

FOURTH QUARTER 2015

KENTUCKY

FORFEITURE

Gritton v. Com., 2015 WL 7813413 (Ky. App. 2015)

FACTS: Gritton was unemployed, on disability and had a history of drug dealing in Jefferson County.¹ On May 31, 2012, Gritton bought a truck. He, his daughter Robin (Purtilar) and son-in-law Stephen (Purtilar) each gave cashier's checks to a dealership, for a total of over \$19K for the vehicle. Gritton bought insurance on the truck but Robin and Stephen alone were on the title. At the same time, police had been tipped that Gritton had "resumed dealing drugs." They surveilled his residence for six weeks and saw the truck parked there most of the time. On July 17, they did a search warrant and found 90 pills and a variety of other incriminating evidence, along with the truck title and two sets of keys for it.

Gritton was indicted for trafficking, but the Commonwealth agreed to dismiss all charges in exchange for a forfeiture hearing on the truck. Stephen testified they'd bought the truck for their son but that Gritton began driving it because the son could not afford the payments and Gritton's own vehicle was inoperable. Robin, however, stated that Gritton borrowed the truck a month later than the purchase. Gritton also provided conflicting information, but agreed he'd insured the truck and drove it to earn extra money. The trial court ordered it was subject to forfeiture and Gritton appealed.

ISSUE: For a forfeiture case, must the item be actually connected to illegal funds?

HOLDING: Yes

DISCUSSION: Gritton argued that "the facts were insufficient to link the truck to violations of KRS 218A." The Court noted that "KRS 218A.410 governs Kentucky forfeiture law. Under that statute, any proceeds, including personal property traceable to an exchange of a controlled substance in violation of KRS 218A, are subject to forfeiture." The burden of proof in such cases falls to the Commonwealth, to "produce some evidence that the currency or some portion of it had been used or was intended to be used in a drug transaction."² Although the two primary cases³ involve currency, the Court agreed that this "sets forth that this procedure applies to personal property forfeitures as well."⁴

The Court noted that the "truck's location during six weeks of police surveillance, the location of the truck's car keys, and Gritton's insurance policy only tend to show that Gritton was the truck's true owner—not that he bought the truck with illicit funds." It does not follow, necessarily, that even though he was unemployed, "that he bought the truck with unlawful proceeds." He had recently received, in fact, \$15K lawfully. The Court concluded that "any attempt to say the funds were illegally obtained, much less the proceeds of a drug deal, is a mere accusation and too tenuous to be called slight." The Court reversed the forfeiture.

DRIVING UNDER THE INFLUENCE

Rekic v. Com., 2015 WL 9413418 (Ky. App. 2015)

FACTS: On March 30, 2013, an Edgewood officer spotted Rekic driving recklessly, at a high rate of speed. When the officer made a traffic stop, he found Rekic to smell of alcohol, with "glassy, bloodshot

¹ He had just earlier lost over \$200K in a forfeiture case.

² Osborne v. Com., 839 S.W.2d 281 (Ky.1992).

³ Smith v. Com., 339 S.W.3d 485 (Ky. App. 2010).

⁴ Brewer v. Com., 206 S.W.3d 343 (Ky. 2006),

eyes and slurred speech.” He failed three FSTs and a PBT indicated alcohol. Rekić admitted to three beers. He consented to a blood test at the hospital.

Rekić was charged with Reckless Driving and DUI. He moved to suppress the blood tests, but the trial court ruled that under “(KRS) 189A.103, the privilege of driving a vehicle in Kentucky carries with it the implied consent of every driver to testing of blood, breath, urine or a combination thereof, to determine alcohol concentration in the bloodstream which may impair driving ability.” Under Beach v. Com., KRS 189A.103 does not require officers to first offer suspects a breathalyzer test before asking them to submit to a blood test.”⁵ Rekić took a conditional guilty plea and appealed.

ISSUE: Is a breath test required before a blood test may be requested?

HOLDING: No

DISCUSSION: “Rekić argues that KRS 189A.103(5) prohibits the taking of blood or urine absent reasonable grounds to believe there is impairment by a substance other than alcohol which is not subject to testing by a breath test. In other words, he argued that where alcohol is the suspected intoxicant, a police officer is required to analyze the suspect’s breath before proceeding to another test of blood alcohol content (BAC). This reasoning turns the statute’s purpose on its ear and is contrary to Beach, the case upon which the circuit court based its analysis.” The Court noted that Com. v. Duncan, “reaffirms Beach; it is controlling; and, it is directly on point.”⁶

The Court agreed:

If an officer suspects a driver is under the influence of alcohol, KRS 189A.103(5) is not implicated; KRS 189A.103(1) alone provides sufficient authority for an officer the unfettered choice to pursue a blood, urine, or breath test.

The Court affirmed his plea.

Lewellen v. Com., 2015 WL 6780402 (Ky. App. 2015)

FACTS: Lewellen was involved in a wreck in Jessamine County, in which the Gullettes (Eric and Erin) were seriously injured. Deputy Hall was already on the scene, since the Gullettes had been involved in a minor collision minutes before. While investigating, he saw Lewellen crash into the Gullette vehicle, and it was caught on the deputy’s dash-cam. He did not initially smell alcohol on Lewellen, but a firefighter reported that he did so. When asked, Lewellen agreed he’d been drinking (one shot). He failed a PBT and one FST, and then Lewellen told the deputy to “just take him to jail.” Since he was complaining of pain, the deputy took him instead to the hospital, where he read him the Implied Consent Warning. Lewellen consented to a blood test – he was not given the option of a breath test.

Lewellen requested suppression of his statements and of the blood test, both of which the trial court denied. He then moved to suppress the results of the blood test on the basis that the arresting officer compelled Lewellen “to permit the taking of a sample of his blood for chemical testing without first obtaining a search warrant.”

The circuit court found that the officer administered “a PBT first as required by KRS 189A.103(5).” The court then noted that pursuant to Beach v. Com., “and other authority, in the absence of an explicit statutory directive, evidence should not be excluded for the violation of a statute where no constitutional right is involved.”⁷ Lewellen’s motion to suppress the blood test was ultimately denied, with the circuit court reasoning that Deputy Hall “testified that after smelling alcohol on the defendant at an accident scene[,] he administered a PBT[,] which defendant failed.” The circuit court noted that pursuant to Beach,

⁵ 927 S.W.2d 826 (Ky. 1996)

⁶ This case is not yet final.

⁷ *Supra*.

the officer chose to take Lewellen to the clinic to have a blood test administered and that after Deputy Hall read the implied consent warning, Lewellen consented to the blood test. The court found the search was consensual, rendering Missouri v. McNeely, inapplicable.⁸ The Court concluded that “case law indicates that any coercive effect (loss of license, more severe penalties, etc.) of the implied consent statute does not negate voluntariness of consent.”

He was offered several options with respect to a plea, which he accepted, apparently conditionally.

ISSUE: Is a breath test required before a blood test may be requested?

HOLDING: No

DISCUSSION: The Court first addressed the blood test issue, looking to its “recent opinion of Com. v. Duncan, the Kentucky Supreme Court reviewed McNeely and KRS 189A.103(5) in analyzing whether an officer violated Kentucky’s Implied Consent law when the officer denied a breathalyzer test to the defendant and chose to request a blood test instead.⁹

Kentucky Revised Statute 189A.103(5) provides:

The following provision[] shall apply to any person who operates or is in physical control of a motor vehicle or a vehicle that is not a motor vehicle in this Commonwealth: . . .

(5) When the preliminary breath test, breath test or other evidence gives the peace officer reasonable grounds to believe there is impairment by a substance which is not subject to testing by a breath test, then blood or urine tests, or both, may be required in addition to a breath test, or in lieu of a breath test.

Deputy Hall had reasonable grounds to believe that Lewellen was operating his motor vehicle under the influence of alcohol, due to the following facts: A fireman advised Deputy Hall that Lewellen smelled of alcohol; Deputy Hall then noticed that Lewellen smelled of alcohol; and Lewellen failed one field sobriety test and while another field sobriety test was being conducted, Lewellen told the officer to just take him to jail rather than conducting further field sobriety tests. Therefore, Deputy Hall could request that Lewellen submit to a blood test in order to determine Lewellen’s BAC. Consequently, the officer was not obligated to administer a breathalyzer test before Lewellen’s blood test was administered.”

And of course, Lewellen consented to the blood test, negating any need to even consider a breath test.

With respect to the statements, the initial question about drinking occurred when he was not in custody and was thus admissible. He was not free to leave at the moment due to the collision, not due to a suspicion. The Court then noted that although the deputy had handcuffed Lewellen following his arrest, he wasn’t planning on questioning him initially. While driving to the hospital, “and during “normal” conversation, Lewellen told Deputy Hall that he “usually gets hammered on whiskey” but he can drink forty beers and not get as drunk as he does on one shot of whiskey.” The Court agreed both statements were properly admitted.

DOMESTIC / FAMILY

Shelton v. Shelton, 2015 WL 7068557 (Ky. App. 2015)

FACTS: The Sheltons were married for about six years; one child was born. In early 2013, they divorced, following a “long history of domestic violence.” Zachary retained custody and Elizabeth had supervised visitation of their then 8-year-old child. On March 8, 2015, Elizabeth went to Zachary’s home

⁸ ___ U.S. ___, 133 S.Ct. 1552, (2013)

⁹ ___ S.W.3d ___, No. 2013-SC-000742-DG, 2015 WL 2266474, *1 (Ky. May 14, 2015).

to visit the child, during which time Elizabeth “rejected [Zachary’s] attempt to kiss her, after which she went upstairs to play with the child.” Zachary pulled Elizabeth’s legs out from under her, causing her to fall, and then duct-taped her hands and “feet together and pulled her across the carpeted floor of the child’s room.” He pulled her pants down and ripped her underwear and then smacked her on the stomach several times. (The child was present, and he told the child that “Mommy likes to be tied up” and told the child to “look at mommy’s fat belly” as he smacked her.) He used a marker to draw penises on her arms and back, and encouraged the child to “join in.” (The child wrote “I’m dumb” on Elizabeth’s back.) After 10-15 minutes, Elizabeth freed herself (using scissors Zachary apparently provided); her mother arrived and drove her to the Georgetown PD. Officer Hagar took a report and went to Zachary’s home, he told the officer that they were “merely rough housing and that the incident was consensual.” He showed the officer a photo of Elizabeth “face-down on the floor with her hands and feet duct taped.”

Elizabeth sought an EPO. At the same time, there were pending criminal charges against Zachary for Kidnapping and other charges relating to the incident. He continued to argue that the “incident was playful and consensual,” with Elizabeth arguing it was not. The Family Court ruled that while it may have initially been intended to be so, Elizabeth did suffer both injury (rug burns and her hands were “pretty red”) and “fear of imminent physical injury.” The Court awarded a DVO and Zachary appealed.

ISSUE: May a court make a credibility determination in a DVO case?

HOLDING: Yes

DISCUSSION: The court looked to the facts as alleged and agreed that Elizabeth was credible in her assertions. The court upheld the DVO.

SEARCH & SEIZURE – SEARCH WARRANT

Franklin v. Com., 2015 WL 5768630 (Ky. App. 2015)

FACTS: On November 4, 2013, a CI told Det. Morris (KSP) that he could get heroin from Franklin. He provided information about Franklin, including his home address and vehicle information, and stated Franklin kept a gun in the car. The CI had previously proved reliable. After corroborating some information, the CI arranged for a controlled buy. However, since the CI and Franklin had a “falling out,” a middleman was used, Perry. Perry was able to buy what appeared to be Percocet tablets, but were in fact heroin, as expected.

Det. Masters obtained a warrant for Franklin’s house and it was executed. Drugs and weapons were found. Franklin moved to suppress the warrant. When that was denied, he took a conditional guilty plea and appealed.

ISSUE: Does corroboration support a CI’s information?

HOLDING: Yes

DISCUSSION: Franklin argued that the warrant did not provide probable cause to support it, that the CI was unknown and the buy was not controlled. He claimed he was framed by the CI. The Court, however, determined that sufficient corroboration was provided, although it also agreed that more information would have bolstered the warrant and made it stronger. The Court affirmed his plea.

Brown v. Com., 2015 WL 7573771 (Ky. 2015)

FACTS: In 2011, Officer Maynard (Lexington – Fayette PD) applied for a search warrant for a ground floor, right-side, apartment in a four-plex, looking for heroin, drug paraphernalia and other items. The affidavit indicated that a qualified CI had advised the officer that “Mike” was living there with his girlfriend and children and selling heroin. (The affidavit indicated he’d provided reliable information

multiple times in the past.) The Officer did a further independent investigation, including two controlled buys using the CI. A Michael Brown was listed as living at the residence, pursuant to a traffic violation in which he'd given that address. The CI identified "Mike" using a booking photo. During the subsequent search, heroin and other drugs were found. Brown was charged with multiple drug offenses and related charges. He requested suppression and was denied. He then took a conditional plea and appealed.

ISSUE: May another officer's experience with a CI substitute for the affiant's first-hand experience?

HOLDING: Yes

DISCUSSION: Brown argued that the search warrant was insufficient to prove probable cause. At the suppression hearing, Officer Maynard indicated he'd not worked with the CI before, but that Det. Ford had, and that he "relied on Detective Ford's prior experience with the confidential informant when he attested to the confidential informant's reliability." Det. Ford testified as to the CI's long history of reliable work, and acknowledged that in return, she received consideration on her own charges. She was searched before and after each buy, but she was not given marked money or provided with a recording device. Heroin was purchased, although both officers agreed they'd determined the substance was heroin purely on a visual inspection. No testing of any type was done. Both agreed they could not be absolutely certain it was, in fact, heroin, when they requested the warrant. Brown was not charged for the substance purchased by the CI, but the buys were used solely to support the search warrant.

Brown argued that the "search warrant was intentionally false or made with reckless disregard for the truth" and that if "purged of these falsities," the affidavit would not be sufficient to support probable cause. The Court agreed that the standard for probable cause was the totality of the circumstances test, and if based on an informant's tip, the Court must look at whether the "reliance was reasonable considering the informant's veracity, reliability, basis of knowledge and other indicia of reliability."¹⁰ The Court noted that it was up to Brown to "allege and prove by a preponderance of the evidence that the affidavit contains a falsehood that was either made deliberately or with reckless disregard for the truth, and that if the false material was removed the remaining material would be insufficient to establish probable cause." The same standard applies when material facts are either intentionally or recklessly omitted.¹¹

In this case, the Court agreed that omissions, if they existed at all, were immaterial to determining the reliability of the informant. It was immaterial, for example, that the affiant officer had not worked with the CI before, as he was working closing with Det. Ford, who did have a "long history of working with the confidential informant." The officers did not omit anything that was critical and while it may have been better practice to say that the substance "appeared to be heroin," there was no suggestion that there was any testing and it was clear that the substance had been judged on appearance and context alone.

The court upheld the denial of the motion to suppress and upheld his plea.

Wilson v. Com., 2015 WL 6768877 (Ky. App. 2015)

FACTS: On September 30, 2012, King (Clarkson PD) was contacted by Durbin that Wilson (her daughter's boyfriend) was making methamphetamine and giving it to her daughter, Harrison. Upon investigation, he confirmed that Harrison had recently purchased a quantity of pseudoephedrine. Harrison and Polly, her friend, lived outside Clarkson, however, so he enlisted the aid of Deputy Meredith (Grayson County SD).

The two went to the Harrison residence and interviewed both women. Harrison admitted she'd bought the pseudoephedrine and gave it to Wilson, and that he later returned with methamphetamine, which they consumed. She also gave information that she'd seen Wilson manufacture it and told the deputy where he hid the materials. Statements taken, however, did not specifically state he made the

¹⁰ Lovett v. Com., 103 S.W.3d 72 (Ky. 2003).

¹¹ Com. v. Smith, 898 S.W. 496 (Ky. App. 1995).

methamphetamine at his residence. (Polly stated that Harrison had told her that he made it at Beaver Dam.) Wilson then was spotted in the passenger seat of a car passing by Harrison's home. King stopped the vehicle and held it for Meredith, who arrested Wilson.

Deputy Meredith wrote a search warrant affidavit for Wilson's home. He did note Polly's statement, but added that information from Harrison indicated he did make methamphetamine at the residence. In the search, they found items in the hiding spots described by Harrison.

Wilson was indicted for manufacturing and possessing methamphetamine. He moved for suppression, which was denied. He took a conditional guilty plea to possessing precursors and appealed.

ISSUE: May verbal statements be relied upon in a search warrant affidavit?

HOLDING: Yes

DISCUSSION: Wilson argued that the search warrant included false statements, because neither written statement made reference to him manufacturing methamphetamine at his home. The Court noted that the deputy "relied on both the written statements and the verbal statements of the women when he wrote his affidavit in support of the search warrant." Neither of the two women testified. The Court agreed that simply because it wasn't included in the written statements, that did not mean that the statements weren't in fact made, verbally.

The Court upheld the plea.

Gibson v. Com., 2015 WL 9243583 (Ky. 2015)

FACTS: Sheriff Peebles (Pendleton County) began to suspect Gibson of Manufacturing Methamphetamine. He tracked her purchases of pseudoephedrine and other items associated with it. He then sought a search warrant for a blue metal garage on her property, including the note that fires had occurred in that garage twice over the last several years and that Gibson had priors for drug offenses. He obtained the warrant and "discovered an abundance of evidence" of manufacturing.

Gibson was charged and sought suppression. The trial court denied the motion and she was convicted. She then appealed.

ISSUE: Could a warrant be stricken of incorrect information and remain valid?

HOLDING: Yes

DISCUSSION: Gibson argued that two pieces of information, the fires and her prior offenses, were deliberate or reckless misrepresentations. She further argued that with or without that information, the affidavit did not establish probable cause. The Court agreed that "intentionally false statements or statements made with reckless disregard for the truth must be stricken."¹²

In Franks, the Court set forth the procedure:

[W]here the defendant makes a substantial preliminary showing that a false statement knowingly and intentionally, or with reckless disregard for the truth, was included by the affiant in the warrant affidavit, and if the allegedly false statement is necessary to the finding of probable cause, the Fourth Amendment requires that a hearing be held at the defendant's request. In the event that at that hearing the allegation of perjury or reckless disregard is established by the defendant by a preponderance of the evidence, and, with the affidavit's false material set to one side, the affidavit's remaining content is insufficient to establish probable cause, the search

¹² Franks v. Delaware, 438 U.S. 154 (1978).

warrant must be voided and the fruits of the search excluded to the same extent as if probable cause was lacking on the face of the affidavit.

To prove the warrant invalid, Gibson must show “that (1) the affidavit contains intentionally or recklessly false statements, and (2) the affidavit, purged of its falsities, would not be sufficient to support a finding of probable cause.”¹³

The Court noted that although Gibson had been charged of offenses, she had not been convicted, and the fires actually occurred on an adjoining property belonging to her sister. Given the lay of the land, the Court found it to be more of a misstatement than a deliberate or intentional wrong statement. The trial court had removed the erroneous reference to her criminal record and insisted that the statement about the fires should have also been removed. The Court agreed with the Sheriff that since the two properties lacked a “clearly distinguishable boundary” it was understandable how he misspoke about the fires. Even purged of the errors, the Sheriff included sufficient details to support the warrant. Even though many of the purchases were several months old, the investigation was actually for a continuous criminal enterprise.

Gibson’s conviction was affirmed.

SEARCH & SEIZURE – TERRY

Huang v. Com., 2015 WL 9264514 (Ky. App. 2015)

FACTS: On November 9, 2013, Huang was arrested at a Lexington bar. Employees suspected he was passing counterfeit cash and the bar summoned an officer. They identified Huang to the officer but “did not indicate Huang had a weapon.” Huang produced \$59 in currency from his pockets. A testing marker indicated those bills were real. The officer then frisked Huang and felt a bulge in a pants pocket. Upon request, Huang removed several bills which were “discolored, odd in texture and some had the same serial number.” Those were counterfeit and Huang was arrested.

Huang moved for suppression of the bills, and of the statements he made. The trial court suppressed the statements but allowed the seized bills to be introduced. The trial court ruled that the “officer had a reasonable and articulable suspicion of Huang’s criminal activity justifying his initial detention under Terry v. Ohio,” but no evidence of a weapon to justify a frisk.¹⁴ The Court noted that the officer testified that “it was his standard policy—for his own safety—to conduct pat downs every time he detains someone. Thus, the court ruled although the initial Terry stop was proper, the subsequent pat down was improper.” However, the trial court found that Huang “voluntarily gave the bills to the officer.”

Huang took an Alford plea and appealed.

ISSUE: Does a Terry frisk require at least a reasonable suspicion that the individual is armed and dangerous?

HOLDING: Yes

DISCUSSION: The Court framed the question as whether the trial court “erred in denying the motion to suppress the counterfeit bills”. Huang argues the officer only obtained the bills as a result of his unlawful pat down under Terry and the trial court erred in finding Huang’s handing over the counterfeit bills intervened and removed the taint associated with the improper Terry pat down. Huang argues the bills were the fruit of the poisonous tree.¹⁵

¹³ Com. v. Smith, 898 S.W.2d 496 (Ky. App. 1995).

¹⁴ 392 U.S. 1 (1968).

¹⁵ See Goncalves v. Com., 404 S.W.3d 180 (Ky. 2013).

The Court agreed that there was more than sufficient cause to detain Huang, but also agreed that the “officer had no basis under Terry to pat down Huang because there was no allegation and no evidence presented to the officer before or during the initial detention that Huang was armed and dangerous. The officer testified he routinely pats down all detainees, without any indication the person has a weapon. Thus, the officer failed to follow Terry’s requirement of reasonable belief the detainee is armed and dangerous, and, therefore, he had no legal basis to pat down Huang.”

With respect to the bills, however, the Court noted that when Huang removed the bills himself, rather than “given a verbal response, said nothing, or done nothing when the officer asked about the contents of his pocket,” he voluntarily gave the officer the incriminating evidence. The Court noted that under Colorado v Connelly, it had to “deem the handing over of the counterfeit bills an act of free will on Huang’s part and not, in this very narrow fact pattern, an act of police coercion or overreaching.”¹⁶

The Court affirmed Huang’s plea.

Douglas v. Com., 2015 WL 6768861 (Ky. App. 2015)

FACTS: On October 9, 2013, about 10:13 p.m., Sgt. Dawson and Officer Cooper (Lexington PD) responded to a complaint about a specific individual involved in “drug related” crimes. They spotted their target inside a specific house so they pulled up to watch the scene. The officers saw Douglas and another man standing in front of the house. The officers were driving an “unmarked, but fairly well known vehicle.” They stopped in front of Douglas and “asked if he had any drugs.” Both officers were wearing vests with POLICE emblazoned on front and back. Douglas began to walk away, calling out “police, police, police” – apparently to alert others nearby. The officers got out and yelled at Douglas to stop, that they were police, and to “come back and speak to them.” He began moving more “briskly” at a “half-spring,” and then bladed his body away from the officers. They saw him “digging at the waistband of his pants.” He did not respond to a command to show his hands, so Officer Cooper tased him. As he was tased, Cooper saw Douglas “make a throwing motion and heard a loud ‘clang’ sound.” They called for backup and EMS. Once secure, the officers searched the area and found a handgun inside a storm drain nearby. He was taken from the cruiser, whereupon the officers saw white powder on his hands and found he’d been attempting to “shove cocaine underneath the seat of the cruiser.”

Douglas, a felon, was charged with the weapon, possession of a controlled substance, and other offenses. He moved to suppress the evidence and was denied. He took a conditional guilty plea and appealed.

ISSUE: Is a person fleeing a scene of an attempted stop validly stopped under Terry?

HOLDING: Yes

DISCUSSION: The Court noted the primary question is, was the Terry stop proper? The Court noted that in this case, it was certainly a Terry stop, since “whenever a police officer accosts an individual and restrains his freedom to walk away, he has ‘seized’ that person.”¹⁷ There is no seizure, however, “until there has been some application of physical force or as how of authority to which a person yields.”¹⁸ As such, Douglas was not seized until he was tased, and as such, what occurred being the time the officers parked and until he was tased is relevant in determining the validity of the actual stop.

The Court looked to Illinois v. Wardlow and agreed that a “person’s presence in an area known for narcotics trafficking and his flight upon noticing the police have been deemed sufficient justification for a Terry stop.”¹⁹ The Court agreed the articulable facts clearly led to reasonable suspicion.

¹⁶ 479 U.S. 157(1986): See also Keeling v. Com., 381 S.W.3d 248 (Ky. 2012); Stanton v. Com., 349 S.W.3d 914 (Ky. 2011).

¹⁷ Terry v. Ohio, 392 U.S. 1 (1968).

¹⁸ California v. Hodari D., 499 U.S. 621 (1991).

¹⁹ 528 U.S. 199 (2000).

The Court upheld his plea.

King v. Com., 2015 WL 7822853 (Ky. App. 2015)

FACTS: On July 18, 2013, Lexington bank employees observed two men (King being one), “loitering around the bushes near the bank.” King later entered the bank. Two days later, they spotted the men again, this time, both entered the bank. “The employees described the men’s activities as suspicious and felt there was something “just not right” about them.” They called police to report it. On July 24, the men entered again. King sat on a couch while the other man spoke to a teller and at some point, that man “provided false credit card information.” On July 30, King returned to ask about opening an account, he left and then returned again. “The bank employees were so suspicious of his behavior and concerned about their own safety that they locked the doors and would not let him enter the bank. He returned the next day, but the employees again locked the door and would not let him enter.”

On August 1, Lexington detectives reviewed surveillance video and determined they believed King was armed. They posted up at the bank to observe. “King was spotted walking on a road adjacent to the bank. He appeared to drop something in a mail box and then walked towards the parking lot of the bank. He sat on the curb for about five minutes, walked towards the bank doors where he stopped to adjust his shoes, and then entered the bank. King spoke briefly with a teller and left.” Det. McCowan, identified by a tactical vest, grabbed King and steered him away from the door. Ten officers surrounded him and he admitted to having a firearm. King was restrained and forced to the ground. The gun was found. He was charged with CCDW, and officers found “an additional loaded magazine for the handgun, a handwritten demand note to the bank personnel, a pair of surgical gloves, an ink stamper, a rag, a dollar bill and a plastic Kroger grocery bag.”

King was charged with a variety of offenses, including Attempted Robbery and being a felon in possession. He moved for suppression and was denied. He took a conditional guilty plea and appealed.

ISSUE: If someone admits to having a firearm, is a frisk appropriate?

HOLDING: Yes

DISCUSSION: King argued the officers had insufficient cause to frisk him. The Court reviewed Terry v. Ohio and Gray v. Com.²⁰ He admitted the stop was proper, but “argued that the subsequent frisk for weapons was not justified.” The court noted that the original seizure, at the door, was justified, and that when he admitted to having a gun, it was proper to seek it out. The Court agreed that based on the facts, and the observation of a possible weapon on the video from an earlier visit. Once he admitted to having a weapon unlawfully, it was proper to arrest him, and that everything else was found as part of the search incident to arrest.

The Court affirmed his plea.

SEARCH & SEIZURE – CURTILAGE

Thomas v. Com., 2015 WL 6593951 (Ky. 2015)

FACTS: Thomas, Brenda (wife) and Brenda’s son shared a farm home in Owen County. They also had a business. Thomas was ordered out of the home due to an EPO, but returned to retrieve some belongings. The couple argued and Brenda called 911. Sheriff Hammond responded; he found the couple outside arguing. Sheriff Hammond and Thomas consulted with the judge, in person, who agreed to give Thomas two hours to retrieve items, while Brenda left. Sheriff Hammond took some photos inside the house, but noticed no drugs or paraphernalia. He left while Thomas and a friend packed items. The Sheriff returned and was told Thomas needed “just a few minutes” to finish. Brenda came back and waited in the car until Thomas left. Brenda quickly realized she didn’t have a barn key (where her

²⁰ 150 S.W.3d 71 (Ky.App. 2004).

motorcycle was to be parked) and Sheriff Hammond called Thomas to return with a key. Trooper Roberts (KSP) drove by and knowing the household, stopped to see if the Sheriff needed assistance.

After Thomas unlocked the barn, he immediately left. Trooper Roberts and Sheriff Hammond accompanied him there, but on the way back, the trooper noticed several items that suggested methamphetamine manufacturing in an area where the couple transacted public business. Brenda claimed no knowledge of the items and consented to a search, contraband was found. Learning she had also no key to the locked garage, the trooper got a search warrant for the garage and outbuildings. Guns, along with chemicals and equipment for manufacturing methamphetamine, were found.

Thomas was arrested, released, and then disappeared. When finally re-arrested, he was in possession of methamphetamine, marijuana and drug paraphernalia. Prior to trial, the prosecution asked if Thomas was planning to invoke the spousal privilege and prevent Brenda from testifying. He indicated that he planned to call her as a defense witness, in fact. However, the morning of trial, she indicated “that she did not wish to testify for either side” – invoking both the spousal privilege (KRE 504) and her Fifth Amendment privilege against self-incrimination as she also had outstanding charges as well.²¹ The Court “precluded her as a witness for either party.” Thomas was convicted and appealed.

ISSUE: Is there an expectation of privacy with respect to items clearly visible, but within the curtilage?

HOLDING: No

DISCUSSION: Since the Fifth Amendment issue was the only one addressed at trial, the Court did not address the spousal privilege issue. The Court properly followed KRE 511(b) which states that “in jury cases, proceedings shall be conducted, to the extent practicable, so as to facilitate the assertion of claims of privilege without the knowledge of the jury.” The Court agreed the trial court properly excluded Brenda from testifying.

Thomas also argued that evidence should have been suppressed that was seized from the property. Trooper Roberts spotted several items outside while the barn was being unlocked, and then properly sought consent from Brenda to search further. The trial court had denied the motion “on two grounds: first, it found that the barrels were outside the curtilage of Appellant’s home; and, alternatively, it found that even if the barrels were inside the curtilage, Trooper Roberts was on the property for legitimate police business and his search of the barrels was valid under the plain view doctrine.” The Court elected to address the issue under plain view, noting that the “plain-view exception to the warrant requirement applies when the object seized is plainly visible, the officer is lawfully in a position to view the object, and the incriminating nature of the object is immediately apparent.”²²

As such, Thomas had no expectation of privacy in the items, even if within the curtilage.

The Court further agreed that certain evidence proving his propensity and knowledge in using and manufacturing methamphetamine was properly admitted under KRE 404(b) – prior bad acts. The “Court had previously held that the evidence regarding an individual’s ‘methamphetamine manufacturing during the preceding months was admissible to show that [he] had knowledge of this process.’”²³ [The Court] went on state in Young, “we find evidence concerning [the appellant’s] knowledge highly probative of his intent.” The Court reaffirmed the holding.

Under Bell, the Court had devised several factors: 1) the evidence was relevant for some purpose other than to prove Appellant’s criminal disposition; (2) that the evidence was sufficiently probative of Appellant’s commission of the charged crimes as to warrant its introduction into evidence; and (3) the

²¹ The Commonwealth had previously proposed a plea deal to Brenda in exchange for her testimony in this matter. However, Brenda’s decision to claim testimonial privileges nullified that deal.

²² Chavies v. Com., 354 S.W.3d 103 (Ky. 2011) (citing Horton v. California, 496 U.S. 128 (1990)).

²³ Young v. Corn., 25 S.W.3d 66 (Ky. 2000).

potential for prejudice from the use of the evidence substantially outweighed its probative value.

The Court pointed to its holding in Tipton v. Com., where it stated:

We believe that the evidence here was highly relevant to whether Appellant knew how to manufacture methamphetamine and that the nature of the evidence, when taken with his own admission, was extremely probative of his intent to manufacture methamphetamine. Given its clear probative value, we do not believe the trial court erred in concluding that its probative value was not substantially outweighed by the risk of undue prejudice.²⁴

The Court upheld Thomas's conviction.

INTERROGATION – JUVENILE

Gonzalez v. Com., 2015 WL 8527998 (Ky. App. 2015)

FACTS: Following a school class on sexual abuse, one of Gonzalez's daughters reported that she'd been sexually abused by him. The other biological daughter and a stepdaughter corroborated the report and the "children were placed in protective custody at school and later transported to the Owensboro Police Department to continue the investigation." Gonzalez came to the school and was promptly arrested.

Gonzalez was convicted of various sexual offenses and appealed.

ISSUE: Is testimony given by children suppressible because they've been removed from school without a parental notification?

HOLDING: No

DISCUSSION: Gonzalez argued that the testimony of his daughters should have been suppressed because they were removed from school and that it was an illegal search and seizure. He cited KRS 620.040 which reads:

KRS 620.040(5), in relevant part, states:

(a) If, after receiving the report, the law enforcement officer, the cabinet, or its designated representative cannot gain admission to the location of the child, a search warrant shall be requested from, and may be issued by, the judge to the appropriate law enforcement official upon probable cause that the child is dependent, neglected, or abused. If, pursuant to a search under a warrant, a child is discovered and appears to be in imminent danger, the child may be removed by the law enforcement officer.

...

(c) Any appropriate law enforcement officer may take a child into protective custody and may hold that child in protective custody without the consent of the parent or other person exercising custodial control or supervision if there exist reasonable grounds for the officer to believe that the child is in danger of imminent death or serious physical injury, is being sexually abused, or is a victim of human trafficking and that the parents or other person exercising custodial control or supervision are unable or unwilling to protect the child. The officer or the person to whom the officer entrusts the child shall, within twelve (12) hours of taking the child into protective custody, request the court to issue an emergency custody order.

Pursuant to KRS 620.030(1), any teacher or school personnel who "knows or has reasonable cause to believe that a child is . . . abused shall immediately cause an oral or written report to be

²⁴ No. 2009-SC-000119-MR, 2010 WL 1005899, at *4 (Ky. Mar. 18, 2010).

made to a local law enforcement agency or the Department of Kentucky State Police. . . . Nothing in this section shall relieve individuals of their obligations to report.”

He complained that there was no showing that the girls were in “imminent danger” or that he and his wife could not protect them. Without a showing of an exigent circumstances, that they should have been notified, and that since they were safe at school, they should not have been removed.

First, the Court noted, he could not claim a violation of the Fourth Amendment for someone else, and no matter, that the children were not being interrogated but protected. The Court noted that there was no need to show any exigent circumstances, and their mother had been unwilling or unable to protect them.

Gonzalez’s convictions were affirmed.

SEARCH & SEIZURE – TRAFFIC STOP

Fishback v. Com., 2015 WL 6437231 Ky. App. 2015

FACTS: On May 6, 2014, Officer Clements (Lexington PD) made traffic stop on an unregistered vehicle that made a U-turn. Perry was driving, Smith was in the front passenger seat and Fishback was in the back seat. Due to the tinted windows, the officer asked that the windows be rolled down at which point he spotted a handgun on the front seat console. Backup was requested and arrived quickly. No other weapons were found on the occupants. Smith claimed ownership of the weapon and since he was not prohibited from owning a weapon, no charges were made. At some point, Officer Tyree spotted another gun, halfway under the rear of the driver’s seat, where Fishback had been sitting. Fishback admitted it was his. At the time, he was the subject of an EPO/DVO, so he was charged with carrying a concealed weapon and violating the EPO/DVO, and when drugs were found on his person, for the drugs as well.

Fishback moved to suppress the evidence, arguing that it was unreasonable to remove him from the vehicle. When that was denied, he took a conditional plea and appealed.

ISSUE: Is removing passengers during a traffic stop permitted?

HOLDING: Yes

DISCUSSION: The Court agreed that as a passenger, Fishback could challenge the legality of the stop.²⁵ However, the Court agreed, there was no question but that the traffic stop was lawful. Further, removing drivers and passengers routinely is also allowed.²⁶ The testimony suggested that “things progressed quickly” during the traffic stop and that two firearms were quickly found, and once that happened, it was reasonable to determine the ownership of both. Further, he did not have standing to contest the search of the vehicle, as he did not own it.

The Court affirmed his plea.

Green. v. Com., 2015 WL 6082744 (Ky. App. 2015)

FACTS: On July 17, 2013, Sgt. Bastian was patrolling downtown Lexington. He spotted a vehicle pull over at the curb in an area where there were no houses or open businesses, so he circled the block. He found the vehicle still parked so he pulled up nearby and spotlighted it. He could see two individuals in the front seat who were “making furtive movements” toward the console and under the seat. Sgt. Bastian suspected prostitution and approached the car. Green stated that he had stopped to make a phone call.

²⁵ Brendlin v. California, 551 U.S. 249 (2007).

²⁶ Maryland v. Wilson, 519 U.S. 408 (1997).

Coleman, the female passenger, was asked to step out. She claimed that she had a relationship with Green and he was taking her home. At the same time, Green was observed continuing to reach toward the console and seat and was told to keep his hands visible. He persisted, however, and Sgt. Bastian had Green get out. He handcuffed both while waiting for backup. When additional backup arrived, the handcuffs were removed. Green denied consent to search but a drug dog alerted on the car. Cocaine and a scale were found, along with cash and other items.

