

Department of
CRIMINAL JUSTICE TRAINING

KENTUCKY JUSTICE AND PUBLIC SAFETY CABINET

2012



Leadership is a behavior, not a position

FIRST QUARTER
CASE LAW UPDATES



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Commissioner





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

docjt.legal@ky.gov

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

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

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

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



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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.

KENTUCKY

PENAL CODE – KRS 508 – ASSAULT

Hinkle v. Com., 2012 WL 1057958 (Ky.App. 2012)

FACTS: On December 5, 2009, Erlanger officers responded to a 911 call at a home that was “a dormitory-style residence with each tenant having his own bedroom.” They found Reed in his bedroom bleeding from a gash on the head. He was initially unconscious but awakened and said he “remembered little of what had occurred.” He named Hinkle as being the last person he saw but “did not recall being struck.” He also claimed to have had no problems with Hinkle and could not explain the assault. Ridenour, a witness, had heard Hinkle and his girlfriend (Bonnett) arguing loudly about 6 a.m. as they went upstairs. He then heard an argument between Hinkle and Reed and heard “big noises.” At that point, he called 911. Both Bonnett and Hinkle claimed Reed was the initial aggressor and that after Reed came banging on the door, Hinkle went out to fight with him. Bonnet stated Hinkle carried a baton although Hinkle denied that. Bonnett also called 911.

A baton was found under the basement staircase and damage to the door frame of Reed’s room matched that baton. Hinkle finally admitted that he assaulted Reed and made additional threats against the residence and the landlord. He was charged with Assault 2nd. Prior to trial, Hinkle moved for dismissal under KRS 503, claiming self-defense and the presumption of fear. However, the trial court agreed that “presumption does not apply when defensive force is used upon a person who is a lawful resident of the dwelling or has the right to be present on the premises.” The trial court ruled in the Commonwealth’s favor and the case went to trial.

Hinkle, however, failed to appear for the second day of trial and he was convicted in absentia. He was ultimately located in California and returned to Kentucky, where he appealed his conviction.

ISSUE: Is prior ownership of a particular weapon admissible in an Assault case?

HOLDING: Yes

DISCUSSION: Hinkle contended that the trial court improperly allowed the prosecution “to solicit testimony regarding his prior ownership of the baton used in the assault,” which violated KRE 404(b). The Court looked to McQueen v. Com., and noted it had ruled that prior ownership of a weapon was admissible evidence.¹ Further, the Court noted that it was not unlawful to own the baton, so it could not “be construed as character evidence of other crimes, wrongs, or acts.”

The Court also noted that Hinkle waited until a few weeks before trial to raise the immunity motion, which should have properly been raised much earlier. The Court upheld Hinkle’s conviction.

¹ 339 S.W.3d 441 (Ky. 2011).

PENAL CODE – KRS 514 – THEFT

D.L. v. Com., 2012 WL 512623 (Ky. App. 2012)

FACTS: ON April 23, 2010, Lexington officers responded to a theft of a moped. The moped was recovered about a week later from D.L., who claimed he'd bought it from a third party. He further claimed the mope had been wrecked at the time and that he bought it and repaired it. He was charged with Receiving Stolen Property. He was adjudicated delinquent and further, was required to pay restitution for the damage in the amount of about \$1,300.

D. L. appealed.

ISSUE: Does the fact that stolen property is claimed to be damaged prior to being received by a third party require that its value be lessened for charging purposes?

HOLDING: Yes

DISCUSSION: D.L. challenged the decision that he received property valued at more than \$500. The Court noted that "the property stolen, or a photograph depicting such property, need not be produced at trial since verbal testimony describing the stolen property is sufficient to support a conviction."² D.L. argued that at the time he allegedly received the moped, its value had been diminished by the damage; the Court agreed that the "Commonwealth must necessarily undertake an assessment of depreciation and the amount of damage sustained by the property and the impact thereon of its value." Since such evidence was never introduced, the Court agreed that D.L. should have, instead, have been adjudicated for the misdemeanor charge rather than the felony charge.

PENAL CODE – KRS 524 – TAMPERING WITH PHYSICAL EVIDENCE

Cornelius v. Com., 362 S.W.3d 382 (Ky. App. 2012)

FACTS: Deputy Riddle (McCracken County SO) got a call from a CI that Williams had contacted him about selling cocaine. The CI arranged to meet Williams to purchase the drugs and was told Williams would be in a "large tan Dodge pickup truck." The informant was wired and surveillance was established. Williams arrived as a passenger in the truck, Cornelius was driving. They met in a parking lot and the transaction was made, but the substance was later shown not to be cocaine.

Det. Crabtree stopped the truck after it left the scene. Both occupants were removed and frisked. Det. Crabtree felt a baggie in Cornelius's pocket. He was asked if he was trying to hide the marijuana, he responded if that had been the case, he would have "placed it in his underwear." Cornelius was ultimately convicted of possession of the marijuana as well as tampering with physical evidence for hiding it.³ Because Cornelius was a convicted felon, he was also a PFO. Cornelius appealed, arguing that he was entitled to a directed verdict on the tampering charge.

² Irvin v. Com., 446 S.W.2d 570 (Ky. 1969).

³ Note that the marijuana charge is a misdemeanor, but the tampering charge is a felony.

ISSUE: Is it proper to charge with Tampering with no evidence the person intended to hide or destroy evidence?

HOLDING: No

DISCUSSION: The Court looked to its decision in Mullins v. Com.⁴ and noted that it was improper to “bootstrap a tampering charge onto another charge when there is no evidence of an active intent by [Cornelius] to impair the availability of evidence.” The marijuana was not hidden where it could not be readily detected on a frisk and the Court considering the tampering charge to be improper “piling on.”

The court reversed the tampering conviction as well as the PFO.

FAMILY ISSUES

Stokes v. Gatton-Stokes, 2012 WL 752079(Ky. App. 2012)

FACTS: On May 24, 2012 Christopher Stokes called his former wife, Christen Gatton-Stokes to speak with their minor child on the telephone pursuant to a “telephone visitation schedule.” Christen listened in to monitor the conversation. (Christen later contended that Christopher had been pressuring her to sign a \$1.3 million loan and that he only called the child on the phone when he wanted to speak to her about the loan.) After he hung up, he texted Christen asking if everyone was alright since “he heard a disturbance in the background.” He told Christen he would call the police if she didn’t return his call. He called and telephoned numerous times over the next 2 ½ hours. Christen returned some of his calls trying to reassure him. He did, indeed, send the police to the house who told her that Christopher had reported that the child had called him to report that they were being “smacked by a man.”

A week before, Christopher had been arrested for terroristic threatening involving a former wife and also was the subject of two DVO’s involving other parties. Christen requested an EPO/DVO, indicating that “she was fearful” because he had been contacting her about the loan, describing the calls as “harassing” and “desperate.” The EPO was issued in Fayette County, where Christen lived, and he was ultimately served in Laurel County, where he lived.

The no-contact DVO was issued and Christopher appealed.

ISSUE: Does a DVO require that a threat actually be made, at the least?

HOLDING: Yes

DISCUSSION: After resolving a jurisdictional issue, the Court addressed whether an act of domestic violence had, in fact, occurred. The Court looked to the definition and noted that “Christen did not identify any threat made by Christopher that indicated that he intended to inflict any type of physical injury to her or the child.” She did not express any fear that he would do so. Further, the Court noted that the other acts of domestic violence were essentially irrelevant and the “devastating effect that having a DVO entered without sufficient factual basis can have against the alleged perpetrator.”

⁴ 350 S.W.3d 434 (Ky. 2011).

The Court reversed the DVO.

JUVENILE

Brown v. Com., 2012 WL 876748 (Ky. App. 2012)

FACTS: On January 19, 2012, Louisville Metro PD received a report of a person selling drugs outside a convenience store. There they spotted Brown, who fit the description. He went inside the store as they approached him, so they followed him inside. Ultimately Brown was escorted outside by the officers and tried to run. They struggled and a gun Brown was carrying went off. No one was hurt.

Brown was 17 so a juvenile petition was taken out. He was transferred to adult court after a hearing and indicted for Attempted Murder and other charges. The Attempted Murder charges were reduced to Wanton Endangerment. Brown took a plea but moved to be sentenced under the Juvenile Code rather than under adult provisions. That was denied and he appealed.

ISSUE: Does the use in any way of a firearm during a crime exempt a child from sentencing under the juvenile code?

HOLDING: Yes

DISCUSSION: The Court looked to KRS 640.040(4) and 635.020(2)-(8). The Court noted that a child may be sentenced under the juvenile code unless exempt. One of the exemptions, specifically, is the use of a firearm during the commission of the offense. Brown argued he did not use a firearm, but the Court disagreed, since the wanton endangerment charge reflected the shots fired. As such, the Court agreed it was proper to sentence him as a youthful offender.

JUVENILE - INTERROGATION

Com. v. Bell and T.C., 365 S.W.3d 216 (Ky. App. 2012)

FACTS: On May 19, 2010, Detectives Johnson and Ball (unidentified Fayette County agency) had T.C., age 13, removed from his middle school classroom and brought to another room for questioning. T.C.'s parents were not notified and no other adults were present. He was given Miranda warnings but told "he was not under arrest and that if he was honest and truthful, everything would be alright." The detectives talked to him about T.C.'s cousin, who he had allegedly sodomized while they were both showering. T.C. denied doing anything intentional but then changed his story to state that they were wrestling and that there might have been penetration at some point. After continued questioning, T.C. finally admitted that he had done it intentionally. The officers questioned T.C. about whether he was, or had been, a victim of sexual abuse, which he denied. The interview was allegedly not recorded. He was then allowed to return to class.

When T.C. got home, he told his father what had happened. T.C. was ultimately charged with sodomy and a motion was filed to suppress his statements based upon a violation of KRS 610.200, the parental notification statute, because the officers did not notify his parents prior to the interview. At the subsequent

hearing, Det. Johnson “mistakenly testified that he interviewed T.C. on June 3 at police headquarters when T.C.’s father brought him there to pick up the charges. He also stated that he’d spoken with T.C. at the school interview, but testified that the purpose of that interview “was to ascertain whether T.C. himself was being sexually abused.” T.C. disputed that the interview was not recorded and both he and his father stated T.C. was never at police headquarters at all, so he could not have been interviewed there. The hearing was continued and reconvened some months later. At that time, it was conceded that the interview took place at the school but the Commonwealth argued that T.C. was not in custody so the statute was not triggered. The trial court ruled that he was in custody at the time of the school interview and as such, the detective was obligated to notify T.C.’s parents prior to the interview. At a following hearing, a few weeks later, the detective admitted that he’d made a mistake “regarding the circumstances of his interrogation of T.C.” The court was provided the audio recording of the first interrogation.

The trial court agreed that KRS 610.200 was not violated because T.C. was not in custody but still suppressed his admissions. The Court found that even if T.C. was not in custody, his statements were not voluntary, relying upon the detectives “inconsistent testimony,” T.C.’s age, mental state, lack of a parental presence and nature of the interrogation. The Commonwealth filed for a Writ of Prohibition to keep the statement from being suppressed, which the Circuit Court denied. The Commonwealth appealed.

ISSUE: Is a young teenager interviewed at school by detectives in custody for purposes of the parental notification statute?

HOLDING: Yes

DISCUSSION: A writ of prohibition is “an extraordinary form of relief” and not easily granted. In this case, the Commonwealth argued that the trial court made an error that could not be adequately remedied by the usual avenue of an appeal. In this case, had the Commonwealth elected to try the case without the suppressed evidence, if the subject was acquitted, they would not be able to appeal that decision. The burden was on the prosecution to show that T.C.’s statements were voluntary. The Court looked at the totality of the circumstances and compared the actual recording to the detective’s “independent recollection” which was “inconsistent, mistaken and, consequently misleading, albeit unintentionally so.”

The sole issue upon review was the voluntariness of the boy’s statements, and to examine that, “both the characteristics of the accused and the details of the interrogation are considered.”⁵ While the facts pointed out by the Commonwealth, that they did not deprive him of food or water and the detectives used a “calm, conversational tone throughout the interview,” may have “serv[ed] to assure an adult, or even a mature minor” that there was no coercion, it would not provide that “same assurance” to a 13-year-old boy.

The Court agreed that while a “school is not designed or intended to create a coercive environment in which a child’s will is entirely subjugated,” it is a place “where compliance with adult authority is required and where such compliance is compelled almost exclusively by the force of authority.” That, the Court stated, is “the definition of coercion.” If sent to a particular location, the child is expected to stay there and in this case, when instructed to be in a room with the officers, how could T.C. have known that “some other set of rules applies?” The Court concluded that it was not reasonable to believe that T.C. believed he had the “right to say nothing or to get up and leave the detective there alone.” The repetitive questioning that he faced, against someone who “feigned superior knowledge” about what happened, was subjectively

⁵ Schneckloth v. Bustamonte, 412 U.S. 218, 226 (1973).

coercive. When dealing with an “impressionable youth” of possibly “limited mental ability”, “issues of suggestibility and possible overreaching” must be addressed.

The Court concluded, when viewed “through the lens of” T.C., the Court found the statements to have not been given of his free will and the court affirmed the denial of the writ of prohibition.

ARREST

Burnside v. Com., 365 S.W.3d 216 (Ky. App. 2012)

FACTS: On September 22, 2010, Arnold, a clerk at Video Plus, asked Fulton police to “come by.” She reported to the officer that “she had a ‘contrary’ customer who was upset because she refused to let him rent any movies as he was not an account holder.” He’d sat in his car in the lot for some time until another customer arrived. After closing, at about 2120, she requested the police and Officer Latta responded. As the officer arrived, he saw Burnside “shake the door of the establishment and then walk back to his car.” (Latta was familiar with Burnside.) He assumed that Burnside was the reason for the call and spoke to him, but Burnside (profanely) refused to talk to the officer. Burnside left and Arnold came out to talk to the officer. (It was later learned that Burnside was not, in fact, the problem customer, but Latta did not know that.)

Officer Latta followed Burnside and pulled up behind him, activating his lights. Burnside did not stop until he reached a motel, where he pulled into the lot. By this time, two additional officers had responded. Burnside got out and started yelling, and at the same time, the officers could see he had a green, leafy substance in his mouth which he “was spitting out.” Burnside was arrested for disorderly conduct and his car was searched. The officers found marijuana, a scale and a large amount of cash.

Burnside requested suppression, arguing that the officer’s lacked probable cause to stop him. The Court reviewed the facts and found it reasonable for the officer to believe that Burnside was the reason for the call and denied the motion. Burnside took a conditional guilty plea and appealed.

ISSUE: Is an arrest for a misdemeanor valid when the original reason for the stop proves to be an error, but when the arrest is based on separate cause?

HOLDING: Yes

DISCUSSION: Burnside argued, specifically, that the dispatch log indicated that Latta had been told, prior to arrival, that the problem customer had “left the area” which “eliminated any probable cause the officers might have had to perform an investigatory stop.” The Court reviewed, specifically, whether Latta had the ability, under KRS 431.005, to make an arrest, for the offenses of disorderly conduct and resisting arrest. The Court agreed that Burnside’s behavior at the motel was sufficient to support his arrest, and once they saw the marijuana (and a drug dog alerted on the car), they had sufficient cause to search the vehicle itself.⁶

The Court agreed the arrest was proper and upheld the conditional plea.

⁶ Johnson v. Com., 179 S.W.3d 882 (Ky. App. 2005).

SEARCH & SEIZURE – WARRANT

Cunningham v. Com., 2012 WL 246277 (Ky. App. 2012)

FACTS: Cunningham's Lexington apartment was searched on June 11, 2009, pursuant to a search warrant. Det. Curtsinger (Lexington PD) obtained the warrant and later testified that a reliable CI had provided information that Cunningham was selling cocaine from the apartment. The detective verified information provided, including Cunningham's residence, vehicle and employment, and that Cunningham had previously been convicted of trafficking in a controlled substance. Curtsinger set up three controlled buys and observed the informant arrive and leave the apartment. Det. Curtsinger then collected an amount of cocaine from the CI after each buy consistent with the amount of money provided. The third buy was within 48 hours of the application for the warrant.

Charges were placed against Cunningham solely with respect to the drugs found in the apartment. He moved for suppression and asked for the identity of the CI, both of which were denied. He took a conditional guilty plea and appealed.

ISSUE: May a warrant be based upon a tip and controlled buys from an unidentified, but reliable, confidential informant?

HOLDING: Yes

DISCUSSION: The Court agreed that "a bare and uncorroborated tip from a confidential informant will not establish probable cause for a search warrant." However, the detective "specified that the informant had proven to be reliable on at least six previous occasions. " He corroborated much of the information and then did three buys. As such, the Court agreed the affidavit was sufficient to establish reliability, and to establish probable cause for the search.

Further, with respect to the identity of the informant, the Court agreed that since Cunningham was not charged based on any of the buys made by the CI, he could not show a legitimate need for that information.

Cunningham's pleas were affirmed

Luckl v. Com., 2012 WL 28693 (Ky. App. 2012)

FACTS: In February, 2008, a package was "pulled aside" by the Louisville airport interdiction unit after Det. Boughey found the package suspicious for several reasons. He then discovered both the sender and recipient were fictitious. A drug dog alerted on the package and it was opened, pursuant to a warrant. Some of the methamphetamine located in the package was removed a tracking device was inserted. Another warrant was obtained ultimately to enter the location where the package ended up and the device signaled it had been opened, or when the device stopped transmitting.

The package was then delivered by an undercover officer. The package was left on the porch and surveillance initiated. The officers watched Povill pick up the package, go inside, and then come back outside and drive away, carrying the package. They made a traffic stop. They returned to the initial house

and searched it, pursuant to the warrant, and found nothing. Povill admitted that he had an arrangement to have packages delivered to the address for a third party and that he'd accepted other deliveries, with the packages being then delivered to Luckl at another address. He was permitted, under observation, to drive to Luckl's address and was recorded giving Luckl the package. When the device triggered that the package had been opened, the officers entered. Luckl admitted there was more methamphetamine at the location and they obtained yet another warrant for that address.

Both men were charged with trafficking. Luckl moved to suppress all of the evidence and statements made but the Court denied the motion. Luckl was convicted and appealed.

ISSUE: Are anticipatory warrants valid?

HOLDING: Yes

DISCUSSION: The Court discussed the use of "anticipatory warrants" as validated under U.S. v. Grubbs.⁷ The Court agreed such warrants require the same degree of probable cause as other types of warrants. Luckl argued that "if the contraband to be delivered is the only evidence of criminal activity that the police believe will be located in the place to be searched, it is logical to condition the search upon the contraband's arrival at its destination."⁸ However, in this case, the Court agreed, the warrant authorized the seizure of the package only where it was delivered and then opened. The Court noted, however, that "the police did not create the chain of events which led to the delivery of the package to Luckl's residence." Their interaction with Povill did not "interrupt the occurrence of the triggering condition required by the anticipatory warrant."

After further addressing several issues relating to testimony by Det. Boughey, the Court affirmed Luckl's conviction.

SEARCH & SEIZURE – TERRY STOP

Minniefield v. Com., 2012 WL 28680 (Ky. App. 2012)

FACTS: On July 1, 2009, Officer Toms (Lexington PD) spoke to a Speedway manager about drug transactions in the parking lot. Officer Toms conducted surveillance that night and parked (in a marked vehicle) nearby. He observed certain interactions between two vehicles and later watched video from the store's security cameras that showed Minniefield, the passenger in one of the vehicles, go inside, make a purchase, and then come outside and stand by the other vehicle for several minutes. Officer Toms believed that he was witnessing a drug transaction. He entered the lot and approached but the men separated and got into their respective vehicles. Officer Toms blocked in the vehicles and called for backup and then began speaking with Minniefield (in the passenger seat) and the driver in their car.

Officer Toms noted that Minniefield was "overly nervous," "sweating profusely," "shaking," and "was stuttering." The driver was also "shaking uncontrollably," sweating and his eyes were "open wider than normal." Officer Toms requested a drug dog. When additional officers and the dog arrived, he had Minniefield get out. Minniefield admitted he had a small amount of marijuana on his person and consented

⁷ 547 U.S. 90 (2006).

⁸ U.S. v. Penney, 576 F.3d 297 (6th Cir. 2009).

to a search. Officer Toms found a rolled-up dollar bill containing marijuana and “during an additional pat-down search,” Minniefield refused to spread his feet. When forced to do so, two baggies of marijuana fell from his pants. He admitted involvement in trafficking and was arrested.

Minniefield was indicted and moved for suppression. The trial court agreed Minniefield was seized when he was blocked in, or at least, when he was asked to get out of the car. However, the Court also agreed that the officer had reasonable suspicion at the time he seized Minniefield. (Further, the Court agreed that as a “traffic stop,” the officer could ask questions without providing Miranda.) Minniefield took a conditional guilty plea and appealed.

ISSUE: Does the fact that behavior could be innocent render it non-suspicious?

HOLDING: No

DISCUSSION: Upon appeal, Minniefield only challenged the finding that Officer Toms had a reasonable suspicion to make the stop. He attempted to equate the facts in his case with that in Strange v. Com.⁹ and that “most of the behavior [discussed] ... could reasonably be considered as innocent under the circumstances.” The Court noted, however, that it “must consider all of the officers’ observations, and give due weight to the inferences and deductions drawn by trained law enforcement officers.” The Court agreed that much of Minniefield’s behavior (coupled with the actions of the other individuals) “could be construed as innocent when viewed separately” that “when considered together, they constituted ‘specific, articulable facts’ sufficient to establish a reasonable suspicion of criminal activity.” Given the totality of the circumstances, the Court agreed that the stop was proper.

Minniefield’s plea was upheld.

Strickland v. Com., 2012 WL 361879 (Ky. App. 2012)

FACTS: On November 22, 2009, Officer Mason (Louisville Metro PD) responded to a call of a “fight with guns and cars” at a specific location. No descriptions were provided. On his way there, the officer spotted Strickland, “who was alone and quickly walking the perimeter of Algonquin Park.” Because it was close to the location of the fight, the officer thought the person might be connected. He approached Strickland and spoke to him, and later testified that Strickland “was very polite and cooperative.” The officer noticed a “large bulge” in the front “kangaroo pocket” of the sweatshirt and suspected a weapon, so he asked Strickland about it. He denied having a weapon but Officer Mason patted him down and discovered that it was, indeed, a handgun. Strickland was arrested and indicted, as he was a convicted felon.

Strickland moved for suppression, arguing that the stop was “unwarranted by his mere presence in a high crime area.” The Court, however, agreed that the officer had sufficient cause for the stop, and ultimately the frisk, and denied the suppression. Strickland was convicted and appealed.

ISSUE: Is an officer speaking to an individual on the street always an investigatory seizure?

HOLDING: No

⁹ 269 S.W.3d 847 (Ky. 2008).

DISCUSSION: Strickland did not dispute that the frisk was proper, but only the stop. The Court noted there was no indication that “Officer Mason utilized any force or coercion nor that Strickland believed he was not free to leave.” In fact, the Court concluded that Strickland was not even “seized” under the Fourth Amendment until the officer conducted the frisk, which was justified by the “noticeable bulge” in the pocket. The court affirmed the conviction.

SEARCH & SEIZURE – OPEN FIELDS

Dunn v. Com., 360 S.W.3d 751(Ky. 2012)

FACTS: L.M., age 14, reported that he had been sodomized by Dunn on multiple occasions, while in Muhlenberg County. L.M. disclosed this while under a mental evaluation for an accusation of having killed cats and dogs. An investigation by KSP corroborated at least part of his allegation, when they found a condom containing Dunn’s DNA where the victim claimed one of the assaults had occurred, in a wooded area behind a junkyard, both apparently owned by Dunn. Dunn was indicted. At trial, he denied having committed the crime and provided an alternative explanation for the evidence that KSP recovered.

Dunn was convicted and appealed.

ISSUE: Is an item found outside the curtilage improperly seized under the Fourth Amendment?

HOLDING: No

DISCUSSION: Dunn argued that the condom was improperly seized during a search by KSP. Trooper Hunt had testified that they met L.M. on property owned by a third party and “then hiked through the woods for about twenty minutes to reach the spot on [Dunn’s] property where L.M. said the sodomy occurred, crossing a fence in the process.” There they searched and finally found the condom under leaves. This location was “just off a four-wheeler trail and near a deer blind,” which was in turn directly behind Dunn’s house. The relevant locations were marked on an aerial photo and a topographic map for the benefit of the jury. Dunn had posted no trespassing signs and had a fence on at least part of the property boundary, which he owned in common with other family members.

The Court discussed the case facts with respect to U.S. v. Dunn¹⁰, Oliver v. U.S.¹¹ and Hester v. U.S.¹² and concluded that the “area that was searched was not within the curtilage of [Dunn’s] home. Although never specifically established, the distance between the junkyard at the rear of the home and the scene was approximately 300-400 feet. Although not dispositive, “this substantial distance” did not support an inference that the searched area “should be treated as an adjunct of the house.” Although the land was at least partially fenced, it was not a fence that marked off the house – it “apparently marked portions of the edge of [Dunn’s] large property rather than enclosing a relatively small area around the home” The usage of the property did not support Dunn’s assertions, nor did the signage and fence, as Dunn could not “convert an open field to an area protected by the Fourth Amendment simply by posting signs and putting up a fence.”

¹⁰ 480 U.S. 294 (1987).

¹¹ 466 U.S. 170 (1984).

¹² 265 U.S. 57 (1924).

The Court agreed that the area in question was “not part of the curtilage” and “therefore was not protected from warrantless search and seizure.” The evidence was properly admitted.

The Court addressed a separate issue concerning the inability of the boy “to provide specific dates for the incidents.” The Court had held previously that in such cases, “a child victim’s vagueness about dates and times of incidents does not create a due process violation.”¹³ The Court also identified an issue with confusion over incidents alleged and testified to by L.M. and Trooper Hunt, and which may have included an uncharged incident for which Dunn had been assured would not be discussed. The Court, however, concluded that Dunn had been aware prior to the trial that the incident would be mentioned and as such, he was on notice to be prepared to address it.

The Court also addressed an issue under KRE 412(c)(1), concerning L.M.’s prior sexual behavior and a possibly false allegation of another sexual crime by a third party. The trial court, after hearing some arguments, declined to allow the evidence to be presented at trial. The Court ruled that a prior ruling had held that allowing testimony about a “purportedly false allegation” would serve to shift the focus and put the victim on trial.¹⁴ Dunn was unable to make a showing that the allegation was, in fact, demonstrably false and as such it was proper to exclude it.

Finally, the Court addressed an issue concerning whether Dunn was entitled to L.M.’s psychiatric records as exculpatory evidence. The trial judge had reviewed the records and provided all of the documents “he believed to be exculpatory.” He specifically did not provide records concerning L.M.’s supposed physical abuse at his father’s hand, the trial court did not find that relevant as it did not involve sexual abuse and it was not recent. The Court agreed the trial court had followed the proper process to review the material and upheld its denial of the records.

Dunn’s convictions were affirmed.

SEARCH & SEIZURE – EXIGENT ENTRY

Brumley v. Com., 2012 WL 592251 (Ky. App. 2012)

FACTS: In early 2009, Sheriff Riddle (Clinton County) tried several times to execute a felony arrest warrant on Brumley. On May 29, the Sheriff got a tip that Brumley was home so he went to the house with several officers (apparently KSP troopers). Brumley “cooperated by stepping out of his residence.” As the officers were arresting him, they heard a “rustling inside the trailer” and entered, the sound was ultimately discovered to have been his dog. However, once inside, they observed, in plain view, the components of a meth lab and Brumley was also charged with that offense.

Brumley moved for suppression, which was denied. He was convicted and appealed.

ISSUE: Is it reasonable for officers to enter a location if they suspect another person might be inside?

¹³ Hampton v. Com., 666 S.W.2d 737 (Ky. 1984).

¹⁴ Dennis v. Com., 306 S.W.3d 466 (Ky. 2010).

HOLDING: Yes

DISCUSSION: The Court looked at the exigency of the officers' entry into the trailer. The Court noted that they believed Brumley could have weapons and it was "not unreasonable to suspect another person might be armed inside the trailer when they heard the movement." They discounted his argument that he was alone "because only he answered the door when the police knocked" as it was not expected that every occupant would come to the door to answer a knock, and that given the time, other occupants could be sleeping. The Court agreed that the entry was not unreasonable.

