KENTUCKY SUPREME COURT CASE SUMMARIES

JANUARY-JUNE 2021

DEPENDENCY, ABUSE, AND NEGLECT OF CHILDREN

M.C. v. Commonwealth of Kentucky, Cabinet for Health and Family Services, 614 S.W.3d 915 (Ky. 2021)

FACTS

M.C. is the father and primary custodian of three children. On April 16, 2019, the Murray Police Department conducted a welfare check at M.C.'s home, which revealed no concerns with the well-being of M.C.'s children. On April 19, 2019, a social worker from the Cabinet visited M.C.'s home to investigate allegations that M.C. consumed alcoholic beverages around the children. During this visit, the social worker found nothing to indicate concerns with how the children were doing in school, that the children were not properly fed, clothed, or otherwise provided for, or that the home was unsafe for the children. Nevertheless, the social worker demanded the M.C. stop drinking and attend an intensive outpatient program to address his alcohol usage or she would file a petition to have the children removed from his care. M.C. told her he would not attend an IOP as he has always maintained that, while he drinks, it does not have an effect on his ability to parent and care for his children.

The social worker filed a petition on April 23, 2019, alleging that the children were being neglected due to M.C.'s use of alcohol, and the children were removed from M.C.'s home via an emergency custody petition filed the same day. Additionally, because M.C. denied the neglect and refused to sign the prevention plan, his visitation with the children was suspended by the Cabinet. The family court granted the emergency custody petition on the grounds that "[t]he [children were] in danger of imminent death or serious physical injury or [were] being sexually abused." The children were then placed with a foster family.

The family court ultimately found that the children were neglected under KRS 600.020(1)(a)2, 3, 4, and 8 and found that there were no less restrictive means than removal because "[t]he father has refused to stop drinking and has refused to enter intensive out patient (sic) rehab as advised by Four Rivers. The father is unwilling to address his substance abuse issues." The Court of Appeals affirmed the family court. M.C. appealed to the Kentucky Supreme Court.

ISSUE

Is abuse of alcohol, by itself, sufficient grounds to find that a parent neglected his/her children?

HOLDING

No. Abuse of alcohol, by itself, is insufficient to find that a parent neglected a child.

ANALYSIS

The family court's finding that M.C. neglected his children by engaging in a pattern of conduct that rendered him incapable of caring for the immediate and ongoing needs of his children, including but not limited to parental incapacity due to a substance use disorder, was an abuse of discretion. In this case, the Kentucky Supreme Court held that sufficient evidence existed to support the finding that M.C. had a mild to moderate substance use disorder, but there was no evidence presented to show that M.C.'s disorder rendered him incapable of caring for his children or meeting their needs.

To support a finding of neglect, KRS 620.100(3) requires the Cabinet to prove by a preponderance of the evidence that the children were being neglected. KRS 600.020(1)(a) requires that a parent's substance use disorder "renders the parent incapable of caring for the immediate and ongoing needs of the child." Likewise, the required consideration by the family court under KRS 620.023(1)(c) is substance use disorder "that results in an incapacity by the parent or caretaker to provide essential care and protection for the child[.]" Therefore, by the express language of two different statutes, it is not enough that M.C. had a substance use disorder. That substance use disorder had to render him incapable of providing proper care to his children in order for the family court to find that he neglected his children under KRS 600.020(1)(a).

There was no evidence presented in this case that M.C.'s substance use disorder rendered him incapable of caring for his children or meeting their needs. No evidence was presented that M.C. was failing to properly care for the children, and the Cabinet conceded it had no concerns that M.C. was not meeting their needs or caring for them.

Further, KRS 600.020(1)(a)4 and 8 allow for a family court to find a parent has neglected a child if that parent either "[c]ontinuously or repeatedly fails or refuses to provide essential parental care and protection for the child, considering the age of the child," or "does not provide the child with adequate care, supervision, food, clothing, shelter, and education or medical care necessary for the child's well-being." In this case, the children were thirteen and fifteen years old, respectively, during the relevant period and were largely capable of looking after themselves. Even so, the evidence was uncontroverted

that M.C. provided the kind of care discussed by the aforementioned statutory provisions. The social worker testified that she was not concerned with how the children were doing in school, they were not missing school, and continued to excel in school. In that vein, on the children testified that M.C. got the children up in the morning for school and typically drove them there. The social worker further stated that she had no concerns about the children being properly clothed, fed, or otherwise provided for. The only point of concern, apart from M.C.'s drinking, was that M.C.'s home was "cluttered." But cluttered, of course, does not necessarily mean dirty and the social worker could not say that the house was dirty. Indeed, the social worker stated that she did not see anything in the home that was a threat to the children's health or well-being.

