

**KENTUCKY**  
**FOURTH QUARTER**

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## KENTUCKY

### PENAL CODE

#### PENAL CODE – KRS 503 – FORCE IMMUNITY

##### Jones v. Com., 2018 WL 6264432 (Ky. App. 2018)

**FACTS:** Mardy Jones allegedly shot his half-brother, West, seven times, on August 7, 2016. The shooting occurred in Horse Cave, where Mardy lived with his brother, Ralph, and Ralph’s girlfriend, Colleen Stovall. His half-brothers, including West, lived next door. Mardy and West had a contentious relationship and both were well known to law enforcement. The two were involved in a heated argument on August 6. The next morning, Mardy was awakened by West strangling him and threatening him. Mardy grabbed his weapon and fired multiple shots, killing West. Mardy also shot himself in the arm. West was highly intoxicated at the time.

Mardy was not arrested until January 2017. On a motion to dismiss, Mardy argued that he was entitled to immunity pursuant to KRS 503.085. The trial court found that his use of force was unlawful. Mardy entered a conditional guilty plea to reckless homicide. An appeal followed

**ISSUE:** Is the unlawful presence of a person in a location, by itself, justification for using force?

**HOLDING:** No.

**DISCUSSION:** Mardy argued that West’s unlawful presence justified the use of force. The Court, however, stated that the important point was whether the Commonwealth had found that that force was unlawful. The Court found that Mardy was not statutorily immune and that the evidence should have been allowed to go to a jury – although Mardy’s plea foreclosed that option.

The Court upheld the plea.

#### PENAL CODE – KRS 505 – ENTRAPMENT

##### Green v. Com., 2018 WL 4847083 (Ky. App. 2018)

**FACTS:** On May 19, 2016, Officer Boyer (Carlisle PD) found an ad for a “casual encounter” on Craigslist.<sup>1</sup> Green’s ad indicated he wanted to engage in sex with a “young lady,” and indicated he was 40 years old. Officer Boyer noted that the ad’s emphasis on “youth and inexperience” suggested that the poster was an online predator. The officer created a profile that indicated he

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<sup>1</sup> Craigslist no longer has a personals section due to federal law changes, which might subject it to liability.

was a 14-year-old female and responded. Green replied that 14-years of age was “pretty young” and the officer and Green engaged in a message dialogue. Boyer provided images of his own wife, who provided photos and videos for the agency when needed in such cases. Green asked for a semi-nude picture, which Boyer refused. Green arranged to meet the young girl in the local cemetery. Upon arrival at the cemetery, Green was met by Officer Boyer and several other officers. Green was removed from his truck, given Miranda and questioned. Green admitted he was there to meet a 14-year-old girl. Green then signed a confession.

Green was convicted on one count of unlawful use of electronic means. An appeal followed.

**ISSUE:** Is an entrapment instruction needed when the individual clearly showed a predisposition to commit a crime?

**HOLDING:** No.

**DISCUSSION** Green argued he should have been given an entrapment instruction. The Court, however, noted that under KRS 505.010, certain elements must be met before the jury will be instructed on entrapment. The Court determined that Green initiated the advertising and responded quickly, within two minutes, to the bait message. He thus showed a predisposition to commit the crime, and was simply afforded the opportunity to do so. The Court held Green’s conviction was proper and he was not entitled to an entrapment instruction.

The Court upheld his conviction.

## **PENAL CODE – KRS 509 – KIDNAPPING**

### **Lotz v. Com., 2018 WL 5732835 (Ky. 2018)**

**FACTS:** Jerry D. Lotz purportedly robbed Soltau and McLaren in Soltau’s home in Jefferson County. When no cash was found, the robber insisted they take him to the bank to get money and stated he had others outside standing watch with guns. They all got into Soltau’s car, then Soltau said she had to go back inside for her ID. As they all walked back inside, Soltau pushed McLaren inside and slammed the door, locking out the robber. The robber, who had her keys, took off in the car. Later that night, Lt. Crowell made a stop and found Lotz trying to get out. He learned the car was stolen and found an item belonging to McLaren in Lotz’s possession. Lotz was charged with a variety of crimes, including kidnapping. Lotz was convicted and appealed.

**ISSUE:** Does moving a robbery victim allow for a kidnapping charge as well?

**HOLDING:** Yes.

**DISCUSSION:** Lotz had argued that the kidnapping exemption applied and that the restraint of the couple was incidental to the robbery. The Court looked to KRS 509.050 and to cases that had

interpreted it. The Court agreed that once Lotz forced them out of the house and to the car, it could, arguably, have become kidnapping as it went beyond the parameters of a robbery. The Court agreed his conviction for kidnapping was proper.

The Court also looked at convictions for both robbery and theft (of the vehicle), which the Commonwealth had tried to separate into two occurrences. Under double jeopardy, the Court held that it was not proper to charge with both theft and robbery and vacated the theft conviction as it was the lesser offense.

In addition, the Court allowed Det. Snook to testify that that Lotz's voice, with a Southern accent, matched the description given by the victim. The Court determined that the detective only confirmed that a Southern accent was involved. The Court determined that an admonishment was unnecessary because there was "nothing to correct."

The Court upheld the suppression.

**NOTE:** *KRS 431.015(3) now allows a citation for a misdemeanor committed outside the officer's presence as long as the officer possessed probable cause to believe that the person committed the misdemeanor and the officer has reason to believe the suspect will appear in court.*

## **SEARCH & SEIZURE**

### **SEARCH & SEIZURE - ARREST**

#### **Com. v. Easterling (Judge), 2018 WL 6015931 (Ky. App. 2018)**

**FACTS:** On October 26, 2015, Officer Ullrich (Covington PD) received a report of a pickpocket. The caller provided detailed information concerning the suspects and the vehicle used by the suspects. Shortly thereafter, the officer spotted the described vehicle. Officer Ullrich learned as he followed the car that most of the stolen items had already been recovered. Nevertheless, he stopped the vehicle, driven by McNeil. The officer realized McNeil was intoxicated and charged her with DUI, open container violations and failure to produce an insurance card. McNeil moved to suppress, arguing the stop was invalid because the officer may not arrest for a misdemeanor committed outside his presence.

The court granted the motion to suppress and the Commonwealth filed a writ of prohibition in circuit court, arguing that officers are still permitted to make an investigatory stop. The circuit court denied the motion and the Commonwealth further appealed.

**ISSUE:** May an officer make a stop for an ongoing misdemeanor?

**HOLDING:** Yes.

**DISCUSSION:** In U.S. v. Hensley, the Court had ruled that reasonable suspicion stops were appropriate for a completed felony, but it remained unclear if that was the case for a completed misdemeanor.<sup>2</sup> Various courts have split on the issue since then, but Kentucky has been silent. However, the Court noted, the Commonwealth analyzed the case as “if it involved an ongoing crime,” which was clearly not the case. The officer suspected the misdemeanor was completed. As such, the Court found no continuing crime and thus no reason to make the stop.

## **SEARCH & SEIZURE - SEARCH WARRANT**

### **Metcalfe v. Com., 2018 WL 6264431 (Ky. App. 2018)**

**FACTS:** On November 3, 2016, Det. Williamson (Bardstown) sought a warrant for Metcalfe’s property, in response to a complaint that Metcalfe was cultivating and selling marijuana. Another CI relayed information about a big sale, which he learned of from Metcalfe’s girlfriend, Clan. They had provided earlier tips as well. Det. Williams confirmed Metcalfe’s address, conducted surveillance, and made a traffic stop of another man that resulted only in finding a half-pill.

Dets. Williamson and Watts did a “knock and talk” and found Metcalfe nervous and evasive. They spotted a grow light outside as well. Metcalfe refused consent for a search. The neighbors (related to Metcalfe) were also invasive but Metcalfe’s sister in law confirmed she believed Metcalfe was involved in criminal activity.

Upon executing a search warrant, officers found an indoor grow operation. Metcalfe was charged and argued that the affidavit supporting the search warrant was insufficient. The court found the warrant was sufficient. Metcalfe entered a conditional guilty plea and appealed.

**ISSUE:** May multiple tips support probable cause?

**HOLDING:** Yes.

**DISCUSSION:** Metcalfe argued that the information was “unsubstantiated, unreliable and stale.” The Court noted the first tip was anonymous, but agreed it was only one part of the totality of the evidence presented and should not be discounted. The second tip came from a new and inexperienced CI but again, that did not “mean the tip was worthless.” She was known to the officers and corroborated the earlier tip. The tips were possibly stale and not well documented, but that did not mean they were not reliable. The traffic stop also did not stand alone. The Court agreed, “in sum,” that the individual elements were not enough, but when considered together, the affidavit was sufficient.

The Court upheld the denial of the motion to suppress.

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<sup>2</sup> 469 U.S. 221 (1985).

## **SEARCH & SEIZURE – CONSENT**

### **Chisholm v. Com., 2018 WL 6016664 (Ky. App. 2019)**

**FACTS:** On January 9, 2017, Deputy Goodrich (Owen County) received information on Chisholm and Prather. Both men had active warrants and were supposed to be at the Heitzman home. (Heitzman was in jail and the two men were caring for her children.) Deputy Goodrich and Trooper Payton went to the home, knocked and a 14 year old boy answered the door. He agreed the officers could enter after he secured a pet dog. They entered and found Chisholm sitting on a bed and methamphetamine on the table nearby. Chisholm was arrested on the warrant, and then later also charged with the drugs. He moved to suppress the drugs, which was denied. Chisholm took a conditional guilty plea and appealed.

**ISSUE:** May a teenager give consent for an entry?

**HOLDING:** Yes

**DISCUSSION:** Chisholm argued that the only evidence for consent was the officer’s testimony and that the child had no authority to give consent when there were two adults in the home. The Court noted that the teenager was the son of the homeowner, who was incarcerated and unavailable. The officers had a reasonable believe that the teenager had “sufficient authority and control over the premises to give valid consent.”

The Court upheld Chisholm’s plea.

## **SEARCH & SEIZURE – TERRY**

### **Yopp v. Com., 562 S.W.3d 290 (Ky. App. 2018)**

**FACTS:** In January 2018, a postal inspector notified the Greater Hardin Narcotics Task Force about several packages destined for Hardin County. Task force members examined the packages and determined they contained marijuana, and obtained search warrants for the destinations. They made controlled deliveries and executed warrants at two of the three locations. In each of those, the recipients stated the packages were to go to Yopp and identified him from his Facebook photos. One of the detectives also noted the photos showed a black truck. While surveilling the third residence, where the suspect package was sitting at the door, they spotted a similar black truck approaching. A check of the plate showed it belonged to Yopp.

Trooper Payne (KSP) did a traffic stop, upon request, using his drug dog. Yopp gave consent for a search of the truck and Yopp told him there was a gun. The dog alerted to drugs. A pistol and a jar with “marijuana residue” were found. Det. Turner provided Miranda. Yopp gave his home address and consented to a search. While his truck was being taken to the station, Yopp went with other officers to his residence. The vehicle was not marked and he rode in the front seat. At the house, they knocked and entered, finding Yopp’s roommate. Both men signed consent to

search and a number of drugs and related items were found. Yopp gave permission for a search of his cell phone, and messages linked him with the other two package deliveries.

Both men were questioned; Yopp was arrested. He took a conditional plea to trafficking in marijuana and related charges, and appealed.

**ISSUE:** May several pieces of information be combined for reasonable suspicion?

**HOLDING:** Yes

**DISCUSSION:** Yopp argued that they officers lacked reasonable suspicion to make the initial stop, which tainted everything that flowed from it. The Court looked to Baltimore v. Com.<sup>3</sup> to agree with the trial court that in fact, there was more than enough evidence linking Yopp with the trafficking. The Court agreed the standard for reasonable, articulable suspicion is “relatively low.” Although his actions in driving back and forth in front an address (where the third package was located), might not in itself be suspicious, when linked to the other information, it certainly meet the standard.

Once Yopp was stopped, he willingly gave consent for a search of the vehicle and nothing indicates he was under duress or coerced. The remaining consent of his residence, was also given after he was provided Miranda warnings. Further, “proper consent negates the need for a search warrant.”

With respect to his interrogation, the Court agreed with the trial court that Yopp was not in custody until the end of his interview at the Radcliff PD. He was free to cease cooperating, or talking, at any time. In fact, nothing he said was actually used in his “eventual prosecution.”

The Court agreed that the denial of the motion to suppress was proper.

**Sapp v. Com. , 2018 WL 6721324 (Ky. App 2018)**

**FACTS:** In August 2016, a reliable CI tipped the Franklin County Sheriff’s Office about a delivery of drugs to Bowman, who was already under investigation. Deputies initiated surveillance on the address provided, that of Conway. A vehicle approached the house and Bowman got into the back seat. Sapp, it was later discovered, was the front passenger. The detectives engaged the vehicle. Det. Farmer observed Sapp reached under the seat, and he immediately ordered the occupants to put up their hands. Bowman dropped something, which turned out to be methamphetamine. All of the occupants were ordered out and the vehicle searched. Methamphetamine and scales were located, and Bowman also had scales and cash. All of the occupants were arrested.

Sapp had an outstanding warrant. During transport, he admitted he’d driven to Louisville to

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<sup>3</sup> 119 S.W.3d 532 (Ky. App. 2003).

obtain methamphetamine for Bowman. Sapp was charged, took a conditional guilty plea, and appealed.

**ISSUE:** May observation and information from a CI create reasonable suspicion?

**HOLDING:** Yes

**DISCUSSION:** Sapp argued the detectives lacked reasonable suspicion to make the initial stop and seizure. The Court, however, agreed that “there was reasonable and articulable suspicion warranting the investigatory stop based on the detectives’ observations and information from the CI.”

The Court upheld the plea.

**Noe v. Com., 2018 WL 5732312 (Ky. 2018)**

**FACTS:** On July 16, 2015, a man entered a Richmond bank and gave the teller a bag. He ordered her to put the money in the bag, all the while keeping his right hand in his sweatshirt pocket. A second teller indicated he thought the robber had a gun in that pocket, due to his stance. No gun was seen, however, nor was a direct threat made, and a still frame only suggested a bulge in that pocket that could have also simply been his hand.

Noe came under immediate suspicion, as he fit the description and video of his apartment building, only a few blocks away, later showed him leaving the apartment wearing the same clothing during that same time frame. Officer Gray spotted Noe only moments after the robbery and spoke to him, observing that he was sweating, and he was wearing slightly different clothing and a different backpack. Officer Gray placed him in cuffs and removed the backpack. Further questioning caught Noe in several lies about his relationship with ECU – as he’d said he was on his way to class but was confirmed not to be enrolled in that term. Officer Gray ran a K-9 track to try to uncover evidence of his involvement in the robbery.

Noe remained with other officers in an alley leading to his apartment. He gave consent to search his apartment within about a half-hour, but first, they went into the wrong apartment. Once they entered the correct apartment, officers found the backpack used in the robbery and most of the cash. The backpack included the clothing worn during the robbery and most notably, a boxcutter.

Officers obtained a search warrant and arrested Noe. At the suppression hearing, it was learned one of the officers may have had a bodycam, but nothing was done with that fact until it was mentioned at the last day of trial. Noe was convicted of Robbery 1<sup>st</sup> and appealed.

**ISSUE:** May a long Terry detention still be valid?

**HOLDING:** Yes

**DISCUSSION:** With respect to the search of his apartment, Noe claimed he did not consent, yet the officers testified that he did so, which was supported by dispatch records. The Court agreed the evidence of consent was sufficient. With respect to his original stop, the Court agreed that the information available to the officer was sufficient to support the stop as well, and even using handcuffs. With respect to the time he was held, the court looked to Com. v. Bucalo, which “set forth the following test: Even if an officer has reasonable and articulable suspicion, there are still limits on the duration of the detention. The detention cannot extend beyond what is reasonable and necessary.<sup>4</sup> The test is “whether the police diligently pursued a means of investigation that was likely to confirm or dispel their suspicions quickly[.]”<sup>5</sup>

While the detention was fairly long, the record showed that the officer was “diligently pursuing his investigation and attempting to confirm or dispel his suspicions by phoning university police, walking to the bank to check surveillance and speak with other officers and witnesses, running a track from the bank to Noe’s apartment with his K-9, and returning to Noe to compare him to surveillance pictures from the bank.” As such, the Court agreed the detention was valid and his motion to suppress was properly denied.

