

Department of
CRIMINAL JUSTICE TRAINING

KENTUCKY JUSTICE AND PUBLIC SAFETY CABINET

2013
EDITION



Leadership is a behavior, not a position

CASE LAW UPDATES

KENTUCKY COURT OF APPEALS 2012

KENTUCKY SUPREME COURT 2012

SIXTH CIRCUIT COURT OF APPEALS 2012

U.S. SUPREME COURT 2012-13 TERM



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NOTE:

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

The case law summaries in this book have been edited from the summaries available on the Department of Criminal Justice website. For additional cases, and other useful links and documents, please go to the website at <http://docjt.ky.gov/legal/>.

TWO CASES ARE NOT CITED IN THIS UPDATE, BECAUSE OF THE NUMBER OF TIMES THEY APPEAR.

FULL CITATIONS:

Miranda v. Arizona, 384 U.S. 436 (1966)

Terry v. Ohio, 392 U.S. 1 (1968)

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KENTUCKY

PENAL CODE – KRS 508 – ASSAULT

Moran v. Com., 2012 WL 1365860 (Ky. App. 2012)

FACTS: In 2007, Moran and Amy Madden were dating while Madden was still married to Howard Madden. She and Moran married after her divorce. On January 20, 2009, however, Howard picked Amy up from a class. Moran spotted them sitting together in a parking lot and pulled in next to them. At some point, Moran struck Howard (Madden) with his vehicle and allegedly broke his leg – Moran claimed it was an accident but both Amy and Howard argued it was intentional. Ultimately, Moran was convicted of Assault 4th and appealed.

ISSUE: May soft tissue damage be considered a serious physical injury?

HOLDING: Yes

DISCUSSION: The Court reversed the conviction for jury instruction reasons, but elected to also address an important issue. The Court noted that one of the elements of Assault 1st (as Moran was originally charged) is serious physical injury. There was apparently some conflict in the description of the injury, as the Commonwealth called it, in the indictment, only “soft tissue damage.” However, Howard did spend 20 days in the hospital, used a walker following that, and had continuing problems with the leg. At one point, amputation was contemplated. As such, the Court argued that claim made the original indictment was immaterial and that Moran was not prejudiced by the discussion as to the nature of the injury.

Jones v. Com., 2012 WL 3776666 (Ky. App. 2012)

FACTS: On April 9, 2008, Huckabee was attacked while at a Graves County car wash. A man choked her repeatedly, to momentary unconsciousness, only fleeing when others arrived at the car wash. Jones was arrested and charged with Assault 2d and Attempt-Kidnapping. At trial, Jones argued there was no showing of serious physical injury. He was convicted of Assault 2d and Unlawful Imprisonment and appealed.

ISSUE: Can one suffer minor injury but still be at a substantial risk of death?

HOLDING: Yes

DISCUSISON: The Court noted that although Huckabee did not allegedly suffer any true serious injury, describing only bruises and minor treatment, she was under a substantial risk of death during the assault. Jones argued that “a serious physical injury must be more than conduct which creates a risk of contemporaneous death but results in no injury.” The Court agreed the bruising was physical injuries. The Court noted that during the attack, Huckabee reported that “she was lightheaded, seeing black and feeling that she was going to die” and that was enough to conclude she faced a substantial risk of doing so.

With respect to the unlawful imprisonment charge, which Jones argued was improper, the Court noted that Huckabee was attacked in her car, pulled from the car and then moved up against another structure

nearby. Even though she was moved only a short distance, the Court found that was enough to negate the kidnapping exemption and upheld the unlawful imprisonment conviction.

PENAL CODE – KRS 508 - CRIMINAL ABUSE

Com. v. O’Conner, 372 S.W.3d 855 (Ky. 2012)

FACTS: On August 24, 2007, Wright, a CHFS social worker, visited the O’Conner home in Pulaski County. She could see a 3 year old and 7 month old child through the window, but could not get anyone to come to the door. Deputy Sheriff Wesley responded to her call. Eventually, O’Conner answered the door and stated he’d been asleep.

Wright and Wesley entered and found a “deplorable scene;” the home was dirty, had animal excrement inside, with the kitchen sink full of “dirty dishes caked with moldy food and flies were plentiful.” Clothes and trash were throughout and there was no working toilet. In fact, three children were present, his wife was at work and an older child at preschool. The children were all locked in their rooms with windows that were closed or boarded up, with no food or water. One of the children had defecated in their room. The air was stifling and the temperature outside was 104.

O’Conner had previously been found to have locked the children in their rooms, under similar conditions. At that time, he was advised as to options for day care and told to get fans to cool the residence. “He heeded this instruction, but placed the fans in his own bedroom.”

O’Conner was indicted on charges of Criminal Abuse, 1st degree. He appealed, arguing that there was sufficient proof of intent. His conviction was reversed and the Government appealed.

ISSUE: Is letting your children live in filth and extreme heat intentional?

HOLDING: Not necessarily (see discussion)

DISCUSSION: The Court deplored “the unspeakable filth, unsanitary living conditions, and misery in which the three children were found.” The Court noted that that it was not unreasonable for a jury to “conclude that the abuse of these helpless babes was intentional.” The court found that the appellate court did not “properly defer to the jury its proper fact-finding role” and reversed its decision, returning the case to the trial court to reinstate the conviction.

PENAL CODE – KRS 509 - UNLAWFUL IMPRISONMENT

Linville v. Com., 2012 WL 2362489 (Ky. 2012)

FACTS: In December 2009, Linville was accused of restraining his girlfriend in their bedroom in Sardis. He verbally and physically assaulted her, and then raped and sodomized her. He was acquitted of Rape and Sodomy, but convicted of Unlawful Imprisonment, Assault 4th degree and Terroristic Threatening. Linville appealed the Unlawful Imprisonment charge.

ISSUE: Is threatening someone with a pocket knife sufficient to be a threat of serious physical injury?

HOLDING: Yes

DISCUSSION: Linville argued that he did not unlawfully restrain A.J. to the extent that it would have potentially caused her serious physical injury, sufficient to warrant 1st degree (felony) unlawful imprisonment. A.J. alleged that Linville threatened her with a small, pocket knife, held to her throat. The Court agreed that it was appropriate for the jury to find Linville guilty of the more serious offense. Further, the Court agreed that the kidnapping exemption did not apply, as the restraint was not simply incidental to the sexual assault but lasted for several hours.

Linville's convictions were upheld.

Johnson v. Com., 2012 WL 1365805 (Ky. App. 2012)

FACTS: On January 12, 2008, as McKee was trying to pass a van on the Natcher Parkway (Daviness County), the occupant (Johnson) starting throwing items from the vehicle, some of which struck McKee's vehicle. McKee stayed behind him as she called her husband, Trooper McKee (KSP), who was off-duty. Trooper McKee immediately responded and caught up to the two vehicles. He fell in behind Johnson and pursued him for over three minutes. Johnson was not speeding, but did not pull over and continued to throw items out of his vehicle. Troopers Weiss and Whittaker responded to assist; Trooper Whittaker intended to deploy stop sticks to halt the pursuit. However, as he was getting them from his vehicle, Johnson's van approached and the trooper "dove out of the way and narrowly avoided being hit." Unfortunately, the cruisers were struck, as was Trooper Weiss. Trooper Weiss was seriously injured and missed over a year of work. Johnson finally stopped and ran, but was brought down by Trooper McKee. He was taken to the hospital where two bags of methamphetamine were found in his sock.

Johnson was indicted on numerous charges, including Assault 1st. At trial he argued he was insane due to his diagnosis of bipolar disorder that triggered paranoid delusions. He also argued that the "actions of the trooper caused him to run off the road and lose control of his vehicle.

Johnson was found guilty but mentally ill. He appealed.

ISSUE: Are injuries sustained as a result of a police chase an assault?

HOLDING: Yes

DISCUSSION: Johnson argued that the charges required that he be proven to have intended to cause the collision, and that this burden was not met. Instead, he argued, he "merely lost control of his van and that the accident was exacerbated by the overzealous actions of police." He had offered proof that he was not speeding or driving erratically and that the evidence indicated he was sliding when he hit the cruiser. The Court reviewed the in-car video which suggested Johnson drove into the median, struck the cruisers and then accelerated back onto the road. Further, his deflated tires were actually likely caused by the collision, not the stop sticks.

Further, the court agreed that Assault 1st may be proven by wanton conduct, not necessarily intentional conduct. Although Johnson argued he could not see the troopers, the Court noted it wasn't unreasonable to assume troopers would in or near the parked cruisers. As such, the wanton endangerment charge for the other troopers was also valid. Fleeing and evading was appropriate because he failed to pull over when signaled (by lights and sirens) to do so.

Finally, the court agreed that an instruction on Extreme Emotional Disturbance (EED) was unnecessary because mental illness, standing alone, "does not constitute EED." Instead, EED is established by a showing of some triggering event that causes an "explosion of violence." It must be "sudden and interrupted" and be as a result of "adequate provocation." None of this was shown in Johnson's case; he argued that a call from his girlfriend angered him, but no specifics were proven. A "general contention" that he was paranoid about police was also insufficient.

Johnson's convictions were affirmed.

PENAL CODE – KRS 510 - SEXUAL ABUSE

Conder v. Com., 2012 WL 2053878 (Ky. App. 2012)

FACTS: Conder, along with other members of an Owensboro area church, went on a mission trip to Letcher County. One evening, Conder, age 22, W.M., age 15 and others were watching a movie on a laptop. W.M. testified that Conder began touching her by putting his hand down the back of her pants. W.M. moved away from him, but Conder followed, this time placing his hand down the front of her pants. Conder later testified that he may have touched her but it was not intentional.

Conder was convicted of sexual abuse and appealed.

ISSUE: Is touching of the pubic area, but not the actual genitalia, sufficient for sexual abuse charges?

HOLDING: Yes

DISCUSSION: Conder argued that it was not proven that he touched W.M. in an intimate way, for sexual gratification. The Court that although Conder did not apparently touch her genitalia, he was touching the area near her pubic hair. W.M. testified that he touched her throughout the trip. The Court agreed her testimony to be clear, consistent and corroborated by another witness.

Conder's conviction was affirmed.

PENAL CODE – KRS 511 - BURGLARY

Hall v. Com., 2012 WL 528948 (Ky. 2012)

FACTS: On February 11, 2011, at about 0030, Barbourville PD got a report of a prowler at a local business. Officers Tye and Lawson, along with Trooper Bunch (KSP) responded. They found a truck, with the tailgate down, backed up near one of the darkened buildings. Two entered, finding Hall, "laying [sic] on

the floor under an object with his hands and face hidden." He came out when ordered. Trooper Bunch later stated that Hall was not asleep and "he seemed unhappy." The building was used to store angle iron valued at about \$10 a pound. Several pieces were stacked near the door on top of a generator and had had obviously just been placed there, due to the disturbance in the dust. Hall was arrested and volunteered he'd been given permission to go into the building and get iron to scrap, but he "did not identify" who had given him the alleged permission.

Hall was indicted for Theft and Burglary 3d, as well as PFO. He was convicted of Burglary and Attempt- Theft. He then appealed.

ISSUE: May a person's presence inside a building, and other circumstances, be used to support an inference of burglary?

HOLDING: Yes

DISCUSSION: Hall argued that there was no evidence that he intended to commit a crime inside the building. The court agreed that the evidence was sufficient for a jury to so find, and upheld the Burglary conviction.

PENAL CODE – KRS 514 – RECEIVING STOLEN PROPERTY

Jordan v. Com., 2012 WL 5627264 (Ky. App. 2012)

FACTS: On September 9, 2009, an ATV was stolen from Strong, in Scott County. When he called to report it, he learned that it had already been recovered. A witness had recognized that the ATV was stolen and tracked the truck that had been involved with it to Jordan's home. The witness, Northcutt, later identified Jordan "as the person he saw with the ATV." (The ATV had fallen off the back of a pickup, driven by Jordan.) Another witness, Norton, also identified Jordan. Norton, in fact, apprehended Jordan after a brief chase, during which he seized the truck keys and told Jordan he was calling 911. Jordan ran from the scene, but Norton picked Jordan from a photo array. (A deputy sheriff had arrived after Jordan escaped, but had been unable to locate him that night, but he did seize both the ATV and the pickup truck, which was registered to Jordan.)

Jordan called the deputy and tried to place the blame on another individual, Josh, to explain how he came into possession of the ATV. He stated he did not know it was stolen until it fell from the truck. He stated that he called his girlfriend to explain his predicament, and she advised him to get Josh out of his truck. He claimed that he was afraid that men who Josh claimed were chasing him were now after him, and that he parked in Norton's yard to avoid them, hiding in the back of the truck. He claimed he fled the scene because he didn't think the police would believe him, as he was on probation. Ultimately he was told to come in and give a statement, but he did not do so until later that day.

Jordan was ultimately arrested for Receiving Stolen Property. As he was awaiting trial, he "jokingly" offered a family member of the person he was staying with \$2,000 to testify to something that would discredit Norton's statement. Over objection, this was heard by the jury.

Jordan was convicted and appealed.

ISSUE: May possession of an item shortly after it is stolen be used to infer knowledge that it is stolen?

HOLDING: Yes

DISCUSSION: Jordan first argued that there was “only a possibility that he had knowledge that the ATV was stolen” and intended to keep it from the owner. The Commonwealth countered that there was no dispute that he was in possession of the stolen ATV and that the decision was to the jury. The Court noted that under KRS 514.110(2), “The possession by any person of any recently stolen movable property shall be prima facie evidence that such person knew such property was stolen.” There was no question that he was in possession of it immediately after it was taken and that it was in his truck.

With respect to the bribery, for which he was not charged, the Court noted that once the Commonwealth was made aware of the statement, it notified the court and the defense that it intended to use it as KRE 404(b) evidence as consciousness of guilt. The Court, however, noted that in O’Bryan v. Com., the “basic rule that evidence of uncharged conduct is inadmissible.”¹ However, it might be admitted, as follows:

Evidence of the commission of crimes other than the one charged is admissible if, (1) it is offered to prove motive, intent, knowledge, identity, plan or scheme, or absence of mistake or accident; (2) such evidence is relevant to the issues other than proof of a general criminal disposition, and (3) the possibility of prejudice to accused is outweighed by the probative worth and need for the evidence.

In this case, the Court agreed that evidence of the attempted bribe was properly admitted, as the “courts have held that evidence that a witness has been threatened or otherwise influenced in an attempt to suppress his testimony is admissible in a criminal prosecution only where the threat was made by, or on behalf of, the accused.”² Further, a showing of such attempts tends to “show guilt.”³ Such evidence is “routinely” found “to be more probative than prejudicial.”

The Court affirmed his conviction.

PENAL CODE – KRS 520 - ESCAPE

Land v. Com., 366 S.W.3d 9 (Ky. App. 2012)

FACTS: In March, 2010, Land was sentenced to five years for a felony, but received an alternative sentence of restitution and 20 days in jail. He was permitted to serve his sentence on weekends. However, Land failed to report to jail one weekend and was indicted for Escape 2nd. He moved to dismiss, arguing that it was a probation violation, instead, but the trial court disagreed. He took a conditional guilty plea and appealed.

ISSUE: Is failure to return to jail after a work release an escape?

¹ 634 S.W.3d 153 (Ky. 1982).

² Campbell v. Com., 564 S.W.2d 528 (Ky. 1978).

³ Foley v. Com., 942 S.W.2d 876 (Ky. 1996), citing Collier v. Com., 339 S.W.2d 167 (Ky. 1960).

HOLDING: Yes

DISCUSSION: The Court agreed that escape was a departure from custody or a detention facility. In this case, he failed to return to the jail, as required, and further, was a convicted felon. The Court agreed under either argument, it was clearly Escape 2nd, and affirmed his conviction.

PENAL CODE – KRS 520 – FLEEING AND EVADING

Turley v. Com., 2012 WL 2892364 (Ky. App. 2012)

FACTS: On September 30, 2010, Deputy McCoy (McLean County SO) was patrolling when he saw a vehicle make a turn without signaling. He followed and made a stop, after noting, as well, that the license plate was not illuminated. He activated his lights but Turley (the driver) “accelerated and pulled away.” Deputy McCoy pursued, despite the difficulty of dust from the gravel road. He estimated that they were going 45-50 mph when they reentered the paved highway. Turley ignored the stop sign when pulling sharply onto the road. As he fled, he disregarded a number of stop signs and at one point, turned off his headlights. The deputy followed Turley into a cemetery and Turley abruptly stopped, causing the deputy to rear-end Turley’s vehicle.

Turley said he was fleeing because he thought he had outstanding warrants. A “cool beer” and a joint were found in the truck. Turley was charged with Fleeing and Evading. He claimed at trial that he never saw the deputy until he pulled into the cemetery and that he ran the stop signs because he had a manual transmission and it was easier to do so then to downshift at a stop.

Turley was convicted and appealed.

ISSUE: Does fleeing an officer in a vehicle usually support a charge of Fleeing & Evading 1st?

HOLDING: Yes

DISCUSSION: Turley argued that there was insufficient proof that his fleeing created a substantial risk of serious physical injury to support the 1st degree of that offense. The Court agreed that “blatant disregard for stop signs, other approaching cars, limited space on bridges, and travel over a moderate distance at a high rate of speed” supported the 1st degree conviction.

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.⁴ 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.

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.⁵ 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.

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.

⁴ Note that the marijuana charge is a misdemeanor, but the tampering charge is a felony.

⁵ 350 S.W.3d 434 (Ky. 2011).

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."⁶ 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 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.

DUI

Harris v. Com., 2012 WL 2052100 (Ky. App. 2012)

FACTS: On September 3, 2008, Harris was involved in a minor crash in Louisville. The responding officer reported a strong odor of alcohol and Harris admitted he'd had a beer, along with some sleeping medication, and that "he had been around people who were smoking marijuana." He also claimed to have been distracted by his cell phone. He was given FSTs and was unsteady, and slurred his speech. He agreed to blood, breath and urine tests. His blood alcohol was zero, but he had Xanax in his blood. His urine test, however, indicated Xanax, hydrocodone and the byproducts of marijuana.

Harris was charged with DUI. At trial, Dr. Davis testified that he had reviewed all the evidence and believed Harris to have been intoxicated. Harris filed a motion to limit the admission of the urine test, arguing that the marijuana could have been from up to several weeks before and that the hydrocodone could have been from as much as two days before. Harris contended that it was impossible to conclude he'd been impaired from the urine test and that it was "both irrelevant and unduly prejudicial." The District Court disagreed, as did the Circuit Court. He took a conditional guilty plea and appealed.

ISSUE: Is urine evidence useless in judging impairment?

HOLDING: No

⁶ Schneckloth v. Bustamonte, 412 U.S. 218, 226 (1973).

DISCUSSION: The Court looked to the “balancing test” required by KRE 403. Although in Burton v. Com.⁷, the Court had “held that in the absence of other evidence reliably supporting a conclusion of impairment, the scientific remoteness of urinalysis only encourages juror speculation,” in this case, there was other evidence. Harris’s blood alcohol level was “inconsistent with his alleged state of intoxication” and not explained by the single beer he admitted to drinking. In this case, the urine test results were highly relevant.

The Court upheld the plea.

Com. v. Hobbs, 2012 WL 1957297 (Ky. App. 2012)

FACTS: On September 29, 2007, Trooper Drane (KSP) stopped Hobbs for drunk driving, in Meade County. Hobbs was given an Intoxilyzer, which registered .09. He was advised that he could have an independent blood test and asked to have one. Trooper Drane took Hobbs to Hardin Memorial Hospital, unaware that the hospital might refuse to do the test. (Hobbs did not ask for a specific place.) The hospital told Hobbs they wouldn’t take the blood test unless there was a physical exam and a medical need, so Hobbs declined. He did not ask for another provider and was taken to jail. Hobbs ultimately argued for suppression of the Intoxilyzer and was refused. He took a conditional guilty plea. The Meade Circuit Court reversed the conviction and the Commonwealth appealed.

ISSUE: If a subject does not agree to a physical exam in order to get a blood test for DUI, is the Intoxilyzer still admissible?

HOLDING: Yes

DISCUSSION: The Court distinguished this from Lee v. Com., which had almost identical facts and involved the same hospital.⁸ Here, had Hobbs submitted to the exam, the blood test would have been given to him. The Court agreed that there was no reason for the trooper to know what the hospital would do and there was an “utter lack of evidence” that Hobbs asked for another chance to take the test.

The Court agreed the Intoxilyzer should have been admitted and reversed the Circuit Court’s decision.

Ogle v. Com., 2012 WL 5627566 (Ky. App. 2012)

FACTS: On September 11, 2009, Ogle was driving in Fayette County when he collided with another vehicle, driven by Yanko. Two others witnessed the collision and went to assist. Reed, one of the witnesses, approached Ogle and was under the impression that he was intoxicated. Both of the drivers were injured and transported, but because neither was believed to have life-threatening injuries, a “full investigation was not performed at the scene.” The positions of the vehicles was documented, however, and photos taken.

Ogle’s blood was drawn by a nurse, who noted that Ogle “appeared intoxicated” and was “belligerent and uncooperative.” The blood vial was marked and sent to the lab via pneumatic tube. The vial was opened and tested for alcohol, which came back at .259. A urine screen tested positive for oxycodone and

⁷ 300 S.W.3d 126 (Ky. 2009).

⁸ 313 S.W.3d 555 (Ky. 2010).

marijuana. Ogle was treated for multiple fractures. Other medical records indicated that treating personnel believed him to be “grossly intoxicated.” Yanko had numerous fractures and was sent to surgery. He died, ultimately from a pulmonary embolism and cardiac arrest.

Lexington police arrived to investigate the possible DUI. (Apparently they were unaware of his intoxication at the scene because he was bleeding facially.) He admitted to having had multiple beers, but apparently refused an official blood test. When Yanko died, a further accident reconstruction was done. The investigator also asked that the hospital blood be secured pending a warrant, and it was ultimately taken to the KSP lab. At the lab, the alcohol concentration was found to be .24, but they could not test for drugs due to the sample size. Ultimately, the sample was destroyed pursuant to the lab’s procedures.

Ogle was charged with Manslaughter 2nd. He was convicted and appealed.

ISSUE: May hospital blood tests be used as evidence?

HOLDING: Yes

DISCUSSION: Ogle argued that there were numerous problems with the chain of custody of the hospital blood sample, because “there was no formal documentation of how the blood changed hands, and who placed the blood in the pneumatic tube.” The court noted that a perfect chain of custody is not required.⁹ It is only important that “there is persuasive evidence, by a reasonable probability, that the evidence has not been altered in any material respect.” Any “gaps in the chain of custody go to weight of the evidence rather than to its admissibility.” In this case, the Court found no reason to believe that it was, in fact, altered in any way, and it was handled the way such samples typically are, as part of normal hospital procedure.

With respect to the destruction, Ogle argued that the test results should be excluded “because the lab unnecessarily destroyed the blood sample.”¹⁰ However, the Court noted that in this situation, Ogle was provided with information about the test. Further, Kentucky has adopted the rule in Arizona v. Youngblood¹¹ that “that there is no denial of due process absent a showing of bad faith on the part of law enforcement or the Commonwealth where law enforcement or the Commonwealth have failed “to preserve evidentiary material of which no more can be said than that it could have been subjected to tests, the results of which might have exonerated the defendant.”¹² As there was no showing of bad faith, the Court agreed the results were properly admitted. Ogle also argued it was improper to admit the showing of the urine screen done by UK hospital, because neither of the drugs was in his blood at the time. The Court agreed it was improper as it was irrelevant, but further noted that it was harmless error in the face of the overwhelming evidence that he was intoxicated.

Finally, Ogle argued that it was improper to admit “investigative hearsay” given by several of the officers. In several instances, officers mentioned what they had been told by other officers. The Court agreed that “many of the statements are hearsay” because “they go to the truth of the matter asserted whether Ogle’s car crashed because he was intoxicated.” However, the Court agreed the error was harmless because the “testimony in question was cumulative of other properly admitted evidence.”

⁹ Rabovsky v. Com., 973 S.W.6 (Ky. 1998).

¹⁰ Green v Com., 684 S.W.2d 13 (Ky. App. 1984).

¹¹ 488 U.S. 51 (1998).

¹² Collins v.Com., 951 S.W.2d 569 (Ky. 1997).

Ogle's conviction was affirmed.

Ferguson v. Com., 362 S.W.3d 341 (Ky. App. 2012)

FACTS: On April 19, 2009, Trooper Maupin (KSP) stopped Ferguson's vehicle in Carroll County; it lacked tail lights. After a FST and PBT, she was arrested for DUI. On the way, she used her cell phone to call her roommate, who'd been with her in the car, with the trooper's permission. At the jail, her purse, with the cell phone inside, was confiscated. She was given her implied consent rights, during which time she learned she could try to contact an attorney prior to the Intoxilyzer. As she has an attorney, she asked to contact him, but she told the trooper that her attorney did not have a landline, only a cell phone, and his number was in the phone. The Deputy jailer said that the jail's policy prohibited the use of the phone, instead, she only had access to a collect-call phone on the wall. As she could not recall the attorney's number, she was unsuccessful in contacting him.

Ferguson registered a result of .092 on the Intoxilyzer. She moved for suppression of the results in District Court, which was denied. She took a conditional guilty plea and appealed. The Circuit Court affirmed and Ferguson further appealed.

ISSUE: May a subject under arrest for DUI be permitted to use their cell phone for the purpose of contacting an attorney?

HOLDING: Yes

DISCUSSION: The Court looked to Bhattacharya v. Com.¹³ and KRS 189A.105(3) for guidance. In the former, the Court agreed that Bhattacharya was denied his right to contact an attorney when he was provided with a telephone directory. The arresting officer insisted the Bhattacharya read the numbers he wanted to have dialed and the officer dialed them. (Bhattacharya was unsuccessful in reaching an attorney through the two numbers he requested.) The court noted that "in today's technologically advanced society, many people store important contact information in their cell phone." It noted it was not unreasonable to expect that subject be given access to a cell phone "for the limited purpose of procuring an attorney's phone number or contacting said attorney." The Court noted that certainly the trooper and deputy jailer could monitor her use of the phone to obtain the number, and in fact, they could have even dialed the number, once found, for her. (The Court recognized that some cell phones may not be able to accept reversed charges or collect calls, and in such case, she would need access to a phone that would, in fact link with the number she dialed.)

The Court discounted the fact that she could have tried to contact the attorney while in the transport vehicle, noting that she did not receive her implied consent rights until she arrived at the jail.

Ferguson's plea was reversed and the case remanded.

¹³ 292 S.W.3d 901 (Ky. App. 2009).

FORFEITURE

Com. v. Burnett, 2012 WL 3144027 (Ky. App. 2012)

FACTS: Burnett, with others, was indicted for Trafficking 1st and possession of drug paraphernalia, based on evidence discovered incident to his arrest, and later seized with a search warrant. Officers seized a cell phone and \$1,404 in cash. However, because the court suppressed the evidence seized, finding that the warrant did not precede the search, all charges against them were dropped.

Burnett demanded the return of the items seized, finding that since he was not convicted, they could not hold the items. The Commonwealth objected, claiming that “a conviction was not a prerequisite for a hearing regarding the forfeiture of seized property.” The Circuit Court ruled that the items be returned and the Commonwealth appealed.

ISSUE: Must there be a conviction in order for items to be forfeited?

HOLDING: Yes

DISCUSSION: The Commonwealth argued “that because forfeiture of a person’s property who is not the individual convicted of a crime is permitted, a conviction is not a prerequisite for a hearing regarding forfeiture of previously seized property.” The Court noted that while property may be seized from individuals who are not convicted, that in those cases, someone is, in fact, convicted of a crime. Further, there must be “some link between the property to be forfeited and a violation of the” the law. In Singleton v. Com., the Court noted that “[c]onfiscation of [a person’s] property is only authorized after a conviction of the party alleged to have committed the offense. This is a foundation of the Commonwealth’s right.”¹⁴

The Court affirmed the denial of the forfeiture.

Cooper v. Com., 2012 WL 5457507 (Ky. App. 2012)

FACTS: Cooper pled guilty in 2011 to a charge of Trafficking, DUI and other charges. At his final sentencing, the Commonwealth requested forfeiture of property in his possession at the time of the arrest, specifically a Night Vision Monocular. At a hearing on the matter, the arresting deputy (Ballard County SO) explained the circumstances of the arrest, which occurred after a controlled buy had been made from Cooper. The monocular was in a bag sitting next to the drugs in question. He agreed that the monocular was likely not used in the transaction, which took place during daylight hours, but that his experience suggested that such equipment was used to conduct counter-surveillance. Cooper testified he did not use the monocular for that purpose but was, in fact, returning it to his brother, from whom he’d borrowed it. The trial court agreed it had likely not been used in the transaction at bar, but that it was properly subject to forfeiture under KRS 218A.410(1)(f) as an item “which could be used to deliver, import or export controlled substances.” Cooper appealed the forfeiture.

ISSUE: May items (other than cash) be presumed to be proceeds of drug trafficking for purposes of forfeiture?

¹⁴ 208 S.W.2d 325 (1948).

HOLDING: No

DISCUSSION: The Court looked to the statute, which presumes that “all monies found in close proximity to controlled substances or activities or equipment related to drug manufacturing or distribution are subject to forfeiture.” There is, however, no such presumption for other property. The Commonwealth must “prove a nexus between the property sought to be forfeited and its use to facilitate a violation of KRS 218A.¹⁵ The Court agreed that there was insufficient evidence to prove that the monocular was, in fact, linked to the crime in question, the connection was “simply too tenuous to support the inference required.”

The Ballard County decision was reversed.

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

¹⁵ Osborne v. Com., 839 S.W. 2d 218 (Ky. 1992).

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.¹⁶

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

Bagby v. Com., 376 S.W.3d 620 (Ky. App. 2012)

FACTS: On March 8, 2010, Bagby's home and car were searched in Fayette County, pursuant to a valid warrant. She was arrested as a result was found during the search. The warrant was supported by an affidavit that discussed a CI making controlled buys, two in Bagby's house and one in her car. Bagby moved for suppression, arguing that the officers knew, early in the investigation, that her OL was suspended and that they "observed or encouraged her (through the use of the CI) to drive her vehicle in violation of KRS 189A.090." The Commonwealth argued that the officers "are to be afforded wide latitude in conducting their investigations and that they were not required to arrest her immediately. The Court denied her motion to suppress and she took a conditional guilty plea. She then appealed.

ISSUE: Is an officer required to make an arrest for a suspended OL as soon as they realize the individual has one?

HOLDING: No

DISCUSSION: Bagby continued to argue that the officers were "duty-bound" to arrest her as soon as they saw her driving without a valid OL. The Court, however, noted, that in Hoffa v. U.S.¹⁷ there is no constitutional right to be arrested within a particular time frame. Further, officers are permitted to conduct their investigations in such a way as they are satisfied it is time to halt the investigation.¹⁸

The Court upheld Bagby's plea.

SEARCH & SEIZURE – ARREST WARRANT / SWEEP

Burgess-Smith v. Com., 2012 WL 3136773 (Ky. App. 2012)

FACTS: On August 29, 2009, Officer Muravchick responded to a 911 hang-up to the home where Burgess-Smith was staying. He was familiar with the location having made an unrelated domestic violence call a few days later. He knew the male subject in that case was "known to carry a weapon and had absconded" when the officers arrived. They had a warrant for that subject, as well. Inside the residence, they "could hear a male and a female in a loud argument." Officer Muravchick later stated that the front door was open and they could see down a hall, but did not see anyone. When they knocked, a female answered the door and said she was fine and that the male subject was no longer there. The officers did a "protective sweep" with Officer Muravchick later testifying that they couldn't be sure that the female was not under duress, nor did he want "someone in the back of the house to come out and attack the officers by

¹⁶ Johnson v. Com., 179 S.W.3d 882 (Ky. App. 2005).

¹⁷ 385 U.S. 293 (1966).

¹⁸ Phillips v. Com., 473 S.W.2d 135 (Ky. App. 1971).

surprise." They located Burgess-Smith in a bedroom and asked him to come to the front. Officer Muravchick recognized him as someone for whom they had a warrant. Officer Muravchick frisked Burgess-Smith and then got out his handcuffs. "Burgess-Smith threw his elbow down, pushed Officer Muravchick into a wall, struggled with Officer Muravchick, and ran off." Officer Maynard was able to tackle him, but again, Burgess-Smith got away. Officer Muravchick was finally able to Tase and arrest him. But once again, "Burgess-Smith jumped to his feet and ran." He was finally Tased a second time and taken into custody.

Burgess-Smith was charged with the warrant, Assault 3d, Fleeing and Evading, Escape and PFO. He moved for suppression of the warrantless entry. The trial court agreed he had an expectation of privacy as an invited guest, but that the officers had reasonable cause to do the protective sweep. At trial, McDonald, the residence occupant, testified that she did not give permission for the officers to enter. Burgess-Smith was convicted on all charges and appealed.

ISSUE: Does an arrest warrant justify an entry?

HOLDING: Yes

DISCUSSION: The Court noted that despite any taint on the entry, "Burgess-Smith's active outstanding warrant for his arrest was an intervening cause" that justified the entry to effect the arrest. With respect to the Assault 3rd charge, in which he argued that the officer sustained no injury, the Court noted that all that was required was that he attempt to cause an injury to the officer and there was sufficient proof that he did so.

Finally, the Court agreed that it was proper for Officer Muravchick to state that he recognized Burgess-Smith as being the subject of an active arrest warrant, as that was "inextricably intertwined with the charged offenses." He properly did not state the reason for the warrant however. It explained why he was frisked and immediately secured, and "why the officers so fervently pursued Burgess-Smith during his repeated attempts to escape."

Burgess-Smith's conviction was affirmed.

SEARCH & SEIZURE – SEARCH WARRANT

Petrey v. Com., 2012 WL 3628880 (Ky. App. 2012)

FACTS: On May 15, 2008, Petrey lived in an apartment complex in Park Hills. His victim did as well, sharing an apartment with a third individual, Patterson. Both Petrey and his victim were drug abusers. They became friends and their friendship became sexual. At some point, Patterson learned of the relationship and the victim "freaked out" because she was financially dependent on Patterson. On May 15, she went to Petrey's apartment to smoke marijuana and get a ride to the methadone clinic. There, she ran into her cousin and told him Petrey had raped her while she was unconscious. Her cousin took her to the police station where she explained their history, also telling the police where drugs could be found in the apartment.

Chief Smith got a search warrant. He later testified that he was aware the victim had been at the methadone clinic and that she was slurring her speech, but did not include this in the affidavit. During the subsequent search, they found drugs and a video suggesting the victim was unconscious during a sexual act.

Petrey was charged with drug and sexual offenses, including Sodomy 1st and Sexual Abuse. He was convicted and appealed.

ISSUE: Does omitted information necessarily taint a search warrant?

HOLDING: No

DISCUSSION: Petrey argued that “the affidavit used to obtain the search warrant was inaccurate and unreliable because it did not contain any information regarding the victim being under the influence of drugs or having just visited a methadone clinic at the time of her statement.” The Chief admitted he did not know what effect methadone might have and that the individual was unknown to him. He testified at a hearing that the victim was excited, scared and crying and that he attributed her slurring to her upset, and that she did not appear to be intoxicated. Instead, she appeared focused. The Court found that “at best, the failure to include the omitted information in the affidavit was negligent or an innocent mistake.” Even with that information, there was still more than enough information to support the warrant.

Petrey also argued that the trial court should have instructed the jury on sexual misconduct as a lesser included offense to sodomy. The court, however, noted that its “longstanding rule is that KRS 510.140 applies only to cases involving victims under 16 and perpetrators under 21.” Further, the Court agreed that the four charges of sodomy were documented by discrete acts on the videotape, although they were part of the same continuous sex act.

The Court affirmed Petrey's convictions.

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.¹⁹ 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.”²⁰ 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

¹⁹ 547 U.S. 90 (2006).

²⁰ U.S. v. Penney, 576 F.3d 297 (6th Cir. 2009).

"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."

The Court affirmed Luckl's conviction.

Harris v. Com., 2012 WL 1758140 (Ky. App. 2012)

FACTS: On October 20, 2009, Det. Curtsinger (Lexington PD) requested a search warrant for Harris's home, submitting a detailed affidavit connecting Harris to drug trafficking. Cocaine and related trafficking items were discovered. Harris sought suppression of the evidence. When that was denied, he took a conditional guilty plea and appealed.

ISSUE: Is it necessary to name a CI in a search warrant affidavit?

HOLDING: No

DISCUSSION: The Court noted that the "affidavit was thorough and detailed and provided ample, specific information – including the detective's own observation." It "clearly demonstrated a pattern of behavior on the part of Harris likely indicative of drug dealing activity." The Court agreed that although the CI is not identified by name, the information provided was sufficient to lead to the "reasonable inference that the CI had actual knowledge of the allegations and was reporting accurately." Det. Curtsinger took steps to corroborate what he could, and controlled buys were made in which apparent cocaine was purchased. The Court agreed, however, that Harris's past convictions for marijuana were sufficiently dissimilar to have little relevance to the case at hand.

The Court found the warrant showed sufficient probable cause and upheld the plea.

Rogers v. Com., 366 S.W.3d 446 (Ky. 2012)

FACTS: In September, 2009, a CI told Bardstown PD and the Hardin County Task Force that he would be willing to make a buy from Rogers. He received cocaine in exchange for money from Rogers during two buys. Right before the second buy, the detective had gotten a search warrant for Rogers' house and garage. When the buy was confirmed, the officers executed the warrant, finding the marked money from both buys. They also found cocaine, scales and baggies. Rogers moved for suppression of the warrant. "Timing quickly became an issue." The warrant indicated it was signed at 4:50 p.m., which was also apparently the same time that the search itself allegedly began. The detective, however, stated he received the warrant before meeting with the CI for the second buy. The trial judge, who also apparently signed the warrant, suggested that the warrant had to have been signed prior to 4:30, before the courthouse was locked for the day. In fact, the record indicated the judge was involved in another matter at the time the judge supposedly signed the warrant. Further, the Court signed a "presumptive" warrant, which would not have been the case if the buy had already occurred.²¹ The motion was denied.

Rogers was indicted for Trafficking and moved for suppression. When that was denied, Rogers was convicted and appealed.

²¹ Presumably the Court meant an anticipatory warrant.

ISSUE: Does a clerical mistake invalidate a warrant?

HOLDING: No (as a general rule)

DISCUSSION The Court noted that it was appropriate for the judge to use his own knowledge, combined with verifying the recollection by referring to the court record of the day in question. The mistake was clerical and the RCr 10.10 permits such errors to be corrected.

The Court held the warrant and the search were valid. Rogers' conviction was affirmed.

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 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.²² and that "most of the behavior [discussed] ... could reasonably be considered as innocent under the

²² 269 S.W.3d 847 (Ky. 2008).

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. As a convicted felon, Strickland was arrested and indicted.

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

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 - CONSENT

Com. v. Brooks & Garland, 2012 WL 6062752 (Ky.App. 2012)

FACTS: On May 24, 2011, Det. Farmer (Louisville Metro PD) received a tip from a CI that Garland was selling drugs. He did surveillance and "saw an apparent drug transaction between a female occupant of the home and a passenger in a silver Saturn." He did a traffic stop and with consent, found 9 hydrocodone pills in her purse. She (and her husband, also in the car) admitted she'd gotten the pills from Garland. Det. Farmer went to the Garland house with 7 other officers to do a "knock and talk." They found several people on the porch and when they approached, with badges showing, "an unidentified male ran from the porch into the home." The officers pursued and secured him. Det. Farmer obtained consent from Houchens, the homeowner, to search.

During the search, everyone was secured and sequestered. They found a purse in the basement, with pills and cash – the purse belonged to Garland. Apparently the basement was later considered a separate apartment, but it is not clear it was recognized as such at the time. Brooks and Garland were indicted for Trafficking and related charges.

Both Brooks and Garland moved for suppression. The Court agreed the basement search was valid, but not the search of the purse, and suppressed the evidence. The Commonwealth appealed.

ISSUE: May a homeowner give permission to search a purse that doesn't belong to them?

HOLDING: No

DISCUSSION: The Court noted that "it is axiomatic that absent exigent circumstances, law enforcement officers may not enter an individual's private residence in order to conduct a warrantless search."²³ The Court agreed that the homeowner consented and that the search of the basement was proper. The Court, however, found no exigency in the search of the purse, which did not belong to the homeowner. (The assertion that there might be a "hidden danger or weapon" in the purse was discounted, as Garland, and everyone else, was secured in another room at the time.)

The Court distinguished the situation from that discussed in other cases raised by the Commonwealth. In this case, the Court characterized it as a "third-party consent" situation, as in Colbert v. Com.,²⁴ but in Colbert, the property was owned by the suspect's mother. But in this case, the Court found it difficult to extend Houchens' permission to a closed purse that did not belong to her.

The Court upheld the suppression of the items found in the purse.

Combs (Richard and Betty) v. Com., 2012 WL 1254775 (Ky. App. 2012)

FACTS: On March 2, 2010 Captain Allen (Hazard PD) questioned H.M. about a theft, to which he confessed. He claimed to need to money to pay a drug debt owed to Richard Combs and that he feared Richard would hurt him if he did not pay. H.M. took the officer to the Combs' trailer and they set up surveillance. People came and left within minutes. Suspecting drug activity, Captain Allen did a knock and talk and obtained consent to search. Det. Grigsby found an Oxycontin tablet. The officer stopped the search, secured the residence and got a search warrant. They found methadone, hydrocodone and over \$2,000 in cash. They moved for suppression, arguing that the officers anticipated that they would find contraband, and were denied. Both were indicted for trafficking, and convicted.

ISSUE: Is a consent gained during a knock-and-talk valid?

HOLDING: Yes

²³ Payton v. New York, 445 U.S. 573 (1989).

²⁴ 43 S.W.3d 777 (Ky. 2001).

DISCUSSION: The Court noted that “officers may seek consent-based encounters if they are lawfully present in the place where the consensual encounter occurs.”²⁵ The Court supported knock and talks, as well.²⁶ As the Court agreed that the officers received valid consent, the Court supported the search.

The convictions were affirmed.

SEARCH & SEIZURE – HOT PURSUIT

Allen v. Com., 2012 WL 1556298 (Ky. App. 2012)

FACTS: On July 17, 2009, at about 3 a.m., Officer Williams (Lexington PD) noticed that a vehicle turned into a cluster of businesses, none of which were open, and drove behind one of the businesses. He turned on his overhead lights. The vehicle did a U-turn and Allen, the passenger, jumped out and fled. Officer Williams chased after him and caught Allen when he slipped and fell. (Allen claimed he was tackled, Williams stated Allen slipped and fell on his own.) The two struggled and Allen was secured. At some point, apparently, Officer Bowles, who responded as backup, gave Allen his Miranda warnings. Officer Williams asked Allen why he ran; he stated there was an outstanding warrant against him. That was confirmed and Allen was arrested. Over \$1,000 in cash was found during the search. When asked if anything was missed, he stated “it fell down my leg.” Drugs were found nearby. Sgt. Lowe readvised Allen of his rights. Allen was taken to the hospital and questioned again, less than an hour later, and he admitted that the drugs found were his.

Allen was charged and requested suppression. The Court agreed that it appreciated the officer’s investigation of suspicious activity, “but noted that he could have done so without initiating the stop.” The Court found no reasonable suspicion for the stop.

However, the Court noted that “other jurisdictions have held that the discovery of an outstanding warrant overcomes any taint of an impermissible initial encounter.” Further, Allen’s flight gave them an independent reason to stop him. The Court concluded that the evidence did not need to be suppressed. The Court commended the officer’s truthfulness when he admitted that he wasn’t sure that Allen received his Miranda warnings. The Court sustained the suppression of the initial statements. After he was given Miranda²⁷, and answered questions, however, the Court agreed it was admissible, and it also admitted the statements made at the hospital.

Allen took a conditional guilty plea and appealed.

ISSUE: Does unprovoked flight, in itself, satisfy reasonable suspicion?

HOLDING: Yes

DISCUSSION: Allen continued to argue that if Williams lacked reasonable suspicion for the initial stop, “all evidence flowing from the stop must be suppressed.” Further, he argued that his flight was not enough to justify the officer chasing and stopping him. The Court looked to Illinois v. Wardlow and agreed that such

²⁵ Kentucky v. King, 131 S.Ct. 1849 (2011).

²⁶ Quintana v. Com., 276 S.W.3d 753 (Ky. 2008).

²⁷ 384 U.S. 436 (1966). For the sake of brevity, Miranda will not be cited from this point forward.

flight was the “consummate act of evasion.” He “jumped out of a moving vehicle and ran” and was not seized until he was engaged with Officer Williams.

With respect to his initial statement, about something falling down his leg, the Court noted that while his statement could be excluded, “evidence obtained as a result of such a statement” is not subject to exclusion.²⁸ The Court agreed the later statement, after Miranda, was admissible.

The Court affirmed the conditional guilty plea.

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. Dunn²⁹, Oliver v. U.S.³⁰ and Hester v. U.S.³¹ 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

²⁸ U.S. v. Patane, 542 U.S. 630 (2004).

²⁹ 480 U.S. 294 (1987).

³⁰ 466 U.S. 170 (1984).

³¹ 265 U.S. 57 (1924).

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." 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.

Dunn's convictions were affirmed.

SEARCH & SEIZURE – CURTILAGE

Cruz-Vasquez v. Com., 2012 WL 4760914 (Ky. App. 2012)

FACTS: On March 20, 2010, Officers Gray and Lain (Richmond PD) were on foot patrol in a mobile home park. After finishing their patrol, they took a short cut between two mobile homes and Officer Gray saw Cruz-Vasquez "manipulating items" he believed to be cocaine and a plastic bag. Although the blinds were drawn, the officer could see inside through a small gap. The officers approached and knocked. Cruz-Vasquez opened the door, still holding the bag. As they questioned him, Cruz-Vasquez dropped the bag and stepped back inside; the officers grabbed and handcuffed him. Officer Lain did a sweep, finding no one. They confirmed the bag was cocaine and arrested Cruz-Vasquez. The officers obtained a search warrant and found more drugs and paraphernalia.