The Kentucky Supreme Court held that family court's finding of neglect against M.C. was therefore an abuse of discretion.

DRIVING UNDER THE INFLUENCE

Commonwealth v. McCarthy, ---- S.W. ----, 2021 WL 1679306 (Ky. 2021)

NOTE: This opinion was rendered on April 29, 2021, but is NOT FINAL under Kentucky Rules of Civil Procedure (CR) 76.30(2)(a) because a petition for rehearing was timely filed pursuant to CR 76.32 with the Kentucky Supreme Court on May 19, 2021. Because this opinion is NOT FINAL, it SHALL NOT BE CITED AS AUTHORITY in any courts of the Commonwealth of Kentucky. Should the petition for rehearing be denied by the Kentucky Supreme Court, this opinion becomes final on the date the petition for rehearing is denied. CR 76.32(2)(c). Accordingly, the reader is strongly advised to check the Supreme Court Case Information tab at https://kycourts.gov/Courts/Supreme-Court/Pages/default.aspx to determine the finality of this opinion prior to relying on this case as legal authority.

FACTS

On November 1, 2014 at 1:00 a.m., an Owensboro police officer stopped Jared McCarthy on suspicion of DUI. The officer administered a series of field sobriety tests and placed McCarthy under arrest. The officer transported McCarthy to the hospital where he requested McCarthy submit to a blood test and informed McCarthy of the repercussions under KRS 189A.105(2)(a)1 for refusing the test. Specifically, the officer warned McCarthy that (1) if he refused the test, the fact of the refusal may be used against him in court as evidence of violating KRS 189A.010, the DUI statute, and (2) if he refused the test and was subsequently convicted of DUI under KRS 189A.010, then he would be subject to a mandatory minimum jail sentence twice as long as the mandatory

minimum jail sentence imposed if he were to submit to the test. McCarthy refused the blood test.

In Birchfield v. North Dakota,[1] the United States Supreme Court held that the Fourth Amendment permits a warrantless breath test incident to an arrest for drunk driving, but not a warrantless blood test. Under Birchfield, warrantless blood tests constitute unreasonable searches under the Fourth Amendment unless valid consent is given or exigent circumstances justifies the search.

Pretrial, McCarthy filed a motion in limine to exclude any evidence of his refusal to submit to a warrantless blood test, citing Birchfield. McCarthy argued that a blood draw is a search of his person requiring a warrant and that he could not be deemed to have consented to the blood draw through statutory implied consent when facing a criminal penalty, namely additional jail time. McCarthy argued that his refusal to consent to a warrantless blood test could not be used against him as an aggravator for penalty purposes or as evidence at trial of the DUI offense. The trial court ruled in McCarthy's favor and concluded that the Commonwealth could not use McCarthy's refusal to submit to the warrantless blood test as evidence implying guilt during its case-in-chief, but could use the refusal to explain the absence of any scientific evidence to prove DUI. The trial court further prohibited the Commonwealth from using McCarthy's refusal to enhance any penalty upon conviction for DUI.

At trial, Owensboro Police Officer Fleury testified that he stopped McCarthy after observing his vehicle leave a bar parking lot and swerve across the roadway's centerline. Officer Fleury testified that McCarthy's vehicle and person smelled of alcoholic beverages, that McCarthy had slurred speech, was lethargic and failed field sobriety tests. The jury also viewed video of the entire DUI stop and McCarthy's performance on the field sobriety tests. A search of the vehicle yielded three open containers of beer and prescription bottles of clonazepam and hydrocodone. Officer Fleury testified that he arrested McCarthy for DUI, transported him to a hospital for a blood draw, and that McCarthy refused to submit to the blood test.

The jury found McCarthy guilty of DUI, fourth offense, and the circuit court sentenced McCarthy to two years' imprisonment. McCarthy appealed to the Kentucky Court of Appeals. The Kentucky Court of Appeals reversed McCarthy's conviction, holding that Birchfield prohibited the Commonwealth from using any evidence of McCarthy's refusal to submit to a warrantless blood test as evidence of guilt in a DUI prosecution. The Kentucky Supreme Court accepted discretionary review.

[1] ---- U.S. ----, 136 S.Ct. 2160, 195 L.Ed.2d 560 (2016).

ISSUES

1. May the Commonwealth penalize a DUI suspect for the suspect's refusal to submit to a warrantless blood test as provided by KRS 189A.105?

2. May the Commonwealth use a DUI suspect's refusal to consent to a warrantless blood test pursuant to KRS 189A.105 as evidence of guilt of driving under the influence?

3. May the Commonwealth introduce a DUI suspect's refusal to submit to a warrantless blood test to explain to the jury the lack of scientific evidence that the suspect was driving under the influence?

