2016
FOURTH QUARTER

KENTUCKY

PENAL CODE – KRS 503 – USE OF FORCE

Yaden v. Com., 2016 WL 1719131 (Ky. App. 2016)

FACTS: On April 8-9, 2014, Yaden had lived in his Kenton County home for some time. Krauss lived in the basement and had a separate entrance. During the overnight hours of April 8-9, 2014, Yaden got into an altercation with Jefferson, Krauss's boyfriend. Yaden allegedly had stated that Jefferson was not allowed in the house because he and Krauss "fought too much."

On that evening, all were drinking, Williams was also present. According to Yaden, at some point, Jefferson saw Williams "performing a sex act" in the hot tub, on Krauss. "Apparently blaming Yaden for what happened, [Jefferson] hit Yaden on the head with the side of a hammer, knocking him to the ground. Yaden retrieved a handgun from his bedside table and went back to the front door. He "raised the gun, fired into the air, and said 'be gone.'" Jefferson ran and Yaden put the gun away. He went outside to close the garage door, and Jefferson and Kraus "began throwing landscaping rocks at him in the driveway." Yaden grabbed an axe, and hit the windshield of a Jeep being driven by either Krauss or Jefferson. Jefferson ran off and Yaden closed the garage door. When the police arrived, "Yaden reported that he was the victim and had been hit in the head with a hammer. He was upset with the way the police were treating him."

Jefferson told a different tale, claiming that he had Yaden had gotten into a fight after the encounter in the hot tub. He could not find his keys so he got into the Jeep and "Yaden began hitting the driver's side window with a rock, breaking the window." At some point, he claimed "Yaden came back outside with a gun and said he wanted to kill Chris." He ran from the scene but returned to try to find his keys and get the Jeep, finding "Yaden hitting the front windshield of the Jeep with the axe" – and Yaden proceeded to chase Jefferson but could not get close enough with the axe. Jefferson ran again and encountered a police officer – they returned to the house. (He told that officer that Yaden had a gun.) They did a GSR on Yaden and only Yaden was arrested.

Officer Warner (Covington PD) testified that he believed there were at least two shots fired that night. He agreed that Yaden had facial injuries and stated he'd been hit with a hammer. Officer Fulton made the arrest. Yaden was charged with Wanton Endangerment and Criminal Mischief. At trial, various witnesses recounted the events of the night and to the presence of the gun and death threats. Krauss testified that the gun was fired at least once.

The trial court directed acquittal on one of the two Wanton Endangerment counts. The jury was instructed on the various charges it could find, Wanton Endangerment, Menacing and Criminal Mischief for the damage to the Jeep. Yaden was convicted of Wanton Endangerment 2nd and Criminal Mischief 2nd. He then appealed.

ISSUE: Is there an "imperfect self-defense" argument?

HOLDING: Yes

DISCUSSION: Yaden argued that the jury instructions were inadequate. The Court began:

> In KRS 503.050(1), the General Assembly provided for the defense of self-protection: "The use of physical force by a defendant upon another person is justifiable when the defendant believes that such force is necessary to protect himself against the use or imminent use of unlawful physical force by the other person." KRS 503.120(1), in turn, addresses mistaken or imperfect self-defense: When the defendant believes that the use of force upon or toward the person of another is necessary for any of the purposes for which such belief would establish a justification under KRS 503.050 to 503.110 but the defendant is wanton or reckless in believing the use of any force, or the degree of force used, to be necessary or in acquiring or failing to acquire any knowledge or belief which is material to the justifiability of his use of force, the justification afforded by those sections is unavailable in a prosecution for an offense for which wantonness or recklessness, as the case may be, suffices to establish culpability.
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> In Hager, the Supreme Court addressed the application of KRS 503.120 in a homicide case, stating, "[w]e note at the outset that a mistaken belief in the need to act in self-protection does not affect the privilege to act in self-protection unless the mistaken belief is so unreasonably held as to rise to the level of wantonness or recklessness with respect to the circumstance then being encountered by the defendant."[1]

Looking at prior case law, the Court noted that it had held in another case that "the end result for a recklessly held mistaken belief in the need for self-protection for each situation is reckless homicide." The Court agreed that the jury was properly instructed, however.

Yaden also argued it was improper to call the insurance adjustor to discuss the damage to the Jeep. "Yaden contends that the Commonwealth improperly called him as a fact witness rather than as an expert witness and that the trial court abused its discretion in permitting him to testify because the Commonwealth had not provided proper notice pursuant to RCr 7.24(1)(c)."

> RCr 7.24 provides for discovery and the inspection of records in criminal cases. Specifically relating to this case, RCr 7.24(1)(c) mandates: [u]pon written request by the defense, the attorney for the Commonwealth shall furnish to the defendant a written summary of any expert testimony that the Commonwealth intends to introduce at trial. This summary must identify the witness and describe the witness's opinions, the bases and reasons for those opinions, and the witness's qualifications.

Yaden had made a request but apparently had gotten nothing. The Court, however, found that the adjustor was not testifying as to "brain surgery" and allowed him to testify. The adjustor agreed he "required specialized knowledge to do his job, including using the computer program provided by the manufacturer to determine parts and labor costs. He admitted that his estimate was based on his specialized knowledge, training, and experience." The Court agreed that it appeared he should have been qualified as an expert witness and notice provided, but that he was effectively cross-examined. (In fact, his estimate was in excess of $1700, but the jury convicted Yaden of Criminal Mischief 2nd only.)

Yaden's conviction was affirmed.

PENAL CODE – KRS 506 - INCHOATE

Wicker v. Com., 2016 WL 7324294 (Ky. App. 2016)

FACTS: On the day in question, Officer Melvin (Corrections / Probation and Parole) was searching for several individuals who had absconded from supervision. Accompanied by another officer, he was acting on a tip that Wicker Jr. could be found at a home in Mousie, Knott County. The officers found a vehicle at the location with Wicker driving, Wicker Jr. in the passenger seat and a woman in the middle. The officers pulled up in a marked van. Officer Melvin approached with gun out, having received information that Wicker Jr. was possibly armed. He identified himself and order Wicker Jr. out. The truck sped off.

[1] Hager v. Com., 41 S.W.3d 828 (Ky. 2001) holding modified by Elery v. Com., 368 S.W.3d 78 (Ky. 2012),

The officers did not pursue but stayed near the home, watching. Some minutes later, they saw Wicker come out onto the front porch and they returned to the house. Officer Melvin got out and approached Wicker on foot, wearing an external Kevlar vest and a visible badge and weapon. Wicker fired twice at Melvin with a shotgun, hitting him in the arm and chest – where the vest did not cover. The second shot shattered the window of the van, and Officer Ratliff was struck by the flying glass. Officer Melvin was able to cover his fellow officers as they retreated – he was the only one who fired. Wicker called 911 and surrendered peacefully.

Wicker was charged with Attempt-Murder (2 counts) and Wanton Endangerment. In his defense, he said he fled because he had been told bounty hunters with orders to shoot to kill were after his son. He claimed he only fired when he was fired upon. He was convicted of Attempt-Murder (Melvin), Attempt-Manslaughter (Ratliff) and two counts of Wanton Endangerment for the other two uninjured officers. He then appealed.

ISSUE: Does firing a weapon at specific individuals (even though missed) allow for a Wanton Endangerment 1st charge?

HOLDING: Yes

DISCUSSION: Wicker argued that the Commonwealth did not meet its burden in the two substantive charges. The Court looked at the elements and agreed that it was clearly reasonable that he intended to shoot both of the men. He further argued he was entitled to an instruction on second degree wanton endangerment but the Court disagreed, finding that his use of a shotgun in close proximity showed an "extreme indifference to the value of human life," as he was firing in the direction of specific individuals, rather than aimlessly. The Court upheld his convictions.

Com. v. Jones, 497 S.W.3d 222 (Ky. 2016)

FACTS: Jones and Anderson were Detroit residents who came up with a "get-rich-quick plan."

> The plan involved driving to Lexington, Kentucky, and employing homeless men to sign up for two-year cell-phone service contracts with no intent to make payments in order to obtain high-end international smartphones at discounted rates. A particular Blackberry phone with international service was very popular on the secondary market and could be purchased at a greatly discounted rate from service providers if the purchaser agrees to a two-year service contract. Jones and Anderson would pay each homeless person $20 for his efforts and resell the activated phones on the secondary market to a great monetary windfall.

Det. Duane (Lexington PD) got a call from Best Buy about a homeless man tried to buy a cell phone. He went to the store and talked to the man, and convinced him not to buy the phone. "He followed the man outside the store and observed him speaking to another man in a van. Detective Duane approached the man in the van and learned he was from Detroit; the man eventually explained to the detective the entire scheme. The Michigan man believed he was simply exploiting a loophole in the law." He was not taken into custody, however. Over the next few months, the police "received reports from a number of cell-phone retailers that the homeless cell-phone scam continued. But each time law enforcement arrived at the store, the men (and the van) had already left. Later, Detective Duane finally apprehended one of the phone purchasers. After reading the man his Miranda rights, the man informed him he was a resident of a local homeless shelter and he was recruited by people in a van offering each resident $20 for every cell phone purchased. To be sure, the man had purchased several cell phones (and contracts) that day. He admitted to Detective Duane that he had no intention of honoring the two-year service contract he signed at each location."

This time, however, Det. Duane was able to find the van; Jones was driving. He found Anderson and other men in the van. "Jones was very cooperative with Detective Duane, and fully explained the situation. After obtaining consent to search the van, he also discovered several cell phones, a handwritten budget detailing the entire operation, and receipts for phones and service contracts purchased by twelve different people.

Jones and Anderson were then taken to police headquarters and Jones provided a recorded statement after receiving his Miranda warnings. Detective Duane then seized all of their equipment and cell phones, leaving them just enough cash to return to Detroit."

Both Jones and Anderson were charged with Engaging in Organized Crime. Det. Duane chose not to charge the homeless men, however. Jones was convicted and then sought post-conviction appeals. The Court of Appeals reversed his conviction, with the panel "concluding that there was insufficient evidence to prove he and his conspirators collaborated under the "continuing basis" necessary to sustain an organized-crime conviction." The Commonwealth appealed.

ISSUE: Must a criminal syndicate engage in a continuing crime?

HOLDING: Yes

DISCUSSION: The Court began:

> The Kentucky Penal Code offers a broad description of precisely what activity is subject to criminal liability for participation in organized crime. Kentucky Revised Statutes (KRS) 506.120 establishes nine classes of activities for which a "person, with the purpose to establish or maintain a criminal syndicate or to facilitate any of its activities" may be subject to prosecution. Of these nine activities, six are potentially applicable to this case: 1. Organize or participate in a criminal syndicate or any of its activities. . 2. Provide material aid to a criminal syndicate or any of its activities, whether such aid is in the form of money or other property, or credit.? 3. Manage, supervise, or direct any of the activities of a criminal syndicate, at any level of responsibility. 4. Commit, or conspire or attempt to commit, or act as an accomplice in the commission of, any offense of a type in which a criminal syndicate engages on a continuing basis. 5. Commit, or conspire or attempt to commit, or act as an accomplice in the commission of more than one (1) theft of retail merchandise with intent to resell the merchandise. 6. Acquire stolen retail merchandise for the purpose of reselling it where the person knew or should have known that the merchandise had been stolen." Specifically, Jones was indicted for "managing, supervising and/or directing numerous other individuals to acquire retail merchandise including cell phones, by deception and/or fraud, with the intent to resell it."

The Commonwealth prosecuted him "under a theory that he engaged in a criminal syndicate to commit retail-merchandise theft with the intent to resell the stolen merchandise. There is no doubt that Jones organized, managed, and participated in the scheme, he is the architect of the plan. But the most critical question in determining Jones's criminal liability is whether his plan may be properly labeled a "criminal syndicate." In fact, Jones denies any criminality in his actions; rather, he contends he simply took advantage of the laws and exploited a loophole, as any successful entrepreneur would. The statute offers tremendous assistance in this inquiry. A criminal syndicate is defined as either "five (5) or more persons, or, *in cases of merchandise theft* from a retail store for the purpose of reselling the stolen merchandise, two (2) or more persons, collaborating to promote or engage" the commission of "any theft offense as defined by KRS Chapter 514."

The Court broke it down to the following elements: "1) that a "theft" occurred in furtherance of Jones's scheme; (2) that two or more persons were involved; (3) that the persons collaborated in furtherance of the plan; and (4) that the scheme operated on a continuing basis." The Court defined the situation as a Theft by Deception because the buyers had had no intention of fulfilling the contracts. The cell phone employees testified as to how this affected their business and that the sales operatives work for base plus commission, and when a contract is not fulfilled, they are docked for it. (They also believed they could not refuse a sale, however.) The Court agreed there was a clear intent to deceive. It was clear that there were at least a dozen homeless participants in the scheme and that there was collaboration between parties, even if all the homeless men didn't know each other. "Jones and Anderson are co-architects; at the very least Anderson could be aptly described as an accomplice to Jones's plan with full knowledge of what they hoped to achieve."

With respect to the final element:

In support of its decision reversing Jones's conviction, the Court of Appeals majority relied on our recent holding in Parker v. Com..[2] And to be sure, we vigorously interpreted Kentucky's organized-crime statute in its most paradigmatic application—gang-related violence and drug trafficking. In Parker, we reversed a criminal defendant's criminal syndicate conviction because the Commonwealth provided insufficient evidence to prove he collaborated with four or more persons on a continuing basis dealing drugs as part of his association with the Crips gang. But there are critical discrepancies in the present case that are distinct from Parker.

In Parker, we held that there was insufficient evidence of a continuing basis because the Commonwealth's case centered on a "singular drug deal that resulted in Barnes' death." The Court of Appeals majority reached a similar result in this case, taking issue that most of the Commonwealth's evidence zeroed-in on Jones's activity on one particular day. But in Parker, we also reaffirmed that "[t]he Commonwealth is not held to proving any specific number of incidents or any element of time, but must show by the proof what the jury could infer from the evidence as intent to collaborate on a continuing basis." Unlike Parker, where the evidence focused on one drug deal, the Commonwealth in this case presented evidence of multiple purchases in a single day, repeated criminal acts. Some homeless participants testified to going to multiple stores in one day. And Jones made multiple trips to Lexington to effectuate his plan. The Commonwealth did enough to ensure the jury knew of far more than one instance in furtherance of the scheme, which Parker strongly condemns as insufficient proof of a continuing basis.

We also refused to find a continuous collaboration in Parker because one witness testified that "every man did their own thing." Though the Commonwealth in Parker pursued a criminal-syndicate theory premised on drug trafficking, witness testimony stated that "the Crips made their own deals and sold their own drugs." But such autonomy is unquestionably lacking in this case. Though it is true each participant went into each store alone and signed every contract individually, it is equally true he did so at Jones's behest. Jones drove all of the men to each store, directed which store to enter, told them which phone and plan to purchase, and compensated each man that successfully returned with the international smartphone. It is clear from the Commonwealth's proof that each participant in Jones's scheme did not, in contrast to Parker, "do their own thing."

And finally, as part of its continuing-basis analysis, the Court of Appeals spent considerable time discussing whether Jones intended to continue his scheme into the future. But this is an unnecessary inquiry. Even if we willingly suspend disbelief that Jones did not know he was perpetuating theft and that after learning of the unlawful nature of his operation he would abandon his business, there remains ample evidence that he was conducting this collaboration on a continuing basis at the time of his arrest. At minimum, the Commonwealth presented enough evidence to allow reasonable jurors to decide for themselves."

Finally, the Court even though Jones argued he didn't know what he was doing was a crime, it was immaterial as to whether he "subjectively knew he was forming a criminal syndicate." The Court concluded that "the statute plainly criminalizes organized efforts to engage in merchandise theft. And Jones created such an organization whether he subjectively classified it as criminal or not."

Jones's convictions were affirmed.

PENAL CODE – KRS 508 - ASSAULT

Lemon v. Com., 2016 WL 7414524 (Ky. App. 2016)

FACTS: On March 6, 2014, Lemon, while drunk, boarded a city bus with a walker in Louisville. The bus driver admitted him, although his pass was expired. He sat in the front of the bus (the handicapped section) and "quickly became unruly," by yelling at passengers and complaining loudly. He was asked to

[2] 291 S.W.3d 647 (Ky. 2009).

move to accommodate a passenger in a wheelchair and became indignant, insulting the new passenger. As a result, he was told to get off the bus and "reluctantly complied." He fell as he was getting off, landing face first. EMS was called. Taylor and Forst arrived on the ambulance.

Taylor approached Lemon, who was "not receptive and swung his walker in the air." He spat blood at Taylor, hitting him in the face. Forst called for police, who ordered Lemon to cooperate, and he was transported to the hospital. He continued to yell and spat blood at Forst. Both medics ended up with blood in their eyes. Lemon kept yelling that he hoped both "got his AIDS." As it turned out, he did not have AIDS but did test positive for Hepatitis C.

Lemon was charged with Assault 3rd, for each of the two EMTs, he was convicted only for spitting at Forst, however. He appealed.

ISSUE: Does Assault 3rd include both intentional and reckless conduct?

HOLDING: Yes

DISCUSSION: Lemon argued first that the Commonwealth amended the indictment to read intentionally, rather than recklessly – the Court agreed that was proper under RCr 6.16. Since KRS 508.025 (1)(a)(4), covers both intentional and reckless attempts to injury, it made no substantive change in the case. (In fact, by raising the mental state to a more stringent standard, it actually helped Lemon.) Further, since Criminal Attempt requires intent, under KRS 506.010, and he had a fair opportunity to raise any appropriate applicable affirmative defenses, such as voluntary intoxication, there was no violation of his substantive rights.

The Court affirmed his conviction.

Montgomery v. Com., 505 S.W. 3d 274 (Ky. App. 2016)

FACTS: On October 27, 2014, Montgomery got into a "heated argument" with his parents in Hazel Green (Morgan County). He wanted to use a family vehicle but did not have a license. He headed toward the vehicle with the keys but his mother hopped into the driver's seat instead. Armed with a bat, he threatened to break out the windows. His father called 911.

Trooper Bolin (KSP) arrived. Montgomery's father told the trooper that "his son had stated a willingness to fight any law enforcement officer who arrived." Montgomery yelled at the trooper in an aggressive manner and ran down the porch steps toward the trooper; he had the bat resting on his shoulder. Trooper Bolin tased Montgomery, who paused for a moment and then raised the bat and resumed his charge. The trooper dropped the Taser and backed up to draw his pistol, which stopped Montgomery who ran around several vehicles. Trooper Bolin chased him, and spotted him again, this time with the bat on the ground but with a "large, military-style knife in his hand." Trooper Bolin ordered him to drop the weapon and that he would shoot him if he moved toward him. Montgomery, after hesitation, followed the order and dropped the knife. However, he fought against being handcuffed, but Trooper Bolin was finally able to get him handcuffed.

Trooper Bolin charged him with Wanton Endangerment 1st and Resisting Arrest. The Grand Jury added Assault 3rd. He was convicted of all charges, with the Wanton Endangerment charge being reduced to 2nd degree, however. He appealed.

ISSUE: May an Assault 3rd charge be brought when there is only an attempt to injure?

HOLDING: Yes

DISCUSSION: Montgomery argued that since the trooper did not suffer any injury, nor was there a 'credible attempt to injure him," and that he was "never in substantial danger of physical injury," that the charges for Wanton Endangerment and Assault 3rd was improper. He added that that the struggle over the handcuffs was insufficient for Resisting Arrest.

The Court looked at each charge. With respect to the Assault 3rd, "Montgomery was never given the opportunity swing the bat, but his actions nonetheless demonstrated an attempt to cause physical injury to a peace officer." The Resisting Arrest charge, as well, during which Montgomery pulled his arm away from Bolin and tried to stand up, while close, was arguably an application of physical force to prevent the arrest.

However, the Court agreed that the Wanton Endangerment charge constituted a double jeopardy violation, as both involved the same victim, the trooper, and further, two different mens rea (wanton for one, intentional for the other). The court reversed the Wanton Endangerment 2nd charge.

The court also addressed to comments made by the trooper, alluding to prior criminal contacts with Montgomery, but the court agreed they were minor and harmless.

PENAL CODE – KRS 510 – SEXUAL ASSAULT

Cassidy v. Com., 2016 WL 6134906 (Ky. App. 2016)

FACTS: On February 13, 2013, Cassidy's daughter and two female friends spent the night at the Cassidy home. The girls slept in Cassidy's bedroom (in one bed) while Cassidy and his son slept on the couch. T.S. one of the girls, awoke to find Cassidy touching her genitals with his fingers and tongue. She kicked T.C. (Cassidy's daughter) who woke up, punched her father and told him to leave. T.S. called her uncle for a ride but did not immediately tell him what had happened. S.H., the other friend, later testified that she also saw Cassidy touching T.S.

Cassidy was charged with both Sodomy 2nd and Sexual Abuse 1st. He appealed, arguing Double Jeopardy.

ISSUE: Is Sexual Abuse usually a lesser-included offense of Sodomy?

HOLDING: Yes

DISCUSSION: The Court looked to Turner v. Com.:

> A defendant is put in double jeopardy when he is convicted of two crimes with identical elements, or where one is simply a lesser-included offense of the other. In such a case, the defendant has only actually committed one crime and can only endure one conviction." However, while double jeopardy precludes convictions for a greater and a lesser-included offense, it does not prohibit convictions for the greater and lesser offense if the defendant committed two separate criminal acts.[3]

The Court agreed that "First-degree sexual abuse is properly classified as a lesser included offense of first-degree sodomy."[4] To determine if it is double jeopardy, the Ccourt must determine whether the "sexual abuse was incidental to the sodomy or a separate criminal act." In this case, the Court agreed, the jury was properly instructed and double jeopardy did not apply. The Court affirmed his convictions.