Cruz-Vasquez was charged with Trafficking and Possession of Drug Paraphernalia. He moved for suppression on the basis of an illegal search. The Court denied the motion. Cruz-Vasquez took a conditional guilty plea and appealed.

ISSUE: Is the land around a mobile home generally considered curtilage?

HOLDING: No

DISCUSSION: The Court noted that generally, "a home and its surrounding curtilage are protected by the Fourth Amendment."³² Curtilage extends "to the area immediately surrounding a dwelling house." In this case, the Court applied the Dunn³³ factors and agreed that the area from which the officers could see inside the mobile home was not enclosed, was open to the public access and was unconnected to any "intimate activity" in the home. The only factor that supported the area being curtilage was the distance from the home. The Court also agreed that the officers' entry to seize Cruz-Vasquez and the plastic bag were appropriate under exigent circumstances, as they reasonably believed he would destroy it. The Court noted that although they did confirm that the white substance in the bag was cocaine by field-testing, that did not negate the "intrinsically incriminating" nature of the evidence.

His plea was upheld.

Burd v. Com., 2012 WL 5289418 (Ky. 2012)

FACTS: On June 18, 2010, Det. Wimpee (KSP) learned that Burd was manufacturing methamphetamine at his home and there was an outstanding warrant for violating parole conditions. He

³² U.S. v. Dunn, 480 U.S. 294 (1987); Quintana v. Com., *supra*.

³³ Supra.

went to the home, with other officers, to arrest him. At the rear of the home, Dets. Wimpee and Drummond found a camping fuel can and an acetone can sitting on top of a garbage can. From his place in the yard, he also saw marijuana growing in pots nearby. When they received no answer at the door, officers went to get a search warrant, but others remained at the scene believing, in fact, that someone was there.

About an hour later, Det. Wimpee returned with a warrant, and additional assistance. The door was forced open and inside, they found Burd, his wife and another adult. Det. Wimpee detected the smell of chemicals. When asked, Burd directed them to the kitchen and a glass jar, and additional items connected to manufacturing methamphetamine. Processed methamphetamine was found in the house.

Burd was eventually convicted Manufacturing Methamphetamine, Possession of a Controlled Substance and related offenses. Burd appealed.

ISSUE: Are officers allowed to enter the curtilage to secure the back door during an arrest warrant execution?

HOLDING: Yes

DISCUSSION: Burd argued, first that the warrant was based on information obtained in violation of his reasonable expectation of privacy and false or misleading statements. He argued that the items spotted by Det. Wimpee in the rear of the house were as a result of an illegal search of the curtilage. The court looked to McCloud v. Com., in which the issue was virtually identical.³⁴ The court noted that “because law enforcement officers are authorized to secure the backdoor by accessing the backyard, any illegal activity (or reliable evidence thereof) taking place in plain view of the backyard may be identified in an affidavit in support of a search warrant without violating the suspect’s reasonable expectation of privacy.” The Court also agreed that Det. Wimpee stated, affirmatively, that he could see and identify the marijuana plants, based on his training and experience.

The Court upheld Burd’s conviction.

SEARCH & SEIZURE – EXIGENT ENTRY / BUIE / SWEEP

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?

³⁴ 279 S.W.3d 162 (Ky. App. 2007).

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.

Brumley's conviction was affirmed.

Guzman v. Com., 375 S.W. 3d 805 (Ky. 2012)

FACTS: On September 10, 2008, Lexington police responded to a call from Guzman's neighbor. He stated that the apartment was rented to Guzman's boyfriend, who was in jail, and that she was there engaging in prostitution and trafficking drugs. She stated she had seen Guzman enter the apartment with two men, one white and one black. As they arrived, the officers spotted Demerit leaving the apartment and he was identified by the neighbor as having been in the apartment earlier. He was released after questioning. They proceeded to the apartment for a knock and talk. It was past 0100 when they knocked and Hendren finally answered the door. He explained that he and Guzman were having sex, explaining the delay. The officers entered as Guzman was dressing under a blanket.

With the lights on, they saw a blanket tacked over a wide doorway. Although she said no one else was in the apartment, they did a protective sweep. In the kitchen they found a burned spoon with residue on it. They asked for consent to search and she asked what would happen if she refused – she was told they'd secure the premises and get a warrant. She then consented. They found cocaine and additional paraphernalia. She moved for suppression and was denied. Guzman then took a conditional guilty plea and appealed. The Court of Appeals affirmed her plea and she further appealed.

ISSUE: May an officer do a sweep search without at least some reason to believe there is anyone else in a building?

HOLDING: No

DISCUSSION: The Court agreed that the Court could search, incident to an arrest, the "area that is considered to be in the immediate control and possession of the person being arrested."³⁵ The Court in Chimel v. California, however, found no justification for searching other rooms, routinely.³⁶ Chimel has been modified, however, by the decision of Maryland v. Buie.³⁷ The Court concluded that it was time to follow and adopt Buie, noting that even prior to that decision, however, Kentucky had recognized a "protective sweep" or "safety check" in Com. v. Elliott.³⁸ However, in Buie and Elliott, the sweeps were done in conjunction with an arrest, which was not the case in Guzman. The Court noted that their

³⁵ U.S. v. Rabinowitz, 339 U.S. 56 (1950).

³⁶ 395 U.S. 752 (1969).

³⁷ 494 U.S. 325 (1990).

³⁸ 714 S.W.2d 494 (Ky. App. 1986).

presence was only as a result of a complaint from a neighbor, and the police had already accounted for everyone who had been observed by the neighbor. They did not ask to conduct the sweep, they simply did it “without a search warrant in hand or both probable cause and exigent circumstances.”³⁹ The Court agreed that the officers “went beyond that limited area (where they were permitted) into other parts of the apartment where consent had not been given.” The Court noted that “under the ‘objective reasonableness’ standard, a reasonable person inviting the police into his or her living room would not have understood the invitation to extend to the entire house.”

With respect to the blanket covering the doorway, the Court noted that “the covering is simply a barrier to an entranceway that is less attractive and substantial perhaps than a door, but still signaling an expectation of privacy.”

The Court quoted William Pitt concerning the Fourth Amendment:

It may be frail; its roof may shake; the wind may blow through it; the storm may enter; the rain may enter; but the King of England cannot enter; all his forces dare not cross the threshold of the ruined tenement.

The Court noted that it was not insensitive to the concerns of law enforcement, but noted that a simple request may have gained consent, or they could have asked Guzman to step outside. The Court concluded that “consent by the owner for the police to enter his home does not extend to the entire house, even for a protective sweep.” Since the original evidence was found during that sweep, it tainted everything that followed.

The Court reversed the lower courts’ decisions and remanded the case.

SEARCH & SEIZURE – ABANDONED PROPERTY

King v. Com., 374 S.W.3d 281 (Ky. 2012)

FACTS: On August 13, 2007, Lexington PD was involved in a controlled buy between King and a CI. The officers moved in after the buy to question King, “in hopes of developing probable cause or obtaining consent to search the vehicle by drug dog.” However, King fled and they pursued. King “pulled into a driveway, jumped out of the Jeep, and fled on foot; the Jeep rolled into a parked car.” He was caught after about 40 yards and charged with Fleeing and Evading. In a subsequent search of the Jeep, officers found crack cocaine and marijuana, along with over \$3,000 in cash on King’s person. He moved to suppress the drugs, but the trial court ruled that he had abandoned the vehicle and that the search was lawful. The Court also upheld the stop. King was convicted of Trafficking (for the crack cocaine), Fleeing and Evading and Possession (marijuana). He appealed.

ISSUE: Does leaving property behind during a flight from police suggest abandonment?

HOLDING: Yes

DISCUSSION: The Court looked to another recent decision and agreed that:

³⁹ See Kirk v. Louisiana, 536 U.S. 635 (2002).

Leaving property behind, when in flight from apprehension by law enforcement, must be considered in and of itself an abandonment of that property. When one or more persons are fleeing and evading law enforcement officers, who are in hot pursuit, and the car is stopped or becomes disabled and all occupants flee from the vehicle, that vehicle is considered abandoned and may be subject to a warrantless search.⁴⁰

Despite King's argument that he did not abandon the vehicle, as evidenced by pulling it into a driveway and then fleeing the vehicle. The Court noted that he had to be aware that he was being followed by marked cruisers with emergency equipment activated. The court agreed it was abandoned and upheld the search.

The Court affirmed his convictions.⁴¹

SEARCH & SEIZURE – VEHICLE

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. 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.'"⁴² 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

⁴⁰ Watkins v. Com., 307 S.W.3d 628 (Ky. 2010).

⁴¹ This case also ruled on a separate matter, in which it did reverse a separate charge, however.

⁴² Creech v. Com., 812 S.W.2d 162 (Ky. App. 1991).

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.

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.⁴³ 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.

Kavanaugh v. Com., 2012 WL 4473299 (Ky. App. 2012)

FACTS: On March 6, 2010, Officer Rice (Lexington PD) was on patrol. At about 0340 he noticed a vehicle parked along the road with its headlights on. When he passed, he did not see anyone inside. The officer thought that it was either stolen or involved in drug trafficking or prosecution, or that a burglary could be in progress. He called in the tag number and then noticed two people were in the vehicle. He lit up the vehicle with a spotlight and walked up to talk to the driver, Kimeli. Kavanaugh was in the passenger seat. Kimeli explained she’d just dropped off a friend and provided ID. Kavanaugh stated he had no ID

⁴³ 434 U.S. 106 (1977).

and questioned why Officer Rice wanted to know who he was. During that time, “Kavanaugh was not looking at him while responding and kept reaching into his coat and digging into his pocket.” Officer Rice had Kavanaugh get out of the vehicle.

As they walked toward the rear of the car, Officer Rice saw Kavanaugh remove a “small, unidentified black item out of his pocket.” He ordered Kavanaugh to keep his hands out of his pockets and told him he would be frisked. Instead of complying by turning around, Kavanaugh removed a “small, black, digital recorder and spoke into it, saying something along the lines that he was being harassed.” He insisted on holding the recorder while being frisked but still did not provide his name. Officer Rice removed Kavanaugh’s wallet. Kavanaugh spun around and seized the officer in a “bear hug,” whereupon he was arrested.

Pursuant to the subsequent search, a small amount of crack cocaine was found. He was charged, took a conditional guilty plea and appealed.

ISSUE: Does an officer need any reason at all to approach a vehicle in a public location?

HOLDING: No

DISCUSSION: The Court noted that “reasonable suspicion is not required to approach parked vehicles on publicly accessible property.”⁴⁴ It was certainly appropriate to question occupants, and to become suspicious when Kavanaugh refused to identify himself. It was also reasonable to believe the small black item, although it turned out to be a recorder, to be something more dangerous. Once Kavanaugh made physical contact with the officer, an arrest was proper.

The Court upheld Kavanaugh’s plea.

SEARCH & SEIZURE – VEHICLE – GANT

Johnson v. Com., 2012 WL 1573517 (Ky. App. 2012)

FACTS: On March 13, 2009, Shively PD set up a sting operation involving a prostitute, Gortney. Det. Spaulding and Gortney agreed on a price, and when she accepted, she was arrested. A small amount of cocaine was found during the subsequent search. She agreed to become an informant and a buy was arranged with Johnson. Upon Gortney getting out of the car with Johnson, officers converged on her. They found her in possession of cocaine and Johnson in possession of the marked money she had gotten from police. They also found, in Johnson’s car, 200 hydrocodone and 97 alprazolam. He was charged with Trafficking, Promoting Prostitution and PFO. At trial, he moved to suppress the evidence under Arizona v. Gant⁴⁵ because he was outside the vehicle when it was searched. The trial court denied the motion, finding he was searched for evidence of the arrest (drugs). At trial, Johnson argued that since no cocaine was found on his person or the car, and he was legally entitled to have the pills, the prosecution failed to prove Trafficking. The Commonwealth argued that the pills weren’t in properly marked bottles and were prescribed in quantities far less than the number actually found. It argued that trafficking could be inferred from the number of pills and their location. Johnson testified that he had purchased the pills with a prescription and had accumulated them because he took them only as needed. He claimed all his

⁴⁴ U.S. v. Dyson, 639 F.3d 230 (6th Cir. 2011).

⁴⁵ 129 U.S. 1710 (2009).

possessions were in his truck as he was living out of it, and that Gortney had given him the money in repayment of a loan.

Johnson was, however, convicted and appealed.

ISSUE: Does a drug arrest permit searching a vehicle for drugs under Gant?

HOLDING: Yes

DISCUSSION: Johnson continued to argue that under Gant, the search was unlawful. However, the Court noted, “since Gant, Kentucky courts have consistently held that arrests for drug offenses provide a basis for searching the passenger compartment of an arrestee’s vehicle for evidence relating to that offense.” The Court agreed they had a reasonable basis to search the vehicle. Further, the Court agreed that his possession of the medications, particularly those in unmarked bottles, in quantities far in excess of the normal prescription was questionable. Further, he was filling prescriptions while unemployed and with his own money, rather than insurance, and accumulating those pills. That evidence was sufficient to support the position of the Commonwealth.

The Court upheld the conviction.

INTERROGATION – MENTAL ILLNESS

Keeling v. Com., 381 S.W.3d 248 (Ky. 2012)

FACTS: Keeling is a paranoid schizophrenic. On May 27, 2004, he approached Morefield, who was doing yard work, and asked for a lighter. Morefield had never seen him before. As Morefield reached for a lighter, Keeling stabbed him in the chest. The next day, his father told his mother that the police were looking for Keeling. Keeling and his father, also schizophrenic, fought several times over the night and Keeling ultimately also stabbed his father in the chest. He died from his injuries. Keeling was captured and admitted to both stabbings. Over the next six years, Keeling was ruled incompetent to stand trial. In 2009, he was ruled competent. Ultimately he was found guilty but mentally ill for the murder and the assault. He appealed.

ISSUE: Does mental illness automatically make a statement inadmissible?

HOLDING: No

DISCUSSION: Among a multitude of other issues, Keeling argued that his post-arrest statements to police should have been suppressed due to his mental illness, which caused hallucinations and delusions. The court agreed that under Colorado v. Connelly, a subject’s mental condition is a factor in determining whether a confession is voluntary.⁴⁶ It ruled, however, that “although a defendant’s mental illness can be considered in determining whether law enforcement coerced a confession—for example, by exploiting the mental illness as in Blackburn v. Alabama⁴⁷ and Bailey v. Com.⁴⁸ it is not, without some official coercion,

⁴⁶ 479 U.S. 157 (1986).

⁴⁷ 361 U.S. 199 (1960).

⁴⁸ 194 S.W.3d 296 (Ky. 2006)

sufficient for suppression purposes. The Court noted that in Bailey, the subject was mildly mentally retarded, but that Keeling was of average intelligence. The Court reviewed the recording of the questioning and found “absolutely no evidence of coercion, psychological or otherwise.” The Court agreed that although he may not have been able to properly judge what was going on, there was no evidence that the police exploited his mental illness. The Court noted that his objections to being held under guard, in the same clothes he’s been wearing at the time of the murder of his father, which were blood-stained, did not constitute coercion. Although he argued he received no medication or visitors, the Court noted that he was not prescribed any medication at the time, nor did anyone attempt to visit him.

Keeling’s conviction was upheld.

INTERROGATION – RIGHT TO COUNSEL

Tooley v. Com., 2012 WL 1137845 (Ky. App. 2012)

FACTS: On January 4, 2006, Tooley was arrested in Louisville, for Vitt’s death. Det. Halbleib (Louisville Metro PD) gave Tooley his Miranda rights and he waived those rights, in writing. For about 2 hours, Dets. Halbleib and Cohn “attempted to build rapport” with him, working up to asking him about the homicide. When they did so, Tooley asked “Do I get to call my attorney?” He was reminded that he had been given his rights and he “quickly confirmed multiple times that he wanted to speak to his attorney.” The interrogation ended. In a few minutes, Det. Halbleib gave Tooley a phone book to look up his attorney’s number. While he was doing so, Det. Cohn began to question him about a handgun, told him that they had an “open and shut case.” Tooley reiterated he wanted to speak to his attorney. Cohn continued questioning him for 25 minutes, until he was told to stop by another officer.

During the break, Tooley was arrested. He asked to return to the interrogation room, “declaring he wanted to tell them what happened.” Halbleib reminded him that because he’d asked for an attorney, he could not talk to Tooley. Tooley said he no longer wanted one and the second interview began. Halbleib reviewed the Miranda rights and confirmed that Tooley wanted to speak to them. Tooley confessed and was indicted. He moved for suppression, arguing that it was improper to speak to him after he’d invoked right to counsel. The trial court suppressed the first interview, but not the second, finding that in the first, they’d continued interrogation after he’d invoked. Tooley was convicted of Manslaughter and appealed.

ISSUE: May a statement be suppressed if officers violate a suspect’s right to counsel?

HOLDING: Yes

DISCUSSION: In Minnick v. Mississippi, the Court clarified that Edwards⁴⁹ “does not prohibit a suspect from engaging in subsequent discussion with the police if the suspect himself, rather than the police, “initiates further communication, exchanges or conversations with the police.”⁵⁰ That does not occur, however, when the suspect responds simply to “further police-initiated custodial interrogation.”⁵¹ If that does, in fact, occur, the Court must apply the two-part test developed by Oregon v. Bradshaw⁵² and Smith

⁴⁹ Edwards, supra.

⁵⁰ 498 U.S. 146 (1990).

⁵¹ Arizona v. Roberson, 486 U.S. 675 (1988) United States v. Whaley, 13 F.3d 963 (6th Cir. 1994).

⁵² 462 U.S. 1039 (1983).

v. Illinois.⁵³ First, the Court must determine if the subject actually invoked, and if so, whether they initiated further discussion and “knowingly and intelligently” waived a right he’d previously invoked. The Court agreed that the second confession was properly admitted.

The Court strongly criticized the issue surrounding the first interview, describing Det. Cohn’s actions as “badgering” – “in the precise manner forbidden by Edwards, and constituting a serious violation of Tooley’s Miranda rights.” Had he confessed then, his confession would have been inadmissible. The Court, however, declined to make it a rule that “an Edwards violation by an interrogating police officer cannot be superseded and rendered harmless by the accused’s subsequent voluntary conduct.” There was no indication that the detectives intended to “employ an intentional two-step interrogation strategy.” Instead, it appeared that his decision to talk stemmed from his realization that he was going to jail that night. As such, the Court upheld the admission of the second interrogation.

INTERROGATION – RIGHT TO SILENCE

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

⁵³ 469 U.S. 91 (1984).

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.”⁵⁴

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”⁵⁵ 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.

Buster v. Com., 364 S.W.3d 157 (Ky. 2012)

FACTS: Kenny Buster was accused of sexual abuse and rape of multiple children, in Hart County, who began to come forward in 2009. His wife, Patricia, was accused of witnessing and participating in the abuse. Patricia Buster is mentally handicapped with a “significantly substandard intelligence.” When she was arrested, and given Miranda rights, she told Munfordville Chief Atwell she had nothing to say to him. Bell, a CHFS social worker, learned of the arrest and headed to the station. Bell was already investigating related allegations and had interviewed Buster at least twice. She had given Bell a list of victims, which he had in turn given to the police. When asked, she agreed that she would talk to Bell and he spoke privately to her for about thirty minutes, whereupon she agreed to give Atwell a statement. She signed a waiver of rights and handwrote a lengthy confession, naming victims and acts of sexual abuse.

Buster was charged with multiple counts of sexual abuse, complicity, rape and related charges. She moved for suppression, arguing she did not “intelligently and knowingly waive her rights and that her confession was not voluntarily made.” When that was denied, she took a conditional guilty plea and appealed.

ISSUE: May a statement be suppressed if officers violate a suspect’s right to silence?

HOLDING: Yes

DISCUSSION: Buster argued that the “police failed to respect her invocation of her right to silence” by asking her if she wanted to speak to Bell. However, the Court had previously not “read Miranda as establishing a bright-line rule that police may never return to questioning a suspect who has invoked his right to silence.”⁵⁶ The Court noted, however, that simply because Bell was not a police officer “does not mean that his actions could not violate [Buster’s] rights.” He was working as an investigator and he was turning over all the information he had to the police. He was a government actor. Although no explanation

⁵⁴ See Ragland v. Com., 191 S.W.3d 569 (Ky. 2006).

⁵⁵ Major v. Com., 177 S.W.3d 700 (Ky. 2006).

⁵⁶ Michigan v. Mosley, 423 U.S. 96 (1975).

was given as to the purpose in having Bell talk to Buster, "it is difficult to imagine what purpose they could have had other than convincing [Buster] to talk to the police."

The court was "skeptical that Bell, who was actively investigating Appellant and who admitted he wanted her to make a statement because it would help his investigation, could truly act as a neutral "supporter" as he talked with Appellant while she was in custody at a police station. More importantly, the decision that Bell was supposedly supporting her in making—whether or not she should make a statement to him or to Atwell—had already been made. Appellant had already unequivocally asserted her right to silence, and there was no need for further discussion."

The court agreed that by "By ignoring her invocation of her right almost immediately and by talking with her at length about a decision she had already made, Atwell and Bell "persist[ed] in repeated efforts to wear down [her] resistance and make [her] change her mind." As such, they did not "scrupulously honor" her right to stop questioning. Finally, only moments passed between her statements that she would not talk, and being asked if she would talk to Bell. Although Bell called it a conversation, the Court agreed that it was, in fact, an interrogation. It took place at the same police station, and likely, in the same room.

The Court vacated her conviction.

INTERROGATION – MIRANDA – CUSTODY

Butler v. Com., 367 S.W.3d 609 (Ky. App. 2012)

FACTS: On December 10, 2008, Dets. Hankinson and Szydloski (Louisville Metro PD) observed a vehicle pull in and the occupants enter an apartment they were watching, and quickly return to the car. They left. The detectives made a traffic stop based on an un signaled turn and observation that the driver was unbelted. Det. Hankinson observed Jones, the back seat passenger put something in his pocket. He had Jones get out and Jones agreed he had crack cocaine and handed over 20 individually wrapped rocks. Hankinson turned to Butler, who also admitted he had crack cocaine. He turned over 31 individually wrapped packages. Butler was cited and released, but subsequently indicted. Butler moved for suppression, alleging he was subjected to a custodial interrogation without having been warned. The motion was denied. He also objected to characterizing the area as high-crime, but the Court stated it would rule on that issue at trial. At trial, Det. Szydlowski "began to testify that the area" ... "was known to be a high narcotics area." Butler objected and the jury was admonished.

Butler was convicted and appealed.

ISSUE: Is it permissible to question a passenger during the course of a traffic stop?

HOLDING: Yes

DISCUSSION: Butler argued that the stop evolved into a custodial interrogation and in fact, Det. Hankinson agreed that Butler was not free to leave the scene. However, it was permissible for the detective to order the occupants from the car and Butler let himself out upon request. At the time, Det. Szydlowski "was still speaking to the driver." Det. Hankinson had also observed Jones hiding something

and was concerned about it. Even after the drugs were found, Butler was not arrested, but only cited. The Court found the detention was not sufficiently custodial as to trigger Miranda. Butler's conviction was affirmed.

SUSPECT IDENTIFICATION

Malone v. Com., 364 S.W.3d 121 (Ky. 2012)

FACTS: Stewart was killed in Louisville, on November 22, 2008. He died at Murphy's home, in a makeshift recording studio. On the night in question, Malone was working in the studio. Stewart apparently criticized Malone's music and Malone left, returning moments later. Within seconds, "Malone pulled out a gun and shot Stewart several times." Malone fled and Stewart died from his injuries. Initially Murphy and Hudson (another witness) were interviewed. Hudson told the detectives he did not know the shooter, but gave a tentative ID from a photopak. He did, in fact, know him, but did not want to identify Malone initially. He later explaining that he wanted Malone to be "subjected to 'street justice'" rather than arrested. Murphy originally misidentified Malone as well, but corrected himself and picked out a photo of Malone, claiming he did not want to be involved.

Malone was charged and stood trial. Malone's defense consisted of trying to discredit Hudson and Murphy. Malone introduced testimony of another individual, McDonald, who had been in the house, but the testimony given at trial was considerably differently than what he told the detectives initially. McDonald later claimed he had "fabricated much of it because Murphy had asked him to do so." Malone was convicted and appealed.

ISSUE: May pretrial descriptions affect the credibility of a photopak?

HOLDING: Yes (but see discussion)

DISCUSSION: Malone argued that the identification evidence was improperly admitted. He claimed that the "pretrial descriptions of him were so inconsistent and their photo pack identification of him so uncertain," that they were fatally flawed. The Court agreed that the descriptions varied somewhat. However, the Court noted that there was no challenge to the actual photopak identifications, which were "in no way suggestive of Malone." And of course, Murphy and McDonald both actually knew Malone and therefore were unlikely to have mistakenly identified him.

Malone's conviction was affirmed.

TRIAL PROCEDURE / EVIDENCE – VIDEO

Trainer v. Com., 2012 WL 1899778 (Ky. 2012)

FACTS: Trainer was involved in a house fire caused by Trainer cooking methamphetamine. Laster, who was seriously burned in the fire, claimed that she, along with Trainer and Graham, were cooking methamphetamine at the time, but Trainer denied this, claiming he wasn't home at the time. At trial, they testified to conflicting accounts, and Laster was challenged as to her reason for testifying. Officer Lindsey (unidentified Muhlenberg County agency) investigated. During the fire response, evidence suggesting

manufacturing was found, including jars, Drano and related items. As Trainer claimed to have been at a local video rental store at the time of the fire, the officer obtained a copy of the store's security video. Over objection, he was permitted to testify that he did not see Trainer on the recording during the relevant time frame.

Trainer was convicted and appealed.

ISSUE: May a witness narrate a video?

HOLDING: No

DISCUSSION: Trainer argued that it was improper for Lindsey to be allowed to testify as to what the video showed. (Although the tape was introduced into evidence, it was not shown to the jury until after Lindsey testified.) The officer had admitted, under questioning, that the quality of the tape was poor at that it was possible that Trainer had been in the store. Trainer argued that the tape, itself, was the best evidence and that even if shown, having already heard Lindsey's belief as to what it showed, the jury likely substituted his beliefs for their own. The Court agreed that Lindsey had no personal knowledge of what occurred on the tape and it was improper to allow Lindsey to testify to it. However, it found that the error did not unduly prejudice Trainer as Lindsey agreed on cross-examination that it was possible Trainer was at the store.

Trainer also objected to the testimony of the fire investigators regarding the possible contents (white sludge) found in mason jars at the home. The investigators were trained in such investigations and their belief that the sludge was methamphetamine residue was "based on experience and training."⁵⁷ The sludge itself was not tested. Further, Trainer argued that the testimony by two arson investigators that the home was in a high-crime area was improper, but again the Court found it not prejudicial.

Trainer's conviction was affirmed.

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.

⁵⁷ See Allegeier v. Com., 915 S.W.2d 745 (Ky. 1996); Sargent v. Com., 813 S.W.2d 801 (Ky. 1991).

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.”⁵⁸ 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.”⁵⁹ 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.

TRIAL PROCEDURE / EVIDENCE – DISCOVERY

Wilson v. Com., 2012 WL 6061789 (Ky. App. 2012)

FACTS: On August 18, 2010, Officers Shelton and Hidrogo (Louisville Metro PD) began their shift at 2300. Officer Shelton was driving a pool car so he checked the car’s interior, including pulling out the rear seat, for anything left behind. About 0100 the next morning, he and Officer Hidrogo were patrolling a local apartment complex (posted for No Trespassing) when they saw Wilson walking. They approached to talk to him and Wilson ran. The officers “took separate paths around the apartment buildings, meeting up next to a building entrance where they smelled a strong odor of marijuana coming from inside the foyer entrance doors; they located Wilson” inside behind a group of three men. Although confusion about the orders given to the men, both officers “agreed that Wilson exited the building past the officers using the group of three men as a screen.” The officers chased him, with Wilson swinging a grocery cart and tripping Officer Shelton.⁶⁰

The officers had to chase Wilson across Goldsmith Lane but the officers testified they encountered no traffic and crossed safely. Wilson was captured after he slipped “while tossing baggies of marijuana out of

⁵⁸ Cuzick v. Com., 276 S.W.3d 260 (Ky. 2009).

⁵⁹ KRE 602; KRE 701.

⁶⁰ Officer Hidrogo’s citation did not mention this incident.

his pocket.” He was handcuffed and searched, and more marijuana was found. Wilson was secured in Shelton’s cruiser initially and then transferred to Hidrogo’s car. “During the transfer, Officer Shelton noticed a small piece of sandwich baggie stuck in the rear bench seat where Wilson had been seated” – which contained a walnut sized (22g) chunk of cocaine.

Wilson was charged. His defense counsel requested discovery of the audio/video of the cruisers and a list of individuals transported in Shelton’s pool car in the 24 hours preceding the arrest. The order was issued, but the information was not provided by the time of the deadline. Wilson asked to have the case dismissed, but the court gave the Commonwealth an additional three days to comply. Finally, 19 days after the original deadline, Wilson’s counsel was faxed a response providing almost no data except a list of Officer Shelton’s arrests from Courtnet. In addition, the day before trial, the prosecutor told defense counsel that “there were no in-car audio/videos.” Defense counsel argued that the information was not responsive, as it did not indicate everyone who may have been arrested by other officers using the pool car.

During additional discussion, the Court ruled that the Commonwealth had complied with the court order. During voir dire, the Commonwealth produced a log of the pool car usage but defense counsel argued it could not “simultaneously investigate the log” and “ethically defend Wilson” at the same time. A request for a continuance was denied because of an issue with Officer Shelton’s schedule.

Wilson was convicted on Trafficking and related charges and appealed.

ISSUE: May a failure to produce discovery cause a conviction to be overturned?

HOLDING: Yes

DISCUSSION: Wilson argued that the discovery violation, including the delayed production of the pool car log, required that his conviction be overturned. The Court agreed that “an officer’s statement that he routinely checks his patrol or pool cars for maintenance, safety, and the existence of any weapons or drugs is not conclusive evidence that the officer properly checked the patrol or pool car at issue.” Since Officer Shelton and Officer Hidrogo had conflicting testimony on events, Officer Shelton’s credibility was at issue. It was “prejudicial to Wilson for his counsel not to be able to investigate the ‘pool’ car’s use log, despite her attempts to obtain a copy of it well before trial.” The Court vacated Wilson’s conviction and remanded the case.

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.

Butler v. Com. 2012 WL 1383197 (Ky. App. 2012)

FACTS: Smith worked with Ashland police, in 2009, as a CI. She made a hydrocodone buy and a cocaine buy from Butler, on separate occasions. Butler's case was presented to the grand jury, which took no evidence but indicted him anyway. Butler argued at trial that Ingram (who controlled the apartment) actually did the sales. (Ingram had already been convicted separately.) The defense told the jury that they would hear audiotapes a buy between Ingram and Smith and one with Butler's voice, so they could compare the voices. The Court, realizing they were two separate incidents, agreed it was improper and refused to permit the use of the tape comparison.

Det. Clark was also questioned about his presentation to the grand jury, and agreed that he had simply listed the charges and Butler's information, and then received an indictment.

Butler was convicted, and appealed.

ISSUE: Must a party provide a piece of evidence in discovery that the other side created?

HOLDING: Yes

DISCUSSION: With respect to the discovery issue, the Court agreed that the defense had the tape and should have made the prosecution aware of it, so they could prepare and rebut it, if necessary. The Court found it irrelevant that the tape was actually generated by the police department, but only that the defense

were unaware that they were going to use the tape. (The Court also noted that the defense could have called Ingram, but chose not to do so.)

The Court upheld the conviction.

TRIAL PROCEDURE / EVIDENCE – RULE 7.24

Buchanan v. Com., 2012 WL 1478778 (Ky. 2012)

FACTS: In 2007, Allen and her son, Braden, moved in with Buchanan, in Fleming County. A year later, Allen and Buchanan had a daughter Kaylee. On July 20, 2008, they went to a campsite with the children. Buchanan's stepmother, Bonnie, cared for Kaylee while the couple went fishing with Braden. Later that afternoon, at home, Buchanan brought Kaylee to Allen – Kaylee appeared to be unconscious. They called 911 and attempted resuscitation.

At the hospital, it was determined that Kaylee had a traumatic brain injury, likely from being shaken, and also had a leg injury that was a week old. Kaylee died a few days later and it was believed she'd suffered some form of blunt force trauma to the head. Both Allen and Buchanan were charged with Murder and Criminal Abuse, and tried jointly. Buchanan was convicted of manslaughter and appealed.

ISSUE: Must oral statements that are incriminating be provided to the defense?

HOLDING: Yes

DISCUSSION: Buchanan argued that it was error to introduce a statement made by Allen. The trial court "had entered a discovery order pursuant to RCr 7.24 requiring disclosure" of "any oral incriminating statement known by the Attorney for the Commonwealth to have been made by the Defendant to any witness." A statement made by Allen to another individual was introduced, although Allen denied having made the statement. The other witness was called to rebut Allen's denial of the statement. The Court agreed that it was a violation of the discovery rules not to disclose an incriminating statement, even if they only intended to use it in rebuttal. However, the rule only applies to incriminating statements and it was not clear that in fact, what Allen said was incriminating. In fact, it suggested that it was possible Allen felt that Buchanan was withholding information that might incriminate her, not the reverse.

Buchanan's conviction for Manslaughter was affirmed but his conviction for Criminal Abuse was reversed for an unreviewed reason.

TRIAL PROCEDURE / EVIDENCE – CONFRONTATION CLAUSE

McKee v. Com., 2012 WL 1478779 (Ky. 2012)

FACTS: On December 17, 2004, McKee was driving through Breathitt County, highly intoxicated. He collided with Wenrick's vehicle and Michelle Wenrick, the front seat passenger, died. Sgt. Noble (Jackson PD) gave McKee a FST, which he failed. He was arrested and a blood test was performed; it registered .018.

McKee was charged with DUI, Wanton Murder and Assault 4th. He was convicted, but later argued ineffective assistance of counsel. He was successful in this motion and was subsequently retried, and again convicted. He appealed.

ISSUE: Are all testimonial statements necessarily excluded under Crawford?

HOLDING: No (but see discussion)

DISCUSSION: McKee argued that Sgt. Noble repeated what another witness had said about the condition of McKee's headlights just prior to the crash. He argued that the statement was testimonial and should have been excluded under Crawford v. Washington.⁶¹ The court, however, ruled that it was simply cumulative to other testimony presented, by witnesses that the headlights were off. The officer properly attributed it to a particular witness. The Court upheld McKee's convictions.

TRIAL PROCEDURE / EVIDENCE – HEARSAY

Hammond v. Com., 366 S.W.3d 425 (Ky. 2012)

FACTS: In June, 2006, Sawyers, Cherry and Williams were all murdered in Louisville. Sawyers, specifically was murdered at Sheckles' home and she witnessed the killing. Investigators linked Hammond with Cherry, who was apparently then murdered to keep him from testifying about the Sawyers' murder. The charges were dismissed in the Sawyers/Cherry murders, however, because Sheckles could not be found to testify. The Williams case was dismissed when another key witness refused to testify.

Hammonds was subsequently re-indicted on the murders and the three cases were consolidated. Hammond was convicted on all three murders and appealed.

ISSUE: May testimony from a deceased witness be used at trial?

HOLDING: Yes (but see discussion)

DISCUSSION: The Court addressed Hammond's objection to the introduction of Sheckles' recorded statements to the police. Sheckles was murdered (allegedly at Hammonds' behest) prior to his second trial. Under normal circumstances, her statement would be not admitted under the hearsay rules and Hammonds's Sixth Amendment right to confront witnesses.⁶² The prosecution argued that the statements should be admitted under the "forfeiture by wrongdoing" exception to the hearsay rule.⁶³ However, no formal hearing was held on that issue nor did any witnesses testify to the link between Sheckles' murder and Hammonds, instead only a "stack of documents" relating to the investigation of her death was proffered to the Court. The Court looked to Parker v. Com.⁶⁴ and agreed that a hearing is necessary, noting that evidence is necessary to prove the connection. It was incumbent to show that the documents "were, in

⁶¹ 541 U.S. 36 (2004).

⁶² Crawford v. Washington, *supra*.

⁶³ KRE 804(b)(5). the hearsay rule does not apply to "[a] statement offered against a party that has engaged or acquiesced in wrongdoing that was intended to, and did, procure the unavailability of the declarant as a witness." See also Davis v. Washington, 547 U.S. 813 (2006).

⁶⁴ 291 S.W.3d 647 (Ky. 2009).

fact, what they were purported to be and that the information upon which it relied to make its case was credible." It was not enough to presume the documents were reliable simply because they were accumulated by the police in investigating a homicide. The Court noted that if the contention that Hammonds was involved with the murder is "well-documented" is true, it should be a simple matter for the prosecution "to identify by chapter and verse the parts of documents that establish those facts."

The Court also agreed that the two sets of crimes should not have been consolidated and that doing so was prejudicial to Hammond. There was "no serious contention" that the Williams case was connected to the Sawyers/Cherry murder. Although "temporal and geographic proximity" may be relevant in proving a connection between crimes, it was not sufficient in this situation. Further, the Court agreed that doing so was extremely prejudicial to the trial and warranted reversal of his convictions.

The Court reversed Hammonds' convictions.

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."⁶⁵ The Court, however, ruled that in this case, the error was harmless in the face of his otherwise overwhelming guilt.

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

⁶⁵ Chestnut v. Com., 250 S.W.3d 288 (Ky. 2008).

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.⁶⁶ 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.”⁶⁷ 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.⁶⁸ However, Frazier did testify and was cross-examined, so any statements she made to the SANE did not violate Crawford v. Washington.⁶⁹

⁶⁶ KRE 803(6).

⁶⁷ KRE 803(4).

⁶⁸ Hartsfield v. Com., 277 S.W.3d 239 (Ky. 2009).

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,⁷⁰ 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.”

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”⁷¹ 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”⁷² 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.’”⁷³

The Court affirmed James’s conviction.

⁶⁹ 541 U.S. 36 (2004).

⁷⁰ Brady v. Maryland, 373 U.S. 83 (1963).

⁷¹ KRE 106.

⁷² KRE 801A(a)(2).

⁷³ Engbreetsen v. Fairchild Aircraft Corp., 21 F.3d 721 (6th Cir. 1994).

TRIAL PROCEDURE/ EVIDENCE – DRUG EVIDENCE

Simms v. Com., 2012 WL 4464437 (Ky. App. 2012)

FACTS: On March 11, 2008, Simms was headed home from his girlfriend's home in Louisville. He was spotted by Officer Szpila (Louisville Metro PD), who later testified that Simms's vehicle crossed the yellow line. He also stated that he saw sparks from under Simms's vehicle and that debris from that vehicle hit the cruiser. He pulled Simms over and smelled burned rubber as he approached. He saw that the passenger side of Simms's vehicle was damaged and the tires on that side were flat. Simms provided his documents and the paperwork indicated that the vehicle belonged to Ruff (his girlfriend). Officer Szpila saw open alcoholic beverages and smelled fresh marijuana. He had Simms get out and moved him to the front of the cruiser. Lt. Fox observed Simms while Officer Szila searched the car, finding a gallon-size baggie of marijuana (less than a pound) and a smaller, separate amount. Simms was arrested.

Officer Szpila and Sgt. Minnear went to Ruff's home, with Simms in tow in another vehicle. Ruff answered their ring and allowed the officers to enter. Both officers later testified that they could smell burned marijuana and found another individual, Murphy. An ashtray on the table had roaches. When she learned her car had been stopped, with a large amount of marijuana inside, she agreed to allow them to search the apartment. She showed them two large tubs of marijuana, packaged bags of marijuana and a small amount of cocaine. They also found scales and a gun. She stated Simms slept in her bedroom, that the marijuana had not been there before that day and that Simms had apparently left it there.

Ruff, Murphy and Simms were arrested for marijuana trafficking and related charges, along with the traffic related offenses for which Simms was charged. Ruff took a guilty plea to a lesser charges and agreed to testify. Murphy's charges were completely dismissed. Simms moved prior to trial that a chain of custody had to be established and that the marijuana in the car had to be separated from that found in the house. Both motions were denied.

Simms was convicted only of trafficking in the marijuana found in the house, as well as possession of the firearm (as he was a convicted felon). He appealed.

ISSUE: Is it possible for there to be a discrepancy in the weight of marijuana through the passage of time?

HOLDING: Yes

DISCUSSION: Simms argued that since there was substantial discrepancy between the recorded weight of the drugs when logged into the evidence room, and between that done by the lab, there was a question as to whether it was, in fact, the same evidence. He continued to argue it was improper to co-mingle the marijuana at the house and that which was in the car. The lab technician, however, testified that it was common to see the weight decrease, due to the marijuana drying prior to being weighed. The Court agreed that the issue did not go to the admissibility, but only the credibility.

The court agreed that it was not improper to have not segregated the two amounts of marijuana, particularly since the larger amount was, by itself, over 5 pounds. As such, the error, if any, was harmless.

Simms argued that the knock and talk was improper, as the officers “claimed to be cold” in order to get inside. The Court, however, agreed that Ruff’s consent was knowing, voluntary and given intelligently.

Simms’s conviction was affirmed.

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.⁷⁴ 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.”

⁷⁴ 2006 WL 1947765 (Ky. App. 2006).

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.⁷⁵ "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.'"⁷⁶ 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 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.

TRIAL PROCEDURE / EVIDENCE – CHAIN OF CUSTODY

Damrell v. Com., 2012 WL 4327800 (Ky. 2012)

FACTS: Damrell was spotted riding an ATV on a public roadway by Trooper Pennington, who further testified that several items fell from a bag. Items in the bag, including a "one-step meth lab," were located. Trooper Pennington sent a sample of the contents of the container to KSP. Damrell was indicted

⁷⁵ Daubert v. Merrell Dow Pharmaceuticals, Inc., 509 U.S. 579 (1993).

⁷⁶ Goodyear Tire and Rubber Co. v. Thompson, 11 S.W.3d 575 (Ky. 2000).

in Rockcastle County for Manufacturing Methamphetamine, Possession of Methamphetamine, Operating an ATV unlawfully and Fleeing and Evading 2nd. At trial, there was a question as to the lack of a signature on the KSP 41 chain of custody form, but at trial, the technician noted that the KSP 26 (testing) form was completed and signed. However, because that latter form was not provided prior to trial, it was suppressed under RCr 7.24. In addition, prior to trial, the physical evidence of the manufacturing was destroyed prior to trial.

Damrell was convicted and appealed.

ISSUE: Must a chain of custody be perfect?

HOLDING: No

DISCUSSION: Damrell argued that the evidence should have been suppressed due to the lack of adequate proof of chain of custody. The Court, however, noted that "it is unnecessary to establish a perfect chain of custody or to eliminate all possibility of tampering or misidentification, so long as there is persuasive evidence that 'the reasonable probability is that the evidence has not been altered in an material respect.'"⁷⁷ In addition, with respect to the destruction of the evidence, the Court agreed that "absent a showing of bad faith, the Due Process Clause is not implicated by 'the failure of the State to preserve evidentiary material of which no more can be said than that it could have been subjected to tests, the results of which might have exonerated the defendant.'"⁷⁸ Nothing suggested bad faith and there was nothing to indicate that the destroyed material was exculpatory.

The Court affirmed Damrell's conviction.

Brown v. Com., 2012 WL 5630437 (Ky. App. 2012)

FACTS: On April 16, 2010, Dets. Dubree and Murphy, and Trooper Maxwell (KSP) went with Barkley, a social worker, to Brown's home in Monroe County. During a "knock and talk," Brown consented to a search. Det. Dubree found a piece of foil with methamphetamine. However, Brown was not actually arrested until January 6, 2011. When he went to trial, in June, Det. Dubree was on military deployment.

At trial, Barkley testified about what had occurred when the foil was located. Trooper Maxwell did as well, and also testified that Brown admitted it belonged to him. Sgt. Heller, the evidence officer, testified that Det. Dubree entered the foil into the evidence locker. A KSP chemist testified that the sample was methamphetamine.

Brown moved for a directed verdict and was denied. He was convicted and appealed.

ISSUE: Must a chain of custody be perfect?

HOLDING: No

⁷⁷ Rabovsky v. Com., 973 S.W.2d 6 (Ky. 1998).

⁷⁸ Estep v. Com., 64 S.W.3d 805 (Ky. 2002).

DISCUSSION: On appeal, Brown argued that there was insufficient proof that the foil was the same foil collected by Dubree at the scene. The Court noted that he provided no proof that the disputed evidence was subject to tampering of any kind, nor that the foil recovered “was altered or replaced with some other material.” The Court concluded that the testimony “adequately proved the authenticity of the foil.”

Brown’s conviction was affirmed.

TRIAL PROCEDURE / EVIDENCE – SENTENCING

Williams v. Butler, 2012 WL 5038331 (Ky. App. 2012)

FACTS: On July 7, 2007, Williams was found walking naked in the I-75 median in Kenton County. He was struck, tased and pepper-sprayed by officers Sandel, Fultz, Gilvin and Smith; he was finally arrested. He was convicted of Disorderly Conduct and eventually also pled guilty to Resisting Arrest and Wanton Endangerment.

Williams then filed a civil complaint against all the officers and the chief (Butler) for malicious prosecution, which was denied, on the basis of his guilty plea and convictions. Williams appealed.

ISSUE: Is a dismissal pursuant to a larger plea agreement a favorable termination to the accused?

HOLDING: No

DISCUSSION: The Court looked to the elements of malicious prosecution. To succeed, the plaintiff must show:

- 1) The institution or continuation of original judicial proceedings, either civil or criminal, or of administrative or disciplinary proceedings,
- 2) By, or at the instance, of the plaintiff,
- 3) The termination of such proceedings in defendant’s favor,
- 4) Malice in the institution of such proceeding,
- 5) Want or lack of probable cause for the proceeding, and
- 6) The suffering of damage as a result of the proceeding.

