

The following are brief summaries of opinions issued by the Kentucky Supreme Court, the Kentucky Court of Appeals, the Sixth Circuit Court of Appeals and the United States Supreme Court from January-June 2020.

These summaries are designed as a study and reference tool for officers in training classes. Although care has been taken to make these summaries as accurate as possible, official copies should be consulted when possible before taking any actions that may have legal consequences. For a full copy of any of the opinions summarized below, please visit:

Kentucky Supreme Court:

<https://kycourts.gov/courts/supreme/Pages/supremecourt.aspx>

Kentucky Court of Appeals:

<https://kycourts.gov/courts/coa/Pages/coa.aspx>

United States Court of Appeals for the Sixth Circuit:

<https://www.ca6.uscourts.gov/opinions>

Supreme Court of the United States:

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KENTUCKY SUPREME COURT
AND
KENTUCKY COURT OF APPEALS
JANUARY - JUNE 2020

I. COURT PROCEEDINGS – HANDCUFFING

Bates v. Commonwealth, 2020 WL 2092600 (Ky. 2020) – NP – F

FACTS: Leonard Bates was convicted of first-degree trafficking in a controlled substance and complicity to first-degree trafficking in a controlled substance. At trial, the jury observed him, wearing plain clothes, being escorted into the courtroom with a bailiff from an area of the courthouse where the holding cells were located. On appeal, Bates argued that being observed by the jury with the bailiff prejudiced him.

ISSUE: Does the jury’s observation of a defendant, wearing plain clothes, being escorted into the courtroom with a bailiff from an area of the courthouse where the holding cells were located constitute a violation of due process rights?

HOLDING: No. The inadvertent viewing of the defendant in either handcuffs or another restraint for the sole purpose of being taken to or from the courtroom is not automatically reversible error.¹ In Shegog v. Commonwealth,² after potential jurors saw the defendant in handcuffs escorted by a deputy, the Kentucky Supreme Court reiterated that “it would be impossible as a practical matter to conduct a trial without the jury seeing some sign that the defendant [is] not entirely free to come and go as [he] please[s].” Thus, the presence of one deputy opening a door and escorting Bates—dressed in plain clothes and no restraints—into the courtroom did not affect Bates’ right to a fair trial.

The convictions were affirmed.

Crawford v. Commonwealth, 2020 WL 1289877 (Ky. 2020) – NP - F

FACTS: Crawford sexually abused his six-year-old neighbor Abby two times. Abby informed nobody of Crawford’s abuse at this time. Several years later during preparations for her wedding, Abby advised her mother of Crawford’s abuse. Believing Crawford was dead, Abby

¹ Moss v. Commonwealth, 949 S.W.2d 579, 582-83 (Ky. 1997).

² 142 S.W.3d 101, 109 (Ky. 2004).

and her mother believed nothing would be gained by reporting the incidents. Later, Abby's mother and father saw Crawford with his son's family at a local restaurant. Upon learning that Crawford was alive, and fearful that Crawford could abuse other children, Abby reported the abuse to the Boone County Sheriff's Department.

Detective Melody Parker assisted Abby in making a recorded forty-five minute telephone call to Crawford. During the call, Crawford apologized for his actions and indicated that he had never done anything like that before or since. Crawford blamed financial stress, alcoholism, and lack of marital sexual relations for his actions. After the phone call, Detective Parker visited Crawford and asked him to accompany her to the police station for an interview. Crawford complied. During the recorded interview, Crawford initially denied the abuse, but ultimately acknowledged abusing Abby and attempted to minimize his own culpability. Crawford wrote an apology letter to Abby for his actions.

Crawford was charged with first-degree sexual abuse and first-degree sodomy (victim under 12). The recording of the telephone call between Abby and Crawford, as well as the recorded interview between Crawford and Detective Parker, was played at trial. Crawford was convicted of both charges and was placed in handcuffs for the penalty phase of the trial. The jury recommended a sentence of 31 years in prison. Crawford appealed to the Kentucky Supreme Court.

ISSUES: Is handcuffing/shackling a defendant during a trial's penalty phase appropriate absent extraordinary circumstances?

HOLDING: No. Handcuffing or shackling a defendant during a trial's penalty phase is not appropriate unless the trial court makes a specific finding on the record of extraordinary circumstances to warrant such restraint. RCr 8.28(5) states: "[e]xcept for good cause shown the judge shall not permit the defendant to be seen by the jury in shackles or other devised for physical restraint." This restriction applied to all jury-observed aspects of a criminal trial, not just the guilt phase.³ Normally, extraordinary circumstances included a finding that a defendant constituted a flight risk or was violent. Due to the overwhelming evidence of guilt, however, the Supreme Court held that handcuffing Crawford before the jury was harmless error.

The convictions were affirmed.

Mulazim v. Commonwealth, 2020 WL 2091812 (Ky. 2020) – PUB - NF

FACTS: After the jury verdict was read acquitting Canada of murder, Canada raised his arms while his co-defendant, Mulazim, hit the defense table three times. This conduct occurred despite the trial court's command prior to the reading of the verdicts that all present in the courtroom were to remain calm and exercise restraint. As both defendants were convicted of other offenses, the trial court ordered them remanded to the custody of the Fayette County

³ Barbour v. Commonwealth, 204 S.W.3d 606, 612 (Ky. 2006).

Detention Center. The next day, the trial court refused to remove the ankle shackles on both defendants for the penalty phase of trial due to their in-court behavior. The jury did not see either defendant walk into the courtroom in shackles and it was unlikely that the jury observed the shackles while both defendants were seated.

ISSUE: Is handcuffing/shackling a defendant during a trial’s penalty phase appropriate absent extraordinary circumstances?

HOLDING: No. “Shackling of a defendant in a jury trial is allowed only in the presence of extraordinary circumstances.”⁴ Disfavor of the practice is also reflected in RCr 8.28(5), which states that “[e]xcept for good cause shown the judge shall not permit the defendant to be seen by the jury in shackles or other devices for physical restraint.” When reviewing a trial court’s decision to keep a defendant in shackles in the presence of the jury, we give great deference to the trial court.⁵ However, there generally must be “substantive evidence or [a] finding by the trial court that Appellant was either violent or a flight risk...”⁶

In this case, the Kentucky Supreme Court found the refusal to remove the shackles from both defendants to be harmless error. Hitting the table in celebration is not an “extraordinary circumstance” that justifies the use of restraints upon a defendant. However, no evidence of record indicated that the jury actually observed the defendants wearing ankle shackles, so there was little possibility that this substantially impacted the sentences imposed upon the defendants.

The convictions and sentences imposed upon the defendants in this case were affirmed.

II. EVIDENCE

Banks-Brown v. Commonwealth, 2020 WL 1230503 (Ky. App. 2020) – NP – NF DR filed 4/14/20

FACTS: While sitting in his cruiser in the parking lot of a Lexington Marathon station, Detective Page observed two men sitting in a white Toyota Camry parked at the side of the station, continuing to talk on the phone and look around as if they were waiting for someone. After activating his surveillance camera, a red Chrysler 300 pulled up to a gas pump. A passenger from the Chrysler 300 exited that vehicle and walked towards the passenger side of the Camry. A passenger exited the Camry and both men entered the service station. Within a few minutes, the passenger from the Camry came out of the store and the Camry driver got out of the vehicle and walked toward the store, passing his passenger as he returned to the Camry. Detective Page testified that as he was walking toward the Camry, the passenger looked down at his cupped hand, opened it, and then smirked before re-entering the car. Page also testified that it was

⁴ Barbour v. Commonwealth, 204 S.W.3d 606, 612 (Ky. 2006) (citing Peterson v. Commonwealth, 160 S.W.3d 730, 733 (Ky. 2005)).

⁵ Barbour, 204 S.W.3d at 612.

⁶ Id. at 614.

“common for drug transactions, a buyer, to buy a substance, keep it in their hand, have it cupped until they get where they're going.” In a few minutes, the driver returned and re-entered the Camry at which point he and the passenger laughed and drove away. Detective Page stated that whatever the passenger had in his cupped hand appeared to be very small but admitted that it could have been keys, money, or something else in his hand.

Detective Page testified that, at that point, he pulled around in an attempt to video the people in the red Chrysler but could not see them through the darkly-tinted windows. Detective Page told the jury that it was his “belief at this point that the seller, who I believe to be the seller of narcotics, was in the Chrysler 300.” Although he was unable to see into the car, Detective Page noted the temporary tag on the Chrysler before leaving the station in an unsuccessful attempt to find the Camry.

At police headquarters, Detective Page described to fellow officers what he had observed at the station, showed them the surveillance video, and asked them what they thought about it. Detective Page testified that the officers “said it obviously looked like a narcotics transaction to them as well” and that Detective Curtsinger had stated that he received a complaint concerning daily heroin sales at that Marathon station. Around 4 p.m., after executing an unrelated search warrant, the officers passed the Marathon station on their way back to the department office. Detective Curtsinger noticed a Red Chrysler at the gas pumps and pulled his vehicle into the station. Detective Page also turned into the station facing the Chrysler. As Detective Curtsinger was parking his vehicle, Banks-Brown got out of the passenger side of the Chrysler. Detectives Curtsinger and Smoot walked toward the Chrysler and smelled a strong odor of marijuana coming from the car. Those officers detained the driver and Detective Page detained Banks-Brown at the rear of the car.

Detective Page advised Banks-Brown that he was being detained because of the marijuana smell coming from the car, as well as his suspicion that he was involved in what appeared to be a drug transaction a few hours earlier. When Detective Page asked for permission to search, Banks-Brown began pulling things from his pocket, including a digital scale with white powder on it. Banks-Brown also stated that he had bought marijuana from the men in the white Camry. A subsequent search of the red Chrysler revealed a partially burnt marijuana cigarette on the console which Banks-Brown admitted was his. In addition, Detective Curtsinger discovered “bindle” paper containing .731 grams of “gravel” heroin and .513 grams of mixed heroin and crack cocaine in the console near the passenger seat, as well as a box of plastic baggies in the floorboard of the passenger side.

Banks-Brown ultimately admitted possessing contraband and Detectives Curtsinger and Smoot searched him in the service station restroom. That search produced plastic baggies containing 5.158 and .845 grams of heroin and another baggie containing approximately 6.674 grams of crack cocaine in a “cookie” shape concealed Banks-Brown’s pants. The detectives also found \$342

in mixed bills. Detective Curtsinger testified that the size, quantity, and appearance of the heroin and cocaine indicated to him that Appellant was engaged in trafficking.

After a jury trial in Fayette Circuit Court, Banks-Brown was convicted of two counts of trafficking in a controlled substance, possession of marijuana, possession of drug paraphernalia, and being a first-degree persistent felon for which he was sentenced to ten years' imprisonment.

ISSUE: May an officer testify as to opinion or inferences that are rationally based upon the officer's perceptions?

HOLDING: Yes. Detective Page testified that he informed fellow officers what he had observed at the station, showed them the surveillance video, asked them what they thought about it, and stated that the other officers "said it obviously looked like a narcotics transaction to them as well." Page also testified to Detective Curtsinger's statement to him that there had been multiple complaints concerning daily heroin sales at that Marathon station. This testimony fell within the parameters of Kentucky Rules of Evidence 701:

If the witness is not testifying as an expert, the witness' testimony in the form of opinions or inferences is limited to those opinions or inferences which are:

- (a) Rationally based on the perception of the witness;
- (b) Helpful to a clear understanding of the witness' testimony or the determination of a fact in issue; and
- (c) Not based on scientific, technical, or other specialized knowledge within the scope of Rule 702.

In United States v. Parkhurst,⁷ the court classified a detective's testimony regarding his perception of a conversation at the time it occurred as "classic Rule 701 lay-witness testimony." Moreover, in Young v. Commonwealth,⁸ the Kentucky Supreme Court held that "[a] police officer may testify about information furnished to him by an absent witness only if that information tends to explain the action that was taken by the police officer as a result of the information and the taking of that action is an issue in the case." Young explained that such an out-of-court statement is not hearsay "because it is not offered to prove the truth of the matter asserted but to explain why the officer acted as he did."⁹

The Court of Appeals found no error with Detective Page's testimony, holding that it was merely explanatory of the course of action he and the other officers undertook a few hours later.

⁷ 865 F.3d 509, 514-15 (7th Cir. 2017).

⁸ 50 S.W.3d 148, 167 (Ky. 2001).

⁹ Id.

The convictions were affirmed.

Bates v. Commonwealth, 2020 WL 2092022 (Ky. 2020) – NP – NF

FACTS: Cody Bates was charged with murder with respect to the death of three-month-old Prestyn Amato, the infant son of his girlfriend. X-rays and a CT scan of Prestyn revealed a skull fracture, three sub-scalp injuries, and a subdural hemorrhage with accompanying brain bleed. Later, Prestyn’s autopsy revealed optic nerve sheath damage not visible in the CT scan. These closed-head injuries were not externally visible. Bates originally advised that Prestyn rolled off a couch and possibly hit his head on a wooden table. During an interrogation, Bates advised that he accidentally dropped Prestyn to the floor, tried to pick him up and then fell, throwing the child four feet towards a couch. Four autopsy photographs were displayed to the jury, with two photographs depicting external facial injuries and the other two depicting internal sub-scalp injuries. The photos were ultimately admitted into evidence.

The jury found Bates guilty of wanton murder and recommended a prison sentence of 35 years. An appeal followed.

ISSUE: Are autopsy photographs depicting significant head injuries of an infant admissible in a prosecution for homicide?

HOLDING: Yes. Under KRE 403, “[a]lthough relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of undue prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, or needless presentation of cumulative evidence.” “Like all evidence, [photographs] are subject to the balancing test of KRE 403.”¹⁰ In reviewing the admissibility to relevant, but potentially prejudicial evidence, the trial court must engage in a three-part evaluation:

(i) assessment of the probative worth of the evidence whose exclusion is sought; (ii) assessment of the probable impact of specified undesirable consequences likely to flow from its admission (i.e., “undue prejudice, confusion of the issues, or misleading the jury, ... undue delay, or needless presentation of cumulative evidence”); and (iii) a determination of whether the product of the second judgment (harmful effects from admission) exceeds the product of the first judgment (probative worth of evidence).¹¹

¹⁰ Hall v. Commonwealth, 468 S.W.3d 814, 823 (Ky. 2015).

¹¹ Webb v. Commonwealth, 387 S.W.3d 319, 326 (Ky. 2012).

In this case, Bates did not contest the descriptions of the external or internal injuries by Amato, Dr. Nichols, and Dr. Springer. Despite that lack of contest, albeit tacit acceptance, the Commonwealth offered a credible reason for admitting the photographs. Namely, the Commonwealth argued it needed the photographs to prove its case to jurors who may learn visually. The Commonwealth stated that some jurors might grasp the importance of the injuries, both fatal and non-fatal, from Dr. Springer's testimony. However, other jurors may be visual learners who require a different way to receive critical information. Faced with a high burden of proof and with defense counsel's claim in opening statements that Bates was going to testify and offer a version of what happened more consistent with accident (or at least with a state of mind less than intentional), the Commonwealth's contention that it needed to reach every juror with its critical evidence was reasonable. The photographs were consistent with the expert testimony presented by the Commonwealth.

The conviction was affirmed.

Davis v. Commonwealth, 2020 WL 1302688 (Ky. 2020) – NP - F

FACTS: Davis was charged with multiple offenses related to sexual abuse of his daughter. At trial, Davis' daughter testified that Davis photographed her genitals when she was nine-years-old. The photographs, which only depicted the naked lower half of the body of a young female, were uploaded to the family's laptop computer. Davis asked for a jury instruction of possession or viewing of matter portraying a sexual performance by a minor. This request was denied. Davis was convicted of four counts of using a minor in a sexual performance and sentenced to seventy years in prison. Davis appealed to the Kentucky Supreme Court.

ISSUES:

1. Is possession or viewing of matter portraying a sexual performance by a minor a lesser included offense of use of a minor in a sexual performance?
2. Are photographs depicting only the naked lower half of the body of a young female sufficient to prove use of a minor in a sexual performance?

HOLDINGS:

1. No. The Kentucky Supreme Court specifically held that KRS 531.335, possession of matter portraying a sexual performance by a minor is not a lesser included offense of using a minor in a sexual performance because the crimes require proof of different facts. "An individual can induce a child to engage in a sexual performance without creating any lasting media or possessing any record portraying the event, and an individual may knowingly possess a depiction of a minor engaging in a sexual performance without playing any role in the creation of the media."¹² In this case, the offense of using a minor in a sexual performance was completed when Davis induced his daughter to expose herself and photographed her. Uploading the photos to the family laptop indicates possession, constituting the offense under KRS 531.335. Viewing them is also an offense under KRS 531.335.

¹² Meade v. Commonwealth, 2014 WL 2809815 (Ky. 2014).

2. Yes. The photos constituted physical evidence of the crime itself. When paired with his daughter's testimony, the photos establish that Davis used his daughter in a sexual performance. While these photos were prejudicial, the prejudice did not outweigh the probative value of the photographs under KRE 403's balancing test. Thus, the photographs were relevant evidence to prove use of a minor in a sexual performance.

The convictions were affirmed.

Helton v. Commonwealth, 595 S.W.3d 128 (Ky. 2020)

FACTS: Kathryn Reed, an investigator with the Cyber Crimes Branch, identified an IP address suspected of searching or sharing child pornography. She identified the IP address on December 3, 2013 and began running her automated software. By December 4, 2013, her first download from that IP address was complete. Reed viewed the video file and determined that it contained child pornography. Over the next few days, Reed downloaded four more video files, each of which she determined contained child pornography. On December 13, 2013, she determined that Helton was the Internet service subscriber of that IP address. Based on this information, Reed and her team obtained a search warrant for Helton's home. A search was conducted on March 10, 2014, and seven items were seized, including a desktop computer, two laptop computers, three cell phones, and ten CDs or DVDs. Helton was subsequently arrested. Later, a forensic examination of the seized items revealed eighty-eight additional videos and three images of child pornography located on the desktop and a DVD containing three images of child pornography. Both the desktop and the DVD had been seized from a spare room located across from the master bedroom.

Despite attempts to shift blame to others who lived in the house, a Russell County jury found Helton guilty of five counts of possession of matter portraying a sexual performance by a minor and five counts of distribution of matter portraying a sexual performance by a minor. The circuit court sentenced Helton to twenty years in prison. Helton appealed to the Kentucky Supreme Court.

ISSUE: May a trial court permit the Commonwealth to introduce into evidence videos and images containing child pornography over the defendant's request for a stipulation?

HOLDING: Yes. The Commonwealth is not obligated to accept an offer to stipulation just because it has been presented because the prosecution is permitted to prove its case by competent evidence of its own choosing. A defendant is also not permitted to "stipulate away the parts of the case that he does not want the jury to see."¹³

In this case, the probative value of the five videos containing child pornography outweighed the danger of undue prejudice because the videos themselves were highly probative of the fact that

¹³ Pollini v. Commonwealth, 172 S.W.3d 418, 424 (Ky. 2005).

they did, in fact, contain child pornography, a necessary element of the charges of possession and distribution of matter portraying a sexual performance by a minor. While there was testimony regarding the content of the videos, including vivid descriptions, the images themselves contained the actual evidence of the child pornography, and each video contained a different video file, which established a separate charge. The trial court did, however, instruct the Commonwealth to only show the briefest portion of the videos possible to establish the necessary elements because the videos were “too graphic” and would be “overwhelming” to the jury.

The convictions were affirmed.

Krueger v. Commonwealth, 2020 WL 598249 (Ky. App. 2020) – NP – F

FACTS: Pursuant to a search warrant, law enforcement searched Krueger’s residence in Muhlenberg County on June 29, 2018. Law enforcement’s discovered various items indicative of drug trafficking, including a plastic bag of methamphetamine and digital scales on a kitchen counter; \$5,653 in cash in a safe; a Ruger 9mm handgun; and \$909 in cash and a cell phone found on Krueger’s person. Based upon the fruits of the search, Krueger was charged with first-degree trafficking in a controlled substance (methamphetamine), possession of a handgun by a convicted felon, possession of drug paraphernalia, and being a first-degree persistent felony offender. A jury found Krueger guilty of first-degree trafficking in a controlled substance and possession of drug paraphernalia, acquitted him on the handgun charge, and found him guilty of being a first-degree persistent felony offender. His sentence was fixed at 18 years. An appeal followed.

ISSUE: Are text messages on a defendant’s cellular telephone containing terms commonly associated with methamphetamine relevant evidence of drug trafficking?

HOLDING: Yes. Relevant evidence” is “evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.”¹⁴ Relevant evidence is admissible, but it may be excluded “if its probative value is substantially outweighed by the danger of undue prejudice[.]”¹⁵

In order to find Krueger guilty of the crime of first-degree trafficking in a controlled substance, the jury had to find, among other things, that Krueger had the methamphetamine in his possession with the intent of selling it to another person.¹⁶ It was undisputed that

¹⁴ KRE 401.

¹⁵ KRE 403.

¹⁶ KRS 218A.1412 and KRS 218A.010(56).

methamphetamine was found in Krueger's residence and Krueger was there with it. Likewise, digital scales and a large amount of cash were found at the same time.

The Court of Appeals concluded the text messages were relevant to show intent to sell, as those messages indicated Krueger's familiarity with drug trafficking and his involvement in it. Further, it appeared that the messages were in chronological order and that the messages were likely sent and received within three days of the search of the premises and discovery of the evidence as text messages generally have only the date and time if they were sent or received in the present year.

The convictions were affirmed.

Pennington v. Commonwealth, 2020 WL 504963 (Ky. App. 2020) NP – NF

FACTS: Pennington was convicted in the mid-1990s of two counts of kidnapping, two counts of first-degree rape, two counts of first-degree sodomy, criminal trespass, and second-degree stalking. The trial court ordered the penalties for these convictions to run consecutively, sentencing Pennington to a total of one hundred five (105) years of incarceration. The Supreme Court of Kentucky affirmed the conviction and sentence on direct appeal in an unpublished memorandum opinion.

Pennington filed a post-conviction motion pursuant to Criminal Rule 60.02 alleging that the Commonwealth had withheld material exculpatory evidence in violation of Brady v. Maryland.¹⁷ Pennington discovered that the investigating detective in his case had tested the handgun found in the locked briefcase for fingerprints and that the results of the test showed that Pennington's fingerprints were not on the handgun. For unknown reasons, this fingerprint testing was not disclosed to the defense. Pennington asserted that this evidence would have corroborated his denial of ownership of the handgun at trial (he claimed it actually belonged to his mother).

The Fayette Circuit Court denied the post-conviction motion. Pennington appealed.

ISSUE: Does the Commonwealth have a duty to disclose exculpatory evidence where the evidence is material either to guilt or punishment?

HOLDING: Yes. The United States Supreme Court has held: "suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution."¹⁸ The Supreme Court has extended Brady several times since it was rendered in

¹⁷ 373 U.S. 83, 83 S. Ct. 1194, 10 L. Ed. 2d 215 (1963).

¹⁸ Brady, 373 U.S. at 87, 83 S. Ct. at 1196-97.

1963, creating a general duty for a prosecutor to disclose exculpatory information -- provided that such information is material.

In considering materiality, the Supreme Court has held that a defendant demonstrates a Brady violation “by showing that the favorable evidence could reasonably be taken to put the whole case in such a different light as to undermine confidence in the verdict.”¹⁹ The trial court found that the fingerprint evidence was not material for Brady purposes because the Commonwealth never alleged that Pennington used the handgun to commit the crimes for which he was convicted.

The Court of Appeals agreed with this finding because the record on appeal indicated that the handgun was properly admitted for the limited purpose of demonstrating the victim’s fear of Pennington because of her knowledge that he had access to the handgun. The presence or absence of fingerprints on the handgun was of no consequence in showing that fear. As a result, the missing fingerprint report could not be said “to put the whole case in such a different light as to undermine confidence in the verdict.”

The circuit court’s denial of post-conviction relief was affirmed.

Torrence v. Commonwealth, 2020 WL 1303912 (Ky. 2020) – PUB - MFR

FACTS: On May 17, 2016, Torrence shot Thomas on 26th Street in Louisville. The shooting left Thomas paralyzed below the waist. During police questioning, Torrence claimed that he was picking up his daughter in the Blue Lick area of Louisville, approximately 11 air miles from 26th Street. To verify, Louisville Police Detective Snider served a search warrant on AT&T requesting historical cell phone tower data for Torrence’s cell phone for May 17, 2016. Based upon the information contained in the 500-page report from AT&T, Detective Snider was able to determine which cell phone towers were communicating with Torrence’s cell phone, recorded the latitude and longitude coordinates of those towers, the directional degree reading of the cell phone in relation to the towers, and marked those coordinates on a Google map. The Google map graph overlay showed the Torrence’s cell phone was in contact with towers close to the shooting location and not in contact with towers near the Blue Lick area when Thomas was shot. Detective Snider testified about his findings as a lay witness and not as an expert witness. No expert testimony was presented concerning the AT&T report or the data contained therein.

Torrence was ultimately convicted of first-degree assault, possession of a handgun by a convicted felon, and being a persistent felony offender. The trial court sentenced Torrence to a total sentence of twenty-five years in prison. Torrence appealed to the Kentucky Supreme Court.

¹⁹ Kyles v. Whitley, 514 U.S. 419, 435, 115 S. Ct. 1555, 1566, 131 L. Ed. 2d 490 (1995).

ISSUE: May law testimony be used to present historical cell-tower data so long as the testimony does not go beyond simply marking coordinates on a map?

HOLDING: Yes. In a case of first impression, the Kentucky Supreme Court held that Detective Snider's testimony presenting his findings from his investigation of this historical cell-tower data from Torrence's cell phone. Detective Snider used the cell-phone data to plot geographical points on a map, which was entered into evidence, to cast doubt on Torrence's claimed alibi. Detective Snider did not attempt to offer an opinion about any inferences that may be drawn from that information. If the witness does attempt to offer an opinion about inferences that may be drawn from data, i.e., an opinion as to the actual location of the cell phone during the relevant time based on the plotted coordinates, the witness must be qualified as an expert witness under KRE 702.

The convictions were affirmed.

III. INTERVIEWS AND INTERROGATIONS

Crowe v. Commonwealth, 2020 WL 2611150 (Ky. App. 2020) NP – NF

FACTS: While investigating a murder, Bardstown Police pursued a person of interest to a residence on Johnson Street in Bardstown. With the resident's permission, police entered the home to look for him. Police discovered him hiding among the insulation in the attic. Crowe was hiding with him in the attic insulation. An officer patted Crowe down to check for weapons, but none was found.

Police then obtained a warrant to search the residence and the persons of the four individuals then at the location, including Crowe. To effectuate the search, the police took Crowe and the others outside, handcuffed, and then placed them in cruisers for transport to the police station where they were interrogated separately.

At the station, Crowe was taken to the office of Detective Lynn Davis, who interrogated him. He was cooperative with the detective. After Crowe's handcuffs were removed, Detective Davis read him his Miranda rights and Crowe signed an acknowledgement that he had been read his rights. The detective began asking questions about the murder. After about thirty minutes, Detective Davis concluded Crowe had little to provide to his investigation. However, Detective Davis had learned from interrogating two of the three other detainees that Crowe was at the Johnson Street property to sell cocaine and still had the drugs on him. Detective Davis advised Crowe that he was aware that Crowe was selling cocaine and that he needed to hand it and put on a rubber glove. Crowe then reached into his undergarments and gave Detective Davis a ball of cocaine. Crowe then left the station, but he was ultimately prosecuted for the drugs. The trial court denied Crowe's motion to suppress. Crowe entered a conditional guilty plea and appealed.

ISSUE: When a suspect is taken into custody, are police required to Mirandize the subject prior to asking incriminating questions?

HOLDING: Yes. “The inquiry for making a custodial determination is whether ... there was a restraint on freedom of movement to the degree associated with formal arrest.”²⁰ “The test is whether, considering the surrounding circumstances, a reasonable person would have believed he or she was free to leave.”²¹ “Some of the factors that demonstrate a seizure or custody have occurred are the threatening presence of several officers, physical touching of the person, or use of a tone or language that might compel compliance with the request of the police.”²²

In this situation, a reasonable person would not have believed he was free to leave the police station after being interrogated regarding a murder until the officer questioning him said he was free to leave. That did not occur until after Crowe gave Detective Davis the cocaine. Detective Davis read Crowe his Miranda rights and Davis executed a signed waiver of those rights. Moreover, the Court of Appeals saw no legal issue in any shift from interrogating Crowe regarding the murder to interrogating him about selling cocaine. To the extent that shift was deemed some kind of disruption, it did not impact the prophylactic effect of the Miranda warnings. Miranda does not require that the warnings be repeated each time the interrogation process is resumed after an interruption.²³ “In each case, the ultimate question is: Did the defendant, with a full knowledge of his legal rights, knowingly and intentionally relinquish them?”²⁴ There being no dispute that Crowe’s Miranda rights were made known to him by Detective Davis, the Court of Appeals concluded Crowe knowingly and voluntarily turned over to the police evidence that could be used against him.

Finally, the Court of Appeals held that probable cause existed for taking Crowe into custody. “To determine whether an officer had probable cause to make an arrest, a court must examine the events leading up to the arrest, and then decide ‘whether these historical facts, viewed from the standpoint of an objectively reasonable police officer, amount to’ probable cause.”²⁵ Whether probable cause exists “is based on an analysis of the facts considering the totality of the circumstances.”²⁶ Here, Crowe was discovered by police during the lawful search of a home,

²⁰ Galloway v. Commonwealth, 424 S.W.3d 921, 927 (Ky. 2014) (citation omitted).

²¹ Id.

²² Commonwealth v. Lucas, 195 S.W.3d 403, 405-06 (Ky. 2006) (citing Baker v. Commonwealth, 5 S.W.3d 142, 145 (Ky. 1999)).

²³ United States v. Delay, 500 F.2d 1360, 1365 (8th Cir. 1974); Evans v. Swenson, 455 F.2d 291, 296-97 (8th Cir. 1972), cert. denied, 408 U.S. 929, 92 S. Ct. 2508, 33 L. Ed. 2d 342 (1972); Miller v. United States, 396 F.2d 492, 496 (8th Cir. 1968), cert. denied, 393 U.S. 1031, 89 S. Ct. 643, 21 L. Ed. 2d 574 (1969).

²⁴ Miller, 396 F.2d at 496.

²⁵ Jackson v. Commonwealth, 343 S.W.3d 647, 653-54 (Ky. App. 2011) (quoting Maryland v. Pringle, 540 U.S. 366, 366, 124 S. Ct. 795, 797, 157 L. Ed. 2d 769 (2003)).

²⁶ Stewart v. Commonwealth, 44 S.W.3d 376, 379 (Ky. App. 2000).

hiding in attic insulation, lying next to the target of that search, a person of interest in a murder investigation. This alone is evidence that Crowe was engaged in criminal activity.²⁷ When he was found hiding, he was closely associated, in a physical sense at least, with the target of a murder investigation.

The conviction was affirmed.

Ipina-Garcia v. Commonwealth, 2020 WL 2091822 (Ky. 2020) NP – NF

FACTS: On November 24, 2016, fourteen-year-old Angel Juarez was fatally shot in Lexington, Kentucky. Lexington police quickly identified Ipina-Garcia as a suspect based on witness statements, and they attempted to locate him. However, he was not at his home and his family informed police that he was fleeing to North Carolina. Lexington police pinged Ipina-Garcia's cell phone and found him traveling on I-64 in West Virginia. The Lexington officers then relayed this information to West Virginia police officers, who apprehended Ipina-Garcia on November 25, 2016. He was taken to the Western Regional Jail just outside of Huntington, West Virginia. That same day, Detective Bill Brislin and Detective Steven McCowan traveled to the Western Regional Jail to speak with Ipina-Garcia. Officer Lorenzo Bueno, a native Spanish-speaker, accompanied the two officers to act as an interpreter because the officers were unsure if Ipina-Garcia spoke English.

The interview lasted approximately one hour and twenty-one minutes. At the outset, Detective Brislin provided Miranda warnings to Ipina-Garcia in English. He read these warnings from a pre-printed form. The form did not have the Miranda warnings printed in Spanish, however. Rather, Officer Bueno interpreted the English version of the Miranda warnings to Spanish. Ipina-Garcia acknowledged that he understood his rights. More specifically, he testified that Ipina-Garcia responded "yes" multiple times when asked if he was clear on what had just been read to him and if he understood his rights. When asked if the "yes" on the audio recording was his own voice, rather than Ipina-Garcia's, Officer Bueno clarified that he would only have said "yes" if Ipina-Garcia first said "yes." Detective Brislin similarly testified that Ipina-Garcia responded in the affirmative. He testified that Ipina-Garcia nodded his head to indicate that he understood his rights. However, he also testified about a verbal acknowledgment, saying, "I don't think you can clearly hear [Ipina-Garcia's] acknowledgment on the audio" because Ipina-Garcia is "very soft-spoken."

The officers then interrogated Ipina-Garcia about Juarez's death. Detective Brislin lead the interrogation, and Officer Bueno interpreted. Detective Brislin testified that he would ask a question in English, and Officer Bueno would then repeat that question in Spanish. Ipina-Garcia

²⁷ See Day v. Commonwealth, 361 S.W.3d 299, 303 (Ky. 2012) (flight and avoiding being discovered are admissible evidence of guilt).

would then answer the question in Spanish, and Officer Bueno would translate the answer into English for Detective Brislin. Detective Brislin testified that Ipina-Garcia appeared to understand what Officer Bueno was asking him. According to Detective Brislin, Ipina-Garcia understood some English because he would nod his head in response to Detective Brislin or otherwise looked like he understood what Detective Brislin was saying. Officer Bueno also testified that Ipina-Garcia appeared to understand what was being said and was able to respond to the questions. He testified that he heard no protestation and no request to repeat any questions or statements, nor did Ipina-Garcia ever state that he was unclear about something or ask to stop the interview. Ipina-Garcia ultimately admitted to fatally shooting Juarez.

At the conclusion of the interview, the detectives advised Ipina-Garcia that he was being charged with murder. They thanked him for taking the time to speak to the officers and reminded him that he had not been obligated to speak to them, and that was why he had been read his Miranda rights. Ipina-Garcia then commented, "Thank God, I feel better having gotten it off my chest."

Ipina-Garcia was ultimately charged with murder, first-degree wanton endangerment, and tampering with physical evidence. He filed a motion to suppress the statements made during his interrogation. He argued that the Miranda warnings, as interpreted by Officer Bueno, were insufficient and the waiver of those rights was involuntary. The trial court denied suppression, prompting Ipina-Garcia to enter a conditional guilty plea to the charges. The trial court sentenced Ipina-Garcia to thirty-three years' imprisonment. Ipina-Garcia appealed to the Kentucky Supreme Court.

ISSUE: Are Miranda warnings translated into Spanish by a Spanish-speaking officer valid if the translation reasonably conveys to the suspect his/her constitutional rights?

HOLDING: Yes. In this case, Detective Brislin recited the Miranda warnings as:

We're police officers. You have the right to remain silent. You do not have to make any statement or answer any questions. Any statement you do make or any questions you do answer may be repeated at any later hearing or trial, whether it be for you or against you, or for or against any other person. If you decide to make a statement or answer any questions, you need to know that if you change your mind, you have the right to stop giving your statement or answering any questions at any time. You have the right to speak with a lawyer before making any statement or answering any questions. You have the right to have a lawyer here with you during any questioning. If you cannot afford to hire a lawyer, the court can appoint one for you.

Officer Bueno's translation into Spanish was as follows:

Kevin, do you understand we're police officers? We're from Lexington. We're reading you your rights. You're not obligated to speak with us. You have the absolute right to remain silent. You don't have to speak to us. Do you understand so far? Kevin, do you understand that if you do decide to speak with us here and now, whatever is said here, whatever is discussed here, can be used against you in front of a tribunal, and that obviously is going to be used against you, whatever you talk about here. If you do decide to speak to us, you can have an attorney present. If you can't afford an attorney, one can be appointed for you. At any time during this interview, an attorney can be present here for you. If you do decide that you want an attorney present, the attorney would be provided for you free of charge.

There is no requirement that Miranda warnings must be given in the exact form described in Miranda v. Arizona. Rather, "[t]he inquiry is simply whether the warnings reasonably 'conve[y] to [a suspect] his rights as required by Miranda.'"²⁸ More specifically, Miranda requires that the person "be warned that he has a right to remain silent, that any statement he does make may be used as evidence against him, and that he has a right to the presence of an attorney, either retained or appointed."²⁹ In Duckworth v. Eagan, the warnings, in their totality, "touched all of the bases required by Miranda."³⁰

While Officer Bueno's interpretation may have differed slightly from the pre-printed version read by Detective Brislin, the Kentucky Supreme Court held that the Spanish interpretation did not materially alter the substance of the Miranda warnings. Instead, Officer Bueno's interpretation adequately advised Ipina-Garcia that he had the right to remain silent, that any statement he made could be used as evidence against him, and that he had a right to the presence of an attorney, who could be appointed for him if he could not afford an attorney. These are precisely the procedural safeguards that the Miranda warnings are intended to convey.

When asked if he understood these rights and if he wished to speak to the officers, Ipina-Garcia responded in the affirmative by nodding his head and verbally stating "yes." Ipina-Garcia appeared to understand the questions presented to him and responded to those questions appropriately. He never asked for a break or to stop the interview, nor did he give any indication that he did not understand the questions or his Miranda rights. Accordingly, the Kentucky

²⁸ Duckworth v. Eagan, 492 U.S. 195, 203 (1989).

²⁹ Miranda v. Arizona, 384 U.S. 436, 444 (1966).

³⁰ Duckworth, 492 U.S. at 203.

Supreme Court found that the Commonwealth met its burden of demonstrating that Ipin-Garcia's waiver was knowing, intelligent, and voluntary.

The conviction was affirmed.

Mattingly v. Commonwealth, 2020 WL 2092027 (Ky. 2020) – NP – NF

FACTS: While shooting meth with Grismer and Boyd, Mattingly became paranoid and violent. Mattingly proceeded to place Grismer in a chokehold, took him into a bathroom with two other men, and called 911 to advise dispatchers that Grismer was overdosing. Officer Hillard arrives at the scene, breaks down the bathroom door and discovered three men stacked on top of each other. Grismer, at the bottom of the pile, died. Mattingly was holding Boyd in a chokehold and refused to release Boyd until Officer Hillard pointed his firearm at him. Mattingly was arrested for possession of a controlled substance and taken directly to the hospital.

Upon arrival at the hospital, Mattingly was interviewed by Detective Leigh Maroni and Lieutenant Donny Burbrink. As he was under arrest, Mattingly was handcuffed to the bed throughout the questioning. Det. Maroni read Mattingly his "Miranda rights" before questioning him first for approximately fifty-four minutes, and Lt. Burbrink arrived towards the end of the interview. Twenty minutes after the first interview ended, Lt. Burbrink, with Det. Maroni present, conducted the second interview which lasted about thirty-two minutes. The interviews, which are audio only, were conducted somewhere between four and five hours after Mattingly last ingested meth. During these interrogations, Mattingly provided incriminating information despite being highly intoxicated, with slurred speech and entering into repetitive, off, rambling tangents that had no correlation to the questions he was asked.

Mattingly was ultimately convicted of first-degree manslaughter and attempted second-degree manslaughter, and sentenced to twenty years in prison. Mattingly appealed to the Kentucky Supreme Court.

ISSUE: Can a defendant waive Miranda rights if intoxicated to the degree of mania, was hallucinating, functionally insane, or otherwise unable to understand the meaning of his statement?

HOLDING: No. While a defendant's intoxication alone does not render his/her statements inadmissible, a confession may be suppressed when the defendant was intoxicated to the degree of mania or was hallucinating, functionally insane, or otherwise unable to understand the meaning of his statements.³¹

³¹ Soto v. Commonwealth, 139 S.W.3d 827, 848 (Ky. 2004)(citing Britt v. Commonwealth, 512 S.W.2d 496 (Ky. 1974)); Smith v. Commonwealth, 410 S.W.3d 160, 164 (Ky. 2013).

Here, Mattingly was very obviously suffering from some form of delusion throughout the course of the interviews. He stated numerous times during both interviews that he had the ability to see things before they happened; that either God, his late father, or his late brother spoke to him and told him the future before it occurred. He seemed to imply that he believed someone or something spoke to him that night and told him he was being set up, but his statements are so incoherent it is difficult to discern. Under these facts, the Kentucky Supreme Court held that Mattingly's post-arrest statements should have been suppressed. The Court did, however, hold that the error was harmless because the jury ultimately found Mattingly guilty of second-degree manslaughter and attempted second-degree manslaughter, instructions that Mattingly requested.

As no prejudice occurred in this case, the Kentucky Supreme Court affirmed Mattingly's convictions.

Richardson v. Commonwealth, 2020 WL 2831929 (Ky. 2020) – NP – NF

FACTS: Louisville Police arrested Richardson at his home and charged him with murder, and robbery in connection with a May 31, 2015 robbery and death of Cason outside of a Shell service station. Detective Brian Peters interviewed Richardson after the arrest. Prior to his interview, Peters read Richardson his Miranda rights and asked him if he wished to proceed. Richardson indicated that he would proceed, but was not asked to sign a waiver of rights. During the interview, Richardson denied committing the crimes and ultimately invoked his right to remain silent.

A Jefferson Circuit Court jury convicted Richardson of murder, robbery in the first degree, and being a persistent felony offender. The trial court, consistent with the jury's recommendation, sentenced Richardson to life in prison without the possibility of parole for twenty-five years. This appeal followed.

ISSUE: Must Miranda rights be voluntarily, knowingly, and intelligently waived by a criminal defendant prior to conducting a custodial interview?

HOLDING: Yes. Miranda requires waivers to be voluntarily, knowingly and intelligently made. To be valid, the waiver "must have been voluntary in the sense that it was the product of a free and deliberate choice rather than intimidation, coercion, or deception" and, second, "the waiver must have been made with a full awareness of both the nature of the right being abandoned and the consequences of the decision to abandon it."³²

³² Moran v. Burbine, 475 U.S. 412, 421, 106 S.Ct. 1135, 89 L.Ed.2d 410 (1986).

In this case, Detective Peters read the Miranda warning and advised Richardson, “Basically, this is just no trickery, okay? I am going to be up front with you. I am going to expect the same in return. Is that cool with you?” Richardson nodded that he understood his rights and chose to answer several of the questions. He answered Detective Peters’ questions for close to thirty minutes, and then invoked his rights. This invocation indicates that he understood he had rights that he could invoke when he wanted to do so. Therefore, the Kentucky Supreme Court held that Richardson knowingly and intelligently waived his Miranda rights.

The Supreme Court upheld Richardson’s convictions.

Williams v. Commonwealth, 2020 WL 1488775 (Ky. App. 2020) – NP – NF

FACTS: On July 2, 2016, a home invasion occurred at the Ballman residence. After a physical struggle with the Ballmans, the two invaders left the residence with a safe containing 80 Percocet pills and 80 Xanax pills as well as some cash and jewelry. Once the men had the safe, they left the premises. Ms. Ballman identified Williams as one of the invaders.

Later that same day, Covington police responded to a report that a person was lying on the ground unresponsive at 521 Oliver Street, which was about six blocks from the location of the home invasion at the Ballman residence. Officer Kyle Shepherd, one of the officers who responded to the call, found Williams passed out in the doorway of the garage. Officer Shepherd also found marijuana, eleven Percocet pills, six Xanax pills, a scale, clothing, and a firearm within arm’s length of Williams.

Officer Shepherd awoke Williams, who was intoxicated, and read him his Miranda rights. Williams admitted the marijuana was his, but denied ownership of the pills, which he said were not Percocet. Williams said the gun was a family heirloom, but later said he purchased it on Craigslist.

Police arrested Williams and placed him in the back seat of the cruiser. He passed out again, and an ambulance was called. Williams was transported to the hospital where he received medical care for approximately two hours. After Williams regained consciousness at the hospital, Officer Shepherd again read him his Miranda rights and questioned him further.

Williams moved to suppress his statements to police, arguing that they were not voluntary as he was intoxicated. The trial court denied the motion to suppress.

Williams was convicted of first-degree burglary, first-degree robbery, first-degree possession of a controlled substance, third-degree possession of a controlled substance, and possession of marijuana, and recommended the minimum sentence of ten years, which the court imposed. An appeal followed.

ISSUE: Despite being advised of Miranda rights, are statements given by a suspect to police while the suspect is intoxicated coercive and involuntary?

HOLDING: No. In determining the voluntariness of statements obtained from an intoxicated defendant, ‘the basic question is whether the confessor was in sufficient possession of his faculties to give a reliable statement[.]’³³ In this case, the evidence revealed that Williams’s level of intoxication was not such that he was not in possession of his faculties. Although Williams was not asked if he understood his rights, Officer Shepherd testified that Williams appeared to understand them. Further, although Williams never explicitly agree to speak with the officers, his actions indicated he made a choice to do so.

The convictions were affirmed.

IV. KENTUCKY REVISED STATUTES – CHAPTER 189A DRIVING UNDER THE INFLUENCE

Carrender v. Commonwealth, 2020 WL 855689 (Ky. App. 2020) - P – NF (DR Pending)

FACTS: Kentucky State Police Trooper Corey Jones received approval to conduct a traffic safety checkpoint in Wayne County at a pre-approved location. Trooper Jones was designated as the officer in charge at the checkpoint, and he was assisted by another trooper and the Wayne County Sheriff’s Office. The checkpoint was marked with warning signs, cruisers with flashing lights, and marked law enforcement personnel. The KSP has issued a public service announcement to the media for the entire Post 11 area indicating that periodic traffic safety checkpoints would occur at those locations approved by the KSP Police and Procedures Manual. Every vehicle that entered the checkpoint was stopped. The purpose of the checkpoint was seatbelt usage, sobriety, and insurance and registration violations. Trooper Jones indicated the purpose of the checkpoint was “general law enforcement.”

Carrender entered the checkpoint, but did not want to stop. He nearly struck a trooper with his door upon exiting his vehicle. Trooper Jones detected the odor of alcoholic beverage on Carrender, who also exhibited glossy eyes and slurred speech. Carrender failed field sobriety tests and was arrested for DUI. Carrender refused a breath test.

Carrender moved to suppress the stop, arguing that the checkpoint was unconstitutional because it did not comply with Kentucky law. Suppression was denied, and Carrender entered a guilty plea to first offense DUI. On appeal, the Wayne Circuit Court affirmed. The Court of Appeals granted discretionary review.

³³ Nichols v. Commonwealth, 142 S.W.3d 683, 691-92 (Ky. 2004).

ISSUE: Is a safety checkpoint for “general law enforcement purposes” constitutional if based on the enforcement of traffic laws?

HOLDING: Yes. Law enforcement may not impose checkpoints whose primary purpose is to detect evidence of ordinary criminal wrongdoing; rather, roadblocks must have a “primary purpose,” such as keeping the roads safe from impaired drivers or maintaining border security. Roadblocks set up and operated by police were not set up for primary purpose of detecting evidence of ordinary criminal wrongdoing, in violation of the Fourth Amendment, where stated purpose of roadblocks was to “enforce the traffic laws,” with special attention being paid to “occupant protection (seatbelt adherence), sobriety, insurance and registration violations,” which was a permissible primary purpose.

The Commonwealth has the burden of proving that the checkpoint was established pursuant to the Buchanon\Cox³⁴ test. The Court of Appeals held that this checkpoint satisfied that test.

The conviction was affirmed.

Douglas v. Commonwealth, 2020 WL 1231704 (Ky. App. 2020) – NP – NF

FACTS: Michael Shively, his girlfriend, and his girlfriend’s three-year-old daughter were in Shively’s truck. Shively was driving his truck in his father’s yard to hook up a trailer parked there. Shively’s truck was just a few feet from the highway when a vehicle driven by Douglas came around a nearby curve at a high rate of speed. The vehicle crossed the centerline, crossed the opposite lane of the highway, and sideswiped Shively’s truck in the yard. Douglas did not stop after hitting Shively’s truck. Shively then got out of his truck and into his father’s truck, and the two pursued Douglas. Shively’s mother, his girlfriend, and her daughter also pursued Douglas in another vehicle.

During the pursuit, Shively called 911 and alerted police. As they followed Douglas, the vehicle he was driving was swerving on the road and sideswiped an oncoming vehicle. Shively’s mother attempted to force Douglas to stop the vehicle by getting her car in front of him, but her attempt failed. Shively’s girlfriend attempted to wave Douglas down, but he nearly ran over her. Douglas eventually pulled into a trailer park in Lebanon and stopped the vehicle. Douglas exited the vehicle and started to run away but stopped when Shively told him to do so. Shortly thereafter, police arrived on the scene.

Following a jury trial, Douglas was found guilty of operating a motor vehicle under the influence of alcohol/drugs (DUI), fourth offense; three counts of second-degree wanton endangerment;

³⁴ Commonwealth v. Cox, 491 S.W.3d 167 (Ky. 2015); Commonwealth v. Buchanon, 122 S.W.3d 565 (Ky. 2003).

leaving the scene of an accident; no insurance; operating a motor vehicle on a suspended license; and PFO I. The trial court sentenced Douglas to a total of fifteen years' imprisonment. An appeal followed.

ISSUE: Are witness observations of a defendant's driving and actions after the cessation of operation of a motor vehicle sufficient evidence of DUI?

HOLDING: Yes. This prosecution was made conducted under KRS 189A.010(1)((b), (c), and (e), which prohibits a person from operating a motor vehicle anywhere in this state under the influence of alcohol, substances, or a combination of alcohol and substances.

In this case, the Court of Appeals held that the evidence presented at trial demonstrated that Douglas was recklessly and erratically driving his vehicle prior to his arrest. While driving, Douglas crossed the centerline, crossed over into the oncoming lane of the highway, and sideswiped Shively's truck, located on the shoulder of the highway. After hitting Shively's truck, Douglas continued driving in an erratic manner, continued swerving all over the road, and then sideswiped another vehicle traveling in the oncoming lane of traffic. Witness testimony revealed that Douglas's eyes were bloodshot, his speech was slurred, he failed three field sobriety tests, and he refused to consent to an alcohol Intoxilyzer test at the time of his arrest. Douglas also admitted to police that he had consumed methamphetamine, heroin, and alcohol that day. Douglas was belligerent and combative at the jail after his arrest. He repeatedly kicked the doors of the holding cell and put his belt around his neck and attempted to strangle himself.

The convictions were affirmed.

V. KENTUCKY REVISED STATUTES – CHAPTER 218A CONTROLLED SUBSTANCES

Logsdon v. Commonwealth, 2020 WL 855486 (Ky. App. 2020) – P – NF

FACTS: On August 18, 2018, someone referring to himself as "Kyle" called 911 to report that Logsdon was experiencing a heroin overdose. "Kyle" stated that he would not stay with Logsdon until medical assistance arrived because the caller had outstanding warrants. Boone County Deputy Sheriff Jennifer Crittenden responded to the call, and upon arrival observed that Logsdon was conscious but confused. According to Deputy Crittenden, Appellant was holding a syringe with a needle and residue. On the table in front of Appellant was a used container of the narcotic overdose treatment Narcan, a spoon, and a folded paper with what appeared to be heroin residue. Another deputy arrived, as did Florence EMS. Appellant told EMS personnel that a friend had been over, and he gave conflicting statements as to who had administered the Narcan. Logsdon refused medical treatment and would not cooperate with the deputies. Logsdon

was charged with one count of possession of a controlled substance in the first degree, second offense, and one count of possession of drug paraphernalia.

Logsdon filed a motion to dismiss in Boone Circuit Court pursuant to KRS 218A.133. This statute exempts from prosecution for possession of a controlled substance or drug paraphernalia persons who have requested medical assistance, or one on whose behalf it has been requested. Logsdon asserted that KRS 218A.133 does not require a third-party caller to remain with the person experiencing an overdose for the exemption to apply. KRS 218A.133 states in pertinent part:

(2) A person shall not be charged with or prosecuted for a criminal offense prohibiting the possession of a controlled substance or the possession of drug paraphernalia if:

(a) In good faith, medical assistance with a drug overdose is sought from a public safety answering point, emergency medical services, a law enforcement officer, or a health practitioner because the person:

1. Requests emergency medical assistance for himself or herself or another person;
2. Acts in concert with another person who requests emergency medical assistance; or
3. Appears to be in need of emergency medical assistance and is the individual for whom the request was made;

(b) The person remains with, or is, the individual who appears to be experiencing a drug overdose until the requested assistance is provided; and

(c) The evidence for the charge or prosecution is obtained as a result of the drug overdose and the need for medical assistance.

The circuit court interpreted KRS 218A.133(2) as not providing an exemption from prosecution for Logsdon unless the person requesting medical assistance, in this case Kyle, remained with the person requiring assistance (Logsdon) until medical assistance arrived.

Logsdon entered a plea of guilty to one count of possession of a controlled substance in the first degree, second offense, and possession of drug paraphernalia. He was sentenced to three years' imprisonment. An appeal followed.

ISSUE: Does KRS 218A.133(2) provide an exemption from prosecution only if the person requesting medical assistance for remains with the person requiring assistance until medical assistance arrives?

HOLDING: No. The Court of Appeals held that KRS 218A.133(2) provides an exemption from prosecution for possession of a controlled substance or drug paraphernalia irrespective of whether the reporting party remains with the person experiencing the overdose. The statute provides an exemption for Appellant’s prosecution because he is the person for whom “medical assistance with a drug overdose is sought,” and he is “the individual who appears to be experiencing a drug overdose[.]” KRS 218A.133(2)(a) provides the exemption from prosecution only in the limited circumstance where “[i]n good faith, medical assistance with a drug overdose is sought[.]” Kyle called 911 in apparent good faith seeking medical assistance for Appellant, and it can reasonably be inferred from the used Narcan container on the table in front of Appellant that he was experiencing a drug overdose.

Logsdon’s conviction was reversed.

McCowan v. Commonwealth, 2020 WL 862090 (Ky. App. 2020) – NP – F

FACTS: On October 30, 2017, Lexington Police responded to a single vehicle crash on East New Circle Road. Upon arriving, the officers found McCowan behind the wheel of an automobile. He was under the influence of narcotics and appeared to be experiencing a drug overdose. The police report states that McCowan “used defensive resistance and intentionally prevented officers from making the arrest.” Following the arrest, the officers found a crack pipe in McCowan’s right hand. The officers also determined that McCowan’s license was suspended. Thereafter, the officers transported McCowan to a hospital where he was treated for the drug overdose. McCowan states that the hospital administered Narcan to reverse an opioid overdose, but that fact is not documented in the record. Upon his release, the police transported McCowan to the Fayette County Detention Center. While being booked into the facility, ten dosage units of heroin were found in McCowan’s sock.

McCowan was charged with possession of drug paraphernalia and promoting contraband. He argued that the charges were barred by operation of KRS 218A.133 because the evidence was obtained during the course of his treatment for a drug overdose. After considering the Commonwealth’s response, the trial court denied the motion to dismiss. Subsequently, McCowan entered a conditional guilty plea to an amended charge of first-degree possession of a controlled substance.

ISSUE: Does KRS 218A.133 prohibit prosecution for promoting contraband, or for possession of a controlled substance where the evidence was not obtained as a result of a drug overdose and the need for medical assistance (such as contraband found while being booked into jail)?

HOLDING: No. KRS 218A.133 provides:

(1) As used in this section:

(a) "Drug overdose" means an acute condition of physical illness, coma, mania, hysteria, seizure, cardiac arrest, cessation of breathing, or death which reasonably appears to be the result of consumption or use of a controlled substance, or another substance with which a controlled substance was combined, and that a layperson would reasonably believe requires medical assistance; and

(b) "Good faith" does not include seeking medical assistance during the course of the execution of an arrest warrant, or search warrant, or a lawful search.

(2) A person shall not be charged with or prosecuted for a criminal offense prohibiting the possession of a controlled substance or the possession of drug paraphernalia if:

(a) In good faith, medical assistance with a drug overdose is sought from a public safety answering point, emergency medical services, a law enforcement officer, or a health practitioner because the person:

1. Requests emergency medical assistance for himself or herself or another person;
2. Acts in concert with another person who requests emergency medical assistance; or
3. Appears to be in need of emergency medical assistance and is the individual for whom the request was made;

(b) The person remains with, or is, the individual who appears to be experiencing a drug overdose until the requested assistance is provided; and

(c) The evidence for the charge or prosecution is obtained as a result of the drug overdose and the need for medical assistance.

....

(4) When contact information is available for the person who requested emergency medical assistance, it shall be reported to the local health department. Health department personnel shall make contact with the person who requested emergency medical assistance in order to offer referrals regarding substance abuse treatment, if appropriate.

(5) A law enforcement officer who makes an arrest in contravention of this section shall not be criminally or civilly liable for false arrest or false imprisonment if the arrest was based on probable cause.

The offense of promoting contraband is a crime other than possession of a controlled substance.³⁵ Furthermore, the police officers did not discover the heroin units on McCowan while he was being treated for his drug overdose, but only later, when he was being booked into the Detention Center. Therefore, the Court of Appeals held that the amended possession charge still falls outside of the scope of KRS 218A.133.

The Court of Appeals also held, however, that KRS 218A.133 barred McCowan's prosecution for possession of drug paraphernalia based on the crack pipe found during his drug overdose. This issue ended up becoming moot as this particular charge was dismissed by the trial court prior to appeal.

The conviction was affirmed.

White v. Commonwealth, 2020 WL 2610035 (Ky. App. 2020). NP – NF

FACTS: In January 2017, White sold heroin to a confidential informant (CI). The CI participated in four controlled buys and purchased a cumulative total of two or more grams of heroin from White. White was subsequently indicted in April of 2017 upon first-degree trafficking in a controlled substance (two grams or more of heroin) and PFO I. Following a jury trial, White was found guilty of first-degree trafficking in a controlled substance and being a first-degree persistent felony offender, and was subsequently sentenced to fifteen years' imprisonment. An appeal followed.

ISSUE: Does participating in four controlled buys wherein a cumulative total of two or more grams of heroin are sold by the suspect constitute sufficient evidence of first-degree trafficking in a controlled substance?

HOLDING: Yes. KRS 218A.1412(1)(b) declares that a person is guilty of first-degree trafficking in a controlled substance when the person knowingly and unlawfully traffics in two grams or more of heroin. KRS 218A.1412(2) states that the amounts specified in KRS 218A.1412(1) of this section may occur in a single transaction or may occur in a series of transactions over a period of time not to exceed ninety days that cumulatively result in the quantities specified in this section.

In this case, the four controlled buys between White and the CI were very similar. All four transactions involved the same parties, the CI and White, were recorded on video in a similar fashion, involved texts between the CI and White arranging each transaction, and resulted in the CI returning from each transaction with heroin. There was absolutely no evidence to indicate White was not involved in any one of the four controlled buy transactions. Thus, there was no

³⁵ See Commonwealth v. Kenley, 516 S.W.3d 362, 365 (Ky. App. 2017).

evidentiary basis for the jury to rationally believe that White was not involved in one of the four transactions and, thus, sold under two grams of heroin.

The convictions were affirmed.

VI. KENTUCKY REVISED STATUTES – CHAPTER 434 OFFENSES AGAINST PROPERTY BY FRAUD

Henshaw v. Commonwealth, 2020 WL 1231706 (Ky. App. 2020) – NP – NF

FACTS: Henshaw stole his grandmother’s credit card and went on a spending spree of nearly \$2,700.00. His grandmother did not want to press charges, but other family members did. Henshaw was arrested and indicted for the following offenses: fraudulent use of a credit or debit card under \$10,000; theft/receipt of stolen credit/debit card; and persistent felony offender, second degree (PFO II). Henshaw was found guilty as charged and sentenced to a total of nine years in prison.

ISSUE: Is the offense of theft/receipt of a stolen credit or debit card (KRS 434.580) inherently included in the charge of fraudulent use of a credit card (KRS 434.650)?

HOLDING: Yes. It is double jeopardy to convict a defendant of both theft/receipt of a stolen credit or debit card (KRS 434.580) and fraudulent use of a credit card (KRS 434.650).

Therefore, the conviction for fraudulent use of a credit/debit card was affirmed while the conviction for theft/receipt of a stolen credit/debit card was reversed.

VII. KENTUCKY REVISED STATUTES – CHAPTER 501 LIABILITY

Bratcher v. Commonwealth, 2020 WL 2091864 (Ky. 2020) – NP – NF

FACTS: After pleading guilty to charges of receiving stolen property and being a persistent felony offender with a recommended sentence of five years’ incarceration, Bratcher was released from jail on his own recognizance pending final sentencing in two weeks. Before entering into the plea agreement with the Commonwealth, Bratcher offered to work as an informant for the local drug task force pending final sentencing, to which the Commonwealth agreed. Immediately upon his conditional release, Bratcher “left the jail parking lot, went to the dope man’s house, and got some meth,” and he remained high during the entirety of his release. He failed to appear for final sentencing. Bratcher was charged with bail jumping and of being a persistent felon.

At trial, Bratcher requested an instruction on the defense of voluntary intoxication. The trial court declined to issue the instruction. Bratcher was ultimately convicted, sentenced to twenty years' imprisonment. An appeal followed.

ISSUE: Is voluntary intoxication a defense to bail jumping?

HOLDING: No. KRS 501.080 provides, in part, that “[i]ntoxication is a defense to a criminal charge only if such condition ... [n]egatives the existence of an element of the offense.” As Bratcher correctly notes, and the Commonwealth does not dispute, the necessary bail jumping element of intentionally failing to appear for a scheduled court appearance following release from custody “could conceivably be ‘negated’ by intoxication.”³⁶ But, the Kentucky Supreme Court has repeatedly interpreted KRS 501.080(1) to mean that the voluntary-intoxication defense is justified only where the evidence could lead a reasonable jury to find “that the defendant was so [intoxicated] that he did not know what he was doing.”³⁷ Evidence indicating “mere impairment of judgment and/or physical control that commonly leads intoxicated persons to do things they would not ordinarily do” is not a showing sufficient to entitle the defendant to an instruction on the defense of voluntary intoxication.³⁸

In the present case, in support of his argument that he was entitled to a jury instruction on the voluntary intoxication defense, Bratcher relies solely on his testimony that he: would “black out when using meth and not remember what he had done;” “couldn't remember what city he was in” on the day he missed the final sentencing hearing. Bratcher was not able to provide any evidence to corroborate his claim that he missed his court date because he was so high that he did not know where he was or what he was doing. Furthermore, Bratcher's testimony regarding where he was the day of his scheduled court day was inconsistent. Bratcher testified during direct that on or about the day of his final sentencing hearing, he was elsewhere because his father was hospitalized after suffering another heart attack. Bratcher then testified during cross-examination that he did not remember where he was on the day of his scheduled court appearance, nor what day he attended to his father who suffered a heart attack. While it is true that this lack of specific testimony could be because of Bratcher's loss of all memory from his drug use, Bratcher was able to recall the specifics of his meetings with the drug force task agents and with his drug dealer, as well as the specifics of being later arrested, despite his testimony that he remained high during the entirety of his release. The Commonwealth, however, presented evidence that Bratcher did not appear intoxicated or altered when he interacted with police after his release.

³⁶ Conyers v. Commonwealth, 530 S.W.3d 413, 431 (Ky. 2017)(citing Fredline v. Commonwealth, 241 S.W.3d 793 (Ky. 2007), and Nichols v. Commonwealth, 142 S.W.3d 683 (Ky. 2004)).

³⁷ Conyers, 530 S.W.3d at 432 (quoting Fredline, 241 S.W.3d at 797).

³⁸ Id.

The convictions were affirmed.

Broadway v. Commonwealth, 2020 WL 402291 (Ky. App. 2020) NP – DR filed 2/25/2020

FACTS: On August 20, 2016, officers from the Louisville Metro Police Department (“LMPD”) responded to a call that a man wearing a mask and brandishing a gun had forced his way into the apartment of Phyllis Finney in Jefferson County, Kentucky. When the officers arrived, they observed a black male exiting an apartment building and holding a mask. Testimony was later adduced that the man had a pistol in his hand and that gun shots were exchanged between the man and police, after which the man ran back into the apartment complex. Members of the LMPD SWAT team were summoned and heard Broadway crawling in the ceiling of an apartment. LMPD officers pepper sprayed the ceiling area, and Broadway was taken into custody. Officers found a gun in the ceiling where Broadway had been crawling.

A jury convicted Broadway of second-degree burglary in Jefferson Circuit Court. Broadway appealed his conviction to the Kentucky Court of Appeals.

- ISSUES:**
1. Does a defendant’s incorrect belief that a person he desired to confront for committing an offense against his daughter was present inside of a residence constitute mistake of fact to justify second-degree burglary?
 2. Does breaking into a residence with a pry bar, masked, while armed with a firearm constitute criminal trespass?

HOLDING: 1. No. The jury was asked to determine if Broadway committed second-degree burglary by entering Finney’s dwelling with the intent to commit a crime therein. Broadway testified that he entered Finney’s apartment with the intent to confront Spaulding, under the mistaken belief that Spaulding was present in the apartment. Appellant asserts that this mistake of fact, i.e., his incorrect belief that Spaulding was present in the apartment, demonstrates that he could not have accomplished the crime he intended to commit.

KRS 501.070 states:

- (1) A person’s ignorance or mistake as to a matter of fact or law does not relieve him of criminal liability unless:
 - (a) Such ignorance or mistake negatives the existence of the culpable mental state required for commission of an offense; or
 - (b) The statute under which he is charged or a statute related thereto expressly provides that such ignorance or mistake constitutes a defense or exemption; or

(c) Such ignorance or mistake is of a kind that supports a defense of justification as defined in this Penal Code.

(2) When ignorance or mistake relieves a person of criminal liability under subsection (1) but he would be guilty of another offense had the situation been as he supposed it was, he may be convicted of that other offense.

(3) A person's mistaken belief that his conduct, as a matter of law, does not constitute an offense does not relieve him of criminal liability, unless such mistaken belief is actually founded upon an official statement of the law, afterward determined to be invalid or erroneous, contained in:

(a) A statute or other enactment; or

(b) A judicial decision, opinion or judgment; or

(c) An administrative order or grant of permission; or

(d) An official interpretation of the public officer or body charged by law with responsibility for the interpretation, administration or enforcement of the law defining the offense.

"[A] mistake of fact is not a defense to a charge unless the mistake would support a defense of justification or otherwise show that the charged offense ... could not have been committed."³⁹ Broadway's mistake of fact regarding Spaulding's presence at the apartment at the time Broadway forcibly entered does not fall within the limited exception set out in KRS 501.070, as it does not negate his culpable mental state nor otherwise demonstrate that he could not have committed the offense.

2. No. Under KRS 511.060(1), a person is guilty of first-degree criminal trespass when he knowingly enters or remains unlawfully in a dwelling. In this situation, Broadway admitted to broking into Finney's apartment with a pry bar, that he was armed with a pistol and had a mask, and that he was there for the purpose of confronting Spaulding. This constitutes second-degree burglary under KRS 511.030.

The convictions were affirmed.

VIII. KENTUCKY REVISED STATUTES – CHAPTER 506 INCHOATE OFFENSES

Hancock v. Commonwealth, 2020 WL 507622 (Ky. App. 2020) – NP F

³⁹ Mullikan v. Commonwealth, 341 S.W.3d 99, 107 (Ky. 2011).

FACTS: On April 11, 2018, Hancock learned his wife, Misty, was having an affair. Hancock saw messages on Misty’s phone revealing she had been cheating on him with her Tyson Foods co-worker, Winsol Easton. Hancock became irate at Misty, berated her, pointed a gun at her face, and threatened to kill her. Hancock then shot at the bedroom ceiling while three children were present, slapped Misty while she was holding an infant, took the infant from her and punched her in the face. Hancock then loaded his vehicle with firearms and ammunition. Hancock continued his physical abuse of Misty when Misty’s sister arrived. At that point, Hancock demanded she open the messaging app she used for communicating with Easton. When Misty refused, Hancock punched and kicked her until she complied. He also threw her against a wall and, at one point, pulled Misty’s cheeks open and told her he would hate to see her overdose as he held a bottle of pills. The physical abuse lasted several hours and Misty sustained bruises all over her body. Hancock also made threats that he would go “hunting” Easton at Tyson Foods and made threats against Easton and Misty on Facebook. Hancock left the residence in his vehicle with Misty and the children. Misty’s sister contacted Tyson Foods to warn them that Hancock was en route. The Henderson County Sheriff’s Department was notified.

Deputy Anthony Willett received the information about the threats and preparations for an ambush. Deputy Willett looked up Hancock on Facebook to determine what Hancock looked like and saw Hancock’s threat to kill Easton and Misty. Deputy Willett, Sergeant Morrow, and Deputy Brooks then went to Tyson Foods, and Sergeant Morrow escorted Easton off the premises.

Hancock soon arrived with Misty and the children still in the vehicle. Deputy Willett and Deputy Brooks executed a traffic stop. When they asked Hancock to step out of his vehicle, a magazine of bullets fell from his lap. Deputy Willett handcuffed Hancock, performed a pat down, and discovered a loaded semi-automatic handgun on him. Hancock’s pockets contained bullets. A large knife and more ammunition were in the floorboard. Rifles were also in the back of the vehicle.

At trial, a Henderson Circuit Court jury found Hancock guilty of criminal attempt to commit murder and recommended a ten year prison sentence. Hancock appealed.

ISSUE: Does making threats against the safety of others in person and on social media, loading a vehicle with firearms and ammunition, and driving to a potential victim’s workplace constitute substantial steps toward committing a criminal offense?

HOLDING: Yes. Under KRS 506.010(1)(b), a person is guilty of criminal attempt to commit a crime when:

[A]cting with the kind of culpability otherwise required for commission of the crime, he:

...

(b) Intentionally does or omits to do anything which, under the circumstances as he believes them to be, is a substantial step in a course of conduct planned to culminate in his commission of the crime.

KRS 506.010(2) defines a “substantial step” as “an act or omission which leaves no reasonable doubt as to the defendant’s intention to commit the crime which he is charged with attempting.”

In Commonwealth v. Prather,⁴⁰ the Kentucky Supreme Court explained that “substantial steps” are overt acts “which convincingly demonstrate a firm purpose to commit a crime, while allowing police intervention, based upon observation of such incriminating conduct, in order to prevent the crime when criminal intent becomes apparent.” Furthermore, the substantial steps “must be considered under all of the circumstances of the case to discover whether they manifest a clear intent to commit the crime.”⁴¹

In this case, Hancock’s actions demonstrated a firm purpose to intentionally murder Easton or others. From the time Hancock learned of his wife’s affair, to the time he pulled in to Tyson Foods, his behavior indicated an intent to murder. He went into a rage when he discovered the affair. He pointed a gun at Misty’s face. He beat her. He repeatedly said he was going to kill Misty and Easton. He wrote on Facebook that he was going to kill both of them. He bragged about going “hunting.” He put an arsenal of firearms and ammunition in his vehicle. The weapons were within close reach in the vehicle when he pulled in to Tyson Foods’ parking lot. Simply because Hancock did not use his weapons before the police intercepted him does not mean he lacked the intent to use them. He traveled to his intended victim’s workplace with multiple weapons, including a magazine of ammunition in his lap. Hancock offered no other reason why he would be at Tyson Foods that day at that time. Thus, the Court of Appeals concluded that these overt acts, considering the circumstances of the case and not as isolated acts, demonstrate a firm purpose to commit a crime.

Hancock’s conviction was affirmed.

Messer v. Commonwealth, 2020 WL 1303614 (Ky. 2020) – NP F

FACTS: In the early morning of May 9, 2014, Baker and Wagner, armed and impersonating police officers, broke into the home of a known drug dealer, Mills, demanding drugs and money. Mills was shot and died shortly afterward.

⁴⁰ 690 S.W.2d 396, 397 (Ky. 1985)

⁴¹ Id.

Two days prior to Mills's death, Elijah Messer took Smith and Baker to Mills's residence to buy oxycodone. A purchase was made, but Mills did not have the quantity they wanted to buy. Mills told them he would have more in a day or two. Baker and Smith wanted to rob Mills at that point, but Elijah told them "not to because [he] didn't want to be there and involved in it at that time." Later that night while partying, Elijah heard Smith talking with another person about robbing Mills. Baker and Smith dropped Elijah off at his house the next day.

On May 8, 2014, Wagner met Baker at Baker's house. Baker told him that he had met a guy and that they talked about robbing another guy. Baker and Wagner then went to a dollar store where Baker bought items including plastic handcuffs. Wagner and Baker next went to Smith's house. After that, they went to a trailer belonging to Adam Messer, Elijah's brother. It was there that Wagner met Elijah and Adam for the first time. Angela Mills, Elijah's girlfriend; Angela's daughter; and Adam's girlfriend, Beth, were also at Adam Messer's home.

Wagner testified that he overheard Elijah and Baker talking about robbing Mills and they planned the robbery while there. Elijah told Baker how easy it would be, how Mills didn't own any weapons, and that if Baker did not rob Mills, he would find someone who would. Elijah and Baker said that Mills had about \$200,000 cash and 1500 oxycodone pills.

Baker pulled up on a computer an aerial view of Mills's property. Elijah told Baker that he knew where Mills lived and that he did not need to see the map. Elijah described the layout of the home and its occupants, and stated that Mills's wife would be gone to work. Elijah offered to drive Baker and Wagner in Baker's truck to Mills's house, but Baker refused the offer. Elijah then planned to drive his brother's truck, but Adam stated that only Angela could drive it. Wagner knew when he left Adam's home about 4:00-4:30 a.m. that he and Baker were going to steal money and drugs from Mills. On the road to Mills's home, Baker and Wagner pulled off to cover the truck's license plate. Angela and Messer pulled up during that time.

Angela, at Elijah's direction, drove up the road leading to Mills's residence. Angela drove past Baker and Wagner who were stopped on the side of the road. At Elijah's direction, Angela pulled off in the field near Mills's home and while there, she and Messer smoked meth.

Angela got out of the truck and heard gunshots. She wanted to leave but Elijah did not. Angela and Elijah did not leave the field until Baker and Wagner sped by. At Elijah's direction, Angela pursued Baker and Wagner and tried to get them to stop by blowing her horn and flashing her lights. Elijah wanted to use Angela's pistol to shoot at Baker and Wagner, but she would not let him. Baker and Wagner were supposed to go back to Adam's home, but they did not. When Baker and Wagner finally stopped, she heard Elijah ask them, "Did you get it?"

Wagner also testified that when Baker stopped, Elijah asked what happened and what they got. Baker complained that the robbery was not easy because Mills pulled a gun on him. Baker also stated they did not get anything because "it all broke loose." Wagner testified that Baker took

from a dresser drawer a bag of pills, thought perhaps to be Neurontin, and five oxycodone pills, one of which he gave to Wagner.

In a recorded interview with law enforcement, Elijah stated that he was to get a 25% cut of the proceeds of the robbery, but that he felt “shorted” in the deal.

The jury found Elijah guilty of complicity to second-degree manslaughter, complicity to first-degree robbery and being a second-degree persistent felony offender. The trial court sentenced Elijah to fifty years in prison. An appeal followed.

ISSUE: Is facilitation always a lesser-included offense of complicity under Kentucky law?

HOLDING: No. An instruction on facilitation as a lesser-included offense of complicity is appropriate when affirmative evidence demonstrates that the defendant did not intend the crime to be committed.

KRS 502.020 provides the elements required to be proved in order to find a defendant guilty of complicity. It states, pertinently:

- 1) A person is guilty of an offense committed by another person when, with the intention of promoting or facilitating the commission of the offense, he:
 - (a) Solicits, commands, or engages in a conspiracy with such other person to commit the offense; or
 - (b) Aids, counsels, or attempts to aid such person in planning or committing the offense....

In comparison, KRS 506.080(1) states that a person is guilty of criminal facilitation “when, acting with knowledge that another person is committing or intends to commit a crime, he engages in conduct which knowingly provides such person with means or opportunity for the commission of the crime and which in fact aids such person to commit the crime.”

A principal difference between KRS 502.020’s complicity and KRS 506.080’s facilitation elements is the mental state associated with the offenses. In particular, often-cited Thompkins v. Commonwealth states:

Under either statute, the defendant acts with knowledge that the principal actor is committing or intends to commit a crime. Under the complicity statute, the defendant must intend that the crime be committed; under the facilitation statute, the defendant acts

without such intent. Facilitation only requires provision of the means or opportunity to commit a crime, while complicity requires solicitation, conspiracy, or some form of assistance. Facilitation reflects the mental state of one who is wholly indifferent to the actual completion of the crime.

Elijah's argument was that he was entitled to a facilitation instruction because no testimony was introduced indicating that he would receive or did receive anything from the robbery. Elijah does not identify any affirmative evidence that he was wholly indifferent to the commission of the robbery. The jury was presented with evidence that Elijah knew about the impending robbery, and he intended the robbery be committed, but was not presented with affirmative evidence that he did not care one way or the other that the robbery was completed. Without such evidence, a reasonable jury could not entertain a reasonable doubt of his guilt on the greater complicity offenses, but believe beyond a reasonable doubt that Elijah was guilty of the lesser included facilitation offenses. Consequently, because the evidence either portrayed Elijah as an accomplice (i.e., a solicitor, a counselor, and/or a conspirer) in the robbery of Mills or as being not guilty of complicity, the trial court properly instructed the jury on complicity only.

The conviction was affirmed.

IX. KENTUCKY REVISED STATUTES – CHAPTER 507 HOMICIDE

Miller v. Commonwealth, 2020 WL 1491402 (Ky. App. 2020) – NP – NF

FACTS: Miller hitched a trailer to his pickup truck to drive to Indiana to retrieve a vehicle he purchased. After picking up the vehicle, he stopped for dinner and consumed a few beers. After dinner, he resumed his travel home. He got lost in Meade County and drove his truck and trailer into the path of Allen, who was traveling in the opposite direction on his motorcycle. Allen struck Miller's trailer and died instantly. Miller was charged with wanton murder, DUI and operating on a suspended operator's license.

At trial, the Commonwealth moved to admit photographs taken by KSP Detective Washer of the accident scene. These photographs showed the truck parked in a driveway adjacent to the road, where there was a motorcycle on its side with Allen, deceased, nearby. The pictures were gruesome in nature, particularly with respect to Allen's injuries. The trial court permitted all but one of the photographs to be admitted into evidence.

Miller also requested an instruction on wanton endangerment as a lesser included offense of wanton murder. The trial court denied this request. The jury convicted Miller of second-degree

manslaughter and recommended a ten year prison sentence. The trial court sentenced Miller accordingly, and this appeal followed.

- ISSUES:**
1. Are gruesome photographs of a crime scene unduly prejudicial?
 2. Is wanton endangerment a lesser included offense of wanton murder?

HOLDINGS:

1. No. Under Kentucky Rules of Evidence 403, relevant evidence may be excluded if its probative value is substantially outweighed by the danger of undue prejudice. Generally, a photograph does not become inadmissible simply because it is gruesome, but to determine if it is unduly prejudicial, the trial court must consider the photographs within the full evidentiary context of the case. Thus, it must determine if the probative value is substantially outweighed by the harmful consequences of the photographs.⁴² In this case, the trial court considered the individual photographs in the context of the whole body of evidence, after which the trial court either explicitly or implicitly concluded that the prejudicial impact of each photograph was outweighed by its probative value. Each photograph added to the body of evidence something different from the others and the trial court concluded each were relevant to, and probative of, the Commonwealth's burden of proof. The Court of Appeals held these photographs were properly admitted.

2. No. Although the elements of both first-degree and second-degree wanton endangerment are included in the offense of wanton murder, there is a significant fact that must be proved to convict on the latter offense – the death of the victim. In this case, the Commonwealth presented evidence that Allen was killed. Thus, no reasonable juror can find every other element necessary to a conviction for wanton murder and not conclude that the victim is dead.

The convictions were affirmed.

Spaulding v. Commonwealth, 2020 WL 2092025 (Ky. 2020) – NP – NF

FACTS: On February 2, 2016, Spaulding rode around Louisville with his friend Antoine Major in Major's F-150 truck. They stopped to get cigarettes and beer and eventually ended up at Major's mother's home, where Spaulding smoked spice⁴³, marijuana, did methamphetamine and drank alcohol. Spaulding became paranoid and thought someone was out to kill him. The next morning, Spaulding smoked more spice and marijuana and perhaps did more meth; he could not recall. Later that evening, he bought more cigarettes and spice, and he and Major rode around in Major's truck into the early morning hours of February 4th. Due to his drug

⁴² Hall v. Commonwealth, 468 S.W.3d 814, 822-23 (Ky. 2015).

⁴³ "Spice" is a class of synthetic cannabinoids.

hallucinations, Spaulding became increasingly paranoid, thinking people were following them and out to get him. Believing Major was wired by the FBI, Spaulding made Major strip and then threw his clothes out the window of the truck.

They stopped at a Denny's Restaurant, where Spaulding entered, asking for someone to call the police. While inside Denny's, Spaulding picked up the phone and called 911 himself, reporting that he had been robbed. Convinced people were out to get him, he left before police arrived. Spaulding and Major then pulled into a hotel's parking lot. They went inside the lobby of the hotel; Major was naked, and Spaulding was screaming and yelling at the desk clerk to call the police. Believing people were still out to get him, Spaulding took the elevator to the sixth floor of the hotel and ran down the hall, banging on doors and yelling for help and for someone to call 911. He then fled down the stairs, leaving Major inside the hotel.

