SECOND QUARTER 2019

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KENTUCKY

PENAL CODE

PENAL CODE – KRS 503 - FORCE

Reed v. Com., 2019 WL 1868916 (Ky. App. 2019)

FACTS: Knott and Reed shared a home in Jefferson County. On March 24, 2016, a number of individuals were socializing outside their Louisville home. Reed was complaining about the people outside and also arguing with Love, Knott's girlfriend. Knott intervened and the two began fighting. The two men's girlfriends tried to break up the fight and eventually, it ended. Reed went inside and returned with a baseball bat, which Knott took away from him. Reed again went inside and returned with a kitchen knife and cell phone; Knott called 911.

Knott, still holding the bat, approached Reed and they argued. He tossed away the bat and challenged Reed to fight "like men." Knott punched Reed; Reed stabbed Knott, killing him. Reed was indicted. He sought a self-defense directed verdict and was denied. Reed was convicted of Reckless Homicide and appealed.

ISSUE: Does a self-defense argument apply when the defendant is the one that escalated a physical fight to fight with deadly weapons?

HOLDING: No (as a rule).

DISCUSSION: The Court reviewed the self-defense argument. The Court noted that Knott was the first physical aggressor, but Reed "escalated the situation by twice retrieving weapons from the house." Knott was unarmed when he was stabbed, having tossed away the bat. As such, at best, he could claim "imperfect self-defense" and that was properly presented to the jury. Reed also argued that photos of the victim's organs (heart, lungs and ribs) were improperly shown to the jury to demonstrate the direction of the wound. The Court agreed that although graphic, they were still proper evidence, and were shown only briefly.

The Court upheld Reed's conviction.

PENAL CODE – KRS 514 – THEFT

Dunlap v. Com., 2019 WL 1870640 (Ky. App. 2019)

FACTS: On July 6, 2016, Dunlap was stopped at a Lexington Kroger for shoplifting. She showed a receipt, but it was for a different Kroger and different items. Dunlap was taken to the loss prevention office to wait for Lexington police. Officer Kanis gave Dunlap Miranda.[1] During the course of the interaction, the officer placed the receipt on the desk, with her citation book. Dunlap asked to speak with her attorney and a call was made to the name she provided. The man, Gormley, arrived in a few minutes and they asked to confer in private. Officer Kanis, believing Gormley was an attorney, allowed them to do so. Through the window in the door, Officer Kanis saw Gormley pick up the receipt and hand it to Dunlap, who tucked t into her shirt. When they ended their talk, Officer Kanis asked for the receipt, but both denied having it.

Dunlap was charged with Theft and Tampering, and convicted of both. She appealed.

ISSUE: May you be charged with theft when you are caught before leaving the premises?

HOLDING: Yes

DISCUSSION: Dunlap argued that there was no indication she intended to commit a theft as she never actually left the market, although she avoided the checkout and was in the vestibule when caught. KRS 514.030 allows a charge as she bypassed the point of sale and set off a security sensor, which locked the wheels on the bascart. She was moving items to another cart when caught. The Court agreed that an actual taking is not required, only unlawful control. Her actions satisfied the elements.

With respect to the Tampering charge, related to the receipt, the Court agreed that it was reasonable to believe that she was attempted to remove or destroy an item pending a criminal proceeding. She attempted to convince the jury that she had no idea it was going to be used against her. The circumstances, however, suggested otherwise. The Court agreed and noted she was not hiding the items she'd tried to shoplift, but instead, the physical evidence that she intended shoplifting in the first place.

The Court upheld her charges.

See Com. v. Gormley, elsewhere in this update.

[1] Miranda v. Arizona, 384 U.S. 436 (1966).

PENAL CODE – KRS 519 - TAMPERING

Smith v. Com., 2019 WL 1870655 (Ky. App. 2018)

FACTS: On September 4, 2016, Trooper Peace (KSP) stopped Smith on a state highway in Jenkins. She had only one headlight and while the vehicle had Virginia plates, they had been cancelled. She had no license, proof of insurance or registration, had slurred speech and powder residue on her nose. As she stepped out, a small blue container fell from her clothes and she stepped on it. When he retrieved it, the trooper found it had methamphetamine and Xanax tablets; she admitted to having taken both earlier.

Smith consented to a search and found a quantity of Percocet, Xanax and a pipe. She was convicted of drug trafficking, tampering and related charges. She then appealed the Tampering charge.

ISSUE: Is it tampering to attend to conceal an incriminating item?

HOLDING: Yes.

DISCUSSION: Smith argued that simply dropping the item did not constitute tampering, but the court noted that she didn't drop it, she attempted to conceal it or destroy it. That, the court agreed was sufficient for Tampering.

The Court also agreed that there was a double jeopardy argument with possession of the Percocet and possession outside a lawful container, and vacated the latter.
The Court affirmed the Tampering and most of the other offenses, although the fines were suspended as she was indigent.

PENAL CODE – KRS 520 – HINDERING

Hall v. Com., 2019 WL 1976135 (Ky App 2019)

FACTs: On June 24, 2014, Williamsburg officers went to Hall's residence with a search warrant for the house and with arrest warrants for Hall and Hall's girlfriend, Reeves. Chief Bird was greeted by a juvenile and when the door opened, he spotted Hall. Hall told him he hadn't seen Reeves for several months. Reeves, however, was found hiding in a closet. Hall was charged with Hindering and other charges and ultimately took a conditional plea.

ISSUE: Is asking for the location of a resident of a house an incriminating question?

HOLDING: No.

DISCUSSION: The Commonwealth argued that Hall was not under arrest and that he was not in custody at the time, when the Chief asked the question. The Court noted that the question of

whether he was in actual custody was not the other issue. The Court agreed that the inquiry "was not reasonable intended to elicit an incriminating response nor to further investigation into another crime." "Taken to its logical conclusion, Hall's position would prohibit officers from asking even the most mundane of questions to anyone they came in contact with unless Miranda warnings were given first." The question was not related to his warrant and "suppression was unwarranted."

On an unrelated matter, the court noted that the length of time involved in prosecuting this relatively minor case was extraordinarily long, but that the delays were at Hall's feet, "which complicated the handling of what would otherwise have been a simple matter." (Hall filed a number of motions, hired and fired attorneys and "employed a strategy of litigating every conceivable issue.")

The Court affirmed Hall's plea.

NON-PENAL CODE

CONTROLLED SUBSTANCES

McAlpin v. Com., 2019 WL 2462296 (Ky. 2019)

FACTS: On February 10, 2011, Officers went to McAlpin's Louisville apartment in search of Durham. The latter was a wanted parolee, and her father had given officer's McAlpin's address. Durham answered when they knocked. During the arrest, they did a "safety sweep" to confirm no one else was there but did see syringes and spoons.

Two men arrived, Koger and Duerr, the former also stayed with McAlpin on occasion. As neither had any warrants or anything illegal on their person or in their vehicles, they were allowed to leave, although they were admitted heroin users. Later, it was determined that one of the spoons and clothing found at the apartment belonged to Koger. McAlpin arrived and again, nothing illegal was found on his person or in his vehicle, although allegedly, he had abused pills in the past. Durham claimed all the contraband, including heroin residue and cotton, at the apartment was hers, other than the spoon that belonged to Koger.

Durham was arrested and McAlpin was cited, although the citation was not filed, apparently. He was indicted over a year later and convicted for drug possession and possession of paraphernalia. The latter charge was vacated by the appellate court as untimely. He also appealed his possession conviction.

ISSUE: Must evidence be carefully documented to be admitted under constructive possession?

HOLDING: Yes.

DISCUSSION: Among other issues, McAlpin argued there was insufficient evidence to find him guilty of possession of heroin. The Court differentiated between actual and constructive possession and agreed McAlpin was not found in actual possession. It was also agreed that while it was McAlpin's apartment, others regularly resided there with him, and he did not have exclusive control of the property. In such joint control, further evidence is needed to prove that McAlpin "knew the substance was present and had it under his control." In this case, the heroin present was in the form of residue only, and testimony did not quantify or specify precisely where the heroin residue was even found, as the report was not specific as to which spoon and which piece of cotton it was located on, or where those items were located in the apartment.

The Court agreed that there was insufficient evidence and vacated his conviction.

Hackworth v. Com., 2019 WL 2563021 (Ky. App. 2019)

FACTS: KSP spotted marijuana plants from the air, in a patch in Elliott County. A trooper rappelled down from the helicopter and was joined by other troopers. About 75 plants were found, 5-6 feet tall and not yet flowering. They were in a field behind a fence. Trooper Rollins photographed the plants as they were being removed and another trooper went to the nearby house. He spoke to Hackworth, Jr., age 15, who stated his father was not home. Contact information was left with the son, but the father did not call KSP.

After a lab test confirmed marijuana, Hackworth, Sr. was indicted for cultivation of marijuana. He was convicted and appealed.

ISSUE: Is a person presumed to be aware of marijuana plants in close proximity to their home, on their property?

HOLDING: Yes.

DISCUSSION: Among other issues, Hackworth argued he was unaware of the plants. The court noted that the plants were less than 25 feet from his back door, and his son indicated he knew the plants were there. The plants were clearly visible from the house and accessible to it. They were "healthy and well maintained," and a hose was nearby, as was a pesticide sprayer. A survey from the PVA indicated Hackworth owned the property.

The Court upheld the conviction.

DUI

Dowdy v. Com., 2019 WL 2486219 (Ky. App. 2019)

FACTS: On March 5, 2017, Deputy Doss (Calloway County SO) responded to a crash. Dowdy, the driver of one of the two involved vehicles, was already under EMS care when the deputy arrived – she appeared under the influence with glassy eyes, slurred speech and no recall of the crash. (The other driver, also seriously injured, was alert and could speak about the crash.) A witness reported the Dowdy vehicle being driven erratically and into oncoming traffic prior to the crash.

Deputy Doss requested a search warrant for Dowdy's medical records and her BA was shown to be .206. He filed charged on Wanton Endangerment and DUI (later amended to second offense). Assault charges were added later.

Dowdy moved to suppress her medical records, obtained through the search warrant. She asserted the warrant was not based on probable cause and an improper way to obtain the records. The motion was denied. Dowdy took a conditional guilty plea and appealed.

ISSUE: May medical records be released pursuant to a proper search warrant?

HOLDING: Yes.

DISCUSSION: First, the Court agreed that the search warrant clearly contained sufficient facts to support probable cause. The Court agreed that it was not necessary for a search warrant to provide all the elements of a specific offense, as she asserted, so long as it provided a reasonable person with enough evidence to conclude she was, in fact, DUI. The Court upheld the warrant.

Dowdy also raised a HIPAA challenges, but the Court noted that, in the case of a properly issued search warrant, the production of the records was valid under HIPAA. It is, in fact, the appropriate statutory way to obtain such evidence under Anderson v. Com.[2] She quibbled that certified records (as requested by the warrant) should not have been produced under KRS 422.305, but the Court disagreed that the statute made it improper to provide such records.

Her plea was affirmed.

Whitlow v. Com., 575 S.W.3d 663 (Ky. 2019)

FACTS: On October 29, 2016, in Lexington, Whitlow, driving, left the roadway and went up onto a downtown sidewalk, striking and killing two pedestrians. She was also transported to a hospital for minor injuries and a Lexington officer asked for consent for a blood sample for

[2] 205 S.W. 3d 230 (Ky. App. 2006).

alcohol testing. She refused. The officer obtained a court order for blood draw, supporting it with a detailed affidavit. It was signed at 5:30 a.m., roughly three hours after the crash, and served on the hospital staff. The blood was immediately drawn and tested, and her blood alcohol was .237 at that time.

Several months later, Whitlow was charged with two counts of Manslaughter in the Second Degree and related charges. She moved to suppress the blood test, arguing that taking the blood by court order was improper, as the statute, KRS 189A.105 does not provide for a court order, but for a search warrant. The Commonwealth argued that the two were, in effect, synonymous but at any rate, the test was conducted in good faith. The trial court agreed that the best practice was to use a search warrant, but found that good faith, under U.S. v. Leon, applied, and denied the motion to suppress.[3]

Whitlow took a conditional guilty plea and appealed.

ISSUE: Is a search warrant the proper document to use to seek a blood sample in a DUI case?

HOLDING: Yes.

DISCUSSION: The trial court had agreed that "while a search warrant is a type of court order, search warrants and court orders are not the same. However, the failure to obtain a document entitled 'search warrant' was not a fatal flaw because the police provided complete and accurate information that the district court judge relied on in finding probable cause for issuing the court order authorizing the testing." As such, it was proper to apply the Leon exception. Further, the Court agreed, another statute did include the language that mentions a "court order" separate from a search warrant. The Court indicated that, pursuant to the statute, a search warrant should be sought, however.

In this case, the Court noted:

> "… the court order relied upon to test Whitlow's blood was not labeled "search warrant," but in substance that is exactly what it was. Probable cause existed to justify the blood test, and the police officer completed a detailed affidavit and petition, subscribed and sworn to before a neutral magistrate, which outlined the probable cause and the specific item to be seized, *i.e.,* a sample of Whitlow's blood. Further, the court order provided particularized information regarding the search, what the blood sample was to be tested for, and what to do with the sample once taken. All requirements for a valid warrant were met. In short, even though the court order was not titled "search warrant," it had all the essential elements of a valid warrant, and consequently the trial court properly denied the motion to suppress.

[3] 468 U.S.897 (1984)

The Court addressed another issue. In the affidavit, the officer misquoted the applicable statute, but that, along with title of the court order, but bother were "hyper-technical arguments entitled to little weight." The statute itself leads to confusion between search warrants and court orders, and any errors could be excused in the urgency of the situation. The officer's "missteps in no way obscured the substance of what had occurred and the legitimacy of the ensuing court ordered seizure of a sample of Whitlow's blood."

The Court agreed it was absolutely proper to issue a court order on the hospital, as Whitlow was already there, and the officer properly took charge of the sample after it was drawn by the hospital staff.

The Court noted, finally, that no discussion was needed on Leon because, simply put, the "affidavit and ensuing order were not deficient." The Court concluded that "despite an improper label, the court order was for all intents and purposes a valid search warrant."

The Court agreed the motion to suppress was properly denied and upheld Whitlow's plea.

Jones v. Com., 2019 WL 2563172 (Ky. App. 2019)

FACTS: Jones was stopped on August 20, 2016 in Nicholasville. Officer Cobb had spotted her vehicle weaving and once he made contact, he found Jones "smelled of alcohol, that her eyes were red and glassy, and that her speech was slurred." She performed poorly on FSTs and admitted she'd had beer. Jones was arrested and at the jail, given an Intoxilyzer, which indicated a BA of .217. Among other things, he told her she could have an independent test and estimated the cost at approximately $500. After some back and forth, she never gave a yes or no answer about the test.

At trial, she claimed she was denied her right to an independent blood test. It was noted that the cost would have been between $316 and $443, depending presumably upon the hospital. The trial court found no evidence that she could pay, no matter the cost, and found she was so intoxicated she could not rationally discuss the matter anyway. Further, the Court ruled the difference between the estimate and the actual cost was "not so substantial" so as to deny her the right.

Jones took a conditional guilty plea (this being her fourth offense) and appealed.

ISSUE: Does the cost of a DUI test (making it inaccessible) require the suppression of the officer's test results?

HOLDING: No.

DISCUSSION: The Court looked to Com. v. Riker, and agreed that she was informed of her right and given the opportunity to be transported, and both declined because of the cost.[4] The Court noted the price of the test was outside the control of the officer.

The Court affirmed her plea.

SEARCH & SEIZURE

SEARCH & SEIZURE – SEARCH WARRANT

Giles v. Com., 577 S.W.3d 118 (Ky. App. 2019)

FACTS: On February 25, 2014, Det. Kaufling (Louisville Metro PD) received a tip from a CI about cocaine and marijuana trafficking at a Louisville home. The trafficker was identified by the nickname P, and described, along with his vehicle information. The detective discovered the car was registered to Holyparadox Apollyon, who was named Giles at the time of the crime. Det. Kaufling confirmed Giles had a history of drug convictions and initiated surveillance on the home. On March 7, the detective observed a man leave the apartment and when engaged, identified himself by his "new" name. He smelled of marijuana and he agreed he had methamphetamine on his person. He was also found to have an outstanding warrant from Indiana and was arrested. They entered the apartment with a key obtained by Giles, to secure it and await a warrant, but observed crack cocaine and a small marijuana grow in plain view. A reference to the items was made in the search warrant.

Giles was charged with trafficking and moved to suppress the items found in the apartment. When that was denied, he took a conditional guilty plea and appealed.

ISSUE: Does an arrest a block away from a subject's home constitute an exigency for search incident of arrest of the home?

HOLDING: No.

DISCUSSION: Giles argued there were no exigent circumstances to allow the entry into the apartment. The Court agreed nothing indicated an urgency, and the arrest was made a block away from the apartment, nothing suggested anyone else was in the apartment at the time. It was not incidental to an arrest and the court found no basis for a protective sweep

Further, the Court found insufficient evidence for the warrant with the improper information removed, and there was no other lawful reason for the officers to be in the apartment. The Court reversed and remanded his convictions for the items found in the apartment.