PENAL CODE – KRS 511 - BURGLARY

Johnson v. Com., 2016 WL 6125737 (Ky. 2016)

FACTS: Johnson and Ward lived together in Daviess County. They frequently argued and fought, and several times, Johnson left. Johnson finally moved out permanently. Ward retrieved his key and a garage door opener and tried to reprogram the door so that he could not use the one built into his vehicle. They met a few months later to discuss a matter and Johnson became angry, damaging her car.

[3] 345 S.W.3d 844 (Ky. 2011); Simpson v. Com , 159 S.W.3d 824 (Ky.App. 2005).
[4] Mash v. Com., 376 S.W.3d 548 (Ky. 2012).

A few weeks later, Ward announced via Facebook she was in a new relationship, with Knott. Johnson tried to contact her without success. He then went to her residence, "with the hood of his sweatshirt over his head, and entered the dwelling through the garage door, using the garage door opener on his vehicle, which he had parked at a nearby church." He was armed at the time with a pistol. When he entered he realized that Knott had moved in. When Ward and Knott returned, Johnson shot Knott, causing life-threatening injuries. He shot Ward several times, as well, in the hip and knee, and she fled into a closet. He shot her through the door, striking her in the chest. Johnson fled to his sister's home and threatened suicide, but she convinced him to surrender.

Johnson was charged and convicted of two counts of Assault 1st and one of Burglary 1st. He appealed.

ISSUE: Can a initial illegal entry without intent (trespassing) still lead to a burglary charge?

HOLDING: Yes

DISCUSSION: With respect to the Burglary charge, Johnson argued the jury should have received an instruction on criminal trespass as an alternative to burglary. He argued he had originally entered simply to talk to Ward about making their relationship work and thus lacked the requisite element of entering to commit a crime. The Court noted, however, that even if he originally entered with that in mind, he had no right to be on the property, and after shooting Knott, he remained on the property to assault Ward. As such, Burglary was proven.

Johnson also argued that the evidence at trial did not establish serious physical injury to Ward. Medical evidence indicated that some of Ward's wounds were minor, but that the chest wound caused significant bleeding that could have been fatal without treatment. She still had issues with her arm due to the shooting, as well. The Court found she was, factually, seriously injured. (The Court also agreed that it would have been patently unreasonable to find that either party suffered only a physical injury.)

Finally, the Court agreed that testimony as to his conduct before the day in question, was properly introduced as background to their relationship, despite the Prior Bad Acts prohibition under KRE 404(b). "Evidence of prior violence by a defendant against the victim is generally admissible, particularly when, as here, the prior acts were close in time."[5]

The Court affirmed his convictions.

May v. Com., 2016 WL 6125887 (Ky. 2016)

FACTS: On October 13, 2014, May "led police officers on a high-speed car chase while driving a stolen vehicle" in Hardin County. At one point, he forced a car off the road, crashing it. He eventually abandoned the stolen car and fled on food. Martin was in a nearby subdivision when she spotted a man run by. She went outside and encountered May. He told her "he had been jogging and needed water." He then entered through the garage toward the house door. Martin told him to leave but he refused. He then tried to get into a vehicle parked in the garage. Martin ordered him out and he complied. He then walked toward the house and Martin went after him, but she tried to leave, fearing he was going to trap her in the garage. They struggled and she fell, suffering injuries.

May fled and police were called. Martin observed, however, May enter the house. He was not inside when police arrived, but was quickly found near the tree line and bitten by a K9, Pharaoh.

Martin was arrested on several charges, including Burglary. He was convicted and appealed.

ISSUE: Does Burglary 1st require proof of an injury (if that is the subsection being used)?

HOLDING: Yes

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

DISCUSSION: The Court agreed that Burglary 1st requires proof of physical injury. The prosecution had introduced, through testimony and photos, marks on Martin's body and a laceration that required sutures on her ear. The Court agreed that her testimony that she did not feel the pain to her ear at the time of the fight was immaterial, nor was her inability to pinpoint precisely when she sustained that injury.

The court upheld his conviction.

PENAL CODE – KRS 514 – THEFT

Woods v. Com., 2016 WL 7414527 (Ky. App. 2016)

FACTS: Woods had written a check to a landlord for rent, in Campbell County, but the account had been closed by the bank. She was convicted of Theft by Deception and appealed.

ISSUE: Is writing a bad check, while still in lawful possession of the property in question, as a result of an earlier payment, enough to make it a Theft By Deception?

HOLDING: No

DISCUSION: Woods argued that there was insufficient proof that she obtained the property of another with the necessary intent to deceive, pursuant to KRS 514.040(1). The Commonwealth apparently conceded this issue its brief, acknowledging that she was entitled to a directed verdict of acquittal. The court looked at the elements and definitions in KRS 514 of the relevant terms, especially "obtain" and noted at the time she wrote the check, she still was within the time frame covered by rent she'd paid earlier and as such, was lawfully in possession of the property at that time.

The Court reversed her conviction.

DUI

Kilgore v. Com., 2016 WL 6543580 (Ky. App. 2016)

FACTS: On April 3, 2014, Kendrick and his mother-in-law were driving to Pikeville. Kilgore followed behind them for about 8 miles on the two lane highway, driving a Ford Expedition. Kendrick was concerned about how closely she was following. They became separated when a stop light changed. Kendrick reached his destination, but had to wait to turn for a couple of moments, during which time he heard squealing behind him. Kendrick saw the vehicle behind him swerve, barely missing him, and it struck another vehicle head on. The Expedition ended up on top of the much smaller vehicle it struck – the driver was critically injured and the 6 year old child was killed. Kilgore was also injured.

Kilgore was briefly questioned by Trooper Layne (KSP) and admitted to have taken a Lortab the day before. She refused a blood test, but then consented in the ER. The next day she was questioned again and stated she had been taking OTC sinus medication but no controlled substances. However, the blood test indicated Tramadol and hydrocodone, as well as Citalopram (anti-depression). Trooper Layne's reconstruction found no indication of a sudden stop by Kendrick.

Kilgore was indicated on Reckless Homicide and Assault 4th. Prior to trial, she moved to exclude the blood test as prejudicial under KRE 403. That was denied and the data was admitted. She was convicted and appealed.

ISSUE: Is even the presence of a controlled substance enough to be relevant to impairment?

HOLDING: Yes

DISCUSSION: The Court noted that the test in question did not show the level of the substances, only their presence. The Court looked to Parson v. Com., which noted that even the presence of such substances was relevant to impairment.[6] However, KRE 403 does allow for the exclusion of prejudicial information. The Court agreed that the tests were probative "on the issue of Kilgore's ability to drive her vehicle in a safe manner, and an inference could be drawn that Kilgore's driving ability was impaired, at least somewhat, by the controlled substances in her blood.[7]

The Court also addressed the issue of the child, who was secured only by a lap belt in the back seat, rather than a required booster seat. Kilgore had sought, unsuccessfully, to introduce testimony from Trooper Layne, who had opined that the child's injuries would have been less secure has she been properly restrained. The Court agreed that the question was answered by Sluss v. Com., which held the issue of a vehicle restraint to be inadmissible.[8]

The Court upheld her conviction.

AFFIRMATIVE DEFENSES

Cook v. Com., 2016 WL 7175262 (Ky. App. 2016)

FACTS: On April 4, 2013, Cook arrived at the home of his estranged wife, Magdalena, in Meade County, to "arrange for her to add minutes to his cellular phone." As soon as he left, he started calling her and leaving threatening messages, thinking she was seeing someone else. When she "confirmed his suspicion, news which he stated was "catastrophic" and which "shocked" him. Cook testified that he drank heavily throughout the ensuing evening."

The next day, Cook continued to drink and call Magdalena incessantly, leaving apologetic messages. He asked her to come over and talk, but she showed up with a male friend. She refused to come inside and asked the friend to go get her belongings. As they argued, Cook held a gun to Magdalena's head and she tried to wrestle it away. He fired one shot, which missed, and a second shot that hit her in the ankle. She ran toward a neighbor's home and he fired again, hitting her in the backside. She made it to the neighbor's home and the neighbor confronted Cook. Cook threatened to kill her as well, pushing her out of the way and putting the gun to Magdalena's head again. The neighbor got the gun from Cook and turned it on him. Cook them walked back home and told the neighbor that he would be waiting for the police.

Cook later stated that he had little recollection of the series of events, except for the ending. He was convicted for Assault 1st, Wanton Endangerment 1st and Terroristic Threatening 3d. He appealed.

ISSUE: Does EED require a specific triggering event?

HOLDING: Yes

DISCUSSION: Cooke argued that he was entitled to a jury instruction on the defense of Extreme Emotional Disturbance, which had been denied by the trial court. (This would have served to mitigate his charges.) The Court stated that:

> KRS 507.020 defines EED as acting "under the influence of extreme emotional disturbance for which there was a reasonable explanation or excuse, the reasonableness of which is to be determined from the viewpoint of a person in the defendant's situation under the circumstances as the defendant believed them to be." In McClellan v. Com., Kentucky's Supreme Court expanded on this statutory definition, explaining that, "[e]xtreme emotional disturbance is a temporary state of mind so enraged, inflamed, or disturbed as to overcome one's judgment, and to cause one to

[6] 144 S.W. 775 (Ky.2004).
[7] Berryman v. Com., 237 S.W.3d 175 (Ky. 2007).
[8] 450 S.W.3d 279 (Ky. 2014).

act uncontrollably from the impelling force of the extreme emotional disturbance rather than from evil or malicious purposes."[9]

To require the application of EED, however, the defendant must "present "some definitive, non-speculative evidence" in support of an EED instruction before a trial court is required to tender that instruction.[10] This evidence must establish three elements: "(1) there must be a sudden and uninterrupted triggering event; (2) the defendant must be extremely emotionally disturbed as a result; and (3) the defendant must act under the influence of this disturbance."[11]

In Cook's case, the Commonwealth noted that more than a day had elapsed between the news, the triggering event, and the shooting. The Court acknowledged that "while an adequate and uninterrupted provocation or triggering event is essential to a defense of EED, this event need not occur concurrently with, or even shortly before, the subsequent offense.[12] "The adequate provocation of EED may be more gradual than the 'flash point' normally associated with sudden heat of passion."[13]

The Court noted that while the knowledge that his estranged wife was involved with someone else could be a sufficient triggering event, it had to be more than "mere hurt" or anger. The court agreed that here was no evidence that Cooke was more than that, by his own description of his response. However, his odd actions when the neighbor intervened, from "red-faced" and angry to "inexplicably calm" suggested that he was under the influence of EED. But, the Court agreed, "Kentucky law still requires that an alleged emotional disturbance be traceable to a relatively recent triggering event, or events, the extreme emotional effect of which continues uninterrupted until surfacing in a defendant's violent act." As such, Cook was properly denied the instruction.

The Court also briefly addressed Magdalena's injury, which resulted in scarring and "lingering discomfort," after using a cane for several months, to be enough for serious physical injury. (In fact, the neighbor, a nurse, used a tourniquet on her foot injury to slow blood loss at the scene.) The Court agreed that medical proof would have been helpful, it was not required, and the risk of a gunshot wound was easily understood by a lay jury.

The Court upheld Cook's conviction.

Bowling v. Com., 2016 WL 5863336 (Ky. App. 2016)

FACTS: The Bowlings, Sandra and Allen, had a "tumultuous relationship" for years. When Sandra decided to end the marriage in 2014, Allen stated he would "get back at her." McQueen and her boyfriend, neighbors of the Bowlings, shared substance abuse problems and the boyfriend was in "significant legal trouble." The McQueens began to work as CIs for the Jackson County SO.

On September 12, 2014, Sandra gave Allen a ride to Manchester. When they returned, Allen asked for $16 and gave Sandra two pills (hydrocodone), to give to McQueen. Bowling later stated "she did not wish to take part in this transaction, but capitulated due to Allen's overbearing insistence." Sandra made arrangements to give the pills to McQueen.

Bowling, of course, was unaware that this was part of the controlled buy. It was later stipulated that Bowling did not use drugs and that this was the only transaction she'd ever done, and this was McQueen's only time as a CI, as well.

Bowling was charged with Trafficking 2nd. At trial, she requested an entrapment instruction, arguing that since McQueen was acting as the agent of law enforcement, it applied. The trial court denied the instruction, and Bowling was convicted. She appealed.

[9] 715 S.W.2d 464 (Ky. 1986),
[10] Hudson v.Com., 979 S.W.2d 106 (Ky. 1998) (citing Morgan v.Com., 878 S.W.2d 18 (Ky. 1994)).
[11] Spears v. Com., 30 S.W.3d 152 (Ky. 2001).
[12] See Fields v. Com., 44S.W.3d 355 (Ky. 2001).
[13] Schrimsher v. Com., 190 S.W.3d 318 (Ky. 2006).

ISSUE: Must a law enforcement officer or an agent be involved for Entrapment?

HOLDING: Yes

DISCUSSION: The decision as to instructions lies with the trial court, and in this instance, looking at KRS 505.010, the Court agreed that the evidence did not support the transaction. There was no direct law enforcement involvement to entice her to participate in the transaction. In fact, the deal was arranged with Allen, not with Bowling, by McQueen.

The Court upheld her conviction.

RESTITUTION

Dickerson / Hicks v. Com., 2016 WL 6134903 (Ky. App. 2016)

FACTS: Dickerson was charged with Burglary, with Hicks, her boyfriend, charged with Receiving Stolen Property. The basis of both was the break-in of Gentry's home and the theft of electronics. Hicks helped transport the goods. Both confessed, but at issue was the amount of restitution due to Gentry. Gentry provided a detailed spreadsheet of his losses, including his deductible, the difference between replacement costs and what his insurer paid and the repurchase of extended warranties. Some items had been recovered, but lacked power cords or remotes. The total claim was approximately $3500, and Gentry opted for restitution rather than the return of he recovered items, given their condition.

The Court awarded the full amount, and both appealed.

ISSUE: May replacement costs be factored into restitution?

HOLDING: Yes

DISCUSSION: The Court looked to KRS 533.030 regarding restitution. The burden in proving the amount falls to the Commonwealth, and does require an adversarial hearing when the amount is challenged. The Court agreed that the only item that was apparently returned in its original state, which all cords and such, was a laptop computer, and agreed that its value should have been discussed. The other items were, arguably, altered or substantially damaged as they lacked all original parts in working order.

The Court also agreed that there was no set way to calculate restitution in the case of stolen property, and that in this case, fair market value would not fully compensate the victim. There was competent testimony as to total replacement cost. There was a direct causal link between the burglary and theft, and the need to replace the property (and all ancillary costs.) The Court agreed that the decision was correct with the exception of the value of the laptop.

The Court also agreed that joint and several liability was proper, even though Dickerson was subjected to the more serious charge.

SEARCH & SEIZURE – ARREST

Manns v. Com., 2016 WL 6819746 (Ky. 2016)

FACTS: During the summer of 2014, Det. Duane (Lexington PD) identified Manns and others as members of a drug trafficking gang called the "Money Team." He learned Manns did not have a valid ID and that the gang would have others rent vehicles for them to drive. On July 1, he spotted Manns driving a rented gray vehicle. He did not make a stop, due to traffic, but obtained an arrest warrant for Manns for driving without an OL. As part of the supporting affidavit, he noted that other officers had also linked Manns to a hand-to hand drug transaction, from which he fled from officers.

About a week later, Det. Duane spotted Manns getting into another vehicle. He tried to make a stop but Manns evaded him. About a month later, the detective learned Manns was staying at a local motel and that he had a firearm with an extended magazine. He watched Manns and a female park and enter the hotel. Duane sought backup. The officers watched Manns and the female come outside; they were able to detain the female. Manns made it to the vehicle and locked the doors. Det. Cobb tried to break the window. Manns put his hands out of sight briefly and then unlocked the car and emerged. He was arrested.

Det. Cobb, spotted a set of digital scales in the cup holder. A further search of the car revealed 6.2 grams of cocaine and a loaded handgun. Manns sought suppression, stating that the incriminating nature of the scales was "not readily apparent" and did not support the search.

After several hearings, the Court upheld the search and the arrest. Manns took a conditional guilty plea and appealed.

ISSUE: Can an arrest be valid, even when it violates a specific state law?

HOLDING: Yes

DISCUSSION: Manns argued that under KRS 431.015, an arrest warrant for the OL charge was not legal and continued his argument that the search was invalid as well.

The Court looked first at the validity of the arrest. Det. Duane personally observed Manns driving and the Court agreed that an immediate arrest might have been warranted, particularly since the detective knew that Manns had failed to appear for prior court appearances. In order for it to be arrestable, however, the statute states he must be a flight risk. Nothing indicated in the affidavit that he was such. (It was noted, however, that in fact, he did have another outstanding warrant at the time.)

However, pursuant to Virginia v. Moore, the Court agreed that suppression was not required, when the arrest was otherwise based on probable cause, even if it does violate a state statute.[14] This was upheld in Kentucky pursuant to Bratcher v. Com.[15]

With respect to the vehicle search, Manns argued that it violated Arizona v. Gant and its search incident to arrest doctrine.[16] Further, he argued that was no basis to believe that evidence of the crime of the underlying arrest would be found in the vehicle. The Court noted, however, that under the vehicle exception doctrine, a vehicle in a public location may be searched if probable cause exists that it contains contraband.[17] The Court agreed that under the context, Det. Duane had probable cause to believe the digital scales were contraband. Although they are not "inherently criminal," under the totality of the officer's knowledge, the scales became so.

The Court upheld his plea.

Maner v. Com., 2016 WL 3661793 (Ky. App. 2016)

FACTS: On October 31, 2013, Officer McCullough, Lexington PD, was dispatched to a theft at a local Kroger. A loss prevention officer had stopped the subject, Maner, who claimed the items she had not paid for through the self-checkout lane was due to an accident. Officer McCullough reviewed the video, which "in his opinion clearly showed Maner using her paid for items to try and cover up the unpaid items in her cart." He arrested her for attempting to steal $89 worth of merchandise. In the search incident to arrest, the officer also found a metal tube on her keychain that contained 27 oxycodone pills.

At a suppression hearing, Officer McCullough testified that he was familiar with KRS 431.015, with required citations rather than custodial arrests for most misdemeanors, as well as KRS 433.236 (Shoplifting) which

[14] 553 U.S. 164 (2008).
[15] 424 S.W.3d 411 (Ky. 2014).
[16] 556 U.S. 332 (2009).
[17] Chavies v. Com. 354 S.W.3d 103 (Ky. 2011). Carroll v. U.S., 267 U.S. 132 (1925).

allowed for the arrest. The Court upheld the arrest and Maner took a conditional guilty plea to theft and possession of a controlled substance. She then appealed.

ISSUE: May shoplifters be arrested, despite the provisions of KRS 431.015?

HOLDING: Yes

DISCUSSION: The Court noted that the issue was purely a question of law (rather than of fact) and concerned "the interaction between KRS 433.236 and KRS 431.015. The Court noted that the latter had been amended in 2011 to require citations, rather than permitting them, for most misdemeanors. However, the specific shoplifting statute continued the officer discretion for arrests.

The Court agreed that "there is certainly tension between the two statutes, as the usual rule "generally, when a later-enacted and more specific statutes conflicts with an earlier-enacted and more general statute, the subsequent and specific statute will control."[18] In this case, however, it is the earlier shoplifting statute that is more specific. The court, however, noted that "the legislature is presumed to be aware of the existing law at the time of enactment of a later statute."[19] Further, the Courts also presume that the legislature intends for statutes to be "construed as a whole, for all of its parts to have meaning, and for it to harmonize with related statutes."[20]

The Court agreed that "repeal by implication," is not the preferred method, if the legislature did not specifically repeal it, which they did not do in this case.[21] Further, the court noted, KRS 431.015 addresses misdemeanors committed in the officer's actual presence, which is not normally the case in a shoplifting situation, which further sets this specific crime apart from most misdemeanors. The court agreed that KRS 431.015 should stand as a statute of general applicability, allowing KRS 433.236 to control under its specific set of circumstances."

Maner's plea was upheld.

SEARCH & SEIZURE – WARRANT

Watkins v. Com. 2016 WL 6311219 (Ky. App. 2016)

FACTS: On October 8, 2010, Officer Moore (Paris PD) and Det. Asbury (Bourbon County SO) used a CI to buy pills (Percocet) from Watkins. Six days later, they attempted a second buy, but Watkins spotted a recording device on the CI. He chased her down and tried to get the recording device, unsuccessfully. That same evening, Officer Moore sought a search warrant for Watkins' businesses, home and vehicle. The warrant also included a notation that the CI had seen child pornography on Watkins' computer.

The warrant was signed on October 14, and allowed a search and seizure of the following:

> Prescription narcotics, or any other substance in violation of the Controlled Substance Chapter (KRS 218A); Any computer or computer record involving any substance in violation of the Controlled Substance Chapter (KRS 219A); All weapons and money; All records detailing net worth, occupancy, residency, ownership. Or evidence of money laundering; Any and all items related to or derived from the sale, use, transfer, storage, shipping. Or handling any substance in violation of the Controlled Substance Chapter (KRS 218A); and Any and all items in violation of the Drug Paraphernalia Offenses (KRS 218A.500). Any and all electronic media and reading devices such as computers diskettes, tapes monitors, jump drives, and printers. Any and all evidence of crimes being committed or will be committed.

[18] Stogner v. Com., 35 S.W.3d 831 (Ky. App. 2000).
[19] Id.
[20] Shawnee Telecom Res., Inc. v. Brown, 354 S.W.3d 542 (Ky. 2011).
[21] Osborne v. Com., 185 S.W.3d 645 (Ky. 2006).