Spaulding got into Major's truck and drove to a nearby Stop-n-Go Liquor/Convenience Store. It was about 2 a.m. at this point. A store employee, Kahmal Zahden, was on his way out the door with his friend, as Zahden's shift had just ended. The other store employee, Denny Davis, was inside. Spaulding rushed into the store, shoving Zahden and his friend back inside, and pulled the door behind him, all the while waving his arms and screaming for help, saying someone was trying to rob and kill him. When Zahden picked up the phone to call 911, Spaulding jumped over the counter and wrestled with him for the phone. When Zahden grabbed the store gun which was kept under the counter, Spaulding fought with him for that too. When the gun fell to the floor, Spaulding grabbed it and shot Davis, who fell to the ground. Spaulding fired shots at Zahden, missed, then fatally shot Davis 3-4 more times before leaving the store on foot with the gun and continuing down the street, screaming.

A nearby resident, Mark Adair, was out back of his house smoking a cigarette when he heard someone screaming. Adair went into his house and looked out the front window and saw a guy run up to his door and try to get in. As Adair approached the door to keep the guy from entering, the guy shot the lock off. The bullet stopped by a couch where Adair's teenage son slept. Adair's 5-month-old daughter was in the next room, which was not too far from where the bullet ended up. Adair said the shooter did not enter his home.

Spaulding ran to the house next door where Sean Allender resided with his roommate. Allender heard screaming and pounding on the window of his house and called the police. Allender's bedroom window broke and the loaded handgun went through it. Spaulding did not enter but rather ran back to Major's truck and drove off.

Detective Vito spotted Major's truck as matching the description of the one involved in the shooting at the convenience store and pulled behind it at a red light, activating the sirens and lights. Spaulding ran the red light and a police pursuit ensued down I-65. As Spaulding approached the ramp to the Waterson Expressway, he did a U-turn, hit a wall/rail of the

expressway and jumped out of the truck while it was still in gear. He stood up, put his hands up and walked toward the officers yelling, “Just kill me, just kill me!” It took multiple officers to subdue Spaulding and get him on an ambulance stretcher. Spaulding bit one of the officers on the arm. In the ambulance and at the hospital, Spaulding remained paranoid, shouting and yelling for help. Eventually, Spaulding was discharged from the hospital to jail.

Spaulding was indicted on 13 counts, including murder, criminal attempt to murder, first-degree robbery, first-degree burglary, criminal attempt to commit burglary, four counts of wanton endangerment, tampering with physical evidence, first-degree fleeing/evading police, third-degree assault, and first-degree criminal mischief. Ultimately, the jury found Spaulding guilty of wanton murder of Davis, four counts of first-degree wanton endangerment (one count as to Zahden, and three counts as to Adair and his two children in the path of the shot fired into the lock of Adair’s door), and first-degree fleeing/evading police. The trial court imposed a thirty-three year prison sentence. This appeal followed.

ISSUE: Does voluntary intoxication negate the offense of wanton murder?

HOLDING: No. Spaulding objected to the jury being instructed on wanton murder, arguing that he did not act wantonly because he was not aware of and consciously disregarded a substantial and unjustifiable risk that the result will occur. The Kentucky Supreme Court rejected this argument. Under KRS 501.020(3), “[a] person who creates such a risk but is unaware thereof solely by reason of voluntary intoxication also acts wantonly with respect thereto.” KRS 501.020(3). Thus, under the plain language of the statute, voluntary intoxication does not negate the existence of an element of wanton murder.

The fact that Spaulding may not have been seeking to kill when he entered the convenience store is not dispositive, as wanton murder does not require premeditation. From the evidence presented at trial, a reasonable jury could have concluded that Spaulding’s continuous ingestion of spice, marijuana, methamphetamine and alcohol over the course of days, and his decision to ride around Louisville high on drugs in Major’s truck, and enter the Stop-n-Go in his condition, was behavior “so extreme as to manifest extreme indifference to human life.” A reasonable jury could have also concluded that Spaulding’s actions after entering the store created “a grave risk of death to another person and thereby cause[d] the death of another person” under KRS 507.020(1)(b). Because the evidence supported an instruction on wanton murder, the trial court did not abuse its discretion in so instructing the jury.

The convictions were affirmed.

Williams v. Commonwealth, 2020 WL 2831839 (Ky. 2020) – NP – NF

FACTS: On June 10, 2016, Williams spent most of the day riding around in a car with Sequoia Camp, Jacoya Mangrum, and Mangrum's one-year old son. Camp drove, picking up Williams around 11:00 AM, then picking up Mangrum and the child. The group rode around in Camp's vehicle for much of the day, stopping at a friend's house at least once. Troy Cheatham also joined the group, though he drove separately. The group continued to drive around until the early morning hours.

At one point, Camp drove the group to a man's house so Mangrum could collect some money from the man. However, the man was not home, so the group drove to a nearby gas station, arriving sometime around 2:44 AM on June 11, 2016. Soon after, Camp, Mangrum, and Mangrum's son left in Camp's car, but Williams and Cheatham stayed behind. Camp drove Mangrum and her son back to the man's house, and the man gave Mangrum the money she had been trying to collect from him earlier. Camp, Mangrum, and the child then returned to the gas station around 3:44 AM. Williams got into Camp's car, sitting in the back passenger-side seat, while Mangrum sat in the front passenger seat. Her son was in the back seat with Williams. The group left the gas station around 3:50 AM. Cheatham followed behind in his own vehicle.

After the group left the gas station, Williams and Mangrum began arguing over gas money. At some point during the argument, Mangrum punched Williams, and the fight escalated into a physical fight. Camp could not get the two to stop fighting, and she continued to drive for several blocks before pulling over. She flagged Cheatham down, who pulled over and got out of his car. He and Camp physically separated Williams and Mangrum, but the two continued to cuss at each other. Soon, Williams and Mangrum, now outside of the vehicle, began physically fighting again. Camp and Cheatham separated Williams and Mangrum again, and Camp told Mangrum to get back into the car so Camp could drive her home. Mangrum sat down in the front passenger seat of Camp's car. The passenger-side door was still open, however. Mangrum then picked up Williams's phone and threw it on the ground. Williams then came around the vehicle and shot Mangrum in the head before running away. Camp removed Mangrum's child from the backseat and called 911. Mangrum died at the scene.

Williams was arrested the following day after a routine traffic stop. The matter proceeded to a four-day jury trial beginning February 19, 2019. The jury ultimately found Williams guilty of one count of murder, one count of first-degree wanton endangerment, one count of possession of a handgun by a convicted felon, and one count of being a second-degree persistent felony offender. The jury recommended a total sentence of thirty years of imprisonment. Williams also pleaded guilty to one count of attempted criminal possession of a forged instrument and one count of tampering with physical evidence, for charges arising from the June 12, 2016 traffic stop. He received a one-year sentence on each of these convictions. All sentences were ordered to run concurrently, for a total sentence of thirty years of imprisonment. This appeal followed.

ISSUE: May a defendant claim extreme emotional disturbance simply because the defendant suffered from mere hurt or anger?

HOLDING: No. To support an instruction for extreme emotional disturbance, there must be evidence of more than just mere hurt or anger.⁴⁴ The Kentucky Supreme Court held in this case that Williams presented no definitive or non-speculative proof was offered that her suffered a temporary state of mind so enraged, inflamed, or disturbed as to overcome one's judgment, and to cause one to act uncontrollably from an impelling force of the extreme emotional disturbance rather than from evil or malicious purposes.

The Kentucky Supreme Court upheld the convictions.

X. KENTUCKY REVISED STATUTES – CHAPTER 508 ASSAULT AND RELATED OFFENSES

Chapman v. Commonwealth, 2020 WL 2095901 (Ky. App. 2020) – NP – NF

FACTS: Virgil Chapman, a cancer survivor who uses a feeding tube, lived with his wife, Cora, and their three children. Cora took the kids to work with her because Virgil did not feel well. Upon returning from work, Virgil and the four-wheeler were both missing. Virgil eventually returned and sat on the couch, watching television. Cora returned to work to submit her timesheet. Upon returning from work, she noticed Virgil had urinated on himself and was asleep. When she began to clean Virgil up, Virgil awoke, became hostile, aggressive and belligerent. Virgil eventually grabbed Cora by the throat and strangled her. He then went to the bedroom to retrieve rifles and shotguns. Cora tried to stop them and a physical altercation occurred. Cora escaped, ran from the house and called 911. She advised the dispatcher that Virgil was drunk. Cora drove two miles up the road to wait for the police. A shot was fired at this time.

Kentucky State Police troopers and the Russell County Sheriff's Department responded to the dispatch. Upon arrival, the officers heard two shots ricochet from the tree limbs overhanging the area where the cars were parked. Gunshots also struck the cruisers, causing the officers to shelter in place until backup arrived. The State Police ordered Virgil to exit the residence with his hands up, but Virgil did not comply. In fact, Virgil had fled the scene. The children were evacuated from the residence. At a nearby cabin being constructed, police found a 12-gauge shotgun, a 30/30 rifle and shell casings. Virgil was eventually located around 4:00 A.M. When asked why he shot at the police, Virgil replied that he did not know they were the police and that he "wasn't ready to come out." A few days later, Virgil denied shooting at the police officers.

Chapman was convicted of four counts of wanton endangerment in the first degree, one count for each of the four officers present on the driveway. He was convicted of one count of assault in the fourth degree against Cora. Finally, he was convicted of three counts of endangering the

⁴⁴ Talbott v. Commonwealth, 968 S.W.2d 76, 85 (Ky. 1998)

welfare of a minor, one for each of the three children. He was sentenced in accordance with the jury's recommendation of three years for each count of wanton endangerment in the first degree, running consecutively for a total of twelve years, and twelve months on each of the misdemeanors. An appeal followed.

ISSUES: Does shooting randomly when police arrive at the scene whereby the bullets strike branches above the police cars constitute first-degree wanton endangerment?

HOLDINGS: Yes. Virgil requested an instruction on second-degree wanton endangerment. "The differences between first- and second-degree wanton endangerment are the mental state and degree of danger created."⁴⁵ A person is guilty of first-degree wanton endangerment under KRS 508.060(1) "when, under circumstances manifesting extreme indifference to the value of human life, he wantonly engages in conduct which creates a substantial danger of death or serious physical injury to another person." By contrast, a person is guilty of second-degree wanton endangerment under KRS 508.070(1) "when he wantonly engages in conduct which creates a substantial danger of physical injury to another person."

"As to the mental state, both crimes require wanton behavior, but first-degree also requires circumstances manifesting extreme indifference to the value of human life, which has been described as aggravated wantonness."⁴⁶ "As to the danger created, first-degree requires a substantial danger of death or serious physical injury, whereas second-degree requires only a substantial danger of physical injury."⁴⁷

The Kentucky Supreme Court has cited the following example to illustrate the distinction between the two degrees of the crime: aimlessly firing a gun in public would be the second-degree crime whereas "[f]iring a weapon in the immediate vicinity of others is the prototype of first degree wanton endangerment. This would include the firing of weapons into occupied vehicles or buildings."⁴⁸

In this case, the evidence supported a conviction for first-degree wanton endangerment. Virgil did not deny shooting at the police; rather he only denied knowing that they were the police. There was no evidence of another shooter. Although the police had not activated their lights or sirens, their headlights would have been clearly visible in the darkness and the shooter would have seen them. Firing a gun into a group of cars which have just arrived with their headlights on and presumably containing drivers and passengers is the essence of first-degree wanton endangerment.

The convictions were affirmed.

⁴⁵ Swan v. Commonwealth, 384 S.W.3d 77, 102-03 (Ky. 2012).

⁴⁶ Id., at 102.

⁴⁷ Id.

⁴⁸ Id. (quoting ROBERT G. LAWSON & WILLIAM H. FORTUNE, KENTUCKY CRIMINAL LAW § 9-4(b)(2), at 388 n.142 (1998) (citations omitted)).

Coffman v. Commonwealth, 2020 WL 2510917 (Ky. App. 2020) – NP – NF

FACTS: On May 8, 2016, when Coffman was observed at a residence sexually abusing an adult female victim who has physical and mental disabilities. The victim’s mother, Francine Moore, saw Coffman dancing closely and rubbing against the victim while squeezing her breasts. Appellant was highly intoxicated and his genitals were exposed. Moore pushed Coffman away from the victim, and Coffman threw Moore against a stove. Leonard Hatfield jumped on Coffman, after which Coffman struck him and broke his nose.

Moore called Johnny Thomas, who came to the residence. According to Thomas, Coffman was acting out of control and was yelling, screaming, and punching the wall. Thomas called the Bell County Sheriff’s Department to report Coffman’s intoxication and sexual abuse.

Bell County Sheriff’s Deputy Joel Quillen and Officer Jason Williams of the Pineville Police Department arrived at the residence sometime after the call was dispatched at 3:12 a.m. They observed Coffman apparently sleeping in the back of a truck. When they attempted to wake him, Coffman became combative. Appellant began violently fighting, swinging his fists, and kicking. Officers deployed a Taser two times with no effect, and used pepper spray. Deputy Quillen released his K-9 unit “Jax” who bit Coffman on the leg. Coffman kicked Jax in the dog’s side and face. The two officers and two witnesses then restrained Coffman, who was placed in handcuffs and arrested. Coffman was searched and found to be in possession of a small quantity of methamphetamine. He remained combative while being transported to the hospital via EMS for treatment of the dog bite and assessment of his mental state.

A Bell Circuit Court jury found Coffman guilty of several offenses, including possession of a controlled substance and assault. Coffman appealed.

ISSUE: May a person be charged with both third-degree assault and resisting arrest?

HOLDING: Yes. Third-degree assault and resisting arrest require proof of a fact the other does not. The charge of resisting arrest, KRS 520.090, is proved when a person intentionally prevents or attempts to prevent a peace officer from effectuating an arrest by using or threatening to use physical force, or by any other means creating a substantial risk of physical harm to the peace officer or another. In contrast, assault in the third degree, KRS 508.025, is established when the actor recklessly or intentionally causes or attempts to cause physical injury to a peace officer. The resisting arrest statute requires proof of an attempt to prevent an arrest, which is not found in the assault statute. The assault statute, however, requires proof of an attempt, or threat of an attempt, to cause injury to a police officer – an element not found in the resisting arrest statute. As each statute sets forth at least one element not found in the other, there is no double jeopardy violation.

The convictions were affirmed.

Commodore v. Commonwealth, 2020 WL 2831437 (Ky. 2020) – NP – NF

FACTS: Tommy’s Place, a neighborhood shop in Louisville selling cigarettes, produce, and flowers, and then owned by Tommy Smith, was the scene of a robbery on April 13, 2017. The business’s surveillance camera recorded the robbery. At the time the robber, now known to be Commodore, entered the store, Smith’s wife, Freda, and Douglas Jeffries, a cashier, were in the store behind the counter. Smith was outside.

When Jeffries left the counter to offer help, Commodore pushed Jeffries back behind the counter and demanded that Jeffries open the cash register. Jeffries believed Commodore was holding a gun to his back. Freda beat on a window to alert Smith that there was a problem. When Smith arrived inside, Freda screamed, “Guy’s robbing us!” Smith ran at Commodore as Commodore was heading toward the door, at which point Commodore stabbed Smith in the neck. Smith pursued Commodore outside the store. Commodore put the knife to Smith’s stomach and told him to back off. Smith did so, and Commodore left.

Jeffries called 911. Officer Chenault responded to the scene and his body camera recorded Smith sitting in a chair, wearing a bloody shirt, and holding his neck to control the bleeding. EMS arrived shortly afterward, and Smith was transported to the University of Louisville Hospital trauma unit. Tommy’s Place surveillance video captured images of the robber. Still photos were made of a black male, who had a tattoo on his neck and a tattoo sleeve on his left arm. The robber was wearing a black ball hat with a sticker on top of the bill and a t-shirt that read “My Kicks Get Chicks.”

Using the surveillance video from Tommy’s Place and the neighboring store, the police identified a vehicle suspected of transporting Commodore to and from the scene. A police unit spotted the truck the next day. Armond Stafford, the driver, was taken into custody. He admitted taking Commodore, known to him as “C,” to Tommy’s Place on the day of the robbery, initially picking him up at an apartment complex in the 1000 block of 29th Street. Stafford thought Commodore intended to buy cigarettes. Stafford waited in the truck and Commodore returned in about ten minutes, behaving in a normal manner. Stafford drove Commodore back to the apartment complex and dropped him off.

The police searched 1020 South 29th Street, Apartment #1, on April 14, 2017, and found evidence incriminating Commodore, including a “My Kicks Get Chicks” t-shirt and documents with his name on them. The facts surrounding the search are discussed in more detail below. Also, the police interviewed Commodore on April 19, 2017. During the interview Commodore admitted to robbing Tommy’s Place and stabbing Smith.

A Jefferson County Grand Jury indicted Commodore, charging him with one count of attempted murder, one count of first-degree assault, and three counts of first-degree robbery. The grand jury returned a separate indictment later, charging Commodore with one count of being a PFO I. At trial, the jury found Commodore guilty of one count of first-degree assault, two counts of first-degree robbery, and one count of being a PFO I. The jury recommended enhanced prison

sentences of forty years on the first-degree assault conviction, thirty years on one of the first-degree robbery convictions, and twenty years on the other first-degree robbery conviction. The jury recommended the sentences run concurrently for a combined sentence of forty years in prison. The trial court entered its final judgment, sentencing Commodore as recommended by the jury. This appeal followed.

ISSUE: Is stabbing a person in the neck first-degree assault if the blood loss was controlled prior to transport for medical attention?

HOLDING: No. In order for a defendant to be found guilty of first-degree assault pursuant to KRS 508.010(1), the Commonwealth must prove 1) the defendant “intentionally cause[d] serious physical injury to another person by means of a deadly weapon or a dangerous instrument;” or 2) “[u]nder circumstances manifesting extreme indifference to the value of human life [the defendant] wantonly engage[d] in conduct which creates a grave risk of death to another and thereby cause[d] serious physical injury to another person.” “Serious physical injury” is defined in KRS 500.080(15) as “physical injury which creates a substantial risk of death, or which causes serious and prolonged disfigurement, prolonged impairment of health, or prolonged loss or impairment of the function of any bodily organ.”

In this case, the Kentucky Supreme Court held that Smith did not sustain a serious physical injury from the stabbing either in terms of creating a substantial risk of death or causing serious and prolonged disfigurement. Smith sustained no life-threatening injury because his bleeding was controlled at the scene. Moreover, Smith did not sustain serious or prolonged disfigurement or prolonged impairment of health because the stab wound was superficial, and Smith sustained no vascular or esophageal injuries. Thus, the Court reversed the first-degree assault conviction and remanded for a retrial on the lesser-included offense of second-degree assault.

Farmer v. Commonwealth, 2020 WL 2503492 (Ky. App. 2020) – NP – F

FACTS: Farmer was arrested by the Covington Police Department on October 29, 2015, after an incident at the home of Lona Rose. Rose claimed that Farmer punched her in the face multiple times and stole jewelry from her. As a result, Farmer was charged with first-degree robbery and later with first-degree assault. That charge was later amended to second-degree assault pursuant to KRS 508.020. Farmer entered a plea of not guilty and maintained that he had not injured Rose.

The matter was tried before a jury, where Rose testified that, in the attack, she had sustained blackened eyes, a broken nose and cheekbone, a cut on her mouth requiring stitches, an injury to her temporomandibular joints requiring surgery, and bruising to her neck. She could not eat solid food and was unable to wear her dentures for several days. The jury returned a not guilty verdict on the robbery charge and found Farmer guilty of second-degree assault. On January 9, 2017, the trial court entered a final judgment and sentenced Farmer to ten years’ imprisonment. An appeal followed.

ISSUE: To obtain a conviction for second-degree assault when the dangerous instrument in question is a part of the human body, must the evidence demonstrate that serious physical injury actually occurred as a direct result of the use of that part of the human body?

HOLDING: Yes. Farmer was prosecuted under KRS 508.020(1)(b), wherein a person is guilty of second-degree assault when he/she intentionally causes physical injury to another person by means of a deadly weapon or a dangerous instrument. KRS 500.080(3) defines dangerous instrument as “any instrument, including parts of the human body when a serious physical injury is a direct result of the use of that part of the human body, article, or substance which, under the circumstances in which it is used, attempted to be used, or threatened to be used, is readily capable of causing death or serious physical injury. According to KRS 500.080(13), “physical injury” is defined as “substantial physical pain or any impairment of physical conduction.” “Physical injury which creates a substantial risk of death, or which causes serious and prolonged disfigurement, prolonged impairment of health, or prolonged loss or impairment of the function of any bodily organ” constitutes “serious physical injury” under KRS 500.080(15).

In order for Farmer to be convicted of second-degree assault under KRS 508.020(1)(b), the Commonwealth had to prove that Rose had sustained a physical injury through the use of a deadly weapon or a dangerous instrument. The Commonwealth argued that Farmer’s fist was a dangerous instrument. But in order for a fist to be considered a dangerous instrument, it must directly cause a serious physical injury. The Commonwealth, in actuality, had to establish that Rose sustained a serious physical injury as a direct result of the use of Farmer’s fist in order to establish the elements of this offense. That a fist is readily capable of causing serious physical injury is not enough to establish the “dangerous instrument” element. Not only did the Commonwealth fail to introduce evidence that Rose had sustained a serious physical injury, but it did not introduce any medical expert proof to establish this. And the prosecutor admitted that Rose had only sustained a physical injury, not a serious physical injury, when he argued before the court, meaning that there was not sufficient evidence to support a conviction. Therefore, the Court of Appeals held that Farmer was entitled to a directed verdict of acquittal for the second-degree assault charge.

The conviction for second-degree assault was reversed and remanded to Kenton Circuit Court for an order dismissing the charge.

Jaggers v Commonwealth, 2020 WL 114653 (Ky. App. 2020) – NP – F

FACTS: Jaggers was convicted in Edmonson Circuit Court of attempted rape, sexual abuse, burglary, wanton endangerment, and resisting arrest. The trial court sentenced Jaggers to ten years’ imprisonment. These convictions are based in Jaggers’ actions during an incident wherein, while extremely intoxicated, he sexually abused and attempted to rape a victim at the victim’s house.

During the incident, Edmonson County Sheriff's Detective Ritter physically separated Jagers from the victim. Det. Ritter handcuffed Jagers, cleared the residence, and called EMS for Jagers in case he had been injured. Jagers kept trying to get back to D.D. Det. Ritter put Jagers on D.D.'s front porch, which had a four-foot drop-off. He positioned Jagers on his knees with his legs crossed. When Det. Ritter leaned in the door to tell D.D. what he was doing, Jagers managed to stand up. He would not get back on his knees. He almost chest-bumped Det. Ritter while his back was facing the porch drop-off. Det. Ritter attempted to administer pressure points to get Jager back to the floor; this did not work. He then delivered a knee strike to the side of Jagers' thigh, which also did not work. Jagers kept pushing Det. Ritter toward the drop-off until the Detective had one foot off the porch. Det. Ritter told Jagers he would put him on the concrete if he did not stop. If Jagers had knocked Ritter off the drop-off, there was a good chance the detective would have been knocked out and lost control of the situation. Det. Ritter ultimately knocked Jagers off the porch and onto the concrete sidewalk, rendering him unconscious. Det. Ritter began rendering first aid, and EMTs arrived after that. Jagers had a laceration on his head, which was bandaged by another deputy who had responded. Jagers regained consciousness and continued to be belligerent. Jagers was charged with, and ultimately convicted of first-degree wanton endangerment as a result of this altercation.

The only substantive issue addressed in the subsequent appeal involved the wanton endangerment conviction.

ISSUE: Does "chest bumping" a peace officer to the edge of a porch wherein the peace officer could have fallen off the porch constitute first-degree wanton endangerment?

HOLDING: Yes. KRS 508.060(1) provides that "[a] person is guilty of wanton endangerment in the first degree when, under circumstances manifesting extreme indifference to the value of human life, he wantonly engages in conduct which creates a substantial danger of death or serious physical injury to another person." Jagers continued to chest-bump him and back him towards the drop-off from the porch, until he was able to subdue him. Had Jagers successfully pushed him off the porch, Det. Ritter very well could have suffered injuries such as Jagers himself did, including broken bones, lacerations, and a head injury. The Court of Appeals held this was sufficient evidence to support a conviction for first-degree wanton endangerment.

The convictions were affirmed.

Wyatt v. Commonwealth, 2020 WL 2831933 (Ky. 2020) – NP – NF

FACTS: On March 10, 2016, Wyatt shot Simpson County Sheriff's Detective Eddie Lawson multiple times. One bullet shattered and displaced Lawson's right femur, while another bullet entered his right hip, and a third bullet grazed his left foot. Lawson required multiple surgeries and did not return to work for a year. Wyatt claimed that he shot Detective Lawson because of past encounters with the Simpson County Sheriff's Office, the Franklin City Police, the Department for Community Based Services (DCBS), and interactions with Lawson himself as a law

enforcement officer, which led to his fear of Lawson. Wyatt stated he feared Lawson would not hesitate to try to take Wyatt's life based upon past run-ins. Wyatt moved for an assault under extreme emotional disturbance instruction. The trial court denied the instruction, and a jury convicted Wyatt of first-degree assault. This appeal followed.

ISSUE: Must extreme emotional disturbance be based upon a sudden and uninterrupted triggering event?

HOLDING: Yes. When a defendant is prosecuted under KRS 508.010, assault in the first degree, for intentionally causing serious physical injury to another by means of a deadly weapon or a dangerous instrument, KRS 508.040 permits the defendant to establish in mitigation that he acted under the influence of extreme emotional disturbance. To establish a reduced criminal responsibility, the defendant must show that when he committed the assault, he "acted under the influence of extreme emotional disturbance for which there was a reasonable explanation or excuse, the reasonableness of which is to be determined from the viewpoint of a person in the defendant's situation under the circumstances as the defendant believed them to be."⁴⁹

McClellan v. Commonwealth,⁵⁰ defines extreme emotional disturbance as follows:

Extreme emotional disturbance is a temporary state of mind so enraged, inflamed, or disturbed as to overcome one's judgment, and to cause one to act uncontrollably from the impelling force of the extreme emotional disturbance rather than from evil or malicious purposes. It is not a mental disease in itself, and an enraged, inflamed, or disturbed emotional state does not constitute an extreme emotional disturbance unless there is a reasonable explanation or excuse therefor, the reasonableness of which is to be determined from the viewpoint of a person in the defendant's situation under circumstances as defendant believed them to be.

A necessary element of EED is a sudden and uninterrupted triggering event, which may or may not be contemporaneous with other adequate provocation and other circumstances inducing the crime.⁵¹ The adequate provocation or triggering event for extreme emotional disturbance may come from a single event which festers in the mind,⁵² or from the cumulative impact of a series of related events.⁵³ However, an intervening cooling-off period between the provocation and the crime may be sufficient to conclude that the provocation was not adequate.⁵⁴ Furthermore, "it is wholly insufficient for the accused defendant to claim the defense of extreme emotional

⁴⁹ KRS 508.040, KRS 507.020(1)(a).

⁵⁰ 715 S.W.2d 464, 468-69 (Ky. 1986).

⁵¹ Benjamin v. Commonwealth, 266 S.W.3d 775, 782-83 (Ky. 2008) (citations omitted).

⁵² Springer v. Commonwealth, 998 S.W.2d 439, 452 (Ky. 1999),

⁵³ Fields v. Commonwealth, 44 S.W.3d 355, 359 (Ky. 2001)

⁵⁴ Fields, 44 S.W.3d at 359.

disturbance based on a gradual victimization from his or her environment, unless the additional proof of a triggering event is sufficiently shown.”⁵⁵ The victim may or may not be the perpetrator of the provocation.⁵⁶

The mitigation allowed due to extreme emotional disturbance requires proof of both objective and subjective elements. First, there must be evidence supporting an objective determination as to whether there was a reasonable explanation or excuse for the emotional disturbance. The objective test is: “Is there a ‘reasonable explanation or excuse’ for the mental or emotional disturbance? But, in making that determination, the triers of fact are required to place themselves in the actor’s position as he believed it to be at the time of his act.”⁵⁷ Thus, when an excuse offered for the emotional state is unreasonable, it will not warrant mitigation. Or stated another way, if the circumstances provoked an understandable loss of self-control, mitigation may be warranted. Second, there must be evidence that the actor was actually influenced by an extreme emotional disturbance, or actually lost self-control. If the evidence fails to support either objective or subjective aspect, the defendant is not entitled to an EED instruction.⁵⁸

In this case, the Kentucky Supreme Court found that no triggering event occurred that would support an EED instruction. Wyatt argued that being pepper sprayed by an officer or the officer pulling a gun did not constitute an adequate provocation to cause an extreme emotional, inflamed state of mind because these techniques are commonly known by the public as measures available to officers and used as needed when dealing with a non-cooperative, threatening, armed person upon whom an arrest warrant is being served. Moreover, general paranoia against law enforcement and gradual victimization by the environment is not an extreme emotional disturbance. Finally, all of the events Wyatt complained of were followed by a cooling-off period.

The Kentucky Supreme Court affirmed the first-degree assault conviction.

XI. KENTUCKY REVISED STATUTES – CHAPTER 510 SEXUAL OFFENSES

Ely v. Commonwealth, 2020 WL 39973 (Ky. App. 2020) NP NF

FACTS: On August 28, 2017, a two and a half-year-old child left a haircut appointment with his mother. The child was being carried on his mother's hip to his mother's car, which was parked in front of the library, when Ely approached them. Ely unzipped his pants, pulled out his penis and began to stroke himself, masturbating. The child's mother was upset by his actions, but before she could leave she had to get the child into his car seat, Ely sat down while she put victim in his car seat and then stood up and continued masturbating in her view while they drove off.

⁵⁵ Foster v. Commonwealth, 827 S.W.2d 670, 678 (Ky. 1991).

⁵⁶ Fields, 44 S.W.3d at 358.

⁵⁷ Gall v. Commonwealth, 607 S.W.2d 97, 108 (Ky. 1980), overruled on other grounds by Payne v. Commonwealth, 623 S.W.2d 867 (Ky. 1981).

⁵⁸ See Spears v. Commonwealth, 30 S.W.3d 152, 155 (Ky. 2000).

The mother called the police. Based on victim's mother's description, officers in the vicinity immediately located Ely in an alley near the library. They requested Ely stand and hold his arms out. When he obeyed, they saw that his pants were unzipped, and his penis was outside his pants. After Ely was arrested, victim's mother identified Ely out of a photo array. Video cameras on the library captured Ely and his actions. Ely was found guilty of first-degree sexual exposure and first-degree indecent exposure and sentenced to ten years in prison. Ely appealed to the Kentucky Supreme Court.

- ISSUES:**
1. Does first-degree sexual abuse require proof of actual harm?
 2. Does first-degree indecent exposure require evidence that a victim saw the conduct and was alarmed by the action?

- HOLDING:**
1. No. Pursuant to Kentucky Revised Statutes (KRS) 510.110(1)(c)2:

A person is guilty of sexual abuse in the first degree when: ... Being twenty-one (21) years old or more, he or she: ... Engages in masturbation in the presence of another person who is less than sixteen (16) years old and knows or has reason to know the other person is present[.]

As is evident from the statutory language, KRS 510.110(1)(c)2 does not require any proof of harm. Instead, knowledge of the child's mere presence was enough where it was established that Ely was masturbating, and the relative ages of Ely and victim. It does not matter if Ely intended that his actions be observed by victim's mother rather than victim. Ely knew victim was present and chose to proceed.

2. Pursuant to KRS 510.148(1): "A person is guilty of indecent exposure in the first degree when he intentionally exposes his genitals under circumstances in which he knows or should know that his conduct is likely to cause affront or alarm to a person under the age of eighteen (18) years." The statute does not require that the victim be affronted or alarmed; it only requires that the intentional exposure of Ely's genitals occur "under circumstances in which he knows or should know that his conduct is likely to cause affront or alarm[.]" The exposure of a penis and masturbation on a public street is conduct which Ely should have known was likely to cause affront or alarm to a child, whether or not the particular victim at issue was in fact affronted or alarmed.

The conviction was affirmed.

XII. KENTUCKY REVISED STATUTES – CHAPTER 511 BURGLARY AND RELATED OFFENSES

Miller v. Commonwealth, 2020 WL 1290350 (Ky. 2020) – NP - F

FACTS: Miller’s convictions stem from a confrontation between Miller and Joshua Godby on August 18, 2016. Prior to that incident, Miller and Godby had been friends. The friendship turned sour, however, when Godby had a brief sexual affair with Miller’s girlfriend. Sometime in 2015, Miller confronted Godby about the affair. During that confrontation, Godby pushed Miller, and Miller retrieved his gun and hit Godby on the arm. After that confrontation, the two men exchanged text messages in which they “badmouthed” each other. Godby described these as “come on” and “come get it” messages. In April 2016, Miller did arrive at Godby’s home to confront Miller once again, but was advised by Miller’s live-in girlfriend, Ashley Hunt, that Miller was not home. Miller and Godby did not see each other again until the August 2016 incident.

On August 18, 2016, ten-year-old Ben Godby, Joshua Godby’s son, was outside his father’s house practicing his golf swing. Ben’s father was inside the home watching television with Hunt. While Ben was practicing, Gregory Miller pulled up to the house, got out of his car, and approached Ben. Miller carried a 20-gauge shotgun with him, and according to Ben, he “was holding it ready to fire it if he needed to.” Miller asked Ben where his father was, and Ben said that his father was in the basement before remembering that he was in his bedroom. Ben was intimidated by the gun but believed that Miller “might have needed to talk to [his dad] for a minute.”

Ben led Miller into a screened-in front porch on the house, believing that Miller would wait there while Ben retrieved his father. Ben did not invite Miller into the home, and Miller did not ask if he could enter the home. Nevertheless, Miller walked past Ben, opened the unlocked door, and entered the home. Miller was not sure where Godby’s bedroom was, however, so Ben took Miller to his father’s room. Ben knocked and told his father that someone was there to talk to him, then moved behind Miller. At this point, Miller knocked loudly and kicked the bedroom door, which was locked. Ben testified that Miller began cursing and yelling at Godby to come out of the bedroom. It is unclear how Miller was holding the shotgun or in what direction it was pointed. Ben testified that, at this point, he ran from the hallway to the kitchen, where he sat down, hiding, unsure what to do.

Godby and Hunt heard Miller say, “Godby, I got you now” and recognized the voice as Miller’s. With Miller pounding on the bedroom door, Godby entered a bathroom that was attached to his bedroom. The bathroom also had an entrance in the hallway. Godby exited the bathroom into the hallway, where he saw Miller standing with the shotgun. It is unclear whether Miller was still facing the bedroom door or where he was pointing the gun when Godby exited the adjacent bathroom door, but Godby testified that the gun was not pointed at him. Upon seeing the shotgun, Godby grabbed the barrel of the gun and pushed it up. The gun discharged, shooting straight into the ceiling. Godby wrestled the gun from Miller’s hands and threw it aside. He

“manhandled” Miller to the floor and hit Miller several times as Miller proclaimed that he “didn't do this” and it was not his gun. Both Godby and Hunt testified that Miller repeatedly exclaimed, “We're friends!”

At the time the gun discharged, Hunt was still in the bedroom or bathroom. Hunt then exited through the bathroom into the hallway and saw Miller and Godby struggling over the gun. When Godby took the gun from Miller and tossed it aside, Hunt picked it up. Still carrying the gun, she called 911 as she walked around the house looking for Ben. Unsure of where he was, she walked out of the front door of the house to look for him. Her neighbor then informed her that Ben was safe, and Hunt reentered the home. She returned to the hallway, where Godby still had Miller on the ground. Hunt testified that, at some point, she considered shooting Miller but chose instead to hit Miller twice with the gun. Godby and Hunt kept Miller subdued until police officers arrived.

A Pulaski Circuit Court jury convicted Miller of one count of first-degree wanton endangerment in relation to Joshua Godby, one count of first-degree wanton endangerment in relation to Ashley Hunt, and one count of first-degree burglary. The trial court sentenced Miller to a total of thirty years of imprisonment. Miller appealed to the Kentucky Supreme Court.

ISSUE: Is entering a home without permission with the intent to commit a crime first-degree burglary?

HOLDING: Yes. Under KRS 511.020(1)(a), “[a] person is guilty of burglary in the first degree when, with the intent to commit a crime, he knowingly enters or remains unlawfully in a building, and when in effecting entry or while in the building or in the immediate flight therefrom, he or another participant in the crime ... [i]s armed with explosives or a deadly weapon.” In this case, Miller was not invited into the home by Ben, nor was he expected to appear at the home. Miller simply walked past the child, entered the home and tried to find the Miller’s bedroom, but couldn’t do so until the child led him there. Thus, Miller was not entitled to a directed verdict on the first-degree burglary charge.

Further, Miller’s conduct constitutes first-degree burglary rather than the lesser included offense of criminal trespassing. First-degree burglary requires one to knowingly enter or remain unlawfully in a building with the intent to commit a crime, “and when in effecting entry or while in the building or in the immediate flight therefrom, he ... [i]s armed with explosives or a deadly weapon.” KRS 511.020(1). The lesser-included offense of criminal trespass differs from first-degree burglary in that it requires only that one “knowingly enters or remains unlawfully in a dwelling.” KRS 511.060(1). Here, Godby and Miller had not spoken in several months, and their last interactions had been less than friendly. Miller had not been invited to Godby’s home and Godby was not expecting him. Miller did not receive express permission to enter the house from Ben, nor is there any evidence suggesting that Ben implicitly invited Miller into the home, either by gesture or comment. Rather, he approached the home with a loaded shotgun, which he held as though he were ready to shoot it. He entered the home uninvited while wielding the shotgun, approached Godby’s bedroom door, knocked loudly and kicked the door, and yelled “I got you

now.” Ben also testified that Miller “told [Godby] to come out” and was cursing. A reasonable juror could not interpret the evidence and reasonably conclude that Miller committed criminal trespass rather than burglary.

The conviction for burglary was affirmed. The wanton endangerment convictions were reversed due to the trial court’s failure to instruct on lesser included offenses.

XIII. KENTUCKY REVISED STATUTES – CHAPTER 514 THEFT

Mills v. Commonwealth, 2020 WL 1302690 (Ky. 2020) – NP F

FACTS: At 3:00 AM in Bell County, Josh Mills stole a 2006 Chevy Malibu belonging to Michelle Hensley. He drove the Malibu to Harlan County, abandoned it, and stole a Ford Mustang. Mills drove the stolen Mustang back to Bell County. KSP Trooper Pruitt was notified about the stolen Mustang and, upon seeing a Mustang that matched the description of the vehicle Mills stole, Trooper Pruitt began pursuit. The pursuit exceeded speeds of 100 mph, traversed curvy, country roads, and Trooper Pruitt ultimately lost sight of the stolen vehicle.

Meanwhile, Mills travelled down a road that came to a dead end at Deena Miracle’s residence. The Mustang became stuck in the area where the septic tank for Miracle’s residence was buried. At this point, Mills abandoned the Mustang and attempted to steal Miracle’s vehicle. Upon discovering that Miracle’s vehicle was locked, Mills began walking toward seventy-nine year old Iva Sutton’s house. Mills broke the window frame out of the backdoor, entered Sutton’s house and asked for the key’s to Sutton’s car. Sutton retrieved her keys and gave them to Mills, who proceeded to take her 2004 Chevrolet Impala. Mills drove the Impala to Mountain Drive in Bell County where he abandoned that vehicle and called his estranged wife, Natalie. Mills advised Natalie of the stolen cars and that his plan was for the police to shoot time. Natalie implored Mills to turn himself in, but Mills refused. Natalie called 911. After speaking to Natalie, Mills stole a 2002 Jeep Wrangler and abandoned that vehicle. The Jeep was recovered eight days later.

After abandoning the Jeep, Mills ended up at the Calebs residence in Bell County. Mills broke into the residence and cut the power cable to the security cameras and the internet cable. Mills stole two change jars that were later found in Calebs’ yard.

Two days later, KSP Trooper Farris stopped an ATV vehicle driving at a high rate of speed on a main road. Trooper Farris executed a traffic stop and arrested the driver, who turned out to be Mills. Mills advised Trooper Farris that “the only vehicles [I] stole had keys in them.”

Mills was convicted in Bell Circuit Court of first-degree robbery, two counts of theft by unlawful taking over \$500, second-degree burglary, first-degree fleeing or evading police, and first-degree wanton endangerment. After also being found a second-degree persistent felony offender, he was sentenced to 20 years in prison. Mills appealed to the Kentucky Supreme Court.

ISSUES: Is taking a private vehicle and abandoning it during the commission of a crime theft by unlawful taking over \$500?

HOLDING: Yes. In this case, Mills argued that he was entitled to a jury instruction that he did not commit theft by unlawful taking of the vehicles, but merely engaged in unauthorized use of the vehicles because he lacked the intent to deprive each of the respective owners of their vehicles.

Unlike unauthorized use of a vehicle, theft by unlawful taking requires that the perpetrator “[t]akes or exercises control over [the vehicle] of another with intent to deprive him thereof.” The question becomes whether the evidence would have allowed a jury to conclude Mills lacked the intent to deprive Ms. Hensley, Ms. Sutton, and Mr. Deitsch of their vehicles.

A starting point for such analysis is of course to determine what is meant by “intent to deprive.” The Kentucky Supreme Court grappled at length with this exact issue in Hall v. Commonwealth. In Hall, police officers conducted a traffic stop on Hall in relation to a recent theft. However, Hall fled on foot as soon as he was stopped. The officers pursued him on foot, but he was able to circle back and steal one of the officers’ marked cruisers. Two other officers immediately began pursuing Hall, and eventually saw him take the cruiser down a dirt road towards a strip mine before losing sight of him. Officers later found the abandoned cruiser in a gully; Hall had it for a total of thirty minutes. Because of this incident, Hall was convicted of theft by unlawful taking, value over \$500. On appeal, he argued the conviction was improper because the Commonwealth failed to prove he intended to deprive the police department of its cruiser. The Supreme Court began its analysis in Hall by explaining that

KRS 514.010(1) provides four definitions of deprive: 1) to withhold property of another permanently; 2) to withhold property for so extended a period as to appropriate a major portion of its economic value; 3) to withhold property with intent to restore it only upon payment of reward or other compensation; or 4) to dispose of the property so as to make it unlikely that the owner will recover it.

The Court went on to discuss that the second, third, and fourth definitions of “deprive” could not reasonably apply in Hall’s case. But, regarding the first definition, the Supreme Court held that:

[a] defendant does not need to maintain actual possession over the taken property at all times after taking the property—a defendant can possess the intent to withhold property of another permanently if evidence exists showing that the defendant intended that the rightful owner never exert actual possession over the property again. In other words, as long as evidence exists supporting the assertion that the defendant intended that the property never be restored to its rightful owner, the defendant

need not maintain constant actual possession of the property to be said to have the intent to withhold the property of another permanently. A defendant can have the intent to withhold property of another permanently even if the defendant abandons the property. The abandonment of property, rather than the restoration of the property to its rightful owner, means that the defendant is still preventing the owner from exerting actual possession over the property, i.e. the defendant is withholding the property from the rightful owner. But abandonment does not always mean that the defendant possesses the intent to withhold property of another permanently, because evidence could show that the defendant abandoned property with the intent that the property be restored to the rightful owner.

The Court went on to hold that, based on the totality of the circumstances, no rational trier of fact could have determined Hall had the intent to deprive the police department of its cruiser. The Court noted the following facts in support of its conclusion: “the taking of a marked police cruiser, not a civilian vehicle; the entirety of [the defendant’s] resisting of arrest and his protracted flight from police[;] and [the defendant’s] sudden abandonment of the cruiser in the roadway with police in hot pursuit.”

In this case, the Supreme Court determined that Mills’ theft of the vehicles cannot be said to fall under the second definition of “deprive”: both Ms. Hensley and Ms. Sutton’s car were found the same day they were stolen, and Mr. Deitsch’s Jeep was discovered eight days after it was taken. Likewise, this case does not fall under the third definition of “deprive”: Mills never sought compensation for the return of any of the vehicles. Thus, we are left with the first and fourth definitions of “deprive.” Accordingly, the Court determined whether the totality of the circumstances reasonably supported the conclusion that Mills either: (a) intended that the vehicles never be restored to their rightful owners; or (b) disposed of the vehicles in such a way as to make it unlikely that their owners would ever recover them.

First, there is Ms. Hensley’s Malibu. That vehicle was stolen from a gas station in Bell County and abandoned at an unspecified location in Harlan County. As soon as Mills abandoned the Malibu, he stole a Mustang from the same location. Of course, common sense suggests that, similar to Hall, this act would lead to the police being called to the scene, and the Malibu being discovered. However, we still believe this situation is distinguishable from Hall.

The most notable difference is that Hall stole a police cruiser, and officers began pursuing him immediately. Whereas here, Mills stole a civilian vehicle, and the police did not pursue him from the gas station to Harlan County. Finally, the distance from where the vehicle was stolen to where it was abandoned was much greater than in Hall.

Later, Mills stole Ms. Sutton's Impala from E.W. Miracle Drive and abandoned it on Mountain Drive. The exact location where the Impala was recovered on Mountain Drive is not provided in the record. However, the distance from E.W. Miracle Road to Mountain Drive is roughly thirty minutes by vehicle. Further, police had to take a 4x4 wrecker through a dense wooded area to retrieve the vehicle, as Mills wrecked it off of the road. Naturally the vehicle sustained some dents and scratches. Finally, the vehicle may have never been found if Mills did not call Natalie and tell her where he was.

Last, Mills stole Mr. Deitsch's Jeep from Pitman's Creek Road and abandoned it on Short Branch Road. Pitman's Creek Road and Short Branch Road are about a thirty-minute drive from one another. The Jeep was found in a densely wooded area, and photographic evidence demonstrated that it was nearly impossible to see the Jeep from the road. Indeed, the vehicle was not recovered until eight days after it was stolen. Finally, the Jeep's steering column was ripped out consistent with someone hotwiring the vehicle.

Thus, given the totality of the circumstances, the Kentucky Supreme Court held that Mills possessed the intent to deprive each of the respective owners of their vehicles, making theft by unlawful taking over \$500 the appropriate charge.

The convictions were affirmed.

Osborne v. Commonwealth, 2020 WL 1490773 (Ky. App. 2020) – NP - NF DR Filed 4/13/2020

FACTS: Osborne stole a Samsung Galaxy S7 Edge demo phone from a display mount at a Walmart in Christian County. Osborne was identified by a Walmart loss prevention associate as the person who committed the theft when shown a photo array of six individuals. Osborne was arrested and charged with theft by unlawful taking over \$500. At trial, Osborne did not dispute shoplifting the phone, but disputed the phone's value. Walmart valued the phone at \$824, while Osborne argued, without proof, that the value was under \$500 as it was a display model. Osborne was convicted of theft by unlawful taking over \$500. Osborne appealed.

ISSUE: Is theft by unlawful taking under \$500 a lesser included offense of theft by unlawful taking over \$500?

HOLDING: No. Kentucky only has one crime pertaining to theft by unlawful taking – KRS 514.030. In the statute, there are two different sentencing options depending on the value of the object taken. Hence, this is a sentencing issue, rather than a lesser-included-offense argument.

The conviction was affirmed.

XIV. KENTUCKY REVISED STATUTES – CHAPTER 515 ROBBERY

Holbrook v. Commonwealth, 2020 WL 507632 (Ky. App. 2020) – NP - NF DR Filed 2/13/2020

FACTS: Sometime after midnight on May 30, 2016, Holbrook and several other individuals, all of whom were under the age of 18 and at least some of whom were drinking or consuming drugs, attempted to rob Deonte Turner, who had driven a van to the Pinewood Apartment complex in Lexington to drop off Alisha Mills, a friend of Mackenzie Burnette, who was one of those who participated in the robbery. The plan to rob Turner was apparently hatched by Burnette, age 14.

When Turner arrived and dropped Mills off, Holbrook, Markell Bedford, and Angel Medrano approached the vehicle and began hitting Oliver Gill, who was also in the van. At some point, a gun went off and everyone scattered. Gill had been shot through his left arm and into the wall of his chest. Turner drove Gill to the hospital for treatment, and Gill was treated and released after several hours.

Mills, Burnette, Medrano, Bedford, and Holbrook, all of whom were under 18 years of age, were charged as adults in connection with the incident. All co-defendants except Holbrook and Bedford pled guilty to facilitation to first-degree robbery. These co-defendants were given five-year sentences contingent upon their testimony at the trial of Holbrook and Bedford, who were tried jointly by a jury. Holbrook and Bedford were found guilty of complicity to robbery in the first degree at trial. The circuit court sentenced Holbrook and Bedford to ten years' imprisonment. An appeal followed.

- ISSUES:**
1. May an accomplice be held liable for a co-conspirator's aggravated offense even though the accomplice had no knowledge of the aggravating circumstance?
 2. Is witness testimony that a defendant struck a victim sufficient evidence to support a charge of fourth-degree assault.

HOLDINGS: 1. Yes. In Skinner v. Commonwealth,⁵⁹ the Kentucky Supreme Court held that an accomplice may be held liable for a confederate's aggravated offense even though the accomplice had no knowledge of the aggravating circumstance. In Commonwealth v. Yeager, the Kentucky Supreme Court held that "if the commission of the offense of robbery was intended, the lack of intent of an aggravating circumstance, such as the use of a gun, will not act to lessen

⁵⁹ 864 S.W.2d 186, 187 (Ky. 1991).

criminal liability for the higher degree of the same offense.”⁶⁰ Accordingly, the Supreme Court held that Holbrook could be found guilty of complicity in the higher degree of robbery regardless of whether he knew a firearm would be used in the commission of the offense.

2. Yes. Three witnesses implicated Holbrook in the event, with one witness specifically testifying that Holbrook hit Gill.

The convictions were affirmed.

XV. KENTUCKY REVISED STATUTES – CHAPTER 520 ESCAPE AND OTHER OFFENSES

Eversole v. Commonwealth, 2020 WL 2091860 (Ky. 2020) – P NF

FACTS: Sergeant John Inman and Deputy Shannon Jones from the Laurel County Sheriff’s Office were investigating the theft of a Cadillac Escalade on January 26, 2018. They had received a call from the vehicle’s owner indicating the vehicle’s GM OnStar had pinged at a remote location in a rural part of Laurel County—a field near the end of Lockaby Lane, a single-lane, narrow country road that ended in a one-lane gravel driveway. At midnight, Sergeant Inman arrived in his police cruiser where the blacktop ended, and the gravel driveway began. Deputy Jones was in his cruiser some distance behind Sergeant Inman on Lockaby Lane.

Sergeant Inman saw a white pickup truck on the gravel driveway slowly approach him and he turned his emergency lights on and off to make sure the driver of the white pickup truck knew he was there and to identify himself as an officer. Sergeant Inman pulled his vehicle slightly off the one-lane road, so the pickup truck could pull up beside him. Both vehicles had their headlights on and for a few seconds were window-to-window. Sergeant Inman got a look at the driver when he said “hey” to the driver of the white truck in an attempt to get him to stop. Sergeant Inman assumed the driver was the owner of the property and was attempting to ask him where the Escalade may be in the field. However, in spite of Inman’s attempts, the pickup did not stop moving. Once past Sergeant Inman’s vehicle, the truck took off at a high rate of speed for the conditions of the one-lane road. By the time Sergeant Inman turned his vehicle around and gave chase, the white pickup truck was out of sight.

Sergeant Inman radioed Deputy Jones informing him the white pickup truck was headed in his direction. Lockaby Lane was a single-lane road and the white pickup truck rapidly reached Deputy Jones’s location. As soon as the deputy saw the truck, he activated his emergency lights. Deputy Jones saw the truck crest a hill, accelerate, and continue down the road straight toward his cruiser. Deputy Jones said the white pickup truck never slowed down. To avoid a head-on

⁶⁰ 599 S.W.2d 458, 459-60 (Ky. 1980).

collision, Deputy Jones drove his vehicle almost completely off the road and into a ditch. The truck left the scene and the driver was not apprehended that night.

Several days later, the Laurel County Sheriff's Office got a tip that Eversole would be at a truck stop in northern Laurel County. Eversole was arrested on a separate charge and a deputy at the scene sent a picture to Sergeant Inman, who positively identified Eversole as the driver of the white pickup truck from Lockaby Lane. Eversole was never charged with any offenses concerning the stolen Escalade.

At trial, Eversole was found guilty of guilty of first-degree fleeing or evading, first-degree wanton endangerment, reckless driving, and being a first-degree PFO. The trial court sentenced him to twenty years' imprisonment in accordance with the jury's recommendation. An appeal to the Kentucky Supreme Court followed.

ISSUE: Is a person guilty of first-degree fleeing or evading police (and first-degree wanton endangerment) when the person fails to stop a motor vehicle when a police cruiser blocks a single-lane road with its emergency lights on to prevent that person from proceeding on the roadway?

HOLDING: Yes. KRS 520.095 states, in pertinent part:

(1) A person is guilty of fleeing or evading police in the first degree:

(a) When, while operating a motor vehicle with intent to elude or flee, the person knowingly or wantonly disobeys a direction to stop his or her motor vehicle, given by a person recognized to be a police officer, and at least one (1) of the following conditions exists:

...

4. By fleeing or eluding, the person is the cause, or creates substantial risk, of serious physical injury or death to any person or property; or

Sergeant Inman testified he did not expressly tell the truck driver to stop; rather, he turned his emergency lights on and off and he pulled over enough for the pickup truck to pass his cruiser, side-by-side on the one-lane road. When the pickup truck was even with his cruiser, Sergeant Inman said "hey" in an attempt to start a conversation with the truck's driver. However, the driver did not respond to Inman or stop to hear the rest of the attempted conversation. The rate of speed he employed on the one-lane country road while leaving was a clear indication that he knew the officer wanted Eversole to stop and speak with him—and of Eversole's intention to disregard the officer's attempt to get him to stop. Furthermore, Sergeant Inman was not the only officer that evening who attempted to stop the white pickup truck.

When the pickup truck encountered Deputy Jones on Lockaby Lane, the deputy had his emergency lights on and his cruiser blocking the single-lane road. Addressing a vehicle approaching a cruiser or other emergency vehicle sitting in such a posture, KRS 189.930 provides in pertinent part:

- (5) Upon approaching a stationary emergency vehicle or public safety vehicle, when the emergency vehicle or public safety vehicle is giving a signal by displaying alternately flashing yellow, red, red and white, red and blue, or blue lights, a person who drives an approaching vehicle shall, while proceeding with due caution:
 - (a) Yield the right-of-way by moving to a lane not adjacent to that of the authorized emergency vehicle, if:
 1. The person is driving on a highway having at least four (4) lanes with not fewer than two (2) lanes proceeding in the same direction as the approaching vehicle; and
 2. If it is possible to make the lane change with due regard to safety and traffic conditions; or
 - (b) Reduce the speed of the vehicle, maintaining a safe speed to road conditions, if changing lanes would be impossible or unsafe.

Here, since changing lanes was impossible on a single-lane road, pursuant to KRS 189.930, the driver of the truck should have reduced his speed, maintaining a safe speed for a one-lane road in the dark. However, the driver did no such thing. Once the deputy saw the white pickup truck was not going to stop or even slow down (and was, indeed, accelerating), the deputy was forced to drive his cruiser out of the way and into a ditch to avoid a head-on collision. It is reasonable inference that Deputy Jones obviously wanted the pickup truck to stop—and “maintaining a safe speed” pursuant to KRS 189.930 would have included Eversole stopping the truck completely once he neared the cruiser which was blocking the road with emergency lights activated. An inference is the act performed by the jury of inferring or reaching a conclusion from facts or premises in a logical manner so as to reach a conclusion. A reasonable inference is one in accordance with reason or sound thinking and within the bounds of common sense without regard to extremes or excess. It is a process of reasoning by which a proposition is deduced as a logical consequence from other facts already proven.⁶¹

A reasonable inference that can be drawn from a police cruiser blocking a single-lane road with its emergency lights on is that approaching vehicles should stop—not proceed at an unsafe speed for the roadway and conditions, and even accelerate head-long into the stopped emergency

⁶¹ Martin v. Commonwealth, 13 S.W.3d 232, 235 (Ky. 1999).

vehicle. The logical consequence of these facts was a visible, non-verbal direction to approaching drivers to stop their vehicles.

With respect to the element of substantial risk of injury or death in KRS 520.095(1)(a)(4), accelerating the vehicle constituted a risk of death or serious physical injury, particularly to Deputy Jones. Accordingly, the elements of fleeing and evading in the first degree were satisfied and this conviction was affirmed.

Eversole also challenged his wanton endangerment conviction. Under KRS 508.060(1), a person is guilty of first-degree wanton endangerment when “under circumstances manifesting extreme indifference to the value of human life, he wantonly engages in conduct which creates a substantial danger of death or serious physical injury to another person.” In this case, Deputy Jones testified that Eversole drove a truck which sat high enough to come into the cab of his cruiser at a speed around 40-45 miles per hour. Jones said Eversole was accelerating as he approached his cruiser, which was blocking the road and had its emergency lights activated. Just as his conduct created a substantial risk of serious physical injury or death to support the fleeing or evading charge, it created “substantial danger of death or serious physical injury” as to the wanton endangerment charge. This evidence was sufficient to convict Eversole of the offense.

Despite overwhelming evidence of guilt, Eversole’s convictions were overturned due to a procedural error committed by the trial court concerning an *ex parte* meeting with a juror.

Fogle v. Commonwealth, 2020 WL 855495 (Ky. App. 2020) P NF

FACTS: On July 5, 2016, a law enforcement officer in Campbell County, Kentucky, observed Joseph Fogle operating a motor vehicle at a speed of 81 mph in a 65 mph zone. The officer activated his lights and sirens, but Fogle refused to stop. With the officer still in pursuit, Fogle crossed over from Campbell County, Kentucky, into Ohio, at which time the Kentucky officer alerted Ohio authorities. Fogle was ultimately stopped by the Ohio State Police on State Route 32 in Clermont County, Ohio, and placed under arrest. Law enforcement personnel observed that Fogle had slurred speech, was unsteady on his feet, and had bloodshot, glassy eyes. Following his arrest, Fogle pleaded guilty to operating a motor vehicle under the influence (DUI) in Clermont County, Ohio, pursuant to Ohio law.

Fogle was indicted in Campbell County for first-degree fleeing or evading and speeding. The Commonwealth filed a notice of intent to introduce KRE 4 404(b) testimony of Fogle’s condition at the time of his initial arrest, as well as his Ohio DUI conviction. In response, Fogle filed a motion in limine to exclude all such evidence, arguing it was a legal impossibility for him to be in violation of KRS 189A.010 because the Commonwealth had not obtained (and was not seeking) a conviction under that statute.

The trial court found that the Commonwealth could not establish that Fogle violated KRS 189A.010 based on the Ohio DUI conviction making that conviction inadmissible. However, the trial court determined that KRS 520.095(1)(a)2. required the Commonwealth to obtain a separate conviction of KRS 189A.010 because KRS 520.095(1)(a)2. referred to a violation, not an actual conviction. It reasoned that the Commonwealth could establish Fogle violated KRS 189A.010 by introducing evidence of Fogle's condition after he was stopped in Ohio, because the Ohio stop occurred immediately after he was observed driving in Kentucky with the police in pursuit.

Fogle entered a conditional plea to first-degree fleeing or evading police and appealed to the Kentucky Court of Appeals.

ISSUE: Does first-degree fleeing or evading police require evidence of an actual conviction for driving under the influence under KRS 189A.010?

HOLDING: No. KRS 520.095(1)(a)2. requires factual proof that the defendant was in violation of KRS 189A.010 while fleeing or evading police; it does not require the Commonwealth to actually convict the defendant of KRS 189A.010.

KRS 520.095(1)(a)2. provides:

(1) A person is guilty of fleeing or evading police in the first degree:

(a) When, while operating a motor vehicle with intent to elude or flee, the person knowingly or wantonly disobeys a direction to stop his or her motor vehicle, given by a person recognized to be a police officer, and at least one (1) of the following conditions exists:

...

2. The person is driving under the influence of alcohol or any other substance or combination of substances in violation of KRS 189A.010[.]

KRS 520.095(1)(a)2. unambiguously states that the defendant need only be found in violation of KRS 189A.010. A "violation" is defined as "[a]n infraction or breach of the law[.]" while in contrast, a "conviction" is "[t]he act or process of judicially finding someone guilty of a crime[.]"⁶² The terms are legally distinct. Additionally, "the customary meaning of violation tends toward the broad (any failure to conform to a legal standard) rather than the narrow (a criminal conviction)."⁶³ Perhaps most telling, however, is that the language of KRS 189A.010, itself,

⁶² BLACK'S LAW DICTIONARY (11th ed. 2019).

⁶³ Prewett v. Weems, 749 F.3d 454, 458 (6th Cir. 2014).

references “prosecutions for violations.” The terms “violation” and “conviction” are different in their standards and meanings. Had the General Assembly intended for a conviction or formal prosecution to be necessary with respect to the driving under the influence prong of KRS 520.095, it could have used more precise terms. Accordingly, the Court of Appeals determined that the violation is the act itself, which is distinct from the prosecution and ultimate conviction of having committed the act.

The conviction was affirmed.

XVI. KENTUCKY REVISED STATUTES – CHAPTER 524 TAMPERING WITH PHYSICAL EVIDENCE

Finley v. Commonwealth, 2020 WL 1289874 (Ky. 2020) – NP F

FACTS: On the evening in question, Finley and Jennifer Hendricks traveled together in an automobile owned by Finley’s wife. Following an accident which left the car in a ditch, Hendricks called Scott Bryant, a friend and auto mechanic, for help. Bryant drove to assist Hendricks. Bryant had never met Finley, who had been drinking most of the day.

The vehicle was inoperable, required a tow, and was left on the side of the road. Bryant returned to his trailer with Hendricks and Finley. The three shared a marijuana cigarette and Finley and Hendricks drank moonshine. Trouble began when Finley produced a .380 Taurus semi-automatic handgun and handed it to Hendricks. Bryant told Finley and Hendricks he did not want guns in his trailer.

According to Bryant, Finley and Hendricks briefly went outside, and when the two returned, Finley’s demeanor toward Bryant had changed. Finley, now armed with a 9mm handgun, confronted Bryant, asking him why he had mistreated his ex. Bryant indicated he did not believe he had done so and did not think he needed to answer the question. At that point, Finley stood up, approached Bryant, and swung the gun in his right hand behind Bryant. Finley fired the weapon as Bryant turned toward the gun. The bullet passed through the mattress behind where Bryant sat. After Hendricks yelled at Finley and jumped on him, Bryant secured the 9mm from Finley, who removed the magazine and the round from the chamber. Bryant also saw the .380 handgun sticking out of the waistband of Hendricks’s pants and attempted to secure that weapon as well. While he was unsuccessful in getting possession of that firearm, the magazine release button had been pressed during the struggle and Bryant removed the magazine, leaving that gun with a single round in the chamber.

Finley told Bryant that he would not leave the trailer without the 9mm, and Bryant returned the unloaded gun but kept the magazine. With Bryant in control of both magazines and the bullet from the chamber of the 9mm, Hendricks and Finley left the trailer with both handguns (the now-empty 9mm and the .380 with a single bullet in the chamber). Shortly after leaving, Hendricks

returned asking for the 9mm magazine, but Bryant refused to return it. Bryant closed the door after speaking to Hendricks. Ten to fifteen minutes later, he heard a loud bang outside the trailer, as if someone had slammed his hand against the side. When Bryant opened his door, he saw that Hendricks lay dead in front of the trailer.

During Hendricks's autopsy, the medical examiner retrieved a .380 slug from the back of her brain. The medical examiner ruled out suicide as the cause of death, estimating the gun was fired from a distance of at least three feet from the entry wound. Therefore, the medical examiner ruled her death a homicide. Despite extensive police search efforts, officers never recovered the .380 handgun that fired the fatal shot. Without the gun, experts for the Commonwealth and Finley were unable to determine the shooter's exact location in relation to Hendricks when the shot was fired.

Finley's whereabouts and actions during the three hours following the shooting are unknown. Around midnight, Joanna Finley, Finley's wife, picked him up at a closed auto garage near Bryant's trailer. Finley and Joanna returned to their residence without the Taurus .380. When state troopers arrested Finley at home, he broke a trooper's hand resisting arrest and fighting officers' efforts to confiscate the unloaded 9mm handgun.

Finley was convicted of second-degree manslaughter, first-degree wanton endangerment, and tampering with physical evidence, and sentenced to twenty years' imprisonment. Finley appealed to the Kentucky Supreme Court.

ISSUE: To support a conviction for tampering with physical evidence, must the Commonwealth prove that a defendant actually concealed or destroyed evidence?

HOLDING: Yes. KRS 524.100(a) provides that a person is guilty of tampering with physical evidence when, believing that an official proceeding is pending or may be instituted, destroys, mutilates, conceals, removes or alters physical evidence which he believes is about to be produced or used in the official proceeding with intent to impair its verity or availability in the official proceeding.

In this case, the only evidence presented at trial was that Finley left the scene with the .380 Taurus, but that the police was unable to locate the weapon despite searching for it in a "vast area, Finley's home, and his wife's car."

Kentucky case law is clear that merely leaving a crime scene in possession of evidence does not complete the crime of tampering with physical evidence. "We note, tampering does not arise by the mere act of hiding property on one's person to avoid detection of shoplifting."⁶⁴ Likewise, an appellant's walking away from the scene of a crime with a gun is not enough to support a tampering charge without evidence of some additional act demonstrating an intent to conceal.⁶⁵

⁶⁴ Commonwealth v. Henderson, 85 S.W.3d 618, 620 (Ky. 2002).

⁶⁵ Mullins v. Commonwealth, 350 S.W.3d 434, 442 (Ky. 2011).

As there exists no evidence that Finley concealed the .380 with intent to impair its verity or availability in the official proceeding, Finley should have been granted a directed verdict with respect to the tampering charge.

The conviction for tampering with physical evidence was vacated.

Harris v. Commonwealth, 2020 WL 2610015 (Ky. App. 2020) – NP – NF

FACTS: On March 17, 2016, Tyrran Harris was arrested on unrelated charges and taken to the Shelby County Detention Center where he was strip searched. Deputy Richard Foltmann performed the search in a small bathroom in the booking room. The door was partially closed to obstruct the camera’s view of the strip search. Deputy Foltmann testified that strip searches are routinely performed in the bathroom because it is the only area off-camera.

Once in the bathroom, Deputy Foltmann instructed Harris to disrobe. Instead, Harris – still clothed – pushed Deputy Foltmann who called for assistance. Harris immediately reached into his own pants and extracted a small item from his rectum. Harris threw the item in the toilet and flushed it. Deputy Foltmann could see the item Harris was flushing but could not retrieve it. Deputy Foltmann described the item as “grayish tannish” material in clear plastic wrap “commonly seen in narcotics packaging.” Deputy Foltmann was convinced based on his experience that the package contained narcotics. The officer who had arrested Harris came to Deputy Foltmann’s aid in time to see the toilet flush, but not in time to see the item. Harris contended the item flushed was toilet paper.

Harris was ultimately convicted of tampering with physical evidence. An appeal followed.

ISSUE: Is flushing contraband down a toilet tampering with physical evidence?

HOLDING: Yes. KRS 524.100 provides:

A person is guilty of tampering with physical evidence when, believing that an official proceeding is pending or may be instituted, he:

(a) Destroys, mutilates, conceals, removes or alters physical evidence which he believes is about to be produced or used in the official proceeding with intent to impair its verity or availability in the official proceeding; or

(b) Fabricates any physical evidence with intent that it be introduced in the official proceeding or offers any physical evidence, knowing it to be fabricated or altered.

This is a case of circumstantial evidence. Harris flushed something down the toilet. Deputy Foltmann believed the object was a controlled substance and not toilet paper because the object was in clear plastic wrap. There was also no evidence Harris obtained any toilet paper from a

dispenser in the bathroom. Whatever the item was, he removed it from his pants while still clothed. He flushed the toilet despite no evidence that he had first used it for its intended purpose. Whatever was in his pants would have been revealed by the strip search if Harris had not pushed the deputy conducting the search. His attempt to conceal the item, no matter what it was, is circumstantial evidence suggesting a guilty state of mind.

Further, the statute does not require specific identification of the physical evidence, only that the defendant, believing the physical evidence could be used in a proceeding against him, prevented such use by making it unavailable for that purpose, for example, by flushing it down a toilet.

The Court of Appeals concluded there was competent and relevant evidence affording a reasonable and logical inference that Harris had concealed physical evidence on his person and, when being strip searched, he made it unavailable for use in a proceeding against him by flushing it down a toilet.

The conviction was affirmed.

XVII. OPEN RECORDS

Dept. of Kentucky State Police v. The Courier-Journal, 2020 WL 1897406 (Ky. App. 2020) – P – NF

FACTS: A Courier-Journal reporter filed an open records request with the Kentucky State Police requesting:

An electronic copy of the Uniform Citation File database and all its publicly available fields, which include name; alias; address or city of residence; date of birth; sex; race; vehicle make; vehicle type; vehicle year; color; miles per hour; miles per hour zone; radar violation code; resident status; victim's relationship to offender; ethnic origin; violation date; time; location; breathalyzer results; date of arrest; time; county of violation; violation code; statute; ordinance; charges; post-arrest complaint; name and address of witnesses; officer badge/identification number; assignment; additional offender information.

The Uniform Citation File database referred to by Price is contained in a record management system known as "KyOPS" that tracks KSP's issuance of criminal and traffic citations throughout the Commonwealth. Since 2003, KSP has entered more than eight million individual records into KyOPS at a rate of approximately 1,800 per day. The KSP denied the request under KRS 61.872(6) as imposing an unreasonable burden on the agency. A subsequent open records request by the same reporter, with directions to exclude personal information was also denied by the KSP.

On appeal to the Attorney General, the KSP included an affidavit from Steve Roadcap, the KyOPS Coordinator. Roadcap explained that KyOPS had not been planned to allow for the redaction of

entire categories of information such as Social Security numbers, and opined that a redesign of the system to allow such categorical redactions would result in the creation of a new record.

The Attorney General ultimately found that the KSP violated the Open Records Act. The KSP appealed to Franklin Circuit Court. The circuit court affirmed the Attorney General's decision. An appeal to the Kentucky Court of Appeals followed.

ISSUE: Is separating exempt material contained in a public record equivalent to creating a new record under the Kentucky Open Records Act, thereby permitting the agency to categorically a request for records?

HOLDING: No. The Court of Appeals held that modifying the KyOPS database to enable redactions by entire categories of information, as opposed to the tedious and time-consuming review of every individual entry, does not constitute creating a new record because the end product of either process would be exactly the same. Presumably, if the Courier-Journal had requested only one specific citation from the database, which could have been manually redacted with minimal time and effort, KSP would not have objected on the grounds that it required the creation of a new record or requested costs. The scale of the request does not alter the character of the material requested. Separating exempt material is not equivalent to creating a new record and is mandated by KRS 61.878(4).

The Franklin Circuit Court was affirmed.

Dept. of Kentucky State Police v. Trageser, 600 S.W.3d 749 (Ky. App. 2020)

FACTS: Trageser filed an open records request with KSP to review the disciplinary portions of TFC Woodside's file pursuant to the Kentucky Open Records Act. KSP notified Trageser that it would grant the majority of his request but withhold all Internal Affairs investigative records containing preliminary materials pursuant to the exceptions to KORA listed in KRS 61.878(1)(i) and (j). Trageser appealed to the Office of the Attorney General. The Attorney General ruled that KSP improperly withheld certain portions of the IA files. The Franklin Circuit Court affirmed the OAG. The KSP appealed to the Kentucky Court of Appeals.

ISSUES:

1. Do recommendations and opinions **NOT** relied upon "in the agency's final action" in a disciplinary matter maintain their preliminary characterization and are not subject to public disclosure under the Kentucky Open Records Act?
2. Is information of a personal nature excluded from disclosure under the Kentucky Open Records Act?

HOLDING:

1. Yes. KRS 61.884 states: "[a]ny person shall have access to any public record relating to him or in which he is mentioned by name, upon presentation of appropriate identification, subject to the provisions of KRS 61.878." KRS 878(1) provides some statutory exceptions:

(i) Preliminary drafts, notes, correspondence with private individuals, other than correspondence which is intended to give notice of final action of a public agency;

(j) Preliminary recommendations, and preliminary memoranda in which opinions are expressed or policies formulated or recommended....

In City of Louisville v. Courier-Journal & Louisville Times Co.,⁶⁶ the Court of Appeals held “that investigative files of the [IA Unit] are exempt from public inspection as preliminary under KRS 61.878(g) and (h).” However, that court further noted that “if the [Commissioner] adopts its notes or recommendations as part of his final action, clearly the preliminary characterization is lost to that extent.”⁶⁷

Here, the Court of Appeals held that KSP cannot rely on KRS 61.878(1)(i) and (j) as its basis for withholding the entirety of TFC Woodside’s IA investigative files. However, that same statutory authority does provide KSP with a limited authority to withhold portions of the IA file concerning any disciplinary recommendations or opinions not relied upon by the Commissioner in his final decision.

2. Yes. KRS 61.878(1)(a) excludes disclosure of public records containing information of a personal nature where the public disclosure thereof would constitute a clearly unwarranted invasion of personal privacy. To determine whether KRS 61.878(1)(a) applies, the agency must: (1) determine whether the information is of a personal nature, and (2) determine whether public disclosure of personal information would constitute a clearly unwarranted invasion of personal privacy.⁶⁸

Under this analysis, the record shows there is information of a personal nature in the 2002 and 2012 IA files regarding TFC Woodside, his family members, and civilians who cooperated with the IA’s investigation. The Court of Appeals held that any information such as social security numbers, driver’s license numbers, home addresses, and phone numbers is personal in nature and is not disclosable under KRS 61.878(1)(A) as an unwarranted invasion of privacy. Personal information should be redacted.

The Court of Appeals affirmed the Franklin Circuit Court.

XVIII. SEARCH AND SEIZURE

Avignone v. Commonwealth, 2020 WL 2095897 (Ky. App. 2020) – NP – NF

FACTS: In the early evening of May 26, 2018, Officer Sidney Cates of the Elizabethtown Police Department received an anonymous tip, through dispatch, regarding a vehicle on Dixie

⁶⁶ 637 S.W.2d 658, 660 (Ky. App. 1982).

⁶⁷ *Id.* at 659.

⁶⁸ Palmer v. Driggers, 60 S.W.3d 591 (Ky. App. 2001).

Highway in Elizabethtown. The vehicle was said to be driving erratically, indicating a possibly intoxicated driver, and identified the license plate of the car. Officer Cates located the vehicle and followed it for approximately one-quarter of a mile. According to his later testimony at the suppression hearing, Officer Cates observed the vehicle swerving within its lane. Specifically, he asserted the vehicle “swerved extremely close to the curb,” then “swerved to the left, almost going into the next lane.” At that point, Officer Cates initiated a traffic stop of the vehicle, which traveled a short distance before pulling into a restaurant parking lot. As he exited his cruiser, Officer Cates smelled alcohol as he approached the stopped vehicle. Officer Cates questioned the driver, Avignone, and administered field sobriety tests. Based on the results, he determined Avignone was intoxicated and charged her with driving under the influence of alcohol. A motion to suppress the stop was denied, and Avignone entered a conditional guilty plea to DUI, second offense. The Hardin Circuit Court affirmed on appeal. The Court of Appeals accepted discretionary review.

ISSUE: Does an anonymous tip of a vehicle driving erratically, combined with the officer’s observations of erratic driving, provide reasonable and articulable suspicion to justifying a traffic stop to investigate a possible DUI?

HOLDING: Yes. In order to perform an investigatory stop of an automobile, there must exist a reasonable and articulable suspicion that a violation of the law is occurring.⁶⁹ Complications arise when, as here, the information serving as the sole basis of the officer’s suspicion is provided by an anonymous informant, whose veracity, reputation, and basis of knowledge cannot be readily assessed. In situations such as these, courts examine the totality of the circumstances and determine whether the tip, once suitably corroborated, provides sufficient indicia of reliability to justify an investigatory stop.⁷⁰ An anonymous tip, even though accurate in its details, will not justify an investigatory stop unless “the investigating officer ... independently observe[s] any illegal activity, or any other indication that illegal conduct was afoot.”⁷¹

In this case, Officer Cates received the tip from dispatch, located the vehicle, and maneuvered his cruiser behind Avignone’s car and observed Avignone’s car swerve within her lane. This constituted sufficient collaboration of the anonymous tip.

The conviction was affirmed.

Back v. Commonwealth, 2020 WL 2095894 (Ky. App. 2020) – NP – NF

FACTS: On the evening of July 28, 2017, Lexington Police Officer Nichols observed a black Chevy Impala parked at Race and Second Streets. Nichols, along with Officers Clements and Harris, were members of the department’s Community Law Enforcement Action Response

⁶⁹ Delaware v. Prouse, 440 U.S. 648, 663, 99 S. Ct. 1391, 1401, 59 L. Ed. 2d 660, 673 (1979).

⁷⁰ Alabama v. White, 496 U.S. 325, 332, 110 S. Ct. 2412, 2417, 110 L. Ed. 2d 301, 310 (1990).

⁷¹ Brooks v. Commonwealth, 488 S.W.3d 18, 22 (Ky. App. 2016)

("CLEAR") unit, which patrolled high-crime areas. Nichols recognized the Impala as being on a list of reported stolen vehicles.

Officers Nichols, Clements, and Harris approached the vehicle and made contact with Robert and Charles Back. The officers determined that Robert was the owner of the Impala and that it was no longer listed as stolen. Robert stated that someone with a gun had taken his vehicle, but he found it abandoned and reported the recovery to the police. Robert consented to a vehicle search. No contraband was found, and the Backs were allowed to leave.

At 12:16 a.m. on the morning of July 29, 2017, Officer Clements saw Robert's black Chevy Impala parked in the middle of Self Avenue blocking the street. Clements approached the vehicle and observed that it was again occupied by the Backs. When asked, the Backs told Clements that they were in the area to give Robert's friend "Phil" a ride so he could retrieve some items. Being suspicious about their presence in a high-crime area after midnight, Officer Clements told the Backs to "hang tight." Officers Nichols and Harris arrived, and Officer Clements began asking residents in the area who were outside their homes if they knew anyone named Phil. No one was found who knew Phil.

After checking criminal histories and speaking with his fellow officers, Officer Clements summoned the Canine Unit about eight minutes into this encounter. The Canine Unit arrived at 12:37 a.m., and alerted to the odor of narcotics in the vehicle. Officers then searched the vehicle and found heroin, digital scales, and sandwich baggies. The Backs were charged with first-degree trafficking in a controlled substance, violations of conditions of release and first-degree bail jumping.

The Backs filed a motion to suppress, arguing that the police lacked reasonable suspicion to justify the investigatory stop. The trial court denied the motion to suppress. The Backs entered conditional guilty pleas to possession of a controlled substance and bail jumping. An appeal followed.

ISSUE: Is a law enforcement officer required to have a reasonable and articulable suspicion that an offense has been or is about to be committed to justify further investigation into a minor vehicle parking offense?

HOLDING: Yes. The Fourth Amendment to the U.S. Constitution protects citizens from unreasonable searches and seizures. A traffic stop is considered a seizure of the driver "even though the purpose of the stop is limited and the resulting detention quite brief."⁷² Therefore, a traffic stop is "subject to the constitutional imperative that it not be 'unreasonable' under the circumstances."⁷³ It has long been considered reasonable for an officer to conduct a traffic stop if he or she has probable cause to believe that a traffic violation has occurred.⁷⁴

⁷² Delaware v. Prouse, 440 U.S. 648, 653, 99 S.Ct. 1391, 59 L.Ed.2d 660 (1979).

⁷³ Whren v. U.S., 517 U.S. 806, 810, 116 S.Ct. 1769, 135 L.Ed.2d 89 (1996).

⁷⁴ Wilson v. Commonwealth, 37 S.W.3d 745 (Ky. 2001).

To justify an investigative stop of a vehicle, the stop must be supported by a reasonable and articulable suspicion that an offense has been or is about to be committed.⁷⁵ Reasonable suspicion does not rise to the level of probable cause, and it falls considerably short of satisfying a preponderance of the evidence standard.⁷⁶ Rather, it requires a “minimal level of objective justification[.]”⁷⁷ The detaining law officer must consider the totality of the circumstances when determining whether there is a particularized and objective basis for stopping a person suspected of criminal activity.⁷⁸ The officer may develop reasonable suspicion based on his own personal observation.⁷⁹

In this case, it was undisputed that the Backs were parked in the street blocking traffic. This justified Officer Clements’ approach to the vehicle and his initial questioning of the Backs. The Court of Appeals held that the officers possessed a reasonable suspicion sufficient to justify continuing the stop and employed the least intrusive means necessary to verify or dispel the officer’s suspicions. The Backs were in a high-crime area after midnight, that they were parked in the middle of the road with the engine off and the lights out, and that they had been seen earlier in the evening in a different high-crime area for reasons that could not be corroborated. Further, when Officer Clements asked the Backs why they were parked in the street in a high-crime area after midnight, with two weed eaters present in the vehicle that were not there during the first encounter, the response supported a reasonable inference that they were not telling the truth.

The convictions were affirmed.

