Department of
CRIMINAL JUSTICE TRAINING

KENTUCKY JUSTICE AND PUBLIC SAFETY CABINET

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Leadership is a behavior, not a position

THIRD QUARTER CASE LAW UPDATES

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Commissioner

Department of
CRIMINAL JUSTICE TRAINING
KENTUCKY JUSTICE AND PUBLIC SAFETY CABINET

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

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

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NOTE:

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

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

KENTUCKY

PENAL CODE – KRS 501 - DEFENSE OF INTOXICATION

Whitlock v. Com., 2012 WL 2892354 (Ky. App. 2012)

FACTS: Whitlock was convicted of the shooting of Brunson, during a robbery. He contended that he'd been voluntarily intoxicated (on beer and marijuana) at the time of the shooting and as such, he could not have formed the intent to assault Brunson. Whitlock was, however, convicted and appealed.

ISSUE: Does simply being intoxicated to some degree negate the ability to form intent?

HOLDING: No

DISCUSSION: The Court agreed that **"**[i]ntoxication is a defense to a criminal act if it negates the existence of an element of the offense."[1] Whitlock was charged with an offense that required intent. The Court, however, agreed that the defense requires more than "mere drunkenness," but instead requires proof that Whitlock "was so drunk that he did not know what he was doing."[2] Nothing in the evidence suggested that was the case, and as such, Whitlock's conviction was affirmed.

PENAL CODE – KRS 506 – CRIMINAL FACILITATION

Davis v. Com., 2012 WL 530507 (Ky. App. 2012)

FACTS: On November 22, 2009, Prewitt returned to his home in Fayette County and found a back door window had been broken. He called the police. A neighborhood reported that he'd seen Davis (with whom the neighbor was familiar) and another man removing a TV from the house. When Prewitt was able to get inside, he found a TV and other items missing. Det. Flannery interviewed Davis and Parker (age 17) about the crime. Initially Davis denied involvement, but then admitted to assisting Parker with removing the TV, which he suspected was stolen. Parker stated that Davis had suggested the break-in and that no one else was involved.

Davis was charged with Burglary 2nd, Unlawful Transaction with a Minor and PFO 2nd. Parker testified as to the circumstances of the crime. Davis was convicted and appealed.

ISSUE: Does a claim that the defendant was assisting after the commission of a crime require an instruction on Facilitation?

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[1] KRS 501.080.
[2] Rogers v. Com., 86 S.W.3d 29 (Ky. 2002).

HOLDING: No

DISCUSSION: Davis argued that he should have received an instruction on criminal facilitation. The Court reviewed the law on lesser-included offenses.

> It is an offense that: 1) is established by proof of the same or less than all the facts required to establish the commission of the offense charged; or 2) consists of an attempt to commit the offense charged or to commit an offense otherwise included therein; or 3) differs from the offense charged only in the respect that a lesser kind of culpability suffices to establish its commission; or 4) differs from the offense charged only in the respect that a less serious injury or risk of injury to the same person, property, or public interest suffices to establish its commission.

The court then looked at the elements of burglary and the elements of facilitation. Since under Davis's version, he did not assist Parker until after Parker had left the Prewitt home, the Court agreed that a facilitation defense instruction was not appropriate.

Davis also argued that it was improper to admit evidence of the value of the items taken, as that is not an element in burglary. (Davis was not charged with Theft.) The Court agreed that while unnecessary, it was not "likely shocking or horrifying to the jury" and did not unduly sway them in their decision.

The Court upheld Davis's conviction.

PENAL CODE – KRS 508 - ASSAULT

<u>Jones v. Com.</u>, 2012 WL 3776666 (Ky. App. 2012)

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

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

HOLDING: Yes

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

and feeling that she was going to die" and that was enough to conclude she faced a substantial risk of doing so.

With respect to the unlawful imprisonment charge, which Jones argued was improper, the Court noted that Huckabee was attacked in her car, pulled from the car and then moved up against another structure nearby. Even though she was moved only a short distance, the Court found that was enough to negate the kidnapping exemption and upheld the unlawful imprisonment conviction.

PENAL CODE – KRS 520 – FLEEING AND EVADING

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

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

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

Turley was convicted and appealed.

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

HOLDING: Yes

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

JUVENILE

<u>E.M. v. Com.</u>, 2012 WL 3629022 (Ky. App. 2012)

FACTS: On November 12, 2010, a juvenile complaint was filed by E.M.'s school, for her violation of KRS 630.020(2) – for being "beyond control of the school." An attached report detailed her disruptive behavior and profanity. She was summoned to court and a juvenile status offender order was entered, ordering that she have no behavior problems or violations of the law. During that same time frame, E.M. was admitted to a mental health facility so the case was continued. By February, 2011, she had been released and re-enrolled in school and the case continued. On April 7, during a court review, it was reported that she'd been charged with assaulting a teacher. The Court reminded her that she was still under the court order. At a June hearing, it was disclosed that she'd been in another incident and again, the case was continued.

On June 9, E.M. was before the court for a pretrial conference and was told she was also facing contempt of court charges. She was adjudicated on June 22 and appealed.

ISSUE: Does Family Court have jurisdiction over a school-related status offense?

HOLDING: Yes

DISCUSSION: E.M. argued that the Family Court did not have jurisdiction to handle the status offense, asserting that KRS 600.020(4) required that the school attach documentation as to "all intervention strategies" to the initial complaint. The Court noted that the complaint did include a report of the incidents and the school's intervention strategy in response. At the hearing, several school staff and a social worker testified as to the behavior issues with E.M., who had the opportunity to cross-examine each of them. The Court noted that a brief mention of a prior status offense was not prejudicial, as the trial judge was already personally aware of it.

The adjudication against E.M. was upheld.

FAMILY / DOMESTIC

<u>Floyd v. Tate</u>, 2012 WL 4210119 (Ky. App. 2012)

FACTS: Tate alleged that she and Floyd were in an altercation when she was picking up their daughter. She claimed Floyd "began threatening her," took her cell phone, pushed her and then "put her in a headlock" when she tried to get the phone back. Floyd retorted that he "merely attempted to deflect [Tate's] pushes, kicks, and strikes." They each testified that the other had threatened them previously.

A Nicholasville officer who had responded to the altercation testified that he saw no injury on Tate but that "her face was red." He stated that she "did not inform him that

Kyle had put her in a headlock and held her down" as she later alleged. He did, however, place Floyd under arrest for domestic assault.

The Court ordered Floyd to be put under a DVO and he appealed.

ISSUE: Is evidence of a prior threat a reason to believe that future threats are credible?

HOLDING: Yes

DISCUSSION: The Court agreed that it was appropriate to put more credence on the findings of the District Court, which had the opportunity to view both witnesses. It was proper for the Court to conclude that if it believed Tate had been threatened in the past, that she might also be threatened in the future, and upheld the DVO.

<u>Guenther v. Guenther</u>, 379 S.W.3d 796 (Ky. App. 2012)

FACTS: The Guenthers divorced in 200 and there were two children of the marriage. They reunited in 2009. In May, 2011, they "had an altercation" and Rachelle Guenther obtained an EPO against Keith. At the hearing, they asked for a continuance as they were trying to reach an agreement about the DVO, which was granted. At the hearing on June 8, Rachelle testified as to the circumstances of the altercation, claiming a back injury, although she did not seek medical treatment at the time. She claimed she'd sought treatment later but no medical records were submitted. She testified that she was afraid something more would occur.

The Court granted the DVO and Keith appealed.

ISSUE: Must a victim testify as to a reasonable fear of future abuse to support a DVO?

HOLDING: Yes

DISCUSSION: The Court agreed that Rachelle's "monosyllabic responses to her attorney's leading questions regarding verbal abuse and her fear of future abuse similar to the altercation between the parties is insufficient to base a finding that domestic violence *may* occur again." The Court ruled that the DVO would be vacated and remanded the case to the trial court.

<u>Telek v. Daugherty</u> (Bucher), 376 S.W.3d 623 (Ky. App. 2012)

FACTS: Telek and Daughterty have a child in common, J.T. On August 17, 2009, Daughterty went to pick up J.T. at a football practice. Telek advised he was taking the boy home, however, and they got into a brief physical altercation about it. Daugherty applied for an EPO against Telek. On August 26, at the hearing, Telek's counsel asked that the issue be combined with an ongoing custody dispute and that it

be continued until they could get a date. The Court agreed to automatically continue the EPO until that time. On October 21, the hearing was held. The Court concluded that "something happened," and that Telek "had touched and pushed" Daugherty. The Court entered a DVO and Telek appealed.

ISSUE: Does unwanted touching necessarily support the award of a DVO?

HOLDING: No

DISCUSSION: The court looked to KRS 403.720(1) and its definition of domestic violence and abuse: ""physical injury, serious physical injury, sexual abuse, assault, or the infliction of fear of imminent physical injury, serious physical injury, sexual abuse, or assault between family members or members of an unmarried couple." The Court looked to Caudill[3] and agreed that at most, there was an "unwanted touching" during the incident. The Court found nothing to indicate that Daugherty was in "fear of imminent domestic violence. (The Court noted that the lower court seemed to be basing its decision on Telek's failure to follow orders in the custody case.)

The Court reversed the DVO.

DUI

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

FACTS: On September 29, 2007, Hobbs was stopped by Trooper Drane (KSP) in Meade County. He was given an Intoxilyzer, which registered .09, and was advised of his right to an independent blood test. He requested that test and Trooper Drane took Hobbs to Hardin Memorial Hospital, as was his custom. (The trooper later stated that he was unaware the hospital might refuse to give the test.)

At the hospital, Hobbs was told that they would not do the blood test unless there was a medical need and that Hobbs would need a physical exam. Hobbs declined and did not request to be taken to another facility.

Hobbs was charged and requested suppression of the Intoxilyzer, as he'd not gotten his independent test. That was denied. Hobbs took a conditional guilty plea and appealed. Upon appeal, the Circuit Court reversed. The Commonwealth appealed.

ISSUE: May a hospital require an exam before doing a requested independent blood test?

HOLDING: Yes

[3] Caudill v. Caudill, 318 S.W.3d 112 (Ky. App. 2010),

DISCUSSION: The Court noted that an "arresting officer is required to take reasonable steps to assist the defendant in securing the independent test." The Court noted this situation was nearly identical to Lee v. Com.[4] The trooper had no reason to know that the hospital would refuse to do the test absent a physical exam and the only reason Hobbs did not get the blood test was his unwillingness to take (and presumably pay for) the exam. As nothing distinguishes this case from Lee, the Court reversed the decision of the Meade Circuit Court and reinstated Hobbs's conditional plea.

ARREST

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

FACTS: On March 8, 2010, Bagby's home and car were searched in Fayette County, pursuant to a valid warrant. She was arrested as a result was found during the search. The warrant was supported by an affidavit that discussed a CI making controlled buys, two in Bagby's house and one in her car. Bagby moved for suppression, arguing that the officers knew, early in the investigation, that her OL was suspended and that they "observed or encouraged her (through the use of the CI) to drive her vehicle in violation of KRS 189A.090."

The Commonwealth argued that the officers "are to be afforded wide latitude in conducting their investigations and that they were not required to arrest her immediately. The Court denied her motion to suppress and she took a conditional guilty plea. She then appealed.

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

HOLDING: No

DISCUSSION: Bagby continued to argue that the officers were "duty-bound" to arrest her as soon as they saw her driving without a valid OL. The Court, however, noted, that in Hoffa v. U.S.[5] there is no constitutional right to be arrested within a particular time frame. Further, officers are permitted to conduct their investigations in such a way as they are satisfied it is time to halt the investigation.[6]

The Court upheld Bagby's plea.

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[4] 313 S.W.3d 555 (Ky. 2010).
[5] 385 U.S. 293 (1966).
[6] Phillips v. Com., 473 S.W.2d 135 (Ky. App. 1971).

SEARCH & SEIZURE – ARREST WARRANT / SWEEP

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

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

Officer Muravchick frisked Burgess-Smith and then got out his handcuffs. "Burgess-Smith threw his elbow down, pushed Officer Muravchick into a wall, struggled with Officer Muravchick, and ran off." Officer Maynard was able to tackle him, but again, Burgess-Smith got away. Officer Muravchick was finally able to Tase and arrest him. But once again, "Burgess-Smith jumped to his feet and ran." He was finally Tased a second time and taken into custody.

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

ISSUE: Does an arrest warrant justify an entry?

HOLDING: Yes

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

Finally, the Court agreed that it was proper for Officer Muravchick to state that he recognized Burgess-Smith as being the subject of an active arrest warrant, as that was "inextricably intertwined with the charged offenses." He properly did not state the

reason for the warrant however. It explained why he was frisked and immediately secured, and "why the officers so fervently pursued Burgess-Smith during his repeated attempts to escape."

Burgess-Smith's conviction was affirmed.

SEARCH & SEIZURE – SEARCH WARRANT

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

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

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

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

ISSUE: Does omitted information necessarily taint a search warrant?

HOLDING: No

DISCUSSION: Petrey argued that **"**the affidavit used to obtain the search warrant was inaccurate and unreliable because it did not contain any information regarding the victim being under the influence of drugs or having just visited a methadone clinic at the time of her statement." The Chief admitted he did not know what effect methadone might have and that the individual was unknown to him. He testified at a hearing that the victim was excited, scared and crying and that he attributed her slurring to her upset, and that she did not appear to be intoxicated. Instead, she appeared focused.

The Court found that "at best, the failure to include the omitted information in the affidavit was negligent or an innocent mistake." Even with that information, there was still more than enough information to support the warrant.

Petrey also argued that the trial court should have instructed the jury on sexual misconduct as a lesser included offense to sodomy. The court, however, noted that its

"longstanding rule is that KRS 510.140 applies only to cases involving victims under 16 and perpetrators under 21." Further, the Court agreed that the four charges of sodomy were documented by discrete acts on the videotape, although they were part of the same continuous sex act.

The Court affirmed Petrey's convictions.

SEARCH & SEIZURE – CONSENT

<u>Lovelace v. Com.</u>, 2012 WL 2892356 (Ky. App. 2012)

FACTS: On October 7, 2010, Office Bedell (unidentified Christian County agency) pulled over Lovelace, recognizing him as likely having a suspended OL. (In fact, it was still suspended from the previous week, when Officer Bedell had pulled him over.) Officer Bedell smelled marijuana as he approached the car and had Lovelace get out. Lovelace did not answer questions and Bedell frisked him, finding a large amount of cash, in small denominations, but no drugs. As there was a small child in the car, Bedell had told Lovelace to have a family member pick up the child, but before that person arrived arrived, the officer told the sister (who had called for directions) that he would follow Lovelace back to his apartment complex (about ½ mile). Officer Bedell was aware of complaints about drug trafficking at that location. At the complex, Lovelace's mother and sister met them. His mother, who shared an apartment with Lovelace, gave Officer Bedell permission to enter the apartment. She assented to the officer "walking around" and Lovelace gave consent to them entering his bedroom. Bedell opened the door and saw cocaine, marijuana and scales in plain view.

Lovelace was charged with possession of the drugs and paraphernalia. He moved to suppress and was denied. He took a conditional guilty plea and appealed.

ISSUE: May a valid consent be given even after an allegedly improper detention?

HOLDING: Yes

DISCUSSION: Lovelace did not contest the initial stop or the search of the vehicle, agreeing there was probable cause to do so when the officer smelled marijuana. He argued, however, that when no drugs were found in the search, it should have ended and that he should have been given a ticket and allowed to leave. The Court agreed that Lovelace was detained as they returned to the apartment, in that Officer Bedell was following and had kept Lovelace's phone. However, when Lovelace consented to the search, the phone had been returned and he "had not been arrested, confined, threatened or coerced in any way."

The Court agreed that the consents were given voluntarily by his mother and by Lovelace himself. The Court agreed that Lovelace's consent "occurred after the traffic

stop had ended and was sufficiently separated from that stop to dispel any taint from a potentially illegal detention."

The Court upheld Lovelace's plea.

Weathers v. Com., 2012 WL 3047044 (Ky. App. 2012)

FACTS: On September 23, 2009, Det. Smoot (Lexington PD) received a tip that a black female was dealing drugs from her vehicle. The dealer's nickname was T-Dub and she lived in the Coldstream area. Dets. Smoot and Page went to the area, looking for the described vehicle. They found a vehicle matching the description, ran the plate and confirmed with the CI that the registered owner (Weathers) was T-Dub. The CI said Weathers was heading to a local Kroger, and in fact, she stopped in a shopping center which included a Kroger and a shoe store. She walked, however, toward the shoe store.

The officers confronted Weathers and asked her to return to her car. There she was given Miranda and acknowledged the rights. When he told her why she was stopped, she interjected "They're in my Nike bag." She gave consent to search and Smoot found 87 grams of powder cocaine and a small amount of marijuana. Weathers was arrested.

She denied having any drugs at her home but did agree there was a gun there. She gave consent for a search of the house. They went to the house and used her key, but "heard scuffling inside and a toilet running." Moseley came out of the attic, "covered in insulation." They discovered 194 tablets of Ecstasy, paraphernalia and three guns. He was also arrested.

Weathers was indicted on multiple drug and weapons charges. She moved for suppression, arguing she was not properly given Miranda and did not consent. She further argued the stop was without cause. The trial court ruled that the CI's tip was sufficient for the stop, that she received sufficient warning and that she gave consent.

Weathers was convicted of some of the charges and took a conditional guilty plea to others. She appealed on the consent issue.

ISSUE: Does simply detaining someone with vehicles necessarily invalidate a consent?

HOLDING: No

DISCUSSION: The Court ruled that Weathers did, in fact, give consent, giving more credence to Det. Smoot on that issue. With respect to her argument that she was coerced by a show of force by the police, with the officers blocking her in with vehicles and surrounding her, the Court did not find the conduct to be unjustified or excessive.

The Court upheld her conviction.

Baker v. Com., 2012 WL 2945935 (Ky. App. 2012)

FACTS: Baker moved into Ward's barn in Grayson County, to assist Ward following an injury that limited his mobility. Since suffering the injury, Ward had not been able to go to the barn. On June 30, 2009, Baker was assaulted in the barn, while investigating a "suspicious light." One of the assailants went into the house, fired a gun and then fled. Ward called for assistance and Officer Kelsey arrived. Baker refused medical treatment and described the assault. Officer Kelsey went to the barn to check for other possible victims and found "drain cleaner, a glass jar containing a clear fluid and a bottle of Liquid Fire."

Officer Kelsey described what he'd seen to Det. Blanton. They went to the farm about 11 p.m. the following evening to do a welfare check on Baker and to do a "knock-and-talk" about the possible meth lab. They went to the tack room door and knocked, and got no answer. Inside the barn, they saw the items Officer Kelsey had seen before, as well as a HCl generator. As they approached Ward's house, they were startled when Baker, who had been "laying in a parked truck" quickly got out. Officer Kelsey spoke to Baker about the assault, and then Det. Blanton read Baker his Miranda warnings and asked to talk to him about the meth lab. He also asked for consent to search the tack room, where Baker lived. Baker gave verbal consent but could not locate a key, so Officer Kelsey jimmied the lock. (Baker later stated he did not give consent because he didn't own the property and that the room was searched over his objections.) A number of items were found inside associated with methamphetamine manufacturing and Baker was charged with that offense.

Baker moved for suppression, arguing that he did not give the officers consent to search. The Court denied the motion, ruling that he was competent to give consent of the tack room. He took a conditional guilty plea and appealed.

ISSUE: Does a person have standing to consent a search when they have only marginal interest in a particular location?

HOLDING: Yes

DISCUSSION: Baker claimed he had standing to contest the search because he was an overnight guest in the area in question, the tack room. However, during the trial, Baker distanced himself from the area, claimed no property interest and stated he kept his clothing in the house, only staying in the barn during foaling season. (Specifically, he said he was not sleeping in the barn on the night of the assault, but only went there due to the suspicious light.) As such, the court agreed he lacked standing and without that, he could not claim a constitutional violation.

The Court agreed that the officers "reasonably believed" that Baker lived in the tack room and could give consent to search it. Further, the Court agreed Baker did give

consent voluntarily and he was aware at the time what they had already found. His injuries did not seem to affect his awareness.

For both reasons, the Court found the motion to suppress was properly denied and upheld his conditional guilty plea.

SEARCH & SEIZURE – BUIE/SWEEP SEARCH

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

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

With the lights on, they saw a blanket tacked over a wide doorway. Although she said no one else was in the apartment, they did a protective sweep. In the kitchen they found a burned spoon with residue on it. They asked for consent to search and she asked what would happen if she refused – she was told they'd secure the premises and get a warrant. She then consented.

They found cocaine and additional paraphernalia. She moved for suppression and was denied. Guzman then took a conditional guilty plea and appealed. The Court of Appeals affirmed her plea and she further appealed.

