

Department of
CRIMINAL JUSTICE TRAINING

KENTUCKY JUSTICE AND PUBLIC SAFETY CABINET

2013



Leadership is a behavior, not a position

**U.S. SUPREME COURT
2012-13 TERM**



John W. Bizzack, Ph.D.
Commissioner





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

docjt.legal@ky.gov

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

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

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



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NOTE:

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

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

U.S. SUPREME COURT

FIRST AMENDMENT

Lefemine (DBA Columbia Christians for Life) v. Wideman, 133 S.Ct. 9 (2012)
Decided November 5, 2012

FACTS: On November 3, 2005, Lefemine and other members of Columbia Christians for Life (CCL) were demonstrating in Greenwood County, South Carolina. An officer arrived in response to a complaint about graphic signs that portrayed aborted fetuses. The officer informed Lefemine that if he did not discard the signs, he would be cited for breaching the peace. Although Lefemine object, he finally disbanded the protest. The following year, he sent a letter (through counsel) to the Sheriff, stating that they intended to return to the same location and that if they were interfered with, they would seek legal remedy. The Chief Deputy responded to the letter, stating that if the group arrived and took the same actions, they would again face possible criminal charges. “Out of fear of those sanctions, the group chose not to protest in the county for the next two years.”

In 2008, Lefemine filed suit under 42 U.S.C. §1983 against several deputies, arguing violations of the First Amendment. He sought nominal damages, a declaratory judgment, a permanent injunction and attorney’s fees. The District Court agreed that the prior actions of the Sheriff’s Office did violate his rights and enjoined the agency from further action against CCL, should they choose to protest in the future. The court denied the request for nominal damages and attorney’s fees, however.

The Fourth Circuit Court of Appeals upheld the decision, holding that Lefemine and CCL were not prevailing parties under 42 U.S.C. §1988, under which attorney’s fees are awarded. Lefemine requested certiorari and the U.S. Supreme Court granted review.

ISSUE: Is an award of attorney’s fees warranted when a case is resolved by permanent injunction?

HOLDING: Yes

DISCUSSION: The Court reviewed 42 U.S.C. §1988, the Civil Rights Attorney’s Fees Awards Act of 1976, in which the “prevailing party” is allowed to claim attorney’s fees in addition to any judgment. The Court noted that a plaintiff prevails “when actual relief on the merits of his claim materially alters the legal relationship between the parties by modifying the defendant’s behavior in a way that directly benefits the plaintiff.”¹ In the past, the Court had “held that an injunction or declaratory judgment like a damages award, will usually satisfy that test.”² Under that standard, Lefemine and CCL were certainly prevailing parties as his lawsuit successfully removed the threat of criminal sanctions for a permitted activity and changed the relationship between the Sheriff’s Office and the prospective protestors. Absent special circumstances, none of which were briefed in the case, attorney’s fees were justified.³

The Court vacated the decision of the Fourth Circuit and remanded the case.

¹ Farrar v. Hobby, 506 U.S. 103 (1992).

² Rhodes v Stewart, 488 U.S. 1 (1988).

³ Hensley v. Eckerhart, 461 U.S. 424 (1983).

SEARCH & SEIZURE – DOG SNIFF

Florida v. Harris, 133 S.Ct. 1050 (2013)
Decided February 19, 2013

FACTS: On June 24, 2006, Deputy Wheatley (Liberty County, FL, SO) was on patrol with his drug dog, Aldo. Deputy Wheatley made a traffic stop of Harris, as his truck bore an expired license plate. As the deputy approached, he saw that Harris was “visibly nervous.” He was “unable to sit still, shaking and [was] breathing rapidly.” There was an open can of beer in the cup holder. Deputy Wheatley asked for consent to search, which was refused. He retrieved Aldo, who did a “free air sniff” around the vehicle. He alerted on the driver’s side door handle.

Based on that alert, Deputy Wheatley concluded that he had probable cause to search the vehicle. He did not find any of the drugs Aldo was trained to locate (methamphetamine, marijuana, cocaine, heroin and ecstasy), but did locate 200 pseudoephedrine pills, 8,000 matches, hydrochloric acid, antifreeze, and a coffee filter full of iodine crystals – all ingredients for making methamphetamine. He arrested Harris and gave him Miranda warnings; Harris admitted he cooked methamphetamine at his home. He was charged with possessing pseudoephedrine for the purpose of manufacturing methamphetamine.

Pending trial, Harris “had another run-in with Wheatley and Aldo” when he was stopped for a broken brake light. Aldo again alerted on the car but this time, nothing was located.

Harris moved for suppression, arguing that the alert was not enough for probable cause. At the suppression hearing, Deputy Wheatley testified both about his own training and that of Aldo.⁴ Logs were introduced in evidence showing Aldo’s ability to locate hidden drugs, and he performed “satisfactorily.” However, Aldo’s actual certification had expired the year before. Upon being questioned, Wheatley agreed that he “did not keep complete records of Aldo’s performance in traffic stops or other field work; instead, he maintained records only of alerts resulting in arrests.” He argued that Aldo’s two alerts on a vehicle that did not contain the actual substances he was trained to locate was likely as a result of Harris transferring methamphetamine odor from his hands to the door handle.

The trial court denied the motion to suppress. Harris took a conditional plea and appealed. Ultimately, the Florida Supreme Court reversed his plea, ruling that the deputy lacked probable cause to search the vehicle. In fact, the Florida Supreme Court created “a strict evidentiary checklist to assess a drug-detection dog’s reliability. Requiring the State to introduce comprehensive documentation of the dog’s prior hits and misses in the field, and holding that absent field records will preclude a finding of probable cause no matter how much other proof the State offers.” The State requested certiorari and the U.S. Supreme Court granted review.