Green was indicted for Trafficking and related charges. He moved for suppression, arguing that the spotlighting was improper, but the trial court agreed that the “mere act of shining a spotlight on the car did not constitute a seizure for which probable cause was required.” The actions of the occupants were sufficient reasonable suspicion to support further inquiry.

Green took a conditional guilty plea and appealed.

ISSUE: Does the use of a spotlight indicate seizure?

HOLDING: No

DISCUSSION; The Court agreed that the use of the spotlight was not enough to cause a reasonable person to feel that they were under the officer’s authority. Green was parked in a public location and the officer did not communicate with Green or block his egress. The “only show of authority was the officer’s use of a spotlight a night to illuminate a dark street.” That was not a seizure and the Court affirmed Green’s plea.

Com. v. Harris, 2015 WL 5781422 Ky. App. 2015

FACTS: On January 3, 2012, Deputy Allen (Madison County SO) observed Harris commit several minor traffic offenses. Harris pulled into the parking lot of a convenience store and got out, but the deputy approached and asked him to return to the vehicle, and he got back inside. Deputy Allen could smell marijuana from the vehicle. He was unable to produce an OL, so the deputy had him get back and come to the cruiser, where Allen had him sit in the back seat. While the deputy was writing a citation, deputy King arrived with Klisar, a drug dog. Klisar alerted to the right passenger side door and inside, a backpack containing cash, cocaine, marijuana and hydrocodone was found (all substances Klisar was trained to detect).

Harris was arrested. Ultimately he was charged with Trafficking in Controlled Substances and in Marijuana. He requested suppression, which was granted. The Commonwealth appealed.

ISSUE: Must a drug dog be credible to justify a search based on an alert?

HOLDING: Yes

DISCUSSION: The Court agreed that as long as an officer “has probable cause to believe a civil traffic violation has occurred, [he] may stop [the] vehicle regardless of his or her subjective motivation in doing so.”²⁷ Deputy Allen testified that he witnessed Harris commit several traffic violations before he stopped him. Accordingly, we have no trouble concluding that the initial stop of Harris's vehicle was lawful.²⁸

This does not mean, however, that the ensuing events were legally conducted. The Fourth Amendment curtails what officers may do even after a lawful traffic stop.²⁹ “[o]nce the purpose of the traffic stop is accomplished, the additional detention of a suspect is no longer justified by probable cause. The traffic stop essentially becomes a Terry stop, which requires law enforcement agents to possess a reasonable

²⁷ Wilson, 37 S.W.3d at 749. Com. v. Bucalo, 422 S.W.3d 253 (Ky. 2013), reh’g denied (Mar. 20, 2014).

²⁸ See also, Ward v. Com., 345 S.W.3d 249 (Ky. App. 2011); Garcia v. Com., 185 S.W.3d 658 (Ky. App. 2006).

²⁹ See Illinois v. Caballes, 543 U.S. 405 (2005).

and articulable suspicion that criminal activity is afoot."³⁰ Thus, the search of Harris's vehicle could be constitutionally permissible only if the officers had probable cause to believe that Harris's vehicle contained illegal drugs.³¹

In this case, the trial court had ruled that "Klisar [the dog] was not shown to be a reliable and trustworthy police dog in this instance." "A positive canine alert, signifying the presence of drugs inside a vehicle, provides law enforcement with the authority to search the driver for drugs."³² When challenged as part of a motion to suppress, the Commonwealth must show that the dog is trained and reliable. The Supreme Court set forth the framework as follows:

The question—similar to every inquiry into probable cause—is whether all the facts surrounding a dog's alert, viewed through the lens of common sense, would make a reasonably prudent person think that a search would reveal contraband or evidence of a crime. A sniff is up to snuff when it meets that test.³³

The trial court concluded that the officers could not rely on Klisar to establish probable cause because he was not a well-trained and reliable narcotics detection dog. The trial court made this determination based on the officers' testimony that Klisar's certification expired on September 9, 2011, approximately four months before Harris was pulled over; there was no evidence that Klisar has received any training since his last certification in September of 2009; and Klisar, who was initially trained in May of 2008 had not been recertified because he was scheduled to be retired due to age.

The Court agreed that there was no evidence Klisar had gotten "any formal training since his initial certification" and was due to be retired – and he'd given false alerts in the past. Unlike in Harris, there was no evidence that he'd gotten any training at all.

However, that did not foreclose a finding allowing the search to be based on Deputy Allen detecting the smell of marijuana. But, since the Commonwealth did not pursue this with the trial court, the Court affirmed the suppression of the evidence.

INTERROGATION

Com. v. Robinson, 2015 WL 7068143 (Ky. App. 2015)

FACTS: In November, 2011, Det. Alexander (Louisville Metro PD) contacted Robinson concerning an allegation that he'd engaged in sodomy and sexual abuse with a child. Robinson, who was a juvenile at the time the crime was committed, agreed to come in to be questioned. He was taken alone to an interview room and was told that once they were "done talking," he could leave. The door was closed (as it was adjacent to a common area), but not locked. Robinson was not given Miranda warnings. During the recorded interview, however, he was never told he was free to leave and when the detective left the room, several times, he told Robinson to wait. The tone of the questioning was mostly calm and polite, although at one point, the detective elevated his voice and stood over Robinson. Robinson never asked to leave or said he didn't wish to talk and at the end, he shook the detective's hand. He left with his mother and another man, who had waited for him. The Detective walked them all out.

Robinson was later arrested. The trial court found that Robinson's statements were as the result of a custodial interrogation and suppressed the statements. the Commonwealth appealed. (The indictment had been dismissed without prejudice.)

³⁰ Com. v. Bucalo, *supra* (citing Terry v. Ohio, 392 U.S. 1, 29 (1968)).

³¹ Morton v. Com., 232 S.W.3d 566, 569 (Ky. App. 2007) ("The automobile exception [] permits an officer to search a legitimately stopped automobile where probable cause exists that contraband or evidence of a crime may be in the vehicle."); Dunn v. Com., 199 S.W.3d 775 (Ky. App. 2006); Clark v. Com., 868 S.W.2d 101 (Ky. App. 1993) (citing U.S. v. Ross, 456 U.S. 798(1982)).

³² Morton v. Com., 232 S.W.3d 566 (Ky. App. 2007).

³³ Florida v. Harris, ___ U.S. ___, 133 S.Ct. 1050 (2013).

ISSUE: May an interview in a police station be considered custodial, even if the subject arrives voluntarily?

HOLDING: Yes (but see discussion)

DISCUSSION: The Commonwealth argued that “Robinson was not in custody when he was questioned, and therefore, his statement should not have been suppressed.” Looking to Smith v. Com., the Court asked whether under the circumstances, Robinson should have believed he was free to leave.³⁴ The Court agreed that although a police station “can sometimes be a coercive or intimidating environment, the fact that this interview took place at a police station is not necessarily indicative of a custodial interrogation.”³⁵ The Commonwealth equated this to the circumstances in Com. v. Cecil, which had similar facts.³⁶

The Court, however, looked to the facts of this particular case and noted that while Robinson was told “he could leave after the interview was over,” that would not “lead a reasonable person to think that he or she could leave at anytime, but instead, indicates to a person that he or she can leave only when the interview is concluded.” The Court found that the rather misleading statements by the investigator indicated that “Robinson could not leave until the Detective said the interview was over” and ergo, he was in custody.

The Court affirmed the trial court’s decision.

Vincent v. Com., 2015 WL 1688082 (Ky. App 2015)

FACTS: In 2010, Vincent was accused of sodomizing his girlfriend’s young niece, over a period of four years, in Hardin County. It came to light in 2009 when the girl told her stepmother that Vincent had forced her to perform oral sex on him during visits between 1999 and 2003. Investigators questioned Vincent four times and he took a polygraph. His story evolved from a “categorical denial” to an admission of a single act of oral sex while he was sleeping.

During the interrogation, investigators employed several tactics “designed to elicit a confession.” They told him that he’d failed the polygraph and attempted to establish a rapport by “minimizing any negative consequences of his confession” and suggesting that the niece willingly engaged in oral sex. In effect, they “fed Vincent a narrative,” that suggested that he would not be in trouble if he confessed. They also told him that they had DNA evidence and that she’d spat his semen onto a blanket that the police had in their possession.

Ultimately, he was charged, and later convicted, of one count of Sodomy. His counsel did not challenge the confession, although evidence later indicated that Vincent “suffers cognitive deficiencies,” that meant he was illiterate. (It was not clear if that was due to learning disabilities or actually intellectual or developmental disabilities, but he could not perform basic tasks like paying bills, filling out job applications, or even driving to a place with which he was unfamiliar. He went on disability in 2004 due to back injuries and “mental problems.”) Vincent appealed his conviction.

ISSUE: Is an illiterate individual necessarily intellectually disabled?

HOLDING: No

DISCUSSION: Vincent argued that “his cognitive limitations rendered him so susceptible to police interview tactics that their use resulted in the false confession.” The Court noted that there was evidence that he functioned on a “sub-normal” level, but since that was not explored at trial, the court had no record upon which to rely. However, it could not determine the reason for his low level of functioning. For

³⁴ 312 S.W. 353 (Ky. 2010).

³⁵ Oregon v. Mathiason, 429 U.S. 492 (1977).

³⁶ 297 S.W.3d 12 (Ky. 2009).

example, the court noted that if he has a learning disability, such as dyslexia, that renders him illiterate, that would not “affect his ability to withstand ordinarily coercive police questioning.” Or, he could suffer from an “intellectual disability serious enough to render his confession invalid and his conviction infirm.” Without an evidentiary hearing, it was impossible to know. Certainly, “police used interrogation techniques that undoubtedly have the potential to overcome the will of a mentally-handicapped person, and thus, if Vincent is indeed handicapped, these techniques could have rendered his confession involuntary.”

The Court looked to Scheckloth v. Bustamonte for guidance, in which a court must assess the “voluntariness of a confession after reviewing the totality of the circumstances, including ‘both the characteristics of the accused and details of the interrogation.’”³⁷ Those factors will include, age, education, intelligence, and linguistic ability.”³⁸ The Court must also look at the coerciveness of any questioning, since “absent such coercion, a defendant’s mental state alone cannot render his confession involuntary.”³⁹ Specifically, the Court noted, as “interrogators have increasingly relied on subtle forms of psychological persuasion, courts have found the mental condition of the defendant a more significant factor in the “voluntariness” calculus.” The Court found that such tactics have been held in the past to be “sufficiently coercive to overcome the will of a mentally-handicapped person.”⁴⁰ However, without more facts, the Court agreed, it was impossible to know Vincent’s situation.

The court reversed Vincent’s conviction and remanded the case for further consideration by the trial court.

Dillon v. Com., 2015 WL 6665476 (Ky. 2015)

FACTS: On February 29, 2012, at about 1 p.m., Dennison was seen at a Muhlenberg County gas station. She was sitting in her van, with Dillon. He bought a pack of cigarettes and some gas. The clerk noted that neither got out and neither was talking to the other. He saw nothing that indicated Dennison was in an distress, however.

Dillon later claimed that Dennison drove them to a local cemetery, a “place of significance because they used to meet there,” and pulled a handgun on him. They struggled over the gun and it accidentally went off. Dennison was shot once, and then a second time, this time in the head. Dillon then drove toward another location, a “special place,” claiming that he intended to kill himself there. However, the van got bogged down. Upset, he tried to commit suicide, “waking up in the hospital a month later.” (He had shot himself in the mouth, with the shot exiting through the top of his head.) The Commonwealth, however, posited that Dillon had murdered Dennison and had brought the gun himself, based on blood spatter evidence that refuted his story. (The blood spatter indicated she’d been shot in the back of the van, rather than the driver’s seat, as he’d argued.)

Despite his critical injuries, Dillon was able to somewhat respond to questioning, and was given Miranda warnings. He did not speak but could nod, so the responding trooper asked him a series of yes and no questions. (The trooper later testified that “he was not worried about Dillon’s mental capacity at that time because he was answering questions coherently and immediately, though he admitted that he was fairly sure that the man had a brain injury.”

Dillon was indicted for Murder. In addition to the testimony above, the ME noted that both of Dennison’s wounds were contact wounds. He opined that the first shot occurred while she was in the driver’s seat and the second (the fatal head wound) when she was face down on or near the floor of the van, in the back, with the shooter over her. Some evidence indicated the Dennison was planning to move out of state and leave Dillon, and they had been involved in domestic assault before.

Dillon was convicted and appealed.

³⁷ 412 U.S. 218 (1973).

³⁸ Allee v. Com., 454 S.W.2d 336 (Ky. 1970).

³⁹ Colorado v. Connelly, 479 U.S. 157 (1986).

⁴⁰ Bailey v. Com., 194 S.W.3d 296 (Ky. 2006).

ISSUE: Is a statement given when the subject is in pain, necessarily coercive?

HOLDING: No

DISCUSSION: Dillon first argued that the interrogation by the trooper was improper, given his extensive injuries and presumed brain damage. (He had a hole in the roof of his mouth, along with extensive bleeding and swelling, so much so that he could not open his eyes.) The trooper asserted that Dillon was coherent because he responded appropriately to commands. He nodded in response to questions but only spoke once, to mumble his name. “McPherson admitted that he had never before given Miranda warnings to a victim with a gunshot wound to the head and had not received training in how to assess brain injuries or cognitive functioning or impairment. He also acknowledged that he had a cell phone with video recording capability that day and that it was best practice to record interviews, which he did not do.”

The trial court had admitted the statements, finding that “under the totality of the circumstances, there was no coercive activity by the police.” Further, the Court agreed that Dillon was able to properly waive his rights and that he “comprehended the questions posed by Trooper McPherson, as well as the Miranda rights the officer read to him.”

The Court noted that:

Unfortunately, there is no bright-line test, “no talismanic definition of ‘voluntariness,’ mechanically applicable to the host of situations where the question has arisen.”⁴¹ At its most basic, a voluntary statement is “the product of a rational intellect and a free will.”⁴² That question is a complicated one where the accused is suffering the effects of trauma or illness, as was Dillon.

The Court looked to Mincey v. Arizona, as that also involved a seriously injured suspect.⁴³ In that case, the Court had held that under such situations, “[i]t is hard to imagine a situation less conducive to the exercise of ‘a rational intellect and a free will.’” However, Dillon failed to provide any medical evidence as to his actual state at the time he was questioned. The Court noted that “a statement is not involuntary—the suspect’s will is not always overborne—simply because he is questioned while in pain.”⁴⁴ Indeed, “there is no rule against interrogating suspects who are in anguish and pain, [though] the police ‘may not prolong or increase a suspect’s suffering against the suspect’s will’ nor ‘give the impression that severe pain will be alleviated only if the declarant cooperates.’”⁴⁵

Further, in this case, the trooper sought immediate medical help (although it took some time to arrive given the rural nature of the scene), and provided assistance when Dillon appeared to be “choking or gurgling on his own blood.” The only “arguably coercive action he took was handcuffing Dillon. But that action was for the purpose of officer safety as Dillon could have had another gun on his person, and by itself is insufficient to render Dillon’s answers involuntary.”

The Court agreed:

The simple fact is that Mincey and similar cases require a combination of pain or physical trauma and police overreaching before a confession or statement will be found to be involuntary.⁴⁶ Here, there is no evidence of police overreaching or improper questioning, other than the fact that they questioned so severely injured a man at all. However, the questions were relevant to finding out what had happened.

⁴¹ Schneckloth, 412 U.S. at 224.

⁴² Mincey, 437 U.S. at 398.

⁴³ 437 U.S. 385, 398 (1978),

⁴⁴ See, e.g., U.S. v. George, 987 F.2d 1428, 1430 (9th Cir. 1993); cf. Colorado v. Connelly, 479 U.S. 157, 164 (1986) (holding that mental condition alone does not by itself determine the issue of voluntariness).

⁴⁵ U.S. v. Mayhew, 380 F. Supp. 2d 915 (S.D. Ohio 2005) (quoting Chavez v. Martinez, 538 U.S. 760 (2003) (Kennedy, J., concurring in part and dissenting in part)).

⁴⁶ Abela v. Martin, 380 F.3d 915 (6th Cir. 2004).

Dillon cited: Beecher v. Alabama, in which the Supreme Court held inadmissible statements made while the defendant was in pain in the hospital, under the influence of drugs, and at the mercy of prison hospital authorities.⁴⁷ He suggests that this case stands for the proposition that being in significant pain and in custody, even without overreaching, are sufficient to prove the involuntariness of a statement. But in that case, the hospital stay was part of a continuous "stream of events,"⁴⁸ that began five days before with the defendant's being shot in the leg by officers as he fled and then being "ordered at gunpoint to speak his guilt or be killed." The police engaged in especially egregious conduct toward the defendant that can only be viewed as coercive. That case, therefore, is readily distinguishable from this one, as there is no conduct even remotely resembling that of the officers in Beecher.

Even if the statements were voluntary, that does not necessarily mean the "statements were properly admitted because Dillon also claims his waiver of his Miranda rights was ineffective."

To determine if he was able to properly waive his Miranda rights, however, is a different matter. "That inquiry has two parts, both of which must be shown by the totality of the circumstances."⁴⁹ First, the waiver "must have been voluntary in the sense that it was the product of a free and deliberate choice rather than intimidation, coercion, or deception." *Id.* "Second, the waiver must have been made with a full awareness of both the nature of the right being abandoned and the consequences of the decision to abandon it."

Further:

Taken together, these inquiries require something more than merely ascertaining whether Dillon was willing to answer simple questions put to him by the officer without coercion. His statements may be voluntary under the first inquiry while the apparent waiver of his rights in making such statements can be unknowing and unintelligent under the second inquiry. That is the case here.

In this case, the court agreed, it was not prepared to say that "this record that Dillon had a full awareness of his right to remain silent or what consequences would follow if he answered the trooper's questions." Although he could give his name, follow commands and nod in respond to questions, "he effect of waiving the right to remain silent is a far more complex concept, as is the waiver of right to counsel." He was undoubtedly severely injured and suffering, and apparently aware of his surroundings and able to answer simple questions.

The Commonwealth's burden in showing a proper waiver is a heavy one, though it "is not more than the burden to establish waiver by a preponderance of the evidence."⁵⁰ While Dillon was not required to "understand every possible consequence of a waiver of the Fifth Amendment privilege," and was entitled only to be informed that he was not required to respond to police questions, could have counsel present, and could stop responding at any time, there is nothing that indicates Dillon was capable of integrating these three points in a manner that would allow him to realize that his answers would be used against him in court.⁵¹

He was able to answer at least one question that was verifiable, that the van was not his, but "proof that his mind at that point was capable of correctly answering that simple inquiry is not proof that he was also capable of understanding what the effects of his waiver were. He was asked only if he understood the Miranda warnings, and he nodded yes. The nod, however, does not satisfy the Commonwealth's "heavy burden" of showing that his waiver was knowing and intelligent. The decision to waive the right to remain silent and to have counsel has legal consequences that require a greater level of "intelligent" decision-making than simply nodding yes or no to simple questions while suffering the effects of a massive head

⁴⁷ 389 U.S. 25 (1967) (per curiam),

⁴⁸ Clewis v. Texas, 386 U.S. 707, 709 (1967).

⁴⁹ Moran v. Burbine, 475 U.S. 412 (1986).

⁵⁰ Berghuis v. Thompkins, 560 U.S. 370 (2010).

⁵¹ Colorado v. Spring, 479 U.S. 564 (1987),

trauma. There must be evidence that there is a "full awareness" of the right to remain silent and the "consequences" of waiving it. The facts do not establish this."

The Court agreed that "it may be that he thought he was going to die anyway, and wanted to confess. Or it may be that he had just enough comprehension that he could grasp simple concepts, but not more complex ones." The Court agreed it was error to admit the responses.

However, that did not mean that the responses does not "automatically require reversal of his conviction."⁵² The Court noted that he testified consistently with the answers he gave and in fact, he even agreed he'd killed her, but he did not admit to murder. As such, the court agreed that admitting the statements did not require reversal and were harmless.

The Court dealt with several other issues as well. As part of the prosecution's case, the testimony of a cellmate of Dillon's was admitted. During the trial, however, it was learned that in fact, the cellmate, Saulsberry was repeating what he'd heard from another inmate, who was apparently in conversation with Dillon about the provenance of the gun used. (In effect, he was repeating statements made by the other inmate, who was apparently repeating what Dillon had told him.) The Court agreed that was "impermissible hearsay testimony." He continued in this even after admonished "being evasive about who said what and saying that both men had been talking about the killing while also claiming that Dillon never said any of the incriminating statements." And again, even if error, it did not necessarily require reversal. Although an admonition is normally presumed to cure error, the Court noted that "presumption does not apply "when the question was asked without a factual basis and was 'inflammatory' or 'highly prejudicial.'" The Court agreed that the inmate was a "'a difficult and somewhat confusing witness,' which is an understatement." When the prosecutor attempted to impeach their own witness, the prosecutor allegedly "became a witness." However, that was not properly objected to, although "prosecutor's chosen method of impeachment was clearly and plainly error."⁵³

Indeed, this has been the law in Kentucky for more than 125 years.⁵⁴ The practice violates the Rules of Professional Conduct.⁵⁵⁵⁶ It "also violates KRE 603 and KRE 802," in that the lawyer is making factual assertions without having been sworn and is employing hearsay. And where, as here, the lawyer making the statements is the prosecutor, the error "goes to the heart of fundamental fairness and due process of law." Thus, the error is a constitutional one, and not just an evidentiary one."

In *Holt*, there was an almost identical situation, the testimony was from a jailhouse informant called by the prosecutor in the case-in-chief, and upon receiving unexpected answers, the prosecutor tried to impeach the witness by referring repeatedly to a prior conversation with the witness. Although it is proper that the "he testimony was from a jailhouse informant called by the prosecutor in the case-in-chief, and upon receiving unexpected answers, the prosecutor tried to impeach the witness by referring repeatedly to a prior conversation with the witness. However, in this case, the "prosecutor specifically (and repeatedly) referenced 'a conversation between himself and Saulsberry as the source of the statements, with the prosecutor repeating the statements in most instances." Again, however, the Court agreed that the error was not so substantive as to require reversal.

The Court addressed several other testimony issues and affirmed Dillon's conviction.

⁵² *Chapman v. California*, 386 U.S. 18 (1967).

⁵³ See *Holt v. Com.*, 219 S.W.3d 731 (Ky. 2007) (condemning the practice).

⁵⁴ See *Com. v. Cook*, 86 Ky. 663, 7 S.W. 155 (1888) ("The conduct of the commonwealth's attorney was very reprehensible, and he should have been punished by a heavy fine. It is the duty of a commonwealth's attorney to represent the interest of the commonwealth fully and fairly, with his utmost ability; but it is not his duty to make a statement of fact, the credence of which is always more or less strengthened by his official position, outside of the record or evidence, which may tend in the least degree to prejudice the rights of the accused.").

⁵⁵ See SCR 3.130-3.4(e) ("A lawyer shall not ... in trial ... assert personal knowledge of facts in issue except when testifying as a witness"); SCR 3.130-3.7 (generally prohibiting a lawyer from acting as an advocate at trial where the lawyer is likely to be a necessary witness);

⁵⁶ See also *Holt*, 219 S.W.3d at 732-33 (construing such conduct as violating these rules).

Estes v. Com., 2015 WL 9264916 Ky. App. 2015

FACTS: On May 19, 2008, KSP received a tip that Estes was selling Percocet from a Lexington tavern. Det. Morris and Trooper Harris did surveillance in the parking lot and saw a white male (identified as Estes by his OL photo) sitting in a black Lexus connected to Estes. Another male got into the car for a few minutes and then left. In a few minutes, Estes got out and got into the passenger seat of another car and after a few minutes, returned to his own car. Another man then approached him and got into the Lexus. “During each separate encounter, the officers noted that Estes and the person he was with at the time looked down, leaned toward the middle console, and made several small movements inside the car.” Finally, Estes went into the tavern and the two troopers followed. They saw him playing poker and observed that he was lethargic, nodding off and had bloodshot eyes. He left an hour later. Det. Morris approached and tried to initiate a drug buy, but Estes denied having any pills to sell. Estes left the parking lot.

Trooper Harris followed, asking Lexington PD for help in making a stop, but it was unclear what information was shared. They pulled him over and gave him FSTs, which he passed. After that, “Detective Morris and Trooper Harris approached Estes as he sat on the curb next to his car in a supermarket parking lot. They informed Estes of what they had witnessed at the bar. While speaking with Detective Morris, Estes acknowledged that he had completed two transactions in the parking lot. Estes also consented to a search of his vehicle, which revealed no evidence. However, the officers found a plastic baggie in Estes’s pocket containing fifteen blue pills, later identified as oxycodone, and \$450 in cash.”

Estes agreed to work as an informant, but as a result of “additional run-ins with the law,” they were unable to use him. On October 22, 2010, they took out a complaint and obtained an indictment for Trafficking 1st. He moved for suppression, arguing there was insufficient reasonable suspicion to make the stop and that he was not given Miranda prior to question. That was denied. He took a conditional guilty plea and appealed.

ISSUE: May a non-custodial detention ripen into a custodial detention?

HOLDING: Yes

DISCUSSION: First, the Court addressed the stop, with Estes arguing that the Lexington officer who pulled him over lacked “the requisite “specific and articulate facts” required under Terry v. Ohio, for a legal traffic stop.”⁵⁷ The Court noted that the troopers, however, did have reasonable suspicion that he was driving while impaired, and “based on the collective knowledge of the officers (both the detectives and the Lexington police), there was sufficient cause to stop Estes.”⁵⁸ Moreover, the responding officers were entitled to presume the accuracy of the information furnished to them by the detectives even though they had no direct first-hand knowledge of those events themselves.⁵⁹ As such, the traffic stop was valid.

With respect to the statements, the Court looked at whether the interrogation was custodial, as required in Miranda v. Arizona.⁶⁰ Specifically, the Court held that:

We hold that when an individual is taken into custody or otherwise deprived of his freedom by the authorities in any significant way and is subjected to questioning, the privilege against self-incrimination is jeopardized. Procedural safeguards must be employed to protect the privilege and unless other fully effective means are adopted to notify the person of his right of silence and to assure that the exercise of the right will be scrupulously honored, the following measures are required. He must be warned prior to any questioning that he has the right to remain silent, that anything he says can be used against him in a court of law, that he has the right to the presence

⁵⁷ 392 U.S. 1, 88 S.Ct. 1868 (1968).

⁵⁸ See U.S. v. Hensley, 469 U.S. 221 (1985); U.S. v. Lyons, 687 F.3d 754 (6th Cir. 2012).

⁵⁹ See U.S. v. Lyons, 687 F.3d 754 (6th Cir. 2012).

⁶⁰ 384 U.S. 436 (1966). See also Wells v. Com., 892 S.W.2d 299 (Ky. 1995).

of an attorney, and that if he cannot afford an attorney one will be appointed for him prior to any questioning if he so desires. Opportunity to exercise these rights must be afforded to him throughout the interrogation. After such warnings have been given, and such opportunity afforded him, the individual may knowingly and intelligently waive these rights and agree to answer questions or make a statement. But unless and until such warnings and waiver are demonstrated by the prosecution at trial, no evidence obtained as a result of interrogation can be used against him.

It was undisputed that he was not given any Miranda warnings, hence, the Court had to determine if his detention (immediately following the FSTs) was objectively custodial.⁶¹ The Court agreed that:

Custody does not occur until police, by some form of physical force or show of authority, have restrained the liberty of an individual...The United States Supreme Court has identified factors that suggest 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; the 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. Other factors which have been used to determine custody for Miranda purposes include: (1) the purpose of the questioning; (2) whether the place of the questioning was hostile or coercive; (3) the length of the questioning; and (4) other indicia of custody such as whether the suspect was informed at the time that the questioning was voluntary or that the suspect was free to leave or to request the officers to do so, whether the suspect possessed unrestrained freedom of movement during questioning, and whether the suspect initiated contact with the police or voluntarily admitted the officers into the residence and acquiesced to their requests to answer some questions.⁶²

Interrogation is defined as “any words or actions on the part of police (other than those normally attendant to arrest and custody) that the police should know are reasonably likely to elicit an incriminating response from the suspect ... focus[ing] primarily upon the perceptions of the suspect, rather than the intent of the police.”⁶³ The court agreed that ordinary, traffic stops did not invoke Miranda but they can ripen “into a custodial interrogation if it exceeds the scope of the initial stop and/or if the defendant is taken into “custody” in the nature of a formal arrest.”⁶⁴

The Court, however, found it was unable to address the Miranda issue because the trial court had not made written findings, and remanded the case for further proceedings on that issue.

Blake v. Com., 2015 WL 9413362 (Ky. App. 2015)

FACTS: On September 26, 2013, Blake visited his daughter-in-law, Amy. She saw him take 2 Lortab and 2 Xanax between 8 and 9 a.m. and then another two of each between noon and 12:30. She thought this unusual. The pair went to Blake’s house to get his truck, which he then drove back to her house, with her following. She noted later he was driving “pretty good.” Back at Amy’s home, he called Sheriff McGehee (Muhlenberg County) to ask if there was a warrant out of him or if they were investigating him for a case involving a juvenile. The Sheriff did not know, but promised to look into it. He learned that KSP was in fact, working such a case. The Sheriff called Blake who told him “that things were being said about him that were untrue, and that he had tried to have sexual relations with a juvenile, but was unable to perform.” Concerned, Sheriff McGehee notified the Cabinet for Health and Family Services.”

While conversing with Blake, Sheriff McGehee did not ask him any questions or inform him of his Miranda rights. Blake freely offered all of the information relayed to Sheriff McGehee, and

⁶¹ Stansbury v. California, 511 U.S. 318, 323, 114 S.Ct. 1526 (1994). Wilson v. Com., 199 S.W. 175 (Ky. 2006).

⁶² Smith v. Com., 312 S.W.3d 353 (Ky. 2010).

⁶³ Wells v. Com., 892 S.W.2d 299 (Ky. 1995); Rhode Island v. Innis, 446 U.S. 291 (1980).

⁶⁴ Butler v. Com., 367 S.W.3d 609 (Ky. App. 2012).

volunteered to be interviewed about the allegations. Sheriff McGehee testified that Blake never gave any indication that he was intoxicated or impaired.

After speaking to the Sheriff, Blake got ready to leave. Amy noted that he was “talking very slowly, slurring his words, and stumbling.” She agreed to take him to the interview, but he “slipped out.” He drove himself to Greenville to meet Det. Smith (KSP) and a CHFS worker. Blake answered the initial questions with ease and correctly. He acknowledged Miranda rights and “asked several meaningful questions concerning them.” Ultimately, he waived the rights. Det. Smith later stated that he saw no signs of impairment and he had “specialized experience and training to determine if a person is impaired by drugs and/or alcohol.” He later stated that depressants should have been readily apparent to him.

Later, Blake’s doctor acknowledged he was prescribed both medications and the doctor claimed the amounts Blake allegedly took would have “clouded his memory and made him unable to comprehend the questions posed.”

Blake was charged and requested suppression. The Court denied the motion, finding the evidence did not indicate he “was intoxicated or impaired to such a degree that his confession was not knowingly, willingly, and voluntarily given.” He took a conditional plea to sexual offenses and appealed.

ISSUE: May an intoxicated subject give a valid statement?

HOLDING: Yes

DISCUSSION: Blake argued that he “was so heavily intoxicated he was unable to understand the meaning of his statements or comprehend the questions asked, thus rendering his statements involuntarily made.” The Court noted that “Generally speaking, no constitutional provision protects a drunken defendant from confessing to his crimes.”⁶⁵ It is certainly the right of every citizen, even an intoxicated one, to admit his failings. And, the fact of intoxication does not inescapably render a person incapable of offering a true account of his actions or “disable him from comprehending the intent of his admissions[.]”⁶⁶ It is possible for an intoxicated person to know what he was saying when he said it.⁶⁷

However, “While intoxication does not deem a suspect’s statement to police inadmissible per se, the degree of intoxication is relevant to the voluntariness calculus under the police coercion and reliability rubrics.” Certainly, “intoxication renders a person more susceptible to subtle and overt coercive police tactics. Accordingly, “intoxication may become relevant because a ‘lesser quantum’ of police coercion is needed to overcome the will of an intoxicated defendant.” A confession achieved through coercive police conduct is reckoned involuntary and subject to suppression.⁶⁸ However, in this case, there was no evidence of police coercion, with Blake initiating the contact with the Sheriff and voluntarily undergoing an interview. “Absent coercive police conduct, no confession may be suppressed for want of constitutional adherence.”⁶⁹

The Court agreed that “A confession may also “be suppressed when the defendant was ‘intoxicated to the degree of mania’ or was hallucinating, functionally insane, or otherwise ‘unable to understand the meaning of his statements.’”⁷⁰ “The ‘basic question’ when reviewing the voluntariness of a confession obtained from an intoxicated defendant ‘is whether the confessor was in sufficient possession of his faculties to give a reliable statement.’”⁷¹

The Court noted that the recording indicated that “Blake consistently conversed clearly, calmly, and coherently. He was cognizant enough to ask intelligent questions concerning his Miranda rights and

⁶⁵ Smith v. Com., 410 S.W.3d 160 (Ky. 2013).

⁶⁶ . (quoting Peters v. Commonwealth, 403 S.W.2d 686 (Ky. 1966)).

⁶⁷ Britt v. Commonwealth, 512 S.W.2d 496 (Ky. 1974).

⁶⁸ Jones v. Commonwealth, 560 S.W.2d 810, (Ky. 1977).

⁶⁹ Colorado v. Connelly, 479 U.S. 157 (1986).

⁷⁰ Smith, 410 S.W.3d at 164 (quoting Halvorsen v. Commonwealth, 730 S.W.2d 921 (Ky. 1986)).

⁷¹ Soto v. Commonwealth, 139 S.W.3d 827 (Ky. 2004) (quoting Britt, 512 S.W.2d at 501).”

described with clarity the factual circumstances necessitating the interview. He was articulate and not once did he slur his speech. Blake exhibited no manic behavior during the interview. There is no evidence he was hallucinating.” In fact, he drove home afterward, and clearly the detective did not believe that he was under the influence to the degree that he should not be driving.

The Court affirmed the plea.

INTERROGATION – JUVENILE

Beamon v. Com., 2015 WL 9413389 (Ky. App. 2015)

FACTS: In 2008, at age 17, Beamon shot and killed Webster, took Webster’s car and removed the firearm. He immediately turned himself in and waived Miranda. He confessed to the crime. He was indicted for Murder, Robbery 1st and Tampering. Ultimately, he pled guilty.

Several years later, he filed a motion to set aside the case, arguing that his confession should have been suppressed. After several procedural issues arose, he appealed an adverse ruling.

ISSUE: Does a violation of a juvenile’s parental notification rights automatically invalidate a statement?

HOLDING: No

DISCUSISON: Beamon argued that once the police realized he was a juvenile, the “the proceedings should have been stopped and his guardian notified in accordance with KRS 610.200(1).” The Court looked to the statute, which read:

When a peace officer has taken or received a child into custody on a charge of committing an offense, the officer shall immediately inform the child of his constitutional rights and afford him the protections required thereunder, notify the parent, or if the child is committed, the Department of Juvenile Justice or the cabinet, as appropriate, and if the parent is not available, then a relative, guardian, or person exercising custodial control or supervision of the child, that the child has been taken into custody, give an account of specific charges against the child, including the specific statute alleged to have been violated, and the reasons for taking the child into custody.

The Court however, agreed that a “violation of this statutory notification requirement does not automatically render any statement made by the child inadmissible, if it can be otherwise shown that the statement was given voluntarily.⁷² In evaluating the voluntariness of a minor’s confession, “the greatest care must be taken to assure that the admission was voluntary, in the sense not only that it was not coerced or suggested, but also that it was not a product of ignorance of rights or of adolescent fantasy, fright or despair.”

The court agreed that Beamon should have been accorded an evidentiary hearing, as the issues could not be resolved with the record.

TRIAL PROCEDURE / EVIDENCE - RECORDS

Holland v. Com., 2015 WL 6687404 KY App. 2015

FACTS: Holland learned that his credit union had mistakenly deposited \$64,000 in his account, and he promptly withdrew \$9,000 of it. The credit union vice president attempted to contact Holland, to no avail. He discussed the matter with Officer Stevenson (Paducah PD) who went to Holland’s home to

⁷² Murphy v. Com., 50 S.W.3d 173 (Ky. 2001).

investigate. Holland told the officer the money was his and that it was not unusual for him to have large amounts of money in his account.

Holland continued to insist to the Credit Union that it was his money but agreed to try to pay it back. When he did not do so, however, he was charged with theft of property mislaid. He was convicted at trial and appealed.

ISSUE: Must emails be created in the course of doing business to be admissible?

HOLDING: Yes

DISCUSSION: Holland argued he should have been allowed to introduce evidence, in the form of emails between the officer, the credit union, and himself, that he believed the money was his as the result of an inheritance. He had tried to get them admitted under the business records exception to the hearsay rule, KRE 803(6). However, the Court agreed that they were not business records in the sense that the “were not made in the regular course of business.” The Court agreed they were properly excluded and upheld his conviction.