The Court also addressed a claim regarding the chain of custody regarding HCl generators (modified soda bottles). He argued that a brief gap between the time KSP observed the bottles and left the trailer and Riddle's entry to collect the evidence, rendered the evidence inadmissible. There was no evidence presented that suggested the items were altered in any way during that time and the court agreed it was proper to introduce the photo as evidence. (Apparently the items themselves had been destroyed at some point.)

Brumley's conviction was affirmed.

SEARCH & SEIZURE – PROTECTIVE SWEEP

Dieterlen v. Com., 2012 WL 333757 (Ky. App. 2012)

FACTS: On October 27, 2009, Dets. Warner and Bacon (Kenton County PD) went to Dieterlen's apartment, looking for Rose. Dieterlen answered the door and agreed that a woman inside was Rose. The detectives entered, with Warner staying with the pair in the living room and Bacon doing a protective sweep. During that sweep, Bacon saw ammunition scattered on the floor. Dieterlen indicated there was a rifle in the bedroom closet. They learned that Dieterlen was a convicted felon and he was arrested for its possession.

Dieterlen was convicted, and appealed.

ISSUE: Is a sweep for a weapon lawful, after ammunition has been found?

HOLDING: Yes

DISCUSSION: Dieterlen argued that the rifle should have been suppressed because the "search went beyond the parameters of a protective sweep. The Court noted that when making an arrest, officers may do a protective sweep.¹⁵ At the time the sweep was done, Rose was already in custody. Det. Bacon testified that he saw ammunition on the living room floor (as well as in the bedroom when he did the sweep) and he was "justified if asking if there were any weapons in the area as part of a protective sweep."

The Court upheld the sweep and Dieterlen's conviction.

¹⁵ Maryland v. Buie, 494 U.S. 325 (1990).

SEARCH & SEIZURE – VEHICLE

Fields v. Com., 2012 WL 95561 (Ky. App. 2012)

FACTS: On June 1, 2009, Officer Slark (Lexington PD) with his K9 partner, Blitz, were on patrol. Officer Slark stopped Fields for speeding on I-75. Fields presented paperwork for the rental car and said he'd made a quick trip (a turnaround) to Michigan from Alabama to visit his sick mother. Slark noted a bulge of suspected money in Fields's pocket and a CB antenna and a radio inside the car. He also discovered that Fields had a criminal history. As the officer was asking for consent to search, Slark's backup arrived. The appearance of a vehicle with lights and siren activated changed Fields's demeanor. He backed away and got back into his car. Officer Slark tried to intervene as the car rolled away and he was pulled with it. Fortunately, the vehicle stalled. As Slark tried to restrain Fields, Fields tried to grab Slark's gun. He was finally removed from the vehicle. Blitz then alerted on the vehicle and the officers found, in the trunk, nearly 2,000 pills (Oxycontin, Xanax, Lortab, Ecstasy and Dilaudid) and approximately \$30,000 in cash.

Fields was arrested and indicted on multiple counts of Trafficking. He moved for suppression, arguing the duration of the traffic stop was improperly extended and that the trunk search was unlawful. The Court denied the motion and Fields took a conditional guilty plea. He then appealed.

ISSUE: May a drug dog properly alert on substances to which the dog had not been specifically trained?

HOLDING: Yes

DISCUSSION: The Court noted that the "events unfolded rapidly." It did not accept Fields's assertion that the traffic stop was extended, but instead, agreed that Officer Slark had "developed a reasonable and articulable suspicion - independent of the initial basis for the traffic stop - Fields was engaged in criminal activity."

The Court agreed the detention was proper, and further, that the trunk search was justified under Morton v. Com.¹⁶ However, Blitz was only trained to detect five substances. Five pills were sent for testing and did not match any of the substances for which Blitz was trained, which Fields's contended destroyed Blitz's ability to provide probable cause in this case.

Officer Slark noted that Blitz alerted in his normal manner as he'd been trained to do so, in response to the odor of illegal drugs. As such, the Court agreed that the search was proper and upheld the plea.

Stewart v. Com., 2012 WL 246300 (Ky. App. 2012)

FACTS: On May 7, 2009, KSP received an anonymous tip concerning Stewart, alleging that he travelled monthly to Combs's Hazard home to sell Oxycontin. The vehicle, a camouflage painted trailer, was described as currently being at that home. KSP responded. One of the detectives reported he had seen the vehicle (which was distinctive) about 30 minutes before, on the road to Hazard. Trooper Day then spotted it and made a traffic stop.

¹⁶ 232 S.W.3d 566 (Ky. App. 2007).

The trooper asked for ID and for consent, and found Oxycontin in the subsequent search of the vehicle. Stewart admitted having been at Combs' house but denied selling drugs. However, Combs ultimately turned over pills and said they'd come from Stewart.

Stewart was arrested and indicted for Trafficking. He requested suppression and argued that the traffic stop was unlawful. The trial court denied the motion and Stewart was convicted.

ISSUE: May a vehicle stop be based solely on an anonymous tip?

HOLDING: No

DISCUSSION: During the hearing, a detective "testified that the officers had the right to stop the camper just based on the complaint because it was part of their routine procedure." The Court noted that "this statement raises serious concerns about the stop's validity because the law clearly provides that police must have more than an anonymous tip to justify a vehicle stop." It continued, stating "police may only stop a vehicle when they have 'an articulable and reasonable suspicion of criminal activity.'"¹⁷ As such, "the tip must contain more information than that available to a casual bystander" or just more than a description "of a person in a certain vehicle or location." The only thing KSP could corroborate was that the vehicle was, in fact, in the area.

However, Day did allege at some point, apparently, that the vehicle was "swerving" and that would support the stop. Once lawfully stopped, the trooper was free to ask for consent. But the Court continued to discuss the issues surrounding the stop and noted that consent does not necessarily "dissipate the taint of an illegal detention." The "proximity of time between the stop and Stewart's consent, without an independent intervening act, indicates that his consent was not an independent act of free will but, instead, a result of the stop." Had the stop been based solely on the tip, in other words, Stewart's consent would not have cured the problem and the evidence would have been suppressed.

Because the Court did find no reason to question that Stewart had been swerving, however, the Court upheld the conviction.

West v. Com., 358 S.W.3d 501 (Ky. App. 2012)

FACTS: On January 28, 2010, Officer Dunn (Newport PD) was patrolling when he spotted a vehicle with expired plates. He found the driver, West, in work clothes, a female passenger, in dressier clothes and a back seat female passenger, in a nightgown. He asked where they'd been and was told something he knew to be a lie from personal observation. (He also found it odd that the female passenger was the one answering most of his questions.) Nothing returned on warrants for the occupants, but Officer Dunn asked West to get out and West admitted, upon questioning, that he had pills in his pocket.

West was indicted for possession of the pills (which were never identified but presumably a controlled substance) and he moved for suppression, arguing that the officer had no reason to have him get out of the car. He was denied. West then took a conditional guilty plea, and appealed.

¹⁷ Creech v. Com., 812 S.W.2d 162 (Ky. App. 1991).

ISSUE: May an officer have a subject get out of a vehicle after the initial reason for the stop was concluded?

HOLDING: No

DISCUSSION: West did not contend that the stop was unlawful but that his alleged consent to get out was not voluntarily “because any reasonable person under the circumstances would not feel free to refuse the officer’s request.” The Court looked to Pennsylvania v. Mimms and noted that during a lawful stop, the officer was free to ask the driver out of the car.¹⁸ However, the question is whether it was lawful to continue to detain West, after the purpose of the stop was concluded, and the Court concluded that since the officer had learned nothing new that would permit the continuation of the stop the officer did not give sufficient reason to do so.

West’s plea was vacated.

Johnson v. Com., 2012 WL 95572 (Ky. 2012)

FACTS: In the spring of 2008, Louisville Metro PD received a tip from a CI that Johnson planned to meet someone to purchase pseudoephedrine. Dets. Healey, Lee and Sheehan did surveillance from two different vehicles. At about 5:30 p.m. they saw Johnson sitting in a vehicle in the parking lot and a few minutes later, Johnson pulled out of the lot and drove away. Det. Healey followed him and observed him take a “hit” off a methamphetamine pipe. He later testified that he immediately recognized the pipe for what it was. Det. Healey stopped Johnson and found methamphetamine and the pipe in Johnson’s lap. He also identified a “heavy solvent odor” coming from the vehicle which he associated with the presence of a lab.

Johnson was arrested. When questioned he admitted to having “inactive ‘one pots’” in the trunk. He was charged with a number of drug-related offenses. Johnson moved for suppression and was denied. He was convicted and appealed.

ISSUE: May an officer’s training and experience support their ability to make a determination of reasonable suspicion?

HOLDING: Yes

DISCUSSION: Johnson argued that Det. Healey lacked reasonable suspicion to make the initial stop. Specifically, he argued that Det. Healey’s statement that he saw Johnson hold a lighter to the pipe for the hit was “not credible because no lighter was seized” and that the detective’s testimony that such pipes are very small (half the size of a pen) further indicated he could not have seen the pipe. The Court reviewed Det. Healey’s training and experience and agreed he was certainly capable of making the determination that Johnson was, indeed, smoking methamphetamine.

Johnson’s conviction was affirmed.

SEARCH & SEIZURE – VEHICLE - PRE-GANT

¹⁸ 434 U.S. 106 (1977).

Artis v. Com., 360 S.W.3d 771 (Ky. App. 2012)

FACTS: Artis was stopped by Officer Beard (Hopkinsville PD) for a minor traffic offense. Artis did not have an OL in his possession and Beard learned it was suspended. Artis was arrested and his vehicle searched. Marijuana was found inside and ultimately, more marijuana and a gun were found in the trunk. As Artis was a convicted felon, he was charged with possession of the firearm. In the interim, Arizona v. Gant was decided and he moved for suppression of the evidence. However, the trial court ruled that the “arresting officer had properly relied on the applicable precedent at the time of the search” and denied the suppression.

Artis took a conditional guilty plea and appealed.

ISSUE: Is an arrest made as a result of a pre-Gant search valid?

HOLDING: Yes

DISCUSSION: The Court held his appeal in abeyance because the U.S. Supreme Court was reviewing Davis v. U.S. When that case was decided on June 16, 2011, Artis’s case was returned to the docket. The Court noted that the facts were not in dispute and that at the time the search was conducted, the “police officers had only the precedent at the time to rely upon.”

The Court also agreed that precedent indicated that the Kentucky Constitution “provides no greater protection than does the federal Fourth Amendment.”¹⁹ The Court upheld the decision of the trial court.

INTERROGATION

Com. v. Ferreiro, 2012 WL 762038 (Ky. App. 2012)

FACTS: On January 2, 2010, Ferreiro was arrested charged with Rape, Sodomy and related offenses in Jefferson County. The victim was his girlfriend, Amy. Det. Grissom (Louisville Metro PD) asked to interview him, but Ferreiro told him no. He then asked “what the charges were” – to which Det. Grissom responded. Ferreiro then said “I was drinking, I was on pills, I don’t remember anything.”

On the day of trial, he moved to suppress the evidence, claiming the statements were not voluntary and that he “did not knowingly or intelligently waive any constitutional rights.” Det. Grissom testified that he had not given Ferreiro his Miranda warnings “because it had not been necessary after Ferreiro stated that he would not answer any questions.” He also stated that he had asked for DNA which Ferreiro had agreed to provide.

Despite the fact that most of the proceedings were in English, which Ferreiro was able to speak, the trial court concluded that since English was not his primary language it was proper to suppress the statement. The Commonwealth immediately appealed.

ISSUE: Is telling a suspect the charges against them interrogation?

¹⁹ LaFollette v. Com., 915 S.W.2d 747 (Ky. 1996).

HOLDING: No

DISCUSSION: The Commonwealth argued that the argument that English was not Ferreiro's primary language was not supported by the evidence nor was it relevant. The Commonwealth conceded that Ferreiro was in custody but argued that he was never interrogated and that the statement "was a voluntary and spontaneous utterance which was not precipitated by any interrogation, question or other action by Det. Grissom."

The Court agreed that the detective's act of telling the charges, are statements normally made "attendant to arrest and custody." The Court agreed the statement was not the result of custodial interrogation and as such, should not have been suppressed.

TRIAL PROCEDURE/ EVIDENCE – HEARSAY

Warick v. Com., 2012 WL 601246 (Ky. 2012)

FACTS: During Warrick's trial for drug trafficking, Det. Underwood (unidentified law enforcement agency in Floyd County) "testified to a great deal of hearsay evidence," including what the informant told him about what Warick had said and details of a phone conversation between the two. He identified a pill bottle as that which the informant had claimed to have gotten from Warick.

Warick objected to the admission of the hearsay, but his motion was overruled. He was convicted and appealed.

ISSUE: May an officer testify in hearsay?

HOLDING: No

DISCUSSION: The Court agreed that the detective's statements were hearsay, and not admissible under any hearsay exception. It noted that, however, an officer "may testify about information furnished to him only where it tends to explain the action that was taken by the police officers as a result of this information and the taking of that action is an issue in the case."²⁰ The Court, however, ruled that in this case, the error was harmless in the face of his otherwise overwhelming guilt.

TRIAL PROCEDURE/EVIDENCE – PRIOR BAD ACTS

Carter v. Com., Oliver v. Com., 2012 WL 991650 (Ky. 2012)

FACTS: On August 27, 2009, Church was at home with family. Oliver called Church's home to talk to Julie (Church's sister-in-law) with whom he had a child. Church told Oliver not to call again as he'd assaulted Julie in the past. Eventually the argument devolved to threats, although there was disagreement as to what was actually said. An hour or so later, a vehicle showed up at Church's home, with Brown driving, Carter in the front passenger seat and Oliver behind Carter. Carter got out and put a gun to Church's neck, and then Oliver got out. Joyce, Church's wife emerged and attacked Carter and a melee

²⁰ Chestnut v. Com., 250 S.W.3d 288 (Ky. 2008).

ensued, during which Oliver and Carter assaulted Joyce. Church went inside to see if someone was calling the police and when he came back out, he saw Carter striking Joyce in the back of the head with the gun. Oliver and Carter went to the car, and Carter shot at the Church family several times, although no one was struck.

Ultimately, Carter and Oliver were arrested by Sheriff Kerrick (Meade County) after Sheriff Kerrick spotted the vehicle, with Oliver driving, "operating on three tires and a rim, with a busted windshield." Deputy Matti searched Carter and found cash, cocaine and Xanax on Carter, and a gun in the glove box. Oliver did not testify at trial but had stated that he had left the scene at the Church home before anything had occurred.

During the trial, Church mentioned that Oliver had struck his sister-in-law in the past. Carter was convicted of Assault, Wanton Endangerment and several controlled substance charges. Oliver was convicted of Assault 2nd and related offenses. Both appealed.

ISSUE: Is a minor mention of prior bad acts sufficient to overturn a verdict?

HOLDING: No

DISCUSSION: Oliver argued that the Court improperly admitted evidence of prior bad acts, under KRE 404(b), because of Church's comment, (Over Oliver's objection, the Court the Court refused to admonish the jury or give a mistrial.) The Court agreed that even if the evidence should have been excluded, the error was harmless. The prosecution did not elicit the testimony or try to use the information against Oliver in any way.

Oliver's conviction was affirmed.

Carter argued that he was entitled to a jury instruction on both self protection and protection of another, as well as an instruction on Assault 4th as a lesser included offense of Assault 2nd. He based this assertion on his allegation that when he arrived, Church approached his car with a ball bat.²¹ The Court agreed that the evidence indicated that Church was at his own home and that Carter (with the others) was the initial aggressor. With respect to the Assault charge, he argued that it was reasonable to find he was unaware that holding a gun to someone's skin would cause a scratch (a physical injury). The Court agreed, however, that the firearm was a deadly weapon and that the words "impairment of physical condition" in the statute "simply mean[s] 'injury.'" The Court found no error in not instructing the jury on the Assault 4th charge.

Carter's conviction was affirmed.

Gabbard v. Com., 2012 WL 991697 (Ky. 2012)

FACTS: On April 20, 2006, Gabbard shot and killed his girlfriend, Krystofik, in Lee County. He claimed the shooting was an accident, but Kelly, Krystofik's daughter, testified that they had been bickering and Gabbard had been drinking. Ultimately he was convicted and appealed.²²

²¹ Church had admitted picking up a "child's bat" when the trio arrived.

²² This is actually the second appeal in the case, the first having dealt with an unrelated jury issue.

ISSUE: Is a single "bad act" that occurred some years before admissible?

HOLDING: No (as a general rule)

DISCUSSION: Gabbard argued that it was improper for a witness to testify about Gabbard shooting at a toy some 4 ½ years earlier, which had annoyed him. The Court reviewed the matter under KRE 404(b) and KRE 403, and noted that it was critical to "focus on the exact nature of the crime for which [Gabbard] stands convicted." The jury was instructed only on wanton murder, second-degree manslaughter and reckless homicide, and he was convicted of wanton murder. The trial court ruled it relevant and that it indicated that it showed his "indifference to human life" but shooting in close proximity to others. The Court noted, however, it also showed he was skilled in handling guns in that he could hit "a small toy between the eyes." It also showed he was easily angered, especially when drinking, as was the circumstances in the case at bar.

The Court noted that "the rationale that this evidence should be admitted because it shows conduct that was possibly wanton is the very rationale prohibited by KRE 404(b)." The idea that it was probative evidence was "pretty thin." The conduct took place years in the past and was highly prejudicial.

Gabbard's conviction was reversed.

Driver v. Com., 361 S.W.3d 877 (Ky. 2012)

FACTS: Over the night of January 6-7, 2009, Driver and his wife, Vera, had a physical fight. Deputy Melone (Marshall County SO) responded to a 911 call about it and was admitted by the Driver children. Driver said nothing was going on and his wife was taking a shower. However, she emerged and explained about the fight, and she later gave a written statement. As a result of the statement, Driver was charged with attempted murder, but Vera changed her story to describe "a far more subdued altercation" and attempted to explain away her injuries.

At trial, however, the Commonwealth introduced her initial statement as a "prior inconsistent statement," as well as to earlier instances of domestic violence with Vera and Melinda (Driver's former wife) as victims.

Driver was convicted of Assault 1st Degree and appealed. The Kentucky Court of Appeals affirmed his conviction and he further appealed.

ISSUE: May evidence of "prior bad acts" be introduced in rebuttal or to prove an inconsistent statement?

HOLDING: Yes

DISCUSSION: First, Driver argued that it was improper to admit the evidence of the alleged assault against his former wife, under KRE 404(b) – prior bad acts. The only evidence admitted was that for which there had been a criminal conviction. The Court differentiated between those acts that involved Vera and those that had involved Melinda. With respect to Vera, the Court agreed that as a general rule, "prior bad acts of a similar nature committed by the defendant against the victim will usually be admissible," unless too remote in time. In this case, the alleged acts against Vera had occurred between 4-5 years before, but

were introduced only after Vera's attempt to minimize what had actually occurred. The Court agreed it was proper to admit the evidence and to impeach her claims that her injuries were an accident.

With respect to the evidence concerning Melinda, and assaults that occurred 12 years before the case at bar and involved a third party, the Court found it to be clear error to admit that evidence. Because of that error, the Court reversed his conviction and remanded the case.

Barnhill v. Com., 2012 WL 601224 (Ky. 2012)

FACTS: On the day in question, Smith left her 13-month-old daughter, Kiara, with Barnhill, her boyfriend, while she attended a funeral. Approximately 3 hours after she left, however, Barnhill called 911 to report that the child "had fallen and struck her head on a table." He reported she was "incoherent and breathing heavily." However, when EMS arrived, Kiara was not breathing and lacked a blood pressure or pulse. She was ultimately pronounced dead. The ER doctor noted evidence of significant head trauma not consistent with Barnhill's statement about the accident. Det. Scroggins (KSP) responded to investigate, speaking with the doctor, Smith and Barnhill. Barnhill consented to a search of the apartment, which he shared with Smith. A week later, Barnhill, through his attorney, admitted he lied and stated he had tripped and fallen on the child.

Prior to the trial, the Commonwealth had given notice it intended to introduce KRE 404(b) evidence as to "prior bad acts" alleged against Barnhill – specifically, other acts of abuse that had apparently occurred previously. (The medical evidence included old head trauma.) The trial court allowed evidence to be submitted. Barnhill was indicted, and ultimately convicted, of Wanton Murder. He appealed.

ISSUE: May records of abuse not specifically tied to the defendant be introduced?

HOLDING: No

DISCUSSION: At the outset, the Court concluded that it was improper for the trial court not to tender an instruction on Manslaughter 2nd and reversed the conviction. However, it also elected to address several other issues, because the same issues would also come up during another trial.

The Court, ruled that the hospital records, most of which detailed injuries not specifically linked to Barnhill, were "more prejudicial than probative in the context of the case." Their admission could have created "an opportunity for a juror to infer that Barnhill had abused Kiara before...." The Court noted that the reports should have been considered not just for their admissibility under KRE 404(b) but also its probative value under KRE 403.

Barnhill's conviction was vacated and the case remanded.

TRIAL PROCEDURE/EVIDENCE – EXPERT

Lukjan v. Com., 358 S.W.3d 33 (Ky. App. 2012)

FACTS: On August 19, 2006, at about 5:20 p.m., firefighters were called to a fire at Campbell's Gourmet Cottage, in St. Matthews (Jefferson County). Chief Seng (St. Matthews' FPD) requested the

Louisville arson squad, as he could not determine the “obvious source” of the fire. Sgt. Leonard and Major Ott responding. In the process of securing the building, they “discovered a stack of financial documents relating to Lukjan’s business in two outdoor, open trash cans.” They collected the documents. Three years later, Lukjan was charged with Arson, burning personal property to defraud an insurer and committing a fraudulent insurance act.

During the 2010 trial, three “fire scene investigators” were designated experts and testified that the fire was intentionally set in the basement. A forensic accountant (ATF) testified that based upon the documents found, Lukjan’s financial situation was “desperate.” However, court rulings prevented the defense from using a fire scene expert because he was not a licensed private investigator, pursuant to KRS 329A. Other evidence, including data to support that lightning may have been the cause of the fire, was also excluded.

On July 23, 2010, Lukjan was convicted in Jefferson County of Arson. She appealed.

ISSUE: Does the requirement in KRS 329A that an arson investigator be a license private investigator apply to expert witnesses who testify in a trial?

HOLDING: No

DISCUSSION: The Court first addressed the defense expert who was excluded. Professor Hicks, an EKU fire science professor, was not permitted to testify, although his considerable curriculum vita was published to the jury. However, the Court interpreted KRS 329A.015 as requiring that he be licensed as a Kentucky private investigator in order to testify, and it was undisputed that Hicks is not a PI.

Although usually a review of a decision on an expert witness is done under an “abuse of discretion standard,” in this case, because the trial court actually involved a statutory interpretation, it did the analysis “de novo.” The Court concluded that although the trial court’s interpretation was understandable, it was, in fact, in error. The Court agreed that “providing testimony in a court proceeding is not the equivalent of selling the public one’s services as a private detective.” The court looked to an earlier unpublished case, Hincapie v. Charron, in which the court allowed an expert witness to testify under similar circumstances.²³

Further, the Court agreed that excluding his testimony was not harmless error. Without Hicks’ testimony, Lukjan was left with “no expert opinion rebutting the Commonwealth’s evidence that arson was indeed the cause of the fire.”

The Court also addressed the propriety of admitting several of the Commonwealth’s witnesses (Sgt. Leonard, Major Ott and the ATF witness) without conducting Daubert hearings.²⁴ “To fulfill its function as a ‘gatekeeper’ of proper opinion evidence, the circuit court must engage in a two-fold inquiry: (1) whether the proposed evidence consists of specialized, technical, or scientific knowledge (2) that ‘will assist the trier of fact to understand or determine a fact in issue.’”²⁵ In most cases, the trial court will conduct a preliminary hearing on the need for expert testimony and whether a particular witness has sufficient knowledge to qualify as an expert. At a minimum the Court must “make an affirmative statement on the record” that it has reviewed the material submitted and concluded that the testimony to be proffered is

²³ 2006 WL 1947765 (Ky. App. 2006).

²⁴ Daubert v. Merrell Dow Pharmaceuticals, Inc., 509 U.S. 579 (1993).

²⁵ Goodyear Tire and Rubber Co. v. Thompson, 11 S.W.3d 575 (Ky. 2000).

reliable. The decision not to hold a hearing is subject to an abuse of discretion standard. In this case, the Court agreed that the trial court “failed to adequately perform its gatekeeping function because it neither conducted an evidentiary hearing nor considered a record we could consider ‘adequate.’” (There was no indication that the court actually reviewed their credentials although they were permitted to testify as to the “methodology of their fire scene investigation and their opinions regarding the cause and original of the fire.”) The Court agreed that their record may have been adequate to determine they were sufficiently expert, but there was no indication that the trial court actually reviewed an adequate record. Further, without these witnesses, there “was little direct evidence that the fire was the result of arson, rather than some other cause.” The Court noted that “the testimony of the witnesses now at issue was powerful given their positions of esteem and authority.”

Lukjan also objected to the introduction of a “stack of overdue bills” found by the fire investigators in open trash cans located two feet behind the back door of the business. They were “near a sidewalk which was shared by the business and a high school.” One document was fully visible, viewing the rest required that some be picked up. It was conceded that the trash cans were on private property and that if they had simply looked at the “only visible document, they could not tell that a crime had been committed.” The trial court found that the search was not illegal, in that Lukjan had “no privacy interest in the documents because she had discarded them in trash cans located ‘in the course of a public walkway,’”

With respect to the first issue, the Court agreed it was clear error to exclude the testimony of Professor Hicks and reversed the conviction based upon this issue. As the Court reversed the conviction on the first issue, it did not need to rule on the remaining issues, but did so to provide guidance in any subsequent trial. The Court agreed that it was improper to admit the opinion testimony of the Commonwealth’s witnesses without first considering their credentials. Finally, the Court agreed that the documents were legally obtained as Lukjan had no expectation of privacy in items left in the trash near a public walkway, and in fact, there was no attempt to conceal the trash by placing it in a bag or putting a lid on the can.

Lukjan’s conviction was reversed and the case remanded.

Tillman v. Com., 2012 WL 669931 (Ky. App. 2012)

FACTS: On September 16, 2008, Massie, a CI, drove a friend, Shawna, to a fast food restaurant in Lexington. On the way there, Shawna used Massie’s phone to call someone, and when they arrived, a man was waiting for her. She met with the man at his car and returned to Massie’s car with crack cocaine. Massie contacted the Lexington PD and reported what had occurred to Det. Lube. He provided a description and vehicle identification for the other man.

Officer Karsner and his K-9, Ronin responded. Ronin walked around the suspect vehicle and alerted. The officer went to the drive through window and asked about the car; an employee (Tillman) responded it was his and went outside. The officer learned that it was not, in fact, registered to Tillman and that it was considered a “community car” used by employees and owned by a former employee. Tillman was adamant the car did not contain drugs and refused consent, but the officer explained that he could search based upon the alert.

He found items, including cocaine residue, in the vehicle and arrested Tillman. He found almost \$500 on Tillman’s person, as well. Tillman was indicted for trafficking. He moved for suppression, which was denied. He was then convicted and appealed.

ISSUE: May an expert be called to testify about drug trafficking?

HOLDING: Yes (as a general rule)

DISCUSSION: Tillman objected to the testimony of Det. Ford, an experienced narcotics officer. He testified as an expert “regarding typical practices utilized in the investigation of drug cases.” His testimony followed the defense’s questioning of the K-9 officer, who was unable to answer certain questions because it was outside his area of expertise. The trial court agreed that having opened the line of questioning by suggesting that the investigation was somehow improper, meant that Ford’s testimony must be admitted. The Court noted that prior case law supported “allowed expert testimony by a police officer concerning the drug trafficking enterprise so long as the evidence is probative rather than simply prejudicial.” In this case, the Court agreed that the testimony was proper.