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

HOLDING: No

DISCUSSION: The Court agreed that the Court could search, incident to an arrest, the "area that is considered to be in the immediate control and possession of the person being arrested."[7] The Court in Chimel v. California, however, found no justification for searching other rooms, routinely.[8] Chimel has been modified, however, by the decision of Maryland v. Buie.[9]

[7] U.S. v. Rabinowitz, 339 U.S. 56 (1950).
[8] 395 U.S. 752 (1969).
[9] 494 U.S. 325 (1990).

The Court concluded that it was time to follow and adopt Buie, noting that even prior to that decision, however, Kentucky had recognized a "protective sweep" or "safety check" in Com. v. Elliott.[10] However, in Buie and Elliott, the sweeps were done in conjunction with an arrest, which was not the case in Guzman.

The Court noted that their presence was only as a result of a complaint from a neighbor, and the police had already accounted for everyone who had been observed by the neighbor. They did not ask to conduct the sweep, they simply did it "without a search warrant in hand or both probable cause and exigent circumstances." [11]

The Court agreed that the officers "went beyond that limited area (where they were permitted) into other parts of the apartment where consent had not been given." The Court noted that "under the 'objective reasonableness' standard, a reasonable person inviting the police into his or her living room would not have understood the invitation to extend to the entire house."

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

The Court quoted William Pitt concerning the Fourth Amendment:

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

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

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

SEARCH & SEIZURE – ABANDONED PROPERTY

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

FACTS: On August 13, 2007, Lexington PD was involved in a controlled buy between King and a CI. The moved in after the buy to question King, "in hopes of developing probable cause or obtaining consent to search the vehicle by drug dog." However, King fled and they pursued. King "pulled into a driveway, jumped out of the

[10] 714 S.W.2d 494 (Ky. App. 1986).
[11] See Kirk v. Louisiana, 536 U.S. 635 (2002).

Jeep, and fled on foot; the Jeep rolled into a parked car." He was caught after about 40 yards and charged with Fleeing and Evading.

In a subsequent search of the Jeep, officers found crack cocaine and marijuana, along with over $3,000 in cash on King's person. He moved to suppress the drugs, but the trial court ruled that he had abandoned the vehicle and that the search was lawful. The Court also upheld the stop.

King was convicted of Trafficking (for the crack cocaine), Fleeing and Evading and Possession (marijuana). He appealed.

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

HOLDING: Yes

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

> Leaving property behind, when in flight from apprehension by law enforcement, must be considered in and of itself an abandonment of that property. When one or more persons are fleeing and evading law enforcement officers, who are in hot pursuit, and the car is stopped or becomes disabled and all occupants flee from the vehicle, that vehicle is considered abandoned and may be subject to a warrantless search.[12]

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

The Court affirmed his convictions.[13]

SEARCH & SEIZURE – TRASH PULL

<u>Saunders v. Com.</u>, 2012 WL 2945911 (Ky. App. 2012)

FACTS: Det. Curtsinger (Lexington PD) received information from a cooperating witness that drugs were being sold from a particular address. On January 19, 2010, he did a trash pull, finding blunt rolling paper wrappers and a partially-smoked blunt. He did another trash pull about a month later and found additional blunts and sandwich bags. During the trash pulls, they noticed several cars in the driveway, including one registered to Saunders at the address. Det. Curtsinger learned that Saunders' had a criminal history for marijuana possession.

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[12] <u>Watkins v. Com.</u>, 307 S.W.3d 628 (Ky. 2010).
[13] This case also ruled on a separate matter, in which it did reverse a separate charge, however.

Det. Curtsinger obtained a search warrant and it was promptly executed. At the trial, he explained the practice of doing trash pulls and how they kept track of which bags came from which residences, when they pulled trash from multiple locations at one time. He agreed that he did not do field tests of the marijuana found and that he did not know when the CI had been at the residence with a friend who bought marijuana.

Saunders was indicted for trafficking in controlled substances and marijuana along with related offenses. He moved for suppression. At the hearing, there was discussion as to where, precisely, the trash was located when the trash pull was conducted. Applying the factors in U.S. v. Dunn and Quintana v. Com., the Court ruled that "(1) the trash receptacle was not located in close proximity to the home; (2) the receptacle was not located inside any enclosure with the home, but it was inside the grassy utility easement between the sidewalk and the curb; (3) there was no testimony as to how the homeowners used that space of land, but the court found that it was not used as part of the home; and (4) there were no restrictions or steps taken by Saunders to prevent observation from people passing by the receptacle."[14] The court agreed that the trash was outside the curtilage when collected and further, that the trash was "abandoned property."[15]

When his motion to suppress was denied, Saunders took a conditional guilty plea and appealed.

ISSUE: Should contents collected from different trash pulls but placed in the same vehicle be kept separate and well-documented?

HOLDING: Yes

DISCUSSION: Saunders argued that the evidence from the trash pulls was not collected in accordance with Greenwood, which he claimed required that "only the trash bags pulled from one particular location be placed" in the vehicle at a time. The Court noted that Greenwood required no such thing, and further, that Det. Curtsinger testified that in the second pull, they found mail to Saunders in the same bag. Further, addressing Saunders' contention that the CI's information was likely stale, the Court noted that CI stated that he'd been there often and observed criminal activity, and further, that the trash pulls corroborated the CI's testimony.

The Court agreed there was sufficient probable cause to support the warrant and upheld Saunders' plea.

[14] 480 U.S. 294 (1987); 276 S.W.3d 753 (Ky. 2008).
[15] 486 U.S. 35 (1988).

SEARCH & SEIZURE – VEHICLE STOP

<u>Blane v. Com.</u>, 2012 WL 3538463 (Ky. App. 2012)

FACTS: On July 24, 2008, Trigg County put out a BOLO on a particular vehicle which was allegedly transporting stolen metal. Capt. Johnson and Deputy Wint (Christian County SO) received the BOLO through a dispatch re-transmit. They spotted the vehicle and did a stop. The passenger admitted there were outstanding warrants on him and he was arrested. Capt. Johnson had Blane, the driver, step out and he was frisked. He felt something in a pocket which Blane identified as a cell phone, but when asked to remove it, it turned out to be crack cocaine and marijuana. Blane was arrested. Drug paraphernalia was found in the vehicle.

On December 29, 2008 and January 13, 2009, Blane sold cocaine to Lyle, a CI. The buys were documented and then used to support a search warrant for Blane's home. Prior to the trial, however, Lyle died. A suppression hearing was made about the admissibility of the video recording made during the buys. Officers testified that they maintained visual contact with Lyle the entire time. The Court ruled the recordings were adequately authenticated pursuant to KRE 901.

Blane moved for suppression of the evidence from the encounters. That was denied, and he appealed

ISSUE: Is a tip from another law enforcement agency considered credible?

HOLDING: Yes

DISCUSSION: With respect to the stop, Blane argued that the stop was based on an anonymous tip. The Court agreed, however, it came from a reliable source, another dispatch agency, and was "highly descriptive and particularized." The Court further agreed that Blane did give consent for the search that revealed the drugs.

With respect to the recordings, The Court agreed that the officer authenticated the tapes. Lyle was legally unavailable pursuant to KRE 804. The Court agreed the recordings were properly admitted.

Blane's pleas were upheld.

<u>Kavanaugh v. Com.</u>, 2012 WL 4473299 (Ky. App. 2012)

FACTS: On March 6, 2010, Officer Rice (Lexington PD) was on patrol. At about 0340 he noticed a vehicle parked along the road with its headlights on. When he passed, he did not see anyone inside. The officer thought that it was either stolen or involved in drug trafficking or prosecution, or that a burglary could be in progress. He called in the tag number and then noticed two people were in the vehicle. He lit up the vehicle with a spotlight and walked up to talk to the driver, Kimeli. Kavanaugh was in

the passenger seat. Kimeli explained she'd just dropped off a friend and provided ID. Kavanaugh stated he had no ID and questioned why Officer Rice wanted to know who he was. During that time, "Kavanaugh was not looking at him while responding and kept reaching into his coat and digging into his pocket." Officer Rice had Kavanaugh get out of the vehicle.

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

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

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

HOLDING: No

DISCUSSION: The Court noted that "reasonable suspicion is not required to approach parked vehicles on publicly accessible property."[16] It was certainly appropriate to question to occupants, and to become suspicious when Kavanaugh refused to identify himself. It was also reasonable to believe the small black item, although it turned out to be a recorder, to be something more dangerous. Once Kavanaugh made physical contact with the officer, an arrest was proper.

The Court upheld Kavanaugh's plea.

<u>Cabbil v. Com.</u>, 2012 WL 3236269 (Ky. App. 2012)

FACTS: On February 26, 2008, Det. Presley (Louisville Metro PD) had been advised of suspicious drug activity at a particular address. They stopped a man leaving and found pills, which he reported he'd bought at the house in question. They set up surveillance and soon saw a vehicle arrive. One of the occupants, Cabbil, got out and did a "hand to hand" transaction. The other man drove away in the vehicle and Cabbil went into the house. He came out in a minute and drove off in another vehicle. The officers followed him and discovered he was speeding, so they made a traffic stop.

Cabbil stated he did not have an OL, it was, in fact, suspended. He denied having anything illegal in the car and agreed to a search. Cabbil was frisked and the officer found a "large amount" of cash and a baggie of pills (which turned out to be ibuprofen).

[16] <u>U.S. v. Dyson</u>, 639 F.3d 230 (6th Cir. 2011).

He was then handcuffed. Inside the vehicle, they found "Special K" – liquid codeine, in both the console and the glove compartment.

Cabbil was charged with the drugs and the lack of a license. He took a conditional guilty plea when his motion to suppress was denied. He then appealed.

ISSUE: Does a pretext stop violate the Kentucky Constitution?

HOLDING: No

DISCUSSION: Cabbil agreed that the car was properly stopped, but argued that it was pretextual and that violated the Kentucky Constitution. The Court, however, found the stop valid and upheld Cabbil's plea.

Sexton v. Com., 2012 WL 4036162 (Ky. App. 2012)

FACTS: On January 15, 2010, Troopers Pollard and Hall (KSP) set up a roadblock in Perry County. They observed a truck (driven by Sexton) turn around in a parking lot in an apparent attempt to avoid the roadblock. Trooper Pollard followed and stopped the vehicle. Sexton was nervous and "could not explain why he had turned around or where he was going." He consented to a search of the vehicle and the trooper found hydrocodone in small baggies. They also found a woman who'd been dropped off in the lot and learned that she had an active EPO against Sexton.

Sexton was charged for trafficking and traffic offenses. He moved for suppression and was denied. He took a conditional plea to the drug offenses and appealed.

ISSUE: Does taking suspicious actions to evade a roadblock justify a traffic stop?

HOLDING: Yes

DISCUSSION: Sexton argued that Trooper Pollard lacked reasonable suspicion for the stop and that the roadblock was unconstitutional. The Court assessed the stop, noting that "the totality of the circumstances must be viewed from the trained officer's viewpoint, taking into consideration the officer's reasonable inferences and deductions."[17] The court noted that it had "previously held that the perceived avoidance of a traffic stop sufficiently creates a reasonable suspicion that the driver may be engaged in criminal activity, thereby justifying an investigatory stop."[18] When they saw that a woman had been dropped off at an empty church parking lot, at night, their suspicions were justifiably increased, not decreased.

The Court dismissed his arguments about the roadblock, since in fact, he'd not even been stopped by the roadblock. Sexton's plea was upheld.

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[17] U.S. v. Cortez, 449 U.S. 411 (1981).
[18] Steinbeck v. Com., 862 S.W.2d 912 (Ky. App. 1993).

SUSPECT IDENTIFICATION

<u>Jacobsen v. Com.</u>, 376 S.W.3d 600 (Ky. 2012)

FACTS: On September 5, 2008, at about 10 a.m., a Cash Advance clerk was robbed at gunpoint in Lexington. She described the robber in detail. Another witness, the property manager, described a similar person getting into a truck and was able to provide security video of the individual. The image was broadcast and a witness identified the subject as Jacobsen. When his photo was placed into a photo array, both witnesses "unhesitatingly picked out" the photo of Jacobsen.

Jacobsen was charged with Robbery and related charges. He was identified by the witnesses but he claimed he'd been some distance away that day. He challenged the photo array and presented suspect identification testimony via an expert witness. He was, however, convicted and appealed.

ISSUE: Do simple differences in photos make a photo array unduly suggestive?

HOLDING: No

DISCUSSION: Although admitting that the detective did nothing overtly to "highlight" his photo, Jacobsen argued that his photo was darker in the background and because he was the only subject wearing dark clothing. The detective described why he chose the photos in the array and that he tried to find ones in which the subject resembled Jacobsen. The backgrounds ranged from light to dark . The court found the differences to be incidental and noted that "it is inevitable, after all, that separate photos of different individuals will all be unique in one way or another." Normal variations in clothing and background are not unduly suggestive.

Jacobsen's conviction was affirmed.

TRIAL PROCEDURE/ EVIDENCE – EED

<u>Thacker v. Com.</u>, 2012 WL 3632349 (Ky. 2012)

FACTS: On July 16, 2010, Thacker shot Conn multiple times. He was charged with Assault 1st, as well as multiple counts of Wanton Endangerment for others in the house at the time. Thacker did not deny the shooting, but claimed he was acting under Extreme Emotional Disturbance and voluntary intoxication at the time.

Thacker was convicted, however, and appealed.

ISSUE: Should a statement that a person doesn't want to "go back to prison" be excluded as evidence of a "prior bad act?"

HOLDING: No

DISCUSSION: At trial, Conn and other eyewitnesses all said that Thacker said, just prior to the shooting, that he was "going back to prison." The Court agreed to admit the statement as rebuttal to his claim of EED. Thacker argued it should have been excluded because it revealed a "prior bad act" under KRE 404(b) – that he'd been previously convicted of a crime. The Court agree, however, that the statement was relevant as it showed his state of mind at the time and that he was "mindful of the consequences of his actions and yet decided to shoot the victim anyway." It also showed that he was able to form the intent to commit a criminal act.

The court affirmed his conviction but did remand for sentencing considerations.

TRIAL PROCEDURE/ EVIDENCE – JURY INSTRUCTIONS

Turner v. Com., 2012 WL 4327667 (Ky. 2012)

FACTS: On August 5, 2010, Westfelt was in a car with Carton, Osborne and Turner. Carton was driving. An argument ensued and Westfelt was beaten and abandoned, later getting a ride home from a passerby. He went to the ER and had X-rays, it was determined that three facial bones were broken. He was referred to a specialist but never went. He did go to the Bell County Sheriff's Office to report the assault, also noting that his wallet was gone as well, containing over $800.

All three men were arrested. Turner was indicted on robbery, but on the morning of the trial, that charge was amended to Assault 2nd. Westfelt stated right before trial that he did not wish to testify against Turner, who was "family." He took the stand and gave testimony that "differed sharply from the statement given at the sheriff's office," putting all the blame on Carton and Osborne. When the inconsistency was brought up, he stated he'd been "high on drugs" at the time.

Osborne testified that Turner initiated the attack and that he and Carton had simply tried to stop it. Turner was convicted and appealed.

ISSUE: May the Court decide whether injuries are serious or non-serious for purposes of jury instructions?

HOLDING: No

DISCUSSION: Turner first argued that he should have received a jury instruction as to Assault 4th, and the Court agreed, as Turner was entitled to instructions "on the whole law of the case." The Court noted that the question of whether Westfelt suffered a serious physical injury was a question for the jury. He testified that his injuries were not life-threatening and healed completely within a couple of weeks. Since the Court denied the Assault 4th instruction, it necessarily concluded that his injuries were serious.

The decision of the Bell Circuit Court was reversed.

TRIAL PROCEDURE/ EVIDENCE – CHAIN OF CUSTODY

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

FACTS: Damrell was spotted riding an ATV on a public roadway by Trooper Pennington, who further testified that several items fell from a bag. Items in the bag, including a "one-step meth lab," were located. Trooper Pennington sent a sample of the contents of the container to KSP. Damrell was indicted in Rockcastle County for Manufacturing Methamphetamine, Possession of Methamphetamine, Operating an ATV and Fleeing or Evading 2nd There was a question as to the lack of a signature on the KSP 41 chain of custody form, but at trial, the technician noted that the KSP 26 (testing) form was completed and signed. However, because that latter form was not provided prior to trial, it was suppressed under RCr 7.24. In addition, the physical evidence of the manufacturing was destroyed prior to trial.

Damrell was convicted and appealed.

ISSUE: Must a chain of custody be perfect?

HOLDING: No

DISCUSSION: Damrell argued that the evidence should have been suppressed due to the lack of adequate proof of chain of custody, The Court, however, noted that "it is unnecessary to establish a perfect chain of custody or to eliminate all possibility of tampering or misidentification, so long as there is persuasive evidence that 'the reasonable probability is that the evidence has not been altered in an material respect."[19] In addition, with respect to the destruction of the evidence, the Court agreed that "absent a showing of bad faith, the Due Process Clause is not implicated by 'the failure of the State to preserve evidentiary material of which no more can be said that it could have been subjected to tests, the results of which might have exonerated the defendant."[20] Nothing suggested bad faith and there was nothing to indicate that the destroyed material was exculpatory.

The Court affirmed Damrell's conviction.

[19] Rabovsky v. Com., 973 S.W.2d 6 (Ky. 1998).
[20] Estep v. Com., 64 S.W.3d 805 (Ky. 2002).

TRIAL PROCEDURE/ EVIDENCE – EVIDENCE

<u>Salfi v. Com.</u>, 2012 WL 4327660 (Ky. 2012)

FACTS: Salfi assaulted his former girlfriend, Doyle, and her new boyfriend, Taylor, in Louisville. Taylor was stabbed repeatedly but escaped to a neighbor's house, who called 911. By the time police arrived, Doyle was dead, having been stabbed over 100 times, and Salfi gone. Doyle was also beaten and strangled.

Salfi drove to his mother's house and confessed, and his stepfather called the police. He was taken into custody. Salfi was charged with murder, Assault 1st and Attempt-Murder. He was convicted of Murder and Assault, and appealed.

ISSUE: Is a recording of a suspect's reaction to being told their victim was dead required to be admitted in their defense?

HOLDING: No

DISCUSSION: Four hours after Doyle's death, Salfi was interrogated. He admitted he'd injured Doyle to the investigator and asked about her condition. Eventually, he was told that Doyle was dead. Salfi argued that he should have been allowed to admit the video of the interview to show his emotionally distraught reaction to learning of her death. The court noted that he was permitted to ask the investigator about his reaction and that she "reluctantly" acknowledged his emotional response, although she "tended to minimize it." The Court agreed that the relevance of the tape was marginal as it did not reflect his mental state at the time of the crime itself. The Court noted that instead, the distress may have been at the prospect of prison time.

The Court also addressed his claim of the defense of extreme emotional disturbance. The Court noted that the General Assembly "did not make the absence of EED an element to be proven" by the Commonwealth, but instead, provided that it could be a lesser-included offense to be proven by the defendant. The Jury was properly instructed on the matter.

Salfi's conviction was affirmed.

<u>Neal v. Com.</u>, 2012 WL 2946035 (Ky. App. 2012)

FACTS: On March 11, 2010, Officer Neal (Fish & Wildlife) observed a vehicle near a boat ramp on Lake Cumberland in Wayne County. As he approached, it sped away. He pursued it into Clinton County until the car crashed into an embankment. The driver, Neal (no relation), tried to flee but become tangled in barbed-wire. He was arrested. Det. Guffey (Clinton County SO) responded. He learned that the owner, Birdwell, had not reported it stolen and Neal said he "had either borrowed it or had bought it." He consented to a search and they found an HCl generator in the car, along with marijuana and rolling papers on Neal's person. No actual methamphetamine was

found nor were all the items necessary located, such as pseudoephedrine. Trooper Hammond (KSP) testified that a white substance found, however, was "pill dough" – left after the active ingredient had been extracted from pills. He agreed no lithium was found at the scene.

Neal argued that he had stolen the car from a family friend at that the items were in the car when he took it. Neal was convicted and appealed.

ISSUE: May a subject be charged with items found in a vehicle they, themselves, stole?

HOLDING: Yes

DISCUSSION: Neal continued to argue that since he stole the car, he had no knowledge of what was in it. However, the Court noted "knowledge can be inferred from circumstantial evidence, including control over the location in which the items are found."[21] His flight also inferred knowledge.

Further, the Court agreed that although pseudoephedrine and lithium were not found, that Neil did, in fact, possess more than two of the requisite chemicals needed to make methamphetamine and certainly possessed the equipment to do so.

Neal's convictions were affirmed.

Engles v. Com., 373 S.W.3d 456 (Ky. App. 2012)

FACTS: On June 9, 2008, Engles stole a cart of groceries from a Lexington store. When confronted, he "brandished a gun and fled" to a nearby location, which unfortunately for him, included a police substation. Officers searched the building and found Engles in one restroom and a gun in the other restroom. Engles was identified and charged with Robbery and with possession of the gun, as he was a felon. He moved for suppression of the gun and was denied. He took a plea to Burglary and PFO and appealed.