Noe argued that the presence of body cam footage, worn by one of the officers who arrived later, should have been provided. It was first mentioned at the suppression hearing and the prosecutor indicated at that time that he did not have it. It was not mentioned again until the last day of trial, nor were any motions to produce it. At the time of the trial, the prosecutor agreed the officer had been wearing a body cam but that they did not have it, nor did they think it had been preserved. No bad faith was, however, suggested and the Court agreed that it was not enough to change the verdict.

The Court addressed the confusion relating to charges for Robbery and when a weapon or dangerous instrument is, or may be, involved. The Court noted that the instructions let the jury decide if in fact, Noe had the boxcutter in his possession at the time of the robbery. While circumstantial, it was, in fact up to the jury to decide.

Noe’s conviction was affirmed.

## **SEARCH & SEIZURE – SEARCH INCIDENT**

### **Watkins v. Com. , 2018 WL 5778810 (Ky. App. 2018)**

**FACTS:** On May 28, 2015, Det. Vanhose (KSP) and others executed a search warrant on a Lexington convenience store. Another business, a fast food restaurant, shared a wall with the store and also had a parking lot. As Det. Vanhose arrived, he spotted a white van near the rear door to the subject business and observed Watkins behind the van observing. He got into the passenger seat of another vehicle, in which White was in the driver’s seat.

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<sup>4</sup> See U.S.v. Sharpe, 470 U.S. 675, 686, 105 S. Ct. 1568, 84 L. Ed. 2d 605 (1985).

<sup>5</sup> Com. v. Bucalo, 422 S.W.2d 255 (Ky. 2013),

Unsure as to who the man was, and whether he was connected to the convenience store, Det. Vanhoose pulled in next to that car and activated his lights. He identified himself as KSP and saw Watkins “reaching underneath the seat and into his pocket.” He asked them both out and obtained identification information, although Watkins had no actual ID. Watkins appeared nervous. He learned through dispatch that Watkins’ name was in E-warrants and he might have a warrant. The trooper searched Watkins and found a bag containing heroin. A warrant was confirmed at this point. Det. Vanhoose searched Watkins further. (His testimony was confusing, as he indicated he was both on the phone to dispatch at the same time he was searching, which suggested the search came before the phone call.) His report indicated Watkins was identified and arrested before the search and the confirmation of warrants, but the trooper indicated that “the report did not reflect the chronological order of the events.” He testified he learned of “possible warrants” before he searched Watkins.

The driver, White, testified they were at the fast food restaurant and that Watkins simply returned to the car when he saw the police activity next door. She described the scene as “very chaotic” and over quickly.

The trial court ruled that this was not a search incident to arrest, but found the initial seizure lawful. Since the warrants were properly discovered, the search and discovery was harmless as the items would have inevitably been discovered. His suppression motion was denied and he appealed.

**ISSUE:** Does discovery of a warrant validate a search, even when the initial stop is questionable?

**HOLDING:** Yes

**DISCUSSION:** Watkins argued that the initial stop was improper because there was no “reasonable, articulable suspicion” that he was engaged in any crime. Without that, his warrant would have gone undiscovered. The Court agreed that the reasonable suspicion standard was to a great deal subjective. The court agreed that the detective “observed much more than a person seeking to curb his hunger with a bucket of chicken,” but instead saw a person “lurking behind and suspiciously peeking around both sides of the back of a van,” just a few feet from the door to the back of the target location. His “evasive conduct,” coupled with the actual reason for the warrant, employee theft, was enough to conduct the stop. Once he went to White’s car, he continued to act in a suspicious manner, which justified the continuation of the interaction. Whether the search was before or after the warrants were confirmed, the heroin would have been discovered.

The Court agreed that there was no reason to search him prior to the discovery of the warrants, however, and that “possible warrants” was insufficient. However, the officer already had his information and had provided that information to dispatch, which would have inevitably led to the discovery of the warrant, and another search.

The Court agreed that the motion to suppress was properly denied.

## **SEARCH & SEIZURE – COMMUNITY CARETAKING**

### **Gorden v. Com., 2018 WL 5881612 (Ky. App. 2018)**

**FACTS:** On July 25, 2013, Blake Gordon noticed his father, Ron’s, vehicle parked in the lot across from Blake’s home, The two had a poor relationship and they communicated entirely by text messaging and Ron leaving notes. Blake called the police and reported Ron’s presence, stating he was a heavy drinker, a former Marine and was usually armed. Ron left by the time Blake came back around, and then reappeared. Officer Kerr was dispatched and again, Ron had left, but he drove back through when Kerr was present. Officer Kerr went after Ron and followed him into a subdivision. Ron pulled into a driveway and Kerr approached at gunpoint. He could smell alcohol. Another officer did a FST and Ron was arrested for DUI.

At a subsequent suppression hearing, Blake testified he had no actual knowledge as to whether Ron was drinking that day or not, or whether he was armed, but that it was typical for him to be “intoxicated daily” and carry a firearm. He had sought and obtained an EPO the day after Ron’s arrest. Kerr also testified.

The Court suppressed the evidence found as a result of the stop, finding there was no reasonable suspicion for the stop. The Commonwealth filed a writ of mandamus, to request the Circuit Court to order the District Court to admit the evidence, and that the stop was not an “investigatory stop” but a “community caretaking function.” In the alternative, it argued that the officer had reasonable suspicion of criminal activity as well, and that he was legitimately concerned for Blake’s safety. The Circuit Court concluded it was a proper community caretaking stop and granted the writ. Ron appealed.

**ISSUE:** May a stop be justified on the community caretaking doctrine?

**HOLDING:** Yes

**DISCUSSION:** The Court looked at the community caretaking doctrine, recognized first in Cady v. Dombrowski.<sup>6</sup> The only Kentucky published case, Poe v. Com., also resulted in a criminal stop for DUI, stated that such stops are to be “based on specific and articulable facts that lead to a reasonable conclusion that an individual requires assistance or [that the stop] is necessary for the public’s safety.”<sup>7</sup> In this case, the Court agreed that Officer Kerr had fulfilled his public safety duty by checking to determine why Ron kept parking near his son’s house and driving by, and gave credence to Blake’s stated concern. The intrusion on Ron’s privacy was slight and was intended to circumvent a violent confrontation between the two.

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<sup>6</sup> 413 U.S. 433 (1973).

<sup>7</sup> 169 S.W.3d 54 (Ky. App. 2005).

The Court upheld the writ.

## **SEARCH & SEIZURE – TRAFFIC STOP**

### **Moffett v. Com. , 2018 WL 5881686 (Ky. App. 2018)**

**FACTS:** This case came back to the court following changes in case law. The underlying facts are as follows. On October 10, 2013, just after midnight, Deputy Thomason (Daviness County SO) stopped a vehicle being driven without headlamps. He requested ID from the occupants and learned one of the passengers, Goodman, had two outstanding warrants. The deputy also knew the other passenger had a drug history. He requested a drug dog within a few minutes, which arrived in ten minutes. The dog promptly alerted on the vehicle, drugs were found, and Moffett, the driver, was arrested.

Moffett was charged with the traffic offense and also Trafficking in Marijuana. He contended that the traffic stop was unduly extended and that he should have been allowed to leave when he was found to not have warrants.

The trial court found that the length of the stop (some 13 minutes for the relevant process) was reasonable, given the issues with the two passengers. Moffett's motion to suppress was denied and he took a conditional guilty plea, and appealed. The Court received the case back, however, following an earlier decision.

**ISSUE:** May evidence found after an extended traffic stop be suppressed?

**HOLDING:** Yes

**DISCUSSION:** The Court agreed that the traffic stop itself was proper, and in such a stop, there are other tasks "reasonably incident to the stop" that will occur. Those tasks must be pursued with reasonable diligence. A traffic stop also detains the passengers, of course, however.

The Court noted that had they checked for warrants for Moffett, first, the authority for the stop would have ended at that point. Extending the stop to run warrants for the passengers, however, violated Moffett's Fourth Amendment rights, causing an unreasonable delay. The only justification for holding the vehicle after the passenger, Goodman's arrest was if there was reason to believe the vehicle had evidence of the crime of HIS arrest. Since his arrest was on a probation violation, however, no such evidence could be expected.

The Court reversed Moffett's conviction for trafficking, but allowed the headlamp violation to survive.

## INTERROGATION

### Com. v. Patton, 2018 WL 4941544 (Ky. App. 2018)

**FACTS:** Patton was a suspect in a Jefferson County homicide. His mother contacted an attorney on his behalf and the attorney contacted the local police to explain he would bring Patton in the next day, once he'd had a chance to talk to him. The next day, however, the attorney realized Patton had already been picked up by the police, been given Miranda, waived it and gave a statement. Patton was charged with murder and related charges. He moved for suppression of his statement, which was granted. The Commonwealth appealed.

**ISSUE:** May an individual decide to talk even after they have an attorney?

**HOLDING:** Yes

**DISCUSSION:** The Court agreed that the work of the officers was professional and appropriate, in making a quick arrest in the homicide. Patton was given Miranda and even indicated that his attorney had told him to talk to the police. The Court notes that he agreed that he understood his rights. It continued: "the constitutional right to counsel is a personal right, it does not force counsel on a person by preventing him from talking to the police if he chooses to waive his right, and the person is still required to expressly invoke his right by requesting counsel." His right to access his attorney was scrupulously protected.

The Court reversed the suppression and remanded the case.

### Henderson v. Com. 563 S.W.3d 651 (Ky. 2018)

**FACTS:** In a long and complex rape investigation and prosecution, Henderson, among a myriad of other issues, complained that Det. Farmer, LMPD attempted to speak to him while he was being held in a police cruiser. He told her that he was invoking his right to silence and she left him to continue the investigation. Once a search warrant was obtained, he was taken inside the apartment for the execution of the warrant and for physical evidence to be secured from his person. He began asking questions and Det. Farmer told him that since he'd invoked his rights, she could not discuss the matter with him. He continued to ask questions, so she took him back to the cruiser and asked him if he did want to speak about what had happened. He agreed and he was taken to LMPD. There, he was given Miranda and signed a written waiver. He was questioned and the recorded statement was introduced by another detective. Henderson did not admit guilt but described a consensual encounter with the victim, instead. He expressed confusion about any injuries or assault inflicted on the victim.

Henderson was convicted and appealed.

**ISSUE:** May a suspect change their mind after invoking their right to silence?

**HOLDING:** Yes

**DISCUSSION:** The Court noted that Det. Farmer had properly “cut off all questioning” when Henderson invoked his rights. She also “scrupulously honored” his invocation, as required in Buster v. Commonwealth.<sup>8</sup> The Court noted that

“[T]he Supreme Court has not subsequently read Miranda as establishing a bright-line rule that police may never return to questioning a suspect who has invoked his right to silence.”<sup>9</sup> Once the right to an attorney has been invoked, interrogation must cease, and law enforcement *cannot* re-initiate contact; it is up to a suspect invoking the right to approach law enforcement for any further questioning to constitutionally occur.<sup>10</sup> However, after a suspect invokes the right to remain silent, no such bright-line rule has been created. “[O]nce the right to silence was invoked, Miranda did not create a per se prohibition of indefinite duration on any further questioning.”<sup>11</sup> Thus, “admissibility of statements obtained after the person in custody has decided to remain silent depends under Miranda on whether his ‘right to cut off questioning’ was ‘scrupulously honored.’”<sup>12</sup>

The Court looks to several factors in making this determination: (1) whether the suspect was informed of his Miranda rights before the initial interrogation; (2) whether the officer ‘immediately ceased the interrogation and did not try either to resume the questioning or in any way persuade [the suspect] to reconsider his position’ once the suspect invoked his right to silence; (3) the differences in the circumstances between the original and subsequent interrogation, such as whether it was about the same or different offense, the length of time between the two interrogations, whether it was conducted in a different location, and whether it was conducted by a different officer; and (4) whether the suspect was re-informed of the Miranda rights before the second interrogation.<sup>13</sup>

Applying these factors, the totality of the circumstances supports the trial court’s finding that Henderson’s statements were made voluntarily, rather than being the product of any kind of coercion. Henderson was informed of his Miranda rights at the time of the initial encounter with Det. Farmer. At that point, after invocation, Det. Farmer immediately ceased questioning and left Henderson to investigate the scene, honoring the invocation of his right. The third factor weighed towards Henderson’s argument; the same officer was involved with both interrogations and questioning occurred at the police cruiser on the scene. However, under the fourth factor, Henderson was taken to a different area, the LMPD, and his Miranda rights were again explained

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<sup>8</sup> 364 S.W.3d 157 (Ky. 2012).

<sup>9</sup> Id. (citing Michigan v. Mosley, 423 U.S. 96 (1975)).

<sup>10</sup> See Cummings, 226 S.W.3d at 65 (citing Edwards, 451 U.S. at 484-85).

<sup>11</sup> Buster, 364 S.W.3d at 163 (quoting Com. v. Vanover, 689 S.W.3d 11 (Ky. 1985)).

<sup>12</sup> Buster, 364 S.W.3d at 164 (quoting Mosley, 423 U.S. at 104 (quoting Miranda, 384 U.S. at 474)); see also Carlisle v. Com., 316 S.W.3d 892 (Ky. App. 2010) (quoting Mosley, 423 U.S. at 104) (“[S]tatements made after such an invocation are admissible provided the authorities have ‘scrupulously honored’ the defendant’s right to remain silent.”).

<sup>13</sup> Buster, 364 S.W.3d at 164 (quoting Mosley, 423 U.S. at 104-05).

before the interrogation began. He even asked questions about those rights which Det. Farmer answered openly. He signed a waiver of rights and answered questions for the next few hours without again re-invoking any of those rights. Under the circumstances, “Henderson had an opportunity to consider his options and his rights and still chose to waive his right to remain silent.”

The Court agreed that the lengthy time in the cruiser was of some concern, but it was not coercive, and if he had been under the effects of any drugs, he appeared “alert, coherent, and able and willing to answer any and all questions.” His statement was properly admitted.

Henderson also complained that he was not allowed to ask any questions about the victim’s prior sexual history. He was allowed to ask detailed questions about the day of the attack, however, the Court looked to the Rape Shield law and noted:

Under KRE 412(a), “evidence offered to prove” either “that any alleged victim engaged in other sexual behavior” or “any alleged victim’s sexual predisposition” is inadmissible. However, in a criminal trial, under KRE 412(b), “evidence of specific instances of sexual behavior by the alleged victim offered to prove that a person other than the accused was the source of semen, injury, or other physical evidence” and “evidence of specific instances of sexual behavior by the alleged victim with respect to the person accused of the sexual misconduct offered by the accused to prove consent or by the prosecution” are admissible, if admissible under the other rules of evidence. The rules also allow “other evidence directly pertaining to the offense charged” to be admissible. Any person intending to introduce evidence pursuant to KRE 412(b) must provide written notice at least 14 days prior to trial. KRE 412(c)(1)(A). The rule also requires that the court conduct an *in camera* hearing prior to admitting such evidence.<sup>14</sup>

The Court agreed that “if Henderson was presenting a consent defense, then he was entitled to ask about prior consensual experiences between him and the victim.: But he was, in fact, allowed to ask those questions, he simply was not allowed to ask about a prior relationship, which was properly denied.”

The Court upheld his conviction.

## **TRIAL PROCEDURE / EVIDENCE**

### **TRIAL PROCEDURE / EVIDENCE – LESSER INCLUDED**

**Rochat v. Com. , 2018 WL 6570571 (Ky. App. 2018)**

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<sup>14</sup> KRE 412(c)(2).

