a stop.)

Dukes argued for suppression, claiming that the officer had “no probable cause to believe that a traffic violation had occurred before pulling her over.” The trial court agreed and suppressed the evidence. The government appealed.

ISSUE: May an officer make a traffic stop for a minor traffic violation?

HOLDING: Yes

DISCUSSION: Although the appellate courts pay a great deal deference to the trial courts, in this case, the Court determined that the trial court’s “factual finding that Dukes did not follow to closely to the car in front of her” - and its finding that even had she done so, such an action was not a violation of Ohio law, was in error. Although apparently Trooper Jacks never told Dukes about anything other than her slow speed, that the video recording clearly indicated “that he followed Dukes until she committed the following-too-close violation.” The recording did not indicate anything about the alleged signal problems, however. The court also noted that Ohio law did not provide a specific distance for a following vehicle, that Ohio case law supported the officer’s use of “the car length rule” in deciding upon a violation of the statute.

The trial court’s suppression of the evidence was reversed, and the case remanded.

42 U.S.C. §1983

Jolley v. Harvell
2007 WL 3390935 (6th Cir. 2007)

FACTS: On October 6, 2002, Officer Harvell (Calvert City PD) “saw a 1996 Honda stop at four-way stop intersections, for what the officer characterized as a ‘prolonged stop,’ approximately thirty seconds.” As it was dark, Officer Harvell could not see a plate of any kind. He pulled over the vehicle as it drove into a convenience store, finding it occupied by Jolley (age 19), the driver, and two friends, Konrad and Cunningham.

At this point, as captured on Harvell’s in-car video, Harvell approached and asked for Jolley’s license and insurance card, which Jolley provided. Harvell, believing he smelled marijuana, had Jolley get out, and asked him to perform several FSTs. Jolley was unable to successfully complete the one-leg stand and the walk-and-turn, claiming to be “too shaky.” He did pass the HGN, but Harvell felt that since that was for alcohol use only, he did not consider it determinative. Harvell arrested Jolley for DUI, believing him to be under the influence of marijuana. (The citation detailed the facts, as above, but the vehicle was found to actually have a valid temporary tag.)

Jolley (and the other men) denied having smoked marijuana, and Jolley's tests indicated no marijuana in either blood or urine. A vehicle search, subsequent to the arrest, resulted in no marijuana being found. Three days after the arrest, the local newspaper ran a front-page story on the arrest. Approximately 6 months later, the charges were dismissed on the Commonwealth's motion, and the newspaper ran a story about the result.

During that same time frame, Harvell was disciplined for having poorly performed the tests, and underwent remedial training. (He was also reprimanded for allowing one of the other passengers to leave with the car.)

Jolley sued under 42 U.S.C. §1983, claiming a violation of his Fourth and Fourteenth Amendment rights. Upon Harvell's motion, the trial court granted summary motion in favor of Harvell and the city defendants, finding that the results of the tests gave Harvell probable cause make the stop, and ultimately, to arrest Jolley. Upon motion and reconsideration, the Court concluded that the failure of the one-leg stand indicated a 65% chance that Holley was intoxicated, but found that he did not, in fact, fail the walk-and-turn. Even though the Court acknowledged that, in hindsight, it was apparent that he was not intoxicated, the Court found sufficient reason to grant Harvell qualified immunity.

Jolley appealed.

ISSUE: Does a failure to get a conviction mean the officer has insufficient probable cause to have made an arrest, and is therefore liable?

HOLDING: No

DISCUSSION: The Court reviewed the "DUI/Standardized Field Sobriety Testing Course" manual used during the time Harvell received his training. Jolley argued that Harvell failed to take into account that Jolley was cold and nervous, his reasons for failing the physical tests. Coupled with the unusual stop, the Court found probable cause for the DUI arrest.

Next, Jolley argued that since he was arrested for DUI (marijuana), that the manual's indication that his failures incident a 65% chance that he had BAC higher than .10, a factor that applied only to alcohol. The Court, however, found that a "reasonable officer could have interpreted a failure of the one-leg stand to indicate some form of impairment - whether marijuana or alcohol - such that Jolley could not safely drive a car."

Finally, Jolley argued that the totality of the circumstances did not support his arrest. Balancing the long stop, which he explained was to defrost his car window, he noted that he had been observed committing no other violations, had been cooperative, and that the video indicated his "speech was distinct and not slurred, that his thinking and reasoning were intact, and that his gait was normal." Refuting the trial court's note that at 50 degrees, the night was not cold, he indicated that he was wearing a "short-sleeved shirt" and was shivering. He also noted that Harvell allowed "Konrad to drive Jolley's automobile away from the scene without first checking Konrad's driver's license and administering field sobriety tests to him."

The Court, however, concluded that there was probable cause to justify the arrest. The Court noted that “Harvell’s conduct” was well within the range dictated by Saucier v. Katz,⁴⁵ and that “[a]lthough he may have made some mistakes ... he properly found probable cause.”

The Court upheld qualified immunity in favor of Harvell.

Marvin v. City of Taylor
509 F.3d 234 (6th Cir. Mich. 2007)

FACTS: On July 11, 2004, Marvin was driving from his home to another location. He rear-ended a personal vehicle owned and driven by Commander Helvey, Taylor PD. Helvey was with his wife and four children, on the way home from church. When the two drivers got out of their vehicles, Commander Helvey realized the Marvin was intoxicated, Marvin having admitted as such at the scene. (He did not realize, for some weeks, that Helvey was a police officer.) Officer Miniard arrived in response to a call, and Marvin also stated to him that he was intoxicated. The vehicles were moved off the roadway, to a nearby gas station lot, with Commander Helvey driving Marvin’s car. Marvin willingly accompanied Officer Miniard.

Officer Shewchuk arrived, and gave Marvin three FSTs, all of which he failed. Marvin was given a PBT, with a result of 1.72.⁴⁶ Officer Minard then arrested Marvin, and told him to put his arms behind his back, so that he could be handcuffed.

Marvin, who was 78 years old, claimed that he told Officer Minard “that he was physically unable to place his arms behind his back because it was painful to do so.” Instead, he placed his hands out to the front. At that point, he stated, the officer told him again to do so, and when Marvin refused, he stated that the officer “grabbed my arm, kicked my leg, knocked me down in the back of the police car, knocked my glasses off, my had, snapped my arm behind my back, and slapped the cuffs on me.” This treatment, he alleged, resulted in a broken arm, although the medical evidence actually indicated a different form of damage to his arm, a rupture of a tendon connected to the humerus.⁴⁷

Marvin testified that only Officer Minard touched him, although in fact, Commander Helvey admitted he also assisted in the handcuffing.

Upon Marvin’s arrival at the jail, the Court noted, “there is extensive video documenting most of [his] experience at the jail, but the parties still dispute[d] what the video actually depict[ed].” The Court noted that:

Ordinarily, in a qualified immunity case such as this, the Court would simply adopt the plaintiff’s version of the facts. *See Scott*, 127 S. Ct. at 1775. However, the existence in the record of a videotape capturing the events in question provides an “added wrinkle” to the ordinary situation. *See id.* As will be explained in greater detail below, Marvin’s version of the facts captured on video is

⁴⁵ 533 U.S. 194 (2001).

⁴⁶ More likely, it was .172.