HOLDINGS

1. No. The Commonwealth is not permitted to penalize a DUI suspect for the suspect's refusal to submit to a warrantless blood test as provided by KRS 189A.105.

2. No. A DUI suspect's refusal to consent to a warrantless blood test cannot be offered as evidence of guilt of operating a motor vehicle under the influence.

3. No. The Commonwealth is not permitted to introduce evidence to a jury of a DUI suspect's refusal to submit to a warrantless blood test to explain the lack of scientific evidence that the suspect was driving under the influence.

ANALYSIS

KRS 189A.010(1) provides:

> [a] person shall not operate or be in physical control of a motor vehicle anywhere in this state:
>
> (a) Having an alcohol concentration of 0.08 or more as measured by a scientifically reliable test or tests of a sample of the person's breath or blood taken within two (2) hours of cessation of operation or physical control of a motor vehicle;
>
> (b) While under the influence of alcohol;
>
> (c) While under the influence of any other substance or combination of substances which impairs one's driving ability;

> (d) While the presence of a controlled substance listed in subsection (12) of this section [which includes hydrocodone] is detected in the blood, as measured by a scientifically reliable test, or tests, taken within two (2) hours of cessation of operation or physical control of a motor vehicle;
>
> (e) While under the combined influence of alcohol and any other substance which impairs one's driving ability; or
>
> (f) Having an alcohol concentration of 0.02 or more as measured by a scientifically reliable test or tests of a sample of the person's breath or blood taken within two (2) hours of cessation of operation or physical control of a motor vehicle, if the person is under the age of twenty-one (21).

Under KRS 189A.103(1), a motorist has granted implied consent to testing for alcohol or other substances:

> The following provisions shall apply to any person who operates or is in physical control of a motor vehicle or a vehicle that is not a motor vehicle in this Commonwealth:
>
> (1) **He or she has given his or her consent to one (1) or more tests of his or her blood, breath, and urine, or combination thereof, for the purpose of determining alcohol concentration or presence of a substance which may impair one's driving ability**, if an officer has reasonable grounds to believe that a violation of KRS 189A.010(1) or 189.520(1) [(pertaining to operating a vehicle which is not a motor vehicle)] has occurred.

(Emphasis added.)

If the motorist affirmatively refuses consent–declines to cooperate with a test-the motorist faces certain statutorily-defined consequences. At the time of McCarthy's arrest, KRS 189A.105(1) and (2)(a)1 provided:

> (1) A person's refusal to submit to tests under KRS 189A.103 shall result in revocation of his driving privilege as provided in this chapter.
>
> (2)(a) At the time a breath, blood, or urine test is requested, the person shall be informed:

> 1. That, **if the person refuses to submit to such tests, the fact of this refusal may be used against him in court as evidence of violating KRS 189A.010** and will result in revocation of his motorist's license, **and if the person refuses to submit to the tests and is subsequently convicted of violating KRS 189A.010(1) then he will be subject to a mandatory minimum jail sentence which is twice as long as the mandatory minimum jail sentence imposed if he submits to the tests**, and that if the person refuses to submit to the tests he will be unable to obtain a hardship license.

(Emphasis added.) The United States Supreme Court's Birchfield decision changed the landscape for implied-consent laws by addressing the Fourth Amendment implications of both breath and blood tests relied upon by states in DUI prosecutions. Under Birchfield, warrantless blood tests constitute unreasonable searches under the Fourth Amendment unless valid consent is given or exigent circumstances justify the search.

Applying Birchfield, the Kentucky Supreme Court held that KRS 189A.105 imposes an unauthorized penalty on a motorist's refusal to submit to a warrantless blood test. The fact that the penalty does not apply until after the defendant is convicted of DUI does not lessen its punitive nature, nor does the fact that the mandatory doubled minimum sentence is within the range of potential penalties even for a person who does consent to a blood test. Here, McCarthy's penalty for refusal if convicted of violating KRS 189A.010(5)(d) would have doubled his mandatory minimum jail sentence from 120 to 240 days in jail. While a defendant may or may not have an idea of the minimum sentence he/she is facing, a reasonable person can at least recognize from the warning that by making the choice to refuse the test, he/she is subject to a higher minimum penalty. Although the defendant obviously could face a sentence higher than the mandatory minimum for the DUI offense if convicted, it is absolutely clear that the sentence will be higher than the mandatory minimum due to the refusal. Or said another way, upon a DUI conviction, because of the refusal, the defendant is subject to a criminal penalty that would not apply otherwise, and that result is not allowed under Birchfield.

With respect to the admissibility of the refusal in the Commonwealth's case-in-chief, both to prove guilt and to explain the lack of scientific evidence that the suspect was driving under the influence, the Kentucky Supreme Court declared that a person's refusal to consent to a blood test cannot be offered as evidence of guilt. The Kentucky Supreme Court recognized that Birchfield established that a DUI defendant has a constitutional right under the Fourth Amendment to withhold consent to a blood test.