⁴ Both had trained extensively, separately and Aldo had been certified by a private company that specialized in training law enforcement dogs. They were partnered in 2005 and received refresher training. They did four hours of training a week to maintain skills, as well.

ISSUE: Must a drug dog's "field performance records" be used to prove a dog's reliability?

HOLDING: No

DISCUSSION: The Court noted, that a "police officer has probable cause to conduct a search when 'the facts available to [him] would warrant a [person] of reasonable caution in the belief'" that contraband was present.⁵ In evaluating whether that standard is met, the Court noted it had "consistently looked to the totality of the circumstances," rejecting "rigid rules, bright-line tests, and mechanistic inquiries in favor of a more flexible, all-things-considered approach." The Court looked back to Illinois v. Gates, emphasizing that probable cause is "a fluid concept – turning on the assessment of probabilities in particular factual contexts – not readily, or even usefully, reduced to a neat set of legal rules."⁶

Looking to the decision of the Florida Supreme Court, the Court questioned how, for example, a "rookie dog" could ever be successful, as the prosecution would not be able to introduce "extensive documentation of the dog's prior 'hits' and 'misses' in the field." Absent "field performance records," they would never be able to use the dog, no matter how reliable. The court concluded that the "finding of a drug-detection dog's reliability cannot depend on the State's satisfaction of multiple, independent evidentiary requirements."

The Court also noted that "field data ... may not capture a dog's false negatives," and in addition, "if the dog alerts to a car in which the officer finds no narcotics, the dog may not have made a mistake at all." Instead, the officer may have simply been unable to find the drugs or the drugs may have been present in such small quantities that the officer missed them. In addition, the "dog may have smelled the residual odor of drugs previously in the vehicle or on the driver's person." Field records are not as reliable as the "dog's performance in standard training and certification settings," in fact, as they are done in controlled testing environments. Even in the absence of a formal certification, a dog that has "recently and successfully completed a training program that evaluated ... proficiency in locating drugs," can be considered reliable.

Of course, the Court continued, the defendant has a right to challenge the dog's reliability, but in such cases, a "probable-cause hearing focusing on a dog's alert should proceed much like any other," allowing each side to "make their best case."

The Court agreed that a "sniff is up to snuff when it meets [the] test" as to "whether all the facts surrounding a dog's alert, viewed through the lens of common sense, would make a reasonably prudent person think that a search would reveal contraband or evidence of a crime." In this case, "Aldo's did."

The U.S. Supreme Court reversed the decision of the Florida Supreme Court and remanded the case.

FULL TEXT OF OPINION: http://www.supremecourt.gov/opinions/12pdf/11-817_5if6.pdf.

⁵ Texas v. Brown, 460 U.S. 730 (1983); Carroll v. U.S., 267 U.S. 132 (1925).

⁶ 462 U.S. 213 (1983).

SEARCH & SEIZURE

Bailey v. U.S., 133 S.Ct. 1031 (2013)

Decided February 19, 2013

FACTS: On July 28, 2005, at about 8:45 p.m., local officers obtained a search warrant for a handgun. The location of the search was a basement apartment in Wyandanch, New York. A CI had informed the officers that he saw a gun when he was there to buy drugs from a man called “Polo.” Detectives Sneider and Gorbecki conducted surveillance outside the location as other officers prepared to execute the search warrant. At about 9:56 p.m., two men, Bailey and Middleton, left the gated area above the apartment and got into a car parked in the driveway. Both matched the general description provided for Polo. “There was no indication that the men were aware of the officers’ presence or had a knowledge of the impending search.” The officers ultimately followed, after informing the search team of their intent. Eventually, the warrant team did search the apartment.

The detectives tailed Bailey’s car for about a mile, finally pulling the vehicle over in a parking lot. Both occupants were ordered out and frisked. They found no weapons, but did remove a ring of keys from Bailey’s pocket. Bailey agreed he lived at the suspect location although his OL gave an address in another city – the same city where the CI said Polo used to live. The passenger, Middleton, agreed they were coming from Bailey’s home as well. Both were handcuffed. Bailey asked why and was told “they were being detained incident to the execution of a search warrant at the home.” Bailey promptly denied living there or owning anything found there. Both men were transported back to the subject address and Det. Gorbecki drove Bailey’s car. By the time they returned, the search warrant team had discovered a gun and drugs. Both men were arrested and Bailey’s keys were matched to the apartment.

Bailey was charged with possession with the intent to distribute cocaine, along with weapons charges since he was a convicted felon. Bailey moved for suppression of the key and the initial statements he made during the stop, arguing both stemmed from an unreasonable seizure. The District Court denied the motion to suppress, holding the detention lawful under Michigan v. Summers.⁷ (In the alternative, it also justified the detention under Terry v. Ohio.⁸) Bailey was convicted, and appealed.

The Second Circuit Court of Appeals also agreed the detention was proper under Summers. Bailey requested certiorari and the U.S. Supreme Court granted review.

ISSUE: May occupants of an area being searched under a warrant be detained when they are stopped a substantial distance from the premises?

HOLDING: No

DISCUSSION: The Court noted that within the basic Fourth Amendment framework requiring probable cause, there was “some latitude for police to detain” where the intrusion was minimal compared to the safety interest of officers and others. In Summers, the Court allowed the detention of occupants on a subject premises during a search. The concept was extended in Muehler v. Mena⁹ to explain that “an

⁷ 452 U.S. 692 (1981).

