Department of
Criminal Justice Training

Kentucky Justice and Public Safety Cabinet

CASE LAW UPDATES

Kentucky Court of Appeals January-June 2021
Kentucky Supreme Court January-June 2021
Sixth Circuit Court of Appeals January-June 2021
U.S. Supreme Court 2020 Term

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The following are brief summaries of published opinions issued by the following courts:

Kentucky Supreme Court (January through July 2021)

Kentucky Court of Appeals (January through July 2021)

Sixth Circuit Court of Appeals (January through June 2021)

United States Supreme Court (2020 Term)

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KENTUCKY SUPREME COURT AND KENTUCKY COURT OF APPEALS

SUMMARIES OF PUBLISHED DECISIONS

JANUARY-JULY 2021

ASSET FORFEITURE

Commonwealth v. Doebler, ---- S.W.3d ----, 2021 WL 2619712 (Ky. 2021)

FACTS

On March 14, 2017, Louisville Metro Police responded to a motel fire alarm. Upon arrival, a motel employee informed the officers that a female had been reported stealing clothing from motel guests and was in room 226. Officers went to room 226, encountered Doebler and Lankford, and discovered drugs in the room. Upon their arrest, officers seized drugs, various cellular telephones, a digital scale, a "loaded syringe," and $3,759 in cash from Doebler's purse.

A Jefferson County grand jury returned an indictment charging Doebler and Lankford with complicity to traffic in a controlled substance, first degree, schedule II methamphetamine two grams or more; complicity to illegal possession of a controlled substance, first degree, schedule I heroin; and complicity to illegal use or possession of drug paraphernalia. Lankford entered a guilty plea to trafficking methamphetamine, less than two grams; possession of heroin; and possession of drug paraphernalia. Doebler entered a guilty plea to the charge of possession of drug paraphernalia for the syringe, and the Commonwealth dismissed her remaining charges.

The circuit court held a forfeiture hearing pursuant to KRS 218a.410(1)(j) upon the Commonwealth's motion to seize the $3,759 found in Doebler's purse. Doebler testified that the money came from her late father's PNC bank account and was unrelated to the drug offenses. The Commonwealth conceded that the money may have originated from the PNC bank account, but the cash is now forfeitable because it was connected to drug trafficking since Doebler, and the cash, was found in proximity to Lankford's drugs and she entered a guilty plea to possession of drug paraphernalia.

At the conclusion of the forfeiture hearing, the trial court ordered the money forfeited because "KRS 218A.410 states that all proceeds intended to be used to facilitate a drug transaction are forfeitable, and the burden of proof to rebut the presumption is on the defendant. Given the nature of [Doebler's] conviction herein and the proximity of the

cash proceeds to the drugs when they were discovered by the police, the Court finds [Doebler] has not carried her burden of proof."

On direct appeal, the Kentucky Court of Appeals reversed, holding the proximity to illegal drug activity is insufficient where the defendant has convinced the court she obtained the funds legally. The Court of Appeals held the Commonwealth failed to meet its admittedly minimal burden to justify forfeiture. Citing Osborne v. Commonwealth,[1] the Court of Appeals stated forfeiture required proximity and traceability, and the Commonwealth had failed to adequately present evidence of traceability. The Commonwealth filed for discretionary review with the Kentucky Supreme Court. The Supreme Court granted discretionary review.

ISSUE

Is currency unrelated to drug trafficking but found near controlled substances subject to forfeiture under KRS 218A.410(1)(j)?

HOLDING

Yes. While proximity between currency and controlled substances provides presumption of forfeitability under KRS Chapter 218A, the Commonwealth must still put forward some modicum of evidence tracing the funds to a drug transaction as either proceeds, money intended to be furnished in exchange for drug transaction, or money intended to facilitate violation of controlled substances statutes.

ANALYSIS

KRS 218A.410(1)(j) allows for the following to be subject to forfeiture:

> Everything of value furnished, or intended to be furnished, in exchange for a controlled substance in violation of this chapter, all proceeds, including real and personal property, traceable to the exchange, and all moneys, negotiable instruments, and securities used, or intended to be used, to facilitate any violation of this chapter; except that no property shall be forfeited under this paragraph, to the extent of the interest of an owner, by reason of any act or omission established by him or her to have been committed or omitted without his or her knowledge or consent. It shall be a rebuttable presumption that all moneys, coin, and currency found in close proximity to controlled substances, to drug

[1] 839 S.W.2d 281 (Ky. 1992).

> manufacturing or distributing paraphernalia, or to records of the importation, manufacture, or distribution of controlled substances, are presumed to be forfeitable under this paragraph. The burden of proof shall be upon claimants of personal property to rebut this presumption by clear and convincing evidence. The burden of proof shall be upon the law enforcement agency to prove by clear and convincing evidence that real property is forfeitable under this paragraph.

"[T]he Commonwealth bears the initial burden of producing some evidence, however slight, to link the [property] it seeks to forfeit to the alleged violations of KRS 218A. The burden only shifts to the opponent of the forfeiture if the Commonwealth meets its initial tracing burden."[2] If the Commonwealth establishes its prima facie case, the burden is then on the defendant to rebut this presumption by clear and convincing evidence.[3]

In Osborne, the Supreme Court held "[t]he Commonwealth may meet its initial burden by producing slight evidence of traceability."[4] "Production of such evidence plus proof of close proximity, the weight of which is enhanced by virtue of the presumption, is sufficient to sustain the forfeiture in the absence of clear and convincing evidence to the contrary."[5] Therefore, while proximity provides a presumption of forfeitability, the Commonwealth must still put forward some modicum of evidence tracing the funds to the drug transaction as either "proceeds," money intended to be furnished in exchange for a drug transaction, or money intended to facilitate a violation of KRS Chapter 218A. This is the "slight traceability" requirement. Doebler can submit evidence rebutting the presumption of forfeitability by clear and convincing evidence.

To determine whether property is traceable to a drug transaction, the court must examine the totality of the circumstances. In this case, the trial court accepted Doebler's explanation regarding the source of the funds but simply disbelieved her explanation for her presence in the room. Given the nature of her conviction (possession of drug paraphernalia) and the proximity of the cash proceeds to the drugs at the time they were discovered by the police, Doebler did not carry her burden to rebut the presumption with clear and convincing evidence. Therefore, the Commonwealth was entitled to a presumption of forfeiture due to the connection

[2] Brewer v. Commonwealth, 206 S.W.3d 343, 348 (Ky. 2006).
[3] Osborne, 839 S.W.2d at 284.
[4] Id.
[5] Id.

between Doebler's guilty plea for possession of drug paraphernalia, the presence of the cash, and the surrounding circumstances.

With respect to the order of presentation of evidence at a forfeiture hearing, the Kentucky Supreme Court determined that the Commonwealth must first establish its prima facie case for forfeiture of property by producing some evidence to link property it seeks to forfeit to alleged violations of controlled substances statutes. Upon the introduction of the evidence by the Commonwealth, the burden is then on the defendant to rebut presumption of forfeiture by clear and convincing evidence.

The Supreme Court reversed the Court of Appeals and reinstated the circuit court's forfeiture order.

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)

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,[6] 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.

ISSUES

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

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

The Commonwealth filed a petition for rehearing, which was denied by the Kentucky Supreme Court on August 23, 2021. Unless the Commonwealth requests a petition for a writ of certiorari with the United States Supreme Court, and receives a stay of this opinion, this opinion is final and should be treated immediately as such.

Accordingly, 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.

ELECTRONIC OFFENSES

Shirley v. Commonwealth, ---- S.W.3d ----, 2021 WL 2272814 (Ky. App. 2021).

NOTE: ***This opinion was rendered on June 4, 2021, but is NOT FINAL under Kentucky Rules of Civil Procedure (CR) 76.30(2)(b) because a motion for discretionary review was timely filed pursuant to CR 76.20(2)(b) with the Kentucky Supreme Court on July 8, 2021. Because this opinion is NOT FINAL, it SHALL NOT BE CITED AS***

AUTHORITY in any courts of the Commonwealth of Kentucky. Should the motion for discretionary review be denied by the Kentucky Supreme Court, this opinion becomes final on the date the petition for rehearing is denied. CR 76.30(2)(b). 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 October 5, 2018, Shirley went shopping with her mother and daughter at a Walmart store in Somerset, Kentucky. Walmart loss prevention employees observed Shirley on security cameras as she shopped. After walking around the store and picking up a few items, Shirley proceeded to the self-checkout register. One Walmart employee, Wendy Douglas, would later testify that she observed Shirley pretending to scan a rug and a slip cover for a couch. Instead of scanning the correct barcodes, Douglas would allege that Shirley instead scanned the barcode from a toothbrush. Douglas noted that the items she observed on the camera did not match the items scanned by the computer. The difference in price between the rug and slip cover purportedly purchased and the toothbrush was $80.80.

As Shirley attempted to leave the store, Douglas requested that Shirley talk to Douglas about her purchases. Shirley agreed and she, along with her mother and child, went to an office area with Douglas. Shirley and her mother produced their drivers' licenses for Douglas, who looked on a computer database to see if either had shoplifted from Walmart in the past. Shirley's mother and child left the store a short time later because the child was getting restless.

Shirley grew agitated and argumentative with Douglas. Eventually, Shirley allegedly pushed past Douglas toward the exit. Douglas would claim that Shirley elbowed her into a door while fleeing. Shirley then left the store. Douglas acknowledged she had no lawful authority to detain Shirley.

Thereafter, a Pulaski County grand jury returned an indictment charging Shirley on one count each of unlawful access to a computer in the first degree pursuant to KRS 434.845 and robbery in the second degree pursuant to KRS 515.030. Prior to trial, the robbery count was amended to assault in the fourth degree pursuant to KRS 508.030.

Following a jury trial, Shirley was found guilty on the charge of unlawful access to a computer in the first degree, and not guilty on the assault charge. Shirley waived jury sentencing in exchange for the Commonwealth's recommended sentence of five years

in prison. Shirley ultimately received a probated sentence and was placed on conditional discharge for thirty days. Shirley appealed to the Kentucky Court of Appeals

ISSUE

Is a person guilty of unlawful access to a computer in the first degree if the person intentionally uses a self-checkout register established by a merchant to scan a less expensive item rather than the more expensive item the person purported to buy?

HOLDING

No. A person is not guilty of first-degree unlawful access to a computer if a person uses a self-checkout register established by a merchant to pay for items because the person utilized the machine by consent.

ANALYSIS

KRS 434.845 provides as follows:

> (1) A person is guilty of unlawful access to a computer in the first degree when he or she, without the effective consent of the owner, knowingly and willfully, directly or indirectly accesses, causes to be accessed, or attempts to access any computer software, computer program, data, computer, computer system, computer network, or any part thereof, for the purpose of:
>
> (a) Devising or executing any scheme or artifice to defraud; or
>
> (b) Obtaining money, property, or services for themselves or another by means of false or fraudulent pretenses, representations, or promises.
>
> (2) Unlawful access to a computer in the first degree is a Class C felony.

The lesser degrees of this crime all begin with the same statutory language as that contained in KRS 434.845(1).[7] Second, third, and fourth degree unlawful access specifically link the amount of "loss or damage" incurred to the penalty. The definition of "[l]oss or damage" includes "theft." KRS 434.840(12).

KRS 434.840(9) defines "[e]ffective consent" as follows:

[7] See KRS 434.845(1), KRS 434.850(1), KRS 434.851(1), and KRS 434.853(1).

> "Effective consent" means consent by a person legally authorized to act for the owner. Consent is not effective if it is:
>
> (a) Induced by deception or coercion;
>
> (b) Given by a person who the actor knows is not legally authorized to act for the owner;
>
> (c) Given by a person who by reason of age, mental disease or defect, or intoxication is known by the actor to be unable to make responsible property or data dispositions; or
>
> (d) Used for a purpose other than that for which the consent is given[.]

In evaluating this case, the Kentucky Court of Appeals noted that Walmart and its employees authorize its customers to use its self-checkout registers so long as they are open. Customers use the self-checkout register to scan an item, allowing its identification by barcode and for it to be "rung up" for purchase, and then submit payment for the item and receive a receipt thereby authorizing the customer to depart with the item. Shirley retained the effective consent of Walmart when she used the self-checkout register for its intended purpose, to buy items. Shirley's actions comported exactly with this intended purpose where she scanned a toothbrush barcode and paid for this item, thereby making a lawful purchase. The self-checkout register worked properly and exactly as it was intended within the scope of the effective consent extended to Shirley and all customers.

Shirley's theft was not dependent on the scanner and, indeed, the scanner was not used to commit the theft at all. Instead, the theft occurred in Shirley trying to use a lawful purchase, payment, and issuance of a receipt for the toothbrush to conceal the theft of the rug and slip cover. The self-checkout register was irrelevant to the act other than how Shirley used it to provide "cover" for the act to evade discovery where one clerk is typically monitoring activity on multiple self-checkout registers.

In this case, the Kentucky Court of Appeals held that Shirley's use of the self-checkout register to lawfully purchase an item never exceeded the scope of Walmart's consent, and the use of the scanner was only peripherally related to the theft.

Accordingly, some charges that may be more appropriate in this situation are theft by deception (KRS 514.040), or theft by unlawful taking (KRS 514.030).

In a 2-1 ruling, the Kentucky Court of Appeals reversed Shirley's conviction.

NOTE: *The dissenting judge opined that the Walmart scanner at issue is a computer as defined by KRS 434.840(2), and Shirley admitted using it to obtain property by false means. Shirley did not have Walmart's consent to use the scanner for an unlawful purpose. Consent is "effective" under KRS 434.840(9)(d) only when it is exercised for the purpose for which it was given. Walmart consented to Shirley's use of its scanner for the limited purpose of completing a lawful business transaction. When Shirley's usage of the scanner exceeded the scope of Walmart's consent, the consent was no longer effective.*

ESCAPE AND OTHER OFFENSES RELATED TO CUSTODY

Collins v. Commonwealth, ---- S.W.3d ---- , 2021 WL 3234276 (Ky. App. 2021)

This opinion was rendered on July 30 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 Court of Appeals on August 20, 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 Court of Appeals, this opinion becomes final on the date the petition for rehearing is denied unless a motion for discretionary review is filed in the Kentucky Supreme Court. CR 76.30(2)(c). Accordingly, the reader is strongly advised to check the Kentucky Court of Appeals Case Information tab at https://kycourts.gov/Courts/Court-of-Appeals/Pages/default.aspx to determine the finality of this opinion prior to relying on this case as legal authority.

FACTS

While housed in Cell 121 at the Letcher County Jail, one of Collins's cellmates tested positive for methamphetamine. Concerned that methamphetamine was present at the jail, the Letcher County Jailer ordered all inmates housed in Cell 121 transported to a hospital for x-rays to determine whether they were hiding any drugs or contraband in any of their orifices. During a search of the vehicles used to transport the inmates to the hospital, deputy jailers found a vial containing methamphetamine residue where the inmates were seated. Jail officials then obtained a search warrant to collect urine samples from the residents of Cell 121. All eight inmates, including Collins, tested positive for methamphetamine. Jailer Slone charged each inmate with a positive test result with possession and promoting contraband.

The Letcher County Grand Jury indicted Collins for illegal possession of a controlled substance (methamphetamine) in the first degree, criminal use or possession of drug paraphernalia, promoting contraband in the first degree, and being a second-degree persistent felony offender. A Letcher Circuit Court jury convicted Collins of first-degree

promoting contraband and first-degree possession of a controlled substance. Collins timely appealed to the Kentucky Court of Appeals.

ISSUES

1. Can a defendant be simultaneously convicted of first-degree possession of a controlled substance and first-degree promoting contraband?

2. May a defendant be convicted of first-degree promoting contraband solely because of a positive urine test for methamphetamine?

HOLDING

1. No. Possession of a controlled substance does not require proof of an additional fact that promoting contraband does, so a conviction of both offenses violates the prohibition against double jeopardy.

2. No. A defendant cannot be convicted of first-degree promoting contraband solely because of a positive urine test for methamphetamine.

ANALYSIS

As conceded by the Commonwealth, possession of a controlled substance does not require proof of an additional fact that promoting contraband does.[8] The remedy for this type of statutory double jeopardy violation is to vacate the lesser conviction, and only allow sentencing on the greater conviction.[9] Based on the Commonwealth's concession, the Kentucky Court of Appeals reversed Collins's conviction for possession of a controlled substance as well as the corresponding three-year sentence.

Pursuant to KRS 520.050, a person is guilty of promoting contraband in the first degree when he knowingly introduces dangerous contraband into a detention facility or penitentiary or knowingly makes, obtains, or possesses dangerous contraband while confined in a detention facility or a penitentiary. In Tyler v. Commonwealth,[10] the Kentucky Supreme Court held that promoting contraband in the first degree requires possession of dangerous contraband.

In Nethercutt v. Commonwealth,[11] a prohibition era case, the Court held that the presence of "liquor in one's stomach does not constitute possession within the meaning of the law[.]" The Court then determined that the appellant's motion for a directed

[8] Stewart v. Commonwealth, 306 S.W.3d 502, 505 (Ky. 2010).
[9] Taylor v. Commonwealth, 611 S.W.3d 730, 739-40 (Ky. 2020).
[10] 805 S.W.2d 126, 127 (Ky. 1991).
[11] 241 Ky. 47, 47, 43 S.W.2d 330, 330 (1931).

verdict on the charge of the unlawful possession of intoxicating liquor should have been sustained where the evidence consisted solely of an empty bottle of rubbing alcohol and the appellant's statement that he was drunk on some moonshine liquor which he had found. Accordingly, the Kentucky Court of Appeals held that the fact that Collins had methamphetamine in his urine is insufficient circumstantial evidence to prove prior possession beyond a reasonable doubt absent probative corroborating evidence of actual physical possession. The Court of Appeals discounted the evidence found in the prisoner transport vehicle because the Commonwealth produced no evidence that Collins was seated in the vehicle prior to the discovery of the vial.

The Kentucky Court of Appeals reversed Collins's convictions.

EVIDENCE LAW

Fisher v. Comonwealth, 620 S.W.3d 1 (Ky. 2021)

FACTS

Fisher and his co-defendant, Harvey, were convicted after a joint jury trial in Hardin Circuit Court of complicity to commit murder and tampering with physical evidence in connection Andrew Folena's death. A witness, Goodman, testified that Fisher and Harvey stated that they would kill Folena. Three cellmates of Fisher and Harvey testified that Fisher and Harvey independently confessed to participating in Folena's murder. Harvey specifically described Folena's murder and implicated Fisher.

Arguing a violation of the Confrontation Clause of the Sixth Amendment to the United States Constitution, Fisher objected to the admission of Harvey's hearsay statements made to the cellmates. The trial court permitted the statements to be introduced into evidence. Upon conviction, Fisher appealed to the Kentucky Supreme Court.

ISSUES

1. Are incriminating statements made by a suspect to an undercover informant testimonial for purposes of the Confrontation Clause?

2. Are statements obtained by law enforcement by police testimonial for purposes of the Confrontation Clause?

HOLDING

1. Incriminating statements to an undercover informant are generally not testimonial for Confrontation Clause purposes, even where police are involved closely, at least where a reasonable person in the declarant's position would have been unaware of the informant's role in an investigation.

2. Statements obtained through routine interrogations by police are usually testimonial for purposes of the Confrontation Clause.

ANALYSIS

In Crawford v. Washington,[12] the United States Supreme Court held that the Confrontation Clause forbids admission of all testimonial hearsay statements against a defendant at a criminal trial unless the witness is unavailable and the defendant had a prior opportunity to cross-examine the witness. Under Bruton v. United States,[13] a trial court may not admit a non-testifying co-defendant's testimonial out-of-court statement as evidence against the accused in their joint trial. "In the context of a joint trial, therefore, 'the pretrial confession of one [defendant] cannot be admitted against the other unless the confessing defendant takes the stand.'"[14] Bruton simply extends to joint trials Crawford's prohibition against out-of-court testimony, protecting the accused in a joint trial from the incrimination of his non-testifying co-defendants' hearsay statements.

Whether a statement is testimonial depends solely on the circumstances of the declarant himself at the time he made the statement, not whether a person who heard the statement eventually repeats under solemn oath what she allegedly heard the declarant say. Circumstances tending to indicate a statement is testimonial include when the statement describes a past event, as opposed to an immediate, ongoing event like an emergency;[15] the apparent, primary purpose of the interrogation or conversation is to use the statements obtained as evidence in a prospective criminal prosecution;[16] and particularly where the interrogation, if the exchange can be characterized that way, is formally arranged or conducted,[17] especially by an officer or agent of the state intending to elicit statements as evidence.[18]

Harvey made voluntary, unprompted out-of-court statements to her cellmate, Dean. Those statements were later offered at trial as evidence against Fisher, but Harvey did not testify at trial and was at no point subject to Fisher's cross-examination. Harvey's statements incriminated herself and arguably Fisher by implication. These statements

[12] 541 U.S. 36, 124 S.Ct. 1354, 158 L.Ed.2d 177 (2004).
[13] 391 U.S. 123, 125-126, 88 S.Ct. 1620, 20 L.Ed.2d 476 (1968).
[14] Rodgers v. Commonwealth, 285 S.W.3d 740, 746 (Ky. 2009).
[15] Rankins v. Commonwealth, 237 S.W.3d 128, 131 (Ky. 2007)
[16] Crawford, at 51, 124 S.Ct. 1354.
[17] Crawford, at 68, 124 S.Ct. 1354.
[18] Crawford, at 52, 68, 124 S.Ct. 1354.

were not testimonial under Crawford. Accordingly, the trial court properly admitted Harvey's statements as these statements did not implicate the Confrontation Clause.

The Kentucky Supreme Court affirmed Fisher's conviction.

Nickelberry v. Commonwealth, ---- S.W.3d -----, 2021 WL 642364 (Ky. App. 2021)

NOTE: ***This opinion was rendered on February 19, 2021, but is NOT FINAL under Kentucky Rules of Civil Procedure (CR) 76.30(2)(b) because a motion for discretionary review was timely filed pursuant to CR 76.20(2)(b) with the Kentucky Supreme Court on June 22, 2021. Because this opinion is NOT FINAL, it SHALL NOT BE CITED AS AUTHORITY in any courts of the Commonwealth of Kentucky. Should the motion for discretionary review be denied by the Kentucky Supreme Court, this opinion becomes final on the date the petition for rehearing is denied. CR 76.30(2)(b). 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

In 2006, the Jefferson Circuit Court entered a judgment convicting Derwin Nickelberry of fifteen (15) counts of first-degree robbery and three (3) counts of theft by unlawful taking over $300, and sentenced him seventy (70) years' imprisonment. On direct appeal, the Kentucky Supreme Court affirmed Nickelberry's convictions in 2008.

In 2009, Nickelberry filed a motion pursuant to Kentucky Rules of Criminal Procedure (RCr) 11.42 collaterally attacking his conviction. In his RCr 11.42 motion, Nickelberry argued that the prosecution violated Brady v. Maryland[19] by failing to provide notice of statements of co-defendants in discovery. Nickelberry argued that a Brady violation occurred when the Commonwealth failed to turn over exculpatory statements given by two of his co-defendants during investigations of similar crimes committed in other counties.

After a hearing, the Jefferson Circuit Court denied the post-conviction motion. Nickelberry appealed to the Kentucky Court of Appeals.

ISSUE

What constitutes a due process violation under Brady v. Maryland?

HOLDING

[19] 373 U.S. 83, 87, 83 S. Ct. 1194, 1196-97, 10 L. Ed. 2d 215 (1963).

A violation of due process occurs when evidence which is exculpatory to the accused, as it is material to either the question of guilt or punishment, is withheld by the prosecution, whether such be conducted in bad faith or not.

ANALYSIS

The Kentucky Supreme Court identified three components of a true Brady violation:

1. The evidence at issue must be favorable to the accused, either because it is exculpatory, or because it is impeaching;
2. That evidence must have been suppressed by the State, either willfully or inadvertently, and;
3. Prejudice must have ensued.

In this case, the statements the co-defendants made during investigations into robberies in other counties were not "material." Evidence is material if there is a reasonable probability that the outcome of the proceeding would have been different had the evidence been disclosed.[20] If the statements of the co-defendants constituted the only evidence against Nickelberry, then their materiality may have been of consequence. The Court of Appeals held these statements were simply cumulative of other evidence, and not sufficiently favorable to require reversal.

Moreover, the statements in this case were not suppressed by the Commonwealth. For evidence to be suppressed under Brady, it must be unknown to the defense. At the evidentiary hearing, Nickelberry's trial counsel testified that she investigated the statements, that she obtained an investigative letter from the investigating agency involved in the crimes in the other jurisdictions, and that she also affirmatively obtained a transcript of the testimony of one of the co-defendants, all prior to Nickelberry's trial.

The Court of Appeals affirmed the trial court's denial of the post-conviction motion.

INTERROGATION LAW

Carson v. Commonwealth, 621 S.W.3d 443 (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

[20] United States v. Bagley, 473 U.S. 667, 682, 105 S. Ct. 3375, 3383, 87 L. Ed. 2d 481 (1985).