Several computers and other items were seized. During a jail call with his brother, Watkins learned that the computers had been seized and he stated "I'm dead, I'm done." A second warrant was obtained several days later to allow an in-depth forensic examination for child pornography, based upon the CI's information, and the justification included Watkins' statement to his brother.

During the subsequent exam, a vast quantity of child pornography was found and Watkins was charged with "several counts of possession of matter portraying a sexual performance by a minor." He was denied suppression. He took a conditional guilty plea and appealed.

ISSUE: May a nexus between a crime and a location be inferred in some cases?

HOLDING: Yes

DISCUSSION: First, Watkins argued that the warrant was flawed because "no facts were set out in the affidavit connecting Watkins's suspected criminal activity to his home or business or specifying the locations of his encounters with the confidential informant." The Court looked to Moore v. Com.[22] And agreed that based upon the facts put force, it was unnecessary for the officer to include an explicit statement that connected the place to be searched with the crime, but instead, that a judge can infer a nexus. The information provided was sufficient detail as to indicate it was reliable and in fact, the second warrant was not actually needed, but was commendable.

Watkins also argued that the affidavit was invalid because it "was not sworn to before a magistrate or officer authorized by the court as required by Kentucky Rule of Criminal Procedure 13.10." The Court agreed that under Copley v. Com., the court ruled that a technical deficiency did not violate the law, and did not require suppression.[23] In this case, the error was not done in bad faith and did not prejudice the defendant.

The Court upheld his plea.

SEARCH & SEIZURE – CONSTRUCTIVE POSSESSION

Haney v. Com., 500 S.W. 3d 833 (Ky. App. 2016)

FACTS: On January 25, 2013, the DEA referred a complaint about Hunley and Bolin, that concerned them manufacturing methamphetamine in Morgan County. Trooper Gabbard initiated an investigation and went to the home, and obtained consent to search. He found only drug paraphernalia in the house but encountered a locked door, which Hunley said led into the garage. Music was playing. Hunley "feigned ignorance" as to who might be in the garage and she unlocked the door.

As soon as the garage door opened, Gabbard perceived a "very pronounced" odor that indicated methamphetamine manufacturing. He spotted two "smoking" bottles in plain view on a workbench, and saw other precursor materials. Haney was present and the trooper patted him down, out of a safety concern. Only marijuana seeds were found in that search.

Haney was indicted for manufacturing methamphetamine. He moved for suppression of both searches, and was denied. It took a conditional Alford plea, and appealed.

ISSUE: Is someone locked in with active methamphetamine labs in "constructive possession" of them?

HOLDING: Yes

DISCUSSION: The Court looked to the definition of "constructive possession" – in which a "person does not have the actual possession but instead knowingly has the power and the intention at a given time to

[22] 159 S.W.3d 325 (Ky. 2005).
[23] 361 S.W.3d 902 (Ky. 2012).

exercise dominion and control over an object, either directly or through others."[24] It can be proven by circumstantial evidence. Simple physical proximity isn't enough, for drugs, for example, and some degree of intent is also needed.[25] In this case, Haney was locked in an unventilated space with two active labs, so certainly, he was aware of them. The fact that he apparently had the door locked clearly indicated dominion and control.

With respect to the pat down search, the Court noted there was confusion in the record concerning it. Since it didn't result in the admission of any evidence against Haney, though, even if held to be improper, there was no relief to be given.

The Court upheld his conviction.

SEARCH & SEIZURE – CONSENT

Stokes v. Com., 2016 WL 7324261 (Ky. App. 2016)

FACTS: On August 9, 2014, an "obviously injured woman" approached an officer at the Hopkinsville PD. She claimed to have been assaulted at a local motel in a disagreement about drugs. She was uncertain as to in which of two rooms at the hotel the assault occurred, as the group was using two connecting rooms.

Officers responded and pounded on the door of one of the rooms, to no avail, and heard and saw nothing from the room. Looking through a window at the other room, they could see a woman lying on the bed, but the knocking did not rouse her. They talked to the owner, who told them that Cook was the registered tenant of the second room and Stokes the first room. He agreed to open the first room. Officer Brent entered and found no one, but did see blood on the bed and refrigerator, but no contraband. He left in a few seconds. They went back to the second room and still no one entered, although they did hear noise inside. The owner opened the door and Stokes was found hiding behind the door. The woman lying on the bed was Hodge – Cook was not present.

Both were detained and Stokes gave written consent to search his room. Later he testified he did so because he knew officers had already been in the room and that he "had no real choice" in the matter. Inside, officers found cocaine residue and related items. Stokes agreed they were his and was arrested.

Stokes was charged and moved for suppress, arguing his consent was a "product of coercion." The trial court denied the motion. He was convicted of possession of the cocaine and appealed.

ISSUE: May a exigent entry be allowed if there is a reason to believe someone needs medical aid?

HOLDING: Yes

DISCUSSION: Stokes continued his argument on appeal. The Court agreed that the officer's explanation of the initial entry was credible, to secure the scene and determine if there were any other injured individuals. The Court noted, however, that "even if one were to grant that the initial entry to police into [Stokes' room] was improper," that "Stokes' consent was nonetheless voluntary." The officers were "prudent enough" to request consent and get it in writing, and that his "subjective perception" that refusal was pointless was insufficient. Objectively, his consent was voluntary. It was an independent act of free will even though the time frame was very short, there were no intervening factors and while the entry may have been "procedurally flawed," there was nothing flagrantly inappropriate on the part of the officers.[26] There were clearly articulable reasons to enter the room and there was no actual search at the time.

[24] U.S. v. Bailey, 553 F.3d 940 (6th Cir. 2009); U.S. v. Craven, 478 F.2d 1329 (6th Cir. 1973).
[25] U.S. v. Gordon, 700 F.2d 215 (6th Cir. 1983); U.S. v. Newsom, 452 F.3d 593 (6th Cir. 2006).
[26] See Baltimore v. Com., 119 S.W.3d 532 (Ky.App. 2003).

The court upheld the trial court's denial of suppression.

SEARCH & SEIZURE – SEARCH INCIDENT

Martin v. Com., 2016 WL 6819756 (Ky. App. 2016)

FACTS: In December, 2013, Lexington PD received a tip about heroin-trafficking at specific address. A dealer, called Bri – was identified as Bratcher. On January 10, 2014, a controlled buy was made with a CI an Bri made the sale. Burton was also present at the time. On January 23, a second buy was made and through the CI, learned Bri had some "good China white" that she'd gotten from Detroit. The CI purchased a gram of the latter.

On the same day, detectives obtained a search warrant for the apartment, and found 18 grams of heroin, along with three men, including Martin. During Martin's arrest, Det. Duane found about $1440 in his pocket, including the two marked bills from the earlier buy. No drugs were found in his actual or constructive possession.

Martin was indicted for trafficking. Upon his motion to suppress, the Court agreed the money was found during a lawful search incident to arrest. He took a conditional guilty plea and appealed.

ISSUE: Is a search appropriate when an individual is under a lawful arrest?

HOLDING: Yes

DISCUSSION: The Court looked at the search incident exemption to the usual search & seizure provisions.[27] Based upon the information available at the time, the Court agreed that there was more than sufficient probable cause to arrest Martin, and that he was the source of the drug sold to the CI that day.

The Court upheld the arrest and the contemporaneous search.

SEARCH & SEIZURE – TERRY

Henry v. Com., 2016 WL 6125694 (Ky. 2016)

FACTS: Trooper McGehee (KSP) was patrolling in Muhlenberg County when he spotted Henry sitting in a yard swing. The trooper testified that he saw Henry "take a slim white object, approximately three inches in length, from his mouth and place it underneath his right shoe." Suspicious, the trooper got out and approached, engaging Henry in conversation. Henry said he'd just finished smoking a cigarette. The trooper saw the white object on the ground and verbally pressed Henry if the item was his.

Instead, Henry got up, shoved the trooper aside and ran. The trooper gave chase and subdued Henry, and "after they wrested in a ditch filled with water and mud" – his uniform was damaged and the Taser destroyed. The item was a marijuana joint laced with cocaine.

Henry was charged with Assault 1st, possession of a controlled substance and related offenses. He moved to suppress, arguing that the trooper lacked reasonable suspicion in the initial instance, and the initial conversation was an illegal stop under Terry v. Ohio. The trial court ruled that "McGehee was free to approach Henry and engage him in conversation and Henry's apparent concealment of the suspected cigarette upon observing the presence of the trooper was sufficient to arouse a reasonable suspicion." Henry appealed.

ISSUE: Is hiding a likely contraband item sufficient for reasonable suspicion?

HOLDING: Yes

[27] Rainey v. Com., 197 S.W.3d 89 (Ky. 2006); McCloud v. Com., 286 S.W.3d 780 (Ky. 2009).

DISCUSSION: "In Terry v. Ohio, the United States Supreme Court sketched the parameters of police investigative conduct. The central issue in Terry was whether it is unreasonable for a policeman to seize a person and subject him to a limited search with less than probable cause for an arrest. Reasonable and articulable suspicion may support a proper Terry stop. Relevant contextual considerations in a Terry stop analysis fairly include: (1) the officer's experience or knowledge, and (2) nervous, evasive behavior by an individual.[28]"

The Court agreed that the facts were satisfied when the trooper saw "Henry place an unlit cigarette under his shoe in an attempt to conceal it." That triggered a followup, which supported the eventual arrest.

The Court also addressed the criminal mischief charge, for the damage to the trooper's uniform and equipment. The Court noted that "intent can be inferred from the act itself and the surrounding circumstances. Likewise, a person is presumed to intend the logical and probable consequences of his conduct, a person's state of mind may be inferred from his actions preceding and following the charged offense."[29] It was completely appropriate for the jury to have reasonably inferred Henry rolled the joint and knew what it contained.

The Court upheld his plea.

SEARCH & SEIZURE – TRAFFIC STOP

Cowan v. Com., 2016 WL 6892821 (Ky. App. 2016)

FACTS: At about 9:30 p.m. on evening, Officers Bradley and Johnson (Berea PD) spotted a car with one headlight out. The vehicle matched the description of a vehicle suspected in a drug-related disturbance two nights before. They made a traffic stop and Officer Bradley noticed that the driver's side mirror was missing. The driver, Palmer, told the officers that he and his two passengers, Cowan, in the front passenger seat and Baker, in the rear passenger-side seat, were on the way to Lexington because Baker was late for work. Bradley noted the vehicle related issues and asked for identification for the occupants. Palmer denied consent to search, stating he had borrowed the car and didn't feel comfortable agreeing to a search.

Bradley asked for a K9, but the Berea K9 was unavailable. He was not aware that dispatch had also called for a K9 from the Madison County Sheriff's Office. While Bradley was handling the traffic stop paperwork, Deputy Bol, arrived, after about 11 minutes. Officer Bradley explained the situation, and the K(walked around the vehicle, alerting at two locations. A search done as a result, resulted in marijuana, heroin and drug paraphernalia. Cowan claimed the makeup bag containing the heroin and was arrested.

She moved to suppress the search and statements she made prior to receiving Miranda. The court denied the motion with respect to the search. She took a conditional guilty plea and appealed.

ISSUE: Is the length of a valid traffic stop limited?

HOLDING: Yes

DISCUSSION: Cowan's argument focused on the "duration of the traffic stop." The Court agreed that the duration and scope of such stops are "subject to limitations." Specifically, the stop may not usually extend any longer than necessary to conduct an ordinary traffic stop, nor may it be "excessively intrusive."[30] To extend such stops requires reasonable suspicion equivalent to a Terry stop. Cowan argued that had Officer Bradley focused on writing the citation, it would have been finished in the eight minutes it took for the drug dog to alert. The trial court noted that the relevant time frame to consider was the 32 minutes

[28] U.S. v. Brignoni-Ponce, 422 U.S. 873, 885 (1975).
[29] Parker v. Com., 952 S.W.2d 209 (Ky. 1997).
[30] U.S. v. Davis, 430 F.3d 345 (6th Cir. 2005); Turley v. Com., 399 S.W.3d 412 (Ky. 2013).

between the initiation of the stop and the positive alert for drugs, and acknowledged that Bradley was still within the usual time frame for writing such citation when the deputy arrived. (And in fact, he wasn't even aware a drug dog was on the way, and had no reason to prolong the stop.) During the eight minutes in question, the two officers talked and the drug dog searched and alerted.

The Court found no indication that "the stop was prolonged beyond the time reasonably required to complete its initial purpose – the issuance of the traffic citation. As such, the court upheld her plea.

SEARCH & SEIZURE - ROADBLOCK

Com. V. Crosby / Scruggs, 2016 WL 6819755 (Ky. App. 2016)

FACTS: On May 4, 2014, Deputy Fitzner (Oldham County SO) stopped Scruggs at a roadblock. The roadblock was conducted by Deputies Fitzner and Menard, along with Trooper Brewer (KSP) in conjunction with the Oaks-Derby being held that weekend in Louisville. Several roadblocks were scheduled for that time frame and had been advertised by KSP. During the time frame, 2:30 a.m. to 5 a.m., for the most part, every vehicle was stopped, except for a brief shutdown at 3:17 a.m. Scruggs was arrested at 2:59 a.m. The shutdown occurred because Trooper Brewer left the scene with Scruggs and the two deputies could not continue the roadblock on their own.

Scruggs was subsequently charged with DUI. He moved to suppress the roadblock as unconstitutional. At trial, Trooper Brewer indicated he'd gotten permission the day before from his sergeant to do the checkpoint but had no written proof of the approval nor was it indicated in the CAD.

The trial court approved the motion to suppress, noting that the responses related to the approval were inadequate, that there was no plan in place should an arrest be made, and there was no evidence that the roadblock "had been properly planned, authorized, and undertaken." Looking to Com. v. Buchanan, the court agreed the checkpoint was unreasonable and unconstitutional.[31]

The Commonwealth sought a writ of prohibition and mandamus against the suppression. The Circuit Court agreed with the lower court's ruling and the Commonwealth appealed.

ISSUE: Is meeting the Buchanon factors necessary for a roadblock?

HOLDING: Yes

DISCUSSION: The Court noted that such writs were an "extraordinary remedy. " Since the Commonwealth could not proceed without the evidence from the roadblock, however, there was no other avenue of appeal for the Commonwealth in this case but a writ.

The Court looked at the law with respect to checkpoints and noted that "Kentucky law requires supervisory control over the establishment and operation of a checkpoint for that checkpoint to comply with the Fourth Amendment. Additionally, checkpoints in compliance with the Fourth Amendment put constraints on the use of discretion by individual officers."[32] Evidence seized at an unconstitutional checkpoint is subject to suppression.

The Court considered and applied the four Buchanon factors.[33] The Court noted that KSP's policy required that the planned roadblocks were to be noted on the post schedule and on the CAD unit log. In this case, the sergeant who allegedly approved the checkpoint was never called to confirm he had approved it. There was no testimony about a plan for arrests, or what actually happened after the checkpoint was suspended following the arrest. Further, no evidence was ever submitted concerning the actual purpose of the roadblock, itself.

[31] 122 S.W.3d 565 (Ky. 2003).
[32] Com. v. Bothman, 941 S.W.2d 479 (Ky. App. 1996).
[33] Com. v. Buchanon, 122 S.W.3d 565 (Ky. 2003).

The Court agreed that the trial court's ruling was correct and supported the order of the Oldham Court Circuit Court affirming that ruling.

SUSPECT IDENTIFICATION

Webb v. Com., 2016 WL 7175261 (Ky. App. 2016)

FACTS: On May 2, 2011, the Roseberrys (Lewis and Debbie) were at home in Olive Hill, when they saw car lights shining on their wall. Lewis took his gun and went outside. He recognized one of the two men in the truck as Stamper, a friend of his daughter, but did not know the other man. He allowed them to come inside. He realized Stamper was somewhat intoxicated and the other man was "very intoxicated."

At some point Debbie called Lewis into the other room and when he returned to the kitchen, he found the men, and his pistol, gone. He went after them as they were getting into the truck, but they denied having the pistol. The unknown man then pulled another weapon and pointed out at Roseberry, who "was not dissuaded" and tried to pull Stamper out of the truck. The unknown other man, the driver, reversed and dragged Roseberry until he stopped. Debbie scuffled with the driver, stabbing him with a pen. Roseberry pushed Debbie out of the way and turned for a shovel. At that point, the man shot Roseberry in the leg. Debbie grabbed the gun and was injured, cut, in a struggle for the weapon. As Roseberry struck the truck with the shovel, the men drove off.

The Roseberrys did not call 911, but their daughter, who then called for emergency help. Roseberry went to the hospital with his daughter and was treated and released. (He stated he was given a prescription for pain but testified that he continued to suffer pain from the wound.) Deputy Cox, Carter County SO, arrived to investigate. He did not obtain any statements or collect the clothing, as both members of the couple were in a "highly charged emotional state." He could not find any shell casings. No photos were taken at the scene, but he did take photos of the wounds. The initial dispatch indicated Stamper was the shooter but Deputy Cox indicated he did not think that was correct. He did arrest Stamper that night on an outstanding warrant, however. Although Stamper was placed in the "drunk tank," the deputy did not consider him to be very intoxicated. He interviewed Stamper, who stated Webb shot Roseberry.

At trial, that statement was admitted as a prior inconsistent statement, under KRE 801A. There was no record of the statement in the file, however. Stamper identified Webb's OL photo as Webb. A few days later, both of the Roseberrys, shown the same photo by Cox, and told that Stamper had indicated the individual as a suspect, identified Webb as the shooter. (Stamper later said he had no memory of the interview or signing a consent to interview form.

Webb was charged. He moved to suppress the identification, but was denied. He was convicted of Assault 1st and appealed.

ISSUE: Is showing a single photo to both witnesses unduly suggestive?

HOLDING: Yes (but see discussion)

DISCUSSION: Webb argued that the Roseberry's identification was improperly admitted as it was "undeniably suggestive and with a high likelihood of misidentification."[34] The Court agreed that a single photo is unduly suggestive, and that was made worse by showing it to both parties at the same time. However, it was "otherwise sufficiently reliable under Neil v. Biggers."[35] However, the Court upheld the identification.

Next, the Court looked at the degree of Roseberry's injury, and gave as its determining factor in decided it was serious that he indicated continuing pain from the injury.

[34] King v. Com., 142 S.W.3d 645 (Ky. 2004).
[35] 409 U.S.188 (1972).

The Court upheld Webb's conviction.

Crutcher v. Com., 2016 WL 7175261 (Ky. 2016)

FACTS: Goldsmith was robbed at gunpoint of marijuana and cash, in Fayette County, Yocum and Crutcher went through Goldsmiths's pockets and then told him to run. Goldsmith did so and was shot in the shoulder. (A third man, SD, was present as well.) Goldsmith stated to police that Yocum was involved, but did not know the other two men. He then moved out of Lexington.

Months later, Officer Toms tracked down Goldsmith to show him a lineup, from which Goldsmith identified Yocum. Goldsmith told him that he'd learned that "Little Anthony" was the shooter, from which Toms found Crutcher's photo. Goldsmith then identified Crutcher as well in a photo array.

Both Yocum and Crutcher were arrested. Yocum took a plea but Crutcher went to trial. He was convicted of Robbery 1st and appealed.

ISSUE: Should a photo array be reflective of the description provided?

HOLDING: Yes

DISCUSSION: When Goldsmith was called to testify, he told the bailiff that he was unwilling to come inside because someone in the courtroom had threatened him. The trial judge suggested clearing the courtroom during Goldsmith's testimony and Crutcher's attorney did not object. Crutcher argued that violated his right to a public trial, which the court agreed, but noted that by failing to object, the issue was waived. (Had he objected, the Court would have been obligated to engage in an evaluation under Waller v. Georgia.[36]) The Court agreed that it was not the responsibility of the trial court to do this evaluation sua sponte.

The Court noted that "any attorney not asleep in his chair would understand the change in scenery and face the conscious decision of whether to state an objection" or not.

The Court also addressed the photo identification of Cruchter. When he learned that the shooter was "little Anthony" – the person who told him, a relative, also showed him a photo. The court noted that Goldsmith initially described the man as a "light skinned African American with dreadlocks." All matched, but Crutcher had the lightest skin in the array. The Court agreed it was a proper array.

Crutcher's conviction was affirmed.

INTERROGATION

Marcano-Tanon v. Com., 2016 WL 6826309 (Ky. 2017)

FACTS: On December 13, 2013, two armed, masked men robbed a restaurant in Louisville. The manager and another employee recognized the robbers as two former co-workers, Scrivener and Marcano-Tanon. The take from the robbery was a little over $5,500 and was recorded on surveillance video.

Ultimately, the police tracked down the two men, using the GPS tracking on Marcano-Tanon's cell phone. He consented to a search of the hotel room and car, and incriminating evidence, along with a pistol, a BB gun, a wallet and keys belonging to one of the robbed employees and another items was found. Scrivener initially denied any involvement, but finally admitted he was involved; he placed the blame for the planning and execution of the robbery on Marcano-Tanon. Marcano-Tanon never admitted to being at the robbery, but claimed he was set up by Scrivener.

[36] 467 U.S. 39 (1984).

At trial, an interrogation video was played in which the detectives allegedly bolstered their own abilities (that they never locked up the wrong person) and the testimony of the witnesses by emphasizing their truthfulness. The trial court allowed the use of the recording during the detective's testimony, but did limit his live testimony.

Marcono-Tanon was convicted and appealed.

ISSUE: Is accusing a subject of lying permitted during an interrogation?

HOLDING: Yes (but see discussion)

DISCUSSION: The Court looked to Lanham v. Com., in which the Court had held that "such recorded statements by the police during an interrogation are a legitimate, even ordinary, interrogation technique."[37] The comments in such interrogations, however, cannot be admitted "for the truth of the matter they appear to assert, i.e., that the defendant is lying." In such cases, a limiting admonition to the jury should be provided, cautioning the jury as to how the information may be used.