[4] 573 S.W.3d 622 (Ky. 2019)

SEARCH & SEIZURE – TERRY

Rhodes v. Com., 2019 WL 2404576 (Ky. App. 2019)

FACTS: On July 21, 2016, Louisville Metro officers were working an unrelated traffic stop when a citizen reported a concern about a specific residence and drug trafficking. Officers began surveillance and soon saw three vehicles arrive and quickly leave. They followed the third vehicle, at about 2 a.m., which was driven by Rhodes. At some point, the vehicle pulled into a on-street parking spot. Unsure as to what was going on, the lead officer pulled in front of Rhodes and activated his lights. He approached the vehicle and told Rhodes to get out. He asked him "if he had anything on him that would get him into trouble." Rhodes admitted to a gun. The officer handcuffed Rhodes, retrieved the gun and frisked him further, finding a bag of methamphetamine.

Rhodes, a convicted felon, was indicted on the gun and the drugs. He moved to suppress and was denied. He took a conditional guilty plea and appealed.

ISSUE: Are face to face tips more credible for the purposes of a Terry stop?

HOLDING: Yes.

DISCUSSION: Rhodes argued there was not a reasonable articulable suspicion sufficient to justify the stop of his vehicle. Although he stopped of his own accord, he argued that the officers pulling in front of him constituted a seizure. The Court looked to the tip, which it characterized as coming from a "citizen informant" who approached the officers in person, and such face-to-face tips are entitled to even greater deference, and the tip was corroborated by the officers' own observations.

The Court agreed that the officers possessed "the requisite articulable suspicion of criminal activity" to make the stop. The Court upheld his plea.

INTERROGATION

Merida v. Com., 2019 WL 2713050 (Ky. App. 2019)

FACTS: In 2014, Merida was incarcerated in Florida. He was interviewed by Agent Nguyen (FBI) and allegedly promised that if he confessed to multiple robberies in three states (including two in Kentucky), it would be consolidated into a single federal case. As such, he confessed in a recorded statement, although he claimed he actually did not commit the Kentucky crimes.

Merida was charged in Kentucky, and he argued that the confession was involuntary. The agent was not called to testify but did later give testimony in a related proceeding. The issue of

voluntariness was deferred until the morning of the trial. On that date, in 2017, Agent Nguyen testified that he was told Merida wanted to speak to investigators by jail authorities. A note was provided which detailed "robberies in three states and their locations." Merida was given Miranda[5] before he gave the statement. The agent testified there had been an earlier interrogation which was stopped when Merida asked for counsel. He stated he made no promises and there had been no discussion about bond. He became aware of the Kentucky robberies only a few days before the later interview.

The trial court concluded that it was proper for Merida to waive his previously invoked right to counsel, under Moran v. Burbine as he did so before an adversarial proceeding.[6] The question, the Court agreed, was whether Merida initiated the second interview and ruled that he had, and that nothing in what was provided suggested any deal. The trial court denied the motion and he was convicted. (He pled guilty to a second charge). He then appealed.

ISSUE: May a person waive their invocation of their right to counsel?

HOLDING: Yes.

DISCUSSION: The Court agreed that by his note, Merida initiated the second interview and was properly given Miranda. He was a young man of seemingly normal intelligence and he was "voluntarily, knowingly telling his story." Although he alleged that promises were made, the trial court found that Nguyen was more credible on the issue, which was its prerogative.

Merida's convictions were affirmed.

SUSPECT IDENTIFICATION

Fortner v. Com., 2019 WL 2484452 (Ky. App. 2019)

FACTS: On November 11, 2015, Fortner conspired with three others (Smith, Forney and McGee) to burglarize what they believed was a drug house in Boyd County. They were mistaken, however. The four forced into the house, claiming to be police and secured the occupants, a family. They demanded drugs, which the occupants denied, and ransacked the house. They realized they were mistaken, cut loose the homeowner (Sublett) and fled, one on foot and three in a vehicle. One of the three in the car was apprehended after a chase, the others fled on foot. All eventually were arrested.

Shortly after the crime, Sublett could not identify Fortner from a photo pak, but did identify him from a news report. She also identified him at trial. Fortner denied any involvement. He was convicted of impersonating a police officer and burglary, and appealed.

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[5] Terry v. Ohio, 392 U.S. 1 (1967).
[6] 475 U.S. 412 (1986); See also Oregon v. Bradshaw, 462 U.S. 1039 (1983).

ISSUE: Is an in court identification reliable if it follows upon the subject's photo being shown in a public report?

HOLDING: Yes.

DISCUSSION: Among other issues, Fortner argued that Sublett's in court identification should have been suppressed. The Court noted that the initial photo pak used an old photo, and that Sublett recognized Fortner from a news report. That the Court agreed was reliable. Further, the news report was not "arranged by law enforcement officers."[7] The trial court, however, assessed the totality of the circumstances and found the identification was sufficiently reliable.

The Court upheld Fortner's conviction.

Barnett v. Com., 2019 WL 2157582 (Ky. App. 2019)

FACTS: In 2012, Huckleby was working alone at a check cashing store in Elizabethtown. At the end of the day, she prepared the cash receipts for deposit and placed it in her purse. As she left, she was robbed of her purse and the receipts. The men were Wright and Barnett. Wright's girlfriend had worked at the store in the past and knew the routine, and that the clerk would have a great deal of cash when leaving. She had dropped off the men nearby and when she picked them back up, they had a woman's purse with a bank bag, which the girlfriend, Haycraft, recognized. She asked about it and was told to keep her mouth shut." She did so. A year later, however, she had come under suspicion in the robbery and identified the two men. She denied knowing about the plan but admitted they'd discussed the lack of security.

Both men were convicted and appealed. Ultimately, that conviction was affirmed. Barnett, in 2017, filed a motion claiming ineffective assistance of counsel. the trial court denied the motion. Barnett then appealed.

ISSUE: May a much delayed identification be challenged in court?

HOLDING: Yes.

DISCUSSION: Among other issues, Barnett challenged Haycraft's identification of him as the other robber. She had only met him that one time, and tentatively identified him in a photo array. His hair was longer when she saw him than in the photo, but she claimed that did not affect her ability to identify him. The Court agreed that the defense counsel "more than adequately cross-examined Haycraft" about the matter.

Barnett also argued that Det. Bowling was improperly allowed to state that he received a tip that Hodgenville PD had Barnett in custody, and he went there to interview him. At the time, however, he did not place charges against him. He had also questioned another suspect in

[7] Perry v. New Hampshire, 565 U.S. 228 (2012).

custody in Larue County, who had been "casing" a check cashing place. The Court, however, noted that the testimony did not affect the outcome of the case.

The Court upheld the dismissal of the motion and upheld his conviction.

INTERROGATION

Walker v. Com., 2019 WL 2462806 (Ky. 2019)

FACTS: George Walker lived with his brother, Chris and sister-in-law, Allison, in Adairville. On December 21, 2015, Chris called the Sheriff's Office to report Allison missing and she remained missing through the next day. During the investigation, they interviewed George at the residence and though he was told he was not under arrest, he was given Miranda. He was told several time he was under "no obligation" to continue the interview. Although he expressed uncertainly about talking to the deputies, he continued to engage in conversation and ask questions of the deputies. Ultimately, he agreed to walk down to the river and there, Allison's body was found.

While still on scene, George admitted to the murder. He was arrested and again given Miranda, which he waived and he then repeated the confession. Twice more, he was given Miranda.

George Walker was indicted for Murder. At the trial, the Commonwealth played bodycam footage, during which the officer asked Walker if he would take a polygraph. It was agreed that was inadvertent and unintentional – and they had intended to redact that portion. The answer was muted so the jury did not know if he agreed to do so or not. The trial court provided an admonition, after consulting with both sides.

Walker was convicted and appealed.

ISSUE: Is Miranda only required when an adult is in custody?

HOLDING: Yes.

DISCUSSION: Among other issues, Walker argued his confession should have been suppressed as a violation of Miranda.[8] In this case, the Court agreed that he was not in custody and was told multiple times he was not in custody and did not have to talk to the deputy. In fact, he wasn't the primary suspect initially, as the deputies supposed his brother. And "although he may now regret it, [Walker] made the voluntary decision to talk with police." The Court noted that giving Miranda, when not required, does not convert it to a custodial interview either as the Court did not want to punish officers for providing the rights.

The Court agreed the polygraph mention was inadvertent and harmless error.

[8] Miranda v. Arizona, 384 U.S. 436 (1966).

The Court upheld his conviction.

TRIAL PROCEDURE / EVIDENCE

TRIAL PROCEDURE / EVIDENCE – HEARSAY

Shirley v. Com., 2019 WL 2713148 (Ky. App. 2019)

FACTS: Shirley was accused of sexual abuse in Barren County, the victim being his girlfriend's 8 year old daughter. At trial witnesses, the child's grandmother and two aunts, repeated statements the child had made about what had occurred, which included physical abuse Shirley had committed her mother as well, which her mother denied. (The child had testified the day before, in a closed hearing.)

Shirley was convicted and appealed.

ISSUE: Are excited utterances admissible?

HOLDING: Yes.

DISCUSSION: Shirley argued that the child's statements, as repeated by the adult witnesses, constituted hearsay. The Court agreed that the statements were hearsay, the question remaining whether they were excited utterances, an exception under the rule and thus admissible under KRE 803(2). The Court looked to the spontaneity of the statements, coming close in time to the alleged abuse, tended to suggest no fabrication or coaching. The testimony indicated the child was "excited, scared and even panicked." The statements were made at the scene, and the child was not responding to a question. The criteria for assessing such statements were almost completely in favor of finding the statements to be excited utterances.

The Court affirmed the conviction.

TRIAL PROCEDURE / EVIDENCE – TESTIMONY

Taylor v. Com., 2019 WL 2462780 (Ky. 2019)

FACTS: Javontaye and Quandarious Taylor (brothers) were charged with armed robbery in Fayette County. Det. Merker learned that Hausley, who was present, had facilitated the two men getting into the apartment by getting the victim to open the door with a ruse. He interviewed Hausley, who identified her nephews as the robbers, but that she did not know they planned to do it. Both men were arrested.

During the trial, Det. Merker testified that Javontaye Taylor declined to be interviewed after his arrest. Taylor was convicted and appealed.

ISSUE: Should witnesses avoid any mention that a subject refused to talk to the police?

HOLDING: Yes.

DISCUSSION: The Court agreed that "it is a well-known and often repeated canon of American law that a suspect has a right to remain silent after he or she is arrested." At the first mention, defense counsel objected and then asked for a mistrial, which the court denied. The statement that Javontaye Taylor did not want to speak to the detective was made only once. The Court agreed it was an error, but found it to be harmless and upheld his conviction. (The Court agreed, however, it was improper to require him to pay restitution to his victim without a proper hearing.)

Faison v. Com., 2019 WL 1579604 (Ky. App. 2019)

FACTS: On January 25, 2016, Faison sold a quantity of crack cocaine to Bradley, a CI for the Greater Hardin County Narcotics Task Force. She had worked for them consistently for over 20 years. In this case, she offered to make a buy from Tyndall, in Radcliff and a controlled buy was set up. She met with Det. Ellis, who searched her, attached a camera, provided her with cash and followed her to the location. At trial, a video was played that showed the transaction. Det. Ellis was able to identify Faison as one of the people in the apartment, and in fact, the deal was made with Faison, who took the proffered cash, went outside and returned with the cocaine. (It was not possible to see what was transferred hand to hand, Bradley said it was cocaine and Faison said she returned the cash.) Bradley gave Ellis the drugs.

Faison was charged, and convicted, of Trafficking and PFO. She appealed.

ISSUE: Should witnesses avoid mentions of prior criminal interactions with a subject?

HOLDING: Yes.

DISCUSSION: First, Faison argued that Det. Ellis was improperly allowed to testify about his "prior encounters" with Faison. However, she did not object at the time and as such, the court looked at it carefully and noted that at no time did the detective give any specifics, just that he recognized her. The Court agreed it did not fall under KRE 404(b) and as such, was not improperly admitted.

The Court also looked at the argument that the detective improperly vouched for Bradley's "proven reliability as a CI." Again, no objection had been made. The Court looked to Fairrow v. Com., in which a detective "attempted to bolster" the CI's credibility before it was challenged.[9]

[9] 175 S.W.3d 601 (Ky. 2005)

In such cases, it is generally disallowed under KRE 608(a). However, here, the CI was the first witness and she was challenged on cross, and as such, Fairrow and KRE 608 does not apply.

Next, she argued that the Commonwealth should have been able to bring up, in closing, why two other detectives did not testify, but the Court agreed that was in response to her own challenge to the jury that they should have done so. Even without that, the court agreed that the statement did not affect the outcome, given the wealth of evidence against Faison presented.

The Court upheld the conviction.

TRIAL PROCEDURE / EVIDENCE – CELL PHONE

Rivera-Rodrigues v. Com. 2019 WL 2462783 (Ky. 2019)

FACTS: Rivera-Rodrigues became the target in a Fayette County drug investigation. Mayberry, a CI, was working with KSP and made four buys from Rivera-Rodrigues. During the third buy, he talked to Mayberry about committing a murder for hire, related to drug trafficking, and even offered from a selection of firearms. Mayberry told his handler, who shared the information with Lexington, the FBI and the DEA and a fourth buy was planned.

On that same day, Lexington police responded to a 911 call where they found a blood-covered woman in a vehicle, sitting by the side of the road. A man, also bloody, Dominguez was in the vehicle, deceased. He had been shot several times.

During the fourth buy, Rivera-Rodrigues told Mayberry about the murder also he said the victim was left in a truck, rather than the sedan in which the victims were found. He stated he "came up to the car shooting." Physical evidence in the vehicle included cocaine and a time-stamped receipt for scissors. Det. Buzzard (Lexington PD) found a bullet hole and shell casings.

Det. Upchurch (Lexington) interviewed Rivera-Rodrigues and he admitted having been at the store with his father-in-law, and making the purchase of the scissors. He was indicted for Murder and four counts of Trafficking 1st. At the trial, historical cell phone data was introduced through a technician, with testimony about the cell phone number used in the transaction. Maps were shows as well.

Rivera-Rodrigues was convicted of complicity to murder and trafficking. He appealed.

ISSUE: May cell phone location evidence be admitted in which the technician witness carefully explains the process?

HOLDING: Yes.

DISCUSSION First, Rivera-Rodrigues argued that the technician should not have been allowed to testify as to the cell phone issues, as the report he produced pursuant to RCr 7.24 prior to trial did not contain the information to which he testified. The Commonwealth responded that the testimony was not opinion testimony. Further, during pre-trial proceedings, the defense had attempted to preclude some of the evidence, which suggested that they did, in fact, have much of the information and anticipated what would be discussed at trial. The Court looked to Holbrook v. Com., in which the court had allowed similar testimony, in which the witness had carefully described the limits of the technology used to place the location of cell phone calls.[10] And like in Holbrook, the testimony in this case was "relevant and probative" and allowed the jury to place Rivera-Rodrigues near the scene of the murder.

He also objected to being required by police to provide his cell phone number before he was advised of Miranda. The trial court had found that "asking someone his cell phone number is a routine question."[11] The number he provided was not the number from which the cell phone testimony was provided, but his old number and a girlfriend's number. As such, whether it was a routine booking question is immaterial, but simply didn't relate to the evidence he wanted to suppress.

The Court affirmed the conviction.

TRIAL PROCEDURE / EVIDENCE – EVIDENCE

Edwards v. Com., 2019 WL 2462783 (Ky. App. 2019)

FACTS: On April 20, 2016, Edwards entered a Holiday Inn in Richwood. He was surprised to find a female clerk, but he ordered her to hand over the money at the front desk. She gave him all the cash and told him she could not open the safe. Edwards took the money and fled; she called police. A few hours later, Edwards was at the nearby Belterra Resort in Indiana and lost money at blackjack. After losing at blackjack, Edwards left, but returned an hour later with a roll of cash. He proceeded to gamble away more money until he left again at 5:57 a.m. Thereafter, Edwards robbed a Waffle House in Walton. (He made the servers believe he had a weapon.)

This time, the store manager, Hudson, was arriving and when he learned the vehicle leaving had just committed a robbery, Hudson pursued and called police. Hudson stopped his pursuit when the police caught up with him. KSP then pursued Edwards on I-75 but terminated pursuit due to safety concerns. The KSP identified the vehicle was owned by a couple away on their honeymoon. When the couple were "face-timed" and shown a photo of the robber from surveillance video, they identified the man as Edwards, with whom they had entrusted their vehicle.

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[10] 525 S.W.3d 73 (Ky. 2017).

[11] Dixon v. Com., 149 S.W.3d 426 (Ky. 2004).

Dets. Dickhaus and Faulkner (Florence PD) went to Edwards' mother's home in Ohio. They made arrangements with local law enforcement to have Edwards arrested on an outstanding warrant. After the arrest, the detectives spoke with Edwards about the Kentucky robberies. Edwards invoked his right to remain silent, but the detectives continued speaking to him. Edwards admitted that he committed the robberies, but denied using force. He also admitted to gambling at Belterra. The detectives recovered a shirt and cash. The detectives also obtained video of Edwards gambling at the casino.

