FIRST QUARTER 2019

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KENTUCKY

PENAL CODE

PENAL CODE – KRS 506 - INCHOATE

Reyes v. Com., 2019 WL 413611 (Ky. App. 2019)

FACTS: At about 2 a.m. on November 16, 2016, Officer Fehler (Independence PD) responded to a burglary at a Sprint store. A GPS tracker was taken from the store. Kenton County PD followed the signal from the stolen GPS device. Officer Fehler responded to a location where Officer Snipes had stopped a truck based on the GPS signal. Officer Fehler could see a box containing cell phones and electronic devices behind the front seat in plain view, along with other items in the bed. Reyes was hiding in the cab.

Reyes, Torres and Legon (Torres and Legon were in the truck) were indicted on Burglary, Theft and related charges. Torres absconded and Legon entered a plea in exchange for testifying against the other two. Legon claimed Reyes was his older brother and that the three of them went to the store. It was undisputed that Reyes did not enter the store, but instead waited in the truck while Legon and Torres committed the burglary.

Reyes was convicted of complicity and appealed.

ISSUE: Is assisting someone else to commit a crime complicity?

HOLDING: Yes.

DISCUSSION: Burglary in the Third Degree requires actual entry into a building. However, under KRS 502.020, complicity involves aiding another in committing the offense. Reyes acted as a lookout while the other two entered the store and committed the crime. However, the Court noted the three went to an unfamiliar area (Northern Kentucky) to commit a crime at an obviously closed store, and Reyes made no attempt to flee the scene or contact the police during the crime. Further, Reyes' intent was to assist the others in committing a theft and that they caused damage to the store in the process.

The Court held that complicity charges were appropriate and upheld his convictions.

PENAL CODE – KRS 506 - RECKLESS HOMICIDE

Lord / Futrell v. Com., 2019 WL 413613 (Ky. App. 2019)

FACTS: On July 16, 2011, Lord and her boyfriend Futtrell transported Lord's toddler son to the Wayne County Hospital ER due to the child not breathing. The child was airlifted to the University of Kentucky Medical Center, where he died on July 26, 2011. Both Lord and Futrell, who lived together, were convicted of wanton murder. That conviction was overturned and the case remanded for retrial. In the second trial, witnesses testified about arguments between the couple several weeks earlier and how they removed the child from the situation temporarily to allow the couple to calm down. When one of the witnesses saw the child in the ER, the month before the child's fatal injuries, she testified as to injuries the child did not have just two days before. This witness also testified that Lord would slap and pinch the child for misbehavior. Other witnesses testified as to Lord's statements made in the ER that implicated Futrell.

Following the June, 2011, ER visit, the couple moved in with Futtrell's father. Futtrell's father testified that the child was fine on July 15, and that after Lord took a shower, she screamed that the child was not breathing. He rushed Lord, Futtrell and the child to the hospital with Futtrell doing CPR on the child on the way. Dr. Proudfoot, the ER doctor, testified as to the treatment he provided and that he was able to at least temporarily restore vital signs before the child was airlifted. He testified that during the treatment, he recovered what appeared to be gum from an ET tube used to intubate. Dr. Turner testified as to internal injuries sustained through trauma and that she saw no indication of choking. Lord denied that any bruises existed. Ultimately, the ME testified that the child died from blunt force trauma to the head and lack of oxygen to the brain. Another expert witness testified as to the severity and likely cause of the injuries. (The defense offered opposing testimony suggesting choking and suffocation as the primary cause of death.) The evidence presented indicated that only Lord and Futrell had the access necessary to have inflicted the injuries.

Lord was convicted of complicity to commit reckless homicide, with Futrell the primary. Both appealed, arguing they should have been given requested directed verdicts.

ISSUE: May a jury decide who is responsible for abuse of a child between two defendants?

HOLDING: Yes.

DISCUSSION: The Court examined KRS 507.050 and noted extensive evidence as to the child's injuries and likely cause. Further, the evidence indicated only Lord and Futtrell had direct access to the child and that Futrell was apparently alone with the child when the injuries occurred. Although the case against both defendants was circumstantial, the Court held it was appropriate for the jury to rule as it did. Although mere presence at a scene is not enough, other facts and circumstances may be considered for a conviction.

The Court upheld both convictions.

PENAL CODE – KRS 508 – ASSAULT

Litsey v. Com., 2019 WL 1167987 (Ky. 2019)

FACTS: On July 3, 2016, Officer Besednjak (Shepherdsville PD) ran the plate of the vehicle in front of him and discovered the registered owner (Litsey) had a suspended OL. The officer initiated a traffic stop, and the vehicle pulled over in a gas station parking lot. Additional officers arrived in support of the stop, and one took Litsey's keys and placed them on top of her vehicle. During that time, Officer Besednjak learned Litsey had additional felony warrants and he so informed the other officers.

Officer Besednjak walked back to Litsey's car to remove Litsey from it. Litsey claimed she needed to roll up her windows, but instead grabbed the keys from the top of the vehicle. As Officer Besednjak tried to get the keys away from Litsey and get her out of the vehicle, Litsey got the car started. At the time, the officer was partially inside the vehicle. Litsey took off at a high rate of speed, dragging the officer for a short distance. The officer fell from the vehicle and injured his back – Litsey also ran over his leg. He regained his feet and encouraged fellow officers to pursue, and he did so as well. The officers were unable to catch up with Litsey given the conditions. Litsey and her passenger, Lamb, drove at a high speed for several minutes, hid behind a building and turned off the lights. Litsey ultimately fled on foot.

Litsey was eventually apprehended at charged with Assault 1st, Wanton Endangerment 1st, fleeing police and related offenses. At trial, the officer testified as to his serious injuries, including the removal of a cervical disk as a result of hitting his back on the curb when he was thrown from the vehicle. Officer Besednjak was pursuing retirement disability as a result of his injuries at the time of the trial as he is was (and is) in chronic pain. Lamb testified that they were both highly impaired on drugs at the time, but that she was frightened during the altercation and tried to get Litsey to stop.

Litsey was convicted first-degree assault, wanton endangerment in the first degree, fleeing police, operating without a valid license, and being a PFO II. Litsey appealed.

ISSUE: Is wanton conduct sufficient for assault 1st, when it results in a serious injury?

HOLDING: Yes.

DISCUSSION: Litsey argued that she should have received a directed verdict on the assault and wanton endangerment charges. (The latter charge named Lamb as the victim.) With respect to wanton endangerment, the Court held it was reasonable to believe Litsey placed Lamb at serious risk by driving impaired at a high rate of speed, and having slept for several weeks (due to the drugs). Although her exact speed could not be determined, Litsey drove fast enough to evade police. Lamb begged her to stop and she refused.

With respect to the assault charge, Litsey claimed she was not aware of the danger her actions posted to Officer Besednjak. Clearly, by her own admission, she knew he was trying to wrest the keys out of his hand and the officer was partially inside the vehicle with her. Litsey admitted she just wanted to get away and was not thinking of any danger to him. Body camera footage clearly showed the situation as it occurred and the danger to the officer. The Court agreed that her wanton conduct was sufficient to prove the assault, and noted that "her actions resulted in serious physical injury to the officer who now has little to no prospect of returning to his duties as a police officer."

The Court upheld her convictions and her PFO status.

PENAL CODE – KRS 514 - THEFT

Saxton v. Com., 2019 WL 328679 (Ky. App. 2019)

FACTS: On October 7, 2014, Dickey was headed to a friend's house when he received a phone call from Saxton. Saxton said he was on his way to meet Dickey. When Saxton appeared, Saxton had approximately a dozen men with him. Dickey began to argue with one of the men, Dunbar, and "thought he was being set up" because Saxton had not told him he wouldn't be alone. Dickey and Dunbar commenced to fight, and Dickey was struck in the back of the head and knocked to the ground. The group surrounded Dickey and "proceeded to stomp and kick him." Dickey tried to escape but his vehicle was gone. Belcher, Dickey's girlfriend, passed Dickey's vehicle speeding from the scene and recognized Saxton as the driver. She found Dickey injured and he was taken for treatment. Officer Webb (Mayfield PD) responded to take the report and put out an ATL (attempt to locate) on the vehicle and Saxton. Tennessee Highway Patrol found the vehicle and got it stopped with spike strips. The vehicle crashed. Saxton fled the vehicle but was found hiding nearby.

Saxton was charged with robbery, but the charge was amended to theft by unlawful taking. He was convicted and appealed.

ISSUE: Does theft require an indication of an intent to deprive someone of property?

HOLDING: Yes.

DISCUSSION: Saxton argued that the jury instruction did not include the value of the item taken (the SUV). There was insufficient evidence presented as to whether it was valued at over $10,000 but it certainly was valued at more than $500. The jury instruction agreed upon was a theft instruction without a value and the court agreed that was proper.

Dickey also argued there was no proof he actually intended to deprive Dickey of his vehicle. The Court looked to the recent case of Hall v. Com, in which a police cruiser was taken and then abandoned in a gully.[1] Dickey claimed he only intended to drive the SUV to a safe place and call police, and that he was forced to drive by another man. Belcher, however, testified he was alone in the SUV. The Court noted Saxton was found in Tennessee and that he only abandoned the vehicle when forced to do so. The Court distinguished this matter from Hall and held that Saxton clearly intended to deprive Dickey of his property.

Finally, the Court agreed it was error to show the jury photographs of Dickey's injuries, as Saxton was not being tried for robbery. It was, however, harmless error as Saxton admitted to driving away in the vehicle and he was not charged with injuring Dickey in any way.

The Court upheld his conviction.

PENAL CODE – KRS 524 - TAMPERING

Clark v. Com., 567 S.W.3d 565 (Ky. 2019)

FACTS: On the day in question, several individuals gather at JB Clark's home. JD Clark (the defendant and JB's son), Rowe, Clare (JD's sister and Rowe's girlfriend) and Goble were present. Discord arose and JB tried to choke Rowe. JD approached and shot and killed Rowe. Goble fled and called 911, and heard two more shotgun blasts as he ran. Clare indicated that "JD told her that if Rowe laid another hand on her, he was going to hurt Rowe." She witnessed JD shoot Rowe and also called 911, claiming that they were "trying to bury" Rowe and "burn him." Another witness indicated that JD had made threats toward Rowe.

Law enforcement officers found JD at Prince's home. He denied the shooting at first, but ultimately changed his story, but he never actually confessed. Both JD and JB were charged with murder and tampering with physical evidence. JD was convicted of both charges and appealed.

ISSUE: Does moving a body constitute tampering?

[1] 551 S.W. 3d 7 (Ky. 2018)

HOLDING: Yes

DISCUSSION: JD was charged with tampering for his handling of Rowe's body after the shooting, as it had been dragged outside and was scraped up. The Court agreed that moving the body was sufficient to indicate that JD (and perhaps others) had moved the body and by doing so changed its condition. There was also evidence indicating an effort to clean up some of the blood with rags and a towel. The Court held the conviction for tampering was proper.

With respect to the murder charges, the Court held that although the instructions were not as detailed as they should have been, and perhaps did not fully cover the distinction between perfect and imperfect protection of another, the instructions were sufficient. The Court also held that some 15 photos of Rowe's body and the scene were properly admitted, given that Rowe's body was moved.

The Court upheld JD Clark's convictions.

NON PENAL CODE

DRIVING UNDER THE INFLUENCE

Larue / Covey v. Com., 2019 WL 103959 (Ky. App. 2019)

FACTS: The cases involved Larue and Covey were consolidated for review. Larue was found apparently unconscious in his car in Lawrence County. The deputy was able to rouse Larue, who then got out. He was observed to be visibly impaired and did not successfully complete FSTs. He was taken to the hospital and given the implied consent warning. Larue submitted to the test and was found to have taken oxycodone. He was charged with DUI and requested suppression, arguing that his rights under Birchfield were denied. He was denied and entered a conditional guilty plea. He then appealed, and the Lawrence Circuit Court affirmed the trial court.