In this case, the 3rd element was at issue. The Court noted that a plea is not a “termination favorable to the accused” in a malicious prosecution case. In this case, although the Court agreed to dismiss the Fleeing and Evading charge, the Court noted it was done as part of a larger plea agreement to which Williams accepted responsibility for other offenses.

The dismissal of the lawsuit was affirmed.

CIVIL LITIGATION

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.

Gaither (Estate) v. Justice and Public Safety Cabinet, 2012 WL 1556313 (Ky. App. 2012)

FACTS: In 1995, Gaither, age 17, was in trouble for assault. He was approached about becoming a CI for drug trafficking and agreed. After he turned 18, he began to serve as a CI for the police and earned more than \$3,000 over ten months. He was brought in to testify, under escort, before the grand jury, in two cases in Marion and Taylor counties. A member of the Taylor County grand jury contacted Noel, the drug trafficker, and revealed that Gaither was the witness. The next day, on July 17, 1996, he was to meet Noel to buy more drugs, but he was ordered by his handlers not to get into the car with Noel. However, despite that, he did so. KSP troopers followed the vehicle, continuing to monitor the transaction, but lost track of him. Ultimately, it was learned that Gaither had been taken to Casey County, tortured and murdered. Both Noel and the grand juror who revealed Gaither's identity were convicted for their actions.

Gaither's mother, representing his estate, filed with the Kentucky Board of Claims, arguing that the troopers were negligent. The case was initially dismissed and then reinstated. In 2009, the Board ruled that the troopers' actions were ministerial, rather than discretionary, and that they were negligent in their supervision of Gaither and for allowing him to testify with insufficient protection. She was given an award, but less than she requested, and both side appealed.

The Franklin Circuit Court reversed the Board, finding the troopers' actions to be discretionary and thus not subject to a negligence lawsuit. Again, both sides appealed.

ISSUE: Is monitoring a CI a discretionary act?

HOLDING: Yes

DISCUSSION: The Court began by noting that “determining what is ministerial and what is discretionary and where the line between the two lies is not a straightforward task.” The Court reviewed cases involving both types of acts. The Court stated that discretionary acts require the exercise of reason and discretion in a course of action. Ministerial acts involve “investigative responsibilities as set out in regulations, which were particular in their directive.”⁷⁹

The Court concluded that “an act is purely ministerial if statutes and/or regulations impose a clearly defined duty to perform an act, and the performance of the act requires little, if any, judgment, interpretation, or policy-making decisions.” But “when an actor must choose between or among various courses of action, and that choice involves the exercise of judgment and/or overriding policy issues, the act is discretionary.” The Court acknowledged that there are also “mixed cases” involving both, however.

Gaither pointed to a KSP General order to illustrate three specific duties that were violated by the troopers. However, the Court noted that while the officers had a duty to monitor the CI, the “execution of the undercover operation was left to the judgment and discretion of the detectives.” As such, their actions were discretionary and not ministerial and they are immune from suit.

The Court affirmed the decision of the Circuit Court.

Kareken and Kehrt (Mercer County Sheriff), 2012 WL 1649105 (Ky. App. 2012)

FACTS: On August 7, 2008, Kareken was involved in a single car accident in Mercer County. She was handcuffed and Tased at the scene, She later alleged that she had suffered a seizure and could not respond to the deputies, and that the deputies were aware of that. Kareken was diagnosed with epilepsy following the wreck. However, Deputy Moberly testified that he came across the wreck and found Kareken “acting very strange” ... “as if she was under the influence of drugs.” She “kept screaming and cursing at him” and tried to get away. They struggled and she was placed in a cruiser, and eventually taken to the ER. She struck a citizen at the scene, as well. The possibility of a seizure was mentioned in the use of force report, because it was the only possible medical issue he could think of. Sheriff Kehrt testified later that he felt the use of force was justified, following an investigation.

Kareken sued, but the case was dismissed against all deputies and the Sheriff. Kareken appealed.

ISSUE: Is the development of a policy discretionary?

HOLDING: Yes

DISCUSSION: All of the Mercer County defendants argued that they are entitled to qualified immunity. The court noted it was undisputed that she was combative, even after being placed in handcuffs. The Court looked to Everson v. Leis⁸⁰ and agreed that that Kareken was actively resisting being restrained and as such, the use of force was reasonable. The use of the Taser was also reasonable and within policy. With respect to the Taser policy, the Court noted there was no legal mandate to even have a policy on

⁷⁹ Stratton v. Com., 182 S.W.3d 516 (Ky. 2006).

⁸⁰ 556 F.3d 484 (6th Cir. 2009):

Tasers, and as such, creating the policy itself was discretionary.⁸¹ There was no evidence the policy was created in bad faith and as such, the Sheriff was also entitled to qualified immunity.

The Court upheld the decision to dismiss all defendants.

WORKERS' COMPENSATION

Myers v. Best Buy, 2012 WL 1254773 (Ky. App. 2012)

FACTS: On August 13, 2008, Myers suffered a back injury at work at Best Buy. At the time, she was also employed as a newspaper delivery person. She later stated she believed that Best Buy was aware of her concurrent employment. Myers continued newspaper delivery for two weeks following her back injury and was restricted to light duty at Best Buy. She was eventually completely taken off work completely and went through a multitude of medical exams and treatments. In 2010, she was awarded a 7% permanent rating of disability. She appealed, however, when they did not take her loss of concurrent wages into consideration in determining the award.

ISSUE: If an employee has a secondary job known to an employer, and the employee is injured in the primary job, must the employer also cover wages on the secondary job?

HOLDING: Yes

DISCUSSION: The Court noted that under KRS 342.140(5), "if an injured employer has knowledge of the [secondary] employment prior to the injury,' the wages from all employment are to be 'considered as if earned from the employer liable for compensation.'" The Court noted, however, that the ALJ⁸² ruled that nothing Myers submitted indicated that she continued her newspaper delivery job while still working at Best Buy and that was fatal to her case. The Court reversed part of the case, for other reasons, but declined to overturn the ALJ on the issue of concurrent employment.

NOTE: Although this case obviously does not directly involve law enforcement, many officers have secondary employment. It is important that all employers are aware of other concurrent employment, in case the employee is injured while working at one of the jobs. This does not cover, however, if the officer is working as an independent contractor, rather than an actual employee.

WHISTLEBLOWER ACT

Wilson v. City of Central City, 372 S.W.3d 863 (Ky. 2012)

FACTS: Wilson was an employee of the Central City Water Works Department. During his time there, he became concerned with certain safety issue and reported them to the appropriate regulatory agencies. As a result, the agency was the target of multiple written reprimands in the late 1990s from the Kentucky Division of Water. Wilson continued to make reports to OSHA and the Division of Water. Brown, Wilson's supervisor, refused to talk to the Division of Water about the problems.

⁸¹ Williams v. Ky. Dept. of Educ., 113 S.W.3d 145 (Ky. 2003)

⁸² Administrative Law Judge

In 2003, Wilson allegedly used his work computer for personal reasons. This was confirmed and Wilson was fired. The termination was affirmed by the city council and he filed suit, arguing that he was terminated for contacting authorities about the problems. The trial court ruled in favor of Central City, holding that Wilson was an at-will employee and that any reports he made were not made pursuant to the Whistleblower Act⁸³ or were “too temporally attenuated to be a ‘contributing factor’ in his termination.” He further appealed and the Kentucky Court of Appeals affirmed, holding, instead, that Central City, as a municipality, was not a “political subdivision” and was not covered by the Act at all.

Wilson appealed.

ISSUE: Is a City subject to the Whistleblower Act?

HOLDING: No

DISCUSSION: The Court noted that previous opinions had “muddied the waters” with respect to the distinction between a city, a municipality and a municipal corporation. The Court noted that the differences were becoming increasingly important because many services are provided by “non-city municipal corporations” – such as fire taxing districts. The Court agreed, however, that the legislative history of the Act indicated that the General Assembly intended to exclude cities from its protections. Counties function as administrative subdivisions of the state, but cities “manage purely local governmental functions.”

The Court agreed Central City was not covered by the Act, and upheld the decision in favor of the city.

OPEN RECORDS

Kentucky New Era, Inc v. City of Hopkinsville, 2012 WL 1365863 (Ky. App. 2012)

FACTS: Hunter, a New Era (Hopkinsville) reporter, submitted an open records request to inspect copies of citations at the Hopkinsville PD, for the period from January 1 through August 31, 2009, and which resulted in specific charges. Hopkinsville declined to provide records for “open cases, records involving juveniles, and redacted certain identifying information of victims, subjects and witnesses” from those reports it produced.”

New Era appealed the issue to the Attorney General, which rendered a decision that Hopkinsville had not met its burden to lawfully refuse production under KRS 61.878. Hopkinsville appealed that decision and the trial court ruled in favor of New Era. The trial court ruled that HPD had not met its burden with respect to juveniles who were not defendants or the identifying information that was redacted from reports produced. In a reconsideration, however, it agreed that it could redact Social Security numbers, driver's license numbers, home addresses and telephone numbers, under KRS 61.878(1)(a), as the privacy interest of the individual in those outweighed the public interest.

Both parties appealed.

ISSUE: May agencies redact information from reports in an Open Records request?

⁸³ KRS 61.101.

HOLDING: Yes

DISCUSSION: First, New Era argued that permitting the redaction of the information was improper, conceding, however, that redaction of Social Security numbers was appropriate. The Court, however, disagreed, looking to Zink v. Commonwealth, Dep't of Workers' Claims, Labor Cabinet.⁸⁴ The Court noted that the information redacted passed the first prong of the test laid out in Zink, that which required that the information was such that in which an individual expects at least some degree of privacy. The second prong, an evaluation as to whether the public interest outweighs that private interest was also easily hurdled. The Court agreed that although providing specifics would make the newspaper's job easier, that it did not reveal anything about the police department's "execution of its statutory functions." With respect to the appeal by the Hopkinsville Police Department, the Court reversed the trial court's decision and agreed that it was proper to redact the names of juveniles, holding that the "potential adverse impact on juvenile victims or witness outweighs" any public interest in that information.

The Court further ruled that it was not improper for Hopkinsville to return a "blanket redaction" and that it did not "necessarily violate the Open Records Act," by doing so. It was required, however, that if HPD was challenged about such redaction, it must meet the burden to justify the redaction.

Taylor v. Barlow, 2012 WL 4038434 (Ky. App. 2012)

FACTS: In January, 2011, Dunagan gave Taylor a limited power of attorney to seek information concerning his arrest and treatment while in the custody of the Monroe County Sheriff's Office. Taylor made an Open Records Request of the office, listing himself as a lawful representative of Dunagan. The Sheriff did not respond and Taylor filed an appeal with the Attorney General. The Sheriff still did not respond and the Attorney General ruled in Taylor's favor, requiring the Sheriff to remit any existing records responsive to the request unless they met exceptions under the law.

The Sheriff disclosed some records, but not everything Taylor requested. Believing the Sheriff was not in compliance, Taylor filed suit in Monroe County Circuit Court. In August, the Court held a *sua sponte*⁸⁵ hearing to address Taylor's standing to be involved in the first place. Taylor argued that he wasn't practicing law, but "as the person requesting the information, he was the proper party in interest" in the lawsuit. The Monroe Circuit Court denied the case and noted it believed that Taylor was engaged in the unlawful practice of law.

Taylor appealed.

ISSUE: Must a person have a direct connection to records to request them under Open Records?

HOLDING: No

DISCUSSION: The Court reviewed the Open Records statutes and found that the trial court's reasoning was "fundamentally flawed." The statute specifically permits any person to review any public record, and

⁸⁴ 902 S.W.2d 825 (Ky. App. 1994).

⁸⁵ On the Court's own volition.

does not vest standing only in the person to whom the records directly relate. It is immaterial that the records pertained to Dunagan and not Taylor.

Further the Court ruled that Taylor was not unlawfully engaged in the practice of law by his actions, either. He was acting in his own behalf, which was a clear exception to the statute requiring one to be licensed to practice law.

The Court reversed the decision of the Monroe Circuit Court and remanded the case for further proceedings.

JURISDICTION

Johnson v. Com., 2012 WL 2051961 (Ky. App. 2012)

FACTS: Johnson was arrested for drug trafficking by officers working under Operation Unite, "acting under the authority of the Attorney General's Office," in Powell County.⁸⁶ Johnson argued that the UNITE officers did not have jurisdiction in Powell County at the time of his arrest, and that they were not properly authorized to work under the Attorney General's Office either. The Court concluded that KRS 218A.240(1) vested the Attorney General with the "authority to investigate and make arrests on offenses involving controlled substances."

Johnson took a conditional guilty plea and appealed.

ISSUE: Does the Attorney General's Office have the authority to initiate drug cases?

HOLDING: No

DISCUSSION: The Court looked to another decision, Floyd Grover Johnson v. Com., in which the Court discussed an issue that was indistinguishable. The Court agreed that the Attorney General was granted the limited authority under KRS 15.200 to "investigate and prosecute cases in limited circumstances." Under that statute, the Court found it "clear that a request must be made of the Attorney General's Office in writing for it to intervene, participate or direct any investigation or criminal action."⁸⁷ As such, the court agreed that "the Attorney General, and correspondingly, the UNITE officers, were without authority" to prosecute Johnson. The Court noted that it was "somewhat perplexed by the Attorney General's position" as previously, the Attorney General had ruled that it had only limited investigative authority, but instead, was only allowed to give advice in most criminal prosecutions.

Johnson's plea was reversed and the case remanded.

⁸⁶ At the time of Johnson's arrest, UNITE itself did not extend into Powell County.

⁸⁷ That request must come from the governor, courts, grand juries, sheriff, mayor or the majority of a city legislative body.

EMPLOYMENT – KRS 15.520

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 appeals not to apply 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.

MISCELLANEOUS

Mitchell v. University of Kentucky, 366 S.W.3d 895 (Ky. App. 2012)

FACTS: Mitchell, an anesthesia technician at UK Chandler Medical Center and a graduate student, as well, had a valid CCDW license. On April 22, 2009, Mitchell's coworkers were under the impression that he had a firearm in his employee locker and reported it to hospital administration. Police and hospital administrators searched Mitchell's locker with his permission, finding no firearm. Mitchell informed officers that he had a CCDW license and admitted that he kept a firearm in his vehicle, which was parked on UK property. UK suspended and then terminated Mitchell's employment for violation of its policy prohibiting possession of a deadly weapon on University property or while conducting University business.

Mitchell filed suit alleging termination in violation of public policy, specifically, his right to bear arms as set forth in the United States Constitution, the Kentucky Constitution, and the Kentucky Revised Statutes. The circuit court granted summary judgment in favor of UK. Mitchell appealed.

ISSUE: Is a university employee, who has a license to carry a concealed weapon, authorized to keep a weapon in his car despite any restrictions the university placed on the possession of deadly weapons on university property?

HOLDING: Yes

DISCUSSION: KRS 237.106(1) provides that “no person...shall prohibit any person who is legally entitled to possess a firearm from possessing a firearm, part of a firearm, ammunition, or ammunition component in a vehicle on the property.” While KRS 237.115(1) gives a university the right to “control” all deadly weapons on *all property* it owns or controls, it is limited by KRS 527.020. KRS 527.020(4) and (8) specifically permitted Mitchell to store a firearm in his vehicle, even while on University property.

The judgment of the Fayette Circuit Court is reversed and remanded.

SIXTH CIRCUIT

WIRETAP ORDERS

U.S. v. Sims, 2012 WL 6200261 (6th Cir. Mich. 2012)

FACTS: In May, 2004, a federal judge authorized the Detroit DEA to wiretap Flenory, “believed to be the head of the Black Mafia family.” The agents intercepted multiple calls that led them to stop a vehicle on the way to Louisville that contained 10 kilos of cocaine and a cell phone that indicated a recent call to Toree. That same number had earlier been associated with Sims, whose calls with Flenory had previously been intercepted. The Detroit DEA notified the Louisville DEA and as a result, the Louisville DEA applied for a wiretap order for Sims’ phone. On June 28, 2004, the agents detailed the investigation and obtained the order for a period of time; eventually they searched Johnson’s home – she was Sims’ girlfriend – which led to the discovery scales and drug ledgers. Sims was indicted on drug trafficking. He moved for suppression and was denied. He was convicted and appealed.

ISSUE: Does a wiretap order request require a showing that other investigative methods have been tried or would likely be unsuccessful?

HOLDING: Yes

DISCUSSION: The Court noted that a wiretap order under 18 U.S.C. §2518(1)(c) requires that an application detailing “a full and complete statement as to whether or not other investigative procedures have been tried and failed or why they reasonably appear to be unlikely to succeed if tried or to be dangerous.” In U.S. v. Landmesser, the Court gave as a reason for what it termed the “necessity requirement) to “assure that wiretapping is not resorted to in situations where traditional investigative techniques would suffice to expose the crime” and to keep it from being “routinely used as the initial step in a criminal investigation.”⁸⁸ The Court noted that “all that is required is that the investigators give serious consideration to the non-wiretap techniques prior to applying for wiretap authority and that the court be informed of the reasons for the investigators’ believe that such non-wiretap techniques have been or will likely be inadequate.”⁸⁹

Sims argued that the warrant affidavit was insufficient as the wiretap was being used as an initial technique, that the affidavit did not “allege specific factual circumstances” that normal investigative techniques would be ineffective, and that a similar affidavit involving a co-conspirator had been ruled insufficient. The Court, however, noted that the affidavit did detail the previous investigation, prior to the involvement of the Louisville DEA office. (Specifically, they searched telephone records, ran a pen register and trap/trace and had done a trash pull.) The Court noted that the DEA did use boilerplate language and other information “copied nearly verbatim from other affidavits used in different cases,” but that did not necessary render it insufficient so long as it also included “information about particular facts of the case at hand which would indicate that wiretaps are not being routinely employed as the initial step in criminal investigation.” The affidavit thoroughly discussed the “reasons the affiant did not believe that specific unattempted investigative techniques – such as undercover agents, search warrants, tracking devices, grand jury subpoenas, and

⁸⁸ 553 F.2d 17 (6th Cir. 1977).

⁸⁹ U.S. v. Alfano, 838 F.2d 158 (6th Cir. 1988).

interviews of subjects – would be successful in this particular case.” Finally, the Court noted that the other affidavit did not meet the requirement because it did not apply the boilerplate language to the facts of the case in which it was involved. In Sims’ case, the Court concluded it did so and held the affidavit sufficient.

Sims also argued that he was entitled to a Franks⁹⁰ hearing as a result of inconsistencies in the affidavit, but after detailing all the purported issues, the Court disagreed, finding that none of the questioned paragraphs in the affidavit contained evidence of contradictions nor were they misleading. The Court agreed that there was sufficient probable cause connected to Sims, even though the phone was registered to someone other than Sims, as “it is common for drug conspirators to register their phones under different names.” The Court agreed that the evidence indicated that Sims was using the phone and that was enough.

The Court affirmed Sims’ conviction

U.S. v. Wolcott, 2012 WL 2086944 (6th Cir. 2012)

FACTS: In early 2008, the DEA, KSP and the Tennessee Bureau of Investigation (TBI) began an investigation of drug-trafficking, money-laundering, illegal-gambling and cockfighting in Kentucky and Tennessee. Three individuals, Wolcott, Copas and Glass were the focus. They worked to infiltrate the organization with CIs. The CIs viewed cockfights at the invitation of one of their associates, Ferguson, and bought marijuana. The investigators received pen register data from Ferguson’s cell phone, which showed hundreds of calls to and from the trio. Two controlled buys were made, as well.

The DEA received a wiretap warrant for the phone, which described, as required, an explanation as to “why non-wiretap techniques were unlikely to succeed and thus why wiretap authority was necessary.”⁹¹ The tap was authorized for 30 days, and subsequently, additional taps were authorized for both Joseph and Kevin Wolcott. They searched Joseph’s Wolcott’s home in Tennessee and evidence was found. Prior to trial, however Joseph Wolcott requested suppression, arguing insufficient proof that electronic surveillance was necessary. He was convicted and appealed.

ISSUE: Must a wiretap warrant explain why other methods were not feasible?

HOLDING: Yes

DISCUSSION: Under federal law, a wiretap request must include “a full and complete statement as to whether or not other investigative procedures have been tried and failed or why they reasonably appear to be unlikely to succeed if tried or to be too dangerous.” It should only be the last resort when other more conventional investigative means are exhausted. However, it does not need to prove that other methods are impossible. In this case, although they were getting good information through the CI, it was with a “relatively low-level participant in the operation, Ferguson.” The CI was limited to the role of buyer. The affidavit described other methods they had used, or considered using, to gain information. The Court noted that physical surveillance was difficult, if not impossible, because some of the residences could not be discovered, and others were in rural areas where it would be difficult to conduct surveillance without risking notice.

⁹⁰ Franks v. Delaware, 438 U.S. 154 (1978).

⁹¹ 18 U.S.C. § 2518.

The court agreed that the wiretap authority was appropriate in this case.

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.

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 possession. 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. Hampton, 2012 WL 5382946 (6th Cir. Ky 2012)

FACTS: In March, 2009, German law enforcement detected an individual in the U.S. who was sharing images of child pornography. The information was referred to ICE, who traced the IP address to Hampton, in Louisville. On January 22, 2010, Agent Oberholtzer drafted a search warrant for Hampton's home and computer. Many items, including two computers and a hard drive, were seized.

Hampton was charged under 18 U.S.C. §2252 with receiving and possessing child pornography. He moved for suppression, which was denied. He took a conditional guilty plea and appealed.

ISSUE: Is evidence that is 10 months old necessarily stale?

HOLDING: No

DISCUSSION: Hampton argued that the warrant contained stale information, unsupported allegations and "general boilerplate recitations that were not specific to Hampton." Taking each in turn, the Court agreed

that the affidavit contained information that was 10 months old. But whether information is stale “depends, in part, on ‘the inherent nature of the crime.’”⁹² Child pornography is not a “fleeting crime” and it was reasonable to believe that the collection would be valued and kept for a long period of time, in a secure place.⁹³ In addition, “child pornography can still be discovered on a computer’s hard drive even after those images have been deleted.”⁹⁴ The affidavit detailed Osterholtzer’s investigation and the underlying circumstances that demonstrated probable cause. Further, in general, “another law enforcement officer is a reliable source and ... consequently no special showing of reliability need be made as a part of the probable cause determination.”⁹⁵ The Court found it appropriate to include information about the German investigation, which had been provided to ICE. Finally, the Court agreed that having gone to the effort of obtaining the illegal images it was reasonable to think Hampton would be “unlikely to destroy them,” and that had been proved in the past.⁹⁶

The Court upheld the warrant and Hampton’s plea.

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

⁹² U.S. v. Spikes, 158 F.3d 913 (6th Cir. 1998).

⁹³ U.S. v. Frechette, 583 F.3d 374 (6th Cir. 2009).

⁹⁴ U.S. v. Terry, 522 F.3d 645 (6th Cir. 2008).

⁹⁵ U.S. v. Lapsins, 570 F.3d 758 (6th Cir. 2009).

⁹⁶ This was referred to as the “collector profile.”

“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.”⁹⁷

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

Gordon v. Louisville / Jefferson County Metro Government, 2012 WL 3104491 (6th Cir. 2012).

FACTS: In October, 2006, allegations were made that an employee of Commonwealth Security, Inc. misrepresented themselves as a sworn officer. The company was owned by Gordon. Upon investigation, it was discovered that other CSI employees “were being held out as sworn officers” who were not so, by Gordon, who billed at a higher rate for sworn officers. LMPD got a search warrant for Gordon, his home, his office, his vehicles and his ex-wife (Smith). They stopped Smith as she was leaving the house on a traffic stop and returned her to the home, along with her two children. (Eventually the children were allowed to leave with their grandmother.)

The officers searched a safe, with a code given to them by Gordon. Gordon later alleged that officers stole about \$5,000 of \$11,000 in cash that was in that safe, which officers denied. He also claimed that the officers damaged the home during the search, by “ripping” the door from a Coke machine, opening Christmas presents and the boxes for collectible dolls (reducing their value). The police refuted those assertions with the inventory of the items seized and providing signed affidavits denying other allegations.

On January 31, 2007, the criminal case was presented to the grand jury and Gordon was indicted on multiple counts of theft by deception and one count of forgery. He was, however, acquitted on all counts. Gordon and Smith filed suit under 42 U.S.C. §1983 related to the detention and the search, and later added malicious prosecution. The U.S. District Court ruled in favor of the defendant officers and Gordon and Smith appealed.

ISSUE: Are officers’ collectively responsible for actions taken during a search?

HOLDING: No

DISCUSSION: The Court noted that neither Gordon nor Smith offered any evidence as to which officer was responsible for the alleged theft or damage, noting that “conclusory allegations of officers’ collective responsibility” are not enough to defeat a summary judgment motion.⁹⁸ The court agreed that it is improper to unreasonably destroy property during a search but reiterated that collective liability is improper, liability must be direct. The court agreed it was proper to detain persons during a search warrant, even if they are not named (which Smith was).⁹⁹ The court noted that “limited or routine detention of residents pursuant to a valid search warrant is lawful, even categorical.” Returning Smith to the house to help them gain entry was proper, and both she and her car were listed on the warrant. Supervising the children closely while they were at the house might have been “overly cautious,” but it was lawful. (Although the Court did not

⁹⁷ See U.S. v. Greene, 250 F.3d 471 (6th Cir. 2001).

⁹⁸ Wilson v. Morgan, 477 F.3d 326 (6th Cir. 2007).

⁹⁹ Muehler v. Mena, 544 U.S. 93 (2005); Michigan v. Summers, 452 U.S. 692 (1981); U.S. v. Bohannon, 225 F.3d 615 (6th Cir. 2000). The Court agreed they probably should have stopped her sooner, but ruled that issue was not important in this case. U.S. v. Cochran, 939 F.3d 337 (6th Cir. 1991).

mention this issue, they were turned over to their grandmother about 20 minutes after their arrival at the house.)

With respect to the delay in the traffic stop, the Court agreed that at the time, there had been no “exact number of minutes or miles that police may follow” before making the stop. As such, qualified immunity was appropriate.

The Court affirmed the dismissal of the claims.

U.S. v. Gilliam, 2012 WL 2505548 (6th Cir. 2012)

FACTS: On March 19, 2009, officers executed a search warrant on Gilliam’s home, seeking child pornography. He was charged under federal law for possession and production of it. Gilliam moved for suppression and was denied. He took a conditional guilty plea and appealed.

ISSUE: Must a search warrant make a link between a crime and a location?

HOLDING: Yes

DISCUSSION: Gilliam argued that the warrant was invalid because the affidavit lacked probable cause. The affidavit detailed information from Trooper Brashears (KSP) who stated he was working on a complaint from four minors who alleged they had seen the images on Gilliam’s computer, in his bedroom. They clearly described Gilliam’s residence and sought photographs, computers and the like. The Court agreed that the affidavit clearly made a link between the crime and the residence, and incorporated information from known informants with first-hand knowledge.

The Court upheld the denial of the motion to suppress.

U.S. v. Hoang (Natalia and Liem), 2012 WL 2379917 (6th Cir. 2012)

ISSUE: In May, 2009, Det. Alderink (Kent County, MI, SO) submitted a search warrant affidavit for Hoang’s home, seeking evidence of a marijuana growing operation.

The warrant set out the following:

Alderink has 13 years of law-enforcement experience, is currently a detective in a narcotics division, and is experienced in investigating narcotics cases.

- An anonymous tipster informed Silent Observer1 on an unspecified date that Liem Hoang was growing marijuana in his basement at 6376 Glenstone Dr SE, Grand Rapids, MI 49546; that the tipster has seen the marijuana; that Liem lives at the Glenstone property with his ex-wife Natalia Hoang; and that Liem has a prior felony conviction involving ecstasy.
- Alderink verified through state records that Liem and Natalia lived at the Glenstone property.
- Alderink confirmed the tipster’s statement that Liem had a prior felony conviction involving ecstasy. Liem was convicted in 2001 for importing MDMA.
- Alderink found a website printout about growing marijuana in the trash at the Glenstone property on April 29, 2009.

The utility records for the Glenstone property, which were in Liem's name, were obtained on April 23, 2009 and revealed that electricity use for the home increased between 27% and 131% per month between June 2008 and March 2009 as compared to the same month of the prior year. The average increase in electricity used for that 10-month period compared to the same period of the previous year was 64%.² The records showed the following usage in kilowatt hours:

Month	2007	2008 (% increase)	2009 (% increase)
January		1,475	2,235 (52%)
February		1,508	1,960 (30%)
March		1,357	2,049 (51%)
April		1,594	
May		1,654	
June	1,615	2,055 (27%)	
July	1,536	2,746 (79%)	
August	1,554	3,036 (95%)	
September	1,323	3,051 (131%)	
October	1,009	1,638 (62%)	
November	941	1,860 (98%)	
December	1,645	2,200 (34%)	

The grow lights used to cultivate cannabis plants indoors consume large amounts of electricity. And analyzing the amount of electricity used can reveal valleys and peaks because the amount of light needed can change depending on the grow cycle.

142 planst, along with other evidence was found. Both Liem and Natalia Hoang were indicted under federal law, and moved to suppress. The motion was denied. They both took a conditional guilty plea and appealed.

ISSUE: May corroborated tips provided by an anonymous tipster be used in a warrant to support probable cause?

HOLDING: Yes

DISCUSSION: The Hoangs argued that the search warrant affidavit was not sufficient to show probable cause, but the Court disagreed. The tips from the informant were specific and detailed and demonstrated the tipster's basis for their knowledge – he "saw" the marijuana. The officer corroborated significant parts of the story, as well, in particular that their electricity usage increased substantially, and showed peaks and valleys, which suggested the growing cycle of cannabis. (The Court also noted that comparisons to nearby houses were "of dubious relevance" because it did not demonstrate the size or population of those houses.)

The Court agreed they could not prove the veracity of the anonymous tipster but noted that was only one factor in the evaluation. It was also argued that the information was stale but they did not indicate a date or time frame for the tip. However, the Court noted that "the crime of marijuana growing is ongoing" and the Hoangs were well-established in their home. As such, their home was a "secure operational base." The Court agreed that there might be other reasons behind the electrical usage and a printout of a website, but it was enough to establish probable cause. Finally, the Court agreed that a comparison of electrical usages

between houses could not be made but noted that the usage in the house alone, with its sharp increase, was sufficient.

The Court affirmed their plea.

U.S. v. Ruth, 2012 WL 3089329 (6th Cir. 2012)

FACTS: Ruth's adult adopted son went to the Kent (OH) PD on December 18, 2009, to report that Ruth had a computer "which contained numerous images of child pornography." He gave them a flash drive with samples that he said he'd downloaded. He was interviewed and stated that Ruth had said "he intended to engage in sex with children and then kill them." The son stated he'd been sexually abused by Ruth and that he suspect others had been, as well.

The officers obtained a search warrant detailing the above. Ruth was present when it was executed and he voluntarily stated he'd been downloading child pornography for years and exchanging it with others. The officers seized two computers and other digital media devices, including 13 flash drives and hundreds of DVDs. (In an abundance of caution, they got a second search warrant to permit them to view the storage devices.) He later admitted to having sexually abused over 20 children.

He moved to suppress but was denied. Ruth took a conditional guilty plea and appealed.

ISSUE: Is an identified witness inherently more credible?

HOLDING: Yes

DISCUSSION: Ruth argued that the search warrant was insufficient because the "police had no prior dealings with the son to establish his reliability, and there was no corroboration that the images contained on the thumb drive were actually taken from [Ruth's] computer." The Court, however, noted that "the son fully identified himself, was not a suspect, [and] was put through the crucible of a thorough interview by the police." The Court agreed that the "circumstantial reliability" was enormous.

The Court upheld the plea.

U.S. v. Archibald, 685 F.3d 553 (6th Cir. 2012)

FACTS: On May 20, 2008, Officer Wilson (Nashville PD) arrested a woman for prostitution. She had been an informant in the past, and offered to cooperate as a CI in a drug buy. Later that evening, she did a drug buy at Apartment 5A. Several days later, the officer sought a search warrant for that apartment, citing the CI's buy in support. The warrant was issued, on May 23, and executed on May 28. Archibald and Jenkins were present – Jenkins had crack cocaine and Archibald had a large amount of cash. They also found cash in Archibald's car and a loaded pistol in the house.

Both were charged with drug and weapons-related federal offenses. They moved for suppression. The Court granted the motion, finding that the probable cause for the warrant had gone stale by the time it was executed. The Court also concluded that the affidavit contained knowing or reckless falsities concerning the CI's reliability. The Government appealed.

ISSUE: Is a single controlled buy enough for a warrant?

HOLDING: Yes

DISCUSSION: The Court noted that the affidavit relied exclusively on the CI's information and as such, it was critical to "consider the veracity, reliability, and basis of knowledge" of that CI. The CI, although essentially untried, "made a controlled purchase of narcotics while under police surveillance and it further describes the officers' arrangements for the controlled purchase." Archibald argued that the officer had never met her before and the affidavit did not note that she was working off a criminal charge.

The Court concluded that those issues were immaterial and a single controlled buy was enough for a warrant. It further noted that the three days between the buy and the issuance of the warrant did not make it stale. With respect to the five day delay in executing it, again, the Court agreed that was reasonable. (It was issued on the Friday prior to a 3 day holiday weekend and the warrant team had scheduling conflicts.) The Court agreed the delay was simply coincidence, not planning. Nothing changed to affect the presence of probable cause.

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

SEARCH & SEIZURE – COMMON AREA

U.S. v. Mohammed, 2012 WL 4465626 (6th Cir. Ohio 2012)

FACTS: On July 21, 2009, the Cincinnati PD Vice team did a buy-bust on Mohammad. A CI told the officers that Mohammad (aka "Quan") had heroin for sale. He gave the officer detailed information about Mohammed's home, his vehicle and the details on a purchase. Recorded telephone calls used "coded dialogue" in discussing the buy, but none "captured any express mention of drugs." At about 6:25 p.m., Officer Fox accompanied the CI to the designated meeting place. Mohammad got out of his car and approached as if to open their car door – Officer Fox drove away and other officers moved in to arrest. Mohammed told the officers he had a firearm, and they recovered a loaded pistol from the center backseat console. Mohammed claimed to reside in an area different than the one given by the CI. A K9 alerted strongly on his car but no drugs were found.

The officers went to the address given by the CI and found another of Mohammed's vehicles parked, apparently in the street. A K9 alerted on that vehicle as well. The officers used the keys they'd seized from Mohammed to enter the locked foyer and again, the K9 alerted to Mohammed's apartment door. The officers sought a search warrant. Using that warrant, they found a large quantity of heroin and related items.

Mohammed was indicted for possession of the heroin. He moved for suppression, arguing that the warrantless entry into the foyer violated the Fourth Amendment. The trial court agreed that although the entry did, in fact, violate the Fourth Amendment, "there was sufficient probable cause to support the search warrant when the tainted portions of the search warrant were excised."¹⁰⁰

¹⁰⁰ U.S. v. Carriger, 541 F.2d 545 (6th Cir. 1976).

Mohammed was convicted and appealed.

ISSUE: Is it proper to enter a locked foyer of an apartment building without a warrant?

HOLDING: No

DISCUSSION: The Court agreed that the officers “unconstitutionally entered the locked common area of Mohammed’s apartment building without a warrant.”¹⁰¹ Looking to the independent source rule, however, the Court agreed that “evidence obtained pursuant to an unconstitutional search will be admitted if the Government shows that it was discovered through sources wholly independent of any constitutional violation.”¹⁰² Using this process, the Court agreed that removal of the information as to the apartment door where the dog alerted and that the keys obtained from Mohammed unlocked the foyer and the apartment was proper. However, the Court noted that the remaining untainted information still supported the probable cause finding. (In fact, the evidence suggested that the officers already knew that Mohammed lived in Apartment 2, and as such, it was not necessary to excise that information.)

Mohammed also argued that the officers did not document the CI’s reliability but the Court noted that the “veracity of the information is sufficiently established by the subsequent events corroborating the informant’s information.”

After resolving a number of other issues, the Court upheld Mohammed’s conviction.

SEARCH & SEIZURE – PLAIN VIEW

U.S. v. Lyons, 2012 WL 2044411 (6th Cir. 2012)

FACTS: On May 8, 2009, Northern Ohio Violent Fugitive Task Force had three outstanding arrest warrants on Lyons. They sought him at Dawkins’ home as Lyons had been arrested there previously. No one answered their knock so they tried the door handle, at which point Dawkins “yelled at the officers, asking who was there.” They responded and after a few minutes, Dawkins answered the door. She initially denied Lyons was there but finally admitted it, allowed them to search. They found Lyons “hiding under a mattress and box spring.” They spotted a box of ammunition partially hidden by a couch cushion, and an officer “nudged the cushion with his foot to get a better view.” The nudge revealed a loaded handgun, as well.

As Lyons was a convicted felon, he was charged with possession of the weapon. He moved for suppression and was denied. He was convicted at trial and appealed.

ISSUE: Is ammunition in the residence of a convicted felon “immediately incriminating?”

HOLDING: Yes

¹⁰¹ U.S. v. Heath, 259 F.3d 522 (6th Cir. 2001).

¹⁰² U.S. v. Jenkins, 396 F.3d 751 (6th Cir. 2005).

DISCUSSION: The Court agreed that the ammunition and the handgun were in plain view. The officers were lawfully in the apartment, with Dawkins' permission. Because they knew Lyons was a felon, the box of ammunition was immediately incriminating. (The Court apparently accepted the moving of the cushion as acceptable based upon the need to seize the ammunition.)

Lyons' conviction was affirmed.

U.S. v. Newsome, 2012 WL 5440027 (6th Cir. Ohio 2012)

FACTS: On September 29, 2010, someone fired multiple shots at Caver. Six weeks later, Newsome was identified as the shooter by Caver and another witness through photos. Newsome also owned a vehicle matching the description of the suspect vehicle. Armed with an arrest warrant, police went to his home. Newsome opened the door but then slammed it in the face of the officers. When the officers "started removing the door," Newsome changed his mind and opened it again. The door opened into the kitchen. He was promptly arrested and during the arrest, the officers spotted marijuana on the kitchen table. The officers did a protective sweep of the remainder of the house, "restraining a female in the living room area and noticing a large amount of crack cocaine and heroin on top of a dresser in the bedroom." Officer Bassett left to get a search warrant for the house, which was approved. The officers found a handgun in Newsome's jacket and a safe in the bedroom. When they were able to open the safe, they found another gun and crack cocaine.

Newsome was charged and moved to suppress. The trial court denied the motion with respect to drugs found in plain view and the gun found in his jacket, but suppressed it with respect to what was found in the safe. Newsome took a conditional guilty plea and appealed.

ISSUE: Might items in an adjacent room be considered in plain view?

HOLDING: Yes

DISCUSSION: First, the court looked to the validity of the arrest warrant. The court agreed that normally, a witness making a choice from a photo array "does the trick." The Court noted that such eyewitness identifications are sufficient for probable cause, unless "there is an apparent reason for the officer to believe that the eyewitness was lying, did not accurately describe what he had seen, or was in some fashion mistaken regarding his recollection of the confrontation."¹⁰³ Although the Court agreed there was no indication of this, Newsome disagreed, however, noting that it does not say that the unidentified witness actually saw Newsome fire the shot. The court found that to be hypertechnical and that the warrant was sufficient and properly executed under Ohio law. Either way, the Court agreed it was executed in good faith by the officers.¹⁰⁴

Looking to the seized evidence, the Court noted that the officers did not need a warrant to discover the drugs found in the kitchen or the bedroom.¹⁰⁵ The two rooms were apparently adjacent and flowed into the other. In the bedroom, they did only a cursory inspection and the drugs were in plain view. They did not

¹⁰³ Ahlers v. Schebil, 188 F.3d 365 (6th Cir. 1999).

¹⁰⁴ There was apparently an issue with the form of the warrant, which was initialed rather than signed, but this seemed to be consistent with how it had been done for some time.

¹⁰⁵ Maryland v. Buie, 494 U.S. 325 (1990).

seize the drugs immediately, preferring to wait for the warrant in an “abundance of caution.” However, “the same cannot be said for the gun found in Newsome’s jacket.” Although the search warrant mentioned a gun there was no request in the warrant to search for it, only the drugs. The Court noted that although Newsome did not receive additional prison time, the firearm conviction did become part of his record. The Court vacated the conviction for the firearm in his jacket and remanded the case for limited resentencing.

SEARCH & SEIZURE – CONSENT

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 uniforms, 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.’”¹⁰⁶ Although stepping back in fear is not consent,¹⁰⁷ and the 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.

¹⁰⁶ U.S. v. Buchanan, 904 F.2d 349 (6th Cir. 1990).

¹⁰⁷ See U.S. v. Carter, 378 F.3d 584 (6th Cir. 2004).

SEARCH & SEIZURE - CURTILAGE

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. 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."¹⁰⁸

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."¹⁰⁹ The affidavit did not include any information from the unlawful search

The Court upheld the denial of the suppression motion.

¹⁰⁸ Widgren v. Maple Grove Twp., 429 F.3d 575 (6th Cir. 2005).

¹⁰⁹ Murray v. U.S., 487 U.S. 533 (1988).

U.S. v. Anderson-Bagshaw, 2012 WL 6600331 (6th Cir. Ohio 2012)

FACTS: Bagshaw (now Bagshaw-Anderson) was a mail carrier in Ohio. She underwent surgery for back pain, which was unsuccessful. She was permitted to work on a limited duty schedule. In 2002, she was awarded total disability. Over the next few years, during several medical exams, it was concluded she could not go back to work due to pain and use of medications. She reported on the required annual documents that she “invested in alpacas” with her husband, but stated she didn’t actually earn any income. In 2008, suspecting that she was actually involved in business activities, an investigator attended an event at the farm and witnessed Bagshaw mucking an area. Later that year, in an interview, Bagshaw denied performing any physical activities related to the farm. Following that interview, investigators began surveilling her, documenting her moving luggage, walking, sunbathing and playing bingo. They observed her on a cruise. Surveillance of her on the farm was difficult due to the position of the property, but they were able to use a camera from an adjacent property. During the days they were in operation, they captured her mowing the yard, raking, caring for the flock and pushing a wheelbarrow. (They also caught a few other more private occurrences.) The investigators got a search warrant and confiscated documents and home video.

Bagshaw was charged with fraud and related misrepresentations. She moved to suppress the footage from the camera. The Court denied the motion. She was convicted of most of the charges, and appealed.

ISSUE: May a camera located outside the curtilage be used to film a backyard?

HOLDING: Yes (but see discussion)

DISCUSSION: Bagshaw argued that the camera captured what was going on in her backyard, within the curtilage. The Court noted that she took no steps to conceal her backyard from the neighbor’s property where the camera was located. The Court also noted that even if, subjectively, she felt she had that expectation of privacy, that it was not reasonable since the view for the camera was “identical to those available to a curious utility worker with a cheap pair of binoculars, or the disinterested glance of neighbors in either adjoining lot.” The government never trespassed onto Bagshaw’s property.

The Court looked at the area behind the house, dividing it into the backyard, the barnyard and the pasture. The Court noted that curtilage was decided based upon the unique facts of each property.¹¹⁰ Specifically, the Court held the most relevant consideration is whether the area in question is “so intimately tied to the home itself that it should be placed under” Fourth Amendment protection. The Court agreed that both the barnyard and the pasture were clearly in the open fields, where Bagshaw had no reasonable expectation of privacy. However, the backyard clearly was within the curtilage and was enclosed in part by a line of trees. The Court noted that an area can be curtilage even if neighbors have a view of it.¹¹¹ The area included a picnic table and a clothesline and was partially obscured by the house and foliage.

However, concluding it was curtilage is not enough, since officers “are entitled to observe things in plain sight from publicly accessible areas.”¹¹² In this case, the area was visible from the vacant lot where the

¹¹⁰ U.S. v. Dunn, 480 U.S. 294 (1987).

¹¹¹, 461 F.3d 646 (6th Cir. 2006).

¹¹² California v. Ciraolo, 476 U.S. 207 (1986).

camera was mounted and the view was about the same from the top of the pole, where it was mounted for technical reasons, as it would have been from eye level.

The Court did express some concern “about a rule that would allow the government to conduct long-term video surveillance of a person’s backyard without a warrant. Few people, it seems, would expect that the government can constantly film their backyard for over three weeks using a secret camera that can pan and zoom and stream a live image to government agents.” However, the Court decided any error was harmless and declined to decide, at this point, “whether long-term video surveillance of curtilage requires a warrant.” Only a few clips of Bagshaw were shown the jury when she was in the backyard. By far the best evidence against her was the cruise surveillance footage, and the home movies recovered pursuant to the search warrant clearly showed her physical activities with the alpacas.

The Court affirmed Bagshaw’s convictions.

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.¹¹³ 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.

¹¹³ See California v. Hodari D., 499 U.S. 621 (1991).

SEARCH & SEIZURE – COMMON AREA

U.S. v. Mohammed, 2012 WL 4465626 (6th Cir. Ohio 2012)

FACTS: On July 21, 2009, the Cincinnati PD Vice team did a buy-bust on Mohammad. A CI told the officers that Mohammad (aka “Quan”) had heroin for sale. He gave the officer detailed information about Mohammed’s home, his vehicle and the details on a purchase. Recorded telephone calls used “coded dialogue” in discussing the buy, but none “captured any express mention of drugs.” At about 6:25 p.m., Officer Fox accompanied the CI to the designated meeting place. Mohammad got out of his car and approached as if to open their car door – Officer Fox drove away and other officers moved in to arrest. Mohammed told the officers he had a firearm, and they recovered a loaded pistol from the center backseat console. Mohammed claimed to reside in an area different than the one given by the CI. A K9 alerted strongly on his car but no drugs were found.