⁴⁷ The record indicates no treatment for this condition beyond pain medication.

sometimes blatantly contradicted by the video itself. “When opposing parties tell two different stories, one of which is blatantly contradicted by the record, so that no reasonable jury could believe it, a court should not adopt that version of the facts for purposes of ruling on a motion for summary judgment.” *Id.* at 1776. Accordingly, where Marvin’s version of the facts cannot be countenanced based upon what the video shows, this Court will adopt the video as fact rather than Marvin’s version. More specifically, this Court will view the events as they unfolded in the light most favorable to Marvin, but never in such a manner that is wholly unsupported—in the view of any reasonable jury—by the video recording.⁴⁸

The appellate court addressed each clip and what it depicted. In several instances, the Court noted that the video clips clearly differed in what was depicted from Marvin’s assertions, and in some cases, “Marvin’s characterization of the events is clearly refuted by the actual ... video” and “blatantly contradicts Marvin’s version of events.” Specifically, at one point, Marvin claimed that Officer Shewchuk twisted his “broken right arm” above his head, but the video clearly shows that “the officers’ conduct was in direct response to Marvin’s aggressive swing [with the arm].” In another instance, although Marvin accused the officers of kicking and punching him, but the video shows only that they dragged him into the holding cell.

Following the jail events, Marvin was taken to the hospital for a blood draw, which showed his BAC was 0.18. He was returned to the jail, and claimed that he asked the EMS personnel for pain medication, which they did not carry.

Marvin was released after two days. Subsequently he filed suit against the officers involved, under 42 U.S.C. §1983, alleging violations of his Fourth, Eighth and Fourteenth Amendment rights. The U.S. District Court granted partial summary judgment, but denied it on the part of the individual officers, finding that “there remained a ‘genuine dispute of material fact’ as to Marvin’s assertions. The defendant officers appealed.

ISSUE: May video be used by officers to refute the statements of the plaintiff in a summary judgment proceeding?

HOLDING: Yes

DISCUSSION: The Court reviewed the standards for qualified immunity. It noted that there were:

...five discrete events that give rise to his claim of excessive force: (1) the scene of the arrest; (2) arrival at the police station sally port; (3) the booking room; (4) outside the cell; and (5) the blood draw at the clinic. The first and fifth events are not documented by video and thus the Court must accept Marvin’s version of the events for purposes of summary judgment. The second, third, and fourth events occurred inside the jail and are well documented on video such that, as discussed

⁴⁸ The opinion further detailed a number of technical issues with the clips that were submitted, in that the clips, provided to the District Court and that provided to the Sixth Circuit as part of the appellate record bore different file names.

above, the Court need not accept Marvin's version where that version is blatantly contradicted by the video.

The Court then reviewed each incident in turn.

With respect to the scene of the arrest, the Court noted that the officers "encountered a very drunk elderly man who had just driven his vehicle into the back of a car containing four small children." Even though he was 78 years old and there were three officers at the scene, the Court found that it was "important to keep in mind that Marvin's heavy intoxication created a volatile situation." The later video indicated that it took Officers Minard and Shewchuk, and a third officer, to "restrain Marvin when he began struggling with the officers in the booking room." As such, it found, "it does not necessarily follow that Marvin posed little threat to the officers at the scene simply by virtue of his advanced age as contrasted with the officers' youthful brawn." The Court agreed that Marvin was resisting arrest, albeit passively, by refusing Officer Minard's order to place his hands behind his back, and arguably, his "resistance was not so great as to require Officer Minard's allegedly rough treatment."

The Court noted that Marvin's extremely high blood alcohol level, even close to two hours after the arrested, had to be considered. Officer Minard's need to restrain Marvin was clearly supported by Marvin's later actions at the jail, when he was not so restrained. Although the court agreed that "handcuffing an arrestee in an objectively unreasonable manner is a Fourth Amendment violation," that did not necessarily mean that the officers in this case did so. In this situation, given "Marvin's heavily intoxicated state, abusive language, and his resistance to arrest,"⁴⁹ the Court found that the officers' actions were appropriate.

Next, the Court addressed the actions at the sally port. Marvin asserted that Officer Minard pulled him from the car and "pushed him down on the floor." The video, however, "casts strong doubts on Marvin's characterizations." Although Marvin was on the ground at some point, it was only for a few seconds, and the officers then assisted Marvin to his feet and escorted him inside. Again, the officers' actions were supported by the evidence.

The next incident, inside the booking room, "is clearly depicted on video and that video blatantly contradicts Marvin's version of the facts." Instead, the video "shows the two officers, the cadet, and Marvin peacefully coexisting in the booking room at the jail" until Marvin struck out at Officer Minard with his allegedly injured right arm. They continued to struggle as Officer Minard attempted to complete a more thorough search of Marvin's person. The video contradicted Marvin's assertions that he did not provoke the officers' moving his arms in what he claimed were painful ways. As such, the Court found the officers' actions were appropriate.

Another event that occurred at the jail, in which he alleged the two officers "tackled" him, is also "clearly belied by the video itself." The video indicated that Marvin fell to the ground himself, apparently as a result of overbalancing while trying to kick one of the officers, and that the officers simply held him down for some seconds. They did not "ever kick, punch, or hit him." Once again, the Court found the officers' actions to be justified.

⁴⁹ The Court contrasted this case with the facts in Walton v. City of Southfield, 995 F.2d 1331 (6th Cir. 1991).

The last event, the blood draw, occurred in a location where no video was shot. However, the assertions were that once unhandcuffed, for the hospital personnel to take blood, Marvin again struck out, swinging “his right fist, handcuffs still attached, at Officer Minard’s face.” (Marvin claimed that his shoulder was hurt by their attempt to remove the handcuff, in that the process caused the officer to “elevate Marvin’s hands.”) Even Marvin stated that they were simply trying to remove the cuffs, and that the officers were not acting “maliciously or out of spite.” The Court stated that “[c]onsidering Marvin’s progressively combative nature—from resisting at the scene of the arrest, to trying to hit Officer Minard’s hand in the booking room, to kicking at Officer Minard outside the cell, and to punching Officer Minard in the face at the clinic—it cannot be said that the officers’ attempt to remove Marvin’s handcuffs at the clinic amounted to objectively unreasonable force in violation of the Fourth Amendment.”

The Court concluded that in “each discrete event, from the scene of the arrest through the blood draw at the clinic, Marvin ... failed to demonstrate that the officers acted in an objectively unreasonable manner.” As such, the Court concluded the officers were entitled to summary judgment on the merits, having simply done nothing unreasonable, and the Court was thus not required to decide on the issue of qualified immunity.

The Court further elected to address the Michigan state law claims under pendent jurisdiction, and dismissed those claims as well.

The decision of the U.S. District Court, regarding the officers, was reversed.

Barber v. Overton
496 F.3d 449 (6th Cir. Mich. 2007)

FACTS: In 2002, inmates accused two Michigan prison officers of sexual assault. Sibert, of the prison’s Internal Affairs section, investigated the allegations and summarized them, pursuant to policy, in a report that “contained the officers names, social security numbers, and dates of birth.” He concluded that the allegations were baseless and the prison then charged the prisoners with misconduct for filing the allegations. Lowery, a prison investigator, was provided with the IA report to prepare for the hearing.

Jackson, the hearing officer and another defendant in the case, reviewed the documents, and marked the reports (which were apparently to be given to the prisoner) for redaction. Jackson “was the only person with authority to order redactions.” He did not, however, mark the officers’ personal information for redaction.

