**FOURTH QUARTER 2019**

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KENTUCKY

**PENAL CODE – KRS 514 - THEFT**

**Lydian v. Com., 2019 WL 5092379 (Ky. App. 2019)**

**FACTS:**  In February 2019, Lawson’s vehicle was stolen from her Nelson County residence. She saw Lydian in the parking lot, “behaving in a belligerent manner.” Shortly thereafter, Lydian was involved in a crash in Lawson’s vehicle. He admitted to drinking, but said someone else had been driving. Lydian was heavily intoxicated, and a blood screen revealed opiates and cocaine. Lydian was arrested, charged and tried. He was convicted and appealed.

**ISSUE:** Are the charges of theft and criminal mischief so similar to invoke double jeopardy?

**HOLDING:** No.

**DISCUSSION:** Lydian first argued that there was insufficient proof of the value of the vehicle, which the victim placed at about $2500. That valuation was more than enough to meet the over $500 standard for the theft and the over $1000 standard for the criminal mischief. Further, the Court of Appeals held that a conviction for both charges did not constitute double jeopardy because each charge required proof that the other charge did not.[[1]](#footnote-2)

The Court of Appeals upheld the convictions.

**PENAL CODE - KRS 508 – WANTON ENDANGERMENT**

**Culver v. Com., 590 S.W.3d 810 (Ky. 2019)**

**FACTS:**  On December 15, 2012, Bardstown police were searching for a vehicle that fled the scene of a domestic. A little after 2 a.m., Officer Medley spotted a vehicle in a church parking lot, parked next to a red vehicle, and saw a man get into the first vehicle. He found the red car, still parked, had a broken window. Officer Medley radioed Officer Phillips to stop the vehicle that had left the scene. Both officers then pursued the vehicle for a total of about 8 miles at speeds over the posted speed limit. Ultimately, Culver was apprehended and charged with wanton endangerment and fleeing and evading. Both officers testified as to the circumstances of the chase and the danger they felt they were in during the chase. During the chase, a Nelson County deputy attempted to engage, but was involved in an accident. Culver was also charged with breaking into the red car. Culver was convicted of all charges, although the first degree wanton endangerment charge for the deputy was amended to second degree. The Court of Appeals affirmed and the Kentucky Supreme Court accepted discretionary review.

**ISSUE:** In the context of a pursuit, must evidence that the suspect created a substantial risk of serious physical injury or death required to support a charge of wanton endangerment.

**HOLDING:** Yes**.**

**DISCUSSION:** The Court looked at:

… whether the conduct of the pursuit satisfied the elements of wanton endangerment, which requires that the behavior display “under circumstances manifesting extreme indifference to the value of human life, . . . wantonly engage[d] in conduct which create[d] a substantial danger of death or serious physical injury to another person.” Fleeing and Evading required also mandates at the least, the wanton state of mind, under circumstances that “[b]y fleeing or eluding, he [caused], or create[d] substantial risk, of serious physical injury or death to [a] person or property.”[[2]](#footnote-3)

The Kentucky Supreme Court reviewed several similar cases and ruled that there was sufficient evidence, in the form of the officers’ testimony, that Culver created a substantial risk to the officers and others, noting that each case was unique. The Supreme Court further noted that speed and conditions were critical, along with the presence of traffic control devices. The Court held it was “undisputed that the pursuit happened in the dark, while traveling down the highway and curvy side roads, and that the officers’ speed reached 10-25 m.p.h. over the speed limit while pursuing a faster-traveling Culver.” Hence, speed was not the sole factor. The testimony of the officers, “viewed in harmony with the other circumstances of the pursuit” was enough to allow the jury to decide whether the chase created a substantial risk of serious injury or death to” the officers.

The Supreme Court upheld his convictions.

PENAL CODE – KRS 524 – TAMPERING

***Note: The cases under this heading are companions but were not consolidated.***

**Com. v. James, 586 S.W.3d 717 (Ky. 2019)**

**FACTS:**  On the day in question, Det. Jenkin (KSP) was investigating drug activity. He arrived at the James’ home with two other troopers. Det. Jenkin spotted James approaching the residence, but he “appeared to change direction and go down an alley when he spotted” the troopers. The detective exited his vehicle and yelled at James to stop, but James continued to walk away, keeping his hands near his waistline. Det. Jenkin spotted several items falling from James’ waistline, the last item being a “black cylindrical item.” Det. Jenkin drew his weapon and ordered James to show his hands. James eventually complied and he was arrested. At the area where James dropped items, Det. Jenkin spotted several items, including a glass pipe with methamphetamine residue and a black empty diabetic test-strip canister. James admitted to possessing the black canister (he was diabetic), but not the pipe.

James was charged with possession of the pipe and the residue, and tampering. James was convicted and appealed. The Court of Appeals ruled James should have been granted a directed verdict on all three charges, finding insufficient evidence that James was in constructive possession of any of the items. The Kentucky Supreme Court granted discretionary review.

**ISSUE:** Is more needed than simply dropping items needing for Tampering?

**HOLDING:** Yes.

**DISCUSSION:** The Kentucky Supreme Court held that “[t]he circumstantial evidence presented at trial would allow a reasonable jury to conclude that James was in actual possession of the glass pipe, which he then discarded upon seeing officers approach him.” James deliberately failed to stop when Jenkins, in plainclothes but a clearly marked KSP vest, called for him to do so. Trooper Jenkins found the black canister, which he saw in plain view, within inches of the pipe. The Supreme Court looked to other cases, including U.S. v. Garcia, and found the evidence sufficient for possession.[[3]](#footnote-4) In an appeal based on a denial of a directed verdict motion, as this was, it is necessary that the court view all the evidence, both direct and circumstantial, in the light most favorable to the prosecution.” The Supreme Court agreed that while the evidence in this case was not as strong the evidence in Garcia, the evidence was sufficient to allow the jury to draw the inference that James was in actual possession of the pipe.

With respect to tampering, the Supreme Court held that merely dropping an item, without any concealment or destruction, was insufficient to qualify for a violation of KRS 524.100. The Supreme Court noted that “[w]hile this Court has applied the tampering statute in numerous contexts, until now, it has not addressed whether the criminal-act element is met in the unique set of facts this case presents: a person, in plain view of an officer, drops or tosses away evidence of a possessory crime in a manner that makes the evidence easily retrievable by law enforcement.”

The tampering statute focuses on two words, conceal and remove, and looked to how other states had ruled on such issues. The Supreme Court agreed that abandonment, in clear view of an officer, with nothing more, was not enough for tampering. The Supreme Court emphasized, however, that in some circumstances, this could constitute tampering, particularly if the tossing away of the evidence makes the item difficult to recover, such as when tossed from a moving vehicle or deliberately hidden.

The Supreme Court reversed the Court of Appeals in part by reinstating the drug convictions, but affirmed the reversal of the conviction for tampering.

**McGuire v. Com., --- S.W.3d ---- (Ky. 2019) (Petition for Rehearing Pending 12/11/2019)**

**FACTS:** When Officer Isonhood spotted McGuire on a street corner in Henderson, Isonhood knew there was an outstanding arrest warrant for McGuire. Isonhood attempted to arrest, but McGuire took off with the officer giving chase. Officer Isonhood caught McGuire and took him down, eventually tasing him. McGuire ran again and Isonhood saw him “throw his arm away from the right side of his body.” Eventually Isonhood was able to capture McGuire.

Upon searching McGuire, the officer found unused small baggies and cash in small denominations. Officer Isonhood retraced his steps and searched where he believed McGuire might have thrown something and found both methamphetamine and marijuana ten feet to the right of McGuire’s flight path and in the correct direction to have been thrown.

McGuire was charged with trafficking, fleeing and evading, tampering, and other charges. McGuire was convicted and appealed.

**ISSUE:** Is more needed than simply dropping items needing for tampering?

**HOLDING:** Yes.

**DISCUSSION:** First, McGuire argued it was improper for the officer to testify that the quantity of methamphetamine found was inconsistent with personal use. The Supreme Court agreed that such testimony did not invade the province of the jury as to ultimate guilt or innocence and was routinely admitted in such cases. The Supreme Court noted that qualification is not specifically necessary in such cases, and that the officer’s years of experience in such matters was sufficient to admit what was his opinion testimony.

With respect to the tampering charge, McGuire argued that simply tossing an item did not constitute tampering under KRS 524.100. The Supreme Court agreed with this argument, holding that McGuire had not destroyed and changed the item in anyway.

In Com. v. James, the Supreme Court noted that tampering did not apply “where a defendant merely drops, throws down, or abandons drugs in the vicinity of the defendant and in the presence and view of the police, this conduct does not constitute tampering by either concealment or removal that will support an evidence-tampering charge.” Because the officer was able to quickly and easily retrieve the evidence, the Supreme Court held that tampering was not appropriate.

The Supreme Court reversed the tampering conviction but affirmed the remaining convictions.

NON PENAL CODE

DUI

**Lopez v. Com., 2019 WL 6250421 (Ky. App. 2019)**

**FACTS:** On January 20, 2018, in Knox County, Lopez collided with a vehicle head-on: Lopez was driving the wrong way. In the other vehicle, Tiffany Cummins was driving with her husband, Chad, as a passenger. Both were Tiffany and Chad were injured. Lopez left the scene on foot and, when brought back to the scene, he refused FSTs. Lopez denied being drunk and blamed his conduct (unsteady, etc.) on having been in a wreck. Lopez was taken to the hospital where he refused a blood draw. (At trial, Lopez claimed not to have been taken to the hospital.)

Lopez was convicted of a myriad of charges and appealed.

ISSUE: May a suspect’s refusal to submit to a blood draw be used against the suspect as evidence of operating a motor vehicle under the influence?

HOLDING: Yes.

**DISCUSSION:** First. Lopez argued that the officer should have obtained a warrant upon his refusal to consent. The Court of Appeals held that a warrant is only required if consent is not given and nothing requires an officer get a warrant before asking, or after if consent is not given. The Court of Appeals held that refusal to take a blood test was admissible as evidence of guilt.

After addressing several alleged prosecutorial errors, the Court of Appeals affirmed the convictions.

**Iraola-Lovaco v. Com., 586 S.W.3d 241 (Ky. 2019)**

**FACTS:** In December 2015, Iraola-Lovaco was arrested after speeding and driving up a sidewalk and striking several cars and a utility pole on Winchester Road in Lexington. Officer Bellamy (Lexington) found Iraola-Lovaco a short distance away, sitting in a wrecked car with blood and vomit covering the windshield. The car was also blocking traffic. Iraola-Lovaco admitted that he struck the pole. Officer Bellamy advised him of Miranda rights and administered FSTs. Iraola-Lovaco failed four of the five FSTs and was arrested. Iraola-Lovaco claimed he only had a single beer and did not think he had hit any people. Three victims were transported for serious injuries and two individuals lost a leg.

Almost 3 hours after the initial crash, Iraola-Lovaco had a blood draw. The blood test revealed a BAC of .078. Extrapolated, Iraola-Lovaco would have been at about a .105 to .116 BAC at the time of the incident.

Iraola-Lovaco was convicted of second-degree assault and DUI first offense. A charge of leaving the scene was amended to a misdemeanor. An appeal followed.

**ISSUE:** Is evidence of observations made during Field Sobriety Tests admissible?

**HOLDING:** Yes.

**DISCUSSION:** Iraola-Lovaco argued that it was improper for Officer Bellamy to call the FSTs “tests” and that the officer testified he “failed” the tests. The case had not been based on the *per se* rule and the officer conceded that the subject was not “falling down drunk” and that he was looking for the “little things” to indicate impairment.

The Supreme Court noted:

Kentucky law is clear that evidence of FSTs is admissible and that officers observing a defendant’s driving and physical condition may offer opinion testimony that the defendant was intoxicated.

Officer Bellamy testified at length as to the five tests he administered, and that based on his training and experience, Iraola-Lovaco was impaired. The officer properly did not try to equate a certain BAC to what he observed, just that he was intoxicated. The Supreme Court did not find that the use of certain nomenclature rendered that testimony invalid and affirmed the convictions.

Mattingly v. Com., 2019 WL 6972903 (Ky. 2019)

**FACTS:** On September 27, 2017, Mattingly (age 63) pulled into a car sales lot in Columbia and began to urinate in public view. Withers, the owner, approached Mattingly and asked him to go elsewhere. Withers realized that Mattingly was slurring his speech and “seemed unstable,” but attributed the instability to Mattingly’s age. Withers became alarmed when Mattingly drove erratically upon leaving the lot. Withers contacted Officer Brockman of the Columbia PD.

Officer Brockman located Mattingly and stopped him. Mattingly admitted to consuming a “couple of beers” and refused to do any FSTs. Brockman attempted a PBT. After several botched attempts with the PBT, Brockman got a reading of alcohol. Mattingly had bloodshot eyes, was “thick-tongued,” and was belligerent. Officer Brockman arrested Mattingly and took him to the local hospital. He read the implied consent warning under KRS 189A.105. Mattingly refused all tests. Taken to the jail, Mattingly also refused an Intoxilyzer test.

Mattingly was convicted of DUI, fourth offense, which was enhanced into a PFO 1 due to Mattingly’s other previous convictions for felony offenses. Mattingly appealed.

**ISSUE:** Should an officer discuss the actual science of DUI tests?

**HOLDING:** No.

**DISCUSSION:** First, Mattingly argued it was improper for the prosecutor to mention his refusals in closing argument, and that the prosecutor was referencing the PBT. The Supreme Court agreed that while refusal to take a PBT should not be mentioned, the prosecutor was referencing the official tests only (as indicated by the context in connection to the hospital visit).

The Supreme Court also addressed Officer Brockman’s testimony as to his training in giving FSTs. Specifically, the Supreme Court addressed his testimony on the HGN, to which the defense counsel had objected as the officer was not a medical expert on the “science behind the test.” The trial court directed Officer Brockman testify concerning what he was looking for in doing the tests, and he did so. (The defense objected to the jury learning that Officer Brockman is also a licensed EMT, as part of his training and experience.) The Supreme Court held that it was not proper or necessary to mention the science behind FSTs, and properly the trial court’s direction with respect to the officer’s testimony was appropriate. Defense counsel did not request an admonition on the issue.

The Supreme Court noted that Kentucky has yet to specifically address the issue as to whether expert testimony is needed on the HGN. Some states have done so, others have not. However, the Supreme Court noted that since Mattingly refused the HGN test, the issue was moot.

The Supreme Court affirmed Mattingly’s conviction and enhanced sentence.

McCubbin v. Com., 2019 WL 5853733 (Ky. App. 2019)

**FACTS:** Shortly before midnight on June 12, 2015, Officer Morgan (Cave City PD) executed a traffic stop of McCubbin’s vehicle based upon observations of erratic driving. From the encounter and McCubbin’s admissions, Officer Morgan arrested McCubbin for possession of a controlled substance, drug paraphernalia and DUI. McCubbin consented to a blood test that returned positive for methamphetamine.

McCubbin was sentenced to diversion but, repeatedly failed her conditions. She was charged with offenses over two years later. She unsuccessfully argued that the blood test must be suppressed under Birchfield v. North Dakota.[[4]](#footnote-5) McCubbin entered a conditional guilty plea and appealed.

**ISSUE:** Should consent for a DUI blood draw be documented in the record?

**HOLDING:** Yes.

**DISCUSSION:** The crux of McCubbin’s argument was that her consent was not voluntary because she gave consent after she was given the implied-consent warning. Since the last Kentucky case on the warning, the U.S. Supreme Court had emphasized that a blood test is a search.[[5]](#footnote-6) As such, a warrant is required for a blood draw unless the facts of the case fall within a “well-recognized exception” to the warrant requirement.”

The Court of Appeals noted, however, that consent was one of the well-recognized exceptions to the need for a warrant. In Birchfield, the U.S. Supreme Court approved of the “general concept of implied-consent laws that merely impose civil penalties and evidentiary consequences on motorists who refuse to comply.” Kentucky’s law does not impose separate criminal penalties for refusal, but may, if the individual is convicted, subject them to enhanced penalties. In Com. v. Brown, the Court of Appeals held that the “Commonwealth may rely on the presumption of implied consent only where there is evidence establishing that: (1) there was probable cause to believe that the defendant was operating a motor vehicle under the influence of an intoxicant; and (2) the defendant was advised of his or her right to withdraw consent to a blood test as required by KRS 189A.105(2)(a).[[6]](#footnote-7) The warnings required by KRS 189A.105(2)(a) implicitly permit a DUI suspect to withdraw consent to a blood test, but the suspect *may* face additional consequences for doing so, and then only upon conviction.

The Court of Appeals noted that the record was silent on whether McCubbin consented to the blood test at all. The Court of Appeals held that “once the Commonwealth establishes that the defendant gave express consent to the taking of a blood sample, the Commonwealth need only show by a preponderance of the evidence that the consent given was freely and voluntarily obtained without any threat or express or implied coercion.[[7]](#footnote-8) A determination of whether consent was voluntary requires a finding that the consent was “an independent act of free will.”[[8]](#footnote-9)

The Court of Appeals remanded the matter to the trial court to determine if McCubbin did, in fact, give a voluntary and express consent or whether her consent was presumed.

FORFEITURE

**Doebler v. Com., 2019 WL 5655283 (Ky. App. 2019) (Discretionary Review filed 1/17/2020)**

**FACTS:** Doebler and Lankford were arrested in a Jefferson County hotel. In the room, officers found and seized almost $3,800 in cash, drugs, a cell phone, a scale, and a “loaded syringe.” The money was found in a banking envelope in Doebler’s purse. Photographs were part of the discovery, but were never introduced. Lankford entered a guilty plea to various drug charges. Doebler entered a guilty plea to possession of drug paraphernalia for a syringe. The parties could not reach an agreement concerning the cash, which was mostly in $100s with a few smaller bills mixed in. At a forfeiture hearing, Doebler claimed the money was from an inheritance, which additional evidence supported. Doebler testified it was not her room or her drugs. The Commonwealth countered that the money was found in close proximity to the drugs, thus supporting forfeiture of the cash.

Ultimately, the trial court ordered forfeiture of the cash. Doebler appealed.

**ISSUE:** Must a nexus be drawn between cash and drug trafficking for forfeiture?

**HOLDING:** Yes.

**DISCUSSION:** The Court of Appeals examined KRS 218A.410(1)(j):

It shall be a rebuttable presumption that all moneys, coin, and currency found in close proximity to controlled substances, to drug 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 Court of Appeals noted that although the “burden is slight, it rest squarely on the Commonwealth’s shoulders.”[[9]](#footnote-10) In this case, the Court of Appeals found that no evidence was presented to the trial court to support a connection between the money and drug trafficking. Doebler presented a logical and consistent story as to why she had the money and why she was present in the hotel room (to buy a telephone). The trial court even accepted Doebler’s explanation.

Although both sides referenced Osborne v. Com.[[10]](#footnote-11) to support their respective positions, the Court of Appeals determined that Doebler had the stronger case. The Commonwealth produced no evidence tracing the money to any drug transactions. Other cases were reviewed but the Court of Appeals noted these cases all shared “one thing that is strikingly absent in this case – some proof by the Commonwealth beyond mere proximity to illegal drug activity.”

The Court of Appeals reverse the forfeiture order with respect to the cash.

CONTROLLED SUBSTANCES

**Despain v. Com., 2019 WL 6972897 (Ky. 2019)**

**FACTS:**  In 2013, Despain’s home was searched pursuant to a warrant. Nine marijuana plants were found, along with a firearm – Despain was a convicted felon. Despain argued that the marijuana had not yet “budded” and, as such, possessed insufficient THC to support charges. Despain admitted he was growing the marijuana for medical needs. DeSpain also argued against an enhancement due to his illegal possession of the gun. DeSpain was convicted, entered a conditional plea pursuant to a sentence negotiation, and appealed.

**ISSUE:** Is possession of immature marijuana sufficient for a marijuana charge?

**HOLDING:** Yes.

 **DISCUSSION:** The Kentucky Supreme Court agreed that possession of the plants, despite their status, was sufficient to violate Kentucky law. Despite no laboratory corroboration, the plants and his admission was sufficient evidence to prove the plants were marijuana (rather than, for example, hemp). [[11]](#footnote-12) Further, the number of plants found during the search suggested Despain intended to transfer or sell the marijuana rather than solely personal use. Finally, the Supreme Court looked at the nexus between the gun and his illegal marijuana operation. The Supreme Court examined Com. v. Montaque[[12]](#footnote-13) and held that the presence of the guns under the couch cushion where he had been seated when officers arrived, along with nearby ammunition, constituted a sufficient nexus. Other weapons were also found in the bedroom adjacent to the exterior wall shared with the lean to where the marijuana was being grown. This evidence was sufficient for constructive possession, and the presence of multiple firearms also supported that the guns were connected to his activities.

Despain demanded a Franks hearing, but the Supreme Court held the matter did not meet the clear rule of Franks:

They should point out specifically the portion of the warrant affidavit that is claimed to be false; and they should be accompanied by a statement of supporting reasons. Affidavits or sworn or otherwise reliable statements of witnesses should be furnished, or their absence satisfactorily explained.”[[13]](#footnote-14)

The Supreme Court rejected arguments concerning disclosure of a confidential informant and a discrepancy concerning a judge’s signature on the search warrant.

The Supreme Court affirmed DeSpain’s convictions.

SEARCH & SEIZURE

SEARCH & SEIZURE – SEARCH INCIDENT

**Hunter v. Com., 587 S.W.3d 298 (Ky. 2019)**

**FACTS:**  When Williams and Cooper went to bed on the night of July 16, 2012, they were alone. On the morning of July 17, Cooper awoke to a loud sound and pain in her leg. She had been shot and Williams, on the floor, had been fatally shot in the chest. Shortly thereafter, Louisville Metro officers spotted Hunter, shirtless, jogging alone in the area. The officers saw Hunter had something heavy in his shorts pocket. The officers thought was a gun. The officers exited their cruiser and yelled “police” – Hunter took off running. The officers dashed after him, ordering him to stop, but Hunter continued running, occasionally reaching into his pocket. Hunter was briefly out of sight of all of the officers, but he was eventually apprehended. The pocket was empty, but he did have one live round in his possession. At the same time, the officers learned of the shooting nearby. A K-9 located the discarded firearm, right where Hunter had been briefly out of sight.

Hunter, a juvenile, was charged as an adult in the shootings. He was convicted and appealed.