Beard v. Commonwealth, 2020 WL 969141 (Ky. App. 2020) – NP - F

FACTS: Officer Pike received a dispatch report on August 29, 2017 regarding a pickup truck containing stolen construction equipment in the bed. While responding to an unrelated call in his official vehicle, Officer Pike was passed by a pickup truck operated by Beard that contained a large amount of construction equipment in the bed. Officer Pike executed a traffic stop and observed Beard acting nervously, specifically by placing a cigarette in his mouth backward and stuttering. Officer Pike searched the truck and found several grams of illegal drugs and found where Beard had attempted to hide a plastic bag of methamphetamine in a chicken sandwich. Officer Pike charged Beard with possession of illegal drugs, tampering with physical evidence, and operating a motor vehicle in violation of KRS 189.110, a traffic safety law regulating automobile tinting. The grand jury ultimately returned an indictment charging Beard with first-

⁷⁵ Terry v. Ohio, 392 U.S. 1, 88 S.Ct. 1868, 20 L.Ed.2d 889 (1968); Creech v. Commonwealth, 812 S.W.2d 162, 163 (Ky. App. 1991).

⁷⁶ United States v. Sokolow, 490 U.S. 1, 7, 109 S.Ct. 1581, 1585, 104 L.Ed.2d 1 (1989).

⁷⁷ Id.

⁷⁸ Id., 490 U.S. at 8, 109 S.Ct. at 1585.

⁷⁹ Commonwealth v. Bucalo, 422 S.W.3d 253, 259 (Ky. 2013).

degree trafficking, tampering with physical evidence, operating a vehicle with an obstructed windshield, and being a persistent felony offender.

Beard moved to suppress the evidence, arguing that Officer Pike did not observe a traffic violation and that the officer did not have an “objectively reasonable and articulable basis for believing the truck was carrying stolen construction equipment.” During the suppression hearing, Officer Pike testified that he conducted the stop based upon his belief that the construction equipment obstructing the driver’s rear view, as well as his motivation to determine if the items in the bed of the truck matched the description of the earlier dispatch report. Even though Officer Pike cited the wrong statute in his citation (he should have cited KRS 189.020, not KRS 189.110), the trial court denied the motion to suppress after finding that this was a reasonable mistake of law. Beard entered a conditional guilty plea to the trafficking and tampering charges. Beard appealed.

ISSUE: Is a traffic stop justified by an officer’s reasonable belief that items obstructing the back windshield of a pickup truck creates a potential danger to roadway traffic?

HOLDING: Yes. While the Kentucky Court of Appeals found this to be a very close case, it held that Officer Pike’s traffic stop was justified based upon his reasonable belief that the stacked construction equipment in the back of this pickup truck could create a danger to the driver and other drivers. Until Officer Pike executed the stop, he was unable to ascertain whether Beard’s side mirrors were sufficiently unobstructed permitting Beard to safely transport the load.

The Court of Appeals did opine, however, that the traffic stop would not have been justified based solely on Officer Pike’s knowledge that some construction equipment had been reported stolen. Nothing in the dispatch report specifically tied the construction equipment to Beard or to Beard’s truck. This issue was held moot because the traffic safety issue provided sufficient justification for the traffic stop.

The convictions were affirmed.

Benton v. Commonwealth, 2020 WL 855489 (Ky. App. 2020) – NP – F

FACTS: On February 20, 2017, Benton was driving in Lexington, Kentucky around 11 p.m. Lexington Police Officer Daniel True, on special assignment, was looking for people who may have been breaking into residences or automobiles. Officer True checked Kenawood Park for criminal activity. As he approached a roundabout, Officer True saw a vehicle, whose lights were initially off, turn on its lights and exit the park. He believed the park closed at dark and testified there was an ordinance to that effect.

Officer True began following the vehicle that exited the park. He ran the vehicle’s registration plate through his computer with the National Crime Information Center (“NCIC”) and discovered the owner had an active warrant. He could not see inside the vehicle because the windows were tinted. Officer True pulled the vehicle over.

As Officer True walked toward the vehicle, he smelled marijuana. Also, he was still in contact with dispatch over his radio and learned that the vehicle was connected to a theft at Hibbett Sports. Benton rolled his window partially down and Officer True asked for Benton's driver's license. Benton did not have a driver's license, so Officer True requested Benton's Social Security number instead. The Social Security number Benton gave was invalid. Officer True advised Benton that giving false information was a crime. Benton then gave Officer True a paper scan of his Ohio driver's license. This time a record was returned. Although no warrants were active, Benton's record revealed an investigative alert from the gang resource unit. Officer True testified this alert meant if the police made contact with Benton, that unit would want to talk with him.

At this point, Officer True already determined that Benton was not the subject of the active warrant based on Benton's age. Benton told Officer True that the vehicle belonged to his father, who was not present. So, Officer True believed that Benton's father was probably the subject of the warrant.

Officer True's backup, Officer Jacob Webster, arrived at the stop. The officers asked Benton and his passenger to exit the vehicle. Benton was agitated and yelled at Officer True as he searched the vehicle. Inside the vehicle, the officers found a digital scale and a loaded handgun. Benton was placed under arrest and, upon searching Benton, the officers found approximately forty-seven grams of heroin in his underwear. Marijuana was also found.

Benton was indicted on one count of trafficking in a controlled substance of two or more grams of heroin with a firearm enhancement, being a felon in possession of a handgun, trafficking in marijuana, carrying a concealed deadly weapon, promoting contraband, resisting arrest, possession of drug paraphernalia, having no operator's license, menacing, and being a first-degree felony offender.

Benton filed a motion to suppress all evidence resulting from the stop. Benton argued Officer True had no probable cause to believe a traffic violation had occurred and no reasonable articulable suspicion that any criminal activity was afoot. During the suppression hearing, Officer True testified that the NCIC search revealed an active warrant for the owner of the vehicle. The actual warrant was not introduced or produced during the hearing. The trial court denied the motion to suppress finding the police had a reasonable suspicion to follow Benton, run the license plate, and, after learning of the warrant, to stop Benton.

Thereafter, Benton entered an Alford plea to the amended charges of trafficking in a controlled substance in the first degree, being a convicted felon in possession of a firearm, and being a persistent felony offender in the second degree. The other charges were dismissed as part of the plea. The trial court sentenced Benton to ten years in prison. Benton appealed.

ISSUE: Does the existence of an active warrant on the owner of a vehicle provide reasonable suspicion of criminal activity to justify the warrantless investigative stop of a vehicle, even though the actual warrant is never physically produced?

HOLDING: Yes. The Fourth Amendment ensures that individuals have the right to be free from “unreasonable searches and seizures.”⁸⁰ Ordinarily, a search or seizure must be based on a warrant supported by probable cause.⁸¹ However, the Fourth Amendment permits brief investigative stops when an officer has a particularized and objective basis for suspecting that “either the vehicle or an occupant is otherwise subject to seizure for violation of law[.]”⁸² To conduct an investigative stop, the officer must articulate a “reasonable suspicion” of criminal activity.⁸³ Whether the officer has reasonable suspicion to conduct a stop is determined by the totality of the circumstances.⁸⁴

Here, Officer True believed that the driver was subject to seizure for violation of the law because the NCIC search of the license plate showed an active warrant against the owner of the vehicle. Benton also admits the existence of an active warrant for the vehicle’s owner creates the necessary reasonable suspicion required to conduct an investigative stop.⁸⁵ However, Benton’s complaint is that the warrant was not produced, so the trial court’s denial of his motion to suppress was not supported by substantial evidence.

The production of the warrant itself is irrelevant. The standard for an investigative stop is reasonable suspicion, not proof beyond a reasonable doubt or proof by a preponderance of the evidence or even probable cause. A police officer may stop a vehicle based on information from known or even anonymous third parties, as long as the information is supported by an indicia of reliability.⁸⁶ Here, Officer True testified that he ran an NCIC search on his computer, which returned an active warrant for the vehicle’s owner. The NCIC search generated information that Officer True relied upon in making the stop. Officer True did not need to physically possess the warrant to conduct the investigative stop. And, the trial court did not need to evaluate the physical warrant to find Officer True’s testimony credible and reliable. “[A]n officer’s testimony provides sufficient evidence to meet the substantial evidence standard.”⁸⁷ Officer True articulated a reasonable suspicion of criminal activity to justify the stop. He noted the vehicle in which Benton was driving turned on its lights and exited the park as he entered. Officer True testified the park closed at dark and it was around 11 p.m. when he saw Benton’s vehicle. Even though Officer True testified that he treats a violation of a city ordinance the same as a crime, he did not immediately pull over Benton for being in the park after dark. He followed the vehicle for about one mile while running a search of the license plate. At that point, the NCIC search returned an active warrant for the vehicle’s owner. This information gave Officer True a particularized and objective basis for suspecting the vehicle’s owner was subject to seizure for violation of the law,

⁸⁰ U.S. CONST. amend. IV.

⁸¹ Navarette v. California, 572 U.S. 393, 396-97, 134 S.Ct. 1683, 1687, 188 L.Ed.2d 680 (2014).

⁸² Delaware v. Prouse, 440 U.S. 648, 663, 99 S.Ct. 1391, 1401, 59 L.Ed.2d 660 (1979).

⁸³ Terry v. Ohio, 392 U.S. 1, 19-31, 88 S.Ct. 1868, 20 L.Ed.2d 889 (1968).

⁸⁴ Alabama v. White, 496 U.S. 325, 328, 110 S.Ct. 2412, 2415, 110 L.Ed.2d 301 (1990).

⁸⁵ Traft v. Commonwealth, 539 S.W.3d 647, 651 (Ky. 2018).

⁸⁶ White, 496 U.S. at 329, 110 S.Ct. at 2415-16.

⁸⁷ Cobb v. Commonwealth, 509 S.W.3d 705, 708 (Ky. 2017).

which met the reasonable suspicion standard to justify the stop. The testimony of Officer True and Officer Webster to the above facts provided substantial evidence upon which the trial court properly relied when denying Benton’s motion to suppress. The actual warrant was not required for the trial court to make this decision.

The Court of Appeals affirmed Benton’s convictions.

Bryant v. Commonwealth, 2020 WL 2298423 (Ky. App. 2020) – NP – NF

FACTS: Louisville Metro Police Detectives Settle and Vidourek observed Bryant walk between houses in Louisville’s Russell neighborhood, an area known for burglaries and thefts. Deeming Bryant’s actions suspicious the detectives, wearing vests bearing the word “Police,” activated their emergency equipment and exited their car to speak with Bryant. Bryant fled on foot. During the chase, Bryant extended his arm as if to drop something. Detective Settle caught up to Bryant and ordered him to the ground. Bryant complied. Detective Settle performed a pat down search for weapons and discovered none. Detective Vidourek arrived and, believing Bryant was under arrest, searched Bryant and discovered a bullet in a pocket. A loaded firearm was found where Bryant extended his arm during the chase. Bryant was indicted for several offenses, including possession of a handgun by a convicted felon.

Bryant moved to suppress the bullet and firearm, arguing that there was no reasonable suspicion to support the initial stop and no probable cause for the search or arrest. The trial court denied the motion. While there was no evidence supporting criminal trespass, the trial court found that the bullet would have been inevitably discovered because probable cause existed to arrest Bryant for carrying a concealed deadly weapon and tampering with physical evidence once Detective Settle discovered the gun.

At trial, the jury found Settle guilty of possession of a handgun by a convicted felon. An appeal followed.

ISSUE:

1. Does a seizure occur when a suspect fails to yield to law enforcement in response to a show of authority?
2. Is a search incident to an arrest invalid if it was mistakenly conducted prior to an actual arrest based upon probable cause?

HOLDING:

1. No. Bryant argued that he was illegally seized when Detective Settle activated his emergency equipment and commanded Appellant to ‘come here’ when he had no reasonable suspicion to seize him. This argument was rejected. The Court of Appeals held that, under both the United States Constitution and the Kentucky Constitution, a seizure does not occur if in response to a show of authority, the subject does not yield. In that event, the seizure occurs only when the police physically subdue the subject. This holding is essentially a reaffirmation of the Kentucky Supreme Court’s holding in Hunter v. Commonwealth.⁸⁸ Thus,

⁸⁸ 587 S.W.3d 298 (Ky. 2019).

because he ran from the police, Bryant was not seized until after his flight ceased. The gun found along the flight path was admissible as abandoned property.

2. No. With respect to the bullet, the Court of Appeals held that probable cause existed for arresting Bryant, even though the search was executed on the mistaken belief that Bryant had been arrested. So long as probable cause existed for the arrest, it is immaterial whether the search incident to arrest occurred slightly prior to the actual arrest.⁸⁹ In this case, the detectives, at a minimum, had probable cause to believe that Bryant committed third-degree criminal trespass because they saw Bryant walk and/or run between private houses and through private yards before and during his flight. KRS 511.080(1) only requires a person to “knowingly enter[] or remain [] unlawfully in or upon premises.

The conviction was affirmed.

Collis v. Commonwealth, 2020 WL 2296990 (Ky. App. 2020) – NP - NF

FACTS: Newport Police responded to a 911 call from a resident of the Victoria Square Apartments reporting a domestic disturbance. When officers arrived, Collis opened the door before the officers could knock. Collis was holding an unknown object in his right hand, which was in the pocket of his hoodie. When told to remove his hand from his pocket, Collis shut the door. Collis refused orders to open the door. Police summoned the apartment complex manager, who advised that Collis had been “beating the s--- out of her.” The manager produced a key, which Lt. Kunkel used to open the door. The door was chained from the inside and only slightly opened. Inside the apartment, the officers observed a crying woman and Collis holding a baby.

Lt. Kunkel told Collis that they were investigating a call for a domestic dispute and were not going to leave until the matter was resolved. Lt. Kunkel then broke the chain, and the three officers entered the apartment. Collis’s hand was still in his hoodie pocket leading the officers to believe that he had a firearm. Collis refused to remove his hand from his pocket. A brief struggle ensued and the officers gained control of Collis’s right arm. Collis had a loaded firearm in the right pocket of his hoodie. Collis was arrested, taken into custody and ultimately indicted for possession of a handgun by a convicted felon, two counts of wanton endangerment in the first degree, resisting arrest, menacing, criminal trespass in the first degree, and being a second-degree persistent felony offender.

Collis moved the trial court to suppress the evidence that he unlawfully possessed a handgun, arguing that police lacked probable cause or other lawful basis for entering the apartment. The Campbell Circuit Court denied the motion to suppress. At trial, the jury convicted Collis of possession of a handgun by a convicted felon and being a second-degree PFO. Collis entered an Alford plea to menacing and wanton endangerment. This appeal followed.

⁸⁹ Williams v. Commonwealth, 147 S.W.3d 1, 7 (Ky. 2004),

ISSUE: May law enforcement lawfully enter a residence without a warrant under exigent circumstances based upon observations arising to probable cause that domestic violence was actively occurring within the residence?

HOLDING: Yes. Absence exigent circumstances, the Fourth Amendment prohibits law enforcement from entering a residence without a warrant.⁹⁰ Exigent circumstances must be based on probable cause. “[P]robable cause just means a good reason to act, ... it does not mean certainty, or even more likely than not, that a crime has been committed or a medical emergency is ongoing.”⁹¹

The Court of Appeals concluded that the police officers had probable cause to believe that a crime had been committed or was being committed at the apartment, and that exigent circumstances required their intervention. Their presence at the apartment was requested by the 911 caller who reported a domestic disturbance, and upon their arrival the apartment manager told them that Appellant was beating the woman in the apartment. These facts, coupled with Collis closing the door and refusing to remove his hand from his pocket, as well the officers’ observation of a crying woman and an infant inside the apartment, were more than sufficient to establish “a good reason to act.”

The convictions were affirmed.

Carlisle v. Commonwealth, ---- S.W.3d ----, 2020 WL 2831454 (Ky. 2020) – P – NF

FACTS: Sometime in September 2017 at 3:10 PM, Covington Police Officer Brian Powers stopped a truck for improper equipment, namely, tinted taillights and a loud exhaust. The truck was driven by Christopher Hughes; Carlisle was the only passenger. Two other officers, Sergeant S. Mangus and Officer Kyle Shepard, arrived on the scene to assist.

The traffic stop was captured on Officer Powers’s body cam. The video shows that Officer Powers first approached the driver’s side window and explained why he had stopped the truck. He then asked where Hughes and Carlisle were coming from, where Hughes lived (Newport), where the two were headed, where exactly Hughes was staying in Newport, and why they were so far from Newport. Hughes explained that he was living with someone in Newport but was helping someone move nearby, and he was headed to Sunoco for gas. Officer Powers then collected Hughes’s license and, while Hughes searched for proof of insurance, also collected Carlisle’s identification card. He also asked Hughes if he had ever been arrested, and Hughes responded yes, for possession of drug paraphernalia in 2001.

Officer Powers returned to his cruiser, immediately commenting “shady” to his own passenger. (It is unclear who this passenger is or why he was riding along.) He noted that the computer was running slowly. He also commented that he would “see if they got any prior charges.” As he attempted to run Hughes’s license number, he commented to his passenger, “We’ll see if we can

⁹⁰ Payton v. New York, 445 U.S. 573, 589-90, 100 S.Ct. 1371, 63 L.Ed.2d 639 (1980).

⁹¹ Goben v. Commonwealth, 503 S.W.3d 890, 913 (Ky. 2016).

search the car, I don't know if he's gonna allow us to." He had trouble running Hughes's license number because the license was damaged and some of the numbers were illegible, so he contacted dispatch for assistance. Dispatch eventually responded that Hughes's license was suspended.

Officer Powers returned to the driver's side window of the truck. He immediately returned the IDs and proof of insurance to Hughes. After handing back the IDs, Officer Powers explained that Hughes's license was suspended and that the license itself was so damaged that he would need to get a new one. At approximately 3:23:49, Officer Powers stated to Hughes, "So you can't leave, I'm not gonna cite you for it, but you can't leave. You gotta park your vehicle." Hughes responded, "Can I park it right here at Sunoco?" To this question, Officer Powers responded, "Yeah, that's fine, just park it out of the way, okay. Is there anything illegal in the vehicle at all?" This last question was asked at approximately 3:23:55. Hughes responded in the negative. Officer Powers asked, "No weapons, drugs, nothing like that?" Hughes responded that the only thing he had was a pocket knife. At 3:23:58, Officer Powers asked Hughes, "Mind if I take a look?" Hughes responded "no" at approximately 3:23:59, thereby consenting to a search of the truck.

Hughes immediately exited the vehicle and was quickly frisked by Officer Powers. Officer Powers then directed Hughes to move toward the back of the truck where his supervisor was standing, "just wherever you want to stand with him." Carlisle was also instructed to exit the vehicle, at which point he was thoroughly frisked by Officer Shepard. The officer found a pocket knife, which he handed to Officer Powers. The officer also asked Carlisle how much cash he had on him. When the frisk was complete, Officer Powers directed Carlisle to "walk back over with my supervisor," at which point Carlisle walked over to one of the police cruisers parked behind the truck. The body cam shows that another officer pointed to the cruiser, at which point Carlisle sat down on the front of the cruiser. It is not clear if Carlisle was told that he had to sit there or only that he could sit there.

As Officer Powers began his search of the truck, he commented to one of the other officers that the passenger (Carlisle) was a convicted felon with a prior gun charge, and both men had prior drug charges. Officer Powers then focused his attention on a black drawstring backpack located in the passenger seat, resting against the middle console, while another officer began searching the driver's side. Officer Powers initially pulled two packages of unused syringes from the bag. At this point, he commented to the other officer that "it was under him so..." The other officer asked if he was referencing the passenger, to which Officer Powers responded, "Yeah." As he continued to search the bag, Officer Powers also found several cell phones. When the other officer mentioned that he would start looking through the seat cushions, Officer Powers commented, "It's gonna be on him." The other officer asked if the men had been searched yet, and Officer Powers responded that he had only patted them down, but "I think we got enough now to search." He also commented that "[Officer] Shepard patted this guy down, he's got a ton of money in his pocket."

Ultimately, the other officer found a digital scale in the driver's side door, and Officer Powers pulled from the bag an iPad, several cell phones, and a canister of butane, in addition to the syringes and various personal items like cologne, Tylenol, and an energy drink. In reference to the butane, Officer Powers commented, "Probably shooting meth." The other officer also asked what the butane was for, to which Officer Powers responded, "I've only ever seen that with meth."

Officer Powers then pulled the passenger seat up and picked up a plastic cellophane wrapper from the floorboard. Though it is not clear from his body cam footage, Officer Powers testified at the suppression hearing that there was a white residue on the wrapper. In the video, he stated that there was "at one point something in" the wrapper. In reference to the residue, he also stated, "I don't think there's gonna be enough to do anything with." He also stated, "If anything, it's gonna be on him, I'll check him."

Officer Powers then called dispatch to run the iPad's serial number to check if it was stolen. After doing that, he walked over to Carlisle. Officer Shepard, who had been standing with the men, handcuffed Carlisle, explaining that Carlisle had been acting "super nervous" and was "tensing up," so the officer did not "want to take any chances."

Officer Powers then searched Carlisle's person. He first checked the left pocket of his jeans and discovered a large amount of cash. He then asked Carlisle when he had last taken meth and whether he had any meth on him. Carlisle responded in the negative. Officer Powers then moved to Carlisle's right side and pulled from his waistband a small piece of plastic, apparently the top of a plastic baggie. Officer Powers finished searching Carlisle's pockets and found "suspected marijuana." He then attempted to find the rest of the plastic baggie and ultimately had Carlisle step out of his shoes and out of his jeans. Carlisle wore shorts underneath his jeans. The rest of the plastic baggie, which contained a suspected narcotic, was found after Carlisle stepped out of his jeans. Carlisle was read his Miranda rights, and the officers then continued to search him, shaking out his shorts and checking his socks and shoes.

After Carlisle was placed in the back of the police cruiser, the officers quickly searched Hughes and, finding nothing, allowed him to leave. Carlisle was ultimately transported to booking, at which point the body cam footage ended.

Carlisle moved to suppress all evidence from the traffic stop, and a hearing was held in which only Officer Powers testified. The body cam footage was also submitted as an exhibit. The trial court ultimately denied the motion. A jury found Carlisle guilty of three counts of first-degree trafficking in a controlled substance. Carlisle was sentenced to a total of twenty years of imprisonment. This appeal followed.

ISSUES: 1. Is a traffic stop extended beyond its original purpose when an officer asks the driver and/or passenger questions concerning travel plans?

2. May an officer ask for the identification and perform a criminal-records check of a driver and any passengers during an otherwise lawful traffic stop to determine an individual's prior contact with law enforcement?
3. Has a passenger of a motor vehicle been unconstitutionally detained if ordered to exit a vehicle during a traffic stop and directed to stand in a specific location?
4. Does law enforcement obtain probable cause to search a passenger based upon the discovery of incriminating evidence on the trunk of a vehicle?

HOLDINGS: 1-2. Yes. In Rodriguez v. United States,⁹² the United States Supreme Court held that a police stop exceeding the time needed to handle the matter for which the stop was made violates the Constitution's shield against unreasonable seizures. A seizure justified only by a police-observed traffic violation, therefore, "become[s] unlawful if it is prolonged beyond the time reasonably required to complete th[e] mission" of issuing a ticket for the violation. However, "[a]n officer ... may conduct certain unrelated checks during an otherwise lawful traffic stop," but "he may not do so in a way that prolongs the stop, absent the reasonable suspicion ordinarily demanded to justify detaining an individual."⁹³ So, the Kentucky Supreme Court examined whether the traffic stop was ongoing and, if the stop was ongoing, whether Officer Powers inquired into matters unrelated to the stop's mission.

Normally, the stop ends when the police have no further need to control the scene, and inform the driver and passengers they are free to leave.⁹⁴ Thus, the authority for the seizure ends when tasks tied to the traffic infraction are, or reasonably should have been, completed.⁹⁵ Here, Officer Powers stopped Hughes's truck for faulty equipment, then learned that Hughes's license was suspended. Though he chose not to cite Hughes for these infractions, he needed to maintain control of the scene to ensure that Hughes did not continue to drive a vehicle with faulty equipment and with a suspended license. In other words, he needed to maintain control of the situation until the vehicle was safely off the road and Hughes (and Carlisle) left the scene on foot or by other means. His continued control over the situation is demonstrated by his instruction to Hughes that he could not leave and would have to park his car, and Hughes's request for permission to park the truck at the Sunoco lot. Under these circumstances, the lawful mission of the traffic stop had not concluded.

The Kentucky Supreme Court next turned to whether Officer Powers inquired into matters unrelated to the purpose of the traffic stop. Rodriguez identified a number of tasks that are ordinary inquiries incident to a traffic stop. These inquiries include "checking the driver's license, determining whether there are outstanding warrants against the driver, and inspecting the

⁹² 575 U.S. 348, 350-51 (2015).

⁹³ *Id.* at 355.

⁹⁴ Arizona v. Johnson, 555 U.S. 323 (2009).

⁹⁵ Rodriguez, 575 U.S. at 354.

automobile's registration and proof of insurance."⁹⁶ These checks serve the same objective as enforcement of the traffic code: ensuring that vehicles on the road are operated safely and responsibly.⁹⁷

In the present case, Carlisle focuses on the questions initially asked to Hughes, including where he lived and where the men were going and why. However, "[g]enerally, questions about travel plans are ordinary inquiries incident to a traffic stop."⁹⁸ With respect to criminal records checks, the federal circuit courts are split on the matter, and Kentucky law is unclear.

Ultimately, the Kentucky Supreme Court held in this case that an officer reasonably may ask for the identification and perform a criminal-records check of a driver and any passengers during an otherwise lawful traffic stop to determine an individual's prior contact with law enforcement. Such a task is an ordinary inquiry related to officer safety. Accordingly, Officer Powers's collection of Carlisle's identification and subsequent checking of his criminal history was not an unrelated inquiry that prolonged the traffic stop.

3. No. It is well settled that a police officer may, as a matter of course, order the driver of a lawfully-stopped vehicle to exit the vehicle.⁹⁹ Passengers of lawfully stopped vehicles may also be ordered to exit the vehicle.¹⁰⁰ In this case, Carlisle had already been stopped and detained by police while the ordinary inquiries of the traffic stop were conducted, and the detention outside the vehicle lasted less than ten minutes. As such, the intrusion into Carlisle's personal liberty in this case was minimal. The Kentucky Supreme Court concluded that the officers' interest in safety in this case outweighed the intrusion into Carlisle's personal liberty, and his detention during the search of the truck was reasonable.

4. Yes. In absence of consent, the police may not conduct a warrantless search or seizure without both probable cause and exigent circumstances."¹⁰¹ The test for probable cause is whether, under the totality of the circumstances, a fair probability exists that contraband or evidence of a crime will be found in a particular place.¹⁰² The exigent circumstances doctrine, on the other hand, "arises when, considering the totality of the circumstances, an officer reasonably finds that sufficient exigent circumstances exist," thereby requiring "swift action to prevent imminent danger to life or serious damage to property, and action to prevent the imminent destruction of evidence."¹⁰³ In narcotics cases, the exigent circumstances doctrine "is particularly compelling," as "contraband and records can be easily and quickly destroyed while a search is progressing."¹⁰⁴

⁹⁶ Id.

⁹⁷ Id.

⁹⁸ United States v. Campbell, 912 F.3d 1340, 1354 (11th Cir. 2019) (citations omitted).

⁹⁹ Pennsylvania v. Mimms, 434 U.S. 106 (1977).

¹⁰⁰ Maryland v. Wilson, 519 U.S. 408 (1997).

¹⁰¹ Guzman v. Commonwealth, 375 S.W.3d 805, 808 (Ky. 2012) (citing Kirk v. Louisiana, 536 U.S. 635, 638 (2002)).

¹⁰² Moore v. Commonwealth, 159 S.W.3d 325, 329 (Ky. 2005) (citation omitted).

¹⁰³ Bishop v. Commonwealth, 237 S.W.3d 567, 569 (Ky. App. 2007) (citations omitted) (internal quotation marks omitted).

¹⁰⁴ United States v. Young, 909 F.2d 442, 446 (11th Cir. 1990)

In this case, under the totality of the circumstances, the various items recovered in the search contributed probable cause to search both Hughes and Carlisle. The officers' search of the truck revealed a digital scale, a bottle of butane, several cell phones, two packages of syringes, and a cellophane wrapper covered in white residue. Officer Powers testified at the suppression hearing that these items lead him to believe that the two men would have more paraphernalia on their persons. As he was searching the truck, he can also be heard commenting that he had "only ever seen" butane "with meth." In addition, during the frisk of Carlisle, Officer Shepard apparently felt a substantial amount of cash on Carlisle's person. Under the totality of these circumstances, there was probable cause to believe that Hughes and Carlisle held more contraband on their persons. Because there was a high likelihood that that contraband included narcotics, which could easily and quickly be destroyed, exigent circumstances also existed.

Probable cause to search the driver of a vehicle does not automatically justify a search of a passenger in the same car. This is because passengers in an automobile are not generally perceived to have the kind of control over the contents of an automobile as do drivers. Consequently, "some additional substantive nexus between the passenger and the criminal conduct must appear to exist in order for an officer to have probable cause to either search or arrest a passenger."¹⁰⁵ In this case, however, the officers discovered much of the evidence (the syringes, butane canister, and cell phones) in a backpack sitting in the passenger seat where Carlisle had been seated, and the wrapper with white residue was found behind the passenger seat. Furthermore, Officer Shepard had already discovered that Carlisle carried a substantial amount of cash on his person. The location of the evidence in the truck and the cash on Carlisle's person provided the necessary "substantive nexus" between Carlisle and the possible criminal conduct.

Therefore, the Kentucky Supreme Court held that the probable cause and exigent circumstances requirements were satisfied, thereby warranting a search of Hughes's person and, given the nexus between Carlisle and the evidence, Carlisle's person.

The Supreme Court affirmed Carlisle's convictions.

Collins v. Commonwealth, 2020 WL 1650672 (Ky. App. 2020) – NP – NF

FACTS: On May 11, 2018, Detective Daniel Gagnon (Montgomery County Sheriff – Tennessee) spoke directly via telephone with an anonymous tipster. The tipster informed him that Vandivort would be in a red Honda Accord traveling from Nashville, Tennessee, to Clarksville, Tennessee, at Exit 4, to purchase methamphetamine. Det. Gagnon and another officer went to Exit 4, located the described vehicle and followed it to a nearby parking lot. Det. Gagnon ran the license plate of the vehicle and confirmed it was registered to Vandivort. Det. Gagnon observed

¹⁰⁵ Morton v. Commonwealth, 232 S.W.3d 566, 570 (Ky. App. 2007) (quoting State v. Wallace, 812 A.2d 291, 304 (Md. 2002)).

a man exit the vehicle and approach and enter a white minivan. After the man returned to his car, Det. Gagnon approached the vehicle and observed a bag of crystalized substance similar in appearance to methamphetamine in the man’s lap, in plain view. The man was read his Miranda rights and identified himself as Vandivort. Det. Gagnon field-tested the substance and confirmed it was methamphetamine. Det. Gagnon asked Vandivort where he got the methamphetamine, and Vandivort said he got it from Collins. Meanwhile, the other officer identified the driver of the minivan as Collins and read him his Miranda rights. Collins agreed to speak to the officer and admitted he had illegal marijuana at his Kentucky residence. Both Vandivort and Collins were arrested.

Det. Gagnon contacted Det. Troy Gibson of Kentucky’s Pennyriple Narcotics Task Force and relayed what had transpired with the anonymous tip, Vandivort, and Collins. Based on this information, Det. Gibson prepared an affidavit for a search warrant to search Collins’s residence for “marijuana, and/or any controlled substances, any instrumentalities, paraphernalia, or other contraband associated therewith.” A search warrant was issued, and a search of Collins’s residence was conducted. That search recovered: two large bags of methamphetamine, a set of digital scales, a large amount of cash, assorted ammunition, bags of baggies, a scanner, eight containers of marijuana “dab” or paste, two boxes of ammunition, and a bolt action rifle with a wooden stock inside a gun case. Collins was charged in Muhlenberg Circuit Court based on the evidence found pursuant to the search warrant.

Collins moved the trial court to suppress the evidence obtained pursuant to the search warrant. The trial court denied Collins’s suppression motion. Collins entered a conditional guilty plea and was sentenced to seven years’ imprisonment. Collins appealed.

ISSUE: Does an anonymous tip that provides specific predictive information, including the location and details of a drug transaction, that is verified by law enforcement provide reasonable suspicion to conduct a Terry stop?

HOLDING: Yes. The tip herein provided predictive information including what type of drug transaction would be made and where. “What was important was the caller’s ability to predict respondent’s future behavior, because it demonstrated inside information—a special familiarity with respondent’s affairs.”¹⁰⁶ “Because only a small number of people are generally privy to an individual’s itinerary, it is reasonable for police to believe that a person with access to such information is likely to also have access to reliable information about that individual’s illegal activities.”¹⁰⁷ “When significant aspects of the caller’s predictions were verified, there was reason to believe not only that the caller was honest but also that he was well informed, at least well enough to justify the stop.”¹⁰⁸ Because Det. Gagnon verified the information given by the

¹⁰⁶ Alabama v. White, 496 U.S. 325, 332, 110 S.Ct. 2412, 2417, 110 L.Ed.2d 301 (1990).

¹⁰⁷ Id.

¹⁰⁸ Id.

tipster, as well as their predictions, this bolstered the credibility of the tipster enough to justify the stop.

Furthermore, Det. Gagnon independently observed suspicious activity, which according to his experience and training appeared to be a drug transaction, prior to approaching Vandivort's vehicle, and illegal activity of possession of methamphetamine when he looked into the vehicle. Thus, given the totality of the circumstances, there was sufficient indicia of reliability to justify the stop of Vandivort and Collins.

Collins's conviction was affirmed.

Commonwealth v. Perry, 2020 WL 2603604 (Ky. App. 2020) – NP – NF

FACTS: Lawrenceburg Police Officer Nathan Doty observed Perry and another person walking down the sidewalk near a nursing home facility at 8:21 a.m. on August 28, 2018. Officer Doty knew Perry, as he had previously arrested him on drug charges, and that he knew Perry usually had narcotics on his person and active arrest warrants outstanding. Based on that information, he decided to stop and approach Perry.

Officer Doty testified that upon approaching Perry, he immediately noticed that Perry appeared to be under the influence of narcotics. He stated that Perry had pinpoint pupils and was unsteady on his feet. Shortly after Officer Doty initiated the encounter, Officer Zach King arrived.

Officer Doty testified that Perry was very cooperative and was never restrained or handcuffed. Further, Officer Doty testified that neither Perry nor the other person with him expressed a desire not to speak with him. The officer stated that he asked Perry for his consent to search, which Perry granted. During a search of Perry and his backpack, the officer found narcotics and several items of drug paraphernalia. Sometime between 26 and 38 minutes after the stop began, Officer Doty arrested Perry. Perry was charged with first-degree possession of a controlled substance (heroin), first-degree possession of a controlled substance (methamphetamine), possession of drug paraphernalia, and possession of a legend drug (gabapentin) that was not prescribed to him.

The trial court granted a motion to suppress evidence and suppressed all evidence seized as a result of the stop. The trial court found that Officer Doty's approach of Perry was not based on reasonable suspicion to believe that Perry was involved in criminal activity. The Commonwealth appealed.

ISSUE: Is stopping a person based solely upon personal knowledge that the person had been arrested for drug possession in the past and that the person usually had drugs on is person sufficient reasonable suspicion to justify a Terry stop?

HOLDING: No. A person may be briefly stopped for investigative purposes when the police have reasonable suspicion the individual is involved in criminal activity.¹⁰⁹ “[I]n justifying the

¹⁰⁹ Terry v. Ohio, 392 U.S. 1, 88 S.Ct. 1868, 20 L.Ed.2d 889 (1968).

particular intrusion the police officer must be able to point to specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant that intrusion.”¹¹⁰ The mere act of walking on a street does not create a reasonable suspicion to conduct a stop.¹¹¹

While police officers are free to approach anyone in a public area for any reason, the Court of Appeals found that this stop was conducted to investigate Perry because Perry usually had warrants and narcotics on his person. The purpose was to detain and investigate is supported by the fact that a second officer (Officer King) arrived shortly after the encounter. Officer Doty was on patrol and exited his vehicle to confront Perry. Were his purpose simply to converse with him, it is doubtful a backup unit would have come to the scene. The Court of Appeals held that the purpose of the stop was to investigate Perry and was, therefore, a Terry stop. (Note: this opinion did not address whether Perry did, in fact, have an active warrant for his arrest).

The trial court’s order granting suppression was affirmed.

Conner v. Commonwealth, 2020 WL 507634 (Ky. App. 2020) – NP – NF DR Filed 2/27/2020

FACTS: On the evening of November 21, 2016, Officer Brandon Mayo of the Fulton Police Department was on patrol in Fulton, Kentucky. At approximately 8:12 p.m., Mayo observed a vehicle traveling on Martin Luther King Boulevard in an erratic manner on the roadway. Mayo recognized the vehicle as one previously operated by Shuntrell Conner. Mayo initiated a traffic stop by activating his lights, and the vehicle pulled over. As Mayo approached the vehicle, he recognized Conner as the individual in the passenger’s seat. Mayo was not familiar with the individual driving the vehicle, Joey Garmon. Mayo asked Garmon why he had swerved. Garmon responded he was attempting to miss a pothole in the road. Mayo then asked Garmon for his driver’s license, proof of insurance, and registration.

While Mayo was in his cruiser running Garmon’s license, he observed Conner placing a plastic bag in the back seat of the auto underneath some other items. Mayo then decided to call for a K-9 unit to detect the presence of any drugs in the vehicle. The first K-9 officer contacted by Mayo was off duty. However, that officer did inform Mayo there was a pending warrant for Conner’s arrest. Mayo then called for a second K-9 unit at 8:26 p.m. While waiting for the K-9 unit to arrive, Mayo effectuated an arrest of Conner based upon the warrant. Deputy J.L. Atwill and his K-9 arrived on the scene at 8:43 p.m. The K-9 alerted the officers to drug presence on both sides of the vehicle. Mayo asked Garmon to exit the vehicle and then conducted a search of the vehicle. The search produced a plastic bag containing approximately 6.5 ounces of marijuana, a digital scale, and a box of plastic bags.

Conner was indicted by a Fulton County Grand Jury upon one count of trafficking in marijuana, less than eight ounces, second offense, tampering with physical evidence, possession of drug paraphernalia, and being a persistent felony offender (PFO) in the first degree. Conner

¹¹⁰ Id., 392 U.S. at 21, 88 S.Ct. at 1880 (footnote omitted).

¹¹¹ Commonwealth v. Sanders, 332 S.W.3d 739, 741 (Ky. App. 2011),

subsequently filed a motion to suppress evidence seized during the November 21, 2016, encounter with police. Following denial of the motion to suppress, Conner entered a conditional guilty plea to the first three counts of the indictment; the PFO count was dismissed. Conner was sentenced to a total of two and one-half years' imprisonment. An appeal followed.

ISSUE: May a traffic stop be extended while an officer obtains a drug dog for a sniff search that is unrelated to the purpose of the traffic stop?

HOLDING: No. It is well-established that a police officer may conduct a traffic stop if he possesses “probable cause to believe that a traffic violation has occurred.”¹¹² However, the authority for the traffic stop “ends when tasks tied to the traffic infraction are – or reasonably should have been – completed.”¹¹³ Any extension of the traffic stop beyond resolution of the reason for the initial stop is unconstitutional “unless something happened during the stop to cause the officer to have a reasonable and articulable suspicion that criminal activity [is] afoot.”¹¹⁴

In this case, the validity of the stop is not at issue because Officer Mayo saw the vehicle swerve. The issue becomes whether the officer had reasonable suspicion that criminal activity was afoot to constitutionally justify his calling the K-9 unit, thus extending the traffic stop into an investigatory stop.

Officer Mayo testified that while running the license of the driver, he observed Conner place a plastic bag in the vehicle’s backseat underneath other items. Officer Mayo considered this movement as suspicious for drug activity. Further, Officer Mayo was aware that Conner was selling meth.

In this case, Garmon was driving the automobile, not Conner. The stop was made because of Garmon's erratic driving, not any purported drug activity by Conner. And, the K-9 unit did not arrive until 31 minutes after the stop. Moreover, the mere act of placing a plastic bag in the back seat underneath other items is not inherently suspicious activity. Accordingly, the Court of Appeals held that no reasonable suspicion of drug activity existed at the time Officer Mayo called for the K-9 unit. The purpose of the stop had been or reasonably should have been accomplished and the appellate court did not believe that Mayo's observations of Conner in the car were sufficient to believe that criminal activity was afoot.

After holding that suppression should have been granted, the Court of Appeals reversed and remanded for further proceedings.

Constant v. Commonwealth, 2020 WL 1966537 (Ky. App. 2020) – P – NF

¹¹² Commonwealth v. Bucalo, 422 S.W.3d 253, 258 (Ky. 2013) (citation omitted).

¹¹³ Rodriguez v. U.S., 575 U.S. 348, 354 (2015).

¹¹⁴ Davis v. Commonwealth, 484 S.W.3d 288, 292 (Ky. 2016) (citations omitted).

FACTS: Lexington Police Officers Johnson and Bueno were dispatched to an apartment on Cross Keys Road to execute a pickup order for seventeen-year-old B.P. Upon arrival, the officers advised the man who answered the door of the reason for their arrival. B.P.'s mother went to B.P.'s bedroom door and attempted to convince B.P. to come out of her bedroom. B.P. initially refused, and B.P.'s mother unsuccessfully tried to open the bedroom door, which was locked. At this point, Officer Johnson went to watch B.P.'s window in case she tried to climb out and escape, while Officer Bueno remained on the landing outside the open apartment door. Four minutes later, Officer Bueno told Officer Johnson over the radio that B.P. had come out of her room.

When B.P. emerged from her bedroom, the officers discovered Constant, a thirty-year-old man, also locked in the bedroom with B.P. B.P.'s mother was not previously aware of Constant's presence in her daughter's bedroom.

During the short time it took to place B.P. in handcuffs, the officers asked a nervous-looking Constant to identify himself. Constant told Officer Bueno that his name was Kevin Smith and provided him with a Social Security number and birthdate. Constant contradicted himself several times, however, and the information proved to be false. Officer Bueno told Constant that he was not being honest.

According to Officer Bueno's report, he needed Constant's identifying information so that he could provide the CDW with information relevant to B.P.'s associations. Officer Johnson testified that they frequently asked for bystanders' identifications when picking up juveniles with habitual truancy or runaway offenses so that they would know where to look in the future. Officer Johnson also stated that he was concerned about B.P. being locked in a bedroom with a grown man who was obviously several years older than B.P.

Once Officer Bueno had handcuffed B.P., Officer Johnson took B.P. out of the apartment and onto the breezeway. Meanwhile, Constant began to pace and shout inside the apartment. Officer Johnson was just about to pat down B.P. when Constant, who was now smoking a cigarette, approached the apartment door to tell B.P. that he loved her and would get her bailed out. Officer Bueno gestured for Constant to stay in the apartment and blocked him from leaving.

Constant took another drag on his cigarette and suddenly bolted from the apartment, knocking Officer Bueno aside. Officer Johnson was forced to let go of B.P. to keep from being dragged down the stairs. Officer Johnson grabbed Constant's shirt to stop him, but Constant was running so fast that Constant's shirt began to rip and Officer Johnson let go. Officer Johnson pursued Constant down the stairs but was stopped when Constant ran through and slammed an exterior door on Johnson. Officer Johnson fell at the top of another set of steps, got up, and continued chasing Constant through traffic across Cross Keys Road, through a park, and then around a house on Maywick Street. Officer Johnson repeatedly ordered Constant to the ground, but Constant refused to comply until Officer Johnson drew his taser. At this point, Constant became compliant. Constant was subdued and placed under arrest at which time he was searched and found to be

in possession of fentanyl. Officer Johnson had been injured during these events, fracturing his left tibia.

Constant was charged with two counts of assault in the third degree, fleeing or evading in the first degree, possession of a controlled substance in the first degree, resisting arrest, giving an officer a false name, and being a persistent felon in the first degree. Constant filed a motion to suppress for unlawful detention and seizure. The suppression motion was denied. Constant entered a conditional guilty plea to the charges and appealed.

ISSUE: May law enforcement briefly detain all individuals, even innocent bystanders, at the scene of an arrest even absent particularized reasonable suspicion of criminal activity?

HOLDING: Yes. Even absent particularized reasonable suspicion, innocent bystanders may be temporarily detained where necessary to secure the scene of a valid search or arrest and ensure the safety of officers and others. This practice has been permitted by the Sixth Circuit in Bletz v. Gribble.¹¹⁵ Moreover, under Kentucky law, detentions for the purpose of identification must be based on “objective criteria” that criminal activity is afoot.¹¹⁶ Here, Officer Bueno had a legitimate basis for detaining Constant. Under § 14-47 of the Lexington-Fayette Urban County Government Code of Ordinances, it is a finable offense to “interfere with or obstruct a police officer in the discharge of his duty[.]” The delay in B.P. unlocking and emerging from her bedroom certainly obstructed Officer Bueno from executing the pickup order for B.P., and more evidence was needed to determine whether B.P. or Constant caused the interference. Officer Bueno was justified in briefly detaining Constant to gather more information regardless of his subjective intention.

The Court of Appeals further held that even if Constant’s initial detention in B.P.’s home had been unlawful, evidence of his fleeing or evading and possession of a controlled substance would not be suppressed. The exclusionary rule does not extend to suppress evidence of independent crimes taking place as a reaction of an unlawful arrest or search.¹¹⁷

The convictions were affirmed.

Damron v. Commonwealth, 2020 WL 862103 (Ky. App. 2020) – NP – F

FACTS: On July 29, 2017, Ballard County Sheriff’s Deputy Kevin Green and several other law enforcement officials executed a search warrant at the residence of Danny Fithen for evidence of illegal drug activity. Fithen was present and uncooperative with the investigation but admitted the cell phone located by law enforcement officials at his residence belonged to him.

¹¹⁵ 641 F.3d 743, 755 (6th Cir. 2011).

¹¹⁶ Strange v. Commonwealth, 269 S.W.3d 847, 851 (Ky. 2008).

¹¹⁷ Commonwealth v. Johnson, 245 S.W.3d 821, 824 (Ky. App. 2008).

Another law enforcement officer reviewed text messages between Fithen and “D. David” and told Deputy Green they outlined specifics of illegal drug transactions.

Hartfelder, Fithen’s girlfriend, was also present during the execution of the search warrant. Hartfelder was cooperative and told Deputy Green that Fithen had purchased illegal drugs from David Damron at Damron’s residence on multiple occasions—two to three times per week. According to Deputy Green, Hartfelder provided a street address and description of the house, stating that she had accompanied Fithen for these transactions.

Based on this investigation, on July 30, 2017, at 12:16 a.m., Deputy Green swore an affidavit for a search warrant upon David Damron’s residence for evidence of illegal drug activity. On July 30, 2017, at 12:52 a.m., a search warrant was issued for Damron’s residence.

Later that night, Deputy Green and several other law enforcement officers executed the search warrant at Damron’s residence shared with his girlfriend, Sullivan. Damron and Sullivan were known to other officers executing the warrant, and law enforcement was able to locate the residence, which had a different street address than that in the search warrant, without difficulty. Damron, Sullivan, and contraband were present at the residence. Consequently, Damron and Sullivan were arrested.

Damron moved the trial court to suppress evidence obtained pursuant to the search warrant issued on July 30, 2017. The trial court ultimately denied Damron’s suppression motion, ruling that the issuing judge had a substantial basis for finding that probable cause evidence of wrongdoing would likely be found at Damron’s residence.

Damron entered a conditional guilty plea, and an appeal followed.

- ISSUES:**
1. May probable cause in support of a search warrant be based on hearsay evidence?
 2. Is a search warrant containing an incorrect address for the premises to be searched constitutionally valid if the warrant contains a description of the premises to be searched with such particularity that the officer executing the warrant is able to identify the place to be searched with reasonable effort?

HOLDINGS: 1. Yes. The basis for Damron’s appeal centers on the validity of the search of his residence. He first attacks the portion of the affidavit for search warrant that reads:

Acting on the information received, Affiant conducted the following independent investigation:

Cell phone messages from Danny Fithen’s phone outline specifics for drug purchases by Fithen from David Damron. Messages go back to July 11, 2017.

Damron takes issue with the assertion that the text messages “outline specifics for drug purchases.” Damron then takes issue with the Affiant’s—Deputy Green’s—assertion that he

conducted the independent investigation because he did not initially search the phone, nor could he recall the name of the law enforcement officer that reviewed the text messages. Damron further criticizes Deputy Green's assumption that "D. David" was David Damron absent independent verification.

In Franks v. Delaware,¹¹⁸ the United States Supreme Court held:

"[W]hen the Fourth Amendment demands a factual showing sufficient to comprise 'probable cause,' the obvious assumption is that there will be a truthful showing" (emphasis in original). This does not mean "truthful" in the sense that every fact recited in the warrant affidavit is necessarily correct, for probable cause may be founded upon hearsay and upon information received from informants, as well as upon information within the affiant's own knowledge that sometimes must be garnered hastily. But surely it is to be "truthful" in the sense that the information put forth is believed or appropriately accepted by the affiant as true. It is established law that a warrant affidavit must set forth particular facts and circumstances underlying the existence of probable cause, so as to allow the magistrate to make an independent evaluation of the matter. If an informant's tip is the source of information, the affidavit must recite "some of the underlying circumstances from which the informant concluded" that relevant evidence might be discovered, and "some of the underlying circumstances from which the officer concluded that the informant, whose identity need not be disclosed, ... was 'credible' or his information 'reliable.' "

Deputy Green has over sixteen years of law enforcement experience and is well acquainted with reading text messages evincing drug deals. Deputy Green testified that his reading of the text messages between Fithen and "D. David"—whom he reasonably believed was Damron based on Hartfelder's information that Fithen bought drugs from David Damron—demonstrated exchanges like those used in other known illegal drug transactions. Deputy Green testified that the exchanges were cryptic with hidden meanings. Deputy Green further testified that while the text exchanges were not "specific" in the sense of being overt, he reasonably believed that the exchanges outlined drug transactions.

It matters not whether Deputy Green was the law enforcement officer who read the text messages at Fithen's residence. Nor does it matter that Deputy Green could not later recall the name of the other law enforcement officer who initially read the text messages. Under Franks

¹¹⁸ 438 U.S. 154, 164-65, 98 S.Ct. 2674, 2681, 57 L.Ed.2d 667 (1978)

and the collective knowledge doctrine,¹¹⁹ Deputy Green was able to rely on Hartfelder's information and the investigation conducted by another law enforcement official in making his affidavit.

2. Yes. In McCloud v. Commonwealth,¹²⁰ a search warrant containing an incorrect address for the premises to be searched may still be constitutionally valid if the warrant contains a description of the premises to be searched with such particularity that the officer executing the warrant is able to identify the place to be searched with reasonable effort. In this case, law enforcement had prior knowledge concerning the correct location of Damron's residence and executed the warrant at Damron's residence, which was the actual target of the search. Thus, the warrant did not violate the particularity requirement of the Fourth Amendment.

The convictions were affirmed.

Estell-Bradshaw v. Commonwealth, 2020 WL 1488776 (Ky. App. 2020) – NP – NF

FACTS: Richmond Police Officer Barron observed Bradshaw operating a motor vehicle. Officer Barron ran the license plate tag on the vehicle, which came back as registered to Bradshaw. Attached to the license plate response in the National Crime Information Center (NCIC) (the computer in the police car) was an active warrant matching Bradshaw's name, date of birth, and Social Security number. Officer Barron testified that because he was driving, he could not sit still to read the entire report. He just knew that there was a warrant, and thus he initiated a traffic stop. During the traffic stop, Officer Barron advised Bradshaw that there was an active warrant for his arrest for child support. Bradshaw contacted the Madison County child support office, who advised Bradshaw that no warrant for child support existed. Officer Barron replied that dispatch confirmed the existence of the warrant and that he had a duty to serve it.

Officer Barron searched Bradshaw's person incident to arrest. He then conducted the vehicle inventory, which produced a heroin-fentanyl mix located in the trunk. Upon returning cruiser, Officer Barron reviewed the active warrant in NCIC, which showed that the actual charge against Bradshaw was for failure to pay a fine for possession of marijuana. Officer Barron informed Bradshaw of that fact at the scene.

The trial court denied Bradshaw's motion to suppress. Bradshaw entered a conditional plea of guilty to trafficking in a controlled substance, heroin; and possession of drug paraphernalia. AN appeal followed.

¹¹⁹ In Lamb v. Commonwealth, 510 S.W.3d 316, 323 (Ky. 2017), the Supreme Court of Kentucky has held:

Under the collective knowledge doctrine, an arresting officer is entitled to act on the strength of the knowledge communicated from a fellow officer and he may assume its reliability provided he is not otherwise aware of circumstances sufficient to materially impeach the information received. See United States v. Hensley, 469 U.S. 221, 232-233, 105 S.Ct. 675, 83 L.Ed.2d 604 (1985).

¹²⁰ 279 S.W.3d 162, 165 (Ky. App. 2007).

ISSUE: Does the existence of an active warrant discovered during an NCIC check of a suspect’s license plate, justify a traffic stop, arrest and subsequent search incident to arrest even if the officer misidentifies the underlying charge for which the warrant was issued?

HOLDING: No. An officer’s subjective motivation does not invalidate the stop if the stop is made validly and conducted within the bounds of official property.¹²¹ In Traft v. Commonwealth,¹²² the Kentucky Supreme Court held that an officer’s knowledge that an individual to whom a vehicle was registered had an active arrest warrant created an articulable and reasonable suspicion to initiate a traffic stop -- even though the officer did not know the driver’s identity when he initiated the stop. The officer was merely acting in good faith to carry out his duty. Accordingly, he was abiding by the terms of the warrant.

In this case, Officer Barron was carrying out his sworn duty. It was objectively reasonable for Officer Barron to initiate the stop because an active warrant did in fact exist. Therefore, the Court of Appeals affirmed the trial court’s denial of the motion to suppress on the ground that there was an active warrant which justified the initial traffic stop, thereby validating the search and seizure that followed.

Fagan v. Commonwealth, 2020 WL 1898394 (Ky. App. 2020) – NP – F

FACTS: During an investigation for drug trafficking in Paducah, a detective obtained a search warrant to search a residence at 2630 North Friendship Road. In the affidavit supporting the search warrant application, the detective noted that surveillance units once again observed Fagan (one of the suspects) standing near his gray Ford F-150 in the yard of the 2630 North Friendship Road residence. Wentworth also averred that, based upon his training and experience, drug dealers often stored the fruits and instrumentalities of their crimes at either “stash houses” or their residences. The warrant was issued and meth was seized at 2630 North Friendship Road. Fagan moved to suppress the evidence seized at this location, arguing that an adequate nexus between this location and criminal activity was not sufficiently established. Fagan was convicted of first-degree trafficking in a controlled substance, greater than or equal to 2 grams of methamphetamine, subsequent offender. An appeal followed.

ISSUE: Is an affidavit in support of a search warrant for a specific address required to establish an adequate nexus between that address and alleged criminal activity?

HOLDING: Yes. The salient question for Fourth Amendment purposes is whether the police can show a “nexus” between the site and the evidence.¹²³ When officers violate a suspect’s Fourth Amendment rights by using a defective warrant that fails to establish a nexus between incriminating evidence and the site of a search, suppression is the customary remedy.¹²⁴ But,

¹²¹ Lamb v. Commonwealth, 510 S.W.3d 316, 322 (Ky. 2017).

¹²² 539 S.W.3d 647, 651 (Ky. 2018).

¹²³ United States v. Carpenter, 360 F.3d 591, 594 (6th Cir. 2004) (en banc).

¹²⁴ See Mapp v. Ohio, 367 U.S. 643, 655, 81 S.Ct. 1684, 1691, 6 L.Ed.2d 1081 (1961).

that general rule is qualified by an exception: A court may admit evidence gleaned under the auspices of an unconstitutional warrant if a reasonable officer would not have appreciated the defect.¹²⁵ A defendant may defeat an officer's claim of good faith if the affidavit was so lacking in factual support that the officer's belief in probable cause was entirely unreasonable or the affiant included information that he knew or should have known was false.¹²⁶

The Court of Appeals held that the officers were entitled to rely on the warrant to search 2630 North Friendship Road, and that the reliance on that warrant was in good faith. Thus, the evidence seized during the search of the premises was admissible.

The convictions were affirmed.

McCann v. Commonwealth, 2020 WL 864166 (Ky.App. 2020) – NP – F

FACTS: On February 1, 2017, Lexington police were dispatched to a gas station after a Pepsi delivery driver called 911 to report a black man had assaulted a black woman. The Pepsi driver reported the black man was wearing a black toboggan and a black vest.

Officers Dellacamera and McAllister arrived at the gas station around 10:08 a.m. Officer Dellacamera testified he saw McCann, who fit the caller's description, inside the gas station at the cash register. As Officer Dellacamera entered the gas station, McCann had finished making his purchase of coffee and was walking toward the bathroom at the back of the store. Officer Dellacamera said, "Sir, Sir, Sir ... Stop," and began running toward McCann, thinking McCann was trying to exit out the back of the gas station.

McCann stopped. Officer Dellacamera grabbed McCann by the wrists, questioned what he was doing, and felt the outside pockets of McCann's vest. The police officers asked McCann if he had assaulted a woman, which he denied. They also asked if he had a weapon, which he denied, and if he had been drinking, which he admitted. McCann stated he worked next door, he came to the gas station to get coffee, and had just been dropped off by his wife.

Officer Dellacamera asked McCann for identification and obtained McCann's wallet from his back pocket. While the police continued speaking with McCann, Officer McAllister ran McCann's information. Officer Dellacamera asked McCann with whom he had been fighting and, in response, McCann suggested he call his wife to ask her about the situation and gave Officer Dellacamera his wife's phone number and name.

Officer McAllister discovered McCann's wife had an EPO/DVO against him and asked McCann about it. While still speaking with the police officers, McCann received a call on his Bluetooth earpiece, apparently from his wife. McCann got his phone out in an apparent attempt to show the officer where his wife just called and, during this time, he appeared to call his wife's number

¹²⁵ United States v. Leon, 468 U.S. 897, 104 S.Ct. 3405, 82 L.Ed.2d 677 (1984). Leon was adopted in Crayton v. Commonwealth, 846 S.W.2d 684 (Ky. 1992).

¹²⁶ Id.

twice. Officer McAllister told Officer Dellacamera that the EPO/DVO was a “no contact” order and, by having contact with his wife, McCann violated that order.

The police handcuffed McCann and asked him if he had any weapons or anything else that could cause harm while searching him. McCann eventually told Officer Dellacamera he had a weapon, and Officer Dellacamera retrieved a gun from McCann’s hip.

The encounter was captured on Officer Dellacamera’s bodycam, starting with the police officers entering the gas station and ending with McCann being placed in the police cruiser. The police charged McCann with being a convicted felon in possession of a handgun, violating a Kentucky EPO/DVO, and carrying a concealed deadly weapon.

McCann filed a motion to suppress incriminating statements he may have made when the police officers interviewed him because they failed to warn him of his Miranda rights. No evidence was presented indicating that McCann was advised of his Miranda rights. The trial court found that a Miranda warning was not given and McCann was in custody after he submitted to Officer Dellacamera’s command to “stop” because “no reasonable person would have believed he was free to leave” at that time. The trial court also found the public safety exception to Miranda did not apply because “at the best[,] officers eventually learned [McCann] may have been guilty of violation of an outstanding EPO/DVO. There was no indication at first that [McCann] might have had a weapon on him or was a danger to the officer or the public.” The trial court suppressed McCann’s un-Mirandized answer that he had a weapon on him in response to Officer Dellacamera’s interrogation. The order only suppressed this one statement and neither party appealed this ruling.

Five months later, while preparing for trial, McCann’s attorney realized that the February 16, 2018, order only suppressed McCann’s statement that he had a gun on him. So, on July 26, 2018, McCann filed a second motion to suppress “ALL” statements, as well as the gun found on him. McCann claimed the February 16, 2018, order already held he was in custody when the police commanded him to “stop” and that he should have been read his Miranda rights before being questioned. Thus, all his statements should have been suppressed, not just the statement that he had a weapon on him, and the gun should be suppressed as “fruit of the poisonous tree,” The trial court denied McCann’s second motion to suppress, finding the handgun was admissible because McCann was stopped pursuant to a lawful Terry stop, during which police could pat him down for safety. The trial court further held that, even if McCann had not told the police he had a gun, the police would have, inevitably, discovered it.

McCann entered a conditional guilty plea to one count of being a convicted felon in possession of a handgun and one count of violating a Kentucky EPO/DVO. He was sentenced to a total of five years. An appeal followed.

ISSUE: May a peace officer stop an individual who matches the physical description of a suspect in an assault to investigate the alleged assault?

HOLDING: Yes. The police have three types of interactions with citizens: consensual encounters, temporary detentions (referred to as Terry stops), and arrests.¹²⁷ The protection against unreasonable searches and seizures, provided by the Fourth Amendment, applies only to the last two encounters: Terry stops and arrests.¹²⁸ “Generally, under the Fourth Amendment, an official seizure of a person must be supported by probable cause, even if no formal arrest of the person is made.”¹²⁹ However, the courts recognize several exceptions to that requirement depending on the nature and extent of the intrusion and the government interest involved.¹³⁰

Here, the trial court held McCann’s encounter with the police was a lawful Terry stop. A Terry stop originates from the seminal case, Terry v. Ohio,¹³¹ wherein the Supreme Court held that a brief investigative stop and frisk for weapons does not violate the Fourth Amendment, if the stop is supported by reasonable suspicion. Reasonable suspicion is a far lighter standard than probable cause.¹³² So, a police officer may approach a person, identify herself or himself as a police officer, and ask a few questions without implicating the Fourth Amendment.¹³³ The police must have “a reasonable suspicion grounded in specific and articulable facts, that a person they encounter was involved in or is wanted in connection with a completed felony” before making a Terry stop to investigate that suspicion.¹³⁴

Determining the legitimacy of a Terry stop involves a two-step analysis. The first step asks: is there a proper basis for the stop based on the police officer’s awareness of specific and articulable facts giving rise to reasonable suspicion?¹³⁵ The second step asks: is the degree of intrusion reasonably related in scope to the justification for the stop?¹³⁶

In this case, the police officers were responding to a 911 call from the Pepsi driver who reported that a man had assaulted a woman. Officer Dellacamera testified that McCann fit the description of the suspect, as he was a black man wearing a black toboggan and black vest, who was still present at the gas station. The police had a sufficient reasonable and articulable suspicion to stop McCann to investigate the reported assault and check McCann’s identification, which they did. Thus, the trial court’s findings were supported by substantial evidence to justify the stop of McCann.

Although the trial court found the Terry stop to be justified, it also found the Terry stop to be custodial. This means that McCann was in custody in the gas station, as he did not believe he was free to leave. Thus, the police should have given him a Miranda warning before questioning him.

¹²⁷ See Baltimore v. Commonwealth, 119 S.W.3d 532, 537 (Ky. App. 2003)

¹²⁸ Id.

¹²⁹ Id.

¹³⁰ Id.

¹³¹ 392 U.S. 1, 88 S.Ct. 1868, 20 L.Ed.2d 889 (1968).

¹³² Baltimore, at 537.

¹³³ Id.

¹³⁴ Id., at 538.

¹³⁵ Id.

¹³⁶ Id.

Because the police did not Mirandize McCann, the trial court held McCann's statements should be suppressed. McCann argues that, in the absence of his statements, the police lacked probable cause for his arrest and, because no valid probable cause for arrest existed, there would be no inevitable discovery of the gun, contrary to the trial court's holding.

The "inevitable discovery rule" was adopted by the United States Supreme Court in Nix v. Williams.¹³⁷ In that case, a victim's body was initially discovered as a result of an unlawfully obtained statement from the defendant. However, the body was found within an area already being searched by two hundred volunteers who inevitably would have discovered it in short order, so the body was held to be admissible evidence.¹³⁸ Under this rule, "evidence unlawfully obtained upon proof by a preponderance of the evidence that the same evidence would have been inevitably discovered by lawful means" is permitted.¹³⁹ This rule has been applied to the fruits of illegal searches as well as to the fruits of illegally obtained confessions.¹⁴⁰

On appeal, the Court of Appeals held that the firearm would have inevitably discovered. Officer Dellacamera testified that McCann fit the description of the suspect described by the Pepsi driver. And, when he entered the store, Officer Dellacamera thought McCann was trying to flee out the back, which prompted him to run after McCann yelling, "Sir, Sir, Sir ... Stop." Officer Dellacamera had a lawful basis for stopping McCann. During this stop, the police properly checked his identification and discovered that McCann had an EPO/DVO against him. Even ignoring McCann's statement that his wife had just dropped him off at the gas station or McCann's statements about his relationship with his wife, the police officers were responding to the Pepsi driver's report of an assault by someone who fit McCann's description and then witnessed McCann speak with his wife on the phone. The evidence supports the finding that the police officers knew McCann openly violated the EPO/DVO in front of them, which created sufficient probable cause to arrest him. The police could then search McCann, where they would have inevitably found the gun incident to the valid arrest.

Police are permitted to search a person incident to an arrest. "A police officer in Kentucky is statutorily authorized to conduct a warrantless arrest if the officer either observes the arrestee commit a felony or misdemeanor in the officer's presence or when the officer has probable cause to believe the arrestee has committed a felony."¹⁴¹ Because the police had probable cause to arrest McCann and the gun was found in the search incident to his arrest, the trial court did not err in denying McCann's motion to suppress.

The convictions were affirmed.

¹³⁷ 467 U.S. 431, 435-37, 104 S.Ct. 2501, 2505, 81 L.Ed.2d 377 (1984).

¹³⁸ Id.

¹³⁹ Hughes v. Commonwealth, 87 S.W.3d 850, 853 (Ky. 2002).

¹⁴⁰ Id.

¹⁴¹ McCloud v. Commonwealth, 286 S.W.3d 780, 785 (Ky. 2009); see also KRS 431.005 (allowing a police officer to make an arrest without a warrant when he has probable cause to believe a person being arrested has committed a felony).

Olmeda v. Commonwealth, 2020 WL 1646882 (Ky. App. 2020) – P – NF

FACTS: Olmeda was driving his Chevrolet S-10 truck in Paducah when he was pulled over by Deputy Bobby Cook of the McCracken County Sheriff's Office. Deputy Cook stopped Olmeda for vehicle equipment violations, as Olmeda's truck did not have working brake lights, working taillights, or an illuminated license plate. Olmeda could not produce a driver's license upon Deputy Cook's request. At some point during the stop, the deputy learned Olmeda's license had been suspended. Deputy Cook believed he could smell alcohol coming from the vehicle, and he also thought Olmeda's pupils were dilated. Believing Olmeda may be driving under the influence of alcohol, Deputy Cook called dispatch to request the assistance of a unit trained to detect blood alcohol concentration.

Paducah Police Officer Kevin Collins arrived approximately ten minutes later, and Deputy Sheriff Ronnie Giles arrived shortly thereafter. Officer Collins conducted pre-exit tests on Olmeda and did not find any evidence of alcohol impairment. The deputies conferred with Officer Collins, and the three discussed Olmeda's suspended license. Deputy Giles informed Officer Collins of Olmeda's dilated pupils. Officer Collins had previously overlooked that observation but confirmed it by looking at Olmeda's eyes. At that point, Officer Collins believed it was possible that Olmeda was under the influence of drugs rather than alcohol.

Deputy Giles removed Olmeda from the vehicle and asked Officer Collins to call for a K-9 unit. After doing so, Officer Collins began conducting field sobriety tests on Olmeda. Officer Collins had not finished the tests when the K-9 unit arrived and conducted a sniff search around Olmeda's truck. The dog alerted to the presence of drugs in the vehicle. Upon searching Olmeda's truck, the officers discovered small amounts of marijuana and cocaine in the center console, as well as drug paraphernalia. Deputy Giles then placed Olmeda under arrest and transported him to the jail at approximately 1:12 a.m. Olmeda was ultimately charged with possession of marijuana, first-degree possession of a controlled substance (cocaine), and possession of drug paraphernalia.

Olmeda moved the trial court to suppress evidence found during the warrantless search of his vehicle, arguing that the length of his roadside detention was excessive. Even though the trial court found no evidence that Olmeda's eyes were not dilated and there may have been no justification for the field sobriety tests, it denied the suppression motion because Olmeda would not have been free to leave because he had a suspended license.

A jury convicted Olmeda of all of the charged offenses, and he was sentenced to two years in prison. An appeal followed.

ISSUE: May police detain a suspect during a traffic stop until a K-9 unit could arrive to conduct a sniff upon learning that the suspect was operating the motor vehicle on a suspended license?

HOLDING: Yes. “A police officer is authorized to conduct a traffic stop when he or she reasonably believes that a traffic violation has occurred.”¹⁴² However, “[a]n officer cannot detain a vehicle’s occupants beyond completion of the purpose of the initial traffic stop unless something happened during the stop to cause the officer to have a reasonable and articulable suspicion that criminal activity [is] afoot.”¹⁴³ A traffic stop may not be extended “beyond its original purpose for the sole purpose of conducting a sniff search—not even for a *de minimis* period of time.”¹⁴⁴

Here, the length of the vehicle’s stop was ultimately governed by the fact that Olmeda, even if he were only issued a citation for his offenses, could not legally drive away due to his suspended license. As a result, regardless of whether Olmeda was present, Olmeda’s truck would certainly have remained at the scene long enough for the K-9 unit to arrive.

Moreover, the doctrine of inevitable discovery applies in this case because Olmeda’s lack of a valid license prevented him from driving the vehicle away from the scene. Therefore, the K-9 unit’s discovery of the contraband within Olmeda’s truck was inevitable, regardless of whether the investigation into Olmeda’s sobriety was appropriate. Inevitable discovery applies because “police were not ‘in a better position than they would have been absent the error[.]’”¹⁴⁵

The convictions were affirmed.

Simpson v. Commonwealth, 2020 WL 2095892 (Ky. App. 2020) – NP – NF

FACTS: Just after midnight on January 18, 2018, Officers Harris and Nichols were patrolling Breathitt Avenue in Lexington, Kentucky. They were patrolling the west-end neighborhood of Lexington due to the high criminal activity and increased occurrence of narcotics transactions. While driving, they observed a car with two passengers “circling” the block near Breathitt Avenue and Price Road. It was the only car on the road in the area. When the car turned on to Price Road, Officer Harris noticed its unilluminated license plate and the driver failing to use a turn signal. For these reasons, Officer Harris initiated a stop at the corner of Price Road and De Porres Avenue, and the car travelled approximately 25 yards before pulling over. But during that time, neither Officer Harris nor Officer Nichols saw any furtive or evasive movements from either the driver or the passenger.

Once out of their cruiser, Officers Harris and Nichols walked up to the car. Officer Harris approached the driver’s side and Officer Nichols approached the front passenger’s side. The driver, Keith Byrd, slightly rolled down his window and turned the dome light on in the car. Officer

¹⁴² Commonwealth v. Lane, 553 S.W.3d 203, 205 (Ky. 2018) (citing Commonwealth v. Bucalo, 422 S.W.3d 253, 258 (Ky. 2013)).

¹⁴³ Commonwealth v. Smith, 542 S.W.3d 276, 282 (Ky. 2018) (quoting Turley v. Commonwealth, 399 S.W.3d 412, 421 (Ky. 2013)).

¹⁴⁴ Davis v. Commonwealth, 484 S.W.3d 288, 293 (Ky. 2016).

¹⁴⁵ Johnson v. Commonwealth, 522 S.W.3d 207, 211 (Ky. App. 2017) (quoting Commonwealth v. Elliott, 714 S.W.2d 494, 496 (Ky. App. 1986)).

Harris began a basic line of questioning, i.e., “Do you know why I pulled you over?”; “Where are you going?”; “Where have you been?”; etc. Byrd answered all questions, immediately reached into his glove compartment, and handed Officer Harris his license, registration, and proof of insurance. During the interaction, Byrd infrequently made eye contact with Officer Harris, did not roll his window down completely, and seemed “nervous and confused.” After talking to Byrd, Officer Harris returned to his cruiser to run Byrd’s information and check for warrants.

On the other side of the car, Officer Nichols questioned Simpson. Simpson did not have an identification card on him but gave Officer Nichols his social security number to check. He also answered all of Officer Nichols’s questions. And like Byrd, Simpson also made infrequent eye contact with Officer Nichols. Before returning to the cruiser, Officer Nichols asked Simpson if he “had any priors for narcotics,” and Simpson replied, “No.”

Once both officers were back in the cruiser, Officer Harris entered Simpson’s information for a warrant search, while also accessing the Fayette County Detention Center website to review his criminal history. Officer Harris then began reading Simpson’s prior charges aloud, stating Simpson had a prior second-degree possession of a controlled substance charge. And at that point, Officer Nichols interjected, saying Simpson lied about having prior “dope” charges. Upon learning this information, Officer Harris called in for the canine unit. Quickly after the canine unit arrived, the dog alerted on Byrd’s car. Because of this, the officers searched the car, finding a handgun between the driver’s seat and middle console and cocaine.

The Fayette County Grand Jury indicted Simpson for being a felon in possession of a handgun and carrying a concealed deadly weapon. Simpson moved to suppress evidence recorded from the search of Byrd’s car, arguing the search was unconstitutionally prolonged. The trial court denied the motion to suppress, prompting Simpson to enter a conditional Alford plea to one count of convicted felon in possession of a firearm. An appeal followed.

ISSUE: May a traffic stop be extended to await the arrival of a canine unit based upon a reasonable and articulable suspicion that criminal activity was afoot?

HOLDING: Yes. Under Kentucky law, a lawful traffic stop “can become unlawful if it is prolonged beyond the time reasonably required to issue a traffic citation.”¹⁴⁶ In other words, if an officer unjustifiably extends a traffic stop beyond what is reasonably required to complete the purpose of the stop, it violates the Fourth Amendment’s protection against unreasonable seizures.¹⁴⁷ But if officers have a reasonable suspicion to extend the stop, that suspicion legally permits an extension.¹⁴⁸

¹⁴⁶ Commonwealth v. Smith, 542 S.W.3d 276, 281 (Ky. 2018) (citing Illinois v. Caballes, 543 U.S. 405, 407, 125 S. Ct. 834, 160 L. Ed. 2d 842 (2005)).

¹⁴⁷ Id. (citing Rodriguez v. United States, 575 U.S. 348, 135 S. Ct. 1609, 191 L. Ed. 2d 492 (2015)).

¹⁴⁸ Turley v. Commonwealth, 399 S.W.3d 412, 421 (Ky. 2013).

Courts “consider the totality of the circumstances to determine whether a particularized and objective basis existed for suspecting [an] [a]ppellant of illegal activity.”¹⁴⁹ “[A] reviewing court should not view the factors relied upon by the police officer(s) to create reasonable suspicion in isolation but must consider all of the officer(s) observations and give due regard to inferences and deductions drawn by them from their experience and training.”¹⁵⁰

The Court of Appeals held that Officers Harris and Nichols had a requisite, objective basis to form a reasonable suspicion that criminal activity was afoot. First, Officer Harris testified that he noticed Byrd’s car circling the block on a frigid night, in a high-crime area, after midnight. The mere presence in a high-crime area at night is not *per se* sufficient evidence to justify an investigatory stop and seizure.¹⁵¹ But these circumstances can be used in an officer’s formation of reasonable suspicion when coupled with other conduct and facts.¹⁵²

Second, Byrd took an extended time to pull over after the stop initiated. Officer Harris testified that when he initiated the stop, Byrd continued for 75 more feet down a vacant road and made a turn before finally pulling over. Officer Harris testified that he found the behavior suspicious because in his training and experience, individuals prolong coming to a stop to hide contraband or firearms from law enforcement. The Sixth Circuit has held those circumstances were factors that gave rise to the officer’s reasonable suspicion.¹⁵³

Third, Byrd and Simpson gave conflicting statements and multiple addresses when the officers questioned them. Byrd gave Officer Harris multiple addresses and told him that he picked up Simpson on Price Road. But Simpson indicated that Byrd picked him up on Ash Street. While inconsistencies in testimony are not inherently criminal, it can give rise to reasonable suspicion when combined with other circumstances.

Fourth, Byrd and Simpson made minimal eye contact and seemed nervous while being questioned. While being questioned by Officer Harris, Byrd made infrequent eye contact with him, choosing to look forward more often than looking at Officer Harris. He also seemed nervous and confused throughout the entire interaction. Similarly, Officer Nichols conveyed to Officer Harris that Simpson made minimal eye contact with him, too. Nervous behavior—standing alone—is insufficient to constitute reasonable suspicion, but nervousness is something which may be used as a factor to support the existence of reasonable suspicion.¹⁵⁴

And, fifth, Simpson lied about having prior “dope” charges. Under Kentucky law, lying to an officer during a traffic stop is insufficient grounds for reasonable suspicion.¹⁵⁵ But lying to a police officer about one’s criminal record, when combined with other contributing factors, can give

¹⁴⁹ Moberly v. Commonwealth, 551 S.W.3d 26, 31 (Ky. 2018) (citation omitted).

¹⁵⁰ Baltimore v. Commonwealth, 119 S.W.3d 532, 539 (Ky. App. 2003).

¹⁵¹ Strange v. Commonwealth, 269 S.W.3d 847, 852 (Ky. 2008).

¹⁵² Illinois v. Wardlow, 528 U.S. 119, 124, 120 S. Ct. 673, 676, 145 L. Ed. 2d 570 (2000).

¹⁵³ United States v. Ledbetter, 929 F.3d 338, 347 (6th Cir. 2019).

¹⁵⁴ Frazier v. Commonwealth, 406 S.W.3d 448, 454 (Ky. 2013).

¹⁵⁵ See West v. Commonwealth, 358 S.W.3d 501, 503 (Ky. App. 2012)

grounds for an officer's reasonable suspicion. If anything, the officer is on heightened alert because a defendant lied to them about their criminal history.¹⁵⁶

Based upon the totality of the circumstances, the Court of Appeals held that the officers possessed a reasonable and articulable suspicion that criminal activity was afoot. The Court of Appeals affirmed Simpson's convictions.

Reed v. Commonwealth, 2020 WL 594084 (Ky. App. 2020) – P – NF DR Filed 4/10/2020

FACTS: Reed robbed Caldwell in the parking lot of a Versailles gas station. During his investigation, Versailles Police Officer Lyons obtained a description of the vehicle Reed was driving and Reed's cell phone number and relayed that information to dispatch. Dispatch contacted the cell phone carrier. The cell phone carrier "pinged" the phone, which tracked Reed's location, and relayed that information back to dispatch. Dispatch advised Officer Lyons of the location. Based on this information, Officer Lyons ultimately executed a traffic stop on Reed. During the traffic stop, Lyons smelled marijuana by the open driver's side window. He searched the interior and found marijuana and some cash on the driver's side of the car and a black handgun in the trunk. At no time did Officer Lyons apply for or execute a search warrant for the "pinged" cell phone records.

Reed was charged with one count of first-degree robbery, one count of possession of a handgun by a convicted felon, and one count of receiving stolen property, firearm. Reed's motion to suppress evidence was denied, prompting him to enter a conditional guilty plea to the charges. The trial court sentenced him to seven years' imprisonment. Reed appealed.

ISSUE: Is the Fourth Amendment violated when police use real-time cell site location information (CSLI) to track a suspect's cell phone without first obtaining a warrant based upon probable cause?

HOLDING: Yes. Utilizing the holding of Carpenter v. United States,¹⁵⁷ the Kentucky Court of Appeals extended the same privacy protections of historic CSLI data to the acquisition of real-time CSLI data. Thus, the Court of Appeals held that a warrant is required to acquire real-time CSLI because pinging a cell phone enables the police to almost instantaneously track individuals far beyond the public thoroughfare into areas where the individual would have a reasonable, legitimate expectation of privacy.

The Court of Appeals also held that the good faith exception does not apply to prevent suppression in this case because no binding appellate precedent existed in Kentucky to support the decision of the police to collect Reed's real-time CSLI without a warrant.

Reed's convictions were reversed and the matter was remanded to the trial court for additional proceedings.

¹⁵⁶ See United States v. Mason, 628 F.3d 123 (4th Cir. 2010)

¹⁵⁷ Carpenter v. United States, — U.S. —, 138 S. Ct. 2206, 2220, 201 L. Ed. 2d 507 (2018)

Sadikov v. Commonwealth, 2020 WL 598410 (Ky. App. 2020) – NP – F

FACTS: On the evening of February 3, 2018, three officers of the Newport Police Department responded to a call notifying them that two women had passed out in a car in the Target parking lot in Newport. Sadikov was in the front passenger seat, and the other woman was in the driver's seat. Officer Boshears observed the two women and believed they might be overdosing. Officer Boshears further testified there was an abnormal amount of receipts and tags in the car. He believed the items were signs of "receipt shopping," a common practice in which a person searches trash cans for receipts and attempts to fraudulently return items. Officer White obtained consent to search the vehicle from the driver. Officer Bailey initiated contact with Sadikov and testified he believed she was intoxicated from using opiates or methamphetamine because her pupils were dilated, her behavior was erratic, and she was unable to follow his instructions. Officer Bailey arrested Sadikov for public intoxication, and upon conducting a search incident to arrest, he found methamphetamine in her purse and charged her with first-degree possession of a controlled substance.

Sadikov moved to suppress the evidence obtained as a result of the search. After the trial court denied the motion to suppress, Sadikov entered a conditional guilty plea to public intoxication and first-degree possession of a controlled substance. This appeal followed.

ISSUE: Does a lawful arrest for public intoxication justify a search of that person incident to arrest?

