2019 THIRD QUARTER

Contents

KENTUCKY

PENAL CODE

PENAL CODE – KRS - CRUELTY TO ANIMALS

Morgan v. Com., 2019 WL 2896651 (Ky. App. 2019)

FACTS: On February 6, 2016, Morgan was hosting cockfighting events on his property in Calloway County. He was charged with second-degree cruelty to animals, but argued that "spectating or otherwise engaging in cockfighting activity does not constitute cruelty to animals because birds are exempt from the statutory definition of an animal." The trial court denied the motion to dismiss. Morgan was indicted in December on felony gambling charges while the prior action was still pending, with second-degree cruelty to animals also a change in that case. Morgan entered a conditional guilty plea pursuant to Alford[1] plea and appealed.

[1] North Carolina v. Alford, 400 U.S. 25 (1970).

ISSUE: Does cockfighting constitute cruelty to animals?

HOLDING: Yes.

DISCUSSION: The Court noted:

Under KRS 525.130(1):

> A person is guilty of cruelty to animals in the second degree when except as authorized by law he intentionally or wantonly:
>
> (a) Subjects any animal to or causes cruel or injurious mistreatment through abandonment, participates other than as provided in KRS 525.125 in causing it to fight for pleasure or profit (including, but not limited to being a spectator or vendor at an event where a four (4) legged animal is caused to fight for pleasure or profit).

KRS 446.010(2) defines "animal" as 'every warm-blooded living creature except a human being.'"

Morgan argued that under the LRC notes to the statute, a procedural situation negated the idea that birds were not animals under the law. The Court of Appeals held that the legislature had not amended the statute to exempt birds. As such, in Munn v. Com., "the General Assembly's failure to amend the definition is indicative of its intent to include birds in the definition of animal."[2]

The Court affirmed this conviction.

PENAL CODE – KRS 524 – TAMPERING

Plank v. Com., 2019 WL 3992729 (Ky. App. 2019)

FACTS: In September 2015 Plank was placed under the supervision of Kentucky Probation and Parole. On March 10, 2017, Probation Officers Walton and Eldridge visited Plank at her parents' home. Plank's mother went to wake Plank. It was undisputed that Plank was properly taking several sedatives as prescribed and was groggy at being awakened. Officer Walton found Plank in the kitchen drinking a glass of water. Officer Walton required Plank to produce a urine sample, which the officer used to administer field test. Plank tested positive for amphetamines. Walton confirmed the results with Eldridge colleague and told Plank it would be officially tested at the lab. Per procedure, Walton handed the sample back to Plank to transfer to the official test vial. As Plank did so, she filled the test vial almost full and then suddenly dumped both on the sink and turned on the faucet, washing it away. She then said

[2] 889 S.W.2d 49 (Ky. App. 1994).

"oops" – although "there is some contention as to whether this statement was made in good faith."

The officers arrested Plank for tampering with physical evidence. Plank was tested at the detention center and those tests were negative. She was convicted and appealed.

ISSUE: Does destroying evidence intended to be tested constitute tampering?

HOLDING: Yes.

DISCUSSION: The Court examined whether Plank intended "to impair the availability of physical evidence in an official proceeding." Under KRS 524.100 "extraneous bodily fluids, once extracted, are indeed physical evidence."[3] A urine test under this circumstances would be "considered to yield unique test results because of the constant state of change which exists in the chemical composition of the body." Certainly Plank understood the consequences of a positive drug test as well.

Finally, Plank argued that in her groggy state, she became confused because she always disposed of samples in the past by pouring them down the toilet. However, the Court of Appeals believed "any attempt to conflate a toilet and a sink should not be entertained, as one would hardly expect to conflate their general usage." The officer, in addition, described her as "alert and attentive."

The Court upheld this conviction.

Phelps v. Com., 2019 WL 3763633 (Ky. App. 2019)

FACTS: Phelps shared a home with his wife, son and four stepchildren. The home had only one bathroom so it was common for one person to otherwise be in the bathroom while someone else was in the shower. Allegedly, Phelps knocked and told his 16-year-old stepdaughter he was coming in to use the toilet while she was in the shower and asked her if she was showering or bathing. She looked up and saw Phelps holding his phone above the shower curtain and she could see herself on the screen. He left, returned, and did it again. She did not see her private areas on the screen. The victim stayed with a friend that night and reported this incident to the police the next day. She testified he posted an apology on her Facebook page but then deleted it.

Officer Patterson (Somerset PD) took the report and obtained a warrant. When Officer Patterson explained to Phelps why he was there, "Phelps spontaneously stated that it must have been about him holding his cell phone up while he was fixing the light fixture in the bathroom while the victim was showering." The phone was seized. Phelps gave a recorded statement in which he claimed he noticed wiring hanging from a fixture and he reached up to fix it, while holding the phone, He acknowledged he was checking Facebook and email and might have accidentally activated the video recording feature.

[3] Page v. Com., 149 S.W.3d 416 (Ky. 2004).

Investigator Bell (OAG) testified he found no child pornography or videos of the victim on the phone on the first examination, but the second time, after an update in the software, he found 220 videos with 60 deletions. One of the deleted videos was shot during the time in question.

Phelps testified that the first time, he used the phone to push up dangling wiring. The second time, he admitted, he did shoot a few seconds of video and then immediately deleted it, without viewing it. He said that "he did not know what he was thinking" and immediately regretted it. Phelps stated they often had conversations in the bathroom, though.

Phelps was convicted of promoting a sexual performance by a minor, tampering and voyeurism. He appealed.

ISSUE: Is deleting potential evidence on an electronic devices tampering?

HOLDING: Yes.

DISCUSSION: The Court of Appeals held that Phelps admitted to making the recording, which alone was enough for the conviction. With respect to tampering, Phelps argued he deleted it because it was wrong, not because it was evidence. The Court of Appeals noted that it was reasonable for the jury to believe it was deleted to avoid prosecution. Although Phelps did not "destroy" it in the usual sense by deleting it, it was put in storage to be overwritten. With respect to the promoting charge, there was no indication he caught images of the girl's private areas, but she was certainly naked. The Court of Appeals held that it was reasonable to think that by waving his phone down over the shower curtain, he was certainly trying to collect images.

With respect to voyeurism, Phelps used his phone to make a video, which he then deleted. It was reasonable for the jury to find that private areas were filmed as a result.

The convictions were affirmed.

PENAL CODE – KRS 527 – FIREARMS

Higgs v. Com., 2019 WL 3763544 (Ky. App. 2019)

FACTS: In 2015, while driving through Kentucky, Higgs made eye contact with Trooper Williams (KSP). The trooper noted that "Higgs had a noticeable emotional reaction upon making eye contact with him, which prompted Williams to conduct a records check on the license plate on Higgs's vehicle." Trooper Williams discovered the vehicle was apparently not insured and executed a traffic stop. The trooper ordered Higgs out of the vehicle. He then approached the passenger, Higgs' quasi-wife, and spotted a glass pipe in plain view. She confirmed having "dab" – marijuana wax - and when her purse was searched, live ammunition was found. She admitted there was a rifle "buried" somewhere in the detritus in the back seat. Ultimately law

enforcement found the rifle, more ammunition, a handgun and an improvised explosive device – and with the latter, they called the KSP Hazardous Materials Unit.

Higgs, a convicted felon, was charged with the guns and having a weapon of mass destruction, as well as drug and driving offenses. He moved to suppress and was denied. At trial, Higgs explained others loaded the vehicle and he was unaware of the explosive device and that the guns belonged to his companion. He stipulated he was a convicted felon and at trial, he was asked about his knowledge of the illegality of his possession of a firearm, which he denied, launching instead into "his own interpretation of the Second Amendment." (With that, the Court allowed him to be impeached with the nature of his out-of-state felonies, at least one of which was for possessing a firearm as a convicted felon.) Higgs was convicted and appealed.

ISSUE: Does the charge of use of a weapon of mass destruction require intent to place the device?

HOLDING: Yes.

DISCUSSION: The Court of Appeals agreed with Higgs that charging him separately for a handgun and a rifle, found together, was double jeopardy. However, this holding did not affect his ultimate sentence.

Instead, the Court of Appeals reversed the conviction on a separate issue, holding that it was improper under impeachment to solicit information about a defendant's prior convictions for the same offense as he never actually denied he had felony convictions. Nor did the Court agree it was harmless error and reversed the conviction.

With respect to the weapon of mass destruction charge, the Court ruled that the statute, which had "been the subject of scant analysis," referenced the "placing" of such devices, not simply possession. As the statutes did not provide a clear definition, either in the statute itself or KRS 446, the word must be interpreted "according to the common and approved usage of language." The definition of place, the Court agreed, was problematical, as the General Assembly had created a differentiation between the possession of such devices, in KRS 237.040 and the use of it in KRS 527.210 (under which he was charged). The Court agreed Higgs' definition of placement but specifically did not "preclude prosecution for the intentional placement of such a device within a vehicle for the purpose of using the vehicle itself as a mobile weapon, such as occurred in the infamous Oklahoma City bombing in 1995." While he denied even knowing it was in the vehicle, the Court determined that "the Commonwealth's case fell short of establishing an essential element of the offense charged – placement. Law enforcement officers testified that the bomb was found buried under the couple's luggage in the trunk of the vehicle. Importantly, Higgs testified that he was merely passing through Kentucky on the way to Alabama. While Higgs may have possessed or transported the device, there is no specific evidence to support an inference that he placed or used it within the Commonwealth of Kentucky."

The Court noted that KRS 527.210, which requires placement, is a step higher than KRS 237.040, so that logically, the General Assembly wished to address the difference. "Given the wide-spread damage these weapons can cause, it would seem prudent to make mere possession a crime as well, rather than the added element of intent.

The conviction was reversed.

Finally, Higgs argued that the stop began with a license check which indicated the vehicle was uninsured. The Court of Appeals noted the progression of the stop, with each step building upon the one before. The court agreed the legal stop which led to the legal questioning of the passenger was appropriate.

The Court held that Higgs should be resentenced for one count of possession of a firearm and that the conviction for the improvised explosive would be reversed.

NON PENAL CODE OFFENSES

CONTROLLED SUBSTANCES

Wilson v. Com., 2019 WL 3059968 (Ky. App. 2019)(Depublished case)

FACTS: On April 13, 2017, a Lexington officer responded to a call that two females were slumped over inside a car that was parked in the caller's driveway. The caller had tried to rouse them with no luck and she did not know them. The officer tried to rouse them as well. The officer observed a plastic lid with residue in plain view, along with tourniquets. Wilson finally woke up and refused medical care, but was confused with slurred speech. On June 6, 2017, Wilson was indicted on various drug charges. She moved to dismiss charges of possession of a controlled substance and possession of drug paraphernalia because those charges originated with a 911 call by a third party due to her apparent drug overdose. The motion to dismiss was denied. Wilson entered a conditional guilty plea and appealed.

ISSUE: If medical assistance is summoned for an unknown situation, does that give amnesty under KRS 218A.133?

HOLDING: No.

DISCUSSION: The Court examined whether "medical assistance was sought for a drug overdose" within the meaning of KRS 218A.133. In this case, the caller did not know what was going on, but only that the occupants were nonresponsive. The court held the statute did not apply and upheld the plea.

Carr v. Com., 2019 WL 2896626 (Ky. App. 2019)

FACTS: Carr was charged in Campbell County with importing heroin and trafficking in a controlled substance. He did not raise any issues at trial with respect to the charges, but argued on appeal that being convicted of both offenses violates his right against double jeopardy.

ISSUE: Does a conviction for importing and trafficking constitute double jeopardy?

HOLDING: No.

DISCUSSION: The court looked to the enactment of the later offense (importing) and the intentions of the General Assembly. The court held that the General Assembly clearly intended that the sentence for importing "is to apply cumulatively to other crimes, including trafficking." Thus, the conviction was upheld.

DOMESTIC VIOLENCE

Kummer v. Valla, 2019 WL 1578801 (Ky. App. 2019)

FACTS: Valla and Kummer lived together in Jefferson County for five years before they ultimately broke up. In July 2018, Valla requested a DVO, stating Kummer came to her workplace and demanded entry, contacted friends and family to find her address, "stalked and harassed" her, followed her, and that she was afraid of him. An EPO was granted. At the hearing, Kummer argued that the allegations of stalking needed a "pattern and not a single incident." Valla acknowledged Kummer did not threaten or hurt her. The DVO was issued. Kummer appealed.

ISSUE: Must conduct meet the elements of stalking to warrant an IPO based on stalking?

HOLDING: Yes.

DISCUSSION: To dispose of this appeal, the court found it necessary to look at the new body of law for Interpersonal Protective Orders. The language of that law (KRS 456) referenced the penal code offenses of stalking (KRS 508). The Court of Appeals held that the statutory requirements of KRS 403.720 were not met as there was insufficient evidence indicating Kummer's conduct constituted stalking as defined by statute. A general allegation of fear was insufficient, without any allegation of a specific threat or fear of threat.

The court reversed issuance of the DVO.

Hughes v. Com., 2019 WL 4565542 (Ky. App. 2019)

FACTS: On June 10, 2016, Edwards called police to claim Hughes assaulted her, that Hughes was still present in her apartment, and likely would assault her again. Hughes left before police arrived. Sgt. Latham (Elizabethtown PD) located Edwards and brought her back to the apartment, finding men's clothes scattered about and that Edwards had marks and scratches. The couple reconciled. Approximately nine months later, Edwards bore a son with Hughes.

A month later, the Grand Jury indicted Hughes for fourth-degree assault with the enhancement that they were an unmarried couple under KRS 403. Edwards did not cooperate with the Commonwealth at trial and jail calls suggesting intimidation were played for the jury. These calls also showed a clear "continued romantic relationship." (Edwards claimed to have moved to Alabama, but was actually living in Ohio at the time.)

At trial, Sgt. Latham affirmed the couple had a child in common. Hughes counsel noted that the Commonwealth was only attempting to prove the unmarried couple status by showing they lived together. The trial court found that a "potential child in common" issue could be addressed in cross-examination. Hughes testified that they did not live together at the time of the assault, nor was he aware of Edwards being pregnant at that time.

Hughes was convicted and appealed.

ISSUE: Is simply being pregnant by at most a few weeks prior to a domestic incident evidence of the couple having a child in common?

HOLDING: No.

DISCUSSION: Hughes argued the instructions were improper as they referenced a child in common, but at most, Edwards could have been only a few weeks pregnant. The Commonwealth did not argue that being pregnant constituted having a "child in common" for purposes of the statute. The Court of Appeals believed that the proceedings in the trial court did not "instill much confidence that the jury's guilty verdict was based on the evidence Hughes and Edwards lived together rather than Sgt. Latham's statement that they had a 'child in common.'" The testimony caused a potential conflict in the verdict and jeopardized it being unanimous – as there was no way to tell if jurors convicted based on a belief they lived together or had a child together.

The Court of Appeals upheld the conviction for assault, but not the enhancement based on the couple's actual status.

FORFEITURE

Martin v. Com., 586 S.W.3d 252 (Ky. App. 2019)

FACTS: Martin entered a guilty plea to theft, drug-related offenses and possession of a handgun in Clark County. The Commonwealth moved for forfeiture of his truck, a trailer and a variety of tools. After forfeiture was granted, Martin appealed.

ISSUE: Is traceability needed to do a forfeiture?

HOLDING: Yes.

DISCUSSION: Under KRS 218A.410 the Commonwealth must produce some evidence that links the property at issue to the criminal drug offenses. Only when the Commonwealth produces some evidence does the burden shift to the defendant to rebut that presumption by clear and convincing evidence.[4] Here, the trial court made no written findings of fact concerning whether forfeiture of the tools was appropriate. Martin argued he inherited the tools from his father and others he purchased with legal income.

The Court of Appeals affirmed that the truck and trailer were properly traced and forfeiture was appropriate, but remanded the case for further findings with respect to whether the tools should be forfeited.

DUI

Com. Ex Rel Logan County Attorney v. Williams / Ortiz, 2019 WL 4559354 (Ky. App. 2019) (DR filed 12/6/2019)

FACTS: On September 10, 2016, Officer Eggleston (Russellville PD) responded to an erratic driver. He executed a traffic stop. Upon approach, Officer Eggleston noted the "strong odor of alcohol" on both driver (Ortiz) and car. Ortiz was unsteady on his feet and appeared highly intoxicated. He also had an open container in the vehicle. Ortiz indicated he understood the officer but was unable to do adequately complete the FSTs. Ortiz stated in English that he understood the test directions. A PBT showed the presence of alcohol. Ortiz was taken to the hospital and consented to a blood draw, which returned at .233. Ortiz was cited for DUI and having no OL. Six months later, Ortiz argued that he did not understand English or that he could refuse testing. A motion was filed to suppress the BAC and/or the failed FSTs. A coworker indicated that Ortiz "routinely nods, smiles and agrees" but that he did not actually understand English. The trial court watched the video of the stop, which showed that Ortiz occasionally responded in English and spoke to his family at the hospital in English. The trial court found that he was not fluent enough in English to give informed consent. The trial court further found

[4] Brewer v. Com., 206 S.W.3d 343 (Ky. 2006); Smith v. Com., 339 S.W.3d 485 (Ky. App. 2010).

that the officer spoke slowly and used a smattering of Spanish and hand signals to communicate with Ortiz, and therefore should have known Ortiz had a limited grasp of English.

The trial court suppressed the BAC but allowed the case could go forward on Eggleston's lay opinion. The Commonwealth petitioned the circuit court for a writ or prohibition to prevent the suppression of evidence. The circuit court affirmed the district court, "noting KRS 189A.105 does not merely require information be recited in English but specifically requires the person suspected of drunk driving be "informed" of the consequences of submitting to testing as well as refusing testing."

The Commonwealth appealed to the Kentucky Court of Appeals.

ISSUE: Must implied consent warnings be given in another language if the suspect does not appear to be fluent in English?

HOLDING: No.

DISCUSSION: Kentucky's implied consent law is codified in KRS 189A.103. By operating or physically controlling a vehicle in Kentucky, a person consents—upon request of an officer—to the testing of his blood, breath or urine—or any combination of the three—to determine alcohol concentration or impaired driving ability when drunk driving is reasonably suspected.[5] Prompt collection of a sample is critical because the alcohol would be constantly dissipating from the body.

The Court of Appeals held that "reading of the implied consent warning in English satisfies KRS 189A.103 and 189A.105." It looked to Com. v. Rhodes, wherein the driver's behavior indicated that she was not listening to the officer, but that he was still mandated to read it to her. [6] Although the statute says "inform" rather than "read," Ortiz insisted more was needed. The appellate court "set upon a question to find its common, ordinary meaning," as required under KRS 446.080(4). The Court of Appeals noted that a dictionary interpretation suggested that the "focus is on providing relevant facts, not the recipients ability to process the facts provided." The court noted it would have been impossible for the officer to know if Ortiz's reactions were due to his language comprehension or his heavy intoxication, particularly when he responded to English questions both verbally and by gesture appropriately. The court held that it "will not require an officer to assume what is not communicated to him, and further indicated that "Ortiz did not act vastly different from highly intoxicated fully English-speaking persons suspected of drunk driving."

[5] Com. v. Brown, 560 S.W.3d 873 (Ky. App. 2018) (citing KRS 189A.103; Helton v. Com., 299 S.W.3d 555 (Ky. 2009))."

[6] 308 S.W.3d 720(Ky. App. 2010).

The Court of Appeals specifically stated:

> There being no statutory requirement for the suspect to understand the implied consent warning, there is no requirement it be provided to him in his native tongue.

Further, under Bedway, even if his rights were violated, suppression was not mandated. [7]

The Commonwealth also objected to the circuit court taking judicial notice that there are "electronic devices and cell phone apps to translate foreign languages." The Commonwealth noted that it was "unwilling to trust—without question—a foreign language translation just because it was found on the internet. The internet, and access to it via cell phone, is a fantastic advancement, but by no means is it perfect and unquestionably accurate such that it is a proper basis on which to take judicial notice. Unless someone with knowledge of the particular foreign language thoroughly investigates the computer program, website or cell phone app, and assures its accuracy, we cannot endorse reliance on it. Languages have various dialects, and while citizens of several different countries speak Spanish, not all speak the same version. Even trained interpreters may disagree as to the proper translation of a phrase or paragraph. At some point, reliance on a foreign language translation computer program or cell phone app may be appropriate, but we have not been cited to one in this case. Thus, the circuit court erred in taking judicial notice of the fact of computer programs and cell phone apps being available to accurately translate foreign languages."

The Court of Appeals reversed suppression and remanded the case for further proceedings.

Com. v. Morgan, 583 S.W.3d 432 (Ky. App. 2019)

FACTS: On March 27, 2017, a Campbell County police officer arrested Morgan and charged him with DUI. Morgan was taken to the jail for the Intoxilyzer. Morgan consented and the 20-minute observation period began. Just before the test, Morgan told the officer he needed to use the restroom, but he was required to wait. Eleven minutes after the test, Morgan asked to use the restroom again. The officer continued the process, printed out the citation in his cruiser and turned off his body cam. The trial court understood the Morgan was allowed to use the restroom when they went back into the jail. However, the arresting officer did not read the independent blood test warning after the Intoxilyzer was completed, indicated Morgan declined the test and that he did not sign because he needed to rush to the restroom. Morgan blew a 0.187.

During a suppression hearing, Morgan argued he was never provided the independent test warning as required by statute. Despite finding that the second warning concerning the independent test was skipped, the trial court denied the suppression motion. The trial court found that Morgan's need to use the restroom was made in good faith. Morgan entered a

[7] Com. v. Bedway, 466 S.W. 468 (Ky. 2015)

conditional guilty plea to DUI and appealed. The circuit court reversed the denial of suppression, finding that the officer's justification did not hold up because he continued some 22 minutes after the test and Morgan's requests to use the restroom.

The Commonwealth appealed.

ISSUE: Must a subject be offered an independent DUI test after they complete the officer's tests?

HOLDING: Yes.

DISCUSSION: The Court of Appeals held that the officer violated the statutory mandate of KRS 189A.105(4) with respect to the second warning. The Court of Appeals determined that no reason existed why the warning could not have been given as soon as the Intoxilyzer was given. The officer did not claim he forgot, but indicated affirmatively that Morgan declined.

The Court affirmed the granting of the motion to suppress the results of the breath test.

SEARCH & SEIZURE

SEARCH & SEIZURE – TERRY

Standifer v. Com., 2019 WL 3763538 (Ky. App. 2019)(DR Filed 9/11/2019)

FACTS: On August 13, 2016, Officers Baker and Crawford (Louisville Metro) patrolled a grocery store parking lot that was known for drug trafficking. The officers focused on Standifer's legally-parked vehicle. The officers were suspicious because this vehicle sat for 15 minutes with no activity. The officers approached on foot.

Standifer was in the driver's seat smoking a cigarette with the vehicle turned off and the window partially down. Officer Baker saw scissors with marijuana flakes in Standifer's lap. Baker asked Standifer to exist the vehicle, and he refused. Baker reached inside the vehicle and grabbed Standifer's shoulder, while Officer Crawford saw Standifer place a gun in the back seat. Standifer was removed from the vehicle and handcuffed. A handgun and marijuana were found and Standifer was charged. Standifer was a convicted felon.

The trial court denied suppression and Standifer entered a conditional guilty plea. He appealed.

ISSUE: Is some force permitted during a Terry stop?

HOLDING: Yes.

DISCUSSION: The Court of Appeals held that no reasonable cause existed to detain or search Standifer, but that "does not mean that the officers could not engage with the parked vehicle and its occupants." "Police officers are free to approach anyone in public areas for any reason."[8]

Officer Baker testified he knew that he was seeing marijuana. He testified that "(1) that the substance he saw was consistent with marijuana; (2) he was aware based on his experience and training that scissors were often used to cut up or break up marijuana before rolling it; and (3) residual marijuana often sticks to the blades because marijuana is sticky."

A warrant was not necessary "when 'the object seized is plainly visible, the officer is lawfully in a position to view the object, and the incriminating nature of the object is immediately apparent.'"[9] In this case, Officer Baker could clearly see the scissors from outside, with the only question being whether the "incriminating nature of the flakes" was so immediately apparent to warrant a detention.