The Court did express concern that a single photo was presented to Massie to identify Tillman, but did not find it was “so unduly suggestive as to fatally taint the identification.”

Tillman’s conviction was affirmed.

TRIAL PROCEDURE/ EVIDENCE – TESTIMONY

Bartley v. Com., 2012 WL 752021 (Ky. App. 2012)

FACTS: On July 31, 2007, KSP was dispatched to the Bartley’s home in Jeffersonville. A family member was concerned about the welfare of Pamela and Carl Bartley. The troopers got a key from the family and searched the home, finding Carl’s body hidden in the garage, wrapped in a blanket, covered in boxes and located between two cars. He had been shot in the back of the head. The family “indicated their belief that Pamela was responsible” for the murder due to their “tumultuous marital relationship: that had escalated that month.” Pamela had been heard threatening to kill Carl and she had allegedly brandished a weapon at him. A young grandchild later testified that Pamela had told him that she planned to kill Carl.

In September, after having been threatened by the brother of a woman with whom Carl had been having an affair prior to his death, Pamela “engaged in a lengthy recorded conversation” with Det. Bowling (KSP). She said she didn’t want to discuss the murder, but implicated the brother (Lee) several times. She remained silent as to her whereabouts during the murder. Her moods swung wildly during the conversation, from laughter to crying to anger. Eventually she was arrested on an unrelated warrant.

Pamela was indicted for the murder, but the initial trial in Montgomery mistried. Venue was changed to Rowan County. During that trial, the Court admitted the recorded conversation with Det. Bowling as well as evidence that “multiple guns” were seized from the house that proved not to be the murder weapon, which was in fact never found. (A .38 caliber revolver that she was known to carry, and which matched the round recovered, was also never found.) She was convicted of Manslaughter, 2nd degree and appealed

ISSUE: May a subject’s willingness to talk about topics other than the crime at hand negate a claim that they invoked their right to silence?

HOLDING: Yes

DISCUSSION: Pamela Bartley argued that it was error to admit her conversation with Det. Bowling, and the error was compounded when the prosecution was permitted to “elicit testimony regarding her pre-arrest silence as captured on the audio recording.” (The trial court had several hearings regarding the recording and did redact small portions of it.) The Court noted that although she specifically invoked her right to silence with respect to everything other than the events of that particular day, she repeatedly “attempted to manipulate the discussion to implicate [Lee] in the murder. She willingly discussed other events until Det. Bowling began to question her, and only then did she fall silent. That pattern continued throughout the interview. The Court agreed that her “subsequent actions constituted a minimum an implicit waiver of that asserted right.”²⁶

With respect to questioning Det. Bowling “regarding her pre-arrest silence” and mentioning it in closing, the Court noted that the defense did not object at the time. The Court found no clear error and noted that despite the fact she was charged with intentional murder, the jury returned a verdict on a lesser charge. With respect to the mention of the guns, the Court agreed that in general, “guns unrelated to the crime are inadmissible”²⁷ but that rule is not absolute. The Court agreed, however, that it was error to admit any mention of the weapons but held that the error in this case was harmless.

Bartley’s conviction was affirmed.

Ladd v. Com., 2012 WL 601228 (Ky. 2012)

FACTS: During the months prior to Christmas, 2007, Ladd had been in a relationship with Jasmen Quarles. Through her, he was acquainted with her sister, Jackie, and Jackie’s two young daughters, T.Q. and J.Q. T.Q., age 6, later testified that during that time, the girls were with Jasmen and Ladd, and that on the morning in question, he grabbed her and reached inside her panties, digitally penetrating her. When J.Q. came in, he whispered to T.Q. that “he would kill her and her mother if she told anyone.” However, she immediately reported to J.Q. what had happened, and J.Q. immediately told Jasmen and then her mother. Jackie immediately took her to the hospital, where it was discovered that her hymen had recently been torn.

Ladd argued that he had not even been with them during the time frame, but he was convicted on Sexual Abuse 1st as well as PFO 1st. He appealed.

ISSUE: May hearsay be used as evidence of an excited utterance?

HOLDING: Yes

DISCUSSION: Ladd argued that it was error to allow J.Q. and Jackie to repeat what T.Q. had told them, as it was hearsay. However, KRE 801A allows that such prior consistent statements may be admitted by a third party when it is used “to rebut an express or implied charge against the declarant of recent fabrication or improper influence (sic) or motive.” But, the Court agreed, the testimony was admitted prior to any

²⁶ See Ragland v. Com., 191 S.W.3d 569 (Ky. 2006).

²⁷ Major v. Com., 177 S.W.3d 700 (Ky. 2006).

suggestion that T.Q. statements were a recent fabrication. When the trial court later realized that KRE 801A did not apply, it referred to KRE 803, looking specifically to admitting the statements under the “present sense impression” or her “existing state of mind.” The appellate court, however, concluded that it was more appropriate to admit the statements as “excited utterances” because “experience teaches that one does not fabricate or tailor the statements one makes under the immediate stress of strong emotion.” The Court agreed that the statement was not the “product of reflection and deliberation.”²⁸ T.Q.’s statement to her sister “followed within mere moments of the alleged abuse” and was hampered by the normal fear of a child. She was still frightened when she told her mother what occurred.

Ladd also argued that the medical records (which were properly self-authenticated under KRS 422.030) should have been excluded as testimonial hearsay under Crawford v. Washington.²⁹ However, Ladd failed to object to the admission of the records and the Court refused to consider the issue.

The Court agreed there was sufficient evidence to support his conviction was Sexual Abuse. It further agreed that his conviction for Intimidating a Participant in a Legal Proceeding (for his threat to kill T.Q. if she spoke to anyone) must be reversed, as at the time of the threat, there was no active case.

Beasley v. Com., 2012 WL 991716 (Ky. 2012)

FACTS: Shortly after Day purchased a house in McCracken County, in March/April, 2010, he was contacted by Beasley about purchasing some flooring to install in the house. Day gave Beasley \$600 for the purchase but Beasley never returned with the flooring. Day sent a number of text messages, which became progressively more angry and invited Beasley to fight. Beasley responded in kind, with text messages that “could fairly be described as taunting and/or vulgar.” Day contacted the KSP and eventually gave him his phone as evidence.

Beasley was indicted and convicted on Theft by Deception (over \$500) and Harassing Communications, as well as PFO 1st. He appealed.

ISSUE: Are text messages that are the basis for a charge of harassing communications required to be provided to the jury?

HOLDING: Yes

DISCUSSION: Beasley argued it was improper to admit certain of the text messages. The Court ruled that since Beasley had been charged with Harassing Communications, and because the messages lacked any purpose but to “harass, annoy or alarm” Day, they were admissible. Day ultimately read the messages to the jury and described an image he had been sent. (Day agreed that he’d deleted the messages he’d sent from his own phone, and that some of the messages from Beasley may have been responses to messages he had sent.) Beasley argued that each message should have been ruled on individually and that they somehow fell under KRE 404(b) – evidence of prior bad acts. The Court noted that the messages were, in fact, the basis for one of the charged crimes, and served also to reinforce the theft charge as well. The Court agreed the messages were relevant and admissible.

²⁸ Hartsfield v. Com., 277 S.W.3d 239 (Ky. 2009).

²⁹ 541 U.S. 36 (2004).

Beasley argued that admitting all of the messages (through a transcript) had a prejudicial effect that outweighed their probative value. However, since at least a couple of the messages were arguably in response to messages from Day, the Court reasoned that had the trial court excluded the "sexually-oriented messages," the jury may have been inclined to believe the messages were more of a back and forth rather than harassment. The Court concluded that it was not error to admit all of the messages.

The Court affirmed Beasley's convictions on both charges.

TRIAL PROCEDURE/EVIDENCE – HEARSAY (SANE)

James v. Com., 360 S.W.3d 189 (Ky. 2012)

FACTS: James and Frazier "were involved in a tumultuous relationship for several years," beginning in 2002. Frazier claimed that James had struck her on multiple occasions, and she obtained "a series" of EPOs and DVOs. In some cases, "she would 'cry wolf' to the police, making false claims and self-inflicting injuries so that James would be jailed. (She would do this when he claimed he would leave her.) Both parties repeatedly violated no-contact orders. On January 16-17, 2008, "in violation of an existing domestic violence order, they were staying in the same apartment." On that evening, she alleged that he assaulted her for approximately five hours. During one of the "short breaks" from the assault, she realized he was sexually aroused and she testified "that she believed if she allowed sexual intercourse, he would stop beating her." When he permitted her to leave the next morning, she went to a shelter and the police were contacted.

Frazier was taken to an ER and found to have significant injuries, including a "broken jaw, a broken nose, and several broken ribs." The SANE nurse who examined her could not give an opinion as to whether the sex was consensual or nonconsensual.

James was charged, and ultimately tried, on charges of Rape 1st, Sodomy 1st, Sexual Assault 1st, Assault 2nd, Assault 4th, Sexual Abuse 1st, Wanton Endangerment 2nd, Unlawful Imprisonment 1st and Violation of a Protective Order. He was convicted of Rape, Assault 4th, Unlawful Imprisonment 1st and Violating the DVO. Remaining charges were dismissed or mistried, but he was also PFO. James appealed.

ISSUE: Is everything contained in a medical record admissible?

HOLDING: No

DISCUSSION: James challenged the introduction of medical records as containing "prejudicial hearsay" that "should have been redacted." The registration form indicated that Frazier was a "rape victim" and that a "sexual assault" had occurred and also included notes from the SANE that appeared to be direct quotes from Frazier. James is not identified by name, however. The records were mentioned during the testimony of the nurse "with questions about diagnoses made by other medical personnel and recorded in the records." When James objected, the Court agreed that it "would need to come in through another witness." However, no other witness testified to the records and the prosecution rested. The next morning, the prosecution asked to reopen its case and to introduce certified copies of the records. The documents were admitted. The Court agreed that so long as they were properly authenticated, medical records may

normally be admitted as business records.³⁰ However, it is only permitted with respect to “matters that the person making the record had personal knowledge of” and such records “may contain a second level of hearsay – for example, statements made by the victim who is being examined – that is not included in the business records exception.” Some of the statements, those “describing the injuries sustained and their source” may be admitted as “statements for the purpose of medical diagnosis and treatment and describing medical history, or past or present symptoms, pain, or sensations, or the inception of general character of the cause of external source thereof insofar as reasonably pertinent to treatment or diagnosis.”³¹ But some of the statements became a triple hearsay, when Frazier repeated statements made to her by James and she then repeated them to the SANE, who then repeated them in court, because they were “not necessary or pertinent to her diagnosis or treatment, nor did it describe her medical history or the source or character of the injuries.” Conclusory statement that she had been raped or subjected to sexual assault, made by medical personnel as “merely opinions or conclusions” are likewise inadmissible. However, in this case, because of the other facts in the case, the Court concluded that their admissibility was harmless error. The Court agreed that statements made to a SANE “were testimonial in nature” because they act in cooperation with law enforcement.³² However, Frazier did testify and was cross-examined, so any statements she made to the SANE did not violate Crawford v. Washington.³³

Among other issues in the case, James also argued that the prosecution failed to prove that he forced Frazier into sex because it did not prove that the assault was done for the purpose of forcing her to engage in sex, and noted that he did not initiate the sex nor did he threaten Frazier. (Frazier testified that she thought the sex “would be a way to calm him down.”) The Court, however, noted that the jury could reasonably believe that Frazier “believed she had to engage in sexual acts to prevent further beatings.” The Court looked to Frazier’s state of mind and noted that James’s action could have “presented a choice between engaging in sexual conduct or suffering further violence.” The Court agreed that while there must be a nexus between the sex and the violence, it had been demonstrated in this case and that Frazier had submitted to his “implicit sexual advance to avoid further violence.” His display of obvious arousal, combined with kissing her, “was tantamount to a request for sex.” She testified to her fear and belief that if they did not have sex, he would further hurt her. The Court found that “enough to prove forcible compulsion.”

With respect to his argument that he was not provided with exculpatory evidence, as required under Brady,³⁴ James claimed that statements made by Frazier before the trial, in which she stated “she was not raped and that she started sex” differed from the statements actually disclosed to him. The prosecutor also stated “that Heather [Frazier] had been uncomfortable describing what happened as rape, but that her story had always been consistent.” The Court noted that a “victim’s legal conclusion about an assailant’s behavior simply is not exculpatory, especially in a case like this one where the victim continued not to want to think of herself as a rape victim and appeared not to want the assailant convicted of such a serious offense.” Further the Court found that the statements turned over to the defense, and the challenged statements, “were all substantially the same.”

³⁰ KRE 803(6).

³¹ KRE 803(4).

³² Hartsfield v. Com., 277 S.W.3d 239 (Ky. 2009).

³³ 541 U.S. 36 (2004).

³⁴ Brady v. Maryland, 373 U.S. 83 (1963).

Finally, with respect to other hearsay allegations, the Court addressed a statement made by James to Det. Cohen (Louisville Metro PD). She summarized the statement in a report that was produced in discovery to the defense. The prosecution moved to bar the introduction of the “self serving” portions of the interview and the defense objected, although not specifying the “rule of completeness,” when he argued that the entire statement be introduced. Det. Cohen did repeat some of the inculpatory statements he made and they were admitted under KRE 801A(b). However, the Court agreed that the statements James wanted to admit were inadmissible hearsay that did not fall under any exception. The Court looked to the “rule of completeness”³⁵ and noted it does not open the door to introduce a statement if not otherwise permitted, and excluding the self-serving portions did not distort or change the meaning of the admissions that were admitted.

Finally, the Court agreed that admission of Frazier’s prior statements were appropriate as “prior consistent statements”³⁶ that indicated that she did not change her story and were offered “solely to rebut [James’s] claim that” her story “had changed, had been inconsistent, and had been shown to be partly false, all of which tended to show generally that she was a liar.” It is not hearsay because it is “offered not for the truth of the matter but ‘to rehabilitate ... credibility.’”³⁷

The Court affirmed James’s conviction.

TRIAL PROCEDURE/EVIDENCE - IMPEACHMENT

McPherson v. Com., 360 S.W.3d 207 (Ky. 2012)

FACTS: McPherson, Milligan and Parker were involved in drug trafficking and use in Muhlenberg County for many years. In 2007, Milligan was in trouble for passing bad checks and agreed to work with the Pennyryle Narcotics Task Force to gather evidence on drug trafficking. She gathered evidence against Smith, a well known drug dealer, and who was also a close friend of McPherson. Smith was indicted. “It was apparently known that Lora Milligan was to be one of the witnesses against him and he offered McPherson money and drugs to murder Milligan.” McPherson recruited Parker, who initially rejected the offer, but eventually agreed to cooperate as she was desperate for money.

On June 29, 2007, the two took Milligan to a location with the intent of engaging in drug use. The plan was to substitute insulin for the expected drug. However, Parker backed out at the last moment and emptied the syringe on the floor. McPherson then borrowed a gun and stole some ammunition, and later that night, again met up with Milligan. McPherson shot her in the head. McPherson met with Smith and got paid, and later met up with Parker and another couple. During the evening Parker told the other couple about the murder. Eventually Parker and McPherson, after having gotten more money from Smith, went to St. Louis.

Milligan’s body was found on July 2. Through investigation of her cell phone records, they realized that the last calls were to and from Parker. Parker was already wanted for violating her parole by buying tickets to St. Louis, and she had been arrested for that. McPherson was not arrested there but stayed with Parker.

³⁵ KRE 106.

³⁶ KRE 801A(a)(2).

³⁷ Engbreetsen v. Fairchild Aircraft Corp., 21 F.3d 721 (6th Cir. 1994).

Parker gave a statement that implicated both of them in the murder, as the couple (the Presleys) were at the same time talking to KSP about what they had been told.

Both McPherson and Parker were indicted. Parker took a plea deal for Manslaughter 2nd. McPherson's defense consisted of an alternate perpetrator – Parker and Presley. The Court put, as McPherson claimed, limitations on his ability to discredit Parker. He was convicted and appealed.

ISSUE: May evidence of a prior death threat, that bears no similarity to the current homicide at bar, be admitted as impeachment?

HOLDING: No

DISCUSSION: With respect to the exclusion of the evidence, the Court noted that Parker had apparently made a death threat against a person she believed had informed against her in the past (She took a plea to intimidating from that situation.) McPherson sought to introduce the evidence as impeachment as well as evidence that she “was violently inclined toward ‘informants’ against her.” The Court agreed that a prior felony conviction can be used as impeachment but that it was improper to disclose the underlying crime under KRE 609(a). However, he argued, under KRE 404(b), it might be admissible to prove “motive, opportunity, intent or identity.” In this case, however, the court noted that her “telephone threat, dire as it was, has virtually no similarity to the murder of Milligan” and gives no reasonable probability that “the two acts were committed by the same person.” The Court agreed it was properly excluded.

McPherson also argued that he was “not allowed to question [Parker] regarding other times she had testified or given statements against friends and acquaintances” and that she had a “habit of ‘flipping’ on people when she gets in trouble.” The Court found no evidence, however, that her “flipping” was dishonest, “only that it was self-serving” and upheld the decision to limit that testimony.

Finally, he argued that he was entitled to a “missing evidence” instruction with respect to notes taken by the St. Louis detective who interviewed her there. He admitted at a related hearing that he’d destroyed his notes that covered time prior to a recording that was produced. (The notes were destroyed after being incorporated into a report, which was produced to the defense.) The Court rejected McPherson’s argument that the notes were destroyed because they were exculpatory. The Court equated the destruction “more a matter of routine housekeeping than the suppression of evidence” and RCr 7.24, which makes the official report discoverable, but not the preliminary notes, seems to contemplate that. There was no indication that the notes were not destroyed in good faith and “in accord with their normal practice.” The Court noted that even if she initially denied involvement, that it was quite common “for perpetrators initially to deny their crimes, or for their statements to evolve from a less incriminating version to a more incriminating one.” In fact, she admitted that she did so during the statement. The Court upheld the decision on that issue as well.

McPherson’s conviction was affirmed.

TRIAL PROCEDURE / EVIDENCE – VIDEO

Handley v. Com., 2012 WL 876751 (Ky. App. 2012)

FACTS: On August 4, 2009, Whittaker Guns (Daviness County) was burglarized and a number of weapons, along with ammunition, were taken. Reed, one of the burglars, eventually admitted his own involvement and testified at Handley's trial, implicating Handley as part of the group as well. (Surveillance video showed 4 burglars.) Sappenfield, who had been with the group earlier, testified as to the plan to steal the guns, although he did not participate in the actual theft. He did help dispose of items from the theft, later, however.

During the trial, surveillance video of a local Wal-mart was also shown, which indicated individuals matching those in the gun store video entering a Wal-mart. (Allegedly, while there, they stole gloves to use in the burglary.) During the playback of the video from the gun store, the detective advanced it frame by frame and described the movements to the jury. Upon objection, the Court noted that since the video was dark, it "was necessary to alert the jury to movements which might otherwise be easily overlooked." The video was played at normal speed from that point and the detective "made few further comments regarding the contents of the tape." Handley testified, providing an alibi, but rebuttal evidence indicated he had been in Owensboro that day.

Handley was convicted and appealed.

ISSUE: Is some narration of a surveillance video permitted?

HOLDING: Yes, but see discussion.

DISCUSSION: Handley argued it was error to allow Det. Palmiter to narrate the surveillance videos from both locations. Prior to the objection, the detective had been answering prosecution questions and "making unprompted statements about what was happening on the screen." The Court agreed that "officers are permitted to offer some narrative testimony while a crime scene video is played for the jury."³⁸ However, they are limited "to testimony on matters about which the witness has personal knowledge, is rationally based on their own perceptions, and which is helpful to the jury."³⁹ The Court noted that the detective's knowledge of the situation was sufficient to allow his testimony, as he did not interpret "the images being shown, provided an identification of Handley as a perpetrator of the burglary, or invaded the fact-finding province of the jury." With respect to the Wal-mart video, his testimony again served only to orient the jurors "to the scenes being depicted, calling their attention to activities which might otherwise have easily been missed, and explaining how and why he obtained the tape from Wal-mart." The Court found the error, if any, was harmless.

The Court also addressed the issue of the prosecution, which called Sappenfield as a witness, being allowed to question him as a "hostile witness" under KRE 611. The Court agreed that given his involvement in the offense, it was appropriate to allow him to be so designated.

Handley's conviction was affirmed.

³⁸ Cuzick v. Com., 276 S.W.3d 260 (Ky. 2009).

³⁹ KRE 602; KRE 701.

TRIAL PROCEDURE/EVIDENCE - DISCOVERY

Newsome v. Com., 2012 WL 751971 (Ky. App. 2012)

FACTS: On March 26, 2009, Newsome was accused of shooting Tracy Heaberlin, the estranged husband of Newsome's girlfriend, Donna. Heaberlin later alleged that as he was backing out of his driveway in Lawrence County when he noticed a vehicle he'd never seen before. As he drove off, the vehicle was right behind him. The vehicle pulled alongside and then the driver (Newsome) pointed a gun at him. Heaberlin tried to get away but the gunshot broke his upper arm. He wrecked his car and was rescued by a passing motorist. Deputy Sheriff Wheeler found Heaberlin's car and interviewed Donna. He learned that Newsome was staying with Setty, who owned a vehicle matching the description of the suspect vehicle. KSP located the car and both parties were detained; Setty gave consent to a search of the car. A number of items were found, but no weapon.

Deputy Wheeler interviewed Newsome, who had waived his Miranda rights. He denied any involvement in the shooting. Upon closer inspection of the items found in the car, the deputy discovered that a Pepsi can contained handgun and rifle ammunition.

Newsome was charged. Two days before trial, the Commonwealth produced a lab report from KSP that concluded that the bullet found at the scene shared the same "observed characteristics" as that found in the can. Newsome immediately moved to have that evidence held back from trial and for a continuance to have an opportunity to get his own witness. The motion was denied and the case went to trial. At trial, the expert discussed her method of matching the bullets.

Newsome was convicted and appealed.

ISSUE: May last minute production of evidence delay a trial?

HOLDING: Yes

DISCUSSION: Newsome argued that the last minute disclosure of the forensic evidence was improper and that he was entitled to a continuance. The Court weighed the factors required to decide upon a continuance and noted that the bullets were critical pieces of evidence for the prosecution. The denial of the continuance allowed the prosecution to present evidence without Newsome having the opportunity to contest it. Unrebutted expert testimony carries a great deal of weight before a jury.

The Court agreed Newsome was entitled to have been given a continuance, and reversed his conviction. The Case was remanded to Lawrence Circuit Court for further proceedings.

CIVIL

Burden v. Hampton & Hicks, 2012 WL 162710 (Ky. App. 2012)

FACTS: On March 19, 2007, a drug dog involved in doing a random sweep of cars in the Kenton County High School parking lot alerted on Burden's car. Burden, a student, was summoned from class and consented to a search. Officers found a marijuana seed in the ashtray and a "trace amount of a green,

leafy substance on the floorboard.” She was arrested and charged, but the charges were dismissed prior to trial. (During that time she was suspended from school, as well.)

Burden filed suit against the officers involved, Officers Benton (Kenton County PD), Officer Hampton and Officer Hicks (Independence PD). She initially asserted a federal claim under 42 U.S.C. §1983 as well as state claims, but agreed to dismiss the federal claim and allow the matter to be resolved in state court. Following discovery, the officers requested summary judgment and the trial court dismissed the case against all three officers. Burden appealed the dismissal against Officers Hampton and Hicks, alleging that the officers fabricated evidence against her in a “scheme to pressure her to incriminate her boyfriend, who they suspected of trafficking in marijuana” and that they lacked probable cause for the arrest.

ISSUE: Do minor discrepancies in a case make it impossible to resolve a claim on summary judgment in state court?

HOLDING: No

DISCUSSION: The Court noted that the existence of probable cause for an arrest was an issue of law for the trial court to decide, but that when the evidence was in conflict, the “existence of facts and circumstances amounting to probable cause” the issue was left to the jury. The Court concluded that although there might have been “some inconsistencies concerning how the evidence was collected and handled,” there was no disagreement that the substance collected was marijuana. As such, the officers had probable cause to make the arrest, absent evidence that the officers “either planted the marijuana in her car or otherwise misrepresented that the marijuana was found in her car.”

Burden illustrated several problems in the case.

First, Burden points to a number of inconsistencies in the officers’ testimony concerning the search of her car. While several officers testified that Officer Hampton was not involved in the search of Burden’s vehicle, Officer Hampton’s report indicates that he was. The officers’ testimony was also inconsistent as to whether the marijuana was found in the ashtray or on the floorboard of her car. There is also conflicting testimony about whether the marijuana residue was found on the floorboard of the driver’s side or the passenger’s side. The officers stated that they spotted the evidence in a full ashtray and on the floorboard and were able to retrieve the evidence with their bare hands. Moreover, Burden notes that the only evidence recovered was a single marijuana seed and a trace amount of marijuana so small that it did not register a weight. Given these inconsistencies, Burden contends a jury could reasonably find that the officers lied about finding the marijuana in her car.

Burden next focuses on alleged misrepresentations in various reports filed by the officers. Officer Hampton’s report stated that Burden admitted the substance found was marijuana and that the marijuana was hers, but he later stated that Burden never made any explicit admissions. Furthermore, in his report submitting the substance to the laboratory for testing, Officer Hampton listed its weight as .01 grams. He later admitted that material did not record any weight. Finally, Burden points to inconsistent descriptions of the substance and irregularities in the handling of the evidence while it was in police custody. Burden maintains that these inconsistencies cast further doubt on the credibility of the officers’ accounts.

Despite the Court's concerns about the allegations, the Court could find no evidence of deliberate misconduct and agreed with the trial court that "the inconsistencies in the police testimony and reports about the search merely fall within the normal variation expected when different people describe the same event." The problems with the evidence could have affected its introduction in the criminal case and certainly the discrepancies in their testimony could have raised doubt about Burden's guilt. However, it did not suggest "active misconduct." As such, the officers had probable cause for the arrest.

Next, she claimed that the misrepresentations subjected the officers to "liability for fraud and forgery." She noted again the inconsistent descriptions found on the various reports and again, the Court disagreed that the evidence did not support the claims.

The summary judgment in favor of the officers was affirmed.

EMPLOYMENT

Hill v. City of Mt. Washington, 2012 WL 163037 (Ky. 2012)

FACTS: Hill, a Mt. Washington police officer, was disciplined for insubordination on November 10, 2008. He elected not to use internal grievance procedures, instead requesting an administrative hearing pursuant to KRS 15.520. The city denied his demand and he filed suit. The Bullitt Circuit Court ruled that the statute applied only to external, not internal, complaints. Further, because he failed to make a timely request for a grievance hearing, he was also denied that right as well.

Hill appealed.

ISSUE: Is an external citizen complaint required for KRS 15.520 to apply?

HOLDING: Yes

DISCUSSION: The Court noted that the "sole question presented is whether KRS 15.520 applies to departmental disciplinary actions against police officers that are not triggered by citizen complaints." The Court looked to recent decisions and agreed that the statute specifically applies "to provide procedural due process to police officers who are accused of wrongdoing by citizens." As such, KRS 15.520 applies not to internally-generated complaints, and that "intradepartmental investigations ... differ from citizen complaint investigations."

The Court agreed that the limiting the statute in this way "is entirely consistent with the language used and purpose of the statute." The Court affirmed the decision of the Circuit Court.

ORDINANCE INTERPRETATION

McGinnis v. Com., 2012 WL 28684 (Ky. App. 2012)

FACTS: On August 7, 2009, at about 2330, Officer Dunn (Lexington PD) heard music from a nightclub owned by McGinnis. The door was open and she heard the music from loudspeakers inside from "less than twenty yards away." McGinnis was cited under a local ordinance that prohibited the use of

a loudspeaker on a public right of way. McGinnis argued that the ordinance did not apply because the speakers were actually inside. McGinnis was convicted and appealed and the Fayette Circuit Court affirmed that decision. He further appealed to the Kentucky Court of Appeals, but did not “present a constitutional challenge” therefore the Attorney General was “not notified of a constitutional attack on the ordinance” as required.

ISSUE: Are local ordinances required to be interpreted as to their overbreadth and their possible vagueness?