The officers went to the address given by the CI and found another of Mohammed’s vehicles parked, apparently in the street. A K9 alerted on that vehicle as well. The officers used the keys they’d seized from Mohammed to enter the locked foyer and again, the K9 alerted to Mohammed’s apartment door. The officers sought a search warrant. Using that warrant, they found a large quantity of heroin and related items.

Mohammed was indicted for possession of the heroin. He moved for suppression, arguing that the warrantless entry into the foyer violated the Fourth Amendment. The trial court agreed that although the entry did, in fact, violate the Fourth Amendment, “there was sufficient probable cause to support the search warrant when the tainted portions of the search warrant were excised.”¹¹⁴

Mohammed was convicted and appealed.

ISSUE: Is it proper to enter a locked foyer of an apartment building without a warrant?

HOLDING: No

DISCUSSION: The Court agreed that the officers “unconstitutionally entered the locked common area of Mohammed’s apartment building without a warrant.”¹¹⁵ Looking to the independent source rule, however, the Court agreed that “evidence obtained pursuant to an unconstitutional search will be admitted if the Government shows that it was discovered through sources wholly independent of any constitutional violation.”¹¹⁶ Using this process, the Court agreed that removal of the information as to the apartment door where the dog alerted and that the keys obtained from Mohammed unlocked the foyer and the apartment was proper. However, the Court noted that the remaining untainted information still supported the probable cause finding. (In fact, the evidence suggested that the officers already knew that Mohammed lived in Apartment 2, and as such, it was not necessary to excise that information.)

¹¹⁴ U.S. v. Carriger, 541 F.2d 545 (6th Cir. 1976).

¹¹⁵ U.S. v. Heath, 259 F.3d 522 (6th Cir. 2001).

¹¹⁶ U.S. v. Jenkins, 396 F.3d 751 (6th Cir. 2005).

Mohammed also argued that the officers did not document the CI's reliability but the Court noted that the "veracity of the information is sufficiently established by the subsequent events corroborating the informant's information."

After resolving a number of other issues, the Court upheld Mohammed's conviction.

SEARCH & SEIZURE – DRUG DOG

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 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, officers 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."¹¹⁷ 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."

¹¹⁷ U.S. v. Alfano, 838 F.2d 158 (6th Cir. 1988).

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”¹¹⁸ 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.

U.S. v. Johnson, 2012 WL 1994765 (6th Cir. 2012)

FACTS: Johnson was stopped for speeding in Chattanooga, “but that was the least of his worries.” During the stop, Officer Duggan wrote a warning ticket and asked for consent to search. He suspected criminal activity because Johnson was nervous, sweating, his hands were shaking and he stared intently. He also spotted degreaser in the vehicle, which was a rental, which he took as a sign that Johnson wanted to clean something up. He also noted that the rental contract only allowed the vehicle to be driving in Georgia and Florida, but obviously, he was stopped in Tennessee and admitted he was going to Kentucky. His stated travel plan, to visit a woman he knew but had not met, was highly suspicious. His records check indicated he had a violent history. They engaged in “chat,” Johnson refused to consent and Duggan called for a drug dog, which arrived about 19 minutes later. Max, the dog, alerted on the car. “Clothed with power from the dog’s alert,” Officer Duggan searched, finding the gun, which had been stolen. (He did not find drugs.) Johnson, a felon, was indicted for possession of the gun. Johnson moved for suppression, arguing the stop was unlawfully extended. He was denied, which the judge finding reasonable suspicion to extend the stop. Johnson took a conditional guilty plea, and appealed.

ISSUE: May a traffic stop be extended on articulated suspicion of drug trafficking, if the indicators are weak?

HOLDING: No

DISCUSSION: The Court looked to the totality of the circumstances, and agreed that officers may “draw on their own experience and specialized training to make inferences from and deductions about the cumulative information available to them that might well elude an untrained person.”¹¹⁹ If they find reasonable suspicion, they “may extend a traffic stop long enough to confirm or dispel his suspicions.”¹²⁰ The Court agreed that the officer “had no difficulty articulating his grounds for suspicion,” focusing on numerous “nervous indicators” and the unusual contents of the vehicle, including his lack of conventional luggage. The Court agreed, however, that the individual indicators were weak, although the officer “clearly believed that criminal activity was afoot.” His story was inconsistent and he had a prior criminal history, but again, the link was “tenuous, at best.”

¹¹⁸ U.S. v. Hill, 195 F.3d 258 (6th Cir. 1999); U.S. v. Burnett, 791 F.2d 64 (6th Cir. 1986)

¹¹⁹ U.S. v. Shank, 543 F.3d 309 (6th Cir. 2008).

¹²⁰ U.S. v. Davis, 430 F.3d 345 (6th Cir. 2005).

The Court agreed that it was a close call, but that there was insufficient reasonable suspicion to justify holding him for the drug dog. The Court reversed the conviction and remanded the case.

SEARCH & SEIZURE – GPS

U.S. v. Shephard, 2012 WL 3834774 (6th Cir. 2012)

FACTS: Between May 1 and 21, 2009, Shepard allegedly conspired with others to acquire property in Ohio and Michigan, through selling drugs as a middleman. The conspiracy unraveled when a Kentucky officer arrested Patrick for possession of oxycodone. She admitted she'd gotten the drugs from Satterwhite and Trammell, in Dayton. Ultimately, it was learned that the pair were getting their supply from Shepard, who distributed them in Kentucky and Ohio. Trammell and Moore were stopped in Perry County (KY) in possession of more than 400 oxycodone pills.

Shepard was ultimately arrested in the Hazard area and charged with conspiracy and trafficking. He was convicted and appealed.

ISSUE: Does one have a standing to contest a tracker placed on a vehicle they do not own?

HOLDING: No

DISCUSSION: Among other issues, Shepard claimed that he had standing to contest an arrest based, in part, on GPS tracking done on his co-conspirator's vehicles. To prevail, he would have to "show that he had a legitimate expectation of privacy that was violated by an illegal search." Since he did not own the vehicle where the tracker was placed, he had no such expectation.

Shepard's conviction was affirmed.

U.S. v. Skinner, 690 F.3d 772 (6th Cir. 2012)

FACTS: In January, 2006, law enforcement stopped Shearer, in Flagstaff, Arizona, in possession of \$362,000 in cash. He was on his way to deliver money to West's supplier of marijuana, Apodaca, who lived in Tucson. He told the DEA how the conspiracy worked, in which Apodaca would buy "pay-as-you-go" cell phones programmed with necessary numbers for the couriers. Eventually, they would discard the phones and get new ones with different numbers and under false identities. They also identified regular cell phones being used by principals in the conspiracy, Shearer and "Big Foot," who worked as a transporter.

The DEA got a court order for "subscriber information, cell site information, GPS real-time location, and 'ping' data for the 6447 phone in order to learn Big Foot's location while he was en route to deliver the drugs." Upon pinging, they found that one suspect phone was at West's home in North Carolina. Using data from that communication, they got a second order for the number that Big Foot was using and learned it was in Flagstaff. The tracked Big Foot by continuously pinging the phone and when it stopped about 0200, learned it was in a Texas truck stop. DEA agents located Skinner at the suspect vehicle, a motor home and a truck combination. He refused consent to search the vehicle, so the agents had a K-9 sniff

around the motor home. When the dog alerted, they searched the motor home, finding 61 bales of marijuana (1,100 pounds), two cell phones and two handguns. Skinner and his son were arrested for distributing marijuana.

Skinner moved for suppression, arguing that the use of the GPS tracking data from the cell phone was unlawful. The District Court ruled that because it was purchased with the intent to be used in a criminal scheme, that he had no expectation of privacy in it, or in a motor home driven on public roads. Skinner was convicted and appealed.

ISSUE: Is there an expectation of privacy in one's cell phone signal?

HOLDING: No

DISCUSSION: The Court began:

There is no Fourth Amendment violation because Skinner did not have a reasonable expectation of privacy in the data given off by his voluntarily procured pay as-you-go cell phone. If a tool used to transport contraband gives off a signal that can be tracked for location, certainly the police can track the signal. The law cannot be that a criminal is entitled to rely on the expected untrackability of his tools. Otherwise, dogs could not be used to track a fugitive if the fugitive did not know that the dog hounds had his scent. A getaway car could not be identified and followed based on the license plate number if the driver reasonably thought he had gotten away unseen. The recent nature of cell phone location technology does not change this. If it did, then technology would help criminals but not the police. It follows that Skinner had no expectation of privacy in the context of this case, just as the driver of a getaway car has no expectation of privacy in the particular combination of colors of the car's paint.

The Court looked to U.S. v. Knotts.¹²¹ In that case, the Court held that a "person traveling in an automobile on public thoroughfares has no reasonable expectation of privacy in his movements from one place to another." The Court found "no inherent constitutional difference between trailing a defendant and tracking him via such technology." The Court agreed that "law enforcement tactics must be allowed to advance with technological changes, in order to prevent criminals from circumventing the justice system." The Court also looked to U.S. v. Forest¹²² in which it noted that the agents could have gotten the same information simply by following the suspect's car. In this case, Skinner argued, that the agents "had never established visual surveillance of his movements, did not know his identity, and did not know the make or model of the vehicle he was driving." (They did apparently know it was a motorhome towed by a truck.) The Court did not find this to be a distinction, however, of importance.

In this case, the Court noted that the agents properly sought court orders to obtain the information. It also distinguished it from U.S. v. Jones¹²³ which focused on the "trespassory nature of the police action." The Court concluded that "Because authorities tracked a known number that was voluntarily used while traveling on public thoroughfares, Skinner did not have a reasonable expectation of privacy in the GPS data and location of his cell phone."

¹²¹ 460 U.S. 276 (1983).

¹²² 355 F.3d 942 (6th Cir. 2004).

¹²³ 132 S. Ct. 945 (2012).

The Court upheld Skinner's conviction.

SEARCH & SEIZURE – LAPTOP

U.S. v. Bradley, 2012 WL 2580807 (6th Cir. 2012)

FACTS: Bradley came under suspicion by the Kentucky Attorney General's office in 2008 for trading in child pornography. The investigator determined that a specific IP address in Fayette County, assigned to a Lexington Fire Station, was displaying file names and hash values connected to child pornography. He tried to connect to the computer via LimeWire. Further investigation indicated that the transactions coincided with one particular fire crew. The investigators went to the station and obtained consent from Bradley to search his laptop. Despite difficulties, they obtained enough information to seize the computer and apply for a search warrant. The next day, it was searched pursuant to the warrant and a number of videos and images were found.

Bradley was charged. He moved to suppress the evidence, arguing that Det. Bell had seized his computer unlawfully. The Court agreed that the investigator had probable cause that the computer held child pornography and that the concern that he would destroy the evidence was valid, and constituted an exigent circumstance. The Court found the delay in getting the warrant, the next day, was reasonable.

Bradley took a conditional guilty plea in receiving child pornography and appealed.

ISSUE: Is it proper to seize an item to avoid a risk of destruction?

HOLDING: Yes

DISCUSSION: The court agreed that it is proper to seize an item pending a warrant if there is probable cause to believe it contains contraband. It is a recognized exception that it is proper to seize such an item because of the "urgent need to prevent evidence from being lost or destroyed."¹²⁴ The Court noted that Bradley knew the substance of the investigation and as such, the investigator's fears were reasonable. The Court noted "that courts are still struggling to conceptualize Fourth Amendment jurisprudence as applied to computers and the variety of interests implicated by seizures and searches of personal electronics" and that some have "analogized computers to closed containers." Computers often contain "information of exceptional value to its owner." However, digital evidence "is inherently ephemeral and easily destructible." The investigator properly waited until he had a warrant to actually search the laptop and seizing it affected only Bradley's possessory interest, not any liberty interest.

The Court found no explanation in the record as to the delay, in waiting until the next day to apply for a warrant, and certainly "the better practice would have been to seek review sooner rather than later." The duration of the warrantless "hold" was approximately 26 hours, which the court held to be reasonable, as well, however. The Court noted that they could not apply for the warrant in advance because they did not know who was actually involved, that Bradley would be present or would have the laptop with him.

The Court affirmed the trial court's decision.

¹²⁴ U.S. v. Sangineto-Miranda, 859 F.2d 1501 (6th Cir. 1988).

SEARCH & SEIZURE – TERRY

U.S. v. Martin, 473 Fed.Appx. 494, 2012 WL 3064822 (6th Cir. 2012)

FACTS: At about 0400-0500, a woman delivering newspapers reported to a security guard “that she’d seen a man in black pants and white hooded jacket come out of the bushes in a residential neighborhood.” At about that time, a burglar alarm sounded. Police were called. Another witness corroborated the newspaper carrier and a responding officer noted that he’d seen a man matching the description nearby. The officers canvassed the area and found Martin, dressed as described and with leaves on his clothing. They asked him to stop and provide ID. He “made a sudden, quick move to reach into his left front pocket.” Assuming he was reaching for a weapon, the officers grabbed him and cuffed him. Upon frisking him, they found a handgun in that pocket.

Martin, a felon, was charged for the weapon. He moved for suppression and was denied. He took a conditional guilty plea and appealed.

ISSUE: Does a frisk require articulable suspicion that the subject is armed?

HOLDING: Yes

DISCUSSION: The Court agreed that the initial detention was appropriate, given the facts presented. With respect to the frisk, the Court noted that “in order to frisk Martin for a weapon, the police must have a reasonable suspicion that he was armed.”¹²⁵ The Court accepted that “police officers’ testimony that none of them believed that Martin was quickly reaching into his left front pocket to produce identification” as requested, but instead, that he was reaching for a weapon.

The Court upheld the denial of the motion to suppress.

U.S. v. Johnson, 2012 WL 6720244 (6th Cir. Mich. 2012)

FACTS: On August 20, 2010, at about 0145, a 911 operator received a call about a “man with a gun” walking down a street in Detroit. The man was described as wearing a blue t-shirt and dark-colored shorts. Officers responded to the scene but officers who testified later testified differently as to “what information was relayed in the call.” In any event, the officers found Johnson walking in the area, and noted his “unusual gait” – as if he was trying to keep his pants up by keeping his legs wider apart than normal. They also noted that his shirt was “protruding a nice amount” and that the bulge moved. The officers believed he had a weapon in that location. Eventually, Officer Hill stopped his car, with the light activated, and “jumped out with his weapon drawn and pointed down,” ordering Johnson to stop. Johnson complied with the orders and he was frisked. Officer Hill found a rifle with the stock cut off and Johnson was arrested. The entire stop lasted less than three minutes.

Johnson, a felon, was charged with possession of the weapon. He moved for suppression, arguing that the seizure was as a result of an unconstitutional stop, as the officers lacked a reasonable suspicion to stop him and that they exceeded the scope of any permitted search. At the hearing, Officers Hill and Davis were questioned about discrepancies in their reports and testimony. The Court denied the motion to

¹²⁵ Arizona v. Johnson, 555 U.S. 323 (2009); U.S. v. Pearce, 531 F.3d 374 (6th Cir. 2008).

suppress, finding the inconsistencies to be “more semantic” than anything. Johnson also sought to exclude the 911 call, that was also denied. Johnson was convicted and appealed.

ISSUE: Does displaying a weapon take a stop outside the bounds of Terry?

HOLDING: No

DISCUSSION: First, with respect to the stop, the Court agreed that based upon the stated facts, the officers had reasonable suspicion to make the stop. The Court agreed that although there were discrepancies, the trial court had an opportunity to judge the officers’ demeanor and manner of responding. Although finding that their “testimonies were less than ideal,” the Court agreed that the discrepancies could be attributed to sloppiness. With respect to the scope, the Court noted that the Terry stop “ripened almost immediately into a de facto arrest” by the officers’ actions. Looking to Florida v. Royer, the Court noted that officers are not to use “means that approach the conditions of arrest.” However, simply displaying a weapon does not exceed a Terry stop boundaries “when reasonably necessary for the protection of the officers or to effectuate the investigatory stop.”¹²⁶ Even at the time of the initial interaction, the officers believed Johnson was armed and as such, drawing a weapon was proper. The Court agreed that admitting the weapon found was proper.

With respect to the 911 call, the Court agreed that the hearsay on the call was not testimonial, and as such, did not violate the Sixth Amendment Confrontation Clause. Further, it was admissible as a present sense impression. The Court agreed that nontestimonial statements do not invoke the Confrontation Clause.¹²⁷ In this case, an anonymous caller called 911 for assistance, to “enable police assistance in response to any ongoing emergency.” As such, it was admissible.

The Court affirmed Johnson’s conviction.

U.S. v. Russ, 2012 WL 6115922 (6th Cir. Ohio 2012)

FACTS: On July 10, 2010, Russ fled from a U.S. Marshal and police in an unnamed Ohio jurisdiction, following a brief stop. Following his arrest, officers retraced the path he’d taken and a K9 located a revolver. Russ, a convicted felon, was charged with possession of the gun as the Marshal apparently saw the weapon on Russ as he fled. He moved for suppression. When that was denied, Russ was convicted. He then appealed.

ISSUE: Does a flight from officers justify a Terry stop?

HOLDING: Yes

DISCUSSION: The Court noted that when Russ ran for the officers after a brief interaction, it was reasonable suspicion to pursue him to investigate. As such, the finding of the weapon was also lawful. The Court upheld the denial of the suppression motion, but due to a jury error, the conviction was reversed.

¹²⁶ Houston v. Clark Cnty. Sheriff Deputy John Does 1-5, 174 F.3d 809 (6th Cir. 1999).

¹²⁷ Whorton v. Bockting, 549 U.S. 406 (2007).

U.S. v. Young, 2012 WL 6621352 (6th Cir. Mich. 2012)

FACTS: On December 15, 2006, at about 1:15 a.m., Young was reclining in the passenger seat of a car parked in a lot outside a Grand Rapids bar. The lot was used by patrons of the bar but had also been the site of violent crime. Officers regularly patrolled for loitering individuals, having learned that people with guns stay outside the bar, which did security checks. (It was unlawful for someone to be in the lot without having business at one of the nearby locations.) Officers Fannon and Johnson pulled into the lot and they spotted the car. Officer Loeb arrived and the officers approached, looking through the windows with flashlights. Young rolled down the window and Fannon asked for ID. Young explained his friend had gone inside to see about getting a table or take-out. The friend (Eric) was emerging at that time. The officers told Eric to go back inside and Young to “sit tight.” Officer Johnson proceeded to check Young’s information and they explained about the law regarding the lot. Officer Fannon observed Young touching his pocket in a way that was suspicious. Young denied having a weapon, but continued his “gestures.” He stepped out when ordered to do so. Young then admitted to having a gun in the pocket. He was searched and handcuffed. Officer Johnson reported he had an outstanding arrest warrant.

Young, a felon, was charged with possession of the weapon. Young moved for suppression of the gun, arguing they had no right to approach him in the lot. The Court disagreed and refused to suppress the gun. Young took a conditional guilty plea and appealed.

ISSUE: Does blocking in a car constitute a seizure?

HOLDING: Yes

DISCUSSION: The Court looked to similar situations and noted that when police park in such a way that a parked vehicle cannot leave, they are seized under Terry. The Court agreed that in this case, the officers did park in such a way that the vehicle could not leave and that the officers’ further actions only solidified it. However, the Court noted the suspicion of trespassing made the interaction proper even though other factors, the crime history of the lot and practice of the bar to do pat-downs were not specific to Young. The Court noted that such “contextual factors ... should not be given too much weight because they raise concerns of racial, ethnic, and socioeconomic profiling.”¹²⁸ However, that does not mean that they are not relevant in a totality analysis. Officers testified that “the trespassing and gun crimes are inter-related.” Young’s position in the vehicle was unusual, as was the fact that “he appeared to be going nowhere.” They had not yet gotten his explanation for his presence in the parking lot. As such, he appeared to be trespassing. They quickly discounted his argument that a trespassing violation was not enough to justify a Terry stop, because it didn’t pose a threat. Further, a warrant check and questioning was appropriate to the situation. Questioning a person’s identity was a standard part of many Terry stops and “knowledge of identity may inform an officer that a suspect is wanted for another offense.” Because that check, which resulted in the discovery of a warrant, was valid, the fruit of that information, the gun, was validly seized.

The Court upheld Young’s plea.

¹²⁸ U.S. v. Caruthers, 458 F.3d 459 (6th Cir. 2006).

U.S. v. Cochrane, 702 F.3d 334 (6th Cir. Ohio 2012)

FACTS: On February 4, 2011, members of the Youngstown (OH) task force (focusing on gun and drug crime) stopped Cochrane for a traffic offense. Although a drug dog alerted on the vehicle, no drugs were found. Cochrane was giving a warning and sent on his way. On March 15, the same officers again spotted him. Since Cochrane's vehicle lacked a required front plate, they followed him to an apartment building where his fiancée and children were known to live. He was already out of the vehicle when the officers pulled up and they ordered him back to the car. Lt. Mercer spoke to him briefly. There was dispute about whether Cochrane gave consent for a search of the vehicle, but ultimately, a firearm was located hidden in the console. Cochrane was arrested for improper handling of the weapon and at some point, also received a citation for the traffic offense.

Cochrane was also later indicted on being a felon in possession. He moved for suppression, arguing the stop was improper and the search done without consent. His motion was denied and he was convicted. Cochrane then appealed.

ISSUE: Does asking questions about contraband before asking for a license make a vehicle stop improper?

HOLDING: No

DISCUSSION: Cochrane did not dispute that the initial stop was justified due to the license plate violation. However, he argued that it went on too long. The court agreed that the conversation with Lt. Mercer was "extremely brief" – just a few sentences. The short duration, pursuant to U.S. v. Everett,¹²⁹ coupled with questioning "directed toward officer safety ... do not bespeak a lack of diligence" in pursuing the original reason for the stop. Although Mercer asked about drugs, as well, that "minuscule additional delay" did not offset the pursuit of safety information. The Court noted that there was no rule that the officer must ask for OL and registration before asking about contraband. The Court agreed the questioning did not make the seizure unreasonable.

With respect to the consent to search, Mercer argued both that he did not give consent or that, if he did, it was not voluntary. The Court gave more credence to Lt. Mercer's testimony that Cochrane said "go ahead" to his request. In addition, the Court agreed that he was not coerced, as the officers did not physically threaten or intimidate him.

Cochrane's conviction was upheld.

U.S. v. Haywood, 2012 WL 5896552 (6th Cir. Ohio 2012)

FACTS: In March, 2009, Memphis PD received a tip from a CI that Haywood was selling cocaine and other drugs from his grandfather's home. The CI, who had been reliable in the past, described Haywood and gave a license number for his vehicle. Det. McNeal set up surveillance and sought a search warrant. Det. Tate started watching the house and the vehicle from a block away. He watched Haywood walk to the car and sit inside, with different people, 3 times in an hour. Det. Tate then watched Holloway

¹²⁹ 601 F.3d 484 (6th Cir. 2010).

drive up and Haywood pass Holloway a gun. Haywood got inside that vehicle on the passenger side. Concerned that Haywood was about to leave, Tate radioed the rest of the team.

Tate then got out of his vehicle and stopped Holloway. (He was in a police vest at the time.) Other detectives arrived and Haywood jumped out of the vehicle and ran. He was eventually arrested and searched, and the detectives found drugs and over \$4,000 in cash on his person. When the search warrant arrived, they searched Haywood's vehicle, left at the house, and found more drugs and money.

Haywood denied everything and maintained he didn't know that Tate was an officer when he stopped the vehicle. He eventually took a conditional guilty plea and appealed.

ISSUE: Does prior possession of a weapon justify a Terry frisk?

HOLDING: Yes

DISCUSSION: The court agreed that Haywood had been in possession of a gun and had fled from the officers. Although Tate's ability to see inside the vehicle was questioned, as was his inability to give a precise details of what he'd observed prior to the arrest, the Court found him to be credible.

Further, the Court rejected any "cognitive-bias argument," as Haywood argued that Tate saw what he expected to see – "some kind of action." However, the Court agreed with Haywood that the Terry stop doctrine supported the suppression of the items in his pockets, as there was no testimony that supported the idea that the "detectives plainly recognized the presence of the drugs and cash upon placing their hands over Haywood's pockets." Unfortunately, however, for Haywood, the Court ruled that even though the flight itself might not have been a crime, once he was apprehended by officers in a marked car, and "yet forcibly attempted to break free," he did commit a crime. As such, even if the actual "stop" was unlawful, his attempt to fight his way free was not. For that reason, the search of his pockets was done incident to a lawful arrest. Once they found the drugs and cash in his pockets, the officers were authorized under the "automobile exception" to search Haywood's vehicle, still parked in the driveway.

Haywood's plea was upheld.

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?

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.”¹³⁰ The Court noted, however, that another arrested subject actually answered the door, and it was proper for the officers to enter to arrest her. 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

¹³⁰ Payton v. New York, 445 U.S. 573 (1980); U.S. v. Hardin, 539 F.3d 404 (6th Cir. 2008).

swept harbors an individual posing a danger to those on the arrest scene.”¹³¹ 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.¹³²

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:

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

¹³¹ Maryland v. Buie, *supra*.

¹³² Michigan v. Long, 463 U.S. 1032 (1983); U.S. v. Bohannon, 225 F.3d 615 (6th Cir. 2000).

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.¹³³

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.¹³⁴ 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.

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

¹³³ U.S. v. Sangineto-Miranda, 859 F.2d 1501 (6th Cir. 1988).

¹³⁴ This search that located the key was conceded to have been unconstitutional.

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.”¹³⁵ 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.¹³⁶

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

¹³⁵ 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)).

¹³⁶ Zuern v. Tate, 336 F.3d 478 (6th Cir. 2003).

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

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. Lurry, 2012 WL 2337329 (6th Cir. 2012)

FACTS: On August 12, 2009, Officers Williams and Hazelrig (Memphis PD) made a traffic stop after an "automatic license plate reader" indicated the owner or occupant may have a warrant. The driver (Lurry) was "moving around a lot." Officer Williams hurried up and told him to quit moving around. Lurry admitted his license was suspended. Officer Williams frisked Lurry and spotted a bag of shotgun shells on the back seat. Lurry was placed in the cruiser back seat, but not handcuffed.

Officer Hazelrig did a records check while Officer Williams searched the car. He found a sawed-off shotgun in the passenger compartment and returned to the car to make the arrest. After a struggle, Lurry was actually arrested. As he was a felon, he was charged with possession of the handgun. He requested suppression. The Court upheld the search because the officers saw the shells in plain view. Lurry took a conditional guilty plea and appealed.

ISSUE: May a vehicle be “frisked” for weapons if ammunition is spotted?

HOLDING: Yes

DISCUSSION: The Court ruled that the plain view exception did not apply “because the incriminating nature of the shotgun shells was not immediately apparent.” The officers began the search before they learned of his status as a convicted felon and shotgun shells are normally legal to possess. However, the court found it to be a “permissible protective search” under Michigan v. Long.¹³⁷ Since Lurry was not actually secured at the time, although he was in the cruiser, the Court agreed that he might reenter the vehicle. Officer Williams had reason to believe there was a weapon in the vehicle. The Court ruled that Gant did not apply because he was not under arrest at the time.

The Court upheld the decision to deny the suppression.

SEARCH & SEIZURE – COLLECTIVE KNOWLEDGE DOCTRINE

U.S. v. Lyons, 687 F.3d 754 (6th Cir. 2012)

FACTS: In June, 2007, the DEA began an investigation of a prescription drug / fraud ring using a medical practice (QRMP) based out of Detroit. It identified a location that had been a residence on Stratford Road and which had been converted to an office to be used by one of the doctors involved in the scheme, but concluded that no drugs were actually kept there. During the lengthy investigation of the QRMP, “three multi-state traffics stops ... yielded narcotics” linked to the medical practice. All of the vehicles involved were “plated to Kentucky.”

On September 25, 2008, Agent Graber (DEA) began surveillance of the Stratford house. They spotted Williams’ vehicle in the driveway, but it left shortly after they arrived. Young, the office manager there, also left and they tailed that vehicle. Using wiretaps, they intercepted a call between the two and learned that “they could expect a female driving a gray vehicle with out-of-state plates” and sure enough, within minutes, Lyons arrived in a gray minivan with Alabama plates. Williams returned. Agent Graber decided the minivan should be stopped when it left the house. He arranged for Troopers Wise and Grubbs (Michigan State Police) to do so, also sharing some details of the investigation and the “basic facts” that suggested drugs would be in the vehicle. He specifically asked, however, “the troopers to develop independent probable cause for the stop, because the DEA did not want its lead targets tipped off” about the investigation.

The troopers made the stop, based upon items hanging from the rearview mirror. The driver, Lyons, could not produce a valid OL – the vehicle was rented. The troopers smelled mothballs and knew that was often used to mask the smell of narcotics. She got out and consented to a search, which Lyons later contested,

¹³⁷ 463 U.S. 1032 (1983).

arguing she'd been placed in handcuffs before being asked for consent. However, she did reach for her purse upon getting out, and she agreed to let them look in their purse (for "safety" reasons). They found "several large bundles of currency and a suspended Michigan drivers license." She became "teary-eyed" when the trooper advised her that her explanations were inconsistent. During the subsequent search, between the van and the purse, they "discovered over \$11,000 in cash, 39 bottles of codeine cough syrup, and a box of mothballs." She was arrested.

Ultimately, in May, 2009, Lyons was included in a major indictment that involved other members of the QRMP. Lyons, specifically, was charged with conspiracy to distribute and with possession with intent to distribute a controlled substance, and related charges. She moved for suppression, which the trial court granted, despite the magistrate judges recommendations that "although the troopers lacked probable cause to believe there was a vision obstruction, the stop was nevertheless supported by the DEA's reasonable suspicion of drug trafficking activity." The District Court ruled that the "stop was premised solely on the unfounded civil infraction and that the troopers did not act on the collective knowledge of the DEA's investigation."

The Government appealed.

ISSUE: Is the collective knowledge doctrine valid?

HOLDING: Yes

DISCUSSION: Because Michigan's law about vision obstructions did not apply to out-of-state vehicles, the Government argued on "whether the DEA possessed reasonable suspicion to request the stop and whether the troopers were permitted to act upon the DEA's request." The Court ruled that the "reasonableness of a traffic stop is measured by the same standards set forth for investigatory stops in Terry v. Ohio, and its progeny."¹³⁸ Once a stop is justified, the "degree of a traffic stop's intrusion must be reasonable related in scope to the situation at hand, as judged by examining the reasonableness of the officer's conduct given his suspicions and the surrounding circumstances."¹³⁹

The Court agreed that Agent Garber "articulated clear and specific facts to support his suspicion" that Lyons was involved in the drug trafficking ring. Her apparent identity as an Alabama resident suggested she wasn't a mere patient, nor was the doctor even there that day. She argued that Graber had, at most, a hunch, but the Court agreed that "considered through the prism of the DEA's prior knowledge," Agent Graber had sufficient reasonable suspicion. Although the DEA "had no specific information relating to [Lyons] or her minivan, the agents were not required to set aside their prior knowledge when drawing inferences as to whether the circumstances suggested innocent or criminal activity."

The Court then considered whether the DEA's collective knowledge could be imputed to the troopers. The Court agreed that "[i]t is well-established that an officer may conduct a stop based on information obtained by fellow officers."¹⁴⁰ This is "variously called the 'collective knowledge' or 'fellow officer' rule, and "recognizes the practical reality that "effective law enforcement cannot be conducted unless police officers

¹³⁸ U.S. v. Everett, 601 F.3d 484 (6th Cir. 2010). Dorsey v. Barber, 517 F.3d 389 (6th Cir. 2008) (quoting Smoak v. Hall, 460 F.3d 768 (6th Cir. 2006)).

¹³⁹ U.S. v. Davis, 430 F.3d 345 (6th Cir. 2005).

¹⁴⁰ U.S. v. Barnes, 910 F.2d 1342 (6th Cir. 1990) (citing U.S. v. Hensley, 469 U.S. 221 (1985)).

can act on directions and information transmitted by one officer to another.” This holds even when “the evidence demonstrates that the responding officer was totally unaware of the specific facts that established reasonable suspicion for the stop.” The Court stated:

Whether conveyed by police bulletin or dispatch, direct communication or indirect communication, the collective knowledge doctrine may apply whenever a responding officer executes a stop at the request of an officer who possesses the facts necessary to establish reasonable suspicion.¹⁴¹

The doctrine does have boundaries, primarily, of course, the Fourth Amendment. The Court looked to another circuit to clarify the doctrine, noting three separate inquiries: “(1) the officer taking the action must act in objective reliance on the information received; (2) the officer providing the information must have facts supporting the level of suspicion required; and (3) the stop must be no more intrusive than would have been permissible for the officer requesting it.”¹⁴²

The Court commended the simplicity of the approach and noted that a “a responding officer is invariably in a better position when provided with the details helpful and necessary to perform his duties.” The Court found no need for the officers to have a prior relationship with the investigation or be of the same agency. The Court looked to Whiteley v. Warden, Wyo. State Penitentiary,¹⁴³ in which information passed through multiple agencies. In U.S. v. Hensley, “the sole communication between the law enforcement bodies was a flyer issued by the investigating authority that notified fellow police departments that the defendant was wanted for a bank robbery.”¹⁴⁴ The court concluded that the collective knowledge doctrine applied. The troopers were acting solely based on the DEA request and that it was a “fairly typical” request. They possessed everything they needed to know – that the DEA believed that illegal drugs would be found in the vehicle. Further, they asked only a few questions before asking consent to search.

Responding officers are entitled to presume the accuracy of the information furnished to them by other law enforcement personnel. They are also entitled to rely upon the investigating officer’s representations of reasonable suspicion, and to the extent applicable, whatever exigent circumstances are claimed to support a stop. The interests of our law enforcement would be stifled without permitting such presumptions, and it is those interests that lie at the heart of the collective knowledge doctrine.

With respect to the search, the Court found that the automobile exception clearly applied.¹⁴⁵ The driver’s lack of an OL, inconsistent answers and the odor were sufficient to uphold the search. Holding the search valid, the Court declined to address the consent issue.

The Court reversed the trial court decision and remanded the case for further proceedings.

¹⁴¹ The Court noted this avoids placing “crippling restrictions” on law enforcement.

¹⁴² U.S. v. Williams, 627 F.3d 247 (7th Cir. 2010) (citing U.S. v. Nafzger, 974 F.2d 906 (7th Cir. 1992)).

¹⁴³ 401 U.S. 560 (1971).

¹⁴⁴ 469 U.S. 221 (1985).

¹⁴⁵ Maryland v. Dyson, 527 U.S. 465 (1999) (citing Carroll v. U.S., 267 U.S. 132 (1925)).

SEARCH & SEIZURE – INVENTORY

U.S. v. Jackson, 682 F.3d 448 (6th Cir. 2012)

FACTS: On August 27, 2010, Akron, OH, PD officers were given a BOLO for a shooting suspect. The vehicle was described in detail. Officer Meech was familiar with the suspect and spotted the vehicle. He turned to follow and tried to read a temporary tag, but the vehicle swung into a driveway. As the driver did not use a turn signal, Meech initiated a traffic stop. Jackson, the driver, opened the door. Officer Meech saw that both Jackson and Gay, the passenger, were drinking. Jackson agreed he did not have an OL. Meech realized quickly, however, that the vehicle was not the suspect vehicle, although it was very similar. Jackson was arrested and was also discovered to have an outstanding warrant. Gay had a suspended OL.

Because neither could lawfully drive the vehicle, Meech towed it pursuant to APD policy Meech did an inventory before the vehicle was towed. He found a pistol under the floor carpet. Because Jackson was a convicted felon, he was also charged with possession of the gun. He moved for suppression, which was denied. He then took a conditional guilty plea and appealed.

ISSUE: May a vehicle be searched pursuant to an agency's inventory policy?

HOLDING: Yes

DISCUSSION: Jackson argued that the officer did not have to tow the vehicle (and thus search it) but instead, could have left it where it was, on private property, simply by asking the property owner. (There is no indication Jackson had any connection with the property.) The Court found no reason to believe that the officer had any improper motive in electing to tow it, however, and upheld the inventory. Further, the Court agreed that lifting the carpet, which already appeared "torn up" was justified.

Jackson's plea was upheld.

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.¹⁴⁶ Brown appealed.

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."¹⁴⁷ 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."¹⁴⁸ 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."¹⁴⁹

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.

¹⁴⁶ Terry v. Ohio, 392 U.S. 1 (1968).

¹⁴⁷ Florida v. Bostick, 501 U.S. 429 (1991).

¹⁴⁸ Cady v. Dombrowski, 413 U.S. 433 (1973).

¹⁴⁹ Illinois v. Wardlow, 528 U.S. 119 (2000); U.S. v. Sokolow, 490 U.S. 1 (1989).

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 individual. The account was blocked as a result. A few weeks later, the IRS did two more deposits to one of the 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.¹⁵⁰ 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

¹⁵⁰ U.S. v. Crews, 445 U.S. 463 (1980).

suppression in this case.”¹⁵¹ 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:

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 - SEARCH & SEIZURE - ARREST

Embody v. Ward, 695 F.3d 577 (6th Cir. 2012)

FACTS: Tennessee law permits individuals with gun permits to carry handguns, as defined in state law, in public places, including parks. Embody, “armed with knowledge of this law and one thing more – a Draco AK-47 pistol” – “went to a state park near Nashville.” He carried the handgun slung across his chest with a loaded, 30-round magazine attached. He was wearing camouflage. He anticipated his appearance would attract attention and carried an audio-recorder with him. Park visitors reported Embody to the ranger, with one saying he was carrying an “assault rifle.”

Two more predictable things happened. A park ranger disarmed and detained Embody to determine whether the AK-47 was a legitimate pistol under Tennessee law, releasing him only after determining that it was. And Embody sued the park ranger, claiming he had violated his Second, Fourth and Fourteenth Amendment rights.”

In his first encounter, Ranger Walsh requested Embody’s permit, which he produced. However, the ranger could not decide if the weapon was legal, but allowed Embody to proceed despite his concern. The ranger phoned his supervisor, Ranger Ward, who called Chief Ranger Petty. Neither believed the weapon was lawful and it was decided they should do a “felony take down” to disarm Embody. They called Nashville PD for assistance.

Ranger Ward found Embody and ordered him to the ground at gunpoint. He removed the gun and detained him. When Nashville PD arrived, he explained his concern. Embody requested a supervisor, although it was explained that it would delay the situation. Once they confirmed the weapon was barely

¹⁵¹ U.S. v. Akridge, 346 F.3d 618 (6th Cir. 2003).

within the barrel length to be a handgun under Tennessee law, he was released. The entire detention was about 2 ½ hours.

Emboday sued Ward under 42 U.S.C. §1983. The trial court granted Ward's motion for summary judgment and Emboday appealed.

ISSUE: Does the carrying of a large weapon, possibly illegally, justify a Terry stop?

HOLDING: Yes

DISCUSSION: The Court agreed that Emboday's carrying of the unusual, large weapon "gave Ward ample reason for suspicion that Emboday possessed an illegal firearm." The Court noted that he had "painted the barrel tip of the gun orange, typically an indication that the gun is a toy." Based upon this, "an officer could reasonably suspect that something was amiss." Further, ordering him to the ground was appropriate, based upon what the rangers knew at the time. The Court noted that "the constitutional question is whether the officers had reasonable suspicion of a crime, not whether a crime occurred," since "otherwise, all failed investigatory stops would lead to successful §1983 actions." The Court noted that "having worked hard to appear suspicious in an armed-and-loaded visit to the park, Emboday cannot cry foul after park rangers, to say nothing of passers-by, took the bait." Although the stop was lengthy, it was still lawful.

The Court affirmed the dismissal of the action.

Nettles-Nickerson v. Free, 687 F.3d 288 (6th Cir. 2012)

FACTS: On May 8, 2009, Nettles-Nickerson visited a local bar in Okemos, MI. She drank enough to be too impaired to drive. Another patron saw her stagger towards her car, fall, and get back up, and eventually get into her Hummer. She started the car but apparently did not drive off. The patron called 911. Officers Free, McCready and Harris arrived. Officer Free approached the vehicle and saw that it was running, but in park. He thought the driver was sleeping but when he announced himself, she immediately opened her eyes. He saw her eyes were "watery and bloodshot" and that she "smelled of intoxicants." She got out upon request but could not perform the FSTs successfully. A PBT came back at .165. Officer Free arrested her for operating the vehicle while intoxicated.

However, the state court ruled that she was not, in fact, operating the vehicle and dismissed the case against her. Nettles-Nickerson sued the officers. The District Court agreed that a reasonable officer could have believed she was unlawfully operating her vehicle and awarded qualified immunity to the officers.

ISSUE: Is an arrest made upon a reasonable interpretation of a state statute valid?

HOLDING: Yes

DISCUSSION: The Court noted that the only question was whether she was, in fact, operating her Hummer under Michigan law. In Michigan, "operating" is defined as "being in actual physical control of" the vehicle. It noted that nothing impeded Nettles-Nickerson from driving the vehicle. The Court agreed that Michigan case law was vague on the issues, but the fact that she had started her car and according to witnesses, depressed the brake pedal, suggested she was, in fact, operating the vehicle. The Court found it "perfectly reasonable" for the officers to believe an arrest was permitted under the circumstances.

The Court noted, that the “law must be clearly established” to justify a lawsuit and in this case, “the police officer commendably consulted with each other before” deciding to make the arrest.

The decision of the District Court was upheld.

U.S. v. Williams, 475 Fed.Appx. 36, 2012 WL 1138999 (6th Cir. 2012)

FACTS: On September 5, 2007, Cincinnati PD did an undercover “drug buy-bust.” They were in plainclothes and would buy drugs and then arrest the seller. Officer Longworth, one of the officers involved, was riding with a CI. Williams flagged down their car and solicited a sale of a rock of cocaine for \$20. Officer Longworth put out a radio call and Officer Edwards and Grubb, also in an unmarked car, spotted Williams less than two minutes later. Williams fled from them on foot. Officer Edwards saw Williams reach into his waistband and remove a “dark object” Edwards thought was a handgun. Officer Edwards drew his weapon and “heard metal hit concrete.” The chase resumed but eventually Edwards stopped. Edwards returned to the place where he had heard the sound and found a loaded pistol.

Eventually, another officer caught Williams and matched the \$20 bill in his possession with the one he’d gotten from Officer Longworth. (For an explained reason, the bill was not introduced in court, however.) Longworth also identified Williams.

Williams was indicted on drug trafficking and possession of the gun and moved for suppression. The motion was denied and he took a conditional guilty plea. He then appealed.

ISSUE: May fleeing the scene ripen suspicion into probable cause for an arrest?

HOLDING: Yes

DISCUSSION: Williams argued that the officers lacked probable cause to arrest him. The Court agreed that the initial officers who encountered Williams were suspicious of him because he matched the description, and thus it was appropriate to try to stop him. When Williams fled, the officer’s “reasonable suspicion ripened into probable cause.” The Court agreed that while no officer specifically saw a gun, there was sufficient evidence to arrest him even absent his possession of a weapon.

The Court upheld the denial of the motion to suppress.

Halasah v. City of Kirtland, 2012 WL 2366231 (6th Cir. 2012)

FACTS: On May 23, 2009, Halasah was called to the Kirtland (OH) PD to get his underage son. The boy had been taken into custody from a party and was suspected of drinking and trespassing. Halasah asked that his son be given a breath test, which the officers refused. Officer Fisher later stated that Halasah “behaved in a disruptive manner.” He was told to leave or he would be arrested, and he did so.

Officer Fisher forwarded his report to the prosecutor, who concluded Halasah should be charged with disorderly conduct. The officer prepared a criminal complaint and a warrant was issued. Halasah was arrested and released. The charges were reduced and ultimately, Halasah stood trial and was acquitted.

Halasah filed suit against Officer Fisher and the City of Kirtland under 42 U.S.C. §1983. The defendants requested summary judgment, which was granted. Halasah appealed.

ISSUE: Does an arrest require proof on every element of a charge?

HOLDING: Yes

DISCUSSION: The Court noted that the only real issue was the claim against Officer Fisher. The Court noted that to succeed, Halasah would have to show that the officer “knowingly and deliberately, or with a reckless disregard for the truth, made false statements or omissions that created a falsehood” The Court looked to the officer’s complaint and noted it was silent on an essential element of the charge in Ohio, and in fact, his later testimony at trial was also silent on that issue. Further, there was a question as to the accuracy of the officer’s claim that he had to repeatedly ask Halasah to leave.

The Court upheld the summary judgment in favor of the police chief and the city, but reversed it with respect to Officer Fisher.

42 U.S.C. §1983 – SEARCH WARRANT

Cline v. Myers, 2012 WL 3553490 (6th Cir. 2012)

FACTS: On the day in question, Ontario (OH) police were trying to arrest Foster. Det. Snively was informed that Foster was hiding in a particular house, and Snively got a warrant to arrest Foster there. He arranged for surveillance of the house by the Allied Special Operations Response Team. The informant then told Snively that Foster had moved to another location. They obtained a search warrant for that location, but the “affidavit contained facts relating only” to the first location. Eventually, they searched the second house. The occupants claimed that the officers used excessive force on them, Fuller, for example, complained the Myers “kicked him twice despite the fact that Fuller was in handcuffs and not a suspect.” Fuller also stated he was held for at least 25 minutes, although it was determined quickly that Foster was not present.

Cline, the Fullers and the Willises (who were all present during the search), filed suit under 42 U.S.C. §1983, claiming an improper search warrant and excessive force. Snively and Myers requested summary judgment, which the trial court denied. They appealed.

ISSUE: Does intentionally including false statements in a warrant affidavit subject an officer to liability?

HOLDING: Yes

DISCUSSION: With respect to the warrant, the court agreed that an investigator who makes material false statements in such documents may be held liable. The Court agreed that a jury could believe that

"Snavelly swore to the statements in the supporting affidavit with a reckless disregard to the truth and that the information was 'material to the finding of probable cause.'" The court agreed to the denial with respect to the warrant.

With respect to the force, the Court agreed that the kick, if true, was excessive force under the facts presented. With respect to the length of the detention, earlier courts had held a much shorter period of time as excessive, under similar circumstances, and as such, the Court agreed to the denial on that ground, as well.