⁸ 392 U.S. 1 (1968).

⁹ 544 U.S. 93 (2005).

officer's authority to detain incident to a search is categorical; it does not depend on the 'quantum of proof justifying detention or the extent of the intrusion to be imposed by the seizure.'" However, in Summers and later cases, "the occupants detained were found within or immediately outside a residence at the moment the police officers executed the search warrant."

In this case, Bailey was almost a mile away from the house. The Court agreed that "an exception to the Fourth Amendment rule prohibiting detention absent probable cause must not diverge from its purpose and rational."¹⁰ The court looked to the "three important law enforcement interests" that factored into the Summers decision: "officer safety, facilitating the completion of the search, and preventing flight."

First, the Court looked to the need to minimize the risk of harm to the officers, agreeing that during a search for drugs, there was a risk that suspects might engage in "sudden violence or frantic efforts to conceal or destroy evidence." As such, officers must "exercise unquestioned command of the situation," by securing the location and detaining current occupants. In Muehler, the Court agreed that even when a person is not suspected of involvement, it was still proper to detain them for the duration of the search, even handcuff them. The Court agreed that even if the subject is away from the residence when the search begins, they might return, but it noted that by "taking routine precautions" and keeping people out, officers could maintain their safety within. Bailey had left and had no apparent intention to return and as such, he was at little risk. However, had he returned, he could have been detained.

In fact, the Court noted, there is always a risk that an occupant who is not present at the initiation of the search might come home, "whether he left five minutes or five hours earlier." Others might arrive unexpectedly as well. "Were police to have the authority to detain those persons away from the premises, the authority to detain incident to the execution of a search warrant would reach beyond the rationale of ensuring the integrity of the search by detaining those who are in fact on the scene." The Court agreed that being unable to detain persons who leave a location when they are out of sight of the house might cause an inconvenience and delay a potential arrest, but the Court noted that they could, if appropriate rely instead on Terry. The Court agreed that under the government's position, officers would be justified in "detaining anyone in the neighborhood who could alert occupants that the police are outside, all without individualized suspicion of criminal activity or connection to the residence to be searched."

The second interest was the ability to complete the search in an orderly fashion. Certainly if occupants are permitted to wander around outside, there is the potential for interference, as they could "hide or destroy evidence, seek to distract the officers, or simply get in the way." However, those risks are not present when the occupant has already left. Had he returned, he could have been detained at that time. Bailey could have been of no assistance in the search, either, as by the time he was returned, the search team had discovered contraband.

The third interest is the interest in "preventing flight in the event that incriminating evidence is found." The Court noted that the "concern over flight is not because of the danger of flight itself but because of the damage that potential flight can cause to the integrity of the search." It does not, however, justify detaining individuals who are not in the immediate vicinity. Even if that detention could serve to "facilitate a later arrest," the "mere fact that law enforcement may be made more efficient can never by itself justify disregard of the Fourth Amendment."¹¹

¹⁰ Florida v. Royer, 460 U.S. 491 (1983).

¹¹ Mincey v. Arizona, 437 U.S. 385 (1978).

Looking to all three interests, the Court agreed that none justified extending the ability to detain an occupant beyond the immediate vicinity of the premises being searched, as this would “give officers too much discretion.” The Court noted that detaining an individual away from their home was an “additional level of intrusiveness” since a “public detention, even if merely incident to a search, will resemble a full-fledged arrest.” It will almost always lead to the subject being returned to the search location, which involves the “additional indignity of a compelled transfer back to the premises, giving all the appearances of an arrest.”

The court concluded that a “spatial constraint defined by the immediate vicinity of the premises to be searched is therefore required for detentions incident to the execution of a search warrant.” Bailey was detained “at a point beyond any reasonable understanding of the immediate vicinity of the premises in question,” and as such, it did not require the Court to “further define the meaning of immediate vicinity.” The Court left it to later rulings, noting that factors to be considered include “the lawful limits of the premises, whether the occupant was within the line of sight of his dwelling, the ease of reentry from the occupants location, and other relevant factors.”

The Court concluded:

Because detention is justified by the interests in executing a safe and efficient search, the decision to detain must be acted upon at the scene of the search and not at a later time in a more remote place. If officers elect to defer the detention until the suspect or departing occupant leaves the immediate vicinity, the lawfulness of detention is controlled by other standards, including, of course, a brief stop for questioning based on reasonable suspicion under *Terry* or an arrest based on probable cause. A suspect’s particular actions in leaving the scene, including whether he appears to be armed or fleeing with the evidence sought, and any information the officers acquire from those who are conducting the search, including information that incriminating evidence has been discovered, will bear, of course, on the lawfulness of a later stop or detention.

The Court noted that the District Court had held that stopping Bailey was lawful under *Terry*. The Court reversed the federal appellate court’s decision, that the detention was justified under *Summers* and remanded the case for a determination if the stop and search was justified under *Terry*.

FULL TEXT OF OPINION: http://www.supremecourt.gov/opinions/12pdf/11-770_j4ek.pdf.