HOLDING: Yes. In this case, Sadikov argues she was unlawfully arrested for public intoxication because she was not manifestly intoxicated, nor a danger to herself or others or unreasonably annoying because she was merely sleeping in the car. Under KRS 525.100(1), a person is guilty of public intoxication when he/she appears in a public place manifestly under the influence of a controlled substance, or other intoxicating substance not therapeutically administered, to the degree that he/she may endanger himself or other persons or property, or unreasonably annoy persons in his/her vicinity.

Here, Sadikov's intoxication was obvious to the arresting officer. Her pupils were dilated, she acted erratically, and she was unable to follow his instructions. The circuit court found she was a danger to herself and would have been a danger to Target property and unreasonably annoying to persons in her vicinity. There was evidence that Sadikov planned to enter Target to fraudulently return items to the store. Sadikov stated on the officer's body camera video that she was going into the store to return a sweatshirt. Thus, the Court of Appeals held that Sadikov was manifestly under the influence of a controlled substance to the degree that she may have engaged in endangering or unreasonably annoying conduct. As such, the circuit court correctly found the officers had probable cause to arrest Sadikov for public intoxication.

As probable cause to arrest occurred, the warrantless search incident to her arrest was reasonable under Arizona v. Gant.¹⁵⁸

The convictions were affirmed.

Whitworth v. Commonwealth, 2020 WL 1970599 (Ky. App. 2020) – NP – NF

FACTS: On October 16, 2017, Detective Mike Lantrip and other officers with the Pennyrile Narcotics Task Force followed a confidential informant (“CI”) to Whitworth’s residence. The CI gave Shane Parker a one-hundred-dollar bill provided to him and documented by the task force. Parker entered Whitworth’s residence and provide the CI with marijuana and methamphetamine. Det. Lantrip and other officers met with the CI while Det. Trent Fox continued surveillance of the residence.

When Det. Lantrip and two other detectives from the task force returned, Det. Fox informed them that over the course of approximately two hours, he had observed numerous vehicles arrive and individuals enter and exit the residence from its back door. The detectives decided to perform a “knock and talk” and approached Whitworth’s back door which, based on Det. Fox’s observations, appeared to be the main entrance of the house. None of the detectives were in uniform or had badges or guns displayed as they approached the residence.

Det. Lantrip knocked on the door, and David Oliver—a convicted felon who had previously worked with Det. Lantrip and Det. Fox—opened the door wide and stepped aside, saying nothing. The detectives stepped inside and smelled marijuana. They then moved to the kitchen area near the back door and saw digital scales, a marijuana pipe, and plastic bags containing marijuana. Whitworth identified himself as the homeowner and was advised of his Miranda rights by Det. Lantrip.

Det. Lantrip asked Whitworth for permission to search the residence. Whitworth consented, stating something to the effect of, “Why not, you’ve already got it.” The detectives searched the remainder of the residence and discovered additional contraband. When the detectives searched Whitworth’s person, they found the money from the controlled buy. Whitworth was arrested and charged with trafficking in a controlled substance, first offense, trafficking in marijuana, more than eight ounces but less than five pounds, first offense, and possession of drug paraphernalia.

Whitworth moved the trial court to suppress “any and all evidence seized as a result of the unlawful search made of his residence.” The trial court denied the motion to suppress. Whitworth was convicted of all charged and appealed.

ISSUE: Does conducting a knock and talk at the back door of a residence unconstitutionally infringe on curtilage if the back door is used as primary access to the residence?

¹⁵⁸ 556 U.S. 332, 129 S. Ct. 1710, 173 L. Ed. 2d 485 (2009).

HOLDING: No. The Kentucky Court of Appeals held that the detectives did not violate Whitworth's reasonable expectation of privacy nor improperly invade the curtilage of the residence because the evidence established that the back door was the primary access to the residence. Utilizing the factors of United States v. Dunn,¹⁵⁹ the Court of Appeals held that the officers conducted the knock and talk in an area where they had a legal right to be.

The search of the house was also found to be lawfully conducted via Whitworth's consent.

The convictions were affirmed.

Wilson v. Commonwealth, 2020 WL 1074836 (Ky. App. 2020) - NP - F

FACTS: Lexington Police Officer Johnson as patrolling his beat with Officer Baker along Ohio Street and more broadly from 3rd Street up to Loudon Avenue, an area of high narcotic use and trafficking with frequent gang activity. Police received a complaint that two male black subjects were smoking marijuana on the steps of the apartment complex on 500 Ohio Street.

Wilson saw Officer Baker and quickly dropped a cigar that he was smoking on the ground between his legs. Officer Baker observed that Wilson had bloodshot eyes, droopy eyelids, and was unsteady and swaying in his seated position. A resident of the apartment complex came out of the top level of the apartment complex, pointed at Wilson and gave a nod to Officer Baker indicating that the seated individual was Wilson, the person observed smoking marijuana. This individual was not contacted by either Officer Johnson or Officer Baker.

Wilson told Officer Baker that he lived on Woodland Avenue and that he was at the apartment complex by himself and did not know anyone residing at the complex. According to Officer Baker, Wilson also said he had no method of transportation to get back home. At this time Officer Baker observed that Wilson was in and out of consciousness and nodding off at various points in the conversation.

Based on his observations and conversation, Wilson appeared to be under the influence of synthetic marijuana. Officer Johnson subsequently placed Wilson under arrest for public intoxication. Officer Baker and Officer Johnson conducted a search incident to arrest and found a .25 caliber handgun in Wilson's front pocket that was loaded with six rounds. An additional three rounds were loose in the pocket of Wilson's cargo pants. The search also yielded a small baggy corner containing 1.1 grams of synthetic marijuana. Officer Baker and Officer Johnson then recovered the cigar Wilson dropped between his legs and found it to be consistent with synthetic marijuana. Officer Johnson believed that Wilson was not in a state to be walking around because

¹⁵⁹ 480 U.S. 294, 107 S.Ct. 1134, 94 L.Ed.2d 326 (1987). In Dunn, the Supreme Court established four analytical, non-exclusive factors which should be applied to solve curtilage questions: the proximity of the area to the home, whether the area is included in an enclosure with the home, how the area is used, and the steps the resident has taken to prevent observation from the people passing by. Because there is no expectation of privacy for anything that can be observed from outside the curtilage, either by sight or other senses, the focus of a knock and talk analysis must be on the right of access to private property within the curtilage.

Wilson did not live near 500 Ohio Street, he was unsteady and would be a danger to himself or others if he were to walk home.

The trial court denied a motion to suppress evidence, prompting Wilson to enter a conditional guilty plea to being a convicted felon in possession of a handgun and second-degree persistent felony offender. The trial court sentenced Wilson to ten years in prison. This appeal followed.

ISSUE: Does a lawful arrest for public intoxication justify a search of that person incident to arrest?

HOLDING: Yes. Under KRS 525.100(1), a person is guilty of public intoxication when he/she appears in a public place manifestly under the influence of a controlled substance, or other intoxicating substance not therapeutically administered, to the degree that he/she may endanger himself or other persons or property, or unreasonably annoy persons in his/her vicinity. Here, Officer Johnson testified that Wilson had droopy eyelids, bloodshot eyes, slurred speech, did not live in the vicinity, was unsteady in a seated position, and nodded off at various points during their conversation. This was sufficient evidence of public intoxication.

KRS 431.015(1)(b)2. permits a peace officer to make a warrantless arrest of a person for a misdemeanor if committed in the officer's presence if the offense is on which the defendant poses a risk of danger to himself, herself, or another person. Based upon the facts, Wilson posed a danger to himself and others.

The convictions were affirmed.

Wright v. Commonwealth, ex rel O'Connell, 2020 WL 116004 (Ky. App. 2020) – NP NF

FACTS: On August 30, 2017, Louisville Metro Police Department Officers Wagner and Greene conducted a traffic stop on National Turnpike in Jefferson County. The officers' vehicles were stopped partly or mostly off the right side of the roadway, with Wagner's vehicle canted at an angle and blocking a portion of the right driving lane. While stopped on the side of the road, the officers observed a 2012 Mazda operated by Wright travelling past them at what the officers would later characterize as a high rate of speed. As Wright passed the stopped police vehicles, Appellant moved his vehicle into the left lane and away from the stopped police vehicles.

Officer Greene pursued Wright for about one mile and initiated a traffic stop. Officer Greene testified that he had to drive up to 80 miles per hour to catch Appellant's vehicle. According to Greene, Wright's breath smelled of alcohol. Greene conducted three field sobriety tests which indicated that Wright was intoxicated. Wright stated that he had consumed four or five beers. Greene arrested Wright and charged him with failure to give right-of-way to an emergency stopped vehicle, and with operating a motor vehicle under the influence of alcohol or drugs, first offense. Wright was not charged with speeding.

The Jefferson District Court suppressed the traffic stop, finding that it was not supported by a reasonable and articulable suspicion of criminality. The district court further found that no

evidence was presented that Wright violated KRS 189.930(5) because the statute does not require a driver to both move over and slow down. The Jefferson Circuit Court granted a writ of mandamus/prohibition preventing the district court from enforcing its order suppressing the stop. An appeal to the Kentucky Court of Appeals followed:

ISSUE: Does traveling at a speed in excess of the post speed limit while peace officers have stopped on the side of the roadway and activated emergency equipment constitute a violation of the duty to yield to emergency vehicles under KRS 189.930(5)?

HOLDING: Yes. A peace officer is permitted to conduct a traffic stop upon probable cause to believe that a traffic violation has occurred.¹⁶⁰ In this case, the officers observed Wright’s vehicle travel at a high rate of speed when he passed their cruisers. This constituted a reasonable and articulable suspicion that Wright failed to yield to an emergency vehicle as required by Kentucky law. Moreover, an arrest may be valid even if the police officer does not charge the suspect with the offense that gave rise to the officer's reasonable, articulable suspicion for the stop.¹⁶¹ Officer Greene's observation of Appellant's speeding constituted probable cause for the traffic stop even though Wright was not subsequently charged with speeding.

The Court of Appeals affirmed the grant of a writ of mandamus/prohibition.

XIX. SUSPECT IDENTIFICATION

Mulazim v. Commonwealth, 2020 WL 2091812 (Ky. 2020) – PUB - NF

On June 15, 2014, Mulazim and Canada robbed Hansford, Smith and Rutherford at gunpoint in their hotel room. During the robbery, Hansford’s .45 caliber Springfield XDS was taken. The victims provided descriptions of the suspects that included clothing type and color, hairstyle, and descriptions of the guns they used. The police later met with the victims to obtain spent casings from the stolen handgun and to present photo lineups. Hansford identified Mulazim from a photo lineup, while Smith identified Canada from the photo lineup. Hansford later identified Mulazim as saying “come on nephew” during the robbery.

Five days later, Megan Price was celebrating her birthday with her husband, Jonathan Price. The couple and a group of their friends met at Austin City Saloon in Lexington. Megan and Jonathan went outside a little after midnight to wait for their ride and two men approached them. Megan described one of the men as having dreadlocks and the other man as being shorter with short hair and a dark shirt. One of the men held a gun to Jonathan’s head and told him to hand over his money, while the other man tugged at Megan’s purse as she tried to hand it over. Megan heard a gunshot and fell, realizing she was shot in the leg. As Megan handed the man with dreadlocks her purse, Jonathan punched the other robber and told Megan to run. Jonathan was

¹⁶⁰ Wilson v. Commonwealth, 37 S.W.3d 745 (Ky. 2001).

¹⁶¹ Devenpeck v. Alford, 543 U.S. 146, 153, 125 S.Ct. 588, 593-94, 160 L.Ed.2d 537 (2004).

also shot, and the man with dreadlocks took his wallet as he fell to the ground. Megan required surgery for her gunshot wound and survived, but Jonathan died from his injuries. A surveillance camera from an adjacent business captured the incident, although the quality of the video played at trial was poor. Megan provided a description of the robbers to the police.

Lexington Police Detective Tim Upchurch was assigned to investigate the Quality Inn robbery. Detective Upchurch entered the serial number of Hansford's stolen Springfield .45 XDS handgun into a national database for stolen weapons. The Bureau of Alcohol, Tobacco and Firearms later recovered Hansford's stolen handgun during a controlled street transaction with a man named Anthony Frye approximately two and a half months after Jonathan Price's murder. Detective Upchurch learned that police believed the same kind of gun stolen at the Quality Inn may have been used in the Austin City Saloon shooting based on the shell casings from the murder scene. Those casings were later compared with casings fired from the recovered handgun. Based on information received, Mulazim and Canada were developed as suspects for the crimes at both the Quality Inn and the Austin City Saloon.

Mulazim and Canada were both charged with the aggravated murder of Jonathan Price, the second-degree assault of Megan Price, and five counts of first-degree robbery, three at the Quality Inn and two at the Austin City Saloon. Mulazim was also charged with tampering with physical evidence.

Prior to trial, Mulazim and Canada filed separate but similar motions to suppress the pre-trial identifications Hansford and Smith made to police, arguing that the photo identification procedures were unduly suggestive and unreliable. Canada argued that the trial court erred by failing to suppress the identification because the photo lineup used an intentionally altered photograph. Specifically, Canada has a small tattoo on his face under his left eye, but the photo of Canada used in the lineup does not show the tattoo.

Officer Dunn testified at the suppression hearing as to how she assembled the photo lineup. Officer Dunn explained that she searched the Fayette County Detention Center website for photos of similar age subjects who had hair, eye color and skin tone comparable to Canada. Officer Dunn testified that Lexington Police guidelines at that time suggested that if a suspect had visible scars or tattoos present then that area of the suspect's face should be obscured in the photo and all subjects in the photo lineup should have the same parts of their faces covered as well. Officer Dunn testified that because another officer gave her the photo of Canada she was unaware at the time she used it that it had been altered.

The trial court denied the motion to suppress, stating the ruling might have been different if the three Quality Inn witnesses identified Canada's photo with absolute certainty. However, Hansford and Rutherford did not identify Canada, and Smith actually selected two photos out of the six photos in the lineup — one of Canada and one of a man incarcerated at the time of the crimes. He wrote "Number 2 & 5 look most like the man with the dreads that robbed me at gunpoint. If I saw them in person I could make a distinction from there and saw (sic) how tall they

were.” The trial court found that the photo lineup was not unduly suggestive and admitted Smith’s pre-trial identification.

At trial, Smith testified that he identified two individuals in the photo lineup that looked like the man with dreadlocks that robbed him at gunpoint and further stated that he had told the police he would be better able to distinguish the men if he could see how tall they were. At that point, the Commonwealth directed Smith’s attention to Canada, sitting in the courtroom, and Smith confirmed that he was the one who robbed him. Canada fully cross-examined Smith about his in-court identification and his failure to identify Canada in the photo lineup prior to trial. Smith admitted that he did not say anything to the police about either of the robbers having a facial tattoo. Canada also introduced an expert who testified about the difficulty of cross-racial eyewitness identifications, and who cast doubt on the reliability of in-court identifications.

Canada was acquitted of all charges related to the events at Austin City Saloon, but the jury found him guilty of three counts of first-degree robbery at the Quality Inn and of being a first-degree PFO. Canada received a sentence of fifty years on each count to run concurrently. The jury convicted Mulazim of the three robbery charges related to the Quality Inn incident, tampering with physical evidence, and of being a first-degree PFO. He received a sixty-year sentence. The jury could not reach a decision about Mulazim’s guilt on any of the charges related to the Austin City Saloon incident. Both Canada and Mulazim appealed.

ISSUE: Is the inclusion of an intentionally altered photograph of a defendant, specifically the removal of the defendant’s facial tattoo, in a photo lineup unduly or impermissibly suggestive?

HOLDING: No. This cases presented an issue of first impression in Kentucky as the sole issue here is the alteration of Canada’s photograph to remove his facial tattoo.

Determining whether identification testimony violates a defendant's due process rights requires a two-step process:

First, the court determines if the identification procedures were impermissibly suggestive. If they were not, then the admission of evidence based thereon does not violate the Due Process Clause, and the inquiry is at an end. If the procedures were unduly suggestive, then the court moves to the second step of the test and determines whether, in light of the totality of the circumstances, the suggestive procedures created a very substantial likelihood of irreparable misidentification.¹⁶²

Under the specific circumstances in this case, the Kentucky Supreme Court found that the identification procedures were not unduly suggestive because Smith was unable to definitively

¹⁶² Duncan v. Commonwealth, 332 S.W.3d 81, 95 (Ky. 2010).

identify Canada's photo as that of the man who robbed him. Smith merely reduced the field of photos from six to two. "The key to the first step is determining whether Appellant stood out of the lineup so much that the procedure was unduly suggestive."¹⁶³ Canada's photo does not stand out of the photo lineup. The fact that the other two victims, Hansford and Rutherford, were not able to identify Canada in the photo lineup, further establishes that it was not unduly suggestive.

Ultimately, a determination as to whether a photo lineup is unduly suggestive will be determined on a case by case basis. Here, the lineup would have most likely been challenged as impermissibly suggestive if police left the tattoo on Canada's face because he undoubtedly would have stood out in the lineup. The Kentucky Supreme Court did not address a better alternative as that issue was not before it. Yet, it was noted that participants in lineups inevitably will have differing facial characteristics. It will be difficult, and perhaps impossible, for law enforcement officers to obtain photographs of virtually identical individuals, especially considering the various forms of distinguishing marks, features, and tattoos a person may have.

Digital alteration of photos used in eyewitness identification lineups is a relatively new practice and there is little guidance as to what constitutes a permissible alteration. While facial tattoos are uncommon, many individuals may have other identifying marks on their faces, such as scars, birthmarks, or piercings. These types of features can make it increasingly difficult for law enforcement officers to find similar filler photos when preparing photo lineups. However, a defendant need not be surrounded by individuals nearly identical to him to render a pre-trial lineup and identification admissible. The ultimate concern is whether the manipulation of the defendant's photo resulted in an impermissibly suggestive identification procedure. Here, the Kentucky Supreme Court held that this procedure was not impermissibly or unduly suggestive.

The convictions were affirmed.

Torrence v. Commonwealth, 2020 WL 1303912 (Ky. 2020) – PUB - MFR

FACTS: On May 17, 2016, Torrence shot Thomas on 26th Street in Louisville. The shooting left Thomas paralyzed below the waist. Thomas knew the individual who shot him as "Man-Man."

While at the hospital on May 26, Torrence was visited by his sister and girlfriend, who showed Thomas a single photo of Torrence that was downloaded from a social media post. Shortly thereafter on the same day, Thomas reviewed a police-generated six-photo array and picked Torrence as the shooter. The photo array was a standard police array containing six facial photographs including head and neck, all made in front of a grey background. Six African-American men are shown wearing black T-shirts and are approximately the same age. Three of the men have facial hair ranging from a goatee to a slight beard, and all six have mustaches. Skin color in the photos ranges from three with darker tones to three with lighter tones. No photograph has any special or unique features or attributes that draw attention to it. After

¹⁶³ Oakes v. Commonwealth, 320 S.W.3d 50, 57 (Ky. 2010).

identifying Torrence, Detective Snider (Louisville PD) collected the single photograph of Torrence from Thomas's family and placed it in the police file. The evidence does not indicate that police requested Thomas's family to show him the single photograph.

Torrence raised no issue with the photo array photos, but objected to the identification made from the array by Thomas after he was shown a single photo of Torrence by his sister or girlfriend as they visited him in the hospital. A black and white copy of the single photo collected by Detective Snider from Thomas's family was admitted into evidence and shows Torrence sitting in a vehicle wearing a hat and track suit, his face clearly visible. The circuit court rejected the challenge to the identification from the photo array.

ISSUE: Is a suspect identification that occurs from a police photo array that occurs following a witnesses being presented by family with a single photo of the subject a procedure so suggestive as to render any identifications unreliable?

HOLDING: No. State action is required for the trial court to exclude an identification procedure. A due process check on the admission of eyewitness identification is applicable when the police have arranged suggestive circumstances leading to an identification by an eyewitness. The United States Supreme Court has not extended pretrial screening for reliability of identification to situations not arranged by law enforcement.¹⁶⁴ In this case, the single photograph was presented to Thomas by his family, not a government agent. There is no evidence that the family acted at police behest.

The convictions were affirmed.

XX. USE OF FORCE – SELF-DEFENSE

Curry v. Commonwealth, ---- S.W.3d ----, 2020 WL 2831836 (Ky. 2020) – P – NF

FACTS: Curry, a convicted felon who was in the custody of the Louisville Metro Department of Corrections' home incarceration program, shot Harris to death at the apartment that they shared. Curry claimed that Harris was getting aggressive with him and "started talking crazy to him." Testimony from other witnesses revealed that Curry requested a peace officer to return him to jail rather than remain on home incarceration, and when that failed had a gun brought to him from his mother's house, along with 9 bullets. Curry was convicted of murder, being a felon in possession of a firearm, and being a persistent felony offender in the first degree. Curry appealed, arguing that the trial court failed to instruct the jury that he was not required to retreat prior to using force against Harris.

ISSUE: Is a criminal defendant entitled to an instruction on no duty to retreat in a murder prosecution when the defendant was engaged in an unlawful activity at the time

¹⁶⁴ Perry v. New Hampshire, 565 U.S. 228, 237, 132 S.Ct. 716, 181 L.Ed.2d 694 (2012).

of the shooting, even though the defendant was lawfully at the location of the shooting and the evidence otherwise supported the instruction?

HOLDING: No. KRS 503.055(3) requires both that a defendant is “not engaged in unlawful activity” and “is attacked in any other place where he or she has a right to be” before the provisions of that statute apply. While Curry was lawfully in Harris’ apartment, the trial court declined to give Curry a no duty to retreat instruction because it found that he was a convicted felon in possession of a firearm, which is unlawful under Kentucky law.

The Kentucky Supreme Court affirmed the convictions.

Williams v. Commonwealth, 2020 WL 1303610 (Ky. 2020) – NP - F

FACTS: On August 1, 2017, Broadus and Chaney went to East 13th Street in Covington. On arrival, Broadus and Chaney saw Williams with a group of people. Williams and Broadus had a disagreement in the past, so Broadus contacted Bandy and Pouncey to the scene. Bandy and Pouncey arrived. Pouncey exited the vehicle, brandishing a firearm. Bandy walked up to Broadus and asked what was wrong. Broadus revealed that Williams owed Broadus money. At this point, an argument ensued between Williams and Broadus over the alleged debt. Broadus threw a bottle and gestured as if he had a gun. Williams knew that Broadus usually carried a firearm. The dispute escalated with Williams Bandy obtaining Pouncey’s firearm. Williams ultimately shot Bandy in the back of the head, killing him. Williams then chased Broadus, shooting him five times in the right shoulder, right arm, left shoulder and then stood over Broadus and shot him in the face. Williams fled the scene. Broadus was taken to a local hospital where he had a breathing tube inserted. Broadus survived. The incident was recorded by two security cameras. Williams later confessed to shooting Broadus and Bandy.

Williams was convicted of first-degree manslaughter and attempted murder. The circuit court sentenced Williams to a total of thirty-five years’ imprisonment. Williams appealed to the Kentucky Supreme Court.

ISSUES:

1. Is a defendant entitled to a “no duty to retreat” instruction if the facts demonstrate that the defendant was not attacked?
2. Is a defendant entitled to an instruction on extreme emotional disturbance (EED) if provoked by an unrelated event?

HOLDINGS:

1. No. Self-defense is based on the subjective standard, that force is justifiable if the defendant, correctly or incorrectly, believes force is necessary. In contrast, the “no duty to retreat” statute is based on an objective standard, in determining when a defendant has the right to stand his ground and meet force with force.¹⁶⁵ To obtain a “no duty to retreat instruction,” a defendant must show that he was attacked.

¹⁶⁵ Commonwealth v. Hasch, 421 S.W.3d 589, 594 (Ky. 2013).

In this case, no evidence exists that Williams was attacked by Bandy, Pouncey or Broadus. Accordingly, the trial court had no duty to instruct the jury on a theory unsupported by the facts of the case.

2. No. An EED defense requires “adequate provocation” for the action – or a “triggering event” that caused the action. In this case, Williams claims that he shot Bandy first because he had been robbed in June 2016, thus causing him to act uncontrollably. The evidence, however, showed that Williams made the conscious decision to shoot Bandy in the back of the head, with this decision made before Williams actually believed he would be shot. Moreover, the unrelated robbery occurred over a year prior to the incident with Broadus and Bandy. Thus, the evidence did not warrant an EED instruction.

The convictions were affirmed.

SIXTH CIRCUIT COURT OF APPEALS

I. ADMINISTRATIVE LAW

A. AGE DISCRIMINATION IN EMPLOYMENT ACT

Miles v. South Central Human Resource Agency, 946 F.3d 883 (6th Cir. 2020) – F

FACTS: South Central Human Resource Agency (SCHRA), a public nonprofit, terminated Cynthia Miles’s at-will employment after an investigation uncovered several financial deficiencies and abuse business practices between a contractor and SCHRA. Miles directly supervised some of these programs targeted by the investigation. Miles was not given a reason for her termination other than she was being terminated “at-will.”

In response to the termination of her employment, Miles filed an age discrimination complaint with the Equal Employment Opportunity Commission (“EEOC”). In response to the complaint, SCHRA stated that Miles was terminated because of her implication in misconduct by the Comptroller’s report and her toxic relationship with her subordinates. The EEOC granted Miles a right to sue under the ADEA and she filed her complaint in district court. During discovery, SCHRA reaffirmed that it terminated Miles because of her implication in misconduct by the Comptroller’s report and her toxic relationship with her subordinates.

SCHRA filed a motion for summary judgment, which the trial court granted. Miles appealed.

ISSUE: For an employee to assert a valid claim under the Age Discrimination in Employment Act (ADEA), is the employee required to prove by a preponderance of the evidence (direct or circumstantial) that age was the “but-for” cause of the challenged employment action?

HOLDING: Yes. An “employer may fire an employee for a good reason, a bad reason, a reason based on erroneous facts, or for no reason at all, as long as its action is not for a discriminatory

reason.”¹⁶⁶ The ADEA only prevents employers from terminating an employee “because of such individual’s age.”¹⁶⁷ In interpreting that language the Sixth Circuit has stated: “it is not sufficient for the plaintiff to show that age was a motivating factor in the adverse action; rather, the ADEA’s ‘because of’ language requires that a plaintiff ‘prove by a preponderance of the evidence (which may be direct or circumstantial) that age was the “but-for” cause of the challenged employer decision.””¹⁶⁸ Miles does not try to satisfy her burden with direct evidence. Instead, she relies on circumstantial, or indirect, evidence. In evaluating indirect evidence claims under the ADEA, this court uses the well-established McDonnell Douglas¹⁶⁹ burden-shifting framework.

McDonnell Douglas first requires the plaintiff to establish a prima facie case of discrimination. If she can, the burden shifts to the defendant, who must produce legitimate, nondiscriminatory reasons for the adverse employment action. And if the employer can produce those reasons, the burden shifts back to the plaintiff to establish that the proffered reasons are simply pretext for age discrimination. If the plaintiff satisfies this third step, the factfinder may reasonably infer discrimination. SCHRA conceded that Miles can establish a prima facie case of age discrimination as her replacement was twenty years younger, and Miles does not contest the legitimacy or nondiscriminatory nature of the reasons SCHRA offers as motivation for her firing. So this appeal presented one question: is there a genuine dispute about whether SCHRA’s proffered rationales for Miles’s termination were pretextual?

To satisfy her burden and survive summary judgment, Miles must “produce sufficient evidence from which a jury could reasonably reject [SCHRA’s] explanation of why it fired her.”¹⁷⁰ This “is a commonsense inquiry: did the employer fire the employee for the stated reason or not?”¹⁷¹ And ultimately, this burden merges with Miles’s overall burden of proving discrimination.¹⁷² Plaintiffs typically show pretext in the following manner: “(1) that the proffered reasons had no basis in fact, (2) that the proffered reasons did not actually motivate the employer’s action, or (3) that the proffered reasons were insufficient to motivate the employer’s action.”¹⁷³ Regardless of the manner chosen, a plaintiff must articulate some cognizable explanation of how the evidence she has put forth establishes pretext and that the true motive was age discrimination. Miles simply failed to do this or offer anything that rebutted SCHRA’s justification for ending the employment relationship.

The Sixth Circuit affirmed summary judgment for SCHRA.

¹⁶⁶ Nix v. WLCY Radio/Rahall Commc’ns, 738 F.2d 1181, 1187 (11th Cir. 1984).

¹⁶⁷ 29 U.S.C. § 623(a)(1).

¹⁶⁸ Scheick v. Tecumseh Pub. Sch., 766 F.3d 523, 529 (6th Cir. 2014) (quoting Gross v. FBL Fin. Servs., Inc., 557 U.S. 167, 177–78, 129 S.Ct. 2343, 174 L.Ed.2d 119 (2009)).

¹⁶⁹ McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802, 93 S.Ct. 1817, 36 L.Ed.2d 668 (1973).

¹⁷⁰ Chen v. Dow Chemical Co., 580 F.3d 394, 400 (6th Cir. 2009) (citation omitted).

¹⁷¹ Id. at 400 n.4.

¹⁷² Provenzano v. LCI Holdings, Inc., 663 F.3d 806, 812 (6th Cir. 2011).

¹⁷³ Chen, 580 F.3d at 400.

Sukari v. Akebono Brake Corp., ---- Fed. Appx. ----, 2020 WL 2787698 (6th Cir. 2020) – NF

FACTS: Sukari, an employee of the Human Resources Department at Akebono Brake, suffered from osteoarthritis. During bad episodes, she can barely move. Sukari requested and received accommodations from Akebono, including use of a standing desk at work as well as Family Medical Leave arrangements, which allowed her to request intermittent FMLA leave.

Sukari’s two-year tenure at Akebono was marked by severe attendance issues. At the beginning of her tenure, she showed up two days late for her first day. Her performance evaluations noted that attendance only “partially meets expectations.”

Sukari’s supervisor and the Human Resources director attempted to meet with Sukari concerning her time and attendance issues, but Sukari missed the first meeting. During the second meeting, Sukari’s supervisor advised that her twelve absences exceeded the five “absent-salary days” permitted by policy. Thereafter, Sukari left work without permission prior to her scheduled vacation. Further, she failed to timely return from her vacation.

At this point, Akebono terminated Sukari’s employment due to the time and attendance issues. Sukari filed a lawsuit, alleging that her termination was based upon her osteoarthritis in violation of the Americans with Disabilities Act, and in retaliation for exercising her rights under the FMLA. The district court granted summary judgment to Akebono on all claims. On appeal, Sukari challenges the district court’s findings that (1) Akebono did not violate the ADA when it terminated Sukari, (2) Akebono did not fail to accommodate Sukari in violation of the ADA, and (3) Akebono did not retaliate against Sukari for exercising her rights under the FMLA. This appeal followed.

ISSUE: Does an employer violate the Americans with Disabilities Act for terminating an employee who has a disability based upon documented time and attendance issues that are unrelated to the disability?

HOLDING: No. The Sixth Circuit held that Sukari failed to establish an ADA-based discrimination claim. Under the ADA, an employee is replaced only where another employee is hired or reassigned to perform the terminated employee’s duties.¹⁷⁴ In this case, Sukari’s duties were distributed to other employees currently employed by Akebono. Where a plaintiff’s roles and responsibilities are re-assigned or redistributed among current employees—as opposed to reassigned completely to one other employee—the position is not considered “replaced.”¹⁷⁵

With respect to her failure to accommodate claim, Sukari must show: “(1) she [is] disabled ...; (2) she [is] otherwise qualified for her position, with or without reasonable accommodation; (3) [Akebono] knew or had reason to know about her disability; (4) she requested an accommodation; and (5) [Akebono] failed to provide the necessary accommodation.”¹⁷⁶ Here,

¹⁷⁴ Webb v. ServiceMaster BSC LLC, 438 F. App’x 451, 454 (6th Cir. 2011)

¹⁷⁵ Id.

¹⁷⁶ Brumley v. UPS, 909 F.3d 834, 839 (6th Cir. 2018).

Sukari never requested an accommodation. Even if she requested an accommodation, she failed to demonstrate that she was qualified for the position. These facts are fatal to the failure to accommodate claim.

With respect to retaliation under the FMLA, Sukari must show: “(1) [she] was engaged in an activity protected by the FMLA; (2) [Akebono] knew that she was exercising her rights under the FMLA; (3) after learning of [Sukari]’s exercise of FMLA rights [Akebono] took an employment action adverse to her; and (4) there was a causal connection between the protected FMLA activity and the adverse employment action.”¹⁷⁷ Sukari satisfied the first two elements – she requested FMLA leave on January 15, was approved on January 30, and discharged on March 1. She is unable, however, to demonstrate a causal connection between the FMLA request and her termination because Sukari’s recurring attendance issues culminated in her unauthorized extension of her scheduled vacation, two days on the front end, and two days on the back, all of which occurred after her request for FMLA coverage. Thus, the retaliation claim fails.

The Sixth Circuit affirmed the district court’s summary judgment for Akebono.

Willard v. Huntington Ford, Inc., 952 F.3d 795 (6th Cir. 2020) – F

FACTS: Willard was a car salesperson for Huntington Ford from 2005-2016. During this time, he was one of Huntington Ford’s top producing salespersons. Willard’s success won him one of the most visible, and hence desirable, desks in the dealership’s showroom, near the door where customers entered, and Willard took full advantage of this prime location. Other employees considered Willard to be “abrasive,” and “a bully.” Willard’s supervisors routinely asked him when he was going to retire, and used ageist insults against Willard, including “grandpa,” “dinosaur,” and “over the hill.” One of the sales managers also overtly favored younger employees.

Willard only received formal discipline twice, but a physical altercation between Willard and another employee led to Willard being suspended for a week for aggressive behavior. Willard refused to sign the Employee Warning Notice presented to him because it did not state the length of the suspension or the return date. Willard did not report for work for a week. Upon Willard’s return to work, his employment was terminated because of his failure to return to work or call in. Willard’s sales managers also advised him that the termination was also partly because of the physical altercation. Willard was 63 years of age at the time of these events. Willard was replaced with two other employees who were 56 and 52 years of age.

Willard sued under the Age Discrimination in Employment Act of 1967 (“ADEA”), alleging that Huntington Ford seized upon the physical altercation and misled him about the length of his suspension so that it could terminate him because of his age. The district court granted summary judgment for Huntington Ford. This appeal followed.

¹⁷⁷ Donald v. Sybra, Inc., 667 F.3d 757, 761 (6th Cir. 2012)

ISSUE: For an employee to assert a valid claim under the Age Discrimination in Employment Act (ADEA), is the employee required to prove by a preponderance of the evidence (direct or circumstantial) that age was the “but-for” cause of the challenged employment action?

HOLDING: Yes. Pursuant to the ADEA, employers may not terminate an individual “because of such individual’s age.”¹⁷⁸ A plaintiff may present either direct or indirect evidence to prove an ADEA violation.¹⁷⁹ No matter the type of evidence presented, the plaintiff retains the burden of persuasion to demonstrate “by a preponderance of the evidence ... that age was the ‘but-for’ cause of the challenged employer decision.”¹⁸⁰

ADEA claims relying on indirect evidence of age discrimination are analyzed under the McDonnell Douglas Corp. v. Green,¹⁸¹ burden-shifting framework. A plaintiff establishes his prima facie case under the ADEA by showing that (1) he is a member of a protected group, (2) he was qualified for the position in question, (3) his employer took an adverse employment action against him, and (4) there are “circumstances that support an inference of discrimination.”¹⁸² Willard was a member of a protected group because he was over the age of forty, he was qualified for the position of new-car salesperson; and his termination was an adverse employment action, and so only the fourth factor is disputed. The Sixth Circuit concluded that Willard presented evidence to establish the fourth factor of his prima facie case because he points to evidence that Huntington Ford replaced him with a younger new-car salesperson after he was discharged and that younger salespersons were treated better.

Next, the burden shifts to Huntington Ford to offer legitimate, non-discriminatory reasons for Willard’s termination. Huntington Ford offers three. First, Willard did not show up for work on Monday, December 26, 2016, and Tuesday, December 27, 2016, or call to explain his absences. Second, the physical altercation with another employee was sufficient alone to justify his termination. And third, Willard had previous written and verbal disciplinary warnings. Huntington Ford has satisfied its burden.

Finally, Willard must demonstrate that the Huntington Ford’s reasons for terminating him are merely pretextual. “An employee may show that an employer’s proffered reason for terminating him was pretext by demonstrating ‘that the proffered reason (1) has no basis in fact, (2) did not actually motivate the defendant’s challenged conduct, or (3) was insufficient to warrant the challenged conduct.’”¹⁸³ The Sixth Circuit held that a jury could reasonably reject Huntington Ford’s proffered reasons for terminating him and could determine that his age was the but-for cause of his termination, based upon the facts that he was provided a warning notice with no

¹⁷⁸ 29 U.S.C. § 623(a)(1).

¹⁷⁹ Geiger v. Tower Auto., 579 F.3d 614, 620 (6th Cir. 2009)

¹⁸⁰ Gross v. FBL Fin. Servs., Inc., 557 U.S. 167, 177–78, 129 S.Ct. 2343, 174 L.Ed.2d 119 (2009)

¹⁸¹ 411 U.S. 792, 93 S.Ct. 1817, 36 L.Ed.2d 668 (1973).

¹⁸² Blizard v. Marion Technical College, 698 F.3d 275 (6th Cir. 2012).

¹⁸³ Pierson v. Quad/Graphics Printing Corp., 749 F.3d 530 (6th Cir. 2014).

suspension length or return date, that the physical altercation events may not have been entirely his fault, the comments made by his superiors relating to his age, and that his disciplinary history was distant from his termination.

The Sixth Circuit reversed and remanded the matter for additional proceedings.

B. AMERICANS WITH DISABILITIES ACT

Fisher v. Nissan North America, Inc., 951 F.3d 409 (6th Cir. 2020) – F

FACTS: Fisher began working on Defendant Nissan North America’s factory floor in 2003. Approximately 12 years later, Fisher went on extended leave for severe kidney disease and, ultimately, a kidney transplant. When he returned to work, he was still recovering from the transplant, and his attendance suffered. Fisher proposed several different accommodations, some of which were not provided. When he received a final written warning about his attendance, he left work and did not return. Fisher filed suit, centrally claiming that Nissan failed to accommodate his disability and to engage in the interactive process, as required by the Americans with Disabilities Act (ADA), 42 U.S.C. § 12101 et seq. The district court granted summary judgment to Nissan.

- ISSUES:**
1. When a claimant alleges that an employer failed to offer a reasonable accommodation under the ADA, must the claimant provide direct evidence of discrimination under the ADA?
 2. Does an employee’s absences render that employee unqualified for the position if the absenteeism is caused by an employer’s underlying failure to accommodate a disability?
 3. Does the ADA require employers to make reasonable accommodations to an employee to a qualified individual with a disability?
 4. Under the ADA, must the employer engage in an interactive process with the employee to determine how best of accommodate the employee’s disability?

HOLDING: 1. Yes. The ADA, codified in 42 U.S.C. § 12101(a)(8), was enacted in response to congressional findings highlighting “the continuing existence of unfair and unnecessary discrimination and prejudice [that] denies people with disabilities the opportunity to compete on an equal basis.” When the Act was amended in 2008, “Congress reasserted its goal of ‘provid[ing] clear, strong, consistent, enforceable standards’ to implement a ‘comprehensive national mandate for the elimination of discrimination against individuals with disabilities.’”¹⁸⁴ To that end, the ADA prohibits “discriminat[ion] against a qualified individual on the basis of

¹⁸⁴ Hostettler v. Coll. of Wooster, 895 F.3d 844, 849 (6th Cir. 2018) (alteration in original) (quoting 42 U.S.C. § 12101(b)(1), (2)).

disability.”¹⁸⁵ The Act’s broad definition of discrimination includes “not making reasonable accommodations to the known physical or mental limitations of an otherwise qualified individual with a disability who is an applicant or employee, unless such covered entity can demonstrate that the accommodation would impose an undue hardship on the operation of the business of such covered entity.”¹⁸⁶

Under the direct-evidence framework, an employee bears the burden of establishing (1) that he is disabled, and (2) that he is “ ‘otherwise qualified’ for the position despite his or her disability: (a) without accommodation from the employer; (b) with an alleged ‘essential’ job requirement eliminated; or (c) with a proposed reasonable accommodation.”¹⁸⁷ Employers bear the burden of “proving that a challenged job criterion is essential, and therefore a business necessity, or that a proposed accommodation will impose an undue hardship.”¹⁸⁸ Notably, although “[a] defendant may use a legitimate, nondiscriminatory rationale as a shield against indirect or circumstantial evidence of discrimination,” such a “neutral policy is of no moment” under the direct test.¹⁸⁹ In other words, an employer “may not illegitimately deny an employee a reasonable accommodation” pursuant to “a general policy and use that same policy as a” so-called “neutral basis for firing him.”¹⁹⁰

2. No. An employee’s absences does not render that employee unqualified for the position if the absenteeism is caused by an employer’s underlying failure to accommodate a disability. In this situation, Fisher’s absences were caused by his kidney issues. Therefore, the analysis shifts to whether a reasonable accommodation would avoid the absences.

3. Yes. The ADA requires employers to “mak[e] reasonable accommodations.”¹⁹¹ The plaintiff bears the initial burden of showing “that an ‘accommodation’ seems reasonable on its face, i.e., ordinarily or in the run of cases.”¹⁹² The defendant then must show either “special (typically case-specific) circumstances that demonstrate undue hardship in the particular circumstances,”¹⁹³ or that the proposed accommodation eliminates an essential job requirement.¹⁹⁴ The reasonableness of a proposed accommodation is a question of fact.¹⁹⁵

In this case, Fisher requested to be transferred to more suitable positions, but Nissan provided no assistance or explanation for denial of his requests. 42 U.S.C. § 12111(9)(B) defines reasonable accommodation to include “reassignment to a vacant position.” To show disability discrimination

¹⁸⁵ 42 U.S.C. § 12112(a).

¹⁸⁶ *Id.* § 12112(b)(5)(A); see also *Kleiber v. Honda of Am. Mfg.*, 485 F.3d 862, 868 (6th Cir. 2007).

¹⁸⁷ *Kleiber*, 485 F.3d at 869.

¹⁸⁸ *Id.*

¹⁸⁹ *EEOC v. Dolgencorp, LLC*, 899 F.3d 428, 435 (6th Cir. 2018).

¹⁹⁰ *Id.*

¹⁹¹ 42 U.S.C. § 12112(b)(5)(A); see also *Kleiber*, 485 F.3d at 868.

¹⁹² *U.S. Airways, Inc. v. Barnett*, 535 U.S. 391, 401, 122 S.Ct. 1516, 152 L.Ed.2d 589 (2002).

¹⁹³ *Id.* at 402, 122 S.Ct. 1516,

¹⁹⁴ *Kleiber*, 485 F.3d at 869.

¹⁹⁵ *Cassidy v. Detroit Edison Co.*, 138 F.3d 629, 634 (6th Cir. 1998).

in the reassignment context, a plaintiff must show either that “he requested, and was denied, reassignment to a position for which he was otherwise qualified” or that “he requested and was denied some specific assistance in identifying jobs for which he could qualify.”¹⁹⁶ If an employee requests assistance in identifying vacant positions—even a request as generic as “I want to keep working for you—do you have any suggestions?”—then “the employer has a duty under the ADA to ascertain whether he has some job that the employee might be able to fill.”¹⁹⁷ The employee is not required to use magic words such as “accommodation” and “disability”; rather, we ask whether “a factfinder could infer that [the interaction] constituted a request for an accommodation.”¹⁹⁸ Then, “to overcome summary judgment, the plaintiff generally must identify the specific job he seeks and demonstrate that he is qualified for that position.”¹⁹⁹

When an employee requests a reasonable accommodation, the employer must engage in three steps: (1) “identify the full range of alternative positions for which the individual satisfies the employer’s legitimate, nondiscriminatory prerequisites”; (2) “determine whether the employee’s own knowledge, skills, and abilities would enable her to perform the essential functions of any of those alternative positions, with or without reasonable accommodations”; and (3) “consider transferring the employee to any of these other jobs, including those that would represent a demotion.”²⁰⁰ If a transfer is requested, the position to which the transfer is requested must be vacant. Upon completing the three-step analysis, the employer then is afforded an opportunity to show that Fisher’s transfer request would create an undue hardship or remove an essential function of the job.²⁰¹

4. Yes. Once an employee requests an accommodation, the employer has a duty to engage in an interactive process.²⁰² From that point, “both parties have a duty to participate in good faith.”²⁰³ Once the employee “establishes a prima facie showing that he proposed a reasonable accommodation,”²⁰⁴ “the employer has the burden of showing how the accommodation would cause an undue hardship.”²⁰⁵ If the interactive process was triggered but not successfully resolved, “courts should attempt to isolate the cause of the breakdown and then assign responsibility.”²⁰⁶ For example, though an employer is not required to propose counter accommodations, such a proposal may be “evidence of good faith.”²⁰⁷ On the other hand, an

¹⁹⁶ Burns v. Coca-Cola Enterprises Inc., 222 F.3d 247, 258 (6th Cir. 2000).

¹⁹⁷ Id., at 257.

¹⁹⁸ Smith v. Henderson, 376 F.3d 529, 535 (6th Cir. 2004).

¹⁹⁹ Kleiber, 485 F.3d at 870.

²⁰⁰ Burns, 222 F.3d at 257

²⁰¹ Kleiber, 485 F.3d at 869.

²⁰² Hostettler, 895 F.3d at 857.

²⁰³ Kleiber, 485 F.3d at 871.

²⁰⁴ Rorrer v. City of Stow, 743 F.3d 1025, 1041 (6th Cir. 2014).

²⁰⁵ Jakubowski v. Christ Hosp., Inc., 627 F.3d 195, 202–03 (6th Cir. 2010).

²⁰⁶ Kleiber, 485 F.3d at 871

²⁰⁷ Jakubowski, 627 F.3d at 203.

employer who “determine[s] what accommodation it [is] willing to offer before ever speaking with” the employee does not participate in good faith.²⁰⁸

In this situation, Nissan did take steps to facilitate Fisher’s transition upon his return to work after surgery by transferring him to a vacant position in the Closures department. When this position proved more strenuous than Fisher’s previous position, Nissan obliged with an extension of leave. This demonstrated Nissan’s participation in the interactive process. When Fisher began missing work and asked for another accommodation, Nissan did not engage in the process with Fisher.

The Sixth Circuit found that summary judgment was prematurely granted for Nissan and remanded the matter to the district court for additional proceedings.

Tchankpa v. Ascena Retail Group, Inc., 951 F.3d 805 (6th Cir. 2020) – F

FACTS: Kassi Tchankpa suffered a serious shoulder injury while employed by Ascena Retail Group, Inc. (Ascena). The injury occurred in December 2012 while carrying transporting laptops. Tchankpa requested a work-from-home accommodation wherein he could telecommute three days per week. Ascena requested medical documentation linking his injured shoulder and his work-from-home request. Tchankpa did not provide this documentation until October 2013. The doctor’s note stated that Tchankpa could perform his job so long as he could take intermittent breaks and not lift more than ten pounds. Tchankpa ultimately engaged in heated conversations with his superiors and ultimately resigned his employment. The resignation letter complained that Ascena failed to provide Tchankpa ample professional training or appreciate his work. Even after Tchankpa gave his two-weeks’ notice, Ascena followed up on his potential leave of absence. All in all, Tchankpa left his job voluntarily and then sued Ascena in September 2016 alleging disability discrimination under the Americans with Disabilities Act (ADA). The district court granted Ascena’s motion for summary judgment and dismissed the matter. Tchankpa appealed.

ISSUE: Under the ADA, may an employer request documentation supporting an employee’s requested accommodation?

HOLDING: Yes. Employers may require documentation supporting an employee’s requested accommodation, and the employer has a right to assess its employee’s requested accommodation.²⁰⁹ Ascena was within their right to request documentation tying the work-from-home request to the injured shoulder.

When requesting accommodations, the employee bears the burden of proving that the requested accommodation is reasonable and provide medical documentation supporting the accommodation’s necessity. In this case, Tchankpa did neither. If anything, his own doctor’s report confirmed that Tchankpa could do his job without working from home. Tchankpa claimed that he wanted to work from home because his injured shoulder made driving painful. But he

²⁰⁸ Mosby-Meachem v. Memphis Light, Gas & Water Div., 883 F.3d 595, 606 (6th Cir. 2018).

²⁰⁹ Kennedy v. Superior Printing Co., 215 F.3d 650, 656 (6th Cir. 2000)

never explained why working from home only three days per week would help him perform his job while injured.

Tchankpa also argues that he was constructively discharged in retaliation for requesting accommodations. A constructive discharge occurs when “working conditions would have been so difficult or unpleasant that a reasonable person in the employee’s shoes would have felt compelled to resign.”²¹⁰ To succeed, an employee must also show that the employer intended to oust him.²¹¹ In other words, the employer must have created an objectively intolerable work environment to deliberately force a disabled employee to resign.²¹² Otherwise the employer did not commit constructive discharge.

In this case, no constructive discharge occurred. Demotion, reduction in salary, badgering, harassment, humiliation, and sexual assault suggest an objectively intolerable workplace.²¹³ Lifting laptops, denying his work-from-home request, and receiving negative feedback does not suggest an objective intolerable workplace.

The Sixth Circuit affirmed the grant of summary judgment to Ascena.

C. HOSTILE WORK ENVIRONMENT

Chaney v. Haworth, Inc., 802 Fed. Appx. 1006 (6th Cir. 2020) – F

FACTS: Haworth manufactures commercial office furniture and related products. The company hired Chaney, who is African American, on July 5, 2016, as a production supervisor at Haworth’s Laminated Products Plant. Chaney managed roughly thirty employees. In the first few weeks, Chaney received training (which he says was useless) and had several informal coaching meetings with his direct supervisor, Tina Pietrangelo.

It was not long before Pietrangelo began noticing problems with Chaney’s work. In August and September 2016, Pietrangelo met with Chaney twice to discuss performance and communication issues. Then, on October 17, 2016, she issued Chaney a “Documented Warning [for] Unsatisfactory Performance.” The five-page letter raised many specific concerns about Chaney’s ability to perform his job and professionally communicate with others. Chaney was required to create a written plan to fix the problems.

Meanwhile, on October 3, 2016, Chaney told Human Resources Business Partner Tina Porcelli about an email he had received in August 2016 from another employee, William Johns. The email contained an image from the comedy film, “Friday,” depicting two African American men rolling a marijuana cigarette. The subject of the email was “On Again.” Porcelli confronted Johns about the email. Johns explained that he had sent the email to Chaney “because the two of them were

²¹⁰ Talley v. Family Dollar Stores of Ohio, Inc., 542 F.3d 1099, 1107 (6th Cir. 2008) (quoting Held v. Gulf Oil Co., 684 F.2d 427, 432 (6th Cir. 1982)).

²¹¹ Id.

²¹² See Agnew v. BASF Corp., 286 F.3d 307, 309–10 (6th Cir. 2002).

²¹³ See, e.g., Agnew, 286 F.3d at 310; Hurt v. Int’l Servs., Inc., 627 F. App’x 414, 420 (6th Cir. 2015).

discussing the movie earlier that night and, when he returned home following work, he found the movie on the television. So he took a picture of the movie and forwarded it to Mr. Chaney with the cover message indicating that it was 'On Again.' " Another employee confirmed that the conversation about the movie had taken place. Porcelli met with Johns and Chaney together. After Johns explained why he had sent the email, Chaney remembered that they had talked about the movie. According to Porcelli, "Mr. Johns apologized for any unintended offense he may have caused, and Mr. Chaney accepted the apology. Their conversation ended with a fist-bump after Mr. Johns asked, 'Are we okay, man?' and Mr. Chaney responded, 'yeah.'" Chaney does not dispute this account. Johns nonetheless received a written warning for using "company email for a personal use that caused concern for another member."

On November 8, 2016 (election night), Chaney "overheard someone from the engineering department say, '[a]fter tonight, we'll be done with that n***** Obama.'" According to Chaney, he reported the comment to Pietrangelo, who said she would look into it.

Chaney's job performance did not improve, and on November 23, 2016, Pietrangelo issued Chaney a "Final Warning [for] Leader Behavior/Performance Below Expectations." The letter discussed workplace problems occurring after the first warning letter, contained detailed expectations and requirements for Chaney going forward, and warned him that if he failed to meet the expectations, he faced "severe disciplinary action up to and including termination of [his] employment." Six days after receiving the letter, Chaney met with Haworth's Vice President of Global Human Resources, Ann Harten. Chaney "shared his concern that [the] documented performance warnings that he had received from his supervisor, Tina Pietrangelo, were the result of racial bias and that his supervisor treated him unfairly." Harten immediately appointed Marsha Major, a Senior Human Resources Business Partner, to investigate Chaney's concerns.

The day after Chaney met with Harten, Chaney opened a compartment above his desk and found a Chewbacca figurine from the Star Wars movie series suspended from its arms by a pair of earplugs. Haworth security responded immediately. Chaney then had security call the police, who responded and investigated the incident. After a police officer questioned Chaney, Chaney left work. He then took two weeks of medical leave. Haworth removed the figurine before Chaney returned to work on December 12, 2016.

Marsha Major, whom Haworth had appointed to investigate Chaney's concerns about his work environment and his relationship with Pietrangelo, also investigated the Chewbacca incident. She interviewed Chaney and several other employees but was never able to determine who had placed the figurine in the overheard compartment.

After Chaney returned to work, Pietrangelo extended the deadlines for him to complete the requirements detailed in the final warning letter. But Chaney made no progress, and Haworth terminated his employment on February 13, 2017. The termination letter detailed Chaney's failure to meet the expectations and requirements set forth in the final warning letter. The letter

concluded that Chaney had “demonstrated that [he] is unwilling to perform at the level necessary to meet Haworth expectations.”

Chaney sued Haworth, alleging a hostile work environment and race discrimination in violation of Title VII and the Michigan Elliot-Larsen Civil Rights Act. The district court granted Haworth’s motion for summary judgment and dismissed the case. Chaney now appeals.

ISSUE: For a hostile work environment claim, must a plaintiff show that the employer knew or should have known of the harassment and failed to act?

HOLDING: Yes. Title VII makes it “an unlawful employment practice for an employer ... to discriminate against any individual with respect to his compensation terms, conditions, or privileges of employment, because of such individual’s race, color, religion, sex, or national origin.”²¹⁴ “[R]equiring people to work in a discriminatorily hostile or abusive environment” runs afoul of this provision.²¹⁵ To prevail, Chaney must prove “that (1) [he] belonged to a protected group, (2) [he] was subject to unwelcome harassment, (3) the harassment was based on race, (4) the harassment was sufficiently severe or pervasive to alter the conditions of employment and create an abusive working environment, and (5) [Haworth] knew or should have known about the harassment and failed to act.”²¹⁶

“[T]he fifth element requires a plaintiff to demonstrate a basis for holding the employer liable for the harassing conduct of an employee’s coworkers.”²¹⁷ For Haworth to be liable, Chaney must show that Haworth’s “response to [his] complaints manifest[ed] indifference or unreasonableness in light of the facts the employer knew or should have known.”²¹⁸ A response is adequate if it is reasonably calculated to end the harassment.²¹⁹

In this case, the Sixth Circuit held that no reasonable jury could conclude that Haworth “failed to act” in response to Chaney’s complaints. First, Haworth responded appropriately to the email incident. Once Chaney told Porcelli about the email from Johns, Porcelli investigated, speaking with Johns and two other employees. She then met with Johns and Chaney together, where Johns explained that the email stemmed from a conversation he and Chaney had had about the movie. Johns apologized to Chaney, and the two parted ways amicably. Despite the apparently innocent motive behind the email, Porcelli issued Johns a written warning for sending it. Haworth thus acted as soon as it learned of the incident, investigated it, and disciplined Johns for his action. Chaney does not say what more Haworth should have done.

Haworth also responded appropriately to the Chewbacca incident. Haworth security arrived immediately after Chaney found the figurine. At Chaney’s request, security contacted the police,

²¹⁴ 42 U.S.C. § 2000e-2(a)(1).

²¹⁵ Harris v. Forklift Systems, Inc., 510 U.S. 17, 21, 114 S.Ct. 367, 126 L.Ed.2d 295 (1993).

²¹⁶ Williams v. CSX Transp. Co., Inc., 643 F.3d 502, 511 (6th Cir. 2011).

²¹⁷ Waldo v. Consumers Energy Co., 726 F.3d 802, 814 (6th Cir. 2013).

²¹⁸ Id.

²¹⁹ Id.

who responded shortly thereafter. The police investigated the incident, although they were apparently unable to determine who had placed the figurine in the overhead compartment. In addition, Haworth took steps to address Chaney's concern that the Chewbacca figurine was a threat, including offering Chaney additional security measures, which he declined.

Haworth also conducted its own investigation. Major interviewed Chaney three times. She questioned several other employees about the Chewbacca incident and about a potentially racially hostile work environment at Haworth. The employees told Major that there were no rumors about the incident and that no one on the floor was talking about it. Ultimately, Major could not determine who had placed the Chewbacca figurine in Chaney's desk. That said, no further incidents followed.

Thus, the Sixth Circuit held that Chaney did not establish that Haworth failed to act in response to the alleged instances of harassment. The district court's grant of summary judgment was affirmed.

Harper v. Elder, 803 Fed. Appx. 853 (6th Cir. 2020) – F

FACTS: Harper worked as a deputy jailer at the Webster County (Ky.) Jail. Jailer Elder warned her before the first day on the job, "don't let the guys run you off this shift." A co-worker also advised Harper that Deputy Conaway demeaned women and two female employees switched shifts simply to avoid Conaway.

Conaway asked Harper about her romantic availability, complimented her physical appearance and made overt sexual advances. Harper reported Conaway's conduct to Elder, who took no corrective action. Harper rebuffed Conaway's overtures, which caused him to yell at her in front of other deputies and order her around even though they both were of equal rank. Conaway was ultimately promoted to sergeant. Conaway selected Harper to complete menial tasks.

The resulting stress caused Harper to suffer migraines and nausea that worsened over time prompting Harper's therapist to diagnose anxiety and adjustment disorder with depressed mood. On doctor's orders, Harper requested FMLA leave and the County granted it. During her leave, Harper asked Jailer Elder to assign Conaway to the other day shift so they would not overlap. Elder instead recommended that Harper switch to the night shift. She rejected that option, viewing it as a demotion—though financially equivalent—and non-curative as she would still intersect with him at shift changes.

With Conaway's ongoing harassment and Elder's failure to remedy it, Harper left the job when her medical leave expired, deeming herself constructively discharged as she was "unable to return." Harper sued Elder, Conaway, and the County for hostile work environment, retaliation, and whistleblower violations. The district court granted summary judgment to all defendants, holding that Harper failed to establish (1) "severe or pervasive" harassment to support her hostile work environment claims, (2) an adverse employment action supporting her retaliation claim,

and (3) any action taken to punish her for reporting misconduct, an essential element of her whistleblower claim. Harper appealed.

ISSUE: For a claim of workplace harassment to survive summary judgment, must a plaintiff demonstrate that the harassment was severe or pervasive?

HOLDING: Yes. To survive summary judgment, a plaintiff must demonstrate that workplace harassment was severe or pervasive. When assessing the totality of Harper’s proffered evidence, district courts should look to the harassment’s frequency, severity, whether it is physically threatening or humiliating, and whether it unreasonably interferes with work performance.

In this case, Harper testified that Conway’s conduct occurred daily and occurred for at least a year. And as for the requirement that the harassment “unreasonably interfere” with Harper’s work performance, Harper’s migraines and nausea eventually escalated “to the point where [she] was having trouble functioning,” prompting her doctor to prescribe medical leave. This evidence was sufficient to survive summary judgment.

D. RELIGIOUS DISCRIMINATION

Small v. Memphis Light, Gas and Water, 952 F.3d 821 (6th Cir. 2020) – F

FACTS: For over a decade, Small worked as an electrician at Memphis Light. But in early 2013, he suffered an on-the-job injury that required him to change positions. At first, Small expressed interest in a position as a revenue inspector. Instead, Memphis Light offered him a position as a service dispatcher. Without another offer—and at the risk of otherwise being terminated—Small accepted the dispatcher position.

Around the same time, Small raised concerns with Memphis Light that his new position would conflict with the practice of his religion (Jehovah’s Witness). Small explained that he had services on Wednesday evenings and Sundays and that he had community work on Saturdays. He asked the company to reassign him to a different position or to different shifts. But Memphis Light denied the request, explaining that the accommodations would impose an undue hardship on the company and that its union required shifts be assigned based on seniority. Instead, the company suggested that Small swap shifts with his co-workers or use paid time off. Small renewed the same request without success. Yet later, Memphis Light reconsidered its decision and offered Small the option to “blanket swap” shifts—meaning that he could swap his shifts with another employee for an entire quarter.

Since then Small has remained in the dispatcher position. The parties dispute whether his schedule still conflicts with his religious commitments.

In 2017, Small sued Memphis Light for disability and religious discrimination as well as retaliation. On the eve of trial, the district court granted summary judgment to the company.

Almost immediately, Small filed a motion with the district court to enforce an alleged settlement agreement between the parties. According to Small, the parties had agreed on a settlement right before the summary judgment ruling. But the district court rejected the motion, finding that the parties had never agreed on all the material terms. This appeal followed.

ISSUE: In the context of discrimination on the basis of religion, must an employer offer accommodations that impose an “undue hardship” on the business?

HOLDING: No. Employers not have to offer any accommodation that would have imposes an “undue hardship” on its business—meaning (apparently) anything more than a “de minimis cost.”²²⁰ The Sixth Circuit found that Small’s proposed accommodation for his religious practices would have been more than a “de minimis cost” for Memphis Light.

The Sixth Circuit affirmed the district court’s decision.

E. RETALIATION

Brown v. Kelsey-Hayes Company, ---- Fed. Appx. -----, 2020 WL 2731900 (6th Cir. 2020) – NF

FACTS: Kelsey-Hayes Company employed Brown from 2003 until her termination at 59-years-old in January 2016. Brown reported to Ann Lipanski, the Vice President of Internal Audit, from 2006 to 2016. Brown acted as Lipanski’s Administrative Assistant in 2006 and then worked as Lipanski’s Senior Executive Secretary for nine years. To name a few tasks, Brown corresponded for Lipanski, maintained Lipanski’s calendar, set up travel arrangements, and prepared reports and presentations.

In 2015, German auto supplier ZF Friedrichshafen AG acquired TRW Automotive Holdings Corporation and its subsidiary, Kelsey-Hayes. Naturally, as the entities combined, decisionmakers eliminated some positions. Lipanski resigned, anticipating these eliminations, and left the company in December 2015. As a result, the new company eliminated Lipanski’s position and a few others in her department, including Brown’s. Removing Brown’s position and not transferring her to another paved the way for this lawsuit.

While employed, Brown used oxygen at work because she has asthma. And she sometimes used a wheelchair around work when her asthma acted up. Kelsey-Hayes had granted Brown Family and Medical Leave Act (FMLA) leave a few times because of these asthma problems. And Brown thought the company’s failure to transfer her had to do with these medical issues. However, during Brown’s time as Senior Executive Secretary, Lipanski evaluated Brown each year. And Lipanski always gave Brown mixed reviews.

The company removed Brown’s Senior Executive Secretary position shortly after, since it did not plan to hire a replacement for Lipanski. In mid-January 2016, Joe Cantie, TRW Automotive

²²⁰ Trans World Airlines, Inc. v. Hardison, 432 U.S. 63, 84, 97 S.Ct. 2264, 53 L.Ed.2d 113 (1977); Tepper v. Potter, 505 F.3d 508, 514 (6th Cir. 2007).

Holdings Corporation's CFO, and Lisa McGunagle, the Corporate Human Resources (HR) Manager for the Finance and IT departments, met with Brown. The two told Brown that her position no longer existed because of the companies combining. Brown asked if she could take an administrative position working for Jerry Dekker. McGunagle explained that Brown could apply online for that role.

To be sure, McGunagle knew that Brown suffered from asthma, used a wheelchair some days, and took FMLA leave. In fact, Brown discussed her leave with McGunagle. During one such conversation, McGunagle told Brown that she was looking at Brown's documents and thought "wow, this girl is never here." Brown said "really?" to which McGunagle responded, "yeah, I'm just joking."

After this termination meeting with Cantie and McGunagle, Brown applied for, or at least showed interest in, eleven secretarial positions, including the position working for Dekker. She submitted a Voluntary Self-Identification of Disability form and a U.S. Equal Employment Opportunity form when applying. And around the time she started applying for these spots, her attorneys notified McGunagle about Brown's potential plan to sue because Brown believed that discrimination caused the company to not transfer her to any open jobs. Brown did not receive any offers, despite this letter.

To understand Brown's claims about her lack of offers, it's important to note how the company assesses candidates and fills jobs. When a position opens at the company, the HR Manager for the relevant department creates a requisition in Kenexa, the company's online job application and tracking system. Then upper management approves the requisition. Once that happens, the HR Manager may look to an internal departmental candidate for the role.

If the HR Manager does not find any satisfactory internal candidate for the open position, Talent Acquisition Center (TAC) steps in to help. TAC Recruiters post the position opening online, and both internal and external candidates can apply then. The Recruiters assist the company's Hiring Managers, who decide who to hire in the end.

Pamela Hoye worked at the company as the Talent Acquisition Manager when Brown applied for the eleven jobs. In that position, Hoye had access to confidential self-identification information, including whether a candidate has a medical condition. Recruiters, on the other hand, lack access to this information when they review applications and recommend certain candidates to the company's Hiring Managers.

But sometimes Hoye acted as a Recruiter, even though she mainly worked as the Talent Acquisition Manager. And Hoye acted as the Recruiter assisting the Hiring Managers for eight of the eleven positions to which Brown applied. When Hoye acts as a Recruiter, she does not look at the confidential, self-identification information that she otherwise has access to in her managerial role. In fact, Hoye swears she did not look at Brown's self-identification at all. Instead, she says she decided not to interview Brown upon reviewing Brown's evaluations that she got from McGunagle.

Brown also applied for a role as secretary to Patricia Zazzetti. Zazzetti acted as the Hiring Manager for that position. She, like Hoyer, asked McGunagle about Brown's prior performance after a Recruiter recommended Brown to Zazzetti as a potential candidate to interview. After reviewing the evaluations and speaking with McGunagle on the phone, Zazzetti chose not to interview Brown, as well. McGunagle told Zazzetti that McGunagle would have concerns about hiring Brown over Brown's inattention to detail, software mistakes, scheduling issues, and overall poor work. The two did not discuss Brown's FMLA leave. That said, in later interviews Zazzetti asked interviewees the maximum work each candidate thought an employee should miss.

Of the eleven positions to which Brown applied or expressed interest, the company filled ten with younger individuals. It paid new employees higher annual salaries. And nine employees did not have disabilities. We do not know the two others' disability statuses.

Pointing to these facts as support, Brown alleges that Defendants discriminated against her because of her disability, age, and FMLA leave when they chose not to transfer her to or rehire her for an available position at the company. Brown arbitrated the issues. Yet the arbitrator denied her relief on all claims. So Brown filed her complaint in the district court, alleging that Defendants discriminated against her in violation of the (1) Americans with Disabilities Act (ADA), (2) Michigan Persons with Disabilities Civil Rights Act (PWDCRA), (3) Age Discrimination in Employment Act (ADEA), and (4) Michigan Elliot-Larsen Civil Rights Act (ELCRA). She also sued for retaliation under these four and the FMLA.

The district court granted summary judgment for Kelsey-Hayes, finding that although Brown established a prima facie case of discrimination, she did not show a genuine issue of material fact as to pretext. And without deciding whether Brown showed a prima facie case of retaliation, the court found that she also failed to establish a genuine issue of material fact as to pretext for the retaliation claims. This appeal followed, in which Brown argued that Defendants' reason for failing to transfer or rehire her was a pretext for discrimination and retaliation.

ISSUE: May an employer discharge an employee for poor work performance even though the employee falls within some protected class or has received protection under a federal anti-discrimination law?

HOLDING: Yes. A plaintiff can establish pretext by showing that the proffered reason: "(1) ha[d] no basis in fact; (2) did not actually motivate the [adverse employment] action; or (3) [was] insufficient to warrant the [adverse employment] action."²²¹ Parties need not follow the categories rigidly. The categories simply provide a "convenient way of marshaling evidence and focusing it on the ultimate inquiry: 'did the employer [take the employment action] for the stated reason or not?'"²²² Ultimately the plaintiff must produce "sufficient evidence from which a jury

²²¹ Hostettler v. Coll. of Wooster, 895 F.3d 844, 858 (6th Cir. 2018) (quoting Demyanovich v. Cadon Plating & Coatings, L.L.C., 747 F.3d 419, 431 (6th Cir. 2014)).

²²² Tingle v. Arbors at Hilliard, 692 F.3d 523, 530 (6th Cir. 2012) (quoting Chen v. Dow Chem. Co., 580 F.3d 394, 400 n.4 (6th Cir. 2009)).

could reasonably reject [the employer’s] explanation of why it fired [or failed to rehire] her.”²²³ She must meet this evidentiary burden by a preponderance of the evidence.²²⁴

In this case, Kelsey-Hayes asserts that it did not rehire or transfer Brown due to her poor performance reviews. Brown is required to prove that these reviews never occurred or were false.²²⁵ The record clearly indicates that Brown’s performance ratings were not very good. In fact, these ratings contained criticism of her communication skills and that she struggled to perform critical job responsibilities.

Accordingly, the Sixth Circuit affirmed the award of summary judgment to Kelsey-Hayes.

Carrethers v. McCarthy, ---- Fed. Appx. ----, 2020 WL 2768854 (6th Cir. 2020) – NF

FACTS: Carrethers worked for the United States Army as an IT specialist. During the last 18 months of her employment, she repeatedly accused her supervisors and other coworkers of various sorts of harassment. Her allegations were never substantiated, prompting a warning and then a reprimand about the unfounded complaints. Carrethers then filed yet another set of allegations against her immediate supervisor. This time, the Army appointed an officer to investigate. After interviewing Carrethers, this officer thought it “extremely clear” that she was “mak[ing] things up.” But the officer didn’t stop there. He also interviewed fourteen other employees who Carrethers said could verify her claims. As it turned out, they contradicted her claims. A few of them added that Carrethers’s tendency to claim harassment had made them uncomfortable working with her.

Given this evidence, the investigating officer concluded that Carrethers was abusing the complaint system to distract from her poor work performance. His conclusions were reported up the chain of command, and the Adjutant General made the decision to fire Carrethers.

Carrethers then sued the Secretary of the Army under Title VII of the Civil Rights Act, alleging that her termination was illegal retaliation for her complaints. The district court granted summary judgment to the Secretary. This appeal followed.

ISSUE: May an employer legitimately terminate the employment of an employee if the employer honestly believes that the employee falsified misconduct allegations?

HOLDING: Yes. Title VII forbids retaliation against an employee for “oppos[ing] any ... unlawful employment practice.”²²⁶ To survive summary judgment for a retaliation claim, a plaintiff must at least establish a “prima facie case” by showing that: (1) she engaged in protected Title VII activity; (2) the defendant knew of this protected activity; (3) the defendant took adverse employment action against her; and (4) there was a causal connection between the protected

²²³ Chen, 580 F.3d at 400.

²²⁴ Redlin v. Grosse Pointe Pub. Sch. Sys., 921 F.3d 599, 607 (6th Cir. 2019).

²²⁵ Peters v. Lincoln Elec. Co., 285 F.3d 456, 470 (6th Cir. 2002).

²²⁶ 42 U.S.C. § 2000e-3(a).

activity and the adverse action.²²⁷ If the employer points to a “legitimate, non-retaliatory reason” for the adverse action, then the plaintiff must also provide evidence that (5) the proffered reason is a mere “pretext,” not the real motive.²²⁸

However, the employer’s motive for the termination is the major issue at this case. The Army terminated Carrethers’ employment because it believed that the complaints were not made in good faith. After all, groundless complaints defame innocent coworkers, undermine trust in the workplace, and waste resources. It only gets worse when (as here) the employee seems to have made a habit of making things up. Employers are allowed to fire such employees.

The Sixth Circuit affirmed the dismissal of this case.

Hamade v. Valiant Government Services, LLC., 807 Fed. Appx. 546 (6th Cir. 2020) – F

FACTS: In July 2017, Hamade was hired by defendant Valiant Government Services, LLC (a Kentucky corporation), as a full-time Arabic-Iraqi linguist stationed in Iraq. While working in Iraq, Hamade was approached by a civilian female linguist who worked for a different government contractor. The relationship between the female linguist and Hamade is not described in the complaint, and it is unknown if she is a United States citizen. The female linguist informed Hamade that she had been sexually assaulted and asked Hamade to help her find the proper authority to report the assault. Hamade agreed to accompany the female linguist to the offices of the Army Sexual Harassment/Assault Response and Prevention.

While traveling together to report the assault, Hamade and female linguist were confronted by Sergeant Major Goodman, a noncommissioned Army officer. At this time, Hamade learned that Goodman was the woman’s alleged assailant. The female linguist told Goodman that she was reporting his harassment and bullying against her. Goodman became angry, and demanded to see Hamade’s identification. Hamade refused, stating that he would only give his identification to a higher-ranking officer. Goodman “continued to bully and pressure” Hamade and the female linguist, raising his voice and drawing a crowd. Instead of giving his identification to Goodman, Hamade gave it to a first lieutenant nearby. The lieutenant, with the help of a fellow commissioned officer identified as Major Dam, listened to the female linguist explain what had occurred. Major Dam then accompanied Hamade and the female linguist to the office of Colonel Thomas Shuler, where Hamade and the female linguist were advised to make an appointment for the next day. The next day, Hamade and the female linguist met with Colonel Shuler to discuss the alleged sexual assault and the identification-withholding situation that had occurred the night before with Sergeant Goodman. Hamade expressed concern to Shuler about retaliation from Goodman regarding his refusal to give Goodman his identification during the confrontation the previous day.

²²⁷ Redlin v. Grosse Pointe Pub. Sch. Sys., 921 F.3d 599, 613 (6th Cir. 2019).

²²⁸ Id., 614-615.

The next day, Hamade learned that Sergeant Goodman had complained to Valiant and recommended that Valiant terminate Hamade for withholding his identification from Goodman. Hamade met with Colonel Shuler two days later to notify Shuler of Goodman's complaint and recommended termination of Hamade. Colonel Shuler assured Hamade that no adverse action would be taken against him and promised to provide Hamade with a "closure statement" within the next two days that would assure plaintiff in writing that no retaliation would occur. Hamade waited for the closure statement for two weeks before sending Shuler an email reminding the Colonel of his promise.

The day after he emailed Colonel Shuler, Hamade received a letter of reprimand from Valiant, stating that the U.S. Army had filed a "complaint" against him because Hamade had requested a written statement from Colonel Shuler. After the Army filed its complaint, Hamade alleges that his unit was given orders to watch his performance. Thereafter, formal statements appeared in Hamade's file relating to "petty," non-performance concerns. Hamada alleges that he was told by Valiant's "site manager" that it was not a good time for Valiant employees to raise issues with the Army because Valiant's contract was up for rebidding.

On January 7, 2018, Valiant informed Hamade that he was being terminated for upsetting an Iraqi General Officer by asking the Iraqi General to "switch seating" with another officer. When Hamade confronted the Iraqi General about the termination, the General was "astonished by the news of the alleged complaint and vehemently denied having complained to anyone at any time" and said that someone must have misinterpreted the joking regarding the seating arrangement. The Iraqi General and another Iraqi officer, General Khalaf, submitted written statements that no such incident happened, and no complaint was ever made.

Later, Valiant's site manager told Hamade that he had not been terminated because of the chair-switching incident, but because he had "re-open[ed] the case" regarding the sexual assault allegations against Sergeant Goodman. On January 11, 2018, Valiant's deputy program manager informed Hamada that the main reason for his termination was because Hamade "refused to provide his identification" to Sergeant Goodman and because he assisted the female linguist in reporting the sexual harassment by Goodman. On January 15, 2018, Hamade filed a complaint with the Office of the Army Inspector General in Iraq. Valiant was notified of Hamade's complaint to the Inspector General. Two days after Hamade filed the complaint with the Inspector General, Valiant's program director in Iraq informed Hamade that his termination was "at will." Valiant's site manager gave Hamade a written reprimand that said plaintiff was being disciplined because he had been too friendly with the Iraqi officers.

Four months after his termination, Hamade filed a charge with the Equal Employment Opportunity Commission. In responding to Hamade's filing of the EEOC charge, Valiant stated that Hamade had been terminated because of "his behavior and attitude," "because he was unprofessional and unfit to support the U.S. Government," "because he complained about living conditions," and "because he routinely took issues outside of the proper chain of command and was inappropriate with officers in the Iraqi security forces."

On August 3, 2018, the EEOC dismissed the charge and issued a “Notice of Suit Rights.” On November 12, 2018, Hamade filed a one-count complaint under Title VII of the Civil Rights Act of 1964 and the Kentucky Civil Rights Act in federal court, alleging that he had “engaged in protected activity when he assisted in reporting the sexual harassment and hostile work environment created by Sergeant Major Goodman,” and he was subject to adverse action in retaliation for that his assistance. Valiant filed a motion to dismiss for failure to state a claim because plaintiff failed to plead facts showing that he engaged in protected activity under Title VII or Kentucky law. The district court granted Valiant’s motion, finding that plaintiff had not alleged that he had engaged in protected activity as required by Title VII or Kentucky law. Hamade filed a timely notice of appeal.

ISSUE: Is an employee’s discharge for participating in an employer’s internal investigation into unlawful discrimination retaliation only where that investigation occurs pursuant to a pending charge before the EEOC?

HOLDING: Yes. In Abbott v. Crown Motor Co., Inc.,²²⁹ the Sixth Circuit held that “Title VII protects an employee’s participation in an employer’s internal investigation into allegations of unlawful discrimination where the investigation occurs pursuant to a pending EEOC charge.” It does not, however, cover “an employee’s participation ‘in an employer’s internal, in-house investigation, conducted apart from a formal charge with the EEOC;’ at a minimum, an employee must have filed a charge with the EEOC or otherwise instigated proceedings under Title VII.”²³⁰

In this case, Hamade’s role was that of assisting the female linguist to file a complaint through the Army’s internal disciplinary system, not with the Equal Employment Opportunity Commission. Hamade has explicitly conceded that there was no pending EEOC investigation or charge by him or anyone else at the time of his termination as required by our precedent in order to proceed with a retaliation claim under the participation clause. As such, his complaint fails to state a claim under the participation clause of Title VII.

The Sixth Circuit affirmed the district court’s dismissal of Hamade’s claim.

F. TITLE VII

Murphy v. Vaive Wood Products, 802 Fed. Appx. 930 (6th Cir. 2020) – F

FACTS: Crystal Murphy sued her former employer, Vaive Wood Products Company, for sexual harassment, securing a \$6,700 judgment and \$46,935 in attorney’s fees. Vaive appealed the award of attorney’s fees, arguing that willful concealment of certain records foreclosed any award of attorney’s fees.

²²⁹ 348 F.3d 537, 543 (6th Cir. 2003).

²³⁰ *Id.*

ISSUE: Does a plaintiff's willful concealment of facts necessarily prohibit an award of attorney's fees in a discrimination case?

HOLDING: No. In any action or proceeding under" Title VII, "the court, in its discretion, may allow the prevailing party ... a reasonable attorney's fee ... as part of the costs."²³¹ The Supreme Court has directed that "a prevailing plaintiff should ordinarily recover an attorney's fee unless special circumstances would render such an award unjust."²³² Vaive alleges that Murphy's failure to disclose the existence of her probate proceedings at her deposition was a dishonest act that should bar her from receiving attorney's fees as a matter of equity. But under Sixth Circuit precedent, "a plaintiff's bad acts" are not "special circumstances" that render a fee award unjust.²³³ Murphy's deposition testimony therefore does not bar her from receiving attorney's fees.

Stokes v. Detroit Public Schools, 807 Fed. Appx. 493 (6th Cir. 2020) – F

FACTS: Gregory Stokes worked for Detroit Public Schools (DPS) for almost ten years. In his last position, he worked as the Acting Deputy Executive Director to the Executive Director of Human Resources. He signed a six-month contract to serve in that role. Near the end of his contract, Stokes applied for a job as the Executive Director-Talent Acquisition. After interviewing three candidates, including Stokes, DPS hired a twenty-eight-year-old female instead. And DPS did not move Stokes to another position after his contract expired, ending his employment with DPS. Stokes filed this lawsuit, alleging failure to promote and unlawful discharge because of gender in violation of Title VII and Michigan's Elliott-Larsen Civil Rights Act (ELCRA) and age in violation of the Age Discrimination in Employment Act (ADEA) and ELCRA. Stokes based his claim on irregularities throughout the interview process, and that DPS preselected the successful candidate. DPS stated that Stokes performed poorly during the interview. The district court granted DPS's motion for summary judgment. This appeal followed.

ISSUE:

1. Is poor performance on an interview a legitimate, non-pretextual reason for not selecting a candidate for employment?
2. Is pre-selecting a candidate a legitimate, non-pretextual reason for not selecting a candidate for employment?

HOLDINGS:

1. Yes. A plaintiff normally establishes pretext by showing that the proffered reason: (1) "had no basis in fact," (2) "did not actually motivate the employer's action," or (3) was "insufficient to motivate the employer's action."²³⁴ Irregularities in a company's interview process alone do not constitute pretext sufficient to overcome summary judgment.²³⁵ A plaintiff

²³¹ 42 U.S.C. § 2000e-5(k).

²³² Hensley v. Eckerhart, 461 U.S. 424, 429, 103 S.Ct. 1933, 76 L.Ed.2d 40 (1983) (citation omitted).