**ISSUE:** May the search of a person be done contemporaneous with a lawful arrest?

**HOLDING:** Yes.

**DISCUSSION:** Among other procedural issues, Hunter argued that he was seized at the moment the officers tried to stop him. The Kentucky Supreme Court noted, “this, however, is counter to the United States Supreme Court’s holding in California v. Hodari D.”**[[14]](#footnote-15)** Although the states had mixed results in following Hodari, Kentucky had done so in Taylor v. Com. **[[15]](#footnote-16)** The Supreme Court noted that “Section 10 of the Kentucky Constitution provides no greater protection than does the federal Fourth Amendment.”**[[16]](#footnote-17)** Further, the Kentucky Supreme Court held “[a] seizure does not occur...if in response to a show of authority, the subject does not yield. In that event, the seizure occurs only when the police physically subdue the subject.”

Hunter also argued for suppression as to what was found on his person. Hunter argued he was not under arrest at the time, while the Commonwealth argued that he was. The Supreme Court looked closely at the chronological events – as the trial court found that Hunter was under arrest but did not specify for what. The Supreme Court noted that while the group was running, there was heavy traffic in the area. There was a struggle before he was handcuffed and events unfolded quickly. The arresting officer handed him over to another officer, who did the search prior to placing him in the back of the cruiser. During the same time, the arresting officer was directing others in the search for the discarded weapon. It was unclear, the Supreme Court noted, “who knew about the shots-fired call and when they knew it, in relation to the search of Hunter’s pocket.” At the time Hunter was apprehended, the officers on the scene had reason to believe Hunter had committed the crime of fleeing and evading. The Supreme Court further noted that “a reasonable and prudent police officer would have reason to believe that chasing an armed individual, both on foot and by vehicle, across heavily trafficked streets, through backyards, and across railway tracks creates a substantial risk of serious physical injury.” The search was contemporaneous with a lawful arrest, and thus valid.

The Supreme Court also addressed several double jeopardy arguments, but ultimately affirmed the convictions for murder, first-degree assault, tampering with physical evidence and possession of a handgun by a minor. The fleeing and evading charge was reversed because the Commonwealth failed to present any evidence at trial concerning this offense.

SEARCH & SEIZURE – CONSENT

**Taylor v. Com., 2019 WL 6973755 (Ky. 2019)**

**FACTS:**  In 2017, Probation and Parole Officer Turpin received an anonymous report of Taylor selling heroin and that a family member of the caller had died from heroin purchased from him. Probation and Parole Officers Turpin and Copher went to the home to pay a visit. The probation and parole officers observed several people, including a woman they understood to be Taylor’s wife. The woman told the officers that they could enter. Inside, the officers saw several items of suspected contraband and obtained a warrant, which led to the discovery of more contraband.

Taylor was charged with various drug charges and was convicted. An appeal followed.

**ISSUE:** May a third party with apparent common authority allow entry to a home?

**HOLDING:** Yes.

 **DISCUSSION:** The Supreme Court noted that under U.S. v. Matlock[[17]](#footnote-18) and Illinois v. Rodriguez,[[18]](#footnote-19) a third party with common authority may grant consent over the premises. “The test for whether third-party consent is valid is whether a reasonable police officer faced with the prevailing facts reasonably believed that the consenting party had common authority over the premises to be searched.”[[19]](#footnote-20) In addition, “our Court has cited with approval U.S. v. Jenkins in which the U.S. Court of Appeals for the Sixth Circuit held “that in the absence of additional information to the contrary, it is generally considered reasonable for police officers to presume that persons answering knocks at the door of a residence have authority to consent to a search of that residence.”[[20]](#footnote-21)

In this case, the woman who gave consent was cleaning the front door and one of the two officers understood her to be Taylor’s wife, having met her several times during home visits. As such, the Court held that it was objectively reasonable for the officers to believe she had the authority to allow them to enter. The Kentucky Supreme Court affirmed Taylor’s conviction.

SEARCH & SEIZURE – TERRY

**Hash v. Com., 2019 WL 6999071 (Ky. App. 2019)**

**FACTS:**  On January 9, 2017, Lexington PD received a CI tip that Carlin was driving a specific vehicle with expired tags and a suspended OL, and that he possessed a large amount of methamphetamine. Corroboration of details led Lexington police to believe the information was solid and they found the vehicle in a parking lot of an animal clinic. A male and female got out, with a dog. Carlin left the clinic alone and officers approached him. The woman inside saw the encounter and went into the restricted area of the clinic over staff objections. Police entered the clinic seized her as trespassing. Minutes later, officers found a loaded handgun in the trash in that area. The woman, Hash, admitted the gun was hers. A loaded magazine for the firearm was found in her purse.

At the same time, other officers were questioning Carlin, who denied driving or that anything illegal was located in the truck. Carlin claimed the truck belonged to his mother. During that time, a K-9 arrived and alerted. Inside the truck, another gun, methamphetamine, marijuana and cocaine were found. Carlin was arrested for possession and Hash for tampering.

Hash testified at the grand jury against Carlin, admitting to her own actions. She was subsequently charged. She entered a condition guilty plea after her motion to suppress was denied.

**ISSUE:** May an individual be detained when their actions constitute a minor crime?

**HOLDING:** Yes.

**DISCUSSON:** Hash characterized the interaction as a traffic stop, and argued it was unreasonably extended. The Court of Appeals noted that any right violated, hypothetically, was Carlin’s, not hers. Hash lacked any standing to object to the stop and the search.[[21]](#footnote-22) The Court determined that the police investigation yielded sufficient evidence to interact with Carlin and he was not in the vehicle when approached. Further, “to the extent police interaction with Carlin exceeded a consensual encounter, that interaction did “arise from a reasonable articulable suspicion that criminal activity is afoot.”[[22]](#footnote-23) The Court held that the interaction was a Terry stop, and was “justified by a reasonable articulable suspicion that Carlin was engaged in criminal activity.” Hash’s own actions raised the suspicions of the police, particularly when she entered a restricted area of the business over staff objections. Hash claimed she was seized and the Court of Appeal found that she was lawfully seized because she committed trespassing in full view of the officers. The officers claimed that the seizure, if any, only occurred after they found the discarded handgun.

Further, the court noted, neither party could have driven away because Carlin had no license and Hash was being detained. Carlin was waiting for his mother to come to the scene when the K-9 deployed. Thus, “the police did not delay any detention; circumstances of Hash’s and Carlin’s own making did.” The Court of Appeals also held that Hash testified willingly before the grand jury without any immunity, so her statements were properly used to charge her.

Hash’s conviction was upheld.

**Sullivan v. Com., 2019 WL 6650576 (Ky. App. 2019)**

**FACTS:** In 2017, Sullivan was arrested as a result of a “felony roundup” in Lexington. Among others sought, officers were given information on a Byron White, who had an active warrant. Officers went to White’s last known address and found no one home. They spotted Sullivan riding a moped nearby and thought he resembled White. The officers approached Sullivan where he had stopped and asked for ID. Sullivan had no ID, so the officers tried to identify him by other means. Sullivan “initiated conversation” and stated he might have a warrant. Sullivan, in fact, did have a warrant and was arrested. Sullivan admitted he had a weapon, a crack pipe, and that he was a convicted felon. Sullivan was charged with the weapon’s possession.

Sullivan was indicted and moved for suppression. When denied, he entered a conditional guilty plea and appealed.

**ISSUE:** Is it lawful to make a Terry stop of an individual for whom police have reasonable suspicion of being involved in a crime?

**HOLDING:** Yes.

**DISCUSSION:** The Court of Appeals held that “[a] warrantless stop of a person without probable cause is permissible if law enforcement possesses a reasonable articulable suspicion that the person has been involved in criminal activity.[[23]](#footnote-24) When determining whether reasonable articulable suspicion exists, “the totality of the circumstances” must be considered.[[24]](#footnote-25) And, a Terry stop is permissible if: (1) it is based upon an “objective reliance” on a police department’s wanted flyer or bulletin, and (2) the “police who issued the flyer or bulletin possessed a reasonable suspicion justifying a stop[.]” The Court of Appeals noted that they were looking for a man of similar appearance, in that immediate area, when they happened upon Sullivan.

The Court of Appeals affirmed the conviction.

SEARCH & SEIZURE – TRAFFIC STOP

**Mayfield v. Com., 590 S.W.3d 300 (Ky. App. 2019)**

**FACTS:** On April 2, 2017, Officer Mascoe (Lexington PD) pulled over a vehicle for a license plate violation. He had stopped the same vehicle for a similar offense a few months earlier. That time, the driver said he had left his OL at home, but the officer “was not so forgiving a second time.”

As he approached the vehicle, the officer had smelled marijuana. When he ran the information provided by the driver, he was given information that returned no results. The driver, when removed from the vehicle, admitted to having smoked marijuana in the vehicle, but the officer found no evidence of it in the car beyond the odor. On the driver, however, he found a scale, cash and marijuana. The driver volunteered he had sold “weed” earlier in the evening. Officer Mascoe read Miranda and, ultimately, the driver provided his real name – Mayfield. At the jail, more drugs were found packaged in his crotch area.

Mayfield was indicted on drug and traffic charges and moved for suppression of the fruits of the search and his statements. That motion was denied. He entered a conditional guilty plea and appealed.

**ISSUE:** Does the smell of marijuana give probable cause to search a driver?

**HOLDING:** Yes.

**DISCUSSION:** First, the Court of Appeals held that the smell of marijuana gives the officer probable cause to search the person[[25]](#footnote-26) because “plain smell” – as a branch of plain view, was permitted.[[26]](#footnote-27) “It is a fundamental principle that a policeman may ‘observe’ with any of his five senses for purposes of a misdemeanor arrest.”[[27]](#footnote-28) The “automobile exception to the warrant requirement extends to the operator of the vehicle when the “plain smell” of marijuana results in the existence of probable cause, which justifies a search independently of an arrest.”

The Court of Appeals affirmed this conviction.

SEARCH & SEIZURE – EXPECTATION OF PRIVACY

**Bolin v. Com., --- S.W.3d ----, (Ky. App. 2019)**

**FACTS:** In August 2017, Trooper Hensley (KSP) pulled over a vehicle with expired tags. Bolin was driving; the owner was a passenger. Bolin was sweating profusely, shaking, and talking rapidly during the stop. He was drinking from two different bottles – tea and a soft drink, claiming to be “extremely hot and thirsty.” Trooper Hensley believed Bolin might be on drugs and instructed him to perform several FSTs. Bolin successfully completed the first FST, but the trooper noted Bolin’s pupils were dilated and his eyelids were droopy. Bolin completed a second FST satisfactorily, but failed the final three tests. Bolin was arrested for DUI and for outstanding warrants. Bolin admitted to having recently taken methamphetamine and that there “may be” drugs in the vehicle.

Trooper Hensley requested the Henderson PD K-9, which promptly alerted on the front driver’s seat. They searched the vehicle, finding methamphetamine, paraphernalia and a loaded firearm. Bolin was charged with the drugs, being a convicted felon in possession of a firearm, and DUI. Bolin unsuccessfully moved to suppress the evidence. Trooper Hensley stated he could not recall if read Hensley his rights under Miranda. Trooper Hensley further testified that he had ARIDE training to detect drugs. The trial court suppressed Bolin’s statements, finding that he was in custody at the time he made the statements, but declined to suppress the physical evidence found during the stop because the trooper possessed probable cause to believe the vehicle contained evidence related to the DUI offense and Bolin lacked standing to object to the search because the vehicle’s passenger did not object to the search of the vehicle.

Bolin entered a conditional guilty plea and appealed.

**ISSUE:** Does a non-owner driver, with the owner in the vehicle, have an expectation of privacy in that vehicle?

**HOLDING:** No.

**DISCUSSION:** The Court of Appeals reviewed the law and first discussed whether Bolin had a legitimate expectation of privacy in the vehicle he drove but did not own. The Court of Appeals looked first to Rakas, and noted that Bolin shared the occupancy of the vehicle with the owner, and his occupancy was “never exclusive.” As such, like Rakas, Bolin did not demonstrate a recognized expectation of privacy in the vehicle.[[28]](#footnote-29) The analysis might be different if the vehicle’s owner had not been present.

The Court of Appeals held:

… whether the non-owner driver of a vehicle has a reasonable expectation of privacy with respect to the vehicle’s compartments and interior hinges on whether the owner has relinquished both possession of and control over the vehicle to the non-owner such that the non-owner driver formed a subjective expectation of privacy that society is prepared to accept as reasonable. This is a fact intensive inquiry and one that the defendant bears the burden of proving as exemplified by U.S. v. Lochan.[[29]](#footnote-30)

Bolin operated the vehicle “subject to the whims of the owner/passenger.” Driving is not enough to provide standing. Bolin was, however, seized during the traffic stop. During the stop, the trooper recognized Bolin was likely impaired and further discovered his outstanding warrants. Thus, Bolin was properly detained from that point forward.

The Court of Appeals affirmed the convictions.

INTERROGATION

Bullitt v. Com., 2019 WL 6972077 (Ky. 2019) (Rehearing Pending – 1/09/2020).

FACTS: In 2015, a female reported a rape and robbery in a Louisville alley. Evidence was collected and she identified Bullitt in a photo array the following day. Bullitt was arrested, interrogated, and ultimately charged with the rape and robbery. Bullitt was convicted of rape, but not Robbery and other charges. He appealed.

ISSUE: Is an ambiguous comment related to remaining silent enough to invoke the right to silence?

HOLDING: No.

DISCUSSION: The Kentucky Supreme Court noted that prior to arrest, Bullitt was read the Miranda warning and signed a waiver. Bullitt argued, however, that he invoked his right to silence several times but that demand was not honored. He did not confess, but argued that derogatory statements he made about the victim, when shown her picture, were used to cast him in a negative light. Bullitt denied any contact with the victim, although DNA evidence connected him to the rape. His statements were used for impeachment.

The Supreme Court examined the specific statements. At one point, about 20 minutes into the session, Bullitt stated ““if I’m going to jail, I’m saying, let’s go, you know, that’s all I’m saying, sir. I’m innocent, I’m innocent.” These statements are similar to those analyzed in Quisenberry v. Commonwealth.[[30]](#footnote-31) In Quisenberry, Appellant Williams stated, “Y’all just need to go on and take me to jail.” The court in Quisenberry concluded that even if Williams meant to invoke his right to remain silent, his remarks were far from unambiguous and just as the officer who conducted the interview testified as to his interpretation, Williams’s statements could be viewed as a concession that the police might as well take him to jail. Bullitt argued that his remarks could not be interpreted in a like manner. The Supreme Court held that Bullitt’s statement was not an invocation of his right to remain silent.

Another statement, about an hour into the session, was ““I’m done talking . . . whatever y’all got to do, man, y’all do it.” On its own, that could be viewed as an invocation, but “Bullitt on his own volition continued to talk about the case by stating “if I was the rapist. . . .” That was akin to Buster v. Com., and when Bullitt spontaneously continued to talk, he negated his invocation.[[31]](#footnote-32)

Bullitt’s conviction was affirmed.

Mills v. Com., 2019 WL 5681190 (Ky. App. 2019)

FACTS: Mills owned a convenience store in Butler County. On May 21, 2017, Mills touched a female employee several times in a manner that constituted sexual abuse. Trooper Alexander (KSP) investigated, along with a Butler County Deputy Sheriff who was serving a protective order. After the protective order was served, Trooper Alexander asked Mills to speak with him about the incident. Mills told him the surveillance camera was inoperable on the day in question. Trooper Alexander obtained a search warrant for the system. Mills also agreed to a recorded interview, which was done at the store. Mills admitted most of the allegations, except for touching the employee’s breasts. Mills was indicted for sexual abuse.

Mills moved to suppress his statements, arguing that he was in custody at the time. Trooper Alexander testified that he did not advise Mills of his Miranda rights because Mills was not in custody at the time. The trial court agreed and did not grant the motion to suppress. Mills was convicted and appealed.

ISSUE: Is an interview at the suspect’s place of business generally non-custodial?

HOLDING: Yes.

DISCUSSON: The Court of Appeals noted that the interview was voluntary and took place at Mills’ business, in full view of the public. The “tenor of the discussion was cordial and neutral.” Mills was not in an “inherently coercive environment” and he was not restrained. The motion to suppress was properly denied and the conviction was affirmed.

Roof v. Com., 2019 WL 6817353 (Ky. App. 2019)

FACTS: Roof was interviewed before his arrest by Sheriff Pate (Breckinridge County) and Hayes, a social worker. Roof voluntarily appeared at the Sheriff’s Office for the interview, which occurred in a room with the door closed. Roof was not advised of his rights under Miranda during the interview. Roof was later accused of sexual abuse of his step-daughter, convicted and appealed.

ISSUE: Is voluntary attendance at an interview custodial?

HOLDING: No (as a rule).

DISCUSSION: Roof argued that his statements were made under custodial interrogation. Roof was not advised of Miranda at any point during the interview. He had responded to the Sheriff’s request for a “talk” and met the two in the Sheriff’s Office, not an interrogation room. The Sheriff testified he was attempting to get a statement to compare to the victim’s statement. Roof was not arrested at the time. The Sheriff could not recall if he advised Roof that he could leave at any time, but the social worker stated he did so, and that Roof was not bullied in any way. The interview ended when the Sheriff asked for a recorded interview, which Roof declined.

The trial court found that Roof was not in custody because Roof was asked to come in, was not ordered to do so, and was told he was free to leave at any time. The Court of Appeals examined Oregon v. Mathison and, after considering all the factors in totality, held that the statements were properly admitted.[[32]](#footnote-33)

Unfortunately, due to errors in the jury instructions, the Court of Appeals reluctantly reversed the convictions due to duplicitous instructions and remanded the case.

Decker v. Com., 2019 WL 5681456 (Ky. App. 2019)

**FACTS:**  Decker was involved in a traffic crash on January 11, 2014. His wife was in the front seat, and her two children were in the back seat. Another driver, Kellog, saw the vehicle being driven erratically, and tried to call the police. Kellog had no cell phone signal, so he honked and flashed his lights, trying to get Decker’s attention. Decker struck an oncoming vehicle head on.

Decker was ejected, while the two children and the other driver were seriously injured. All were airlifted for medical attention. While waiting at the scene for EMS, Decker was in and out of consciousness. Deputy Hammons (Grayson County SO) overheard one of the paramedics ask Decker whether he had used drugs or alcohol. (Hammons, also an EMT, knew that was a standard question.) Decker admitted to the paramedic that he consumed alcohol and marijuana. (It was some four hours, however, before his blood was tested.)

Decker was indicted on multiple counts of first-degree assault, fourth-degree assault, and related offenses. Decker moved to suppress the blood results and the statement, arguing he should have been advised of his right to remain silent. The trial court denied that motion. Decker was convicted of first-degree assault and DUI. An appeal followed.

**ISSUE:** Is someone having emergency medical care in custody, even if an officer is nearby?

**HOLDING:** No.

**DISCUSSION:** The Court of Appeals began:

Miranda v. Arizona, requires police officers to advise suspects of their rights against self-incrimination and to an attorney prior to subjecting them to custodial interrogation.”[[33]](#footnote-34) Consequently, “only statements made during custodial interrogations are subject to suppression pursuant to Miranda.”[[34]](#footnote-35) Custodial interrogation is defined as questioning initiated by law enforcement after a person has been taken into custody or otherwise deprived of freedom of action in any significant way. . . . The inquiry for making a custodial determination is whether the person was under formal arrest or whether there was a restraint of his freedom or whether there was a restraint on freedom of movement to the degree associated with formal arrest. Custody does not occur until police, by some form of physical force or show of authority, have restrained the liberty of an individual. The test is whether, considering the surrounding circumstances, a reasonable person would have believed he or she was free to leave. Some of the factors that demonstrate a seizure or custody have occurred are the threatening presence of several officers, physical touching of the person, or use of a tone or language that might compel compliance with the request of the police.[[35]](#footnote-36)

Decker argued he was in custody because he was not free to leave due to his injuries. On appeal, Decker claimed the paramedics were state actors, but failed to raise that issue in the trial court. The Court of Appeals chose not to review the lower court’s finding due to the lack of preservation and upheld the admission of his statement.

On a separate issue, Decker argued that he could not have engaged in wanton conduct by not having the two children properly secured because “under the version of KRS 189.125 in effect at the time of the accident, the failure to use a child passenger restraint system or a child booster seat could not be considered contributory negligence nor be admissible as evidence in a civil trial. He also relied on Com. v. Mitchell, wherein the Kentucky Supreme Court held that the failure to secure an infant in the proper child restraint system is insufficient to prove recklessness, a lesser level of *mens rea* than wantonness.[[36]](#footnote-37) The Mitchell court, however, did not suggest that failure to secure a child in the proper restraint system could never be used as evidence of criminal *mens rea*. It simply stated that such evidence was insufficient when standing alone without any other evidence. No evidence was introduced indicating that Decker’s failure to restrain the children properly was sufficient evidence, on its own, to support a finding of wantonness. It was a piece of evidence to be considered in conjunction with all the other evidence of Decker’s impairment and his erratic and dangerous driving.

The Court of Appeals affirmed Decker’s convictions.

TRIAL PROCEDURE / EVIDENCE

TRIAL PROCEDURE / EVIDENCE – JAIL CALLS

**Ward v. Com., 587 S.W.3d 312 (Ky. 2019)**

**FACTS:** For an extended period of time, the victim lived in Boone County with her father and stepmother in close proximity to Ward and his family. Over time, the relationship with the victim became sexual. Eventually, when the victim was in her mid-teens, Ward’s wife became aware of the situation and cooperated with the Boone County Sheriff’s Office in an investigation. Ward was charged, and convicted, of numerous sexual offenses.

**ISSUE:** Should officers listen to calls that are clearly between attorneys and clients?

**HOLDING:** No.

**DISCUSSION:** Among other issues, Ward argued that the Boone County Sheriff’s Office (and the Commonwealth’s Attorney) should be disqualified from any involvement in his prosecution because they possessed recorded jail calls that contained privileged attorney-client communications. The Commonwealth’s Attorney agreed it had copies of the calls and that it routinely requested all recordings of ingoing and outgoing calls, but when the calls were between an attorney and an inmate, they simply did not listen to them. Although each call was prefaced with a warning that the call was being recorded, there is also a message that attorney-client calls are not recorded.

At a hearing, the prosecutor indicated that he had assigned the duty to listen to the calls to Det. Parker (Boone County SO). The prosecutor realized that at one point, there was an attorney call in the series of calls. He indicated that “the possibility of hearing attorney-client conversations on recorded jail calls had never occurred to him.” He simply assumed that a mistake had been made to include the call and took no further action, but simply did not listen to the call. The detective was also unsure if she heard any such calls, but did not believe that was the case. The Kentucky Supreme Court held that “although troublesome,” no Sixth Amendment violation had occurred. The Supreme Court examined Weatherford v. Bursey, a case where law enforcement accidentally came across privileged information, but did not disclose it further.[[37]](#footnote-38)

The Supreme Court also examined the four factors in U.S. v. Steele:

1) Whether the presence of the informant was purposely caused by the government in order to garner confidential, privileged information, or whether the presence of the informant was the

result of other inadvertent occurrences;

2) Whether the government obtained, directly or indirectly, any evidence which was used at trial as the result of the informant’s intrusion;

3) Whether any information gained by the informant’s intrusion was used in any other manner to the substantial detriment of the defendant, and;

4) Whether the details about trial preparations were learned by the government.[[38]](#footnote-39)

The Supreme Court agreed that “mere possession” of the transcripts was insufficient to violate the Sixth Amendment.