Standifer argued that "Officer Baker exceeded his authority in doing so and arresting him since the possession of paraphernalia is a misdemeanor, which in most instances requires the officer to issue a citation instead of making an arrest." The appellate court held that Officer Baker did not arrest him at that point, but only ordered Standifer out of the car. This was an "entirely appropriate directive" under the circumstances. When he refused, the situation "changed dramatically." As soon as the gun came into play, there was a "far more concerning issue."

Once the contraband was seized, the officers knew they were dealing with several felonies. At this point, Standifer could be placed under arrest. Standifer argued that he was actually arrested when initially removed and handcuffed, but the appellate court held that the length and manner of an investigatory stop should be reasonably related to the basis for the intrusion.[10]

The Court of Appeals determined that "the right to make an arrest **or investigatory stop** necessarily carries with it the right to use some degree of physical coercion or threat thereof[.]" This is because there is a substantial interest in officer safety and preventing flight of the suspect. Thus, placing Standifer in handcuffs outside the vehicle was reasonable for officer safety and did not constitute an arrest. The arrest took place fifteen minutes later, after the officers discovered the contraband and the incriminating nature thereof.

The Court affirmed the denial of the motion to suppress and affirmed the conviction.

Com. v. Swift, 2019 WL 3381406 (Ky. App., 2019)

[8] Com. v. Banks, 68 S.W.3d 347 (Ky. 2001).
[9] Kerr v. Com., 400 S.W.3d 250 (Ky. 2013).
[10] Williams v. Com., 147 S.W.3d 1 (Ky. 2004).

FACTS: On September 4, 2015, Det. Cook (Leitchfield PD), Det. Dover (Greater Hardin County Narcotics Task Force) and Deputy Beasley (Grayson County SO) went to Swift's home in Caneyville on a knock and talk. The officers had a tip that Swift possessed a large quantity of marijuana. Swift gave consent to enter. Immediately, the officers spotted several items they recognized as likely being connected to drug activity. The officers asked to search the garage and were refused, so they elected to obtain a search warrant. While waiting, Det. Dover put Swift in handcuffs and frisked him. Det. Dover located a plastic bag in the front pocket that he believed was methamphetamine; he was correct.

Swift was indicted for manufacturing methamphetamine and trafficking. He moved for suppression and was initially denied. In further proceedings, however, the trial court agreed to suppress.

The trial court noted:

> The testimony by Detective Robert Dover of the Greater Hardin County Task Force was he had no formal training at any police academy or continuing education classes by any accredited body to [sic] for touching and determining whether a substance in a suspect's pocket is illegal drugs. No evidence was produced [that] any such training ever existed or exists today. There is no Daubert standard upon which to verify the methodology. Further, Det. Dover's "expertise" came from his field experience over years as a county police officer in the field. There is no training which has any scientific or other validity for admission in a trial.
>
> There was no testimony this search occurred in an area where drug trafficking is well known. It occurred inside a premises based upon a warrantless "knock and talk". The four occupants inside the premises were detained by Dover for three hours without being placed under arrest. Dover was waiting for a search warrant which could have been obtained prior to the search of Swift's pockets. Dover felt no weapons in his pat[-] down of Swift. Det. Dover never placed Swift under arrest. Dover had no right to continue his search into Swift's pockets after his safety pat[-]down revealed no weapons.

The Commonwealth appealed.

ISSUE: May contraband be located on plain feel, gained through experience?

HOLDING: Yes.

DISCUSSON: The Court of Appeals noted that "when a police officer possesses reasonable suspicion of criminal activity, the officer may briefly detain the suspect and may also pat-down the suspect whenever it is reasonable to believe the suspect is armed and dangerous." During

such a frisk, contraband may be seized if "immediately identifiable" by "plain feel."[11] The court emphasized that "the incriminating nature of the contraband must be immediately identifiable by the sense of touch and without the officer manipulating or moving the contraband." In this case, as soon as he touched it, Det. Dover recognized it and told his fellow officers. He was very experienced in finding such packages. The circuit court was "concerned" that his expertise came through years of service, not through training, even though no such training was even identified.

The Court of Appeals noted that under Marshall, an officer's experience could be sufficient to support a ruling. The suppression was overturned and the case was remanded for further proceedings.

Chappell v. Com., 2019 WL 4565242 (Ky. App. 2019)

FACTS: On April 16, 2016, Officer Boyd (Newport PD) stopped Chappell for a minor traffic violation. As Chappell rolled down his window, the officer detected the odor of burning marijuana. Officer Boyd called for backup. Lt. Drohan responded and also detected the odor. Chappell got out of the vehicle and Officer Boyd searched him, finding $2,300 in cash, and three cell phones. Several baggies of heroin were found in the vehicle.

Chappell was indicted on trafficking and related offenses. He moved to suppress and was denied. Chappell entered a conditional guilty plea and appealed.

ISSUE: May contraband be located on plain feel, gained through experience?

HOLDING: Yes.

DISCUSSION: Chappell argued the trial court "improperly relied upon the officers' training and experience as neither officer had any training on how to detect the odor of marijuana, and neither could demonstrate any experience in accurately detecting the odor of marijuana." Both officers, however, had testified they had years of experience in that odor, given both had been officers for some years. The Court of Appeals found this sufficient for the stop. Further, the appellate court held that the full searches (rather than frisks) were justified on probable cause for his person and the vehicle, which was supplied by the odor.[12]

The Court affirmed the convictions.

SEARCH & SEIZURE – VEHICLE SEARCH

Com. v. Garrett, 585 S.W.3d 780 (Ky. App. 2019)

[11] Com. v. Marshall, 319 S.W.3d 352 (Ky. 2010).
[12] Morton v. Com., 232 S.W.3d 566 (Ky. App. 2007).

FACTS: On the evening of September 5, 2016, Officer Smith (Mt. Sterling PD) spotted a vehicle parked in an unpaved, partially graveled, area with the headlights off. The officer found this suspicious as he had never seen a vehicle parked at that location at night and because this was a high crime area. Officer Smith ran the plate and it came back negative. He and Officer Roberts approached the vehicle, finding Garrett, the driver, and Hendrix, the passenger. Garrett provided his OL on request.

When Officer Smith ran Garrett, he was told Garrett might "possibly have a warrant." Garrett was removed from the car and handcuffed. At all times, Garrett was cooperative. After a few minutes, as Officer Smith was trying to talk to Garrett, he saw Hendrix trying to conceal or reach between the seats. (There was some confusion as to when Garrett was actually handcuffed.) At some point, Garrett was found to have no warrant. The detention lasted approximately 32 minutes. Suspicion centered on Hendrix based on her actions, so she was removed from the vehicle. Neither Garrett nor Hendrix were frisked, but the officers did check Hendrix's seat for a weapon. During a more thorough search of the vehicle, the officers found cannabis, scales, more marijuana, cocaine, and approximately $1200 in cash. Hendrix was later found with methamphetamine at the jail.

The trial court granted Garrett's motion to suppress evidence after finding "that when the search was conducted, neither Garrett nor Hendrix was under arrest; there was no evidence that either officer observed contraband or a weapon in plain view or plain smell; and "[t]here were no exigent circumstances." Further, the search was not consensual. The trial court also found no probable cause for a Carroll[13] search.

The Commonwealth appealed.

ISSUE: May an officer conduct a warrantless search or seizure of a vehicle in a public place without probable cause or exigent circumstances?

FACTS: No.

DISCUSSION: The Commonwealth argued that the prior decision "improperly conflated the officers' actions after removing Hendrix from the vehicle by treating the "continuum" of events as a single thorough search. The Commonwealth says the search was conducted incrementally, as follows: (1) Officer Smith asked Garrett "to step out of the vehicle, so he could check the validity of the warrant"; (2) "Officer Roberts alerted Officer Smith of the erratic movements of the passenger"; (3) "Out of concern for officer safety, Officer Smith placed [Garrett] in handcuffs and went to the passenger side of the vehicle"; (4) The officers "then searched the area where Ms. Hendrix was reaching and located cannabis and scales"; (5) "[T]he Officer's [sic] then proceeded to search the remainder of the vehicle locating cocaine." The Court of Appeals acknowledged, however, that the officer gave two different "versions" of the sequence.

[13] Carroll v. U.S., 267 U.S. 132 (1925)

The Court of Appeals determined that the Commonwealth tried to use the wrong standard, and that there "is only one standard applicable to a warrantless physical search of a vehicle – "officers may search an automobile without having obtained a warrant so long as they have *probable cause* to do so."[14] The Court of Appeals held that there was no probable cause for the search.

The Court stated, "unlike most police interaction with occupants of vehicles, this incident did not begin as a traffic stop. In other words, the officers did not pull Garrett over for violating a traffic law – "[a] seizure justified . . . by a police-observed traffic violation . . . ."[15] There was no police-observed infraction of the law. Officer Smith simply approached Garrett at 10:02 PM on Labor Day "to see what his activities were." And there is nothing wrong with that."

"Police officers are free to approach anyone in public areas for any reason[.]"[16] "No 'Terry' stop occurs when police officers engage a person . . . in conversation by asking questions."[17] In Fourth Amendment jurisprudence, such conduct is characterized as a "consensual encounter" and is not itself a search or a seizure.[18]

The appellate court held that the process remained consensual for most of the interaction. However, the court noted that the officer never actually asked Garrett why he was there, but started with asking for identification. However, the request for identification was permitted because "a request for identification by the police does not, by itself, constitute a Fourth Amendment seizure."[19]

Officer Smith was polite and requested identification, which "would not have caused a reasonable person to suspect he was not free to leave the scene." (The court noted in a footnote that Garrett did not even have to turn over his OL, as he was not stopped for a driving offense.) The court emphasized that "circumstances changed when Officer Smith walked away from Garrett while still in possession of his driver's license." At that point, under Florida v. Royer, Garrett was seized.[20]

The court disagreed that the factors the officer identified were insufficient to satisfy reasonable suspicion and, in fact, some of the factors the circuit court got wrong. Location can be relevant, but is not dispositive. Regardless, any evidence seized was the fruit of the poisonous tree and thus had to be excluded. Under Utah v. Strieff, a warrant can be an intervening factor – but in this case "Garrett's warrant was never more than a possible civil warrant, not a criminal warrant, and turned out to be non-existent after all."[21] His detention was "was extended

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[14] Collins v. Virginia, 584 U.S. __, (2018) (citing California v. Carney, 471 U.S. 386 (1985))."
[15] Rodriguez v. U.S., __ U.S. __ (2015).
[16] Strange v. Com., 269 S.W.3d 847 (Ky. 2008) (quoting Com. v. Banks, 68 S.W.3d 347 (Ky. 2001)).
[17] Id. at 850 (citing Florida v. Royer, 460 U.S. 491 (1983)).
[18] U.S. v. Campbell, 486 F.3d 949 (6th Cir. 2007).
[19] I.N.S. v. Delgado, 466 U.S. 210 (1984).
[20] 460 U.S. 491 (1983).
[21] 579 U.S. --- (2016).

twenty minutes to investigate that mere possibility." Hendrix's nervous behavior was also not enough and occurred well into the prolonged stop. Further, Officer Roberts saw the movements yet did not testify.

The Court of Appeals concluded that "the fact that their investigative "hunch" was corroborated by the evidence they seized does not mean the steps preceding the seizure were not flagrant errors in their police work.[22] These errors included: taking Garrett's license to run a warrant check when he did nothing inconsistent with lawful conduct; detaining him (perhaps in handcuffs) for twenty minutes because of a "possible" civil warrant while dispatch dealt with an administrative glitch; handcuffing Garrett for officer safety with no reason to believe the officers' safety was at risk (other than Hendrix's movement after half an hour of sitting still); pulling Hendrix from the vehicle to search it for a weapon without probable cause and without patting down either Garrett or Hendrix in search of a weapon; evidence they seized does not mean the steps preceding the seizure were not flagrant errors in their police work. At best, "Officer Smith unlawfully detained Garrett for twenty minutes while dispatch dealt with its administrative snafu."

Finally, searching the vehicle, "ostensibly for a weapon, without first conducting a "pat down" of either Hendrix or Garrett, smacks of pretext." "A protective search . . . must be strictly limited to that which is necessary for the discovery of weapons which might be used to harm the officer or others nearby."[23] And even though we allow "the police to conduct an area search of the passenger compartment to uncover weapons," we do so only if the police "possess an articulable and objectively reasonable belief that the suspect is potentially dangerous."[24]

The Court of Appeals affirmed the suppression of the evidence.

SEARCH & SEIZURE – ROADBLOCK

Shelton v. Com., 2019 WL 3991065 (Ky. App. 2019)(DR pending)

FACTS: Shelton was stopped at a KSP roadblock in Muhlenberg County. KSP announced a Labor Day 2018 enforcement plan and provided a number of possible locations for traffic checkpoints. On the night in question, Sgt. Ayers and Trooper Crick met at the site of the roadblock. They started the checkpoint at 9:02 and ended at 9:46. The troopers had uniforms and cruisers with lights activated. There were no signs or traffic cones.

Shelton was the third or fourth vehicle to pass through, and every vehicle before him was stopped. Trooper Crick noted the smell of green marijuana and Shelton was asked to exit his vehicle. Upon request, Shelton removed several items, a rag, and cash from his pockets. The

[22] Nichols v. Com., 186 S.W.3d 761 (Ky. App. 2005).
[23] Com. v. Whitmore, 92 S.W.3d 76 (Ky. 2002) (citing Terry).
[24] Michigan v. Long, 463 U.S. 1032 (1983); Docksteader v. Com., 802 S.W.2d 149 (Ky. App. 1991).

rag included a meth pipe. Shelton failed several FSTs. The trooper found cash, marijuana and meth in the car.

Shelton was charged and, on suppression, argued that the roadblock was unconstitutional, as not complying with Com. v. Buchanon.[25] The trial court denied the motion to suppress. Shelton entered a conditional guilty plea and appealed.

ISSUE: May a law enforcement checkpoint be conducted for only a brief period of time?

HOLDING: Yes.

DISCUSSION: The Court of Appeals reviewed traffic checkpoint law and opined that "a highway stop of motorists at a government-operated checkpoint constitutes a seizure for Fourth Amendment purposes."[26] Such checkpoints must be reasonable. It reviewed the "non-exclusive factors" in use:

> First, it is important that decisions regarding the location, time, and procedures governing a particular roadblock should be determined by those law enforcement officials in a supervisory position, rather than by the officers who are out in the field. Any lower ranking officer who wishes to establish a roadblock should seek permission from supervisory officials. Locations should be chosen so as not to affect the public's safety and should bear some reasonable relation to the conduct law enforcement is trying to curtail.
>
> Second, the law enforcement officials who work the roadblock should comply with the procedures established by their superior officers so that each motorist is dealt with in exactly the same manner. Officers in the field should not have unfettered discretion in deciding which vehicles to stop or how each stop is handled.
>
> Third, the nature of the roadblock should be readily apparent to approaching motorists. At least some of the law enforcement officers present at the scene should be in uniform and patrol cars should be marked in some manner. Signs warning of a checkpoint ahead are also advisable.
>
> Fourth, the length of a stop is an important factor in determining the intrusiveness of the roadblock. Motorists should not be detained any longer than necessary in order to perform a cursory examination of the vehicle to look for signs of intoxication or check for license and registration. If during the initial stop, an officer has a reasonable suspicion that the motorist has violated the law, the motorist should be asked to pull to the side so that other motorists can proceed.

[25] 122 S.W. 3d 565 (Ky. 2003).
[26] Michigan Dep't of State Police v. Sitz, 496 U.S. 444 (1990).

This checkpoint was properly pre-approved and selected based upon prior history. The checkpoint was intended to run for only one hour. Even though Shelton was the last vehicle stopped, no specific vehicles were targeted. While the troopers were with Shelton, no additional vehicles were stopped. A media announcement of the checkpoint had been made in advance, and the scene was adequately marked.

The Court held Shelton was not targeted by this checkpoint and found the checkpoint to be valid. The conviction was affirmed.

SEARCH & SEIZURE – TRAFFIC STOP

Warick v. Com., 2019 WL 4072774 (Ky. 2019)(Petition for Rehearing pending 10/4/19)

FACTS: Warick and two passengers, Brian and Jessica Bertram, stopped at the Dairy Queen in Prestonsburg. While waiting for the order, he backed into a parking space. The drive thru attendant had 911 called for a possible DUI, because they spotted an open container of beer.

Multiple officers arrived, with Officer Tussey first. He walked up and saw the beer but Warick denied drinking. He passed field sobriety tests, including a PBT which registered 0. In a pat-down, Tussey found a quantity of cash. Brian was nervous and upon being searched, a marijuana cigarette and a needle were found. A K-9 called to the area found drugs (marijuana and pills) on the grassy berm behind the parked car. The bottle had a label indicating it was Warick's but contained unprescribed oxycodone. During a search pursuant to the car, they found three cell phones with incriminating texts and a drug ledger.

Warick was arrested. Ultimately other officers obtained a search warrant for Warick's Johnson County home. Upon execution of the search warrant, officers discovered drug paraphernalia, marijuana, marijuana seeds and marijuana plants. Warick moved for suppression, arguing the DUI stop was unduly prolonged. The trial court ruled that the items were found "from a natural progression of events related to the traffic stop." Warick entered a conditional guilty plea in and appealed.

The Kentucky Court of Appeals held that Warick had no standing to challenge the discovery of the items outside the vehicle or to challenge Brian Bertram's search. The Kentucky Supreme Court accepted discretionary review.

ISSUE: When are a person's Fourth Amendment protections implicated?

HOLDING: When the person invoking protection can claim a reasonable expectation of privacy.

DISCUSSION: This case revolved around the issue of whether Warick had "standing" to challenge the search of a vehicle in which he was the driver. Warick asserted that the search of the vehicle and the subsequent search of his residence were unlawful because the purpose of the stop, to investigate a possible DUI, were completed well before the searches were executed.

Under the recently decided case of Byrd v. U.S., the United States Supreme Court noted:

> The concept of standing in Fourth Amendment cases can be a useful shorthand for capturing the idea that a person must have a cognizable Fourth Amendment interest in the place searched before seeking relief for an unconstitutional search; but it should not be confused with Article III standing, which is jurisdictional and must be assessed before reaching the merits. Because Fourth Amendment standing is subsumed under substantive Fourth Amendment doctrine, it is not a jurisdictional question and hence need not be addressed before addressing other aspects of the merits of a Fourth Amendment claim.

As a jurisdictional "standing" argument is improper under Fourth Amendment law, the Kentucky Supreme Court determined that the trial court and the Court of Appeals did not properly review Warick's complete Fourth Amendment argument. Courts are required to review the merits of an individual's Fourth Amendment claim to determine whether a reasonable expectation of privacy exists.

An operator of a private vehicle has an expectation of privacy and Warick properly asserted his Fourth Amendment rights when the officers' actions infringed upon his own Fourth Amendment rights. Warick claimed he was unlawfully detained when he was held beyond the time necessary for issuing a citation, and then the officer searched his Bertram, which led to the K-9 unit being brought to the site and the discovery of incriminating evidence. The Court of Appeals ignored this argument and instead reviewed the search of the grassy area and Bertram's search.

The Court of Appeals opinion was vacated. The trial court failed to issue sufficient factual findings concerning the suppression issue. Therefore, the Supreme Court remanded the matter to the trial court for additional findings of fact.

INTERROGATION

Ball v. Com., 2019 WL 5617798 (Ky. 2019)

FACTS: On October 30, 2015, Ball and Matthews committed an armed robbery at a Louisville convenience store. Ball shot an employee in the process. The police released a media release depicting the truck used. The truck belonged to Ball, who apparently reported it stolen. Both men were arrested and questioned.

Both men were charged with the robbery and related offenses, with Ball having an additional charge of attempted murder. Ball's motion for suppression was denied. Both were convicted and Ball appealed.

ISSUE: Must a suspect be immediate advised of Miranda rights upon arrest?

HOLDING: No.

DISCUSSION: Ball argued that during his interrogation, "officers 'primed' him prior to his interrogation and impliedly threatened harm to Ball and his family." The Kentucky Supreme Court found no evidence supporting Ball's argument. Specifically, the Supreme Court noted "[t]he tone, tenor, and content of his extended and extensive statement to the police belie[d] his assertion of coercion."

The Supreme Court emphasized:

> Ball first points out that he was not immediately Mirandized upon arrest. However, the law does not require that a suspect be Mirandized prior to or immediately after arrest; it only requires that the suspect be Mirandized prior to a custodial interrogation. At Ball's suppression hearing, he testified that he was Mirandized before being transported to LMPD and was reread those rights after he arrived at LMPD. He does not argue to this Court that a custodial interrogation took place prior to either Miranda warning being given. Furthermore, the Commonwealth did not seek to introduce at trial any statements made prior to the formal interrogation at LMPD. Nevertheless, Ball argues that, prior to being formally interrogated at the police department, the detectives "primed" him for interrogation by threatening the safety of his parents.
>
> Ball discussed this allegedly coercive conversation at his suppression hearing. He testified that Detective Smith Mirandized him at some point after his arrest but prior to being transported to LMPD offices. According to Ball's testimony, he verbally acknowledged his Miranda rights and said that he wanted a lawyer and wished to remain silent, at which point Detective Smith stated his belief that Ball had hidden evidence at his parents' home in Palmyra, Indiana and SWAT might have to execute a search warrant there. Ball testified that Detective Smith told him that the SWAT team responsible for executing that warrant would be "going in blind" and did not know how many guns or people were on the property, so "if anything bad happened," it would be Ball's fault. He also testified that Detective Smith asked Ball if his father owned any weapons. According to Ball, he responded that his dad had two guns, probably for hunting varmints, and Detective Smith asked whether there would be a shootout with Ball's father. Ball claimed that he took these statements as a threat and felt compelled to sign a written waiver of his rights once he arrived at LMPD.

The detective did not recall his exact conversation, but believed it was general small talk. Although there was talk of not needing a confession, that was consist with the detectives

already having linked him to the crime. Ball admitted that he thought evidence might have been hidden there, but any such references were to ensure there would not be a problem if they did have to search that property. (Most of this took place after he confessed). The Supreme Court of Kentucky opined that where there is conflict in the evidence, it is up to the finder of fact to evaluate the credibility of the evidence.

The Supreme Court further determined that some statements Ball characterized as threats were instead statements of fact, even if these statements indicated an unpleasant consequence. Indicating that Ball's parents' home might be searched was an accurate representation of what steps the detectives could take under the circumstances.

The Court also agreed that despite the fact LMPD apparently had a policy of no more than two interrogators, and that three interrogators were apparently present part of the time, this fact was not enough for coercion based upon the facts of the case. The presence of the third interrogation was insufficient to constitute a violation of KRS 422.110, the anti-sweating statute.

The Court affirmed his convictions.

Vincent v. Com., 584 S.W.3d 762 (Ky. App. 2019)

FACTS: Vincent was charged with three counts of sodomy on a child under 12. The Commonwealth relied on the testimony of the child victim and Vincent's admissions. Vincent's admissions were introduced by Det. Bingham (Radcliff PD). Through a series of four interviews, which went from denials to tacit admissions, Vincent admitted to committing oral sodomy on the victim. The defense focused on portraying Vincent as intellectually disabled and argued he was duped into a false confession. (He had been on SSI most of his life, and stated he could not read or write.) Vincent testified about how he "freaked out" when they told him his DNA was on items – although that was a ruse – and that he simply adopted a "theory" of the case suggested by the detective.

Vincent was convicted and appealed. The Kentucky Supreme Court affirmed on direct appeal. Vincent's post-conviction motion filed pursuant to Criminal Rule 11.42 was denied. Vincent appealed to the Court of Appeals.

ISSUE: Does some degree of intellectual disability negate a confession?

HOLDING: No.

DISCUSSION: In Bailey v. Com., the Kentucky Supreme Court held "some police tactics similar to those at issue here were sufficiently coercive to overcome the will of a mentally-handicapped person, and thus warranted the suppression of his incriminating statements."[27]

[27] 194 S.W.3d 296 (Ky. 2006).