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,[21] the apparent age of a person,[22] and a person's apparent mental or emotional state because these inferences arose based upon the witness' observation of

[21] Motorists Mut. Ins. Co. v. Glass, 996 S.W.2d 437 (Ky. 1997).
[22] Howard v. Kentucky Alcoholic Control Bd., 294 Ky. 429, 172 S.W.2d 46 (1943).

behavior.[23] A witness' life experiences also permits making a judgment as to the matter involved.[24] Consequently, law enforcement officers may provide law opinion testimony concerning their experience-based interpretations of certain facts which the officer personally observed.[25] Thus, law enforcement officers may testify as to their interpretation of drug-sniffing dogs' behavior,[26] that a juice bottle appeared to be a homemade silencer,[27] and that a suspect appeared to be intoxicated due to his performance on a field sobriety test.[28] 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.[29]

Neither lay nor expert testimony is appropriate with respect to the veracity of a witness.[30] Witnesses are not permitted to act as a human lie detector on the witness stand.[31] 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."[32]

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.

[23] Commonwealth v. Sego, 872 S.W.2d 441, 444 (Ky. 1994).
[24] Hunt v. Commonwealth, 304 S.W.3d 15, 35 (Ky. 2009).
[25] 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).
[26] Debruler v. Commonwealth, 231 S.W.3d 752, 757-58 (Ky. 2007).
[27] Hunt v. Commonwealth, 304 S.W.3d 15, 30-31 (Ky. 2009).
[28] Iraola-Lovaco v. Commonwealth, 586 S.W.3d at 247.
[29] McGuire v. Commonwealth, 595 S.W.3d 90, 95 (Ky. 2019).
[30] Ordway v. Commonwealth, 391 S.W.3d 762, 789 (Ky. 2013).
[31] Cf. Ice v. Commonwealth, 667 S.W.2d 671, 675 (Ky. 1984).
[32] 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.[33] To be effective, however, any invocation of the right must be clear and unambiguous.[34] 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."[35]

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

[33] Miranda v. Arizona, 384 U.S. 436, 473-74, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966).
[34] Berghuis v. Thompkins, 560 U.S. 370, 381-82, 130 S.Ct. 2250, 176 L.Ed.2d 1098 (2010).
[35] 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)

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 being a PFO 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.[36] To engage in some type of police action, a law enforcement officer would require jurisdiction.

KRS 218A.240(1) provides:

> 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

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

> 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.

PUBLIC EMPLOYMENT

Clark County Attorney v. Thompson, 617 S.W.3d 427 (Ky. App. 2021)

FACTS

In August 2018, the then-Clark County Attorney wrote a letter to the Kentucky Attorney General's office seeking an opinion as to whether a person may serve simultaneously as a City of Winchester police officer and a Clark County magistrate. At that time, Thompson was a candidate for a Clark County magistrate and was scheduled to soon become a Winchester police officer. KRS 61.080(3) provides that "[n]o person shall, at the same time, fill a county office and a municipal office." As it is undisputed that a magistrate is a county office, the real issue is whether a Winchester city police officer is a city officer or a city employee. Before the Attorney General's office responded, Thompson took the oath of office to become a Winchester police officer in late August or early September 2018. In November 2018, Thompson was elected as a Clark County magistrate.

On January 3, 2019, the Attorney General's office issued a letter, not a formal opinion, opining that the two positions "are neither constitutionally nor statutorily incompatible" because a Winchester police officer was an employee, not an officer. Unfortunately, the letter did not discuss contrary authority, including numerous formal opinions of the Kentucky Office of the Attorney General (OAG) which refer to municipal police officers as municipal officers. The next day, Thompson took the oath of office as a Clark County magistrate.

A week later, the new Clark County Attorney sent a letter to the Winchester Chief of Police opining that Thompson could not serve as a magistrate and city police officer. The County Attorney sent similar letters in February and March 2019. In response, Thompson was removed from his police patrol duties and placed on "desk duty."

In March 2019, Thompson filed a petition for declaration of rights, naming only the City of Winchester as a respondent, asking the Clark Circuit Court to declare that the "office of a City Police Officer is not an incompatible office with that of the Constitutional Position of Magistrate." Winchester filed an answer opining that the two positions were not incompatible. Soon thereafter, the Office of the Clark County Attorney successfully moved to intervene, over Thompson's objection.

The Clark Circuit Court ultimately found that Thompson may simultaneously serve as a duly elected magistrate on the Clark Fiscal Court and be employed as a police office for the City of Winchester. The Clark County Attorney appealed to the Kentucky Court of Appeals.

ISSUES

1. Is a city police officer a municipal employee or a municipal officer?

2. May a city police officer serve as a duly elected county magistrate?

HOLDINGS

1. A city police officer is a municipal employee.

2. As a municipal employee, a city police officer may serve as an elected county magistrate.

ANALYSIS

The determination of whether a government employee is an officer "has to be on a case-by-case basis, depending on the nature and importance of the office in question."[37] Consequently, the only public employment question addressed by the Court of Appeals in this opinion is whether Thompson is a municipal officer under KRS 83A.010(10), not whether all municipal police officers are, or are not, municipal officers.

KRS 83A.010(1) permits cities to create nonelected city offices by ordinance that shall specify the title of the office, the powers and duties of the office, the oath of office, and any required bond. The City of Winchester created the Winchester Police Department by ordinance, but the ordinance failed to specify the title, powers and duties of the office. After examining KRS 83A.010(1) and the Winchester ordinances, the Court of Appeals held "[b]ecause Winchester has not met the statutory criteria to create a city office for its police officers, it is inescapable that Winchester police officers cannot be nonelected city officers. And since police officers are not elected, that means they

[37] Commonwealth ex rel. Hancock v. Clark, 506 S.W.2d 503, 504 (Ky. 1974).

cannot be city officers at all." Thus, there is no need to address either a city police officer is an "officer" as defined in KRS 83A.010(10).

Further, the Kentucky Court of Appeals found that no constitutional incompatibility exists between Thompson's two positions. Section 165 of Kentucky's Constitution provides that:

> No person shall, at the same time, be a State officer or a deputy officer or member of the General Assembly, and an officer of any county, city, town, or other municipality, or an employee thereof; and no person shall, at the same time, fill two municipal offices, either in the same or different municipalities, except as may be otherwise provided in this Constitution; but a Notary Public, or an officer of the militia, shall not be ineligible to hold any other office mentioned in this section.

Thompson is not a state officer, nor does he hold any municipal office. Section 165 "do[es] not forbid a county officer being an employee of a city or town."[38] Thus, Thompson's dual employment does not violate Kentucky Constitution Section 165.

The Court of Appeals also found that Thompson's dual status does not violate KRS 61.080. KRS 61.080(3) provides in relevant part that "[n]o person shall, at the same time, fill a county office and a municipal office." Since Thompson is not a municipal officer, KRS 61.080(3) is not violated.

The Kentucky Court of Appeals also rejected the Clark County Attorney's common law and collateral incompatibility of offices arguments.

The Court of Appeals affirmed the Clark Circuit Court's judgment and permitted Thompson to serve as both a county magistrate and city police officer.

NOTE: *In a concurring opinion, Judge Maze wrote that this opinion is based on the circumstances and evidence presented in this specific case. While this analysis will be useful in other cases, Judge Maze emphasized "that the outcome of this case is not necessarily indicative of the appropriate result in other cases." Therefore, the holding in this case is limited to this specific situation only, and readers are strongly cautioned to avoid applying this case as precedent to any other particular office compatibility issues.*

[38] Walling v. Commonwealth, 260 Ky. 178, 84 S.W.2d 10, 12 (1935).

SEARCH AND SEIZURE

Commonwealth v. Norton, 617 S.W.3d 826 (Ky. App. 2021)

FACTS

On November 30, 2018, Kentucky State Police Trooper Joshua Housley responded to a New Castle residence following a report of a theft. The victim reported there was no sign of a forced entry, and that only four firearms were taken. The victim also stated that Quentin Harris had been living with the family, and Harris knew where the guns were located. Based on his interview with the victim and observation of the scene, Trooper Housley determined that Harris was likely involved. The victim further advised Trooper Housley that Harris was known to associate with M.B., a juvenile.

Trooper Housley then proceeded to M.B.'s address. The juvenile was not present, but his parents were at the residence. The parents told Trooper Housley that they had not seen M.B. that day and that they believed M.B. was with another juvenile, K.N. The parents were able to locate M.B.'s cellphone at Osage Apartments in New Castle.

Upon leaving M.B.'s residence, Trooper Housley requested backup from another officer. Trooper Paul Johnson met Trooper Housley at the apartment complex. After talking with several residents, the troopers were able to locate K.N.'s apartment. Trooper Johnson stood in front of the window of the apartment while Trooper Housley knocked. Through the window blinds, Trooper Johnson saw a person move to the back of the apartment. However, neither officer heard any noises from inside the apartment.

After about three minutes, Norton answered the door. Both troopers testified that they could smell marijuana when the door opened. Neither trooper observed any criminal activity. Trooper Housley asked Norton if M.B. or Harris were present. Norton stated that she did not know but she would check. Norton started to close the door, but Trooper Housley put his hand on the door and told her not to close it.

Trooper Housley and Trooper Johnson then entered the apartment. Upon entering, they called out instructing all people who were present to come into the living room. Trooper Housley also walked to a back bedroom where he found more people present. Thirteen juveniles, including one seven-year old, were found in the apartment. No contraband was observed in plain view. Once everyone was in the living room, the troopers identified Harris and M.B., who accompanied Trooper Johnson outside the apartment.

At that point, Trooper Housley asked Norton for permission to search the apartment. She declined and requested he obtain a warrant. Trooper Housley contacted Kassidy Dees, Assistant Henry County Attorney, who instructed Trooper Housley to conduct

another sweep of the apartment. The troopers then obtained a search warrant. The subsequent search produced the stolen firearms, marijuana, and drug paraphernalia.

On January 25, 2019, a Henry County grand jury returned an indictment charging Norton with twelve counts of unlawful transaction with a minor, second degree, and one count each of endangering the welfare of a minor, possession of drug paraphernalia, and possession of marijuana. Thereafter, Norton filed a motion to suppress evidence seized under a search warrant issued following a warrantless entry and search of her apartment. The trial court found that the Commonwealth failed to demonstrate that the warrantless entry and search of the apartment was justified by exigent circumstances and suppressed all evidence obtained from all searches conducted in this matter.

Pursuant to KRS 22A.020(4), the Commonwealth filed an interlocutory appeal in the Kentucky Court of Appeals from the order granting Norton's suppression motion.

ISSUE

Does the potential presence of firearms and marijuana around juveniles constitute exigent circumstances to justify the warrantless entry and search of a residence?

HOLDING

No. The mere potential presence of firearms and marijuana around juveniles does not constitute exigent circumstances to justify the warrantless entry and search of a residence.

ANALYSIS

Generally, warrantless searches are unreasonable subject only to a few specifically established and well-delineated exceptions.[39] Among these recognized exceptions is when "the exigencies of the situation make the needs of law enforcement so compelling that the warrantless search is objectively reasonable under the Fourth Amendment."[40] In determining if this exception applies, we do not rely on the subjective intent of the officers; rather, courts must ask "whether there was 'an objectively reasonable basis for believing' that medical assistance was needed, or persons were in danger."[41]

In this case, at the time the troopers entered the apartment, they only had a suspicion that M.B. could be there. Furthermore, they had no direct information that Harris, the

[39] Helphenstine v. Commonwealth, 423 S.W.3d 708, 714 (Ky. 2014)
[40] Mincey v. Arizona, 437 U.S. 385, 394, 98 S. Ct. 2408, 2414, 57 L. Ed. 2d 290 (1978)
[41] Pace v. Commonwealth, 529 S.W.3d 747, 754 (Ky. 2017)

person suspected of the firearm theft, was with him at the time. And while the smell of an illegal substance may provide probable cause for a search warrant, it is not sufficient to justify a warrantless search absent a showing of exigent circumstances.

Similarly, the mere possibility that evidence may be destroyed is not sufficient to provide exigent circumstances to justify a warrantless entry. Although the troopers noted the smell of burnt marijuana, the facts of this case do not suggest that evidence was being destroyed. Moreover, the suspected firearms could not be so easily destroyed.

Consequently, the Court of Appeals affirmed the trial court's decision to suppress all evidence obtained from the warrantless search of Norton's apartment. Further, because the search warrant obtained by the troopers was based entirely on information obtained from the initial searches, the Court of Appeals affirmed the trial court's decision to suppress all evidence seized during the execution of the warrant.

Commonwealth v. Wilson, 625 S.W.3d 252 (Ky. App. 2021)

FACTS

On September 18, 2019, Louisville Metro Police Officers Gammons and Gadegaard were patrolling in an unmarked police vehicle. They observed Wilson riding a bicycle on an unoccupied public sidewalk in contravention of Louisville/Jefferson County Metro Government Code of Ordinances § 74.01(A). When Wilson crossed the street and entered an alley, Officer Gammons performed a U-turn without engaging the vehicle's lights or sirens. While continuing to follow Wilson, Officer Gammons briefly engaged the lights and sirens. Wilson did not stop. After the lights and sirens were disengaged, Officer Gammons sped down the alley behind Wilson.

Wilson pulled his bicycle to the side of the alley. Officer Gadegaard then jumped from the vehicle and began chasing Wilson. Officer Gadegaard yelled "stop," but did not identify himself as a police officer. Upon reaching Wilson, Officer Gadegaard wrestled him to the ground and jumped on top of him. Officer Gadegaard pressed his gun to Wilson's face, yelled profanities, and threatened to shoot him in the head. Wilson attempted to raise his hands, apologized, and explained that he had not heard the officers because he was wearing headphones. Officer Gadegaard discovered a firearm under Wilson's jacket while sitting on top of him. Officer Gammons removed the firearm and Wilson was placed under arrest.

A Jefferson County grand jury returned an indictment charging Wilson with possession of a handgun by a convicted felon, carrying a concealed deadly weapon by a prior

deadly weapon felony offender, and receiving a stolen firearm. The indictment did not charge Wilson with any violations of city ordinances or traffic infractions.

Wilson moved to suppress evidence seized by the officers, arguing the search and seizure were prohibited under the Fourth Amendment of the United States Constitution and Section 10 of the Kentucky Constitution. The Jefferson Circuit Court granted the motion to suppress on grounds that the officers did not possess probable cause to stop, pursue, or detain Wilson.

Pursuant to KRS 22A.020(4), the Commonwealth filed an interlocutory appeal in the Kentucky Court of Appeals from the order granting Norton's suppression motion.

ISSUE

Does a suspect's violation of a city ordinance provide probable cause to arrest and execute a search incident to arrest?

HOLDING

No. A suspect's violation of a city ordinance provide probable cause to arrest and execute a search incident to arrest.

ANALYSIS

The Fourth Amendment to the United States Constitution and Section 10 of the Kentucky Constitution protects a citizen from unreasonable searches and seizures by governmental agents. A search conducted without a warrant is unreasonable,[42] and the exclusionary rule provides that evidence obtained from an illegal search is not admissible against a defendant.[43] The Commonwealth must justify the search and seizure under one of the exceptions to the warrant requirement.[44]

In this case, Wilson merely violated an ordinance. The ordinance at issue was not a felony or a misdemeanor, so it did not constitute a criminal act under KRS 500.080(2). A violation of a city ordinance is neither a misdemeanor nor a felony.[45]

On appeal, the Commonwealth argued that Wilson committed a misdemeanor under KRS 520.100(1)(a) by fleeing or evading police in the second degree. Mere flight is

[42] Lydon v. Commonwealth, 490 S.W.3d 699, 701-02 (Ky. App. 2016).
[43] Laterza v. Commonwealth, 244 S.W.3d 754, 756 (Ky. App. 2008).
[44] Dunn v. Commonwealth, 199 S.W.3d 775, 776 (Ky. App. 2006).
[45] Singleton v. Commonwealth, 364 S.W.3d 97, 104 n.6 (Ky. 2012).

insufficient to prove an offense under KRS 520.100.[46] Moreover, the Commonwealth could not articulate any criminal offense that occurred prior to the alleged flight.

The Court of Appeals affirmed the Jefferson Circuit Court's order suppressing evidence.

Giles v. Commonwealth, 620 S.W.3d 204 (Ky. App. 2021)

FACTS

On January 8, 2019, Lexington Police narcotics detectives issued a radio call asking officers to stop a white Nissan Altima that just left a house known for drug activity on Locust Avenue. Officer Hood spotted a white Nissan Altima and began to follow the vehicle. While following the vehicle, Officer Hood noticed the tag on the license plate was expired. Officer Hood initiated a traffic stop at 1:41 p.m. and turned on his body camera. Giles was seated in the passenger seat of the vehicle.

Upon approach to the passenger side, Officer Hood asked the driver for his license. The driver responded that he did not have his license with him and provided his Social Security number. Giles informed Officer Hood that he did not have a driver's license, but did produce a state-issued identification card. Officer Hood requested the vehicle's registration and insurance card. Giles responded that the vehicle belonged to his aunt and he provided an insurance card. Giles was unable to locate the vehicle's registration.

Officer Hood returned to his cruiser and radioed a narcotics detective to inform him that a traffic stop of an Altima had been effectuated based upon an expired license plate tag. The driver was identified as Dianglea Santana. Officer Hood advised the narcotics detective that Santana and Giles were the individuals in the vehicle. The narcotics detective then asked Officer Hood if there was reasonable suspicion of criminal activity or any basis for sending a canine unit. Officer Hood responded "possibly" because he spotted a plastic baggie in the console area and that he intended to ask consent to search the vehicle. Another officer arrived at the location, and Officer Hood asked dispatch to check for warrants on Santana and Giles.

Officer Hood returned to the Altima and again requested the vehicle's registration. Giles was again unable to locate the registration. Officer Hood then questioned Giles and Santana about their activities prior to the stop. Giles and Santana stated that they were returning to Frankfort after visiting a family member who resided on Locust Avenue. Giles and Santana denied that the vehicle contained anything to "worry about" and denied consent to search. Officer Hood and the other officer discussed the

[46] Commonwealth v. Jones, 217 S.W.3d 190, 197 (Ky. 2006).

situation, determined that the baggie found in the console was for plastic silverware, and the other officer advised, “You got nothing, man. I don’t see anything.”

Officer Hood returned to his cruiser and was informed by dispatch that neither Giles or Santana had any outstanding warrants and that Santana had an active driver’s license. Hood advised the narcotics detective that the plastic baggie was for silverware and that Santana denied consent to search the vehicle. Officer Hood then requested the canine unit. Dispatch informed Officer Hood that a canine unit was unavailable. After several minutes of radio chatter, including Officer Hood’s statement that he did not have “plain smell” or visualization of “shake,” along with Officer Hood working on his computer, the narcotics detective stated that a canine was in route. The narcotics detective told Officer Hood to start writing the citation for the expired license plate tag. Officer Hood responded that he had begun the citation.

Approximately thirty minutes after the initial stop, Officer Hood printed the citation upon the canine unit’s arrival. While Officer Hood held onto the citation, other officers asked Giles and Santana to exit the vehicle. A sniff by the vehicle led to the discovery of cocaine, a baggie with residue, and scales.

A Fayette County Grand Jury returned an indictment charging Giles with trafficking in a controlled substance in the first degree, promoting contraband in the first degree, possession of a controlled substance in the first degree, possession of drug paraphernalia, and being a persistent felony offender in the first degree. Giles filed a motion to suppress evidence seized during the traffic stop. Even through the circuit court determined that Officer Hood prolonged the traffic stop beyond the time reasonably necessary to complete the stop, the circuit court ultimately determined that Officer Hood possessed reasonable suspicion of criminal activity to prolong the stop based upon the collective knowledge doctrine.

Giles entered a conditional guilty plea to possession of a controlled substance in the first degree, promoting contraband in the first degree, and being a persistent felony offender in the first degree. The circuit court sentenced Giles to a total to ten years’ imprisonment. Giles appealed to the Kentucky Court of Appeals.

ISSUES:

1. May a lawful traffic stop of a vehicle for a traffic violation become unlawful if prolonged beyond the time reasonably required to issue a traffic citation?

2. To justify prolonging a traffic stop, must law enforcement have a reasonable and articulable suspicion that criminal activity is afoot?

HOLDING:

1. Yes. A lawful traffic stop of a vehicle for a traffic violation is unlawful if the stop is prolonged beyond the time reasonably required to issue a traffic citation.

2. Yes. To justify prolonging a traffic stop, law enforcement must have a reasonable and articulable suspicion that criminal activity is afoot.

ANALYSIS:

In this case, Officer Hood's stop of this vehicle was lawful based upon the vehicle's expired license plate tag. However, a lawful traffic stop can become unlawful if the stop is prolonged beyond the time reasonably required to issue the citation.[47] Detaining the driver and passengers of a vehicle during a traffic stop becomes unreasonable when the "tasks tied to the traffic infraction are – or reasonably should have been – completed …"[48] The Court of Appeals agreed with the circuit court that the stop was prolonged beyond the time reasonably necessary to issue the citation for the expired license plate tag. Thus, the pivotal question becomes whether there was reasonable and articulable suspicion of criminal activity to justify prolonging the traffic stop for the canine unit to arrive.

Law enforcement must have a reasonable and articulable suspicion that criminal activity was afoot to justify prolonging a traffic stop.[49] Reasonable suspicion is determined by the totality of the circumstances.[50] When determining whether reasonable suspicion of criminal activity exists, "the collective knowledge of all the law enforcement officers involved in the stop may be taken into consideration."[51] While a police officer may properly rely upon a radio bulletin or other information shared by another officer to justify a Terry[52] stop, the bulletin or other information must be based upon reasonable suspicion of criminal activity.[53]

The Kentucky Court of Appeals determined that this traffic stop was impermissibly prolonged for the arrival of the canine unit. Officer Hood acknowledged that no contraband was in plain view or recognizable by plain smell. There was no evidence introduced at the suppression hearing supporting the narcotics detective's belief that the house on Locust Avenue was a known drug house. Hood also did not see the Altima

[47] Commonwealth v. Smith, 542 S.W.3d 276, 281 (Ky. 2018).
[48] Id., at 281.
[49] Commonwealth v. Blake, 540 S.W.3d 369, 373 (Ky. 2018) (citing Terry v. Ohio, 392 U.S. 1, 30 (1968)).
[50] Id.
[51] Id., at 373.
[52] Terry v. Ohio, 392 U.S. 1 (1968).
[53] U.S. v. Hensley, 469 U.S. 221, 232 (1985).

leave the house, and the detective did not provide a license plate number or a description of the individuals in the Altima. Santana had an active driver's license and neither Santana nor Giles had any outstanding warrants. Accordingly, prolonging this stop for an expired license plate tag to await a canine unit was unreasonable.

The Court of Appeals reversed Giles' conviction and remanded to Fayette Circuit Court for further proceedings.

TAMPERING WITH PHYSICAL EVIDENCE

Bell v. Commonwealth, ---- S.W.3d ----- 2021 WL 2274313 (Ky. App. 2021)

NOTE: ***This opinion was rendered on June 4, 2021, but is NOT FINAL under Kentucky Rules of Civil Procedure (CR) 76.30(2)(b) because a motion for discretionary review was timely filed pursuant to CR 76.20(2)(b) with the Kentucky Supreme Court on August 3, 2021. Because this opinion is NOT FINAL, it SHALL NOT BE CITED AS AUTHORITY in any courts of the Commonwealth of Kentucky. Should the motion for discretionary review be denied by the Kentucky Supreme Court, this opinion becomes final on the date the petition for rehearing is denied. CR 76.30(2)(b). 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 October 28, 2018, law enforcement arrested Bell in Marion County, Kentucky, because of his actions during a traffic stop. According to the arrest citation:

> Bell was the passenger in a vehicle that was parked in the middle of the road at the dead end of Hamilton Heights. Upon approaching the vehicle, this officer observed Bell take his right hand and appear to conceal something under his right leg. When he was removed from the vehicle, Cpl. Cook saw in plain view a small plastic baggie containing what appeared to be synthetic marijuana, or "Spice." Search of the rest of the vehicle found in between the front passenger seat and the center console, a small round container that held what appeared to be crystal methamphetamine that was inside of a piece of paper. Also inside this container were several pieces of what appear to be Suboxon[e], a Schedule III Controlled Substance. The owner of the vehicle claimed no knowledge of these substances, so due to Bell being within[ ] arm[']s reach of them, he

> was charged. Upon getting Bell to MCDC [Marion County Detention Center], staff found a large white pill inside his pants pocket that was identified by Poison Control as a 800 mg Gabapentin, a Sch[e]dule 5 Controlled Substance.

The Marion County grand jury returned an indictment charging Bell with possession of controlled substances, possession of drug paraphernalia, tampering with physical evidence, and being a second-degree persistent felony offender. A jury convicted Bell of all charges and appealed to the Kentucky Court of Appeals.

ISSUE

Does a suspect's conduct of hiding a plastic bag of synthetic marijuana under his right thigh, and then in the space between the passenger car door and seat constitute an act of concealment sufficient to support a conviction for tampering with physical evidence?