Ward also argued that law enforcement’s arrival at his house on the basis of a threat he made to his wife that he would burn the house down, was improper. Deputies quickly arrived and tried to get Ward to answer the door, which he did after a few minutes. Deputies entered, frisked Ward and found his cell phone. Deputies seized the cell phone with his permission and put it in airplane mode to secure it. The deputies explained why they were there, read Ward Miranda, but advised him he was not in custody. Other officers did a sweep. He was permitted to leave, but not to take his truck unless he agreed to a search of his truck. Ward consented to the search. Two other phones were found and secured, but not searched until a warrant was obtained.

Ward was unable to articulate any argument that this process affected his trial outcome. The only damaging evidence obtained from the search was the cell phones, which would have been obtained with the subsequent search warrant anyway.

Ward’s conviction were ultimately overturned due to an issue with jury selection.

TRIAL PROCEDURE / EVIDENCE – INVESTIGATIVE HEARSAY

Brewer v. Com., 2019 WL 5092606 (Ky. App. 2019)(Discretionary Review filed 11/13/2019)

FACTS: Before Brewer’s trial in Perry County for the murder of Miller, the Commonwealth gave notice that it intended to introduce evidence that Brewer had previously entered Miller’s home and assaulted Miller’s caregiver. Dillon, the caregiver, lived with Brewer as his caregiver in the past, but had left due to Miller’s abuse and moved to Ohio. Brewer eventually returned to Perry County where she moved in with Miller. Miller and Brewer lived on the same rural road and were essentially neighbors.

On the day of the murder, Brewer arrived at the Miller home and struck Dillon; Miller objected. Brewer shot Miller in the face and he subsequently died.

At trial, multiple witnesses testified. Sgt. Abner (KSP) was the lead investigator. Sgt. Abner found no evidence at the Miller home indicating that Brewer was the shooter. Later, Sgt. Abner found a bullet in the ceiling, obtained an arrest warrant for Brewer, and a search warrant for his home. Numerous guns were found at Brewer’s home, but not the gun involved in the shooting. Another witness came forward to provide statements that Brewer had shared concerning the shooting.

Brewer was convicted of first-degree manslaughter and appealed.

ISSUE: Is investigative hearsay improper?

HOLDING: Yes.

DISCUSSION: Brewer objected to the introduction of the “prior bad acts” evidence committed against Dillon in the days before the shooting. The Court of Appeals held that the evidence was not introduced to show Brewer’s propensity for violence, but instead to indicate why he went to Miller’s house that night. In effect, this evidence provided context and showed motive.[[39]](#footnote-40) Without that prior history being available to the jury, the jury would be “left to speculate as to why Brewer would randomly show up at the Victim’s residence, with a gun, slap Dillon and shoot the Victim.” The Court of Appeals agreed this evidence was properly introduced.

The Court of Appeals also addressed the testimony of the three law enforcement officers. When each testified, the prosecutor “elicited him to repeat what his interviewee said.” Brewer argued that was “both hearsay and improper bolstering” – but did not object at trial.

KRE 801(c) defines “hearsay” as “a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted.” Generally, pursuant to KRE 802, hearsay is not admissible unless it falls within one of the exceptions found in KRE 803 through KRE 806. There is no exception for investigative hearsay.

As the Supreme Court of Kentucky noted in Sanborn v. Com., investigative hearsay is:

… a misnomer, an oxymoron. The rule is that a police officer may testify about information furnished to him only where it tends to explain the action that was information is then admissible, not to prove the facts told to the police officer, but only to prove why the police officer then acted as he did. It is admissible *only if* there is an issue about the police officer’s action.[[40]](#footnote-41)

The Court of Appeals held the trial court should have excluded the testimony, but since the testimony was not subject to an in-court objection or would have changed the result of the trial, the admission did not rise to the level of manifest injustice.

The Court of Appeals did caution against the future practice of allowing law enforcement officers to repeat what a testifying witness told them.[[41]](#footnote-42)

Further, Brewer objected to the testimony of one officer who said “that nothing after his active investigation made him doubt his conclusion as to the suspect.”[[42]](#footnote-43) While this might have been reversible error, no objection was made at the time and did not lead to palpable error.

The Court affirmed Brewer’s conviction.

TRIAL PROCEDURE / EVIDENCE – BOLSTERING

**Smith v. Com., 2019 WL 5091996 (Ky. App. 2019)**

**FACTS:**  Smith was involved in a violent attack on his girlfriend, Kinney, who already had obtained a DVO against him. Smith was charged with second-degree assault and related offenses. At trial, after procedural issues concerning his desire to proceed *pro se*, his competency to stand trial, and the testimony of Police Chief Grogan (Hickman PD), Smith were addressed, Smith was convicted and subsequently appealed.

**ISSUE:** Is bolstering another witness’s testimony improper?

**HOLDING:** Yes.

**DISCUSSION:** Among other issues, Smith argued “that Chief Grogan vouched for and bolstered Kinney’s testimony by attempting to testify that some of her injuries were consistent with strangulation.” The Court agreed that “at most, his causation testimony indirectly supported Kinney’s testimony.” The trial court had “strongly admonished the jury to disregard Grogan’s causation testimony” and the Commonwealth presented other substantial evidence concerning Kinney’s injuries.

The Court of Appeals affirmed the conviction but did overturn the trial court’s imposition of fines.

**Agan v. Com., 2019 WL 5854033 (Ky. App. 2019)**

**FACTS:** Agan was indicted of trafficking in a controlled substance for allegedly selling cocaine to a CI. During trial, Det. Wilmore testified about the reliability of the CI and stated that he used the CI before and the CI had been reliable. Agan was convicted and appealed.

**ISSUE:** Is bolstering another witness’s testimony improper?

**HOLDING:** Yes.

**DISCUSSION:** Agan contended that Det. Wilmore’s testimony improperly bolstered the testimony of the CI.[[43]](#footnote-44) The Court of Appeals agreed that the testimony was improper and inadmissible under Fairrow and 404(a). Because the jury was given overwhelming evidence of Agan’s guilt even without that specific testimony, the error was harmless.

The conviction was affirmed.

TRIAL PROCEDURE / EVIDENCE – RECORDINGS

**Wilson v. Com., 2019 WL 5861905 (Ky. App. 2019)**

**FACTS:**  Wilson was arrested for drug trafficking based, in part, on information from a CI in Russell County. Audio recordings of the transaction were introduced at trial. The CI intended to buy drugs from another individual, but was directed to Williams. The CI and Williams drove to Wilson’s home, where Williams made the transaction, out of the sight and hearing of the CI.

Wilson was convicted and appealed.

**ISSUE:** Is hearsay admissible?

**HOLDING:** No.

**DISCUSSION:** The Court of Appeals noted that:

Review of the recordings discloses three distinct types of statements. First, the recordings contain the voice of Officer Hoover at the beginning and end of each recording. In fact, Officer Hoover, who had observed the transactions from afar, specifically states at the end of the first recording that the informant had gone to appellant’s home to make the drug purchase. Second, the recordings contain conversations between the informant and Mr. Williams discussing the drug buys at appellant’s home, drug buys in the future, the use of drugs in general, and, at times when she’s alone, the informant’s own commentary about what is taking place. Third, the recordings contain Mr. Williams’ statements about what was occurring, plans for future drug transactions, and who they were dealing with.

The Court of Appeals noted that audio recordings are admissible when introduced for “non-hearsay purposes and is evidence of the event as it occurred.” In this case, the majority of the recording was not of the crime itself and as such, was hearsay. Because of the way it was introduced, with the CI stating she did not remember what had occurred because she was high at the time. Williams testified he had no direct contact with Wilson but made the transaction through Wilson’s girlfriend.

The officer’s statements on the recording were consistent with his testimony and are hearsay. The CI’s forgetfulness, which was not apparently hostile but was not inquired upon in detail, was also inadmissible provided that was the case. Finally, Williams’ statements on the recording were inconsistent with his trial testimony, and thus could be admissible under KRE 801A(a)(1). No foundation had been laid for this evidence as required but instead.

The Court of Appeals held that the recordings were impermissibly introduced as evidence and reversed Wilson’s conviction.

OPEN RECORDS

**City of Taylorsville/Biven v. Trageser, 2019 WL 5092383 (Ky. App. 2019)**

**FACTS:**  On November 17, 2013, Trageser filed an open records request for a police report on a local domestic abuse call. The City Clerk, Biven, responded that the request was referred to the city attorney to determine if any exemptions applied. Trageser immediately appealed to the Kentucky Attorney General, claiming that the response was not proper. Within a few days, Trageser received a second response stating that a JC-3 form existed, but this information was confidential pursuant to KRS 620.050. Trageser appealed again, arguing that statute only applied when children were involved, and this situation involved adults. The city attorney responded that certain subsections applied to spousal abuse.

The Attorney General issued opinion 14-ORD-038 opining that the denial of the records request was improper, but it could not be determine it if the city’s response was untimely because there was no indication as to when the City received the request. The OAG criticized the City for failing to comply with its statutory duties to cite specific exemptions and applying them. The statutes cited did not authorize nondisclosure because it only exempted a JC-3 from being disclosed when it involves children. As the City chose not to appeal, the decision gained the force and effect of law under KRS 61.880(5)(b).

Following this, the City’s attorney only provided a redacted copy of the report, arguing that KRS 61.878(1)(a) exempts clearly personal information and KRS 61.878(1)(i) exempts preliminary drafts and the like. Trageser objected. A year later, Trageser filed a complaint arguing he was entitled to an unredacted report. After extended procedural byplay, the circuit court ruled the redactions were a new issue and requested an unredacted copy for review. Following *in camera* review, the circuit court upheld a number of the redactions, but not others. The circuit court ordered the report released with only its redactions. The City appealed.

 **ISSUE:** May redactions in an open records case be permitted to avoid embarrassment or inconvenience to persons listed within the record?

**HOLDING:** No.

**DISCUSSION:** The Court of Appeals opined that the procedure was flawed. It noted that since the City did not raise the issue of redactions in the first proceeding, the OAG had no knowledge of it. The Court of Appeals considered the City’s tactics to be evasive and designed to put Trageser in a “Catch-22” with respect to future actions. The Court of Appeals held there was no actual statute of limitations in bringing an appeal of an open records decision.

With respect to the redactions, the Court looked to Kentucky New Era, Inc. v. City of Hopkinsville.[[44]](#footnote-45)

In Kentucky New Era, the Court addressed whether the privacy exception from the Open Records Act found at KRS 61.878(1)(a) permitted nondisclosure of some personal information in police reports and arrest citations. The test for whether information is exempt under the privacy exception requires balancing the person’s interest in personal privacy with the public interest in disclosure. Because private citizens “have a compelling interest in the privacy of law enforcement records pertaining to them” the Court permitted a public agency to redact the addresses, phone numbers, social security numbers and driver’s license numbers of witnesses, victims and uncharged suspects. The circuit court here properly permitted redaction of the same information, as well as the names of juveniles listed in the report.

The trial court agreed that further redactions, as sought by the City were not appropriate. “[M]ere embarrassment or inconvenience to the persons listed in the report is insufficient as a basis to limit an open records request.”

The Court of Appeals affirmed the circuit court’s decision.

EMPLOYMENT

**Lainhart v. Clark County Fiscal Court, 2019 WL 5854025 (Ky. App. 2019)**

**FACTS:** Lainhart worked for Clark County as a janitor. A few weeks into her employment, she witnessed the Clark County Attorney verbally abuse another Fiscal Court employee. Lainhart encouraged the employee to report the matter, but reported it to a magistrate herself. Lainhart also posted about the incident on social media and indicated on that media that she expected to be terminated for reporting the matter. The Judge-Executive expressed his displeasure at the post and told her that she violated employment policies. Lainhart was promptly fire. The termination was upheld by the Fiscal Court.

Lainhart filed suit, arguing that she was protected by the Whistleblower Act, KRS 61.102(1). The circuit court dismissed the matter with prejudice. Lainhart appealed.

**ISSUE:** Is reporting a verbal abuse against a County Attorney protected by the Whistleblower Act?

**HOLDING:** No.

**DISCUSSION:** The Court of Appeals noted that it had previously held that four elements must be met for an employee to succeed under the statute:

(1) the employer is an officer of the state; (2) the employee is employed by the state; (3) the employee made or attempted to make a good faith report or disclosure of a suspected violation of state or local law to an appropriate body or authority; and (4) the employer took action or threatened to take action to discourage the employee from making such a disclosure or to punish the employee for making such a disclosure.[[45]](#footnote-46)

The Court of Appeals agreed that this type of verbal altercation “was not of such character that qualifies its disclosure for protection under the Act.”[[46]](#footnote-47) In this case, the County Attorney exercised no supervisory authority over the Fiscal Court’s employees. As such, the Court affirmed the dismissal of the action.

**Robinson v. City of Mt. Vernon, 2019 WL 5290527 (Ky. App. 2019) (Discretionary Review Filed 1/14/2020)**

**FACTS:** Robinson was a Mt. Vernon police officer. On June 29, 2016, he was suspended with pay and accused of several instances of misconduct. Robinson was told he was entitled to a hearing under KRS 15.520 and that he was subject to termination. He received a hearing on July 25, in front of the Mayor of Mt. Vernon. A detailed listing of his infractions were listed, with the Mayor finding that his infractions included flirtatious horseplay at a hospital that resulted in the firing of a nurse involved, and the failure to provide dignitary protection at a detail involving the Governor. No evidence was provided for other allegations.

The Mayor suspended him for four weeks without pay. Robinson was also prohibited from providing security at the hospital and was required to complete sexual harassment training. On appeal, the circuit court affirmed the suspension. An appeal to the Kentucky Court of Appeals followed.

**ISSUE:** Does KRS 15.520 only apply to external complaints?

**HOLDING:** No.

**DISCUSSION:** Robinson argued:

The focus of Appellant’s claim of error is his contention that KRS 15.520 “no longer applies to disciplinary actions” that originate from within a police department or by the Mayor. He maintains that on July 1, 2018, the legislature amended KRS 15.520 to remove the word “individual” when referring to those alleging officer misconduct and inserted in its place the word “citizen.” The substance of his argument is that the July 1, 2018 amendment rendered KRS 15.520 applicable only to “citizen” complaints and not to departmental or mayoral complaints of officer misconduct.

The Court noted, however, that:

KRS 15.520(4) applies not only to citizen complaints, but also to claims of “an act or omission that would constitute a violation of law enforcement procedures *by any individual within the law enforcement agency employing the officer, including supervisors and elected or appointed officials of the officer’s employing agency*[.]” KRS 15.520(4)(a). In the matter before us, Appellant was charged with violation of Mt. Vernon’s “Police Manual Policy 2-2015.” Appellant was reprimanded by the Chief of Police and subsequently formally charged by the Mayor, *i.e.*, an elected official of the officer’s employing agency. KRS 15.520(4)(a). In conformity with KRS 15.520(5)-(7), Appellant received notice of the charge and the hearing, was allowed the opportunity to obtain counsel, and was able to present and cross-examine witnesses.

The Court of Appeals held that Robinson was accorded the full panoply of rights to which he was entitled, and that the Mayor’s decision was supported by more than enough evidence. The Court of Appeals affirmed the circuit court’s decision.

CIVIL LITIGATION

**Fox v. Brumback, 2019 WL 6817315 (Ky. App. 2019)**

**FACTS:**  On July 5, 2015, Deputy Fox (Franklin County SO) responded to a 911 call. The caller, Paige, reported that her neighbor was waving a pistol. Deputy Fox ultimately arrested Brumback and charged him with several offenses. He was indicted, but reached an agreement that resulted in the dismissal of the case.

Brumback filed a civil case against a witness, Paige, and the deputy. Fox moved for dismissal, arguing sovereign immunity. Deputy Fox was then named individually. She moved again for dismissal. The motion to dismiss was denied and the case proceeded. After discovery, she moved for summary judgment on the malicious prosecution claim, asserting immunity. The circuit court denied the motion for summary judgment and she appealed.

**ISSUE:** Is the Sheriff immune for actions against his deputy?

**DISCUSSON:** No.

**HOLDING:** The Court noted:

Sovereign immunity is a common law principle “that precludes the maintaining of any suit against the state unless the state has given its consent or otherwise waived its immunity.”[[47]](#footnote-48) Governmental immunity is derived from sovereign immunity and applies to the tort liability of governmental agencies.[[48]](#footnote-49) The immunity of our county governments extends to public officials sued in their official capacity.

The Court of Appeals examined KRS 70.040, which waives “immunity as applied to the office of the sheriff for acts committed by its deputies.” The statute provides that: “[t]he sheriff shall be liable for the acts or omissions of his deputies; except that, the office of sheriff, and not the individual holder thereof, shall be liable under this section.”[[49]](#footnote-50) The Supreme Court of Kentucky has held that this statute waives immunity for the office of the sheriff for acts committed by its deputies.

The Court of Appeals held that KRS 70.040 does not bar the claim of malicious prosecution. The Court of Appeals affirmed the denial of summary judgment.

**Barlow v. Evans, Ky. App. 2019**

**FACTS:**  On May 28, 2012, Evans was involved in a collision between his motorcycle and a Monroe County sheriff’s vehicle, driven by Pickerell. Pickerell had backed into Evans’ motorcycle. Evans sought treatment the next day. Pickerell served as a dispatcher and did vehicle maintenance for the Sheriff but was not a paid employee. Pickerell was performing maintenance work at the time of the collision, notably testing the brakes of the vehicle, when he inadvertently backed into the motorcycle.

Evans sued Sheriff Barlow and Pickerell for his injuries. Sheriff Barlow moved for summary judgment, arguing official immunity. The circuit court reasoned that vehicle maintenance was a ministerial act and as such, official immunity was not warranted. Sheriff Barlow appealed.

**ISSUE:** Is the Sheriff entitled to official immunity for a ministerial act?

**HOLDING:** No.

**DISCUSSION:**  The Court of Appeals reviewed official immunity under state law.

“‘Official immunity’ is immunity from tort liability afforded to public officers and employees for acts performed in the exercise of their discretionary functions. It rests not on the status or title of the officer or employee, but on the function performed.”[[50]](#footnote-51) When an officer is sued in his representative capacity, the officer’s “actions are afforded the same immunity, if any, to which the agency, itself, would be entitled[.]” However, when sued in his individual capacity, “public officers and employees enjoy only qualified official immunity, which affords protection from damages liability for good faith judgment calls made in a legally uncertain environment.”

 A public official sued in his individual capacity is entitled to qualified immunity for his negligent acts when he performs: “(1) discretionary acts or functions, i.e., those involving the exercise of discretion and judgment, or personal deliberation, decision, and judgment; (2) in good faith; and (3) within the scope of [his] authority.” Id. (citations omitted). However, “an officer or employee is afforded no immunity from tort liability for the negligent performance of a ministerial act, i.e., one that requires only obedience to the orders of others, or when the officer’s duty is absolute, certain, and imperative, involving merely execution of a specific act arising from fixed and designated facts.”

The Court of Appeals examined several cases to determine if a matter is discretionary or ministerial. Qualified immunity might apply in discretionary matters but does not apply in ministerial tasks. Arranging for Pickerell to perform the maintenance of patrol vehicles was discretionary. As such, Sheriff Barlow had official immunity. However, whether Pickerell had qualified immunity from suit in his individual capacity is a separate determination. The Court of Appeals noted Sheriff Barlow “would be entitled to qualified immunity if he performed: (1) a discretionary act, (2) in good faith, and (3) within the scope of his authority.”[[51]](#footnote-52) Since the trial court had ruled the Sheriff’s act was ministerial, it did not do an evaluation under the correct standard.

The Court of Appeals remanded to the trial court to “determine whether he acted in good faith and in the scope of his authority. If the trial court finds these elements are satisfied, then Sheriff Barlow, in his individual capacity, is entitled to qualified immunity.”

The Court of Appeals further noted that “official immunity is absolute when an official’s or an employee’s actions are subject to suit in his official capacity” unless immunity has been waived.[[52]](#footnote-53) Generally, a sheriff “has absolute official immunity at common law for torts . . . when sued in his official capacity.” The main exception to this general rule is that KRS 70.040 waives a “sheriff’s official immunity . . . for the tortious acts or omissions of his deputies.” Here, there is no dispute that Pickerell was not a deputy. On remand, the trial court was ordered to determine whether there was any waiver of absolute official immunity for Sheriff Barlow, in his official capacity. If there was no waiver, Sheriff Barlow is entitled to official immunity in his official capacity.”

**Wilson v. Clem, 2019 WL 5090397 (Ky. App. 2019)**

**FACTS:**  In 2014, Wilson filed suit against Deputy Clem (Boyle County SO) claiming malicious prosecution, defamation, false light and trespass. Wilson claimed he was falsely arrested on allegations he had committed a felony. (Wilson was acquitted at trial.) The trespass and defamation claims were dismissed in 2016, but the malicious prosecution claim was allowed to continue. Deputy Clem reasserted his motion for summary judgment on that claim and it was dismissed in 2017. The circuit court found that since probable cause existed for the arrest, Deputy Clem was protected by qualified immunity for performing a “discretionary action in good faith” by executing an arrest warrant. Wilson appealed.

**ISSUE:** Does probable cause for an arrest negate a malicious prosecution claim?

**HOLDING:** Yes.

**DISCUSSION:** The Court of Appeals examined Martin v. O’Daniel and held that “acting with malice and acting in good faith are mutually exclusive.”[[53]](#footnote-54) The Court of Appeals noted that “the issue of qualified official immunity is superfluous” as it is negated by a finding of the malice necessary for a malicious prosecution claim.

To prove malicious prosecution, the following elements are required:

1) the defendant initiated, continued, or procured a criminal or civil judicial proceeding, or an administrative disciplinary proceeding against the plaintiff;

2) the defendant acted without probable cause;

3) the defendant acted with malice, which, in the criminal context, means seeking to achieve a purpose other than bringing an offender to justice; and in the civil context, means seeking to achieve a purpose other than the proper adjudication of the claim upon which the underlying proceeding was based;

4) the proceeding, except in *ex parte* civil actions, terminated in favor of the person against whom it was brought; and

5) the plaintiff suffered damages as a result of the proceeding.[[54]](#footnote-55)

Specifically, the Court of Appeals addressed the probable cause element. Wilson argued Clem’s grand jury testimony was “exaggerated and misleading,” but failed to offer any elaboration on these claims. As such, the Court affirmed the circuit court’s decision.