In Covey's case, she was found sitting in a parked car in Covington. She admitted to having had several alcoholic beverages. She failed FSTs and was taken to the hospital for a blood test. She too was given the implied consent warning, and submitted to the test. She was found to have a BA of .15. She made the same motion, and was also denied. She entered a conditional guilty plea and appealed.

ISSUE: Is the Kentucky implied consent warning constitutional?

HOLDING: Yes.

DISCUSSION: Both cases were argued under the precepts of Birchfield v. North Dakota.[2] Covey argued that although Kentucky doesn't have a separate criminal penalty for refusal, that the doubling of the mandatory minimum if convicted is essentially just that. The Court noted it had rejected that argument in Com. v. Brown on the same issue and that the sentence was contingent on conviction.[3]

Larue argued that the language of the warning was "deceptive and coercive," by noting that the warning was somewhat defective, as it noted that the jail sentence might be doubled for an offender, when a first time offender (as Larue was) might get no jail time at all. The Court acknowledged that it was not inherently coercive, however. The deputy denied that he told Larue that he would be "automatically guilty" if he refused the test and that Larue willingly consented.

The Court concluded that Kentucky's implied consent does not violate the Fourth Amendment, and although the warning was defective, it was not unconstitutional.

The Court affirmed the convictions.

JUVENILES

Gray v. Com., 2019 WL 643969 (Ky. App. 2019)

FACTS: On September 20, 2012, Gray was arrested in an armed robbery/shooting case in Fayette County. At the time he was taken into custody, he was identified as being 15 years of age and his mother was promptly notified. He entered a guilty plea, but two years later moved to vacate the plea, claiming inadequate counsel on various issues. The post-conviction motion was denied. Gray appealed.

ISSUE: Is it required that a parent or guardian be present before questioning a juvenile?

HOLDING: No.

DISCUSSION: Gray argued that the officers violated KRS 610.200 when he was brought in for questioning without notifying his guardian and allowing her to be present. As such, Gray argued his confession was involuntary. The Court noted that his mother was notified approximately 14 minutes after he was taken into custody and nothing requires that the parent or guardian actually be present before questioning. Gray did not allege that he was not given Miranda prior to questioning. Further, he again admitted to the offenses, under oath, during a plea colloquy.

The Court upheld the conviction.

[2] 579 U.S. --- (2016).
[3] 560 S.W.3d 873 (Ky. App. 2018).

CONTROLLED SUBSTANCES

Baldwin v. Com., 2019 WL 645920 (Ky. App. 2019).

FACTS: On August 16, 2016, during a call for service at an apartment complex, Officer Gilpin (Campbellsville PD) observed Baldwin walk across the parking lot and get into a vehicle. Baldwin approached Officer Gilpin and gave him a baggie of methamphetamine. He also volunteered he had slashed a tire in the parking lot, "on a vehicle owned by a resident who had angered him …." During a search incident to arrest, Baldwin brass knuckles in his pocket.

Baldwin was arrested and charged possession of a controlled substance, first offense, carrying a concealed deadly weapon and first-degree criminal mischief. At trail, Baldwin testified was looking for his girlfriend and that another friend gave him the methamphetamine. He was convicted and appealed.

ISSUE: Is the brief possession (pending turning it over to law enforcement) of drugs a legal defense to a possession charge that may be presented to a jury?

HOLDING: Yes.

DISCUSSION: Baldwin argued that the possession was not unlawful as he was holding them only long enough to dispose of the drugs to the proper authorities (the officer). The Court looked to KRS 218A.220 which was intended to "encourage persons who find controlled substances or otherwise come innocently into their possession to turn them in and give whatever information they might have about them." It is, in effect, a legal defense to be raised by the defendant when appropriate, and to which an instruction might be warranted. Baldwin had testified, however, that he had "no real plan for the drugs" after he accepted them. He claimed to only know the first name of the person who gave them to him. As such, the Court agreed, he could not raise a "credible innocent possession defense."

The Court agreed that the court's refusal to give a directed verdict on the issue was proper and that it was appropriate to leave it to the jury. Further, all of the charges resulted from a "series of poor decisions during an ongoing course of conduct that resulted in charges stemming from closely related events, all of which occurred within a short period of time." As such, it was proper to try the entire case at one time.

After resolving other procedural issues, the Court upheld his convictions.

SEARCH & SEIZURE

SEARCH & SEIZURE – SEARCH WARRANT

Davis v. Com., 2019 WL 1422911, Ky. App. 2019

FACTS: In 2014, LMPD received an anonymous tip that provided a photo of Davis, his address, and an assertion he was trafficking cocaine from his home. On February 11, 2014, Det. Kaufling went to do a knock and talk and found Davis in the alley behind his home. Davis told Kaufling he needed to get a warrant in order to search. Kaufling explained that the tip indicated Davis had a gun, which Davis confirmed, and that Davis also stated he had marijuana and a digital scale. Kaufling knew Davis was a convicted felon. Davis offered to take Kaufling inside and give him the gun, but reiterated he could not search. The home was not searched at that time and a search warrant was obtained. The gun, drugs and paraphernalia were seized and Davis was indicted on multiple charges.

Davis moved to suppress and was denied. He entered a conditional guilty plea and appealed.

ISSUE: Is a convicted felon's admission that a gun, marijuana, and a digital scale are present in a residence sufficient probable cause to obtain a warrant to search for evidence of drug trafficking?

HOLDING: Yes.

DISCUSSION: Davis argued that the warrant, based on the tip, was insufficient. However, Kaufling did not seek a warrant based on the tip, but only after Davis admitted that he possessed a gun during the knock and talk. The initial tip was possibly stale but was corroborated by "recent information showing the evidence (the gun, marijuana and digital scale) remains in the location." Davis allowed Kaufling inside to retrieve the gun, but Kaufling did not search the premises. Kaufling did not, in fact, actually seize the gun at that time but waited until he obtained a search warrant.

The Court upheld Davis's convictions.

SEARCH & SEIZURE – EXPECTATION OF PRIVACY

Poe v. Com., 2019 WL 168675 (Ky. App. 2019)

FACTS: In January 2017, two officers bought drugs from an individual in the Clay City (Powell County) area. The officers obtained a search warrant for the residence of that individual, but the affidavit had some inaccuracies as to the location, particularly, the address was listed as 113 Powell Street). In fact, the officers actually searched a house some 200-300 feet away (70 Powell Street) from the address listed on the warrant – on the opposite side of the street – but the house searched matched the general description contained within the warrant.

When the team arrived, Troopers Faulkner and Crabtree (KSP) assisted. Trooper Faulkner found Poe sitting in her vehicle in the driveway of the home they were to search and learned that Poe had an outstanding arrest warrant. Drugs and other items were found, which added to Poe's charges.

Poe moved to suppress, arguing the validity of the search warrant. That motion was denied. She entered a conditional guilty plea and appealed.

ISSUE: Does a person located in a driveway that does not belong to that person have an expectation of privacy?

HOLDING: No.

DISCUSSION: Poe had to establish that she had some legitimate expectation of privacy in the residence. Nothing indicated that Poe owned the residence, or even lived there temporarily. Moreover, she was found in the driveway, which is recognized as a public place. As such, the Court held, she had no expectation of privacy there. Even if the search warrant itself was fatally flawed, that did not require overturning her arrest on a valid warrant. The Court held that someone clearly visible in a driveway has no expectation of privacy and once the officers discovered the warrant, she was lawfully arrested and searched.

The Court upheld the convictions.

SEARCH & SEIZURE – CONSENT

<u>Miller v. Com.</u>, 2019 WL 856759 (Ky. App. 2019)

FACTS: Miller was apprehended by Princeton Police near the scene of his ex-girlfriend's home. She had called to report Miller was harassing her. Officers were familiar with Miller, and the girlfriend had earlier complained he had stolen two phones from her. Although he claimed a friend dropped him off, officers found keys on his person and found a vehicle that matched the keys in the nearby parking lot. Through the window, they could see a phone that matched the description given by the girlfriend, as it had a distinctive case. Miller finally admitted he had driven the car there, but denied consent to search the vehicle. It was impounded and towed.

The next day, a detective obtained consent from the registered owner, Miller's ex-wife. He found the second missing phone and inside a partially open backpack, a variety of ammunition and other contraband. (Only the ammunition was relevant to this case.) The owner denied owning the backpack. At the scene, officers searched the area and found a holster, and then a handgun near where Miller had been apprehended. It matched the caliber of some of the ammunition.

Miller, a convicted felon, was charged with possession of the handgun. He was indicted and moved to suppress. The trial court denied suppression, and Miller was convicted of possession of the firearm. He then appealed.

ISSUE: If a party giving consent does not limit the consent, is it permissible to search closed containers?

HOLDING: Yes.

DISCUSSION: First, Miller argued that his ex-wife's consent to search her car did not cover his backpack. The trial court had found it lawful under consent, plain view and the automobile exception. The Court took each in turn. Miller did not contest that his ex-wife could give consent for the car, but argued she could not for the backpack. The Court looked to Florida v. Jimeno and ruled that when the consenting party does not limit the search, closed containers were permitted as well.[4] Although the stolen phones were their initial object, the search consent was not limited to that. Further, the backpack was partially open, unzipped, and ownership was unclear. Even absent that, however, the Court noted that plain view combined with the automobile exception applied. The nature of the phones was readily apparent, which led to a proper search of the car. The Court upheld the denial of the motion to suppress.

Further, the Court held that testimony from a witness that the handgun found appeared to be the same one Miller routinely carried in a holster was properly admitted, although the witness did not see the gun that night. This evidence was properly admitted to prove his constructive possession of the firearm.

The Court affirmed Miller's conviction.

SEARCH & SEIZURE – PROBATION

Waddell v. Com., 2019 WL 326878 (Ky. App. 2019)

FACTS: In June, 2016, Det. Gibson (Muhlenberg agency) received information from a CI about drug activity at Waddell's residence. Det. Gibson had also previously arrested someone for purchasing illegal drugs at that residence. The detective surveilled the property and observed drug activity, as well as noticing the presence of Waddell's vehicle. Knowing Waddell was on parole, he notified that office. On June 7, Gibson accompanied Officers Kirkpatrick and Newman (Probation & Parole), neither of whom actually supervised Waddell, to the home. The occupant, Morris, denied that Waddell lived there but when pressed, acknowledged Waddell stayed there sometimes. She called out for Waddell. Kirkpatrick entered, following by the other two officers, and Morris did not object. They learned Dennisson, another parolee, was present, and they went downstairs to talk to him. The officers observed marijuana in plain view. Dennison refused to agree to a search, so the officers cleared the residence and obtained a search warrant. During

[4] 500 U.S. 248 (1991).

the search, the officers found drugs in the residence. Waddell admitted to possession of the drugs.

All three were indicted on drugs offenses. They sought suppression and were denied. Waddell entered a conditional guilty plea and appealed.

ISSUE: Does Probation & Parole have the authority to enter a residence where a resident is on parole without a warrant?

HOLDING: Yes.

DISCUSSION: Waddell argued that the entry into the residence by the officers was improper and violated his Fourth Amendment rights. The Court noted that it was not disputed that Waddell was on parole and was a resident of the house. Thus, the Court held that reasonable suspicion was not necessary with respect to entry of a residence to search a parolee. Notwithstanding, the Court did hold that the officers did have reasonable suspicion to enter the residence. Nothing suggested that Waddell, a resident, "did not have access to or control over the downstairs area" which the officers entered to conduct a protective sweep and found incriminating evidence.