Edwards was indicted for two counts of robbery and fleeing and evading. Following the indictment, Edwards moved to suppress his statements. The trial court found that Edwards was in custody and had already invoked his Miranda rights when he made the statements. The trial court suppressed his confession and the items seized after that time. At the trial, Edwards learned they intended to introduce the Belterra video, which the Commonwealth maintained was admissible under the inevitable discovery rule. In an in camera hearing, Det. Faulkner testified that they would have discovered the Belterra video anyway because of "good police work" and Edwards' connection to gambling. Det. Faulkner testified that he would have requested the information from the Gaming Commission and would have found it regardless of what Edwards told him. The video was played at trial.

Edwards testified that he used no threats against the women as he knew the clerks were trained to "not resist such demands" – and that he simply asked for the money.

Edwards was convicted of all charges and appealed.

ISSUE: May evidence that would have inevitably been found be admitted, even if the process in getting the information was flawed?

HOLDING: Yes.

DISCUSSION: Edward argued the video should have been suppressed. After examining Miranda v. Arizona and Bartley v. Com.,[12] the Court of Appeals held that questioning must cease after an invocation of Miranda rights and that statements made after the invocation of rights must be suppressed. Further, in Dye v. Com., the court also said that the rule "applies to evidence obtained directly from violations of Miranda as well as evidence that is tainted or fruit of the poisonous tree."[13]

However, the Exclusionary Rule "is subject to the same limiting principles as its counterparts in the Fourth and Sixth Amendments – the independent-source, inevitable discovery, and dissipation-of-taint-doctrines." In the inevitable discovery rule, such evidence may be admitted if it could be shown that the "same evidence would have been inevitably discovered by lawful

[12] 445 S.W. 3d 1 (Ky. 2014).
[13] 411 S.W.3d 227 (Ky. 2013).

means.[14] In effect, the inevitable discovery rule places officers in the same footing that they would have without the statement. The trial court agreed that the video would have been located absent the statement.

The Court of Appeals held that given the knowledge the detectives had of Edwards prior to questioning him, it was logical to believe gambling was behind the robberies and Belterra was the logical gambling venue. Thus, the Court held that the evidence was property admitted.

The Court affirmed his convictions.

James v. Com., 2019 WL 2462484 (Ky. 2019)

FACTS: James and Coleman were in an on and off romantic relationship in Warren County. On April 26, 2016, Coleman went to a job interview and found she had inadvertently picked up James' phone, and found text messages to another woman. When she returned to the motel where they were living, she confronted him. They argued and both packed their bags, but left together, still arguing. James held a gun on Coleman as she drove.

Coleman stated she intended to ask James to drive, planning to escape as they exchanged seats. As they stopped at a stop sign, a passerby stopped to see if they needed help. James said everything was OK, but Coleman shook her head no. Coleman than ran and James shot her twice. He shot her again as she lay on the ground and then left the scene. Witnesses called the police and EMS, and followed James until law enforcement could catch up. He tossed the gun during the chase, which was retrieved. He was arrested and also found in possession of cocaine. Coleman survived.

James was charged with Assault 1st, Assault under EED, Kidnapping and drug offenses. He was convicted of most of the charges and appealed.

ISSUE: May crime scene photos, even if gruesome, be admitted?

HOLDING: Yes.

DISCUSSION: James argued first that the bloodstained photos from the crime scene should not have been introduced. Two photos of the stain were shown, each with items nearby for reference purposes. He argued because there was no question that Coleman had been shot, showing the photos to the jury was prejudicial. The Commonwealth noted that the photos helped the jury to put the scene into context and that it was "probative to show the potentially life-threatening injury" she sustained. The Court held that these photos were more "clinical" as they did not even show a victim and added to Coleman's testimony about her severe injuries. Postoperative photos were also shown and also added value to the victim's testimony and

[14] Hughes v. Com., 87 S.W.3d 850 (Ky. 2002).

emphasized the seriousness of her injuries. The court held that the photos were properly admitted.

EMPLOYMENT

Marshall v. Montaplast of North America, Inc., 575 S.W.3d 650 (Ky. 2019)

FACTS: Marshall had worked for Montaplast since 1998. In 2015, Marshall learned a supervisor was a registered sex offender and told a few of her coworkers about it. Marshall was quickly terminated. She sued Montaplast, arguing wrongful discharge and that the Sex Offender Registration Act (SORNA) indicated that the purpose of the registry was to be open and accessible. Montaplast argued that such a termination was not protected under SORNA.

The Franklin Circuit Court and the Court of Appeals ruled for Montaplast. Marshall appealed.

ISSUE: Does immunity on discussing individuals on the sex offender register translate to protection to revealing that in an employment situation?

HOLDING: No.

DISCUSSION: The Supreme Court noted that while at-will employees may, as a general rule, be terminated at any time for any reason, it had carved out a "narrow public policy exception" to that rule.[15] Three circumstances must be applied:

(1) When there are "explicit legislative statements prohibiting the discharge;"
(2) When the "alleged reason for the discharge … was the employee's failure or refusal to violate a law in the course of employment," or
(3) "when 'the reason for the discharge was the employee's exercise of a right conferred by well-established legislative enactment."

Further, the public policy must be connected to the employment.

Marshall argued that KRS 17.580 provided immunity for sharing information contained on a sex offender registry. The Supreme Court found nothing in SORNA that created a public policy exception to the usual at-will doctrine.

The Court affirmed the decision.

CIVIL LITIGATION

Gonzalez v. Johnson, 581 S.W.3d 529 (Ky. 2019)

[15] Grzyb v. Evans, 70 S.W. 2d 399 (Ky. 1985).

FACTS: In January 2014, the Kentucky State Police and the Scott County Sheriff's Office collaborated to capture a heroin dealer in a sting operation involving a buy by a CI. Deputy Johnson (Scott County SO) was enlisted to hide during the planned transaction, observe, and be available to conduct a traffic stop if necessary. However, after the transaction, and without orders, Johnson witnessed the suspect (McLaughlin) run a traffic light, and began a pursuit.

> A litany of things went wrong with the pursuit. To begin, it had been raining, making the well-traveled road slippery. Further, the cruiser Deputy Johnson was using that evening was a K-9 unit, and K-9 Officer Hugo was in the back seat. The partition in the cruiser was unlocked, and the restless dog was able to poke his head through the partition into the front seat. Finally, while the lights on Deputy Johnson's cruiser were functioning, the siren was not. Deputy Johnson claimed he did not realize the siren was broken until two miles into the pursuit. He testified that, though he knew pursing a suspect without his siren violated KRS 189.940 and the Scott Co. Sheriff Dept.'s practices, he continued the pursuit for about another mile.

Both parties slowed as they approached an S-curve, and Johnson decided to terminate the pursuit. At almost the same instant, McLaughlin's car fishtailed and careened out of control, striking Gonzalez' car. Gonzalez, the passenger, died at the scene and Spencer, the driver, died later.

The Gonzalez Estate filed suit against Johnson and the Scott County Sheriff, Hampton. The trial court granted summary judgment to both under Chambers v. Ideal Pure Milk Co., that Johnson's actions "were not the proximate or legal cause of Gonzales' death as a matter of law."[16]

The Court of Appeals "reluctantly affirmed," and the Estate appealed.

ISSUE: Is the *per se* no proximate cause rule established by Chambers abandoned in Kentucky law?

HOLDING: Yes.

DISCUSSION: In state wrongful death suits, KRS 411.130(1) provides: "Whenever the death of a person results from an injury inflicted by the negligence or wrongful act of another, damages may be recovered for the death from the person who caused it, or whose agent or servant caused it."

Basic negligence actions all involve four elements:

(1) the defendant owed the plaintiff a duty of care;
(2) the defendant breached that duty of care;

[16] 245 S.W.2d 589 (Ky. 1952).

(3) a causal connection between the defendant's conduct and the plaintiffs damages; and
(4) damages.[17]

Causation can be broken down into two elements: cause in fact or "legal or consequential causation." The latter "concerns the concepts of foreseeability and the public policy consideration on limiting the scope of responsibility for damages."

In the Chambers' case, the court held that an officer's actions "could, as a matter of law, never be the proximate or legal cause of damages suffered by a third party struck by a fleeing suspect." As in this case, in Chambers, there was no direct contact between the injured third party and the law enforcement vehicle.

The Court noted that after 67 years, Kentucky "finds itself in a nearly non-existent minority of states that have such a *per se* no proximate cause rule." In the interim, Kentucky had "adopted the substantial factor test to determine legal causation."[18] In that new test, the Court stated:

The actor's negligent conduct is a legal cause of harm to another if
(a) his conduct is a substantial factor in bringing about the harm, and
(b) there is no rule of law relieving the actor from liability because of the manner in which his negligence has resulted in the harm.

As such, to find liability, a jury would only need to determine that the defendant's actions "were a substantial factor in bringing about the harm." In 1984, as well, Kentucky had "abandoned the traditional approach of contributory negligence in favor of the modem approach, comparative fault."[19] Over time, the framework of Kentucky's tort law has become "vastly different" from the time of Chambers, which among other things, did not allow for apportionment of fault. Further, KRS 189.940 had also been amended. KRS 189.940 now requires emergency vehicles to have both warning lights and a siren in operation when exercising the privileges accorded to emergency driving.

The Supreme Court concluded that it overruled Chambers "insofar as it created a *per se* no proximate cause rule. We instead hold that an officer can be the cause-in-fact and legal cause of damages inflicted upon a third party as a result of a negligent pursuit. The duty of care owed to the public at large by pursuing officers is that of due regard in accordance with KRS 189.940."

The Supreme Court remanded the case for the trial court to assess the facts to "apportion fault, if fault is found."

Smith v. City of Ashland, 2019 WL 1579703 (Ky. App. 2019)

[17] Patton v. Bickford, 529 S.W.3d 717 (Ky. 2016).
[18] Deutsch v. Shein, 597 S.W.2d 141 (Ky. 1980), abrogated on other grounds by Osborne v. Keeney, 399 S.W.3d 1 (Ky. 2012).
[19] Hilen v. Hays, 673 S.W.2d 714 (Ky. 1984).

FACTS: On December 31, 2012, Officer Burr (Ashland PD) arrested Smith for DUI. Officer Burr originally stopped Smith for driving without headlights, and striking a curb. In another officer's presence, Smith was unable to successfully complete several FSTs, but the PBT showed no indication of alcohol. Smith was taken for a blood test, which showed no evidence of intoxicants. Smith was booked and ultimately pled guilty to the traffic offense. Smith, it turned out, was on kidney dialysis and also suffered neuropathy, which caused lack of sensation in his legs and balance issues. Smith claimed he told the officer that he did not consume alcohol because he had "no kidneys."

Smith filed suit for false imprisonment. The trial court found that Officer Burr had probable cause for the arrest and granted summary judgment. Smith appealed.

ISSUE: Is probable cause for an arrest a defense to false arrest?

HOLDING: Yes.

DISCUSSION: Smith identified no facts in dispute. The Court of Appeals examined whether the officer "had a reasonable and good faith believe that Smith had committed a misdemeanor in his presence." The Court of Appeals held that the officer possessed probable cause and affirmed the trial court's decision.

COURTS

Roberts v. Com., 2019 WL 2067115 (Ky. 2019)

FACTS: Roberts was convicted of reckless homicide in Jefferson County and appealed. On appeal, Roberts asserted improper interactions between the jury and the bailiff (a deputy sheriff). Following the close of proof on December 18, 2017, and before sending jurors to deliberate, pursuant to RCr 9.68, the deputy sheriff bailiffing the court was sworn in. That evening, the juror asked to see the weapon used, and a written interchange occurred with the judge. Another note from the jury a few hours later suggested that the jury was deadlocked. Those notes were placed in the court's file. At some point, a verbal interchange occurred between the bailiff and the jury concerning the jury's desire to replay testimony. The court reminded both the bailiff and the jurors to put all requests in writing.

At some point, defense counsel asked for a mistrial as the bailiff had revealed that the jury believed they were "hung." The matter went on the record and the bailiff testified.

ISSUE: Should requests from the jury be written down?

HOLDING: Yes.

DISCUSSION: Roberts argued that jury "requests that were either never reduced to writing or if written, cannot be located. He takes the bailiff to task for not delivering to the trial court an unspecified number of written jury requests and argues all requests must be given to the trial court."[20] During a motion for a new trial hearing, the trial court noted that notes were missing, but had read into the record each note received. There was apparently some discussion of a request for a TV to replay testimony, but the request was never reduced to writing.

The appellate court noted:

> Curiously, the bailiff was not called to testify during the new trial hearing. Thus, we do not know whether he received a written request for a television or to re-watch testimony. We do not know how he communicated with the jury, how many notes he received, nor how he handled them. We do not know whether he—of his own volition—told an individual juror or the jury as a whole no television would be brought to the jury room, but the entire panel could return to the courtroom and review Roberts' complete testimony as a group with everyone. Testimony from the bailiff would have avoided the speculation on which Roberts now relies. We will not assume the bailiff breached his sworn duty.

With respect to a mandate to write down all requests, the Supreme Court noted that "[w]hile creating a paper trail is wise, we are cited no authority mandating it. If a judge chooses to require all jury inquiries to be written, such a policy should be conveyed to the jury before it retires to deliberate. Roberts' jury was advised of such between being sworn and hearing opening statements." With respect to "[w]hether any testimony, or how much testimony, would be replayed was to be decided by the trial court, not the jury."

Further, the Supreme Court dismissed an allegation that a random juror, not the foreperson, communicated with the bailiff, finding no mandate in RCr 9.74 for the communication to only come from the foreperson. The Supreme Court found "no clear showing the bailiff influenced deliberations or failed to convey jury communications to the court."

Roberts' conviction was affirmed.

WORKERS COMPENSATION

Calloway County Sheriff's Dept v. Woodall (Estate of Spillman), 2019 WL 2067115 (Ky. App. 2019)

FACTS: In March 2007, Calloway County Deputy Sheriff Spillman was seriously injured in an automobile accident. Spillman received a permanent partial disability assessment and

[20] Young v. State Farm Mut. Auto. Ins. Co., 975 S.W.2d 98 (Ky. 1998) (jury requests should be "immediately conveyed to the trial judge. . . . Bailiffs are cautioned to follow the law and bring any question to the attention of the court.").

received weekly payments. He reopened his claim in 2013 due to a worsening of his medical condition and received a settlement increasing his benefits. That settlement expired in July 2016. He underwent back surgery in 2017 and died of a pulmonary embolism during surgery. "It was uncontested that the surgery was attributable to Spillman's 2007 injuries."

Woodall (Spillman's spouse) filed for death benefits and to reopen the claim. The ALJ denied the claim. The Workers' Compensation Board affirmed that the claim was time barred for lump sum benefits (with a four year limit), but reversed the denial of surviving spouse benefits and remanded to the ALJ for recalculation.

CCSD appealed the issue concerning surviving spousal benefits, while Woodall cross-appealed, arguing that the four year time limitation was unconstitutional.

ISSUE: Do workers' compensation benefits differentiate between individual and spousal benefits?

HOLDING: Yes.

DISCUSSION: The Court of Appeals examined KRS 342.750, which covered both types of benefits. Further, in Family Dollar v. Baytos, the injured employee had settled his claim a year before his death from the same work-related injuries.[21] In Baytos, the court noted that the correct way to approach such a situation is for the survivor to open a claim in their own right, not try to reopen the decedent's claim, as Woodall did. Thus, the issue of the four year limitation was irrelevant. Further, there is no limit on Woodall's claim for periodic death benefits and the Board correctly awarded Woodall benefits.

The CCSD argued that Woodall could not receive survivor benefits because the lump sum settlement had ended his regular payments. The Court noted that since the General Assembly had not yet amended the statute after Baytos, it must be the legislature's intent to continue allowing such benefits.

With respect to the issue of the lump sum benefits specifically, the Court held that Woodall had not met the heavy burden of overturning a statute as unconstitutional. The Court ruled that the four year limitation is intended to prevent stale claims and to provide stability to the system. It was rationally related to that intent and the limitations apply to all.

The Court of Appeals affirmed the Board's decision.

Kenton County Sheriff's Department v. Rodriguez, 2019 WL 2713075 (Ky. App. 2019)

FACTS: Rodriguez served as a sheriff's deputy for the Kenton County Sheriff's Office. He suffered a work related injury in 2016 and additionally claimed PTSD. He was very specific

[21] 525 S.W.3d 65 (Ky. 2017).

about his symptoms, including night terrors and insomnia, which he attributed to his long service as a SWAT officer. In particular, Rodriguez described three horrific fatal incidents, his K9 being stabbed by a suspect and being bled on by a HepC infected suspect.

The medicals and lost wages for the injury were agreed upon by the parties, thereby leaving only the issue of the psychological injuries. Rodriguez returned to work from the initial injury and then left again due to the psychological condition, although he is still apparently employed at less than his previous wage. At the hearing, the Administrative Law Judge (ALJ) agreed Rodriguez suffered from disabling PTSD but that he did not prove a psychological injury under the law as that injury was not related to the specific medical injury – a slip and fall.

Rodriguez appealed to the Workers' Compensation Board, which vacated the decision after finding that the PTSD did not have to be specifically connected to the injury. The Sheriff's Office appealed.