**FACTS:** On July 26, 2015, Rochat was caught by Robinson, his girlfriend, in the living room, head covered by a blanket, with his head between the girlfriend's six-year old granddaughter's legs. The child's underwear was pulled down to her ankles. He apologized and said he "was not in his right mind." He left the next morning. Robinson called the police and gave a statement but the child would not talk about it. Rochat, a truck driver, was arrested while on the road and charged with Sodomy. He was convicted and appealed.

**ISSUE:** Is a defendant entitled to an instruction on a lesser-included offense (Sexual Abuse) when there is evidence that might support it?

**HOLDING:** Yes

**DISCUSSION:** Robinson argued he should have been given an instruction on the lesser included offense of Sexual Abuse. The only physical evidence include his saliva/DNA being found on the child's underwear, but not on her body. Although the witness said she saw contact between the victim's genitalia and Rochat's mouth, but also said his head was covered by a blanket. As such, the jury could believe that there had not been contact, and Rochat should have been allowed the instruction.

Although that alone warranted a reversal, the Court also discussed several other issues. The Court argued that showing his mug shot was inappropriate, as he appeared considerably different from that photo once he came to trial. The Court noted that Robinson was easily able to identify himself, but the Commonwealth argued that the police officer witnesses, who had not seen his "new" appearance, might not be able to do so. The court, however, ruled that a single use of the mug shot was permitted, but not the continued usage via projection to the jury.

The Court also agreed that it was improper to show a video of the questioning of the child done at the Child Advocacy Center. Although she did not speak in the interview, her silence and demeanor spoke instead. The Court also agreed that the presumptive test for saliva (Phadebas testing) done before the source item was sent off for DNA testing was proper as well, although the witnesses to such a test should emphasize it is presumptive, rather that positive.

Finally, the Court agreed that Lt. Vonderhaar (Boone County SO) properly testified as to the data he extracted from Rochat's phone and that he was properly qualified as an expert in the use of the technology and data analysis.

The Court reversed the conviction on the first issue.

## **TRIAL PROCEDURE / EVIDENCE – EVIDENCE**

**Mason v. Com., 559 S.W.3d 337 (Ky. 2018)**

**FACTS:** Three men were found dead at Todd's home. Todd claimed that he knew nothing about the killings as he was away from home and only found the bodies when he returned. Three men were questioning, Todd, Giddens and Mason. Todd later recanted, and claimed that Mason had committed the murder and Giddens had helped try to hide the bodies. Todd had helped by mopping blood and cutting up carpet. He went to the home of a family member and ultimately returned and called police. Giddens corroborated Todd's account. Mason was convicted of murdering two of the three men; he appealed.

**ISSUE:** If the defense mentions a polygraph, may the prosecution follow up?

**HOLDING:** Yes

**DISCUSSION:** Both Todd and Giddens testified, and then, the Commonwealth sought to introduce their recorded police interviews as well. This was done to refute Mason's position, brought out in cross, that the officer was "aggressive and improperly influential" in the interrogation. The Court noted that meant that the jury basically heard the information twice, but that they said essentially the same thing. The admission was in error, as it fell under the "prior consistent statements hearsay exception, but not prejudicial.

The Court also addressed the admission of Mason's recorded interrogation, in which, he argued, he did "very little talking," but instead the detective was outlining the case against him and challenging him to rebut the incriminating evidence. Taking that as true, the Court noted, he said nothing to incriminate himself, so hearsay did not apply. The Court noted that he did respond, through body language as well as occasionally verbally, and in the past, KRE 801(B)(1) allowed the admission of the entire recording to "lend context to the investigation."

The Court noted that Todd stated he'd taken a lie detector test, and that he "did well enough" not to end up charged with murder. The Court noted that polygraph examinations are inadmissible, but once the door was opened, the opposing party can rebut any evidence presented.

The Court affirmed the convictions.

**Welch v. Com., 563 S.W.3d 612 (Ky. 2018)**

**FACTS:** On February 10, 2016, Jones was delivering food to Arnold, near Carrollton. As she left, a man approached her on the property and ordered her at gunpoint to get into the car and drive. His face was partially obscured. She handed over all the money she had. As they drove, she figured out the man was Welch, who was related to her sole employee. At his orders, she drove him to the back of the nearby state park and let him out. She called a friend quickly and the friend called police. She identified Welch but expressed her fear that if he knew she'd made the identification, he would kill her. She told the officer that Arnold had a trail camera on his barn. Assistant Chief Mitchell followed footprints in the snow while Deputy Hawkins pulled the SD card from the camera. He recognized Welch, as did Mitchell and Officer Gividen. Officer Gividen knew

where Welch lived and there, Deputy Hawkins saw boot prints that were similar to the ones he'd seen at Arnold's home.

They found Welch in the shower, fully clothed, and found Welch's wallet hidden, with cash inside. Other clothing was found that matched the victim's description. Although no gun was found, his grandmother acknowledged he had one, but also gave him an alibi, stating he'd returned home before the robbery would have occurred. The victim identified Welch in a photo lineup and he was charged with Robbery, Kidnapping, Burglary and PFO. At trial, his eyewitness expert was not allowed to testify, but did provide testimony by avowal. He was convicted and appealed.

**ISSUE:** May an officer testify about lay observations?

**HOLDING:** Yes

**DISCUSSION:** Welch attempted to introduce a witness on eyewitness testimony. The Court agreed he was qualified as an expert, but in Com. v. Christie, the Court had the discretion as to whether to admit such testimony.<sup>15</sup> The court agreed the situation was totally different, and that the victim, in fact, was familiar with the suspect and had more than enough time to get a good view. In addition, other evidence implicated Welch.

With respect to the boot print testimony, the court agreed that the officer offered proper lay testimony about his observations, and his belief that the two sets of prints were from the same boot. With respect to the infrared trail camera still images, Deputy Hawkins testified as to his familiarity with such cameras and noted the images were in black and white as it was dark outside, he noted that the image was mostly white because of that. He admitted that he was not an expert but related his knowledge on how such cameras worked. The Court noted that he only moved into semi-expert testimony under cross-examination and the obligation was on the defense not to ask improper questions. Defense counsel argued with the deputy, and he only offered his opinions under pressure. The Court noted that the officers properly identified Welch through the images, which was the most important issue.

Finally, with respect to the photo array, the Court agreed that although the officers did not follow a Dept. of Justice guideline on photo arrays, there was no obligation in Kentucky to do so. The Court agreed that Jones' identification was not unduly suggestive and that she properly did an identification.

The Court upheld his conviction.

**Walls v. Com., 2018 WL 6574665 (Ky. 2018)**

**FACTS:** During Walls' trial for drug trafficking in Franklin County, a law enforcement evidence detective mentioned prior trafficking involving Walls and the CI, although it had been

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<sup>15</sup> 98 S.W.3d 485 (Ky. 2002).

previously agreed that the Commonwealth would not introduce such evidence. Specifically, it was mentioned that he had two \$50 bills that had been used in the prior trafficking, in his possession during the charged offense. (The Court admonished the jury not to consider it, when an objection was made.)

Walls was ultimately convicted and appealed.

**ISSUE:** Is reference to a prior crime generally improper?

**HOLDING:** Yes

**DISCUSSION:** The Court agreed that the only possible use of such evidence is to show that the accused has a propensity to commit the same type of crime of which they stand accused. Further, the Court agreed, the introduction was not harmless in the context of the overall evidence, but was, in fact, “devastating.” Further, evidence was presented concerning the CI that again, the Commonwealth had agreed not to introduce.

The Court vacated Walls’ conviction.

**Adams v. Com., 564 S.W.3d 584 (Ky. App. 2018)**

**FACTS:** On September 13, 2015, Adams was stopped at a checkpoint set up by the Radcliffe police department. Chief Curl, of the West Point PD, walked up to the vehicle and requested his documents, at which point, Adams took off, squealing his tires. Officers gave chase, which ended about a mile later when Adams crashed into a tree. He fell upon getting out, got up ran, and officers took him down. He collapsed and EMS transported him to the hospital. There, Officer Smith, who was at the hospital, admitted to a nurse he’d taken pain meds which were not his and he refused a blood test. Smith observed slurred speech and bloodshot eyes.

Adams was charged with DUI, fleeing and evading and wanton endangerment. Officers testified about the checkpoint. Adams claimed his foot got stuck under the accelerator when he was trying to get out his license, causing him to take off. During Smith’s testimony, he was asked if he knew about that type of car and was familiar with that model of car, as he owned one from the subsequent year and “worked on it.” The Court allowed the testimony, in which Smith testified the mechanics of the vehicle would not have allowed the situation to occur as Adams described.

Adams was convicted and appealed.

**ISSUE:** Is testimony about the workings of a vehicle generally “expert” testimony?

**HOLDING:** Yes

**DISCUSSION:** The Court agreed that the officer’s testimony was within the scope of permitted rebuttal testimony to Adams’ claims. There was no attempt to qualify him as an expert, so the

question was whether it was proper lay testimony under KRE 701. The Court agreed, however, that the testimony “far exceeded the common knowledge of ordinary people.” Further, there was no testimony that the officer was familiar with that specific model or that he’d ever worked on the acceleration system of any vehicle at all.

The Court also agreed it was double jeopardy to convict Adams of DUI and first degree Fleeing and Eevading while DUI, given that the latter subsumed the former.

The Court vacated the convictions.

## **TRIAL PROCEDURE / EVIDENCE – PARTY ADMISSIONS**

### **Lawson v. Com., 2018 WL 5732094 (Ky. 2018)**

**FACTS:** On March 3, 2013, Law murdered Aniton at her home, through beating and strangulation. He set the home on fire and also burned a nearby rooming house accidentally. He fled the scene, have sustained burns. When captured some time later, he had burn marks on his arm.

An arson investigator had determined there were multiple points of origin throughout the home, and found items that suggested kindling. Lawson was charged with murder, arson and a variety of related charges. He was convicted and appealed.

**ISSUE:** Is an “admission against interest” generally admissible?

**HOLDING:** Yes

**DISCUSSION:** First, Lawson objected to a recording of a police interview being played in court, in which he indicated he’d “once had a disagreement with the victim.” His statement was an “admission against interest” under KRE 801A(b)(1). The Court agreed it was properly used.

After resolving several other issues, the Court affirmed his conviction.

### **Farley v. Com. , 2018 WL 6721276 (Ky. App. 2018)**

**FACTS:** The Owens (Anthony and Deborah)<sup>16</sup> had a short-lived marriage, ending with the issuance of an EPO against Anthony in 2011. The EPO ordered Anthony to not return to the residence, but he did so, that same night. He was again ordered to stay away, but was given the opportunity to retrieve belongings, along with his nephew and two deputy sheriffs. He left when told to do so by the deputies. He returned that same night, however, and attacked Deborah and her daughter Brenna, with a knife. They struggled and Deborah was able to retreat and call police. Anthony fled the home. Both women were injured, having been cut.

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<sup>16</sup> At some point, it appears, Owens changed his name to Farley.

Anthony was charged with Attempt-Murder, Burglary and Assault, and related charges. At trial he argued the defense of Extreme Emotional Disturbance (EED), claiming to have been triggered by walking past the house and seeing items he'd been unable to retrieve. (He also claimed some of the items he'd retrieved had been broken.) He claimed he snapped when he saw Deborah and had no memory of injuring the women.

He was convicted of Burglary and Assault 2<sup>nd</sup>, but not the Attempt-Murder, and appealed.

**ISSUE:** Does a decision on EED fall to the jury?

**HOLDING:** Yes

**DISCUSSION:** Anthony argued that he should have been allowed to testify about his psychiatric treatment for depression, which occurred following the incident. The Court had limited the psychiatrist's testimony, to prevent him from offering an opinion as to whether Anthony was suffering from EED or prone to it. The Court agreed it was proper to limit the doctor's testimony and disallow any such testimony, as a decision on EED was solely the purview of the jury.

The Court also addressed the testimony of the detective, to the extent that she went to Anthony's mother's home and attempted to talk to his mother and stepfather. They refused to speak to her without a lawyer. The Court agreed that what was done was not hearsay, let alone investigative hearsay, but was properly entered to show the steps of the investigation.

The Court upheld Farley's convictions.

## **TRIAL PROCEDURE / EVIDENCE – PRIOR BAD ACTS**

### **Smith v. Com. 2018 WL 6570795 (Ky. 2018)**

**FACTS:** On April 20, 2012, the victim was found dead of a massive head wound and multiple stab wounds in Monroe County. A witness noticed a particular vehicle near the scene and reported it to his son, coincidentally, the Sheriff. The information was related to the detectives, who recognized the car as belonging to Hagan, a former CI. The victim's daughter received a tip that Webb committed the crime. Interviews with the two women were unproductive but when the officers returned Hagan home, a man, Smith, ran from the back of the house. He was captured but denied any involvement in the crime. Eventually, "Hagan confessed to being at the scene of the murder but stated that Smith was the one who" committed the crime. Evidence was found in Hagan's vehicle. Hagan gave a confused series of statements as to what had occurred but both were charged. During the trial, the Commonwealth was allowed to introduce prior bad act evidence as to his drug use and motive for the murder, which indicated he'd tried to break into another house before that of the victim, looking for drugs. Smith was convicted of Murder, Robbery, Burglary and Tampering. He appealed.

**ISSUE:** May some prior act evidence be admitted to give a complete picture?

**HOLDING:** Yes

**DISCUSSION;** Smith argued that the prior bad act evidence was improperly admitted. While the Commonwealth argued that the crimes were “so inextricably intertwined” with the crime at bar that the evidence was “essential to the case.” The Court agreed that to properly present a “complete, unfragmented picture of the crime and investigation,” it was necessary to admit the evidence of what occurred immediately fore and after the crime itself. The Court agreed the “evidence was relevant and probative.” The defense was able to present ample evidence that could have impacted the jury’s assessment of the witness’s testimony as well.

The Court affirmed Smith’s convictions.

**Stump v. Com., 2018 WL 6571043 (Ky. 2018)**

**FACTS:** In 2012, Sally reported that her step grandfather had raped her, to her best friend, and then to a teacher and counselor, who referred the case on to investigators. This occurred in Shelby County. She was interviewed and it was suggested that other rapes may have occurred when she was much younger. As the case progressed, the Commonwealth filed a motion to introduce prior bad acts evidence as to the earlier sexual assaults, in the form of Sally’s testimony. In a delayed response, Stump objected, but the court agreed to allow it to be introduced.

At the trial, she testified about the earlier rapes and indicated he used to medical device to assist in the process. He was convicted and appealed.

**ISSUE:** May some prior bad act evidence be admitted, with prior notice?

**HOLDING:** Yes

**DISCUSSION:** Stump argued that the prior bad acts evidence should have been suppressed as he had inadequate notice of the evidence. The Commonwealth argued his counsel had viewed the evidence, including a prescription that supported his use of a medical device. Discovery materials had been filed that included a timeline of prior assaults. The Court ruled the admission was proper.

After ruling on other issues, the court upheld his conviction.

**TRIAL PROCEDURE / EVIDENCE – WITNESS**

**Ramirez v. Com., 2018 WL 6264423 (Ky. App. 2018)**

**FACTS:** On February 5, 2017, Officer Adkins (Lexington PD) made a traffic stop on a cancelled license plate. The driver, Ramirez, showed an insurance card, but not a valid OL. He was found to have an outstanding warrant. In the subsequent search, he was found to have a large amount of cash in his pocket and methamphetamine. He gave consent to search the car, and over \$14,000 in cash, a scale and four cell phones were found. Ramirez stated he kept the cash as he didn't have a bank account and his wife could not be trusted with it. He asked the officer to go through one of his phones to get his wife's phone number.