Pursuant to Jackson’s order, Lowery redacted the information marked (relating to prison informants) and delivered the reports to the prisoners. Lowery later stated that he did not notice the personal information, which was set aside in a caption, and would have redacted it, as it was

exempt from release under the internal prison policy and the department's Freedom of Information Act policies.

The prisoners then began to use the information to taunt the guards, "often incorporating the [guards'] social security numbers (which they had committed to memory) into the taunts." They used the information to obtain "other confidential information, including the [guards'] home addresses and discovered the names of their family members, including the children" - even going so far as to be able to give accurate descriptions of the children. They were able to get the social security number of one of the guard's spouses, and the prison officials were able to intercept prison mail that included photos of the guard's home and car, "apparently taken by a prisoner's accomplice outside the prison."

A number of the involved guards sued the prison, Jackson, Lowery and others under 42 U.S.C. §1983, for releasing the information. The trial court eventually dismissed the case against the individual defendants, concluding that they did not violate the guards' constitutional rights. (In Jackson's case, the Court found he had absolute judicial immunity, as well, for his actions, and could not be sued.) The guards appealed.

ISSUE: Are public employees entitled to a right to privacy in their personal data?

HOLDING: No (under federal law)

DISCUSSION: The Court first addressed whether Lowery and Sibert are entitled to qualified immunity for their actions. The Court noted that since "the Fourteenth Amendment does not (in the ordinary case) provide private citizens a right to be free from prisoner abuse if those prisoners are not acting under the color of state law," that normally, individuals cannot be held liable for actions they don't, individually do. However, in Kallstrom v. City of Columbus, the Court had found an exemption - if the state, itself, created a "special danger" - now called the "state created danger doctrine."⁵⁰ In such situations, although the "state does not shoulder an affirmative duty to protect its citizens from acts of violence, it may not cause or greatly increase the risk of harm to its citizens without due process of law through its affirmative acts." The court developed a three part test in such cases: "an affirmative act that creates or increases the risk, a special danger to the victim as distinguished from the public at large, and the requisite degree of state culpability."⁵¹ The risk must, in fact, be substantial.⁵²

Next, the Court discussed qualified immunity. Under Saucier v. Katz, the Court requires first an identification of the constitutional right allegedly violated. Next, it must identify "whether that right was, at the time the violation occurred, clearly established" and finally, "determine whether the actor violating the right was acting under color of state law, that is, whether the state actor created or greatly increased a danger that was specific to the plaintiffs and did so with deliberate indifference."⁵³

⁵⁰ 136 F.3d 1055 (6th Cir. 1998).

⁵¹ McQueen v. Beecher Comty. Schs., 433 F.3d 460 (6th Cir. 2006).

⁵² See Summar v. Bennett, 157 F.3d 1054 (6th Cir. 1998).

⁵³ 533 U.S. 194 (2001).

In the case at bar, the Court first looked to “whether the states are required, by the Constitution, to keep plaintiffs’ social security numbers and dates of birth private.” In Kallstrom, the information released included far more than released in this case, including financial account numbers and copies of driver’s licenses. In Kallstrom, which “broke new ground,” the court “held that the officer’s privacy interest implicated an important liberty interest: to wit, an interest in preserving their and their families’ personal security and bodily integrity.” The Kallstrom Court ruled that some of the information should not have been released, but did not rule on the issue of the social security numbers, and remanded the case for further proceedings, which are not reported.

The Court noted that Kallstrom “did not create a broad right protecting plaintiffs’ personal information.” It did not hold that the “mere disclosure of social security numbers” was improper and it “did not restrict any private information from disclosure to anyone in any circumstances, but rather only certain restricted information when the plaintiffs had a reason to fear retaliation from persons to whom it was disclosed.”

In this case, the Court stated that:

First, scary though it may be, the diligent miscreant who wishes to exact vengeance can locate a person with limited information. Plaintiffs' names, general whereabouts (near the IMAX facility), and approximate ages were already known to these prisoners. While the social security numbers and birth dates might have pinpointed the residence of a particular plaintiff, there are other methods of learning where persons reside; several hours in a car or several telephone calls might well provide the very same information. Voter registration records, county property records, and a plethora of other publically [sic] available sources exist through which persons can discover the residency of an individual and prisoners' accomplices have as ready access to them as any other citizen. The plaintiffs do not allege that this information allowed the prisoners to discover information that they would have been unable to otherwise. Therefore, this information does not rise to the level of sensitivity we found constitutionally significant in Kallstrom.

Second, while there can be no doubt that plaintiffs have a dangerous job, their relationship to the prisoners is not defined by the clear animosity apparent in Kallstrom where the plaintiffs had gone undercover, infiltrated a violent gang, and testified against them at trial. While we do not condone nor indicate that we consider in any way prudent the release of the information to these prisoners, we also must remember that the right we created in Kallstrom was exceeding narrow.

The Court concluded, stating that its “opinion does not mean that [the Court] attach[es] little significance to the right of privacy, or that there is no constitutional right to nondisclosure of private information.... Our opinion simply holds that not all rights of privacy or interests in nondisclosure of private information are of constitutional dimension, so as to require balancing

government action against individual privacy. As with the disclosure in Paul v. Davis, protection of appellants' privacy rights here must be left to the states or the legislative process.⁵⁴

The Court affirmed the trial court's decision. However, the dissent (judges who disagreed with the majority's decision) made a very strong point, stating that:

The majority concludes that social security numbers are not “tantamount to the sensitive information disclosed in Kallstrom.” The majority highlights the fact that in Kallstrom “[t]he district court did not make any explicit findings with respect to whether disclosure of ... social security numbers ... put the officers at substantial risk of serious bodily harm[,]” and therefore a remand was necessary for the district court to “consider the extent to which the release of this information jeopardized the officers' personal security, and whether the threat, if any, implicated the officers' constitutionally protected interests in privacy and bodily integrity.” However, the majority holds that social security numbers today are not sufficiently sensitive as a matter of law. Adherence to Kallstrom would seem to require a remand on this point.

In any event, in the nearly ten years since Kallstrom was decided, with the growth of the internet and ubiquitous online databases, social security numbers have become, if anything, more sensitive.⁵⁵ Indeed, armed with a social security number and an internet connection, anyone can obtain an individual's credit report, which, at a minimum, contains the individual's name, address, phone number, birth date, employer, and spouse's name, in addition to credit information and public-record information⁵⁶. This is materially indistinguishable from the information we deemed to be sufficiently sensitive in Kallstrom. (“We hold that because disclosure of the officers' addresses, phone numbers, and driver's licenses, as well as the names, addresses, and phone numbers of their family members, placed the officers and their families at substantial risk of serious bodily harm, the prior release of this information encroached upon their fundamental rights to privacy and personal security under the Due Process Clause of the Fourteenth Amendment.”).

Therefore, given that today a social security number is a veritable key to an individual's most sensitive personal information, [the dissenting judge was] unpersuaded by the majority's analysis that social security numbers are less sensitive than the information disclosed in Kallstrom, and the majority's implicit conclusion that, in the almost ten years since we decided Kallstrom, social security numbers have become less sensitive such that a remand on this point is no longer warranted.

The Court found in favor of the prison and against the guards.

⁵⁴ 424 U.S. 693(1976)

⁵⁵ See generally, e.g., Lynn M. LoPucki, Human Identification Theory and the Identity Theft Problem, 80 Tex. L.Rev. 89 (2001).

⁵⁶ See, e.g., Federal Trade Commission: Building a Better Credit Report, <http://www.ftc.gov/bcp/edu/pubs/consumer/credit/cre03.shtm> (last visited July 30, 2007).