ISSUE: Is some PTSD compensable under workers' compensation?

HOLDING: Yes.

DISCUSSION: The Court noted that the ALJ is the sole factfinder. The KCSD argued that the only issue before the ALJ was the medical injury, and that Rodriguez did not properly, and separately, claim a psychological injury. As such, the KCSD did not have notice to defend the claim. On appellate review, the Board found that Rodriguez did properly plead that claim. The Board noted that the ALJ had an "incomplete understanding" of the law (KRS 342.0011) in that situation. In Lexington-Fayette County Urban County Government v. West, 52 S.W.3d 564 (Ky. 2001), the Kentucky Supreme Court had discussed psychological injuries and ruled that the injuries "must directly result from the physically traumatic event." The statute, however, "contains no explicit requirement that each traumatic event in a series of such events must involve physical rather than mental trauma in order to authorize compensation" for resulting psychological claims, but only that "the harmful change must be 'the direct result of a physical injury.'" Specifically, it was noted that the first in a series of traumatic events may involve physical trauma, but not necessarily the "date of loss" in the matter under consideration.

The Court of Appeals remanded the case to the ALJ for further consideration of other physical traumas Rodriguez had suffered through his years as an officer, such as an injured hand in one and smoke inhalation in another. If the first in the series involved physical trauma, the resulting PTSD could relate back to that trauma. If the PTSD only resulted from "observing gruesome crime scenes," the ALJ must make that clear in the report.

SIXTH CIRCUIT

FEDERAL LAW

FEDERAL LAW 18 U.S.C. §241 – 242

U.S. v. Dukes, 779 Fed.Appx. 332 (6th Cir. 2019)

FACTS: Late one evening, Littlepage went for a drive. That same night, Officer Dukes (Providence PD) received a call of a reckless driver. Thinking Littlepage was the driver, Dukes made a traffic stop. When Littlepage didn't move fast enough, he was subjected to frisk, but not an "ordinary" one. Instead Littlepage was struck in the back and genitals. Dukes released Littlepage with a warning and told Littlepage to stay off that particular road or he would "answer" to Dukes.

Littlepage, unfortunately, needed to use that road the next day. But "he was confused and traumatized"… and … "did not know what would happen if he ended up on that road again." So he tried to register his concern. First, Littlepage called Providence PD, and was told he could contact the chief the next day – but he needed to drive down that road the next morning. He was given the opportunity to talk to the officer on duty – which was, of course, Dukes, and that only made matters worse. Littlepage was told he could file a complaint and hung up on him. Littlepage called back and Dukes threatened to arrest him for harassing communications. Littlepage then called the Webster County Sheriff's Office. Thereafter, Littlepage called KSP. After that call, KSP called Providence PD.

Dukes soon got wind of Littlepage's calls. He instructed the dispatcher to contact Littlepage and tell him he could come down to the station to talk to a supervisor that night, but no supervisor was present. Littlepage asked instead that the supervisor come to his house, but the dispatcher said no, but did ask for Littlepage's address. Littlepage provided it after being assured no one would arrest or bother him. Littlepage went to bed.

A short time later, Dukes showed up, banged on the door until he answered and then told Littlepage he was under arrest. Littlepage backed into the house, followed by Dukes. What ensued was recorded, and resulted in Dukes tasing Littlepage twice, spraying him with OC, breaking his nose with a punch, and hitting him multiple times with the baton. Dukes told the responding EMT that "he hadn't been in a good fight like this in a long while." Littlepage was transported to the hospital and cited for harassing communications, resisting arrest, assaulting a police officer and criminal mischief – the last "for allowing his broken nose – courtesy of Dukes – to bleed on Dukes' uniform."

The matter was referred to the Kentucky Attorney General, who referred it to the U.S. Attorney. Dukes was charged under 18 U.S.C. §242 for a variety of criminal charges relating to the use of force and related issues. Dukes was convicted for the unlawful arrest and appealed.

ISSUE: If probable cause to arrest is the ultimate issue in the case, must the jury determine if probable cause existed to arrest for a specific offense?

HOLDING: Yes.

DISCUSSION: The Court noted that:

> It is usually not a good thing to see the flashing lights of law enforcement behind you. Sometimes you get lucky, and the officer just gives you a warning; other times you are not so lucky, and you get a ticket. But the string of horrors Officer William Dukes Jr. paraded on Jeffrey Littlepage after a simple traffic stop has no place in our society.

The Court reviewed the standards for the charge and agreed that when probable cause was an issue in a criminal case, it was for the jury to provide. Looking at the charges placed against Littlepage, the Court agreed that there was no probable cause for harassing communications. His calls were absolutely for a "legitimate purpose" even if they bothered Dukes.

One of the witnesses testified as to Dukes' training which indicated that he had been specifically taught the elements of the crime. Although the testimony was close to the line with respect to admissibility, as the witness came close to invading the province of the jury in making the ultimate determination – the Court agreed that the error, if any, was harmless.

The Court affirmed his conviction.

SEARCH AND SEIZURE

SEARCH AND SEIZURE – SEARCH WARRANT

U.S. v. Christian, 925 F.3d 305 (6th Cir. 2019)

FACTS: On September 3, 2015, Officer Bush (Grand Rapids, MI, PD) obtained a search warrant for Christian's home. The affidavit provided a number of details. When heroin and other items, including a gun, were found, Christian was charged under federal law with drug trafficking and possession of the firearm. Christian's motion to suppress was denied.

Christian was convicted and appealed.

ISSUE: Is a search warrant rife with factual assertions "bare bones?"

HOLDING: No.

DISCUSSION: Christian argued that the warrant was insufficient, that it "did not establish probable cause and that the Leon good-faith exception to the exclusionary rule should not

apply."[22] He also challenged the admission of a jail call between two other parties that suggested where Christian had hidden evidence later located by the police.

The 6th Circuit held that the affidavit was more than adequate, and "really not even close." The court reviewed the "totality of the circumstances" "through the 'lens of common sense'" and determined that the "conclusion is inescapable" – that a search of the indicated property would "uncover evidence of drug trafficking." In fact, "[m]ost readers of the affidavit would have been surprised if it did not." In fact, the affidavit specially stated that the target was seen entering and leaving the suspect property – despite Christian denying it. While the affidavit could have been more precise as there was a question about the target location, but "probable cause is not the same thing as proof." All of the evidence was connected to the address which was the subject of the warrant. In U.S. v. Hines, it was held that ""not all search warrant affidavits include the same ingredients," we said before recognizing that "[i]t is the mix that courts review to decide whether evidence generated from the search may be used or must be suppressed."[23] Even if there was an issue, the good faith exception of U.S. v. Leon, applied. The affidavit contained a vast number of factual allegations and was far above "bare bones."

Finally, the 6th Circuit held that any error in admitting the telephone call, did not sway the decision.

The Court affirmed Christian's conviction.

U.S. v. Chaney (James/Lesa) and Ace Clinique of Medicine, LLC, 921 F.3d 572 (6th Cir. 2019)

FACTS: The Chaneys were operating a medical clinic in Hazard. Dr. James Chaney, known as "Ace," was licensed as a physician in Kentucky and his wife, Lesa, operated the business as president and CEO. In 2010, the Cabinet for Health and Family Services received a tip that Chaney was pre-signing prescriptions for the clinic to be used when he was not physically present. Investigator Johnson confirmed that prescriptions were being used during times when Chaney was out of town. Clinic employees confirmed the process. A search warrant was obtained for the clinic, the Chaney home and an airplane hangar. This led to federal charges of distribution of controlled substances, fraud and money laundering.

The Chaneys sought suppression, to only partial success, with the airplane hangar evidence been suppressed along with old evidence from the clinic. At trial, the Chaneys were convicted of some of the charges and appealed.

ISSUE: Should a warrant for medical records be carefully circumscribed?

HOLDING: Yes.

[22] 468 U.S. 897 (1984).
[23] 885 F.3d 919 (6th Cir. 2018).

DISCUSSION: The defendants argued that the "patient files" demanded as part of the search warrant was overbroad and allowed seizure of patient records that were legitimate. The 6th Circuit noted that the preamble to the list "acted as a limit on the list" – as officers could only seize what was part of the criminal enterprise. The FBI agent involved admitted in testimony that they essentially took everything during the search. The 6th Circuit held this approach was reasonable as "there was no way agents in the field could have determined which files were potentially relevant evidence."

The search warrant itself was also found to be proper.

The Court noted that:

> Two sorts of infirmities can lead to an insufficiently particular, and therefore unconstitutional, warrant.[24] The first is when a warrant provides information insufficient "to guide and control the agent's judgment in selecting what to take."[25] The second is when the category of things specified "is too broad in the sense that it includes items that should not be seized." This is often referred to as "overbreadth." "The degree of specificity required depends on the crime involved and the types of items sought."[26]

The Government argued that the business was **"**so permeated with fraud that there was probable cause to seize all patient files." The 6th Circuit disagreed that was a sufficient reason as there was dispute concerning how much of the clinic business was "pain management." Accordingly, the evidence did not support that the entire business was a fraud, but it would be difficult to readily separate the fraudulent from the legitimate. The court further noted that the central purpose of the business had to be considered. In this case, a substantial number of patients were involved in "pain management," and thus potentially fraudulent, but they had at least a "non-negligible amount of legitimate patients" as well. The evidence was close, but not quite enough to suggested permeation.

However, the Court held that the preamble clause did serve as an adequate limitation on the breadth of the warrant. Although there is no formula to follow, the court determined that the preamble and the statutes that were referenced in the affidavit, provided "specific guidance as to what sorts of patient files were authorized to be seized—namely, those that were evidence of drug distribution." Such papers and records, while not contraband, do contain valuable evidence of the crime. The warrant authorized seizure of files related to the scheme and "[t]his category surely contains numerous documents, but it is nevertheless tailored: the scheme was large, and so too the quantity of files seized."

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[24] U.S. v. Richards, 659 F.3d 527 (6th Cir. 2011).
[25] Id. (quoting U.S. v. Upham, 168 F.3d 532 (1st Cir. 1999)).
[26] U.S. v. Abboud, 438 F.3d 554 (6th Cir. 2006) (quoting U.S. v. Blakeney, 942 F.2d 1001 (6th Cir. 1991)) (for example, "[i]n a business fraud case, the authorization to search for general business records is not overbroad").

The court held that "in sum, the warrant, as written, was constitutional."

The court also reviewed, at length, each of the charges and agreed that the Chaneys were properly convicted, in that they operated to provide prescriptions for opioids for patients with no actual legitimate medical need for them, as indicated by an independent medical review of the files and testimony from former patients as to their medical care. That led to the health care fraud charges as well.

The Court affirmed these convictions.

SEARCH & SEIZURE – CIVIL LEVY

Watson v. Pearson, 928 F.3d 507 (6th Cir. 2019)

FACTS: In December 2013, Deputies Pearson and Mendez (Blount County, TN Sheriff's Office) went to serve a civil levy on Watson. Joined at the residence by Deputy Talbott, they knocked on the front door. Watson finally emerged. The deputies stated their purpose and Watson claimed not to live at the residence. Watson claimed that the residence belonged to his girlfriend. (In fact, he rented it with her.) Watson claimed he had locked himself out. Having only change in his pocket to satisfy the levy, Watson was told he could free to leave.

Deputies checked and determined that the door was locked, so they walked around the house, looking for items on which to levy. They smelled marijuana coming from the crawl space and saw hand rolled alleged joints outside, but they were never tested. The deputies obtained a search warrant, amassing what they observed, Watson's record and a CI tip. Inside the residence, the deputies found a large quantity of marijuana and other items.

Watson was charged under state law and successfully moved to suppress. Thereafter, Watson filed suit against the deputies under 42 U.S.C. §1983. Following several proceedings, only Deputies Mendez and Talbott remained as defendants. They received qualified immunity and Watson appealed.

ISSUE: May deputies walk into the curtilage when searching for items upon which to levy?

HOLDING: No.

DISCUSSION: The 6th Circuit considered the search of the curtilage without a warrant, and without a valid exigent circumstance. The court noted that Watson had indicated that he was "an overnight or social guest with a legitimate expectation of privacy at the residence."[27] There was no indication that the residence was abandoned, although apparently unoccupied at the time. Watson had established rights that he had not given up. Case law had protected the

[27] Minnesota v. Olson, 495 U.S. 91 (1990).

curtilage for many years prior to 2013 and in Florida v. Jardines, the rights under a knock and talk were also clearly established as early as 2006.[28] Despite some conflicting subsequent case law, the Court disagreed, and emphasized Jardines had settled the point. They were walking around not to locate someone to talk to, but to find items upon which to levy.

The Court reversed the summary judgement and remanded the case.

SEARCH & SEIZURE – CELL SITE DATA

U.S. v. Carpenter, 926 F.3d 313 (6th Cir. 2019)

NOTE: This case was remanded from the U.S. Supreme Court for further proceedings.

FACTS: In the underlying factual case, Carpenter was convicted with the use of cell site historical location data. At the U.S. Supreme Court, the Court held that using such cell site data requires a warrant. This matter was remanded to the Sixth Circuit for further proceedings.

ISSUE: Is it improper to use historical CSLI without a warrant?

HOLDING: Yes.

DISCUSSION: The Sixth Circuit addressed the issue of Cell Site Location Information (CSLI) as it was used in the prosecution of Carpenter in multiple robberies. The court noted that in "this new era of connected devices," it had to address the Stored Communication Act – upon which the FBI depending in obtaining the data without a warrant under certain circumstances.

The court addressed the case in the context of the "intersection of two lines" under the Fourth Amendment. The first line addresses a person's privacy in their location and the second the person's abandonment of information voluntarily turned over to a third party. In the first issue, the court noted that tracking cell phones is almost as good as attaching an ankle monitor to a subject because the phone follows the user everywhere. Accordingly, Carpenter had an expectation of privacy in his physical movements. The court also determined that the third-party doctrine did not matter as it would never have been imagined that a phone could travel with the owner in that way.

In this case, however, "what matters is whether it was objectively reasonable for the officers to rely on the statute at the time of the search." The court held that it was reasonable for law enforcement to believe that they did not need a warrant, and two magistrate judges had also issued orders to compel the production of the data.

[28] 569 U.S. 1 (2013).

The court concluded that the decision in Carpenter at the highest level taught that the lower courts must "carefully and incrementally adapt their Fourth Amendment jurisprudence to advances in the digital era." However, the court also opined that it was reasonable for the FBI at the time to rely on the SCA to obtain data with respect to Carpenter.

SEARCH & SEIZURE – TRAFFIC STOP

U.S. v. Murray (Born / Elstarheem), 769 Fed.Appx. 273 (6th Cir. 2019) (CERT PENDING)

FACTS: In November 2016, the Murrays (brothers) were stopped by Trooper Weeks (Ohio State Police). Trooper Weeks initiated traffic stops when asked to do so by undercover officers in the area. Agents followed the brothers when they left a local hotel, and watched until Elstarheem made an illegal lane change. The agent asked Weeks via radio to execute a traffic stop.

During the stop, Elstarheem admitted that he lacked a valid license, and both brothers had prior convictions. Born, who had a license, agreed to drive and they were released to go to the nearest hospital, as they claimed to be seeking medical aid for Born. The brothers returned to the hotel instead, where they were discovered loading luggage into a different car. Approximately 90 minutes later, Born committed another traffic violation and Weeks executed a second stop.

This time, Weeks again checked the records and told Elstarheem to sit with his hands on the dashboard. Elstarheem "bolted" and only stopped when Weeks advised that he would be tased. With both brothers secured in the cruiser, Weeks' drug dog alerted on the trunk of the vehicle. No drugs were found, but the trunk contained two envelopes holding 150 stolen commercial checks. The brothers were charged with a variety of offenses related to the checks and moved for suppression. When suppression was denied, they entered a conditional guilty plea and appealed.

ISSUE: Is a pretextual stop proper?

HOLDING: Yes.

DISCUSSION: The Murrays focused on the short time (less than one minute) between the second traffic stop and Elstarheem's flight. The brothers argued that the detention was unlawful because Weeks had "abandoned his traffic violation investigation" and instead had Born exit the vehicle to investigate drug trafficking without any reasonable cause. Although the stop was arguably a "pretext to fish," it was still lawfully based on an observed traffic violation.[29] The Sixth Circuit noted that while "reasonable may become unreasonable," there simply wasn't enough time for Weeks to have done anything at all with the traffic citation, and he had "barely started" the process. Weeks had not asked for Born's license because Weeks

[29] Whren v. U.S., 517 U.S. 806 (1996).

had checked it just a short time before, and it was appropriate to order Born out of the vehicle.[30] Weeks had already caught the two men in a lie and, therefore, it was proper to remove the driver from the vehicle to figure out what was going on.

The court affirmed the convictions.

U.S. v. Belakhdhar, 924 F.3d 925 (6th Cir. 2019)

FACTS: DEA agents stopped Belakhdhar riding tandem with a car suspected of transporting heroin between Chicago and Detroit. After two sequential traffic stops, 2 kilos of heroin were found in his trunk. The first stop was based on the vehicle dropping below the required minimum speed, the second stop ensued after it was determined that he lacked legal status, and was made by a Border Patrol agent. Belakhdhar was granted suppression. The Government appealed.