Vincent's counsel decided against medical testimony concerning Vincent's status and counsel had no doubt he was competent, although he worked hard to be disabled. Counsel did not want to open the door to the Commonwealth getting its own evaluation that might show he was malingering. Later experts disagreed as to the degree of his intellectual disability and noted discrepancies on mental test results. Vincent could drive, use a complicated telephone system to call his attorney, play bingo, and had no trouble giving his personal data – all of which family members said he could not do.

Finally, the Court of Appeals differentiated Vincent from Bailey, finding that Vincent was significantly more able than the defendant in Bailey and the Radcliff officers had no reason to doubt his abilities. They were not aware of Vincent's literacy issues until the third interview and his responses did not suggest an intellectual disability. Vincent actively objected to some of the things officers suggested, which indicated his will was not overborne.

The Court of Appeals affirmed the denial of the post-conviction motion.

RIGHT TO COUNSEL

Buemi v. Com., 2019 WL 4732548 (Ky. App. 2019)(DR Pending 12/3/2019)

FACTS: Buemi was under investigation by Newport police for several burglaries. Officer Gabbard interviewed Buemi, who denied any involvement in the burglaries. Buemi was indicted and his recorded interview was played at trial. Since Buemi invoked his right to an attorney during the interview, the recording was to be stopped before the invocation of counsel, but the Commonwealth was "not entirely sure where that point is in the recording." As a result, the jury heard the invocation before the recording was shut off. A few minutes later, Officer Gabbard responded to questions about what he asked Buemi during the interview and twice stated that "Buemi had asked for an attorney before he could ask that question."

The jury was allowed to listen to the recording again, during deliberations, but only in open court and the recording was stopped before Buemi's request for counsel.

Buemi was convicted and appealed.

ISSUES: 1. Is it unduly prejudicial to permit the jury to learn that a criminal defendant invoked the right to counsel?

2. Is the intent to commit an underlying crime presumed during a break-in?

HOLDING: 1. No.

2. Yes.

DISCUSSION: The Court of Appeals noted there were "only three fleeting, and apparently inadvertent, references were made to Buemi's invocation of his right to counsel. The fourth instance was cut off prior to completion of Buemi's request for an attorney and, thus, was too vague to be a true reference." The Court of Appeals held this was not enough to overturn the verdict.

Buemi also argued that his conviction for one of the two burglaries was unsupported because he did not actually commit any crime inside the premises even though he did break in. (He did, however, commit a theft at the other burglary, which was near in time and place to the first.) The appellate court determined that it was reasonable for the jury to believe that Buemi intended to commit a crime there, and for whatever reason, did not.

The Court affirmed the convictions.

TRIAL PROCEDURE/EVIDENCE

TRIAL PROCEDURE/EVIDENCE – RECORDINGS

Grimes v. Com., 2019 WL 3059969 (Ky. App. 2019)

FACTS: In 2016, Doreen Grimes ran a daycare out of her Hardin County residence. Her husband, Ronnie, was often present. On August 1, 2016, Grimes had one of the children, Jane, age 6, on his lap – he slid his hand into her panties and touched her vagina. Jane told her parents, who contacted Det. Priddy (Hardin County SO.) Det. Priddy interviewed Ronnie, who "closed off" with her. She elected to enlist the aid of a male officer, Det. Schoonover (KSP). Det. Schoonover invited Ronnie to submit to a polygraph examination. During the polygraph, Grimes first denied touching the child, but finally admitted that he "pinched" her there and "she liked it." Det. Priddy observed by video monitor.

Grimes was indicted for first-degree sexual abuse. At trial, the Commonwealth was permitted to introduce his admissions elicited after the polygraph. The child also testified, but Det. Schoonover did not. Grimes was convicted and appealed.

ISSUES: 1. Is an eight-year-old sexual abuse victim competent to testify as a witness?

2. May a recording of an interview with a suspect be used to provide context?

HOLDING: 1. Yes.

2. Yes.

DISCUSSION: Grimes argued it was improper to allow the child to testify (nearly 8 at the time of the trial) to testify as she was not "competent" due to her age. Under KRE 601(a)

"age is not determinative of competency and there is no minimum age for testimonial capacity." The Court of Appeals held that the trial court had the discretion to determine if a child could testify.

Grimes also argued it was improper to show the video of Det. Schoonover when he, himself, did not testify. Crawford v. Washington only applies to testimonial hearsay, not when material is introduced for other reasons.[28] In Turner v. Com., similar statements were declared to not be hearsay as the statements were not offered for truth, but to put the admissions into context.[29]

Finally, Grimes argued the admissions made after the polygraph were improper because his "will was overborne" when confronted about his failure on the polygraph. The Court of Appeals held that "incriminating statements made in circumstances surrounding a polygraph are nonetheless admissible.[30] Further, no evidence existed of any coercion.

The conviction was affirmed.

Easterling v. Com., 580 S.W. 3d 496 (Ky. 2019)

FACTS: Seventeen-year-old Tristan Cole, having sustained three gunshot wounds, was found dead at a vacant house in the Deep Creek area in Mercer County the evening of April 13, 2016. Investigators quickly determined that Cole was last seen with then sixteen-year-old Easterling.

Easterling had recently been spending time at the home of Zachary Lay, a senior at the high school Easterling attended. Lay was a known drug dealer who usually kept a handgun in a safe for protection. Interested in helping protect Lay, Easterling obtained an AR-15 rifle from Cole and took it to Lay for potential purchase but Lay decided the gun was too expensive. Easterling then had the idea to steal the gun from Cole, even though Lay did not want him to.

On April 12, Easterling obtained a ride from Lay's home to a Harrodsburg park. The driver, Jerrard Smith, witnessed Easterling going over to Cole's red truck. Shortly afterward, Travis Stephens observed the red truck in his driveway on Deep Creek. Two other witnesses also saw Easterling in the passenger seat of the truck around the same time.

Soon afterward, Easterling called and asked Lay to pick him up at Deep Creek Baptist Church. Lay took Smith with him to the church and they found Easterling in the cemetery area of the grounds. When Easterling got into Lay's vehicle, he handed Lay his own handgun from the safe. Easterling told Lay he had smashed a rock in Cole's face and shot him three times. Easterling's hand had blood on it and he showed Lay and Smith that he had taken Cole's wallet. He said he had killed Cole in order to protect Lay.

[28] 541 U.S. 36 (2004).
[29] 248 S.W.3d 543 (Ky. 2008).
[30] Com. v. Hall, 14 S.W.3d 30 (Ky. App. 1999); Powell v. Com., 994 S.W.2d 1 (Ky. App. 1997).

The Kentucky State Police, with the assistance of the Mercer County Sheriff's Department, investigated the homicide. On April 14, 2016, a detective and a deputy interviewed Easterling at the sheriff's department with his mother present. Easterling confessed he shot Cole three times, but the confession was later suppressed because the officers did not read Easterling his Miranda rights prior to questioning him. Upon hearing her son's confession, Easterling's mother terminated the interview by asking for an attorney. Easterling's grandfather then joined Easterling and his mother in the interview room and Easterling, in response to a question from his grandfather, again acknowledged that he had killed Cole.

Easterling was tried for murder and first-degree robbery. After hearing from numerous witnesses, the jury found Easterling guilty of murder but acquitted him of the robbery charge. Easterling appealed to the Kentucky Supreme Court.

ISSUE: 1. Must a juvenile be advised of Miranda prior to any custodial interview?

2. Is a videotaped statement made by a juvenile to family members in the interrogation room after the juvenile invoked the right to counsel inadmissible as eavesdropping?

3. May evidence collected by a recording made in a jail be used?

HOLDING: 1. Yes.

2. No, if no reasonable expectation of privacy exists.

3. Yes.

DISCUSSION: Easterling argued that that a videotaped statement he made to his mother and grandfather in the interrogation room after requesting counsel should have been suppressed because they did not know that the conversation was being recorded. Easterling argued that the recording violated KRS 526.020 and that the interrogation that was suppressed led to the statement in question.

KRS 526.020 creates a felony for eavesdropping. None of the parties inside the room knew they were being recorded, and there was no signage in the room that indicated such. No waivers were executed. The Commonwealth argued that, under Beach v. Com., the exclusionary rule applies to constitutional errors, not statutory violations, and that the video clip was still admissible.[31] Under Beach, "evidence obtained in violation of a state statute will not be excluded unless it involves a violation of constitutional rights or the legislature mandates exclusion." The Supreme Court noted that nothing in the statute mandated exclusion.

[31] 927 S.W.2d 826 (Ky. 1996).

> The trial court's written order made findings that the defendant was in custody in a police station, charged with a crime. He was sitting in an interrogation room with officers in the area, and a camera/microphone was visible on the wall near the room's ceiling. The trial court concluded that Easterling could not have had an expectation of privacy under these circumstances and that little or no significant difference exists between his conversation with his family and a typical "jail house" conversation.

The Supreme Court further examined this situation under the Fourth Amendment. While nothing in Kentucky had addressed the issue of an expectation of privacy in such rooms, the Supreme Court looked to the line of cases under Katz v. U.S.[32] The trial court concluded there was no reasonable and objective expectation of privacy in this interrogation room. Other courts have addressed the issue and noted that "in prison, official surveillance has traditionally been the order of the day." As far back as Lanza v. State of New York,[33] the United States Supreme Court held that jail visiting-room conversations are not protected.

The Kentucky Supreme Court held that "Easterling's Fourth Amendment rights were not violated when his conversation with family members in the interrogation room was videotaped and a portion of that tape was later introduced at trial."

Easterling also argued that his statement to his grandfather was the fruit of the poisonous tree and that if he had not been arrested pursuant to the suppressed confession, he would not have made the statement. The Supreme Court looked to a potential attenuated connection occurs: "when the connection between unconstitutional police conduct and the evidence is remote or has been interrupted by some intervening circumstance."[34]

> Under the exploitation analysis, we consider whether the police exploited one event, Easterling's unlawful confession, to achieve a second event, Easterling's incriminating statement to his family. Or stated another way, we consider whether the government has established a break in the illegal action and the evidence subsequently obtained. The Commonwealth argues that the break or the intervening circumstance occurred when Easterling's mother terminated the police interview.

The Supreme Court held that there was a change of circumstances, not a "purposeful police action." Easterling was answering a family member's question when he made the statement. Thus, "the statement to the detective did not provide "a lead 'to Easterling's unanticipated and yet-to-be-made incriminating statement to his family.'" "There was attenuation between the events which dissipated the taint of the illegally obtained confession."

Easterling's conviction was affirmed.

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[32] 389 U.S. 347 (1967)
[33] 370 U.S. 139 (1962)
[34] Utah v. Strieff, 136 S. Ct. 2056 (2016).

TRIAL PROCEDURE/EVIDENCE – CONFIDENTIAL INFORMANT

Fowler v. Com., 2019 WL 1870609 (Ky. App. 2019)

FACTS: Prior to February 21, 2015, a CI conducted a buy at an address. The CI purchased from "Josh" and told detectives there were more narcotics. The LMPD surveilled the property for some time and watched multiple subjects making short visits. Detectives obtained a search warrant and executed it on February 21. Just prior to executing it, they saw Fowler arrive, let himself in with a key, and then leave a short while later. Fowler was detained at that point and held. Drugs, cash, two handguns and a rifle were seized.

Fowler was charged with trafficking. Fowler demanded the name and address of the CI. He also noted the search warrant suggested the CI made the buy from someone other than Fowler, as a different name was in the warrant. The motion to produce the CI's identity was denied. Fowler entered a conditional guilty plea and appealed.

ISSUE: Must a CI's identity be disclosed if no charges are placed in the transaction in which they were involved?

HOLDING: No (as a rule).

DISCUSSION: KRE 508 permits the Commonwealth to withhold the identity of a CI in specific circumstances. The relevant exception is that when the CI participates in the transaction for which the defendant is charged, the identity of the CI must be disclosed. In this case, the Court of Appeals held that even if someone else sold the drugs in that transaction, Fowler was not charged in any offense related to that transaction, but for narcotics packaged for sale found with the warrant. As such, the testimony of the CI was not needed. (Note: It was believed the other name used in the warrant was simply an error.)

Fowler's conviction was affirmed.

WORKER'S COMPENSATION

Kenton County Sheriff's Department v. Rodriguez, 2019 WL 2713075 (Ky. App. 2019) (Appeal to Kentucky Supreme Court filed August 2, 2019)

FACTS: Rodriguez was a deputy with the Kenton County Sheriff's Department (KCSD). In 2016, he suffered a physical injury and claimed workers' compensation. In the same claim, Rodriquez claimed he was diagnosed with PTSD and described various symptoms, including

night terrors and insomnia, linked to "numerous incidents which occurred in the course of his employment as a SWAT first responder."[35]

The immediate injuries were stipulated and the parties agreed that Rodriguez stopped working due to a psychological claim and that he was earning less that his average weekly wage. After a hearing, the ALJ ruled in Rodriguez's favor considering the specific physical injuries, and found that Rodriguez had a disabling, work-related PTSD. The ALJ, however, concluded that Rodriguez did not suffer a psychological injury under Kentucky's worker's compensation law. On appeal to the Workers' Compensation Board, the Board held that PTSD might be compensable separately, vacated that part of the ruling, and remanded for further findings.[36] The KCSD appealed.

ISSUE: May PTSD be considered a work-related injury?

HOLDING: Yes.

DISCUSSION: On appeal, the Court of Appeals had to determine whether a compensable injury existed. In West, a "physical injury" in the "context of an alleged work-related psychological injury" is:

> An event that involves physical trauma may be viewed as a "physical injury" without regard to whether the harmful change that directly and proximately results is physical, psychological, psychiatric, or stress-related. But in instances where the harmful change is psychological, psychiatric, or stress-related, it must directly result from the physically traumatic event. We view an incident that is described as a "full-fledged fight" in which a police officer and suspect are scuffling and rolling on the ground as an event that involves physical trauma, in other words, as a physically traumatic event.

KRS 342.0011(1) has no requirement that "each traumatic event in a series of such events must involve physical rather than mental trauma in order to authorize compensation for a resulting psychological psychiatric, or stress-related change, only that the harmful change must be 'the direct result of a physical injury.'" The statute permits the viability of a PTSD claim.

The Court of Appeals held that reconsideration of this issue before the ALJ is appropriate and provided specific guidance to the ALJ in making a determination if the PTSD is a compensable claim.

[35] These includes three shootings, a fatal car crash in which he was unable to rescue the driver, fire entries, burned children, his own serious car accidents, his K-9 being stabbed and exposure to infectious diseases.
[36] Lexington-Fayette Urban County Government v. West, 52 S.W. 3d 564 (Ky. 2001).

Benningfield v. Fields, 584 S.W.3d 731 (Ky. 2019)

FACTS: Fields suffered a work related injury while working for the Taylor County Jailer in 2009. He had two surgeries and was eventually declared permanently restricted in his work activities. Since no light duty work was available, Fields never returned to work. During his time off, he kept his employer up to date on his progress. During one conversation with the Jailer, Fields was told of the hardship his injury was causing to the agency and he was demoted from Sergeant to Deputy. When his medical excuse expired in 2010, Field's employment was terminated. Fields did not appeal it this action to the county.

Following his workers' compensation settlement in 2011, Fields filed suit in federal court. The district court granted summary judgment for the Jailer and for Taylor County on the alleged wrongful dismissal, but refused to rule on the state court issues. Fields filed suit in Taylor Circuit Court, alleging that Taylor County violated Kentucky law by "harassing, coercing, or discriminating against him for pursuing a workers' compensation claim" in violation of KRS 342.197. The Court of Appeals ruled against Fields and he further appealed.

ISSUE: 1. Does KRS 342.197 waive governmental immunity for governmental employers in their official capacities?

2. Can a governmental employer, in the individual capacity, assert qualified immunity in defense of a retaliation claim made pursuant to KRS 342.197?

HOLDING: 1. Yes.

2. Yes.

DISCUSSION: The only issue on appeal was Field's allegation that his employment was unlawfully terminated in retaliation for filing a workers' compensation under KRS 342.197.

The Supreme Court held that KRS 342.197 waived immunity for governmental entities, such as the Taylor County Fiscal Court. Through a complicated legal analysis, the Supreme Court concluded that it was not intended that government employees would be left without a recourse should they be wrongfully terminated for filing a workers' compensation claim. However, the waiver only applies to the actual employer, not others – which means, in Fields' case, only the Taylor County Fiscal Court and the Taylor County Jailer in office at the time of Field's termination in official capacities only.

The court held that Fields had at least shown that he met his initial burden in the case, which meant summary judgment was not appropriate for the Taylor County Fiscal Court and Benningfield in official capacities. The other individual defendants were, however, properly dismissed as they were not employers for purposes of the statute or were shielded by governmental immunity.

OPEN RECORDS

Lexington – Fayette County Urban County Government v. Maharrey, 2019 WL 2712967 (Ky. App. 2019)

FACTS: On July 17, 2017, Maharrey, a freelance journalist, made a detailed request concerning eleven surveillance technologies in use by the Lexington Police Department. The Lexington Police Department provided information of body worn cameras, but denied that it possessed most of the other technologies. For one technology it did own, video and audio monitoring and/or recording technology, it denied the open records request pursuant to KRS 17.150(2)(b) and KRS 61.878(1)(m). Maharrey appealed to the Attorney General and the LFUCG stated that all nonexempt documents would be released. Eventually Lexington Police produced 467 pages, but redacted specifics on 29 cameras. It also withheld training manuals as a safety issue. LFUCG filed an appeal in Fayette Circuit Court of the OAG's decision.

The Fayette Circuit Court held that the LFUCG relied improperly on the exemptions and that "no exemption … would warrant nondisclosure of information under the ORA." The LFUCG appealed.

ISSUE: May information be withheld in open records if the information is not usable as a safety or similar issue?

HOLDING: No, but the circuit court must conduct an in camera review to address the safety concerns.

DISCUSSION: The LFUCG argued that releasing the information would jeopardize officers and informants and provide too much information to criminal targets. The Court of Appeals, however, found it hard to believe that any criminal target could readily make use of information when they would not even know what camera was being used. The Court of Appeals reversed and remanded the matter to the circuit court for further evidentiary proceedings.

SIXTH CIRCUIT

FEDERAL LAW

Sentence Enhancement

U.S. v. Pineda-Duarte, 933 F.3d 519 (6th Cir. 2019)

FACTS: Pineda-Duarte, a Mexican citizen, had twice been subject to removal. On his third return, he ended up in Clark County, Kentucky, working on a farm growing marijuana. KSP discovered this plot and after a brief "operation," set up an arrest. Pineda-Duarte did not go to the ground when ordered to do so. Instead, he swung a shovel at the officers, missed the officers while swinging the shovel, then dropped the shovel and tried to flee. He was apprehended. He was charged with manufacturing under federal law.

Pineda took a guilty plea. During the sentencing process, it was recommended that his sentence be enhanced for his violent act against the trooper. Pineda argued he did not intend violence (as was required by the enhancement) but acted purely on reflex. The District Court disagreed and Pineda appealed.

ISSUE: Is swinging a shovel reflexively or with the intent to injure an officer a "credible threat to use violence" under the Federal Sentencing Guidelines imposing a sentencing enhancement for making a treat of violence in the course of committing a drug-related offense absence of some credible evidence of verbal or physical intent?

HOLDING: Probably not, unless the defendant's intent to use violence is proven.

DISCUSSION: The Sixth Circuit noted that the issue was whether there was a "credible threat" posed by Pineda's action, warranting the enhancement. Pineda-Durate argued it was, at most, attempted violence. The Sixth Circuit reviewed the language of the sentencing guideline and held that just because the shovel "missed the mark" and did not hit anyone, did not change its characterization of "violence." Further findings with respect to Pineda-Durate's intent to use violence and whether that intent was articulated for the purpose of a sentencing enhancement is required, so the matter was remanded for further findings of fact.

RETALIATION AGAINST A WITNESS

U.S. v. Edwards, 783 Fed.Appx. 540 (6th Cir. 2019)

FACTS: In 2015, D.B. was working as a CI in a case against two brothers, the McShans, in Steubenville, Ohio. Their trial was held in Columbus (150 miles away). D.B. and others testified. Family members and friends of the McShans had to be removed from the courtroom for photographing witnesses. Both men were convicted.

A few months later, Edwards (the McShans' sister) and others began posting and reposting photos of D.B. on social media and making very derogatory and threatening comments about him. She did not take any of the photos or create images, but mostly reposted others with her own captions. Her Facebook page was set on public and broadcast the CI's name, nickname, location, family members and his cooperation with law enforcement.

Edwards was charged with retaliating against a witness, 18 U.S.C. §1513(e). Edwards claimed the statute was unconstitutional based upon the First Amendment and moved to dismiss. The trial court denied the motion to dismiss, finding the statute constitutional. Edwards was convicted and appealed.

ISSUE: May Facebook postings be considered retaliation?

HOLDING: Yes.

DISCUSSION: Edwards conceded she knowingly posted the messages on Facebook, but there was no indication that she intended to retaliate against D.B., or that she caused D.B. any real harm. The Sixth Circuit opined that the use of the word "snitch" increased a risk of harm, and that such inflammatory comments could foreseeably lead to negative consequences. Edwards argued that others posted similar statements, so she could not be held to blame for his overall harm. There was "close temporal proximity" between her statements and his harm, and D.B. felt intimidated at in fear of his safety in Steubenville. His little sister received threats as well, as a result. He chose to not visit his family as much or live at home. The Sixth Circuit held that Edwards' action constituted harm.

The Sixth Circuit further noted that Edwards was not selectively prosecuted because she made posts, but rather that "*her Facebook posts were the crime*." It was "hardly remarkable that she was singled out for enforcement."

Edwards' conviction was affirmed.

SEARCH & SEIZURE

SEARCH & SEIZURE – SEARCH WARRANT

U.S. v. Harney, 934 F.3d 502 (6th Cir. 2019)

FACTS: In 2015, the FBI gained control of Playpen, a large child pornography website. The FBI continued operating the site in a controlled manner to capture users. The FBI obtained a warrant to find the users behind the usernames, as they were shielded by another router. With that warrant, the FBI identified several users, including Harney. While executing a search warrant for Harney's home, he admitted he had downloaded child pornography. A forensic

examination confirmed 3,640 child pornography images and 1,199 child pornography videos were downloaded onto Harney's computer.

Harney was charged with possessing child pornography and moved to suppress, arguing that the warrant was improper. His motion was denied.

Harney entered a conditional guilty plea to receiving child pornography and appealed.

ISSUE: May officers rely on a search warrant obtained in good faith?

HOLDING: Yes.

DISCUSSION: The Sixth Circuit held that the investigators relied in good faith on the detailed warrant. Harney argued the FBI failed to describe where the government would search, as they did not know where the computers were actually located. The Sixth Circuit noted "that frequent reality of web-based searches" is simply a reality of the digital age and did not convert it to a general warrant.

Further, under a change in Federal Criminal Rule 41, it was proper for a judge one district to issue warrants that extended outside of their normal jurisdiction, for exactly this reason. The agent conveyed firsthand knowledge in the warrant.

Finally, Harney argued that the warrant, in effect, authorized illegal or outrageous conduct – the continued operation of the website. The Sixth Circuit noted that although this was a defense, it had never actually been applied by the court, making it "the kind of rare bird that is much talked about but never seen." The Court left "some sliver of hope that one day, some day, the defense might apply. But not in this case."

The Court affirmed the conviction.

U.S. v. Jones, 781 Fed.Appx. 423 (6th Cir. 2019)

FACTS: On February 14, 2018, Det. Schmidt (Akron PD) prepared a search warrant affidavit in a drug trafficking case. A CI had told Det. Schmidt that Dortch was an occupant and that Jones and Thompson were also selling drugs from the house. He provided corroborating information for the CI and information on the criminal history of the three subjects. During the subsequent search, drugs, guns, cash and processing equipment. Jones (and the others) filed a motion to suppress, arguing the search warrant affidavit failed to establish probable cause. The trial court denied suppression. Jones entered a conditional guilty plea and appealed.