Florida v. Jardines, 133 S.Ct. 1409 (2013)

Decided March 26, 2013

FACTS: In 2006, Det. Pedraja (Miami-Dade PD) received a tip that marijuana was being grown at Jardines’ house. About a month later, the PD and the DEA did a joint surveillance, in which Det. Pedraja surveilled the home for about 15 minutes. He saw no vehicles or activity at the house; the blinds were drawn. He and Det. Bartelt approached the house, along with Bartelt’s “drug-sniffing dog.” The dog was on a lead. When they came to the front porch, the dog, “apparently sensed one of the odors he had been trained to detect, and began energetically exploring the area for the strongest point source of that odor.” The dog was “tracking back and forth” which was later described as “bracketing.” Eventually, the dog sat at the base of the front door, identifying that as the odor’s strongest point. Using that information, Det.

Pedraja received a warrant for the residence. When it was executed later that day, they found Jardines and marijuana plants, for which he was charged.

At trial, Jardines moved for suppression, arguing that the dog sniff at his porch was an unreasonable search. The trial court granted the suppression. The initial appellate court reversed that decision but the Florida Supreme Court quashed the Court of Appeals decision, approving the trial court's decision to suppress. The Government appealed and the U.S. Supreme Court granted certiorari.

ISSUE: May a drug dog be used to seek evidence within the curtilage?

HOLDING: No

DISCUSSION: The Court noted that “officers were gathering information in an area belonging to Jardines and immediately surrounding his house – in the curtilage of the house.” They “gathered that information by physically entering and occupying the area to engage in conduct not explicitly or implicitly permitted by the homeowner.” The Court noted that the concept that the curtilage is protected has “ancient and durable roots” with Blackstone¹² and that the curtilage is “intimately linked to the home, both physically and psychologically,” where “privacy expectations are most heightened.”¹³

The Court noted that an “officer’s leave to gather information is sharply circumscribed when he steps off those thoroughfares [the public way] and enters the Fourth Amendment’s protected areas.” When, for example, the Court has permitted visual observation of the curtilage from the air, the observation was done in a “physically nonintrusive manner.” The Court noted that in Boyd v. U.S.¹⁴ it reiterated that the general rule is that “our law holds the property of every man so sacred, that no man can set his foot upon his neighbor’s close¹⁵ without his leave.” The Court agreed that it was undisputed that “the detectives had all four of their feet and all four of their companion’s firmly planted on the constitutionally protected extension of Jardines’ home.” The only question was whether they had permission to do so, and of course, they did not.

The Court had recognized that the “knocker on the front door is treated as an invitation to the home by solicitors, hawkers and peddlers of all kinds.”¹⁶ The “implicit license typically permits the visitor to approach the home by the front path, knock promptly, wait briefly to be received, and then (absent invitation to linger longer) leave.” The Court agreed that “complying with the terms of that traditional invitation does not require fine-grained legal knowledge; it is generally managed without incident by the Nation’s Girl Scouts and trick-or-treaters.” As such, a “police officer not armed with a warrant may approach a home and knock, precisely because that is ‘no more than any private citizen may do.’”¹⁷ But, the Court continued, “introducing a trained police dog to explore the area around the home in hopes of discovering incriminating evidence is something else.” A knocker does not invite one to “engage in canine forensic investigation.” The Court emphasized: “To find a visitor knocking on the door is routine (even if sometimes unwelcome); to spot that same visitor exploring the front path with a metal detector, or marching his bloodhound into the garden before saying hello and asking permission, would inspire most of us to – well, call the police.”

¹² 4 W. Blackstone, Commentaries on the Laws of England 223 (1769).

¹³ California v. Ciraolo, 476 U.S. 207 (1986).

¹⁴ 116 U.S. 616 (1886).

¹⁵ Property, especially that which is “enclosed” in some way.

¹⁶ Breard v. Alexandria, 341 U.S. 622 (1951)

¹⁷ Kentucky v. King, 563 U.S. – (2011).

The question for the Court to determine was “whether the officer’s conduct was an objectively reasonable search,” which further depended upon whether they had an “implied license to enter the porch, which in turn depend[ed] upon the purpose for which they entered.” Their behavior (in bringing the dog) “objectively reveal[ed] a purpose to conduct a search, which is not what anyone would think he had license to do.”

The Court agreed that in other cases, it had upheld the use of drug-sniffing dogs. In this case, however, the “officers learned what they learned only by physically intruding on Jardines’ property to gather evidence,” much like in the situation in U.S. v. Jones.¹⁸ The “Fourth Amendment’s property-rights baseline” “keeps easy cases easy.” The Court ruled that the use of “trained police dogs to investigate a home and its immediate surrounding is a ‘search’ within the meaning of the Fourth Amendment.” The Court affirmed the decision of the Supreme Court of Florida in suppressing the evidence.

FULL TEXT OF OPINION: http://www.supremecourt.gov/opinions/12pdf/11-564_5426.pdf.

Missouri v. McNeely, 133 S.Ct. 1552 (2013)
Decided April 17, 2013

FACTS: At about 2:08 a.m., a Missouri police officer stopped McNeely’s truck for speeding and crossing the centerline. “The officer noticed several signs that McNeely was intoxicated, including McNeely’s bloodshot eyes, his slurred speech, and the smell of alcohol on his breath.” He was unsteady as he got out of the truck and admitted to having had “a couple of beers.” McNeely did “poorly on a battery of field-sobriety tests” and refused the PBT. He was arrested.

On the way to the jail, McNeely indicated he would again refuse any breath testing so the officer “changed course and took McNeely to a nearby hospital for blood testing.” The officer did not have a warrant. Reading from the implied consent form, the officer explained that if he refused to submit to the blood test, his license would be immediately revoked and his refusal “could be used against him in a future prosecution.”¹⁹ He continued to refuse and the officer instructed the technician to take the blood anyway. It eventually tested at 0.154, well above Missouri’s limit of .08.