**Pape v. White, 2019 WL 6998650 (Ky. App. 2019)**

**FACTS:**  While working as a photographer for UK, White was struck by a utility ATV operated by Commander Pape (Lexington PD). Commander Pape was assisting with traffic at a UK football game at the time. White filed suit against Pape and the Lexington-Fayette Urban County Government on a variety of negligence claims. Pape and LFUCG moved for sovereign immunity (LFUCG) and qualified immunity (Pape). The motion were denied and appeals followed.

**ISSUE:** Is driving a non-emergency vehicle generally a ministerial task?

**HOLDING:** Yes.

 **DISCUSSION:** First, with respect to LFUCG and its police department, the Court of Appeals held they were county agencies and entitled to sovereign immunity. That, by extension, provided immunity to Pape in his official capacity. With respect to Pape in his individual capacity, the Court of Appeals examined qualified immunity.

The defense of qualified immunity “applies to the negligent performance of ‘(1) discretionary acts or functions, i.e., those involving the exercise of discretion and judgment, or personal deliberation, decision, and judgment; (2) in good faith; and (3) within the scope of the employee’s authority.’”[[55]](#footnote-56) Further, it requires an analysis of the “particular acts or functions” and whether they are discretionary or ministerial. Qualified immunity only applies to discretionary acts. Driving is generally considered ministerial, and in this case, Pape was driving on the sidewalk en route to his assignment, not “involved in a police pursuit, crowd control, or an emergency response.” Accordingly, qualified official immunity does not apply.

The Court of Appeals reversed with respect to LFUCG, but affirmed with respect to Pape in his individual capacity.

SIXTH CIRCUIT

FEDERAL LAW

**Obi v. U.S., 2019 WL 6998155 (6th Cir. 2019)**

**FACTS:**  Lares spent the evening with Obi, in his apartment. Obi provided heroin to her, After ingesting the heroin, Lares became unresponsive. Obi called 911, but Lares passed away. Obi admitted the drug use. Lares’ autopsy revealed other drugs, including ethanol, codeine and morphine in her system and the cause of death was listed as “mixed use toxicity.” A medical expert testified that, but for the heroin, Lares would not have died. Another witness testified that both the heroin and the codeine would metabolize into morphine. Obi was charged with distributing that resulted in death. He stipulated the facts but argued that “these are not the drugs we are looking for.” Under the Burrage[[56]](#footnote-57) causation test, however, Obi could not show “actual innocence.”

He entered a conditional guilty plea and appealed.

**ISSUE:** May a subject be convicted of killing someone by providing drugs?

**HOLDING:** Yes.

**DISCUSSION:** The Sixth Circuit examined the “actual innocence” prong under Burrage. In that case, the “Supreme Court clarified the causation requirement of 21 U.S.C. § 841(a)(1) and (b)(1)(C), the same statute governing Obi’s case.” Applied to a case involving mixed use toxicity, the Sixth Circuit noted that “providing a drug that combined with other drugs to kill a victim, without proof that the other drugs would have killed the victim on their own, only amounts to a ‘contributing cause[.]’ That analysis led the Court to reverse the underlying conviction because contributing causes do not create liability under 21 U.S.C. § 814.”

For a conviction under Burrage, “the government must show the drug distributed by the defendant would have killed the victim independent of other drugs in the victim’s system or that the drug caused a death that would not have otherwise occurred.” Under that analysis, “even if the drug in question would not have caused the victim’s death on its own, the person who provided the drug is still liable if the drug “was the straw that broke the camel’s back.” That the testimony of the two doctors was proper and that “to rule for Obi, the lower court needed to conclude that no reasonable juror could find the heroin provided by Obi would have killed Lares independent of the other substances in her system. Looking at the doctors’ testimony about the minimal importance of Lares having ethanol and codeine in her system and about the medically lethal amount of morphine, the district court ruled against Obi. As such, he did not make a compelling argument for his actual innocence and the Court affirmed his conviction.

SEARCH & SEIZURE

SEARCH & SEIZURE – SEARCH WARRANT

**U.S. v. Thompson / Dortch, 790 Fed. Appx 685 (6th Cir. 2019)**

**FACTS:**  On February 14, 2018, Det. Schmidt (Akron PD) applied for a search warrant for a home to search for evidence of drug trafficking. Det. Schmidt described in detail the facts that supported the warrant, particularly describing that Dortch and Thompson were implicated by a CI. Upon execution of the search, officers found a variety of illicit drugs, cash, handguns and other items. Dortch and Thompson were both charged with possession and distribution. Suppression was denied. Also, the district court found no reason for a Franks[[57]](#footnote-58) hearing. After being denied a continuance, the pair, along with a co-defendant, entered conditional guilty pleas and appealed.

**ISSUE:** Can the terms “occupant” and “resident” have the same meaning within the confines of a search warrant affidavit?

**HOLDING:** Yes.

**DISCUSSION:** First, the Sixth Circuit noted that “to be entitled to a Franks hearing a defendant must: “1) make[] a substantial preliminary showing that the affiant knowingly and intentionally, or with reckless disregard for the truth, included a false statement or material omission in the affidavit; and 2) prove[] that the false statement or material omission is necessary to the probable cause finding in the affidavit.”[[58]](#footnote-59)

Dortch argued that when he was described as an occupant of the house, it was an “intentional or reckless falsehood” because he did not, in fact live there. The trial court “determined that the description was not untrue, because the term “occupant” is not synonymous with “resident”; the dictionary defines an occupant as “[one] that resides in or uses a physical space.”[[59]](#footnote-60) Therefore, the affidavit did not necessarily say that Dortch lived at 450 W. Bartges; it only said that he used the house. Because Dortch did use the house on at least one occasion, the description was accurate. Though it did not need to, the district court proceeded to the second Franks requirement and concluded that even if the identification of Dortch as an occupant was intentionally misleading, it was unnecessary to the magistrate’s assessment of probable cause. If the term “occupant” was erased from the affidavit, it would still state sufficient evidence to support a finding of probable cause.

The district court was affirmed.

**U.S. v Runyon, 792 Fed. Appx. 379 (6th Cir 2019)**

**FACTS:** On March 16, 2016, Officer VandenBerg (Grand Rapids, MI) applied for a search warrant for a local photography studio to search for drugs and drug evidence. The evidence in his affidavit included the following:

(1) A “reliable and credible” police informant, titled “#1228,” told VandenBerg, in person, that he “had been at [the studio at 12 Leonard Street] within the last 48 hours” and had “observed a quantity of cocaine being sold there” by a person named “David Dearies Runyon.”

(2) At the time informant #1228 left the studio, Runyon still had cocaine on the premises for sale.

(3) Informant #1228 had “been known to the Vice Unit for over two years,” “ha[d] made at least 8 controlled purchases of controlled substances,” and “ha[d] supplied information on numerous drug traffickers in the community,” which VandenBerg had “verified . . . through police records, personal observations, other police officers, and other reliable informants.”

The warrant was issued and the subsequent search revealed drugs and two illegal firearms. As he was a felon, Runyon was charged with possession. Runyon moved for suppression, arguing that the warrant lacked probable cause. The trial court found that the warrant was not perfect, but it was adequate. Even it was not adequate, Leon’s good faith exception applied.

Runyon entered a conditional guilty plea and appealed.

**ISSUE:** May an affidavit for a search warrant that provides minimal detail about past work with a CI be sufficient for the issuance of the warrant?

**HOLDING:** Yes.

**DISCUSSION:** The Sixth Circuit began:

Before entering a person’s home or property, and absent certain exceptional circumstances not at issue here, the government must obtain a warrant based “upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.”[[60]](#footnote-61) This provision of the Fourth Amendment exists to safeguard the people’s right to “retreat into the home and ‘there be free from unreasonable governmental intrusion.’”[[61]](#footnote-62) And, in recognition of this right’s importance, the Supreme Court has long held that evidence collected in violation of the Fourth Amendment may be excluded from the criminal trial of the victim of the unlawful search.[[62]](#footnote-63)

However, because being searched is different than being convicted, and because search warrants “are normally drafted by nonlawyers in the midst and haste of a criminal investigation,” probable cause presents a less demanding standard than “proof beyond a reasonable doubt” or “preponderance of the evidence”. Rather, all that is required is a “fair probability,” based upon “the totality of the circumstances,” that “evidence of a crime will be located on the premises of the proposed search.”[[63]](#footnote-64) This is a “practical,” “common-sensical” inquiry.[[64]](#footnote-65)

Moreover, even if the police execute a search warrant based on something less than probable cause, evidence acquired as a result of that search is not necessarily excludable at trial. Rather, under the “good faith” exception to exclusion set forth in U.S. v. Leon such evidence is excludable only “(1) when the affidavit supporting the search warrant contains a knowing or reckless falsity; (2) when the magistrate who issued the search warrant wholly abandoned his or her judicial role; (3) when the affidavit is so lacking in indicia of probable cause that a belief in its existence is objectively unreasonable; or (4) when the warrant is so facially deficient that it cannot reasonably be presumed valid.”[[65]](#footnote-66) This exception to the exclusionary rule exists because “the judge issuing a warrant—not the officer applying for one—has responsibility for determining whether probable cause exists.”[[66]](#footnote-67) There is therefore “little deterrent effect” to applying the exclusionary rule to law-enforcement officers who merely applied for a warrant in good faith, and who otherwise behaved in an “objectively reasonable” manner.

In applying these vague principles to the particular facts before us, three, more narrowly drawn, principles are of note, too. First, “if a confidential informant—personally known by the [officer] to be reliable—allege[s] direct, personal observation of criminal activity, then the [officer] [does] not have to include in the affidavit further corroboration of the informant’s allegations.”[[67]](#footnote-68) Second, for an informant to be sufficiently “reliable” under this first principle, the officer “need only specify that the confidential informant has given accurate information in the past.”[[68]](#footnote-69) Third, if the sufficiency of an officer’s affidavit “is a close question”— because the affidavit is notably similar to one affirmed by a prior precedent of this court—the Leon good-faith exception should generally apply.[[69]](#footnote-70)

The Sixth Circuit agreed the affidavit is weak, and that more would have supported it, “precedent squarely holds that such corroboration was not necessary under the circumstances.”

It continued:

Here, Officer VandenBerg’s description of informant #1228’s tip was hardly “detailed.” However, informant #1228 did relay recent, “first-hand” observations of cocaine distribution by a particular person at a particular residence, and further confirmed that cocaine was still on the premises for sale after he left. Based on this information, it is hard to distinguish Brown, much less the confidential-informant cases upon which Brown relied, which presented even less detailed affidavits than the one presented here.[[70]](#footnote-71) Consequently, to secure probable cause to search Runyon’s studio for drugs, Officer VandenBerg did not need to execute a controlled buy or inspect local property records (although the affidavit would have been far stronger had he done so).

Second, although Runyon is also undoubtedly correct that Officer VandenBerg should have provided more detail about his relationship with informant #1228, such as by noting when in the “last two years” informant #1228 had provided reliable information, our precedents likewise hold that that such detail was unnecessary under the circumstances. Brown is again illustrative. There, we held that the officer used sufficient detail to verify an informant’s reliability when the officer attested, first, that the informant “had been used by [the Narcotics Enforcement Team] in numerous other investigations and provided information that ha[d] been corroborated and shown to be reliable by [the Narcotics Enforcement Team], the Michigan State Police and the Grand Rapids Police Department,” and, second, that he (the officer) was “personally aware that [the informant] ha[d] provided information that has led to the prosecution and conviction of at least two federal defendants in the Western District of Michigan, as well as other persons convicted by Michigan authorities. Our “clearly establishe[d]” precedent required nothing more, we ruled. Because Officer VandenBerg provided equally detailed information here—for instance, by specifically noting that the Grand Rapids Vice Unit had worked with informant #1228 for “two years,” that the Unit had relied on informant #1228’s assistance for “eight controlled buys,” and that Officer VandenBerg had confirmed informant #1228’s reliability through, inter alia, “personal observation”—Brown, and the precedents upon which Brown relied, guide the outcome here, too. As a result, probable cause was not lacking simply because Officer VandenBerg failed to provide more detailed information about his past work with informant #1228.

Third, and most importantly, even if Officer VandenBerg’s affidavit did not provide “probable cause” to search Runyon’s studio—and we need not definitively say if it did or not—this case falls in the very heartland of the Leon good-faith exception.[[71]](#footnote-72) U.S. v. McCraven is instructive. In that case, the police applied for, and received, a warrant to search a suspected drug dealer’s home. The affidavit supporting the warrant application was even sparser than the one here. It simply stated: “an informant who ha[s] previously given reliable information saw [the defendant] selling cocaine and marijuana inside his house.” This statement arguably failed to provide probable cause, we observed, because, although it was similar to affidavits we had approved in cases like U.S. v. Allen, it nonetheless failed to provide important details contained in those affidavits, such as statements about “the length of the relationship between the detectives and the informant” or about “the nature of the information provided by the informant in the past.” There was also “no suggestion that the detectives named the informant to the issuing judge.” Id. Still, we held, because “the facts of Allen [did] not define the minimum requirements for an affidavit based on an informant’s tip,” and because “the sufficiency of the [at issue] affidavit [was] a close question” under those precedents, it seemed “obvious that the law-enforcement version of the hypothetical ‘reasonable person’—i.e.[,] ‘a reasonably well trained officer’—would not necessarily have known that the affidavit supporting the warrant at issue here was insufficient, if in fact it was insufficient. Accordingly, the Leon good-faith exception applied.

The Court concluded:

To close, we again emphasize that Officer VandenBerg’s affidavit was weak, and that he should have put more effort into investigating informant #1228’s tip than he did. Accordingly, this holding should not be understood as an open “invitation for investigators to draft—or for executing officers to rely upon—similarly threadbare affidavits.”[[72]](#footnote-73) However, because precedent controls the outcome of this particular decision, we need not say more about how far the exclusionary rule will bend to accommodate “similarly threadbare affidavits” in future cases.

The Sixth Circuit affirmed the denial of the motion to suppress.

**U.S. v. Crawford, 943 F.3d 297 (6th Cir. 2019)**

**FACTS**: Officer Nelson (Blue Ash, Ohio, PD) learned through a CI by the name of Heard that Crawford was dealing cocaine. Nelson had not worked with the before, so he proceeded to talk to other officers who had. Other officers deemed him reliable. Heard also identified Crawford from a photo and provided the officer with Crawford’s cell phone number. Heard told Nelson that Crawford was looking to sell a large quantity of cocaine. Nelson also learned Crawford had multiple drug-trafficking convictions. Heard continued his work and showed text messages to Nelson in which a sale was being organized.

Using that information, Nelson obtained a warrant to track Crawford’s cell phone. He cited Heard’s information but did not name him. Heard provided more information concerning Crawford’s car. The vehicle was registered in Ohio and was located at an apartment near Florence, Kentucky, where Crawford’s wife lived. Nelson saw Crawford at that location. With the help of Detective Boyd,[[73]](#footnote-74) Nelson obtained a second warrant, which allowed the placement of a tracking device on the vehicle. Heard’s information was contained within the second warrant. Finally, Heard completed a controlled buy, and Crawford was surveilled when he left the apartment in Kentucky to go to the location. Heard was searched and given cash for the buy, but the listening device he wore did not operate. Heard returned with the drugs, and GPS data indicated Crawford returned to the apartment. With that information, the officers sought a third search warrant, for the apartment. Cash and cocaine were found. “Crawford incriminated himself, admitting that he sold on consignment an ounce of cocaine to “Jerry,” and that he had placed cocaine under his sink.

Crawford was charged with three counts related to drug trafficking. He moved to suppress, arguing against the search warrant. Specifically, he claimed that Boyd “made a materially false statement regarding the content of the phone conversation during which the gym meeting was arranged.” The magistrate ruled against his motion and demand for a Franks hearing. He was convicted at trial and appealed.

**ISSUE:** May officers rely on a CI attested to by other officers?

**HOLDING:** Yes.

**DISCUSSION:** The Sixth Circuit began:

Confidential informants play an important role in combatting drug trafficking. Reflecting as much, our cases reveal numerous examples of confidential informants providing critical information to support search warrants targeting drug crimes.

To determine probable cause, a reviewing court “is limited to examining only “the information presented in the four-corners of the affidavit.”[[74]](#footnote-75) But as to the conclusions to be drawn from the information within those four corners, a reviewing court must accord “great deference” to the decision of the issuing court.[[75]](#footnote-76)

When CI’s are an important part of a search warrant application, courts are required to “examine the messenger more than the message,” with a focus on the informant’s reliability. Different circumstances require different means for verifying an informant’s reliability. Courts begin by examining the known facts and circumstances regarding the informant.[[76]](#footnote-77) An easier case for verification is one in which an officer uses a confidential informant known to that officer. In that setting, courts typically do not require the officer to verify independently any of the information provided by the informant. Allen is one example. There, the Sixth Circuit did not require independent corroboration of information received from a confidential informant because the informant, for “over a five-year period,” was “personally known to the detective who swore the affidavit.

When other officers know the informant, the assessment is a bit different. “If the affiant officer avers that another officer has vouched for the informant’s reliability, that too will typically satisfy our reliability inquiry.”[[77]](#footnote-78)

Finally, in cases in which “an officer relies upon information from an informant the officer is using for the first time, and whose credibility the officer cannot verify through other officers. In that instance, there is no track record of credibility to fall back on. We thus require the officer to take steps to test the informant’s veracity.[[78]](#footnote-79) In such cases, officers might verify key information received from the informant, where plausible to do so. Or the officer could identify multiple sources providing the same information, increasing the likelihood that the tip is reliable.

In this case, neither Nelson nor Boyd knew Heard. Nelson adequately supported Heard’s information, however, by talking to other officers who had worked with Heard. “That confirmation alone can be compelling evidence of an informant’s reliability. Nelson also stated that Heard identified Crawford from his driver’s license photo. And, Nelson added, Heard provided him with Crawford’s telephone number, reaffirmed that number a second time, and then a third time, showing Nelson text messages between Heard and Crawford. Nelson, for his part, independently examined Crawford’s background, discovering Crawford’s criminal past, which included drug trafficking.” The Court held that passed muster.

With respect to the third warrant, Crawford argued there “was no nexus between his home and his then-known criminal conduct, meaning that affidavit too did not sufficiently establish probable cause justifying the ensuing search.” He had not raised that issue before, however, which limited the court to reviewing it under the plain error standard, a “tall order.”

The Sixth Circuit held that:

That general rule is refined when the place is a home and the evidence drugs. “[I]n the case of drug dealers,” we have observed, “evidence is likely to be found where the dealers live.”[[79]](#footnote-80) And so a court issuing a search warrant “may infer that drug traffickers use their homes to store drugs and otherwise further their drug trafficking.”[[80]](#footnote-81)

Boyd had used the information in the first two warrants, obtained by Nelson, to obtain the third. “Heard was demonstrably a reliable source of information, as reflected in the first two warrants. And the third warrant, it bears adding, was also supported by Heard’s first-hand account of purchasing cocaine directly from Crawford.”

Finally, Crawford argued the third warrant was “premised upon a knowingly and intentionally false statement in the underlying affidavit. Crawford singles out the statement in the affidavit asserting that Heard and Crawford arranged to meet for a drug transaction. Because there was no express mention of drugs in the monitored phone call in which Crawford and Heard discussed meeting at the gym, Crawford says the corresponding statement in the affidavit is untruthful. Accordingly, Crawford requests a hearing to test how that false statement impacted the evidence-gathering process.[[81]](#footnote-82)

Addressing this argument, the Sixth Circuit stated:

The type of hearing Crawford seeks has come to be known as a “Franks hearing,” following the Supreme Court’s holding in a case by that name. In a Franks hearing, a court determines whether to suppress the fruits of an executed search warrant, where the warrant was the result of a false statement. To demonstrate entitlement to the hearing, a defendant must make a “substantial preliminary showing that a false statement knowingly and intentionally, or with reckless disregard for the truth, was included by the affiant in the warrant affidavit.” “The allegedly false statement,” moreover, must be “necessary to the finding of probable cause.”

A Franks analysis turns on two questions of fact, and one of law. The two questions of fact: One, is there a false statement included in an affidavit? If so, then two, how culpable is the affiant officer in including that statement in the affidavit? Where the affidavit does include a false statement, and where the officer making the statement was culpable in doing so, then the court turns to a question of law: After excising the false statement, is there sufficient information in the affidavit to constitute probable cause to issue a warrant?

Even if, for arguments’ sake, Crawford can meet his burden on the factual issues, he cannot meet his burden on the legal one. After all, even if the statements at issue were false, and even if Boyd had some culpability in including them in his affidavit, the affidavit contained an ample amount of other evidence to support a finding of probable cause to search Crawford’s home. It explained that Heard and Crawford had discussed the price at which Crawford would sell cocaine to Heard as well as the organization from which Crawford would buy that cocaine. And it explained the details of the controlled buy in which Heard claimed to have purchased cocaine from Crawford.

The truthful evidence in the affidavit thus outweighs any concern over the inclusion of arguably false content. It follows that, after excising any mention of the phone call, the district court still had sufficient evidence upon which to find probable cause. Accordingly, we reject Crawford’s claim that he should be afforded a Franks hearing.”

Crawford also argued that his “incriminating statements made to police officers while in custody.” He contended he was not giving his Miranda rights prior to the interrogation. Both officers testified, however, that they did so. The Court agreed the trial court’s assessment of credibility would hold. His only evidence was “a recording made while he was being questioned in a police car. In that recording, Deputy Canfield mentions that he did not know whether Crawford had been Mirandized. But weigh that equivocal statement against the unequivocal testimony from two other officers, each of whom testified that Crawford had been Mirandized. The best Crawford can say, then, is that the district court was presented with conflicting testimony.” Further, the magistrate had ruled that Crawford had waived his rights, voluntarily and knowingly.

Finally, the Court addressed a complaint of improper witness bolstering by the prosecution, but the Court agreed that Nelson’s testimony as to how he validated the CI’s credibility was appropriate.

Crawford’s conviction was affirmed.

**U.S. v. Bateman, 945 F.3d 997 (6th Cir. 2019)**

**FACTS:** In 2014, the FBI began to investigate a dark web site – Playpen – a message board that advertised and distributed child pornography. Playpen was relatively inaccessible, hidden behind the Tor network. To gain entry, one had to install special software and obtain the “intricate URL” from another user and then enter the convoluted URL into the software. The server was based in Central America, which further masked users. Eventually the FBI learned that a U.S. based IP was being used for it. The FBI executed search warrants in early 2015, and were able to duplicate the server, taking administrative control of the site.