ISSUE: Is a warrant that identifies sufficient information valid?

HOLDING: Yes.

DISCUSSION: The Sixth Circuit held that this affidavit "leads the reader … to draw … collective conclusions or inferences." The affidavit linked known drug dealers to a specific location where drugs had been found before, and further stated that drugs were likely currently in the building. A CI made a controlled buy from one of the three suspects and surveillance had the CI leaving the house for the buy.

Jones also argued that the prior crimes connected to the house and arrests of the men earlier were too stale to be considered in the warrant. The Sixth Circuit rejected this argument and affirmed the conviction.

SEARCH & SEIZURE - SEARCH INCIDENT

U.S. v. Ruffin, 783 Fed.Appx. 478 (6th Cir. 2019)(Certiorari Pending 12/22/2019)

FACTS: In October 2015, a Postal Service drug dog alerted on a package, which contained four pounds of methamphetamine. Someone else was "interested" in the package as well, as evidence indicated it was closely tracked on its journey; that someone was Ruffin. The package was seized. The next month, two more packages were found going to two different addresses in the same area. Officers set a trap, substituted a counterfeit for the drugs in one package and a small quantity of the drugs with a tracker in another. Both packages were released for delivery and were tracked.

The postal carrier, however, confiscated the packages, scanned them as delivered, and placed them into her personal vehicle. On the way home, she drove the packages to a local drug house. The postal carrier was arrested before she could deliver these packages. Ruffin was inside that house. The occupants saw the arrest of the postal carrier and fled. Ruffin was stopped almost immediately. At the time of his seizure, he had $1,400 in cash, marijuana and two cell phones on his person.

When agents searched the cell phones, "Ruffin's prospects went from bad to worse." A phone included photos of the package on its trip, and showed he was in communication with Harris and Tucker concerning this trafficking. Ruffin also talked about the trafficking in a group message on Facebook. The agents mapped his movements before the delivery as well.

Ruffin was charged with conspiracy and moved to suppress. He was convicted and appealed.

ISSUE: Does probable cause for an arrest also justify a search?

HOLDING: Yes.

DISCUSSION: Ruffin argued the officers lacked probable cause to arrest him. The Sixth Circuit believed that Maryland v. Pringle[37] provided probable cause to arrest and search. Further, headlong flight is also the "consummate act of evasion" and added to the probable cause.[38]

With respect to his cell phone, it was noted that the officers took their action before Carpenter[39] was decided. This search comported with the Stored Communications Act, 18 U.S.C. 2703(d) as it existed at the time

The Sixth Circuit affirmed the conviction.

SEARCH & SEIZURE – CONSENT

U.S. v. Harris, 2019 WL 4447543 (6th Cir. 2019)

FACTS: On February 13, 2017, McNairy County (TN) deputy sheriffs went to Harris's home with an arrest warrant. They knocked and Harris answered. Harris was advised of the warrant for his arrest and he was immediately handcuffed on his front porch. Harris expressed concern that the front door was open and asked that it be locked. Deputy Gilbert swept the home, finding Bailey, Harris's girlfriend. Bailey collected her belongings and left. Deputy Gilbert made sure no one else was in the residence and turned off a fan. On his way out, Deputy Gilbert spotted a plastic bag and could see marijuana inside the bag. He opened the bag, confirming the presence of marijuana. Deputy Gilbert also found methamphetamine. Deputy Gilbert called another deputy to obtain a search warrant for the home.

Harris stated he did not give consent for the entry, instead claiming that he asked if he could go inside. Harris stated he was going to see if Bailey was planning to stay and if she had a key. Harris was told he could not go back inside. He told the officers they could not go in without a search warrant, but they entered anyway.

The trial court denied the motion to suppress, finding Harris gave the officers consent to enter the home. Harris was convicted of the underlying crime and appealed.

ISSUE: May officers enter with consent to secure a property?

HOLDING: Yes.

DISCUSSION: The Sixth Circuit determined that there were inconsistencies in the officers' testimony but that ultimately, there was good reason to believe that Harris wanted his house to be locked up, and that the officers were given permission to enter.

[37] 540 U.S. 366 (2003).
[38] Illinois v. Wardlow, 528 U.S. 119 (2000)
[39] U.S. v. Carpenter, 926 F.3d 313 (6th Cir. 2019).

The Sixth Circuit affirmed the conviction.

U.S. v. Porter, 774 Fed.Appx. 978 (6th Cir. 2019)

FACTS: Officers visited Porter's Tennessee home in the early morning hours with an arrest warrant. When a woman answered their knock, the officers smelled marijuana. Porter came out on request and was arrested. Porter admitted he smoked in the house and there might be a blunt inside. Porter granted consent for a partial search, but the officers instead obtained a search warrant.

As they waited, the officers watched the occupants (Porter's girlfriend and five children) as they prepared to leave. The officers searched nothing. When the warrant arrived, they searched the residence, finding marijuana, a scale, and most importantly, two guns and ammunition.

Porter, a convicted felon, was charged for the guns. His motion to suppress was denied. He was convicted and appealed.

ISSUE: Does the strong odor of marijuana coming from within a residence while conducting the lawful arrest of a subject at the front door constitute probable cause that the home may contain evidence of a crime for purposes of obtaining a search warrant?

HOLDING: Yes.

DISCUSSION: Even accepting Porter's assertions of issues with the search, the Court asked "only whether the final, warrant-supported search was an independent source of the evidence free of any illegal taint."[40] The Court focused on the fact that the officers smelled a strong odor from inside that they recognized as the "distinctive fragrance of marijuana." The fact that officers did not see contraband during an initial walk through was immaterial, because they weren't looking for it. The Court affirmed the search and his conviction.

SEARCH & SEIZURE – VEHICLE SEARCH

U.S. v. Keeling, 783 Fed.Appx. 517 (6th Cir. 2019)

FACTS: In 2014, Nelson County task force members began an investigation that led the task force to believe that Keeling was manufacturing methamphetamine. A CI alerted officers to a transport that was to take place on February 15, 2016, and described a truck and a destination. The destination was a house that belonged to Evans, another person of interest. The officers began surveillance, using a pole camera installed across the street, and monitored the camera from nearby. The officers saw Keeling arrive, stay 20 minutes, and then leave, enough "time to sit down and conduct business." The officers followed, loose sight of Keeling, but then found the truck Keeling was driving at the home of another suspect, Janes. (Janes was

[40] Murray v. U.S., 487 U.S. 533 (1988).

also the father of Keeling's girlfriend, Bivens.) Keeling left there, as well. When the officers followed Keeling, he apparently became spooked and engaged in evasive maneuvers.

Marked cruisers moved in to intercept Keeling. Officer Wright was first and activated his lights. An observed abrupt move by Keeling made Officer Wright believe that Keeling was reaching for a gun, so he drew on Keeling. Officer Lewis arrived and saw Keeling reach for a firearm and Officer Lewis ordered Keeling to stop. Keeling was taken into custody and frisked, and a gun was found. The passenger, Bivens, was also apprehended.

The officers moved to search the truck. Zeus, a K-9, alerted on several areas of the truck. Officers found methamphetamine, guns and other paraphernalia in the truck. Keeling was charged under federal law with several drug-related offenses. Keeling moved for suppression and was denied. He entered a conditional guilty plea and appealed.

ISSUE: May a corroborated tip support a traffic stop?

HOLDING: Yes.

DISCUSSION: Keeling argued that the traffic stop and subsequent search were improper. The Sixth Circuit held that a tip from a reliable informant may provide sufficient reason to make the stop and that not much was said about the tipster in this case. However, the officers did corroborate the tip and confirmed many details contained in the tip. The officers also knew Keeling's history, including a prior attempt to evade, and Keeling was already a suspect in the ongoing investigation. The Sixth Circuit determined this was enough for the stop.

The Sixth Circuit further determined that the search of the automobile was valid based upon the automobile exception. The totality of the facts were enough to satisfy probable cause that drugs or trafficking evidence would be inside. It was certainly reasonable for them to suspect a gun, given Keeling's criminal history.

The Sixth Circuit affirmed Keeling's conviction.

U.S. v. Lambert, 770 Fed.Appx. 737 (6th Cir. 2019)

FACTS: On November 19, 2012, Officer McMullen (Jackson, TN PD) was dispatched to a call about a man with a gun at a local shopping mall. On the way, the officer received another dispatch that the man was leaving and provided a vehicle description. The officer spotted the car and followed it. Upon confirming the plate, Officer McMullen executed a traffic stop. The officer had the driver, Lambert, exit the vehicle and the door was left open. Officer McMullen explained the purpose of the stop, and Lambert denied having a gun. Officer McMullen frisked Lambert. While McMullen was conducting the frisk, another officer looked through the window of the vehicle and spotted a toddler in a car seat. The other officer searched the vehicle and ultimately found a pistol tucked between the console and the driver's seat.

Lambert, a convicted felon, was indicted for possession of the gun. He moved to suppress, but the trial court found that the officer had performed a "legal protective sweep of the area within reach of the driver." McMullen pled guilty and appealed.

ISSUE: May a vehicle be searched under Gant if the subject has the ability to access the car?

HOLDING: Yes, but this is a fact-specific and case-specific analysis.

DISCUSSION: Lambert asserted that no sufficient reason existed to search his car. Further, Lambert argued that the search was improper. The Sixth Circuit held that Officer McMullen had reasonable suspicion to make the stop. The appellate court also noted that while carrying a weapon is not illegal, the initial call suggested a disturbance, and even a lawful carrier – which Lambert was not – may not engage in criminal action with the firearm.

With respect to the search, Gant, and Michigan v. Long were examined. A vehicle search is valid even if the subject is under the officer's control because the subject could break away and access the vehicle. Until a full custodial arrest is executed, the officer is vulnerable. In this situation, Lambert remained standing next to the open driver's door. Thus, this situation "falls squarely" under Long. "Gant specifically recognized the continuing validity of Michigan v. Long as an established exception to the Fourth Amendment warrant requirement."[41] The possibility legality of the weapon was not a factor.

The conviction was affirmed.

U.S. v. Evans, 780 Fed.Appx. 340 (6th Cir. 2019)

FACTS: Responding to a drug overdose call, Officer Fetheroff (Mentor, OH PD) found Evans unconscious in his vehicle. EMS responded. The driver, Corby, told the officer she saw Evans struggling, so she stopped and attempted to get him aid. Corby allowed a search of the car and two phones were found. Evidence was found indicating she had actually been sent to pick up Evans. The officer seized Evans' phone and it was booked into evidence – having first been put into airplane mode. This was pursuant to policy to prevent outside tampering before a warrant can be obtained. Det. Alvord, handing the phone, was unfamiliar with the IPhone and inadvertently opened the camera mode. Thereafter, a thumbnail picture of a topless, prepubescent girl wearing bikini underwear was displayed in the corner of the screen. Still struggling to find the settings application to shut off iPhone, he found more photos. Ultimately, Det. Alvord was able to power it down.

Det. Alvord obtained a search warrant and a number of images of "real minors" were found. Evans moved for suppression for the search of the phones and was denied. Evans was convicted and appealed.

[41] Arizona v. Gant, 556 U.S. 332 (2009); Michigan v. Long, 463 U.S. 1032 (1983).

ISSUE: Could manipulating a phone to turn it off constitute a search if evidence is found during that time?

HOLDING: Yes.

DISCUSSION: Evans argued that it was immaterial whether Alvord intended to commit a search, all that matters is that he did. Because the trial court considered the matter using an incorrect standard, the trial court never decided the legitimacy of his actions in handling the phone. The Sixth Circuit noted that the limited record was silent on numerous issues, including whether Alvord was involved in the initial situation, to fully determine the validity of Evans' argument.

The Sixth Circuit vacated and remanded to the trial court for further proceedings.

U.S. v. Coleman, 923 F.3d 450 (6th Cir. 2019)

FACTS: In March 2017, law enforcement officers began to investigate Powell, a local drug dealer. After a CI identified one of the sources as Coleman, the investigation turned to him. A few days later, Coleman was observed associating with Powell. After further investigation, officers obtained a search warrant to attach a tracking device on Coleman's vehicles, which were parked in an open apartment parking lot. One vehicle was in his shared driveway and the other vehicle was in a parking space open to residents and guests. After Coleman made some sales to Powell, he was tracked back and forth to his home.

Agents obtained a search warrant for Coleman's home, locating a number of items. Coleman admitted possession of the cocaine found and a firearm (he was a convicted felon). Coleman's motion to suppress the fruits of the search warrants was denied. Coleman entered a conditional guilty plea and appealed.

ISSUE: Is a public parking lot curtilage?

HOLDING: No.

DISCUSSION: The appellate court first held that the tracking device warrant was property supported and obtained as the supporting affidavit listed the facts known to the issuing magistrate. The Sixth Circuit then examined the installation of the tracker, which Coleman argued was within the curtilage. Coleman's driveway was open, shared with another resident of the apartment complex, and was not enclosed in any way, abutted a sidewalk, and was the point of entry to the residence.[42] The court held that the entry was proper.

[42] Collins v. Virginia, 584 U.S. --- (2018).

Additionally, sufficient evidence existed to support a warrant for the residence, as it was a fair inference that drug dealers have evidence at their residence. Coleman regularly drove between his home and transactions.

The district court was affirmed.

SEARCH & SEIZURE – WARRANT

U.S. v. McElrath, 2019 WL 4447582 (6th Cir. 2019)

FACTS: In February 2018, Kalamazoo (MI) PD officers obtained a search warrant for a home, and evidence indicated that McElrath, a crack cocaine drug dealer, was working from that residence. There was also evidence guns were located in the house. That night, multiple officers converged on the home. A driveway was between the target home (637) and the neighbor (635). The driveway belonged to 635 but was physically closer to 637. There was a car and two men in the driveway. As the officers arrived, the two men walked away and the car accelerated out of the driveway, struck a police car and fled along the sidewalk. The two men were apprehended. Smith, went to the ground immediately while McElrath was slower to follow commands, but eventually complied. McElrath gave his name and admitted to having "something illegal" on his person. He reeked of marijuana and admitted to smoking it. He denied consent to search unless he was under arrest.

Officer Cake told him that they had a warrant for 637, including the occupants, and McElrath gave consent for a search. An empty magazine and drug foil was found. Officer Cake was reminded that McElrath had been mentioned in the pre-raid briefing. McElrath was arrested and a further search found a quantity of cocaine.

McElrath was charged with drugs and a firearm charge because a gun was found in his proximity when he was seized. McElrath argued that the search warrant did not give authority to search him, and that the officers had no reasonable suspicion to seize and hold him. The district court granted suppression, finding that he was not on the property at the time and that there was nothing else to raise sufficient suspicion. The Government appealed.

ISSUE: May officers detain a suspect with reasonable suspicion?

HOLDING: Yes.

DISCUSSION: An officer may detain a suspect if the officer has an objective reasonable suspicion. In this case, it turned on whether the officers had a "particularized and objective basis" for doing so. The Sixth Circuit reviewed what the officers knew and while each fact, in isolation, was not enough, the details had to be considered in combination with each other. It is immaterial what the officers thought, only what they perceived at the time. Nothing suggested which house "owned" the driveway, and both officers indicated being closer to 637,

the target house. Further, the appellate court held that the officers had enough to warrant handcuffing McElrath, especially given the vehicle's actions had just placed them in danger.

The suppression order was reversed.

42 U.S.C. §1983

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

42 U.S.C. §1983 – ARREST

Vanderhoef v. Dixon, 938 F.3d 271 (6th Cir. 2019)

FACTS: Vanderhoef was involved in an automobile accident in Tennessee with Dixon, an off-duty reserve police officer, who was driving home in his personal vehicle. Vanderhoef was driving at a high rate of speed, lost control of his vehicle in a curve, struck Dixon's vehicle, and ultimately stuck a telephone pole. After the accident, Dixon held Vanderhoef and his passengers (teenagers) at gunpoint for several minutes. Vanderhoef filed suit and the matter went to trial. The jury found in Vanderhoef's favor and awarded a nominal judgment in the amount of $500. (The trial court determined that Dixon was acting under color of law in his actions.) After trial, Dixon renewed his motion for qualified immunity, which the trial court granted and dismissed the judgment. Vanderhoef appealed.

ISSUE: May an off-duty officer be held liable for actions taken under color of law?

HOLDING: Yes.

DISCUSSION: The Sixth Circuit held that it was unreasonable for Dixon to hold the occupants of the other vehicle at gunpoint under the circumstances. He did not identify himself as a police officer until the end of the interaction, but continued to issue orders for several minutes. The Sixth Circuit examined Graham v. Connor's factors and found them all to fall to Vanderhoef's favor.

The trial court's decision to award qualified immunity to Dixon was reversed and the judgment was reinstated.

Parnell v. City of Detroit, 786 Fed.Appx. 43 (6th Cir. 2019)

FACTS: On January 14, 2016, Parnell was celebrating his birthday in Detroit with his fiancée, Cann. Cann wanted to practice firing her legal firearm – so she went outside and fired

several shots at the abandoned house next door. Cann did this twice. Parnell never went outside or fired a weapon.

A neighbor called 911 and officers Billingslea and Patterson responded. As they passed, Billingslea later stated he saw a male dressed in a brown shirt (as Parnell was) shoot at the cruiser from Cann's porch. They called for backup. When the officers knocked, both Cann and Parnell came outside, with Cann yelling she had been the person firing the gun. The officers ignored Cann and focused on Parnell. Parnell complied with commands to walk backwards toward them and he alleged that he was then beaten. (Parnell could identify Billingslea from prior interactions, but no one else.) Patterson helped take Parnell into custody.

Cann had given permission for a residence search and the gun was found. Cann continued to insist she had been the person shooting and even reported such to 911. Captain Thompson wrote a report but indicated he could not confirm the officer's claim as there were no marks on the cruiser. There was, however, significant evidence to support Cann, as there were several marks on the empty house. Sgt. Mack submitted the reports, except for the one that concerned what was found on the house, to the prosecutor Yang. Yang filed charges against Parnell.

Right before the trial, Sgt. Diaz, an evidence technician who examined the house and found evidence supporting Cann's account of this incident, spoke to the trial prosecutor, Lanning. Lanning was surprised and realized that there was conflicting evidence. Ultimately, the case against Parnell was dismissed without prejudice and ultimately was completely dropped.

Parnell filed suit under state law, and the case was removed to federal court. The officers' motion for summary judgment was denied. This appeal followed.

ISSUE: To support a false arrest claim, is lack of probable cause a prerequisite?

HOLDING: Yes.

DISCUSSION: To succeed on a false arrest claim, Parnell must prove there was no probable cause for the arrest.[43] That same element was one of four needed for a malicious prosecution claim. Under the available facts, a reasonable jury could find that both officers made knowing or reckless material false statements that resulted in Parnell's arrest and prosecution.

Further, in this case, a jury might note the "eyebrow-raising nature of Billingslea's claim" – that he could see so much in the rear-view mirror, in the dark, while moving and quite some distance away and while "under fire." The Sixth Circuit found the story to stretch credulity.

With respect to Sgt. Mack, also a defendant, the Sixth Circuit found that he passed on the information to the prosecutor with at "least reckless disregard for the truth." "Significant physical evidence unambiguously indicated that the shooter fired not toward the officers, but

[43] Voyticky v. Village of Timerblake, 412 F.3d 669 (6th Cir. 2005); Wallace v. Kato, 549 U.S. 384 (2007).

in the opposite direction." Without Billingslea's claim, there was simply no evidence Parnell fired at the officers.

With respect to the remainder of the malicious prosecution elements, the Sixth Circuit held that the false information certainly influenced Yang's decision to prosecute Parnell. Further, the prompt dismissal of the charges against Parnell upon the prosecutors learning the facts suggested that there was a "formal abandonment" of the charges.

The Sixth Circuit held that qualified immunity was not appropriate and affirmed the district court.

42 U.S.C. §1983 – SEARCH

Novak v. City of Parma, 932 F.3d 421 (6th Cir. 2019)

FACTS: "Apple pie, baseball, and the right to ridicule the government." The events that follow occurred in Parma, Ohio.

Novak "created a 'farcical Facebook account' designed to look like the Parma Police Department's official page." The page was up for twelve hours and published several posts. Among the posts was a recruitment advertisement that "strongly encourag[ed] minorities to not apply." Novak also posted an apology from the department for "neglecting to inform the public about an armed white male who robbed a Subway sandwich shop," while promising to bring to justice an 'African American woman' who was loitering outside the Subway during the robbery. The page polarized the community, with some finding it hilarious, other angered, and some confused, believing it to be a real page. The Parma Police Department was not amused.

> A Facebook battle ensued. First, the department posted a warning on its official Facebook page. The warning alerted the public to the fake page and assured them that the matter was "currently being investigated." Then Novak reposted the exact same warning on his own page. He claims he did this to "deepen his satire." For the same reason, Novak deleted "pedantic comments" on his page explaining that the page was fake, as these "clumsy explication[s]" only "belabored the joke."

After that, the conflict moved from social media into the real world. Officer Riley assigned Officer Connor to the task of tracking down who created the page. Connor requested Facebook delete the page, by letter and email. A local news outlet opened an investigation. Novak elected to delete the page, concerned about consequences.

"Though Novak was done posting, the police department was not done investigating. They still wanted to find the person behind the laptop." Connor obtained a search warrant in which Novak claimed that Connor made "material misrepresentations and omissions." Facebook provided Novak's identity. With that, Connor obtained a search warrant for Novak's residence and an arrest warrant for Novak, claiming his actions impaired the department's ability to

function in violation of Ohio law. Novak argued other than tying up the telephone lines for some 12 minutes with citizen's calls, nothing else directly affected the department. Novak was acquitted at trial.

Novak filed suit against the City of Parma, Officer Riley and Officer Connor. The officers moved to dismiss the 30-plus claims, claiming qualified immunity. The trial court granted the motion in part, but denied the motion in part, leaving 26 claims pending. The officers appealed.

ISSUE: Is parody a protected right?

HOLDING: Yes.

DISCUSSION: The Sixth Circuit began:

> Apple pie, baseball, and the right to ridicule the government. Each holds an important place in American history and tradition. So thought Anthony Novak when he created a Facebook page to mock the Parma Police Department. He styled his page to look like the department's official Facebook page. But the similarities ended there. Novak shared posts like an advertisement for a "Pedophile Reform event," at which pedophiles would receive honorary police commissions.
>
> Novak's page delighted, disgusted, and confused. Not everyone understood it. But when it comes to parody, the law requires a reasonable reader standard, not a "most gullible person on Facebook" standard. The First Amendment does not depend on whether everyone is in on the joke. Neither is it bothered by public disapproval, whether tepid or red-hot.
>
> Novak's Facebook page was either a protected parody in the great American tradition of ridiculing the government or a disruptive violation of state law. Maybe both. At this stage, we decide only whether the officers are entitled to qualified immunity. For some of Novak's claims they are, but for others they are not.

The Sixth Circuit further noted:

> For a right to be "clearly established," the "constitutionality of the officer's conduct" must have been "beyond debate" in the "particular circumstances before him."[44] The Supreme Court has cautioned that "clearly established" must not be defined "at a high level of generality." Instead, we must be sensitive to the fact that police officers work in the real world, which is often messier than law books would have us believe.[45] So when it comes to holding police officers liable for heat-of-the-moment decisions they make in the line of duty, abstract legal principles will not do the trick.