ISSUE: Is the operation of two vehicles in tandem sufficient reasonable suspicion to justify a stop?

HOLDING: Yes.

DISCUSSION: The appellate court looked at what the officers knew in making the stops. The Sixth Circuit noted that tandem driving is recognized as a way for drug couriers to travel, and since the trial court apparently ruled that such driving was not enough for at least reasonable suspicion, it erred.

The Sixth Circuit vacated suppression and remanded the case for further proceedings.

42 U.S.C. §1983

The following cases (specifically under this heading) may involve ongoing litigation. The summaries below reflect the most recent published decision in the case in the Sixth Circuit Court of Appeals. In cases involving the reversal of a summary judgment granted by a 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 – MALICIOUS PROSECUTION

Evans (Joe/Linda) v. Kirk, 772 Fed.Appx. 317 (6th Cir. 2019)

FACTS: Joe and Linda Evans owned a pawn shop in Inez, (Martin County) Kentucky. In February 2016, Sheriff Kirk spotted Dials enter the pawn shop and thought Dials had an outstanding warrant. Sheriff Kirk entered the pawn shop and asked Dials to come outside –

[30] U.S. v. Lash, 665 F.App'x 428 (6th Cir. 2016).

Dials did so but "began to sweat and look nervous." Dials finally handed over oxycodone and suboxone. Deputy Witten arrived and placed Dials under arrest for public intoxication. Evans identified the source of the drugs as an employee of the pawn shop, and the transaction had taken place there.

Witten obtained a search warrant for the pawn shop and found more pills, $20,000 in cash and a stolen gun. Joe and Linda Evans were arrested for trafficking, but the charges were ultimately dismissed by mutual agreement. Joe and Linda filed suit under 42 U.S.C. §1983 asserting Fourth Amendment issues and malicious prosecution. The deputies were granted qualified immunity and summary judgment. The Evans' appealed.

ISSUE: Is providing factual information to a grand jury and a judge in an affidavit in support of a search warrant a defense to malicious prosecution?

HOLDING: Yes.

DISCUSSION: The Evans focused on the malicious prosecution claim. The appellate court noted there was no proof that any of the officers engaged in conduct that would constitute malicious prosecution. The officers made no false claims, and nothing indicated that the evidence was improperly found pursuant to a valid warrant. At most, the court noted, Deputy Witten did not note that the informant, Dials, was impaired at the time and was not necessarily a reliable informant. These statements, in fact, bore nothing to do with this prosecution.

The Court affirmed the decision.

42 U.S.C. §1983 – FORCE

Williams v. City of Chattanooga, 772 Fed.Appx. 277 (6th Cir. 2019)

FACTS: In December 2015, Hamilton County, TN (Chattanooga) 911 received a "strange call" from Eagle. Despite Eagle's rambling statements, he was able to provide coherent answers to his name, address, etc. It was dispatched as a "mental health issue." Officer Cobb (Chattanooga) responded and found Eagle with his daughter, JSE, at the door, and both retreated into the house. Cobb then heard a gunshot. Cobb called for a crisis team. Minutes later Eagle came out, holding a pistol. Cobb took cover and commanded him to put the gun down.

Sgt. Churchwell arrived and reiterated the command. Eagle continued a pattern of bizarre behavior, putting the gun down and picking it up, and going in and out of the apartment. The two officers tried to approach but each time Eagle would pick up the weapon again.

Officers Weary, Moss and Johnson responded and saw Eagle "ranting and raving acting crazy, irrational, saying things that did not make sense." Officer Griffith also arrived. Eagle went inside, came back out armed, holding his daughter so that her feet could not touch the ground

while "cradling a samurai sword under his other arm." Officers believed Eagle was pointing a gun in the area of the child's head. Eagle put the child down and went inside, and the officers tried to beckon her over to them. The child made it about halfway to them when she stopped. Sgt. Churchwell left cover and ran to grab the child and carry her away. At that moment, Eagle came back out, with gun and sword, and sprinted toward Churchwell. There was dispute as to whether Eagle was pointing the gun at the officer.

Officers Johnston and McFarland each fired at Eagle, who fell to the ground and dropped his weapons. Griffith approached and Eagle shifted, stretching out his arms. Griffith, Moss, Weary, Palmer and McFarland all fired again, and Eagle was struck by eight rounds. Griffith then recovered the gun. Eagle passed away.

Williams, as the estate representative, filed suit alleging excessive force. The district court granted summary judgment for the officers after finding the officers did not violate Eagle's rights. The district court also granted summary judgment for the City as well. The state law claims were remanded to state court.

Williams appealed.

ISSUE: Is deadly force justified in the face of an immediate threat?

HOLDING: Yes.

DISCUSSION: The Sixth Circuit noted that the officers did not violate Eagle's Fourth Amendment rights when they fired the second volley because it was reasonable to believe Eagle, despite his injuries, was holding and aiming a gun at that time. Eagle's prior behavior would have been enough to put the officers on "high alert" and cause them to believe that he "presented an immediate threat of serious bodily harm to Griffith, who was a mere six feet away …."

The court further noted that "what constitutes 'reasonable' action may seem quite different to someone facing a possible assailant than to someone analyzing the question at leisure." Further, each officers' actions must be assessed individually, and noted that in this case, "all Officers were [not] operating in the same universe of facts because they arrived on scene in waves at various times." Nothing suggested they could have 'learned of the relevant preceding events," and the timing of their arrival dictated what they knew to be happening. But even with that, the result is the same, as each was responding to a "tense [and] uncertain" event. Their decision to fire was "not objectively unreasonable."

The district court's award of summary judgment was affirmed.

Lemmon (Estate) v. City of Akron, 768 Fed.Appx. 410 (6th Cir. 2019)

FACTS: On September 25, 2015, Lemmon became a suspect in an armed robbery in Akron, Ohio, along with another man. Officers responded and Sgt. Armstead spotted a man who met the reported general description riding a bicycle. That man was later identified as Lemmon. Officer Forney also responded, and Lemmon crossed directly in front of her cruiser. Forney followed while waiting for confirmation of the description, and was joined by Sgt. Armstead, who added that he saw Lemmon was concealing some object. Officer Forney pulled Lemmon over. She was joined by Sgt. Armstead and additional officers. The officers gathered around Lemmon, all with drawn weapons but one – that officer held a Taser. The officers ordered Lemmon to show his hands, but he verbally refused telling the officers they would need to shoot him. Lemmon suddenly dropped his bike and make a "quick movement" toward Sgt. Armstead, who shot him four times. Officer Patrick fired his Taser as well.

Officers immediately moved in and handcuffed Lemmon, and then provided aid, including CPR. Lemmon had no weapon. Lemmon died.

Local prosecutors declined to take any criminal action, finding the shooting justified. Lemmon's Estate filed suit. The district court granted summary judgment to the officers, which the Estate appealed. The sole issue on appeal was excessive force.

ISSUE: May deadly force be justified if there is a strong suggestion that an individual has a deadly weapon?

HOLDING: Yes.

DISCUSSION: The Estate argued that the use of deadly force was not justified as Lemmon never displayed a weapon during the standoff. The Sixth Circuit noted that qualified immunity exists to "protect state actors who must operate along the 'hazy border' that divides acceptable from excessive force. The court considered the Graham v. Connor factors, as well as an "objective assessment of the danger a suspect poses at that moment."[31]

The court held that the underlying crime, armed robbery, played a significant role in this matter. By keeping his hand out of sight and refusing orders to show it, Lemmon engaged in a heated standoff. Lemmon was, in fact, daring officers to shoot him. Therefore, he posed an immediate threat to the officers by his actions. It was clear Lemmon "did not intend to resolve the dispute peacefully." No force was used until Lemmon moved aggressively toward the officers, and the officer reasonably feared for his safety at that moment. These actions satisfied the "immediacy-of-the-threat" factor, and Lemmon was also clearly resisting arrest at the time. Under the totality of the circumstances, the court held the use of force was reasonable.

The Sixth Circuit also held that it was immaterial whether there was probable cause to stop Lemmon and whether Lemmon was the correct suspect.

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[31] Bouggess v. Mattingly, 482 F.3d 886 (6th Cir. 2007).

Further, the court addressed spoliation issues because the only objective evidence, dashcam video, was not available. While the video was preserved, it apparently contained no relevant video. There was no evidence any video was destroyed or that Sgt. Armstead had no control over it. The court found no proof of spoliation and affirmed the lower court's decision.

42 U.S.C. §1983 – ARREST

Rayfield v. City of Grand Rapids (Michigan), 768 Fed.Appx. 495 (6th Cir. 2019)

FACTS: Rayfield, a Grand Rapids artist, became involved with Smith, who allowed Rayfield to live in one of her rental properties. In 2014, the relationship "soured" and Smith sought to evict Rayfield. Sawinski, the other tenant in the duplex obtained a protective order against Rayfield which prohibited Rayfield from entering Sawinski's property. The two units, however, shared a garage, making the protective order difficult to enforce. Rayfield alleged that the PD documented that Sawinski obtained the order to allow Smith to circumvent the usual eviction process. At the same time, Smith filed for eviction. The day before the eviction hearing, Sawinski called police claiming a violation of the order (a PPO in Michigan) and Rayfield was arrested. Rayfield claimed he had a video showing Sawinski was the aggressor but the officers declined to look at it.

Due to his arrest and being held for three days, Rayfield missed the eviction hearing and was subsequently evicted.

Rayfield filed suit under 42 U.S.C. §1983 for his arrest and detention against the officers, the city and the county. All claims were dismissed. Rayfield appealed.

ISSUE: Is probable cause a defense to a false arrest claim?

HOLDING: Yes.

DISCUSSION: In some of the claims, Rayfield initially filed against John Doe city defendants, and later amended his claim to include county defendants (reflective of the county jail). The Court held that procedure barred Rayfield from relating his county claims back.

As for the city defendants, the court determined that "Section 1983 does not create any substantive rights; rather, it is a statutory vehicle through which plaintiffs may seek redress for violations of a right secured by the Constitution or federal laws." Further, a claim "requires proof that: (1) the defendant was a person acting under the color of state law, and (2) the defendant deprived the plaintiff of rights, privileges, or immunities secured by the Constitution or laws of the United States."[32] In addition, "the constitutional right must be "clearly established" at the

[32] Fridley v. Horrighs, 291 F.3d 867 (6th Cir. 2002), cert. denied, 537 U.S. 1191 (2003).

time of the violation so that "it would be clear to a reasonable officer that his conduct was unlawful in the situation he confronted."[33]

With respect to individual claims, the court held that the original arresting officers possessed probable cause for the arrest, given the nature of the allegations and the PPO still being valid. Even though the officers understood the impracticality of enforcement given the shared garage space, "the mere fact that an order is difficult to enforce does not suggest that it cannot therefore be violated." The fact that one of the officers later supported the lifting of the PPO, given Sawinski's own aggressive actions, did not negate the "clear language of the still-effective PPO." With respect to the video, if the arrest been solely for the violation, the officers should have reviewed it because the video potentially contained "exculpatory—and corroborative—evidence showing that Rayfield had not violated the PPO." The court held that "[a]lthough officers are not required to conduct further investigations to disprove possible affirmative defenses or to corroborate a suspect's proclaimed innocence, when a suspect presents allegedly exculpatory, and quickly ascertainable, evidence showing that the officers' basis for probable cause is inaccurate, those officers may not turn a "blind eye" to that evidence in favor of the inculpatory evidence."[34]

However, in this case, the court noted that the video was not, in fact, exculpatory given that even if it showed what Rayfield alleged, he still violated the PPO by staying in Sawinski's presence. The court affirmed the dismissal of that claim.

With respect to Rayfield's detention in jail, the Court found since there was probable cause, the arrest was valid. With respect to the length of time for his detention, during which time Rayfield was transferred from a holding cell in Grand Rapids to the County jail, and the officers should have alerted the jail as to how long he had been held pending a required hearing, Rayfield was still lawfully held for that 48 hours, which would have covered the time for the eviction hearing. In this case, it was not clearly established that the officers' "failure to communicate regarding Rayfield's detention would [not] necessarily violate Rayfield's constitutional rights …." The court also upheld dismissal of the claims against the city for failure to train the officers how to properly protect hearing rights under the state's 48 hour rule. Although the court indicated some concern at how the process apparently worked in the jurisdiction, and that there was a "likelihood of miscommunication or administrative delays when more than one governmental entity is involved [that] may well extend a person's detention beyond the time frame established in County of Riverside, the Court affirmed the dismissal of those claims due to procedural issues.[35]

Campbell v. Mack, 777 Fed.Appx 122 (6th Cir. 2019)

FACTS: During the early evening of June 7, 2016, Campbell, an African-American, was driving his wife's recently purchased minivan which bore a temporary license plate in the back

[33] Klein v. Long, 275 F.3d 544 (6th Cir. 2001)
[34] Ahlers v. Schebil, 188 F.3d 365 (6th Cir. 1999).
[35] County of Riverside v. McLaughlin, 500 U.S. 44 (1991).

window. Campbell passed Allen Park Officer Mack, who was with his K9 Clyde. Officer Mack stopped Campbell, who provided his state ID and the vehicle's paperwork. Campbell did not have a driver's license. Campbell exited the vehicle upon command.

When Campbell exited the minivan, Mack "jostled" Campbell, handcuffed him "very tightly," conducted a pat down search of Campbell's person, and placed Campbell in the backseat of his cruiser. Campbell complained that the handcuffs hurt his wrists and asked Mack to loosen them. Mack tightened the handcuffs and replied, "[t]hat's the loosest they're going to get."

Mack accused Campbell of stealing the van. Campbell denied the allegation and stated he was on the way to a friend's house. Clyde searched the minivan, which was eventually towed in. Campbell was taken to the station to be booked for driving on a suspended OL. The handcuffs were removed, although Campbell continued to complain about them. Mack conducted a strip search of Campbell by ordering him to "get naked" and drop his pants. Mack did an extensive search, examining his buttocks and genitals, and told him the "dog indicated." Mack pulled up the pants, and then pulled down Campbell's pants and underwear, insisting to a second officer that Campbell had drugs hidden, but found nothing. He also ordered Campbell to remove his wedding ring and tossed it outside the cage. Mack finally resorted to a body cavity search but still found nothing.

Campbell filed suit under §1983, and Mack moved for summary judgment. The trial court denied the motion, finding that a genuine dispute of material fact existed regarding whether the traffic stop violated the Fourth Amendment and that Campbell's Fourth Amendment rights were clearly established. The district court further found that, because Mack was not entitled to qualified immunity on Campbell's Fourth Amendment claim arising from the traffic stop, he was also not entitled to summary judgment on Campbell's Fourth Amendment claims concerning conduct that occurred after the stop, *i.e.*, the search of the minivan, the two strip searches, and the body cavity search.

Mack appealed.

ISSUE: Must the defendant accept the plaintiff's version of the "facts" in a motion for summary judgment?

HOLDING: Yes.

DISCUSSION: The Sixth Circuit attempted to "disentangle Mack's impermissible arguments involving disputed material facts from the purely legal issues to determine whether, viewing the facts in the light most favorable to Campbell, the district court properly denied Mack qualified immunity on Campbell's constitutional claims."

The Court listed all of the places where the:

> … parties had presented conflicting evidence on the following disputed factual issues: (1) "[w]hether the temporary license plate affixed to the back of Campbell's minivan was visible;" (2) "[w]hether Campbell told Mack where his 'home' was and whether Campbell said specifically what city he was coming from and what city he was driving to;" (3) "[w]hether Campbell's pants were unzipped when he stepped out of the minivan and whether and how his pants became unzipped during the encounter;" (4) "[h]ow much physical force Mack used to patdown and handcuff Campbell, and whether Mack tightened Campbell's cuffs after Campbell complained they were too tight;" (5) whether Mack walked Clyde, the police dog, around Campbell's minivan and whether Clyde indicated the presence of narcotic odor, or whether, alternatively, Mack placed Clyde directly inside the minivan; (6) whether Campbell moved around or otherwise acted suspiciously while he was handcuffed in the backseat of Mack's cruiser; (7) "[w]hether Mack told Campbell that Mack would need to perform a strip and/or body cavity search of Campbell at the Allen Park police station;" (8) "[w]hether Mack placed his hands inside of Campbell's underwear during the strip search;" and (9) "[w]hether Mack placed his finger(s) inside Campbell's anus during the strip and/or body cavity search.

In his motion, Mack relied on "his preferred version" of the disputed facts, rather than conceding Campbell's version, as required at this state of the proceeding. The court noted it could simply dismiss the motion for that reason, but elected to discuss the substantive matters as well.

First the court agreed that Mack lacked any objective reason for the stop, as the temporary tag was properly placed pursuant to Michigan law and was clearly visible. As such, Mack was not entitled to qualified immunity on the claim. Campbell argued that his tight handcuffs and the searches were in retaliation for his complaints, and were adverse actions under the law.