HOLDING: Yes

DISCUSSION: The Court noted that because the penalties for violating noise ordinances are minor, they have rarely been reviewed by the courts. The Court agreed that a “city’s interest in attempting to preserve or improve the quality of urban life is one which must be accorded high respect.”⁴⁰ A noise ordinance is “constitutionally tested” under two doctrines: overbreadth and void-for-vagueness. In cases involving amplified sound, the courts “have focused on the specificity of the time, place, and volume levels restricted.” The Court noted the difficulty in defining how much noise was too much, as it was a very subjective standard. The Court agreed that the Lexington ordinance was broad and that had the case been properly presented on constitutional grounds, it would have merit. However, the Court agreed that even though as a pro se litigant McGinnis was entitled to great latitude, it was essential that the Attorney General be notified of a constitutional challenge. The Court decided, however, that it could address the issue without bringing in the constitutional doctrine by using ordinary rules of construction, and agreed that Lexington’s interpretation of the ordinance was absurd because he would mean every time a patron opened the door of a nightclub, the club owner would be in violation for allowing the music to flow out the door.

The Court reversed McGinnis’s conviction and remanded the case.

⁴⁰ Hendricks v. Com., 865 S.W.2d 332 (Ky. 1993).

SIXTH CIRCUIT

FEDERAL CRIMINAL LAW – INTERSTATE COMMERCE

U.S. v. Varnes (Jason and Jeffrey), 465 Fed.Appx. 495, 2012 WL 688339 (6th Cir. 2012)

FACTS: The Varnes (brothers) attended a party in which they arranged to buy cocaine. They paid, but realized they'd been cheated when the men failed to return with the product. Jason located the men and returned to tell Jeffrey they'd been defrauded. Several hours later, after leaving the party, the Varnes bought gasoline and set the back porch of the 4-plex where the men were living on fire.

The Varnes were indicted for arson and conspiracy to commit arson. At Jason's trial, the jury was instructed that they must find that the property (the apartment building) destroyed must be proved to be "used in or affecting interstate commerce" for the federal charge. The jury asked whether "as a matter of law, residential rental property affected interstate commerce;" the judge agreed that it did. Jason was convicted. The same issue arose at Jeffrey's trial and he too was convicted. Both appealed.

ISSUE: Does the fact that property is rental affect interstate commerce for federal jurisdiction?

HOLDING: Yes

DISCUSSION: The Court looked to federal arson law under 18 USC §844 (i). The Court ruled in Russell v. U.S. that the statute applies to apartment buildings because the "rental of real estate is an activity that affects interstate commerce."⁴¹ However, owner-occupied private homes do not, as they aren't being used for commercial purposes.⁴²

The Court agreed the instruction was proper and upheld both convictions.

CONSTRUCTIVE POSSESSION

U.S. v. Lawhorn, 467 Fed.Appx. 493, 2012 WL 987750 (6th Cir. 2012)

FACTS: On May 27, 2010, Akron (OH) officers did a controlled buy from Lawhorn at his home. On June 1, the officers responded to a domestic disturbance involving Lawhorn at that address. Later that day, they obtained a search warrant based on an affidavit by Det. Callahan, who detailed the controlled buy.

When the warrant was executed, Lawhorn and his grandmother were present. On Lawhorn, they found \$900 and an ID that listed that home as his address. They also found ammunition and a loaded handgun at that address. As Lawhorn was a felon, he was charged with possession of the weapon, which was found hidden in a shoe box in a trash can located outside. Lawhorn was indicted and requested suppression, which was denied. He was convicted and appealed.

⁴¹ 471 U.S. 858 (1985).

⁴² Jones v. U.S., 529 U.S. 848 (2000).

ISSUE: May a subject be found in constructive possession of a contraband item?

HOLDING: Yes

DISCUSSION: Lawhorn argued that he was in neither actual or constructive possession of the handgun. It was conceded that he was not in actual possession of the handgun but the Court gave instructions that permitted the jury to find on either actual or constructive. The Court agreed, however, that he “resided at and exercised dominion over the house” where the gun was found, even though there were no fingerprints or DNA of his found on the weapons.

The Court affirmed his conviction.

SEARCH & SEIZURE - WARRANT

U.S. v. Lawson, 2012 WL 806393 (6th Cir. 2012)

FACTS: On January 18, 2008, DEA and local law enforcement officers executed a search warrant in East Liverpool, OH. No one answered so they forced the door. Inside, they found Lawson and Abercrombie standing on the stairs, “in various states of undress.” The officers allowed Lawson to dress, put him in handcuffs, removed him to the kitchen and gave him Miranda warnings. He waived his rights.

During an initial sweep, the officers found a pistol, so they asked Lawson about other weapons or drugs. He noted they’d already found the weapon and admitted there might be drugs in his pants, draped over a nearby chair. Ultimately, he pointed them in the direction of a quantity of crack cocaine. They also found a large quantity of crack cocaine and cash in another location.

The search warrant was based on an affidavit that “utilized information from three confidential informants.” The CIs were “considered reliable based upon corroborations through surveillance and independent investigation” and each had worked with law enforcement before, successfully.

Lawson moved for suppression but was denied. He was convicted and appealed.

ISSUE: Must a warrant show a nexus between the crime and the address to be searched?

HOLDING: Yes

DISCUSSION: Lawson argued that the affidavit was invalid “because it failed to establish a connection between Lawson and the Needham Street residence.” The Court noted that all three CIs provided information that Lawson had sold from the house and planned to do so in the future. The information from the first two detailed information based on events occurring in 2006 and 2007, which the Court agreed that “standing alone” would have rendered the information stale, it noted that “consider all three confidential informants’ statements together,” it was clear that “Lawson kept and sold drugs from that residence.”⁴³

⁴³ See U.S. v. Greene, 250 F.3d 471 (6th Cir. 2001).

The Court further found sufficient nexus that he was present at and selling drugs from the address and upheld the convictions.

U.S. v. Witherspoon, 467 Fed.Appx. 486, 2012 WL 975074 (6th Cir. 2012)

FACTS: A police spotter flying over Clinton County saw marijuana growing a few hundred yards behind Witherspoon's house, in a cornfield. The spotter directed officers on the ground to a driveway of Witherspoon's home, which was nearest the field. (The opinion detailed the precise layout of the area.) The spotter directed them to plants in the middle of the field and then to an area with seedlings that was within the first few rows of corn nearest Witherspoon's house, about 60 yards directly behind the house.

"The seedlings suggested cultivation, and nearby footprints identified a possible cultivator." Tracks in the muddy ground "marked a path" between the seedlings and the entrance to the metal outbuilding on Witherspoon's property. An officer followed them and found a tub of marijuana plants on the property. The officer entered the outbuilding and saw more seedlings.

Officer McArthur sought and received a warrant for the property. During the subsequent search, they found marijuana and related items, along with several guns. Witherspoon was charged under federal law. He moved for suppression and was denied. The trial court declined the suppression and Witherspoon took a conditional guilty plea. He then appealed.

ISSUE: Must the boundary of an alleged curtilage be defined for a violation of that curtilage to be proven?

HOLDING: Yes

DISCUSSION: Witherspoon argued that the affidavit contained "information obtained during an unlawful search of his curtilage, and that without this ill-gotten evidence the affidavit fails to demonstrate a sufficient nexus between the marijuana in the cornfield and Witherspoon's property." The Court, however, ruled that the affidavit "described overwhelming evidence of the illegal cultivation of marijuana, all of which pointed directly at Witherspoon's property." Witherspoon contended that they could not have seen the footprints and the marijuana actually on his property without following them into the clearing, which was within his curtilage. The Court, however, credited the officer's statement that he could see them "from the edge of the cornfield."⁴⁴

The Court addressed a fundamental error by Witherspoon, that he never asked the lower court to delineate the boundary of his curtilage. The absence of such is fatal to his appeal, as "he must demonstrate an expectation of privacy in the area behind his outbuildings before claiming that the officers intruded on that expectation." Simply "showing that McArthur verged on entering the curtilage does not show that he invaded it." With respect to his entry into the outbuilding prior to getting the warrant, the Court agreed that the "inevitable-discovery doctrine trumps."⁴⁵ The affidavit did not include any information from the unlawful search

The Court upheld the denial of the suppression motion.

⁴⁴ Widgren v. Maple Grove Twp., 429 F.3d 575 (6th Cir. 2005).

⁴⁵ Murray v. U.S., 487 U.S. 533 (1988).

U.S. v. Justice, 461 Fed.Appx. 415, 2012 WL 360814 (6th Cir. 2012)

FACTS: On December 18, 2009, Newark (OH) Police received a tip from the DEA that a “white tractor-trailer suspected of involvement in drug trafficking” was parked in front of Jay Justice’s father’s home. They set up surveillance and saw his father, the truck and what appeared to be several bales of marijuana in a pole barn. An officer followed the truck as it left. A few minutes later, Jay Justice drove to the barn from his home nearby and helped move several large items.

Meanwhile, the truck was pulled over for speeding. A drug dog hit on the vehicle and \$500K in wrapped cash was found. The driver admitted he’d just delivered over 500 pounds of marijuana to the barn and met “Jeff” and “Jay.” The officers sought a search warrant for the properties owned by both Justices. At Jay’s home, they found no marijuana, but did find a transaction register and 8 guns. He was given his Miranda warnings and admitted he was a convicted felon and that he possessed the guns.

Jay Justice was indicted for the guns. He moved for suppression and the court agreed that the warrant did not establish probable cause “because it did not show a nexus between drug trafficking and Jay’s house.” It also suppressed the admission he made as the “fruit of the poisonous tree.” The Government appealed.

ISSUE: Is a warrant that ties a subject directly to drug trafficking presumptively valid?

HOLDING: Yes

DISCUSSION: The Court noted that suppression is particularly difficult “when officers follow the constitutionally preferred route” by getting a warrant. In such cases, the defendant must show that the officers “could not have relied on the warrant in good faith.”⁴⁶

The Court reviewed the facts set forth in the affidavit.

(1) officers observed a tractor-trailer believed to be involved in drug trafficking and bales of what appeared to be marijuana in a barn on the father’s property; (2) shortly after the tractor-trailer left, officers saw Jay Justice drive over from his house and help his father move items around the barn; (3) when officers later pulled over the truck they found \$500,000 in cash inside and the driver admitted to meeting “a man named Jeff and a man named Jay” at the barn and delivering 518 pounds of marijuana, R. 16-1 at 5; (4) over the years, police had received tips that Jay obtained marijuana from his father and sold it from his home; and (5) Jay’s lifestyle did not match the modest income he reported on his tax returns.

The Court agreed that the affidavit “contained evidence directly tying Justice to drug-trafficking.” The tips of prior dealings had not been fleshed out in the affidavit, but the other evidence served to adequately corroborate the tips and provided the nexus necessary.

The Court reversed the trial court’s decision to suppress the evidence and remanded it for further proceedings.

⁴⁶ U.S. v. Leon, 468 U.S. 897(1984).

U.S. v. Jeffries, Meadoweal and Calloway, 457 Fed.Appx. 471, 2012 WL 181392 (6th Cir. 2012)

FACTS: Jeffries, Meadoweal and Calloway were involved in a complex case that encompassed activities in several states, including Kentucky. When Meadoweal was arrested in Louisiana, Louisville officers, using information they'd been accumulating, obtained a search warrant for Calloway's home in Louisville and found evidence that linked Calloway to the other persons. They also tied him to a defendant in a Texas drug case. Calloway was arrested and he contacted Jeffries and told him to empty their joint account, which he did.

With both Meadoweal and Calloway in jail, the officers focused on Jeffries and another house in Louisville, which they suspected was the stash house. They had observed a suspect vehicle, the one in which Meadoweal was arrested, at that house. They were unable to catch Jeffries at the house, but did find him at a nearby liquor store. A drug K-9 alerted on his clothing and he was arrested, but no drugs were found, only a large amount of cash. Police obtained a search warrant for Jeffries' vehicle and the house, finding crack cocaine and the means to package and distribute it.

Ultimately, all three sought suppression of the searches that resulted in their respective arrests. That was denied. They were convicted and appealed.

FACTS: Is it enough, in a search warrant, to prove that a drug dealer lives in a particular house in order to search it?

HOLDING: No

DISCUSSION: With respect to Calloway, he argued that the warrant for his home was based on an insufficient search warrant, the information "lacked independent corroboration and reliability" and "that there was no nexus between his home and the cocaine found in the Lincoln." The court considered the facts and noted that the suspicion that Calloway was a drug dealer "would not have been, by itself, sufficient to establish probable cause to search his home." But the affidavit was "replete with corroborating information" that was more than enough to support the warrant.

Meadoweal challenged the Louisiana traffic stop, which was based on several traffic offenses. The Court agreed that the stop was valid, however.

With respect to Jeffries, he argued that the officers did not have probable cause to arrest him at the liquor store. He asserted that once no drugs were found on his person, he should have been released. Given what the officers already knew about the vehicle which was tied to both Meadoweal and Jeffries, they had probable cause to arrest him at the time they approached him. Again, "ample corroborating information" linked the second house, which was in Jeffries' possession, to the conspiracy. Although much of the information dated from two months before the arrest, the affidavit "tied together older information ... with new information that Jeffries had just been at Middle Lane and then lied about it."

After addressing a number of other procedural issues, the Court affirmed the convictions of all three defendants.

U.S. v. Rodgers, 463 Fed.Appx. 556, 2012 WL 616996 (6th Cir. 2012)

FACTS: On August 11, 2008, Officer Michelin (Michigan's Upper Peninsula Substance Enforcement Team – UPSET) arranged to buy crack cocaine from Lampinen. He and Lampinen drove to King's home, but King did not have the drugs so he used Michelin's phone to arrange a meeting location. There, they found Rodgers, who made the transaction. 9 days later, he made another deal with King and purchased more cocaine from Rodgers – although Abbott actually handled the transaction. The last transaction was a buy-bust and Rodgers was under surveillance even prior to delivering the drugs. As soon as officers were notified that the transaction was made, they made an arrest. They went to Abbott's apartment, where Rodgers officially lived at least part-time and she took him to the second home where he spent part of his time.

Michelin sought a search warrant for the second address and officers went to secure that residence. Calhoun, who also lived there, was uncooperative, but eventually consented to a search of the house, except for Rodgers's bedroom which was locked. Ultimately the officers obtained the warrant and were able to unlock the room with a key from Rodgers, and found cash, including marked cash from the earlier drug transactions. (There was confusion as to whether they entered the room prior to getting the warrant.)

All of the parties were charged with drug trafficking. Rodgers moved for suppression of the evidence found in the locked room. The Court ruled that the search was valid, both because of the warrant and because as a probationer, Rodgers had a lesser expectation of privacy and because he was maintaining a home without notifying his probation officer.

Rodgers was convicted and appealed.

ISSUE: Is the question of whether officers entered a room prior to the arrival of a warrant critical to the admission of the evidence?

HOLDING: No

DISCUSSION: The Court ruled that it was not clear error to find that the officers did not enter the room until after the warrant arrived, and that evidence to the contrary was not definitive. The Court upheld the convictions.

NOTE: Although not discussed in this case, presumably the doctrine of inevitable discovery also would permit the introduction of the evidence.

SEARCH & SEIZURE – WARRANT - PORNOGRAPHY

U.S. v. Zorn, 461 Fed.Appx. 493, 2012 WL 447493 (6th Cir. 2012)

FACTS: Around the end of November, 2009, an officer sought a warrant to search AOL records related to two specific accounts. The affidavit cited a complaint from the National Center for Missing and Exploited Children (NCMEC), concerning a Yahoo account in which child pornography had been detected and described several of the images. Shortly thereafter, two more complaints had come from the NCMEC concerning child pornographic videos from the same email address. Comcast, which owned one of the IP

addresses from which communications had come, had indicated the account was owned by Zorn, in Taylor, Michigan. The warrant was issued and an investigator examined the AOL account. When it was confirmed that photos and videos depicting child pornography were sent from Zorn's address, the officers sought a warrant for his home, as well. During the execution of that warrant, more child pornography was found.

Zorn was indicted on federal child pornography charges. He moved for suppression of the evidence found in the searches and was denied. He took a conditional guilty plea and appealed.

ISSUE: Does the fact that digital files are sought in a computer warrant make it less likely that a warrant be considered stale?

HOLDING: Yes

DISCUSSION: Zorn argued that the affidavits were insufficient to indicate that either the AOL account or his home would have evidence of the crime. He noted that the affidavits did not even specifically allege a crime as there might be innocent reasons why his account was involved. The Court noted that "there are only so many ways a person's email or AOL account can be 'involved in' a child pornography incident." The Court stated that it was not required that the warrant specify a crime in order to be valid.

Further, he argued that the affidavits did not reveal when the NCMEC received the information or when the incidents actually occurred, making the information potentially stale. The Court agreed that the "digital world has a long memory," even for files users try to delete." The Court found that the officers relied on the warrants in good faith.

The Court upheld his conviction.

SEARCH & SEIZURE – WARRANT – FRANKS

U.S. v. Schimley, 467 Fed.Appx. 482, 2012 WL 954157 (6th Cir. 2012)

FACTS: On February 13, 2007, Trooper Erdley (presumably Ohio State Police) did a computer search for a particular child pornography video. He downloaded a file from a user later determined to be Schimley. Agent Russ obtained a search warrant based upon Erdley's investigation and recovered additional evidence. Schimley was charged with several federal offenses involving child pornography. He moved for suppression and for an evidentiary hearing under Franks v. Delaware.⁴⁷ When that was denied, he took a conditional guilty plea and appealed.

ISSUE: Must statements in a warrant be made in a recklessly false manner to justify a Franks hearing?

HOLDING: Yes

DISCUSSION: Schimley argued that there were two false statements in the affidavit. First, Erdley did not do a keyword search, as he claimed, and second, that the file the trooper downloaded did not have the

⁴⁷ 438 U.S. 154 (1978).

same name as the “known child-pornography movie file.” The prosecution explained what had happened and the confusion as to the use of a “hash value.” Further, the video downloaded was actually found on Schimley’s computer during the search, under a different name referenced in the warrant affidavit.

The Court agreed that a Franks hearing was not required and was properly denied, as Schimley failed to show that “Russ knowingly or recklessly included false statements in the warrant affidavit.”

Schimley’s plea was upheld.

SEARCH & SEIZURE – CONSENT

U.S. v. Trejo, 2012 WL 975063 (6th Cir. 2012)

FACTS: In July 2008, images of child pornography were traced to a computer in St. Louis, through AOL accounts opened with Trejo’s credit card. Two officers went there to talk to him, but his father, Raymond Trejo, was the only one home. They explained their purpose and he asked if they were talking about child pornography, to which they agreed. He showed the officers the family computer, located in the dining room. They seized the computer and found numerous images of pornography and erotica under Trejo’s user account, which was not password protected.

The officers returned over a year later, intending to arrest him. They saw a new computer and asked Rose if they could search it. The immediately found suspect images and ultimately, found over 3,000 images. (In both cases, there was dispute as to whether the parents gave consent to search the computers.) Trejo was charged and moved for suppression. The trial court ruled that they had “apparent authority to consent to the searches, given the placement of the computer and lack of password on Armando Trejo’s computer user accounts.” The Court ruled that they had, in fact, given that consent.

Trejo was convicted and appealed.

ISSUE: Is joint computer access presumed when in a shared household and the account is not password protected?

HOLDING: Yes

DISCUSSION: The Court noted that the parents had access to, and used, the computers regularly, and that they paid for the Internet service. The Court looked to establish apparent authority by the location and use of the computer. Although Trejo had an individual user profile, it was not password protected.

The Court noted:

While the existence of user profiles on a computer does suggest an expectation that generally only that particular person will have reason to access the content saved to that profile, it is reasonable to understand that other family members may have occasion to access profiles without passwords on a general-use family computer. If a user chooses not to protect a profile with a password or otherwise indicate an intention to restrict third-party access, a reasonable officer could conclude that other family members have authority to consent to its search.

The Court looked to U.S. v. Aaron⁴⁸ in which the Court agreed that not restricting access via a password suggested apparent authority. The Court understood that having a profile without a password might be for reasons other than privacy, such as the need to have preferred settings and to use a particular desktop background. If the user wished privacy, the Court agreed they should use a password.

The court noted that the issue of consent was unclear, and that both testified they did not give consent but “rather remained silent and felt they had no choice but to let the detectives take the computers.” However, the Court believed that the District Court studied the matter carefully and declined to reverse the decision.

The Court also agreed that it was not error to admit Detective Brian’s testimony about Raymond Trejo’s question as to whether they were looking for child pornography (which the detective initially described as “inappropriate images”). The Court ruled the comment was not legally hearsay and was admissible.

The Court upheld the conviction.

U.S. v. Jackson, 468 Fed.Appx. 447, 2012 WL 386384 (6th Cir. 2012)

FACTS: On March 11, 2009, Officer Thomas (Lexington PD) received information from Officer Green that Jackson was engaging in crack cocaine dealing. He received the tip from Crawford, Jackson’s former girlfriend, who had told Green about the dealing and further, that he’d stolen a TV from her. She told Officer Bryan where Jackson lived but could not identify the exact apartment. She also told him he drove a white Lexus SUV. Officers went to the complex to investigate. Officer Thomas spotted the vehicle as he was leaving and pulled back in, with other officers who had already left hurrying to come back as well.

After Jackson got out of the SUV, Thomas approached him on foot and confirmed his identity. Jackson stated the car belonged to his new girlfriend, Ferguson. He agreed to take the officer to their apartment. Three officers followed Jackson to the apartment. Once there, the circumstances of their entry was disputed, with the officers say they were welcomed in because it seemed he held the door for them, while Jackson saying he shut the door and the officers opened it and entered without permission. The girlfriend, who was in bed sick, came into the living room. Thomas asked Ferguson if they could talk alone and once in the bedroom, he explained why they were there and asked for permission to “take a look around.” There was dispute over whether Officer Thomas used the word “search” and Thomas stated she specifically gave permission to search both the apartment and the car.

Upon searching the car, Thomas found crack cocaine and marijuana. They found marijuana, scales, packaging material and a handgun in the apartment. Neither Ferguson or Jackson said anything to stop the search once it started and “both conceded that they were never threatened by the officers in any way.”

Jackson, a convicted felon, was charged with drug trafficking and possession of the handgun. He moved for suppression, which was denied. Jackson took a conditional guilty plea and appealed.

ISSUE: May a consent be given nonverbally?

⁴⁸ 33 F.App’x 180 (6th Cir. 2002).

HOLDING: Yes

DISCUSSION: The Court agreed that it had previously held that a person's "stepping back from the front door after the police identified themselves and asked permission to enter was conduct sufficient to convey his consent to their entry." The Court agreed that the trial court's finding that the entry was lawful was supported by the evidence.

With respect to the search, the Court found no evidence that the consent to search of the apartment or the SUV "was the product of duress or coercion." The Court agreed that the law does not require that an officer must "inform an individual that she has the right to refuse consent in order to render ... consent voluntary."⁴⁹ The trial court found it relevant that during the entire search, Ferguson's son, sleeping in the other bedroom, never awakened. The Court agreed the consent was properly given. Finally, with respect to Jackson's claim that Thomas was only given consent to get Jackson's identification from over the visor in the SUV, not do a full search, the Court reviewed the "exchange" between Ferguson and the officer. The Court agreed that "the scope of a search is generally defined by its expressed object."⁵⁰ The District Court, however, credited Thomas's version of the exchange, and that he stated, in Ferguson's presence, that he'd gotten consent to search the SUV.

Jackson's convictions were affirmed.

U.S. v. Ortiz, 455 Fed.Appx. 669, 2012 WL 118455 (6th Cir. 2012)

FACTS: On October 6, 2006, Officers Schrouf and Embry (Louisville Metro PD) knocked at Ortiz's door. The officers, both in uniform, suspected Ortiz of sexual assault, as he'd been identified as the perpetrator by the 13-year-old victim. They explained, in English, their reason for being there, and he "stepped back," opened the door wider and gestured them inside. They asked for ID, which he was unable to readily supply. What happened next was in dispute, with one officer testifying that he specifically asked Ortiz if he could accompany Ortiz into the bedroom in search of further identification, and that "Ortiz signaled his consent with a gesture." The other officer was "more equivocal," and was unsure if "either officer verbally requested permission to follow Ortiz" into his bedroom. Ortiz stated that neither asked, nor did he agree, for permission. He did not, however, protest when they did follow him, at which point Officer Schrouf saw drugs and paraphernalia in plain view.

Ortiz was charged under federal law for possession of methamphetamine with intent to distribute, and with possessing a gun after entering the U.S. illegally. He moved for suppression and was denied. He took a conditional guilty plea and appealed.

ISSUE: May a consent be given nonverbally?

HOLDING: Yes

DISCUSSION: The Court agreed that "consent to a search may be nonverbal so long [sic] it is not the product of 'duress, coercion, or trickery.'"⁵¹ Although stepping back in fear is not consent,⁵² and the

⁴⁹ Schneckloth v. Bustamonte, *supra*.

⁵⁰ Florida v. Jimeno, 500 U.S. 248 (1991).

⁵¹ U.S. v. Buchanan, 904 F.2d 349 (6th Cir. 1990).

presence of uniformed officers at his door likely made him nervous, “more was required to vitiate the assent that Ortiz otherwise unambiguously conveyed by his conduct.” He did not claim that he failed to understand the officers, although English was not his native language. The Court agreed Ortiz gave consent for the officers’ entry both into the apartment and into the bedroom, especially since he did not protest when they did so.

Ortiz’s plea was upheld.

SEARCH & SEIZURE – ABANDONED PROPERTY

U.S. v. George, 456 Fed.Appx. 530, 2012 WL 128402 (6th Cir. 2012)

FACTS: On May 7, 2009, Officer Salyers (Chattanooga, TN) was patrolling a “high crime area.” He spotted George and Pointer, “standing next to a car that was stopped in the middle of the street.” The car left and the two men walked toward Officer Salyers. He ordered them to put their hands on the car – Pointer did, but George did not. Instead, he walked toward the passenger side. Salyers ordered him again to put his hands on the car, but instead, George returned to where Pointer was standing. Salyers drew his weapon and ordered him again, and heard something drop to the pavement that sounded like “hard metal.” There began a chase, with George running around the car until caught by Salyers, who held George at gunpoint until backup arrived. They found a .22 handgun on the ground.

George, a convicted felon, was charged with the weapon. He moved for suppression, which was denied. He took a conditional guilty plea and appealed.

ISSUE: Is a weapon discarded prior to a seizure considered abandoned?

HOLDING: Yes

DISCUSSION: The Court agreed that at the time he abandoned the weapon, Georg was not yet seized as he had not complied with Salyers’ orders.⁵³ Because he had not submitted and he discarded the weapon, it was abandoned and not the fruit of the seizure.

George’s plea was affirmed.

SEARCH & SEIZURE – SEIZURE

U.S. v. Smith (aka Walls), 463 Fed.Appx. 564, 2012 WL 638050 (6th Cir. 2012)

FACTS: On November 10, 2005, a USPS letter carrier in Memphis reported she’d been raped and robbed while working. Police and postal investigators began a search for her described assailant and about 2 hours later, found someone in the neighborhood, sitting on the curb, matching the description provided by the victim. He fled, however, upon their approach. A Memphis officer believed he recognized the suspect from the description as being one of three people. They set out in search of the three. Finding the first, he stated that Walls was the likely suspect. He told Postal Inspector Clay of Walls’s

⁵² See U.S. v. Carter, 378 F.3d 584 (6th Cir. 2004).

⁵³ See California v. Hodari D., 499 U.S. 621 (1991).

location. Two inspectors went to the location and found a man who provided ID as Smith, but who was actually identified by an occupant as Walls. (An occupant of the location stated that “the man sitting in the car” was Walls and confirmed he used both names. She told the officers that he’d told her he was “running from the police” and showed him clothing he’d changed from, one item was blue jeans with distinctive white stitching as the victim had described. Walls was then arrested.

Ultimately his DNA matched that found from the victim and he was indicted under federal law since the victim was a federal employee. He moved for suppression, which was denied. He was ultimately convicted and appealed.

ISSUE: Is a seizure, with probable cause for an actual arrest, valid?

