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LEGAL TRAINING SECTION

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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 516 - CRIMINAL POSSESSION OF A FORGED INSTRUMENT

Kilgore v. Com., 2014 WL 6674713 (Ky. App. 2014)

FACTS: On May 26, 2010, Kilgore forged Carroll's signature and cashed a Social Security check made out to her. Carroll had, in fact, died the previous month. A few months later, Kilgore was indicted for Theft and Criminal Possession of a Forged Instrument, 1st Degree, as well as PFO. He took a plea to the Possession charges and agreed to pay restitution. He failed to do so and his probation was revoked.

Kilgore filed a writ of coram nobis, arguing that since the amount was less than $500, at most, he could have only been prosecuted for Possession, 3rd Degree.[1] The Court disagreed, upholding his plea. Kilgore then appealed.

ISSUE: Does the degree of Criminal Possession of a Forged Instrument depend upon the nature of the instrument, rather than the amount?

HOLDING: Yes

DISCUSSION: The Court noted that the difference between the degrees of Criminal Possession does not turn on the value of the instrument, but instead upon the identification of the specific instrument, in this case, a federal check, a first-degree offense.

The Court upheld Kilgore's plea.

RESTITUTION

Porter v. Com., 2014 WL 4177436 (Ky. App. 2014)

FACTS: Porter had come into legal possession of Moore's guns, storing them for Moore in a gun safe. They lost contact and eventually, Porter sold all but one of the guns. That gun was returned to Moore ultimately. He was charged with Theft by Failure to Make Required Disposition, to which he pled guilty and he agreed to pay restitution. At a hearing, there was discussion on the number of guns, accessories and the gun safe and their total value, which Moore estimated to be in the area of $15,000. The Court ordered restitution of $15.590.17. Porter appealed.

ISSUE: May restitution be ordered for more than the amount that a charge would indicate?

HOLDING: Yes

[1] A petition for a writ of coram nobis is brought before the trial court to attempt to correct an error made by that court.

DISCUSION: Porter argued that since he pled guilty to a theft under $10,000, he could not be ordered to pay restitution over that amount, under Com. v. Morseman.[2] The Court disagreed with Porter's reading of Morseman, however, and ruled that the restitution order was valid. Further, the Court agreed that although the parties disagreed as to number and value, the trial court's decision was valid. (A clerical error, however, reduced it to $15.540.17.)

Killion v. Com., 2014 WL 3021316 (Ky. App. 2014)

FACTS: On July 6, 2012, Tomes reported the theft of jewelry from her home in Kenton County. The next day, most of the jewelry was recovered from a local pawn shop and Killion was identified. He eventually pled guilty to receiving stolen property and agreed to pay "all appropriate restitution." In a restitution hearing, Tomes testified as to the value of a diamond ring, which was reported stolen and not recovered. Complicating matters, however, was that her home had been broken into on July 9, 2012, and additional items were stolen. None of the items from that burglary were recovered and Killion was not charged with that crime. Restitution was ordered in the amount of $7,100. Killion appealed.

ISSUE: Must restitution be only for actual items taken?

HOLDING: Yes

DISCUSSION: The Court noted that the clear meaning of the plea agreement is that Killion agreed to pay for items taken in the first break-in that were not recovered, even though the amount was not initially given. However, since the value of a second ring, apparently taken in the later break-in, was included in the calculation, to that extent, the value of that ring ($600) must be deducted from the total.

Taylor v. Com., 2014 WL 3548056 (Ky. App. 2014)

FACTS: Taylor was charged in Jefferson County with the theft of jewelry, valued at over $10,000, from Crable. He pled guilty to Receiving Stolen Property in excess of $500 and agreed that restitution would be set in a hearing.

At the hearing, Crable's testimony proved the value of the property to be in excess of $19,000. Taylor appealed the restitution amount.

ISSUE: Must an owner have appraisals to get restitution?

HOLDING: No

DISCUSSION: The Court noted that the victim had "provided a detailed list of the unrecovered jewelry," including photographs and prices of similar jewelry. She also explained how she'd come to the price of each item, by averaging amounts garnered from the Internet. None of the items were insured or appraised but the Court disagreed that was necessary, noting that to require such would deny most people the right to seek restitution. The Court upheld the amount.

[2] 379 S.W.3d 144 (Ky. 2012).

Davis v. Com., 2014 WL 2983605 (Ky. App. 2014)

FACTS: On September 13, 2012, Davis was arrested in Tennessee, trying to pawn items stolen from the Murrays, in Bell County, that same day. He claimed to be selling the items for someone else but gave two different names. He was ultimately convicted of Burglary 2nd and appealed.

ISSUE: May restitution be ordered without some proof as to value?

HOLDING: No

DISCUSSION: Among other things, $600 in restitution was requested for a computer that was not recovered. At the hearing, there was no indication as to why the amount was requested, and no proof as to the value of the computer. Davis was given no prior notice as to what was going to be requested. The Court agreed and reversed the restitution amount, remanding the case for further proceedings.

DOMESTIC VIOLENCE

Echsner v. Echsner, 2014 WL 3406685 (Ky. App. 2014)

FACTS: At a DVO hearing, John Echsner alleged that Pamela Echsner had become verbally abusive in a bar and thrown a heavy item (apparently a purse) at a friend he was with there. That same night, both his and his friend's cars were damaged. John alleged Pamela had thrown other items at him during their marriage. He had been given an EPO as a result of his allegations.

At the DVO hearing, John alleged that he was fearful of what Pamela might do and that the violence was escalating. Pamela argued that she'd told John not to bring his new girlfriend to that bar. She declined to speak about the purse incident (criminal charges were pending) but denied the vandalism. She stated that John had struck her in the past.

The Court issued the DVO and Pamela appealed.

ISSUE: Is a representation as to legitimate fear (based upon facts) enough to support a DVO?

HOLDING: Yes

DISCUSSION: The Court agreed that John's allegations were sufficient to support a DVO.

Lewis v. Lewis, 2014 WL 3796276 (Ky. App. 2014)

FACTS: On December 22, 2013, Cathy Lewis requested an EPO/ DVO against her husband, Michael Lewis, in Jefferson County. At the hearing, she admitted she'd not witnessed an alleged act of vandalism and denied he'd ever injured her, although she stated that she feared him on the above date. (She had actually not sought an EPO on the date an initial incident occurred, but

decided to do so after her vehicle was vandalized at a later time.) She also claimed that he'd painted parts of the kitchen, damaged her clothing and her work computer. On his part, Michael denied he'd taken most of the alleged actions, although he did admit to the painting.

The Court concluded that Michael had caused the damage and that Cathy had reason to be fearful; it then issued the DVO. Michael appealed.

ISSUE: Does property damage qualify for a DVO?

HOLDING: No

DISCUSSION: The Court agreed that Cathy had "failed to establish that an act of domestic violence and abuse," under KRS 403.720(1), had actually occurred, as her testimony concerned almost entirely the destruction of property. Further, her admission was that she was not initially going to file a petition, but only elected to do so after a further act of vandalism occurred. The Court noted that destruction of property is not included in the definition of domestic abuse.

The Court reversed the DVO.

Baker v. Palmer, 2014 WL 3406681 (Ky. App. 2014)

FACTS: On February 25, 2013, Palmer requested a DVO against Baker. Although he did not live with Palmer at the time, the evidence indicated he had done so previously – as prior police reports and his driver's license address so indicated. The Court issued a DVO and Baker appealed.

ISSUE: Does a prior live-in relationship qualify for a DVO?

HOLDING: Yes

DISCUSSION: The Court agreed that the trial court had jurisdiction over the case, as the evidence clearly indicated that they had previously lived together. The Court upheld the DVO.

Johnson v. Fuqua, 2014 WL 4536346 (Ky. App. 2014)

FACTS: Johnson and Fuqua were unmarried and had a child in common. Fuqua filed for a DVO, claiming that during a dispute over the child, on the phone, Johnson stated that if she called the police, he would shoot her. She did call the police, and it was apparently categorized as a custodial dispute. Fuqua claimed that there was a pattern of such threats in the past. She received an EPO. At the DVO hearing, Johnson denied any threats and showed friendly texts exchanged earlier in the day. He claimed she only became angry because he was late at an exchange for the child, who was later picked up at a relative's house. The judge specifically made reference to other petitions filed against Johnson in the past. The DVO was issued and Johnson appealed.

ISSUE: Is evidence on prior DVO petition admissible?

HOLDING: No (generally)

DISCUSSION: Johnson argued it was improper to consider the prior petitions, under KRE 404(b). The Court agreed that as a general rule, "evidence of crimes or bad acts other than that charged is not admissible." The Court agreed that in some situations, however, it might be relevant. The Court found it to be erroneous, in this case, but further, that despite that error, the proper evidence supported the DVO.

DUI

Grannis v. Com., 2014 WL 4267437 (Ky.App. 2014)

FACTS: On July 9, 2011, at about 4 a.m., Grannis rear-ended a vehicle occupied by Simms, Thoroughman and Dunigan. Grannis was intoxicated at the time. The crash occurred in Mason County. All were injured, Thoroughman most seriously. Grannis asked Simms not to call the police but she said she had no choice. She could "smell alcohol on Grannis." At some point, it was alleged, Grannis acted as if he would strike Simms. Barker and Chaney came upon the scene and also later testified that Grannis appeared intoxicated. His conduct indicated he was trying to find a way to leave the scene. Deputy Gallenstein arrived and secured Grannis. He was given and failed four FSTs. He admitted he'd been drinking in the adjacent county, Fleming. Grannis was arrested for DUI and transported by Sheriff Boggs. At the jail, his Intoxilyzer came back at .106.

Grannis was indicted for Assault 1st, Wanton Endangerment 1st and DUI 2nd. He was convicted. and appealed.

ISSUE: Is evidence of drinking just before driving, and evidence of high speed relative to road conditions, sufficient to prove wanton behavior?

HOLDING: Yes

DISCUSSION: Grannis argued that he should not have been convicted of Assault, because there was insufficient proof of wantonness. (He did not appeal the Wanton Endangerment convictions.) The Court looked to the definition of wanton, KRS 501.010 and noted that the Commonwealth had to prove that Grannis was aware of the risk and the facts making driving dangerous and later intoxication could not be used to negate the intent to commit the crime. Kentucky courts had "considered driver impairment, inattentiveness, and evidence of a defendant ignoring the conditions of the road, among other factors of wantonness, in motor vehicle accident cases." There was, however, no checklist and juries are to examine the specific facts of each case.

Grannis had admitted to drinking immediately prior to the wreck, which was at night and under foggy conditions. He was also driving at "a significant speed relative to road conditions." In addition, evidence of calls he made from the jail indicated that "he had a habit of not keeping his 'eyes glued,' and that there was 'no one on State [the state highway].'" The Court agreed the evidence was sufficient to support his conviction.

Grannis also argued that the testimony of Barker and Chaney had not been provided to him pursuant to RCr 7.24. He had moved to have it excluded, which the trial court denied. However, the statements to which Barker testified about were included in the report submitted by the deputy,

so the purpose of the rule was "not undermined." Other statements that might have been arguably improper were simply

SEARCH & SEIZURE – SEARCH INCIDENT TO ARREST

Jackson v. Com., 2014 WL 3401164 (Ky. App. 2014)

FACTS: On January 17, 2012, Officer Smith responded to a burglary and theft of an air conditioning unit in Hopkinsville. As he approached the scene, he spotted an individual matching the general description of the suspect. The individual walked up to the officer and presented a Kentucky ID card, with Jackson's name. The address was apparently incorrect and Officer Smith questioned the man about it. (It listed a street that only had commercial structures.) "Jackson gave extremely evasive answers, grew nervous as questions progressed, and appeared as if he were about to flee."

When asked about weapons or contraband, "Jackson brought his hands to the center of his waist, stepped back, and answered in the negative." Officer Smith grabbed Jackson's left shoulder and Jackson struck the officer in the chest. The officer lifted him up against the car, Jackson struggled and got out of his shirt and jacket. A firearm fell to the ground and Jackson fled. He was arrested at some point later and charged with a variety of offenses. He moved for suppression, which was denied. Jackson then took a conditional guilty plea and appealed.

ISSUE: Does "flight behavior" justify a frisk?

HOLDING: Yes

DISCUSSION: Jackson argued that the officer lacked reasonable suspicion to seize and frisk him. Officer Smith testified as the details of the encounter, which took place at around 5 a.m. During the encounter, he testified that Jackson "displayed 'flight' behavior" by nervously looking all around rather than focusing on the officer. When he asked about possible weapons, Smith said he "did not want to be searched and that he felt harassed." The Court agreed that the circumstances were appropriate for a frisk and upheld the plea.

Green v. Com., 2014 WL 4527834 (Ky. App. 2014)

FACTS: On January 26, 2013, Chief Evitts (Clay PD) and Troopers Kromer and Braden (KSP) went to Green's home due to tips about methamphetamine manufacturing. Their intent was to do a knock and talk. As they approached, they "smelled the distinct chemical odor associated with active methamphetamine labs" near the basement door. They spotted a fog flowing out of the basement door, indicated that the occupants were "smoking out." The officers heard voices and a vacuum and they pounded on the door. The voices stopped but there was no sound of anyone coming to the door. Trooper Braden and Chief Evitts kicked in the door and went in, just as Trooper Kromer knocked on the front door. He also entered and heard his fellow officers downstairs. Meanwhile, the two downstairs had "encountered a thick fog" and found Green and Easley standing over items that are components of meth labs. They were immediately brought outside and the doors and windows opened to dissipate the fumes.[3]

[3] Trooper Braden in particular is certified in lab cleanup.

Outside they spoke to the two men and Green took full responsibility, claiming Easley was just an observer. Green gave written consent to search and ultimately, evidence was found in the house. Green was charged and asked for suppression, which was denied, the trial court finding exigent circumstances to justify the entry. Green took a conditional guilty plea and appealed.

ISSUE: Does a meth lab justify an exigent entry?

HOLDING: Yes

DISCUSISION: Green argued that the entry exceeded the bounds of a knock and talk, their initial intention. The Court agreed that the "exigent circumstances at the residence changed the character of the investigation and justified their entrance." The Court applied the third exception of Kentucky v. King, that of prevention of destruction of evidence.[4] They readily recognized that a meth lab was present, active and extremely dangerous.[5] As such, under the emergency aid exception, the officers' entry was also appropriate.

The Court affirmed Green's plea.

Agee v. Com., 2014 WL 3795492 (Ky. App. 2014)

FACTS: On September 25, 2009, at about 11:30 p.m., Officer Spalding (Richmond PD) responded to a complaint of a woman smoking and possibly doing drugs in the Waffle House restroom. As he arrived, he spotted Agee and asked if they could speak outside. Officer Petry arrived, and later noted that Agee was "fidgety," "scratchy," her pupils constricted and her speech slurred. She admitted to taking Dilantin for seizures and to having smoked crack several days before. She also admitted to taking Lortab, Tramadol and Valium that day. Corp. Eaves was summoned to the scene. Officer Spalding told Agee to empty her pockets, which she did, but refused a request to search her purse and backpack. Corp. Eaves arrived and did a frisk; nothing was found. Agee failed at least the HGN FST, although there was dispute as to whether other tests were performed. She indicated she wanted to leave and was driving. Officer Spalding refused to allow her to drive and arrested her for public intoxication. She was advised of her Miranda rights; Officer Petry searched her purse and backpack. Heroin, cash and paraphernalia were found.

Agee moved for suppression, arguing the stop was improper. The Court disagreed. Agee took a conditional guilty plea and appealed. Initially, the appellate court upheld the search, but the Kentucky Supreme Court overruled, not on the merits of the search, and remanded it in light of Frazier v. Com.[6] The Court of Appeals took up the case once again.

ISSUE: May a Terry stop be extended by facts as developed during the stop?

HOLDING: Yes

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[4] 131 S. Ct. 1849 (2011).
[5] See Bishop v. Com., 237 S.W.3d 567 (Ky. App. 2007); U.S. v. Atchley, 474 F.3d 840 (6th Cir. 2007); Pate v. Com., 243 S.W.3d 327 (Ky. 2007).
[6] 406 S.W.3d 448 (Ky. 2013).

DISCUSSION: The Court reviewed Frazier and noted that in that case, the "officers lacked any specific and articulable facts to justify" a frisk. Applying the same analysis as used in Frazier, the Court noted that even Agee agreed the initial stop was a valid one. She did not challenge the frisk because no incriminating evidence was found. Instead, she argued that the detention went on too long to be a Terry stop.

The Court agreed that Officer Spalding had a credible reason to detain Agee initially, and further, that he had probable cause to arrest her for public intoxication. At that time, her backpack was on the trunk, a few feet away from her. The Court noted that Arizona v. Gant[7] and Davis v. U.S.[8] dealt with the search of vehicles and the backpack was not inside the vehicle at the time. Further, Gant does permit a search when it "was reasonable to believe that evidence of the crime of arrest would be found." In addition, the backpack was unsecured and out in the open, so that her expectation of privacy was much less as well. Finally, she had been carrying the backpack when initially stopped and it would have been taken to the jail, and searched, at that time.

The Court concluded that the search was lawful and upheld Agee's conviction.

SEARCH & SEIZURE – CONSENT

Widdifield v. Com., 2014 WL 4656840(Ky. 2014)

FACTS: Deputy Emmick (Hancock County SO) and Trooper Gaither (KSP) arrived at the Widdifield home to arrest Allan on an outstanding warrant. Allan approached them from his garden and they explained why they were there. He surrendered a weapon in his pocket, was given Miranda and secured in the cruiser. Later, Deputy Emmick stated he told Allan that the Owensboro PD had told him that there was drug activity on the premises, and Allan acknowledged there was contraband, proceeding to show them the evidence in specific locations (a shed and on the tree line). The officers "uncovered evidence of the manufacture of methamphetamine during their inspection of the shed and tree line," as well. Deputy Emmick asked Allan for consent to search the house; Allan agreed. However, when they tried to enter, Jacqueline Widdifield refused. When they learned who she was, however, she was found to have an outstanding warrant and arrested.

At that point Allan withdrew his consent and Deputy Emmick left to obtain a warrant. When he returned later, methamphetamine was found inside a lockbox in a closet, and several loaded firearms were found as well. The Widdifields told a different story, claiming that Allan never let them search any part of the property. Jacqueline was indicted for drug and firearm-related offenses; she moved to suppress evidence found in the shed and home. The Court denied the motion. She was convicted and appealed.

ISSUE: May external facts be used to support a consent?

HOLDING: Yes

[7] 556 U.S. 332 (2009).
[8] 564 U.S. – (2011).

DISCUSSION: The Court agreed that "consent to search is a question of fact." The Court found that the deputy's testimony surrounding the consent was "detailed and through" and convincing. He noted that Allan had said he was responsible for any marijuana found in the property and that that Jacqueline did not want the residence searched because she did, occasionally, use it. Further, the deputy stopped the search when consent was withdrawn and thus the evidence indicated he was abiding by the denial. Trooper Gaither supported his testimony.

Further, he was advised of his Miranda rights and admitted to drug activity on the premises. His offer to escort the officers around the property was voluntary. The search of the house only came after a warrant was obtained and that was based on observations made during the walk-through of the property.

The Court upheld her conviction.

SEARCH & SEIZURE – CARROLL

Hedgepath v. Com., 441 S.W.3d 119 (Ky. 2014)

FACTS: On January 17, 2010, at about 10 a.m., Hedgepath called 911, in Union County, and reported that Reyes, his girlfriend, would not wake up. She was airlifted to the hospital, where it was discovered she had suffered a blow to the head and had a subdural hematoma. She also had a number of other serious injuries, including broken ribs, a lacerated liver and spleen and lung bruising. She subsequently died.

Hedgepath claimed an ex-boyfriend had beaten her while he wasn't home. He left, supposedly to go to the hospital, but instead, dropped Reyes's children with their grandmother. Det. Whittaker (KSP) looked for him at the hospital. He was concerned about the situation and ultimately had the cell phone company "ping" Hedgepath's phone. Det. Whittaker learned the next morning that his phone was at a specific apartment complex. About the same time, Hedgepath called KSP and he was patched through to Whittaker, who asked Hedgepath to meet him at the KSP post in Henderson. He agreed to do so.

At the post, Hedgepath was interrogated by Whittaker. He denied any involvement and reiterated his claim that an ex-boyfriend had beaten her. Ultimately, the police seized his phone, finding the SIM card missing. However, on the phone itself, found inside the vehicle he drove to the post, they found "ten highly incriminating videos" made on January 15 that depicted a sexual assault, which included Hedgepath using a "bottle" on her, and her objecting.

Hedgepath was charged with Rape, Sodomy and Murder, for events that occurred over several days. Denied suppression, he took a guilty plea and appealed.

ISSUE: Does evidence (not necessarily contraband) in plain view justify a Carroll search?

HOLDING: Yes

DISCUSSION: With respect to the cell phone pinging, Hedgepath argued that under 18 U.S.C. §2702, Det. Whittaker was required to submit an affidavit to the company "which allows a cell phone provider to divulge information about a customer in various circumstances, including 'if the provider, in good faith, believes that an emergency involving danger of death or serious physical injury to any person requires disclosure without delay of information relating to the emergency." Det. Whittaker did so, basing his request on the need to location the two children, believed to be in the company of a man not their father, who was also a suspect in a homicide. At the time of the initial request, he learned the phone was turned off. A little later that same day, he learned the children were safe, but he did not cancel his request, and learned the next morning of Hedgepath's whereabouts, when he apparently turned the phone back on. Although he verified that Hedgepath's car was there, he took no further action, since Hedgepath had independently called KSP.