In this case, however, it is unclear if such an admonishment occurred. The Court concluded, nonetheless, that any error was harmless, since there was sufficient evidence of his conviction even removing the detective's statements from consideration.

The Court upheld his conviction.

TRIAL PROCEDURE / EVIDENCE – ILLEGAL EVIDENCE

Sanders v. Com., 2016 WL 7410726 (Ky. App. 2016)

FACTS: On March 29, 2014, at about 12:40 a.m., Officer Richardson (Hodgenville PD) spotted a vehicle speeding (about 15 over). When he made the stop, he discovered Sanders, the driver, with "bloodshot eyes and a strong odor of alcohol on his breath." He denied having anything to drink but registered sufficient on the PBT to indicate he was intoxicated. He then admitted he had not been too long since he'd had a drink. The standard FSTs indicated he was intoxicated. He was arrested but refused a breath test at the jail.

The dash cam video became part of the file and since Sanders was the county school superintendent, the press sought access to the recording. The chief released the video and as such, the full video was shown to the public.

At trial, Sanders moved to have the video suppressed, as well as his statements. The Court denied the motion and Sanders took a conditional guilty plea. He then appealed. The LaRue Circuit Court affirmed, and he further appealed.

ISSUE: Are DUI videos protected under state law?

HOLDING: Yes

DISCUSSION: The Court first addressed the video issue. The Court noted that while such videos are admissible at trial, under KRS 189A.100(2)(e), they are otherwise to be considered confidential records and not subject to disclosure under Open Records. "Release of the videos in a way not comporting with this statutorily-mandated confidentiality subjects the releasing party to criminal penalties" under Official Misconduct. However, the Court agreed, the release did not violate his constitutional rights, as it would have been subject to being shown at trial anyway and the pending criminal charge against the chief was immaterial. The evidence was legally acquired during the course of the arrest and it the exclusionary rule

[37] 171 S.W.3d 14 (Ky. 2005).

does not generally apply to statutory violations, if constitutional rights are not implicated. The Court upheld the use of the video at trial.

With respect to statements he made, the court agreed that they were not made during a custodial interrogation. [38] As such, they were properly admitted.

NOTE: The police chief was charged and ultimately acquitted of official misconduct in 2015.

TRIAL PROCEDURES / EVIDENCE - RELEVANCE

Kane v. Com., 2016 WL 6125904 (Ky. 2016)

FACTS: On April 27, 2015, Fleming County officers searched Kane's home, finding evidence of manufacturing. His young child was present. The house was in a "pitiful state of disrepair" and reeked of animal waste. Kane was indicted on a "host of charges," including manufacturing methamphetamine.

Among other evidence, photos of two discarded 2-Liter bottles were introduced, that were found just behind the home. Testimony indicated they were "shake and bake" labs.

Kane was convicted, and appealed.

ISSUE: Is evidence that isn't directed connected to the crime under prosecution possibly still admissible?

HOLDING: Yes

DISCUSION: Kane argued that the bottles were not relevant to the crime at hand. The trial court had noted that the officers found them but that the powder inside had not been tested. That was made clear from the testimony given. The deputy's testimony that the bottles were consistent with the method was proper.

The Court also agreed that "the list of relevant materials [for a manufacturing charge] discovered in [Kane's] residence and in his nearby vehicle is extensive." The court also noted that the house, in disrepair, had a working video surveillance system. The Court agreed that the list of items was properly provided to the jury, and the jury made a reasonable decision as to their use.

The Court upheld the conviction.

TRIAL PROCEDURES / EVIDENCE – JURISDICTION

Fischer v. Com., 2016 WL 7321434 (Ky. App. 2016)

FACTS: In June, 2013, Fischer went to a family home in Lexington for a gathering. There he sexually assaulted a 4-year-old female cousin multiple times. The assault was assigned to Detectives Hammond and Welch (Lexington PD). They drove to Winchester (Clark County) to do a knock and talk to determine if Fischer would agree to speak to them. **"**The detectives did not obtain an arrest warrant in either Fayette or Clark Counties prior to making contact with Fischer, did not have any cooperative agreements in Clark County that would extend their jurisdiction, and did not make any contact with Clark County law enforcement prior to the knock and talk." Fischer agreed to talk to them while sitting in the police unmarked SUV, with Fischer sitting in the front passenger seat. He was given Miranda warnings but told he wasn't under arrest. The doors were unlocked and he was not secured in any way.

Fischer admitted to the contact and gave a version that was consistent with the child's allegations. He wrote a letter of apology to the child and her parents. He was asked if he would accompany the officers

[38] Greene v. Com., 244 S.W. 3d 128 (Ky.App. 2008).

to Lexington, but was assured he wasn't under arrest. He was told he would have time to do so before he had to go to work later that evening. He asked for a ride rather than driving himself and they agreed to give him a ride home afterward. He gave additional details and made a second confession in Lexington and was immediately arrested.

Fischer was indicted for sexual abuse and sodomy, both in the first degree. He moved to suppress the statements made in Winchester, arguing the officers had no jurisdiction to conduct an investigation outside Fayette County. The Court ruled that "at no point during this encounter with Fischer did the detectives attempt to speak to him in a location beyond where the public has a right to be as required for a proper knock and talk." The Court denied his motion, and Fischer took a conditional guilty plea. He then appealed.

ISSUE: May a knock and talk be done by an officer outside their jurisdiction?

HOLDING: Yes

DISCUSSOIN: The Court agreed that "whether a police officer is outside his jurisdiction is not the consideration for whether a knock and talk is proper. Rather, the consideration is whether the officer was where a member of the public would have a right to be. When a police officer is acting outside his jurisdiction, eh becomes akin to a member of the public. As held in Quintana, the public has a right to approach the front door of someone's home and ask if they would speak with them."[39]

The Court moved on to whether the interaction was consensual. Fischer argued that "although he agreed to speak with the detectives, he only did so because he did not feel free to refuse or to terminate the encounter" and it was a "veiled attempt" to get a confession. The Court looked to Cecil v. Com., which noted that "the United States Supreme Court has identified factors that might suggest that a seizure has occurred and that a suspect is in custody: the threatening presence of several officers; the display of a weapon by an officer; physical touching of the suspect; and the use of tone of voice or language that would indicate that compliance with the officer's request would be compelled.[40] In short, "The test is whether, considering the surrounding circumstances, a reasonable person would have believed he or she was free to leave."[41]

Looking at the testimony, the Court agreed that "Fischer's encounter with the detectives was voluntary and consensual at all times." In fact, he "returned inside his home, unaccompanied, to prepare for the trip, and came back outside to the detectives' vehicle to accompany them to Lexington."

Finally, since the first encounter and confession was proper, the second could not be tainted.

The Court upheld his plea.

TRIAL PROCEDURES / EVIDENCE – EXPERT WITNESS

Luna v. Com. 460 S.W.3d 851 Ky. 2015 (HELD OVER FOR FINALITY)

FACTS: On September 8, 2007, in Trigg County, at about 8 p.m. Hendrickson's trailer was found to be fully engulfed by fire. Initially, since her vehicle wasn't there, it was believed she was not home, but her body was found inside. Investigation indicated that Luna had been living sporadically with Hendrickson for several months. But, according to Luna, the relationship was not romantic and he later, testified, she had inflicted physical abuse on him numerous times.

Earlier on the day of the fire, they had gone into Paducah and Hendrickson drove Luna home. He claimed he later left to visit his daughter in Illinois, but returned when he realized he'd left behind a tool. He claimed that he returned and thought he saw flames inside, but "supposing he was drunk and sensing things that

[39] Quintana v. Com., 276 S.W.3d 753 (Ky. 2009).
[40] 297 S.W.3d 12 (Ky. 2009) (citing U.S. v. Mendenhall, 446 U.S. 544 (1980).
[41] Baker v. Com., 5 S.W.3d 142 (Ky. 1999).

were not there, he drove away." He did call 911 about it, but couldn't provide the address or even Hendrickson's last name, and "became belligerent with her when she called him back seeking more information. He was arrested at 7:34 p.m. in Illinois for speeding.

Luna was extradited back to Kentucky and charged with Murder and Arson, 1st degree. He was convicted but his conviction was reversed. He was tried again, convicted again and appealed.

ISSUE: Is a hearing required to qualify an expert witness's proposed testimony?

HOLDING: Yes

DISCUSSION: Among a myriad of other issues, Luna argued that the court's acceptance of the Commonwealth arson investigator was flawed.

> When faced with the prospect of expert testimony under Kentucky Rule of Evidence (KRE) 702, the general outline of the trial court's gatekeeping role is to ask whether the expert proposes to testify to scientific, technical, or other specialized knowledge that will assist the fact-trier in understanding or determining a fact in issue. This requires the trial court to discern whether the proposed testimony is both relevant and reliable. Relevancy, in this context, has been repeatedly described as one of "fit":
>
> `Fit' is not always obvious, and scientific validity for one purpose is not necessarily scientific validity for other, unrelated purposes....
>
> The study of the phases of the moon, for example, may provide valid scientific[, technical, or other specialized] 'knowledge' about whether a certain night was dark, and if darkness is a fact in issue, the knowledge will assist the trier of fact. However, (absent creditable grounds supporting such a link), evidence that the moon was full on a certain night will not assist the trier of fact in determining whether an individual was unusually likely to have behaved irrationally on that night.[42]
>
> Reliability, on the other hand, focuses on the "validity of the reasoning and methodology upon which the expert testimony is based."[43] Taken together then, a trial court's overall inquiry is "whether the reasoning or methodology underlying the testimony is scientifically valid and [1 whether that reasoning or methodology properly can be applied to the facts in issue."[44] Whether a witness properly qualifies as an expert is within the scope of the trial court's discretion. Accordingly, we review for an abuse of that discretion. Any factual determinations made when reviewing an expert's reliability, however, we review for clear error.[45]

In most cases, the Court agreed, a hearing should be held, because "determining the admissibility of expert testimony on an inadequate record is an abuse of discretion." In this case, there was a hearing, but the arson investigator was not produced initially, requiring Luna to produce his own witnesses first. The Court noted that Luna's witnesses did not refute the process used by the investigator, as described in the report. Ultimately, when the investigator testified at trial, he was fully cross-examined as to his conclusions.

Luna also objected to the "admission of various statements made by Hendrickson to others regarding Luna's abusing her and forcing her to participate in various schemes to defraud her insurance company." The grounds for the admission of these statements "was the little-used exception to hearsay's general rule of exclusion: KRE 804(b)(5), forfeiture-by-wrongdoing." In support of this theme, that Hendrickson was killed to prevent her from reporting him, the Commonwealth put on a great deal of proof, noting that in his

[42] Goodyear Tire & Rubber Co. v. Thompson, 11 S.W.3d 575, 578 (Ky. 2000) (alterations in original).
[43] Toyota Motor Corp., 136 S.W.3d at 39.
[44] Daubert, 509 U.S. at 592-93.
[45] Hyman & Armstrong P.S.C. v. Gunderson, 279 S.W.3d 93, 101-02 (Ky. 2008) ("An appellate court's standard of review relative to a ruling on the reliability of scientific evidence under Daubert is whether the ruling is supported by substantial evidence.") (citing Miller v. Eldridge, 146 S.W.3d 909, 917 (Ky. 2004)).

insurance fraud scheme, Hendrickson was “his partner through it all” and “Hendrickson was the only individual who could implicate Luna in any of these crimes. It nearly goes without saying that her betrayal would have weighed heavily on Luna.”

The Court continued:

> Hearsay is an out-of-court statement offered to prove the truth of the matter asserted.[46] Contrary to the overarching lean toward admission throughout our evidence law, hearsay is generally not admissible unless the statement fits within an exception provided in our rules. Forfeiture-by-wrongdoing is one such exception based upon the timeless concept that an individual should not be permitted to profit or gain from improper conduct.
>
> We have had little opportunity to mold the scope of the forfeiture-by- wrongdoing exception. In Parker v. Com., our most extensive treatment of KRE 804(b)(5) to date, we declared it was "no longer sufficient []simply to show that a defendant caused the declarant's absence; rather, the forfeiture-by-wrongdoing exception to the confrontation clause is applicable `only when the defendant engaged in conduct designed to prevent the witness from testifying. '"[47] And we mandated trial courts to hold an evidentiary hearing before ruling on the admission of hearsay under the forfeiture-by-wrongdoing exception. At such a hearing, the proponent of the evidence bears the burden to show "good reason to believe that the defendant has intentionally procured the absence of the witness, after which the burden then shifts to the opposing party to offer credible evidence to the contrary."[48]

The Parker decision relied heavily on Giles v. California,[49] in which the Court noted that “when dealing with testimonial statements, the proponent of the evidence must prove the defendant intended to prevent the witness from testifying. This, of course, begs the question: what is required for nontestimonial statements?”

The Court concluded, however, that there was no need for any distinction between the two, since “hearsay will only be admissible under the rule if offered ‘against a party that has engaged in or acquiesced in wrongdoing that was intended to, and did, procure the unavailability of the declarant as a witness.’’ The Court agreed that the prosecution’s case “does seem to require intent to be inferred from Luna's conduct.”

The Court continued:

> Giles and its specific-intent requirement govern only testimonial statements protected by the confrontation clause of the U.S. Constitution. Our evidentiary rule operates for nontestimonial statements and, as such, could be interpreted to allow an inference of intent.
>
> This inference has long been recognized in our law: "Whether a defendant actually has an intent to kill is a subjective matter[, but a] defendant may be presumed to intend the natural and probable consequences of his act[;] and thus a jury is entitled to find an intent to cause death from an act of which death is a natural and probable consequence."

However, the Court noted that the evidence wasn’t even hearsay, as her statements “were not offered for the truth of the matter asserted, e.g. whether Luna actually abused her or made her drive him to Illinois at knifepoint.” In fact, they were “less like hearsay and more akin to prior-bad-acts evidence offered for ‘some other purpose’ as allowed under KRE 404(b).” The Court agreed that it was important “to be vigilant with this type of evidence because it can be highly prejudicial, effectively convicting the defendant because of who he is rather than what he is charged with doing.”[50]

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[46] See KRE 801(c).
[47] Parker, 291 S.W.3d at 670. 291 S.W.3d 647, 668 (Ky. 2009) (quoting Giles v. California, 554 U.S. 353 (2008)).
[48] Id.
[49] Giles, supra.
[50] See O'Bryan v. Com., 634 S.W.2d 153 (Ky. 1982).

> Kentucky's rules recognize a narrow set of circumstances where prior-bad-acts evidence is admissible: (1) when offered for "some other purpose, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident"; or (2) if the prior-bad-acts evidence is "so inextricably intertwined with other evidence essential to the case that the separation of the two [] could not be accomplished without serious adverse effect on the offering party. "[51]

Hendrickson's statements were "offered for the purpose of motive, preparation, or plan." They were relevant, as they went to the "existence of Luna's mental state and motive." While prejudicial, they were not unduly so, "because it is not unnecessary or unreasonable." The Court agreed the statements were properly admitted.

Luna also argued it was improper to introduce evidence of "an altercation Luna had with police while awaiting booking after being arrested" in Illinois. The Court agreed that the attempt to equate a fight he had with a trooper with an attempt to flee was specious. The Court, however, found the error to be harmless.

The Court also agreed that it was proper to deny Luna a jury instruction on voluntary intoxication. The Court noted that: Our case law requires more than mere evidence of alcohol consumption. Instead, a voluntary intoxication instruction is appropriate "where there is evidence reasonably sufficient to prove that the defendant was so drunk that he did not know what he was doing."[52] Simple drunkenness is not sufficient; instead, a "more advanced degree of drunkenness"[53] is required." Nothing in the evidence indicated that, although the "the evidence certainly indicates that Luna consumed an impressive amount of alcohol on the night in question; indeed, his blood alcohol content hours after Hendrickson's murder was .209. To be sure, that reading was taken after Luna finished off a bottle of liquor when unable to find Hendrickson's pulse and continued to drink alcohol during his getaway to Illinois; and, more importantly, it indicates little with regard to Luna's level of intoxication at the time of the murder. Luna offers no evidence of blacking out or otherwise succumbing to alcohol in a manner that makes him seem unaware of his conduct.[54] The evidence points to the contrary, in fact. At trial, Luna provided a detailed account of the events leading up to Hendrickson's murder and the alleged physical clash between him and Hendrickson. That account, discussed below, did not indicate intoxication to the point of negating an intentional mental state. To the contrary, Luna appeared in control of his mental faculties. Even though his testimony was filled with comments that he was drunk, we reiterate that without evidence of a more advanced drunkenness, a voluntary intoxication instruction is not warranted.

Neither was there any information to support an extreme-emotional disturbance instruction. Luna's own testimony, in fact, proved fatal to that theory, as he suggested that any actions he took were in self-defense.

The Court agreed that despite some errors, the jury verdict.

TRIAL PROCEDURES / EVIDENCE – LAB RECORDS

Manery v. Com. 492 S.W.3d 140 (Ky. 2016)

FACTS: Manery lived with Sarah Spicer, at the home of her parents. A number of other people lived in the house as well, including Sarah's daughter, Jane, age 12. Patricia, Sarah's mother, however, had custody of the child, because Jane was born with marijuana in her system. During the time they resided there, Sarah was arrested and taken into rehab, while Manery stayed with the Spicers, paying rent. He often shared a room with Jane.

[51] KRE 404(b)(1)-(2).
[52] Harris v. Com., 313 S.W.3d 40, 50 (Ky. 2010).
[53] Foster v. Com., 827 S.W.2d 670, 677 (Ky. 1991).
[54] See, e.g., Colyer v. Com., 2009 WL 736001 (No. 2007-SC-000195-MR March 19, 2009) ("Appellant's testimony that he drank heavily and used drugs on the day of the assault alone would not entitle him to an intoxication instruction if not for his testimony that he blacked out during the commission of the assaults.").

Following a medical complaint, it was learned that Jane had gonorrhea, a STD. Her exam was relatively normal except for redness and vulvovaginitis. Jane admitted that "Manery had done something to her" – and eventually, three separate rapes were identified.

Manery was interviewed and "vehemently denied any wrongdoing or any sexual contact with Jane." Using a search warrant, it was learned that Manery tested positive for gonorrhea and chlamydia. He was indicted on multiple counts of Rape, Sodomy and Sexual Abuse, along with related charges. During the trial, the test results were introduced under the medical records exception, through the jail doctor, rather than the technician that performed the test. (The doctor used that information to treat Manery for gonorrhea, although he was never formally diagnosed with it.) He was ultimately convicted of Rape and Sexual Abuse. He then appealed.

ISSUE: Should a lab technician be used to admit lab records?

HOLDING: Yes

DISCUSSION: Manery argued that he was entitled to have the lab technician testify.

The Court noted that:

> In recent history, the U.S. Supreme Court's construction of the Confrontation Clause has undergone a dramatic makeover. The old rule, as exemplified by Ohio v. Roberts, allowed third-party admission of out-of-court testimony if the evidence bore "adequate indicia of reliability."[55] When a witness against the accused is unavailable for live testimony, the Court ruled that the Constitution allowed the testimony through either a "firmly rooted hearsay exception" in the rules of evidence, or if the testimony contained "particularized guarantees of trustworthiness." The old rule thus construed basic evidentiary practices as satisfactory for Confrontation Clause purposes. But in Crawford v. Washington, the Court rejected the Ohio v. Roberts position.[56] Under the Crawford rule, "the inquiry is not whether hearsay falls under a deeply rooted exception or has particularized guarantees of trustworthiness; rather, the inquiry is whether the out-of-court statement is `testimonial' and whether the defendant had an opportunity to cross-examine the statement when it was made." So Crawford introduced a more searching inquiry than the traditional standard—non-testimonial statements may still be examined for reliability, but *testimonial* out-of-court statements from unavailable witnesses are categorically barred from admission under the Constitution unless the defendant had an opportunity for cross-examination.

The Court further stated that:

> It is uncontested that Manery has not been afforded the opportunity to cross-examine the Quest lab analyst who tested his DNA swab. The essential question for his case is whether the results of this test are "testimonial "evidence against him. In Davis v. Washington, a follow-up to Crawford, the Supreme Court presented an explanation of testimonial and non-testimonial evidence for Confrontation Clause purposes. A statement is not testimonial, the Court held, if it is "made in the course of police interrogation under circumstances objectively indicating that the primary purpose of the interrogation is to enable police assistance to meet an ongoing emergency." But a statement is testimonial if "the circumstances objectively indicate that there is no such ongoing emergency, and that the primary purpose...is to establish or prove past events potentially relevant to later criminal prosecution." 19 So essentially, after *Davis* the question of whether evidence is testimonial in nature depends on the purpose for which it was created—and the strictures of the Confrontation Clause must apply to statements, the purpose of which is to incriminate the defendant.
>
> The Supreme Court has also tackled the application of the Confrontation Clause to forensic analysis, delineating the distinction between testimonial medical records and those intended for

[55] 448 U.S. 56, 66 (1980).
[56] 541 U.S. 34 (2004)

medical treatment. In Melendez-Diaz v. Massachusetts, the Court held that forensic reports prepared for trial are testimonial, but "medical reports created for treatment purposes" are "not testimonial under our decision today."[57]

The Court also looked to Little v. Com., but noted that in this case, the test was performed using a DNA swab, for which the primary purpose would be prosecution.[58] "When the analyst at Quest conducted the test, any positive results for gonorrhea would doubtlessly inculpate Manery with the crimes alleged by Jane, and there was no broader purpose beyond identifying the perpetrator of these sex crimes. So we have no doubt that the report in this case is properly considered testimonial for purposes of the Confrontation Clause." By determining that "the out-of-court information is testimonial and that Manery never had the opportunity for cross-examination, there is nothing the rules of evidence can do to circumvent the constitutional imperative. We see no reason to grant a specific exception or to allow the Commonwealth to bootstrap unconstitutional evidence when the Constitution presents such an unequivocal command."