[44] Id. at 589–90 (quoting Ashcroft v. al–Kidd, 563 U.S. 731 (2011)).
[45] Nieves v. Bartlett, 139 S. Ct. 1715 (2019)

The Sixth Circuit then broke down the issues. First was an examination of whether the officers committed retaliation based on Novak's protected speech. **"**The retaliation claim turns on two issues: (1) whether Novak's Facebook page was a parody and (2) whether the Parma police had probable cause to arrest Novak for his page. Because resolving both issues involves questions of fact, the claim survives.[46]

> Was Novak's speech protected? The Supreme Court has repeatedly reminded us that almost all speech is protected other than "in a few limited areas."[47] These "limited areas" include speech expressed as part of a crime, obscene expression, incitement, and fraud.[48] It is clearly established, though, that parody does not fall in one of these "limited areas."[49] It is protected speech.
>
> The question, then, is whether Novak's page was a parody. The officers claim that his Facebook page was false and meant to mislead the public, not a parody. But they are wrong to think that we just look to a few confused people to determine if the page is protected parody.
>
> Our nation's long-held First Amendment protection for parody does not rise and fall with whether a few people are confused. Instead, we must apply a "reasonable reader" test. Speech that "could not reasonably have been interpreted as stating actual facts" is a parody, even if "patently offensive." The test is not whether one person, or even ten people, or even one hundred people were confused by Novak's page. Indeed, the genius of parody is that it comes close enough to reality to spark a moment of doubt in the reader's mind before she realizes the joke. "The germ of parody lies in the definition of the Greek *parodeia* . . . as a song sung alongside another."[50] And masterful parody may skirt that line even closer. Benjamin Franklin's 1784 satirical essay in the *Journal de Paris* came so close to the truth that it anticipated reality before it happened. Franklin spoke of the benefits of daylight and joked that the French should consider waking up earlier to save money on candles. In his tongue-in-cheek proposal, Franklin recommended several measures for the implementation of his plan. He suggested that: "Every morning, as soon as the sun rises, let all the bells in every church be set ringing; and if that is not sufficient?, let cannon be fired in every street, to wake the sluggards effectually, and make them open their eyes to see their true interest."[51] Through his satire, Franklin predicted the reality of daylight saving time, which would come a century and a half later.

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[46] Greene v. Barber, 310 F.3d 889 (6th Cir. 2002).
[47] U.S. v. Stevens, 559 U.S. 460 (2010) (internal quotation marks omitted).
[48] See U.S. v. Alvarez, 567 U.S. 709 (2012).
[49] Hustler Magazine, Inc. v. Falwell, 485 U.S. 46 (1988).
[50] Campbell v. Acuff-Rose Music, Inc., 510 U.S. 569 (1994) (internal quotation marks omitted).
[51] Benjamin Franklin, An Economical Project, Letter to the Editor of the Journal of Paris (1784), http://www.webexhibits.org/daylightsaving/franklin3.html.

> And a parody need not spoil its own punchline by declaring itself a parody. "Parody serves its goals whether labeled or not, and there is no reason to require parody to state the obvious (or even the reasonably perceived)."[52] Imagine if *The Onion* were required to disclaim that parodical headlines like the following are, in reality, false: *Presidential Debate Sidetracked By Booker, De Blasio Arguing About Best Place In Lower Manhattan To Get Tapas*, or, *John Bolton Urges War Against the Sun After Uncovering Evidence It Has Nuclear Capabilities*. *News in Brief*.[53] The law of parody does not require us to strain credulity so far. And that is not because everyone always understands the joke.[54]
>
> Instead, the test for parody is whether a reasonable reader would have seen Novak's Facebook page and concluded that the posts stated "actual facts." Our nation boasts a long history of protecting parody and satire. "[F]rom the early cartoon portraying George Washington as an ass down to the present day, . . . satirical cartoons have played a prominent role in public and political debate." And parody, like all protected speech, need not be high-minded or respectful to find safe haven under the First Amendment. "One of the prerogatives of American citizenship is the right to criticize public men and measures—and that means not only informed and responsible criticism but the freedom to speak foolishly and without moderation."[55] "The art of the cartoonist is often not reasoned or evenhanded, but slashing and one-sided." We uphold this right, even where parody shocks us, because "[o]ur trust in the good sense of the people on deliberate reflection goes deep."

The Sixth Circuit determined that it could not establish at this stage whether Novak's page was protected parody. Instead, that remains a jury decision.

The next question concerned whether the officers had probable cause to arrest Novak. "To answer this question," the Sixth Circuit noted that it needed "more facts." Without probable cause, Novak was arrested based upon a "'forbidden retaliatory motive."

"A plaintiff alleging retaliatory arrest must disentangle these "wholly legitimate" considerations of speech from any wholly illegitimate retaliatory motives." The Sixth Circuit questioned whether Novak would have been arrested even had he not criticized the department, and that would, of course, depend upon facts, and whether the officers truly believed they had probable cause for a non-retaliatory arrest.

In summary:

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[52] Campbell, 510 U.S. at 583 n.17.
[53] The Onion (June 26, 2019), https://politics.theonion.com/presidential-debate-sidetracked-by-booker-de-blasio-ar-1835870332; News in Brief, The Onion (June 10, 2019), https://politics.theonion.com/john-bolton-urges-war-against-the-sun-after-uncovering-1835805360.
[54] Susanna Kim, All the Times People Were Fooled by The Onion, ABC News (June 1, 2015), https://abcnews.go.com/International/times-people-fooled-onion/story?id=31444478.
[55] Baumgartner v. U.S., 322 U.S. 665 (1944) (Frankfurter, J.).

> … to resolve the retaliation claim, the factfinder below will have to decide: (1) whether Novak's Facebook page was a parody, and thus protected speech, and; (2) whether the officers had probable cause to arrest Novak under the Ohio statute. If the officers did not have probable cause, they are not entitled to qualified immunity, and Novak can attempt to show the arrest was retaliatory. If the officers did have probable cause, they are entitled to qualified immunity even if Novak's page was protected speech because the law at the time did not clearly establish that charging Novak under the statute would violate his constitutional rights.

Potential issues were identified by the appellate court, which noted that a "thorny causation issue" arises "in cases with both protected speech and unprotected conduct." In such cases, the factfinder might be unable to "disentangle whether the officer arrested him because of what he did or because of what he said." In this case, without the speech, there would be no case at all. The Sixth Circuit also noted that the statute itself was vague and overbroad.

The appellate court examined whether the deletion of comments on the official department Facebook page "censored speech in a public forum and violated [Novak's] right to receive information." The Sixth Circuit stated:

> The First Amendment no doubt applies to the wild and "vast democratic forums of the Internet."[56] But when it comes to online speech, the law lags behind the times. And rightly so. "The forces and directions of the Internet are so new, so protean, and so far reaching that courts must be conscious that what they say today might be obsolete tomorrow."

"Courts have not reached consensus on how First Amendment protections will apply to comments on social media platforms." Even though the right to speak anonymously is deeply rooted in American political tradition and in First Amendment doctrine, there was no clearly established law on the issue of social media posting. Novak argued that the discovery of his identity during the investigation was improper but again, there is "no law clearly establishing that investigative actions by police can violate the right to speak anonymously." On that issue, the officers were entitled to qualified immunity. The Sixth Circuit held that allegations of improper search and seizure and malicious prosecution could continue as well.

Novak also alleges a violation of the Privacy Protection Act. This claim also depends on whether the officers lacked probable cause to search Novak's apartment and seize his property. Because he has alleged facts that make it plausible that the officers lacked probable cause, the claim survives for now.

The Court noted:

[56] Packingham v. North Carolina, 137 S. Ct. 1730 (2017).

> The Privacy Protection Act makes it unlawful for a government officer to "search for or seize any work product materials possessed by a person reasonably believed to have a purpose to disseminate" information to the public.[57] But the statute has a "suspect exception."[58] The Act does not apply if the officers have "probable cause to believe that the person possessing such materials has committed or is committing the criminal offense to which the materials relate." Novak has alleged that the officers lacked probable cause to search and seize the contents of his apartment, so the "suspect exception" does not apply at this stage. The claim goes forward.

Finally, the Sixth Circuit looked to conspiracy. Although the intracorprate conspiracy doctrine has been applied in the sixth Circuit – it did not apply because at least one member of the law enforcement team, an unidentified task force member, was not part of the same agency.[59]

In conclusion:

> Though Novak's Facebook page mocking the Parma Police Department has since left the cyber world, several of his legal claims will live on. Others will end here. We REVERSE the district court's decision to deny the motion to dismiss on Novak's claims related to anonymous speech, censorship in a public forum, and the right to receive speech.

Butler v. City of Detroit, Michigan, 936 F.3d 410 (6th Cir. 2019)

FACTS: In December 2015, Officer Benitez (Detroit PD) swore out a warrant to search a specific address, naming as his source an experienced and reliable CI. Officer Benitez provided details to support that reliability. He noted that the CI indicated in October that he saw drugs in the listed house (and two others) within the prior 24 hours. The officer further indicates he conducted surveillance on one of the other addresses and the target address – but the addresses were 8 miles apart. In December, he supposedly did the same thing – suggesting he was observing the same two locations, including the one for which he wanted the warrant, at the same time. The CI also conducted a controlled buy at the other address. However, despite the inconsistencies in the affidavit, Benitez received the warrant.

Butler, the owner of the target home returned home from an errand after receiving break in alert. He identified himself to the officers present, who seized his lawful weapon and his wallet. Butler was handcuffed, taken inside and "slammed" into a wall by Detective Meadows, exacerbating a previous injury. Butler remained cooperative. A number of items, including almost $5,000 and cash were seized, but no charges were ever filed as nothing illegal was seized.

[57] 42 U.S.C. § 2000aa(a).
[58] S.H.A.R.K. v. Metro Parks Serving Summit Cty., 499 F.3d 553 (6th Cir. 2007).
[59] Jackson v. City of Cleveland, 925 F.3d 793 (6th Cir. 2019).

Butler filed suit under 42 U.S.C. §1983 on a variety of claims. The trial court ruled in favor of the defendants except for a claim against Benitez for the search and against Meadows for the force. Butler appealed.

ISSUE: Is there a high standard for a claim that a search warrant is fatally flawed?

HOLDING: Yes.

DISCUSSION: Butler argued first that Benitez's errors were material falsehoods that led to the warrant being wrongfully issued. Courts "have never required that police officers be infallible to avoid liability under 42 U.S.C. § 1983. Instead, the doctrine of qualified immunity 'provides ample protection to all but the plainly incompetent or those who knowingly violate the law.'[60] In the context of a Fourth Amendment claim that a police officer lied in a search warrant, we have distilled a specific inquiry. 'To overcome an officer's entitlement to qualified immunity, a § 1983 plaintiff must make 'a substantial showing that the defendant stated a deliberate falsehood or showed reckless disregard for the truth.'"[61] In addition, the plaintiff must then show "that the allegedly false or omitted information was material to the finding of probable cause."

> This court derived the Vakilian standard from the Supreme Court's decision in Franks v. Delaware.[62] In Franks, a criminal defendant moved to suppress evidence seized during a search of his apartment. He requested an evidentiary hearing to prove his allegations that officers had made false statements in their search warrant affidavits. The Supreme Court determined that the Fourth Amendment's exclusionary rule allowed a defendant, in narrow circumstances, to attack the veracity of a search warrant affidavit. Id. at 164–65. The Court, however, carefully circumscribed the opportunity to do so, recognizing the need to give respectful deference to a magistrate's probable cause determination. Id. at 166–67. The bottom line was that an evidentiary hearing on the affidavit's truthfulness was required only if the defendant alleged "deliberate falsehood or . . . reckless disregard for the truth.". "Allegations of negligence or innocent mistake," the Court emphasized, would be "insufficient." Id. And the allegations of deliberate or reckless falsehood "must be accompanied by an offer of proof." Id. Even having satisfied these steps, a defendant must still show that "when material that is the subject of the alleged falsity or reckless disregard is set to one side," the affidavit's remainder no longer demonstrates probable cause. Only then is a defendant entitled to a Franks hearing to prove his allegations. Franks thus drew an evidentiary line with reference to the well-known common-law scienter standards: negligence, recklessness, and willfulness. See Restatement (Second) of Torts §§ 8A, 282, 500 (1965). Only "substantial" evidence tending to show one of the two more culpable mental states, Franks said, would do.

[60] Malley v. Briggs, 475 U.S. 335 (1986).
[61] Vakilian v. Shaw, 335 F.3d 509 (6th Cir. 2003).
[62] 438 U.S. 154 (1973).

The Court acknowledged that officers do make mistakes, only a deliberate falsehood should lead to the officer being ineligible for qualified immunity, to give them "breathing room" to do the job. To overcome immunity, there must be substantial evidence of a "culpable mental state." In this case, Butler made no such showing. Benitez admitted his error, but that did not equate to any "calculated or reckless deception." Even "spotting Butler everything in the affidavit that he claims is deliberately or recklessly false, the remaining affidavit material still establishes probable cause to search Butler's house." The informant's tip alone would have been enough.

With respect to the force claim, Meadows argued that he was shoved against the wall only once. The Sixth Circuit, however, noted that "the Constitution says nothing about free passes for just '*one* shove against the wall,' even during drug raids."

The Sixth Circuit held that Meadows was properly denied qualified immunity. The district court's decision to deny qualified immunity to Benitez was reversed and the matter was remanded to the district court for further proceedings.

NOTE: There was a strong dissent in this case, noting the inconsistencies and especially, that the CI only indicated he had been to Butler's address, but not what he saw there or the purpose of the visit.

Coffey v. Carroll, 933 F.3d 577 (6th Cir. 2019)

FACTS: Officers Carroll, Pranger and Pilchak (Taylor, Michigan, PD) were dispatched to the scene of a car break in (with the occupant inside). "The 911 caller gave the officers a lead in tracking the purported burglars. Mother Nature did the rest. Because the attempted break in took place with fresh snow on the ground, the officers could track prints in the snow revealing the men's escape. The incriminating trail of snowprints led the officers to the home of Nicholas Coffey."

They found David (Nicholas' father) outside the home. David claims he did not give consent to entry, the officers said he did. What happened when they entered is "at the crux of this dispute." Coffey claims he was violently arrested after been awakened from sleep, while the officers claimed he violently resisted. Coffey suffered facial injuries. Coffey was charged with assaulting the officers but acquitted.

Invoking 42 U.S.C. § 1983, Coffey filed his own action against the officers and the City of Taylor. Coffey alleged that the officers, under the supervision of the City, violated his constitutional rights by engaging in conduct amounting to unlawful entry, excessive force, and malicious prosecution. By stipulation, the suit against the City was dismissed and the claims against the officers proceeded through discovery.

The officers claimed summary judgment and the Court returned a mixed decision, finding in favor of summary judgment part and against in part. Cross-appeals were filed.

ISSUE: May a hot pursuit start inside a house?

HOLDING: No.

DISCUSSION: It was a matter of dispute as to whether the officers lawfully entered David's home to seize Coffey. "For Fourth Amendment purposes, the search here occurred on sacred ground. "[T]he Fourth Amendment has drawn a firm line at the entrance to the house."[63] A government official may knock on a person's front door and try to initiate a consensual entry.[64] But absent consent, and in the absence of a warrant or exigent circumstances, the Fourth Amendment prohibits the official from entering the home."[65]

The Court then looked to whether this was a hot pursuit. Coffey was inside with the door closed, and not in the public view. Coffey was inside the home, asleep on a loveseat. Further, the officers were not in hot pursuit, which is a recognized exception to search and seizure. "The justification has been invoked in instances where an officer without a warrant justifiably chases a suspect into a private home when the criminal has fled arrest in a public place.[66] "The 'pursuit' begins when police start to arrest a suspect in a public place, the suspect flees and the officers give chase."[67] "[T]he emergency nature of the situation," turns an ordinary pursuit into a "hot" one, creating the need for "immediate police action," justifying what might otherwise be an illegal search and seizure."

Further, the officers were neither "hot" nor in "pursuit," in any fair sense of those words. The sequence of events lacked an emergency. At most, Coffey had attempted (and failed) to commit a non-violent property crime earlier in the day, meaning that when the officers arrived at his house sometime later, their pursuit was lukewarm at best. Nor were the officers truly in pursuit of Coffey, as that term is understood in the case law. Pursuit is defined as an effort to catch and detain an individual following an attempted arrest and subsequent escape. But here, the officers encountered Coffey for the first time *after* they entered the home; it was only then that they began to arrest him. In other words, this was not pursuit following a failed arrest. The district court thus correctly concluded that the search was not justified by an exigent emergency."

The Court correctly denied summary judgment on this issue.

The Court also looked at the excessive force claim. Although the officers argued that Coffey claimed to have no memory of what happened, he did testify as did his father, who was present but did not see everything. The Court noted that "our bottom-line inquiry is whether the totality of the circumstances justifies a particular level of force.[68]. Factors to consider in making

[63] Payton v. New York, 445 U.S. 573 (1980).
[64] See U.S. v. Thomas, 430 F.3d 274 (6th Cir. 2005).
[65] Cummings v. City of Akron, 418 F.3d 676 (6th Cir. 2005)."
[66] Warden v. Hayden, 387 U.S. 294 (1967).
[67] Smith v Stoneburner, 716 F.3d 926 (6th Cir. 2013) (citing Cummings v. City of Akron, 418 F.3d 676 (6th Cir. 2005)).
[68] Mitchell v. Schlabach, 864 F.3d 416 (6th Cir. 2017).

this inquiry include (but are not limited to) 'the severity of the crime at issue, whether the suspect poses an immediate threat to the safety of the officers or others, and whether he is actively resisting arrest or attempting to evade arrest by flight.'" Upon assessment of these factors, the Sixth Circuit determined that "the Graham factors on balance support the conclusion that the officers arguably acted in an objectively unreasonable manner." Thus, summary judgment was not appropriate.

Lastly, two of the officers allegedly offered false testimony at the preliminary examination and as such, without further proof, summary judgment was not appropriate for the officers on the malicious prosecution claim.

42 U.S.C. §1983 – SUSPECT ID

Shull v. Walgreen Company / City of Crossville, TN 7825 Fed.Appx. 373 (6th Cir. 2019)

FACTS: On January 16, 2015, Officer VanRuden (Crossville, TN) responded to a shoplifting call at Walgreen's. The officer was given a specific description and a description of a vehicle, and linked that to a woman named Tucker. Shull also lived at that same address. The officer obtained photos of both women and showed the photos to a clerk. Shull was identified by several employees. Shull was already on the banned list at the store. Warrants were issued and Shull turned herself in. She claimed she had not been at the store that night. Ultimately, the prosecution decided not to go forward.

Shull filed suit under state law, and the matter was removed to federal court. The district court denied Officer VanRuden's motion for qualified immunity, but granted the City summary judgment. The officer appealed.

ISSUE: Is using DMV photos impermissibly suggestive?

HOLDING: No.

DISCUSSION: Shull argued that the officers use of photographs from the DMV were impermissibly suggestive. The Sixth Circuit looked to Neil v. Biggers and agreed that summary judgment on this issue was also appropriate using such photographs were not unduly suggestive.[69]

The Court vacated the decision against the officer and remanded the case for entry of a judgment granting qualified immunity to the officer and the city.

42 U.S.C. §1983 – FORCE

Studdard v. Shelby County, 934 F.3d 478 (6th Cir. 2019)(Certiorari Pending 11/14/2019)

[69] 409 U.S. 188 (1972).

FACTS: On a hot day in July 2016, Deputy Lane (Shelby County, TN) responded to a situation involving Studdard. Deputy Lane responded to a hit and run and bystanders directed him to Studdard, who was walking away. Deputy Lane was advised that the man had cut his own wrists, causing Deputy Lane to follow him. Next, Deputy Lane pulled up next to Studdard and tried to talk to him. Studdard turned toward Lane and displayed a knife and bloody wrists. Lane continued to follow, calling for backup. Deputies Pair, Shepherd and Reed arrived and positioned their vehicles to intercept Studdard. All three pulled out their firearms. Studdard was, in effect, sandwiched between two sets of responders. Studdard was ordered to drop the knife. He raised the knife to his throat and began to sway while moving forward. Deputies Reed and Shepherd fired, hitting Studdard several times. Studdard died several weeks later.

Studdard's wife filed suit under 42 U.S.C. §1983, claiming excessive force. The officers moved for summary judgment and were denied. The officers appealed.

ISSUE: May officers use potentially deadly force against an individual who is only a threat to themselves?

HOLDING: No.

DISCUSSION: When confronting Studdard initially, the officers had good reason to believe Studdard was dangerous and uncooperative. He did not comply with commands, but did not pose a serious risk to anyone, with the closest officers more than 30 feet away. Studdard threatened only himself. The Sixth Circuit compared this case to Sova v. City of Mt. Pleasant and held that, if anything, that case was closer, but in Sova, they also concluded that the use of deadly force against a man in a similar situation was excessive.[70]

The Court affirmed the denial of summary judgement.

Hodge v. Blount County, TN, 783 Fed.Appx. 584 (6th Cir. 2019)

FACTS: On June 10, 2015, Hodge left the scene of a minor wreck. (He suffered from vascular dementia.) The other driver followed him while calling police. Eventually, Deputy Vaughn (Blount County SO) stopped Hodge. Before Vaughn could get out of his vehicle, Hodge's truck lurched forward. Vaughn approached Hodge's vehicle with his pistol drawn and ordered Hodge out multiple times. Hodge did not respond but instead asked what he had done. Vaughn then pulled Hodge out of the vehicle, causing him to fall to the ground. Hodge, who was already in poor health, died shortly after this incident.

Hodge's wife and estate representative filed suit, arguing excessive force. The district court refused to give summary judgment to Deputy Vaughn and he appealed.

[70] 142 F.3d 898 (6th Cir. 1998).

ISSUE: Is a violent jerk enough for an excessive force claim?

HOLDING: Yes.

DISCUSSION: The Sixth Circuit assessed the case in segments, noting that "the officer's conduct must be reasonable at every stage.[71] The appellate court determined that there appeared to be no actual risk to the office because Hodge was "obviously confused." Hodge's hands were always in plain sight. And even if some force was permitted, a violent jerk – as described by a witness – was "clearly over the line."

The Court affirmed the district court's denial of immunity.

Phillips v. Blair (and others), 2019 WL 4164727 (6th Cir. 2019)

FACTS: On a summer night in 2014, a caller reported a commercial structure burglary to 911. "In a classic case of finding oneself in the wrong place at the wrong time," Phillips had stopped his truck at that same building. Officer Blair, responding to the 911 call, found Phillips there and questioned him, even though his vehicle did not match the caller's description. Phillips resisted the questioning and avoided handing over his license, until Blair explained about the burglary. As more officers arrived, matters became disputed and heated. Eventually Officer Groves "pulled on his arm and repeatedly commanded him to stop resisting before a group of officers—despite his attempts to comply—violently took him to the ground, cuffed him, and sprayed mace directly into his eyes." Phillips was treated and questioned, and arrested for obstructing official business. Phillips was convicted of that charge, successfully appealed, and was eventually acquitted.

Phillips filed suit under 42 U.S.C. §1983 against a number of officers and the City of Columbus, Ohio, for the arrest, the force and for a First Amendment claim. The officers were denied summary judgment and appealed.

ISSUE: Is a forcible seizure permitted when a violent crime is reasonably suspected?

HOLDING: Yes.

DISCUSSION: View this matter in the light most favorable to Phillips, there was sufficient reasonable suspicion for the officers to detain him. He was, after all, the only vehicle present at the scene within moments of the 911 call. Phillips' evasion only exacerbated the situation. Further, as the situation evolved, it was appropriate to continue the stop, and the other officers, who arrived in moments, "reacted to a swiftly developing situation and nothing about Blair's brief, initial interaction with Phillips definitively ruled out his involvement in the

[71] Dickerson v. McClellan, 101 F.3d 1151 (6th Cir. 1996).

suspected burglary." Further, once Groves arrived, the officers acted reasonably in asking Phillips to exit his truck for safety reasons and to dispel suspicions.[72]

The district court's denial of summary judgment with respect to the detention was reversed.

With respect to the arrest, the Sixth Circuit noted:

> A probable cause determination depends on whether, at the moment of arrest, "the facts and circumstances within [the officers'] knowledge and of which they had reasonably trustworthy information were sufficient to warrant a prudent man in believing that the petitioner had committed or was committing an offense."[73]

Reviewing the specific Ohio state law for which Phillips was arrested, the Court noted that "Phillips knew that the officers wanted him out of the truck, yet he did not exit voluntarily." Although reasonable minds could differ, the appellate court determined there was enough to support the arrest.