ISSUE: May a weapon found in close proximity to a robbery be admitted, even if not actually proven to be the weapon used?

HOLDING: Yes

DISCUSSION: Engles argued that it was improper to admit the weapon because "it was not proven to be connected to the incident." The Court noted that "the gun was found near enough both in time and in place to be relevant." Within minutes, it was located in the same building where they found Engles and the gun was similar to that described by the witnesses. While not conclusive, it was reasonable to allow the jury to consider the weapon.

[21] Beaty v. Com., 125 S.W.3d 196 (Ky. 2003).

Engles' plea was affirmed.

TRIAL PROCEDURE/ EVIDENCE – TESTIMONY

Gray v. Com., 2012 WL 2945975 (Ky. App. 2012)

FACTS: On January 25, 2010, shortly after midnight, Officer Knuckles (Barbourville PD) was looking for a suspect vehicle. A few hours later, he spotted a car matching the description coming toward him and then making a sudden U-turn. Finding that suspicious, he made a traffic stop.

Officers Clark and Helton arrived to assist. They learned the Gray, the driver, had a suspended OL. He consented to a vehicle search and the officers found over $3,000 in cash, a stack of receipts, a check for a local restaurant and pliers. On the way to jail, Gray began "running his mouth" about the restaurant. When he stated that the "door of the restaurant was still open" and that he was "supposed to take care of the money," the officers changed direction and went to the restaurant. They met with the store manager there and found the door ajar. The lock on the safe was broken and money and receipts missing.

Gray was charged with Burglary and Theft. He argued that his unwarned statements should be excluded from evidence but the trial court denied his motion. He was convicted and appealed.

ISSUE: Must unwarned statements be suppressed, when made when the individual was not in custody?

HOLDING: No

DISCUSSION: Gray argued that he was entitled to an evidentiary hearing when he moved to suppress the statements, even though he did not object initially when the statements were given in testimony by Officer Clark. The Court agreed that he was entitled to a hearing, even though he did not specifically request it at the time.[22] The Court noted that the admission of the statements was not error since Jones was not subject to custodial interrogation at the time he made the unwarned statements.

Further, Court noted that although it was apparently permitted for Gray to be in the restaurant after closing time, that the manager testified that he was the last one to leave and the money was secured at that time. Based on this, the Court found it reasonable for the jury to "find that Gray knowingly entered or remained in the restaurant with the intent to steal the items."

Gray's convictions were affirmed.

[22] Lewis v. Com., 42 S.W.3d 605 (Ky. 2001).

TRIAL PROCEDURE/ EVIDENCE – DOUBLE JEOPARDY

Fagan v. Com., 374 S.W.3d 274 (Ky. 2012)

FACTS: Fagan was charged with the theft of copper cables, with a value of over $30,000, which had been removed from railroad locomotives. However, to replace the cables cost over $400,000, between the replacement cable and the damage done during the theft. He was indicted for both Theft and Criminal Mischief. He was convicted and appealed.

ISSUE: Is it double jeopardy to charge with both Theft and Criminal Damage?

HOLDING: No

DISCUSSION: Fagan argued that it was double jeopardy because to steal the cables, it was necessary to damage the locomotives. The Court disagreed, however, holding that under the Blockburger[23] test, each offense had elements the other did not. (In other words, it is possible to steal without doing damage, although perhaps not in this case, and it is possible to do damage without stealing.

The Court upheld Fagan's conviction.

TRIAL PROCEDURE/ EVIDENCE – CHILD WITNESS

Gartley v. Com., 2012 WL 4464388 (Ky. App. 2012)

FACTS: Gartley was charged with Sexual Abuse 1st and Sodomy, accused of sexual contact with his six-year-old granddaughter, C.H. in 2008. Prior to the trial, the Court examined C.H. to determine if she was competent to testify pursuant to KRE 601(b). She was permitted to testify while in the judge's chambers, with her testimony viewed by the jury on closed-circuit television. During her testimony, concerning events from more than a year before, she testified to some degree in an inconsistent manner to prior statements, not mentioning, for example, that she'd told a doctor that Gartley had digitally penetrated her.

Gartley had been questioned by Det. Turner (Paducah PD) and stated he did not recall touching C.H., but that he did not believe she was lying. (He was a substance abuser and admitted he had blackouts.)

Gartley was convicted of Sexual Abuse, but not Sodomy. Gartley then appealed.

[23] Blockburger v. U.S., 284 U.S. 299 (1932).

ISSUE: May a child witness be examined by the court to be determined to be competent?

HOLDING: Yes

DISCUSSION: Gartley argued that C.H. was incompetent to testify "because she was unable to sufficiently recall and narrate facts." The Court looked to the rule, which presumes that a witness is competent unless he or she "(1) lacked the capacity to perceive accurately the matters about which he proposes to testify; (2) lacks the capacity to recollect facts; (3) lacks the capacity to express himself so as to be understood, either directly or through an interpreter; or (4) lacks the capacity to understand the obligation of a witness to tell the truth." Age, in itself, is not determinative. The court noted that her answers "fell well within" the minimum requirements, and she responded accurately "to nearly, if not all, of the questions posed by the court" to validate her memory. She "spoke clearly and articulately, although quietly at times." She was able to distinguish between the truth and a lie. Her inability to recall specific details of the abuse did not affect her competency, only her potential credibility, and that was for the jury to decide.

In addition, the Court agreed that allowing her to testify from outside the courtroom was authorized under KRS 421.350, as she was under the age of 12 and there was a "compelling need" to do so, as determined by the judge during his examination of C.H. She had responded negatively when she saw Gartley, the Court noting that she "wheeled around, froze, and began to cry" and that it took 45 minutes to convince her to come back inside.[24] At that point, she "sat or lay on the steps or floor of the witness box during her interview" with the judge, thereby blocking her view of Gartley.

Gartley also argued that his statements to Det. Turner should have been suppressed. Gartley was asked by the detective and another officer to "accompany them to the police station" and that he would be brought home after the interview. He agreed to do so. Gartley rode in the front seat of the cruiser and was brought into the interview room by a side door. Most of the time, he was questioned only by Det. Turner. He "sat, unrestrained, in a chair against a wall and was often left alone in the interview room." He was allowed to go to the restroom unaccompanied. He was arrested at the end of the interview.

The Court looked to Fugett v. Com., which had similar circumstances.[25] In that case, the Court ruled that the subject was not in custody. The court agreed that "Miranda warnings are not required simply because the questioning takes place at the station house, or because the questioned person is the one whom the police suspect."[26] The Court agreed that under the circumstances described, Gartley was not in custody for Miranda purposes.

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[24] She was lured back into the courtroom with French fries and other treats.
[25] 250 S.W.3d 604 (Ky. 2008).
[26] California v. Beheler, 463 U.S. 1121 (1983); Oregon v. Mathiason, 429 U.S. 492 (1977).

Gartley's conviction was affirmed.

TRIAL PROCEDURE/ EVIDENCE – SEPARATION OF WITNESSES

<u>Cline v. Com.</u>, 2012 WL 4045192 (Ky. App. 2012)

FACTS: In the fall of 2009, Cline moved in with his cousin, Shuck, her nine-year-old daughter, C.S. and her new boyfriend, Montalvo. All were unemployed and spent their time doing drugs and drinking. On November 23, the Perkins home was burglarized – the Perkins being Shuck's aunt and uncle. They were out of town when it occurred. When the Perkins returned, the immediately suspected Shuck and relayed that to the investigators from KSP, Troopers Haynes and Perkins.[27] Montalvo let them in and said that Shuck and Cline had gone to get cigarettes. They spoke to Montalvo and C.S. separately.

Montalvo admitted that the pair had borrowed his truck earlier and returned with "a pillowcase containing coins, jewelry, and two-dollar bills." They had travelled to several locations to convert the coins and two-dollar bills to more convenient cash, to sell some stolen jewelry and to buy some cocaine. C.S. related a similar story. While they were there, Cline called to say that Shuck was passed out and that he needed directions. They were taken into custody upon their return.

Cline was charged with Burglary, Theft, and related charges. He was convicted of most of the charges and appealed.

ISSUE: Is the presence of the arresting officer at the prosecution table necessarily essential?

HOLDING: No

DISCUSSION: Cline argued that it was improper to allow both Troopers to remain in the courtroom, rather than requiring one to remain outside until testifying. (Each did leave during the others' testimony, however.) The court agreed that under KRE 615, only one of the troopers should have been permitted to stay in the courtroom as a representative, at most. In fact, the Court ruled that neither was actually even "essential" to the presentation of the case, which was not complex or lengthy. The court, however, found no prejudice in the error.

Cline also argued that Montalvo did the burglary and there was insufficient evidence to implicate him. He claimed C.S. implicated him because she was afraid of Montalvo. The Court agreed however, that "Montalvo had no knowledge the police were coming to the trailer, and once the police arrived there was little opportunity for Montalvo to threaten C.S." and they were separated before being interviewed. Their tales were

[27] No relation.

consistent. It was more likely that C.S. was influenced to change her testimony after that time, not before.

Cline's convictions were affirmed.

TRIAL PROCEDURE/ EVIDENCE – DRUG EVIDENCE

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

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

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

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

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

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

HOLDING: Yes

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

The court agreed that it was not improper to have not segregated the two amounts of marijuana, particularly since the larger amount was, by itself, over 5 pounds. As such, the error, if any, was harmless. Simms argued that the knock and talk was improper, as the officers "claimed to be cold" in order to get inside. The Court, however, agreed that Ruff's consent was knowing, voluntary and given intelligently.

Simms's conviction was affirmed.

TRIAL PROCEDURE/ EVIDENCE – VIDEO EVIDENCE

Wesner v. Com., 2012 WL 3636928 (Ky. 2012)

FACTS: Wesner was charged with murder in the abuse fatality of his girlfriend's 2-year-old daughter. During the trial, the Court played his recorded interview with a Lexington detective, in which the officer "repeatedly states or implies that [Wesner] is not being truthful." Wesner was convicted and appealed.

ISSUE: May otherwise inadmissible statements be admitted to provide context to a recorded statement?

HOLDING: Yes

DISCUSSION: Wesner argued that the admission of the recording was improper. The Court looked to Lanham v. Com., in which the Court "upheld the admission of a similar, unredacted recording of a police interrogation, in which the officer accused the defendant of lying."[28] The Court agreed that the "recording was admissible not as an expression of the interrogator's actual opinion about the defendant's credibility, but as a verbal act providing context for the suspect's responses."[29] The Court agreed that Wesner could have asked for an admonition to the use the jury could place on the comments, but he did not do so. Det. Johnson had stated that he "had trouble keeping track of the different versions" of the story.

The Court upheld the conviction.

[28] 71 S.W.3d 14 (Ky. 2005).
[29] Walker v. Com., 349 S.W.3d 307 (Ky. 2011).

TRIAL PROCEDURE/ EVIDENCE – EXPERT WITNESS

Meador v. Sandage, 2012 WL 3762423 (Ky. App. 2012)

FACTS: On October 28, 2009, Sandage rear-ended Anderson's vehicle, in which Meador was a passenger, as they were both going in the same direction on the Natcher Parkway in Warren County. The primary issue was the lighting conditions at the time of the wreck. Sandage argued that she could not see the taillights of Anderson's truck, or the trailer it was towing, at the time. Anderson argued that he had connected the trailer taillights and they had been properly working.

Both sides presented expert testimony as to whether the taillights had been on, discussing the "hot shock" test. Meador's witness opined that the trailer lights were not on at the time of impact, and that he didn't give an opinion on the condition of the truck's taillights. Sandage's expert testified that the trailer lights were not on at the time of impact, but he did find that one of the truck's taillights was apparently on. Sandage argued, and Anderson disputed, how dark it actually was at the time of the crash.

The jury ruled in favor of Sandage, and Meador appealed.

ISSUE: Must a Daubert hearing be done on proposed witnesses?

HOLDING: Yes (usually)

DISCUSSION: Meador argued that the Court should have done a Daubert[30] hearing on Sandage's expert, although it had already admitted the testimony of Meador's own expert by that time. The Court agreed that the trial court should have done so, but noted that since both experts testified essentially identically, it was harmless error.

The Court upheld the judgment.

TRIAL PROCEDURE/ EVIDENCE – PRIOR BAD ACTS

Douglas v. Com., 374 S.W.3d 345 (Ky. App. 2012)

FACTS: On June 13, 2009, Douglas was involved in a fatal crash in Lawrence County with Spence, who was on a motorcycle. Earlier that day, Douglas had taken prescribed Percocet and Valium. As part of trial preparation, the prosecution obtained KASPER reports on Douglas and provided them to Dr. Davis, to use as an expert witness on her presumed impairment. However, disclosure of such records to Davis violated KRS 218A.202(6). The court granted the motion to exclude the records but denied the motion to exclude Davis's testimony. He suggested, as a result of his review of the records, that since Douglas had overlapping prescriptions for

[30] Daubert v. Merrell Dow Pharmaceuticals, 509 U.S. 579 (1993).

hydrocodone and oxycodone (Percocet), that she was abusing the drugs. (There was evidence of a legitimate prescription for both, however.)

Douglas was convicted of Manslaughter 2nd and appealed.

ISSUE: May an expert witness be provided with a KASPER report?

HOLDING: No

DISCUSSION: The Court looked at the admission of the evidence under KRE 404(b) – prior bad acts. The Court agreed that it was "irrelevant and more prejudicial than probative" to admit the evidence of the prescriptions and that Dr. Davis should not have been allowed to testify about the prescriptions.

Further, the Court agreed that Davis should not have been provided with the KASPER report, either, as there was no court order to provide it. The Court emphasized that at the time, neither the prosecutor or Dr. Davis was authorized to have it and went on to say:

> We pause to note that this is disconcerting because this appears to be a recurring problem in the Commonwealth, *i.e.*, that prosecutors and other unauthorized people are being provided copies of KASPER reports without court orders directing those people to be given such reports … without fear of prosecution.[31]

The conviction was reversed and the case remanded.[32]

FORFEITURE

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

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

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

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

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[31] Com., Cabinet for Health and Family Services v. Bartlett, 311 S.W.3d 224 (Ky. 2010).

[32] The provisions prohibiting prosecutors from having such reports were changed in the 2012 General Assembly.

HOLDING: Yes

DISCUSSION: The Commonwealth argued "that because forfeiture of a person's property who is not the individual convicted of a crime is permitted, a conviction is not a prerequisite for a hearing regarding forfeiture of previously seized property." The Court noted that while property may be seized from individuals who are not convicted, that in those cases, someone is, in fact, convicted of a crime. Further, there must be "some link between the property to be forfeited and a violation of the" the law. In Singleton v. Com., the court noted that ""[c]onfiscation of [a person's] property is only authorized after a conviction of the party alleged to have committed the offense. This is a foundation of the Commonwealth's right."[33]

The Court affirmed the denial of the forfeiture.

JURISDICTION

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

FACTS: Johnson was arrested for drug trafficking by officers working under Operation Unite, "acting under the authority of the Attorney General's Office," in Powell County.[34] Johnson argued that the UNITE officers did not have jurisdiction in Powell County at the time of his arrest, and that they were not properly authorized to work under the Attorney General's Office either. The Court concluded that KRS 218A.240(1) vested the Attorney General with the "authority to investigate and make arrests on offenses involving controlled substances."

Johnson took a conditional guilty plea and appealed.

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

HOLDING: No

DISCUSSION: The Court looked to another decision, Floyd Grover Johnson v. Com., in which the Court discussed an issue that was indistinguishable. The Court agreed that the Attorney General was granted the limited authority under KRS 15.200 to "investigate and prosecute cases in limited circumstances." Under that statute, the Court found it "clear that a request must be made of the Attorney General's Office in writing for it to intervene, participate or direct any investigation or criminal action."[35] As such, the court agreed that "the Attorney General, and correspondingly, the UNITE officers, were without authority" to prosecute Johnson.

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[33] 306 Ky. 454, 208 S.W.2d 325 (1948).
[34] At the time of Johnson's arrest, UNITE itself did not extend into Powell County.
[35] That request must come from the governor, courts, grand juries, sheriff, mayor or the majority of a city legislative body.

The Court noted that it was "somewhat perplexed by the Attorney General's position" as previously, the Attorney General had ruled that it had only limited investigative authority, but instead, was only allowed to give advice in most criminal prosecutions.

Johnson's plea was reversed and the case remanded.

OPEN RECORDS

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

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

The Sheriff disclosed some records, but not everything Taylor requested. Believing the Sheriff was not in compliance, Taylor filed suit in Monroe County Circuit Court. In August, the Court held a *sua sponte*[36] hearing to address Taylor's standing to be involved in the first place. Taylor argued that he wasn't practicing law, but "as the person requesting the information, he was the proper party in interest" in the lawsuit. The Monroe Circuit Court denied the case and noted it believed that Taylor was engaged in the unlawful practice of law.

Taylor appealed.

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

HOLDING: No

DISCUSSION: The Court reviewed the Open Records statutes and found that the trial court's reasoning was "fundamentally flawed." The statute specifically permits any person to review any public record, and does not vest standing only in the person to whom the records directly relate. It is immaterial that the records pertained to Dunagan and not Taylor.

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

[36] On the Court's own volition.

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

SIXTH CIRCUIT

<u>U.S. v. Jackson</u>, 2012 WL 2948020 (6th Cir. 2012)

FACTS: On December 20, 2009, while on patrol looking for suspects with outstanding warrants, Officer Crider (Chattanooga PD) spotted Jackson turn his back to the unmarked car (which was well known in the area) and pull his hoodie over his face. The officers circled the block and found Jackson, and they noticed t the "left front pocket of his baggy pants swing with each step as if he had a heavy object in his pocket" and saw "possibly the outline of the slide top of a gun in the bottom of the pocket." They pulled alongside and asked Jackson his name. He said Jason, and upon being pressed further, Jackson ran. Crider tried to block him with the car, and then gave chase on foot. As Jackson ran, he "kept grabbing his pants pocket on the outside." When he was captured, they engaged in a struggle. Finally, Crider's partner caught up and they were able to handcuff Jackson. Crider frisked Jackson and found a handgun. Once he was able to get a look at Jackson, Crider realized he'd had "past encounters" with him.

Jackson, a felon, was charged with possession of the weapon. He moved for suppression and was denied. He took a conditional guilty plea and appealed.

ISSUE: May the Court choose which witness is more credible?

HOLDING: Yes

DISCUSSION: Jackson challenged the basis for the initial stop, focusing solely on Crider's credibility. The trial court had credited Crider's version when it conflicted with Jackson's or that of another witness. The Court agreed that Crider was the more credible and upheld Jackson's plea.

SEARCH & SEIZURE – SEARCH WARRANT

<u>U.S. v. Ruth</u>, 2012 WL 3089329 (6th Cir. 2012)

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

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

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

ISSUE: Is an identified witness inherently more credible?

HOLDING: Yes

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

The Court upheld the plea.

<u>U.S. v. Moore</u>, 473 Fed.Appx. 495, 2012 WL 3064823 (6th Cir. 2012)

FACTS: Moore was identified as having taken a ring (stolen in a burglary) in trade for cocaine. The burglary suspect identified Moore and gave the police information as to where he lived. The police obtained a search warrant for the ring. They met him at the house, as he returned from work, and he immediately handed over the ring, which he was wearing. Nonetheless, they searched the home, finding weapons and drugs. (The officer in charge testified that he didn't hand over the ring until after the search.) After Moore was arrested, an informant called to state that the police had missed some hidden drugs and money; Moore admitted that might be the case. They obtained a second warrant and found additional drugs and money.

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

ISSUE: Must a search warrant include information about an informant's criminal history?

HOLDING: No

DISCUSSION: Moore argued that the search warrant should have included the informant's criminal history, instead of just noting that he admitted to burglaries and was using the stolen items to obtain cocaine. The Court, however, found that was sufficient, and further, that the informant was named in the warrant and claimed to have been an eyewitness to the crime.

The Court further gave credence to the officer's statement that he didn't realize that Moore was wearing the ring and that he didn't get the ring from Moore until after the search.

The denial of the suppression motion was affirmed.

U.S. v. Yates, 2012 WL 4748149 (6th Cir. 2012)

FACTS: On October 26, 2010, Det. Harvey (Akron PD) obtained a search warrant. Yates was detained outside his residence as it was executed and the officers located cocaine, ammunition and firearms along with a few other items. As Yates was a convicted felon, he was charged with the weapons, along with the drugs. He argued for suppression of the evidence found in a detached garage (one of the firearms) and was denied. He was convicted and appealed.

ISSUE: May information from an known but untested informant be supported by corroboration?

HOLDING: Yes

DISCUSSION: Yates argued that the affidavit was not sufficient in that "it contained uncorroborated hearsay concerning the purchase of crack cocaine by an apparently unwitting intermediary whose reliability had not been established." The individual in question was known but not a tipster or informant. The CI that was discussed in the warrant was known to the officer and the information was "coupled with independent police corroboration."