Bailey v. City of Port Huron
507 F.3d 364 (6th Cir. Mich. 2007)

FACTS: On March 28, 2004, Bailey and her husband (a St. Clair Co., Michigan, SD deputy sheriff) were “involved in a one-car, alcohol-related, rollover accident in Port Huron.” She told the initial officers at the scene that she had been driving, but in fact, her husband was the driver. A few days later, the Port Huron police department “issued a press release” about the wreck, stating that it was “alcohol-related” and that the deputy sheriff had been driving. The Baileys met with the police department and the city attorney, and “expressed concern about media coverage about the incident.” Chief Corbett told them that he “did not intend to contact the media further” leaving the Baileys to believe that “the media would not have any further involvement.”

Both Baileys were charged - she with a Michigan offense involving her lying to the officer about who was driving and her husband with DUI. They both pleaded no contest. On April 30, the PD issued a second press release that identified them by name and listing their hometown. Information was also released to the media under the state’s open records law, including “Bailey’s mug shot, a note that her husband was ‘in undercover assignment,’ and a copy of the accident report, which listed the telephone number the Baileys apparently gave officers at the accident scene.”

Following the release of this information, the Baileys claimed, they were involved in several “threatening incidents, including a time when the family was “followed” at a local store by people Deputy Bailey recognized as suspects he’d investigated, their cable line was cut, a vehicle was damaged and someone was seen in their backyard by a neighbor.”

Bailey filed suit under 42 U.S.C. §1983, claiming that her right to privacy was violated when the photo and personal information was released. The trial court dismissed the case, finding that the agency had not violated any constitutional rights, and she appealed.

FACTS: Does a criminal suspect have a right to privacy in their basic information?

HOLDING: No

DISCUSSION: Bailey argued that “an individual charged with a crime has a right to prevent the public from obtaining accessing [sic] to her mug shot, the information contained in the police report and the occupation of her spouse.” The court looked to Paul v. Davis, in which it had held that “there is no constitutional right to privacy in one’s criminal record.”⁵⁷

The Court found that:

These precedents leave no room for Bailey’s claim. As a matter of federal constitutional law, a criminal suspect does not have a right to keep her mug shot

⁵⁷ 424 U.S. 693 (1976); see also Cline v. Rogers, 87 F.3d 176 (6th Cir. 1996).

and the information contained in a police report outside of the public domain—and least of all from legitimate requests for the information from the press.

Further:

Any lingering suspense about the proper resolution of this case can be brought to an end by Barber v. Overton. There, we declined to establish a privacy right in personal information collected during an internal investigation of corrections officers accused of sexually assaulting prisoners. We held that state officials did not violate the officers' rights by including their names, birth dates and social security numbers in an investigation report and disclosing the information to prisoners.⁵⁸

The decision of the trial court was affirmed.

U.S. v. Marco
2007 WL 3101867 (6th Cir. 2007)

FACTS: On Feb. 1, 2005, Investigator Gregg (Washington County, TN, SD) was staking out the residence of a man arrested earlier that night on drug trafficking charges. Another man (Marco) approached the house with a small bag, knocked, and left when no one entered. Gregg followed the vehicle and made a traffic stop when the vehicle began weaving, suspecting the driver was impaired. When the driver did not stop for his unmarked car, Gregg got assistance from Lt. Horton, in a marked car. Horton fell into the pursuit and chased the vehicle at a high speed, during which the driver threw something out of the passenger side window.

Horton, Gregg and a third officer were finally able to box in the suspect vehicle, approached and extracted the driver. They handcuffed and patted him down. They found over \$3,000 in cash and a vial containing a "white powdery substance." A bag of a "pink, crystal-type substance" was found in the car. Both substances were methamphetamine.

Marco was arrested and jailed. While in jail, his phone calls were taped and were later introduced against him. In particular, he asked his girlfriend, Bryant, to retrieve a bag of tools that he'd tossed out. In fact, the bag contained scales and methamphetamine. Marco told her to get rid of the six "horses" and their feedbags - slang for the drugs and the baggies. He told her she could get \$11,000 for the drugs. He further told her to get some tools from a vehicle parked outside her home - in fact, she found a handgun. She eventually asked a friend to take the methamphetamine elsewhere, but he accidentally left some behind.

The officers got a search warrant for Bryant's house, finding scales, marijuana, a gun, cash and a Crown Royal bag containing an ounce of methamphetamine. Bryant elected to cooperate and led the officers to where the other methamphetamine had been taken. There, they got consent from the homeowners, parents of the friend, and the officers found the remainder of the

⁵⁸ Id.

methamphetamine. Bryant later told Marco, during a monitored phone call, that the “stuff” had been seized.

Marco was convicted of conspiring to distribute the methamphetamine. He was convicted and appealed.

ISSUE: May a court find that circumstantial evidence supports the identification of a discarded package as one abandoned earlier by a suspect?

HOLDING: Yes

DISCUSSION: Marco argued that the officers lacked probable cause for the initial stop. The Court however, found that the stop, based upon his erratic driving, was lawful, and that once he was arrested, the search of his person was also lawful. With respect to the evidence found by the road, Marco argued that there was no way to be sure that the package of drugs recovered from that location was the same item he’d tossed earlier. The Court, however, agreed that the government “through Bryant, introduced evidence to establish the necessary link between Marco and the methamphetamine found in the two residences.”

Marco’s conviction was affirmed.

EVIDENCE

Parker v. Renico (Warden)
506 F.3d 444 (6th Cir. 2007)

FACTS On the day in question, Parker was the back seat, driver’s side passenger in a vehicle occupied by three other men. Two of the occupants got out of the car, approached another individual, who was sitting in his own car, and shot him multiple times.

Troopers Tuer and Campbell (Michigan State Police) were on patrol when they heard the gunshots. They saw the suspect vehicle, and from its driving, suspected that the driver was intoxicated. A chase ensued, during which the driver’s door opened at least once, and possibly multiple times - and the troopers suspected the occupant was tossing drugs from the car. Eventually, the suspect vehicle crashed, and the driver, Tillman, “opened his door and took off running.” Trooper Campbell gave chase. The other men were trying to get out when Trooper Tuer ordered them to stay in the car. Parker complied, and when he did later get out, “he sat on the ground and, in a voice audible on the video, repeatedly told Tuer that he intended to follow his orders.” Trooper Tuer fought to subdue the other two men, and another officer arrived to assist, and in fact, Parker protected the other officer during the fight. (As one of the men “reached into the car to pick up a gun from the front floorboard, Parker pushed his hand away.”) Two handguns were found in the car during the subsequent search, and another was found along the chase route.

The four men were charged with multiple offenses. Parker moved for a directed verdict, arguing that there was no indication he had been involved in the assault, nor did he have actual or

constructive possession of the weapons in the vehicle. (Apparently, he argued that they were not in plain sight.) He was convicted on the weapons charges, and appealed. His conviction was affirmed through the Michigan state courts, and Parker then appealed, under habeas corpus, to the U.S. District Court. The U.S. District Court granted Parker's petition, and Michigan appealed.

ISSUE: Is a gun found in a vehicle where a suspect is a passenger always admissible against the passenger?