The Court upheld the conviction.

SEARCH & SEIZURE – TERRY

Starr v Com., 2019 WL 1422705 (Ky. App. 2019)

FACTS: On the day in question, a Campbell County restaurant called police to report that two males were in the parking lot "nodding off" and two women had been in the restroom a long time. Officers Love and Blank (Highland Heights PD) arrived, along with an unnamed officer. Officers approaching the restroom encountered Fields, who had a fresh, bleeding needle wound in her arm, and she was lethargic and impaired. She stated Starr was still in the restroom. Starr was in a stall and refused to leave when ordered to do so, stating she needed a minute. She finally exited the stall and they all went outside, as the restaurant was closing for the night.

Sgt Love testified he saw an orange syringe cap in her mouth and told her to spit it out. She was given Miranda, but continued to talk. She admitted having methamphetamine on her person. Starr was arrested for possession of the drug and the cap (as paraphernalia). She moved for suppression and was denied. Starr took a conditional guilty plea and appealed.

ISSUE: May an officer make a stop on reasonable suspicion the individual has just used drugs?

HOLDING: Yes

DISCUSSION: The Court discussed several alleged errors. Of most importance, the Court looked at how Fields' condition was described, and noted that regardless of how it was described, the officers recognized she had just used injected drugs, and there was reasonable articular suspicion to detain her briefly and talked to her. Further, once they talked to Starr, it was reasonable even though she did not appear obviously impaired. Since she did not raise the issue of being told to spit out the cap at trial, the Court refused to entertain that issue.

Starr's conviction was affirmed.

SEARCH & SEIZURE – CONSTRUCTIVE POSSESSION

Ray v. Com., 2019 WL 1430728 (Ky. App. 2019)

FACTS: Ray was a probationer. In August 2017, Det. Lamb (LMPD) obtained a search warrant for the house where Ray was staying with his girlfriend, Nash, on allegations that Ray was trafficking in narcotics. No drugs were found during the search, but a handgun was located in the master bedroom nightstand. Evidence indicated that Nash owned the firearm and she stated she normally kept it in her car, but she had brought the handgun inside as the car was going in for service. She stated Ray was unaware of the gun, and he also stated he had no idea it was there.

The Commonwealth filed a motion to revoke Ray's probation for constructive possession of the weapon. This motion was granted. Ray appealed.

ISSUE: Does the simple presence of a gun in the nightstand of a bedroom where no evidence exists that the subject has access constitute constructive possession?

HOLDING: No.

DISCUSSION: The Commonwealth argued that the presence in the nightstand was enough for constructive possession. There was no testimony that Ray shared that room with Nash or that any of his possession were in the room. His "brief residence at Nash's house was not so established as to warrant an inference that he had access to and knowledge of everything in the house." Nash "consistently claimed ownership of the gun, even before Ray was even aware that the search had taken place." Evidence corroborated that Nash's brother had bought the handgun in 2010 and given it to Nash. Further allegations in a search warrant, with no evidence found to support it, was also insufficient to revoke his probation.

The Court reversed the revocation order.

Jones v. Com., 567 S.W.3d 922 (Ky. App. 2019)

FACTS: On November 21, 2016, Trooper Begley (KSP) and several Russell County deputy sheriffs went to Grider's home to serve warrants on Jones and Morgan. Hammonds, Jones' aunt, admitted the officers into the residence. The officers found the pair sleeping, woke them up and told them of the warrants. With the lights on, Trooper Begley spotted an unlabeled pill bottle and other drug evidence, as well as tablets and capsules lying loose. Later testimony indicated the drugs found included methamphetamine, tramadol and possibly gabapentin (those pills were not tested).

Jones was charged (as was Morgan) for the drugs found in the room. Jones argued that nothing indicated who placed the drugs in the room and multiple people had access to the bedroom. He also argued there was no evidence of trafficking.

ISSUE: Does sleeping in a room convey constructive possession of items found there?

HOLDING: Yes (it may).

DISCUSSION: First, the Court agreed, that the fact the two were sleeping in the room made them subject to constructive possession. Further, the amount alone was inconsistent with personal use, and trafficking could be inferred. However, the fact that the capsules (the bulk of the pills) were not tested and that the jury should have been instructed to determine whether gabapentin is a legend drug rather than a controlled substance. Thus, the trafficking in a legend drug conviction warranted reversal with respect to the gabapentin.

Steele v. Com., 568 S.W.3d 387 (Ky. App. 2019)

FACTS: Steele was charged in 2013 with possession of materials portraying a minor in a sexual performance. Steele's wife discovered a nude photos of her daughter and photos of her daughter engaging in sexual acts with her boyfriend on Steele's password protected iPad. Steele advised his wife that he had installed a hidden webcam in the room the daughter used when she stayed at their apartment. Steele's wife kicked him out of the apartment and she called the police. Officers from the Louisville Metro Police Department searched the home, including the basement where Steele's belongings and computer equipment were stored. The basement was considered to be Steele's "man cave." The officer collected a computer and some flash or zip drives, along with Steele's iPad. During the next few weeks, Steele's wife cleaned up the basement and found a box of floppy disks. They were turned over the box to the LMPD. The floppy disks contained various images of child pornography and photos of nude adult celebrities. The iPad also contained pornography but no child pornography.

Steele admitted to voyeurism, but denied tampering with evidence and child pornography. He was convicted of voyeurism and possession of child pornography. He appealed the latter charge.

ISSUE: Are items found in a basement used by a subject enough to constitute constructive possession?

HOLDING: Yes.

DISCUSSION: Steele argued that there was no evidence that he had knowledge of what was on the disks, as he possessed no equipment on which to read them. He also noted at the time they were found, he had not been in the house for some six weeks. (The detective had only the wife's word as to where the items were found.) Steele argued that the fact that the iPad contained nude adult photos and some photos were also found on the disks was not enough. The Court noted that Steele was allegedly the only person who used the basement and the items were found with other items that did belong to him.

The Court upheld his conviction.

SEARCH & SEIZURE – TRAFFIC STOP

Dehaven v. Com, 2019 WL 1092664 (Ky. 2019)

FACTS: On January 4, 2017, Deputy Williford (McCracken County SD) was on patrol at 1:00 a.m., when he spotted a parked car, backed into the rear door of a closed convenience store. As the deputy pulled in, the car pulled away. The deputy had received prior reports of criminal activity and loitering at the store. The vehicle made no attempt to elude him or avoid him and was committing no traffic infractions. The deputy initiated a stop, and he had explained to a fellow deputy that he stopped the car to check to see if the occupants were employees. As a result, during a search, drugs and other contraband was found.

Dehaven testified that the driver had pulled in to get directions and pulled back out almost immediately. He had no idea what the deputy was doing and that Williford followed them for some distance (miles) before he made the stop. The trial court found that the stop was justified on reasonable suspicion.

Dehaven was charged with a multitude of offenses. He entered a conditional guilty plea and appealed.

ISSUE: Must a reasonable, articulable suspicion precede a Terry stop of an automobile?

HOLDING: Yes

DISCUSSION: The Court detailed each of the factors the deputy considered in making the stop. The Court noted that mere presence of a vehicle in a suspicious location was insufficient. The deputy's own statement when he made the stop that he did so to "see if there was suspicious"

activity indicated he was working with the inarticulable hunch prohibited by Terry.[5] The Court note that "reasonable suspicion must preexist the stop."

The Court reversed the conviction.

SEARCH & SEIZURE – CARROLL

Lewis v. Com., 2019 WL 413610 (Ky. App. 2019)

FACTS: On April 17, 2017, at about 11:30 a.m., Officer Mascoe (Lexington PD) observed a vehicle run a stop sign. He was unable to immediately execute a traffic stop due to traffic. When the intersection cleared, Mascoe saw the other vehicle accelerate at a high rate of speed. He was able to track it due to its loud muffler exhaust. The officer caught up with this vehicle, initiated a traffic stop, and found Lewis driving, and a female passenger. As he approached, he smelled marijuana. He found Lewis nervous, jittery, with shaking hands and he was "sweating profusely." Lewis admitted he did not have a license. Lewis was found to have a suspended or revoked license and an outstanding warrant.

When backup arrived, Lewis was arrested. Lewis said he did not own the vehicle and did not want it searched. Officer Mascoe searched the vehicle, finding a gun and drug evidence. Lewis admitted he was a convicted felon. No contraband was found on his person, although the passenger had marijuana on her person.

Lewis was indicted on the gun as well as the traffic related offenses. He moved to suppress, which was denied. He took a conditional plea and appealed.

ISSUE: May a case involving a search of a motor vehicle following an arrest be based on Carroll rather than Gant?

HOLDING: Yes

DISCUSSION: Lewis argued that the search of the vehicle was improper under Arizona v. Gant.[6] The Court noted that the second exception, "regarding whether the vehicle may contain evidence relevant to the arrest," is the more common situation and that will depend upon the substance of the underlying arrest. In Lewis' case, he was arresting on an outstanding warrant and there was no reason to believe any evidence would be found relevant to that warrant. However, the Court held that the trial court was correct in not basing the search on Gant, but on the plain smell on the marijuana, a different exception to the warrant requirement. Under that, the search was qualified under the "automobile exception."[7]

[5] 392 U.S. 1 (1968).
[6] 556 U.S. 332 (2009).
[7] Dunn v. Com., 199 S.W. 3d 775 (Ky. App. 2006).

The Court affirmed the conviction.

INTERROGATION

Brooks v. Com., 2019 WL 1422704 (Ky. App. 2019)

FACTS: Brooks (age 19) was under investigation for a sexual relationship with a 13-year-old girl in Hardin County. Det. Washer (KSP) went to his home to talk to him and asked him to come to the post for an interview. Brooks was willing but needed a ride; he was given a ride by Det. Washer in the back of his cruiser. Brooks was unrestrained and not questioned during the ride. Upon arrival at the post, Brooks exited the cruiser on his own. At the post, he was shown to an interview room, where Washer "kept a comfortable conversational distance" from Brooks. Det. Washer began to give him Miranda but realized the warnings were unnecessary so he did not complete them. Brooks agreed to a conversation.

Det. Washer told Brooks he just needed the truth and that he did not plan on making an arrest that day. Ultimately, Brooks confessed and Washer took him home. Washer presented the case to the grand jury and an indictment was returned charging Brooks with rape. Brooks was convicted and appealed.

ISSUE: Is a willing interview which takes place in an interview room a custodial interview?

HOLDING: No.

DISCUSSION: Brooks argued that he was improperly interrogated. Washer agreed he did not give complete warnings, but the Court noted, Miranda is only required when the suspect is being interrogated AND is in custody.[8] In cases with no actual arrest, it is necessary to assess whether "there was a restraint on freedom of movement to the degree associated with a formal arrest."[9] Cases have fleshed out this matter over the years.

In this case, the Court found no coercion in the situation. Being directed where to sit in the interview room, was to be expected as an instruction given to anyone unfamiliar with any particular room. He was not told he was free to leave, but that is "not conclusive as it is just a factor." Being told he "needed to tell the truth" was also not "inherently coercive" either. Giving partial warnings also does not convert the matter into custodial.

The Court noted that "while Brooks now regrets the words he spoke, there is no evidence they were spoken while in custody." The Court affirmed his conviction.

Galloway v. Com., 2019 WL 1313149 (Ky. App. 2019)

[8] Thomas v Keohane, 516 U.S. 99 (1995).
[9] California v. Beheler, 463 U.S. 1121 (1983); Oregon v. Mathiason, 429 U.S. 492 (1977).

