

2018

Second Quarter

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KENTUCKY

PENAL CODE

PENAL CODE – KRS 503 – FORCE

Com. v. Bennett, 553 S.W.3d 268 (Ky. App. 2018)

FACTS: Bennett and Deutsch began arguing at a birthday party. Bennett left and then returned at Deutsch’s request. The altercation moved outside and other family members became involved. At one point Turner rushed Bennett and shoved him against the car, while punching him. Bennett fired, injuring Deutsch slightly. Initially, Bennett was indicted for Assault and Wanton Endangerment, but Bennett claimed immunity from prosecution claiming self-defense under KRS 503.085.

After several proceedings (before two different judges), the Court set an evidentiary hearing. The Commonwealth sought a writ of prohibition from the Court of Appeals, which the Court denied. However, the Kentucky Supreme Court reversed and prohibited the trial court from setting the evidentiary hearing holding that the trial court is limited only to determining immunity based upon the discovery of record. On remand, the trial court heard Bennett’s motion to dismiss, ultimately found that Bennett acted in self-defense, granted immunity from prosecution and dismissed the case. The Commonwealth appealed to the Court of Appeals.

ISSUE: Who has the burden of proof when an individual claims immunity under self-defense?

HOLDING: The prosecution.

DISCUSSION: The Court noted the prosecution has the burden of proving that the force used was not legally justified. The Commonwealth argued that it proved the force was unlawful under the probable cause standard and that immunity was improperly granted. However, the Court determined that the trial court relied on Bennett to prove justification for self-defense, rather

than the proper standard, whether there was probable cause to find his use of deadly force was unlawful. A simple assertion of lawfulness is not enough. The Court noted, as well, that the statutes that relate “to the unlawful use of force are distinct from the statutes allowing for justification of self-defense.”

The Court held that even if a subject acts in self-defense, immunity does not apply when the individual is acting wantonly or recklessly, or if they create a risk to innocent people. Under the “imperfect self-defense” doctrine, if that use of force is unreasonable or harms a third party, the immunity defense does not apply.

The Court ruled that the trial court should have decided if Bennett’s use of force was unlawful, which would include innocent victims. Using the same video depended upon by both sides, the Court noted that the evidence was unclear and conflicting.

The court remanded the case and ordered the trial court to reinstate the charges against Bennett.

PENAL CODE – KRS 508 - ASSAULT

Thompson v. Com., 2018 WL 1687692 (Ky. App. 2018)

FACTS: On July 14, 2015, Deputy Smith (Fulton County) responded to a call at Bing’s home. Bing met him at the front door and invited him inside. He identified Thompson as an intoxicated individual who refused to leave and the Deputy told Thompson to step outside. Thompson responded “just come in and arrest me.” When told he was not under arrest, he agreed to go outside and they stood in the driveway near the deputy’s cruiser. Thompson was frisked and ultimately an altercation erupted between Thompson and three deputies; during that fight, Thompson struck Deputy Fulcher with his handcuffed hands.

Thompson was charged with Assault 3rd, Criminal Mischief, Disorderly Conduct, Alcohol Intoxication, Giving a False Name, Criminal Trespass and Resisting Arrest. A jury found Thompson guilty of all offenses except Trespass, which the judge had already dismissed. Thompson appealed.

ISSUE: Is waving one’s arms, and striking someone, an intentional assault?

HOLDING: Yes

DISCUSSION: Thompson argued that his actions did not occur in a public place, but the Court quickly agreed that a driveway, although on private property, qualified as a public place under both disorderly conduct and AI.

With respect to the Assault charge, Thompson argued he did not act intentionally in striking the deputy. The Court held, however, that Thompson’s actions did qualify as third-degree assault because he intentionally swung his arms, even if Thompson did not intend specifically to strike

the deputy. The Court also held that it was proper to admit the testimony of the other deputies as to Thompson's mental state at the time under KRE 701, as their "opinions were based upon Thompson's actions and emotions as manifested by Thompson." The resisting arrest conviction was reversed based on an error in the jury instructions.

With respect to the false name charge, there was no indication the officers warned him about doing so as required by KRS 523.110. Accordingly, he was entitled to a directed verdict on that charge.

PENAL CODE – KRS 508 - WANTON ENDANGERMENT

Calhoun v. Com., 2018 WL 2988107 (Ky. 2018)

FACTS: During a complicated altercation involving multiple parties, someone outside the subject residence fired a gun multiple times through a closed door inside the residence. One of those inside was injured as a result of being shot and falling down stairs. Another died. Calhoun was charged with, among other offenses, wanton murder and wanton endangerment. Calhoun was convicted and appealed.

ISSUE: Is firing a weapon at an occupied home wanton conduct?

HOLDING: Yes

DISCUSSION: The Court agreed that "firing a weapon in the immediate vicinity of others is the prototype of first degree wanton endangerment. This would include the firing of weapons into occupied vehicles or buildings." In this case, Calhoun knew there were multiple subjects inside the house. The Court upheld the verdict for Wanton Endangerment, Assault and Homicide.

PENAL CODE – KRS 524 – TAMPERING WITH PHYSICAL EVIDENCE

Chinn v. Com., 2018 WL 3202819 (Ky. App. 2018)

FACTS: On November 11, 2014, Chinn was standing on a Louisville porch when Daughterty rolled up. Chinn owed Daughterty a substantial amount of money. Eventually, Daughterty drew a gun and Chinn got it away from him. Chinn then shot Daughterty. Daughterty was able to get the gun back and Chinn fled, ultimately leading to a police standoff. While barricaded, Chinn washed his clothes.

Chinn was acquitted on most charges, including attempted murder, but was convicted of tampering with physical evidence. Because of his PFO status, he received a lengthy sentence and appealed.

ISSUE: Is washing blood-stained clothing tampering?

HOLDING: Yes

DISCUSSION: The Court determined that the instructions to the jury led to an unfair result, particularly the trial court’s instruction on physical evidence. Clothing was a physical object and that was a term of common usage. Further, he argued that he can’t be charged with tampering with evidence for a crime that “never occurred” – as he was acquitted of any crimes connected to the actual shooting. The Court held, however, that washing the clothing impaired the ability to use it as evidence.

The Court affirmed Chinn’s conviction.

PENAL CODE – KRS 527 – FIREARMS

Sykes v. Com., 550 S.W.3d 60 (Ky. App. 2018)

FACTS: On May 7, 2016, Lexington officers were dispatched to a shots fired call. Upon arrival, the officers approached a vehicle that was parked and running on the side of the road. When an officer approached, Sykes rolled down the window. Thereafter, the officers smelled marijuana. When Sykes emerged from the vehicle and raised his arms as ordered, the officers spotted a concealed firearm in his waistband. Marijuana, cash and another firearm were located in the vehicle.

Among other charges, Sykes was charged with carrying a concealed firearm. He was convicted and appealed.

ISSUE: Is a gun revealed only when someone raises their arms concealed for purposes of Kentucky law?

HOLDING: Yes

DISCUSSION: The Court reviewed the issues of “concealed,” looking to Vega v. Com.¹ It acknowledged the statute did not provide a precise definition, but that case law did. The Court noted that a weapon is concealed when it is not “observed by persons making ordinary contact with him in associations such as are common in the everyday walks of life.”² In this case, the officers did not see the weapon until he raised his arms, causing his shirt to rise as well. That was fully described in testimony to the jury.

The Court affirmed his conviction.

¹ 435 S.W.3d 621 (Ky. 2013).

² [Avery v. Com., 223 Ky. 248, 3 S.W.2d 624, 626 (1928)].

NON-PENAL CODE OFFENSES

CONTROLLED SUBSTANCES

McArthur v. Com., 2018 WL 2460359 (Ky. App. 2018)

FACTS: In May 2014, McArthur was found unresponsive in her home in Southgate. She was transported to a hospital for a suspected heroin overdose and an officer had observed a syringe with heroin in her presence. She was charged with possession of the drug and of the syringe. Approximately 2 months later, KRS 218A.133 came into effect, and she filed for dismissal of the possession charges, arguing that KRS 218A.133 should be applied retroactively. When her motion to dismiss was denied, she entered a conditional guilty plea and appealed.

ISSUE: Is 218A.133 retroactive?

HOLDING: Yes

DISCUSSION: The Court held that KRS 218A.133 was a procedural change in the law and as such, should be applied to cases that are still in process. The Court agreed the case should have been dismissed and remanded it back to the Circuit Court.

DOMESTIC VIOLENCE

Dunn v. Thacker, 546 S.W.3d 576 (Ky. App. 2018)

FACTS: Thacker and Dunn shared a child in Powell County. Thacker filed a petition for a DVO on behalf of the child, who lived with Dunn and her boyfriend. Dunn advised Thacker via text that the boyfriend had physically abused the child. Dunn stated she had sent the text, but contended she was trying to force a reconciliation with Thacker. The court was “unswayed” by her argument and issued a DVO against Dunn, who had allowed the boyfriend to abuse the child. (Dunn admitted she intended to marry the boyfriend.)

The trial court awarded temporary custody to Thacker, with visitation with Dunn to be supervised by the grandparents. Dunn appealed, arguing that the alleged domestic violence was committed by the boyfriend and not her, yet the order was directed to her.

ISSUE: May a DVO be issued against a parent who allows another to harm their child?

HOLDING: Yes

DISCUSSION: The Court agreed that “Dunn’s very inaction in the face of harm inflicted on her child ... is tantamount to abuse.” In Lane v. Com., the Kentucky Supreme Court had carved out a

“new interpretation of parental responsibility and accountability for children.”³ In a situation similar to that involving Dunn, the abuse was against a child by a domestic companion, and the Court agreed that a parent had a duty to protect the child in such situations. KRS 620.050(1) requires reporting of abuse by “any person” which of course would include the actual parents of the child.

Further, clearly, she was aware of the abuse against the child, as evidenced by the texts sent to Thacker. Although she claimed that she lied in those texts, “when someone appears before a court and admits to lying while insisting that she is now telling the truth with zero corroborating evidence, a court would rightfully be suspicious of such testimony.”