HOLDING: No

DISCUSSION: The Court examined the factors that Michigan argued supported the original jury verdict. First, the Court noted that Parker's alleged "flight" was not probative of guilt. Instead, his attempt to get out of a vehicle that had wrecked was reasonable, and that he admittedly made no attempt to flee after he got out, but, in fact, followed the troopers' orders. "Parker did not resist and even protected the officers by thwarting Tillman's efforts" to hurt one of the troopers. Next, the Court noted that while the initial statements indicated that a door on the driver's side was opened during the chase, that the trooper later clarified that it was, in fact, the actual driver's door, not the door where Parker was sitting. Third, the Court noted that "[p]resence near a firearm, without more, does not suffice to prove possession." The court noted that the evidence was, at most, speculative, that Parker possessed, in any way, the gun found in the backseat, and noted that given where it was found, it was more likely in the possession of Williams, the other back seat passenger. Although the Court agreed that possession can be joint, that the facts in this case did not support it, noting that "[n]o evidence linked Parker and Williams to common possession of the gun other than their presence in the Grand Am's backseat."

The Court found that "this is the rare case where the jury's conclusion fails to conform to that of a rational jury" and that the Michigan courts' decision was unreasonable. The Court affirmed the grant of the habeas petition.

U.S. v. Garner
507 F.3d 399 (6th Cir. 2007)

FACTS: On May 10, 2005, Dotson was "carjacked by two men in the driveway of the home of his girlfriend," Melton. During the crime, he was struck in the head with a gun and his pockets were rifled. The thief took a cell phone and \$10 in cash. During the crime, the girlfriend recognized a second robber as her former boyfriend, Bryce Smith, and Smith "held a gun on Dotson while the other attacker continued to rifle through Dotson's pockets." The girlfriend's younger sister originally identified the other attacker as a former boyfriend, Foster - apparently because Smith and Foster were "always together." The girlfriend thought they were "playing" and tried to get the keys from the masked subject, who then "pulled his mask off" and pointed the gun at her, and identified himself as Pel Pel. (Later, several "witnesses testified that ... David Garner is known as 'Pel Pel' in the community.") Melton handed over the vehicle keys and he drove away in the truck, which was recovered four months later.

Melton called 911 and reported that “her boyfriend had been ‘gunned down.’” (Later, she explained “that what she meant by this was that Dotson had been robbed at gun point.” Her sister, in the background, volunteered that the carjacker’s name was “Pel Pel,” but she never stated that a second person, Smith, had been involved.

Dotson, who had run down the street, called 911 from a cell phone. He identified his attackers as Smith and Foster, based upon hearing the two women “address the two attackers and his knowledge that Smith and Foster were always together.” He did not provide the name “Pel Pel” to the 911 operator. He did not see the face of that attacker, although he did see Smith’s face. He testified at trial that he could not say for sure that Garner was the masked attacker. After he had spoken with Melton, later that night, he “chang[ed] his story and identif[ied] the second attacker as ‘Pel Pel’ ... after he had spoken with Shalonda Melton later that night....”

Smith pled guilty and testified against Garner.⁵⁹ Smith stated that he “encountered” Garner, and that Garner “was drunk and had a gun.” Smith told Garner he had a “lick” - “a way to make some money” - and Garner and Smith went to the Melton house and waited.

At the second trial, Agent Williams (FBI) testified about Dotson’s cell phone records over the time in question.⁶⁰ It had taken multiple subpoenas to Nextel to get the records. Agent Williams had spoken to the individuals to whom calls were made and asked if they knew Garner, he did not, however, ask if they knew Smith, Foster or anyone else. Garner’s defense counsel received those records at the start of the second trial, and requested a motion to limit the prosecution’s use of the records, since he had no opportunity to investigate the information. The trial court denied the motion, tentatively, provided the prosecution provide to the defendant the “names of any people identified as placing or receiving a call on the cell phone during the relevant time period.” Some of the numbers had not been identified. In addition, [o]ne of the numbers on the record ... was that of Shalonda Melton’s cell phone, but “her name was not one of the names identified to Garner’s counsel before the start of the trial.”⁶¹

Dotson laid the foundation for the records, identifying the numbers familiar to him. Garner’s attorney requested a continuance, but was denied. The prosecution noted that the phone had been used to call a woman who was the roommate of a woman Garner knew well, and with whom he shared an “intimate” relationship. That call was not completed. The roommate, Love, testified that she knew Garner and Smith, but not Foster. Dotson identified one of the numbers as belonging to Melton, and that call, made after the robbery, lasted 3 ½ minutes. The defense could not question Melton about who had answered the call, because she had already testified and been released.

Garner was convicted, and appealed.

ISSUE: Must cell phone records be disclosed in a timely manner by the prosecution?

⁵⁹ Garner stood trial twice.

⁶⁰ The cell phone was turned off within hours of the robbery.

⁶¹ There was no indication if “Melton ever told anyone that she had called Dotson’s cell phone and spoken with someone after the carjacking, leaving the phone record as the only evidence of this call.”

HOLDING: Yes

DISCUSSION: Garner argued that “the government’s failure to disclose the cell phone records in a timely manner” violated Brady v. Maryland.⁶² The Court noted that “undisclosed evidence material ‘if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different.’”⁶³ In this case, the “cell phone records are material because the person or persons who attacked ... Dotson and took his truck also had his cell phone....” Further, the “cell phone was used to make and receive calls during the time it was out of Dotson’s possession, presumably by the person or persons who attacked Dotson and took his truck.” Because of the delay in the government’s turning over the records, Garner was prejudiced.

The Court noted that the “identification of Garner as the perpetrator by Dotson, Smith, Melton and Melton’s sister are all subject to question.” The two women “may have had personal motives to identify Garner” rather than the men they considered friends/ex-boyfriends. Melton’s statements were also inconsistent, in that she didn’t identify Garner when she contacted 911, and later, she did not mention Smith’s involvement. The incomplete call to Love could have involved Smith, as she knew him as well. Smith, of course, had a motive to minimize his role and place the blame on another. Dotson never even saw the face of one of his attackers, and based his ID on Melton’s statement. None of Garner’s prints were found in the truck, but the prints found were never compared to those of Smith or Foster. The Court noted that “Garner had been wanted by the police before the carjacking and, once he was identified by Melton as the attacker, it is clear that the police ceased investigating any other suspects or probing the witnesses’ stories too deeply.”

Because of the weakness of the case, “Melton’s credibility was paramount” and the government’s actions resulted in Garner lacking an opportunity to impeach her effectively. Although the prosecution did not get the records until the start of the trial, they had been “in the possession of law enforcement investigators since the previous Wednesday, five days before the start of trial.” Such “possession is imputed to the prosecution regardless of whether it had actual possession of the records.” Those five days were being used to “check the phone numbers to try to make connections to Garner” it conceded “that it took ‘an extensive amount of time’ to check the phone numbers in the records.”

The Court concluded that the government’s failure “to turn over the records sooner, Garner did not receive a fair trial.” There was a suggestion that Melton may have actually been involved in setting up the robbery, as she had told “him to leave an hour after he arrived.” Finally, the jury had actually sent out a question about the records, which showed that the “jury recognized the importance of the cell phone records to Garner’s guilt.”

Either, or both, the alleged Brady violation or the denial of the requested continuance, warranted the granting of a new trial. Given that the FBI “could not get the subscriber information timely

⁶² 373 U.S. 83 (1963)

⁶³ U.S. v. Bagley, 473 U.S. 667 (1985).

and easily,” the Court found it “difficult to see why the trial judge ruled that Garner’s attorney should be able to get the information within a day.”