Finally, with respect to the force claim:

> "[T]he right to make an arrest or investigatory stop necessarily carries with it the right to use some degree of physical coercion or threat thereof to effect it."[74] Determining the reasonableness of the physical coercion "requires careful attention to the facts and circumstances of each particular case, including [1] the severity of the crime at issue, [2] whether the suspect poses an immediate threat to the safety of the officers or others, and [3] whether he is actively resisting arrest or attempting to evade arrest by flight." Id. As with probable cause, "the question is whether the officers' actions are 'objectively reasonable' in light of the facts and circumstances confronting them, without regard to their underlying intent or motivation," as officers "are often forced to make split-second judgments—in circumstances that are tense, uncertain, and rapidly evolving—about the amount of force that is necessary in a particular situation." The reasonability analysis includes some "built-in measure of deference to the officer's on-the-spot judgment."[75]

In Phillips case, Officer Groves extracted him from the truck and had taken him to the ground, and officers "piled on top" – injuring Phillips in the process. At the time, however, the officers believed Phillips might have been involved in the burglary, a serious crime. Phillips' conduct suggested he might be a risk to the officers, which again tipped the Graham factors in favor of the officers. The Sixth Circuit reversed the district court's denial of immunity on the excessive force claims.

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[72] *See* U.S. v. Noble, 762 F.3d 509 (6th Cir. 2014).
[73] Beck v. Ohio, 379 U.S. 89 (1964).
[74] Graham v. Connor, 490 U.S. 386 (1989).
[75] Burchett v. Kiefer, 310 F.3d 937 (6th Cir. 2002).

A final claim involving mace was permitted to proceed.

McGrew v. Duncan, 937 F.3d 664 (6th Cir. 2019)

FACTS: On Thanksgiving Eve, 2014, McGrew was cooking at her home when the Detroit PD arrived with a search warrant. While McGrew was stirring macaroni in the kitchen, she heard a bang at the front door. When she went to investigate, she found a group of Detroit Police officers, wearing all black and masked, standing in her living room. She was thrown to the ground by the officers and handcuffed. When she complained that the handcuffs were too tight, one of the officers responded that she "shouldn't be so fat." He also threatened to "blow [her] head off" if she didn't "shut her f--ing mouth." The officered seized a gun and marijuana, which was documented on the search warrant return, but also allegedly seized another gun, diamond earrings, a computer and a phone – which were not documented. McGrew went to the hospital and was treated for some injuries sustained during the raid.

McGrew filed suit against various officers under 42 U.S.C. §1983, claiming excessive force and related claims. The officers all moved for summary judgment; it was denied. The officers appealed.

ISSUE: Is bruising enough for a handcuff claim?

HOLDING: Yes.

DISCUSSION: With respect to the handcuffing claim, the officers did "not dispute that McGrew complained and that they did not loosen the handcuffs." The officers contended, however, that "bruising is not enough" for a claim. In Morrison v. Bd. Of Trs., the Sixth Circuit held that bruising and marks do create a "genuine issue of material fact" sufficient to overcome summary judgment.[76] As such, summary judgment is not warranted on the bruising claim.

The agency's claim that qualified immunity was warranted because McGrew could not identify who handcuffed her was also addressed by the court. McGrew was only able to give a general description. "If officers actively conceal their identities by wearing masks, and if that concealment prevents a plaintiff from identifying which officer violated her rights, she may get to a jury if she can create genuine factual issues regarding the officers' presence at the scene.[77] And on this record, the trier of fact may decide liability because the officers actively concealed their identities by wearing masks and none disputes his presence at the scene."

The Sixth Circuit affirmed the district court's denial of qualified immunity and remanded the case for further proceedings.

[76] 583 F.3d 394 (6th Cir. 2009).

[77] See Burley v. Gagacki, 729 F.3d 610 (6th Cir. 2013); see also Greer v. City of Highland Park, 884 F.3d 310 (6th Cir. 2018).

Baker (Estate) v. City of Trenton, 936 F.3d 523 (6th Cir. 2019)

FACTS: Baker decided to try LSD on "Senior Skip Day" – right before he graduated from high school. On May 28, 2015, a week later, he began acting oddly, likely after-effects of the LSD. He was sent to the principal's office. Suspecting drugs, the principal called the police. Officer Davis visited the school, observed Baker and believed that he was under the influence of something. Officer Davis and the principal left to discuss the matter. When they returned, Baker had left. The principal called Baker's parents, who were divorced, and a friend of Baker's, independently, texted Baker's mother. Baker's father finally reached him, and he told Baker to go home. Baker's mother also reached Baker, but Baker did not tell her where he was. When he did not answer additional calls, Mrs. Baker texted the friend that she was concerned.

The friend, Collin, went looking for Baker and found him alone in his father's basement. Collin used his own phone to call Baker's mother so they could talk, but Baker refused to return the phone to his friend, showing a knife instead. Collin, now without a phone, went directly to the police department and told a dispatcher what had happened. Although Collin later disputed exactly what he said, the dispatcher dispatched police officers and attested later to the validity of what she said. Officers Driscoll, Arnocski, Lyons and Biniarz responded to the house. The dispatcher added more details that indicated that Baker was armed with a knife or shotgun, or both, and was holding his mother hostage.

The officers found an unlocked door, entered, and called out. Baker responded with obscenities and demanded they leave. The officers swept the upstairs, finding nothing of interest. They went to the basement steps and tried to talk to Baker, who was at the bottom of the stairs. They could see Baker holding a lawnmower blade and when asked, he said he did not know where his mother was. Baker refused to come upstairs, but after a standoff of several minutes, he took a couple of steps up, where he was tased. Driscoll went down to subdue him, but Baker stood up still with the blade. The other officers drew back, but Driscoll, who had fallen into a seated position, was pinned, facing Baker who was swinging the blade erratically. He managed to strike Driscoll, cutting him, and Driscoll shot him. Forensic evidence indicated Driscoll fired downward, although he said he fired upward, with Baker above him. Baker died from his injuries. The officers cleared the house, finding a shotgun under the bed.

An investigation indicated that the shooting was in self-defense. The Estate Representative filed suit under §1983, but the district court granted summary judgment for Driscoll and the other officers. The Estate appealed.

ISSUE: Is a reasonable, although mistaken, use of deadly force permitted?

HOLDING: Yes.

DISCUSSION: The Sixth Circuit examined the "three Fourth Amendment claims: 1) that the officers violated Kyle's constitutional rights when they entered the home without a warrant, 2) that Driscoll violated Kyle's constitutional rights when he shot Kyle, and 3) that the City of Trenton violated Kyle's constitutional rights by failing to properly train and discipline its police

officers." The Sixth Circuit held that that exigent circumstances, those that "are situations where real[,] immediate[,] and serious consequences will certainly occur if the police officer postpones action to obtain a warrant" can permit entry under the right circumstances. The appellate court noted that the only match in the list of exigent circumstances was that his actions posed a risk of danger.

> Under the exigent circumstances exception concerning the threat of violence to officers or others, police officers "may enter a home without a warrant to render emergency assistance to an injured occupant or to protect an occupant from imminent injury."[78] We use an objective test to analyze the circumstances that gave rise to a warrantless entry: "An action is 'reasonable' under the Fourth Amendment, regardless of the individual officer's state of mind, 'as long as the circumstances, viewed *objectively*, justify [the] action.'"[79] As applied to the danger-to-police-or-others exception, a lawful warrantless entry requires "an objectively reasonable basis for believing . . . that a person within the house is in need of immediate aid."[80] More specifically, this standard requires us to determine whether "a reasonable person [would] believe that the entry was necessary to prevent physical harm to the officers or other persons."[81]

In this case, the Sixth Circuit opined that the offices reasonably believed that they needed to enter the residence to prevent physical harm. Using what they knew, and nothing more, and without the ability to communicate with anyone inside, entering the residence was reasonable. Upon encountering Baker, the officers had to take some action. The officers had no way of knowing whether Mrs. Baker was in the house, and had they retreated, far worse consequences could have ensued. The court upheld the warrantless entry to this residence.

With respect to a force claim, the Sixth Circuit noted that under Graham's objective reasonableness test, no reasonable jury could find in favor of Baker's estate. Although the other officers had retreated and were momentarily safe, Driscoll was unable to do safely retreat and was in a "vulnerable position." Driscoll acted in self-defense.

The district court's grant of summary judgment for the defendants was affirmed.

Burgess (William / Grace) v. Bowers, 773 Fed.Appx. 238 (6th Cir. 2019)

FACTS: Officer Bowers (Knox County SO) had been attempting to serve civil process on William Burgess, who he believed was actively evading and hiding from him. He attempted service at Burgess's mother's home, which William used as a business address. He learned from an employee that William was on the property and summoned assistance. Officer Jenkins and others were dispatched. Jenkins verified with Captain Norris that they could enter if they had

[78] Goodwin v. City of Painesville, 781 F.3d 314 (6th Cir. 2015) (quoting Schreiber v. Moe, 596 F.3d 323 (6th Cir. 2010)).
[79] Brigham City v. Stuart, 547 U.S. 398 (2006) (quoting Scott v. U.S., 436 U.S. 128 (1978)).
[80] Goodwin, 781 F.3d at 332 (quoting Michigan v. Fisher, 558 U.S. 45, 47 (2009)).
[81] Brigham City, 547 U.S. at 402 (citation omitted) (alteration in original).

probable cause to make an arrest for evasion or obstruction of justice. Jenkins found her fellow officers talking to Grace, William's mother, at the back of the house, and Grace was pleading with William to come outside. That confirmed William was inside, so Jenkins entered over Grace's objection. Burgess was found hiding in the basement crawlspace. Officer Ballard ultimately sent in his canine. As Burgess fought the dog, he was tased multiple times and the tasing made it impossible for him to resist the dog. In the process, William was seriously injured.

William was indicted for two misdemeanors, and he and his mother filed suit against the officers under 42 U.S.C. §1983, making several claims. William was convicted, but his conviction was overturned in state court. During the pendency of those proceedings, the federal civil case continued. Ultimately, the officers were granted qualified immunity on the false arrest claim, but were denied qualified immunity on the unreasonable search and seizure claims.

Cross-appeals followed.

ISSUE: 1. Should officers enter a third-party's home without an arrest or search warrant to make an arrest for evasion of civil process?

2. Does a suspect have the right to be free from a warrantless arrest in somebody else's home?

HOLDING: 1. No.

2. No.

DISCUSSION: The first claim examined was Grace's claim of an unreasonable search when the officers entered her home without any type of warrant. Grace's home was arguably both a public business and a residence. As there was no evidence concerning the usage of that particular structure, which the Burgesses claim was purely a residence with the business operating from another building, the appellate court held it was a factual determination that required a denial of qualified immunity. Under Steagald v. U.S.,[82] it is improper to enter a third party's residence to effect an arrest without a search warrant, let alone enter without an arrest warrant. Further, the Sixth Circuit rejected the contention that acting under legal advice (an attorney apparently advised Jenkins' supervisor that it was alright) immunized the officers absent extraordinary circumstances. Accordingly, the Sixth Circuit affirmed the decision to deny qualified immunity.

William's unreasonable search claim could go forward even though he was not arrested in his own home, but his mother's home. In Buckner, the appellate court held that a party does not have a reasonable expectation of privacy in someone else's home simply because they are there at the time. Nothing suggested that William was an overnight guest even though he was

[82] 451 U.S. 204 (1981).

"certainly more than a casual visitor" and maintained a basement workshop there. The Sixth Circuit determined that the right, if it existed, was certainly not clearly established. Therefore, the officers were entitled to qualified immunity with respect to William's unreasonable seizure claim.

With respect to William's force claim, specifically the use of the dog and the use of the Taser, this situation was factually similar to Robinette v. Barnes.[83] In Robinette, the officers were forced to deal with a suspect who was hiding in a dark crawlspace and they could not be sure of whether the suspect was armed. The space was only 18 inches or so in height, which would put an officer who entered the space at a dangerous disadvantage. The suspect was told several times the dog would be deployed. Granted that his crime was a misdemeanor, he also never rebutted that he was tased because he was fighting the dog, and when he was subdued, the dog was called off. A delay in calling off a dog might be actionable under Greco v Livinston County. With respect to William, even under his version of the facts, it is arguable whether the force was excessive.[84] Accordingly, Ballard, the K-9 handler, was entitled to qualified immunity.

With respect to the Taser, William never disputed the argument that he was Tased because he was stomping the dog's head, nor did he argue that the officers tased him more than was necessary to subdue him. The use of the dog was to stop him from resisting arrest, and was therefore appropriate.

The officers were entitled to qualified immunity with respect to William's claims, but not with respect to Grace's claims.

Saunders v. Cuyahoga Metropolitan Housing Authority, 769 Fed.Appx. 214 (6th Cir. 2019)

FACTS: On January 20, 2014, Officer Ali (Cuyahoga Metropolitan House Authority Police Department) was dispatched to a noise complaint. When he arrived, Saunders, a maintenance man, was inside delivering a drink to the tenant's sister. Officer Ali asked about the leaseholder and was told she was not present. Officer Ali asked to enter and requested ID. The sister, Williams, had no ID but gave her identity and relationship to the leaseholder. Officer Ali then turned to Saunders, made "intimidating" actions, including cracking his knuckles and started rolling his shoulders. Officer Ali said he was calling a supervisor. When Saunders put his hands in his pockets, Officer Ali told Saunders to remove his hands from his pockets and to approach Ali. Saunders pulled out his hands and held them up, but refused to get closer to Ali. Ali called dispatch and said he had a male "claiming to be maintenance" inside and refusing to show ID.

Saunders looked up to see Officer Ali holding a Taser. When Saunders went to open the door, turning his back to Ali, he was Tased. The tasing had no effect because of Saunders' heavy jacket. As Saunders walked down the hallway, Officer Ali never commanded him to stop. Ali then used OC spray, while Saunders called for help and ended up in another apartment. That

[83] 854 F.2d 909 (6th Cir. 1998).
[84] 774 F.3d 1061 (6th Cir. 2014).

tenant refused to allow the officer to enter. When two other officers arrived, all three officers entered the apartment. The two newly arrived officers handcuffed Saunders, and Ali drive-stunned him. Officer Reynolds told Ali to stop, but Ali stunned Saunders again after he was pulled out to the hallway and laid down. Video taken late in the encounter was not dispositive. Ali's Taser log indicated he fired it with a series of 8 the first time and 5 the second time.

Saunders was charged with assault, burglary and obstructing official business. The burglary was dismissed and he was acquitted of assault. He was convicted of obstructing official business, but the conviction was overturned on unrelated issues. Ultimately, he entered a plea to disorderly conduct.

Saunders filed suit against Officer Ali and the CMHA, alleging excessive force. Ali requested summary judgment, but was denied. Ali appealed.

ISSUE: Should force be used against a non-resisting subject?

HOLDING: No.

DISCUSSION: Ali argued that the undisputed evidence indicated that Saunders was engaged in criminal conduct and presented a danger by refusing to show ID and comply with commands, and that Ali resisted and attempted to evade arrest by fleeing. Ali stated he had a report before about the location (but perhaps not that apartment) being used in drug activity. The Sixth Circuit examined Graham v. Connor factors and noted that the first factor leaned against Ali – as the "crime" in question was a noise complaint, and even what Saunders pled to, disorderly conduct, was not a serious crime. For the second factor, the Court found no indication that he posed any immediate threat, as Saunders stood quietly against the wall most of the time. He identified himself as a custodian, which argued against the need to arrest him immediately or "risk losing him forever." In fact, Saunders was never told he was under arrest, a predicate to a resisting arrest charge. Saunders simply walked out of the apartment.

Ali's actions were deemed unreasonable, so the judgment of the district court was affirmed.

Phillips v. Curtis, 765 Fed.Appx 130 (6th Cir. 2019)

FACTS: In May 2012, Phillips was physically abused by her boyfriend. When the police arrived, however, Phillips tried to leave in a vehicle and struck a police cruiser. Officers ordered her to stop, and even broke the car windows trying to get her to turn off the car. Her car continued to move slowly while officers were in close proximity. Curtis shot her through the rear window.

Phillips was indicted for multiple counts of wanton endangerment. While the criminal case was pending, Phillips filed a civil lawsuit alleging excessive force. . The civil case had been held in

abeyance until the criminal case was resolved. In 2018, she pled guilty in the criminal case. Upon conviction, the civil lawsuit was dismissed under Heck v. Humphrey.[85] Phillips appealed.

ISSUE: May a person be guilty and still have a civil claim under Heck?

HOLDING: Yes.

DISCUSSION: To determine whether a civil judgment and a criminal conviction conflict, a court must "look to many considerations." In this case, Phillips argued there were "two separate incidents, one when she endangered Curtis, the other when he opened fire." If they occur together, Heck will apply. Phillips, however, argued that "she placed Curtis's life in jeopardy at point one, she ceased to be a threat at point two, and only after that did Curtis shoot her." Under her version, given the gap between the two events, she could escape the Heck bar.

The Sixth Circuit remanded for further discovery concerning the nature of Phillip's plea and the timing of her conduct and the shooting.

Judd v. City of Baxter / Haney, 780 Fed.Appx. 345 (6th Cir. 2019)

FACTS: In August 2015, Judd was eating dinner at home when he learned that a market, owned by his girlfriend and where he worked, was on fire. He grabbed his keys and rushed to the scene. There, this "self-described frail individual," a 76-year-old man who had a pacemaker and a bad knee, encountered a variety of responders, including Paramedic Haney. Judd tried to give a female officer who was trying to gain access his keys but, Judd alleged, she threw him to the ground. Haney then "pounced" on him and beat him in the back.

Judd sued all involved, primarily Officer Bennett and Paramedic Haney. Both moved for summary judgment. The district court granted Haney qualified immunity on the false arrest claim, but denied immunity on the excessive force claim. Haney appealed.

ISSUE: May a non-sworn government employee still be liable in a force claim?

HOLDING: Yes.

DISCUSSION: Judd provided evidence indicating Haney violated his right to be free from excessive force. It was clearly established that such force could not be used against a prone, unresisting suspect. Although there were discrepancies in Judd's recitation, it was not so high as to rise to the level of making his version incredible. Prior case law indicated that "paramedics who act in a law enforcement capacity are held to the same standard as police officers."

The district court's decision was affirmed.

[85] 512 U.S. 477 (1994).

42 U.S.C. §1983 – INVESTIGATION

Manolios (Estate) v. Macomb County, 785 Fed.Appx. 304 (6th Cir. 2019)

FACTS: In May 2015, five teenage boys were involved in a major crash in a Michigan park. Four were ejected, one stayed in the vehicle. Of the four ejected, only one survived. All five were intoxicated. It was not immediately clear who was driving. The one boy remaining in the vehicle was the only one who could not have been driving because he was in a seatbelt in the passenger seat. Eventually, the Macomb County Sheriff's Department concluded Manolios had been the driver but mistakenly reported his blood alcohol was 0.086. Manolios' BAC was actually 0.024. The Manolios family contended that Narra, the ejected survivor, had been driving and that the sheriff's office intended to shield Narra from prosecution. The Manolios family also claimed the insurance company did not initially pay a claim because of that alleged error, but eventually did so.

The Manolios family filed suit under 42 U.S.C. §1983, claiming several violations of their constitutional rights.

ISSUE: Is an alleged error in a police investigation actionable?

HOLDING: No (as a rule).

DISCUSSION: There was no indication the family was subjected to any unequal treatment as a member of a protected class, and even such protection existed, there was a rational basis for the agency's identification of Manolios as the driver – the surviving passenger told them Manolios was driving. The "clear establishment" of a constitutional right is a very high bar and the "public misidentification of Manolios as the driver falls well below that standard."

The district court was affirmed.

42 U.S.C. §1983 – FIRST AMENDMENT

Hartman v. Thompson, 931 F.3d 471 (6th Cir. 2019)

FACTS: On August 27, 2015, the Kentucky Farm Bureau (KFB) sponsored an annual event at the Kentucky State Fair known as the Ham Breakfast. To attend the Ham Breakfast, a person had to have a separate ticket for the breakfast and purchase admission to the state fair. The day before the breakfast, the Fairness Campaign, the American Civil Liberties Union of Kentucky, and the Jefferson County Teachers Association (and some other organizations) issued a press release announcing they would protest the event against discriminatory policies on the part of the KFB. Trooper Thompson (KSP), who was overseeing fair security, received a call from Fairgrounds CEO Rippetoe, which precipitated a meeting of fair personnel to discuss how this protest would be handled. Kentucky Administrative Regulations required a 72-hour notice to the Executive Director of the Kentucky Exposition Center of any protest activities and a permit

was required to be obtained. Ultimately, it was decided that this protest could go forward despite the lack of notice.

Thompson met with the group and suggested an area in the parking lot some 50 feet from the sidewalk. "The suggestion was based on handicap-accessible parking because Thompson remembered from previous dealings with The Fairness Campaign, when they had protested the event in prior years, that 'there were a few members that were with the group that were handicapped, or if not handicapped they used assistance with canes, wheelchairs and so on.'" The group agreed with Thompson's recommendations and flagged off the area …." He also met the group the next morning and told them they could use signs, megaphones and "the whole nine yards" during their demonstration.

However, anticipating that some of the protestors would have tickets for the event, Thompson warned the group that they could not disrupt the event from inside the facility. Hartman, one of the protestors, stated "I'm going to do what I have to do." Trooper Thompson was aware of what had occurred the previous year which involved several attendees disrupting the event. No arrests were made in 2014.

Based on Thompson's warning, the Fairness Campaign decided to "rethink its plan." Instead of moving to the front of the speakers' dais as they had done the previous year, they "decided they would stand silently at their assigned table for 60 seconds." As soon as the first speaker started, the group did as they planned and three tables of protestors stood up silently.

At this point, accounts differed. The protestors claimed that "immediately after they stood up, police officers approached them, placed Hartman under arrest, and escorted him from the building." They alleged no one was warned to sit down or leave. Trooper Thompson, however, "testified he approached Hartman and asked him to sit down, but Hartman refused to answer and did not sit down." Trooper Drane testified that "after Hartman was placed into handcuffs, he picked his feet up and had to be "pack[ed] out" of the venue by the troopers." Hartman stated that in protest to being handcuffed, he did a "dead drop" in response to being jerked forwarded when he delayed cooperating. Trooper Drane arrested Hartman for failure to disperse and disorderly conduct. Thompson returned and found others still standing. He told them they had to leave and all but two did so, leaving only DeVries and Wallace. DeVries claimed that Trooper Hill told her to leave and she replied she was waiting for her friends. Hill, however, stated that she was already handcuffed when he was told to take charge of her and remove her, and she too was charged with failure to disperse. Wallace claimed she was told she had to leave, but before she could comply, she was removed and arrested on the same charges.

Ultimately, the Jefferson County Attorney dismissed all charges. At that time, they filed a lawsuit in state court, which was ultimately removed to federal court under 42 U.S.C. §1983. The three asserted claims of "false arrest and malicious prosecution in violation of the Fourth Amendment, and free speech and retaliatory arrest claims in violation of the First Amendment" under federal law and "wrongful arrest, malicious prosecution, and battery under Kentucky law."

The district court granted summary judgment to the troopers and the protestors appealed.

ISSUES: 1. Is law enforcement's actions in moving protestors to a "protest zone" reasonable when law enforcement was not involved with the creation or enforcement of the protest zone?

2. Is a law enforcement's officer's recommendation of the location for the "protest zone" outside of a quasi-public event a violation of free speech?

3. Is requiring protestors to protest within a designated "protest zone" viewpoint discrimination in violation of the First Amendment?

4. Does passive disruption of a lawful meeting provide probable cause to arrest for disorderly conduct, disrupting a meeting and/or failure to disperse?

5. Is a police officer liable for malicious prosecution for simply forwarding a police report to a prosecutor's office?

HOLDING: 1. No.