Using a more targeted search warrant, the FBI was able to discover the IP addresses of users, utilizing the Network Investigative Technique (NIT). For approximately two weeks, the FBI operated the Playpen site, collecting user data. One user was Bateman; he was a heavy user during that time. With that data, another warrant was obtained, this one for Bateman’s residence in Ohio. An investigator determined that most of the images Bateman accessed were likely child pornography. Ultimately a number of images and video files of child pornography were discovered.

Bateman was charged with possession of child pornography. He moved to suppress and was denied. He entered a conditional guilty plea and appealed.

**ISSUE:** May a possibly invalid warrant still be upheld under Leon?

**HOLDING:** Yes.

**DISCUSSION:** The Sixth Circuit began:

The ever increasing and unprecedented capabilities of today’s world wide web offer users access to information far beyond even twentieth-century imagination––all in just a matter of seconds. Adopting the vernacular of cyber-speak, the great majority of this content is on the “open” or “traditional” internet, meaning it is accessible by ordinary users without use of any special equipment, passwords, secret knowledge, or closed networks. But, beneath this easily accessible world lies a wholly separate world of cyber content, known colloquially as the “dark web,” which is largely inaccessible to average internet users. Within this space, a number of cyber outlets distribute questionable content.

Bateman first argued that the initial warrant was void *ab initio* because it could not apply outside the Eastern District of Virginia, where the warrant was obtained. Thus, Bateman asserts that the warrant issued for his Ohio home was invalid. His case was one of many arguing the same point by defendants across the U.S. that were caught up in this investigation. Following the logic from a Tennessee case, the district court found that under Leon, the warrants were executed in good faith. The Sixth Circuit found no reason to deviate from that line of authority.

The Sixth Circuit also disagreed that a Franks hearing was needed to challenge the primary investigator’s warrant. The affidavit identified the site as focusing on child pornography rather than, as Bateman argued, a site for innocent child erotica. The “multiple, arduous steps” needed to access the hidden site, and its obvious import as show on its home page, made it clear that the characterization was not improper. And even removing the agent’s characterization from the affidavits was not enough to overturn all of the other evidence of Bateman’s awareness of the nature of the site.

The Sixth Circuit affirmed the conviction.

**U.S. v. Carter, 792 Fed. Appx. 366 (6th Cir. 2019)**

**FACTS:**  During the summer of 2014, Carter, an adult living in Tennessee with his parents, befriended a number of minor females on Kik. He used multiple personas to entice the girls to send him nude photos, and then blackmailed them into sending more nude photos by threatening to publicize the photos he already had. Finally, a 13-year-old victim reported what had occurred. Investigators determined the usernames and subpoenaed the information from Kik as to the real identity. The IP addresses for the sessions with that victim had already been deleted, but more recent sessions with that username linked to an IP address to Carter.

The case was handled by Det. Higgins, a deputy sheriff in Rutherford County, TN, where the address was located. She obtained a search warrant detailing the investigation. Carter surrendered his devices and passwords, and the investigators found hundreds of images of child pornography, along with records of Kik chat sessions.

Carter was charged with a variety of child-pornography related federal crimes. Carter moved for suppression and a Franks hearing. Both were denied. Carter entered a conditional guilty plea and appealed.

**ISSUE:** Is there a high standard for a Franks hearing?

**HOLDING:** Yes.

**DISCUSSION:** The Court began:

To obtain a Franks hearing, a defendant must make a substantial preliminary showing of two things: first, that the affidavit includes a false statement that was made “knowingly and intentionally, or with reckless disregard for the truth”; second, that the allegedly false statement is “necessary to the finding of probable cause.”[[82]](#footnote-83) In the context of child pornography, an affidavit that connects a defendant, an offending username, and the defendant’s residence is enough to establish probable cause for a search.[[83]](#footnote-84) Carter says that Higgins’s affidavit falsely linked the September 14 chat sessions with his IP address, because Kik in fact did not have IP information for those sessions. The rest of the affidavit, however, shows that someone used two usernames to coerce a child to send sexually explicit images, and that those usernames accessed Kik from an IP address associated with Carter’s residence. That connection—between Carter, his residence, and the offending usernames—is enough to show that there was a “fair probability” that evidence of a crime would be found at Carter’s house. The affidavit’s allegedly false statement was therefore immaterial to the issue of probable cause. Hence the district court properly denied Carter’s motion for a Franks hearing.

The same standard, essentially, applied to motion to suppress the fruits of a search. The Sixth Circuit held that the search was restricted to an iPhone and iPad used to facilitate the viewing of images and chat sessions. The warrant was not overbroad in what it authorized. Further, the officers were voluntarily admitted by Carter’s father and showed the warrant when asked.

Finally Carter argued that the use of an administrative warrant was improper, but the Sixth Circuit noted that “the good-faith exception to the exclusionary rule applies to searches that complied with the Stored Communications Act and then-binding case law.[[84]](#footnote-85)

Carter’s conviction was affirmed.

**U.S. v. Cooper, 778 Fed. Appx. 396 (6th Cir. 2019)**

**FACTS:**  On September 23, 2016, Sgt. Palmer (Lexington PD) was doing paperwork in his cruiser when he heard 8 gunshots nearby. At first, Sgt. Palmer thought someone was shooting at him. He moved toward the sounds and spotted a vehicle moving toward him and away from the location of the gunshots. He turned to follow the vehicle and did so until the vehicle pulled into a driveway and stopped. The driver (Cooper) exited and headed toward the house. Palmer approached on foot. Palmer asked what Cooper was doing, and Cooper indicated he was visiting a friend, albeit the house was dark. Palmer found nothing on Cooper via a frisk and was denied consent to search the car. Arriving backup officers could see, in plain view, shell casings inside the car. Cooper was handcuffed and frisked a second time. A woman appeared from the home and denied anyone in the house bore the name Cooper had provided for his friend. Palmer intended to release Cooper but hold the car. On a third frisk, another officer found cocaine. Cooper was then arrested.

Officers obtained a warrant for the car and found a pistol loaded with a single round, 8 shell casings, drugs and paraphernalia. Cooper, a convicted felon, was charged under federal law with possessing the guns and with trafficking. He moved to suppress and was denied. He eventually entered a conditional plea to some of the charges and appealed.

**ISSUE:** May an officer detain a subject briefly on suspicion?

**HOLDING:** Yes.

**DISCUSSION:** Cooper argued there was insufficient reasonable suspicion to detain him. Palmer, however, testified as to his experience and training, and what that told him about Cooper’s actions. Cooper’s vehicle was the only vehicle coming from the direction of the nearby gunshots and pulled into the driveway of a darkened home, after midnight. Cooper’s explanation was suspicious. Despite documents that suggested the shots had occurred 37 minutes prior to the stop, Palmer explained that was a simple timestamp issue, and that he saw Cooper within a minute of the shots. Further, even though nothing was found on the initial frisk, that was not the end of the investigation, and that any delay was simply waiting for backup officers. Once they spotted the casings, further investigation was warranted.

Cooper’s convictions were affirmed.

SEARCH & SEIZURE - CONSENT

**U.S. v. West, 789 Fed. Appx. 520 (6th Cir. 2019)**

**FACTS:** During a traffic stop following a tip that she was transporting drugs Tennessee, West admitted that she was concealing drugs on her person and handed them over. She gave consent to search the car but nothing incriminating was found. The dash video showed West “walking around, engaging in discussion with officers, and also laughing with officers.” She claimed, later, that “she did not do so voluntarily because the police had, by that point, created an “inherently coercive environment” in violation of the Fourth Amendment.

West was indicated for possession with intent to distribute. The trial court denied her motion to suppress, finding that the video showed no intimidation. A private conversation, with the lead detective, was out of the camera’s line of sight, was initiated by West, and she later conceded she had done so to talk about the drugs.

West entered a conditional guilty plea and appealed.

**ISSUE:** May a suspect’s conduct indicate that consent to search was not coerced?

**HOLDING:** Yes.

**DISCUSSION:** The Sixth Circuit began:

We assume, for purposes of this decision, that Shockley’s request for West to turn over the drugs qualifies as a “search” under the Fourth Amendment, which avoids any need to opine on that preliminary issue.[[85]](#footnote-86) The search was nevertheless reasonable under the Fourth Amendment. A search is reasonable when it is supported by a warrant or an exception to the warrant requirement.[[86]](#footnote-87) The usual exceptions apply in this verbal-search context.[[87]](#footnote-88) And here, the magistrate judge found as a fact that West voluntarily produced the drugs without police coercion.

The Sixth Circuit held that it was proper to find no coercion when the dash-cam footage that showed that West was “cooperative and nonchalant in her actions.”

The conviction was affirmed.

INTERROGATION

**U.S. v. Martinez, 2019 WL 6005494 (6th Cir. 2019)**

**FACTS:** Martinez had long been a Detroit PD officer when he was caught up in a Nevada investigation of child pornography. The case was passed to the Detroit FBI and while Martinez was on duty, agents served a search warrant on his home. Thereafter, the agents decided to interview him. Concerned that Martinez would be armed, they brought him into police headquarters on a ruse, during which he was to go to a secured part of the building that required him to disarm and lock up his firearm before entering the conference room. The FBI agents inside were armed. Martinez was seated across from the agents, facing the door. The agents explained their investigation and what they had discovered. Martinez admitted using the software, a file sharing program, but stated that he used it only to search for music, and that he deleted all improper material. The agents showed him graphic screenshots of what they found in the folder where such material was downloaded on his computer.

Throughout the conversation, both agents used a cordial and nonconfrontational tone. The agents did not handcuff Martinez or physically restrain him in any way. The agents also said repeatedly—nine times in total, on average once every nine minutes—that Martinez was speaking with them voluntarily, was not under arrest, or that he had the right to leave anytime he wished. Martinez’s own comments likewise indicated that he understood he was free to go and was not under arrest. [[88]](#footnote-89)

The interview was “not entirely enjoyable for Martinez.” Martinez was concerned about losing his job and the embarrassment. He refused to share his computer password but did allow access to his phone. He was arrested at the end of the interview but allowed to use the restroom and make phone calls.

Martinez was indicted and moved for suppression, arguing that “he had been in custody for Miranda purposes but had not been given Miranda warnings.” The district court agreed and suppressed the evidence. The government appealed.

**ISSUE:** Must a number of factors be considered in deciding for or against a Miranda custody decision?

**HOLDING:** Yes.

**DISCUSSION:** The Sixth Circuit began:

If a suspect is in police custody, officers must clearly inform him of his Miranda rights

before questioning him.[[89]](#footnote-90) If they do not, they may not use the resulting evidence in a subsequent prosecution. A person may be “in custody” while not actually under arrest. “‘[C]ustody’ is a term of art that specifies circumstances that are thought generally to present a serious danger of coercion.”[[90]](#footnote-91) “In determining whether a person is in custody in this sense, the initial step is to ascertain whether, in light of ‘the objective circumstances of the interrogation,’ a ‘reasonable person [would] have felt he or she was not at liberty to terminate the interrogation and leave.’”[[91]](#footnote-92) To determine “how a suspect would have ‘gauge[d]’ his ‘freedom of movement,’ courts must examine ‘all of the circumstances

surrounding the interrogation.’”[[92]](#footnote-93)

The ultimate question is “whether the relevant environment presents the same inherently

coercive pressures as the type of station house questioning at issue in Miranda.” Id. Four

considerations have particular relevance: “(1) the location of the interview; (2) the length and manner of the questioning; (3) whether there was any restraint on the individual’s freedom of movement; and (4) whether the individual was told he or she did not need to answer the questions.”[[93]](#footnote-94) But this list is not exhaustive, and no single factor is determinative.[[94]](#footnote-95)

The district court recited the Hinojosa factors and concluded that “these factors weigh in favor of a finding of custody.” The Sixth Circuit disagreed, noting that “whether investigators inform a suspect that he is free to leave or to refuse to answer questions is the most important consideration in the Miranda custody analysis.” Assurances that he would be released (even though he was not) would “cut[s] heavily against Martinez’s argument that he was in custody.” The agents “told Martinez at least nine times—on average, once every nine minutes—that he was meeting with them voluntarily and could leave at will. The agents were clear that Martinez had the right to speak with an attorney and that they would not “play games with that.” A reasonable interviewee, told nine times that he was not in custody and could leave at will, would generally understand just that.” The Sixth Circuit noted that “[e]xplicit warnings that an interviewee may leave at any time do not become less valid with repetition. If anything, they become more so.” Despite the “desperation” in his voice, that does not mean he was not talking voluntarily. ““Whether a person is in custody for Miranda purposes is determined by neither the perception of the defendant nor of the police. It is determined by the objective perception of a reasonable man in the defendant’s shoes.”[[95]](#footnote-96) Despites his comments that he would “love” to go back out and work his shift, in context, this statement was simply a reflection of his “growing realization that he would not be able to continue a career he loved.”

The Sixth Circuit also examined other factors, including the fact that while he came to headquarters on a ruse, he was not ordered to talk to the agents. A ruse is not illegal, and is “is relevant for Miranda purposes only to the extent that it would make a reasonable person in Martinez’s position feel compelled to remain and answer the agents’ questions.[[96]](#footnote-97)

Martinez doubtlessly felt some psychological pressure to answer the agents’ questions when he realized that they had tricked him into coming to an unfamiliar location so that they could interrogate him. Still, nothing about the ruse indicated that the agents would prevent him from leaving the conference room or attempt to force him to speak. Absent additional facts that bear more directly on whether a reasonable person in Martinez’s position would have felt free to leave, the agents’ ruse on its own cannot establish Miranda custody.

\*\*\*\*\*

Hinojosa tells us to look next at “the length and manner of the questioning.”

The district court found that the length of the interview (eighty minutes) was not itself

problematic. We agree. Nevertheless, said the district court, “one need only listen to the recording to determine that the Agents’ manner of questioning, albeit ‘cordial,’ was relentless and accusatory. They repeatedly called Mr. Martinez’s story bullshit . . . .” Again, however, the audio recording itself leaves us with the definite and firm conviction that these factual findings were mistaken.

The questioning was hardly “relentless”; there were stretches of silence in which the agents asked no questions at all until Martinez (obviously coming to terms with the end of his law enforcement career) broke the silence and started thinking out loud. For example, without any question to prompt him, Martinez attempted to explain away his computer’s contents—saying that sometimes he would download lots of files and leave the house, and would delete any illicit files as he came across them later. At another point—again, without prompting—he volunteered that he is a “good guy” and “didn’t do any of this stuff with malice or intent.”

The interview might be described as “accusatory” in the sense that the agents believed Martinez had committed crimes and laid out the evidence they had against him. But that is not enough to create custody: “Miranda warnings are not required simply . . . because the questioned person is one whom the police suspect.”[[97]](#footnote-98) (citations omitted). A statement by an officer that he believes the suspect is guilty is relevant only to the extent that it “affect[s] how a reasonable person in that position would perceive his or her freedom to leave.” We have previously found no Miranda custody where, as here, a federal agent confronted the defendant with images of child pornography downloaded from his computer and, unlike here, even informed the defendant that the Government was going to prosecute him.[[98]](#footnote-99) In this case, the tone of the conversation remained calm and noncombative, and we would certainly not describe it as so “relentless” or “accusatory” that it would lead Martinez to believe he was not free to leave.

It is true that one of the agents called Martinez’s answers “bullshit” on one occasion—but this did not happen “repeatedly,” as the district court found, and the agent’s tone was not hostile or aggressive. And even so, using such language does not strongly support a finding of custody in these circumstances; both Martinez and the agents casually swore throughout the interview in a joking sort of way, and Martinez was the first to do so. Further undercutting the district court’s findings in this regard was the respect with which the agents conducted the interview. They told Martinez over and over that they admired his thirty years of DPD service; offered him the chance to satisfactorily tell his “side” of the story; explained that they had interviewed him at Headquarters rather than at Martinez’s usual post because they did not want to embarrass him in front of his coworkers; and said they would have preferred to interview him at his house if they could have done so.

Martinez’s own statements during the interview similarly cut against the district court’s conclusion. He told one of the agents that the agent seemed like a “good guy” and that he could “respect him”; he mentioned that he would have enjoyed challenging the agents to a game of pool in his basement if the interview had been at his house; and he repeatedly joked around with the agents. And toward the end of the interview, when Agent Nichols said he had no more questions for Martinez, Martinez replied: “I don’t want you guys to leave man, I kind of like talking to you, hanging out with you guys.” Of course, Martinez’s state of mind is not directly relevant to whether he was in Miranda custody, but these statements can be evidence of how a reasonable person would have perceived the situation. This was a friendly, albeit uncomfortable, interaction—not an inquisition. Accordingly, we find clear error in the district court’s factual findings. The manner and tone of the agents’ questions do not weigh in favor of Miranda custody.

We look also to whether Martinez’s freedom of movement was restricted to the degree associated with a formal arrest.[[99]](#footnote-100) The district court found that Martinez was “confined to a conference room in which two armed FBI agents were seated between him and a closed door.” Although this fact points slightly in favor of custody, that is not nearly enough, and other facts reveal that Martinez’s freedom of movement was not significantly restricted. The interview took place in a large conference room, and Martinez was not handcuffed until his later, formal arrest.[[100]](#footnote-101) There is no evidence that Martinez was not free to move about the room. Furthermore, one agent offered uncontradicted testimony that although the conference doors were closed, they were unlocked.[[101]](#footnote-102) Both agents were armed, but they never brandished their weapons or even showed them to Martinez.[[102]](#footnote-103)

Also relevant to this factor is whether the agents isolated Martinez from the outside world.[[103]](#footnote-104) Martinez is right that the officers asked him to turn off his police radio at the outset of the interview. Listening to the recording, however, makes clear why the agents made this request—the radio traffic was so loud it was interfering with their conversation. A reasonable person in Martinez’s position would not have perceived this request as an attempt to isolate him. The agents told Martinez he could “absolutely” check his personal text messages during the interview.[[104]](#footnote-105) And after the interview concluded, Martinez was allowed to go to the bathroom and make two phone calls before he was formally arrested. These details, which the district court did not discuss, weigh against custody.

The district court instead focused its attention on Martinez’s request for water, finding that “[w]hen [Martinez] asked if he could get water, . . . the two Agents looked at each other, Agent Fitzgerald shook his head ‘no,’ and Agent Nichols went to retrieve the water on his behalf.” This particular interaction does weigh in favor of custody.

But on whole it was error to conclude that Martinez’s freedom of movement was restricted to the degree associated with a formal arrest. Considering the absence of physical restraints and Martinez’s ability to communicate via cell phone, a reasonable person would not have felt significantly restrained.

In sum, the agents’ ruse and Martinez’s unfamiliarity with the Headquarters building tip slightly in favor of custody, as does the agents’ decision to confront Martinez with graphic still images of child pornography taken from his Ares folder and their refusal to let him exit the room to retrieve water himself. But the length and manner of the questioning, as well as the absence of restraints, cut strongly against Miranda custody. Martinez voluntarily agreed to speak with the agents; the interview’s length (eighty minutes) was not too long under these circumstances; Martinez was not handcuffed or physically restrained; Martinez was free to contact others outside the conference room by text message; and Martinez was able to go to the bathroom and make two phone calls before being formally arrested. Even without considering the agents’ assurances, we would likely conclude the interview was noncustodial. But the agents’ repeated statements that Martinez was speaking to them voluntarily and was free to leave dissolve any remaining doubt. Under these circumstances, the fact that the FBI agents told Martinez nine times that he was not under arrest, was there voluntarily, or was free to leave weighs heavily in favor of non-custody. The district court either discounted the evidentiary value of these statements or considered them evidence of Miranda custody (“But he doth protest too much”). Either approach would have been legal error. The totality of the circumstances, giving appropriate and substantial weight to the agents’ clear and frequent assurances, tells us that Martinez was clearly not in custody during this interview. Accordingly, suppression was not warranted.

The Sixth Circuit reversed the suppression order.

**U.S. v. Butler, 790 Fed. Appx. 782 (6th Cir. 2019)**

**FACTS:** In August 2017, Butler walked into a Mansfield (OH) gun store. When a clerk was distracted, he seized a pistol and hid it on his person. When the clerk realized the gun was missing, the store owner reviewed video that documented the theft, and reported the theft to police. Officer Gladden watched the video and recognized Butler. Officer Gladden’s report indicated personal knowledge of Butler. Sgt. Kilgore read the report. Later that same day, Sgt. Kilgore responded to a theft at a gas station that involved Butler. As Kilgore approached the store, he spotted Butler and followed him, and was joined by other officers.

Kilgore spoke to Butler. Because Butler claimed to be afraid to be a snitch, he agreed to accompany Kilgore while pretending to be in custody. Kilgore told him, when he presented his hands to be handcuffed, that he was not in custody. They drove a short distance and Kilgore got Gladden on speakerphone. Butler agreed to get the missing gun but that he needed some time. Gladden told Kilgore (off speaker) to arrest Butler for theft and he did so.

Butler, a convicted felon, was charged with possession of the gun. Butler moved to suppress his admission. The trial court agreed Kilgore’s version was more reasonable than Butler’s and denied the suppression. Butler was convicted and appealed.

**ISSUE:** Does an arrest “ruse” requested by the subject mean they are actually in custody for Miranda purposes?

**HOLDING:** No.

**DISCUSSION:** Butler argued he was placed in custody and questioned without Miranda warnings. The Sixth Circuit held that Kilgore’s version of events was credible and that an encounter in open view at an agreed upon location was generally not custody. Sgt. Kilgore specifically did not handcuff Butler. The questioning was less than 15 minutes. Butler argued that he was locked inside the cruiser, being presumably in the back seat, but “Butler himself chose to be there.” While he was not told he could leave or refuse to answer, that omission alone does not change the analysis.

The conviction was affirmed.

**U.S. v. Davis, 2019 WL 6713394 (6th Cir. 2019)**

**FACTS:** Davis was accused of making straw firearms purchases, claiming he was buying firearms for himself when he was actually buying firearms for others. When search warrants were executed at Davis’s home, he was interviewed and admitted to making false statements. A motion to suppress and was denied. Davis was convicted and appealed.

**ISSUE:** Does Miranda require explaining the exact nature of the investigation?

**HOLDING:** No.

**DISCUSSION:** Davis argued by not being advised prior to the questioning that he was under investigation for making false statements, he was not “fully and appropriately” advised of his rights. He was, in fact, given Miranda twice. Nothing, the court agreed, required law enforcement to explain the nature of his crimes under investigation. In fact, the ATF agent discussed the search warrants with Davis and told him the warrants related to his activities with firearms.

The conviction was affirmed.