The Kentucky Supreme Court affirmed the opinion of the Court of Appeals and the matter was remanded to the trial court for further proceedings.

IMPLICATIONS

It must be reiterated that this opinion is **NOT FINAL** and **CANNOT** be used as authority in Kentucky until the Kentucky Supreme Court reaches a decision on the petition for rehearing that the Commonwealth filed on May 19, 2021.

In response to this preliminary opinion, law enforcement agencies are advised:

1. Discuss this opinion with your local prosecutors as those prosecutors will ultimately be responsible for presenting a DUI prosecution in court.

2. Always assume that a suspect will always refuse an offered test. Therefore, the officer should always gather and document as much evidence as possible of a suspect's impairment before arrest.

3. If the officer suspects operation of the motor vehicle under the influence of alcohol, ALWAYS ask for a breath test first. The refusal to submit to a breath test would be admissible under McCarthy.

4. If the officer suspects that the intoxicant is something other than alcohol, or in addition to alcohol, ALWAYS ask for blood test. If the person refuses the blood test, THEN ask for a urine test. Kentucky law provides for both blood and urine testing, and the implied consent warning mentions it. While Birchfield prohibits criminal penalties or jail sentence enhancements, there is no harm in asking for consent for a blood test. If the suspect refuses the blood test, the urine test is still available and should be requested upon refusal of the blood test. Refusal of the urine test at the end of the line can be used as evidence of DUI under McCarthy.

   Urine is of no use for alcohol concentration testing because there is no standard set forth in KRS 189A.005. However, urine would still be useful for everything else, to some degree. McCarthy does not address whether urine testing violates the Fourth Amendment.

INTERROGATION LAW

Carson v. Commonwealth, --- S.W.3d ----, 2021 WL 1771987 (Ky. 2021)

FACTS

In December 2013, a ten-year-old boy disclosed to a family member that Carson subjected him to sexual contact on multiple occasions. Upon observing the boy's interview with staff from the Children's Advocacy Center wherein the boy repeated the allegations, Covington Police Detective Bradbury contacted and, on January 24, 2014, interviewed Carson. During the four-hour interview, Detective Bradbury used the "Reid Technique," a multi-phase interrogation technique in which an investigating officer analyzes the suspect's behavior, looking for signs of deception, and then engages in a confrontational interrogation if the officer suspects such indicators. During the interview, Carson asked Detective Bradbury to "please stop. I'm telling the truth," and that "I want to get out of here," after Detective Bradbury accused Carson of performing oral sex on the boy. Despite his assertions, Carson continued speaking and Carson ultimately admitted to committing a series of sexual acts on the boy.

The Kenton County Grand Jury returned an indictment charging Carson with four counts of first-degree sexual abuse, three counts of first-degree sodomy, and three counts of incest. Carson unsuccessfully moved to suppress his statements. At trial, the jury convicted Carson on all counts, and the trial court sentenced Carson to a total of twenty years' imprisonment. Carson appealed to the Kentucky Supreme Court.

ISSUES

1. May a law enforcement officer provide opinion testimony concerning a defendant's verbal and non-verbal cues of deception?

2. Must a criminal suspect clearly invoke Fifth Amendment rights?

HOLDINGS

1. No. Law enforcement may not provide opinion testimony concerning whether a defendant's verbal and non-verbal cues constitute a suspect's deception.

2. Yes. A criminal suspect must clearly invoke Fifth Amendment rights for the invocation of rights to be effective.

ANALYSIS

Under Kentucky Rule of Evidence (KRE) 701, a lay witness may provide opinion testimony only if the opinion is (1) based on the perception of the witness; (2) helpful to a clear understanding of the witness' testimony or the determination of a fact at issue; and (3) not based on scientific, technical, or specialized knowledge. Kentucky law permits a witness to give opinion testimony regarding a person's apparent intoxication,[2]

[2] Motorists Mut. Ins. Co. v. Glass, 996 S.W.2d 437 (Ky. 1997).

the apparent age of a person,[3] and a person's apparent mental or emotional state because these inferences arose based upon the witness' observation of behavior.[4] A witness' life experiences also permits making a judgment as to the matter involved.[5] Consequently, law enforcement officers may provide law opinion testimony concerning their experience-based interpretations of certain facts which the officer personally observed.[6] Thus, law enforcement officers may testify as to their interpretation of drug-sniffing dogs' behavior,[7] that a juice bottle appeared to be a homemade silencer,[8] and that a suspect appeared to be intoxicated due to his performance on a field sobriety test.[9] However, when the subject matter of the officer's opinion is either not based on personal knowledge or based on specialized knowledge, the trial court must first qualify the officer as an expert. Further, Kentucky law does not permit lay or expert testimony concerning the veracity of a witness as the ultimately determination as to whether a defendant is providing truthful evidence lies with the jury.[10]