TRIAL PROCEDURE / EVIDENCE – SPOUSAL PRIVILEGE

Marcum v. Com., 2015 WL 6605546 (Ky. 2015)

FACTS: Marcum and Singleton were accused of “crimes surrounding the death and dismemberment of [Singleton’s] wife, Angela.” Marcum was indicted for complicity in the crimes. Singleton plead guilty and Marcum was convicted. During Marcum’s trial, two items were introduced against her. The first was a written statement by Singleton from his plea colloquy in which he admitted dismembering and disposing of the body, but claimed that Marcum committed the murder and a note that was written by Marcum after she visited Singleton in jail. (The note was found by Marcum’s husband and turned over.) She appealed.

ISSUE: Is a note possibly left for a spouse a privileged spousal communication?

HOLDING: No

DISCUSSION: Marcum first argued that the Confrontation Clause was violated when Singleton’s plea offer was introduced against her. “She alleges that the statement was obviously inculpatory and, because Jason was available to testify but not called, she had no opportunity to cross-examine her accuser.”

However, the Court noted, Marcum did not object to entering the proffer into evidence and as such, the Court ruled that it was an “adoptive admission.” In fact, her own attorney insisted that all of his statements should be read into the record, and that the defense chose not to call Singleton to testify, considering him a “wildcard.” In addition, defense counsel opened the door to it during his cross-examination of the detective.

Marcum also argued that introducing the note was improper and that it was a confidential communication between her and her husband. However, her husband indicated that “he did not think Marcum was trying to communicate anything to him” with the note and that he turned it over to the police. On the contrary, the Court agreed, it was not intended for the husband at all. As such, introducing it did not violate KRE 504(b) – the spousal privilege rule. The Court agreed that it clearly was not intended as a confidential communication between Marcum and her husband.

The Court agreed both items were properly admitted and upheld her conviction.

TRIAL PROCEDURE / EVIDENCE – SUPPRESSION HEARING TESTIMONY

Com. v. Taylor, 2015 WL 9243640 Ky. 2015

FACTS: In May, 2010, Joe Taylor was living with his aunt, Diane (Taylor) in Fulton. On May 14, officers went to the residence to arrest Taylor. The officers spotted Taylor sitting on the porch, smoking marijuana. Diane was on parole and her parole officer was with the arresting officers. The parole officer spotted alcohol inside the home, which was a violation of Diane's parole. Diane gave consent for a search of the property, including what turned out to be Taylor's bedroom. There, they found cocaine, cash, a handgun, along with Joe's wallet and ID. Joe was charged with Trafficking, Possession of the Firearm (as he was a convicted felon) and related offenses. He moved for suppression, arguing that Diane could not give consent of the search of his bedroom, as it was either under his exclusive control, or in the alternative, the issue of control was ambiguous enough that "police should have inquired further before searching it." Officers testified that Diane gave consent and she said "Joe did not pay rent to stay in the home."

The trial court denied the suppression motion, finding that the officers had the authority to search the area in question, and that he "had no expectation of privacy because the door to his bedroom was not locked and there was nothing to indicate that the room was exclusively his." He was tried first on the handgun charge and convicted, with the trafficking charge to be held later.

Taylor filed a second suppression motion, in which he testified that the "door had a lock to which he had the only key." He agreed it might not have been locked that day but that the bedroom was "his space." He did not know the search was occurring or he would have objected. Again the trial court denied the motion. At trial for the cocaine, he argued that the cocaine belonged to Diane and that she'd hidden it in his room. (An officer also testified that Joe Taylor had told him that the room was his and no one else was supposed to go in there.) Taylor was convicted on that charge as well. Upon appeal, the two cases were consolidated.

The Court of Appeals held that the suppression motions were properly denied. The Court upheld the handgun conviction but reversed the trafficking case, finding that the use of his testimony at the suppression hearing, "violated his right not to incriminate himself under Shull v. Com.⁷³" The Commonwealth appealed.

ISSUE: Must a subject raise a challenge to an incriminating statement at trial?

HOLDING: Yes

DISCUSSION: The Court discussed the "dilemma faced by defendants who ha[ve] to either choose to make admissions at a suppression hearing to establish their standing to challenge seized evidence, or to maintain their silence and there preserve their rights not to incriminate themselves at trial."⁷⁴ However, the Commonwealth argued, his lack of objection to the use of the testimony allowed it to be used.⁷⁵ The Court agreed that the court specifically incorporated an objection requirement, and that failure to object serves as a waiver. The "mechanism essentially allows a defendant to make a fourth Amendment claim which might require inculpatory testimony and then to assert the Fifth Amendment privilege against self-incrimination *after the fact.*" However, "the protections of the privilege with respect to incriminating statements are not automatic."⁷⁶ In other words, to claim it, a defendant must assert it.

The Court reversed the vacating of the trafficking conviction.

⁷³ 475 S.W.2d 469 (Ky. 1971).

⁷⁴ Simmons v. U.S., 390 U.S. 377 (1968).

⁷⁵ As noted, the court said "this means that the objection requirement is part of the substantive law," rather than the procedural.

⁷⁶ Bartley v. Com., 445 S.W.3d (Ky. 2014).

TRIAL PROCEDURE / EVIDENCE – TESTIMONY

Gay v. Com., 2015 WL 5781272 (Ky. App. 2015)

FACTS: On December 20, 2012, Gay and Jackson robbed Kloiber at his Lexington home. Gay forced his way inside with a gun, followed by Jackson. They stole several items and left. Kloiber was able to identify Gay, who was wearing an ankle monitor. GPS proved he was at the residence at the time. He confessed when he was taken into custody, but claimed he was simply a lookout and didn't have a gun.

Gay was charged with Robbery 1st. During the trial, evidence was presented as to the ankle monitor. The jury asked to review Gay's confession, as well, and they were allowed to do so, using the prosecutor's laptop.

Gay was convicted and appealed.

ISSUE: Is it proper to introduce evidence from an ankle monitor to prove someone's location?

HOLDING: Yes

DISCUSSION: Gay argued it was improper to introduce the evidence that he was wearing an ankle monitor, as that suggested prior bad acts under KRE 404(b). He argued it served no purpose since he admitted he was there. However, the Court agreed, it was "within the realm of possibility that Gay would recant his confession or otherwise challenge its admission," and it was therefore quite relevant to prove where he was at the time of the crime. Placing him there was a proper purpose for using the GPS locator.

Gay also argued it was improper to let the jury use the prosecutor's laptop. The Court agreed it was proper to allow the jury to watch the confession in the jury room and the jury was admonished to view on the video in question. The Court found no error in allowing it.

Gay's conviction was affirmed.

Mayes v. Com., 2015 WL 6779033 (Ky. App. 2015)

FACTS: Mayes was indicted in 2012 for the alleged theft of a vehicle that was on a car-hauler. The vehicle was unlocked and the keys were in the passenger compartment (the usual practice). GPS in the vehicle brought police to the vehicle, in Lexington. Mayes was sitting nearby when it was found. Officer Newman later testified that "Mayes was sitting alone in a chair with a set of keys in his lap, one of which was the key to the nearby BMW." He tried to pocket the keys when the officer approached. (Apparently he handed over the keys, however.) No further questioning was done at the scene, nor were photos taken. Officer Walker testified that Mayes admitted he wanted to steal it and had the keys, but decided against it. He also had asked for the other keys on the keyring, although at one point, he claimed the keys were not his. Mayes testified that he'd noticed the keys on the ground and that there were witnesses to that effect. He stated that when his attention was drawn to the keys by the officers, he'd told them the keys were not his. No viable fingerprints were found in the car.

Upon cross examination, the prosecutor asked Mayes if the officers were lying, and when that drew an objection, rephrased it somewhat. However, Mayes answered the officers were "not being honest."

Mayes was convicted only for receiving the keys (as stolen property), but acquitted of the same for the actual car. He appealed.

ISSUE: Is it proper to force a witness to accuse another witness of lying?

HOLDING: No

DISCUSSION: Mayes argued that it was improper to ask him to characterize the officers as lying. The Court agreed that violated the precepts of Moss v. Com.⁷⁷ The Court noted that the “jury was only presented with testimony portraying two differing sides of a story, and in such instances, the issue of witness credibility becomes a crucial factor.” “Witness credibility was a determining factor in this case, and by requiring Mayes to characterize the officers’ testimony as untruthful, the trial court committed error that affected Mayes’ substantial rights.”

The court reversed his conviction.

Com. v. Rieder, 474 S.W.3d 143 (Ky. 2015)

FACTS: On April 17, 2011, about 1 a.m., Rieder was leaving a Lexington bar when approached by Muzic. Muzic asked Rieder for a ride home, but Rieder refused. Muzic followed him and jumped into the backseat. Rieder ordered him out, but Muzic refused, insisting he just needed a ride to a nearby gas station and Rieder reluctantly agreed. However, Muzic refused to get out at the gas station. Rieder got out, drew a weapon (he has a CCDW permit) and ordered Muzic out. “Muzic again refused and Rieder forcibly removed him.” Outside the car, the two men scuffled, shoving each other. Rieder fired one shot at Muzic and struck him in the head, killing him instantly. Rieder then drove off, but eventually called 911 to report the shooting.

Rieder was charged with Murder, but eventually convicted of Manslaughter 2d. Upon appeal, the Court of Appeals vacated his conviction and remanded for a new trial. The Commonwealth appealed.

ISSUE: Should an officer testify as to the validity of a self-defense claim?

HOLDING: No

DISCUSSION: At the trial, Sgt. Richardson (Lexington PD) testified about his interview with Rieder. Among other things, he testified that he charged Rieder because “there was no physical force being used against him, and I didn’t feel he had the right to use his gun at that instant.” Rieder argued on appeal that statement involved an improper invasion into the purview of the jury, as the officer was expressing his opinion on the validity of the self-defense claim. The Court agreed the statement was admitted in error, that the officer should not have made the statement, but noted that Rieder “made separate and distinct statements that the shooting was accidental.” His argument at trial was mixed, both that he was justified and that the shooting was accidental. Several eyewitnesses testified as to what they observed in the shooting, as well. Finally, the officer’s statement was in the context of responding to a question about why he’d charged Rieder with murder.

Finding the statement impermissible, however, the Court had to determine whether the error was harmless (and did not truly factor into the jury’s decision) or palpable, since Rieder did not object in a timely manner and allowed the trial court the opportunity to remediate the error immediately. The Court concluded that the error was not so heavily weighted that an unfair result was reached.

The Court reinstated Rieder’s conviction.

Garcia-Hernandez v. Com., 2015 WL 7821148 Ky. App. 2015

FACTS: On June 13, 2013, Lexington PD received a shots fired call at 918 Ward Drive. When they arrived, they discovered the location was duplex, with the other side being 920. No one answered at 918, despite the officers yelling through the open windows. They knocked on 920 and Garcia-Hernandez answered. He said he did not live at 918 and gave the landlord’s contact information. However, the Landlord said that Garcia-Hernandez paid the rent on 918. The landlord then gave consent to search the unit and officers found 19 pounds of marijuana and firearms.

⁷⁷ 949 S.W.2d 579 (Ky. 1997).

Garcia-Hernandez was indicted. He contended he did not live at 918 but only delivered the rent on occasion as a favor to those tenants. To support that he did, the Commonwealth was permitted to introduce testimony from the landlord that Garcia-Hernandez “told him earlier that spring that intruders tried to break in 918 Ward Drive on or about May 13th and [he] shot at them.” Shell casings were also found outside 918 that matched one of the guns found inside.

Garcia-Hernandez was convicted and appealed.

ISSUE: Is evidence that a subject lives at a suspect location relevant?

HOLDING: Yes (if necessary to the case)

DISCUSSION: Garcia-Hernandez argued that the testimony was irrelevant and improperly admitted. The Court noted that the evidence tended “to indicate that [Garcia-Hernandez] actually resided at that unit and had a vested interest in preventing the contents of that unit from being stolen.” The Court agreed that was relevant to the issue at hand. The Court agreed he was free to argue that the bullet casing found outside (apparently connected to the earlier shooting) was not his, and further, noted that it was “not evidence of a crime or prior bad act as such defensive conduct is lawful.”⁷⁸

The Court affirmed his conviction.

TRIAL PROCEDURE / EVIDENCE – CONFRONTATION CLAUSE

Harris v. Com., 2015 WL 7821026 (Ky. App. 2015)

FACTS: On October 31, 2012, after having received information from a CI about Harris, Paducah PD set up a buy. Purvis, the CI, was equipped to record and given buy money and made several phone calls to arrange a buy of hydrocodone pills. Harris arrived at Purvis’s home, where the sale was to take place, and he came out and got into the car to make the buy. Harris was charged with trafficking. At trial, Harris told a completely different story to account for what had occurred that day (that she was returning pills Purvis had left in her car and getting back money he owed her). In the recording, she’d asked if police were around, which she explained was because she knew Purvis was an informant and “believed that he might be trying to set her up.” Her story, however, was inconsistent and she was convicted. She then appealed.

ISSUE: Is the identity of a CI protected?

HOLDING: Yes (but see discussion)

DISCUSSION: At trial, Harris had wanted to “introduce evidence of Purvis acting as a confidential informant in another case in order to show witness bias.” Finding that matter to be unrelated, the Court also “expressed concern about identifying a confidential informant in a separate, unrelated case in a separate (federal) venue involving Mexican gangs and a claimed homicide.”

The Court noted that:

The Confrontation Clause of the Sixth Amendment guarantees the right of an accused in a criminal prosecution to be confronted with the witnesses against him.⁷⁹ “An essential aspect of the Sixth Amendment Confrontation Clause is the right to cross-examine witnesses.”⁸⁰ A

⁷⁸ See KRS1 503.070 .

⁷⁹ *Delaware v. Van Arsdall*, 475 U.S. 673, 106 S.Ct. 1431, 89 L.Ed.2d 674 (1986).

⁸⁰ *Davenport v. Com.*, 177 S.W. 3d 763 (Ky. 2005) (citing *Douglas v. Alabama*, 380 U.S.415 (1965)).

defendant's right to expose a witnesses' motivation for testifying is proper and constitutionally protected.⁸¹

However, the Court continued,

However, it is well-established that the right to cross-examine is not without its limits.⁸² The trial court "retain[s] wide latitude insofar as the Confrontation Clause is concerned to impose reasonable limits on such cross-examination based on concerns about, among other things, harassment, prejudice, confusion of the issues, the witness' safety, or interrogation that is repetitive or only marginally relevant."⁸³

Thus, a limitation placed on the "opportunity to cross-examine an adverse witness does not fit within the limited category of constitutional errors that are deemed prejudicial in every case." In order to prove prejudice, a defendant must show "that he was prohibited from engaging in otherwise appropriate cross-examination... [and that a] reasonable jury might have received a significantly different impression of [the witness'] credibility had [defense] counsel been permitted to pursue his proposed line of cross-examination."⁸⁴

In other words, the trial court has the "power and discretion to set appropriate boundaries."⁸⁵ In this case, the Court agreed it was proper to limit the testimony and in fact, Purvis was questioned extensively about information that might call his credibility into question. Further, "The jury was clearly aware that Purvis was assisting law enforcement and that he received benefits as a result."

The Court affirmed Harris's conviction.

TRIAL PROCEDURE / EVIDENCE – EVIDENCE

Majors v. Com., 2015 WL 5897508 (Ky. App. 2015)

FACTS: On July 19, 2012, Majors, along with Love, Gruts and Trice, entered an Elizabethtown Kohl's store. Their behavior quickly drew the attention of Stucker, the store's loss prevention supervisor. (Specifically, Love lined "a shopping card with clear plastic garbage bag and fill[ed] it with shirts while Grubbs stuffed other merchandise into his pants.") Majors removed a few of the shirts from the cart and walked toward the fitting rooms, while Love and Grubbs pushed the car toward the shoe department. Grubbs removed the bag and they headed toward the door. Kohl's security staff approached and the two men fled through Kohl's to another exit. Stucker saw Majors and Trice walking toward the opposite exit, with another security officer behind. They got into a black car and left.

Stucker followed them to a nearby restaurant and found stolen Kohl's merchandise in the restroom there. Trice confessed that she'd taken some, but not all, of the merchandise in the bathroom. She said it was Majors who took the majority of the items – which totaled over \$600 (retail). More merchandise, from other stores, was found in the vehicle, as well as a handbag lined with aluminum foil. Additional surveillance footage showed the foursome walking in pairs at another local store.

Majors was charged with felony Theft and PFO. At trial, the Commonwealth introduced evidence under KRE 404(b), to prove her motive and plan to steal. The video footage of the earlier theft was introduced to show the similar methods used, and that the parties knew each and were engaging in a "common pattern of conduct." Photos of other items (not from Kohl's apparently) found in the car were introduced, as they too were suspected of being stolen and finally, Majors' foil lined bag was introduced, over Majors' objection that she'd never brought the bag into to the Kohl's. Majors was convicted and appealed.

⁸¹ Davis v. Alaska, 415 U.S. 308 (1974).

⁸² Davenport, 177 S.W.3d at 767-68.

⁸³ Van Arsdall, 475 U.S. at 679, 106 S.Ct at 1435.

⁸⁴ Davenport, 177 S.W. 3d at 768.

⁸⁵ Id. (quoting Commonwealth v. Maddox, 955 S.W.2d 718 (Ky. 1977)).

ISSUE: Is evidence from another case admissible to show a conspiracy?

HOLDING: Yes

DISCUSSION: The Court agreed it was proper to introduce evidence that indicated the four were working together in a joint effort to steal from Kohl's – and likely other places. Trice provided evidence that indicated she was working with Majors. As such, it was proper for a jury to find that “Majors intended or aided” the crimes committed by the others.

In addition, even though the valuation of the items connected to Majors was only documented by their retail value in the store, it did not take into consideration that the items might have fact have been marked down for some reason. The Court agreed that “such retail prices represent an expert’s opinion of an item’s value and a jury is free to accept them as correct.”⁸⁶

The Court agreed that the contested evidence was properly admitted and affirmed Majors’ conviction.

TRIAL PROCEDURE / EVIDENCE – EVIDENCE

Swint v. Com., 2015 WL 9243521 (Ky. 2015)

FACTS: On December 18, 2011, Jackson (aka Banks), along with three other men, was at a bar in Louisville. All were Somali immigrants. Ahmed (Mohamed) and Hadrawie (Mohamid) were from the same clan, and Ahmed and Qasin (Qasin Ahmed) were longtime friends. Jackson approached Ahmed and Quasin looking to buy Xanax for a friend, Swint. He left and then returned with Swint. The four men (without Jackson) left in a vehicle and stopped in a neighborhood to make the purchase. After completing it, they drove back towards the bar.

However, Swint purchased less than Qasin anticipated, which irritated him. Qasin demanded gas money from Swint and was refused. He did give Qasin one of the pills however. They stopped again but finally arrived back at the bar. As Swint got out, he shot and killed Qasin. He turned toward Ahmed and they struggled, but the car was able to drive away. Swint fired at the vehicle, and Hadrawie was hit in the arm.

Swint fled to his girlfriend Carter’s home; Jackson was there. Carter testified later that Swint had a firearm with him, and overheard him admit to shooting Qasin and shooting at the car. Swint moved to Morgan’s home, and she testified she overheard him talking about the need to dispose of a handgun. No weapon was found. Several tips (including one from Carter) led the police to Swint. He was apprehended, charged and convicted of Murder and related offenses.

ISSUE: Is a criminal deposition of a medical examiner admissible?

HOLDING: Yes

DISCUSSION: As part of the trial, Dr. Corey (the state ME) was called to testify by deposition about the autopsy of Qasin. She testified by deposition at a pretrial proceeding but not at trial. The Court agreed that it was proper to allow the admission of her testimony in lieu of live testimony at trial. The Court agreed that even though the defendant had not yet had the advantage of hearing the testimony of the other men in the car, he still could not show how live testimony would have changed matters.

Swint also argued it was improper to admit unauthenticated jail phone calls to a total of five different people. Det. Downs (Louisville Metro PD) had reviewed the calls and was able to identify some of the recipients. Some of the calls related to the shooting. The Court looked to “KRE 901(b)(5) and (b)(6) provide non-exclusive methods for authenticating telephone conversations. However, that is necessary in authenticating a phone call is that the proponent offer ‘sufficient authentication to make a prima facie case

⁸⁶ Irvin v. Com., 446 S.W.2d 570 (Ky. 1969).

that would allow the issue of identity to be decided by the jury."⁸⁷ The Court agreed that the process used by the detective was more than adequate and it was undisputed that Swint made the calls.

With respect to an interpretation by Det. Downs as to the content of a call that was not introduced, using only her notes, the Court agreed that since her "testimony was brief, consisted of several direct quotes she had transcribed in her notes from the recording, and was subjected to cross-examination by the defense," it could be admitted. Although the Court agreed it would have been better to actually introduce the recording itself, the error, if any, was harmless.

The Court upheld Swint's conviction.

Tackett v. Com., 2015 WL 5656301 (Ky. 2015)

FACTS: The Mayhorns own a business in Pikeville and live above the store. One night around midnight, Joanne Mayhorn heard noises from downstairs, looked out a window and "saw someone running toward the back of the building." She spotted another individual driving the store's front-end loader and heard cracking and popping from downstairs. She called the police but stayed in the apartment. She watched the thieves use the front-end loader to put the store's safe inside the Mayhorn's SUV. Hamilton, across the street, also witnessed the break in and called police.

Sgt. Gabbard arrived and saw two people fleeing on foot. He lost sight of them briefly, but then found one of the Tacketts, Julius, "lying face down in a deep ditch or creek not far from the Mayhorns' store. [He] appeared intoxicated and was described by officers as being 'disorderly and aggressive' towards them." The officer found metal snips in his pocket and he claimed to be fishing for crawdads, but had nothing else in his possession indicating that activity.

Sgt. Gabbard also found Jacob Tackett hiding nearby, he had a folding box cutter knife and also claimed to have been fishing. He was also intoxicated. Officers on scene heard a car alarm nearby, as well, and Trooper Petry saw a vehicle "start up and speed away." He pursued the van into Floyd County, lost it, but eventually found it abandoned at the end of a dirt road. That vehicle was registered to Shirley Tackett.

Both of the Tacketts were tried together. During the trial, it was discussed that a key fob was found near the scene of the break-in, but it had disappeared in the interim. Julius was convicted of burglary, theft and criminal mischief. He appealed.

ISSUE: Does the loss of a possibly exculpatory item require a verdict be overturned?

HOLDING: No

DISCUSSION: First Tackett argued that the failure to submit an item found during the original search of the property after the crime, a key fob, made it ultimately unavailable. (The fob was never accounted for, but may have been returned to the Mayhorns.) Neither side learned about the item until the morning of trial and Tackett had moved for a continuance. The Court denied the continuance but "agreed that a mistrial might be required if the missing key tag had exculpatory value." The detective testified that he "rejected the idea of testing the key tag for DNA because he determined that the gloves found at the scene would provide a better DNA test. He explained that his ability to have items tested for DNA was limited and he believed that testing the gloves would be more likely to provide a useful result." Although his written report indicated that the key tag had been sent to the state police lab for testing, the detective testified that his report was incorrect in that respect. He described the mistake as an administrative error. He was unable to determine what happened to the key tag. The Court agreed there was no bad faith, however.

The Court continued:

⁸⁷ Robert G. Lawson, *The Kentucky Evidence Law Handbook* § 7.51[1][d], at 512 (5th ed., 2013) (quoting *First State Bank of Denton v. Maryland Cas. Co.*, 918 F.2d 38, 41 (5th Cir. 1990)).

The loss of potentially exculpatory evidence in the hands of the police has possible due process implications. In McPherson v. Com., we identified three elements that must be proven to establish a due process violation with respect to missing evidence, which if preserved and subjected to testing, might have produced results that exonerated the defendant.⁸⁸ First, it must be shown that the state acted in bad faith in failing to preserve the evidence. Second, it must be shown that the evidence's exculpatory potential was apparent while it was still in the hands of the police, i.e., before it was lost. And third, it must be shown that the lost evidence was to some extent irreplaceable.⁸⁹

The Court noted that there was nothing to indicate it was exculpatory before it went missing, and it was not clear it was "even likely to contain identifiable DNA." The Court agreed it was proper not to dismiss the charges.

The Court affirmed the conviction.

Johnson v. Com., 2015 WL 9243644 (Ky. 2015)

FACTS: Johnson was charged in the shooting death of Raglin, in Lexington. Johnson and Shelby were quickly identified as suspects. Once in custody, both were tested for gunshot residue on their hands, and both came up positive. Johnson was indicted, but Shelby was not. Raglin was convicted and appealed.

ISSUE: Must a person be told he could refuse a GSR test?

HOLDING: No

DISCUSSION: In addition to a number of trial related issues, Johnson argued that the results of the gun residue tests should have been suppressed. Both of the investigators in the case testified that Johnson had come to the station voluntarily and that he consented to the GSR test (as well as a buccal swab). His consent was not documented in any way, however. He did acknowledge his consent in a recorded interview, however. (Further, he'd come in voluntarily and was not either handcuffed or under arrest at the time.)

The Court agreed that "the taking of physical evidence constitutes a search for the purposes of the Fourth Amendment."⁹⁰ Warrantless searches are considered per se unreasonable, absent circumstances satisfying one of the exceptions to the rule.⁹¹ Consent to search is one such exception.⁹² In order to establish a valid consent to search, the government must prove that based on the circumstances surrounding a defendant's consent, that the consent was voluntarily given—that is, not the product of either explicit or implicit coercion. The Commonwealth bears the burden of establishing by a preponderance of the evidence that consent was voluntarily given.⁹³

There was no requirement, however, that the officers inform him that he could refuse to submit to the test. Since he was not in custody, Miranda did not need to be given either. The Court agreed the test was properly given.

The conviction was reversed, however, for unrelated procedural errors.

⁸⁸ 360 S.W.3d 207 (Ky. 2012),

⁸⁹ Id. at 217 (citing Illinois v. Fisher, 540 U.S. 544 (2004) and California v. Trombetta, 467 U.S. 479 (1984)).

⁹⁰ Farmer v. Commonwealth, 6 S.W.3d 144 (Ky. App. 1999); see also Schmerber v. California, 384 U.S. 757 (1966).

⁹¹ Katz v. United States, 389 U.S. 347 (1967); Coolidge v. New Hampshire, 403 U.S. 443 (1971).

⁹² Schnecko v. Bustamonte, 412 U.S. 218 (1973).

⁹³ Cook v. Commonwealth, 826 S.W.2d 329 (Ky. 1992).

TRIAL PROCEDURE / EVIDENCE – RULE 7.24

Com. v. Feldhoff, Yopp (Christopher) and Yopp (Nicholas), 2015 WL 5897677 (Ky. App. 2015)

FACTS: Feldhoff and the Yopps were indicted for Receiving Stolen Property after police responded to a complaint that \$2K in jewelry went missing after the subjects cleaned the victim's carpet. Christopher Yopp, in charge, had retrieved the jewelry from the truck and returned it to the victim.

The Court ordered the discovery be produced within 30 days of arraignment. The Commonwealth "acknowledged it was "aware of a 911 recording," as well as photographs and an in car video, which it stated would "be provided upon receipt by the Commonwealth." On July 18, 2013, Christopher moved to compel discovery of "further exculpatory or discoverable evidence." The Commonwealth responded that there was no such evidence available and that the earlier claim that there might be was based on checked off boxes on the uniform citation. The officer then confirmed that no such evidence was in fact available. Christopher promptly asked the Commonwealth to state "whether any evidence or materials have been destroyed in this case" – which the Commonwealth denied, to the best of its knowledge.

Christopher then moved for a dismissal for prosecutorial misconduct, since "an investigator in the Public Defender's office was able to obtain a copy of the 911 recording from the Louisville Metro Police Department." The prosecutor, during the hearing, claimed that material on her computer had been deleted inadvertently, which, Christopher claimed called into question "potentially lost evidence."

The first prosecutor resigned and a new prosecutor took over. In opposition to the motion to dismiss, the 911 call was provided and an affidavit from the paralegal indicated she'd provided the information to the prosecutor but it had been deleted and that she got a second copy of it. The officer also submitted an affidavit indicated she would have told her about the 911 call and that no in-car video or photographs existed. The officer related other information she'd given to the new prosecutor about the case, including a report and an oral statement made to the officer by Christopher taking responsibility for the theft, even though he personally had not committed it, because he was the boss.

The Court dismissed the case, noting:

Throughout the course of this case, shifting explanations were being offered for the non-production of the requested evidence. First, it exists. Second, no such evidence existed. Third, if it existed, it was lost when the computer hard drive failed. [The original prosecutor] claimed she was informed by Officer Reccius that the evidence did not exist. Officer Reccius does not recall this conversation, but stated she would have told her such evidence existed if asked. Just as troubling is the fact that [the original prosecutor] knew these files were deleted in April, 2011, yet did nothing to bring this dilemma to the Court's attention until the September hearing. [The original prosecutor] revealed this information only after being confronted with the results of the independent investigation.

[The original prosecutor] is in violation of RCr 7.24. Furthermore, there is a possibility that evidence pertinent to this case has been lost. Taken together, this outrageous conduct calls for the extreme remedy of dismissal.

The Commonwealth appealed.

ISSUE: Is the prosecution required to disclose all oral incriminating statements?

HOLDING: Yes

DISCUSSION: The Court noted that despite the Court's oral order to the contrary, the Commonwealth, pursuant to RCr 7.26(1), "had until forty-eight hours prior to trial to turn over the 911 recording." As such, dismissal on that issue was improper.

Regarding Christopher's incriminating statement, it was required to be produced in discovery pursuant to RCr 7.24(1), which provides: "Upon written request by the defense, the attorney for the Commonwealth shall disclose the substance, including time, date, and place, of any oral incriminating statement known by the attorney for the Commonwealth to have been made by a defendant to any witness" The Commonwealth turned Christopher's incriminating statement over in early October 2013, which was approximately one month prior to trial. Thus, the [Defendants] cannot prove that they were severely prejudiced by the delay in turning over the statement, particularly considering there remained one month before trial. Consequently, because there was no severe prejudice, the circuit court had no authority to dismiss the indictment on this basis.

The Court agreed that the original prosecutor might have been subject to sanctions, but that dismissing the indictment with prejudice was not the appropriate remedy. The Court reversed the dismissal and remanded the case.

TRIAL PROCEDURE / EVIDENCE – RAPE SHIELD

Krusley v. Com., 2015 WL 8528398 (Ky. App. 2015)

FACTS: Krusley was charged in Pulaski County with forced sexual intercourse (Rape) of an adult female victim. However, the victim is of low IQ and has a guardian. She engaged in sexual intercourse willingly but at some point told Krusley to stop because it was painful. He did not do so and the trial court concluded that "the fact that Krusley continued, despite the victim repeatedly telling him that he was hurting her, is sufficient evidence that Krusley used physical force to continue having sexual intercourse with her." During the trial, Krusley attempted to have admitted, unsuccessfully, information concerning the victim's relationship with her boyfriend. He was convicted and appealed.

ISSUE: Is evidence of a victim's prior sexual history admissible?

HOLDING: No (as a rule)

DISCUSSION: Krusley first argued that "there to be forcible compulsion, the physical force alone is insufficient – rather, he appears to argue that there must be physical force that places the victim in fear of physical injury." However, the Court noted "pursuant to KRS 510.010(2), "forcible compulsion may be shown in two broad ways: an act of physical force or a threat of physical force."⁹⁴ In other words, the Commonwealth does not need to show that the victim was in fear of physical injury if it can show the rape occurred by physical force. "Forcible compulsion" also requires "lack of consent by the victim, in the sense of lack of voluntariness or permissiveness." "[T]he evaluation of physical force is based on a victim's express non-consent, or other involuntariness, to a defendant's act."

Krusley also argued that he should have been allowed to introduce an alternative theory as to how the victim had bruises on her thighs – allegedly as a result of sexual relations with her boyfriend the day before. Krusley acknowledges that the type of evidence at issue is known as KRE 412 evidence. Kentucky Rule of Evidence 412 is known as Kentucky's "Rape Shield" law, and it provides as follows:

(a) Evidence generally inadmissible. The following evidence is not admissible in any civil or criminal proceeding involving alleged sexual misconduct except as provided in subdivisions (b) and (c):

(1) Evidence offered to prove that any alleged victim engaged in other sexual behavior.

(2) Evidence offered to prove any alleged victim's sexual predisposition.

(b) Exceptions:

(1) In a criminal case, the following evidence is admissible, if otherwise admissible under these rules:

(A) evidence of specific instances of sexual behavior by the alleged victim offered to prove that a person other than the accused was the source of semen, injury, or other physical evidence;

⁹⁴ Yates v. Commonwealth, 430 S.W.3d 883 (Ky. 2014).

(B) evidence of specific instances of sexual behavior by the alleged victim with respect to the person accused of the sexual misconduct offered by the accused to prove consent or by the prosecution; and

(C) any other evidence directly pertaining to the offense charged.

(2) In a civil case, evidence offered to prove the sexual behavior or sexual predisposition of any alleged victim is admissible if it is otherwise admissible under these rules and its probative value substantially outweighs the danger of harm to any victim and of unfair prejudice to any party. Evidence of an alleged victim's reputation is admissible only if it has been placed in controversy by the alleged victim.

(c) Procedure to determine admissibility.

(1) A party intending to offer evidence under subdivision (b) must:

(A) file a written motion at least fourteen (14) days before trial specifically describing the evidence and stating the purpose for which it is offered unless the court, for good cause requires a different time for

filing or permits filing during trial; and

(B) serve the motion on all parties and notify the alleged victim or, when appropriate, the alleged victim's guardian or representative.

(2) Before admitting evidence under this rule the court must conduct a hearing in camera and afford the victim and parties a right to attend and be heard. The motion, related papers, and the record of the hearing must be sealed and remain under seal unless the court orders otherwise.

Krusley did not notify the victim or her guardian that he moved to introduce the evidence, but he later said he'd asked the prosecution to do so. In fact, it wasn't evidence at all, but simply an allegation by defense counsel, rather than an affidavit or testimony. As such, the Court agreed it was properly disregarded.

Krusley also argued that introduction of the rape kit was improper, when there was no chain of custody presented. The Court noted that:

[w]hile the integrity of weapons or similar items of physical evidence, which are clearly identifiable and distinguishable, does not require proof of a chain of custody, . . . a chain of custody is required for blood samples or other specimens taken from a human body for the purpose of analysis. . . .

Even with respect to substances which are not clearly identifiable or distinguishable, it is unnecessary to establish a perfect chain of custody or to eliminate all possibility of tampering or misidentification, so long as there is persuasive evidence that the reasonable probability is that the evidence has not been altered in any material respect. . . . Gaps in the chain normally go to the weight of the evidence rather than to its admissibility.⁹⁵

In this case, the nurse who collected the victim's underwear was not called as a prosecution witness, but was called by the defense. She described the process she normally followed in such cases. This, the court concluded, was sufficient. Further, he argued that the introduction of the kit without the nurse testifying as to the procedures was improper, but again, the court disagreed.

Krusley's conviction was affirmed.

TRIAL PROCEDURE / EVIDENCE – SEXUAL ASSAULT CHARGES / INVESTIGATIVE HEARSAY

Ruiz v. Com., 471 S.W.3d 675 (Ky. 2015)

This case was originally posted as unpublished in the Second Quarter, it has now been modified and published.

⁹⁵ Rabovsky v. Commonwealth, 973 S.W.2d 6 (Ky. 1998)

FACTS: On November 28, 2012, Linda, age 6, reported to her grandmother (her caregiver at the time, since her mother – Ruiz’s wife – was on deployment) that she’d been sexually assaulted by Ruiz multiple times. She was examined and ultimately Ruiz was charged with Sexual Abuse and Sodomy (specifically both anal and oral). He was convicted of Sodomy (oral) and Sexual Abuse. He then appealed.

ISSUE: 1) Must individual sex acts be proven?
2) Is investigative hearsay permitted?

HOLDING: 1) Yes
2) No

DISCUSSION: The Court agreed that the “the probability that all jurors agreed on the same event substantially declines.” Further, During her testimony, Ruiz argued that his right to a unanimous verdict was violated because the victim “testified to multiple indistinguishable instances of sexual abuse and multiple indistinguishable instances of sodomy as having occurred during the relevant time period, and so there is no assurance that each of the jurors were focused upon the same occurrence when they cast their respective guilty votes.” The Court noted that “as in many cases of child sex abuse, Linda was the only eye-witness to the crimes charged against” Ruiz. She was not asked to “isolate and identify any individual episode of sexual abuse or sodomy that would relate the specific crime to the instructions to be given to the jury.” – instead “her testimony described a generalized, nonspecific and undifferentiated continuing course of conduct of sexual misconduct perpetrated by [Ruiz].” Without specific instructions, the “jury was left to adjudicate guilt on any or all of the vaguely alleged incidents, resulting in a verdict of doubtful unanimity.” Since the victim testified as to many instances of abuse, with it occurring 2-3 times a week over serial acts of sexual abuse are not a “course of conduct” crime – and the prosecution “must charge and prove sex crimes as specific, individual acts of criminal behavior.” The Court found the error to be “jurisprudentially intolerable” and reversed the judgement.