Ramirez was charged with drug trafficking. Prior to trial, the Commonwealth moved for permission to do a forensic search of the cell phones and an officer retrieved text messages referencing drug trafficking and several incriminating photos. Ramirez argued that using any of those messages was improper "other crimes" evidence under KRE 404(b), but the Court agreed they were instead "evidence of an on-going act of criminal activity." The detective was allowed to testify as to what he found. Another officer testified as an expert witness on drug trafficking in Lexington and mentioned that "Lexington had become a central hub for drug trafficking operations for Mexican cartels." Ramirez objected, arguing that created the implication that he was a cartel member and a large-scale trafficker. The Court ordered a clarification and gave an admonition to the jury. The officer gave curative testimony and went on, eventually, to render the opinion that Ramirez was engaged in trafficking.

Ramirez was convicted and appealed.

**ISSUE:** Should offering an opinion in testimony be avoided?

**HOLDING:** Yes

**DISCUSSION:** Ramirez argued that the detective's testimony warranted a mistrial and that he invaded the province of the jury by offering his opinion. The Court agreed that the rehabilitative testimony offered as a result of his objection was sufficient to remedy any prejudice. Further, the Court agreed the test messages (some two months old) were also admissible as part of a continuing act and helped prove his intent to sell (rather than use) the drugs in his possession.

The Court upheld his conviction.

## **CIVIL LITIGATION**

### **Haworth v. H.R. and Louisville Metro, 2018 WL 4847209 (Ky. App. 2018)**

**FACTS:** H.R. was a female juvenile committed to Maryhurst in Louisville for psychiatric treatment. On July 15, 2014, she and others were taken to Waterfront Park on a field trip. When the time came to leave, she refused, and the counselor called 911. At the same time, the counselor spotted Officer Haworth and flagged her down and told her the H.R. had gone AWOL. Officer Haworth advised that she get a beat officer at the scene as Haworth was on foot patrol

on the Big Four Bridge. At some point, H.R. had met with four others, who took her to a home and sexually assaulted her.

Robbins, H.R.'s mother, filed suit against H.R., and then added Haworth and Metro Louisville to the case. Fischer and Conrad (Mayor and Chief), named specifically, filed for dismissed in that such claims were barred by the doctrine of sovereign immunity. Haworth claimed she was entitled to qualified official immunity and breached no duty to H.R. The Circuit Court denied the motions for individual immunity but did agree to official immunity. The parties appealed.

**ISSUE:** May the word "shall" convert a policy to a ministerial duty?

**HOLDING:** Yes

**DISCUSSION:** Haworth argued that her decision to stay in her assigned area and refer the counselor to call 911 to summon a nearby beat or patrol officer was discretionary. The Circuit Court looked to Louisville Metro's SOP on missing person, suggesting that it turned the action into ministerial. The Court agreed that "an SOP or similar policy may establish ministerial and/or discretionary duties."<sup>17</sup> The Court closely examined the full text of the two referenced policies. The Court agreed that the language of the two policies (which uses the term shall) triggered the "ministerial notification duty." But, it continued, that mandate only occurred under specific circumstances, and further review of the facts were necessary to determine if the situation did, in fact, match the SOPs.

The lower court's decision was vacated (that Haworth had a ministerial duty) and the case was remanded back to the circuit court for further proceedings.

With respect to Fischer and Conrad, the court also agreed that it was premature to decide that they had a ministerial duty to train Haworth, and remanded that case back, as well.

## **MISCELLANEOUS**

### **Buis v. Com. , 2018 WL 5881681 (Ky. App. 2018)**

**FACTS:** Buis was on probation for drug offenses in Pulaski County. In July, 2017, the Commonwealth moved to revoke his probation, based on his Facebook posts. In a myriad of postings, he made what appeared to be direct threats to one of the officers on his case and the officer's family. It was stipulated he made the postings, but not that they were threats or that he was "commenting to" the officer. The defense "acknowledged the stupidity" of the comments but asked that they just shut down his page.

The trial court responded:

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<sup>17</sup> Coleman v. Smith, 405 S.W.3d 487 (Ky. App. 2012).

Its [*sic*] always stupid to make threats against somebody whether you did it in a letter ... or a Facebook post and that's a crime and one of the conditions of your probation was that you should make -- do nothing unlawfully, and abide by the law, to be on good behavior, not to participate in anything that would be vicious or bad habits, and this is completely contrary to the order of probation.

Despite the argument that the comments weren't threats, the Court noted "it looks like a threat to me" and ordered the probation revoked. He appealed.

**ISSUE:** Should a court give written findings to support its decision?

**HOLDING:** Yes

**DISCUSSION:** Buis focused on the court's order that he stipulated to the threat and argued that he never did so. The Court agreed that the trial court's written findings were not just "sparse," but "are conclusory and virtually non-existent." He was not, in fact, charged with any new offense as a result of the Facebook comments.

The Court reversed the decision and remanded the case back for further decisions.

## SIXTH CIRCUIT

### FEDERAL LAW

#### UNLAWFUL POSSESSION OF A FIREARM

##### U.S. v. Workman, 2018 WL 5881533 (6<sup>th</sup> Cir. 2018)

**FACTS:** On September 30, 2013, officers obtained a search warrant for Workman's residence, a home and a workshop, the latter used as a gym and office. They found a number of items indicating that was his address, and his business was listed as being located at that same address. Around his office desk, they found numerous pieces of ammunition for different weapons. In his home, they found a Taurus "Judge" and another revolver, along with a number of long guns, along with numerous items linking him to the location. Workman denied living there, however, claiming instead he lived in a nearby camper. His girlfriend, who possessed the residence, claimed that he would sleep in the camper occasionally, but usually showered and dressed in the house and would stay there several nights a week. He denied handling the guns but his girlfriend said he shot the guns on the property and stored them in the house. She had purchased five of the six guns, but did so with his aid and advice, and she also purchased the ammunition. (The remaining gun was giving to Workman by a friend.) Phone data extraction indicated a number of messages suggesting he owned or was using guns.

Workman, a convicted felon, was indicted for being a Felon in Possession. He was convicted and appealed.

**ISSUE:** May possession be constructive?

**HOLDING:** Yes

**DISCUSSION:** Workman argued that the evidence was insufficient to prove he was in possession of the firearms and ammunition. Certainly at the time they found the weapons, he was not in or near them, as he was under arrest for other charges. But "actual possession is not necessary when constructive possession can be shown." The question was whether the location was either his home or whether he had "dominion over" the location and the Court agreed despite his denials, that he certainly did.

The Court upheld his convictions.

## SEARCH & SEIZURE

### SEARCH & SEIZURE – SEARCH WARRANT

#### U.S. v. Cleveland, 907 F.3d 423 (6th Cir. 2018)

**FACTS:** On October 17, 2015, the Youngstown (Ohio) Drug task force learned of a plan to transport cocaine in a damaged vehicle on a transport truck. They linked the delivery location to Williams, a suspected drug dealer. Officers seized the truck and found the drugs, and then switched it with a package of a similar appearance. They allowed the delivery to proceed and witnessed two men claim it. They tailed the men (Cleveland and Williams) and it was taken to Williams' home. They also saw two men riding around on bicycles, apparently watching for a tail. One later carried a backpack into the house.

They obtained a search warrant for the home and found the sham packages and guns. Both Williams and Cleveland were shown to have handled the packages, which had been coated with powder that showed on their hands. Both men, as well as McCain, who had the backpack, were arrested.

One of the items seized in the house was Cleveland's cell phone, for which a warrant was obtained, which required that the warrant authorized by a certain date. It was duly seized and the phone shipped to a lab for digital extraction. However, the extraction was not done until sometime after the date indicated on the warrant. (The warrant indicated it must be executed by a certain date, and the phone was seized and shipped, but not examined, before that date.)

Cleveland was convicted and appealed.

**ISSUE:** Is the date on a warrant for seizure of an item that must then be examined, a deadline for the actual exam?

**HOLDING:** No

**DISCUSSION:** Cleveland argued that the date on the warrant was a deadline. The Court noted that the federal Rules of Criminal Procedure control only when the seizure or on-site copying much occur, not when "off-site investigation and analysis" is involved. That is often outside the control of the original law enforcement agency. There was no indication that the phone continued to receive data that post-dated the warrant, in fact.

The Court affirmed his convictions.

#### U.S. v. Ardd, 911 F.3d 348 (6th Cir. 2018)

**FACTS:** Ardd sought to buy a half pound of cocaine, but unfortunately, his seller was an undercover Memphis police officer. Upon his arrest, the cocaine, almost \$10,000 in cash and a loaded pistol were found. (More was found at his home with a search warrant.) He was given Miranda and admitted to having been dealing, and that he had more drugs and another gun at his home. He was charged and moved for suppression. When that was denied, he was convicted and appealed.

**ISSUE:** May a flawed warrant still be valid under Leon?<sup>18</sup>

**HOLDING:** Yes

**DISCUSSION:** The Court noted that it had “struggled to identify the quantum of evidence needed to connect drug trafficking by an individual to a probability that evidence will be found at the individuals’s residence.”<sup>19</sup> In this case, the Court agreed it did not need to “enter those frothy waters” because the warrant clearly met the good faith exception under Leon, anyway. The officer noted in the warrant that “in his experience, drug dealers often keep evidence of their criminal activity at their homes.” The amount of cocaine Ardd wanted to buy was “distribution quantities” and he was ready to purchase enough for “thousands of retail hits of cocaine.” It was absolutely reasonable for the officers to believe there was probable cause to believe there was evidence at this home. Further, despite there being argued errors, most could be considered innocent mistakes or grammatical misrepresentations, rather than deliberate falsehoods.

The Court affirmed his convictions.

### **U.S. v. Benanti, 2018 WL 6068569 (6<sup>th</sup> Cir. 2018)**

**FACTS:** In 2014-15, Benanti and Witham committed a string of bank robberies, first “old-fashioned” stand up armed robberies, and then bank extortion and kidnapping, when they would hold a bank executive’s family hostage in exchange for money. On September 3, 2015, a North Carolina Highway Patrol officer tried to stop the pair for speeding, which led to a chase in which the two men crashed and then escaped on foot, carrying large black duffel bags. Using video, however, they linked the occupants to a kidnapping a few months ago, and from the SUV’s GPS unit, they found an address that they put under surveillance. They found the pair a few weeks later, driving another, stolen, SUV Trooper Reynolds tried to make a stop and again, the vehicle pulled over and one of the occupants emerged. The vehicle then took off “but this time it left the passenger, Benanti, behind.” From his appearance, he was believed to be the same passenger from the earlier attempted stop. They found evidence in his possession linking him to the kidnapping scheme. They located Witham and more evidence.

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<sup>18</sup> U.S. v. Leon, 468 U.S. 897 (1984).

<sup>19</sup> U.S. v. Brown, 828 F.3d 375 (6<sup>th</sup> Cir. 2016).

With a search warrant, they found additional evidence in the cabin where the two men were staying, and ultimately, Benanti was charged with multiple offenses. Benanti filed two motions to suppress, both for his initial arrest and for the search warrant affidavit. Ultimately they were denied and he was convicted. He then appealed.

**ISSUE:** Should a search warrant affidavit make a clear link between a location and the crime?

**HOLDING:** Yes

**DISCUSSION:** Benanti argued that the arrest was made without probable cause. The Court noted that Reynolds knew far more than just Benanti had been a passenger in a vehicle with stolen plates, he knew, at least to the level of probable cause, that Benanti was the same passenger in the prior chase, having seen video from that chase as well.

With respect to the search of the cabin, the Court found that the affidavit made a clear link between the investigation and the crimes, and the cabin. The Court noted that the affidavit gave sufficient evidence to lead the magistrate judge to think that two abductions and robberies were committed by the same men, given the similarities in the ways the crimes were committed.

Finally, the Court agreed that Benanti was not entitled to a Franks<sup>20</sup> hearing, with his argument that the officers makes several misrepresentations. But the Court agreed there was no proof that the errors, if in fact they existed, were made with knowing or reckless disregard to their falsity.

The Court upheld his convictions.

**U.S. v. Fitzgerald/ Anderson / Smith, 906 F.3d 437**  
**(6<sup>th</sup> Circ. 2018)**

**FACTS:** Fitzgerald, Anderson and Smith were part of a complex investigation with Walker, the primary target. As a result of developed information, detectives sought a warrant for Fitzgerald's home and storage locker, along with other locations. No drugs were found at Fitzgerald's residence, but other suggestive items were, including Pelican cases (which were being used to transport drugs pursuant to the overall plan), modified suitcases and a large amount of cash. Along with his co-traffickers, Fitzgerald was indicted on a number of federal charges and convicted. He appealed.

**ISSUE:** Should an affidavit show a nexus between the crime and the location?

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<sup>20</sup> Franks v. Delaware, 438 U.S. 154 (1978)

**HOLDING:** Yes

**DISCUSSION:** Among other issues, Fitzgerald argued that the search warrant for his locations was insufficient. The Court reviewed the facts listed in the warrant, and noted that a prior conviction for drug dealing is a strong factor but not a determining one. It noted “[w]e have acknowledged that ‘[i]n the case of drug dealers, evidence is likely to be found where the dealers live.’”<sup>21</sup> However, we also maintain that “a defendant’s status as a drug dealer, standing alone, does not give rise to a fair probability that drugs will be found in defendant’s home.”<sup>22</sup> Such evidence must be supported by evidence of recent drug activity, especially controlled buys. In particular, there must be a direct nexus between the home and the drug dealing. “Thus, an affidavit supporting a narcotics search warrant for a residence does not establish a nexus between a defendant’s recent drug activity and his residence where the affiant did not provide direct knowledge that the defendant has either sold drugs or used that particular residence for selling drugs.”<sup>23</sup>

In Fitzgerald’s case:

The affidavit supporting the search warrant of his residence does not establish his status as a drug dealer or a proper nexus between his alleged drug activity and that address. The affidavit does not reference Fitzgerald’s criminal history; in fact, he has no prior arrests, charges, or convictions. Nor does the affidavit assert that NOLETF officers or the confidential informant ever observed Fitzgerald in possession of drugs, delivering drugs, or receiving drugs, despite a year of investigation. The affidavit also does not include any claims of firsthand knowledge that Fitzgerald was engaged in the purchase or sale of drugs.

Even if the affidavit had established Fitzgerald was a known drug dealer, in a year of listening to Fitzgerald’s phone conversations, tracking Walker’s location, and attempting to surveil a delivery between Walker and Fitzgerald, NOLETF officers did not observe any drug activity at or near Fitzgerald’s residence.”

Specifically, the Court noted “there must be a separate ‘substantial basis for finding that the affidavit established probable cause to believe that the evidence would be found *at the place cited.*’”<sup>24</sup>

The Court agreed there was insufficient cause to issue the warrant, but also that it was not “bare bones” either, as it detailing a complicated, year-long investigation with interlocking parties. The Court found “no evidence in the record that officers did not rely on this warrant in good faith or that they applied for the warrant knowing the information within it was false.” As such, the Court agreed it was objectively reasonable for the officers to believe they had a valid warrant.

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<sup>21</sup> U.S. v. Jones, 159 F.3d 969 (6th Cir. 1998) (citing U.S. v. Lamon, 930 F.2d 1183 (7th Cir. 1991)).

<sup>22</sup> U.S. v. Berry, 565 F.3d 332 (6th Cir. 2009) (citing Frazier, 423 F.3d at 533).”

<sup>23</sup> See, e.g., U.S. v. Higgins, 557 F.3d 381, 390 (6th Cir. 2009)”

<sup>24</sup> U.S. v. Rodriguez-Suazo, 346 F.3d 637(6th Cir. 2003) (quoting U.S. v. Davidson, 936 F.2d 856 (6th Cir. 1991)

The Court upheld the denial of the motion to suppress, and ultimately, affirmed his conviction.

**U.S. v. Davis, 2018 WL 6262253 (6<sup>th</sup> Cir. 2018)**

**FACTS:** In November 2017, Officer Orrand (Akron PD) spotted a SUV with out of state plate driving out in a parking lot. He found that “consistent with drug activity,” so he alerted other officers. Trooper McCarty (Ohio State Police) spotted it and followed, and stopped it for speeding. As he was performing traffic stop related activities, another officer asked Davis to get out. Instead, Davis took off in the vehicle, with McCarty in pursuit. After a crash, Davis jumped out and ran, again pursued by McCarty. He was caught and arrested. Officers found a gun on the driver’s side of the SUV and 11 packages of what turned out to be cocaine (11 kilos). They obtained a warrant for Davis’s house and found another 25 kilos, a gun and other evidence.