2. No.

3. No.

4. Yes.

5. No.

DISCUSSION: With respect to the protest zone, the Sixth Circuit noted that since neither Drane or Hill was involved in the establishment of the zone, they were entitled to summary judgment on that claim. As for Thompson, "§1983 requires that the defendant 'subjects, or causes to be subjected' a United States citizen to the deprivation of a constitutional right." Thompson recommended the placement of the zone at a request from the Kentucky Exposition Center. Only the director of the Kentucky State Fair could authorize this protest and establish the parameters of the protest. Thus, Thompson could not be subject to lawsuit on that claim.

With respect to the protected speech issue, the Sixth Circuit noted that "there are four types of speech fora: nonpublic, public, designated public, and limited public."[86] Although the protestors argued they were on sidewalks outside of the Kentucky Exposition Center, they were clearly in a parking lot property owned and maintained by the Exposition Center. The protestors also had to pay admission to be located where they were. Accordingly, this was a "limited public forum." In a "limited public forum," the government "is not required to and does not allow persons to engage in every type of speech."[87] The government may restrict speech so long as the restrictions are viewpoint neutral and "reasonable in light of the purpose served by the

[86] Pleasant Grove City v. Summum, 555 U.S. 460 (2009); Miller v. City of Cincinnati, 622 F.3d 524 (6th Cir. 2010).
[87] Good News Club v. Milford Cent. Sch., 533 U.S. 98 (2001).

forum." Viewpoint discrimination is a more "egregious" form of content discrimination."[88] It occurs when speech is restricted because of the speaker's viewpoint on the topic—i.e., but for the perspective of the speaker, the speech would normally be permissible.[89]

The Sixth Circuit held that "the Fairgrounds had a legitimate, viewpoint-neutral reason for designating a protest zone for a large group of people. The Fairgrounds regulations allow demonstrations unless a demonstration unreasonably and substantially interferes with (1) patron safety; (2) '[t]he orderly movement of vehicle and pedestrian traffic'; or (3) the 'normal functions' of the Fairgrounds." Some 2,000 attendees were expected for the breakfast and State Fair personnel were concerned about this group interfering with that traffic. The location was not designated because of any particular viewpoint, and any other protestor would have been placed in a similar "protest zone." Although the protestors alleged others were permitted to be in the sidewalk, closer, with signs, they did not provide any specifics. As such, there was a "viewpoint-neutral rationale for the protest zone."

With respect to the argument that it was improper to force protestors to "indicate their intent to protest" and make a "distinction between those registering to protest and those who simply show up and do so arbitrarily favors those who do not register," The Sixth Circuit held that Thompson's actions were reasonable under the circumstances.

With respect to what occurred inside the venue, the Sixth Circuit determined that this event was a private forum, so the rules of engagement between law enforcement and the public are different. Arrest requires probable cause and "[t]o determine whether probable cause exists, we consider only 'the facts known to the arresting officer at the time of the arrest.'"[90] The offense establishing probable cause need not be "closely related to, and based on the same conduct as, the offense identified by the arresting officer at the time of arrest." Nor does an officer's subjective motivation invalidate an otherwise lawful arrest based on probable cause.[91]

The district court ruled that the troopers had probable cause to arrest each of the protestors and found no reason to disagree with that ruling. However, the district court had pointed to a different Kentucky statute – Disrupting a lawful meeting – KRS 525.150 instead. Indeed, they admitted the intent was to "draw attention away from the speaker." Even if the protestors did not actually obstruct the meeting, they engaged in an action "tending" to do so. Trooper Thompson was aware of the events that occurred the prior year, and that Hartman had intended to "ramp up" in 2015. "Considering these facts, Thompson had reason to believe that The Fairness Campaign was going to do something more than forming a wall in front of the speaker for 60 seconds. That action would certainly tend to obstruct or interfere physically with the Ham Breakfast in violation of Ky. Rev. Stat. § 525.150."

[88] Rosenberger v. Rector & Visitors of Univ. of Va., 515 U.S. 819 (1995).
[89] See, e.g., Lamb's Chapel v. Ctr. Moriches Union Free Sch. Dist., 508 U.S. 384 (1993)
[90] Devenpeck v. Alford, 543 U.S. 146 (2004).
[91] Arkansas v. Sullivan, 532 U.S. 769 (2001).

Finally, although a silent standing demonstration is an "age old form of political speech at public meetings," this was not, in fact, a public event. Once probable cause is established, the Sixth Circuit noted, the "remaining claims fall like a house of cards."

Under 42 U.S.C. §1983, if the officer has probable cause, a false arrest claim cannot be maintained. Since probable cause existed, the false arrest claims failed. With respect to First Amendment retaliation, the court noted that "a claim of First Amendment retaliation requires proof that: "(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" the first two elements, i.e. "the adverse action was motivated at least in part by the plaintiff's protected conduct."[92]

The district court ruled that probable cause defeated the claim for retaliatory arrest, relying on Hartman v. Moore[93] and Marcilis v. Township of Redford.[94] Hartman established that a plaintiff claiming retaliatory prosecution must plead and prove a lack of probable cause to prosecute. Because the officers had probable cause to arrest, the First Amendments claim also failed.

The Sixth Circuit also elected to mention the most recent decision, Nieves v. Barlett.[95] "As Nieves makes clear, if there is a showing of probable cause, a retaliatory arrest claim fails."

With respect to malicious prosecution, the Court noted:

> A claim for malicious prosecution under § 1983 requires: (1) that the defendant "ma[d]e, influence[d], or participate[d] in the decision to prosecute" the plaintiff; (2) a lack of probable cause for the criminal prosecution; (3) the plaintiff suffered a deprivation of liberty as a consequence of the legal proceeding; and (4) the criminal proceedings were resolved in the plaintiff's favor.[96]

The protestors did not show the first element, as there is no indication the troopers took any action in the prosecution after the initial arrest.

Under Kentucky law, these elements are slightly different. In Kentucky:

> This … requires a plaintiff to prove that

[92] Thaddeus-X v. Blatter, 175 F.3d 378 (6th Cir. 1999) (en banc).
[93] 547 U.S. 250 (2006).
[94] 693 F.3d 589 (6th. Cir. 2012).
[95] 139 S. Ct. 1715 (2019) held that "probable cause to make an arrest defeats a claim that the arrest was in retaliation for speech protected by the First Amendment." The Court noted that in First Amendment retaliation cases, "it is particularly difficult to determine whether the adverse government action was caused by the officer's malice or the plaintiff's potentially criminal conduct," and thus, "[b]ecause of the 'close relationship' between the two claims, their related causal challenge should lead to the same solution: The plaintiff pressing a retaliatory arrest claim must plead and prove the absence of probable cause for the arrest."
[96] Sykes v. Anderson, 625 F.3d 294 (6th. Cir. 2010).

1) the defendant initiated, continued, or procured a criminal . . . proceeding. . . against the plaintiff;
2) the defendant acted without probable cause;
3) the defendant acted with malice, which, in the criminal context, means seeking to achieve a purpose other than bringing an offender to justice . . . ;
4) the proceeding . . . terminated in favor of the person against whom it was brought; and
5) the plaintiff suffered damages as a result of the proceeding.[97]

Here, the troopers had probable cause to arrest and acted without malice. In fact, following the arrests, Trooper Thompson met with the remaining protestors, told them they could still protest outside, and even offered to put the flags back up that protected the zone which had been knocked down.

With respect to Hartman's battery claim, the court held that appropriate force was used because Hartman refused to walk.

The district court was affirmed.

42 U.S.C. §1983 – MENTAL HEALTH SEIZURE

Dolbin v. Miller, 786 Fed.Appx. 52 (6th Cir. 2019)

FACTS: On February 2, 2015, M.K., a minor, called to report her father, Dolbin, was barricaded in a closet threatening suicide with a gun. Officers Miller and Whelan (Strongsville OH PD) responded to the dispatch. Dolbin realized 911 had been called and went to the door to wait for police with his hands against the glass door. Officer Whelan drew his firearm and told Dolbin about the call. Dolbin explained that he was unarmed and obviously not in the closet. Realizing Doblin was calm, Officer Whalen reholstered his weapon. Officer Whalen told Dolbin they still needed to investigate. Dolbin asked to speak to a supervisor, and Sgt. O'Deens responded. O'Deens and Whalen entered the residence to speak with Dolbin, who explained he made a general threat to his wife earlier in the day. Doblin agreed to go for a mental evaluation with the officers. Doblin was handcuffed and placed in the cruiser.

At some point, the officers were told that Dolbin's wife and daughter were at the police department to take out a domestic assault charge on him. Eventually, his daughter recanted her allegations and Doblin was acquitted of criminal charges.

Dolbin filed suit against the officers, alleging unreasonable search and seizure, false imprisonment, and malicious prosecution. The district court granted summary judgment to the

[97] Martin v. O'Daniel, 507 S.W.3d 1 (Ky. 2016), as corrected (Sept. 22, 2016), reh'g denied (Feb. 16, 2017).

officers on all but the search and seizure claims after finding that a genuine issue of material facts existed concerning whether the officers had no authority to seize Doblin to transport him for a mental health evaluation.

ISSUE: May officers seize an individual and transport that person for a mental health evaluation based upon a credible threat of suicide?

HOLDING: Yes.

DISCUSSION: Even though the information may have been incorrect, the officers were relying on a credible report from Doblin's daughter that Dolbin was "actively suicidal." The daughter provided "concrete allegations of specific and particularized suicidal and dangerous behavior. The Sixth Circuit held that the officers were entitled to qualified immunity.

Rudolph v. Babinec, 939 F.3d 742 (6th Cir. 2019)

FACTS: On the night in question, Leticia Rudolph's ex-husband, Kyle, received a text from their son stating that his mother had her handgun "out" and asking his father to check on her. Kyle did so, and he spoke with Leticia for an extended period of time. With Leticia's consent, Kyle took the gun with him. Later that night, Kyle was stopped by a Michigan police officer and advised that he was in possession of a firearm. Kyle explained why he possessed the weapon and even showed the officer the text. Kyle was released, but the officers "felt obligated to do a wellness check on Rudolph."

Officer Babinec and Officer Atkinson went to the home and banged on the doors and windows to no avail. They advised Officer Hodges, who had made the traffic stop. Officer Hodges told Kyle to call Leticia – she answered and explained she was sleeping. Leticia got up and opened the door to the officers outside. They asked if she was suicidal, which she denied, stating she "felt fine." "Rudolph generally cooperated with the officers, but the officers, without much further inquiry, gave her the option of going voluntarily to the hospital or being taken into custody involuntarily for a mental-health check."

> Then, according to Rudolph, things took a turn. Rudolph says that Officer Babinec grabbed her by the arm without warning, slammed her body and face into the wall, and handcuffed her. She told the officers that the handcuffs were "really tight," and that the officers were hurting her. They responded that she was suicidal. The officers then "manhandled" her out of the house, without giving her a chance to put shoes on, and dragged her across her forty-foot driveway. Rudolph could not keep up with the officers and asked them to slow down. They did not. Rudolph stumbled and hurt her right ankle—so badly that she would later need two surgeries to treat that injury. She complained repeatedly to Officers Babinec and Atkinson that the handcuffs were too tight, but they did not respond.

At the hospital, Leticia was determined to be intoxicated so a mental evaluation could not be done immediately. In a few hours, she was evaluated and determined to be at low risk of self-harm, and released.

Leticia filed suit against Officer Babinec and Atkinson, and their employer, Fruitport Township, under 42 U.S.C. §1983. The officers were denied summary judgment.

ISSUE: Must officers have probable cause of a threat of harm to make a mental health seizure?

HOLDING: Yes.

DISCUSSION: The Sixth Circuit began:

> There are two sides to every story. Here, the two sides read like they come from different books.

With respect to Leticia's Fourth Amendment argument, the Sixth Circuit noted that although the officers had a reason to show up at her door, a jury could find they had no probable cause for the mental-health seizure.

In Fisher v. Harden, the Sixth Circuit held "that in the context of a mental health seizure an officer must have probable cause to believe that the person seized poses a danger to [her]self or others."[98] "A showing of probable cause in the mental health seizure context requires only a 'probability or substantial chance' of dangerous behavior, not an actual showing of such behavior."[99] If probable cause exists, a person's denial that they are at risk of suicide does not by itself eliminate that probable cause.[100] Further discussion of Fisher revealed another significant point in the analysis for mental-health seizures: whether a reasonable officer would question the veracity of a suicide report based on the facts at the scene of the wellness check that is done in response to the suicide report.

In Fisher, no probable cause existed for the seizure, while in Monday v. Oullette, there was a much clearer indication of a mental health emergency. Leticia's case "falls more on the Fisher side of the line." Nothing Kyle reportedly said indicated Leticia was suicidal, and no evidence existed that he asked the officers to check on her. (Kyle's concern about the firearm may have centered Leticia's intoxication – she tested at .153 at the hospital.) While the officers believed that Leticia was intoxicated, there is no indication they thought she was so drunk as to die, or that she had overdosed on pills. "[O]nce the danger—i.e., the gun—was removed from the equation, there was no longer an unacceptable risk of Rudolph harming herself." The officers

[98] Fisher v. Harden, 398 F.3d 837 (6th Cir. 2005).
[99] Id. at 843 (quoting Monday v. Oullette, 118 F.3d 1099 (6th Cir. 1997)).
[100] See Ziegler v. Auckerman, 512 F.3d 777 (6th Cir. 2008) (granting qualified immunity even though plaintiff denied making any suicidal comments, and "plaintiff allegedly suffer[ed] from a mental illness that prevent[ed] her from realizing her own need for treatment.").

may have been right to be initially concerned, but it became "less reasonable" as they investigated. As such, qualified immunity was unavailable.

Leticia also put forward a handcuffing claim because she consistently complained that the handcuffs were too tight. "[W]hat matters in an excessive force claim is whether the Miller requirements—complaint, ignoring of complaint, and injury—are met, and whether the officers acted reasonably in the circumstances."[101] Although the officers stated Leticia was only handcuffed ten minutes, Leticia argued she was handcuffed for much longer. At this stage of litigation, the district court must accept her version absent evidence to the contrary. While subjective pain may not be enough, "Rudolph provided photos she took one day after the incident, showing the injuries on her hands, wrists, and arms. And a picture is often worth a thousand words." Summary judgment was not available on the handcuffing claim as well.

Leticia also claimed excessive force during the seizure. Leticia claimed that despite complying with the officers' orders, the officers "slammed her face and body into a wall, pulled her out of her house, and dragged her down a long driveway so roughly that she needed multiple surgeries.

After addressing some Michigan state issues, the Court affirmed the denial of the district court's denial of summary judgment.

42 U.S.C. §1983 – SEARCH AND SEIZURE

Fineout v. Kostanko, 780 Fed.Appx. 317 (6th Cir. 2019)

FACTS: On the day in question, Tyler, Fineout and Wright all shared a home with 4 children between them. Under Michigan law, occupying a "red-tagged" property - one deemed uninhabitable by code inspectors, was a misdemeanor. It was common for officers interacting with a resident to check to see if the property was, in fact, red-tagged. On that day, Lansing (Michigan) officers arrived in response to a 911 call about child abuse and the officers were told by 911 that the house was red-tagged. The officers forced entry and arrested the adults. In this case, pursuant to procedure, Dispatch Supervisor Harris confirmed the red-tag status using a computer database maintained.

Unfortunately, the house was not red-tagged at this point, although it may have been at some point in the past. Officers did learn that one of the adults had a separate arrest warrant, but that was not discovered until after they entered. The occupants initially denied entry, telling officers they needed a warrant. Instead, relying on the red-tag status, officers forced entry. Upon entry, officers found 21 marijuana plants, which were claimed eventually by Tyler, who was not present when the officers entered. Tyler stated, and later proved, he had a medical exemption or the marijuana.

[101] Miller v. Sanilac County, 606 F.3d 240 (6th Cir. 2010).

All charges were dismissed when it was shown the property was not red-tagged.

A lawsuit was filed against the officers and the dispatcher, claiming unlawful search, arrest and related claims. Qualified immunity was granted, and this appeal followed.

ISSUE: May officers rely on information from dispatch?

HOLDING: Yes.

DISCUSSION: To sustain an "unlawful search" claim, plaintiffs must demonstrate that the officers' entry was not reasonable. Although police are generally required to "obtain a warrant based upon a judicial determination of probable cause prior to entering a home[,] . . . there are a few well-defined and carefully circumscribed circumstances in which a warrant will not be required."[102] One of those exceptions is the existence of "exigent circumstances"—"situations where real immediate and serious consequences will certainly occur if the police officer postpones action to obtain a warrant."[103] One such exigent circumstance is a "risk of danger to the police or others." "Thus, law enforcement officers 'may enter a home . . . to protect an occupant from imminent injury.'"[104].

Further, under Payton v. New York, an arrest warrant justified entry if there is reason to believe the suspect lives there and is present.[105] With respect to the officers, the Sixth Circuit held that it was reasonable for the officers to believe entry was lawful.

> Police officers have the "right to rely on dispatch information" and courts therefore consider an officer's reasonable reliance on such information when determining whether the officer is protected by qualified immunity.[106] Here, dispatch twice informed the police defendants that the residence had been red-tagged, and the officers had no reason to doubt this information. It was therefore reasonable for them to believe that the residence was, in fact, red-tagged.
>
> Citing multiple cases supporting the warrant requirement, plaintiffs contend that even with the red-tag information, defendants lacked authority to forcibly enter the residence without a warrant. But the record establishes that it was a common practice for Lansing police officers to enter red-tagged properties, without a warrant, where

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[102] Thacker v. City of Columbus, 328 F.3d 244 (6th Cir. 2003) (citing Mincey v. Arizona, 437 U.S. 385 (1978)).
[103] Id. at 253 (internal quotation marks omitted) (quoting Ewolski v. City of Brunswick, 287 F.3d 492 (6th Cir. 2002)).
[104] Michigan v. Fisher, 558 U.S. 45 (2009) (quoting Brigham City v. Stuart, 547 U.S. 398 (2006)); Schreiber v. Moe, 596 F.3d 323 (6th Cir. 2010) ("Preventing imminent or ongoing physical abuse within a home qualifies as an exigent circumstance[.]").
[105] 445 U.S. 573 (1980).
[106] Dorsey v. Barber, 517 F.3d 389 (6th Cir. 2008); see also Feathers v. Aey, 319 F.3d 843, (6th Cir. 2003) (finding that officers were protected by qualified immunity where "[i]f the dispatcher's information were accurate and reliable, as the police presumed, the totality of circumstances would justify" the officers' actions).

there was reason to believe that someone was illegally occupying the structure. Officers testified that it was part of their training to do so. Indeed, plaintiffs argued below that the officers entered the residence pursuant to a policy and custom of the City of Lansing. We note that Lansing's practice of conducting warrantless entries into occupied, red-tagged homes is troubling. However, in this case, plaintiffs have identified no case supporting that it was clearly established that police cannot lawfully enter an illegally occupied structure without a warrant."

With respect to Harris, the Sixth Circuit held that it was not possible to know what Harris saw on her computer on the date in question, but that it was undisputed the property was not red-tagged on that date. Even had the house not been red-tagged, the officers could enter on the claim of active child abuse. Although they were found not to be violating the law with respect to the house, when the plaintiffs refused to allow the officers to see the children, it was sufficient for other charges also placed against Fineout and Wright. Further, when Tyler admitted possession of the plants and could not immediately produce documentation as to the legal status, his arrest was also warranted – although later dismissed as well.

The district court was affirmed.

Richards v. City of Jackson, Michigan, 2019 WL 4447390 (6th Cir. 2019)

FACTS: In 2014, Richards, Harris and their dog, Kane, lived together in a duplex at Jackson, Michigan. The couple shared responsibility for the dog. On November 28, officers arrived at their address on a matter unrelated to the couple, they were looking for a different person but their address was one that had been provided. Upon arriving at 511/513, the officers found two units in one building. "Each unit had a separate door on the exterior of the house, and each door was conspicuously labeled with a single, distinct address identifying the residence inside. Each door was also accompanied by its own mailbox, and the door marked "513" (their address) had its own doorbell as well." One officer went to 511 and knocked, but Officer Peters, at 513, just opened the door and walked inside. (He claimed he thought it led to a common entryway for multiple units.) Harris claimed that Peters opened the inner, solid door upon entry. The stairs there opened into the upstairs living room. Harris and Caddell (Richards' younger brother) were there playing video games. Peters apparently knocked on the wall and Harris yelled down, asking who it was, to which Peters responded "police." Kane went running down the stairs. After some dialogue, over a few seconds, caught on Peters' bodycam, the officer shot Kane.

At that point, stories differed, with Officer Costley claiming that Kane was growling and barking and had Peters backed into corner. Peters told Harris he shot the dog because he was bitten. It was later proven than Kane had not bitten Peters.

Richards and Harris brought suit, arguing an unlawful entry and related claims. Summary judgment was denied for Peters. Peters appealed.

ISSUE: Should officers take care when entering a multi-unit building to ensure they are not actually entering an actual dwelling unit?

HOLDING: Yes.

DISCUSSION: "[P]hysical entry of the home is the chief evil against which the wording of the Fourth Amendment is directed."[107] The Sixth Circuit noted that it had "taken this threshold seriously, making clear that "any physical invasion of the structure of the home, 'by even a fraction of an inch,' [is] too much," and that "there is certainly no exception to the warrant requirement for the officer who barely cracks open the front door and sees nothing but the non-intimate rug on the vestibule floor."[108] "With few exceptions, the question whether a warrantless search of a home is reasonable and hence constitutional must be answered no."

Peters does not argue that he had a warrant, consent, or exigent circumstances to enter the home. Instead, his argument turns on whether he had entered the plaintiffs' home at all. Peters claims that he reasonably believed the front door led to a common entryway shared by multiple residences, and he argues that individuals have no "objectively reasonable expectation of privacy in the unlocked and open common hallway and stairway of [their] duplex."[109] The Sixth Circuit rejected this argument, holding that this was not a common area, even though it was a foyer with steps leading to a single upstairs unit.

With respect to the dog, "there is a constitutional right under the Fourth Amendment to not have one's dog unreasonably seized."[110] Unreasonably using deadly force against a household pet was improper. "[When Peters announced his presence from inside the home, Kane ran down the stairs and growled but never advanced past the foot of the stairwell; that Kane did not lunge or bite at Peters; and that Harris was on his way down the stairs to get Kane at the time that Peters shot Kane." Growing, barking, and approaching by a dog is to be expected when a stranger enters the dog's home, a "common dog behavior" as it were. This was not a serious enough display of aggression to warrant deadly force. And most importantly, there was nothing to justify Officer Peters' entry at all.

The district court was affirmed.

Taylor v. City of Saginaw, 922 F.3d 328 (6th Cir. 2019)

FACTS: Taylor was a frequent recipient of parking violations in Saginaw. Parking enforcement used chalk to mark vehicle tires to ensure that a vehicle had not been moved in the requisite time frame. Taylor brought an action under 42 U.S.C. arguing that the chalking violated her rights against illegal search.

[107] U.S. v. U.S. District Court (Keith), 407 U.S. 297, 313 (1972);
[108] Kyllo v. U.S., 533 U.S. 27 (2001) (quoting Silverman v. U.S., 365 U.S. 505, (1961)).
[109] U.S. v. Dillard, 438 F.3d 675 (6th Cir. 2006).
[110] Brown v. Battle Creek Police Dep't, 844 F.3d 556 (6th Cir. 2016)."

The district court ruled that while it may have been a search, the search reasonable. Taylor appealed.

ISSUE: Is chalking vehicle tires a search?

HOLDING: Yes.

DISCUSSION: The Sixth Circuit held that the chalking was a search because it constitutes a slight physical intrusion onto private property. Under U.S. v. Jones, it becomes a search when the government trespasses upon private property to obtain information.[111] Both existed in this case. Although vehicles have a lessened degree of privacy, at the time the vehicle was chalked, the city simply did not know if it was parked illegally.

The community caretaking doctrine does not save the case, as exceeding the permitted time for parking was not sufficient to allow the warrantless search.

The district court was reversed.

Bullman v. City of Detroit, 2019 WL 4691416 (6th Cir. 2019)

FACTS: In 2016, Detroit officers conducted a drug raid at Castro's home. The officers were acting on a tip that marijuana was being sold at Castro's home. The target actually possessed a medical marijuana license and had two "patients." Castro refused to sell to a CI. Officer Fox obtained a search warrant and the executed the raid.