HOLDING

A suspect's conduct of hiding a plastic bag of synthetic marijuana under his right thigh and then in the space between the passenger car door and seat was insufficient to constitute an act of concealment, as required to support his tampering with physical evidence conviction.

ANALYSIS

Bell only challenged his conviction for tampering with physical evidence.

KRS 524.010 provides:

> (1) A person is guilty of tampering with physical evidence when, believing that an official proceeding is pending or may be instituted, he:
>
> (a) Destroys, mutilates, conceals, removes or alters physical evidence which he believes is about to be produced or used in the official proceeding with intent to impair its verity or availability in the official proceeding[.]
>
> ....
>
> (2) Tampering with physical evidence is a Class D felony.

In James v. Commonwealth,[54] the Kentucky Supreme Court held that dropping or throwing the evidence to the ground in the presence and view of law enforcement in a manner that left the evidence easily retrievable was not an act of concealment or removal sufficient to sustain an additional charge for tampering with physical evidence. The Kentucky Supreme Court noted in James that KRS 524.100 requires the Commonwealth to prove both criminal intent and that the suspect completed the requisite criminal act. Under this statute, the Commonwealth satisfies the intent element by showing beyond a reasonable doubt that the defendant acted with "intent to impair [the evidence's] verity or availability in the official proceeding."[55]

In this case, the Court of Appeals found that Bell "'did not destroy, mutilate, or alter the contents of the plastic bag that he placed under his right leg; thus, the issue is whether he 'concealed' or 'removed' the items when he performed that action in the presence of the arresting officer." While Bell deliberately and calculatedly attempted to conceal the plastic bag by first hiding it under his thigh and then placing it between the door and the passenger seat, Bell did not discard the evidence, nor did he attempt to ingest it or otherwise alter or destroy it. Bell's conduct consisted of the furtive but futile acts of hiding it under his thigh and then in the space between the door and the passenger seat. As soon as he was removed from the car, the officer readily found the evidence "in plain view." No search was required. No K-9 unit was needed. In the language of James, the evidence was "easily retrievable."[56]

The Court of Appeals reversed Bell's conviction for tampering with physical evidence and being a second-degree persistent felony offender as it pertains to that conviction, and remanded to Marion Circuit Court for further proceedings.

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

[54] 586 S.W.3d 717 (Ky. 2019).
[55] Id., at 724-25.
[56] 586 S.W.3d at 725.

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."[57] "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."[58]

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

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

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.

SIXTH CIRCUIT COURT OF APPEALS

SUMMARIES OF PUBLISHED DECISIONS

JANUARY-JUNE 2021

CONSPIRACY – DRUG TRAFFICKING

United States v. Rosales, 990 F.3d 989 (6th Cir. 2021)

FACTS

In February 2017, Monica Duran agreed to transport drugs for her boyfriend "Christian" from Santa Ana, California to Springfield, Ohio on a Greyhound bus. Duran hid ten packages of methamphetamine, weighing a total of 4,427 grams, in a black duffel bag.

Christian arranged for money to be transferred to Duran to cover the expenses of the transport. On February 10, 2017, Christian texted Duran a reference number for a money wire to Walmart along with "send[er] Terry Tolle." Subsequent investigation identified Tolle as the father of Rosales' then-girlfriend Tinisha Delong.

On February 13, 2017 the Drug Enforcement Agency ("DEA") intercepted Duran while she was en route to Ohio. Duran agreed to cooperate in exchange for leniency and allowed the government to copy all calls, texts, and data from her cellphone.

That same day, under the direction of law enforcement, Duran texted Christian to inquire whether the drug delivery would occur that night and whether he would send her the number of the local contact. Christian sent Duran the address of a local Comfort Inn, indicating that a prior drug delivery had taken place there. At 1:12 a.m. on February 14, 2017, Christian texted Duran the number for the local contact, which ended in 0163, along with the words, "on the part of the cousin." Duran understood from the text that this was the person to whom she was supposed to deliver the drugs, and that she should tell the contact she was calling on behalf of the cousin.

At around 10:42 a.m. on February 14, 2017, Duran told Christian she would call the contact. Christian texted Duran, "they are ready for you to speak to them. Okay. First someone will come by for you to give them that, [and] then another person will come by for them to give you papers, okay." Duran then called the number Christian had texted

her the night before, and Rosales answered. Duran told Rosales that she was calling “on behalf of cousin,” to which Rosales replied, “Yes, he wasn't calling me. Well, I'm going to call him.” A short time later in a subsequent conversation, Rosales expressed confusion about where he was supposed to go to meet Duran. When Duran texted Christian about this confusion Christian responded, “He doesn't know where the hotel is. Well, they met up there last time unless it's someone else who is coming to pick up. Give him the address then.”

Several hours later when Duran called Rosales, Rosales told Duran that he “shouldn't be that long” and again clarified the meeting location. Rosales then texted, “[s]o its outside.” Duran testified that she understood this to be a reference to the drugs and responded affirmatively. A few minutes later Rosales texted that he was outside the hotel in a burgundy minivan, but law enforcement officers saw no such vehicle. Duran then called Christian and told Christian that the contact was not outside. Christian said he would call the local contact. Christian called Duran back a few moments later and said he had spoken with the contact and that this was a tactic to make sure she had not been followed.

Shortly thereafter Christian texted her that the new plan was for her to take a taxi to a house in Springfield, Ohio. Law enforcement identified the house as the residence of Rosales and his father Stephen Rosales. Following instructions from law enforcement, Duran insisted that the delivery take place at the hotel.

Around 4:30 p.m. Christian called Duran. Though the DEA inadvertently did not record that call, DEA task force officer Sean Zint, while listening to the call between Christian and Duran wrote down, “elevated Ram P.U. $5,000.” A short time after that call Rosales texted Duran that he was “outside in a big truck.” Christian then called Duran and said, “they are around there now.” After realizing that Rosales was at the wrong hotel, Duran texted Rosales the address of the Comfort Inn in Dayton, Ohio and confirmed with Christian that Rosales was on his way to the correct location.

At 5:19 p.m. Rosales texted Duran that he was on his way to meet her and said, “You're going with me. My brother said you don't want to be there. You can stay—no problem. No one is going to mess with you. You can stay as long as you like. Pops will be there.” Duran testified that she was confused about this message because she had not agreed to stay at anyone's house.

At 6:13 p.m. Rosales texted Duran that he had arrived. Duran told him, “Go to the Nissan truck that has the Wisconsin plates. I put the bag there underneath.” Rosales then texted, “are you ready?” Rosales parked his truck next to the minivan and, without

waiting for Duran, picked up the large duffel bag containing the drugs and placed it in his car.

At that point, a group of armed officers surrounded Rosales. Rosales then threw his phone to ground, causing it to break apart, and said, “f--- it.” As he was being searched incident to arrest Rosales told the arresting officer, “I bet you had fun today.” That evening, officers searched for the cellphone, but recovered only the battery and cover of Rosales’ phone. An officer returned the next day to continue the search but was unable to locate any other parts of the phone.

Officers found a bundle of cash totaling $6,962 in Rosales’ front pocket, $5,000 of which was in large bills. Officers also searched the pickup truck and found two money orders from a Walmart in Springfield, Ohio. Both money orders were sent around 4:00 p.m. on February 10, approximately one hour before Christian had texted Duran the details of the money order that had been sent in her name to fund the transport. The officers also searched Rosales’ home, where they found $9,500 in cash and a knife. No controlled substances, drug paraphernalia, or drug ledgers were found.

The DEA issued an administrative subpoena for the subscriber information and toll records of the 0163 phone number. The service provider was not able to provide subscriber information, but the toll data for the phone number listed the contacts with Duran's phone along with nine contacts on February 13 and seven text messages exchanged on February 14 between the 0163 number and a Mexican phone number used by Christian. The toll records indicated that the last outgoing communication was at 6:31 p.m. on February 14, which was about the time that Rosales was arrested and spiked his cellphone. Several incoming calls came after that time, but none were connected, suggesting the phone was no longer in use.

A jury convicted Rosales with conspiracy to possess with intent to distributed and attempt to possess with intent to distribute 500 grams or more of methamphetamine. The district court sentenced him to 240 months’ imprisonment. This appeal followed.

ISSUE

Is evidence of a single drug transaction sufficient to demonstrate conspiracy to violate federal drug laws if the government can prove that the single drug transaction is part of a larger trafficking conspiracy?

HOLDING

Yes. Evidence of a single drug transaction is sufficient to demonstrate conspiracy to violate federal drug laws if the government can prove that the single drug transaction is part of a larger trafficking conspiracy.

ANALYSIS

To sustain a conviction for conspiracy under 21 U.S.C. § 846, the government must have demonstrated: (1) an agreement to violate drug laws; (2) knowledge and intent to join the conspiracy; and (3) participation in that conspiracy.[59]

With respect to a single buy, "[t]he buy-sell transaction is simply not probative of an agreement to join together to accomplish a criminal objective beyond that already being accomplished by the transaction."[60] To establish that a single transaction is part of a larger conspiracy we have considered several factors, including: "(1) the length of the relationship; (2) the established method of payment; (3) the extent to which transactions are standardized; and (4) the level of mutual trust between the buyer and the seller."[61]

In this case, the Sixth Circuit held that a reasonable jury could have found that there was a previous relationship between Rosales and Christian. Christian indicated to Duran that someone whose phone number ended in 0163 would be coming to retrieve the drugs. When Duran called that phone number Rosales answered. Rosales never identified himself, nor asked Duran to identify herself. The only identifying information was Duran's initial statement that she was calling on behalf of the cousin. Rosales seems to have understood this to mean Christian, as he did not question who the cousin was and instead said, "Yes, he wasn't calling me. Well, I'm going to call him." A reasonable jury could have inferred from this interaction that there was a previous relationship between Rosales and Christian.

Rosales asserts that there was no evidence of an established method of payment. But Christian had told Duran that someone in a Ram pick-up truck would give her $5,000. DEA task force officer Zint testified that his note from the phone call between Christian and Duran in which he had written down "elevated Ram P.U. $5,000," referred to a description of the contact's vehicle and that Duran was supposed to pick up $5,000. At the time of his arrest, Rosales had $5,000 cash in large bills in his pocket. Furthermore, a money order receipt found in Rosales' car listed Terry Tolle as the sender, the same

[59] United States v. Deitz, 577 F.3d 672, 677 (6th Cir. 2009).
[60] United States v. Hamm, 952 F.3d 728, 736 (6th Cir. 2020) (quoting United States v. Townsend, 924 F.2d 1385, 1394 (7th Cir. 1991)).
[61] Deitz, 577 F.3d at 681 (citation omitted).

individual Christian had told Duran would be transferring money to her for the transport on February 10.

The third Deitz factor, which looks at the standardization of transactions, also supports the conviction. Christian texted Duran the address and telephone number of a Comfort Inn, indicating that a previous drug transaction had taken place there and that the local contact "already know[s] which one it is."

Finally, the evidence arguably demonstrated that there was some level of trust involved in this transaction. The government estimated that the street value of methamphetamine is $60,000-$80,000 per kilogram and presented testimony that drug dealers often execute fronting arrangements to accept drugs without any upfront payments. If Rosales was only going to pay $5,000 up front for drugs that were worth over $200,000, the jury could have interpreted that as a sign of the trust between him and Christian, lending further credibility to the conspiracy charge under the fourth Deitz factor.

Furthermore, "large quantities of drugs, such as a kilogram or more, support an inference of a conspiracy."[62] This case involves 4,427 grams of methamphetamine, which far exceeds the quantity a simple drug user would typically possess. The drug quantity therefore supports an inference of a conspiracy despite there only being a single transaction.

The Sixth Circuit affirmed Rosales's convictions.

United States v. Williams, 998 F.3d 716 (6th Cir. 2021)

FACTS

In May 2016, the Drug Enforcement Administration ("DEA") was investigating the distribution of counterfeit prescription pills in Florida, Kentucky, and Tennessee. The DEA raided the home of Eric Falkowski—the primary target of the investigation—and found tableting machines, bags of powders, and dyes. Soon thereafter, Joedon Bradley approached Falkowski, wanting to move Falkowski's drug business to Tennessee. Once in Madison, Tennessee, Falkowski and Bradley pressed thousands of pills containing a mixture of alprazolam, acetaminophen, and fentanyl. The white pills were marked with an "A333" stamp and looked nearly identical to Percocet pills.

On July 5, 2016, a large quantity of those counterfeit pills was distributed in Murfreesboro, Tennessee. On July 6, law enforcement and emergency medical

[62] United States v. Lopez-Medina, 461 F.3d 724, 748 (6th Cir. 2006).

personnel attended to several victims who overdosed on the counterfeit pills, which the victims thought were 10 mg Percocet pills. One individual died from the overdose, while seven other individuals had to be hospitalized. An investigation revealed that Jennifer Dogonski had brokered an agreement between Johnny Williams and Jonathan Barrett for the purchase of 150 pills.

On July 7, law enforcement then executed a search warrant for Barrett's home, where it found approximately 70 Xanax pills, but not the counterfeit pills. Law enforcement arrested Barrett and took him to the Murfreesboro Police Department ("MPD"), where law enforcement interrogated him and had him sign a written statement about his conduct before releasing him. Barrett then returned to the MPD days later for another recorded interrogation. During this second interrogation, on July 11, Barrett explained that he had purchased, and later distributed, 150 counterfeit Percocet pills in a deal Dogonski brokered between Williams and him. Barrett also acknowledged that he had traded the last of his counterfeit pills for the Xanax pills found in his home with the overdose victim who died.

Law enforcement also interrogated Johnny Williams on July 7, 2016. During the interrogation, Williams decided to terminate questioning. The officers released Williams but, on his way out, they convinced him to come back to finish the interview. They read him his Miranda rights and Williams signed a waiver. During the interview, Williams stated that he received a call from Dogonski, who asked Williams if he had any oxycodone or Percocet pills. Williams admitted that he sold Dogonski the counterfeit Percocet pills, which he had obtained from "Bo." Following the interview, Williams was allowed to leave, but law enforcement seized his cell phone on the belief that it contained evidence of criminal activity. Four hours later, the officers obtained and executed a search warrant on the phone, where they discovered that Williams had exchanged text messages with Dogonski about the sale of the pills. Based on the information recovered from the search of his cell phone, a search warrant was later issued for Williams' apartment.

Law enforcement identified Davi Valles, Jr. as "Bo." Valles had purchased approximately 400 of the counterfeit pills from Preston Davis. Davis later admitted to manufacturing the pills with Falkowski and Bradley. In executing a search warrant at Davis' home, law enforcement found fentanyl, a pill press, and a pill die stamped with "A333." Law enforcement also searched Falkowski's phone and found text messages between him and Bradley discussing the manufacture and distribution of the pills. On December 22, 2016, law enforcement arrested Bradley. Once handcuffed, he admitted his involvement in manufacturing and distributing the pills with Falkowski.

On May 10, 2017, a federal grand jury issued a 10-count indictment, charging Williams and Barrett with crimes related to the distribution of fentanyl.[63] Bradley was added to all nine substantive counts under an aiding-and-abetting theory. The remaining four defendants (Bradley, Barrett, Williams, and Jason Moss) were charged with one count of conspiracy to distribute and possess with intent to distribute a mixture or substance containing a detectible amount of fentanyl under 21 U.S.C. §§ 841(a)(1), (b)(1)(C), and 846; and eight counts of distribution of a substance containing a detectible amount of fentanyl, the use of which resulted in serious bodily injury or death, under 21 U.S.C. §§ 841(a)(1), (b)(1)(C) and 18 U.S.C. § 2. Counts Six and Ten listed only Bradley, although the government voluntarily dismissed Count Six before trial.

At trial, a jury convicted Bradley, Barrett and Williams guilty on all counts, finding that the pills were the but-for cause of the harm to the victims. The district court sentenced Williams to 240 months' imprisonment, Barrett to 276 months' imprisonment and Bradley to 360 months' imprisonment. This appeal followed.

ISSUE

May a single conspiracy to violate federal drug laws be proven with circumstantial evidence?

HOLDING

Yes. A single conspiracy to violate federal drug laws may be proven with circumstantial evidence.

ANALYSIS

To sustain a conviction for drug conspiracy under section 846, the government must prove beyond a reasonable doubt: (1) an agreement to violate drug laws; (2) knowledge of and intent to join the conspiracy; and (3) participation in the conspiracy.[64] Conspiracy requires: "(1) An object to be accomplished[;] (2) [a] plan or scheme embodying means to accomplish that object[;] and (3) [a]n agreement or understanding between two or more of the defendants whereby they become definitely committed to cooperate for the accomplishment of the object by the means embodied in the agreement, or by any effectual means."[65]

[63] Davis and Dogonski were each charged separately and entered into plea deals with the government. Between the Fourth and Fifth Superseding indictments, Falkowski, Valles, and LaKrista Knowles (a mid-level distributor) were removed as defendants after making plea deals with the government.
[64] United States v. Gardner, 488 F.3d 700, 710 (6th Cir. 2007).
[65] United States v. Bostic, 480 F.2d 965, 968 (6th Cir. 1973).

An agreement can be tacit, not formal, and the "government may meet its burden of proof through circumstantial evidence."[66] "Generally, a buyer-seller relationship alone is insufficient to tie a buyer to a conspiracy because mere sales do not prove the existence of the agreement that must exist for there to be a conspiracy."[67] However, conspiracy convictions have been upheld where there was additional evidence, beyond the mere purchase or sale, of a wider agreement.[68] To that end, circumstantial evidence that may establish that "a drug sale is part of a larger drug conspiracy" includes advance planning, ongoing purchases or arrangements, large quantities of drugs, standardized transactions, an established method of payment, and trust between the buyer and seller.[69]

Here, the evidence is sufficient to show that a reasonable jury could find that all three defendants participated in a "chain" conspiracy to distribute controlled substances. In a chain conspiracy, "the agreement can be inferred from the interdependent nature of the criminal enterprise."[70] And knowledge of the operation "may be inferred from the interrelated nature of the drug business or the volume of drugs involved."[71] The evidence demonstrated that Bradley, as the manufacturer of thousands of counterfeit pills, worked with other intermediaries to achieve a common goal of distributing controlled substances. The government also showed that Williams bought 300 pills from Valles, sold pills to Dogonski (for sale to others), and worked with Dogonski to sell 150 pills to Barrett. Based on the number of Williams' contacts within the chain, a reasonable juror could find that he knowingly agreed to participate in a larger scheme to violate drug laws. Likewise, Barrett, as an end distributor in the chain, bought counterfeit pills with the intent to distribute them to third parties (rather than use them personally). He communicated with Dogonski about the availability of Percocet, purchased pills from Williams with Dogonski's assistance, and sold pills to another distributor and several end-users who overdosed. Although Barrett may not have known individuals higher in the chain, the Sixth Circuit held that it was reasonable for the jury to find that he participated in the conspiracy.

The Sixth Circuit disposed of other minor issues challenging the sufficiency of the evidence, challenging the jury instruction, and arguments asserting that Miranda

[66] United States v. Layne, 192 F.3d 556, 567 (6th Cir. 1999).
[67] United States v. Deitz, 577 F.3d 672, 680 (6th Cir. 2009) (internal quotation marks omitted) (quoting United States v. Cole, 59 F. App'x 696, 699 (6th Cir. 2003)).
[68] Cole, 59 F. App'x at 699–700.
[69] Deitz, 577 F.3d at 680–81 (citations omitted).
[70] See United States v. Hitow, 889 F.2d 1573, 1577 (6th Cir. 1989).
[71] Id.

warnings were not provided prior to the defendants providing incriminating information.

The Sixth Circuit affirmed all convictions.

EMPLOYMENT LAW – TITLE VII OF THE CIVIL RIGHTS ACT OF 1964

Jackson v. Genesee County Road Commission, 999 F.3d 333 (6th Cir. 2021)

FACTS

Genesee County Road Commission hired Makini Jackson, an African American woman, as HR director in March 2016. As HR director, Jackson investigated several discrimination complaints from various employees involving the director of equipment and facilities. At the conclusion of her investigation, Jackson recommended termination of the director's employment. She also negotiated the director's severance package.

In addition to investigating employee complaints, Jackson was the Equal Employment Opportunity (EEO) Officer and approved Equal Employment Opportunity Plans submitted by vendors and contractors. Jackson became concerned that the director of engineering and the director of construction were inappropriately colluding with potential bidders. Jackson edits the EEOP submission instructions to require that all entries and questions regarding EEO Plan Policy and Process be directed solely to her. Vendors and employees complained to management about the manner in which Jackson communicated and handled matters.

The Genesee County Road Commission terminated Jackson's employment in October 2016 with no reason provided other than she was an at-will employee. Jackson filed a complaint with the Equal Employment Opportunity Commission (EEOC) in May 2017 charging that her employment was terminated by the Road Commission in violation of Title VII as retaliation for her investigative and EEO work. She was ultimately issued a right to sue letter by the EEOC and filed a complaint in federal court claiming retaliation in violation of Title VII. The district court found that Jackson did not engage in a protected activity under Title VII because her conduct was related to her regular job duties as HR Director. Jackson appealed to the Sixth Circuit.

ISSUES

1. Is the investigation of discrimination complaints protected activity under Title VII?

2. Are activities taken as an EEO officer protected activity under Title VII?

HOLDINGS

1. Yes. The investigation of discrimination complaints constitutes protected activity under Title VII.

2. Yes. Activities taken as an EEO officer constitute protected activity under Title VII.

ANALYSIS

Title VII of the 1964 Civil Rights Act prohibits retaliation against employees because they either oppose discriminatory actions (the "Opposition Clause") or because of their participation in an investigation, proceeding, or hearing under Title VII (the "Participation Clause").[72]

To establish a prima facie case of retaliation under Title VII, a plaintiff must demonstrate: (1) she engaged in protected activity, (2) the defendant was aware of the protected activity, (3) "the defendant took an action that was 'materially adverse' to the plaintiff," and (4) there is a causal connection between the plaintiff's protected activity and the defendant's adverse action.[73] Retaliation can be proven through direct or circumstantial evidence.[74]

The Sixth Circuit held that Jackson's conduct within her role as EEO, and her investigation of employee complaints against the director both constituted protected activity under Title VII. According to the Sixth Circuit, to constitute opposition activity, an employee must express opposition in a reasonable manner and must have a reasonable and good faith belief that the opposed practices were unlawful. Examples of opposition activity protected under Title VII include complaining to anyone (management, unions, other employees, or newspapers) about allegedly unlawful practices and refusing to obey an order because the worker thinks it is unlawful under Title VII. Viewed as a whole, Jackson's actions, while within the scope of her employment as HR Director, could be viewed as taking steps to ensure there was no discrimination in hiring both within the Genesee County Road Commission and among its vendors. Those actions constituted protected activity under Title VII as the opposition of a discriminatory practice.

The Sixth Circuit reversed the district court's order granting summary judgment for Genesee County Road Commission.

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[72] 42 U.S.C. § 2000e-3(a).

[73] Laster v. City of Kalamazoo, 746 F.3d 714, 730 (6th Cir. 2014).

[74] Redlin v. Grosse Pointe Pub. Sch. Sys., 921 F.3d 599, 613 (6th Cir. 2019).

Nathan v. Great Lakes Water Authority, 992 F.3d 557 (6th Cir. 2021)

FACTS

In 2004, Nicole Massey began working for the Detroit Water and Sewerage Department. Massey claimed her supervisor harassed her by commenting on her appearance, "her weight, the size of her breast, her looks and body [odor]." Supervisors and employees also referred to Massey as the "Queen of FMLA," referencing her leave requests made under the Family and Medical Leave Act. In addition, she alleged another female supervisor was directed to put her hand down Massey's shirt to check if she was wearing a bra. Massey was denied FMLA leave for asthma.

Massey claimed the harassment continued after the Great Lakes Water Authority replaced Detroit Water as the operator of the city's water and sewer systems. While with Great Lakes Water, Massey cited five instances of sexual harassment over a 15-month period to substantiate her hostile work environment claim. The alleged incidents included several comments and a performance evaluation concerning the size of Massey's breasts and her need for a more supportive bra. When Massey complained to a coworker about the hostile work environment, no investigation occurred. Instead, Massey was cited for harassing the coworker. Great Lakes Water terminated Massey's employment after an investigation determined that she falsified an incident report concerning a company-owned vehicle.

Massey, through her Chapter 7 bankruptcy trustee, alleged sexual harassment, gender discrimination and unlawful retaliation in violation of Title VII. The district court granted summary judgment to Great Lakes. This appeal followed.

ISSUES

1. When a woman is subjected to derogatory comments about her breasts, could a reasonable jury find that those comments were based on her sex?

2. Is sexual harassment pervasive or severe if only five instances of sex-based harassment occurred over a fifteen-month period?

HOLDINGS

1. Yes. When a woman is subjected to derogatory comments about her breasts, a reasonable jury could find that those comments were based on her sex.

2. No. Sexual harassment is not considered pervasive or severe when only five instances of sex-based harassment occurs over a fifteen-month period.