HOLDING: Yes

DISCUSSION: Walls argued that he was arrested without probable cause when he was “handcuffed and placed in the Inspector’s vehicle.”⁵⁴ The Court however, agreed that Inspector Dietz had sufficient probable cause for an arrest at that point as he had made a statement to his friends by that time, admitting his guilt, and before details of the crime had been released to the public. The Court agreed his subsequent consent was not tainted by an invalid arrest.

The Court affirmed his conviction.

SEARCH & SEIZURE – SEIZURE

U.S. v. Gregory, 456 Fed.Appx. 533, 2012 WL 128507 (6th Cir. 2012)

FACTS: In 2009, Det. Bunch (Arson, KSP) called Gregory at his business. Gregory’s residence had previously been damaged by fire. Bunch explained he needed to examine the surveillance system, but this was actually a ruse to get a meeting between Gregory, Agent Kersey (DEA) and Agent Johnson (Operation Unite). They hoped to gain his cooperation as an informant. Gregory agreed to ride with Bunch back to the house. At some point during the meeting, Gregory indicated he had a gun. Kersey knew that Gregory had an active DVO and took the weapon.

Bunch left Gregory with the other two. Gregory told them he had an attorney for an unrelated case, but they assured him they were only interested in the drug operation. They parted and Gregory got a ride back to his business.

He was later indicted for the weapon, because of the DVO, under federal law. He moved for suppression, which was denied. He took a conditional guilty plea and appealed.

ISSUE: If a request to interview a subject at their own home a seizure?

HOLDING: No

⁵⁴ Peete v. Metro. Gov’t of Nashville & Davidson Cnty., 486 F.3d 217 (6th Cir. 2007).

DISCUSSION: Gregory argued that he was illegally seized and that the ruse negated any consent. The Court agreed, however, that the “totality of the circumstances” indicated that Gregory was free to move and was not restrained. The Court noted that Bunch asked Gregory to accompany him back to his own home, a request “far less threatening” than a request to go to a police station, for example. The Court agreed this was a “non-confrontational, consensual encounter.”

With respect to the ruse, the Court agreed that sometimes, such tricks “can undermine an otherwise consensual encounter.”⁵⁵ The Court asked whether the ruse created a situation in which Gregory had no choice but to give up any privacy rights. But Gregory knew that Bunch was an officer. The Court concluded the ruse did not change the result.

Finally, Gregory argued that he was illegally searched, and his weapon unlawfully seized, when Kersey asked about weapons. There was dispute about precisely where the gun was found, and Gregory admitted, in some way, that he’d volunteered that he had the weapon. The Court ruled that asking if someone has a gun does not make the consensual encounter into a seizure. Once Gregory admitted he had a gun, when Kersey knew he had a DVO, it was proper to confiscate the illegally held weapon. The seizure of the gun was valid.

The Court further held that since the officers were not interested in the out-of-state case in which Gregory had an attorney, that any Sixth Amendment claim was invalid.

Gregory’s plea was upheld.

SEARCH & SEIZURE – K-9

U.S. v. Kelley, 459 Fed.Appx. 527, 2012 WL 386371 (6th Cir. 2012)

FACTS: Kelley was part of a group arrested in 2008 for the multi-state distribution of cocaine. Kelley came to the attention of officers when he called Akins, “on whom the police had a wiretap.” As a result, Tennessee officers got a wiretap on Kelley’s phones, as well. They intercepted a call in which Kelley told Akins he would be bringing Akins \$69,500, later conceding the money was to pay for cocaine. Officers were stationed on the road where Kelley would be driving and told to pull him over if they saw a traffic offense. Officer Ritter stopped him for following too closely. Kelley appeared nervous and refused to allow a vehicle search. A drug dog alerted at the front of the car.

Ritter had Kelley get out and patted him down, whereupon he found a bulge that turned out to be cash. They searched his car and found the money discussed above. The officer seized the money and “told him if he could prove that the money was for legitimate purposes within three days, they would return it.” He was given a warning for the traffic offense.

Kelley got a backdated contract from a local businessman to account for the cash. However the officers did not return the cash. Instead, on March 18, 2008, Detective Brown got a search warrant for Kelley’s home, using additional intercepted calls that suggested that persons were coming to Kelley’s house to either buy

⁵⁵ U.S. v. Hardin, 539 F.3d 404 (6th Cir. 2008).

or sell drugs. During the search, they seized cocaine, cash, a money counter and drug-trafficking paraphernalia.

Kelley was charged with a variety of conspiracy and drug trafficking offenses. Kelley moved for suppression and the trial court denied the motion. Kelley took a conditional plea and appealed.

ISSUE: Does an alert by a trained drug K-9 support a search?

HOLDING: Yes

DISCUSSION: First, Kelley argued that the wiretap for his phone was improper. To get a wiretap, offices must show that it is necessary and that “requires a determination that other means of obtaining information, such as physical surveillance, use of informants, and other investigative techniques, would be unsuccessful.”⁵⁶ The Court agreed that the “wiretap affidavit provided sufficient detail about alternative means of obtaining information and also identified the reasons why the wiretap was the best of those alternatives.”

With respect to the car search, the Court noted that the officers did not search until the drug K-9 alerted. The Court agreed that the original stop was based on a valid traffic offense. The Court also agreed that “it is well settled that an alert from a trained dog provides probable cause for a search for drugs”⁵⁷ even though the drug dog alerted on the front and the contraband was found in the trunk.

Finally, with respect to the house, the detective gave a detailed description of “the ongoing investigation of Michael Lewis for cocaine distribution, that Kelley had been implicated in this investigation by his phone calls with Lewis, the ensuing wiretap of Kelley’s phones, the subsequent search of Kelley’s car and the seizure of \$69,500, and several subsequent phone calls that seemed to discuss illegal activity.” The Court found it sufficient to support the probable cause needed.

Kelley’s plea was affirmed.

SEARCH & SEIZURE – FRISK

U.S. v. Stennis, 457 Fed.Appx. 494, 2012 WL 232958 (6th Cir. 2012)

FACTS: On April 8, 2007, Officer Roncska made a traffic stop of Stennis. He asked for consent to search the vehicle, which Stennis granted. Noticing some bulges, the officer frisked Stennis as he sat in his wheelchair and found a firearm. As he was a convicted felon, he was charged with possession of the gun, along with drug trafficking for drugs that were found on his person at the same time. The officer had prior contact with Stennis and had knowledge that he likely had a weapon.

Stennis took a conditional guilty plea and appealed.

ISSUE: Does knowledge of a subject and the seeing of a suspicious bulge support a frisk?

⁵⁶ U.S. v. Alfano, 838 F.2d 158 (6th Cir. 1988).

⁵⁷ U.S. v. Hill, 195 F.3d 258 (6th Cir. 1999); U.S. v. Burnett, 791 F.2d 64 (6th Cir. 1986)

HOLDING: Yes

DISCUSSION: The Court discussed whether the officer had sufficient reasonable suspicion to support the frisk. The Court reviewed the recording of the stop and noted that the moment the officer “noticed the bulge is amply evident.” Further, it was obvious the officer had ample knowledge of Stennis as evidenced by the long discussion they had in which details were exchanged. While there were discrepancies in various statements made by the officer, they were “minor and inconsequential when compared to the facts.” The frisk itself of “unremarkable in scope or duration” and reasonable related to his suspicion. The Court agreed that the officer’s pulling up of his shirt and jacket did not exceed the scope, given that he was dealing with a man in a wheelchair.

The Court affirmed the denial of the motion to suppress.

SEARCH & SEIZURE – EXIGENT ENTRY/SWEEP

U.S. v. Taylor, 666 F.3d 406 (6th Cir. 2012)

FACTS: Between June and September, 2008, police did surveillance on an Ohio address. They observed travel between that address and other suspect homes and found “marijuana paraphernalia, an empty ammunition box, and mail address to two people, including Taylor” in trash set at the curb. On October 2, they executed a search warrant at the house and found “numerous firearms.” A few months later they indicted Taylor and 28 other people for drug trafficking, some were also indicted on firearms offenses. When they went to execute the arrest warrants, they sought Taylor at that first address. The woman who answered also had an arrest warrant, so she was immediately arrested. Within a minute, Taylor appeared at the top of the steps and he came downstairs when ordered and submitted to arrest.

During the arrests, other officers did a protective sweep of the areas large enough to hold a person, including the securing of the bedrooms. Officers found a handgun and marijuana in one bedroom, as well as a “semiautomatic machine gun” in a closet near the living room. During that same time, an officer spoke to a woman who had come downstairs, she indicated her baby was upstairs and they went upstairs to get the child. Before she went to a room where she could nurse, she told the officer there was a gun there – the officer found a gun where indicated, under a couch.

Officers sought a search warrant, once the arrested subjects were transported. They searched the location further, finding more drugs and firearms. Taylor moved for suppression of the evidence found during the sweep but was denied. He took a conditional guilty plea and appealed.

ISSUE: May officers sweep an area if they have a reasonable belief that someone else is present?

HOLDING: Yes

DISCUSSION: Taylor argued that the officers’ entry was “unconstitutional because the police had no reason to believe that he was in the home at the time of the search.”⁵⁸ The Court noted, however, that another arrested subject actually answered the door, and it was proper for the officers to enter to arrest her.

⁵⁸ Payton v. New York, 445 U.S. 573 (1980); U.S. v. Hardin, 539 F.3d 404 (6th Cir. 2008).

With respect to the sweep, the Court noted that officers “can search a home pursuant to arresting someone if there are ‘articulable facts’ that would ‘warrant a reasonably prudent officer in believing that the area to be swept harbors an individual posing a danger to those on the arrest scene.’”⁵⁹ The Court agreed that it was not proper to sweep simply because it is “standard procedure,” as the officers initially testified. However, the Court found additional justifications, as the officers had reason to believe there were additional persons in the house, they had already seen multiple subjects and they believed it to be a “hub for a drug-trafficking organization.” They had good reason to believe subjects were armed, as the earlier search had revealed weapons and some of the charges involved guns. The sweep properly included both floors, as well, since subjects had been seen on both. The sweep was brief and focused. Further, the Court found no issues with the officers holding the scene while waiting for transport.

Finally, with respect to the search under the couch, the Court agreed it was not proper for the protective sweep, but justified because they were specifically told a weapon was located there. The Court held that it was “within a person’s grab space,” and thus it was proper to seize it.⁶⁰

The Court upheld the plea, but did reverse the sentencing and remanded it for further consideration of the sentence.

U.S. v. Johnson, 457 Fed.Appx. 512, 2012 WL 247947 (6th Cir. 2012)

FACTS: On March 17, 2010, in Cleveland, several individuals involved in drug trafficking were arrested. Johnson, who was also involved, was spotted leaving a suspect residence. A traffic stop was made and drugs were found on his person. The officers were concerned, however, that he would notify the other occupants of the residence upon his release and they decided, upon consulting with the AUSA to secure the residence. They knocked but got no answer. They could not open the front door – it was later found to be wedged shut with a steel pole. The officers broke down the door and searched for occupants, no one was found but they did find several “large bags of marijuana.” The sweep lasted only a few minutes, whereupon they secured the residence and left it under guard.

Officer Payne sought and received a search warrant; a vast amount of drugs, a gun and money were found. Johnson was charged for trafficking in heroin and marijuana and for being a felon in possession of a firearm. Johnson moved for suppression, which was denied. He took a conditional guilty plea and appealed.

ISSUE: May an entry and sweep be done to prevent the destruction of evidence?

HOLDING: Yes

DISCUSSION: Johnson argued that the initial sweep was “a warrantless and unlawful search” and that the observations made during that sweep should have been excluded from the affidavit. The Government argued that the entry was supported by exigent circumstances, “namely, the need to perform a protective sweep of the residence to prevent occupants from destroying evidence.” The Court noted:

⁵⁹ Maryland v. Buie, *supra*.

⁶⁰ Michigan v. Long, 463 U.S. 1032 (1983); U.S. v. Bohannon, 225 F.3d 615 (6th Cir. 2000).

Where an officer believes that he must enter a private residence without a warrant to prevent the immediate destruction of contraband, he must demonstrate: “1) a reasonable belief that third parties are inside the dwelling; and 2) a reasonable belief that these third parties may soon become aware the police are on their trail, so that the destruction of evidence would be in order.”⁶¹

The officers went to the home upon the report by a reliable CI and their subsequent investigation corroborated that there was a large scale drug trafficking operation in existence. Further, the Court credited the officer’s belief, based upon the fact that the lights and the TV were on, that one or more persons might have remained at the suspect residence. The Court upheld the sweep. However, the Court also noted that even if they’d removed the challenged details from the affidavit, there remained sufficient evidence to support the issuance of the warrant.

The Court affirmed the denial of the motion to suppress.

SEARCH & SEIZURE – VEHICLE STOP/SEARCH

U.S. v. Alexander & Odom, 467 Fed.Appx. 355, 2012 WL 48214 (6th Circ. 2012)

FACTS: On March 21, 2007, Officer O’Gwynn (Murfreesboro, TN, PD) was on patrol when he noticed a vehicle without a “tag light.” He believed that to be a violation of a local ordinance and pulled it over. Johnson was driving, with Odom, her boyfriend, in the front passenger seat. Gaines and Alexander were in the back. Odom produced a state probation card, on request for ID, and the back seat passengers stated they had no ID. He obtained identifying information and both gave what turned out to be false information. Alexander’s information returned to a female, but it was only later that they realized that Gaines also provided false information. Alexander was asked out of the car by Officer Haigh and O’Gwynn frisked him upon getting consent. He found a loaded revolver. Upon Haigh’s call about the weapon, four more officers arrived. Alexander was arrested and secured and the remaining three occupants were gotten from the car and handcuffed. Odom was frisked and nothing found, but the officers could not get into the locked glove box. A key found in Odom’s pocket fit, however.⁶² A loaded firearm with an obliterated serial number was found in the vehicle; Johnson claimed it was hers.

All were transported and Alexander was finally identified. He had an outstanding warrant. Johnson admitted she lied and that the gun belonged to Odom.

The police then interviewed Odom, who had been placed in an interview room where he had waited alone for some 10 minutes, his left arm handcuffed to the table. Detective Merrill Beene, in plainclothes, and Officers O’Gwynn and Haigh, in uniform, entered the interview room. All three wore sidearms, but did not brandish the weapons at any time. Detective Beene, who knew Odom, read Odom his Miranda rights; Odom waived those rights in writing.” He was asked questions and “his responses kept changing.

Odom finally admitted that the weapon was his. Both Alexander and Odom were charged with possession of the respective firearms, as both were felons.

⁶¹ U.S. v. Sangineto-Miranda, 859 F.2d 1501 (6th Cir. 1988).

⁶² This search that located the key was conceded to have been unconstitutional.

Alexander took a conditional guilty plea, and Odom was convicted at trial. At trial, Johnson's prior testimony from the suppression hearing was excluded, "because they could not secure her presence at trial." Odom moved for mistrial when "Officer O'Gwynn stated during redirect, "there's some things I can't say.'" Odom was denied and was ultimately convicted.

Both appealed.

ISSUE: May an officer ask for passenger ID during a traffic stop?

HOLDING: Yes

DISCUSSION: Alexander and Odom questioned the validity of the local ordinance concerning the tag light but the Court agreed that "there was probable cause to believe there was an ongoing traffic violation." The trial court had taken judicial notice (although they used a slightly different term) that the ordinance existed and no further proof was required. The Court agreed that even if the ordinance was invalid, the officer was working in good faith and that the stop was valid. The Court also noted that in the Sixth Circuit "an officer does not violate the Fourth Amendment during a traffic stop by asking for passenger identification, even where there was no reasonable suspicion of any wrongdoing by the passengers." The Court also ruled that the "stop was not so long as to render it unlawful." Alexander's gun was found "only 10 minutes after the initial stop." The "entire affair took only about 30 minutes."

With respect to the vehicle search, the Court agreed that "officers may search the passenger compartment of a car for evidence relevant to the crime of arrest if they have a reasonable belief that such evidence might be found in the vehicle."⁶³ Once they found Alexander's weapon, it was proper to search for other evidence related to Alexander's arrest and "It just so happened that the evidence they discovered—the 9-mm handgun and the knit stocking cap—was later linked to Odom." Arizona v. Gant, in fact, only strengthened the decision. Even excluding the unlawful search that resulted in the finding of the key, the Court agreed that suppression was not warranted because the discovery was inevitable, as they would have simply pried it open.

Finally with respect to his statement, the Court agreed Odom properly waived his Miranda rights and that he seemed "quite at ease regarding the process, which is understandable, since—given his lengthy criminal history—he was quite familiar with the police." The interview took only a half hour and nothing raised "suspicions of coercion." The Court upheld his statement. The Court also admitted Johnson's suppression hearing testimony, as they were unable to procure her live testimony for the trial. Odom's counsel was present at that hearing and was able to cross-examine her, although he chose not to do so. The Court agreed the Government had "exerted a great deal of effort" to try to get her at trial, to no avail. With respect to O'Gwynn's comment, the Court looked to certain factors:

(1) whether the remark was unsolicited, (2) whether the government's line of questioning was reasonable, (3) whether the limiting instruction was immediate, clear, and forceful, (4) whether any bad faith was evidenced by the government, and (5) whether the remark was only a small part of the evidence against the defendant.⁶⁴

⁶³ U.S. v. Nichols, 512 F.3d 789 (6th Cir. 2008), abrogated in part on other grounds by Arizona v. Gant, 129 S. Ct. 1710 (2009).

⁶⁴ Zuern v. Tate, 336 F.3d 478, 485 (6th Cir. 2003).

From the context, the prosecution was not eliciting the comment from O’Gwynn and was simply a “brief isolated remark.”

Both Alexander’s plea and Odom’s conviction were upheld.

U.S. v. Anderson, U.S. v. Hollin, 459 Fed.Appx. 535, 2012 WL 400571 (6th Cir. 2012)

FACTS: On 2009, the Kalamazoo (MI) Valley Enforcement Team (KVET) was investigating heroin trafficking. They suspected Owen was involved, with Anderson serving as a “mule.” Others were also linked to the operation. On June 4, at around 8 a.m., KVET began to surveil Anderson. They found a vehicle bearing a license plate belonging to Anderson, but it was on the incorrect vehicle. They decided to reserve that violation “as a basis for a later stop.” They followed Anderson until he picked up Hollin and then travelled to a second location. Hollis entered that location briefly and then returned to the car, and they immediately returned to where Hollin had been picked up. Anderson set out alone, back towards Kalamazoo, and the officers made a traffic stop. (This was approximately 4 hours after they first noted the violation.) They asked for consent to search his person and the vehicle but Anderson limited the consent for the vehicle to the trunk. They found nothing in the trunk but did find “two bundles of currency” on Anderson. A drug dog arrived a few minutes later and alerted to the inside of the vehicle, and heroin was found in an armrest.

Anderson was charged with distribution under federal law. He moved for suppression, and was denied. He was convicted and appealed.

In the meantime, the officers returned to the apartment the pair had visited and learned that Hollin was the godfather of the occupant’s children. He had a key and “could come and go as he pleased.” He kept a large box at the apartment. The occupant gave consent to search and during the search, they spotted marijuana roaches. When she refused to allow them to search the remainder of the apartment, they obtained a warrant. However, the warrant affidavit “did not mention the earlier observation of Hollin and Anderson, Hollin’s visit to the Apartment, or the seizure of cocaine from Anderson’s vehicle.” The warrant was issued and they found heroin and related paraphernalia.

Hollin was charged and requested suppression, arguing that the search warrant didn’t prove probable cause. The motion to suppress was denied and he was ultimately convicted. Hollin then appealed.

ISSUE: May an officer make a traffic stop for an ongoing violation some period of time after the violation begins?

HOLDING: Yes

DISCUSSION: The Court first looked at the reasonableness of the initial traffic stop. Anderson pointed to a “handful of cases from other circuits that place limits on an officer’s ability to initiate a traffic stop when some amount of time has passed since the officer observed the underlying violation.” However, the Court noted, each “involved a delayed stop that followed a prior *completed* misdemeanor,” rather than an “*ongoing* violation.” In this case, there was no question but that “at the time of the stop, Anderson was still

engaged in an ongoing traffic violation.” Further, even though their true motivation was drug trafficking, that was of “no consequence.”⁶⁵

The Court agreed that “although law enforcement does not have unbounded discretion to delay a stop in order to facilitate the investigative process, where, as here, the facts involve an ongoing traffic violation and a relatively short delay,” the Court declined to say that the stop was improper. Anderson’s conviction was affirmed.

The Court looked to Hollin’s argument that the search warrant was insufficient. However, the Court noted that under “good faith” – pursuant to U.S. v. Leon⁶⁶ - the warrant was at least sufficient so as to not be considered “bare bones” for at least possession. It included at least a mention of the marijuana found in the apartment, offering “a factual basis to believe” more drugs would be found there.⁶⁷

The Court upheld Hollin’s conviction as well.

U.S. v. Smith, 456 Fed.Appx. 572, 2012 WL 181393 (6th Cir. 2012)

FACTS: Officer Sifuentes (Welasco, TX, PD) notified the DEA in Michigan that they had intercepted a Fed Ex package of heroin being sent to Detroit. Agent Roel agreed to do a controlled delivery and the package was allowed to proceed on its normal route. A DEA drug dog alerted on the substance which was confirmed as heroin. They obtained a search warrant for the address to which it was to be delivered and replaced a small amount of the heroin into the package.

Officer Pace, in a Fed Ex uniform, made the delivery to Smith, who signed for it. As soon as Pace left, though, Smith looked out. He subsequently drove off, apparently with the package, which had not yet been opened.

The officers tried to make a stop, but Smith kept going. He was eventually “boxed in” near the original delivery address. He was handcuffed and the package was recovered.

Smith was indicted on federal trafficking charges. He moved for suppression, and the District Court ruled that the officers lacked reasonable suspicion to make the stop. The Government appealed.

ISSUE: Is a subject that evades a traffic stop seized?

HOLDING: No

DISCUSSION: The Court noted “the problem with the district court’s analysis is that the police did not need to “justify their ‘attempt to stop’ Smith.” Further, “if a suspect is not seized because he evades law enforcement – as Smith was not seized when he put his vehicle in reverse and drove away from the officers here – the Fourth Amendment is not implicated.” He “signed for and received a known package of heroin; he glanced up and down the street in a suspicious manner before leaving in a vehicle; and he subsequently ignored the officers’ commands for him to stop the vehicle, instead shifting into reverse and

⁶⁵ See Whren v. U.S., 517 U.S. 806 (1996).

⁶⁶ 468 U.S. 897 (1984).

⁶⁷ The Court did agree it was insufficient with respect to trafficking.

driving at a high rate of speed away from them for approximately half a block until other officers boxed him in.”

The Court ruled that was more than sufficient for reasonable suspicion for the stop and reversed the suppression of the evidence.

U.S. v. Justice, 464 Fed.Appx. 448, 2012 WL 593125 (6th Circ. 2012)

FACTS: In April, 2009, Justice’s estranged wife contacted the Maysville (KY) PD to let them know that Justice was driving a truck with expired plates, possessed firearms and was dealing in drugs. She stated Justice was living in a local motel. About two weeks later, Agent Fegan spotted the vehicle entering Maysville from Ohio and notified Det. Palmer. The detective confirmed the vehicle was not currently registered and he pulled in behind Justice as he parked in the lot, blocking him in. Det. Palmer approached him and told him the vehicle was not registered, and asked for documents. He gave consent to search the car “without hesitation.” Additional officers arrived and Det. Palmer called Aberdeen Ohio to verify that the vehicle had been registered there that day as Justice claimed.

During the vehicle search, they found evidence of drug use and a bullet. Wagner, Justice’s girlfriend, came from a motel room and asked what was going on; they confirmed Justice lived there with her. They noticed marijuana on the hood of the pickup and pills near where Wagner was standing. Both were advised of their Miranda rights. Justice did not respond to a request to search the room. They explained they had sufficient probable cause to seek a warrant for the room and Justice agreed, verbally, to a search. They found two firearms in the room. Justice was cooperative until they found the guns, and at that point, they arrested both Justice and Wagner. Approximately 75 minutes spanned the time between the stop and the arrest.

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

ISSUE: May a person be detained to discover if a vehicle is properly registered?

HOLDING: Yes

DISCUSSION: The Court first looked at the stop and agreed that it was lawfully based on a traffic violation, no matter the motivation.⁶⁸ With respect to the consent for the search of the vehicle, Justice argued that his consent was coerced because he was not free to leave. The Court, however, ruled that Det. Palmer “did not unreasonably extend the duration and scope of the traffic stop by asking ... for consent.” The detention to determine if the vehicle was properly registered was proper. Finally, the Court noted that he wasn’t actually detained until after the firearms were found, as evidenced by him being “free to walk in and out of the motel room while officers conducted a search of the room.” It was not essential that Justice be informed of his right to refuse consent.⁶⁹ In addition, the Court agreed “that an officer’s indication that he will obtain a search warrant if a person declines consent to search does not taint the consent.”⁷⁰

⁶⁸ Whren, supra.

⁶⁹ Schneckloth v. Bustamonte, supra.

⁷⁰ U.S. v. Salvo, 133 F.3d 943 (6th Cir. 1998); U.S. v. Blanco, 844 F.2d 344 (6th Cir. 1988).

The Court upheld the convictions.

U.S. v. McCraney, 674 F.3d 614 (6th Cir. 2012)

FACTS: On July 4, 2010, at about 12:50 a.m., Officer Ricker (Massillon, OH, PD) was on patrol. McCraney was a passenger in a vehicle that passed the officer in the opposite direction. The driver of the vehicle failed to dim his headlights and Ricker followed. As the officer fell in behind the vehicle, he saw both occupants “lean over toward the floor of the car.” He later testified that type of movement virtually always led to the discovery of contraband or firearms in the car. McCraney later claimed that he and the driver, Ammons, did not make such a motion, however. The vehicle was registered to McCraney, who had a suspended OL; Ammons, the driver, also had a suspended OL. Ricker cited both, Ammons for the suspended OL and McCraney for “unlawful entrustment” in letting Ammons drive. McCraney was permitted to call a relative to get them and the car. While they were waiting, however, they were frisked and the passenger compartment was searched. A gun was found under the driver’s seat and both men were arrested. McCraney, a convicted felon, later admitted to his probation officer that he owned the gun.

McCraney moved for suppression, which was granted. The government appealed.

ISSUE: May a claim of a need to sweep a car be negated by the officers’ actions at the scene?

HOLDING: Yes

DISCUSSION: The Court first looked at the search under Arizona v. Gant. The Government argued that since the men were not restrained, they could gain access to the passenger compartment. However, they were apparently standing at the rear of the vehicle, surrounded by three officers, while two other officers searched the car. For that reason, the court agreed, it was not reasonable to believe they were “within reaching distance.”

The Government also argued that the search was permitted under Michigan v. Long, and noted Ricker’s testimony about the suspicious movements. However, the officer had also testified that he would have let McCraney drive away in the vehicle had his license been valid, and that he was intending to permit McCraney’s family member to take the car. (In fact, Ricker later testified that it was a ruse and that he was simply trying to avoid escalating the situation until backup could arrive.) The Court noted that there was no evidence suggesting that the occupants were involved in any criminal activity, initially.

The Court agreed that the officers lacked even reasonable suspicion to do a protective sweep of the vehicle’s passenger compartment, and upheld the suppression.

U.S. v. Herrin, 468 Fed.Appx. 444, 2012 WL 75434 (6th Cir. 2012)

FACTS: Late one evening, in May, 2010, Officers Hathaway and Mitchell were on patrol in a “high-crime area of Murfreesboro (TN)” Their vehicle, though unmarked, was well known to be a police vehicle. The observed “several men speaking to the driver of a parked vehicle through the vehicle’s passenger-side window.” That driver, Herrin, “apparently panicked at the sight of the officers’ approach and drove away at a high rate of speed, passing the officers and heading west.” Certainly, “seeing Herrin idle in an area known for drug sales and then race away at the sight of a police vehicle aroused suspicion.” They followed without activating emergency equipment, to see who owned the vehicle. They lost sight of it, but then

spotted the vehicle in a nearby driveway, about a block away from where it had originally been sighted. The vehicle was unoccupied but the driver-side door was open and the dome light was on. Herrin was on the porch, knocking at the door. The officers pulled in next to the suspect vehicle.