The Court allowed the case to go forward.

42 U.S.C. §1983 – ENTRY

Turk v. Comerford, Stasenko, Rexing and Adams, 2012 WL 2897476 (6th Cir. 2012)

FACTS: On February 13, 2009, James Turk, a former officer now a private investigator, met with Mattice at an intersection in Cleveland. He was not aware that Mattice had been arrested for rape a few months before and that there was an outstanding warrant for his arrest for missing a court appearance in that case. During Turk's investigation, he and Mattice went to the location of the assault and spoke to "Emily" – and was able to photograph where the assault Turk was investigating took place. He dropped off Mattice and left the area.

Following their visit, Emily, having been in contact with officers looking for Mattice, called them upset about the visit, stating that "Turk was pushy" and has forced his way into the house. On the morning of February 17, Turk's son spotted a man outside with a gun. He alerted his father, who went to his daughter's room. Turk saw cars and officers and heard them pounding on the door screaming at him to open the door and that he was going to jail. As he was trying to get the door open, they continued pushing, and eventually, the front door was splintered because they were trying to force a "dummy door." (Officers remembered, however, that Turk's wife opened the door.) Officers Stasenko, Adams and Chapman came inside, followed by Comerford. Eventually, Officer Rexing also entered. They had an arrest warrant for Mattice but not a search warrant for Turk's home.

Unbeknownst to the officers, Turk was recording the interaction. There was discussion about searching the house and that Turk was under arrest. Turk was allowed to call the attorney he worked for, and were told that unless the officers produced an arrest warrant, they would have to leave. Turk gave the phone to the Stasenko who told the attorney that they'd gotten consent to search and that if the Turks didn't cooperate, Turk would be going to jail "based on investigative purposes." The recording suggested confusion about whether the Turks gave consent or not. Turk was asked about his interaction with Mattice and refused to answer. The attorney called back at some point and told the officers that Mattice was going to appear for arraignment that same day.

After about 30 minutes, the officers left. The Turks filed suit under 42 U.S.C. §1983, arguing violations of state and federal law, including failure to train the Task Force properly. After extensive discovery, the District Court ruled that the officers entered lawfully because Turk admitted he was opening the door, and that gave the initial officers reason to think he was allowing them to enter. They dismissed Comerford and

Rexing, reasoning that they would have no reason to know their fellow officers may have acted improperly by entering.

The Turks appealed.

ISSUE: Does unlocking and opening a door mean that the individual gives consent for officers to enter?

HOLDING: No

DISCUSSION: The Court began, noting that “without question, Task Force officers had no warrant to search Turk’s house. Nor do they claim that exigent circumstances justified their actions.” Instead, the officers claimed that they had consent to enter and search the home.

The Court continued:

The notion of voluntariness is itself an amphibian. It purports at once to describe an internal psychic state and to characterize that state for legal purposes.”¹⁵²

The Court agreed that consent is voluntary if “it is unequivocal, specific and intelligently given, uncontaminated by any duress or coercion.”¹⁵³ Turning to the facts, and looking to Turk’s recitation of those facts (along with the recording), the Court agreed that it described “a textbook Fourth Amendment violation.”

The Court continued:

Here, law-enforcement officers, without a warrant, consent, or any exigent circumstance, literally forced their way into the Turks’ home, arrogating to themselves powers beyond those of the King of England. True, Turk’s turning the deadbolt may have shown that he was willing to talk with the officers face-to-face. But, without more, there is nothing about unlocking a door that demonstrates consent—“unequivocal, specific and intelligently given,” And even if he did initially intend to consent, their “threatening jail time and pounding on the door so hard that the glass shook was coercive and therefore vitiated any consent that Turk gave.” The Court agreed the initial entry violated the Fourth Amendment.

The Court agreed that consent could be given by conduct, but “that conduct, like any other kind of consent, must unequivocally and specifically convey a message of consent, intelligently given and uncontaminated by duress or coercion.” The Court concluded that the “officers who broke down Turk’s door are not entitled to qualified immunity for their entry.”¹⁵⁴

With respect to the subsequent search, the Court agreed it was “an independent Fourth Amendment event, subject to independent Fourth Amendment analysis.” The Court noted that “mere submission” is not enough, especially when the officers demanded entry. Although Mrs. Turk, upset, indicated that they should

¹⁵² *Culombe v. Connecticut*, 367 U.S. 568 (1961).

¹⁵³ *U.S. v. Moon*, 513 F.3d 527 (6th Cir. 2008)

¹⁵⁴ See *Steagald v. U.S.*, 451 U.S. 204 (1981).

search and leave, “Turk was not so definitive.” The Court noted that “after breaking down the door and barging into the Turks’ home, no reasonable officer could have believed that the Turks’ subsequent consent was voluntary.” The Court ruled that the search was not done with consent.

Finally, Turk argued that he was unlawfully detained in the foyer by Officer Stasenکو, who physically detained Turk, grabbing him by his wrist to keep him in the foyer and away from his wife.” The officer would not permit him to finish getting dressed and he held the Turks there under threat of jail. The Court again ruled in favor of Turk.

The Court ruled in favor of Comerford, finding that none of the actions he committed were unlawful, as he came into the house only after the search was underway. However, with respect to Rexing, the Court ruled that since there was disagreement as to his actions, it was appropriate to retain him in the action.

Finally, the Court agreed that “a law-enforcement officer may enter a home’s curtilage without a warrant if he has a legitimate law-enforcement objective, and the intrusion is limited.” Because the case law on that specific issue was not well developed, that Court agreed that the officers were entitled to qualified immunity on that claim.

Sanders v. Detroit Police Department, 2012 WL 3140232 (6th Cir. 2012)

FACTS: On April 15, 2006, Officer Griffin (Detroit PD) was dispatched to Sanders’ home on an assault and battery report. He found Tiyani (Sanders’ wife) outside, “visibly injured.” She explained Sanders had hit her and threatened to kill her with a knife. Griffin entered the apartment and arrested Sanders.

On April 27, after a preliminary exam, Sanders was held for trial. He was convicted of domestic violence. He filed suit under 42 U.S.C. §1983 against Officer Griffin, the PD and two judges. He claimed that Griffin unlawfully entered the home, that Detroit had an unconstitutional policy or custom regarding such entries in domestic violence cases, along with a procedural claim. The Court denied his claims under Heck. Sanders appealed, arguing that Heck did not bar his case.

ISSUE: May an officer enter a home in response to a call of possible domestic violence?

HOLDING: Yes

DISCUSSION: The Court looked to each claim. First, with respect to the entry, the Court noted that claim did “not necessarily call into question the validity of his conviction.”¹⁵⁵ The Court noted that under the facts available to it, it could not determine whether anything obtained as a result of the allegedly unlawful entry was essential to Sanders’ subsequent conviction. The Court further noted, however, that although a warrant is usually needed to enter a home, that this entry “was triggered by Tiyani’s emergency phone call that Sanders had assaulted and threatened her.” “Such a warrantless entry may be proper if it fits into what has come to be known as the ‘domestic abuse exception.’”¹⁵⁶

¹⁵⁵ New York v. Harris, 495 U.S. 14 (1990).

¹⁵⁶ Georgia v. Randolph, *supra*.

The Court remanded the case for further consideration as to whether “Tiyani validly consented to the entry, Griffin asked for such consent, or Sanders ever objected.

Hays v. Bolton, Grassing, Vermilion (OH) PD, 2012 WL 2913765 (6th Cir. 2012)

FACTS: On December 7, 2008, Heather Hays (age 18) became angry with her parents and told them she was moving out. When she continued screaming, Hays told her that if she was going to leave, she needed to just leave. He escorted her to the door and locked it behind her. He did not realize that she was barefoot at the time, her shoes having slipped off. It was 19 degrees out and there was snow on the ground. Heather’s friend was waiting when she was escorted outside and her friend gave her shoes to wear that were a little too small. Heather realized she’d left some items behind and called for assistance from the Vermilion PD to get her belongings. They discussed how she was thrown out of the house and knocked and rang the doorbell. No one answered and eventually, they realized the garage was unlocked. Heather went inside with the officers and she gathered her belongings. The officers searched for residents. Hays came out and objected to their presence. He objected to coming downstairs and he was then arrested for domestic violence.

Hays went to trial and was acquitted. He sued the officers involved for their entry into his house, and for the arrest. Ultimately all of the defendant officers received qualified immunity and Hays appealed.

ISSUE: May an officer enter with someone reasonably believed to be a resident of a residence?

HOLDING: Yes

DISCUSSION: The Court agreed that there was “ample evidence to support” ... “that Heather had apparent authority to consent to a warrantless entry into the Hays residence.” In fact, she never specifically said she had moved, only that she’d been “thrown out.” She admitted she expected that the officers would go inside with her. The Court noted that it had not, in the past “held that “magic words” are not necessary for effective consent; rather, the totality of the circumstances, including a party’s non-verbal conduct, should be considered in determining whether consent exists.”¹⁵⁷ The court considered her a “forcibly removed co-tenant with authority to consent to a warrantless search of the residence.” Even if, in fact, she was no longer a resident, it was reasonable for the officers to consider her to be so.

Hays argued that he revoked Heather’s consent, under the doctrine of Georgia v. Randolph.¹⁵⁸ The Court noted, however, that the police had already entered and noted that issue had not yet been discussed – whether consent could be withdrawn after the entry had occurred. The Court considered Heather’s ongoing consent to override Hays refusal.

Hays also argued his arrest was unlawful. The court agreed that under Ohio law, his excluding her from the house without shoes in sub-freezing weather violated the law, and her comments that he “grabbed,” “threw” and “pulled” her validated that fact. Physical injury was not required, only the intent to cause harm. The Court agreed the arrest was valid.

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

¹⁵⁷ U.S. v. Carter, 378 F.3d 584 (6th Cir. 2004)

¹⁵⁸ Randolph, *supra*; U.S. v. Tatman, 397 F. App’x 152 (6th Cir. 2010) - two years after.

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 an 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 – HECK

Noel v. Guerrero, 2012 WL 1522870 (6th Cir. 2012)

FACTS: Noel was under investigation from the BAYAYET narcotics team, in the Saginaw, MI, area. His property was searched three times, with the first two yielding evidence used against him in federal prosecutions. He asked to have claims bifurcated (tried separately) so that he could pursue civil claims related to the lawsuit prior to the resolution of the criminal claims to avoid the Heck v. Humphrey¹⁵⁹ bar.

¹⁵⁹ 512 U.S. 477 (1994).

The Court refused to hold the case in abeyance, however, and he was convicted. He filed suit, but the case was dismissed. He then appealed.

ISSUE: Does the Heck bar require dismissal of a lawsuit that would challenge the underlying conviction for a crime?

HOLDING: Yes

DISCUSSION: Under the Heck bar, a lawsuit cannot go forward if it challenges the validity of the underlying conviction. The Court ruled that the District Court properly dismissed the civil case without prejudice and that Noel could refile if he is able to successfully challenge his convictions.

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.¹⁶⁰ 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,

¹⁶⁰ 512 U.S. 477 (1994).

however, Karrtunen v. Clark¹⁶¹, 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.

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

42 U.S.C. §1983 – USE OF FORCE - TASER

Thomas v. Plummer/ Myers, 2012 WL 2897007 (6th Cir. 2012)

FACTS: On August 23, 2009, Washington, driving Thomas’s car, rear-ended a garbage truck. (Thomas was with him but had been drinking and did not want to drive.) He left the scene and was stopped by Officers Glueck and Myers. He had no OL or insurance proof, so he was ordered out of the car. Officer Glueck went to check the information and returned, immediately placing Washington in handcuffs. She told him he had a warrant. “Washington vehemently denied having a warrant and started to struggle.” Thomas started to get out of the car and was ordered back into it. Officer Plummer arrived and was told to get Thomas back in the car. Instead, he drew his weapon and ordered her to the ground. She continued to stand, arguing, and Officers Plummer and Glueck continued to order her to the ground. She sank to a kneeling position with her hands up, but Officer Plummer screamed to “Get. Down. On. The. Ground. Or. You. Will. Be. Tased.” He then walked behind her and Tased her in the back. She screamed and sobbed, questioning what was going on. She was taken into custody and secured in the vehicle. They searched the car and found an open container of alcohol. She was cited for Obstructing Official Business and Possessing an Open Flask. Washington was cited for DUI and the outstanding warrant. The container of an alcoholic beverage was suppressed and the City dismissed the charge. Thomas was acquitted of the other charge. Officer Plummer was investigated by the city and eventually fired.

Thomas filed suit under 42 U.S.C. §1983 against Officers Plummer and Myers. She claimed Myers violated her rights by searching the car, and Plummer used excessive force. Both officer moved for qualified immunity, which was denied. Both officers appealed.

ISSUE: Is it justified to use a Taser on a compliant subject who remains argumentative?

HOLDING: No

DISCUSSION: With respect to Officer Plummer’s Taser use, the Court would again look to see if on the date in question, it was clearly established that such use was excessive. The Court noted that Thomas disobeyed the officer’s order, but “she did not do so through violence or flight, but through questions.” She “assumed a completely submissive position by dropping to her knees and raising her hands above her head.” He then used the Taser. The Court agreed that it was clearly unreasonable to do so. Her crime was minor under Ohio law nor did she pose any particular risk to the officers. She was posing no active resistance and as such, she should not have been Tased.

¹⁶¹ 369 F. App’x 705 (6th Cir. 2010).

The Court moved on to Officer Myers, noting that to succeed, Thomas must show that her search violated the Fourth Amendment and that the violation was clearly established on the date of the search. At the time of the search, both Thomas and Washington were secured in cruisers. On that date, Gant having been decided, it was necessary to “decide what to treat as the crime of arrest.”¹⁶² Then, the Court must determine whether a reasonable officer would believe relevant evidence might be found in the vehicle. The original charge was Obstructing Official Business, based on Thomas’s behavior during the stop. As such, there could be no relevant evidence in the vehicle.

However, with respect to Washington, he was handcuffed because of the outstanding burglary warrant and then for DUI. The Court found it was unnecessary to decide which one was the crime of arrest, because the result would be the same either way. The federal appellate courts have been divided on DUI cases, but generally follow the principle that if a driver is DUI, evidence of that crime might be found in the vehicle. With respect to burglary, the court had to decide whether it was reasonable to believe that a “months-old” burglary warrant, with no indication it was tied to Thomas’s vehicle was enough to justify the search. The Court agreed that the search was, in fact, not so clearly unconstitutional as to invalidate the search.

Thomas argued that because the evidence was suppressed at the trial court level, that precluded a finding by the federal court that it was not unconstitutional. The Court ruled, however, that an officer would not have been given a “full and fair opportunity to litigate her position” in a suppression hearing. The Court agreed that Officer Myers was entitled to qualified immunity.

The Court reversed the decision with respect to Officer Myers and awarded her summary judgment. It affirmed the decision with respect to Officer Plummer.

Foos (Estate) v. City of Delaware (OH), 2012 WL 2896901 (6th Cir. 2012)

FACTS: Foos crashed his pickup into a concrete pillar. Officer Hatcher, who arrived first, saw that a lot of smoke was coming from the rear tires of Foos’ truck. He activated his emergency equipment but Foos kept spinning the tires. Officer Hatcher tried to get his attention with a spotlight, changing his siren, but Foos continued. The officer reported that his “impression was that Foos was trying to flee and that Foos had no idea he was parked behind him.” He approached carefully, cautious of the spinning tires. He saw the windows were tinted but he could see Foos inside, “violently rocking back and forth.” (He thought Foos was trying to use his weight to get the truck off the concrete pillar.) Foos finally drew his weapon and hit the window with his flashlight. He could hear Foos yelling and Foos “continued his erratic behavior.” Hatcher moved away from the truck as he believed that to be safest.

Hatcher called for EMS and backup and he didn’t know what was wrong with Foos. Within minutes, help arrived. Hatcher had noted that Foos had stopped revving the truck but continued to “rock back and forth and to flail his arms, occasionally hitting the horn.” Officer Gerke, who arrived as backup, also tried to get Foos to turn off the truck. “The situation became even more urgent when the officers observed Foos positioned between the driver’s and passenger’s seats and reaching into the backseat.” They were concerned there were weapons in the truck and “concluded that they were going to have to open one of the truck’s locked doors to get Foos out, place him into custody, and do whatever needed to be done to get him help.” Officer Gerke broke out a front window, all the while Foos was still accelerating the wheels, filling

¹⁶² Arizona v. Gant, 556 U.S. 332 (2009).

the area with smoke. As Foos continued to rock, Hatcher decided to use a Taser to control him so they could extract him and turn off the engine. Hatcher fired his Taser but it had no apparent effect. Officer Gerke fired his Taser and Foos finally stopped moving, allowing them to reach inside and turn off the truck.

Foos was extracted and found to be naked from the waist down. As he “was put on the ground, he was yelling, kicking his feet, and jerking back and forth, but he was not resisting the officers, nor was he responding to any of the officers’ instructions.” He was secured and transported by EMS. There, the doctor noted that “Foos appeared to be in a hyperagitated condition and that his pupils were dilated, which, Dr. Zuesi testified, is a sign of hyperstimulation.” A tox screen indicated the presence of cocaine and amphetamines. Foos seized and went into cardiac arrest; he was resuscitated and put on an external pacemaker. He had a profound acid/base abnormality that was “almost incompatible with life,” which the doctor attributed to his drug intoxication. At the time the doctor did not know Foos had been Tased, but the doctor did not change his diagnosis when he was told, still finding that the drugs caused his condition. Foos died the next day and the ME stated that the drugs, not the Tasing, caused his death.

Foos’ parents, on behalf of his estate, filed suit under 42 U.S.C. §1983, claiming wrongful death and related claims. The trial court denied all claims and the Estate appealed.

ISSUE: May a Taser be used to gain control over a resisting, violent subject?

HOLDING: Yes

DISCUSSION: The Court reviewed the case law related to force claims. The Court discussed the use of the Taser. In this case, the officers were not planning to arrest Foos, but they still faced a situation in which they needed to get a subject under control. Both officers described their safety concerns relating to the vehicle and noted that the “need for intervention was obvious.” The Court quoted from the colloquy with the plaintiff’s attorney at oral argument:

THE COURT: Well, what should they have done in this crazy situation, if not try and remove him from that truck?

COUNSEL: Well, their objective they didn’t announce wasn’t to remove him from the truck. Their objective was to turn off the engine.

THE COURT: Well, they couldn’t do that without removing him from the truck.

COUNSEL: Why couldn’t they have just broken out the windows, and forced him back, and then turned off the engine?

THE COURT: He wasn’t exactly sitting quietly.

Although the Estate argued that the truck was truly stuck, the Court noted that was only known from the 20/20 vision of hindsight. The Court agreed it was reasonable to use the Taser in this situation. It was not clear that he was unarmed, and in addition, he had the truck itself as a potential dangerous instrument.

The Estate also argued that the officers neglected his medical need, but the Court noted that one of the first steps Officer Hatcher took was to summon EMS and have them stand by. Once Foos was extracted, EMS immediately took over and he was whisked to the hospital. The Court noted that the Estate’s reliance on medical articles suggesting that Tasers could be harmful to someone on drugs neglected to address the fact that the officers did not know he was, in fact, on drugs. Someone had notified the hospital that he’d been Tased, in fact, as it was noted on the intake sheet.

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

42 U.S.C. §1983 – FORCE

Barkovic v. Hogan & Township of Shelby (MI), 2012 WL 5862468 (6th Cir. Mich. 2012)

FACTS: Prior to March 10, 2009, Barkovic (a defense attorney) and Officer Hogan (Shelby Township PD) had a contentious history. On that day, Officer Hogan was in court, in response to a subpoena and arrived at the conference room. Hogan later said that Barkovic “was disrespecting everybody in that whole room that day” – calling people names. After they left, the pair got into a verbal argument that escalated into a physical fight that started with mutual pushing, although the stories differed. At some point, Barkovic ended up on the floor.

Barkovic sued Hogan and his agency, claiming use of force and related claims, under 42 U.S.C. §1983. Hogan counterclaimed for assault and battery. Ultimately all other parties were dismissed, leaving only assault claims between the two. Hogan claimed he was not acting under the color of state law, but did raise the defense of qualified and statutory immunity, stating he acted in the course of his employment. The Court found he was not acting under color of law and dismissed the assault claims against Hogan. Barkovic appealed.

ISSUE: Must an officer be acting under color of law to raise a qualified immunity defense?

HOLDING: Yes

DISCUSSION: The Court discussed the limited case law available on when an officer is acting under color of law. In Chapman v. Higbee Co.,¹⁶³ a deputy took action while working under secondary employment but in uniform, with badge and weapon. The Court noted that since he took actions that only law enforcement could take, while working for the secondary employer, the deputy went beyond a security guard. The Court agreed that there were “unanswered questions of fact” that were necessary to make the decision as to whether Hogan was acting in his official capacity. Hogan noted he was not in uniform nor did he display a badge or weapon, however, his own arguments raised defenses available only to law enforcement.

Citing the need for more facts, the Court reversed the summary judgment and remanded the case.

Gentry v. County of Wayne, 2012 WL 4477530 (6th Cir. Mich 2012)

FACTS: The “crux” of the argument in this case involved a “struggle in the stairwell immediately” before Deputy Carmona (Wayne County, MI, SO) shot Gentry. According to Deputy Carmona, Gentry fell on top of Deputy Morrow, who shouted that Gentry “was trying to take his weapon.” Deputy Carmona believed Gentry was in fact trying to do so and fired at Gentry’s back. (Gentry argued, however, that they both fell beside each other, and that Deputy Morrow did not shout.)

¹⁶³ 319 F.3d 825 (6th Cir. 2003).

Gentry filed suit under 42 U.S.C. §1983. The deputies requested qualified immunity and summary judgment, which was denied. The deputies appealed.

ISSUE: Is reasonableness the standard for a use of force case?

HOLDING: Yes

DISCUSSION: The Court noted that excessive/deadly force claims must be analyzed under the Fourth Amendment's reasonableness standard.¹⁶⁴ Whether a use of force is reasonable "depends primary on objective assessment of the danger a suspect poses at the moment."¹⁶⁵ The Court agreed that the trial court's focus on the "moments immediately preceding the" shooting was appropriate." And, since those moments were disputed by the parties, it was necessary to allow the case to go forward, even though Gentry's testimony conflicted with that of the officers.

The Court dismissed the appeal.

Allen (Estate) v. City of West Memphis, 2012 WL 6634306 (6th Cir. 2012)

FACTS: On July 18, 2004, about midnight, Officer Forthman (West Memphis, Arkansas) stopped a vehicle with only one headlight. Rickard was driving, Allen was the passenger. When the officer attempted to question Rickard about vehicle damage, Rickard sped off. Officers pursued Rickard into Memphis, Tennessee. Officers indicated that Richard tried to "ram" them via their radios. Eventually, one of the officers collided with Rickard, with Rickard apparently intentionally hitting the vehicle head-on. Rickard still attempted to get away but was unsuccessful. Officer Plumhoff fired three shots into the vehicle from near the passenger side. Rickard took off and Officer Gardner fired ten shots into the vehicle, from the side and then the rear. Officer Galtelli fired two shots. Rickard lost control and crashed into a building. Both Rickard and Allen died.

The estates of both Rickard and Allen sued West Memphis under 42 U.S.C. §1983. The defendant officers moved for summary judgment under qualified immunity, and the trial court denied it with respect to the Rickard claim. (The Court also ruled that because the shooting occurred in Tennessee, the officers were not entitled to state law immunity under Arkansas law.) The defendant officers appealed.

ISSUE: Is it justified to shoot into a stopped vehicle, absent other evidence?

HOLDING: No

DISCUSSION: The Court noted the similarity in the facts of this case with the facts in Scott v. Harris.¹⁶⁶ However, the Court stated that "as always, the devil is in the details, and it is those details that cause [the Court] to conclude that Scott is distinguishable." The Court noted that the vehicle in Scott was rammed while it was still actively fleeing, but that Richard's vehicle "was essentially stopped and surrounded by police officers and police cars although some effort to elude capture was still being made." The officers

¹⁶⁴ Schrieber v. Moe, 596 F.3d 323 (6th Cir. 2011).

¹⁶⁵ Bouggess v. Mattingly, 482 F.3d 886 (6th Cir. 2007).

¹⁶⁶ 550 U.S. 372 (2007).

knew that there was a passenger in the vehicle when they fired 15 shots at close range. The Court noted that the defendants “make much of the fact that they felt they were in personal danger” but stated that “the degree to which that was true is not resolved by the video recordings.” The Court agreed this case was more complex than Scott and that the video didn’t provide clear support for either side. The Court made a point that after the Scott decision, it “would appear that an interlocutory appeal of a denial of qualified immunity which makes a good faith Scott claim requires [the court] to review the record” itself.

The Court upheld the dismissal of the qualified immunity motion, allowing the case to go forward. It addressed, in passing, the issues of applying an Arkansas statute to Arkansas officers taking action in Tennessee (and conversely, applying Tennessee law to their actions) and agreed that neither applied to an alleged civil rights violation.

Sutton v. Metro Nashville and Martin, 700 F.3d 865 (6th Cir. Tenn. 2012)

FACTS: On April 21, 2009, Officer Martin (Metro Nashville PD) responded to a grocery store shoplifting. “He ended up in possession of a cell phone that was found in the pocket of a jacket dropped by the alleged perpetrator.” He called a number in the contacts list and the person who answered identified the holder of the phone as Sutton, who worked at “Summit Hospital.” Officer Martin went to the hospital in search of Sutton. Sutton, who was working in the kitchen, was told that “someone was in the cafeteria wanting to see him.” There he was surrounded by Officer Martin and other officers. He was asked about the phone and denied it was his. He produced his own cell phone upon request and Officer Martin “promptly confiscated” it over Sutton’s objections. (He supposedly suggested that Sutton might have two cell phones in order to have a “couple nurses on the side.”) Officer Martin refused to give Sutton the phone to call his wife, or to allow him to “clock out” from his job. The officer told Sutton if he admitted to shoplifting, he would just get a citation, but Sutton denied the theft.

Officer Martin “took Sutton tightly by the arm” and escorted him from the hospital. A Kroger security guard, waiting outside, identified Sutton as the shoplifter. Sutton was arrested and taken back to the grocery store, where he waited in a cruiser while they reviewed the video. Officer Martin expressed uncertainty about whether Sutton was the person in the video, but was urged by the security guard to make the arrest. (The guard later swore out a warrant on Sutton, as well.) Sutton was held until his wife posted bond.

Sutton was acquitted at trial, in June 2009. He filed suit against Officer Martin, the guard, Metro Nashville and Kroger. The Court dismissed most of the charges, upon Officer Martin’s motion, but refused to dismiss Sutton’s claim of an unreasonable search and seizure. The trial court ruled that the officer lacked even reasonable suspicion to detain Sutton, because the person in the contacts list was not necessarily reliable. (The facts are unclear as to how the person he called identified the owner of the phone.)

Officer Martin appealed the denial.

ISSUE: Is it proper to, in effect, arrest someone without probable cause?

HOLDING: No

DISCUSSION: With respect to the initial encounter, at the hospital, Officer Martin claimed it was an investigatory detention. The Court noted that at that point, the “permissible scope of Officer Martin’s initial detention of Sutton was to ascertain his identity and to ask limited questions regarding the cell phone found

at the Kroger.” That did not allow Officer Martin, however, to seize Sutton and forcibly remove him from his workplace – such actions changed the interaction from a Terry investigation to a “Royer-like arrest.”¹⁶⁷ Even though he was identified once he got outside by the security guard, it was improper to, in effect, arrest him to get him outside the hospital.

The Court agreed the seizure was improper and upheld the denial of summary judgment for Officer Martin.

Jones v. City of Cincinnati, 2012 WL 5974432 (6th Cir. Ohio 2012)

FACTS: On November 30, 2003, shortly before 6 a.m., Cincinnati firefighters sought help with a disorderly person in a parking lot. Officers Pike and Osterman arrived, finding Jones “marching, squatting, and shouting profanities outside.” Jones weighed 348 pounds and was 5’11. Pike called in, stating that he “may be violent” and required a mental health response team. He turned on his video system, but some of the view of the camera was obscured by the vehicle. However, it did record Jones punching at Officer Pike, as well as Osterman and Pike tackling Jones. Jones did not comply with orders and struggled as both officers struck him with their batons. At one point, Jones grabbed toward Osterman’s waist and also seized Pike’s baton briefly. More officers arrived and the officers used batons as they tried to handcuff Jones. Within two minutes of the beginning of the encounter, Jones can be heard moaning and he is lying still. As the officers get him handcuffed and roll him over, they are heard on the video calling for the firefighters to come over, but they had already left and had to be summoned back to the scene. The officers can be seen on the video checking his pulse but they noted that he didn’t appear to be breathing. Within two minutes, the fire department arrived and began CPR. Jones was pronounced dead within the hour, and his death attributed to “abnormal cardiac rhythms resulting from a violent struggle and positional asphyxia.”

Jones’s estate filed suit under 42 U.S.C. §1983. The officers requested qualified immunity and were denied. They appealed.

ISSUE: Is the reasonableness of a use of force determined by the precise facts of each case?

HOLDING: Yes

DISCUSSION: The Court examined each of the claims in turn. With respect to the baton use, the court agreed that Jones, a large man, initiated a struggle with the two officers and did not comply with their orders. The Court found it significant that the officers “directed all jabs and strikes to non-critical areas of Jones’ body, such as arms, torso, back, and legs.” The Court noted that “even assuming that Jones started struggling to breathe” while he was being struck, that did not mean the officers’ actions were objectively unreasonable. “Given the “rapidly evolving circumstances,” it would not have been possible for them to know whether he was resisting because he chose not to comply or because he was unable to breathe.” Either way, the officers would be entitled to qualified immunity for an “objectively reasonable mistake as to the amount of force that was necessary.”

The Estate also questioned the refusal of one of the officers to remove Jones’s handcuffs when requested to do so by the firefighter. The Court agreed that although subjective motivations are not relevant in such cases, the officer’s explanation that he did not know if Jones was feigning injury and that putting on the handcuffs was very difficult was persuasive in showing the officer’s objective reasons for the refusal. The

¹⁶⁷ Florida v. Royer, 460 U.S. 491 (1983).

Court noted that no one told the officer that they couldn't do CPR with the handcuffs in place. The Court agreed that the refusal to remove the cuffs was not objectively unreasonable.

The Estate also argued that the officers were deliberately indifferent to Jones's medical needs. The Court noted that within a minute of securing him, they realized he needed to be rolled over onto his back and they did so immediately. They called immediately for medical assistance when they realized the fire department had left and they took action, within their ability to address his medical emergency. The Court agreed that their actions were reasonable.

Finally, the Court found no fault in any of their actions under Ohio law, either. The Court reversed the denial of qualified immunity and remanded the case for an order to that effect.

Hickman (Estate) v. Moore (and others), 2012 WL 4857037 (6th Cir. Tenn. 2012)

FACTS: On February 24, 2008, Officers Craig, Moore, Berkley and Gilmore (Blount County, TN) attempted to lure Hickman from his home in order to arrest him. Craig, in plainclothes, was to convince Hickman to come outside to assist her with a vehicle. During the effort, however, she lost cell phone contact with her fellow deputies. When Hickman began to look under the hood, Deputies, Moore, Gilman and Berkley ran toward him, identifying their agency (Sheriff's Office) and telling him to show his hands. "Instead, Hickman placed his right hand inside his coat pocket and 'brought it up in his jacket' as if he was pointing a gun at Moore." Moore began yelling "gun" as other officers were still yelling for Hickman to show his hands. Berkley racked his shotgun, causing Hickman to turn toward him. Craig drew her weapon and fired at Hickman's back. He was handcuffed after he fell and the deputies asserted they found a weapon at that time. Hickman, who died prior to trial, stated that Craig panicked and "emptied her entire magazine" and that Moore also fired "gratuitously and in reaction" to Craig shooting. Hickman also alleged that before calling for an ambulance, they moved him, entered his residence, and removed weapons. He contended that one of the deputies told Officer Hernandez (Alcoa PD) that Hickman would not take his hands from his pockets and that he was "known to have assault weapons." During a subsequent consent search, deputies found a gun and empty holster, which his wife claimed was not one Hickman would have carried.

Hickman's estate filed suit, making excessive force and related claims under both federal and state law. The District Court gave summary judgment to most of the deputies and Blount County. The Court found enough evidence to question Moore's use of force, however, and denied summary judgment to him.. Hickman appealed the dismissals, and Moore appealed the denial of summary judgment in his favor.

ISSUE: Is summary judgment permitted on a use of force when there are disputed facts?

HOLDING: No

DISCUSSION: The Court began by noting that the first prong in the Saucier test requires identifying the "specific constitutional right allegedly infringed."¹⁶⁸ Hickman alleged excessive force, which must be evaluated under the Fourth Amendment's "objective reasonableness" standard.¹⁶⁹ In a use of force situation, reasonableness is assessed as "judged from the perspective of a reasonable officer on the

¹⁶⁸ Saucier v. Katz, 534 U.S. 194 (2001)

¹⁶⁹ Simmonds v. Genesse Cnty., 682 F.3d 438 (6th Cir. 2012); Graham v. Connor, 490 U.S. 386 (1989).

scene, rather than with the 20/20 vision of hindsight.”¹⁷⁰ In addition, an “officer who has not exerted excessive force “may be responsible for another officer’s use of excessive force if the officer (1) actively participated in the use of excessive force, (2) supervised the officer who used excessive force, or (3) owed the victim a duty of protection against the use of excessive force.”¹⁷¹

First, with respect to Deputy Craig, the Court found no reason to find she’d “fired in panic,” and also, that she “reasonably believed that Hickman had a gun at the time she fired, despite her failure to see a gun, based on her knowledge of his prior threats, her interactions with him up to that point, and hearing Moore yell ‘gun, gun, gun.’” The Court agreed that her decision to shoot was reasonable. The Court agreed that Craig did not know where her fellow officers were precisely located, and noted that she also knew that “(1) Hickman’s wife and adult daughter had warned the officers that Hickman had threatened to use deadly force against them, (2) Hickman was not complying with the officers’ orders to show his hands, and (3) Moore had recently indicated that Hickman had a gun.”

With respect to Berkley and Gilmore, neither fired. Hickman argued that under Claybrook v. Birchwell, however, that both deputies “may be held liable for participating in the events leading up to a police shooting if the police “ultimately brought the parties from stand-off to shoot-out.”¹⁷² The Court easily distinguished Claybrook from the case at bar, however, noting that both identified themselves and did nothing to provoke Hickman’s response. The Court found no dispute that Hickman engaged in “threatening conduct” prior to the shooting. The Court affirmed the summary judgment on their behalf.

With respect to Moore, the Court noted that he apparently shot Hickman after he had “turned away and was heading in the direction of his house.” Because of the dispute, the Court refused to consider Moore’s appeal.

With respect to claims against Sheriff Berrong and Blount County, the Court reviewed the Sheriff’s deadly force policy. The Court found it to satisfactorily meet the Garner ¹⁷³ standard and as such, was constitutional. The Court noted that a “handful of isolated excessive force complaints from the past did not create a ‘pattern or practice’ of condoning such activity, particularly since the county investigated and addressed each complaint.”

In conclusion, the Court noted that the only question, with respect to Craig, was whether her “prior knowledge and perception of events would give a reasonable officer probable cause to discharge her weapon.” The court upheld all of the decisions of the District Court.

Scozzari v. McGraw and Miedzianowski, 2012 WL 4039753 (6th Cir. 2012)

FACTS: Scozzari, who suffered from schizophrenia, lived at a motel in Clare, Michigan. On September 18, 2007, at about 2300, officers were called to the area because of shots fired near the motel. Chief Miedzianowski arrived, followed by Officer McGraw. Chief Miedzianowski saw Scozzari standing 10-15 feet away, carrying a stick. It told Scozzari to drop the stick, to which Scozzari replied in the obscene negative, kept walking and “drew the stick back.” (Other witnesses testified that Scozzari said nothing.)

¹⁷⁰ Graham, supra.

¹⁷¹ Bletz v. Gribble, 641 F.3d 743 (6th Cir. 2011).

¹⁷² 274 F.3d 1098 (6th Cir. 2001).

¹⁷³ 471 U.S. 1 (1985).

The Chief ran behind a truck and yelled at Scozzari to drop the stick – he then drew his OC. Scozzari allegedly lowered the stick, but did not drop it and moved his other hand to his waistband. The Chief, believing he saw a knife there, claimed he deployed his OC, although Scozzari did not respond. (Witnesses claimed they did not smell OC it, either.) The Chief drew his weapon and Scozzari retreated into his motel room. When McGraw arrived, the Chief briefed him. They pounded on the door, with a Taser poised. McGraw kicked the door. Scozzari opened the door and “according to McGraw, had weapons in his hands.” Scozzari was shot and killed.

Scozzari's Estate filed suit, against the two officers, under 42 U.S.C. §1983, claiming excessive force. The trial court found that Scozzari was never actually seized, because he never complied. The Court dismissed the claims and the Estate appealed.

ISSUE: Is a subject who does not follow an officer's command to stop as yet seized?

HOLDING: No

DISCUSSION: The Court agreed that Scozzari was not seized in that he never submitted to any of Miedzianowski's demands. The Court noted that “walking away from a police officer when repeatedly asked to put down a stick is not submission to authority.” The Court agreed, however, that blocking a door to prevent a suspect from exiting is a seizure, but again noted there was no finding that he actually acceded to the officers' authority – all he did was open the door. The Court agreed that there was insufficient allegations in the complaint to conclude that he acceded to their demands. Specifically, the complaint failed to allege what happened after Scozzari opened the door. The Court upheld the dismissal of the illegal detention and unreasonable seizure claims.

The Court also upheld the dismissal of claims related to the use of the pepper spray, noting that the complaint specifically said he was not affected by it at all. The Court upheld the dismissal of the claims against the officers.

Malory v. Whiting, Gentilia and City of Ferndale, MI, 2012 WL 2874033 (6th Cir. 2012)

FACTS: Malory was driving in Ferndale when he was stopped for a traffic offense. The officers learned he did not have a valid OL so he was arrested. At the booking counter, Officer Gentilia was entering in information while Lt. Whiting was examining Malory's wallet. He began to remove items and toss them to the counter; Malory objected. Malory initialed the property form and Whiting told him to sign his whole name. Malory objected and then signed an X. Whiting pointed out he'd signed two cards in his wallet and then cut up those two cards.

Malory was then ordered by Whiting to strip for a search. Malory objected to taking off all of his clothing since a female officer was in the area. He took off some items of clothing, draping his belt over his shoulder. Whiting became angry and allegedly assaulted Malory, holding his hands behind his back and yanking his feet from under him. He then “drove” his knee into Malory's head. Gentilia allegedly stood on his wrist (extended for handcuffing) and punched him in the ribs as other officers pulled at him. They cut off some of his clothing. He asked for medical care and a phone call but was denied.

He was released on bond the next day and sought medical treatment. He filed suit for excessive force under 42 U.S.C. §1983. The officers moved for summary judgment, which was partially granted; the court

denied summary judgment with respect to Whiting and Gentilia. The officers appealed. (Malory also appealed with respect to the dismissal of some claims.)

ISSUE: Is using a great deal of force against an argumentative, but compliant subject, permitted?

HOLDING: No

DISCUSSION: The Court noted that in their answer, the officers ignored the “decidedly non-violent nature of [Malory’s] offense and his compliant conduct when he was transported.” He may have acted belligerently and that justified, to a degree, his “violent restraint.” But, the Court noted, just because he was argumentative, it was unnecessary to thrust him into the counter. The video of the encounter did not support the use of force and did not indicate that Malory was being aggressive in any way. The Court look askance at the claim that when Malory draped his belt over his shoulder, while undressing, that he was “taking an attack stance.” While on the ground, the Court found nothing in the recording supported the officers’ use of force against Malory.

The Court noted that the law has long been established that a suspect has a right to be free from excessive force. Malory was subdued and presented no danger to the officers when they used violent physical force against him. Malory may have been stubborn, but their response was excessive.

The Court upheld the denial of the motion.

Cutlip (Estate) v. City of Toledo, 2012 WL 2580818 (6th Cir. 2012)

FACTS: On May 27, 2007, Rocky Cutlip “began to display erratic and paranoid behavior. At some point, the next day, he took a high dosage of Adderall. On May 29, at about 0230, he called 911, claiming that officers were outside with federal warrants.¹⁷⁴ At the time, Rocky was a police officer, apparently in another jurisdiction. Dispatch sent Toledo police to the home. They spoke to Webb, Cutlip’s fiancée, who told them what had happened. Cutlip appeared inside the house, at the top of the stairway. The officers told him to come talk to them, but instead, he “grabbed a shotgun and pointed it at his head,” and retreated into a bedroom. After futile attempts to get him to come outside, they called for a negotiator.

Officers Gillen and Korsog arrived shortly. As Officer Gillen talked to Rocky, other officers were getting the children out and doing interviews to try to understand the situation. Learning that he was diabetic, they contacted the fire department for advice, and at their suggestion, gave him a candy bar and a drink. Officer Gillen talked to Rocky at length, but had trouble because “Rocky would fluctuate between calmness and excitement.” When he asked to speak to his father, and was told he needed to put the shotgun down first, he became agitated. Fearing that he was preparing to commit suicide, they initiated the contingency plan. SWAT approached and activated a flash bang outside the house, hoping to distract him without causing him to pull the trigger. The team hoped to time it when he had the shotgun pointed away from his face. The point officer on the SWAT team was also loaded with bean bag rounds. At about 0438 however, they detonated the flash bang, and sadly Cutlip committed suicide.

Cutlip’s estate filed suit against the City of Toledo, under 42 U.S.C. §1983, arguing that the City was “was deliberately indifferent to the safety of its citizens by failing to properly train and supervise its police force in

¹⁷⁴ This was not true.

how to deal with barricaded suspects who are suicidal or mentally ill, and that this lack of training and supervision was directly responsible for the death of” Cutlip. The City moved for summary judgment under DeShaney, which was granted by the Court, finding that neither of the parameters of that case were satisfied.¹⁷⁵ In addition, the court “held that the unavoidable liability doctrine barred liability because if the police officers had done nothing,” they would still have faced a potential lawsuit.

The Estate appealed.

ISSUE: Is there some duty to attempt to keep a mentally ill subject from injuring themselves?

HOLDING: Yes

DISCUSSION: The Court looked to Youngberg v. Romeo¹⁷⁶ in acknowledging that mental patients may be entitled to a duty to keep them from harming themselves. However, In this case, “Rocky was not incarcerated, institutionalized, or put under a similar restraint at the time that he killed himself—in fact, he had not even been arrested.” He could have put down the gun and walked out at any time, as the officers pleaded with him to do. As such, he was not in custody or even seized by the officers. The Court looked to the other DeShaney exception, the “state-created danger” exception, and noted that they had never found liability when the subject committed suicide when the police were not directly responsible. The municipality did not create the “self-destructive impulse.” When a “person makes a free and affirmative choice to end his life, the responsibility for his actions remains with him.” However, in this case, there is some question “about whether Rocky intentionally committed suicide or whether he involuntarily pulled the trigger after the police detonated the flash-bang device.” However, “crucially, the police officers’ affirmative acts must be made with deliberate indifference” which this Circuit has “equated with subjective recklessness.” The Court agreed that “the accepted facts simply do not show that the police officers acted with a callous indifference towards Rocky’s rights.”

The Court noted that they had no reason to know how he would react to their arrival pursuant to the 911 call, and that “expecting the police simply to leave after witnessing Rocky’s bizarre behavior, as Cutlip appears to argue for, is neither reasonable nor desirable.” They chose the flash bang method “only after they believed they were out of other options.” They had every intention of waiting as long as it took and were taking affirmative action to deal with potential medical issues. They knew a forced entry would be dangerous, for themselves as well as Rocky, but “far from showing a callous disregard for Rocky’s life, the police tried to modify their traditional forced-entry techniques to reduce the risk of harm to Rocky.” They were aware that he might pull the trigger, attempted to minimize that risk and “were sadly unsuccessful.”

The Court addressed the expert witness put forth by the Estate and noted that at this stage of the proceedings, the Court is “not required to accept expert opinions that lack a basis in fact.”

The Court found that Toledo did not violate Rocky’s constitutional rights and as such, they were not liable. The Court affirmed the summary judgment and dismissal of the case.

¹⁷⁵ DeShaney v. Winnebago County Department of Social Services, 489 U.S. 189 (1989).

¹⁷⁶ 457 U.S. 307 (1982).

Saad (Zihra and Mahmoud) v. Krause, 472 Fed.Appx. 403, 2012 WL 2896669 (6th Cir. 2012)

FACTS: On March 10, 2010, Officer Krause (Dearborn Heights MI PD) tried to pull over Joseph Saad for a traffic violation. When Saad “appeared to ignore” Krause’s lights and pulled into a nearby driveway, Krause followed him. Saad fled into the house, with Krause following to the porch. There, he encountered Zihra Saad (age 78), Joseph’s mother, who refused to allow Krause to enter “despite his allegedly point[ing] a firearm at her.” Other officers went into the back, let Krause in the front door, and Joseph was arrested.

Zihra Saad filed suit against Krause, under 42 U.S.C. §1983, arguing that his pointing the gun at her was excessive force. Krause argued he’d not been pointing it at her, but only at the house and demanded summary judgment. The trial court denied his motion and Krause appealed.

ISSUE: Is pointing a gun at a subject not suspected of a crime excessive force?

HOLDING: Yes

DISCUSSION: The Court agreed that it was possible, under the facts stated, for a jury to find that the action of which Krause was accused was excessive force and denied his motion for qualified immunity.

Marcilis v. Township of Redford, 693 F.3d 589 (6th Cir. 2012)

FACTS: On May 2, 2007, officer executed a search pursuant to a warrant of two houses in Detroit. Various members of the Marcilis family lived in the two homes. A CI had identified the homes as being part of a drug sale and possession operation. Officer Jones (Redford Township PD) had also provided information corroborating the CI.