ANALYSIS

Title VII prohibits employment discrimination "because of … sex."[75] Sexual harassment in the workplace constitutes a hostile work environment in violation of Title VII "[w]hen the workplace is permeated with discriminatory intimidation, ridicule, and insult that is sufficiently severe or pervasive to alter the conditions of the victim's employment and create an abusive working environment."[76] Harassment is based on sex when an employee is "exposed to disadvantageous terms or conditions of employment to which members of the other sex are not exposed."[77] Accordingly, Nathan must show that "but for" Massey's sex, she would not have been harassed in the way that she was.[78]

In this case, the Sixth Circuit held that a reasonable jury could find that Massey's supervisors and co-workers would not have harassed her about her about her breasts "but for" Massey's sex. Massey's breasts are "a distinguishing feature and characteristic of her body as a woman." Massey's co-workers specifically chose this feature of Massey's appearance to target with their continued ridicule. Accordingly, a reasonable jury could infer from that choice that the "sex specific and derogatory" comments would not have been made but for Massey's sex.

Massey, through Nathan, must now demonstrate that this harassment constituted a hostile work environment. To prove that sexual harassment constituted a hostile work environment, it must be shown that: (1) a plaintiff belonged to a protected group, (2) a plaintiff was subject to unwelcome harassment, (3) the harassment was based on [sex], (4) the harassment was sufficiently severe or pervasive to alter the conditions of employment and create an abusive working environment, and (5) the defendant knew or should have known about the harassment and failed to act.[79]

In this case, the Sixth Circuit held that Nathan produced insufficient evidence that the environment at Great Lakes was objectively hostile. To determine whether a work environment was objectively hostile, courts must consider all the circumstances from the perspective of a reasonable person in the plaintiff's position.[80] non-exhaustive list of the relevant circumstances includes the "frequency of the discriminatory conduct; its severity; whether it is physically threatening or humiliating, or a mere offensive

[75] 42 U.S.C. § 2000e-2(a)(1).
[76] Oncale v. Sundowner Offshore Servs., 523 U.S. 75, 78, 118 S.Ct. 998, 140 L.Ed.2d 201 (1998).
[77] Id., 523 U.S. at 80.
[78] Williams v. General Motors Corp., 187 F.3d 553, 565 (6th Cir. 1999).
[79] Waldo v. Consumers Energy Co., 726 F.3d 802, 813 (6th Cir. 2013).
[80] Harris v. Forklift Sys., Inc., 510 U.S. 17, 23 (1993); Onacle, 523 U.S. at 81.

utterance; and whether it unreasonably interferes with an employee's work performance."[81]

In this case, the Sixth Circuit held that only five instances of sex-based harassment over a roughly fifteen-month period of time was insufficient to demonstrate that the harassment was pervasive or severe. Daily harassment would constitute pervasive or severe conduct. Moreover, Nathan cannot identify any incidents wherein Massey was physically threatened or publicly ridiculed. While the harassment may have made it more difficult for Massey to do her job, the Sixth Circuit believed that a reasonable person would not have found the Great Lakes environment to be hostile.

The Sixth Circuit also rejected Nathan's retaliation claim after holding that Great Lakes terminated Massey's employment for falsification of a report, not for reporting sexual harassment.

The Sixth Circuit affirmed the district court's judgment granting summary judgment to Great Lakes.

Pelcha v. MW Bancorp, Inc., 988 F.3d 318 (6th Cir. 2021)

FACTS

Melanie Pelcha was employed as a bank teller for Watch Hill Bank and its holding company, MW Bancorp, Inc. A new supervisor, Brenda Sonderman, began overseeing Pelcha in May 2016 and started to implement policy changes for employees. Sonderman required written requests for any time out of the office instead of sending an email as had been done in the past. These written requests had to be submitted by the middle of the month before the month of the requested time off. In early July 2016, Pelcha planned to take a few hours off from work but decided not to fill out the written request form. Instead, she orally obtained permission from Sonderman. Pelcha "bridled at the notion of having to fill out a written request," reviewed the employee handbook, and told Sonderman that she was "not filling [the request out] because [she didn't] have to." Despite her complaints, Pelcha completed the form and placed it in Sonderman's office on July 7, 2016, the day before her time off.

The next day, Sonderman spoke with Greg Niesen, then-President and CEO of Watch Hill, at a regularly scheduled senior management meeting. Sonderman told Niesen about Pelcha's failure to turn in the form as well as other workplace issues, such as her negative attitude and failure to timely complete tasks. Niesen stated that he had zero tolerance for insubordination and told everyone present he intended to fire Pelcha.

[81] Harris, 510 U.S. at 23, 114 S.Ct. 367.

Additionally, Niesen asked Sonderman to memorialize the chain of events in a memo. Shortly thereafter, Niesen terminated Pelcha's employment on July 12, 2016, and informed her that it was because of her insubordination.

Following her termination, Pelcha sued under the Age Discrimination in Employment Act (ADEA) for age discrimination. Pelcha was 47 years old at the time of her termination. After discovery, Watch Hill moved for summary judgment arguing that Pelcha could not establish a prima facie case of age discrimination under the ADEA. The district court granted summary judgment on the ADEA claim on April 17, 2020. Pelcha appealed to the Sixth Circuit.

ISSUE

In an age discrimination case under the Age Discrimination in Employment Act (ADEA), must a plaintiff prove that age was the but-for cause of the adverse action?

HOLDING

Yes. The ADEA prohibits employers from terminating employees because of such individual's age.[82] In an age discrimination case under the ADEA, plaintiffs must prove by a preponderance of the evidence, which may be direct or circumstantial, that age was the but-for cause of the challenged employer decision.[83] This requires showing that age was the determinative reason a plaintiff was terminated, that is, it must be shown that age was the "reason" the employer decided to act.[84]

In this case, Watch Hill terminated Pelcha's employment for insubordination. Insubordination constitutes a legitimate, nondiscriminatory reason for an adverse action.[85] Pelcha's insubordination occurred when she refused to complete a leave form weeks in advance, as required by her supervisor.

The Sixth Circuit affirmed the district court's judgment dismissing the matter.

Thompson v. Fresh Products, LLC, 985 F.3d 509 (6th Cir. 2021)

FACTS

Fresh Products, LLC, manufactures odor-control products and has a production facility in Perrysberg, Ohio. Most of its employees are entry-level production workers. According to Fresh Products' job description, production workers perform "assembly-type

[82] 29 U.S.C. § 623(a)(1).
[83] Gross v. FBL Fin. Servs. Inc., 557 U.S. 167, 177-78 (2009).
[84] Scheick v. Tecumseh Pub. Schs., 766 F.3d 523, 529 (6th Cir. 2014).
[85] Fullen v. City of Columbus, 514 F. App'x 601, 606 (6th Cir. 2013).

functions ... utilizing various light equipment and machinery." Production workers must be able "to stand on feet for up to 10–12 hours at a time, and to occasionally reach, bend, kneel, grasp, walk, or carry."

Fresh Products employed fifty-two-year-old Cassandra Thompson as a production worker. Thompson has arthritis, which affects her knees, back, and neck and restricts her from doing heavy lifting. Because of her inability to do heavy lifting, Thompson's doctor gave her weight restrictions at one of her previous jobs, and she sought work "that doesn't require heavy lifting." Thompson received treatment for her arthritis, including injections, pain medication, and pain cream, and that her arthritis inhibits her ability to "[l]ive a full life." She was approved for Social Security Disability (SSD) payments in 2014 based on a primary disability of morbid obesity and a secondary disability of arthritis. Thompson, who is African American, failed to disclose her arthritis diagnosis to Fresh Products during her employment interview.

As a new hire, Thompson signed a "Handbook Acknowledgement" which stated that "I agree that any claim or lawsuit arising out of my employment with Fresh Products must be filed no more than six (6) months after the date of the employment action that is subject [sic] of the claim or lawsuit. While I understand that the statute of limitations for claims arising out of an employment action may be longer than six (6) months, I agree to be bound by the six (6) month period of limitations set forth herein and I waive any statute of limitations to the contrary."

In October 2016, Thompson asked her supervisor about the possibility of working part-time due to her arthritis. Management never responded to the request and Thompson never provided any medical documentation supporting part-time work. Two supervisors denied Thompson ever mentioning any medical conditions.

Towards the end of 2016, Fresh Products experienced a reduction in sales. This caused the company to adjust the work shifts of employees. Thompson indicated that she could not work the new shift schedule, failed to select a preference for a new shift, and requested part-time work. Thompson, along with four other employees, were laid off on January 27, 2017.

Thompson filed a discrimination complaint with the Ohio Civil Rights Commission. The Ohio Civil Rights Commission ultimately dismissed the complaint finding no probable cause for discrimination. The Equal Employment Opportunity Commission (EEOC) adopted the Ohio Civil Rights Commission's findings and issued a right to sue letter. Thompson filed a lawsuit in federal district court alleging that Fresh Products, LLC, had discriminated against her because of her disability, age, and race, in violation of the

ADA, ADEA, and Title VII, respectively, when terminating her employment during a reduction-in-force. The district court granted summary judgment for Fresh Foods as having been untimely filed. Thompson appealed to the Sixth Circuit.

ISSUES

1. May an employer shorten the period established by Title VII for an employee to file a lawsuit alleging workplace discrimination by contract?

2. To support a claim of disability discrimination, must a plaintiff provide evidence indicating that an adverse action occurred because of a disability?

HOLDINGS

1. No. An employer may not contractually shorten the period established by Title VII for an employee to file a lawsuit alleging workplace discrimination.

2. Yes. To support a claim of disability discrimination, a plaintiff must provide evidence indicating that an adverse action occurred because of a disability.

ANALYSIS

Under Title VII, an employee bringing a claim of disability discrimination has 180 (or 300) days after an adverse employment action to file a charge with the EEOC.[86] Then she must wait 180 days for the EEOC's period of exclusive jurisdiction to pass.[87] After she receives a right-to-sue letter, she has 90 days to file suit.[88] In the Title VII context, permitting parties to shorten the period in which an employee may bring a civil action under the ADA risks "removing the incentive of employers to cooperate with the EEOC," undermining the value of pre-suit cooperative processes, and frustrating the uniform application of the statute.[89] Accordingly, the Sixth Circuit held that an employer cannot shorten the period through a contract for filing a workplace discrimination claim.

To establish a prima facie case of disability discrimination, Thompson must first show that she is disabled under the ADA and that "her employer 'knew or had reason to know' of her disability."[90] A person is disabled under the ADA when the person has "a physical or mental impairment that substantially limits one or more major life activities," has "a record of such impairment," or is "regarded as having such an

[86] 42 U.S.C. § 2000e-5(e).
[87] Id. § 2000e-5(f)(1).
[88] Ibid.
[89] Logan v. MGM Grand Detroit Casino, 939 F.3d 824, 829 (6th Cir. 2019).
[90] Williams v. AT&T Mobility Services, LLC, 847 F.3d 384, 395 (6th Cir. 2017).

impairment."[91] Major life activities include "walking, standing, lifting, bending, ... and working."[92] An employee is regarded as having a disability "if the [employee] establishes that he or she has been subjected to an action prohibited under this chapter because of an actual or perceived physical or mental impairment whether or not the impairment limits or is perceived to limit a major life activity."[93] The definition of disability must be construed broadly.[94]

In this case, the Sixth Circuit held that Thompson established that she is regarded as having a disability when she told a supervisor that she wanted part-time work due to her arthritis. This is sufficient to establish a factual dispute regarding whether Fresh Products knew of her disability.

Thompson, however, produced no "additional direct, circumstantial, or statistical evidence tending to indicate that the employer singled [her] out ... for discharge for impermissible reasons."[95] Thompson was not fired for productivity problems or absenteeism. Rather, Thompson was let go after a survey process asking who could or would work the new shifts. Accordingly, the Sixth Circuit held that Thompson has not shown that she was singled out due to her disability

The Sixth Circuit affirmed the district court's grant of summary judgment to Fresh Products on Thompson's ADA discrimination claim.

Wyatt v. Nissan North America, Inc., 999 F.3d 400 (6th Cir. 2021)

FACTS

Wyatt, an African American woman employed by Nissan as a project manager, was subjected to inappropriate comments by Walter Mullen, a senior manager. On September 2, 2015, Mullen invited and drove Wyatt to lunch, then stopped at a hotel on the way under the pretense of showing Wyatt a suit his homeowner's insurance company was paying for while Mullen had his floors redone. Wyatt reluctantly agreed to go inside. Upon arrival, Mullen sexually harassed and assault her by making sexual comments, exposing his genitals, asked Wyatt if she wanted to touch his genitals, prevented Wyatt from leaving the room, and attempted to embrace her. Wyatt directed Mullen to stop and attempted to leave. Mullen eventually allowed Wyatt to leave and took Wyatt back to the office. Approximately a month later, Mullen

[91] 42 U.S.C. § 12102(1).
[92] Id. § 12102(2)(A).
[93] Babb v. Maryville Anesthesiologists P.C., 942 F.3d 308, 319 (6th Cir. 2019) (quoting 42 U.S.C. § 12102(3)(A)).
[94] 42 U.S.C. § 12102(4)(A).
[95] Barnes v. GenCorp, Inc., 896 F.2d 1457, 1465 (6th Cir. 1990).

inappropriately touched Wyatt. Wyatt reported the unwelcomed touching to another manager, Butler, who escalated the matter to Nissan's Human Resources department. Human resources did not investigate the incident until Wyatt reached out to that department herself. After receiving a negative evaluation which Wyatt believed was issued in retaliation for her sexual harassment complaint, Wyatt took medical leave.

Wyatt filed a complaint against Nissan alleging hostile work environment, retaliation and failure to accommodate claims in violation of Title VII. The district court granted summary judgment to Nissan. This appeal followed.

ISSUES

1. Is ongoing unwelcome physical touching severe or pervasive conduct that constitutes sexual harassment as a hostile work environment?

2. Upon receiving a report of sexual harassment, is an employer required to immediately investigate?

HOLDINGS

1. Yes. Ongoing unwelcome physical touching is severe or pervasive conduct that constitutes sexual harassment as a hostile work environment.

2. Yes. Upon receiving a report of sexual harassment, an employer is required to immediately investigate.

ANALYSIS

Under Title VII, to establish a prima facie hostile-work-environment claim, Wyatt must show: "(1) she was a member of a protected class; (2) she was subjected to unwelcomed harassment; (3) the harassment was based on sex[ ]; (4) the harassment created a hostile work environment; and (5) employer liability."[96] The fourth and fifth elements are the only elements in dispute.

Harassment creates a hostile work environment "[w]hen the workplace is permeated with 'discriminatory intimidation, ridicule, and insult,' that is 'sufficiently severe or pervasive to alter the conditions of the victim's employment and create an abusive working environment.'"[97] The conduct must be "severe or pervasive enough to create an objectively hostile or abusive work environment—an environment that a reasonable

[96] Ladd v. Grand Trunk Western R.R., 552 F.3d 495, 500 (6th Cir. 2009).
[97] Harris v. Forklift Systems, Inc., 510 U.S. 17, 21, 114 S.Ct. 367, 126 L.Ed.2d 295 (1993) (quoting Meritor Sav. Bank, FSB v. Vinson, 477 U.S. 57, 65, 67, 106 S.Ct. 2399, 91 L.Ed.2d 49 (1986)).

person would find hostile or abusive."[98] When assessing whether conduct has become objectively severe or pervasive, the Supreme Court has instructed courts to consider a nonexhaustive list of factors, including "the frequency of the discriminatory conduct; its severity; whether it is physically threatening or humiliating, or a mere offensive utterance; and whether it unreasonably interferes with an employee's work performance."[99] We are more likely to conclude that conduct is pervasive when the sexually harassing conduct is continuous and not sporadic.[100] Sixth Circuit precedent makes clear that "harassment involving an 'element of physical invasion' is more severe than harassing comments alone."[101]

In this case, the Sixth Circuit held that Mullen's persistent harassment falls squarely within the scope of severe or pervasive conduct. The unwelcome physical touching was ongoing, and Mullen intentionally propositioned Wyatt at the hotel. Wyatt's allegations of the explicit solicitation, the unwanted display of Mullen's genitals, and the ongoing sexual harassment, especially the continued physical invasions, set forth sufficient facts to survive summary judgment. The Sixth Circuit also believed that a reasonable person in Wyatt's position would have perceived this environment to be hostile. Thus, a jury could reasonably find that Wyatt established that Mullen's conduct was unwelcome, hostile, and the ongoing harassment made it more difficult for Wyatt to do her job.

Under Title VII, once a plaintiff establishes that they experienced a hostile work environment, employer liability must be established based upon the status of the employee. When the plaintiff's harasser is a co-worker, a heightened negligence standard applied. However, if the harasser is a supervisor, we apply a more stringent standard. "If the supervisor's harassment culminates in a tangible employment action, the employer is strictly liable."[102] The Sixth Circuit held that Mullen was a supervisor because Wyatt was in his chain of command and directly reported to him.

Since supervisor liability is at issue, Nissan could potentially be liable unless it exercised reasonable care to prevent and correct any harassing behavior and that Wyatt unreasonably failed to take advantage of the preventive or corrective opportunities that Nissan provided.[103] While Nissan had a sexual harassment policy in place, it failed to timely and promptly investigate and correct the alleged sexual harassment. Nissan did not investigate the sexual harassment after Butler reported the matter to HR. Instead,

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[98] Id.
[99] Id. at 23, 114 S.Ct. 367.
[100] Hawkins v. Anheuser-Busch, Inc., 517 F.3d 321, 334 (6th Cir. 2008).
[101] Id. (quoting Williams v. Gen. Motors Corp., 187 F.3d 553, 563 (6th Cir. 1999)).
[102] Vance v. Ball State Univ., 570 U.S. 421, 424, 133 S.Ct. 2434, 186 L.Ed.2d 565 (2013).
[103] Id., at 424.

Nissan's HR department took no action for approximately one month when Wyatt contacted HR herself.

The Sixth Circuit reversed the district court's award of summary judgment for Nissan with respect to the hostile work environment claim and remanded for further proceedings.

KIDNAPPING

United States v. Small, 988 F.3d 241 (6th Cir. 2021)(cert. filed June 15, 2021)

FACTS

While home alone in Tennessee, seventy-three-year-old Linda Spoon noticed a black Chevrolet Malibu pull into her driveway. Small and Johnson ran into Spoon's house. Small pointed a gun at Spoon, then gave the gun to Johnson, who continued to hold Spoon at gunpoint while Small ransacked the house. Small and Johnson then bound Spoon's feet and hands together with various telephone and computer cords. Johnson and Small held Spoon captive for approximately 25 minutes before they drove away in the Chevrolet Malibu. Small and Johnson stole jewelry, firearms, knives, cell phones, cash, medicine, and other items from Spoon's residence. Spoon freed herself, called law enforcement, and provided a description of the Chevrolet Malibu.

A pawn shop's video camera captured Small entering and leaving a West Virginia pawn shop where Small pawned several knives. Law enforcement located the Chevrolet Malibu and arrested Small. During a search of the vehicle, officers recovered jewelry, women's clothing, and a receipt that included a Knoxville, Tennessee, address, date, and Johnson's name. During Small's arrest, Johnson attempted to flee in a white Ford truck that was owned by Small. Police arrested Johnson two days later.

Small and Johnson were charged in an indictment for aiding and abetting a kidnapping and conspiracy to commit kidnapping. A jury convicted Small and Johnson of the offenses. The trial court sentenced Small to 360 months' imprisonment and Johnson to 300 months' imprisonment. Small and Johnson appealed to the Sixth Circuit.

ISSUES

1. Does a suspect violate the federal kidnapping statute if the victim was held not only for a reward, but for any other reason?

2. May a person be convicted of kidnapping under federal law even when the physical kidnapping occurred within the borders of a single state?

HOLDINGS

1. Yes. The term "otherwise" in the kidnapping statute, which makes it a crime to unlawfully confine and hold any person for ransom or reward, or otherwise, includes any objective of a kidnapping which the defendant may fund of sufficient benefit to induct the commission of a kidnapping.

2. Yes. A person may be convicted of kidnapping under federal law even when the physical kidnapping occurred within the borders of a single state.

ANALYSIS

Under 18 U.S.C. § 1201(a) makes it s crime to unlawfully "confine [ ] . . . and hold[ ] for ransom or reward or otherwise" any person. The word "otherwise" in the statute is interpreted broadly.[104] Congress intended this statute to apply to persons who had been held "not only for reward, but for any other reason."[105] "Otherwise" included any objective of a kidnapping which the defendant may find of sufficient benefit to induce him to commit the kidnapping.[106] Thus, the defendant need only hold the victim for some purpose of his own.[107] To satisfy the "otherwise" element of the federal kidnapping statute, it is sufficient for the government to show that the defendant acted for any reason which would in any way be of benefit.[108] In this case, because Small and Johnson confined Spoon against her will in order to steal Spoon's possessions and escape without any interference and resistance, the government sufficiently proved the ransom, reward, or otherwise element of the federal kidnapping statute.

Federal kidnapping law applies when the offender travels in interstate or foreign commerce or uses the mail or any means, facility, or instrumentality of interstate commerce in committing or in furtherance of the commission of the offense.[109] In this case, Small and Johnson travelled from West Virginia in a rental car to Tennessee to commit the robbery of Spoon's residence. During the robbery, they bound Spoon's hands and feet, ransacked her home, and stole various items. Thereafter, Small and Johnson returned to West Virginia and pawned Spoon's stolen property. This constituted an offense involving interstate commerce, even though the physical incident occurred in a single state.[110]

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[104] United States v. Sensmeier, 2 F.App'x 473, 476 (6th Cir. 2001).
[105] Id.
[106] Id.
[107] Id.
[108] Gooch v. United States, 297 U.S. 124, 128, 56 S.Ct. 395, 80 L.Ed. 522 (1936).
[109] 18 U.S.C. § 1201(a)(1).
[110] See United States v. Ballinger, 395 F.3d 1218, 1226 (11th Cir. 2005); United States v. Bishop, 66 F.3d 569, 588 (3rd Cir. 1995).

To prove conspiracy to kidnap, the government must show "(1) the existence of an agreement to violate the law; (2) knowledge and intent to join the conspiracy; and (3) an overt act constituting actual participation in the conspiracy."[111] In this case, Small and Johnson worked in concert to invade Spoon's home, hold her at gunpoint, and tie her up to steal her property. It can be inferred that both Johnson and Small realized the purpose and result of their actions. Moreover, Johnson followed Small's instructions in holding Spoon at gunpoint and tying her up, while Small was able to ransack Spoon's home and steal her valuables. After they completed the theft, they escaped without freeing Spoon. These facts are sufficient to prove that Small and Johnson agreed with respect to the commission of the offense.

The Sixth Circuit affirmed the convictions.

SEARCH AND SEIZURE

United States v. Brooks, 987 F.3d 593 (6th Cir. 2021)

FACTS

During the late evening of August 4, 2018, Detroit police officers Amarante, Anthony, and Rodriguez stopped at a red light next to a Jeep Compass. Alexsand Pina was driving the Jeep; Angel Torres was in its front passenger's seat; Brooks sat behind Torres in the backseat. While waiting for the light to turn green, Officers Amarante and Anthony both observed that Torres was not wearing his seatbelt. The officers decided to pull the Jeep over for this civil infraction. They stopped the Jeep at a vacant gas station.

As Officer Anthony approached the Jeep's passenger side, he smelled marijuana emanating from the vehicle. Officer Anthony also saw Brooks in the backseat leaning forward with his shoulders parallel to his knees "making a stuffing motion under the seat." Believing that Brooks was trying to conceal contraband and potentially a firearm, Officer Anthony asked Brooks what he had stuck under the seat. Officer Anthony also alerted his fellow officers to Brooks's conduct because the conduct raised "an officer safety issue." After Brooks denied hiding anything, Officer Anthony opened the car door and ordered him out of the vehicle.

In the meantime, Officer Amarante approached the driver, Pina. Pina told Officer Amarante that he had a permit to carry a firearm and that the gun was located in the driver-side door. Officer Amarante also noticed the smell of marijuana as he spoke with Pina, but Pina denied allowing anyone to smoke in the car. Officer Amarante realized at that point that Brooks had been in the backseat and saw what appeared to be a

[111] United States v. Blackwell, 459 F.3d 739, 760 (6th Cir. 2006).

“marijuana cigar” in Brooks's left ear. Officer Amarante also heard Officer Anthony convey to Brooks: “My man, let me see your hands.” Officer Amarante secured Pina's gun and ordered him out of the Jeep so that they could look for marijuana.

Officer Rodriguez searched the Jeep while the other two officers conversed with the three occupants outside the vehicle. When searching the Jeep's rear passenger side where Brooks had made his stuffing motion, Officer Rodriguez saw the handle of a firearm protruding out between the seat and floorboard. The handgun had been loaded and its serial number scratched off. Officer Rodriguez immediately turned around from the rear passenger-side door and showed the other officers the gun. The officers also recovered suspected marijuana, a suspected marijuana cigarette, and $723 from Brooks.