The Court concluded that:

It is clear that the police investigation was conducted in a manner to support what the police believed – that David Garner was the primary attacker in this carjacking. This belief arose based almost solely on Shalonda Melton’s identification of Garner as the attacker, despite her possible motive to protect two friends well known to her – her former boyfriend, Bryce Smith, and her sister’s former boyfriend, Deandrew Foster. Given the initial uncertainty of the identity of the attacker by all the witnesses, combined with Melton’s possible motivation to protect two friends at the expense of someone unknown to her, the opportunity to fully investigate the phone records may have provided counsel valuable evidence to exonerate his client or to at least raise a reasonable doubt as to his guilt.

The Court ruled that Garner was entitled to a new trial.

U.S. v. Stout
509 F.3d 796 (6th Cir. Ky. 2007)

FACTS: Stout was originally convicted on crimes connected with videotaping a juvenile female in the shower. Following his release on probation, he moved to Louisville from his original residence in Boone County. In 2005, his probation officer received a tip that Stout possessed child pornography, and along with other officers, made a visit. Stout “consented to a search of his computer, which revealed evidence that it had been used to view pornographic web pages.” He argued, and his girlfriend confirmed, that others had access to the computer.

The computer was seized, and upon further examination, 37 pornographic photos, allegedly of minors, were found. From their specific location, in “unallocated space of the computer’s memory,” it was concluded “that they were viewed during Internet browsing, but were not downloaded and saved by the viewer.” The images all appeared to be teenage girls, over the age of 12, and all were alone in the photos. (There were other, legal, pornographic photos of adult women in the same area of the computer’s memory.)

Stout was indicted for possession of child pornography. The prosecution indicated its intent to introduce evidence of his earlier conviction, to show that his possession was not by mistake or accident. Stout moved to exclude the evidence, and the trial court agreed with Stout. The prosecution appealed.

ISSUE: May knowledge that a suspect had been convicted of child pornography in the past be admitted to show that the defendant would be able to recognize child pornography as such?

HOLDING: Yes (but see discussion)

DISCUSSION: The Court noted that “[a]ctual knowledge in a child pornography case is often, undoubtedly, difficult to show when the persons depicted are teenagers.” The Court agreed that the:

... “prior bad act evidence in this case can demonstrate (although admittedly somewhat weakly) that Stout had knowledge of the subject matter outside of the ordinary ken. Having produced and (presumably) viewed the pornographic images of one child, he is more likely to identify children as children in other pornographic images. The probative value is not strong – but that is not the test. All relevant evidence is admissible, subject to specific restrictions in the Federal Rules.

The appellate court agreed that the trial court appropriately weighed the evidence, balancing the needs of the prosecution for probative evidence against unfair prejudice to Stout. Further, the Court agreed that the alternative, a limiting instruction to the jury as to how to use that evidence, was insufficient. The Court agreed that the “prior bad acts in this case were significantly worse than the acts charged and the probative value of the evidence was relatively slight.”

Finally, the Court noted that as this was an interlocutory appeal, and the actual trial had not yet occurred, that the prohibition of the evidence applied only to Stout’s “case in chief only.” As “[t]rials are uncertain creatures” it was possible that the evidence might be admitted at another point of the proceeding, such as in rebuttal.

SUSPECT ID

U.S. v. McComb

249 Fed.Appx. 429, 2007 WL 2859743 (6th Cir. 2007)

FACTS: On May 10, 2004, a man entered the Family Dollar Store in Columbus, OH, and robbed the assistant manager. She fought back and eventually, the man, who was armed, fled the store. Two days later, a man robbed a Payless Shoe Store in Whitehall, OH, and was able to get money. On May 19 and May 21, similar robberies occurred at two different Payless Shoe Stores in Columbus. On June 2, a similar robbery occurred at a hotel and on June 11, a robbery occurred at a First America Cash Advance. In most of the robberies, baseball caps that the robber had allegedly been wearing were recovered near the respective scenes.

All of the clerks identified McComb from a photo array. He was indicted. At trial, in addition to the identifications made by the clerks, the prosecution “offered evidence that DNA removed from the hats matched McCombs’ DNA. He was convicted, and appealed.

ISSUE: May a photo array be considered too suggestive?

HOLDING: Yes (but see discussion)

DISCUSSION: McComb appealed on several issues. In particular, however, he argued that the “photo array presented to [one of the clerk’s] “was impermissibly suggestive because

McComb's face is shown in front of a green-colored background while the other faces are in front of a blue background, and because only McComb's picture shows both rows of his teeth."⁶⁴

The Court reviewed the challenge to the identification. Suing the two-step analysis described in Ledbetter v. Edwards,⁶⁵ the Court first looked to "whether the pretrial identification was unduly suggestive." This part of the analysis is "fact-specific," and includes consideration of "the size of the [photographic] array, the manner of its presentation by the officers, and the details of the photographs themselves."⁶⁶ If it is found to be unduly suggestive, the Court must then determine whether the circumstances made it "nonetheless reliable." Those factors will include the five factors described in Neil v. Biggers:

- 1) the witness's opportunity to view the criminal at the time of the crime;
- 2) the witness's degree of attention;
- 3) the accuracy of the witness's prior description of the criminal;
- 4) the level of certainty demonstrated at the confrontation; and
- 5) the time between the crime and the confrontation.⁶⁷

The officer that presented the array to the witness also indicated that he told the witness the following:

"I'm going to show you a group of photographs. Please take your time to examine all the photographs carefully. If you recognize any of the photographs, please explain why. You do not have to select anyone from these photos. Please keep in mind that hair styles, beards and mustaches are easily changed. Photographs do not always depict the true complexion of a person, meaning the complexion may be lighter or darker, depending upon the lighting present at the time the photo was taken. Please do not discuss with other witnesses whether you recognize anyone in these photographs."

The clerk quickly identified McComb as the robber, in particular because he had actually come into the store multiple times on the day in question.

The Court found that the differences in the photos were not sufficient to make the photo array "unduly suggestive" and that the clerk's identification was not tainted by the slight differences. The clerk had a good look at the robber and had, in fact, conversed with him. The photo array was presented approximately a month after the robbery, which was also a factor in favor of it being reliable.

McComb's conviction was affirmed.

⁶⁴ Apparently the filler photos were all from the OL records, but McCombs did not have an OL so they lacked a similar photo. The photo used for McComb was from the parole authority. The officer that assembled the photo array indicated that he had no choice about the backgrounds, that different colors and shades were used.

⁶⁵ 35 F.3d 1062 (6th Cir. 1994).

⁶⁶ U.S. v. Sanchez, 24 F.3d 1259 (10th Cir. 1994).

⁶⁷ 409 U.S. 188 (1972).

TRIAL PROCEDURE

U.S. v. Holloway

2007 WL 4395579 (6th Cir. 2007)

FACTS: On January 14, 2005, Officer Masterson (Lexington PD) stopped a vehicle for “disregarding a traffic light.” The driver, Holloway, put his hands out the window. Officer Masterson “observed a large amount of smoke escaping” through the open window.” Holloway admitted to having smoked marijuana, and was arrested for DUI. His female passenger, who also appeared to be intoxicated and was found to be in possession of a crack pipe, was also arrested.

During the search of the vehicle, the officer found bagged marijuana and crack cocaine, rolling papers and cash, along with a weapon and three cell phones. When one of the phones rang, an officer answered it and a male voice asked for a \$50 rock. Later investigation indicated that Holloway owned the account to which the phone was connected, and Christine Kirkland controlled the account from which the call was made. Five more calls were made between the two numbers, between midnight and 2 a.m., and it was later shown that the calls were probably made by the cell phone owner’s grandson, Jeff Kirkland.