²³³ Wikol ex rel. Wikol v. Birmingham Pub. Schs. Bd. of Educ., 360 F.3d 604, 611 (6th Cir. 2004) (citing Price v. Pelka, 690 F.2d 98, 101 (6th Cir. 1982)).

²³⁴ Miles v. S. Cent. Human Res. Agency, Inc., 946 F.3d 883, 887 (6th Cir. 2020).

²³⁵ Jenkins v. Nashville Pub. Radio, 106 Fed. Appx. 991 (6th Cir. 2004).

must show how the irregularities prejudiced him in the selection process or indicate dishonesty or bad faith on behalf of the employer.²³⁶ In this case, Stokes produced no evidence as to how the irregularities substantially impacted the fact that he was not selected.

2. Yes. “[P]reselection is relevant evidence of [an] employer’s motivation,” and it “operates to discredit the employer’s proffered explanation for its employment decision.”²³⁷ Because DPS planned to offer Hampton the position before the interview, Stokes has shown a genuine issue of material fact as to whether the interview scores were the actual motivation behind DPS not hiring him for the position. Stokes points to an email sent by Denton-Brown on November 30, 2015, a few weeks after Hampton initially applied, in which he, among other things, asked members of his team where Hampton’s status stood. There was also an email indicating that executives of DPS would like to move Hampton through the process as quickly as possible.

The Sixth Circuit affirmed in part, reversed in part, and remanded for further proceedings with respect to the preselection argument.

II. ARMED CAREER CRIMINAL ACT

Porter v. United States, 959 F.3d 800 (6th Cir. 2020) – NF

FACTS: Xavier Porter was convicted of numerous robberies during his lifetime. He robbed nine different businesses in Louisville, Kentucky using a pistol-grip shotgun, and was ultimately convicted in federal court for these crimes. He also had three previous convictions for armed robbery in Georgia. The trial court viewed the Georgia armed robbery convictions as violent felonies and enhanced his sentences under the Armed Career Criminal Act.

ISSUE: Is armed robbery a violent offense for purposes of the Armed Career Criminal Act?

HOLDING: Yes. Under the Armed Career Criminal Act, (ACCA), to qualify as a “violent felony,” the underlying felony at issue must have “as an element the use, attempted use, or threatened use of physical force against the person of another.”²³⁸ To determine whether a felony qualifies, courts look to the statutory elements and judicial interpretations of those elements—not the facts underlying the conviction.²³⁹

Both history and common sense suggest that robbery with a deadly weapon involves an element of physical force.²⁴⁰ In United States v. Harris, the Sixth Circuit held that a conviction for armed robbery in Kentucky constitutes a violent felony for purposes of the ACCA.²⁴¹ The Sixth Circuit held that Georgia’s armed robbery statute also constitutes a violent felony.

²³⁶ Briggs v. Potter, 463 F.3d 507, 516 (6th Cir. 2006).

²³⁷ Goostree v. Tennessee, 796 F.2d 854, 861 (6th Cir. 1986).

²³⁸ 18 U.S.C. § 924(e)(2)(B)(i).

²³⁹ See Mathis v. United States, — U.S. —, 136 S. Ct. 2243, 2248, 195 L.Ed.2d 604 (2016); United States v. Harris, 853 F.3d 318, 320 (6th Cir. 2017).

²⁴⁰ Cf. Stokeling v. United States, — U.S. —, 139 S. Ct. 544, 550–52, 202 L.Ed.2d 512 (2019).

²⁴¹ 790 F.App’x 770, 774-75 (6th Cir. 2019).

The Sixth Circuit affirmed the enhanced sentence.

United States v. Brown, 957 F.3d 679 (6th Cir. 2020) – NF

FACTS: The Armed Career Criminal Act, 18 U.S.C. § 924(a)(2), (e), increases the sentence for felons who possess firearms from a 10-year maximum to a 15-year minimum if the defendant has three prior convictions that qualify as “violent felonies.” In 2007, a jury convicted Brown of being a felon in possession of a firearm in violation of federal law. Brown also had three aggravated-burglary convictions from Tennessee. At the time of his conviction, the district court found the burglary convictions to be violent felonies and sentenced Brown to 180 months in prison. The Sixth Circuit affirmed. On a collateral attack of the sentence, the Sixth Circuit ultimately determined that the Tennessee burglaries were not violent felonies under the Armed Career Criminal Act and ordered Brown released from prison. The United States Supreme Court reversed and remanded for further proceedings.

ISSUE: Is burglary a violent felony for purposes of the Armed Career Criminal Act?

HOLDING: Yes. In Taylor v. United States, the United States Supreme Court defined the elements of generic ‘burglary’ as ‘an unlawful or unprivileged entry into, or remaining in, a building or other structure, with intent to commit a crime.’²⁴² If a state burglary statute sweeps in more conduct than this generic definition of the crime, convictions under the state statute will not qualify as convictions for “burglary” under the federal Act.²⁴³

On remand, the Sixth Circuit held that Tennessee’s burglary statute qualified as a violent felony under the Armed Career Criminal Act.

The Sixth Circuit remanded the matter to the district court with instructions to reinstate Brown’s original sentence.

NOTE: Burglary was found to be a violent felony for purposes of the Armed Career Criminal Act in the following cases:

Booker v. United States, ---- Fed. Appx. ----- (6th Cir. 2020)

United States v. Jenkins, ---- Fed. Appx. ----- (6th Cir. 2020)

United States v. Howard, ---- Fed. Appx. ---- (6th Cir. 2020)

United States v. O’Dell, ---- Fed. Appx. ----- (6th Cir. 2020)

United States v. Morris, ---- Fed. Appx. ----- (6th Cir. 2020)

Gilliam v. United States, ---- Fed. Appx. ----- (6th Cir. 2020)

United States v. McClurg, ---- Fed. Appx. ----- (6th Cir. 2020)

United States v. Morgan, ---- Fed. Appx. ---- (6th Cir. 2020)

²⁴² 495 U.S. 575, 110 S.Ct. 2143, 109 L.Ed.2d 607 (1990).

²⁴³ See Mathis v. United States, — U.S. —, 136 S. Ct. 2243, 2247–48, 195 L.Ed.2d 604 (2016).

United States v. Buie, ---- F.3d ----, 2020 WL 2781311 (6th Cir. 2020) – NF

FACTS: Buie was convicted for felonious possession of a firearm and the district court enhanced his sentence pursuant to the Armed Career Criminal Act. Buie appealed, arguing that a previous conviction for arson does not constitute a “violent felony.”

ISSUE: Is arson a violent felony for purposes of the Armed Career Criminal Act?

HOLDING: Yes. The Sixth Circuit held that arson is a violent felony for purposes of the Armed Career Criminal Act.

The Sixth Circuit affirmed Buie’s sentence.

United States v. West, 799 Fed.Appx. 322 (6th Cir. 2020) – F

FACTS: West was convicted of possession of a firearm by a convicted felon. The district court enhanced his sentence under the Armed Career Criminal Act after finding that his prior convictions in Tennessee for robbery, aggravated burglary, and aggravated assault qualified as violent felonies. West appealed the enhanced sentence.

ISSUE: Is aggravated assault a violent felony for purposes of the Armed Career Criminal Act?

HOLDING: Yes. Under Tennessee law, aggravated assault contained an element of substantial bodily harm. West acknowledged that a physical altercation occurred between three codefendants and the victim, who subsequently died. This constituted a violent felony under the Armed Career Criminal Act.

The Sixth Circuit affirmed the sentence.

NOTE: Assault was found to be a violent felony for purposes of the Armed Career Criminal Act in the following cases:

United States v. McBee, ----- Fed. Appx. ----- (6th Cir. 2020).

III. CRIMINAL LAW AND PROCEDURE – ASSAULT

Manners v. United States, 947 F.3d 377 (6th Cir. 2020) – F

FACTS: In 2011, Manners pleaded guilty to two counts: 1) assault with a dangerous weapon in aid of racketeering in violation of 18 U.S.C. § 1959(a)(3), and 2) use of a firearm during and in relation to a crime of violence under 18 U.S.C. § 924(c). The district court sentenced Manners to eighteen months of imprisonment on the first count and 120 months on the second count, to be served consecutively.

In 2016, Manners filed a motion to vacate. The district court denied Manners’s motion. The Sixth Circuit affirmed, but the United States Supreme Court granted certiorari and remanded the matter for further consideration.

ISSUE: Is assault with a dangerous weapon in aid of racketeering a crime of violence for purposes of federal sentencing statutes?

HOLDING: Yes. When a felony must be committed with deadly weapon and involves some degree or threat of physical force, it is “crime of violence” under federal criminal statutes. The Sixth Circuit specifically found that Manner’s conviction for assault with a dangerous weapon in aid of racketeering constitutes a crime of violence.

The sentence was affirmed.

IV. CRIMINAL LAW AND PROCEDURE – ARSON

United States v. Doggart, 947 F.3d 879 (6th Cir. 2020) – F

FACTS: Doggart solicited the help of others to burn down a mosque in upstate New York, believing that a small Islamic community in New York was plotting a terrorist attack against New York City. After a plea deal was rejected by the district court, Doggart was convicted after a jury trial of solicitation to damage religious property, solicitation to commit federal arson, and two counts of making a threat in interstate commerce over the telephone. The convictions were reversed by the Sixth Circuit Court of Appeals and remanded to district court after holding that the district court utilized the wrong legal test in determining whether Doggart made a threat because it Doggart made a true threat, his original plea deal may have been erroneously rejected.

On remand, the district court concluded that Doggart made a threat, but rejected the plea deal because the agreement “did not adequately reflect the severity of his conduct.” Another appeal followed.

ISSUE: Is a mosque “used in” interstate commerce or in any activity affective interstate commerce, thereby permitting federal arson charges?

HOLDING: No. 18 U.S.C. § 844(i) provides “Whoever maliciously damages or destroys, or attempts to damage or destroy, by means of fire or an explosive, any building, vehicle, or other real or personal property used in interstate or foreign commerce or in any activity affecting interstate or foreign commerce shall be imprisoned.” The Sixth Circuit found that this statute does “not cover the attempted destruction of a local mosque or for that matter any house of worship. In everyday English, one does not think of a mosque that serves a 200-person local community as a building used in commerce, much less interstate commerce.”

The Sixth Circuit held that Doggart’s actions constituted a state law crime that was best left to the states to prosecute. Therefore, nothing would prevent Doggart from being prosecuted under state law for attempted arson charges. The remaining convictions were upheld.

The Sixth Circuit affirmed in part, reversed in part and remanded for further proceedings.

V. CRIMINAL LAW AND PROCEDURE – ASSET FORFEITURE

United States v. \$39,000 in U.S. Currency, 951 F.3d 740 (6th Cir. 2020).

FACTS: On March 13, 2018, a routine Transportation Security Administration (“TSA”) screening indicated the presence of an organic bulk mass in Addonise Wells' carry-on luggage. Upon examination of the luggage, TSA officials discovered several rubber-banded bundles of mixed-denomination U.S. currency totaling \$39,000.00.

On July 30, 2018, the government filed a forfeiture action. Wells filed a verified claim asserting that he is “the sole [] and absolute owner of the monies,” that he was “in sole and exclusive possession of all these monies when it was unlawfully removed from [his] exclusive possession and control,” and that he is being “victimized by the illegal retention of [these] funds.” Subsequently, Wells filed an answer to the government's forfeiture complaint, denying the government's allegations on the grounds “that the answer could very well tend to, or actually, violate Claimant's Fifth Amendment rights.”

The district court ultimately granted summary judgment to the government. Wells appealed.

ISSUE: In an asset forfeiture proceeding, is the government required to first establish that it lawfully seized the property subject to forfeiture before the defendant is required to provide more than a mere assertion of ownership?

HOLDING: No. Under federal asset forfeiture law, before determining whether the government lawfully seized the defendant property, the property's claimant must establish standing to challenge the lawfulness of seizure.²⁴⁴ Property claimants “bears the burden of demonstrating an interest in the seized [currency] sufficient to satisfy the court of his standing as a claimant” and, after discovery, “[m]ere physical possession of property does not suffice to show standing.”²⁴⁵ “[I]nstead, we ‘require some explanation or contextual information regarding the claimant's relationship to the seized property.’”²⁴⁶

A “universal invocation of the Fifth Amendment during discovery foreclose[s] any way for [a claimant] to sustain this burden.”²⁴⁷ A blanket assertion of the Fifth Amendment privilege does not excuse a claimant's burden of establishing standing at the summary judgment stage, nor can a claimant use this invocation of the privilege as “a sword ... to make one's assertions of ownership impervious to attack.”²⁴⁸ Otherwise, a claimant's invocation of privilege could allow

²⁴⁴ See Supplemental Rule G(8)(a); United States v. \$46,340.00 in U.S. Currency, 791 Fed.Appx. 596, 597 (6th Cir. 2020); United States v. \$31,000.00 in U.S. Currency, 774 F. App'x 288, 292 n.1 (6th Cir. 2019).

²⁴⁵ United States v. \$46,340.00 in U.S. Currency, 791 Fed.Appx. at 597.

²⁴⁶ Id.

²⁴⁷ Id.

²⁴⁸ \$31,000.00 in U.S. Currency, 774 F. App'x at 292; see also United States v. Certain Real Prop. 566 Hendrickson Blvd., Clawson, Oakland Cty., Mich., 986 F.2d 990, 996 (6th Cir. 1993).

the claimant to proceed with what may be false evidence while depriving the government of any means of detecting the falsity.²⁴⁹

The Sixth Circuit held that Wells' invocation of his Fifth Amendment rights defeats his ability to establish standing with respect to the currency. Accordingly, Sixth Circuit affirmed the district court's finding that Wells lacked standing to contest this asset forfeiture.

United States v. \$46,340.00 in U.S. Currency, 791 Fed. Appx. 596 (6th Cir. 2020) – F

FACTS: The Drug Enforcement Administration seized \$46,340.00 in U.S. Currency from a residence in Toledo, Ohio pursuant to a search warrant, leading the government to commence this forfeiture proceeding. Claimant George Abernathy filed a verified claim attesting to his ownership of the money, but refused to answer the government's discovery requests "on the basis of his Fifth Amendment Rights." So the government moved to strike his claim for lack of standing and for summary judgment. A magistrate judge recommended that the district court grant the government's motion for lack of standing. The district court overruled Abernathy's objections, adopted the report and recommendation, and ordered the money forfeited. Abernathy appeals.

ISSUES:

1. Is mere physical possession of property by a defendant sufficient to show standing of the property in an asset forfeiture proceeding?
2. Does a blanket assertion of the Fifth Amendment serve as a defense in an asset forfeiture proceeding.

HOLDING: 1. No. Abernathy "bears the burden of demonstrating an interest in the seized [currency] sufficient to satisfy the court of his standing as a claimant."²⁵⁰ Mere physical possession of property does not suffice to show standing; instead, we "require some explanation or contextual information regarding the claimant's relationship to the seized property."²⁵¹

2. No. A blanket assertion of the Fifth Amendment privilege against self-incrimination is no defense to a forfeiture proceeding.²⁵²

The Sixth Circuit held that Abernathy possessed no standing to contest the forfeiture proceeding and affirmed the district court.

United States v. Tolliver, 949 F.3d 244 (6th Cir. 2020) – NF – Pet. for Cert. filed 4/27/2020

FACTS: Reshon Tolliver was convicted after a jury trial of money laundering conspiracy related to his participation in a nationwide marijuana distribution ring that funneled money and

²⁴⁹ United States v. \$99,500.00 U.S. Currency Seized on Mar. 20, 2016, No. 18-4042, 2019 WL 5783471, at *4 (6th Cir. Nov. 6, 2019).

²⁵⁰ United States v. \$515,060.42 in U.S. Currency, 152 F.3d 491, 498 (6th Cir. 1998).

²⁵¹ *Id.*

²⁵² United States v. Certain Real Prop. 566 Hendrickson Blvd., Clawson, Oakland Cty., Mich., 986 F.2d 990, 996 (6th Cir. 1993),

drugs between a supplier in California and a large-scale dealer in Memphis. As a result of his conviction, Tolliver was ordered to forfeit his gambling winnings plus and additional \$40,000 what was traced to the money laundering.

ISSUE: With respect to asset forfeiture, must the government show a nexus between the property to be seized and the criminal activity by a preponderance of the evidence?

HOLDING: The government must support forfeiture by a preponderance of the evidence and must show a nexus between the property and the crime. Basically, the government must show that it was more likely than not that the defendant either (1) gained the money from the illegal activity or (2) derived the money from other money or property gained from the illegal activity. In any case, the money must be traceable to the offense.

In this case, Tolliver gambled hundreds of thousands of dollars but put forth no evidence that he had any source of income besides the cuts he got from the money laundering scheme. Indeed, Tolliver filed no tax return for the two years in question. The district court also considered the timing of Tolliver's gambling. He was a long-time gambler, but the amount of money he gambled skyrocketed once he joined the conspiracy. In the five years before his involvement in the conspiracy, he never gambled with more than \$23,000 per year. Yet in 2017, he gambled over thirty times that much at \$712,000. The district court did not err in deciding that this made it more likely than not that Tolliver gambled with laundered money.

So too, the district court did not err in adding the \$40,000 based on testimony at sentencing. There, the FBI agent said that he spoke with a co-conspirator who said she delivered cash to Tolliver on more than one occasion (plus the bank transfers already accounted for). And wiretap discussions showed that the average amount of cash she delivered was \$40,000. The district court found this evidence reliable. But in an abundance of caution, it only added \$40,000 to the forfeiture calculation, even though the co-conspirator said she delivered money to Tolliver more than once. Here again, a preponderance of the evidence shows that Tolliver would have received at least \$40,000 in cash as part of the money laundering conspiracy.

For these reasons, the Sixth Circuit held that forfeiture calculation was proper and affirmed.

VI. CRIMINAL LAW AND PROCEDURE – CONSPIRACY

United States v. Cantrell, 807 Fed. Appx. 428 (6th Cir. 2020) – F

FACTS: On March 16, 2018, Joshua Ison, a Morehead, Kentucky police officer, responded to a 911 call reporting that a man armed with a handgun was threatening a woman at a Days Inn motel. The caller described a black Lincoln Navigator that had left the scene. En route to the Days Inn, Ison noticed the Lincoln Navigator driving away, so he began to follow it with lights flashing. The Navigator immediately accelerated and attempted to outrun Ison's patrol car, but the car chase soon ended when the Navigator approached a dead end in a parking lot.

Near the end of that chase, but before the Navigator had completely stopped, Cantrell opened the rear driver-side door and hung his foot out of the vehicle as if preparing to run. Once the Navigator stopped, Cantrell immediately exited and attempted to flee. Ison drew his gun, saying: “Police. Stop. Show me your hands. Get on the ground.” Cantrell hesitated, then jumped back into the Navigator. Ison could partially see him rummaging around inside the vehicle. Cantrell and the Navigator’s two other occupants exited the vehicle and, after additional officers arrived, were taken into custody. Ison approached the Navigator to ensure that nobody else was inside. He saw a pistol box in the front, many small Ziploc bags inside a “woman’s satchel” on the backseat floor, and drug paraphernalia in the center console.

Ison spoke with the Navigator’s occupants. Cantrell admitted to arguing with a woman at the Days Inn but denied using a gun. The other two arrestees—Mark Lockwood, the Navigator’s owner and driver, and Jessica DeBarr, the front-seat passenger—told the same story. All three denied that the Navigator contained drugs or anything else illegal. Ison found evidence suggesting otherwise: Lockwood had several hundred dollars and two small bags containing a crystal substance that appeared to be methamphetamine on his person, Cantrell had a syringe on his person, and both Cantrell and DeBarr appeared to be under the influence of drugs.

Armed with this information, Ison obtained a warrant to search the Navigator. He found the following items stuffed inside a gap between the back seats where Cantrell had been sitting: a Taurus 9-millimeter handgun with a chambered round and a full or nearly full magazine, a crystal substance that appeared to be methamphetamine, and a powdery substance that appeared to be heroin, fentanyl, or cocaine. Ison also found on the back-seat floor a McDonald’s bag with “a very large quantity” of what looked like methamphetamine inside, a large set of digital scales, a box containing more small Ziploc bags, two smaller sets of digital scales, and a plastic-wrapped package containing yet more apparent methamphetamine.

Ison next obtained a warrant to search the adjoining motel rooms (Rooms 201 and 202) at the Days Inn where Cantrell and the others had been staying. Room 201 contained nothing incriminating, but Room 202 contained needles, syringes, and a small plastic bag containing what looked like more methamphetamine.

Cantrell was charged and convicted of conspiracy to distribute 50 grams or more of a mixture or substances containing methamphetamine, possessing with intent to distribute 50 grams or more of a mixture or substance containing methamphetamine (or aiding and abetting the others in doing so), possessing a firearm in furtherance of one or both of these drug-trafficking crimes, and being a felon in possession of a firearm. An appeal followed.

ISSUE: Is evidence of a tacit or mutual understanding among conspirators sufficient to convict for a conspiracy charge?

HOLDING: Yes. To prove an agreement, moreover, the government did not need to “prove the existence of a formal or express agreement among the conspirators”; “a tacit or mutual

understanding among the conspirators is sufficient.”²⁵³ And “once the existence [of] a conspiracy is shown, the evidence linking an individual to that conspiracy need only be slight.”²⁵⁴

Here, the evidence showed that the Lincoln Navigator contained a loaded gun, large quantities of drugs that indicated trafficking rather than individual use, three sets of digital scales, and large quantities of small Ziploc bags of the kind drug traffickers often use to package drugs for individual use. The evidence also showed that Lockwood had rented adjoining rooms in a motel close to the interstate, a setup that Officer Dawkins testified was consistent with drug trafficking, and that one of those rooms also contained drugs and drug paraphernalia. This evidence would allow a rational juror to conclude generally that two or more people had agreed to distribute drugs. From there, a rational juror could also conclude specifically that Cantrell knew about and intentionally joined this drug-trafficking conspiracy.

The Sixth Circuit affirmed the convictions.

VII. CRIMINAL LAW AND PROCEDURE – ENTRAPMENT

United States v. Hood, ---- Fed. Appx. ----- (6th Cir. 2020) – NF

FACTS: On June 28, 2017, James Hood sent a “friend request” on Facebook to J.H., a 17-year-old teen pageant contestant in Tennessee. At the time, Hood was a 53-year-old divorced male who lived alone. J.H. accepted the friend request, thinking that Hood might be a judge for the pageant. J.H. had been soliciting votes for her pageant activities on her Facebook page. Hood almost immediately began sending J.H. private messages through Facebook. The first few messages were about the pageant. Hood asked, “did u make it[?]” and promised, “I’ll vote for u.” J.H. responded appreciatively: “Thank you so very much!!!” Hood then said, “[y]ou are really beautiful and deserve to win,” to which J.H. replied, “[y]ou are very sweet!”

Hood then asked a series of introductory questions a judge would normally ask a pageant contestant, such as whether J.H. was a junior or senior, what she did for fun, whether she had a boyfriend, whether she liked to read or watch movies, what her favorite food was, and whether she expected to win the pageant. When J.H. told Hood that she was 17 years of age, he responded, “[s]o young!!” Hood assured J.H. that he was “not trying to flirt” and said, “I promise I’m just interested in talking to u that’s all I swear.” Hood also sent messages that would not ordinarily come from a pageant judge. He asked, “can we really be friends[?] I like chatting with u,” and inquired whether J.H. was a Christian. Hood showered J.H. with compliments, telling her that she was “a really beautiful young woman,” and when J.H. told him that she was going dress shopping, commented, “I’m sure you look good in everything.” Less than 24 hours after first contacting J.H., Hood asked J.H. if they could move their conversation to text messaging. J.H. declined and stopped messaging Hood. This caused Hood to worry that he had upset J.H., and he sent numerous messages apologizing and trying to assure her that he had good intentions.

²⁵³ United States v. Gardner, 488 F.3d 700, 710 (6th Cir. 2007).

²⁵⁴ United States v. Caver, 470 F.3d 220, 233 (6th Cir. 2006).

Hood's messages continued until 2:41 a.m. the next day. This caused J.H. to block Hood on Facebook and Instagram and report the conversation to her mother.

J.H.'s mother in turn reported the Facebook activity to the Knoxville Police Department. With J.H.'s mother's permission, Knoxville investigator Thomas Evans impersonated J.H. and renewed the conversation with Hood twelve days later on July 11, 2017. Evans instructed J.H.'s mother to temporarily unblock Hood on Facebook in order to reinitiate contact with him. Evans provided J.H.'s mother with a message to send to Hood, which read as follows:

Sorry my parents r constantly gettin in my biz. I got my fone long enough to FB u.
U can text me I guess on a textn app I got if you want. They don't know about it.
[Redacted phone number] just make sure I know its u kk? I am goin to block u
again so they won't know bye.

Hood responded to "J.H.'s" Facebook message almost immediately by texting the number "J.H." provided him. Right off the bat, Hood expressed a strong interest in becoming friends with "J.H." Hood quickly asked again if "J.H." had a boyfriend. Within hours, Hood asked "J.H." for a "clean" picture of "herself" and inquired if "she" would be able to video chat. Hood asked again when "J.H." turned 18. When "J.H." answered that "she" did not turn 18 until the following year, Hood replied, "[o]h geez lol" and two texts later said, "[y]ou are so beautiful."

As he did previously with the real J.H., Hood showered "J.H." with compliments and repeatedly told "her" that "she" was beautiful. Hood said to "J.H.," "I [] care about you," "I wanna make you feel good and happy," and "I want you to feel [comfortable] with me." "J.H." came back with responses such as, "[a]we, thank you soo much. Your sweet," and "[y]our kinda neat yourself." About twenty-four hours after first texting "J.H.," Hood began using terms of endearment such as "sweetie" and started reciting romantic poetry. "J.H." reciprocated to a certain extent, stating, for example, "I am liking you a lot your very sweet," and "I love the poetry and words you use." The text conversations went well into the night and resumed in the mornings, usually with Hood continuing the conversation.

Hood exhibited signs of fear that his relationship with "J.H." was inappropriate or violated the law. He inquired about "J.H.'s" parents, asking if they were "afraid u will do something or get together with a bad guy." Hood later asked if "J.H.'s" mom checked "J.H.'s" texts and if "her" mother was "mad at [him]." When "J.H." asked, "[w]hat do you think of when you think of me," Hood answered, "I have to be careful. You are 17. I know what I want to say. I think I've said a lot of what I think. I think you are a beautiful princess. I think of awesomeness, of a beautiful painting, someone who I really want to get to know[.] I wish I could tell you everything[.] ... I want to tell you what I'm feeling just afraid." The following morning, on July 13, 2017, Hood texted, "[u] swear u are not setting me up?" and added, "I'm just a little scared ok." "J.H." feigned indignation at Hood's suspicion and threatened to stop communicating. Hood sent a torrent of text messages in response, begging "J.H." to forgive him and professing his love for "her." Despite the agent's telling Hood multiple times to "[l]eave me alone for a while," Hood did not relent.

On the third day of texting, Hood invited "J.H." to his apartment. When asked what they would do at his apartment, Hood responded, "[j]ust talk lol ... get to know each other." It is at this point that "J.H." first suggested the possibility of a sexual relationship, responding that "I think if we care about each other intimacy is part of it." Hood was hesitant at first to admit to wanting an "intimate" relationship, stating, "[c]an we just not see how things go. I mean I want to get to know you." "J.H." pretended to be affronted by Hood's refusal to express his sexual desires: "I see. You want me to be honest and then when I ask you somethin direct you don't answer. It gets tiring[.]" Hood responded by saying, "I mean I want to see where things go. If it happens it happens." "J.H." continued to pester Hood to be upfront about his feelings. The agent responded, "[t]hat's just it. I want to know what your thinking and feeling when you say 'if it happens[.]' What is 'it[?]' " Hood revealed that his reluctance to be forthright had to do with "J.H.'s" age, exclaiming, "[w]hy are u doing this to me? You are 17. I'm trying to be careful[.]" Hood's evasiveness lasted for about one hour, after which he asked whether "J.H." was a virgin, whether "she" had had experience with sex, and if "she" looked "hot naked." From there, the conversation became progressively more sexual in nature, with Hood graphically describing various sex acts and positions over the course of several hours. Hood continued to send "J.H." sexually explicit text messages over the next few days.

As Hood and "J.H." got closer to arranging a meeting, Hood became increasingly afraid that he was the target of a sting operation. He repeatedly asked "J.H." for pictures of "herself" and phone calls to prove that "she" was real. Hood said, "I need to know you are not someone else doing this," and "[b]aby I could go to jail. I gotta make sure.... I need to know you ain't your mother or a cop." Several times in response, the agent gave Hood the opportunity to end the encounter. For instance, "J.H." said, "I don't see the point honestly [if] you don't believe it's me. I'm going to go for a while. I [have other] people I have been ignoring." In another text shortly thereafter, "J.H." told Hood that "[i]f I decide to continue our relationship so it can move forward [I] will let you know and probably call u or let you call me. My feelings are hurt and I'm exhausted from this[.] ... I learned early that things don't always work out the way we want them too. This [relationship] may not work." Hood refused to give up on his relationship with "J.H.," however, telling "J.H." that "I want this [relationship] to work.... I can make u happy. U gotta trust me," and sent seven text messages during the next ninety minutes without receiving a response.

The next day, Agent Evans arranged a phone call with Hood using the real J.H. in the hope of allaying Hood's fears. After the call, Evans and Hood arranged to meet at a coffee shop in Knoxville. When Hood arrived at the coffee shop, he was arrested and taken into custody. After the arrest, police searched Hood's cell phone and found a "bookmark" that Hood had saved on his Google Chrome browser in 2016 entitled "Jr. Young Miss Nudist Pageant Pics." Hood had also searched Google for "teen nudist pageant" the day before he was arrested. The search of Hood's phone also turned up screen shots of two news articles that Hood had accessed in June 2017. The first related to a sheriff's deputy in Blount County, Tennessee who had been arrested on a child solicitation charge. Hood's son-in-law worked for the Blount County Sheriff's office at the time. The second article reported on a sheriff's deputy in Hamilton County, Tennessee, who was

indicted for having child pornography on his cell phone. Hood himself used to work at the Hamilton County Sheriff's office and had sent the article to a friend still employed there.

Hood was indicted in the Eastern District of Tennessee on one count of using "a facility or means of interstate and foreign commerce" to attempt to persuade, induce, and entice a minor to engage in sexual activity "for which any person can be charged with a criminal offense." the underlying criminal offense was aggravated statutory rape under Tennessee law.

Hood invoked an entrapment defense and moved for a judgment of acquittal. The trial court denied the motion for acquittal and submitted the entrapment defense to the jury at the close of proof. The jury rejected the entrapment defense and found Hood guilty. This appeal followed.

ISSUE: For an entrapment defense to be successful, must a defendant prove that law enforcement induced the crime and that the defendant lacked predisposition to engage in the criminal activity?

HOLDING: Yes. An entrapment defense requires proof of two interrelated elements: (1) government inducement of the crime, and (2) lack of predisposition on the part of the defendant to engage in the criminal activity.²⁵⁵ "The key question in determining predisposition is whether law enforcement planted a 'criminal design in the mind of an otherwise law-abiding citizen or whether the government merely provided an opportunity to commit a crime to one who was already predisposed to do so.'"²⁵⁶ In answering this question, courts examine the following factors:

[1] the character or reputation of the defendant, including any prior criminal record; [2] whether the suggestion of the criminal activity was initially made by the Government; [3] whether the defendant was engaged in criminal activity for profit; [4] whether the defendant evidenced reluctance to commit the offense, overcome only by repeated Government inducements or persuasion; and [5] the nature of the inducement or persuasion supplied by the Government.²⁵⁷

The Sixth Circuit worked through the five factors and held that although the Government encouraged Hood to commit the offense in question, "[g]overnment agents do not entrap by merely presenting the opportunity to engage in criminal activity."²⁵⁸ Nor is the government

²⁵⁵ Mathews v. United States, 485 U.S. 58, 63, 108 S.Ct. 883, 99 L.Ed.2d 54 (1988); United States v. Khalil, 279 F.3d 358, 364 (6th Cir. 2002).

²⁵⁶ United States v. Demmler, 655 F.3d 451, 457 (6th Cir. 2011) (quoting United States v. Al-Cholan, 610 F.3d 945, 950 (6th Cir. 2010)).

²⁵⁷ Al-Cholan, 610 F.3d at 950 (internal brackets omitted) (quoting United States v. Moore, 916 F.2d 1131, 1137 (6th Cir. 1990)).

²⁵⁸ United States v. Summers, 238 F. App'x 74, 76 (6th Cir. 2007).

prohibited from using “stealth and strategy” to catch unwary criminals.²⁵⁹ Hood seized the opportunity to engage in a romantic relationship with “J.H.” and agreed to have sex within one hour of the agent’s suggestion. Even accepting the premise that the Government induced Hood by capitalizing on his need for companionship, Hood’s conduct, including his incessant flattery of “J.H.” and outward display of fear that he would be detected by law enforcement, provided sufficient evidence from which a reasonable jury could conclude that he was predisposed to commit the instant offense. This is especially so given the defendant’s burden to demonstrate a “‘patently clear’ absence of predisposition.

The Sixth Circuit affirmed Hood’s conviction.

VIII. CRIMINAL LAW AND PROCEDURE – EVIDENCE

United States v. Craig, 953 F.3d 898 (6th Cir. 2020) – F

FACTS: Terrance Craig was involved in a high-speed shootout in the streets of Akron, Ohio and was apprehended wearing a shoulder holster and with gunshot residue on his hands. His DNA was identified on a firearm discovered in the backseat of one of the vehicles. Craig was charged with being a felon in possession of a firearm and took the case to trial. Craig admitted that he possessed a firearm while being a felon but testified that he possessed the gun only long enough to defend himself and his friends during the firefight. On cross-examination, the Government played for the jury a video depicting a masked individual it alleged to be Craig rapping and wielding a firearm that was similar to the gun for which he was charged. Craig denied that he was the masked individual in the video, and the Government did not attempt to introduce the video into evidence. The district court never issued a limiting instruction about whether or how to consider the video, and the Government referenced the video in closing arguments. Craig was convicted of being a felon in possession of a firearm. This appeal followed.

ISSUE: May a criminal conviction be supported by evidence that was published for the jury as an unadmitted exhibit under the guise of impeachment?

HOLDING: No. To authenticate an exhibit, “the proponent must produce evidence sufficient to support a finding that the item is what the proponent claims it is.”²⁶⁰ The proponent must provide sufficient evidence “so that a reasonable juror could find in favor of authenticity or identification.”²⁶¹ In this case, the Government never attempted to authenticate the video. The Government believed that the video could be used to impeach Craig’s testimony under the Federal Rules of Evidence. The Sixth Circuit found that playing the video as extrinsic impeachment evidence was not permitted under the Federal Rules of Evidence.

The Sixth Circuit reversed this conviction and remanded for a new trial.

²⁵⁹ Sherman v. United States, 356 U.S. 369, 372, 78 S.Ct. 819 (1958).

²⁶⁰ Fed. R. Evid. 901(a).

²⁶¹ United States v. Jones, 107 F.3d 1147, 1150 n.1 (6th Cir. 1997).

United States v. Dunnican, ----- F.3d -----, 2020 WL 3056229 (6th Cir. 2020) – NF

FACTS: Keli Dunnican was convicted of being a felon in possession of a firearm, possessing marijuana with the intent to distribute it, and carrying a firearm during and in relation to a drug trafficking crime. Dunnican’s conviction arose from a search of his car conducted by agents of the Ohio Adult Parole Authority while he was on parole. The main issue of this appeal was the admissibility of expert-opinion testimony of DEA Special Agent Moses, who spoke regarding the particulars of the illegal marijuana trade and explained specialized drug jargon and transactions.

ISSUE: May a police officer testify as an expert witness if the testimony will aid the jury’s understanding of an area, such as drug dealing, not within the experience of the average juror?

HOLDING: Yes. Expert testimony regarding the very specific slang, street language, and jargon used in the illegal drug trafficking trade may be admitted under Federal Rule of Evidence 702.²⁶² Because such expert testimony is required for both judges and juries to make rational determinations of a defendant’s culpability, “[c]ourts have overwhelmingly found police officers’ expert testimony admissible where it will aid the jury’s understanding of an area, such as drug dealing, not within the experience of the average juror.”²⁶³ Moreover, “[l]aw enforcement officers may testify concerning the methods and techniques employed in an area of criminal activity and to establish ‘modus operandi’ of particular crimes.”²⁶⁴

In this case, the Sixth Circuit found Moses’s testimony properly admitted. Moses offered no opinion on Dunnican’s mental state or intent. Rather, Moses, drawing upon his training, experience, and review of the evidence, simply shared his subjective assessment of the facts at hand: that it “appear[ed] to [him]” that the marijuana discovered in Dunnican’s car “was packed for resale.” At no point did Moses state any opinion of Dunnican’s state of mind. Rather, Moses merely offered “general terms” (i.e., the “marijuana was packed for resale”) related to the “common practices” of drug dealers “who possess the requisite intent” to distribute marijuana.

The Sixth Circuit affirmed the convictions.

United States v. Hendricks, 950 F.3d 348 (6th Cir. 2020) – F

FACTS: Hendricks was convicted of attempting and conspiring to provide material support to a foreign terrorist organization. Both counts charged Hendricks with conspiring or attempting to provide material support in the form of personnel and services to ISIS. The only evidence introduced linking Hendricks to the offenses was testimony from an FBI undercover agent and

²⁶² See United States v. Kilpatrick, 798 F.3d 365, 379–81 (6th Cir. 2015).

²⁶³ United States v. Thomas, 74 F.3d 676, 682 (6th Cir. 1996), abrogated on other grounds by United States v. Barron, 940 F.3d 903, 920 (6th Cir. 2019) (emphasis added); see also United States v. Lopez-Medina, 461 F.3d 724, 742 (6th Cir. 2006).

²⁶⁴ United States v. Pearce, 912 F.2d 159, 163 (6th Cir. 1990).

other witnesses that Hendricks communicated with ISIS members, viewed himself as an agent of ISIS and acted upon the behalf of ISIS.

ISSUE: May a conviction for a criminal offense be based solely upon circumstantial evidence?

HOLDING: Yes. Hendricks presented no direct evidence of any conversation or meeting with specific ISIS members where he was directed or proposed to establish an ISIS cell. It was not necessary, however, for the government to present such evidence. A conviction may be based on “[c]ircumstantial evidence alone.”²⁶⁵ Circumstantial evidence presented through witnesses with respect to Hendricks’s actions was sufficient to secure a conviction.

The conviction was affirmed.

IX. CRIMINAL LAW AND PROCEDURE – FIREARMS

United States v. Ward, 957 F.3d 691 (6th Cir. 2020) – F

FACTS: On the evening of May 27, 2017, police officers responded to reports of a shooting on Clovia Lane in Memphis, Tennessee. When the officers arrived, witnesses told them that Leon Ward had pulled up in a blue Chevrolet Impala and had fired shots at several individuals gathered in a yard outside one of the houses on the street. Ward then got out of the car and continued shooting, which prompted several of the individuals to return fire. The witnesses then directed the officers to another house, where the officers found Ward inside the kitchen with a severe gunshot wound to his leg. Ward was transported to a hospital. Officers subsequently found an empty, silver and black Springfield Armory XD .40-caliber pistol on the front lawn of the house next to the house where they had found Ward. They also found several spent .40-caliber shell casings in the area. After checking the serial number of the gun, the officers learned that it had been reported stolen a month earlier. A little over two weeks after this incident, on June 13, 2017, Ward—who at the time was still on crutches—was arrested for trying to rob a CVS pharmacy.

Ward has two prior felonies. In 2007, he was convicted in state court of aggravated robbery and subsequently served two and a half years in prison before being paroled. In 2011, he was convicted in federal court of brandishing a firearm during a robbery and was sentenced to seven years in federal prison before being released in December of 2016. Ward pleaded guilty in both instances. At the time of his arrest for the attempted robbery at the CVS, Ward was still on supervised release from his federal conviction.

A federal grand jury indicted Ward for being a felon in possession of a firearm, attempted robbery and brandishing a firearm during a robbery. Ward entered a guilty plea to the robbery charge in

²⁶⁵ United States v. Spearman, 186 F.3d 743, 746 (6th Cir. 199

exchange for the brandishing a firearm charge being dropped. A jury convicted Ward of the felon-in-possession charge. This appeal followed:

ISSUES: To support a conviction for being a felon in possession of a handgun, is the prosecution required to prove that a defendant knew that he was barred from possessing a firearm because he was a felon?

HOLDING: Yes. In Rehaif v. United States,²⁶⁶ the United States Supreme Court held that the Government must prove both that the defendant knew he possessed a firearm and that he knew he belonged to the relevant category of persons barred from possessing a firearm. Ward stipulated that he was a felon, and the record was clear that Ward had two prior felony convictions (one state, one federal) and was still on supervised release from his federal felony.

Moreover to obtain a conviction with respect to a felon-in-possession charge under 18 U.S.C. § 922(g)(1), the government must prove beyond a reasonable doubt that: (1) the defendant was a felon; (2) the defendant knew he was a felon; (3) the defendant knowingly possessed a firearm; and (4) that the firearm had traveled through interstate commerce.²⁶⁷

In this case, the trial record demonstrates that there was ample evidence from which the jury could have inferred that Ward knowingly possessed the gun. Two witnesses testified that they saw Ward point a silver and black .40-caliber gun out of his blue Impala and fire shots at individuals on Clovia Lane. Another witness testified that he saw a man point a silver and black gun out of the car window, and that he knew the car to belong to Ward. The descriptions of the gun matched the gun that officers later recovered in the yard of the house next to the house where Ward was arrested. Although the officers did not arrest Ward with the gun, the jury could have credited the statements from the witnesses and believed their descriptions of a gun that matched the one recovered close to Ward. Drawing all reasonable inferences in favor of the government, the Sixth Circuit held that the evidence was sufficient for a rational juror to conclude that Ward had possessed a firearm on the date in question. As previously mentioned here, Ward stipulated that he was a felon.

The Sixth Circuit affirmed the conviction.

X. DUE PROCESS

Medlin v. City of Algood (TN), ---- Fed. Appx. ----, 2020 WL 2319044 (6th Cir. 2020) – NF

FACTS: Vaughn Larson, the city clerk, and Justin Medlin, a city police officer, met through their employment with the City. The two began a relationship and exchanged explicit messages over Facebook. Medlin was also engaged in romantic or sexual relationships with several other city employees, including City Councilwoman Jennifer Green. When Medlin sent a nude photo of himself to a cousin of the Algood police chief, Chief Gary Harris, the City began an investigation

²⁶⁶ ____ U.S. ____, 139 S.Ct. 2191, 204 L.Ed.2d 594 (2019).

²⁶⁷ Id., at 2200.

into Medlin’s conduct and searched his electronic devices. The City concluded that Medlin was using a city-provided cellular service to send and receive sexually explicit messages and images. The City suspended Medlin pending an investigation, and he subsequently resigned. By a vote of the city council, Larson’s employment was also terminated. The City’s charter contains a provision that permits a city official to be removed from their employment by the city council for any crime in office or for grave misconduct showing unfitness for public service after notice of the charges in writing and an opportunity to be heard at a public hearing. It was later discovered that Larson was also sending inappropriate photos of herself to Medlin via Facebook Messenger. The cell phone issued to Medlin was paid for by Chief Harris, but Medlin was aware that it was provided by the City for official use.

Larson and Medlin both claim that they held a property interest in their continued employment and that the City and its officials denied them due process. Larson claims as well that her property interest in her good name and reputation was damaged by the mayor’s statements to the press. Medlin additionally claims that the termination of his employment was retaliation for the exercise of his rights to free speech and intimate association. The district court granted summary judgment for the City. This appeal followed.

ISSUE: Does a voluntary resignation prior to a scheduled pre-termination hearing waive a due process claim?

HOLDING: Yes. Courts must consider two questions when confronted with due process claims: 1) Does the employee have a property interest in their employment protected by the Constitution, and; 2) Was the employee afforded the procedures to which governmental employees with a property interest in their jobs ordinarily entitled?²⁶⁸ Sufficient pretermination process need only include oral or written notice of the charges, an explanation of the employer’s evidence, and an opportunity for the employee to tell his side of the story. *Id.*

“A constructive discharge may constitute a deprivation of property within the meaning of the Fourteenth Amendment.”²⁶⁹ Employee resignations, however, are presumed to be voluntary.²⁷⁰ “A constructive discharge exists if working conditions would have been so difficult or unpleasant that a reasonable person in the employee’s shoes would have felt compelled to resign.”²⁷¹ The plaintiff must demonstrate “that 1) ‘the employer ... deliberately create[d] intolerable working conditions, as perceived by a reasonable person,’ and 2) the employer did so ‘with the intention of forcing the employee to quit...’”²⁷²

²⁶⁸ *Kuhn v. Washtenaw County*, 709 F.3d 612, 620 (6th Cir. 2013).

²⁶⁹ *Nunn v. Lynch*, 113 Fed. App’x 55, 59 (6th Cir. 2004).

²⁷⁰ *Spangler v. Lucas County*, 477 F. App’x 301, 303 (6th Cir. 2012); *Nunn*, 113 F. App’x at 59.

²⁷¹ *Ford v. Gen. Motors Corp.*, 305 F.3d 545, 554 (6th Cir. 2002) (quoting *Yates v. Avco Corp.*, 819 F.2d 630, 636–37 (6th Cir. 1987)).

²⁷² *Logan v. Denny’s, Inc.*, 259 F.3d 558, 568–69 (6th Cir. 2001) (quoting *Moore v. KUKA Welding Sys.*, 171 F.3d 1073, 1080 (6th Cir. 1999)).

In this case, the City scheduled a termination hearing for Medlin, offering him an opportunity to testify, present evidence, and confront witnesses. Furthermore, Medlin testified that the City permitted him to resign so that he could receive a payout for sick days, vacation days, and comp time. The facts here indicate that Medlin had a choice—to resign with the guarantee of additional compensation or to proceed with the hearing. There is no evidence that Medlin was pressured to resign, and Medlin is unable to prove that the City intended to force him to quit. The Sixth Circuit held that Medlin resigned on his own free will.

The Sixth Circuit affirmed the district court.

Moore v. City of Cleveland, ---- Fed. Appx. ----, 2020 WL 2095228 (6th Cir. 2020) – NF

FACTS: In 2018, the City of Cleveland (Ohio) fired 15 recruits enrolled in the Cleveland Police Academy after concluding that those recruits plagiarized certain assignments that were part of the Academy’s curriculum. The recruits were not permitted to sit for the final examination scheduled for August 16, 2018, effectively terminating their employment with the police department. The city conducted disciplinary hearings from August 17-23, 2018. Thirteen recruits were found guilty of three rule violations, while two recruits were found guilty of two rules violations. On September 17, the city announced that the fifteen recruits were fired for cheating and publicly identified them. Seven of those recruits filed federal and state law claims. The federal district court granted summary judgment for the city. The recruits appealed.

ISSUE: With respect to the termination of governmental employment for dishonesty, must the employee request a “name-clearing” hearing and be denied that request before alleging a violation of due process?

HOLDING: Yes. The Fourteenth Amendment’s Due Process Clause requires that no state shall “deprive any person of life, liberty, or property, without due process of law.” A person’s “reputation, good name, honor, and integrity are among the liberty interests protected” by this provision.²⁷³ In general, “before a person is deprived of either a liberty or property interest, he has a right to some kind of hearing.”²⁷⁴

When plaintiffs allege, as the recruits have here, that a state action has injured their reputation, this type of claim is frequently called a “stigma-plus” claim.²⁷⁵ The name derives from the fact that, to prevail on such a claim, a plaintiff must show “that the state’s action both damaged his or her reputation (the stigma) and that it ‘deprived [him or her] of a right previously held under state law’ (the plus).”²⁷⁶

²⁷³ Chilingirian v. Boris, 882 F.2d 200, 205 (6th Cir. 1989) (citing Bd. of Regents of State Colls. v. Roth, 408 U.S. 564, 573, 92 S.Ct. 2701, 33 L.Ed.2d 548 (1972)).

²⁷⁴ Quinn v. Shirey, 293 F.3d 315, 319 (6th Cir. 2002) (citing Roth, 408 U.S. at 570 n.7, 92 S.Ct. 2701).

²⁷⁵ See Doe v. Mich. Dep’t of State Police, 490 F.3d 491, 501 (6th Cir. 2007).

²⁷⁶ Id. at 502 (alteration in original) (quoting Paul v. Davis, 424 U.S. 693, 708, 96 S.Ct. 1155, 47 L.Ed.2d 405 (1976)).

Five prerequisites that must be satisfied in order for a plaintiff to establish that he or she was deprived of a liberty interest and thus entitled to a name-clearing hearing. They are as follows:

First, the stigmatizing statements must be made in conjunction with the plaintiff's termination from employment. Second, a plaintiff is not deprived of his liberty interest when the employer has alleged merely improper or inadequate performance, incompetence, neglect of duty or malfeasance. Third, the stigmatizing statements or charges must be made public. Fourth, the plaintiff must claim that the charges made against him were false. Lastly, the public dissemination must have been voluntary.²⁷⁷

In addition, before bringing suit, a plaintiff must request a name-clearing hearing and be denied that request.²⁷⁸ A plaintiff may not necessarily have to use the precise phrase "name-clearing hearing," but his request must "'sufficiently apprise' Defendants of his desire for a hearing to clear his name 'following the dissemination of the statements.'"²⁷⁹

As required by law, the district court assumed that the plagiarism charges were false. It accordingly determined that the recruits had satisfied the five prerequisites listed above because the City had named the recruits in a news report accusing them of dishonesty, and the City had voluntarily publicized their names in the process of terminating their employment.

The district court, however, went on to conclude that the recruits had not sufficiently apprised the City of their desire for a name-clearing hearing. The Sixth Circuit concurred with the district court, holding that no communication, including a letter the recruits' attorney sent to a representative of the City on August 12, 2018, specifically requested such a hearing. Moreover, even though the City provided a pre-termination disciplinary hearing that comported with due process with respect to the property interest, this hearing did not relieve any recruit of the obligation to request a name-clearing hearing before filing a lawsuit alleging deprivation of a liberty interest. "Name-clearing" is a liberty interest.

The Sixth Circuit affirmed the district court.

XI. MIRANDA

United States v. Ramamoorthy, 949 F.3d 955 (6th Cir. 2020) – F

FACTS: A female passenger on a flight from Las Vegas to Detroit awoke to find her pants unbuttoned and unzipped with Ramamoorthy either inserting or trying to insert his fingers into her vagina. The passenger advised the flight attendants, who escorted her off the plane upon

²⁷⁷ Quinn, 293 F.3d at 320.

²⁷⁸ See id. at 321–24 ("[A] plaintiff who fails to allege that he has requested a hearing and was denied the same has no cause of action....").

²⁷⁹ Id. at 325 (quoting Ludwig v. Bd. of Trustees of Ferris State Univ., 123 F.3d 404, 411 (6th Cir. 1997)).

landing. Airport police Sergeant Alvarado and Corporal Hunter met Ramamoorthy in the jetway as he came off the plane.

Sergeant Alvarado asked Ramamoorthy, “What’s going on today?” In response, and without further questioning, Ramamoorthy immediately began talking about the female passenger, claiming that she fell asleep on him and that he did not know where he had put his hands. He also said he was very tired on the flight because he had taken some Tylenol. Sergeant Alvarado then led him into the airport terminal, where they continued to talk in an area open to the public.

Another officer, Officer Chalmers, arrived and asked Ramamoorthy some questions about what had happened on the flight, to which Ramamoorthy gave similar answers. At the end of their conversation, Ramamoorthy made a written statement of his recollection. In the statement, he repeated that the passenger had slept on him, that he had been in a “deep sleep,” and that he did not remember where he had put his hands.

The officers arrested Ramamoorthy and took him to the airport police station, where two FBI agents interviewed him for a little over an hour. Before asking Ramamoorthy any questions about the flight, the agents provided him with a written Miranda waiver form. Ramamoorthy signed the form after reading his rights aloud and discussing them with the agents for about ten minutes. Ramamoorthy then admitted that he had tried to put his fingers inside Laura’s pants.

Ramamoorthy moved to suppress the statements he made to the FBI, arguing that he did not knowingly and intelligently waive his Miranda rights because he did not speak English with enough fluency. The district court denied the motion to suppress after finding that Ramamoorthy was an “articulate, natural English speaker” and that the agents had “no contemporaneous reason to believe” that Ramamoorthy did not understand the consequences of waiving his rights.

After a jury trial, Ramamoorthy was convicted of sexual abuse. He appealed.

ISSUE: Is an examination of the validity of a Miranda waiver conducted from the totality of the circumstances from the perspective of law enforcement?

HOLDING: Yes. Statements made in response to custodial police interrogation must be suppressed unless the suspect first waived his Miranda rights ‘voluntarily, knowingly and intelligently.’”²⁸⁰ Waiver is voluntary when “it was the product *965 of a free and deliberate choice rather than intimidation, coercion, or deception.”²⁸¹ It is intelligent when it is “made with a full awareness of both the nature of the right being abandoned and the consequences of the decision to abandon it.”²⁸² “To determine whether a waiver is valid, we examine the totality of the circumstances.”²⁸³ We do so “‘primarily from the perspective of the police,’ such that where

²⁸⁰ United States v. Al-Cholan, 610 F.3d 945, 954 (6th Cir. 2010) (quoting Colorado v. Spring, 479 U.S. 564, 572, 107 S.Ct. 851, 93 L.Ed.2d 954 (1987)).

²⁸¹ Moran v. Burbine, 475 U.S. 412, 421, 106 S.Ct. 1135, 89 L.Ed.2d 410 (1986).

²⁸² Id.

²⁸³ United States v. Ray, 803 F.3d 244, 266 (6th Cir. 2015).

‘[the] police had no reason to believe that [the defendant] misunderstood the warnings, ... there is no basis for invalidating [the] Miranda waiver.’”²⁸⁴

The Sixth Circuit reviewed the interrogation video with the FBI agents and determined that he officers conducted themselves respectfully and professionally, making no threats and speaking with a calm demeanor. By responding in coherent English, asking thoughtful questions, nodding his head, and signing his initials after reading each right aloud, Ramamoorthy gave every indication to the agents that he understood his rights and the consequences of waiving them. None of the circumstances that the agents could have observed reasonably suggested that Ramamoorthy had asked about the timing of a judicial proceeding because he believed that only statements made to a judge were admissible evidence.

The conviction was affirmed.

XII. SEARCH AND SEIZURE

United States v. Ammons, 806 Fed. Appx. 378 (6th Cir. 2020) – NF

FACTS: Ammons was charged with production of child pornography and knowingly accessing child pornography with intent to view it. The charges against Ammons stemmed from the execution of a search warrant issued by a Virginia judge which placed malware on Playpen (a website on the dark web which contained child pornography). From that malware, the FBI was able to obtain IP addresses, and ultimately traced an IP address obtained from Ammons’ home in Muldraugh, Kentucky.

During the execution of a search warrant issued in Kentucky, the FBI interviewed Ammons. He waived his Miranda rights and agreed to answer the agents’ questions. Ammons told the agents that he was the primary user of the computer in his household. He also explained that he had installed a password protected wireless router in the house a few months earlier. Finally, after initially denying ever seeing child pornography, Ammons admitted that he came across child pornography while exploring the “dark web.” He named multiple sites where he had seen child pornography and described the images to the agents—though he claimed he was not a “collector” of these images.

The FBI also interviewed Ammons’ 16-year-old niece, who lived in his Kentucky home. She told agents that Ammons had previously taken nude photographs of her. She described an incident in which Ammons had caught her taking nude pictures of herself. She stated that Ammons confronted her, confiscated the phone on which she had taken the pictures, and threatened to tell her mother unless she agreed to pose nude for Ammons. She claimed that Ammons then took nude photographs of her, forcing her to pose with her legs spread apart exposing her genitals. These photographs were never found.

²⁸⁴ Al-Cholan, 610 F.3d at 954.

Prior to trial, Ammons moved to suppress the evidence obtained from his computer through both the NIT and the physical search of his home. He argued that the Virginia Warrant was invalid because the issuing magistrate judge lacked jurisdiction over Kentucky, where Ammons' computer was located when the government implemented the NIT. Because the subsequent Kentucky Warrant was obtained with information from the NIT, Ammons contended that evidence from both searches must be suppressed. The district court denied Ammons' motion, and the case proceeded to trial.

After trial, the jury rendered a split verdict, acquitting Ammons of producing child pornography but convicting him of knowingly accessing child pornography with intent to view it. Ammons moved for a judgment of acquittal, arguing that the evidence was insufficient to support his conviction. The district court denied his motion. Ammons was sentenced and appealed.

ISSUE: Does the good-faith exception to the exclusionary rule apply to evidence seized in reasonable reliance on a search warrant that was invalid as a result of the issuing judge's jurisdictional error?

HOLDING: Yes. In United States v. Moorehead,²⁸⁵ the 6th Circuit held that the good faith exception to exclusionary rule is not categorically inapplicable to warrants that are void *ab initio* as a result of magistrate judge's jurisdictional error. Accordingly, the Sixth Circuit held that the evidence obtained as a result of the search warrant executed on Ammons' residence was obtained in good faith based upon underlying information uncovered from the execution of the Virginia search warrant.

The Sixth Circuit affirmed Ammons' convictions.

United States v. Betts, 806 Fed. Appx. 426 (6th Cir. 2020) – NF

FACTS: Michael Betts drove his vehicle to a commercial parking lot in Salem, Ohio, early one November morning. Betts was in the parking lot at roughly 1 a.m., when all the adjacent businesses were closed. Betts parked his vehicle in front of a shop that had been frequently burglarized. Betts's vehicle blocked the shop's drive-through window. And Betts paced around his vehicle, despite chilly middle-of-the-night November temperatures.

After viewing this episode for more than half an hour, a witness called the police, identified himself, and explained what he had seen. Officer Donald Paulin and another officer were dispatched to the scene. When they arrived, Paulin pulled behind Betts's vehicle, turned on his emergency lights, and ran a check of Betts's license plate. Within two minutes, Paulin learned that the plate was invalid. Paulin also knew that the shop Betts was parked in front of had been frequently burglarized through the drive-through window Betts was now blocking.

Upon seeing the emergency police lights, Betts re-entered his vehicle. Paulin approached the vehicle and ordered Betts out. As they spoke, Betts was "sweating profusely" (despite the frigid

²⁸⁵ 912 F.3d 963 (6th Cir. 2019).

temperatures) and “talking a lot.” Betts stated that he had driven to the parking lot to get a drink from a nearby vending machine, yet he reportedly had been in the lot for over thirty minutes, pacing around the vehicle. Betts added that he was looking for an address on Arch Street. But the address Betts provided did not exist on Arch Street in Salem—the Arch Street address Betts was looking for, Paulin knew, was an established drug area in neighboring Alliance. At this point, the officers on the scene called for a police dog.

Roughly five minutes after this call, and within eleven minutes of the initial stop, Officer Michael Garber arrived with his police dog, Simon. Garber took Simon for a first pass around Betts’s vehicle. As they passed the trunk, Simon snapped his head and increased his sniffing intensity, an alert behavior to the presence of contraband. During a second pass, Simon again exhibited alert behavior to the presence of contraband near the trunk.

Because neither Betts nor anyone else could legally drive the vehicle due to its invalid license plate, and because the vehicle was blocking a drive-through window, the officers informed Betts that the vehicle needed to be towed. Paulin in turn agreed to Betts’s request that Betts be allowed to call a tow truck himself to have the vehicle towed to a friend’s house. Betts then spoke on his cell phone, but he did not call for a truck. By this point, the police dog had exhibited alert behavior to the presence of contraband. The officers asked Betts if they could search his vehicle. Betts refused. After calling the local prosecutor for legal guidance, the officers searched the vehicle without Betts’s consent. They found marijuana, crack cocaine, heroin, multiple cell phones, a firearm, and a loaded magazine.

Following his ensuing indictment for possession with intent to distribute and felon in possession of a firearm charges, Betts moved to suppress the evidence found in his vehicle on Fourth Amendment grounds. The district court denied Betts’s motion to suppress, and a jury convicted Betts. Betts now appeals the district court’s denial of his motion to suppress.

ISSUE: May law enforcement search a vehicle upon probable cause that the vehicle contains evidence of criminal activity?

HOLDING: Yes. Under the Terry doctrine, a police officer who has “reasonable suspicion” that criminal activity is ongoing or about to occur may stop an individual to investigate. Terry stops, though, are limited in both duration and scope. The duration is limited to the length of time necessary to investigate the underlying reason for the stop.²⁸⁶ And the scope is limited to the original purpose of the stop. *Id.* at 661 (noting that, absent additional reasonable suspicion, “all the officer’s actions must be ‘reasonably related in scope to circumstances justifying the original interference’”²⁸⁷

²⁸⁶ United States v. Stepp, 680 F.3d 651, 661–62 (6th Cir. 2012).

²⁸⁷ *Id.*

One additional consideration is whether the police have probable cause that the vehicle contains evidence of criminal activity.²⁸⁸ A common way to discern evidence of criminal activity is through the nose of a trained canine, also known as a “dog sniff.”²⁸⁹ Because there is no expectation of privacy in contraband, a routine dog sniff to detect contraband is generally not, by itself, a “search” for Fourth Amendment purposes.²⁹⁰ Where a sniff takes place before completion of the stop’s purpose, the indication of contraband would justify a search of the vehicle. But where a stop is extended for the sole purpose of performing a dog sniff, an ensuing vehicle search would be in tension with the duration and scope limitations on Terry stops, and thus unlawful under the Fourth Amendment.²⁹¹

In this case, the seizure was justified under the Terry because Paulin reasonably suspected criminal activity based upon the fact that Betts was pacing in a parking lot in the cold at night, with his vehicle for over 30 minutes where surrounding businesses had been closed at a location where prior burglaries occurred. During this investigatory stop, Paulin immediately discovered criminal activity because the license plate on the car was invalid, thereby causing the car to be towed. While waiting for the tow truck, a drug canine unit arrived, sniffed the car and alerted to the presence of contraband. To conduct a search of a vehicle, law enforcement officers do not need a warrant—they need only probable cause that the vehicle contains evidence of criminal activity.²⁹² When a well-trained drug dog indicates the presence of contraband in a vehicle, police have probable cause to search the vehicle.²⁹³

The Sixth Circuit affirmed the judgment of the district court.

United States v. Britton, ---- Fed. Appx. -----, 2020 WL 2062278 (6th Cir. 2020) – NF

FACTS: Between December 2010 and October 2015, a group of individuals burglarized small pharmacies throughout the southeastern United States. These individuals stole drugs—primarily oxycodone and hydrocodone—from the pharmacies. In September 2015, the police stopped a vehicle that had been identified as being used in the burglary of one of these pharmacies. The owner of the vehicle, Robert Nunley, was subsequently arrested. Nunley’s arrest led to the arrest of seven additional individuals, including Britton and Jones.

²⁸⁸ United States v. Graham, 275 F.3d 490, 509 (6th Cir. 2001)

²⁸⁹ See Carter v. Hamaoui, 699 F. App'x 519, 532–33 (6th Cir. 2017) (citing Florida v. Harris, 568 U.S. 237, 247, 133 S.Ct. 1050, 185 L.Ed.2d 61 (2013)).

²⁹⁰ Illinois v. Caballes, 543 U.S. 405, 408–09, 125 S.Ct. 834, 160 L.Ed.2d 842 (2005).

²⁹¹ Rodriguez v. United States, 575 U.S. 348, 357, 135 S.Ct. 1609, 191 L.Ed.2d 492 (2015)

²⁹² United States v. Smith, 510 F.3d 641, 647 (6th Cir. 2007).

²⁹³ Hamaoui, 699 F. App'x at 533.

A federal grand jury indicted all eight of the individual, including Britton and Jones. Six of the codefendants pleaded guilty to drug conspiracy. Britton and Jones were tried by a jury. Three of the other codefendants testified for the government at trial.

Prior to trial, Britton moved to suppress the results of two search warrants from 2015 and 2016 that had uncovered subscriber information and historical CSLI for the number assigned to his mobile phone. The district court denied Britton's motion to suppress. Britton also filed a motion in limine seeking to exclude his CSLI data. That motion was also denied. Finally, Britton objected to an exhibit illustrating a map with two cell-tower locations near the site of a pharmacy burglary in Corbin, Kentucky that had pink circles surrounding the cell-phone towers. Britton objected that the circles were suggestive of the signal range of the towers and unfairly implied that his phone was located within that range. The district court overruled Britton's objection.

Britton and Jones were both convicted and appealed.

ISSUE: If evidence is obtained in reasonable reliance to a search warrant, does the exclusionary rule automatically require suppression of the evidence?

HOLDING: No. Britton bases his argument on the 2008 United States Supreme Court's holding in Carpenter v. United States,²⁹⁴ which held that law enforcement must obtain a search warrant before compelling a wireless carrier to turn over a subscriber's CSLI. "But exclusion of evidence does not automatically follow from the fact that a Fourth Amendment violation occurred."²⁹⁵ "[W]hen the police conduct a search in objectively reasonable reliance on binding appellate precedent, the exclusionary rule does not apply."²⁹⁶ Binding precedent at the time of the 2016 warrant had established that defendants "lack any property interest in cell-site records created and maintained by their wireless carriers."²⁹⁷ Accordingly, the government's collection of business records containing cell-site data was not considered a search under the Fourth Amendment, and a warrant was not required.²⁹⁸ The search and seizure of Britton's CSLI was conducted in reliance on past precedent.

The Sixth Circuit affirmed Britton's conviction. The Sixth Circuit affirmed Jones's conviction after rejecting his sufficiency of the evidence argument.

United States v. Castro, ---- F.3d ----, 2020 WL 2900772 (6th Cir. 2020) – NF

FACTS: A jury convicted Alex Castro, Dante Howard, and Solon Tatum of conspiring to distribute heroin, cocaine, and marijuana in western Michigan. The evidence at trial depicted a sophisticated drug trafficking organization, with the conspirators going to great lengths to avoid detection. Appellants challenge the tools the government used to ensnare members of the

²⁹⁴ — U.S. —, 138 S. Ct. 2206, 201 L.Ed.2d 507 (2018)

²⁹⁵ Davis v. United States, 564 U.S. 229, 243, 131 S.Ct. 2419, 180 L.Ed.2d 285 (2011).

²⁹⁶ Id. at 249–50, 131 S.Ct. 2419.

²⁹⁷ United States v. Carpenter, 819 F.3d 880, 888 (6th Cir. 2016).

²⁹⁸ Id.

organization, including wiretaps that recorded drug-related conversations between co-conspirators. This appeal followed.

ISSUE: To use a wiretap under federal law, must law enforcement describe to an authorizing judge whether or not other investigative procedures have been tried and failed, or why other procedures appear unlikely to succeed if tried?

HOLDING: Yes. To use a wiretap, federal law enforcement officials must describe to an authorizing judge “whether or not other investigative procedures have been tried and failed or why they reasonably appear to be unlikely to succeed if tried or to be too dangerous.”²⁹⁹ This “necessity requirement” ensures that wiretapping “is not resorted to in situations where traditional investigative techniques would suffice to expose the crime.”³⁰⁰ Even so, “the purpose of the necessity requirement ‘is not to foreclose electronic surveillance until every other imaginable method of investigation has been unsuccessfully attempted, but simply to inform the issuing judge of the difficulties involved in the use of conventional techniques.’”³⁰¹

The government met that standard in this case. In a sixty-page affidavit in support of an application to monitor Phillips’s cell phone, DEA special agent Alexis Giudice explained the goals of the investigation and why wiretaps were necessary to achieve those goals. Agent Giudice stated that her team intended to uncover “the identities and roles of all suppliers of controlled substances to the [Phillips-Lee organization]” and to “[o]btain[] admissible evidence that demonstrates beyond a reasonable doubt that the TARGET SUBJECTS and any later identified targets committed the alleged violations of law set forth herein.” She went on to explain why traditional investigative techniques were either unlikely to succeed or too dangerous to attempt. For example, physical surveillance was not likely to uncover the supplier because the known suspects demonstrated “surveillance consciousness,” an awareness of when they were being watched and the use of evasive measures to avoid detection. In addition, none of the government’s confidential sources knew who supplied heroin and cocaine to Phillips and Lee, and Agent Giudice considered it unlikely that Phillips and Lee would reveal their source to an undercover agent. Similarly, Agent Giudice doubted that Phillips and Lee would simply identify their supplier once they were in government custody. In her experience, “without evidence of criminal wrongdoing, members of criminal organizations are more likely to honor their commitment to the organization (i.e., to not cooperate with law enforcement) over their personal responsibility to provide truthful information to law enforcement officers.”

²⁹⁹ 18 U.S.C. § 2518(1)(c).

³⁰⁰ United States v. Alfano, 838 F.2d 158, 163 (6th Cir. 1988) (quoting United States v. Kahn, 415 U.S. 143, 153 n. 12, 94 S.Ct. 977, 39 L.Ed.2d 225 (1974)).

³⁰¹ United States v. Corrado, 227 F.3d 528, 539 (6th Cir. 2000) (quoting United States v. Landmesser, 553 F.2d 17, 20 (6th Cir. 1977)).

Because the district court properly authorized those wiretaps, properly admitted evidence obtained from them, properly concluded that the evidence offered by the government supported the convictions, the Sixth Circuit affirmed the convictions for all defendants.

United States v. Gilbert, 952 F.3d 759 (6th Cir. 2020) – F

FACTS: On August 29, 2016, Cleveland Police Detective Yasenchack observed a suspected drug transaction at an intersection known for its drug activity. He watched Williams enter and then exit a Jeep Cherokee belonging to Gilbert within a few seconds. Williams shoved a large plastic bag into his shorts as he exited and then drove off in his own vehicle. Yasenchack stopped Williams and recovered almost half a pound of cocaine. Williams later pleaded guilty to state drug trafficking charges.

About two weeks later, Yasenchack saw Gilbert driving the Jeep and conducted a traffic stop. Yasenchack smelled marijuana emanating from Gilbert’s vehicle, but his search only turned up a large amount of cash. After this second encounter, Yasenchack learned that Gilbert had a lengthy criminal history, including 2006 convictions for drug trafficking, drug possession, and possessing a weapon while under disability.

Suspecting that Gilbert was once again distributing narcotics, Yasenchack began surveilling Gilbert and searching his trash. On February 21, 2017, Yasenchack searched the trash placed outside Gilbert’s residence on Rainbow Avenue in Cleveland. Yasenchack found chrome scale weights, a vacuum sealed bag and zip-lock bags (which tested negative for controlled substances). Then, between February and April 2017, Gilbert moved to a house on Yellowstone Road in Cleveland Heights. On April 27, 2017, Yasenchack searched the trash at Gilbert’s Yellowstone Road residence but found nothing suggestive of drug trafficking. In June 2017, Detective Yasenchack again searched Gilbert’s trash at the Yellowstone Road residence and discovered a large vacuum-sealed bag containing “crumbs” of what Yasenchack believed to be marijuana. A field report later confirmed that the crumbs were marijuana.

Yasenchack applied for a search warrant the next day to search Gilbert’s Yellowstone Road residence. In support of the search warrant application, Yasenchack attested to the following facts: (1) he had witnessed Gilbert participate in a drug transaction on August 29, 2016, which had led to the conviction of Williams; (2) he found “a large quantity of cash” in Gilbert’s vehicle following a traffic stop; (3) Gilbert had a lengthy criminal history including 2006 convictions for drug trafficking and drug possession; (4) Yasenchack surveilled Gilbert’s homes many times; (5) at one point, Yasenchack had attempted to tail Gilbert’s vehicle but broke off surveillance once Gilbert began driving in circles which was “a tactic drug dealers often use to determine if they are being followed”; (6) he had conducted three trash pulls over several months; and (7) the day prior to the search warrant application, he discovered “suspected marijuana crumbs” in Gilbert’s trash within a large vacuum sealed bag, which he knew drug dealers often used to conceal the scent of marijuana. Yasenchack also included several boilerplate paragraphs about his training and experience in investigating drug trafficking.

An Ohio judge authorized a search warrant to search Gilbert’s Yellowstone Road home, which law enforcement executed the following day. The search yielded nearly four kilograms of heroin (some of which was laced with fentanyl), a handgun, approximately \$119,000 in cash, a money counter, numerous cell phones, and a drug ledger.

A federal grand jury subsequently charged Gilbert with possession with intent to distribute heroin, possession with intent to distribute a mixed drug containing heroin and fentanyl, and being a felon in possession of a firearm and ammunition. Gilbert moved to suppress the evidence obtained from his home, arguing that the search warrant did not establish probable cause on several grounds, including that it lacked a sufficient nexus between the alleged drug activity and Gilbert’s home. He also contended Detective Yasenchack’s affidavit contained falsehoods or reckless misrepresentations. The district court denied the suppression motion, and Gilbert entered a conditional guilty plea to all charges.

On appeal, Gilbert argues that the search warrant that authorized the search of his home purportedly lacked probable cause in violation of the Fourth Amendment.

ISSUE: Would the good faith rule of United States v. Leon³⁰² apply if evidence is seized in a reasonable, good-faith reliance on a search warrant that is not apparently or obviously defective?

HOLDING: Yes. In United States v. Leon, the Supreme Court created an exception to the exclusionary rule for evidence seized in reasonable, good-faith reliance on a search warrant that is subsequently held to be defective. When presented with a motion to suppress evidence claiming a lack of probable cause, a court must ask whether a reasonably well trained officer would have known that the search was illegal despite the magistrate’s decision.³⁰³ If a reasonably well trained officer would have known that the search was illegal despite the magistrate’s issuance of the search warrant, suppression is appropriate.³⁰⁴

An affidavit that is so lacking in indicia of probable cause that no reasonable officer would rely on the warrant has come to be known as a “bare bones” affidavit.³⁰⁵ “We reserve that label for an affidavit that merely ‘states suspicions, or conclusions, without providing some underlying factual circumstances regarding veracity, reliability, and basis of knowledge.’”³⁰⁶ Thus, the affidavit must be so lacking in indicia of probable cause’ as to make an officer’s belief in its existence objectively unreasonable.³⁰⁷

Here, Yasenchack’s affidavit was sufficiently meaty to avoid being labeled bare bones. Gilbert argues that Yasenchack “obtained the warrant based on his suspicions alone.” Yasenchack’s

³⁰² 468 U.S. 897, 104 S.Ct. 3405, 82 L.Ed.2d 677 (1984).

³⁰³ United States v. White, 874 F.3d 490, 496 (6th Cir. 2017).

³⁰⁴ Id.

³⁰⁵ Id., at 498.

³⁰⁶ United States v. Christian, 925 F.3d 305, 312 (6th Cir. 2019).

³⁰⁷ Id.

affidavit, however, contained several verifiable facts, including that: (1) Gilbert was party to a large drug transaction on August 27, 2016, and possessed “a large quantity of cash” in his vehicle about two weeks later; (2) law enforcement discovered “a large black vacuum bag with suspected marijuana crumbs,” “recent mail addressed to Tyrone Gilbert,” and “[b]lack rubber gloves with residue” at his residence the day prior to seeking the search warrant; and (3) Gilbert had previously been convicted of drug trafficking and possession. Indisputably, these are facts. And importantly, these are facts that establish “some connection” between the suspected drug trafficking and Gilbert’s Yellowstone Road home, in light of the marijuana taken from Gilbert’s trash at that address and his demonstrated history of drug trafficking.³⁰⁸ Therefore, the search warrant affidavit at least met the minimally sufficient nexus between the illegal activity and the place to be searched’ to avoid the bare-bones designation and thus be one upon which an officer can rely in good faith.

Because a reasonably well-trained officer in the circumstances presented here would not know to disregard a judicial determination that probable cause existed, the good-faith exception applies, the Sixth Circuit affirmed Griffin’s convictions.

United States v. Govea, 806 Fed. Appx. 423 (6th Cir. 2020) –

FACTS: In November 2017, an officer at the Kent County (MI) Sheriff’s Department applied for a warrant to search Roberto Govea’s residence in Grand Rapids, Michigan. The officer’s sworn affidavit filed in support of this application explained that the department had been investigating the sale of methamphetamine from the residence of another suspect, Ashton Belcher. In their investigation, the police relied on a confidential informant (“CI”) who described having purchased narcotics from Belcher over a hundred times during the year prior to the warrant application. The CI told police that during most of these purchases, Govea was with Belcher and had carried a gun on multiple occasions.

During the month prior to the warrant application, the police used this CI—whom they believed to be reliable and credible—to engage in three controlled buys of methamphetamine from Belcher. Govea was with Belcher during all three controlled buys, and the CI observed Govea with a handgun in his waistband during one of the buys.

During the last of the controlled buys, which was within 48 hours of the warrant application, Belcher had a phone call with the CI in which Belcher identified a meeting spot for their methamphetamine transaction. While one officer was with the CI, a detective watched Belcher’s home. The detective saw two suspects leave Belcher’s backyard in a 2017 Nissan. The detective followed the Nissan to Govea’s residence. Govea “went inside for a few minutes and then exited.” “The Nissan [then] responded directly to the informant and Ashton Belcher completed the meth transaction.” The CI identified Govea as the driver of the Nissan that transported Belcher to the

³⁰⁸ White, 874 F.3d at 497; see also United States v. Abernathy, 843 F.3d 243, 251–52 (6th Cir. 2016) (“It is well established in this Circuit that drug paraphernalia recovered from a trash pull establishes probable cause to search a home when combined with other evidence of the resident’s involvement in drug crimes.”).

location of the controlled buy, and police records indicated that Govea had recently received a speeding ticket while driving that Nissan about a month before the warrant application. In the officer's affidavit, he stated that "[t]hrough [his] training and experience" he had "learned that narcotic dealers have stash houses where narcotics, cash from narcotics proceeds, and guns are stored," and "stash houses are frequented before or after narcotic transactions."

A state judge issued the search warrant in accordance with the officer's request. The warrant authorized a search of Govea's home and seizure of items evidencing narcotics trafficking, including any quantities of methamphetamine or any other controlled substance. Upon execution of the warrant at Govea's home, police found 40 grams of methamphetamine, 28 grams of heroin, 8 grams of cocaine, 20 suboxone strips, 3 digital scales, and drug packaging.

On January 30, 2018, a grand jury indicted Govea for possession with intent to distribute methamphetamine, possession with intent to distribute heroin, and possession with intent to distribute cocaine. Govea filed a motion to suppress, arguing that the evidence seized from his residence should be suppressed because the affidavit in support of the search warrant application did not establish probable cause, and the good-faith exception to the exclusionary rule under United States v. Leon,³⁰⁹ did not apply. The district court denied Govea's motion to suppress after holding a non-evidentiary hearing. The district court held that the Leon good-faith exception applied.

Govea then conditionally pleaded guilty to the three charges listed in the indictment. In his plea agreement, Govea expressly "reserve[d] the right, on appeal from the judgment, to seek review of the adverse determination of his motion to suppress evidence." The district court sentenced Govea to 84 months' imprisonment and entered judgment on November 6, 2018. Govea filed a timely notice of appeal.

ISSUE: For the Leon good faith exception to apply, must the affidavit in support of the search warrant provide probable cause indicating a sufficient nexus between the criminal activity and the location to be searched?

HOLDING: Yes. The Leon good-faith exception is inapplicable where any one of the following situations is present:

(1) where the affidavit contains information the affiant knows or should have known to be false; (2) where the issuing magistrate wholly abandoned his or her judicial role; (3) where the affidavit was so lacking in indicia of probable cause as to render official belief in its existence entirely unreasonable [or] where the warrant application was supported by [nothing] more than a "bare bones" affidavit; [or] (4) where the warrant is so facially deficient that the executing officers cannot reasonably presume it to be valid.³¹⁰

³⁰⁹ 468 U.S. 897, 104 S.Ct. 3405, 82 L.Ed.2d 677 (1984),

³¹⁰ United States v. Washington, 380 F.3d 236, 241 (6th Cir. 2004).

The good-faith exception clearly applies in a situation where the affidavit “tie[s] the alleged drug activity to [the defendant’s] residence,” is “based upon multiple events,” and “relie[s] on verifiable facts, not conclusory assertions, unsubstantiated hearsay, or a purely subjective belief that [the defendant] was involved in drug trafficking.”³¹¹ Those circumstances are present here. The affidavit detailed several closely monitored controlled buys, a detective’s direct observation of a brief stop at Govea’s residence just prior to one of these buys, and a reliable CI’s description of Govea’s longstanding ties to an ongoing drug-trafficking operation.

The Sixth Circuit affirmed the district court’s denial of the motion to suppress.

United States v. Howard, 806 Fed. Appx. 383 (6th Cir. 2020) – F

FACTS: Officer Stephen Westrich of the Memphis Police Department was assigned to the Ridgeway precinct task force on April 3, 2017. While patrolling the area, a Nissan Maxima parked in a driveway caught his attention because it was listed on the stolen vehicle list. After running the tags, Officer Westrich confirmed the Nissan was stolen, and the accompanying incident report informed him that two armed African-American males were the suspects.