The government charged Brooks with being a felon in possession of a firearm in violation of 18 U.S.C. § 922(g)(1). He moved to suppress the gun on the ground that the officers violated the Fourth Amendment. The district court denied the motion to suppress because the officers possessed probable cause to stop the vehicle based upon Torres’s seat belt violation. Further, the district court found that the smell of marijuana and Brooks’s “stuffing motion” provided probable cause to search the Jeep. It credited the officers’ testimony that Torres had not been wearing his seatbelt, which gave them probable cause to stop the Jeep.

The jury ultimately found Brooks guilty of the felon-in-possession count. The district court sentenced him to sixty-six months’ imprisonment. This appeal followed.

ISSUES

1. Does the observation of a traffic violation provide probable cause to execute a traffic stop a vehicle?

2. Does the smell of marijuana detected from a vehicle, coupled with an observation that one of the passengers was stuffing an object under a seat in the passenger compartment, provide probable cause to search the vehicle for evidence of criminal activity?

HOLDINGS

1. Yes. The observation of a traffic violation provided sufficient probable cause to execute a traffic stop of a vehicle.

2. Yes. The smell of marijuana detected from a vehicle, coupled with an observation that one of the passengers was stuffing an object under a seat in the

passenger compartment, provides probable cause to search the vehicle for evidence of criminal activity.

ANALYSIS

The Fourth Amendment provides in relevant part: "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated[.]"

The stop of a vehicle qualifies as the "seizure" of a "person" that must be "reasonable" under the Fourth Amendment.[112] Yet reasonableness in this context does not require a warrant. "[P]ractically since the beginning of the Government," officers have been allowed to stop a vehicle on public roads without a warrant when they have probable cause to believe that the occupants have committed a crime.[113] Court have also permitted vehicle stops based on a mere "reasonable suspicion" that a felony has occurred or that a misdemeanor is occurring, analogizing these temporary stops to the well-known "Terry stop" from Terry v. Ohio.[114] An officer has probable cause to execute a traffic stop of a motor vehicle if the officer sees an individual in the vehicle not wearing a seatbelt in violation of state law.[115]

In this case, the officers herein clearly possessed probable cause to believe that a traffic violation was occurring under Michigan law. Michigan law requires most individuals in the front seat of a motor vehicle to wear a seat belt, and the failure to do so is a civil infraction. Officers Amarante and Anthony both personally observed the Jeep's font passenger, Torres, not wearing a seatbelt. Accordingly, the Sixth Circuit held that the officers had probable cause to execute this traffic stop.

With respect to a search of a motor vehicle during a lawfully executed traffic stop, the police may conduct a warrantless search if probable cause exists to believe that the vehicle contains evidence of a crime.[116] The Sixth Circuit has long held that officers have the required probable cause when they detect the odor of illegal marijuana coming from the vehicle.[117]

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[112] See Whren v. United States, 517 U.S. 806, 809–10, 116 S.Ct. 1769, 135 L.Ed.2d 89 (1996).
[113] Carroll v. United States, 267 U.S. 132, 153–56, 45 S.Ct. 280, 69 L.Ed. 543 (1925).
[114] 392 U.S. 1, 88 S.Ct. 1868, 20 L.Ed.2d 889 (1968).
[115] See United States v. Tillman, 543 F. App'x 557, 560 (6th Cir. 2013); United States v. Street, 614 F.3d 228, 232 (6th Cir. 2010); United States v. Canipe, 569 F.3d 597, 601 (6th Cir. 2009); United States v. Draper, 22 F. App'x 413, 414–15 (6th Cir. 2001) (per curiam).
[116] See California v. Acevedo, 500 U.S. 565, 569, 111 S.Ct. 1982, 114 L.Ed.2d 619 (1991); Carroll, 267 U.S. at 153–56, 45 S.Ct. 280.
[117] See United States v. Sheron, 787 F. App'x 332, 332 (6th Cir. 2019); United States v. McKinley, 735 F. App'x 871, 873 (6th Cir. 2018); United States v. Johnson, 707 F.3d 655, 658 (6th Cir. 2013); United States v. Crumb, 287 F.

In this case, Officer Amarante ordered the search of the Jeep because he smelled marijuana emanating from it and saw what appeared to be a "marijuana cigar" behind Brooks's ear. Officer Anthony likewise testified that the marijuana smell was so strong that he could detect it as he first approached the Jeep. The officers did not need to rely on the smell of narcotics alone: Anthony also observed Brooks stuffing something under a seat—what was, in his experience, a sure sign of an attempt to hide contraband. These facts provided sufficient probable cause that the Jeep contained evidence of criminal activity.

The Sixth Circuit affirmed Brooks's conviction.

United States v. Reed, 993 F.3d 441 (6th Cir. 2021) (cert. filed July 30, 2021)

FACTS

Memphis Police suspected Reed of distributing marijuana. On May 17, 2018, Detective Brandon Evans filed three affidavits seeking search warrants for three locations. Evans's first affidavit sought a warrant to search the business "OK Tire" for marijuana, drug paraphernalia, and drug-related records. In this affidavit, Evans described his training and experience and indicated that he had been investigating Reed's drug trafficking. Within the five day prior to the submission of this affidavit, Evans stated that a confidential informant executed a controlled buy from Reed at the OK Tire and saw Reed "selling and storing marijuana" there. The purchased substance tested positive for THC. Evans noted that Reed's girlfriend, Dominique Johnson, had witnessed the buy and that a computer search had identified Johnson as the business's owner. Evans added that he had surveilled Johnson and Reed leaving their home on Kate Bond Road and traveling to the OK Tire. He observed both Johnson and Reed use their own set of keys to open the business on different occasions. Evans lastly described the informant's as having been responsible for several prior drug seizures and had provided information about drug houses that had been corroborated through additional police work.

Evans's second affidavit sought a warrant to search a home on Orchi Road for the same evidence. In this affidavit, Evans noted that Reed's mother lived at the Orchi Road address and that Reed's driver's license listed it. Evans also indicated that the confidential informant had made a controlled buy from Reed at this home within the last 20 days. Surveilling this buy, Evans watched Reed walk out of the house and sell marijuana to the informant. Evans again explained that the purchased substance tested

App'x 511, 514 (6th Cir. 2008); United States v. Puckett, 422 F.3d 340, 343 (6th Cir. 2005); United States v. Foster, 376 F.3d 577, 588 (6th Cir. 2004); United States v. Elkins, 300 F.3d 638, 659 (6th Cir. 2002); United States v. Garza, 10 F.3d 1241, 1246 (6th Cir. 1993).

positive for THC. Aside from the controlled buy, Evans observed Reed drive the streets near this home in a maroon Mustang and "conduct hand to hand transactions" with individuals. Within the last five days, Evans observed Reed drive a brown Cadillac Escalade and park it at the home. Evans also watched people pull into the home's driveway. Reed would come out and engage in hand-to-hand transactions with these individuals. Evans noted that "[o]n some occasions" the individuals would "hand Reed money and Reed would in turn hand them a clear bag with an unknown substance." Evans lastly indicated that Reed had four prior felony drug convictions and two prior misdemeanor drug convictions.

Evans's third affidavit sought a warrant to search Reed and Johnson's home on Kate Bond Road for financial records and drug proceeds (but not for drugs). In this affidavit, Evans again recounted his experience investigating drug crimes, as well as the informant's controlled buys from Reed at the other two locations. Evans noted that Johnson had active utilities in her name at the home on Kate Bond Road and that she and Reed had lived together at different homes in Memphis. Evans also watched Reed and Johnson leave this home in the brown Cadillac Escalade. The informant had likewise confirmed to Evans that Johnson and Reed lived together.

A state judge decided that probable cause existed to issue search warrants for all three locations and signed the warrants within a minute of each other. Officers executed the warrants the following day. Officers seized nothing from the OK Tire and seized only baggies and a digital scale from the Orchi Road home. The search of the home on Kate Bond Road uncovered two guns, approximately 18 rounds of ammunition, 18.7 grams of marijuana, 2.1 grams of THC wax, and $5,636 in cash.

After the search, Reed waived his rights under Miranda v. Arizona,[118] and confessed that the guns and drugs belonged to him and that he had been selling marijuana.

A grand jury returned an indictment charging Reed with one count of possession with the intent to distribute marijuana; two counts of possession of a firearm in furtherance of a drug-trafficking crime; and two counts of being a felon in possession of a firearm, in violation of 18 U.S.C. § 922(g)(1). Reed moved to suppress the evidence obtained from the search of his home on Kate Bond Road, including his statements to police. He argued that the affidavit in support of this warrant failed to identify a "nexus" between his drug dealing and the home to sufficiently raise an inference that drug records or proceeds would be found there. Reed also argued that the affidavit was so deficient that the judge's warrant could not avoid the exclusionary rule under the good-faith

[118] 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966).

exception from United States v. Leon.[119] The district court suppressed the evidence, finding that Evans's affidavit contained no allegations that Reed conducted drug activity at the Kate Bond Road property. The district court further held that Leon's good faith exception did not apply because Evans's affidavit needed to contain more allegations than the conclusion that Reed was a drug dealer who happens to reside at the home.

The government appealed the suppression order to the Sixth Circuit.

ISSUE

If a search warrant affidavit establishes a minimally sufficient nexus between the place to be searched and the contraband or evidence of crime that is to be found, as required in order for officer to rely in good faith on search warrant in conducting a search, does this permit the application of the Leon "good faith" exception to exclusionary rule?

HOLDING

Yes. If a search warrant affidavit establishes a minimally sufficient nexus between the place to be searched and the contraband or evidence of crime that is to be found, as required in order for officer to rely in good faith on search warrant in conducting a search, the Leon "good faith" exception to exclusionary rule would apply because there is some connection between the criminal activity at issue and the place to be searched.

ANALYSIS

The Fourth Amendment (applicable to state officers through the Fourteenth Amendment) commands that "no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized." Designed to prohibit the general warrants common at the time of the founding, the Fourth Amendment requires that a warrant specifically identify the "place" to be searched and the "things" to be seized. And courts have long held that a probable cause "nexus" must connect these two together: There must be a fair probability that the specific place that officers want to search will contain the specific things that they are looking for.[120]

In this case, the Sixth Circuit wrestled with two competing concepts: 1) Evidence of a drug dealer's ongoing drug activity can sometimes create a sufficient nexus to the suspect's residence to establish probable cause for a search of that residence, and 2) probable cause to arrest a suspect does not necessarily establish probable cause to

[119] 468 U.S. 897, 104 S.Ct. 3405, 82 L.Ed.2d 677 (1984).
[120] See United States v. Carpenter, 360 F.3d 591, 594 (6th Cir. 2004) (en banc); see also Zurcher v. Stanford Daily, 436 U.S. 547, 556, 98 S.Ct. 1970, 56 L.Ed.2d 525 (1978).

search the suspect's home. The Sixth Circuit undergoes an extensive analysis concerning these two competing concepts, but ultimately decided to leave a resolution for another day.

Instead, the Sixth Circuit examined whether the district court should have suppressed evidence obtained by law enforcement based upon the good faith execution of a search warrant issued by a state court judge. In United States v. Leon,[121] the United States Supreme Court held that even when a search violates the Fourth Amendment, a court should not suppress evidence if the police reasonably relied on a judge's decision that probable cause justified the warrant. However, Leon's good-faith exception to the exclusionary rule does not apply if an officer's affidavit in support of the warrant is "so lacking in indicia of probable cause as to render official belief in its existence entirely unreasonable."[122] This type of affidavit—a "bare-bones affidavit"—shows that the officer recklessly relied on the judge's decision that probable cause existed for the warrant.[123]

The Sixth Circuit held that Leon's good-faith exception extends to this case's nexus question. Even if an affidavit describing a suspect's drug activity does not establish a probable-cause nexus between the place to be searched and the evidence of that activity, the affidavit will avoid the bare-bones label so long as it identifies a "minimally sufficient" nexus between the two. In this case, the Leon exception applied because Detective Evans could reasonably rely on the state judge's conclusion that probable cause existed to search Reed's home on Kate Bond Road. First, the police had probable cause to believe that Reed was a drug dealer who had engaged in recent drug sales. A reliable informant had made controlled buys from Reed at the Orchi Road residence (within the last twenty days) and at the OK Tire (within the last five days). Evans had also seen Reed engaged in suspicious transactions near the Orchi Road home and had confirmed Reed's many prior drug convictions. Second, the police had probable cause to believe that Reed lived at the home on Kate Bond Road. His girlfriend had utilities in her name at this address and Evans knew that the two had lived together at other Memphis homes. The informant likewise relayed to Evans that Johnson and Reed currently lived together. Evans also connected the brown Cadillac Escalade parked at the home on Orchi Road during Reed's suspected drug sales to the one Evans saw at the home on Kate Bond Road. And Evans had watched Reed leave this home and travel to

[121] 468 U.S. 897, 922–23, 104 S.Ct. 3405, 82 L.Ed.2d 677 (1984).
[122] 468 U.S. at 923, 104 S.Ct. 3405 (citation omitted).
[123] United States v. White, 874 F.3d 490, 496 (6th Cir. 2017).

the OK Tire. Based upon these facts disclosed in the affidavits, law enforcement did not behave recklessly by relying on the state judge's probable cause determination.

The Sixth Circuit reversed the district court's suppression order and remanded the matter for further proceedings.

United States v. Sheckles, 996 F.3d 330 (6th Cir. 2021) (cert. filed July 28, 2021)

FACTS

In 2007, the Louisville office of the Drug Enforcement Administration (DEA) was monitoring a local drug dealer named Byron Mayes. Mayes had been receiving drugs from two brothers, Julio and Alfredo "Freddy" Rivas-Lopez. Living in Phoenix, Julio would ship cocaine from Mexico to Freddy in Louisville. Freddy would sell the drugs to dealers like Mayes. This investigation led to the seizure of many kilograms of cocaine and hundreds of thousands of dollars and the convictions of all three drug dealers.

In 2016, these individuals were out of prison. The Rivas-Lopez brothers were living in Mexico (Freddy had escaped from a federal prison), and Mayes was living in Louisville. Sheckles came to the DEA's attention during surveillance of a suspected drug "stash" house in Louisville. Officers believed that this house's "operator" had been receiving drugs from Julio Rivas-Lopez in Mexico and selling a portion to Mayes. After learning of Julio's suspected drug shipment in December 2016, officers observed the driver of a red truck visit the house. The license plate came back to a rental-car company that had leased the truck to Sheckles. Later that month, officers executed a search warrant at the house and seized a kilogram of heroin and about $200,000. The phone of the house's "operator" contained many texts from Julio.

Officers continued to monitor the Rivas-Lopez family in Mexico. In early 2017, they learned that Julio had been murdered. In June, they learned from an undercover DEA agent that Freddy had taken over his brother's business and planned to send ten kilograms of cocaine to his "Louisville distributor." Officers had obtained a pen register for Freddy's phone. Using his phone records, they identified the likely phone number of this Louisville distributor. In July, a state judge issued a warrant to obtain location data from AT&T for the distributor's phone.

The officers suspected that the phone belonged to Mayes. But their "pinging" of it led to Sheckles. On July 7, the phone pinged at the Terrace Creek Apartments. Officers saw a Ford Expedition rented by Sheckles at this location and confirmed that he had an address there.

Three days later, officers learned from the undercover DEA agent that Freddy's deal with his Louisville distributor (Sheckles) had fallen through because this distributor had invested in other drugs. The officers decided to ping the phone again on July 11. This ping took them to the Crescent Centre Apartments. They saw Sheckles's Expedition parked in a spot assigned to Apartment 234.

The next day, an employee at the apartment building noted that someone had just made an anonymous complaint about drug dealing from this apartment. The apartment was leased to a "John Murphy," but Murphy had illegally subleased the apartment to two men nicknamed "D" and "Boy" for their drug dealing. A maintenance person had also smelled marijuana in the apartment, and an officer smelled marijuana as he walked by it. The officer knew that Sheckles was at the apartment at this time but that his pinged phone remained at the Terrace Creek apartment.

After learning this information, officers sought search warrants for both apartments late on July 12. While one officer obtained the warrants, others observed Sheckles leave the Crescent Centre apartments at about 11:30 p.m. They stopped his vehicle and smelled marijuana. The officers detained Sheckles until a drug dog could arrive. The dog positively alerted to the presence of contraband. The officers searched the vehicle and found a handgun. Sheckles could not possess firearms because of a prior felony drug conviction, so the officers arrested him.

A little under an hour after the officers initiated this stop, a state judge approved the search warrants for the two apartments. The officers first searched the Crescent Centre apartment. They seized about 1.5 kilograms of heroin and 144 grams of crystal methamphetamine. They also recovered two handguns and an AR-15 rifle.

While the Crescent Centre search progressed, others executed the warrant at the Terrace Creek apartment. It was the middle of the night. Sheckles's girlfriend, Cristal Flores, was sleeping in the apartment with her young daughter. About nine to ten officers entered with guns drawn. They ordered Flores to the ground. When she explained that she was pregnant, they told her to get up, holstered their weapons, and turned the lights on. Officers proceeded with the search. They found the pinged phone, a firearm magazine, documents containing the name "John Murphy" as the lessee of the Crescent Centre apartment, and paperwork for a storage unit at a self-storage facility.

The officers asked Flores about the storage unit. The parties dispute what was said. According to the officers, Flores calmly acknowledged that she had been to the storage unit and kept clothes and many one-dollar bills for her daughter there. She also allegedly stated her belief that Sheckles had retrieved around $40,000 from the unit a

short time ago to buy the heroin found at the other apartment. During a suppression hearing, Flores did not recall these statements. She testified that she had no authority over the storage unit, was scared, and just wanted the officers to leave. At 3:20 a.m., roughly two hours after the officers' entry, Flores signed a form consenting to a search of the storage unit. The search revealed a substantial amount of money, along with separate bags of clothes and one-dollar bills.

Sheckles was indicted on several counts. He moved to suppress the evidence against him, arguing that the government violated the Fourth Amendment when it tracked his phone, stopped his car, and searched his apartments and storage unit. The district court denied the suppression motion. Sheckles entered into a conditional plea agreement. He pleaded guilty to five counts involving drug or firearm offenses. The district court sentenced him to 108 months' imprisonment. This appeal followed.

ISSUES

1. May a court issue a search warrant to obtain the location data of a suspects cellular telephone if law enforcement demonstrates by probable cause in an affidavit supporting the search warrant that the phone's location data was linked to criminal activity?

2. Is a search warrant valid for two locations where law enforcement submits a virtually identical affidavit in support of each warrant?

3. May consent to search a storage unit be obtained by a person who has "actual authority" over the storage unit?

HOLDINGS

1. Yes. A court may issue a search warrant to obtain the location data of a suspects cellular telephone if law enforcement demonstrates by probable cause in an affidavit supporting the search warrant that the phone's location data was linked to criminal activity.

2. Yes. A search warrant is valid for two locations where law enforcement submits a virtually identical affidavit in support of each warrant if the affidavits' information provided a sufficient nexus between the apartments and evidence of criminal activity.

3 Yes. Consent to search a storage unit may be obtained by a person who has "actual authority" over the storage unit.

ANALYSIS

On appeal, Sheckles argues that the officers lacked probable cause for all of the warrants and did not have proper consent to search the storage unit.

In Carpenter v. United States,[124] the Supreme Court reserved whether the acquisition of a phone's "real-time" location data (as compared to its historical location data) is a Fourth Amendment "search" necessitating a warrant. With respect to the location data for Sheckles' cellular telephone, the officers sought to locate the phone to identify the person using it and investigate that person's criminal activity. The search warrant did not seek to seize anything. So, the Sixth Circuit determined that it was unclear what type of analysis was necessary to determine the type of nexus is required within the search warrant affidavit to establish probable cause. Must the affidavit show only a fair probability that the phone's data will aid in a particular investigation and disclose evidence of criminal activity? Or must it show, say, a fair probability that the phone itself is being used in connection with criminal activity?

The Sixth Circuit held that no matter the nature of the required nexus between the phone's location and criminal activity, the information provided in the affidavit supporting the search warrant sufficiently established probable cause to obtain the phone's location information. The affidavit summarized the 2007 investigation of the Rivas-Lopez brothers, their distribution to Byron Mayes, and the DEA's large seizure of drugs and money at that time. The affidavit next summarized the Rivas-Lopez brothers' post-prison drug trafficking in 2016 and the seizure of a large amount of drugs and money from the Louisville stash house. It also noted that Freddy told an undercover DEA agent on June 14, 2017, that he had just spoken with "his Louisville distributor" and that he wanted the agent to deliver ten kilograms of cocaine to the distributor. Freddy later told the agent that the Louisville distributor would pay in cash at a price of $27,000 per kilogram. Using "toll analysis" of Freddy's phone from June 14, the DEA identified the phone number and phone that this Louisville distributor likely used to speak with Freddy. The prepaid phone had no identifiable customer. The affidavit explained that, in the officer's experience, drug dealers commonly use that type of phone to remain anonymous.

Considered collectively, this information provided a "substantial basis" for the state judge's finding that probable cause existed to obtain the phone's location data.

With respect to the same affidavit being used to support search warrants for two separate apartments, the Sixth Circuit noted that probable cause for these two warrants required a fair probability that the specific place to be searched contained the specific

[124] —— U.S. ——, 138 S. Ct. 2206, 201 L.Ed.2d 507 (2018).

things to be seized.[125] There must be a "nexus" between the place to be searched and the evidence sought.[126]

In this case, law enforcement submitted a virtually identical affidavit, and the affidavits supported three propositions: Sheckles was a drug dealer, he lived at the Terrace Creek apartment, and sold drugs from the Crescent Centre apartment. The affidavits sought search warrants to seize drugs, paraphernalia, proceeds, and records. The Sixth Circuit examined the affidavits and determined that the information contained therein provided a sufficient nexus between these items and the apartments.

Finally, with respect to the search of the storage unit, Sheckles argued that Flores's consent was not voluntary and that she lacked authority over the unit. Although consent to a search avoids the need for a warrant or probable cause, the consent must be voluntary and must come from a party with apparent or actual authority over the premises.[127] The government must prove that a party consented to a search by a preponderance of the evidence.[128] To be valid, the consent must be "voluntary, unequivocal, specific, intelligently given, and uncontaminated by duress or coercion."[129] When deciding whether a party's consent was freely given or coercively extracted, a court should consider the totality of the circumstances, including, for example, the party's age and education and the nature of the questioning from which the consent originated.[130] Consent is validly granted if law enforcement's initial show of force had dissipated by the time the party gave consent.[131] With respect to consent, the Supreme Court has held that the constitutional power to consent exists if the party has "actual" or "apparent" authority over the property.[132] The authority to consent depends on the "mutual use of the property by persons generally having joint access or control for most purposes[.]"[133] When a party shares property with others, the entire group has a reduced expectation of privacy because the group members have "assumed the risk that one of their number might permit the common area to be searched."[134]

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[125] Zurcher v. Stanford Daily, 436 U.S. 547, 556, 98 S.Ct. 1970, 56 L.Ed.2d 525 (1978).
[126] United States v. Carpenter, 360 F.3d 591, 594 (6th Cir. 2004).
[127] See Illinois v. Rodriguez, 497 U.S. 177, 188–89, 110 S.Ct. 2793, 111 L.Ed.2d 148 (1990); Schneckloth v. Bustamonte, 412 U.S. 218, 219, 222, 93 S.Ct. 2041, 36 L.Ed.2d 854 (1973).
[128] See United States v. Lee, 793 F.3d 680, 685 (6th Cir. 2015).
[129] United States v. Alexander, 954 F.3d 910, 918 (6th Cir. 2020) (quoting United States v. Canipe, 569 F.3d 597, 602 (6th Cir. 2009)).
[130] Schneckloth, 412 U.S. at 226, 93 S.Ct. 2041.
[131] United States v. Warwick, 928 F.3d 939, 945 (10th Cir. 2019);
[132] See Rodriguez, 497 U.S. at 188–89, 110 S.Ct. 2793; United States v. Ayoub, 498 F.3d 532, 541 (6th Cir. 2007).
[133] Rodriguez, 497 U.S. at 181, 110 S.Ct. 2793.
[134] United States v. Matlock, 415 U.S. 164, 171 n.7, 94 S.Ct. 988, 39 L.Ed.2d 242 (1974).

The Sixth Circuit held that Flores possessed the authority to consent to the search, and that her consent was not coerced. While police entered the apartment with guns drawn, that display of force occurred long before Flores signed the consent forms. Moreover, Flores possessed authority to consent to a search because the rental agreement provided her with access to the unit.

The Sixth Circuit also addressed a challenge to the stop and search of vehicle. The Sixth Circuit held that the stop of the vehicle was a valid Terry stop based upon reasonable suspicion that Sheckles was engaging in criminal activity. Sheckles was driving away from the Crescent Centre apartment while law enforcement was obtaining a warrant to search that location.

The Sixth Circuit affirmed Sheckles's convictions.

United States v. White, 990 F.3d 488 (6th Cir. 2021)

FACTS

Muskegon County (Michigan) Detective T. Schmidt investigated illegal drug trafficking in western Michigan as an undercover agent. While in a car with Jared Conkle, a suspected drug dealer, in early December 2019, Schmidt asked to buy some cocaine. Conkle knew where to go. He told Schmidt to "park in the rear" of a house that belonged to Michael White, whom he described as an "acquaintance." Schmidt watched Conkle exit the car, walk into White's house, and reemerge, after which Conkle handed Schmidt three grams of cocaine.