**U.S. v. Parrish, 942 F.3d 289 (6th Cir. 2019)**

**FACTS:** In August 2016, law enforcement served a search warrant at a Newark, Ohio home. The warrant was based upon an investigation that linked child pornography downloads to that residence. Parrish was the focus of this investigation. Parrish had a prior conviction in a related matter. Parrish was present at the time of the search warrant’s execution and he spoke to officers at the scene in a mobile forensic lab. The lab was new and the officers were unfamiliar with the audio equipment. Inadvertently, the officers muted the audio of the interview, leaving only video being recorded. Parrish was advised of his Miranda rights and admitted he had nude pictures of his pre-teen daughter on the phone. At some point, Parrish handed over his phone after changing the password to a simple one. Det. Simon located the videos. Parrish explained that he discovered them after his daughter sent the videos to a man on Facebook, and he preserved them to confront her with them if necessary. He did not have custody of his daughter, apparently. While must of Parrish’s statements were confirmed, Parrish had taken one inappropriate photo on his own. Evidence further showed that he watched the video a number of times and had screenshots from the video as well. Parrish never addressed the situation with his daughter.

Parrish was convicted of receiving child pornography. He appealed.

**ISSUE:**  Is it coercive to hand over a cell phone upon request, while at the scene but in a police vehicle?

**HOLDING:** No.

**DISCUSSION:** The Sixth Circuit addressed whether the warrant authorized the search of the phone. The search warrant authorized a search of “any computers or digital media” at the residence. The Sixth Circuit held that cell phone data is digital media and this fell within the parameters of the warrant. The warrant, however, did not explicitly provide for a search of persons (and phones on their persons). The Sixth Circuit found to be insignificant because the officers could reasonably believe a search of a person and cell phones found on that person was authorized in good faith.[[105]](#footnote-106) Specifically, the Sixth Circuit “could not fault an officer for thinking, reasonably, that it reached cell phones.”

Further, Parrish voluntarily consented by handing over his phone. The interview was “low key and conducted in a cooperative spirit” and no attempt was made it keep him in the lab. The Sixth Circuit found nothing indicating that Parrish was coerced into handing over his cell phone.

The convictions were affirmed.

**U.S. v. Wooden, 945 F.3d 498 (6th Cir. 2019)**

**FACTS:** On a cold November morning,Wooden answered a knock on his door. The man outside the door wanted to speak to Wooden’s wife, Harris. The man asked if he could step inside to keep warm while Wooden went to fetch her. As he did so, the man saw Wooden pick up a rifle. The problem was, Wooden was a felon and the man, who had not identified himself at this point, was a plainclothes deputy sheriff with Monroe County, TN, who knew that Wooden was a convicted felon. Wooden put down the rifle as instructed. Wooden was searched; deputies found a loaded revolver on his person as well. Wooden consented to a search, and while the deputies did not find the man they were initially seeking, Harrelson, they did find another rifle. Wooden waived his Miranda rights and admitted owning all three weapons.

Wooden was charged federally for the weapons and he moved to suppress, arguing the deputies entered without a warrant or consent. Suppression was denied and he was convicted at trial. He appealed.

**ISSUE:** Is an entry, under consent, invalid because the law enforcement officer does not identify themselves as an officer?

**HOLDING:** No.

**DISCUSSION:** The Court began:

The Fourth Amendment, of course, protects people, not places. But in assessing what protection one is owed, we must naturally consider the place of the search. And for Fourth Amendment purposes, the search here occurred on sacred ground, as “the Fourth Amendment has drawn a firm line at the entrance to the house.”[[106]](#footnote-107) This means government agents, oftentimes law enforcement officers, cannot enter a person’s home unless the officer has a warrant supported by probable cause, or there exists a valid exception to the warrant requirement.[[107]](#footnote-108) If officers enter a home without a warrant and without any other valid justification, courts will suppress the evidence obtained during that search, rendering the evidence inadmissible at trial.[[108]](#footnote-109)

The officer testified that Wooden told him he could wait inside, out of the cold, although he could not recall his precise words. Wooden argued that he did not give consent to an entry. The Sixth Circuit found no reason to overturn the district court’s determination that the deputy was more credible.

Wooden’s second argument alleging deception was not raised at the outset. The deputy was not in uniform, nor did he identify himself. “[G]enerally speaking, neither amounts to improper deception in the Fourth Amendment context.”[[109]](#footnote-110) The deputy simply remained silent, “he did not hold himself out to be anything he was not.” The other two deputies, uniformed, were simply out of his sight.

The convictions were affirmed.

SEARCH & SEIZURE – CREDIBILITY

**U.S. v. Sheron, 787 Fed. Appx. 332 (6th Cir. 2019)**

**FACTS:** Officer Webb and his partner stopped Sheron for running a stop sign. As Officer Webb approached the car, he “immediately noticed the smell of burnt marijuana coming from the window.” Sheron put his hands out the window to hand over his documents. Checking, the officer found a possible warrant, although it turned out not to be current. While waiting, he asked Sheron to get out. Sheron appeared to be trying to hide something. When Sheron finally got out, he was handcuffed and placed in the cruiser. Looking where he had been fumbling, officers found a gun. Marijuana blunts were found in the ashtray. Sheron was arrested for being a felon in possession of a firearm.

Sheron moved to suppress and was denied. He entered a conditional guilty plea and appealed.

**ISSUE:** Does the trial court make the final determination on credibility?

**HOLDING:** Yes.

**DISCUSSION:** Sheron argued that there was no probable cause, and that “Officer Webb did not *really* smell marijuana, but rather made up that fact after he discovered the firearm and the marijuana blunt.” The Sixth Circuit confirmed that “the smell of marijuana establishes probable cause.[[110]](#footnote-111) As such, the case came down to who was more credible.

… considerable evidence supports Officer Webb’s credibility. First and most important, there was a burnt marijuana roach on the center console of Sheron’s car. That strongly corroborates Officer Webb’s statement. Second, Sheron acted as if he were hiding something on the floor when the officers asked him to exit the car. Finally, Officer Webb’s overall account of the events was credible, as the body camera corroborated his description of what happened. This makes it more likely that he testified credibly about the smell of marijuana as well.

There was, of course, another way to interpret the evidence. “For one, Officer Webb announced that he smelled marijuana only after he found the gun. For another, he first told his partner he was going to search for weapons, not drugs.”

The Court noted:

This follows from everyday life. Think about the difference between watching a movie in the front row of a theater and reading the screenplay after the fact. Sure, you could read Arnold Schwarzenegger announce that he’ll be back. But it’s just not the same as watching the iconic scene in The Terminator. And how many misunderstandings could have been avoided if people had spoken face-to-face, rather than by text or email? Sifting through a cold written record, months or even years later, we lose the crucial human element that lies at the heart of credibility judgments. The Supreme Court recognized this reality and required that we do the same.

The conviction was affirmed.

SEARCH & SEIZURE – FRISK

**U.S. v. Bloodworth, 2019 WL 6650495 (6th Cir. 2019)**

**FACTS:** On June 13, 2018, Officer Oliver (Kalamazoo, MI) was to start his shift at 1900. At 1530, however, he spotted a subject, Ross, who had outstanding warrants, driving. Officer Oliver, who was in his POV and wearing street clothes, called for help from on-duty personnel, but no one was able to respond. A few hours later, now in uniform and in a cruiser, he spotted the vehicle again, in a “problem area” known for trafficking. The vehicle was in the middle of a narrow street, and a person was leaning into the car. This, he knew likely was a drug transaction, as “many times involve the dealer leaning into the car window to make a hand-to-hand swap. Other times the dealer will hop in the backseat and conduct the transaction from there.” Either way, the car and the crowd around it had piqued Officer Oliver’s interest, so he decided to go check it out.”

At first, all he:

… “intended to do was conduct a ‘citizen contact,’ which is a voluntary interaction between a member of the public and law enforcement. But to make sure the individuals in and around the car didn’t scatter or go inside the house, he approached the car by the quickest way possible, turning against traffic down the one-way street. Recall that he was now on duty, so he was driving a fully marked patrol car. As he pulled up, the Saturn backed into a driveway. Officer Oliver thought this was suspicious—the car had backed into the spot right at the moment when the marked patrol car was approaching. Officer Oliver rolled down his window to see if he could see anything illegal or smell any drugs.

Officer Oliver claims that he smelled a heavy odor of marijuana when he came within about twenty feet of the white Saturn. Based in large part on his experience in over 215 drug-related investigations, Officer Oliver concluded that the plant-like smell meant the marijuana was fresh—as opposed to burnt marijuana, which smells smoky. The Saturn was on the passenger side of Officer Oliver’s cruiser. There is some dispute over whether Officer Oliver’s passenger-side window was open, and by how much. Mr. Bloodworth highlights how, in Officer Oliver’s testimony, he said he rolled down “his window,” which Mr. Bloodworth takes to mean only the driver-side window. Now, we do have body-camera footage from Officer Oliver, although the footage starts only after Officer Oliver exited his car. (This is because the body camera started recording only after Officer Oliver activated it.) Still, we can see from the footage that the passenger window was open and being rolled back up as Officer Oliver was leaving his cruiser and approaching the Saturn. The district court concluded that ‘the fairest and strongest inference from [the body-camera footage] is the passenger window at least was open.’”

Officer Oliver pulled into the driveway, blocking the white Saturn in. At that point, Mr. Bloodworth was in the backseat, on the rear passenger side. He started to leave the car and walk away, but Officer Oliver ordered him to get back in (which he did). Officer Oliver recognized Mr. Bloodworth from previous investigations in the 900 block of Hayes Park. Along with Mr. Bloodworth, there were two other people in the car, one in the driver’s seat and one in the passenger’s seat, neither of whom was Mark Ross, the man Officer Oliver had seen in the other white Saturn earlier. Officer Oliver approached the driver-side window. Just as he got there, Mr. Bloodworth again opened the car door (now on the opposite side of Officer Oliver) and started to walk away. After Officer Oliver told him to get back in the car, Mr. Bloodworth started running.

Officer Oliver took off after him. As he ran, Mr. Bloodworth had his hand on his waist, at least according to Officer Oliver. After a brief chase, through backyards and even over a fence, Officer Oliver eventually caught up to Mr. Bloodworth and tackled him. He struggled to detain Mr. Bloodworth after the two had fallen to the ground. According to Officer Oliver, Mr. Bloodworth was reaching for his waistband, which made Officer Oliver concerned that he had a weapon. To subdue Mr. Bloodworth and keep him from reaching his waistband, Officer Oliver punched him several times. Eventually, more officers arrived on the scene, and they were able to handcuff Mr. Bloodworth. The officers then discovered a gun on Mr. Bloodworth’s person.

Bloodworth, a felon, was convicted of having the firearm and for having a stolen firearm. He moved for suppression of the “the evidence discovered after he fled the scene of the white Saturn at Hayes Park, arguing that Officer Oliver did not have reasonable suspicion of criminal activity.” His motion was denied.

The district court considered “(1) the similarities between the car in Hayes Park and the car Mark Ross was driving earlier that same day, (2) the high-crime reputation of the 900 block of Hayes Park, (3) the individual leaning into the car window, (4) the car backing into the driveway as soon as the police cruiser arrived, and (5) the odor of marijuana. The district court also considered Mr. Bloodworth’s flight.”

Most importantly, the trial court had found the officer’s testimony credible and that he was in a position to detect such odors readily.

Bloodworth entered a conditional guilty plea and appealed.

**ISSUE:** May an individual be detained on reasonable suspicion?

**HOLDING:** Yes.

**DISCUSSION:** Bloodworth’s seizure was supported by reasonable suspicion. When Officer Oliver blocked the vehicle in the driveway, it was obvious to the occupants they were not free to leave. However, the seizure was justified by the Terry standard - “reasonable, articulable suspicion that the person has been, is, or is about to be engaged in criminal activity.” Further, “[s]uspicion must be based on “specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant th[e] intrusion.” This standard is an objective one, asking whether “the facts available to the officer at the moment of the seizure or the search ‘warrant a man of reasonable caution in the belief’ that the action taken was appropriate.”[[111]](#footnote-112)

When reviewing whether reasonable suspicion exists, we look to the totality of the circumstances.[[112]](#footnote-113) The totality inquiry “allows officers to draw on their own experience and specialized training to make inferences from and deductions about the cumulative information available to them that ‘might well elude an untrained person.’”[[113]](#footnote-114) As a result, behavior that might be “by itself readily susceptible to an innocent explanation” can nevertheless form part of the basis of an officer’s reasonable suspicion.[[114]](#footnote-115) Assessing all the evidence before the trial court, the Court found “Taken together, the circumstances are sufficient to establish reasonable suspicion, and thus the district court did not err in denying the motion to suppress. “

*High-Crime Area*. The district court noted that Mr. Bloodworth was detained in a high

crime area. To be sure, “[a]n individual’s presence in an area of expected criminal activity, standing alone, is not enough to support a reasonable, particularized suspicion that the person is committing a crime.”[[115]](#footnote-116) But at the same time, “officers are not required to ignore the relevant characteristics of a location in determining whether the circumstances are sufficiently suspicious to warrant further investigation.” The district court was therefore justified in relying on Officer Oliver’s characterization of the area as part of its assessment of reasonable suspicion.

On the high-crime-area factor, Mr. Bloodworth likens his case to two of our precedents

where we found no reasonable suspicion even though the events took place in a high-crime area: U.S. v. See[[116]](#footnote-117) , and U.S. v. Gross.[[117]](#footnote-118) But in both those cases, there was far less contextual evidence supporting reasonable suspicion. In See, aside from being in a high-crime area, the defendants were detained merely because they were sitting in a car early one morning away from a housing complex, with their lights off and without a front license plate (which was not a traffic violation, because the car had valid temporary tags). And in Gross, again aside from being in a high-crime area, the defendant was detained merely for sitting slumped in his legally parked car (with the engine running) early in the morning.

Here, there are more contextual factors supporting reasonable suspicion than there were in See and Gross. By the time he detained Mr. Bloodworth, Officer Oliver had noticed a car of the same make and model as one he knew belonged to someone with an outstanding arrest warrant, observed behavior consistent with a drug transaction, witnessed potentially evasive movements, and most importantly smelled marijuana. Unlike in See and Gross, here the officer can point to specific behavior suggesting possible criminal activity. Thus, it is much clearer here than it was in See and Gross that the criminal reputation of the area formed only a part of the officer’s totality of-the-circumstances assessment. Those cases are therefore distinguishable. Mr. Bloodworth also argues that this is not a situation like U.S. v. Caruthers.[[118]](#footnote-119) There, the court considered the high-crime area’s reputation as a factor largely because the area was narrowly defined (“a specific intersection rather than an entire neighborhood”) and was known for criminal activity related to the reason for which the defendant was detained. [[119]](#footnote-120)That was not the case here, according to Mr. Bloodworth. We disagree. The area here is narrowly defined, since Officer Oliver acted based on the reputation of one specific residential block. And Mr. Bloodworth even admits that the 900 block of Hayes Park was known for drug activity. That is exactly what Mr. Bloodworth was detained for—Officer Oliver blocked the white Saturn into the driveway in large part because he smelled marijuana. So if anything, Caruthers reinforces a finding of reasonable suspicion here.

*Marijuana Odor*. Mr. Bloodworth contests Officer Oliver’s ability to detect the smell of unburnt marijuana. According to Mr. Bloodworth, it is not credible that Officer Oliver could have determined from twenty feet away through a passenger-side window that there was fresh marijuana near the white Saturn. Notably, Mr. Bloodworth does not argue that the smell of marijuana is not enough to create reasonable suspicion. Nor could he, because we have found that the smell of marijuana can satisfy not only the reasonable-suspicion standard but also the even higher standard of probable cause.[[120]](#footnote-121) Moreover, we give due weight to the district court’s fact finding, because it can hear witness testimony directly and determine credibility far more reliably.[[121]](#footnote-122) Here, the district court heard Officer Oliver’s testimony, took note of how officers like him are trained to detect narcotics, pointed out how plants can often emit strong odors that even lay persons can detect, and accordingly credited Officer Oliver’s testimony as truthful. Giving the district court the deference it is due, we cannot find clear error in its determination that Officer Oliver smelled marijuana coming from the direction of the white Saturn.

Mr. Bloodworth points to three additional factors in an attempt to undermine the credibility of Officer Oliver’s assertion that he smelled marijuana: (a) Officer Oliver did not turn on his dash camera, (b) he did not disclose all the relevant facts in his report, including that he had a civilian “ride-along” in the police car with him, and (c) he took off after Mr. Bloodworth. The dash camera and the ride-along could have corroborated Officer Oliver’s claim—for example, if the dash camera recorded some conversation between the two where they discussed the smell of marijuana. According to Mr. Bloodworth, the absence of this corroborating information should be held against Officer Oliver. Additionally, Mr. Bloodworth asks: if Officer Oliver really believed there were drugs in the car, why did he abandon it and take off after Mr. Bloodworth?

However, all these facts bearing on Officer Oliver’s credibility were before the district court. And as we have already noted, the district court is far better situated to make credibility determinations. The district court acknowledged these additional facts and still found Officer Oliver believable—the court credited, for example, Officer Oliver’s explanation that he did not turn on the dash camera because he did not want to make the civilian ride-along uncomfortable by recording their entire conversation. Giving due weight to the district court’s credibility finding, we do not find clear error here.

*Remaining Factors.* Besides the marijuana smell and the car’s presence in a high-crime area, the district court also considered (a) the car’s similarity to Mark Ross’s, (b) the person leaning into the car, and (c) the car’s backing into the driveway upon seeing the police cruiser. Even though our precedents make clear that the reasonable-suspicion inquiry is based on the totality of the circumstances, Mr. Bloodworth takes a more segmented approach here. He goes factor by factor and argues that many of those relied on by the district court are susceptible to perfectly innocent explanations. For example, Officer Oliver was suspicious that the white Saturn was Mark Ross’s car, but white Saturns are common enough that the car could have belonged not to Mark Ross, but to a completely innocent person. Officer Oliver thought that a person leaning into a car window could suggest a drug deal in progress, but it could also suggest that a friendly neighbor was stopping by to say hello. Officer Oliver thought that backing the car into the driveway was evasive, but the car could simply have been getting out of the way.

Maybe. But that does not mean that Officer Oliver should have ignored these factors simply because they were susceptible to innocent explanations. The Supreme Court has explicitly rejected this type of analysis.[[122]](#footnote-123) “A determination that reasonable suspicion exists . . . need not rule out the possibility of innocent conduct.” A finding of reasonable suspicion does not even mean the officer has probable cause that criminal conduct is occurring. It simply means that the officer has seen enough that would “warrant a man of reasonable caution in the belief” that a brief investigatory detention is necessary.[[123]](#footnote-124) And under the Terry standard, factors that, taken on their own, would be “susceptible of innocent explanation” can nevertheless form the basis of reasonable suspicion.[[124]](#footnote-125)

In total, we find that there was reasonable suspicion to block the white Saturn into the driveway. Taking together the smell of marijuana in an area known for drug violations, the person leaning into the car, and the car’s backing away as soon as the police car approached, Officer Oliver was reasonable in suspecting some drug-related activity. Thus, there was enough here to warrant a reasonable person in the belief that criminal activity was afoot, so Officer Oliver was justified in detaining the car to investigate further.

*Mr. Bloodworth’s Flight*

After the white Saturn was blocked in, Mr. Bloodworth left the car and eventually fled from Officer Oliver. On appeal, Mr. Bloodworth does not argue that Officer Oliver’s subsequent pursuit was an improper means of executing a Terry stop. Instead, he makes two arguments about his flight. First, he argues that the flight occurred after the initial detention, so it cannot form the basis of Officer Oliver’s reasonable suspicion. True, this court has previously found that “reasonable suspicion . . . cannot be based on events that occur after the defendant is seized.”[[125]](#footnote-126) However, here the district court concluded that Officer Oliver had reasonable suspicion even before Mr. Bloodworth’s flight. And because we have concluded that the district court did not err when it found reasonable suspicion based on the already-discussed factors, we need not even address Mr. Bloodworth’s flight as evidence contributing to reasonable suspicion.[[126]](#footnote-127)

Second, Mr. Bloodworth argues that his flight was in response to illegal police conduct, so he was acting within his rights under Michigan law.[[127]](#footnote-128) But we have already determined that Officer Oliver acted lawfully here, so Mr. Bloodworth’s argument about resisting unlawful police conduct has no bearing on this case.

The Sixth Circuit affirmed the lower court’s decision.

42 U.S.C. §1983

T*he 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.*

42 U.S.C. §1983 - ARREST

**Thames v. City of Westland, 2019 WL 6650561 (6th Cir. 2019)**

**FACTS:** On August 27, 2016, Thames, joined by three other pro-life activists and a Roman Catholic, was on the public sidewalk in front of an abortion clinic in Westland. They held large signs. The clinic staff were familiar with Thames but the security guard, Parsley, was not. Thames and Parsley conversed, and although there was conflict in who mentioned bombs first, bombs were discussed. Thames left the area to go to the restroom, and Parsely reported the conversation to a clinic staff member, who called police. Four Westland officers arrived. Thames returned. Officer Gatti had already interviewed Parsley and Guibernat, the staff member. Parsley claimed she fled when he tried to take her photo. Officer Soulliere spoke to Thames and asked her if she made a bomb threat, but she “talked around” his questions, but repeated she had not made any threat. Eventually, Sgt. Brooks order Thames arrested for “making a terrorist threat” under Michigan law.

During the process, a microphone worn by one of the officers caught a comment from Sgt. Brooks stating that “[a]nybody who has anything to do with this whole thing, they’re fanatics.” He later stated he meant the comment for both sides of the debate. When she was handcuffed, one of the other protestors, a nun, stated she had not heard any bomb threats and that Parsley was lying. She harangued Officer Gatti, who eventually responded, “You shouldn’t be in the position you are. You’re a disgrace.”

At some point, Thames was moved to Officer Soulliere’s cruiser from that of Officer Halaas. Officer Halaas had been summoned to another call. He was aggravated by her questions and expressed it verbally. During the process, the Court noted, her car was searched and nothing was found. It noted, later, that “officers did not evacuate the Clinic or the surrounding area, nor did they conduct a search of the Clinic, the adjacent parking lot, or a nearby dumpster. They did not contact the Michigan State Police to request bomb sniffing dogs. They did not impound Thames’s car.”

She was processed and held over the weekend, and declined to eat for the duration. She was not given an opportunity for religious devotions. Det. Farrar, to which the case was assigned, had been summoned to a homicide and did not address her case until Monday. He determined that in fact, no threat was made and released her. The PD conducted an internal investigation and concluded the arrest was “reasonable and justified” although it criticized several of the officers for some of their comments.