Hathaway recognized Herrin, having arrested him in the past, and also knew him to be a suspect in several shootings and a murder. He knew Herrin's license was suspended and that he did not own or reside at the house where they were located. Officer Hathaway spoke to Herrin and confirmed he had a suspended license. They searched the area around the porch and found a handgun wrapped in a baby blanket. Officer Mitchell handcuffed Herrin, gave him Miranda and questioned him. He admitted that he fled the scene and that his brother cautioned him about the gun in the car. He then elected to abandon the weapon because he was a convicted felon.

Herrin was charged for the weapon and moved for suppression of the evidence and the statements. The District Court ruled against the motion and Herrin took a conditional guilty plea. He then appealed.

ISSUE: Is an officer stopping next to an already parked car a "traffic stop?"

HOLDING: No

DISCUSSION: The Court reviewed only Herrin's contention that the initial encounter was a traffic stop. The Court found that the officers did not restrain Herrin by their "driving maneuvers," but instead they simply parked next to his "already stopped vehicle" and approached him on foot. Herrin argued that Officer Hathaway's two U-turns to fall in behind him "manifested the officers' intention to give chase," but the Court ruled that an "investigatory pursuit" does not necessarily constitute a seizure under the Fourth Amendment.⁷¹ Further, Herrin apparently stopped the car to get rid of the gun, not to submit to the officers' authority. The Court agreed that a seizure occurred only after he admitted to driving with a suspended license, a criminal offense.

The Court affirmed his plea.

U.S. v. Moreno-Martinez, 467 Fed.Appx. 492, 2012 WL 975075 (6th Cir. 2012)

FACTS: On the day in question, several Border Patrol agents approached Moreno-Martinez's van, where it was parked in a rest stop on the Ohio Turnpike. He was asleep and they knocked on the driver's side window. Moreno-Martinez assured them he was okay and admitted he was from Mexico and was in the country illegally. They took all of the occupants of the van into custody.

Federal charges were placed. He moved for suppression of the stop and was denied. Moreno-Martinez took a conditional guilty plea and appealed.

ISSUE: Is an officer stopping to check on a sleeping subject in a vehicle making a consensual encounter?

HOLDING: Yes

⁷¹ Michigan v. Chesternut, 486 U.S. 567 (1988).

DISCUSSION: The Court noted that a “consensual encounter between an individual and a law enforcement officer does not trigger Fourth Amendment scrutiny.”⁷² The Court agreed that “under the circumstances, a reasonable person ... would have felt free to end the encounter,” and that the encounter was, in fact, consensual.

The Court upheld the plea.

U.S. v. Ware, 465 Fed.Appx. 487, 2012 WL 695452 (6th Cir. 2012)

FACTS: On October 1, 2008, just before 5 p.m., Det. Staimpel (Cleveland PD) received a call from a known informant, who reported that a specific individual was on his way to a particular location known for drug trafficking and other activities. He was in possession of crack cocaine and was armed. Dets. Staimpel and Miles responded, requesting backup from uniformed officers. They initially planned to locate the vehicle the man was driving, but they happened upon it more quickly than they expected. They followed it as it made an un signaled turn. A registration check indicated that Ware and a female owned the car. They followed until marked cars arrived and then Det. Staimpel activated his emergency equipment. The car immediately pulled over and the officers surrounded it, blocking it in. Because of movement in the car, the detectives approached with guns drawn. They immediately had both occupants get out and frisked them. Officer McClain opened the car’s center console (the movements inside the car centered on that area) and found a gun and a “fake” can in which drugs were found. The two occupants (Ware and McKinley) were placed in separate cars. Ware was cited for the failure to use a turn signal and for not wearing a seat belt. He was later questioned after receiving Miranda warnings and made inculpatory statements.

Ware was charged with the drugs and moved for suppression. The informant testified at the hearing and stated that she knew Ware as the father of her grandchild. Ware, however, testified that the law enforcement recitation of the facts was wrong and that he had done none of the things of which he was accused. The trial court concluded that the officers were more credible and Ware was ultimately convicted. Ware then appealed.

ISSUE: May a traffic stop be based on a minor traffic violation?

HOLDING: Yes

DISCUSSION: The Court first addressed the traffic stop, holding that the “officers themselves well knew they did not have a sufficient basis to stop the car based only on [the] tip.” However, they did have cause once they saw a traffic violation, and the Court agreed that the detectives’ testimony was more credible.

With respect to the traffic stop, the Court agreed that the detectives had reasonable suspicion that Ware was engaged in criminal activity. The Court focused on the issue of whether the officers “violated the Fourth Amendment when they searched the center console.” The Court noted that Ware was standing directly outside the car when the officers located the weapon and that the officers kept the weapon in site as they secured the two men away from the car. The Court stated the search “falls cleanly within Michigan

⁷² Florida v. Bostick, 501 U.S. 429 (1991).

v. Long.⁷³ Further, locating the drugs fell within Maryland v. Dyson since they had “probable cause to believe that the automobile would contain crack cocaine, just as the informant reported.”⁷⁴

Ware’s conviction was affirmed.

U.S. v. King, 466 Fed.Appx. 484, 2012 WL 806025 (6th Cir. 2012)

FACTS: On July 28, 2009, on an unrelated case. Detectives Miller and Guzik (Lakewood PD) observed a driver who matched a description given by a CI of a man involved in drug activity. Guzik got out and told Miller to drive away, so that he could observe on foot what happened next. The suspect parked, got out and entered an apartment building in an area known for drug trafficking. The person emerged after a few minutes and left. Guzik believed a drug transaction had occurred and called for a uniformed officer to arrive to provide assistance. Guzik joined back up with Miller and they followed the vehicle. Uniformed officers arrived and a traffic stop was made by Officer Romanello. As the officer was checking the license, the vehicle sped away.

Officer Romanello went in pursuit and witnessed a number of traffic violations. The vehicle crashed and Romanello saw King flee on foot. He gave chase along with another officer who tried to block King with a vehicle. King was captured and arrested. During a search, officers found 101 pieces of crack cocaine, individually wrapped, a cell phone and cash. They found heroin on the ground near the car and a loaded weapon laying on the floorboard in plain view.

King was charged with a number of drug offenses and well as for his possession of the firearm, as he was a convicted felon. He moved for suppression and was denied, with the trial court agreeing that the initial stop was actually not supported by reasonable suspicion, “King’s intervening decision to flee the scene and break

Numerous laws —all witnessed by police — provided probable cause for his subsequent arrest and search.” King ultimately took a plea agreement and appealed.

ISSUE: Does fleeing an improper stop invalidate a later stop based upon different cause?

HOLDING: No

DISCUSSION: The court initially discounted possible jurisdictional issues, as the arrest took place in Cleveland rather than Lakewood.⁷⁵ The Court ruled that it was unnecessary to discuss the issue as the legality of the arrest did not depend upon Ohio law. The Court agreed that in the Sixth Circuit, “fleeing or otherwise resisting an unlawful search or seizure constitutes an intervening independent act of free will that purges the taint from the initial unlawful search or seizure.”⁷⁶

The Court agreed the arrest, and the subsequent lawful seizure of the evidence, was proper. King’s conviction was affirmed.

⁷³ 463 U.S. 1032 (1983). See also U.S. v. Graham, 483 F.3d 431 (6th Cir. 2007).

⁷⁴ 527 U.S. 465 (1999); Carroll v. U.S., 267 U.S. 132 (1925).

⁷⁵ Both cities are in Cuyahoga County, but it is unclear whether Lakewood officers have jurisdiction in Cleveland.

⁷⁶ U.S. v. Allen, 619 F.3d 518 (6th Cir. 2010).

U.S. v. Carr, 674 F.3d 570 (6th Cir. 2012)

FACTS: On August 29, 2006, officers from the Madison County Metro Narcotics Unit were on patrol in a high-crime area. They spotted a white Chevy Tahoe in a car wash and knew that was a place where drug-dealing took place. It was not being washed and they could not tell if it was occupied. The officers went around and returned, it had not moved but they found the lack of activity unusual. They drove in and parked near the Tahoe but did not block it in. They momentarily turned on the blue lights to alert the occupants as to whom they were and Officers Carneal and Bynum approached it on foot. They saw “Carr bending toward the middle console, fidgeting with his hands.” Officer Carneal spotted a bag of marijuana on the console and he had Carr get out, and he was frisked. Carr was arrested and consented to a vehicle search, whereupon they found marijuana, cocaine, paraphernalia, money and a loaded handgun.

Carr was charged with several federal offenses, including possession of the gun as he was a felon. He moved for suppression, which was denied. Carr took a conditional guilty plea and appealed. The Court “remanded for further fact-finding regarding the positioning of the police car and to determine the extent to which the blue lights were used. After a second hearing, his motion was again denied and he again appealed.

ISSUE: Is an approach to a subject in a vehicle generally consensual?

HOLDING: Yes

DISCUSSION: The Court divided the encounter into “three stages: the parking of the police vehicle, the officers’ approach on foot, and Carr’s exit from his vehicle.” The Court agreed the way the car was parked “gave Carr sufficient room to drive either forward or backward out of the carwash bay.” The use of the lights served simply to inform Carr of their identity. Their approach on foot was also consensual, with one officer on each side of the vehicle. Once they asked Carr to get out, however, “the encounter transformed from voluntary to compulsory.” As soon as they spotted the marijuana, the officers had reasonable suspicion, indeed, probable cause to believe Carr was engaging in a crime. The Court agreed, in addition, that the officers would have had reasonable suspicion to justify the encounter, given the facts that they knew. Although the time of night and the characterization of the area as “high-crime,” standing alone, would not be enough, when added to the other facts, the Court agreed there was sufficient reasonable suspicion to approach the vehicle.

The denial of the motion to suppress was affirmed.

SEARCH & SEIZURE – VEHICLE STOP/SEARCH - GANT

U.S. v. Collins, 462 Fed.Appx. 507, 2012 WL 34375 (6th Cir. 2012)

FACTS: In January, 2009, “Miami police identified a trend connecting vehicle break-ins.” Witnesses to several reported that the suspect was driving a particular vehicle, and the officers “eventually identified a vehicle matching the profile.” The vehicle was registered to Collins. They did “intermittent surveillance for roughly two weeks” and observed him switch to a different vehicle with temporary tags. Sure enough, subsequent burglary witnesses began reporting that the suspect drove a vehicle matching that description. On January 28, following several break-ins, an officer spotted the new vehicle. Officer

Lewis stopped it and saw a duffel bag matching the description of one stolen earlier that day. He discovered Collins, the driver, had no insurance and a suspended OL. Officer Lewis frisked Collins and found a flashlight and a window punch. He arrested Collins and had the car towed, first doing an inventory search where additional evidence was found.

Collins waived his Miranda warning and confessed to a number of car break-ins, including the theft of a shotgun which resulted in the federal charges. (Collins was a convicted felon.) Following the denial of his suppression motion, Collins was convicted. He then appealed.

ISSUE: Is a search for proceeds of a burglary permitted under Gant?

HOLDING: Yes

DISCUSSION: Collins argued that evidence found during the car inventory should have been suppressed. However, the District Court ruled that the officers did the inventory "in a manner consistent with the department's towing policy."⁷⁷ The Court however, found it did not need to resolve any dispute about the policy "because either way the police had probable cause to search the vehicle" under Arizona v. Gant.

Collins also argued that his statement was involuntary due to a medical condition (diabetes) and that he was "out of [his] mind." He argued initially his blood sugar had dropped dangerously low, but then testified that his blood sugar tested, right after the interview, so high that the machine could not register it. The court noted it was not required to "believe one-half of this contradictory story."

The Court upheld the conviction.

SEARCH & SEIZURE – COMMUNITY CARETAKING

U.S. v. Brown, 2012 WL 2948020 (6th Cir. 2012)

FACTS: When Jackson, age 17, failed to return to his Youngstown, Ohio, home on May 25, 2009, his mother reported him missing. Officer Pesa responded and was told that Jackson had left the house about 4:30 a.m. that morning, having been out earlier with Brown and another friend. His mother had contacted Brown, who had told her some details of the evening. Officer Pesa concluded he would need to speak to Brown as well and about that time, Brown drove by. Officer Pesa called to him and Brown stopped the car. He told Brown he needed to speak to him, and Brown "appeared panicked, confused, and about to cry." He asked to go to his grandmother's house, which Pesa refused. He had Brown get out, but immediately began looking around, which to Officer Pesa indicated he was about to run, so he secured him up against the car. The officer "felt a hard object in Brown's waist area that he immediately recognized as a firearm." He cuffed him and retrieved the weapon. Brown volunteered that Patterson gave him the gun and that Jackson was dead, providing the location of the body.

Brown, a felon, was charged with possession of the gun. He moved for suppression, which the trial court denied, finding that the officer's actions were common sense and that the initial stop was justified under Terry v. Ohio.⁷⁸ Brown appealed.

⁷⁷ South Dakota v. Opperman, 428 U.S. 364 (1976).

⁷⁸ Terry v. Ohio, 392 U.S. 1 (1968).

ISSUE: May vehicles be stopped when officers are seeking information about a missing juvenile?

HOLDING: Yes

DISCUSSION: First, the Court agreed that calling to Brown to come to him did not constitute a seizure in this case. The Court noted that “in order to determine whether a particular encounter constitutes a seizure, a court must consider all the circumstances surrounding the encounter to determine whether the police conduct would have communicated to a reasonable person that the person was not free to decline the officers’ requests or otherwise terminate the encounter.”⁷⁹ The fact that Brown did respond to the request (when he was driving and could have simply driven away) made it consensual. The timing of his later request to “stop,” when Brown was already in the process of returning, suggested that “Brown stopped and engaged in a conversation with Officer Pesa voluntarily.” Further, however, the Court noted that even if it was not consensual, “the community-caretaking function of locating missing minors would permit an officer to stop a key eyewitness when prompt inquiry may assist in finding the minor before he comes to harm.”⁸⁰ At the time, Officer Pesa had no evidence to indicate that Brown had harmed Jackson, only that he had been with him earlier. “He had yet to see Brown’s extreme reaction to Ashton’s mother, his panicked demeanor, or his furtive behavior.” The Court agreed that “No Fourth Amendment violation results when an immediate caretaking interest justifiably compels an officer’s intrusions.” Once he began talking to Brown, however, and he denied Brown’s request to leave, “the encounter changed from voluntary to compulsory.” By that time, however, the officer had reasonable suspicion that Brown was more involved as his behavior went “beyond the ordinary nervousness one might expect from interacting with an authority figure.”⁸¹

From that point, the Court agree that the officer’s concern for “his safety justified his asking Brown to step out of his vehicle.” At the time, a “crowd of uncertain affiliation gathering behind Pesa, the lone officer in the high-crime neighborhood, justified Pesa’s moving in to block Brown’s escape and to place himself between the potentially hostile crowd and Brown.” Once he felt the weapon, he now knew Brown had access to a weapon.

The Court agreed that Officer’s Pesa’s actions were correct and affirmed the denial of the motion to suppress.

SEARCH & SEIZURE – EXCLUSIONARY RULE

U.S. v. Fofana, 666 F.3d 985 (6th Cir. 2012)

FACTS: On November 29, 2007, two U.S. Bank checking accounts were opened in Cincinnati in Diallo’s name. A passport was used for identification. Money was deposited by the IRS into the account and Diallo withdrew most of it, before the bank realized that the money belonged to another individuals. The account was blocked as a result. A few weeks later, the IRS did two more deposits to one of the

⁷⁹ Florida v. Bostick, 501 U.S. 429 (1991).

⁸⁰ Cady v. Dombrowski, 413 U.S. 433 (1973).

⁸¹ Illinois v. Wardlow, 528 U.S. 119 (2000); U.S. v. Sokolow, 490 U.S. 1 (1989).

accounts, money that belonged to someone else. Diallo tried to make a withdrawal but due to the block, he was not successful. By this time, the Secret Service was investigating.

On January 31, 2009, Fofana arrived at the Port Columbus International Airport. He was flagged for additional screening. During a search of his belongings, TSA found a large amount of cash and three passports with Fofana's photo but different names – one for Diallo. He was promptly arrested.

The Bank filed a Suspicious Activity Report (SAR) and concluded that Fofana was Diallo. He was indicted for possession of the false passports and for bank fraud. Fofana filed for suppression. The trial court concluded that "the extent of the search went beyond the permissible purpose of detecting weapons and explosives and was instead motivated by the desire to uncover contraband evidencing ordinary criminal wrongdoing." The Government chose to drop the passport charges. The trial court also agreed to exclude all of the bank evidence as the fruit of the unlawful airport search, finding that there was no indication Fofana would have been linked to the Diallo name "through an independent source or through inevitable discovery." The Government appealed.

ISSUE: If lawfully held information is proven to be valuable through unlawful means, may the evidence still be admissible?

HOLDING: Yes

DISCUSSION: The Court began:

There is a difference between evidence that the Government *obtains* because of knowledge illegally acquired, and evidence properly in the Government's possession that it *learns the relevance of* because of knowledge illegally acquired. It may be that the latter must be suppressed in some cases. But in the context of the present case, bank records and other evidence that the Government obtained independently of the airport search do not have to be suppressed on account of the unconstitutionality of that search, merely because the relevance or usefulness of that evidence became apparent because of the search.

The Court noted that the actual documents were in the Government's possession "entirely free of illegal means." They possessed a photo of Fofana that could have linked him back to the bank account, as well.⁸² It was "only incidental that an illegal search speeded the recognition of the usefulness of the available evidence, or in other words narrowed the investigation."

In addition, "the illegal search was not directed to the crime, or even the type of crime, for which the discovered information turned out to be useful, thereby eliminating much of the deterrent effect of suppression in this case."⁸³ The Government was already under the burden of the deterrent affect of having lost the passports, and some circuits "have held that the exclusionary rule did not apply when a second, more remote set of charges was brought on the same evidence illegally obtained, since the deterrent effect was achieved by suppressing the evidence on the initial charges."

Finally:

⁸² U.S. v. Crews, 445 U.S. 463 (1980).

⁸³ U.S. v. Akridge, 346 F.3d 618 (6th Cir. 2003).

Once the Government learns who Diallo really is, how is the Government to identify him free of the taint of the underlying knowledge? No matter how investigators finally identify Diallo, the Government will be accused of having used its ill-gotten knowledge in narrowing the investigation. And requiring the police to follow a lot of known false leads appears an undue cost of the exclusionary rule. A more reasonable cost is that the police must find new or different untainted evidence, as they have in this case.

In addition, "In this case, upholding suppression would just as perpetually keep the very evidence of the bank fraud—the bank records of the fraud—from being presented to the criminal fact finder."

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

42 U.S.C. §1983 – WARRANT

Horacek v. Neph, 466 Fed.Appx. 508, 2012 WL 806055 (6th Cir. 2012)

FACTS: In June, 2005, DeRaad's business in Michigan was burglarized. Several items, including checkbooks were stolen. On June 16, a check was cashed in Rochester Hills, payable and endorsed by Gary Roberts. On June 24, Horacek was arrested on unrelated charges and officers found several checks stolen from DeRaad. Some were payable to Horacek, others were blank except for a partial signature of DeRaad.

Det. Neph was assigned to the case. He interviewed bank personnel after Horacek's arrest and learned there was video of the transaction. He claimed that Horacek had confessed while in jail. He appeared at a hearing on July 14 as to the facts for which he wanted an arrest warrant and the warrant was issued. He later testified, at another hearing, that he'd made errors in his testimony, and further, the stolen check and the video had both been destroyed by the bank. Ultimately the Court dismissed the charge, finding no probable cause existed.

Horacek filed suit under 42 U.S.C. §1983, alleging that Neph "knowingly gave false testimony during the criminal proceedings." He claimed that it was done in retaliation for Horacek bringing an unrelated lawsuit against other officers. The District Court gave Neph summary judgment and Horacek appealed.

ISSUE: May false statements made in a arrest warrant subject the officer to liability?

HOLDING: Yes

DISCUSSION: The Court looked to the claims and agreed with Horacek that a "genuine issue of material fact exists as to whether Neph's testimony in support of the arrest warrant included statements made with deliberate or reckless disregard for the truth." The errors were not simple mistakes, but appeared to be more – as he testified that two witnesses identified Horacek, when they said they did not, and that he'd viewed the video, when again, he did not. Without that evidence, there was insufficient evidence that Horacek had tried to cash the check

The Court agreed that these errors, along with the assertion that Neph was engaging in retaliation because

of protected First Amendment conduct – filing the lawsuit - was sufficient to prevent the case from being disposed upon by summary judgment.

The Court reversed the grant of summary judgment and remanded the case.

42 U.S.C. §1983 – ENTRY

Farinacci v. City of Garfield Heights (OH) 461 Fed.Appx. 447, 2012 WL 386368 (6th Cir. 2012)

FACTS: Farinacci lived in Garfield Heights for many years. In January 2006, she fell behind on mortgage payments and in December, foreclosure proceedings ensued. On February 21, 2007, she left her home because of poverty and illness, leaving behind most belongings, including a number of cats. Her daughter, Kim, returned to the home regularly to care for the animals.

On April 27, James, who was handling the preservation of the property for the bank, asked the City Service Director, McLaughlin, to remove the cats. Eventually Kristof, the Animal Warden, went to remove the cats. No one, however, notified the Farinaccis or the Bank to verify James's authority to take the action, and the Farinaccis never gave permission for the entry. The city entered the house and put out traps, but Kim found the traps, freed the cats and removed the traps. A police report was taken for the missing traps.

That same day, an action was filed in court to declare the property vacant and abandoned – which the Farinaccis claimed circumvented the local ordinance which required posting and an opportunity for the owner to respond.

The Farinaccis brought a claim under 42 U.S.C. §1983 claiming a violation of due process and against individuals, including the Animal Warden, for entering the property in violation of the Fourth Amendment. All defendants moved for dismissal under 42 U.S.C. §1983, which was granted. The Farinaccis appealed.

ISSUE: May a third party (bank) give authorization for an entry into a foreclosed property?

HOLDING: Yes

DISCUSSION: The Court began with the Fourth Amendment claim, framing the issue as to whether James had authorization to give third party consent for the entry. The Court noted that the Farinaccis had no contract or other dealings with James and the "property preservation company", which was contracted with the foreclosing bank. They argued that while they did agree that the Bank/Mortgage holder could enter and authorize their agents to do so, that no one else could give a third party permission to enter. The District Court had concluded that the Bank properly delegated its authority to James.

The Court agreed that such authority is "not to be implied from the mere property interest a third party has in the property."⁸⁴ However, the Court agreed that the mortgage instrument gave the Bank the authority to take such actions as necessary to preserve the property and that it could delegate that to third parties, such as James. The Court agreed the entry was properly authorized under the terms of the agreement and upheld the dismissal.

⁸⁴ U.S. v. Matlock, 415 U.S. 164 (1974).

42 U.S.C. §1983 – HECK

Matheney v. City of Cookeville (TN) 461 Fed.Appx. 427, 2012 WL 372974 (6th Cir. 2012)

FACTS: On July 17, 2007, Cookeville officer responded to call of suspicious activity concerning occupants in a truck, located in the trailer part. They tried to stop Matheney, who was driving a truck in that area, but he would not stop and proceeded out of the park onto the public street. Officer Mathis gave chase. The pursuit went on for 7 miles, during which Matheney “ignored all stop signs and traffic control devices.” The chase ended when Matheney made a controlled crash at a junkyard, and then jumped out and hid. Officer Mathis followed and ordered him to give up or face being apprehended by a K-9, Melo. Melo then entered the yard and bit Matheney. Matheney fought with Melo, who released him, and he continued to fight. The officers fought with him, and eventually, he was Tasered. He continued to fight. Matheney later stated that he didn’t hear that the dog would be deployed and that Melo was still biting him, even when he was otherwise subdued by the officers. He was handcuffed and taken to the patrol car. The entire event at the junkyard took about three minutes.

Matheney filed suit under §1983 against the officers, the chief and the city, on a claim of excessive force. The District Court had awarded summary judgment, holding the lawsuit barred under Heck v. Humphrey.⁸⁵ Matheney appealed.

ISSUE: Is a civil claim barred if a finding in their favor would imply the invalidity of a state criminal conviction on the same matter?

HOLDING: Yes

DISCUSSION: In Heck, the Court held that a plaintiff cannot recover under §1983 “when the basis for the claim necessarily implies the invalidity of a previous state criminal conviction.” That would occur if a decision in the plaintiff’s favor “would negate one of the elements of the crime of which the plaintiff was found guilty.”

In an excessive force claim, for Heck to be a bar, it is necessary that the claim and the conviction “must arise out of the same events.” Matheney failed to develop any facts on the record to explain how actions taken after the arrest (and he was handcuffed) were excessive force, beyond arguing that he was forced to “walk right” on his injured leg. He did not argue that “the dog bite, knee strikes, or taser deployment occurred after he was handcuffed.” The force used prior to the arrest would be inextricably intertwined with the decision to arrest him, and thus to the resisting arrest charge. In one case, however, Karrtunen v. Clark⁸⁶, however, the Court had ruled that excessive force claims were not barred by a resisting arrest charge, ruling that way because in Michigan (unlike Tennessee) “excessive force is not a defense to resisting arrest.”

Finally, the Court disagreed that Matheney did not understand to what he was pleading when he pled guilty to resisting arrest. The Court noted that he signed a form indicating he understood the charges and it was clear that charge came from the fight.

⁸⁵ 512 U.S. 477 (1994).

⁸⁶ 369 F. App’x 705 (6th Cir. 2010).

The Court ruled it was correct to dismiss the case pursuant to Heck.

42 U.S.C. §1983 – FORCE

Kowolonek v. Moore (and others) & City of Florence, 463 Fed.Appx. 531, 2012 WL 573996 (6th Cir. 2012)

FACTS: On August 22, 2007, Officer Moore (Florence PD) responded to a burglary in progress. A description was broadcast of the supposed burglar as Puerto Rican. However, the caller was mistaken and Kowolonek, who lived at the address, had simply broken the window accidentally. (He further did not meet the description of the burglar, as he is biracial and not Hispanic.)

However, Moore “did not have the benefit of this information” when he arrived. He found Kowolonek sitting on the front step, wearing a gray tee-shirt as had been described. Kowolonek said he lived there but had “no clue” as to where his ID might be. The officer asked Kowolonek to put down the cigarette he was trying to light, but he refused to do so, and ultimately “Moore grabbed the cigarette from his mouth.” After further discussion, Moore placed on cuff on Kowolonek, who then “reached for the screen door and grabbed it.” His girlfriend tried to intervene and stated that she would go inside and get his mother or his ID. They continued to struggle and Kowolonek resisted Moore’s attempt to cuff him.

Additional officers arrived, from Florence PD and the Sheriff’s Office. They grabbed Kowolonek and struggled, and finally, Kowolonek’s mother “began to yell from the upstairs window that Kowolonek lived there.” One of the officers Tased him. Kowolonek was fully handcuffed and taken to the cruiser for a few minutes. After the officers talked to his mother and some neighbors, Kowolonek was released. (The one sheriff’s deputy, Hill, was identified as using the Taser.)

Kowolonek filed suit against all of the officers and the deputy at the scene under 42 U.S.C. §1983, alleging excessive force and other violations of the Fourth Amendment.. The trial court dismissed all of the claims and Kowolonek appealed.

ISSUE: Is a brief handcuffing, during a valid Terry stop, valid?

HOLDING: Yes

DISCUSSION: The Court reviewed the interaction as one that falls under Terry v. Ohio. The Court concluded the actual stop “began when Moore handcuffed one of Kowolonek’s wrists” so the question was whether at that point “Moore possessed reasonable, articulable suspicion that Kowolonek had engaged in criminal activity.” Kowolonek generally, although not precisely, fit the description of a presumed burglar, made by one of the immediate neighbors. Under “ideal circumstances,” Moore “would have called the dispatcher to confirm the description of the suspect,” but he was responding to an urgent call. The Court agreed that discrepancies in the description did not invalidate the call. Moore was “entitled to further investigate to corroborate this information [from Kowolonek], especially since he considered Kowolonek a suspect based on the 911 call.” At this point, Moore could not be clear on what the “situation was inside the house.” He had reason to “temporarily prevent him from entering the house.”⁸⁷

⁸⁷ U.S. v. Foster, 376 F.3d 577 (6th Cir. 2004).