A similar sequence repeated itself about forty days later. Schmidt approached Conkle and again asked him where he could buy cocaine. Conkle again took him to White's house. Rather than direct Schmidt to the rear of White's house, Conkle told Schmidt to follow him to a nearby alley. Schmidt handed Conkle some pre-marked cash, and Conkle drove by himself to White's house. Another detective watched as Conkle approached the house, exited his car, and entered through the back. Conkle reemerged, got back into his car, and traveled back to Schmidt, where he completed the sale.

Believing that White kept drugs inside his house for distribution, Schmidt applied for a search warrant within 48 hours of Conkle's second purchase. Schmidt gave the above account, then explained that, "based on [his] training and experience" of seventeen years, drug dealers often keep "controlled substances at residences of other individuals" they know. Schmidt explained how he confirmed that the home belonged to White. Because he feared that knocking and announcing the officers' presence might "endanger [their] safety" and because he thought that White might "attempt to

dispose" of drugs if they knocked, Schmidt also sought permission for a no-knock warrant.

A Michigan state judge approved the requests. The search turned up over 20 grams of cocaine, over 30 grams of "crack" cocaine, a stolen semi-automatic handgun, an AR-style rifle, and over $2,500 in cash. The government charged White with being a felon in possession of a firearm, possessing a firearm to further drug trafficking, possessing with intent to distribute controlled substances, and brandishing a weapon to further drug trafficking.

Before trial, White moved to suppress the evidence recovered during the search, arguing that Detective Schmidt's affidavit failed to establish probable cause. The district court granted the motion. The government appealed to the Sixth Circuit.

ISSUES

1. May a judge issue a search warrant for a residence to law enforcement if there is a fair probability or a common-sense inference that the residence contains contraband?

2. May a judge issue a no-knock warrant if law enforcement officers face threat of physical violence or if they seek evidence that might be readily destroyed?

3. If law enforcement violates the knock-and-announce rule, is suppression of the evidence obtained the appropriate remedy?

HOLDINGS

1. Yes. A judge may issue a search warrant for a residence to law enforcement if there is a fair probability or a common-sense inference that the residence contains contraband.

2. Yes. A judge may issue a no-knock warrant if law enforcement officers face threat of physical violence or if they seek evidence that might be readily destroyed.

3. No. Suppression of evidence is not the appropriate remedy for a violation of the knock-and-announce rule for service of a warrant. The appropriate remedy for a violation of the knock-and-announce rule is a civil rights action filed pursuant to 42 U.S.C. § 1983.

ANALYSIS

The Fourth Amendment protects the "right of the people to be secure in their ... houses" and requires that "no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized." In deciding whether "probable cause" exists to issue a warrant, the magistrate must "make a practical, common-sense decision whether, given all the circumstances set forth in the affidavit before him, ... there is a fair probability that contraband or evidence of a crime will be found in a particular place."[135] In reviewing challenges to a warrant, we ask whether the magistrate had a "substantial basis" for finding probable cause.[136]

The Sixth Circuit held that probable cause supported the issuance of this particular search warrant. Detective Schmidt asked Conkle, a suspected drug dealer, for cocaine. Conkle directed Detective Schmidt to White's house. Conkle went into White's house and reemerged to meet up with Schmidt. Only then did Conkle produce the drugs to complete the sale. Conkle's visit to White's house between the offer and the sale raised a "common-sense" inference and a "fair probability" that he obtained drugs from White's house. A second buy occurred forty days later and reinforced the inference. Detective Schmidt again approached Conkle to buy cocaine from him. Conkle again went into White's house. After leaving White's house, Conkle again produced cocaine for sale to Schmidt. At a minimum, the second buy gave Schmidt ample reason to seek a warrant and the magistrate ample reason to grant one. The Sixth Circuit held that this warrant was valid and issued based upon probable cause.

White separately argued that police unjustifiably used a no-knock warrant to search his home. Although the Fourth Amendment incorporates the common law rule that officers must knock and announce their presence before executing a warrant,[137] an exception applies if officers face a threat of physical violence or if they seek evidence that might readily be destroyed.[138] Whether this affidavit sufficed to invoke the exception is an open question. It will remain one. Even if the police violated the knock-and-announce rule, suppression is not the appropriate remedy.[139] The key remedy for unjustified no-knock entries is an action under § 1983 for money damages, not exclusion of the evidence in a criminal proceeding.[140]

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[135] Illinois v. Gates, 462 U.S. 213, 238, 103 S.Ct. 2317, 76 L.Ed.2d 527 (1983).
[136] Id.
[137] Wilson v. Arkansas, 514 U.S. 927, 929, 115 S.Ct. 1914, 131 L.Ed.2d 976 (1995).
[138] Id. at 936, 115 S.Ct. 1914.
[139] See Hudson v. Michigan, 547 U.S. 586, 594, 126 S.Ct. 2159, 165 L.Ed.2d 56 (2006).
[140] Id. at 597–99, 126 S.Ct. 2159

The Sixth Circuit reversed the district court's order granting suppression and remanded for further proceedings.

TRAFFICKING IN A CONTROLLED SUBSTANCE

United States v. Burris, 999 F.3d 973 (6th Cir. 2021)

FACTS

In September and October 2019, undercover Detective Joseph Kovac initiated three controlled purchases of methamphetamine by dialing the same telephone number both times. Two of these controlled buys involved Douglas Davis while the third controlled buy involved a different individual, later identified as Burris. Detective Kovac recorded the license plate number of the third a pickup truck that was involved in the third transaction. The truck was registered to Burris at 1142 Agard Avenue, Benton Harbor, Michigan. Detective Kovac reviewed Burris' driver's license photo and confirmed Burris' identity.

Three more transactions then took place. Officers conducting surveillance saw Davis leave 1142 Agard Avenue to meet with Detective Kovac. When Detective Kovac met with Davis during the fifth transaction, Detective Kovac requested to purchase more methamphetamine. Davis advised that he did not have the additional methamphetamine with him, but asked Detective Kovac to drop him off at a nearby intersection and to circle the block. Officers observed Davis exit Detective Kovac's vehicle, walk to 1142 Agard Avenue, and then enter the residence at that address. A short time later, Davis returned to Detective Kovac's vehicle with the additional methamphetamine.

The final controlled purchase occurred on October 23, 2019. Davis was arrested in the front yard of 1142 Agard Avenue. Thereafter, several officers proceeded to execute a search warrant. Upon moving into the backyard, the officers observed Burris exit the residence from the backyard. While fleeing, one officer observed Burris's left arm clutched to his chest, "similar to how you would see a football player carrying a football." Burris was ultimately apprehended. During a search incident to arrest, officers recovered a small amount of cash, a cell phone, and a loaded handgun.

While retracing Burris's flight path, officer found a black leather bag containing methamphetamine at the exact location where Burris scaled a fence. Inside of the residence, officers recovered two additional firearms and a digital scale.

Burris was charged with conspiracy to distribute methamphetamine, distribution of methamphetamine, possession of methamphetamine, and being a felon in possession

of a firearm. At trial, Burris's counsel failed to challenge the sufficiency of the evidence. A jury found Burris guilty on all counts and the trial court sentenced him to 180 months of imprisonment. This appeal followed.

ISSUE

1. May a suspect be convicted of conspiracy to distribute controlled substances based upon from evidence that the suspect was involved in repeat drug transactions or events with other participants of the conspiracy?

2. Must the prosecution provide direct evidence of an agreement between coconspirators to prove the existence of a conspiracy?

HOLDING

1. Yes. A suspect may be convicted of conspiracy to distribute controlled substances based upon from evidence that the suspect was involved in repeat drug transactions or events with other participants of the conspiracy.

2. No. A conspiracy may be inferred from circumstantial evidence which may reasonably interpreted as participation in a common plan.

ANALYSIS

To sustain a conviction for conspiracy to distribute a controlled substance under federal law, the government must prove: "(1) an agreement to violate drug laws; (2) knowledge of and intent to join the conspiracy; and (3) participation in the conspiracy."[141] Burris argues that "mere association" is insufficient to establish participation in a conspiracy. In this case, however, there is much more than simple association between Burris and Davis. When Det. Kovac called the phone number to arrange drug sales, Davis delivered the drugs five times and Burris brought the drugs one time. Although Burris sold methamphetamine to Det. Kovac on only one of those occasions, officers observed Davis come and go from Burris's residence before and after each of the following three drug transactions (including the October 22 transaction, when officers observed Davis exit Det. Kovac's car, enter Burris's residence, and return to Det. Kovac's car after Det. Kovac requested more drugs than the previously agreed-upon quantity). And when the officers executed a search warrant of Burris's residence, Burris fled. The officers found firearms and a digital scale in the house, as well as a bag of methamphetamine in Burris's flight path. This evidence was sufficient to establish Burris's involvement in the narcotics conspiracy.

[141] United States v. Gardner, 488 F.3d 700, 710 (6th Cir. 2007).

Second, Burris contends that "there was not sufficient evidence of an agreement because there was no proof of communication between Davis and Burris." The Sixth Circuit found this argument unpersuasive because the government need not provide direct evidence of an agreement between coconspirators. "[A] conspiracy may be inferred from circumstantial evidence which may reasonably be interpreted as participation in a common plan."[142]

The Sixth Circuit affirmed Burris's convictions.

42 U.S.C. § 1983

The following cases (specifically under this heading) may involve ongoing litigation. The summaries below reflect the most recent published decision in the case in the Sixth Circuit Court of Appeals. In cases involving the reversal of a summary judgment granted by the District Court (that is a ruling against the agency or officer), the agency may continue the litigation or it may be settled out of court. The following may not be the final determination in the case.

Anders v. Cuevas, 984 F.3d 1166 (6th Cir. 2021)

FACTS

Anders owned two towing and storage companies, Star Towing and Recovery LLC and Area Towing and Recovery, Inc. Anders bought Star Towing in 2015, when Star Towing had been contracted to conduct tows for the Michigan State Police and was on the non-preference tow rotation list for the state police's Monroe County Post. After Anders purchased Star Towing, the relationship between Star Towing and the Michigan State Police declined. From December 2015 to November 2017, the internal affairs division of the Michigan State Police approached Anders with respect to sporting event tickets that he provided to eighteen state troopers. The troopers who accepted the tickets were disciplined, causing consternation with the troopers of the Monroe Post. By letter dated March 15, 2018, Monroe County Post Commander Cuevas removed Star Towing from the non-preference tow list for the Monroe Post. The internal affairs investigation also impacted Area Towing's contracts with the state and the City of Taylor, Michigan. Ultimately, the City of Taylor Mayor Sollars vetoed a new contract for Area Towing.

[142] United States v. Volkman, 797 F.3d 377, 390 (6th Cir. 2015)

Anders alleged that the veto resulted from his refusal to give Mayor Sollars a campaign contribution, Anders' hesitation to work with another towing company for heavy-duty tows because the owner of the other company was under federal criminal investigation, and because Anders cooperated with the FBI. A city councilman for the City of Taylor also publicly declared his disdain for Anders in a televised interview. Area Towing is still providing towing services to the City of Taylor on a month-to-month basis.

Anders filed a lawsuit pursuant to 42 U.S.C. § 1983, alleging retaliation, defamation and equal protection claims in violation of the First and Fourteenth Amendments against Commander Cuevas, Trooper Darzeil, Mayor Sollars, the City of Taylor and the councilman who gave the interview. The federal district court dismissed the claims against the City of Taylor and the official capacity claims against Sollars and the councilman. The defendants appealed to the Sixth Circuit.

ISSUE

Does retaliation by a public agency and its employees against a person who cooperates with an internal affairs investigation violate the First Amendment?

HOLDING

Yes. Retaliation by a public agency and its employees against a person who cooperates with an internal affairs investigation violates the First Amendment.

ANALYSIS

A prima facie First Amendment retaliation claim requires the towing companies to establish three elements: "(1) [that they] engaged in constitutionally protected speech or conduct; (2) an adverse action was taken against [them] that would deter a person of ordinary firmness from continuing to engage in that conduct; [and] (3) ... the adverse action was motivated at least in part by [their] protected conduct."[143]

With respect to Star Towing, the Sixth Circuit reviewed the elements of a retaliation claim under the facts of this case. First, Anders' speech was made in the context of an internal affairs investigation concerning whether state troopers engaged in inappropriate conduct by accepting free sporting event tickets from Anders. Anders cooperated with the investigation and provided the names of the troopers who accepted the tickets. Statements exposing possible corruption in a police department are exactly the type of statements that demand strong First Amendment protection.[144]

[143] Dixon v. Univ. of Toledo, 702 F.3d 269, 274 (6th Cir. 2012).
[144] See v. City of Elyria, 502 F.3d 484 (6th Cir. 2007).

An adverse action is an action that capable of deterring a person of ordinary firmness from exercising the constitutional rights in question.[145] Nothing justifies harassing people for exercising constitutional rights.[146] In Lucas v. Monroe County,[147] the Sixth Circuit found that a county engaged in an adverse action against a wrecker service and its operator by removal from the sheriff department's standby towing list following the operator's public criticism of the sheriff. The Sixth Circuit found that, if proven, the removal of Star Towing from the non-preference list constituted an adverse action.

Finally, to establish causation, a plaintiff must demonstrate that its protected speech was a substantial or motivating factor of the adverse action.[148] In this case, the Sixth Circuit held that the timing of Star Towing's removal from the tow list, coupled with statements and circumstances during the internal affairs investigation, created a reasonable inference at this point of causation.

To defeat a claim of qualified immunity, the plaintiff must show that the official's conduct (1) violated a constitutional right that (2) was clearly established.[149] The Sixth Circuit held that a reasonable government officer would have known at the time in question that he would be violating the Constitution if he retaliated against Star Towing for Anders' cooperation with law enforcement. Accordingly, the district court thus did not err in concluding that Anders' First Amendment right to such speech was clearly established at the time that Star Towing was removed from the list. The Sixth Circuit affirmed on this issue.

Cunningham v. Shelby County, Tennessee, 994 F.3d 761 (6th Cir. 2021)

FACTS

On March 17, 2017, around noon, Nancy Lewellyn called 911 and advised a dispatcher that "she was depressed and suicidal, that she had a gun, and that she would kill anyone who came to her residence." Shelby County Deputy Sheriffs Jayroe, Paschal and Wiggins responded to the call. The deputies were aware that Lewellyn was "suffering from some type of mental illness and/or crisis," and that she was saying that she was armed with "what may be a .45 caliber pistol."

[145] Hill v. Lappin, 630 F.3d 468, 472 (6th Cir. 2010).
[146] Thaddeus-X v. Blatter, 175 F.3d 378, 397 (6th Cir. 1999)(en banc).
[147] 203 F.3d 964, 974 (6th Cir. 2000).
[148] Vereecke v. Huron Valley Sch. Dist., 609 F.3d 392, 400 (6th Cir. 2010).
[149] See Cahoo v. SAS Analytics Inc., 912 F.3d 887, 897 (6th Cir. 2019).

At 12:14 p.m., Lewellyn walked out of her front door and turned towards the driveway in front of her home's garage where a sedan was parked. She had a BB handgun in her hand. The BB handgun resembled a .45 caliber pistol.

The video recorded by the dashcam in Jayroe's cruiser shows that Lewellyn walked towards the driveway and raised the handgun. The deputies yelled at her. Ultimately, Deputy Paschal fired his service pistol once. A second shot followed. As Lewellyn continued walking with her right arm extended horizontally and the pistol pointed in the direction of her car, Deputy Wiggins began shooting. After reaching her vehicle, Lewellyn leaned on its hood briefly and then turned back towards the house. As the firing continued, she took a few steps and collapsed. She left the BB gun on the hood of her sedan. Eleven seconds elapsed since Lewellyn exited the house.

The deputies fired ten shots, striking Lewellyn eight times. Despite rendering medical aid, Lewellyn died at the scene.

Lewellyn's estate filed an action pursuant to 42 U.S.C. § 1983 against Shelby County, Tennessee and Deputies Paschal and Wiggins, alleging the deputies used excessive force. The deputies claimed entitlement to qualified immunity and filed a motion for summary judgment. The district court denied the motion for summary judgment. The deputies appealed to the Sixth Circuit Court of Appeals.

ISSUES

1. Should qualified immunity be granted to a law enforcement officer who fatally shoots a suspect who turned towards the officers while brandishing a firearm and had previously called sheriff's office to declare that she possessed a firearm and intended to use it against anyone who came to her residence?

2. Should a reviewing court rely upon "screen shots" when analyzing an excessive force claim when videotaped footage of the events exist?

HOLDING

1. Yes. Law enforcement officers were entitled to qualified immunity for their conduct in fatally shooting a suspect who turned toward the officers while brandishing what appeared to be a firearm, and had previously called the sheriff's office to declare that she possessed a firearm and intended to use it against anyone who came to her residence.

2. No. When videotaped footage exists, reviewing courts should view the facts in the light depicted by the entire videotape, not "screen shots," to determine whether the force used was objectively reasonable.

ANALYSIS

Qualified immunity shields federal and state officials from money damages in a civil rights action unless a plaintiff points to facts showing (1) that the official violated a statutory or constitutional right, and (2) that the right was clearly established at the time of the challenged conduct.[150] Because a plaintiff must satisfy both prongs of the qualified immunity analysis, the court is permitted to decided which prong to address first.[151]

The Sixth Circuit considered whether it was "clearly established" that deputies Paschal and Wiggins' resort to lethal force violated Lewellyn's Fourth Amendment right to be free from an unreasonable seizure. Reasonableness is judged against the backdrop of the law at the time of conduct.[152] The existing precedent need not be exactly on point, but must place the statutory or constitutional question beyond debate.[153]

The Sixth Circuit determined that no existing precedent identifies situations where officers acting under circumstances similar to those faced by deputies Paschal and Wiggins were held to have violated the Fourth Amendment. No authority existed involving the ultimate victim calling the police to declare that she possessed a firearm and intended to use it against anyone who came to her residence. Moreover, no precedent was undisputed that the victim of the police shooting was brandishing a firearm in the manner Lewellyn displayed in the video. Deputy Paschal said in his deposition that he felt threatened by her display of the gun as he perceived her beginning to turn in the deputies' direction. The district court improperly relied on a stop action "screen shot" rather than the videotaped footage from the dashcam, which more accurately depicted Paschal's perception of the events. When videotape footage exists, the reviewing court need not credit the version of a party who asserts facts "blatantly contradicted" by the videotape; rather it should view the facts in the light depicted by the videotape.[154]

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[150] Harlow v. Fitzgerald, 457 U.S. 800, 812 (1982).
[151] Ashcraft v. al-Kidd, 563 U.S. 731, 735 (2011).
[152] Brosseau v. Haugen, 543 U.S. 194, 198 (2004).
[153] White v. Pauly, 137 S.Ct. 548, 551 (2017).
[154] Scott v. Harris, 550 U.S. 372, 380-81 (2007).

Fourth Amendment excessive force claims are analyzed under an objective reasonableness standard.[155] In Graham, the United States Supreme Court explained that the application of the reasonableness standard in this context "requires careful attention to the facts and circumstances of each particular case, including the severity of the crime at issue, whether the suspect poses an immediate threat to the safety of the officers or others, and whether he is actively resisting arrest or attempting to evade arrest by flight."[156] In addition, "[t]he 'reasonableness' of a particular use of force must be judged from the perspective of a reasonable officer on the scene, rather than with the 20/20 vision of hindsight."[157] In this case, the Sixth Circuit held that the "facts and circumstances" support the deputies' contention that reasonable officers would perceive that Lewellyn posed an immediate threat to their safety.

The Sixth Circuit vacated the judgment of the district court and remanded with instructions to grant summary judgment based upon qualified immunity.

Dibrell v. City of Knoxville, Tennessee, 984 F.3d 1156 (6th Cir. 2021)

FACTS

On February 17, 2014, Knoxville Police Officer Joey Whitehead took his police cruiser to a car wash. While there, an unknown person flagged Officer Whitehead down and claimed that a man named Calvin Dibrell was selling drugs out of his Chrysler 300 at a nearby Walgreens. Officer Whitehead relayed this tip to three colleagues: Officers Thomas Turner, Richard White, and John Pickens.

These officers arrived at the Walgreens and stopped their cruisers in a manner that blocked in the Chrysler. Dibrell was sitting in its driver's seat. An officer approached the car and spoke with Dibrell for a minute before asking him to get out. Dibrell obliged. The officer patted Dibrell down for weapons and told him to "hang tight" on the sidewalk. Officers casually conversed with Dibrell for the next three minutes or so until Officer Whitehead arrived with his police dog. Upon Whitehead's arrival, his dog took two laps around Dibrell's car. Whitehead asserted that the dog alerted to the smell of drugs.

Relying on the alert, the officers searched the Chrysler. The officers found three pill bottles inside. The first pill bottle contained 9 hydrocodone pills; the second pill bottle contained 40 oxycodone pills; and the third pill bottle contained 42 alprazolam pills. The officers suspected that Dibrell had been illegally selling these drugs because the drugs did not match the labels on their respective bottles. The officers searched Dibrell and

[155] Graham v. Connor, 490 U.S. 386, 395 (1989).
[156] Id. at 396, 109 S.Ct. 1865 (citation omitted).
[157] Id.

found a bag with 30 more oxycodone pills and around $800. The officers arrested him. Dibrell posted bond the following day.

Fifteen months later, in April 2015, a grand jury returned an indictment charging Dibrell with twelve drug-trafficking counts under Tennessee law. Dibrell moved to suppress the drugs and money uncovered by the officers, arguing that they lacked reasonable suspicion to detain him while waiting for the police dog to arrive. The state trial court denied Dibrell's motion to suppress, reasoning that the officers had not detained Dibrell before the dog sniff. In June 2016, a jury convicted Dibrell. The trial court sentenced him to 12 years' imprisonment.

In March 2018, a Tennessee appellate court vacated Dibrell's convictions after holding that the officers seized Dibrell before the dog sniff and that the anonymous tip did not provide reasonable suspicion. The appellate court further held that the trial court should have suppressed the drugs under the Fourth Amendment and dismissed the charges.

In September 2018, Dibrell sued the City of Knoxville, the Officers Whitehead, Turner, White, and Pickens, and four other officers. The federal district court granted summary judgment to the officers and the city, rejecting Dibrell's constitutional claims under 42 U.S.C. § 1983 on statute-of-limitations grounds or on the merits. Dibrell appealed to the Sixth Circuit.

ISSUES

1. What is the statute of limitations for a claim under 42 U.S.C. § 1983?

2. When does a claim for false arrest and imprisonment accrue under federal law?

2. Does the return of an indictment by a grand jury constitute probable cause that would defeat a malicious prosecution claim?

HOLDINGS

1. Section 1983 does not contain a statute of limitations, so federal courts borrow the limitations period for personal injury actions from the state where the events occurred. Federal law governs when the claims accrue.

2. False arrest and imprisonment claims accrue at the earlier of when the plaintiff is either released from confinement on bond without a continuing detention condition or outright, or is ordered released with the issuance of legal process

3. Yes. A grand jury's indictment creates a presumption that probable cause for prosecution existed. This presumption can be overcome only by showing that defendant fabricated evidence or recklessly made false statements outside grand jury.

ANALYSIS

42 U.S.C. § 1983 makes liable every person who under color of state law subjects, or causes to be subjected, another person to the deprivation of any rights, privileges, or immunities secured by the Constitution. Although this statute "creates a species of tort liability,"[158] Section 1983 does not permit the courts to create and amend rights in common-law fashion. In fact, Section 1983 contains no substantive rights. This statute merely provides a vehicle for vindicating rights found in the Constitution or another federal law.[159] And whether a defendant has violated a constitutional right turns on the meaning of the constitutional text, not on the common law of torts.[160] The "threshold inquiry" under § 1983 must always be "to 'identify the specific constitutional right' at issue."[161] In this case, Dibrell asserts false arrest/imprisonment and malicious prosecution claims.

Section 1983 does not contain a statute of limitations, so federal courts borrow the limitations period for personal injury actions from the state where the events occurred.[162] Under Tennessee law, the statute of limitations for personal injury torts and federal civil rights issues is one year. False arrest and imprisonment claims accrue at the earlier of when the plaintiff is either released from confinement (release on bond satisfies this requirement) or is ordered released with the issuance of legal process.[163] In this case, Dibrell is unable to clearly identify when his detention ended because he alleged multiple claims of unlawful confinement. Thus, the Sixth Circuit held that the false arrest and imprisonment claim was untimely under Section 1983.