The court affirmed the issuance of the DVO.

DUI

Com. v. Crosby / Spellman, 2018 WL 3193074 (Ky. App. 2018)

FACTS: On December 8, 2015, Sgt. Brown (Oldham County PD) approved a traffic checkpoint for the evening of December 11. No advance notice was provided to the media and no signs were posted as to an approaching checkpoint. There was no written policy on checkpoints. A number of uniformed officers assembled to do the checkpoint. Sgt. Brown briefed the officers on the process. Most of the vehicles were lighted to provide notice and safety.

Spellman approached in his vehicle. Officer Flynn smelled alcohol and directed Spellman into the adjacent parking lot, as was the plan for such situations. Spellman did not perform well on FSTs and admitted to consuming “two beers.” He was arrested and transported to the jail by Officer Lay, who watched in in the rear view mirror en route. He started the observation period about 12 miles from the jail, and directed Spellman not to eat, drink, etc. The officer sat with Spellman in the cruiser at the jail, typing the citation. He then gave Spellman the implied consent form, and Spellman submitted to the Intoxilyzer test. Spellman denied having brought up anything from his stomach and the test was performed. He was charged with DUI, refused an attorney and did not seek an independent test.

Spellman sought suppression of the checkpoint and the BAC, arguing the latter’s observation period did not occur at the test location. At the hearing, it was undisputed that the entire 20 minutes did not occur at the jail. The district court ruled against the prosecution after finding that the checkpoint did not accord with Buchanon and that the BAC was improperly performed. The Circuit Court affirmed on appeal, and the Commonwealth appealed to the Court of Appeals.

ISSUE: Must the entire observation period in a DUI take place where the instrument is actually located?

³ Lane v. Com., 956 S.W.2d 874 (Ky. 1997).

HOLDING: Yes.

DISCUSSION: The Court noted that at the time, a written policy, warning signs and advance media notice was recommended, but not mandatory. However, it agreed, the lack of these items confirmed the proper procedures were not in place.⁴

With respect to the BAC, the Court agreed that observation in the cruiser did not satisfy the requirements and that the entire observation must occur where the instrument is located. Although he was in Lay's custody, Lay was driving down a dark, rural road, presumably with the interior car lights off. At the jail, the officer was focused on writing the citation as well. As such, anything could have happened in the cruiser that might affect the results.

The Court affirmed the conviction.

Com. v. Brown, 2018 WL 2271149 (Ky. App 2018)

FACTS: On December 26, 2014, just outside Hardinsburg, Brown lost control of her vehicle and hit a tree. Brown was seriously injured and her passenger, McCarty, was killed. The first arriving paramedic found Brown talking on her cell phone. During care, he heard her admit to having been drinking. She was extricated and airlifted to the hospital.

Officer Magness and Trooper Drane were present McCarty was declared deceased. The latter summoned Trooper Adams and sent him to meet Brown at the hospital, to obtain a blood sample. Adams was present when the helicopter arrived and waited while she was stabilized. He detected alcohol on Brown's breath and person. She was still on a backboard when he talked to her and read her the standard KSP implied consent warning. She appeared to understand the warning and consented to the blood test.

The test was taken at 11:46 p.m., the wreck having occurred at 9:07 p.m. The lab later determined that her blood alcohol content was .125. A second sample was drawn at 12:23 for medical purposes, which revealed a blood alcohol content of .164, but it was noted that the hospital's method typically yielded a higher reading. (This result was obtained via subpoena.)

Brown was charged some five months later with Manslaughter 2nd, DUI, and driving without a license. She moved to suppress, arguing both that "KRS 189A.010(1)(a) requires the test to be administered within two hours of the cessation of operation of a motor vehicle and that KRS 189A.105(2)(b) requires a warrant to obtain a blood draw and testing in fatal automobile accidents."

The trial court granted the motion to suppress, finding she did not consent and they did not get a warrant. (There was no proof beyond the Trooper's testimony as to the consent.) However,

⁴ See Com. v. Cox, 491 S.W. 3d 167 (Ky. 2015)

the court ruled that the blood draw was obtained within the time frame. The second draw was tainted by chain of custody and other issues. The Commonwealth appealed.

ISSUE: May an operator of a motor vehicle grant consent to the taking of blood in a DUI prosecution?

HOLDING: Yes.

DISCUSSION: The Court noted that Adams testified that Brown had a significant head injury, did not know the circumstances of the crash and did not even know why Adams was there. There was no medical testimony considering a possible clouding of the ability to think or reason. The trial court, on its own, decided she lacked capacity to consent. However, “Examining Adams’ conduct objectively, rather than from Brown’s subjective position, reveals no error by Adams.” He read her the warning and she indicated her understanding multiple times. The Court agreed that the consent was voluntary.

Further, if express consent is not present, implied consent becomes a factor under KRS 189A.103, creating a presumption that testing is lawful.⁵ “The general rule, established by KRS 189A.103, is that every driver consents by default to such testing by virtue of driving on Kentucky roadway.” This was changed, to some extent, but Birchfield v. North Dakota, but Kentucky’s law differed to some extent from that at bar, in that it enhances existing penalties for refusal, rather than creating a new crime.⁶ The Court disagreed that Birchfield is a factor in Kentucky, as the enhancement is only a factor if the individual is, in fact, convicted.

The Court agreed the initial blood test was properly admitted, and that a warrant was unnecessary as she gave a valid consent. The court looked to Com. v. Morris and agreed that KRS 189A.105 does not apply when the defendant has not yet been charged in a fatality.⁷

The Court reversed the suppression and remanded the case.

SEARCH & SEIZURE

SEARCH & SEIZURE – PLAIN VIEW

Gibson v. Com., 2018 WL 3090436 (Ky. App. 2018)

FACTS: On October 25, 2015, Officer McBride and Sgt. Jarret (Lexington PD) called for assistance, and Officer Rothermund responded. They were working an anonymous tip that “Trisha” was trafficking in Xanax at a local motel. Rothermund and Jarret did a knock and talk. A man and woman (Gibson) were standing in the breezeway. When the officers realized the couple

⁵ Speers v. Com., 828 S.W.2d 638, 640 (Ky. 1992). Helton v. Com., 299 S.W.3d 555, 558 (Ky. 2009) (quoting Com. v. Wirth, 936 S.W.2d 78, 82 (Ky. 1996)).

⁶ ---U.S. ---, 136 S. Ct. 2160 (2016),

⁷ 70 S.W.3d 419 (Ky. 2002).

was heading toward the suspect room, they engaged the pair in conversation at the threshold. Officer Rothermund, however, testified that he could see partially into the room and spotted a pipe and grinder. He stated that although the items were legal, they were still suspicious together. The officer stepped into the room and then saw marijuana residue and smelled burned marijuana.

Officer McBride, in the meantime, had determined the registered guest was Gibson. He joined the other officers at the room and asked for consent to search, which was refused. Officer McBride stated they were going to “seize and freeze” the room pending a search warrant, and frisked the occupants and did a quick sweep. She was charged with possession of a controlled substance and related charges. Gibson was convicted and appealed.

ISSUE: May legal items still be recognized as contraband in a plain view assessment?

HOLDING: Yes.

DISCUSSION: In the suppression hearing, the trial court ruled that the plain view doctrine justified the actions based on the pipe and grinder and agreed that the contraband nature of the items was “immediately apparent” even though the items were independently legal. Both had “known uses related to marijuana use.” The Court agreed with that assessment and that it gave the officers probable cause even without any further investigation.

The Court affirmed her conviction.

SEARCH & SEIZURE – CONSENT

Nalley v. Com., 2018 WL 2176084 (Ky. App. 2018)

FACTS: Bardstown police responded to a complaint of drug trafficking and marijuana cultivation at the Nalley residence. Officers did a knock and talk, and Nalley’s 15-year-old brother answered the door. (He claimed he was 16, however.) The officers stated that the boy (C.N.) permitted them to enter, which the boy denied. Inside, officers found Nalley asleep on the couch. Nalley gave permission for a search both outside and inside, and when the detective outside found grow equipment, Nalley revoked consent and the search ended. When his mother, who owned the property, arrived, the detectives asked for consent to continue the search, which she gave. (The mother later claimed consent was coerced because they officers told her they would tear up her house if she had to get a warrant.) The officers found evidence during the search, and with consent, forced open the door of padlocked storage room. In the storage room, they found a great deal of cash, marijuana, mushrooms, heroin and other items.

Nalley was indicted and moved to suppress. The court denied the motion to suppress, finding the detectives were properly allowed entry. Nalley appealed.

ISSUE: May a teenaged resident give consent for officers to enter?

HOLDING: Yes.

DISCUSSION: Nalley argued that his younger brother did not consent to the search, nor did he have apparent authority to do so. With respect to knock and talk, the officers had a right to approach the front door and knock on the door. Objectively, after listening to a poor quality recording, determined that C.N. did give permission for the officers to enter the home. The Court agreed that a teenaged resident may have apparent authority to allow officers to enter.⁸ The officers made no attempt to search until further permission was gained from the mother. There was no evidence in the recordings that she was “bullied” into giving consent.

Further, consent can be verbal or nonverbal, and C.N. did not object to the entry in any way. In fact, he asked to use their phone to call his mother, and was allowed to do so. Once inside, they saw Nalley and matters progressed. In the recorded conversation, they did not threaten to tear up the house, but did indicate that if they got a search warrant they would “go through everything,” a true statement. As they had sufficient information to get a search warrant, it was inevitable that they would have been able to find to anyway. However, the court held in this case that the mother freely consented to the search.

The court upheld the denial of the suppression motion.