FACTS: Galloway lived in Bowling Green with his girlfriend, L.S., and her two children. She began a job at the same place, and the same shift, as Galloway. During that shift, he became angry, suspecting her of flirting. On the way home, he struck her in the face, then forced her to drive to a secluded area where he sodomized and raped her. On the way home, he threatened her and her children if she moved and at the apartment, raped and threatened her again with a knife.

As she was injured, Galloway agreed to take L.S. for medical treatment if she would tell the police she had been injured in a robbery, and he staged events to appear to be a robbery. L.S., however, was able to give a note to admissions personnel and police were summoned.

Det. Myrick (Bowling Green PD) interviewed Galloway at the hospital and he described the robbery. Myrick excused himself and then told Galloway he knew that Galloway was lying. Galloway was arrested and given Miranda. He was charged with rape, sodomy and related charges and appealed. Ultimately one of the minor charges was overturned, but the remaining and more serious charges were upheld. He filed a collateral attack on the conviction, arguing that the statements prior to Miranda should be suppressed, and other issues. The trial court denied the collateral attack on the conviction, and Galloway appealed.

ISSUE: Does Miranda only prevent the admission of testimonial self-incrimination?

HOLDING: Yes.

DISCUSSION: The Court declined to determine whether Galloway was in custody prior to his arrest, but noted that Miranda only prevents the admission of testimonial self-incrimination. In this case, Galloway "repeatedly informed" the detective of his innocence and he made no incriminating statements during that time.

The Court also noted that the SANE nurses are recognized as a "distinct professional nursing certification" and the one involved in the case was an extremely experienced one, and was well qualified to testify without a Daubert evaluation.

Galloway's conviction was affirmed.

TRIAL PROCEDURE / EVIDENCE

TRIAL PROCEDURE / EVIDENCE – EVIDENCE

Tigue v. Com., 2018 WL 7814537 (Ky. 2019)

FACTS: On April 11, 2003, the body of "elderly, bedridden Bertha Bradshaw" was found in her Bell County bed, having been shot in the back. Neighbors reported seeing Tigue's vehicle at the house that morning and there was damage to the house doors, indicating a forced entry. That afternoon, Trooper Lee stopped Tigue's truck. Tigue's wife was driving the truck and Tigue

was a passenger. Trooper Lee found a prescription pill bottle with three types of drugs, which Tigue said was his medication, but the label was scraped and tampered with. Tigue also had a military duffel filled with shotgun shells. Tigue was brought to the post for questioning.

Det. Perry interviewed Tigue at approximately 7 p.m. and Tigue appeared to be intoxicated. He claimed he had bought the Xanax found in his possession and that he had a prescription for the hydrocodone found in the bottle for his "self-diagnosed seizures." He claimed the bag and shells belonged to his late father. He admitted having taken the Xanax. That morning, Tigue went with his cousin to buy illegal drugs and that they had the prescription filled at a local pharmacy. He was re-interviewed the next day and admitted that Smith had given him the items, told him to fill the prescriptions, and to get rid of the bag. Tigue assumed that Smith had robbed someone but didn't know about the murder. In a third interview, just 30 minutes after the end of the second one, Tigue admitted having broken into the Bradshaw residence and shot Bradshaw while high on drugs. Tigue led the police to the location of the gun, which he discarded in a cemetery.

The pharmacist described who had filled the prescription, and another pharmacist identified a purse that had been abandoned near the store and turned in on April 11. Tigue's cousin, Buddy, described that he sold pills to Tigue and that Tigue had offered to sell him a shotgun, which was "hot." A witness spotted Smith near the Bradshaw home on that day, trying to get out of a thicket of vines.

Ultimately, Tigue pled guilty, but challenged the validity of his plea. The case was reversed and remanded for a new trial. At trial, Tigue was convicted of murder and related charges. Tigue appealed.

ISSUE: Does missing evidence always warrant a missing evidence instruction?

HOLDING: No.

DISCUSSION: In a host of challenged issues, Tigue challenged the destruction of a good part of the evidence in the case following his guilty plea. The remainder of the items were returned to the victim's family. The detective authorized the destruction because he thought the case was over with the denial of Tigue's motion to withdraw his guilty plea. (The new trial was more than ten years after the fact.) He was allowed to use reports related to the destroyed evidence and that a "missing evidence" instruction was not warranted as there was no bad faith on the part of the detective. The Court agreed the destruction was, at most, careless and a possible violation of policy and the law (KRS 524.140). However, the Court agreed the trial court could have handled the matter differently.

Tigue also argued that his confession should have been suppressed. The Court noted that Tigue asked to speak to the detective despite being intoxicated and then "detoxing." The Court found no evidence Tigue was mistreated while in jail and the witnesses indicated he was coherent. However, the refusal of the trial court to allow testimony from a witness about a "false confession" should have been allowed.

Due to the multitude of errors, the Court reversed Tigue's murder conviction.

Probus v. Com., 2019 WL 1172953 (Ky. 2019)

FACTS: Probus was charged in a complex home invasion robbery in Oldham County. Among other issues, Probus argued that the prosecution "offered insufficient evidence" concerning the item which was used in the crime – characterizing it as a "fake," a "toy," a BB gun or an Airsoft. (In fact, it was a pellet gun of some type, which looked like a pistol.)

He was convicted and appealed on a number of issues.

ISSUE: Could a jury find an Airsoft weapon or BB Gun to be a deadly weapon or a dangerous instrument under Kentucky law?

HOLDING: Yes.

DISCUSSION: The Court agreed that the weapon in this case, even if not a deadly weapon, could certainly be a dangerous instrument. (Although not a "traditional firearm," its firing of a pellet could still be considered dangerous, even potentially deadly.)

The Court also agreed it was proper to try the case against Probus on a theory different to that used on his co-conspirator, who entered a plea on a lesser offense.

The Court also addressed his argument that testimony from the lead investigator (Sgt. Whitehill) was improperly admitted. Probus had alleged the investigator was sloppy and lazy, which was countered by the prosecution asking questions concerning his commendations and work history. Although "pushing the bounds of relevancy," Probus introduced the issue by questioning his capabilities.

Probus argued that it was improper to introduce records of his text messaging with a co-conspirator the night before and morning of the crime. Only the fact of the messages was introduced, not their content, which he complained put them out of context. The Court noted that if these messages were truly exculpatory, Probus could have retrieved and used them at trial, which he did not do. Probus also argued that it was improper to deny him the ability to introduce a photograph that showed him in the hospital several days later, which the Court excluded on hearsay grounds. The Court determined that the photo was not hearsay. However, it found the error harmless as his presence in the hospital four days after the crime said nothing about his status on the day of the crime.

The Court upheld his conviction.

Reynolds v. Com., 2019 WL 1422702 (Ky. App. 2019) (DR Filed 5/1/2019).

FACTS: During an unrelated interaction, Reynolds was arrested by LMPD. Two baggies of narcotics were found in his "general vicinity" and he was charged with numerous offenses. Pursuant to KSP protocol, which dictated the higher weight and highest penalty bag would be tested first, only one baggie was tested and found to contain a mixture of heroin, cocaine and methamphetamine. Reynold objected to any mention of the second bag, but the Court allowed testimony by an officer who stated he believed the second bag contained methamphetamine because of its texture. He also tested the amount was inconsistent with personal use.

Reynolds was convicted of numerous offenses and appealed only his conviction for trafficking in methamphetamine.

ISSUE: Is a Daubert hearing always required for an officer to testify about drugs?

HOLDING: No.

DISCUSISON: Reynolds argued at the officer, to testify with respect to the contents of the baggie, should have been qualified as an expert after a Daubert[10] hearing. The Court looked at the issue as procedural and noted that Reynolds never specifically asked for a Daubert hearing, although the Commonwealth had indicated it would call an expert prior to the trial. The Court held that the officer's testimony was "expert" in that a juror would be unlikely to be able to identify the substance by sight. However, the officer's testimony was based on his personal observation, training, and experience rather than any scientific knowledge. The Court held that a Daubert hearing was not required and that the officer's experience as sufficient to be an expert for purposes of this case.

The Court affirmed the conviction.

TRIAL PROCEDURE / EVIDENCE – DOUBLE JEOPARDY

Coogle v. Com., 2019 WL 1177462 (Ky. 2019)

FACTS: On March 21, 2017, Sgt. Miller (Hardin County SO) was on patrol when he spotted two vehicles pull onto a road leading to a small cemetery. That road ended in a loop. The vehicles' headlights went out. That area was not lit and was "fairly secluded and quiet." Sgt. Miller pulled in and activated his lights. He got a clear look at one vehicle, which was "fairly beaten up with a broken windshield." One of the drivers tried to wave the officer out of the way, but when Sgt. Miller did not move, the driver "floored his vehicle" and drove around the cruiser and onto the main road. Sgt. Miller later identified the driver as Coogle and pursued.

The chase occurred on curvy country roads at a high rate of speed. Coogle turned into a property with a barn and Miller, being familiar with that property, just waited until Coogle drove into the

[10] 509 U.S. 579 (1993).

well-lit area in the front of the barn. Sgt. Miller tried to wave him to stop, but Coogle "slammed on the gas" and drove towards Miller, who took cover behind his vehicle. Coogle passed by closely on the other side. Miller fired, fearing Coogle was going to come back and would attempt to drive over him again. He went in search of Coogle.

Eventually, Coogle's vehicle was found crashed into a tree. Drug paraphernalia was discovered inside the vehicle. The vehicle also had a bullet hole in the trunk, and Miller's spent round was found inside.

Coogle had an active warrant at the time. He was apprehended and charged with attempted murder, and third-degree assault, wanton endangerment, and other offenses. At trial, Coogle was convicted of third-degree assault, first-degree fleeing and evading, and drug offenses. Coogle appealed, arguing the third-degree assault and first-degree fleeing and evading convictions were improper because of Double Jeopardy.

ISSUE: May a person be charged with both third-degree assault and fleeing and evading?

HOLDING: Yes.

DISCUSSION: The Court compared the two offenses, and held that despite confusing language (between intentionally and wantonly), the charges were not duplicative. Coogle could, for example, be convicted if he "wantonly disobeyed a direction from the police officer (first-degree fleeing or evading) but then could also intentionally attempt to cause that same officer injury (third-degree assault). As such, the conviction for both was consistent.

The Court also noted that video taken from a drone, shown to the jury, that recorded Coogle's route around the barn, shot in the daytime some four months later, was properly admitted. (Of course, Miller could not see the route he took behind the barn so that was presumed.) The Court considered it just a video of the area, not a reenactment and there was "clear probative value" in showing it. The Court noted that "describing the geographic area of this rural scene was difficult for any officer or witness; it was even harder to appreciate and picture it as a listening jury member. The aerial footage was extremely helpful in assisting the jury …" It was not presented or intended as a reenactment and the differences were not germane, the video simply showed the scene.

After ruling on other issues, the Court upheld the convictions.

<u>Bishop v. Com.</u>, 2019 WL 103924 (Ky. App. 2019)

FACTS: On March 26, 2016, Deputy Thomas (Fulton County SO) spotted Bishop driving with two children in the vehicle. He knew Bishop lacked a valid OL and attempted a traffic stop. Bishop sped off. Thomas clocked Bishop at 93 in a 35 MPH zone, with Bishop also driving erratically and violating other traffic laws. Deputy Thomas contacted other officers in the area, who also attempted blocking maneuvers, with no success. Bishop eluded law enforcement.

Bishop ultimately turned up at a relative's house. While he denied being the driver, he was arrested. During the arrest, Bishop threatened Deputy Thomas. The vehicle was located at an apartment complex in Hickman. During a subsequent search, a wallet that contained Bishop's identification was found. The vehicle belonged to his mother.

Bishop was indicted on numerous charges, including speeding, fleeing and evading and wanton endangerment. Bishop was convicted of most of the charges and appealed.