With respect to the malicious prosecution claim, a plaintiff must show that the state lacked probable cause for the prosecution or detention.[164] Probable cause "requires only a probability or substantial chance of criminal activity, not an actual showing of such activity."[165] A grand jury's indictment also creates a presumption that probable

[158] Heck v. Humphrey, 512 U.S. 477, 483, 114 S.Ct. 2364, 129 L.Ed.2d 383 (1994).
[159] Graham v. Connor, 490 U.S. 386, 393–94, 109 S.Ct. 1865, 104 L.Ed.2d 443 (1989).
[160] See id. at 394, 109 S.Ct. 1865.
[161] Manuel v. City of Joliet, —— U.S. ——, 137 S. Ct. 911, 920, 197 L.Ed.2d 312 (2017) (citation omitted).
[162] Wilson v. Garcia, 471 U.S. 261, 278–79, 105 S.Ct. 1938, 85 L.Ed.2d 254 (1985).
[163] Wallace v. Kato, 549 U.S. 384, 388-90, 127 S.Ct. 1091, 166 L.Ed.2d 973 (2007).
[164] Tlapanco v. Elges, 969 F.3d 638, 654 (6th Cir. 2020).
[165] District of Columbia v. Wesby, —— U.S. ——, 138 S. Ct. 577, 586, 199 L.Ed.2d 453 (2018) (citation omitted).

cause existed, one that the plaintiff can overcome only by showing that the defendant fabricated evidence or recklessly made false statements outside the grand jury.[166] In this case, a Tennessee grand jury returned an indictment charging Dibrell with twelve drug-trafficking counts of possession with intent to deliver or sell hydrocodone, oxycodone, and alprazolam within 1,000 feet of a school and child-care agency in violation of Tennessee law. Dibrell failed to dispute that probable cause existed to believe that the Walgreens at which the officers encountered him was within 1,000 feet of a school and a child-care agency. Dibrell also does not dispute that probable cause existed to believe that the drugs he possessed were hydrocodone, oxycodone, and alprazolam. In fact, Dibrell stipulated to these facts at his trial.

The Sixth Circuit affirmed the district court's dismissal of Dibrell's Section 1983 lawsuit.

NOTE: The statute of limitations for a 42 U.S.C. § 1983 claim begins to run when the plaintiff knows or has reason to know that the act providing the basis of his or her injury has occurred.[167] In Collard v. Kentucky Board of Nursing,[168] the Sixth Circuit held that the one-year limitation period under KRS 413.140(1)(a) applies to constitutional torts committed in Kentucky.

Harden v. Hillman and City of Heritage Creek, Kentucky, 993 F.3d 465 (6th Cir. 2021)

FACTS

On August 1, 2014, after finishing work, John Harden went home, drank a couple of beers, and fell asleep. He awoke at 1:20 a.m. and decided to purchase more beer. Knowing that beer was only sold in Kentucky until 2:00 a.m., Harden rushed to a nearby Thorntons store. When he entered Thorntons, he noticed a uniformed police officer, Hillman, providing security for the store outside of his regular hours as an officer for the City of Heritage Creek.

After choosing a beer, Harden attempted to pay. However, the store clerk refused to serve Harden after smelling the odor of alcoholic beverage on his breath. Harden that she smelled alcohol on his breath. After arguing with the clerk, Hillman shouted, "didn't she say she wasn't selling you any beer." When Harden confirmed the store clerk's statement, Hillman said, "[w]ell, get out of the store right now and don't come back."

Harden then left Thorntons and decided to go to another store to purchase beer. But when he checked the time, he realized that he would not be able to make it anywhere

[166] See King v. Harwood, 852 F.3d 568, 586–88 (6th Cir. 2017).
[167] Cooey v. Strickland, 479 F.3d 412, 416 (6th Cir. 2007).
[168] 896 F.2d 179, 181-182 (6th Cir. 1990).

else before 2:00 a.m. He decided to give up on buying beer and to, instead, purchase a bag of chips from Thorntons. While he was in the store, Hillman said, "I thought I told you not to come back in here." Hillman then ran over to Harden and pinned him against the counter. While pinning Harden, Hillman told him, "[y]ou get out of the store right now and don't come back, or I'm going to take you to jail." Harden replied, "[w]ell, take me to jail." Hillman then allegedly picked Harden up off the ground, slammed him down onto the floor, and handcuffed him.

Hillman subsequently called for a transport to the police station. However, after Harden told him that "I need to go to the doctor. I'm hurt pretty bad. You've messed up my back," Hillman called for emergency medical services, which transported Harden to the University of Louisville Hospital. At the hospital, Hillman issued Harden a citation for disorderly conduct, resisting arrest, and public intoxication. Harden was released that same night. The charges against Harden were eventually dismissed after Hillman failed to appear for court.

Harden sued Hillman, the City of Heritage Creek, and Thorntons, Inc. pursuant to 42 U.S.C. § 1983, alleging violations of constitutional rights, as well as state law claims that he was arrested without probable cause. All of Harden's claims were dismissed except for the excessive force claim against Hillman. Following a trial, the jury returned a verdict in favor of Hillman on the excessive force claim.

Harden appealed to the Sixth Circuit, arguing that the district court erroneously granted summary judgment on his claim that he was arrested without probable cause.

ISSUE

May an off-duty police officer providing security services for a private business arrest and/or cite an individual for criminal trespassing upon a showing of probable cause?

HOLDING

Yes. An off-duty police officer providing security services for a private business may arrest or cite an individual for criminal trespassing upon showing of probable cause.

ANALYSIS

State law defines the offense for which an officer may arrest a person, while federal law dictates whether probable cause existed for an arrest.[169] "Probable cause exists if the facts and circumstances known to the officer warrant a prudent man in believing that

[169] Kennedy v. City of Villa Hills, Ky., 635 F.3d 210, 215 (6th Cir. 2011).

the offense has been committed."[170] "A finding of probable cause does not require evidence that is completely convincing or even evidence that would be admissible at trial; all that is required is that the evidence be sufficient to lead a reasonable officer to conclude that the arrestee has committed or is committing a crime."[171]

The district court held that Hillman had probable cause to arrest Harden for the Kentucky offense of criminal trespass in the third degree. Under Kentucky law, criminal trespass in the third degree is only applicable when a "defendant enter[s] upon the victim's unimproved land."[172] However, Kentucky law provides that "[a] person is guilty of criminal trespass in the second degree when he knowingly enters or remains unlawfully in a building. ..."[173] Whether Hillman's intent was to arrest Harden for criminal trespass in the second or third degree is of no import because the "subjective reason for making the arrest need not be the criminal offense as to which the known facts provide probable cause."[174] Thus, the appropriate inquiry is whether probable cause existed for Hillman to arrest Harden for the offense of criminal trespass in the second degree.

For purposes of criminal trespass in the second degree, "[a] person 'enters or remains unlawfully' in or upon premises when he is not privileged or licensed to do so."[175] A person who "defies a lawful order not to enter or remain personally communicated to him by the owner of such premises or other authorized person" lacks a privilege or license to remain on the premises.[176]

Harden argues that Hillman was not authorized to revoke his license to enter or remain on Thorntons property and, accordingly, that Hillman lacked probable cause to arrest him when he reentered the store. However, Dale Wright, a Thorntons regional manager, testified that Hillman was hired to provide security for Thorntons, and that Thorntons did not "define a [role] or responsibility for the security services that were provided." Although Harden argues that, according to Wright, the "only expectations that [Thorntons] had of Hillman was his presence in a uniform to deter theft," Wright testified that Thorntons expected "Hillman to exercise his discretion in conducting

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[170] Newman v. Twp. of Hamburg, 773 F.3d 769, 772 (6th Cir. 2014) (quoting Henry v. United States, 361 U.S. 98, 102, 80 S.Ct. 168, 4 L.Ed.2d 134 (1959)).
[171] Everson v. Leis, 556 F.3d 484, 498–99 (6th Cir. 2009) (quoting Harris v. Bornhorst, 513 F.3d 503, 511 (6th Cir. 2008)).
[172] Colwell v. Commonwealth, 37 S.W.3d 721, 726–27 (Ky. 2000).
[173] KRS 511.070(1).
[174] Devenpeck v. Alford, 543 U.S. 146, 153, 125 S.Ct. 588, 160 L.Ed.2d 537 (2004); see also Howse v. Hodous, 953 F.3d 402, 409 (6th Cir. 2020)
[175] KRS 511.090(1); see also Howard v. Spradlin, 562 S.W.3d 281, 285 (Ky. Ct. App. 2018).
[176] Id. KRS 511.090(2); see also Lewis v. Commonwealth, 392 S.W.3d 917, 920 (Ky. 2013).

security work." Chief of Police Perry testified that security work encompasses "watching out for shoplifters, disorderly subjects, intoxicated people. The list, you know, I could go on and on ... basically any violation of any law." Therefore, contrary to Harden's assertions, the undisputed evidence establishes that a reasonable person in Hillman's position would have believed himself authorized to revoke Harden's license to be in Thorntons. Because the undisputed evidence also shows that Harden knowingly reentered Thorntons, probable cause existed to conclude that Harden committed the offense of criminal trespass in the second degree.

The Sixth Circuit affirmed the grant of summary judgment to Hillman, holding that the arrest was based on probable cause. Procedural issues surrounding the jury deliberations caused the remainder of the judgment to be vacated and remanded to district court for further proceedings.

Jordan v. Howard, 987 F.3d 537 (6th Cir. 2021)

FACTS

On October 20, 2017, Moraine Police Officer Jerry Knight responded to a noise complaint coming from a vehicle at the Valley View Apartment Complex in Moraine, Ohio. Officers Howard and Cornely provided backup.

Upon arrival, Officer Knight spotted a vehicle emitting exhaust and realized that music was coming from that car's stereo. Officer Knight approached the vehicle and saw Jamarco McShann asleep in the driver's seat with his left hand behind his head. Officer Knight noticed that McShann was resting his right hand on a handgun with an extended magazine on his right thigh. Officer Knight retreated and regrouped with Officer Cornely, who had just arrived at the scene. Officer Howard soon arrived, and the three officers discussed how they would safely wake McShann to resolve the noise complaint. The officers also ran the vehicle's plates and determined that it was registered to a woman who lived in the Valley View complex. The officers then attempted to find the woman at her apartment but were unsuccessful.

By now, it was approaching 5:30 A.M., and the officers were worried about resolving the situation before other apartment residents began going about their daily business. They devised a plan to approach the vehicle and requested additional officers respond to the scene with a ballistics shield as an additional safety precaution. Officer Brian O'Neal and Detective Justin Eller arrived on the scene ten minutes later with the requested ballistics shield.

Collectively, the officers decided that Officer Knight would approach the driver-side door to make contact with McShann. The officers decided that Officer O'Neal would use the ballistic shield to provide cover to Officer Knight. Officer Howard would be positioned at the rear of the vehicle with a shotgun to provide cover. Officer Cornely approached the passenger-side of the vehicle to provide additional light and cover. Detective Eller stayed back by the patrol car.

Officer Knight, accompanied by Officer O'Neal, approached the vehicle and attempted to wake McShann by rapping his heavy flashlight against the glass of the driver-door window. Officer Knight observed that McShann's position had not changed; his left hand remained behind his head and his right hand was resting on the gun, on his right thigh. The gun was laying flat with the muzzle facing the driver-side door. After five or ten seconds of Officer Knight banging the flashlight against the window, McShann woke and Officer Knight recalled that he moved his left hand from behind his head and took his right hand off the gun. While the officers shouted "show me your hands," Officer Knight says that McShann sat up and looked around at the officers on each side of the car, slightly twisting his body back and forth twice to scan the area with his hands raised. But then, Officer Knight asserts, McShann reached back down to pick up the gun. Officer Knight saw McShann raise the gun "in [his] direction," but that he wasn't sure the muzzle "ever actually specifically pointed" at him. When Officer Knight saw McShann pick up and swing the gun in his direction, he "started shooting [his] firearm and backpedaling" in tandem with Officer O'Neal. While Officer Knight tried to keep his eyes on McShann's hands as he backed away from the vehicle, glass from the vehicle was shattering and his muzzle was flashing in front of him with each shot, so he could not keep his eyes on McShann's gun the entire time. Officer Knight testified that he shot until the threat was eliminated—when he realized that McShann was no longer facing towards the driver-side window but was instead facing forward, and the gun was no longer in his hand. At that point, Officer Knight knew McShann had been shot.

Officer O'Neal carried the ballistics shield to the driver-side door to provide cover for Officer Knight. Officer O'Neal testified that he had "eyes on" McShann from the approach until the time McShann was shot. Officer O'Neal testified that when McShann was roused from his slumber, McShann sat up and looked at the officers outside the car from left-to-right, and then again from left-to-right. Officer O'Neal recalled that McShann's right arm "stayed down by the weapon" during the "scans." But once McShann completed the second scan, O'Neal says that McShann "looked back at Jerry Knight and [O'Neal's] position, grabbed his weapon[,] and swung it up towards [O'Neal]." While Officer O'Neal had his weapon drawn, he did not shoot because he

heard Officer Knight's shot and was worried about getting in Officer Knight's line of fire. Once Officer Knight began shooting, Officer O'Neal retreated with him, continuing to provide cover with the ballistic shield.

Officer Cornely observed from the passenger-side of the vehicle as Officer Knight woke McShann. He remembered that the officers immediately began identifying themselves and instructing McShann to keep his hands up and away from the gun. Officer Cornely stated that when McShann woke, he raised his left hand with his palm exposed, but that he lifted his right hand only partially up, off the gun—"just hovering above the pistol"—and that he would not "bring it the rest of the way up." Then, Officer Cornely testified that with a hand hovering over the gun, McShann "started scanning, looking side to side in the vehicle." After two or three looks back-and-forth of the officers on both sides of the car, Officer Cornely claims that McShann began "to turn his head back toward the driver's side of the car," and "reache[d] down and pick[ed] the gun up with the muzzle pointed at the driver's side door." Although the barrel of the gun had always been positioned roughly in the direction of the driver-side door, Officer Cornely testified that it had been resting at an angle towards the driver's mirror, but once McShann grabbed it, "he swung the muzzle straight to the left[,] right at the driver's side door where [Knight and O'Neal] were standing." Officer Cornely did not fire his service weapon and "started backing away [from the car]," because he was concerned that the "officers on [the other] side of the car were probably going to open fire." He explained that because McShann was seated in the driver's seat, it would have been a harder and more perilous shot for him to make across the car from the passenger side of the vehicle, and he "would have endangered [his] guys on the other side of the car" by shooting.

Officer Howard, positioned at the rear of the vehicle, testified that he saw McShann wake up and move his hands to "mid range," meaning that they were neither in his lap, nor fully extended in the air, which Howard found "encouraging." He observed that McShann slowly "scanned" the vehicle and the surrounding officers two or three times. Then, Howard said that he saw McShann's "hand reaching for the gun," and "grabb[ing] the gun with his right hand." Once Officer Howard saw McShann reach for the gun, he perceived a deadly threat to himself and his fellow officers, so he "shifted [his] attention" from the gun "to ... the left a little to center mass and [he] pulled the trigger." Unlike Officers Knight, O'Neal, and Cornely, Howard testified that he did not know if McShann had ever pointed the gun at Officer Knight and Officer O'Neal because he "stopped focusing on the gun" once McShann reached down and grabbed it.

Once the shooting stopped, the officers called for backup and medical assistance. Officer Knight reached through the broken window of driver's side rear passenger door

and “kind of crawled through the back a little bit up over [McShann's] left shoulder,” to unlock McShann's door. Officers Knight and O'Neal pulled McShann onto a grassy area nearby to begin first aid and applied pressure to McShann's bullet wounds to slow the bleeding until paramedics arrived.

McShann died as a result of his injuries. The medical examiner's autopsy concluded that he was struck by at least six gun shots. Officer Knight shot his pistol eight times and struck McShann at least four times—twice in his right arm, once in his right hand, and once in his upper left arm. Officer Howard's two shots struck McShann in the middle of his back and in his right arm and right torso.

Jeremy Bauer, Ph.D., a certified accident reconstructionist and expert on biomechanics, concluded to “a reasonable degree of scientific and biomechanical certainty, that Mr. McShann's right hand was raised in front of him, near shoulder level when he was shot in the base of the right thumb.” Bauer further reasoned that “[t]he lack of damage to the gun provides clear evidence that Mr. McShann was not holding the gun when he was shot in the hand.” Bauer offered no other opinions in his expert report.

McShann’s estate filed a lawsuit pursuant to 42 U.S.C. § 1983, alleging that Officers Howard, Knight and O’Neal used excessive force in violation of the Fourth Amendment which resulted in McShann’s death. The district court granted qualified immunity to the officers. The estate appealed to the Sixth Circuit.

ISSUE

Is an officer’s use of deadly force objectively reasonable under the Fourth Amendment if the officer has probable cause to believe that the suspect poses a threat of serious physical harm to either the officer or to others?

HOLDING

Yes. An officer’s use of deadly force is objectively reasonable under the Fourth Amendment if the officer has probable cause to believe that the suspect poses a threat of serious physical harm to either the officer or to others.

ANALYSIS

The federal right at issue here is the right to be free from excessive force during a seizure, which is secured by the Fourth Amendment. It is undisputed that Officers Knight and Howard “seized” McShann by shooting him, thereby triggering the Fourth Amendment's “reasonableness” requirement.[177] “Determining whether the force used

[177] See Tennessee v. Garner, 471 U.S. 1, 7, 105 S.Ct. 1694, 85 L.Ed.2d 1 (1985)

to effect a particular seizure is 'reasonable' under the Fourth Amendment requires a careful balancing of the nature and quality of the intrusion on the individual's Fourth Amendment interests against the countervailing governmental interests at stake."[178] In Garner, the Supreme Court held that the reasonableness of using deadly force to subdue a suspect depends upon whether "the officer has probable cause to believe that the suspect poses a threat of serious physical harm, either to the officer or to others."[179]

This objective test requires courts to judge the use of force from the perspective of a reasonable officer on the scene, "in light of the facts and circumstances confronting them, without regard to their underlying intent or motivation."[180] While there are three factors to be considered, the Sixth Circuit focused on whether the suspect poses an immediate threat to the safety of the officers or others.[181] This is because an officer's use of deadly force is objectively reasonable if "the officer has probable cause to believe that the suspect poses a threat of serious physical harm, either to the officer or to others."[182] Additionally, the Sixth Circuit requires the evaluation of "the use of force by focusing on the split-second judgment made immediately before the officer used allegedly excessive force, not on the poor planning or bad tactics that might have created the circumstances that led to the use of force."[183]

The Sixth Circuit held that the officers' use of deadly force was objectively reasonable. Three of the four officers surrounding McShann's vehicle testified that when McShann woke, he was compliant or mostly compliant with their order that he put his hands up. But then, after looking back and forth at the officers surrounding the vehicle for a few seconds, all four officers testified that McShann grabbed his gun. At this point, Officer Howard perceived a serious and deadly threat to himself and his fellow officers and took aim at McShann's "center mass"—necessarily taking his vision away from the gun itself. While that process was playing out, the other three officers agree that McShann "swung" the gun towards Officer Knight at the driver-side window. Officer Knight testified that he feared for his safety once McShann swung the gun towards him. At that point, both Officers Knight and Howard used deadly force.

The Sixth Circuit affirmed the district court's award of qualified immunity.

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[178] Graham v. Connor, 490 U.S. 386, 396, 109 S.Ct. 1865, 104 L.Ed.2d 443 (1989) (citation and some internal quotation marks omitted).
[179] 471 U.S. at 11, 105 S.Ct. 1694.
[180] Graham, 490 U.S. at 397, 109 S.Ct. 1865.
[181] Id. at 396, 109 S.Ct. 1865; see also Garner, 471 U.S. at 8–9, 105 S.Ct. 1694.
[182] Garner, 471 U.S. at 11, 105 S.Ct. 1694.
[183] Reich v. City of Elizabethtown, 945 F.3d 968, 978 (6th Cir. 2019) (internal quotation marks omitted).

Lester v. Roberts, Detective, and Louisville Metro Government, 986 F.3d 599 (6th Cir. 2021).

FACTS

On August 25, 2007, Dominic Hudson was shot and killed in his Louisville apartment. Detective Roberts of the Louisville Police Department's homicide unit investigated Hudson's murder. The investigation ultimately led Detective Roberts to Jasmine Hudson, who advised that on the day of the murder, she was with Eugene Baker, her baby and a man named "Desean" in a silver Impala belonging to "Desean's" girlfriend. Williams thought that they were going to Hudson's apartment to pick up a phone. They parked at the nearby BP, and the two men walked across the street to Hudson's apartment. The men later came running back with "bandanas tied around their face[s]" yelling "go—go—go!" Williams added that they had "weed and all this other s---," including money. "Desean" dropped Baker and Williams off at the home of Baker's cousin. There, Baker confessed that he murdered Hudson, telling Williams that he "shot him in the back of the head" and "when he fell he was ... kinda shaking on the floor[.]" Williams thought that Baker murdered Hudson because he had become the area's main drug dealer.

Williams knew Baker better than "Desean." She could not recall "Desean's" last name and pronounced his first name differently from how Lester pronounces his name (spelled Duzuan and pronounced like the mustard). She had met "Desean" on only a few occasions when he came to her apartment to rap with Baker. She also never saw him after the murder. But she opined that Baker and "Desean" knew each other "very well" based on their interactions. When shown a photo array, she identified Lester's picture as the "Desean" who had accompanied Baker.

This time, the prosecution decided to indict Baker and Lester. In December 2012, Roberts testified before a grand jury that Baker and Lester "were developed as suspects" during his investigation. He indicated that the two traveled to Hudson's apartment, that Baker shot Hudson, and that they took cash and suspected marijuana. The grand jury indicted the pair on, among other charges, murder and robbery counts.

In early 2015, the prosecution tried Baker and Lester. At trial, Jasmine Williams distanced herself from her photo identification of Lester as the "Desean" who had accompanied Baker. She testified: "Honestly, um, that don't look like Duzuan." Although the court denied Lester's motion for judgment of acquittal, a prosecutor (who had not been involved before trial) made an unusual request during closing: that the jury acquit Lester. The jury acquitted Lester but did not reach a verdict for Baker. The prosecution

retried Baker a year later. A second jury convicted Baker of murder, robbery, tampering with evidence, and being a felon in possession of a firearm. Lester spent a total of 20 months in jail and three months in home confinement.

After acquittal, Lester sued Roberts and the Louisville Metro Government in state court, alleging malicious prosecution. The matter was removed to federal court. The federal district court dismissed the lawsuit. Lester appealed to the Sixth Circuit.

ISSUE

Does the testimony of an eyewitness that implicates a suspect to a murder, corroborated by other evidence, provide sufficient probable cause for the arrest and prosecution of a suspect?

HOLDING

Yes. Eyewitness account implicating a suspect in murder, corroborated by other evidence, provides probable cause for suspect's arrest and prosecution.

ANALYSIS

The Fourth Amendment prohibits only those pretrial seizures (or prosecutions) that lack probable cause, and § 1983 grants qualified immunity to defendants who mistakenly but reasonably conclude that probable cause exists. As a matter of procedure, the Fourth Amendment prohibits extended pretrial detentions unless a neutral decisionmaker finds that probable cause exists, and § 1983 grants absolute immunity to witnesses who testify before one such decisionmaker (the grand jury).

To assert a claim for malicious prosecution, the courts require proof that: (1) the defendant "made, influenced, or participated in the decision to prosecute"; (2) the government lacked probable cause; (3) the proceeding caused the plaintiff to suffer a deprivation of liberty; and (4) the prosecution ended in the plaintiff's favor.[184] Accordingly, those asserting a Fourth Amendment claim against a pretrial detention (or prosecution) must show, at a minimum, that the defendant lacked probable cause.[185] As the United States Supreme Court has said, "the finding of an indictment, fair upon its face, by a properly constituted grand jury, conclusively determines the existence of probable cause for the purpose of holding the accused to answer."[186]

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[184] See Jones v. Clark County, 959 F.3d 748, 756 (6th Cir. 2020).
[185] Manuel v. City of Joliet, —— U.S. ——, 137 S. Ct. 911, 919–20, 197 L.Ed.2d 312 (2017).
[186] Ex Parte United States, 287 U.S. 241, 250, 53 S.Ct. 129, 77 L.Ed. 283 (1932).

In this case, the Jefferson County grand jury returned an indictment charging Lester with a crime, thereby triggering the presumption of probable cause. To overcome this presumption, Lester argued that Detective Roberts "recklessly failed to disclose to the prosecutors and the grand jury problems with Jasmine Williams's statements." This argument failed because prosecutors are not required to present any exculpatory evidence to a grand jury[187] and because Detective Roberts received absolute immunity for his actual testimony before the grand jury, as well as his preparatory activity.[188]

Most notably, however, Jasmine Williams's account implicated Lester. She told Roberts that she had gone with Baker and his friend "Desean" to Hudson's apartment complex, that the two men went to Hudson's apartment, and that they ran out with money and marijuana. That night, Williams added, Baker confessed to shooting and killing Hudson. Williams also identified Lester from a photo array as the "Desean" that accompanied Baker to the murder and robbed Hudson. Detective Roberts had substantial corroborating evidence that also linked Lester to Hudson's death in the form of statements from other witnesses, and DNA evidence on a hat found at the scene that was consistent with a mixture from Lester and Baker.

The Sixth Circuit affirmed the district court's dismissal of the complaint.