Yates also argued for staleness, as a single buy had been made within the ten days previous to the warrant being obtained. The court noted that staleness "depends on the inherent nature of the crime," and the critical question is whether the affidavit established a fair probability that evidence would still be found at the location to be searched."[37] The affidavit indicated that drug trafficking was ongoing and that Yates had lived there for over six months.

The Court upheld the warrant and Yates' conviction.

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

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

Both were charged with drug and weapons-related federal offenses. They moved for suppression. The Court granted the motion, finding that the probable cause for the

[37] U.S. v. Spikes, 158 F.3d 913 (6th Cir. 1998); see also U.S. v. Abboud, 438 F.3d 554 (6th Cir. 2006).

warrant had gone stale by the time it was executed. The Court also concluded that the affidavit contained knowing or reckless falsities concerning the CI's reliability. The Government appealed.

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

HOLDING: Yes

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

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

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

U.S. v. McCreary, 2012 WL 2874019 (6th Cir. 2012)

FACTS: On April 2, 2009, two Detroit officers, along with U.S. ICE agents, were conducting surveillance on an unrelated case near that house when they noticed clues that indicated that the address was being used for narcotics trafficking, noting in particular what he believed was a hand-to-hand transaction. They obtained a warrant and Detroit officers executed it on the house. They were able to gain entry after several attempts when McCreary opened the door. Both doors were barricaded. Inside they found drug related items (scales and baggies) along with a loaded shotgun. They found no drugs, money or documents that suggested McCreary controlled the house. He did ask to get a coat which he retrieved from the room where the shotgun was found.

Because McCreary was a felon, he was charged for the shotgun. He argued that they lacked probable cause for the warrant and that the shotgun should be suppressed. The trial court assumed the warrant was invalid but still denied the motion, ruling that the shotgun was admissible based on the good faith exception to the exclusionary rule.[38]

[38] U.S. v. Leon, 468 U.S. 897 (1984).

McCreary took a direct federal appeal. The U.S. District Court ruled against him and he further appealed.

ISSUE: Do allegedly false or misleading statements in a search warrant require a Franks hearing?

HOLDING: Not necessarily

DISCUSSION: McCreary argued that the trial testimony of one of the officers indicated "that the warrant affidavit included knowingly or recklessly false statements." As such, he argued that the affidavit should have been discounted or in the alternative, that he should have been granted a Franks[39] hearing to challenge the officer. The Court ruled that he waived the issue by failing to raise it, but he argued that the "falsehood was not revealed until trial." However, the Court agreed that as an occupant of the house, he should have recognized the inconsistency in the affidavit without even knowing what the officer would say at trial. The Court agreed that the statements, while they did not match, were not necessarily inconsistent, either.

The Court affirmed the admission of the warrant and the shotgun and upheld the decision of the District Court.

SEARCH & SEIZURE – CONSENT

U.S. v. Master, 2012 WL 3192106 (6th Cir. 2012)

FACTS: On January 14, 2007, Investigator Dyer (Franklin County, TN, SO), requested a search warrant for Master's residence, indicating it was in Franklin County. However, the residence is, in fact, in Coffee County, not Franklin County. The judge signed the warrant, despite a recent arrest made by Franklin County at the same address being dismissed because of venue.

The deputies executed the warrant, during which time Master stated that he had a shotgun. As he was a convicted felon, Master was arrested. He moved for suppression. After a hearing, the Court denied the motion to suppress. Master appealed.

ISSUE: Does an improperly signed warrant always require suppression?

HOLDING: No

DISCUSSION: Master argued that the warrant was *void ab initio*.[40] The Court looked to U.S. v. Scott, which "held that when a warrant is signed by someone who lacks the legal authority to issue a warrant, the warrant is void from the beginning."[41] The Court agreed, however, that the Herring balancing test was appropriate in this

[39] Franks v. Delaware, 438 U.S. 154 (1978).
[40] Void from the beginning.
[41] 260 F.3d 512 (6th Cir. 2001).

case[42] and that such evidence should only be suppressed if the officer could properly be said to have had the knowledge that the search was not permitted. Master argued that since another deputy in the agency knew that his residence was in Coffee, the investigator should have known.

The Court noted that "the idea that the entire department should be held accountable for all information received by each individual officer as it relates to a particular case has no basis in the law." The Court agreed, however, that "under the collective knowledge theory, 'the knowledge of one law enforcement officer can be imputed to another if the other is working on the same investigation,'" however.[43] The Court noted that there were ongoing disputes about which county the property was located in, but that they had received services from Franklin County in the past. The Court agreed that the investigator had tried to verify the correct county using several resources, but that "police work is often times fast paced and requires officers to do a great deal of work in a short period of time." Requiring them to go to a public records office, which is "more than likely" not open 24 hours, is not reasonable.

The Court agreed that suppression was not appropriate in this case.

SEARCH & SEIZURE – TERRY

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

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

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

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

HOLDING: Yes

DISCUSSION: The Court agreed that the initial detention was appropriate, given the facts presented. With respect to the frisk, the Court noted that "in order to frisk Martin for a weapon, the police must have a reasonable suspicion that he was armed."[44]

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[42] 555 U.S. 135 (2009).
[43] U.S. v. Yoon, 398 F.3d 802 (6th Cir. 2005).
[44] Arizona v. Johnson, 555 U.S. 323 (2009); U.S. v. Pearce, 531 F.3d 374 (6th Cir. 2008).

The Court accepted that "police officers' testimony that none of them believed that Martin was quickly reaching into his left front pocket to produce identification" as requested, but instead, that he was reaching for a weapon.

The Court upheld the denial of the motion to suppress.

SEARCH & SEIZURE – SEIZURE

<u>U.S. v. Saddler</u>, 2012 WL 3834774 (6th Cir. 2012)

FACTS: On June 6, 2010, Cincinnati PD received a call for shots fired and a burglary at the same location. Sgt. Fritz responded at about 0124 to the address. He found women's shoes in the street. A neighbor reported that a man and woman had jumped into a car after the shots were fired and sped away. He found bullet holes at the address, the door was open, but no one was inside. Officers Grote and Weyda did a sweep around the house. Bullet casings and fragments were found in the street. They found a safe outside the residence (apparently in the yard) and noted that the refrigerator had been pulled away from its cubby inside.

Saddler, the home resident, arrived, claiming that "people were shooting at him from his house." He said he was unarmed and was a convicted felon. He claimed to have called 911 when he arrived at the house and found two men coming outside, and that they'd fired at him as he fled the scene with his girlfriend, whom he'd taken home. The officers, however, believed that the firing originated in the street, however.

During that time, the locked safe and a book bag, which had been left at the side entrance of the house, were still available. Saddler admitted to owning the safe. He was asked to open it to confirm the contents were intact but he said he didn't remember the combination. He then said he was "holding" it for his brother. The items were carefully transported and stored at the PD, separate from other evidence, and left for the dog to "sniff" the next day. When the dog alerted on the safe, the officers obtained a search warrant and the safe was pried open. Marijuana, pistols, scales and Saddler's ID were found inside.

Saddler moved for suppression and was denied. The Court found it valid under plain view, the inevitable discovery exception, lack of standing (as Saddler had denied ownership) and exigent circumstances. Saddler took a conditional guilty plea to possession of the weapons inside, and appealed.

ISSUE: Is holding a portable item for less than 24 hours in anticipation of a search warrant permissible?

HOLDING: Yes

DISCUSSION: Sgt. Fritz argued he seized the safe, believing it contained evidence related to the burglary, and that it was reasonable to believe that evidence was

contraband. Saddler argued that they never did take prints and that once they found the guns in the safe, the "focus was trained on Saddler, and the safe and any further investigation of the burglary was scrapped." Saddler argued the seizure was pretext. The Court agreed that it was reasonable to find the safe portable and that if left it behind, Saddler or someone else were try to destroy it, or at least its contents.

The Court agreed that the "considering the brief nature of the intrusion into Saddler's possessory interest, the fragility of the evidence, as well as the government's significant interest in solving crime" it was reasonable to "conclude that the government's interest outweighed the individual interests at issue."

With respect to his argument that they should have simply waited at the scene, the Court looked at Sgt. Fritz's reasoning, which was that it was simpler to take the safe in and hold it for the warrant. The Court noted that the law does not require officers to "engage in the least intrusive search or seizure." Looking at the length of time (22 hours) the safe was secured, the Court noted that such seizure of containers "affects only possessory interests and not the privacy interests vested in their contents." The Court found no lack of diligence in waiting to get the warrant until the next day. The Court looked to U.S. v. Respress[45] which held that "[t]he practice of seizing an item based on probable cause in order to secure a search warrant" was acceptable.

The Court upheld Saddler's conviction.

SEARCH & SEIZURE – GPS

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

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

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

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

HOLDING: No

[45] 9 F.3d 483 (6th Cir. 1993).

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

Shephard's conviction was affirmed.

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

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

The DEA got a court order for "subscriber information, cell site information, GPS real-time location, and 'ping' data for the 6447 phone in order to learn Big Foot's location while he was en route to deliver the drugs." Upon pinging, they found that one suspect phone was at West's home in North Carolina. Using data from that communication, they got a second order for the number that Big Foot was using and learned it was in Flagstaff. The tracked Big Foot by continuously pinging the phone and when it stopped about 0200, learned it was in a Texas truck stop. DEA agents located Skinner at the suspect vehicle, a motor home and a truck combination. He refused consent to search the vehicle, so the agents had a K-9 sniff around the motor home. When the dog alerted, they searched the motor home, finding 61 bales of marijuana (1,100 pounds), two cell phones and two handguns. Skinner and his son were arrested for distributing marijuana.

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

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

HOLDING: No

DISCUSSION: The Court began:

> There is no Fourth Amendment violation because Skinner did not have a reasonable expectation of privacy in the data given off by his voluntarily procured pay as-you-go cell phone. If a tool used to transport contraband gives off a signal

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

The Court looked to U.S. v. Knotts.[46] In that case, the Court held that a "person traveling in an automobile on public thoroughfares has no reasonable expectation of privacy in his movements from one place to another." The Court found "no inherent constitutional difference between trailing a defendant and tracking him via such technology." The Court agreed that "law enforcement tactics must be allowed to advance with technological changes, in order to prevent criminals from circumventing the justice system." The Court also looked to U.S. v. Forest[47] in which it noted that the agents could have gotten the same information simply by following the suspect's car. In this case, Skinner argued, that the agents "had never established visual surveillance of his movements, did not know his identity, and did not know the make or model of the vehicle he was driving." (They did apparently know it was a motorhome towed by a truck.) The Court did not find this to be a distinction, however, of importance.

In this case, the Court noted that the agents properly sought court orders to obtain the information. It also distinguished it from U.S. v. Jones[48] which focused on the "trespassory nature of the police action." The Court concluded that "Because authorities tracked a known number that was voluntarily used while traveling on public thoroughfares, Skinner did not have a reasonable expectation of privacy in the GPS data and location of his cell phone."

The Court upheld Skinner's conviction.

SEARCH & SEIZURE – LAPTOP

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

FACTS: Bradley came under suspicion by the Kentucky Attorney General's office in 2008 for trading in child pornography. The investigator determined that a specific IP address in Fayette County, assigned to a Lexington Fire Station, was displaying file names and hash values connected to child pornography. He tried to connect to the computer via LimeWire. Further investigation indicated that the transactions coincided with one particular fire crew. The investigators went to the

[46] 460 U.S. 276 (1983).
[47] 355 F.3d 942 (6th Cir. 2004).
[48] 132 S. Ct. 945 (2012).

station and obtained consent from Bradley to search his laptop. Despite difficulties, they obtained enough information to seize the computer and apply for a search warrant. The next day, it was searched pursuant to the warrant and a number of videos and images were found.

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

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

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

HOLDING: Yes

DISCUSSION: The court agreed that it is proper to seize an item pending a warrant if there is probable cause to believe it contains contraband. It is a recognized exception that it is proper to seize such an items because of the "urgent need to prevent evidence from being lost or destroyed."[49] The Court noted that Bradley knew the substance of the investigation and as such, the investigator's fears were reasonable. The Court noted "that courts are still struggling to conceptualize Fourth Amendment jurisprudence as applied to computers and the variety of interests implicated by seizures and searches of personal electronics" and that some have "analogized computers to closed containers." Computers often contain "information of exceptional value to its owner." However, digital evidence "is inherently ephemeral and easily destructible." The investigator properly waited until he had a warrant to actually search the laptop and seizing it affected only Bradley's possessory interest, not any liberty interest.

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

The Court affirmed the trial court's decision.

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

SEARCH & SEIZURE – PAROLE AUTHORITY

U.S. v. Starnes, 2012 WL 4372560 (6th Cir. 2012)

FACTS: In July, 2010, several bank robberies occurred in Sheffield Lake. When Starnes became a suspect, the detective checked into his parole status. His parole officer, Fitzgerald, identified Starnes from surveillance photos and decided to take Starnes into custody for failure to report. A number of officers, from various agencies, went to make an arrest. They had planned to ram the door, but discovered that would likely not work so they decided to knock instead. Starnes' wife, Kim, answered and was immediate put on the floor and handcuffed. They located Starnes, who explained that he was not on parole.[50] The apartment was searched by the parole officer on scene, but no evidence was seized. The FBI agent on scene explained to Kim that Starnes was a bank robbery suspect. Kim signed a consent to search form. (She later said she didn't read it and didn't think she had a choice, since the parole officer was already searching.) During the FBI search, incriminating items, including a pellet gun, were seized. Determining that she lacked authority to consent to a search of a vehicle, the parole officer was asked to search it – and found a crossbow, bolt cutters and a camo baseball cap.

Starnes was charged with the robberies. He moved for suppression , arguing that the searches were unlawful and was denied. He was tried and convicted. He then appealed.

ISSUE: May a parole officer simply ignore a court order?

HOLDING: No

DISCUSSION: There was confusion as to the exact status of Starnes' probation, since one of the convictions for which he was being supervised was overturned. The Court noted, however, that if the parole authority believed there was confusion as a result of the court order, it should have brought up the point in court. The Court ruled that the parole authority "had no authority to disregard a binding court order simply because" they disagreed with it. The Court noted that "[a] court speaks only through its orders, and only a court order could have rectified the sentencing judge's error, if indeed there ever was one." The Court noted that emailing the judge about its disagreement with the order was not sufficient and that they improperly disregarded the order.

The government also argued that the officers acted in good faith, even if, in fact, they were mistaken. However, noting that the supervisors of the parole officers were very aware of the order and deliberately disregarded it, the Court agreed that the government was not entitled to the protection of Herring.[51]

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[50] Apparently there was ongoing confusion as to his parole status, and a judge had ordered that he would not be currently under supervision. The parole authority was disputing that he was not currently under supervision.

[51] Herring v. U.S., 555 U.S. 135 (2009).

With respect to the consent, the Court agreed that Starnes' objection to their presence and search were sufficient to indicate that he revoked Kim's consent. The facts were unclear as to when Starnes' was taken from the apartment, but the Court agreed that the government did not sufficiently prove that Kim's consent was voluntary, given the overall circumstances that were "highly distressing, fast moving, and confusing."

The Court suppressed the evidence and remanded the case.

SEARCH & SEIZURE – VEHICLE

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

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

On September 25, 2008, Agent Graber (DEA) began surveillance of the Stratford house. They spotted Williams' vehicle in the driveway, but it left shortly after they arrived. Young, the office manager there, also left and they tailed that vehicle. Using wiretaps, they intercepted a call between the two and learned that "they could expect a female driving a gray vehicle with out-of-state plates" and sure enough, within minutes, Lyons arrived in a gray minivan with Alabama plates. Williams returned.

Agent Graber decided the minivan should be stopped when it left the house. He arranged for Troopers Wise and Grubbs (Michigan State Police) to do so, also sharing some details of the investigation and the "basic facts" that suggested drugs would be in the vehicle. He specifically asked, however, "the troopers to develop independent probable cause for the stop, because the DEA did not want its lead targets tipped off" about the investigation.

The troopers made the stop, based upon items hanging from the rearview mirror. The driver, Lyons, could not produce a valid OL – the vehicle was rented. The troopers smelled mothballs and knew that was often used to mask the smell of narcotics. She got out and consented to a search, which Lyons later contested, arguing she'd been placed in handcuffs before being asked for consent. However, she did reach for her purse upon getting out, and she agreed to let them look in their purse (for "safety" reasons). They found "several large bundles of currency and a suspended Michigan drivers license." She became "teary-eyed" when the trooper advised her that her explanations were inconsistent.

During the subsequent search, between the van and the purse, they "discovered over $11,000 in cash, 39 bottles of codeine cough syrup, and a box of mothballs." She was arrested.

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

The Government appealed.

ISSUE: Is the collective knowledge doctrine valid?

HOLDING: Yes

DISCUSSION: Because Michigan's law about vision obstructions did not apply to out-of-state vehicles, the Government argued on "whether the DEA possessed reasonable suspicion to request the stop and whether the troopers were permitted to act upon the DEA's request." The Court ruled that the "reasonableness of a traffic stop is measured by the same standards set forth for investigatory stops in Terry v. Ohio,, and its progeny."[52] Once a stop is justified, the "degree of a traffic stop's intrusion must be reasonable related in scope to the situation at hand, as judged by examining the reasonableness of the officer's conduct given his suspicions and the surrounding circumstances.[53]

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

The Court then considered whether the DEA's collective knowledge could be imputed to the troopers. The Court agreed that "[i]t is well-established that an officer may conduct

[52] Terry v. Ohio, 392 U.S. 1 (1968); U.S. v. Everett, 601 F.3d 484 (6th Cir. 2010). Dorsey v. Barber, 517 F.3d 389 (6th Cir. 2008) (quoting Smoak v. Hall, 460 F.3d 768 (6th Cir. 2006)).
[53] U.S. v. Davis, 430 F.3d 345 (6th Cir. 2005).

a stop based on information obtained by fellow officers."[54] This is "variously called the 'collective knowledge' or 'fellow officer' rule, and "recognizes the practical reality that "effective law enforcement cannot be conducted unless police officers can act on directions and information transmitted by one officer to another." This holds even when "the evidence demonstrates that the responding officer was totally unaware of the specific facts that established reasonable suspicion for the stop." The Court stated:

> Whether conveyed by police bulletin or dispatch, direct communication or indirect communication, the collective knowledge doctrine may apply whenever a responding officer executes a stop at the request of an officer who possesses the facts necessary to establish reasonable suspicion.[55]

The doctrine does have boundaries, primarily, of course, the Fourth Amendment. The Court looked to another circuit to clarify the doctrine, noting three separate inquiries: "(1) the officer taking the action must act in objective reliance on the information received; (2) the officer providing the information must have facts supporting the level of suspicion required; and (3) the stop must be no more intrusive than would have been permissible for the officer requesting it."[56]

The court commended the simplicity of the approach and noted that a "a responding officer is invariably in a better position when provided with the details helpful and necessary to perform his duties." The Court found no need for the officers to have a prior relationship with the investigation or be of the same agency. The Court looked to Whiteley v. Warden, Wyo. State Penitentiary,[57] in which information passed through multiple agencies. In U.S. v. Hensley, "the sole communication between the law enforcement bodies was a flyer issued by the investigating authority that notified fellow police departments that the defendant was wanted for a bank robbery."[58]

The court concluded that the collective knowledge doctrine applied. The troopers were acting solely based on the DEA request and that it was a "fairly typical" request. They possessed everything they needed to know – that the DEA believed that illegal drugs would be found in the vehicle. Further, they asked only a few questions before asking consent to search.

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

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[54] U.S. v. Barnes, 910 F.2d 1342 (6th Cir. 1990) (citing U.S. v. Hensley, 469 U.S. 221 (1985)).
[55] The Court noted this avoids placing "crippling restrictions" on law enforcement.
[56] U.S. v. Williams, 627 F.3d 247 (7th Cir. 2010) (citing U.S. v. Nafzger, 974 F.2d 906 (7th Cir. 1992)).
[57] 401 U.S. 560 (1971).
[58] 469 U.S. 221 (1985).

With respect to the search, the Court found that the automobile exception clearly applied.[59] The driver's lack of an OL, inconsistent answers and the odor were sufficient to uphold the search. Holding the search valid, the Court declined to address the consent issue.

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

U.S. v. Gill, 685 F.3d 606 (6th Cir. 2012)

FACTS: After an arrest in Cincinnati, Holmes agreed to become a CI to lead police to the person that sold him drugs. He telephoned Gill and arranged to make a buy. They set up surveillance on the meeting point and watched Gill arrive. They approached him and identified themselves. He fled, dropping a set of keys. He finally stopped on command and lay on the ground. He was frisked and a small amount of marijuana located. They found a loaded handgun hidden where he'd stopped briefly and laid down before he resumed his short flight. A drug dog alerted on the car and they searched it, finding the designated amount of cocaine for the buy.[60]

Gill, a felon, was indicted for the possession of the firearm and for the drug trafficking. He moved for suppression and was denied. He was convicted and appealed.