Although the case was overturned, the Court chose to address another issue as it determined that it might arise again. Prior to trial, Ruiz was successful in obtaining an order to “prevent the Commonwealth from eliciting “investigative hearsay” from any of its witnesses.” However, he complained that in fact, the first witness was permitted to do so. The Court noted, specifically:

Lest our repetition of the term “investigative hearsay” be misconstrued, we state here without equivocation: there is no such thing in our jurisprudence as “investigative hearsay.” There is no special rule of evidence known as “investigative hearsay.” The term simply is not a part of the evidentiary lexicon.

Further, the Court said:

Despite our condemnation in Sanborn v. Com., of what has been termed the “investigative hearsay” rule, it is still invoked on occasion. Perhaps we have failed in our decisions to vanquish it with sufficient vigor to send the message. We said in Sanborn, “Prosecutors should, once and for all, abandon the term ‘investigative hearsay’ as a misnomer, an oxymoron.” We now extend that suggestion to all of the bench and bar.

The use of the term exposes a fundamental misconception about the nature of the evidence it purports to describe; what it purports to describe is far more effectively, and more precisely, explained by the basic definition of hearsay itself and the conventional rules of evidence pertaining to hearsay. The term, “investigative hearsay” creates the false impression that there is a special or unique species of hearsay evidence that abides by its own rules removed from the rigors of ordinary hearsay law. Using this inartful term serves only to muddle the analysis of issue at hand and to distort the language by which hearsay issues must be resolved. In its most common application, the term “investigative hearsay” is tagged to an out-of-court statement made to, or in the presence of, a police officer, such that it tends to explain subsequent investigative

action taken by the police as a result of the statement.⁹⁶ We said recently in McDaniel v. Com.: "[I]nvestigative hearsay' is a 'misnomer . . . derived from an attempt to create a hearsay exception permitting law enforcement officers to testify to the results of their investigations.' This erroneous basis for the admission of hearsay evidence was rejected in a line of cases beginning with Sanborn []."⁹⁷

The Court continued by noting that "To be clear, there is no special rule regarding out-of-court statements made to police officers investigating crimes."

Instead, the Court stated the "conventional rules of evidence and the traditional evidentiary vocabulary are perfectly suited to describe the legal concept at hand." An out of court statement made to a law enforcement officer "is judged by the same rules of evidence that govern any out-of-court statement by any out-of-court declarant. If it is relevant and probative only to prove the truth of the matter asserted by the out-of-court declarant, then the statement is hearsay, and its admission into evidence is governed by the traditional hearsay rule. And, as any other statement, if the out-of-court statement made to a police officer has relevance and probative value that is *not* dependent upon its truthfulness, and it is *not* offered into evidence as proof of the matter asserted, then by definition the evidence is *not* hearsay.

The Court pointed to several examples of what was, and not is not hearsay in such situations. It focused on the reason for admitting the statements and whether it was to prove the "truth of the matter asserted." In some cases, it might be "offered to explain the action that was taken and has relevance regardless of whether the statement was true or false. Most "So-called "investigative hearsay" is still, fundamentally, hearsay. There is no special kind of evidence known as "investigative hearsay;" we have no rule of evidence called the "investigative hearsay rule." Use of the term imparts no meaningful information to the analysis that is not otherwise supplied by the word "hearsay."

In addition, the Court agreed, the detective was "improperly permitted to bolster the family members' testimony." The detective testified as to the demeanor of the family members he interviewed, as well as the victim – in effect, indirectly vouching for the credibility of those witnesses. The Court agreed that under Ordway v. Com., that a witness may describe another person's "conduct, demeanor, and statements [] based upon his or her observations to the extent that the testimony is not otherwise excluded by the Rules of Evidence."⁹⁸ However, it is "well established that a witness may not vouch for the truthfulness of another witness. Looking at what was specifically said, the Court noted that the detective "did not express a view upon the veracity of Linda and her family." He described their demeanor specifically and while that might suggest an effort to arouse sympathy (a separate concern) it was not so much intended to enhance their credibility. The Court agreed that his "testimony that Linda's family members were overwrought by the allegations, and that he, too, was emotionally affected by their anguish, should not be admitted."

Finally, the Court noted, the detective's statement that he found "probable cause" sufficient to prepare a report was improper, and "could be readily understood to mean that he personally believed Linda's account." As such, it was enough to invoke the rule against vouching or bolstering and should not be permitted in any retrial. However, the comments he made describing the "anguish" of the victims:

Havens did not express a view upon the veracity of Linda and her family. He described their demeanor immediately after claims surfaced that another family member had engaged in a disturbing pattern of child sexual abuse. He said the aunt's and the grandmother's "eyes were swollen" because they had been crying; and that they all "broke down." The rule against bolstering or vouching addresses attempts by one witness to express belief in the credence of another witness.⁹⁹

⁹⁶ See Gordon v. Com., 916 S.W.2d 176 (Ky. 1995); and Young v. Com., 50 S.W.3d 148 (Ky. 2001).

⁹⁷ 415 S.W.3d 643 (Ky. 2013) (citations omitted).

⁹⁸ Overruled on other grounds by Harp v. Com., 266 S.W.3d 813 (Ky. 2008)

⁹⁹ Bell v. Com., 245 S.W.3d 738, 744-45 (Ky. 2008) 6 (a social worker's statement that a child's testimony seemed "spontaneous" and "unrehearsed" constituted implicit improper bolstering, because it was an attempt to opine upon the veracity of the child.)

Here, the overwrought demeanor of Linda's aunt and grandmother as described by Haven was not so much of an effort to enhance their credibility—the child's accusation alone, believable or not, would reasonably give rise to anguish sorrow. Rather, the testimony more clearly suggests an effort to arouse sympathy for Linda and her family, which may pose its own relevancy concerns.

Nevertheless, the witnesses' distress upon hearing of the allegation of abuse says nothing about the truth of the allegation. In other words, the revelation of the accusation alone, whether true or false and whether believed or doubted, would understandably provoke emotions of distress and sadness, and it bears little, if any, relevance to a fact in controversy. Upon retrial Havens' testimony that Linda's family members were overwrought by the allegations, and that he, too, was emotionally affected by their anguish, should not be admitted.

The Court vacated the trial court's decision and remanded the case.

TRIAL PROCEDURE / EVIDENCE – DYING DECLARATION

Lewis v. Com., 475 S.W.3d 26 (Ky. 2015)

FACTS: On September 23, 2009, Lewis approached an apartment building in Louisville. As was often the case, the Johnsons (Jonte, Dejuan and Demarcus – cousins) along with Knighton and Matthews, were sitting on the porch. Lewis had a handgun and engaged in a verbal confrontation with the men. Horsley, carrying a rifle, came around the corner and started firing; Lewis fired as well. Jonte and Knighton died in the shooting, the other three men were seriously injured. Jonte and Knighton were killed by Horsley, but it was not clear the source of some of the injuries to the others. Before he died, Jonte made it to his grandmother's apartment and told her that "I'm dying. I've been shot. Chum (meaning Lewis) did it."

Horsley and Lewis were arrested and charged with a variety of offenses. Horsley claimed "he thought someone on the porch had a gun and was about to start shooting." Horsley took a plea to Manslaughter 2nd, while Lewis went to trial. He was conviction of Intentional Murder, Assault 1st and related charges and appealed.

ISSUE: Is a dying declaration admissible?

HOLDING: Yes

DISCUSSION: Lewis argued that it was improper to introduce Jonte's statement, which was permitted with a "finding that the statement was a dying declaration and that it was not testimonial in nature."

The Court continued:

There is no dispute that Jonte's statement to his grandmother - "Chum did it" - is hearsay and not admissible unless it falls within-an exception to KRE 803, the hearsay rule. Furthermore, there is no dispute that Jonte's statement falls within KRE 804(b)(2), which sets forth an exception to the hearsay rule for a statement made under belief of impending death. However, there is a dispute regarding how KRE 804(b)(2) and the confrontation clauses of the United States and Kentucky Constitutions interact.

In Crawford v. Washington, the United States Supreme Court held that, hearsay exceptions notwithstanding, the testimonial statement of a declarant who does not appear at trial is not admissible unless the declarant is unavailable and the defendant had the opportunity to cross-examine him.¹⁰⁰ We adopted Crawford in Rankins v. Com.,¹⁰¹ In Rankins, we also adopted the

¹⁰⁰ 541 U.S. 36 (2004)

¹⁰¹ 237 S.W.3d 128 (Ky. 2007).

U.S. Supreme Court's subsequent analysis in *Davis v. Washington*, regarding what constitutes a testimonial statement.¹⁰² "Where statements recount potentially criminal past events, the declarant is, for Confrontation Clause purposes, acting as a witness against the accused. More simply, statements that tell 'what is happening' are nontestimonial, while statements that tell 'what happened' are testimonial."

If that were the end of the matter, we would agree with Lewis that admission of Jonte's dying declaration was error. However, this Court revisited the tension between the confrontation clause and the hearsay exceptions in *Hartsfield v. Com.*¹⁰³ Hartsfield was charged with multiple sexual crimes involving three victims, including M.B., who died before trial. Following M.B.'s death, Hartsfield moved for dismissal of all charges related to her. The trial court denied the motion and the Commonwealth filed a motion in limine stating that it intended to introduce evidence from a Sexual Assault Nurse Examiner regarding details of the rape that M.B. disclosed while being examined. The Commonwealth also stated that it intended to introduce evidence that, immediately after being raped, M.B. ran out of her house and yelled to a passerby, "He raped me; He raped me," as Hartsfield fled. Finally, the Commonwealth introduced evidence that M.B. then ran to her daughter's house and told her daughter that she had just been raped. The trial court held that the statements by M.B. to these third parties were not admissible and ordered the Commonwealth to dismiss the charges related to M.B. Hartsfield then pled guilty to reduced charges as to the other victims, and the Commonwealth appealed the dismissal of the charges related to M.B.

This Court held that the trial court properly excluded M.B.'s statements to the nurse examiner because the nurse examiner's interview of M.B. was "the functional equivalent of police questioning. . . . [which] involved past events, was not related to an ongoing emergency, and took on the nature of a formal interview." However, this Court held that the trial court erred in excluding the statements M.B. made to her daughter and the passerby. In doing so, we noted that the statements in *Crawford*, *Davis*, and a companion case, *Hammon v. Indiana*,¹⁰⁴ were made in response to questioning by police officers or their surrogates. However, the statements made by M.B. to her daughter and the passerby were: made spontaneously "and unprompted by questioning . . . were not formal[,] not delivered to law enforcement or its equivalent, and were in the nature of seeking help for an emergency (even though it was not ongoing)." Thus, we concluded that the statements were not testimonial and admissible as excited utterances. Lewis argues that this case is distinguishable from Hartsfield because Jonte's statements were not excited utterances. Furthermore, he argues that Jonte believed his death was imminent; therefore, the statement "Chum did it" could not have been made for the purpose of seeking help for an emergency but was made for the purpose of future prosecution. These arguments are unpersuasive for at least five reasons.

First, Jonte had just been shot several times and was bleeding to death; therefore, his statement can easily be characterized as both an excited utterance and a dying declaration. Second, since Jonte made the statement within a minute or two of being shot, and likely did not know where Lewis and Horsley had gone, there was clearly an ongoing emergency situation. Third, it is as likely that Jonte was trying to warn his grandmother about who was involved, as it was that he was contemplating future court proceedings. Fourth, like M.B., Jonte made his statement to a lay witness, not to the police or those working on behalf of the police. Finally, like M.B.; Jonte made his statement spontaneously, not in response to questioning by anyone. Therefore, we discern no error in the trial court's admission of Jonte's statement.

The Court upheld Lewis's conviction.

¹⁰² 547 U.S. 813 (2006)

¹⁰³ 277 S.W.3d 239 (2009).

¹⁰⁴ 547 U.S. 813 (2006),

Further, Lewis had wanted to enter Horsley's plea agreement (to a wanton homicide charge) into evidence, to show that the Commonwealth had "adopted" the idea that the shooting was wanton. The Commonwealth, however, argued that it had not adopted Horsley's argument and that "even if true, the facts in the plea agreement were irrelevant because the issue involved Lewis's mental state, not Horsley's." The parties agree that Horsley's statements in the plea agreement are hearsay and, absent an exception, inadmissible. However, Lewis argues that Horsley's statements fall under the exception created by Kentucky Rule of Evidence (KRE) 801A(b)(2):

A statement is not excluded by the hearsay rule, even though the declarant is available as a witness, if the statement is offered against a party and is:

...

A statement of which the party has manifested an adoption or belief in its truth.

The Court noted that "Whether the Commonwealth's actions or inactions with regard to Horsley's plea agreement and plea constituted adoption of Horsley's statement of facts is an issue of first impression." As such, the Court looked to other jurisdictions for guidance and noted that many reasons play into a decision to accept a plea rather than prosecute for a higher charge, and that it is not an independent determination that the individual is not guilty of the offense charged. The Court ruled that Commonwealth's acceptance of Horsley's plea agreement did not amount to an admission by adoption."

The Court agreed it was properly excluded.

TRIAL PROCEDURE / EVIDENCE – CONFIDENTIAL INFORMANT

Hawkins v. Com., 2015 WL 5781515 (Ky. App. 2015)

FACTS: In early 2013, a CI that Det. Newman (Henderson PD) had been using for more than a year, provided information on drug activities at the Hawkins home. The "CI had always proved reliable and had resulted in several felony convictions." On October 10, following further investigation, Det. Newman obtained a search warrant for the Hawkins' home and vehicles. When executed, they found crack cocaine, marijuana, digital scales and over \$4K in cash. More was found in the vehicles.

Hawkins was indicted for Trafficking 1st and related offenses. He moved to compel disclosure of the CI's name and following a hearing, the Court agreed that "the Commonwealth had asserted its right under KRE 508(a) to keep the CI's name secret; and Hawkins had asserted an exception—relevance—as permitted by KRE(c)(2)." Disclosing their name "would be detrimental to both the active cases and to the CI's safety since retaliation was a distinct possibility." The detective admitted the CI had been paid, but didn't recall the amount, and that in the past, had gotten leniency on his own cases, but not in this matter. (At one point, the detective used the CI's name in the hearing, but it was obscured by the court.)

At trial, the Court also addressed the issue of the drug testing, and the lab director indicated that they generally don't test all of the drugs submitted. As a rule, the drugs are not tested for purity either, unless the case is going to federal court, and then only for methamphetamine. The Court agreed that under Kentucky law, so long as the substance tested as cocaine and was over 4 grams, it was proper to submit it as a trafficking case.

Hawkins was convicted and appealed.

ISSUE: May a CI's identity be withheld?

HOLDING: Yes

DISCUSSION: The Court looked to Heard v. Com., sets forth the protocol for a trial court’s handling of a motion to compel disclosure of a CI’s identity.¹⁰⁵ First, the Commonwealth asserts the privilege. Second, the defendant invokes one or more of three specified exceptions. Third, once the defendant makes the required showing, the burden shifts to the Commonwealth to preserve the privilege.¹⁰⁶ Fourth, the trial court balances the unique facts of each case—specifically considering “the crimes charged, the possible defenses, the possible significance of the informer’s testimony and other relevant factors.”¹⁰⁷ Fifth, if the trial court believes the CI may have relevant testimony, under KRE 508(c)(2) the court conducts an in camera hearing—either by affidavit or via live testimony—at which the government offers proof in support of its claim of privilege. Sixth, if after the hearing the court is satisfied the informer can give relevant testimony, but the government chooses not to reveal the CI’s identity, the court has an array of steps it may take to provide appropriate relief to the defense.

The court noted that the steps outlined “were followed meticulously in this case” and found no error in how it was resolved.

Further, with respect to the question of whether the amount (likely not pure) of cocaine was sufficient to prove a trafficking case, the Court noted: “If the General Assembly intended to require trafficking in pure cocaine, or in a percentage of pure cocaine, it certainly could have said so, but it did not, and we are not at liberty to add such language now.” The Court agreed that both KRS 218A.010(5) and 218A.1412 were properly assessed and upheld his conviction.

TRIAL PROCEDURE / EVIDENCE – TESTIMONY

King v. Com., 472 S.W.3d 523 (Ky. 2015)

FACTS: Thomas and family attended a Laurel County church where King was a youth minister. In early 2012, Thomas attended a sleepover at King’s home, with other children. He told his mother several days later that King “had subjected him to sexual acts.” King was ultimately charged with Sodomy 1st and Sexual Abuse 1st. He appealed.

ISSUE: Is testimony on CSAAS admissible?

HOLDING: No

DISCUSSION: King argued that Thomas’s testimony was inconsistent and included “improbable aspects” that destroyed its credibility. The Court disagreed, noting that the testimony included “had only the kinds of routine inconsistencies and flaws common to child witnesses, all of which go to the weight to be accorded his testimony.” In other words, that was for the jury to decide.

King also argued that “Thomas’s credibility was improperly bolstered by Detective Anderkin’s testimony relating to the discredited theory of child sexual abuse accommodation syndrome [CSAAS] and by Anderkin’s testimony about the role of the Laurel County Task Force on Child Sexual and Physical Abuse in the pre-indictment process.” The detective testified as to why there was a five-day delay and noted that it was very rare for a child to report immediately.¹⁰⁸ She also testified as to the process in the county on bringing such charges and discussed the makeup of the task force. “Anderkin’s testimony thereby implies to the jury that, in addition to the ordinary grand jury review, a prestigious body of experienced law enforcement and child welfare experts reviewed the evidence against Appellant and decided that he should be prosecuted.”

With respect to the first issue, the Court noted that “the phenomenon of ‘delayed reporting’ is but one of several (usually stated as five) symptoms claimed to be characteristic of the so-called “child sexual abuse

¹⁰⁵ 172 S.W.3d 372 (Ky. 2005),

¹⁰⁶ See United States v. McManus, 560 F.2d 747 (6th Cir. 1977).

¹⁰⁷ Taylor v. Commonwealth, 987 S.W.2d 302, 304 (Ky. 1998).

¹⁰⁸ The Court questioned the validity of the conclusions, finding the numbers flawed.

accommodation syndrome" (CSAAS), a theoretical construct promoted by some social and psychological professionals as a useful tool for diagnosing young victims of sexual abuse and for verifying claims of sexual abuse. That Detective Anderkin did not use the term "child abuse accommodation syndrome" and did not relate all of its symptoms to Thomas is inconsequential; omission of the term "syndrome" does not transform the objectionable nature of the testimony into reliable scientific evidence.¹⁰⁹ Further, the Court noted "Given the substantial body of case law against the use of "delayed reporting" to validate a claim of sexual abuse, we have to conclude that the inadmissibility of Anderkin's statement was obvious." However, the Court did not find it to be so serious as to be "manifest injustice."¹¹⁰ (The court also noted that until the process is subjected to a Daubert analysis, it simply could not conclude it was valid testimony and not once has this occurred as yet in Kentucky.)

With respect to the task force testimony, the court noted that "by testifying that the Task Force approved the charges, the Commonwealth was permitted to vouch for Thomas's credibility as having been verified by a panel of respected experts." It is not proper to admit an "opinion vouching for the truthfulness of another witness."¹¹¹ In reality, that information was irrelevant to the case, since it "tended neither to prove nor disprove that the sexual assault actually occurred, but its prejudicial nature is clearly apparent."

As such, the Court reversed the conviction and remanded the case.

Barnett v. Com. 2015 WL 9243368 (Ky. 2015)

FACTS: On July 3, 2012, Huckleby was leaving her employment with a bank deposit when she was confronted by two men who forced her into a car briefly and then took her purse. The two men were Wright and Barnett, who had learned through Wright's girlfriend that "the store owners frequently required their workers to transport large amounts of cash to the bank with lax security procedures." When the girlfriend learned what they'd done, she was threatened with reprisal if she told.

A year later, the girlfriend was called to the police department, which was investigating the robbery. She identified the two men as the robbers, denied knowing anything about the plan, but "admitted having had numerous conversations with them about the store's lax security." Both men were charged with Robbery 2nd and convicted.

During the testimony, Det. Bowling (Elizabethtown PD) talked about "the investigative process, particularly focusing on how the investigation was not initially successful." He talked about "various leads in the case, including eye-witness testimony and video-surveillance footage, which were largely fruitless." He mentioned a tip he'd received that Barnett was in custody in Hodgenville on gun charges – the prosecutor immediately stopped him and said he could not discuss those charges. He also mentioned Bates, Barnett's brother, and his involvement in casing another store.

As he did not object during trial, there was no ruling on the admission of the above. Barnett was convicted and appealed.

ISSUE: Is a mention of other criminal acts admissible?

¹⁰⁹ Blount v. Commonwealth, 392 S.W.3d 393 (Ky. 2013)."

¹¹⁰ At this point, it is worth taking note of the history of CSAAS evidence in Kentucky. Justice Abramson's separate opinion echoes the lament of Justice. This use is distinguished from instances in which a defendant may open the door to such evidence by insinuating that the delayed reporting indicates that the claim of sexual abuse has been fabricated. Here, Appellant did not open that door. Graves's dissenting opinion nearly twenty years ago in Newkirk v. Commonwealth, 937 S.W.2d 690 (Ky. 1996): "Kentucky remains as one of the few jurisdictions that still rejects all testimony regarding the phenomenon clinically identified and demonstrated as the Child Sexual Abuse Accommodation Syndrome which provides jurors a psychological explanation for certain behavior in small children following sexual abuse." *Id.* at 696. Whether that is a good thing or a bad thing is yet to be shown. Kentucky is also the only state to eliminate commercial bail bonding and the first state to institute video recording in all of its courtrooms. Being exceptional is per se neither good nor bad. What is clear is that the validity of the CSAAS theory is not readily self-evident. The theory is not self-proving and an appellate court cannot spontaneously decide that, from now on, CSAAS evidence should be admissible. Like any scientific or technical theory, the validity of CSAAS as a fact. Facts are determined from evidence presented to a trial court, ordinarily at a pre-trial hearing by adverse parties. As far as we can tell, no trial court in Kentucky has ever been asked to hold such a hearing with respect to CSAAS.

¹¹¹ Stringer v. Commonwealth, 956 S.W.2d 883, 888 (Ky. 1997) (citing Hall v. Commonwealth; 862 S.W.2d 321, 323 (Ky. 1993).

HOLDING: No (as a rule)

DISCUSSION: The Court agreed that although error, the detective's statements were not so egregious as to require reversal.

TRIAL PROCEDURE / EVIDENCE – TESTIMONY

Ragland v. Com., 2015 WL 9243531 (Ky. 2015)

FACTS: Ragland was charged in the 2010 beating death of Mitchell, in Lexington. Mitchell's body was not found for six days. He was not charged until September, 2011, however. Ragland argued that he acted in self-defense, after Mitchell had attempted a sex act on him. He claimed that Mitchell was alive when he left. He was convicted of Manslaughter and appealed.

ISSUE: May prior violent acts be admitted?

HOLDING: Yes (but see discussion)

DISCUSSION: In addition to jury instruction issues relating to his self-defense argument, the Court addressed Ragland's claim that he should have been allowed to introduce testimony about Mitchell's prior violent acts, as "pertinent trait of character of the victim of the crime," KRE 404(2)(a), which is admissible if offered by the accused." The Court agreed that "evidence of a victim's violent character is typically relevant, and therefore admissible, in self-defense cases because it supports the defendant's claim that the victim was, in fact, the first aggressor."¹¹² However, that evidence may only be introduced under KRE 405 by "proof may be made by testimony as to general reputation in the community or by testimony in the form of opinion." Instead, he wanted to show "specific instances of conduct" which was not permitted. In addition, "nonetheless, in self-defense cases, a victim's prior violent acts may also be admitted for another, non-character purpose: as proof of the defendant's fear of the victim. In that case, evidence of the prior violent act is not being used to prove the victim's violent character (and, in turn, that the victim was the initial aggressor), but instead is being used to prove the defendant's state of mind (fear of the victim) at the time he believed that physical force was needed to protect himself against the victim's aggression. But for such evidence to be relevant and admissible for this purpose, the defendant must have known of the victim's prior bad acts at the time he purportedly acted in self-defense."¹¹³ It should go without saying that a defendant's fear of being physically harmed by another cannot have been influenced by violent acts that the defendant knew nothing about." However, in contrast, Ragland's knowledge and fear of Mitchell's HIV was admissible since his "status had been generally known in the community will be relevant and admissible to support his claim on retrial." In addition, he argued that a statement from Sgt. Richardson that Mitchell had a history of trading food and clothing for sex from homeless men should have been admitted as "pertinent trait of character of the victim under KRE 402(a)(2)." The Court agreed that at trial, it might be admitted to the trial court's discretion.

Ragland's conviction was reversed due to the jury instruction issues.

Ratliff v. Com., 2015 WL 8528066 Ky. App. 2015

FACTS: On May 30, 2013, Jonathan and Ronald Ratliff, along with Webb, "unlawfully entered onto the property of Greg Meek [in Lawrence County] and unlawfully took over \$500 in galvanized tin and angle iron." Deputy Wheeler (Lawrence County SO) later testified that Meek had approached him a few days before, complaining that items had been taken, and asked the deputy to "keep a watch out." The deputy then was able to catch the three men in the act of stealing items a few days later and he found the metal in the bed of the truck on site. The Ratliffs argued at trial that they did not steal it but "had permission to haul it" from Webb. (He later claimed that Webb apologized for getting them into trouble.)

¹¹² See KRE 404(a)(2); Saylor v. Commonwealth, 144 S.W.3d 812 (Ky. 2004)."

¹¹³ Baze v. Commonwealth, 965 S.W.2d 817 (Ky. 1997).

Despite discussion as to the actual value of the metal, both of the Ratliffs were convicted of Theft over \$500 and Trespass. They appealed.

ISSUE: Is flight evidence of consciousness of guilt?

HOLDING: Yes

DISCUSSION: The Ratliffs argued that the Commonwealth failed to prove either of the two charges involved. Specifically, they argued that since Webb lied to them, they were entitled to a jury instruction to that effect under “KRS 501.070 provides “(1) A person’s ignorance or mistake as to a matter of fact or law does not relieve him of criminal liability unless: (a) Such ignorance or mistake negatives the existence of the culpable mental state required for commission of an offense...” Since intent and knowledge were necessary elements of both charges, it was improper to deny the instruction. As such, the Court vacated their convictions.

The Court noted, however, that intent might be proven by circumstantial evidence, in this case, by the fact that they attempted to hide and flee when the deputy arrived. “Consciousness of guilt can be inferred from behavior such as flight or concealment from the authorities.”¹¹⁴

The Ratliffs also argued that the metal was not valued at over \$500. The Court agreed that the Commonwealth had the burden of proof and that the testimony of the owner of stolen property is competent evidence as to the value of the property.¹¹⁵ Both Meek and Deputy Wheeler testified concerning the value of the galvanized tin and angle iron. Even discounting their opinions as to the value of the metal, both contradicted Jonathan’s testimony describing the tin as old and thin. Considering the evidence as a whole, we find that there was sufficient competent evidence which would allow the jury to find that the value of the metal exceeded \$500.”

Damrell v. Com., 2012 WL 4327800 (Ky. App. 2015)

FACTS: On August 23, 2010, Trooper Pennington (KSP) spotted Damrell operating an ATV on a public road in Rockcastle County. He tried to pull him over but Damrell got away. During the chase he saw “several items” fall off the ATV – when collected, they proved to be “supplies used to make methamphetamine and a mason jar containing an active methamphetamine lab.” Damrell was arrested and charged with both riding the ATV and fleeing and evading, as well as convicted in a separate trial of manufacturing methamphetamine. During the trial, there were questions raised concerning deals allegedly made to witnesses to testify. He appealed.

ISSUE: Is evidence of deals admissible?

HOLDING: Yes (but see discussion)

DISCUSSION: Damrell argued that his trial counsel should have investigated and impeached the trooper’s testimony by introducing evidence of leniency or “deals” offered to witnesses. The trooper was questioned and denied it, as did the witnesses. Further, an allegation that the trooper was enamored of Damrell’s girlfriend was only mentioned by her, and that “evidence was impeached with evidence that Trooper Pennington had arrested her on at least two occasions.”

Damrell’s conviction was affirmed.

Miller v. Com., 2015 WL 6560448 (Ky. 2015)

FACTS: The Waltons were married briefly in 1994 and following that, their daughter, Ann was born. Ann lived with her mother for about 3 ½ years, then with her father, his wife and their children until

¹¹⁴ Day v. Com., 361 S.W.3d 299, 303 (Ky. 2012).

¹¹⁵ See Com. v. Reed, 57 S.W.3d 269 (Ky. 2001).Id., citing Poteet v. Com., 556 S.W.2d 893 (Ky. 1977).

2004, when she returned to her mother's home in Meade County. She had no contact with Miller, her father, until 2007, while he was in jail, then they began regular visitation, until 2009. At that time, in late 2009, Ann, age 14, told her mother that her father had sexually abused her. She was interviewed by Det. Gabhart (KSP) and told him they'd engaged in oral sodomy when she was between 5 and 8. Miller stated he believed the false allegations arose from him telling Ann "to stop spending time with a boy she liked." At some point, another girl claimed he'd sexually abused her as well.

Miller was charged for actions against both girls. During the trial, Det. Gabhart briefly mentioned that Miller was in jail (for an unrelated drug crime) when interviewed the second time. He was convicted and appealed.

ISSUE: May uncharged bad acts be mentioned?

HOLDING: Yes (but see discussion)

DISCUSSION: First, Miller argued that Ann was permitted to testify to uncharged sexual acts. The Court noted that "that prior bad acts evidence may be admissible to establish a pattern of conduct or modus operandi"¹¹⁶ and that "evidence of similar acts perpetrated against the same victim are almost always admissible" to prove "intent, plan, or absence of mistake or accident."¹¹⁷ The Court noted that the uncharged acts were similar in fact to the charged act (attempted anal sex as opposed to oral sex) and that the precursor, fondling, showed a pattern of behavior with both girls. The Court agreed it was properly admitted.

Miller further argued he should have received a mistrial for the detective's comment. The Court provided an admonition. The Court agreed that the "testimony, although not in direct response to a question and perhaps inadvertent, was improper and in direct violation of KRE 404(b)."¹¹⁸ See The Court noted:

Furthermore, we note that these inadvertent testimonial "slips" by police officers occur with an alarming frequency. It would behoove the Commonwealth's attorneys to advise officers who are going to testify that such "slips" jeopardize the fairness of the judicial process and create unnecessary appellate issues.

The Court agreed, however, it was not so egregious that it warranted a mistrial, given the well-crafted admonition by the court. The Court affirmed his conviction.

TRIAL PROCEDURE / EVIDENCE – PRIOR BAD ACTS

Moment v. Com., 2015 WL 6769051 (Ky. 2015)

FACTS: Moment was attending a party in Lexington when police arrived to execute a search warrant. Moment was found standing in the kitchen, within a few feet of a digital scale that contained cocaine residue. He had, on his person, cocaine in excess of 7 grams, three Xanax and marijuana, along with a small amount of cash. Det. Lewis questioned Moment and he admitted to having cocaine and giving it away.

He was convicted of trafficking and related issues and appealed.

ISSUE: May some prior bad acts be admitted?

HOLDING: Yes

¹¹⁶ Dant v. Commonwealth, 258 S.W.3d 12, 18-19 (Ky. 2008),

¹¹⁷ Noel v. Commonwealth, 76 S.W.3d 923, 931 (Ky. 2002)."

¹¹⁸ Wiley v. Commonwealth, 348 S.W.3d 570, 581 (Ky. 2010).

DISCUSSION: During the trial, an audio recording of his questioning by a detective at the scene was introduced, and Moment objected because it “indicated he had a past history of trafficking in controlled substances” in violation of KRE 404(b). The trial court had agreed that while prejudicial, his statements were “highly relevant and therefore admissible.” Further, the defense had adequate notice that the Commonwealth planned to use the recording, even if it wasn’t in the form of an official notice to that effect. The Court agreed it was properly introduced.

Moment also argued that he was not notified that Det. Curtsinger would testify as an expert concerning whether the amount of cocaine found indicated personal use or trafficking. Also at the last minute, the Court agreed that it was not improper to allow the detective to testify.

Malone v. Com., 2015 WL 9243877 (Ky. 2015)

FACTS: Malone and Cruz met in Lexington in the summer of 2011. At the time, Cruz had three children with another man. Malone became jealous of the other man and “threatened to kill the children’s father and threatened her and one of her children with a knife.” Police were called but Malone had fled. Cruz did not press charges. As the year went on, though, “Malone continued to threaten and argue with the children’s father, and Malone argued with, struck, and threatened Cruz several times.”

On February 12, 2012, Malone became angry and threatened Cruz with a knife. This time, the police arrested him, but when he was released, he and Cruz resumed the relationship. On May 19, he pushed her and she miscarried a child. (The Court did not note the cause of the miscarriage, however.) Over the next few months, between May and August, several acts of violence occurred. At some point Malone moved – Malone said that Cruz kept calling him, but Cruz stated that Malone continued to harass her.

On September 13, Malone went to Cruz’s workplace and threatened her, taking her cell phone. They exchanged a number of calls and text messages over the next two days. (Again, both indicated the other party was initiating the contact.) Malone called while police were at Cruz’s home and he spoke to the officers, threatening “to kill Cruz and the officers, and he said he would wait for the police at a nearby BP gas station.” Two officers went in search of him, while Officer Dearinger stayed at the apartment.

When the officers could not find Malone, they left. As Officer Dearinger was leaving, a cab driver flagged him down and reported that a passenger, who he had dropped off near Cruz’s apartment, had not paid his fare. Officer Dearinger believed the passenger was Malone and returned to Cruz’s apartment. When he entered the apartment, Officer Dearinger noticed that the door had been damaged and he heard Cruz screaming. Officer Dearinger then went to a bedroom, where he saw Malone lying on top of Cruz stabbing her. Officer Dearinger yelled to Malone to stop and threatened to shoot Malone. However, because of Malone’s proximity to Cruz, officer Dearinger could not shoot him. Another officer then arrived, tazed Malone twice, and the officers arrested Malone and took him to jail.

Malone was charged with a variety of offenses, from Assault, Burglary and Stalking to lesser related charges. He was convicted of Assault 2nd, Burglary 1st, Stalking 2nd, Wanton Endangerment 2nd and Terroristic Threatening 3d. He appealed.

ISSUE: May prior bad acts be introduced at trial?

HOLDING: Yes (but see discussion)

DISCUSSION: Prior to the trial, the Commonwealth properly filed notice that it “intended to introduce evidence of a number of incidents of domestic violence for which Malone had not been charged in order to prove “motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident in accordance with KRE 404(b)(1).” The Commonwealth argued that “the uncharged acts of domestic violence were inextricably intertwined with the charged acts, and their admission was necessary to show the complete picture of the couple’s relationship. Malone objected arguing primarily that each of

the uncharged incidents was a separate and distinct act, not part of an ongoing pattern, and that they did not fall within any of the exceptions to 404(b)(1).”

The Court noted that there were two distinct sets of charged crimes, those that occurred in December 2011/July 2012 and those that occurred over September 14-15, 2012. The Court looked at each under the framework of KRE 404(b) which provides:

Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible: (1) If 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 so inextricably intertwined with other evidence essential to the case that separation of the two (2) could not be accomplished without serious adverse effect on the offering party.

To determine if such evidence is admissible, it must be “relevant for an acceptable purpose”¹¹⁹ and “probative.”¹²⁰ The Court must then “determine if the prejudicial impact of the evidence outweighs its probative value.” The Court noted that the prior assaults showed a pattern, Malone assaulting Cruz “when he believed she was involved with another man.” He had a “consistent motive” – jealousy – that ran through all of the assaults. In addition, “the fact that Malone had assaulted Cruz on other occasions without having had an argument with another man is relevant to disprove his extreme emotional distress defense.”¹²¹ There was “more than sufficient evidence that the uncharged acts took place,” between Cruz herself, police officer and friends, and Malone did not deny them. Finally, since he admitted he committed the last assault, the worst assault, evidence of prior assaults could not be than prejudicial. And in fact, the jury did not convict him of those crimes.

On a minor note, the Court noted that during the September 14-15 time frame, Malone and Cruz sent numerous text messages to each other and spoke several times on the phone. The police were able to recover copies of the text messages Malone had sent but were not able to recover the message he received from Cruz or the messages Cruz sent. One of the assertions Malone made at trial was that he broke off the relationship with Cruz, and she kept harassing him in an attempt to rekindle the relationship. As proof of that assertion, Malone sought to introduce his text messages to Cruz. However, because introducing only Malone's text messages would have presented a skewed picture to the jury, and because there was no evidence how those messages were retrieved, the court refused to permit Malone to introduce them into evidence. The court did however permit Malone to testify about what he remembered texting to Cruz. Malone's counsel then stated that he wanted to use the text messages to refresh Malone's memory, if necessary. The Court reiterated that Malone could testify about what he remembered texting to Cruz; however, the court stated that Malone would not be permitted to read the messages verbatim into evidence. Malone now argues that the court refused to let him review the text messages to refresh his memory, thus impeding his ability to present a complete defense.