ISSUE: Do convictions for both speeding and wanton endangerment constitute Double Jeopardy?

HOLDING: Yes.

DISCUSSION: Among other issues, Bishop argued that his convictions for both speeding and wanton endangerment constituted Double Jeopardy. The Court looked to the instructions and noted that "the instructions for each offense must contain an element 'which the other does not.'"[11] In this case, everything in the speeding instruction was duplicated in the wanton endangerment instruction, with the added element of "extreme indifference to the value of human life." In effect, the wanton endangerment charge goes "one step farther."

The Court held that it was improper to convict on both on charges, and vacated the lesser of the two offenses – in this case speeding.

On an unrelated note, Bishop argued that service on one of his desired witnesses was improper because the subpoena was given to his mother and no personally served on the witness. The witness was over 18 at the time. The witness had communicated to the court that he did not wish to be involved. The Court questioned the trial judge's ex parte contact with the witness's father, but agreed that the witness, Smith, was not under subpoena as he was not properly served.

The Court vacated the speeding conviction, but affirmed the remaining convictions.

TRIAL PROCEDURE / EVIDENCE – CONTEMPT

Stone v. Beagle, 20198 WL 413609 (Ky. App. 2019)

FACTS: In October 2017, Stone appeared at an EPO hearing taken out by his ex-girlfriend, Beagle, in Harrison County. The Court issued the DVO and also found him in contempt of the EPO for contact he made with Beagle in the courtroom prior to the hearing. After the hearing, Officer Lane (a CSO, apparently) escorted Beagle to a car and reported that he saw Stone outside, shouting expletives and threats to Beagle. Stone was further charged. At the subsequent hearing, Beagle testified she didn't hear anything but the Court found Lane credible and found Stone in contempt, sentencing him to six months. Stone appealed.

[11] Com. v. Burge, 947 S.W. 2d 805 (Ky. 1996); Blockburger v. U.S., 284 U.S. 299 (1932).

ISSUE: Is indirect criminal contempt essentially a summary decision by the trial court?

HOLDING: Yes.

DISCUSISON: The Court noted that trial courts have "broad authority when exercising its contempt powers" and the review of such cases was limited. In this case, the Court agreed that "indirect criminal contempt is committed outside the presence of the court and requires a hearing and the presentation of evidence."[12] The Court agreed that the "trial court was in the best position to weigh the evidence, and it simply found Lane's testimony to be more credible than the testimony offered by Stone."

The Court upheld the decision.

TRIAL PROCEDURE / EVIDENCE – TESTIMONY

Bell v. Com., 2019 WL 258094 (Ky. App. 2019)

FACTS: On February 9, 2016, Bell was stopped by Officer Rigsby (Erlanger PD). When the officer approached, he saw signs of impairment, including slurred speech, and smelled the strong odor of an alcoholic beverage. Bell admitted he had a "few" drinks at a party. Bell failed several FSTs and when getting out, was unsteady and used the car for balance. He failed the walk and turn and the one-leg stand. He also saw signs of impairment during the HGN test. A PBT indicated the presence of alcohol. Officer Rigsby arrested Bell for DUI and Bell declined a breath test.

At trial, Rigsby was subjected to a lengthy cross-examination on his DUI training, including questions on the HGN. He expressed no knowledge for "normal nystagmus" and the defense question sought to have him disqualified from testifying about the HGN, but the trial court denied the request. After further debate on testimony on the HGN, Bell was convicted.

Bell appealed, arguing that the trial court limited his cross-examination of Rigsby which deprived him of a fair trial. The circuit court affirmed, finding the officer competent to testify as to the HGN test. Bell appealed.

ISSUE: May testimony be limited by the court?

HOLDING: Yes.

DISCUSSION: The Court concluded that Bell's only articulated issue was a challenge to the limitation on cross-examination (which was not the issue he presented to the Court of Appeals in his motion for discretionary review). As that was a well-settled area of the law, and "noting

[12] Com. v. Burge, supra.

new or novel [was] presented," the Court agreed that further review was not warranted. The court dismissed the appeal.

Chapman v. Com., 2019 WL 103926 (Ky. App. 2019)(DR Filed 5/15/2019)

FACTS: Chapman was tried for the stabbing assault of another individual in Jefferson County. At trial, he argued self-defense. The detective who investigated the matter testified that he did not believe, given the facts, that Chapman acted in self-defense. After several questions, the defense moved for a mistrial, arguing that the "testimony was improper because it went to the ultimate issue" in the case. The Court denied the request. Chapman was convicted and appealed.

ISSUE: Should a witness refrain from offering opinions on the stand?

HOLDING: Yes.

DISCUSSION: The Court noted that the trial court "immediately and thoroughly admonished the jury that [the detective] was not defining the law for them." In fact, given that Chapman had been charged, the detective "merely stated the obvious" that he believed self-defense was not a factor. The jury by their verdict, suggested they accepted that it was "imperfect self-defense" situation by not convicting him of attempted murder.

After resolving other trial related issues, the Court affirmed the judgement.

TRIAL PROCEDURE / EVIDENCE – PRIOR BAD ACTS

Abplanalp-Bryant v. Com., 2019 WL 328675 (Ky. App. 2019)

FACTS: Bryant and A.T., his sister, lived with their parents, 3 more sisters and 2 brothers. The Cabinet removed A.T. and two sisters from the home due to neglect. A.T. in particular, was "specifically targeted for mistreatment." While in the custody of her aunt, and during therapy, A.T. said that she had not been sexually abused. However, when moved to a residential treatment facility, A.T. disclosed she had been sexually abused by Bryant. That abuse included rape. Bryant was indicted on charges of Rape, Incest and Sexual Abuse.

The Commonwealth filed notice under KRE 404 (c) that it intended to introduce "uncharged acts" of sexual abuse on A.T. and another sister. The Court allowed this evidence with respect to A.T. because "there were few cases in which an alleged pattern of abuse against the same victim was not presented to the jury." The evidence deemed admissible about the other sister was limited by the trial court, however. A local detective also testified as to his involvement with the family and Bryant's "access" to his sisters.

Ultimately, Bryant was only convicted of sexual abuse. He appealed.

ISSUE: May evidence of prior bad acts be admitted with limitations?

HOLDING: Yes.

DISCUSSION: Bryant argued he was unfairly prejudiced by the evidence of prior bad acts against both sisters. The Court held that with A.T., the evidence of uncharged crimes was admissible to show why she feared reporting the abuse, and that Bryant, despite his claims, was around her unsupervised. With respect to the other sister, the detective's testimony about situations in which she was the victim was relevant to impeach the testimony of their mother, who claimed she would always supervise and that the parents were not concerned with the well-being of their daughters.

The Court agreed that the jury was properly instructed as to how to use the testimony provided. The Court agreed that the conviction was proper and affirmed the trial court's decision.

COURTS

Kuhbander v. Com., 2019 WL 1172990 (Ky. 2018)

FACTS: Among other issues, Kuhbander's counsel requested that Kuhbander, who had been convicted in Jessamine County of sexually abusing his girlfriend's daughter, remain free of shackles through the penalty phase of trial. However, just prior to the closing in that phase, Kuhbander appeared shackled on the video. The Court denied the request, noting that during sentencing, prisoners are generally restrained. Counsel objected and Kuhbander appealed.

ISSUE: Are shackles permitted in the courtroom under some circumstances?

HOLDING: Yes

DISCUSSION: The Court noted that the Kentucky Rule of Criminal Procedure 8.28(5) prohibited routine shackling without good cause. In this case, the trial court made no explanation as to why the judge permitted shackling. The Court held that while likely an error, it was harmless because this was a sentencing with respect to a PFO. By that time, the jury was aware of his prior convictions and his argumentative behavior on the witness stand.

After resolving several other issues, the Court affirmed the judgment and sentence.

OPEN RECORDS

Com. (KSP) v. Teague, 2019 WL 856756 (Ky. App. 2019)

FACTS: In 1995, Teague was abducted from a Henderson beach. Her body has never been found and no arrests have been made since that time. Starting in 2004, Teague's mother began making open records requests to KSP concerning its investigation into the crime. Over the years, those requests have been consistently denied.

In 2016, Teague made the most recent request, seeing a variety of specific records, including 911 calls from the time of the abduction. KSP denied the request under KRS 17.150(2)(d), which exempts disclosure which would harm the investigation. KSP claimed the investigation was "still open, active and ongoing." Teague appealed the denial to the Attorney General, which upheld the denial. She appealed the case to the Henderson Circuit Court and it was transferred to the Franklin Circuit Court.

Franklin Circuit Court granted her leave to supplement her request, which was again denied by KSP. Ultimately all of the requested records were submitted to the court for in-camera review. The circuit court concluded that KSP failed to sustain its burden and required KSP to release the records. Teague amended her request, also demanding that KSP pay attorneys' fees and a fine for its willful withholding of the records. In 2018, the Court agreed and awarded Teague over $20,000 in related costs and fines. KSP appealed. The penalty was reduced but KSP further appealed.

ISSUE: Must a denial of a records request be based on some factual basis?

HOLDING: Yes.

DISCUSSION: The primary issue is whether KSP willfully withheld the records, which would justify fines and penalties. KSP focused on the exemptions set forth in KRS 17.150 and KRS 61.878 (1)(h), which to some extent mirror each other. The Court noted that KSP's relied on the fact that the 22 year old case had not been solved or closed and release could taint the jury pool or tip off those involved. This was the same argument it had consistently raised in each request. The circuit court determined the rational was "vague, speculative" … and "constituted extremely remote *possibilities*." The Court emphasized that "a mere parroting of the statutory language does not satisfy the requirement of a *factual* basis for denial of an open records request." In fact, the KSP had previously shared some of the evidence with Teague, although they did not provide copies. Its "pattern of vague denials over the course of so many years is more than sufficient to support the imposition of penalties." The court had adjusted the penalty for the initial failure to bring the case in the correct venue (Franklin), leaving the award to be appropriate.

The Court affirmed the Franklin Circuit Court's decision.

CIVIL LITIGATION

Collins v. Carroll County Sheriff's Department, 2019 WL 413614 (Ky. App. 2019)

FACTS: In February 2013, Collins was arrested for child abuse in Carroll County. His charge was dismissed prior to trial. He moved to expunge all records related to his arrest, including but not limited to the entry on the Sheriff's Office website concerning the arrest. The Sheriff's Office did not comply initially with the order, but did remove the article after it was served with the lawsuit. The CCSD moved for summary judgment, which was granted, and found the CCSD not to have painted him in a false light as the article was truthful and that the statements were privileged under KRS 411.060. Further, it found no private right of action under KRS 431.076. The trial court dismissed the case and Collins appealed.

ISSUE: Is the sheriff's office usually immune from suit?

HOLDING: Yes.

DISCUSSION: The Court first looked at CCSD's claim on immunity. Collins argued that KRS 70.040 served as a limited waiver of the sheriff's official immunity, but since that only applied to the deputies, which Collins did not name, the Court disagreed. As such, the Court agreed the sheriff's immunity prevailed.

Further, the Court found no cause of action for emotional distress either.

The Court upheld the decision in favor of the Sheriff's Office.

Mabrey v. Simpson, 2019 WL 1422645 (Ky. App. 2019)

FACTS: In 2012, Simpson's mother called 911 to report her son (Maverick Simpson) had stolen his grandmother's vehicle. She reported he was 14 and suffered from depression and might be under the influence of drugs, but did not have a weapon. His father separately reported the theft as well. Officer Mabrey met with the father to take the report, and as he did so, Simpson drove by in the stolen vehicle. Mabrey could not pursue immediately. He learned that Simpson might be at a certain Louisville address and found the vehicle in the driveway there. Mabrey approached on foot. Simpson drove around the officer and fled, with Mabrey in pursuit, but not closely. Simpson lost control and hit a guardrail, suffering serious but not fatal injuries.