The Court noted that "whether the location information of a cell phone is entitled to constitutional protection under the Fourth Amendment is an open question." State and federal courts around the U.S. have ruled in a different manner on the issue. However, in this case, it was unnecessary to address the issue, since no evidence was derived as a result of the ping. The incriminating phone evidence used was not discovered as a result of the ping.

Hedgepath further argued that the seizure and search of his vehicle was improper. He had asked to have the vehicle released to his sister, but instead, the detective had seized it, as he could see the phone which had been left inside. He also knew by that time that the vehicle was registered to someone else (in Indiana) and lacked insurance. He obtained a search warrant for the vehicle and a separate apartment, requesting among other things, a cell phone. The Court agreed, however, that given what the detective knew, he could properly hold, and even search, the vehicle, under Carroll v. U.S. Further, there was no exigency needed to do so.[9] The detective clearly had probable cause that it contained potential evidence. In fact, the Court noted that he could have searched the vehicle immediately, rather than electing to wait for a warrant.

With respect to the search of the phone, the Court noted that Hedgepath certainly did have an expectation of privacy in its contents.[10] However, that does not make it immune from search. The detective obtained a search warrant that specifically included the phone and the thrust of the warrant was for evidence of any assault on Reyes. The court agreed that the "search warrant and affidavit were sufficiently particular, both as to the cell phone and the type of evidence sought, to make the search of the cell phone reasonable."

Finally, Hedgepath argued that the recorded statements of Reyes' children should have been admitted. At the time of trial, the children could not be found, having presumably been taken to Mexico by their father. At an initial interview, the children stated that "Bobby Jo" had assaulted their mother, but later identified Hedgepath. He argued that the statements impeached the credibility of the officer. The court had excluded it as Aaltperp evidence – alleged alternative perpetrator.[11] While such evidence is often admissible, it is not automatic, and it was later determined the individual in question was incarcerated at the time of the crime. As such, along with

[9] Maryland v. Dyson, 527 U.S. 465 (1999).
[10] Riley v. California, 134 S. Ct. 2473 (2014).
[11] Beaty v. Com., 125 S.W.3d 196 (Ky. 2003).

the cell phone evidence that was "as close to the proverbial smoking gun as it gets," it was proper to exclude it.

The court upheld his conviction.

SEARCH & SEIZURE – PRIOR LAW

Parker v. Com., 440 S.W.3d 381 (Ky. 2014)

FACTS: On January 12, 2009, Officer Reccius (Louisville Metro PD) made a stop of Parker's car after observing it weaving. He learned that Parker's OL was suspended so he had him get out and come to the rear of the car where he was questioned. Officer Reccius searched the car while Parker, not restrained, was under the eye of another officer. Officer Reccius found a loaded handgun and marijuana. Parker, a convicted felon, was arrested. He was further indicted for DUI. He moved for suppression, which was initially granted based upon Arizona v. Gant.[12] The Commonwealth filed an appeal and the trial court's decision was overturned. He appealed.

ISSUE: Is a search under current law valid, when the law later changes?

HOLDING: Yes

DISCUSSION: The Court noted that that time of the original stop, New York v. Belton was controlling law.[13] Gant, decided a few months later, is now controlling law that was officially recognized in Kentucky by Rose v. Com.[14] Although the Court agreed that pursuant to Griffith v. Kentucky, Gant is to be applied retroactively, it was not proper to suppress the contested evidence[15] as the officer was relying in good faith on Belton.

The Court noted that the "dissonance between Gant, Griffith, and Davis,[16] paints the law in shades of gray where blackletter is desperately needed." The Court noted that the rule is that when evidence is obtained unlawfully, suppression is warranted as the results are inadmissible. However, exceptions exist to that rule, including U.S. v. Leon, which permits the admission of evidence when found by officers acting in "objectively reasonable reliance" on a flawed warrant.[17] Most germane is U.S. v. Davis, however, which did not require suppression of a weapon found in a pre-Gant search, ruling that ""when the police conduct a search in objectively reasonable reliance on binding appellate precedent, the exclusionary rule does not apply."

Applying Davis, the Court noted that

> Law enforcement officers are the vanguard of our legal system. They operate in real time without the benefit of judicial hindsight and must rely on their training and experience. Here, Officer Reccius testified that the search of Parker's vehicle complied with the training he

[12] Supra. Note, however, that this stop occurred before Gant was decided on April 21, 2009.
[13] 453 U.S. 454 (1981). *see also* Henry v. Com., 275 S.W.3d 194 (Ky. 2008)
[14] 322 S.W.3d 76 (Ky. 2010).
[15] 479 U.S. 314 (1987).
[16] Davis v. U.S., 131 S. Ct. 2419 (2011).
[17] 468 U.S. 897 (1984).

> received prior to the search and that this type of search was common practice in his police department at that time. Reccius further testified that since the contested search in this case, he was informed by the Louisville Metro Police Department's legal division and his superiors that automobile searches must now comply with Gant. This is exactly the type of diligence and prudent instruction that should be encouraged.

The Court affirmed the vacating of the suppression order on the evidence found in Parker's car and remanded the case for further proceedings.

INTERROGATION

Gregory v. Com., 2014 WL 3406683 (Ky. App. 2014)

FACTS: On June 21, 2012, Gregory was taken into custody following a police chase in Shively. He was taken to the station and placed in an interrogation room. Sgt. Vittitoe and Officer Walker told Gregory they wanted to question him but first gave him Miranda warnings. He signed a waiver form. He was questioned for just under than 30 minutes. He admitted to being addicted to crack and heroin, and then stated he'd used drugs that night before. He explained he'd stolen a car that night before and cashed some checks he found in the car. The officers told him they appreciated his honesty and "would do what they could be help him because of it." He was then further questioned about criminal activity on June 18-19 and admitted he's stolen another car, cashed forged checks and broke into a home. They again promised to "try to help him out" in court.

At that point, two LMPD officers entered and questioned him about cash found on his person. He admitted having cashed a forged check at a local bank and confirmed the amount. Throughout the interview, he "expressed fear that he was going to go to prison for a very long time." They assured him he would not get a life sentence and that his willingness to talk boded well for him at sentencing. They encouraged him to "focus on getting clean." He told them he was starving and they told him they'd try to "locate some food for him." That interview took about 13 minutes.

Gregory was indicted for Burglary 1st, multiple counts of Possession of a Forged Instrument, Robbery and related charges. He filed for suppression, arguing his confession was not voluntary, but was denied. He took a conditional guilty plea and appealed.

ISSUE: Must all officers appear at a suppression hearing?

HOLDING: No

DISCUSSION: The Court noted that it used three criteria to determine whether a confession was voluntary. First, "whether the police activity was objectively coercive," second, "whether the coercion overbore the will of the defendant" and third, "whether the defense showed that the coercive police activity was the crucial motivating factor behind the defendant's confession."[18]

First, he argued that since only one of the four officers present testified at the suppression hearing, it was improper – however, the Court noted, his entire interview was recorded and played at the

[18] Henson v. Com., 20 S.W.3d 466 (Ky. 1999).

hearing. The officer that testified had personally witnessed the signing of the waiver as well. Further, with respect to the waiver, Gregory argued he was "intoxicated and/or paid little attention to the Miranda warnings" and that he signed the form without reading it. The Court noted that under Smith v. Com., intoxication alone doesn't warrant suppression.[19] The Court had the opportunity to actually view his behavior on the video and found him to be "listening, engaged, and comfortable throughout the interview." The waiver was read to him and there was no indication he was rushed or pressured, and he had every opportunity to view it.

He argued he was held in a hot car and deprived of food, but the evidence showed that he was provided a drink at the outset of the interview. Only at the end of the interview did he mention he was hungry. Although he was apparently held in handcuffs, he did not indicate any discomfort. He complained that he was in a "delicate mental and emotional state." However, the Court found no indication that they "preyed upon some vulnerable mental state." The Court found that the "promises" were not improper.[20]

The Court upheld his confession.

INTERROGATION – JUVENILE

A.K.M. V. Com., 2014 WL 3887910 (Ky. App. 2014)

FACTS: A.K.M. was accused of entering Powell County High School and stealing money from a classroom. The principal questioned the student, first in a hallway and then in a teacher's lounge, about it, advising him to tell the truth and reminding him there was an officer at the school. He admitted his involvement.

The principal then walked A.K.M. to the office were Officer Townsend and Pickelsimer (a Dept. of Juvenile Justice worker) were waiting. They had arrived on an unrelated matter. The principal told Officer Townsend about the confession and the officer immediately gave the student his Miranda warnings. By phone, his mother gave the officer permission to talk to him A.K.M. stated several times that he did not "want to tell on myself" – but eventually confessed. At his adjudication hearing, A.K.M. moved for suppression of his statement, which was denied. He took a conditional guilty plea and appealed.

ISSUE: Does questioning by a school official (with no law enforcement involvement) require Miranda?

HOLDING: No

DISCUSSION: A.K.M. argued that he should have been given Miranda before being questioned by the principal. The Court noted, of course, that "school principals are not law enforcement officers." Unlike the case in N.C. v. Com., there was no indication that the principal in this case was acting in concert with law enforcement.[21] In fact, he testified that they generally did

[19] 410 S.W.3d 160(Ky. 2013).
[20] See Peak v. Com., 197 S.W. 3d 536 (Ky. 2006).
[21] 396 S.W.3d 852 (Ky. 2013).

not involve law enforcement until school personnel had done an investigation. The officer was "only coincidentally present" at the school. The Court elected to interpret N.C. narrowly to its facts.

With respect to questioning by Townsend, after A.K.M. stated he did not want to tell on himself, was a violation of his Fifth Amendment right to silence. The Court agreed that interrogation should have ceased after that invocation and that any statements he made after that time were inadmissible.

TRIAL PROCEDURE / EVIDENCE – PROOF

Kessinger v. Com., 2014 WL 4657568 (Ky. 2014)

FACTS: On April 2, 2010, Martin called the Louisville Metro PD to report his girlfriend, Tanselle, was missing. Det. Leish (properly Leitsch) began an investigation and interviewed a number of individuals, including Kessinger. The pair were co-owners of a new business that had not yet opened, and in addition, Kessinger "kept property in Tanselle's name." He lived in house owned by Tanselle and it was later discovered, a large marijuana grow operation was at that house.

On April 4, Kessinger said he'd last seen her on April 2. Another witness reported that Tanselle had been upset with Kessinger over a conversation. Kessinger would not tell the detective where he was living but eventually, they connected him to the house owned by Tanselle. On April 5, Dets. Hamilton and McNamara went to that house and found Kessinger there, and he agreed to follow them to the police station for an interview. They asked another officer to investigate marijuana they'd spotted in a vehicle at the house. However, during the trip to the station, Kessinger took off, leading a chase that eventually went into Indiana. He was captured and marijuana was found in the truck. In addition, the police found a receipt "reflecting the purchase of duct tape and a tarpaulin on April 4th." Kessinger admitted that he grew the marijuana found at the house for personal use, and claimed he was concerned about being linked to Tanselle's disappearance. A further search of the house "uncovered spatterings of Tanselle's blood" at the house. Her phone was found near the house. Eventually, on April 8th, her body was found hidden in a van about a half mile away, parked in an apartment complex lot.

Kessinger was indicted for murder and related charges. He claimed that Tanselle had died for some reason and he simply hid the body. Tanselle's cause of death was either asphyxiation or a heart attack, it was undetermined because her advanced state of decomposition made it difficult to determine external trauma. The witness did identify a potential rug burn on her face but found no stab or gunshot wounds. Alcohol, hydrocodone and oxycodone were found in her system but it was not possible to quantify it.

Kessinger was convicted of murder and appealed.

ISSUE: May circumstantial evidence prove a murder?

HOLDING: Yes

DISCUSSION: Kessinger argued that since the Commonwealth could not prove that Tanselle was murdered, rather than dying of natural causes, he could not be convicted of murder. The Court, however, noted that his behavior, as well as the blood and other evidence found in the house that indicated a struggle, along with evidence of an "acrimonious relationship" was sufficient to allow the jury to find homicide. Further, the most compelling evidence was his behavior after her death, concealing the body, as well as his evasion about his home address. The Court agreed that 'flight and attempts at concealment are circumstantial evidence of guilt as they 'suggest a guilty state of mind.'"[22] Further, circumstantial evidence as to the "corpus delicti" – the body of the crime – was also sufficient proof.

The Court agreed that the proof (and the jury instructions) was sufficient to uphold his conviction.

TRIAL PROCEDURE / EVIDENCE - TESTIMONY

Kotarek v. Com., 2014 WL 4520459 (Ky. App. 2014)

FACTS: On March 6, 2010, Matlock and Howard, 13 year old girls) were walking on Old Highway 54, near Philpot, at about 6 p.m. They were to meet another friend, Huff, who was walking towards them. Earlier that day Kotarek had been moving furniture, with the help of the Schmitts, during which time he drank a quantity of beer. On his way home, he was to pick up fast food. As he drove on Hwy 54, he crossed the center line and struck Matlock, causing fatal injuries. Both Matlock and Huff saw the vehicle, but only for a few seconds. Later evidence indicated that Kotarek's vehicle sustained damage during the same time frame, he later told one of the Schmitts that he'd struck a deer.

During that same time frame, Hawkins, driving on Hwy 54, came across the scene and called 911. The vehicle was described as red. Further investigation by Deputy Spurrier indicated the vehicle, which left debris, was likely an old Ford Bronco. He obtained a list of all similar vehicles registered in the area and began a canvass.

The next day, Kotarek washed the vehicle. Soon thereafter, Det. Spurrier discovered that Kotarek had sold the vehicle - which had been made undrivable as a result of a one-car crash - and discovered the new owner was parting it out. They were able to retrieve it and examine it, finding the damage and missing pieces to be consistent with the items recovered. Physical evidence was also found at the scene that matched with Matlock. Matlock was questioned and denied any involvement in the hit and run. He did admit to having been drinking that night, however.

Following a number of evidentiary rulings, Matlock stood trial. He completely denied his involvement, but was convicted. He then appealed.

ISSUE: May lay witnesses testify that a vehicle is speeding?

HOLDING: Yes

[22] Fugate v. Com., 445 S.W.2d 675 (Ky. 1969).

DISCUSSION: First, Kotorek argued that the two girls should not have been permitted to testify that he was driving fast, although neither estimated a speed. Both girls were very familiar with the road and normal traffic. As such, their testimony could be weighed by the jury.

The Court had agreed to hold back the police report, which provided an estimate of speed. The Court had agreed prior to trial it would not be used unless Kotarek opened the door to it, but did allow it to be admitted on the first day and allowed the officer to testify about projected speed at time of impact. It allowed that the defense could challenge the investigators conclusions during cross-examination. With respect to admitting the report, however, the Court noted that several factors were identified on the report. The report itself could be considered hearsay, and while improperly admitted as evidence, it was simply cumulative of testimony already given.

With respect to his degree of intoxication, the Court agreed it was not proper to conclusively state he was intoxicated, but that it was absolutely proper to admit testimony as to what he was observed as doing – drinking beer.

The Court upheld his conviction.

Com. v. Rosario-Ramirez, 2014 WL 3887934 (Ky. App. 2014)

FACTS: Ramirez was charged with the 2005 murder of two men in Bourbon County, charges that were later amended down to kidnapping (with victim death) and related charges. Multiple defendants were implicated. At trial, when an interview tape of his interrogation was to be used, he moved to redact from the recording the detective's questions and statements and suggested if the jury "needed context for the answers on the tape, the detective could provide it from the witness stand." The Court argued that it wasn't a confession, as Ramirez did not admit to involvement in the homicides. "It maintained that the interview was a typical police interview including the interviewer making up lies to get information from the defendant."

The jury was permitted to hear the entire tape. Ultimately, Ramirez was convicted of complicity to commit kidnapping. He requested a new trial, which the court agreed to give him. The Commonwealth appealed.

ISSUE: Is the playing of a police interview for a jury sometimes "limited" by the court?

HOLDING: Yes

DISCUSSION: The Court looked to Lanham v. Com., which held that "allowing police statements that accuse the defendant of lying could confuse jurors."[23] This might be remedied by the giving of a limiting admonition before allowing the jury to hear the recording. In this case, however, the "statements go beyond merely challenging Ramirez's veracity but his character (fighting, drinking and cheating) as well, and it was important enough to the jury that it requested it during deliberations." Some of the statements bolster the credibility of other witnesses as well, which was also not permitted.

[23] 171 S.W.3d 14 (Ky. 2005).

The Court upheld the order for a new trial.

Lee v. Com., 2014 WL 4160143 (Ky. 2014)

FACTS: Lee shared a home in Greenup, with his wife, Leslie. On March 4, 2011, at 6:48 a.m., he called 911 to report his wife had been killed. EMS and deputy sheriffs arrived and Det. Bocock did a "walk-through video," documenting evidence. When the deputy coroner arrived, they discovered two stab wounds in her neck, which caused her to exsanguinate. Rolling her over, they also discovered a glove that was caught up in the victim's shirt. Lee gave a statement that he'd left the house to drive around and when he returned, he found the door open to the residence. He denied having harmed his wife. He also reported that their bulldog had also been missing when he returned home. He pointed to members of a motorcycle gang as suspects.

Lee was charged, however, with murder. During the trial, his first wife had testified that they were planning to reunite. Further, a neighbor testified that no stranger could have gotten past the dog, which was ultimately found some ten days later in the area where Lee had taken his "drive" on the night of the murder. The glove was of the type that had been issued to Lee, by his employer. Most damning, one of Lee's cellmates had testified that Lee had confessed to him. During the trial, the neighbor witness mentioned that he'd been willing to take a lie detector to prove he was telling the truth. Lee was convicted and appealed.

ISSUE: Is a mention about a polygraph automatic grounds for a mistrial?

HOLDING: No

DISCUSSION: During the neighbor's testimony about the dog, when he spontaneously noted that he'd offered to take a lie detector, an immediate motion for a mistrial was made. The Court admonished the jury to ignore the statement but denied Lee's motion. The Court agreed that mentioning the polygraph was improper but that the mere mention of it doesn't invalidate a trial.[24]

With respect to his confession, the Court ruled that an earlier ruse by the detective, to get Lee to agree to a polygraph, was not so coercive as to have tainted the confession he gave some months later. Nor was there any indication that the cellmate was an agent of the officers.[25]

The Court upheld his conviction.

Clay v. Com., 2014 WL 4160134 (Ky. 2014)

FACTS: Clay lived with Kays, in Franklin County, along with Kays' infant granddaughter, Sally. As Sally grew up, her mother, Ashley, took over responsibility for the child; Clay and Kays broke up. Clay remained in contact with Ashley, providing her with financial assistance. On the day in question, Clay drove her to several appointments and then returned to her apartment, which she shared with her three children. He then proceeded to drink a quantity of beer. When it was time to put the children to bed, he offered to help tend to Sally and her brother

[24] Phillips v. Com., 17 S.W.3d 870 (Ky. 2000).
[25] Maine v. Moulton, 474 U.S. 159 (1985); Massiah v. U.S., 377 U.S. 201 (1964); U.S. v. Henry, 447 U.S. 264 (1980).

but Ashley told him to leave the bedroom. When she returned a few minutes later, she found him leaning over Sally. She later confirmed that Clay had orally sodomized Sally.

Ashley called the police; Clay left. Officer Hankins took a statement and then confirmed Clay was involved in a foot chase, nearby. He was interviewed by Det. Riley that same day, Clay admitted to the activities of the day but denied any sexual contact. He downplayed his relationship with Ashley and claimed not to know the names of the children. He was tried for Sodomy, convicted and appealed.

ISSUE: Are forensic interviews testimonial?

HOLDING: Yes

DISCUSSION: Clay argued that his statements to Riley were made without the benefit of Miranda, which was acknowledged by the court. However, because Clay allowed considerable information to be admitted before objecting, that constituted a waiver to that objection.

He also argued that the admission of the video of Sally's interview at an advocacy center was improperly admitted. The Court agreed that such forensic interviews are specifically to collect information for law enforcement. However, the Commonwealth argued that the statement was not hearsay because it was "not offered to prove the truth of the matter asserted." The Court ruled that the questions asked "provide nothing more than context for Sally's answers." Sally, in turn, was available at trial and was subject to cross-examination, so her answers were admissible as well. Further, Ashley's statement as to what Sally told her was an excited utterance and was also admissible under KRE 803(2), as the statement was made moments after the event, with little opportunity or reason for fabrication, and when the child was to some degree upset, although not hysterical. It took place at the same location where the event occurred and there were ample physical and other corroborating evidence that something had occurred, as well. Sally had nothing to gain or lose by making the claim.

With respect to Sally's statements during the forensic interview, the Court agreed they were legally hearsay. The Court stated that "this scheduled, testimonial, out-of-court interview is inadmissible hearsay." The Court noted concern "about the frequency with which similar inadmissible interviews are being admitted into evidence" without regard to the KRE. Other instances of witnesses repeating Sally's statements were also rejected. Finally, the Court agreed that Riley improperly bolstered Ashley's statement by nothing he found her truthful, which is improper. Also, Sally, age 8 at the time of the trial, was properly ruled competent to testify.

However, the Court agreed, ultimately, that the errors did not raise to the level that reversal of his conviction.