The Court was not persuaded by this argument for five reasons.

First, contrary to Malone's argument, the court did not state that Malone could not review the text messages. The court stated that Malone could not read the messages into evidence.

Second, during Malone's testimony, counsel asked him if he remembered what he had texted to Cruz, and Malone stated that he did and that he had repeatedly texted Cruz asking her to stop bothering him. It is clear that Malone knew what was in the text messages, messages he repeatedly referred to during direct and cross-examination, and Malone had no lapse in his memory that needed to be refreshed.

¹¹⁹ Bell v. Commonwealth, 875 S.W.2d 882, 889-91 (Ky. 1994)

¹²⁰ Meece v. Commonwealth, 348 S.W.3d 627, 662 (Ky. 2011) citing Commonwealth v. Davis, 376 Mass. 777, 384 N.E.2d 181 (1978).

¹²¹ See Brown v. Commonwealth, 983 S.W.2d 513, 516 (Ky. 1999), as modified (Jan. 27, 1999)(“Evidence of collateral criminal conduct is admissible for purposes of rebutting ‘a material contention of the defendant.’”(citation omitted).”

Third, Malone did not dispute that he went to Cruz's apartment, broke down the door, broke Cruz's nose when he struck her in the face, and stabbed her. He has not shown how reviewing the text messages would have assisted him in refuting any of these facts.

Fourth, Malone has not shown how reviewing the text messages would have assisted him in proving his defense of extreme emotional distress, which he said was triggered by his conversation with Cruz's boyfriend, not text messages from Cruz.

Fifth, Malone has not shown how reviewing the text messages would have assisted him in proving his defense of intoxication. He admitted to being an alcoholic and to drinking daily, a pattern of behavior that was not altered by the text messages.

Thus, Malone has not shown how his reviewing the text messages would have altered the jury's findings, and we discern no error in the trial court's ruling.

The Court affirmed all but three of the terroristic threatening counts.

Ingram v. Com., 2015 WL 6768864 (Ky App. 2015)

FACTS: Clark was 9 months pregnant when she passed an unknown man in Daviess County park. He ran up behind her and walked beside her, and they started talking. She realized he "appeared to be masturbating." She tried to ignore it, turned away and walked away. He grabbed her crotch from behind and turned her around. He pushed her to the ground as she was screaming for help. Clark was able to get help from a local jogger. She gave a detailed description of the man and identified him from a "series of twenty photographs sent to her phone by police." She later also identified him from a photo array of six photos.

Ingram was convicted of Rape-Attempt and appealed.

ISSUE: Are prior bad acts, that aren't similar to the act in question, be introduced?

HOLDING: No

DISCUSSION: Ingram argued that the evidence of masturbation, pursuit and aggression were not enough to be a "substantial step" toward a rape attempt. The Court looked to other cases and noted that the circumstances of each must be examined to "discover whether they manifest a clear intent to commit the crime. In this case, Ingram "engaged in overtly sexual conduct and physical violence."

Further, the Court agreed it was proper to have introduced evidence of two prior bad acts. First Ingram had been identified as being a man who had been hanging around the women's restroom in the park and staring at women, and upon investigation, it was discovered the Ingram was a registered sex offender. (The photos above were actually on a Kentucky Sex Offender Registry page, apparently, but the circumstances of the investigation were presented as if they were a regular lineup.)

The Court agreed, however, that the events at the restroom (actually two separate reports) "were not sufficiently similar to the crime at issue to be evidence of a common plan, scheme or design." However, the process was, the Commonwealth argued, "inextricably intertwined" with the investigation, but the Court disagreed. (Instead, it only explained how his photo ended up in the photo array. Instead, it was "precisely the type of propensity evidence KRE 404(b) is designed to exclude. Although improper, however, the Court agreed that the error was harmless as the other evidence against Ingram was overwhelming. (In addition, the court agreed it was improper to allow an investigating officer to "testify regarding hearsay statements made by a [witness] in violation of [Ingram's] Sixth Amendment right to confrontation." However, again, the error was harmless.

Anderson v. Com., 2015 WL 6560442 (Ky. 2015)

FACTS: During the late evening of June 30, 2013, officers discovered a methamphetamine lab at Drury's McLean County home. They obtained a warrant to search and ultimately did a lab clean-up of the

house through the early morning hours. They returned later that morning and found McDaniels there, he was arrested. He told police that Anderson was also involved, had methamphetamine at his house, and possibly had anhydrous ammonia as well. Martin was also arrested as a result of the lab, and he too said Anderson was involved.

Police contacted Newman, Anderson's parole officer, and asked that he accompany them to Anderson's home. Under Newman's authority, the residence was searched and a number of items were seized. He was charged with manufacturing methamphetamine and other related charges. At trial, "other crimes evidence" was to be introduced by the Commonwealth, which gave proper notice that it would have evidence of two different instances of manufacturing. The Court permitted only the last instance because it was "inextricably intertwined with Appellant's possession of the meth-making ingredients at his home the following day." He was convicted and appealed.

ISSUE: May evidence of a prior session of methamphetamine manufacturing be introduced?

HOLDING: Yes

DISCUSSION: The Court agreed that the evidence of the meth-making session the day before the items were found in the search warrant was admissible as it met the test for admissibility under KRE 404(b): "(1) whether the evidence is relevant; (2) the probative value of the evidence; and (3) whether its probative value is substantially outweighed by its prejudicial effect."¹²²

The relevance was plain and the probative value was great. It tended to "persuasively resolve any ambiguity about his purpose for possessing some of the items found at his home." However, due to the way the jury was instructed on the law of the case, the Court reversed the decision.

The Court also addressed an issue of McDaniels conviction, and that he received leniency because of information he provided on Anderson. The Court agreed that "There is no dispute that the police were induced to search Appellant's residence because of what McDaniels told them. The only relevance of McDaniels' tip to police was that it explained why his parole officer and the police came to search [Anderson's] residence on July 1, 2013. McDaniels' bias against [Anderson] or his desire to win favorable treatment from police would be relevant to the issue of whether McDaniel's tip was truthful, but the truthfulness of the tip itself is irrelevant to the issues of [Anderson's] trial. It makes no difference whether McDaniels' tip was true or false; its only relevance is that it caused the police to visit [Anderson's] home. Neither the truthfulness of the tip, nor the motivation behind it, affects the validity of the search of [Anderson's] residence." The Court agreed that evidence of McDaniels' criminal conviction was irrelevant.

Robert v. Com., 2015 WL 6584641 (Ky. 2015)

FACTS: More than 20 years ago, in Daviess County, Jane, then 11, began visiting Robert and his wife. When she was in her mid-30s, she reported that Robert had "molested her for approximately five years, beginning when she was eleven years old." Robert was charged with a number of sexual offenses as a result, although both he and his wife denied it. He also claimed the allegations began when Jane asked if their children could play together, and was rebuffed. Robert was convicted and appealed.

ISSUE: May uncharged crimes be mentioned at trial?

HOLDING: Yes

DISCUSSION: Robert's conviction was actually reversed on a juror issue, but the Court elected to address several issues that would come up on retrial.

¹²² Bell v. Commonwealth, 875 S.W.2d 882 (Ky. 1994); KRE 403.

First the Court addressed the Commonwealth's use of evidence that Robert "at trial that [Robert] had engaged in sexual acts with Jane on numerous occasions—more instances than those for which [Robert] had been charged." The Court noted that KRE 404(b) – prior bad acts – and that "this Court has ruled on numerous occasions that "similar acts perpetrated against the same victim are almost always admissible" to prove motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.¹²³ The Court agreed it was proper, only cautioning that the jury be properly instructed that it was for the limited purpose of proving Robert's "motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident" or "if [it is] so inextricably intertwined with other evidence essential to the case that separation of the two (2) could not be accomplished without serious adverse effect on the offering party." KRE 404(b).

The Court also agreed it was proper to use photos of Jane at the ages relevant to the crimes charges, one when she was eleven and one at fourteen. "Just as one is entitled to use photographs of a deceased victim to show him or her as a living person, an alleged victim of sexual abuse may use photographs of himself or herself at the time of the alleged incident to provide an accurate depiction at the relevant age.¹²⁴ Often, sexual crimes are not reported or prosecuted until later in time, when the victim's appearance may, have markedly changed since the time of the alleged crime. Thus, these photographs were relevant for that purpose.

EMPLOYMENT

Beavers v. City of Berea, 2015 WL 5781423 (Ky. App. 2015)

FACTS: On July 4, 2007, Beavers (Berea PD) was involved in a police pursuit that resulted in him using force against the passenger in the suspect vehicle. Although the passenger did not complain, Berea PD instituted an internal investigation and suspended Beavers with pay pending the outcome. On August 1, they found that he'd violated agency regulations and he was fired. Beavers grieved it, but it was promptly denied. He was told he could seek a hearing, however. His counsel argued that he was entitled to an evidentiary hearing under KRS 15.520, but the City took the position that he was only entitled to an administrative hearing. Beavers declined. He filed suit and ultimately, the trial court concluded KRS 15.520 did not apply.

Beavers further appealed. Initially the Court of Appeals ruled that KRS 15.520 did not apply, but when the Kentucky Supreme Court decided Pearce v. University of Louisville, the Court of Appeals was ordered to reconsider Beavers' case in light of that decision.¹²⁵

ISSUE: Are internal complaints against a law enforcement officer subject to KRS 15.520?

HOLDING: Yes

DISCUSSION: The court noted that Pearce effectively meant that internal matters (as well as external complaints) were covered by KRS 15.520, and of course, Berea was part of KLEMPF. The remaining argument was whether Beavers' failure to "exhaust his administrative remedies" affected his claim. Since the Kentucky Supreme Court did not address the issue when it vacated and remanded, the Court noted that the record was too limited to allow it to do so. The case was remanded back to the trial court for further examination in light of Pearce v. Whitenack.¹²⁶

The dismissal of Beavers' claims was reversed and the case remanded.

¹²³ Price v. Commonwealth, 31 S.W.3d 885, 888 n. 4 (2000).

¹²⁴ Rogers v. Commonwealth, 60 S.W.3d 555, 560 (Ky. 2001).

¹²⁵ 448 S.W.3d 746 (Ky. 2014).

¹²⁶ 440 S.W.3d 392 (Ky. App. 2014).

MISCELLAENOUS

Davis v. Com., 2015 WL 7423632 (Ky. App. 2015)

FACTS: Davis was involved in an armed robbery in Covington, in 2010. He was arrested in Cincinnati, however. He was indicted in Kentucky for the robbery and a detainer was lodged with Ohio. He was also charged in Ohio with various crimes. Davis was provided with the forms necessary to inform him of his rights to be adjudicated in Kentucky, and while he completed the forms, he never followed through with what was necessary to pay the postage to have the forms transmitted to Kentucky. Ultimately, in 2012, he was brought to Kentucky for trial, and attempted to have the case dismissed under the Interstate Agreement on Detainers (IAD). That was denied and he stood trial in Campbell County for the robbery. During the trial, he also requested a mistrial on the basis of the testimony of an officer, that “Davis admitted to possessing the guns found in the car” and that he “confessed to being the only one of the three alleged robbers ever to have touched the guns.” This information was not provided to the defense before trial.

Davis was convicted and appealed.

ISSUE: May a prisoner held out of state move to be brought to trial in 180 days?

HOLDING: Yes (but see discussion)

DISCUSSION: First, the Court addressed the IAD issue. Under the interstate agreement, Davis was required to be “brought to trial within one hundred eighty (180) days after he shall have caused to be delivered to the prosecuting officer and the appropriate court of the prosecuting officer’s jurisdiction written notice of the place of his imprisonment and his request for a final disposition to be made of the indictment”¹²⁷

The Court noted, however, that in fact, the Kentucky authorities never received the required forms. Even though he allegedly told the Kentucky prosecutors that he’d started the process, nothing “authorizes verbal notification.” The Court agreed that in Kentucky, the 180 days does not begin until Kentucky receives the appropriate application. His claim that he was indigent, and therefore entitled to free postage from Ohio, failed because there was no proof that he was, in fact, considered indigent at the time (based on the balance in his prison account), and even so, the Court agreed, he was not entitled to unlimited free postage.

With respect to the statement, the Court noted that Brady only applies when the evidence in question is “favorable to an accused,” and his statements did not. “[W]here the undisclosed information is merely incriminating and unfavorable rather than exculpatory or impeaching, Brady is inapplicable.”¹²⁸ Further, “Brady only applies to ‘the discovery, after trial, of information which had been known to the prosecution but unknown to the defense.’”¹²⁹ In this case, the information was discovered during trial, and “furthermore, for purposes of Brady, we can presume the defendant knows what statements he himself makes, especially when the statement is exculpatory, such as Brady is intended to cover.”

However, the Court agreed that the failure to disclose the statement “did violate RCr18 7.24(1).”¹³⁰ A violation of the discovery rules does not rise to the level of the constitutionally-based Brady violation.” The trial court held a brief hearing on the issue mid-trial and admonished the jury that they were “not allowed to consider Davis’s undisclosed statement during their deliberations.” The Court found more than sufficient evidence to support his conviction.

¹²⁷ KRS 440.450 Art. III (1).

¹²⁸ Houchin v. Commonwealth, 2008-SC-000373-MR, 2009 WL 4251645, at *6

¹²⁹ Bowling v. Commonwealth, 80 S.W.3d 405, 410 (Ky. 2002) (quoting United States v. Agurs, 427 U.S. 972 (1976)).

¹³⁰ Chestnut v. Commonwealth, 250 S.W.3d 288, 297 (Ky. 2008) (nondisclosure of a defendant’s incriminating oral statement by the Commonwealth during discovery constitutes a violation of the discovery rules under RCr 7.24(1)).

Haydon / Adams v. Dozier, 2015 WL 8527518 (Ky. App. 2015)

FACTS: In September, 2013, Dozer won a large verdict against Haydon. Dozer requested an injunction to prevent Haydon from disposing of assets under the judgement was satisfied, which the trial court granted, but also allowed him to execute the trial judgement immediate and provided for garnishment of bank accounts. It denied Haydon's appeal on November 14.

On November 25, an execution order was entered and delivered to the Hardin County Sheriff. On December 11, the order was served on Haydon. A large amount of cash was seized, along with coin collections. Adams, who also resided at the home, filed an action claiming that the seized property was hers, not Haydon's, and on the same day, Dozer filed to have the seized assets turned over to him. A hearing was scheduled to resolve the ownership issue. At the hearing, Adams claimed that the items belonged to her, stating she'd gotten it from her husband's estate and insurance, along with other sources. She claimed the coin collections had belonged to her husband. Haydon stated that none of the money was his and that he only had five dollars in the bank. (He claimed to own property with 14 tenants, however.) He verified that three of his accounts had been emptied and that he'd made no deposits into those accounts after the judgement – despite having made regular large deposits into them previously.

Det. Dover, who was present during the execution, testified that Adams had been in possession of a large amount of cash during the execution, which she had under her shirt. The Court ruled that Adams could only prove that \$4200 belonged to her, and it held the remainder of the amount, over \$30,000, belonged to Haydon and was the subject of the execution. It ruled the coin collections belonged to Adams and should be returned. Appeals followed.

ISSUE: May items reasonably believed to be subject to seizure under an execution order be taken, even though they might later have to be returned?

HOLDING: Yes

DISCUSSION: The Court agreed that the deputies “reasonably concluded the property was subject to seizure.” Although Adams was hiding it in her shirt, she had removed it from where it had been secured under Haydon's computer desk in his home office. When a person asserts ownership of items “found in the possession of the execution defendant,” the burden is on them to prove it.¹³¹ Certainly she had no documentation to prove her ownership of most of the cash, and offered little evidence. In contrast, for three months, Haydon deposited none of his rental income into any bank account, either. The Court upheld the trial court's ruling as to the cash and coin collection.

¹³¹ Borches v. Bellis, 62 S.W. 486 (1901).

SIXTH CIRCUIT

FEDERAL LAW

U.S. v. Shahulhameed, 2015 WL 6219237 (6th Cir. 2015)

FACTS: On August 23, 2012, just hours following the firing of Shahulhameed, Toyota Motors in Kentucky experienced a cyberattack that rendered several servers inoperable. The attack was tracked to Shahulhameed's Toyota-owned laptop and user account, as he was a computer contractor for them. He was charged with computer crimes under 18 U.S.C. §1030(1)(5)(A) and (c)(4)(B)(i), resulting in damage to a protected computer. During the trial, the evidence indicated that his password protected user account was logged into Toyota's remote-access system, which was the only way to access the servers from outside the facility. Codes were transmitted that made changes to the configuration files and information from the laptop confirmed it was used. Further, the court agreed the computer was protected under the law because it was used in interstate commerce. He was convicted and appealed.

ISSUE: Are making unauthorized changes to a computer system to which one still has access enough to justify a damage charge?

HOLDING: Yes

DISCUSSION: Shahulhameed argued that his access was authorized because Toyota had failed to disable his account, even after they were notified that he had been fired. He had been told earlier that he was not to communicate or report to the Toyota site. The Court agreed that the phone call and email was sufficient to indicate that he was not authorized to access the system at the time he did so.

Further, the changes he made betrayed an "intent to cause damage" to the system, by making it impossible for the computers to operate as intended. "Some of the changes were minute and difficult to detect" without specialized tools and knowledge, and were clearly intended to mask what had been done.

With respect to the amount of damage, in excess of the \$5,000 threshold needed for the federal law, Toyota provided documentation that employees had spent far in excess of 2,000 hours responding and repairing the damage.

The Court affirmed his conviction.

SEARCH & SEIZURE – WARRANT

U.S. v. Sinclair, 62015 WL 7567577 (6th Cir. 2015)

FACTS: On April 2, 2013, a Michigan judge issued a search warrant for two homes (in Highland Park and Detroit). Det. Cooper's affidavit read as follows:

On March 4, 2012, a confidential source (CS1) disclosed that he or she had been purchasing heroin from "Durand" for several years. Id. CS1 explained that he or she contacts a telephone number and is then directed to the address on Pasadena in Highland Park. Id. Officers identified Durand Sinclair as the individual involved in the narcotic sales. As the affidavit provides, the FBI previously investigated Sinclair in 2008 for selling narcotics at a different Pasadena address. The 2008 investigation "revealed that Sinclair would store narcotics at his residence and make daily deliveries" to the Pasadena address. In July 2012, law enforcement began surveillance on the Pasadena address described by CS1. Officers and agents conducted surveillance on eight occasions from July through November 2012. During this investigation, agents stopped individuals leaving the Pasadena address and made arrests for possession of illegal narcotics.

The affidavit states that officers observed Sinclair parking a vehicle near the Pasadena address and entering the house “numerous times.”

Officers and agents also conducted surveillance on the Snowden address in Detroit, which the affidavit describes as Sinclair’s residence. On November 16, 2012, the affidavit states that officers observed the “subject vehicle in front [of Sinclair’s] residence” on Snowden. On November 26, 2012, law enforcement observed Sinclair leaving the Snowden address. The officers followed him from the Snowden residence to the address on Pasadena, noting that Sinclair was “see[ing] if he was being followed by circling and making frequent turns.”

Months later, on March 5, 2013, officers again observed Sinclair “depart his residence” on Snowden in a green BMW, and “return using a key to gain entry into the residence.” Agents simultaneously observed the house on Pasadena, noting that “no one was observed visiting or conducting narcotics transaction” on Pasadena during the time that Sinclair was on Snowden. Id. The next day, on March 6, 2013, officers observed the green BMW parked on Pasadena and saw Sinclair enter the Pasadena address. Over the course of the next several hours, numerous individuals arrived and “stayed no more than a few minutes and then left . . . consistent with narcotic trafficking.” On March 9, 2013, officers stopped a car leaving the Pasadena address and found a plastic baggie of heroin.

On March 18, 2013, officers again conducted surveillance on the Snowden and Pasadena residences. At 3:55 p.m., officers observed Sinclair arrive at the Snowden residence in a white Chevrolet van and use a “key to unlock the front door.” Officers on Pasadena observed no activity at the Pasadena address “between the hours of 8:00 a.m. and 6:10 p.m.” At 6:10 p.m., officers saw the white Chevrolet van parked on Pasadena. According to the affidavit, “[d]uring the next hour . . . 11 people arrived” and stayed “between one and five minutes,” consistent with narcotics trafficking. On March 22, officers stopped a woman leaving the Pasadena address and found crack cocaine. On March 31, officers stopped a male leaving the Pasadena address and again discovered crack cocaine. Sinclair “was observed on Pasadena during the time of narcotic sales” on March 31.

Det Cooper indicated that based on his training or experience, he believed that currency, records, and ledgers, controlled substances, firearms, computer records and other items would be found. At the time it was served, Sinclair was inside the Highland Park home, where drugs and drug paraphernalia was found. Cash, a shotgun and a bill with Sinclair’s name was found at the Detroit house.

Sinclair, a felon, was charged with possession of a firearm. He moved for suppression of the items found at the Detroit (Snowden) address, because the warrant “failed to establish a nexus between the drug activity [at Highland Park (Pasadena)] and the Snowden residence.” The only connection he had with that location was that he had a key to enter. He further argued that the warrant was invalid due to staleness – since some 14 days passed between the last mention of the location and the warrant. The Court, however, denied it, relying on U.S. v. Frazier¹³², and to hold that “status as a drug dealer, plus the observation of drug activity in other places is sufficient to establish probable cause to search the home.” The district court found that the affidavit established probable cause that evidence would be found at the Snowden residence because the officers followed Sinclair from Snowden to Pasadena, observed him at the Pasadena address, and because Sinclair is a “known drug dealer.” The Court also addressed Sinclair’s staleness argument, even though it was raised for the first time in his reply brief.

The court found that the affidavit was not stale because the defendant was “entrenched in the Detroit area,” his residence “could be considered a secure operational base,” and the affidavit set forth an “ongoing criminal investigation.”

Sinclair took a conditional guilty plea and appealed.

ISSUE: Is a warrant for a drug dealer’s home stale just due to passage of time (14 days)?

¹³² 423 F.3d 526 (6th Cir. 2005),

HOLDING: No

DISCUSSION: First, the Court agreed the information was not stale. Looking to U.S. v. Abboud, the court “¹³³ consider[ed] several factors to determine whether information in an affidavit is stale, including “the character of the crime (chance encounter in the night or regenerating conspiracy?), the criminal (nomadic or entrenched?), the thing to be seized (perishable and easily transferable or of enduring utility to its holder?), [and] the place to be searched (mere criminal forum of convenience or secure operational base?).”¹³⁴

Each of these factors weighs against a finding of staleness. First, the nature of Sinclair’s crime was “an ongoing drug trafficking conspiracy.”¹³⁵ CS1 detailed to officers that he or she had purchased heroin from Sinclair “for several years,” and officers subsequently observed Sinclair’s activity over the course of a year. “Evidence of ongoing criminal activity will generally defeat a claim of staleness.”¹³⁶ Second, the ongoing nature of the criminal activity described in the affidavit, and Sinclair’s previous drug-related activity on Pasadena in 2008, suggests that Sinclair was “entrenched” in the Detroit area rather than “nomadic.” Third, the items to be seized in the search warrant included non-perishable items such as firearms, business records, and drug paraphernalia. Finally, because officers observed Sinclair at Snowden on four separate occasions over the course of a year-long investigation, and observed him using a key to gain entry, the Snowden address is closer to a “secure operational base” rather than a “mere criminal forum of convenience.” Accordingly, the fifteen-day span between the officers’ last observation of Sinclair on Snowden and the issuance of the affidavit is not sufficient to defeat probable cause.

The Court found the nexus question to be closer, since “an affidavit in support of probable cause must demonstrate that there is “a nexus between the place to be searched and the evidence sought.”¹³⁷ (quotations omitted). Specifically, “the affidavit must suggest ‘that there is reasonable cause to believe that the specific things to be searched for and seized are located on the property to which entry is sought’ and not merely ‘that the owner of the property is suspected of a crime.’”¹³⁸ It was reasonable to find that a drug dealer’s home will include drugs, but the affidavit did not indicate he lived at the Snowden address. The evidence could have easily only shown him to be a friend or family member of the resident. However, even if it was insufficient, the Court agreed the officers acted in good faith, and that “

“[c]ourts should not . . . suppress ‘evidence obtained in objectively reasonable reliance on a subsequently invalidated search warrant.’”¹³⁹ There are four circumstances, however, in which Leon’s good faith exception is inapplicable:

(1) where the issuing magistrate was misled by information in an affidavit that the affiant knew was false. . . ; (2) where the issuing magistrate wholly abandoned his judicial role . . . ; (3) where the affidavit was nothing more than a “bare bones” affidavit that did not provide the magistrate with a substantial basis for determining the existence of probable cause, or where the affidavit was so lacking in indicia of probable cause as to render official belief in its existence entirely unreasonable; and (4) where the officer’s reliance on the warrant was not in good faith or objectively reasonable, such as where the warrant is facially deficient.

The warrant was more than a barebones accounting, but “included enough facts with respect to the nexus between the criminal activity and the [Snowden] residence to overcome the ‘so lacking’ hurdle.”¹⁴⁰ Comparing what was provided, the Court noted that the affidavit did include enough detail to provide a “common sense inference” that Sinclair did live there. As such, “Accordingly, the “affidavit was not so

¹³³ 438 F.3d 554, 572 (6th Cir. 2006).

¹³⁴ United States v. Spikes, 158 F.3d 913, 923 (6th Cir. 1998)

¹³⁵ See United States v. Brown, 801 F.3d 679, United States v. Sinclair, 690 (6th Cir. 2015).

¹³⁶ United States v. Greene, 250 F.3d 471, 481 (6th Cir. 2001).

¹³⁷ United States v. Carpenter, 360 F.3d 591, 594 (6th Cir. 2004) (en banc)

¹³⁸ United States v. McPhearson, 469 F.3d 518, 524 (6th Cir. 2006) (quoting Zurcher v. Stanford Daily, 436 U.S. 547, 556 (1978)).

¹³⁹ Carpenter, 360 F.3d at 595 (quoting United States v. Leon, 468 U.S. 897, 922 (1984)).

¹⁴⁰ Washington, 380 F.3d at 243.

lacking in probable cause as to render official belief in its existence unreasonable,” and Leon’s good-faith exception to the exclusionary rule applies.”

The Court affirmed Sinclair’s conviction.

U.S. v. Howard, 2015 WL 7567624 (6th Cir. 2015)

FACTS: On February 6, 2013, Det. Skeens (KSP/UNITE) got a search warrant for Howard’s Magoffin County home.

The warrant read as follows:

On the 5th day of Feb. 2013, at approximately 5:45 p.m., affiant received information from: Shawn Compton that Brian Howard was currently conducting narcotics deliveries for a variety of addicts in Magoffin Co[.] Shawn Compton states that Brian Howard is receiving the narcotics from Greg Howard a relative of Brian Howard at the location described herein and the photo attached hereto. The witness states that Brian Howard does not have a vehicle and usually borrows the purchasers vehicle and drives to the residence described herein to pick up the pills for the addicts while leaving the addicts at Brians home located on coon creek.

On 02-05-2013 myself and Det Adams met the witness at an undisclosed location in Magoffin co and conducted a control buy from Brian Howard. The witness stated they arrived at the residence of Brian Howard on Coon Creek and Brian Howard took the witnesses money and vehicle and began pulling out of the driveway and stopped[.] Brian exited the vehicle and told the witness that Greg Howard had just contacted him and told him to wait 15 minutes before leaving coon creek to come get the pills. Durring [sic] the buy the witness stated that Brian Howard went to the residence of Greg Howard described herein to purchase a quantity of Oxycodone pills for the witness. Detectives also personally observed the witnesses vehicle leaving the residence described herein.

The witness stated that when Brian returned with the pills that was purchased that Brian Howard told the witness that he went to purchase the pills from Greg Howard and further told the witness that Greg Howard was currently laying low because he was scared of getting caught by Law Enforcement.

The affidavit continued:

Acting on the information received, affiant conducted the following independent investigation: UNITE and KSP have been receiving tips about Greg Howard and his Oxycodone trafficking activities that has been directly linked to Howards Grocery located in Magoffin County[.] Unite detectives have made controlled buys from the store from individuals associated with Greg Howard.

When they executed the warrant, they found Howard “attempting to dispose of pills in a bathroom sink.” Recovered pills were determined to be Oxycodone, and they also recovered over \$5K in cash, some of which include marked buy money indicated in the warrant.

Howard was indicated for trafficking. He moved to suppress and was denied, finding that the informant ““was a named informant and his statements are therefore generally considered to be reliable even without independent corroboration to establish his credibility.” And even had he not been, the “detectives’ observations during the controlled buy constituted sufficient corroboration to establish probable cause.” Howard took a conditional guilty plea and appealed.

ISSUE: May a magistrate rely on hearsay in a warrant affidavit?

HOLDING: Yes

DISCUSSION: The Court began by noting that “The Fourth Amendment provides that “no Warrants shall issue, but upon probable cause, supported by Oath or affirmation”¹⁴¹ In deciding whether the affidavit supporting a warrant establishes probable cause, magistrates must consider “the totality of the circumstances.”¹⁴² In turn, “[t]he duty of a reviewing court is simply to ensure that the magistrate had a ‘substantial basis’ for concluding that probable cause existed.”¹⁴³

A magistrate may rely on hearsay evidence provided by an informant when considering whether probable cause exists to issue a warrant.¹⁴⁴ In so doing, the magistrate should make a practical, common-sense decision whether, given all the circumstances set forth in the affidavit before him, including the “veracity” and “basis of knowledge” of persons supplying hearsay information, there is a fair probability that contraband or evidence of a crime will be found in a particular place.

Importantly, these indicia of an informant’s credibility—veracity and basis of knowledge—provide only a framework for determining whether an informant’s tip creates probable cause.¹⁴⁵ In other words, the “veracity or reliability and . . . basis of knowledge” of an informant should not be viewed “as entirely separate and independent requirements to be rigidly exacted in every case.”¹⁴⁶ Even so, “these factors remain highly relevant in the . . . analysis under the ‘totality of the circumstances.’”¹⁴⁷

In Gates, the Supreme Court provided examples of how the veracity/basis of knowledge framework might play out:

If, for example, a particular informant is known for the unusual reliability of his predictions of certain types of criminal activities in a locality, his failure, in a particular case, to thoroughly set forth the basis of his knowledge surely should not serve as an absolute bar to a finding of probable cause based on his tip. . . . Likewise, if an unquestionably honest citizen comes forward with a report of criminal activity—which if fabricated would subject him to criminal liability—we have found rigorous scrutiny of the basis of his knowledge unnecessary.¹⁴⁸

Conversely, even if we entertain some doubt as to an informant’s motives, his explicit and detailed description of alleged wrongdoing, along with a statement that the event was observed first-hand, entitles his tip to greater weight than might otherwise be the case. And regardless how an informant fares in this framework, “corroboration through other sources of information” can provide “a substantial basis for crediting” an informant’s tip.

In this case, the court agreed “the facts contained in the affidavit bolstered Compton’s veracity and, to a lesser extent, his basis of knowledge. In addition, the controlled buy described in the affidavit corroborated Compton’s tip. For these reasons, we conclude that under the totality of the circumstances, the magistrate had a substantial basis for concluding probable cause existed, and that the district court’s order denying Defendant’s motion to suppress should therefore be affirmed.

The Court continued:

The “veracity or reliability” factor of the Gates framework concerns the individual informant’s credibility as such.¹⁴⁹ Generally, “[a]n affidavit . . . must contain a statement about some of the underlying circumstances indicating the informant was credible or that his information was

¹⁴¹ U.S. Const. amend. IV.

¹⁴² United States v. Allen, 211 F.3d 970, 972 (6th Cir. 2000) (en banc) (citing Illinois v. Gates, 462 U.S. 213, 230–31 (1983)); see also United States v. Davidson, 936 F.2d 856, 859 (6th Cir. 1991) (“Probable cause exists when there is a ‘fair probability,’ given the totality of the circumstances, that contraband or evidence of a crime will be found in a particular place.”).

¹⁴³ United States v. Gunter, 551 F.3d 472, 479 (6th Cir. 2009) (quoting Gates, 462 U.S. at 238–39).

¹⁴⁴ United States v. Helton, 314 F.3d 812, 819 (6th Cir. 2003).

¹⁴⁵ See Helton, 314 F.3d at 819–20.

¹⁴⁶ Gates, 462 U.S. at 230, 233 (internal quotation marks omitted).

¹⁴⁷ United States v. Smith, 182 F.3d 473, 477 (6th Cir. 1999) (quoting Gates, 462 U.S. at 230).

¹⁴⁸ Adams v. Williams, 407 U.S. 143 (1972).

¹⁴⁹ See Gates, 462 U.S. at 233–34.

reliable.”¹⁵⁰ What police know about an individual informant plays a significant role in evaluation of her veracity. Tips from anonymous persons, for example, “demand more stringent scrutiny of their veracity, reliability, and basis of knowledge than reports from confidential informants.”¹⁵¹

The Supreme Court illustrated this principle in Florida v. J.L.. In that case, an anonymous caller informed police “that a young black male standing at a particular bus stop and wearing a plaid shirt was carrying a gun.”¹⁵² Police discovered a person matching this description at the indicated location, but did not see a firearm. *Id.* Even so, officers frisked the suspect and discovered a gun in his pocket. The Court held “that an anonymous tip lacking indicia of reliability . . . does not justify a stop and frisk whenever and however it alleges the illegal possession of a firearm.” In so holding, the Court observed that “[u]nlike a tip from a known informant whose reputation can be assessed and who can be held responsible if her allegations turn out to be fabricated . . . an anonymous tip alone seldom demonstrates the informant’s basis of knowledge or veracity.”

Florida v. J.L. thus suggests that where an informant is known to police, that informant’s tip is entitled to more weight because (1) officers can assess the informant’s reputation or otherwise evaluate her credibility, and (2) the threat of prosecution for filing a false statement is circumstantial evidence of veracity.¹⁵³

This Circuit has placed particular emphasis on the “informant’s reputation” factor discussed in Florida v. J.L. In U.S. v. Allen, for example, this Court held that where an informant “to whose reliability an officer attests with some detail, states that he has seen a particular crime and particular evidence, in the recent past,” such a statement may, on its own, be sufficient to establish probable cause.¹⁵⁴ We have also accorded considerable weight to the threat of prosecution that a named informant faces for filing a false police report.¹⁵⁵ Relying on Hodge and Williams, the district court in this case concluded, “Compton was a named informant and his statements are . . . generally considered to be reliable even without independent corroboration to establish his credibility.”

The Court noted that “all our named informant cases share this common thread—affidavits containing an informant’s name plus other indicia of reliability.”¹⁵⁶

Read in this light, our cases are more in step with the Supreme Court’s admonition that courts evaluating probable cause must take into account the “totality of the circumstances,” rather than implement bright-line rules.” The Court noted that it would “run afoul” of the precepts of the Fourth Amendment if it was “to

¹⁵⁰ Smith, 182 F.3d at 477.

¹⁵¹ Helton, 314 F.3d at 820; see also United States v. Johnson, 364 F.3d 1185, 1190 (10th Cir. 2004) (“A tipster who refuses to identify himself may simply be making up the story, perhaps trying to use the police to harass another citizen.”).

¹⁵² 529 U.S. 266 (2000).

¹⁵³ See *id.*; see also United States v. May, 399 F.3d 817, 824–25 (6th Cir. 2005) (“The statements of an informant . . . whose identity was known to the police and who would be subject to prosecution for making a false report, are thus entitled to far greater weight than those of an anonymous source.”).

¹⁵⁴ 211 F.3d 970 (6th Cir. 2000) (*en banc*), *Id.* at 976; see also Smith, 182 F.3d at 483 (“[I]f the prior track record of an informant adequately substantiates his credibility, other indicia of reliability are not necessarily required.”). But see Allen, 211 F.3d at 986–87 (Clay, J., dissenting) (arguing that a warrant “based simply upon a generalized assertion regarding the reliability of the informant” is not supported by probable cause).

¹⁵⁵ See, e.g., United States v. Hodge, 714 F.3d 380, 384–85 (6th Cir. 2013) (“Statements from a source named in a warrant application . . . are generally sufficient to establish probable cause without further corroboration because the legal consequences of lying to law enforcement officials tend to ensure reliability.”);

¹⁵⁶ See, e.g., United States v. Kinison, 710 F.3d 678, 683 (6th Cir. 2013) (holding probable cause existed based on informant’s “credibility as a named informant along with [her] decidedly intimate relationship” with the suspect, as revealed in a text-message log provided by the informant (emphasis added)); United States v. Combs, 369 F.3d 925, 938 (6th Cir. 2004) (noting informant “was known to the police . . . [had] informed them that he had recently traded guns with [defendant] for OxyContin, and his statements corroborated other information the police already had”); United States v. Miller, 314 F.3d 265, 269–70 (6th Cir. 2002) (noting named informant spoke to police on two occasions over the telephone, drove with police to the location of the residence at which the informant alleged illegal activity, and provided a detailed description of the defendant’s marijuana growing operation); United States v. Pelham, 801 F.2d 875, 878 (6th Cir. 1986) (“When a witness has seen evidence in a specific location in the immediate past, and is willing to be named in the affidavit, the ‘totality of the circumstances’ presents a ‘substantial basis’ for conducting a search for that evidence.”).

declare that police can invade the sanctity of the home based on a warrant containing only an informant's name, full stop.”