Thames filed suit against the four on-scene officers and the City of Westland, claiming false arrest and related situations. Notably, for procedural reasons, and essential in this case, “Thames has deliberately pressed her claims, and her arguments in this appeal, as if she made the statements as Parsley represented, effectively admitting Parsley’s accusation of what she said—or conceding any dispute about it—and arguing only that those statements, considered in context, would not be sufficiently threatening to establish probable cause for her arrest. She has therefore insisted that there are no material facts in dispute and the only question here is whether, as a matter of law, her statements as reported by Parsley and the events in the recordings establish probable cause.” The district court denied summary judgment from both sides for most of the issues, but did grant it to the Westland Police Chief and the City, finding that finding that Thames had not asserted, nor could she prove, a pattern, policy, or specific action necessary for Monell-based liability claims.[[128]](#footnote-129)

The officers filed an interlocutory appeal, challenging the denial of summary judgment. Thames cross appealed, on the denial of her motions as well.

**ISSUE:** Does probable cause negate a retaliatory arrest claim?

**HOLDING:** Yes.

**DISCUSSION:**  First, the Sixth Circuit addressed the officer’s appeal from their denial of qualified immunity. Since Thames conceded, for the purposes of argument, that Parsley’s recitation was true, it made the case “purely legal.”

The Sixth Circuit examined Michigan state law and the interpretation of a “true threat.” Thames argued that even if she said precisely what Parsley stated, it was not a threat. While a subjective fear response is not enough, it still had to take the statements in context. Specifically:

Four other facts bear mention. One, Thames said ‘bombs.’ She did not threaten brimstone, or God’s fiery wrath, or something that might be considered overzealous proselytizing—she said “bomb.” Two, she approached and said it, discreetly, to the security guard—she did not say it to staff passing by, or patients, or bystanders—and she did not say it where anyone else could hear her. Three, following this conversation, Thames refused to let Parsley photograph her and, without explanation to Parsley, immediately got into her car and drove off. She did return, but not until after the police had arrived. And, finally, when questioned, Thames emphatically denied making any bomb threat, but she was actively evasive and unwilling to tell Officer Soulliere what she had said to Parsley, even though Soulliere asked multiple times and stressed to her the importance of her answer.

Based upon this, the Court agreed that the officers were entitled to qualified immunity on the false arrest claim.

With respect to claims based upon a First Amendment-based retaliatory arrest claim, the Court looked to Lozman v. City of Riviera Beach (2018).[[129]](#footnote-130) The Sixth Circuit “identified two potentially applicable tests: the Hartman test, which requires that “a plaintiff alleging a retaliatory prosecution must show the absence of probable cause for the underlying criminal charge . . . [or else] the case ends,”[[130]](#footnote-131) and the Mt. Healthy test, which allows a plaintiff to prevail by showing that the retaliation was the “but-for cause” of the governmental action (i.e., the arrest), regardless of the existence of probable cause.”[[131]](#footnote-132)

Under Hartman, “beginning with the officers’ reasonable belief that they had probable cause (as established above) for this run-of-the-mine arrest, Thames’s failure to disprove probable cause necessarily defeats her claims that the officers are liable for wrongfully arresting her as retaliation for exercising her First Amendment rights to free speech and religion by protesting at the Clinic. Even using the Mt. Healthy test, Thames’s claim fails because she has no evidence to show that the alleged retaliation was the “but-for cause” of her arrest. Given that none of the other protesters were arrested, particularly the far more effectively antagonistic nun, the officers’ comments at the scene (i.e., Officer Halaas’s hostile shout of “I don’t give a shit,” Sgt. Brooks’s expression of his opinion that “anybody who has anything to do with this thing is a fanatic,” and Officer Gatti’s insult to the nun, calling her a “disgrace”) do not demonstrate that they would not have arrested Thames “but for” her anti-abortion protesting. Rather, they arrested her for making what they reasonably accepted as being a bomb threat and for behaving in an evasive manner during the investigation of it.”

The Sixth Circuit agreed it was incorrect to say she was arrested for her First Amendment speech, but in fact, the officers arrested her for her believed bomb threat. No matter, they would have removed her from the public sidewalk, no matter the charges. The Court noted that the details of her detention were outside the realm of the officers named in the lawsuit. The Court upheld qualified immunity on those claims as well. Finally, the Court agreed summary judgment for the Chief and the City was proper.

The decision of the district court that denied qualified immunity to the officers was reversed.

42 U.S.C. §1983 - FORCE

**Stewart v. City of Memphis (TN), 788 Fed. Appx. 341 (6th Cir. 2019)**

**FACTS:** Officer Schilling (Memphis PD) shot and killed Stewart, a passenger in a car that he had stopped. Schilling had arrested Stewart on an outstanding warrant and Stewart escaped the patrol car. Stewart was shot twice during a violent physical fight and died. Stewart’s mother, his Estate Representative, filed suit under 42 U.S.C. §1983, claiming excessive force. Schilling and the City moved for summary judgment. The district court denied Schilling’s motion, but granted the City’s motion, finding nothing in the City’s policies and procedures were implicated. Stewart appealed the denial of summary judgment with respect to the City. At some point, Stewart agreed to dismiss the claim against Schilling without prejudice.

**ISSUE:** Does a single, possibly improper action indicate a lack of proper training on the part of the city?

**HOLDING:** No.

**DISCUSSION:** The Court began:

To establish that a municipality has ratified illegal actions, a plaintiff may prove that the municipality has a pattern of inadequately investigating similar claims.[[132]](#footnote-133) Importantly, there must be multiple earlier inadequate investigations and they must concern comparable claims.

Stewart had argued that the City had not adequately investigated earlier cases, but the Court agreed those cases were not similar to what had occurred in this case.

With respect to a claim of inadequate training, “to establish that a municipality has ratified illegal actions, a plaintiff may prove that the municipality has a pattern of inadequately investigating similar claims.[[133]](#footnote-134) Importantly, there must be multiple earlier inadequate investigations and they must concern comparable claims.” Specifically, they allege that he was inadequately trained in two ways: “(1) he was trained to check all individuals for warrants during a traffic stop and (2) he was not trained to call for backup before arresting uncuffed suspects seated in the back of patrol cars.” The City had argued that it was a common practice to do the first and further, that “‘[t]hat a particular officer may be unsatisfactorily trained will not alone suffice to fasten liability on the city.’”[[134]](#footnote-135) “Evidence that the City inadequately trained Schilling, without more, [was] not enough to prove [to the district court] that the City had an inadequate training program.”

Finally, plaintiffs attempt to prove that there is a persistent pattern of excessive force because the City “failed to conduct a reasonable administrative investigation of the use of deadly force allegations [made against] Officer Schilling.” However, the district court determined that “one administrative determination on one officer-involved shooting does not show that officers regularly use excessive force” and “[a] pattern requires more than one incident.” We agree. Arguing that “one instance of potential misconduct” is evidence of a clear and persistent pattern is a “path to municipal liability [that] has been forbidden by the Supreme Court.” Because of the dearth of evidence, a reasonable jury could not conclude that the City’s alleged failure to properly investigate the alleged use of force shows the existence of a clear and persistent pattern. Therefore, the plaintiffs’ contention that the City failed to properly investigate the alleged use of force does not—on its own or in conjunction with other things—show that there is a genuine issue of material fact regarding the existence of a clear and persistent pattern of the City’s police officers using excessive force.

The Sixth Circuit affirmed the dismissal of the City.

**Bey v. Falk / Canton, Ohio, 946 F.3d 304 (6th Cir. 2019)**

**FACTS:**  On March 16, 2013, Bey and two friends were out in Bey’s minivan. The van bore a temporary tag. They went shopping, finally ending up finding the item they sought at the third store. Unbeknownst to them, at their first stop, when they left empty-handed, their activity had been noted by undercover police officers working crime prevention. When leaving the third store, they were stopped by Canton officers, who had been asked to make the stop. As later described, their actions fit the possibility that they were engaged in retail theft, including a quick turnaround on the highway perceived as an effort to “shake” any tails. Inside the third store, the three men separated, looking a different things. However, the officer following them saw nothing indicating they were attempting to steal. As protocol indicated that plainclothes officers not make stops, Officer Falk (Canton PD) was dispatched to assist and he was briefed by the plainclothes officers. Bey was stopped shortly after leaving the store. Bey was armed, and promptly notified Falk – he had a concealed weapons license. Unfortunately, it was expired. He showed the receipts for the items they bought but he was arrested for the weapon.

Bey moved for suppression. For some reason, only Falk testified, and he did so truthfully, stating he “personally had seen no suspicious activity.” The state court suppressed the evidence and ultimately, the case was dismissed. Bey filed suit under 42 USC §1983 against all of the involved officers. The officers sought summary judgment on qualified immunity and were denied. The officers appealed.

**ISSUE:** Does a demand that another agency make a traffic stop, with insufficient cause, possibly lead to liability for the officer who makes the request?

**HOLDING:** Yes.

**DISCUSSION:** The Sixth Circuit addressed the claims against each officer.

McAteer and Eisenbeis, members of the team that observed the group, did not participate in any action that violated Bey’s rights. As such, the Court agreed, both were entitled to summary judgment.

McKinley, who ordered the stop, was a different matter. He directed the stop without at a minimum, reasonable suspicion. None of the officers had observed any criminal or even overtly suspicious, actions. Even allowing for McKinley’s arguments, they were simply “meager observations.” The most damning information was that Bey’s temporary tag came back with no record, but it was known that it often took some time after a sale for such tags to appear in the official database. (There was also an assertion that the tag was unreadable, but that was contradicted by the testimony of others.) The Sixth Circuit permitted the case against McKinley could proceed.

With respect to Falk, he made the stop at the behest of other officers, after a briefing of just a few minutes. Under the collective knowledge doctrine, officers may conduct a stop based on information from other officers.[[135]](#footnote-136) It would not be expected that he would cross-examine his fellow officers. The doctrine holds even when the officer is “wholly unaware of the specific facts that established reasonable suspicion for the stop.”[[136]](#footnote-137) Often such information is “quite skimpy.” In this case, the underlying information was not enough for reasonable suspicion, but the officer acted in good faith.” Falk’s role was merely to make the stop when ordered to do so by McKinley. It was reasonable for him to believe the other, more experienced officers had far more information than he did at the time.

The Sixth Circuit held “an officer is not subjected to liability if he, through no improper action or inaction on his part, conducts a stop that is unconstitutional due to the error of a generally trustworthy source.”[[137]](#footnote-138) It was noted that officers might have additional information about the situation, but nothing suggested an improper action or inaction on Falk’s part. Simply put, nothing would have suggested to Falk that McKinley’s action was improper. As such, Falk was also entitled to qualified immunity.

McKinley’s appeal was dismissed, with the case allowed to move forward against him, while the claims against the other three officers were dismissed.

TRIAL PROCEDURE / EVIDENCE

TRIAL PROCEDURE / EVIDENCE - TESTIMONY

**U.S. v. Whyte, 2019 WL 5884550 (6th Cir. 2019)(Petition for Certiorari filed 2/10/2020).**

**FACTS:**  On October 15, 2016, Boomers died of an overdose after being sold heroin by Whyte. Whyte was already under investigation by the federal authorities and was soon charged with heroin and firearms related offense, and they included Boomers’ death. Whyte argued he was being “set up” by another dealer, Reed, who testified against him in the part of the case involving Boomers’ death. Reed testified he had bought heroin from Whyte and immediately turned it over to Boomers. (Reed also received a lenient plea agreement in his own case as a result.) Whyte was convicted and appealed.

**ISSUE:** May an officer offer testimony in translating drug trafficking jargon?

**HOLDING:** Yes.

**DISCUSSION:** First, Whyte argued that Agent Burns (DEA) “was allowed to offer opinion testimony about the meaning of certain ‘plain English’ drug trafficking phrases in text messages” between the parties. “Under Federal Rule of Evidence 702, a person with ‘specialized knowledge’ qualified by his or her ‘knowledge, skill, experience, training, or education’ may give ‘expert’ opinion testimony if it ‘will help the trier of fact to understand the evidence or to determine a fact in issue.’ Such testimony is not appropriate when the language is within the ken of a juror’s normal understanding. The drug trafficking jargon in question was the following:

“buying houses and businesses to keep clean money”

“if you have 70, I’ll make it super fat”

“I’m going to get another half tonight”

“cut”

“re-up”“the trap”

“gray”

“OG”

“got another eighth of the strongest”

“lemon cush real sticky”

“I need a 60 of boy, Bro. Sick already and need to feel better”

“front”

“hot”

Certainly, the Court agreed a reasonable juror might have been able to understand some of the phrases without help, but “the government was well within its rights to assume otherwise, and to attempt to ensure that the jury understood that the numerous text messages exchanged between Peterson, Whyte, and their customers were part and parcel of a conspiracy to distribute heroin (and, occasionally, marijuana).” The testimony was at worst, harmless.

Whyte also argued that it was error ` by permitting the government to show the jury several unfairly “inflammatory” photos of Whyte and Peterson flaunting cash, drugs, and firearms.” These photos were obtained from social media. The Court agreed that “Evidence that Whyte (and/or Peterson) took photos of themselves flaunting cash, guns, and drugs could not possibly have led the jury to convict Whyte on “an improper basis,” because Whyte was on trial for, among other crimes, being part of a heroin distribution ring and possessing a firearm in furtherance of that drug-trafficking ring.” When presented in conjunction with the same type of equally incriminating evidence found with the search warrants, the evidence was “fair game.”

Finally, with respect to the enhanced penalties allowed when trafficking results in death. The Court agreed that “To prove that a particular distribution “resulted in” a user’s death, the government must show that that distribution was “either an independent, sufficient cause of the victim’s death or a but-for cause.” “But-for” causation, which is the only kind of causation at issue here, occurs when the distributed drug “‘combines with other factors to produce’ death, and death would not have occurred ‘without the incremental effect’ of the controlled substance.”[[138]](#footnote-139)

The Sixth Circuit was proper to defer such a credibility determination to the trial court and affirmed Whyte’s conviction and enhanced sentence.

TRIAL PROCEDURE / EVIDENCE – PHOTOGRAPHS

**U.S. v. Holmes / Carter, 2019 WL 6842343 (6th Cir. 2019)**

**FACTS:**  In 2016, two Cleveland Dollar General stores were robbed by masked men, multiple times. Holmes and Carter were ultimately identified as the robbers, both having inside knowledge of the workings of the stores. Both were charged under federal law for “Hobbs Act robbery”[[139]](#footnote-140) and related charges. At their joint trial, six photos were introduced (over objection) from Holmes’s Facebook page, showing him dressed as the robber was, “with wads of cash,” along with money, a gun and snacks. (Six other photos were excluded.) Both men were convicted of most charges and appealed.

**ISSUE:** May photographs of apparently stolen property be introduced as evidence?

**HOLDING:** Yes.

**DISCUSSION:** Holmes argued that the photos should have been excluded as unduly prejudicial. It was not possible to know if the cash in the photos was the recently stolen cash. Courts have “long recognized the inference that possessing recently stolen property connects the possessor to the crime.”[[140]](#footnote-141) Further, “temporal proximity increases a prior act’s probative value.”[[141]](#footnote-142) Photos of Holmes, uploaded shortly after the robberies, with handfuls of “worn currency” were certainly strongly suggestive. The firearm, as well, was similar to that used by the robbers. Certainly, as Holmes argued, it cannot be known when the photos were actually taken, only when they were added to Facebook. However, his distinctive footwear and clothing, already identified by the victims, linked him as well.

The photos were of “substantial probative value” and did not create unfair prejudice.

The convictions were affirmed.

TRIAL PROCEDURE / EVIDENCE – RECORDINGS

**U.S. v. Smith-Kilpatrick, 942 F.3d 734 (6th Cir. 2019)(Petition for Certiorari filed 2/7/2020)**

**FACTS:**  Smith-Kilpatrick was one of several individuals involved in a massive drug trafficking enterprise in Michigan. Much of the evidence included call records and cell phone records. Among others, Kilpatrick was convicted. She appealed.

**ISSUE:** May cell phone records be introduced as “business records” under the rules of evidence?

**HOLDING:** Yes.

**DISCUSSION:** Kilpatrick argued that the records were improperly admitted, but the Sixth Circuit noted that Crawford v. Washington had remarked that “that “business records” covered by the traditional hearsay exception are “by their nature” not testimonial.[[142]](#footnote-143) In this case, the records were “company documentations of wire transfers, phone calls, car rentals, and hotel stays” that mentioned Kilpatrick by name. The person entering her name had no reason to anticipate a criminal prosecution. Summaries of some of the more voluminous records were also properly admitted, and the person who prepared the summaries was available for cross-examination. Kilpatrick argued, as well, that there was no proof that the person indicated was, in fact, her. The Court noted that the disputed records all satisfied the three requirements of Rule 803(b):

1. the record was made at or near the time by—or from information transmitted by—someone with knowledge; (B) the record was kept in the course of a regularly conducted activity of a business, organization, occupation, or calling, whether or not for profit; (C) making the record was a regular practice of that activity;

The Court noted her argument that it might have been an imposter making the transactions did not invalidate the authenticity of the records themselves, nor was there any indication the records themselves were not trustworthy. The fact that there might have been video footage of the transactions that was not preserved and presented did not invalidate the evidence.

In addition, several statements were presented that were from conspirators who did not testify. The Court noted that under the Federal Rules of Evidence 801(d)(2)( E) a statement is not hearsay when made to further the conspiracy.[[143]](#footnote-144) Her argument that she was not a co-conspirator was to no avail as the evidence that indicated she was substantial.

Kirkpatrick’s conviction for drug trafficking was upheld.

EMPLOYMENT

**Johnson v. Ohio Department of Public Safety, 942 F.3d 329 (6th Cir. 2019)**

**FACTS:**  Trooper Morris Johnson (Ohio Highway Patrol) pulled over a woman for a DUI, arrested her and then asked her out. A month later, seeing the same woman, he again pulled her over, with no cause, to talk to her, asked her out to go gambling and told her he “liked” her. He gave her his personal cell number and told her to “hide it in a secret location.” Learning of this, the Ohio Department of Public Safety elected against termination but had Johnson sign a “Last Chance Agreement,” warning him against such behavior.

“Only he didn’t follow the rules.” Johnson soon did it again, arresting a woman for DUI and then taking her to her home, even after she had texted someone for a ride. Johnson failed to activate his camera on the trip, a violation of policy. He radioed the end of the transport but stayed at the house for thirty minutes. He later texted her. At that point, Johnson was fired for violating the “Last Chance Agreement.”

Morris Johnson filed suit, arguing racial discrimination. He cited the conduct of a white trooper, also named (David) Johnson, who had allegedly sent someone he detained a Facebook friend request. Three years later, David Johnson did it again. David Johnson received a one-day suspension for the second action. As such, the question presented was whether Morris Johnson’s actions were sufficient similarly situated “in all relevant aspects?” Both acted inappropriately, but the district court found that their situations were different. Morris Johnson appealed.

**ISSUE:** To make an initial case for racial discrimination in violation of Title VII, must an employee show that he/she was similarly situated in all of the relevant respects to an employee of a different race who was treated better?

**HOLDING:** Yes**.**

**DISCUSSION:** The Sixth Circuit held that the acts were not of “comparable seriousness.” As an example, “stitches and open-heart surgery are both medical procedures.” Drawing conduct at too broad of a generalization is meaningless. The Sixth Circuit detailed the differences between the actions of the two men and agreed: “[T]he quantum of misbehavior is radically different, so one would naturally expect a radically different disciplinary outcome.”

Under the Mitchell standard, the Court inquired into the matter, considering whether the employees: (1) engaged in the same conduct, (2) dealt with the same supervisor, and (3) were subject to the same standards.[[144]](#footnote-145) Although the troopers had two different supervisors and they received different warnings – with Morris being told he would be fired if he committed another infraction, while David was warned that he might be disciplined “if he didn’t clean up his act,” their violations were sufficiently different as to warrant different discipline.

The Sixth Circuit affirmed the judgment.

**Hudson v. City of Highland Park, Michigan, 943 F.3d 792 (6th Cir. 2019)**

**FACTS:** Hudson was a Highland Park, Michigan, firefighter and a devout Christian. For five years, he criticized fellow firefighters for what he believed was immoral conduct that harmed their work performance. His colleagues responded by criticizing his faith and belittling him. In 2015, Hudson was found to have over-reported hours in a particular position and he was fired following several grievance proceedings. He argued then that he had made a simple mistake. Hudson sued the City, the Fire Chief and the Human Resources Director. The district court dismissed his claims. Hudson appealed.

**ISSUE:** Is lack of workplace civility actionable?

**HOLDING:** No.

**DISCUSSION:** Hudson premised his appeal on arguing that the Fire Department engaged in retaliation against his protected speech. “[E]mployers may not retaliate against employees based on their protected speech.”[[145]](#footnote-146) Three elements must be proven to make such a claim: “that he engaged in protected speech; that he suffered an adverse employment action; and that the fire department fired him because of his speech.” The Sixth Circuit found that the second and third elements were clearly met.

That left the first prong – the question of whether he was fired because of his protected speech. With respect to the Human Resources Director, there was no allegation that she even knew about his speech, let alone acted on it. With respect to the Fire Chief, however, clearly Hillman knew of Hudson’s complaints and he, himself, was the target of some of those complaints. Hudson had, in the year prior to his termination, filed formal OSHA complaints linking misbehavior at the firehouse to a lack of equipment maintenance. The Sixth Circuit held there was at least enough on that issue to move forward into discovery.

The Fire Chief argued that he had done nothing for five years, and while the “short passage of time between the protected speech and the adverse action sometimes helps a retaliation claim, the opposite is not necessarily true.” Hudson argued that Hillman had expressed frustration about the ongoing complaints. The Sixth Circuit held that “faith-based speech that implicated free-exercise and free-speech rights.”[[146]](#footnote-147)

With respect to the government body, the appellate court determined that due process was afforded with the hearing and grievance process, and Hudson failed to exhaust other remedies available to him. Under Title VII, Hudson had protections and that, in order to make out a disparate treatment claim, Hudson must show “that (1) he belonged to a protected class, (2) suffered an adverse employment action, (3) met the qualifications for his position, and (4) was treated differently from a similar employee who does not belong to his protected class.[[147]](#footnote-148) If he succeeds, the city must offer a legitimate, non-discriminatory explanation for its action. That puts the ball back in Hudson’s court to show that the city’s justification amounts to a pretextual excuse to hide discrimination.”

One: Employees are free to speak out about misconduct in the workplace without subjecting themselves to discharge for rocking the boat. Two: Employees are no less free to root legitimate criticisms about the workplace in their faith than in any other aspects of their worldview. For many people of faith, their religion is not an abstraction. It has consequences for how they behave and may require them to be witnesses and examples for their faith. That reality does not permit differential treatment of them because they criticize behavior on moral grounds stemming from religious convictions as opposed to moral grounds stemming from secular convictions. “Let firemen be firemen” is not a cognizable defense to Title VII claims based on gender discrimination, race discrimination, or faith-based discrimination.