Davis was charged with drug and firearm offenses, and moved for suppression. When that was denied, he was convicted. He then appealed.

**ISSUE:** Is it probable cause to believe drug evidence will be at the home of a “major player” drug dealer?

**HOLDING:** Yes

**DISCUSSION:** Davis argued that first, the traffic stop was improper, but the Court noted that the in-car camera documented the lawful reason for the stop. He then argued that affidavit failed to provide probable cause that drugs would be found at his home. The Court agreed that simply his status as a dealer wasn’t enough, but his status as a “major player,” as the amount indicated, was more than enough.

The Court affirmed his conviction.

**SEARCH & SEIZURE - CURTILAGE**

**Brennan v. Dawson, 2018 WL 4961332 (6<sup>th</sup> Cir. 2018) (CERT REQUESTED)**

**FACTS:** On February 21, 2015, Deputy Dawson (Clare County, MI, SO) went to Brennan’s home with the intent to administer a PBT. Brennan was on probation and prohibited from using alcohol, and required to submit to random testing. Dawson knocked repeatedly, to no avail, but Dawson believed he was home. He spent some 90 minutes making trips around the house, knocking on doors and windows and manipulated the exterior security camera. He ran his lights and siren as well. At some point, a third party appeared and told the deputy that the occupants were out of town and had called her to check on what was going on – having observed activity through the camera. Finally, Brennan came out and took the PBT, which registered a zero. However, Dawson arrested Brennan for failing to take the breath test on demand.

Brennan filed suit against Clare, the Sheriff's Office and related parties, under 42 U.S.C. §1983, for violating the Fourth Amendment in his actions. The District Court granted summary judgement to the Sheriff's office and Brennan appealed.

**ISSUE:** Is the curtilage protected?

**HOLDING:** Yes

**DISCUSSION:** The Court began:

A warrantless search is, "in the main, *per se* unreasonable" under the Fourth Amendment.<sup>25</sup> The Fourth Amendment is at its strongest when the home is concerned: for centuries, the home "has been regarded as entitled to special protection," and "[h]ome intrusions . . . are indeed the chief evil against which the Fourth Amendment is directed."

Furthermore, the Fourth Amendment protects curtilage, the area immediately surrounding the home.<sup>26</sup> Indeed, curtilage is entitled to the same Fourth Amendment protection as "that covering the interior of a structure."<sup>27</sup> We determine whether an area falls within a home's curtilage based on the unique facts of each case, using these factors as guideposts: (1) the proximity of the area to the home; (2) whether the area is included within an enclosure surrounding the home; (3) the purpose for which the area serves; and (4) whether the resident has taken steps to protect the area from passersby.<sup>28</sup> The "centrally relevant consideration" is whether the area "is so intimately tied to the home itself that it should be placed under the home's 'umbrella' of Fourth Amendment protection."

The Court agreed that the deputy entered and remained on the curtilage multiple times. Of course, "Although the Fourth Amendment protects the curtilage, a police officer has an implied license to enter the curtilage and attempt to speak with the home's occupant, even if the officer lacks a search warrant.<sup>29</sup> And until recently, this Court, along with the Third, Fourth, and Eighth Circuits, also recognized special circumstances under which a police officer may travel to the rear of the home without a warrant during a "knock and talk" investigation.<sup>30</sup> In Hardesty, the Court "explained that when "circumstances indicate that someone is home" and an officer's knocking at the front door goes unanswered, "an officer may take reasonable steps to speak with the person being sought out even where such steps require an intrusion into the curtilage." We held that an officer may travel to the rear of the home when he has reason to believe that the

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<sup>25</sup> Kentucky v. King, 563 U.S. 452 (2011).

<sup>26</sup> U.S. v. Dunn, 480 U.S. 294 (1987).

<sup>27</sup> Dow Chem. Co. v. U.S., 476 U.S. 227 (1986).

<sup>28</sup> Daughenbaugh v. City of Tiffin, 150 F.3d 594 (6th Cir. 1998), Dunn, 480 U.S. at 301.

<sup>29</sup> Jardines, 569 U.S. at 10; King, 563 U.S. at 469–70; U.S. v. Thomas, 430 F.3d 274 (6th Cir. 2005).

<sup>30</sup> Hardesty v. Hamburg Twp., 461 F.3d 646 (6th Cir. 2006).

occupant is inside but does not answer the front door.” The Court, in Turk v. Comerford,<sup>31</sup> concluded that Jardines and Collins v. Virginia,<sup>32</sup> overruled both decisions.

Thus, law enforcement officials cannot linger on the curtilage once they have exhausted the “implied invitation extended to all guests,” even if they suspect that someone is inside.

In this case, the Court agreed:

Dawson arguably violated the Constitution<sup>33</sup>. But regardless, that conclusion is now clear in light of Morgan. To be sure, Dawson’s initial approach to the home and knocking on the front door to administer the breath test fell squarely under his implied license as established in Jardines. But Dawson overextended his stay. Rather than retreat to his police cruiser after no one answered his knocking at the front door, Dawson walked the perimeter of the home, pausing to knock on and peer through the windows that he passed. Dawson did not stop there. By his own estimation, Dawson made five to ten trips around the perimeter of Brennan’s home. And, at one point, he returned to his police cruiser to fetch yellow crime-scene tape, went back to the front porch, and wrapped the tape around Brennan’s home security camera, which had been mounted to record approaching visitors. In total, ninety minutes passed between Dawson’s arrival and Brennan’s ultimate exit from the home—and during this time, Dawson never once sought to obtain a search warrant.

A police officer simply cannot linger and continue to search the curtilage of the home if his knocking at the front door goes unanswered. Those actions are inconsistent with the limits of the implied license recognized in Jardines.<sup>34</sup> As a result, we hold that Dawson exceeded his implied license when he repeatedly entered and traveled through Brennan’s curtilage over the course of ninety minutes and thus violated Brennan’s Fourth Amendment rights.”

The Court noted that his probation does not change the assessment. His agreement did not extend to warrantless searches of his home, only required him to submit to testing.

However, the Court agreed, at the time he committed the intrusion, Jardines had not yet been decided and as such, the law was not clearly established that he could not engage in such actions, and Hardesty remained good law.

With respect to the arrest, the Court agreed that Dawson did have probable cause to make the arrest.

The Court affirmed the summary judgements.

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<sup>31</sup> 488 F. App’x 933 (6th Cir. 2012).

<sup>32</sup> 138 S. Ct. 1663 (2018),

<sup>33</sup> See Nyilas 2016 WL 8969353 at \*5 (finding that Hardesty did not permit the officers to knock “continuously for an hour and a half”).

<sup>34</sup> Jardines, supra.

## SEARCH & SEIZURE – INEVITABLE DISCOVERY

### U.S. v. Chapman-Sexton, 2018 WL 6653018 (6<sup>th</sup> Cir. 2018)

**FACTS:** In a complicated series of events, the Buckeye Lake Police Department (BLPD) learned from thieves that a flash drive and Playstation that had been stolen from Chapman-Sexton contained child pornography. The “victim” confirmed the items belonged to him. The police chief was aware that Chapman-Sexton was a registered sex offender with a federal child pornography conviction. He did a limited search of the flash drive to confirm the presence of such matter and after several images, stopped. He obtained a search warrant for Chapman-Sexton’s apartment and two days later, for the electronic devices already in the possession of the BLPD and those found in the search. Eventually the FBI took over the matter and placed federal charges against Chapman-Sexton, using only the images on the flash drive. He moved to suppress and was denied. He was convicted and appealed.

**ISSUE:** May evidence be searched when justified under the independent source doctrine?

**HOLDING:** Yes

**DISCUSISON:** Sexton-Chapman argued that the evidence found on the flash drive was tainted by the chief’s “initial review” and that the latter search was fruit of the poisonous tree. The trial court had agreed the initial search was improper, but that the evidence was admissible under the Independent Source Doctrine. “This doctrine “holds that evidence will be admitted if the government shows that it was discovered through sources ‘wholly independent of any constitutional violation.’”<sup>35</sup> So evidence obtained pursuant to a search warrant that relied, in part, on unlawfully obtained information may nevertheless be admissible under the independent-source doctrine. As explained in Jenkins, “[i]f the application for a warrant ‘contains probable cause apart from the improper information, then the warrant is lawful and the independent source doctrine applies, providing that the officers were not prompted to obtain the warrant by what they observed during the initial entry.’”<sup>36</sup>

The district court analyzed the first prong of Jenkins and determined that probable cause existed to support the search even without considering the tainted initial search of the flash drive by Chief Hanzey. But the Court failed to consider the second prong of Jenkins—i.e., whether the law-enforcement officer was “prompted to obtain the warrant by what [he] observed during the initial entry.” We have grave doubts as to whether this second prong was met because Chief Hanzey expressed concern that the prosecutor’s office would not seek a search warrant unless he first confirmed that the flash drive contained child pornography.”

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<sup>35</sup> U.S. v. Jenkins, 396 F.3d 751 (6th Cir. 2005) (quoting Nix v. Williams, 467 U.S. 431 (1984)).

<sup>36</sup> 396 F.3d at 758 (quoting U.S. v. Herrold, 962 F.2d 1131 (3d Cir. 1992)); see also Murray v. U.S., 487 U.S. 533 & n.3 (1988) (“To determine whether the warrant was independent of the illegal entry, one must ask whether it would have been sought even if what actually happened had not occurred . . .”).

The Court noted, however, that it could affirm on a different issue, and looked to the inevitable discovery exception instead. He had more than enough to communicate his concerns to Sexton-Chapman's probation officer, and the "probation officer, in turn, would have inevitably wanted to examine both the PlayStation and the flash drive that had been stolen from Chapman-Sexton's residence and that were now in Chief Hanzey's possession." A flash drive "is readily usable as a means to conceal prohibited images from discovery," and the probation officer would likely suspect that Chapman-Sexton was concealing child pornography."<sup>37</sup>

The Court agreed that "the incriminating evidence against Chapman-Sexton would have been inevitably discovered by the government even without Chief Hanzey's initial pre-warrant search of the flash drive" and affirmed his conviction.

## **SEARCH & SEIZURE - TERRY**

### **U.S. v. Ward, 2018 WL 6181644 (6<sup>th</sup> Cir. 2018)**

**FACTS:** On November 9, 2016, Ward, Hunter and Harris stood in front of a Dayton (OH) Market. Directly across the street was a housing project, considered to be a "high crime area." Officers Campbell and Sharp passed by over a period of hours, several times, and saw the three men, "standing outside the market and repeatedly entering and exiting a black SUV vehicle parked in front of the store." Believing their conduct was consistent with drug trafficking they elected to do a Field Interview. They parked next to the SUV and approached on foot. Ward stood slightly apart from the other two, with his dog on a leash. Officer Orick arrived. When asked what they were doing there for so long, the men replied they were "just chillin.'" When asked about ID, Hunter said he had none, and Ward, "began reciting a string of numbers." He agreed that was his Social Security number, and also gave his name. The officers learned that the SUV belong to Hunter's cousin, and denied drug trafficking. The officers asked about a pat down, and both Hunter and Ward mildly objected, but they frisked Hunter anyway. Ward told his dog to sit and observed. When Officer Sharp called Ward over, presumably to be frisked, Ward took off running, which officers in close foot pursuit. During the flight, he tossed away a pistol.

Ward was a convicted felon, and he was indicted for possession of the gun. He moved for suppression, and was denied, with the Court find his seizure to be lawful under Terry. Ward took a conditional guilty plea and appealed.

**ISSUE:** Is questioning someone a seizure?

**HOLDING:** No

**DISCUSSION:** The Court agreed that Ward was not seized at the moment he tossed the firearm. The Court ruled that up to that point, the interaction was consensual, and the "the officers did

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<sup>37</sup> U.S. v. Makeeff, 820 F.3d 995 (8th Cir. 2016).

not use any physical force to restrain Ward's liberty." He did not submit to the officers' show of authority, so it was unnecessary to analyze whether he should have felt free to leave.

The Court broke it down into two chunks of time, the questioning and Hunter's frisk. Neither, the Court agreed, amounted to a seizure of Ward. Specifically, during the questioning, the court agreed, the officers kept to a "noticeably, perhaps even surprisingly, non-threatening tone." Asking for information was appropriate under the circumstances. Once Ward, there was no actual submission, so there was no seizure.<sup>38</sup> His behavior did not rise to the level of passive acquiescence, either. In this case, "Ward continued doing what he had been doing for hours before the officers arrived: he stood on the sidewalk, and he talked to his dog." Further, "Whatever the officers' intent, an attempted seizure is still not a seizure."<sup>39</sup>

The Court concluded: The Fourth Amendment protects against unreasonable seizures, not unreasonable attempted seizures." The Court upheld the denial of the motion to suppress.

## **SEARCH & SEIZURE - CARROLL**

### **Carter v. Parris (Warden), 910 F.3d 835 (6<sup>th</sup> Cir. 2018)**

**FACTS:** Around midnight on June 2, 2007, the Smith County (TN) SO got calls about a gathering of people on county property. Deputies found a group of cars and a campfire. As Deputy Babcock approached Carter's car, he saw a bag of a green leafy substance and rolling papers. The passenger was only 13, and Carter confirmed the car was his and gave consent. Another bag of marijuana was found, at which point, Carter had an anxiety attack and was transported to the hospital. The deputies continued searching and found a concealed lockbox that looked like a book. Deputy Babcock snapped the lock and found explicit photos of the minor passenger and DVDS.

Carter was arrested when he was released from the hospital. He gave consent to an apartment search, and more images were found. Carter admitted he had exposed the minor to HIV and used the photos as blackmail. Carter was charged with state crimes involving the minor, in two counties. He was denied suppression in the state courts and took an appeal. The state courts refused to consider the consent issue as it was beyond the scope of the appeal, given the way the case was handled. Carter took a habeas corpus appeal.

**ISSUE:** May a container be searched for evidence under Carroll?

**HOLDING:** Yes

**DISCUSSION:** The Court discussed whether an attempt to suppress the lockbox evidence would have been successful (the standard for his appeal). The Court noted that:

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<sup>38</sup> Brendlin v. California, 551 U.S. 249 (2007)

<sup>39</sup> See U.S. v. Smith, 594 F.3d 530 (6<sup>th</sup> Cir. 2010).

Even if Carter did not consent to the search of his lockbox, *and* even if the inventory exception would not have applied to the evidence, the lockbox photos were still admissible. Although the Fourth Amendment generally requires police to obtain a warrant before performing a search, law enforcement may “search a vehicle without a warrant if they have probable cause to believe that the vehicle contains evidence of a crime.”<sup>40</sup>

In other words, once he saw the drugs, he had probable cause to search. With respect to the search of the locked container, the Court noted that:

The Supreme Court long ago dispensed with any categorical distinction between cars and the containers within cars.<sup>41</sup> So long as “probable cause justifies the search of a lawfully stopped vehicle, it justifies the search of *every part* of the vehicle and its contents that may conceal the object of the search.”<sup>42</sup> Moreover, this is not a case where the probable cause to search the car failed to extend to the container in the car, i.e., the lockbox. For instance, if the deputies were looking for a stolen barrel of Pappy Van Winkle bourbon, they would not have had probable cause to search in a place that could clearly not fit a barrel, like a car’s small glovebox. But, in this case, the deputies were not looking for a bourbon barrel in the glovebox, nor were they searching for a surfboard in the center console. The deputies were searching for additional quantities of drugs or drug paraphernalia. There is no dispute that the deputies had probable cause to believe such items could have been in the lockbox, especially once the deputies realized it was a container that “could conceal the object of the search.”<sup>43 44</sup>

The Court noted that “Deputy Babcock had probable cause to search the car with or without Carter’s consent, and the fact that he asked for consent is of no moment. Deputies may have many reasons to ask for consent. For instance, asking for consent may allow officers to assure themselves that a subsequent search is constitutional—even if the consent is unnecessary.<sup>45</sup> But asking for consent does not somehow forfeit the probable cause that had already developed for a search.”