ISSUE: May a vehicle be searched on probable cause?

HOLDING: Yes

DISCUSSION: The Government argued that they had probable cause to search the vehicle "prior to, and independent of" the discovery of the drugs and the weapon. He arrived in the expected vehicle and fled when approached, after setting up a drug transaction. They did not, however, witness any crime . The Court looked to U.S. v. Strickland for guidance.[61] The Court noted that they had sufficient cause to arrest him, and that since the arrest took place before Arizona v. Gant was decided, prior case law that permitted the search of cars in such circumstances applied. The Court upheld the search.

The court also agreed that the weapon was present in furtherance of the drug deal, and upheld the charge related to the weapon located where he had been just moments before, hidden under an item on the stoop.

The Court upheld the denials of the motions to suppress and his conviction.

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[59] Maryland v. Dyson, 527 U.S. 465 (1999) (citing Carroll v. U.S., 267 U.S. 132 (1925)).
[60] As there were issues relating to the training of the drug dog, it was not used to support the search.
[61] 144 F.3d 412 (6th Cir. 1998).

SEARCH & SEIZURE – K-9

<u>U.S. v. Sharp</u>, 689 F.3d 616 (6th Cir. 2012)

FACTS: Sharp was arrested in Tennessee on an unrelated warrant. A drug dog hopped in the car and alerted to drugs found inside a shaving kit. He had already sniffed around the exterior and was not responding to a specific command when he got inside and nosed the shaving kit.

Sharp moved for suppression, arguing they'd actually searched his car before the dog arrived and that the dog sniff was improper. That motion was denied and he was convicted. He then appealed.

ISSUE: Does a drug dog's jump into a vehicle before alerting negate the probable cause it would otherwise provide?

HOLDING: No

DISCUSSION: The Court noted that a dog sniff is not a search under the Fourth Amendment, but agreed this situation was a bit different as the dog had gotten inside the car before alerting. The Court looked to other circuits which it noted were unanimous in holding that an "instinctive jump into a car does not violate the Fourth Amendment so long as it is at the dog's own initiative and "neither encouraged or placed" inside. The dog had a "known habit of jumping into open car windows" but the handler stated that he would jump if he was following an odor, but not unless he had detected an odor. The Court found no duty on the officers to keep him from doing so.

Sharp's conviction was affirmed.

INTERROGATION – MIRANDA

<u>U.S. v. Wynn</u>, 2012 WL 3893103 (6th Cir. 2012)

FACTS: On September 6, 2008, Officer Bevis (Nashville PD) was dispatched to a shots fired call. On arrival, he found two other officers facing a door as Wynn was coming out and getting down on the ground, apparently in response to commands. The Sergeant at the scene told Bevis to take Wynn into custody, who was then "handed off" to Officer Morris. Neither Bevis or Morris questioned Wynn. A woman drove up and Wynn told the officers he wanted to talk to her. They rolled down the window somewhat, but the woman would not talk to Wynn. Wynn became agitated and "began to yell and cry." Morris pulled the car forward, hoping to calm Wynn – telling Wynn that it would be OK. Morris admitted he may have asked Wynn to pray with him.

"During this interaction, Wynn made incriminating statements to Morris, including that Wynn has fired a couple of shots into the ground." Morris did not recall if this happened

before or after they prayed. Wynn, a convicted felon, was charged with possession of the weapon under 18 U.S.C. §922(g)(1). Wynn moved for suppression of his statements. The trial court denied the motion. Wynn took a conditional guilty plea and appealed.

ISSUE: Are unwarned, voluntary statements while in custody admissible?

HOLDING: Yes

DISCUSSION: The court agreed that a "suspect in police custody must be informed of his or her constitutional rights before he or she may be interrogated." However, voluntary statements, made without interrogation, are admissible. The trial court found that his statements were "not made in response to police questioning, but in response to his being ignored by his girlfriend." The trial court had not made its ruling dependent upon whether or not praying occurred, but instead, ruled that the Morris's actions were immaterial in its decision. Even assuming Morris suggested that they pray, the Court ruled that did not trigger Miranda. The Court agreed that Wynn's statements "were a voluntary, emotional response to the woman's failure to respond to him, rather than a response to the prayer itself."

The Court affirmed Wynn's plea.

Neal v. Booker, 2012 WL 3711524 (6th Cir. 2012)

FACTS: In Michigan, Neal was driving a vehicle from which a number of gunshots were fired, killing Newsom. (Newsom was apparently mistaken for the intended target, Bradley.) The van, with its four occupants, was quickly located and all four were arrested. Neal waited to be formally questioned and was attended by Deputy Adams during the wait. They engaged in casual conversation and the deputy later stated that "Neal did most of the talking." "Neal did discuss the reason for his trip to Adrian and where he and the family members had driven earlier that night, but the record indicates that he did not make any incriminating statements to Adams before he was given his Miranda rights." When the detective arrived, Neal was given his rights and waived them. He claimed "he had no involvement in Newsom's murder, but admit[ed] that he had facilitated the escape from the crime scene." He did not share the names of the other people in the van, but since they were already in custody, that was unimportant. He claimed to be cooperating because he had nothing to hide.

He was convicted of Murder and appealed. After exhausting state court appeals, he took a habeas petition.

ISSUE: Are unwarned statements made while in custody admissible, when no interrogation was taking place?

HOLDING: Yes

DISCUSSION: Neal argued that "the written and oral statements that he gave after signing the Miranda waiver should have been suppressed as the "fruit of the poisonous tree," because they were tainted by statements elicited before the warnings were given and the waiver signed." The Court found that nothing in the record even suggested that he was interrogated and "that he did not make what could be considered a confession while they waited the arrival of Detective Labarr." The court looked to Seibert and found that the warnings he received were effective and there was no intent to circumvent Miranda by the casual conversation. His later statements were consistent and in fact, he was attempting to exculpate himself in the shooting.

Neal's conviction was affirmed.

Tremble v. Burt, 2012 WL 3799145 (6th Cir. 2012)

FACTS: Tremble, age 14, was found by Deputy Chmielewski on April 19, 1997, at about 0200, standing next to a vehicle in a ditch. Tremble admitted to having stolen the car and to have been drinking. At the station, he was giving his Miranda rights and giving a breath test, which registered .05. He answered questions about the stolen car. At the time, the deputy was unaware that the vehicle's owners, the Stanleys, had been murdered. When he discovered that, about the time that the breath test results were returned, he contacted Sheriff Mosciski. The Sheriff repeated the questioning of Tremble, who denied having anything more to say than what he'd told the deputy. He asked him again about a half hour later and got the same answer.

At about 0530, Tremble's parents were contacted, and they arrived about two hours later. They were told what had occurred and that they could talk to him after interrogation. (There was some dispute as to what was actually said, however.) Tremble was brought to the Sheriff's office again, at about 0830, given Miranda and he waived his rights. "Mosciski then relayed the message from Tremble's parents, stating that they wanted him to come clean." Tremelbe confessed to the shooting deaths of the couple.

At the time he confessed, "Tremble had been sitting in a padded chair with his hands handcuffed behind his back for approximately four to five hours."[62] He had not indicated any discomfort and had refused breakfast.

Tremelbe was convicted of murder and related charges, and appealed. After exhausting his state court appeals, he requested a habeas petition.

ISSUE: Are statements made by a juvenile outside the presence of their attorney or parents admissible?

HOLDING: Yes

[62] Later testimony indicated they were waiting for a lab team to process his hands.

DISCUSSION: Tremble argued that his confession was not voluntary. He did not request his parents or an attorney before he was questioned and he had been told prior to the interrogation, by a juvenile corrections officer, that the charges were very serious. He was apparently of normal intelligence for his age. His initial statement was made shortly after he was arrested. There was no indication he was mistreated and his handcuffs were loosened when he complained.

There was some question that he may have asked for an attorney when he signed the Miranda waiver, but that evidence was not addressed at the trial court level. The court also addressed Tremble's assertion that he'd invoked his right to remain silent by twice telling the Sheriff he had nothing more to say. The Court found his statement to be ambiguous and not necessarily an clear evocation of his right to silence. The Court agreed that the trial court had to decide between a sets of competing facts and that it was reasonable to believe that his confession was sufficiently voluntary.

Tremble's petition was denied and the conviction upheld.

Wilkens v. Lafler (Warden), 2012 WL 2686101 (6th Cir. 2012)

FACTS: Wilkins was charged in Michigan for a sexual assault. He was convicted and lost all state appeals; he then took a habeas corpus petition through the federal courts. When his petition was denied, he further appealed to the federal appellate court. The essence of his appeal, among other issues, was that his attorney failed to challenge an alleged Miranda violation. During the investigation, Wilkens was interviewed by officers at his home.

ISSUE: Is one's home a custodial location?

HOLDING: No (usually)

DISCUSSION: Wilkens argued that the "objective circumstances of the encounter - the prolonged and accusatory rapid-fire questioning, the detectives' insistence that he direct them from room to room, and his inability to speak to his roommate—transformed his home to a custodial environment."[63] The Court noted that the only inquiry that was relevant in deciding about custody "is how a reasonable man in the suspect's position would have understood his situation."[64] Michigan determined he was not in custody, but Wilkens argued that the detectives "relentlessly interrogated him until he gave them the answers they wanted." However, the record "reveals a more moderate course of events." He consented to a search and prior to that search, the detectives sat at his table and talked to him. The "conversation eventually became 'intense,' with both detectives "throwing questions at [him] one after another" and everyone "talkin' at the same time." He accused the detective of misstating what he said as a result of the "disorganized conversation." The Court agreed that the evidence was weak that Wilkens was in custody and that he simply participated "in an unpleasant conversation."

[63] Stansbury v. California, 511 U.S. 318 (1994)
[64] Berkemer v. McCarty, 468 U.S. 420 (1984); Orozco v. Texas, 394 U.S.324 (1969).

He could have left the table or terminated the conversation at any time. When they did the search, the brought him along to each room, but there was also evidence that "Wilkens left the detectives' presence from time to time and that nobody stopped him."

The Court agreed the interrogation was not while Wilkens was in custody.

INTERROGATION – COERCION

U.S. v. Montgomery, 2012 WL 3217117 (6th Circ. 2012)

FACTS: On January 31, 2008, Flint, Michigan, officers executed a search warrant. Sgt. Sorenson led the team. When they did not get a response to a knock, a side door was rammed. Sgt. Suttles, first in the door, found Montgomery in the kitchen. He ran into a bathroom and tossed something in the toilet. Sgt. Suttles was able to keep him from flushing it by tackling Montgomery. They fell into the shower stall and eventually, Montgomery was handcuffed. He found crack cocaine and marijuana in the bathroom.

Montgomery was arrested and the house was searched. In the living room, they found the TV on and two unloaded revolvers hidden under a chair cushion. They also found scales and cocaine in the kitchen. Cocaine and cash were found on Montgomery.

Montgomery was taken to the station and interviewed. He waived his Miranda warnings and named his two suppliers. He wrote out a confession. Despite having outstanding warrants, he was released.

Montgomery was indicted for his possession of the firearms. He argued unsuccessfully for suppression, arguing that the confession was coerced. He went to trial, during which Sgt. Meyer testified as an expert in "the sale and distribution of illegal drugs." Montgomery was convicted and appealed.

ISSUE: Is a statement made under a promise that one would not be arrested coerced?

HOLDING: No

DISCUSSION: Montgomery argued that the confession was based on a promise that "he could go home" so long as he "took responsibility for the weapons." The court looked to U.S. v. Stoker, noting that a confession is involuntary due to police coercion if ""(i) the police activity was objectively coercive; (ii) the coercion in question was sufficient to overbear the defendant's will; (iii) and the alleged police misconduct was the crucial motivating factor in the defendant's decision to offer the statement."[65] However, the Court noted that "promises of leniency are coercive only 'if they are broken or illusory.'" Montgomery testimony was uncertain about what the promise

[65] 631 F.3d 802 (6th Cir. 2011).

actually was and the Court gave more credit to the officer's testimony about what was promised.

The Court summarized:

> Contrasted with Sergeant Sorensen's unwavering testimony (corroborated by his notes taken during the interview) that he made no promises contingent upon a confession, Montgomery's nebulous "understanding" that he must "t[ake] responsibility for the weapons" so that he could "go home" falls far short of the objective evidence of coercion necessary to suppress his statement, particularly when his status as a seasoned career offender is taken into consideration.

With respect to the expert testimony, the Court noted that the jury was properly instructed as to the "dual roles of a law enforcement officer as a fact witness and as an expert witness." The court agreed that in this case, the information was helpful to the jury. The officer property testified "regarding conduct that would be consistent with an intent to distribute and left to the jury the final conclusion regarding whether the defendant actually possessed the requisite intent."

Montgomery's conviction was affirmed.

INTERROGATION

<u>Brown v. Jackson</u>, 2012 WL 4372555 (6th Cir. 2012)

FACTS: Brown was arrested on September 8, 1999, by Detroit PD, for questioning in a robbery/murder case. He claimed the jail conditions were horrible, that the toilet did not work and that cockroaches were everywhere. He claimed he did not get much, if any sleep and that he was periodically interrogated in a "small, cold" room. Brown claimed they never gave him his rights and ignored his request for an attorney. He further claimed he was ill during his incarceration and his requests for help ignored.

After 51 hours, he admitted to involvement in a homicide. He waived his rights in writing but later claimed that he was told that was the only way he'd get medical care. The next morning he was found unconscious in his cell and was briefly admitted to the hospital. He was released, but then immediately indicted for the murder.

He moved for exclusion but the trial court denied the motion, finding his story to be incredible. Brown was convicted and moved ultimately, for habeas relief. The District Court denied the motion but he was permitted to appeal.

ISSUE: Is a lengthy detention automatically considered coercive?

HOLDING: No

DISCUSSION: The Court agreed that "if an inculpatory statement is the product of police coercion, it is deemed involuntary and inadmissible."[66] The Court look to "the crucial element of police coercion, the length of the interrogations, its location, its continuity, the defendant's maturity, education, physical condition, and mental health."[67] Brown argued that his situation was similar to Greenwald v. Wisconsin.[68] The trial court, however, clearly did not believe much of Brown's assertions. The Court did find it troublesome that he'd been held for 51 hours, which was apparently unrefuted, but did not find that alone to be determinative.

Relying on the factual findings made by the trial court, the Court agreed that his confession was given voluntarily. The Court affirmed the Michigan state court's decision.

INTERROGATION – RIGHT TO COUNSEL

U.S. v. Scott, 693 F.3d 715 (6th Cir. 2012)

FACTS: Scott was arrested by Memphis officers on May 28, 2008, for involvement in a string of robberies in the area. He was taken to Det. Taylor, who gave him his Miranda rights. Scott filled out the Advice of Rights form but declined to speak to the officers. They did not question him further and took him to the jail. The transporting Detective told him that he would be taken to jail but that they would return if he was ready to speak, and that they would check with him tomorrow. Scott told him that he knew he needed to talk to the officers but that he just wasn't ready to do it then. The next evening, he was brought from the jail back to the robbery office, and this time, he agreed to talk to the officers. He confessed to several, but not the most recent one. He was returned to jail and on the third day, again brought back to the office, where again, he confessed.

He was charged and moved for suppression. He was convicted of 16 counts of robbery and related charges. He appealed.

ISSUE: Is a negative answer to the question if one wishes to speak to officers after being given Miranda an invocation of one's right to counsel as well as right to silence?

HOLDING: Yes

DISCUSSION: Scott argued that in fact, he asked for a lawyer at his initial questioning, which Taylor denied. The trial court found that Taylor was more credible and that his detailed written report did not indicate that Scott requested counsel.

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[66] Colorado v. Connelly, 479 U.S. 157 (1986).
[67] Withrow v. Williams, 507 U.S. 680 (1993).
[68] 390 U.S. 519 (1968).

The Court then examined the Advice of Rights form. As common in such forms, following the actual five rights, the form included two questions. The second question – having these rights in mind, do you wish to talk to us now – was at issue. Scott originally indicated "no" to this question, and argued that by doing so, he was invoking not just his right to silence but also his right to an attorney (since the form indicated the plural "rights"). The Court agreed that "in light of the wording of the form, [it could not] conclude that a reasonable police officer would have thought that Scott was not invoking the right to counsel." The Court noted that "if there is any ambiguity about Scott's right to counsel, it is in the form itself, and not in his invocation of the right."

However, the Court could not conclude that after invoking, he didn't later waive that right.[69] The Court noted there was conflicting testimony as to who initiated the subsequent discussion.

The Court remanded the case for further factfinding on the above issue.

42 U.S.C. §1983 – ARREST

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

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

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

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

Ranger Ward found Embody and ordered him to the ground at gunpoint. He removed the gun and detained him. When Nashville PD arrived, he explained his concern.

[69] Edwards v. Arizona, 451 U.S. 477 (1981).

Embody requested a supervisor, although it was explained that it would delay the situation. Once they confirmed the weapon was barely within the barrel length to be a handgun under Tennessee law, he was released. The entire detention was about 2 ½ hours.

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

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

HOLDING: Yes

DISCUSSION: The Court agreed that Embody's carrying of the unusual, large weapon "gave Ward ample reason for suspicion that Embody possessed an illegal firearm." The Court noted that he had "painted the barrel tip of the gun orange, typically an indication that the gun is a toy." Based upon this, "an officer could reasonably suspect that something was amiss." Further, ordering him to the ground was appropriate, based upon what the rangers knew at the time.

The Court noted that "the constitutional question is whether the officers had reasonable suspicion of a crime, not whether a crime occurred," since "otherwise, all failed investigatory stops would lead to successful §1983 actions." The Court noted that "having worked hard to appear suspicious in an armed-and-loaded visit to the park, Embody cannot cry foul after park rangers, to say nothing of passers-by, took the bait." Although the stop was lengthy, it was still lawful.

The Court affirmed the dismissal of the action.

Army v. Collins, 2012 WL 2913736 (6th Cir. 2012)

FACTS: On October 16, 2005, Detroit officers responded to a car crash. They found Richards slumped over the steering wheel and his car on fire. He had been shot in the head and the handgun was found inside the car. They suspected he had been murdered. Det. Collins investigated and concluded that Army had been in the car and was complicit in the murder. He prepared a report to that effect, summarizing his investigation. He was charged and tried twice, with both trials ended in mistrials due to deadlock. The prosecutor dismissed the charges without prejudice and Army filed suit.

ISSUE: Is an allegation that information is false enough to invalidate a warrant?

HOLDING: No

DISCUSSION: Army argued that Det. Collins gave the prosecutor false information and that he intentionally included "false statements or material omissions that were

critical to the probable-cause determination." Specifically, he states that information from two witnesses was false and should have been excluded, but presented no evidence to that effect beyond an apparent discrepancy in cell phone records. Further, the Court noted that the evidence indicated that the officer did provide the contested records to the prosecutor and that if Army was without the records, "it plainly had nothing to do with Collins."

The Court upheld the dismissal of the lawsuit.

<u>Ghaith v. Rauschenberger, Dresser and Gordon</u>, 2012 WL 3289922 (6th Cir. 2012)

FACTS: By August, 2008, Dawn Ghaith had decided she wished to divorce her husband, Fawaz. At the time, both were dual citizens of the U.S. and Jordan. Dawn was living in Jordan and decided she would move back to her parents' home in Michigan. However, her youngest son's passport was expired and she needed Ghaith to renew it.[70] Their oldest daughter, Hanan, left Jordan for Michigan after having been beaten by her uncle. At the time, Ghaith was working in the U.S. and he spoke on the phone to his daughter. He accepted an invitation to have dinner at his in-laws to visit her on September 2. He did not know that the in-laws had contacted the Gladwin County Sheriff's Office to report that he was harassing and threatening them and his daughter. They also contacted the Michigan State Police. They reported to Det. Raushcenberger (MSP) when he was to arrive and stated that he was going to "take Hanan back to Jordan and that Ghaith had threatened to kill them if they stood in his way." The detective met with Hanan before Ghaith arrived and then contacted the prosecutor, who affirmed that they had sufficient probable cause for an arrest. Ghaith arrived but no one was at the house. Michigan State Police arrived and arrested Ghaith as he sat in the driveway. He was charged with extortion.

When the Jordanian authorities learned of the arrest, they permitted Dawn to renew the child's passport. (This was under Jordanian law, if the father was incarcerated, the mother could then do it.) Dawn and the remaining children arrived in the U.S. days later. After spending about six months in custody, Ghaith was released because they could not confirm that in fact he'd made the reported calls. (During that time, the investigation included searching his cell phone records.) Ghaith filed under 42 U.S.C. §1983, claiming he was unlawfully arrested and that affected his ability to parent his children. The Court ruled in favor of the officers and prosecutors and Ghaith appealed.