Lewellen v. Com., 2014 WL 4656861 (Ky. 2014)

FACTS: On January 5, 2013, at about 9 p.m., Lewellen's vehicle was spotted "parked and blocking the public road with a door open and dome light on" in Muhlenberg County. Trooper McGee (KSP) immediately suspected narcotics when Lewellen could not perform a FST. He searched the vehicle but found nothing. He advised Lewellen that taking contraband into the jail was a felony, but he denied he had anything on his person. He was taken to the hospital for a blood

test and then to the jail. Because he wore a prosthetic right leg, Deputy Jailer McPherson assisted him in removing the shoe on that limb, whereupon, a wrapped packet fell out. Lewellen asked it be thrown away and offered the deputy jailer a large amount of money to do so. Instead, he gave the object to Trooper McGee, who recognized it as methamphetamine.

Trooper McGee gave Lewellen Miranda warnings. He admitted he had purchased the drug and stated he'd tried to get rid of it but could not access the shoe to do so.

Lewellen was charged with promoting contraband and PFO. He was convicted and appealed.

ISSUE: Is it proper to question about a defendant's impaired state?

HOLDING: Yes

DISCUSSION: First, during cross-examination, Trooper McGee testified that ingesting methamphetamine "would impair all cognitive functions of the brain." He stated that Lewellen "had difficulty following his instructions and was clearly intoxicated." The defense counsel's further questions, as to whether Lewellen should have been able to understand the directions, drew an objection which was sustained. Lewellen argued that preventing that line of questioning kept him from showing he lacked the necessary mental state for promoting contraband – knowing. However, despite any potential testimony, Lewellen himself had admitted that he tried to remove it before arriving at the jail, a clear indication that he was acting knowingly.

Lewellen argued that the bailiff in the case had not been properly sworn under RCr 9.68 – "must be sworn to keep the jurors together, and to suffer no person to speak to, or communicate with, them on any subject connected with the trial, and not to do so themselves." However, so long as the bailiff did their duty, it is not reversible error.[26] Lewellen argued there were two instances of jurors talking to witnesses (the trooper and the deputy jailer). Both instances were brought to the trial court's attention prior to deliberation and the jury was admonished. (Further, one juror was an alternate and did not deliberate.)

Lewellen's conviction was affirmed.

Bauer v. Com., 2014 WL 4113110 (Ky. 2014)

FACTS: Deputy Rainwater and Sheriff Moss (Adair County SO) went to Bauer's home in response to a neighbor's complaint. Bauer shared the house with her husband, Price. The neighbor alleged Price was mowing his yard late at night, had mowed part of the neighbor's yard and also, had a methamphetamine cook at the house. The officers had an outstanding warrant for Price, as well. When they arrived, they questioned both Price and Bauer about the alleged methamphetamine cook. The officers later stated that Bauer "made incriminating statements about her involvement in manufacturing and using methamphetamine." During a search of the house, they found evidence as well. Price pled guilty to manufacturing, but Bauer went to trial.

At trial, Deputy Rainwater testified as to the investigation and repeated statements Bauer had said. He confirmed that Price and Bauer had purchased pseudoephedrine during the time in question.

[26] Cole v. Com., 553 S.W.2d 468 (Ky. 1977).

Bauer claimed she was using it for its legitimate purpose, sinus congestion and that she used it regularly. Bauer was convicted and appealed.

ISSUE: Is using the term "meth check" improper at trial?

HOLDING: No

DISCUSSION: Among other issues, Bauer claimed that Deputy Rainwater's "use of the term 'meth check' for the national precursor Log Exchange" was improper, and "invaded the province of the jury." The deputy had described the NPLEx system and its purpose and the court agreed that it did not rise to the level of error to use the term.

However, the Court reversed the conviction for manufacturing on an unrelated procedural reason.

TRIAL PROCEDURE / EVIDENCE – DOUBLE JEOPARDY

Bruner v. Com., 2014 WL 4160141 (Ky. 2014)

FACTS: Bruner devised a plan to murder his wife Holly. On February 12, 2011, he laced her breakfast with a sleeping medication. When she dozed off, he left her at their Meade County home, taking the children with him, and set the home on fire. Fortunately, the "timely intervention of neighbors and firefighters saved Holly." Bruner filed an insurance claim, but the investigator suspected the fire as having been deliberate. Eventually, Bruner admitted to the police he was having an affair and made a full confession.

At trial, Bruner argued he was acting under an extreme emotional disturbance (EED) "brought about by the pressures of his overburdened life." He was convicted for attempted murder, arson and insurance fraud, and appealed.

ISSUE: Are convictions for Arson 1st and Attempt-Murder Double Jeopardy?

HOLDING: No

DISCUSSION: Among other issues, Bruner argued that his convictions for Arson 1st and Attempted Murder constituted double jeopardy. The Court, however, disagreed, finding the two charges easily distinguishable. As such, the Court agreed both convictions were proper.

Spicer v. Com., Ky. 2014

FACTS: Spicer and Warren (his long-time girlfriend) broke up. Spicer moved out of their home but continued to see their child regularly; he would often stay at the home with the child. In February, 2013, Warren gave Spicer a ride to the place he was staying (the Lawson's). During the trip, he "grew agitated" with her and tried to grab her phone, accused her of "being with someone else." He was upset by the time they arrived, refused to get out of the car, was crying, and saying "he did not want to be without her." He became angry when Warren did not reply that she loved him. Warren was concerned because she knew he had a knife. She asked him if he was going to kill her but he said she was "being dramatic." She fled from the car and he gave chase, tackling her and

stabbing her. Eventually he stabbed her 16 times over her torso, but she survived. Finally a neighbor came to her rescue and called 911, and Spicer left the scene.

Spicer was ultimately found, hiding under a bed in the Lawson home. He kept saying he was sorry, and repeated that apology on camera. At trial, Warren testified that he told her that if he couldn't have her, no one could. He was charged and ultimately convicted of both Assault 1st and Attempt-Murder. He then appealed.

ISSUE: Is a conviction for Assault 1st and Attempt-Murder Double Jeopardy?

HOLDING: Yes

DISCUSSION: The Court discussed whether a conviction for assault and murder can be sustained. The court agreed that in Kiper v. Com., it had held:

> Section 13 of the Kentucky Constitution ensures no person shall `be twice put in jeopardy of his life or limb' for the same offense. In addition to prohibiting retrial for the same crime following a conviction or retrial following an acquittal, the 'final component of double jeopardy—protection against cumulative punishments—is designed to ensure that the sentencing discretion of courts is confined to the limits established by the legislature.' Therefore, a defendant may not be convicted of multiple crimes when there was but one course of conduct and a single *mens rea.* KRS 505.020 expresses our statutory structure for analyzing whether multiple convictions for the same course of conduct are permissible . . . .[27]

It is possible for both charges to be brought if there is a "cognizable lapse … in the course of conduct during which the defendant could have reflected upon his conduct, if only momentarily, and formed the intent to commit additional acts."[28] Despite the attempt to differentiate the first stab wound and the last, near-fatal, wound to the neck, the Court was not convinced that Spicer's acts represented "two separate courses of conduct" rather than a single continuous effort. The Court noted that many of her wounds struck vital places. As such, convictions for both charges were inappropriate. Further, the Court agreed it was proper to allow the interview he gave to a TV reporter, in which he confessed, as that statement was not made to "police authorities."

The Court reversed the Assault conviction but let the Attempted Murder conviction stand.

TRIAL PROCEDURE / EVIDENCE – RIGHT TO SILENCE

Strohmaier v. Com., 2014 WL 4521771 (Ky. App. 2014)

FACTS: On June 8, 2011, Strohmaier and his wife (the victim) got into an altercation in Jefferson County. During the trial, the victim made several statements that Strohmaier argued violated KRE 404(b), in which she made comments about prior actions such as womanizing, excessive drinking and prior instances of domestic abuse. Although the victim had been cautioned, the Court noted that her comments were isolated and "off the cuff." The Court did not find any of her statements to be so egregious as to require a mistrial. He appealed.

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[27] 399 S.W.3d 736(Ky. 2012).

[28] Welborn v. Com., 157 S.W.3d 608 (Ky. 2005). Terry v. Com., 253 S.W.3d 466 (Ky. 2008)).

ISSUE: May a defendant on the stand be questioned about no speaking at an earlier time?

HOLDING: Yes

DISCUSSION: Strohmaier had testified that when he was arrested, he was not provided with Miranda or asked about what had happened. When cross-examined, he clarified that he never gave police his version of the story. He later argued that violated his Fifth Amendment right to remain silent and that they elicited his testimony improperly. The Court considered this situation to be analogous to Fletcher v. Weir, in which the Court had held that it does not violate "due process … to permit cross-examination as to postarrest silence when a defendant chooses to take the stand."[29] The Court agreed the questioning was proper.

Strohmaier's conviction was upheld.

TRIAL PROCEDURE / EVIDENCE – PRIOR BAD ACTS

Henderson v. Com., 438 S.W.3d 335 (Ky. 2014)

FACTS: Henderson and Hatcher (a female friend) went to a nightclub in Louisville. Henderson was approached by Harris, an acquaintance, who was at the club with his wife and her cousin. Henderson thought he was being robbed and "wheeled around and allegedly jabbed the muzzle of a handgun into Harris's stomach." (Henderson later said he simply used two fingers. Realizing his error, and recognizing his "erstwhile friend," he pulled back. He apparently "said something insulting" about Harris's wife, however. Harris returned to his wife and told her what had been said; she became upset. She told the club owner and also called the police. "So, for the rest of the night, until the warring factions left the club," the two groups "exchanged glares across the club." (Harris's wife's cousin, Harbin, and Hatcher apparently had a "longstanding sour relationship.") Henderson and Hatcher left, after Henderson made an attempt to make amends, and Harris's group followed them closely, In the parking lot, Williams (Harris's wife) was "seemingly bent on preventing Henderson from leaving before the police arrived." Henderson attempted an apology. At some point, it was alleged, Henderson tried to get rid of the gun, which supposedly, Hatcher threw under the car.

When the police arrived, Harris and Williams "steadfastly insisted Henderson had a gun." The officers looked but found nothing. Henderson was told he could leave and as he drove off, a small pistol was spotted in a puddle. Henderson was arrested and marijuana was found in the subsequent search of his person.

Henderson, a convicted felon, was charged with possession of the gun and a variety of other charges. He was convicted of the possession and pled guilty to the remaining charges. He then appealed.

ISSUE: Does the requirement of notice of intent to use prior bad act evidence apply to the defense?

[29] 455 U.S. 603 (1982).

HOLDING: No

DISCUSSION: Henderson attempted to talk about an altercation he'd had with Harris about two weeks before. It was excluded because he had not provided notice of prior bad acts evidence under KRE 404(c). The Court noted that this ruling was clearly wrong, as it only requires such notice when it is to be used by the prosecution, not the defense. However, he failed to provide any indication of the substance of the excluded testimony and as such, the Court could not rule specifically on the excluded evidence. As such, the Court affirmed the conviction.

Wilson v. Com., 2014 WL 3796235 (Ky. App. 2014)

FACTS: On April 8, 2012, Wilson drove to Ogle's home while she was having a birthday party for her son. He thought there might be trouble, but decided, ultimately, to attend. York approached and asked Wilson if he remembered him, Wilson agreed. York then punched Wilson, due to prior instances of domestic disputes involving Wilson and Ogle A general fight ensued and Tharpe jumped in, he was then stabbed by Wilson. Hart and Wilson fled and Wilson threw the knife he used out the window, into a river.

Wilson was charged, and ultimately convicted, of Assault 1st and Tampering with Physical Evidence. Wilson appealed.

ISSUE: Are some prior bad acts admissible, when intertwined with a current case?

HOLDING: Yes

DISCUSSION: Wilson argued it was improper to permit evidence of prior domestic disputes in which he'd been involved. During a pretrial discussion of a prior cutting (allegedly accidental), the Court had ruled the evidence was to be excluded. However, the Commonwealth raised the issue again at trial, arguing it was "unavoidably intertwined with York's testimony because it was York's reason for punching Wilson." The Court agreed it would be difficult to "completely avoid the topic" as otherwise, the jury would be confused about the initial attack. It was agreed the witnesses could mention a "domestic dispute" without details. The witnesses, however, when asked, mentioned "several domestic disputes,' to which Wilson objected, arguing only one incident could be mentioned. The Court, however, that almost it might have been mildly improper, it was harmless error.

Wilson also argued that a law enforcement witness had mentioned Wilson's nickname – Outlaw. Prior to trial, the witnesses had been cautioned about it, but the detective, nonetheless, mentioned it at trial. The Court denied Wilson a mistrial but cautioned the jury not to draw any inferences from the nickname. The Court agreed that a jury is presumed to follow such admonishments.

Wilson's conviction was affirmed.

Roe v. Com., 2014 WL 4667269 (Ky. App. 2014)

FACTS: Roe lived in Carter County with his girlfriend, their two children and the girlfriend's older daughter, T.T. T.T. had begged for a cell phone and been denied; she later alleged

that Roe offered to give her a phone if she would go to bed with him. She said he touched himself between his legs when he made the proposition. Eventually, she told a friend and the allegations were reported to law enforcement and social services. T.T. reported multiple instances of abuse over a number of years, which stopped when she turned 10. (She was 14 at the time of trial.) She said he continued to touch himself inappropriately in her presence, however. She claimed he'd attempted rape (with no penetration) when she was 8 and had orally sodomized her, as well.

Roe was charged with Sexual Abuse 1st and Sodomy 1st. During the investigation, her mother agreed to not allow Roe to have contact with T.T. or the other children. He was indicted but it took some weeks to find him, living in a camper near the home. When they arrived, they found Roe's son running barefoot (in the winter) from the camper. There was a power cord running to the home and it appeared to be well-lived in. T.T.'s mother was charged with hindering his prosecution. Roe admitted he was living in the camper, in violation of the order, but denied contact with the children. He argued that T.T. was untruthful and made up the story to "get away from a home she hated." Roe was convicted only of the Sexual Abuse charge and appealed.

ISSUE: Are some prior bad acts admissible?

HOLDING: Yes

DISCUSSION: Roe argued that during the trial, a quantity of irrelevant and highly prejudicial evidence was presented related to uncharged crimes, which violated KRE 404(b). The Court agreed that the evidence of other incidents, over a period of time, was relevant to show an "absence of mistake or accident" on T.T.'s part. The Court also agreed that the social worker's testimony about the family situation was probative of the case.

In addition, Davis, the social worker, had interviewed T.T., and related at trial what had occurred during an interview. The Court cautioned the witness but it was ruled that her testimony did not "directly bolster" T.T.'s testimony. Further, testimony from two troopers, who had testified that the social worker had passed on a tip as to where Roe was staying was not impermissible either.

The Court upheld his conviction.

TRIAL PROCEDURE / EVIDENCE – DISMISSAL / PROCEDURAL

King v. Com. , 2014 WL 3547480 (Ky. App. 2014)

FACTS: In 2006, King was charged for the 1998 murder of Breeden. She ultimately took an Alford Plea to manslaughter, although professing her innocence.[30] In 2012, the Kentucky Innocence Project moved to vacate the plea, arguing that newly discovered evidence, a recent confession by a third party to the murder, required it. The trial court denied it, since she had, in fact, taken a guilty plea. King appealed.

ISSUE: May an individual who took a guilty plea still be released based on new evidence?

[30] North Carolina v. Alford, 400 U.S. 25 (1970). In this type of plea, the defendant maintains their innocence but agrees there is sufficient evidence to support a conviction.

HOLDING: Yes

DISCUSSION: The Court noted that "it is self-evident that the conviction of an innocent person offends both social norms of justice and the law embodied in our Constitution." As such, the Court agreed that she was entitled to relief under the court rules and reversed the decision which disallowed her from moving forward.

Com. v. King, 2014 WL 4667325 (Ky. App. 2014)

FACTS: King had taken a conditional plea to drug related charges, and had successfully appealed his case (based on a search issue) all the way to the U.S. Supreme Court.[31] The case was remanded back to Kentucky, and ultimately, Kentucky suppressed the evidence and remanded it back down to the trial court.[32] King asked that the trial court dismiss the indictment with prejudice, to which the Commonwealth objected, asking instead that it be dismissed without prejudice. Ultimately, the trial court sided with King. The Commonwealth appealed.

ISSUE: May a trial court summarily dismiss a case?

HOLDING: No

DISCUSSION: The Commonwealth argued that the dismissal with prejudice was inappropriate. The Court noted that there was a "separation of powers" and that a trial court "has no authority to weigh the sufficiency of the evidence prior to trial or to summarily dismiss indictments in criminal cases."[33] The Court looked to the possibility of double jeopardy and ruled that in fact, as his case had not yet gotten to the point of the swearing in of injury, it did not attach. The burden to prove all of the elements, which King argued the Commonwealth could not do without the evidence suppressed, is a burden at trial and not before.

The Court noted that it would violate that separation of powers (also called checks and balances) to allow the judiciary to screen out cases, and to do so would violate the right of the grand jury to render indictments.

The Court ruled that a dismissal with prejudice was not proper and remanded the case.

WORKER'S COMPENSATION

Camps v. Garrard County Fiscal Court, 2014 WL 4526904 (Ky. App. 2014)

FACTS: Camps was a full-time paramedic for Garrard County when she suffered a serious ankle sprain that led to ankle surgery. She filed a worker's compensation claim, claiming loss of income from not only Garrard County, but also concurrent employment with Clark County EMS. For almost a year prior to the injury, she had worked for both and Garrard County was aware of her dual employment, which was common for paramedics. She had resigned from Clark County a week

[31] Kentucky v. King, 131 S. Ct. 1849 (2011).
[32] King v. Com., 386 S.W.3d 119 (Ky. 2012).
[33] Com. v. Bishop, 245 S.W.3d 733 (Ky. 2008).

prior to the injury, intending to obtain another position closer to her home. At a hearing, she testified she normally had two employers and submitted wage records from Clark County; she explained that a recent move to Danville made working in Winchester too difficult. She had intended to obtain a second job at Boyle County EMS.

Garrard County disputed her entitlement to the wages from Clark County. The Administrative Law Judge (ALJ) agreed and Camps appealed.

ISSUE: Should recent prior employment be counted in the AWW in a worker's compensation case?

HOLDING: Yes

DISCUSSION: Camps argued that her adjusted weekly wage (AWW) must be calculated based on wages from Clark County under KRS 342.140(1)(d). The Court looked to the language of the statute and noted that its purpose is to "realistically estimate an injured worker's earning capacity."[34] That computation might include wages injured from another employer as well, even during the "look-back period" in that statute. Looking to case law from states with equivalent statutes, the court noted it would be unjust to deny her a calculation based on concurrent employment when it was "merely a fortuitous circumstances that [she] was not actually working at both jobs on the date of the accident."

To prove concurrent employment, all that was necessary was "proof that the claimant was working under contracts with more than one employer during the relevant look-back period following an injury and proof the defendant employer had knowledge of the employment."

The Court reversed the decision and remanded the case.

CIVIL LITIGATION

Palmer v. Carter, 2014 WL 4377874 (Ky App. 2014)

FACTS: On October 14, 2006, Palmer (a KSP trooper) stopped Carter. He was frisked and his vehicle searched. Ultimately, he was charged with possession of marijuana (in his vehicle and found on his person at the jail), DUI, possession of cocaine and related charges. Carter moved for suppression. Arguing that there was no valid reason for the stop. Palmer testified that no video recording existed but ultimately, one was located. Carter moved to reopen the status conference. Palmer was ordered to appear and ultimately, the Commonwealth dismissed the case.

Carter filed a lawsuit against Palmer. Most of the claims were dismissed, but a claim of malicious prosecution was remanded back to the state court. He reasserted that claim in Fayette County and Palmer appealed.

ISSUE: May a civil lawsuit be based on statements made in a grand jury proceeding?

HOLDING: No

[34] Marsh v. Mercer Transp., 77 S.W.3d 592 (Ky. 2002).

DISCUSSION: Palmer argued that since the federal court found insufficient proof to go forward on the §1983 case, that it had, in fact, found no probable cause for a state malicious prosecution case, either. The Court noted, however, that qualified immunity does not apply to malicious prosecution claims in Kentucky, it only applies to negligence cases, since "malice" is a basic element of malicious prosecution and requires an *intentional* act

Palmer also argued that he is entitled to absolute immunity because the claim is "based entirely upon testimony he offered at a grand jury proceeding." Generally, testimony given at judicial proceedings cannot supply the basis for a civil case[35] even if false. As such, his statement that there was no video could not be used in any subsequent lawsuit. However, that did not mean his lawsuit should be dismissed, as his suit was based, in part, "upon a non-testimonial, pretrial act," – namely the citation which Palmer knew was baseless.

The court upheld the determination that qualified immunity did not exist.

Lickteig v. Schwab, 2014 WL 4177442 (Ky. App. 2014)

FACTS: On September 30, 2010, Sgt. Schwab (Louisville Metro PD) took out a criminal complaint against Lickteig for Indecent Exposure. The complaint was approved by his supervisor, a prosecutor and a judge, as well. The individual had allegedly exposed himself to a police department employee, who had reported it to 911. Schwab had assembled a photo pack using the owner of the vehicle (identified by the victim) and others; he advised the witness that the registered owner was in the photo pack. She identified Lickteig.

Lickteig testified that he did not expose himself, but instead, that it was a road rage incident with Roth as the aggressor. Another witness testified that Roth had told her that the exposure had happened at a park and that Roth said she was "going to get him." The Court, even assuming he had exposed himself, there was no evidence he'd tried to draw attention to himself but instead was apparently masturbating in his own vehicle. Lickteig was acquitted.

Lickteig filed suit against Schwab. The case was delayed due to medical complications experienced by Lickteig's attorney. Schwab moved for summary judgment, arguing that the case had not moved forward. The trial court agreed, and further ruled that Schwab had done nothing improper and had probable cause to request the complaint be issued. Lickteig appealed.