McNeely was charged with Driving While Intoxicated (DWI).²⁰ As a result of having two prior DWIs, McNeely was charged with a felony. McNeely argued that “taking his blood for chemical testing without first obtaining a search warrant violated his rights under the Fourth Amendment.” The trial court agreed, concluding that apart from the fact that his body was metabolizing the alcohol, there was no exigency. Eventually the Missouri Supreme Court affirmed the decision, ruling that pursuant to Schmerber v. California,²¹ more is required than the “mere dissipation of blood-alcohol evidence to support a warrantless blood draw in alcohol-related case.” As this was a “routine DWI case,” the Missouri Court ruled that the “nonconsensual warrantless blood draw” was improper.

Missouri requested certiorari and the U.S. Supreme Court granted review.

¹⁸ U.S. v. Jones, 565 U.S. – (2012).

¹⁹ Mo. Ann. Stat. §§577.020.1; 577.041.

²⁰ Mo. Ann. Stat. §577.010.

²¹ 384 U.S. 757 (1966).

ISSUE: Is there an exception to the search warrant requirement for nonconsensual blood testing in drunk-driving cases?

HOLDING: No

DISCUSSION: The Court began by noting that a “warrantless search of the person is reasonable only if it falls within a recognized exception.”²² The Court applied that principle to the “type of search at issue in this case, which involved a compelled physical intrusion beneath McNeely’s skin and into his veins to obtain a sample of his blood for use as evidence in a criminal investigation.”

The Court also looked to Schmerber, in which the Court has “reasoned that ‘absent an emergency, no less could be required where intrusions into the human body are concerned.’” This was the case even if a lawful arrest had been made.²³ The Court agreed that exceptions can be made when there is a compelling exigent circumstances, including, as relevant to this situation, when there is a need to prevent the imminent destruction of evidence.²⁴ To evaluate exigency, the Court has always looked to the totality of the circumstances. In Schmerber, the subject had been brought to the hospital as the result of injuries sustained in a wreck and there was no time for the officers to get a warrant.

In the case at bar, the Court agreed that the natural metabolic processes would cause the alcohol in the bloodstream to decline steadily until totally absorbed and that a “significant delay in testing will negatively affect the probative value of the results.” However, the Court explained that it did not follow that it should “depart from careful case-by-case assessment of exigency and adopt the categorical rule” that such searches are automatically permitted.

The Court emphasized that “some circumstances will make obtaining a warrant impractical such that the dissipation of alcohol from the bloodstream will support an exigency justifying a properly conducted warrantless blood test.” The Court noted that the suspect has no control over the dissipation process and that it occurs “in a gradual and relatively predictable manner.” Moreover, it is inevitable that there will be some delay; just because transport to a medical facility and getting the assistance of the proper medical professional is needed.

Of note, the Court recognized that many states permit “police officers or prosecutors to apply for search warrants remotely through various means, including telephonic or radio communication, electronic communication such as e-mail, and video conferencing.”²⁵ Other jurisdictions have found different way to streamline the process. The Court agreed that “warrants inevitably take time ... to complete ... and review” even in those states that allow for telephone and electronic warrants. And, of course, nothing guarantees that a judge will be readily available, especially in late night arrests. The Court declined to adopt a *per se* rule, noting that doing so “might well diminish the incentive for jurisdictions ‘to pursue progressive approaches to warrant acquisition that preserve the protections afforded by the warrant while meeting the legitimate interests of law enforcement.’”

²² U.S. v. Robinson, 414 U. S. 218 (1973).

²³ See Johnson v. U.S., 333 U.S. 10 (1948).

²⁴ Cupp v. Murphy, 412 U.S. 291 (1973); Ker v. California, 374 U.S. 23 (1963).

²⁵ This is not currently the case in Missouri, however, nor is there a statutory or provision in the court rules in Kentucky for such warrants, at this time.

The Court left open the possibility that “given the large number of arrests for this offense in differing jurisdictions nationwide, cases will arise when anticipated delays in obtaining a warrant will justify a blood test without judicial authorization, for in every case the law must be concerned that evidence is being destroyed.” However, since that was not the question before the Court at this time, the Court declined to address that issue further.

The Court affirmed the decision of the Missouri Supreme Court, declining to create a *per se* rule that warrants are unnecessary for a DWI/DUI blood draw.

NOTE: *In Kentucky, KRS 189A.105 provides for additional penalties against a defendant who refuses the tests requested by a peace officer. If the subject is involved in a situation resulting in the physical injury of a person, a search warrant may be obtained. If there is a fatality, the investigation officer shall seek a search warrant unless the blood, breath or urine has already been obtained by consent. As such, if an officer is unable to get consent from a conscious suspect in a non-injury situation, the proper course of action is to proceed with the prosecution and request the additional penalty upon conviction. If someone is injured as a result and consent cannot be obtained, the officer should consider a search warrant. This case reinforces the need to make a DUI case upon observations as well as any potential substance testing.*

FULL TEXT OF OPINION: http://www.supremecourt.gov/opinions/12pdf/11-1425_cb8e.pdf

DNA

Maryland v. King, 133 S.Ct. 1958 (2013)

Decided June 3, 2013

FACTS: King was arrested in April, 2009 in Maryland on felony assault charges. As required under state law, a DNA sample was collected from him during booking. A few months later, the information was uploaded to the state DNA database and on August 4, his DNA profile matched him to evidence collected in a 2003 open rape case. He was indicted and arrested. With a search warrant, a second sample was collected and double-checked, it again matched. King moved for suppression, arguing that the collection of DNA during booking was a violation of the Fourth Amendment. The trial court denied the suppression.