In Thaddeus-X v. Blatter, a three-part test for First Amendment retaliation claims was established:

> (1) the plaintiff engaged in protected conduct; (2) an adverse action was taken against the plaintiff that would deter a person of ordinary firmness from continuing to engage in that conduct; and (3) there is a causal connection between elements one and two—that is, the adverse action was motivated at least in part by the plaintiff's protected conduct.[36]

Mack conceded below that Campbell engaged in protected conduct when he complained about Mack's actions during the traffic stop and the strip and/or body cavity searches. Accordingly, to determine whether Campbell established a constitutional violation for purposes of summary judgment, we need only evaluate whether he satisfied the second and third prongs of his First Amendment retaliation claim; that is, whether Mack took an adverse action against Campbell and, if so, whether a causal connection existed between Campbell's complaints and Mack's adverse action.

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[36] Thaddeus-X v. Blatter, 175 F.3d 378 (6th Cir. 1999).

Regarding the second element—whether the officer took an adverse action that would deter a person of ordinary firmness from engaging in the protected conduct—courts have "emphasize[d] that while certain threats or deprivations are so *de minimis* that they do not rise to the level of being constitutional violations, this threshold is intended to weed out only inconsequential actions, and is not a means whereby solely egregious retaliatory acts are allowed to proceed past summary judgment." Further, "[w]hether a retaliatory action is sufficiently severe to deter a person of ordinary firmness from exercising his or her rights is a question of fact."[37] "Thus, unless the claimed retaliatory action is truly 'inconsequential,' the plaintiff's claim should go to the jury."

Regarding the third element—whether a causal connection existed between the protected conduct and the adverse action—the court must evaluate "the totality of the circumstances to determine whether an inference of retaliatory motive [may] be drawn."[38] To establish causation, the plaintiff need only demonstrate "that his protected conduct was a motivating factor" for the retaliatory acts.[39] "[T]he motivating factor prong of a First Amendment retaliation case can be supported by circumstantial evidence, with temporal proximity aiding in the analysis."[40] Because "[p]roof of an official's retaliatory intent rarely will be supported by direct evidence of such intent[,] . . . claims involving proof of a [defendant's] intent seldom lend themselves to summary disposition."

The Sixth Circuit held that the alleged actions did rise to the level of the adverse action and met the elements because "it is well-established that a public official's retaliation against an individual exercising his or her First Amendment rights is a violation of § 1983."[41] Further, "the courts that have considered qualified immunity in the context of a retaliation claim have focused on the retaliatory intent of the defendant" rather than on the retaliatory action the defendant allegedly undertook.[42] This is because "[t]he unlawful intent inherent in such a retaliatory action places it beyond the scope of a police officer's qualified immunity if the right retaliated against was clearly established."

The Court stated:

> Based on Sixth Circuit precedent that existed before 2016, a reasonable officer would have known that retaliating against Campbell for complaining about Mack's conduct by tightening his handcuffs to the point of injury, subjecting him to strip and/or body cavity searches, and conducting these searches in an overly aggressive manner would violate the First Amendment.

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[37] Bell v. Johnson, 308 F.3d 594 (6th Cir. 2002).
[38] Holzemer v. City of Memphis, 621 F.3d 512 (6th Cir. 2010) (citing Vereecke v. Huron Valley Sch. Dist., 609 F.3d 392 (6th Cir. 2010)).
[39] Maben v. Thelen, 887 F.3d 252 (6th Cir. 2018) (quoting Thaddeus–X, 175 F.3d at 399).
[40] Spencer v. City of Catlettsburg, 506 F. App'x 392 (6th Cir. 2012) (citing Gaspers v. Ohio Dep't of Youth Servs., 648 F.3d 400 (6th Cir. 2011)).
[41] Barrett v. Harrington, 130 F.3d 246 (6th Cir. 1997).
[42] Bloch v. Ribar, 156 F.3d 673 (6th Cir. 1998).

The Court affirmed the denial of the motion for summary judgment based on qualified immunity.

42 U.S.C. 1983 – BRADY

Jackson / Ajamu / Bridgeman v. City of Cleveland, 925 F.3d 793 (6th Cir. 2019)

FACTS: This case involves several men who served long sentences for crimes they did not commit and each spent at least several years on death row. They were eventually exonerated of the crimes through the Innocence Project and are generally acknowledged to truly be innocent of the crimes. Each filed suit against the City of Cleveland arguing that detectives in each of their cases did not properly share exculpatory evidence with the defense. The district court awarded summary judgment to the claims under arising from violations of Brady v. Maryland, fabrication of evidence, and malicious prosecution.[43] This appeal followed.

ISSUE: Do officers of the same agency working together to commit a misdeed constitute conspiracy?

HOLDING: No.

DISCUSSION: The Court noted that "Brady claims have three elements: "[1] the evidence at issue must be favorable to the accused, either because it is exculpatory, or because it is impeaching; [2] that evidence must have been suppressed by the State, either willfully or inadvertently; and [3] prejudice must have ensued."[44]

The court found that in one case, although a jury might ultimately disagree and find that the officer "did not suppress evidence, it would not be unreasonable in finding that he had."

With respect to allegations of conspiracy, given that multiple officers were involved in the cases, a reasonable jury could find that the detectives were working together to prevent the evidence from reaching the prosecutors. However, under the intracorporate conspiracy doctrine, individual officers within the government entity could not be considered to be in a conspiracy as they all worked for the same entity.

Following an extensive discussion, the Sixth Circuit held that Brady was clearly established at the time the cases originated. The officers should have been aware of a requirement that they disclose exculpatory evidence, and that the evidence involved was potentially exculpatory. The Court emphasized "Brady is concerned only with cases in which the government possesses information which the defendant does not."[45] The Court linked this with the concept that an

[43] 373 U.S. 83 (1963).
[44] Strickler v. Greene, 527 U.S. 263 (1999).
[45] U.S. v. Graham, 484 F.3d 413 (6th Cir. 2007).

officer would not know that coercing a perjured statement was unlawful as well, as was alleged.

More concretely, as far back as 1935, the Supreme Court recognized that the introduction of fabricated evidence violates "the fundamental conceptions of justice which lie at the base of our civil and political institutions."[46] And in 1942, the Supreme Court held that when a witness perjures himself because of threats from police officers, the defendant suffers "a deprivation of rights guaranteed by the Federal Constitution."[47]

The Court reversed the summary judgment decisions with respect to the primary detective, and remanded the case for further proceedings.

42 U.S.C. §1983 – SEARCH

Gardner v. Evans, 777 Fed.Appx 122 (6th Cir. 2019)

FACTS: During the time in question, Lansing authorities were aggressively seeking out and investigating "drug houses." All of the subsequent searches were made with warrants.

The searches were aggressive: officers knocked in doors with rams, used flashbangs and, according to plaintiffs, left the homes in complete disarray. During or immediately following a search, a police officer would sometimes call a housing code compliance officer ("inspector") to the scene. In some instances, the inspector would soon appear and inspect the home. Reliably, the inspector would find code violations such as water heaters without inspection tags, bare electrical wiring, and non-working smoke detectors. The inspector would then declare the home unsafe for occupancy, which is often called "red tagging." When a home has been red tagged, the occupants must leave immediately and may not occupy the home until the violations have been corrected.

This was what occurred with the plaintiffs in this case. In each case, the underlying criminal charges were dismissed and the plaintiffs filed suit under 42 U.S.C. §1983 against officers and inspectors. The various government defendants demanded qualified immunity and during interlocutory appeals, were granted summary judgment. The plaintiffs appealed.

ISSUE: Is damage done during a search warrant execution actionable?

HOLDING: Yes.

[46] Mooney v. Holohan, 294 U.S. 103 (1935) (citing Hebert v. Louisiana, 272 U.S. 312 (1926)).
[47] Pyle v. Kansas, 317 U.S. 213 (1942).

DISCUSSION: First, the court addressed the warrants. In the case of Gardner, the court agreed the warrant was not stale, but was issued promptly after information linked the suspect to the house and the officers moved expeditiously. With the Hudson search, the suspect was also long linked to the residence and after a trash pull revealed drug evidence, a warrant was quickly requested and issued. Although the court found the information was more tenuous, it was still reasonable. In the case of the Louden house, controlled buys led to the search and again, a search warrant was promptly obtained. The Holsey situation was more complex, as Woods was likely using multiple residences, including the one also occupied by Holsey, but again, there was sufficient evidence linking Holsey's home to a drug trafficking scheme. (It did not specifically link Holsey, but the court held that "a known drug dealer came and went from the searched home repeatedly, and on at least three occasions did so immediately before or after a controlled drug buy." That was enough.

Overall, the Sixth Circuit held that "some measure of disarray" is to be expected in a search, but the plaintiffs argued that the searches were "unreasonably destructive." In each case, the plaintiffs detailed the disarray (clothing left on the floor, as an example) and the damage (food left to spoil, damaged smoke detectors, walls, vents and light covers damaged, broken locks, etc.) In this situation, there remained "material factual disputes," and the claimed damage was "possibly neither necessary nor reasonable."

In Hill v. McIntyre, a great deal of destruction ensued during a search warrant execution.[48] In this case, the plaintiffs were making "similar allegations and worse" and compounded by the "red tagging" that followed, based upon damage done BY the officers. However, with respect to the law enforcement officers, the Sixth Circuit held that it was necessary to specify which officers did the damage, and the officers sued (who obtained the warrants) were not the officers directly involved IN the damage.

The court also addressed a right to privacy claim, based upon the officers inviting inspectors into the homes. "Here, the police officers contacted the inspectors only after entering the home pursuant to the warrant and discovering the code violations. The second difference concerns the invitees. Here, unlike Bills[49], the invitees were state actors who, under the right conditions, may search a home themselves. These differences do not render Bills inapplicable, but they compel us to separate the police officers' actions into two stages: reporting the code violations to the inspectors and then admitting them into the residences." The court held that it was proper to report what was found upon entry (such as exposed wiring) to appropriate code officials.

However:

[48] 884 F.2d 271 (6th Cir. 1989).
[49] Bills v. Aseltine, 958 F.2d 697 (6th Cir. 1992).

> There is a difference, however, between alerting housing officials of a possible violation and opening the door to those officials once they arrive. As we explained in Bills, when police execute a search warrant, they "are temporarily placed in control of the premises and its occupants" and it "is as though the premises were given to the officers in trust for such time as may be required to execute their search in safety and then depart." But they "may violate that trust and exceed the scope of the authority implicitly granted them by their warrant when they permit unauthorized invasions of privacy by third parties who have no connection to the search warrant or the officers' purposes for being on the premises." Here, the police officers were given specific permission to search the houses for cocaine or other controlled substances along with the paraphernalia for mixing, packaging, and selling it—nothing more. Allowing inspectors into the home would not have aided them in finding those things.

As a rule, "additional parties must generally have their own warrants." The officers present "simply had no authority to admit third parties—even state actors—who had no warrant and could provide no assistance to the police officers' own searches." Determining who specifically let the inspectors enter was a critical hurdle. The plaintiffs' affidavits named the officers, but "none provides further context on whether the affiant observed the admission of the inspector, or how the affiant came to identify the police officer by name or concluded that the officer "had control" of the house." The Sixth Circuit found this proof insufficient and held that the inspectors were entitled to summary judgment.

With respect to the warrantless search by the inspectors, however, the Sixth Circuit noted than an exception to the search warrant rule was an "administrative search[] designed to assure compliance with building codes, including codes designed to prevent buildings from becoming dangerous to tenants or neighbors."[50] "In such cases, if the search is made without a warrant, the person whose home is to be searched "must be afforded an opportunity to obtain precompliance review before a neutral decisionmaker." The Lansing Housing Code "explicitly requires inspectors to obtain a warrant from a court in all non-emergency situations." Consent for the search is always preferred. The court determined that the right to be free from such searches was well established at the time and that "securing either permission or a warrant is a necessary step demanded by the Fourth Amendment and not an empty formality." Further, there was no indication of any exigent circumstances and the fact that "Lansing police officers call for immediate follow-up inspections by inspectors in around 90% of the drug raids that they conduct" precluded that thought that there might be exigent circumstances in that case. Accordingly, the inspectors were not entitled to summary judgment on this claim, but a material jury question existed as to whether consent or exigent circumstances existed in these particular cases.

With respect to the "red-tagging," the court found a "genuine dispute of material fact," concerning the condition of the homes and whether there was an actual emergency. The red tag itself provided no information "regarding the occupant's right to appeal the inspector's

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[50] Benjamin v. Stemple, 915 F.3d 1066 (6th Cir. 2019); City of Los Angeles v. Patel, 135 S. Ct. 2443 (2015).

decision and receive an administrative hearing." Although the information was on the city's website, it was "not a foregone conclusion that the mere posting of information on a city's website is a "reasonably calculated" way to apprise persons evicted from their homes that they may appeal the red tagging." Eviction without notice is a serious matter and in the case of red-tags, even suspends mail delivery. It requires the residents to find immediate temporary lodging. Further, the website was out of date and included incorrect information, and the ordinance itself was difficult even for the attorneys involved to find. Although the tags identified the inspector and a contact number, that did not provide any notice about a possible appeal. One inspector, in particular, testified that he knew nothing about the process of appealing. Finally, the information provided was what was expected by the city itself, which indicated a "policy and practice" on the part of the municipality. The court, however, concluded that the individual inspectors could not be liable, but suggested that the "higher-up officials" might be.

Finally, the Court dismissed a malicious prosecution claim on the part of an individual.

The Sixth Circuit affirmed the dismissal of the claims related to the search warrants and the invasion of privacy claims, but did allow some claims to proceed.

42 U.S.C. §1983 – WRONGFUL DEATH

Williams v. City of Georgetown, 774 Fed.Appx. 951 (6th Cir. 2019)

FACTS: On October 2, 2017, at approximately 7:45 p.m., the Georgetown PD and Scott County Sheriff's Office received a call of an erratic driver in the area. Officer Enricco (Georgetown PD) found the identified vehicle and made the stop. He was soon joined by another city officer (Noel) and a deputy sheriff (Nettles). Burns was driving his deceased brother's vehicle.

The officers learned Burns had recently been in the hospital for a stroke and was "obviously frail and unsteady on his feet." Burns gave inconsistent answers to questions and denied being on any impairing medications. Burns also indicated he missed two doses of diabetes medication. Concerned about Burns' medical situation, the officers called for EMS. Burns refused treatment or transport. Burns' truck was impounded and the officers obtained a phone number for Burns' sister, Williams, who lived in London, Kentucky. The officers explained Burns' situation to Williams' husband and indicated Burns was in "police custody" and needed a ride. Williams indicated they would arrive within an hour.

Williams arrived around 10 p.m. Williams was told to call dispatch for directions upon arrival and learned that Burns had been dropped off at a McDonald's in the area to wait for his ride. Williams went to McDonald's, but could not find Burns. No one at the restaurant remembered anyone being dropped off. Williams continued to drive around and called dispatch again, providing his cell number. As he prepared to leave the area, Williams received a call from dispatch, was told "they have your brother-in-law," and provided a number to call. The number was for the corner.

Burns, walking in the roadway 2 miles away from the McDonald's, was struck by a vehicle and killed. Burn was wearing dark clothing at the time of this accident.

Williams, the Estate Administrator, filed suit against the City of Georgetown and the involved officers and agencies. The Estate claimed that it was "objectively unreasonable, or alternatively deliberately indifferent, for the responding law enforcement officers to fail to give Burns medical attention at the scene and then to abandon him at the McDonald's after the stop." The defendant officers moved for dismissal, which was granted, and the state claims were also dismissed. The trial court ruled that the "officers were not deliberately indifferent to Burns' medical needs and the officers did not create a more dangerous situation" than he was already in. The Estate challenged only the Fourteenth Amendment claim.

ISSUE: Do officers have a legal duty to protect citizens from harm?

HOLDING: No (as a rule).

DISCUSSION: The court examined this case from two different timeframes. First, the court noted that the officers properly recognized a potential medical need and summoned EMS, but "Burns refused treatment – as was his right."[51] Thus, the officers were entitled to qualified immunity for the actions at the initial stop.

The second timeframe involved the officers dropping Burns off at the McDonalds. The court noted that a state actor's "failure to protect an individual against private violence" does not violate the Fourteenth Amendment's Due Process Clause.[52] There are two exceptions to the rule, but the trial court resolved the issue by holding that Burns was not in police custody at the time he was killed. Accordingly, it evaluated whether the officers created a "state created danger" with the following factors:

> To show a state-created danger, plaintiff must show: 1) an affirmative act by the state which either created or increased the risk that the plaintiff would be exposed to an act of violence by a third party; 2) a special danger to the plaintiff wherein the state's actions placed the plaintiff specifically at risk, as distinguished from a risk that affects the public at large; and 3) the state knew or should have known that its actions specifically endangered the plaintiff.[53]

In this case, the Court held:

> Here, the tragic harm visited upon Burns had nothing to do with the state. Burns was unquestionably safer at McDonald's waiting for a ride home than getting back in his car and driving home.

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[51] Washington v. Glucksberg, 512 U.S. 702 (1997).
[52] DeShaney v. Winnebago Cty. Dep't of Soc. Servs., 489 U.S. 189 (1989).
[53] Cartwright v. City of Marine City, 336 F.3d 487 (6th Cir. 2003).