Holloway was charged with possessing cocaine with the intent to distribute, as well as for possession of the weapon, as he was felon. He was convicted, and appealed.

ISSUE: Are officers permitted to testify as experts about drug trafficking?

HOLDING: Yes

DISCUSSION: Holloway objected to Sgt. Ford’s testimony that “Holloway’s conduct was consistent with distribution.” Holloway argued that it was improper to admit testimony as to his mental state, as a violation of Rule 704(b). The Court noted that officers “are routinely allowed to testify that circumstances are consistent with distribution of drugs rather than personal use.”⁶⁸ Quoting from U.S. v. Combs, the Court noted that officers would be permitted to testify “regarding conduct that would be consistent with an intent to distribute and left to the jury the final conclusion regarding whether Combs actually possessed the requisite intent.”⁶⁹

The Court agreed the testimony was properly admitted, and upheld the conviction.

EMPLOYMENT

Murphy v. Cockrell

505 F.3d 446 (6th Cir. 2007)

⁶⁸ U.S. v. Swafford, 385 F.3d 1026 (6th Cir. 2004).

⁶⁹ 369 F. 3d 925 (6th Cir. 2004).

FACTS: In May, 2004, the Montgomery County Property Valuation Administrator (PVA) retired. At that time, both Murphy and Cockrell had been long-time employees of the office. Cockrell was nominated as the Republican candidate in the upcoming election, and shortly thereafter, she was appointed to hold that position in the interim. Murphy became the Democratic candidate for the position.

Upon her appointment by Governor Fletcher to interim PVA, Cockrell moved Murphy from the front office to the back office, where she would not have public contact. Cockrell also asked Murphy to not take any calls at the PVA office related to her real estate business. Cockrell requested Murphy return her office key so that she could be sure that Murphy was not using PVA resources for campaign purposes.

In due course, Cockrell won the election. “Two days later, apparently in accord with what must be a very efficient and businesslike office, Cockrell sent Murphy a letter stating only the following: ‘Your services are no longer required, effective immediately.’”

Murphy appealed her termination to the state, but was not successful. She filed suit under 42 U.S.C. §1983, alleged violations of her rights under the First, Fourth and Fourteenth Amendments. The trial court awarded summary judgment in favor of Cockrell, and Murphy appealed only the dismissals of her claims under the First Amendment (free speech) and the Fourteenth (due process), as well as her state law claim of wrongful discharge.

ISSUE: Is there a protected right to free speech during a political campaign?

HOLDING: Yes

DISCUSSION: First, Murphy argued that she was fired for her speech during her candidacy, and “bolster[ed] her argument with Cockrell’s own deposition testimony stating that Murphy was not fired due to her candidacy, but rather due to the manner in which she campaigned.”

First, the Court noted that “there is no protected right to candidacy under the First Amendment, and a public employee may be terminated because of the fact of that employee’s candidacy.”⁷⁰ However, Cockrell stated that she was not fired for her candidacy, but for her speech during said candidacy.

The Court reviewed its precedent in such matters, and concluded that:

The teaching of the ... cited cases leads us to believe that if Murphy supported another candidate in the race for Montgomery County PVA other than Cockrell, such conduct would be protected by the First Amendment. In fact, if Murphy had simply actively campaigned against Cockrell, but had not become a candidate herself, her speech would be protected. Cockrell argues that the fact that Murphy was a candidate, and supported herself as such, is reason enough under Carver to

⁷⁰ Carver v. Dennis, 104 F.3d 847 (6th Cir. 1997).

justify Murphy's termination. We decline to extend Carver in such a manner. Carver itself distinguished cases in which candidates had been singled out or treated differently based on their political viewpoints or expressions, noting that Carver was dismissed solely based on the fact of his candidacy, not his political views.

...

Further:

Because we hold that Murphy's speech during the course of her campaign is protected under the First Amendment, [the Court] quickly address[ed] the district court's determination that the speech used by Murphy during her campaign was not an actual expression of political beliefs, and thus not worthy of protection. The district court found that during the course of the campaign, Murphy merely called into question Cockrell's experience and party affiliation. The district court held that because such speech was not an expression of political views or beliefs, Murphy did not engage in protected conduct. Murphy argues that "the ultimate political consideration in any race is who is the better candidate . . . To suggest that the endorsement of a candidate is not the expression of a political belief borders on the ludicrous." Appellant's Br. at 10. We believe Murphy is correct. In Sowards, this Court stated that "support for a political candidate falls within the scope of the right of political association."⁷¹ Thus, if Murphy had been holding the same signs with the same message in support of another candidate running against Cockrell, her activities would have been protected by the First Amendment. The district court's ad hoc determination that the message conveyed by Murphy's campaign was not "political" enough to warrant protection is without support and is in error. As the Supreme Court stated, "[i]f there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics"⁷²

Because the Court found that Murphy's speech was protected, the Court moved to consider as to "whether Cockrell had an "overriding state interest in efficient public service that would be undermined by [Murphy's] speech," Silberstein, 440 F.3d at 318, and thus was entitled to terminate Murphy."

The Court stated that:

We employ the balancing test outlined in Pickering v. Bd. of Educ.,⁷³ to determine if Murphy's free speech interests outweigh Cockrell's interests in maintaining an efficient PVA office.⁷⁴ Murphy's speech during the course of her campaign "will not be considered in a vacuum; the manner, time, and place of the

⁷¹ 203 F.3d at 432.

⁷² Elrod v. Burns, 427 U.S. 347, 356 (quoting Bd. of Educ. v. Barnette, 319 U.S. 624 (1943)).

⁷³ 391 U.S. 563, 574 (1983).

⁷⁴ Scarborough v. Morgan Cnty. Bd. of Educ., 470 F.3d 250, 255 (6th Cir. 2006).

employee's expression are relevant, as is the context in which the dispute arose." In order to justify Murphy's termination, her speech must "impair discipline by superiors, have a detrimental impact on close working relationships, undermine a legitimate goal or mission of the employer, impede the performance of [Murphy's] duties, or impair harmony among co-workers."⁷⁵ Cockrell bears the burden of "showing a legitimate justification for discipline."

The question then becomes whether Cockrell's interest in reducing the tension in the PVA office outweighed Murphy's First Amendment right to express her political views. As has previously been decided by this Court, supporting a political party or candidate of one's choosing is a fundamental right protected under the First Amendment, and as such, it is impermissible to allow a superior to terminate an employee simply because tensions that did not impede the functions of the workplace arose over such protected speech. It would contravene the intent of the First Amendment to permit Cockrell to dismiss Murphy due to her speech and political beliefs in this way.

The Court concluded that Cockrell did terminate Murphy because of her political speech, and found "no countervailing governmental interest" to support the need to do so, the Court found that Murphy did state a valid First Amendment claim.

Cockrell, however argued that she was entitled to qualified immunity under the "Elrod-Branti Exception."