Schwamberger v. Marion County Board of Election, 988 F.3d 851 (6th Cir. 2021)

FACTS

Schwamberger was employed as a former deputy director for the Marion County (Ohio) Board of Elections. During the 2018 election cycle, Schwamberger's son ran for County Prosecutor. To avoid any appearance of impropriety, the Board barred Schwamberger from administering that year's elections in Marion County. Sometime during this election cycle, and for reasons not explained in this opinion, Schwamberger received a written reprimand resulting in a three-day suspension.

After the general election, the Board called a special meeting at which Schwamberger, per her complaint, "verbally attempted to present" the Board with a "list of errors, discrepancies, problems, and/or possible criminal violations" related to the 2018 election cycle. She claimed that two primary-election votes were uncounted, that 31 special-election votes were inaccurately recorded, and that 254 general-election votes had not been correctly "unloaded." Schwamberger alleged that these errors occurred because of flawed policies regarding the administration of elections in Marion County.

[187] United States v. Williams, 504 U.S 36, 112 S.Ct. 1735, 118 L.Ed.2d 352 (1992).
[188] Rehberg v. Paulk, 566 U.S. 356, 370, 132 S.Ct.1497, 182 L.Ed.2d 593 (2012).

After she presented these and other alleged errors to the Board, the Board convened an executive session and voted 3–1 to terminate her for impermissibly commenting on the election process, and therefore on policy and political issues related to her deputy-director position.

Schwamberger filed a lawsuit against the Marion County Board of Elections pursuant to 42 U.S.C. § 1983 alleging retaliation for exercising her right to free speech, as well as due process and equal protection claims. The district court dismissed the lawsuit. Schwamberger appealed to the Sixth Circuit.

ISSUE

Does 42 U.S.C. § 1983 protect speech implicating policy concerns of a governmental agency made by a public official who serves in a policymaking role?

HOLDING

No. 42 U.S.C. § 1983 does not protect speech implicating policy concerns of a governmental agency made by a public official who serves in a policymaking role.

ANALYSIS

In Rose v. Stephens,[189] the Sixth Circuit established a two-part test to determine when the discharge of a public employee supports a First Amendment retaliation claim. First, the speech must concern a matter of public concern.[190] Second, the speech must outweigh the efficiency interest of the government as an employer.[191]

The first part of the Rose test is met because speech concerning the conduction of elections relates to a matter of public concern because an election is a matter of political, social or other concern to the community.[192] The second part of the Rose test, however, is not met because, under Ohio law, the deputy director of an Elections Board is an at-will policymaking position. Schwamberger's statements at the special meeting concerned the Board's election policies. Therefore, this speech made by a policymaker concerning a matter of agency policy is unprotected, making her termination was lawful.

The Sixth Circuit affirmed the district court's dismissal of the complaint.

[189] 291 F.3d 917, 920 (6th Cir. 2020).
[190] Id.
[191] Id.
[192] Connick v. Myers, 461 U.S. 138, 146, 103 S.Ct. 1684, 75 L.Ed.2d 708 (1983)

Strickland v. City of Detroit, 995 F.3d 495 (6th Cir. 2021)

FACTS

Strickland, an African American police officer for the City of Detroit, filed a complaint alleging a hostile work environment based upon race. The complaint alleged racially motivated derogatory comments and conduct that had occurred during the course or Strickland's tenure with the Detroit Police Department.

Shortly after his shift ended on January 22, 2017, Strickland pulled into a gas station near his home. Unbeknownst to him, the gas station was the site of an active police investigation of a reported incendiary device. Due to a thick fog, Strickland could not see the firetrucks that were at either end of the street or the police cars with their lights on before he pulled into the gas station. When he exited his vehicle, Strickland heard a commotion, but, again, due to the fog, he could not see the source. Someone, who did not identify himself yelled at Strickland to leave. Once Strickland saw a uniformed Sergeant Rodney Ballinger emerge from the fog, he immediately identified himself as a police officer. Sergeant Ballinger continued to scream and yell at Strickland, said he did not care if Strickland was a police officer, and ordered Strickland to put his hands up. Sergeant Ballinger then placed handcuffs on Strickland that were extremely tight and did not double lock them, which is a technique used to prevent the handcuffs from tightening further. Sergeant Ballinger then walked Strickland out of the gas station, belittling him as stupid and dumb. Eventually they reached Sergeant Ballinger's scout car, where they were met by Officer Casey Schimeck and Officer Lawrence Blackburn. Sergeant Ballinger continued to mock Strickland in front of the other officers. Sergeant Ballinger then left Strickland with Officer Schimeck. Officer Schimeck grabbed the handcuffs, lifting them up, and tightened them further. Strickland told Officer Schimeck that the handcuffs were too tight, and she did not respond. Eventually, Officer Blackburn loosened the handcuffs. Strickland was diagnosed with a bilateral wrist contusion after the incident.

Strickland was disciplined because of the January 22, 2017 and suspended for three days without pay or benefits. An internal affairs investigation further charged Strickland with additional violations of department policy.

Strickland filed a lawsuit alleging discrimination in violation of Title VII of the 1964 Civil Rights Act for racial discrimination and retaliation and 42 U.S.C. § 1983, including an assertion of excessive force because the handcuffs were fastened too tightly. The district court granted summary judgment on the Title VII and Section 1983 claims.

Strickland appealed to the Sixth Circuit. This summary only addresses the Section 1983 claim.

ISSUE

Is qualified immunity available to an officer who failed to respond to a complaint that a suspect's handcuffs are fastened to tightly even when another officer later adjusted the handcuffs in response to the complaint?

HOLDING

No. Qualified immunity is not available to an officer who failed to respond to a complaint that a suspect's handcuffs are fastened to tightly even when another officer later adjusted the handcuffs in response to the complaint.

ANALYSIS

The right to be free of excessive handcuffing is a clearly established right in the Sixth Circuit.[193] For an excessive handcuffing claim to survive summary judgment, a plaintiff must identify evidence that (1) there was a complaint made that the handcuffs were too tight; (2) the complaint was ignored; and (3) "some physical injury" resulted from the handcuffing.[194]

In this case, Strickland complained to Officer Schimeck that his handcuffs were too fight. Officer Schimeck failed to respond to this complaint. Eventually, another officer adjusted the handcuffs. The Sixth Circuit held that qualified immunity is inappropriate just because another officer eventually loosens and removes a plaintiff's handcuffs.

The Sixth Circuit reversed the district court's dismissal of the excessive force claim and remanded for further proceedings.

[193] Ouza v. City of Dearborn Heights, 969 F.3d 265, 271, 278 (6th Cir. 2020)
[194] Morrison v. Bd. of Tr. of Green Twp., 583 F.3d 394, 401 (6th Cir. 2009) (citing Lyons v. City of Xenia, 417 F.3d 565, 575–76 (6th Cir. 2005)).

UNITED STATES SUPREME COURT

FOURTH AMENDMENT

Kansas v. Glover, 589 U.S. ----, 140 S.Ct. 1183 (2020)

FACTS

While on routine patrol, Douglas County (Kansas) Deputy Sheriff Mark Mehrer observed a 1995 Chevrolet 1500 pickup truck with Kansas plate 295ATJ being operated by a male subject. Deputy Mehrer ran the license plate through the Kansas Department of Revenue's file service. The registration check indicated that the plate was assigned to a 1995 Chevrolet 1500 pickup truck, registered to Charles Glover, Jr. Deputy Mehrer was further advised that Glover's driver's license was revoked. Based solely upon this information and believing that the male operator was Glover, Deputy Mehrer executed a traffic stop. During the stop, Deputy Mehrer identified the truck's driver as Charles Glover, Jr. Glover was charged with driving as a habitual violator. Glover filed a motion to suppress all evidence seized during the stop. The district court granted Glover's motion to suppress. The Kansas Supreme Court affirmed the district court, holding that Deputy Mehrer was unable to articulate reasonable suspicion of criminal activity to justify this stop because his belief that Glover was operating the vehicle was "only a hunch." The United States Supreme Court granted certiorari.

ISSUE

For purposes of an investigative stop under the Fourth Amendment, is it reasonable for an officer to suspect that the registered owner of a vehicle is the one driving the vehicle absent any information to the contrary?

HOLDING

Yes. When a police officer lacks information negating an inference that a person driving is the vehicle's owner, an investigative traffic stop made after running the vehicle's license plate and learning that the registered owner's driver's license has been revoked it reasonable under the Fourth Amendment.

ANALYSIS

The ultimate touchstone of the Fourth Amendment is reasonableness.[195] The Fourth Amendment permits an officer to initiate a brief investigative stop when the officer has "a particularized and objective basis for suspecting the particular person stopped of criminal activity"[196] that is considerably less than either preponderance of the evidence or probable cause.[197] Reasonable suspicion does not have to be perfect.[198] In articulating reasonable suspicion, officers are also permitted to make "commonsense judgments and inferences about human behavior."[199]

States have a vital interest in ensuring that only those qualified to do so are permitted to operate motor vehicles and that licensing, registration and vehicle inspection requirements are being observed. [200] Further, research has proven that drivers with revoked licenses frequently continue to drive and therefore pose safety risks to other motorists and pedestrians.

In this case, Deputy Mehrer observed a male suspect operate a 1995 Chevrolet 1500 pickup truck with Kansas plate 295ATJ. The deputy learned from running this license plate that the truck's registered owner, Glover, had a revoked license. From these facts, Deputy Mehrer drew the commonsense inference that Glover was likely the driver of the vehicle, which provided more than reasonable suspicion to initiate the stop. Combining database information and commonsense judgments in this context is fully consonant with Fourth Amendment precedent.

The United States Supreme Court did stress that all seizures must be justified at its inception, taking the totality of the circumstances into account. Accordingly, the presence of additional facts may dispel reasonable suspicion. For example, if the registered owner of the vehicle is identified as a male in his mid-sixties, but the officer observed that the driver is a female in her mid-twenties, the totality of the circumstances would not justify a stop absent some other violation of the law.

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[195] Heien v. North Carolina, 574 U.S. 54, 60, 135 S.Ct. 530, 190 L.Ed.2d 475 (2014)(quoting Riley v. California, 573 U.S. 373, 381, 134 S.Ct. 2473, 189 L.Ed.2d 430 (2014)).
[196] United States v. Cortez, 449 U.S. 411, 417-418, 101 S.Ct. 690, 66 L.Ed.2d 621 (1981); see also Terry v. Ohio, 392 U.S. 1, 21-22, 88 S.Ct. 1868, 20 L.Ed.2d 889 (1968).
[197] Prado Navarette v. California, 572 U.S. 393, 397, 134 S.Ct. 1683, 188 L.Ed.2d 680 (2014) (quotation altered); United States v. Sokolow, 490 U.S. 1, 7, 109 S.Ct. 1581, 104 L.Ed.2d 1 (1989).
[198] Heien, 574 U.S. at 60.
[199] Illinois v. Wardlow, 528 U.S. 119, 125, 120 S.Ct. 673, 145 L.Ed.2d 570 (2000).
[200] Delaware v. Prouse, 440 U.S. 648, 658, 99 S.Ct. 1391, 59 L.Ed.2d 660 (1979).

Lange v. California, ---- U.S. ----, 141 S.Ct. 2011 (2021)

FACTS

Lange drove by a California Highway Patrol Officer in Sonoma, California, while listening to loud music with his windows rolled down and was repeatedly honking his horn. The officer began to follow Lange's vehicle and ultimately decided to execute a traffic stop by activating his cruiser's emergency equipment. At this point, Lange was approximately one hundred feet from his residence. Rather than stopping, Lange continued to his driveway and pulled his car into his attached garage. The officer followed Lange into the garage and began questioning him. Observing signs of intoxication, the officer subjected Lange to several field sobriety tests. Lange did not perform well on the field sobriety tests, and a later blood test revealed that his blood alcohol content was more than three times the legal limit in California.

The officer charged Lange with driving under the influence of alcohol, a misdemeanor, and a noise infraction. Lange moved to suppress all evidence obtained after the officer entered his garage, arguing that the warrantless entry violated the Fourth Amendment. In response, the State of California argued that the officer had probable cause to arrest Lange for the misdemeanor offense of failing to comply with a police signal. Further, the State of California asserted that the pursuit of a suspected misdemeanant always qualifies as an exigent circumstance authorizing a warrantless home entry. The Superior Court denied the motion to suppress, and this decision was affirmed on appeal.

The United States Supreme Court granted certiorari. During the pendency of the appeal before the United States Supreme Court, the State of California abandoned its position.

ISSUE

Does the pursuit of a fleeing misdemeanor suspect always qualify as an exigent circumstance, thereby permitting law enforcement to enter a residence without a warrant?

HOLDING

No. Under the Fourth Amendment, the pursuit of a fleeing misdemeanor suspect does not always or categorically qualify as an exigent circumstance justifying a warrantless entry into a home.

ANALYSIS

The Fourth Amendment provides that "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall

not be violated." As that text makes clear, "the ultimate touchstone of the Fourth Amendment is 'reasonableness.'"[201] That standard "generally requires the obtaining of a judicial warrant" before a law enforcement officer can enter a home without permission.[202] But not always: The "warrant requirement is subject to certain exceptions."[203]

Exigent circumstances are one important exception. An officer may make a warrantless entry when "the exigencies of the situation" create a compelling law enforcement need.[204] The exigent circumstances exception enables law enforcement officers to handle emergency situations presenting a "compelling need for official action and no time to secure a warrant."[205] Over the years, this Court has identified several such exigencies. An officer, for example, may "enter a home without a warrant to render emergency assistance to an injured occupant[,] to protect an occupant from imminent injury," or to ensure his own safety.[206] So too, the police may make a warrantless entry to "prevent the imminent destruction of evidence" or to "prevent a suspect's escape."[207] In those circumstances, the delay required to obtain a warrant would bring about "some real immediate and serious consequences"—and so the absence of a warrant is excused.[208]

Exigent circumstances "requires a court to examine whether an emergency justified a warrantless search in each particular case."[209] Or put more curtly, the exception is "case-specific."[210] That approach reflects the nature of emergencies. Whether a "now or never situation" actually exists depends upon facts on the ground.[211] The issue is most naturally considered by "look[ing] to the totality of circumstances" confronting the officer as he decides to make a warrantless entry.[212]

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[201] Brigham City v. Stuart, 547 U.S. 398, 403, 126 S.Ct. 1943, 164 L.Ed.2d 650 (2006).
[202] Riley v. California, 573 U.S. 373, 382, 134 S.Ct. 2473, 189 L.Ed.2d 430 (2014) (internal quotation marks omitted).
[203] Brigham City, 547 U.S., at 403, 126 S.Ct. 1943.
[204] Kentucky v. King, 563 U.S. 452, 460, 131 S.Ct. 1849, 179 L.Ed.2d 865 (2011).
[205] Riley, 573 U.S., at 402, 134 S.Ct. 2473; Missouri v. McNeely, 569 U.S. 141, 149, 133 S.Ct. 1552, 185 L.Ed.2d 696 (2013).
[206] Brigham City, 547 U.S., at 403, 126 S.Ct. 1943; Riley, 573 U.S., at 388, 134 S.Ct. 2473.
[207] Brigham City, 547 U.S., at 403, 126 S.Ct. 1943; Minnesota v. Olson, 495 U.S. 91, 100, 110 S.Ct. 1684, 109 L.Ed.2d 85 (1990) (internal quotation marks omitted).
[208] Welsh v. Wisconsin, 466 U.S. 740, 751, 104 S.Ct. 2091, 80 L.Ed.2d 732 (1984)
[209] Riley, 573 U.S., at 402, 134 S.Ct. 2473.
[210] Id., at 388, 134 S.Ct. 2473.
[211] Id., at 391, 134 S.Ct. 2473 (internal quotation marks omitted); McNeely, 569 U.S., at 149, 133 S.Ct. 1552 (internal quotation marks omitted).
[212] Id., at 149, 133 S.Ct. 1552.

The United States Supreme Court continued to recognize that a person's living space has the greatest expectation of privacy under the Fourth Amendment. The Fourth Amendment is based on the principle that the "right of a man to retreat into his own home and there be free from unreasonable government intrusion."[213] The Fourth Amendment thus "draw[s] a firm line at the entrance to the house."[214] What lies behind that line is of course not inviolable. An officer may always enter a home with a proper warrant. Exigent circumstances allow even warrantless intrusions.[215] But the contours of that or any other warrant exception permitting home entry are "jealously and carefully drawn," in keeping with the "centuries-old principle" that the "home is entitled to special protection."[216]

The Supreme Court held that misdemeanors are usually minor offenses, categorized by less violent and less dangerous crimes. When a minor offense alone is involved, law enforcement does not usually face the kind of emergency that can justify a warrantless home entry. While flight could potentially necessitate quick action by police, the Supreme Court determined that every case of misdemeanor flight does not pose immediate dangers of evidence destruction or further flight.

Accordingly, the Fourth Amendment requires an assessment of the case-by-case exigences arising from a misdemeanant's flight. That approach will in many, if not most, cases allow a warrantless home entry. When the totality of circumstances shows an emergency—such as imminent harm to others, a threat to the officer himself, destruction of evidence, or escape from the home—the police may act without waiting. And those circumstances, as described just above, include the flight itself. But the need to pursue a misdemeanant does not trigger a categorical rule allowing home entry, even absent a law enforcement emergency. Accordingly, the Supreme Court held that when nature of the crime, the nature of the flight, and surrounding facts present no such exigency, officers must respect the sanctity of the home—which means that they must get a warrant.

The United States Supreme Court vacated the judgment of the California Court of Appeal and remanded for further proceedings.

Torres v. Madrid, 592 U.S. ----, 141 S.Ct. 989 (2021).

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[213] Collins v. Virginia, 584 U. S. ——, ——, 138 S.Ct. 1663, 1670, 201 L.Ed.2d 9 (2018) (internal quotation marks omitted).
[214] Id., at 590, 100 S.Ct. 1371.
[215] See ibid.; supra, at 2017 - 2018.
[216] Georgia v. Randolph, 547 U.S. 103, 109, 115, 126 S.Ct. 1515, 164 L.Ed.2d 208 (2006).

FACTS

On July 15, 2014, four officers from the New Mexico State Police arrived at an apartment complex in Albuquerque to execute an arrest warrant for a woman accused of both white collar crimes and "drug trafficking, murder, and other violent crimes." Upon arrival, the officers observed Torres standing with another person near a Toyota FJ Cruiser in the complex's parking lot. Officer Williamson concluded that neither Torres nor her companion was the target of the warrant. When the officers approached the vehicle, the companion fled and Torres got into the driver's seat of the vehicle. The officers, wearing tactical vests marked with police identification, attempted to speak with Torres. Torres failed to notice the officers until one officer attempted to open the vehicle's door.

Torres, who was experiencing methamphetamine withdrawal symptoms, believed that the officers were armed carjackers trying to steal her car. Acting upon her belief that she was being carjacked, Torres hit the gas pedal to escape. Officers Madrid and Williamson stood in the path of the vehicle, drew their service pistols, and fired 13 shots at Torres, striking her twice in the back and temporarily paralyzing her left arm. Using only her right hand, Torres drove out of the complex's parking lot and stopped in another parking lot. After asking a bystander to report an attempted carjacking, Torres stole a Kia Soul that happened to be idling nearby and drove 75 miles to Grants, New Mexico. Torres sought treatment at a hospital in Grants, but was airlifted to a hospital in Albuquerque for appropriate care. Police arrested Torres and she pleaded no contest to aggravated fleeing from a law enforcement officer, assault on a peace officer, and unlawfully taking a motor vehicle.

Torres filed a lawsuit pursuant to 42 U.S.C. § 1983 claiming that Officers Madrid and Williamson applied excessive force, making the shooting an unreasonable seizure under the Fourth Amendment. The district court granted summary judgment to the officers. The Tenth Circuit affirmed on the ground that "a suspect's continued flight after being shot by police negates a Fourth Amendment excessive-force claim." Under Tenth Circuit precedent, "no seizure can occur unless there is physical touch or a show of authority," and that "such physical touch (or force) must terminate the suspect's movement" or otherwise give rise to physical control over the suspect.

The Supreme Court of the United States granted certiorari.

ISSUE

Does a seizure occur when law enforcement applies physical force to the body of a person with intent to restrain, even if the force does not succeed in subduing the person?

HOLDING

Yes. The application of physical force to the body of a person with intent to restrain is a seizure even if the person does not submit and is not subdued.

ANALYSIS

This case concerns the seizure of a person, which can take the form of "physical force" or a "show of authority" that "in some way restrain[s] the liberty" of a person. The Fourth Amendment protects the right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures. Supreme Court precedent has interpreted the term "seizure" by consulting the common law of arrest. The arrest of a person is a seizure. The common law considered the application of physical force to the body of a person with the intent to restrain to be an arrest even if the person does not yield.

The appropriate inquiry is whether the challenged conduct by law enforcement manifests an intent to restrain. This test does not depend on either the subjective motivation of the officer or the subjective perception of the suspect. The type of force used also does not impact this test. A seizure requires the use of force with intent to restrain, as opposed to force applied by accident or for some other purpose. A seizure by force lasts only as long as the application of force unless the suspect submits.

In this case, the officers applied physical force to Torres's body by shooting her and objectively manifested an intent to restrain her from driving away. The Supreme Court held that the officers seized Torres for the instant that the bullets struck her. Determining whether a seizure exists is only the first step in the analysis. The Fourth Amendment does not forbid all seizures – just unreasonable seizures.

The Supreme Court was only asked to determine whether Torres was seized. The Supreme Court did not consider whether the seizure was reasonable, damages caused by the seizure, or whether the officers were entitled to qualified immunity. Those questions will be determined on remand.

The Supreme Court vacated the judgment of the Tenth Circuit and remanded for further proceedings.

TITLE VII

Bostock v. Clayton County, 590 U.S. ----, 140 S.Ct. 1731 (2020)

FACTS

This matter involves three separate cases that arose from the Eleventh Circuit, the Second Circuit and the Sixth Circuit. In each of these cases, an employer allegedly fired a long-time employee simply for being homosexual or transgender. In the Eleventh Circuit case, Clayton County, Georgia, fired Gerald Bostock for conduct "unbecoming" a county employee shortly after he began participating in a gay recreational softball league. The Second Circuit case involved Altitude Express firing Donald Zarda days after he mentioned being gay. And, from the Sixth Circuit, R.G. & G.R. Harris Funeral Homes fired Aimee Stephens, who presented as a male when she was hired, after she informed her employer that she planned to "live and work full-time as a woman." Each employee sued, alleging sex discrimination under Title VII of the Civil Rights Act of 1964. The Eleventh Circuit held that Title VII does not prohibit employers from firing employees for being gay and so Mr. Bostock's suit could be dismissed as a matter of law. The Second and Sixth Circuits, however, allowed the claims of Mr. Zarda and Ms. Stephens, respectively, to proceed. The United States Supreme Court granted certiorari in all three cases to resolve the circuit split.

ISSUE

Does Title VII of the Civil Rights Act of 1964 which prohibits employment discrimination "because of … sex" prohibit discrimination based on an individual's sexual orientation?

HOLDING

Yes. Title VII of the Civil Rights Act of 1964 which prohibits employment discrimination "because of … sex" prohibit discrimination based on an individual's sexual orientation.

ANALYSIS

Title VII makes it "unlawful ... for an employer to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual ... because of such individual's race, color, religion, sex, or national origin."[217] Courts are required to interpret a statute in accord with the ordinary public meaning of its terms at the time of its enactment. After all, only the words on the page constitute the law adopted by Congress and approved by the President. If judges could add to, remodel, update, or detract from old statutory terms inspired only by extratextual sources and our own

[217] 42 U.S.C. § 2000e–2(a)(1).

imaginations, the judiciary risks amending statutes outside the legislative process reserved for the people's representatives. And the judiciary would then deny the people the right to continue relying on the original meaning of the law they have counted on to settle their rights and obligations.[218] Accordingly, the United States Supreme Court proceeded to examine the language of Title VII.

Examining the ordinary public meaning of the statute's language at the time of the law's adoption, the United States Supreme Court held that a straightforward rule emerges: An employer violates Title VII when it intentionally fires an individual employee based in part on sex. It does not matter if other factors besides a person's sex contributed to the decision. And it doesn't matter if the employer treated women as a group the same when compared to men as a group. If an employer intentionally relies in part on an individual employee's sex when deciding to discharge the employee—put differently, if changing the employee's sex would have yielded a different choice by the employer—a statutory violation has occurred. Title VII's message is "simple but momentous": An individual employee's sex is "not relevant to the selection, evaluation, or compensation of employees."[219]

The statute's message for these types of cases is equally simple and momentous: An individual's homosexuality or transgender status is not relevant to employment decisions. It is impossible to discriminate against a person for being homosexual or transgender without discriminating against that individual based on sex.

[218] See New Prime Inc. v. Oliveira, 586 U.S. ——, —— – ——, 139 S.Ct. 532, 538–539, 202 L.Ed.2d 536 (2019).
[219] Price Waterhouse v. Hopkins, 490 U.S. 228, 239, 109 S.Ct. 1775, 104 L.Ed.2d 268 (1989) (plurality opinion).

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