ISSUE: Do factual disputes invalidate a warrant?

HOLDING: No

DISCUSSION: Ghaith argued that Det. Rauschenberger made false statements to establish probable cause. If the claims made were true, he would have been guilty of extortion, but the trial court agreed that the officers believed that he had, in fact, made the threats. There was no indication that the officer knew of certain facts that were

[70] This was a provision of Jordanian law.

known to the family and was selective in picking the information he passed on to the prosecutor. The court noted that there were numerous factual disputes, but most involve actions or statements made after the arrest. Further, there was no indication that there was a conspiracy to put Ghaith in jail to allow Dawn to renew the passport.

The Court upheld the dismissal.

<u>Stahl v. Czernik & O'Meara</u>, 2012 WL 3668013 (6th Cir. 2012)

FACTS: In July, 2008, Stahl was doing odd jobs for residents of Romulus, MI. During that time, Brown (a neighbor of Daly, for whom Stahl had done odd jobs) saw a man walking around Daly's house and then enter the backyard. Brown asked a neighbor if she knew the man. They called police after they saw the man leave with a "jar of money." They described the man as having a large tattoo (Brown said a dragon) on his left calf. Upon being contacted, Daly said that sounded like Stahl. A few days later, the same man apparently tried to break into another home, but the resident, Culiver, was there and he ran away. She described the suspect as having tattoos on his arms. She identified Stahl from a photo on the officer's vehicle computer, apparently it just happened to be up on the screen. She was told he was a suspect in earlier break-ins. The officer made note of her description, but "did not mention her spontaneous identification."

Det. Czernik was assigned the case and was informed that Stahl was a suspect. He showed the witnesses a photo array; Brown and Culiver identified Stahl, the third witness did not. Brown indicated he'd be certain if he knew whether Stahl had a leg tattoo. The detective did a report to use in applying for a warrant to arrest Stahl, but did not mention the leg tattoo and a few other points. Stahl, who was already in custody in another state for an unrelated offense, was transferred to Michigan. He waived his right to contest probable cause, but was released some six months later when another person confessed to the crime.

Stahl sued Czernick and other under 42 U.S.C. §1983, claiming false arrest and imprisonment. Czernik sought qualified immunity and the trial court "held that a constitutional violation occurred when Czernik failed to mention the problems with the eyewitness identifications in the warrant application: Brown's identification was qualified, Culiver previewed Stahl's photograph, and Swantek did not identify Stahl." The Court noted that a discrepancy between Stahl s appearance and that which was given should have been noted. Czernik appealed the denial.

ISSUE: Is an arrest pursuant to a facially good warrant valid?

HOLDING: Yes

DISCUSSION: The Court noted that Czernik was entitled to qualified immunity "because probable cause supported Stahl's arrest and the information Czernik omitted from the warrant application was not material." The court agreed that "an arrest

pursuant to a facially valid warrant is normally a complete defense to a false arrest claim."[71] To overturn that presumption, Stahl would have to "show that the officer recklessly or intentionally "omitted information . . . provided that the information . . . is critical to the finding of probable cause."[72] Stahl pointed to four items that he claimed were material facts: "(1) that Brown qualified his identification of Stahl; (2) that Culiver had previewed Stahl's photo prior to the photo lineup; (3) that discrepancies existed between the witness descriptions and Romulus police records; and (4) that Swantek did not identify Stahl as the perpetrator." The court noted that it's "central inquiry is whether there would have been sufficient probable cause had the warrant application included this omitted information."[73] The Court agreed that there was sufficient probable cause to arrest Stahl even if the omitted information was taken into consideration and that the officer was reasonable in believing the warrant to be proper.[74] Two witnesses specifically identified Stahl as the perpetrator and there was nothing to suggest they were not credible. Brown's qualification on needing to see a tattoo "did not vitiate the identification completely." Further, the fact that Culiver saw Stahl's photo before she saw his photo in the array did not taint her identification, since she saw it "without any direction or suggestion from the police, and spontaneously identified Stahl as the perpetrator."[75] It was, in fact, similar to a show-up identification and in fact, its exclusion from the affidavit likely benefited him.

The court noted that once applying for the warrant, Czernik "had no continuing duty to investigate." [76] Certainly, when in the process of determining whether probable cause exists" officers 'cannot simply turn a blind eye toward potentially exculpatory evidence known to them in an effort to pin a crime on someone.' But in this case, Czernick "had no duty to sift through records … for potentially exculpatory evidence before applying for a warrant."

The Court reversed the District Court and remanded the case for an award of summary judgment in Czernik's favor.

42 U.S.C. §1983 – ENTRY

Denton v. Rievley, 2012 WL 2989242 (6th Cir. 2012)

FACTS: On September 9, 2006, Bradley Denton (Roy Denton's son) called to complain he'd been assaulted by his father and brother, Officer Rieveley responded, entered and arrested Denton, and searched the home. Denton filed suit under 42 U.S.C. §1983. The case went to trial and a verdict was handed down in favor of Officer Rieveley. Denton appealed.

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[71] Baker v. McCollan, 443 U.S. 137 (1979).
[72] Voyticky v. Vill. of Timberlake, 412 F.3d 669 (6th Cir. 2005).
[73] Sykes v. Anderson, 625 F.3d 294 (6th Cir. 2010) (citing Hill v. McIntyre, 884 F.2d 271 (6th Cir. 1989)).
[74] Hunter v. Bryant, 502 U.S. 224 (1991).
[75] See Mock v. Rose, 472 F.2d 619 (6th Cir. 1972),
[76] Ahlers v. Schebil, 188 F.3d 365 (6th Cir.1999)

ISSUE: May an officer enter with an occupant to retrieve belongings?

HOLDING: Yes

DISCUSSION: Officer Rieveley testified that he went into the house because he saw Deputy Brewer go inside. He knew that there was another suspect (Denton's other son) who was reported to be drunk, and that there were weapons in the house. Once inside, he assisted the complaining son, Brandon, in retrieving some belongings and there was no indication that the officer actually searched the home or took anything of Denton's.

Further, at the time the officer entered, apparently Denton had already been removed from the premises and thus could not revoke his son's consent. [77]

The court affirmed the lower court's decision.

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

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

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

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

HOLDING: Yes

DISCUSSION: The Court looked to each claim. First, with respect to the entry, the Court noted that claim did "not necessarily call into question the validity of his conviction."[78] The Court noted that under the facts available to it, it could not determine whether anything obtained as a result of the allegedly unlawful entry was essential to Sanders' subsequent conviction. The Court further noted, however, that although a warrant is usually needed to enter a home, that this entry "was triggered by Tiyani's emergency phone call that Sanders had assaulted and threatened her." "Such a

[77] Georgia v. Randolph, 547 U.S. 103 (2006).
[78] New York v. Harris, 495 U.S. 14 (1990).

warrantless entry may be proper if it fits into what has come to be known as the 'domestic abuse exception.'"[79]

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

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

FACTS: On December 7, 2008, Heather Hays (age 18) became angry with her parents and told them she was moving out. When she continued screaming, Hays told her that if she was going to leave, she needed to just leave. He escorted her to the door and locked it behind her. He did not realize that she was barefoot at the time, her shoes having slipped off. It was 19 degrees out and there was snow on the ground.

Heather's friend was waiting when she was escorted outside and her friend gave her shoes to wear that were a little too small. Heather realized she'd left some items behind and called for assistance from the Vermilion PD to get her belongings. They discussed how she was thrown out of the house and knocked and rang the doorbell. No one answered and eventually, they realized the garage was unlocked. Heather went inside with the officers and she gathered her belongings. The officers searched for residents. Hays came out and objected to their presence. He objected to coming downstairs and he was then arrested for domestic violence.

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

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

HOLDING: Yes

DISCUSSION: The Court agreed that there was "ample evidence to support" … "that Heather had apparent authority to consent to a warrantless entry into the Hays residence." In fact, she never specifically said she had moved, only that she'd been "thrown out." She admitted she expected that the officers would go inside with her. The Court noted that it had not, in the past "held that "magic words" are not necessary for effective consent; rather, the totality of the circumstances, including a party's non-verbal conduct, should be considered in determining whether consent exists."[80] The court considered her a "forcibly removed co-tenant with authority to consent to a warrantless search of the residence." Even if, in fact, she was no longer a resident, it was reasonable for the officers to consider her to be so.

[79] Georgia v. Randolph, supra.
[80] U.S. v. Carter, 378 F.3d 584 (6th Cir. 2004)

Hays argued that he revoked Heather's consent, under the doctrine of Georgia v. Randolph.[81] The Court noted, however, that the police had already entered and noted that issue had not yet been discussed – whether consent could be withdrawn after the entry had occurred. The Court considered Heather's ongoing consent to override Hays refusal.

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

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

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

Austin v. Redford Township PD, 690 F.3d 490 (6th Cir. 2012)

FACTS: On August 5, 2005, Officer Riley (Redford Township PD) tried to stop Austin for speeding. Austin fled at a high rate of speed. When he finally reached a dead end, he "put his car in reverse and it struck Riley's vehicle." Austin pulled into a driveway with Riley right behind him.[82] Additional officers arrived, including Officers Paull and Morgan. Austin tossed a handgun (that he legally possessed) out the window, in a holster. He then got out.

Austin stood with his hands up and palms open, talking to Officer Riley. Officer Paull's K-9 approached Austin, who stepped backward and lowered his hands. Officer Riley then fired his Taser at Austin and he fell back into the car. On the video, "Paull is seen pointing at Austin, instructing his dog to attack Austin." Paull then pulled back his dog and removed Austin from the car, during which time Officer Riley Tased him again. Austin was handcuffed. At some point, Officer Morgan also used a Taser in drive stun mode when he alleged Austin resisted being placed in the cruiser.

Austin filed suit against the officers for excessive force under 42 U.S.C. §1983. The Court ruled in favor of Riley in his initial deployment of the Taser, but ruled against the officers with respect to everything else. The officers appealed.

ISSUE: May a Taser be used on a non-resisting subject?

HOLDING: No

DISCUSSION: Austin argued that he did, in fact, comply with the officer's orders after the chase was over and took no aggressive actions. The District Court ruled that

[81] Randolph, supra; U.S. v. Tatman, 397 F. App'x 152 (6th Cir. 2010) - two years after.
[82] The opinion noted that there was video and audio capturing parts of the encounter.

there was a factual dispute as to whether Austin posed any "significant threat" to the officers once he was secured.

Taking each instance in turn, the officers argued that when Austin was removed from the car, he was clearly still resisting and as such, Taser use was appropriate. This was after, however, the officers had reported to dispatch that he was "now secured." As such, relying on precedent with respect to the use of force on subdued subjects was appropriate and the Court upheld that decision. With respect to the use of the police K-9, the Court noted that the video showed no movement that would trigger the use of that degree of force. The Court upheld the denial of qualified immunity on that instance, as well.

With respect to Morgan using his Taser on Austin, who was in the back seat of the cruiser at the time, the Court noted that Morgan could be seen "leading Austin back to his patrol car without incident or resistance." Austin was arguably a "disoriented and unresisting subject." The trial court "[f]ound that the thirty seconds between Morgan's first order to Austin to put his feet in the police car and Morgan's use of the Taser did not provide Austin with adequate time to comply with the order." Morgan argued that using his Taser on a noncompliant (as opposed to actively resisting) subject did not violate clearly established law. The Court reviewed existing case law and agreed that it had been previously established as unlawful to "use significant force on a restrained subject, even if some level of passive resistance is presented."[83]

The Court noted that at the time he was Tased by Morgan, Austin "was disoriented from at least two prior Taser deployments and at least one attack by a police dog; he was experiencing and complaining of shortness of breath; he was already placed in the patrol car leaving only his feet outside; and he did not have time to comply with Morgan's order before Morgan used his Taser." There was no allegations that he was "belligerent, threatening or assaulting officers, or attempting to escape." The Court looked to Michaels v. City of Vermillion to find that "the use of non-lethal, temporarily incapacitating force on a handcuffed suspect who no longer poses a safety threat, flight risk, and /or is not resisting arrest constitutes excessive force."[84]

The Court affirmed the denial of qualified immunity on the contested allegations.

Hagans v. Franklin County (OH) Sheriff's Office, 695 F.3d 505 (6th Circ. 2012)

FACTS: At about 0530, on May 13, 2007, Hagans "became paranoid and locked himself in the bathroom, telling his girlfriend that 'people were after him.'" He'd spent the night smoking crack cocaine. He broke out the window, climbed outside and "began running around his yard screaming." A neighbor found Hagans' "kicking chairs around his deck and jumping on top of cars in his driveway."

[83] Meirthew v. Amore, 417 F. App'x 494 (6th Cir. 2011).
[84] 539 F.Supp.2d 975 (N.D. Ohio 2008).

Officer Frantz arrived in response to the call, and "a shirtless Hagans came running toward him." Hagans bolted to the backyard and the officer gave chase. The officer tried OC, to no effect. "Hagans raced back to the front of the house," encountering Officer Hughes. Hagans ran to the cruiser and "began yanking on the locked driver's side door handle." Officer Hughes grabbed him and wrestled him to the ground, with Officer Frantz assisting. Hagans resisted handcuffing, lying down on the ground and locking "his arms tightly under his body, kicking his feet and continuing to scream." Officer Ratcliff applied his Taser in drive stun, but "the shock did not faze Hagans," who reached back and tried to grab the Taser instead. Ratcliff fired two probes, which missed, and went back to using the Taser in drive stun several times. Realizing they were not having any effect, the officers were finally able to get Hagans secured with handcuffs and leg shackles.

Although alert when EMS arrived, "Hagans lost consciousness and stopped breathing about ten minutes later." He was resuscitated, but died three days later. The cause of death was attributed to the cocaine starving his brain of oxygen and other medical contributing factors.

Hagans' estate filed suit against Officer Ratcliff and the Sheriff's Office in state court and the case was removed to federal court. Officer Ratcliff moved for summary judgment, which was denied. Ratcliff appealed.

ISSUE: Is it permissible to use a Taser on an actively resisting subject?

HOLDING: Yes

DISCUSSION: The Court began:

> Defined at the appropriate level of generality – a reasonably particularized one – the question at hand is whether it was clearly established that in May 2007 that using a Taser repeatedly on a suspect actively resisting arrest and refusing to be handcuffed amounted to excessive force.

The Court conclude that no, it had not been and that in fact, it still does not violate clearly established precedent in the circuit to use a Taser in some circumstances. The court agreed that "a suspect's active resistance … marks the line between reasonable and unreasonable tasing in other circuits," as well. The Court noted that the line may not hold, ultimately, because a Taser "remains a relatively new technology." However, it can be said that Tasers carry less risk of injury and that most people suffer little to no injury from their use In this case, the reality was that "Hagans was out of control and continued forcefully to resist arrest." Even though the use of the Taser might have contributed to his death, that did not mean that the officer violated the Fourth Amendment.

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

<u>Helfrich v. Lakeside Park Police Department and Rodriguez</u>, 2012 WL 3740689 (6th Cir. 2012)

FACTS: Helfrich attended a wedding on August 8, 2008 in Northern Kentucky. Alcoholic beverages flowed freely at the reception and Helfrich, for whom transportation was assured, had at least 8 drinks. At about 0230, he went to the hotel pool area where a number of people had gathered, including others with the reception.

At about that time, Officer Rodriguez (Lakeside Park/Crestview Hills PD) was dispatched to a disorderly persons call at the hotel. He found about 50 people in the pool area, some intoxicated. He ordered the group to go to their rooms but only a few complied. Rodriguez asked the crowd "Who needs to be made an example of?" Rodriguez heard someone behind him say that they would be the "example" – when he turned, he saw Helfrich. Helfrich refused a direct order to go to his room. Rodriguez arrested him for alcohol intoxication and disorderly conduct. They struggled and the crowd became involved, so Rodriguez called for backup. The bride intervened and Rodriguez, believing the "situation was escalating and getting dangerous," drew his Taser. He ordered Helfrich to the ground. Sgt. Loos arrived and distracted the crowd. Rodriguez got the handcuffs on Helfrich, who "threatened to 'kick his ass'" and led him outside. Helfrich calmed down and complained about the cuffs. He ignored orders to get into the car, so Rodriguez pushed him inside. "When Helfrich sat down, he kicked Rodriguez in the knee and, despite a warning from Rodriguez to stop it, kicked him again. So Rodriguez tased Helfrich on his shoulder and placed him in the car."

Officers Humphrey and Liliich also responded and assisted with part of the arrest. Pursuant to policy, after a Taser use, EMS responded, but Helfrich refused treatment. Witnesses were interviewed while Helfrich was taken to jail. There was confusion about the booking form, which indicated that someone had said the inmate did not engage in violent behavior. Rodriguez had a contusion on his knee from being kicked but that evidence was not apparently actually admitted at trial, although it was mentioned.

Helfrich argued that he was simply questioning why he was being arrested and was not violent. He was charged with Assault, Disorderly Conduct, Alcohol Intoxication and Resisting Arrest. He ultimately pled guilty to only Disorderly Conduct and everything else was dismissed/merged.

Helfrich filed suit under 42 U.S.C. §1983. The District Court gave summary judgment to the defendants, leaving only the excessive-force, assault and battery claims against Rodriguez to be tried. Before trial, Rodriguez objected to the admission of the plea bargain in the criminal trial, and the court agreed, stating it could only be used in impeachment. Helfrich's attorney did mention it during the opening statement, but because Rodriguez did not mention it during testimony, Helfrich could not discuss it either. The Court also allowed, over objection, admission of evidence of Helfrich's prior convictions for DUI and Disorderly Conduct. The Court again had agreed it could not be discussed unless Helfrich put his "good character" before the jury, so when he

did so, the prosecution was allowed to put his arrests on the record. The Court also refused to permit the testimony of another individual, Clark, who had been Tased by Rodriguez just two night before.

The jury found in favor of Rodriguez on all claims and Helfrich appealed.

ISSUE: Is testimony that an officer had used a Taser in another arrest permissible evidence?

HOLDING: Yes

DISCUSSION: The Court looked first at the exclusion of Clark's testimony, because it was "impermissible propensity reasoning" – that because Clark was allegedly improperly tased, that Helfrich was as well. The Court simply found no connection between the two. The Court noted that such considerations, as to intent to commit excessive force, must be objective, even though Kentucky law (KRS 503.090) suggests subjectivity. The court noted that in Haugh v. City of Louisville, the "the court applied a standard which appears to be objective: an officer "is entitled to use such force as is necessary, or reasonably appears so, to take a suspect into custody."[85] The Court agreed that it was proper to exclude Clark's testimony, particularly in light of a report that justified Clark's Tasing.

With respect to Helfrich's prior arrest, the Court noted that "When a party offers evidence of his good character, he opens the door for the opponent to admit rebuttal evidence of his prior bad acts." As such, the evidence was properly admitted.

The Court affirmed the decision of the District Court.

Burden v. Paul, 2012 WL 3216453 (6th Cir. 2012)

FACTS: On July 5, 2008, Burden and her daughter (Lacy) attended a Fourth of July event in Independence. Adults who wished to drink alcoholic beverages were provided a distinctive wristband and the drinks were in "visually distinctive cups." Thompson, the manager of the location, saw the underage daughter come from the restroom holding two of those cups. After Burden came out of the restroom, Lacy handed her one of the cups. Burden offered Lacy a sip of her drink. Thompson told her supervisor, Jansen, and Jansen further observed that he thought Lacy was staggering. He called the police.

Officer Paul and other officers of the Independence PD arrived. They approached Lacy and tried to escort her out. She resisted and struggled. They were finally able to get her outside and up against a wall. By the time Burden caught up with them, Lacy was on the ground. The officers refused to speak with Burden or to allow her to speak with Lacy. Lacy was arrested and eventually pled guilty to alcohol intoxication.

[85] Haugh v. City of Louisville, 242 S.W.3d 683 (Ky. App. 2007).

Officer Paul returned to the bar later to thank them for cooperating. He spoke to Burden, who was there, and also to Thompson, who told him what had happened in the restroom. As a result, he spoke to the county attorney and requested a summons, if appropriate, for a violation of KRS 530.070.[86] The County Attorney agreed and the summons was filed. Burden appeared and argued that the statute exempts a minor's parent from liability.[87] The charge was then changed to KRS 244.085(3), "which prohibits a person from aiding someone under the age of 21 with the purchase or service of an alcoholic beverage." At trial, the Court returned a directed verdict in Burden's favor. Burden filed suit under 42 U.S.C. §1983, arguing unlawful arrest and malicious prosecution against the officer. The District Court ruled in the officer's favor and Burden appealed.

ISSUE: Once an arrest is made, is an officer obliged to look for additional exculpatory evidence?