King was convicted and appealed. The Maryland Court of Appeals agreed, finding the collection of DNA using a buccal (cheek) swab to be a violation. The government requested certiorari and the U.S. Supreme Court granted review.

FACTS: May DNA be collected by a buccal swab during booking and used for identification purposes?

HOLDING: Yes

DISCUSSION: The Court noted that federal and state courts throughout the country “have reached differing conclusions as to whether the Fourth Amendment prohibits the collection and analysis of a DNA sample from persons arrested, but not yet convicted, on felony charges.” The Court started by discussing the “advent of DNA technology,” describing it as “one of the most significant scientific advancements of our

era.” In the criminal justice system, since the first positive ID made in 1986, DNA has been acknowledged to have the “unparalleled ability both to exonerate the wrongly convicted and to identify the guilty.” The Court extensively described the process for using DNA as a positive identifier. It further noted that Maryland law authorizes the collection of DNA from individuals charged with crimes of violence, which are further described in another Maryland statute. The sample may not be processed and placed in a database until arraignment, at which point a judge determines there is probable cause to bind them over for trial. If that does not occur, or if they are not convicted, the samples are to be destroyed. The DNA may only be used for identification purposes. Further, the process used is not intrusive at all. The match was done by the FBI’s Combined DNA Index System (CODIS).

The Court agreed that a buccal swab is a search under the Fourth Amendment.²⁶ However, the taking of the sample, which requires “but a light touch on the inside of the cheek,” is a negligible intrusion. In other words, although a search, there are situations that “may render a warrantless search or seizure reasonable.”²⁷ In Maryland, the collection is done when the subject is already in custody for a serious offense supported by probable cause. The Court agreed that the purposes for the collection include “the need for law enforcement officers in a safe and accurate way to process and identify the persons and possessions they must take into custody.” The Court agreed that certain “administrative steps” are incident to arrest.²⁸ The doctrine of search incident to arrest “has been regarded as settled from its first enunciation, and has remained virtually unchallenged;”²⁹ the “fact of a lawful arrest, standing alone, authorizes a search.”³⁰ The “routine administrative procedure[s] at a police station house incident to booking and jailing the suspect” have a different origin.³¹ In every case, it is critical to properly identify the individual, who may in fact have a reason to disguise or conceal their actual identity by carrying false identification. The Court noted that individuals arrested for minor offenses may in fact be “the most devious and dangerous criminals,” mentioning that, for example, Timothy McVeigh (Oklahoma City bombing) was originally stopped for driving without a license plate. The Court agreed that “the only difference between DNA analysis and the accepted use of fingerprint databases is the unparalleled accuracy DNA provides.” The court found it little different “than matching an arrestee’s face to a wanted poster of a previously unidentified suspects; or matching tattoos to known gang symbols to reveal a criminal affiliation; or matching the arrestee’s fingerprints to those recovered from a crime scene.” The Court found it little different than checking other data, such as photos, Social Security number, etc., which “are checked as a routine matter to produce a more comprehensive record of the suspect’s complete identity.” Further, identifying an individual is critical to the safety of staff and other inmates, and “DNA identification can provide untainted information” about the subject, equating to the visual inspection for possible gang tattoos. In addition, since the government “has a substantial interest in ensuring that persons accused of crimes are available for trial,”³² it is critical to know if “a person who is arrested for one offense” “has yet to answer for some past crime” – providing a strong motivation to flee. It also provides valuable information on potential pretrial release. The Court noted that “pretrial release of a person charged with a dangerous crime is a most serious responsibility.” Finally, the Court noted, such identifications may “have the salutary effect of freeing a person wrongfully imprisoned for the same offense.”

²⁶ Schmerber v. California, *supra*.

²⁷ Illinois v. McArthur, 531 U.S. 326 (2001).

²⁸ Gerstein v. Pugh, 420 U.S. 103 (1975).

²⁹ U.S. v. Robinson, 414 U.S. 218 (1973).

³⁰ Michigan v. DeFillippo, 442 U.S. 31 (1979).

³¹ Illinois v. Lafayette, 462 U.S. 640 (1983).

³² Bell v. Wolfish, 441 U.S. 520 (1979).

The Court agreed that there was little reason to question the legitimate interest in the government “in knowing for an absolute certainty the identity of the person arrested, in knowing whether he is wanted elsewhere, and in ensuring his identification in the event he flees prosecution.” The Court considered the collection and use of DNA “is no more than an extension of methods of identification long used in dealing with persons under arrest.”³³ The search involved in minimal, and further, the expectation of privacy for a detainee is diminished, although not extinguished completely.

The Court reversed the decision of the Maryland Court of Appeals, thereby reinstating King’s conviction.

FULL TEXT OF OPINION: http://www.supremecourt.gov/opinions/12pdf/12-207_d18e.pdf

RIGHT TO SILENCE

Salinas v. Texas, 133 S.Ct. 2174 (2013)

Decided June 17, 2013

FACTS: On December 18, 1992, two brothers were murdered in their Houston home. A neighbor heard the gunshots and saw someone race away in a dark vehicle. Six shotgun shell cases were recovered at the scene. The investigation led to Salinas, who had been a guest at a party at the home the night before. The officers visited Salinas, seeing a dark blue vehicle at the home. He handed over his shotgun for testing and accompanied the police to the station.