ISSUE: May the timelines in a civil lawsuit be extended because of circumstances?

HOLDING: Yes

DISCUSSION: The Court noted that although much time had passed, there was a legitimate reason for the delay. Further, there had been no pretrial discovery orders or timelines. Given the lack of the order and extenuating circumstances, the Court ruled there should have been sufficient time given to complete discovery. The Court reversed the dismissal.

[35] Smith v. Hodges, 199 S.W.3d 185 (Ky. App. 2005).

EMPLOYMENT

Pearce v. Whitenack (Harrodsburg PD) 440 S.W.3d 392 (Ky. App. 2014)

FACTS: On March 31, 2012, Pearce, a Harrodsburg PD officer, posted a comment on his Facebook page about a fatal accident he'd worked earlier that day.[36] He was issued a "notice of verbal counseling" on April 5 and was informed he'd violated agency policy.

On April 6, 2012, Sallee filed a complaint concerning an incident at Walmart, when Pearce was off-duty. On May 14, he was issued a 48-hour notice for a scheduled meeting on May 17. On May 25, he was suspended with pay pending an investigation. On June 1, he resigned and just two hours later, filed a grievance with the city clerk, alleging that "sundry provisions of KRS 15.520" were violated by the chief. On June 4, he was told that his grievance was procedurally defective and would not be heard. He then filed a complaint in Mercer Circuit Court against Whitenack (the chief), Harrodsburg and various officials, concerning violation of due process and related claims surrounding his alleged constructive discharge. The City argued he'd failed to exhaust his administrative remedies. The Trial Court agreed with the city and Pearce appealed.

ISSUE: Is an officer required to exhaust their remedies under KRS 15.520 before filing a lawsuit?

HOLDING: Yes

DISCUSSION: The Court first looked to KRS 15.520, which "sets forth specific procedural due process steps that a city must comply with in connection to investigating and resolving a complaint of misconduct against a city police officer." However, Pearce's situation was analogous to Redmon v. McDaniel, in which the officer resigned prior to a hearing.[37] – even though it was ruled upon under a different statute in KRS 78. Because he chose to resign, he failed to follow through with the process and thus the Court had "no way to know what the result of that process would have been." His assertion that being suspended, deprived of his badge and gun, was a constructive discharge was not sufficient to prove a constructive discharge.

With respect to Pearce's argument that his privacy was invaded by the attention paid to his Facebook posting, the court noted that what is put out in public, on a social media site, warrants no expectation of privacy. The Court noted that "by analogy, Pearce's Facebook posting was a walk on the Internet, the information super-highway." While social media is creating new questions, when information is shared to the public, even just with "friends," it is not worthy of privacy. Even though the record did not indicate the settings Pearce used, "as with all internet communications, Pearce ran the risk that eventual posting or communication he intended to remain private would be further disseminated by an authorized recipient."[38]

The Court upheld the decision of the Mercer Circuit Court.

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[36] "rough night investigating a fatal accident. The family has my prayers."
[37] 540 S.W.3d 870 (Ky. 1976).
[38] See Guest v. Leis, 255 F.3d 325 (6th Cir. 2001).

SIXTH CIRCUIT

FEDERAL CRIMINAL LAW – FORCED LABOR

U.S. v. Toviave, 761 F.3d 623 (6th Cir. 2014)

FACTS: Toviave brought four of his young family members from Togo (a small African country) to live with him in Michigan. The children were required to cook, clean and do laundry, and also babysit on occasion. If they misbehaved, they were beaten and he demanded absolute obedience. Toviave provided for the children and was working two jobs. The children attended school and played sports; many of their punishments related to failure to pay attention to schoolwork. He provided a tutor for the children to learn English and enforced study periods, even giving them extra educational assignments.

The children's teachers suspected the children were being abused and eventually, the children were removed from the house. The authorities realized they'd been brought to the U.S. illegally, using falsified documents, and Toviave was charged with a variety of offenses, including forced labor and human trafficking under federal law. He pled guilty to the document fraud and the human trafficking charge was dropped. He proceeded to trial under the forced labor charge, however. Despite questions raised by the child court about whether this was even, in fact, properly being pursued in federal court, he was convicted. He appealed.

ISSUE: Is making your children do chores "forced labor?"

HOLDING: No

DISCUSSION: The Court agreed that his treatment of the children in his care was "reprehensible" but that it was not forced labor. The Court noted that "forcing children to do household chores cannot be forced labor without reading the statute as making most responsible American parents and guardians into federal criminals." Even if they were also subjected to child abuse for not performing the chores, that "does not change the nature of the work." Finally, child abuse is a state crime, not a federal crime. Even though in this case he was not the parent or legal guardian, he was, the de facto guardian and in loco parentis to the children. The children were not brought to the U.S. to do the work and were not denied contact with the outside world, even though they were strictly supervised.

Toviare's conviction for forced labor was reversed.

FORFEITURE

U.S. v. $72,050.00 & Smith, 2014 WL 4723586 (6th Cir. 2014)

FACTS: Smith, along with others, including his two sons, Michael and Christopher, were found to be involved in mail and wire fraud. As part of the investigation, two cashier's checks were seized from Smith's home. Although Smith was not convicted, his two sons were, and the jury found that the cashier's checks were proceeds of the crime. Smith appealed the forfeiture.

ISSUE: Is money subject to forfeiture even if not directly tied to the conspiracy?

HOLDING: Yes

DISCUSSION: Smith argued that the checks (totaling $122,000) were not forfeitable proceeds. The money was investor funds, the government argued, that was obtained during the conspiracy, but Smith countered that the "government needed to prove that the overt acts of fraud directly generated the funds" he claimed as exempt.

The court agreed that the "fraud touched everything" and that everything in the revenue stream was subject to being seized. Detailed information as to how money was being taken in and spent was presented to the jury. In addition, Smith did not qualify as an "innocent owner" of the money, although he himself was not convicted, because the money that generated the checks was in a joint account and deposits occurred during the course of the conspiracy.

The Court upheld the forfeiture.

CONSTRUCTIVE POSSESSION

U.S. v. Garcia, 758 F.3d 714 (6th Cir. 2014)

FACTS: A woman in Kalamazoo, Michigan, awoke to the sound of multiple gunshots. She was calling 911 as she looked out the window and saw a person "dart off." Officer Boutell arrived within a few minutes and spotted a man (Garcia) walking through the complex. His clothing did not match the clothing described by the witness, but there was some discussion that the light could have affected perceptions. The officers parked and followed Garcia, who had glanced at the car and "quickened his pace." He "stretched into a full sprint" – and Sgt. VanderKlok arrived and continued the pursuit. Garcia fell over a fence and items fell out of his pocket. He was eventually apprehended. At some point, Garcia "expressed concern about 'his hat.'" Backtracking, Sgt. VanderKlok found a baseball cap (as stated by the witness) and a revolver. The revolver was found in the snow, which had fallen within the past 24 hours, and there were no tracks in the snow other than those that had just occurred. There were other objects submerged in the snow, however. Two spent casings and three unfired rounds were in the cylinder. No followup tests were done.

Garcia, a convicted felon, was charged and convicted with possession of the gun. He appealed.

ISSUE: Is constructive possession sufficient to prove possession?

HOLDING: Yes

DISCUSSION: The prosecution had admitted that "no one saw Garcia holding the weapon, and VanderKlok acknowledged that he never saw Garcia drop the gun." The Court detailed the evidence and noted that it was up to the jury to decide if he did, in fact, possess it. Although circumstantial, the evidence was more than sufficient.

The Court upheld his conviction.

U.S. v. Kelley, 2014 WL 4815362 (6th Cir. 2014)

FACTS: Covington police responded to a report of gunshots at a housing project and a particular building was identified. Arriving, they found expended shotgun shells both in the front and back of the building. Looking into a window, they saw a live shell on the kitchen counter of the unit. They contacted those inside (Kelley and two others) but were denied entrance. A search warrant was obtained and the SWAT team executed it. A sawed off shotgun and a quantity of ammunition (both expended and live) was found. Kelley was identified as the shooter and was arrested. He was charged with state crimes, as well as, eventually, the federal crime of possession of a firearm by a convicted felon and for the shotgun. State charges were ultimately dropped and parole for an Ohio case was revoked.

Kelly pled guilty to the possession charge, but argued against a sentencing enhancement based upon the underlying Kentucky crime he committed – Wanton Endangerment 1st – since that charge was actually dismissed. At a hearing, testimony indicated the shooting occurred in a densely populated area, and that Kelley had been "drinking and going crazy" prior to the shooting. He also fired it from two different locations.

ISSUE: May a dismissed state case by used as a factor in a federal case?

HOLDING: Yes

DISCUSSION: The Court looked to the elements of the Kentucky statute and agreed that although dismissed in favor of the federal case, that his actions clearly met the elements for a felony. Kelley's sentence was affirmed.

SEARCH & SEIZURE – WARRANT

U.S. v. Green, 572 Fed.Appx.438 (6th Cir. 2014)

FACTS: In June, 2012, Officer Carter (Youngstown, OH, PD) swore out an affidavit on a home, in which he detailed drug activity at that location. As a result, Green, who lived there, was arrested. Green moved for suppression, arguing that the warrant did not establish probable cause for the detached garage, where, apparently, some items were found. He also argued that Carter made intentionally false statements and he was entitled to a Franks hearing.[39] His motion was denied and he was convicted. He then appealed.

ISSUE: Does a Franks hearing require an allegation of specific false statements?

HOLDING: Yes

DISCUSSION: Among other arguments, Green argued that the officer, in effect, recycled "boilerplate language" from previous affidavits. To succeed in Franks, he would have to "point to specific false statements" and then 'accompany his allegations with an offer of proof." If successful, "those allegations – not the entire affidavit – are set aside" and the remainder examined to determine if probable cause is still present. Looking at each point with which Green took issue,

[39] Franks v. Delaware, 438 U.S. 154 (1978).

the court agreed that the errors, if any, were not determinative on whether probable cause existed that drug trafficking occurred.[40] Nothing suggested that Carter "intentionally or recklessly falsified" the affidavit. Further, the absence of any complaints about drug trafficking by neighbors did not indicate it did not occur.

The Court affirmed his conviction.

U.S. v. Neal, 577 Fed.Appx. 434 (6th Cir. 2014)

FACTS: In the spring of 2011, Agent Nocera (FBI) was approached by a CI (CS1) who volunteered information about a drug trafficking operation between Knoxville and Chicago. (The CI's motive was a consideration that her fiancé's sentence in an unrelated case be reduced.) CS1 met Neal and accompanied him on road trips between Chicago and Knoxville, although she didn't initially know the purpose for the trips. (Neal paid her to ride with him, apparently believing a couple was less suspicious.) He had a handgun during the trips. On the first two trips, in April, 2011, they travelled in a rental car to a Knoxville home and she observed him meet with his brother. They cooked cocaine into crack and packaged it, and then sold it to 6-8 people. They returned to Chicago. She described the house to the FBI and upon being presented with a photo, positively identified the home. Further surveillance placed a car, owned by Neal's brother, Michael, at the house. His cell phone number was also connected to the utilities. Further surveillance showed numerous visitors. Michael Neal had prior cocaine trafficking charges as well.

On a third trip, on May 20, they were in a different vehicle. CS1 was able to update the FBI as to her location and ultimately, the vehicle was spotted entering Tennessee. The vehicle pulled into the suspect house at 5:20 a.m. A search warrant was obtained and the FBI entered shortly after they arrived. Three kilos of cocaine and a variety of other items were located, along with the Neal brothers and a third person, along with CS1.

Neal was arraigned and moved for suppression. When that was denied, he took a conditional guilty plea and appealed.

ISSUE: Must a warrant affidavit based on a CI provide some indicia of reliability?

HOLDING: Yes

DISCUSSION: Neal challenged the District Court's ruling that he lacked standing to contest the search warrant on his brother's home. He also argued there was insufficient probable cause. The Court agreed that "where an affidavit substantially relies on hearsay statements provided by a confidential informant, probable cause for a warrant to issue depends on whether the reliability of the informant or sufficient independent police corroboration of the informant's statements can be found within the four corners of the affidavit."[41] The Court examined the information available to the FBI and balanced all the "potential indicia of reliability present in the affidavit." When an affidavit "does not aver facts showing the relationship between the affiant and the informant, or detail the affiant's knowledge regarding the informant providing prior reliable tips that relate to the

[40] For example, the field reports indicated heroin, not cocaine, as indicated in the affidavit, Green's appearance, the amount of money used in the buys, etc.

[41] See U.S. v. Woosley, 361 F.3d 924 (6th Cir. 2004); U.S. v. Weaver, 99 F.3d 1372 (6th Cir. 1996).

same type of crimes as the current tip concerns, this Court has generally found that other indicia of reliability must be present to substantiate the informant's statements.[42] In this case, Nocera's only statements regarding her reliability are:

> CS1 has provided what I believe to be truthful and accurate information concerning the people who have been transporting multiple kilograms of cocaine from Chicago to Knoxville in recent weeks. As will be detailed in subsequent paragraphs herein, CS1's information is detailed and has been independently corroborated in a number of ways. As a consequence, I believe CS1 to be highly credible.

In other words, he "did not indicate that he had worked with CS1 in the past or that he was aware of any prior information she had provided law enforcement that was subsequently found to be reliable." There was no indication that he'd ever met her before or verified that she'd provided information to other agencies. Her identity was not disclosed to the magistrate. His only averments were "conclusory statements not supported by personal knowledge." Even though arguably she was complicit in the underlying crime, that did not mean that her "admission against penal interest" was enough to credit her statements. Even though her statements were detailed and indicated firsthand knowledge, that was not sufficient, as there was still insufficient information to judge their credibility.

> In Frazier, this Court found insufficient facts existed to support a confidential informant's reliability where the affidavit provided no information regarding (1) previous reliable information provided by the informant; (2) the length of the relationship between the affiant and the informant; or (3) disclosure of the informant's identity to the issuing magistrate.

In Dyer, the Court "determined that despite a similar lack of any of the three listed indicia of reliability in the affidavit, the informant's reliability was proven based on the facts that the affiant met and travelled with the informant to the location to be searched to corroborate details from the informant's statement, and that the informant had stated that he had witnessed illegal activity on the premises to be searched." In fact, Nocera could not even use a personal observation to determine credibility, as it appeared all of their communications were by telephone.

With respect to corroboration, which might save the lack of knowledge, the Court acknowledged a great deal of detail, but noted that the only incriminating fact was the number of visitors to the Knoxville house. The first two trips could not be cited as corroboration because in fact, they had only the word of CS1 that they even occurred. Ultimately, the Court agreed that the warrant provided insufficient information to validate.

However, the Court agreed that "while the Affidavit in this case did not meet the standard necessary to provide probable cause for the search, Nocera did corroborate enough specific facts (void of criminal behavior as they may be) to establish a minimal nexus between the place to be searched and the potential for criminal activity." As such, the Court found it to be not so "facially deficient" that officers should not have presumed it to be valid.[43] The Court found the Good Faith exception to apply. Nor was Neal entitled to his demand for a Franks hearing, as Neal failed to make a "substantial preliminary showing that a false statement knowingly and intentionally, or with reckless

[42] Frazier v. U.S., 856 F.2d 196 (6th Cir. 1988).
[43] U.S. v. Leon, 468 U.S. 897 (1984).

disregard for the truth, was included by the affiant in the warrant affidavit, and . . . the allegedly false statement is necessary to the finding of probable cause." The omission of a statement made by another FBI agent that questioned the veracity of CS1, of which Nocera may have even been unaware, was not enough to require Franks hearing.

The Court upheld the denial of Neal's motions to suppress.

SEARCH & SEIZURE – TERRY

U.S. v. Preston, 579 Fed.Appx. 495 (6th Cir. 2014)

FACTS: On New Year's Eve, Officers Jackson and Harnphanich, along with Sgt. Duncan, spotted Preston walking through an alley near a liquor store. Seeing the marked car, he appeared to alter his route to avoid approaching it. The officers suspected he was casing for a robbery. He passed out of sight behind a dumpster and "lingered there a moment longer than seemed right," and again, they "wondered if he was hiding something." Preston then continued to approach the liquor store. Officer Jackson, the passenger in the cruiser, rolled down his window and spoke to Preston in a conversational tone. Preston approached the car – he was wearing a hoodie and hand his hands in the pockets. The officer asked something about whether Preston was armed and asked him to show his hands. Although in a written report, the officer indicated he "ordered" Preston to do so, his "sworn testimony belie[d] the characterization." The Court noted that Jackson "could not have been more clear that his tone of voice was conversational or that he was not loud, challenging, or demanding." Preston agreed he had a gun, in his coat. When he was discovered to be a felon, he was charged with possession of the gun.

Preston moved for suppression and was denied. When he was convicted, he appealed.

ISSUE: Is someone voluntarily walking to a police car a "stop?"

HOLDING: No

DISCUSSION: First, the Court agreed, Preston voluntarily walked toward the stopped police car; he was not stopped or called over to it. Second, the Court agreed that while Jackson's report may not have been complete, his later, more detailed, testimony as to what was said and how it was said, was not inconsistent and was credible.

Preston also argued that he did not consent to talk to the officers, but the Court noted that he "voluntarily walked toward the police car," in a well-lit parking lot with many other people about. The officer remained in the car, did not draw his weapon, nor did he accuse Preston of anything.

The Court upheld the denial of the suppression

SEARCH & SEIZURE – SEARCH INCIDENT

U.S. v. Page, 575 Fed.Appx. 641 (6th Cir. 2014)

FACTS; As part of a drug investigation, Page was arrested for driving on a suspended license. During that arrest, his vehicle was searched and drug evidence found. Page moved for suppression of the evidence, but the trial court upheld the seizure. Page appealed.

ISSUE: Is immediately recognizing a subject with a likely suspended OL, and making a traffic stop, permitted?

HOLDING: Yes

DISCUSSION: The Court noted that since one of the officers immediately recognized Page – and knew his license was suspended – the traffic stop was proper. Page argued that he could have had a valid license in another state (although officers knew he spent his time in Tennessee and Michigan, and was arrested in Tennessee), but the Court disagreed. Officers had, apparently, during the investigation, checked his driving status more than once.

The Court upheld the denial.

SEARCH & SEIZURE – INEVITABLE DISCOVERY

U.S. v. Ray and Howard, 577 Fed.Appx. 526 (6th Cir. 2014)

FACTS: On December 12, 2012, Lt. Caraballo (Cuyahoga County SO) was contacted by a confidential reliable informant (CRI) about drug activity in a motel room in Lakewood, Ohio. He gave detailed information and Lt. Caraballo was able to verify several suspicious facts about the occupants. The next day, Ray, the occupant, renewed his stay and paid for another night for the occupants in the next room as well. Keeping the rooms under surveillance, they observed Johnson, apparently occupying that second room. As she left and they followed, she committed several traffic violations and was stopped. Her nervousness led to a drug dog alerting on the vehicle, where a white bag was found to contain two kilos of cocaine that appeared to be a part of a larger amount.

Johnson was arrested and given Miranda warnings. She waived those rights and admitted to owning the cocaine and having been at the motel. She stated she owed the two men at the hotel a large sum of money and described their deal. At the same time, a detective observed several men were occupying the rooms and going back and forth between them. They matched descriptions provided by Johnson. They were advised to secure the rooms and wait for a warrant, as they feared they would learn of the traffic stop. Lt. Caraballo obtained room keys and also had a ram, just in case, and K-9 officers were stationed outside the windows. Ultimately, when the occupants did not answer the door, they went inside. Both Ray and Howard were arrested and secured; the room was quickly swept for occupants. No other search was done and nothing incriminating was observed during the sweep.

Eventually, Lt. Caraballo arrived with the warrant. A dog was used to pinpoint narcotics. Cocaine and a large amount of currency was found, and everything was documented. Both men ultimately were charged with trafficking offenses and took conditional guilty pleas. They then appealed.

ISSUE: Is evidence found during a possibly improper search admissible if a later, legal, search was inevitable?

HOLDING: Yes

DISCUSSION: Ray and Howard argued that the initial protective sweep was unlawful. The Court noted that it need not reach that issue, however, because "both the information obtained in the initial search was not necessary to secure the warrant and that all evidence asserted discovered during the sweep would have been discovered during the later search pursuant to the warrant." In other words, even if it was improper, the warrants themselves were valid, as was all evidence located with that warrant (even if found before the warrant arrived, as was argued). Under Segura v. U.S., there was an "independent source for the warrant under which that evidence was seized."[44] The evidence was not the fruit of the poisonous tree. Even if money had been uncovered prior to the arrival of the warrant, it was inevitable that it would have been discovered anyway.[45]

Both convictions were affirmed.

SEARCH & SEIZURE – EXIGENT ENTRY

U.S. v. Barclay, 578 Fed.Appx. 545 (6th Cir. 2014)

FACTS: On November 29, 2012, at about 7:20 p.m., Officers Brown and Lamm (Akron PD) responded to two 911 calls about gunfire in the vicinity of a particular apartment. They spoke to the neighbor, who indicated a man had stood in a nearby yard and fired a rifle into the air; he then ran back inside. The officers went to that location , with guns drawn. The officers could hear a man and woman arguing inside. Officers Hughes and Manvo also arrived, and Hughes went to secure the back door. Officer Lamm knocked and initially received no response. Barclay then answered, told them to "hold on," and slammed the door behind him. He attempted to flee out the back door but was captured by Hughes, assisted by Manvo. The officers could see shotgun shell casings scattered on the ground, but no shotgun.