DEA and Redford Township officers did the searches. The occupants of the first house were held on the floor at gunpoint; they were eventually moved in handcuffs to the cruiser. They were then moved to the police station, where they were held for hours, perhaps days.¹⁷⁷ A number of items and a large amount of cash were seized, although most were eventually returned. Although Russell Marcilis II was charged, his case was dismissed upon the motion of the U.S. Government.

At the second home, again everyone, Marcilis I, Marie (his wife) and Jasmine, another family member, were ordered to the floor at gunpoint. Allegedly, Marcilis and Marie were manhandled and prescription medication destroyed. The officers seized a number of items, including an “empty suspected cocaine wrapper” and a bag containing a white substance. Again, items were allegedly not returned, including a deed to the house, birth certificates, other documents and photos.

Both couples (and Jasmine) filed suit against the officers and the DEA agents. Eventually all the claims were dismissed except a knock and announce claim, and the Marcilises appealed.

ISSUE: May suspect items, not specifically named in a warrant, be seized?

HOLDING: Yes

¹⁷⁷ The officers disputed that they held the male subject for three days.

DISCUSSION: The Court first considered the pleadings, which addressed the actions of the officers and the agents collectively. The Court agreed that it was appropriate to dismiss the two DEA agents since the Marcilises failed to plead what they each did, specifically.

Looking to the Redford Township officers, the Court examined the excessive force claim. The Court noted that the use of such force “in the execution of a search warrant constitutes a Fourth Amendment violation”¹⁷⁸ The Marcilises gave a number of examples alleging such force: “(1) the police officers threw Marie onto a couch, causing bruises; (2) the police officers threatened to hit Marie in the face with a gun; (3) the police officers pushed Marcilis I ‘violently’ to the floor despite the fact that he was visibly bandaged; (4) the police officers pointed guns at Marcilis I, Marie, and Jasmine for thirty minutes; (5) the police officers handcuffed Felicia and Marcilis II for ten minutes; and (6) the federal agents and police officers wore combat gear or masks.” The Officers argued that even if they did such things, that “the law was not clearly established such that the police officers would have known these specific actions were unconstitutional under the circumstances presented here.” The Court looked to Michigan v. Summers¹⁷⁹ and agreed it was not improper to detain individuals in handcuffs and display firearms where the officers have a justifiable fear of personal safety.” The Court agreed that the use of handcuffs did not mean that the officers’ actions were improper.

With respect to the search, the Court agreed there was sufficient probable cause to support the warrant and that the information was not stale. In fact, a controlled buy had been made in one of the homes about 35 hours before the affidavit was presented. Ongoing drug activity had been documented over the months leading up to the search. With respect to the items seized during the search, the Court noted that the warrant authorized the seizure of:

All suspected controlled substances, . . . all monies and valuables derived from the sale of controlled substances and any items obtained through the sale of controlled substances. All firearms and items establishing ownership, control, occupancy or possession of the above-described place. All photographs, photo albums and video cassettes that depict controlled substances and/or proceeds from controlled substances. All bank records, bank statements and safety deposit keys.

Some of the items complained of clearly fell within the scope of the affidavit, including money, jewelry and photographs.¹⁸⁰ In addition, a search does not become invalid simply because items not covered by the warrant are seized, but only when “the searching officers demonstrate an flagrant disregard for the limitations of a search warrant.”¹⁸¹ The Court agreed that the officers may have been mistaken about some of the items, but did not find a general disregard.

With respect to the detention during the searches, the Court noted that the warrants both authorized a search for weapons. In one home, the occupants were detained, but not handcuffed, for approximately 90 minutes. However, in the other house, the occupants were removed completely from the home and taken to the station, and that would require probable cause to support “their continued detention.” At the time

¹⁷⁸ Grawey v. Drury, 567 F.3d 302 (6th Cir. 2009).

¹⁷⁹ 452 U.S. 692 (1981); See also Ingram v. City of Columbus, 185 F.3d 579 (6th Cir. 1999).

¹⁸⁰ U.S. v. Blair, 214 F.3d 690 (6th Cir. 2000)

¹⁸¹ U.S. v. Lambert, 771 F.2d 83 (6th Cir. 1985).

they did so, the officers had already located green leafy material, drug paraphernalia and a large sum of money, enough to justify an arrest.

Finally, the Court considered the claim against Redford Township itself. The Marcilises pointed to the following to support its claim that the PD did not adequately train its officers: “(1) Officer Jones could not remember when he last received training about the use of force; (2) Officer Woodall testified that his only use-of-force training took place during his time at the police academy; (3) Officer Jones testified that he received only on-the-job training about how to execute a search warrant; and (4) Officer Woodall could not remember when he last received training on arrests and search warrants.” They also alleged that the PD “neither conducts performance evaluations of officers nor has a system in place to review or monitor its officers.” The Court, however, noted that they had “not come forward with evidence of deliberate indifference, the second prong of a failure to train or supervise claim.” There was nothing in the record that indicated “evidence of any history of abuse or any events that would have put Redford Township on notice that officer training regarding the use of force or search warrant execution was “deficient [or] likely to cause injury.”

The decision of the District Court to dismiss the action in toto was affirmed.

King (Estate Administrator) v. Taylor, 694 F.3d 650 (6th Cir. 2012)

FACTS: On November 25, 2009, the Boyle County Sheriff’s Office received an arrest warrant and EPO for service on King. Deputy Adams was given the task and was cautioned about King’s behavior the week before. He was ordered to get KSP assistance to serve the warrant. Adams also knew that King had shot at a KSP trooper years before and had been arrested for that crime. He recruited Deputy Isaacs to help and Deputy Isaacs enlisted the aid of Trooper Taylor (KSP).

Taylor made the following comments to dispatch:

“So, my thought . . . was, there shouldn’t be no [Emergency Protective Order] on that guy. And [Frank Thornberry] said, well, what do you mean? I said, you don’t serve an EPO on dead people. You know?”; “either [King will] be home (a); (b) he’ll be home and come out shooting, you know; or (c) he’ll come out, and—yeah, and one of us will have to kill—shoot him.”; “If I did [shoot him], I don’t care to be off. I’ll be off until after the first of the year.”; and “Well, if you don’t get a hold of me [later tonight], then it may be I’m busy shooting bullets or something.”

Trooper Taylor, along with five deputies, went to the home. Adams knocked and got no answer. Taylor covered Isaacs when Isaacs went to the back door. Inside, he saw King laying on the couch, in his underwear. Adams, Taylor and Isaacs gathered on the back porch and the two deputies approached a window. (Taylor held a rifle, in cover.) King sat up at their knock on the glass. He gave them a contemptuous look and turned, and Taylor “saw King’s right hand come up with a gun and point it directly at the officers.” Taylor fired, striking King in the face, killing him instantly.

King’s estate administrator filed suit against Taylor and the Commonwealth. They agreed to dismiss the official claims against Taylor and the Commonwealth. Taylor claimed in his answer that he had not been properly served, as an individual, but did not move to dismiss the action on those grounds for almost a year. The Court ruled in Taylor’s favor and the Estate appealed.

ISSUE: Must an officer sued in their personal capacity be personally served?

HOLDING: Yes

DISCUSSION: With respect to the service of process, Taylor was initially sued in both his official and individual capacity. A summons was sent to him in care of the Legal Counsel for KSP and was duly accepted. However, that was insufficient to serve him in his personal capacity. The fact that he knew he'd been sued was immaterial. Taylor preserved his defense in including the issue in his answer. Had counsel studied the response made by Taylor, he would have recognized that his service effort was unsuccessful.

However, Taylor forfeited the right to raise the defense "through his extensive participation in the litigation." Taylor "was completely silent" until they attempted summary judgment. His "voluntary, active, and extensive participation in the litigation" gave them reason to believe he would be defending the suit on the merit, not on procedure. His KSP counsel agreed that she did not bring the motion concerning the service issue earlier in order to let the statute of limitations expire.

The Court turned to the merits of the case. The Court agreed that looking at the facts from King's point of view, concluding that it was arguable "whether Taylor reasonably believed that King posed a threat of serious physical harm to Taylor or the other officers." All three officers stated that King was looking at them through the glass, and was seated, but the forensic evidence did not support the positions claimed by the three, and in fact, was consistent with King actually lying on the couch at the time he was shot. As such, "what exactly happened just before King was shot is a question for the jury" not the judge. The Court agreed that summary judgment under KRS 503 was also not appropriate at this time.

The Court reversed the trial court's ruling and remanded the case.

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."¹⁸²

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."

¹⁸² U.S. v. Foster, 376 F.3d 577 (6th Cir. 2004).

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.”¹⁸³ 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.’”¹⁸⁴

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.

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.

¹⁸³ Graham v. Connor, 490 U.S. 386 (1989).

¹⁸⁴ 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 Court agreed that there was an issue of fact as to whether the officers “acted with deliberate indifference to Scozzari’s pressing medical needs.”¹⁸⁵ The Court upheld the denial of summary judgment to the officers.

NOTE: *This case is listed twice in the Update, due to the importance of both issues addressed.*

42 U.S.C. §1983 – USE OF FORCE - TASER

Austin v. Redford Township PD, 690 F.3d 490 (6th Cir. 2012)

FACTS: On August 5, 2005, Officer Riley (Redford Township PD) tried to stop Austin for speeding. Austin fled at a high rate of speed. When he finally reached a dead end, he “put his car in reverse and it struck Riley’s vehicle.” Austin pulled into a driveway with Riley right behind him.¹⁸⁶ Additional officers arrived, including Officers Paull and Morgan. Austin tossed a handgun (that he legally possessed) out the window, in a holster. He then got out.

Austin stood with his hands up and palms open, talking to Officer Riley. Officer Paull’s K-9 approached Austin, who stepped backward and lowered his hands. Officer Riley then fired his Taser at Austin and he fell back into the car. On the video, “Paull is seen pointing at Austin, instructing his dog to attack Austin.” Paull then pulled back his dog and removed Austin from the car, during which time Officer Riley Tased him again. Austin was handcuffed. At some point, Officer Morgan also used a Taser in drive stun mode when he alleged Austin resisted being placed in the cruiser.

Austin filed suit against the officers for excessive force under 42 U.S.C. §1983. The Court ruled in favor of Riley in his initial deployment of the Taser, but ruled against the officers with respect to everything else. The officers appealed.

ISSUE: May a Taser be used on a non-resisting subject?

HOLDING: No

DISCUSSION: Austin argued that he did, in fact, comply with the officer’s orders after the chase was over and took no aggressive actions. The District Court ruled that there was a factual dispute as to whether Austin posed any “significant threat” to the officers once he was secured.

Taking each instance in turn, the officers argued that when Austin was removed from the car, he was clearly still resisting and as such, Taser use was appropriate. This was after, however, the officers had reported to dispatch that he was “now secured.” As such, relying on precedent with respect to the use of force on subdued subjects was appropriate and the Court upheld that decision. With respect to the use of the police K-9, the Court noted that the video showed no movement that would trigger the use of that degree of force. The Court upheld the denial of qualified immunity on that instance, as well.

With respect to Morgan using his Taser on Austin, who was in the back seat of the cruiser at the time, the Court noted that Morgan could be seen “leading Austin back to his patrol car without incident or resistance.”

¹⁸⁵ Estate of Owensby v. City of Cincinnati, 414 F.3d 596 (6th Cir. 2005).

¹⁸⁶ The opinion noted that there was video and audio capturing parts of the encounter.

Austin was arguably a “disoriented and unresisting subject.” The trial court “[f]ound that the thirty seconds between Morgan’s first order to Austin to put his feet in the police car and Morgan’s use of the Taser did not provide Austin with adequate time to comply with the order.” Morgan argued that using his Taser on a noncompliant (as opposed to actively resisting) subject did not violate clearly established law. The Court reviewed existing case law and agreed that it had been previously established as unlawful to “use significant force on a restrained subject, even if some level of passive resistance is presented.”¹⁸⁷

The Court noted that at the time he was Tased by Morgan, Austin “was disoriented from at least two prior Taser deployments and at least one attack by a police dog; he was experiencing and complaining of shortness of breath; he was already placed in the patrol car leaving only his feet outside; and he did not have time to comply with Morgan’s order before Morgan used his Taser.” There were no allegations that he was “belligerent, threatening or assaulting officers, or attempting to escape.” The Court looked to Michaels v. City of Vermillion to find that “the use of non-lethal, temporarily incapacitating force on a handcuffed suspect who no longer poses a safety threat, flight risk, and /or is not resisting arrest constitutes excessive force.”¹⁸⁸

The Court affirmed the denial of qualified immunity on the contested allegations.

Hagens v. Franklin County (OH) Sheriff’s Office, 695 F.3d 505 (6th Circ. 2012)

FACTS: At about 0530, on May 13, 2007, Hagens “became paranoid and locked himself in the bathroom, telling his girlfriend that ‘people were after him.’” He’d spent the night smoking crack cocaine. He broke out the window, climbed outside and “began running around his yard screaming.” A neighbor found Hagens’ “kicking chairs around his deck and jumping on top of cars in his driveway.”

Officer Frantz arrived in response to the call, and “a shirtless Hagens came running toward him.” Hagens bolted to the backyard and the officer gave chase. The officer tried OC, to no effect. “Hagens raced back to the front of the house,” encountering Officer Hughes. Hagens ran to the cruiser and “began yanking on the locked driver’s side door handle.” Officer Hughes grabbed him and wrestled him to the ground, with Officer Frantz assisting. Hagens resisted handcuffing, lying down on the ground and locking “his arms tightly under his body, kicking his feet and continuing to scream.” Officer Ratcliff applied his Taser in drive stun, but “the shock did not faze Hagens,” who reached back and tried to grab the Taser instead. Ratcliff fired two probes, which missed, and went back to using the Taser in drive stun several times. Realizing they were not having any effect, the officers were finally able to get Hagens secured with handcuffs and leg shackles. Although alert when EMS arrived, “Hagens lost consciousness and stopped breathing about ten minutes later.” He was resuscitated, but died three days later. The cause of death was attributed to the cocaine starving his brain of oxygen and other medical contributing factors.

Hagens’ estate filed suit against Officer Ratcliff and the Sheriff’s Office in state court and the case was removed to federal court. Officer Ratcliff moved for summary judgment, which was denied. Ratcliff appealed.

ISSUE: Is it permissible to use a Taser on an actively resisting subject?

¹⁸⁷ Meirthew v. Amore, 417 F. App’x 494 (6th Cir. 2011).

¹⁸⁸ 539 F.Supp.2d 975 (N.D. Ohio 2008).

HOLDING: Yes

DISCUSSION: The Court began:

Defined at the appropriate level of generality – a reasonably particularized one – the question at hand is whether it was clearly established that in May 2007 that using a Taser repeatedly on a suspect actively resisting arrest and refusing to be handcuffed amounted to excessive force.

The Court conclude that no, it had not been and that in fact, it still does not violate clearly established precedent in the circuit to use a Taser in some circumstances. The court agreed that “a suspect’s active resistance ... marks the line between reasonable and unreasonable tasing in other circuits,” as well. The Court noted that the line may not hold, ultimately, because a Taser “remains a relatively new technology.” However, it can be said that Tasers carry less risk of injury and that most people suffer little to no injury from their use. In this case, the reality was that “Hagans was out of control and continued forcefully to resist arrest.” Even though the use of the Taser might have contributed to his death, that did not mean that the officer violated the Fourth Amendment.

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

Helfrich v. Lakeside Park Police Department and Rodriguez, 2012 WL 3740689 (6th Cir. 2012)

FACTS: Helfrich attended a wedding on August 8, 2008 in Northern Kentucky. Alcoholic beverages flowed freely at the reception and Helfrich, for whom transportation was assured, had at least 8 drinks. At about 2:30 a.m., he went to the hotel pool area where a number of people had gathered, including others with the reception. At about that time, Officer Rodriguez (Lakeside Park/Crestview Hills PD) was dispatched to a disorderly persons call at the hotel. He found about 50 people in the pool area, some intoxicated. He ordered the group to go to their rooms but only a few complied. Rodriguez asked the crowd “Who needs to be made an example of?” Rodriguez heard someone behind him say that they would be the “example” – when he turned, he saw Helfrich. Helfrich refused a direct order to go to his room. Rodriguez arrested him for alcohol intoxication and disorderly conduct. They struggled and the crowd became involved, so Rodriguez called for backup. The bride intervened and Rodriguez, believing the “situation was escalating and getting dangerous,” drew his Taser. He ordered Helfrich to the ground. Sgt. Loos arrived and distracted the crowd. Rodriguez got the handcuffs on Helfrich, who “threatened to ‘kick his ass’” and led him outside. Helfrich calmed down and complained about the cuffs. He ignored orders to get into the car, so Rodriguez pushed him inside. “When Helfrich sat down, he kicked Rodriguez in the knee and, despite a warning from Rodriguez to stop it, kicked him again. So Rodriguez tased Helfrich on his shoulder and placed him in the car.”

Officers Humphrey and Lilich also responded and assisted with part of the arrest. Pursuant to policy, after a Taser use, EMS responded, but Helfrich refused treatment. Witnesses were interviewed while Helfrich was taken to jail. There was confusion about the booking form, which indicated that someone had said the inmate did not engage in violent behavior. Rodriguez had a contusion on his knee from being kicked but that evidence was not apparently actually admitted at trial, although it was mentioned. Helfrich argued that he was simply questioning why he was being arrested and was not violent. He was charged with Assault, Disorderly Conduct, Alcohol Intoxication and Resisting Arrest. He ultimately pled guilty to only Disorderly Conduct and everything else was dismissed/merged.

Helfrich filed suit under 42 U.S.C. §1983. The District Court gave summary judgment to the defendants, leaving only the excessive-force, assault and battery claims against Rodriguez to be tried. Before trial, Rodriguez objected to the admission of the plea bargain in the criminal trial, and the court agreed, stating it could only be used in impeachment. Helfrich's attorney did mention it during the opening statement, but because Rodriguez did not mention it during testimony, Helfrich could not discuss it either. The Court also allowed, over objection, admission of evidence of Helfrich's prior convictions for DUI and Disorderly Conduct. The Court again had agreed it could not be discussed unless Helfrich put his "good character" before the jury, so when he did so, the prosecution was allowed to put his arrests on the record. The Court also refused to permit the testimony of another individual, Clark, who had been Tased by Rodriguez just two night before.

The jury found in favor of Rodriguez on all claims and Helfrich appealed.

ISSUE: Is testimony that an officer had used a Taser in another arrest permissible evidence?

HOLDING: No

DISCUSSION: The Court looked first at the exclusion of Clark's testimony, because it was "impermissible propensity reasoning" – that because Clark was allegedly improperly tased, that Helfrich was as well. The Court simply found no connection between the two. The Court noted that such considerations, as to intent to commit excessive force, must be objective, even though Kentucky law (KRS 503.090) suggests subjectivity. The court noted that in Haugh v. City of Louisville, the "the court applied a standard which appears to be objective: an officer "is entitled to use such force as is necessary, or reasonably appears so, to take a suspect into custody."¹⁸⁹ The Court agreed that it was proper to exclude Clark's testimony, particularly in light of a report that justified Clark's Tasing.

With respect to Helfrich's prior arrest, the Court noted that "when a party offers evidence of his good character, he opens the door for the opponent to admit rebuttal evidence of his prior bad acts." As such, the evidence was properly admitted.

The Court affirmed the decision of the District Court.

Burden v. Paul, 2012 WL 3216453 (6th Cir. 2012)

FACTS: On July 5, 2008, Burden and her daughter (Lacy) attended a Fourth of July event in Independence. Adults who wished to drink alcoholic beverages were provided a distinctive wristband and the drinks were in "visually distinctive cups." Thompson, the manager of the location, saw the underage daughter come from the restroom holding two of those cups. After Burden came out of the restroom, Lacy handed her one of the cups. Burden offered Lacy a sip of her drink. Thompson told her supervisor, Jansen, and Jansen further observed that he thought Lacy was staggering. He called the police.

Officer Paul and other officers of the Independence PD arrived. They approached Lacy and tried to escort her out. She resisted and struggled. They were finally able to get her outside and up against a wall. By the time Burden caught up with them, Lacy was on the ground. The officers refused to speak with Burden or to allow her to speak with Lacy. Lacy was arrested and eventually pled guilty to alcohol intoxication.

¹⁸⁹ Haugh v. City of Louisville, 242 S.W.3d 683 (Ky. App. 2007).

Officer Paul returned to the bar later to thank them for cooperating. He spoke to Burden, who was there, and also to Thompson, who told him what had happened in the restroom. As a result, he spoke to the county attorney and requested a summons, if appropriate, for a violation of KRS 530.070.¹⁹⁰ The County Attorney agreed and the summons was filed. Burden appeared and argued that the statute exempts a minor's parent from liability.¹⁹¹ The charge was then changed to KRS 244.085(3), "which prohibits a person from aiding someone under the age of 21 with the purchase or service of an alcoholic beverage." At trial, the Court returned a directed verdict in Burden's favor. Burden filed suit under 42 U.S.C. §1983, arguing unlawful arrest and malicious prosecution against the officer. The District Court ruled in the officer's favor and Burden appealed.

ISSUE: Once an arrest is made, is an officer obliged to look for additional exculpatory evidence?

HOLDING: No

DISCUSSION: The Court noted that "an arrest is invalid only if the plaintiff proves that the officer could not have reasonably believed that the arrest was lawful in light of the information known to the officer at the time of the arrest."¹⁹² In making that decision, the "officer must consider both exculpatory and inculpatory information in deciding whether probable cause exists," but once the arrest is made, there was no need to continue to search for exculpatory evidence. The court looked to Avery v. King¹⁹³ and agreed that although the officer was incorrect in his initial choice of statutes, that he did have probable cause to arrest her for a related offense. The court noted that the officer was not sure about the initial charge and he left it to the County Attorney to make the decision on charging.

Further, the Court agreed that changing the charge did not constitute malicious prosecution as it was, in fact, a valid charge. There was no indication that the officer acted out of any malice in suggesting charges. Further, the Court disagreed that there was any indication that the charges were placed in retaliation for a lawsuit in 2007 filed by Burden, that lawsuit was eventually dismissed. (The officer knew of the lawsuit, but was not involved in it.)

The Court upheld the dismissal of the action.

Caie v. West Bloomfield Township (Michigan) 2012 WL 2301648 (6th Cir. 2012)

FACTS: On August 2, 2009, West Bloomfield PD responded to a welfare check on Caie, age 19, who was "depressed, intoxicated and suicidal." He had attempted suicide in the past. He had drunk three bottles of wine and had snorted Paxil. He called his brother, Scott, and told him he was going to row out into the lake and drown himself.

Scott and Brandon (a friend) were able to calm Caie, initially. Scott and their father stayed with him, but Caie was able to escape through a window. They called the police for help. Officer Daily and Sgt. Tilli arrived. They found Scott and his father in a paddle boat on the lake, along with an empty rowboat. They

¹⁹⁰ Unlawful transaction with a minor in the third degree.

¹⁹¹ The original charged statute actually provides an exception when a parent provides an alcoholic beverage to their own child.

¹⁹² Green v. Throckmorton, 681 F.3d 853 (6th Cir. 2012); see Logsdon v. Hains, 492 F.3d 334 (6th Cir. 2007).

¹⁹³ 110 F.3d 12 (6th Cir. 1997).

called that Caie's cell phone and shoes were in the boat. Officer Dailey spotted someone in the water and called for the person to come to her. Caie was uncooperative, at one point, musing aloud whether he should fight so that the officers would have a reason to kill him. He did eventually emerge, however, but continued to "behave erratically." Officer Koziarski and the fire department arrived, but Caie would still not calm down or go voluntarily with the EMS crew. Sgt. Tilli signaled that they would have to take him into custody to be transported. Sgt. Tilli unholstered his Taser and fired when Caie ran, but he missed him. Officer tackled Caie, but could not get his arms out for handcuffing. Sgt. Tilli then used his Taser in drive-stun mode and Caie was subdued and transported.

Caie filed suit under 42 U.S.C. §1983, arguing that excessive force was used against him. Ultimately, his entire claim was dismissed and he appealed.

ISSUE: May a Taser be used on an actively-resisting mentally ill subject?

HOLDING: Yes

DISCUSSION: The Court noted that the reasonableness of a use of force could only be judged from the officers' perspectives at the scene. The Court agreed that using a Taser on a non-resistant person was unreasonable, but in this case, Caie was still actively resisting apprehension. He was not compliant with their attempt to put him into custody, and he was intoxicated, suicidal, threatening, volatile, unstable and uncooperative. He was actively attempting to provoke the officers into using deadly force. Even though in this case they were not attempting arrest, Caie was a threat to the safety of the officers and others. The single use of the Taser in drive stun served the purpose of getting him into control.

The Court upheld the dismissal of the case.

Dixon v. County of Roscommon, 2012 WL 1522320 (6th Cir. 2012)

FACTS: On December 21, 2007, Dixon broke down in a borrowed van. He stopped in front of a driveway, prompting a call to law enforcement. Deputies Quintana and Kory (Roscommon County, MI, SO) arrived. Dixon could not provide ID and appeared to be under the influence of drugs. He said he was with the van's owner, Dean, who was not present, however. He provided a false name, for someone who turned out to have a suspended OL. Sgt. Tatrai and Deputy Smith arrived. Dixon was told to get out, but instead, he rolled up the window and locked the doors. He began smoking a marijuana pipe. The deputies broke the window with a flashlight, "hit Dixon on the back of the head, pulled him through the broken window, forced him to the ground, and placed him in handcuffs." He was charged and eventually pleaded to resisting and operating on a suspended OL.

Dixon then filed suit under 42 U.S.C. §1983, for excessive force and related state claims. He claimed that in addition to the above, he was "kneed" in the face and choked. The District Court found most of the force reasonable and supported by video, but ruled that there was an issue with the alleged choking, "which appeared to have occurred after Dixon had been subdued." The deputies appealed that ruling.

ISSUE: Must a disputed claim go forward in a §1983 lawsuit?

HOLDING: Yes

DISCUSSION: The deputies argued that Dixon failed to show an issue “because the video recording does not support his allegations that he was choked and that, at the time that he [claimed] he was choked, he was not putting forth any resistance.” The Court agreed, however, that the video “neither proves or disproves” that claim.

The Court upheld the trial court’s decision.

Landis v. Galarneau, 2012 WL 2044406 (6th Cir. 2012)

FACTS: On November 25, 2004, Michigan State Police troopers responded to a vehicle blocking a major road. They found Keiser trying to get into another vehicle and ordered him to stop. However, he fled and eventually Trooper Cardoza tackled him. Trooper Galarneau arrived and tried to assist, but Keiser tried to choke him. Galarneau used OC spray and Keiser released him, then walking into the woods. The troopers, along with two deputy sheriffs, followed him into a swampy area. He did not comply with orders to come out of the water and they tried to Tase him, but his coat was too heavy. They entered the water, using a Taser and a baton on him. “In the melee, Keiser fell or was forced down into the water.” Deputy Lynch pulled him out of the water and once he was handcuffed, he was brought to land. However, he was found to be deceased, having drowned.

Landis (Keiser’s estate representative) filed suit under the troopers, the deputies and Livingston County. Most settled out, but Galarneau went to trial. The jury ruled in Galarneau’s favor. Landis appealed.

ISSUE: May an officer be found liable for an injury they did not commit and could not prevent?

HOLDING: No

DISCUSSION: Landis argued that Galarneau could be liable for the actions of the other officers and that it was not necessary to find specific fault upon him. The Court agreed that sometimes, an officer might be liable for the actions of another officer, but that “mere participation in an event” is not sufficient. To be successful, Landis would have to prove that “Galarneau himself violated the Constitution by asking another officer to use excessive force or by failing to stop him from doing so.” It was pointed out at trial that no one was accused of deliberately holding Keiser’s head under the water.

The Court addressed a number of problematical statements made by Galarneau’s defense attorney, but ultimately ruled in favor of upholding the verdict in the trooper’s favor.

McColman v. St. Clair County, 2012 WL 1237845 (6th Cir. 2012)

FACTS: McColman is a double amputee, below the knees, who uses prosthetics. On August 28, 2008, she was stopped for drunk driving. A week before, she had been involved in a domestic altercation with her husband in which she set a small fire and struck him with a prosthetic.

Deputy Doan spotted McColman weaving in her vehicle and pulled her over. She failed one of the FSTs and was given a PBT, which registered .18. She claimed at that time, she was handcuffed too tightly. He put her in the car and told her to scoot over, but she said she could not because she needed her hands to do so. He then went to the other side and “yanked” her across the seat, causing pain. One of her prosthetic limbs fell off but he replaced it. He left her sitting sideways and during the transport, she

allegedly fell over and struck her head. Doan stopped and found her unresponsive, so he took her to the hospital. There she was allegedly left alone and fell from the gurney as she lost her balance due to the slippage from her prosthetics. Despite her complaints of pain from her head and wrists, she was cleared to go to jail.

Following her release, McColman filed suit under 42 U.S.C. §1983, alleging excessive force. Doan moved for dismissal, and the trial court agreed that McColman never actually made an excessive force claim related to the handcuffing, and that the other assertions were unfounded. The Court dismissed all claims against Doan and McColman appealed.

ISSUE: Must a claim be specifically raised in order to be litigated?

HOLDING: Yes

DISCUSSION: The Court agreed that McColman's pleadings did not cover the handcuffing claim and upheld the dismissal of those assertions. With respect to pulling her across the seat, the Court noted that Doan's previous experience with McColman indicated he knew of her aggressiveness and he had to use some force simply to get her into the vehicle, even though it did cause some bruising. The position she was seated in the vehicle was also reasonable, given her disability, and she did not apparently tell Doan she was "unstable" in that position. At best, he was negligent, but not grossly negligent, in doing so. Doan had asked another officer to supervise her at the hospital and that officer apparently failed to do so, but that could not be anticipated by Doan. (The Court also noted that she apparently fell because she was trying to avoid having a prosthetic slip off, so she was, in fact, the proximate cause of her fall.)

The Court upheld the dismissal.

Smith v. City of Akron, 476 Fed.Appx. 67, 2012 WL 1139003 (6th Cir. 2012)

FACTS: On August 27, 2007, Officers Ross and Miles (Akron, OH, PD) began to follow Smith, who was driving a stolen car. Smith stopped, got out and began to talk to the officers, telling them that the vehicle belonged to an unnamed friend. He was arrested. During the arrest, both agreed that Miles "wrestled Smith to the ground, punched and kicked him in his back, sprayed him with chemical spray and tased him." However, Smith argued that he was cooperative during the arrest, which the police disputed.

Smith filed suit in state court, the city removed it to federal court. However, he initially did not name the officers, only listing "John Does." They were not officially added until some time after the two year statute of limitations had passed. The officers objected, and the District Court agreed, finding that the amendment was untimely. The Court granted summary judgment and Smith appealed.

ISSUE: Must officers be named in a timely fashion in a lawsuit, if they are not initially identified?

HOLDING: Yes

DISCUSSION: Smith argued that the addition of the officers "related back to his original complaint" under the federal rules. He claimed that since Ross and Miles knew about the lawsuit, they were not prejudiced by being added after the two year statute of limitations. The Court noted that he did not make a mistake in the parties, he simply claimed that he did not know who they were and thus could not name them initially.

The Court noted that it is proper for defendants to be named as John Doe and then added latter. (The Court also noted that he waited until the last day possible to even file the lawsuit.)

Further, the Court agreed nothing that was alleged implicated the city in any liability and upheld the dismissal of the case.

Hermiz v. City of Southfield, 2012 WL 1816230 (6th Cir. 2012)

FACTS: On September 27, 2007, Officer Matatail made a traffic stop of Hermiz. His video camera showed no indication of erratic driving or speeding, however. Hermiz pulled into a parking lot, followed by the officer.. Apparently, Hermiz then slowly pulled out of the lot and Matatail then fired four shots into the car, hitting Hermiz. He died at the hospital.

Hermiz's estate filed suit, under 41 U.S.C. §1983. The City and Matatall requested summary judgment and were denied. They filed an interlocutory appeal.

ISSUE: May an officer continue to fire at a vehicle, when it poses no threat?

HOLDING: No

DISCUSSION: The court agreed that "an officer may shoot at a driver that appears to pose an immediate threat to the officer's safety or the safety of others."¹⁹⁴ However, they cannot continue to fire "once the car moves away, leaving the officer and bystanders in a position of safety"¹⁹⁵ ... "unless the officer's prior interactions with the driver suggest that the driver with continue to endanger others with his car."¹⁹⁶ The Court agreed that the jury could reasonably infer that at least some of the shots, and certainly the last one, was fired when Matatall could not reasonably believe he was in danger from the car. Further, the Court had already ruled that the law was clearly established that it was unreasonable to shoot at a driver that no longer poses a threat.¹⁹⁷

Although the Court agreed that Matatall might be able convince a jury that the shooting was appropriate, by proving "whether an officer had sufficient time to perceive, at the time of the last shot through the driver's-side window, that the passing car no longer presents an immediate threat." At this point, the Court could only address the "legal question" and agreed that the Fourth Amendment prohibited shooting.

The Court upheld the denial of summary judgment.

Simmonds v. Genesee County, 682 F.3d 438 (6th Cir. 2012)

FACTS: On November 23, 2007, Genesee County law enforcement received 911 calls concerning Simmonds' "threatening behavior. His father reported that Simmonds had threatened to kill the Careys, his ex-girlfriend's parents. Troopers Kaiser and Dirkse (Michigan State Police) responded, along with officers from Richfield Township and Genessee County Sheriff's Office. Some went to the Simmonds' home, and

¹⁹⁴ Brousseau v. Haugen, 542 U.S. 194 (2004).

¹⁹⁵ Kirby v. Duva, 530 F.3d 475 (6th Cir. 2008).

¹⁹⁶ Smith v. Freland 954 F.2d 343 (6th Cir. 1992); Walker v. Davis, 649 F.3d 502 (6th Cir. 2011).

¹⁹⁷ Sigley v. City of Parma Heights, 437 F.3d 527 (6th Cir.2006).

others to the Carey residence. After learning that Simmonds was not at the Carey home, most of the officers there left for the Simmonds' home.

There, they formulated a plan to capture Simmonds, understanding him to be in a heavily-wooded area of the property. His father explained Simmonds' mental state and that he was drinking and possibly suicidal. As they were implementing the plan, however, Simmonds drove up a private road from the woods toward the cruisers. The officers turned on their emergency lights and ordered him to get out with his hands raised. Instead, he backed his vehicle into the wooded area. Officers and deputies pursued him. Simmonds' truck became stuck in snow and five of the officers approached him on foot, still ordering him to submit. Deputy Stone opened the truck door and deployed his Taser. He believed the Taser had worked, but in fact, Simmonds leaned over intentionally, faking a reaction. (His heavy jacket protected him from the probes.) Simmonds arose, yelled that he had a firearm and turned toward the officers "with his hands extended in a firing position." Although the details differed, several officers were consistent in reporting a "silver object" in his hands. Deputy Comstock "did not hesitate and immediately fired several shots." Trooper Dirkse also fired. The officers attempted aid, but Simmonds died. Following his removal from the vehicle, "they found a silver and blue cell phone with the antenna extended" on the front seat. They also found a .22 caliber rifle in the snow near the truck.

Video caught part of the events. Notably, because of the way the cruiser was parked, however, the view was partially obstructed of the scene. In addition, there was music playing inside the cruiser, so "the video could not capture any audible statements from either the officers or [Simmonds] – only the gunshots."

Simmonds' father (as the representative of his estate) filed suit under 42 U.S.C. §1983, alleging a number of issues. All officers moved for qualified immunity and summary judgment. The officers were deposed and they renewed their motions. The Estate objected, noting certain "factual discrepancies" in the officers' deposition testimony. The depositions related to testimony between Dirkse and Comstock "concerning where Kevin pointed the alleged weapon." Further, Comstock testified that Simmonds had "brandished the weapon through the open driver's side window whereas Dirkse stated that it was through the open driver's side door."

The District Court agreed with the officers that "neither discrepancy involved a genuine issue of material fact, " having "no bearing on the officers' entitlement to qualified immunity, as these facts did not alter the reasonableness and permissibility of the officers' use of force." Simmonds appealed with respect only to Comstock and Dirkse.

ISSUE: Do minor discrepancies require dismissal of a qualified immunity motion?

HOLDING: No

DISCUSSION: The Court reviewed whether the Estate had presented "evidence sufficient to create a genuine issue as to whether the defendant committed the acts that violated the law."¹⁹⁸ In this case, the Court agreed that the Estate did not, agreeing with the trial court that the two discrepancies identified did not demonstrate that the shooting violated Simmonds constitutional rights. The Court agreed that the shooting was objectively reasonable and that the analysis of such "contains a built-in measure of deference

¹⁹⁸ Adams v. Metiva, 31 F.3d 375 (6th Cir. 1994).

to the officer's on-the-spot judgment about the level of force necessary in light of the circumstances."¹⁹⁹ The Court reviewed the undisputed facts noting that Simmonds rested his case on inconsistent and illogical facts, suggesting, for example, that since Simmonds' alleged assertion that he had a gun could not be heard on the recording, he did not say it. In fact, the Court agreed, there were "absolutely no audible statements" during the relevant time. The Court noted that to accept the Estate's claim, the Court "would have to reasonably infer that this group of police officers approached Simmonds and, without warning or hesitation, shot him" and "such an inference stretches the definition of "reasonable" beyond its natural boundary." The undisputed facts permitted the officers to use deadly force.

The decision to award the officers with qualified immunity was affirmed.

42 U.S.C. §1983 – HANDCUFFING

Crooks v. Hamilton County (OH). 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.

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.²⁰⁰ 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.

¹⁹⁹ Burchett v. Kiefer, 310 F.3d 937 (6th Cir. 2002).

²⁰⁰ 995 F.2d 1331 (6th Cir. 1993)

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.”²⁰¹ 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 guidelines for Taser use and recommended it was only to be used 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.²⁰² First, it began “by considering whether the right allegedly violated was clearly established on the date of the incident.” The problem comes with determining the “level of generality at which the constitutional right must be clearly established.”²⁰³ 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

²⁰¹ The Court noted there was no indication that he “ordered Cockrell to halt or put him under arrest.”

²⁰² 555 U.S. 223 (2009).

²⁰³ Casey v. City of Federal Heights, 509 F.3d 127 (10th Cir. 2007).

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 - ADA

Burnett v. Sault Ste. Marie Police Department, 469 Fed.Appx. 463, 2012 WL 1522768 (6th Cir. 2012).

FACTS: Burnett visited a university library to use the Internet. An officer looked at his camera (apparently with consent) and then seized it. He stated Burnett had been banned from the library and ordered Burnett to come to the station with him, but the vehicle was not handicapped accessible. Burnett claimed that the transport "caused him excruciating pain and injury" and filed a lawsuit under ADA. The trial court dismissed the case and Burnett appealed.

ISSUE: Does transporting a handicapped subject automatically trigger the ADA?

HOLDING: No

DISCUSSION: The Court noted that to argue intentional discrimination under the ADA, Burnett must show that (1) he has a disability, (2) he otherwise qualified for the service involved; (3) he was being denied a benefit because of his disability and (4) the discrimination was intentionally directed towards him.²⁰⁴ In this case, the Court noted that Burnett failed to explain the deficiencies he alleged in the vehicle or how they could be remedied. He did not allege even that he made the officer aware of the problem so that he could be accommodated.

The Court upheld the dismissal of the ADA claim.

42 U.S.C. §1983 – REPO

Hensley v. Gassman, Scott and Gilbert, 693 F.3d 681 (6th Cir. 2012)

FACTS: On August 13, 2008, at about 0315, Gassman, who worked as a repo agent for a local (Michigan) company, went to the Hensley home to repossess a vehicle. When Gassman and his helper found the vehicle, they requested a "civil stand-by" from the Sheriff's Office to assist. (During a previous repossession, Hensley, Sr. had assaulted Gassman.)

Deputies Scott and Gilbert were dispatched and they all proceeded to the house. Gassman prepared to tow the vehicle. At some point he told the deputies he had a repo order and showed "a file containing some documents" which they did not read. At the time Sheila and Hensley, Jr. were home. They awoke and came outside, telling the parties that they should not take the vehicle. Sheila tried to explain that the payments were up to date but Deputy Scott told her "he did not care" and to straighten it out in the morning. Sheila got into the car and locked the door. By this time, the tow chains had been hooked up and she

²⁰⁴ Tucker v. Tennessee, 539 F.3d 526 (6th Cir. 2008).

began to “tow” the truck, endangering Gassman and his helper who were still on the ground. Deputy Scott tried to break the window, unsuccessfully. Gassman got into the tow truck and pulled the vehicle into the road. At some point, Deputy Scott, after ordering Sheila to get out several times, used a hammer to break the window and unlock the doors. Deputy Gilbert pulled her from the car. He told her that she should get any personal belongings from the vehicle and she did so. Gassman towed the vehicle. The next day it was discovered that in fact, “Sheila was indeed telling the truth about the payment.” The vehicle was returned. The deputies submitted an arrest warrant, charging Sheila with assault (with Gassman and his helper being the victims). She pleaded no contest to the charges, as well as an additional attempted assault charge.

All three of the Hensleys filed suit against Gassman and the two deputies. Although the Court agreed that the “Deputies’ conduct was more than mere presence at the scene” and as such was a constitutional violation, that they were entitled to qualified immunity.²⁰⁵

The Hensleys appealed.²⁰⁶

ISSUE: May an officer’s actions transform a private vehicle repossession into a state action?

HOLDING: Yes

DISCUSSION: The Hensley’s claimed that the participation of the deputies transformed the repossession in an unreasonable seizure and not just a private action. The court agreed that their presence alone did not accomplish that, even when they interacted with the parties (the Hensleys). The Court noted that “the deputies also appealed, arguing the conclusion that their conduct constituted state action.” At some point, the Court agreed, “repossession by private individuals assumes the character of state action.” In addition, “even without active participation, courts have found that an officer’s conduct can facilitate a repossession if it chills the plaintiff’s right to object.” Specifically, when the party physically objects, it becomes the debtor’s “most powerful (and lawful) tool in fending off an improper repossession because it constitutes a breach of the peace requiring the creditor to abandon his efforts to repossess.”

The Court looked to the case of Barrett v. Harwood²⁰⁷ and reviewed the “spectrum of police involvement.” It noted cases where the officers were simply present and did nothing to help or hinder the effort. At the opposite end was Soldal v. County of Cook, in which the officers told the subject that they were there to keep him from interfering in what turned out to be an unlawful eviction.²⁰⁸

Applying the case law to the facts, the Court noted the following that indicated state action: “(1) the Deputies arrived at the Hensley residence with, and at the request of, Gassman; (2) Deputy Scott ordered Hensley Jr., at least once, to move from between the Buick and the tow truck, as Hensley Jr. was attempting to thwart the repossession; (3) the Deputies ignored Hensley Jr.’s demands to leave the property; (4) Deputy Gilbert told Hensley Jr. that Gassman was taking the Buick; and (5) Deputy Scott ignored both Sheila’s protest and her explanation and told Sheila that Gassman was still going to take the Buick.” The Court agreed that when Deputy Scott ordered Gassman to tow the Buick, he engaged in state action. Their actions in breaking the window and removing her from the car were also state action. In fact,

²⁰⁵ A claim against the Sheriff was also made.

²⁰⁶ The deputies also appealed, arguing the conclusion that their conduct constituted state action.

²⁰⁷ 189 F.3d 297 (2d Cir. 1999),

²⁰⁸ 942 F.2d 1073 (7th Cir. 1991).

"this conduct was not only active participation, but was instrumental to Gassman's success in completing the repossession." Legally, at that point, Gassman's attempt to pursue a self-help remedy ended and the state law required him to cease his attempt to take the car. Given that the deputies only knew that Gassman claimed he was authorized to do the repossession, they could certainly find that the seizure was unreasonable. Once they extracted her from the vehicle, their actions became "manifestly unreasonable." Although the deputies did not take the vehicle, their actions enabled Gassman to do so.

Next, the Court agreed that the deputies should have known that their conduct was improper. Although the court agreed that a "determination of whether a police officer's involvement in a repossession or eviction is sufficiently active to amount to state action "is particularly fact-sensitive, ... this is not a close case: the Deputies' active involvement facilitated the repossession." The Court agreed that a reasonable mistake might excuse their actions, but in this case, they did not even review the order at all.²⁰⁹ The Court agreed that the deputies were not entitled to qualified immunity and reinstated the claim against them.

42 U.S.C. §1983 - RELEASE AGREEMENTS

Marshall (David / Chandra) v. City of Farmington Hills, 2012 WL 1522699 (6th Cir. 2012).

FACTS: On December 13, 2006, Officer Marshall (Detroit PD) was off duty and on his way home. He was pulled over by Officer Meister (Farmington Hills PD) on a traffic stop. Officer Meister ordered Officer Marshall to remove his service weapon and he refused. Officer Jarrett Tased Marshall three times, removed the weapon and arrested Marshall for "obstructing law enforcement." Marshall was separately charged with child abuse in an unrelated incident and was acquitted of that offense. Marshall entered into a conditional release-dismissal in exchange for Marshall not filing suit against Farmington Hills, subject to two conditions to be negotiated. However, they were never able to reach agreement on the conditions and as such, Marshall considered the release unenforceable. He demanded a trial on the obstruction charge. The Court refused that, however, finding the release valid and binding.

Marshall and his wife filed suit under 42 U.S.C. §1983, alleging false arrest and related claims. The trial court found the release barred the lawsuit and dismissed. The Marshalls appealed.

ISSUE: Must a case be resolved by a written order (rather than verbal)?

HOLDING: Yes

DISCUSSION: The Marshalls argued that the underlying case was never fully litigated to a final determination because the trial court did not render a written order. The Court agreed and noted that to hold otherwise would prevent the Marshalls from arguing issues of misconduct. The Court reversed the dismissal.

²⁰⁹ The order, in fact, was an order from the creditor to Gassman to repossess the vehicle, not a court order.