Neither lay nor expert testimony is appropriate with respect to the veracity of a witness.[11] Witnesses are not permitted to act as a human lie detector on the witness stand.[12] As such, "neither expert nor lay witness may testify that another witness or a defendant is lying or faking. That determination is within the exclusive province of the jury."[13]

In this case, Detective Bradbury testified he was trained on his ability to determine a suspect's truthfulness using the Reid Technique. After Detective Bradbury described the manner wherein the Reid Technique determines a suspect's truthfulness, the trial court called a bench conference and expressed concern that Detective Bradbury was purporting to be a "verbal lie detector" and ultimately admonished the jury to disregard any references to the Reid Technique as being able to determine whether Carson was truthful as determining the truthfulness of a witness is entirely with the province of the jury. Despite the admonition, the Commonwealth referenced Detective Bradbury's ability to determine Carson's truthfulness using the Reid Technique.

---

[3] Howard v. Kentucky Alcoholic Control Bd., 294 Ky. 429, 172 S.W.2d 46 (1943).
[4] Commonwealth v. Sego, 872 S.W.2d 441, 444 (Ky. 1994).
[5] Hunt v. Commonwealth, 304 S.W.3d 15, 35 (Ky. 2009).
[6] See e.g. Iraola-Lovaco v. Commonwealth, 586 S.W.3d 241, 247 (Ky. 2019); Burton v. Commonwealth, 300 S.W.3d 126, 140 (Ky. 2009).
[7] Debruler v. Commonwealth, 231 S.W.3d 752, 757-58 (Ky. 2007).
[8] Hunt v. Commonwealth, 304 S.W.3d 15, 30-31 (Ky. 2009).
[9] Iraola-Lovaco v. Commonwealth, 586 S.W.3d at 247.
[10] McGuire v. Commonwealth, 595 S.W.3d 90, 95 (Ky. 2019).
[11] Ordway v. Commonwealth, 391 S.W.3d 762, 789 (Ky. 2013).
[12] Cf. Ice v. Commonwealth, 667 S.W.2d 671, 675 (Ky. 1984).
[13] Moss v. Commonwealth, 949 S.W.2d 579, 583 (Ky. 1997).

The Kentucky Supreme Court held that Detective Bradbury's testimony ventured beyond the proper scope of lay opinion testimony. While testimony regarding a suspect's body language is proper, testimony concerning opinions on Carson's deception as revealed through the Reid Technique is not. Effectively, the Kentucky Supreme Court held that the detective's testimony that he was able to determine that Carson was lying through visual observation of body language was inadmissible as this opinion testimony infringes on the province of the jury. The trial court's admonish did not cure the error and merited reversal of the conviction.

2. Yes. When a suspect invokes the right to remain silent, any custodial interrogation must immediately cease.[14] To be effective, however, any invocation of the right must be clear and unambiguous.[15] That is, a suspect must articulate the intention to remain silent "in a manner that a reasonable police officer in the situation would understand that the suspect wished for questioning to cease."[16]

Carson argued that his statements to "please stop," and "I want to get out of here," were sufficient to invoke his Fifth Amendment rights. The Kentucky Supreme Court rejected Carson's arguments. With respect to the statement to "please stop," the Kentucky Supreme Court held that this statement was ambiguous because a reasonable officer in this situation could understand that statement to mean "please stop accusing me of performing oral sex" rather than "please stop the interview."

With respect to the statement "I want to get out of here," Carson continued speaking immediately after stating that he wished to leave. Because Carson continued engaging with Detective Bradbury, the Supreme Court held that statement to be insufficient to invoke Carson's right to remain silent.

The Kentucky Supreme Court reversed Carson's conviction and remanded to Kenton Circuit Court for further proceedings.

Hargroves v. Commonwealth, 615 S.W.3d 1 (2021)

FACTS

Hargroves and Dixon had a child in common and lived together in the second floor of an apartment complex in Radcliff. Dixon was the child's legal custodian. On November 1, 2017, Hargroves arrived home and found Dixon and their child in the company of another man, who escaped the apartment by jumping out of a window. An argument

[14] Miranda v. Arizona, 384 U.S. 436, 473-74, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966).
[15] Berghuis v. Thompkins, 560 U.S. 370, 381-82, 130 S.Ct. 2250, 176 L.Ed.2d 1098 (2010).
[16] Meskimen v. Commonwealth, 435 S.W.3d 526, 531 (Ky. 2013).

ensued between Hargroves and Dixon, wherein Dixon established that they were not a couple and that she could do whatever she pleased.