"During the arrest, Barclay loudly and repeatedly declared to the officers that no one else was in the house and told them not to go inside." The neighbor, hearing it, even called 911 to ensure the officers knew that she could "see lights and movement on the second floor," that information was relayed to those officers by dispatch. As he was being taken to the cruiser, Barclay yelled back towards the house not to let anyone inside. Officer Lamm continued to try to get someone to open the door and finally, Carson, a guest, opened it. "Officers Lamm and Brown then moved past her and entered the home," followed by Brown.

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[44] 468 U.S. 796 (1984).

[45] U.S. v. Bowden, 240 F. App'x 56 (6th Cir. 2007) (citing Murray v. U.S., 487 U.S. 533 (1988); Segura, 468 U.S. at 813–16; U.S. v. Keszthelyi, 308 F.3d 557 (6th Cir. 2002)).

Inside, they found three women, who in turn, called three minor children down from upstairs. Officer Hughes, apparently through an open door, spotted a shotgun shell on the kitchen counter and went in to get it – from there, he saw a shotgun on the basement floor – again, apparently through an open door. Both items were seized.

Barclay, a convicted felon, was charged with its possession. His motion to suppress was denied and he took a conditional guilty plea. He then appealed.

ISSUE: Is a sweep permitted on exigent circumstances?

HOLDING: Yes

DISCUSSION: Barclay argued that the officers illegally entered his house. The Court looked at the entry under the "exigent circumstances doctrine," under U.S. v. Purcell.[46] "To determine the reasonableness of a warrantless entry based on exigent circumstances, we balance the extent of the intrusion on an individual's Fourth Amendment rights against the legitimate governmental interests supporting entry." To enter, the officers must "have an objectively reasonable basis for believing an exigency in fact exists."[47]

The Court reviewed the categories of exigent circumstances. In this case, the information known to the officers clearly indicated that there was at least one additional person in the house, a person that Barclay initially declared was not present. "At this point, the officers had no way of knowing whether Barclay was the shooter, or whether a different man, wielding a gun, was still in the home." The Court looked to Causey v. City of Bay City and agreed that the intrusion in this case was quite reasonable.[48]

Once inside, the Court agreed, the officers found the shotgun in plain view. Given the nature of the initial call, the shotgun shell, and ultimately the shotgun, was incriminating.[49]

The Court affirmed the denial of the suppression motion.

U.S. v. Ashbourne, 571 Fed.Appx. 422 (6th Cir. 2014)

FACTS: In November, 2011, a CI (known and reliable) reported to Detroit PD that he'd bought marijuana from a man later identified as Ashbourne at a specific apartment. He further stated he had observed about 70 pounds of marijuana and firearms. Working with UPS, the officers discovered a package en route, and upon being opened, it was found to hold about 25 pounds of marijuana. It was resealed for a controlled delivery and the officers obtained an anticipatory warrant. Two officers posed as UPS drivers.

Ashbourne met the driver in the entranceway and offered to take the package, which was actually directed to someone else. The driver stated it had to go to the written address (Apt. 129) and was directed to the end of the hallway. However, the highest number there was 128. Ashbourne

[46] 526 F.3d 953 (6th Cir. 2008).
[47] Brigham City v. Stuart, 547 U.S. 398 (2006).
[48] 442 F.3d 524 (6th Cir. 2006).
[49] Horton v. California, 496 U.S. 128 (1990).

"continued to ask for the package." A second man joined them. The officers were "rattled … a bit" by the unexpected turn of events – one slipped away to inform the team and the other turned the package over to Ashbourne. He left via the exit door, which he had indicated was Apt. 129. After a brief chase, the two men were captured and the package recovered.

During that same time, the officers began investigating the two apartments at the end of the hall (127 and 128). The occupant of 128 denied knowing the second man, who claimed to be visiting a friend at the "end of the hall." At 128, a woman answered the door, and the officers were immediately confronted with the very strong odor of unburned marijuana. She claimed that she and her uncle, Jerome, were visiting – and that he was inside. Hearing loud banging noises, the officers called for Jerome to come to the door. When no one did, they entered, did a sweep and found no person, but did find "an open window, a gun, and a large quantity of marijuana, all in plain view." They secured the apartment and got a warrant. With the warrant, they found a vast amount of additional evidence, including documents tied to Ashbourne that indicated he lived there. (He had also admitted living there.)

Ashbourne was charged with being an illegal alien in possession of a firearm and drug-related offenses. He moved for suppression and was denied. He was convicted and appealed.

ISSUE: Do exigent circumstances justify an exigent entry?

HOLDING: Yes

DISCUSSION: Ashbourne argued there were no exigent circumstances allowing the entry. Reviewing all the details known to, and developed by, the officers, the Court agreed that it was reasonable to believe evidence might, at the least, be destroyed and that alone justified the entry. A complicating factor in this case, however, is that medical use of marijuana is permitted in Michigan, and as such, it was not automatic that the smell of marijuana indicated illegal activity. The Court noted that even without the odor, however, the officers had sufficient probable cause to justify their entry under the destruction of evidence exception.

The Court affirmed his conviction.

SEARCH & SEIZURE – TRAFFIC STOP

U.S. v. Jackson, 573 Fed.Appx. 401 (6th Cir. 2014)

FACTS: On May 7, 2011, at about 1:50 a.m., Troops Kane and Skrbec (Michigan State Police) saw Jackson, driving erratically, near Flint – specifically straddling the white line between lanes. They followed and additional weaving was observed. Trooper Kane pulled him over and both troopers approached. Jackson provided "expired paperwork" to Trooper Kane, who noted that Jackson's eyes were bloodshot. He had him get out, but then told him to return the paperwork to the car. When Jackson climbed back into the car, instead, Kane ordered him back out, but Jackson "did not immediately assent." Fearing what he might be doing, the trooper pulled him back out, and in the process, a gun was felt in Jackson's pocket. Jackson was arrested (and was also cited for his driving.)

Once found to be a convicted felon, Jackson was charged for possession of the gun. He moved for suppression and was denied. Once convicted, he appealed.

ISSUE: Does a traffic violation justify a traffic stop?

HOLDING: Yes

DISCUSSION: Jackson argued that both the stop and the "frisk" violated his rights. The Court noted that the stop was based upon personally observed multiple traffic offenses. Further, given his driving, it was legitimate to suspect he might be intoxicated, although it turned out he was not.

Jackson further argued that the troopers did not have to forcibly remove him from the car, which caused the pistol to drop. The Court looked at whether the force used was reasonable under the circumstances and agreed that, given the totality of the circumstances, it was reasonable for the trooper to believe Jackson might be reaching for a weapon. When he grappled with Jackson, he immediately felt the weapon. The further frisk and the removal of the weapon were properly predicated on what the trooper initially felt.

U.S. v. Cheatham, 577 Fed.Appx. 500 (6th Cir. 2014)

FACTS: Cheatham was the passenger in a vehicle pulled over for a broken taillight. The driver immediately admitted he did not have a valid license and was promptly arrested. The officers spoke to Cheatham, ordered him from the car and had him interlace his fingers over his head. He was being "escorted" to the cruiser for a search when he broke free and ran. The officers did not order him to stop but did chase him.

Ultimately he was apprehended and found to be carrying a pistol and two bags of hashish. He was charged with several federal crimes related to the gun and the drugs. He moved for suppression and was denied. He then appealed.

ISSUE: May a passenger be held after the purposes of the traffic stop is completed?

HOLDING: No

DISCUSSION: The Court agreed quickly that the "purpose of the traffic stop had been accomplished after the driver was arrested, and [Cheatham] was unlawfully detained after the traffic stop was completed." The Court found no reasonable suspicion to prolong the stop. As such, they should have advised Cheatham that the vehicle was being impounded and he was free to go.

The Court affirmed the grant of the motion to suppress.

U.S. v. Noble, 762 F.3d 509 (6th Cir. 2014)

FACTS: In fall, 2012, McIntosh, a member of a DEA Task Force in Kentucky, was investigating a methamphetamine distribution network. He learned of the involvement of Brooks and Adkins – with Brooks picking up methamphetamine in Louisville, then going to Lexington to pass it on to Adkins. Adkins would distribute it in Wolfe and Powell Counties. In December, in an

interview, Brooks confirmed that was the case and that one of Adkins' customers was Noble. In January, another informant tipped McIntosh to a trip by Brooks and gave him detailed information as to her vehicle. However, the vehicle was not spotted during surveillance of the route during the time in question. When told this, the informant stated Brooks might have used Adkins' vehicle for the trip, instead. The defendant then identified a particular motel in Lexington as a "way station."

Officer McIntosh asked for Det. Hart, a Lexington officer with the task force, to check the motel, and Adkins' vehicle was spotted. Det. Hart followed as it left the motel parking lot and attempted to get a uniformed officer to make a traffic stop. Officer Ray was told nothing but that the vehicle was involved in methamphetamine trafficking. Officer Ray caught up with the vehicle on I-64 and observed a minor traffic violation – changing lanes without a signal. The vehicle's windows were also heavily tinted. He pulled over the car and Det. Hart immediately stopped as well. Officer Ray later noted that the passenger (Noble) was extremely nervous, much more so than expected for a simple traffic stop. The officer confirmed the window tint violated Kentucky law, using a tint meter. He administered a FST, which Adkins passed. Ray questioned Adkins about why Noble was also so nervous. Adkins denied knowing why and gave consent for a search of the vehicle. Adkins was frisked and handed over to Hart, and Ray told Noble to get out, since he was going to search the car. He frisked Noble, because of Noble's nervousness and because of the suspicions about the vehicle. As he frisked, he felt what he believed to be crack cocaine (described as "thick sand") and Noble denied knowing what it was. Officer Ray removed it and discovered it was methamphetamine instead. He eventually found other items, including a loaded pistol, on Noble's person, and he was arrested. He was subsequently found to have $1700 in his sock.

Adkins, in the meantime, admitted that he was driving Noble to buy drugs and he too was arrested. Observing Brooks still at the motel, they obtained a search warrant for the room and found a variety of contraband items. She too was arrested.

Each was charged with a variety of federal drug offenses. Noble moved to suppress evidence, joined by the other two defendants, but the motion was denied. All took conditional guilty pleas and appealed.

ISSUE: May a nervous, but compliant passenger, be frisked?

HOLDING: No

DISCUSSION: The trio conceded that the initial stop was valid, but argued three points. "First, the defendants claim that Officer Ray inappropriately prolonged the stop. Second, they argue that Officer Ray lacked reasonable suspicion to pat down Noble. Third, they argue that even if Officer Ray had reasonable suspicion to frisk Noble, his manipulation of Noble's pocket constituted a full-blown search for which there was no probable cause."

With respect to the first, the Court found that the stop was not "impermissibly long in duration" and that the actions Officer Ray took were related directly to the original reason for the stop and all were completed within a few minutes. It was then proper to ask for consent, which would then extend the time permitted for the search.

With respect to the frisk, the Court found no issue with having both occupants get out of the vehicle, However, a frisk is only permitted "upon reasonable suspicion that they may be armed and

dangerous." The "three pieces of information" put forth by the prosecution" were insufficient to "add up to reasonable suspicion in this case." The Court emphasized the nervous behavior is an "unreliable indicator" and that Noble was completely compliant with all demands. Mere presence in the suspect car, on the part of Noble, was also not enough.[50] Neither party was recognized as having a criminal history and Noble was holding only a can of Ale-8-One. Nothing in his described behavior suggested he had a weapon or was concealing anything.

The Court concluded:

> In so holding, we are not unmindful of Officer Ray's belief that individuals involved in drug trafficking are generally armed. We have recognized before that a police officer, like Officer Ray, can "rely on his [or her] training and experience that drug dealers frequently carry weapons . . . ."[51] However, we have always required some corroboration that particular individuals are involved in dealing drugs before allowing a frisk for weapons.[52]

Further, noting linked Noble to the network, in fact, for most of the time, they did not even identify him. He could not be linked to a drug-trafficking profile that might account for a frisk. The Court reversed Noble's plea. With respect to how that decision affected Adkins and Brooks, however, neither explained how Noble's frisk impacted their own rights. The Court noted confusion as to why the government never challenged their standing in this case but for procedural reasons, since they did not, the Court found it necessary to reverse the denial of the motion to suppress for both Adkins and Brooks, as well.

U.S. v. Tullock, 578 Fed.Appx. 510 (6th Cir. 2014)

FACTS: Tullock was connected to a large drug conspiracy through "intercepted telephone conversations" between him and McMahan, through a Title III wiretap on the phone and his own interview statements. During ongoing surveillance, on April 21, 2010, Trooper Stielow (Tennessee Highway Patrol) found a reason to make a traffic stop on Tullock's van – for following too closely. He did a consent search and found oxycodone pills in bottles with Tullock's name. Although there was no evidence he was trafficking, he did admit it during an interview. He was subsequently convicted of trafficking offenses and appealed.

ISSUE: Must objective facts be articulated to justify a traffic stop?

HOLDING: Yes

DISCUSSION: Tullock argued that the trooper lacked sufficient cause to make the traffic stop. The trooper testified that he had made the stop for following too closely, and that he'd taken a number of things into consideration, primarily "whether the van driver could stop without causing a rear-end collision if the vehicle in front of him had to stop for any reason." He noted he did not

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[50] Ybarra v. Illinois, 444 U.S. 85 (1979).

[51] Branch, 537 F.3d at 589; *see also* U.S. v. Jacob, 377 F.3d 573 (6th Cir. 2004) (holding same); U.S. v. Heath, 259 F.3d 522 (6th Cir. 2001) (same).

[52] *See, e.g.*, Branch, 537 F.3d at 589 (upholding a patdown after a drug dog had alerted to the presence of narcotics in the automobile); U.S. v. Garcia, 496 F.3d 495, 505 (6th Cir. 2007) (upholding a patdown after officers overheard passengers—all suspected drug dealers—discussing weapons); Noble, 364 F. App'x at 965 (upholding patdown when officers smelled marijuana in the car).

think the van was actually speeding and the weather was not bad. He had asked about medications to explain Tullock's nervousness and that Tullock gave consent to search. He testified that several empty pill containers were found that would have accounted for about 170 pills, all obtained in Florida in the previous month. He did not seize the pills, however, because they weren't inherently illegal. He gave Tullock only a warning at the time.

The Court noted that its decision focused on the validity of the stop, and noted that the trooper could recall "few objective facts to justify the traffic stop." In other cases, the Court noted, the officers could give detailed facts to support their decisions. "By stark contrast, Trooper Stielow did not."

The Court reversed Tullock's conviction.

SEARCH & SEIZURE – VEHICLE SEARCH

U.S. v. James, 575 Fed.Appx. 636 (6th Cir. 2014)

FACTS: James was arrested because of a loaded weapon found in his car during a traffic stop, as he was a convicted felon. On the day in question, he was stopped by two Youngstown (OH) PD officers because his windows appeared to be too highly tinted. He pulled into a driveway of a home, got out and headed for the door, despite the officers having their lights and sirens activated. They drew their weapons and ordered him to the ground, handcuffing him. They could smell the strong odor of marijuana but he denied having anything on him. He admitted to a gun in the vehicle console and marijuana cigarettes in the car, however. (He claimed he told them about the gun only after they were already searching the car, and "doing so in a rough manner.")

James moved for suppression and was denied. The trial court agreed that the initial stop was justified due to the traffic violation and further, found the officers' testimony credible concerning his actions when they tried to make the stop. The Court ruled that under the automobile exception, the search was justified, based on the smell of marijuana emanating from his person.

Further, he argued, that he was questioned without being given Miranda, but the Court ruled that the questions were asked due to a concern for officer safety. Even so, the Court agreed, the marijuana odor was enough to justify the search, so it was inevitable that the gun would have been found anyway. He took a conditional guilty plea and appealed.

ISSUE: Does the automobile exception justify a vehicle search?

HOLDING: Yes

DISCUSSON: The Court agreed that the automobile exception justified the search of the vehicle, as the odor justified their belief that there was marijuana/ contraband in the vehicle. His conduct only emphasized the likelihood that something would be found in the vehicle.

The court affirmed the denial of the motion to suppress.

42 U.S.C. §1983 – ARREST

Halasah v. Kirtland (OH), 574 Fed.Appx. 624 (6th Cir. 2014)

FACTS: On May 23, 2009, Officer Fisher (Kirtland PD) found some teens drinking alcohol. More officers rounded up other teens that had tried to flee. The teens were told to call their parents for pickup. At about 1:30 a.m., Halasah got a call about his son, A.H., one of the teens. When he arrived, the "scene was noisy and chaotic," with the police, the teens and the parents. A.H. admitted to having been at the party, and had admitted drinking to the officers, but denied it to his father. Halasah approached one of the officers, Volk, asking what right they had to be at a private residence and interfering. Volk directed him to Fisher. Fisher was, apparently, in the process of releasing another teenager to parents at the time. "Halasah demanded that Fisher explain how the officers had probable cause to be at a private residence and ordered Fisher to administer a field sobriety test and breathalyzer to A.H." He refused to provide ID or sign paperwork to claim his son. At the same time, another teen, N.P. became extremely upset, apparently "feeding off" Halasah's conduct. N.P. was temporarily secured in a cruiser as a result.

Finally, Halasah did what was necessary to have his son released, but he refused to leave, stating he wanted to be sure N.P. was alright. After being told, after several requests, to leave, he finally did. Fisher returned to the station and prepared reports, stating that among other possible charges, he believed Halasah should be charged with obstruction. After reviewing the case, the prosecutor concluded that Disorderly Conduct was warranted and Fisher initiated the action. Halasah was ultimately arrested but was acquitted of the charge.

Halasah filed suit against Fisher and the City under 42 U.S.C. §1983, claiming false arrest, malicious prosecution and related claims. When that was dismissed in favor of Fisher, Halasah appealed.

ISSUE: May an arrest be justified on a different charge than that originally placed?

HOLDING: Yes

DISCUSSION: The Court concluded probable cause existed for the arrest and dismissed the majority of the case, but did remand it back for further discovery on one issue. Ultimately, the Court agreed there was probable cause for the arrest, and noted that Fisher did not influence the prosecutor in bringing the charges. The Court looked to the possible charges, including the one that the officer originally recommended, and the court agreed that even if there was not enough cause for Disorderly Conduct, there certainly was for Obstructing.

The Court affirmed the summary judgment for Fisher.

Garner v. City of Memphis, 576 Fed.Appx.460 (6th Cir. 2014)

FACTS: On February 26, 2011, Garner was detained by the Memphis PD as a suspect in the attempted murder of a prostitute, because one of his business cards was found with the victim. He already had an outstanding arrest warrant at the time. They also considered him a suspect in a separate robbery case and put a "hold" on him for investigation. He was held for

almost two weeks, until the victim came out of a coma and said he was not her attacker. The robbery charges were also dropped.

Garner filed suit under 42 U.S.C. §1983, claiming false arrest and related damages. The defendant officers and the city requested summary judgment, which was granted. Garner appealed.

ISSUE: Must a custom and practice be shown for a city to be liable for violating a Constitutional right?

HOLDING: Yes

DISCUSSION: The Court noted that, in order to prevail, Garner would have to "establish (1) the deprivation of a right secured by the Constitution or law of the United States; and (2) that the deprivation was caused by a person acting under color of state law." The City could only be liable if it had a custom or policy that caused the constitutional violation to occur.[53] Both sides agreed the officers were acting under color of state law but Garner failed to identify any "unlawful policy or custom" that authorized the actions he claimed were improper. The Court noted that he already had an arrest warrant, which would have justified the initial arrest, and nothing suggested that any of their subsequent actions, in investigating the matter, were improper.

The dismissal under summary judgment was upheld.

Young / Hendrix v. Owens, Denny and Hendricks, 577 Fed.Appx. 410 (6th Cir. 2014)

FACTS: Young and Hendrix owned the Ohio Trading Company (OTC), a secondhand store in Colerain Township, Ohio. Owen, Denney and Hendricks were all police officers in that township. On May, 2010, the PD learned a stolen GPS had been found at OTC. In addition, other PDs had notified the CTPD that Young was suspected of trafficking in stolen electronics. Several weeks of surveillance indicated that "many suspected and former criminals were frequently selling items to OTC." They worked with a CI, Earls, to do several controlled sales of items provided by Home Depot. "All items were unopened, in the original packaging, and sold for significantly less than a third of their retail value." One item still had a security lanyard attached when sold. They obtained a search warrant for OTC and for Young's home – the latter because a PD had stated that Young had on occasion sold stolen property from there as well. A number of stolen items were located and Young arrested, but for some reason, the prosecutor dropped the case.

Young and Hendrix filed suit under 42 U.S.C. §1983, alleging illegal arrest, illegal seizure of property and malicious prosecution, as well as related claims. The District Court awarded the officers summary judgment and Young and Hendrix appealed.

ISSUE: Is an arrest made on strong circumstantial evidence Constitutional?

HOLDING: Yes

[53] Monell v. Dept. of Social Services, 436 U.S. 658 (1978).

DISCUSSION: The Court noted that the "critical link among the alleged §1983 violations is the assertion by the plaintiffs that the police took various actions – searching, seizing and arresting – without probable cause. This court, of course, has long recognized that §1983 claims arise when police officers take such actions absent probable cause."[54] The threshold of probable cause is defined as ""whether at that moment the facts and circumstances within the officer's knowledge and of which they had reasonably trustworthy information were sufficient to warrant a prudent man in believing that the arrestee had committed or was committing an offense."[55] They argued that since Earls never specifically said the items were stolen, that they could not have knowingly purchased stolen items. Further, even if they might have an affirmative defense, it is not necessary that the law enforcement agency know that or seek to disprove it. Further, while he might have a defense, "that defense was not conclusive." Ohio state criminal law did not make it clear what was needed to make the knowingly element of the crime.