SEARCH & SEIZURE – VEHICLE

SEARCH & SEIZURE – VEHICLE – COLLECTIVE KNOWLEDGE DOCTRINE

Quintero v. Com., 2018 WL 2753333 (Ky. App. 2018)

FACTS: On May 3, 2012, Officer Eden (Lexington PD) received an anonymous tip that Quintero was selling drugs from his residence and from his vehicle. Officer Eden set up surveillance, assisted by Officers Green, Cooper and Thomas. They observed Quintero moving items from one vehicle to another, and then drive off, with music on so loud it could be heard from several hundred feet away. Officer Green reported the loud music to Officer Eden and gave him the vehicle’s direction of travel. Officer Eden, in a marked unit, made a traffic stop. Officer Eden did not hear the loud music but did see that Quintero was talking on his cell phone. Quintero did not pull over immediately, but continued driving very slowly, while on his cell phone. Officer Eden tried to get him to stop with his PA, but Quintero continued until he reached his parking lot. He heard Quintero say that he was being arrested. He produced only a Mexican identification card.

Officer Eden arrested Quintero for his lack of a license, and searched him incident to the arrest. Cash and cocaine were found on his person. He consented to a truck search and \$9,000 in cash

⁸ Perkins v. Com., 237 S.W.3d 215 (Ky. App. 2007).

was found in a can with a false compartment (as the tip had indicated). His girlfriend (now wife) later testified she was on the phone call and did not hear any loud music.

The trial court concluded that Officer Eden did not hear the music, but based his stop on Green's observations. The trial court found the stop invalid – based only on a possible notice ordinance violation. The evidence was suppressed initially. However, on its own, the trial court reversed its ruling, finding that the stop was justified on the basis of information from a fellow officer that had predictive elements. Quintero ultimately was convicted of charges based on the evidence found in the vehicle and appealed.

ISSUE: May officers take action on information provided by another officer?

HOLDING: Yes

DISCUSSION: The Court noted that “Kentucky has adopted the collective knowledge doctrine, which allows one officer to rely on information communicated from a fellow officer to support his decision to make a stop or an arrest.”⁹ The Court reviewed the ordinance in question and it was reasonable to believe that music played as loudly as described would disturb others.

The Court affirmed Quintero's conviction.

SEARCH & SEIZURE – TERRY

Rice v. Com., 2018 WL 3090030 (Ky. App. 2018)

FACTS: On March 4, 2014, Deputy Wagner (Knox County SO) investigated a car in a ditch. Deputy Wagner saw the car was empty and safety off the road. A little later, he returned because of a report of a possibly intoxicated man (Rice) knocking on doors. He found Rice as a passenger in a second vehicle and ordered him to step out of the vehicle. Deputy Wagner spoke to Rice briefly, frisked him and seated him in the back in the vehicle. Deputy Wagner was told by a witness that Rice had been “bragging about drugs” and had a baggie in his sock. He returned back to the vehicle, a truck, which was low enough that Wagner could see inside through the back, and saw Rice pull out of baggie and put it back into his shoe. He asked Rice what he had in his shoe and Rice denied any allegation. He tried a sleight of hand, but Wagner pulled him out and found a baggie with two pills and a green substance. Observing strange contortions on the way to the jail, jail staff searched further and found Rice tried to hide drugs in his rectum.

Rice was charged with promoting contraband and was convicted. He appealed.

ISSUE: May reasonable suspicion allow a case to evolve?

HOLDING: Yes.

⁹ Lamb v. Com., 510 S.W.3d 316 (Ky. 2017).

DISCUSSION: Among other issues, Rice argued that Wagner lacked sufficient reasonable suspicion to take the actions against Rice. The Court agreed that as the situation evolved, each step justified the next step in the investigation. The Court agreed the process was adequate.

The Court also addressed a chain of custody issue as well, in that a deputy checked out the evidence for transport to the lab on one day and delivered it to the lab the next day. The Court refused to find any nefarious purpose in this, without more, and noted that the jury was aware of the issue and could determine what evidentiary weight to give to the issue.

Porter v. Com., 2018 WL 3090464 (Ky. App. 2018)

FACTS: On March 21, 2016, Officer Stafford observed what was believed to be a hand-to-hand transaction involving Porter; Det. Duane targeted Porter and got him to stop. Porter admitted he had a gun and drugs and Duane frisked him. (Others stopped also had guns.) Porter was cooperative and was charged with CCDW. The area was described as high crime, with guns, drug activity and posted with No Trespassing signage. Before Porter was questioned about a gun, he was not given Miranda. He moved for suppression and was denied, with the trial court finding sufficient reasonable suspicion for the Terry stop. He entered a conditional pleas of possession and a CCDW offense. Porter appealed.

ISSUE: May officers stop an individual who is in a high crime area for which there is no trespassing, after observing what is thought to be a drug transaction?

HOLDING: Yes.

DISCUSSION: The Court reviewed the specific facts available to the trial court. It acknowledged that a group of men had been gathered and had scattered when they saw the officers. They had been ordered back, which the Court agreed was a seizure – as they would not have felt free to leave. “Citizens are encouraged to comply with reasonable police directives, and the police should be permitted to expect reasonable compliance with reasonable demands.”¹⁰

However, that did not end the evaluation, as the Court had to determine next if the seizure was constitutional. Reviewing what the officers knew, including that the immediate area was rife with tips of loitering and drug sales, and that individuals were armed, the Court agreed Porter’s seizure and frisk (and that of the others) was based on an articulable reasonable suspicion.¹¹

With respect to Porter’s argument that the detective should have given Miranda before asking him about a gun, the Court agreed (as did the trial court) that while it was a concern, Porter was going to be frisked anyway and the gun would have inevitably been discovered.¹² The same logic applied to the drugs that were found on his person.

¹⁰ Strange v. Com., 269 S.W.3d 847 (Ky. 2008).

¹¹ Illinois v. Wardlow, 528 U.S. 119 (2000).

¹² Dye v. Com., 411 S.W.3d 227 (Ky. 2013).

Porter's conviction was affirmed.

SEARCH & SEIZURE – VEHICLE STOP (K9)

Juarez v. Com., 2018 WL 1787165 (Ky. App. 2018)

FACEBOOK: On January 15, 2015, Trooper Williams (KSP) stopped Juarez's vehicle on I-24, in Lyon County. Ortiz was a passenger. Trooper Ramsey backed up Williams. Juarez produced a Mexican identification card and Williams had Juarez sit in the cruiser while they talked. Trooper Ramsey questioned Ortiz and then walked his dog around the car. The dog alerted. Juarez consented to a search of the vehicle, and marijuana was found hidden inside the shell of a cooler in the back seat. Methamphetamine and cocaine were also found.

Juarez was indicted on trafficking and other charges. He moved to suppress, arguing the stop was delayed for the dog. Trooper Williams testified that when the dog alerted, he was still working on the citation, and when he finished it, he printed it, which could clearly be seen on the video. There was a delay between his apparent completion and printing it, since he was waiting for dispatch to look for additional information on Juarez but he stated that generally, it takes him about ten minutes to complete the citation. The dog's alert could be clearly seen on the dash cam, which recorded the full timeline of the interaction. The trial court had ruled that two activities were occurring concurrently and denied the motion to suppress. Juarez was convicted and appealed.

ISSUE: May a dog sniff be conducted if it does not prolong the stop?

HOLDING: Yes

DISCUSSION: The Court agreed that the question was whether conducting the sniff prolonged the stop. In this case, the held it did not. The Court also held that the evidence indicated Juarez did at least suspect that Ortiz was a drug courier, based on his behavior during the stop – he exhibited extreme nervousness, for example. Ortiz admitted he possessed the cooler, but claimed that he'd been paid to transport the cooler to Nashville. Juarez claimed he'd simply been paid to transport Ortiz from Missouri to Nashville, but their stories were inconsistent. The Court agreed the evidence was sufficient to place at least some responsibility for the cooler's contents on Juarez.

Juarez's conviction was affirmed.

SUSPECT IDENTIFICATION

Fryer v. Com., 2018 WL 2979742 (Ky. 2018)

FACTS: In August 2016, Fryer robbed Fitzgerald in Radcliff. During the crime, Fryer shot Fitzgerald, breaking his femur. Fitzgerald admitted to police he went to the location to buy drugs, but was reluctant to say much as he was in fear for his life. Ultimately he identified Fryer as his assailant, although he knew him under a different last name. Det. Mattingly (Radcliff) showed Fitzgerald a photo array, which included Fryer's photo.

Sgt. Kirkpatrick, who was not familiar with the case, presented the array to Fitzgerald, with Det. Mattingly present. Fitzgerald immediately selected Fryer's photo.

Fryer was ultimately convicted and appealed.

ISSUE: May a photo array include photos that have slightly different compositions?

HOLDING: Yes.

DISCUSSION: Among other issues, Fryer argued that the photo array was flawed. The Court disagreed, finding that Fitzgerald's identification of Fryer by name, albeit an incorrect one, was enough to add him to the array, after the officers were able to connect the incorrect name with Fryer. Although Fryer's photo was a bit different than the others, with the background being darker, that was not significant. Under the factors of Neil v. Biggers¹³, the Court agreed that:

In the present case, Fitzgerald testified that the lighting was sufficient, and that Fryer was close enough to him for him to see clearly. Fryer reached into Fitzgerald's pockets, which supports the contention that Fitzgerald had a good opportunity to look at his assailant. He also stated that he recognized Fryer immediately. Certainly, Fitzgerald had a good opportunity to view Fryer at the time of the crime. Next, considering that Fryer was pointing a gun at Fitzgerald, it is likely that Fitzgerald was paying close attention to Fryer, as opposed to being a "casual observer."¹⁴ As to the third factor, although Fitzgerald did not provide much of a physical description of his assailant, he indicated that he recognized Fryer immediately as he emerged on the night of the shooting. Fitzgerald demonstrated certainty that Fryer was the perpetrator as evidenced by his immediate recognition of Fryer, and his confidence that he would be able to identify his assailant in a photo lineup. Lastly, the shooting occurred in the early morning hours of August 6, 2016, and Fitzgerald identified Fryer in the lineup when it was presented to him a mere day later on August 7, 2016, which is a short window of time between the incident and the identification. Under the totality of the circumstances, Fitzgerald's identification of Fryer was reliable.