The next morning, Hargroves and two friends consumed vodka. That evening, Hargroves went to Bernard Williams' first-floor apartment that was located directly below the apartment Hargroves shared with Dixon. Hargroves was dressed in multiple layers of clothing, with a full outer layer of field camouflage, and armed with a .38 special revolver containing six bullets. Hargroves knocked on the door. When Williams opened the door, he saw Dixon and the child sitting on the couch. Hargroves fired six shots through the open door, striking Williams four times and striking Williams once.

Radcliff Police Officer Hunt responded and found Williams one the floor just inside the apartment door struggling to breathe. The child was seated on the couch. With his body camera recording, Officer Hunt rendered first aid to Williams, who managed to provide his name and state that Hargroves, his upstairs neighbor, shot him. Williams ultimately died from his injuries.

Dixon approached Radcliff Police Officer Vance in the complex's parking lot with a bleeding chest wound. Dixon was transported to a hospital, where she underwent medical treatment for a collapsed lung, pulmonary contusion of the lung, clavicle and rib fractures, bleeding from the lung, and air around the heart. Dixon's treating physician testified that Dixon's injuries would have been fatal without treatment.

Radcliff Police ultimately "pinged" Hargroves' cell phone and found him in a wooded area approximately 750 feet behind the apartment complex. Hargrove obeyed the officers' commands and surrendered at approximately 11:00 p.m. During a search incident to arrest, three baggies of marijuana, cash, and debit cards were seized from Hargroves' person. Hargroves' revolver was found in the wooded area the next morning. Ballistics testing linked the revolver to the shooting.

After receiving a Miranda warning from Detective Berry at 11:43 p.m., Hargroves revealed nothing about the shooting, citing that his memory of the events was foggy. Hargroves also did not response when asked whether he shot Williams in self-defense. During the interview, he reached for a holster buried under his clothing and realized that the holster was empty. The questioning continued under 1:17 a.m. when Hargroves was moved to another room. At 1:53 a.m., Hargroves advised officers that he now recalled the shooting. Officer Padilla activated his bodycam and recorded the conversation. During this discussion, Hargroves asked about the whereabouts of his "chain" because seeing a "chain" collected from his person caused him to remember walking inside Williams' apartment where Williams choked him to the point where

Hargroves was unable to breathe, causing Hargroves to shoot Williams. Hargroves stated that Williams broke the "chain" around his neck during this incident. A chain with a medallion and intact clasp was collected from Hargroves' pocket and taken into evidence along with five rings and a bracelet. A second chain, with a broken clasp, was found on the ground outside Williams' apartment, eight to ten feet from the threshold.

Just after 2:00 a.m., Officer Rossell drove Hargroves approximately thirty minutes to the Hardin County Detention Center. During the drive, Hargroves again said, "I shot Mr. Bernard (Williams) because he choked me. He choked me and he grabbed me by the neck and lifted me up in the air. Hey, I'm pretty sure. I'll probably get attempted murder and have to do time for that." Hargroves also said Dixon had a controlling personality, had threatened to kill his entire family, and would not allow him to smoke marijuana or spice. Despite criticizing Dixon, Hargroves never said he shot out of revenge or anger toward her for being with another man. Instead, he attributed the shooting entirely to Williams choking him, lifting him off the ground, and breaking his chain, after which he said he was sorry and had gone "too far."

During the ride to the jail, Hargroves evinced concern that no one had looked at or photographed his neck to preserve evidence of the alleged choking because it "might help my case." Upon arrival at the jail, both Officer Rossell and a nurse inspected Hargroves' neck for injuries but found no sign of choking or other fresh injury.

At trial, a Hardin Circuit Court jury convicted Hargroves of murder, first-degree assault, first-degree wanton endangerment, and possession of marijuana. The circuit court sentenced Hargroves to forty-five years' imprisonment. Hargroves appealed.

ISSUE

Is a criminal suspect required to receive a second Miranda warning prior to being transported to a detention center after an interrogation was conducted at the police station?

HOLDING

No. A criminal suspect is not required to receive a second Miranda warning prior to being transported to a detention center after an interrogation was conducted at the police station

ANALYSIS

The failure to provide a defendant with a second Miranda warning between being interviewed by a detective at the police station and an officer engaging in a discussion

with the defendant while driving him to the jail a couple of hours later did not require suppression of the defendant's statement made to the officer during transport to jail.