Officer Westrich called for back-up and all officers surveilled the scene. As soon as a woman, who later turned out to be Evelyn Harris (Howard’s girlfriend), exited the house and approached the vehicle, officers detained her. At one point, the door to the house was open and officers on the scene observed two African-American males in the doorway. While other officers were at the front of the residence dealing with Harris, Officer Westrich secured the back of the house. Meanwhile, the officers in the front were detaining individuals in the house and placing them in separate squad cars, including Howard. Upon returning to the front of the house, Officer Westrich then questioned three individuals placed in the squad cars to ask if anyone was a leaseholder. All denied being a leaseholder. Officer Westrich then joined his fellow officers inside. At this point, he encountered Laquita McAbee, who had several children with her and was waiting in the living room. She was the only adult individual who remained in the house. Officer Westrich approached her and asked if she was the leaseholder to the house. Like the others, she answered no. He then asked if she lived in the residence, and she confirmed she did. Officer Westrich explained to McAbee that he wanted to search the house and would like her consent. He also explained that, with a consent search, the officers would not be able to “tear up [her] home,” while they would be able to if they had to go get a search warrant. Officer Westrich handed her a consent to search form, which she signed. She also verbally agreed to the search. Officer Westrich then proceeded upstairs and entered the unlocked bedroom on the left, which later turned out to be Harris’s and Howard’s bedroom (not McAbee’s). Officer Westrich went about his usual search, “[l]ifting, looking, making sure there was nothing there.” And he discovered a firearm under the mattress—the firearm illegally possessed by Howard.

³¹¹ United States v. Gilbert, 952 F.3d 759, 762 (6th Cir. 2020).

Ultimately, a grand jury returned a one-count indictment charging Howard with being a felon in possession of a firearm. Howard moved to suppress the evidence obtained from the search, arguing that McAbee had no real or apparent authority to consent to a search of the residence. During the suppression hearing, McAbee states that she took care of the Harris's kids who lived in the house, paid most of the rent, slept in the house, and had access to the room Howard and Harris shared. Notably, when the police arrived, McAbee went into Harris's room to pick up Harris's and Howard's child before heading downstairs to the living room.

The district court ultimately concluded there was no Fourth Amendment violation, finding that apparent authority existed for McAbee to consent to the search, or in the alternative, that the police acted in good faith. Howard appealed.

ISSUE: Does actual and/or apparent authority to consent to a search a residence exist when an adult family member present in the residence has access to all portions of the residence?

HOLDING: Yes. First, the Sixth Circuit found that McAbee possessed actual authority. “[T]here is every reason to suppose that mature family members possess the authority to admit police to look about the family residence.”³¹² Indeed, “absent special circumstances, all rooms in the residence can be said to be areas of usage common to all members of the family.”³¹³ In this case, McAbee lived there with her three siblings, paid a large portion of the rent and took care of Harris's four children.

The Sixth Circuit also found that McAbee possessed apparent authority. Apparent authority exists where the factual circumstances “available to the officer at the moment” would “warrant a man of reasonable caution in the belief that the consenting party had authority over the premises[.]”³¹⁴ In this case, McAbee had all four children by her side when asked for consent, McAbee signed a consent-to-search form that authorized a “complete search,” the bedroom where the firearm was located was unlocked, and McAbee said she lived there and no other detained individual indicated leaseholder status. This was sufficient for Officer Westrich to believe that McAbee possessed apparent authority to authorize a search.

Howard argued that McAbee's consent to search was no voluntary. The Sixth Circuit rejected this argument, holding that McAbee was thirty-five years old, has a high school education, and was employed as a computer repair technician and as a singer. McAbee acknowledged that, when giving consent, no officer yelled, brandished a gun, threatened her, or handcuffed her. Officer Westrich described McAbee as “calm and polite and cooperative” at the time consent was obtained. McAbee stated she thought the officers already had permission to be in the house, but regardless, she would have given consent anyway. Further, Officer Westrich testified that, when

³¹² United States v. Clutter, 914 F.2d 775, 777 (6th Cir. 1990).

³¹³ Id.

³¹⁴ Illinois v. Rodriguez, 497 U.S. 177, 181, 110 S.Ct. 2793, 111 L.Ed.2d 148 (1990).

giving McAbee the consent to search form to sign, he told her “[n]obody here can make you do it.”

The Sixth Circuit affirmed the district court.

United States v. Jones, 953 F.3d 433 (6th Cir. 2020) – F

FACTS: On April 30, 2017, Ti’Erica McKinney called the Paducah police department to report a domestic violence incident. Several officers, including Andrew Parrish, arrived at the scene. McKinney told Parrish that she had come home from work to find her ex-boyfriend, Jermaine Jones, inside her house. She asked Jones to leave. When he refused, they began arguing. Matters got out of hand. Jones poured dish detergent over her couch, then chased her out of the home. Once outside, Jones threw Sprite cans and a bottle of dish soap at McKinney as she ran for help. McKinney dodged the cans but did not evade the bottle of dish soap. McKinney eventually returned to see William Snipes, Jones’ friend, driving Jones away in a white “Tahoe-like vehicle with a long body.”

Officer Parrish took steps to corroborate McKinney’s story. He questioned her about reports that other people had come to her aid. McKinney admitted that her brothers had arrived before the police but left when Jones fled to avoid dealing with the authorities. Around the house, Officer Parrish saw items consistent with McKinney’s account. He found a soap-stained couch and a bottle of detergent on the floor. He also spotted Sprite cans near McKinney’s vehicle and noticed damage to the car. In her front yard, he located the bottle of dish soap that had hit McKinney’s back. When McKinney showed Officer Parrish her injury, he pointed out that he could not see any bruising but acknowledged it might take a few days for the harm to show.

Consistent with department policy, Officer Parrish and McKinney filled out a “Domestic Violence Lethality Screen,” a questionnaire to determine if an officer should refer a victim to domestic violence resources. She told Officer Parrish that Jones had threatened to kill her in the past, might try to kill her in the future, and could easily obtain a gun. McKinney elaborated that Jones had strangled her and kicked in her front door. She repeatedly told Parrish, without prompting, that she planned to get an emergency protective order against Jones and that she feared he would return to attack her once the officers left.

To allay McKinney’s concerns, Officer Parrish stayed in his car next to the house and finished up some paperwork. Shortly after Officer Parrish finished up with McKinney, he saw two black males in a white Chevy Suburban sitting at the intersection near McKinney’s home. Parrish pulled the Suburban over and approached the passenger side, where Jones sat. After a brief discussion, Parrish asked Jones to exit the vehicle and escorted him to Parrish’s car. A quick pat-down of Jones revealed nothing. Asked about the incident, Jones denied everything: the detergent, the Sprite cans, the dish soap. Parrish did not believe him and arrested him for the assault. He cuffed Jones, conducted a second, more thorough, search, and placed him in the back of his squad car.

Jones began yelling that Parrish had cuffed him too tightly. When Parrish checked the cuffs, he spotted a firearm in the back of his cruiser that he had not seen before. That led to a charge of unlawful possession of a firearm.

Jones moved to suppress the gun arguing that Parrish only stopped the vehicle on the suspicion Jones had committed a crime. To make a valid stop, Jones asserted, Parrish needed a reasonable suspicion of ongoing or imminent criminal activity. At the hearing, Parrish confirmed that he had stopped Jones' vehicle solely to "further investigate" McKinney's allegations of assault. In Kentucky, fourth-degree assault, a misdemeanor.

The district court suppressed the evidence. The government appealed.

ISSUE: Does the Fourth Amendment completely prohibit law enforcement from making a Terry stop to investigate a misdemeanor?

HOLDING: No. The Fourth Amendment does not bar the stop of a vehicle to investigate criminal activity that already occurred if the activity is a felony.³¹⁵ In determining whether officers may make Terry stop to investigate completed misdemeanor, courts must balance interests in public safety and personal liberty, taking into consideration nature of crime, how long ago suspect committed it, and ongoing risk of the suspect to public safety. The entire balancing test falls upon reasonableness.

In this case, at the time he pulled Jones over, Parrish had a reasonable suspicion that Jones had assaulted McKinney. He had corroborated almost every part of her account, and the car he saw matched her description. Stopping the vehicle directly promoted the interest of preventing crime. McKinney credibly alleged that Jones intended to harm her or her home.

The stop also promoted public safety. McKinney told the officer that Jones could get a firearm easily, attacked her before, and recently fought with her brothers. Hailing down the vehicle gave Parrish the chance to stop Jones from further violence and threats. By stopping Jones' car to investigate McKinney's allegations of assault, misdemeanor or not, felony or not, Parrish used common sense and acted in eminently reasonable fashion. Accordingly, the Sixth Circuit held that this stop was appropriate.

The Sixth Circuit also found that Parrish possessed probable cause to arrest him for assaulting McKinney. Parrish had more than just McKinney's accusation. He had all of the evidence around him corroborating her story. On top of that, the white Suburban pulled up to the intersection at McKinney's home, just as she had predicted. Once Officer Parrish identified Jones as the passenger, if not before then, his reasonable suspicion "developed into probable cause" to make the arrest.

The Sixth Circuit reversed the district court's order suppressing the firearm.

³¹⁵ United States v. Hensley, 469 U.S. 221, 226, 105 S.Ct. 675, 83 L.Ed.2d 604 (1985).

United States v. Mathis, 807 Fed. Appx. 476 (6th Cir. 2020) – F

FACTS: A confidential informant told the police that a man was dealing marijuana out of an apartment in Euclid, Ohio. Based on the tip, officers waited for the apartment’s residents to place their trash out for collection. By prior arrangement, the trash collector gave the police the bags collected from the residence and the police searched through their contents. Inside they found 10–15 clear plastic sandwich bags, mail addressed to Mathis and his girlfriend, approximately 30 marijuana stems, and an envelope which, based on subsequent lab tests, contained marijuana residue. Officers conducted a second trash pull two weeks later and found bags and a FedEx box with the return and addressee labels torn off, all of which contained marijuana residue. All the while, officers kept an eye on the residence. The informant had given them a physical description of the alleged drug dealer and, during the month of the trash pulls, officers saw a man matching that description come and go from the house. The man was Mathis, and at the time he had outstanding warrants for drug trafficking offenses.

These details were memorialized in an affidavit which led to a warranted search of Mathis’s apartment soon after. After detaining Mathis, his girlfriend, and their young daughter, the searching officers found a loaded handgun under a mattress and ammunition for other firearms elsewhere in the apartment. They also found \$1,905 in small bills, a scale, packaging materials with marijuana residue, and four cell phones. A grand jury later indicted Mathis for knowingly possessing a firearm and ammunition as a felon, knowingly possessing a firearm in furtherance of a drug-trafficking crime, and possessing marijuana with the intention of distributing it.

Mathis moved to suppress the evidence found during both of the trash pulls and the search of his apartment. He maintained that he had an expectation of privacy regarding the garbage bags because, according to him, they “were not on the curb, were not abandoned, were not open and available for anyone to take[.]” The affidavit did not state where exactly the trash had been placed, which Mathis believed was an intentional omission. The court held a single hearing on all the issues and, after hearing testimony from the officer who orchestrated the pulls, found that the bags were indeed left on the curb. The motion was denied and the evidence was used at trial. Now on appeal, Mathis argued that the evidence should have been suppressed.

ISSUE: Is trash left in a bag on the curb for pickup considered abandoned property?

HOLDING: Yes. In California v. Greenwood³¹⁶, the United States Supreme Court held that an individual has no reasonable expectation of privacy or trash left at the curb for collection. Even though a local ordinance prohibited third parties from removing any waste from trash set out for collection, trash pulls would still be permissible under Greenwood, and Mathis failed to timely present this argument.

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

³¹⁶ 486 U.S. 35, 39, 108 S.Ct. 1625, 100 L.Ed.2d 30 (1988).

United States v. May-Shaw, 955 F.3d 563 (6th Cir. 2020) – NF

FACTS: In December 2015, the City of Grand Rapids Police Department began investigating May-Shaw for suspected involvement in drug trafficking. The Department had received tips from Silent Observer—an organization that receives anonymous information from the public—describing vehicles May-Shaw was using to transport drugs and a specific bag where he kept drugs, money, and a gun. A criminal history check on May-Shaw revealed that he had one felony firearm conviction and two felony drug convictions. Based on all of this information, the Grand Rapids police decided to conduct surveillance of the exterior of May-Shaw’s apartment building and the parking lot of the apartment complex.

The apartment where May-Shaw lived is one of several units in the complex, which itself abuts a communal parking lot. In the parking lot are covered carports, the interiors of which are easily viewable from a public vantage point on Norman Drive, a road outside of the parking lot. May-Shaw often parked his vehicles under a covered carport close to the entrance to his apartment building. Nothing in the record indicates whether the carport was specifically assigned to him, or if he had just consistently parked there.

The carport is next to a parking lot that is accessible only from Norman Drive, and that entrance affords almost complete visibility of the lot and adjacent apartment complex. The owner of the complex gave police permission to conduct physical and video surveillance of the lot. They had a good view, for only a line of trees obstructs the parking lot from public view on the road, and there was no foliage obstructing the view in February 2016, when the surveillance occurred.

Most of the stakeout, lasting several weeks, was done from a van using remotely operated cameras. Officers would park the van in the lot, moving its location every day or two. Through this method, police observed May-Shaw loading and unloading drugs and cash from his BMW and engaging in what officers believed to be drug deals in the parking lot.

In addition to their surveillance from the van, on January 26, 2016, police installed a camera on a telephone pole on Norman Drive. Officer Mesman, the principal investigator in May-Shaw’s case, testified as to the specifics of the pole camera. According to Mesman, the camera was affixed to the pole approximately twenty feet from the ground, and could pan from side to side and up and down. The camera, which recorded continuously for twenty-three days, could produce video as well as still shots. Though officers did not monitor the footage continuously in real time, they reviewed the footage they missed by watching the recorded video.

The pole-camera and van-camera footage captured May-Shaw engaging in what the officers suspected were drug transactions in the parking lot. They based this conclusion on observations of May-Shaw making brief contact with people inside their vehicles, during which time he and the person in the car exchanged something. Also, on several occasions May-Shaw retrieved what appeared to be evidence of drug distribution from his vehicles. For example, on February 17, 2016, officers observed him lean into the front passenger side of one of his vehicles and remove cash and a bag of suspected drugs, hide the items under his jacket, and carry them inside the

apartment. The next day, officers watched May-Shaw reach into the back of his car and remove a large stack of cash, which he also took inside the apartment. Soon thereafter, the officers saw him put another two bags, which they also suspected contained drugs and cash, in the trunk of his BMW.

After witnessing such suspected drug transactions, the officers called in a K-9 unit for a drug-detecting dog sniff of the BMW, where the officers had just seen May-Shaw stash the bags. When the dog circled the BMW, which was parked directly under the carport, it alerted the officers to the odor of narcotics.

Based on the surveillance and dog sniff, the officers sought a search warrant. The police relied primarily on the footage from the pole camera and the surveillance van, which showed different angles of the same conduct described earlier. A state magistrate judge authorized a search warrant for the apartment and three vehicles connected to May-Shaw. The apartment search resulted in seizure of almost \$2,000 in cash, a gun, drug paraphernalia and packaging material, and nearly a pound of marijuana. In their search of the BMW, police found a kilogram of cocaine, some fentanyl, and over \$200,000 in cash. The search of one of May-Shaw's other vehicles, a Chevrolet Tahoe, turned up another \$486 in cash. Neither May-Shaw nor his third car was present when the police conducted the search. May-Shaw was arrested some months later in Brooklyn, New York.

A federal grand jury in the U.S. District Court for the Western District of Michigan returned a superseding indictment charging May-Shaw with conspiracy to distribute and possess with intent to distribute cocaine, possession with intent to distribute cocaine, and maintaining drug-involved premises.

May-Shaw moved the district court to suppress the evidence seized pursuant to the search warrant, arguing that the warrantless surveillance through the pole camera and the warrantless sniff by the drug-detecting dog of the BMW constituted unconstitutional warrantless searches. The district court denied the motion, holding that (1) May-Shaw had no reasonable expectation of privacy in the parking lot; (2) the area surveilled by the pole camera was not constitutionally protected curtilage of the apartment; (3) the dog sniff was permitted under the Fourth Amendment; and (4) even if the dog sniff was unconstitutional, the remainder of the information in the warrant affidavit was sufficient to support probable cause for the search warrant.

May-Shaw entered a conditional guilty plea to the conspiracy count, preserving the right to appeal the denial of the motion to suppress. He appealed.

- ISSUES:**
1. Does a person have a right of privacy within a carport in the communal parking lot of an apartment complex, thereby prohibiting the use of a surveillance pole camera?
 2. Is a carport located in the communal area of an apartment complex's parking lot curtilage?

HOLDINGS: 1. No. The Fourth Amendment protects the right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures. Under Fourth Amendment jurisprudence, there are two ways in which government action may constitute a search. First, when the government gains information by physically intruding into a constitutionally protected area—namely, “persons, houses, papers, and effects,”³¹⁷ “a search within the original meaning of the Fourth Amendment’ has ‘undoubtedly occurred.’”³¹⁸ Second, as articulated by the Supreme Court, a search occurs when “a government official invades an area in which ‘a person has a constitutionally protected reasonable expectation of privacy.’”³¹⁹ Under the latter framework, there are two requirements for a government intrusion to constitute a Fourth Amendment search: first, a person must exhibit “an actual (subjective) expectation of privacy” in the place or thing searched; second, the expectation is one “that society is prepared to recognize as ‘reasonable.’”³²⁰

Because the officers’ use of the pole camera did not involve any sort of physical intrusion into a constitutionally protected area, May-Shaw must show that he had a reasonable expectation of privacy in the carport. In United States v. Houston, the Sixth Circuit held that affixing a video camera to the top of a utility pole to record the defendant’s front porch over a ten-week period did not violate the defendant’s Fourth Amendment rights because “agents only observed what [the defendant] made public to any person traveling on the roads” surrounding his home.³²¹

In this case, the surveillance footage and photos generated from the pole cameras did not “generate[] a precise, comprehensive record of [May-Shaw’s] public movements that reflects a wealth of detail about [his] familial, political, professional, religious, and sexual associations,”³²² which could raise significant Fourth Amendment concerns. Rather, the footage and photos only revealed what May-Shaw did in a public space—the parking lot. They captured images of May-Shaw moving things from his car to his apartment. The video showed when he arrived and left the apartment. In other words, the cameras observed only what “was possible for any member of the public to have observed ... during the surveillance period.”³²³ Accordingly, the Sixth Circuit held that May-Shaw did not demonstrate that when the government surveilled the carport for twenty-three days with the pole camera, it violated his reasonable expectation of privacy. Thus, the use of the pole camera in this instance was constitutional.

³¹⁷ U.S. Const. amend. IV.

³¹⁸ Morgan v. Fairfield Cty., 903 F.3d 553, 561 (6th Cir. 2018) (quoting Florida v. Jardines, 569 U.S. 1, 5, 133 S.Ct. 1409, 185 L.Ed.2d 495 (2013)).

³¹⁹ Taylor v. City of Saginaw, 922 F.3d 328, 332 (6th Cir. 2019) (quoting Katz v. United States, 389 U.S. 347, 360, 88 S.Ct. 507, 19 L.Ed.2d 576 (1967) (Harlan, J., concurring)).

³²⁰ Katz, 389 U.S. at 361, 88 S.Ct. 507.

³²¹ 813 F.3d 282, 288 (6th Cir. 2016).

³²² Jones, 565 U.S. at 415, 132 S.Ct. 945 (Sotomayor, J., concurring).

³²³ Houston, 813 F.3d at 290.

2. No. The Fourth Amendment protects people from unreasonable searches of their houses, and the curtilage of the home is protected by the Fourth Amendment.³²⁴ Warrantless dog-sniffs within the curtilage violates the Fourth Amendment.³²⁵

Courts have identified four factors as guideposts to determining whether an area falls within a home's curtilage: (1) the proximity of the area to the home, (2) whether the area is within an enclosure around the home, (3) how that area is used, and (4) what the owner has done to protect the area from observation from passersby.³²⁶ These factors are not to be applied mechanically; rather, they are "useful analytical tools only to the degree that, in any given case, they bear upon the centrally relevant consideration—whether the area in question is so intimately tied to the home itself that it should be placed under the home's 'umbrella' of Fourth Amendment protection."³²⁷

In this case, although the carport where May-Shaw parked his vehicles was the closest in proximity to his apartment, it was not as close to the residence as other structures found to be curtilage have been. Moreover, Sixth Circuit precedent has found that carports located in the driveways of single-family residences were not, absent any other factor, curtilage.

The second factor—whether the area is an enclosure around the home—also cuts against May-Shaw. Here, although the area was enclosed, at least to the extent that the carport had a roof and two side walls, it was not in an enclosure around the residence as was the walled-off driveway in *Collins*, nor was it enclosed within natural boundaries of the property like a detached garage.

The third factor, which relates to May-Shaw's use of the carport, arguably weighs in his favor because, by regularly parking his car in the carport, he contends it was sufficiently associated with the activities and privacies of domestic life to ostensibly support a finding that it was within the curtilage of his apartment. However, there is no evidence that May-Shaw had any legal right to exclude others from the carport.

Furthermore, May-Shaw did little to protect the area from the view of passersby, and so the fourth factor weighs against him. May-Shaw took no additional steps to protect the area from passersby or his neighbors. Because officers could see into the carport from a camera affixed to a utility pole across a street, it is apparent that May-Shaw did not take significant steps to protect the area from observation.

³²⁴ See *United States v. Dunn*, 480 U.S. 294, 300, 107 S.Ct. 1134, 94 L.Ed.2d 326 (1987); see also *Jardines*, 569 U.S. at 6, 133 S.Ct. 1409 (noting that the area "immediately surrounding and associated with the home" is "part of the home itself for Fourth Amendment purposes" (quoting *Oliver v. United States*, 466 U.S. 170, 180, 104 S.Ct. 1735, 80 L.Ed.2d 214 (1984))).

³²⁵ *Jardines*, 569 U.S. at 11–12, 133 S.Ct. 1409

³²⁶ *Morgan*, 903 F.3d at 561 (citing *Dunn*, 480 U.S. at 301, 107 S.Ct. 1134).

³²⁷ *Dunn*, 480 U.S. at 301, 107 S.Ct. 1134.

The Sixth Circuit held that May-Shaw did not show that (1) police surveillance from the pole camera violated his reasonable expectation of privacy; or (2) the dog sniff constituted an unconstitutional search. Accordingly, the Court affirmed the district court's denial of his motion to suppress.

United States v. Nixon, 802 Fed. Appx. 925 (6th Cir. 2020) –

FACTS: On November 16, 2017, the parents of a 10-year-old female victim informed the District of Columbia Metropolitan Police Department that an unknown person was texting their daughter, requesting she send nude images of herself to the phone number 360-214-1406, and that the victim complied. Law enforcement issued an administrative subpoena to Verizon Wireless for that number, to no avail, as Verizon identified that the number was assigned to a pre-paid cellular phone and thus was unable to identify a subscriber. That number, however, was associated with a complaint filed with the Bellingham, Washington Police Department on November 10, 2017 by the father of a 17-year-old female victim who had received similar text messages and sent nude images of herself.

Based on that information, on November 20, 2017, a magistrate judge authorized a sealed search warrant directing Verizon Wireless to provide the historical cell-site and location data for the phone number 360-214-1406. The following day, Verizon informed law enforcement that the phone number of the target device had been changed to 360-210-2360 and contained the following mobile equipment identifier (MEID): A00000477F7856. The judge then issued a pen register order to Verizon for the 360-210-2360 number, authorizing the gathering of the number's dialing, routing, addressing, and signaling information.

Law enforcement enlisted Special Agent Jacob Kunkle, a member of the FBI's Cellular Analysis Survey Team, to analyze the data provided by Verizon. Kunkle reviewed the data and determined that the device the phone number belonged to was located within a three-mile radius of the cell towers located at State Route 95 and County Road 2704 in the Perrysville, Ohio area. He also examined the top 25 numbers most frequently in contact with 360-210-2360 and identified that one number, 419-496-9799, was in the geographical vicinity of the area in which the cell towers indicated the targeted device was located. The phone number 419-496-9799 belonged to Courtney Perry and, after searching Perry's Facebook, law enforcement identified Michael Gregory Nixon in a photograph with her.

Kunkle earlier had searched residences located within the target area and, upon identifying Michael Gregory Nixon in the Facebook photograph, recognized that his name had also come up in the target area search as someone previously residing at 929 Township Road 2375, Perrysville, Ohio. Utilizing Ohio Law Enforcement Gateway (OHLEG) database records, Kunkle further identified Michael D. Nixon—Michael Gregory Nixon's father—as currently residing at 929 Township Road 2375, Perrysville, Ohio. An affidavit prepared by FBI officer Bryan Allen and attached to the warrant specified that only one other residence was located within the target

area, but law enforcement had no investigative leads linking the second residence to the target number 360-210-2360.

Based on the foregoing, on November 29, 2017, another magistrate judge issued federal search warrants for the target residence, 929 Township Road 2375, Perrysville, Ohio, and for Nixon's person (as opposed to Gregory's). Both warrants authorized the seizure of a phone assigned the number 360-210-2360 and/or the MEID A00000477F7856. The warrant for Nixon included his: photograph, physical description, date of birth, and social security number.

The FBI executed the search warrants that day and found Nixon present at the residence. FBI agents found a Samsung Gusto 3 cellphone on Nixon's person, which was the target phone, and several other mobile phones and laptop computer devices in the residence. On December 11, 2017, another federal search warrant was issued for the contents of those devices, which ultimately were found to contain child pornography.

In April 2018, Nixon was charged in a seven-count indictment with five counts of sexual exploitation of children, one count of receipt and distribution of visual depictions of minors engaged in sexually explicit conduct, and one count of possession of child pornography. Nixon filed a motion to suppress on October 31, 2018, challenging (1) the use of a warrant to search his person; (2) the probable cause finding that Nixon was involved in child pornography; and (3) the cell phone data analysis concluding that the target phone was located at 929 Township Road 2375, Perrysville, Ohio. The district court denied the motion.

Nixon thereafter conditionally pled guilty to all seven counts of the indictment, reserving his right to appeal the district court's denial of his motion to suppress.

ISSUE: Can law enforcement developed probable cause to believe that a particular device may have been used for criminal activity through cell phone data analysis which demonstrates that the target device was located in, or associated with, a specific address?

HOLDING: Yes. In this case, the affidavit included investigative findings from Kunkle, an expert with experience analyzing pen register and cell-site location data. Kunkle analyzed data for the phone number 360-210-2360 and determined that the location of the target device was within a 3-mile radius of cell towers located at State Route 95 and County Road 2704 in Perrysville, Ohio. After reviewing the top 25 numbers frequently in contact with the phone number, Kunkle discovered that the number 419-496-9799, belonging to Courtney Alexis Perry, was being used in the geographical area of the target device. Kunkle searched Perry's Facebook and discovered a photograph of her with Michael Gregory Nixon, a name Kunkle recognized from a prior search as previously having resided in the geographical area of the target device, specifically at 929 Township Road 2375, Perrysville, Ohio. That residence was only one of two located in the geographical area of the target device and, after conducting a search through OHLEG records, Kunkle learned that Michael D. Nixon was the current resident there. Law enforcement had no investigative leads to the second residence located within the geographical

area. The foregoing establishes probable cause that the target device was located in, or associated with, the 929 Township Road residence.³²⁸

The Sixth Circuit affirmed Nixon's conviction.

United States v. Novak, ---- Fed. Appx. ----, 2020 WL 2767363 (6th Cir. 2020) – NF

FACTS: In January 2019, a trusted confidential informant ("CI") "advised" Elyria city police that a man known as T.Y. "reside[d] on Tedman Court"—a street located within the Wilkes Villa low-rise apartment complex—and "distribute[d] narcotics from that residence." This tip piqued the interest of officers in the city's narcotics unit and so they began investigating further.

As a first step, on February 12, 2019, the officers asked the CI to conduct a "controlled drug buy" from T.Y., meaning that the officers would give the CI money to purchase the drugs and observe from a distance, and the CI would wear a wire and video recording device during the transaction. The CI agreed and made a recorded call to T.Y. Thereafter, the CI purchased less than one gram of crack-cocaine from T.Y. in a hospital parking lot while sitting in the backseat of T.Y.'s Ford Taurus. T.Y. and the CI then drove to a different parking lot, where T.Y. consummated another drug sale. After completing that transaction, T.Y. returned the CI to the hospital lot and drove off. The officers promptly confirmed that that the drug T.Y. sold the CI tested positive for cocaine. And, perhaps more importantly, upon reviewing the CI's video recording, the officers realized "immediately" that "T.Y." was in fact Joshua Novak, a local gang member with whom the officers were familiar. The officers then confirmed that Novak had some connection to Tedman Court, because, "several hours after" the transaction, they spotted Novak "turning off of Tedman Ct.," in the Taurus.

Not content with the evidence gleaned from this first controlled buy, on February 15, 2019 the officers again asked the CI to buy drugs from Novak, which the CI again agreed to do. This time, though, the officers endeavored to surveil the Tedman Court residence from the transaction's outset. So, with the officers listening in, the CI called Novak and asked to purchase a hundred dollars' worth of crack-cocaine and heroin. Novak replied that he was "inside [the] Wilkes Villa Apartment complex," that he "only had heroin on him," and that, if the CI wanted crack-cocaine, he (Novak) would need to pick it up from elsewhere. The CI replied that he wanted the heroin straightaway, and that he would meet Novak at a nearby mall parking lot to buy it. The officers then observed the Taurus—which was parked near the Tedman Court residence—leave "the area of Tedman Ct. and arrive[] in the area of [the mall] shortly after." Once there, the officers confirmed not only that Novak was driving the Taurus, but also that a "known drug trafficker" named Christopher Howse was riding with him.¹ Id. Then, just as in the prior controlled buy, the CI entered the car and bought the drugs from Novak, which the officers subsequently confirmed to contain fentanyl.

³²⁸ See United States v. Powell, 847 F.3d 760, 771 (6th Cir. 2017).

After that, Novak and Howse drove to Howse’s girlfriend’s house—in a different part of town—to cook some crack, while the CI waited elsewhere. A short time later, officers observed Novak leave Howse’s girlfriend’s house in the Taurus and drive to meet the CI at a restaurant parking lot. Once there, Novak sold the CI less than one gram of a substance that the officers again confirmed to contain crack cocaine.

The officers continued surveilling the Tedman Court residence in the days thereafter. And while doing so, the officers observed Novak exit the residence, get into his Taurus (which was parked nearby), and then re-enter the residence upon his return.

The officers compiled their investigative efforts into an affidavit and, on February 19, 2019, requested a search warrant for the Tedman Court residence (and for the Taurus), asserting that they had probable cause to believe evidence of drug trafficking would be found in both locations. The state common pleas judge agreed and approved the warrant that day. Two days later, the officers executed the warrant. And, once inside the residence, the officers discovered Novak, 6.86 grams of a heroin and fentanyl mixture, a digital scale with white residue, and a loaded .25-caliber handgun, among other items. The officers also found a gram of cocaine in the Taurus, which was parked outside.

A federal grand jury subsequently indicted Novak on various drug trafficking and felon-in-possession-of-a-firearm charges. Novak moved to suppress the evidence collected from the residence (but not the Taurus), arguing that the officers lacked probable cause to believe evidence of drug trafficking would be found there. After the district court denied Novak’s motion, Novak entered a conditional guilty plea. This appeal followed.

ISSUE: To demonstrate probable cause supporting a search warrant, is law enforcement required to provide reliable evidence connecting the known drug dealer’s ongoing criminal activity to the location to be searched?

HOLDING: Yes. The Fourth Amendment does not permit officers to search a drug dealer’s home just because that person is a drug dealer; rather, police must provide “reliable evidence connecting the known drug dealer’s ongoing criminal activity to the residence [to be searched].”³²⁹

Novak argues that because the officers did not attest that they saw Novak transport drugs to or from the Tedman Court residence—rather than to or from Tedman Court/Wilkes Villa more generally—the officers failed to establish a nexus between the residence and Novak’s drug trafficking activity and therefore lacked probable cause to believe drugs or other illicit evidence would be found therein. Even though the officer’s affidavit failed to connect with particularity the Tedman Court residence to Novak’s criminal activities, the officers conducted a thorough investigations into Novak, including physical surveillance of his residence and multiple controlled buys, which generally collaborated the CI’s initiating tip. Moreover, the affidavit in support of

³²⁹ United States v. Brown, 828 F.3d 375, 381 (6th Cir. 2016).

the warrant was not bare bones, so a reasonable officer could believe it was valid. Accordingly, the Leon good faith exception applies to this warrant.

The Sixth Circuit affirmed the convictions.

United States v. Pedicini, 804 Fed. Appx. 351 (6th Cir. 2020) – F

FACTS: On November 26, 2017, Pedicini was driving a Toyota rental vehicle northbound on West 41st Street when he passed Trooper Skipper’s patrol vehicle. Trooper Skipper explained that he was parked perpendicular to the street Pedicini was driving on and, after Pedicini passed his vehicle, he noticed Pedicini swerve approximately half a car width over the marked-lane line into the bicycle lane. Concluding that Pedicini had committed a traffic violation, Trooper Skipper pulled onto West 41st Street, turned on his sirens, and pulled Pedicini over.

Trooper Skipper approached Pedicini’s driver-side window, requested his driver’s license, and asked a number of background questions. Pedicini told the Trooper he had a prior felony conviction for trafficking cocaine and that he was driving a rental vehicle because his personal car had engine problems. Pedicini also commented that he was wearing two pairs of pants because he was coming from work, which Trooper Skipper thought strange. As Pedicini handed over his paperwork his fingers trembled, and the Trooper noticed that Pedicini kept rubbing his fingertips together.

Trooper Skipper asked Pedicini to step out of his vehicle and to come with him to the back of the car, in front of the cruiser, to go over Pedicini’s license and a “couple more things.” The Trooper told him that if everything checked out he would be free to go, to which Pedicini replied “alright.” He asked Pedicini if he had any citations recently and Pedicini responded that he had not, and then, seemingly confused, asked “so you want me to come with you?” After the Trooper affirmed, Pedicini asked if he was under arrest. Trooper Skipper explained that Pedicini was not under arrest and said he just wanted to “talk to [him] about a few things.” Pedicini stepped out of the vehicle and the Trooper walked him to the front of his patrol car directly before the dash camera while asking Pedicini if he had any weapons on him. The video footage shows no clear verbal or physical response to this question, but it appears Pedicini slightly shook his head no. Trooper Skipper asked Pedicini if he could conduct a pat-down search for weapons, but Pedicini verbally did not answer this question either; instead, while Pedicini slightly extended his arms he asked both why he was being patted-down and if he was in trouble. Trooper Skipper, speaking rapidly throughout the exchange, responded that he was patting Pedicini down for weapons, asked him again if he could pat him down, while continuing to question Pedicini about whether he possessed any objects that could injure the Trooper and then listing what those objects might be. Pedicini subtly nodded, but to what exactly is unclear. The Trooper proceeded to pat-down Pedicini, which led to the discovery of a handgun in Pedicini’s groin area. He handcuffed Pedicini, and then read him his Miranda rights. Trooper Skipper ultimately let Pedicini go with a verbal warning for the marked-lane violation.

On January 4, 2018, a grand jury charged Pedicini with one count of being a felon in possession of a firearm and ammunition, in violation of 18 U.S.C. § 922(g)(1). Pedicini moved to suppress the loaded firearm. The district court held an evidentiary hearing at which Trooper Skipper, Pedicini, and Henry Lipian, Pedicini's expert, testified; the court denied the motion. Pedicini later pled guilty, reserving his right to appeal the denial of his motion to suppress. The court sentenced Pedicini to 100 months' imprisonment, and Pedicini timely appealed.

ISSUE: In the context of a traffic stop, must a suspect unequivocally grant consent for an officer to conduct a pat-down search for weapons absent reasonable suspicion that the suspect may be armed and dangerous?

HOLDING: Yes. Whether consent was voluntary is a question of fact to be determined based on the totality of the circumstances.³³⁰ Non-verbal actions can constitute consent, but they must be clear and "will not be found upon mere 'acquiescence to a claim of lawful authority.'"³³¹ Pedicini's consent must have been "unequivocally, specifically, and intelligently given, uncontaminated by any duress and coercion."³³² To determine whether this standard is met, courts consider the length and nature of the detention,³³³ coercive conduct by the police,³³⁴ and any indications of "more subtle forms of coercion that might flaw [an individual's] judgment."³³⁵

Trooper Skipper's dash camera shows that he asked Pedicini to step out of his car, which led Pedicini to question what was happening by asking if he was under arrest. The Trooper told Pedicini that he was not under arrest and that he just wanted to talk to him and then would let him go free. Pedicini stepped out of the vehicle and followed the Trooper to the front of his cruiser where the officer asked Pedicini if he had any weapons on him. Trooper Skipper, speaking rapidly throughout the exchange, then asked Pedicini if he would mind a pat-down of his person, but Pedicini did not give a verbal response. Instead, while slightly extending his arms, he asked both why he was being patted-down and if he was in trouble. The Trooper explained that he wanted to search Pedicini for weapons, asked him if he would mind the pat-down search and if Pedicini had any weapons that could injure him during the pat-down. Without allowing Pedicini a chance to respond, he proceeded to list potential sharp items. It was only following this series of questions that Pedicini slightly nodded his head, perhaps in response to Trooper Skipper's first question, perhaps to the second, or perhaps just a nod in acknowledgment of the Trooper's list of various dangerous objects. What is clear from this exchange is Pedicini's consistent confusion and reluctance to be searched as indicated by his repeated questions even while acquiescing to the Trooper. Based on the totality of the circumstances, Pedicini's non-verbal actions were not

³³⁰ Schneckloth v. Bustamonte, 412 U.S. 218, 248-49, 93 S.Ct. 2041, 36 L.Ed.2d 854 (1973).

³³¹ United States v. Carter, 378 F.3d 584, 589 (6th Cir. 2004).

³³² United States v. Worley, 193 F.3d 380, 386 (6th Cir. 1999).

³³³ Bustamonte, 412 U.S. at 226, 93 S.Ct. 2041;

³³⁴ Id.

³³⁵ United States v. Watson, 423 U.S. 411, 424, 96 S.Ct. 820, 46 L.Ed.2d 598 (1976).

unequivocal, specific, and intelligently undertaken; they did not constitute voluntary consent. Thus, the district court’s contrary finding was clearly erroneous.

Next, the Sixth Circuit determined if Trooper Skipper had reasonable suspicion to conduct the search. An officer may perform a pat-down “only upon reasonable suspicion that they may be armed and dangerous.”³³⁶ Reasonable suspicion demand a particularized and objective basis for suspecting that the particular person is armed and dangerous.³³⁷

In this case, the Sixth Circuit held that Pedicini’s nervousness, the fact that he was driving a rental car under an expired contract, that his infraction was in a high crime area, and that he had prior felony charges for drug trafficking did not rise to the reasonable suspicion standard that Pedicini was armed and dangerous.

The Sixth Circuit reversed the district court’s judgment.

United States v. Salazar, 805 Fed. Appx 369 (6th Cir. 2020) –

FACTS: Salazar and Somarriba were travelling eastbound on Interstate 70 in a black Chevy Malibu when they exited the highway and parked in the commercial-vehicle area of a rest stop. Sergeant Timothy Williamson of the Ohio State Highway Patrol followed the Malibu into the rest stop and parked his cruiser directly behind the vehicle. After talking with Salazar and Somarriba, Sergeant Williamson called for a K-9 unit. The dog scratched at the Malibu, indicating the odor of narcotics, and a search of the vehicle uncovered nine bundles of heroin with a total approximate weight of 21.5 pounds.

A federal grand jury subsequently returned an indictment charging Salazar and Somarriba with possession with intent to distribute one or more kilograms of heroin.

Salazar filed a motion to suppress the heroin seized from the Malibu, asserting in relevant part that Sergeant Williamson lacked probable cause to stop the vehicle. Somarriba joined in the suppression motion. At the evidentiary hearing, Sergeant Williamson testified that several minutes before spotting the Malibu, he had received a call from another sergeant suggesting that he look out for a vehicle matching the Malibu’s description. When the Malibu passed Sergeant Williamson’s vehicle on Interstate 70, he pulled out of the crossover and began following it because it was moving slowly. He and his passenger, Officer Morehouse, then quickly recognized it as the vehicle he had been told to look for. Shortly after they began following it, Sergeant Williamson and Officer Morehouse observed the Malibu take the exit for the rest area “at the last minute” and cut across the solid lane lines marking the gore.

The district court denied the suppression motion, concluding in relevant part that Sergeant Williamson had probable cause to believe that Salazar, the driver of the Malibu, exited the highway without first ascertaining that the movement could be made with safety, in violation of

³³⁶ United States v. Noble, 762 F.3d 509, 521 (6th Cir. 2014).

³³⁷ Id.

Ohio law. Salazar and Somarriba entered conditional guilty pleas, preserving their right to appeal the denial of the suppression motion.

ISSUE: Does probable cause to believe that a traffic violation has occurred or was occurring justify a traffic stop?

HOLDING: Yes. “[S]o long as the officer has probable cause to believe that a traffic violation has occurred or was occurring, the resulting stop is not unlawful and does not violate the Fourth Amendment.”³³⁸ Sergeant Williamson testified that he observed a traffic violation when the Malibu took the exit ramp for the rest stop “at the last minute” and cut across the solid lane lines marking the gore. Under Ohio Rev. Code § 4511.33(A)(1), “[w]henver any roadway has been divided into two or more clearly marked lanes for traffic,” a vehicle “shall be driven, as nearly as is practicable, entirely within a single lane or line of traffic and shall not be moved from such lane or line until the driver has first ascertained that such movement can be made with safety.” Sergeant Williamson’s observations were sufficient to justify the traffic stop.

The Sixth Circuit affirmed the district court’s denial of the suppression motion.

United States v. Serrano-Ramirez, ---- Fed. Appx. ---, 2020 WL 2095884 (6th Cir. 2020) – NF

FACTS: On July 25, 2017, staff at the Country Meadows Mobile Home Community in Nashville, Tennessee discovered a shirtless, shoeless man named Xavier Alvarado Ezcana in a state of distress and covered in bruises, claiming to have been kidnapped by MS-13. A blue USB cable was still tied around one of his wrists, and one of his fingers was “smashed.” Alvarado asked to call his mother; the community manager called the police.

One week later, a group of local and federal law enforcement officers interviewed Alvarado. Alvarado told the agents that he had been tortured and interrogated by Gerson Serrano-Ramirez at Serrano-Ramirez’s residence in the Country Meadows complex. Alvarado also told the agents that Serrano-Ramirez was part of the notorious MS-13 gang. Based on this information, the officers obtained a search warrant for Serrano-Ramirez’s trailer at Country Meadows and executed it on August 8, 2017.

Inside Serrano-Ramirez’s residence, officers found evidence corroborating Alvarado’s account of his kidnapping, including one of the shoes that he had left behind in his flight from the trailer. Officers also discovered a loaded assault rifle, ammunition, a bulletproof vest, a small amount of cocaine, digital scales, and several thousand dollars in cash. A cell phone found on the premises contained a video of Serrano-Ramirez chambering a round in the assault rifle while on the premises on August 7, 2017.

³³⁸ United States v. Ferguson, 8 F.3d 385, 391 (6th Cir. 1993); see Whren v. United States, 517 U.S. 806, 810, 116 S.Ct. 1769, 135 L.Ed.2d 89 (1996) (“As a general matter, the decision to stop an automobile is reasonable where the police have probable cause to believe that a traffic violation has occurred.”).

Law enforcement also found a surveillance system, which captured approximately 30 days of activity in Serrano-Ramirez’s living room. The footage included Serrano-Ramirez’s torturing of Alvarado. It also depicted Serrano-Ramirez participating in an apparent drug deal on July 25, 2017 and preparing what appeared to be a controlled substance for distribution on August 7, 2017.

A grand jury charged Serrano-Ramirez of being an illegal alien in possession of a firearm (Count 1); illegal reentry (Count 2); tampering with a witness (Count 3); distributing and possessing with intent to distribute cocaine on July 25, 2017 (Count 4); brandishing a firearm during and in relation to the foregoing witness-tampering and drug-trafficking offenses (Count 5); possessing with intent to distribute cocaine on August 7, 2017 (Count 6); maintaining a premises for the purpose of distributing or using controlled substances (Count 8); and two counts of possessing a firearm in furtherance of the foregoing drug-trafficking offenses (Counts 7 and 9).

Serrano-Ramirez moved to suppress the evidence obtained pursuant to the search warrant. He argued that the search warrant affidavit was insufficient to establish probable cause because it relied entirely on statements made by Alvarado, whom he characterized as an unreliable confidential informant. The district court denied the motion to suppress.

At trial, the jury convicted Serrano-Ramirez of all counts. This appeal followed.

ISSUE: Must a search warrant affidavit give rise to a fair probability that, under the totality of the circumstances, contraband or evidence of a crime would be found at the location to be searched?

HOLDING: Yes. In this case, the affidavit support the search warrant contained dates, personal details about the victim and alleged perpetrator, information about the relationship between the two individuals, specific details about the alleged kidnapping and assault of the victim including the use of an assault rifle and bleach during the attack, a specific description of the victim’s property that was allegedly stolen and located within the residence to be searched, the location of the residence identified by the victim, and a picture of the residence. In essence, the Affidavit exhibited on its face “the probability ... of criminal activity.”³³⁹ Where, as here, “a witness has seen evidence in a specific location in the immediate past, and is willing to be named in the affidavit, the ‘totality of the circumstances’ presents a ‘substantial basis’ for conducting a search for that evidence.”³⁴⁰

The Sixth Circuit affirmed the convictions.

United States v. Sumlin, 956 F.3d 879 (6th Cir. 2020) – F

FACTS: On March 28, 2015, Carrie Dobbins died in Akron, Ohio after ingesting heroin and fentanyl. Carrie obtained the drugs from Sumlin, who brought them to Carrie’s residence.

³³⁹ United States v. Pelham, 801 F.2d 875, 878 (6th Cir. 1986).

³⁴⁰ Id.

Carrie's mother advised law enforcement that she observed Sumlin's car, a Chrysler 300, parked outside of the residence and saw Sumlin in the living room with Carrie.

Following Carrie's death, and between the span of April 24, 2015 and April 27, 2015, Akron Police Department Detective Mike Schmidt visited an address believed to be Sumlin's residence on Firestone Boulevard in Akron. Detective Schmidt saw a Chrysler 300—the same model of car seen parked in the driveway at Carrie's residence on the morning of March 28, 2015—parked in the driveway of the Firestone Boulevard address. Although the car was registered to Sumlin's mother, police records confirmed that Sumlin had been arrested while driving the vehicle in 2014. Further investigation revealed that the utilities of the Firestone Boulevard residence were paid for by Sumlin's then-current girlfriend. Also, according to a police report stemming from an unrelated assault complaint filed in April 2015, Sumlin was identified as living there with this girlfriend. Additional police records from prior years, relating to Sumlin's arrests for the possession of heroin, the possession of cocaine, parole violations, failure to comply with police, and willful fleeing, further connected him to the Firestone Boulevard property.

Aware of these facts, the police turned their focus on Sumlin as a suspect. Based on his personal experience and training, Detective Schmidt prepared an affidavit using the information obtained from the police investigation, including interviews with Julie Dobbins (Carrie's mother), Amanda Kelly (Carrie's sister and Sumlin's ex-girlfriend), Dr. George Sterbenz, and Akron Detective Benjamin Surblis, to obtain a search warrant for the Firestone Boulevard residence.

The affidavit sought authority to search for any evidence relating to drug trafficking, which could include heroin, currency, records and documents, and cellular telephones. Detective Schmidt was particularly focused on locating the (330) 815-4524 telephone, which Sumlin used to communicate with Dobbins on the morning of March 28, 2015. On April 27, 2015, the warrant was approved by Akron Municipal Court Judge Jerry K. Larson. The following day, the Akron police executed the search warrant. Officers seized a number of items, including approximately 190 grams of then-suspected cocaine (which upon further testing, was determined to be fentanyl), 48 grams of suspected heroin; drug trafficking paraphernalia (i.e. multiple scales, a press, a grinder, glassware with residue); \$11,920 cash in one location; \$2,482 in another location; and eight cellular telephones.

A grand jury indicted Sumlin with drug trafficking. Sumlin moved to suppress the search of his residence, arguing that the affidavit supporting the warrant was insufficient. The district court denied suppression, and a jury convicted Sumlin of all charges. Sumlin appealed.

ISSUE: Is an affidavit supporting a search warrant required to include facts establishing a sufficient nexus between the location to be searched and the alleged criminal activity?

HOLDING: Yes. The affidavit supporting the warrant must contain facts that demonstrate "a fair probability that evidence of a crime will be located on the premises of the proposed

search.”³⁴¹ If “a government agent fails to support his application with this showing of probable cause, a judge should refuse to issue the warrant.”³⁴² “Our review of the sufficiency of the evidence supporting probable cause is limited to the information presented in the four-corners of the affidavit[.]”³⁴³

Detective Schmidt’s affidavit established a sufficient nexus between Sumlin’s drug-trafficking activity and his Firestone Boulevard residence to justify the magistrate judge’s finding of probable cause. The probable cause analysis involves several components. The government’s affidavit needed to demonstrate probable cause (1) that Sumlin was trafficking drugs; (2) that Sumlin lived at the Firestone Boulevard residence; and (3) that evidence of drug trafficking would be found at Sumlin’s residence. The government accomplished all three tasks in sufficient detail.

First, the affidavit set forth probable cause to show he was in the illegal drug trade. Relatedly, the affidavit, which includes information and medical confirmation of Carrie’s death, shows that she died on March 28, 2015 of a drug overdose. Connecting these pieces, evidence on Carrie’s cellphone established that she had exchanged text messages with “TJ” —Sumlin’s confirmed drug alias—early in the morning of March 28, 2015. Though the two used coded language, it is reasonable to believe that during this conversation, Sumlin agreed to bring drugs to Carrie. The affidavit also includes witness testimony of the decedent’s sister, Amanda Kelly, who not only had purchased drugs from Sumlin, but also had been his girlfriend. Based on her past involvement with Sumlin, Kelly confirmed that he was in fact a drug dealer. Furthermore, according to Kelly, she saw Sumlin in the living room of her mother’s residence with her sister at approximately 8:45 a.m. on the morning of March 28, 2015, and his car was in the driveway of her mother’s residence. The affidavit also outlines that “TJ’s” cellphone number, Facebook account, automobile, and picture were all connected to Sumlin. Collectively, these facts in the affidavit establish probable cause to believe that Sumlin trafficked drugs.

Secondly, the affidavit showed specific detail to establish probable cause that Sumlin lived at the Firestone Boulevard address. Sumlin’s car (registered to his mother), which had been seen at Carrie’s residence on the morning of March 28, 2015, was subsequently observed by police to have been parked in the driveway of the Firestone Boulevard property on multiple days following Carrie’s death. The utilities at the residence were under the name of Sumlin’s then-girlfriend. Moreover, earlier that month, police had responded to a domestic disturbance at the residence relating to a fight between Sumlin and his then-girlfriend. And finally, the mother of Sumlin’s then-girlfriend told police that Sumlin lived in the Firestone Boulevard residence. Collectively, this evidence not only seems sufficient, but appears overwhelming in its support of the probable cause determination that Sumlin lived at the subject property of the search warrant.

³⁴¹ United States v. Jenkins, 396 F.3d 751, 760 (6th Cir. 2005); United States v. Frazier, 423 F.3d 526, 531 (6th Cir. 2005).

³⁴² United States v. McCoy, 905 F.3d 409, 415 (6th Cir. 2018).

³⁴³ Frazier, 423 F.3d at 531.

Finally, the affidavit established probable cause to believe that evidence of Sumlin’s drug trafficking would be found at the Firestone Boulevard residence. “[I]n the case of drug dealers, evidence is likely to be found where the dealers live.”³⁴⁴ “An affidavit containing credible, verified allegations of drug trafficking, verification that said defendant lives at a particular residence, combined with the affiant officer’s experience that drug dealers keep evidence of dealing at their residence,” can be sufficient to demonstrate a nexus between the criminal activity and the suspect residence to validate the warrant—even “when there is absolutely no indication of any wrongdoing occurring at that residence....”³⁴⁵

The Sixth Circuit held that the government’s affidavit established the requisite nexus. It provided facts showing that Sumlin was a drug trafficker and that he resided at Firestone Boulevard. As Detective Schmidt related in the affidavit, he knew from his personal experience and training that drug dealers like Sumlin routinely keep drug-related items (i.e. records of their drug transactions, equipment, supplies, and weapons) at their residences. Akron police officers also observed Sumlin’s car—the same one seen by witnesses parked next to the home of Carrie’s mother on the morning of March 28, 2015—parked at the Firestone Boulevard residence multiple times following Carrie’s death. We agree with the emphasis placed by the district court on the timing of the text messages exchanged between Carrie and Sumlin. Namely, the back-and-forth exchange, which occurred within a span of twenty-nine minutes, suggested that Sumlin was at his home when Carrie texted that morning, and then necessarily was leaving from his home to deliver the drugs to Carrie. Finally, the Akron police were aware of recent evidence that Sumlin was drug-dealing, as stated in the affidavit. Connecting the pieces of this analysis, there was a sufficient nexus existing between Sumlin’s drug trafficking-related activity and his residence.

No Fourth Amendment violation occurred because the four corners of the search warrant affidavit established a sufficient nexus between Sumlin’s residence and his criminal activity of drug dealing.

The Sixth Circuit affirmed the convictions.

United States v. Tubbs-Smith, 800 Fed. Appx. 349 (6th Cir. 2020) – F

FACTS: On February 21, 2018, at 11:00 p.m., Deputy Webb of the Washtenaw County Police Department observed Tubbs-Smith’s red Honda pass oncoming traffic with its high beams on. Deputy Webb executed a traffic stop based on the high beams law. Deputy Webb advised Tubbs-Smith that “you’re not supposed to be driving with those on down the road.” Tubbs-Smith apologized, turned the lights off, and gave Deputy Webb his driver’s license and registration. Deputy Webb checked the documentation and learned that Tubbs-Smith had an outstanding felony arrest warrant in Michigan. He then arrested Tubbs-Smith and searched his pockets, finding crack cocaine and over \$1,000 in cash. Another officer who had arrived on the scene then searched the car. That search yielded a crack pipe and other drug paraphernalia. Based on that

³⁴⁴ United States v. Jones, 159 F.3d 969, 975 (6th Cir. 1998).

³⁴⁵ United States v. Goward, 188 F. App’x 355, 358–59 (6th Cir. 2006).

evidence, the government charged Tubbs-Smith with two counts of Possession with Intent to Distribute Controlled Substances in violation of 21 U.S.C. § 841. Deputy Webb also issued Tubbs-Smith a citation for expired license plates and failure to dim his high beams.

Tubbs-Smith filed a motion to suppress evidence gained through the search and requested an evidentiary hearing on the motion to suppress. He argued that he “did not commit a ticketable offense” because the lighting conditions were such that “a reasonable driver would use high beams while driving in the area where [Tubbs-Smith] was stopped.” The district court denied Tubbs-Smith’s motion for an evidentiary hearing, reasoning that the motion hinged on legal—not factual—issues. However, the court sought further briefing on the legal issues raised in Tubbs-Smith’s motion.

In his supplemental brief, Tubbs-Smith asserted that his actions were lawful because Michigan law only penalizes the use of high beams when the lights cast glaring rays into the eyes of oncoming drivers. Thus, he contended, the government lacked probable cause to effectuate the stop because the record was devoid of proof that his high beams blinded oncoming traffic. In response, the government noted that video evidence showed that Tubbs-Smith passed several oncoming cars with his high beams on, and that Deputy Webb therefore had probable cause to believe that glaring rays were projected into the eyes of oncoming drivers. The district court ultimately denied Tubbs-Smith’s motion, reasoning that even if Tubbs-Smith’s interpretation of Michigan law were correct, Deputy Webb’s mistake of law was reasonable, so suppression of the evidence seized after the stop was unwarranted.

Tubbs-Smith then pleaded guilty to both counts in the indictment, reserving his right to appeal the order denying the suppression motion and the order denying his request for an evidentiary hearing. He was sentenced to the mandatory minimum sentence of ten years in prison.

ISSUE: May a law enforcement officer stop and detain a motorist as long as the officer has probable cause to believe that the motorist have violated a traffic law?

HOLDING: Yes. “Stopping and detaining a motorist ‘constitute[s] a seizure’ within the meaning of the Fourth Amendment.”³⁴⁶ Thus, “[a]n officer may stop and detain a motorist so long as the officer has probable cause to believe that the motorist has violated a traffic law.”³⁴⁷

In this case, Deputy Webb stopped Tubbs-Smith because Tubbs-Smith passed several oncoming cars with his high beam lights on. The lights were on longer than a “mere flash.” Tubbs-Smith dimmed the lights during the traffic stop. This constituted probable cause to believe that Tubbs-Smith violated Michigan’s traffic laws with respect to the use of high beams. Thus, the Sixth Circuit held that this traffic stop was valid.

³⁴⁶ United States v. Bell, 555 F.3d 535, 539 (6th Cir. 2009) (quoting Delaware v. Prouse, 440 U.S. 648, 653, 99 S.Ct. 1391, 59 L.Ed.2d 660 (1979)).

³⁴⁷ Id. (citing United States v. Blair, 524 F.3d 740, 748 (6th Cir. 2008)).

The Sixth Circuit affirmed the district court's orders denying the motion to suppress.

United States v. Wilson, 806 Fed. Appx. 450 (6th Cir. 2020) – F

FACTS: In June 2018, someone called 911 just before 5 am to report a person “passed out” in a vehicle in Lansing, Michigan. Lansing police officers Ricky Spratt, Robert Bricker, and Stacey Browe responded. Dispatch informed them that the car belonged to a woman who did not live in the immediate area. The vehicle was at the end of an unlit dead-end street known to the officers to be a high-crime area. When the officers, who were wearing body cameras, arrived, they saw an “unresponsive” man sitting upright in the driver’s seat of the vehicle. Loud music was playing from the radio. The volume of the music made it impossible for Officer Spratt to tell if the engine was running, but he noticed as he approached that the keys were in the ignition and turned forward.

The officers were concerned that the man, who was later identified to be defendant, was having a medical emergency, and they tried to rouse him by shining their flashlights on his face, but got no response. Officer Spratt then opened the unlocked passenger-side door and saw an open bottle of what he believed to be alcohol in the center console. Officer Bricker opened the driver-side door. Officer Spratt removed the keys from the ignition to stop the music, and he shook defendant on the right arm and kept talking to him until he was responsive. Each time Officer Spratt moved defendant’s right arm, his hand went to his waistband. Fearing that the man might have a weapon, Officer Spratt ordered him to keep his hands up. The officers wanted to summon an ambulance because they continued to fear that the man might have overdosed or be experiencing some other medical problem, but defendant declined. Officer Spratt testified that he believed the man to be intoxicated.

Officer Spratt asked defendant to step out of the car. The officer testified that defendant “stumbled a bit” and seemed “puzzled” and swayed back and forth. He told the officers that his name was “Duke Wilson” and he was visiting a friend in the area. Officer Spratt asked him if he could pat him down “so we can make sure our safety is fine.” Defendant nodded and complied with the officer’s request to put his hands behind his back. Officer Spratt patted the man down and felt a pistol handle in his front right waistband. Office Spratt removed the gun and handcuffed the man. Once arrested, a preliminary breath test for alcohol determined his alcohol count was more than double the legal limit. It was later discovered that defendant had three baggies of cocaine in his pocket, and he was on federal supervised release for earlier crimes.

Wilson was charged with being a felon in possession of a firearm and possession of a controlled substance. After his motion to suppress the weapon and drugs was denied, Wilson pled guilty to being a felon in possession of a firearm pursuant to a conditional plea agreement that reserved his right to appeal the suppression ruling. Wilson was sentenced to 50 months imprisonment. This timely appeal followed.

ISSUE: May an individual consent to a search of his person for weapons?

HOLDING: Yes. While the Fourth Amendment protects citizens against unreasonable searches and seizures, a search of a person is not unreasonable if that person gives free and voluntary consent.³⁴⁸ “Consent is voluntary when it is unequivocal, specific and intelligently given, uncontaminated by any duress or coercion.”³⁴⁹ Voluntariness is determined by examining the totality of the circumstances.³⁵⁰ A court should consider the use of coercive or punishing conduct by the police; and indications of “more subtle forms of coercion that might flaw [an individual’s] judgment.”³⁵¹

In conducting an inquiry into consent to search, the court should examine the following nonexclusive factors: “the age, intelligence, and education of the individual; whether the individual understands the right to refuse to consent; whether the individual understands his or her constitutional rights; the length and nature of detention; and the use of coercive or punishing conduct by the police.”³⁵²

The district court properly considered the totality of the circumstances in concluding that defendant freely gave consent to the pat-down search for weapons. The court noted that, as seen in the video, defendant “perceptively nodd[ed]” his head and then put his hands behind his back at Officer’s Pratt’s request. The district court also concluded the officers’ actions and tone of voice indicate that the officers did not engage in any coercive behavior towards defendant that would vitiate consent. The district court did not clearly err in concluding that the government met its burden in demonstrating that defendant “voluntarily and knowingly” consented to the pat-down search.

The Sixth Circuit affirmed the conviction.

XIII. SEXUAL OFFENSES

United States v. Vinton, 946 F.3d 847 (6th Cir. 2020) – F

FACTS: An undercover FBI analyst posted a “shout” on a social media application called Whisper, which allows its users to post, share photos, and message other users anonymously. The analyst’s post featured what the record describes as a photo of an “adult female in a provocative pose” superimposed with the text “Anybody into [name of known series of child pornography] ? ? ##Tab00.” Vinton responded by sending a private message to the analyst saying that he was “[j]ust into taboo.” When the analyst replied that she was “into incest and young,” Vinton added that he also liked “incest and younger women.” The analyst described herself as a thirty-six-year-old female with a daughter, and she said, “I think what I’m interested in is not

³⁴⁸ See Schneckloth v. Bustamonte, 412 U.S. 218, 219, 93 S.Ct. 2041, 36 L.Ed.2d 854 (1973); United States v. Kelly, 913 F.2d 261, 265 (6th Cir. 1990).

³⁴⁹ United States v. Moon, 513 F.3d 527, 537 (6th Cir. 2008) (internal citations omitted).

³⁵⁰ See Bustamonte, 412 U.S. at 227, 93 S.Ct. 2041; United States v. McCaleb, 552 F.2d 717, 720 (6th Cir. 1977).

³⁵¹ United States v. Watson, 423 U.S. 411, 424, 96 S.Ct. 820, 46 L.Ed.2d 598 (1976).

³⁵² United States v. Worley, 193 F.3d 380, 386 (6th Cir. 1999) (quoting United States v. Riascos-Suarez, 73 F.3d 616, 625 (6th Cir. 1996)).

what your [sic] into.” Vinton indicated that he wanted to engage in sexual conduct with both the analyst and the fictitious twelve-year-old daughter. The analyst and Vinton then proceeded to have an extended conversation about the three of them—Vinton, the purported mother, and her fictitious twelve-year-old daughter—meeting to have sex. Vinton asked in graphic detail what specific sexual acts the daughter could and would perform. The analyst answered his questions and insisted that Vinton be gentle with the minor and make sure the child enjoyed herself. Vinton said he “would be very gentle” and suggested that the FBI analyst could “help with that.” Vinton also requested that they exchange photos. The analyst sent a photo of the fictitious daughter, but never sent a photo of herself. Vinton asked several more times for the analyst’s photo and sent two photos of himself. First, Vinton sent an unsolicited photo of male genitalia, ostensibly his own, and asked “[d]o you think both of you will like this[?]” Later, Vinton also sent a photo of his face. Vinton never spoke directly to the daughter, but he expressed his interest in both the analyst and her daughter several times, confirming that all three would have sex. Vinton also expressed concern about apprehension by authorities at various points, saying “your daughter scares me a lot,” “there is a lot of risk for me,” and “something I am also worried about [i]s the cops.” But Vinton followed up his concerns each time by affirming his desire to go through with the plan, saying “but I would like to try it” and “I do want to do this”

The pair turned to logistics. When Vinton showed up at the chosen meeting place and followed the analyst to her purported home, he was arrested. With Vinton’s consent, the police searched his vehicle at the scene, and they found condoms, his phone, and \$1,400 in cash. Vinton was then indicted for using a facility of interstate commerce to attempt to persuade, induce, entice, or coerce an individual under the age of eighteen to engage in an unlawful sexual activity in violation of 18 U.S.C. § 2422(b).

The Eastern District of Court of Michigan dismissed the indictment after concluding that Vinton’s conduct did not fit the elements of the crime as a matter of law, because a reasonable juror could not find beyond a reasonable doubt that he had the requisite intent to persuade or entice a minor. The government appealed.

ISSUE: To prove that a suspect attempted to entice a minor to engage in illegal sexual activity, must the show that the suspect intended to persuade or entice a minor to participate in unlawful sexual conduct and that a substantial step was taken toward persuading or enticing a minor?

HOLDING: Yes. To prove attempt (as no real minor existed) to entice a minor to engage in illegal sexual activity, the government must show the following two elements: (1) the defendant intended to persuade or entice a minor to participate in unlawful sexual conduct; and (2) the defendant took a substantial step toward persuading or enticing a minor.³⁵³

³⁵³ United States v. Roman, 795 F.3d 511, 517 (6th Cir. 2015).

In this case, the Sixth Circuit found that a juror could reasonably infer that Vinton satisfied both elements. With respect to the first element, it can be reasonably inferred that Vinton was specifically seeking minors for sex when he logged into the social media application and responded to a post featuring a photo of an adult female in a provocative pose superimposed with the name of a known series of child pornography that depicted prepubescent or young teenage girls. The undercover police officer indicated in message to defendant that she was interested in someone having sex with her and her daughter and Vinton said that he “would love to try something like that,” and he maintained that he “want[ed] to do both [officer and her daughter]” when officer specified that her daughter was twelve years old. The substantial step was completed when communicated with the adult intermediary of the minor to arrange a meeting to engage in illicit sexual conduct and traveled to meet the minor.

The Sixth Circuit reversed the judgment of the district court and remanded the matter for trial.

XIV. OFFICIAL IMMUNITY

Doe v. Dordoni, 806 Fed. Appx. 417 (6th Cir. 2020) –

FACTS: Doe, a student at Western Kentucky University, was advised by Senior International Student and Scholar Advisor George Dordoni to take a leave of absence from WKU and return to Saudi Arabia due to family issues and Dordoni advised Doe that his immigration and student documents would be valid to permit his return. This advice proved inaccurate. Either through a computer glitch or a misunderstanding, Doe’s registration at WKU was shown to be cancelled. Doe was treated as an asylum seeker and permitted to remain in the United States. Doe filed a lawsuit against Dordoni. Dordoni claimed official immunity. The district court dismissed the complaint.

ISSUE: Does official immunity apply to a governmental official for the performance of ministerial duties?

HOLDING: No. Kentucky law affords official immunity to officers only “for acts performed in the exercise of their discretionary functions.”³⁵⁴ The immunity “applies to the negligent performance ... of (1) discretionary acts or functions, i.e., those involving the exercise of discretion and judgment, or personal deliberation, decision and judgment; (2) in good faith; and (3) within the scope of the employee’s authority.”³⁵⁵ Discretionary acts are those that “necessarily require the exercise of reason in the adaptation of means to an end, and discretion in determining how or whether the act shall be done or the course pursued.”³⁵⁶ Discretion may also arise in the manner of the performance of an act “where it is left to the will or judgment of

³⁵⁴ Yanero v. Davis, 65 S.W.3d 510, 521 (Ky. 2001).

³⁵⁵ Id.

³⁵⁶ Haney v. Monsky, 311 S.W.3d 235, 240 (Ky. 2010).

the performer to determine in which way it shall be performed.”³⁵⁷ However, “[a]n act is not necessarily ‘discretionary’ just because the officer performing it has some discretion with respect to the means or method to be employed.”³⁵⁸

Official immunity does not apply to ministerial acts or functions that require “only obedience to the orders of others, or when the officer’s duty is absolute, certain, and imperative, involving merely execution of a specific act arising from fixed and designated facts.”³⁵⁹ “That a necessity may exist for the ascertainment of those facts does not operate to convert the act into one discretionary in nature.”³⁶⁰ Because “most acts contain both discretionary and ministerial components, the court’s ‘analysis looks for the dominant nature of the act.’”³⁶¹ Kentucky courts have cautioned that “a proper analysis must always be carefully discerning, so as to not equate the act at issue with that of a closely related but differing act.”³⁶² Moreover, courts must be careful not to “limit[] ministerial acts to almost nothing except those acts that are directly compelled by an order or rule ... under[mining] the rule that an act can be ministerial even though it has a component of discretion.”³⁶³

In this case, Dordoni’s inaccurate response to Doe’s inquiry about whether it was safe for him to re-enter the country was held to be a ministerial duty. As such, official immunity did not apply.

The Sixth Circuit reversed the grant of official immunity and remanded for further proceedings.

XV. THREATS

United States v. Howard, 947 F.3d 936 (6th Cir. 2020) – F

FACTS: Howard was convicted of transmitting a murder threat in interstate commerce, relating to a voicemail message he left for Former United States Attorney Eric Holder at Holder’s former law firm (Covington & Burling, LLP) in Covington.³⁶⁴ Howard clearly identified himself and explicitly stated, “I’m going to kill you” and “I’m going to murder you.” Howard left these threats angry about having been convicted and sentenced to other federal crimes.

ISSUE: Is a voicemail left on the individual’s voicemail threatening death and/or physical harm sufficient evidence of intent to make a threat?

HOLDING: Yes. Under 18 U.S.C. § 875(c), a person is guilty of transmitting in interstate commerce a communication containing a threat to injure another person by sending a message in interstate commerce that a reasonable observer would view as a threat, and that the

³⁵⁷ Id.

³⁵⁸ Yanero, 65 S.W.3d at 522 (quoting Franklin Cty. v. Malone, 957 S.W.2d 195, 201 (Ky. 1997)).

³⁵⁹ Id. at 522 (citing Malone, 957 S.W.2d at 201).

³⁶⁰ Id. (quoting Upchurch v. Clinton Cty., 330 S.W.2d 428, 430 (Ky. 1959)).

³⁶¹ Estate of Collins v. Wilburn, 755 F. App’x 550, 556 (6th Cir. 2018) (quoting Haney, 311 S.W.3d at 240).

³⁶² Haney, 311 S.W.3d at 241.

³⁶³ Marson v. Thomason, 438 S.W.3d 292, 302 (Ky. 2014).

³⁶⁴ At the time the opinion was rendered, Mr. Holder was a partner in the firm’s Washington, D.C. office.

defendant intended the message as a threat. In this case the Sixth Circuit held that the voicemail message clearly constituted a threat and that the indictment sufficiently detailed the factual and legal basis of the charge.

The conviction was affirmed.

XVI. 42 U.S.C. § 1983

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

Abu-Joudeh v. Schneider, 954 F.3d 842 (6th Cir. 2020) – F

FACTS: Jiries Abu-Joudeh lives in Allenton, Michigan, with his wife Yasmeen and three sons. On November 20, 2014, Michael Edwards and Patrick Leaveck—two repossession agents with Best Recovery Services, LLC—came to the Abu-Joudehs' home to repossess their car. An altercation ensued. According to Yasmeen, one of the agents pushed her and later shoved Jiries into her. But the repossession agents say that Jiries asked Yasmeen to get him a gun, and then hit her when she refused. Whatever happened, the repossession agents called the police, and the Abu-Joudehs moved their car into the garage and shut the door.

Police officers soon arrived at the Abu-Joudehs', specifically Chief Heather Schneider of the Capac Police Department and Trooper Rick Sebring of the Michigan State Police. Yasmeen let the officers into the house and denied that Jiries hit her. But after a scuffle with Schneider, Jiries was arrested for assault.

Following the arrest, two more police cars arrived at the scene, both driven by male officers. One of these officers—whom Yasmeen refers to as the “third officer” to arrive—entered the house and began assisting Schneider and Sebring.

While inside the house, Yasmeen says that the third officer was standing by her and kept her seated on the couch, ordering her to “[s]it down” and repeatedly telling her to “shut up” when she tried to get Jiries his medication. Of particular relevance to this appeal, Schneider's police report suggests that this third officer was Chief Scott Sheets of the Memphis Police Department. Yasmeen also described the third officer as being mostly bald with short blond or dirty-blond hair, medium height and build, relatively young, and wearing a blue uniform. On the other hand, the fourth officer had dark or black hair.

According to Yasmeen, the third officer spoke with the repossession agents and then told Schneider and Sebring that the garage was locked. After that, the third officer—joined by the two repossession agents—took a metal bar and attempted to pry open the main electric door to the

garage, presumably to help the agents take the Abu-Joudehs' truck. When this attempt failed, they went around to the side door, which one of them opened, allowing the trio to enter the garage. While Yasmeen did not see which of the three actually opened the side door, Leaveck testified that it was a police officer who let them into the garage, but he was unable to specifically identify the police officer.

Jiries Abu-Joudeh filed suit in federal court. While Abu-Joudeh initially named several police officers and the repossession agents as defendants, the only relevant claim for this appeal is that against Scott Sheets for allegedly breaking into Abu-Joudeh's garage, thereby violating his Fourth Amendment right against unreasonable searches and seizures. The district court granted summary judgment for Sheets. This appeal followed.

ISSUE: To prevail in a claim under 42 U.S.C. § 1983, must a plaintiff show that the defendant was personally involved in the alleged constitutional violation?

HOLDING: Yes. To prevail in a claim under 42 U.S.C. § 1983, a plaintiff must show that the defendant was “personally involved in the [alleged] constitutional violations.”³⁶⁵ This is because, in a suit for damages, “[e]ach defendant's liability must be assessed individually based on his own actions.”³⁶⁶ Thus, to survive summary judgment, a plaintiff must put forward evidence suggesting that the defendant participated in the violation of the plaintiff's rights, since “[a]s a general rule, mere presence at the scene of a search, without a showing of direct responsibility for the action, will not subject an officer to liability.”³⁶⁷

In this case, the Sixth Circuit held that Yasmeen's testimony is enough to show that it was the officer who broke into the garage, not one of the repossession agents. She said that the third officer grabbed a metal bar and was using it in an attempt to pry open the electric garage door. And while the officer was standing with the two repossession agents at the side door, so Yasmeen could not see which of the three broke open that door, a reasonable juror could easily infer that it was the police officer who did so, given the fact that he was holding the metal bar and had already attempted to open the electric door. Furthermore, Yasmeen's physical description also creates a genuine issue of fact as to whether Sheets was the officer in question. Yasmeen's testimony suggests that neither Schneider nor Sebring opened the garage, leaving only Sheets and the other unidentified officer. But Yasmeen provided physical descriptions of both unidentified officers, testifying that the “third officer” was mostly bald with a small amount of blond or dirty blond hair, whereas the “fourth officer” had dark or black hair. These descriptions are sufficient to survive summary judgment.

The Sixth Circuit reversed the district court and remanded this matter for further proceedings.

³⁶⁵ Binay v. Bettendorf, 601 F.3d 640, 650 (6th Cir. 2010); accord, e.g., Burley v. Gagacki, 729 F.3d 610, 619 (6th Cir. 2013).

³⁶⁶ Pollard v. City of Columbus, 780 F.3d 395, 402 (6th Cir. 2015) (alteration in original) (quoting Binay, 601 F.3d at 650); accord, e.g., Fazica v. Jordan, 926 F.3d 283, 289 (6th Cir. 2019).

³⁶⁷ Binay, 601 F.3d at 650.

Adams v. Blount County, TN, 946 F.3d 940 (6th Cir. 2020) – F

FACTS: On July 24, 2019, Blount County Deputy Sheriff Burns was dispatched to a call of three suspicion individuals walking near Winchester Drive. Deputy Burns was concerned that one of these individuals may be Dylan Tarbett, a suspect wanted for assaulting a peace officer. Deputy Burns drove by two men, one of whom looked “fidgety.” Deputy Burns exited his cruiser, activated his body camera and asked the men to identify themselves. The men identified themselves as Travis Hickman and Joe Eldridge. Eldridge provided his date of birth as “7/87/85” and snickered. Suspicious, Deputy Burns ordered Eldridge to stand “right there” and put his hands behind his head. Deputy Burns patted Eldridge down. As so as the deputy placed his hand in Eldridge’s pocket, Eldridge ran. A brief chase ensued, with Deputy Burns catching Eldridge after Eldridge fell. Deputy Burns ordered Eldridge to put his hands behind his back. The men struggled on the ground while Deputy Burns attempted to get Eldridge to roll over. Eldridge complained that he was injured and having a seizure. Deputy Bennett arrived as backup and noticed Eldridge appeared to be giving Deputy Burns “a piggy back ride.” Deputy Patty arrived and heard Eldridge say that he had a seizure, that Deputy Burns stuck him in the face, and that Eldridge requested Burns to call 911. Deputy Burns advised Deputy Patty that “every time I get up, he runs.” Deputy Burns handcuffed Eldridge and threatened him with a taser. Deputy Burns and Deputy Patty escorted Eldridge to Patty’s SUV. During the walk to the SUV, Eldridge escaped from the officers and attempted run yet again. Deputy Burns caught up to Eldridge, grabbed him by the waist and lifted Eldridge into the air. During this fall, Eldridge kicked Patty in the groin and ultimately landed on his back. A witness stated that it appeared Eldridge and Deputy Burns got their feet tangled up, causing them to fall to the ground.

Sergeant Boyd arrived at the scene and saw Eldridge handcuffed and lying on the ground with blood coming out of his ears. He called for medical assistance and spoke with Deputies Burns and Patty. The deputies advised that Burns “slammed” Eldridge to the ground. As a result of this incident Eldridge sustained a fractured skull in the rear of the head near the spinal cord and a severe brain injury. Eldridge died as a result of his injuries.

At some point, it was discovered the Eldridge was a false name. Eldridge was actually Anthony Edwards. The medical examiner categorized Edwards’ death as a homicide. An administrative review found no violation of the department’s general order for the use of force.

Adams, Edwards’s fiancée and the mother of his two children, filed a lawsuit pursuant to 42 U.S.C. § 1983 against the county, Deputy Burns and Deputy Patty, alleging excessive force. The district court denied qualified immunity for Burns on the excessive force claim, finding that a genuine issue of material fact existed concerning whether Burns’ use of force was excessive. Burns filed an interlocutory appeal to address qualified immunity on the excessive force claim.

ISSUES:

1. Must the plaintiff in a 1983 action carry the burden of proving that a governmental defendant is not entitled to qualified immunity?

2. May a police officer utilize deadly force if the officer has probable cause to believe that the arrestee poses a threat of severe physical harm?
3. May a governmental defendant appeal from a trial court order denying a motion for summary judgment based on qualified immunity if the trial court determines that a genuine issue of material fact is set forth for trial?

HOLDINGS: 1. Yes. To prevail on their § 1983 claim, Plaintiffs “must establish that a person acting under color of state law deprived [Edwards] of a right secured by the Constitution or laws of the United States.”³⁶⁸

Burns asserts “the defense of qualified immunity, which shields government officials from ‘liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known.’”³⁶⁹ Thus, Plaintiffs carry the burden of proving that Burns is not entitled to qualified immunity.³⁷⁰ In determining whether law enforcement is shielded from civil liability due to qualified immunity, the court must determine: (1) whether, when viewing the facts in the light most favorable to Plaintiffs, Burns violated Edwards’s rights; and (2) whether those rights were clearly established at the time of the alleged violation.³⁷¹ “These questions may be answered in either order[.]”³⁷²

2. Yes. In excessive force cases, the threat factor is “‘a minimum requirement for the use of deadly force,’ meaning deadly force ‘may be used only if the officer has probable cause to believe that the suspect poses a threat of severe physical harm.’”³⁷³

3. No. A governmental defendant may not appeal a denial of a motion for summary judgment based on qualified immunity “insofar as that order determines whether or not the pretrial record sets forth a ‘genuine’ issue of fact for trial.”³⁷⁴ Because the arguments raised by Burns concerning the denial of qualified immunity rely on disputed facts with respect to his use of force rather than an issue of law, an appeal is improper and the Sixth Circuit did not have jurisdiction to consider the matter.

The appeal was dismissed.

Adkins v. Morgan County, TN., 798 Fed.Appx. 858 (6th Cir. 2020) – F

³⁶⁸ Smoak v. Hall, 460 F.3d 768, 777 (6th Cir. 2006) (quoting Waters v. City of Morristown, 242 F.3d 353, 358–59 (6th Cir. 2001)).

³⁶⁹ Id. (quoting Harlow v. Fitzgerald, 457 U.S. 800, 818, 102 S.Ct. 2727, 73 L.Ed.2d 396 (1982)).

³⁷⁰ See v. City of Elyria, 502 F.3d 484, 491 (6th Cir. 2007).

³⁷¹ See Campbell v. City of Springboro, Ohio, 700 F.3d 779, 786 (6th Cir. 2012); see also Saucier v. Katz, 533 U.S. 194, 201, 121 S.Ct. 2151, 150 L.Ed.2d 272 (2001).

³⁷² Goodwin v. City of Painesville, 781 F.3d 314, 321 (6th Cir. 2015).

³⁷³ Mullins v. Cyranek, 805 F.3d 760, 766 (6th Cir. 2015)

³⁷⁴ Johnson v. Jones, 515 U.S. 304, 320, 115 S.Ct. 2151, 132 L.Ed.2d 238 (1995).