Simpson filed suit, claiming Mabrey was negligent in not terminating the pursuit. He alleged his actions were in violation of the LMPD SOP. Mabrey's request for qualified immunity was denied, with the trial court finding that the SOPs are ministerial and as such, squalified immunity did not apply. Mabrey appealed.

ISSUE: Could an SOP be considered ministerial based upon the language used in the SOP?

HOLDING: Yes.

DISCUSSION: The Court looked to Yanero v. Davis.[13] Under state law, qualified official immunity applies to negligence when the government employee is in performance of a discretionary act or function, acted in good faith, and within the scope of their authority. However, an act that is ministerial does not enjoy the same protection. In this case, the trial court looked to Mattingly v. Mitchell[14] and concluded Mabrey's actions were ministerial because the SOPs "provide specific directives to its officers when initiating or engaging in a pursuit." The use of the word "shall" for example, is mandatory language and indicates a ministerial duty. Mabrey argued that he did not violate the SOPs, but the Court agreed that decision must be made by a jury.

Mabrey also argued that the Court should consider whether he owed Simpson a legal duty and whether the pursuit was the proximate cause of Simpson's collision. Again the Court agreed it did not have the jurisdiction to determine the issue of proximate causation.

SIXTH CIRCUIT

SEARCH & SEIZURE

SEARCH & SEIZURE – SEARCH WARRANT

U.S. v. Asgari, 918 F.3d 509 (6th Cir. 2019)

FACTS: Asgari, an Iranian national who earned a doctorate at Drexel University, began teaching in Iran. He returned to the U.S. several times, on business and pleasure, collaborating on a scientific research project at Case Western University in Cleveland, Ohio. (That university worked on a number of defense-related projects, although nothing there was specifically classified.) In August 2012, he came to the U.S. on a mixed business/pleasure trip, based in New York where his son lived. He applied for a university position at Case Western Reserve while in the U.S. At some point, the FBI received a tip that he was working at the university on an improper visa and the university was questioned about it.

Agent Boggs obtained a search warrant for Asgari's personal email account, to determine if he violated any federal law and ultimately, he was indicted on multiple counts of "stealing trade secrets" by allegedly transmitting information to Iran in violation of American sanction laws. Asgari moved to suppress any evidence from the 2013 warrant, arguing it was improper, and that information used from the execution of that warrant was used to find information for a 2015 warrant, which resulted in the charges. The trial court agreed with Asgari and suppressed all of the evidence and the Government appealed.

ISSUE: May Leon[15] save a deficient warrant affidavit?

[13] 65 S.W.3d 510 (Ky. 2001).
[14] 425 S.W.3d 85 (Ky. App. 2013).
[15] 468 U.S. 897 (1984).

HOLDING: Yes.

DISCUSSION: The case turns on the evidence uncovered by the execution of the 2013 warrant. The Court agreed that even if probable cause was questionable, the good faith rule under Leon applies. Leon provides a "safe harbor for reasonable slipups." The Court held that a reasonable officer could rely on the lengthy affidavit in the 2013 warrant affidavit, which included that although he never indicated Cleveland (where Case Western is located) as a destination on the visa, he travelled there and exchanged numerous emails with parties there, and he worked on the project there in 2012. None of these actions were permitted under the visa he obtained, and Asgari, in effect, misled the State Department about his true intent. The evidence suggested that Asgari "may have exploited his position to transmit information back to Iran." Iran, it noted was under broad sanctions. The Court held that in putting it all of this information together, the investigators operated in good faith. His omission to list Cleveland on either trip clearly appeared to be part of an effort to deceive. Asgari argued he was on sabbatical and that he was corresponding mostly with students, but he was communicating with students of a university (his home institution) with close ties to the sanctioned government.

Although the affidavit had some errors, they were more minor omissions as opposed to deliberate falsehoods designed to mislead the judge.

The Court held the warrant met the good faith threshold and reversed the lower court's ruling.

U.S. v. Hampton, 760 Fed.App. 399 (6th Cir. 2019)

FACTS: On September 11, 2015, Hampton's father died while in hospice care. Hampton was his caregiver. A few months later, Hampton's half-brother filed a report that he suspected the father died from being overmedicated on morphine that was administered by Hampton. The hospice provider did not believe that to be the case and a blood test of samples from the deceased did not indicate it either.

A few weeks later, BATF received a tip that Hampton had a number of firearms and regularly carried one on his person and in his vehicle. Hampton was a convicted felon. Further investigation showed that in the previous four years he had obtained 58 hunting licenses and most were for "gun season." The informant was not identified, but the agent knew it was the half-brother and he was aware of the prior allegations. He did not include that in the subsequent search warrant application.

Several guns were found at Hampton's home and he was charged with various weapons offenses. Hampton moved for suppression, arguing the information was stale, and was denied. He entered a conditional guilty plea and appealed.

ISSUE: Are guns less likely to be "stale?"

HOLDING: Yes.

DISCUSSION: The Court addressed the staleness issue and noted that the "critical inquiry in determining whether a search is warranted is whether there is reasonable cause to believe that the specific things the agents seek to search for and seize are located on the property to which entry is sought."[16] Staleness, as well, depends upon the crime. In this case, guns are durable goods and possession of a firearm is "continuing in nature." Hampton was "not nomadic" and had lived in the residence for some time. Photos of the guns, shared with the agent, were ten months old, but the informant had been in the house since, and apparently had not seen any guns at that time.

The Court agreed this was a totality of the circumstances situation. The Court held that the evidence was provided by someone with a close personal relationship with Hampton and was corroborated by the hunting licenses, one of which was current and was for waterfowl, commonly hunted with a firearm. The Court held that the warrant was properly issued, even though the agent omitted the information on the informant and the prior investigation to protect his identity.

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.

42 U.S.C. §1983 – EMPLOYMENT

Liogghio v. Township of Salem (Michigan), 766 Fed.Appx. 323 (6th Cir. 2019)

FACTS: Liogghio was the administrative assistant to the Township Supervisor. When that individual ran for re-election, she ran for Clerk as his running mate. They lost the race. The new Supervisor told a witness that he would not fire her but would "force her to quit." Over the ensuing months, he made changes to her position. It culminated with Liogghio engaging in an argument with the new Supervisor. She then stopped going to work, for health reasons, accusing the Supervisor of making her working conditions so intolerable that she was forced to resign. She never returned but instead, filed suit under 42 U.S.C. §1983, claiming a violation of her First Amendment right to run for the office. The Town Supervisor moved for summary judgment, which was denied. He appealed.

[16] U.S. v. Frazier, 423 F.3d 526 (6th Cir. 2005).

ISSUE: May constructive dismissal for exercising First Amendment rights lead to litigation?

HOLDING: Yes.

DISCUSSION: Liogghio argued she was constructively discharged by the Township's actions. The Township Supervisor argued his actions, which reduced her duties and responsibilities, were not sufficient to constitute retaliation, and that in fact, she never actually quit.

The Court held that the factual issues Liogghio presented barred summary judgment. The case was allowed to move forward.

42 U.S.C. §1983 – ARREST

Watson v. City of Burton, 764 Fed. Appx. 539 (6th Cir. 2019)

FACTS: On August 4, 2015, Hubarth contacted the Burton, Michigan PD alleging Watson had sent her threatening text messages and she believed he was armed. On August 12, officers went to Watson's apartment and asked him to come outside, but then reached in and led him outside. He admitted to sending the messages to Meissner, Hubarth's friend, not to Hubarth. Watson was charged with a local violation and those were later charged.

Watson filed suit under 42 USC §1983 against the department and the officers involved, claiming improper arrest. Watson argued he was inside the house when grabbed and pulled outside. The officers argued that Watson was on the threshold and thus in a public place. The trial court denied summary judgment and the officers and city appealed.

ISSUE: May a home be entered to make a warrantless arrest, absent an exigency?

HOLDING: No.

DISCUSSION: The Court equated this to the situation in U.S. v. Saari, calling this a constructive in-home arrest."[17] In both, the subject was seized by intimidation and a command or action while inside their homes. "Absent exigent circumstances, that threshold may not reasonably be crossed without a warrant."[18]

In this case, the Court found "no compelling law enforcement need to enter the home at the moment they did." As such, the Court affirmed the denial of summary judgment and permitted the case to move forward.

Kalvitz v. City of Cleveland, 763 Fed.Appx. 490 (6th Cir. 2019)

[17] 272 F.3d 804 (6th Cir. 2001).
[18] Payton v. New York, 445 U.S. 573 (1980).

FACTS: "Almost every important fact in this case is in dispute." In May 2014, Kalvitz, a retired police officer was attending an annual police event. He got into a fight with an officer from another jurisdiction and he was carried out in handcuffs. During the fight, Officers Kinas and Randolph, both Cleveland officers, intervened, but "not to calm things down." Instead, Kalvitz alleged Kinas and Randolph beat him while he was on the floor, and then arrested him. As Kalvitz was carried outside, he was banged into the walls and ultimately thrown into a concrete wall. He suffered a number of injuries. The Cleveland officers, however, claimed they were off duty and bystanders but by the time they saw Kalvitz, he was already cuffed and outside. They also claimed they were off-duty and private citizens at the time.

The trial court cited the factual disputes and ruled against summary judgment. The Cleveland officers appealed.

ISSUE: May officers be sued for official acts taken while off-duty?

HOLDING: Yes.

DISCUSSON: The Court noted that there would be no debate should Kalvitz's claims turned out to the true. The officers claimed, in an alternative argument, they had been told that Kalvitz had brandished a knife, but they only heard that after the fact. As such, it was immaterial. Kalvitz claimed he did not resist arrest; the Cleveland officers claimed he did. Further, Kalvitz specifically identified which officers took which action.

Finally, the Cleveland officers argued that they were acting off-duty, and thus a §1983 action was not appropriate. The Court noted whether it was state action did not depend on their duty status but how they presented. All of the officers announced they were officers, wore weapons and two wore badges. This suggests that they were acting in an official capacity. If they used their handcuffs, that would also implicate state action. But that will be "for the jury to sort out."

The Court affirmed the denial of summary judgment and allowed the case to go forward.

Jacobs v. Alam / Weinman / Kimbrough, 915 F.3d 1028 (6th Cir. 2019)

FACTS: On January 3, 2014, a Michigan law enforcement task force, with local officers serving as Special Deputy U.S. Marshals, including those subject to the lawsuit, arrived at the home of Vargas, the brother of a fugitive they were seeking. They searched but did not find the fugitive. They also searched the basement apartment of the residence, occupied by Jacobs. During the search, Jacobs had arrived through a back entrance and did not notice the officers – although they saw him. Jacobs found his space ransacked and "bounded" up the interior stairs into the house proper. Jacobs found people he did not expect (the officers) and spun around to run, but fell down the stairs. Jacobs was armed but did not get a chance to draw his weapon. He was shot as he fell. Jacobs retreated and only then learned it was law enforcement officers who had shot him. (One recovered bullet came from Kimbrough's gun.)

The version given by Kimbrough and Alam, who both fired, indicated that when Jacobs emerged from the basement, he had a pistol pointed at Kimbrough. Kimbrough identified himself as police. Kimbrough stated that Jacobs fired his weapon (although forensic evidence indicated he did not) and Kimbrough retreated. He claimed Jacobs surrendered after exchanging shots. Alam indicated he heard shots but did not know who fired. The other men saw nothing. The Sergeant who was present stated that Jacobs said he "had the drop" on the men but Jacobs denied saying he had pointed a gun at anyone.

Jacobs was indicted but acquitted of all charges related to the incident. He then filed suit against the officers under Bivens, as they were serving as federal officers at the time.[19] The officers moved for summary judgement and were denied. They then appealed.