42 U.S.C. §1983 - BRADY

Westerfield v. U.S. and Lucas / Metcalf, 2012 WL 2086847 (6th Cir. 2012)

FACTS: Westerfield was tried for possession of crack cocaine in Ohio. Det. Metcalf (Richland County SO) testified about the search warrant which resulted in the seizure of the cocaine. At the time, however, Metcalf had “given perjurious testimony against” one of Westerfield’s co-defendants, but Westerfield was not provided that information. Both Lucas (a DEA agent) and Metcalf were aware of the falsity of the testimony.

When the issue was revealed, the Government agreed to vacate Westerfield’s conviction. Westerfield filed suit against both Lucas and Metcalf, under 42 U.S.C. §1983. The two requested qualified immunity which the trial court denied. They took an interlocutory appeal.

ISSUE: Does Brady apply to individual law enforcement officers, as well as the prosecution?

HOLDING: Yes

DISCUSSION: Westerfield contended that his rights under Brady v. Maryland²¹⁰ were violated when they failed to disclose the issues with Metcalf’s testimony. Had Metcalf been impeached, the prosecution would have lost critical evidence. The Court looked to Beuke v. Houk²¹¹ and agreed that the evidence was material. Further, the Court agreed that Brady applies “with equal force to individual law enforcement officers.”²¹²

The officers further claimed that Westerfield “was not subjected to even a single day of wrongful incarceration” because he was imprisoned on a separate charge at the time. The Court agreed, however, that was not an issue in a civil rights claim for denial of a fair trial.

The Court upheld the denial of a fair trial.

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

²¹⁰ 373 U.S. 83 (1963)

²¹¹ 537 F.3d 618 (6th Cir. 2008).

²¹² Elkins v. Summit County, Ohio, 615 F.3d 671 (6th Cir. 2010).

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.

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.”²¹³ 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. The ordered her to step away and she turned to speak to her husband, at which time the officers

²¹³ Everson v. Leis, 556 F.3d 484 (6th Cir. 2009); Berryman v. Rieger, 150 F.3d 561 (6th Cir. 1998).

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 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.”²¹⁴ 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.’”²¹⁵ 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,

²¹⁴ Sykes v. Anderson, 625 F.3d 294 (6th Cir. 2010).

²¹⁵ 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)).

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, 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.”²¹⁶ 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 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.”²¹⁷

The Court upheld the decision to dismiss all claims.

INTERROGATION

Brown v. Jackson, 2012 WL 4372555 (6th Cir. 2012)

FACTS: Brown was arrested on September 8, 1999, by Detroit PD, for questioning in a robbery/murder case. He claimed the jail conditions were horrible, that the toilet did not work and that cockroaches were everywhere. He claimed he did not get much, if any sleep and that he was periodically interrogated in a “small, cold” room. Brown claimed they never gave him his rights and ignored his request for an attorney. He further claimed he was ill during his incarceration and his requests for help ignored.

After 51 hours, he admitted to involvement in a homicide. He waived his rights in writing but later claimed that he was told that was the only way he’d get medical care. The next morning he was found unconscious in his cell and was briefly admitted to the hospital. He was released, but then immediately indicted for the murder.

He moved for exclusion but the trial court denied the motion, finding his story to be incredible. Brown was convicted and moved ultimately, for habeas relief. The District Court denied the motion but he was permitted to appeal.

ISSUE: Is a lengthy detention automatically considered coercive?

HOLDING: No

DISCUSSION: The Court agreed that “if an inculpatory statement is the product of police coercion, it is deemed involuntary and inadmissible.”²¹⁸ The Court look to “the crucial element of police coercion, the length of the interrogations, its location, its continuity, the defendant’s maturity, education, physical condition, and mental health.”²¹⁹ Brown argued that his situation was similar to Greenwald v. Wisconsin.²²⁰ The trial court, however, clearly did not believe much of Brown’s assertions. The Court did

²¹⁶ 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)).

²¹⁷ See Macko v. Byron, 760 F.2d 95 (6th Cir. 1985); Briscoe v. LaHue, 460 U.S. 325 (1983).

²¹⁸ Colorado v. Connelly, 479 U.S. 157 (1986).

²¹⁹ Withrow v. Williams, 507 U.S. 680 (1993).

²²⁰ 390 U.S. 519 (1968).

find it troublesome that he'd been held for 51 hours, which was apparently unrefuted, but did not find that alone to be determinative.

Relying on the factual findings made by the trial court, the Court agreed that his confession was given voluntarily. The Court affirmed the Michigan state court's decision.

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.'"²²¹ The question must be whether Evans's "will was overborne at the time he confessed."²²² To decide, the Court must examine the "totality of the circumstances" surrounding the confession.²²³ 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."

The Court upheld the admission of the statement.

²²¹ Miller v. Fenton, 474 U.S. 104 (1985); Culombe v. Connecticut, 367 U.S. 568 (1961).

²²² Reck v. Pate, 367 U.S. 433 (1961).

²²³ Schneckloth, *supra*.

INTERROGATION – RIGHT TO SILENCE

Rogers v. Kerns, 2012 WL 2126355 (6th Cir. 2012)

FACTS: Following his arrest for an Ohio murder, Rogers was interrogated. He provided an inculpatory statement given during a custodial interrogation. During a suppression hearing, one of the officers testified that he wanted to talk to his father and that “my dad would want me to have a lawyer here.” There was another mentioned, when he was asked to write out his confession, in which he said “I can’t write this with a lawyer or anybody.”

Rogers was convicted, and appealed.

ISSUE: Must a subject be specific about asking for an attorney to invoke the Edwards rule?

HOLDING: Yes

DISCUSSION: The Court noted that, under Edwards, it was improper to continue to question Rogers after he invoked his right to counsel.²²⁴ However, the Court agreed that he never, in fact, did that. Looking to Davis v. U.S., it concluded that what he said was not a “formal, unequivocal request for an attorney such that it mandated the cessation of all further interrogation,” as “[s]tatements less ambiguous than [Rogers’s] have been found to be too ambiguous to require that questioning cease.”²²⁵ The Court did not agree that his request to speak to his father should have been construed as a request to a lawyer, as he was 19 years old, not a juvenile. To do so would have forced the officers in the “type of guessing game rejected by Davis....”

The Court upheld the denial of the habeas plea.

INTERROGATION – SELF- INCRIMINATION CLAUSE

U.S. v. Vreeland, 684 F.3d 653 (6th Cir. 2012)

FACTS: While on probation for an unrelated matter, in early, 2008, Vreeland committed a home invasion and theft in Kalamazoo, Michigan. Officer Bobo, his U.S. Probation Officer learned of the crime. When Vreeland reported, as scheduled, he told Bobo about an interview with the investigator in that crime. He denied any involvement and denied current ownership of the vehicle (registered to him) supposedly involved – he claimed to have sold it to a junkyard. Bobo asked for documentation as to that, but did not receive it. Vreeland was arrested for a violation of his supervised release, but refused a waiver of a hearing. Later that year, Bobo was advised that he was no longer expected to be prosecuted. However, Bobo continued his own investigation and met with Vreeland (who was apparently soon to be released again) to review his supervision conditions. By October, Bobo had concluded that Vreeland had, in fact, committed the crime and brought it up in a scheduled meeting, asking his “specific questions” about the crime. He denied knowing Russell, the other person involved, and Bob warned him that it was a violation of federal law to lie to a federal officer. He made a written statement denying any knowledge of Russell. Vreeland then left.

²²⁴ Edwards v. Arizona, *supra*.

²²⁵ Davis v. U.S., *supra*.

Eventually, Vreeland was charged with lying to Bobo. Bobo also sought revocation, claiming that Vreeland did commit the crime in violation of his conditions. The Court agreed and revoked his probation. Vreeland appealed.

ISSUE: Does questioning while not in custody trigger the Fifth Amendment?

HOLDING: No

DISCUSSION: Vreeland argued that when he was questioned by Bobo, his Fifth Amendment right against self-incrimination was violated. The trial court agreed that Vreeland was not in custody, therefore Miranda wasn't required. Further, Bobo had been informed that Bobo's attorney had resigned at the time of his visit. Vreeland argued, however, that under Minnesota v. Murphy,²²⁶ the "threat to impose sanctions or penalties such that it forces self-incrimination" automatically invoked the Fifth Amendment. However, in that case, the Court held that simply meeting with a probation officer does not invoke self-incrimination and that Bobo did not threaten arrest or a violation during the initial meeting. In fact, he was permitted to leave. He was advised of the penalty for lying and "lie he did."

The Court upheld his conviction.

INTERROGATION - MIRANDA

U.S. v. Wynn, 2012 WL 3893103 (6th Cir. 2012)

FACTS: On September 6, 2008, Officer Bevis (Nashville PD) was dispatched to a shots fired call. On arrival, he found two other officers facing a door as Wynn was coming out and getting down on the ground, apparently in response to commands. The Sergeant at the scene told Bevis to take Wynn into custody, who was then "handed off" to Officer Morris. Neither Bevis or Morris questioned Wynn. A woman drove up and Wynn told the officers he wanted to talk to her. They rolled down the window somewhat, but the woman would not talk to Wynn. Wynn became agitated and "began to yell and cry." Morris pulled the car forward, hoping to calm Wynn – telling Wynn that it would be OK. Morris admitted he may have asked Wynn to pray with him.

"During this interaction, Wynn made incriminating statements to Morris, including that Wynn has fired a couple of shots into the ground." Morris did not recall if this happened before or after they prayed. Wynn, a convicted felon, was charged with possession of the weapon under 18 U.S.C. §922(g)(1). Wynn moved for suppression of his statements. The trial court denied the motion. Wynn took a conditional guilty plea and appealed.

ISSUE: Are unwarned, voluntary statements while in custody admissible?

HOLDING: Yes

DISCUSSION: The court agreed that a "suspect in police custody must be informed of his or her constitutional rights before he or she may be interrogated." However, voluntary statements, made without

²²⁶ 465 U.S. 420 (1984).

interrogation, are admissible. The trial court found that his statements were “not made in response to police questioning, but in response to his being ignored by his girlfriend.” The trial court had not made its ruling dependent upon whether or not praying occurred, but instead, ruled that the Morris’s actions were immaterial in its decision. Even assuming Morris suggested that they pray, the Court ruled that did not trigger Miranda. The Court agreed that Wynn’s statements “were a voluntary, emotional response to the woman’s failure to respond to him, rather than a response to the prayer itself.”

The Court affirmed Wynn’s plea.

Neal v. Booker, 2012 WL 3711524 (6th Cir. 2012)

FACTS: In Michigan, Neal was driving a vehicle from which a number of gunshots were fired, killing Newsom. (Newsom was apparently mistaken for the intended target, Bradley.) The van, with its four occupants, was quickly located and all four were arrested. Neal waited to be formally questioned and was attended by Deputy Adams during the wait. They engaged in casual conversation and the deputy later stated that “Neal did most of the talking.” “Neal did discuss the reason for his trip to Adrian and where he and the family members had driven earlier that night, but the record indicates that he did not make any incriminating statements to Adams before he was given his Miranda rights.” When the detective arrived, Neal was given his rights and waived them. He claimed “he had no involvement in Newsom’s murder, but admit[ed] that he had facilitated the escape from the crime scene.” He did not share the names of the other people in the van, but since they were already in custody, that was unimportant. He claimed to be cooperating because he had nothing to hide.

He was convicted of Murder and appealed. After exhausting state court appeals, he took a habeas petition.

ISSUE: Are unwarned statements made while in custody admissible, when no interrogation was taking place?

HOLDING: Yes

DISCUSSION: Neal argued that “the written and oral statements that he gave after signing the Miranda waiver should have been suppressed as the “fruit of the poisonous tree,” because they were tainted by statements elicited before the warnings were given and the waiver signed.” The Court found that nothing in the record even suggested that he was interrogated and “that he did not make what could be considered a confession while they waited the arrival of Detective Labarr.” The court looked to Seibert and found that the warnings he received were effective and there was no intent to circumvent Miranda by the casual conversation. His later statements were consistent and in fact, he was attempting to exculpate himself in the shooting.

Neal’s conviction was affirmed.

Tremble v. Burt, 2012 WL 3799145 (6th Cir. 2012)

FACTS: Tremble, age 14, was found by Deputy Chmielewski on April 19, 1997, at about 0200, standing next to a vehicle in a ditch. Tremble admitted to having stolen the car and to have been drinking. At the station, he was giving his Miranda rights and giving a breath test, which registered .05. He answered questions about the stolen car. At the time, the deputy was unaware that the vehicle’s owners,

the Stanleys, had been murdered. When he discovered that, about the time that the breath test results were returned, he contacted Sheriff Mosciski. The Sheriff repeated the questioning of Tremble, who denied having anything more to say than what he'd told the deputy. He asked him again about a half hour later and got the same answer.

At about 0530, Tremble's parents were contacted, and they arrived about two hours later. They were told what had occurred and that they could talk to him after interrogation. (There was some dispute as to what was actually said, however.) Tremble was brought to the Sheriff's office again, at about 0830, given Miranda and he waived his rights. "Mosciski then relayed the message from Tremble's parents, stating that they wanted him to come clean." Tremelbe confessed to the shooting deaths of the couple. At the time he confessed, "Tremble had been sitting in a padded chair with his hands handcuffed behind his back for approximately four to five hours."²²⁷ He had not indicated any discomfort and had refused breakfast.

Tremelbe was convicted of murder and related charges, and appealed. After exhausting his state court appeals, he requested a habeas petition.

ISSUE: Are statements made by a juvenile outside the presence of their attorney or parents admissible?

HOLDING: Yes

DISCUSSION: Tremble argued that his confession was not voluntary. He did not request his parents or an attorney before he was questioned and he had been told prior to the interrogation, by a juvenile corrections officer, that the charges were very serious. He was apparently of normal intelligence for his age. His initial statement was made shortly after he was arrested. There was no indication he was mistreated and his handcuffs were loosened when he complained.

There was some question that he may have asked for an attorney when he signed the Miranda waiver, but that evidence was not addressed at the trial court level. The court also addressed Tremble's assertion that he'd invoked his right to remain silent by twice telling the Sheriff he had nothing more to say. The Court found his statement to be ambiguous and not necessarily an clear evocation of his right to silence. The Court agreed that the trial court had to decide between a sets of competing facts and that it was reasonable to believe that his confession was sufficiently voluntary.

Tremble's petition was denied and the conviction upheld.

Wilkins v. Lafler (Warden), 2012 WL 2686101 (6th Cir. 2012)

FACTS: Wilkins was charged in Michigan for a sexual assault. He was convicted and lost all state appeals; he then took a habeas corpus petition through the federal courts. When his petition was denied, he further appealed to the federal appellate court. The essence of his appeal, among other issues, was that his attorney failed to challenge an alleged Miranda violation. During the investigation, Wilkins was interviewed by officers at his home.

ISSUE: Is one's home a custodial location?

²²⁷ Later testimony indicated they were waiting for a lab team to process his hands.

HOLDING: No (usually)

DISCUSSION: Wilkens argued that the “objective circumstances of the encounter - the prolonged and accusatory rapid-fire questioning, the detectives’ insistence that he direct them from room to room, and his inability to speak to his roommate—transformed his home to a custodial environment.”²²⁸ The Court noted that the only inquiry that was relevant in deciding about custody “is how a reasonable man in the suspect’s position would have understood his situation.”²²⁹ Michigan determined he was not in custody, but Wilkens argued that the detectives “relentlessly interrogated him until he gave them the answers they wanted.” However, the record “reveals a more moderate course of events.” He consented to a search and prior to that search, the detectives sat at his table and talked to him. The “conversation eventually became ‘intense,’ with both detectives “throwing questions at [him] one after another” and everyone “talkin’ at the same time.” He accused the detective of misstating what he said as a result of the “disorganized conversation.” The Court agreed that the evidence was weak that Wilkens was in custody and that he simply participated “in an unpleasant conversation.” He could have left the table or terminated the conversation at any time. When they did the search, they brought him along to each room, but there was also evidence that “Wilkens left the detectives’ presence from time to time and that nobody stopped him.”

The Court agreed the interrogation was not while Wilkens was in custody.

U.S. v. Shields, 2012 WL 1654956 (6th Cir. 2012)

FACTS: On May 19, 2004, Shannon and Sonny Shields (cousins) carjacked and abducted Lott, in Memphis. Ultimately, Lott was murdered. The crime was caught on surveillance camera, and there was one eyewitness, Tapplin, age 13. He identified Sonny Shields in a photo array shortly after the crime, but failed to do so several days later. Tapplin was never able to identify Shannon.

Sonny turned himself in, making inculpatory statements, but “largely shifted the blame” to Shannon. Shannon was apprehended in Mississippi and turned over to Memphis officers. He waived Miranda and gave a “self-serving but incriminating” statement, shifting the blame primarily to Sonny. During the ensuing trial, Trooper Arnold (Arkansas State Police) testified about similarities between Shannon’s shoes and shoe prints near the body.

Shannon was convicted, and appealed.

ISSUE: Does mental incapacity invalidate a Miranda waiver?

HOLDING: Not automatically

DISCUSSION: Shannon argued that his waiver was not made knowingly or intelligently because he is, in fact mentally retarded. The Court agreed that diminished mental capacity can limit the ability of a subject to understand their rights, but the defense was not raised as it should have been. Further, borderline intelligence does not necessarily mean that the subject cannot validly waive Miranda, but simply, it must be

²²⁸ Stansbury v. California, 511 U.S. 318 (1994)

²²⁹ Berkemer v. McCarty, 468 U.S. 420 (1984); Orozco v. Texas, 394 U.S.324 (1969).

decided on a case by case situation. In this situation, the trial court had noted that he manifested no outward sign of being unable to comprehend his rights and validly waive them.

Further, the Court agreed that Trooper Arnold was not an expert but that it was proper lay testimony based upon his rational perceptions under FRE 701.

Shannon Shields' conviction was upheld.

INTERROGATION – CUSTODY

Mason v. Brunzman, 2012 WL 1913965 (6th Cir. 2012)

FACTS: Mason and (Angela) Turley were involved in an on-off romantic relationship for about two years. Turley moved from Mason's home, in Northern Kentucky, to her mother's home in Ohio, and got a DVO against Mason, in 2003. Two months later, she claimed he violated the order and asked for a hearing. On May 13, 2003, the day before the scheduled hearing, Turley's mother, Janie, found Mason in her apartment parking lot. He claimed to have money he owed Angela. He followed Janie and forced his way into the apartment, holding a gun. He and Angela (who was inside) struggled over the gun and Angela was shot. Janie tried to intervene but was struck in the head. She witnessed Mason shoot Angela twice in the head, killing her.

Mason fled to Kentucky, where he was located in Covington. While at the ER, awaiting treatment (he'd shot himself in the hand), Det. Webster (Covington PD) held him in a room. He told Mason that Ohio officers were on the way and would likely question him at the Covington PD. Mason began a story that was "markedly different" from that given by Janie Turley. Webster stopped him and asked him if he knew his rights, and Mason responded with most of the rights, missing only the right to have an attorney appointed. Webster reminded him of that right and continued the story, claiming, essentially, that Angela had the gun. As Mason was being questioned, he was receiving treatment for his injury and was transferred to another hospital for surgery. He gave another statement, identical and was eventually arrested and taken to jail.

Mason was indicted in Ohio and eventually convicted of murder. When he was unsuccessful in state court appeals, he took a habeas petition, which was denied. He then appealed that denial.

ISSUE: Is being held in a hospital under guard custody?

HOLDING: Yes

DISCUSSION: The Court noted that the Ohio court had "ignored the fact that Mason was placed in a small room with constant police supervision and was not allowed to walk anywhere, including when he was taken for an x-ray, without at least one officer accompanying him." It continued that any setting "can be transported into a custodial environment."²³⁰ Even though medical personnel were freely permitted in the room, Mason was under continual supervision by armed officers. He was never told he could leave or that he could stop answering questions, but was told instead, he was under investigation and that his next stop was the police station. A reasonable person would not have felt free to leave. However, the admission of

²³⁰ Orozco v. Texas, 394 U.S. 324 (1969).

his self-serving statement did not have a material effect on the verdict, in the fact of Janie Turley's testimony.

The Court affirmed the denial of the writ.

INTERROGATION – COERCION

U.S. v. Montgomery, 2012 WL 3217117 (6th Circ. 2012)

FACTS: On January 31, 2008, Flint, Michigan, officers executed a search warrant. Sgt. Sorenson led the team. When they did not get a response to a knock, a side door was rammed. Sgt. Suttles, first in the door, found Montgomery in the kitchen. He ran into a bathroom and tossed something in the toilet. Sgt. Suttles was able to keep him from flushing it by tackling Montgomery. They fell into the shower stall and eventually, Montgomery was handcuffed. He found crack cocaine and marijuana in the bathroom.

Montgomery was arrested and the house was searched. In the living room, they found the TV on and two unloaded revolvers hidden under a chair cushion. They also found scales and cocaine in the kitchen. Cocaine and cash were found on Montgomery.

Montgomery was taken to the station and interviewed. He waived his Miranda warnings and named his two suppliers. He wrote out a confession. Despite having outstanding warrants, he was released.

Montgomery was indicted for his possession of the firearms. He argued unsuccessfully for suppression, arguing that the confession was coerced. He went to trial, during which Sgt. Meyer testified as an expert in "the sale and distribution of illegal drugs." Montgomery was convicted and appealed.

ISSUE: Is a statement made under a promise that one would not be arrested coerced?

HOLDING: No

DISCUSSION: Montgomery argued that the confession was based on a promise that "he could go home" so long as he "took responsibility for the weapons." The court looked to U.S. v. Stoker, noting that a confession is involuntary due to police coercion if "(i) the police activity was objectively coercive; (ii) the coercion in question was sufficient to overbear the defendant's will; (iii) and the alleged police misconduct was the crucial motivating factor in the defendant's decision to offer the statement."²³¹ However, the Court noted that "promises of leniency are coercive only 'if they are broken or illusory.'" Montgomery testimony was uncertain about what the promise actually was and the Court gave more credit to the officer's testimony about what was promised.

The Court summarized:

Contrasted with Sergeant Sorensen's unwavering testimony (corroborated by his notes taken during the interview) that he made no promises contingent upon a confession, Montgomery's nebulous "understanding" that he must "[t]ake] responsibility for the weapons" so that he could "go

²³¹ 631 F.3d 802 (6th Cir. 2011).

home" falls far short of the objective evidence of coercion necessary to suppress his statement, particularly when his status as a seasoned career offender is taken into consideration.

With respect to the expert testimony, the Court noted that the jury was properly instructed as to the "dual roles of a law enforcement officer as a fact witness and as an expert witness." The court agreed that in this case, the information was helpful to the jury. The officer properly testified "regarding conduct that would be consistent with an intent to distribute and left to the jury the final conclusion regarding whether the defendant actually possessed the requisite intent."

Montgomery's conviction was affirmed.

INTERROGATION – RIGHT TO COUNSEL

U.S. v. Scott, 693 F.3d 715 (6th Cir. 2012)

FACTS: Scott was arrested by Memphis officers on May 28, 2008, for involvement in a string of robberies in the area. He was taken to Det. Taylor, who gave him his Miranda rights. Scott filled out the Advice of Rights form but declined to speak to the officers. They did not question him further and took him to the jail. The transporting Detective told him that he would be taken to jail but that they would return if he was ready to speak, and that they would check with him tomorrow. Scott told him that he knew he needed to talk to the officers but that he just wasn't ready to do it then. The next evening, he was brought from the jail back to the robbery office, and this time, he agreed to talk to the officers. He confessed to several, but not the most recent one. He was returned to jail and on the third day, again brought back to the office, where again, he confessed.

He was charged and moved for suppression. He was convicted of 16 counts of robbery and related charges. He appealed.

ISSUE: Is a negative answer to the question if one wishes to speak to officers after being given Miranda an invocation of one's right to counsel as well as right to silence?

HOLDING: Yes

DISCUSSION: Scott argued that in fact, he asked for a lawyer at his initial questioning, which Taylor denied. The trial court found that Taylor was more credible and that his detailed written report did not indicate that Scott requested counsel.

The Court then examined the Advice of Rights form. As common in such forms, following the actual five rights, the form included two questions. The second question – having these rights in mind, do you wish to talk to us now – was at issue. Scott originally indicated "no" to this question, and argued that by doing so, he was invoking not just his right to silence but also his right to an attorney (since the form indicated the plural "rights"). The Court agreed that "in light of the wording of the form, [it could not] conclude that a reasonable police officer would have thought that Scott was not invoking the right to counsel." The Court noted that "if there is any ambiguity about Scott's right to counsel, it is in the form itself, and not in his invocation of the right."

However, the Court could not conclude that after invoking, he didn't later waive that right.²³² The Court noted there was conflicting testimony as to who initiated the subsequent discussion.

The Court remanded the case for further factfinding on the above issue.

SUSPECT IDENTIFICATION

U.S. v. Washam, 468 Fed.Appx. 568, 2012 WL 1109465 (6th Cir. 2012)

FACTS: On March 26, 2003, a Bowling Green (KY) bank was robbed. 29 days later, it was robbed by someone, again, who fit the same description. An employee saw the robber's car, however, during that robbery. Several weeks later, Washam robbed a bank in Florence and he was apprehended within minutes. Because Washam matched the description of the Bowling Green robber, a photo array was shown to witnesses, three identified him. The FBI also learned that Washam had sold a car matching the description of the vehicle seen during the Bowling Green robbery, just days after that robbery.

Washam moved to suppress the identifications, arguing that the photo array was too suggestive. The trial court agreed that "Washam's picture was the only one that matched the suspect's description." However, the Court ruled that the identification was reliable, after reviewing it with the factors in Neil v. Biggers.²³³

Washam was charged and convicted of bank robbery and related offenses.

ISSUE: Is a failure to identify a suspect at trial (after having identified them previously) necessarily fatal?

HOLDING: No

DISCUSSION: The Court agreed that the identifications were reliable, despite concerns that only one witness could identify him at trial. Three years had passed and Washam had significantly changed his appearance in the meantime. The Court upheld the admission of the identifications.

In addition, Washam argued that admitting evidence of the Florence robbery, to which he pled guilty, violated FRE 404(b). The Court agreed, however, that it provided motive (admitted drug addiction) and helped to show identity since a person with a similar description committed the robberies. In addition, there were other similarities, such as the demeanor of the robber. The Court agreed its admission was proper.

Washam's conviction was affirmed.

²³² Edwards v. Arizona, *supra*.

²³³ 409 U.S. 188 (1972). Whether an identification is reliable turns on (1) the witness's opportunity to view the criminal, (2) his degree of attention, (3) the accuracy of his prior descriptions, (4) how certain he was when he made the identification and (5) the length of time between the crime and the identification.

TRIAL PROCEDURE / EVIDENCE – BRADY

Thorne v. Timmerman-Cooper., 473 Fed.Appx. 457, 2012 WL 1130420 (6th Cir. 2012)

FACTS: On March 31, 1999, Layne was murdered in her home. During the investigation, it was discovered that Layne was pursuing a paternity action against Thorne, with respect to their son, Brandon. Wilkes became a suspect after another witness contacted the police concerning his statements that he'd been hired to kill a woman. Wilkes was arrested and implicated Thorne, leading police to the murder weapon (a knife) and his clothing.

Thorne was convicted for his involvement and appealed. He exhausted his state court claims and took a habeas corpus petition.

ISSUE: If information is not exculpatory, must it be disclosed under Brady?

HOLDING: No

DISCUSSION: During lengthy post-trial actions, Thorne argued a Brady claim that, among other things, police had shown two witnesses who saw a man at the crime scene a photo array including both him and Wilkes, and that the witnesses could not identify him. The trial court concluded that the failure to disclose this information was "neither exculpatory nor material" as any number of other people could have been at the home. With respect to evidence that suggested that the investigation was not thorough or reliable, again, the Court found that Brady was not violated. Finally, any evidence that he was "framed" by the police was also not required to be produced.

The Court agreed that although there was no doubt that the prosecution withheld evidence, that there was not proof that the evidence was "both exculpatory and material."

Thorne's habeas petition was denied.

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 indicted 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.²³⁴ 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

²³⁴ 541 U.S. 615 (2004).

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. Khalil²³⁵ 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.

U.S. v. Lemons, 2012 WL 1662035 (6th Cir. 2012)

FACTS: Lemons, a convicted felon, bought a rifle from a friend, Capps. Capps happened to be a jailer, and then a deputy sheriff. He assured Lemons it was legal for him to own a long gun. Lemons was discovered with the rifle and was indicted in federal court. He pled guilty. When it was learned that he was to be sentenced, however, as an armed career criminal, he argued for entrapment and a lesser sentence because of what he’d been told. The judge was sympathetic but sentenced him accordingly. Lemons appealed.

ISSUE: Is estoppel by entrapment available when a state or federal officer tells a subject that an action is legal?

HOLDING: No

DISCUSSION: The Court noted that in the Sixth Circuit the defense of “estoppel by entrapment” is not available “when a state or local law enforcement official tells a defendant that an act is legal, and the federal government prosecutes the crime.”²³⁶ Lemons argued for a partial use of the doctrine as a “middle ground.” The Court, however, declined to do so and upheld his sentence.

U.S. v. Hackworth, 2012 WL 208694 (6th Cir. 2012)

FACTS: On February 18, 2009, Hackworth (age 31) began chatting with “Amber” via the Internet. He believed he was chatting with a 14-year-old girl, but in fact, was chatting with Det. Arterburn (Louisville Metro PD). He friended her on the Yahoo site they were using. On April 7, “Amber” initiated a chat by commenting on Hackworth’s avatar. At his request, a photo was provided that was a young-looking female officer. Hackworth commented that it was “too bad” that she was only 14 as they could “have some fun if she was older.” The conversation continued with “Amber” prodding him to explain what might happen at a meeting. He assured her they would just meet. The next day, he initiated contact and they again discussed a meeting to “hang out.” However, although it became sexual in nature, he said he would never meet with her as she was too young. The next day, Hackworth again initiated a conversation as to wishing she “did massages” that he would be willing to pay for. Finally, the following day, he discussed having sex and agreed to meeting. When Hackworth approached the decoy “Amber,” he was arrested.

²³⁵ 279 F.3d 358 (6th Cir. 2002).

²³⁶ U.S. v. Ormsby, 252 F.3d 844 (6th Cir. 2001).

Hackworth was charged under 18 U.S.C. §2422(b).²³⁷ At trial, Det. Arterburn testified as to what the crime would have been had they had sex. Hackworth was convicted and appealed.

ISSUE: Does continuing a communication with an apparent minor negate an entrapment defense?

HOLDING: Yes

DISCUSSION: Hackworth argued that he was entrapped by the communications. Under federal law, such a defense “requires proof of two elements: (1) government inducement of the crime and (2) a lack of predisposition on the part of the defendant to engage in the criminal conduct.” The prosecution bears the burden to show predisposition beyond a reasonable doubt. The government conceded that Hackworth did not have a prior record of soliciting children for sex nor did a subsequent search reveal any indication he was interested in such. However, the Court noted that he asked her for “sexy” photos and continued contacting her after he knew her age. Although looking at certain passages of the chat log, in isolation, may have supported his contention that he only wanted to meet and talk with her, taken in its entirety, and his explicit responses to her prompting, meant otherwise.

Further, under the federal statute, the fact that he was, in fact, chatting with an adult did not negate his conviction, as the law criminalized only the attempt to persuade a minor to engage in unlawful sex. The fact that the underlying Kentucky sexual offenses would have required a minor for conviction was immaterial.

The Court upheld his conviction.

TRIAL PROCEDURE / EVIDENCE – CONSTRUCTIVE POSSESSION

U.S. v. Williamson, 2012 WL 1940340 (6th Cir. 2012)

FACTS: On August 6, 2008, Memphis officer saw Williamson engage in a drug transaction with another man. When they approached, Williamson fled, ducking into an apartment a few feet away. Det. Handley saw that Williamson was holding something in one hand and “clutching his right hand.” Williams threw down marijuana while fleeing up interior stairs, and at the top of the steps, took a “black object” from his waistband and tossed it, making a loud sound. He was apprehended in a bathroom. A loaded black handgun was located in the area where he’d tossed the object.

As a convicted felon, Williams was arrested for its possession. During discovery, the government provided a copy of the arrest documents which reflected oral statements he made, along with the rights waiver form. However, on the back of the form, which was not provided, he also denied possessing the gun and denied any knowledge of it. At trial, his sister, who lived in that apartment, testified that the weapon belonged to someone else and contested where the pistol was located. She admitted she had not told anyone that the pistol belonged to someone else (a former boyfriend who had belongings there) until a month before the trial and the claimed owner was deceased.

When the actual rights waiver was produced to rebut an unrelated claim, an objection was made because only the front side had been provided. The document itself was not admitted.

²³⁷ Coercion and enticement to engage in prostitution.

Williams was convicted and appealed.

ISSUE: May evidence as to how a weapon is situated be introduced to prove a subject could have been in possession of it?

HOLDING: Yes

DISCUSSION: Williamson argued that the evidence was not enough to prove he possessed the weapon. He claimed it was unlikely, if not impossible, for him to have thrown the weapon where it was found. However the Court agreed that the jury had the advantage of photos and an officer's testimony, and that their decision was rational. On a related note, the Court agreed that the officer that testified about the gun was correctly permitted to testify about whether it was possible to toss the pistol from the steps in to the open closet, as his rational perception. The testimony was proper as lay testimony.

With respect to the rights form, the back of which was introduced to rebut a suggestion that Williamson was abused during his arrest, the Court found it was proper to admit it. By the time it was introduced, his counsel was aware of the document. Further, his counsel was aware that the document was two-sided and that they had an opportunity to review the original, but chose not to do so. He had always argued he did not possess the pistol, so his statement to that effect was not material.

Williamson's conviction was affirmed.

TRIAL PROCEDURE / EVIDENCE - GIGLIO

U.S. v. Taylor, Henderson and Lewis, 471 Fed.Appx. 499, 2012 WL 2366243 (6th Circ. 2012)

FACTS: During an extensive drug-trafficking investigation in the Cleveland area, officers suspected Henderson of being involved in transporting PCP from California to Ohio. They found Henderson registered at a hotel in Brooklyn (OH) even though he lived nearby in Cleveland. They learned he'd stayed there often and that he had an active felony warrant. On January 11, 2007, they learned he'd returned to the hotel. The officers also found that Lewis, who was supposedly from California, was staying in the next room, along with a second man. They set up surveillance of both rooms. Ultimately, they followed two minivans that were linked to the three men, a green minivan currently occupied by Henderson and Madden, and silver one by Lewis and Taylor. A uniformed officer was asked to make the stop.

Upon stopping the vehicle, the officers smelled marijuana. Henderson gave a false ID and was not fully identified by Madden, either. Officers, however, recognized him to be Henderson. Both were arrested. Madden was found to be in the possession of a large amount of cash, but no drugs. Madden (Henderson's wife) finally gave consent to search their home and admitted they would find cash and marijuana. In fact, they found PCP and other contraband, as well. Madden was arrested.

Henderson was given Miranda and ultimately claimed responsibility for what was found at the house. When the vehicle parked, the officers pulled alongside and realized that the occupants were smoking marijuana. They learned additional information and sought a warrant for the room occupied by Lewis and Taylor. There, they were confronted with the "the "overwhelming" chemical odor of PCP and they

discovered an open water bottle containing PCP in the sink.” They found a vast amount of PCP and cash, along with plane ticket, in the room. They did not seize luggage at that time, but was later given the luggage by the hotel, and it was found to contain clothing that corresponded to Lewis and Taylor’s sizes.

Everyone was arrested and indicted on drug trafficking charges. They moved for suppression, based upon the argument that Madden’s consent and the statements she made incriminating Henderson was coerced by her detention. The trial court agreed that she had been “for all intents and purposes, been illegally arrested when she was put into the back of Captain Hefferman’s car.” All evidence against Madden was suppressed and the charges were dismissed. Henderson appealed as well, and because of the privacy interests he held in the home, the Court agreed that all such evidence found there against him would also be suppressed as “fruits of the poisonous tree.” However, the Court agreed that it was proper to admit his statements as they were unrelated to the search of the house.

Lewis and Taylor moved to suppress the evidence found in their room, arguing a lack of probable cause.

After a complicated criminal proceeding, all were convicted. Following the trial, it was discovered that one of the agents involved, Lucas, had “previously made knowingly false statements under oath in other cases,” and they were not notified. (He was apparently under investigation at the time.) All appealed on numerous issues.

ISSUE: Is non-material evidence required to be disclosed under Giglio?

HOLDING: No

DISCUSSION: First, With respect to Agent Lucas, the Court noted that the evidence against Agent Lucas “was not material to the suppression-hearing proceedings or to the trials held in this case.” Further, following the trial, some of the allegations made against Lucas were not sustained. In addition, his testimony was corroborated by others or by independent objective evidence. The Court did not approve of the effort to protect the agent, but did not find it affected the final determination.

Next, Henderson argued that his statements about connections to Lewis and Taylor were fabricated by Agent Lucas. Then asserted, in contradiction, that any statements made were intended to protect Madden. The Court concluded the statements were properly admitted. Lewis and Taylor argued their statements should have been suppressed because they lacked reasonable suspicion to stop the van, probable cause to arrest them or probable cause to search the room. The Court noted that the trial court had found probable cause existed for the stop based upon traffic offenses and as such, the stop was lawful. Both that, and the spotting of them apparently smoking marijuana, justified the stop. They apparently admitted to smoking marijuana and as such, they were properly arrested.

With respect to the affidavit, the Court agreed that it was sufficiently detailed.

Taylor argued that he did not “knowingly possess” the PCP found in the room. Taylor was not listed as a guest, but the government proved that he was staying there, by finding clothing and a plane ticket. He was an occupant of the room during the relevant time frame, and the PCP was in plain view, and plain smell. Intention to distribute could be inferred by the quantity.

All of the convictions were affirmed.

TRIAL PROCEDURE/EVIDENCE – TESTIMONY

Jones v. Bagley, 696 F.3d 475 (6th Cir. Mich. 2012)

FACTS: While being interrogated on a murder, Jones stated that he needed to “talk to an attorney before he answered any more questions.” He had been given his Miranda rights but was not under arrest. At trial, the prosecutor was permitted to “elicit from the police witness the fact that the interrogation ended when Jones asked to speak with an attorney.” The Court admonished the jury that anyone could decide to speak to an attorney and that it should not be understood as an admission of guilt. Following the trial, Jones also argued that four pieces of evidence were withheld from him.

Jones was convicted and appealed, first through the Ohio state court system, and then through the federal court system, via a habeas petition.

ISSUE: Is it proper to give testimony that indicates a person invoked their right to counsel?

HOLDING: No

DISCUSSION: The Court noted that each of the lower courts had ruled that it was improper for the prosecutor to elicit testimony suggested a subject had invoked their right to counsel, however, the Court agreed that it was harmless, given that the “judge gave curative instructions and the evidence against Jones was otherwise strong.”

With respect to the withheld evidence, the Court noted that to make a case under Brady v. Maryland, it was necessary to show that 1) the evidence was favorable to Jones, 2) that the prosecutor withheld it and 3) that Jones suffered actual prejudice from it, meaning it was material to his conviction or his sentence. Because the Court agreed that in fact, most of the allegedly withheld evidence was not exculpatory, Jones failed to make the necessary showing. With respect to other evidence, which may have been exculpatory, the Court ruled that Jones was aware of the issue with the evidence and could have pursued it at trial, if he chose to do so. Cumulatively, the Court concluded that there was no Brady violation.

Jones’s conviction was affirmed.

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.

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."²³⁸

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."²³⁹ 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.

U.S. v. Wilson, 2012 WL 4457583 (6th Cir. 2012)

FACTS: Officer Petrich (Flint PD) and others were investigating drug activity at two apartments in a single building. They went to one apartment and asked for consent to search, finding that Wilson had moved there previously. They located a large amount of drugs, weapons and ammunition. A month later, a CI purchased cocaine from another apartment in a nearby building and the officer got a search warrant for that apartment. In the affidavit, he claimed that the CI was under constant surveillance during the buy. During the forcible entry execution of the warrant, they found Wilson, "already laid out flat on the ground" near the bathroom. The toilet had been flushed but they were able to recover much incriminating evidence. They also found the same box from which they'd recovered a shotgun at the search a month before.

Wilson was charged with drug trafficking and firearms offenses. At trial, Officer Petrich testified in an inconsistent manner with the warrant affidavit and report, in fact the buy had taken place after the two subjects (Wilson and the CI) walked to another apartment building, the same one where he'd been living initially. (The warrant suggested differently.) Petrich explained he'd been trying to protect the informant by

²³⁸ 475 U.S. 673 (1986).

²³⁹ Arizona v. Fulminante, 499 U.S. 279 (1991).

leaving out such details. Following Wilson's conviction, the Court refused to order a mistrial and Wilson appealed.

ISSUE: Does the prosecution have an obligation to disclose when it knows that trial testimony will differ from a document already in the record?

HOLDING: Yes

DISCUSSION: The Court agreed that when the prosecution learned that the officer's trial testimony would differ from the search warrant affidavit, it had an obligation to disclose this to the defense, immediately, under Rule 16(c). The Court agreed, however, that even removing the challenged information, the affidavit provided sufficient connection to the address to support probable cause for the warrant.

The Court also agreed that although the information was provided during trial, it wasn't impermissibly delayed nor was Wilson prejudiced by the corrected information. Wilson was able to impeach Officer Petrich with the information effectively.

Wilson's conviction was affirmed.

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

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."²⁴⁰ 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

²⁴⁰ Illinois v. Fisher, 540 U.S. 544 (2004).

TRIAL PROCEDURE / EVIDENCE - SPOILIATION

Adkins v. Wolever, 692 F.3d 499 (6th Cir. 2012)

FACTS: Adkins, a prisoner in Michigan, was involved in litigation with a prison officer, Wolever, involving an excessive force claim. Prior to the lawsuit being filed, a prison inspector had reviewed color photos and video footage of the incident. However, once Adkins filed the action, prison officials could not locate the photos and video, as well as other evidence. Because it could not be produced, he asked for a spoliation instruction to the jury, informing the jurors that they could presume that the missing evidence would be favorable to Adkins. The District Court, applying Michigan law, denied the request because Michigan's "spoliation instruction required Adkins to demonstrate that the spoliated evidence was under Wolever's [direct] control, which it undisputedly was not."

Upon initial appeal, the Sixth Circuit ruled that federal law governed the spoliation sanctions that apply during federal litigation. During subsequent discovery, it was agreed that a surveillance video had existed and had been downloaded and viewed by the inspector. The prison retention schedule for such records was three years, unless there was pending litigation, in which case it would be held for the litigation. Neither Adkins or Wolever would have had access to the video initially, and special access was needed to download or record the video. However, the person that viewed it (before it went missing) testified and suggested that there was little of interest on it relating to the claims. For that reason, the trial court concluded that a spoliation instruction was not needed. Adkins again appealed.

ISSUE: Are spoliation sanctions appropriate when the affected officer never had control of the evidence (which was destroyed)?

HOLDING: No

DISCUSSION: The Court looked to Beaven v. United States Dep't of Justice for guidance on "whether a particular spoliation sanction is appropriate." The Court agreed that Wolever never had control of the video, and as such, it did not go to the second prong, which was that it was destroyed with a culpable state of mind, by him. The Court concluded that in this case, a spoliation instruction was not warranted, but cautioned that does not mean that in another case, it would not be appropriate.

TRIAL PROCEDURE / EVIDENCE – RAPE SHIELD

U.S. v. Ogden, 685 F.3d 600 (6th Cir. 2012)

FACTS: In March, 2005, Ogden contacted a young female through Yahoo. She claimed to be 15 and he claimed to be 25. They exchanged chat and photos. Ogden requested more photos, she sent topless photos, and told her he wanted even more. He suggested that she change clothes in front of a webcam for him. She sent a number of sexually explicit photos and videos and in one case, sent a video showing her masturbating. She turned 16 and Ogden went to see her, in California, meeting her at a hotel. Her mother tried to call her, but the victim hung up. When she returned home, she learned her father had read her journal and learned about Ogden. Her father invited Ogden to the house and when he arrived, he was arrested. (He was discovered to have lied about his age and other details.)

Ogden was charged for a variety of sexual crimes. Just before trial, the government produced records of 400 online conversations between the victim and other men, making it clear she'd shared explicit photos before. The Court ruled they were inadmissible however. Ogden was convicted and appealed.

ISSUE: Are chat logs between a victim and other men admissible under the Rape Shield provisions?

HOLDING: No (as a rule)

DISCUSSION: Ogden argued that he wasn't aware that he would be getting such photos but the Court noted that the victim specifically asked to see topless photos and that he reciprocated with similar photos of himself as well. As such, he satisfied the requirement that he knowingly solicited such photos. In addition, the evidence indicated she produced explicit photos and videos after being asked by him to do so and that at least some of the photos were taken specifically for him, and were not photos she'd taken for others. .

In addition, the Court agreed the chat-logs were properly excluded under the federal equipment of the Rape Shield rule.²⁴¹ The Court did not find them critical to the defense and nothing in them could have been used to impeach the victim's testimony.

His conviction was affirmed.

TRIAL PROCEDURE/EVIDENCE – HEARSAY

U.S. v. Mohammed, 2012 WL 4465626 (6th Cir. 2012)

FACTS: On July 21, 2009, Cincinnati officers conducted a "buy-bust" intended to arrest Mohammed once he sold drugs to a CI. Recorded calls never specifically mentioned drugs but talked about doing the "car thing." Mohammed arrived as planned and walked up to the car where the CI and an officer were waiting, but as soon as Mohammed reached out for the door, the officer drove the car away. Other officers arrested Mohammed, who denied having any drugs or weapons on his person. He agreed that he had a handgun in the car, however. Mohammed did not claim to live where the CI said he did. A drug dog "gave a clear and aggressive indication" – but no drugs were found in the car. They went to the address given by the CI and found another of Mohammed's cars, and again, the dog alerted on the vehicle. They used Mohammed's keys to enter the common entry foyer and the dog alerted on the apartment indicated by the CI.