The Court reversed his conviction and remanded the case. In anticipation of retrial, in which the report can be used along with a live witness (the technician), the Court noted that despite the limited testing done, forensic evidence "most certainly raises an inference that he gave Jane the disease and, accordingly, tends to make it more probable that he is her abuser. The rules further articulate that all relevant evidence is admissible, absent additional rule of law barring its admission. As relevant evidence, we begin with the presumption that the Quest report is admissible." The Court then looked at KRE 403, which requires that evidence be reliable, and that it be weighed, with the proof balanced against the risk of undue prejudice. Since he was never official diagnosed, but only presumptively as a result of a swab test, he argued it was improper. The court, however, agreed it would have been better to have subjected him to more testing, but that doctors were used to "minimize the suggested unreliability of this evidence." (Specifically, doctors indicated they use this test often solo and use the results for treatment.)

The Court agreed that introduction the presumptive-positive test was proper and could be so used in a subsequent trial.

TRIAL PROCEDURES / EVIDENCE – CROSS-EXAMINATION

Cunningham v. Com., 501 S.W.3d 414 (Ky. 2016)

FACTS: When Martin's home in Todd County burned, during the nighttime hours of July 4-5, 2011, arson was suspected. Martin was in custody at the time. One of the items taken was a motorcycle and a tip led them to finding the motorcycle at Cunningham's home. It was seized. Cunningham was given Miranda and agreed to talk. Cunningham claimed that he actually owned it, but had left it with Martin as security for a loan. He had retrieved the motorcycle and title, as he'd paid off the loan.

Cunningham was charged with Theft and Burglary of the residence and garage, as well as arson. The arson charges were dismissed prior to trial. At trial, there were differing statements as to the motorcycle transaction, neither of which matched Cunningham's initial explanation. Martin claimed he'd taken it originally for collateral, and then bought it by giving Cunningham more money. Cunningham had then signed over the title, but that signature was not notarized because the transaction had become "tense and uncongenial." Cunningham's story was that there was a sham transaction.

At trial, Cunningham claimed he was out of town and brought forward an alibi witness. The prosecutor brought that forward during closing, that he'd had a supposed alibi witness and never once mentioned them to anyone pending trial.

[57] 129 S.Ct. 2527 (2008).
[58] 1997-CA-003007-MR (Ky. App. 1999).

Cunningham was convicted and appealed.

ISSUE: Is a suspect expected to "speak up" when statements are made in their presence that would naturally result in a disclosure of exculpatory evidence by the defendent, such as an alibi for the time of the crime?

HOLDING: Yes

DISCUSSION: First, the Court noted that, **"t**he overarching question presented is whether, and under what circumstances, a criminal suspect, who was given Miranda warnings and elected to waive his right to silence by discussing the allegations with police, may be cross-examined about his failure to disclose exculpatory matters to which he later testifies at trial." The Court noted that common law had previously allowed witnesses to be impeached "by their previous failure to state a fact in circumstance in which that fact naturally would have been asserted." The Court noted that providing an alibi would have been a "natural response" under the circumstances.

> The common law-rule relied upon in Jenkins[59] is embodied in KRE 801A(b)(2) and is often referred to as an "adoptive admission" or as "silence as admission." The key to the application of the common law principle cited in Jenkins is its underlying premise: the silent admission must be *"the failure to state a fact in circumstances in which that fact naturally would have been asserted."* Applying our counterpart to that common law rule, we explained in Trigg, "[t]o qualify as an adoptive admission through silence under KRE 801A(b)(2), the defendant's silence must be a response to 'statements [of another person, the declarant] that would normally evoke denial by the party if untrue.'[60]

Although in this case, he wasn't silent, statements were made in his presence that would have naturally motivated Cunningham to explain his whereabouts at the time of the crime. **"**Consequently, "[w]hen a prior inconsistent statement is offered to impeach a witness and the claimed inconsistency rests on an omission to state previously a fact now asserted, the prior statement is admissible if it also can be shown that prior circumstances were such that the witness could have been expected to state the omitted fact . . . because he or she was asked specifically about it . . . ."

The Court noted, however, nothing indicated that the officers said anything to him about the specific date of the fire and burglary, so, his failure to put forth his alibi immediately had no meaning. As such, the comment about his silence was unfair and the court reversed his conviction.

The Court also addressed the conflict in testimony concerning ownership. It was undisputed that the motorcycle was never properly transferred to Martin, although he was in possession of it. The Court noted that pursuant to KRS 186.010(7)(a) "Kentucky's motor vehicle registration law, the "owner" of a motor vehicle is "a person who holds the legal title of a vehicle or *a person who pursuant to a bona fide sale has received physical possession of the vehicle . . . ."* In other words*, a "*certificate of title is an *indicator* of ownership of a vehicle, but it is not exclusive and may be rebutted by other evidence. Thus, while the legal title had not been fully transferred to Martin, the Commonwealth presented substantial evidence that Martin, having physical possession of the motorcycle after paying for it "pursuant to a bona fide sale," was its 'owner' under KRS Chapter 186A."

The Court also noted it was improper to admit evidence that Martin lacked insurance and thus "lost everything" in the fire.

The Court reversed Cunningham's conviction.

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[59] Jenkins v. Anderson, 447 U.S. 231 (1980

[60] Trigg v. Com., 460 S.W.3d 322 (Ky. 2015460 S.W.3d at 330-333 (quoting Robert G. Lawson, The Kentucky Evidence Law Handbook *§* 8.20[3][b] at 597 (5th ed. 2013), citing Com. v. Buford, 197 S.W.3d 66 (Ky. 2006)).

TRIAL PROCEDURE / EVIDENCE – TESTIMONY

Hanks v. Com., 2016 WL 5862945 (Ky. App. 2016)

FACTS: About August 25, 2010, Whitaker (CHFS) and Deputy Marvel (Hancock County SO) respond to an adult abuse call in Hawesville. They found Mutchman, age 78, looking out the back door, but she indicated she was locked in and could not open the door. In fact, it was screwed shut. The deputy broke in and found the room hot, stifling, and stinking of urine. Mutchman was unkempt, with long nails and her bed was a bare mattress soaked in urine. She could not access the rest of the house as the doorknob was reversed, with the lock positioned so as to lock her inside. Deputy Marvel pried that door open and found no one else at home.

Ruth was removed and a note was left. Hanks, Mutchman's daughter, the homeowner, contacted Deputy Marvel. Mutchman shared the home with Hanks and her husband. Hanks also had Mutchman's power of attorney and had diverted thousands of dollars into her own accounts. She also collected the rent from his son, who was living in a home owned by Mutchman. When indicted, she wrote a check to her lawyer from Mutchman's account for the fees.

Both of the Hanks were indicted for Adult Abuse and Exploitation, as well as Theft. (Kenneth died before trial.) Hanks was convicted and appealed.

ISSUE: Is hearsay generally inadmissible?

HOLDING: Yes

DISCUSSION: Hanks argued, among other things, that Kenneth's death left her as the only witness to testify as to her key defense, that Mutchman was locked in due to dementia, having struck Kenneth on the head with a metal rolling pin. (Since he felt unsafe sleeping after that, they locked Mutchman into the room.) The hearsay statements were excluded at trial. Although the Court was somewhat troubled by the lack of consideration the trial court gave to the motion, it noted that Hanks was able to testify as to what had led up to the situation herself, and the fear they felt concerning her mother. The Court also agreed that the deposition of the doctor who treated Kenneth was also properly excluded and that it didn't definitively note who assaulted Kenneth anyway.

Hanks also argued she should have been allowed to introduce all of her recorded interview with Deputy Marvel under KRE 106.[61] The Court noted that the rule does not necessarily compel full introduction of a recording.[62] In this case, the Court found no allegations as to why what was admitted was "potentially misleading without the excluded portions."

The Court upheld most of her convictions, absent certain procedural errors.

Fugate v. Com., 2016 WL 6134902 (Ky. App. 2016)

FACTS: Trooper Huff spotted a vehicle in traffic "with the driver's side seatbelt dangling and unfastened" in Perry County. He made the stop and found two people inside, neither moved. When talking to the driver, Pratt, he spotted **"**what he suspected to be a methamphetamine "one-step lab" on the floor behind the driver's seat." Another trooper Richardson arrived when he notified dispatch. He asked if the lab was active, but neither responded.

After a FST, Trooper Huff learned Pratt was under the influence, as was Fugate, the passenger. The meth items were placed in the trunk. Fugate volunteered that there was a gun in the vehicle and it too was located. Fugate gave a teary, weepy statement in which he admitted he knew the active lab was in the car.

[61] [W]hen a writing or recorded statement or part thereof is introduced by a party, an adverse party may require the introduction at that time of any other part or any other writing or recorded statement which ought in *fairness* to be considered contemporaneously with it.
[62] Sykes v. Com., 453 S.W.3d 722 (Ky. 2015) (citing Schrimsher v. Com., 190 S.W.3d 318 (Ky. 2006)).

He claimed that he'd been kidnapped by Pratt after being accused of having sex with Pratt's girlfriend. Trooper Richardson later testified that Fugate had "red eyes and slurred speech" and that an investigation had been made concerning the alleged kidnapping, but no charges were brought.

Det. Campbell (KSP) stated he responded to the lab, as he was qualified to handle such matters. He identified the items found were consistent with an inactive one-step meth lap and that one item submitted came back negative, which didn't surprise him.

Before trial, Pratt pled guilty to manufacturing methamphetamine, DUI and Wanton Endangerment. Fugate was charged with manufacturing and related offense, as well as being in possession of the handgun as a convicted felon. He was convicted of only the manufacturing charge, the gun charge was severed. He appealed.

ISSUE: May a subject bring up aaltperp evidence?

HOLDING: Yes

DISCUSSION: Fugate argued it was improper to deny testimony from Knott County officers that in 2012, Pratt had been arrested for possession of drugs and a gun. He was charged but never convicted. He argued he should have been able to present an alleged alternative perpetrator (aaltperp) defense. The court agreed he could do so, but would not let him use the Knott County information as it was unrelated.

> In Beaty v. Com., the court noted, "the Kentucky Supreme Court held that one way to advance an "aaltperp" theory of defense is to establish that an alternative perpetrator had both the motive and opportunity to commit the crime."[63] In Gray, the Court noted that "motive-and-opportunity approach articulated in Beaty is not the only path to advance an aaltperp theory and it is certainly not an absolute prerequisite for admission into evidence." It held that the true threshold for admitting aaltperp evidence is the balancing test found in KRE 403, which prompts the trial court to weigh the probative value of the evidence against the risk of prejudice at trial, including confusing the issues or misleading the jury" However, the court agreed Fugate was able to fully discuss his aaltperp defense and that it was proper to exclude the Knott County information.

With respect to the methamphetamine evidence, the Court agreed that the troopers' testimony was sufficient to prove the items were being used to manufacture.

EMPLOYMENT - SHERIFF

Lanham v. Elliott (Boyle County Sheriff), 2016 WL 6543579 (Ky. App. 2016)

FACTS: Lanham was hired by the Boyle County Sheriff in 2002 and eventually became the Chief Deputy. In 2012, Sheriff Elliott was told about conduct of Lanham's that was of concern. On October 1, he demoted Lanham and suspended him a few days later. On October 17, he was formally terminated.

Lanham filed suit, arguing that KRS 15.520 was violated by the Sheriff not affording him a hearing, failing to obtain affidavits from complaining parties and failing to advise Lanham of his rights under the statute. The Sheriff sought summary judgement, arguing that KRS 15.520 does not apply to Lanham, but instead, he fell under KRS 70.030(5), which allowed for an at will termination, since there was no merit board in the county. (Other issues were brought forth as well.) The trial court ruled in favor of the Sheriff and Lanham appealed.

ISSUE: Are Sheriff's Offices subject to KRS 15.520?

HOLDING: Yes

[63] 125 S.W.3d 196 (Ky. 2003); Gray v. Com., 480 S.W.3d 253 (Ky. 2016).

DISCUSSION: Lanham argued that since a sheriff's deputy is included in the definition of police officer and that a sheriff's office is legally a "local unit of government,"[64] KRS 15.520 applies. Further, he noted, KRS 15.520 applies to any such agency that receives KLEFP funds. He argued that the merit board issue was simply inconsequential to the application of KRS 15.520.

The Court noted that although originally not included in the definition of 15.410, deputy sheriff and sheriff's office were added in 1998, at which time they became eligible for KLEPF.[65] KRS 70.030 was amended to provide that a sheriff's office could participate without establishing a merit board. Taken separately, the court stated, the statutes were "plain and straight forward." The Court agreed that "the ambiguity only arises when juxtaposing the two statutes." The Court looked to Pearce and its recognition that the statute should be read with a "'broad and expansive reach - and it's suggestion that the goal was a uniformity of due process protections."[66]

The Court concluded that the requirements of KRS 15.520 is triggered by the sheriff's acceptance of KLEFP funds and that KRS 70.030 (and the presence or non-presence of a merit board) is immaterial.

(On a related note, in the wrongful termination claim, Lanham argued he was fired because he told the Sheriff he was seeking counsel. The Court noted that is no well-defined public policy violated by such an action, even if true.)

The Court reversed and remanded the judgement on the due process argument, and affirmed the remainder of the case.

CIVIL LITIGATION

Williams v. Cline/McCormick, 2016 WL 7330569 (Ky. App. 2016)

FACTS: Williams alleged that she was mistakenly arrested and charged with Trafficking 1st, by Cline (Morehead PD) and McCormick (Assistant Rowan County Attorney). To resolve the original criminal charge, Williams agreed to a dismissal of the charges, in which she stipulated probable cause for the arrest. Williams then filed suit, claiming negligence and malicious prosecution. The case was remanded back to the trial court to resolve certain issues. On remand, the trial court ruled in favor of the officers and Williams appealed. In a second process, the appellate court ruled that the circuit court did not follow its directions in determining the validity of the dismissal agreement (the Coughlen[67] factors) and remanded it once again. Once again, the trial court ruled in favor of the officers and once again, Williams appealed.

ISSUE: Is a dismissal agreement valid if entered into with full disclosure?

HOLDING: Yes

DISCUSSION: Williams argued she was "rushed along" and not given an opportunity to develop facts and evidence. The Court found nothing in the record that suggested it was the case, however. The Ccourt agreed, there was no evidence to indicate she did not enter into the dismissal agreement voluntarily. In fact, as "soon as the issue of misidentification came to light, Williams was promptly informed and the parties worked toward a mutually agreeable resolution." There was no evidence that either of the officers acted in bad faith in the initial arrest.

The Court affirmed the dismissal of the action in favor of the two officers.

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[64] KRS 15.420; Pearce v. Univ of Louisville, 448 S.W.3d 746 (Ky. 2014); One complicating factor in this issue is that at the time the definitions in 15.420 were created, KRS 15.510 was the last statute in that section of the law. Unlike the usual language for such definitions – as used in this chapter – this statute did, and still does, limit the definitions to KRS 15.410 to 15.510, thus they don't, by the statue apply to 15.520. However, it would have an absurd result not to use the same definitions in 15.520.

[65] See footnote above.

[66] Pearce, supra.

[67] Coughlen v. Coots, 5 F.3d 970 (6th Cir. 1993).

MISCELLANEOUS – OATHS

Com v. Harper / Ballard/ Dennison, 2016 WL 5864592 (Ky. App. 2016)

FACTS: On December 17, 2013, Deputies Butler and Wilson (Hart County SO) searched a shed at Dennison's home, on a burglary company. They found a cooler containing evidence of methamphetamine manufacturing. The staked out the shed and waited for the owner to return for it. However, the shed was left unattended and when the deputy returned, it was gone. Deputy Wilson spotted someone carrying it, leaving the residence, and he smelled the evidence of manufacturing.

Deputy Wilson called Sheriff Hensley for backup. Wilson stayed at the back while Hensley did a knock and talk at the front. Dennison answered the door, while another person ran out the back, but ran back inside when Wilson made his presence known. Wilson contacted Deputy Butler about a search warrant, and in turn, Butler contacted a prosecutor. Documents were faxed back and forth with ultimately, Butler being sworn over the telephone and faxing a signed copy to the judge, who faxed back a signed warrant. During the subsequent search, methamphetamine manufacturing items were located and everyone was arrested, including Harper and Ballard.

Dennison moved to suppress, arguing that the warrant was not properly issued pursuant to RCr 13.10 and 2.02, to which Ballard and Harper joined. The trial court agreed and suppressed the evidence. The Commonwealth moved to vacate the suppression but the trial court, noting that the original signed copy of the warrant wasn't even in the file, declined it. The Commonwealth appealed.

ISSUE: Is a telephonic warrant currently questionable?

HOLDING: Yes

DISCUSSION: The Court looked at the two rules. The defendants argued that administering the oath required the parties to be present to each other. The Court agreed that the "telephonic swearing of an oath is not 'before' the officer empowered to administer such oaths and is therefore a violation of" the rules. The Commonwealth argued that the violations were not deliberate but at most, negligent. The Court, however, concluded that instead, the error was as the result of inadequate training on the part of the three individuals involved.

The Court also agreed that the search was adequately supported by probable cause and upheld the convictions.

SIXTH CIRCUIT

CONSTRUCTIVE POSSESSION

U.S. v. Jackson, 2016 WL 5940049 (6th Cir. 2016)

FACTS: Officer Cook spotted Jackson riding as a passenger in a vehicle, without a seatbelt. When he ran the plate, he saw that Miller, the owner had an outstanding felony warrant. He pulled over the vehicle, Miller was driving, and he arrested her. He asked if she had any contraband on her person, warning her that it was a felony at the jail. She replied that Jackson had "stuffed something down her pants," then stated it was heroin.

Cook asked Jackson for his identifying information, but he claimed to have no ID and "fumbled twice" over his SSN. Cook frisked Jackson and based on plain feel, detected a substantial amount of cash. 50 grams of heroin were found on Miller, some in capsules. A drug dog alerted on the car and paraphernalia and packaging was found. Jackson was arrested and $4,000 in cash was found.

Miller stated she was driving Jackson around to sell heroin and that Jackson and his brother had heroin and cash at their apartment. In a search, over 280 grams and $8,000 in cash was found.

Jackson was charged with distributing and related charges. He moved for suppression of the cash found on his person, arguing there was no reasonable suspicion to frisk him nor was the cash obviously contraband. The motion was denied. Jackson was convicted and appealed.

ISSUE: Are suspicious movements enough for a frisk?

HOLDING: Yes

DISCUSSION: First, Jackson argued that the frisk was improper. The Court looked to the facts available, including Miller's statement and his nervousness and continued searching around the car after he'd said he lacked ID (and presumably wouldn't have been looking for it in the car), and agreed there was at least enough reasonable suspicion for a frisk. The Court agreed that his movements were certainly enough to believe he was attempting to conceal something or posed a safety risk.

Further, Cook's experience was sufficient for him to infer that Miller's possession of drugs indicated the reasonable likelihood of a firearm. The Court agreed the frisk was appropriate.

The Court also agreed that certain testimony (by Miller, the co-conspirator) was proper and upheld Jackson's conviction.

SEARCH & SEIZURE - WARRANT

U.S. v. Raglin, 2016 WL 5754008 (6th Cir. 2016)

FACTS: In 2015, Lexington police were following Wheat as part of an ongoing drug investigation. Wheat took a child to a mall parking lot, left the child with a man in a vehicle, drove to another part of the lot, appeared to exchange drugs for money with a man in a tan vehicle, and then returned for the child. After all left the parking lot, police stopped the tan vehicle, searched and found approximately 1,000 opioid pills. Another group followed the black vehicle to Raglin's home. When that vehicle was stopped and searched, $3,000 in cash was found. Edmonds was driving that vehicle and stated that Raglin lived in the home he'd just left.

Officers returned to the house and tried to contact the resident. "A neighbor told them that a purse had just appeared on the roof of Raglin's house." Haddix, who lived with Raglin, claimed the purse as hers and

gave consent for the purse to be retrieved and searched. $38,000 in cash was found in the purse. This was noted as the "going rate for a kilogram of cocaine," when added to the $3,000 already found. Haddix also stated there were firearms inside.

Raglin came out and was seized. A criminal history indicated two prior convictions for trafficking in cocaine and a firearms violation.

Det. Duane completed a search warrant affidavit, detailing the information above. In editing the search warrant, however, the boilerplate that details the items sought routinely in such cases was inadvertently deleted, but did include the affidavit. What was described was simply "evidence related to the illegal use/s[ale]/transfer of illegal narcotics." The warrant was executed and cash, almost $5,000 in cash, loaded firearms, ammunition, scales and a metal press, along with other items, were found.

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

ISSUE: Is it permitted to have a generic list of items to look for in a drug warrant?

HOLDING: Yes

DISCUSSION: First, the Court agreed, there was a sufficient nexus drawn between the crime and Raglin's residence, by identifying that a suspected drug deal had just occurred and a purse stuffed with cash were connected to the house. With respect to the particularity requirement, the Court agreed that drug trafficking is a crime that "often generates the same distinctive evidence from case to case," so much so that officers "have a generic list of items to look for in this kind of investigation." Although detail is important, evidence not specifically listed may be seized "if it is reasonably related to the offense which forms the basis for the search warrant." Further, leaving the section blank, as was done, "would be a problem if not for the reality that the warrant incorporated the supporting affidavit." (It was apparently attached and "made a part of" as well.)

The Court affirmed the plea.