The circumstantial evidence was more than sufficient to link the two men to suspected trafficking in stolen goods. The sellers observed, a "who's who of criminals" made numerous trips to the store, several times a week, which the officers found atypical. Further, the information from other police agencies had significant weight.[56] Earls was also considered very reliable from the personal experience of the officers. "Collectively, this information–independent of the controlled sales–established an adequate basis for the defendants to find probable cause with respect to Young's arrest as well as for the authorization to search."

The Court affirmed the dismissal of the claims against the officers.

Gregory v. Burnett, 577 Fed.Appx. 512 (6th Cir. 2014)

FACTS: Gregory lived at his home from the age of 8 until the date this case began, on April 4, 2009. At the time, he was 53 years old. Only Gregory and his father lived on the lane, which was unnamed until 911 went into effect, their shared driveway gained a name (Fred Gregory Lane) and a sign was posted at its intersection with Levi Branch Road, in Bell County.

On that day, at about 3 p.m., Gregory was taking his granddaughter to lunch. He drove down that lane until he spotted Lt. Burnett (KSP) in the middle of Levi Branch, about 65 feet away. Gregory stopped his truck and shut off his engine, before entering the road. He'd been stopped previously, he argued improperly, and he'd installed a video camera to develop proof. He unsnapped his seat belt to turn on the camera. Burnett waved him into the road but Gregory gestured for Burnett to keep driving. The video showed the subsequent interaction. Lt. Burnett told Gregory his windows were tinted (presumably too darkly) and that he wasn't wearing his seat belt. Gregory was asked to show his OL, to which he objected because he was "sitting … on [his] own property." The trooper replied that he was on the public road. After further interaction, Gregory was arrested for menacing, but also cited for a seatbelt violation and disorderly conduct. He was jailed for a few hours and released, and ultimately, the Bell County Attorney declined to prosecute. The matter was dismissed without prejudice.

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[54] *See, e.g.,* Fridley v. Horrighs, 291 F.3d 867 (6th Cir. 2002); Yancey v. Carroll Cnty., Ky., 876 F.2d 1238 (6th Cir. 1989).
[55] Radvansky v. City of Olmsted Falls, 395 F.3d 291(6th Cir. 2005) (quoting Beck v. Ohio, 379 U.S. 89 (1964)).
[56] Albright v. Rodriguez, 51 F.3d 1531(10th Cir. 1995).

Gregory filed suit and after discovery, Burnett received summary judgment on all claims. Gregory appealed.

ISSUE: Is probable cause for a minor offense required to justify a traffic stop?

HOLDING: Yes

DISCUSSION: Gregory argued that "[t]o justify a traffic stop, an officer must possess either probable cause to believe a civil infraction has been committed or reasonable suspicion of criminal activity."[57] "Probable cause is required for an investigatory stop for completed misdemeanor traffic violations; an investigatory stop for an ongoing violation, no matter how minor, requires only reasonable suspicion."[58]

The Court agreed that the first "stop" wasn't a stop at all, because Gregory was stopped when Burnett tried to wave him onto the road. The second stop was when Burnett pulled onto the lane, had Gregory get out and arrested him. Even though Gregory argued he was on his own property, the Court found "no constitutional impediment to an officer approaching a driver in his own driveway and engaging him in conversation." Having him get out at the time merged the situation into the third encounter, the arrest.

The Court noted that in reviewing the tape, "Gregory did nothing that would legitimately constitute either disorderly conduct or menacing." The only thing left to justify it was the purported seat belt violation. Under Kentucky law, a seatbelt violation is not arrestable. Although an error "does not rise to the level of a Fourth Amendment violation if there was probable cause to believe that Gregory committed the seatbelt violation," in this case, there was a question as to whether he even had done that. Since the vehicle was off at the time, there was a question as to whether Burnett could cite/arrest for the purported violation. As such, the Court agreed:

> In addition, to prove retaliation, Gregory was required to show that "(1) he was engaged in protected conduct; (2) an adverse action was taken against him that would deter a person of ordinary firmness from continuing to engage in that conduct; and (3) there was a causal connection between his protected conduct and arrest because the arrest was motivated at least in part by his protected conduct."[59] Gregory had a right to "request that Burnett stop harassing him," and it was possible a jury could agree that "Burnett's conduct in arresting Gregory was in response to Gregory's exercising that right and that the arrest would deter a person of ordinary firmness from exercising that right." As the facts suggested a lack of probable cause, it was necessary to vacate the lower Court's decision and remand.

Finally, with respect to a malicious prosecution claim, Gregory argued he was falsely arrested and maliciously prosecuted. In this case, there was little in the way of a prosecution since the case was dismissed, a dismissal initiated by the prosecutor.

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[57] U.S. v. Lyons, 687 F.3d 754 (6th Cir. 2012) (citing Gaddis ex rel. Gaddis v. Redford Twp., 364 F.3d 763 (6th Cir. 2004)); Terry v. Ohio, 392 U.S. 1 (1968).
[58] U.S. v. Simpson, 520 F.3d 531 (6th Cir. 2008).
[59] Thaddeus-X v. Blatter, 175 F.3d 378 (6th Cir. 1999).

The Court reversed the dismissal of the claims and remanded the case for further proceedings.

42 U.S.C. §1983 - SEARCH & SEIZURE – DETENTION

Lacey v. City of Warren / Yuricek, 571 Fed.Appx. 400 (6th Cir. 2014)

FACTS: Officer Yuricek (Warren, OH, PD) responded to a call of a "reported abduction." Upon arrival, they found Lacey with a handcuffed woman in his car. Lacey was detained and handcuffed and it was learned he was a bail bondsman taking the woman into custody. Lacey later argued that within just a few minutes, it was learned that there was a capias for the woman's arrest and Lacey told the officers several times he was a bondsman; he was also displaying a badge. The woman never claimed she was being abducted. They continued to hold him and never asked for ID as to his bondsman status.

Ultimately he was released, however. Lacey then filed suit under 42 U.S.C. §1983, claiming false arrest and detention. Officer Yurick sought summary judgment and was denied. He appealed.

ISSUE: Must a person be released as soon as possible, when a crime has been disproved?

HOLDING: Yes

DISCUSSION: Based on the facts as presented so far, "Yuricek violated clearly established law" by holding Lacey for as long as he did. Once he checked out the situation and confirmed that an abduction was not taking place, he "should have let Lacey go." The Court noted one complicating factor, however, was Yuricek's belief that Lacey may have violated Ohio law in not notifying local law enforcement that he was attempting an apprehension. However, since Yuricek never raised this issue in his initial brief, he could not rely upon it at this time. He could, however, raise the issue at trial.

The Court upheld the denial of the summary judgment motion.

42 U.S.C. §1983 – USE OF FORCE

Krause v. Jones, 765 F.3d 675 (6th Cir. 2014)

FACTS: On December 12, 2008, Marshals arrived at Krause's home in Redford, MI. They had a felony warrant for cocaine possession. When he opened the door and saw them, he fled to a bedroom. One of the marshals saw Krause in that room, pointing a handgun, and retreated. They surrounded the room and ordered his surrender, but he said he had multiple guns and would kill anyone who came in.

Redford Township PD responded and SWAT surrounded the house. Sgt. Gregg, a negotiator, talked to Krause for some eight hours. He repeatedly threatened to come out shooting. Finally, a camera indicated he appeared to be sleeping in the closet of the room. The SWAT team discussed a number of options and settled on using a flash bang. They also set their weapons to automatic fire. A number of officers entered and Krause shot, apparently at Officer Jones. Within seconds,

shooting stopped. Krause was found "seated in the closet with his hand on a gun." He died at the house. Krause had fired once from his revolver, and had been shot 20 times.

Krause's mother filed suit against a number of officers and Redford Township. The District Court granted all defendants summary judgment, and Krause's mother appealed.

ISSUE: Does the number of shots fired matter in a use of force case?

HOLDING: No

DISCUSSION: First, Krause claimed that the use of the flash bang violated his Fourth Amendment rights. The Court found that the flash bang in fact caused no seizure and did not harm him. And even so, the use of the flash bang was reasonable, and they were attempting to minimize the risk of injury by stunning and confusing him. Further, they had a clear view of the area and knew there was little in the room that could present a problem with using the flash bang, as the area was isolated and no one else was present. The Court looked specifically to Bing v. City of Whitehall for guidance.[60]

"When put under the microscope of hindsight, it is true, the encounter did not end well." But, the flash bang had nothing to do with it. The Court found its use to be reasonable.

With respect to the shooting, the Court noted that Officer Jones fired at Krause after he was fired upon. He knew that Krause had at least one, and possibly more, guns and had repeatedly threatened to shoot. Even if Krause fired only because he was jolted awake, the shooting was reasonable. Further, with questions regarding the number of rounds fired, apparently all from a single weapon, the Court noted that "flows from the reasonable decision to engage the automatic-trigger function." Nothing indicated Jones continued firing after he knew Krause was incapacitated or had surrendered. The Court noted that "if police officers are justified in firing at a suspect in order to end a severe threat to public safety, the officers need not stop shooting until the threat is ended."[61]

Finally, the Estate asked:

> Why the officers opted to enter the bedroom instead of waiting for Krause to exit on his own. But the officers did try waiting – ten hours in all devoted to trying to coax Krause out of the bedroom. This was not an impulsive entry. At any rate, 'the police need not have taken that chance and hoped for the best.' Keep in mind that Krause never backed off his suicidal threat during the stand-off to emerge with guns firing. The assumption that waiting carried no risks of its own is belied by the reality that, so far as they knew, Krause could have emerged at any point and acted on this threat to 'come out shooting' or could have taken his own life during the delay. That is why continuing to wait was not, as the claimant suggests, a risk-free option. The officers reasonably waited until Krause fell asleep and opted to act then. No doubt, the plan did not end well, leaving us with the seen consequences of the officers' actions (the regrettable death of a child and brother) and the unseen possibilities of what might have been (perhaps no death at all). Yet when the Supreme Court warns lower

[60] 456 F.3d 555 (6th Cir. 2006).
[61] Plumhoff v. Ricard, 134 S.Ct. 2012 (2014).

> courts not to judge the reasonableness of an officer's action from the peace and safety of their chambers 'with the 20/20 vision of hindsight,' Graham, this is what they mean. The question for us is: Did the officers act reasonably based on what they knew at the time? The answer on this record is: Yes.

Another question, with respect to setting the weapon on automatic fire, the Court made no distinction, ruling, essentially, that so long as the shots were justified, it did not matter how the firearm was set. The Court noted that "the reason Matthew Krause died was that he fired first."

The court affirmed the summary judgment.

Ragsdale v. Sidoti, 574 Fed.Appx. 718 (6th Cir. 2014)

FACTS: Ragsdale and Provitt (his brother) "got into a spat over a three-dollar debt." The argument escalated and Ragsdale retreated to his girlfriend's house. Provitt kicked in the back door. Ragsdale ran upstairs for a gun and fired a warning shot into the wall. Provitt, now outside, called the police. Officers Sidoti and Seiler (Akron PD) arrived. Officer Sidoti, armed with an AR-15, approached from the backyard.

At this point, the parties were in dispute. Ragsdale claimed he took a step outside, armed with a rifle, and was shot in the elbow by Officer Sidoti, who, he said, gave no commands before firing. Ragsdale went to the ground to avoid a "barrage of bullets." Sidoti claimed that he heard Officer Seiler give a command to Ragsdale to drop the weapon, but that Ragsdale came "running toward him in the dark, holding what seemed to be a gun." He then fired on Ragsdale, for a total of 14 rounds. He was then sent for treatment.

Ragsdale sued Officer Sidoti, claiming excessive force. Officer Sidoti moved for summary judgment, asserting qualified immunity. The trial court denied the motion and Officer Sidot appealed.

ISSUE: Is summary judgment proper in a §1983 case when there is a genuine issue of material fact?

HOLDING: No

DISCUSSION: The Court noted that summary judgment is only proper when "there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." In this situation, the court noted that a reasonable jury could, in fact, find that the officer violated Ragsdale's rights, if in fact, he was shot without warning and continued to be shot at after he'd dropped the weapon. A ballistics expert had opined that the evidence suggested that Ragsdale was "not where he says he was" when the officer fired and that he didn't immediately drop his weapon. However, as the expert acknowledged, "his reconstruction of the shooting is one reasonable approximation of what happened, it is not the only reasonable approximation of what happened."

The Court affirmed the denial of qualified immunity.

Latits v. Phillips, 573 Fed.Appx. 562 (6th Cir. 2014)

FACTS: On June 24, 2010, Latis was stopped by Ferndale officers for a minor traffic violation. Officer Jaklic pointed a gun at him, point blank, and he fled in his vehicle, but did not drive fast. He was pursued by three officers for what was, under state law, "at most, a civil infraction or a misdemeanor in their presence." He was not suspected of any felony offenses. The pursuit ended in Detroit, when Officer Wurm began to ram the car. Finally, Officer Phillips rammed and blocked the car. He ran to the passenger side of the car as Latits began to back up slowly, curving away from the officer. Phillips fired seven shots, at least three after Latits was completely past him. Latits was fatally shot – three times.

Latits' wife filed suit under 42 U.S.C. §1983, alleging a violation of the Fourth Amendment. Officer Phillips moved for qualified immunity and was denied. He appealed that denial.

ISSUE: Must the defendant in a §1983 case concede all disputed facts to the plaintiff in a summary judgment motion?

HOLDING: Yes

DISCUSSION: The Court noted that during the briefing process, "Officer Phillips steadfastly refused to concede the most favorable view of the facts for [Latits]." The Court noted that the officer did not have that option and had "made no effort to demonstrate that, under the facts alleged by [Latits], he did not violate the deceased's Fourth Amendment rights or that he is entitled to qualified immunity due to a lack of clearly established law."[62]

The Court dismissed Officer Phillips' appeal.

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

Bolick v. City of East Grand Rapids, 580 Fed.Appx. 314 (6th Cir. 2014)

FACTS: On the day in question, Matthew Bolick, age 30, was living with his parents in East Grand Rapid, MI. According to Stephen (his father), he "had been acting strangely," had reported hearing voices and that he was "being watched by the Secret Service." He also indicated he would be throwing the first pitch at a New York Mets game soon. That night, Stephen and Kevin (another son) came home to find the picture window broken; Matthew, outside, admitted breaking it. He began to run about. Stephen dialed 911 as he drove away, telling them "my son is freaking out, he's lost it, he has threatened me."

Sgt. Davis and Officer Parker met Stephen at a nearly gas station. He reported the threats and that Matthew was suicidal. Parker went to the house and spoke to a neighbor, who reported Matthew had pounded on his car. Parker saw Matthew running in the street and told him to stop, he did so. Parker told him to "chill out," but instead, Matthew punched Parker and ran. He caught him and asked him where he lived, again, Matthew "sucker-punched Parker." Parker Tased Matthew

[62] Plumhoff v. Rickard, supra.

multiple times, at one point, Matthew ripped out the wires and kept running away. Davis arrived and he joined in the chase, trying to Tase Matthew.

Eventually, they ended up in the kitchen. Matthew did not comply with their commands and seemed to be "making his way to the sink" while "crouching into a fighting position." Seeing knives nearby, they reiterated commands. When he reached into a trash can, Davis kicked it over. As Matthew charged Parker, Parker drive-stunned him. The two officers, both much larger than Matthew, struggled to control him as he "put up significant resistance." Finally, they were able to get him handcuffed and lying on his stomach, when they were finally able to call for backup. At some point while handcuffed, Parker Tased Matthew again, later stating that even though he was handcuffed he was still continuing to resist. Both officers were lying on top of him and it was alleged that Davis was using his hands and knees ("but not the full weight of his body") and putting pressure across Matthew's shoulders to hold him down. Both testified that he continued to try to "buck them and almost succeeded in doing so."

Kevin and Jonathan, another brother, however, testified that Matthew screamed at the officers and that Davis was using his full weight to apply pressure. He claimed Matthew only moved his legs in a shuffling motion but that he could not move more than that. Two other officers relieved Davis and Parker, and they too indicated that Matthew struggled. He did not really respond to questions about whether he was OK. When EMS arrived, "his eyes were half open and glassy, and the color had drained from his face." He was soon pronounced dead at the scene. The ME reported exhaustive mania / excited delirium syndrome as the cause of death.

The Bolicks filed suit against the City and the two officers, claiming excessive force under §1983. They also made a failure to train claim against the city. Looking at the record, the District Court agreed there were issues of material fact "as to the officers' post-handcuff Tasing and back pressure" and denied qualified immunity on those claims, but gave the city summary dismissal. The officers appealed.

ISSUE: Must the defendant in a §1983 case concede all disputed facts to the plaintiff in a summary judgment motion?

HOLDING: Yes

DISCUSSION: The Court noted that at this stage in the proceeding, they were required to read the record in Matthew's favor, in which it was indicated that he did not resist after being handcuffed. The officers argued that his actions would be interpreted by any officer as active resistance.

Specifically, the Court noted, there were "two discrete police actions" that night – the use of a Taser on a handcuffed subject and the pressure. Using the Graham[63] factors, the Court first looked at the timeline. He had assaulted an officer multiple times and threatened to kill his father, and force was justified in taking him into custody. The force used appeared to be appropriate. Once he was handcuffed and on the ground, however, there was dispute as to how much resistance he actually could in fact put, up – so any force that could be used would be minimal. At that time, he did not pose a threat and could not effectively resist arrest. Although the Court agreed that the situation

[63] Graham v. Connor, 490 U.S. 386 (1989).

must be judged in its totality, the Court further agreed that the two actions complained of, viewed from Matthew's perspective, could be considered unreasonable by a jury.

Further finding that qualified immunity was not appropriate at this time, the Court denied the appeal.

Baker and Jones v. Union Township (OH), 2014 WL 4653068 (6th Cir. 2014)

FACTS: On February 14, 2011, Baker went to the Union Township VFW. He'd already been drinking heavily. He was soon asked to leave because "he was engaged in a tense, aggressive discussion with another patron." A fight ensued and the police were called. The bartender warned Baker that the police were on the way. He left through the front door, saw the police and re-entered the building. He then left through the back door, abandoning his car in the lot, and jogged to his house, some 200 yards away. He was Tased while running and fell, but was able to remove the probes and "ran the rest of the way to the house with the police in pursuit."

He shut and locked the door and told his girlfriend not to allow officers to enter. However as he was standing near the basement staircase, Officer Ventre entered and Tased him again, causing him to fall down the basement steps and suffering severe injuries, including a broken neck. However, the party's stories diverged at this point, with Baker saying he was standing still and made no attempt to flee down the steps before he was Tased. Ventre stated he only Tased Baker when he opened that door in an attempt to flee, after being ordered not to do so. He also noted that he was not aware the door led to a staircase.

Baker was charged with a variety of offenses, and eventually pled guilty to resisting arrest. He and his girlfriend then filed suit for excessive force and other claims under 42 U.S.C. §1983. The District Court dismissed some of Baker's claims, and Jones's single claim, but denied Ventre summary judgment under §1983. Ventre and the county appealed.

ISSUE: Is Tasing an unresisting subject permitted?

HOLDING: No

DISCUSSION: To determine whether summary judgment is appropriate, the Court need look, first, whether Ventre's actions were "objectively unreasonable" under Graham v. Connor.[64] In this case, taking the facts in the light most favorable to Baker (as required at this stage of the proceeding), "Ventre confronted a non-violent misdemeanant suspect who had been, but was no longer, fleeing, standing at the top of an observable staircase and offering no resistance or indication of aggression." Under Graham, the "crime at issue was not severe." Although he was intoxicated, he was not behaving aggressively at the time he was Tased a second time. Finally, he "did not move once Officer Ventre entered the home." The Court noted that "it is widely known among law enforcement and was even a subject of Ventre's police training that Tasers should not be employed against suspects on elevated surfaces because of the risk of serious injury from a resulting fall."

With respect to the second part of the evaluation, whether the right was clearly established at the time. Clearly, the Court agreed, Ventre should have been aware that he was not to use physical

[64] Supra.

force against an unresisting subject.[65] Since Ventre apparently admitted he did not, in fact, issue any commands, Baker could not have legally resisted. Further, he gave no warning was an additional factor in determining there was a violation of the right to be free of excessive force. The Court agreed that the denial of summary judgment was appropriate.

Margeson v. White County, TN, 579 Fed.Appx. 466 (6th Cir. 2014)

FACTS: After years of issues related to substance abuse and domestic violence, in 2011, the Margesons were informed that Tennessee was going to permanently terminate their parental rights. The situation escalated and James Margeson was arrested on drug charges. Prior to his court date, he told Brenda (his wife) that he was not going to appear at the hearing. He began to carry a gun and told her he intended to shoot officers if they came for him. When he failed to appear, his bond agent texted him that he was to be arrested.

On July 22, 2011, the Margesons were staying with James' mother, Brock. They walked over to his aunt's house for breakfast; he was armed with a pistol. His wife had seen him with a loaded "long gun" earlier the same day. When confronted about a pending arrest, he stated something like – "that is a part of life." Another comment suggested he would have to be removed in a body bag. When they went back to his mother's house, he laid down with both guns nearby, with Brenda hoping he would go to sleep and she could remove the weapons. Brock when to the Sheriff's Office to report his erratic behavior. Sheriff Shoupe confirmed the bench warrant and assembled a team to make an arrest. As they arrived Brenda emerged and was met by Det. Capps. She turned back toward James and told him that police were outside, as she was pulled outside by the officers.