FACTS: While an inmate at the Morgan County Jail, Atkins began experiencing back pain. The pain intensified to the point where Atkins required medical attention. After being examined by medical professionals, Atkins was prescribed medication to be taken four times per day to address the back pain and was discharged. He was transferred to a couple of different cells before being sent back to his normal cell. Upon being returned to his normal cell, the pain again intensified, speaking to his stomach and causing difficulty with leg movements. Another inmate used the intercom to advise correctional officers of Atkins's condition and stated that Atkins needed emergency care. Corrections Officer Schubert responded by stating that Atkins was "faking it" and took no action to address that matter. The next morning, Atkins's legs were completely numb and he was unable to move. At that point, jail officials took Atkins to a hospital. At the hospital, doctors found Atkins to be critically ill and diagnosed him with a spinal abscess. Atkins received treatment at another hospital and was able to walk again after a two-month hospitalization.

Adkins filed a lawsuit against several jailers pursuant to 42 U.S.C. 1983 for a violation of his constitutional rights, arguing that jail guards were deliberately indifferent to his serious medical needs. The district court granted qualified immunity to all jail guards except Schubert. Schubert appealed.

ISSUE: Does an inmate have a clearly established constitutional right to receive adequate medical care while in custody?

HOLDING: Yes. Qualified immunity is a personal defense that applies to government officials in their individual capacities, which shields said officials "from personal liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." It exists to insulate government officials from "undue interference with their duties and from potentially disabling threats of liability." When this court is confronted with an appeal of the denial of qualified immunity, it must decide two questions in the plaintiff's favor in order to affirm the denial of qualified immunity. First, do the facts, viewed in the light most favorable to the plaintiff, demonstrate that the defendant has violated a constitutional right? Second, was the right in question clearly established at the time of the violation?

Ashford v. Raby, 951 F.3d 798 (6th Cir. 2020) – F

FACTS: Keyonte Ashford was driving on the highway after having too much to drink. A police officer noticed him speeding at over 100 miles per hour and changing lanes without a turn signal. The officer sped up to follow and soon turned on his lights to indicate that Ashford should pull over. This sent Ashford into a panic attack. Instead of promptly pulling over, he decided to drive somewhere he felt more comfortable stopping (a Walgreens by his home).

Of course, the officer knew nothing about what Ashford was feeling. He knew only what he could see from his perspective: someone had been driving erratically at over 100 mph and was now refusing to pull over. The officer tailed Ashford for more than two minutes while radioing in the

details of the chase. Eventually, two backup cruisers arrived. The three police cars then surrounded Ashford and forced him to stop.

At that point, two officers got out of their cars and told Ashford to show his hands. Ashford complied, thrusting his hands out the window. The officers then told Ashford twice to turn his engine off. Ashford did not comply; instead, he simply thrust his hands further out the window.

Officer Michael Raby and his trained police dog Ruger arrived on the scene. Raby took the leading role in the officers' interactions with Ashford. While the other officers told Ashford to keep his hands up, Raby slowly approached Ashford's door and tried to open it. Finding it locked, Raby told Ashford to unlock it, then reached through the window, unlocked the door himself, and pulled it open. With the door open, the officers started telling Ashford to step out of the vehicle.

Ashford did not exit his SUV because it was still in drive, and his foot on the brake was the only thing stopping it from lurching forward into a police cruiser. Ashford was afraid that if that happened, the officers would think he was using his vehicle as a weapon and would shoot him. Unfortunately, Ashford did not think he could turn the vehicle off because that would have required Ashford to retract a hand into the passenger compartment. Ashford was terrified that if he did that, the officers would think he was reaching for a weapon and would shoot him.

Ashford tried to explain this dilemma to the officers and proposed a solution: although he was unwilling to leave the vehicle while it was in drive, the officers were free to reach into the vehicle and park or shut it down themselves (at which point he would gladly get out). But it's unclear whether the officers heard this suggestion amid the noise. The officers just kept telling Ashford to step out of the car. They also warned him that if he did not, Raby would send the dog to apprehend him. After twenty seconds of Ashford's refusal to leave the vehicle (and one final warning about the dog), Raby commanded Ruger to attack.

Ruger made two lunges but failed to lock on to Ashford either time. After the second attempt, Raby stepped in to help, grabbing Ashford's left arm and lowering it for Ruger to bite. Raby and Ruger then pulled Ashford out of the driver's seat and onto the road, where the officers completed the arrest. Afterward, the officers took Ashford to the hospital. He was treated for three puncture wounds and several more superficial injuries to his left forearm.

Ashford later sued Raby under 42 U.S.C. § 1983, claiming that the canine seizure violated his Fourth Amendment right against excessive force. The district court entered summary judgment for Raby based on qualified immunity, finding that Raby's use of force was legal and did not violate clearly established law. Ashford appealed.

ISSUE: To be constitutional under the Fourth Amendment, must an officer's use of force be reasonable under the circumstances?

HOLDING: Yes. To be constitutional under the Fourth Amendment, Raby’s use of force only needed to be reasonable under the circumstances.³⁷⁵ Reasonable does not mean vindicated by hindsight.³⁷⁶ Nor does it mean only the best technique available at the time.³⁷⁷ In police work, officers usually face a range of acceptable options, not a single, rigid right answer. The reasonableness standard thus “contains a built-in measure of deference to the officer’s on-the-spot judgment.”³⁷⁸ This substantive constitutional standard protects [the officer’s] reasonable factual mistakes and qualified immunity protects him from liability where he reasonably misjudged the legal standard.³⁷⁹ Even if the use of force was unreasonable, a remedy pursuant to § 1983 is unavailable unless the unreasonableness of the force was clearly established at the time, and so clear that every similarly situated reasonable officer would have recognized that the force used was excessive in that precise situation.³⁸⁰

In this situation, the Sixth Circuit examined whether it was reasonable for Raby to use force to remove Ashford from the vehicle, deploy the dog and reasonably manage the dog during its deployment. The Sixth Circuit, considering the officer’s perspective, held that Raby’s actions were reasonable because of the fact that Ashford led police on a high-speed chase and was unwilling to exit the vehicle when ordered. With respect to the deployment of the dog, Ashford was unable to identify any authority holding that deployment of the dog in similar circumstances violated the Fourth Amendment unless the dog was improperly trained.³⁸¹ There is no evidence indicating that this dog was improperly trained. Finally, with respect to the management of the dog, Raby commanded the dog to release Ashford a couple of seconds after the dog bite Ashford. The dog obeyed the command within seconds. The Sixth Circuit held that “the footage shows that Raby’s handling of Ruger during the seizure was responsible and professional. At most, one could argue that Raby could have called the dog off a second or two sooner. But that kind of fine-sliced judgment call amid “tense, uncertain, and rapidly evolving” circumstances just isn’t the stuff of a Fourth Amendment violation.”

As the Sixth Circuit found no violation of clearly established law, the district court’s grant of qualified immunity was affirmed.

Baird v. Hamilton County Department of Job and Family Services, ---- Fed. Appx. ----- (6th Cir. 2020). – NF

FACTS: In 2016, Baird was a “Children Services Manager” at the Hamilton County Department of Job and Family Services. In that role, she supervised caseworkers and ensured

³⁷⁵ Graham v. Connor, 490 U.S. 386, 396–97, 109 S.Ct. 1865, 104 L.Ed.2d 443 (1989).

³⁷⁶ Id. at 396, 109 S.Ct. 1865

³⁷⁷ Dickerson v. McClellan, 101 F.3d 1151, 1160 (6th Cir. 1996).

³⁷⁸ Burchett v. Kiefer, 310 F.3d 937, 944 (6th Cir. 2002).

³⁷⁹ Weinmann v. McClone, 787 F.3d 444, 450 (7th Cir. 2015).

³⁸⁰ District of Columbia v. Wesby, — U.S. —, 138 S. Ct. 577, 589, 199 L.Ed.2d 453 (2018).

³⁸¹ Indeed, most of this circuit’s excessive-force precedents involving police dogs find no violation at all. See Dunigan v. Noble, 390 F.3d 486, 492–93 (6th Cir. 2004); Matthews v. Jones, 35 F.3d 1046, 1051–52 (6th Cir. 1994); Robinette v. Barnes, 854 F.2d 909, 913–14 (6th Cir. 1988).

that they understood the Department's child-welfare policies. At home, Baird cared for her adult son, Chico, who suffers from schizoaffective disorder, paranoia, mania, and depression. Chico lived in an apartment building near Baird's; she herself lived with Chico's infant daughter, N.C., and N.C.'s mother, Samantha Cruz.

In March 2016, a neighbor of Chico called Baird to report loud noises and shouts coming from Chico's apartment. Baird then called Chico, who was sobbing and distraught. He was also babysitting N.C. by himself. Baird called a psychiatric response team (the "Crisis Unit") to notify them of the situation; then she went to Chico's apartment. N.C. was unharmed when Baird got there. Members of the Crisis Unit then arrived and observed that Chico was drunk and apparently suicidal. They called the police, who came to the scene and eventually tasered Chico and took him to the hospital.

A social worker with the Crisis Unit reported the incident to the Hamilton County Department of Job and Family Services for further investigation. An investigator (albeit one from a neighboring county) conducted a home visit, during which she interviewed Chico and Baird. Afterward the investigator requested an emergency order to remove N.C. from Baird's home, on the ground that Baird was basically in denial about the danger that Chico posed to N.C. A magistrate granted the investigator's request and the Department removed N.C. from Baird's home the same day.

A few days later, Baird petitioned a magistrate for custody of N.C. The magistrate promptly held a hearing at which the witnesses presented conflicting evidence. Specifically, the investigator testified that Baird had concealed from her Chico's history of domestic violence, whereas Baird testified that the investigator had never asked her about that topic. Similarly, the Crisis Unit's report stated that Chico's apartment had been in a state of disarray: the cable box had been ripped out of the wall, fragments of wood were strewn about, and Chico was bleeding from his hand. Yet Baird testified that Chico's apartment was fine. The magistrate ultimately denied Baird's petition on the ground that Baird did not fully appreciate Chico's potential danger to N.C.

A few months later, the Department held a pre-disciplinary conference with Baird and her attorney. The Department suspended Baird for 10 days, likewise finding that, despite her status as a trained child-welfare professional, her testimony at the hearing showed that she had failed to appreciate the danger that Chico posed to N.C.

Baird thereafter brought this suit under 42 U.S.C. § 1983, claiming that the defendants had suspended her in retaliation for testimony at the hearing, in violation of her First Amendment rights, and that her suspension had violated her right to due process under the Fourteenth Amendment. Thereafter, during discovery, Baird's attorney revealed that, during the course of events giving rise to the suit, Baird had secretly recorded a meeting with Department personnel, which itself violated the Department's employment policy. That violation was Baird's third, when combined with the events giving rise to her suspension and an earlier unrelated incident. The Department therefore fired her in accordance with its progressive discipline policy. Baird then

amended her complaint to include her termination. The district court granted summary judgment to the defendants. This appeal followed.

ISSUE: May a public sector employee be subject to disciplinary action based upon sworn testimony given in a proceeding that is a matter of personal interest because that testimony may relate to how the public employee performs a job function?

HOLDING: Yes. Baird argues that the Department violated the First Amendment when it suspended her in retaliation, she says, for her testimony at N.C.’s custody hearing. To prevail on that claim, Baird must show, among other things, that her testimony was a matter of public concern. “Speech involves matters of public concern when it ... relat[es] to any matter of political, social, or other concern to the community[.]”³⁸²

Here, Baird’s testimony focused almost exclusively on questions related to her son’s mental health, his fitness as a parent, and whether he posed a danger to N.C. The point of her testimony was to secure custody of her granddaughter—a matter of personal interest, not one of public concern.³⁸³

The Sixth Circuit also held that Baird received adequate due process because she was granted a pre-disciplinary conference prior to her suspension. She had the opportunity to testify, defend herself, and cross-examine witnesses.

The Sixth Circuit affirmed the district court.

Barton v. Martin, 949 F.3d 938 (6th Cir. 2020) – F

FACTS: Neighbors Dwain Barton and Jill Martin engaged in arguments over stray cats that Martin routinely fed enter Barton’s yard. Barton complained to animal control about the cats in the past. On November 3, 2014, a cat attacked Barton’s daughter in the backyard. Barton shot a BB gun to scare the cat away and later advised Martin that “the next cat that I see in my yard will be a dead one.” Martin falsely reported to police that Barton had shot a stray cat in his backyard. The dispatcher advised law enforcement that a woman had called to say that her neighbor was “shooting cats,” but did not see any injured animals. Animal control responded and spoke to Barton through a screen door. Barton refused to provide any identification, but denied injuring any animals. Barton advised animal control that he fired a BB gun to scare the cat away. The animal control officer radioed contacted the police department, advising that Barton “admitted to shooting animals.”

Ten minutes later, four police cars, with two officers in each car, showed up at Barton’s home. The officers pulled “what looked like assault rifles” out of their trunks and “surrounded” Barton’s house. Barton provided his identification to the animal control officer. Moments later, “fearing that [Barton] was grabbing a gun,” Officer Vann “ripped [their] screen door off [and barged] into

³⁸² Lane v. Franks, 573 U.S. 228, 241, 134 S.Ct. 2369, 189 L.Ed.2d 312 (2014) (quotation marks omitted).

³⁸³ See Rodgers v. Banks, 344 F.3d 587, 597 (6th Cir. 2003).

[their] house.” Vann testified that when he entered Barton’s home, he saw Barton “standing in the kitchen” and “at that point,” did not perceive a threat from him because Barton did not have “anything in his hands” and was not “in control of any type of a weapon.” Nonetheless, Vann “threw [Barton] up against the counter like a linebacker.” Barton explained that Vann “lifted [him] up with his elbows underneath [his] body and [his] arm and literally picked [him] up and slammed [him] up against [the] kitchen cupboards, at which point all of the other officers, like ants, followed in, and at which point they all surrounded [him].”

Although both Barton and his wife testified that Barton never resisted arrest, Vann then told Barton to “stop resisting” and to place his hands behind his back because he was under arrest. In response, Barton stated that he could not put his hands or shoulders behind his back due to a previous shoulder injury. Vann responded, “Oh, we’ll make it fit.” Vann then “grabbed both of [Barton’s] wrists and took them both behind [his] back[,] ... shoved them both together[,] and put the handcuffs on [him] as tight as he possibly could.” None of the officers involved had a warrant to enter Barton’s home or to arrest him.

Vann then “shoved” Barton outside his home, down his porch steps, and into a patrol car. During the drive to the police station, Barton complained that Vann had injured his shoulder when he slammed him against the kitchen cabinets. Upon arriving at the station, Barton was strip searched with one hand handcuffed to the wall, about three feet above his head. He continued to tell officers that his shoulder hurt and “that [Officer Vann] had injured [him],” to which Barton was told to “shut the f*** up unless [he] want[ed] to spend the night there.” Officers told him that he was being charged with animal cruelty and issued a citation. Approximately three hours after his arrest, Barton was released on a \$500 cash bond. The charge against Barton was later dismissed.

Barton filed a lawsuit pursuant to 42 U.S.C. §1983, alleging illegal entry, wrongful arrest, excessive force, and retaliatory arrest. The district court held that Vann was entitled to qualified immunity with respect to the illegal entry, wrongful arrest, and retaliatory arrest claims, and that Barton failed to raise a genuine issue of material fact on the excessive force claim. The district court also dismissed the state law claims. Barton appealed the district court’s grant of summary judgment on the illegal entry, wrongful arrest, and excessive force claims.

- ISSUES:**
1. Under the Fourth Amendment, can a police officer enter a home without a warrant absent exigent circumstances?
 2. Must an arresting officer possess probable cause that a criminal offense has been created prior to executing a warrantless arrest?
 3. Does the Fourth Amendment prohibit the use of excessive force while executing an arrest and after a suspect has been rendered incapacitated?

HOLDINGS: The Sixth Circuit reversed the district court’s judgment granting qualified immunity to Officer Vann.

Qualified immunity shields government officials performing discretionary functions “from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known.”³⁸⁴ Created to protect government officials from interference with their official duties, qualified immunity “is an immunity from suit rather than a mere defense to liability.”³⁸⁵ It allows police officers “breathing room to make reasonable but mistaken judgments and protects all but the plainly incompetent or those who knowingly violate the law.”³⁸⁶ After a defending officer initially raises qualified immunity, the plaintiff bears the burden of showing that the officer is not entitled to qualified immunity.³⁸⁷

Qualified immunity involves a two-step inquiry, and courts exercise discretion in deciding in what order to address the questions.³⁸⁸ First, viewing the facts in the light most favorable to the plaintiff, the court must determine whether the officer committed a constitutional violation.³⁸⁹ Second, if there is a constitutional violation, the court must determine whether that constitutional right was clearly established at the time of the incident.³⁹⁰ A right is clearly established when the “contours of the right [are] sufficiently clear that a reasonable official would understand that what he is doing violates that right.”³⁹¹ While there need not be “a case directly on point” for the law to be clearly established, “existing precedent must have placed the statutory or constitutional question beyond debate.”³⁹²

1. No. “A police officer’s entry into a home without a warrant is presumptively unconstitutional under the Fourth Amendment.”³⁹³ Indeed, warrantless entry of one’s home is the “chief evil” against which the Amendment is designed to guard.³⁹⁴ When “exigent circumstances” exist, however, warrantless entries are permissible.³⁹⁵ Exigent circumstances exist when a reasonable officer could believe that there are “‘real immediate and serious consequences’ that would certainly occur were a police officer to ‘postpone action to get a warrant.’”³⁹⁶ Thus, exigent circumstances may exist when “the suspect represent[s] an immediate threat to the arresting officers and public.”³⁹⁷ It is clearly established that warrantless

³⁸⁴ Harlow v. Fitzgerald, 457 U.S. 800, 818, 102 S.Ct. 2727, 73 L.Ed.2d 396 (1982).

³⁸⁵ Mitchell v. Forsyth, 472 U.S. 511, 526, 105 S.Ct. 2806, 86 L.Ed.2d 411 (1985).

³⁸⁶ Stanton v. Sims, 571 U.S. 3, 6, 134 S.Ct. 3, 187 L.Ed.2d 341 (2013) (per curiam) (quoting Ashcroft v. al-Kidd, 563 U.S. 731, 743, 131 S.Ct. 2074, 179 L.Ed.2d 1149 (2011)) (internal quotation marks omitted).

³⁸⁷ Burgess v. Fischer, 735 F.3d 462, 472 (6th Cir. 2013).

³⁸⁸ Pearson v. Callahan, 555 U.S. 223, 236, 129 S.Ct. 808, 172 L.Ed.2d 565 (2009).

³⁸⁹ Burchett v. Kiefer, 310 F.3d 937, 942 (6th Cir. 2002).

³⁹⁰ Id.

³⁹¹ Morrison v. Bd. of Trs. of Green Twp., 583 F.3d 394, 400 (6th Cir. 2009) (quoting Anderson v. Creighton, 483 U.S. 635, 640, 107 S.Ct. 3034, 97 L.Ed.2d 523 (1987)).

³⁹² Ashcroft, 563 U.S. at 741, 131 S.Ct. 2074.

³⁹³ Ewolski v. City of Brunswick, 287 F.3d 492, 501 (6th Cir. 2002).

³⁹⁴ United States v. U.S. District Court, 407 U.S. 297, 313, 92 S.Ct. 2125, 32 L.Ed.2d 752 (1972).

³⁹⁵ Hancock v. Dodson, 958 F.2d 1367, 1375 (6th Cir. 1992).

³⁹⁶ Ewolski, 287 F.3d at 501 (quoting O’Brien v. City of Grand Rapids, 23 F.3d 990, 997 (6th Cir. 1994)).

³⁹⁷ Hancock, 958 F.2d at 1375.

entry into a home without an exception to the warrant requirement violated clearly established law.³⁹⁸

In this case, while Barton did initially decline to exit his home to speak to the animal control officer, Barton eventually spoke with the animal control officer and indicated that he shot the BB gun only to scare the cat. This was relayed to the officers by animal control. There was no evidence presented to the officers that Barton actually shot a stray cat. Moreover, there was no evidence that Barton was a threat to anyone. Without additional evidence of a threat against the police or bystanders, a report of an armed suspect inside his home does not justify warrantless entry. “Evidence that firearms are within a residence, by itself, is not sufficient to create an exigency”³⁹⁹ Rather, the government must show that the police “possessed information that the suspect was armed and likely to use a weapon or become violent.”⁴⁰⁰ Thus, officers responding to a shots-fired report must have additional evidence of an immediate threat before entering a home without a warrant.

Ultimately, the Sixth Circuit held that evidence that someone has shot at a stray cat does not indicate willingness to shoot at a human being, and there was no indication that Barton was shooting at strays inside his home; thus, Vann’s belief that there was an exigency that precluded procuring a warrant before entering Barton’s home was unreasonable.

2. Yes. It is well settled that the Fourth and Fourteenth Amendments require probable cause to justify arresting an individual.⁴⁰¹ A warrantless arrest is reasonable under the Fourth Amendment if the arresting officer has probable cause for the arrest.⁴⁰² An officer has probable cause “when, at the moment the officer seeks the arrest, ‘the facts and circumstances within [the officer’s] knowledge and of which [he] had reasonably trustworthy information [are] sufficient to warrant a prudent man in believing that the [plaintiff] had committed or was committing an offense.’”⁴⁰³ Under a totality-of-the-circumstances analysis, “probable cause exists only when the police officer ‘discovers reasonably reliable information that the suspect has committed a crime.’”⁴⁰⁴ “A probable cause determination ... must take account of ‘both the inculpatory and exculpatory evidence’ then within the knowledge of the arresting officer” at the time of the arrest.⁴⁰⁵ An officer “cannot simply turn a blind eye toward potentially exculpatory evidence.”⁴⁰⁶ A phone call reporting criminal activity, without any corroborating information, does not provide probable cause for an arrest.⁴⁰⁷

³⁹⁸ See Armstrong v. City of Melvindale, 432 F.3d 695, 700 (6th Cir. 2006)

³⁹⁹ United States v. Bates, 84 F.3d 790, 795 (6th Cir. 1996).

⁴⁰⁰ Id.

⁴⁰¹ Beck v. Ohio, 379 U.S. 89, 91, 85 S.Ct. 223, 13 L.Ed.2d 142 (1964);

⁴⁰² See District of Columbia v. Wesby, — U.S. —, 138 S. Ct. 577, 586, 199 L.Ed.2d 453 (2018).

⁴⁰³ Wesley v. Campbell, 779 F.3d 421, 429 (6th Cir. 2015)

⁴⁰⁴ Courtright v. City of Battle Creek, 839 F.3d 513, 521 (6th Cir. 2016)

⁴⁰⁵ Id.

⁴⁰⁶ Logsdon v. Hains, 492 F.3d 334, 341 (6th Cir. 2007).

⁴⁰⁷ Courtright, 839 F.3d at 522;

In this case, qualified immunity was not available with respect to the arrest because a reasonable jury could find that Vann lacked probable cause to arrest Barton for animal cruelty. Barton's neighbor called to report Barton was shooting at cats. Barton's neighbor was not an eyewitness to the attack on Barton's daughter or Barton's shooting his BB gun at the cat; rather, she called 911 after her confrontation with Barton. Manchester responded to the 911 call and, after speaking with Barton, relayed over police radio that Barton admitted to shooting animals. Upon arriving at Barton's home, Vann did not see a weapon or an injured cat. Nor did any other officer at the scene see any physical evidence of wrongdoing. Additionally, Vann's interaction with Barton did not lead to further corroboration of the neighbor's call prior to the arrest. And, taking Barton's story as true, before Barton was arrested, he denied the allegation that he was shooting at cats and instead told Vann that he had only shot his BB gun at a trampoline pole. Viewing the evidence in Barton's favor, the neighbor's call, by itself without further corroborating evidence, was not enough to establish probable cause for arrest. Based on the information Vann had at the time, including the exculpatory statement offered by Barton, no reasonable officer would have concluded that there was probable cause for arrest.

3. Yes. Use of force that is not objectively reasonable violates the Fourth Amendment.⁴⁰⁸ Whether an officer exerts excessive force is determined under an "objective reasonableness" standard.⁴⁰⁹ In analyzing objective reasonableness, "courts must balance the consequences to the individual against the government's interests in effecting the seizure,"⁴¹⁰ and consider the "facts and circumstance of each case viewed from the perspective of a reasonable officer on the scene and not with 20/20 hindsight."⁴¹¹ To determine the objective reasonableness of an officer's use of force, we "pay particular attention to 'the severity of the crime at issue, whether the suspect poses an immediate threat to the safety of the officers or others, and whether he is actively resisting arrest or attempting to evade arrest by flight.'"⁴¹²

In applying these considerations to the facts at hand, it would be clear to a reasonable officer that the amount of force used by Vann against Barton was unlawful. First, Barton was being arrested for animal cruelty, not a crime that would justify the amount of force used here. It was contested as to whether Barton shot the cat, and even if he did, whether he would have been justified in doing so given the attack on his daughter. There was no threat to human safety from Barton's actions.

Second, Barton did not pose an immediate threat to the safety of the officers or others. Vann testified that although he was unsure whether Barton was armed when he initially arrived at the scene, when he entered Barton's home, he saw Barton "standing in the kitchen" and "at that point," did not perceive a threat from him because Barton did not have "anything in his hands"

⁴⁰⁸ Graham v. Connor, 490 U.S. 386, 396, 109 S.Ct. 1865, 104 L.Ed.2d 443 (1989).

⁴⁰⁹ Kostrzewa v. City of Troy, 247 F.3d 633, 639 (6th Cir. 2001).

⁴¹⁰ Burchett v. Kiefer, 310 F.3d 937, 944 (6th Cir. 2002).

⁴¹¹ Fox v. DeSoto, 489 F.3d 227, 236 (6th Cir. 2007).

⁴¹² Solomon v. Auburn Hills Police Dep't, 389 F.3d 167, 174 (6th Cir. 2004)

and was not “in control of any type of a weapon.” Thus, Vann testified that he realized, at least upon entering Barton’s home, that Barton was not armed. Hence, while some use of force may have been reasonable when Vann was unsure whether Barton had a weapon,⁴¹³ slamming Barton against the cabinet was no longer reasonable once Vann realized that Barton was not holding anything in his hands.⁴¹⁴

Third, the facts do not suggest that Barton was resisting arrest or attempting to flee. Both Barton and Vann testified that Barton did not resist or evade arrest. Rather, when Vann told Barton to put his hands behind his back, Barton “complied and was placed under arrest” and “there was no struggle.” That Barton did not attempt to evade arrest or flee is corroborated by the fact that he passed his identification through the screen door to his mother-in-law, who was on his porch, to hand to the officers before Vann crashed through the door.

A reasonable jury could also conclude that Vann used excessive force after arresting Barton. Once he was handcuffed, Barton claims that Vann “tossed [him] down” his front porch, elevated about three feet from the sidewalk, to Manchester. This was after Barton told Vann of a prior shoulder injury. The court has “held repeatedly that the use of force after a suspect has been incapacitated or neutralized is excessive as a matter of law.”⁴¹⁵ “The reason for this is that once the detainee ceases to pose a threat to the safety of the officers or others, the legitimate government interest in the application of significant force dissipates.”⁴¹⁶ “‘Gratuitous violence’ inflicted upon an incapacitated detainee constitutes an excessive use of force, even when the injuries suffered are not substantial.”⁴¹⁷ As Barton was incapacitated after being handcuffed, Vann tossing Barton down his front porch stairs was unreasonable. There were no officer safety concerns or other legitimate government interests justifying this use of force. This circuit’s case law has long recognized the unconstitutionality of using gratuitous force against an incapacitated suspect.⁴¹⁸

The Sixth Circuit reversed the district court’s grant to qualified immunity to Officer Vann and remanded for further proceedings.

Bullock v. City of Detroit, ---- Fed. Appx. ----, 2020 WL 2500640 (6th Cir. 2020) – NF

FACTS: Bullock lived alone with her dog Mandy at her home in Detroit, Michigan. On August 31, 2015, a confidential informant told Officer Castro and his partner that individuals were selling drugs at several locations, including Bullock’s home. This informant had given information to the major violators unit at least ten prior times, which had led to at least 20 drug-related arrests and the seizures of drugs and firearms. Castro thus considered the informant reliable and

⁴¹³ See Dunn v. Matatali, 549 F.3d 348, 354 (6th Cir. 2008) (noting that when officer is unsure whether suspect is armed, suspect poses greater threat to officer’s safety),

⁴¹⁴ See Wells v. City of Dearborn Heights, 538 F. App’x 631, 638 (6th Cir. 2013) (explaining that how much force is reasonable may evolve as an incident progresses and an officer learns new information).

⁴¹⁵ Baker v. City of Hamilton, 471 F.3d 601, 607–08 (6th Cir. 2006).

⁴¹⁶ Morrison, 583 F.3d at 404–05.

⁴¹⁷ Id. at 407.

⁴¹⁸ Coley v. Lucas County, 799 F.3d 530, 540 (6th Cir. 2015).

arranged for a controlled buy at Bullock's home. After giving the informant \$10 or \$20 for the transaction, Castro and his partner monitored the buy from an unmarked car parked a few houses down the street. Castro watched as the informant walked to Bullock's home, interacted for one or two minutes with an adult male who came to the door, and returned to Castro's car. Castro did not see the exchange of drugs for cash, but the informant came back with a folded lottery ticket containing a substance that looked like heroin. Beyond watching the buy, Castro conducted no other surveillance of Bullock's home.

On September 1, after confirming that the substance was heroin, Castro used the controlled buy to get a search warrant for Bullock's home. Castro's affidavit expressed his belief that the informant was reliable and discussed the unit's prior experiences with the informant and the resulting arrests and seizures. It also described the controlled buy, noting that Castro "observed the [informant] go directly to the target location, stay a short time, and then return directly to" Castro. A magistrate judge issued the warrant.

The next day, seven members of the major violators unit executed the warrant. The officers knocked on the door and announced their presence, but nobody answered. After an officer rammed the door, Morrison entered with Castro immediately behind. Both officers carried shotguns. Up to this point, neither Castro nor Morrison had heard or seen evidence of a dog, and the informant had not mentioned a dog at the residence either.

Just before or just after entering the house, Morrison saw Bullock's dog Mandy about 12 to 15 feet away. He thought the dog looked like a Pitbull, but Bullock claims Mandy was a Labrador Retriever. According to Morrison, the dog barked, showed her teeth, and charged snarling. Morrison yelled "dog" and fired two shots at Mandy. Castro, who was covering Morrison's "six," did not recall whether he heard the dog bark or growl and did not see the dog, but he heard Morrison's shout. Morrison noted that the wounded dog "squealed" and escaped to the basement leaving a trail of blood. The officers proceeded to secure the house. Morrison and another officer eventually reached the basement where (again according to Morrison) the dog stopped crying and started barking. Morrison says that Mandy approached the officers "kind of limping." He fired two more shots, this time killing the dog.

The house secure, the officers searched for drugs. They found none. The officers did confiscate two old handguns located in Bullock's bedroom. They left a copy of the warrant and a list of seized items, but did not mention the dog. Following official policy, Castro disposed of the dog at a landfill.

On the day of this search, Bullock had taken her granddaughter to Cedar Point, an amusement park in Sandusky, Ohio. When returning from the park that evening, Bullock received a call from her neighbor that her door was hanging wide open. She got home about an hour later to find her house in disarray. The shots from Morrison's shotgun had left holes in her bedroom door, dresser, and mattress as well as in her basement walls and bar. Bullock realized that her dog had been killed after speaking with neighbors who had heard the search and seeing the blood on her

basement steps. She called the police, they came several hours later, and they told her that her house had been searched pursuant to a warrant.

Bullock says that Mandy had never previously bitten, attacked, or charged anyone; the dog would run away from strangers. She also has never been convicted of a crime, was not aware of drug sales from her home, and had never had the police called there before. Bullock did, however, catch someone that she knew to be a local drug dealer cutting through her yard about a month or so before the search. When discussing the confiscated guns, Bullock asserted that one was her uncle's antique German Luger from World War II, and the other was a "starter pistol" for relay races. She tried to get the Luger back, but both guns were destroyed.

Bullock brought a two-count complaint against Castro, Morrison, and the City of Detroit under 42 U.S.C. § 1983. She alleged that Castro's affidavit failed to establish probable cause to search her home and thus violated the Fourth Amendment's ban on unreasonable searches. She added that Morrison used excessive force when shooting her dog and thus violated the Fourth Amendment's ban on unreasonable seizures. The officers claimed qualified immunity, but this claim was rejected.

ISSUE:

1. Is it clearly established law that a single, controlled drug buy at a particular location by itself does not establish probable cause to search the location?
2. May law enforcement utilize deadly force against a person's dog while executing a search warrant if the dog poses an imminent threat to the officer's safety?

HOLDING:

1. No. Sixth Circuit precedent clearly rejects the idea that a single, controlled drug buy at a particular location by itself does not establish probable cause to search the location.⁴¹⁹ Accordingly, a single, controlled drug buy at a particular location by itself can serve to provide probable cause to support a search warrant. The Sixth Circuit held that the warrant in this case was based upon probable cause due to the officer's observation of a drug buy at Bullock's residence.

2. Yes. The Fourth Amendment also protects "[t]he right of the people to be secure in their ... effects ... against unreasonable ... seizures[.]" An officer's use of deadly force against a person's dog qualifies as a "seizure" of the person's "effect."⁴²⁰ The critical question thus becomes whether an officer's use of deadly force against a dog was "unreasonable." The Sixth Circuit has held that "a police officer's use of deadly force against a dog while executing a warrant to search a home for illegal drug activity is reasonable under the Fourth Amendment when, given the

⁴¹⁹ United States v. Archibald, 685 F.3d 553, 555, 557 (6th Cir. 2012).

⁴²⁰ See Brown v. Battle Creek Police Dep't, 844 F.3d 556, 566 (6th Cir. 2016). (For the historical analysis on this point, see Altman v. City of High Point, 330 F.3d 194, 200–05 (4th Cir. 2003).)

totality of the circumstances and viewed from the perspective of an objectively reasonable officer, the dog poses an imminent threat to the officer's safety."⁴²¹

In this case, the parties dispute the facts – whether Mandy posed an imminent threat to the officer's safety during the execution of the search warrant. As this is a factual, not a legal dispute at this stage, qualified immunity is unavailable.

The Sixth Circuit also rejected the argument that Bullock's unlicensed dog was contraband and thus unprotected by the Fourth Amendment.

The Sixth Circuit affirmed the denial of qualified immunity on the basis of the excessive force claim, but reversed with respect to the unlawful entry claim.

Davis v. Gallagher, 951 F.3d 743 (6th Cir. 2020) – F

FACTS: Davis, an African-American inmate in a Michigan prison, was subjected to racial slurs by Corrections Officer James Gallagher. Davis advised Gallagher that he might file a grievance over Gallagher's perceived racism, to which Gallagher threatened to place him in solitary confinement.

During a second interaction on the same day, Gallagher found heroin in Davis's pocket. Davis alleges that Gallagher planted the heroin during a search. Gallagher stated that he saw Davis place an item in his pocket. Upon being taken to a holding cell for a subsequent investigation, Davis denied possessing heroin. The substance was tested and it was heroin. Davis was charged with one count of felony heroin possession by a prisoner. A jury found Davis not guilty of the offense.

Davis filed an action pursuant to 42 U.S.C. § 1983, alleging numerous constitutional violations, including a Fourth Amendment violation for malicious prosecution. The district court ultimately granted summary judgment for Gallagher. Davis appealed.

ISSUE: Is a malicious prosecution claim viable based upon an assertion that falsified evidence was presented to provide probable cause?

HOLDING: Yes. The elements of a malicious prosecution claim are: "(1) a criminal prosecution was initiated against the plaintiff and the defendant made, influenced, or participated in the decision to prosecute; (2) there was no probable cause for the criminal prosecution; (3) as a consequence of the legal proceeding, the plaintiff suffered a deprivation of liberty apart from the initial seizure; and (4) the criminal proceeding was resolved in the plaintiff's favor."⁴²²

The only issue on appeal is whether probable cause existed for the criminal prosecution. Where an officer falsifies the evidence that purports to provide probable cause, that fact typically goes

⁴²¹ Brown, 844 F.3d at 568.

⁴²² Johnson v. Moseley, 790 F.3d 649, 654 (6th Cir. 2015)

a long way in justifying a malicious prosecution claim brought in a § 1983 action.⁴²³ Davis argues that the charges against him were based upon Gallagher planting the heroin on him. This argument is based entirely on Davis's self-serving statements. While self-serving statements oftentimes do not create a genuine issue of material fact, thereby allowing a trial court to grant summary judgment, the record before the Sixth Circuit provided no indication that Davis's claim is demonstrably false or totally implausible.

Accordingly, the Sixth Circuit reversed the district court's summary judgment on the malicious prosecution claim and remanded that claim for further proceedings.

Estate of Barnwell v. Grigsby, 801 Fed. Appx. 354 (6th Cir. 2020) – F

FACTS: On November 11, 2011, Dustin Barnwell took eight prescription muscle relaxant pills and lost consciousness. Barnwell's girlfriend, Shasta Gilmore, called 911 to report that Barnwell was possibly overdosing and trying to fight her. Two police officers and four paramedics responded to the call. The officers held Barnwell down while the paramedics treated him. Pursuant to their intubation protocols, the paramedics administered a series of drugs, including a paralytic called succinylcholine. After the paramedics intubated him, Barnwell was transported to the hospital and died soon after.

Gilmore, on behalf of Barnwell's estate, sued the paramedics, officers, and Roane County, Tennessee. Her complaint alleged federal claims under 42 U.S.C. §§ 1983 and 1985, health care liability claims, and state-law battery claims. The district court dismissed each of Gilmore's claims at various stages of the litigation, culminating in the entry of judgment as a matter of law in favor of the defendants after three days of trial. This appeal followed.

ISSUE: Does an individual possess a clearly established right to be free from unintentional, invasive medical care provided by a law enforcement officer acting in an emergency-medical response capacity?

HOLDING: No. In Peete v. Metropolitan Government of Nashville,⁴²⁴ the Sixth Circuit held that no seizure occurs when a person is restrained in order to administer emergency medical treatment. To be sure, "where the purpose is to render solicited aid in an emergency rather than to enforce the law, punish, deter, or incarcerate, there is no federal case authority creating a constitutional liability for the negligence, deliberate indifference, and incompetence alleged in the instant case."⁴²⁵

In this case, the Sixth Circuit held that the officers who restrained Barnwell did not unreasonably seize him for the purpose of interfering with his liberty and were not acting to enforce the law,

⁴²³ See France v. Lucas, 836 F.3d 612, 626 (6th Cir. 2016).

⁴²⁴ 486 F.3d 217, 291 (6th Cir. 2007).

⁴²⁵ Id., at 221.

deter or incarcerate. The officers held Barnwell down and handcuffed him because he was resisting their attempts to help him in a medical emergency. Because the officers were acting in an emergency-medical response capacity rather than a law-enforcement capacity, the officers were entitled to qualified immunity.

The Sixth Circuit affirmed the district court's decision to grant judgment as a matter of law to the defendant officers.

Graves v. Malone, ---- Fed. Appx. ----- (6th Cir. 2020) – NF

FACTS: On July 16, 2015, Ronnie Graves had been suffering from severe hallucinations. Throughout the day, he had been plagued by voices in his head telling him, among other things, that he was going to be killed as part of a human sacrifice. His mental breakdown culminated in him using a knife to stab his grandmother in the mobile home in which they both lived. He has no memory of the attack.

Graves's grandmother had sustained non-fatal injuries in the confrontation, and she fled to her neighbors' trailer to seek help. She took with her the knife blade, which had separated from the handle during her struggle with Graves. The neighbors called 911 and reported the assault. Central dispatch reported to responding law enforcement with the Monroe County Sheriff's Department that Graves had a history of suicidal threats involving knives but there was no incident history involving guns.

Sgt. Hedger, Deputy Potratz, and Deputy Myers all responded to the scene, as did other first responders. Hedger was the first officer on the scene. He learned from neighbors that the knife blade used in the attack was secure and that Graves was still in the trailer. Hedger instructed another responding officer to acquire the blade and secure it in a patrol vehicle.

Potratz was the second officer on the scene. Immediately after he arrived, Potratz told Hedger he was going to grab his firearm—an AR-15—and Hedger ordered him to position himself with the weapon on the south side of Graves's trailer. Myers and Deputy Melissa Crain arrived next. Hedger, Myers, and Crain all positioned themselves at the north side of the trailer—Myers and Crain with handguns drawn, and Hedger with his taser drawn.

One of the officers yelled, "Ronnie, Sheriff's office." Hedger, Myers, and Crain then entered the north door of the trailer. As all three officers stood in the living room, they quickly ascertained that there was no one in the living room or the kitchen, but that the hallway to the bedrooms and bathroom was too crowded to safely enter.

Myers remained in the living room while the other officers regrouped outside the trailer. Hedger acquired a crowbar and, bringing Crain with him, pried open the south door where Potratz was stationed with his AR-15. As soon as the door was open, the three officers stationed at the south door—Hedger, Crain, and Potratz—could see Graves positioned in the bathtub across the hallway from the door. He was seated, facing out with his back to the wall, and his legs were dangling

over the side of the tub. Graves was stationary, staring straight ahead, not making eye contact with anyone.

In the thirty-eight seconds that elapsed between locating Graves and shooting him, the following events transpired. As soon as he spotted Graves, Hedger shouted: “In the tub. In the tub. Right there. Don’t f***ing move.” Hedger and Crain entered the trailer through the south door, while Potratz remained just outside the door, his AR-15 trained on Graves. Hedger then ordered Myers—who had remained in the living room—to proceed down the cluttered hallway to the bathroom where Graves had been located. Myers proceeded down the hallway and made visual contact with Graves.

The officers could not see Graves’s hands, so, over the course of approximately 30 seconds, they repeatedly shouted at Graves to show his hands. Graves did not respond to the commands; instead, he remained just as the officers found him, staring vacantly ahead. As Hedger surveyed the situation, he “wasn’t worried about [Graves] escaping”—he was worried that Graves may try to provoke the officers to shoot him, or, as Hedger put it, he “was worried about a possible suicide by cop.”

Myers testified that as he proceeded down the hallway, he saw a metal folding chair outside the bathroom door that impeded his ability to move, so he picked it up and moved it aside. As he moved the chair, Myers explained, his foot got caught in a divot in the hallway floorboard—or, he conceded, it was possible that he just tripped.

Meanwhile, as Myers fell, Graves continued to suffer from extreme delusions. He recalls that, as he sat in the bathtub, he felt safe from the voices in his head telling him that he and his family were going to die. But now that law enforcement had broken into his trailer, he heard voices “barking” at him, telling him that “they were finally there to finish [him] off.” It was then that he moved for the first time: he raised his right fist straight up in the air. His fist contained a black plastic item. The record is not clear as to what the item was. Graves testified that he believed he was holding a comb.

Myers testified that, as he was falling in the hallway, he saw the item in Graves’s hand, perceived it as a handgun, and feared for his life. He conceded, however, that he had no reason to believe that Graves had held a gun. Nevertheless, he decided then to shoot Graves. But his shot missed.

Potratz, for his part, offered several—sometimes contradictory—accounts of what he perceived the object to be. He declared to his fellow officers immediately after the incident that he believed the object was a gun. But in his deposition, his story changed: despite repeated questioning, he stated that he was unable to identify what he thought the object was at the time, other than that he perceived it to be “a weapon”—a rather unhelpful categorization, as it turns out, because Potratz also stated that in his view, “[a]nything can be a weapon.” He did cross some possibilities off the list stating that he did not perceive that Graves held a knife with a blade or—despite his earlier proclamation—a gun, and that he only later believed the object in Graves’s hand to be the

bladeless knife handle used earlier in the attack because someone told him that the handle had eventually been recovered from the bathtub.

As Myers shot his handgun at Graves, Potratz concurrently fired his AR-15 twice. Potratz testified that he didn't shoot because he heard Myers's gun go off; indeed, he was not sure who shot first as between him and Myers. He also could not specify whether he perceived that Graves was extending his hand when he shot, stating only that he "shot him when it was threatening." Despite being unsure as to the order of events, or even as to what Graves was holding in his hand, he testified that he deployed deadly force under the belief that he was protecting Myers, because he perceived Graves could have harmed him. One of the two bullets from Potratz's gun hit Graves directly in the face. After blasting through Graves's face, the bullet traveled through the trailer park and penetrated at least two other trailers.

In the immediate wake of the shootings, Hedger surveyed the gruesome scene. He knew that Graves had taken a bullet to the right side of his face: blood was everywhere and Graves's "face was hanging off" as Graves remained sitting still in the tub in the same position in which they had found him. Hedger also confirmed that Myers had not been shot. What happened next is disputed. Hedger claims he ordered Graves to raise his hands again. But Graves argues that statement is contradicted by the evidence: the dashcam recording suggests that no audible orders were given at all.

Seven seconds after shots were fired, Hedger tased Graves. He did so for a full five-second cycle. And he did so even though he conceded that Graves was non-responsive and might have been in shock—just as he speculated he himself would have been had he just been shot in the face with an AR-15.

After the incident, Graves was charged with Assault with Intent to Commit Murder for the attack on his grandmother. He was ultimately found not guilty by reason of insanity.

As a result of the shooting, Graves is completely blind in his right eye. His face is severely disfigured. He no longer has a right cheekbone and his sinus cavity is exposed through a void in his palate. His nose remains broken, and resultingly, his right nostril has caved in and will not permit air to flow to his lungs. He suffers from headaches and constant jaw pain.

Graves filed a civil complaint seeking damages and injunctive relief under § 1983. Relevant here, he alleged that defendants Hedger, Myers, and Potratz unreasonably used excessive force against him in violation of the Fourth Amendment. Defendants sought summary judgment, arguing that the uses of force were objectively reasonable, and that defendants were protected by qualified immunity. The district court granted defendants' motion and entered judgment in favor of defendants. Graves filed a timely notice of appeal.

ISSUES: 1. Does mere creation of the circumstances in which force is ultimately deployed by law enforcement rise to a constitutional violation?

2. May law enforcement use lethal force against an unresponsive, slight, unarmed man who is trapped in a confined area?
3. Does a criminal suspect have a clearly established constitutional right not be shot unless the suspect is perceived to pose a threat to pursuing officers or to others?

HOLDINGS: 1. No. This issue was framed as supervisor liability because Hedger ordered Myers and Potratz to enter the trailer with their weapons drawn and failed to prevent excessive force from being deployed. For supervisory liability to apply, the supervisor must order, or at least implicitly authorize, the use of force.⁴²⁶ Here, the record shows that Hedger ordered or authorized only the circumstances that, perhaps, ultimately led to the use of force; indeed, Myers and Potratz both testified that the decision to shoot was their own. Mere creation of the circumstances in which force is ultimately deployed does not give rise to a constitutional violation.⁴²⁷

2. No. Where, as here, a plaintiff alleges a claim of excessive force in the context of an arrest of a free citizen, he or she invokes the protections of the Fourth Amendment to the United States Constitution.⁴²⁸ The Fourth Amendment guarantees citizens the right “to be secure in their persons ... against unreasonable ... seizures. ...” Thus, in ascertaining whether a particular use of force violates the Constitution, the operative question is whether the force used was “reasonable” under the circumstances.⁴²⁹ The reasonableness test under Graham is objective and asks “whether the officers’ actions are objectively reasonable in light of the facts and circumstances confronting them, without regard to their underlying intent or motivation.”⁴³⁰ Graham sets out a three-factor test to aid courts in assessing objective reasonableness. Those factors are: (1) “the severity of the crime at issue,” (2) “whether the suspect poses an immediate threat to the safety of the officers or others,” and (3) “whether he is actively resisting arrest or attempting to evade arrest by flight.”⁴³¹ When it comes to lethal force, we have emphasized that the “minimum requirement” of objective reasonableness is that the officer had “probable cause to believe that the suspect pose[d] a threat of severe physical harm, either to the officer or others.”⁴³²

The deputies insist that Graves posed an immediate threat to the safety of those on the scene. But the facts considered in the light most favorable to Graves tell a different story. It is true that the first Graham factor cuts against Graves—Graves was suspected of having committed a violent crime. But the scene the officers encountered when they pried open the trailer door was calm.

⁴²⁶ Jones v. Sanducky Cty., 541 Fed. Appx. 653, 667 (6th Cir. 2013).

⁴²⁷ Livermore ex rel Rohm v. Lubelan, 476 F.3d 397 (6th Cir. 2007).

⁴²⁸ Graham v. Connor, 490 U.S. 386, 394, 109 S.Ct. 1865, 104 L.Ed.2d 443 (1989).

⁴²⁹ Id., at 396.

⁴³⁰ Id., at 397.

⁴³¹ Id.

⁴³² Untalan v. City of Lorain, 430 F.3d 312, 314 (6th Cir. 2005).

They did not discover a man who was brandishing a knife at them; instead, they discovered a man who was—by all accounts—stationary and non-responsive. Additionally, Graves was incapacitated by position: he was seated, facing out with his back to the wall, and his legs were dangling over the side of the tub.

In the officers' telling, the lethal threat arose when Graves raised his hand with a black plastic object in it. Myers testified that he believed the object in Graves's hand was a gun. But a reasonable juror might decline to credit Myers's account for at least two reasons. First, she might find it non-credible because the object in Graves's hand was not a gun, bore little likeness to a gun, and because Myers himself testified that he had no reason to believe the object was a gun. Second, there is a genuine dispute of material fact as to the circumstances under which Myers perceived the purported threat. In Myers's telling, he moved a metal chair from the hallway, started falling, and then fired his weapon. In Graves's telling, Myers fired his weapon and then fell. The district court held this dispute was not material to the question of qualified immunity, as the "key fact in this case is that Plaintiff raised his arm holding a black object to scare the officers before they fired at him." But the question whether Myers acted reasonably when he shot at Graves depends on what Myers perceived, and in Graves's telling, Myers had a clear line of sight to the object in Graves's hand and had not yet begun falling when he made the decision to use lethal force. Accepting those facts as true, a reasonable juror could conclude that it was unreasonable for Myers to perceive that Graves was holding a gun, and that it was therefore unreasonable for Myers to shoot Graves.

3. Yes. Here, the right of a criminal suspect "not to be shot unless he [is] perceived to pose a threat to pursuing officers or to others" has been established since at least 1988.⁴³³ In Sample v. Bailey,⁴³⁴ the Sixth Circuit clarified: "regardless of whether the incident took place at day or night, in a building or outside, whether the suspect is fleeing or found, armed or unarmed, intoxicated or sober, mentally unbalanced or sane, it is clearly established that a reasonable police officer may not shoot the suspect unless the suspect poses a perceived threat of serious physical harm to the officer or others. These factual distinctions between the cases do not alter the certainty about the law itself."

The Sixth Circuit concluded that under the facts as alleged by Graves, Myers and Portatz applied lethal force against a suspect from whom they perceived no serious threat. Accordingly, those actions violated clearly established law.

The Sixth Circuit affirmed in part, reversed in part, and remanded for further proceedings.

Greve v. Bass, 805 Fed. Appx. 336 (6th Cir. 2020) – F

FACTS: When Police Officer Austin Bass responded to an after-hours break-in at a nightclub owned by M Street Entertainment Group ("MSEG"), he immediately spotted,

⁴³³ Robinson v. Bibb, 840 F.2d 349 (6th Cir. 1988).

⁴³⁴ 409 F.3d 689, 699 (6th Cir. 2005).

suspected, and detained Patrick Greve. He refused to hear Greve’s explanation or consider any exonerating facts or circumstances. When the Club’s night manager, Oleg Bulut, arrived, he chose to press charges instead of corroborating Greve’s explanation of the exonerating circumstances or providing the Club’s surveillance video, which would have cleared Greve; no one at MSEG ever chose to help Greve by sharing or acting on their knowledge and evidence of his innocence. Officer Bass arrested Greve on charges of public intoxication and attempted burglary, but the state court dismissed the charges. Greve sued in federal court, accusing Bass of false arrest in violation of the Fourth Amendment, and accusing Bulut and MSEG of malicious prosecution in violation of Tennessee law. The district court granted the defendants’ motion for summary judgment and Greve appeals, claiming that genuine disputes of material fact should have been submitted to a jury: namely, whether Officer Bass had probable cause for the arrest and whether Bulut and MSEG furthered the criminal prosecution.

ISSUE: Must an officer possess probable cause that a suspect committed an arrestable offense prior to executing the arrest?

HOLDING: Yes. Any arrest without probable cause violates the Fourth Amendment.⁴³⁵ Probable cause exists if the facts and circumstances known to the officer warrant a prudent man in believing that the offense has been committed. The inquiry depends upon the reasonable conclusion to be drawn from the facts known to the arresting officer at the time of the arrest where supported by reasonably trustworthy information.⁴³⁶

Here, Officer Bass did not even have reasonable suspicion to believe Greve committed an offense. Bass responded to a dispatch, heard an alarm sounding from within building, and encountered an eager potential witness in Greve. Bass immediately detained Greve, before he observed the broken door handle, questioned Greve, or even determined what was going on. Even in his post-hoc explanation at his deposition, Bass’s reasons for the detention were dubious or—as with the claim that “I believe he had a glass in his hand”—suspiciously contrived. But even if Bass had reasonable suspicion to detain Greve initially, he never investigated at all the potentially exculpatory evidence or explanation that Greve had explicitly called to his attention, so that suspicion could not mature into probable cause for arrest. Accordingly, the Sixth Circuit held that in deciding whether he had probable cause to arrest (and recommend prosecution of) Greve, Bass was required to consider all of the facts and circumstances readily and reasonably within his knowledge, and that his failure—actually refusal—to do so in this case, if proved at trial, would be a violation of Greve’s right to be free from an illegal seizure.

Qualified immunity shields government officials in the performance of discretionary functions from standing trial for civil liability unless their actions violate clearly established rights of which a reasonable person would have known.⁴³⁷ The plaintiff in a 42 U.S.C. § 1983 action against such

⁴³⁵ Thacker v. City of Columbus, 328 F.3d 244, 255 (6th Cir. 2003).

⁴³⁶ Logsdon v. Hains, 492 F.3d 334 (6th Cir. 2007).

⁴³⁷ Harlow v. Fitzgerald, 457 U.S. 800, 818, 102 S.Ct. 2727, 73 L.Ed.2d 396 (1982).

an official bears the burden of overcoming the qualified-immunity defense.⁴³⁸ At the summary-judgment stage, the plaintiff must show that (1) the defendant violated a constitutional right and (2) the right was clearly established.⁴³⁹ At a minimum, this requires evidence of a “genuine issue of fact”; that is, “evidence on which [a] jury could reasonably find for the plaintiff.”⁴⁴⁰

Because a genuine issue of fact existed as to whether probable cause existed for Greve’s arrest, the Sixth Circuit reversed the district court’s grant of qualified immunity and remanded for additional proceedings.

Haywood v. Hough, ----- F.3d ----- (6th Cir. 2020) – NF

FACTS: On February 14, 2016, Haywood traveled to Chippewa Correctional Facility in Kinross, Michigan to visit her husband, an inmate imprisoned there. She kissed her husband upon greeting him in the prisoner visitation room. While they were kissing, corrections officer Cassandra Wilcox observed “what appeared to be a green object being passed by mouth from Mrs. Haywood to Mr. Haywood. Ms. Haywood had a difficult time getting the object into Mr. Haywood’s mouth and Mr. Haywood had a difficult time swallowing the object.” Wilcox believed the object “may have been marijuana” and informed her shift supervisor. It is a felony in Michigan to give a controlled substance to a prisoner or bring a controlled substance into a correctional facility.

Peter Hubbard, a corrections officer employed by the Michigan Department of Corrections (MDOC), was informed of Wilcox’s observations. He approached Haywood at the conclusion of her visit and asked her to accompany him. She agreed and followed him to a nearby conference room where Paul Eagle, a police officer with the Kinross Police Department, was waiting for them. Hubbard asked Haywood whether she had passed marijuana to her husband. She denied that she had, joking instead that she had passed him a Jolly Rancher candy.

Hubbard and Eagle detained Haywood in the conference room for forty minutes until Lawrence Hough came to the scene. Hough is both an MDOC inspector and a Chippewa County deputy sheriff. Once Hough arrived, the three officers escorted Haywood to the prison lobby, where she was handcuffed. Hough then repeatedly threatened to take Haywood to jail unless she consented to a search of her car, which was on prison grounds. She agreed because she felt, in her own words, “scared to death.” Hubbard and Eagle searched the car and found a small quantity of marijuana. Haywood was then placed in the front seat of Hough’s police car. While she was being placed, the officers mocked her for being a white woman married to a black man.

Once Haywood was in the car, Hough again threatened to take her to jail if she did not permit him to search her hotel room. Feeling threatened, she agreed. Upon searching her room, Hough found another small quantity of marijuana as well as Haywood’s expired Michigan Medical

⁴³⁸ Quigley v. Tuong Vinh Thai, 707 F.3d 675, 681 (6th Cir. 2013).

⁴³⁹ Id. at 680.

⁴⁴⁰ Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 252, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986).

Marijuana Program card. Hough then transported Haywood back to the prison, where he released her. Haywood was subsequently charged with misdemeanor possession of marijuana in state court.

Haywood brought suit against Hubbard, Eagle, and Hough, alleging nine causes of action under § 1983 and Michigan law. The trial court dismissed most of the claims, but denied qualified immunity to Hubbard, Eagle and Hough with respect to the false arrest and illegal search claims. The officers timely appealed.

- ISSUES:**
1. May a governmental official assert qualified immunity for false arrest if the official does not possess lawful authority to take something into or terminate detention?
 2. Is an officer a passive observer to an unlawful search and seizure if the officer participates in the handcuffed detention of a suspect for 40 minutes?

HOLDINGS: 1. No. “Qualified immunity attaches when an official’s conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known.”⁴⁴¹ When an officer raises a qualified immunity defense, courts determine (1) “whether the officer’s conduct violated a constitutional right” and (2) “whether that right was clearly established at the time of the incident.”⁴⁴² Reviewing courts may evaluate the two prongs in either order.⁴⁴³

Governmental officials are entitled to qualified immunity only with respect to discretionary functions performed in their official capacities.⁴⁴⁴ Hubbard is not entitled to qualified immunity because he lacked any authority to detain Haywood.

2. No. In cases where police officers take an active role in a seizure, the officer is no longer merely a passive observer.⁴⁴⁵ Once in the conference room, Haywood sat by the door while Hubbard and Eagle gathered in another corner of the room. Haywood testified that Hubbard asked her questions about what she had passed to her husband and that both Hubbard and Eagle mocked her. She recalled that the three of them remained in the room for about forty minutes until Hough arrived. Once Hough arrived, Haywood stated that the officers escorted her to the prison lobby where she was handcuffed. Relying on this testimony, the R & R found that “Hubbard and Eagle continued to detain Plaintiff for approximately 40 minutes, awaiting Defendant Hough’s arrival.” The Sixth Circuit held that no reasonable officer who confined a suspect to a

⁴⁴¹ City of Escondido v. Emmons, — U.S. —, 139 S. Ct. 500, 503, 202 L.Ed.2d 455 (2019) (per curiam).

⁴⁴² Watson v. Pearson, 928 F.3d 507, 510 (6th Cir. 2019).

⁴⁴³ Reich v. City of Elizabethtown, 945 F.3d 968, 978 (6th Cir. 2019).

⁴⁴⁴ Ziglar v. Abbasi, — U.S. —, 137 S. Ct. 1843, 1866, 198 L.Ed.2d 290 (2017)

⁴⁴⁵ Cochran v. Gilliam, 656 F.3d 300, 308 (6th Cir. 2011).

room for forty minutes could have believed he was a mere passive observer. Eagle is not entitled to qualified immunity on this ground.

The Sixth Circuit vacated the district court's judgment in part and remanded for further proceedings.

Henry v. City of Flint (MI), --- Fed. Appx. ----, 2020 WL 2520695 (6th Cir. 2020) – NF

FACTS: In November 2016, at 1:30 in the morning, Flint Police officers, acting properly, went to a house to see if a person wanted on a warrant might be there. A next-door neighbor, David Henry, apparently concerned and/or annoyed by the appearance of unknown persons and lights outside the house next to his, came out onto his porch. The ensuing conversation with the police officers, which was captured on Henry's relatively clear cell-phone recording, moved from straightforward to belligerent to, ultimately, Henry's being arrested, pepper-sprayed, taken to the ground and handcuffed. Henry was charged with disorderly conduct and resisting arrest, but these charges were ultimately dropped when the officers failed to show up for the court date.

Henry filed a lawsuit pursuant to 42 U.S.C. § 1983 against the three officers, alleging unlawful arrest, retaliatory arrest and excessive force. The district court granted qualified immunity to the officers. This appeal followed.

ISSUE: Is qualified immunity available if a reasonable officer has probable cause to believe that a person is violating a statute or ordinance and makes an arrest forthwith?

HOLDING: Yes. The legal question with regard to Henry's false-arrest claim, turned on only one issue. Could any reasonable officer have thought Henry violated City of Flint Code of Ordinance § 31-12 (Disorderly Conduct and Disorderly Persons)? Answering that question, in turn, depends on another: Did a neighbor turn on a light in his house? If so, a reasonable officer standing in the shoes of the Flint police might have had probable cause to think the ordinance had been violated, and thus qualified immunity would attach. If not, then no reasonable officer could have thought that arresting Henry was constitutional.

With respect to the use of force during the arrest, if the police did have good reason to take Henry into custody, then the use of pepper spray to induce compliance in a suspect who was trying to get away from the arresting officers was not clearly excessive.⁴⁴⁶ Thus, the excessive force claim can only go forward to the extent that the underlying false-arrest claim remains viable.

Because the fact question concerning the arrest was not captured on video and is disputed in the evidence, the Sixth Circuit reversed and remanded for a jury to make that determination.

Hernandez v. Boles, 949 F.3d 251 (6th Cir. 2020) – F

⁴⁴⁶ See Abdul-Khaliq v. City of Newark, 275 Fed. App'x, 517, 521 (6th Cir. 2008).

FACTS: Hernandez was driving a Yukon SUV in Coffee County, Tennessee when Trooper Boles clocked him driving 77 miles per hour in a 70-mph zone. Boles waited for Hernandez's car to exit Interstate 24, then pulled him over at the side of a local road at 11:52 a.m. Boles was part of a Tennessee Highway Patrol unit called "Interdiction Plus" that "pull[s] people over for minor traffic offenses and then investigate[s] them for more serious crimes." His unit stops motorists for traffic violations such as minor speeding infractions and then, if there are no "indicators" of criminal activity, "they're given a warning ... and they're released." In this case, Boles did not plan to issue Hernandez a ticket for speeding if he saw no such indicators; instead he planned only "to issue him a warning citation."

Betancourt, owner of the Yukon, was sitting in the front passenger seat; Norge Rodriguez and Jose Perez were sitting in the back seat. Boles approached the car and requested Hernandez's driver's license, the car's registration, and proof of insurance. Upon learning that Betancourt owned the car, he also requested Betancourt's license. Boles went back to his patrol car and requested a warrant check from the National Criminal Information Center (NCIC). At 11:59 a.m., seven minutes into the stop, the dispatcher told Boles that the NCIC warrant check was negative.

Boles returned to the Yukon, requested Hernandez to step out for questioning, then asked where he was going, who was in the car, whether he had ever been in trouble, and so on. Trooper Donnie Clark arrived during the questioning. Boles then attempted to question the other occupants of the car but was stymied by their limited English. Hernandez and Betancourt repeatedly denied having anything illegal in the car, but Betancourt refused to consent to a car search. Boles told them to wait a few minutes, and Clark requested a K-9 unit.

Boles then obtained driver's licenses from Rodriguez and Perez and ran NCIC warrant checks on them as well. At about 12:13 p.m., dispatch told him that the warrant checks on Rodriguez and Perez were also negative. Around 12:12 or 12:13 p.m., Clark called the Blue Lightning Operations Center (BLOC), a more comprehensive database that Boles did not have access to, to conduct a more detailed check on all four occupants of the car.

While the Troopers awaited the results from BLOC, a dog handler arrived with a K-9 unit at about 12:17 p.m. The police dog sniffed the exterior of the Yukon, alerting to the odor of drugs. The handler then opened the car doors and the rear compartment and let the drug dog into the car to sniff the interior. The dog did not alert once inside the vehicle; instead, it ate some fast food out of a bag. After the dog did not alert inside the car, the K-9 handler shook the hands of all four occupants and gave them a thumbs up. The K-9 handler then told Clark, "Donnie, I'm sorry, Bubba."

After the dog failed to alert, Clark received a return call from BLOC. Clark told Boles to call their supervisor and tell him, "We've got a refusal, and the canine didn't hit, and they've got an extensive background—meth." Boles received authorization to conduct a manual search, and Clark searched the Yukon. Clark found some gift cards in the driver's side door and a large number of gift cards rubber-banded together, as well as a bag containing an unknown substance, in a bag

in the back seat. Clark later used a scanner to ascertain that the gift cards had been re-encoded with credit card numbers.

Hernandez, Betancourt, Rodriguez and Perez were arrested for possession of 370 re-encoded gift cards and 15 grams of a substance believed to be methamphetamine. Hernandez, Betancourt, and Perez were held in pre-trial incarceration for nine months until the criminal charges against them were dismissed. Rodriguez was held in pre-trial incarceration for only three months before the dismissal of charges because he was bailed out. All four men filed a lawsuit pursuant to 42 U.S.C. § 1983, alleging that the Troopers violated the Fourth Amendment by (a) illegally searching the car and (b) unreasonably extending the car stop. The district court granted qualified immunity to the Troopers on the car search based on case law existing at that time. At trial, the jury found that the car stop was not impermissibly prolonged.

- ISSUES:**
1. Under the Fourth Amendment, may police officers stop a vehicle that commits a traffic violation and look for evidence of a crime, even if the traffic stop is merely a pretext and the officer does not have an independent reasonable suspicion of criminal activity?
 2. May officer prolong a traffic stop to have a drug dog sniff a car absent independent reasonable suspicion to detain the motorists?
 3. Is the Fourth Amendment violated when an automobile is manually searched even though the drug dog failed to alert to the car's interior?

HOLDING:

1. Yes. It is well established, however, that police officers may stop a vehicle that commits a traffic violation and look for evidence of a crime, even if the traffic stop is merely a pretext and they do not have an independent reasonable suspicion of criminal activity.⁴⁴⁷ In the case, because the trooper observed a traffic violation, the initial stop of the vehicle was found to be proper.

2. No. In Rodriguez v. United States,⁴⁴⁸ the Supreme Court held that officers may not prolong a traffic stop to have a drug dog sniff a car—a crime detecting action not ordinarily incident to a traffic stop—absent independent reasonable suspicion to detain the motorist(s). The stop in Rodriguez lasted an additional seven to eight minutes after a citation was issued. “Like a Terry stop, the tolerable duration of police inquiries in the traffic-stop context is determined by the seizure’s ‘mission’—to address the traffic violation that warranted the stop ... and attend to related safety concerns.”⁴⁴⁹ “Authority for the seizure thus ends when tasks tied to the traffic infraction are—or reasonably should have been—completed;” whichever comes first.⁴⁵⁰

⁴⁴⁷ See Whren v. United States, 517 U.S. 806, 813, 819, 116 S.Ct. 1769, 135 L.Ed.2d 89 (1996);

⁴⁴⁸ 575 U.S. 348, 135 S. Ct. 1609, 1615–16, 191 L.Ed.2d 492 (2015).

⁴⁴⁹ Id. at 1614.

⁴⁵⁰ Id.

In this case, the traffic stop was not unreasonably prolonged simply to await the arrival of the canine unit. The delay was caused by the troopers checking multiple databases for warrants during the traffic stop. While the BLOC check was not conducted until 20 minutes into the stop (compared to four minutes into the stop for the NCIC check), there is no bright-line rule that officers are limited to checking one database for warrants during a traffic stop. While the Sixth Circuit expressed concern about the delay with conducting the BLOC check, it affirmed the jury's finding that the stop was not unreasonably prolonged.

3. Yes. The failure of a drug-sniffing dog to alert to a car dispels suspicion.⁴⁵¹ In this case, a jury could determine that the dog's fruitless sniffing of the car interior was sufficiently thorough to dissipate the probable cause to search provided by its initial alert. The dog's handler opened all four of the SUV's doors and the rear compartment, allowing the dog to sniff the whole interior, and the dog spent several minutes inside the car. After the dog failed to alert, moreover, the dog's handler shook the occupants' hands, gave them a thumbs up, and apologized to Trooper Clark for the dog's failure to alert. These actions suggest that the handler felt the dog had cleared the Hernandez-Plaintiffs. Then, when telling Boles what information to relay to their supervisor, Clark said that "the canine didn't hit." A reasonable jury could conclude that the dog's failure to alert inside the car dispelled the probable cause provided by its initial alert to the exterior, and the Troopers could therefore no longer lawfully search the car.

However, qualified immunity was appropriate for the troopers because the law was not specific enough to clearly establish that the manual car search was illegal when the dog failed to alert to the interior. The law must be specific enough to put a reasonable officer on notice that the conduct at issue was unconstitutional.⁴⁵²

The Sixth Circuit affirmed the district court.

Hicks v. Scott, 958 F.3d 421 (6th Cir. 2020) – F

FACTS: Shortly before 11:00 PM on June 9, 2015, Cincinnati Police Officers Doris Scott and Justin Moore responded to a reported incident of menacing in the Northside neighborhood of Cincinnati. When the officers arrived at the scene, Raquella Norman and Jonathan Jones alleged that Quandavier had driven by their home earlier that night and threatened to kill them. According to Jones, the incident occurred after he accused Quandavier of stealing from the couple's house. Jones said that he was scared and believed that Quandavier owned and carried guns.

Scott, concerned that the situation might escalate, asked Officer Christopher Loreaux to locate Quandavier so that the officers could speak with him and get his side of the story. Jones told Scott and Moore that Quandavier lived nearby on Chase Avenue and had been driving a silver Ford

⁴⁵¹ See United States v. Davis, 430 F.3d 345, 356 (6th Cir. 2005) (holding that officers no longer had reasonable suspicion to detain a motorist on suspicion of drug possession and call a second drug-sniffing dog to the scene after the first drug-sniffing dog did not alert)

⁴⁵² Brown v. Lewis, 779 F.3d 401 (6th Cir. 2015).

Focus with a damaged side-view mirror. Jones could not provide an exact address. Nevertheless, Loreaux drove along Chase Avenue and identified a vehicle fitting Jones's description. The vehicle was parked across the street from 1751 Chase Avenue.

After Loreaux identified the vehicle, Schneider joined him at 1751 Chase Avenue. When Schneider arrived, he placed his hand on the car's hood and felt that it was hot, indicating to him that it had been driven recently. When the officers ran the car's license plate, however, they were unable to find an associated address for Quandavier. The vehicle instead came back as registered to Ariel Wilson.

Shortly after the officers ran the license plate, a woman exited from a door along the side of 1751 Chase Avenue and walked across the street to the Ford Focus. The officers walked over and questioned her. The woman, whom the officers would later learn was Wilson, told Schneider and Loreaux that she had just come from seeing her boyfriend "Jason" in the "second floor apartment." Wilson said that neither she nor anyone else had driven the Ford Focus recently and denied knowing anyone named Quandavier.

At that point, Wilson departed. Schneider found Wilson's account not credible based on his earlier assessment that the car had recently been driven. He concluded that the Ford Focus was likely the vehicle that Quandavier had been driving earlier and, in turn, that Quandavier was likely the boyfriend Wilson had been visiting in the second-floor apartment.

Scott and Moore arrived shortly thereafter. As the four officers—Scott, Moore, Schneider, and Loreaux—stood outside of 1751 Chase Avenue, they heard a voice call out "Ariel" from what they thought was the second floor. The officers deduced that the voice was likely that of Quandavier. They decided to approach 1751 Chase Avenue to see if they could locate and speak with Quandavier.

The structure located at 1751 Chase Avenue is a two-family home divided into two separate apartment units: one unit located on the first floor of the house and another unit located on the second and third floors of the house. A door at the front of the house leads to the first-floor unit. A separate door along the side of the house leads to the upstairs unit. Quandavier rented the upstairs unit.

After knocking on the front door and getting no answer, the officers went to the side of the building where the entrance to the upstairs apartment is located. The door was closed. It had two deadbolt locks, both clearly visible, and a curtain covering the top half of the door, which was glass. Behind the curtain were metal security bars. The door had no knocker, bells, or nameplates.

The exterior side door opens into a small foyer. A few steps inside is a stairway leading to the building's upper floors. The stairway plateaus onto a small landing, turns 180 degrees to the left, and then continues up. After another few steps, the stairway opens onto a second-floor landing

with four doors. According to Quandavier's uncle, Robert Thompson, none of these areas were "accessible to the public" or "shared with the First Floor Apartment."

When Scott knocked on the exterior door, however, it swung open. The officers let themselves in. They acknowledge that they did not have a warrant and that there were no exigent circumstances. Scott entered first, followed by Moore and Schneider. Loreaux remained stationed outside. Neither Scott nor Moore recall any of the officers announcing their presence or identifying themselves as police.

Scott, Moore, and Schneider proceeded up the stairway. When the officers reached the second-floor landing, they observed two closed doors immediately to their left—forming a 90-degree angle—and an area with at least one door to their right. None of the doors had locks, numbers, knockers, or nameplates. Scott knocked at least twice on one of the closed doors to her left. After the second round of knocking, she heard someone descending a stairway behind the other door immediately to her left. She stepped backed slightly.

As the stairway door opened, Scott "saw the barrel of a rifle pointed at [her] face." Moore and Schneider also saw the rifle pointed directly at her. Scott testified that the rifle was "a few feet" from her face when Quandavier opened the door, and Schneider estimated that the end of the rifle was "five feet" or "[m]aybe a few feet" from Scott. Schneider also described Quandavier as "nonchalantly" panning the rifle from left to right "at waist level," adding that it did not appear as though he was "picking out anyone in particular."

As the rifle emerged from the stairway door, Moore reached for its barrel. His hand was on the barrel as Scott fired her weapon. Moore did not instruct Quandavier to drop his rifle before reaching for the barrel, nor did Scott issue any commands before firing her weapon. Schneider estimated that the entire encounter lasted "[t]wo to three seconds, at most."

The bullet from Scott's gun hit Quandavier on the left side of his chest, piercing his lungs and "transecting," or cutting across, "[his] ascending aorta." Quandavier collapsed instantly and Moore was left standing with the rifle in his outstretched hand. Schneider testified that Quandavier was "clearly ... struggling for his life" after being shot. Both Scott and Schneider immediately radioed for paramedics. And Schneider, perceiving a need to provide medical assistance to Quandavier, attempted to first secure him with handcuffs.

Schneider ultimately failed to apply the handcuffs or provide first aid. The amount of blood gushing from Quandavier's wound and mouth prevented him from properly securing Quandavier's hands. And before Schneider was able to provide Quandavier with any medical attention, he was interrupted by a voice coming from the third floor. Schneider, upon hearing the voice, immediately redirected his efforts to securing the third floor. With the assistance of Moore, he detained the newly discovered individual—an overnight guest of Quandavier's named Robert Boggs—and conducted a sweep of the upstairs. Schneider had no further interaction with Quandavier.

Loreaux had remained stationed outside the building as the other officers looked for Quandavier inside. But when he heard the gunshot, Loreaux immediately entered through the side door and went toward the second-floor landing. He testified that, after nearly reaching the landing, Schneider handed him Quandavier's rifle. Schneider then asked him to retrieve crime scene tape. Loreaux leaned the rifle against the wall of the lower landing and left to retrieve the tape.

As soon as he exited the building, however, Loreaux saw that another officer was already retrieving the tape, so he went back inside. Loreaux estimated that only "30 to 45 seconds" passed between setting down the rifle and his return to the second floor. Loreaux testified that, as soon as he returned, he asked Schneider whether Quandavier still required medical attention. Schneider testified that he did not recall any interaction with Loreaux regarding Quandavier's condition. According to Loreaux, however, Schneider told him that Quandavier was dead. As a result, Loreaux never examined Quandavier and made no attempt to administer first aid. Quandavier died at the scene without receiving medical attention.

In June 2016, Ruby Hicks, administrator of Quandavier's estate, sued Scott, Moore, Schneider, and the City of Cincinnati, alleging federal claims pursuant to 42 U.S.C. § 1983 for unlawful entry, excessive force, and deliberate indifference to a serious medical need, as well as state-law claims for wrongful death and battery. The district court, finding that Scott, Moore, and Schneider committed no constitutional violations, entered summary judgment in their favor based on both federal qualified immunity and immunity under Ohio law. The court also entered summary judgment in favor of the City of Cincinnati, explaining that there could be no municipal liability without an underlying constitutional violation. Hicks timely appealed.

- ISSUES:**
1. Is it clearly established law that an individual has an objectively reasonable expectation of privacy in a foyer, stairwell, and second-floor landing of a duplex that is not open and accessible to the public?
 2. Is it clearly established law that an individual has a right to be free from warrantless entry into an apartment absent an exception to the warrant requirement?
 3. If deadly force is utilized by law enforcement, must the use of deadly force be objectively reasonable?

HOLDINGS: 1-2. Yes. The Fourth Amendment protects people from "unreasonable searches and seizures." A search conducted without a warrant is "per se unreasonable,"⁴⁵³ unless it "falls within a specific exception to the warrant requirement."⁴⁵⁴

There are two analytical approaches to determining whether a Fourth Amendment search has occurred.⁴⁵⁵ The most familiar approach examines whether a person claiming Fourth

⁴⁵³ *Katz v. United States*, 389 U.S. 347, 357, 88 S.Ct. 507, 19 L.Ed.2d 576 (1967),

⁴⁵⁴ *Riley v. California*, 573 U.S. 373, 382, 134 S.Ct. 2473, 189 L.Ed.2d 430 (2014).

⁴⁵⁵ See *United States v. Jones*, 565 U.S. 400, 408–09, 132 S.Ct. 945, 181 L.Ed.2d 911 (2012).

Amendment protection had a “legitimate expectation of privacy” in the place that was searched.⁴⁵⁶ This is a two-part inquiry.⁴⁵⁷ First, the person claiming Fourth Amendment protection must have “exhibited an actual (subjective) expectation of privacy” in the targeted area.⁴⁵⁸ Second, even if the person demonstrates a subjective expectation of privacy, that expectation must also be “one that society is prepared to recognize as ‘reasonable’.”⁴⁵⁹ This is necessarily a fact-dependent inquiry and must be “made on a case-by-case basis.”⁴⁶⁰

In recent years, however, the Supreme Court has revived a “property-based” approach to Fourth Amendment searches.⁴⁶¹ Under the property-based approach, “Fourth Amendment rights do not rise or fall with the Katz formulation” but rather retain an irreducible minimum of protection from intrusions into those areas “enumerate[d]” by the Fourth Amendment.⁴⁶² In turn, “when the government gains evidence by physically intruding on constitutionally protected areas,” it is “unnecessary” to consider whether the intrusion violated a person’s reasonable expectation of privacy under Katz; instead, the physical intrusion itself is “enough to establish that a search occurred.”⁴⁶³ As the Supreme Court observed in Jardines, “[o]ne virtue of the Fourth Amendment’s property-rights baseline is that it keeps easy cases easy.”⁴⁶⁴

Under a property-based approach to Fourth Amendment searches, no location receives greater protection than a person’s home and its surrounding areas.⁴⁶⁵ “[T]he Fourth Amendment has drawn a firm line at the entrance to the house.”⁴⁶⁶ To that end, “[w]hen the government gains information by physically intruding into one’s home, ‘a “search” within the original meaning of the Fourth Amendment’ has ‘undoubtedly occurred.’”⁴⁶⁷ The same is true of the physical areas “immediately surrounding and associated with the home.”⁴⁶⁸ These areas, known as the

⁴⁵⁶ Rakas v. Illinois, 439 U.S. 128, 144, 99 S.Ct. 421, 58 L.Ed.2d 387 (1978).

⁴⁵⁷ See Katz, 389 U.S. at 359, 88 S.Ct. at 516 (Harlan, J., concurring).

⁴⁵⁸ Id.

⁴⁵⁹ Id.

⁴⁶⁰ United States v. King, 227 F.3d 732, 744 (6th Cir. 2000).

⁴⁶¹ Florida v. Jardines, 569 U.S. 1, 11, 133 S.Ct. 1409, 185 L.Ed.2d 495 (2013); see also Jones, 565 U.S. at 406–07 & 406 n.3, 132 S.Ct. 945 (finding a Fourth Amendment search based exclusively on the government’s “physical[] intru[sion] on a constitutionally protected area”).

⁴⁶² Jones, 565 U.S. at 406, 132 S.Ct. 945.

⁴⁶³ Jardines, 569 U.S. at 11, 133 S.Ct. 1409; see also United States v. Carriger, 541 F.2d 545, 549–50 (6th Cir. 1976) (finding that Katz added to—rather than displaced—existing property-based protections under the Fourth Amendment).

⁴⁶⁴ 569 U.S. at 11, 133 S.Ct. 1409.

⁴⁶⁵ See id. at 6, 133 S.Ct. 1409 (“[W]hen it comes to the Fourth Amendment, the home is first among equals.”); Silverman v. United States, 365 U.S. 505, 511, 81 S.Ct. 679, 5 L.Ed.2d 734 (1961) (“At the [Fourth Amendment’s] very core stands the right of a man to retreat into his own home”).

⁴⁶⁶ Payton v. New York, 445 U.S. 573, 590, 100 S.Ct. 1371, 63 L.Ed.2d 639 (1980).

⁴⁶⁷ Morgan v. Fairfield Cty., 903 F.3d 553, 561 (6th Cir. 2018) (quoting Jardines, 569 U.S. at 5, 133 S.Ct. 1409).

⁴⁶⁸ Id.