SEARCH & SEIZURE – DETENTION

U.S. v. Price, 841 F.3d 703 (6th Cir. 2016)

FACTS: On February 4, 2014, about dusk, the Kent (MI) Area Narcotics Team executed a search warrant on Price's home. Price was suspected of heroin dealing, as related in information provided in the affidavit that detailed information from several informants. Given his criminal history (6 convictions for narcotics) the team wanted to secure Price outside before searching the location. They waited outside until they spotted Price's truck, but before he actually arrived at his home, they witnessed him stop and make what they believed to be a drug transaction with the occupant of another vehicle.

Det. Frederick asked if he should follow the other vehicle, but was directed to continue on Price, who was out on foot at the time. Det. MacKellar, also on surveillance, observed Price get into another vehicle and drive off. She immediately radioed that the officers should seize him quickly, but Frederick was trapped by snow and Price's trailer, which he'd left blocking the road during the transaction. Price was finally intercepted a block from his home and secured.

In the house, officers found drug paraphernalia, but no drugs. They found records on two nearby storage units. Price refused consent to search the units, so the detectives began the process of getting warrants, and learned that the storage unit was, in fact, a parking place occupied by a large van. Following questioning, Price admitted the van was his and that there were guns inside. With his subsequent consent, officers found guns and cocaine.

Price was charged with being a felon in possession. He argued that his seizure and detention were unlawful and thus, his consent was tainted. The Court disagreed and he was convicted at trial. He then appealed. (He also moved for the return of several items.)

ISSUE: May possibly lawful actions be sufficient to support a seizure?

HOLDING: Yes

DISCUSSION: Price argued that at the time he was seized outside his home, the officers lacked probable cause to detain him at gunpoint. The Court reviewed the circumstances and the timeline, noting that when the officers arrived, they had at least reasonable suspicion of drug trafficking. At the time Price was seized, he'd already walked past three unmarked, but recognizable vehicles, Crown Victorias – vehicles associated with the police. He engaged in conduct that appeared to be flight, even abandoning his truck and trailer in the street, partially blocking it. He then roamed around and got into a vehicle different than the one he'd arrived in. As such, the reasonable suspicion evolved into probable cause.

The Court agreed that it was certainly possible that he wasn't engaged in a drug transaction and that he was merely "going about his regular business" in taking those actions. However, the Court agreed, "the police could reasonably infer that Price's behavior was not merely a series of remarkable coincidences – ant that instead he was likely dealing drugs." The court noted that "probable cause requires no more than that." As such, his arrest was lawful and his consent valid as well. (The court further noted that the property he claimed under federal law was never in the control of the federal authorities to begin with, and thus he could not seek their return under a federal statute that applied only to federal authorities.)

The Court upheld his conviction.

SEARCH & SEIZURE – TRASH PULL

U.S. v. Abernathy, 843 F.3d 243 (6th Cir. 2016)

FACTS: On April 26, 2013, Dets. Oakley, Particelli and Heil (Metro Nashville PD) traveled to Abernathy's home, which he shared with a girlfriend. They did a trash pull and found evidence of marijuana trafficking, along with mail address to both Abernathy and his girlfriend (who owns the property). Det. Particelli sought a search warrant for the home, detailing the above, as well as some form language about his experience with drug dealers and the "common habits and practices of such dealers." He did include a statement to the effect that he had information that the occupants "have been and re currently engaging in illegal drug activity." Information about Abernathy's lengthy history with drugs and weapons was not included in the warrant." Officers obtained a search warrant and a search revealed large quantities of cash, marijuana, cocaine and firearms. He was indicted and sought a Franks[68] hearing, and as a result, that statement was struck from the affidavit. However, the Court agreed, the remaining evidence, especially the trash pull, was enough to support the affidavit.

Abernathy took a conditional guilty plea and appealed. He then appealed.

ISSUE: Is trash pull evidence alone sufficient to authorize a warrant?

HOLDING: Yes

DISCUSSION: The trial court had agreed that the warrant was proper, and that the evidence, at a minimum, indicated that drugs, in the form of marijuana, would be found in the house. The government did not challenge the ruling that the officer's statement was "recklessly and materially false" and violated Franks, and was thus properly removed. However, drug paraphernalia from a trash pull, combined with other evidence, had been found separate from the statement was enough to support a search.[69] The Court

[68] Franks v. Delaware, 438 U.S. 154 (1978).
[69] Marcilis v. Township of Redford, 693 F.3d 589 (6th Cir. 2012).

had not before considered whether trash pull evidence alone was sufficient, however, In prior cases, in dicta, the Court had suggested that it was not and the Court agreed, that it was not enough to create a fair probability that marijuana would be found there at the time. At the most, a very small quantity had been in the house previously, and the connection between the drugs in the trash (several roaches and plastic bags) and the residence was attenuated.

However, the Court noted, even if the warrant was lacking, the good faith exception under U.S. v. Leon might apply.[70] But, in U.S. v. Hammond, the Court had ruled that the good faith exception does not apply when the underlying affidavit contains "knowing or reckless" false statements in violation of Franks.[71] As that was the case here, the court agreed the government could not benefit from Leon.

The Court reversed the decision that denied the motion to suppress and vacated his plea.

SEARCH & SEIZURE – VEHICLE STOP

U.S. v. Pacheco, 841 F.3d 384 (6th Cir. 2016)

FACTS: On December 10, 2010, Det. Best received a call from Sgt. Lipp, about a CI with information on a subject moving narcotics around Columbus, Ohio. Best was very familiar with the neighborhood identified. The CI agreed to meet Best and provided detailed information. Best set up surveillance in the identified area. Best had never dealt with the CI, but was able to corroborate information he provided about a suspect vehicle that arrived as expected at the location. Best elected to follow it to determine if it was, in fact, the suspect vehicle and to learn if the driver matched the information he'd been given. As Best pulled alongside, he verified the occupants as two Hispanic males, as he'd been told. He called Officer Phalen and related information about an improper signal violation by the driver – Officer Phalen and Trivette moved in behind, and they followed until they saw another violation – crossing the yellow lines. He made a traffic stop.

Both officers got out and approached. Phalen learned the driver, Calderon, had no valid license – he was also visibly shaking. Trivette, saw the passenger, Pacheco, was not wearing a seat belt. He did not respond to a request for ID, instead, he "began rummaging" in the glovebox. He was nervous and kept glancing around the vehicle, and then opened the glovebox again. Trivette was concerned that he was looking for a weapon and ordered him out. Pacheco did not get out, so Trivette opened the door for him and ordered him out again, at which point, he complied.

Trivette did a pat down and felt a "large chunk of money" in one cargo pocket. He saw a brick like object, 6-8 inches long, wrapped and taped in brown paper, sticking out of the other cargo pocket. He recognized it was almost certainly cocaine.

Pacheco was charged with possession and distribution. Pacheco moved to suppress, arguing that the officer lacked sufficient cause to do the frisk. The District Court disagreed, finding reasonable suspicion that Pacheco was armed and dangerous, and the seizure of the money and drugs was justified. Pacheco took a conditional guilty plea and appealed.

ISSUE: Are minor traffic offenses enough to justify a stop?

HOLDING: Yes

DISCUSSION: The Court agreed that first, the stop was proper, based upon two traffic infractions, even if motivated by underlying factors, under Whren v. U.S. During the stop, it was proper as well to require both drivers and passengers from the vehicles.[72] With reasonable suspicion, the frisk was also proper, based on the totality of the available facts.[73] Reasonable suspicion is an abstract concept, a fluid concept, but

[70] U.S. v. Leon, 468 U.S. 897 (1984).
[71] 351 F.3d 765 (6th Cir. 2003).
[72] Maryland v. Wilson, 519 U.s. 408 (1997). Michigan v. Long., 463 U.S. 1032 (1983).
[73] Joshua v. DeWitt, 341 F.3d 430 (6th Cir. 2003).

requires that that court not consider the facts in isolation but in concert, with one another. Comparing the facts to others, the Court agreed the tip was detailed and corroborated, strongly indicating the two men were involved in trafficking. And with trafficking, comes weapons. (The vehicle itself, a Lincoln Aviator, was so unusual the detective had never even heard of it, the vehicle having being produced for only two model years. It was very expensive, compared to other SUV models.) Pacheco's nervousness and actions, and refusal to respond to or make eye contact with Trivette, ramped up the likelihood. The time of day and location (at night in a high crime area) was weak, but still factors. As in Arvizu[74] – when considered together, the Court agreed, there was sufficient reasonable suspicion for the frisk.

In such a frisk, although primarily for weapons, the Court is not required to ignore observed contraband. Under Minnesota v. Dickerson, the Court extended the concept of plain view to plain feel. Trivette properly had Pacheco out of the vehicle, and being lawfully frisked, and while doing so, recognizing the wad of money and brick as contraband was reasonable for an experienced officer.[75] To determine if something is immediately incriminating, the Court looked to three factors: a "nexus between the seized object and the [suspected criminal activity;" " whether the intrinsic nature or appearance of the seized object gives probable cause to believe that it is associated with criminal activity;" and " whether the executing officers can at the time of discovery of the object on the facts then available to them determine probable cause of the object's incriminating nature."[76] Money and drug trafficking were clearly linked, and the brick by size and feel was readily consistent with how cocaine was packaged. (Pacheco claimed it was tortillas.)

The Court upheld the frisk and the denial of the motion to suppress.

SEARCH & SEIZURE – CONSENT

U.S. v. Thomas, 2016 WL 6427287 (6th Cir. 2016)

FACTS: On July 12, 2013, Chief Lewis (Taylorsville PD) observed Thomas without a seatbelt. He pulled him over, and at the window, detected a strong marijuana odor. When he informed Thomas that if he had only a small amount of marijuana, he would only cite him, Thomas handed over a marijuana cigarette from his pocket. Chief Lewis had him get out from a frisk, and he did so, Thomas also handed him a bud. Chief Lewis observed grow trays and items in the back seat. He called for backup and Officer Wills arrived. Chief Lewis gave Thomas his Miranda warnings and secured him in the cruiser – telling him that it was for safety and that he was not under arrest. After conferring with Wills, he got Thomas back out and reiterated he wasn't under arrest. Chief Lewis had identified liquid fertilizer in the car, as well. Chief Lewis asked Thomas for consent to search and Thomas agreed, saying it was "just dirt" – that was recorded on a cell phone and the recording played at trial.

In the trunk, 15 bags of potting soil, sticks and a grow light bulb were found. Chief Lewis testified this suggested an indoor grow operation to him. Photos were taken of the trunk contents. Thomas never responded directly to a question about it, but stated he was remediating his poor soil and that he grew tomatoes. No marijuana was found. He was cited and released.

As the initial stop took place in Spencer County, and Thomas lived in Marion County, Officer Wills talked to KSP, which initiated an investigation. Det. Begley, Campbellsville PD, was a member of the task force and learned that complaints had been made about Thomas growing marijuana at his property. The residence was surrounded by a sheet metal fence and he kept dogs inside.

Det. Begly found electricity records and determined that the bills appeared high, and that it was normally paid in cash, with excess to be applied to future bills.

[74] U.S. v. Arvizu, 534 U.S. 266 (2002).
[75] The court noted that the "requirement that the incriminating nature of seized items be immediately apparently was 'very likely an unhappy choice of words, since it can be taken to imply that an unduly high degree of certainty as to the incriminatory character of evidence is necessary for an application of the 'plain view' doctrine." Texas v. Brown, 460 U.S. 730 (1983).
[76] Horton v. California, 496 U.S. 128 (1990).

Det. Begley obtained a search warrant, which was executed on July 12, 2013. Two large garbage bags of marijuana were found, 779 plants, indoor grow equipment and guns with ammunition. He was charged with marijuana growing offenses under federal law. He was denied a motion to suppress, took a conditional plea and appealed.

ISSUE: Is holding someone in a cruiser so coercive as to negate consent?

HOLDING: No

DISCUSSION: Thomas argued that Chief Lewis lacked probable cause to search the car and that his consent was coerced. The Court noted that consent must be voluntary and free of duress or coercion, either express or implied.[77] Thomas later argued that he invoked his Miranda rights, but did not raise that earlier, and Chief Lewis testified that the questioning and the Miranda invocation occurred after the search. Thomas argued that being placed in the car "had a coercive effect" and that he "did not appreciate" he could refuse consent. Even though not required, Chief Thomas even asked for permission, suggesting that Thomas should understand he could refuse. The Court agreed the consent was freely given. As such, the search was properly done pursuant to that consent.

Thomas also argued that the grand jury subpoena used to obtain his electricity records was improperly obtained. The Court agreed that since he had no expectation of privacy in the records, that he lacked any standing to contest the subpoena, no matter the situation with it.[78] He argued that an Open Records decision in Kentucky suggested that, but the Court found no indication that his electric bills fell within the scope of the act as the product of a public agency. The Court agreed there "is no Fourth Amendment privacy interest in the number of kilowatt hours one uses."

The Court further agreed that the affidavit was sufficient, when all the facts were taken together, to support the search warrant, although the individual pieces of information certainly would not. (Specifically, the court found the vague information about electric usage to be "underwhelming and perfunctory," and that it could have included more detailed comparisons to be more compelling.) However, it was enough, when combined with the other evidence.

The Court affirmed the decision.

42 U.S.C. 1983 - SEARCH & SEIZURE - FORCE

Brown (Mark & Cheryl) v. Battle Creek Police Dept., 844 F.3d 556 (6th Cir. 2016)

FACTS: On April 16, 2013, Battle Creek PD did a trash pull at the Nesbitt home. They recovered baggies with cocaine and marijuana residue, a little loose marijuana and mail addressed to the Browns and Jones (the father of Nesbitt's child). They obtained a search warrant the next day, using the information from the trash and from a CI, specifically targeting Jones as trafficking in drugs. (Nesbitt was Cheryl Brown's daughter, she owned the home and allowed her mother and her stepfather, Mark Brown, to live in the basement.) They executed the warrant that day, after a planning session concerning any concerns about it. As a result of that session, they decided to include the Emergency Response Team, given Jones's history and gang affiliations. (In fact, his gang was the reason for the existence of the Battle Creek gang unit.) Jones had been released from prison the month before. Specifically, there was no information as to whether there were dogs in the residence.

The officers and the ERT headed to the residence. On the way, they learned Jones had left the home and been detained, and was found with heroin. They searched that there was a dog in the backyard and that a man (Mark Brown) was at the home. As Brown was walking toward his vehicle, Officer Sutherland pulled up and seized Brown, explaining they would shortly be executing a search warrant.

[77] Schneckloth v. Bustamonte, 412 U.S. 218 (1973).
[78] U.S. v. Miller, 425 U.S. 435 (1976); Smith v. Maryland, 442 U.S. 735 (1979); U.S. v. Pollard, 215 F.3d 643 (6th Cir. 2000).

A few minutes later, Officers Case, Klein and Young, and the ERT, pulled up. They spotted the Beware of Dog sign outside. Brown told the officer holding him he had a key and that two dogs were inside. But Officer Sutherland was unable to relay the information before the door was breached. Officer Klein, who led the team, could see two dogs acting aggressively at the front window, barking and pawing. After a perfunctory knock, they rammed the door. (Brown said he could see the two dogs on the couch and that neither was barking.)

Officer Klein shot the first pit bull after it "lunged" at him, the other ran down into the basement. The first dog was not fatally struck and moved away from the officers, also going down into the basement. When the officers moved to clear the basement, he shot the injured pit bull, which was at the bottom of the steps barking at him. He spotted the second dog, "just standing there," barking. He then shot at that dog, causing it to run away. Officer Young shot her and she retreated further, whether upon the officers, seeing she was bleeding from multiple gunshots, "put her out of her misery."

The Browns filed suit against the officers, claiming they violated the Fourth Amendment by shooting the two dogs. The District Court ruled in favor of the officers and Battle Creek and the Brown's appealed.

ISSUE: Is shooting a dog in a drug house permitted during an entry?

HOLDING: Yes (but see discussion)

DISCUSSION: The Court looked at Battle Creek's policy on use of force against dogs. Battle Creek argued that the Browns had no constitutional right to be free from their dogs being seized because the Sixth Circuit and the U.S. Supreme Court had not laid out such rights, and that the shootings were thus reasonable. The Court agreed, at the outset, that a dog is property, and that other circuits had ruled that using such force against a "household pet is reasonably only if the pet possess an [imminent] danger and the use of force is unavoidable." As such, the Sixth Circuit agreed, "there is a constitutional right under the Fourth Amendment to not have one's dog unreasonably seized." (And the Court agreed, the officers were on reasonable notice that shooting a dog would constitute a seizure.) Every circuit that has addressed the issue had consistently recognized this to be the case.

Moving on to the reasonableness of the issue, the Court summarized:

> … the standard we set out today is that a police officer's use of deadly force against a dog while executing a warrant to search a home for illegal drug activity is reasonable under the Fourth Amendment when, given the totality of the circumstances and viewed from the perspective of an objectively reasonable officer, the dog poses an imminent threat to the officer's safety

The Court agreed that there was "no dispute that the shooting of [Brown's] dogs were severe intrusions given the emotional attachment between a dog and an owner.[79] On the other hand, insuring officer safety and preventing the destruction of evidence are particularly important governmental interests that the courts must strive to protect. Therefore, the question before the district court was whether, given all of the circumstances and viewed from the perspective of a reasonable officer at the scene, the two pit bulls posed imminent threats to the officers." The Court agreed that Jones' was a high risk for the officers – noting among other factors that he "maxed out" in prison – served his entire sentence – which was itself highly unusual and suggested behavior issues. Even though he was detained, they could expect that other gang members might be at the house, or nearby. The Court agreed that a 97-pound pit bull posed a serious threat to the safety of the officers. Further, it was essential that the officers go into the basement, where they were faced with a wounded dog. With respect to the second, 53-pound dog, the Court agreed that dog, as well, posed an imminent threat, even when the officer pursued her into the corner of the basement.

In this case, the officers "had no meaningful time to formulate a plan on how to deal with" dogs and that any delay may have alerted the subjects of the pending raid. Comparing the facts in this case, to those found in other cases involving dogs, the Court agreed the officers' actions were reasonable.

[79] See Hells Angels v. City of San Jose, 402 F.3d 962 (9th Cir. 2005).

Further, the Court found no cause of actions against the City, as there was no record of officers needlessly killing pet animals during searches and thus, nothing to indicate that the city need to do more training in that area. Finally, with respect to the damage to the door, the Court agreed ""[O]fficers executing search warrants on occasion must damage property in order to perform their duty."[80]" Further, "the general touchstone of reasonableness which governs Fourth Amendment analysis . . . governs the method of execution of the warrant."[81] In this case, the court noted, "the officers would not have used the keys Mark Brown offered to give them because the officers would not have had any idea whether those keys were the correct keys." Fumbling with the incorrect keys might have "given somebody in the house the opportunity to destroy the drugs or time to prepare to attack or shoot the officers as they entered the residence.[82]

The Court affirmed the decision.

SEARCH & SEIZURE – VEHICLE STOP

U.S. v. Carter / Wilson, 2016 WL 5682707 (6th Cir. 2016)

FACTS: As part of a drug trafficking conspiracy in Akron, Ohio, the FBI obtained court authorization to monitor calls and GPS locations from Carter's cell phone. As a result of those interceptions, Wilson, his cousin, also became a suspect – she was determined to be a broker. As a result of the calls, officers began physical surveillance of Carter, which resulted in a traffic stop made with the help of the Ohio State Patrol – Sgt. Laughlin.

Trooper Laughlin determined Carter was speeding and that the vehicle's plate was missing its required stickers, so he made a traffic stop. Carter was driving with Sanders a passenger. Trooper Griffith, assisting, approached the passenger side and informed them of the violation. Griffith later noted that "Sanders' hands were shaking, she was breathing heavily, and she appeared more nervous than someone would in a routine traffic stop." The trooper also smelled raw marijuana. She had both occupants step out. Sanders consented to a pat-down and a baggie of marijuana was found. Trooper Morrow arrived and with Laughlin, searched the car. They found a revolver in plain view, with a marijuana joint and heroin in Sanders' purse.

Both were charged with a variety of drug trafficking and related offenses (along with others who were part of the larger conspiracy) and moved for suppression. The trial court denied the motion, finding there was probable cause for the stop, and the search. Carter and Sanders appealed.

ISSUE: Does a discrepancy in testimony indicate untruthfulness?

HOLDING: No

DISCUSSION: The Court agreed that first, there was sufficient cause for the stop for speeding.[83] The Court agreed that the laser was working properly, according to testimony, and that they also paced the vehicle sufficiently. (Although the video footage from the vehicle was questionable, it did appear to show some indication of pacing.) Carter also admitted to speeding.

With respect to the search, the Court noted that Griffith and Laughlin did testify someone differently, and did not "affirmatively mention the marijuana smell on the" on the video, that they "fabricated the smell." The Court found the officers' credible, however.

The Court upheld both convictions.

[80] Dalia v. U.S., 441 U.S. 238 (1979).
[81] U.S. v. Ramirez, 523 U.S. 65 (1998)
[82] See U.S. v. Banks, 540 U.S. 31 (2003)
[83] U.S. v. Freeman, 209 F.3d 464 (6th Cir. 2000) (quoting U.S. v. Ferguson, 8 F.3d 385 (6th Cir. 1993)); See also U.S. v. Wellman, 185 F.3d 651 (6th Cir. 1999)

U.S. v. Lash, 2016 WL 7093990 (6th Cir. 2016)

FACTS: On a December, 2014, evening, Dets. Middaugh, Schroeder and Periandri, members of the Gang Impact Unit, were patrolling in an unmarked car. They noted a vehicle with out of state plates pulling to the side of the road, so they elected to stop and observe. The suspect vehicle idled for a few minutes and then pulled back into the road, but there was a delay in turning on the headlights. When it failed to signal a turn, the officers made a traffic stop. Lash and two other occupants were in the vehicle.