The Court noted that:

> Instead of incarcerating him on potentially dubious grounds, the officers did Burns a favor and took him to a safer place while they resumed their duties. Dropping him at a well-lit restaurant decreased Burns's risk of causing harm or suffering it. That he chose to leave the McDonald's was not a choice the officers made. There is no allegation in the complaint that Burns resisted being dropped off.[54] And we can hardly call a highway-side McDonald's "dark and dangerous" or "forlorn."

The Court noted that an officer's duty to someone under such circumstances "does not extend in perpetuity." Nor was there any municipal or supervisory liability present.

The Sixth Circuit affirmed.

42 U.S.C. §1983 – INVESTIGATION

Green v. City of Southfield, 925 F.3d 281 (6th Cir. 2019)

FACTS: In October 2012, Green was involved in a traffic collision in Southfield, Michigan with Patterson. Officer Maya and Traffic Specialist Birberick responded. Birberick questioned the participants, but Green stated she could not remember the accident. Birberick determined Green was at fault. He indicated on the accident report that Green ran a traffic control signal. Once Green saw the report, she challenged it, claiming to have an eyewitness. Sgt. Bassett made the ultimate determination that the report would not be changed, although the witness's name was appended to the report.

Green sued Patterson and ultimately settled the case against him. She then filed a lawsuit against the officers and the agency under 42 U.S.C. §1983, claiming an inadequate investigation. The district court granted ting summary judgment for the officers. Both sides appealed.

ISSUE: Is a sloppy investigation by itself grounds for a §1983 suit?

HOLDING: No.

DISCUSSION: Green claimed that the officers showed racial and gender bias during the investigation. The court noted that even Green's own testimony indicated she was dazed and confused after the crash and it was proper to ask Patterson, who was uninjured, about the crash and not Green, who was seriously injured. Green asserted she would have given a statement if

[54] Salyers v. City of Portsmouth, 534 F. App'x 454 (6th Cir. 2013).

asked, but "the relevant point at any rate isn't whether Birberick could have coaxed Green's story out of her had he tried; it's whether he had good reason to leave her alone." The court noted several direct contradictions between what was said at the scene and what Green later asserted in her complaint. Her witness stated that he "left the scene without attempting to speak to anyone," and thus the police were unaware of him.

Green argued that the failure to solicit witness statements crippled her case against Patterson, but the court noted that alleged "laxity in investigation" is not a violation of the Constitution. The police may have found more evidence with more effort, but "no one claims that Birberick took witness statements and then destroyed them, or that he deleted case notes or log sheets to deprive Green of favorable evidence."[55] By the time the officers and EMS had handled the immediate accident, there were no witnesses available to question.

After addressing procedural issues, the Court affirmed the decision.

SUSPECT IDENTIFICATION

Ojile v. Smith (Warden), 779 Fed.Appx 288 (6th Cir. 2019)

FACTS: Ojile and Erkins were convicted on multiple charges of robbery in Ohio. Their modus operandi was much the same in each. During a lengthy investigation, the police were able to thwart several robberies planned by Ojile and Erkins, and eventually used a decoy victim to catch the pair. The pair, plus a girlfriend, Hoover, were arrested and charged.

At trial, an eyewitness, Weisbod, testified that he was a victim, having been robbed at gunpoint. About six months later, Weisbod saw the trio on the news and recognized Ojile and Erkins. He was shown photos of the trio shortly before trial. Tanks, a jailhouse informant, also testified that he and Ojile had talked about the crimes and he shared that information with the prosecution, having notified the prosecutor that "he had information that might be useful to them." After that, Tanks and Ojile shared a cell for a few days and while questioned, what he shared was not materially different than what he had learned before his connection with the prosecution. (He had been deposed initially about what he knew.) In neither case did Ojile seek to suppress the testimony.

Ojile was convicted and appealed. The conviction was affirmed by the Ohio state courts, prompting appeals to the federal courts. The district court denied his petition and he further appealed.

ISSUE: Does showing a witness a defendant's photo prior to trial possibly taint a later identification?

[55] Flagg v. City of Detroit, 715 F.3d 165 (6th Cir. 2013); see Swekel v. City of River Rouge, 119 F.3d 1259 (6th Cir. 1997).

HOLDING: Yes.

DISCUSSION: Ojibe argued that Weisrod's identification was flawed because he was shown the photos prior to the trial.

The Court noted:

> There is little doubt that the prosecution's pretrial photograph display was "unduly suggestive."[56] Nor does the Warden justify that conduct. The question thus becomes whether the "indicators of [Weisbrod's] ability to make an accurate identification" were "outweighed by the corrupting effect" of the prosecution's photograph display.

The Supreme Court has articulated five factors for assessing the reliability of eyewitness identification: (1) the witness's opportunity to view the suspect at the time of the crime, (2) the degree of the witness's attention, (3) the accuracy of the description, (4) the witness's level of certainty about the identification, and (5) the time between the crime and the confrontation. Applying these factors here indicates that Weisbrod's identification—like many eyewitness identifications—was only moderately reliable.

> The first factor, Weisbrod's opportunity to view the perpetrators, cuts in favor of reliability. Weisbrod testified that the area where he was robbed was well lit, the robbers were not wearing masks, and he got a good look at their faces. At the time, he told the police he "would probably be able to identify the suspects if he saw them again," though he did not say he would "certainly" be able to do so. The second factor, Weisbrod's degree of attention, weighs against reliability. Weisbrod testified that the robbery was a "very, very traumatic experience." And this court has stated that "[t]here is a great potential for misidentification when a witness identifies a stranger based solely upon a single brief observation, and this risk is increased when the observation was made at a time of stress or excitement."[57] The third factor, the accuracy of Weisbrod's initial description of the suspects, also cuts somewhat against reliability. His description was generic—two black males, in their 20s, with black hoodies—and cross-racial identifications are often suspect.[58] The fourth factor, the certainty of Weisbrod's in-court identification, favors reliability. At trial, Weisbrod expressed absolute certainty that Ojile was one of the men who robbed him. Lastly, the fifth factor, the gap between the crime and the identification, cuts against reliability; there was roughly a year between the crime and the in-court identification.[59] The result of this analysis is thus that Weisbrod's eyewitness identification was only somewhat reliable.

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[56] See Manson v. Brathwaite, 432 U.S. 98 (1977) (explaining that "identifications arising from single-photograph displays may be viewed in general with suspicion").
[57] Wilson v. Mitchell, 250 F.3d 388 (6th Cir. 2001) (quoting U.S. v. Russell, 532 F.2d 1063 (6th Cir. 1976)).
[58] Webb v. Havener, 549 F.2d 1081(6th Cir. 1977).
[59] See Neil v. Biggers, 409 U.S. 188 (1972) (suggesting that a delay of seven months might undermine reliability).

Nevertheless, the reliability of Weisbrod's identification was not "outweighed by the corrupting effect of the challenged identification itself." The prosecution did not seek to introduce Weisbrod's suggestively-procured pretrial identification as evidence at trial. Ojile, therefore, must show that the prosecution's *pretrial* photograph display so corrupted Weisbrod's *in-court* identification as to create a substantial risk that he identified Ojile in error. It is not plausible, however, that the pretrial display had any influence (or, at least, any material influence) on Weisbrod's in-court identification. This is because Ojile has not disputed Weisbrod's testimony at trial that he recognized Ojile and his co-defendants in news reports broadcast shortly after they were arrested. Thus, well before the police showed Weisbrod the photo of Ojile, Weisbrod had already seen a picture of Ojile, and had decided that he was one of the men who robbed him. Given this prior valid identification, Ojile has not shown that the prosecution's pretrial photograph display had any further deleterious effect whatsoever.

Of course, the news reports were as suggestive as the prosecution's photograph display, if not more so. But in Perry the Supreme Court affirmed that due process is only implicated "when *the police* have arranged suggestive circumstances leading the witness to identify a particular person as the perpetrator of a crime."[60] The news reports do not implicate due process because they were not state action. In sum, the *de minimis* "corrupting effect" of the government's pretrial display did not outweigh Weisbrod's ability to make an accurate identification of Ojile in court.

Ojile next argues that he was deprived of his right to counsel when the government used Tanks as its agent to elicit incriminating information. In Massiah v. U.S.,[61] the Supreme Court held that it violates a criminal defendant's right to counsel when, at trial, the state uses "evidence of [the defendant's] own incriminating words, which [state] agents had deliberately elicited from him after he had been indicted and in the absence of his counsel."

The primary concern of the Massiah line of decisions is secret interrogation by investigatory techniques that are the equivalent of direct police interrogation."[62] Thus, the Supreme Court has found inadmissible "incriminating statements made by [a criminal defendant] to his cellmate, an undisclosed Government informant, after indictment and while in custody."[63] Put broadly, the state cannot "intentionally creat[e] a situation likely to induce [a criminal defendant] to make incriminating statements without the assistance of counsel."

Ojile argues that Tanks acted as a state agent after he was deposed by the prosecution on April 6, 2011; the Warden disputes that point. But it does not matter. Even if Ojile were correct, he has not identified any materially incriminating statements made *after* the April 6 deposition and introduced against him at trial. The only difference between Tanks' April 6 deposition, which comprised Ojile's admissions before Tanks was putatively acting as a state agent, and Tanks'

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[60] 565 U.S. at 232.
[61] 377 U.S. 201 (1964).
[62] Kuhlmann v. Wilson, 477 U.S. 436 (1986).
[63] U.S. v. Henry, 447 U.S. 264 (1980).

testimony at trial is that the trial testimony was slightly more specific. Tanks told prosecutors during his deposition that Ojile planned to say that the police planted a victim's ID cards in his apartment. At trial, Tanks testified that Ojile said he planned to say that a specific officer—Officer Morgan—had planted the victim's ID cards.

Even assuming that this detail was extracted from Ojile after the April 6 deposition—assuming, therefore, that Ojile's right to counsel was infringed—the error was certainly harmless.[64]. Based solely on Ojile's pre-April 6 admissions, Tanks could permissibly testify about Ojile's numerous admissions of guilt and his strategy to accuse the police of planting evidence. In light of this, and given the evidence of Ojile's guilt, Tanks' ability to name a specific officer—Officer Morgan—as the one Ojile had planned to name as the planter of the evidence did not have a "substantial and injurious effect or influence in determining the . . . verdict."[65]

The court affirmed the denial of this petition.

FIFTH AMENDMENT

U.S. v. Potter, 927 F.3d 446 (6th Cir. 2019)

FACTS: In 2015, Potter made a deal with a friend to make money selling methamphetamine in Tennessee. In several trips, Potter transported a quantity of meth back and forth from Georgia to Tennessee. On June 26, Potter was arrested on unrelated charges and told the police he did not want to talk. He changed his mind, signed a waiver, and talked to two state drug task force members. Potter admitted trafficking in ten pounds of the drug. After his arrest, Potter directed his brother, Hilliard, to collect money and to warn one of his fellow traffickers about the arrest. Hilliard took over the "business."

Once released, Potter began trafficking again and several of his dealers were eventually arrested. Before trial, Potter moved to suppress, arguing that he had asked for a lawyer several times and was ignored. One of the agents indicated Potter may have mentioned a lawyer but never asked for one. Suppression was denied. Potter was convicted and appealed.

ISSUE: Must a request for an attorney be explicit?

HOLDING: Yes.

DISCUSSION: Davis v. U.S. set a high bar for what constituted a request for an attorney under Edwards v. Arizona.[66] In Davis, the court held that an ambiguous or equivocal request was not sufficient to require officers to stop questioning.[67] The individual must make a "firm request" for

[64] Ayers v. Hudson, 623 F.3d 301 (6th Cir. 2010) ("Massiah violations are normally subject to harmless-error analysis." (citing Milton v. Wainwright, 407 U.S. 371 (1972)))
[65] Moore v. Berghuis, 700 F.3d 882 (6th Cir. 2012) (quoting Tolliver v. Sheets, 594 F.3d 900 (6th Cir. 2010).
[66] 451 U.S. 477 (1981).
[67] 512 U.S. 452 (1994).

counsel. In this case, nothing Potter said made it over that high bar and the "mere mention of an attorney does not cut it."

The court noted that the night before the interrogation, Potter had told officers he did not want to speak to them, and they honored that request. The next day, he initiated an exchange and signed a waiver.

The Court affirmed this conviction.

TRIAL PROCEDURE / EVIDENCE

TRIAL PROCEDURE / EVIDENCE – EVIDENCE

U.S. v. Johnson, 775 Fed.Appx. 794 (6th Cir. 2019)

FACTS: On August 25, 2015, investigators became aware of a Craigslist ad that indicated a solicitation to sex involving a young (under 19) male in the Detroit area. Johnson had posted the ad and subsequently engaged in communication with an agent posing as a 15-year-old male. That communication ended with the two setting up a meeting at a park. At the park, Johnson was arrested and taken into custody.

Further investigation led law enforcement to his hotel room where evidence was located that indicated his interest in such activities, including a recording device. The laptop found in the room had a "virtual machine" installed, so he could remotely access another computer. On that virtual machine, investigators found a quantity of child pornography, along with several encrypted items that could not be accessed.

Johnson was convicted of possession of child pornography and other related charges. Johnson appealed.

ISSUE: Is computer evidence difficult to present?

HOLDING: Yes.

DISCUSSION: Among issues relating only to federal law, Johnson argued that he was not proven to have knowingly possessed child pornography. Because of the way he "held" the images, some were on the virtual machine and others were found in the cache. The court opined that when "images are … recovered from a computer system's cache, rather than organized on a hard drive or other storage media in a more intentional manner, it is sometimes more difficult for the government to show" knowing possession. Such a showing, however, is not impossible. The court noted that the laptop was a work computer on which he installed the software needed to access the virtual machine. Johnson's internet search history also indicated an interest in child

pornography. Johnson offered no alternative explanation for the pornography found, and the "evidence supporting [his] guilt is copious."

The Court affirmed his convictions.

U.S. v. Moran, 771 Fed.Appx. 594 (6th Cir. 2019)

FACTS: In 2016, the Internet Crimes Against Children Task Force (Kentucky) was in search of child pornography being distributed on peer-to-peer networks. The Task Force located a user and Det. Cooper (KSP) confirmed files that were illegal – and that led to Moran, who lived with family near Maysville.

After eliminating other occupants, Moran was left. He admitted using BitTorrent on his laptop. He was advised of his rights and admitted to having child pornography on his laptop. He denied having actively searched for "baby porn" but did express an interest in Japanese animated pornography (which was legal). Moran admitted to using several peer-to-peer programs and that sometimes he ended up with things he did not want and tried to delete those files. During the interview, Moran discussed file sharing, and despite denying knowing how it worked, he made statements "that suggested he understood well enough." Moran admitted others could have gotten images from his "share folder."

At trial, Det. Viergutz testified as an expert. Viergutz testified to finding 106 videos and 91 images of child pornography. Although the ones picked up originally were not there, evidence remained that they had been at one time. Moran was convicted of distributing and possession of child pornography and appealed.

ISSUE: Must prosecution expert testimony be disclosed to the defense?

HOLDING: Yes.

DISCUSSION: Moran argued that it was improper to allow Viergutz to testify to certain evidence because it had not been specifically disclosed to the defense prior to trial as required under the Federal Rules. The government disclosed that Viergutz was an expert and would testify to the contents of the forensics report he had prepared and was also disclosed, including a spreadsheet he had made. The court held this disclosure was sufficient and affirmed the conviction.

TRIAL PROCEDURE / EVIDENCE – CONFIDENTIAL INFORMANT

U.S. v. Shanklin, 924 F.3d 905 (6th Cir. 2019)

FACTS: In 2013, based on a tip from a reliable CI, Louisville Police began an investigation into marijuana cultivation at Shanklin's home. Officers initiated surveillance and observed Shanklin leave the home. During a traffic stop, marijuana was found in Shanklin's vehicle. Officers also maintained surveillance on the home and, upon approach to the residence, detected the

strong smell of marijuana and observed marijuana plants outside. Officers obtained a search warrant and found over 50 plants and other paraphernalia. Numerous items indicated Shanklin lived at the home. A pistol was also found during the search.

Shanklin was charged with cultivating marijuana and possession of the firearm by a convicted felon. While those charges were severed, the marijuana charge was enhanced by the presence of the firearm. He was ultimately convicted of both charges and appealed.

ISSUE: May the identity of a CI be withheld?

HOLDING: Yes (depending upon circumstances).

DISCUSSION: Shanklin argued that the government should have been compelled to share the identity of the CI because it was possible the CI, who had reportedly been in the residence days before the search warrant, might have left the gun and other items. The court looked to Roviaro v. U.S. and held that in such cases, the "police have an important interest in maintaining the CI's identity" to allow them to continue to use the CI.[68] Each case requires a careful, individualized consideration to determine if the informant's identity would assist in the defense. In this case, the CI did not testify and none of the CI's statements were introduced for the truth of the matter asserted (hearsay), but instead were only used as background for the search warrant. Further, nothing involving the CI had anything to do with the firearm, but only the drugs. The detective was thoroughly questioned about the matter as well, including any possible motivation for the CI to have provided false information.

The convictions were affirmed.