The Court determined the photo array was properly done and affirmed the conviction.

¹³ 409 U.S. 188, 199-200 (1972). The Biggers factors include: [1] the opportunity of the witness to view the criminal at the time of the crime; '[2] the witness' degree of attention; [3] the accuracy of the witness' prior description of the criminal; [4] the level of certainty demonstrated by the witness at the confrontation, and [5] the length of time between the crime and the confrontation.

¹⁴ Moore v. Com., 569 S.W.2d 150, 153 (Ky. 1978).

TRIAL PROCEDURE / EVIDENCE

TRIAL PROCEDURE / EVIDENCE – TESTIMONY

Davidson v. Com., 548 S.W.3d 255 (Ky. 2018)

FACTS: Davidson (and Boyd) were charged in 14 separate restaurant robberies (a total of 31 victims) during a six week span in 2013. During the trial, three officers were allowed to testify that the specific robberies they investigated were all related or connected.

Davidson was convicted and appealed.

ISSUE: Should officers testify specifically that a series of crimes are connected?

HOLDING: No.

DISCUSSION: The testimony was admitted under KRE 701, as an opinion rationally based upon an officer's perception. However, the Court noted "none of the officers witnessed the robberies or saw the perpetrators." In this case, the Court agreed the jurors were just as capable of noting the similarities and "connecting the dots" in the cases.

The Court agreed that the officers should not have been allowed to testify as to whether the specific robberies were connected, but that the error was harmless. Davidson's convictions were affirmed.

Walker v. Com., 548 S.W.2d 250 (Ky. 2018)

FACTS: Walker was accused of sexually assaulting Hannah from 2005 through 2011, starting when the child was about 7-8 years old. It started with oral sodomy and sexual abuse, and rape occurred when the child was older. At the time, Walker lived with Hannah and her grandmother (his girlfriend).

During the trial, when Hannah was 17, the prosecutor (with the court's permission) blocked Hannah's view of Walker with a television cart as she was highly distressed while testifying. The defense counsel objected after a minute or two, but the Court overruled the objection.

Ultimately Walker was convicted and appealed.

ISSUE: May the court take steps to protect juvenile witnesses when testifying?

HOLDING: Yes

DISCUSSION: The Court noted that KRS 421.350 applies to child witnesses who are 12 and younger, which was not the case with Hannah. However, KRS 26A.140 also applies, which permits courts to use measures to “accommodate the special needs of children” while balancing the needs of the defendant, including shielding the children from view. The trial court had acknowledged the difficulty in the girl testifying, and that she “had a breakdown,” and noted that Walker could hear the testimony and the shielding was not unduly burdensome.

The Court also addressed a mention by Hannah that she’d been sexually abused by Walker while in Ohio. That crime was of course not part of the Kentucky case. Walker argued it was impermissible prior bad act evidence, under KRE 404(b), but that type of evidence is considered a “well-recognized exception” to that rule.¹⁵ Walker also objected to testimony offered by the investigating officer, that could be considered bolstering and hearsay. The Court agreed the testimony, which noted that the victim’s statement had remained consistent, was improper, but harmless.

Walker’s convictions were affirmed.

Ratliff v. Com., 2018 WL 2979583 (Ky. 2018)

FACTS: During his trial for murder in Hardin County, an investigator mentioned that Ratliff was already under investigation for downloading child pornography. Prior to trial, the defense moved to have no references made to that investigation, but the trial court had noted that his psychiatric records were “replete with references to child pornography” and it would appear as part of his “psychiatric defense.” However, it ordered the Commonwealth not to refer to it in their opening statement and not to call it child pornography (but only illegal), and if it was mentioned unexpectedly, a limited instruction would be provided.

When the detective made the comment, the court dismissed the jury and further explored the situation. It concluded that the defense had asked an “open-ended question” and that the answer was responsive to the question. It provided an admonition to the jury and directed the jury to draw no inferences. Ultimately, Ratliff was convicted and appealed.

ISSUE: May a jury be admonished when improper evidence is presented?

HOLDING: Yes.

DISCUSSION: The Court noted that a jury is presumed to be capable of following an admonition. Ratliff’s conviction was affirmed.

TRIAL PROCEDURE / EVIDENCE – EVIDENCE

Miracle v. Com., 2018 WL 3202821 (Ky. App. 2018)

¹⁵ Harp v. Com., 266 S.W.3d 813 (Ky. 2008).

FACTS: Miracle came up on a traffic roadblock in Bell County. When he spotted it, Miracle immediately shifted into reverse and backed at a high rate of speed. Officers pursued him, he fled the vehicle and ran off into the woods. An officer located Hughett and Miracle, and found a duffel bag with rifles and a handgun. Hughett admitted the guns were his and that he ran off because he was scared. Miracle stated he did not know about those weapons, but was ultimately charged with being in possession of them as he was a convicted felon. (He said he didn't flee the scene, but thought what he was seeing was a car crash.) Hughett corroborated Miracle, saying Miracle did not know what was in the bag, but had actually signed a statement before that was the opposite.

Miracle also testified, and stated Hughett did not tell him what was in the bag, nor did he know Miracle was a convicted felon. The Court noted that Miracle had twice testified that he encountered a roadblock. Miracle was convicted and appealed.

ISSUE: Does running constitute strong circumstantial evidence?

HOLDING: Yes.

DISCUSSION: The Court noted that despite conflicts, there was strong evidence that he knew there were guns, and his attempts at concealment (by running) was strong circumstantial evidence. The trooper's testimony concerning his approach also constituted strong evidence that he was fleeing the scene, rather than simply avoiding a crash.

Miracle also argued that under state law, charging him with possession of both a handgun and a firearm as a convicted felon was improper, as both were under the same law. The Court agreed that Hinchey v. Com., which ruled that possession of two or more firearms in a single transaction, could support only one conviction.¹⁶ Miracle should have only been convicted of a single firearms charge. The Court reversed that conviction and remanded the case back for penalty assessment.

Bush v. Com., 2018 WL 3090440 (Ky. App. 2018)

FACTS: Bush, along with two others, was convicted in the 1992 Frankfort murder of King. During the initial investigation, evidence was discovered that linked the three men with the crime. After long post-conviction proceedings, Bush moved for DNA testing of hair found in King's vehicle, arguing that if it wasn't his, he might not have been involved in the crime. The Court denied his motion and he appealed.

ISSUE: Is the failure to test a particular item that would contain DNA necessarily exculpatory, if the issue of the source of the DNA is essentially immaterial?

¹⁶ 432 S.W.3d 710 (Ky. App. 2014).

HOLDING: No.

DISCUSSION: The Court noted that there was no evidence that would have proved material at trial. The Court noted that the record did not indicate if the evidence was even still in the possession of the Commonwealth, but its response suggested it was not. The Court noted the “reasonable probability analysis” requires that the Court first assume the defendant is correct, but in this case, even if it did not come back to Bush, that would have meant little with respect to the overall prosecution. As such, the court upheld the denial.

The Court denied his other arguments as untimely and upheld his conviction.

Thompson v. Com., 2018 WL 2979952 (Ky. 2018)

FACTS: During Thompson’s trial for assault and criminal abuse, Trooper Allen (KSP) testified about his interview with Thompson regarding the allegations. A recording of the interview was played for the jury. In that recording, the trooper had mentioned that Thompson’s mother was afraid of him and the defense objected, as they would be unable to cross-examine the mother on that issue. The Commonwealth indicated they planned to put Thompson’s mother on the stand and she would be available for cross-examination. The Commonwealth also indicated it would attempt to stop the recording before the statement was mentioned. However, when it came up, the Commonwealth was not able to cut off the recording quickly enough and at least a mention was heard by the jury. However, Thompson’s mother did testify as to her fear as well and the jury was admonished to not consider anything said by the trooper in the statement as evidence.

Thompson was convicted and appealed.

ISSUE: May improper hearsay testimony be validated if the witness quoted actually testifies?

HOLDING: Yes

DISCUSSION: The Court agreed the matter was properly handled by the trial court and upheld the conviction for assault. (The matter was remanded to the trial court for jury instruction issues.)

CIVIL LITIGATION

Browder v. Fentress, 2018 WL 3202975 (Ky. App. 2018)

FACTS: On June 6, 2010, Deputy Browder (Hardin County SO) was passed by Jessie on I-65 at a high rate of speed. When Jessie did not pull over after the deputy activated his emergency equipment, a high-speed pursuit ensued. The chase took them off the expressway onto Ky

Highway 313, and traveled almost 10 miles, at speeds topping 100 mph. It ended when Jessie ran a red light and crashed in Fentress, killing him.

Fentress's wife, acting as the estate representative, filed suit against Browder, among others, for actions that took place related to the chase. (All other defendants were resolved.) Browder, the estate argued, was negligent in the pursuit and failing to order other officers to block the intersection, Browder filed for summary judgment, arguing that his actions were discretionary and that he was not the proximate cause of Fentress's death. The estate countered that his actions were ministerial, as the sheriff's office had specific, and mandatory, policies for how such a pursuit should be handled. In a deposition, Browder admitted that he knew it was an extreme safety hazard, but that he thought the chase would end before it did. The trial court found that most actions taken during a chase were ministerial, and ruled against Browder on his claim of qualified immunity. Browder appealed.

ISSUE: May an officer be negligent for failing to follow policy in a pursuit?

HOLDING: Yes.

DISCUSSION: The Court noted that qualified immunity "applies only to a public officer or employee's negligent performance of a discretionary act or function." Hence, the critical determination is whether the action was discretionary or ministerial, as the protection does not extend to ministerial acts. The Court looked at the case of Jones v. Lathram, as did the trial court.¹⁷ Further, a similar case ensued in Mattingly v. Mitchell.¹⁸ In which the Court noted, whatever discretion the officer had "was constrained" by the agency's written policies." The Court noted that he "either violated the procedures or he did not." The Court agreed that although at the outset, he may have witnessed the crime of wanton endangerment, as Jessie was speeding down the interstate, the policy itself addressed that issue – once the pursuit started, speeding alone was not enough to continue the pursuit. Further, at the time, the deputy made no attempt to contact a supervisor since at that moment, as the deputy knew, there was no supervisor on duty at all.