The Court noted that

The Supreme Court in Elrod, and Branti v. Finkel,⁷⁶ held that "certain public employees in confidential and policymaking positions may be dismissed on the basis of their political affiliation without violating the First Amendment." In order to determine whether Murphy's position as deputy PVA falls under the Elrod-Branti exception, this Court must "look beyond the mere job title and examine the actual duties of the specific position." In McCloud v. Testa, four categories of positions that fall under the exception were identified:

Category One: positions specifically named in relevant federal, state, county, or municipal law to which discretionary authority with respect to the enforcement of that law or the carrying out of some other policy of political concern is granted;

Category Two: positions to which a significant portion of the total discretionary authority available to category one position-holders has been delegated; or positions not named in law, possessing by virtue of the jurisdiction's pattern or practice the same quantum or type of discretionary authority commonly held by category one positions in other jurisdictions;

Category Three: confidential advisors who spend a significant portion of their time on the job advising category one or two position-holders on how to exercise their statutory or delegated policymaking authority, or other confidential

⁷⁵ Akridge v. Wilkinson, 178 F. App'x 474, 479-80 (6th Cir. 2006) (citing Rankin v. McPherson, 483 U.S. 378, 388 (1987)).

⁷⁶ 445 U.S. 507 (1980),

employees who control the lines of communication to category one positions, category two position or confidential advisors;
Category Four: positions that are part of a group of positions filled by balancing out political party representation, or that are filled by balancing out selections made by different governmental agents or bodies.⁷⁷

The Court looked only to the first two categories, and concluded that Murphy was “not in a confidential or policymaking position, and that as such, Cockrell was not entitled to qualified immunity.” As such, her state claim for wrongful discharge might also be supported, and was allowed to piggyback onto the First Amendment claim.

The Court, did, however agree that Murphy’s Fourteenth Amendment claim was properly dismissed.

FIRST AMENDMENT

Daubemire v. City of Columbus 507 F.3d 383 (6th Cir. 2007)

FACTS: On June 23, 2001, Spingola and Meyer protested a parade in Columbus, Ohio. As part of their protest, they burned a “rainbow flag.” Sgt. Piccininni and Officer Bush arrested them for a city ordinance concerning open burning. The pair requested dismissal, arguing that the ordinance violated their First Amendment protections on free speech. The Ohio trial court agreed and dismissed the case, finding that the prohibition, “as applied to flag burning,’ was an unconstitutional intrusion upon their First Amendment right to free speech.” The Ohio Court of Appeals reversed that decision and reinstated the charges, and the Ohio Supreme Court denied review of the case. The case was remanded to the local trial court, where they pleaded no-contest to the charge of “open burning without a permit.”

In 2004, Spingola again planned to burn a rainbow flag at the same parade. He tried to get a permit for several weeks prior to the event, but he did not receive the permit until less than 24 hours before the scheduled parade, and only when his attorney contacted the city about it. Spingola later claimed that “he still faced intimidation from the City when one of its police officers approached him . . . and threatened [him] with arrest if he did not begin his burn demonstration right at 1:00 p.m. ”even though his burn application allowed him to wait until 1:30 p.m.” “However, Spingola was not arrested.”

Daubemire sought permits for two “ceremonial burnings” to be held on two separate dates in July, 2004. He received no reply from the city on his permit applications. Before he began the first one, however, on July 19, the ceremonial site was “surrounded and monitored by dozens of City police officers, creating an environment of great intimidation for the peaceful assembly of Christians.” He was told that the permit had been denied at that time. As a result, he cancelled the demonstration. The next day, he (along with others) met with City officials to challenge the

⁷⁷ 97 F.3d 1536, 1557 (6th Cir. 1996)(footnotes omitted)(emphasis in original).

denial - during which he claimed he was told that the “permit had not been issued to [him] because of the content of what was being burned (i.e., the Koran)” which suggested that “the City did not want to damage its good relations with the Muslim community.” As a result of this meeting, the City agreed to issue two permits, although he was forced to reapply and he was limited to a 20-minute window each time. The first one went off as planned, but in the second instance, “before the procession of protestors arrived at the federal courthouse where the Supreme Court cases were to be burned, City officials informed the Christian leaders that the burn permit had expired.” Most of the protestors then left, but one did burn the decisions (a handful of paper) and was arrested.

The three protestors, Daubenmire, Spingola and Meyer then took the case to the federal courts, asserting a cause of action under 42 U.S.C. §1983, against the City and various other defendants. The trial court granted the defendants summary motions, and otherwise dismissed the case. The three men appealed.

ISSUE: May individuals bring claims against a city for a burdensome or unequal permit standard - as a violation of First Amendment rights?

HOLDING: Yes

DISCUSSION: First, the men argue that they have “suffered actual injury” because the City had a “standardless permit scheme.” They alleged that they were forced into an “extensive, time-wasting hassle” to obtain permits, and suffered threats of intimidation even after they got said permits. Further, Daubenmire characterized the process as “an unmitigated fiasco, with permits at first withheld, and then alternatively denied, issued, modified, and revoked for various events in spite of [his] attempt to comply.” Spingola and Meyer pointed to an incident involving another individual who was permitted to engage in such burning “without City inference and without a permit and that [that individual] had been told that the City does not issue burn permits for public sidewalks.” The District Court had concluded that the men did not suffer any injury as a result of the City’s actions, but the appellate court, noted that “Plaintiffs’ allegations of consistently burdensome and differential past treatment during the permit application process, combined with the fact that Plaintiffs repeatedly engage in and plan to conduct future ceremonial burnings that require them to go through this process, are sufficient to demonstrate a significant possibility of future harm.” As such, the Court ruled that the Plaintiffs had standing to continue the lawsuit and were entitled to proceed with their attempt to get an injunction on the city’s ability to enforce that particular ordinance using their existing permitting scheme.

Next, the Court found that Spingola and Meyer’s pleas in the state court mooted their ability to re-litigate the issue in federal court. As such, the dismissal of their claims under the events of 2001 was upheld, as were their claims that they were selectively prosecuted when another did not face legal action for the same conduct.

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NOTES

While many of these cases involve multiple issues, only those issues of interest to Kentucky law enforcement officers are reported in these summaries. In addition, a case is only reported under one topical heading, but multiple issues may be referenced in the discussion. Readers are strongly encouraged to share and discuss the case law and statutory changes discussed herein with agency legal counsel, to determine how the issues discussed in these cases may apply to specific cases in which your agency is or may be involved.

Non-published opinions may be included in this update and will be so noted, see below for specific caveats regarding these cases. Cases that are not final at the time of printing are not included. When relevant opinions are finalized, they will be included in future updates. As such, each update may include cases that were decided earlier, but were held for finality.

All quotes not otherwise cited are from the case under discussion. Certain cases, because they appear so often and in cases not specific to their topic matter, do not have their citations included in the footnotes. Their full citations are:

Miranda v. Arizona, 384 U.S. 436 (1966)
Terry v. Ohio, 392 U.S. 1 (1968)

NOTES REGARDING UNPUBLISHED CASES

FEDERAL CASES:

Unpublished Cases carry a “Fed. Appx.” Or Westlaw (WL) citation.

Sixth Circuit cases that are noted as “Unpublished” or that are published in the “Federal Appendix” carry the following caveat:

Not Recommended For Full--Text Publication

KENTUCKY CASES:

Unpublished Cases carry the Westlaw (WL) citation.

Kentucky cases that are noted as “Unpublished” carry the following caveat:

Sixth Circuit Rule 28(g) limits citation to specific situations. Please see Rule 28(g) before citing in a proceeding in a court in the Sixth Circuit. If cited, a copy must be served on other parties and the Court.

UNPUBLISHED CASES

Unpublished opinions shall never be cited or used as authority in any other case in any court of this state. See KY ST RCP Rule 76.28(4).