Further, even though it could have later been justified as inevitable had they done an inventory, that was an unnecessary argument.

The Court upheld his conviction.

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<sup>40</sup> U.S. v. Galaviz, 645 F.3d 347 (6th Cir. 2011) (internal quotation marks omitted).

<sup>41</sup> See California v. Acevedo, 500 U.S. 565 (1991); U.S. v. Ross, 456 U.S. 798 (1982).

<sup>42</sup> Ross, *id.*

<sup>43</sup> *Id.*; see also Wyoming v. Houghton, 526 U.S. 295 (1999).

<sup>44</sup> The court included the following footnote: Pappy Van Winkle is an extremely rare bourbon, hard to find and hard to afford. And while much bourbon is understandably lost to the Angel’s Share, Pappy seems to be often lost in robberies and heists—or what one may call the Thief’s Share. See Mike Esterl, Bourbon Heist: Who Stole the Pappy Van Winkle?, Wall St. J. (Oct. 17, 2013).

<sup>45</sup> See U.S. v. Hudson, 405 F.3d 425 (6th Cir. 2005) (“An officer with consent needs neither a warrant nor probable cause to conduct a constitutional search.”).

## INTERROGATION

### U.S. v. Holt, 2018 WL 5778314 (6<sup>th</sup> Cir. 2018)

**FACTS:** The Short North Posse, a drug gang in Columbus, Ohio, was also engaged in robberies as well. Reynolds was involved in several of the robberies, with the help of Holt, who was not a member of the gang. Wharton and Bowers testified about the robberies, and the involvement in the gang. Battle, one of the victims, was a marijuana dealer, and he was killed in one of the robberies. The case was cold for years but eventually, Holt became a suspect. He was summoned to appear for a DNA sample, fingerprints and a photograph. Holt arrived, in a wheelchair, having been made a paraplegic by being shot in the back in an unrelated situation. Holt arrived with his girlfriend, who assisted him with doors. Holt asked the agents whether he needed a lawyer but he claimed he was told that he did not, that they “just wanted to ask him a couple of questions.” One of the agents stated he did not ask about an attorney, however. His girlfriend was not present. Federal and local law enforcement questioned him. Although the interview should have been recorded, the device battery to be used was dead and no recording was made. The statement was summarized and all notes destroyed.

According to the statement he was given at least a variation of Miranda and told that he could leave after providing the DNA and such. Holt admitted that he possessed the gun that had been used in the Battle shooting, and that he’d done reconnaissance. At that point, the prosecutor present told him he needed to leave and talk to an attorney and to tell that attorney the truth. He started “rubbing his head,” and then told two more versions, the last being that he was there, but did not enter the house.

Holt was charged with murder in aid of racketeering. He moved for suppression, claiming he was interrogated while under custody, and without Miranda. The trial court concluded it was not custodial and denied the motion. Holt was convicted and appealed.

**ISSUE:** Is coming to the prosecutor’s office custody?

**HOLDING:** No

**DISCUSSION:** The Court agreed “Holt was not in custody when he was questioned.” All he was required to do was have his photo and fingerprints taken and a DNA sample collected, and he was told specifically he did not have to answer any questions. Even though this took place in the U.S. Attorney’s satellite office, this alone did not make it coercive. He could, it was noted, manage his wheelchair on his own and could have left at any time.

The length of the interview, two hours, it was early on when he was cautioned that he should talk to an attorney. Although the interview should have been recorded by local police, the trial court had not doubted the officers’ credibility.

The Court agreed his motion was properly denied. After a ruling on other issues, the Court affirmed the District Court's judgement.

**U.S. v. Villa-Castaneda, 2018 WL 5817074 (6<sup>th</sup> Cir. 2018)**

**FACTS:** During his time in jail, in Woodford County, Villa-Castaneda communicated with two fellow inmates as to his desire to put out a hit on Duncan, the AUSA in his federal case. An attorney for one of the inmates brought it to the attention of law enforcement. Neither inmate spoke Spanish and the conversations took place in English. Further recorded interactions, although unclear in content, were clearly in English as well.

Agent Whitehead, FBI, interviewed Villa-Castaneda in English, and he signed an English language Advice of Rights Miranda form. He waived his right to have an attorney present and declined an offer for a translator. He admitted to having made the threats and provided details about how he planned to get the money.

He was convicted of threatening to murder a AUSA and appealed.

**ISSUE:** Is a foreign language Miranda required when clearly, the subject does understand English?

**HOLDING:** No

**DISCUSSION:** Villa-Castaneda argued that "language difficulties impaired his ability to knowingly and voluntarily waive his rights." The Court noted that he "received Miranda warnings verbally and via a standard FBI Advice of Rights form, and Defendant signed the form acknowledging his understanding of the rights before speaking to the agents." The District Court ruled that he "significantly understates" his language abilities and that the evidence indicated he had sufficient fluency in English. The jail had no issues in communicating with him either. The agent would have had no reason to believe he could not speak English adequately.

The Court affirmed his conviction.

**42 U.S.C. §1983**

**42 U.S.C. 1983 - INJUNCTION**

**Gale v. O'Donohue, 2018 WL 6132050 (6<sup>th</sup> Cir. 2018)**

**FACTS:** On September 4, 2016, at about 2:27 a.m., a Royal Oak Michigan resident called 911 complaining about a strange man who had knocked on her door minutes before. Her husband had answered the knock and the man walked away. Officer Kling found Gale a few minutes later and he matched the description. Gale raised his hands when the officer

approached. He told the police that he was trying to get to a friend's house but could not provide a coherent explanation of where it was. When the officer asked for identification, he agreed to have the officer check, as his hands were still raised. He denied having knocked on any doors but was unsure how much he'd had to drink. He denied seeing anyone else in the area. Ultimately the officers offered to call a taxi if he could tell the taxi where to take him.

Officer Paramo offered to give him a ride, but that he would have to be patted down first. The officer agreed he was free to walk, but if he wanted a ride, he would need to be frisked. Gale agreed and entered the cruiser. The officers asked for his friend's full name, so they could find him, Gale refused. He was told he could leave if he wanted, but that the officers were just trying to help him get to his destination. The officers explained they would likely get more calls on him if he continued to walk around. Ultimately, the officer started the cruiser and headed to a bar which Gale had mentioned as near his friend's home. The drive, about two minutes, ended when the officer got to a gas station near the bar, where he let him out. The entire interaction took 11 minutes and 27 seconds, with five minutes inside the cruiser.

Gale filed a citizen's complaint and Lt. Van Ness spent some two hours explaining policy and procedure to him. Lt. Van Ness stated that the officers acted appropriately.

Gale filed a lawsuit, arguing a variety of claims, and asked for an injunction to keep the police from making such stops. The trial court denied the injunction and Gale appealed.

**ISSUE:** Does an injunction against a police department require a very high standard?

**HOLDING:** Yes

**DISCUSSION:** The Court agreed that such injunctions were a drastic tool, and further, that he had not demonstrated a likelihood of success on his underlying claim. Gale argued the officers were "investigating a completed act," and that the community caretaking doctrine did not justify the interaction either.

Gale also argued that the Royal Oak PD inadequately trained its officers, and that their current practices practically guaranteed constitutional violations. However, nothing in what he provided indicated any such improper training. The Court agreed there was no irreparable harm that required an injunction that would in effect, "enjoin a wide swath of police activity in Royal Oak."

The Court affirmed the denial of an injunction.

## **42 U.S.C. §1983 – FORCE**

**Stahl v. Coshocton County (Ohio) 2018 WL 5733362 (6<sup>th</sup> Cir. 2018)**

**FACTS:** On March 26, 2013, in New Concord, Ohio, Officer Downing observed a vehicle run a red light. When he started after the vehicle, it swerved and barely missed another vehicle and a row of mailboxes. A pursuit began that crossed over into neighboring Coshocton County. Deputies in that county had been advised and Downing ended his pursuit. It was picked up by Deputies Andrews Sharrock, Snyder and Stone, who also tried to get the vehicle to pull over.

It did not, however, and at one point, it struck Deputy Sharrock's cruiser, a move that appeared intentional to Deputy Snyder. Deputy Snyder tried to initiate a "controlled contact" maneuver to get it off the road. It rolled down an embankment and into a field. Deputy Stone and his K-9, along with Deputy Snyder got out and ran toward the vehicle. Stahl, the driver, accelerated toward Stone who sidestepped. He was accelerating toward Deputy Snyder. Deputy Stone tried to distract the driver by striking the window to no avail. Deputy Snyder fired through the windshield and the side window. The deputies believed Stahl was deceased at that point.

Sharrock, injured, was still up on the road. Paramedics arrived and one, Reedy, walked down to the truck with Deputy Andrews and they realized Stahl was still alive. As Reedy was starting medical interventions, Deputy Andrews starting taking photos. Reedy later stated he had no recollection of pictures being taken but that the deputies did not interfere in any way with his medical care. An EMS supervisor arrived and made the decision to cancel the helicopter, already summoned, in favor of ground transport, as he believe Stahl's injuries were mortal. This was based on information from Deputy Snyder, who was also a paramedic. (In fact, the helicopter could not fly that night.)

Stahl died. His estate representative filed suit under 42 U.S.C. §1983. The District Court ruled in the officers' favor and Stahl's estate appealed.

**ISSUE:** May a violent, fleeing subject be stopped with a use of force?

**HOLDING:** Yes

**DISCUSSION:** First, Stahl complained that his rights were violated by the initial seizure, but the Court agreed that the deputies had probable cause to believe he had violated Ohio law, including an assault with the vehicle. With respect to the shooting by Deputy Snyder, Stahl argued that Deputy Snyder created the danger to himself by needlessly running in front of the truck, but the Court agreed the Stahl was in fact, accelerating toward Snyder. Further, the "dashboard camera video conclusively establishes that the shooting unfolded in seconds, without the benefit of calm reflection." The Court ruled in favor of Deputy Snyder on this claim.

With respect to the claim that his medical needs were disregarded, the estate named both the law enforcement officers and the paramedics on scene. The Court noted it was necessarily to specifically state how each of the defendants failed to take appropriate actions. The Court noted that both Snyder and Stone legitimately believed that Stahl was dead, and with that belief, not taking further action was not deliberate indifference. In fact, they did call for on-duty

EMS, which arrived in minutes and managed to depart the scene, with Stahl on board, 15 minutes after they received the initial shots fired call.

With respect to complaints that deputies loitered and gawked, while one deputy took photos, the Court found instead that while the deputies were present, their actions did not cause the situation to worsen. Several of the EMS crew members were attending to Sharrock, in fact. Nothing whatsoever indicated any deliberate indifference to his medical needs.

With no liability on the part of the individual defendants, there could be no liability on the part of the municipality either.

**Smith/Thomas v. City of Detroit, 2018 WL 4961285 (6<sup>th</sup> Cir. 2018)**

**FACTS:** Smith and Thomas lived in an abandoned Detroit home with their three unlicensed dogs (two pit bulls and a Rottweiler). In January 2016, they were reported for selling marijuana from the house and Officer Wawrzyniak and a CI arranged for a controlled buy. The CI reported there might be a “small dog” at the home. Officers obtained a search warrant and during the briefing, the possibility of a dog was mentioned. When they entered, after knocking and then ramming the door, they heard dogs barking. Smith, the only person present, allegedly called out that she would secure the dogs, and put the two pit bulls in the basement, securing them by pushing a stove in front of the open doorway. The Rottweiler was already in a closed bathroom. One of the dogs escaped from the basement and one of the officers shot him. One of the officers stated he fired shot at the dog’s legs and then allowed Smith to try to put him up, but she lost control and the dog charged back toward the officers. Another officer shot him multiple times, killing the dog. When they opened the bathroom door to determine if Thomas was present and the dog became trapped and they shot him through the door. (He was shot again by another officer when they realized he was mortally wounded.) When they went to clear the basement, the last dog charged up the steps and she was shot as well.

Smith was charged with misdemeanor possession of marijuana and that charge was dismissed when the officers failed to appear in court. Internal investigations cleared the officers in the shooting. Smith and Thomas filed suit under 42 U.S.C. 1983. The District court ruled that since the dogs were unlicensed, the pair did not have a legitimate possessory interest in the dogs. The Court also noted that even if they did have that interest, the shooting of the last dog was lawful but the shooting of the other two dogs required more evaluation as to whether they were in fact an imminent threat.

Smith and Thomas appealed.

**ISSUE:** Is shooting a dog, which is not posing an immediate threat, lawful?

**HOLDING:** No

**DISCUSSION:** The court noted that the officers conceded that there were material factual issues as to whether the seizure of the two dogs upstairs was justified by exigent circumstances and that the right to possess a lawfully owned dog was protected. The question remained whether an unlicensed dog, was lawfully owned or contraband. Prior to 2014, it was lawful in Michigan for peace officers to kill unlicensed dogs but that law changed to a requirement that proceedings be brought against the owner instead. The law essentially guaranteed due process to the owners, making it clear they had a possessory interest.

The Court noted that just like the law protected the stolen stereo in Arizona v. Hicks, it protected the unlicensed dogs.<sup>46</sup> The Court noted that at the time, of course, the officers could not have known whether they were licensed or not, as wearing tags was not required, or they could have been under the age or residence time frame and thus not subject to the local licensing requirement.

The Court reversed the summary judgement with respect to the two officers that actually shot the dogs upstairs.

**Estate of Collins v. Wilburn, 2018 WL 6012329 (6<sup>th</sup> Cir. 2018)**

**FACTS:** In 2015, Sgt. Wilburn (Louisa PD) was working a local event. He was told by the police chief that a truck had been driven into a nearby ditch. He approached and found Collins, and upon checking discovered he was driving on a suspended license. There was also beer and empty beer containers in the vehicle. Wilburn did not smell alcohol but during a FST, Collins “screamed and cursed at people going by” over Wilburn’s orders not to do so.

Collins was arrested for disorderly conduct and the suspended OL. The officer did not handcuff Collins, who promised to cooperate, but upon arrival, he refused to get out of the cruiser and cursed. Collins finally gave in and got out, and as they walked up the ramp into the building, grabbed the railing and “began yelling at cursing” at the officer and bystanders, and refused to let go. Wilburn activated his body camera.

Wilburn attempted to handcuff Collins, who continued to struggle, but only got one around the left wrist. He warned Collins he would use his Taser if did not allow him to put the handcuffs on. Officer Miller arrived as backup. Collins continued to argue and curse, and refuse to release the railing. Wilburn administered a drive-stun and Collins swung on Wilburn, striking him in the chest. Miller also used his Taser, which proved ineffective. Collins staggered back into the station and closed the door, barricading himself into the foyer. Officer Keefer arrived. The officers were concerned as there were weapons accessible in the building, should Collins kick down doors, and of course, there were “readily available makeshift weapons” such as chairs and scissors. They pried open the door enough for Keefer to use his Taser, again, it proved ineffective. (At one point, Collins removed the wires and held them.) Collins got the door shut. Deputy Wilhite (Lawrence County SO) arrived.

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<sup>46</sup> 480 U.S. 321 (1987).

Wilburn realized he could use a key to enter through the back door and approach Collins from the rear. He got into the building and behind Collins, just outside the foyer. He deployed his Taser into Collins back, but he still refused to go to the ground. He did release the door, however, and the other officers entered. Keefer struck Collins and got him to the ground and Collins continued to struggle against handcuffing. Wilburn cycled his Taser as Keefer used his baton and Miller “closed empty hand strikes,” and they used batons to try to get his hands out from underneath his body.