The disparate treatment claimed failed because Hudson could not “show that the city’s justification for his discharge amounted to a pretextual basis for discriminating against him because of his faith. The fire department put forth a legitimate, non-discriminatory reason for treating Hudson differently. He falsified his time-sheets while other firefighters did not.” He had responded that another firefighter had done much the same thing, but the appellate court determined that the situations were not comparable.

Finally, with respect to workplace harassment, Hudson was required to prove that “(1) he was a member of a protected class, (2) he faced unwelcome harassment, (3) he suffered the harassment because of his religion, (4) the harassment created a work environment that unreasonably interfered with Hudson’s work performance, and (5) the city was responsible for the harassment.”[[148]](#footnote-149) On the fourth element, Hudson could only prove that he suffered “rude comments from his co-workers, which generally do not suffice.” “It’s easy to be critical of the comments—and we have to wonder, if Hudson’s allegations are true, who is running the station and what their theory of leadership is. But the reality remains that Title VII does not serve as a “general civility code for the American workplace.”[[149]](#footnote-150) Despite his complaints, he presented no evidence that the byplay interfered with his work performance or his assignments. He never officially complained of the harassment, officially. While Hudson’s “colleagues at times did not extend to him the civility and respect that should be the norm in the workplace, that doesn’t mean their conduct violated Title VII.”

The claim against the Fire Chief was permitted to move forward.

**Gipson v. Tawas Police Authority, 2019 WL 6876619 (6th Cir. 2019)**

**FACTS:** Gipson was a Tawas Police Authority (TPA) officer for a few years before he was seriously injury in a car wreck. He could not return to work for 6 months and then required accommodations. Even then, he struggled with pain and returned to medical leave for four months. Upon returning to work, he was still on light duty with a lifting restriction. During that time frame, Chief Ferguson worked on a specific job description for TPA patrol officers, something the agency lacked.

After a few months on light duty, Gipson felt ready to return to work without restrictions, as his doctor cleared him. Chief Ferguson, however, wanted Gipson to take a “functional capacity exam” to determine if he could safely work as a patrol officer. Gipson believed the motive behind the exam was to prevent him from staying at the TPA, but agreed to take the test, using the tasks listed on the new job description. Gipson passed and returned to work, but that return lasted only a week. The lifting he had been required to do in the FCE aggravated his back condition. Gipson has never returned to police work, or any work, since.

Gipson filed suit, arguing the requirement violated the ADA and Michigan state law. After discovery, the trial court granted summary judgment to the government defendants. Gipson appealed.

**ISSUE:** Is it lawful to require a medical exam for an employee returning to work after an extended absence for medical reasons?

**HOLDING:** Yes.

**DISCUSSION:** Specifically, Gipson argued that it was improper to require him to take an exam that he argued, was not job-related. It was the employer’s burden at that point “to prove that the exam was job-related and consistent with business necessity. It falls to the employer if they can provide “significant evidence that could cause a reasonable person to inquire as to whether [the] employee [was] still capable of performing his job.”[[150]](#footnote-151) Further, the employer must prove that the individual who decided to require the medical exam was aware of this evidence.

Certainly, the Chief was aware that Gipson had missed almost a year of work. Even with working, he had required restrictions that prevented him from fully working as a patrol officer. Gipson, however, argued that the FCE “was too broad in scope” and did not “accurately state the essential job functions of a TPA officer.” Specifically, he argued that the ability to lift and move items of moderate or even weight was not an essential job function, as he had been able to work for some time without the need to do so. Gipson, however, was on accommodations and was seeking to return to work without restrictions. That meant the FCE was “meant to test his ability to perform all the essential duties of a TPA officer without any accommodations.” The lifting he experienced in the exam was intended to do an individual assessment of his ability to do the job.” There was no dispute that the FCE was “job-related and consistent with business necessity.” In addition, a legitimate medical exam “ordered for valid reasons can neither count as an adverse job action nor prove discrimination.”

The district court’s decision was affirmed.

**Bagi v. City of Parma, Ohio, 2019 WL 5806890 (6th Cir. 2019)**

**FACTS:** Bagi (and Vojtush) had concerns over years that the Parma Fire Department was not administering promotional tests fairly. Specifically they argued a 2004 test was manipulated by the chief to give certain employees a higher score. Over 6 years, it was grieved to three union presidents, none of whom found any fault in the test. In 2011, another testing began and Bagi did not take the test, believing it would be unfairly given. Bagi brought that to the attention of Captain Poznako, reiterating his belief that the Captain “favored his friends” in the earlier testing process. After the testing, and positions were accorded, Bagi sent a letter to the Chief and the Human Resources director, and noted he was concerned about retaliation. Assistant Fire Chief Ryan found that the allegations in the letter were false and based on rumor. Chief French then moved to terminate Bagi and Vojtush, the primary signatories. Instead they were suspended for a number of tours of duty. Other signatories were suspended for shorter periods as well.

Bagi grieved the suspension and the arbitrator found that the allegations were false. However, he also rejected the City’s claim that there was no indication Bagi acted with malice or knew they were false. The arbitrator reduced the suspensions.

Bagi and others brought suit under 42 U.S.C. §1983, arguing First Amendment retaliation. “A plaintiff claiming First Amendment retaliation must make a prima facie showing that: “(1) he engaged in constitutionally protected speech or conduct; (2) an adverse action was taken against him that would deter a person of ordinary firmness from continuing to engage in that conduct; [and] (3) . . . the adverse action was motivated at least in part by his protected conduct.”[[151]](#footnote-152)

When asked later whether he believed Bagi intentionally made false accusations when writing the letter, Chief French testified, “I believe he felt there was some truth to the basis of it.” Vojtush also brought one claim of retaliation under the Family and Medical Leave Act, but voluntarily dismissed that claim.

In 2016, the district court granted summary judgment to the City and found Bagi’s statements were:

… outside the realm of constitutional protection because Plaintiffs made them with reckless indifference to their falsity. Specifically, “The court rested its conclusion on its findings that: Bagi wrote and signed the letter despite having no first-hand knowledge that the assertions therein were true; Vojtush signed the letter without reading it, having heard only rumors; when he wrote the letter, Bagi knew that investigations into the 2004 test had uncovered no evidence of wrongdoing; Bagi did not take the 2011 test and turned down the opportunity to attend an informational meeting to learn more about its administration; Bagi misled other signatories as to the letter’s purpose and contents; and Plaintiffs wrote and signed the letter without regard to its consequences for the PFD and individual firefighters. Thus, the court held that, because the letter was written with reckless disregard to its falsity, it was not constitutionally protected speech.

Bagi and others appealed, and it was upheld by the Sixth Circuit with a finding that the speech was not protected because ““Bagi’s letter concerned personnel and internal policy issues, not matters of public concern.”[[152]](#footnote-153) During the appeal, the City moved for attorneys’ fees under 42 U.S.C. §1988. The district court awarded the fees, in an amount of $139,903. The plaintiffs appealed, arguing that their claim was not frivolous and thus no award of fees was permitted. The district court denied their motion and tacked on more fees, to a total of $173,000. Another appeal followed.

**ISSUE:** May a losing party in a frivolous §1983 action be required to pay attorney’s fees?

**HOLDING:** Yes.

**DISCUSSION:** “An award of attorney fees to a defendant in a civil-rights action “is an extreme sanction, and must be limited to truly egregious cases of misconduct.”[[153]](#footnote-154) In Christiansburg Garment Co. v. EEOC, the Supreme Court held that attorney fees should not be assessed against a civil-rights plaintiff unless the action is “frivolous, unreasonable, or groundless, or the plaintiff continued to litigate after it clearly became so.”[[154]](#footnote-155) Application of these standards requires examining a plaintiff’s basis for filing suit, and awards to prevailing defendants depend on the factual circumstances of each case.[[155]](#footnote-156) Although a finding that a plaintiff brought a claim in bad faith will warrant an award of attorney fees, an action may be frivolous, unreasonable, or without foundation even if brought in good faith.[[156]](#footnote-157)

The Christiansburg Court cautioned that district courts should “resist the understandable temptation to engage in post hoc reasoning by concluding that, because a plaintiff did not ultimately prevail, his action must have been unreasonable or without foundation.” Id. The Court explained that “[t]his kind of hindsight logic could discourage all but the most airtight claims.” Id.

At the time the action was brought, the Sixth Circuit had settled law that the “the First Amendment does not protect statements made with reckless indifference to their falsity.[[157]](#footnote-158) As such, the District Court acted appropriately that the “suit was frivolous, unreasonable, or groundless under the Christiansburg standards.”

The Sixth Circuit did find that the plaintiffs should have been allowed an opportunity to demonstrate that they lacked enough income to pay such a high amount in fees and remanded the case for consideration on that matter.

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71. Leon, supra. [↑](#footnote-ref-72)
72. U.S. v. Howard, 632 F. App’x 795, 806 (6th Cir. 2015); see also Allen, 211 F.3d at 976 (discussing the “dangers” that can arise when police “fail[] to corroborate all that can easily be corroborated”). [↑](#footnote-ref-73)
73. The decision stated Boyd was with the Norfolk PD, in fact, he was with Newport. [↑](#footnote-ref-74)
74. U.S. v. Frazier, 423 F.3d 526, 531 (6th Cir. 2005); see also Christian, 925 F.3d at 314 . [↑](#footnote-ref-75)
75. U.S. v. Allen, 211 F.3d 970, 973 (6th Cir. 2000). [↑](#footnote-ref-76)
76. See U.S. v. Jackson, 470 F.3d 299 (6th Cir. 2006). [↑](#footnote-ref-77)
77. See U.S. v. Brown, 732 F.3d 569 (6th Cir. 2013) [↑](#footnote-ref-78)
78. See U.S. v. Hammond, 351 F.3d 765 (6th Cir. 2003). [↑](#footnote-ref-79)
79. U.S. v. Jones, 159 F.3d 969 (6th Cir. 1998). [↑](#footnote-ref-80)
80. U.S. v. Williams, 544 F.3d 683 (6th Cir. 2008). [↑](#footnote-ref-81)
81. See Franks v. Delaware, 438 U.S. 154 (1978). [↑](#footnote-ref-82)
82. See U.S. v. Mastromatteo, 538 F.3d 535 (6th Cir. 2008). [↑](#footnote-ref-83)
83. See U.S. v. Elbe, 774 F.3d 885 (6th Cir. 2014). [↑](#footnote-ref-84)
84. See U.S. v. Carpenter, 926 F.3d 313 (6th Cir. 2019). [↑](#footnote-ref-85)
85. Cf. U.S. v. Street, 614 F.3d 228, 233 (6th Cir. 2010). [↑](#footnote-ref-86)
86. Kentucky v. King, 563 U.S. 452 (2011). [↑](#footnote-ref-87)
87. U.S. v. Pope, 686 F.3d 1078 (9th Cir. 2012), and those exceptions include voluntary consent, see Schneckloth, 412 U.S. at 219. [↑](#footnote-ref-88)
88. See, e.g., Audio at 9:00–02 (Agent Fitzgerald: “I can’t force you to talk to us.”

Martinez: “Right.”). [↑](#footnote-ref-89)
89. Miranda v. Arizona, 384 U.S. 436 (1966). [↑](#footnote-ref-90)
90. Howes v. Fields, 565 U.S. 499, 508–09 (2012). [↑](#footnote-ref-91)
91. Id. at 509 (alteration in original) (quoting Stansbury v. California, 511 U.S. 318 (1994) (per curiam), and Thompson v. Keohane, 516 U.S. 99 (1995)). [↑](#footnote-ref-92)
92. Id. (alteration in original) (quoting Stansbury, 511 U.S. at 322, 325). [↑](#footnote-ref-93)
93. U.S. v. Hinojosa, 606 F.3d 875 (6th Cir. 2010) (citations omitted). [↑](#footnote-ref-94)
94. U.S. v. Swanson, 341 F.3d 524 (6th Cir. 2003). [↑](#footnote-ref-95)
95. U.S. v. Galloway, 316 F.3d 624 (6th Cir. 2003) [↑](#footnote-ref-96)
96. See Loza v. Mitchell, 766 F.3d 466, 480 (6th Cir. 2014) (“Ploys to mislead a suspect or lull him into a false sense of security that do not rise to the level of compulsion or coercion to speak are not within Miranda’s concerns.”

(quoting Illinois v. Perkins, 496 U.S. 292 (1990))). [↑](#footnote-ref-97)
97. Levenderis, 806 F.3d at 400 (alteration in original) (quoting California v. Beheler, 463 U.S. 1121 (1983)); see also U.S. v. Saylor, 705 F. App’x 369 (6th Cir. 2017) (“We have never held . . . that a noncustodial conversation

may be transformed into a custodial interrogation simply by virtue of the fact that police confronted the defendant with evidence of guilt.”). [↑](#footnote-ref-98)
98. Salvo, 133 F.3d at 953. [↑](#footnote-ref-99)
99. Howes, 565 U.S. at 515; Hinojosa, 606 F.3d at 883; Holt, 751 F. App’x at 824. [↑](#footnote-ref-100)
100. See Howes, 565 U.S. at 515 (“[R]espondent was not physically restrained or threatened and was interviewed in a well-lit, average-sized conference room, where he was ‘not uncomfortable.’”). [↑](#footnote-ref-101)
101. See Levenderis, 806 F.3d at 400 (“Defendant stresses the fact that the room was small and the agents sat closely around his bed while they questioned him. However, there is also no evidence agents prevented him from getting up from his bed.”); Mahan, 190 F.3d at 422 (fact that “both interview rooms were unlocked” weighed against finding of custody). [↑](#footnote-ref-102)
102. See U.S. v. Crossley, 224 F.3d 847 (6th Cir. 2000) (fact that officer “did not have his gun drawn” weighed against finding of custody), superseded by statute on other grounds. And the agents were wearing business suits, not tactical gear or other intimidating clothing. See Ambrose, 668 F.3d at 957 (fact that federal agents “both were in business attire” weighed against finding of custody). [↑](#footnote-ref-103)
103. Howes, 565 U.S. at 512 (“[I]solation may contribute to a coercive atmosphere by preventing family members, friends, and others who may be sympathetic from providing either advice or emotional support.”); Coomer v. Yukins, 533 F.3d 477, 486 (6th Cir. 2008) (explaining that “Miranda concerned ‘the principal psychological factor’ of ‘isolating the suspect in unfamiliar surroundings’” (quoting Beckwith v. U.S., 425 U.S. 341 (1976))). [↑](#footnote-ref-104)
104. See U.S. v. LeBrun, 363 F.3d 715 (8th Cir. 2004) (en banc) (stating that the “mere possession of a cellular phone . . . is relevant to the question of whether . . . a reasonable person in the same circumstances would feel restrained”); cf. Levenderis, 806 F.3d at 400–01 (“Defendant was also able to place and receive phone calls during the interviews, something a reasonable person in police custody would not feel free to do.”). [↑](#footnote-ref-105)
105. Leon, supra. [↑](#footnote-ref-106)
106. Payton v. New York, 445 U.S. 573 (1980). [↑](#footnote-ref-107)
107. See Kentucky v. King, 563 U.S. 452 (2011). [↑](#footnote-ref-108)
108. See Hudson v. Michigan, 547 U.S. 586 (2006). [↑](#footnote-ref-109)
109. U.S. v. Baldwin, 621 F.2d 251 (6th Cir. 1980) (citing Lewis v. U.S. , 385 U.S. 206 (1966)). [↑](#footnote-ref-110)
110. See U.S. v. Crumb, 287 F. App’x 511 (6th Cir. 2008) (collecting cases); U.S. v. Garza, 10 F.3d 1241 (6th Cir. 1993). [↑](#footnote-ref-111)
111. Quoting Carroll v. U.S., 267 U.S. 132 (1925)). [↑](#footnote-ref-112)
112. U.S. v. Arvizu, 534 U.S. 266 (2002). [↑](#footnote-ref-113)
113. Id. (quoting U.S. v. Cortez, 449 U.S. 411 (1981)). [↑](#footnote-ref-114)
114. Id. at 274; see also U.S. v. Sokolow, 490 U.S. 1 (1989) (“Any one of these factors is not by itself proof of any illegal conduct and is quite consistent with innocent travel. But we think taken together they amount to reasonable suspicion.”). [↑](#footnote-ref-115)
115. Illinois v. Wardlow, 528 U.S. 119 (2000) (emphasis added); U.S. v. Caruthers, 458 F.3d 459 (6th Cir. 2006), abrogated on other grounds by Cradler v. U.S., 891 F.3d 659 (6th Cir. 2018). [↑](#footnote-ref-116)
116. 574 F.3d 309 (6th Cir. 2009). [↑](#footnote-ref-117)
117. 662 F.3d 393 (6th Cir. 2011). [↑](#footnote-ref-118)
118. 458 F.3d 459 (6th Cir. 2006). [↑](#footnote-ref-119)
119. 458 F.3d 459 (6th Cir. 2006). [↑](#footnote-ref-120)
120. See U.S. v. Johnson, 707 F.3d 655 (6th Cir. 2013). [↑](#footnote-ref-121)
121. Foster, 376 F.3d at 583. [↑](#footnote-ref-122)
122. See Arvizu, 534 U.S. at 273–75. [↑](#footnote-ref-123)
123. Terry, 392 U.S. at 22 (quoting Carroll v. U.S., 267 U.S. 132 (1925)). [↑](#footnote-ref-124)
124. Arvizu, 534 U.S. at 277–78. [↑](#footnote-ref-125)
125. U.S. v. Johnson, 620 F.3d 685 (6th Cir. 2010). [↑](#footnote-ref-126)
126. See U.S. v. Lopez-Gonzalez, 916 F.2d 1011 (5th Cir. 1990). [↑](#footnote-ref-127)
127. See People v. Moreno, 814 N.W.2d 624 (Mich. 2012). [↑](#footnote-ref-128)
128. Monell v. Department of Social Services, 436 U.S. 658 (1978). [↑](#footnote-ref-129)
129. 585 U.S. --, 138 S. Ct. 1945 (2018). [↑](#footnote-ref-130)
130. Id. at 1952 (discussing Hartman v. Moore, 547 U.S. 250 (2006)); [↑](#footnote-ref-131)
131. See id. at 1952 (discussing Mt. Healthy City Sch. Dist. Bd. of Educ. v. Doyle, 429 U.S. 274 (1977)). [↑](#footnote-ref-132)
132. Leach v. Shelby Cty. Sheriff, 891 F.2d 1241 (6th Cir. 1989); Burgess v. Fischer, 735 F.3d 462 (6th Cir. 2013). [↑](#footnote-ref-133)
133. Leach v. Shelby Cty. Sheriff, 891 F.2d 1241 (6th Cir. 1989); Burgess v. Fischer, 735 F.3d 462 (6th Cir. 2013). [↑](#footnote-ref-134)
134. Id. (quoting City of Canton, 489 U.S. at 390) (other citations omitted). [↑](#footnote-ref-135)
135. Brown v. Lewis, 779 F.3d 401 (6th Cir. 2015). [↑](#footnote-ref-136)
136. U.S. v. Lyons, 687 F.3d 754 (quoting U.S. v. Hensley, 469 U.S. 221 (1985)). U.S. v. Kaplansky, 42 F.3d 320 (6th Cir. 1994). [↑](#footnote-ref-137)
137. Hardesty v. Hamburg Township, 461 F.3d 646 (6th Cir. 2006) [↑](#footnote-ref-138)
138. U.S. v. Volkman, 797 F.3d 377 (6th Cir. 2015) (quoting Burrage, 571 U.S. at 211). Notably, too, “[n]othing in [the Supreme Court’s decision in] Burrage or the plain language of the statute limits responsibility to only the last person to distribute the drug before the harm occurs.” U.S. v. Lewis, 895 F.3d 1004 (8th Cir. 2018). [↑](#footnote-ref-139)
139. A Hobs Act Robbery is any robbery affecting interstate or foreign commerce. [↑](#footnote-ref-140)
140. U.S. v. Johnson, 741 F.2d 854 (6th Cir. 1984). [↑](#footnote-ref-141)
141. U.S. v. Asher, 910 F.3d 854 (6th Cir. 2018). [↑](#footnote-ref-142)
142. 541 U.S. 36 (2004). [↑](#footnote-ref-143)
143. U.S. v. Martinez, 430 F.3d 317 (6th Cir. 2005). [↑](#footnote-ref-144)
144. Mitchell v. Toledo Hosp., 964 F.2d 577 (6th Cir. 1992). [↑](#footnote-ref-145)
145. Buddenberg v. Weisdack, 939 F.3d 732 (6th Cir. 2019); Chappel v. Montgomery Cty. Fire Prot. Dist. No. 1, 131 F.3d 564 (6th Cir. 1997) [↑](#footnote-ref-146)
146. Compare Minersville Sch. Dist. v. Gobitis, 310 U.S. 586 (1940), with W. Va. State Bd. of Educ. v. Barnette, 319 U.S. 624 (1943). [↑](#footnote-ref-147)
147. Tepper v. Potter, 505 F.3d 508 (6th Cir. 2007). [↑](#footnote-ref-148)
148. . See e.g., Haughton v. Orchid Automation, 206 F. App’x. 524 (6th Cir. 2006) Hafford v. Seidner, 183 F.3d 506 (6th Cir. 1999).” [↑](#footnote-ref-149)
149. Oncale v. Sundowner Offshore Servs., Inc., 523 U.S. 75, 80 (1998). [↑](#footnote-ref-150)
150. Kroll v. White Lake Ambulance Auth., 763 F.3d 619 (6th Cir. 2014); Sullivan v. River Valley Sch. Dist., 197

F.3d 804 (6th Cir. 1999). [↑](#footnote-ref-151)
151. Benison v. Ross, 765 F.3d 649 (6th Cir. 2014). [↑](#footnote-ref-152)
152. Bagi v. City of Parma, 714 F. App’x 480, 486 (6th Cir. 2017). [↑](#footnote-ref-153)
153. Jones v. The Continental Corp., 789 F.2d 1225 (6th Cir. 1986). [↑](#footnote-ref-154)
154. 434 U.S. 412 (1978). [↑](#footnote-ref-155)
155. Smith v. Smyth-Cramer Co., 754 F.2d 180 (6th Cir. 1985). [↑](#footnote-ref-156)
156. 434 U.S. at 421. [↑](#footnote-ref-157)
157. See Westmoreland v. Sutherland, 662 F.3d 714 (6th Cir. 2011). [↑](#footnote-ref-158)