At the time of the raid, three pit bulls, Castro and Chris Bullman were in the residence. Castro had several signs warning that dogs were inside. The officers knocked, but according to Castro, entered within second. Castro grabbed one dog and secured it in another room, while the remaining two were cowering in the kitchen which was open partially to the living space. Castro tried to keep the officers from killing the dogs, but Officer Bray shot the two dogs several times. Officers testified that the dogs were behaving in a threatening way, trying to jump a barricade between the two rooms.

Officers cleared the house, seizing plants and money. Castro claimed they damaged his interior cameras as there was no video. Castro was permitted to secure the remaining dog before the search was conducted. Castro was charged but upon proving he had the license, the charges were dismissed.

At the same time, Alonzo Bullman was stopped outside, as he was lingering in the vicinity. Nothing was found in his vehicle, which was searched.

[111] 565 U.S. 400 (2012).

Alonzo Bullman filed suit concerning the search, and Castro (and another man) filed suit relating to the death of the dogs. Officers Bray and Hurd were denied summary judgment, and appealed.

ISSUE: Must dogs present an imminent threat in order to be shot?

HOLDING: Yes.

DISCUSSION: With respect to the stop, the Sixth Circuit held there was enough to warrant a Terry stop of Bullman's vehicle, given the concerns that Bullman might be planning to interfere with the raid. The search, however, was not unsupported because it was based on the alleged odor of marijuana they claimed was emanating from the car.

With respect to the shooting of the dogs, the Court found no indicated that either dog presented any imminent threat to the officers. The Sixth Circuit examined Brown v. Battle Creek Police Dep't and held that the officers were physically separated by a barricade and were allegedly cowering in fear.[112] Even though one of the dogs was unlicensed, a violation under state law, such violation was insufficient to justify the shooting. The Sixth Circuit affirmed the district court's decision to deny qualified immunity with respect to the shooting of the dogs.

42 U.S.C. §1983 – INTERROGATION

Peterson v. Heymes, 931 F.3d 546 (6th Cir. 2019)

FACTS: In the mid-1990s, Montgomery was raped and murdered in her Michigan home. Twenty-two months later, inmates identified Peterson as the perpetrator. Peterson was in custody on an unrelated matter, claiming he had made an incriminating statement about the earlier crime. Peterson claimed that he was mentally ill and had suffered cognitive issues due to brain damage.

Det. Somers opened an investigation. Peterson denied any involvement, but after nine interrogations and several polygraphs, conducted by Somers, Heymes and Uribe, all with Kalaska County, Peterson confessed. A week later, DNA results indicated Peterson was not the source of the rape DNA. A shirt also bore source but could not be tested at the time. Charges were brought on a multiple assailant theory.

> Peterson alleges that the officers took advantage of his mental state, fed him information to provide in his statements, and induced his confession with false promises, including that he would be sent to a psychiatric hospital instead of prison. He also claims that the officers continued to mislead him about the consequences of his confession in order to pressure him into maintaining his statement even after he attempted to recant it.

[112] 844 F.3d 556 (6th Cir. 2016).

Suppression was denied as the district court found his confession voluntary and admissible. Peterson was convicted. In 2013, the shirt sample was tested using new technology and Peterson was found not to have been the source. Peterson's conviction was vacated and all charges were dismissed. In 2015, Peterson brought suit under 42 U.S.C. §1983 against the officers and the city. The district court denied qualified immunity for the officers. This appeal followed.

ISSUE: If an interrogation rises to the level of a coercion, may the confession obtained be suppressed?

HOLDING: Yes.

DISCUSSION: The Sixth Circuit examined the voluntariness of Peteron's confession.

> The Fifth Amendment, which protects against self-incrimination, requires confessions to be given freely and voluntarily.[113] This right is applicable to the states through the Fourteenth Amendment. A Fifth Amendment violation occurs only if the coerced confession is used against the defendant at trial.[114] In determining whether a confession is compelled, the constitutional inquiry is whether "a defendant's will was overborne in a particular case," considering "the totality of all the surrounding circumstances."[115] Thus, the Supreme Court has acknowledged that "coercion can be mental as well as physical."[116] For Fourteenth Amendment Due Process claims, the Sixth Circuit considers whether the defendant's conduct "shocks the conscience." This is a higher standard for "deprivations of liberty caused by the most egregious conduct."
>
> Peterson maintains that Defendants Somers and Uribe knew but ignored the fact that Peterson was brain-damaged, emotionally unstable, depressed, and suicidal at the time of his interrogation. In addition, Peterson, who was twenty-two years old at the time, contends that Somers and Uribe fed him information to provide in his statements, and promised he would be sent to a psychiatric hospital instead of prison if he confessed. Although the right against self-incrimination "does not mandate that the police forgo all questioning," considering the totality of the circumstances and taking Peterson's allegations as true at this stage, Peterson's assertions are enough to show that Somers and Uribe's conduct could have amounted to a violation of the Fifth and Fourteenth Amendments. Thus, Peterson has met the requirements to overcome Somers and

[113] Malloy v. Hogan, 378 U.S. 1 (1964) (citing Bram v. U.S., 168 U.S. 532 (1897)).
[114] Chavez v. Martinez, 538 U.S. 760 (2003).
[115] Schneckloth v. Bustamonte, 412 U.S. 218 (1973) (noting that the U.S. Supreme Court has taken into account the age, education, and intelligence of the accused, length of detention, repeated or prolonged nature of questioning, physical punishment, and psychological impact on the accused); U.S. v. Alsante, 812 F.3d 544 (6th Cir. 2016).
[116] Blackburn v. Alabama, 361 U.S. 199 (1960); see also Culombe v. Connecticut, 367 U.S. 568, (1961) (finding a cognitively impaired man's confession was coerced and improperly admitted at trial where officers pressured his wife and children to coax him into confessing).

Uribe's qualified immunity defense with respect to his claim under the Fifth and Fourteenth Amendments (Count I).

The Sixth Circuit held that the actions of Somers and Uribe, working together, constituted conspiracy, making qualified immunity unavailable. However, another officer who was involved in a tangential manner and operated in good faith in his actions was entitled to qualified immunity.

Mitchell v. MacLaren, 933 F.3d 526 (6th Cir. 2019)

FACTS: On June 21, 2008, Mitchell allegedly killed Jorden. (There was dispute as to who actually committed the homicide, as another man was also involved in the dispute.) Mitchell was arrested a few months later. The morning after the arrest, "Detective Collins took Mitchell out of his cell, interrogated him for thirty minutes without reading him his Miranda rights, and then returned him to his cell. In the afternoon, Collins again removed Mitchell from his cell and again questioned him without Miranda warnings. During this second interrogation, Mitchell told Collins that there had been 'an incident about a gun *before* June 21,'" prompting Collins to ask Mitchell about the night of June 21, when the shooting happened. Mitchell responded that "there was a lot of us who were just hanging around getting ready to go out." When Collins pressed for further details, Mitchell told Collins that he "would tell him what happened," but that Mitchell would need "to start from the beginning so he would understand." "As soon as I said this," according to Mitchell's affidavit, "Detective Collins stopped me." Collins then took Mitchell upstairs to an interrogation room to be Mirandized and video-recorded.

Collins, however, stated he spoke only briefly with Mitchell and he knew Mitchell was involved in a homicide from another witness. Once upstairs, he provided Mitchell a document explaining his Miranda rights. At that pointed, Mitchell asked a few questions about his rights and then made several admission, but claimed the other man actually shot Jorden. Mitchell's motion to suppress his statements was denied, he was convicted of Murder (and felony murder) and appealed.

ISSUE: Does an inadvertent failure to give Miranda require suppression?

HOLDING: No, as a rule.

DISCUSSON: Mitchell argued that the detective's statement as to when he was entitled to an attorney (during questioning versus in court) was misleading. The Court looked to Duckworth v. Eagan which upheld a warning that included the statement ""we have no way of giving you a lawyer, but one will be appointed for you, if you wish, *if and when you go to court*."[117] The Court had stated "Miranda does not require that attorneys be producible on call, but only that the suspect be informed, as here, that he has the right to an attorney before and during

[117] 492 U.S. 195 (1989).

questioning, and that an attorney would be appointed for him if he could not afford one." The Court agreed that the warnings were sufficient.

The Court also looked at Mitchell's argument that he was "only advised … of his Miranda rights 'mid-stream.'" The Court noted

> To understand the applicable Supreme Court case law, we must first consider Oregon v. Elstad.[118] In Elstad, the police went to the suspect's house to take him into custody on a charge of burglary. Before the arrest, one officer spoke with the suspect's mother while the other officer joined the suspect in the living room, where the officer said he "felt" the suspect was involved in a burglary. The suspect said, "Yes, I was there." Later, at the station house, the suspect was given Miranda warnings, and he made a full confession.
>
> The Elstad Court reasoned that "a simple failure to administer the [Miranda] warnings, unaccompanied by any actual coercion or other circumstances calculated to undermine the suspect's ability to exercise his free will," does not automatically "taint[] the investigatory process." "[T]here is no warrant for presuming coercive effect where the suspect's initial inculpatory statement, though technically in violation of Miranda, was voluntary. The relevant inquiry is whether, in fact, the second [i.e., the Mirandized] statement was also voluntarily made.". "[A] suspect who has once responded to unwarned [i.e., un-Mirandized] yet uncoercive questioning is not thereby disabled from waiving his rights and confessing after he has been given the requisite Miranda warnings." Id.
>
> After Elstad came Seibert, upon which Mitchell relies. There, police questioning led to the defendant's confession to a crime, after which she was given a 20-minute break.). Following the break, the officer turned on the tape recorder and only then gave the defendant her Miranda warnings. When the defendant resisted making a statement, the officer reminded her that she had already admitted involvement in the crime; the defendant then confessed post-warning. In a fractured decision, the Supreme Court held that the post-warning confession was inadmissible.
>
> Elstad was distinguished based on the following factors: "[1] the completeness and detail of the questions and answers in the first round of interrogation, [2] the overlapping content of the two statements, [3] the timing and setting of the first and the second, [4] the continuity of police personnel, and [5] the degree to which the interrogator's questions treated the second round as continuous with the first." On the facts of Seibert, the Court determined, these factors dictated reversal "[b]ecause the question-first tactic effectively threatens to thwart Miranda's purpose of reducing the risk that a coerced confession would be admitted, and because the facts here do not reasonably support a conclusion that the warnings given could have served their purpose."

[118] 470 U.S. 298 (1985).

The Sixth Circuit held that Mitchell did not admit any wrongdoing during the earliest questioning.

The conviction was affirmed.

SUSPECT IDENTIFICATION

U.S. v. Lett, 782 Fed. App. 429 (6th Cir. 2019)

FACTS: In 2006, Lett and two friends attended a gun show in Berea, Ohio. Lett was a convicted felon and could not purchase a firearm "so he stole one instead." Fortunately, the vendor quickly realized a handgun was missing from his table. While he was making a report, Lett approached and stole a different gun—picking it up off the table and walking away. Fortunately, the vendor's son, who was at a neighboring table, saw Lett, confronted him, and recovered the gun. Lett and a "partner in crime" stole a third gun later that day, using the same method, with one distracting the vendor while the other stole the gun. That vendor also reported the theft and "that report made its way to an off-duty officer who was working security." The officer spotted Lett and knew he was involved in the prior situations.

Armed with this knowledge, the officer tried to stop Lett. But Lett refused to stop; he said he had not done anything wrong and kept on walking. So the officer physically restrained him. Then three or four more vendors arrived and identified Lett as one of the thieves. Lett later provided his identification and as the officer verified its accuracy, he learned that Lett had several active arrest warrants. At that point, federal agents who were also at the show stepped in and took Lett to a private area for questioning.

At the same time, one of his accomplices had left the show and went into a nearby hospital. Since the accomplice was believed to be armed, the hospital went into lockdown. "One agent took Lett's picture with a cellphone, showed the picture to two vendors, and asked them if the picture depicted one of the men they had witnessed stealing guns. The agent did the same with drivers-license photographs of whom he believed were the other suspects—including the one who had entered the hospital. The vendors confirmed that Lett and the others were the ones who had stolen multiple guns."

Lett was arrested and charged with being a convicted felon in possession and with possessing a stolen firearm. Lett moved for suppression, arguing initially a lack of reasonable suspicion to stop, and that showing the photos violated due process by suggesting he was the suspect. Suppression was denied and he was convicted. He then appealed.

ISSUE: Is a cell phone identification proper?

HOLDING: Yes.

DISCUSSION: The Sixth Circuit wrote:

> If bringing a knife to a gun fight is a supremely bad idea, stealing a gun from a gun show is not far behind it. When defendant Anthony Lett tested his luck by attempting the latter, it left him with two federal charges and—after a jury trial—two federal convictions.

With respect to the stop, several eyewitnesses identified Lett as one of the men who had stolen guns. That alone was enough to justify a stop based on reasonable suspicion.

With respect to the photo identification process, Lett claimed it was "highly suggestive," but "never explains *why* that was so." Even though the "agent never used a blind administrator (someone who does not know the suspect's identity) and never circled back with a lineup of multiple photographs or actual people," that does not make it improper. The Sixth Circuit noted that "everything about the identifications suggests that the vendors were correct. As the government points out, both venders interacted with Lett that day, speaking with him as he stood just a few feet away. He stole a gun in front of one of them, and he was speaking with the other as his accomplice stole a different gun—events that were sure to stick out from the run-of-the-mill interactions the vendors had that day. And they identified his photograph the day of the crimes, not weeks or months later."

Lett's convictions were affirmed.

INTERROGATION

U.S. v. Clayton, 937 F.3d 630 (6th Cir. 2019)

FACTS: Clayton became involved with J.P., a drug addicted juvenile female. Clayton gave J.P. drugs in exchange for sex, recorded the sex and shared it on Snapchat. He introduced J.P. to other men and began serving as her pimp, still in exchange for drugs. Eventually, J.P. texted her father and said she feared for her life. J.P.'s father called the Battle Creek (Michigan) PD, and officers raced to the house. The officers found J.P. inside, along with drug evidence and guns. Clayton and Robbins, another man in the house, were arrested. Hernandez was arrested later.

Before questioning, Clayton was advised of his Miranda rights. However, the officer misread one of the warnings, omitting the clause that said he could have an attorney with him during questioning. Clayton refused to sign the form, but indicated verbally he understood his rights. In two separate questionings, Clayton provided no material information.

The next day, he was questioned again, and was asked by Agent Williams (Homeland Security) if he wanted to talk. Williams indicated he understood Clayton had already been advised of his Miranda rights. Clayton agreed to talk and admitted to the sex, stating he

thought J.P. was 17. Clayton provided his cellphone password. J.P. was also interviewed at length.

Williams obtained search warrants for Clayton's phone, Facebook and Snapchat accounts. Williams found video of three different victims, although with photos of drugs and guns, along with text messages discussing trafficking J.P.

Clayton was charged with numerous offenses under federal law. His motion to suppress was denied. At trial, evidence was presented primarily about the sex trafficking, involving several victims. Clayton was convicted and appealed.

ISSUE: May a faulty Miranda still be sufficient?

HOLDING: Yes.

DISCUSSION: In reviewing the Miranda issue, the Sixth Circuit acknowledged that the phrase concerning having an attorney present during questioning was omitted, but the full warning was on the written form provided to Clayton. It was unclear, however, whether Clayton, who refused to sign the form, actually read it. The Sixth Circuit held that the verbal warning, although deficient, was sufficient to convey Miranda to him. All that was necessary is that the warning "touch all the bases" to convey the rights. Florida v. Powell had a similar deficiency and the Supreme Court agreed the provided warning was enough to properly convey the rights.[119] Both warnings "made clear the seminal right at stake – 'the right to talk to a lawyer.'" The warning given to Clayton was enough "to communicate 'the same essential message'" as in Powell and, in fact, was more comprehensive.

The Sixth Circuit reiterated that "officers are expected to take the necessary steps to properly Mirandize a suspect." In this case, the officer did not read from the form in his hand, "opting instead to recite the warnings from memory." In this case, "his memory failed him," which left him open to a Fifth Amendment challenge, albeit unsuccessful. "[I]n the world of Miranda, substance controls form. And here, the substance passes constitutional muster."

Clayton's statements were voluntary. He was of normal intelligence and he "had the opportunity to respond freely" to the questioning, a process he had been through before. There was no evidence of coercion. Clayton argued he was "freaking out" and grabbed at the "lifeline" extended to him by Agent Williams. That offer was nothing more than a suggestion of possible leniency for cooperation, "a practice that is generally permissible." This "freaking out" was nothing more than what would be expected in the face of serious charges.

The convictions were affirmed.

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[119] 559 U.S. 50 (2010).

FIRST AMENDMENT

Brindley v. City of Memphis, 934 F.3d 461 (6th Cir. 2019)

FACTS: In 2017, a Planned Parenthood clinic opened next to the Virginia Run Cove, a collection of commercial properties in Memphis. The Cove exists as a two lane street that provides access to the businesses, with no sidewalks but manicured berms lining the street. It is directly off a major public thoroughfare. On May 1, 2017, Brindley arrived at the clinic to promote a pro-life message. A Planned Parenthood employee told him that the street was private and he had to leave. Eventually, Memphis police arrived and Lt. Barham confirmed that the street was private. He ordered Brindley to relocate to the main street, several hundred feet away. Brindley left.

Brindley then filed suit against the City of Memphis and Lt. Barham, for violations of the First Amendment, namely excluding him from a traditional public forum. Brindley demanded access to the Cove and requested and injunction. The district court denied the injunction and this appeal followed.

ISSUE: May a private road still be considered public for First Amendment purposes?

HOLDING: Yes.

DISCUSSION: All parties agreed that Brindley was engaging in protected speech, so the issue turned on "the Cove's forum classification." Public streets had long been considered the "archetype of a traditional public forum."[120] If a privately owned street is physically indistinguishable from a public street and functions like a public street, then it is a traditional public forum.[121] Here, the Cove is physically unable to be separated from a public street, this street provides free access to businesses, and nothing would suggest a private ownership. Further, documents suggested it had been dedicated to public use.

Since the street was a public place, any restriction must be narrowly drawn to serve a compelling state interest. The Sixth Circuit found no reason to believe any restriction was necessary and reversed the denial of the injunction. The case was remanded.

Sensabaugh v. Halliburton, 937 F.3d 621 (6th Cir. 2019)(Certiorari pending 12/16/2019)

FACTS: Sensabaugh was the head football coach at David Crockett High School in Tennessee. He paid a visit to a local elementary school in the same district, a visit unrelated to his job, and posted photos on his Facebook page of a classroom and students, decrying the condition of the school. The principal of that school contacted the district, concerned

[120] Frisby v. Schultz, 487 U.S. 474 (1988).
[121] Denver Area Educ. Telecommunications Consortium, Inc. v. FCC, 518 U.S. 727 (1996).

about the photos showing the children. Halliburton, the Director of Schools, believed it might violate FERPA and unsuccessfully tried to contact Sensabaugh. She communicated with him via text to remove the photos, but he did not do so.

Two days later Sensabaugh posted again, discussing concerns about prisoners working in the school. Halliburton texted him, and he called her, talking to both Halliburton and Principal Wright. The phone call became contentious and Sensabaugh refused to remove the post, yelling at the two administrators. Sensabaugh characterized it differently, claiming that his employment was threatened. Halliburton sought legal counsel on firing Sensabaugh, and Sensabaugh was given a Letter of Guidance. When this document was given to him, Sensabaugh became belligerent and brought up allegations that a student had brought a gun to school and that another coach was "high." Sensabaugh later denied these allegations.

Wright contacted the county attorney and reported that she believed Sensabaugh was a threat to the school. Wright wanted to fire him, but instead, a Letter of Reprimand was issued, along with a suspension pending possible termination. Following a lengthy investigation, many of the allegations were sustained. During that time, Sensabaugh filed suit against Halliburton and Wright. Termination was recommended and he was fired in May 2018. He amended his lawsuit to include the termination. The district court awarded summary judgment to Halliburton. Sensabaugh appealed.

ISSUE: I**s** a suspension with pay a disciplinary action for protected speech?

HOLDING: No.

DISCUSSION: Sensabaugh argued that Halliburton retaliated against him for his protected speech, the initial Facebook post. The Sixth Circuit determined that the two letters were not adverse actions and there was no causal connection between the posts and his ultimate termination months later. The first letter had no effect on his job as head football coach, and the second letter and suspension with pay was also not an adverse action. While the termination certainly was an adverse action, the termination was not connected to the Facebook posts. (In fact, although Halliburton expressed concern on the posts, she did not ask him to remove them.)

The district court was affirmed.

MISCELLAENOUS

U.S. v. Catching, 2019 WL 4164769 (6th Cir. 2019)

FACTS: During Catching's supervised release following incarceration for drug offenses, he was "forbidden from possessing controlled substances or committing any

crimes, and he was required to submit to periodic drug testing." In 2018, within the supervision period, he was the subject of two traffic stops (on the same day) in Harrodsburg. His companion, Whitehead, told police she had sought help from Catching after a domestic dispute and he picked her up in a rental vehicle. (Nothing was indicated as to who rented that vehicle.) The first stop was for speeding and Officer Wren confirmed Catching's parolee status. A K9 alerted on marijuana in the vehicle, and Catching told the officer that Whitehead had brought it into the vehicle. There was also $2,100 in cash in the console and Catching had almost $300 on his person. Catching was arrested.

Whitehead took the vehicle to Danville. Upon Catching's release later that same day, Catching met her and the two were driving back to Lexington. On the way, they were again stopped for speeding. This time Whitehead was driving. The officer smelled marijuana and Whitehead admitted she smoked it in the car earlier. She also explained there was a lot of cash in the car, which she was taking to her father. The officer found the cash but did not seize it, as no drugs were found in the vehicle. Whitehead was given a warning.

Soon afterward, Catching was accused of violating the terms of his supervised release by trafficking in marijuana. At a hearing, there was debate as to who owned the marijuana. Whitehead "took inconsistent positions" about whether the marijuana belonged to her. There was also discussion as to whether 22 grams, as was found, was personal use or trafficking, although Whitehead testified she regularly possessed that amount. Catching's supervised release was revoked and he appealed.

ISSUE: Is non-exclusive control over a vehicle enough to satisfy constructive possession?

HOLDING: No.

DISCUSSION: The underlying Kentucky charge was examined and the appellate court held that the charge included both actual and constructive possession. Certainly the drugs were within Catching's "dominion and control," but courts had found "that the fact that a defendant drove a vehicle in which contraband was found is insufficient, by itself, to establish constructive possession."

Other factors that Kentucky courts have considered in the context of constructive possession of drugs found in a vehicle include whether "the [contraband] was found in an area in the car next to where [the defendant] had previously been sitting, i.e., in an area within his immediate control," whether other occupants of the vehicle "disavowed possession of the drugs and claimed that they belonged to [the defendant]," whether the defendant admitted he had been using drugs, and whether officers had received complaints

that the defendant was trafficking in drugs.[122] Again, each of these factors provides some nexus between the defendant and the drugs beyond the defendant's mere presence in the vehicle.

In this case, Catching had, at most, "non-exclusive control" over the vehicle, as nothing indicated he actually even rented it. The contraband was found in the back seat, not under the driver seat.[123] The same applied to the cash, mere proximity was not enough.

Lacking any nexus, the Sixth Circuit held that he could not have been found to constructively possess the marijuana. The revocation of his release was reversed.

[122] Burnett v. Com. , 31 S.W.3d 878 (Ky. 2000), overruled on other grounds by Travis v. Com., 327 S.W.3d 456 (Ky. 2010); Paul v. Com., 765 S.W.2d 24 (Ky. 1988); McLevain v. Com., No. 2004-CA-001510-MR, 2005 WL 1846349 (Ky. Ct. App. Aug. 5, 2005).
[123] U.S. v. Bailey, 553 F.3d 940 (6th Cir. 2009).

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