ISSUE: May local officers be sued under Bivens?

HOLDING: Yes.

DISCUSSION: The Court looked at whether a Bivens remedy is available under Zigler[20] and Hernandez[21]. Under Ziglar, the Court noted that each action must be considered as to whether factors warranted extending it to a Bivens action. The Court, however, noted this was in face a run of the mill challenge to a standard law enforcement activity and presented no novel idea.

The Court agreed that this action involved a simple allegation of excessive force, and because of the dispute in what actually occurred, it could not be resolved in an interlocutory ruling.

42 U.S.C. §1983 – SEARCH & SEIZURE

Naselroad v. Mabry / Craycraft, 763 Fed.Appx. 452 (6th Cir. 2019)

FACTS: On October 8, 2013, Detectives Mabry and Craycraft (KSP) went to Naselroad's home in Clark County, Kentucky to conduct a knock and talk. They were investigating a tip that marijuana was being grown behind the residence. While Mabry was talking to Naselroad's mother, Craycraft spotted Naselroad going out the back door and yelled at Naselroad. The detectives saw that Naselroad had a rifle. They called at him to drop it, but he did not do so, and he was shot once in the chest. Both detectives were in plainclothes and, according to Naselroad, did not specifically identify themselves as police. Naselroad survived. It was later explained that Naselroad was investigating an individual spotted on surveillance video on his property – almost certainly the individual who provided the tip to the police. He did not know who the men were that were yelling at him and was confused. Following the shooting, officers obtained a search warrant and found marijuana and drug paraphernalia. He was convicted of possession of

[19] 403 U.S. 388 (1971).
[20] 137 S.Ct. 1843 (2017).
[21] 137 S.Ct. 2003 (2017).

marijuana and drug paraphernalia, but not of other charges on which he was indicted, including wanton endangerment and cultivation.

Naselroad sued Craycraft and Mabry, among others, under 42 U.S.C. §1983. The district court ruled in favor of the police defendants under qualified immunity and Naselroad appealed the decision with respect to Mabry and Craycraft.

ISSUE: Is there a right to be free from deadly force if someone does not pose a deadly threat?

HOLDING: Yes

DISCUSSION: First, the Court agreed the Heck v. Humphrey[22] did not bar the claims. Naselroad was convicted of charges related to marijuana, found as evidence obtained as a result of a search warrant obtained after the shooting. (The defendants were in the odd position of arguing that the search warrant, obtained by another officer, was facially invalid and fell outside the Leon good faith doctrine, but the Court disagreed. The warrant did accurately reflect that Naselroad was pursued and seized while on his own property.)

With respect to the issue of summary judgment, the Court first looked to the initial entry onto the property. The Court agreed that entry into the curtilage is only justified under specific circumstances and that they did arrive, apparently, in a marked unit, with a uniformed trooper in the group, and they identified themselves to Naselroad's mother. Further, "evasive activity after contact with law enforcement conducting a 'knock and talk' to investigate drugs can support a reasonable inference that evidence is about to be destroyed."[23] As such, the decision to pursue Naselroad was proper.

With respect to the use of force, however, the Court agreed that "Naselroad enjoyed a clearly established right not to be shot if he did not present a threat sufficient to justify the use of deadly force."[24]. The Court found summary judgement on the issue inappropriate at this stage, as there was a dispute as to any threat presented by Naselroad. The officers were at the scene to investigate a non-violent, low-level crime and had no additional information to suggest that Naselroad was threatening. He had put on the record that he held the gun, apparently a rifle, at "low ready" and pointed down.

The Court affirmed the Fourth Amendment decision, but reversed the judgment with respect to the force claim. The Court also remanded the claims under Kentucky state law for malicious prosecution, assault and battery.

[22] 512 U.S. 477 (1994).
[23] U.S. v. Hogan, 539 F. 3d 916 (8th Cir. 2008).
[24] King v. Taylor, 694 F.3d 650 (6th Cir. 2012).

42 U.S.C. §1983 – FIRST AMENDMENT

Cruise-Gulyas v. Minard, 918 F.3d 494 (6th Cir. 2019) (Cert filed 5/15/2019).

FACTS: In June 2017, Officer Minard (Taylor, MI) stopped Cruise-Gulyas for speeding but elected to cite her for a lesser violation. She was "apparently ungrateful for the reduction," and she "made an all-too-familiar gesture at Minard with her hand and without four of her fingers showing." Minard, unhappy, pulled her over within 100 yards and changed the ticket to a speeding offense.

Cruise-Gulyas filed suit under 42 U.S.C. §1983, claiming retaliation because of protected speech. Minard moved for summary judgment based on qualified immunity. The trial court denied the motion, ruling that she "could not be stopped a second time in the absence of a new violation of the law." Minard filed an interlocutory appeal.

ISSUE: Does rudeness constitute a basis for a traffic stop?

HOLDING: No.

DISCUSSION: The Court began by noting "fits of rudeness or lack of gratitude may violate the Golden Rule." However, "that does make them illegal…." The Court agreed that for the second stop, he needed a new driving infraction, which he did not have. Her crude gesture provided "no legal basis" to make the second traffic stop.

"Qualified immunity protects police from personal liability unless they violate a person's clearly established constitutional or statutory rights. The rights asserted by Cruise-Gulyas meet that standard."[25] To have pulled her over the second time, he needed probable cause of a traffic infraction or reasonable suspicion of a crime, but he had neither. In Wilson v. Martin, the court had ruled that the "gesture was crude, not criminal."[26] As such, "Minard should have known better here." The second stop was "distinct" from the first, and was "*not* a continuation of it." Any reasonable officer should know that such a gesture is free speech that is protected under the First Amendment."[27] "No matter how he slices it, Cruise-Gulyas's crude gesture could not provide that new justification" for a stop." Minard, in short, clearly ha[d] no proper basis for seizing Cruise-Gulyas a second time."

The Court affirmed the denial of summary judgment and permitted this matter to proceed.

Harcz, et al v. Boucher, et. al., 763 Fed. Appx. 536 (6th Cir. 2019)

[25] Kisela v. Hughes, 138 S.Ct. 1148 (2018).
[26] 549 F.App'x 309 (6th Cr. 2013).
[27] Sandul v. Larion, 119 F.3d 1250 (6th Cir. 1997); Cohen v. California, 403 U.S. 15 (1971).

FACTS: In 2014, several groups in Michigan planned an event to celebrate the 25th anniversary of the ADA. Harcz, among others, mostly physically disabled, knew about and planned to attend the event and Harcz was directly involved in the planning.

Due to some controversy, there were concerns about a protest and possible disruption of the event. Organizers notified the Michigan State Police about the concerns. Allegedly two organizers, Grivetti and Weaver met with the police and it was agreed that protesters would be excluded from the Capitol where the event was to be held.

The morning of the event, Boucher, and others, assembled near the Capitol to stage their protest and were prevented from entering the Capitol environs. The group, numbering 15-20, were blocked by police and then barricaded from approaching the stage set up for the event. Harcz, who was blind, attempted to circumvent the barricades and was ultimately arrested; he was detained for the duration of the event. He was charged but most charges were dismissed, although a judge did find probable cause for obstruction.

Harcz and others filed suit under 42 U.S.C. §1983, under the First and Fourteenth Amendment. The District Court dismissed part of the claim, as it was against private entities not showed to be in a civil conspiracy with law enforcement. It dismissed Harcz's individual claims as probable cause was found for his underlying arrest. The plaintiffs' appealed.

ISSUE: May private citizens be sued under §1983 if involved in a conspiracy with law enforcement?

HOLDING: Yes.

DISCUSSION: First, the Court looked at the claims against the private defendants, which could only move forward if they were shown to be acting in conspiracy with the law enforcement defendants. Although group members did meet individually with police, there was no indication of a "shared objective" and more indication that the law enforcement defendants acted independently in developing an operation plan to handle protesters without input from the event organizers, who had simply expressed concerns. The Court noted that it did not want to "deter private citizens from reaching out to the police with concerns" and did not want to "impose liability here without sending a clear message to think twice before notifying the police about a concern." The court upheld the dismissal involved the private defendants.

With respect to the law enforcement defendants, the Court however, agreed that further development of the facts was critical to evaluable the actions of the MSP. The complaint plausibly alleged a First Amendment violation.

In such as assessment, three considerations must be made:

1) "whether the plaintiff's conduct is protected speech";
2) "the nature of the forum"; and

3) Whether the justification for exclusion from the relevant forum satisfy the requisite standard.

In this case the speech was protected and the forum public. Even in a "traditional public forum, the government may impose reasonable time, place, and manner restrictions on speech as long as the restrictions are content-neutral, are narrowly tailored to serve a significant government interest, and leave open ample alternative channels of communication."

The protesters argued that they "posed no threat of disruption before the police excluded them from the event" and the police countered they imposed the restrictions with the aim of "crowd control, safety, and prevent a heckler's veto." The Court noted that video evidence only showed conduct well after they were denied access and as such, the facts clearly support a First Amendment violation, a right that was clearly established.

The Court reversed the dismissal of those claims.

With respect to Harcz's individual claims, available video, although not definitive, suggested more than one interpretation of what occurred and the Court agreed dismissal of Harcz's claims was to be reversed.

42 U.S.C. §1983 – SEARCH

U.S. v. Latham, 763 Fed. Appx. 428 (6th Cir. 2019)

FACTS: Latham was stopped by Michigan police in August 2016, for having windows too darkly tinted. He continued some time before pulling over. The officers spotted a beer can on the floor and Latham handed it over. (Police said the can was half full and cold, Latham said it was empty and warm.) He initially refused to get out of the car, but finally did. Officers believed he was intoxicated. He refused all roadside testing – a later warranted blood draw showed he had a .149 BAC. He was arrested and secured. Officers searched the passenger compartment and found alcoholic beverages and a loaded handgun. He was charged with driving under the influence and for the weapon, as he was a convicted felon.

Latham moved to suppress, arguing that the search was unlawful. The Court denied the suppression. Latham took a conditional plea and appealed.

ISSUE: May an impaired driver's car be searched for alcohol under the second prong of Gant?

HOLDING: Yes.

DISCUSSION: The Court looked at the two different exceptions that could apply in the case. The Court noted that the "search incident to lawful arrest exception is primarily intended to ensure

that a suspect does not have immediate access to weapons or the ability to destroy evidence."[28] Latham was secured in the patrol car, so he argued that did not apply. However, under Gant, the vehicle may also be searched if it is reasonable to believe that "evidence relevant to the crime of arrest" might be found inside that vehicle. In Latham's case, he was suspected of impaired driving and as such, it was proper to search for the means by which he became impaired. The fact that he had not yet been formally arrested at the time was immaterial, as it occurred "quickly on the heels of the challenged search."

The Court agreed the search was lawful and upheld his conviction for the firearm.

42 U.S.C. §1983 – DETENTION

Jackson v. Lawson, 760 Fed.Appx. 394 (6th Cir. 2019)(Cert. filed 5/9/2019)

FACTS: On December 16, 2016, Officer Lawson (Louisville Metro PD) responded to a suspicious person call. He found Jackson preparing to inject heroin. Lawson found multiple hits under Jackson's name for active warrants, and placed Lawson under arrest. After booking, Lawson again ran Jackson through the system and found several outstanding warrants, in particular, one for flagrant non-support out of Grant County. The subject in that warrant had the same birth year and last four numbers of the Social Security number, but few other identifiers were in the warrant. When told, Jackson said he "didn't think it was him." Jackson indicated he was aware of it and had, two years before, written a letter to "some lawyer" and said they had the wrong person, but "did nothing else." (Jackson denied that he was told about the warrant at that time.) Lawson went through some steps and ultimately served it, but realized Jackson was a little taller than indicated by the warrant and gave a different street address.