They finally got the handcuffs on and then realized his face was “turning dark.” They sat him upright and found he was breathing, but he was unresponsive and mumbling. Fire and EMS responded and CPR was started. EMS transported him, but he was pronounced dead at the hospital. The Medical Examiner considered the cause of death to be cardiovascular disease, perhaps exacerbated by the struggle. Collins had minor injuries from the struggle but no trauma.

Collins’ estate filed suit against all parties and their government employers. The District Court awarded all summary judgment under qualified immunity and the Estate appealed.

**ISSUE:** Is a use of force appropriate when arresting a violent subject, even if the underlying offense is a misdemeanor?

**HOLDING:** Yes

**DISCUSSION:** The Estate argued the force used was objectively unreasonable and that he was incapacitated and unable to comply with the officer’s commands while pinned to the floor. The Court noted that “active resistance” includes physical struggles, threats and disobeying commands, all of which were clearly shown by the video. When a subject refuses to be handcuffed and is resisting arrest, physical force is justified and to be expected. The Estate argued that when the underlying offenses are misdemeanors, a lesser degree of force is to be used, but the Court noted that Collins became violent during the arrest itself. The Court agreed that the Estate “failed to establish” a violation of any of Collins’ “clearly established constitutional rights.” As such, the Court affirmed the grant of qualified immunity.

With respect to state tort liability, the Court noted that “Kentucky law offers immunity from tort liability to public officers for acts performed in the exercise of their discretionary functions.”<sup>47</sup> Deciding how much force to use is a discretionary act.<sup>48</sup> The Court agreed that the officers were entitled to state immunity as well, as was the City of Louisa.

**Baxter v. Bracey / Harris, 2018 WL 5877253 (6<sup>th</sup> Cir. 2018)**

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<sup>47</sup> Yanero v. Davis, 65 S.W.3d 510 (Ky. 2001).

<sup>48</sup> Smith v. Norton Hosps., Inc. 488 S.W.3d 23 (Ky. App. 2016 ); Nichols v. Bourton Cty Sheriff’s Dept., 26 F.Supp 3 634 (E.D. Ky. 2014).

**FACTS:** On January 8, 2014, Officers Harris and Bracey responded to a break-in. They pursued the burglar, Baxter, who sought refuge in a house and hid. Ultimately, the officers entered the house with a K-9, Iwo and warned that they would release the dog if the suspect did not surrender. Harris released Iwo, who quickly found Baxter in the basement. Baxter later claimed he put his hands up, but still did not emerge. Within a few seconds, Iwo was released again, and he bit Baxter in his arm, once. He released Baxter on command and he was taken into custody.

Baxter, pro se, brought a claim against the two officers under 42 U.S.C. §1983, claiming excessive force (Harris) and failure to intervene (Bracey). Both officers moved for summary judgement, and were denied. The officers appealed.

**ISSUE:** Is a K-9 bite automatically excessive force?

**HOLDING:** No

**DISCUSSION:** The Court began:

The clarity of the constitutional violation is critical. An individual suing under §1983 must demonstrate two things: First, that the officer violated his constitutional rights. And second, that the violation was “clearly established at the time.”<sup>49</sup>

Further, “so long as the alleged violation has not been clearly established, the officers receive qualified immunity and the suit can be dismissed.”<sup>50</sup> The Court agreed in this case, the court agreed, “the officers are entitled to qualified immunity because Harris’s use of the canine to apprehend Baxter did not violate clearly established law.”

Factually, Baxter fled the scene from a serious crime and did not respond to multiple warnings that the K-9 would be released. Iwo was properly trained and had no bad history. Even though Baxter argued that he had already surrendered, by raising his hands, the Court agreed that was not necessarily enough. “That’s because even with Baxter’s hands raised, Harris faced a suspect hiding in an unfamiliar location after fleeing from the police who posed an unknown safety risk— all factors the Campbell court identified as significant to determining whether the seizure was lawful.”<sup>51</sup> Following the discovery, which fleshed out the story on both sides, the Court agreed, nothing would have suggested to the officers that what they were doing was unlawful.

Further, since Harris’s actions were appropriate, so were Bracey’s. The Court reversed the denial of qualified immunity and ruled in favor of the officers.

**Brozman v. Solic, 2018 WL 6266763 (6<sup>th</sup> Cir. 2018)**

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<sup>49</sup> District of Columbia v. Wesby, 138 S. Ct. 577 (2018).

<sup>50</sup> Ashcroft v. al-Kidd, 563 U.S. 731(2011).

<sup>51</sup> Campbell v. City of Springboro, 700 F.3d 779 (6th Cir. 2013).

**FACTS:** Officer Hess and Sgt. Collins (Austintown, OH) stopped a vehicle in which Brozman was a passenger. The occupants were told to get out and a K9 alerted to drugs in the vehicle. Brozman put his hand in his pockets and was told to remove them, then put his hands back in his pockets. When he ignored a second order, he was tased. He removed one of the probes and was then restrained forcible. After being processed and released, he was found to have suffered a hip fracture. He was charged with resisting and drug abuse (pills having been found in his pocket); the resisting was dismissed and he took a guilty plea on the drug charge.

Brozman filed suit under 42 U.S.C. §1983 claiming excessive force. The officers moved for summary judgement, which was granted. Brozman appealed.

**ISSUE:** Does a serious injury necessary indicate that excessive force was used?

**HOLDING:** No

**DISCUSSION:** First, Brozman failed to argue that the hip fracture constituted circumstantial evidence of an excessive use of force, but the court noted that by failing to do so, he forfeited his right to bring it on the appellate level. Brozman also argued that he was tased after being handcuffed, but in fact, admitted the tasing came before the handcuffing. That prior admission negated his argument.

The Court upheld the dismissal.

**Wilkerson v. City of Akron, 906 F.3d 477 (6<sup>th</sup> Cir. 2018)**

**FACTS:** Officer Danzy (Akron PD) responded to a suspicious person call (from an off duty officer) and found Thomas and Gray standing on the sidewalk. This led to a frisk, which led to a tussle, and Thomas's concealed pistol went off. Thomas then ran and Officer Danzy shot and killed him. Wilkerson (his mother) filed suit on behalf of the Estate. The Court denied summary judgement on one claim, on the initial stop, which Danzy appealed, and granted it on the remaining claims, including the force claims, which the estate appealed.

**ISSUE:** Does the fact that a seizure was unlawful automatically make force used after that unlawful?

**HOLDING:** No

**DISCUSSION:** The Court noted that Danzy stopped and frisked Thomas because "he seemed 'nervous.'" The Court noted that "walking away from a consensual conversation with an officer is not in itself enough to justify reasonable suspicion." That issue, which was captured on video, would fall to the jury to decide. The Court noted that although the original call came from an off duty officer, that officer did not see behavior consistent with a burglary, and seemed to be connected to a broken down vehicle. The Court agreed that Officer Danzy was not entitled to summary judgement on that claim.

With respect to the force, however, The Court agreed that in the seconds before Danzy fired, he and another officers had been “wrestling a large and resistant subject, one who managed to fight off two officers at once.” There was no evidence that he left the gun behind. Even though he apparently had to grab at his pants as he ran, that would be only a briefly situation. A warning was not feasible, and “as far as Danzy knew, Thomas still had the once-discharged weapon (as the evidence show he did), and nothing prevented Thomas from turning to fire upon the officers.” Danzy immediately called for medical aid.

The court affirmed the dismissal of the force claim.

## **42 U.S.C. §1983 – MALICIOUS PROSECUTION**

### **Howell v. Cox / City of Fairview, TN, 2018 WL 6720704 (6<sup>th</sup> Cir. 2018)**

**FACTS:** Matthew Howell went to a bar to play poker and have a few drinks. But his night took a turn for the worse when he got into an argument with another poker player. Police were called to the scene, and Howell left the bar. Howell claims that he was not intoxicated and was “ready . . . to go,” so he paid his tab and left. Officer Cox encountered Howell walking away and found him drunk, unsteady and with bloodshot eyes. He agreed that he’d gotten into an argument and the bar owner indicated he’d been told to leave due to his language. When Cox went back to Howell, he found him “still using profanity and sexually explicit language.” Officer Cox decided to cite him for intoxication, rather than arrest for disorderly conduct, but that still required a trip to the police station. He was picked up by a friend.

Cox’s first trial ended in a mistrial and he failed to appear for his second trial, arguing he did not get the court date. He was arrested by Officer Cox on an arrest warrant. He was ultimately acquitted at a second trial. He then sued Cox and the City for that arrest. The District Court gave the defendants summary judgement, and Howell appealed.

**ISSUE:** Is an officer who executed a warrant subject to malicious prosecution?

**HOLDING:** No

**DISCUSSION:** First, Howell alleged malicious prosecution, but could show no “evidence to suggest that Cox played a role in the court’s decision to issue the warrant.” He simply executed it. Nothing would indicate that the first case, which did not involve an arrest, would lead to an arrest some two years later. He also failed in his retaliation claim, which was based on an arrest for his language, and the court agreed it was far outside the statute of limitations for such a claim.

The Court noted that his cause of action – for his claim he was cited in violation of his right to speak profanity – accrued on the date he was cited. It continued:

The continuing-violation doctrine rarely applies to § 1983 claims, and this case is no exception.<sup>52</sup> It may have been inconvenient for Howell to bring his retaliation claims while the prosecution was in progress, but that is what the law requires. Thus, Howell's retaliation claims, filed almost four years after his arrest in 2012, are time-barred.

The Court affirmed the dismissal.

## **42 U.S.C. §1983 – FIRST AMENDMENT**

### **Peffer (Julie/Jesse) v. Thompson / King / Kopach, 2018 WL 525363 (6<sup>th</sup> Cir. 2018)**

**FACTS:** In 2012, Jesse Peffer was charged with possessing and distributing marijuana and in early 2014, additional relating charges including manufacturing marijuana, in another county. He pled guilty and received a minor sentence. Julie was charged with conspiracy and she negotiated a dismissal in exchange for forfeiture. (Both argued, apparently, that their marijuana use was considered medical, but there was no official determination on that issue.)

In 2014, Thompson, a prosecutor, with the help of King and Kopach (law enforcement) filed an action that demanded the forfeiture of real property, supposedly in retaliation for the lax pleas. The Peffers filed suit under 42 U.S.C. §1983, claiming First Amendment retaliation. The Court dismissed their claims and the Peffers appealed.

**ISSUE:** Is plea bargaining protected speech?

**HOLDING:** No

**DISCUSSION:** The Court noted that it was “struggle[ing] to identify the First Amendment protected activity” involved in the claim. The Court could find no indication that plea bargaining was protected speech nor was their involvement in pre-trial proceedings such either. Further, the publishing, by filing the appropriate paperwork to start forfeiture claims, was not speech. The Court ruled that what was included was not false and that a criminal prosecution wasn't even necessary for forfeiture claim in the first place.

The Court upheld the dismissal.

## **TRIAL PROCEDURE / EVIDENCE**

### **TRIAL PROCEDURE / EVIDENCE - EVIDENCE**

#### **U.S. v. Johns, 2018 WL 6703465 (6<sup>th</sup> Cir. 2018)**

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<sup>52</sup> Bowerman, 646 F.3d at 366; Sharpe, 319 F.3d at 267.

**FACTS:** In 1999, two women, Westphal and Johns, began a secret relationship through AOL and then moved into occasional physical encounters. Westphal wanted to keep it secret and ended the relationship a year later. Johns showed up at Westphal's parents Michigan home and Westphal, who was there, agreed to go elsewhere to talk. Instead, Johns allegedly kidnapped her at gunpoint and they drove to Iowa and back over the following week. Westphal argued she was threatened at gunpoint and sexually assaulted, Johns claimed she only threatened herself with the gun and that Westphal's presence was voluntary. Westphal got away from her and drove to the police station, and reported the crime.

Johns was charged with interstate kidnapping. She absconded from detention and was only discovered again in 2016, in Wisconsin. At trial, Johns offered a number of printed out electronic communications between the couple as evidence, that dated from the time of their relationship, AOL, of course, no longer had records. The prosecution moved to exclude the emails for a variety of reasons, most specifically, because it was impossible to prove that they were authentic. "The government pointed out that on occasion Johns had logged into Westphal's account and impersonated her, calling into question the authenticity of the content of the original emails. The Government also challenged the production of the messages, arguing there was no way to determine if the copied-and-pasted messenger conversations had been altered since they did not come from AOL directly, thus calling into question the authenticity of the documents." The trial court ruled that the majority of the messages were relevant and probative and decided to rule on hearsay objections as they might be used. It "acknowledged that the records could be used for purposes of impeachment, but required Johns to provide more evidence to lay the foundation for a finding of authenticity as to those records." Johns provided nothing further to authenticate the documents nor did she attempt to admit them at trial, although she did use some of them for impeachment."

Johns was convicted and appealed

**ISSUE:** May old emails and message (printed out) be admitted?

**HOLDING:** No

**DISCUSSION:** The Court began: "the facts of this case tell a salacious tale of star-crossed lovers, heartbreak, abduction, a decade-long disappearance, and she-said-she-said intrigue originating from the now-infamous AOL chatrooms in the early days of the internet. In contrast, the actual legal issues presented in this case are dry, technical, and straightforward."

Johns argued that the trial court improperly applied the rules of evidence and refused to allow her to admit the emails for substances purposes. The Court noted that "the proposed exhibits had been printed off sixteen years earlier from an unknown computer by an unidentified person and some of the emails included copied and pasted AOL Instant Messenger conversations between Johns and Westphal." The District Court went on to state "[c]urrently, the Court does not know whether the printed messages were printed directly from AOL in a view-only mode that

prohibited alterations, or whether the messages were copied from AOL and pasted into another program, like Microsoft Word, enabling a user to edit the text of the message.”

The Court summarized:

The fact of the matter is that the district court was presented with printed documents from sixteen years earlier, from an unknown computer, via an unknown program, by an unidentified person who had opportunity to alter them, with no evidence or testimony offered to account for how the documents were produced. The Court agreed the matter was properly handled.

Johns’ conviction was affirmed.

## **TRIAL PROCEDURE / EVIDENCE - TESTIMONY**

### **Phillips v. Hoffner, 2018 WL 5794466 (6<sup>th</sup> Cir. 2018) (CERT REQUESTED)**

**FACTS:** Phillips was charged 22 years after the fact in a 1987 Detroit murder. During the investigation, Officer Kimber (Detroit PD) did evidence collection and a serologist tested for blood types. Some years later, more testing was done on evidence and better technology was then available, and Phillips was then identified as linked to the scene by DNA. He was convicted and appealed.

**ISSUE:** May the court admit technical reports through a third party, if the creator testifies as well?

**HOLDING:** Yes

**DISCUSSION:** Among a number of other issues, Phillips argued that an investigator’s “reliance on the file” to testify about a matter violated the Confrontation Clause. The file was created by the serologist, who also testified. As such, the Court agreed that the testimony was valid. The Court noted that “ “Reports memorializing the work performed by laboratory analysts when carrying out forensic duties are testimonial statements subject to the requirements of the Sixth Amendment, as interpreted by Crawford.”<sup>53</sup> But, in this case, since the person who created the report also testified, it was not an issue.

The Court noted that despite the troubling nature of much of the prosecution’s overall case, and the long delay in prosecuting Phillips, it was “bound to affirm.”

## **TRIAL PROCEDURE / EVIDENCE – SPOUSAL PRIVILEGE**

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<sup>53</sup> Holland v. Rivard, 800 F.3d 224 (6th Cir. 2015) (citing Bullcoming v. New Mexico, 564 U.S. 647 (2011); Melendez-Diaz v. Massachusetts, 557 U.S. 305 (2009)).

**U.S. v. Ayala, 2018 WL 5805962 (6<sup>th</sup> Cir. 2018)**

**FACTS:** During a stationhouse interview, Palmer took a phone call from her husband, Ayala, who was in jail. She “put the call on speakerphone so the police could hear and record the call.” During the call, Ayala shared incriminating information. He moved to suppress the call, but was denied. Ayala was convicted and appealed.