HOLDING: No

DISCUSSION: The Court noted that "an arrest is invalid only if the plaintiff proves that the officer could not have reasonably believed that the arrest was lawful in light of the information known to the officer at the time of the arrest."[88] In making that decision, the "officer must consider both exculpatory and inculpatory information in deciding whether probable cause exists," but once the arrest is made, there was no need to continue to search for exculpatory evidence. The court looked to Avery v. King[89] and agreed that although the officer was incorrect in his initial choice of statutes, that he did have probable cause to arrest her for a related offense. The court noted that the officer was not sure about the initial charge and he left it to the County Attorney to make the decision on charging.

Further, the Court agreed that changing the charge did not constitute malicious prosecution as it was, in fact, a valid charge. There was no indication that the officer acted out of any malice in suggesting charges. Further, the Court disagreed that there was any indication that the charges were placed in retaliation for a lawsuit in 2007 filed by Burden, that lawsuit was eventually dismissed. (The officer knew of the lawsuit, but was not involved in it.)

The Court upheld the dismissal of the action.

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[86] Unlawful transaction with a minor in the third degree.

[87] The original charged statute actually provides an exception when a parent provides an alcoholic beverage to their own child.

[88] Green v. Throckmorton, 681 F.3d 853 (6th Cir. 2012); *see* Logsdon v. Hains, 492 F.3d 334 (6th Cir. 2007).

[89] 110 F.3d 12 (6th Cir. 1997).

42 U.S.C. §1983 – ENTRY

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

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

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

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

After about 30 minutes, the officers left. The Turks filed suit under 42 U.S.C. §1983, arguing violations of state and federal law, including failure to train the Task Force properly. After extensive discovery, the District Court ruled that the officers entered lawfully because Turk admitted he was opening the door, and that gave the initial officers reason to think he was allowing them to enter. They dismissed Comerford and Rexing, reasoning that they would have no reason to know their fellow officers may have acted improperly by entering.

The Turks appealed.

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

HOLDING: No

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

The Court continued:

> The notion of voluntariness is itself an amphibian. It purports at once to describe an internal psychic state and to characterize that state for legal purposes."[90]

The Court agreed that consent is voluntary if "it is unequivocal, specific and intelligently given, uncontaminated by any duress or coercion."[91] Turning to the facts, and looking to Turk's recitation of those facts (along with the recording), the Court agreed that it described "a textbook Fourth Amendment violation."

The Court continued:

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

The Court agreed that consent could be given by conduct, but "that conduct, like any other kind of consent, must unequivocally and specifically convey a message of consent, intelligently given and uncontaminated by duress or coercion." The Court concluded that the "officers who broke down Turk's door are not entitled to qualified immunity for their entry."[92]

With respect to the subsequent search, the Court agreed it was "an independent Fourth Amendment event, subject to independent Fourth Amendment analysis." The Court noted that "mere submission" is not enough, especially when the officers demanded entry. Although Mrs. Turk, upset, indicated that they should search and leave, "Turk was not so definitive." The Court noted that "after breaking down the door and barging into the Turks' home, no reasonable officer could have believed that the Turks' subsequent consent was voluntary." The Court ruled that the search was not done with consent.

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[90] Culombe v. Connecticut, 367 U.S. 568 (1961).
[91] U.S. v. Moon, 513 F.3d 527 (6th Cir. 2008)
[92] See Steagald v. U.S., 451 U.S. 204 (1981).

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

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

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

42 U.S.C. §1983 – FORCE

<u>Scozzari v. McGraw and Miedzianowski</u>, 2012 WL 4039753 (6th Cir. 2012)

FACTS: Scozzari, who suffered from schizophrenia, lived at a motel in Clare, Michigan. On September 18, 2007, at about 2300, officers were called to the area because of shots fired near the motel. Chief Miedzianowski arrived, followed by Officer McGraw. Chief Miedizianowski saw Scozzari standing 10-15 feet away, carrying a stick. It told Scozzari to drop the stick, to which Scozzari replied in the obscene negative, kept walking and "drew the stick back." (Other witnesses testified that Scozzari said nothing.) The Chief ran behind a truck and yelled at Scozzari to drop the stick – he then drew his OC. Scozzari allegedly lowered the stick, but did not drop it and moved his other hand to his waistband. The Chief, believing he saw a knife there, claimed he deployed his OC, although Scozzari did not respond. (Witnesses claimed they did not smell OC it, either.) The Chief drew his weapon and Scozzari retreated into his motel room. When McGraw arrived, the Chief briefed him. They pounded on the door, with a Taser poised. McGraw kicked the door. Scozzari opened the door and "according to McGraw, had weapons in his hands." Scozzari was shot and killed.

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

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

HOLDING: No

DISCUSSION: The Court agreed that Scozzari was not seized in that he never submitted to any of Miedizianowski's demands. The Court noted that "walking away

from a police officer when repeatedly asked to put down a stick is not submission to authority." The Court agreed, however, that blocking a door to prevent a suspect from exiting is a seizure, but again noted there was no finding that he actually acceded to the officers' authority – all he did was open the door. The Court agreed that there was insufficient allegations in the complaint to conclude that he acceded to their demands. Specifically, the complaint failed to allege what happened after Scozzari opened the door. The Court upheld the dismissal of the illegal detention and unreasonable seizure claims.

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

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

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

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

He was released on bond the next day and sought medical treatment. He filed suit for excessive force under 42 U.S.C. §1983. The officers moved for summary judgment, which was partially granted; the court denied summary judgment with respect to Whiting and Gentilia. The officers appealed. (Malory also appealed with respect to the dismissal of some claims.)

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

HOLDING: No

DISCUSSION: The Court noted that in their answer, the officers ignored the "decidedly non-violent nature of [Malory's] offense and his compliant conduct when he

was transported." He may have acted belligerently and that justified, to a degree, his "violent restraint." But, the Court noted, just because he was argumentative, it was unnecessary to thrust him into the counter. The video of the encounter did not support the use of force and did not indicate that Malory was being aggressive in any way. The Court look askance at the claim that when Malory draped his belt over his shoulder, while undressing, that he was "taking an attack stance." While on the ground, the Court found nothing in the recording supported the officers' use of force against Malory.

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

The Court upheld the denial of the motion.

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

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

Hatcher called for EMS and backup and he didn't know what was wrong with Foos. Within minutes, help arrived. Hatcher had noted that Foos had stopped revving the truck but continued to "rock back and forth and to flail his arms, occasionally hitting the horn." Officer Gerke, who arrived as backup, also tried to get Foos to turn off the truck. "The situation became even more urgent when the officers observed Foos positioned between the driver's and passenger's seats and reaching into the backseat." They were concerned there were weapons in the truck and "concluded that they were going to have to open one of the truck's locked doors to get Foos out, place him into custody, and do whatever needed to be done to get him help." Officer Gerke broke out a front window, all the while Foos was still accelerating the wheels, filling the area with smoke. As Foos continued to rock, Hatcher decided to use a Taser to control him so they could extract him and turn off the engine. Hatcher fired his Taser but it had no apparent effect. Officer Gerke fired his Taser and Foos finally stopped moving, allowing them to reach inside and turn off the truck.

Foos was extracted and found to be naked from the waist down. As he "was put on the ground, he was yelling, kicking his feet, and jerking back and forth, but he was not

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

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

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

HOLDING: Yes

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

> THE COURT: Well, what should they have done in this crazy situation, if not try and remove him from that truck?
> COUNSEL: Well, their objective they didn't announce wasn't to remove him from the truck. Their objective was to turn off the engine.
> THE COURT: Well, they couldn't do that without removing him from the truck.
> COUNSEL: Why couldn't they have just broken out the windows, and forced him back, and then turned off the engine?
> THE COURT: He wasn't exactly sitting quietly.

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

The Estate also argued that the officers neglected his medical need, but the Court noted that one of the first steps Officer Hatcher took was to summon EMS and have them stand by. Once Foos was extracted, EMS immediately took over and he was whisked to the hospital. The Court noted that the Estate's reliance on medical articles suggesting that Tasers could be harmful to someone on drugs neglected to address the

fact that the officers did not know he was, in fact, on drugs. Someone had notified the hospital that he'd been Tased, in fact, as it was noted on the intake sheet.

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

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

FACTS: On May 27, 2007, Rocky Cutlip "began to display erratic and paranoid behavior. At some point, the next day, he took a high dosage of Adderall. On May 29, at about 0230, he called 911, claiming that officers were outside with federal warrants.[93] At the time, Rocky was a police officer, apparently in another jurisdiction. Dispatch sent Toledo police to the home. They spoke to Webb, Cutlip's fiancée, who told them what had happened. Cutlip appeared inside the house, at the top of the stairway. The officers told him to come talk to them, but instead, he "grabbed a shotgun and pointed it at his head," and retreated into a bedroom. After futile attempts to get him to come outside, they called for a negotiator.

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

Cutlip's estate filed suit against the City of Toledo, under 42 U.S.C. §1983, arguing that the City was "was deliberately indifferent to the safety of its citizens by failing to properly train and supervise its police force in how to deal with barricaded suspects who are suicidal or mentally ill, and that this lack of training and supervision was directly responsible for the death of" Cutlip. The City moved for summary judgment under DeShaney, which was granted by the Court, finding that neither of the parameters of that case were satisfied.[94] In addition, the court "held that the unavoidable liability doctrine barred liability because if the police officers had done nothing," they would still have faced a potential lawsuit.

The Estate appealed.

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

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[93] This was not true.
[94] DeShaney v. Winnebago County Department of Social Services, 489 U.S. 189 (1989).

HOLDING: Yes

DISCUSSION: The Court looked to Youngberg v. Romeo[95] in acknowledging that mental patients may be entitled to a duty to keep them from harming themselves. However, In this case, "Rocky was not incarcerated, institutionalized, or put under a similar restraint at the time that he killed himself—in fact, he had not even been arrested." He could have put down the gun and walked out at any time, as the officers pleaded with him to do. As such, he was not in custody or even seized by the officers. The Court looked to the other DeShaney exception, the "state-created danger" exception, and noted that they had never found liability when the subject committed suicide when the police were not directly responsible. The municipality did not create the "self-destructive impulse." When a "person makes a free and affirmative choice to end his life, the responsibility for his actions remains with him." However, in this case, there is some question "about whether Rocky intentionally committed suicide or whether he involuntarily pulled the trigger after the police detonated the flash-bang device." However, "crucially, the police officers' affirmative acts must be made with deliberate indifference" which this Circuit has "equated with subjective recklessness." The Court agreed that "the accepted facts simply do not show that the police officers acted with a callous indifference towards Rocky's rights."

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

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

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

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

FACTS: On March 10, 2010, Officer Krause (Dearborn Heights MI PD) tried to pull over Joseph Saad for a traffic violation. When Saad "appeared to ignore"

[95] 457 U.S. 307 (1982).

Krause's lights and pulled into a nearby driveway, Krause followed him. Saad fled into the house, with Krause following to the porch. There, he encountered Zihra Saad (age 78), Joseph's mother, who refused to allow Krause to enter "despite his allegedly point[ing] a firearm at her." Other officers went into the back, let Krause in the front door, and Joseph was arrested.

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

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

HOLDING: Yes

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

<u>Cline v. Myers</u>, 2012 WL 3553490 (6th Cir. 2012)

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

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

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

HOLDING: Yes

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

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

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

The Court allowed the case to go forward.

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

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

DEA and Redford Township officers did the searches. The occupants of the first house were held on the floor at gunpoint; they were eventually moved in handcuffs to the cruiser. They were then moved to the police station, where they were held for hours, perhaps days.[96] A number of items and a large amount of cash were seized, although most were eventually returned. Although Russell Marcilis II was charged, his case was dismissed upon the motion of the U.S. Government.

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

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

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

HOLDING: Yes

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

[96] The officers disputed that they held the male subject for three days.

Looking to the Redford Township officers, the Court examined the excessive force claim. The Court noted that the use of such force "in the execution of a search warrant constitutes a Fourth Amendment violation"[97] The Marcilises gave a number of examples alleging such force: "(1) the police officers threw Marie onto a couch, causing bruises; (2) the police officers threatened to hit Marie in the face with a gun; (3) the police officers pushed Marcilis I 'violently' to the floor despite the fact that he was visibly bandaged; (4) the police officers pointed guns at Marcilis I, Marie, and Jasmine for thirty minutes; (5) the police officers handcuffed Felicia and Marcilis II for ten minutes; and (6) the federal agents and police officers wore combat gear or masks." The Officers argued that even if they did such things, that "the law was not clearly established such that the police officers would have known these specific actions were unconstitutional under the circumstances presented here." The Court looked to Michigan v. Summers[98] and agreed it was not improper to detain individuals in handcuffs and display firearms where the officers have a justifiable fear of personal safety." The Court agreed that the use of handcuffs did not mean that the officers' actions were improper.

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

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

Some of the items complained of clearly fell within the scope of the affidavit, including money, jewelry and photographs.[99] In addition, a search does not become invalid simply because items not covered by the warrant are seized, but only when "the searching officers demonstrate an flagrant disregard for the limitations of a search warrant."[100] The Court agreed that the officers may have been mistaken about some of the items, but did not find a general disregard.

With respect to the detention during the searches, the Court noted that the warrants both authorized a search for weapons. In one home, the occupants were detained, but not handcuffed, for approximately 90 minutes. However, in the other house, the

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[97] Grawey v. Drury, 567 F.3d 302 (6th Cir. 2009).
[98] 452 U.S. 692 (1981); See also Ingram v. City of Columbus, 185 F.3d 579 (6th Cir. 1999).
[99] U.S. v. Blair, 214 F.3d 690 (6th Cir. 2000)
[100] U.S. v. Lambert, 771 F.2d 83 (6th Cir. 1985).

occupants were removed completely from the home and taken to the station, and that would require probable cause to support "their continued detention." At the time they did so, the officers had already located green leafy material, drug paraphernalia and a large sum of money, enough to justify an arrest.

Finally, the Court considered the claim against Redford Township itself. The Marcilises pointed to the following to support its claim that the PD did not adequately train its officers: "(1) Officer Jones could not remember when he last received training about the use of force; (2) Officer Woodall testified that his only use-of-force training took place during his time at the police academy; (3) Officer Jones testified that he received only on-the-job training about how to execute a search warrant; and (4) Officer Woodall could not remember when he last received training on arrests and search warrants." They also alleged that the PD "neither conducts performance evaluations of officers nor has a system in place to review or monitor its officers." The Court, however, noted that they had "not come forward with evidence of deliberate indifference, the second prong of a failure to train or supervise claim." There was nothing in the record that indicated "evidence of any history of abuse or any events that would have put Redford Township on notice that officer training regarding the use of force or search warrant execution was "deficient [or] likely to cause injury."

The decision of the District Court to dismiss the action in toto was affirmed.

<u>King (Estate Administrator) v. Taylor</u>, 694 F.3d 650 (6th Cir. 2012)

FACTS: On November 25, 2009, the Boyle County Sheriff's Office received an arrest warrant and EPO for service on King. Deputy Adams was given the task and was cautioned about King's behavior the week before. He was ordered to get KSP assistance to serve the warrant. Adams also knew that King had shot at a KSP trooper years before and had been arrested for that crime. He recruited Deputy Isaacs to help and Deputy Isaacs enlisted the aid of Trooper Taylor (KSP).

Taylor made the following comments to dispatch:

> "So, my thought . . . was, there shouldn't be no [Emergency Protective Order] on that guy. And [Frank Thornberry] said, well, what do you mean? I said, you don't serve an EPO on dead people. You know?"; "either [King will] be home (a); (b) he'll be home and come out shooting, you know; or (c) he'll come out, and—yeah, and one of us will have to kill—shoot him."; "If I did [shoot him], I don't care to be off. I'll be off until after the first of the year."; and "Well, if you don't get a hold of me [later tonight], then it may be I'm busy shooting bullets or something."

Trooper Taylor, along with five deputies, went to the home. Adams knocked and got no answer. Taylor covered Isaacs when Isaacs went to the back door. Inside, he saw King laying on the couch, in his underwear. Adams, Taylor and Isaacs gathered on the back porch and the two deputies approached a window. (Taylor held a rifle, in cover.) King sat up at their knock on the glass. He gave them a contemptuous look and turned, and

Taylor "saw King's right hand come up with a gun and point it directly at the officers." Taylor fired, striking King in the face, killing him instantly.

King's estate administrator filed suit against Taylor and the Commonwealth. They agreed to dismiss the official claims against Taylor and the Commonwealth. Taylor claimed in his answer that he had not been properly served, as an individual, but did not move to dismiss the action on those grounds for almost a year. The Court ruled in Taylor's favor and the Estate appealed.

ISSUE: Must an officer sued in their personal capacity be personally served?

HOLDING: Yes

DISCUSSION: With respect to the service of process, Taylor was initially sued in both his official and individual capacity. A summons was sent to him in care of the Legal Counsel for KSP and was duly accepted. However, that was insufficient to serve him in his personal capacity. The fact that he knew he'd been sued was immaterial. Taylor preserved his defense in including the issue in his answer. Had counsel studied the response made by Taylor, he would have recognized that his service effort was unsuccessful.

However, Taylor forfeited the right to raise the defense "through his extensive participation in the litigation." Taylor "was completely silent" until they attempted summary judgment. His "voluntary, active, and extensive participation in the litigation" gave them reason to believe he would be defending the suit on the merit, not on procedure. His KSP counsel agreed that she did not bring the motion concerning the service issue earlier in order to let the statute of limitations expire.

The Court turned to the merits of the case. The Court agreed that looking at the facts from King's point of view, concluding that it was arguable "whether Taylor reasonably believed that King posed a threat of serious physical harm to Taylor or the other officers." All three officers stated that King was looking at them through the glass, and was seated, but the forensic evidence did not support the positions claimed by the three, and in fact, was consistent with King actually lying on the couch at the time he was shot. As such, "what exactly happened just before King was shot is a question for the jury" not the judge. The Court agreed that summary judgment under KRS 503 was also not appropriate at this time.

The Court reversed the trial court's ruling and remanded the case.

42 U.S.C. §1983 – SEARCH

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

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

The container of an alcoholic beverage was suppressed and the City dismissed the charge. Thomas was acquitted of the other charge. Officer Plummer was investigated by the city and eventually fired.

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

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

HOLDING: No

DISCUSSION: The Court started with Officer Myers, noting that to succeed, Thomas must show that her search violated the Fourth Amendment and that the violation was clearly established on the date of the search. At the time of the search, both Thomas and Washington were secured in cruisers. On that date, Gant having been decided, it was necessary to "decide what to treat as the crime of arrest."[101] Then, the Court must determine whether a reasonable officer would believe relevant evidence might be found in the vehicle. The original charge was Obstructing Official Business, based on Thomas's behavior during the stop. As such, there could be no relevant evidence in the vehicle.

[101] Arizona v. Gant, 556 U.S. 332 (2009).

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

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

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

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

42 U.S.C. §1983 – REPO

<u>Hensley v. Gassman, Scott and Gilbert</u>, 693 F.3d 681 (6th Cir. 2012)

FACTS: On August 13, 2008, at about 0315, Gassman, who worked as a repo agent for a local (Michigan) company, went to the Hensley home to repossess a vehicle. When Gassman and his helper found the vehicle, they requested a "civil stand-by" from the Sheriff's Office to assist. (During a previous repossession, Hensley, Sr. had assaulted Gassman.)

Deputies Scott and Gilbert were dispatched and they all proceeded to the house. Gassman prepared to tow the vehicle. At some point he told the deputies he had a repo order and showed "a file containing some documents" which they did not read. At the time Sheila and Hensley, Jr. were home. They awoke and came outside, telling the parties that they should not take the vehicle. Sheila tried to explain that the payments were up to date but Deputy Scott told her "he did not care" and to straighten it out in the morning. Sheila got into the car and locked the door. By this time, the tow chains had

been hooked up and she began to "tow" the truck, endangering Gassman and his helper who were still on the ground. Deputy Scott tried to break the window, unsuccessfully. Gassman got into the tow truck and pulled the vehicle into the road. At some point, Deputy Scott, after ordering Sheila to get out several times, used a hammer to break the window and unlock the doors. Deputy Gilbert pulled her from the car. He told her that she should get any personal belongings from the vehicle and she did so. Gassman towed the vehicle.

The next day it was discovered that in fact, "Sheila was indeed telling the truth about the payment." The vehicle was returned. The deputies submitted an arrest warrant, charging Sheila with assault (with Gassman and his helper being the victims). She pleased no contest to the charges, as well as an additional attempted assault charge.

All three of the Hensleys filed suit against Gassman and the two deputies. Although the Court agreed that the "Deputies' conduct was more than mere presence at the scene" and as such was a constitutional violation, that they were entitled to qualified immunity.[102]

The Hensleys appealed.[103]

ISSUE: May an officer's actions transform a private vehicle repossession into a state action?