In this case, there was no information as to Compton's history as an informant, but he would still have faced the threat of prosecution for providing false information. Under Kentucky law, even though Compton's knowledge of what Howard did during the buy was based on hearsay, there was no reason he could not still have been prosecuted under KRS 510.040. He also participated in a controlled buy, which could have put him at risk as well. Although it provided nothing as to the basis of his knowledge, and it was devoid of detail, it did provide enough detail to allow the investigators to pursue an investigation. It did little to bolster the credibility of his tip, however. The controlled buy, however, also led little to the corroboration as it was not done under total surveillance and the magistrate was “forced to rely on Compton to verify his own veracity.” However, the detectives did witness Compton leave the home, which linked the criminal activity to the residence. Certainly, they could have done more, but an “affidavit is judged on the adequacy of what it does contain, not on what it lacks, or on what a critic might say should have been added.”¹⁵⁷

With respect to the independent investigation, the court found little to confirm that drugs would be at the residence, and it suggests only that “drugs were purchased at a grocery store associated with Defendant from persons associated with Defendant. The Court concluded that that while simply naming an informant isn't enough, in this case, there was sufficient information to support the warrant. The Court cautioned, however, that

Nevertheless, our holding should not be taken as an invitation for investigators to draft—or for executing officers to rely upon—similarly threadbare affidavits. We are well aware that affidavits “are normally drafted by nonlawyers in the midst and haste of a criminal investigation.”¹⁵⁸ Even so, we are confident that no significant harm would have befallen UNITE's investigation of Defendant had a few self-evidently important details been added to the affidavit—for example, whether investigators actually recovered any controlled substances from Compton after the controlled buy. And as we have previously warned, “[p]olice should be aware that failure to corroborate all that can easily be corroborated . . . risk[s] the loss, at trial or on appeal, of what has been gained with effort in the field.”¹⁵⁹ Had investigators taken a few simple precautions when preparing the warrant to search Defendant's home, this case might not be before us.

The Court affirmed the conviction.

U.S. v. Perez, 2015 WL 6405695 (6th Cir. 2015)

FACTS: In April, 2009, the Mahoning Valley Task Force made two controlled buys from an individual they knew only as “Scar.” “Officer Randall Williams applied for and received a search warrant for (1) “FNU’ ‘LNU’2 AKA ‘Scar’ male, Hispanic 5' 10" 185 lbs. with black hair,” and (2) the “premises known as 2211 Glenwood Avenue.” On May 14, while doing surveillance in preparation for serving the warrant, they saw a man and woman leave – later identified and Perez and Diaz (his girlfriend). They followed the van and it eventually returned to the house, but at that point “police were executing a search warrant at the residence and official vehicles were visibly around the house.” Perez turned away from the residence and was stopped, based on the warrant. He was handcuffed as the investigation was ongoing – notably, one of the numbers they had for Scar rang a phone he had in his possession. They were returned to the residence and seated Perez while they were doing the search. “At this point, Perez allegedly made his first incriminating statement: that the heroin the police found in the house belonged to him.” When he became loud and belligerent, he was removed to the task force office. On the way there, he “made further incriminating admissions. He confessed that the heroin at the Glenwood residence belonged to him and that he sold heroin because a disability prevented him from working.” He made

¹⁵⁷ Allen, 211 F.3d at 975

¹⁵⁸ United States v. Ventresca, 380 U.S. 102 (1965).

¹⁵⁹ Allen, 211 F.3d at 976.

another incriminating statement in the interview room, but it was not recorded. He explained that Diaz didn't know about the trafficking. He was never given Miranda.

Federal law enforcement became involved in the case when Perez was linked to another drug trafficking case involving the FBI. He was convicted of federal charges and appealed.

ISSUE: Must the actual warrant include particular information as to what (or who) is to be seized?

HOLDING: Yes

DISCUSSION: First, Perez argued that the search warrant should have been suppressed. The Court assessed it under a particularity analysis, since “particularity is a facial requirement of the warrant itself and the Fourth Amendment requires particularity in the warrant, not in the supporting documents.”¹⁶⁰ The Fourth Amendment, however, does not prohibit a warrant from incorporating the content of other documents by reference. In order to use an affidavit or supporting document, the warrant must incorporate the affidavit by reference and the affidavit had to have been attached to the warrant.

The Court noted that “the warrant at issue here only contains boilerplate language referring to the affidavit supporting the warrant, stating: “Affidavit having been made before me by Sergeant Randall Williams . . . I am satisfied that the Affidavit(s) and any recorded testimony establish probable cause . . .” However, there was no information that indicated the affidavit was attached to the warrant during the search. As such, the Court looked to wither the warrant as available to the searches would allow them to “reasonably ascertain and identify the things which are authorized to be seized.”

The trial court had “concluded that the original single search warrant actually functioned as two separate warrants, given that Defendant was stopped not in the immediate vicinity of the place to be searched. Therefore, only the information pertaining to Defendant’s person—and not any of the enumerated items—are relevant to our particularity inquiry here. The warrant referred to Defendant by the alias by which police knew him—“Scar”— and provided a description of his height, weight, ethnicity, and hair color.” The Court agreed that the “he use of such fictitious names or aliases in warrants, without more, violates the requirements of the Fourth Amendment.”¹⁶¹ Some further description of the person intended to be designated by the warrant is required. “Where a name that would reasonably identify the subject to be arrested cannot be provided, then some other means reasonable to the circumstances must be used to assist in the identification of the subject of the warrant.”

In this case, the Court agreed the warrant was sufficient because it contained both the name and the detailed physical description. Even though it did not specific a location, they attempted to execute it at his home, and was thwarted when he left. When he returned, he was seized, and had been in constant surveillance once he left initially. The Court agreed the warrant was as specific as circumstances allowed.

Further, when he was moved from the stop location to the residence, under continued detention, the Court agreed that under he was properly seized pursuant to the warrant that was specific to him. He was properly held, and properly moved, under the circumstances. Further, while he was in custody, he was not being functionally interrogated when he was held in the room where the evidence was being collected. His statement en route were voluntary and not as a result of questioning, and “Courts do not hold police accountable for the unforeseeable results of their words or actions.”¹⁶² The definition of interrogation, therefore, only extends to words or actions on the part of officers that they should have known were reasonably likely to elicit an incriminating response. Officer Lees was not the investigator on this case. He explained that he was transporting Defendant to finalize paperwork for the arrest and not for questioning. He responded to Defendant’s questions during a short car ride without asking him any

¹⁶⁰ Groh v. Ramirez, 540 U.S. 551, 557 (2004).

¹⁶¹ United States v. Swanner, 237 F. Supp. 69, 71 (E.D. Tenn. 1964) (emphasis supplied).

¹⁶² Rhode Island v. Innis, 446 U.S. 291, 301–02 (1980).

questions. Lees is not accountable for Defendant's incriminating responses because they were voluntary except for the statement properly excluded by the district court."

The Court upheld his conviction.

SEARCH & SEIZURE - CONSENT

U.S. v. Clay, 2015 WL 6600019 (6th Cir. 2015)

FACTS: Clay and Mitchell, his girlfriend, lived in Frankfort. Mitchell had belongings there, but did not stay there every night – sometimes she stayed with her grandmother. She did have access to the entire apartment, except for one locked closet and used Clay's vehicle. The apartment was in the name of a third party, to whom Clay paid rent in cash. Mitchell did not have a key but had ready access. On April 23, 2013, before 7 a.m., Clay ordered Mitchell out and as she walked away, he knocked her down and scratched her face. Neighbors rescued Mitchell, who left and went to her grandmother's house. She called Frankfort PD.

Sgt. Quire had Mitchell come to the station. She told him about the violence and said she had drugs and a gun at the apartment. (It was unclear whether she said the closet was locked.) She stated she'd lost her cell phone in the melee. She told the same thing to Lt. Sutton and that she wanted to help them obtain the drugs and gun, and she wanted to retrieve some clothing. She gave written consent to the search, but also indicated her residence was her grandmother's. (She later admitted she didn't "consider herself to have the right to reenter the apartment at that time but that she did not express her belief to the officers.")

Officers went to the apartment to search for Clay. They found the cell phone outside. Officers entered using a key from maintenance and did a " cursory search " – observing paraphernalia and cocaine in plain view. The locked closet was noticed and they learned Clay had installed the lock. Officers went back to draft a search warrant for the locked closet and the apartment. When they returned, they found a large amount of drug evidence and a gun, both in the closet and in other locations, along with other related items.

Clay was charged and moved for suppression. The trial court concluded that while Mitchell lacked actual authority to consent, she did have apparently authority for the initial search. The evidence found during that search was properly used to support the warrant. Clay was convicted and appealed.

ISSUE: May a person with common authority give consent to a search?

HOLDING: Yes

DISCUSSION: The Court looked first to the initial consent provided by Mitchell. The Court agreed that "valid consent may be given not only by the defendant but also by a third party" ¹⁶³ A warrantless entry and search does not violate the Fourth Amendment's prohibition so long as the third party consent is from one who possesses common authority over, or other sufficient relationship to, the searched area. ¹⁶⁴ Common authority is the "mutual use of the property by persons generally having joint access or control for most purposes, so that it is reasonable to recognize that any of the co-inhabitants has the right to permit the inspection in his own right and that the others have assumed the risk that one of their number might permit the common area to be searched."

Consent can be actual or apparent, and "Apparent authority is judged by an objective standard." ¹⁶⁵ The question at issue is whether "the facts available to the officer[s] at the moment warrant a man of reasonable caution in the belief that the consenting party had authority over the

¹⁶³ United States v. Morgan, 435 F.3d 660, 663 (6th Cir. 2006) (citation and internal quotation marks omitted).

¹⁶⁴ United States v. Matlock, 415 U.S. 164 (1974); see also Illinois v. Rodriguez, 497 U.S. 177 (1990).

¹⁶⁵ United States v. Gillis, 358 F.3d 386 (6th Cir. 2004) (citing Rodriguez, 497 U.S. at 188–89).

premises[.]”If so, the search is valid. If not, the search is unlawful unless actual authority existed.” Prior decisions agreed that a part-time roommate could give consent and “Factors we consider in determining whether a girlfriend had apparent authority include whether she had a key,¹⁶⁶ whether she provided a detailed description of the premises and the location of drugs, whether her name was on the lease, see *id.*, and whether the police independently knew that she lived with the defendant.¹⁶⁷

In this case, the Court agreed that Mitchell had apparent authority, given the information she gave to the officers. And by allowing her to do so, Clay “assumed the risk that Mitchell could permit unwanted visitors. The officers were “entitled to rely on this ‘assumption of risk,’ and there [was] no burden on the police to eliminate the possibility of atypical shared occupancy arrangements absent some ‘reason to doubt that the regular scheme [was] in place.’”¹⁶⁸ Mitchell provided no such reason.” She provided the officers with sufficient “corroborating information that established her connection with the apartment, namely, a detailed description of the premises.” The fact she did not have a key was not dispositive, as she’d been forced out, and the officers apparently did not know that she had never had a key. The fact that she was not on the lease was also not a factor, as she clearly “mutually used” the apartment in a way relatively equal to Clay.

Once the first search was authorized, the officers properly used the information they discovered to get a search warrant to get further authority to search, especially the locked area. Mitchell was a identified informant, although not named in the affidavit, and the information provided was more than sufficient to find probable cause.

The Court upheld Clay’s conviction.

SEARCH & SEIZURE – TERRY

Williams v. U.S., 2015 WL 7776325 (6th Cir. 2015)

FACTS: On July 13, 2007, members of the MPD’s Organized Crime Unit (OCU) were checking a drug complaint in the area of 1568 Oakwood. As detectives drove onto Oakwood, Kevin Williams was observed closing the door of a 2003 Ford F-150 pickup truck. Williams, standing in the middle of the street, then engaged in a hand-to-hand transaction with a[n] unknown individual. The detectives exited their unmarked police vehicles, identified themselves as police officers and ordered Williams and the other individual to come over to them. Williams immediately turned and ran towards 1568 Oakwood and two of the detectives chased him. Williams ran inside 1568 Oakwood and attempted to close the door on the chasing detectives but was unsuccessful. He was taken into custody without further incident. Williams was searched incidental to arrest and found to be in possession of the ignition keys belonging to the Ford F-150 pick-up truck, as well as \$3,259.00 in cash. The detectives looked into Williams’ pick-up and “observed sitting in plain view, in the console cup-holder, a clear plastic baggie containing a white [sic] powdery substance later determined to be cocaine hydrochloride (powder cocaine). As the officers retrieved the first baggie of cocaine, they looked in the console and found \$790.00 in currency and a second baggie of cocaine. Further search of the truck revealed two Codeine pills (Tylenol III), two Hydrocodone pills and a black digital scale. A search warrant was retrieved and executed at the defendant’s home, 9236 Morning Glow, No. 203. An additional amount of cocaine hydrochloride, as well as cocaine base, 20 Ecstasy pills, and more currency was recovered. A total of \$16,099.00 in currency was seized from the defendant. A DEA laboratory analysis of the seized drugs revealed the following net weights:

Cocaine Hydrochloride 2,604 grams (2.6 kilograms)
Cocaine Base 75 grams

¹⁶⁶ See United States v. Hudson, 405 F.3d 425, 442–43 (6th Cir. 2005).

¹⁶⁷ Penney, 576 F.3d at 307–08; see also Gillis, 358 F.3d at 387–88, 391

(finding apparent authority even when the consenting girlfriend had two residences and the defendant changed the locks on the exterior doors of the searched house); Penney, 576 F.3d at 309 (finding apparent authority even though the defendant had expressly asked the police to bar the consenting girlfriend from the searched house).”

¹⁶⁸ Pratt v. United States, 214 F. App’x 532 (6th Cir. 2007) (quoting Georgia v. Randolph, 547 U.S. 103 (2006)).

Oxycodone (Lortab) .91 grams
Codeine (Tylenol III) .85 grams
Ecstasy No controlled substance found

Williams was charged with and took a plea to Controlled Substances offenses. He had elected not to move to suppress the evidence, but following the plea, claimed that his counsel was ineffective for failing to file the motion. Williams contested that he had never said he didn't want the plea made. He also claimed the officers lied and that the cocaine was not in plain view.

ISSUE: May an officer's observation of a transaction give probable cause for an arrest?

HOLDING: Yes

DISCUSSION: The Court noted that the "facts relevant to whether officers had probable cause to arrest Williams are contained in Williams's PSR, which were uncontested at Williams's sentencing and are uncontested on appeal." The Court agreed that his "presence in the area where the officers had been informed of drug activity coupled with Williams's observed hand-to-hand transaction gave the officers a particularized and objective basis to suspect wrongdoing."¹⁶⁹ The drug complaint alone "should not be given undue weight," but that should not be ignored, either. Along with their observation of a "hand-to-hand transaction consistent with a drug transaction provided the officers more than an "inchoate and unparticularized suspicion or 'hunch."¹⁷⁰ Further, "in assessing probable cause, this court has held that if officers have reasonable suspicion of criminal activity, and the suspect flees when the officers attempt to stop him, the officers' reasonable suspicion ripens into probable cause."¹⁷¹ Accordingly, because the officers had reasonable suspicion of criminal activity after observing Williams engage in a hand-to-hand transaction, they had probable cause to arrest Williams once he fled. After Williams was taken into custody, police searched his car incident to his arrest and found further evidence of crime."

The Court upheld his plea.

SEARCH & SEIZURE – VEHICLE STOP

U.S. v. Huff, 2015 WL 6743477 (6th Cir. 2015)

FACTS: On three separate occasions, in 2009, Fitzpatrick tried to present fraud and treason charges against President Obama to a Monroe County, Tennessee state grand jury. He also tried to get the grand jury foreman indicted for not presenting the indictment. In 2010, Huff accompanied Fitzpatrick to Monroe County with "citizen's arrest warrants" for the President, the foreman and assorted other local, state and federal officials. While being recorded, Fitzpatrick tried to arrest Pettway, the foreman, and Sheriff Bivens. Instead, Fitzpatrick was arrested. Huff met with Fitzpatrick later to coordinate a takeover of the city (Madisonville) by the Georgia Militia. Huff told employees at his local bank of the plan and that he was taking AK-47s with him. Two separate employees contacted law enforcement and the FBI paid Huff a visit. He confirmed his plan with the FBI agents but explained his group would only resort to violence unless provoked.

Trooper Wilson (THP) was briefed concerning the threat to the courthouse. He spotted Huff's black pickup (which boasted suspicious decals) and pulled over the vehicle after observing him commit two traffic violations, following too closely and running a stop sign. Huff displayed the warrant he was planning to deliver. He agreed to place his handgun in the truck box. They engaged in a lengthy discussion, in which he tried to recruit the officers to his cause, and he was allowed to proceed on. (The Court questioned why, after he made allegedly threatening statements, he was allowed to leave.)

United States v. Williams, 544 F.3d 683, 690 (6th Cir. 2008) ("the warrant here named the informants, and named informants, unlike confidential informants, require little corroboration").

¹⁶⁹ Arvizu v. U.S., 534 U.S. 266 (2002).

¹⁷⁰ Terry v. Ohio, 392 U.S. 1, 27 (1968)."

¹⁷¹ United States v. Dotson, 49 F.3d 227, 230 (6th Cir. 1995).

When Huff arrived in Madisonville, he met with a group of about twenty individuals at a restaurant across the street from the courthouse. The group included individuals with firearms at their sides, some of whom pointed at the courthouse, circled it, and photographed it. Over 100 law-enforcement officers were present. They believed that the situation was tense and could have escalated.

Huff tried to rally the group with a “motivational speech,” but ultimately, he lamented that they needed more people and returned to Georgia. He was arrested ten days later on federal charges of transporting a firearm intended to be used to further a civil disorder.¹⁷² He was convicted and appealed.

ISSUE: Are volunteered statements properly admitted?

HOLDING: Yes

DISCUSSION: Huff argued that the statements obtained from the traffic stop should be excluded, in that the traffic stop itself was improper. The Court looked at the two charges under Tennessee law and found that it was highly questionable that he did, in fact, violate them, based upon video of the stop. The Court, however, ruled that even absent the traffic violations, the trooper had reasonable suspicion that the driver might be involved in the projected incident in Madisonville. Further Huff volunteered the statement after any stop had ended, and as such, were not a byproduct of the stop. In fact, the trooper emphasized that Huff was talking, “almost nonstop” about what was planned. They were not prompted by an interrogation but followed a lengthy, somewhat amicable, conversation.

Further, even if the stop was unlawful, in Wong Sun v. U.S., evidence could have been “purged of the primary taint” and become voluntary.¹⁷³ Under Brown v. Illinois, the Court agreed, the statements were “unquestionably voluntary.”¹⁷⁴ They were “sufficiently an act of free will to purge the primary taint” and met the remaining four Brown factors: the giving of Miranda warnings, the temporal proximity of the arrest and the confession, the presence of intervening circumstances, and the purpose and flagrancy of the official misconduct.¹⁷⁵ Since he was not actually taken in custody, Miranda warnings were moot. With respect to time, they occurred moments after he was freed to go but that was balanced with the intervening circumstances, in this case, his release to go. He was never arrested, charged, or even threatened with arrest, and he acceded to his refusal to allow a search. The officer had sufficient reason to follow up with an investigation given what he knew. The Court agreed that “Huff’s release was sufficient to break any causal connection between his initial stop and his parting comments.” The Court thought it was “critical that Huff volunteered his final incriminating statements unprompted by any questioning, or even indirectly prompted by detention. It is telling that, when Huff walked back toward the officers, he pointed his finger at them, in a gesture that might almost be considered threatening. Huff had been released, and all he faced was the open road before him. The police cannot be said to have “exploited” an illegality to “obtain” these statements that were entirely unsolicited, unexpected, and unprompted in any way.”

The Court ruled he gave his statements of his own free will and upheld his conviction.

U.S. v. Johnson, 2015 WL 7434658 (6th Cir. 2015)

FACTS: Johnson was a pizza delivery manager in Flint, Michigan. On May 25, 2012, at about 1:45 a.m., he dropped off a coworker and headed home. As he approached a stop sign, he saw a Michigan State Police car. He stopped and then turned, using his turn signal. Trooper Ross, however,

¹⁷² 18 U.S.C. § 231(a)(2).

¹⁷³ 371 U.S. 471, 488 (1963)

¹⁷⁴ 422 U.S. 590, 602 (1975)

¹⁷⁵ United States v. Wolfe, 166 F. App’x 228, 232–33 (6th Cir. 2006) (citing Brown, 422 U.S. at 603–04).

testified that “Johnson rolled through the stop sign” and he made the stop. (His partner, Trooper Walters, denied seeing it.) They were on “directed patrol” – encouraged to strictly enforce the traffic laws in what was a high crime neighborhood.

The trooper activated his emergency lights. “Johnson, purportedly fearing police brutality, decided not to stop on Wisner, which was dark, deserted, and in a dangerous neighborhood.” Instead he drove a few hundred feet and turned onto another street, and he admittedly “did not come to a full stop” at that sign. He pulled into a service station and up to a gas pump before stopping.

He did not have an OL, so he provided a Michigan ID card instead. He did not initially get out of the car when told to do so, but did, eventually. As he got out, Trooper Ross spotted “a revolver lying on the car’s floor by the open door.” He tried to handcuff Johnson but Johnson “broke away and began running.” He was finally apprehended and arrested.

Johnson, a felon, was indicted for possession of the revolver. He moved for suppression and it was granted. The Government appealed.

ISSUE: Is a person seized when they changing their driving (slowing down) in response to the activation of an officer’s emergency lights?

HOLDING: Yes (but see discussion)

DISCUSSION: The Court was asked to address whether “Johnson was already seized by the time he rolled through the second stop sign.” To be seized, two things must happen: “First, as a result of intentional police conduct, “a reasonable person [must] believe[] that he [is] not free to leave.”¹⁷⁶ Second, “an individual must actually yield to the show of authority.”¹⁷⁷ Yielding to authority requires either that the police use physical force or that the person demonstrate submission to the police.¹⁷⁸ Under Michigan law, failing to stop is a civil infraction and that justified seizing him for “rolling through the second stop sign as they had probable cause to believe he had committed a civil traffic infraction (albeit a minor one).”¹⁷⁹ Both sides agree, however, that if Johnson was unlawfully seized before he rolled through the second stop sign, the traffic infraction could not have justified the seizure.¹⁸⁰

Further:

In this case, the police unquestionably asserted their authority by activating the lights on their patrol car.¹⁸¹ Johnson saw this and understood that he was not free to leave. Because the police did not use physical force to stop Johnson’s car, the only question we need to answer is when he should be deemed to have submitted to their authority, i.e., did he submit before or after he ran the second stop sign.

The Court noted that “In the context of a traffic stop, the Supreme Court has consistently held that once a car has stopped, all of its occupants have been seized for Fourth Amendment purposes.¹⁸² But there is still a question of whether, in order for there to be a seizure, it is necessary for the car to be stopped, or merely sufficient.”

The Court agreed that “changing one’s driving in response to police authority could be enough to signal submission in the right circumstances. Even the government conceded in its briefing that in certain situations—for example, where the police activate their lights in a one lane construction zone where there

¹⁷⁶ *Michigan v. Chesternut*, 486 U.S. 567 (1988) (quoting *United States v. Mendenhall*, 446 U.S. 544 (1980) (opinion of Stewart, J.)).

¹⁷⁷ *United States v. Johnson*, 620 F.3d 685, 690 (6th Cir. 2010).

¹⁷⁸ *California v. Hodari D.*, 499 U.S. 621, 626 (1991).”

¹⁷⁹ See *United States v. Blair*, 524 F.3d 740, 748 (6th Cir. 2008).

¹⁸⁰ See *United States v. Figueredo-Diaz*, 718 F.3d 568, 573 n.2 (6th Cir. 2013) (“Reasonable suspicion for a stop cannot logically be based on events that occur after the suspect is seized.”).

¹⁸¹ *Brower v. Cnty. of Inyo*, 489 U.S. 593, 597 (1989).

¹⁸² E.g., *Brendlin v. California*, 551 U.S. 249, 255–56 (2007).

is no room to pull over—the motorist may be deemed seized from the time she clearly signals her submission—by, for example, slowing down and activating her hazard lights.”

The Court noted that “there must be some conduct that falls between “not fleeing” and “submitting.”¹⁸³ For example, in this case Johnson’s fleeing when the officers tried to handcuff him terminated the seizure. Fleeing can also prevent a seizure from taking place in the first instance. But until the suspect motorist objectively demonstrates actual submission, he has not been seized, even if he also does not flee.”

Johnson argued that although he continued driving after the lights were activated, that he had “that he reasonably concluded the safest place to pull over was the nearby gas station, and that because he stopped as soon as was reasonably possible he therefore was seized from the moment the police activated their lights. He relies primarily on United States v. Randolph, where we said that “it is possible that a person driving a vehicle may be considered seized before he comes to a complete stop” if he “submit[s] to the officer’s show of authority by, for instance, pulling over to stop as soon as reasonably possible.”¹⁸⁴ However there was no particular reason why he could not have stopped sooner, nothing in the traffic conditions that “made it unsafe or impracticable to stop sooner.”¹⁸⁵

Furthermore, the fact that Johnson drove through the second stop sign without actually stopping is itself problematic. Failing to obey a traffic signal can constitute evasive behavior indicating that the driver has not submitted to police authority.¹⁸⁶ Johnson’s activation of his blinker is also consistent with the standard protocol for someone who intends to make a turn and continue driving. It does not necessarily signify that the driver is turning or stopping in response to the officers’ show of authority, even if that is what the driver does, in fact, intend to do. Again, submission is determined based on an objective, not subjective standard. Whether Johnson actually intended to stop is irrelevant. Johnson’s failure to stop on Wisner or at the stop sign simply would not suggest to a reasonable observer that Johnson was submitting to the officers’ authority.

In addition, the fact that he apparently did not slow down would factor into the officers’ belief that he did not intend to stop.

The Court reversed the suppression of the firearm and remanded the case.

42 U.S.C. §1983 – ARREST

Amis v. Twardesky (and others), 2015 WL 8538446 6th Cir. 2015

FACTS: On November 7, 2011, there was an altercation at Risdon’s home in Warren, MI. Multiple people were involved – Bentley stabbed Ciccotelli (Risdon’s boyfriend) in the back with a knife. He was formerly the boyfriend of Brooke Amis, Carmen, the defendant’s, daughter.

Officers McCabe and Lewis responded, and Ciccotelli told him that Angela had stabbed him, and where she lived. They went to the Amis house and found other officers already present there. They told Amis that they were looking for Angela, she denied she was present. She went back inside, possibly at the officer’s request, to check but did not allow the officers inside. She went back in at least one more time, again denying Angela was there.

At some point, however, officers spotted Angela inside. She later said Amis did not know she was there as she was hiding in the basement. Amis went inside and brought Angela outside, and she was arrested.

¹⁸³ See United States v. Waterman, 569 F.3d 144, 146 n.3 (3d Cir. 2009) (“Although Hodari D. involved a suspect engaged in headlong flight, we have since examined acts of defiance that are less overt.”). Fleeing can end a seizure that has already begun. See Hodari D., 499 U.S. at 625–26.

¹⁸⁴ 131 F. App’x 459, 462 (6th Cir. 2005).

¹⁸⁵ Watkins v. City of Southfield, 221 F.3d 883, 885 (6th Cir. 2000)

¹⁸⁶ See, e.g., United States v. Griffin, 652 F.3d 793, 796, 801 (7th Cir. 2011) (defendant ran a red light, along with other evasive driving).

Twardesky arrested Amis for harboring a fugitive and related charges. Ultimately those charges were dismissed.

Amis filed suit for false arrest under 42 U.S.C. §1983. The officers requested and were granted summary judgement on all but a claim of unlawful entry. Amis appealed.

ISSUE: If an arrest is valid on some charge, even if not the one originally cited, is the arrest still valid?

HOLDING: Yes

DISCUSSION: The Court noted that an “officer can lawfully arrest the plaintiff so long as there is probable cause to arrest her for some crime, even if the crime for which there is probable cause is different from the stated crime of arrest.”¹⁸⁷ The officer is entitled to qualified immunity if they could “reasonably (even if erroneously) have believed that the arrest was lawful, in light of clearly established law and the information possessed at the time by the arresting agent.”¹⁸⁸ Looking at the state crimes for which Amis was charged, the Court agreed that was reasonable probable cause to make the arrest. They knew Angela lived there and that she was seen there, after Amis reiterated she was not there. They could “reasonably could conclude that she had been hiding Angela and lying to them.” Even though a jury might have disagreed, the court agreed that the officers were entitled to qualified immunity on the unlawful arrest claim.

42 U.S.C. §1983 – BRADY

Snow v. Nelson, 2015 WL 8479623 (6th Cir. 2015)

FACTS: In the summer of 2013, Norwood (OH) PD’s drug task force began to investigate Snow (aka Emmitt). Dets. Nelson and Rankin were involved after Nelson received a tip from a CI that he’d lived with Emmitt and Emmitt’s girlfriend at a specific address and that Emmitt was dealing drugs. He was validated by two other agencies for whom he’d served as a CI.

On July 15, they did the first of four controlled buys, from two separate locations. Audio and video recordings were made. The CI identified one of the men in the video as the “dope dealer” but did not say either man in the video was Emmitt. Det. Nelson, however, mistakenly assumed that the man identified as the dope dealer was Emmitt, and only later learned the Emmitt was using runners. They identified Snow and Sims as living at the identified address, and the CI identified them both as Emmitt and the girlfriend. Snow was never captured on film in the deals, but the CI identified that once, he did appear to deal with the runner.

Snow was indicted. During discovery, it was learned that the individual identified in the video by the detective was not, in fact, Snow. The case against Snow was dismissed. Snow then filed suit under 42 U.S.C. §1983 under the Fourth and Fourteenth Amendments. The District Court granted summary judgement to the officers, and Snow appealed.

ISSUE: Does a belated sharing of Brady material warrant a dismissal of the case?

HOLDING: No

DISCUSSION: Snow claimed that the detectives failed to disclose to the prosecutors and grand jury that the CI identified a man who was not Snow as Emmitt, the dope dealer. Although brought up untimely, the Court also agreed that “when exculpatory material is disclosed, even belatedly, there is generally no

¹⁸⁷ Devenpeck v. Alford, 543 U.S. 146 (2004).

¹⁸⁸ Everson v. Leis, 556 F.3d 484, 499 (6th Cir. 2009) (citations omitted); Kennedy v. City of Villa Hills, Ky., 635 F.3d 210, 214 (6th Cir. 2011).

Brady violation.”¹⁸⁹ Material prejudice only occurs if it might have made a difference at trial and in this case, there was no trial. Even though it might have contributed to his 52 day detention, it did not bring liability as it did not affect the outcome. Snow’s attorney was aware of the misidentification prior to any plea bargaining.

Further, there was no evidence presented as to which officer even testified before the grand jury, and thus no way to determine if either of the officers “testified falsely or recklessly” about Snow. The Court noted, as well, that he could not make a malicious prosecution case because probable cause still existed to arrest him, notwithstanding the challenged identification.

The Court upheld the dismissal for summary judgement.

42 U.S.C. §1983 – USE OF FORCE

Foster v. Patrick, 806 F.3d 883 (6th Cir. 2015)

FACTS: In May, 2011, Deputy Patrick (Bradley County, TN, SO) spotted Foster walking in the median of I-75 with her two children, D.W. age 6 and K.W. age 10. He explained that her car had broken down and someone was coming to get her. She insisted on continuing to walk in the roadway. She spoke to someone on the phone and he realized her ride was 20-30 miles away. The deputy told her he would give them a ride and if she refused, she would go to jail.

At that point, he got out to open the back door. Foster bladed to him and then raised a knife, making an overhead stabbing motion. Patrick drew his gun and ran to the front of the car. She climbed into the driver’s seat and ordered the children to get in, Patrick ordered them to get back. He ordered Foster out of the car again and as she shifted the car, he shot her multiple times. She put the car into drive and “gassed it.” Patrick fired again and as she pulled away, 4-5 more times. He holstered his weapon as she drove away. A short distance away, she veered off the interstate and died at the hospital. She was shot 8 times and Patrick had fired 13 or 14 shots.

D.W. later testified that Foster had a gun in her back pocket but he never saw it out. He did say that Foster jumped on the deputy’s back and that he thought Foster was going to cut the deputy. He said she was shot after putting the car in the “drive position.” K.W. testified in a similar fashion, but said Foster was shot running to the car.

Foster’s father, representing her estate, filed suit arguing excessive force. Deputy Patrick requested summary judgement and was denied. He appealed.

ISSUE: Is a person driving away from a scene (in a cruiser which contains weapon), subject to the use of deadly force to stop them?

HOLDING: No

DISCUSSION: The Court noted that under Tennessee law, Deputy Patrick could use deadly force “if the suspect threatens the officer with a weapon or there is probable cause to believe that [s]he has committed a crime involving the infliction or threatened infliction of serious physical harm.” The Court looked to several factors: (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 the suspect is actively resisting arrest or attempting to evade arrest by flight.”¹⁹⁰

The Court looked at the situation as described by the estate representative, and agreed that while there was some danger in her driving off in the cruiser, the danger did not warrant deadly force.¹⁹¹ The

¹⁸⁹ See United States v. Word, 806 F.2d 658, 665 (6th Cir. 1986), cert. denied, 480 U.S. 922 (1987)”

¹⁹⁰ Bouggess v. Mattingly, 482 F.3d 886 (6th Cir. 2007).

¹⁹¹ Smith v. Cupp, 430 F.3d 766 (6th Cir. 2005).

evidence suggested that neither Deputy Patrick nor the children were in danger from the car at the time he fired and that he continued firing as she drove away. Although the Court acknowledged there were two weapons in the car, there is no indication that she would use them to harm anyone.

The Court agreed that “an officer cannot shoot a non-dangerous fleeing felon.” Even though a previous violent encounter had occurred, allegedly, the Court noted that had ended and that the use of deadly force at the time was unlawful. The Court upheld the denial of summary judgement.

Mullins v. Cyranek, 805 F.3d 760 (6th Cir. 2015)

FACTS: On August 20, 2011, Officer Cyranek (Cincinnati PD) was providing security at a family reunion. He and other officers were informed that “some young African American males were throwing guns over the fence to individuals who were already inside the event.” As they approached, the men ran towards downtown Cincinnati.

The officers were then assigned to provide extra security at Government Square and Fountain Square. Officer Cyranek saw Mullins walking from Fountain Square, and recognized the other two men with him as running from the family reunion. He saw Mullins was “holding his right side,” which led him to suspect a firearm. He followed Mullins and saw Mullins “position the right side of his body away from Cyranek.” Cyranek followed Mullins into a breezeway and told Mullins to stop, and he did. He grabbed Mullins’ wrists and Mullins resisted. Cyranek pushed Mullins into an alcove, then to the ground, ending up on Mullins back. He began checking Mullins’ clothing. Mullins yelled to his friend, Sims, who was nearby, and Cyranek ordered Sims to step away. At some point, the officer said, he saw that Mullins was holding a gun which he then threw over the officer’s back. Cyranek rose and fired twice at Mullins after the gun was tossed.

Surveillance video did not show when during a five second interval the gun was fired, as only bullet casings can be seen flying across the screen several seconds after the gun was tossed. Cyranek immediately retrieved the tossed gun and placed it near Mullins’ feet, which he explained was to prevent it from being taken. He handcuffed Mullins.

Mullins died at the hospital. He had a gunshot wound to the torso, with the bullet entering the back of his left shoulder and ranging downward.

Mullins’ mother filed suit on behalf of his estate, under 42 U.S.C. §1983, claiming wrongful death and related claims. Cyranek requested summary judgement which was granted. The Estate appealed.

ISSUE: May an unarmed person still be considered a threat?

HOLDING: Yes

DISCUSSION: The Court looked to whether the use of deadly force was reasonable under the Fourth Amendment. The Court had looked at three factors, non-exhaustive, to start, (1) the severity of the crime at issue; (2) whether the suspect poses an immediate threat to the safety of officer or others; and (3) whether the suspect is actively resisting arrest or attempting to evade arrest by flight.¹⁹² This must be judged by the perspective of the officer at the scene.¹⁹³ In this case, the Court looked at “Mullins’s behavior immediately prior to the moment he was shot.” The removal of the handgun from his clothing, in Cyranek’s presence and without his permission, was a serious offense, which weighed against Mullins. Cyranek conceded “that he shot Mullins only after Mullins threw his gun, but he maintains that the confrontation unfolded in such rapid succession that he did not have a chance to realize that a potentially dangerous situation had evolved into a safe one.”¹⁹⁴ The Court agreed that alone didn’t justify the force, but noted that the location, in a heavily populated area, of a person with a gun in his immediate

¹⁹² Sigley v. City of Parma Heights, 437 F.3d 527 (6th Cir. 2006).