Moving on to Moore's subsequent actions, "handcuffing Kowolonek completely and placing him into the cruiser for five minutes," the Court agreed that the duration of the interaction was not unreasonable. The officers used that short time to talk to neighbors and Kowolonek's mother, and then they immediately released him. The Court further agreed that Kowolonek did not appear to be armed, but "he did actively resist being restrained and was visibly upset."

The Court noted that "it is likely that the officers did not exceed the bounds of Terry by handcuffing and briefly detaining Kowolonek in a cruiser to dispel their reasonable suspicion that he was a burglar and a burglary had occurred." However, the Court did not even have to reach that question, because it found that "the officers are nonetheless entitled to qualified immunity because their actions did not violate clearly established rights." The Court found no reason to find that a "reasonable officer would know that this conduct was unlawful." Although the officers "regrettably made a mistake," a mistake does not "automatically disqualify them from entitlement to qualified immunity." Officer Moore certainly had sufficient facts to believe he was justified in detaining and investigating Kowolonek, and the remaining officers, who arrived during the struggle, had that as well.

Finally, with respect to the degree of force used, the Court agreed that handcuffing was appropriate. With respect to the Taser, the Court noted that "issue is the identify of the officer who used his Taser on Kowolonek." There was inconsistency in the description of which officer did so, with confusion as to the color of the uniform and even the color of the actual Taser. Further, Kowolonek's argument that the officers should have anticipated and prevented the Taser from being used "also rings hollow." The entire interaction lasted only minutes and "given the rapid sequence of events here, the officers did not have the opportunity to prevent the harm from occurring."

The Court upheld the dismissal of the claims as well as the federal court's decision to decline jurisdiction over any state law claims.

Scozzari v. Miedzianowski and McGraw, 454 Fed.Appx. 455, 2012 WL 15651 (6th Cir. 2012)

FACTS: On September 18, 2007, Chief Miedzianowski (Clare, Michigan, PD) responded to a shots fired call at a park next to the Lone Pine Motel. He noticed Scozzari "coming around a nearby building and walking toward the motel." He was carrying a cane or stick on his shoulder, a backpack and a flashlight, the latter he pointed briefly at the police car. Miedzianowski called for assistance from Officer McGraw, then got out of the car to talk to Scozzari. He asked Scozzari to drop the stick and approach him, but Scozzari responded with a profanity and continued to walk. Miedzianowski followed Scozzari as he walked to the motel, continuing to order him to put down the stick. In the parking lot, he got closer and repeated the order, to which Scozzari again responded with a profanity and "pulled the stick back in his left hand, as if intending to hit the officer." Miedzianowski retreated behind cover and as Scozzari approached, used pepper spray. In response, Scozzari reached into his waistband and pulled out what the officer thought was a knife. He drew his weapon and ordered him to put it away. Scozzari did so and walked into a motel cabin (his own), closing the door. McGraw arrived and both officers went to the cabin, intent on arresting Scozzari. Scozzari answered the door with a "military knife in one hand and a hatchet in the other." Both were in sheaths, but Scozzari seemed to be trying to remove the knife. McGraw fired his Taser and Scozzari back into the cabin, closing the door. The officers tried to kick open the door and it opened. They ordered Scozzari to drop the weapons he still held. He approached McGraw, who backed up and tripped, and he "tried to scurry backward, stand up and reach for his gun all at once." Scozzari

advanced with the unsheathed hatchet and Miedzianowski fired 4 shots, and as Scozzari turned, McGraw fired 7 times.

Witnesses, however, gave different accounts. One witness stated that he heard the officers shout multiple times to “put the knife down,” and heard the Taser being deployed. He also heard a “new voice” say to “put your gun down.” He saw a silhouette holding an item extended and then heard the gunfire. Another witness, who was awakened, said he saw Scozzari’s arm extended but did not see him holding anything. She also claimed the officers were 15-20 feet away and remained standing throughout. Yet another said that he heard the yelling and saw McGraw stumble, but not fall.

What occurred after the shooting was also in dispute. An autopsy revealed that Scozzari was struck by five rounds, all fired by McGraw. Two entered from the front and three from the back. Two tracings indicated that McGraw was standing when he fired the shots.

Scozzari’s estate representative filed suit under 42 U.S.C. §1983. Upon motion, the trial court ruled that the officers were not entitled to qualified immunity. After further procedural stops, the officers appealed.

ISSUE: Does a question of material fact prevent a finding of qualified immunity?

HOLDING: Yes

DISCUSSION: The Court reviewed the facts as presented with respect to the standard for qualified immunity. It noted:

When analyzing the reasonableness of a search or seizure, courts must pay “careful attention to the facts and circumstances of each particular case, including the severity of the crime at issue, whether the suspect poses an immediate threat to the safety of the officers or others, and whether he is actively resisting arrest or attempting to evade arrest by flight.”⁸⁸ Reasonableness must not be judged retrospectively, but rather from the perspective of a reasonable officer on the scene during the incident.. In particular, courts must account for “the fact that police officers are often forced to make split-second judgments -- in circumstances that are tense, uncertain, and rapidly evolving -- about the amount of force that is necessary in a particular situation.” Nevertheless, “the fact that a situation unfolds relatively quickly ‘does not, by itself, permit [officers] to use deadly force.’”⁸⁹

The Court noted that viewed from the plaintiff’s case (as required at this stage of the proceeding), the officers were some distance away from a man who was “51 years old, 5’3” and 133 pounds, blind in one eye and hardly physically intimidating.” Given the witness statements, the Court found there to be a “genuine question whether the situation compelled a split-second decision to use lethal force.”

The Court agreed that qualified immunity for the excessive force claim was not appropriate at this time.

⁸⁸ Graham v. Connor, 490 U.S. 386 (1989).

⁸⁹ Estate of Kirby v. Duva, 530 F.3d 475 (6th Cir. 2008) (quoting Smith v. Cupp, 430 F.3d 766 (6th Cir. 2005)) (alteration in Kirby).

The estate also claimed that the officers were deliberately indifferent to Scozzari's medical needs "when they delayed calling for medical assistance after the shooting and prevented emergency responders from treating Scozzari as soon as they arrived." Certainly the officers knew that he collapsed due to gunshot wounds, and they admitted seeing a pool of blood and hearing "gurgling sounds." McGraw detected no pulse. As such, a layperson would realize that Scozzari needed immediate medical attention. Approximately 12 minutes elapsed from the shooting until medical assistance was started. Chief Miedzianowski had instructed EMS to stage nearby, with a note in the EMS report indicating that they were told to approach without disturbing evidence. Treatment was paused while the police found and retrieved two more knives from his person.

In particular:

However, the record is uncontroverted that, seven minutes after they first reported the shooting, Miedzianowski and McGraw had not secured the scene of the incident. As a result, when the ambulance arrived, paramedics were forced to stage off-site for two minutes before approaching. Even then, the Officers instructed paramedics to proceed without disturbing the evidence, further delaying Scozzari's treatment by three minutes. In all, it took twelve minutes, from the initial report of the shooting until paramedics were able to treat Scozzari. Defendants emphasize that medical responders are frequently required to stage off-site until the scene of a shooting is secured. However, they fail to explain why they were unable to secure the scene and search Scozzari before the ambulance arrived. Moreover, there is evidence that the Officers spent at least part of this time knocking on doors and asking neighbors to witness Scozzari's weapons, activities that were unrelated to securing the scene or saving Scozzari's life.

The Court agreed that there was an issue of fact as to whether the officers "acted with deliberate indifference to Scozzari's pressing medical needs."⁹⁰ The Court upheld the denial of summary judgment to the officers.

42 U.S.C. §1983 – HANDCUFFING

Crooks v. Hamilton County, Ohio. 458 Fed.Appx. 548, 2012 WL 373288 (6th Cir. 2012)

FACTS: On September 8, 2008, a Union Township (OH) officer arrested Crooks for a bad check. He met with Deputy Gardner (Hamilton County SO) at the county line to transfer her. Crooks, age 65, told Deputy Gardner that she had arthritis and "really bad issues" with her neck, back and shoulders and asked to be handcuffed in front, as the Union Township officer had done. The deputy, however, although he did not believe she was a threat, did not think she fell within any exception to the county's mandatory handcuffing policy. The policy provided an exception for elderly individuals but the deputy "considered age 66 the threshold for 'elderly'" and did not believe any felony would be a "minor offense." He also did not believe she fell within the exception for a physical condition because she did not "cry out in pain" when initially cuffed in the rear.

Her son arrived before they left the scene and asked Gardner to move the cuffs again, he refused. He drove her to the jail and Crooks cried throughout the 30 minute trip. The charges were dropped against her the next day and she was released. Subsequent medical visits documented medical issues.

⁹⁰ Estate of Owensby v. City of Cincinnati, 414 F.3d 596 (6th Cir. 2005).

Crooks filed suit against Gardner and Hamilton County, alleging excessive force under 42 U.S.C. §1983. The District Court gave Gardner qualified immunity, and Crooks appealed.

ISSUE: May a handcuffing be considered excessive force, under some circumstances?

HOLDING: Yes

DISCUSSION: The Court agreed that in Walton v. City of Southfield, it had ruled that an excessive force claim for handcuffing was warranted if the officer knew the subject had an injured arm and posed no threat.⁹¹ The Court noted that cases since Walton had inserted an allegation of physical injury as a requirement, but the Court agreed Crooks had met that requirement with her additional medical evidence. The Court also agreed that “it is not everyday that handcuffing an individual’s hands behind her back leads to a broken rib” but that it was not everyday than an officer would take the actions that led to this case, either. The Court found that to be left to a jury to decide.

The Court reversed the qualified immunity decision and remanded the case for further proceedings.

42 U.S.C. §1983 – TASER

Cockrell v. City of Cincinnati, 468 Fed. Appx. 491, 2012 WL 573972 (6th Cir. 2012)

FACTS: Cockrell was visiting his girlfriend, Jones, on July 3, 2008. He left her apartment to walk across the street to borrow an item, jaywalking. Officer Hall (Cincinnati PD) saw him and ran toward him; Cockrell ran away. Hall chased him and then Tased him, “causing him to crash headlong into the pavement.”⁹² The offense in question did not normally warrant arrest, but Cincinnati argued that by running, Cockrell committed the offense of “obstructing official business” – a more serious misdemeanor offense.

The city’s use of force policy included specific guideline for Taser use, and recommended it was only for self-defense or to control subjects actively resisting arrest.

Cockrell filed suit under 42 U.S.C. §1983, alleging excessive force. Hall moved to dismiss the case on qualified immunity, but the trial court denied that motion. It noted that it had been clearly established by that day that the “use of a Taser, against a fleeing ... non-violent misdemeanant who posed no threat of harm to anyone, was prohibited by the Constitution.” Hall appealed.

ISSUE: Is the use of a Taser against a fleeing subject improper?

HOLDING: No (but see discussion)

DISCUSSION: The Court looked to Pearson v. Callahan.⁹³ First, it began “by considering whether the right allegedly violated was clearly established on the date of the incident.” The problem comes with

⁹¹ 995 F.2d 1331 (6th Cir. 1993)

⁹² The Court noted there was no indication that he “ordered Cockrell to halt or put him under arrest.”

⁹³ 555 U.S. 223 (2009).

determining the “level of generality at which the constitutional right must be clearly established.”⁹⁴ The Court concluded that “because neither case law, nor external sources, nor ‘[t]he obvious cruelty inherent’ in Taser use would have put every reasonable officer on notice that Hall’s conduct violated the Fourth Amendment,” the Court concluded that Hall was entitled to qualified immunity. It declined, however, to state that the action was not excessive force.

The Court reviewed previous Taser cases, noting that they “fall into two groups.” One group includes those “tased while actively resisting arrest by physically struggling with, threatening, or disobeying officers.” In such cases, the courts have concluded that the use of the Taser does not constitute excessive force. The second group includes situations where a subject is tased “who has done nothing to resist arrest or is already detained.” In that group, the courts have held that to use the Taser is excessive force. However, the Court noted, “this case does not fit cleanly within either group.” The Court noted that he did not “use violence, make threats, or even disobey a command to stop.” Instead, he “simply fled.” But, the Court agreed, “flight, non-violent though it may be, is still a form of resistance.” As such, “neither line of cases, then, dictates a particular result in this scenario; both apply in some measure.” The Court agreed that the “contours of the right Hall allegedly violated so clearly that every reasonable officer would know his actions were unconstitutional” were not yet established in July, 2008. The Court noted that both the Dept. of Justice and Taser had cautioned against the use of TASERS when the subject is fleeing because of the risk, but other studies lessened that emphasis. The Court noted that there was a difference of opinion in courts as to the inherent cruelty of the Taser, and that alone kept its use from being objectively unreasonable.

The Court reversed the District Court and ruled that Officer Hall was entitled to qualified immunity.

42 U.S.C. §1983 – STANDARD

Carlson v. Fewins & Jetter, 465 Fed.Appx. 526, 2012 WL 738734 (6th Cir. 2012)

FACTS: On November 9, 2007, Carlson called 911 (in Michigan) and asked for an officer to “stop by and talk to him.” Carlson had a history of mental health issues and local officers had done several “welfare checks” on him in recent months. His sister also called 911, asking that they speak to Carlson, and noted that he “had weapons in his home.”

Officers went to the home, but Carlson became agitated when they refused to enter the house. They learned from his brother and sister that he might commit “suicide by cop” and had already paid all his funeral expenses. They surrounded the home, but did not announce their presence. Carlson went to the back of the house, “opened the door, and fired a shot into the open air.” The officers later testified that they did not believe he was trying to hurt anyone but was simply trying “to get law enforcement attention.” He refused all communication with a negotiator after 3 a.m.

At about 5:19, they launched tear gas into the home several times, and then, about 7 a.m., they tossed in a throw phone. At about 9 a.m., they saw him in the window, “pacing and carrying a rifle.” At that time, Jetter was positioned across the street.

⁹⁴ Casey v. City of Federal Heights, 509 F.3d 127 (10th Cir. 2007).

One of the officers started to talk to Carlson, who was threatening to sue for the damage to the house. The officer "sought to reassure" him that "the county would pay for the damage." Jetter asserted later that Carlson "threatened the police, and then leaned out of the window, shouldered the rifle with his finger on the trigger, and pointed it at the police officers." Jetter shot and killed Carlson. Other officers, however, who were closer to Carlson at the time, "stated that they did not hear the specific threats or see some or all of the threatening actions alleged by Jetter." Forensic evidence also contradicted Jetter's description of Carlson's physical position.

Carlson's estate representative filed suit under 42 U.S.C. §1983. After discovery, all defendants moved for summary judgment. The Court granted summary judgment to all defendants except Jetter. Jetter appealed.

ISSUE: Must a claim for qualified immunity accept the plaintiff's version of the facts?

HOLDING: Yes

DISCUSSION: The Court noted that Jetter was asking that the Court "accept his version of the facts, and find that his version cannot support a violation of clearly established law." The District Court, however, had "noted four factual issues which it could not resolve on summary judgment." The Court noted that in this type of proceeding, the defendant raising the qualified immunity defense "must be prepared to overlook any factual dispute and to concede an interpretation of the facts in the light most favorable to the plaintiff's case."⁹⁵ The Court concluded that while Jetter's "statement of the facts might very well be true, the questions of fact are not for this court to decide."

The Court dismissed the case for lack of jurisdiction.

42 U.S.C. §1983 – MALICIOUS PROSECUTION

Cheolas (Candice and Steve) v. City of Harper Woods, 467 Fed.Appx. 374, 2012 WL 89173 (6th Cir. 2012)

FACTS: The Cheolases decided to host a surprise birthday party on April 24, 2004, for their 15 year old daughter, inviting a number of high school freshman guests. They were specifically told that food and beverages would be provided. At about 10 p.m., the mother of one of the guests called to speak to her daughter. The girl did not come to the phone and Candice Cheolas "found her in an intoxicated state." The girl's parents arrived and found their daughter intoxicated. They immediately called 911 to report "that someone had given his daughter drugs at a party." Officers arrived and requested entry, but Mrs. Cheolas refused. She ordered her to step away and she turned to speak to her husband, at which time the officers entered. They found the girl "pale, semi-conscious, and groggy" and she was ultimately found to have a BA of .18. Breath testing was done on the 31 teens there, 19 were found to have been drinking to varying degrees. (11 registered at higher than .04.) Liquor was found in the basement. Interviews did not indicate that the Cheolases provided any of the alcoholic beverages but Det. Snider (Harper Woods PD) indicated that he believed they should have known that the teens were drinking. The teens were referred to counseling. Steve and Candice Cheolas were charged with allowing the teens to drink and contributing to the delinquency of a minor. Candice was also charged with obstructing a police officer. All charges were

⁹⁵ Everson v. Leis, 556 F.3d 484 (6th Cir. 2009); Berryman v. Rieger, 150 F.3d 561 (6th Cir. 1998).

dismissed but that dismissal was reversed. At a subsequent trial, Candice was tried and received a directed verdict in her favor.

The Cheolases filed suit under 42 U.S.C. §1983 allegedly wrongful and malicious prosecution against a number of parties, including the officers and EMS that responded. The Court dismissed the lawsuit finding that probable cause existed for the charges. They appealed.

ISSUE: Does probable cause negate a malicious prosecution case?

HOLDING: Yes

DISCUSSION: The Court noted that a claim for malicious prosecution fails if (1) “there was probable cause to prosecute” or (2) “when the defendant did not make, influence, or participate in the decision to prosecute.” It has been fleshed out since to include “that: (1) a prosecution was initiated against the plaintiff and that the defendant participated in the decision; (2) there was a lack of probable cause for the criminal prosecution; (3) the plaintiff suffered a deprivation of liberty as a consequence of the legal proceeding; and (4) the criminal proceeding was resolved in the plaintiff’s favor.”⁹⁶ The Court noted that although there was confusion as to Steve Cheolas’s presence during the party, there was “no dispute that Mrs. Cheolas was present at home throughout the entire duration of the birthday party.” With respect to her, the Court reviewed the probable cause for the offenses charged and agreed that there was sufficient cause to believe that she, as the hostess and present during the entire time in the basement, she should have been aware that the teens had been drinking for an extended period of time. The Court agreed that a reasonable person could infer that since she admitted being the basement, she “should have been able to detect alcoholic beverages being consumed.” The Court also agreed that her conduct contributed to the delinquency of the involved minors. With respect to the obstruction charge, the officers testified that she blocked her door and pulled the door shut when they tried to enter. The Court presumed that there was no actual physical resistance but agreed that wasn’t actually necessary for the charge – passive conduct was enough “if it rises to the level of threatened physical interference.” Although she may not have been convicted, it “was close enough to the line to satisfy the probable cause inquiry.”

The Court dismissed the case. In an unusual twist, the City of Harper Woods (the prevailing party) had cross-appealed the denial of attorney’s fees on their behalf against the Cheolases under 42. U.S.C. §1988. The Court had recognized that awarded such fees against the losing plaintiff “is ‘an extreme sanction, and must be limited to truly egregious cases of misconduct.’”⁹⁷ The Court noted that given the difficulty in reaching the decision to dismiss the case, there was no real indication that their claim was, in fact, frivolous, groundless, unreasonable or unsupported by the facts. The decision against the City in the awarding of attorney’s fees was also affirmed.

Taylor & Bonnell v. Streicher, 2012 WL 1700705 (6th Cir. 2012)

FACTS: Taylor, of the Cincinnati PD, was ordered by his commanders to develop a “youth diversionary program” to be funded by the state. He created a program and hired Bonnell to track the performance of the children. He expanded the program to include a computer skills program. “Apparently,

⁹⁶ Sykes v. Anderson, 625 F.3d 294 (6th Cir. 2010).

⁹⁷ Garner v. Cuyahoga County Juvenile Court, 554 F.3d 624 (6th Cir. 2009) (quoting Jones v. Cont’l Corp., 789 F.2d 1225 (6th Cir. 1986)).

the police department was largely unaware of the program or its use of funds, which according to Taylor, was due to the fact that he had little guidance and was not given instructions as to policies or procedures.” In the second year of the program, needing additional funds, he worked with a local attorney to find donated computers. Through a complicated business arrangement, involving a building Taylor owned and leased to the police department for a substation, he created a nonprofit and acquired the donations under that umbrella. His superiors believed he was commingling personal funds with the nonprofit account and an investigation indicated he was not implementing programs he’d listed on the grant requirements.

Bonnell was questioned, and vouched for Taylor. Bonnell learned that some officers apparently created a “rap sheet” for Bonnell that suggested he “was a convicted child molester with an outstanding warrant.” He believed that this document may have been shown to officers being questioned to prejudice them against Bonnell. He met with investigators but was not initially willing to disclose names of involved officers. The investigator assured him that it was in his best interest to do so and he would be protected. He talked to the prosecutor and eventually disclosed that he only knew of it because of Taylor.

The agency executed search warrants of Taylor’s work computer and office, on his bank account and on the nonprofit’s account. As a result of the investigation, he was indicted on 10 charges, including “having an unlawful interest in a public contract.” He eventually took a deal to resign or retire from the PD, and for the nonprofit to plead guilty to two felony counts.

In addition, Taylor argued that he was the target of retaliation because he spoke out publicly about Cincinnati’s gang problems. Taylor and Bonnell filed suit against Chief Streicher, the city of Cincinnati and other parties under 42 U.S.C. §1983 and §2000E for violations of their Fourth and Fourteenth Amendments, and under 42 U.S.C. §1985, for equal protections claims. They also raised related Ohio claims of malicious prosecution, abuse of process, defamation, false imprisonment and intentional infliction of emotional distress. The trial court dismissed the claims, finding that Taylor and Bonnell had not met the threshold of proof. They appealed.

ISSUE: May a claim for malicious prosecution be made against a party that did not make the actual decision to prosecute?

HOLDING: No

DISCUSSION: The Court addressed the equal protection claims, as Taylor argued that the agency had a practice of disciplining black officers more harshly than white officers and treating him differently from similarly situated white officers. The Court, however, noted that he simply failed to offer any evidence of conspiracy. Further, his resignation was as a result of a plea deal. He presented nothing to support his claim of race-based denial of equal protection.

With respect to malicious prosecution, the Court noted that the decision to go forward on the case was made by the Hamilton County prosecutor. The Court agreed that officers “cannot be held liable for malicious prosecution when they did not make the decision to prosecute the plaintiff.”⁹⁸ The Court agreed that there was no abuse of process, either. The decision not to dismiss the charges were “attributable to the local prosecutor” and not the Cincinnati defendants. With respect to defamation, although he alleged

⁹⁸ McKinley v. City of Mansfield, 404 F.3d 418 (6th Cir. 2005) (quoting Skousen v. Brighton High Sch., 305 F.3d 520 (6th Cir. 2002)).

that false statements were made against him, he failed to tell the Court “which statements are false, explain why the statements are false, or produce any evidence to show that the statements are false.” Testimony in front of the grand jury “is protected by absolute privilege.”⁹⁹

The Court upheld the decision to dismiss all claims.

INTERROGATION

Evans v. Booker, 461 Fed.Appx. 441, 2012 WL 373228 (6th Cir. 2012)

FACTS: On March 1, 2001, Evans was taken into custody for Williams’s murder. He was given his Miranda rights by Det. Sgt. Kirk, who did not actually question him at that time as it was the end of his shift. Over the next few days, however, Evans remained in custody and was questioned about an unrelated murder, which resulted in an inculpatory statement. On March 4, at about 10:45 a.m., he was placed in a live line-up for the Williams murder and was positively identified. He was questioned about both murders by Det. Smith about four hours later. There was a transcript of his confession to the first murder but “no indication of what he was asked or said about the Williams’ murder.” He was asked about the Williams murder by Sgt. Kirk about 2330 that same day, after being given Miranda that same day. He gave a lengthy statement and confession.

He was convicted and appealed.

ISSUE: Does a short passage of time make a statement involuntary?

HOLDING: No

DISCUSSION: The Court agreed that “a confession is inadmissible if obtained through means incompatible with due process” and the “ultimate tests of whether a confession accords with due process is ‘the test of voluntariness.’”¹⁰⁰ The question must be whether Evans’s “will was overborne at the time he confessed.”¹⁰¹ To decide, the Court must examine the “totality of the circumstances” surrounding the confession.¹⁰² In a related case, involving the inculpatory statement Evans made regarding the other murder, the Court had ruled that the statement was admissible.

The Court found “no differences between Evans’s two cases for most of the factors in the voluntariness test, including the use of physical punishment, Evans’s mental state, age, and education, and advice on his constitutional rights.” The only difference is that the statement in this case occurred approximately 8 hours later. Nothing in the record, however, indicate that the additional time, or other factors, “would have any significant impact on the voluntariness of Evans’s statement.” He was only questioned twice and gave the confession “without hesitation.”

The Court, however, did condemn his “troubling’ and ‘unreasonable’ extended, incommunicado detention by the Detroit Police Department.”

⁹⁹ See Macko v. Byron, 760 F.2d 95 (6th Cir. 1985); Briscoe v. LaHue, 460 U.S. 325 (1983).

¹⁰⁰ Miller v. Fenton, 474 U.S. 104 (1985); Culombe v. Connecticut, 367 U.S. 568 (1961).

¹⁰¹ Reck v. Pate, 367 U.S. 433 (1961).

¹⁰² Schneckloth, supra.

The Court upheld the admission of the statement.

TRIAL PROCEDURE/EVIDENCE – EXPERT TESTIMONY

U.S. v. Smallwood, 456 Fed.Appx. 563, 2012 WL 171402 (6th Cir. 2012)

FACTS: Following a fire at the Smallwood home, two children died. The parents (Wayne and Billi Jo Smallwood) and the youngest child, survived. Agent Wogner (Army CIS) investigated, since the family lived at Fort Campbell. She noticed that the tires on their vehicle had been punctured and a note left, written on the car. It echoed an alleged threatening phone call Billi Jo had received. Firefighters recovered a knife left on a desk inside the house.

Billi Jo was indicted in the fire and deaths. She moved to exclude Gerber's testimony as a "tool mark expert." She was to testify that the knife found inside was used to puncture the tires. The District Court agreed after a hearing that her testimony was unreliable and granted the motion. The Government appealed.

ISSUE: Must an expert show some expertise in a topic to testify on it?

HOLDING: Yes

DISCUSSION: The Court looked to FRE 702, which discussed the use of expert witnesses. The trial court had concluded that Gerber lacked the "skill and experience" with knife damage in order to reliably render an opinion. The Government argued the standards of the Association of Firearms and Toolmark Examiners (AFTE) and noted that simply because she had less experience with toolmarks rather than with firearms is not a reason to exclude her testimony. The Court disagreed, looking at the same standards. Gerber testified that her training in knives was limited and that she had only done such an exam once, and that was in the context of a class. The Court agreed that Gerber had "virtually no basis for concluding" there was a match between the mark and the knife found.

The Court upheld the exclusion of the expert testimony.

TRIAL PROCEDURE/EVIDENCE – ENTRAPMENT

U.S. v. Schuttpelz, 467 Fed.Appx. 349, 2012 WL 34376 (6th Cir. 2012)

FACTS: In April, 2007, an FBI agent in Detroit, "created an undercover online Yahoo! Profile to assist in her investigation of child sexual exploitation crimes." The profile stated that "Shannon" had two young daughters and suggested, in code, that she was interested in incest and sexual activity with children. On April 7, Schuttpelz, a Nebraska trucker, contacted her and asked about sexual activity with the children. They conversed online and by phone over some two months; he stated he intended to travel to Michigan to meet them, have a relationship with Shannon and have sex with the older child.

At the same time, he was also discussing the same plans with another undercover officer, with the Macomb County, Michigan, Sheriff's Office. He made plans to meet with Shannon on June 1 and the agent got an

arrest warrant. He was arrested when he arrived at the designated location. They searched his truck and seized a cell phone and a laptop computer. A forensic exam of the laptop disclosed child pornography and evidence of numerous other individuals with whom he attempted to communicate about sex with children.