The Kentucky Supreme Court considered the totality of the circumstances with respect to the manner wherein Hargroves made his incriminating statements. Specifically, the Kentucky Supreme Court considered: conditions and length of detention and interrogation; whether Miranda rights were given; and, the accused's age and schooling. Noting absence of a bright line rule governing when a Miranda warning goes stale, the Kentucky Supreme Court affirmed the trial court's ruling findings that Hargroves was not a young man; was of above-average intelligence; and for a total of about two-and-one-half hours was questioned about a single criminal event during a continuing inquiry with no lengthy gaps. Accordingly, the Supreme Court held that Hargroves knowingly, voluntarily and intelligently spoke with Officer Rossell during transport, and the Miranda warning received after arriving at the police department did not lose its effect.

The Kentucky Supreme Court affirmed Hargroves' conviction.

JURISDICTION

Pope v. Commonwealth, ---- S.W.3d ----, 2021 WL 1743575 (Ky. 2021)

NOTE: This opinion was rendered on February 18, 2021, but is NOT FINAL under Kentucky Rules of Civil Procedure (CR) 76.30(2)(a) because a petition for rehearing was timely filed pursuant to CR 76.32 with the Kentucky Supreme Court on March 15, 2021. Because this opinion is NOT FINAL, it SHALL NOT BE CITED AS AUTHORITY in any courts of the Commonwealth of Kentucky. Should the petition for rehearing be denied by the Kentucky Supreme Court, this opinion becomes final on the date the petition for rehearing is denied. CR 76.32(2)(c). Accordingly, the reader is strongly advised to check the Supreme Court Case Information tab at https://kycourts.gov/Courts/Supreme-Court/Pages/default.aspx to determine the finality of this opinion prior to relying on this case as legal authority.

FACTS

Deputies from the Boyle County Sheriff's Office were investigating Pope for trafficking in a controlled substance. The deputies arranged for a confidential informant to purchase drugs from Pope during a controlled buy. The deputies believed that the controlled buy would occur in Boyle County. Instead, the buy was conducted at a fast-food restaurant in Lincoln County. The informant contacted Pope via Snapchat. Pope instructed the informant to leave his vehicle unlocked and come inside the restaurant. When the informant met with Pope inside the restaurant, Pope advised that heroin has been

placed in the glove compartment of his vehicle. The informant paid Pope and left. The Boyle County deputies followed the informant to the restaurant in Lincoln County, surveilled the drug transaction, met the informant in Boyle County after the transaction and obtained the purchased heroin. The Lincoln County Sheriff's Office gave prior verbal approval to the Boyle County deputies for their investigative activities in Lincoln County.

The Lincoln County grand jury returned an indictment charging Pope with trafficking in a controlled substance and being a first-degree persistent felony offender (PFO). Upon issuance of the indictment, a Boyle County deputy sheriff arrested Pope in Boyle County.

A Lincoln County jury found Pope guilty of trafficking in a controlled substance, first degree. Pope entered a guilty plea to the PFO charge and the court sentenced him to twenty years' imprisonment. Pope appealed to the Kentucky Supreme Court.

ISSUE

Is law enforcement investigatory activity through a controlled drug buy that occurred in a neighboring county at the request of the suspect unlawful as extra-jurisdictional?

HOLDING

No. Law enforcement investigatory activity through a controlled drug buy that occurred in a neighboring county at the request of the suspect is not unlawful as extra-jurisdictional if the neighboring county's sheriff's office consents pursuant to KRS 218A.240(1).

ANALYSIS

The Kentucky Supreme Court held that the law enforcement investigatory activity, specifically allowing a controlled drug buy that their confidential informant had arranged to be completed, at the suspect's request, in a neighboring county to the county that employed the officers was neither extra-jurisdictional nor unauthorized.

Normally, when a police officer acts outside of the officer's established jurisdiction, the police officer becomes akin to a member of the public and can only do what a member of the public could do.[17] To engage in some type of police action, a law enforcement officer would require jurisdiction.

KRS 218A.240(1) provides:

[17] Fischer v. Commonwealth, 506 S.W.3d 329, 335 (Ky. App. 2016)

> All police officers and deputy sheriffs directly employed full-time by state, county, city, urban-county, or consolidated local governments, the Department of Kentucky State Police, the Cabinet for Health and Family Services, their officers and agents, an of all city, county, and Commonwealth's attorneys, and the Attorney General, within their respective jurisdictions, shall enforce all provisions of this chapter and cooperate with all agencies charged with the enforcement of the laws of the United States, of this state, and of all other states relating to controlled substances.

The Boyle County deputies sought and obtained express permission from Lincoln County's Sheriff's Office to complete the controlled buy in Lincoln County after learning that the suspect could not meet with the informant at a location within Boyle County. Thus, the Boyle County deputies complied with KRS 218A.240(1) by obtaining permission to conduct the controlled buy in Lincoln County from the Lincoln County Sheriff's Department.

The Supreme Court affirmed Pope's conviction.