¹⁹³ Graham v. Connor, 490 U.S. 386 (1989).

¹⁹⁴ Smith v. Cupp, 430 F.3d 766 (6th Cir. 2005).

possession. The Court noted that “while Cyranek’s decision to shoot Mullins after he threw his weapon may appear unreasonable in the ‘sanitized world of our imagination,” he “was faced with a rapidly escalating situation, and his decision to use deadly force in the face of a sever threat to himself and the public was reasonable.”

Even though Mullins was actually unarmed at the moment was irrelevant, rather, what matters, is whether it was reasonable to believe Mullins was still a threat. Certainly, the officer could believe Mullins was still armed since the gun landed outside the officer’s line of sight, well behind him.

The Court agreed that some of Cyranek’s actions were troublesome, particularly his failure to alert other officers to his concerns and his moving of the gun. However, such misjudgments were not crucial to the decision and in the critical moments, his actions were reasonable.

The Court agreed that Mullins death was “an unfortunate tragedy.” But, the Court concluded, Cyranek’s “split-second decision to use deadly force was not objectively unreasonable.” Although he was mistaken in the assessment of the risk, the Court agreed that §1983 did not apply. The Court affirmed the summary judgement in Cyranek’s favor.

42 U.S.C. §1983 - SEARCH & SEIZURE

Bradley v. Reno / Dobbins /Timberlake and others, 2015 WL 7770189 (6th Cir. 2015)

FACT: On April 24, 2011, Trooper Reno (Ohio State Patrol) noticed a tractor-trailer stopped on an on-ramp. Although it was running, no traffic cones were set out. He checked on the status of the driver and quickly concluded the driver was intoxicated. Bradley, the driver was charged with DUI and found to have a BA of .111. He moved to suppress his statements (in which he admitted drinking) as well as the results of the tests. He was, however, acquitted at trial.

Bradley filed suit against the trooper and others, arguing he was arrested without probable cause. The District Court granted the troopers summary judgement. The Sixth Circuit reversed and remanded, and again, the District Court gave the officers summary judgement, concluding that qualified immunity protected them from liability for arrest. Bradley again appealed.

ISSUE: Does the way a vehicle is parked (improperly) justify a reasonable suspicion stop?

HOLDING: Yes

DISCUSSION: The Court noted that Bradley’s argument seemed to be that “Reno lacked both reasonable suspicion to detain him for field sobriety tests and probable cause to arrest him.” The Court, however, looked to the facts, given where the truck was parked, how it was parked and how it failed to take advantage of a highway rest area only a few hundred feet away, his appearance and his subsequent failure to pass FSTs. The Court noted that Bradley need not been seen to be driving for a drunk driving arrest when he admitted to having been driving – and of course, the fact that the truck could not have been there for long.

The Court found sufficient cause to find both reasonable suspicion for the inquiry, and probable cause for the arrest, and upheld the dismissal of the case.

Middaugh (Joseph, Mary, Michael) v. City of Three Rivers / Piper, 2015 WL 6457994 (6th Cir. 2015)

FACTS: The 1992 Buick at the center of this case changed ownership within the Middaugh family several times. On May 18, 2012, a dispute arose when Lucky sold the car to Joseph, but the title was not available – only a bill of sale was exchanged. Lucky tried to retrieve it from Joseph and Mary’s home, triggering a call to the PD. Officer Piper responded and he and Lucky left before Joseph could return with the bill of sale. Lucky and Joseph (brothers) ended up in a fight at the insurance company where the

vehicle was insured. After several weeks, the “made peace” and a new title was obtained in Joseph and Mary’s name.

Almost a year later, Chrystal (Lucky’s wife) went to the PD and told Officer Gipson that she was divorcing Lucky and was supposed to get the Buick titled in her name. She showed the officer the keys and a title application. Officer Gipson and Piper conferred about it and Chrystal was transported to the Middaugh home by Officer Piper. Chrystal then took the car, which contained personal property, and the officers left. Mary called 911 to report the vehicle stolen. Mary tried to explain, but “Officer Gipson refused to listen” to her, saying Chrystal had proof of ownership. Upon further investigation, however, the officers concluded that in fact, Joseph and Mary were the legal owners. Chrystal returned the vehicle to the police three weeks later, but most of Michael’s personal property was missing and the vehicle was damaged.

Joseph, Mary and Michael Middaugh filed suit against Three Rivers and the officers involved. The officers moved for qualified immunity and were denied. The officers appealed.

ISSUE: If an officer gets involved in an improper seizure of private property by a third party, may the officer also be liable?

HOLDING: Yes

DISCUSSION: The Court argued that by helping Chrystal take the vehicle, the officers “violated the Middaugh’s rights under the Fourth Amendment, which prohibits unreasonable searches or seizures,¹⁹⁵ and the Fourteenth Amendment, which protects against deprivation of property without due process of law.¹⁹⁶ However, the Court noted, this only applies “[to] governmental action” and not “to a search or seizure, even an unreasonable one, effected by a private individual not acting as an agent of the Government or with the participation or knowledge of any government official.”¹⁹⁷ The Supreme Court has made clear, however, that governmental actors “can be held responsible for a private decision” if they have “exercised coercive power or [have] provided such significant encouragement, either overt or covert, that the choice must in law be deemed to be that of the State.”¹⁹⁸

In similar repossession situations, the Court noted that in “Hensley v. Gassman, we explained that while “a police officer’s presence during a repossession solely to keep the peace . . . is alone insufficient to convert the repossession into state action[.]” the scales may tip toward state action “as police involvement becomes increasingly important” to completing the repossession.¹⁹⁹ Put another way, repossession cases “fall[] along a spectrum of police involvement” with “[d]e minimis police involvement not constituting state action . . . at one end” and active police “intervention or aid” comprising state action at the other.²⁰⁰ In U.S. v. Coleman, for example, we declined to find state action where police officers “parked down the street and around the corner[.]” “remained in their car[.]” and “neither encouraged nor directed” a private individual as he repossessed a debtor’s truck.²⁰¹ We held that the police officers’ “presence at the scene” in Coleman “was not an indispensable prerequisite for repossession of the truck” and that “[t]heir benign attendance was not designed to assist [the private individual] in repossession . . . rather, it was in furtherance of their official duties.” By contrast, in Hensley v. Gassman—which, like the present case, involved disputed possession of a Buick—we found state action where deputy sheriffs “arrived at the [scene] with, and at the request of” the would-be reposessor; got out of their official vehicle; “ordered” one of the plaintiffs “to move from between the Buick and the tow truck” as the plaintiff “was attempting to thwart the repossession”; “ignored [one plaintiff’s] demands to leave the property” and another plaintiff’s “protest and . . . explanation” that the repossession was illegal; “told [the plaintiffs] that [the private

¹⁹⁵ see Soldal v. Cook Cnty., 506 U.S. 56, 61 (1992),

¹⁹⁶ see Fuentes v. Shevin, 407 U.S. 67, 80–81 (1972).

¹⁹⁷ Jacobsen, 466 U.S. at 113.

¹⁹⁸ Blum v. Yaretsky, 457 U.S. 991, 1004 (1982).” 42 U.S.C. 1983

¹⁹⁹ Hensley, 693 F.3d at 689.

²⁰⁰ Id. at 690–91; see also Barrett v. Harwood, 189 F.3d 297 (2d Cir. 1999).

²⁰¹ Coleman, 628 F.2d at 963, 964.

individual] was taking the Buick”; and broke the Buick’s front window, unlocked the doors, and forcibly removed one of the plaintiffs who had entered the car in an attempt to stop the repossession.²⁰²

In this case, the officers argued their actions likened more to a peacekeeper and there is a distinction for purposes of state action, “between conduct designed to keep the peace and activity fashioned to assist in the repossession.”²⁰³ The trial court, however, ruled that the officers “set a screen” by the positioning of their vehicles which allowed her to drive the vehicle away without interference. The Court agreed that the “officers’ conduct crossed the line from mere presence to active facilitation and assistance” and that became state action.

Further, Chrystal never had any court order or claim to be a creditor entitled to self-help to repossess the car. They officers knew ownership was disputed and when they did investigate, quickly learned she had no right to the car. As such, they acted unreasonably. Finally, they agreed that the law was well-established under “Cochran v. Gilliam that “the standard has long been that” police officers are not liable for a private party’s actions if the officers “merely stand by in case of trouble” and “neither encourage nor direct a private individual during a repossession,” but that officers “may no longer be entitled to qualified immunity” in cases where they “take an active role in a seizure or eviction[.]” They “cross the line” into state action, we noted, “if they affirmatively intervene to aid the reposessor.”

The Court affirmed the denial of qualified immunity.

42 U.S.C. §1983 – CLAIM PRECLUSION

Wheeler v. Dayton Police Dept., 807 F.3d 764 (6th Cir. 2015)

FACTS: On May 19, 2009, Officers Halburnt and Fuller arrested Wheeler for possession of marijuana and cocaine. He failed to appear for a trial on the misdemeanor marijuana charge (the charges were severed) and a bench warrant was issued. He pled guilty to the felony cocaine charge a few months later and served out his sentence. Shortly after his release, he was arrested on the still outstanding bench warrant. The charge was dropped almost immediately.

Wheeler filed suit in 2012 against the two officers going back to the 2009 arrest, in which he argued the marijuana had been planted and that the officers used excessive force. The District Court dismissed the complaint based on statute of limitations. The Sixth Circuit affirmed that, but based the dismissal primarily on Heck v. Humphrey, find that to the extent the challenge related to the felony, Heck barred the claim, and the statute of limitations blocked the rest.²⁰⁴

In 2013, Wheeler again filed suit, this time, based on the 2012 arrest, arguing that arrest was unconstitutional. In a roundabout argument, he claimed the officers fabricated evidence and falsified the misdemeanor charge, and that as such, the bench warrant was improper. The District Court dismissed the case under claim preclusion and Wheeler appealed.

ISSUE: Does claim preclusion require that all charges be brought together, in a timely manner, rather than piecemeal?

HOLDING: Yes

DISCUSSION: The Court noted that “claim preclusion prevents parties from litigating matters that should have been brought in an earlier case.”²⁰⁵

²⁰² Hensley, 693 F.3d at 691; see also id. at 692.

²⁰³ Haverstick Enters., Inc. v. Fin. Fed. Credit, Inc., 32 F.3d 989, 995 (6th Cir. 1994);

²⁰⁴ 512 U.S. 477 (1994).

²⁰⁵ Migra v. Warren City Sch. Dist. Bd. of Educ., 465 U.S. 75, 77 n.1 (1984).

To establish claim preclusion, the defendants need to show (1) “a final judgment on the merits” in a prior action; (2) “a subsequent suit between the same parties or their privies”; (3) an issue in the second lawsuit that should have been raised in the first; and (4) that the claims in both lawsuits arise from the same transaction.²⁰⁶

In this case, the Court agreed all four elements were satisfied. His previous lawsuit was adjudged against him, and involved essentially the same parties. (The Court noted that the Dayton PD and the City of Dayton were inseparable.) His claims should have been brought in the earlier lawsuit. Finally, both lawsuits arose out of the same incident. All of his claims were dismissed with prejudice as well, in the earlier case.

The Court affirmed the dismissal.

INTERROGATION – RIGHT TO COUNSEL

Bachynski v. Stewart, 2015 WL 9310223 (6th Cir. 2015)

FACTS: Bachynski’s first two victims were Scott and Melissa Berels. Bachynski and her boyfriend, Patrick Selepak, an acquaintance of Melissa, came to the Berels’ house. At some point, they locked the couple in their bathroom. Then Selepak choked Melissa until she was blue but still alive, all within earshot of her restrained husband. Bachynski “finish[ed] it,” pulling a belt around Melissa’s neck until she was dead. Bachynski took a break to smoke a cigarette, then returned to Scott. Selepak beat Scott “until there was blood everywhere,” and Bachynski “moved a knife across [his] neck” and injected him with bleach. Id. Bachynski put her foot on Scott’s head and pulled a belt around his neck, killing Scott. Bachynski took another cigarette break. She and Selepak hid the bodies before stealing the couple’s money and driving away in their car. The next day, they befriended a stranger, Frederick Johnson, at a dance club, and they seduced him later that night and in the days that followed—at a hotel and eventually at Johnson’s house. They also spent time with him eating and shopping in Frankenmuth, Michigan. They returned to the dance club with him and his son-in-law the next day. And they spent the next two days after that watching movies at Johnson’s house. On the last night, they tortured and killed Johnson, apparently in order to steal his truck and other personal items. They loaded his dead body in the bed of Johnson’s truck and stole the truck. Police eventually found Bachynski and Selepak in the dead man’s stolen truck, with the dead body in the back. They were arrested.

Bachynski was given Miranda and requested an attorney. She was not questioned. Two detectives from another jurisdiction arrived and gave her Miranda again. She again said she wanted an attorney and was returned to her cell. Realizing after a period of time that she had no way to actually get an attorney, they asked her if she’d had a chance to use a phone. When she said she had no attorney, she was offered a phone and phone book to make calls. At that point, she said she didn’t want to spend her life and prison and “wondered whether she needed an attorney.” The detective stated they could not talk to her further without her attorney. She asked if she could change her mind and told the other detective that she wanted to talk to him. The prosecutor approved them talking to her. She signed a waiver and confessed.

Six hours later, she asked to speak to the arresting officers, signed another waiver and she again confessed. She repeated this a third time, with Det. Stevens.

Bachynski came to regret her confessions. Her attorney moved to suppress them, arguing that the detectives had “coerce[d]” her into talking through “psychological intimidation.” As Bachynski remembers the events in her cell, the detectives not only offered her a phone to call her attorney but also mentioned that Selepak had waived his Miranda rights and was talking with other officers about the case and that Selepak’s accomplice in a previous case got in more trouble by not talking. All of these statements, her attorney argued, convinced Bachynski to talk and amounted to an improper interrogation.

²⁰⁶ Montana v. United States, 440 U.S. 147 (1979); Wilkins v. Jakeway, 183 F.3d 528 (6th Cir. 1999).

The trial court found that Bachynski had initiated the interrogation and rejected her motion. She was ultimately convicted of two murders. She then appealed, and after several more hearings, the federal District Court found the confessions were improperly admitted. Michigan then appealed.

ISSUE: May a suspect change their mind about wanting an attorney, and reinstate questioning?

HOLDING: Yes

DISCUSSION: The Court began, noting that:

After a suspect invokes her right to counsel, police may not initiate an “interrogation” of the suspect without counsel present.²⁰⁷ An interrogation occurs when the police “should have known” that their conduct was “reasonably likely to elicit an incriminating response.”²⁰⁸ That definition naturally includes “express questioning” designed to ferret out the suspect’s involvement in the case. But it also includes the “functional equivalent” of such questioning—“any words or actions on the part of the police (other than those normally attendant to arrest and custody) that the police should know are reasonably likely to elicit an incriminating response.” If a reasonable person, using all of the facts and circumstances available, would view the police as attempting to obtain a response to use at trial, it is an “interrogation.”

At the same time, suspects who invoke their Miranda rights remain free to change their minds. When the suspect initiates a case-related discussion, “the right to have a lawyer present can be waived.”²⁰⁹ And the police remain free to converse with the suspect about “routine incidents of the custodial relationship.”²¹⁰ The police may not, however, “approach[] [the suspect] for further interrogation.”²¹¹ All of this means that, after a suspect invokes her right to counsel, courts may still admit a subsequent confession if (1) the suspect, as opposed to the officers, initiates the interrogation with the police and (2) the suspect waives her right to counsel.²¹² The state courts reasonably held that Bachynski did both.

The Court agreed that “when a suspect invokes her right to counsel, there is nothing wrong with getting her an attorney or getting her the tools to hire one. The idea that offering a suspect a phone and phone book to call an attorney is somehow a ruse to convince her to do just the opposite—to waive the right she has just invoked—is a heavy lift. The offer facilitates the exercise of the right; it does not subtly or directly undermine it or for that matter amount to a prompt to waive it. The officers had no reason to think she would say something incriminating or reconsider her invocation of counsel when they made this offer. We have previously reached this precise conclusion. An officer’s questions “principally aimed at finding [the suspect] an attorney,” we held, did not constitute an “interrogation.”²¹³ That’s all there is to it—at least to this contention.”

Even if she was informed that her co-defendant was talking that did not mean that an interrogation took place, and the state courts were split on the issue. “ Shaneberger v. Jones held that, where a detective “informed [the suspect] that he had been implicated by a co-defendant,” the state courts reasonably concluded that no interrogation had taken place.²¹⁴ Because the detective “directed [the suspect] not to respond” to his comment, and because the suspect chose to speak to a different officer at a different time, the detective’s statement reasonably fell “outside the realm of interrogation.” *Id.* A like conclusion applies here. As Bachynski acknowledges, Detective Esser directed Bachynski

²⁰⁷ Edwards v. Arizona, 451 U.S. 477, 484–85 (1981).

²⁰⁸ Rhode Island v. Innis, 446 U.S. 291, 301–02 (1980).

²⁰⁹ Wyrick v. Fields, 459 U.S. 42, 46 (1982) (per curiam).

²¹⁰ Oregon v. Bradshaw, 462 U.S. 1039, 1045 (1983) (plurality op.); see Pennsylvania v. Muniz, 496 U.S. No. 15-1442 Bachynski v. Stewart Page 6 582, 603–04 (1990).

²¹¹ McNeil v. Wisconsin, 501 U.S. 171, 177 (1991).

²¹² Smith v. Illinois, 469 U.S. 91 (1984) (per curiam).

²¹³ United States v. Ware, 338 F.3d 476, 481 (6th Cir. 2003).

²¹⁴ 615 F.3d 448 (6th Cir. 2010).

“not to respond” to him. Bachynski instead asked to speak with different officers later in time. And Bachynski admitted that no one talked to her about her case before she brought it up. What was reasonable there is reasonable here.”

Other Sixth Circuit cases are of a piece. An officer’s comment to a suspect that “we’ve got good information on you” did not constitute an “interrogation,” even on direct review.²¹⁵ It “contain[ed] no compulsive element suggesting a Fifth Amendment violation.” *Id.* Neither did a “casual conversation” about acquiring an attorney.²¹⁶ Ditto for an officer’s comment that “things would be easier for [you] if [you] talked.”²¹⁷ The same goes for a comment that the officer “knew that [the suspect] possibly had the weapon.”²¹⁸ And for one that you “could possibly face the death penalty” for your crime.²¹⁹ That is not all. Nor is our circuit alone in reaching this conclusion in similar settings.²²⁰ In the face of these precedents, it is difficult to conclude that it is obviously unconstitutional to say to a suspect who has invoked her right to counsel that a co-suspect is talking.

The Court reversed the prior decision and reinstated her convictions.

U.S. v. Walee Al-Din (and others), 2015 WL 7567528 (6th Cir. 2015)

FACTS: During summer, 2010, Crenshaw, Walee, Kline and Brown were part of a Lansing, MI, gang – the Block Burners. They made money by selling drugs and “hitting licks” – the robbery of other drug dealers of money or drugs. On July 12, Walee and Crenshaw, as well as other non-gang members, Luckey and Haitian P, planned to rob Baechler, a paraplegic man who had medical marijuana. He was beaten so badly that one leg had to be amputated. They left with a large quantity of marijuana, a guitar and music recording equipment. On July 13, Kline, Brown and Lewis robbed Jones, another drug dealer. All of the men were armed. At that robbery, they obtained cocaine, cash and a “bag full of guns.” On July 23, Walee, Brown and Kline gathered at Mustafa’s house and planned a theft of marijuana plants owned by Allen, Johnson’s boyfriend and to achieve their aim, they planned to kidnap Johnson and hold her until either she or Allen took them to the plants. (Although Mustafa did not participate, he was acknowledged to have planned it.)

However,

The abduction did not go as planned. Johnson kicked, screamed, and fought back as Kline and Lewis carried her outside to the car, at times dragging her on the pavement. She continued to struggle inside the trunk, sticking out her legs to keep the trunk door open. Frustrated, Lewis told the others to “[w]atch out”; he stood back and fired five rounds at Johnson. Johnson later died of her injuries.

They ran, and regrouped at Mustafa’s house. Evidence was destroyed and the guns were hidden. The next day, Mustafa was arrested on an unrelated matter. Det. Kranich, Lansing PD, questioned him about the murder. “After executing a Miranda waiver, Mustafa told Kranich that on the day of the murder, six men came to his house to smoke marijuana. Of the six, Mustafa claimed he knew only Lanier. About an hour and a half after the men left, Mustafa heard gunshots and screaming. When he went to his backdoor to check on the noise, he saw the six men running through his backyard. Two of them threatened him with a shotgun and forced him back into his house, where they tied him up and left him in a room. He claimed that he fell asleep for the remainder of the night but was able to free himself the next morning.”

²¹⁵ United States v. Hurst, 228 F.3d 751, 760 (6th Cir. 2000).

²¹⁶ United States v. Thomas, 381 F. App’x 495, 501–03 (6th Cir. 2010).

²¹⁷ United States v. Murphy, 107 F.3d 1199, 1205 (6th Cir. 1997).

²¹⁸ Hart v. Steward, No. 14-5446, 2015 WL 4567590, at *6 (6th Cir. July 30, 2015).

²¹⁹ McKinney v. Ludwick, 649 F.3d 484, 489–90 (6th Cir. 2011).

²²⁰ E.g., United States v. Blake, 571 F.3d 331, 336 (4th Cir. 2009).

The following day, in the late afternoon, Mustafa was questioned again by Det. Gill. He waived Miranda again and repeated his story, but now claimed that “Lanier called him earlier in the day and asked if he was interested in participating in the robbery.” He stated Lanier had seen photos of the marijuana plants on Johnson’s phone, and that he’d told Lanier he wasn’t interested. The detective, however, said he “knew Mustafa was lying—it was clear from cellular phone records that Mustafa had called Lanier, not the other way around.” He confronted him about evidence found in his house. At 5:15 p.m., Mustafa demanded an attorney. In the ensuing few minutes, “Gill told Mustafa he would have a chance to talk to a lawyer “tomorrow,” upon being charged with murder. He added that many people in Mustafa’s position protest their innocence, only to be found guilty at trial. Gill began walking out the door, saying, “the issue is how much time you going to do You’re going to prison. How much time? You could talk to me and work this thing out So if you wanna go to prison for the rest of your life, that’s on you.” Mustafa reminded Gill he had asked for a cigarette. “Can I smoke a cigarette before it, [be]fore we talk again . . . ?” Gill agreed, and left the room at 5:20 p.m. Another officer escorted Mustafa out for a cigarette at 5:29 p.m.”

Ten minutes later, Mustafa said he wanted to continue talking and gave more information, that he was present during the planning, but “reiterated that he did not participate. He continued to claim he’d been tied up by two men, Lewis being one of them. A few hours later, he was interviewed again, after once more waiving Miranda. He then admitted he’d introduced Lanier to the other men involved. During later testimony, the two detectives testified about the interviews, but the information was redacted of Lewis’s and Walee’s names.

Before trial, Mustafa moved to suppress the statements he made to Gill following his request for an attorney at 5:15 p.m., including those from the third interview. The government agreed not to seek admission of statements made in the five-minute period between Mustafa’s request for an attorney and Gill’s exit from the room, but argued that Mustafa waived his asserted right to counsel by voluntarily reinitiating contact with Gill following his cigarette break. The district court agreed and denied the motion. All of the defendants were convicted of varying offenses related to the conspiracy. They appealed.

ISSUE: Is it improper to question someone after they asked for an attorney?

HOLDING: Yes

DISCUSSION: The Court noted that “a criminal defendant is guaranteed the right to counsel during a custodial interrogation under the Fifth and Fourteenth Amendments.”²²¹ “If the individual states that he wants an attorney, the interrogation must cease until an attorney is present.”²²² The Supreme Court set the standard for a waiver of the asserted right to counsel in Edwards v. Arizona: once the accused invokes his right to counsel, “a valid waiver of that right cannot be established by showing only that he responded to further police-initiated custodial interrogation even if he has been advised of his rights”; rather, “the accused himself [must] initiate[] further communication, exchanges, or conversations with the police.”²²³ Thus, after the defendant has requested an attorney, the government “cannot demonstrate a waiver of this right absent the necessary fact” that the defendant himself reopened dialogue with the police “by evinc[ing] a willingness and a desire for a generalized discussion about the investigation.”²²⁴

There was no question but that Mustafa was in custody at the time he made the statements. Assuming he properly asserted his right to counsel initially, the government contended he “reopened the lines of communication not once, but twice: first, before the cigarette break, when he asked, “Can I smoke a cigarette before it, [be]fore we talk again?” And again immediately after the cigarette break, when he confirmed to Gill that he wanted to talk again despite his earlier request for an attorney. But “the whole point of Edwards is to prevent officials from badgering defendants into waiving their asserted rights to

²²¹ Moore v. Berghuis, 700 F.3d 882 (6th Cir. 2012).

²²² Miranda v. Arizona, 384 U.S. 436 (1966).

²²³ 451 U.S. 477, 484–85 (1981) (footnote omitted).

²²⁴ McKinney v. Ludwick, 649 F.3d 484 (6th Cir. 2011).

counsel through repeated questioning.” Id. If the accused reopens dialogue with police agents only after the agents have violated Edwards by continuing the interrogation, “no claim that the accused ‘initiated’ more conversation will be heard.”²²⁵ That, Mustafa contends, is what happened here: he made both requests to talk only after Gill warned that he would be charged with murder and threatened to walk out of the room.”

However, even assuming that it was error to admit his statements, given the magnitude of the evidence against him, any error was harmless.

Further, when the motion was denied, Walee and Lewis moved to sever their case from Mustafa’s, “arguing that admission of his statements at a joint trial would violate their confrontation rights under Bruton v. United States,²²⁶ In response, the government offered proposed redactions of Mustafa’s statements eliminating any references to defendants. Finding the redacted statements adequately resolved the Bruton issue, the district court denied defendants’ motion.” They did not, however, object when the two detectives “used the redacted statements to testify at trial.”

The Court noted that:

The Confrontation Clause guarantees a defendant the right to cross-examine a codefendant who incriminates him.²²⁷ “In Bruton, the Supreme Court held that the Confrontation Clause is violated by the introduction of an incriminating out-of court statement by a non-testifying co-defendant, even if the court gives a limiting instruction that the jury may consider the statement only against the co-defendant.”²²⁸ Thus, a codefendant’s out-of-court statement implicating the defendant cannot be admitted at a joint trial where the codefendant declines to testify.²²⁹ An exception exists, however, when the statement is “redacted to eliminate not only the defendant’s name, but any reference to his or her existence.”²³⁰ Bruton is not a bar to admission of a properly redacted statement accompanied by a limiting instruction, even if the statement “becomes incriminating [to the defendant] when linked with other evidence adduced at trial.”²³¹

The Court agreed the statements were properly redacted and removed identifiable references to Walee and Lewis. In addition, because it was a multifaceted conspiracy, “Nothing in the altered statements drew any more attention to Walee or Lewis than to the other coconspirators.”

The Court also upheld the admission of a letter from Lewis to a family member. The letter was used to prove his alias (Big Chuck), and the court discounted that it also indicated he was in prison and that it frequently used a prejudicial word. Further, it was considered authentic because it includes his inmate information.

After ruling on a number of procedural issues, the Court upheld the convictions.

INTERROGATION – JUVENILE

Barber v. Miller, 2015 WL 7775063 (6th Cir. 2015)

FACTS: In January, 2011, a member of the family reported to Michigan CPS that Barber was neglecting J.B. Miller, a social worker, interviewed J.B. at his elementary school without getting a court order or consent. Barber was also interviewed about his use of controlled substances, with Miller explaining that the marijuana and prescription drugs he used were medically authorized. J.B. was interviewed again six days later and the paternal grandmother was also questioned. (Note that Michigan

²²⁵ Hill v. Brigano, 199 F.3d 833 (6th Cir. 1999).

²²⁶ 391 U.S. 123 (1968)

²²⁷ Bruton, 391 U.S. at 126

²²⁸ Ford, 761 F.3d at 652 (citing Bruton, 391 U.S. at 136–37).

²²⁹ See Gray v. Maryland, 523 U.S. 185, 189–90 (1998).

²³⁰ Id. at 191; see also Richardson v. Marsh, 481 U.S. 200, 211 (1987).

²³¹ Ford, 761 F.3d at 654.

has a statute that allows CPS to “to conduct in-school interviews of suspected child-abuse victims without parental consent.”)

Miller petitioned the family court to place J.B. in protective custody until a hearing could be held, and when that was issued, picked up J.B. from school. After a hearing, the court upheld at least some of the allegations but did return J.B. to Barber, conditioned on him abstaining from marijuana and having drug screening, and “ensuring that J.B. has constant adult supervision.”

Barber sued Miller under 42 U.S.C. §1983 alleging the following as violations: (1) interviewing J.B. at school without a court order or parental consent, (2) littering the protective-custody petition with falsehoods and misrepresentations, and (3) removing J.B. from school pursuant to the protective-custody order. Miller moved for dismissal and the trial court granted the motion. Barber appealed.

ISSUE: May a social worker interview a juvenile at school?

HOLDING: Yes (but see discussion)

DISCUSSION: Barber argued that “Miller violated both his and J.B.’s constitutional rights by including false and misleading statements in the petition for a protective-custody order.” Under Pittman v. Cuyahoga County Department of Children & Family Services, however, “social workers enjoy absolute immunity when acting in their capacities as legal advocates” – which includes “when initiating court proceedings, filing child abuse complaints, and testifying under oath,” even if there are allegations that a “social worker intentionally misrepresented facts to the family court.”²³²

With respect to the interviewing, Miller did not have absolute immunity. As such, he sought qualified immunity. The Court agreed that ““For a right to be clearly established, the contours of the right must be sufficiently clear that a reasonable official would understand that what he is doing violates that right.”²³³ That must be examined ““in light of the specific context of the case, not as a broad general supposition.”²³⁴ With respect to the interview, the Court agreed that “J.B.’s Fourth Amendment right to avoid warrantless, in-school interviews by social workers on suspicion of child abuse not to have been clearly established in January 2011, when Miller interviewed J.B.” (The Court noted that cases cited by Barber were decided after the interview and did not even specifically involve interviews or a removal that occurred at school.) With respect to the removal, Miller properly sought a court order before removing the child so ultimately, the family court made the decision, which was within its authority.

The Court affirmed the dismissal.

SUSPECT IDENTIFICATION

U.S. v. Simmons, 2015 WL 8479628 (6th Cir. 2015)

FACTS: A security guard, Lee, was sent to a complaint of gambling at an apartment location where loitering was prohibited in Memphis. He spotted 6-7 men, including Simmons and knew they were not residents. When he asked for ID, he was refused and cursed. Memphis PD was called. Lee told the men to leave, and were again refused, profanely. Simmons ran when Lee tried to arrest him, and Memphis PD could not catch him either. He yelled back at Lee as he ran that he was going to “get” him.

When Lee ended his shift, after 2 a.m., he was walking to his car. He was approached by a man who pointed a shotgun at him and fired, Lee narrowly escaped being hit. Lee fired back but was unsure if he hit the man. The man reached for his belt and Lee fired again. Only then did the man yell and pull off his mask, revealing that he was Simmons. Alana, the property manager, heard the melee and witnessed the end of it as she called 911.

²³² 640 F.3d 716 (6th Cir. 2011),

²³³ Leonard v. Robinson, 477 F.3d 347 (6th Cir. 2007) (quoting Greene v. Barber, 310 F.3d 889 (6th Cir. 2002)).

²³⁴ Lyons v. City of Xenia, 417 F.3d 565 (6th Cir. 2005) (quoting Saucier v. Katz, 533 U.S. 194 (2001)).

Simmons was indicted for possession of the weapon, but denied any involvement in the shooting. He claimed that others in a group of men told him they were going to “mess with” the guard. He ran when the shooting started and was then struck in the back of the shoulder. He pled guilty to the possession charge and the sentence was enhanced due to the attempted murder. He appealed.

ISSUE: May a single photo shown still be a valid photo ID?

HOLDING: Yes (but see discussion)

DISCUSSION: The Court looked at the discrepancies that Simmons pointed to in Lee’s testimony, but the Court noted “none of these discrepancies leave us with a “definite and firm conviction that a mistake has been committed” in view of the evidence as a whole.²³⁵ In fact, the Court noted, some of the discrepancies were more in the nature of uncertainties, and specifically, Alana testified that she saw only the two men, rather than the group Simmons claimed. Lee expressed certainly that Simmons was the shooter. The Court also agreed that clearly Simmons attempted to kill Lee, in that he laid in wait and ambushed him.”

Simmons also challenged a single photo being shown to Lee in the ID process. The Court noted that:

To determine the validity of an identification procedure, we apply a two-part test:

First, the defendant must demonstrate that the identification procedure was impermissibly suggestive; second, assuming the procedure was suggestive, the court considers whether the identification was nevertheless reliable under the totality of the circumstances.²³⁶

Those circumstances include:

(1) the witness’ opportunity to view the suspect; (2) the witness’ degree of attention; (3) the accuracy of the witness’ prior description of the criminal; (4) the level of certainty demonstrated by the witness at the time of the identification; and (5) the time between the crime and the identification.²³⁷ “Although identifications arising from single-photograph displays may be viewed in general with suspicion,” the total circumstances may nevertheless negate the “corrupting effect of the suggestive identification,” particularly where the witness knows the defendant.²³⁸ Witnesses may have difficulty observing and later identifying a stranger, but they “are very likely to recognize . . . the people in their lives with whom they are most familiar, and any prior acquaintance with another person substantially increases the likelihood of an accurate identification.”²³⁹

Here, Lee knew defendant from previous encounters at the apartment complex; he recognized Simmons when he confronted the gamblers and when defendant removed his mask following the shooting. Alana’s testimony that Simmons was a regular at Kimball Cabana added weight to Lee’s assertion that he recognized Simmons. “[r]eliability is the linchpin in determining the admissibility of identification testimony,” and Lee’s familiarity with defendant “substantially increase[d] the reliability” of his identification.

The totality of the circumstances additionally supports a finding of reliability. Lee had a clear view of defendant during the gambling incident and immediately after the shooting, and his concern for his own safety “also suggests a heightened degree of attention.” Further, Lee gave no prior

²³⁵ Easley v. Cromartie, 532 U.S. 234, 242 (2001) (citation omitted).”

²³⁶ United States v. Meyer, 359 F.3d 820, 824 (6th Cir. 2004).

²³⁷ Haliym v. Mitchell, 492 F.3d 680, 704 (6th Cir. 2007) (citing Manson v. Brathwaite, 432 U.S. 98, 114 (1977); and Neil v. Biggers, 409 U.S. 188, 199–200 (1972)).

²³⁸ Manson, 432 U.S. at 114, 116; see e.g., United States v. Shields, 415 F. App’x 692, 702–03 (6th Cir. 2011) (use of single-photograph was not impermissibly suggestive where witnesses saw the defendant “numerous times prior to being shown the photograph”).

²³⁹ Haliym, 492 F.3d at 706.

inaccurate description of the perpetrator; he identified defendant at the police station within hours of the shooting, and expressed complete certainty in his identification. On the whole, Lee's identification was independently reliable and admission of his testimony did not offend defendant's due process rights.

The Court affirmed Simon's plea.

TRIAL PROCEDURE / EVIDENCE – BRADY

U.S. v. Vujovic, 2015 WL 9310009 (6th Cir. 2015)

FACTS: Vujovic was involved in a fraudulent loan situation and was convicted. He appealed, arguing that “numerous pieces of evidence ... were withheld from him prior to trial in violation of Brady v. Maryland.”²⁴⁰

ISSUE: Must evidence be exculpatory to be required under Brady?

HOLDING: Yes

DISCUSSION: The Court noted that ““there is no general constitutional right to discovery in a criminal case, and Brady did not create one.”²⁴¹ To establish a Brady violation, a defendant has the burden of proving three elements: “the evidence at issue must be favorable to the accused, either because it is exculpatory, or because it is impeaching; that evidence must have been suppressed by the State, either willfully or inadvertently; and prejudice must have ensued.”²⁴² The Court noted that several of the items argued “might not have been suppressed at all” because they were never in the government's possession in the first place or because they were available through public record.²⁴³ Further, the “allegedly withheld evidence was not exculpatory. In order to constitute Brady material, “[t]he evidence at issue must be favorable to the accused, either because it is exculpatory, or because it is impeaching.”

And finally, even had he had all the evidence claimed, there is no reasonable probability that he would not have been convicted.

The Court upheld his convictions.