The court held that Browder was not entitled to qualified immunity.

SIXTH CIRCUIT

SEARCH & SEIZURE

SEARCH & SEIZURE – SEARCH WARRANT

U.S. v. Kemp, 732 Fed.Appx. 368 (6th Cir. 2018)

¹⁷ 150 S.W.3d 50 (Ky. 2004).

¹⁸ 425 S.W.3d 85 (Ky. App. 2013).

FACTS: An “astue Texas State Trooper” found a large quantity of cocaine in a concealed location in a car stopped in Michigan. That led to a controlled delivery of a substance substituted for the cocaine. During a surveillance, this car and the substance, along with two other vehicles, were followed to a Detroit location. There, three men were arrested from the vehicle (a SUV) which stopped. Other officers followed the third vehicle until it stopped. Kemp (the passenger) and its driver were arrested.

Officers obtained a warrant for another address, identified as the residence of one of the first men arrested. There items were found connected to Kemp, including his passport. All were charged with drugs and conspiracy, along with related charges. Kemp was convicted of attempting to possess with intent to distribute, and appealed.

ISSUE: Must a nexus be shown between criminal activity and the location for which the warrant is sought?

HOLDING: Yes.

DISCUSSION: Kemp argued that the search warrant did not establish a nexus between the criminal activity and the location. The Court held that the specific information outlined in the affidavit made an adequate connection between all the parties involved and the location.

The Court affirmed Kemp’s conviction.

U.S. v. Boyd, 735 Fed.Appx. 202 (6th Cir. 2018)

FACTS: In May 2016, Officer Ham learned from a CI that Boyd was selling drugs out of his Kalamazoo apartment. He did some brief surveillance and observed Boyd enter the apartment. He received additional tips over the subsequent months, and also learned that Boyd was carrying a convicted felon who carried a firearm. Ham recruited a CI who set up a controlled deal. The officers wired the CI and observed the controlled buy of methamphetamine.

Officer Ham sought a search warrant, detailing what he knew and noted that Boyd also had four outstanding warrants. During the subsequent search, a variety of drugs and related items were found. Boyd stated he would be accountable for his actions. Ultimately he was charged under federal law and sought suppression, arguing that some of the statements in the affidavit were false. The Court denied the motion. Boyd took a conditional guilty plea and appealed.

ISSUE: Is an affidavit judged on its adequacy rather than its deficiencies?

HOLDING: Yes

DISCUSSION: The Court noted that the affidavit “contained ample information to establish a fair probability” that drugs would be found in Boyd’s residence. Although the affidavit did not

provide information about the CI's reliability, the affidavit had to be evaluated on its adequacy, not its deficiencies. Further, a CI's reliability could be corroborated by the officer's observations, which further linked the transactions to the apartment.

Further, his assertions that Ham lied was not validated by any preliminary showing of false statements, a requirement to demand a hearing under Franks v. Delaware.¹⁹ The Court agreed that some information was omitted, but there was no indication that was done to mislead the judge nor did it change the probable cause calculus.

The Court affirmed the plea.

SEARCH & SEIZURE – CONSTRUCTIVE POSSESSION

U.S. v. Brown, 737 Fed.Appx. 741 (6th Cir. 2018)(certiorari filed November 26, 2018).

FACTS: In 2015, Columbus officers arrested Brown while responding to an altercation at the home where he lived. In plain view, they spotted cocaine and other items. The officers obtained a warrant and searched the home and found a firearm as well. Brown was a convicted felon. Brown was charged and convicted of possession of cocaine base. He appealed.

ISSUE: May drugs found in a common area be attributed to one of the residents?

HOLDING: Yes.

DISCUSSION: Brown argued that there was inadequate proof of possession of the drugs found in the house. The Court noted that although Brown was not on the lease, he paid the rent and lived there full time. Three others shared the home and common areas. When the police arrived, only Brown and his girlfriend were present, but she was upstairs and semi-passed out. The cocaine was on the coffee table just feet from the front door, along with mail addressed to Brown. Although it was true that he was not the only person with access to the house, that was not the law – the fact that he had access was enough to support the charges.

Brown also argued that the introduction of certain evidence, through a police officer, was expert rather than lay testimony. Although arguably, the testimony was that of an expert, the testimony was offered to prove trafficking, and Brown was not convicted of trafficking, but only simple possession.

The Court affirmed his conviction.

U.S. v. Brown, 888 F.3d 829 (6th Cir. 2018)

¹⁹ 438 U.S. 154 (1978).

FACTS: Jeremy Brown and his girlfriend Kimberly (also with the last name of Brown, but not married), were living apart. Kimberly was living with an aunt when Jeremy showed up and they began an argument. At one point, the two women heard a gunshot and glass breaking. They found a gun between the inner and outer doors, which were both locked, but the outer glass door was broken. The security company called in response to an alarm being triggered. In that call, and in two 911 calls, Kimberly named Jeremy as the person who broke the glass. Officers arrived and observed the gun that belonged to Kimberly, but she reported it had been stolen the year before, with Jeremy having been identified as thief. Because Jeremy was a convicted felon, he was charged and ultimately convicted of having possession of the gun. Jeremy appealed.

ISSUE: Is constructive possession sufficient for a case involving possession of a firearm by a convicted felon?

HOLDING: Yes.

DISCUSSION: The Court agreed that there was no direct evidence as to who had the gun “at any given time.” The Court agreed sufficient circumstantial evidence existed to demonstrate that Jeremy Brown possessed the gun on the day in question and affirmed his conviction.

The Court also held that allowing the telephone call recordings, which referenced domestic violence, was impermissible. Yet, the court agreed it was “res gestae” evidence under Rule 404(b) which was “inextricably intertwined” with the charged offense,” or necessary to understand the entire event. The later two calls referred to a very recent incident. The court determined that the temporal proximity of the call and the ongoing incident did not correlate to the domestic violence that had happened in the past. The other two calls were referring to the “history” between the two. None were intrinsic to the incident to the call, and were not integral or necessary.

The Court determined the improper admission of the phone calls was harmless error and affirmed the conviction.

SEARCH & SEIZURE – CELL PHONE

U.S. v. Sweeney, 891 F.3d 232 (6th Cir. 2018)

FACTS: After serving some years for child sexual abuse, Sweeney was released from prison. He tracked down his 14-year-old daughter, over whom he’d lost parental rights following his conviction, and who had been adopted. He communicated with her via Facebook and text message. The girl shared this information with her adopted parents, who contacted DHS and his parole officer. Sweeney told his parole officer he had a cell phone, which he’d left at the shelter where he lived. DHS seized the telephone and, pursuant to a warrant, searched the media-storage card. Child pornography was found.

Sweeney was charged and convicted of child pornography and related offenses. He appealed.

FACTS: May probation and parole, which has a legitimate reason to search a phone, also share what is found with other agencies?

HOLDING: Yes.

DISCUSSION: Sweeney argued that the search of the phone violated the Fourth Amendment. The Court noted that the initial search of his belongings was pursuant to the state law that allowed the warrantless search of a parolee and their residence. However, Sweeney argued that the parole officer was a “stalking horse” to allow DHS officers to evade the Fourth Amendment. Under Griffin v. Wisconsin, the Court noted such warrantless searches must be connected to the needs of the parole authority and not to simply assist in an unrelated investigation.²⁰

The Court looked to a more recent case, Samson, in which Courts have “grounded this exception in the lower expectation of privacy enjoyed by probationers, which is weighed against the promotion of legitimate governmental interests to determine whether the search was reasonable under ‘the totality of the circumstances.’”²¹ That justification “is not always related to the special needs of the probationary system,” and as such, the “reason for conducting the search need not necessarily be related to those needs either.” Since the government was relying on the Samson doctrine, the issue of whether the agent was a stalking horse does not apply.

Further, the court noted it has explicitly allowed police officers and probation officers to work together and share information, to achieve their objectives.²² Here, the parole officer had been informed of Sweeney’s actions of trying to obtain explicit pictures of his daughter. This act was a clear violation of his parole. The fact that DHS was also interested in the contents of his phone was immaterial.

The Court held the search was proper and affirmed his convictions.

SEARCH & SEIZURE – VEHICLE STOP

U.S. v. McKinley, 735 Fed.Appx. 871 (6th Cir. 2018)

FACTS: McKinley was stopped for driving with high beams in violation of a Memphis ordinance. As the officers asked him to get out of the vehicle, as they learned his license was suspended. The officers also spotted a pill vial and smelled marijuana. As the officer reached for the vial located on the floorboard, he spotted a handgun under the driver’s seat. Ultimately officers found 100 Xanax and a quantity of cash.

²⁰ 483 U.S. 868 (1987).

²¹ Samson v. California, 547 U.S. 843 (2006).

²² U.S. v. Martin, 25 F.3d 293 (6th Cir. 1994).

McKinley was charged with the gun because he was a convicted felon. He moved for suppression and was denied. During his time in jail, McKinley made phone calls concerning drug sales, which was used to enhance his sentence. He was convicted and appealed.

ISSUE: May officers make a pretext stop?

HOLDING: Yes.

DISCUSSION: McKinley argued that the traffic stop was improper because the officers were using the headlight violation as a pretext. Pretext is irrelevant, and, in fact, McKinley even admitted he was using his high beams due to a problem with his headlights. Once the officers smelled marijuana, they had probable cause to search the entire car as well.²³ The Court held the search was proper.

The Court affirmed the conviction.

U.S. v. Herrera, 733 Fed.Appx. 821 (6th Cir. 2018)

FACTS: On July 19, 2016, Herrera was on I-40 in Tennessee when he was stopped for a minor traffic violation by a drug task force member, Crouch. At trial, Herrera testified as to what had occurred and agreed he did not have an OL. He provided the registration paperwork to Crouch, but struggled with providing his DOB and Social Security number. Herrera admitted he had been arrested previously. As the officer was writing the citation, they engaged in small talk and the officer continued to ask questions about his travel plans. Herrera agreed to a search of the car.