THEFT AND RELATED OFFENSES

Davis v. Commonwealth, 620 S.W.3d 16 (Ky. 2021)

FACTS

On October 19, 2018, the United States Postal Service delivered two packages from Amacon.com containing six medical coding books and a set of headphones for Stacey Davis at the front stoop her residence in Lexington. Stacey realized the packages were missing when she received a notification from Amazon that the packages were delivered despite the fact that the packages were not on the front stoop. A security camera installed at the residence showed a United States Postal Service employee set the packages on the front steps at approximately 10:00 a.m. Two hours later, the camera's footage showed a man, later identified as Jonathan Davis, approach the residence, take the packages, and drive away in a silver GMC Envoy. Lexington Police Detective Newman contacted Jonathan Davis, who admitted to taking the packages and reselling the coding books. The Fayette County Grand Jury returned an indictment charging Jonathan Davis with one count of theft of mail matter and one count of being a

persistent felony offender. A jury ultimately convicted Jonathan Davis of both charges, and the circuit court sentenced him to twenty years in prison. Jonathan Davis appealed to the Kentucky Supreme Court.

ISSUES

1. Can a defendant be convicted of theft of mail matter if packages are delivered by the United States Postal Service to a porch rather than adjacent to a mailbox?

2. Is theft by unlawful taking a lesser included offense of theft of mail matter?

3. Can a defendant be convicted of both theft of mail matter and theft by unlawful taking without violating double jeopardy?

HOLDINGS

1. Yes. A defendant can be convicted of theft of mail matter if packages are delivered to a porch rather than adjacent to a mailbox by the United States Postal Service.

2. No. Theft by unlawful taking is not a lesser included offense of theft of mail matter.

3. Yes. A defendant be convicted of both theft of mail matter and theft by unlawful taking without violating double jeopardy

ANALYSIS

These issues are matters of first impression in the Commonwealth.

1. Under KRS 514.140(1), a person is guilty of theft of mail matter when with intent to deprive the owner thereof he steals, by fraud or deception obtains, embezzles, conceals, damages, or destroys any mail matter of another from any letterbox, mail receptacle, or other authorized depository for mail matter, or from a letter carrier, postal vehicle, or private mail box or which has been left for collection or delivery adjacent thereto by the United States Postal Service.

The Kentucky Supreme Court held the phrase "authorized depository" as used in KRS 514.140(1) includes any place where a mail recipient either specifically directs or would otherwise reasonably or customarily expect mail to be placed or stored for delivery, regardless of how adjacent the package is to a recipient's door.

2. KRS 505.020(2)(a) provides that a "defendant may be convicted of an offense that is included in any offense with which he is formally charged. An offense is so

included when: (a) [i]t is established by proof of the same or less than all the facts required to established the commission of the offense charged." To determine whether an uncharged offense constitutes a lesser offense of the charged offense, Kentucky law requires a fact-based approach that allows for "instructions on uncharged offenses where the facts alleged in the indictment or the evidence presented at trial supported such instructions."[18] "An instruction on a separate, uncharged, but 'lesser' crime - in other words, an alternative theory of the crime - is required only when a guilty verdict as to the alternative crime would amount to a defense to the charged crime, i.e., when being guilty of both crimes is mutually exclusive."[19]

In this case, the Kentucky Supreme Court held that Jonathan Davis could be found guilty of both theft of mail matter and theft by unlawful taking under $500. Theft of mail matter requires the Commonwealth to prove that the defendant: (1) stole, by fraud or deception obtained, embezzled, concealed, damaged, or destroyed; (2) mail matter of another; (3) from any letterbox, mail receptacle, or other authorized depository for mail matter, or from a letter carrier, postal vehicle, or private mail box or which has been left for collection or delivery adjacent thereto by the United States Postal Service; (4) with the intent to deprive the owner thereof. In contrast, under KRS 514.030(1), theft by unlawful taking under $500 requires the Commonwealth to prove the defendant: (1) took or exercised control over; (2) movable property belonging to another; (3) with the intent to deprive the owner thereof. As the elements of theft of mail matter and theft by unlawful taking under $500 are not mutually exclusive, Jonathan Davis could be found guilty of both offenses.

3. Double jeopardy does not prohibit conviction of both offenses. Theft of mail matter requires that the item be mail matter, although it need not have value, and requires that the item be taken from a place where mail is typically kept. Theft by unlawful taking does not require that the item be stolen from any particular location, but does require that the item stolen have some value. Thus, each offense includes an element the other does not, permitting a defendant to be convicted of both offenses without violating double jeopardy.

The Kentucky Supreme Court affirmed Jonathan Davis's conviction.

[18] Hall v. Commonwealth, 337 S.W.3d 595, 606 (Ky. 2011).
[19] Hudson v. Commonwealth, 202 S.W.3d 17, 22 (Ky. 2006).