After his matters in Jefferson County were resolved, he was to be transferred to Grant. (This was the point at which Jackson stated he learned of the warrant for the first time.) He protested to his attorney but was transferred and remained in custody for another two months, until he could post bond. Within another month, with a DNA test, he was excluded as the father of the child and the case was dismissed.

Jackson filed suit against Lawson and other parties, arguing false arrest and related claims, under 42 U.S.C. §1983. After discovery, Lawson was dismissed under summary judgment. Jackson appealed.

ISSUE: Should officers attempt to verify identity (to the extent they can) when an arrested subject states they are not the right person?

HOLDING: Yes.

DISCUSSION: The Court noted that "the general rule is that when an individual is arrested

[28] Arizona v. Gant, 556 U.S. 332 (2009).

pursuant to a facially valid warrant and detained despite protestations of mistaken identity, the individual's imprisonment is not constitutionally repugnant."[29] The standard would be deliberate indifference and a failure to take some action to verify the identity of the party involved. The Court noted factors to be considered are the length of time of the detention, the extent to which he protested his innocence and the availability of exculpatory evidence to the officer at the time. In this case, his detention was lengthy (two months) but his attempts to protest were minimal, at least to Lawson. Lawson verified as much as he could, based upon available information. The height and address differences were negligible.

The Court affirmed the dismissal.

INTERROGATION

U.S. v. Collado-Rivera, 759 Fed.Appx. 455 (6th Cir. 2019)

FACTS: In July 30, 2015, Ohio authorities stopped a car hauler and found 40 kilos of cocaine. They linked Collado-Rivera and others to the conspiracy. Following a search warrant he was arrested and taken in for an interview. After being read his Miranda rights, he admitted that he was involved in the scheme. He was indicated and sought suppression.

ISSUE: If sufficient time passes, will an interrogation be considered coercive if the initial arrest was violent?

HOLDING: No.

DISCUSSION: Collado-Rivera claimed that he was given suggestions that if he confessed, he might get leniency for his cooperation. He also claimed they promised that no one would know but his interview was revealed in the presence of his co-defendants. The Court ruled that mistreatment, if any, during the search warrant execution did not make the resulting interview coercive. (The raid itself was violent.) Some time had passed between the warrant service and his interview and he expressed no fear of reprisals.

The Court found no evidence that the actions at the scene overbore his will or was the motivating factor for his confession. The court denied his suppression.

TRIAL PROCEDURE / EVIDENCE

TRIAL PROCEDURE / EVIDENCE – TESTIMONY

U.S. v. Quintana, 763 Fed.Appx. 422 (6th Cir. 2019)

[29] Baker v. McCollan, 443 U.S. 137 (1979).

FACTS: During Quintana's trial for drug trafficking, the Court permitted the testimony of Smith, Quintana's cellmate. He testified as to conversations they exchanged about Quintana's crimes. He testified as well that he had not spoken to Humrich, Quintana's co-defendant. The defense tried to offer the testimony of another inmate, Mosley, who would testify that he observed Smith and Humrich talking at length about the case. The trial court found it inadmissible hearsay, but allowed him to testify that he had overheard the pair talking, but not the content of the speech.

The prosecution also permitted the admission of recorded phone calls and text messages, along with Facebook records regarding Quintana's association with Aker briefly as Facebook "friends" They characterized the records, for evidence purposes, as "self-authenticating business records" accompanied by a certificate of authenticity from Facebook. The content of the messages, however, was not specifically captured, only that the exchange occurred.

Quintana was convicted and appealed.

ISSUE: May Facebook records be authenticated by a certificate from that company?

HOLDING: Yes.

DSICUSSION: With respect to the first, the Court agreed that the error (refusing to allow Mosley's testimony), if it was an error, was harmless and that the jury was given other evidence that provided balance.

With respect to the second, Quintana argued that the government did not properly authenticate the records allegedly originating with him. The Court agreed they were properly authenticated under FRE Rule 901, a "relatively low hurdle." It was then left to the jury to decide the weight to be accorded to the evidence presented.[30] The Court noted there was also "powerful circumstantial evidence linking" Quintana to the account. While more could have been done, such as linking the listed email addresses to IP addresses, there was sufficient evidence for the jury to decide.

The Curt affirmed Quintana's convictions.

U.S. v. Isaac, 763 Fed.Appx. 478 (6th Cir. 2019)

FACTS: Osborne and his wife served as CIs to aid in a Pikeville investigation into drug trafficking against Isaac. They were wired. During Isaac's subsequent trial, Officer Hamilton (Pikeville PD) narrated two separate videos and confirmed at various points the meaning of certain terms and phrases. Parts of his testimony drew objections. Det. Adkins testified as to other recorded transactions, doing the same thing. Adkins was also qualified as an expert in drug trafficking behaviors

[30] U.S. v. Farrad, 895 F.3d 859 (6th Cir. 2018).

Ultimately, Isaac was convicted and appealed.

ISSUE: Should an officer narrate and interpret the video of a transaction they did not directly witness?

HOLDING: No (as a rule).

DISCUSSION: Issac only challenged the portions of Hamilton's testimony in which he narrated and interpreted the videos. The Court held that an officer witness (not an expert) may testify when either the "officer is a participant in the conversation, has personal knowledge of the facts being related in the conversation, or observed the conversations as they occurred."[31] This derives from FRE Rule 701. Although the court believed that error may have occurred, in this case, the error was harmless because the "evidence against Isaac was overwhelming." Further, Osborne testified about the videos as well and covered the same ground as Officer Hamilton.

The Court affirmed Osborne's conviction.

COURTS

Daniel v. Burton, 919 F.3d 976 (6th Cir. 2019)

FACTS: During Daniel's trial in Michigan state court, for a drive by shooting, he and two co-defendants were required to wear a "Band-it" – an electronic restraint around his leg hidden under clothing. It was controlled by a court officer and served to send an electric shock if needed. His attorney argued Daniel had never "acted out" in the courtroom and it was unnecessary. During his 9 day trial, the device was never activated.

Daniel appealed his conviction, and after additional hearings, the Michigan courts held that the use of the device was proper and did not affect his due process or fair trial, rights. Daniel appealed to the federal court under habeas corpus.

ISSUE: Is it proper for a court to require a defendant to wear an electronic restraint in trial?

HOLDING: Yes.

DISCUSSION: Daniel argued that the device impeded his ability to communicate with his lawyer because he was afraid it "could go off and it might kill him." However, this contradicted his statements at a court proceeding and observations of court officials. Further, before the device was triggered, it would set off an alert tone and the subject could avoid a shock by stopping what they were doing.

[31] U.S. v. Kilpatrick, 798 F. 3d 365 (6th Cir. 2015).

The Court affirmed his conviction.

MISCELLANEOUS

Acosta (Secretary of Labor) v. Off Duty Police Services, Inc., 915 F.3d 1050 (6th Cir. 2019)

FACTS: Off Duty Police Services, Inc. (ODPS) provides private security and traffic control services in Louisville. Most of the workers are sworn officers, holding full or part-time positions in a law enforcement agency in the area. Some of the individuals working for the company were nonsworn. In many cases, the sworn and nonsworn officers are performing the same tasks. Spurgeon handled assignments by contracting with local businesses, and used schedulers to keep track of requests for service. Workers were then offered assignments, although it was noted that if they rejected assignments, they might be denied future assignments, which they called being placed in "time out."

If they agreed to the work, they would be given the details. Some equipment was occasionally provided, such as jackets and signage, but all provided their own branded shirts and they were required to have a "police-style vehicle." Sworn officers as a rule, had their cruisers, while others purchased a vehicle for that purpose. Sworn officers usually wore their uniforms, while nonsworn wore uniforms that were similar. All were required to be groomed as required by policy and would be supervised by others in some cases. Workers would then send Spurgeon an invoice to document their hours, a practice that started only after the Department of Labor (DOL) opened an investigation into the company's recordkeeping. As a rule, the workers were paid an hourly wage, although on occasion, workers were paid per project. Spurgeon blamed any accounting errors on the workers.

ODPS classed all of the workers as independent contractors and they were required to sign non-compete clauses. It specifically has never paid overtime to those eligible under federal law.

The DOL brought suit against ODPS, arguing that the workers should all be classified as employees, rather than independent contractors, and that the recordkeeping requirements were a violation. At trial, the district court agreed that ODPS nonsworn employees were employees and entitled to overtime pay, but that the sworn officers were independent contractors, because they only used ODPS to supplement their income. It held that the faulty records were not a violation because they were not "knowingly" maintaining inaccurate records.

The Department of Labor appealed the adverse judgements.

ISSUE: May employees be classified as independent contracts when in fact, they are treated as employees?

HOLDING: No.

DISCUSSION: The Court looked to the Fair Labor Standards Act (FLSA), which was designed to protect employees by providing for overtime when the employee works more than 40 hours a week. Critical to that process, however, is whether the worker is an independent contractor or an employee.

The test for the law is that of "economic reality:"

1) The permanency of the relationship between the parties;
2) The degree of skill required for the rendering of the services;
3) The worker's investment in equipment or materials for the task;
4) The worker's opportunity for profit or loss, depending upon his skills;
5) The degree of the alleged employer's right to control the manner in which the work is performed and
6) Whether the service rendered is an integral part of the alleged employer' business.

These facts needed to be weighed in toto, with not one being individually determinative in the assessment. It focused on the workers' "economic dependence or independence from" the alleged employer.

The Court applied the test to the activities of ODPS. It determined that the services provided was, in effect the entire business, despite its argument that ODPS was simply an agent, a broker. The skill involved in the tasks was minimal, traffic control and walking security patrols. Although sworn officers were used, that was immaterial to the tasks they were actually called upon to perform. The only individuals who had a significant capital outlay were those that needed to purchase a vehicle, but the vehicles that were bought were typically being used as household vehicles as well. ODPS provided most of the other specialized equipment needed for the jobs. With respect to the permanency, many, perhaps most, had worked for ODPS for a significant period of time, years and in a few cases, decades. The fact that many worked other jobs was immaterial, but was simply an economic reality. Most worked consistently for ODPS, although they might work intermittently at other places as well. The sworn officers did not "bounce around," but often indicated that they had two primary sources of income – their law enforcement job and ODPS. The Court noted "that is not the kind of itinerant works that independent contractors ordinarily perform." With respect to the skill level, the Court noted that completion of the jobs required limited skill and that the pay was not based upon the skill level of the individual tasked for the job, but simply upon the hours they worked. The fact that workers could control their schedule (and thus their income) was immaterial. Finally, ODPS maintained a great deal of control, both exercised and implied, over its workers.

The Court emphasized that while workers could accept or decline assignments, there would be repercussions in doing so. And because of the non-compete clause, which ODPS had enforced through lawsuits, severing ties with ODPS completely carried financial harm. Although supervision was light, the potential was always there, there was supervision and instruction from the two primaries in the company. Failure to meet grooming or dress mandates, such as wearing a beard, involved repercussions.

In looking at all six factors, the Court agreed that five of the six indicated an employee relationship, and the last, with regard to supervision, was evenly balanced. As such, the Court agreed that both the sworn and nonsworn workers were legally employees under the FLSA.

With respect to the recordkeeping requirements, the Court agreed that it was the responsibility of the employer to maintain the records and that knowledge was not a requirement under the law, as applied to ODPS. (There is a knowledge provision in another part of the statute.)

The Court affirmed the decision that made the nonsworn workers employees and back wages owed to them, and reversed the decision that the sworn officers were independent contractors and that ODPS did not violate the FLSA's recordkeeping requirements. The Court remanded the case to the District Court for further action.

TABLE OF CASES