As the officer waited for backup, he was notified that the information provided by Herrera was flawed. During the search, Crouch found multiple guns and an ID that provided Herrera's correct name and DOB. In fact, Herrera had a prior conviction and an outstanding warrant.

Herrera was indicted for possession of the firearms and moved to suppress. When that motion was denied, he entered a conditional guilty plea and appealed.

ISSUE: May a video be used to support that a stop was properly conducted?

HOLDING: Yes.

DISCUSSION: The Court noted that the stop required Crouch to have probable cause, and while there were two versions of the facts, it was the duty of the finder of fact to determine which was more credible. Using body-camera footage, the Court determined that Crouch's version of the facts was better supported. With respect to the length of the stop, Herrera argued that Crouch "stalled" while writing the citation, giving him a chance to ask more questions. However, the

²³ U.S. v. Foster, 376 F.3d 577 (6th Cir. 2004).

officer was waiting for information about Herrera’s faulty identification. Accordingly, the delay was not occasioned by Crouch’s actions. Finally, the court found that Herrera’s consent to search was voluntary. The officer applied no inappropriate pressure during their conversation and Herrera’s language “conveyed voluntary consent” and not just “mere acquiescence.” Nor was Miranda required before he was questioned about contraband, as Herrera was not in custody.

The Court affirmed his plea.

42 U.S.C. §1983

42 U.S.C. §1983 – ARREST

Newell v. Wayne County (MI), 733 Fed.Appx. 286 (6th Cir. 2018)

FACTS: Newell worked at the Wayne County Jail as a compliance manager. She was fired in 2012 for misconduct. Newell “did not go quietly” and insisted that she was the victim of a set-up. She complained that WCSD Executive Chief Smith was also involved in misconduct. About two months later, the Sheriff and others received information via anonymous email that Smith was using money and connections to dodge prosecution in a federal criminal matter. The Department reviewed the allegations and determined them to be false. Todd (Detroit PD) and Richardson (WCSO) led the investigation.

With the help of a computer forensic investigator, the email was linked to Newell but the investigation could not be considered definite. Nonetheless, Todd believed the Newell was the sender of the email and swore out an affidavit for a search warrant for her equipment. In that search, they linked Newell to the document attached to the email. Newell was not charged, however.

Newell filed suit under 42 U.S.C. §1983, claiming negligence and emotional distress. Todd and Richardson contented they were entitled to qualified immunity. The trial court granted summary judgement to all defendants but Todd and Richardson, and they appealed.

ISSUE: Are officers who make mistakes still entitled to qualified immunity in most cases?

HOLDING: Yes.

DISCUSSION: Newell claimed that Todd made intentional or reckless false statements in his affidavit, when he failed to make clear that the evidence could not definitively connect the email to her. The court evaluated the matter under Franks v. Delaware, in which Newell must first make a “substantial preliminary showing” that Todd intentionally or recklessly included a false statement, rather than simple negligence or an innocent mistake. Only if that first hurdle is cleared was the second step of Franks to be applied, excising that material and evaluating the information that remained to determine if the warrant still established probable cause.

The Court noted that three times in the warrant affidavit Newell was stated to be, without qualification, the author of the attachment to the email. Both men were aware that the information on the origin of that document did not definitively prove she authored the document, but it was strong evidence nonetheless. The Court also excused an error in which Todd mistakenly put a.m. rather than p.m., which would suggest that it originated from her home, when she would have likely been home when, in fact, it was sent in the afternoon. He had put the correct time elsewhere in the document, however, and the Court equated this to the mistakes that Franks did not cover.

The Court also looked at the consistent theme between her prior known communications and the anonymous one used to support the affidavit.

The Court reversed the decision and awarded the two officers summary judgment.

Edwards v. Rougeau, 736 Fed.Appx. 135 (6th Cir. 2018)

FACTS: In October 2013, Edwards was arrested pursuant to a Michigan warrant. Edwards informed officers that his identity had been stolen in 2009 and he was not the person they sought. The next day, the sheriff was ordered to verify with fingerprints. Within 8 days, they determined Edwards was the incorrect subject. He was released and the case dismissed.

Edwards sued a number of officers, including Rougeau, for false arrest. Rougeau moved for qualified immunity. The trial court found that Edwards had made no specific allegations against Rougeau and dismissed the claims. Edwards appealed.

ISSUE: Must specific claims be made against officers to support a lawsuit against them?

HOLDING: Yes.

DISCUSSION: The Court noted that Rougeau was among eight officers who saw Edwards and should have realized that he was the wrong person, and each allowed Rougeau's detention to continue. The Court held that even despite Edwards's attempt to amend his complaint a second time, Rougeau was entitled to dismissal.

Dressler v. Rice, 739 Fed.Appx. 814 (6th Cir. 2018)(certiorari pending)

FACTS: In September 2013, Dressler was shopping at an Ohio Kroger grocery store with a visible handgun. He was approached by Rice, a security guard, but Dressler tried to avoid him. (Dressler claimed he didn't realize Rice was a guard and could not hear him, being partially deaf.) Dressler walked away from Rice into the store. The store called the police.

Officers Zucker and Hodges (Cincinnati PD) arrived, spoke to Dressler, and directed his attention to the sign which purportedly banned guns.²⁴ Zucker arrested Dressler for trespass. There was disagreement as to what the store manager wanted the officers to do, with the officers stating the manager wanted Dressler arrested, while the manager asserted he only wanted Dressler to leave. Ultimately Dressler was found not guilty of criminal trespass.

Dressler filed suit against all the parties involved and all responded with a motion for summary judgement. The district court dismissed all claims and Dressler appealed.

ISSUE: May officers arrest an individual for witnessed criminal trespass?

HOLDING: Yes.

DISCUSSION: The Court reviewed the Ohio state law of trespass and agreed that the officers had probable cause to arrest for trespass, as Dressler was clearly instructed to leave the premises and failed to do so. The Court agreed Rice's motive for directing him to leave was immaterial, and a business may direct a person to leave for a wide variety of reasons. Although the sign upon which Kroger relied did not, in fact, actually ban firearms, that distinction was "not as important as Dressler" made it out to be. Because the officers had probable cause to arrest, the Court upheld the dismissal of the case.

42 U.S.C. §1983 – FORCE

Buck v. City of Highland Park (Michigan), 733 Fed.Appx. 248 (6th Cir. 2018)

FACTS: Sgt. White and Officer Holcomb (Highland Park MI), responded to a silent alarm at a pawnshop on October 10, 2009. Buck arrived moments later and parked near the squad car. Buck and White crossed paths as they all entered the shop. White was immediately confronted by an escaping armed robber and was shot in the arm. Holcomb returned fire. The robber passed Buck who was trying to flee, and Buck was allegedly shot by Holcomb in the process.

Buck filed suit against the officers and the city in state court. Through a long process, Buck was denied at multiple points. Buck filed to reopen the case and more discovery was permitted. Holcomb had been carried as a Jane Doe for most of the case, and was only added by name at that time. Defendants moved the case to federal court. The district court dismissed the case and Buck appealed.

ISSUE: Is an unintended shooting of a bystander during an emergency situation actionable?

HOLDING: No.

²⁴ The wording of the sign was ambiguous and did not specifically prohibit firearms in the store.

DISCUSSION; Buck alleged that by shooting at the robber with Buck only inches away, Holcomb violated his right to “bodily integrity.” The Court first looked at the statute of limitations governing the actions. As there is no federal statute governing that time frame, “federal courts must borrow the statute of limitations governing personal injury actions in the state in which the section 1983 action was brought.”²⁵ In Michigan, that time frame is three years, but Holcomb was added to the lawsuit some seven years after the shooting. Buck argued that Holcomb was a “necessary party” to an existing case and as such, the statute of limitation did not apply. The Court agreed that adding Holcomb was time-barred.

Even if it was, however, the Court noted that her actions did not “shock the conscience,” even if regrettable. She had no time to ponder or debate her actions against a man who had just shot her partner and certainly did not demonstrate an “egregious intent to harm.” It was a “fluid and dangerous situation requiring split-second decision-making.” Buck faulted White for not telling him to stay outside under Michigan’s public duty doctrine. However, the Court noted there was no applicable relationship between the two parties as they simply “exchanged greetings” on the sidewalk. As duty is an essential element of a negligence action, it simply did not exist in this case.

The Court affirmed the dismissal.

Williams v. Godby, 732 Fed.Appx. 418 (6th Cir. 2018)

FACTS: On October 15, 2013, Williams and Lovings were sitting in Lovings’ car in Smyrna, TN. They were drinking and were very loud. The police were called. Williams and Lovings denied to Officer Godby that they were fighting. Ultimately Godby had Williams get out, frisked her and found a miniature bottle of liquor. Ultimately, Williams and Godby struggled and Williams was taken to the ground, breaking her collarbone. Williams was taken to the hospital and found to have a BA of .159. Lovings allowed a search of her car and a dozen small alcohol bottles were found, but nothing else. Lovings was charged with public intoxication, assault and resisting arrest. The state court ruled that the officer had no right to continue the encounter once he learned the two were not fighting. Accordingly, everything that followed was to be suppressed and the case should have been dismissed.

Williams filed suit against the officer and the city, claiming excessive force and related issues. Officer Godby asserted qualified immunity and was denied. He appealed.

ISSUE: May a §1983 case be dismissed when there is dispute concerning the facts?

HOLDING: No.

DISCUSSION: The Court noted that at this stage, a defendant asserting qualified immunity must accept the plaintiff’s facts, as it was not for the judge to decide between competing stories.

²⁵ Banks v. City of Whitehall, 344 F.3d 550 (6th Cir. 2003).

The Court noted that Williams agreed that she became angry, raised her voice and cursed, as she believed she was being harassed by the officer. They disagreed as to what occurred when Godby handcuffed her, and the video of the scene did not either confirm or refute either side. The Court agreed that while she was verbally aggressive and disrespectful, Williams was cooperative and answered questions. Nothing indicated why she was taken to the ground so forcefully, although there were suggestions that Williams had kicked at the officer.