A search warrant was obtained and a large amount of heroin was recovered, along with a few other items. Mohammed was indicted for trafficking. He moved for suppression, arguing that the officers' entry into the foyer was a violation. The trial court agreed, based upon U.S. v. Cariger²⁴² but found there was sufficient other information in the warrant affidavit to support the search.

Mohammed was convicted and appealed.

²⁴¹ FRE 412(1).

²⁴² 541 F.2d 545 (6th Cir. 1976).

ISSUE: Is it proper to give hearsay testimony about what another non-testifying witness said?

HOLDING: No (usually)

DISCUSSION: The Court agreed that it was improper to enter “the locked common area” without a warrant. The Court concurred, however, that the “untainted information contained in the warrant” still supported the warrant. Further, when he turned the key in the apartment building exterior door, a location where Mohammed claimed not to live, it confirmed that he lived in the building (although not necessarily the suspect apartment).

Mohammed argued that it was improper to allow hearsay testimony from police officers from an informant, when they knew the CI would not be testifying. Although the statements were stricken, he argued that the jury would be unable to disregard what they had heard. The Court agreed that some of the statements were testimonial, such as Mohammed’s street name, as they were given directly to the police to use in the prosecution. The court considered whether the error to admit was harmless, considering “(1) the importance of the witness’s 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.”²⁴³ The court concluded that the information put before the jury was not critical to the case, and therefore harmless.

When Mohammed was arrested, the officer “asked whether he had any weapons, drugs, or anything sharp that would stick him.” Mohammed denied anything on his person. He was given Miranda before he was asked about the car, and agreed there was a gun in the vehicle. The Court had no issue that it was proper to ask about a gun on his person, for safety reasons, but had not previously “specifically addressed if questions about whether a suspect is carrying drugs or drug paraphernalia, in anticipation of a pat down, are permissible under the public-safety exception.” Other circuits had held the questions to be proper, however, because of the fear of a syringe or the like, however. The court did not find the pre-Miranda questioning to be a problem.

The court upheld Mohammed’s conviction.

U.S. v. Ballew, 2012 WL 3156445 (6th Cir. 2012)

FACTS: On August 8, 2009, a woman called 911, screaming that someone had just pointed a gun in her face. Jackson (TN) officers responded, finding the complaining who “screamed ‘he’s got a gun,’” and “said the man had run behind the house.” She directed the officers to a vehicle where they found a gun, a backpack with marijuana and Ballew’s driver’s license. Ballew, a convicted felon, was convicted for possession of the gun.

Apparently the woman did not testify, but a responding officer did, repeating her exclamation about the gun. His testimony was admitted under the “excited utterance” exception which covers “a statement relating to a startling event or condition, made while the declarant was under the stress of excitement that it caused.”²⁴⁴

²⁴³ Delaware v. Van Arsdall, 475 U.S. 673 (1986).

²⁴⁴ FRE 803(2); Such issues are usually handled as a jury instruction in Kentucky state courts.

Ballew was convicted and appealed.

ISSUE: Are "excited utterances" an exception to the hearsay rule?

HOLDING: Yes

DISCUSSION: Ballew argued that the admission was improper. The Court agreed, however, that the record showed that all three elements for an excited utterance were present in the case, as the officer testified to the fear the woman showed. The Court also considered his argument under the Confrontation Clause, but the Court agreed that the error (if any) would be harmless under that argument, as the jury heard, unobjected, the 911 call in which essentially the same phrase was used.

Ballew's conviction was affirmed.

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.

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 Crawford²⁴⁵ 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:

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

²⁴⁵ Crawford v. Washington, 541 U.S. 36 (2004).

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. Washington²⁴⁶ 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. California²⁴⁷ 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 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.

²⁴⁶ 541 U.S. 36 (2004).

²⁴⁷ 554 U.S. 353 (2008).

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.

Fagan v. Com., 374 S.W.3d 274 (Ky. 2012)

FACTS: Fagan was charged with the theft of copper cables, with a value of over \$30,000, which had been removed from railroad locomotives. However, to replace the cables cost over \$400,000, between the replacement cable and the damage done during the theft. He was indicted for both Theft and Criminal Mischief. He was convicted and appealed.

ISSUE: Is it double jeopardy to charge with both Theft and Criminal Damage?

HOLDING: No

DISCUSSION: Fagan argued that it was double jeopardy because to steal the cables, it was necessary to damage the locomotives. The Court disagreed, however, holding that under the Blockburger²⁴⁸ test, each offense had elements the other did not. (In other words, it is possible to steal without doing damage, although perhaps not in this case, and it is possible to do damage without stealing.)

The Court upheld Fagan’s conviction.

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

²⁴⁸ Blockburger v. U.S., 284 U.S. 299 (1932).

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 Ornela’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 exclude 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.

EMPLOYMENT – FIRST AMENDMENT

Whitney v. City of Milan (TN), 677 F.3d 292 (6th Cir. 2012).

FACTS: Whitney was employed by the City of Milan and eventually was moved to a position working under the City Recorder, Williams. (They were, in fact, close personal friends.) Williams was fired. Crider ordered Whitney to have no contact with Williams. Whitney was concerned if she did so, she would lose her job. Williams filed a lawsuit against the City, alleging gender discrimination and for speaking out against public corruption. Whitney subsequently filed suit as well, arguing that the City violated her First Amendment rights, specifically her "prior restraint" claim. Crider moved for summary judgment and was denied. He filed an interlocutory appeal.

ISSUE: Is it proper for an employer to order an employee to have no contact with a former employee (absent a complaint)?

HOLDING: No

DISCUSSION: The Court only addressed the issue of Crider's order not to promote Williams's allegations and his order to not participate in the lawsuit. The Court agreed that the order did "restrict private-citizen speech on a matter of public concern." Applying the Pickering²⁴⁹ "balancing test," Crider argued that the restriction was an appropriate way to prevent "the workplace disruption that occurs when a current employee fraternizes with a former, disgruntled employee." The Court noted that he subjected Whitney "to an indefinite gag order without any showing that Whitney had previously caused disruptions in the workplace."

²⁴⁹ Pickering v. Board of Education, 391 U.S. 563 (1968).

The Court agreed that Crider's prohibited speech was of "significant interest to the public" and it had "consistently protected a public employee's right to discuss issues of public corruption and workplace discrimination," which are automatically of public interest.

The Court agreed the Crider was not entitled to qualified immunity.

EMPLOYMENT – DISCRIMINATION

Toth v. City of Toledo, 2012 WL 1816160 (6th Cir. 2012)

FACTS: Toth had worked as a Toledo police officer since 2000. He was involved in several incidents in which he allegedly destroyed evidence and abused his authority, for which he was suspended and was given a deferred termination.²⁵⁰ In 2006 he took the sergeant's test and did well, scoring 8 out of the 48 who took the test. The promotion process, however, had discretionary elements, and Toth, a white male, was never promoted. Over the ensuing years, a total of 17 officers were promoted, 14 white and 3 African-American. Toth sued, claiming reverse racial discrimination. The District Court gave summary judgment to the City and Toth appealed.

ISSUE: Must a comparison be made between similarly-situated subjects for a discrimination claim?

HOLDING: Yes

DISCUSSION: The Court reviewed the issue under the Equal Protection Clause, as Toth claimed "he was deprived of his Fourteenth Amendment right to equal protection under the law when defendants disciplined him and later did not promote him to sergeant, both times because of his race." The Court found no background evidence that the city regularly discriminated against the majority race "with respect to punishment." As he could not demonstrate he was punished more severely than "similarly situated minority officers." Situations he described did not prove his point. North could he demonstrate discrimination with respect to promotions, and no officer with a similar disciplinary record was promoted.

The summary judgment was upheld.

EMPLOYMENT – USERRA

Petty v. Metropolitan Government of Nashville & Davidson County. 687 F.3d 710 (6th Cir. 2012)

FACTS: This case is on remand from an earlier decision which was resolved in Petty's favor (Petty I). In 2003, Petty was a sergeant at Metro Nashville PD (MPD). He was also a member of the Army National Guard. In November, 2003, he was activated and eventually sent to Kuwait. During his service there, he was involved in making wine and resigned his commission to avoid court-martial. However, he was given an honorable discharge, although a separate box indicated it was a separation in lieu of court-martial. In February 2005, he requested reinstatement and was subjected to its "return-to-work process." In response to a question, he revealed that he was involved in military charges in Kuwait, although he did not detail the circumstances. The MPD did a further investigation and concluded he had not been truthful

²⁵⁰ In effect, he was terminated, but his termination was suspended for three years.

on his application and charged him with dishonesty. After further investigation, however, the charges were dismissed. However, as a result of yet further investigation, he was charged again, under an accusation that he'd altered the DD-214 to hide the circumstances of his departure from the military. (In fact, the so-called alteration apparently occurred from attempting to enlarge the form on a copier.)

During this time, Petty had been assigned to the "bubble" – taking telephone calls. He was also not allowed to work off-duty. Petty sued, arguing that the agency had delayed his return by the return-to-work process, failed to reinstate him as a sergeant and denying him the ability to work off-duty. Initially, the trial court had ruled in favor of MPD in all claims except that relating to the off-duty. Following a trial, the Court ruled on that in favor of MPD. Petty appealed. During the appeal, MPD continued their investigation and finally, Petty was terminated. His certification to work as a peace officer was terminated by their POST commission, as well.

In Petty I, the Court held that USERRA's reemployment provisions barred MPD from requiring Petty to undergo the return-to-work process and that it was exacerbated when they delayed his reemployment during the second investigation. The Court ruled that MPD should have fully reemployed Petty immediately. Learning only at the time of argument of Petty's termination, the Court recognized that might affect his actual assignment but remanded the case for further discussion. Upon rehearing, Petty added the claim of discrimination and retaliation in violation of USERRA. Upon remand, the District Court granted Petty summary judgment and ordered his immediate reinstatement to his former position and rank. He was awarded back pay and damages of approximately \$180,000 and an additional \$120,000 in partial liquidated damages. Appeals were taken on both sides, with Petty arguing only that he was entitled to full, rather than partial, liquidated damages.

ISSUE: Is a rehire under USERRA automatic?

HOLDING: Yes

DISCUSSION: The Court began by noting that "USERRA protects the job security of returning veterans," combining several different provisions to achieve this aim. The statute, 38 U.S.C. 4311-4316, protects "different phases of employment." One section covers rehire/return to work, another prohibits discrimination with respect to "any benefit of employment." In fact, the reemployment provision requires no showing of discrimination at all, but only requires that they meet four requirements: "proper notice to his employer in advance of his departure, a service period of less than five years, a timely request for reemployment accompanied by proper documentation, and a separation from military service under honorable conditions." If they do so, the service member must be rehired. However, other provisions of the law require a showing of actual discrimination based upon military service.

MPD argued that the case should have been analyzed as a discrimination case, arguing that the termination was based upon dishonesty. However, the Court noted, Petty was never restored to his previous position (as patrol sergeant) and that served as an ongoing violation of the reemployment provisions, not as a separate matter of reemployment. The Court ruled that although he was reemployed, he was never "fully reemployed" and his rights were limited, as well. The Court tracked all of the disputed issues "to his failure to provide answers and documentation relating to his military service."

The Court noted that:

Though USERRA may permit Metro to terminate Petty for dishonesty after reemploying him, Metro never restored Petty to his position as patrol sergeant. Accordingly, we hold that the district court properly exercised its discretion in awarding Petty back pay and reinstatement under his reemployment claim.

With respect to the off-duty claim, MPD argued that he was on “administrative assignment” because of the investigation, and that status barred him from “engaging in extra-duty employment.” The Court noted that if MPD’s concerns about Petty related to his “conduct in service” than the denial of the benefit (to work off-duty) related back to his military service and was thus improper. Since the District Court had ruled that it had been so proven and ruled in favor of Petty.

After ruling on other procedural issues, the Court affirmed the District Court’s ultimate rulings in Petty I.

EMPLOYMENT – FIRST AMENDMENT

Buchko v. County of Monroe (Sheriff), 2012 WL 5896550 (6th Cir. Mich. 2012)

FACTS: Buchko was a member of the Monroe County (MI) Sheriff’s Office. He tested for a sergeant’s position in 2003. Under their collective bargaining agreement, the Sheriff would use the test scores and “sheriff’s points” to determine who will be promoted. Buchko did not test well enough to place in the top two at that time. In 2004, he was elected to the Monroe Public School Board of Election and was a “school liaison.” In 2005 he tested again, and was ranked second on the list. In 2006, while the list was still in effect, Sheriff Crutchfield passed over Buchko for a slot as the K-9 supervisor, in favor of the deputy who was ranked third. The Sheriff justified the decision by saying that the deputy was a K-9 handler. Buchko was troubled, but did not have any specific criticism of the other deputy’s ability to do the job.

Buchko, however, believed that the decision was based on votes he made as a member of the school board and he filed an unsuccessful grievance. In 2008, he began working on the campaign of a fellow deputy who was running against Sheriff Crutchfield. He later acknowledged that he criticized the Sheriff privately, but never publicly. He claimed that Sheriff Crutchfield retaliated, however, by changing his work schedule and assignments. Emails were sent to him, as a member of the Sheriff’s Office, that he argued were threatening to his work life, emphasizing the need for loyalty. Sheriff Crutchfield won the election. In January, 2009, Buchko was again passed over for promotion by someone who ranked lower than he did on the list. Again a grievance was denied and Buchko filed suit against Monroe County and the Sheriff under 42 U.S.C. §1983. The Sheriff and the county moved for and received summary judgment, dismissing the case, and Buchko appealed.

ISSUE: Must a nexus be proved between protected speech and retaliatory actions?

HOLDING: Yes

DISCUSSION: To succeed in a First Amendment case, the Court noted that Buchko must prove three elements; that he “(1) engaged in constitutionally protected conduct; (2) an adverse action was taken against [him] that would deter a person of ordinary firmness from continuing to engage in that conduct; and (3) the adverse action was motivated at least in part by [Buchko’s] protected conduct.” In this case, the parties agreed that he satisfied the first two elements, the only issue in dispute was whether the failure to

promote was “based at least in part on [Buchko’s] protected activity.” The Court conclude that Buchko did not make a sufficient showing that the Sheriff bypassing him was due to retaliation. The Court noted that his “minimal evidence is purely speculative and he is required to ‘point to specific, nonconclusory allegations reasonably linking [his] speech to employer discipline.’”¹ The evidence he presented was, at best, indirect, and linked only to a statement made by someone (the union president) other than the Sheriff.

The Court noted that there was a lengthy time between the “first alleged protected activity and the alleged adverse employment action,” 29 months, and between the second, 12 months. However, the Court agreed that it should look beyond mere “temporal proximity,” but still found no link between the two. Further, the Court found valid reasons for the Sheriff’s decision to bypass Buchko, as the selected candidates had “skill set[s] and experience” that Buchko lacked.

The Court affirmed the decision to give summary judgment to the Sheriff and the County.

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.”²⁵¹ 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 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.”²⁵²

²⁵¹ The Court noted that the label on the button probably came with the phone and was meaningless.

²⁵² Brandenburg v. Housing Auth. of Irvine, 253 F.3d 891 (6th Cir. 2001).

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.”²⁵³ 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.”²⁵⁴ 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.”²⁵⁵ 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.

FIRST AMENDMENT

Patrizi v. Huff, 690 F.3d 459 (6th Cir. 2012)

FACTS: In December, 2007, Patrizi was at a nightclub with friends. Officers Huff and Connoles responded to the club for an assault. The victim (Wallace) took them inside and pointed out the group that had assaulted her – that included Mills, who was in Patrizi’s group. The officers directed them to the exit of the club to go outside, where it was quieter, to discuss what had happened. Patrizi, who was not with the group when they were initially approached, joined them outside. Officer Connoles began to question Mills and Patrizi interjected. According to the officers, Patrizi began to give orders to Mills and to point into Connoles’s face, stating that Mills did not have to talk to the officer. Eventually Huff tried to pull Patrizi away and Patrizi “swung around” at him, stating she did not have to leave. Patrizi was arrested. Both officers later stated that Patrizi appeared intoxicated. Officer Connoles later testified that Patrizi questioned him about why he was questioning Mills and that Patrizi identified herself as an attorney.

Patrizi was charged with obstructing official business, but the charges were dismissed. Patrizi filed suit under 42 U.S.C. §1983, arguing false arrest. The officers moved for summary judgment, which was denied, with the trial court concluding that “Patrizi’s speech never constituted an affirmative act of obstruction under the ordinance.”

Officers Huff and Connoles appealed.

ISSUE: Does assertive (but not loud or disorderly) speech become impeding police business?

²⁵³ Pickering v. Bd. Of Educ. Of Twp High Sch. Dist. 391 U.S. 563 (1968).

²⁵⁴ Williams v. Kentucky, 24 F.3d 1526 (6th Cir. 1994).

²⁵⁵ Grossman v. Allen, 950 F.2d 338 (6th Cir. 1991).

HOLDING: No

DISCUSSION: The Court looked to the Cleveland ordinance in question and noted that Ohio had interpreted the ordinance that it required an “affirmative act that interrupts police business.” Even “truthful speech” can “satisfy the act element” if done to impede an officer but noted that Ohio had only upheld convictions if the speech “involved yelling, cursing, aggressive conduct, and/or persistent disruptions after warnings from the police against interrupting the investigation.” Ohio had case law that indicated that what Patrizi allegedly did “did not constitute an affirmative act under the obstruction ordinance.” She was never, in fact, told to stop questioning the officers and she was not “aggressive, boisterous, or unduly disruptive.”

The Court also addressed the question that arose in City of Houston v. Hill.²⁵⁶ In Hill, the court ruled that the First Amendment “protects a significant amount of verbal criticism and challenge directed at police officers” and such laws must be narrowly tailored to prohibit “only disorderly conduct or fighting words.” The Court agreed that “nonaggressive questioning of police officers is constitutional protected activity.”

The Court upheld the denial of summary judgment.

COMPUTER CRIME

U.S. v. LaPradd, 2012 WL 1662439 (6th Cir. 2012)

FACTS: In the summer of 2009, LaPradd was using public computers at UL to look at images of nude minors. It was reported to the librarian, who then reported it to ULPD. He returned the next day and officers went to investigate. They watched through a window and saw he was looking at “what appeared to be images of nude children.” He accompanied the officers outside and was given Miranda. One officer remained at the terminal to investigate what he’d been looking at. He agreed he had been looking at the images and that he had a flash drive with images, but argued that “some photographers would argue that it’s not child pornography.” (Later, when testifying, the officer who examined the images could not recall if the images “depicted children engaged in sexual acts.”

LaPradd was arrested for violating KRS 531.335. They seized the computer and flash drive. He waived his Miranda rights and stated he was researching the nude photography of children, and admitted he had more images at his apartment. He consented to a search of his apartment. Det. Jewell did a search warrant to do a forensic evaluation of the computers. Many images were found.

As a result, LaPradd was indicted for “knowingly possessing and receiving child pornography.” He moved for suppression, which was denied. He appealed.

ISSUE: May admissions to the possession of child pornography substitute for actual proof that photos are pornographic?

HOLDING: Yes

²⁵⁶ 482 U.S. 451 (1987).

DISCUSSION: LaPradd argued that the prosecution did not prove that the images were, in fact, child pornography and as such, the officers lacked probable cause to arrest him. The Court, however, noted that he had, in fact, admitted he had child pornography and as such, his “voluntary, self-incriminating statement established probable cause” for the arrest. The officers “were not obligated to investigate further to determine whether the images on the computer screen did in fact constitute child pornography.”

The Court agreed that the arrest was proper. Further, the Court agreed that his post-arrest statements were given after he was given Miranda and as such, admissible.

U.S. v. Mauck, 469 Fed.Appx. 424, 2012 WL 1253209 (6th Cir. 2012)

FACTS: Memphis FBI agents (Crimes Against Children Task Force) received complaints about sexually explicit images of children on Mbuzzzy, a social networking site. They created undercover personas to contact suspects (including Mauck) and exchanged numerous messages with such photos. They discovered his identity and address and learned he had a prior conviction for possessing child pornography. They arrested him and searched his motel room.

Mauck eventually pled guilty, but objected to a sentence enhancement.

ISSUE: Is barter (of images) a thing of value?

HOLDING: Yes

DISCUSSION: Mauck argued that his expectation that he would get different images in exchange was not a “thing of value” that warranted the higher sentence. The Court agreed, however, that since he expected to get pictures in return, the enhancement was proper.

Mauck’s sentence was upheld.

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, Kernel 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.

COMPUTER CRIME – SENTENCING

U.S. v. Keefer, 2012 WL 3156439 (6th Cir. 2012)

FACTS: Keefer was charged with having over 600 images of child pornography on his computer. 1,215 images were found in the “unallocated space” on his computer, with only 39 images readily locatable in the hard drive. However, he was sentenced with having over 600 images and appealed. The trial court agreed that there was little evidence that he had knowledge of the images in the unallocated space and remanded for resentencing. On remand, a forensic computer examiner testified that 1,062 of the images had been viewed or downloaded as full-size images at some point. Keefer was again sentenced for having over 600 and appealed.

ISSUE: Are all images on a computer hard drive (especially in unallocated space) necessarily there intentionally?

HOLDING: No

DISCUSSION: The Court noted that although federal law may not allow for the enhancement, but that Ohio law does punish those who “voluntarily reach out and bring to their computer screen the images in question.” The agent testified about “how images appear in a computer’s unallocated space” and that the area of the hard drive in question was a “temporary storage area when files are opened or deleted.” When a user deletes an image, it does not disappear but instead goes into that unallocated space where a normal user could no longer see it. However, he noted that attachments to unsolicited email via Yahoo, for example, don’t automatically download, but must be clicked to “wind up on the user’s computer.” It can, however, also happen when a user visits a website, and the computer stores information to allow the next visit to load more quickly. (If they are viewed as thumbnails, however, they will appear as thumbnails when stored. The same will occur for pop-up advertisements.) The agent agreed there might be innocent explanations for some of the photos, but “such innocent explanations [were] never offered.” In addition, some of the images were sent specifically to Keefer. The court agreed that “the circumstantial evidence” indicated that he knowingly viewed the images, not just possessed them.

The court upheld the sentence enhancement.

U.S. v. Ranke, 2012 WL 1547985 (6th Cir. 2012)

FACTS: Brown was incarcerated in the federal prison. He received an Easter card containing photos of a nude male. The officials searched his cell and found handwritten notes and a personal address book with a listing that matched the sender of the card. The notes, in “crude code” indicated the sender’s desire to have sex with young boys. The correspondent (Ranke) detailed his prior sexual experience with children. After further investigation, the officials received a search warrant for his residence and his post office boxes. They learned that Ranke actually didn’t live at the first address, his sister’s home, although he used it on occasion as a mailing address. She gave them his actual address and told the officers he worked with autistic children. They confirmed the information and got a search warrant for the second address. There, they found his locked bedroom and inside, a large amount of child pornography, marijuana and a gun. The affidavit described the initial images sent to Brown as “computer generated photographs” and detailed the investigation and the follow-up.

Ranke was charged initially for the firearm, under state law, and subsequently in federal charge for the child pornography. He moved to suppress the evidence of the searches and was denied. Ranke took a conditional plea to mailing child pornography and appealed.

ISSUE: Are computer generated photographs presumed to be of real persons?

HOLDING: Yes (see discussion)

DISCUSSION: Ranke seized on the description of the photos as “computer generated” arguing that under Ashcroft v. Free Speech Coalition, “virtual” child pornography is in fact legal and protected under the First Amendment.²⁵⁷ The Court however, found the argument without merit. The Court agreed that the phrase used by the officer is “somewhat problematic given commonly-used computer terminology and the legal distinction” made in Free Speech Coalition. The Court noted that the phrase “computer-generated” coupled with “photograph” suggested they were of a real child, however, and not CGI²⁵⁸. At best, the phrasing was “internally contradictory.” The Court agreed it might have been better to have more investigation by the judge but found that it did not merit suppression.

He also argued that the detective’s description suggested he did not actually see the photos, which were not attached to the affidavit. The Court agreed, however, that the affidavit was sufficient based upon the fact that the officer consulted with those who had seen the photos. The letters found in the cell were, in fact, submitted and that alone supported the subsequent search warrant. The inmate provided information to the authorities that further corroborated the investigation.

The Court affirmed the denial of the motion to suppress.

COMPUTER CRIME – 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.

²⁵⁷ 535 U.S. 234 (2002).

²⁵⁸ Computer generated image.

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.

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. Aaron²⁵⁹ 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.

FIRST AMENDMENT

McGlone v. Bell, 681 F.3d 718 (6th Cir. 2012)

FACTS: McGlone, an evangelical Christian, sought to speak on the campus of Tennessee Technological University (TTU). The campus “blends in” with Cookeville and there are only a few signs marking the campus boundaries. City streets run through the campus, which includes “many open, accessible areas on the grounds, including sidewalks, park areas with benches and tables, pedestrian malls, and other public ways.” McGlone contacted TTU on April 6, 2009, to find out what he needed to do to speak on the campus and was directed to “stop by the office when he wanted to speak.” The next day, he and a friend, Holes, came to the campus, but before they arrived at the designated office, they spoke to a few students. McGlone went to the office and was told he could speak at a particular location, but he asked if he could use a different location, “there being more students and tables and chairs in that area.” He was told the first location was his only option. He asked to see the written policy on the issue and was threatened with arrest. They continued to pursue the matter with the Dean of Student Affairs. While awaiting a decision, they returned to their preferred location and began to speak to students. TTU Officer Lambert arrived and told them if they did not leave, they would be charged with trespass. They both left. The next day, McGlone contacted the Dean and asked what he needed to do to speak on campus. He was told policy required a written application, submitted 14 days in advance, since he was not affiliated with the campus. McGlone sought further discussion with the Dean and was denied. They went to a location they believed to not be on the campus, as it appeared to be a city sidewalk. They were again threatened with arrest.

²⁵⁹ 33 F.App’x 180 (6th Cir. 2002).

McGlone filed suit under 42 U.S.C. §1983, asserting a policy that has a First Amendment chilling effect. The policy allows university officials open-ended discretion as to where a speaker can be permitted to be, and he argued that the location he was instructed to use was a location “where no one ever goes.” The U.S. District Court dismissed the lawsuit, finding McGlone lacked standing and further, that the “that the campus use policy is content-neutral, narrowly tailored to serve significant government interests, and left ample alternative channels for communication.” McGlone appealed.

ISSUE: Are public areas in a university campus public fora?

HOLDING: Yes

DISCUSSION: First, the Court found that he did, in fact, have proper standing to bring the case. Further, a chilling effect is a “present injury,” and he properly presented evidence that the policy prevented him from exercising a constitutional right. The Court did not agree that his failure to actually apply for a permit destroyed his standing. He was threatened with arrest twice, he sought a waiver of the permit and was denied.

With respect to the actual claim, the Court analyzed the proposed forum. Using a three-step process to determine: 1) whether the expressive activity deserves protection; 2) the nature of the forum, and 3) whether the justifications for exclusion from the relevant forum satisfy the requisite standard.¹ The Court agreed that his speech clearly deserves protection. Further, the Court agreed that the perimeter sidewalks are “traditional public fora” and that “all other open areas are designated public fora.” The sidewalks, in particular, blend in with the city’s sidewalks. The other open areas have been designated by TTU as places where speaking might occur, and as such, those areas are public fora. Finally, the policy imposes a prior restraint which is presumptively unconstitutional. “A prior restraint must be content-neutral, narrowly tailored to serve a significant governmental interest, and leave open alternatives for communication.” The policy in question is not narrowly tailored and unreasonably burdensome. “Any notice period is a substantial inhibition on speech.”¹ “The simple knowledge that one must inform the government of his desire to speak and must fill out appropriate forms and comply with the applicable regulations discourages citizens from speaking freely.”¹ Finally, the Court agreed that “registration requirements dissuade potential speakers by prohibiting anonymous speech.”¹ The Court found that TTU could not adequately defend their policy.

Finally, the court reversed the decision to give TTU officials qualified immunity, noting that the issues in this case had been clearly established prior to the situation.

U.S. SUPREME COURT

FIRST AMENDMENT

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

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

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

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

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

HOLDING: Yes

DISCUSSION: The Court reviewed 42 U.S.C. §1988, the Civil Rights Attorney's Fees Awards Act of 1976, in which the "prevailing party" is allowed to claim attorney's fees in addition to any judgment. The Court noted that a plaintiff prevails "when actual relief on the merits of his claim materially alters the legal relationship between the parties by modifying the defendant's behavior in a way that directly benefits the plaintiff."²⁶⁰ In the past, the Court had "held that an injunction or declaratory judgment like a damages award, will usually satisfy that test."²⁶¹ Under that standard, Lefemine and CCL were certainly prevailing parties as his lawsuit successfully removed the threat of criminal sanctions for a permitted activity and changed the relationship between the Sheriff's Office and the prospective protestors. Absent special circumstances, none of which were briefed in the case, attorney's fees were justified.²⁶²

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

²⁶⁰ Farrar v. Hobby, 506 U.S. 103 (1992).

²⁶¹ Rhodes v Stewart, 488 U.S. 1 (1988).

²⁶² Hensley v. Eckerhart, 461 U.S. 424 (1983).

FULL TEXT OF OPINION: http://www.supremecourt.gov/opinions/12pdf/12-168_9o6b.pdf

SEARCH & SEIZURE – DOG SNIFF

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

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

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

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

Harris moved for suppression, arguing that the alert was not enough for probable cause. At the suppression hearing, Deputy Wheelley testified both about his own training and that of Aldo.²⁶³ Logs were introduced in evidence showing Aldo’s ability to locate hidden drugs, and he performed “satisfactorily.” However, Aldo’s actual certification had expired the year before. Upon being questioned, Wheelley agreed that he “did not keep complete records of Aldo’s performance in traffic stops or other field work; instead, he maintained records only of alerts resulting in arrests.” He argued that Aldo’s two alerts on a vehicle that did not contain the actual substances he was trained to locate was likely as a result of Harris transferring methamphetamine odor from his hands to the door handle.

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

²⁶³ Both had trained extensively, separately and Aldo had been certified by a private company that specialized in training law enforcement dogs. They were partnered in 2005 and received refresher training. They did four hours of training a week to maintain skills, as well.

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

HOLDING: No

DISCUSSION: The Court noted, that a "police officer has probable cause to conduct a search when 'the facts available to [him] would warrant a [person] of reasonable caution in the belief'" that contraband was present.²⁶⁴ In evaluating whether that standard is met, the Court noted it had "consistently looked to the totality of the circumstances," rejecting "rigid rules, bright-line tests, and mechanistic inquiries in favor of a more flexible, all-things-considered approach." The Court looked back to Illinois v. Gates, emphasizing that probable cause is "a fluid concept – turning on the assessment of probabilities in particular factual contexts – not readily, or even usefully, reduced to a neat set of legal rules."²⁶⁵

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

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

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

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

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

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

²⁶⁴ Texas v. Brown, 460 U.S. 730 (1983); Carroll v. U.S., 267 U.S. 132 (1925).

²⁶⁵ 462 U.S. 213 (1983).

SEARCH & SEIZURE

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

Decided February 19, 2013

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

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

Bailey was charged with possession with the intent to distribute cocaine, along with weapons charges since he was a convicted felon. Bailey moved for suppression of the key and the initial statements he made during the stop, arguing both stemmed from an unreasonable seizure. The District Court denied the motion to suppress, holding the detention lawful under Michigan v. Summers.²⁶⁶ (In the alternative, it also justified the detention under Terry v. Ohio.²⁶⁷) Bailey was convicted, and appealed.

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

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

HOLDING: No

DISCUSSION: The Court noted that within the basic Fourth Amendment framework requiring probable cause, there was "some latitude for police to detain" where the intrusion was minimal compared to the safety interest of officers and others. In Summers, the Court allowed the detention of occupants on a subject premises during a search. The concept was extended in Muehler v. Mena²⁶⁸ to explain that "an

²⁶⁶ 452 U.S. 692 (1981).

²⁶⁷ 392 U.S. 1 (1968).

²⁶⁸ 544 U.S. 93 (2005).

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

In this case, Bailey was almost a mile away from the house. The Court agreed that "an exception to the Fourth Amendment rule prohibiting detention absent probable cause must not diverge from its purpose and rational."²⁶⁹ The court looked to the "three important law enforcement interests" that factored into the Summers decision: "officer safety, facilitating the completion of the search, and preventing flight."

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

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

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

The third interest is the interest in "preventing flight in the event that incriminating evidence is found." The Court noted that the "concern over flight is not because of the danger of flight itself but because of the damage that potential flight can cause to the integrity of the search." It does not, however, justify detaining individuals who are not in the immediate vicinity. Even if that detention could serve to "facilitate a later arrest," the "mere fact that law enforcement may be made more efficient can never by itself justify disregard of the Fourth Amendment."²⁷⁰

²⁶⁹ Florida v. Royer, 460 U.S. 491 (1983).

²⁷⁰ Mincey v. Arizona, 437 U.S. 385 (1978).

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

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

The Court concluded:

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

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

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

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

Decided March 26, 2013

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

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

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

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

HOLDING: No

DISCUSSION: The Court noted that "officers were gathering information in an area belonging to Jardines and immediately surrounding his house – in the curtilage of the house." They "gathered that information by physically entering and occupying the area to engage in conduct not explicitly or implicitly permitted by the homeowner." The Court noted that the concept that the curtilage is protected has "ancient and durable roots" with Blackstone²⁷¹ and that the curtilage is "intimately linked to the home, both physically and psychologically," where "privacy expectations are most heightened."²⁷²

The Court noted that an "officer's leave to gather information is sharply circumscribed when he steps off those thoroughfares [the public way] and enters the Fourth Amendment's protected areas." When, for example, the Court has permitted visual observation of the curtilage from the air, the observation was done in a "physically nonintrusive manner." The Court noted that in Boyd v. U.S.²⁷³ it reiterated that the general rule is that "our law holds the property of every man so sacred, that no man can set his foot upon his neighbor's close²⁷⁴ without his leave." The Court agreed that it was undisputed that "the detectives had all four of their feet and all four of their companion's firmly planted on the constitutionally protected extension of Jardines' home." The only question was whether they had permission to do so, and of course, they did not.

The Court had recognized that the "knocker on the front door is treated as an invitation to the home by solicitors, hawkers and peddlers of all kinds."²⁷⁵ The "implicit license typically permits the visitor to approach the home by the front path, knock promptly, wait briefly to be received, and then (absent invitation to linger longer) leave." The Court agreed that "complying with the terms of that traditional invitation does not require fine-grained legal knowledge; it is generally managed without incident by the Nation's Girl Scouts and trick-or-treaters." As such, a "police officer not armed with a warrant may approach a home and knock, precisely because that is 'no more than any private citizen may do.'"²⁷⁶ But, the Court continued, "introducing a trained police dog to explore the area around the home in hopes of discovering incriminating evidence is something else." A knocker does not invite one to "engage in canine forensic investigation." The Court emphasized: "To find a visitor knocking on the door is routine (even if sometimes unwelcome); to spot that same visitor exploring the front path with a metal detector, or marching his

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

²⁷² California v. Ciraolo, 476 U.S. 207 (1986).

²⁷³ 116 U.S. 616 (1886).

²⁷⁴ Property, especially that which is "enclosed" in some way.

²⁷⁵ Breard v. Alexandria, 341 U.S. 622 (1951)

²⁷⁶ Kentucky v. King, 563 U.S. – (2011).

bloodhound into the garden before saying hello and asking permission, would inspire most of us to – well, call the police.”

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

The Court agreed that in other cases, it had upheld the use of drug-sniffing dogs. In this case, however, the “officers learned what they learned only by physically intruding on Jardines’ property to gather evidence,” much like in the situation in U.S. v. Jones.²⁷⁷ The “Fourth Amendment’s property-rights baseline” “keeps easy cases easy.” The Court ruled that the use of “trained police dogs to investigate a home and its immediate surrounding is a ‘search’ within the meaning of the Fourth Amendment.” The Court affirmed the decision of the Supreme Court of Florida in suppressing the evidence.

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

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

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

On the way to the jail, McNeely indicated he would again refuse any breath testing so the officer “changed course and took McNeely to a nearby hospital for blood testing.” The officer did not have a warrant. Reading from the implied consent form, the officer explained that if he refused to submit to the blood test, his license would be immediately revoked and his refusal “could be used against him in a future prosecution.”²⁷⁸ He continued to refuse and the officer instructed the technician to take the blood anyway. It eventually tested at 0.154, well above Missouri’s limit of .08.

McNeely was charged with Driving While Intoxicated (DWI).²⁷⁹ As a result of having two prior DWIs, McNeely was charged with a felony. McNeely argued that “taking his blood for chemical testing without first obtaining a search warrant violated his rights under the Fourth Amendment.” The trial court agreed, concluding that apart from the fact that his body was metabolizing the alcohol, there was no exigency. Eventually the Missouri Supreme Court affirmed the decision, ruling that pursuant to Schmerber v. California,²⁸⁰ more is required than the “mere dissipation of blood-alcohol evidence to support a warrantless blood draw in alcohol-related case.” As this was a “routine DWI case,” the Missouri Court ruled that the “nonconsensual warrantless blood draw” was improper.

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

²⁷⁷ U.S. v. Jones, 565 U.S. – (2012).

²⁷⁸ Mo. Ann. Stat. §§577.020.1; 577.041.

²⁷⁹ Mo. Ann. Stat. §577.010.

²⁸⁰ 384 U.S. 757 (1966).

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

HOLDING: No

DISCUSSION: The Court began by noting that a “warrantless search of the person is reasonable only if it falls within a recognized exception.”²⁸¹ The Court applied that principle to the “type of search at issue in this case, which involved a compelled physical intrusion beneath McNeely’s skin and into his veins to obtain a sample of his blood for use as evidence in a criminal investigation.”

The Court also looked to Schmerber, in which the Court has “reasoned that ‘absent an emergency, no less could be required where intrusions into the human body are concerned.’” This was the case even if a lawful arrest had been made.²⁸² The Court agreed that exceptions can be made when there is a compelling exigent circumstances, including, as relevant to this situation, when there is a need to prevent the imminent destruction of evidence.²⁸³ To evaluate exigency, the Court has always looked to the totality of the circumstances. In Schmerber, the subject had been brought to the hospital as the result of injuries sustained in a wreck and there was no time for the officers to get a warrant.

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

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

Of note, the Court recognized that many states permit “police officers or prosecutors to apply for search warrants remotely through various means, including telephonic or radio communication, electronic communication such as e-mail, and video conferencing.”²⁸⁴ Other jurisdictions have found different way to streamline the process. The Court agreed that “warrants inevitably take time ... to complete ... and review” even in those states that allow for telephone and electronic warrants. And, of course, nothing guarantees that a judge will be readily available, especially in late night arrests. The Court declined to adopt a *per se* rule, noting that doing so “might well diminish the incentive for jurisdictions ‘to pursue progressive approaches to warrant acquisition that preserve the protections afforded by the warrant while meeting the legitimate interests of law enforcement.’”

²⁸¹ U.S. v. Robinson, 414 U. S. 218 (1973).

²⁸² See Johnson v. U.S., 333 U.S. 10 (1948).

²⁸³ Cupp v. Murphy, 412 U.S. 291 (1973); Ker v. California, 374 U.S. 23 (1963).

²⁸⁴ This is not currently the case in Missouri, however, nor is there a statutory or provision in the court rules in Kentucky for such warrants, at this time.

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

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

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

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

DNA

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

Decided June 3, 2013

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

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

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

HOLDING: Yes

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

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

The Court agreed that a buccal swab is a search under the Fourth Amendment.²⁸⁵ However, the taking of the sample, which requires “but a light touch on the inside of the cheek,” is a negligible intrusion. In other words, although a search, there are situations that “may render a warrantless search or seizure reasonable.”²⁸⁶ In Maryland, the collection is done when the subject is already in custody for a serious offense supported by probable cause. The Court agreed that the purposes for the collection include “the need for law enforcement officers in a safe and accurate way to process and identify the persons and possessions they must take into custody.” The Court agreed that certain “administrative steps” are incident to arrest.²⁸⁷ The doctrine of search incident to arrest “has been regarded as settled from its first enunciation, and has remained virtually unchallenged;”²⁸⁸ the “fact of a lawful arrest, standing alone, authorizes a search.”²⁸⁹ The “routine administrative procedure[s] at a police station house incident to booking and jailing the suspect” have a different origin.²⁹⁰ In every case, it is critical to properly identify the individual, who may in fact have a reason to disguise or conceal their actual identity by carrying false identification. The Court noted that individuals arrested for minor offenses may in fact be “the most devious and dangerous criminals,” mentioning that, for example, Timothy McVeigh (Oklahoma City bombing) was originally stopped for driving without a license plate. The Court agreed that “the only difference between DNA analysis and the accepted use of fingerprint databases is the unparalleled accuracy DNA provides.” The court found it little different “than matching an arrestee’s face to a wanted poster of a previously unidentified suspects; or matching tattoos to known gang symbols to reveal a criminal affiliation; or matching the arrestee’s fingerprints to those recovered from a crime scene.” The Court found it little different than checking other data, such as photos, Social Security number, etc., which “are checked as a routine matter to produce a more comprehensive record of the suspect’s complete identity.” Further, identifying an individual is critical to the safety of staff and other inmates, and “DNA identification can provide untainted information” about the subject, equating to the visual inspection for possible gang tattoos. In addition, since the government “has a substantial interest in ensuring that persons accused of crimes are available for trial,”²⁹¹ it is critical to know if “a person who is arrested for one offense” “has yet to answer for some past crime” – providing a strong motivation to flee. It also provides valuable information on potential pretrial release. The Court noted that “pretrial release of a person charged with a dangerous crime is a most serious responsibility.” Finally, the Court noted, such identifications may “have the salutary effect of freeing a person wrongfully imprisoned for the same offense.”

²⁸⁵ Schmerber v. California, *supra*.

²⁸⁶ Illinois v. McArthur, 531 U.S. 326 (2001).

²⁸⁷ Gerstein v. Pugh, 420 U.S. 103 (1975).

²⁸⁸ U.S. v. Robinson, 414 U.S. 218 (1973).

²⁸⁹ Michigan v. DeFillippo, 442 U.S. 31 (1979).

²⁹⁰ Illinois v. Lafayette, 462 U.S. 640 (1983).

²⁹¹ Bell v. Wolfish, 441 U.S. 520 (1979).

The Court agreed that there was little reason to question the legitimate interest in the government “in knowing for an absolute certainty the identity of the person arrested, in knowing whether he is wanted elsewhere, and in ensuring his identification in the event he flees prosecution.” The Court considered the collection and use of DNA “is no more than an extension of methods of identification long used in dealing with persons under arrest.”²⁹² The search involved in minimal, and further, the expectation of privacy for a detainee is diminished, although not extinguished completely.

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

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

RIGHT TO SILENCE

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

Decided June 17, 2013

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

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

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

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

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

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

²⁹² U.S. v. Kelly, 55 F.2d 67 (2nd Cir. 1932).

HOLDING: No

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

The Court agreed that prior case law established that "a defendant normally does not invoke the privilege by remaining silent" or "standing mute."²⁹³ The Court had held repeatedly that "the express invocation requirement applies even when an official has reason to suspect that the answer to his question would incriminate the witness." The Court looked to the most recent case, Berghuis v. Thompkins, with its post-Miranda "extended custodial silence" which was held not to have invoked the privilege, and agreed that if that did not do so, then "surely the momentary silence in this case did not do so either."²⁹⁴ Although Salinas attempted to distinguish it "by observing that it did not concern the admissibility of the defendant's silence but instead involved the admissibility of his subsequent statements," but the Court disagreed, ruling that "a suspect who stands mute has not done enough to put police on notice that he is relying on his Fifth Amendment privilege." The Court noted that not every "possible explanation for silence is probative of guilt," but instead could be related to embarrassment or another reason. The Court noted, as well, that he "did not merely remain silent; he made movements that suggested surprise and anxiety," effectively turning silence into "expressive conduct."

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

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

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

EMPLOYMENT – WORKPLACE HARASSMENT

Vance v. Ball State University, 133 U.S. --- (2013)
Decided June 24, 2013

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

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

²⁹³ Minnesota v. Murphy, 465 U.S. 420 (1984); Roberts v. U.S., 445 U.S. 552 (1980); U.S. v. Sullivan, 274 U.S. 259 (1927).

²⁹⁴ 560 U.S. 370 (2010).

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

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

HOLDING: Yes

DISCUSSION: The Court agreed, first, that the claim of a hostile work environment was viable, under the leading case of Rogers v. EEOC.²⁹⁵ In Faragher v. Boca Raton, the Court had agreed that an employer could be held liable for an employee’s unlawful harassment if the employer was negligent with respect to the offensive behavior.²⁹⁶ Different rules apply, however, if the “harassing employee is the plaintiff’s ‘supervisor’”²⁹⁷ and in such cases, the employer may be held vicariously liable, even though under the general rule, the master (employer) may not be held liable for the torts of their (servants) employees for actions taken outside the scope of their employment, which would, of course include such harassment.

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

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

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

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

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

²⁹⁵ 454 F.2d 234 (1971).

²⁹⁶ 524 U.S. 775 (1998).

²⁹⁷ See Burlington Industries, Inc. v. Ellerth, 524 U.S. 742 (1998).

EMPLOYMENT DISCRIMINATION

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

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

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

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

HOLDING: No

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

The Court looked to Price Waterhouse v. Hopkins²⁹⁸ and noted that the causation standard for a status-based claim is whether a plaintiff "could show that one of the prohibited traits was a 'motivating' or 'substantial' factor in the employer's decision." If the plaintiff is able to do so, the burden shifts to the employer, "which could escape liability if it could prove that it would have taken the same employment action in the absence of all discriminatory animus." A modification to the statute, passed in 1991,

²⁹⁸ 490 U.S. 228 (1989).

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

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

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

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

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