All parties later agreed that the interview was non-custodial and that he was not given Miranda warnings. He answered most of the questions posed, but when asked if his shotgun would match the recovered shells, he “declined to answer.” Instead, he “looked down at the floor, shuffled his feet, bit the bottom lip, clenched his hands in his lap, [and] began to tighten up.” A few moments of silence passed and the interviewing officer moved on to additional questions, which Salinas answered.

Salinas was arrested on outstanding traffic warrants, but without more information, the police elected not to charge him on the murder. A few days later, with information that a witness had heard Salinas confess to the crime, they decided to charge him. By that time, however, he had absconded. He was located and apprehended finally in 2007, in the Houston area, using an assumed name.

Salinas did not testify at trial. Instead, and over his objection, the prosecution was permitted to introduce his reaction to the officer’s question about the shotgun. Salinas was convicted. On appeal in the Texas state courts, Salinas argued that the use of his silence violated the Fifth Amendment, but the appellate Texas courts both ruled that his “prearrest, pre-Miranda silence was not ‘compelled’ within the meaning of the Fifth Amendment.”

Salinas requested certiorari, and the U.S. Supreme Court granted review.

FACTS: Is simply failing to answer a question during a noncustodial interview an invocation of the right to silence?

³³ U.S. v. Kelly, 55 F.2d 67 (2nd Cir. 1932).

HOLDING: No

DISCUSSION: The Court noted that Salinas' interview with the police was voluntary. He "agreed to accompany the officers to the station and 'was free to leave at any time during the interview.'" In this case, the "critical question" was whether he was somehow "deprived of the ability to voluntarily invoke the Fifth Amendment." At no point during that interview did he make any attempt to actually invoke his right to refuse to answer the question, he simply did not answer.

The Court agreed that prior case law established that "a defendant normally does not invoke the privilege by remaining silent" or "standing mute."³⁴ The Court had held repeatedly that "the express invocation requirement applies even when an official has reason to suspect that the answer to his question would incriminate the witness." The Court looked to the most recent case, Berghuis v. Thompkins, with its post-Miranda "extended custodial silence" which was held not to have invoked the privilege, and agreed that if that did not do so, then "surely the momentary silence in this case did not do so either."³⁵ Although Salinas attempted to distinguish it "by observing that it did not concern the admissibility of the defendant's silence but instead involved the admissibility of his subsequent statements," but the Court disagreed, ruling that "a suspect who stands mute has not done enough to put police on notice that he is relying on his Fifth Amendment privilege." The Court noted that not every "possible explanation for silence is probative of guilt," but instead could be related to embarrassment or another reason. The Court noted, as well, that he "did not merely remain silent; he made movements that suggested surprise and anxiety," effectively turning silence into "expressive conduct."

The Court concluded that before one might "rely on the privilege against self-incrimination; he was required to invoke it." Since Salinas did not, he could not.

The Court upheld the decision of the Texas Court of Criminal Appeals and affirmed Salinas' conviction.

FULL TEXT OF OPINION: http://www.supremecourt.gov/opinions/12pdf/12-246_1p24.pdf.

EMPLOYMENT – WORKPLACE HARASSMENT

Vance v. Ball State University, 133 U.S. --- (2013)

Decided June 24, 2013

FACTS: Vance, an African-American female, began her employment at Ball State University in 1989. By 2007, she was a full-time catering assistant. During the course of her employment, she was involved in contentious interactions with Davis, a fellow employee with the title of catering specialist. Both agreed, however, that "Davis did not have the power to hire, fire, demote, promote, transfer, or discipline Vance." Vance made a number of complaints to both BSU and the Equal Employment Opportunity Commission (EEOC), making allegations of racial harassment and discrimination, with many pertaining to Davis. Despite BSU's attempts to resolve the conflict, it continued, with Vance filing suit in 2006, claiming that "she had been subjected to a racially hostile work environment in violation of Title VII."

The District Court ruled in favor of BSU, in summary judgment, finding that Davis was not Vance's

³⁴ Minnesota v. Murphy, 465 U.S. 420 (1984); Roberts v. U.S., 445 U.S. 552 (1980); U.S. v. Sullivan, 274 U.S. 259 (1927).

³⁵ 560 U.S. 370 (2010).

supervisor. Further, it agreed that BSU had “responded reasonably to the incidents of which it was aware” and as such, could not be held liable for negligence. The Seventh Circuit Court of Appeals affirmed. Vance requested certiorari and the U.S. Supreme Court granted review.

ISSUE: Does the definition of a supervisor under Title VII include the power to make tangible employment actions against the harassed employee?

HOLDING: Yes

DISCUSSION: The Court agreed, first, that the claim of a hostile work environment was viable, under the leading case of Rogers v. EEOC.³⁶ In Faragher v. Boca Raton, the Court had agreed that an employer could be held liable for an employee’s unlawful harassment if the employer was negligent with respect to the offensive behavior.³⁷ Different rules apply, however, if the “harassing employee is the plaintiff’s ‘supervisor’”³⁸ and in such cases, the employer may be held vicariously liable, even though under the general rule, the master (employer) may not be held liable for the torts of their (servants) employees for actions taken outside the scope of their employment, which would, of course include such harassment.

As such, the determination as to whether an alleged harasser is a supervisor or simply a co-worker is critical. The Court agreed that the Seventh Circuit’s interpretation was correct, and that “an employer may be vicariously liable for an employee’s unlawful harassment only when the employer has empowered that employee to take tangible employment actions against the victim, *i.e.*, to effect a ‘significant change in employment status, such as hiring, firing, failing to promote, reassignment with significantly different responsibilities, or a decision causing a significant change in benefits.’”