James "jumped up and grabbed his guns." He was ordered to drop the weapons but did not, Officer Isom saw James coming through the door and fired the first shot. Officer Lynch started firing as well, as did Officer Williams, although the "timing and sequence is less clear." Margeson fell to the ground but came back up with a handgun. The shooting finally stopped and Det. Capps entered and rendered first aid, along with Officer Lynch. Margeson made statements indicating a suicide-by-cop. Upon investigation the total number of shots were unclear. The Tennessee Bureau of Investigation (TBI) concluded he'd suffered 21 gunshot wounds and 23 shots had struck the house. Brenda estimated the officers fired between 36 and 43 shots. It was noted that some of the shots were from a shotgun.

Brenda Margeson filed suit, alleged excessive force and contending that they had "engaged in "gratuitous violence"' by shooting "after any reasonable threat had already dissipated. The officers moved for summary judgment. The District Court found the initial use of force was reasonable, but questioned whether the additional force was "necessary or reasonable" and denied summary judgment. The officers appealed.

ISSUE: Must courts avoid hindsight bias in use of force cases?

HOLDING: Yes

[65] Wysong v. City of Heath, 260 F.App'x 848 (6th Cir. 2008).

DISCUSSION: The Court noted that "the use of deadly force is justified when an officer has reason to believe that a suspect poses a threat of serious harm to the officer or others."[66] Especially when the events happen quickly, courts are cautioned to beware of hindsight bias. The District Court had "found that the number of shots fired was a significant issue in the case." The officers, however, contended that even after he fell, he "reached for a second firearm," but it was not clear that the two primary shooting officers (Lynch and Williams) "ever saw a gun or perceived any threat" once he went down.

The Court noted that apparently 43 shots were fired (although law enforcement indicated only 5 shotgun and 5 pistol shots were fired) – and that an "audio recording … undermines … testimony about the sequence of events after the initial volley of shots." The Court agreed that while the "number of shots fired is not itself dispositive," it might be relevant in this case to a jury. Either way, the Court concluded, "there are disputed facts at issue that only a jury can properly decide."

The Court affirmed the denial of summary judgment.

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

Martin v. Maurer (Wayne County, OH, Sheriff) 581 Fed.Appx. 509 (6th Cir. 2014)

FACTS: On February 14, 2009, Breitenstine picked up Yost, to go to Breitenstine's ex-boyfriend's home (Roerich). She parked in his driveway and broke into his house, stealing money and marijuana. They drove away. Wheeler, a neighbor, saw it occur and later described the woman he saw. When caught, the pair implicated Martin as a participant – specifically, Martin is much taller than the description given by the neighbor. Martin's father told Deputy Marmet (Wayne County) that his daughter had been at his house. (Other family members who were also there were not interviewed.) In March, the prosecutor told Deputy Marmet that there wasn't enough to go forward on the investigation, suggesting he try to talk to Martin, but he did not do so.

A year later, Martin completed boot camp with the Marines. At that same time, the prosecutor submitted the case to a grand jury and Martin was indicted. She was arrested in December and dishonorably discharged. She was tried a few months later and quickly acquitted.

Martin filed suit under 42 U.S.C. §1983, claiming malicious prosecution. The officers claimed summary immunity and the Court agreed. Martin appealed.

ISSUE: Is exculpatory evidence required to be submitted to the grand jury?

HOLDING: No

DISCUSSION: Such a claim has four elements:

> First, that the defendant 'made, influence or participated' in the decision to prosecute the plaintiff; second, that the prosecution lacked probable cause; third, that the criminal

[66] Tennessee v. Garner, 471 U.S. 1 (1985)

proceeding caused a deprivation of the plaintiff's liberty apart from the initial seizure; and fourth, that the criminal proceeding resolved in the plaintiff's favor.

In this case, the Court focused on the second element, since it was presented to the grand jury. As a rule, an indictment shows probable cause.[67] The only exception is when a defendant knowingly gives false testimony, which was not shown in this case. Martin argued that they withheld "crucial exculpatory evidence" from the grand jury, but the Court noted that the government has no duty to present it. She pointed to a number of deficiencies in the investigation which would have called into question the prosecution, but again, the Court noted, after the indictment, there is no requirement to further investigate. The Court upheld the dismissal.

42 U.S.C. §1983 – HECK

Holson v. Good, 579 Fed.Appx. 363 (6th Cir. 2014)

FACTS: In 2009, Ashland (OH) officers searched the home of Holson and Pepper. They found cocaine and what they believed was child pornography. They were convicted, served a short sentence and were released on parole. Both filed suit, arguing that the search of the home and their parole conditions were invalid. The trial court dismissed all claims and they appealed.

ISSUE: Does the Heck bar prohibit claims when the contested issue would invalidate an underlying conviction?

HOLDING: Yes

DISCUSSION: The Court looked at the Fourth Amendment claims concerning the search. The court noted that the Heck bar precludes claims when the "contested search produced the only evidence supporting the conviction and no legal doctrine could save the evidence from exclusion."[68] Since that was the case here, the court agreed, the Heck bar prohibited the claims.

The Court upheld the dismissal.

42 U.S.C. §1983 – SPECIAL RELATIONSHIP

Carmichael v. City of Cleveland, 571 Fed.Appx. 426 (6th Cir. 2014)

FACTS: On November 10, 2008, Carmichael disappeared from her Warrensville Heights MI home. After 48 hours, her family tried to file a missing persons report but was turned away; the officer stated that she would turn up "after she finishes smoking crack." Because she was actually last seen in Cleveland, they tried to make a report there but were denied, because she did not live in that city. The family found her pickup truck in Cleveland, but the agency still refused to take a report. Finally, after three weeks, Warrensville Heights PD did take a report.

Sowell lived in Cleveland, only a few blocks from where the truck was found. He had previously pled guilty to two counts of violent rape. He was released in 2005 and did not register as a sex

[67] Robertson v. Lucas, 753 F.3d 606 (6th Cir. 2014).
[68] Harper v. Jackson, 293 F. App'x 389 (6th Cir. 2008).

offender, as apparently required. In 2008, he was arrested after a bleeding woman sought help from police, stating Sowell had attacked her. Due to a miscommunication of facts, including Sowell's criminal history, the prosecutor released him, anticipating bringing charges as additional information was developed. In 2009, a naked women fell out of the window of his house. As a result, Sowell's house was searched, and 11 bodies, all of African-American women, were found, including Campbell's. (Neighbor's had complained about a foul smell for years) A company next door had reported that Sowell was disposing of full plastic bags in their dumpster, as well.

Campbell's estate filed a lawsuit under 42 U.S.C. §1983, claiming, among other issues, "racial and national origin discrimination based on the deliberate refusal to take a missing person report and promptly investigate" her disappearance. A variety of different claims were also made against various law enforcement agencies. The trial court granted summary judgment to all defendants and the Estate appealed.

ISSUE: Does a government entity have a "special relationship" with all of its citizens?

HOLDING: No

DISCUSSION: The Court first questioned as to whether the Estate had, in fact, stated a claim to which relief could be granted. The Court looked to whether Campbell's Due Process rights were violated, but noted that the City of Warrensville Heights owed Campbell no duty to prevent her murder by Sowell, a private citizen. The city did not have a "special relationship" with her, nor did they create any "special danger" placing her a risk, as opposed to the public at large.[69] Further, the Court found nothing in the pleadings to suggest that Campbell was treated differently because of her race – instead making only conclusory statements to that effect. Although it was alleged that a policy and practice was in place that kept them from making prompt responses to claims of missing African-American women, the Court noted that "merely alleging that such a policy is in place is not enough."

The Court agreed the dismissals were proper.

EMPLOYMENT – FREE SPEECH

Garceau v. City of Flint, 572 Fed.Appx. 369 (6th Cir. 2014)

FACTS: In 2011/2012, Flint PD promoted several patrol officers to provisional sergeants. A test was administered to determine who should remain in that rank permanently. Two did not pass but remained as provisional sergeants, both were African Americans. Other officers (the plaintiffs) who were Caucasian, raised concerns that these promotions were an attempt to "skirt the department's internal rules" on promotions. As a result, they later argued, the City began retaliatory actions. They sued the City, the Police chief and a specific police captain. The City moved to dismiss and was successful, but only in part. Some claims, including a First Amendment retaliation claim, was allowed to proceed. The City appealed.

[69] DeShaney v. Winnebago Cnty. Dep't of Social Servs., 489 U.S. 189 (1989).

ISSUE: Is an employee involved in protected speech protected from retaliation?

HOLDING: Yes

DISCUSSION: With respect to the individual defendants, both argued that the officer-plaintiffs were not engaged in protected activity under the First Amendment – defined as when they are speaking on "matters of public concern" and doing so "separate and apart from their responsibilities as public employees." The Court agreed that, with the facts available at the time, the speech was, in fact protected and that the case against the individual defendants could proceed.

With respect to the claim against Flint, the Court noted that the alleged discriminatory practice fell to the City, and that there had been discussion of the "trouble the plaintiffs' complaints" had cause. As such, that was enough to show that there was a "plausible inference" that the city had a policy or custom that involved retaliation.

The court allowed the case to go forward.

SUSPECT IDENTIFICATION

Williams v. Bauman, 759 F.3d 630 (6th Cir. 2014)

FACTS: "A robbery went wrong in a Detroit video store in October 2005." Shaba, the owner, was found shot to death, although he was apparently able to shoot one of his attackers. Banks, a witness, testified that two men had entered and demanded money. He claimed one was wearing a dark shirt and hat, although surveillance video indicated the shirt was beige. In the meantime, Coleman had gone home, suffering from two non-critical wounds, and had changed his clothing. Another man (not Williams) was with him. They explained he's been shot during an argument and his mother took him to the hospital. Officers learned that he'd gone there and documented his injuries.

In the meantime, a backpack containing a beige shirt was found with gunshot residue. DNA testing linked blood on it to Coleman. Jeans and a cap were linked to Williams. Both men were charged. Williams was presented to the witness (wearing a dark shirt) in a lineup and quickly identified as the shooter. Banks testified at Coleman's hearing, as well. Williams' counsel only learned of that at the time of his own hearing and requested a continuance to get a copy of that testimony. Since Banks was in poor health, that was denied, and Banks identified Williams. Banks died before trial. Both transcripts were read to the jury in Williams' trial. Both men were ultimately convicted of felony murder and Williams appealed.

ISSUE: Is a lineup that "suggests" an identification always improper?

HOLDING: No

DISCUSSION: Williams argued that the admission of the prior testimony violated his Confrontation rights. The Court agreed that Crawford[70] applied; there was no dispute that Banks'

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testimony was testimonial and that he was unavailable at trial. The Court agreed that his testimony at Williams' own hearing was admissible because there was an opportunity to cross-examine, but that what he said at Coleman's was not, since Williams counsel was not able to cross-examine the witness. (However, the court agreed it was harmless error.)

With respect to the lineup, specifically the police having him wear a dark shirt, which was actually different than what showed up on the recording although the witness stated he was wearing a dark shirt. Williams was shorter that the other man who was wearing a dark shirt, as well. The Court agreed, however, that the witness made a valid identification, and further, that the dark shirt was purely happenstance, it was what he was wearing when arrested. Banks testified to making an identification by face, not by shirt.

Williams' conviction was affirmed.

INTERROGATION

U.S. v. Hampton, 572 Fed.Appx. 430 (6th Cir. 2014)

FACTS: Hampton awoke on July 31, 2008, between 10 and 11 a.m. and he was arrested at about 1:30 a.m. on August 1, in connection with a police shootout. He was held at the police station until booking at 7:30 a.m. He remained in a holding cell until 1:30 p.m., where we was taken to a small room to await testing for gunshot residue. He was then shackled in a different room and fed. Finally, at 3 p.m., he was given Miranda rights and signed an advice form, and was then interviewed.

At about 6 p.m., he signed a statement, after being given Miranda a second time and signing an acknowledgement. Noticing some discrepancies, the officers returned and found him sleeping on the floor, still shackled to a chair. He was awakened, giving Miranda again, and executed another statement, at about 8:40 p.m. He was finally put into a cell, almost 24 hours after the incident, and over 34 hours since he'd last slept.

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

ISSUE: Is lack of sleep coercive?

HOLDING: No

DICUSSION: Hampton argued that he was too sleep-deprived to give a valid statement. In such cases, both sleep deprivation and intoxication, courts generally took to the perceptions of the officers to determine if a statement is knowing and voluntary. In this case, the court noted he'd been given Miranda three times and he agreed that he was speaking voluntarily. The officers had seen no impairment in his functioning; he was coherent and appeared to understand what was going on. He did not appear sleepy or disoriented. The court agreed that his waiver was voluntary and he was not coerced.

Hampton's plea was affirmed.

U.S. v. McCloud, 2014 WL 4668152 (6th Cir. 2014)

FACTS: McCloud was convicted of multiple charges of bank fraud and related crimes. As part of the trial, McCloud's signatures on documents he was required to sign as part of the process (for example, his bond paperwork) were introduced against him to prove he'd signed some of the relevant paperwork. McCloud argued that his writing was compelled and moved the "physical" evidence into the testimonial evidence.[71]

ISSUE: Are non-compelled signatures testimonial?

HOLDING: No

DISCUSSION: The Court agreed that the documents were "introduced as signature exemplars to compare to" the documents actually at issue as evidence.

In addition, McCloud argued he was prejudiced by a late disclosure of documents, including the actual notes taken by an investigator, in violation of Brady v. Maryland.[72] The Court noted that much of what he complained of was not exculpatory, however, but was in fact highly inculpatory. In addition, a typed summary of the notes had been provided and the handwritten notes were provided upon request during the trial. As they were unable to raise any questions as what specific points may have been to McCloud's advantage, the Court agreed that there was no prejudice.

The Court upheld McCloud's convictions.

Loza v. Mitchell, 766 F.3d 466 (6th Cir. 2014)

FACTS: On January 16, 1991, Loza shot and killed four members of his girlfriend's family, in Middletown, Ohio. That afternoon, Hoertt saw a white pickup dumping trash in his dumpster, in that same town, and having had issues with that before, he searched the items looking for something to identify the person. He found a letter signed by Loza that suggested he was avoiding capture by LAPD for crimes committed in California. He called the Warren County SO to report what he'd found and was told it would be awhile before a deputy could respond. In the meantime, he learned Loza and a female were at the nearby bus station. He then called Det. Knable, who responded immediately. They further searched the trash left behind and found a number of other highly incriminating items. As they did so, Loza approached. Det. Knable went to speak to him, drew his weapon and secured him. He asked if he was being stopped because of what he'd put in the dumpster, to which Knable agreed. He identified the woman who'd been seen with him as Rodriguez (he'd also given his name as Rodriguez), that she was his wife and that they were going to California.

Knable found the woman, who gave her name as Jackson. It was determined she was under age. They went to the home identified as Jackson's but were unable to get anyone to answer – and a neighbor stated he'd been trying all day as well. Jackson was taken into custody as a minor and Loza was arrested for contributing to her delinquency. Under questioning, Jackson told them about the

[71] U.S. v. Campbell, 732 F.2d 1017 (1st Cir. 1984).
[72] 373 U.S. 83 (1963).

murders. Using a search warrant, they found the victims. (Some were still alive initially, but subsequently, all died.)

Loza was questioned after waiving Miranda rights. He admitted to having killed all four and stated Jackson did not know about it until it was too late. He was convicted and appealed.

ISSUE: Does handcuffing automatically mean "Miranda detention?"

HOLDING: No

DISCUSSION: Loza argued that the statements he made to Knable while at the dumpster should have been suppressed. He was secured and handcuffed at the time, and that as such, he argued he should have been given Miranda before he gave the false names to the detective. The Ohio courts agreed that it was a lawful Terry stop. The Court noted that under Berkemer v. McCarty, an individual might be detained, but not in Miranda custody.[73] The Court noted that questions to determine identity were appropriate and that the person detained was not required to respond. Although the court noted that "the line between investigatory stops governed by Terry – particularly those that are more intrusive – and custodial interrogations subject to Miranda is, at times unclear" that in this case, the decision of the Ohio court was not unreasonable.

Further, his confession was voluntary and thus admissible. He argued that Jackson had been "threatened" by the detectives, with comments about her unborn baby being born in the penitentiary or even sent to the electric chair. In contrast, the court determined that the detectives did nothing more than tell him of the possible consequences of his actions, in response to his own questions. And specifically, he'd waived his Miranda rights.

The Court upheld Loza's convictions.

March v. McAllister, 573 Fed.Appx. 450 (6th Cir. 2014)

FACTS: March and his wife, Janet were married in 1987; they resided in Nashville. They experienced marital problems and by 1996, their marriage "had seriously deteriorated." March confided to his mother-in-law (Levine) that he believed divorce was imminent. Shortly thereafter, Janet insisted March find somewhere else to live. On August 16, they planned to see a divorce lawyer but the night before, around midnight, March called the Levines to say Janet had left after an argument. Janet was never seen again. A "permanent change of scenery was antithetical of the victim's habits, customs, and ethos." A memorial service was eventually held.

March moved his children first to Chicago, then, in 1999, to Mexico. A number of facts were described that suggested her disappearance was highly suspicious. Later, March's father, Arthur, was deposed – he'd arrived several days after Janet's disappearance and testified that his son had told him she'd died in an accident. His father stated he'd help dispose both of evidence and the body, which was relocated during a trip to Chicago.

March was arrested in 2005 and extradited from California back to Tennessee. On the trip back, Det. Postiglione (Metro Nashville PD) did not give March Miranda warnings, instead saying that "he

[73] 468 U.S. 420 (1984).

understood [March] was an attorney and that he had no intention of interrogating him." But, he said, he would "certainly listen" and convey whatever he said to the proper authorities. The detective acknowledged he was aware March had representation. On the way back, he steadfastly reminded March he lacked the authority to negotiate a plea deal. He did, apparently, make several statements that indicated sympathy about something that might have occurred in a "moment of anger."

While incarcerated, and mistaken about the reason a fellow inmate (Farris) was in custody (he thought the inmate was in for first-degree murder), March solicited the inmate to help murder the Levines, in exchange for helping him to raise money to secure his bond. They discussed the plot repeatedly over a month. Farris contacted his mother and his attorneys about the plot and eventually, Sgt. Postiglione was told. "Farris officially withdrew from the conspiracy and agreed to participate in a jailhouse investigation." Supplied with a recorder, he met with March to finalize the plan, and once released, communicated with him several times by phone as well. Eventually Arthur was arrested and despite an effort to locate Janet's remains, nothing was ever found.

March, still incarcerated, also communicated with two other inmates, King and Martin, telling them details of the murder and his issue with the Levines (over custody of the children). He was convicted of second degree murder of Janet and later, of conspiracy to commit first degree murder of the Levies. He appealed.

ISSUE: Are jailhouse conversations admissible?

HOLDING: Yes (but see discussion)

DISCUSSION: Among other issues, March challenged the use of his comments made during the his jailhouse conversations, arguing that the government elicited incriminating information improperly, when he was represented by counsel.[74] However, the court noted, looking at Maine v. Moulton, that the right to counsel is offense specific, and found that the facts in this case were "neatly wedged" between the principle that Massiah espouses and that "the tenant that a defendant's voluntary statements concerning a crime for which he has not yet been charged are admissible at a subsequent trial" of that offense.[75] The Court concluded however, that "so long as the incriminatory statements are introduced in a manner in which the defendant's right to counsel has already attached, a violation occurs." Since the two crimes were intertwined, it would be improper to admit them in the murder trial. Further, using a tactic to elicit information in what could be 'fabricated or trumped-up future charges" violates fundamental fairness.

However, in this case, the Court affirmed the denial of habeas corpus.

TRIAL PROCEDURE / EVIDENCE – EXPERT TESTIMONY

U.S. v. Dalton, 574 Fed.Appx. 639 (6th Cir. 2014)

[74] U.S. v. Henry, 447 U.S. 264 (1980).
[75] Texas v. Cobb, 632 U.S. 162 (2001).

FACTS: From December, 2009, Dalton sold oxycodone and other pills to other addicts and to other dealers, in Somerset. He both purchased pills from dealers for resale and from trips to pain clinics in Florida and Georgia. He paid others to obtain prescriptions as well. He was ultimately indicted in 2011 for his trafficking activities. He was convicted and appealed.

ISSUE: Is testimony to show patterns of drug trafficking admissible?

HOLDING: Yes

DISCUSSION: Among other issues, Dalton argued that the expert testimony of Det. Hunter was improperly admitted. Hunter testified as the pattern he'd observed in "unrelated oxycodone-conspiracy investigations in Kentucky." The Court agreed that the detective had specialized knowledge "regarding pill-trafficking conspiracies connecting eastern Kentucky and south Florida." He testified as to "the source of oxycodone that he had seen in eastern Kentucky, the prevalence of particular kinds of pills, their respective street prices, the organizational structure of groups trafficking pills from south Florida to eastern Kentucky, the prevalence of cash-strapped pill abusers in these groups and the concomitant necessity of sponsors, the rate of return to the sponsor for financing the trips to Florida pain clinics, and the patterns of medical record-keeping at the pain clinics and pharmacies that supplied the prescriptions and pills." The Court agreed that his testimony was relevant to show the "methods and techniques employed in an area of criminal activity and to establish 'modus operandi' of particular crimes."[76]

The Court upheld his convictions.