The court affirmed the denial.

Pelton v. Perdue / Pifer, 731 Fed.Appx. 418 (6th Cir. 2018)

FACTS: On November 28, 2015, Sgt. Pifer (Lewanee County, Michigan, SO) tackled Pelton, an elderly man, in front of Pelton’s home. Pelton suffered serious injuries. Corporal Perdue stood by but did not intervene. The incident began when Pelton’s home was thought to be a location where an instance of domestic violence involving a gun had occurred. When the police arrived, Pelton and Thompson (his fiancée) went outside and confronted them, and the officers had guns drawn and were shouting orders. The verbal exchange was “marked primarily by confusion and frustration” and resulted in Pelton being tackled and injured.

Pelton filed suit against Pifer and Perdue. The officers argued for summary judgment and were denied. The two officers appealed.

ISSUE: Does a “genuine issue of material fact” preclude a dismissal under §1983?

HOLDING: Yes.

DISCUSSION: The Court agreed the Pelton home was easily confused with the proper suspect home, given the lack of a specific address and the apparent similarity in the description of the house. The officers encountered Thompson, who reluctantly complied with orders to show her hands. Pelton began yelling. He held a small item in his hand (likely a remote) but the officers determined it was not a weapon. The officers refused to answer his questions, instead ordering him to raise his hands. He did not readily comply which precipitated the struggle.

The Court noted that the trial court based its decision on the joint statement of facts, and that deposition testimony of the officers was not to be credited at this stage. The trial court found there was a “genuine dispute of material fact” as to whether the officers had sufficient reason to seize Pelton in the manner they did, given there were discrepancies in what they knew about the suspected situation and Pelton’s residence and circumstances. Just as there was evidence his house was the “right” house, there was also evidence that it was not. As such, the court agreed it was proper to deny the officer’s motion on the question of making the initial seizure.

With respect to the use of force and the Graham²⁶ factors, the Court agreed that they had insufficient reason to believe Pelton was the armed individual reported by the 911 caller, and in fact, they knew he was not armed. When Piper grabbed Pelton, he did not say he was under arrest and at that point, had no cause to arrest him. He simply reflexively pulled his arm away. The Court held that being angry and uncooperative did not justify such a use of force. As such, the court upheld the denial of summary judgment to Pelton.

With respect to Perdue, however, the claim is a failure to intervene. The Court found nothing to indicate he was on notice that Pifer was going to tackle Pelton, and as such, the claim was appropriately dismissed.²⁷

Ruemenapp v. Oscoda Township, MI, 739 Fed.Appx. 804 (6th Cir. 2018)

FACTS: Officers Alexander and Soboleski (Oscoda Township, MI) responded to a call of a heated, but not violent, landlord-tenant argument. According to the officers, Ruemenapp (the landlord) became belligerent with them as they attempted to investigate the dispute, and that the officers then grappled with him, handcuffed and arrested him for disturbing the peace and assaulting the officers. Ruemenapp later argued he suffered facial injuries as a result, but the officers placed the blame for any injuries on Ruemenapp himself. Ruemenapp painted a different picture – “one of overly aggressive, vindictive police officers frustrated by nonviolent resistance to their requests.” He claimed he attempted to calmly present his side of the situation. Some of his account were corroborated by a witness.

In the criminal case, Ruemenapp entered a conditional guilty plea pursuant to the terms of a deferred prosecution agreement to obstructing the officers. Once he fulfilled the agreement, the charges were dismissed. Ruemenapp eventually filed a civil suit against the officers, claiming excessive force, false arrest, malicious prosecution and related claims. Eventually all claims were dismissed except for the allegation of the use of excessive force by the two officers and a failure to train claim against the township. The officers requested summary judgment and the district court granted that motion. Ruemenapp appealed.

ISSUE: Does a conviction for the underlying criminal offense for which officers were required to use force invalidate a civil suit under 42 U.S.C. 1983?

HOLDING: No.

DISCUSSION: The Court looked to the language in the deferred prosecution agreement used to resolve the criminal case. The Court noted that the agreement “was crafted—either carefully or sloppily—to avoid using specific language that could derail Ruemenapp’s excessive-force claim.” The Court agreed that the way it was written only indicated that he admitted to “obstructing or opposing” the officer, not that he resisted him physically. The Court noted that without physical

²⁶ Graham v. Connor, 490 U.S. 386 (1989).

²⁷ Goodwin v. City of Painesville, 781 F.3d 314 (6th Cir. 2015); Burgess v. Fischer, 735 F.3d 462 (6th Cir. 2013).

resistance, arguably, force by the officers was not justified. Under Heck v. Humphrey, it is required that the resolution would “necessarily imply the invalidity of a conviction.”

The Court looked to the actual force used and whether it could be “deemed objectively reasonable.” In this matter, the court agreed that Ruemenapp’s actions may have justified some degree of force, and that an arrest was appropriate. However, the law was well established that individuals who pose no safety risk to arresting officers or other individuals cannot be subjected to gratuitous violence during an arrest.

The Court held that an issue of fact existed in this matter and reversed the grant of summary judgment to the officers and remanded for further proceedings.

Alexander v. Carter, 733 Fed.Appx. 256 (6th Cir. 2018)

FACTS: On January 28, 2013, Officer Burress (Medina, TN, PD) made a traffic stop of Green, Alexander’s nephew. He was suspected of involvement in a hit and run collision. The stop was made on a private driveway owned by Alexander’s sister. The stop was outside the boundaries of Medina and he asked for a “county unit” to assist. Burress questioned Green pending the arrival of additional officers, including Deputy Byrd. Green was believed to be intoxicated and was placed in custody by Officer Burress. Alexander, who lived next door, walked over and asked what was going on. She was instructed to leave by Officer McCallister. Alexander refused, stating that this was “our properties.” Officer McCallister continued to insist that she leave and shook off her hand. Deputy Byrd also approached and ordered her to leave, pointing toward the street.

At that point, Officer McCallister handcuffed Alexander and Chief Lowery (Medina PD) took her purse. She was, alternatively, pushed and guided toward the street, with Deputy Byrd behind. Video recording showed no evidence of Byrd touching Alexander at all. Byrd (who passed away during the pendency of the action) denied having touched her in any way or assisted in the arrest. She was eventually arrested by Officer McCallister and Deputy Byrd then charged her with resisting arrest and assaulting an officer as well. Ultimately, all charges were dismissed.

Alexander filed suit against Deputy Byrd and others. The claims against the remaining officers were resolved, leaving only Deputy Byrd involved. Eventually, the Court granted summary judgement to Deputy Byrd. Alexander appealed.

ISSUE: Is some degree of contact or supervisory control required to make a force case against an officer?

HOLDING: Yes.

DISCUSSOIN: The Court noted that there was no allegation of any physical contact between Byrd and Alexander and as such, Byrd was “merely present” at the scene. There was no other evidence that he actively participated in any force used against her. Nor did he exercise supervisory

authority over Officer McCallister, who was outside his jurisdiction. (And, it should be noted, McCallister's own chief was present as well.)

Finally, the Court declined to consider a failure to protect argument, especially when the events evolved too quickly to have allowed an officer to intervene. (She defined three separate, momentary, instances of force.)

The Court affirmed the dismissal of the case against Deputy Byrd.

Reed v. City of Memphis, 735 Fed.Appx 192 (6th Cir. 2018)

FACTS: This dispute began with a private business arrangement between two Memphis police officers, Reed and Sandlin. Reed hired Sandlin's company to install a fence. When the work was not done within the time specified by the contract specified, Reed terminated the contract and demanded a partial refund. Litigation ensued and the dispute spilled over into the law enforcement agency. Eventually, Sandlin demanded back tools in the possession of the Reeds, and they refused to return them without the refund. Sandlin took out criminal theft charges, which resulted in Reed being relieved of duty. Reed agreed to give a statement to an investigator and did so at the station. Afterward, the investigator was told to secure Reed, by his ankle, to the bench. (He could, and apparently did, adjust the cuff because he retained a handcuff key, and never complained of any discomfort.) Ultimately, they went to the Reed home, with consent, and retrieved the tools, which were given to Sandlin. Reed gave another statement and was finally released. (He was unrestrained except for that short time.)

Reed filed suit under 42 U.S.C. §1983, naming Memphis and various law enforcement defendants. He had also sued Sandlin for breach of contract, which was resolved separately. The District Court ruled in favor of the city and the defendant officers, and noted that there was probable cause for the arrest, and that the leg cuff was not excessive force. Reed appealed.

ISSUE: It is appropriate to secure a suspect, even if in fact, they are never actually charged?

HOLDING: Yes.

DISCUSSION: Among other issues, Reed argued that securing him to the bench was unconstitutional because it allows for no exceptions. The Court noted that the term "should" was describing a process "reasonably calculated to ensure the safety of officers and detainees. It was proper to secure individuals in a proper manner, in a manner not harmful to the subject. Based upon Reed's admission, there was probable cause to believe he was guilty of theft by keeping the property unlawfully.

The Court affirmed the dismissal.

INTERROGATION

Hendrix v. Palmer (Warden), 893 F.3d 906 (6th Cir. 2018)

FACTS: On September 5, 2006, Doen was waiting in a vehicle for her daughter, who was running an errand, when a man carjacked the running vehicle. Doen was pushed out of the vehicle and suffered a serious head injury, but was able to describe the man despite the injury. Some hours later, Hendrix was apprehended in the vehicle. Hendrix was given Miranda and waived his rights, but denied knowing how he obtained the vehicle. He was placed in jail.

Later that same day, Det. Hogan (Shelby Township, MI) attempted to interrogate Hendrix, but Hendrix refused to speak until he talked to his attorney. At some point, Hogan explained to Hendrix that Doen was seriously injured and might die from those injuries. Two days later, Hogan attempted to interview him again, although he still did not have an attorney, Hendrix refused to sign another waiver but he apparently did agree to talk to Hogan. Later, at trial, Hogan's testimony about what was said became central to the case. During his testimony, Hogan specifically noted Hendrix's silence on some matters.