“curtilage,” are treated as “part of [the] home itself for Fourth Amendment purposes,”⁴⁶⁹ and receive the same property-based protections as “the interior of a structure,”⁴⁷⁰

Turning to the present case, the district court erred in assuming that the areas intruded upon by Scott, Moore, and Schneider were distinct from Quandavier’s apartment. Whether a search occurred, at least under a straightforward application of the property-based approach, depends on the “proper characterization” of those areas.⁴⁷¹ That characterization is a question of fact.⁴⁷² It is sufficient at this stage of the litigation that the record contains evidence to support the characterization advocated by Hicks. Quandavier’s girlfriend, Ariel Wilson, repeatedly stated that the defendants “went into [Quandavier’s] house.” She even described the second-floor landing where Quandavier was shot as “his room.” That characterization was echoed by Quandavier’s uncle, Robert Thompson, who described Quandavier’s living area as inclusive of the second floor and stated that no portion of the unit was “accessible to the public” or “shared with the First Floor Apartment.” In fact, there is no documentary or testimonial evidence to support the view that these areas were anything other than interior portions of the rear apartment unit.

The layout of the duplex further evidences that the defendants entered a constitutionally protected area. The only kitchen and bathroom associated with the rear unit are located on the second floor and are connected to the third-floor bedroom via the landing. It would be anomalous to find—let alone at summary judgment—that the conduit between these core living spaces is a public corridor, especially when there is evidence that the foyer, stairwell, and landing were controlled and used by only one person: Quandavier. Moreover, even if the foyer and stairwell could be described as distinct from the core living spaces, they are still “intimately tied” to the apartment’s interior.⁴⁷³ Once inside the exterior door, no additional walls or doors divide the foyer and stairwell from the second-floor landing. More so than an exposed front porch, which the Supreme Court recently held out as an “exemplar” of curtilage, the enclosed foyer and stairwell are areas “to which the activity of home life extends.”⁴⁷⁴ Accordingly, when viewed in a light most favorable to Hicks, the record supports that the defendants invaded a constitutionally protected area.

Moreover, even if we were to accept the defendants’ contested characterization of the area as an extended corridor leading to a self-contained apartment on the third floor, Quandavier had a reasonable expectation of privacy in that space. We have long held that tenants of multi-occupancy structures have a reasonable expectation of privacy in “common areas ... not open to

⁴⁶⁹ Oliver v. United States, 466 U.S. 170, 180, 104 S.Ct. 1735, 80 L.Ed.2d 214 (1984),

⁴⁷⁰ Dow Chem. v. United States, 476 U.S. 227, 235, 106 S.Ct. 1819, 90 L.Ed.2d 226 (1986).

⁴⁷¹ United States v. Werra, 638 F.3d 326, 331 (1st Cir. 2011).

⁴⁷² Richards v. City of Jackson, 788 F. App’x. 324, 329–30 (6th Cir. 2019).

⁴⁷³ Morgan, 903 F.3d at 561 (quoting United States v. Dunn, 480 U.S. 294, 301, 107 S.Ct. 1134, 94 L.Ed.2d 326 (1987)).

⁴⁷⁴ Jardines, 569 U.S. at 7, 133 S.Ct. 1409 (quoting Oliver, 466 U.S. at 182 n.12, 104 S.Ct. 1735).

the general public.”⁴⁷⁵ A tenant in a twelve-unit apartment building, for instance, has a reasonable expectation of privacy in a locked common area leading to multiple units.⁴⁷⁶ The same is true of an unlocked basement shared by the seven tenants of a duplex: it is expected that only the “tenants and landlord” will frequent such an area.⁴⁷⁷ It is only when a tenant should expect that members of the general public will pass through a common space—i.e., persons other than the landlord, co-tenants, and their invited guests—that she loses her reasonable expectation of privacy in that space.⁴⁷⁸ Thus, as we explained in Dillard, if a tenant leaves the door to a common hallway unlocked and “ajar,” and that hallway leads to the entrance of multiple units, it is not reasonable for the tenant to expect that the area will remain private.⁴⁷⁹

Here, viewing the evidence in a light most favorable to Hicks, the interior corridor is one in which Quandavier had a reasonable expectation of privacy. It is uncontroverted that the corridor led to only one apartment: Quandavier’s. And there is no evidence that anyone other than Quandavier and his guests had a right or reason to access that area; indeed, the exterior door—hardly visible from the street—was at the end of a narrow alley running parallel to the duplex. Still, despite the exterior door’s withdrawn location, Quandavier took affirmative steps to exclude the public and maintain his privacy. There is evidence that he normally locked the door with multiple deadbolts, rebuffed prying eyes with a privacy curtain, and fortified the glass with security bars. The lack of a doorbell and knocker could also support the inference that he had no interest in admitting strangers. Although the defendants contend that the unlocked door divested Quandavier of any reasonable expectation of privacy, intervening acts unknown to the sole user of an area cannot independently nullify an otherwise justified expectation of privacy.⁴⁸⁰

As the right to be free from warrantless entry into a private residence and its curtilage was clearly established at the time of Quandavier’s death, the Sixth Circuit held that the officers herein violated Quandavier’s right to be free from unreasonable searches and that qualified immunity was erroneously granted.

3. Yes. The Fourth Amendment’s prohibition against unreasonable seizures prohibits the use of excessive force.⁴⁸¹ The test is one of objective reasonableness: “[T]he question is whether [an] officer[’]s actions [were] ‘objectively reasonable’ in light of the facts and circumstances confronting [her].”⁴⁸² In assessing those circumstances, we consider three main factors: (1) “the severity of the crime at issue,” (2) “whether the suspect pose[d] an immediate threat to the

⁴⁷⁵ Carriger, 541 F.2d at 549; see also United States v. Dillard, 438 F.3d 675, 683 (6th Cir. 2006) (recognizing that Carriger remains “controlling in this circuit”).

⁴⁷⁶ 541 F.2d at 549–52.

⁴⁷⁷ King, 227 F.3d at 749–50.

⁴⁷⁸ Dillard, 438 F.3d at 684.

⁴⁷⁹ Id. at 682–84.

⁴⁸⁰ See, e.g., United States v. Kimber, 395 F. App’x 237, 247–48 (6th Cir. 2010) (holding that lock on common hallway door broken by other tenants did not undermine plaintiff’s reasonable expectation of privacy).

⁴⁸¹ King v. Taylor, 694 F.3d 650, 662 (6th Cir. 2012).

⁴⁸² Graham v. Connor, 490 U.S. 386, 397, 109 S.Ct. 1865, 104 L.Ed.2d 443 (1989).

safety of the officers or others,” and (3) “whether [the suspect was] actively resisting arrest or attempting to evade arrest by flight.”⁴⁸³ When an officer uses deadly force, the critical factor is whether the suspect presented an immediate danger to the officers or others.⁴⁸⁴ To that end, an officer’s use of deadly force is only reasonable if she had “probable cause to believe that the suspect pose[d] [such] a threat.”⁴⁸⁵

The reasonableness of a particular use of force “must be judged from the perspective of a reasonable officer on the scene, rather than with the 20/20 vision of hindsight.”⁴⁸⁶ Courts may not substitute our own opinion of “proper police procedure for the instantaneous decision of the officer at the scene.”⁴⁸⁷ Although the fact that a situation unfolds quickly “does not, by itself, permit [officers] to use deadly force,”⁴⁸⁸ we must afford “a built-in measure of deference to [an] officer’s on-the-spot judgment.”⁴⁸⁹ “The calculus of reasonableness must embody allowance for the fact that police officers are often forced to make split-second judgments—in circumstances that are tense, uncertain, and rapidly evolving—about the amount of force that is necessary in a particular situation.”⁴⁹⁰

In the present case, Scott reasonably perceived an immediate threat to her safety when a rifle was pointed at her face from five feet away. Although “merely possessing a weapon” does not justify deadly force,⁴⁹¹ the reasonableness of an officer’s asserted fear will often turn on whether an armed suspect pointed her weapon at another person.⁴⁹² In turn, if a suspect possessed a gun, we will generally deny qualified immunity only if there is a genuine dispute of fact as to whether the gun was pointed at someone.⁴⁹³

Here, there is no genuine dispute that Quandavier pointed his rifle directly at Scott in the moments before he was shot. The defendants all testified that, as soon as the door started to open, they could see the rifle barrel pointed at Scott. Scott testified that the rifle was “pointed at [her] face.” Whether Quandavier incidentally or deliberately pointed the rifle at Scott is of little relevance: either way, the record shows that, the moment the doorway opened, she was at the

⁴⁸³ Untalan v. City of Lorain, 430 F.3d 312, 314 (6th Cir. 2005) (quoting Graham, 490 U.S. at 396, 109 S.Ct. 1865).

⁴⁸⁴ Mullins v. Cyranek, 805 F.3d 760, 766 (6th Cir. 2015).

⁴⁸⁵ Untalan, 430 F.3d at 314.

⁴⁸⁶ Chappell v. City of Cleveland, 585 F.3d 901, 908 (6th Cir. 2009) (quoting Graham, 490 U.S. at 396, 109 S.Ct. 1865).

⁴⁸⁷ Boyd v. Baeppler, 215 F.3d 594, 602 (6th Cir. 2000).

⁴⁸⁸ Smith v. Cupp, 430 F.3d 766, 775 (6th Cir. 2005),

⁴⁸⁹ Burchett v. Kiefer, 310 F.3d 937, 944 (6th Cir. 2002).

⁴⁹⁰ Graham, 490 U.S. at 396–97, 109 S.Ct. 1865.

⁴⁹¹ Jacobs v. Alam, 915 F.3d 1028, 1040 (6th Cir. 2019),

⁴⁹² See, e.g., Boyd, 215 F.3d at 599 (“[T]he issue that is material here is ... whether [the suspect] pointed his weapon at the officers and thus posed an immediate threat to them.”); David v. City of Bellevue, 706 F. App’x 847, 851 (6th Cir. 2017) (“The key fact ... is whether [the suspect] had his gun pointed at the officers.”); Presnall v. Huey, 657 F. App’x 508, 512 (6th Cir. 2016) (“Time and time again, we have rejected Fourth Amendment claims ... when the officers used deadly force only after the suspect[] had aimed [her] gun[] at [them]”).

⁴⁹³ See, e.g., King, 694 F.3d at 662–63 (denying qualified immunity based on dispute as to where gun was pointed); Brandenburg v. Cureton, 882 F.2d 211, 215 (6th Cir. 1989) (same); David, 706 F. App’x at 851–52 (same).

business end of a rifle. Quandavier may have had no ill intent when he pointed the rifle at Scott; the issue, however, “is whether a reasonable officer in [Scott’s] shoes would have feared for [her] life, not what was in the mind of [Quandavier] when he turned [the corner] with [a] gun in his hand.”⁴⁹⁴

Hicks finally argues that Scott’s use of deadly force was unreasonable because she placed herself in harm’s way and then failed to warn Quandavier before firing. Hicks has a point: Scott may have been negligent or worse in creating the situation when she entered the apartment and failed to announce herself. Under the “segmented analysis” employed by this court, however, “[w]e do not scrutinize whether it was reasonable for the officer to create the circumstances.”⁴⁹⁵ Instead, the only inquiry that matters is whether, in the “moment” before using deadly force, an officer reasonably perceived an immediate threat to her safety.⁴⁹⁶ Here, as already discussed, Scott reasonably perceived such a threat. And it is for this same reason that Scott was not required to give a warning. When the “hesitation involved in giving a warning could readily cause such a warning to be [the officer’s] last,” then a warning is not feasible.⁴⁹⁷ It was not feasible for Scott—unexpectedly confronted with the barrel of a rifle from five feet away—to give a warning before firing her weapon.

The Sixth Circuit held that Scott’s use of deadly force was objectively reasonable and affirmed the grant of qualified immunity to Scott.

The Sixth Circuit affirmed in part, reversed in part and remanded for further proceedings.

Howse v. Hodous, 953 F.3d 402 (6th Cir. 2020) – F

FACTS: One summer night in 2016, Howse was walking home from a convenience store. Along the way, Howse says an unidentified Cleveland Police officer approached and asked whether he had any weapons. Howse said no. The John Doe officer then patted him down and searched his pockets. After finding no contraband, the officer told Howse that he could leave.

When Howse got home, he began climbing the steps on his front porch. The parties dispute what happened next.

Howse claimed that several men (two of whom he later identified as Officers Thomas Hodous and Brian Middaugh) pulled up in an unmarked vehicle. Middaugh asked Howse if he lived at the house. Howse replied that he did. Middaugh asked Howse if he was sure that he lived there. Howse said something like “yes, what the f---” in response. That prompted Middaugh to comment that Howse had a smart mouth and a bad attitude. Middaugh then got out of the car,

⁴⁹⁴ Bell v. City of East Cleveland, No. 96-3801, 1997 WL 640116, at *3 (6th Cir. Oct. 14, 1997).

⁴⁹⁵ Thomas v. City of Columbus, 854 F.3d 361, 365 (6th Cir. 2017); see also Dickerson v. McClellan, 101 F.3d 1151, 1160–62 (6th Cir. 1996) (refusing to consider officers’ unannounced entry when weighing the reasonableness of deadly force).

⁴⁹⁶ Thomas, 854 F.3d at 365.

⁴⁹⁷ McLenagan v. Karnes, 27 F.3d 1002, 1007 (4th Cir. 1994).

walked toward the porch, and asked Howse (yet again) if he was sure that he lived there. Again, Howse responded yes.

Things escalated from there. Middaugh told Howse to put his hands behind his back and that he was going to jail. Howse disobeyed Middaugh's command to put his hands behind his back. Instead, Howse yelled that he has done nothing wrong and that he lived at the house. Middaugh ran onto the porch, grabbed Howse (who at that point was screaming at the top of his lungs), and threw him down. When Middaugh was on top of him, Howse realized that Middaugh was a police officer. Middaugh, with help from Hodous, then tried to handcuff Howse. But Howse, in his own words, was resisting arrest by screaming and "stiffening up" his body. Howse says he never tried to hit, push, or fight with the officers. And he claims that he "didn't do anything that would be considered offensive" to the officers.

At this point, Howse's mother (who owned the house) showed up. She had heard some commotion and rushed to the front porch. When she arrived, she saw a "chaotic" scene: a man in dark clothing straddled Howse and another man struck Howse with a closed fist, which caused Howse's head to strike the porch. She asked the men (who she later realized were police officers) to stop striking her son—she kept explaining that he lived at the house. After things settled down, the officers put Howse in a police car and took him to jail.

The officers tell a different story. That night, Hodous and Middaugh (along with another officer) were patrolling the area where Howse lived—an area known for violence, drugs, and gang activity. While driving in an unmarked vehicle, they saw Howse lingering suspiciously on the front porch of a house. Howse looked nervous when he saw the unmarked vehicle. Middaugh thought the house was vacant because it appeared to be boarded up and there were bars on the doors.

Based on his training and experience, Middaugh suspected that Howse might be engaged in criminal activity. So Middaugh asked Howse whether he lived there. Howse said he did. Middaugh wanted to investigate more, so he got out of the car, walked toward Howse, and asked him if he was trying to break in. Middaugh doesn't remember exactly what Howse said in response, but he does remember that Howse said "f---" along with some other words. (Hodous, for what it's worth, recalls Howse saying "f--- you" and "leave me the f---alone." R. 25-2, Pg. ID 303.)

When Middaugh reached the front porch, Howse clenched his fists and "squared up" into a fighting stance. Middaugh, afraid that Howse wanted to fight, told Howse to put his hands in the air. Howse ignored that instruction and instead motioned towards his pockets, which prompted Middaugh to grab Howse's arm. Hodous joined Middaugh and tried to restrain Howse, who was grabbing at the officers and flailing around. Howse struck Hodous in the chest. Howse also tried to rip off Middaugh's flashlight and handcuff case. So Middaugh used a leg sweep to take Howse to the ground. Even while on the ground, Howse resisted the officers by burying his hands underneath his chest. The officers eventually handcuffed him and put him in a police vehicle. It was not until Howse's mother showed up, the officers claim, that they found out that Howse did in fact live at the house.

After Howse was booked into jail, Middaugh signed a complaint charging Howse with assaulting a police officer. Hodous and Middaugh then wrote up “Use of Force” reports detailing what happened on the front porch. These reports said that Howse resisted arrest and struck the officers. After a few days, Howse posted bond and was released. Later, a grand jury indicted Howse on two counts of assault along with one count of obstruction of official business. The State of Ohio eventually dismissed the charges.

Howse then sued Hodous and Middaugh under 42 U.S.C. § 1983 for violating his Fourth Amendment rights and for committing assault and battery under Ohio law. He also sued the City of Cleveland, claiming that the City was responsible for the Fourth Amendment violations. The district court granted summary judgment for the defendants. This appeal followed.

- ISSUE:**
1. Is it clearly established law that an officer may not tackle a non-compliant suspect and use additional force against the suspect solely because the suspect resists arrest?
 2. To succeed on a claim for municipal liability alleging failure to train, what must the plaintiff prove?

HOLDING: 1. No. Qualified immunity shields law enforcement officers from civil liability unless the officers (1) violated a statutory or constitutional right and (2) the unlawfulness of their conduct was clearly established at the time.⁴⁹⁸ “Clearly established” means that the law is so clear at the time of the incident that every reasonable officer would understand the unlawfulness of his conduct.⁴⁹⁹ In this case, the Sixth Circuit held that the law was not clearly established that that law enforcement cannot tackle a non-compliant suspect and use additional force against him if he resists arrest. Accordingly, the officers are entitled to qualified immunity in this case.

2. Municipalities may be held liable under § 1983 for their own unlawful acts.⁵⁰⁰ To be liable, though, it’s not enough that a municipality’s employees violated someone’s constitutional rights. Instead, the plaintiff must show that the municipality itself caused the constitutional violation through one of its own customs or policies.⁵⁰¹ One way to prove liability is to show a municipal policy of inadequate training that led to the constitutional harm.⁵⁰² Another way is to show a municipal custom of tolerating rights violations that led to that constitutional harm.⁵⁰³

In order to prove failure to train, a plaintiff must show: 1) the training program did not adequately prepare the officers for the tasks they must perform, (2) the inadequacy resulted from the municipality’s deliberate indifference, and (3) the inadequacy either closely related to

⁴⁹⁸ District of Columbia v. Wesby, — U.S. —, 138 S. Ct. 577, 589, 199 L.Ed.2d 453 (2018).

⁴⁹⁹ Id.

⁵⁰⁰ Monell v. Dep’t of Social Servs., 436 U.S. 658, 98 S.Ct. 2018, 56 L.Ed.2d 611 (1978).

⁵⁰¹ Id., at 694.

⁵⁰² Thomas v. City of Chattanooga, 398 F.3d 426, 429 (6th Cir. 2005).

⁵⁰³ Id.

or caused Howse's injury.⁵⁰⁴ In this case, Howse cannot meet these elements. Cleveland's training academy's standards exceed state requirements, and Cleveland's police force has explicit written policies instructing officers not to use excessive force. Howse offers no evidence to the contrary—at least relevant to the claims here. On top of that, Howse hasn't shown how any inadequacy in the training program led to his constitutional injuries. Finally, there is no evidence that Cleveland approved of an unlawful activity or that any such approved caused Howse's injuries. On the contrary, Cleveland has taken affirmative steps to combat the unlawful use of excessive force. Those steps include a thorough use-of-force policy and active enforcement of that policy. Take this case. After Hodous and Middaugh filed their Use of Force reports, several other officers reviewed those reports to make sure that the force used was reasonable.

The Sixth Circuit affirmed the grant of qualified immunity.

Jones v. City of Elyria, Ohio, 947 F.3d 905 (6th Cir. 2020) – F

FACTS: Officers Chalkley and Weber received a call that a potentially intoxicated white male was eating out of a dumpster located behind a shopping plaza. But when the pair responded to the call, they did not see anyone by the dumpsters. Scanning the plaza, the officers eventually spotted Jones, the only white male in the area, talking to two women in the plaza parking lot. Although, as the officers acknowledge, they were not investigating a crime upon making first contact, Weber called out to Jones, asking him to approach the police cruiser. What happened next is deeply disputed.

According to the officers, as Weber called out to Jones, the two women who had been speaking with Jones hurriedly walked away. As they walked past Weber, they thanked him for his help. At the same time, Jones ran behind a nearby clothing donation bin. After repeated instructions from the officers to approach the cruiser, Jones reluctantly complied, emerging from behind the bin with his palms turned down and an unidentified object in each hand. Weber instructed Jones to drop the objects. Jones complied, dropping two green peppers.

Jones then resumed approaching the cruiser. This time, his hands were in his pockets. Concerned that Jones might be concealing a weapon, Weber ordered Jones to keep his hands visible. Jones obeyed only momentarily, quickly returning his hands to his pockets. Once Jones reached the cruiser, Weber instructed Jones to place his hands on the hood. Weber then gave Jones a pat-down, as Chalkley assisted. When Jones again attempted to return one hand to his pocket, Chalkley grabbed Jones's hand. Startled, Jones pushed off the hood of the car and attempted to punch Chalkley.

The officers took Jones to the ground. Jones resisted. He drew his arms underneath his body to avoid being handcuffed while kicking his feet at the officers. He attempted to draw his knees under his body in an effort to stand up. And he attempted to reach for Chalkley's holstered firearm. In an effort to subdue Jones, Weber and Chalkley placed their weight on Jones's hip area

⁵⁰⁴ Winkler v. Madison Cty., 893 F.3d 877, 902 (6th Cir. 2018).

and struck Jones in his arms and sides with closed fists. Chalkley also punched Jones in the face after Jones grabbed Chalkley's testicles.

Officer Mitchell arrived at the scene during the pat-down. As the scuffle with Jones ensued, Mitchell helped hold Jones's legs, to keep him on the ground. With Mitchell's assistance, Weber was able to tase Jones and end his resistance.

Jones states that he was going home after buying two green peppers from a nearby café when he stopped to have a conversation with two women. After talking to the women, Jones resumed walking, at which point he heard Weber call out.

Eventually realizing that Weber was speaking to him, Jones says he did as he was told. As he came toward the cruiser, Jones removed his hands from his pockets, kept them visible at all times, and then placed them on the hood of the cruiser. Weber and Chalkley performed a pat-down. Jones became nervous that he was being detained for no stated reason, so he looked over his left shoulder to speak with the two officers. In response, the officers took Jones to the ground.

Jones says he offered no resistance, and in fact struggled to breathe as his face was pressed against the concrete by an officer's forearm. Jones could not move his arms due to the weight of the officers on top of him. Despite his lack of resistance, Jones says he was repeatedly punched and tased by Weber and Chalkley, barely maintaining consciousness. Though Mitchell arrived later and assisted Weber and Chalkley with the arrest, Jones does not allege that Mitchell struck or tased him.

In any event, Jones was taken to the hospital where Weber filled out a form to have Jones involuntarily committed. Jones was committed for psychiatric evaluation. Jones was ultimately indicted on charges of assault on a police officers, obstructing official business, and resisting arrest. Jones moved to suppress, arguing that the officers did not have probable cause to make an arrest. The trial court denied suppression. Jones was acquitted of all charged after a jury trial.

Jones filed an action pursuant to 42 U.S.C. § 1983 action, asserting (1) an excessive-force claim against Weber, Chalkley, and Mitchell, (2) a supervisory-liability claim against Chief Duane Whitely, (3) Monell and ratification claims against Whitely and the City of Elyria, and (4) wrongful-arrest and malicious-prosecution claims. Jones also brought state-law claims for assault, battery, wrongful arrest, and malicious prosecution against all named defendants along with a claim for intentional infliction of emotional distress against all named defendants except Whitely. Qualified immunity was granted to Whitely and the City of Elyria on all claims. The assault and battery claim was dismissed as untimely. The district court, however, denied immunity to the individual officers on the federal excessive-force claim as well as the federal and state-law wrongful-arrest and malicious-prosecution claims. The officers appealed.

- ISSUES:**
1. Are Terry stops permitted if the officer has a reasonable and articulable suspicion that criminal activity is occurring?
 2. Must an arrest be supported by probable cause?

3. Are the reasonable suspicion and probable cause safeguards clearly established?
4. With respect to the assessment of a public official's claim to qualified immunity, will an officer be held responsible for the conduct of others?
5. Does the Fourth Amendment protect citizens from excessive force in the course of an arrest or other seizure from governmental actors?
6. Does the Fourth Amendment protect private individuals against malicious prosecution?

HOLDINGS: 1. Yes. To preserve public safety, courts afford officers broad powers to investigate potential crimes. But those powers have limits. One fundamental limit is the prohibition on stopping and frisking a suspect without reasonable suspicion of criminal activity.⁵⁰⁵ Reasonable suspicion, as the phrase is generally defined, means more than a mere hunch or intuition. At a minimum, it requires inferences from specific facts known to the officer that tend to suggest criminal activity.⁵⁰⁶ In this case, Weber and Chalkley admit they were not investigating a crime when they initiated contact with Jones. At worst, the officers heard reports that a man fitting Jones's rough description was eating out of a dumpster, a perhaps uncouth but nonetheless non-criminal activity. Whether Jones then darted behind a donation bin after Weber called out to him is disputed by the parties. But even if that conduct occurred, scurrying away from a consensual conversation with a police officer is likewise not enough to create reasonable suspicion. The Sixth Circuit held that the trial court's denial of qualified immunity was appropriate on this claim.

2. Yes. It is well settled that officers must have probable cause before arresting a suspect.⁵⁰⁷ Probable cause is present when the circumstances known to an officer support the belief that a criminal offense has occurred or is ongoing.⁵⁰⁸ A finding of probable cause necessarily defeats a wrongful-arrest claim.⁵⁰⁹ Here, the Sixth Circuit held that refusing to comply with the request from Weber and Chalkley to submit to a pat-down search does not constitute an affirmative act for the offense of obstructing official business under Ohio law. Thus, the trial court's denial of qualified immunity was appropriate on this claim.

3. Yes. The reasonable suspicion and probable cause safeguards are clearly established rights. The prohibition against conducting a non-consensual pat-down search in the absence of

⁵⁰⁵ Terry v. Ohio, 392 U.S. 1, 27, 88 S.Ct. 1868, 20 L.Ed.2d 889 (1968).

⁵⁰⁶ Id. at 21, 88 S.Ct. 1868.

⁵⁰⁷ Malley v. Briggs, 475 U.S. 335, 340–41, 106 S.Ct. 1092, 89 L.Ed.2d 271 (1986); Wesley v. Campbell, 779 F.3d 421, 428 (6th Cir. 2015).

⁵⁰⁸ Newman v. Township of Hamburg, 773 F.3d 769, 772 (6th Cir. 2014).

⁵⁰⁹ See id. at 772–73.

reasonable suspicion of criminal activity has been clearly established for more than five decades. Equally well settled is one's right to freedom from arrest without probable cause.

4. No. This issue arose out of Mitchell's claim of qualified immunity. In the context of assessing a public official's claim to qualified immunity, the Sixth Circuit considers each official on her own terms, examining the relevant events from her perspective in evaluating her entitlement to qualified immunity.⁵¹⁰ Thus, the Sixth Circuit holds that an officer is responsible only for her "own individual conduct and not the conduct of others."⁵¹¹

Mitchell was a late-arriving officer, so the courts must consider the circumstances apparent to each officer at the time of arrival. Mitchell could not have known whether her fellow officers had another reason to take Jones to the ground—perhaps a firearm in Jones's pocket. Given the uncertainty, there is no doubt a similarly situated officer would have done precisely the same thing—assist her fellow officers in securing the suspect and ask questions later. And Mitchell's role, it bears reminding, was merely to hold Jones's legs while Weber and Chalkley allegedly engaged in excessive force in detaining Jones. Beyond restraining Jones for purposes of effectuating an arrest, Mitchell took no independent action against Jones that might constitute excessive force. Accordingly, Mitchell was entitled to qualified immunity.

5. Yes. The Fourth Amendment protects individuals from government actors employing excessive force in the course of an arrest or other seizure.⁵¹² The right to not be subject to excessive force during a government seizure is clearly established.⁵¹³ Ascertaining whether force was excessive in any given case, however, is a fact-intensive inquiry, one that requires balancing the governmental interest at stake with the extent of the intrusion upon the individual.⁵¹⁴ To strike the balance, courts examine "(1) the severity of the crime at issue, (2) whether the suspect poses an immediate threat to the safety of the officers or others, and (3) whether [the suspect] is actively resisting arrest or attempting to evade arrest by flight."⁵¹⁵ Courts assess these factors from the officer's perspective at the time when the excessive force allegedly occurred, rather than from the perspective of a reviewing court with the benefit of hindsight.⁵¹⁶

In this case, the Sixth Circuit found that Weber and Chalkley employed excessive force in arresting Jones. By their own admission, the two officers tackled Jones to the ground, placed their weight on top of him, employed "closed fist strikes" on his arms and sides, punched him in the face, and then tased him. They likewise concede that, when they first arrived on the scene, they were not investigating a crime. In fact, they had little more than a vague, generalized suspicion that Jones might be a threat to himself or others. And as these events unfolded, Jones says he neither

⁵¹⁰ Binay v. Bettendorf, 601 F.3d 640, 650 (6th Cir. 2010).

⁵¹¹ Pollard v. City of Columbus, 780 F.3d 395, 402 (6th Cir. 2015).

⁵¹² Graham v. Connor, 490 U.S. 386, 395, 109 S.Ct. 1865, 104 L.Ed.2d 443 (1989).

⁵¹³ Bennett v. Krakowski, 671 F.3d 553, 562–63 (6th Cir. 2011).

⁵¹⁴ Id. at 396, 109 S.Ct. 1865.

⁵¹⁵ Estate of Hill by Hill v. Miracle, 853 F.3d 306, 312–13 (6th Cir. 2017).

⁵¹⁶ Id. at 315.

resisted nor made any attempt to escape, while repeatedly asking the officers to stop. On Jones's version of the facts, these actions were objectively unreasonable.⁵¹⁷

Mitchell is differently situated than her fellow officers. When Mitchell arrived on the scene, Weber and Chalkley were already struggling with Jones. She did not witness the events that led to the unlawful pat-down, nor do we impute to her the knowledge of facts known only to the other officers. Jones alleges only that Mitchell took hold of his feet while Weber and Chalkley restrained him. Mitchell did not tase Jones or strike him, even on Jones's own version of the events. Additionally, because Mitchell did not witness the events leading up to the altercation, she could have fairly believed that Jones posed a threat to Weber and Chalkley. A reasonable officer in that circumstance would likewise have helped secure the scene. And that is precisely what Mitchell did. As Jones does not say otherwise, Mitchell's actions did not violate Jones's Fourth Amendment rights.

6. Yes. The Fourth Amendment also protects private individuals against unjustified, or malicious, criminal prosecution.⁵¹⁸ To make out a § 1983 claim for malicious prosecution, a plaintiff must establish: "(1) that a criminal prosecution was initiated against the plaintiff and that the defendant ma[d]e, influence[d], or participate[d] in the decision to prosecute; (2) that there was a lack of probable cause for the criminal prosecution; (3) that, as a consequence of a legal proceeding, the plaintiff suffered a deprivation of liberty ... apart from the initial seizure; and (4) that the criminal proceeding must have been resolved in the plaintiff's favor."⁵¹⁹ It is well established law in the Sixth Circuit that governmental officials may be held liable for malicious prosecution when they knowingly include false statements in their investigative materials, where those materials influence the ultimate decision to prosecute.⁵²⁰

Here, Weber, Chalkley and Mitchell each filed a narrative report stating that Jones was actively resisting arrest by fighting with the officers. Witnesses at the scene contradicted those reports. Further, probable cause to prosecute was not present. Thus, qualified immunity is not available.

The Sixth Circuit also addressed the state law claims and reversed one judgment with respect to wrongful arrest concerning Mitchell's actions.

Accordingly, the district court was affirmed in part, reversed in part and remanded for further proceedings.

Jones v. Clark County, Kentucky, 959 F.3d 748 (6th Cir. 2020) – NF

⁵¹⁷ Aldini v. Johnson, 609 F.3d 858, 867 (6th Cir. 2010) ("There is simply no governmental interest in continuing to beat [an arrestee] after he ha[s] been neutralized, nor could a reasonable officer [think] that there [is].") (internal citations omitted) (alterations in original).

⁵¹⁸ Mills v. Barnard, 869 F.3d 473, 479–80 (6th Cir. 2017).

⁵¹⁹ Id.

⁵²⁰ Sykes v. Anderson, 625 F.3d 294, 308–09 (6th Cir. 2010).

FACTS: Lexington Police Detective Flannery tracked the source of a thirty-nine-second video of child pornography to a device that had connected to the internet via a router with an IP address located in Clark County, Kentucky. The video was being shared via the Ares peer-to-peer file sharing network. Detective Flannery contacted Clark County Deputy Sheriff Murray about the video. Deputy Murray obtained a subpoena from the internet provider, AT&T. AT&T identified David Jones at the subscriber associated with the IP address and provided Jones's personal information and address to Deputy Murray. Deputy Murray secured a search warrant for Jones's address. Jones's affidavit noted that Jones was not yet a suspect because Jones did not necessarily have possession of the device connected to the child pornography. According to the affidavit, the purpose of the search was to locate the electronic device(s) used to upload and/or store the illegal video; as well as any "hard copies of images of minors engaged in sexual performances" or other proof of child pornography in the residence.

Murray and his supervisor, Captain Brian Caudill, executed the search warrant along with three other deputies and seized a tablet, cell phone, printer, modem, Xbox gaming console, and three DVDs from Jones' residence. The officers handcuffed Jones as soon as they entered his home and after completing the search they brought him to the Sheriff's Office for further questioning. In his deposition testimony Murray does not clarify the basis for this arrest, explaining only that "there was a download of child pornography associated with an IP address of a router that was in his apartment," and that when Murray arrived at the apartment Jones "was the only one there."

Before the grand jury, Murray clarified that he arrested Jones because of the evidence that a download of child pornography occurred at the IP address associated with Jones' residence. Murray testified that it was not until after Jones was Mirandized that Jones revealed the facts asserted in the Uniform Citation to Murray—that Jones lived alone, was alone the night of the download, and had not shared his router password with anyone. The grand jury ultimately charged Jones with promoting a sexual performance by a minor under sixteen years of age.

After Jones's indictment, Murray received the results of a forensic examination of Murray's telephone. The forensic testing failed to yield a copy of the pornographic video that had been uploaded at Jones' IP address. According to Murray, the tablet was "too new" for a complete forensic exam to be performed. The phone was thoroughly examined, but all that was discovered was an audio file that appeared to have been partially downloaded through the Ares program. It is unclear if the test results were timely provided to the prosecutors or the defense. The defense retained an expert to conduct a forensic test, which yielded a negative result. The defense's exam also found no evidence "that the defendant ever used a peer to peer file sharing program such as Ares." Jones filed a motion to dismiss the charges against him, which was denied.

Ultimately, the Commonwealth dismissed the charge against Jones without prejudice, based upon the competing expert results.

Jones filed a lawsuit pursuant to 42 U.S.C. § 1983 against Clark County, Sheriff Purdue and Deputy Murray for the alleged violation of his constitutional rights stemming from his arrest and prosecution. He asserted that his Fourth, Fifth, and Fourteenth Amendment rights were violated, that Defendants engaged in a malicious prosecution of him under both state and federal law, that Defendants were negligent and grossly negligent, and that they intentionally inflicted emotional distress upon him. The district court dismissed the matter, but that dismissal was overturned by the Sixth Circuit. Upon the close of discovery on remand, the district court granted summary judgment to Clark County, Sheriff Purdue and Deputy Murray. This appeal followed.

- ISSUES:**
1. When making a probable cause determination for making an arrest, must an officer consider the totality of the circumstances, including available inculpatory and exculpatory evidence?
 2. Can a claim for malicious prosecution be based upon continued detention without probable cause?
 3. May supervisory liability under § 1983 attach where the allegation of liability is based upon the supervisor's mere failure to act?
 4. Is the right to be free from malicious prosecution a clearly established right under the Fourth Amendment?

HOLDINGS: Yes. This is a claim for malicious prosecution. Under federal law, a plaintiff must prove four elements to establish a malicious prosecution claim: (1) that a criminal prosecution was initiated against the plaintiff and that the defendant “made, influenced, or participated in the decision to prosecute;” (2) that the state lacked probable cause for the prosecution; (3) that the plaintiff suffered a deprivation of liberty because of the legal proceeding; and (4) that the criminal proceeding was “resolved in the plaintiff's favor.”⁵²¹

An officer “possesses probable cause when, at the moment the officer seeks the arrest, ‘the facts and circumstances within [the officer's] knowledge and of which [she] had reasonably trustworthy information [are] sufficient to warrant a prudent man in believing that the [plaintiff] had committed or was committing an offense.’”⁵²² A probable cause determination is based upon the “totality of the circumstances” and must consider “both the inculpatory and exculpatory evidence.”⁵²³ That means an officer cannot “‘simply turn a blind eye’ toward evidence favorable to the accused,”⁵²⁴ nor “ignore information which becomes available in the course of routine investigations,”⁵²⁵ That said, “[o]nce probable cause is established, an officer is

⁵²¹ Sykes v. Anderson, 625 F.3d 294, 308–09 (6th Cir. 2010).

⁵²² Wesley v. Campbell, 779 F.3d 421, 429 (6th Cir. 2015)

⁵²³ Id., at 429.

⁵²⁴ Id., (quoting Ahlers v. Schebil, 188 F.3d 365, 372 (6th Cir. 1999)),

⁵²⁵ Fridley v. Horrigths, 291 F.3d 867, 873 (6th Cir. 2002).

under no duty to investigate further or to look for additional evidence which may exculpate the accused.”⁵²⁶

Jones was charged with promoting a sexual performance by a minor. Under KRS 531.320, “A person is guilty of promoting sexual performance by a minor when knowing the character and content thereof, he produces, directs or promotes any performance which includes sexual conduct by a minor.” KRS 531.300(7) defines “promote” as “to prepare, publish, print, procure or manufacture, or to offer or agree to do the same.” Under Kentucky law the “statute is violated when one either actively or passively prepares, agrees, or brings forth through their efforts the visual representation of a minor in a sexual performance before an audience.”⁵²⁷ Thus, if there was probable cause to believe that Jones promoted the sexual performance of a minor by uploading the unlawful video through his router, then there was probable cause to arrest Jones.

At the point of arrest, Murray and his fellow officers knew that Jones owned the router associated with the illegal download. That Jones was alone the night of the download, that his router was password-protected, and that he had heard of the Ares program from a computer class he had taken was determined only after Jones was apprehended and then interrogated.

The fact that Jones owned the router that Lexington Police records indicated was used to upload child pornography and that the router was located in Jones' apartment could “warrant a prudent man in believing that the [Jones] had committed or was committing an offense.”⁵²⁸ Accordingly, Jones’s arrest was supported by probable cause.

2. However, a malicious prosecution claim can involve “continued detention” without probable cause.⁵²⁹ Here, there is a question of fact as to whether probable cause supported Jones’s continued detention upon Murray’s receipt of the results of the forensic examination conducted by Lexington Police. It could be reasonably inferred that the Commonwealth lacked the evidence it needed to continue its prosecution of Jones once the forensic examination failed to connect Jones' devices with the video. In fact, the prosecutors admitted that it was the weakness of the forensic report relative to the defense expert’s report that justified the dismissal of charges. Hence, the Sixth Circuit held that Murray was not entitled to summary judgment on the malicious prosecution claim.

3. No. With respect to his claim of supervisory liability against Sheriff Purdue and Clark County, “[s]upervisory liability under § 1983 cannot attach where the allegation of liability is based upon a mere failure to act.”⁵³⁰ Rather, the supervisors must have actively engaged in

⁵²⁶ Ahlers, 188 F.3d at 371.

⁵²⁷ Clark v. Commonwealth, 267 S.W.3d 668, 678 (Ky. 2008).

⁵²⁸ Wesley, 779 F.3d at 429.

⁵²⁹ Spurlock v. Satterfield, 167 F.3d 995, 1006 (6th Cir. 1999); Gregory v. City of Louisville, 444 F.3d 725, 750 (6th Cir. 2006) (recognizing the “subset of malicious prosecution claims which allege continued detention without probable cause”).

⁵³⁰ Bass v. Robinson, 167 F.3d 1041, 1048 (6th Cir. 1999) (citing Leach v. Shelby Cty. Sheriff, 891 F.2d 1241, 1246 (1989)).

unconstitutional behavior.⁵³¹ “Therefore, liability must lie upon more than a mere right to control employees and cannot rely on simple negligence.”⁵³² “A supervisory official's failure to supervise, control or train the offending individual is not actionable unless the supervisor ‘either encouraged the specific incident of misconduct or in some other way directly participated in it.’”⁵³³ “At a minimum a plaintiff must show that the official at least implicitly authorized, approved, or knowingly acquiesced in the unconstitutional conduct of the offending officers.”⁵³⁴

Similarly, a county may not be sued under § 1983 solely because an injury was inflicted by one of its employees or agents.⁵³⁵ Instead, “a plaintiff must show that the alleged federal right violation occurred because of a municipal policy or custom.”⁵³⁶ Such a policy can be shown via “(1) the municipality's legislative enactments or official agency policies; (2) actions taken by officials with final decision-making authority; (3) a policy of inadequate training or supervision; or (4) a custom of tolerance or acquiescence of federal violations.”⁵³⁷ Additionally, “[t]o succeed on a failure to train or supervise claim, the plaintiff must prove the following: (1) the training or supervision was inadequate for the tasks performed; (2) the inadequacy was the result of the municipality's deliberate indifference; and (3) the inadequacy was closely related to or actually caused the injury.”⁵³⁸

In City of St. Louis v. Praprotnik,⁵³⁹ the Supreme Court held that when a plaintiff alleges that an unconstitutional municipal policy is evinced by a single decision by a municipal official, “only those municipal officials who have ‘final policymaking authority’ may by their actions subject the government to § 1983 liability” and that state law determines whether a municipal official has “final policymaking authority.” This Court has distinguished “between ‘policymaking’ authority, which entails a certain amount of discretion to choose among various plausible alternatives, and ‘factfinding’ authority, which involves assessing the fixed realities of a situation” and held as a result that a coroner's authority to make factual findings regarding a person's cause of death was not policy-making.⁵⁴⁰

In this case, Jones identifies no facts that Sheriff Purdue or Clark County through municipal policy, custom or official action, acted unconstitutionally.

4. Yes. The Supreme Court has held that “government officials performing discretionary functions generally are shielded from liability for civil damages insofar as their conduct does not

⁵³¹ Gregory, 444 F.3d at 751 (citing Bass, 167 F.3d at 1048).

⁵³² Id.

⁵³³ Shehee v. Luttrell, 199 F.3d 295, 300 (6th Cir. 1999).

⁵³⁴ Hays v. Jefferson Cty., 668 F.2d 869, 874 (6th Cir. 1982).

⁵³⁵ Thomas v. City of Chattanooga, 398 F.3d 426, 429 (6th Cir. 2005).

⁵³⁶ Id. (citing Monell v. Dep't of Social Servs., 436 U.S. 658, 694, 98 S.Ct. 2018, 56 L.Ed.2d 611 (1978)).

⁵³⁷ Id.

⁵³⁸ Ellis v. Cleveland Mun. Sch. Dist., 455 F.3d 690, 700 (6th Cir. 2006).

⁵³⁹ 485 U.S. 112, 108 S.Ct. 915, 99 L.Ed.2d 107 (1988).

⁵⁴⁰ Jorg v. City of Cincinnati, 145 F. App'x 143, 147 (6th Cir. 2005).

violate clearly established statutory or constitutional rights of which a reasonable person would have known.”⁵⁴¹

The Sixth Circuit has repeatedly held that “individuals have a clearly established Fourth Amendment right to be free from malicious prosecution by a defendant who has made, influenced, or participated in the decision to prosecute the plaintiff.”⁵⁴² In the present case, Jones contends that Murray violated his right against malicious prosecution by facilitating Jones' unlawful continued detention after the forensics results produced no evidence that Jones' devices contained child pornography. A reasonable jury could find that probable cause for Jones' continued detention dissolved after the forensics test was completed and that rather than tell the prosecutors about this critical development in the case Murray withheld that information and thereby continued Jones' detention. If a jury makes both determinations, then Murray would be liable for malicious prosecution of Jones. Accordingly, Deputy Murray was not entitled to qualified immunity.

The Sixth Circuit affirmed qualified immunity for Sheriff Purdue and Clark County, but reversed the district court's grant of qualified immunity for Deputy Murray and remanded for further proceedings.

King v. Montgomery County, TN., 797 Fed. Appx. 949 (6th Cir. 2020). – F

FACTS: King kept fifteen dogs inside her Clarksville, Tennessee, home. King travelled to Kentucky and arranged for friends to care for her dogs while she was gone. Unfortunately, King was imprisoned in Kentucky, so she arranged for Carolyn Will and Trisha Davids to care for the dogs. Davids gave Will access information to King's home. Will arrived at King's home, only to find the dogs living in squalid conditions. Dog feces and urine covered the floor, ammonia fumes made it difficult to breathe and a dog was caged without access to food or water. Will called 911. Officer Matos responded and spoke with Will outside the home. Based upon Will's description of the dogs' condition, coupled with the strong ammonia order, Officer Matos entered the residence. Officer Matos saw trash and dog feces covering the floor, as well as the caged dog. He also found a dog trapped upstairs in a feces-covered room and a refrigerator infested with cockroaches. Officer Matos took pictures of the conditions and contacted animal control. Officer Matos allowed the animal control officer inside the residence and ultimately took custody of the dogs. King's dogs that were in control of others were also taken into custody by animal control.

A grand jury indicted King of ten counts of animal cruelty. A state trial court suppressed the evidence obtained as a result of the warrantless entry into King's home, finding that the entry violated the Fourth Amendment. The state dismissed the charged against King.

⁵⁴¹ Harlow v. Fitzgerald, 457 U.S. 800, 818, 102 S.Ct. 2727, 73 L.Ed.2d 396 (1982).

⁵⁴² King v. Harwood, 852 F.3d 568 (6th Cir. 2017).

King filed a lawsuit pursuant to 42 U.S.C. 1983 claiming that law enforcement and animal control unlawfully searched her home and seized the dogs without a warrant. The district court granted qualified immunity to the governmental officials. King appealed.

ISSUE: Under the Fourth Amendment, do exigent circumstances justify a warrantless entry into a residence to ensure the safety of animals exposed to dangerous conditions?

HOLDING: Yes. Where a need for immediate action by government personnel makes obtaining a search warrant impractical, those exigent circumstances can justify a warrantless entry.⁵⁴³ The need to assist persons who are seriously injured or threatened with such injury constitute exigent circumstances.⁵⁴⁴ This exception to the warrant requirement also permits officers to ensure the safety of animals exposed to dangerous exigent circumstances.⁵⁴⁵

The circumstances described to Officer Matos would have led a reasonable officer to believe that that dogs inside the home were in danger. Will told Matos that ammonia fumes made it difficult to breathe, some dogs did not have adequate food or water, and the dogs needed immediate veterinary attention. Matos verified Will's account because he could smell the ammonia fumes. It is material if Matos overestimated the danger because exigent circumstances permits an officer to respond to a potential emergency.⁵⁴⁶ Exigent Circumstances also justifies the seizure of these animals.⁵⁴⁷

As qualified immunity was properly granted, the Sixth Circuit affirmed the district court.

Korthals v. County of Huron, 797 Fed.Appx. 967 (6th Cir. 2020) – F

FACTS: Huron County Deputy Sheriff Bradley Strozeski arrested Tammy Korthals for driving under the influence of alcohol. Korthals's intoxication was so severe that he took her directly to the hospital and, though the hospital cleared her, she still had evident difficulty walking or maintaining her balance. Despite this difficulty, when they arrived at the jail, Deputy Strozeski left Korthals's hands cuffed behind her back as he led her from the car, down a hallway, and up two stairs. This created a risk that she could stumble and, being unable to use her hands to protect herself, suffer a serious injury. Deputy Strozeski could have reduced that risk by walking behind or alongside Korthals, watching her carefully, and holding onto her for physical assistance or support. He did none of these and was atop the stairs, about six feet in front of her, when she lost her balance, fell backward from the second step, and hit her head on the floor, suffering severe injuries.

⁵⁴³ United Pet Supply, Inc., v. City of Chattanooga, 768 F.3d 464, 490 (6th Cir. 2014).

⁵⁴⁴ Kovacic v. Cuyahoga Cty. Dep't of Children and Family Servs., 724 F.3d 687, 695 (6th Cir. 2013).

⁵⁴⁵ See United Pet Supply, 768 F.3d at 490.

⁵⁴⁶ United States v. Brown, 449 F.3d 741, 749-50 (6th Cir. 2006).

⁵⁴⁷ United Pet Supply, 768 F.3d at 490.

Korthals sued, pursuant to 42 U.S.C. § 1983, claiming that Deputy Strozeski committed a constitutional violation when he allowed her to fall on the stairs and that Huron County's failure to properly train its officers or implement a policy for handling impaired inmates subjected it to municipal liability for that same violation. The district court denied qualified immunity for Deputy Strozeski. This appeal followed.

ISSUE: Does an intoxicated arrestee have a clearly established right to physical assistance or support from an officer to prevent from tripping over stairs with in custody?

HOLDING: No. Korthals's contention is that Deputy Strozeski violated her constitutional right to be protected from a substantial risk of serious harm because he failed to walk behind or alongside her, failed to watch her carefully for a stumble or fall, and failed to hold her or provide physical support when she attempted to mount the stairs, drunk and physically wobbly. There is no authority in the Sixth Circuit that would have placed an officer on notice that such assistance was constitutionally required. Furthermore, while this conduct may constitute negligence, it was not deliberate indifference as deliberate indifference entails something more than negligence. Deliberate indifference means the official actually recognized and then disregarded the risk.⁵⁴⁸

The Sixth Circuit reversed the district court and remanded for entry of order granting Strozeski qualified immunity.

Machan v. Olney, 958 F.3d 1212 – F

FACTS: In October 2016, T.R., then in the seventh grade, sought out a school counselor with whom she had met in the past. The counselor was not available, so T.R. instead met with the school principal, Latonya Gill-Williams. T.R. told Gill-Williams that she had been thinking about suicide for the past month, and that "she sees things at home like guns and knives that makes [sic] her want to hurt herself." Gill-Williams called SRO Shawn Olney, who arrived at Gill-Williams's office a few minutes later. Gill-Williams then told Olney what T.R. had told her. Olney called Machan, T.R.'s father, who was at work about 90 minutes away, and told him that T.R. "was being suicidal" and that Olney planned to take her to the hospital for an evaluation. Machan objected and told Olney to keep T.R. at the school until he got there.

Olney took T.R. to the hospital anyway. A video from a police officer's body camera depicts much of what happened there. Jennifer Parker, an emergency-room nurse, conducted a mental-health assessment of T.R. and concluded that T.R. needed treatment. Although T.R. did not appear intoxicated or disoriented, the attending physician, Dr. Gerald Friedman, ordered a blood draw as part of the hospital's standard procedure for a mental evaluation. T.R. resisted the blood draw, which tested negative for drugs. Dr. Friedman and other medical staff then talked to T.R. about her suicidal thoughts. Eventually Machan arrived and renewed his objections to T.R.'s presence at the hospital. After considerable discussion with Machan, the hospital's medical staff released

⁵⁴⁸ Farmer v. Brennan, 511 U.S. 825, 835.

T.R. on condition that Machan take her to a nearby mental-health center. Machan then took T.R. there, where they stayed for about 45 minutes before going home.

Machan thereafter sued, claiming among other things that Olney violated T.R.'s constitutional rights and his own, as her father, when Olney took T.R. to the hospital over his objection and by authorizing the blood draw without his consent. Olney moved for summary judgment, which the district court denied on the ground that Olney was not entitled to qualified immunity for her actions. Olney appealed.

ISSUE: Does an SRO violate the Fourth Amendment by taking a student to a hospital for a mental health evaluation based upon probable cause that the student may be a danger to herself?

HOLDING: No. "The Fourth Amendment requires an official seizing and detaining a person for a psychiatric evaluation to have probable cause to believe that the person is dangerous to himself or others."⁵⁴⁹ "A showing of probable cause in the mental health seizure context requires only a probability or substantial chance of dangerous behavior, not an actual showing of such behavior."⁵⁵⁰

Here, Olney heard that T.R. herself came to Gill-Williams to say that she had been thinking about suicide, that T.R. had been having suicidal thoughts for about a month, and that she worried about hurting herself with the guns and kitchen knives in her home. Those facts provided Olney with ample grounds to think that T.R. posed a danger to herself, and thus provided probable cause for Olney to take T.R. into protective custody for a mental evaluation. And where the person is suicidal, the mental evaluation can reasonably include a determination whether the person has already acted upon her suicidal thoughts; which means the officer can authorize a blood draw as part of that evaluation.

The Sixth Circuit held that Olney did not violate the Fourth Amendment when she took T.R. to the hospital and authorized the blood draw. Accordingly, Olney was entitled to qualified immunity.

The Sixth Circuit reversed the district court and remanded with instructions to enter judgment in Olney's favor.

Nelson v. City of Battle Creek, Michigan, 802 Fed. Appx. 983 (6th Cir. 2020) – F

FACTS: In November 2013, City of Battle Creek police officer Esteban Rivera responded to reports of an armed man outside the Drive-Thru Party Store. In the parking lot, Rivera encountered a teenage boy, N.K., who fit the report's description. Rivera got out of his patrol car and shouted, "let me see your hands." Rivera drew his firearm. In a span of two seconds, three undisputed things happened: (1) N.K. pulled a black BB handgun—altered to resemble a real

⁵⁴⁹ Monday v. Oullette, 118 F.3d 1099, 1102 (6th Cir. 1997).

⁵⁵⁰ Ziegler v. Aukerman, 512 F.3d 777, 783 (6th Cir. 2008)

handgun—out of his waistband; (2) N.K. tossed it aside and raised his hands; and (3) Rivera shot N.K. in the shoulder.

N.K., by and through his mother Patricia Nelson, sued Rivera under § 1983, claiming that Rivera violated his Fourth Amendment rights by using excessive force. In defense, Rivera raised qualified immunity. The district court denied qualified immunity, finding that factual disputes precluded summary judgment. An appeal followed:

ISSUE: Is the law clearly established that every reasonable officer would know that shooting a juvenile in the shoulder who pulls what appears to be a real handgun out of a waistband, tosses the gun aside and raises his hands constitutes excessive and unconstitutional use of force?

HOLDING: No. “Police officers are immune from civil liability, unless, in the course of performing their discretionary functions, they violate the plaintiff’s clearly established constitutional rights.”⁵⁵¹ Qualified immunity allows police officers “breathing room to make reasonable but mistaken judgments and protects all but the plainly incompetent or those who knowingly violate the law.”⁵⁵² To violate a plaintiff’s clearly established right, an officer’s conduct must be such that, at the time of the allegedly-violative conduct, the contours of that right were sufficiently defined that every “reasonable official would have understood that what he is doing violates that right.”⁵⁵³

Courts determine whether qualified immunity applies in a given case: (1) whether the facts, viewed in the light most favorable to the plaintiff, show that the officer’s conduct violated a constitutional right; and (2) whether that right was clearly established at the time of the challenged conduct.⁵⁵⁴

In cases involving the use of excessive force, the qualified immunity question “should be analyzed under the Fourth Amendment and its ‘reasonableness’ standard.”⁵⁵⁵ This court has said that an officer’s seizure by use of deadly force is permissible “only in rare instances.”⁵⁵⁶ Qualified immunity should nonetheless apply “if officers of reasonable competence could disagree on the issue.”⁵⁵⁷

There is no identifiable case law where an officer under sufficiently similar circumstances was held to have violated the Fourth Amendment. As it was not clearly established that every reasonable officer would know that shooting a juvenile in the shoulder who pulls what appears

⁵⁵¹ Mullins v. Cyraneck, 805 F.3d 760, 765 (6th Cir. 2015) (citing Messerschmidt v. Millender, 565 U.S. 535, 546, 132 S.Ct. 1235, 182 L.Ed.2d 47 (2012)).

⁵⁵² Stanton v. Sims, 571 U.S. 3, 6, 134 S.Ct. 3, 187 L.Ed.2d 341 (2013).

⁵⁵³ Anderson v. Creighton, 483 U.S. 635, 640, 107 S.Ct. 3034, 97 L.Ed.2d 523 (1987).

⁵⁵⁴ Burgess v. Fischer, 735 F.3d 462 (6th Cir. 2013).

⁵⁵⁵ Graham v. Connor, 490 U.S. 386, 395, 109 S.Ct. 1865, 104 L.Ed.2d 443 (1989); Jones v. City of Cincinnati, 521 F.3d 555, 559 (6th Cir. 2008).

⁵⁵⁶ Sample v. Bailey, 409 F.3d 689, 697 (6th Cir. 2005).

⁵⁵⁷ Malley v. Briggs, 475 U.S. 335, 341, 106 S.Ct. 1092, 89 L.Ed.2d 271 (1986).

to be a real handgun out of a waistband, tosses the gun aside and raises his hands constitutes excessive and unconstitutional use of force, qualified immunity should have been granted.

In a 2-1 decision, the Sixth Circuit reversed the district court and remanded for entry of summary judgment based on qualified immunity.

Newell v. Huepenbecker, ---- Fed. Appx. ----, 2020 WL 2843596 (6th Cir. 2020) – NF

FACTS: On April 5, 2016, Huepenbecker, a special deputy sheriff for Henry County, and Newell were receiving firearms training at a range operated by the City of Napoleon, Ohio. The training was open to the public. During a break, Huepenbecker received permission to clean his weapon. Shortly after cleaning the gun, he set it on a picnic table near where other trainees were relaxing. It fired and the bullet hit Newell in the back. The shot damaged Newell’s liver, cracked a vertebra, and caused the loss of his spleen.

Newell filed a Section 1983 suit in federal court naming Huepenbecker, Henry County, its Commissioners, and the City of Napoleon as defendants. The complaint included a second cause of action under Ohio law for negligence.

With respect to the federal cause of action, the district court granted summary judgment to defendants Huepenbecker and the County while declining to exercise jurisdiction over the state-law claim. This appeal followed.

ISSUE: In order for a claim under 42 U.S.C. § 1983 to be viable, must the official defendant have acted under color of state law?

HOLDING: Yes. Liability arises under 42 U.S.C. § 1983 only if the defendant violated the plaintiff’s federal rights while acting “under color of state law.”⁵⁵⁸ “[A]cting under color of state law requires that the defendant ... have exercised the power ‘possessed by virtue of state law and made possible only because the wrongdoer is clothed with the authority of state law.’”⁵⁵⁹

Huepenbecker clearly did not shoot Newell under color of state law. He did not injure Newell by abusing power he possessed as a volunteer sheriff’s deputy, and he neither acted in an official capacity nor exercised official authority. The law-enforcement course was open to the public; the County did not authorize Huepenbecker to carry a gun; and the gun he used was not County-issued. Virtually anyone, County volunteer or not, could have discharged the bullet that struck Newell. Accordingly, neither Hupenbecker nor the County are liable under Section 1983.

The Sixth Circuit affirmed the grant of summary judgment to Huepenbecker and the County and stated that the state law tort of negligence may be the best avenue for recovery of damages.

Sanford v. City of Detroit, Michigan, ---- Fed. Appx. ----, 2020 WL 2768859 (6th Cir. 2020) – NF

⁵⁵⁸ West v. Atkins, 487 U.S. 42, 48, 108 S.Ct. 2250, 101 L.Ed.2d 40 (1988).

⁵⁵⁹ Redding v. St. Eward, 241 F.3d 530, 533 (6th Cir. 2001).

FACTS: On the night of September 17, 2007, a hitman, Vincent Smothers, and his accomplice fatally shot four people inside a home on Runyon Street in Detroit. Within an hour, Detroit police officers, including Michael Russell and James Tolbert, responded to the crime scene.

Shortly after midnight, Russell was canvassing the neighborhood when he met Davontae Sanford, then 14 years-old, walking on the street. Russell began questioning Sanford, who denied seeing anything unusual. Russell and Tolbert then walked Sanford home and received permission from his grandmother to continue questioning him. The officers put Sanford in a police car, bought him a cheeseburger at a local restaurant, and asked Sanford about crime in the neighborhood. Sanford named some local drug dealers, but said nothing about the Runyon Street murders. Russell then drove Sanford to the police station. Beginning around 4 a.m., Russell questioned Sanford for several more hours, but Sanford did not confess to the murder. Later that morning, the officers took him home.

That night, Russell picked up Sanford to question him again. During the drive to the station, Russell accused Sanford of lying during the first interview, and told him—falsely—that his shoes had tested positive for blood. At the station, Russell showed Sanford photographs of the victims at the crime scene, saying, “This is not a game. These people lost their lives.” Russell again questioned Sanford for hours, this time sharing details about the shooting. Eventually Tolbert joined them and sketched the crime scene’s layout in detail. Then Tolbert told Sanford to draw the location of the bodies on the sketch. Sanford did so, based on the crime-scene photographs Russell had shown him earlier. At the end of the interview, Russell drafted a false confession and Sanford signed it. The officers then arrested Sanford.

Russell and Tolbert thereafter told prosecutors that Sanford had drafted the confession and drawn the sketch on his own. These two documents were critical evidence in the decision to charge Sanford and later, during his 2008 bench trial. At trial, Russell testified that Sanford had confessed and drawn the sketch. Then Sanford pled guilty.

Sanford was thereafter sentenced to 37 to 90 years’ imprisonment. But just two weeks later, during a break in a police interrogation, Smothers told Russell that he had committed the Runyon Street murders. Yet neither Russell nor Tolbert investigated Smothers further.

In 2015, the Michigan State Police began investigating potential officer misconduct during the Runyon Street investigation. Tolbert eventually admitted that he fabricated the crime-scene sketch attributed to Sanford. As a result of that investigation—after Sanford had already served nine years in prison—the prosecutor’s office and Sanford’s counsel stipulated to the dismissal of the charges against him.

Sanford thereafter brought this suit under 42 U.S.C. § 1983, claiming among other things that Russell and Tolbert had fabricated evidence, coerced his confession, and maliciously prosecuted him. The officers moved for summary judgment, which the district court denied on the ground that they were not entitled to qualified immunity for their actions. This appeal followed.

- ISSUES:**
1. May law enforcement officers knowingly create false evidence to obtain a conviction?
 2. Is interrogating an adolescent for many hours, late at night, without an attorney present, two nights in a row, coercive?

HOLDING: 1. No. The Fourteenth Amendment bars an officer from knowingly creating false evidence to obtain a conviction.⁵⁶⁰ Here, as the district court correctly held, a jury could find precisely that. Specifically, the evidence would allow a jury to find that Tolbert fabricated a misleading sketch, that Russell drafted a false confession, and that together they attributed both pieces of evidence to Sanford when they gave evidence for the case to the prosecutor. The officers therefore are not entitled to qualified immunity on this claim.

2. The Fifth and Fourteenth Amendments bar the use of confessions that police obtain by objectively coercive means.⁵⁶¹ A “broken or illusory” promise of leniency may be objectively coercive.⁵⁶² The same is true for interrogating an adolescent for many hours, late at night, without an attorney present.⁵⁶³ Thus, qualified immunity was properly denied.

Here, a jury could find that Russell and Tolbert questioned a 14-year-old boy in the middle of the night, for hours at a time, without a parent or attorney present; that they did so for two nights in a row; that Russell falsely told Sanford that officers had found blood on his shoes; and that Russell falsely promised that Sanford could go to school the next day if he hurried up and confessed. The law made clear enough that these tactics, under these circumstances, were likely coercive.⁵⁶⁴ Qualified immunity was not available on this claim.

Moreover, the Sixth Circuit found that qualified immunity was not available on the malicious prosecution claim. Here, for the reasons stated by the district court, a jury could find that Russell and Tolbert fabricated critical evidence, which they passed off to prosecutors as authentic, which in turn caused Sanford to be imprisoned for nine years. Russell and Tolbert cannot seriously contend that a reasonable police officer would not know that these actions would violate Sanford’s constitutional rights. The prototypical malicious prosecution case involves an official who fabricates evidence that leads to a wrongful arrest or indictment of an innocent person.⁵⁶⁵

The Sixth Circuit affirmed the district court’s decision to deny qualified immunity for the officers.

Seales v. City of Detroit, Michigan, 959 F.3d 235 (6th Cir. 2020) – NF

⁵⁶⁰ See Jackson v. City of Cleveland, 925 F.3d 793, 825–26 (6th Cir. 2019); Stemler v. City of Florence, 126 F.3d 856, 872 (6th Cir. 1997).

⁵⁶¹ See Ledbetter v. Edwards, 35 F.3d 1062, 1067 (6th Cir. 1994) (collecting cases).

⁵⁶² See United States v. Johnson, 351 F.3d 254, 262 (6th Cir. 2003).

⁵⁶³ See, e.g., Gallegos v. Colorado, 370 U.S. 49, 54–56, 82 S.Ct. 1209, 8 L.Ed.2d 325 (1962); Haley v. Ohio, 332 U.S. 596, 599, 68 S.Ct. 302, 92 L.Ed. 224 (1948) (plurality opinion).

⁵⁶⁴ See Harris v. Bornhorst, 513 F.3d 503, 512 (6th Cir. 2008).

⁵⁶⁵ Mills v. Barnard, 869 F.3d 473, 480 (6th Cir. 2017).

FACTS: Detroit Police Officer Zberkot with the Detroit Fugitive Apprehension Team was asked to arrest Roderick Siner, who goes by Marvin Seales, on a fugitive arrest warrant. Zberkot, instead, arrested Marvin Seales at his place of employment. Seales insisted that “[y]ou got the wrong guy.” Seales told Officer Zberkot “like, 20 times” that he was innocent. He also asked Officer Zberkot to check his wallet because it contained identification showing he was not their man. Officer Zberkot “kind of chuckled” at this idea, reviewed Seales’ wallet, and said Seales’ identification could be “fake or phony.”

Nevertheless, officers handcuffed Seales and drove him to a Detroit precinct. Zberkot prepared the arrest paperwork, then other officers took possession of Seales. Those officers did not fingerprint Seales, search him, take his mugshot, or interrogate him. Seales spent two nights in a holding cell. Zberkot’s total involvement in this matter was approximately two hours.

The case was then called in court for arraignment. Because the court did not have records on a Marvin Seales, he was sent to the “end of the line.” Ultimately, Seales stated that he was Roderick Siner because “he wasn’t going to get past that point if I didn’t.” At that point, Seales was transferred to the Wayne County Jail where he stayed two weeks. He filed a grievance with jail personnel concerning the mistaken identity. He also signed a medical intake form as “R. Siner” because that was the name he was booked under and he was afraid that he would not receive medical attention if needed. Approximately two weeks after his arrest, Seales was released after the victim of the crime told a prosecutor during a preliminary examination that Seales was not the man that shot him.

In April 2012, Seales filed a lawsuit under 42 U.S.C. § 1983 for unlawful arrest and unlawful detention under the Fourth and Fourteenth Amendments against Officer Zberkot and the City of Detroit. The City of Detroit then filed for bankruptcy, staying the case. In 2015, the district court granted summary judgment for the City of Detroit. The district court denied qualified immunity for Zberkot, and a jury ultimately awarded Seales \$3.5 million on the unlawful arrest and unlawful detention claims. Zberkot appealed.

ISSUE: Is a police officer who possessed probable cause to arrest an individual whose name was very similar to an alias used by an individual named on an arrest warrant, and whose interaction with the individual lasted for just over two hours, liable for unlawfully detaining the individual?

HOLDING: No. If the State detains a person “in the face of repeated protests of innocence,” the detention may “deprive the accused of liberty ... without due process of law” depending “on what procedures the State affords defendants following arrest and prior to [a] trial.”⁵⁶⁶ Not all wrongful detentions violate due process, however. “The Constitution does not guarantee that only the guilty will be arrested.”⁵⁶⁷ The reasonable division of functions between law enforcement officers, committing magistrates, and judicial officers” means that officers are not

⁵⁶⁶ Baker v. McCollan, 443 U.S. 137, 145, 99 S.Ct. 2689, 61 L.Ed.2d 433 (1979).

⁵⁶⁷ Id.

obliged to investigate each claim of innocence during the short period they detain suspects.⁵⁶⁸ An officer maintaining custody of the accused is not required to perform an error-free investigation of mistaken identity claims.⁵⁶⁹ A plaintiff must prove that his jailers “acted with something akin to deliberate indifference in failing to ascertain” that the person in custody is not the person wanted on the warrant.⁵⁷⁰

In this case, Officer Zberkot, as an arresting officer, had little more to do with Seales' detention. That's when the rest of the criminal process took over. He did not fingerprint Seales, interrogate him, or for that matter stay at the prison where he could hear complaints about his innocence. He spent less than three hours on the case, nearly all of it involved in doing the one thing our prior panel made clear he was not liable for: initially detaining Seales through execution of the arrest warrant. Moreover, Seales had the opportunity to speak with a judge within forty-eight hours of his initial arrest and decided to say that his name was “Roderick Siner.” He went down the same road early in the jail process by saying, again, that he was Rodrick Siner in filling out the paperwork. Whatever his explanations for offering this alias, they cannot be laid at the feet of Officer Zberkot. The officer had nothing to do with the sequencing of cases in court that day, and he had nothing to do with providing medical care to detainees. None of this remotely suggests that Officer Zberkot denied Seales due process by unlawfully detaining him under the Fourteenth Amendment.

The Sixth Circuit held that Seales sued the wrong person. Officer Zberkot merely helped to arrest Seales and initiated the booking procedures, all legitimately under the Fourth Amendment. He was not Seales' jailer. Seales admits that other officers at the precinct had the responsibility to maintain custody over him. Seales offers no explanation why Zberkot, as opposed to the jailers, bears responsibility for the fifteen-day detention.

As no deliberate indifference was present concerning Zberkot's actions in this matter (although the Sixth Circuit did note that Zberkot could have been more respectful of Seales instead of laughing at the idea that Seales' identification would have exculpated him), the Sixth Circuit reversed the district court's decision.

Zuress v. City of Newark, OH, ---- Fed. Appx. ----, 2020 WL 2768861 (6th Cir. 2020) – NF

FACTS: City of Newark police were surveilling a suspected drug house in Newark, Ohio. At the same time, they were looking for Jeff Grooms—plaintiff Zuress's boyfriend and the brother of a resident of that house—because he was the subject of an outstanding warrant for unpaid child support. The police department had also told Officer Burris that some detectives wanted to talk to Grooms about an armed robbery. After a confidential informant told Burris that Grooms had been staying at his sister's residence, police also monitored it in order to detain Grooms.

⁵⁶⁸ Id.

⁵⁶⁹ Id.

⁵⁷⁰ Gray v. Cuyahoga Cty. Sheriff's Dep't, 150 F.3d 579, 583 (6th Cir. 1998).

On the day of the incident at issue, Burris was patrolling with his police dog—Ike—and Officer April Hunt. While patrolling, Burris received a tip from a confidential informant that Grooms had arrived at his sister's residence in a tan Jeep Renegade and had entered the house. Burris, Ike, and Hunt then drove to the residence to surveil it. There, Burris saw the Jeep leave the house and followed it. After the Jeep committed a traffic infraction, Officer Hunt turned on the cruiser's emergency lights. The Jeep slowed down, but it passed multiple areas where it could have safely stopped. Once the vehicle finally stopped, Grooms abruptly opened the driver's side door and fled. While Grooms was fleeing, Burris got out of the police cruiser and deployed Ike. However, Burris and Ike were unable to track Grooms because they did not have their tracking equipment.

About nineteen seconds after the Jeep stopped, and before Burris and Ike returned, the Jeep drove away without authorization. Thereafter, once Burris and Ike returned, they drove with Officer Hunt after the Jeep.

While the Jeep was fleeing the scene, another officer—Jon Purtee—intercepted it and pulled it over. As Burris, Hunt, and Ike pulled up behind Purtee's cruiser, Purtee assumed a shooting stance and used his driver's side door as cover. Purtee commanded the driver, plaintiff Zuess, to exit her vehicle and when she did she was facing the officers. For the safety of the officers, Purtee ordered Zuess to turn around. But Zuess did not comply; Purtee directed Zuess to "face away" five times before she turned around. Zuess's noncompliance continued as she turned back around and faced the officers. Further, she did not follow Purtee's command to walk backwards towards him. Instead, Zuess argued with Purtee, waved her hands around, and reached down towards her waistband, adjusting her shirt or pants.

Purtee warned Zuess that he would deploy the dog if she did not comply. One or two seconds after Purtee gave that warning, Burris released Ike, who advanced toward Zuess and her car. As he was trained to do, Ike initially ignored Zuess and entered the car to check for other occupants. While Ike was checking the car, Burris approached Zuess. At roughly the same time that Burris made physical contact with Zuess, Ike emerged from the car, bit down on Zuess's left arm, and held his bite to assist with the arrest. Then Zuess, Burris, and Ike all fell to the ground.

While Ike and Burris gained control of Zuess, other officers advanced; Burris directed them to check the car for other occupants. Once the car was cleared, another officer took Burris's place on top of Zuess to secure her while Burris moved over to Ike to get him to release his bite. After struggling with Ike for about twenty-four seconds, Burris got Ike to release his bite. Burris then moved Ike away from Zuess.

Zuess brought this action against Officer Burris pursuant to 42 U.S.C. § 1983. She alleged that Burris violated her Fourth Amendment right to be free of unreasonable government seizures when he deployed the police dog against her and allowed the dog to continue to bite her after she had been subdued. Zuess claimed excessive force in both the initial deployment of the dog and its continued bite. Officer Burris moved for summary judgment, invoking qualified immunity.

The district court granted summary judgment in Burris’s favor and entered judgment. Zuess has timely appealed.

ISSUE: May the deployment of a canine unit to assist with an arrest during a traffic stop objectively reasonable?

HOLDING: Yes. “An excessive-force claim turns on whether an officer’s actions were ‘objectively reasonable’ given the circumstances he confronted.”⁵⁷¹ This is an objective inquiry. *Id.* at 456. “[W]e ask how a reasonable officer would have seen things in the heat of the moment, not in hindsight.”⁵⁷² To answer that question, our inquiry includes considering the following factors from Graham v. Connor (the “Graham factors”): “the severity of the crime at issue, whether the suspect poses an immediate threat to the safety of the officers or others, and whether he is actively resisting arrest or attempting to evade arrest by flight.”⁵⁷³ The “overarching determination” we must make, however, “is whether the ‘totality of the circumstances’ justified the degree of force an officer used.”⁵⁷⁴

The Sixth Circuit determined that deployment of Ike in this situation was reasonable after examining the Graham factors and the totality of the circumstances. First, plaintiff had just traveled from a known drug house. Second, plaintiff’s traveling companion—Grooms—was under surveillance because there was an outstanding warrant out on him (albeit for unpaid child support). Additionally, Grooms was reportedly a drug addict, and detectives wanted to speak with him about an armed robbery. Third, plaintiff’s traveling companion had abruptly fled on foot from the first traffic stop and plaintiff herself had fled the scene in her vehicle—without authorization—after only about nineteen seconds. Fourth, at the second traffic stop, plaintiff was an unknown quantity and acted unpredictably. She was standing right next to the driver’s seat of her vehicle with the door open. That meant she could have quickly attempted to operate the vehicle again or reached items (such as weapons) inside the vehicle. Plaintiff asserts that she was unarmed, but a reasonable officer would not have known that at the time. Fifth, it was unknown whether more people were in the vehicle and, if so, whether they were armed. Finally, and perhaps most importantly, plaintiff was not complying with the officers’ commands; she was arguing, waving her hands around, turning to face the officers, and even reached for her waistband where a weapon could have been.

The Sixth Circuit also found Zuess’s conduct constituted active resistance. “Active resistance includes ‘physically struggling with, threatening, or disobeying officers.’”⁵⁷⁵ Between exiting her vehicle at the second traffic stop and the deployment of the canine, plaintiff did not have a physical struggle with the officers, and she did not orally threaten them. During that time,

⁵⁷¹ Shanaberg v. Licking Cty., 936 F.3d 453, 455–56 (6th Cir. 2019) (quoting Graham v. Connor, 490 U.S. 386, 397, 109 S.Ct. 1865, 104 L.Ed.2d 443 (1989)).

⁵⁷² *Id.*

⁵⁷³ 490 U.S. at 396, 109 S.Ct. 1865.

⁵⁷⁴ Shanaberg, 936 F.3d at 456 (citation omitted).

⁵⁷⁵ Rudlaff v. Gillispie, 791 F.3d 638, 641 (6th Cir. 2015).

however, plaintiff argued with the officers and repeatedly failed to comply with their commands. We conclude that plaintiff's repeated non-compliance—coupled with her arguing with the officers—put her conduct just over the line into the active-resistance category.

Accordingly, the Sixth Circuit held that Zuess failed to demonstrate that the officers violated a statutory or constitutional right. Therefore, qualified immunity was properly granted.

UNITED STATES SUPREME COURT

Kansas v. Glover, 589 U.S. ----, ---- S.Ct. -----, 2020 WL 1668283 (2020)

FACTS: While on routine patrol, Douglas County (Kansas) Deputy Sheriff Mark Mehrer observed a 1995 Chevrolet 1500 pickup truck with Kansas plate 295ATJ being operated by a male subject. Deputy Mehrer ran the license plate through the Kansas Department of Revenue's file service. The registration check indicated that the plate was assigned to a 1995 Chevrolet 1500 pickup truck, registered to Charles Glover, Jr. Deputy Mehrer was further advised that Glover's driver's license was revoked. Based solely upon this information and believing that the male operator was Glover, Deputy Mehrer executed a traffic stop. During the stop, Deputy Mehrer identified the truck's driver as Charles Glover, Jr. Glover was charged with driving as a habitual violator. Glover filed a motion to suppress all evidence seized during the stop. The district court granted Glover's motion to suppress. The Kansas Supreme Court affirmed the district court, holding that Deputy Mehrer was unable to articulate reasonable suspicion of criminal activity to justify this stop because his belief that Glover was operating the vehicle was "only a hunch." The United States Supreme Court granted certiorari.

ISSUE: For purposes of an investigative stop under the Fourth Amendment, is it reasonable for an officer to suspect that the registered owner of a vehicle is the one driving the vehicle absent any information to the contrary?

HOLDING: **Yes. When a police officer lacks information negating an inference that a person driving is the vehicle's owner, an investigative traffic stop made after running the vehicle's license plate and learning that the registered owner's driver's license has been revoked is reasonable under the Fourth Amendment.**

RATIONALE: The ultimate touchstone of the Fourth Amendment is reasonableness.⁵⁷⁶ The Fourth Amendment permits an officer to initiate a brief investigative stop when the officer has "a particularized and objective basis for suspecting the particular person stopped of criminal activity"⁵⁷⁷ that is considerably less than either preponderance of the evidence or probable

⁵⁷⁶ Heien v. North Carolina, 574 U.S. 54, 60, 135 S.Ct. 530, 190 L.Ed.2d 475 (2014)(quoting Riley v. California, 573 U.S. 373, 381, 134 S.Ct. 2473, 189 L.Ed.2d 430 (2014)).

⁵⁷⁷ United States v. Cortez, 449 U.S. 411, 417-418, 101 S.Ct. 690, 66 L.Ed.2d 621 (1981); see also Terry v. Ohio, 392 U.S. 1, 21-22, 88 S.Ct. 1868, 20 L.Ed.2d 889 (1968).

cause.⁵⁷⁸ Reasonable suspicion does not have to be perfect.⁵⁷⁹ In articulating reasonable suspicion, officers are also permitted to make “commonsense judgments and inferences about human behavior.”⁵⁸⁰

States have a vital interest in ensuring that only those qualified to do so are permitted to operate motor vehicles and that licensing, registration and vehicle inspection requirements are being observed.⁵⁸¹ Further, research has proven that drivers with revoked licenses frequently continue to drive and therefore pose safety risks to other motorists and pedestrians. Specifically, the United States Supreme Court cited studies which found that 75% of suspended or revoked drivers continue to drive, and 19% of traffic fatalities involve an invalid operator’s license.

In this case, Deputy Mehrer observed a male suspect operate a 1995 Chevrolet 1500 pickup truck with Kansas plate 295ATJ. The deputy learned from running this license plate that the truck’s registered owner, Glover, had a revoked license. From these facts, Deputy Mehrer drew the commonsense inference that Glover was likely the driver of the vehicle, which provided more than reasonable suspicion to initiate the stop. Combining database information and commonsense judgments in this context is fully consonant with Fourth Amendment precedent.

The United States Supreme Court did stress that all seizures must be justified at their inception, taking the totality of the circumstances into account. Accordingly, the presence of additional facts may dispel reasonable suspicion. For example, if the registered owner of the vehicle is identified as a male in his mid-sixties, but the officer observed that the driver is a female in her mid-twenties, the totality of the circumstances would not justify a stop absent some other violation of the law.

⁵⁷⁸ Prado Navarette v. California, 572 U.S. 393, 397, 134 S.Ct. 1683, 188 L.Ed.2d 680 (2014) (quotation altered); United States v. Sokolow, 490 U.S. 1, 7, 109 S.Ct. 1581, 104 L.Ed.2d 1 (1989).

⁵⁷⁹ Heien, 574 U.S. at 60.

⁵⁸⁰ Illinois v. Wardlow, 528 U.S. 119, 125, 120 S.Ct. 673, 145 L.Ed.2d 570 (2000).

⁵⁸¹ Delaware v. Prouse, 440 U.S. 648, 658, 99 S.Ct. 1391, 59 L.Ed.2d 660 (1979).

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