U.S. v. Whalen, 578 Fed.Appx. 533 (6th Cir. 2014)

FACTS: In January, 2009, Ward (in Kentucky) and Mitchell (in Massachusetts) began to communicate online. Mitchell visited Ward and her four children for a week. As the relationship progressed, the couple agreed to move together to Maine, where Mitchell would be working with Whalen. Whalen invited the couple and the children to stay with him. Once in Maine, however, Whalen (age 43) began to spend "an inordinate amount of time with Haley" (age 13). He invited her to go shopping and on family visits but did not include the other, younger, children. Mitchell confronted Whalen and both he and Haley denied anything inappropriate. "But that proved to be false," and in fact, Haley had been sneaking into Whalen's bedroom. Eventually, they began engaging in sexual intercourse.

Mitchell and Ward continued to be suspicious and matters boiled over. Whalen threw Mitchell out of the house and Ward (with Mitchell) asked the sheriff's office to assist with Ward and the children leaving. However, Haley refused to leave. Although Whalen was willing to allow Ward (and of course Haley, separately) to live with him, eventually the deputy sheriff had to physically remove her, "screaming and crying."

Ward's ex-husband met with them to bring them back to Kentucky, but Whalen and Haley continued to communicate via instant-messaging. Because her mother also used the phone, Whalen cautioned her to delete the messages. A few days later, on September 26, 2009, Ward discovered Haley missing and checking the phone, found a suspicious message. An Amber Alert

[76] U.S. v. Pearce, 912 F.2d 159 (6th Cir. 1990)

was issued and the FBI became involved. Whalen, intending to take her to his sister's home in Wisconsin, instructed Haley to toss his cell phone out of the car. They stopped in Indiana and then continued on to Wisconsin the next day. While at a hotel there, a police officer recognized the truck and Whalen was apprehended.

Haley stated that Whalen had "neither harmed nor inappropriately touched her." However, upon further interviews, she admitted to sexual contact in both Maine and Wisconsin. Whalen was charged with transporting a minor in interstate commerce with the intent to engage in sexual activity.[77] He was convicted and appealed.

ISSUE: Is lay opinion testimony sometimes permitted?

HOLDING: Yes

DISCUSSION: Among other evidentiary issues, Whalen argued that the "lay opinion testimony" of Moeller, a child protection worker who interviewed Haley in Wisconsin, was improperly admitted. Moeller had testified that it was "not unusual for juvenile victims of sex crimes to deny the sexual contact." Moeller had not been qualified as an expert, but did give her opinion about the tenor of the interview. The Court agreed, however, that she had "framed her testimony as a personal opinion based on Haley's demeanor" – which she had personally witnessed. Although her expertise as a social worker lay behind her opinion, it was properly admitted.

Whalen also argued that the full recording of Haley's interview, in which she initially denied any sexual contact, should have been admitted, but the court noted that the "circuits are split on whether a criminal defendant is entitled to introduce extrinsic evidence of a prior false or inconsistent statement when the witness admits at trial that she made up the statement and that it was false." The Court upheld the denial of the use of the entire recording.

With respect to the admission of Yahoo instant messages, which were preserved via screenshots and to which Ward testified she believed originated with Whalen, Whalen argued that a qualified witness from Yahoo was required concerning the ownership of the user name. He had not objected to their admission, and the Court concluded it was not plain error to allow the jury to come to its own conclusion about that fact. He also argued that he was not provided with the screenshots prior to trial, which the government disputed. The Court did not find that to be prejudicial, as he made no assertion they were "doctored or otherwise inaccurate," or explain what he would have done differently had he had them.

The Court upheld his conviction.

McCarley v. Kelly, 759 F.3d 535 (6th Cir. 2014)

FACTS: McCarley was a suspect in the 1992 murder of the mother of his 3-year-old son, D.P. The child told the responding officers that it was McCarley who "hurt mommy." He also made statements in the presence of his grandmother that also pointed to McCarley. The police directed her to a child psychologist, Dr. Lord, who was "able to elicit several similar statements from him as well." In 1995, additional information was obtained and McCarley was finally indicted in

[77] 18 U.S.C. §2423(a).

2004. During the trial, Dr. Lord "read to the jury … three letters" she had written detailing her sessions with the child. The detective agreed under questioning that he "absolutely planned to use any information provided by Dr. Lord in his investigation to assist him with identifying the persons responsible for the murder." The child's grandmother also testified from notes as to what the child said in her presence, while talking on a toy telephone and looking at a photo of his mother, which included incriminating information. Other officers testified that the child stated that every uniformed officer he saw was the one who hurt his mother – McCarley was found in possession of law enforcement uniform items, which were taken by an investigator as evidence. McCarley was not affiliated with any law enforcement agency.

McCarley was convicted. He appealed, unsuccessfully, in the state courts and ultimately took a habeas corpus petition.

ISSUE: Is testimonial hearsay admissible?

HOLDING: No

DISCUSSION: The Court noted that "Crawford initiated a sea change in Confrontation Clause jurisprudence."[78] Although Crawford did not define "testimonial" – it is generally accepted that testimony is "a solemn declaration or affirmation made for the purpose of establishing or proving some fact." Davis v. Washington and Hammon v. Indiana later differentiated between non-testimonial and testimonial, and noted it did not require formality as a factor.[79] Further, the fruits of an interrogation, "whether reduced to a writing signed by the declarant or embedded in the memory (and perhaps notes) of the interrogating officer, [are] testimonial."

> Specially, in Davis, the Court articulated four reasons why the statements under discussion were not testimonial. Davis articulated four reasons why McCottry's statements were not testimonial evidence. First, "McCottry was speaking about events *as they were actually happening*, rather than describing past events."[80] Second, "any reasonable listener would recognize that McCottry . . . was facing an ongoing emergency." Third, viewing the 911 call objectively, the Court concluded that the nature of the questions asked and the answers given "were necessary to be able to *resolve* the present emergency, rather than simply to learn . . . what had happened in the past." Finally, the Court addressed the different levels of formality between McCottry's 911 call and the statements held to be testimonial in Crawford. McCottry's frantic telephone call from an unsafe environment stood in stark contrast to Crawford's calm responses to questions posed by police in the safety of the station house. Accordingly, McCottry was not bearing witness or testifying because "[n]o 'witness' goes into court to proclaim an emergency and seek help." In Hammon, the Court found no ongoing emergency and that the reason for the questioning was to investigate a crime.

Applying those principles, the Court agreed the psychologist was "acting more as a police interrogator than a child psychologist engaged in private counseling." She was clearly an agent of the police in the situation. The questioning was ten days after the crime. However, to be used to

[78] Crawford v. Washington, 541 U.S. 36 (2004).
[79] 547 U.S. 813 (2006).
[80] Quoting Lilly v. Virginia, 527 U.S. 116 (1999).

overturn a verdict, the error must be more than harmless to the jury's decision. For example, the factors include:

> "the importance of the witness' testimony in the prosecution's case, whether the testimony was cumulative, the presence or absence of evidence corroborating or contradicting the testimony of the witness on material points, the extent of cross-examination otherwise permitted, and . . . the overall strength of the prosecution's case."

In this case, the Court noted that "the importance of Dr. Lord's testimony to the prosecution's case against McCarley cannot be overstated." McCarley actually had two trials and in the second one, the "statements were introduced – without a limiting instruction – to establish the truth of the matter asserted" – making it hearsay. It was not cumulative with the grandmother's similar testimony. Without the testimony, the prosecution's case was less than convincing.

The Court agreed the introduction of the evidence was not harmless error and reversed the denial of habeas corpus petition by the District Court. The case was remanded to allow the writ to be granted.

U.S. v. Johnson, 576 Fed.Appx. 572 (6th Cir. 2014)

FACTS: Johnson was charged in 2011 with respect to an ongoing investigation into a street gang, LSP. He was one of the original members, along with childhood friends. Drug trafficking by the gang escalated into shootings. Johnson "had a reputation for violence" and regularly participating in the shootings. He beat a CI, Robinson, nearly to death and was involved in the shooting of a neighborhood youth at odds with the gang. Johnson and other gang members were indicted. At the trial, Det. Sgt. Lambert (Youngstown OH PD) testified both as an expert on gangs, and specifically the ones in that city, as well as a fact witness with this specific investigation. He returned to the stand later in the trial, testifying only as a fact witness.

Johnson was convicted of a variety of federal organized crime offenses. He appealed.

ISSUE: Is a summary of prospective expert testimony required?

HOLDING: Yes

DISCUSSION: Johnson argued that he should have received, pursuant to FRCP 16, a summary of Lambert's expert testimony. The Court agreed that the summary was not promptly provided, but noted that it was clear from the indictment that the issue would be addressed at trial. Further, he argued, the Court did not take the necessary precautions to allow him to testify as a dual witness, and the Court agreed there was a "complete lack of demarcation" between the two types of testimony, and no admonition to the jury about it, was improper.[81] However, The Court found that both errors were harmless and denied Johnson's appeal.

TRIAL PROCEDURE / EVIDENCE – EXCULPATORY EVIDENCE

McMullen v. Booker, 761 F.3d 662 (6th Cir. 2014)

[81] U.S. v. Lopez-Medina, 461 F.3d 724 (6th Cir. 2006).

FACTS: McMullen and Smith were lifelong friends and also related by marriage. They were also drug addicts who frequently used and shared drugs. On July 6, 2001, Smith became angry because he thought that McMullen had sold him fake Vicodin pills. He tracked down McMullen at a party. He came out to Smith's car and they shared some crack cocaine, but when McMullen requested payment for the crack, Smith threw the purportedly fake pills at him and refused to pay. A fight ensued, during which McMullen snatched a gun from his wife, nearby. He shot Smith in the chest and Smith subsequently died.

McMullen was charged with murder. At trial, the witnesses (including McMullen and a friend of Smith's, McDowell) testified as to conflicting facts. McDowell, it was learned, received a plea in a pending cocaine charge as a result of his agreement to testify. McMullen was ultimately convicted of second-degree murder and appealed. Once his conviction was affirmed to the state court, he took a habeas petition.

ISSUE: Must material exculpatory evidence be disclosed, absent a request?

HOLDING: Yes

DISCUSSION: Among other points, McMullen argued that he should have been told of McDowell's plea deal. The Court agreed that "clearly established federal law imposes a duty on prosecutors to disclose exculpatory evidence."[82] That rule applies even if the defendant does not specifically ask for it.[83] However, that rule only applies to when the evidence is material and that there is a "reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different."[84] "A prosecutor's Brady obligation extends to disclosing the "inducements" and the "possibility of a reward" held out by the government for its witnesses, whether formalized in an agreement or not."

In this case, however, the state court had concluded that since he did, in fact, admit the shooting, that disclosure of the plea deal would have had little effect on the jury's decision. In fact, the prosecutor vehemently denied the two were connected. (The Court, however, was troubled by this, as it noted that it appeared the plea agreement was delayed so as to be able to truthfully say there was no plea deal, and pointed to a court docket notation that indicated that in fact, there was a connection between the cases.) The Court agreed that was the case, but further noted that:

> Although McMullan cannot succeed on his Brady claim, the prosecution in this case may not be wholly blameless. Brady establishes a floor—not a ceiling—for proper prosecutorial conduct. One criticism of Brady is that it is a weak rule. Brady creates little incentive for a prosecutor to disclose exculpatory evidence if the prosecutor believes that the evidence is not "material" within the meaning of Bagley. Further, defendants may never learn of undisclosed Brady material or learn of it only with great difficulty. A third problem with Brady—one illustrated by this case—is that prosecutors must make an ex ante decision about whether to disclose impeachment evidence, but the Brady standard of materiality is ex post—materiality is judged in light of all the evidence at trial. In this case, even though there

[82] Brady v. Maryland, 373 U.S. 83 (1963).
[83] Kyles v. Whitley, 514 U.S. 419 (1995)
[84] U.S. v. Bagley, 473 U.S. 667 (1985).

is considerable question over whether the prosecution should have made a disclosure, any withholding would have been harmless error.

The Court upheld McMullen's conviction.

O'Neal v. Burt, 582 Fed.Appx. 566 (6th Cir. 2014)

FACTS: Dujuan O'Neal was convicted as a result of a "drug deal gone bad" in Detroit. Ultimately, he shot and killed three men. He left them in the basement of the murder house and purchased several items with which to clean up the scene and dismember the bodies. Stewart assisted, placing bloody items in garbage bags and into a vehicle. "He did not get far before police officers" stopped his vehicle and he fled on foot. He was later apprehended and identified. The items inside the vehicle were collected. Before capture, however, Stewart made his way back to the house, joining O'Neal, Chambers and his older brother, Ramone. They all checked into a hotel, but along the way, O'Neal said he would burn down the house. Felicia Stewart (Stewart's mother and previously O'Neal's lover) confronted O'Neal at the hotel, and he admitted he'd done it for the money. Some hours later, the house was burned.

O'Neal was arrested in New York and returned to Michigan. Stewart took a plea in an agreement to testify about the murders, escaping murder charges himself. During O'Neal's trial, a DEA report came to hand that implicated Stewart as the primary killer, however, his defense attorney admittedly did not protest the late disclosure effectively. He was convicted and appealed.

ISSUE: Does a belated Brady disclosure make the evidence inadmissible?

HOLDING: Not necessarily

DISCUSSION: Among other issues, O'Neal argued that the late disclosure was a Brady violation. Such a violation occurs when the prosecutor "withholds evidence that is favorable to the defense and is material to the defendant's guilt or punishment."[85] Such evidence is "material only if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different."[86] When a disclosure is delayed (rather than completely suppressed) the burden becomes what the defendant would have done differently with a proper disclosure. The District Court found that he failed to show how he was prejudiced by the late production, and the Sixth Circuit agreed with that assessment.

O'Neal's conviction was affirmed.

EMPLOYMENT

Kroll v. White Lake Ambulance Authority, 763 F.3d 619 (6th Cir. 2014)

FACTS: While working as an EMT for White Lake Ambulance Authority (WLAA), Kroll began "a tumultuous affair with her married coworker." She began to be emotional at work and had a work dispute with another coworker. Her supervisor expressed concern about the affair

[85] Smith v. Cain, 132 S.Ct. 627 (2012)
[86] U.S. v. Bagley, 474 U.S. 667 (1985).

and demanded she undergo psychological counseling. She refused and was fired. Kroll filed suit, arguing that WLAA violated the Americans with Disabilities Act by demanding a medical exam not job-related. As part of the case, allegedly, she had engaged in a single act of "unsafe driving." The trial court gave summary judgment and she appealed.

ISSUE: Do performance issues justify ordering a mental evaluation?

HOLDING: No

DISCUSSION: The Court agreed that the burden of proving that an exam is job-related is on the employer, which must show that "(1) the employee requests an accommodation; (2) the employee's ability to perform the essential functions of the job is impaired; or (3) the employee poses a direct threat to himself or others."[87] It must be more than simply "convenient or expedient."[88] The Court agreed that the evidence indicated only one incident in which she arguably provided substandard care and only one incident of possibly unsafe driving – using her cell phone. This was insufficient to find any reason to believe she was unable to perform the functions of the job.

The Court agreed that there was evidence that she was emotional at work, but her "behavior is relevant to the assessment of whether she was capable of performing her job only to the extent that it interfered with her ability" to do so, and to the extent that her employer was even aware of it. While the Court agreed that substandard care and unsafe driving could warrant discipline, as "isolated moments of unprofessional conduct" – it was not enough to justify an order for mental care. Certainly her position in public safety could, if supported, justified a direct threat to patients, but there was insufficient evidence that she "ever behaved in a way that could endanger another person."

The Court reversed the decision.

WIRETAP

U.S. v. Amaya, 574 Fed.Appx. 720 (6th Cir. 2014)

FACTS: As part of a large drug trafficking investigation, Amaya's phone was tapped. Following his conviction, he appealed.

ISSUE: Must a wiretap request be specifically detailed?

HOLDING: Yes

DISCUSSION: The Court agreed that a wiretap request requires "a full and complete statement as to whether or not other investigative procedures have been tried and failed or why they reasonably appear to be unlikely to succeed if tried or be too dangerous."[89] The necessity requirement under 18 U.S.C. §2518 is to ensure it isn't the first step in an investigation, but only

[87] Denman v. Davey Tree Expert Co., 266 F. App'x 377 (6th Cir. 2007).
[88] Conroy v. New York Dep't of Corr. Servs., 333 F.3d 88 (2nd Cir. 2003).
[89] U.S. v. Rice, 478 F.3d 704 (6th Cir. 2007).

used after other methods are at least considered. In this case, the investigating officer did list "myriad techniques that had not produced fruitful results," especially given the "geographic scope and the large number of people involved in the conspiracy." The Court agreed that the wiretap request was sufficient and upheld his conviction.

MISCELLANEOUS – RELEASE / DISMISSAL AGREEMENTS

Marshall (David and Chandra) v. City of Farmington Hills, 578 Fed.Appx. 516 **6th Cir. 2014**

FACTS: On December 13, 2006, Marshall, a Detroit police officer, was stopped after running a red light in Farmington Hills. He was in uniform. He was ordered to get out and remove his service weapon, but he "was leery of motioning toward his firearm" so he refused to do so. Instead, he asked a supervisor to come to the scene. When one of the officers reached for his gun, he apparently pushed his arm away, and he was immediately Tased, twice. His gun was removed. He was brought to the station and stripped to his underwear. He was charged with obstructing law enforcement.

Some seven months earlier, Marshall had been investigated for possible child abuse, but the case had been closed in August, 2006. On the day of the incident, the case had been reinitiated by Farmington Hills and the misdemeanor case was sent to the Oakland County Prosecutor. Marshall was charged with child abuse on January 5, 2007. He went to trial on that case first and won. Following that, the parties to the arrest case put a conditional agreement (release-dismissal) on record that the City "would dismiss the obstruction charges and the [Marshalls] would release the City from liability, contingent upon the parties (1) reaching agreement on the exact wording of a press release about the dismissal of the charges, and (2) agreeing on the terms of a release of civil liability."

However, they were unable to reach an agreement on the press release, because the City insisted on no negative connotations on its own officers and refused to "fully exonerate Marshall." On August 14, Marshall requested a trial date. However, the court concluded that the "release-dismissal was valid" and dismissed the case with prejudice.

The Marshalls filed suit against the City and its officers under 42 U.S.C. §1983. The City argued that a lawsuit was prohibited pursuant to the release-dismissal. The Marshalls appealed and the Sixth Circuit reversed and remanded the case, sending it back for further evaluation as to that issue. Ultimately, the District Court reiterated that the agreement was valid and enforceable and the District Court barred the claims. The Marshalls again appealed.

ISSUE: Are release-dismissal agreements questionable?

HOLDING: Yes

DISCUSSION: The Court noted that such agreements are not illegal, but that the "[t]he availability of such agreements may threaten important public interests" embodied in our civil rights laws.

Specifically:

> Permitting such releases may tempt public officials to bring frivolous criminal charges in order to deter meritorious civil complaints. The risk and expense of a criminal trial can easily intimidate even an innocent person whose civil and constitutional rights have been violated. The coercive power of criminal process may be twisted to serve the end of suppressing complaints against official abuse, to the detriment not only of the victim of such abuse, but also of society as a whole.

As such, it can only be enforced if a court of law "specifically determines" "that (1) it was entered into voluntarily; (2) there is no evidence of prosecutorial misconduct; and (3) enforcing the agreement "will not adversely affect relevant public interests."[90]

Looking at each element, the Court noted that the agreement must have been reached as the result of "an informed and voluntary decision." Since Marshall was "judicially compelled" to enter into the agreement, and they never came to an agreement on the conditions, it was clearly not voluntary. Even though Marshall "abandoned negotiation," it was a protracted process and involved a great deal of give and take, albeit unsuccessfully. The City had made its stance clear and Marshall's decision that further discussion was futile was valid.

With respect to prosecutorial misconduct, the burden was on the City to show no misconduct.[91] The Court identified that there were "five possible and interrelated instances of police and prosecutorial misconduct: 1) the initiation of the then-dormant child abuse investigation (which lay dormant for *seven months* and was revived *on the day of his arrest*, and for which Marshall was acquitted) as a punitive measure for threatening suit; 2) repeatedly tasering a uniformed police officer and then forcing the officer to strip to his underwear; 3) continued nighttime police surveillance on Marshall's house; 4) the merits of Marshall's obstruction charge (specifically whether the exit order was proper for running a red light); and 5) the City's less than good faith negotiation tactics, namely an insistence on insulating the officers from any admission of wrongdoing." That suggests that the "coercive power of criminal process" was being used to suppress complaints against abuse.

Finally, consideration as to whether the agreement would "adversely affect the relevant public interests." In this case, it is at least suggested that the city moved on an "otherwise dormant child abuse" charge, arguably to suppress a civil claim of abuse. In some cases, the individual may agree to the dismissal to avoid other consequences, but here, clearly, Marshall was willing to go to trial, and the court handled the matter in a perfunctory manner. His charges fell in the "range of extremely vague offenses, and befit a serious possibility of abuse."

The Court concluded that collateral estoppel did not apply and that the federal court could move forward to adjudicate the validity of a release-dismissal agreement. Marshall had been given no opportunity to litigate the issues that supported his claim.

The Court ruled that the release-dismissal was unenforceable under federal law and the District Court's decision was reversed and remanded.

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[90] Coughlen v. Coots, 5 F.3d 970(6th Cir. 1993). Newton v. Rumery, 480 U.S. 386 (1987).

[91] Hill v. City of Cleveland, 12 F.3d 575, 579 (6th Cir. 1993). Burke v. Johnson, 167 F.3d 276 (6th Cir. 1999).