**ISSUE:** Is a marital conversation privileged when made when others can hear it?

**HOLDING:** No

**DISCUSSION:** Ayala argued that the phone call was a confidential marital communication. However, he knew, apparently, the call was on speakerphone and that as such, the Court agreed, he had no reasonable expectation of privacy. Furner, his end of the call was from the jail, which also indicated that all such calls are recorded.

The Court agreed that the privilege did not apply and upheld his conviction.

**TRIAL PROCEDURE / EVIDENCE – PRIOR BAD ACTS**

**U.S. v. Asher, 910 F.3d 854 (6<sup>th</sup> Cir. 2018)**

**FACTS:** Hill was incarcerated in the Kentucky River Regional Jail. He asked for a phone call and was denied. Upset, he turned on the water in the sink and let it overflow. Deputy Jailers Asher and Hickman responded, and ultimately, Hickman punched Hill, seriously injuring him. Asher allegedly “viciously kicked and stomped Hill” as he lay curled up on the floor that he defecated on himself. He mocked him and told him that they could do what they wanted and would lie if he accused them. He was then placed in a restraint chair and further assailed by Hickman, while Asher watched. (Bruises on his arms and legs documented the ligatures.) A “doctor” – thought to be Asher in disguise – came to see him.

Once released, Hiller filed a complaint. Hickman and Asher wrote a false report that claimed they had to use force to prevent him from harming himself and that some of his injuries occurred when he fell in the water and hit the wall.

Asher was charged with two federal counts, under 18 U.S.C. §242 for the assault and under §1519 for falsifying a record. Asher was told that in proving intent, the prosecution planned to introduce evidence of a similar assault and cover up several years before, at the same jail. Over Asher’s objection, the Court agreed that it was proper to introduce the evidence. The Court noted that the prior act was “no more appalling than the charged crime” and that the government was freedom to prove its case.

Asher was convicted and appealed.

**ISSUE:** Is prior bad act evidence normally inadmissible?

**HOLDING:** Yes

**DISCUSSION:** Asher continued to argue that the prior act evidence was “unduly prejudicial” to his case. The Court allowed such evidence to prove intent based on balancing similarity and temporal proximity. In this case, the prior act evidence “had only incremental probative value” given the specific allegations against Asher, who clearly would not have committed any of his alleged acts without intent.

The Court noted that the evidence against Asher (as opposed to Hickman) was “strong, but not overwhelming.” Hill himself could not clearly testify as to what Asher, specifically, did. As such, the Court found the error was not harmless and vacated his convictions.

## **CIVIL LITIGATION /MALICIOUS PROSECUTION**

### **Dipasquale v. Hawkins, 748 Fed.Appx. 688 (6<sup>th</sup> Cir. 2018)**

**FACTS:** DiPasquale and two other men formed a temporarily partnership to buy and restore vehicles. They started with a 1968 Ford Torino. Within months, however, there had been no progress toward restoration and the men were arguing. DiPasquale, who was paying to store the vehicle, moved it to another place and terminated the business venture. One of the other men, Herres, filed a police report claiming the vehicle was stolen but the title at that point was unassigned. The police department refused to act without proof of ownership. Herres, who had the title, had it assigned to himself and then returned to the PD. Officer DeVore reached out to DiPasquale’s attorney who filled in the story and the officer concluded it was a civil matter.

A few weeks later, DeVore passed on the case to Hawkins. At that time, the third man, Proctor, came into the Clay Township PD to complain and this time, Hawkins did open a criminal case. Ultimately DiPasquale was indicted but was acquitted at a bench trial. The trial judge issued a strong statement to the effect that this was “entirely a civil matter.”

DiPasquale filed suit against his two business partners, and Hawkins, under 42 U.S.C. §1983. Hawkins moved for summary judgement and was denied, except for the testimony he made before the grand jury, for which he had absolute immunity. Hawkins appealed.

**ISSUE:** May an officer be subject to malicious prosecution for an inadequate investigation?

**HOLDING:** Yes

**DISCUSSION:** The Court noted that the complaint detailed factual allegations about Hawkins’ role in the investigation, independent of his testimony, which included his decision to pursue the case in the first place. Although as a rule, an indictment proves probable cause, there

are exceptions, if the officer omits critical evidence or does not adequately investigate the claim. In this case, the Court noted that the complaint did not make sufficient allegations, although in fact, there were some facts and other evidence available to Hawkins that should have influenced his decision to prosecute. The Court agreed that the complaint was not sufficiently pled on the necessary elements and remanded it back for the trial court to consider whether DiPasquale should be allowed to amend his complaint.

**Sanders v. Jones, 728 Fed. Appx. 563 (6<sup>th</sup> Cir. 2018)**

**FACTS:** This case was remanded back as a result of the case of Manuel v. Joliet, in which the court had “rejected the notion that ‘a grand jury indictment or preliminary examination’ serves to ‘expunge’ any possible” claim under the Fourth Amendment.”<sup>54</sup> In King v. Harwood, the Court had found that the “presumption of probable cause created by a grand jury indictment is rebuttable” under certain circumstances.<sup>55</sup> In this case, Jones’ police report set the prosecution in motion, along with an identification made by a CI, and that was the entirety of the case against Sanders. In this case, there was a true dispute as to ether the statements were made by jones in a reckless or knowingly false manner.

**ISSUE:** Does a grand jury indictment automatically indicate probable cause?

**HOLDING:** No

**DISCUSSION:** The Court agreed that even Jones had acknowledged that had he looked at certain video footage from the crime in question more closely, he would have realized that Sanders was not the suspect. The Court agreed that taking Sanders’ information at its best, it had to be determined by the trial court as to whether Jones recklessly identified Sanders, leading to her false indictment. The case was remanded back once again.

**Scheffler v. Lee, 2018 WL 4849690 (6<sup>th</sup> Cir. 2018)**

**FACTS:** In May, 2013, Scheffler was visiting Louisville with a friend. He spent most of the day, on May 17, alone in the hotel, as he suffers from agoraphobia and panic disorder. He set out that evening to search for his friend, Burkett, stopping at several bars before he found him. Scheffler denied having had any alcohol. They headed back to the hotel, with Burkett stopping for food while Scheffler continued on. At the hotel, Scheffler asked in the lobby which tower his room was located and a security guard gave him directions, but then followed him. Scheffler noticed and confronted him. The returned to the lobby so Scheffler could talk to a supervisor. Officer Lee (Louisville Metro) was working at the hotel off duty and asked for Scheffler’s ID, which he refused to give.

Scheffler, thinking he was being unlawfully detained, called 911 and asked for a sheriff’s deputy. He walked outside to meet them. Lee followed and continued to demand ID, and Scheffler moved

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<sup>54</sup> 137 S. Ct. 911 (2017).

<sup>55</sup> 852 F.3d 568 (6<sup>th</sup> Cir. 2017).

out to the sidewalk. Lee warned him he would be arrested for alcohol intoxication and ultimately did so, “throwing him against a parked car.” Scheffler, in the cruiser, began to have a panic attack and asked to go to the hospital. EMS responded and he was taken in the ambulance, and there, he claimed, one of the EMTs did a sternum rub. He was evaluated, discharged and taken to jail, charged with alcohol intoxication and disorderly conduct. He was offered a dismissal in exchange for a stipulation of probable cause, which he refused. At trial, he was promptly acquitted. He filed a complaint under PSU, which ruled in favor in Lee.

Scheffler filed a pro se lawsuit, claiming a First Amendment retaliation claim and a fourth Amendment false arrest and excessive force claim. (He also made claims against the EMT.) He obtained counsel, but the court ruled against him on all claims. Scheffler then appealed.

**ISSUE:** Is probable cause required for an arrest?

**HOLDING:** Yes

**DISCUSSION:** Lee argued that he was entitled to qualified immunity, under the facts as stated. Looking at each claim, the Court noted that the validity of the claim depended upon whether Lee had probable cause to arrest Scheffler for Alcohol Intoxication. The Court looked at the video of the lobby, which refuted Lee’s claims that Scheffler appeared intoxicated, passersby were not reacting to Scheffler and the security personnel seemed relaxed in his presence. He seemed “coherent and relatively calm” on the 911 call. His actions in the cruiser were after the arrest, and could be attributed to his developing panic attack. His medical records suggested that the hospital considered him alert, fully oriented and not a fall risk, but there was no indication of any testing at all for intoxication. Hotel witnesses were contradictory. The Court agreed there was no probable cause for the arrest. With respect to disorderly conduct, the Court found no evidence that anyone was bothered by Scheffler’s actions.

Scheffler also argued that he was subjected to false imprisonment and false arrest and again, the Court agreed, Lee was not entitled to summary judgement on those claims either. With respect to excessive force, the Court agreed that some force was certainly used, the question is, whether it was necessary and appropriate under the circumstances. As Scheffler did walk out of the hotel and down the sidewalk, the Court agreed some force was needed if Lee intended to detain him. As the force used was minimal, the Court agreed Lee was entitled to qualified immunity on this claim.

The Court ruled on several other issues and ruled in favor of Lee.

(The Court ruled that the sternum rub was appropriate medical care, given that the EMT asserted that Scheffler had become unresponsive. The Court ruled in favor of the EMT.)

The Court reversed the summary judgement with respect to false arrest and false imprisonment and remanded the case.

## EMPLOYMENT

### Curtis v. Breathitt County Fiscal Court, 2018 WL 6012328 (6<sup>th</sup> Cir. 2018)

**FACTS:** Curtis was an employee of the Breathitt County Clerk when the position became vacant. She expressed interest in being appointed the interim Clerk, to hold the position until the next election. The County-Judge, Smith, refused to do so, and she alleged it was due to her political association with the prior clerk, Watts, who had retired, creating the vacancy. (She alleged one possible candidate for the temporary position was offered it, on the condition he fire Curtis – which he denied.)

Hutchinson was appointed and although he retained Curtis, she was demoted from her position as chief deputy clerk to a position of a regular deputy clerk. Her pay remained the same. During Hutchinson’s brief tenure, the employees became subject to the county’s administrative code, exempting them from the probationary period, however. Smith then appointed Stevens, who issued re-hire letters to some employees, but not to Curtis. Ultimately, Curtis ran against Stevens and won. (And, in fact, chose not to re-hire a number of Stevens’ clerks.)

Curtis filed suit, arguing that she was improperly terminated. Stevens argued it was for budget reasons, as Curtis was the highest paid clerk at the time, while Curtis claimed it was due to her political association with the former clerk. The Court ruled in favor of the county defendants and she appealed.

**ISSUE:** Is retaliation for political affiliation illegal?

**HOLDING:** Yes (but must be proven)

**DISCUSSION;** In such claims, Curtis must establish three elements of retaliation: 1) that she engaged in constitutionally protected speech or conduct, 2) that an adverse action was taken against her that would deter most from taking the action (a “chilling effect) and 3) that the adverse action was motivated at least in part by her conduct. The parties admitted the first two – and that Curtis’s support of Watts in the past was protected conduct.<sup>56</sup> The third element was at issue, however, with Stevens arguing that their termination was purely budget related.

Curtis noted that the evidence indicated that Stevens in fact increased the personnel following her termination, gave raises to all employees, that Stevens complained Curtis was making too much, but then hired someone at a higher pay. Other budget issues were brought up, as well. The records indicated that some of the claims were mischaracterizations, as some of the additional staff were part-time employees. The Court noted that Curtis was an at-will employee, and the only prohibition was a firing for a prohibited reason. Compensation and hiring was purely

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<sup>56</sup> Sowards v. Loudon Cty., TN, 203 F.3d 426 (6<sup>th</sup> Cir. 2000).

the responsibility of the county clerk. The Court found no evidence that the termination was related to her association with the prior clerk.

The Court also agreed that of course, there could be no conspiracy, either.

The court affirmed the summary judgement decisions.

## **FIRST AMENDMENT**

### **Aquilina v. Wriggelsworth / Buckland, 2018 WL 6169198 (6<sup>th</sup> Cir. 2018)**

**FACTS:** On August 2, 2016, Harding (a prisoner) used a shank against a local prosecutor in Inham County (Michigan). It was captured on video maintain by the courtroom security staff. The next day, a reporter asked a local judge, Aquilina, who had access, to view the video and she agreed, allowing the reporter to record the video on his cell phone. He told her the next day he planned to publish it and she did not object. He made the same request to Sheriff Wriggelsworth and was denied, and then explained he already had the video. He did not tell the sheriff how he got it. The Sheriff instituted an investigation and Det. Buckland was assigned. They discussed the matter with the APA, McCormick. Ultimately the investigation led to Hayes, Aquilina's assistant. Upon further investigation, Buckland wrote a report indicating that he believe Aquiliana's chambers had released the video. He submitted a request for a warrant against the judge, asking for criminal charges. A special prosecutor was appointed. A few weeks later, the press learned of the matter and both the sheriff and Buckland denied having told the press about the matter.

Judge Aquilina sued Wriggelsworth and Buckland for retaliation of her First Amendment rights, under 42 U.S.C. §1983. Both moved for summary judgment and it was granted. Aquilina appealed.

**ISSUE:** Is retaliation for protected speech legal?

**HOLDING:** No

**DISCUSSION:** The Court noted to prevail on the claim, Judge Aquilina must prove three elements: "(1) that [she] was engaged in a constitutionally protected activity; (2) that the defendant[s'] adverse action caused [her] to suffer an injury that would likely chill a person of ordinary firmness from continuing to engage in that activity; and (3) that the adverse action was motivated at least in part as a response to the exercise of [her] constitutional rights."<sup>57</sup> With respect to the first element, both parties agree that releasing the video constituted speech. She had suggested she had a concern over court security, and since she would not have had access to the video but for her position, which indicated she was speaking as a public employee, not a concerned citizen. However, the audience was the general public and discussing courtroom

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<sup>57</sup> Mattox v. City of Forest Park, 183 F.3d 515 (6th Cir. 1999) (citation omitted); Thaddeus-X v. Blatter, 175 F.3d 378 (6th Cir. 1999) (en banc).

security was not part of her normal duties. Under Garcetti, the Court agreed her speech was likely protected speech.<sup>58</sup>

However, the Court also looked at the context of the investigation. At the time it was initiated, the sheriff's office did not know who had released it and the prosecutor agreed that a crime may have been committed. Although they elected ultimately not to pursue a case, that "is not necessarily evidence that it was begun in bad faith."

The Court found no evidence that the Sheriff's Office acted with any retaliatory motive against her and the court upheld the summary judgement in their favor.

## MISCELLANEOUS

### Schlussel v. City of Dearborn Heights, 2018 WL 6039243 (6<sup>th</sup> Cir. 2018)

**FACTS:** In 2014, Kazan, a Muslim woman, was asked to remove her headscarf for a booking photo. She later sued under the Religious Land Use and Institutionalized Person Act (RLUIPA).<sup>59</sup> Her attorney requested and obtained a photo of her without her headscarf, through a FOIA request. Following this, the city instituted a policy that such images would not be released. A year later, a journalist (Schlussel) requested materials related to Kazan's arrest, including the photo, and was denied. She appealed through the City, and was again denied. She then filed suit in federal court, which dismissed the federal claims. Schlussel appealed.

**ISSUE:** Might a change in policy justify disparate treatment?

**HOLDING:** Yes

**DISCUSSION:** Schlussel argued her equal protection rights were violated, as her request was, in essence, identical to Kazan's attorney's request, and that she was treated differently. The Court noted, that the attorney was representing a client, the subject of the photo, where Schlussel had no connection to the subject at all. More importantly, the policy on such photos had changed as well. The Court agreed the Equal Protection claim must fail.

Schlussel also argued that under the Establishment clause, Muslim women were given a protection not accorded to other, and that that was accommodating a specific faith, over others. The Court agreed it did not "entangle" the city with any religious organization but only benefited individual people.

The Court affirmed the decision.

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<sup>58</sup> Garcetti v. Ceballos, 547 U.S. 410 (2006).

<sup>59</sup> 42 U.S.C. 2000cc-2.



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