Lash appeared nervous and was sweating. He also stuttered and tapped his hand on his leg. He provided his license and indicated he'd borrowed the car from his girlfriend, who had rented it. Middaugh was about to end the stop when he spotted the tip of a plastic bag visible from under Lash's leg. He then asked for the rental agreement, admittedly, he later said, to give him a little time to continue to investigate. Had he not seen the bag, Det. Middaugh said he likely would not have even issued a citation.

Fortune, however, favored a different outcome. As Lash reached over to grab the rental agreement, Middaugh saw what appeared to be the butt of a gun inside the plastic bag. At that point, Middaugh opened the car door and asked Lash to step out. Lash refused. Although Middaugh had his hand in the car and Schroeder was in the midst of removing one of the other passengers, Lash 'threw [the car] in drive' and accelerated forward, almost striking two of the officers as he fled."

However, within a few hundred feet, Lash lost control of the vehicle and it ended up stalled on top of a tree stump. Lash was arrested and a gun was secured from the vehicle.

Lash, a felon, was charged with possession of the gun. When his motion to suppress it was denied, he took a conditional guilty plea and appealed.

ISSUE: May a stop be extended so long as there is an articulable reason to do so?

HOLDING: Yes

DISCUSSION: Lash argued that the length of the stop was unreasonable and invalidated the subsequent seizure. The Court, however, agreed the officers had reasonable suspicion for the original stop, the observed traffic violations, under Ohio law. Further, the "officers had a legitimate explanation for detaining Lash further at each stop along the way." Having it get our, for example, was permitted under Pennsylvania v. Mimms.[84] At the time Middaugh saw the bag, he had not formally ended the stop, although he admitted he intended to do so, and the request to see the rental agreement was proper under the circumstances. Finally, under Whren, the request may have been a "makeweight," but still proper, objectively.

The Court upheld the plea.

INTEROGATION

U.S. v. Melcher, 2016 WL 7030978 (6th Cir. 2016)

FACTS: Mackey ran a sports gambling website in Michigan. He met Melcher and eventually, Melcher joined the business, recruiting betters and being paid a commission. He recruited two bettors and also helped out by collecting or paying bettors. Unbeknownst to them, however, the FBI had the website on its radar. They wiretapped Mackey (calls and texts) and with that, found Melcher. They went to interview Melcher on May 14, 2014. Officers encountered a man at the house who said he was the landscaper, who then left, but a few minutes later, returned and they confirmed he was Melcher. The two FBI agents Fischetti and Silski introduced themselves and asked if they could speak to him, Melcher agreed and invited them into the living room. They did not provide Miranda.

[84] 434 U.S. 106 (1977).

During the 30 minute interview, Melcher admitted his involvement with the website and Mackey. He was not restrained, threatened in any way, or ordered to answer questions. As a result, Mackey, Melcher and others were charged with federal gambling violations. Melcher argued for suppression, stating he was in custody at the time, but the District Court disagreed. He opted to testify, stating he originally lied about his identity because he thought the agents were bill collectors. He also denied confessing.

Melcher was convicted of one of the charges, and appealed.

ISSUE: Is an in-home interview almost always considered non-custodial?

HOLDING: Yes

DISCUSSION: First, the Court agreed that Melcher was not in custody during the interview and thus, Miranda was not required. He was interviewed in his home, which was "itself … a near-knockout blow" as in-home interactions were almost always noncustodial. The interview was short, the questioning was "pretty friendly," and he was not restrained.[85] The agents wore holstered weapons but never drew them. (The court noted if the simple presence of a holstered gun was enough, every police interaction would require Miranda.)[86] The only factor that wasn't met was that they never told him he could refuse to be interviewed, but that standing alone, did not tip the scale in Melcher's favor.

After resolving other issues, the court affirmed the conviction.

42 U.S.C. §1983 – ARREST

CHECK

FACTS: Trakhtenberg was married for three years to Liliya, and shared a daughter, RT. Following the divorce, he had his daughter every other weekend. In 2005, when the child was 8, she told her mother that she had crawled into her father's bed to get warm, and that he "took her hand and placed it on his genitalia." Her mother called local social services to report it, and Allen, an investigator, interviewed RT. She gave a detailed description of what had occurred. Det. Cashman (Oakland County, MI, SO) was given the case, and he and another social services investigator, Spates, paid the child a visit, with her mother in attendance. RT repeated the same story to them.

They interviewed Trakhtenberg, he confirmed that RT had been coming into his room and that he rubbed her stomach. He reported that he "put his finger inside her underwear and pressed down on the top of her vagina three times because he learned from his mother and grandmother that it was possible to tell if a girl was sick by seeing if she reacted violently to this test." He stated he had used RT's hand to rub his stomach, but not his genitals. He attempted to show the "test" to the female investigator, who promptly stopped him. (She concluded that he "did not understand boundaries.")

Spates filed a complaint and a motion to terminate parental rights. Det. Cashman, in followup, discovered that RT had been touched in the manner described by her father, and she agreed, but she had not shared it before because she thought she could only tell them what her father had forced her to do, not what he'd done to her. Det. Cashman sough a warrant for criminal sexual conduct.

Trakhtenberg was convicted, and appealed. Following a back and forth, and a reversal, and with Trakhtenberg having already been in jail seven years, the victim elected against another prosecution. Trakhtenberg then filed suit against Det. Cashman and related parties, claiming that his rights were violated by the "forensic interviewing protocols that were in place for conducting interviews of children who may have been abused." (Specifically, he allowed her mother to question her, in his presence, and when there was discussion about how she'd been touched, he held up his own index finger to confirm.) The District court dismissed the actions against Cashman and the other parties and Trakhtenberg appealed.

[85] See U.S. v. Panak, 552 F.3d 462 (6th Cir. 2009).
[86] Berkemer v. McCarty, 468 U.S.420 (1984).

ISSUE: Could ignoring protocols give rise to a cause of action for false arrest?

HOLDING: Yes (but see discussion)

DISCUSSION: Trakhtenberg argued that Det. Cashman had "included information that he "effectively falsified" by failing to adhere to the protocols for interviewing children who have been victims of sexual assault." However, nothing he cited to in the record "how that Det. Cashman purposefully or recklessly ignored the protocols in order to create incriminating evidence, as required for a false arrest and imprisonment claim." In fact, the "uncontroverted record evidence reveals that Det. Cashman was not trained in any of the relevant protocols and may not have even been aware of some of the requirements." Finally, even without the "allegedly-tainted evidence," there was still sufficient probable cause to seek the warrant. He argued, however, that in contravention to another protocol, RT had talked to several people about what had occurred, but it was also noted that one of the interviews was with a church pastor, who she spoke to before the initial police call was even made. (No one knew of this until a hearing on the matter.)

Finally, the Court noted that one of the pieces of information Det. Cushman allegedly excluded was information of which he was totally unaware, although it was information that the initial investigator knew about.

The Court noted that:

> The elements of a malicious prosecution claim under § 1983 when the claim is premised on a violation of the Fourth Amendment are as follows:
>
> First, the plaintiff must show that a criminal prosecution was initiated against the plaintiff and that the defendant made, influenced, or participated in the decision to prosecute. Second, because a § 1983 claim is premised on the violation of a constitutional right, the plaintiff must show that there was a lack of probable cause for the criminal prosecution. Third, the plaintiff must show that, as a consequence of a legal proceeding, the plaintiff suffered a deprivation of liberty . . . apart from the initial seizure. Fourth, the criminal proceeding must have been resolved in the plaintiff's favor.[87]

The Court noted that "there was probable cause at the time of Plaintiff's arrest, whether or not the challenged aspects of the investigation were included. Plaintiff has not argued that any information was acquired subsequent to the arrest that would indicate that initiation of the criminal process was improper."

The Court affirmed the dismissal of the case against Det. Cashman and the other parties.

42 U.S.C. §1983 – ENTRY

CHECK

FACTS: In July, 2009, James Vangel left the home he shared with Fatima, his mother, and called 911. He reported that Fatima had "just went psycho," had attacked him and that a relative (Ali Chahine) had to intervene to pull her off. He stated she had a gun but that he didn't think she would be violent with police. He urged them to hurry. Officers Szopko and Franckowiak responded and found James standing on the street about a block away. He repeated his story, and showed a ripped shirt and scratches.

When the officers arrived, they found the inside door open but the glass storm door shut. A family member, Chahine, had come outside and met the officers. Everyone could see Fatima in the front hallway, and she then retreated towards the back of the house as the officers approached. (She claimed she was coming out of the bathroom.) The officers entered and arrested her for domestic violence and she took a no contest plea to the charge.

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[87] Barnes v. Wright, 449 F.3d 709 (6th Cir. 2006) (quoting Thacker v. City of Columbus, 328 F.3d 244 (6th Cir. 2003)); Fox v. DeSoto, 489 F.3d 227 (6th Cir. 2007).

Family sued the officers and several others for the incident (and an incident from 2012), claiming that the entry was unlawful because they did not have a warrant.[88] The trial court granted summary judgment based on exigent circumstances, which justified the warrantless entry. Fatima Vangel appealed.

ISSUE: Is an exigent entry permitted when there is a clear indication of a risk?

HOLDING: Yes

DISCUSSION: The Court agreed that the facts, in this case, justified the belief of an objectively reasonable officer that entry was necessary due to the potential for immediate and serious consequences. They were responding to "a call potentially fraught with risk; a domestic disturbance." The caller had visible injuries. On the other side, Fatima was apparently alone in the house and the mere presence of a gun in the home did not indicate she might use it. The situation was "less obviously dire" than other cases cited, but even if the entry was a mistake, it was an objectively reasonable action under the law. Certainly, if she did gain access to the gun, the officers and her son were at immediate risk.

The Court agreed the officers were entitled to qualified immunity and upheld the dismissal.

42 U.S.C. §1983 - INVESTIGATION

Caminata v. County of Wexford, 2016 WL 6803728 (6th Cir. 2016)

FACTS: On March 2, 2008, Caminata was at his girlfriend's Wexford County, Michigan, when a fire broke out through the chimney. He supposedly tried to suppress the fire but was unsuccessful and the home was a total loss.

Sgt. Rood (Wexford County, SO) inspected the scene, followed by Sgt. Jenkinson (Michigan SP), a fire investigator. Contrary to Rood's original finding, he determined that a chimney fire was an unlikely cause. During the investigation, the girlfriend's stepfather informed Sgt. Jenkinson that he thought Caminata had deliberately set the fire.

Eventually, Caminata was charged and convicted of arson. He exhausted his Michigan appeals and sought federal appeal, but was denied. In 2013, the Michigan Innocence Clinic secured a new trial, alleging that Jenkinson's investigation was faulty. However, upon a new review of the evidence, the same conclusion was reached by investigators. The night before a hearing, however, additional photos of the scene were discovered and upon questioning, Rood "revealed for the first time that he thought Jenkinson's board reconstruction was incorrect and that Rood might have taken more photographs than were in the case file. Rood testified during his deposition that he believes that about two rolls of film that he took during his inspection were not produced to the defense." The federal prosecutor agreed that Caminanata's motion be granted.

Caminata filed suit against the officers involved. Jenkinson was dismissed, with the court finding that he was, at most, negligent, but the motions against the others were denied. Those parties then settled. Caminata appealed the dismissal of Jenkinson.

ISSUE: Is evidence of at least reckless falsehoods needed for a malicious prosecution claim?

HOLDING: Yes

DISCUSSION: Caminata asserted the "Jenkinson deliberately fabricated the evidence at the fire scene in order to rule out the possibility of a chimney fire."

[88] Payton v. New York, 445 U.S. 573 (1980).

The Court noted that "a Fourth Amendment claim for fabrication of evidence lies where a defendant knowingly manufactures probable cause, thereby effecting a seizure."[89]

Further:

> To succeed on a Fourth Amendment malicious prosecution claim . . . a plaintiff must prove the following: (1) a criminal prosecution was initiated against the plaintiff and the defendant made, influenced, or participated in the decision to prosecute; (2) there was no probable cause for the criminal prosecution; (3) as a consequence of the legal proceeding, the plaintiff suffered a deprivation of liberty apart from the initial seizure; and (4) the criminal proceeding was resolved in the plaintiff's favor." Although actual "malice" is not required to succeed on a malicious prosecution claim, a defendant must have made "deliberate or reckless falsehoods," and "mere negligence" will not create liability.[90]

The Court noted that while he cast doubt on Jenkinson's conclusions, he did not show that "Jenkinson acted intentionally or recklessly in his investigation." The Court looked at the totality of the documentation created by Jenkinson, over 100 photos and several lengthy reports, and he eliminated several other potential causes of the fire. "Through the photographs, reports, and deposition testimony, the record supports that Jenkinson attempted to thoroughly investigate the fire scene. Whether he succeeded is immaterial in establishing a Fourth Amendment violation."[91]

Jenkinson is thus entitled to qualified immunity on Caminata's Fourth Amendment claims of fabrication of evidence and malicious prosecution.

Caminata also argued that Jenkinson withheld exculpatory evidence.

> Just as prosecutors must disclose material evidence to criminal defendants, police officers are obligated to turn over potentially exculpatory evidence to the prosecutor's office.[92] However, a police officer need only disclose evidence "when its exculpatory value is 'apparent' to the officer, that is, when the officer is aware that the evidence 'could form a basis for exonerating the defendant.'"[93] Having concluded that Caminata failed to show that Jenkinson knowingly fabricated his reports, the Brady claim turns on whether, after conducting his investigation, Jenkinson knew that his reports were false and subsequently withheld this information from the prosecutor. Otherwise, the exculpatory value of the information would not have been apparent to Jenkinson.[94]

However, the Court agreed, there was no indication that Jenkinson had any real idea that his investigation was flawed and that Rood had information relevant to the investigation.

The Court affirmed the dismissal.

42 U.S.C. 1983 – HANDCUFFING

Courtright v. City of Battle Creek, 839 F.3d 513 (6th Cir. 2016)

[89] Robertson v. Lucas, 753 F.3d 606 (6th Cir. 2014); see also Gregory v. City of Louisville, 444 F.3d 725 (6th Cir. 2006) ("It is well established that a person's constitutional rights are violated when evidence is knowingly fabricated and a reasonable likelihood exists that the false evidence would have affected the decision of the jury.").
[90] Johnson v. Moseley, 790 F.3d 649 (6th Cir. 2015)
[91] See Ahlers v. Schebil, 188 F.3d 365 (6th Cir. 1999) ("At best, however, the investigation's lack of thoroughness might support an inference of negligence, but it does not demonstrate knowing or intentional behavior designed to violate [plaintiff's] constitutional rights."); see also Seigel v. City of Germantown, 25 F. App'x 249 (6th Cir. 2001) ("The facts in this case supported at most a finding of incompetent or negligent investigation, which is insufficient to establish a constitutional violation.").
[92] See Brady v. Maryland, 373 U.S. 83 (1963), See Moldowan v. City of Warren, 578 F.3d 351 (6th Cir. 2009).
[93] D'Ambrosio v. Marino, 747 F.3d 378 (6th Cir. 2014) (quoting Moldowan, supra.)
[94] Brady v. Maryland, 373 U.S. 83 (1963).

FACTS: Officers Wolf and Rathjen (Battle Creek PD) were dispatched to a motel due to a complaint that a guest (Courtright) had come out with a gun and threatened to shoot another resident's dog. He was arrested and handcuffed, which he later claimed caused him injury. (He alleged he'd told the officers that he'd had prior shoulder injuries and surgeries and that he'd complained of pain, to no avail.) He also claimed that he had told the officers that he wasn't even in his room at the time of the threat. He was jailed overnight, but the prosecutor declined to go forward with the case and he was released. He filed suit under 42 U.S.C. §1983. The officers moved to have the case dismissed but the trial court concluded that although the claims were "thin," there was enough to at least proceed with discovery. The officers (and city) appealed.

ISSUE: Must some physical injury be shown in a handcuffing claim?

HOLDING: Yes

DISCUSSION: The Court first looked at the handcuffing claim and agreed that to make a claim of "excessively forceful handcuffing," physical injury must be shown.[95] It does not, however, have to be severe.[96] The Court agreed that suffering pain due to the prior medical situation was sufficient to allow the case to move forward.

With respect to a false arrest claim, the Court noted that an officer has probable cause to arrest if the "facts and circumstances within [the officer's] knowledge and of which [he] had reasonably trustworthy information were sufficient to warrant a prudent man in believing that the [plaintiff] had committed or was committing an offense."[97] The crux of this case is whether the phone information was sufficient to support the arrest. The Court noted that "probable cause is created only by eyewitness allegations that are reasonably trustworthy, and thus probable cause does not exists where 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."[98]

In this case, the Court concluded, the phone call alone lacked "the indicia of trustworthiness and reliability" necessary under Ahlers,[99] The phone call lacked any corroboration as all, and no investigation was done either. At best, they had enough for a Terry stop.

The Court upheld the denial.

42 U.S.C. §1983 – TESTIMONY

Royse v. Wilbers, 2016 WL 5682710 (6th Cir. 2016)

FACTS: Royse was charged with neglecting an adult patient when she worked as a LPN in a Kentucky nursing home. The case was dismissed when it was discovered that Wilbers, an Attorney General Investigator, presented false testimony to the grand jury. Royse filed a malicious prosecution claim in state court against Wilbers, the case was removed to federal court. Wilbers also requested absolute immunity. The case was dismissed and Royse appealed.

ISSUE: Is there immunity for grand jury testimony?

HOLDING: Yes

DISCUSSION: The Court agreed that Wilbers had absolutely immunity for his testimony and upheld the dismissal.

[95] Neague v. Cynkar, 258 F.3d 504 (6th Cir. 2001).
[96] Morrison v. Bd. Of Trs., 583 F.3d 394 (6th Cir. 2009).
[97] Beck v. Ohio, 379 U.S. 89 (1964).
[98] Wesley v. Campbell, 779 F.3d 421 (6th Cir. 2015).
[99] Ahlers v. Schebil, 188 F.3d 365 (6th Cir. 1999).

42 U.S.C. §1983 - RIGHT TO TRAVEL

Cole v. City of Memphis, 839 F.3d 530 (6th Cir. 2016)

FACTS: At about 3:30 a.m., on August 26, 2012, Cole (who also happened to be a Memphis police officer) was leaving a Beale Street dance club. (Beale Street is a two-block stretch of entertainment venue that is normally closed off to vehicle traffic. When blocked off, patrons may carry alcoholic beverages in the streets and sidewalks.) Cole was arrested and during the arrest, he was pushed against a vehicle hard enough to cause two dents. He was charged with disorderly conduct, resisting arrest and vandalism. The charges were ultimately dropped, but while pending, he was assigned to traffic patrol and lost an opportunity for secondary employment. He also sought medical treatment.

Cole filed suit, arguing that the routine "Beale Street Sweep" – in which officers ordered everyone off the street – was unlawful and caused officers to become "highly aggressive, agitated, frenetic, and confrontational towards individuals lawfully standing and walking on Beale Street." This, he argued, also "infringed the fundamental right to intrastate travel." This resulted in unlawful arrests and excessive force. He sought class action certification against the policy and procedure. The City admitted the practice but defended it as being necessary for public safety.

At trial, the jury concluded that the city had a custom and practice of, mainly on weekends, clearing Beale Street around 3 a.m., preventing people from standing or walking in the area, "without considerations to whether conditions throughout the [area] pose[d] an existing, imminent or immediate threat to public safety." Cole was awarded $35,000. In addition, the trial court permanently enjoined the city from conducted such sweeps routinely, but only when an imminent threat occurred to require it. The City appealed.

ISSUE: Must a street closure policy adhere to the intermediate review standard?

HOLDING: Yes

DISCUSSION: The Court agreed that the right to intrastate travel is a fundamental right.[100] The question, however, is whether it should be subjected to a strict or intermediate scrutiny, which the Court agreed would be based on the degree of regulation that occurred with the local travel. In this situation, pedestrians were limited for a two-block stretch for limited periods of time, typically between 3 and 5 a.m. Those on the street were instructed to either go into a business and leave. Signage warned that it could occur, as well. As such, the Court agreed that intermediate scrutiny was appropriate, as the sweep was narrowly limited. To survive, the "Beale Street Sweep must be 'narrowly tailored to meet significant city objectives.'" Unlike strict scrutiny, however, intermediate review does not require that the practice be the "least restrictive or least intrusive means" to meet the government's objectives.[101]

The Court noted that the custom seemed to be tied not to a specific public safety issue, but "rather to a specific, arbitrary time on certain nights." This was the basis of testimony by command officers. As such, the policy failed even the intermediate scrutiny standard.

The Court upheld the jury decision.

42 U.S.C. §1983 – FORCE

Bell v. Cumberland County, TN, 2016 WL 7048696 (6th Cir. 2016)

FACTS: Fish and Franklin "had a tumultuous relationship punctuated by episodes of domestic abuse by Fish." Police had been to their home on Crossville numerous times. On October 12, 2012,

[100] Johnson v. City of Cincinnati, 310 F.3d 484(6th Cir. 2002).
[101] Neinast v. Bd. of Trs. of Columbus Metro. Library, 346 F.3d 585 (6th Cir. 2003).

Deputy Sheriff Human (Cumberland County, TN) responded to "a call that Fish had been knocking on Franklin's doors and windows before running off." Deputy Human found him nearby and warned him he would be arrested for trespass if he came back.

Two days later, however, Fish did, and Deputy Human was again dispatched. Franklin stated that Fish had begun to rap incessantly on her windows and she hid, but "Fish was not deterred and eventually let himself in through the unlocked garage door, at which point he grabbed a knife and meat cleaver and informer her that they were 'both going to die that day.'" She called Shields, who apparently shared the house, and told him not to come home; Shields called 911.