HOLDING: Yes

DISCUSSION: The Hensley's claimed that the participation of the deputies transformed the repossession in an unreasonable seizure and not just a private action. The court agreed that their presence alone did not accomplish that, even when they interacted with the parties (the Hensleys). The Court noted that "the deputies also appealed, arguing the conclusion that their conduct constituted state action." At some point, the Court agreed, "repossession by private individuals assumes the character of state action." In addition, "even without active participation, courts have found that an officer's conduct can facilitate a repossession if it chills the plaintiff's right to object." Specifically, when the party physically objects, it becomes the debtor's "most powerful (and lawful) tool in fending off an improper repossession because it constitutes a breach of the peace requiring the creditor to abandon his efforts to repossess."

The Court looked to the case of Barrett v. Harwood[104] and reviewed the "spectrum of police involvement." It noted cases where the officers were simply present and did nothing to help or hinder the effort. At the opposite end was Soldal v. County of Cook, in which the officers told the subject that they were there to keep him from interfering in what turned out to be an unlawful eviction.[105]

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[102] A claim against the Sheriff was also made.
[103] The deputies also appealed, arguing the conclusion that their conduct constituted state action.
[104] 189 F.3d 297 (2d Cir. 1999),
[105] 942 F.2d 1073 (7th Cir. 1991).

Applying the case law to the facts, the Court noted the following that indicated state action: "(1) the Deputies arrived at the Hensley residence with, and at the request of, Gassman; (2) Deputy Scott ordered Hensley Jr., at least once, to move from between the Buick and the tow truck, as Hensley Jr. was attempting to thwart the repossession; (3) the Deputies ignored Hensley Jr.'s demands to leave the property; (4) Deputy Gilbert told Hensley Jr. that Gassman was taking the Buick; and (5) Deputy Scott ignored both Sheila's protest and her explanation and told Sheila that Gassman was still going to take the Buick." The Court agreed that when Deputy Scott ordered Gassman to tow the Buick, he engaged in state action. Their actions in breaking the window and removing her from the car were also state action. In fact, "this conduct was not only active participation, but was instrumental to Gassman's success in completing the repossession." Legally, at that point, Gassman's attempt to pursue a self-help remedy ended and the state law required him to cease his attempt to take the car.

Given that the deputies only knew that Gassman claimed he was authorized to do the repossession, they could certainly find that the seizure was unreasonable. Once they extracted her from the vehicle, their actions became "manifestly unreasonable." Although the deputies did not take the vehicle, their actions enabled Gassman to do so.

Next, the Court agreed that the deputies should have known that their conduct was improper. Although the court agreed that a "determination of whether a police officer's involvement in a repossession or eviction is sufficiently active to amount to state action "is particularly fact-sensitive, … this is not a close case: the Deputies' active involvement facilitated the repossession." The Court agreed that a reasonable mistake might excuse their actions, but in this case, they did not even review the order at all.[106] The Court agreed that the deputies were not entitled to qualified immunity and reinstated the claim against them.

TRIAL PROCEDURE / EVIDENCE - HEARSAY

<u>U.S. v. Mohammed</u>, 2012 WL 4465626 (6th Cir. 2012)

FACTS: On July 21, 2009, Cincinnati officers conducted a "buy-bust" intended to arrest Mohammed once he sold drugs to a CI. Recorded calls never specifically mentioned drugs but talked about doing the "car thing." Mohammed arrived as planned and walked up to the car where the CI and an officer were waiting, but as soon as Mohammed reached out for the door, the officer drove the car away. Other officers arrested Mohammed, who denied having any drugs or weapons on his person. He agreed that he had a handgun in the car, however. Mohammed did not claim to live where the CI said he did. A drug dog "gave a clear and aggressive indication" – but no drugs were found in the car. They went to the address given by the CI and found another of Mohammed's cars, and again, the dog alerted on the vehicle. They used

[106] The order, in fact, was an order from the creditor to Gassman to repossess the vehicle, not a court order.

Mohammed's keys to enter the common entry foyer and the dog alerted on the apartment indicated by the CI.

A search warrant was obtained and a large amount of heroin was recovered, along with a few other items. Mohammed was indicted for trafficking. He moved for suppression, arguing that the officers' entry into the foyer was a violation. The trial court agreed, based upon U.S. v. Cariger[107] but found there was sufficient other information in the warrant affidavit to support the search.

Mohammed was convicted and appealed.

ISSUE: Is it proper to give hearsay testimony about what another non-testifying witness said?

HOLDING: No (usually)

DISCUSSION: The Court agreed that it was improper to enter "the locked common area" without a warrant. The Court concurred, however, that the "untainted information contained in the warrant" still supported the warrant. Further, when the turned the key in the apartment building exterior door, a location where Mohammed claimed not to live, it confirmed that he lived in the building (although not necessarily the suspect apartment).

Mohammed argued that it was improper to allow hearsay testimony from police officers from an informant, when they knew the CI would not be testifying. Although the statements were stricken, he argued that the jury would be unable to disregard what they had heard. The Court agreed that some of the statements were testimonial, such as Mohammed's street name, as they were given directly to the police to use in the prosecution. The court considered whether the error to admit was harmless, considering "(1) the importance of the witness's testimony in the prosecution's case; (2) whether the testimony was cumulative; (3) the presence or absence of evidence corroborating or contradicting the testimony of the witness on material points; (4) the extent of cross-examination otherwise permitted, and (5) the overall strength of the prosecution's case."[108] The court concluded that the information put before the jury was not critical to the case, and therefore harmless.

When Mohammed was arrested, the officer "asked whether he had any weapons, drugs, or anything sharp that would stick him." Mohammed denied anything on his person. He was given Miranda before he was asked about the car, and agreed there was a gun in the vehicle. The Court had no issue that it was proper to ask about a gun on his person, for safety reasons, but had not previously "specifically addressed if questions about whether a suspect is carrying drugs or drug paraphernalia, in anticipation of a pat down, are permissible under the public-safety exception." Other circuits had held the

[107] 541 F.2d 545 (6th Cir. 1976).
[108] Delaware v. Van Arsdall, 475 U.S. 673 (1986).

questions to be proper, however, because of the fear of a syringe or the like, however. The court did not find the pre-Miranda questioning to be a problem.

The court upheld Mohammed's conviction.

U.S. v. Ballew, 2012 WL 3156445 (6th Cir. 2012)

FACTS: On August 8, 2009, a woman called 911, screaming that someone had just pointed a gun in her face. Jackson (TN) officers responded, finding the complaining who "screamed 'he's got a gun,'" and "said the man had run behind the house." She directed the officers to a vehicle where they found a gun, a backpack with marijuana and Ballew's driver's license. Ballew, a convicted felon, was convicted for possession of the gun.

Apparently the woman did not testify, but a responding officer did, repeating her exclamation about the gun. His testimony was admitted under the "excited utterance" exception which covers "a statement relating to a startling event or condition, made while the declarant was under the stress of excitement that it caused."[109]

Ballew was convicted and appealed.

ISSUE: Are "excited utterances" an exception to the hearsay rule?

HOLDING: Yes

DISCUSSION: Ballew argued that the admission was improper. The Court agreed, however, that the record showed that all three elements for an excited utterance were present in the case, as the officer testified to the fear the woman showed. The Court also considered his argument under the Confrontation Clause, but the Court agreed that the error (if any) would be harmless under that argument, as the jury heard, unobjected, the 911 call in which essentially the same phrase was used.

Ballew's conviction was affirmed.

TRIAL PROCEDURE / EVIDENCE - SPOLIATION

Adkins v. Wolever, 692 F.3d 499 (6th Cir. 2012)

FACTS: Adkins, a prisoner in Michigan, was involved in litigation with a prison officer, Wolever, involving an excessive force claim. Prior to the lawsuit being filed, a prison inspector had reviewed color photos and video footage of the incident. However, once Adkins filed the action, prison officials could not locate the photos and video, as well as other evidence. Because it could not be produced, he asked for a spoliation instruction to the jury, informing the jurors that they could presume that the

[109] FRE 803(2); Such issues are usually handled as a jury instruction in Kentucky state courts.

missing evidence would be favorable to Adkins. The District Court, applying Michigan law, denied the request because Michigan's "spoliation instruction required Adkins to demonstrate that the spoliated evidence was under Wolever's [direct] control, which it undisputedly was not."

Upon initial appeal, the Sixth Circuit ruled that federal law governed the spoliation sanctions that apply during federal litigation. During subsequent discovery, it was agreed that a surveillance video had existed and had been downloaded and viewed by the inspector. The prison retention schedule for such records was three years, unless there was pending litigation, in which case it would be held for the litigation. Neither Adkins or Wolever would have had access to the video initially, and special access was needed to download or record the video. However, the person that viewed it (before it went missing) testified and suggested that there was little of interest on it relating to the claims. For that reason, the trial court concluded that a spoliation instruction was not needed. Adkins again appealed.

ISSUE: Are spoliation sanctions appropriate when the affected officer never had control of the evidence (which was destroyed)?

HOLDING: No

DISCUSSION: The Court looked to Beaven v. United States Dep't of Justice for guidance on "whether a particular spoliation sanction is appropriate." The Court agreed that Wolover never had control of the video, and as such, it did not go to the second prong, which was that it was destroyed with a culpable state of mind, by him. The Court concluded that in this case, a spoliation instruction was not warranted, but cautioned that does not mean that in another case, it would not be appropriate.

TRIAL PROCEDURE / EVIDENCE – RAPE SHIELD

U.S. v. Ogden, 685 F.3d 600 (6th Cir. 2012)

FACTS: In March, 2005, Ogden contacted a young female through Yahoo. She claimed to be 15 and he claimed to be 25. The exchanged chat and photos. Ogden requested more photos, she sent topless photos, and told her he wanted even more. He suggested that she change clothes in front of a webcam for him. She sent a number of sexually explicit photos and videos and in one case, sent a video showing her masturbating. She turned 16 and Ogden went to see her, in California, meeting her at a hotel. Her mother tried to call her, but the victim hung up. When she returned home, she learned her father had read her journal and learned about Ogden. Her father invited Ogden to the house and when he arrived, he was arrested. (He was discovered to have lied about his age and other details.)

Ogden was charged for a variety of sexual crimes. Just before trial, the government produced records of 400 online conversations between the victim and other men,

making it clear she'd shared explicit photos before. The Court ruled they were inadmissible however. Ogden was convicted and appealed.

ISSUE: Are chat logs between a victim and other men admissible under the Rape Shield provisions?

HOLDING: No (as a rule)

DISCUSSION: Ogden argued that he wasn't aware that he would be getting such photos but the Court noted that the victim specifically asked to see topless photos and that he reciprocated with similar photos of himself as well. As such, he satisfied the requirement that he knowingly solicited such photos. In addition, the evidence indicated she produced explicit photos and videos after being asked by him to do so and that at least some of the photos were taken specifically for him, and were not photos she'd taken for others. .

In addition, the Court agreed the chat-logs were properly excluded under the federal equipment of the Rape Shield rule.[110] The Court did not find them critical to the defense and nothing in them could have been used to impeach the victim's testimony.

His conviction was affirmed.

TRIAL PROCEDURE / EVIDENCE – TESTIMONY

U.S. v. Wilson, 2012 WL 4457583 (6th Cir. 2012)

FACTS: Officer Petrich (Flint PD) and others were investigating drug activity at two apartments in a single building. They went to one apartment and asked for consent to search, finding that Wilson had moved there previously. They located a large amount of drugs, weapons and ammunition. A month later, a CI purchased cocaine from another apartment in a nearby building and the officer got a search warrant for that apartment. In the affidavit, he claimed that the CI was under constant surveillance during the buy. During the forcible entry execution of the warrant, they found Wilson, "already laid out flat on the ground" near the bathroom. The toilet had been flushed but they were able to recover much incriminating evidence. The also found the same box from which they'd recovered a shotgun at the search a month before.

Wilson was charged with drug trafficking and firearms offenses. At trial, Officer Petrich testified in an inconsistent manner with the warrant affidavit and report, in fact the buy had taken place after the two subjects (Wilson and the CI) walked to another apartment building, the same one where he'd been living initially. (The warrant suggested differently.) Petrich explained he'd been trying to protect the informant by leaving out

[110] FRE 412(1).

such details. Following Wilson's conviction, the Court refused to order a mistrial and Wilson appealed.

ISSUE: Does the prosecution have an obligation to disclose when it knows that trial testimony will differ from a document already in the record?

HOLDING: Yes

DISCUSSION: The Court agreed that when the prosecution learned that the officer's trial testimony would different from the search warrant affidavit, it had an obligation to disclose this to the defense, immediately, under Rule 16(c). The Court agreed, however, that even removing the challenged information, the affidavit provided sufficient connection to the address to support probable cause for the warrant.

The Court also agreed that although the information was provided during trial, it wasn't impermissibly delayed nor was Wilson prejudiced by the corrected information. Wilson was able to impeach Officer Petrich with the information effectively.

Wilson's conviction was affirmed.

EMPLOYMENT – USERRA

<u>Petty v. Metropolitan Government of Nashville & Davidson County</u>. 687 F.3d 710 (6th Cir. 2012)

FACTS: This case is on remand from an earlier decision which was resolved in Petty's favor (Petty I). In 2003, Petty was a sergeant at Metro Nashville PD (MPD). He was also a member of the Army National Guard. In November, 2003, he was activated and eventually sent to Kuwait. During his service there, he was involved in making wine and resigned his commission to avoid court-martial. However, he was given an honorable discharge, although a separate box indicated it was a separation in lieu of court-martial. In February 2005, he requested reinstatement and was subjected to its "return-to-work process." In response to a question, he revealed that he was involved in military charges in Kuwait, although he did not detail the circumstances. The MPD did a further investigation and concluded he had not been truthful on his application and charged him with dishonesty. After further investigation, however, the charges were dismissed. However, as a result of yet further investigation, he was charged again, under an accusation that he'd altered the DD-214 to hide the circumstances of his departure from the military. (In fact, the so-called alteration apparently occurred from attempting to enlarge the form on a copier.)

During this time, Petty had been assigned to the "bubble" – taking telephone calls. He was also not allowed to work off-duty. Petty sued, arguing that the agency had delayed his return by the return-to-work process, failed to reinstate him as a sergeant and denying him the ability to work off-duty. Initially, the trial court had ruled in favor of MPD in all claims except that relating to the off-duty. Following a trial, the Court ruled on that

in favor of MPD. Petty appealed. During the appeal, MPD continued their investigation and finally, Petty was terminated. His certification to work as a peace officer was terminated by their POST commission, as well.

In Petty I, the Court held that USERRA's reemployment provisions barred MPD from requiring Petty to undergo the return-to-work process and that it was exacerbated when they delayed his reemployment during the second investigation. The Court ruled that MPD should have fully reemployed Petty immediately. Learning only at the time of argument of Petty's termination, the Court recognized that might affect his actual assignment but remanded the case for further discussion. Upon rehearing, Petty added the claim of discrimination and retaliation in violation of USERRA. Upon remand, the District Court granted Petty summary judgment and ordered his immediate reinstatement to his former position and rank. He was awarded back pay and damages of approximately $180,000 and an additional $120,000 in partial liquidated damages. Appeals were taken on both sides, with Petty arguing only that he was entitled to full, rather than partial, liquidated damages.

ISSUE: Is a rehire under USERRA automatic?

HOLDING: Yes

DISCUSSION: The Court began by noting that "USERRA protects the job security of returning veterans," combining several different provisions to achieve this aim. The statute, 38 U.S.C. 4311-4316, protects "different phases of employment." One section covers rehire/return to work, another prohibits discrimination with respect to "any benefit of employment." In fact, the reemployment provision requires no showing of discrimination at all, but only requires that they meet four requirements: "proper notice to his employer in advance of his departure, a service period of less than five years, a timely request for reemployment accompanied by proper documentation, and a separation from military service under ;honorable conditions.'" If they do so, the service member must be rehired. However, other provisions of the law require a showing of actual discrimination based upon military service.

MPD argued that the case should have been analyzed as a discrimination case, arguing that the termination was based upon dishonesty. However, the Court noted, Petty was never restored to his previous position (as patrol sergeant) and that served as an ongoing violation of the reemployment provisions, not as a separate matter of reemployment. The Court ruled that although he was reemployed, he was never "fully reemployed" and his rights were limited, as well. The Court tracked all of the disputed issues "to his failure to provide answers and documentation relating to his military service."

The Court noted that:

> Though USERRA may permit Metro to terminate Petty for dishonesty after reemploying him, Metro never restored Petty to his position as patrol sergeant.

> Accordingly, we hold that the district court properly exercised its discretion in awarding Petty back pay and reinstatement under his reemployment claim.

With respect to the off-duty claim, MPD argued that he was on "administrative assignment" because of the investigation, and that status barred him from "engaging in extra-duty employment." The Court noted that if MPD's concerns about Petty related to his "conduct in service" than the denial of the benefit (to work off-duty) related back to his military service and was thus improper. Since the District Court had ruled that it had been so proven and ruled in favor of Petty.

After ruling on other procedural issues, the Court affirmed the District Court's ultimate rulings in Petty I.

FIRST AMENDMENT

<u>Patrizi v. Huff</u>, 690 F.3d 459 (6th Cir. 2012)

FACTS: In December, 2007, Pattrizi was at a nightclub with friends. Officers Huff and Connole responded to the club for an assault. The victim (Wallace) took them inside and pointed out the group that had assaulted her – that included Mills, who was in Patrizi's group. The officers directed them to the exit of the club to go outside, where it was quieter, to discuss what had happened. Patrizi, who was not with the group when they were initially approached, joined them outside. Officer Connole began to question Mills and Patrizi interjected. According to the officers, Patrizi began to give orders to Mills and to point into Connole's face, stating that Mills did not have to talk to the officer. Eventually Huff tried to pull Patrizi away and Patrizi "swung around" at him, stating she did not have to leave. Patrizi was arrested. Both officers later stated that Patrizi appeared intoxicated. Officer Connole later testified that Patrizi questioned him about why he was questioning Mills and that Patrizi identified herself as an attorney.

Patrizi was charged with obstructing official business, but the charges were dismissed. Patrizi filed suit under 42 U.S.C. §1983, arguing false arrest. The officers moved for summary judgment, which was denied, with the trial court concluding that "Patrizi's speech never constituted an affirmative act of obstruction under the ordinance."

Officers Huff and Connole appealed.

ISSUE: Does assertive (but not loud or disorderly) speech become impeding police business?

HOLDING: No

DISCUSSION: The Court looked to the Cleveland ordinance in question and noted that Ohio had interpreted the ordinance that it required an "affirmative act that interrupts police business." Even "truthful speech" can "satisfy the act element" if done to impede

an officer but noted that Ohio had only upheld convictions if the speech "involved yelling, cursing, aggressive conduct, and/or persistent disruptions after warnings from the police against interrupting the investigation." Ohio had case law that indicated that what Patrizi allegedly did "did not constitute an affirmative act under the obstruction ordinance." She was never, in fact, told to stop questioning the officers and she was not "aggressive, boisterous, or unduly disruptive."

The Court also addressed the question that arose in City of Houston v. Hill.[111] In Hill, the court ruled that the First Amendment "protects a significant amount of verbal criticism and challenge directed at police officers" and such laws must be narrowly tailored to prohibit "only disorderly conduct or fighting words." The Court agreed that "nonaggressive questioning of police officers is constitutional protected activity."

The Court upheld the denial of summary judgment.

COMPUTER CRIME – SENTENCING

U.S. v. Keefer, 2012 WL 3156439 (6th Cir. 2012)

FACTS: Keefer was charged with having over 600 images of child pornography on his computer. 1,215 images were found in the "unallocated space" on his computer, with only 39 images readily locatable in the hard drive. However, he was sentenced with having over 600 images and appealed. The trial court agreed that there was little evidence that he had knowledge of the images in the unallocated space and remanded for resentencing. On remand, a forensic computer examiner testified that 1,062 of the images had been viewed or downloaded as full-size images at some point. Keefer was again sentenced for having over 600 and appealed.

ISSUE: Are all images on a computer hard drive (especially in unallocated space) necessarily there intentionally?

HOLDING: No

DISCUSSION: The Court noted that although federal law may not allow for the enhancement, but that Ohio law does punish those who "voluntarily reach out and bring to their computer screen the images in question." The agent testified about "how images appear in a computer's unallocated space" and that the area of the hard drive in question was a "temporary storage area when files are opened or deleted." When a user deletes an image, it does not disappear but instead goes into that unallocated space where a normal user could no longer see it. However, he noted that attachments to unsolicited email via Yahoo, for example, don't automatically download, but must be clicked to "wind up on the user's computer." It can, however, also happen when a user visits a website, and the computer stores information to allow the next visit to load more

[111] 482 U.S. 451 (1987).

quickly. (If they are viewed as thumbnails, however, they will appear as thumbnails when stored. The same will occur for pop-up advertisements.)

The agent agreed there might be innocent explanations for some of the photos, but "such innocent explanations [were] never offered." In addition, some of the images were sent specifically to Keefer. The court agreed that "the circumstantial evidence" indicated that he knowingly viewed the images, not just possessed them.

The court upheld the sentence enhancement.