Schuttpelz was indicated on several federal counts related to child pornography. He moved for suppression of the evidence seized from the truck. The Court denied the motion. He went to trial, and eventually requested a jury instruction on entrapment. The Court, however, denied the request, finding that he “readily availed himself” of the “opportunity to perpetuate the crime” and that there was “no repeated government inducement.” Schuttpelz appealed on both issues.

ISSUE: Is an entrapment instruction required when there is clear evidence the defendant was clearly disposed to commit the act?

HOLDING: No

DISCUSSION: The Court noted that the denial of the suppression motion relating to the vehicle was pursuant to Thornton v. U.S.¹⁰³ as he was a recent occupant of the vehicle, even though he’d already stepped out when he was arrested. (Gant was inapplicable because the search occurred long before that decision.) The Court agreed that the law at the time permitted the search and declined to reverse that ruling.

With respect to the entrapment argument, the Court noted that when the evidence “clearly and unequivocally establishes” that [the defendant] was predisposed” to commit a crime, an entrapment instruction is not warranted. The Court looked to U.S. v. Khalil¹⁰⁴ to determine predisposition and agreed there was an “abundance of evidence” of his desire to “engage in criminal sexual activity with minors.” As such, the trial court did not abuse its discretion by denying his request.

Schuttpelz’s conviction was affirmed.

TRIAL PROCEDURE/EVIDENCE – TESTIMONY

Babcock v. Metrish (Warden), 465 Fed.Appx. 519, 2012 WL 738728 (6th Cir. 2012)

FACTS: Babcock was a convicted felon. At some point, he removed a weapon from his girlfriend’s home. Officer Hare (Michigan State Police) retrieved the weapon from a third location and interviewed Babcock about it. Since she was going to be out of state during the trial, the court ordered a video deposition be taken prior to trial. Apparently the deposition was not played in full at trial, although part of it was, along with an edited transcript, both over Babcock’s objection.

He was convicted and appealed. The Michigan Court of Appeals concluded it was error to read the testimony but that the error was harmless. The Michigan Supreme Court refused to review the ruling and Babcock requested a writ of habeas corpus. The District Court granted the writ and Metrish (the Warden) appealed.

¹⁰³ 541 U.S. 615 (2004).

¹⁰⁴ 279 F.3d 358 (6th Cir. 2002).

ISSUE: Is a major witness required to testify live at trial, rather than by criminal deposition?

HOLDING: Yes (unless waived)

DISCUSSION: Metrish agreed that Hare's non-live testimony violated Babcock's Sixth Amendment right to confrontation. The Court reviewed whether the error was harmless under the elements outlined in the case of Delaware v. Van Arsdall – "(1) the importance of the witness' testimony in the prosecution's case; (2) whether the testimony was cumulative; (3) the presence or absence of evidence corroborating or contradicting the testimony of the witness on material points; (4) the extent of cross examination otherwise permitted; and (5) the overall strength of the prosecution's case."¹⁰⁵

Since the primary issue in the case whether Babcock actually possessed a prohibited firearm, Trooper Hare's testimony was very important. It served to corroborate the testimony of his former girlfriend, who did testify. (She reported his possession of the weapon "seemingly simultaneously with the demise of their relationship" thereby putting her credibility into doubt. The other witnesses also had "bias issues" as they were connected with the girlfriend, as well. Trooper Hare's testimony was "necessary to overcome the perceived bias of *all* of the prosecution's witnesses." Her testimony served to bolster by corroborating "much of the live eye-witness testimony."

Further, she testified as to his confession. The Court noted that "a confession is like no other evidence. Indeed, the defendant's own confession is probably the most probative and damaging evidence that can be admitted against him."¹⁰⁶

Finally, because of timing, Babcock's ability to cross-examine Hare during the video deposition was not effective. He did not know how the rulings in trial would resolve so it was difficult to do an effective cross examination.

The Court agreed that "Babcock suffered a substantial and injurious effect" from the admission of the testimony and affirmed the District Court's grant of the petition.

TRIAL PROCEDURE/EVIDENCE – DESTRUCTION OF EVIDENCE

Henshaw v. Berghuis (Warden), 2012 WL 934025 (6th Cir. 2012)

FACTS: Henshaw was convicted with the rape of his girlfriend's two young daughters. He appealed the admission of evidence of "numerous uncharged 'bad acts,'" including his possession of a vast amount of pornographic or sexually suggestive items that he sent to the girls, his harsh punishment of them and provision of alcohol to them, as well as his threats to both them and their mother.

ISSUE: Is destroyed evidence necessarily exculpatory?

HOLDING: No

¹⁰⁵ 475 U.S. 673 (1986).

¹⁰⁶ Arizona v. Fulminante, 499 U.S. 279 (1991).

DISCUSSION: The Court agreed that the evidence admitted “had some probative value and was not overwhelmingly prejudicial.” The pornography demonstrated that he viewed the girls in a sexual manner. The punishment demonstrated why they would be frightened to report sexual abuse, thereby explaining their delay in doing so. The trial court instructed the jury on the proper use of the evidence.

Henshaw also claimed the police destroyed exculpatory evidence, a “jar with slips of paper in it.” The police had destroyed the items prior to his request, “thinking that they were irrelevant.” He was, however, able to cross-examine a detective about the slips. To be successful, he would need to “show either that the evidence was exculpatory or that the police acted in bad faith.”¹⁰⁷ The Court ruled that the slips were “at most, ‘potentially useful evidence’” and the destruction did not violate due process unless there was bad faith, of which there was no evidence.

The Court upheld Henshaw’s convictions

TRIAL PROCEDURE/EVIDENCE – HEARSAY

U.S. v. Edwards, 2012 WL 1059398 (6th Cir. 2012)

FACTS: A law enforcement drug task force was tipped off by a CI (Marks) that Edwards had sold him drugs monthly for four years. The CI agreed to make controlled buys in exchange for leniency in his own case. Marks made a deal to buy 63 grams of crack from Edwards and they set up a meeting. Marks prepared for the meeting, being searched by and provided money by the task force officers. They followed him directly to the meeting and the transaction was completed. The next controlled buy was intended to result in an immediate arrest so he was not provided with money. Both men were arrested and a quantity of drugs was recovered from Marks’s truck.

Edwards was charged with distributing cocaine and related charges. He moved for acquittal and was denied. He was convicted and appealed.

ISSUE: Must a hearsay objection be timely to support an appeal?

HOLDING: Yes

DISCUSSION: Edwards objected to the admission of a statement made by Marks about one of the buys and repeated in court by Det. Dancy. The prosecution argued the statement was not hearsay. The statement to which he objected, however, simply related to the timing of the transaction – he failed to object to an earlier statement that identified Edwards as the seller. Even had he done so, however, the Court agreed that the error, if any, was harmless. Further, the Court agreed that the drugs found in the truck (pushed under the seat) were in his constructive possession.

Edwards’ conviction was affirmed.

¹⁰⁷ Illinois v. Fisher, 540 U.S. 544 (2004).

TRIAL PROCEDURE/EVIDENCE – CRAWFORD

Fields v. Birkett (Warden), 461 Fed.Appx. 454, 2012 WL 400579 (6th Cir. 2012)

FACTS: Fields and Lawson were tried for the murder of Field's mother, Jones. Allegedly, Fields had paid Lawson to kill her. They were tried jointly, and Davis, who had been in the cell next to Lawson, testified as to Lawson's confession, as did a neighbor who testified that "if something happened to her Fields would be responsible." Fields objected to the admission of both statements as violations of the Confrontation Clause but was overruled. He was convicted and appealed.

The state appellate courts upheld the conviction, and he requested a federal habeas corpus petition. He was permitted to appeal to the Sixth Circuit Court of Appeals.

ISSUE: Is a statement to a fellow inmate testimonial?

HOLDING: No

DISCUSSION: The Court agreed that Lawson's statement was admissible under Crawford¹⁰⁸ because the Court agreed that the statement wasn't testimonial, as no one would confess to a fellow inmate if the detainee thought that his confession would be used against him at trial." With respect to the prediction by his mother, the Court concluded that the error, if any, was harmless in the face of the overwhelming evidence that he committed the crime.

The Court affirmed the conviction.

Peak v. Webb, 673 F.3d 465 (6th Cir. 2012)

FACTS: In 2002, Bearden, Meeks and Peak were charged with murder and conspiracy. There was a lack of physical evidence and outside witnesses and only one of the three (Bearden) testified. The only direct evidence establishing Peak as the shooter came from "Meeks's unsworn taped confession." Meeks elected not to testify but agreed to allow the tape be played in full. Peak, however, objected to the admission of the tape, arguing that it violated his own "Sixth Amendment right to confront the witnesses against him." It was admitted and played multiple times during the joint trial and Peak was convicted.

Peak appealed and the Kentucky Supreme Court upheld his conviction. He then took a collateral federal action to challenge his conviction.

ISSUE: Must a witness be available at trial to satisfy the Confrontation Clause?

HOLDING: Yes

DISCUSSION: The Court noted that Peak could have called Meeks to the stand, but chose not to do so. The Court discussed Crawford v. Washington at length. Crawford requires "unavailability and a prior opportunity to cross-examine for the use of testimonial hearsay." The Court noted:

¹⁰⁸ Crawford v. Washington, 541 U.S. 36 (2004).

The crux of the issue is whether making a witness available to be called is confrontation, or whether confrontation instead requires the witness to take the stand at the very time, according to Supreme Court precedent that was clearly established when Peak's conviction became final. It is an open question whether confrontation requires the witness to actually take the stand. At some points, Crawford seems to equate confrontation with cross-examination, which would require the state to put Meeks on the stand when the tape was played. Another Supreme Court case decided prior to Peak's case becoming final also implied that confrontation requires the ability to cross-examine.

However, Crawford also contains language that suggests that confrontation requires only that the witness be made available to be called at trial, not that the witness be put on the stand for immediate cross-examination. So there seems to be a question of whether confrontation demands the opportunity to cross-examine the declarant who has been called by the prosecution, or merely that the declarant is available at trial to be called and (cross-)examined. This case requires an answer to this question. The one Supreme Court case discussing this aspect of Crawford that was decided prior to the finality of Peak's conviction does not dispel the uncertainty. The Supreme Court simply had not, at the time Peak's conviction became final, clearly held that the ability to cross-examine immediately is required by the Confrontation Clause.

The Court noted that confrontation currently requires that the declarant "be made available in the courtroom for a criminal defendant to call during his own case." In such situations, the subject could be called as a hostile witness and subjected to leading questions. The Court noted that although it questioned whether this actually satisfies the Confrontation Clause, noting there was judicial disagreement on this issue, but found that precedent, at this point, required it to affirm the decision to deny the habeas petition.

Jackson v. Stovall (Warden), 467 Fed.Appx. 440, 2012 WL 806227 (6th Cir. 2012)

FACTS: Jackson was convicted of murder and conspiracy in the 1998 deaths of Garland and Simmons. On October 7, 1998, Landers (Jackson's co-defendant) agreed to sell a large amount of cocaine to McConico. Instead, McConico shot Landers and robbed him. Landers blamed Garland for this because he had introduced the pair. Jackson, Landers, Willis and Johnson "tracked down and killed Garland" and Simmons, his girlfriend.

Jackson and Johnson, when arrested for an unrelated matter, agreed to testify against Garland and Simmons. Jackson was convicted at trial but requested habeas corpus.

ISSUE: May evidence of prior testimony be introduced for a non-hearsay purpose?

HOLDING: Yes

DISCUSSION: At trial, one of the witnesses, an attorney, testified about her representation of Jackson during the unrelated case on which she was arrested. The attorney declined to travel to Michigan from California, where she lived, for the current case. Her testimony at the first trial differed from that made in her grand jury testimony, and the prosecutor sought to introduce that testimony for impeachment. The Court agreed and her attorney's "prior inconsistent statement" was entered into the jury.

Jackson argued that her rights under the Confrontation Clause were violated by the use of the testimony of the absent witness. The Court had been careful to caution the jury on the use of the statement, which was limited to the narrow purpose of using it to judge the credibility of the witness. The Court agreed that the trial court was not admitted for hearsay reasons, to prove the truth of the matter asserted by the witness, but exclusively to reflect on the credibility of the witness overall.

The Court affirmed the denial of habeas corpus and upheld the conviction.

Walker v. Harry, 462 Fed.Appx. 543, 2012 WL 447479 (6th Cir. 2012)

FACTS: Walker was convicted for the murder of Baines, who eventually died from three gunshot wounds. (He lived for four days, but died following surgery.) The day before he died, however, Baines's mother asked him if Walker with the shooter and he "nodded his head in the affirmative." The Court agreed the nod "fell within the 'dying declaration' exception to" the hearsay rule and agreed it was admissible.

Walker appealed. During the direct appeal, Crawford v. Washington¹⁰⁹ was decided. His appeal was decided against him, however. He filed a habeas petition, arguing a violation of his Confrontation Clause rights and was again denied. He then appealed.

ISSUE: Is a dying declaration an exception to the Crawford doctrine?

HOLDING: Yes

DISCUSSION: In both Crawford and Giles v. California¹¹⁰ the Court agreed that "dying declarations may fall within an exception to the constitutional bar against testimonial hearsay." The Court agreed that the nod was properly admitted through Baines's mother's testimony.

TRIAL PROCEDURE/EVIDENCE – DOUBLE JEOPARDY

Fulcher v. Logan County Circuit Court, 459 Fed.Appx. 516, 2012 WL 284069 (6th Cir. 2012)

FACTS: On July 24, 2001, in response to a robbery call, officers from several agencies (KSP, Russellville PD, Auburn PD and the Logan County Sheriff's Office) began to search. When the officers passed Fulcher's home, they noticed a number of people who ran into the woods when they spotted the officers. The officers chased them and noticed marijuana plants in the yard and "the scent of ammonia emanating from an open window in the residence." They could not get any response at the house so they sought a search warrant.

While waiting for the warrant, Fulcher came out "claiming to have been asleep." He was kept outside. The individuals who ran into the woods eventually returned voluntarily and most were arrested. The officers found a number of drug related items during the search, including a propane tank containing anhydrous and a glass jar that was being used in an active methamphetamine cook. Items were found throughout the house. One item in particular was a bowl of liquid anhydrous in the freezer which was generating the odor

¹⁰⁹ 541 U.S. 36 (2004).

¹¹⁰ 554 U.S. 353 (2008).

they initially noticed – that was diluted and disposed of without testing. He was charged with manufacturing methamphetamine and related offenses. He was released on bail

Cherry, one of the persons arrested that day, signed a complaint accusing Fulcher of making death threats a few days later. When officers went to the house to serve that warrant, they saw the propane tank which had previously been disabled (by puncturing) and yet another methamphetamine cook, using plastic bottles. Again they found a number of items relating to methamphetamine manufacturing, inside and outside, and again, he was charged.

Fulcher was convicted on all charges in both cases, he then appealed. Most of the charges were reversed, due to case law at the time, and remanded back. He was reconvicted of methamphetamine manufacturing on both days and again appealed. The Kentucky Supreme Court denied his appeals and he took a federal habeas petition.

ISSUE: Is it double jeopardy to charge with two different methamphetamine charges (on separate quantities)?

HOLDING: No

DISCUSSION: As required in this type of proceeding, the Court reviewed whether Fulcher “had a full and fair opportunity to litigate his Fourth Amendment claims in state court.” The Court noted that his appeals relating to both search warrants were adequately considered. He also argued that evidence that law enforcement left behind after the first search was improperly used against him in the second search and subsequent charges. Although this matter was primarily decided on procedural grounds, the Court agreed that it was not double jeopardy to do so under the specific facts of the case.

Fulcher’s convictions were affirmed.

TRIAL PROCEDURE/EVIDENCE – PRIOR BAD ACTS

U.S. v. Johnson, 458 Fed.Appx. 464, 2012 WL 284300 (6th Cir. 2012)

FACTS: Johnson became involved in a drug investigation in Louisville and Oldham County. The investigating officer learned that a call was made to Johnson’s cell phone, with the implication that Johnson was the dealer. A controlled buy was made and eventually, Johnson was indicted for drug trafficking. Duncan, one of the other participants, initially refused to testify against Johnson, but eventually agreed to do so in exchange for a sentencing reduction. At a hearing before trial, the Court agreed to admit evidence of prior instances where Johnson supplied Duncan with crack cocaine. At trial Duncan testified extensively about his connection to Johnson.

Johnson was convicted and appealed.

ISSUE: Is a single witness able to prove a prior bad act?

HOLDING: Yes

DISCUSSION: The Court reviewed the facts under FRE 404(b) – prior bad acts. The Court agreed that a single witness was sufficient to prove such prior acts, and even if that witness is subject to impeachment, that was up to the jury to evaluate. The Court agreed it was properly admitted “for the purpose of establishing identity.” Johnson had put the issue into dispute by arguing he was not the man on the scooter, and as such, it was appropriate to admit evidence that Duncan knew him and had prior dealing with him. Under FRE 402, “identity was front and center in the case, and Duncan’s testimony was singularly persuasive on that issue.”

The Court affirmed Johnson’s conviction.

EMPLOYMENT

McDole v. City of Saginaw, 2012 WL 1003553 (6th Cir. 2012)

FACTS: McDole, a Saginaw police officer, was involved in an incident that occurred on October 14, 2005. While on his way to work, in uniform, a SUV pulled up next to him. The occupants “shouted racial epithets at him and threw two bottles at his vehicle.” He turned on his dome light, to show he was an officer, but the harassment escalated. The SUV cut him off and he got out with his weapon drawn, identifying himself. The occupants “shouted requests that he not shoot them” and sped off. He got the plate number. The SUV returned and followed him closely. McDole and two officers found the driver and he was arrested. Both the driver and passenger were arrested but the charges were dismissed.

An internal investigation was initiated, after complaints from both the prosecutor and the defense attorney. There were allegations that Ornelas (the driver) was abused and that McDole left obscene and threatening messages on Ornelas’s cell phone. McDole’s statement had several discrepancies. He was found to have violated general orders to be truthful, to treat persons in custody properly and to use no more than reasonable force.

He was referred to the Employee Assistance Program and when he resisted, was ordered to do so. He was on leave during this time. He was diagnosed with PTSD and the coordinator believed that he should not have been involved in Ornelas’s arrest. The Chief decided, after conferring with others, to terminate McDole. The Chief maintained he did not know of the PTSD diagnosis at the time he made the decision, however. An arbitrator upheld the firing.

McDole filed suit, arguing a racial animus in his firing. McDole pointed to several instances in which he accused Sgt. Tuer, his immediate supervisor who investigated the incident, had showed racial animus toward him, including suggesting that McDole would never advance in the department due to his race and prior scandals involving African-American leadership. A former police officer testified as to incidents where Tuer used inappropriate and racially-charged language. The jury found in McDole’s favor and gave him a large award. The City appealed.

ISSUE: Is a medical diagnosis relevant in an employment discrimination case?

HOLDING: Yes

DISCUSSION: At trial, the City sought to excluded McDole's PTSD diagnosis, arguing it was irrelevant and highly prejudicial. The Court agreed it was proper to include it, because two of those involved, Tuer and another commander, knew of the diagnosis yet did not share it with the decisionmakers. The Chief admitted that it could have had an impact on their decision and the evidence indicated that such evaluations were usually considered.

The Court also agreed it that is improper to introduce evidence of disparate treatment, including situations in which white officers with at least as serious offenses were not as severely punished, albeit by different decisionmakers.

The Court upheld the decision in McDole's favor, both in substantive as well as procedural matters.

COMPUTER

U.S. v. Bolton, 669 F.3d 780 (6th Cir. 2012)

FACTS: Bolton admitted that his laptop computer contained child pornography, which he had downloaded from a file-sharing site. He argued, however, that he did not intend to use the file-sharing program to distribute the material to anyone else, and as such, could only be charged with possession. The trial court, however, sentenced him as if he had been distributing. Bolton appealed only his sentence.

ISSUE: Is the presence of a file sharing program a rebuttable presumption that the subject was involved in distributing pornography?

HOLDING: Yes

DISCUSSION: The trial court ruled that having a peer-to-peer file sharing program, deliberately installed, was adequate to support a sentence based upon distribution. (In fact, he'd removed one file-sharing program and installed another. The Court agreed that his apparent knowledge of the program was enough to show that he should have known that the files he downloaded were available to be searched and downloaded by others.

The Court upheld the sentence.

U.S. v. Hutchinson, 448 Fed.Appx. 599, 2012 WL 284466 (6th Cir. 2012)

FACTS: Hutchinson confessed to trading child pornography through two different computer applications (Google Hello and Gigatribe). A vast number of photos, and a small number of videos, were found on the laptop. He argued against, however, the enhanced sentence he received for the number of images, arguing that some were duplicates. The trial court noted, however, that even after excluding those, he still had far in excess of the 600 needed to enhance the sentence. Hutchinson appealed.

ISSUE: Is a federal sentence enhanced by the number of pornographic images a subject has in their possession?

HOLDING: Yes

DISCUSSION: Hutchinson argued that the enhancement was improper because it was based on the U.S. Code, rather than the Sentencing Commission. The Court, however concluded that it was constitutional because both originate with Congress.

Hutchinson also argued Double Jeopardy because he was charged with both receipt and distribution of child pornography. The Court agreed that since the same charged conduct seemed to support both, and as such, it reversed the sentence and remanded it back for a clearer determination by the trial court.

U.S. v. Kernell, 667 F.3d 746 (6th Cir. 2012)

FACTS: During the 2008 Presidential election, Kernell was a student at the University of Tennessee (Knoxville). It was reported that candidate Sarah Palin used a particular email account for personal and official business. Kernell attempted to hack into that account, by using the Yahoo forgotten password feature. He successfully guessed the answers to the question asked and then accessed the account and changed the password. He posted about this to a message board, but the site administrators took down the thread soon after he posted the new password.

While it was still active, however, the FBI was notified. Another user logged in, using the new password, changed the password to freeze the account, and notified Palin's staff. The next day, Kernell posted in detail about how he'd done the hacking and criticized the informant. Following this, he deliberately attempted to sanitize his laptop, deleting history and images.

On September 18, the FBI contacted Kernell's father, looking for Kernell. They attempted to set up a meeting, unsuccessfully, and then executed a search warrant, seizing the computer. Despite his attempts, forensic examination found evidence linking him to the hacking.

Kernell was indicted for identity theft, wire fraud, improperly getting information from a protected computer and obstruction justice (for deleting the information." He was convicted on obstruction charges, under 18 USC §1519.

ISSUE: Must an investigation have actually started for a person to be presumed to have knowledge of the investigation?

HOLDING: No

DISCUSSION: Kernell argued that he did not know about the investigation, hence he could not have deleted the information in anticipation of an investigation. The trial court had concluded, however, that he did have actual knowledge of the investigations from postings from others to the message board thread where individuals stated they had notified the FBI. The Court agreed that given the timing, an actual investigation had not started when he deleted the material. The Court found "a difference between knowing that conduct has been reported to the authorities and knowing that an investigation is ongoing." As anonymous posters, the statements about contacting the FBI had no particular "indicia of reliability." (In fact, a key component of that message board was the making of untrue claims.)

However, in U.S. v. Lanham the court “held that the belief that a federal investigation directed at the defendant’s conduct might begin at some point in the future” satisfies the element. In fact, Kernell specifically referenced that possibility in one of his postings. That satisfies the prosecution.

Kernell’s conviction was affirmed.

U.S. v. Bistline, 665 F.3d 758 (6th Cir. 2012)

FACTS: In September, 2007, law enforcement downloaded 12 images of child pornography from an IP address in Mount Vernon, OH, that belonged to Bistline. The files had been placed in a shared peer-to-peer program. A subsequent search of his home/computer revealed 305 images and 56 videos, mostly of pre-teen girls being raped by adult men.

He was convicted of possession and given an extremely short sentence, 24 months, to which the government objected. After a hearing, the Court decided not to imprison him at all, but only to have him spend his nights in “the courthouse lockup.” The court held another hearing but did not change its decision to only lock him up at night. The U.S. appealed.

ISSUE: May a sentence far under the sentencing range be appealed?

HOLDING: Yes

DISCUSSION: The Government argued that the sentence imposed was outside of the permitted range provided by the relevant sentencing and statutory guideline. The Court noted that “Congress can marginalize the Commission all it wants: Congress created it.” The Court looked to the statements made by the trial judge and noted that given the judge’s apparent lack of appreciation of the seriousness of possession (rather than distribution) of child pornography, there was “little wonder ... that Bistline was not sentenced to a day in prison.” The Court agreed that the sentence is not congruent with the seriousness of the offense.

The Court found the sentence unreasonable and remanded the case back for further consideration.

EMPLOYMENT – FIRST AMENDMENT

Kiessel v. Oltersdorf (Leelanau County MI Sheriff) 459 Fed.Appx. 510, 2012 WL 265953 (6th Cir. 2012)

FACTS: In January 2008, Sgt. Kiessel and Sgt. Lamb, reported to the Michigan State Police and the FBI that Sheriff Oltersdorf and Undersheriff Wooters were illegally eavesdropping on employees’ phone conversations by “listening to their phone calls made on the ‘Private Out’ line.”¹¹¹ The Sheriff pointed to policy that stated that employees have no expectation of privacy on office phones, among other technology. The Michigan Attorney General advised the Sheriff that he had no broken the law.

“A public debate ensued.” The Sheriff defended the recording policy and the two sergeants responded with a letter to the editor in which they claimed the Sheriff committed misconduct and unlawful actions by

¹¹¹ The Court noted that the label on the button probably came with the phone and was meaningless.

authorizing the Undersheriff to listen in on official union business phone calls. Six months later, both were suspended for 40 hours for making false public accusations. A year later, they, along with Wright, were terminated

All three filed suit, arguing the First Amendment protected their initial report to the FBI, the letter they wrote to the Board of Commissioners and their union activities, in addition to the letter to the editor. The defendants only argued that the union activities and the letter to the editor were not protected activities.

ISSUE: Do public employees have some First Amendment rights?

HOLDING: Yes

DISCUSSION: The Court noted that the “First Amendment protects public employees from retaliation based on their speech, but only under certain conditions.” An employee must show, first, that they actually “engaged in constitutionally protected speech.” Next, it requires that the “disciplinary action would have chilled an ordinary person from exercising” those rights,” and finally, that the “protected speech was a ‘substantial or motivating’ factor” in the discipline. Protected speech must address a “matter of public concern,” rather than a private grievance, “information ... needed or appropriate to enable the members of society to make informed decisions about the operation of their government.”¹¹²

With respect to the newspaper letter, the Court noted that the deputies claimed the sheriff/undersheriff broke the law, emphasizing their “unlawful” and “illegal” conduct. Such speech is certainly of “public concern.” However, a public employer may “restrict constitutionally protected speech if the employer’s legitimate interests in ‘promoting the efficiency’ of public services outweigh the employee’s First Amendment interests.”¹¹³ The Court agreed the letter met the first prong. Further, certainly, the deputies had “suffered adverse action” because they were terminated. Finally, their speech was directly tied to their termination.

Next, the Court looked to whether the right was clearly established, agreeing that a public employee’s First Amendment right against retaliation “has been clearly established for nearly two decades.”¹¹⁴ However, the defendants would be entitled to qualified immunity only if they “could have believed the plaintiffs knowingly or recklessly made false statements in their protected speech.”¹¹⁵ Although the Sheriff argued that they made false statements after knowing that the Michigan Attorney General had stated that the eavesdropping was permissible, the Court noted that a “state attorney general’s opinion ... is not sufficient to make a conclusive determination of the legality of a public officer’s acts.” The deputies had reported the matter to the FBI as well, and the state opinion dealt only with state law.

The Court ruled the Sheriff/Undersheriff were not entitled to qualified immunity and affirmed the judgment.

¹¹² Brandenburg v. Housing Auth. of Irvine, 253 F.3d 891 (6th Cir. 2001).

¹¹³ Pickering v. Bd. Of Educ. Of Twp High Sch. Dist. 391 U.S. 563 (1968).

¹¹⁴ Williams v. Kentucky, 24 F.3d 1526 (6th Cir. 1994).

¹¹⁵ Grossman v. Allen, 950 F.2d 338 (6th Cir. 1991).