CIVIL LITIGATION

Hall v. City of Williamsburg, 768 Fed.Appx. 366 (6th Cir. 2019)

FACTS: On January 10, 2013, an anonymous posting on Topix offered a reward for a murder of Jones and the concealment of her body. Jones reported the post to KSP and Trooper Sowders investigated. With a warrant, Trooper Sowders obtained the originating IP address and linked it to Hall in Whitley County. The investigation was transferred to the post covering Whitley County and assigned to Trooper Baxter. Trimble, the Commonwealth Attorney for Whitley and McCreary counties, instructed Baxter to get a search warrant. Baxter complied. Hall was arrested and the matter was covered by local media.

At the preliminary hearing, Trooper Baxter testified that Jones considered it a serious threat, although he had not actually spoken to Jones. Hall was bound over and then indicted for solicitation to murder. In 2016, the charges against Hall were dismissed. In the interim, however, Hall, who had been admitted to law school before the arrest, had his offer rescinded. (Trimble

[68] 353 U.S. 53 (1957).

had notified the school of his arrest.) Also during that time, Reeves, Hall's girlfriend, made numerous contacts with Trimble making threats, and Trimble placed intimidation charges against both. Trimble recused himself and handed the case over to a special prosecutor. The intimidation charge was dismissed for lack of prosecution. A later charge was placed for retaliation but that too was dismissed. Other charges were filed, some of which ended with guilty pleas.

Hall filed suit, alleging malicious prosecution under 42 U.S.C. §1983 against multiple defendants. The defendants moved for summary judgment, but also engaged in settlement negotiations (Bird – the primary officer - and the City of Williamsburg) and settled for a nominal amount. Trimble and Baxter were dismissed from the litigation. Hall failed to follow the trial court's direction to sign the paperwork on the settlement, resulting in the dismissal of those claims. Hall appealed.

ISSUE: Are grand jury witnesses immune from lawsuit?

HOLDING: Yes.

DICUSSION: The appellate court held that Trimble, as a prosecutor, was entitled to absolute immunity in his capacity as a prosecutor, but not for investigative functions. The Court, however, held that all of Trimble's actions, including assisting in search and arrest warrants, fell under his role as a prosecutor. Any claims related to the situation in which Trimble was the victim were barred because of the statute of limitations.

With respect to Trooper Baxter, the Court noted:

> To state a federal § 1983 claim for malicious prosecution, a plaintiff must allege facts meeting four elements:
>
> (1) a criminal prosecution was initiated against the plaintiff and the defendant made, influenced, or participated in the decision to prosecute; (2) there was no probable cause for the criminal prosecution; (3) as a consequence of the legal proceeding, the plaintiff suffered a deprivation of liberty apart from the initial seizure; and (4) the criminal proceeding was resolved in the plaintiff's favor.[69]

Further, "In Kentucky, a malicious prosecution plaintiff must also allege that the defendant acted with malice."[70]

In this case, the court determined there was probable cause supporting the solicitation charge, but Hall argued he was not in the position to access the account at the time the posting was made. (He suggested his girlfriend accessed the account.) Hall's claims were based, in part, on Baxter's testimony before the grand jury and grand jury witnesses enjoy absolute immunity. Since there was no indication he provided Trimble with false information, he was also immune

[69] Robertson v. Lucas, 753 F.3d 606 (6th Cir. 2014).
[70] Prewitt v. Sexton, 777 S.W.2d 891 (Ky. 1989).

for his involvement with making the decision to prosecute, which fell to Trimble. Hall argued that Baxter made false statements but the totality of the information available to Baxter was properly shared with Trimble. (In particular, Hall challenged whether Baxter's testimony that Davis was actually frightened by the threat was correct, but the Court agreed that it was.)

Finally, the court held that his agreement to settle, although never formalized, was valid. The court affirmed the dismissals.

FIRST AMENDMENT

Harper v. City of Cleveland, 781 Fed.Appx. 389 (6th Cir. 2019)

FACTS: Harper began his career as a Cleveland police officer in 1989, and moved to an airport assignment two years later. In 2007, the city was considering moving to private law enforcement at the airport. Harper worked with colleagues to campaign against the privatization effort – in effect, he "organized" them. The City ultimately chose not to privatize. In 2009, Harper alleged having unpleasant interactions with Sgt. Reese. In 2013, the City received complaints about Harper's sleeping and "disappearing" while on duty and Harper was found to be "regularly abandoning his post." By investigation, Harper was found napping on regular intervals while on duty.

In 2014, Harper was charged with misconduct and granted a disciplinary hearing. Harper pled "no contest," was suspended from duty and transferred. Harper claims he was constructively forced into retirement. His benefits and salary were unchanged by the transfer.

In 2016, Harper sued the city on claims of race and First Amendment retaliation. The district court awarded summary judgment to the City. Harper appealed.

ISSUE: Must First Amendment retaliation occur close in time to the protected speech?

HOLDING: Yes.

DISCUSSION: In the case of an alleged constructive discharge, the following factors must be examined:

> (1) demotion; (2) reduction in salary; (3) reduction in job responsibilities; (4) reassignment to menial or degrading work; (5) reassignment to work under a younger supervisor; (6) badgering, harassment, or humiliation by the employer calculated to encourage the employee's resignation; or (7) offers of early retirement or continued employment on terms less favorable than the employee's former status.

Harper argued he would have reduced opportunities for overtime and lost the "status" of going from a specialized unit to a patrol unit. He claimed "personal physical jeopardy" as he was given

no retraining for street assignment, but had declined an offered training. He had been an officer for 26 years total. Looking to his suspension and transfer, specifically, Harper provided no comparable officers who had received different discipline for similar situations. Some of those examined had isolated incidents of misconduct, not "an ongoing, month's long dereliction of duty." Further, even had he shown it, the Court found that there was a legitimate and nondiscriminatory reason for the action, neglect and subsequent lies.

With respect to his claim that it was as result of his earlier "speech," the Court noted that he needed to prove that

> (1) he engaged in constitutionally protected speech; (2) an adverse action was taken against him that would deter a person of ordinary firmness from continuing to engage in that conduct; [and] (3) there is a causal connection between elements one and two—that is, the adverse action was motivated at least in part by his protected conduct.[71]

The court noted that there was a long span between the speech and the alleged adverse action, with the speech occurring in 2009, although he claimed random adverse actions in the ensuing years. However, there must also be a very close causal connection between the speech and the alleged retaliation, as well, and nothing indicated that to be the case.

The Court affirmed the dismissal of the action.

EMPLOYMENT

Holt / Erskine v. City of Battle Creek, 925 F.3d 905 (6th Cir. 2019)

FACTS: Holt and Erskine both served as battalion chiefs for the City of Battle Creek Fire Department. Both were the second in command, and in overall command of the department during their respective shifts, and served as the chief's "senior staff." They rotated on standby duty with the fire chief a week at a time which required them to respond to scenes if necessary during their normal off time. During that standby week, they each received 1. 5 hours of pay for each day on standby and overtime pay should they respond to a call. They had a pager, radio and were also expected to field phone calls. During those standby weeks, policy prohibited them from drinking alcohol or leaving town. Both Holt and Erskine argued the restrictions were onerous, but Fire Chief Hausman disagreed.

Both Holt and Erskine filed suit under FLSA, arguing they should receive overtime for standby duty. The trial court ruled that the battalion chiefs were exempt under both executive and administrative exemptions. And even if not exempt, their standby duties were not so onerous as to prevent them from engaging in most activities.

Erskine and Holt appealed.

[71] Gillis v. Miller,845 F.3d 677(6th Cir. 2017) (quoting Dye v. Office of Racing Comm'n 702 F.3d 286 (6th Cir. 2012)).

ISSUE: Are executive level staff exempt from overtime?

HOLDING: Yes.

DISCUSSION: The court examined the FLSA executive exemption elements. Only the second and fourth were at issues – whether the employee's primary duty was management and whether they had hiring/firing authority. The court held that both men performed both functions for the department and played a significant role in personnel decisions, despite the fact the chief did not always follow their recommendations.

The trial court was affirmed.

Barrow / Cook v. City of Hillview, 775 Fed.Appx. 801 (6th Cir. 2019)

FACTS: On January 4, 2012, Barrow, Cook, Caple and Straughn, all members of the Hillview Police Department, responded to a call at Mayor Eadens' home. While searching for suspicious activity, the purpose of the call, they found a backpack in the yard that contained evidence of methamphetamine manufacturing. Allen Eadens, the mayor's son, denied any knowledge of it. Allen was handcuffed. Barrow stayed with Allen while the others continued to search. Cook and Straughn found white garbage bags that smelled of chemicals they recognized as connected to manufacturing. Chief Caple ordered that the backpack be placed with the bags, which were off the mayor's property behind a fence to take the "heat" off the mayor. Cook was familiar with drug processing materials, but moved the bags because of the chief's order despite knowing this was a violation of SOP.

When the others joined him, Barrow asked about the backpack and was told it was in the woods outside the property. Barrow, suspecting they had done something illegal, told Cook he was "done" with the scene and Cook released him. Barrow was ordered by Straughn not to talk to anyone and Barrow gave a "sarcastic salute." At the mayor's request, his son was removed and the drug task force "cleaned up" the scene.

Barrow reported the situation to the Bullitt County Sheriff's Office, which referred it to the FBI. Barrow gave a statement, later corroborated by Cook. Both cooperated with the FBI and Barrow recorded the conversations. By the next year, the investigation became common knowledge and ultimately, Barrow admitted he talked to the FBI. Beginning about that time, Barrow and Cook became the subject of disciplinary actions, including reprimands and suspensions. Cook eventually took a demotion to patrolman to obtain dismissals of the pending discipline.

Both Barrow and Cook sued, arguing retaliation for their cooperation with the FBI. In the interim, Caple was indicted for lying to the FBI and was eventually convicted.

Barrow (joined by Cook later) filed suit against Hillview, Caple and Straughn. He complained of violations of the Kentucky Whistleblower Act and conspiracy to prevent him from reporting the alleged crime. Ultimately, Barrow abandoned the first claim. With respect to the second claim, the trial court found that the intracorporate conspiracy doctrine prevented a conspiracy claim, as all three were under the umbrella of Hillview, and thus a single "person" for purposes of conspiracy. The claims were dismissed, and Barrow and Cook appealed.

ISSUE: Are officers reporting misconduct to a third party protected by the First Amendment?

HOLDING: Yes.

DISCUSSION: The Court noted an exception to the intracorporate conspiracy doctrine when the employees act outside the scope of their employment. In this case, the Sixth Circuit did not find sufficient evidence that what Barrow and Cook were doing was outside the purview of their own Hillview employment. The court upheld the dismissal on that claim. The court addressed whether a personal motive allowed the doctrine to be avoided but in this case, the court rejected this.

With respect to employment reprisal, the court looked at is a public policy wrongful discharge even though the pair were not actually terminated, but only disciplined. As the Kentucky Supreme Court had not provided guidance on the application of the statute, whether "wrongful discharge really means wrongful discipline."

The court also examined the allegations of First Amendment retaliation. The district court found no precedent to rule that reporting misconduct or participating in a FBI investigation was protected speech, the first element of such a claim. The Sixth Circuit disagreed and noted that while it might be their professional responsibility to make the report – as Barrow noted – it was still protected speech.

In such assessment, the court had to make a three step inquiry:

> First, we ascertain whether the relevant speech addressed a matter of public concern.[72] Second, we determine whether the employee spoke as a private citizen or as an employee pursuant to the employee's official duties.[73] Third, we balance the interests of the parties and determine if the employee's speech interest outweighs "the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees."[74]

In the first, the Court agreed the matter was one of strong public concern, exposing government misconduct. The Court noted that "there is considerable value, moreover, in encouraging, rather

[72] Connick v. Myers, 461 U.S. 138 (1983).
[73] Id. (citing Garcetti v. Ceballos, 547 U.S. 410 (2006).
[74] Id. (quoting Pickering v. Bd. of Educ. , 391 U.S. 563 (1968)).

than inhibiting, speech by public employees. For government employees are often in the best position to know what ails the agencies for which they work. The interest at stake is as much the public's interest in receiving informed opinion as it is the employee's own right to disseminate it." Their statements were not within their "ordinary job responsibilities." While certainly general law enforcement was within their duties, taking an allegation of public corruption to outside authorities was not. They did not utilize their own chain of command for obvious reasons, as well, having already been warned off the matter.

Finally, the court engaged in the Pickering balancing test, the Court noted that there was no evidence that anything said by Barrow or Cook was incorrect.

The Sixth Circuit held that the statements were, in fact, protected speech and reversed the summary judgment to the defendants on that claim. The court also reversed the dismissal of the claim against Hillview itself, based on the disciplinary decisions made by the two command officers on behalf of Hillview.

The Court reversed and remanded for further proceedings.

Barrow v. City of Cleveland, 775 Fed.Appx. 801 (6th Cir. 2019)

FACTS: Barrow served as a City of Cleveland police officer for many years, and by all accounts, was a good officer, having risen through the ranks up to Lieutenant by 2011. In that year, he unsuccessfully tested for Captain. Of the ten who took the test, two, including Barrow, failed. Barrow was African American, and only one of the eight who passed was African American. In 2012, Barrow filed a complaint with the EEOC alleging racial discrimination.

Following that charge, Barrow experienced several employment actions that he alleged were taken in retaliation for his complaint. One involved changes to his vehicle assignment, with Barrow losing the newer vehicle until he left the unit to which he was assigned, and the vehicle was then assigned to his successor. He was also removed from duties in his unit, assigned to administrative duties and removed from active street duty, and he was not allowed to have "contact with the public." Barrow remained in that status for approximately two years. He was also denied the ability to overtime work security details by that "no contact" order. Those changes led to a second EEOC claim. He filed suit in 2016 and within months of that filing, retired.

The trial court denied many of the claims as being time-barred, but allowed the retaliation claims to move forward. At trial, he was awarded substantial compensatory damages along with attorney's fees. The City appealed.

ISSUE: Is timing of alleged retaliatory actions critical in making a claim?

HOLDING: Yes.

DISCUSSION: An employee "alleging discrimination or retaliation in violation of Title VII must first file an administrative charge with the EEOC within a certain time after the alleged wrongful act." The Court held that his claim related to being assigned to administrative duty was "reasonably related" to his first allegation and thus it was properly handled, even though he did not specify it in the first claim.

With respect to his Title VII retaliation claim, it was necessary to introduce "direct evidence of retaliation or by proffering circumstantial evidence that would support an inference of retaliation."[75] Circumstantial evidence must be assessed under "the same McDonnell Douglas evidentiary framework that is used to assess claims of discrimination."

In such:

> A plaintiff establishes a prima facie by showing that: (1) he engaged in a protected activity; (2) his exercise of the protected activity was known by the defendant; (3) thereafter, the defendant took an action that was materially adverse to the plaintiff; and (4) a causal connection existed between the protected activity and the adverse action.[76] Finally, it must be proved that "the plaintiff must furnish evidence that "the unlawful retaliation would not have occurred in the absence of the alleged wrongful action or actions of the employer."[77]

The City argued that the decision maker did not know about the EEOC claim. In previous cases, the court had "inferred knowledge of protected activity in situations where the decision-maker 'took an action with respect to the plaintiff, other than the challenged action, from which it could be inferred that the [decision-maker] was aware of the plaintiff's grievance.'"[78] Within weeks of his filing, a memorandum was sent out that required claims to go to the director of public safety rather than directly to human resources, which meant, according to Barrow that "oftentimes you had to forward your complaint directly to the person you were complaining about." That would serve to discourage action. The court held that although the policy applied broadly to city employees, it was reasonable for a jury to find that the "timing and circumstances" were in response to Barrows complaints. Further, there was notification that the EEOC had notified the city of the claim.

In such cases, the protection was not against all retaliation, but against materially adverse actions – those that affect the "terms, conditions or status of employment."[79] The court held that the reassignment was materially adverse, given that it constrained Barrow from performing the tasks inherent in the job. With respect to causation, while temporal proximity alone is not enough, it is a strong factor, but in this case, the first adverse action occurred some 5½ months after he filed

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[75] Laster v. City of Kalamazoo, 746 F.3d 714 (6th Cir. 2014) (quoting Imwalle v. Reliance Medical Products, Inc., 515 F.3d 531 (6th Cir. 2008)).
[76] Rogers v. Henry Ford Health Sys. , 897 F.3d 763 (6th Cir. 2018).
[77] Univ. of Tex. Sw. Med. Ctr. v. Nassar, 570 U.S. 338 (2013).
[78] Mulhall v. Ashcroft, 287 F.3d 543 (6th Cir. 2002).
[79] Hawkins v. Anheuser–Busch, Inc., 517 F.3d 321 (6th Cir. 2008).

the claim. Initially, in fact, he suffered no direct reaction but even his immediate supervisors did not know why Barrow was put on administrative duty and the "no public contact" order – which they testified usually occurred when there was a criminal investigation. It was lifted when Barrow was transferred, which was also illogical if being done for a public safety reason. Thus, it was reasonable for the jury to find causation.

As for emotional distress, Barrow pointed to "specific manifestations" such as being isolated from his unit, and feeling insecure in his position, and seeking medical treatment. The court held that the jury verdict was "neither unreasonable nor against the weight of the evidence." Further, the court held that the fees demanded were appropriate and reasonable. (In fact, the fees were essentially double Barrow's award.)

The Court affirmed the decision.

TABLE OF CASES