Deputy Human arrived. Fish directed Franklin to open the door and get rid of the deputy. She told Deputy Human that Fish was there but that it was OK, but Deputy Human saw she was "visibly upset." He spotted Fish outside, near the edge of the woods. He called at him to come talk to him, but Fish took off running and disappeared. The deputy returned to the house, only to learn that Fish had re-entered and was in the basement. (The deputy assumed Franklin's consent to enter by her body language, which was not disputed.) He found Fish in the corner of the dimly lit basement, drew his weapon and ordered him to show his hands – Fish complied. Human put his gun back into the holster and told Fish they needed to go upstairs and talk. This, Fish refused to do, ignoring Franklin's pleas. He took a fighting stance and lunged toward Franklin. Deputy Human used OC to no avail, and it was knocked out of his hands as well. When Human grabbed Fish's arm, Fish tackled him and drove him backwards into a steel pole. They went to the ground and continued to fight. Franklin later described it as Fish "beating the hell out of Officer Human and Officer Human could not see." Human tried to use his baton but it was "batted away." Fish was on top of Human, on his chest, and Human felt he was losing consciousness. Fish reached for a cast iron skillet and at that point Human shot Fish multiple times.

In the immediate aftermath, Deputy Human found himself largely incapacitated. Deputy Human was in severe pain, his vision was blurry, and Fish was lying across his legs. However, he was still able to radio for help and instruct Franklin to call 911. Other deputies arrived and Fish was transported, he was declared dead on arrival. Deputy Human was treated for rib injuries and a concussion. The shooting was reviewed and deemed justified.

Bell, Fish's sister and Estate Administrator, filed suit under 42 U.S.C. §1983 against Deputy Human, Sheriff Burgess and the Sheriff's Office. The District Court dismissed the case on qualified immunity and Bell appealed.

ISSUE: May an officer, in reasonable fear for their life, use deadly force?

HOLDING: Yes

DISCUSSION: The Court addressed each of the claims. With respect to the Fourth Amendment use of force claim, the Court agreed that it must balance the intrusion on the subject's interests (in this case, his life) and the government's interest. "To aid in this analysis, we consider (1) the severity of the crime at issue; (2) whether the suspect poses an immediate threat to the safety of the officers or others; and (3) whether he is actively resisting arrest or attempting to evade arrest by flight."[102] Using the Garner factors, "the 'reasonableness' of a particular use of force must be judged from the perspective of a reasonable officer on the scene, rather than with the 20/20 vision of hindsight' – given that officers "are often forced to make split second judgements – in circumstances that are tense, uncertain and rapidly evolving – about the amount of force that is necessary in a particular situation."[103]

The Court noted that both witnesses testified that Fish was the aggressor, that Deputy Human was objectively reasonable in fearing for his life and his only chance was to use his weapon. The unprovoked aggravated assault – coming after what was at heart a trespassing matter – and Human exhausting all other options available – combined to justify the use of deadly force. Bell argued that Human was the

[102] Graham v. Connor, 490 U.S. 386 (1989).
[103] See also Tennesee v. Garner, 471 U.S. 1 (1985).

instigator by pursuing Fish when he first spotted him in the woods and that the number of rounds fired was "gratuitous." (The evidence indicated 12 rounds were fired and Fish was struck five times, but also that he stopped firing when Fish was no longer assaulting him.)[104] The Court, noted that it was reasonable to pursue given the information Human had about Fish and noted that the facts indicated that Fish was the aggressor. Finally, the Court noted, the "argument has no bearing on the reasonableness of the force ultimately used."[105] The Court agreed the deputy's actions were completely reasonable.

Bell also argued that the deputy let Fish bleed out without rendering medical care. The Court agreed that a cause of action could be made if the government officials were deliberately indifferent to the serious medical needs of the prisoner, but in fact, in this case, despite his own injuries, the Deputy took steps to get medical care for him.[106] (The Court noted that Human had nothing to do with Fish being handcuffed before being transported.)

The Court upheld the dismissal of the action against all defendants.

Nykoriak v. Wileczek, 2016 WL 7010008 (6th Cir. 2016)

FACTS: On March 8, 2015, Nykoriak called 911 to report that his female passenger (Puchalski) had "turned white and thrown up and that she appeared to be having a seizure." Trooper Wileczek, Michigan state Police, among others, were dispatched to where the vehicle had parked. Trooper Binns recognized Nykoriak from a previous traffic stop in which another vehicle occupant was found with heroin. Trooper Wileczek found Puchalski having difficultly focusing and answering questions, and she believed that the subject was under the influence of heroin or another opiate, and had overdosed. In addition, numerous cell phones were seen in the vehicle.

Nykoriak refused to consent to a search so he was removed from the vehicle. A K-9 unit was summoned. As the officer wanted him to wait in her cruiser, she patted him down, and he told her he had a concealed weapon. It was taken and he was handcuffed and placed in the cruiser. They confirmed that he had a license to carry it, but no record that the weapon was registered, apparently a requirement in Michigan.

The K-9 unit alerted on the vehicle but no drugs were found in the car. Nykoriak was eventually released.

Nykoriak filed suit, claiming he was falsely arrested and imprisoned and that his weapon was illegally confiscated. (Although the facts do not indicate what happened with the weapon, apparently his weapon was not returned.) The Court gave qualified immunity to the trooper and dismissed the case, and Nykoriak appealed.

ISSUE: May a traffic stop be extended as more facts are developed?

HOLDING: Yes

DISCUSSION: The Court noted that in response to the trooper's motion, Nykoriak relied solely in the factual allegations in his unverified complaint – "many of which are refuted by the video and audio recordings in evidence." Nykoriak claimed he was "arrested" when placed in handcuffs, or alternatively, that reasonable suspicion was lacking to stop and search him in the first place. The Court reviewed the elements for a Terry stop and agreed that under the totality of the circumstances, the trooper did have reasonable suspicion to make the initial stop, and to extend the stop as more facts developed. Handcuffing was also appropriate under the circumstances.[107]

[104] Krause v. Jones, 765 F.3d 675 (6th Cir. 2014); Plumhoff v. Rickard, 134 S. Ct. 2012 (2014).
[105] Rucinski – 'cannot estalibhs a Fourth Amendment violation based merely on bad tactics that result in a deadly confrontation that could have been avoided, City & Cnty of San Francisco v. Sheehan, 135 S.Ct. 1765 (2015).
[106] See Phillips v. Roane County, TN, 534 F.3d 531 (6th Cir. 2008); City of Revere v. Mass. Gen. Hosp., 463 U.S. 239 (1983); Blackmore v. Kalamazoo Cty., 390 F.3d 890 (6th Cir. 2004); Rich v. City of Mayfield Heights, 955 F.2d 1092 (6th Cir. 1992).
[107] Houston v. Clark Cty. Sheriff Deputy John Does 1-5, 174 F.3d 809 (6th Cir. 1999).

Calling for a K-9 was quite appropriate as well, to determine if there was probable cause to search the vehicle.[108] With respect to the pistol, Michigan law required that the subject have their license in their possession, which he did not, and that certain steps must be taken to register his pistol. Since he apparently violated both of these laws, seizing the pistol was proper under state law.

The court upheld the decision in factor of the trooper.

TRIAL PROCEDURE / EVIDENCE – DYING DECLARATION

Wright v. Burt (Warden), 2016 WL 7378405 (6th Cir. 2016)

FACTS: On December 29, 2007, Goodwin was shot sitting in a vehicle in front of his mother's Michigan home. A witness, Currie, saw the aftermath, and saw Black, Wright and Worm near the car. Although Black and Worm were masked, he recognized them from walk and body shape, and Wright's face was clearly visible. Currie was also involved in a criminal enterprise and admitted the Wright had paid him to burn a drug house, and that Goodwin would be blamed for it.

Although there were inconsistencies in his testimony, Currie was consistent in his identifications. In addition, Officer Thomas testified that Goodwin had told him that he'd received threats from Wright and two others, but he never documented those concerns.

Wright was convicted and appealed. The trial court agreed that Thomas's testimony was inadmissible hearsay but ruled it to be insufficient to have affected the trial. The Michigan courts denied review, and Wright sought habeas review. The Court ruled in Wright's favor, stating his counsel failed by not objecting to the officer's statement and Michigan appealed.

ISSUE: May volunteered statements also be testimonial?

HOLDING: Yes

DISCUSSION: The Court noted that Goodwin, of course, the maker of the challenged statement, was deceased and unavailable. As such, "the admission of Goodwin's statements to Officer Thomas violated the Confrontation Clause if the statements were testimonial in nature."

The Court looked to Davis v. Washington, and agreed that "testimony that is volunteered, rather than elicited through interrogation, can also be testimonial."[109] Goodwin was not "in the midst of an ongoing emergency when he flagged down Officer Thomas, and the primary purpose of his statements was to 'establish or prove past events potentially relevant to later criminal prosecution.'" As such, the Confrontation Clause violation was obvious and should have drawn an objection. However, the Court agreed that the violation did not affect the ultimate outcome of his trial.

The Court reversed the lower court's decision in favor of Wright.

TRIAL PROCEDURE / EVIDENCE – VOICE IDENTIFICATION

U.S. v. Pryor, 842 F.3d 441 (6th Cir. 2016)

FACTS: Pryor was charged with conspiracy to distribute heroin, along with three other men. Deputy Shattuck intercepted four phone calls between "Daffy," aka "Taz" (Pryor) and an informant regarding buying heroin, and they maintained surveillance as the buy was made. While a search warrant was being obtained for Pryor's home, Pryor arrived, went inside, picked up cash and returned to his car, and then left. (He could be seen from outside the house.) He was stopped for a traffic violation away from the house and when ordered out, was seen to have a pistol at his waist. They confirmed he had a valid license to carry it.

[108] U.S. v. Winters, 782 F.3d 289 (6th Cir. 2015); U.S. v. Diaz, 25 F.3d 392 (6th Cir. 1994).
[109] 547 U.S. 813 (2006).

When frisked, "wads of money" was discovered in his pockets and he was arrested. A cell phone in his pocket, with a disconnected battery, was found, when reconnected and turned on, Shattuck called "Taz's" number, and the phone rang.

From the jail, Pryor made 33 phone calls and a had a recorded visitor. Shattuck obtained the recordings and found that Pryor's voice matched that of Taz. In late April, 2014, Taz called Shattuck and Shattuck also knew the voice was the same. Officer Batora was also involved in the investigation and called one of Taz's "ever-changing phone numbers." He also connected the voice to Pryor.

On December 2, 2014, Pryor was again arrested. He refused to be quiet when brought before the federal magistrate judge. Over Pryor's assertions that the court had no jurisdiction over him, the court appointed stand-by counsel, and he simply refused to "consent to anything." Ultimately, Pryor was convicted (after lengthy issues relating to his claim that he would represent himself and his behavior in court). He then appealed.

ISSUE: May a non-expert testify as to voice identification?

HOLDING: Yes

DISCUSSION: Pryor argued that the admission for the voice-identification testimony of the officers was improper. The Court, however, noted that Shattuck's hearing Pryor's voice in multiple calls was a "reliable exemplar" to use in comparison, nor did it have to be of long duration, rather than short conversations. The Court agreed it was proper to admit the testimony.

Pryor's conviction was affirmed.

TRIAL PROCEDURE / EVIDENCE – CELL SITE DATA

U.S. v. Wahid / Singleton, 2016 WL 6682088 (6th Cir. 2016)

FACTS: From May, 2010 through June, 2014, Wahid, Singleton and other were involved in a conspiracy to deal drugs. In late 2013, federal authorities did a wiretap on Makupson's phone – another member of the conspiracy. With that, they obtained Wahid's number and intercepted calls between the three. They traced Wahid to his location using his cell phone. He moved to suppress the cell phone evidence, and was denied. He appealed.

ISSUE: Is there an expectation of privacy in cell location data?

HOLDING: No

DISCUSSION: Wahid argued that the use of the cell site data violated his Fourth Amendment right to privacy. The Court, however, noted that there is no reasonable expectation of privacy in the data given off by a cell phone.[110] And, the Court noted, in an abundance of caution, the government had in fact even obtained a warrant for the information.

The Court upheld his conviction.

TRIAL PROCEDURE / EVIDENCE – FRANKS

U.S. v. Pate, 2016 WL 7232143 (6th Cir. 2016)

FACTS: On March 23, 2015, Trooper Elsey (Ohio State Patrol) was also working with the DEA to investigate a particular phone number. He requested records connected to a particular phone number, thus identifying Pate, and detailed Pate's criminal history and that two separate CI's had identified Pate as

[110] U.S. v. Skinner, 690 F.3d 772 (6th Cir. 2012); U.S. v. Carpenter, 819 F.3d 880 (6th Cir. 2016).

involved in cocaine trafficking, connecting him to that phone number. Trooper Elsey obtained a warrant to search Pate's home and found Pate fleeing out the back door. He was detained and held.

While in the back of the cruiser, Pate vomited. EMS responded and learned he was diabetic and that his blood sugar had dropped when he dashed out of the home. He was given glucose and stabilized. He was then approached by Trooper Elsey and Agent Costanzo (DEA) and given Miranda.[111] Agent Costanzo later testified that he "appeared calm, coherent, cooperative, and responsive, and did not seem to be in any sort of physical discomfort." He "effectively admitted to ownership of the cocaine, the cocaine press, and the firearms located inside the residence. When the agents asked him about the locations of the items in the residence, Defendant "offered to show us where those items were inside the house." They did a walk-through of the house and he appeared to be in no discomfort, aside from having to wear the handcuffs. However, when he was asked about the origin of the cocaine, he "became hostile and upset, and appeared to be offended." At that point, he asked for an attorney. The officers thought his actions were a result of the question, while Pate later said his demeanor changed because his blood sugar had come up. He later claimed that "he went into hypoglycemic shock after he ran and vomited outside the patrol vehicle, and that he was confused, disoriented, not aware of his surroundings, and in a 'dream-like' state during the questioning and residence walk-through. Defendant testified that he did not remember being read his rights and did not remember agreeing to answer Agent Costanzo's questions, but that he remembered vomiting, walking around the residence, and walking out of the residence."

A quantity of cocaine and firearms, along with material to package cocaine, was found during the search warrant. Pate was convicted and appealed.

ISSUE: Must an actual misstatement be made to qualify for a Franks' hearing?

HOLDING: Yes

DISCUSSION: Pate argued that the evidence from the residence, and the statements he made during interrogation, should have been suppressed, as he did not knowing and intelligently waive Miranda. With respect to the search of the residence, pursuant to the warrant, Pate argued that the affidavit was flawed and lacked probable cause "because: (1) it contained misleading statements concerning Defendant's prior arrest history; (2) it implied that those prior arrests all resulted in felony convictions; and (3) it lacked information concerning the credibility of the confidential informants who assisted the government in the search warrant process." (He had requested and been denied a Franks[112] hearing to explore these issues at the trial court level.)

The Court noted that ""[T]o establish probable cause for a search, an affidavit must show a likelihood of two things: first, that the items sought are 'seizable by virtue of being connected with criminal activity'; and second, 'that the items will be found in the place to be searched.'"[113] Further, a "police request to search for illegal drugs therefore needs to satisfy only the second showing for a valid warrant: 'a fair probability' that the drugs 'will be found in a particular place.'"

With respect to Franks,

> A defendant is entitled to a Franks hearing if he: 1) makes a substantial preliminary showing that the affiant knowingly and intentionally, or with reckless disregard for the truth, included a false statement or material omission in the affidavit; and 2) proves that the false statement or material omission is necessary to the probable cause finding in the affidavit."[114] These allegations must be more than conclusory and must be accompanied with an offer of proof, and if this is satisfied, "then

[111] Miranda v. Arizona, 384 U.S. 436 (1966),
[112] Franks, supra.
[113] U.S.v. Church, 823 F.3d 351, 355 (6th Cir. 2016) (quoting Zurcher v. Stanford Daily, 436 U.S. 537 (1978); U.S. v. Berry, 565 F.3d 332 (6th Cir. 2009).
[114] U.S. v. Pirosko, 787 F.3d 358 (6th Cir. 2015).

> the question becomes whether, absent the challenged statements, there remains sufficient content in the affidavit to support a finding of probable cause."[115] There is even "a higher bar for obtaining a Franks hearing on the basis of an allegedly material omission as opposed to an allegedly false affirmative statement."[116]

In this case, the court noted that he failed to prove that the information was, in fact, an "actual misstatement of his arrest record" – and his attorney acknowledged that it court. While there may have been incomplete information, in that it didn't detail the exact resolution of prior cases, it wasn't intentionally misleading. As such, the warrant was upheld.

The search of the telephone records was properly supported by the warrant, and was limited to the facts needed to get the court order for the records. Informant information was properly corroborated, as well. The federal warrant, piggybacking on the state warrant, to search the home, was also proper. They had used the information to link Pate to the residence, and the CI identified Pate as the individual with whom he was dealing. Physical surveillance supported that as well.

With respect to the statements, the court found that the EMS agency's report indicated that Pate's "breath movements and blood circulation were normal and noted that he was oriented after receiving the glucose paste." The agent's testimony that he appeared fine was credible, as well, and that Pate clearly gave coherent and reasonable responses.

The Court upheld the trial court's decisions.

EMPLOYMENT – FMLA

West v. Wayne County / Garrett, 2016 WL 6994226 (6th Cir. 2016)

FACTS: West was the Chief of Staff and Chief Deputy Clerk to Garrett, the elected Clerk of Wayne County. In October, 2013, Garrett demanded that West fire another employee who had just returned from FMLA leave. West refused to do so, believing that would be unlawful. (The other employee ultimately sought and received a settlement from the county.) West was fired upon his return from vacation, in January, 2014. He filed suit arguing a variety of claims. The County and Garrett moved for, and received, summary judgement, and West appealed.

ISSUE: Is the personal staff of an elected official exempted from bringing a FMLA retaliation lawsuit?

HOLDING: Yes

DISCUSSION: West argued that he was fired because he defended the FMLA rights of the other employee and thus suffered retaliation." However, Garrett and the County argued that West was part of the personal staff of an elected official – a category specifically excluded from eligibility to file suit. The Court looked at a "nonexhaustive list of six factors:(1) whether the elected official has plenary powers of appointment and removal,(2) whether the person in the position at issue is personally accountable to only that elected official, (3) whether the person in the position at issue represents the elected official in the eyes of the public, (4) whether the elected official exercises considerable amount of control over the position, (5) the level of the position within the organization's chain of command, and (6) the actual intimacy of the working relationship between the elected official and the person filing the position.[117]

The Court agreed that, looking at said factors, that West was a member of the personal staff of the elected official and upheld his termination.

[115] U.S. v. Bennett, 905 F.2d 931 (6th Cir. 1990) (citing Franks, supra).
[116] U.S. v..Fowler, 535 F.3d 408 (6th Cir.2008).
[117] Birch v. Cuyahoga Cty. Prob. Ct., 392 F.3d 151 (6th Cir. 2004).

FIRST AMENDMENT

Naghtin v. Montague Fire District Board, 2016 WL 7494866 (6th Cir. 2016)

FACTS: Naghtin was a firefighter for the Montague Fire Department. When another individual was terminated from his position as Captain, Naghtin was vocal, garnering a petition to reinstate that individual. As a result, a special meeting was held, and the board members were told the letter/petition should be construed as a complaint. Since Naghtin did not follow the policies for making such a complaint, he was summarily terminated. (He had prior instances of violating policies on his record.)

Naghtin filed suit under 42 U.S.C. §1983, alleging the chief (who recommended the dismissal) and the Department violated his First Amendment right to free speech and to petition for redresses.

The District Court denied relief finding that since he was not speaking on a matter of public concern, but rather an "quintessential employee beef" – which was not protected. The Court noted that even if it was of public concern, the need for department efficiency outweighed his rights, using the balancing test of Pickering v. Board of Education.[118] Naghtin appealed.

ISSUE: Does a public official have full First Amendment protections?

HOLDING: No

DICUSSION: To make a First Amendment retaliation claim, an employee "must show that: (1) he was engaged in 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 modified, at least in part, by his protected conduct."[119] Both sides agreed that 2 and 3 were met, with the only issue being whether he was "engaged in constitutionally protected conduct." The Court agreed that while a citizen in government service "must accept certain limitations on his or her freedom, they do not "forfeit all their First Amendment rights simply because they are employed by the state or a municipality."[120] A government employee may speak out on a "matter of legitimate public concern."[121] As such, in evaluating a First Amendment retaliation claim, the court had to balance the two interests.

The Court looked to the test in which "the employee must show that: (1) his speech was made as a private citizen, rather than pursuant to his official duties; (2) that his speech involved a matter of public concern; and (3) that his interest in speaking on the matter of public concern outweighed the government-employer's interest in 'promoting the efficiency of the public services it performs through its employees.'"[122]

To determine if Naghtin's speech touches on a matter of public concern the court noted that "mere allegations of managerial incompetence" does not 'amount to constitutionally protected speech.'"[123] Although some instances may, it would be a case by case basis. The Court agreed that the removal of the Captain reeked of "internal office politics," rather than a matter of general public concern, it was essentially a family dispute. (The fired Captain and the Fire Chief were brothers.)

The Court affirmed the District Court.

[118] 391 U.S. 563 (1968).
[119] Handy-Clay v. City of Memphis, 695 F.3d 531 (6th Cir. 2012).
[120] Garcetti v. Ceballos, 547 U.S. 410 (2006).
[121] Connick v. Myers, 461 U.S. 138 (1983).
[122] Garcetti,supra.
[123] Barnes v. McDowell, 848 F.2d 725 (6th Cir. 1988).