Doen ultimately died from brain trauma and the charges against Hendrix were upgraded to reflect that. Hendrix was also linked to several other similar carjackings in the past, and he had been convicted of several such crimes. The prosecutor also emphasized Hendrix's silence in closing arguments. Hendrix was convicted and appealed.

ISSUE: Is it proper to question a prisoner who has invoked his right to an attorney?

HOLDING: No.

DISCUSSION: Although the procedural history of the case is complex, weaving through both state and federal courts, the core of the case involved the statements Hendrix made during the second interrogation. The State conceded, ultimately, that the trial court's admission of the second interrogation was improper. The Court held that interrogation must cease if the subjects invokes the right to counsel. Further, the Court held that error was substantial and certainly not harmless to Hendrix.

Further, Hendrix's attorney's failure to object to the admission of the second interrogation's statements constituted ineffective assistance of counsel. As such, Hendrix was entitled to relief on his claims under both the Fifth and Sixth Amendments. In addition, because the Court found that absent the contested testimony, there was at least sufficient evidence to prove the case (his presence in the stolen vehicle and the similar carjackings in which he had been convicted), the State had the option to retry him despite the reversal of the conviction.

TRIAL PROCEDURE / EVIDENCE

TRIAL PROCEDURE / EVIDENCE – BRADY

Williams v. Schismenos (and others), 738 Fed.Appx. 342 (6th Cir. 2018)

FACTS: Fifteen years after his conviction for assaulting a police officer, Williams learned there was a video recording of the traffic stop. The video was recorded by an officer on a personally owned dash cam. The video was never provided to the defense during the trial. He sued the officers and the City of Akron under 42 U.S.C. §1983. The district court ruled for the officers, finding some claims time-barred and others not substantiated by the video, which showed Williams was uncooperative. Williams appealed.

ISSUE: Are officers required to provide exculpatory evidence to a prosecutor?

HOLDING: Yes.

DISCUSSION: The Court agreed that officers have a responsibility under Brady to turn over exculpatory evidence to the prosecutor's office.²⁸ However, in this case, there was no evidence put forward that the evidence was not provided by the officers to the prosecutor's office. There was no proof put forward that the question was ever posed to the appropriate witnesses. Simply because it was not used at trial does not prove that the prosecutor was unaware of the video. Further, there was sufficient proof that Williams did, in fact, commit the crimes alleged, even though much later, he won a new trial and the case was dismissed rather than be retried.

The Court affirmed the dismissal of the action.

EMPLOYMENT

Meyers v. Village of Oxford, 739 Fed.Appx. 336 (6th Cir. 2018).

FACTS: Meyers, Roesner-Meyers and Calocassides served as volunteer reserve police officers for Oxford PD. A mounted police team was developed of which the three were members, eventually representing the city at several events. The team was invited to be part of the inauguration of President Trump and the chief confirmed that the three would be involved. After a newspaper reported on the matter, however, the Village Council (which was aware of the team and the status of the three reserve officers) objected and voted to remove them as reserve officers, and even denied having approved of the mounted unit. The Village Council claimed in a public meeting that the three were impersonating police officers in their actions.

²⁸ Moldowan v. City of Warren, 578 F.3d 351 (6th Cir. 2009).

The three reserve officers sued the Village and individuals involved. The district court dismissed the case, finding that because they were not paid employees, they were not entitled to a “name-clearing hearing.” The three reserve officers appealed.

ISSUE: Does due process require a hearing for unpaid employees whose employment was terminated when reputation-related misconduct is alleged?

HOLDING: Yes.

DISCUSSION: The Court noted that the “the Due Process Clause of the Fourteenth Amendment protects an individual’s liberty interest in [his] ‘reputation, good name, honor, and integrity.’”²⁹ The District Court relied on the dictionary definition of employment, ruling that since they were not compensated for their service, they were not employees. Under Quinn v. Shirey, a name clearing is required when the following five factors are met:

First, the stigmatizing statements must be made in conjunction with the plaintiff’s termination from employment Second, a plaintiff is not deprived of his liberty interest when the employer has alleged merely improper or inadequate performance, incompetence, neglect of duty or malfeasance Third, the stigmatizing statements or charges must be made public. Fourth, the plaintiff must claim that the charges made against him were false. Lastly, the public dissemination must have been voluntary.

In Goss v. Lopez,³⁰ the Supreme Court had ruled that although “some alteration of a right or status” that is recognized by law is required, paid employment was not the only situation in which it applied. In this case, the Court held the “alleged stigmatizing statements (1) were made in connection with the loss of Appellants’ status as reserve officers for the Village of Oxford Police Department and (2) accused Appellants of illegally impersonating police officers.”

The Court reversed the decision and remanded the case.

CIVIL LITIGATION

Cummin v. North (and others), 731 Fed.Appx. 465 (6th Cir. 2018)

FACTS: In 2014, the Coroner, Dr. Cummin (Hocking County, Ohio) was charged with multiple misdemeanors relating to his office. He had been involved in a longstanding series of disputes with the Sheriff’s Office about situations involving deaths in the county. Most of the misdemeanors were dismissed prior to trial, and Dr. Cummin was acquitted on the remaining charge. Dr. Cummin filed a claim of malicious prosecution against various county officials under 42 U.S.C. §1983. The District Court granted summary judgment to the county defendants and Dr. Cummin appealed.

²⁹ Quinn v. Shirey, 293 F.3d 315 (6th Cir. 2002).

³⁰ 419 U.S. 565 (1975).

ISSUE: Is being released on recognizance a deprivation of one's liberty?

HOLDING: No.

DISCUSSION: As Dr. Cummin was never taken into custody during the criminal case, the only issue was whether he suffered a deprivation of liberty during the pendency of his criminal case. The Court noted that he was released on a personal recognizance bond that required no money be posted. He also agreed to appear as required and to maintain his current address.

The Court agreed that the facts did not constitute a seizure and upheld the dismissal of the case.

MALICIOUS PROSECUTION

Meeks v. City of Detroit, 727 Fed.Appx. 171 (6th Cir. 2018)

FACTS: In the early morning hours of June 8, 2015, an armed robbery occurred at a Detroit convenience store. The victim gave a detailed description of the robber and his vehicle. A few hours later, officers responded to two more robberies and a carjacking under similar circumstances and with a similar suspect. Officer Curry, in Intelligence, identified Meeks as a person of interest in the first robbery and she referred it to the detective handling the cases. She provided detailed information about Meeks. One of the detectives prepared a photo array, but at the time, he claimed, he only had Meeks' name and possible DOB, not the additional information provided by Officer Curry. When he sought photos to use in the array, three photos were selected by the computer, two of Meeks and one of a man with the same first name (James) and the last name of Meekslittle. Thinking all three were the same person, he elected to use the Meekslittle photo in the array. The detective chose five more fillers and the report automatically generated the names connected to the photos, thus adding Meekslittle's data – which was different from that provided by Curry. The detective who prepared the report noticed the name discrepancy, but passed it up to the lead detective, who did not verify that the actual suspect (Meeks) was represented in the photo array.

Ultimately some of the victims did identify the Meekslittle photo, but others could not make an identification. The officers, however, believed that Meeks was the one identified, and he was arrested on outstanding minor warrants. Meeks ultimately confessed to the first robbery, but denied involvement in any carjackings. Using the identifications (actually of Meekslittle), Meeks was charged with one of the carjackings. Ultimately the discrepancy was brought up by Meeks' attorney, and he was released after been held several weeks.

Meeks filed suit against the officers involved in his arrest, claiming malicious prosecution under 42 U.S.C. §1983. The trial court ultimately dismissed the claims against all officers, finding that while he certainly suffered a deprivation of liberty and that the criminal proceeding was resolved in his favor, that Meeks failed with the "participation" element necessary to the claim.

Specifically, the court found the conduct of most of the officers to be too far removed from the decision to prosecute Meeks for the crime. Meeks appealed.

ISSUE: Does a mistake justify a malicious prosecution lawsuit?

HOLDING: No.

DISCUSSION: The Court noted that a claim of malicious prosecution requires four elements: “(1) the defendant made, influenced, or participated in the decision to prosecute the plaintiff; (2) there was no probable cause for the criminal prosecution; (3) as a consequence of the legal proceedings, the plaintiff suffered a deprivation of liberty apart from the initial arrest; and (4) the criminal proceeding was resolved in the plaintiff’s favor.”³¹ In cases involving law enforcement, courts look to whether the officer’s “deliberate or reckless falsehoods result in arrest and prosecution without probable cause.”³²

In such cases, courts must look to whether the mistake led to the prosecution, whether there was probable cause without the evidence resulting from the error. Negligence, it noted, was not enough, the standard is much higher. In this case, both warrant requests stated that Meeks had been positively identified when, of course, it was Meekslittle who was identified. Two of the investigators indicated that in their respective cases, Meeks would not have been arrested but for the identification. The Court reviewed each of the officers sued and their specific involvement in the erroneous identification. It noted that for most of the officers, their errors were, at most, negligent. The Court focused on the officer who created the photo array, who argued that the two men appeared to him to be the same person. (The Court, of course, had the benefit of the actual photo array as part of the record.) The person who created the photo array acknowledged he became aware of the name discrepancy and took no action to verify the identity of the individual in question. However, the Court noted, his participation ended when he handed over the photo arrays. Even if that person’s conduct was reckless, and thus possibly actionable, his actions were too far removed from the decision to prosecution to find malicious prosecution.

As such, the Court held that malicious prosecution did not apply and affirmed the dismissal of the action.

³¹ *Sykes v. Anderson*, 625 F.3d 294 (6th Cir. 2010) (quoting *Barnes v. Wright*, 449 F.3d 709 (6th Cir. 2006)).

³² *Newman v. Township of Hamburg*, 773 F.3d 769 (6th Cir. 2014).

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