EMPLOYMENT – USERRA

Eichaker v. Village of Vicksburg, 2015 WL 5827540 (6th Cir. 2015)

FACTS: In 1999, Eichaker was hired as a police officer for the Village of Vicksburg, MI. He was initially in the Marine Corps Reserve, then switched to the Air National Guard. He did the usual one weekend per month and two weeks military duty. On occasion, however, he took longer leaves, including 14 months after 9/11 on active duty. Shortly after he returned, in 2003, the Chief took a four-month medical leave, and promoted Eichaker to lieutenant and put him in acting command. In 2007, the chief again left, to work as a military contractor for some period of time, again leaving Eichaker in command. When he returned, the Village Manager expressed unhappiness with Eichaker, but never explained why. In July, 2009, Eichaker took four months off for specialized military training. IN April, 2010, the chief told him he was going to retire. Eichaker approached the Village Manager about the position but was put off until “later.”

The Village Manager then selected another officer for the position, West. Although he denied mentioning the military service, others at the closed meeting recalled that in fact, the village manager mentioned

²⁴⁰ 373 U.S. 83 (1963).

²⁴¹ Weatherford v. Bursey, 429 U.S. 545 (1977).

²⁴² Strickler v. Greene, 527 U.S. 263 (1999).

²⁴³ Carter v. Bell, 218 F.3d 581 (6th Cir. 2000)

Eichaker's "young family" and "military career." He told someone else it would be hard for Eichaker to be the chief if he was called away or deployed.

Shortly after West became chief, he demoted Eichaker to Sergeant, which included several other issues – as he would have to pay union dues, more for health insurance and would not receive the difference between his military pay and department pay when deployed. West had previously complained about Eichaker's military obligations. When questioned, West demanded the keys that Eichaker had to the chief's office. West considered eliminating the sergeant's position and demoting Eichaker to patrolman and some six months later, did so.

In the spring of 2011, Eichaker was called up for four months. When he returned, he was excluded from a military funeral escort, with West calling up officers who lived much farther away instead. In November, 2011, Eichaker left for military leave and this time, he was billed for family insurance coverage that the village had previously covered at no cost. While still on deployment, in February, 2012, Eichaker filed a complaint under USERRA and the state Dept. of Labor. He returned to the Village in July, but not to work, and in October, requested discretionary leave until the issue was resolved. When denied, and told he could only take military leave, Eichaker resigned.

Eichaker filed suit under USERRA. The District Court ruled in the Village's favor and Eichaker appealed.

ISSUE: Could comments relating to a subordinate's military service be used in a retaliation case?

HOLDING: Yes

DISCUSSION: With respect to the chief's position, the Court looked to three witnesses to attributed an improper motive to the decision – all three being relevant to the claim. "An employer's concern that an employee is taking too much time off for military service is direct evidence of anti-military animus."²⁴⁴ So is a supervisor criticizing voluntary military duty, and in each case, the statement was made by a decision-maker. Further, this suggested that but for the military service, he would have been promoted.

With respect to the demotion, it was also attributable to statements that his military leaves were a deciding factor. Finally, the second demotion, to patrolman, appeared to be as a direct result of his assertion that he would complain to the military mediators about lost benefits. The Act. 38 U.S. C. §4311 (b)(1) specifically protects all benefits of employment. The demotion clearly appeared to be in retaliation.

Finally, with respect to his insurance benefits, while nothing required the Village to provide the insurance at no cost, neither could they terminate a benefit due to military service. This question, the Court concluded, should be addressed on remand as should the issue of the military funeral.

The Court reversed the trial court and remanded the case.

EMPLOYMENT - ADA

Michael v. City of Troy Police Dept., 808 F.3d 304 (6th Cir. 2015)

FACTS: Michael began working for Troy (MI) PD in 1987. In 2000 and 2001, he underwent surgery for brain tumors and he returned to work after each surgery. In 2007, he began to behave in an aberrant manner that included trying to sue the police chief and recording his wife (they later divorced). The new chief learned that "Michael had accompanied a cocaine dealer to several drug deals" and suspended him. Michael underwent a third surgery in 2009 and was told before he could return, he needed to pass a psychological evaluation. The evaluator concluded that he might be a threat and he was placed on unpaid leave, another evaluator, however, cleared him for duty. Several other evaluations gave differing results, but he remained on unpaid leave.

²⁴⁴ Hance v. Norfolk S. Ry. Co., 571 F.3d 511 (6th Cir. 2009).

Michael filed suit under the ADA, and the trial court concluded he was not qualified to be a patrol officer. Michael appealed.

ISSUE: Is proof that an officer is a direct threat in performing duties, due to a brain issue, sufficient to support termination?

HOLDING: Yes

DISCUSSION: Michael brings his claims specifically under §12112(a) of the ADA, which provides that “[n]o covered entity shall discriminate against a qualified individual on the basis of disability[.]”²⁴⁵ Thus, to prevail on a claim under this section, a plaintiff must prove that (1) he is disabled as defined by the Act, (2) he is a “qualified individual[.]” and (3) his employer “discriminate[d]” against him “on the basis of disability.”²⁴⁶ The Court focused on the second element, and noted that “a disabled person is not qualified for an employment position, however, “if he or she poses a ‘direct threat’ to the health or safety of others which cannot be eliminated by a reasonable accommodation.”²⁴⁷ A “direct threat” is “a significant risk to the health or safety of others that cannot be eliminated by reasonable accommodation.”²⁴⁸

It is objectively reasonable for an employer to rely on a medical opinion to find that a person “cannot safely perform his job functions.” Further, “A medical opinion may conflict with other medical opinions and yet be objectively reasonable.” An employer may also look to “testimonial evidence” that an employee poses a threat. In this case, the City looked to both, including highly detailed evaluations from several experienced doctors in the field. (It was noted that the city’s doctors gave highly detailed, individual evaluations, whereas Michael’s doctors failed to apply his condition to his ability to perform the job in question, having “relatively little to say” on that issue. “Those omissions are conspicuous.” Further, the city depended upon incidents that occurred within and without the department, as well.

The Court affirmed his dismissal.

CHILD PORNOGRAPHY

U.S. v. Hodge, 805 F.3d 675 (6th Cir. 2015)

FACTS: In October, 2011, Hodge’s stepdaughter got out of the shower and noticed that the bathroom cabinet door was open. Inside, she found a recording device and footage of herself, getting out of the shower. She called her mother, who told her to secure the recording, but Hodge removed it before she could do so. The mother called the police, who got a search warrant and found that his laptop had multiple images of child pornography.

Hodge was indicted for receipt and possession of child pornography, both based in images he’d downloaded from the internet. At the time, he also had state charges of voyeurism for the video of the stepdaughter that had not been adjudicated. At the federal sentencing, Hodge argued that the voyeur should not be a factor as “relevant conduct.” The trial court ruled that it was proper to consider it and Hodge appealed.

ISSUE: Is a voyeurism charge relevant conduct in a child pornography case as well?

HOLDING: Yes

DISCUSSION: The Court looked to the relevant federal law and noted that the “conduct must be a criminal offense that carries the potential for incarceration,” but it was not necessary that there be a

²⁴⁵ 42 U.S.C. § 12112(a).

²⁴⁶ Keith v. Cnty. of Oakland, 703 F.3d 918 (6th Cir. 2013).

²⁴⁷ Mauro v. Borgess Med. Ctr., 137 F.3d 398, 402 (6th Cir. 1998); see also Holiday v. City of Chattanooga, 206 F.3d 637, 647 n.4 (6th Cir. 2000) (same); 42 U.S.C. § 12113(b).

²⁴⁸ Id. § 12111(3).”

conviction. Although not child pornography under federal law, as they were not sexually explicit or shown to be lascivious, they could constitute an “attempted” crime of child pornography, however.²⁴⁹ The situation did also appear to violate Kentucky’s voyeurism statute, KRS 531.090, although it was not prosecuted. The Court noted that “receipt and possession are inseparable.” In fact, the Court noted his possession is in fact included *within* the offense. The evidence suggested he was downloading child pornography at the same time he was secretly recording his stepdaughter. As such, it was relevant conduct.

Hodge’s sentence was affirmed.

FIRST AMENDMENT

Bible Believers v. Wayne County Michigan, 805 F.3d 228 (6th Cir. 2015)

FACTS: This case occurred in Dearborn, Michigan, a suburb of Detroit in Wayne County. The population of about 100,000 is second only to New York City in the number of Arab-Americans who call Dearborn home. The Arab population includes both Christians and Muslims. Since 1996, the Arab International Festival had occurred every summer, with the principal purpose being to “promote cultural exchange.” Over the course of three days, the festival has grown to have at least 300,000 attendees. There has been a history of a “diverse array of religious groups” requesting permission to set up booths on the grounds. There has also been a history of “certain Christian evangelists who preferred to roam free among the crowd and proselytize to a large number of Muslims who were typically in attendance each year.”

In 2009, Dearborn PD began to enforce an “anti-leafletting policy” established by the event sponsor and ratified by the City. That practice was changed when it was the subject of a lawsuit and the court ruled that it improperly encroached on the First Amendment. Following that, the Wayne County Sheriff’s Office took over responsibility for Festival security. The Bible Believers were one of the evangelical groups that attended the festival to spread their beliefs. They regularly engaged in street preaching and paraded around with banners and sign that included “overtly anti-Muslim sentiments.”

In 2011, Israel (the group’s leader) and followers attended the festival. On June 17, they were “directed to a protected area on the Festival grounds referred to as a “free speech zone.”” When they returned on June 19, they were told the zone had been removed and it “would not be made available again.” The group opted to walk the streets and sidewalks, spreading their message. (The crux of their message was that “Mohammed was a false prophet who lied to Muslims and that Muslims would be damned to hell if they failed to repent by rejecting Islam.”) This message was “not well received by certain elements of the crowd.” The Bible Believers alleged that they were assaulted by members of the crowd and that initially the WCSO did nothing, but ultimately “silenced the Bible Believers by kicking them out and requiring them to leave the Festival grounds.” The Deputy Chief, in fact, personally arrested one of the Bible Believers.

The following year, the Bible Believers decided that they would return. Prior to the event, they sent a letter to the County and Sheriff Napoleon describing what had happened the prior year and informed the county of their expectations for 2012. The County responded and disagreed with the Bible Believers’ interpretation of First Amendment law and the duties of law enforcement to protect the group. Specifically, it denied any “special relationship” between Israel and the WCSO, which required the latter to provide a “heightened measure of protection.” The county’s letter went on to remind the group that it could be “criminally accountable for conduct which has the tendency to incite riotous behavior or otherwise disturb the peace.” The County’s letter indicated it felt no obligation to protect the group from the consequences of their speech.

During the same time, the Sheriff had circulated an operations plan which outlined how security for the 2012 event would be conducted. High on the list, the likelihood of a situation arising with the Bible Believers was discussed, particularly that the group would attempt to provoke the WCSO into actions that

²⁴⁹ U.S. v. Sims, 708 F.3d 832 (6th Cir. 2013).

would discredit the agency. It was emphasized that the WCSO would not “abridge or deny anyone’s Freedom of Speech, unless public safety becomes [a] paramount concern.” A large number of WCSO personnel, both regular and reserve, approximately 70 total, were to be deployed to the event, more than those used at the World Series or a presidential visit.

The Bible Believers returned at about 5 p.m., on June 15, 2012, the first day of the Festival. To exercise their “sincerely held religious beliefs, they were ‘compelled ... to hurl words and display messages offensive to a predominantly Muslim crowd, many of whom were adolescents.’”²⁵⁰ One of the group carried a “severed pig’s head on a spike,” to keep the Muslims “at bay,” since they are “kind of petrified of that animal,” according to Israel. Tensions arose as some of the youth became incensed at the group’s preaching, but one of the young men told his friends to “quit giving them attention,” and some of the boys dispersed.

Eventually, however, some of the Muslim youths “began to express their anger by throwing plastic bottles and other debris at the Bible Believers.” (A video showed a deputy watching, but not intervening.) At one point, they were told by a deputy to stop using a megaphone as it violated city ordinance. A deputy did tell the youths to back up and did remove one for throwing a bottle. At that point, however, “all police presence and intervention dissipated...” For the next ten minutes, the group continued to preach, “all while a growing group of teenagers jeered and heckled, some throwing bottles and others shouting profanities.” A parent did step in and reprimand one of the youths. “The onslaught reached its climax when a few kids began throwing larger items such as milk crates.” The Bible Believers then stopped speechmaking. However, a “number of debates spawned between members of the crowd (which had continued to swell) and individual Bible Believers.” A few minutes later, four mounted officers rode by, momentarily quieting the crowd. The crowd stayed quiet until the police and a news crew left, and then the Bible Believers were again assaulted by flying debris. They turned away and moved through the crowd, followed by a “large contingent of children” who continued to throw smaller items at the group. The torrent died down once the group settled in another location. Israel suffered a small laceration.

When a deputy appeared, the “children’s belligerence and the assaultive behavior again ceased.” The deputy told them to move and they complied. The deputy told Israel that he was a “danger to public safety” and that the WCSO did not have enough manpower to ensure their safety. He gave the group the option to leave, although Israel pled for “some sort of police presence” in the general vicinity to allow them to remain. When the deputy left, the “bottle throwing resumed.” Moments later deputies arrived and Israel was told the group would be escorted out of the festival grounds. Israel refused, arguing for the opportunity to continue to walk and preach. Deputy Chief Richardson told him that the Bible Believers’ actions were causing the disturbance “and it is a direct threat to the safety of everyone” at the festival. Israel argued that the problem only occurred when the police were not present and that the bottle-throwing had occurred even when they were simply carrying signs and not speaking. After much give and take, Israel refused to leave unless he was faced with the prospect of being arrested. The Deputy Chief emphasized that the WCSO could not provide individual security for every group at the festival and that the Bible Believers needed to leave because their conduct was attracting a crowd. Richardson stated that they would probably be cited if they did not leave, and that they were being disorderly. To this, Israel “replied, incredulously, ‘I would assume 200 angry Muslim children throwing bottles is more of a threat than a few guys with signs.’”

Upon further discussion with legal counsel, additional deputies arrived to surround the area where the Bible Believers had been secluded. Richardson confirmed that the members of the group would be cited if they did not leave and the group left, escorted by over a dozen deputies. Four mounted deputies were also present. The group got into a van and left, followed by WCSO. Within a few blocks, they were pulled over because they’d removed the license plate from the van before leaving the festival grounds.

²⁵⁰ Signs included the following messages: “Islam Is A Religion of Blood and Murder” “Jesus Is the Way, the Truth and the Life. All Others Are Thieves and Robbers” “Prepare to Meet Thy God – Amos 4:12” “Jesus Is the Judge, Therefore Repent, Be Converted That Your Sins May Be Blotted Out” “Trust Jesus, Repent and Believe in Jesus” “Only Jesus Christ Can Save You From Sin and Hell” “Turn or Burn” “Fear God”

After 30 minutes, they were cited for that offense; by that time, eight deputies were present at the traffic stop.

In the post operation report of the day, the deputies noted that they “suggested” the group leave the grounds due to public safety and that they arrested any subjects seen throwing items. (The Court noted that “they apparently did not see very much,” as only one citation, to an adult, was issued. Three juveniles were briefly detained but not charged.) Using video shot at the scene, the only police intervention was toward the Bible Believers, to stop using the megaphone. Nothing was done to “quell the violence,” although whenever deputies appeared, the “agitated crowd became subdued and orderly.”

The Bible Believers filed suit, under 42 U.S.C. §1983, against a number of parties. The defendants moved for summary judgement, which was ultimately granted by the District Court. The Bible Believers appealed and a three judge panel affirmed the summary judgement. The Bible Believers petitioned for an *en banc* rehearing before the entire Sixth Circuit.

ISSUE: May law enforcement allow a heckler’s veto to occur?

HOLDING: No

DISCUSSION: The Court began:

If there is a bedrock principle underlying the First Amendment, it is that the government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable.²⁵¹

“Nowhere is this [First Amendment] shield more necessary than in our own country for a people composed [from such diverse backgrounds].”²⁵² Born from immigrants, our national identity is woven together from a mix of cultures and shaped by countless permutations of geography, race, national origin, religion, wealth, experience, and education. Rather than conform to a single notion of what it means to be an American, we are fiercely individualistic as a people, despite the common threads that bind us. This diversity contributes to our capacity to hold a broad array of opinions on an incalculable number of topics. It is our freedom as Americans, particularly the freedom of speech, which generally allows us to express our views without fear of government sanction.

Diversity, in viewpoints and among cultures, is not always easy. An inability or a general unwillingness to understand new or differing points of view may breed fear, distrust, and even loathing. But it “is the function of speech to free men from the bondage of irrational fears.”²⁵³ Robust discourse, including the exchanging of ideas, may lead to a better understanding (or even an appreciation) of the people whose views we once feared simply because they appeared foreign to our own exposure. But even when communication fails to bridge the gap in understanding, or when understanding fails to heal the divide between us, the First Amendment demands that we tolerate the viewpoints of others with whom we may disagree. If the Constitution were to allow for the suppression of minority or disfavored views, the democratic process would become imperiled through the corrosion of our individual freedom. Because “[t]he right to speak freely and to promote diversity of ideas . . . is . . . one of the chief distinctions that sets us apart from totalitarian regimes,” dissent is an essential ingredient of our political process.²⁵⁴

The First Amendment “may indeed best serve its high purpose when it induces a condition of unrest, creates dissatisfaction with conditions as they are, or even stirs people to anger.” If we are not persuaded by the contents of another’s speech, “the remedy to be applied is more speech,

²⁵¹ Snyder v. Phelps, 562 U.S. 443, 458 (2011)

²⁵² Cantwell v. Connecticut, 310 U.S. 296 (1940).

²⁵³ Whitney v. California, 274 U.S. 357 (1927).

²⁵⁴ Terminiello v. City of Chicago, 337 U.S. 1 (1949).

not enforced silence.”²⁵⁵ And although not all manner of speech is protected, generally, we interpret the First Amendment broadly so as to favor allowing more speech.²⁵⁶

The Court began its discussion by noting that “free-speech claims require a three-step inquiry: first, we determine whether the speech at issue is afforded constitutional protection; second, we examine the nature of the forum where the speech was made; and third, we assess whether the government’s action in shutting off the speech was legitimate, in light of the applicable standard of review.”²⁵⁷ The parties had agreed that the Festival area was a “traditional public forum available to all forms of protected expression.” The Court agreed that the First Amendment “offers sweeping protection that allows all manner of speech to enter the marketplace of ideas.” The protections apply “to loathsome and unpopular speech with the same force as it does to speech that is celebrated and widely accepted.” It applies to both the minority view as well as the majority view and in fact includes “expressive behavior that is deemed distasteful and highly offensive to the vast majority of people, that most often needs protection under the First Amendment.”²⁵⁸ The answer to speech that is “offensive, thoughtless, or baseless . . . that we believe to be untrue” is always “more speech.”²⁵⁹

However, the Court agreed, “not all speech is entitled to its sanctuary.” The Court addressed two forms of expression that “have particular relevance to the interaction between offensive speakers and hostile crowds”: “incitement to violence” (also known as “incitement to riot”) and “fighting words.” Incitement includes “advocacy for the use of force or lawless behavior intent, and imminence,” and the Court found all to be absent from the facts. “Disparaging the views of another to support one’s own cause is protected by the First Amendment.” The Court remarked that it would be rare to find enough evidence to even send such a case to the jury. The County pointed to Feiner v. New York, for the idea that when a crowd

²⁵⁵ Whitney, supra.

²⁵⁶ See Cox v. Louisiana, 379 U.S. 536 (1965) (“[W]hen passing on the validity of a regulation of conduct, which may indirectly infringe on free speech, this Court . . . weigh[s] the circumstances in order to protect, not to destroy, freedom of speech.” (internal quotation marks omitted)) (Black, J., concurring).

²⁵⁷ Cornelius v. NAACP Legal Def. & Educ. Fund. Inc., 473 U.S. 788 (1985); Saieg, 641 F.3d at 734–35.

²⁵⁸ See, e.g., Nat’l Socialist Party of Am. v. Vill. of Skokie, 432 U.S. 43 (1977) (recognizing First Amendment rights of Neo Nazis seeking to march with swastikas and to distribute racist and anti-Semitic propaganda in a predominantly Jewish community); Brandenburg v. Ohio, 395 U.S. 444 (1969) (recognizing the First Amendment rights of Ku Klux Klan members to advocate for white supremacy-based political reform achieved through violent means); Texas v. Johnson, 491 U.S. 397 (1989) (recognizing flag burning as a form of political expression protected by the First Amendment); Snyder, 562 U.S. 443 (2011) (recognizing a religious sect’s right to picket military funerals). “[I]f it is the speaker’s opinion that gives offense, that all, much political and religious speech might be perceived as offensive to some.” Morse v. Frederick, 551 U.S. 393 (2007). Accordingly, “[t]he right to free speech . . . includes the right to attempt to persuade others to change their views, and may not be curtailed simply because the speaker’s message may be offensive to his audience.” Hill v. Colorado, 530 U.S. 703 (2000). Any other rule “would effectively empower a majority to silence dissidents simply as a matter of personal predilections,” Cohen v. California, 403 U.S. 15 (1971), and the government might be inclined to “regulate” offensive speech as “a convenient guise for banning the expression of unpopular views.”

²⁵⁸ Williams-Yulee v. Fla. Bar, 135 S. Ct. 1656 (2015)

²⁵⁸ Feiner v. New York, 340 U.S. 315 (1951),

²⁵⁸ 518 F.2d 899 (6th Cir. 1975)

²⁵⁸ See, e.g., U.S. v. Williams, 553 U.S. 285(2008) (“To be sure, there remains an important distinction between a proposal to engage in illegal activity and the abstract advocacy of illegality.”); NAACP v. Claiborne Hardware Co., 458 U.S. 886 (1982) (“[T]he mere abstract teaching . . . of the moral propriety or even moral necessity for a resort to force and violence, is not the same as preparing a group for violent action and steeling it to such action.” (citation omitted)); Communist Party of Ind. v. Whitcomb, 414 U.S. 441 (1974)/

²⁵⁸ Chaplinsky v. New Hampshire, 315 U.S. 568 (1942); see also Sandul v. Larion, 119 F.3d 1250 (6th Cir. 1997).

²⁵⁸ Street v. New York, 394 U.S. 576 (1969)

²⁵⁸ R.A.V. v. City of St. Paul, 505 U.S. 377 (1992).

²⁵⁸ Perry Educ. Ass’n v. Perry Local Educators’ Ass’n, 460 U.S. 37 (1983); see also Frisby v. Schultz, 487 U.S. 474(1988).

²⁵⁸ U.S. v. Grace, 461 U.S. 171, 177 (1983).

²⁵⁸ Forsyth Cty. v. Nationalist Movement, 505 U.S. 123 (1992), or for taking an enforcement action against a peaceful speaker. See Brown v. Louisiana, 383 U.S. 131 (1966). consequence is a reason for according it constitutional protection.” Hustler Magazine, Inc. v. Falwell, 485 U.S. 46, 55 (1988) (citation omitted). Religious views are no different. “After all, much political and religious speech might be perceived as offensive to some.” Morse v. Frederick, 551 U.S. 393 (2007). Accordingly, “[t]he right to free speech . . . includes the right to attempt to persuade others to change their views, and may not be curtailed simply because the speaker’s message may be offensive to his audience.” Hill v. Colorado, 530 U.S. 703 (2000). Any other rule “would effectively empower a majority to silence dissidents simply as a matter of personal predilections,” Cohen v. California, 403 U.S. 15 (1971), and the government might be inclined to “regulate” offensive speech as “a convenient guise for banning the expression of unpopular views.”

²⁵⁹ Williams-Yulee v. Fla. Bar, 135 S. Ct. 1656 (2015)

“becomes restless,” and begins to “mill around,” stopping the speech is permitted.²⁶⁰ The Court agreed that since the Bible Believers “did not ask their audience to rise up in arms and fight for their beliefs,” that Feiner and Glasson v. City of Louisville²⁶¹ did not apply. Later Supreme Court rulings had deviated from Feiner.²⁶² Instead, the Court has looked to Brandenburg as “establishing the test for incitement” and noted that the “Bible Believers’ speech was not incitement to riot simply because they did not utter a single word that can be perceived as encouraging violence or lawlessness.”

With respect to “fighting words,” which “encompasses words that when spoken aloud instantly “inflict injury or tend to incite an immediate breach of the peace,”²⁶³ the objective standard is applied - “no advocacy can constitute fighting words unless it is ‘likely to provoke the average person to retaliation.’”²⁶⁴ Generally, “offensive statements made generally to a crowd are not excluded from First Amendment protection; the insult or offense must be directed specifically at an individual.”²⁶⁵ Since the Bible Believers were not directing speech at individuals, it cannot be construed as fighting words, nor did most of the listeners react with violence.

In a public fora, as this was acknowledged by all to be, the “government’s rights to ‘limit expressive activity are sharply circumscribed.’”²⁶⁶ Speech restrictions can fall under two different categories: “content-based restrictions or time, place, and manner restrictions that are content-neutral.”²⁶⁷ For the latter, the listener’s reaction cannot be the basis for regulating the speech.²⁶⁸ The county’s actions, however, in this case, were “decidedly content-based,” as evidenced by the statements made by members of the WCSO’s staff. Their contention that their only consideration was public safety failed “in the face of abundant evidence that the police have effectuated a heckler’s veto.” Although the written plan may have been content-neutral, the “the officers enforcing it are ordained with broad discretion to determine, based on listener reaction, that a particular expressive activity is creating a public danger.”²⁶⁹ The Court noted: “if the statute, as read by the police officers on the scene, would allow or disallow speech depending on the reaction of the audience, then the ordinance would run afoul of an independent species of prohibitions on content-restrictive regulations, often described as a First Amendment-based ban on the ‘heckler’s veto.’”²⁷⁰

The Court continued:

It is a fundamental precept of the First Amendment that the government cannot favor the rights of one private speaker over those of another.²⁷¹ Accordingly, content-based restrictions on constitutionally protected speech are anathema to the First Amendment and are deemed “presumptively invalid.”²⁷² An especially “egregious” form of content-based discrimination is that

²⁶⁰ Feiner v. New York, 340 U.S. 315 (1951),

²⁶¹ 518 F.2d 899 (6th Cir. 1975)

²⁶² See, e.g., U.S. v. Williams, 553 U.S. 285(2008) (“To be sure, there remains an important distinction between a proposal to engage in illegal activity and the abstract advocacy of illegality.”); NAACP v. Claiborne Hardware Co., 458 U.S. 886 (1982) (“[T]he mere abstract teaching . . . of the moral propriety or even moral necessity for a resort to force and violence, is not the same as preparing a group for violent action and steeling it to such action.” (citation omitted)); Communist Party of Ind. v. Whitcomb, 414 U.S. 441 (1974)/

²⁶³ Chaplinsky v. New Hampshire, 315 U.S. 568 (1942); see also Sandul v. Larion, 119 F.3d 1250 (6th Cir. 1997).

²⁶⁴ Street v. New York, 394 U.S. 576 (1969)

²⁶⁵ R.A.V. v. City of St. Paul, 505 U.S. 377 (1992).

²⁶⁶ Perry Educ. Ass’n v. Perry Local Educators’ Ass’n, 460 U.S. 37 (1983); see also Frisby v. Schultz, 487 U.S. 474(1988).

²⁶⁷ U.S. v. Grace, 461 U.S. 171, 177 (1983).

²⁶⁸ Forsyth Cty. v. Nationalist Movement, 505 U.S. 123 (1992), or for taking an enforcement action against a peaceful speaker. See Brown v. Louisiana, 383 U.S. 131 (1966).

²⁶⁹ Police Dep’t of Chi. v. Mosley, 408 U.S. 92 (1972) see also Ctr. for Bio-Ethical Reform, Inc. v. L.A. Cty. Sheriff Dep’t, 533 F.3d 780 (9th Cir. 2008).

²⁷⁰ Bachellar v. Maryland, 397 U.S. 564 (1970).

²⁷¹ Rosenberger v. Rector & Visitors of Univ. of Va., 515 U.S. 819 (1995).

²⁷² Ysursa v. Pocatello Educ. Ass’n, 555 U.S. 353 (2009).

which is designed to exclude a particular point of view from the marketplace of ideas.²⁷³ The heckler's veto is precisely that type of odious viewpoint discrimination.²⁷⁴

The Court agreed that "both content- and viewpoint-based discrimination are subject to strict scrutiny."²⁷⁵ No state action that limits protected speech will survive strict scrutiny unless the restriction is narrowly tailored to be the least-restrictive means available to serve a compelling government interest.²⁷⁶ Punishing, removing, or by other means silencing a speaker due to crowd hostility will seldom, if ever, constitute the least restrictive means available to serve a legitimate government purpose.²⁷⁷

The Court traced the evolution of the law in this matter. From early cases that focused on the "clear and present danger" presented by the speech, to cases from the civil rights era in which it was emphasized there was a need to "protect the speaker." In the latter, the Court noted "police cannot punish a peaceful speaker as an easy alternative to dealing with a lawless crowd that is offended by what the speaker has to say. Because the "right 'peaceably to assemble, and to petition the Government for a redress of grievances' is specifically protected by the First Amendment," In Glasson, a "heckler's veto" case was decided, and noting that "[a] police officer has the duty not to ratify and effectuate a heckler's veto nor may he join a moiling mob intent on suppressing ideas." In that case, instead of punishing a "rabble-rousing" crowd, the police took the easier route of taking the speaker's message, her sign, and destroying it instead. Notably, in that case, the Court did not even give the officers the defense of qualified immunity, finding that it was clearly established that "(1) it was the hecklers who posed the threat, and not the speaker (if any threat existed at all); (2) a favorable number of other officers (relative to the size of the crowd) were nearby and available to assist if called upon; and (3) had that number of officers been insufficient to accomplish the task, reinforcements should have been called before they chose to take action against the speaker."

The Court stated that the string of prior decisions indicated that "constitutional rights may not be denied simply because of hostility to their assertion or exercise. This rule allowed for police to be free from damages even when they silence the speaker so long as they acted reasonably is derived from Justice Frankfurter's concurring opinion in Feiner.²⁷⁸ If the speaker's message does not fall into one of the recognized categories of unprotected speech, the message does not lose its protection under the First Amendment due to the lawless reaction of those who hear it. Simply stated, the First Amendment does not permit a heckler's veto." The Court ruled that "to the extent that Glasson's good-faith defense may be interpreted as altering the substantive duties of a police officer not to effectuate a heckler's veto, it is overruled."²⁷⁹

Balancing the two interests, free speech and maintaining the peace, "the scale is heavily weighted in favor of the First Amendment."

Maintenance of the peace should not be achieved at the expense of the free speech. The freedom to espouse sincerely held religious, political, or philosophical beliefs, especially in the face of hostile opposition, is too important to our democratic institution for it to be abridged simply due to the hostility of reactionary listeners who may be offended by a speaker's message. If the mere possibility of violence were allowed to dictate whether our views, when spoken aloud, are safeguarded by the Constitution, surely the myriad views that animate our discourse would be

²⁷³ Rosenberger, 515 U.S. at 829; Perry Educ. Ass'n, 460 U.S. at 62 (Brennan, J., dissenting) ("Viewpoint discrimination is censorship in its purest form and government regulation that discriminates among viewpoints threatens the continued vitality of 'free speech.'").

²⁷⁴ Police Dep't of Chicago v. Mosley, 408 U.S. 92 (1972) ("[T]o deny this . . . group use of the streets because of their views . . . amounts . . . to an invidious discrimination." (quoting Cox, 379 U.S. at 581 (Black, J., concurring))).

²⁷⁵ McCullen v. Coakley, 134 S. Ct. 2518 (2014).

²⁷⁶ U.S. v. Playboy Entm't Grp., 529 U.S. 803 (2000).

²⁷⁷ Cantwell v. Connecticut, 310 U.S. 296 (1940); Terminiello, supra. Edwards v. South Carolina, 372 U.S. 229 (1963); Cox v. Louisiana, 379 U.S. 536 (1965); Gregory v. City of Chicago, 394 U.S. 125 (1969).

²⁷⁸ See Niemotko v. Maryland, 340 U.S. 268 (1951) (Frankfurter, J., concurring and concurring in Feiner v. New York, 340 U.S. 315); Watson v. City of Memphis, 373 U.S. 526 (1963) (citations omitted).

²⁷⁹ See Harlow v. Fitzgerald, 457 U.S. 800 (1982)

reduced to the “standardization of ideas . . . by . . . [the] dominant political or community groups.” Democracy cannot survive such a deplorable result.

Further, silencing the speaker as an “expedient alternative” is not permitted, nor may “an officer sit idly on the sidelines,” and then later claim that removal of the speaker was necessarily. However, the “Constitution does not require that the officer “go down with the speaker” and an officer may retreat if lawless behavior presents a true risk to them. The Court noted that an officer has a “duty to enforce laws already enacted and to make arrests . . . for conduct already made criminal.” Officers “may take any appropriate action to maintain law and order that does not destroy the right to free speech by indefinitely silencing the speaker.”

In this case, the Court found that Wayne County had “not come close to meeting” its burden. Despite the number of officers assigned to the festival, they “were virtually nowhere to be found, save for a few brief appearances” – usually made to chastise the Bible Believers themselves, rather than the disorderly crowd. Enough officers were “sufficiently unoccupied” that they were able to join a large group to remove the Bible Believers and to be present at the traffic stop. The Court found it inarguable that the sole result of a “a purportedly sincere effort to maintain peace among a group of rowdy youths is few verbal warnings and a single arrest.” The Court pointed to measures that could have been taken: increasing police presence in the immediate vicinity, as was requested; erecting a barricade for free speech, as was requested; arresting or threatening to arrest more of the law breakers, as was also requested; or allowing the Bible Believers to speak from the already constructed barricade to which they were eventually secluded prior to being ejected from the Festival.” The WCSO could have called for backup, “as they appear to have done when they decided to eject the Bible Believers from the Festival.” The Court found it impossible to accept that that best course of action was to abridge constitutional rights, “when at the same time the lawless adolescents who caused the risk with their assaultive behavior were left unmolested.”

The Court stated:

Notably, a heckler’s veto effectuated by the police will nearly always be susceptible to being reimaged and repackaged as a means for protecting the public, or the speaker himself, from actual or impending harm. After all, if the audience is sufficiently incensed by the speaker’s message and responds aggressively or even violently thereto, one method of quelling that response would be to cut off the speech and eject the speaker whose words provoked the crowd’s ire. Our point here is that before removing the speaker due to safety concerns, and thereby permanently cutting off his speech, the police must first make bona fide efforts to protect the speaker from the crowd’s hostility by other, less restrictive means. Although Glasson made that requirement clear, and framed the removal of the speaker for his own protection as a last resort to be used only when defending the speaker “would unreasonably subject [officers] to violent retaliation and physical injury,” the WCSO made no discernible efforts to fulfill this obligation.

Finally, the Court agreed that Wayne County also bore responsibility, since the Corporation Counsel (the “county attorney”) was constantly acting in an advisory, even directive, role to the WCSO. The Attorney was clearly the “final authority to establish municipal policy.” As such, the County was liable.

The Court concluded:

From a constitutional standpoint, this should be an easy case to resolve. However, it is also easy to understand Dearborn’s desire to host a joyous Festival celebrating the city’s Arab heritage in an atmosphere that is free of hate and negative influences. But the answer to disagreeable speech is not violent retaliation by offended listeners or ratification of the heckler’s veto through threat of arrest by the police. The adults who did not join in the assault on the Bible Believers knew that violence was not the answer; the parents who pulled their children away likewise recognized that the Bible Believers could simply be ignored; and a few adolescents, instead of hurling bottles, engaged in debate regarding the validity of the Bible Believers’ message. Wayne

County, however, through its Deputy Chiefs and Corporation Counsel, effectuated a constitutionally impermissible heckler's veto by allowing an angry mob of riotous adolescents to dictate what religious beliefs and opinions could and could not be expressed. This, the Constitution simply does not allow.

The Court reversed the grant of summary judgement and remanded the case back to the trial court for further proceedings.

Long v. Insight Communications, 804 F.3d 791 (6th Cir. 2015)

FACTS: The Longs (William, Barbara Jonathan, Melissa and J.L) lived at a Chardon, Ohio home. Internet service was provided by TWC. Agent Warner (unknown agency) had traced a suspected purveyor in child pornography to the account connected to an IP address, which was connected to the Long account. When they executed the warrant, however, it was discovered that the Long's IP address was one number off from the suspect IP and the search was terminated. Agent Warner explained the mistake to the Longs. TWC later admitted it had "run the wrong IP address." The Longs alleged that the search was "extensive, destructive, and in plain sight of all of [their] neighbors."

The Longs filed suit against TWC, claiming the disclosed subscriber information without authorization in violation of the SCA – 18 U.S.C. §27017(a). The trial court found that the mistake was at most negligent and entered judgement for TWC. The Longs appealed.

ISSUE: Does an error in an internet company providing information on a subscriber (that results in a bad search warrant) support a lawsuit?

HOLDING: No

DISCUSSION: The Court noted that a government entity may require a service provider to give a "subset of basic subscriber or customer information" by using an administrative subpoena or a federal or state grand jury or trial subpoena.

In this case, the investigator submitted a grand jury subpoena for a specific IP address, but TWC made an error and provided the wrong information. However, the Court agreed that at best, it was a negligent error, not an intentional one, and upheld the dismissal.