The Court noted that the imprecision of the term “supervisor” in general usage was problematical, noting that it means different things to different people (and employers). Because of such “varying meanings both in colloquial usage and in the law,” the Court emphasized the need for a consistent usage under Title VII. The Court noted that the EEOC’s “definition of a supervisor ... is a study in ambiguity.”

The Court noted that creating a straightforward definition for a supervisor did not “leave employees unprotected against harassment by co-workers who possess the authority to inflict psychological injury by assigning unpleasant tasks or by altering the work environment in objectionable ways.” In such cases, the victims may show employer negligence in allowing the harassment to occur.

The Court ruled that an “employee is a ‘supervisor’ for purposes of vicarious liability under Title VII if he or she is empowered by the employer to take tangible employment actions against the victim.” Because it was agreed that Davis was not, in fact, a supervisor under that definition, the Court affirmed the decision of the Seventh Circuit.

FULL TEXT OF OPINION: http://www.supremecourt.gov/opinions/12pdf/11-556_11o2.pdf

³⁶ 454 F.2d 234 (1971).

³⁷ 524 U.S. 775 (1998).

³⁸ See Burlington Industries, Inc. v. Ellerth, 524 U.S. 742 (1998).

EMPLOYMENT DISCRIMINATION

University of Texas Southwestern Medical Center v. Nassar, 133 S.Ct. --- (2013)
Decided June 24, 2013

FACTS: Dr. Nassar was hired in 1995 as a member of the faculty of the University of Texas Southwestern Medical Center, as well as a staff physician at the Hospital, which was affiliated with the university. He left in 1998 for additional medical training and returned in 2001 as an assistant professor and a physician at the hospital, again. In 2004, Dr. Levine was hired as the University's Chief of Infectious Disease Medicine. She was Nassar's ultimate, although not immediate, superior. On different occasions over the ensuing years, Dr. Nassar alleged that Dr. Levine "was biased against him on account of his religion and ethnic heritage, a bias manifested by undeserved scrutiny of his billing practices and productivity, as well as comments that "Middle Easterners are lazy." He met with Dr. Fitz, the Chair of Internal Medicine, who was over Dr. Levine. Despite having received a promotion in 2006, with Levine's help, Nassar still believed she was biased against him. He attempted to "arrange to continue working at the Hospital without also being on the University's faculty." When he learned it might be possible, he resigned his position with the University, claiming in his letter that he was departing because of Levine's harassment. Dr. Fitz was upset by the accusations against Levine, believing her to be "publicly humiliated" and that she deserved to be "publicly exonerated." In the meantime, Dr. Fitz complained to the Hospital, protesting that the offer was inconsistent with agreements to the contrary. The Hospital withdrew the offer.

Nassar filed suit under Title VII of the Civil Rights Act of 1964, 42 U.S.C. §2000e *et seq.*, arguing that he was constructively discharged from the University by Levine's actions, and that Dr. Fitz's intervention with the Hospital was done in retaliation. The jury found in Nassar's favor on both counts. Upon appeal, the Fifth Circuit, the Court overturned the actual constructive discharge claim, but upheld the retaliation claim. The case was remanded for an adjustment of damages accordingly. The University requested certiorari and the U.S. Supreme Court granted review.

FACTS: Are the standards of a Title VII antiretaliation claim the same as for a status-based discrimination claim?

HOLDING: No

DISCUSSION: The Court noted that under such Title VII discrimination claims, it was unlawful for an employer to discriminate on the basis of "race, color, religion, sex, and national origin" – personal characteristics / status-based – as well as to act against an employee who opposes employment discrimination and the "employee's submission of or support for a complaint that alleges employment discrimination." The latter two, the retaliation claims, are covered by a separate section under Title VII.

The Court looked to Price Waterhouse v. Hopkins³⁹ and noted that the causation standard for a status-based claim is whether a plaintiff "could show that one of the prohibited traits was a 'motivating' or 'substantial' factor in the employer's decision." If the plaintiff is able to do so, the burden shifts to the employer, "which could escape liability if it could prove that it would have taken the same employment action in the absence of all discriminatory animus." A modification to the statute, passed in 1991,

³⁹ 490 U.S. 228 (1989).

effectively codified the lessened causation standard, but removed “the employer’s ability to defeat liability once a plaintiff proved the existence of an impermissible motivating factor.” The statutory change allowed a plaintiff to gain some relief “based solely on proof” that their status “ was a motivating factor but allowed the employer to prove “that it would still have taken the same employment action” and thus escape monetary damages and a reinstatement order.

The antiretaliation provisions falls in a different part of Title VII, but still uses the “because” language that the Court had considered so difficult in the status-based claims. The Court noted that in this case, the “alleged wrongdoer differed” between the status-based claim and the retaliation claim.

After extensive parsing of the specific language in the relevant statutes, the Court concluded that “Title VIII retaliation claims must be proved according to the traditional principles of but-for causation, not the lessened causation test stated” for status-based claims. As such, this required “proof that the unlawful retaliation would not have occurred in the absence of the alleged wrongful action or actions of the employer.” The Court vacated the decision of the Fifth Circuit and remanded the case to the lower courts for further proceedings consistent with the Court’s opinion.

FULL TEXT OF OPINION: http://www.supremecourt.gov/opinions/12pdf/12-484_o759.pdf.