Pa. R.C.P. 1920.42(a) (1) provides:

> If a complaint has been filed requesting a divorce on the grounds of irretrievable breakdown and both parties have filed an affidavit under Section 201(c) of the Divorce Code evidencing consent to the entry of a final decree, the court on motion of either party or its own motion shall review the complaint and affidavits. If in compliance with Section 201(c), the court shall enter a final decree.

In reliance of the foregoing counsel for the respondent contends that the function of the Court in granting a final Decree of Divorce under Section 201(c) is entirely ministerial rather than judicial. Therefore, the decree was ripe for granting immediately upon the filing of the motion with the necessary affidavits, and it should now be granted notwithstanding the intervening death of the defendant.

We do not agree with the contention that the granting of a Decree in Divorce under Pa. R.C.P. 1920.42(a) (1) is entirely a ministerial act, for counsel ignores the mandate of the Rule that "the court... *shall* review the complaint and affidavits" (italics ours). The case at bar is a classic example of precisely why the granting of a divorce decree cannot be considered a ministerial act. Here, the record discloses no evidence that the complaint in divorce was served upon the defendant. Pa. R.C.P. 1920.4 inter alia sets forth in detail the procedure for the service of a complaint in divorce. Neither under that rule or any other rule is service of the complaint excused. Thus, it would have been the responsibility of this Court upon the review mandated by Pa. R.C.P. 1920.42(a) (1) to have remanded the entire matter to counsel for the plaintiff to establish that service of the complaint had, in fact, been made or to follow the necessary procedures for securing jurisdiction of the defendant.

In the case at bar, this Court could not as a matter of law have entered a final decree in divorce at any time prior to the death of the defendant. Upon the death of Mr. Chappell the marriage of the parties was terminated by that death, and the entry of a decree subsequent to that date would be of no legal effect.

Present counsel for the plaintiff has argued that it was unnecessary for the plaintiff to petition to withdraw her motion for a divorce because of the termination of the marriage by reason of the defendant's death; and it would have been sufficient as a matter of law to file a suggestion of the defendant's date of death which would have had the effect of abating

the above-captioned proceeding. This would appear to be correct. However, original counsel for the plaintiff out of an over abundance of concern for the rights of all parties elected to proceed by way of the petition to withdraw the motion for divorce, and we do not find this to be in error since it did present potential heirs at law of the defendant the opportunity to have their day in court.

ORDER OF COURT

NOW, this 9th day of November, 1981, the Rule is made absolute and the Plaintiff's Motion for a Divorce is deemed withdrawn.

Exceptions are granted the respondents.

COMMONWEALTH v. PORTMANN, C.P. Franklin County Branch, Cr. Div., No. 22 of 1981

Criminal Law - Proof of Identity - Suppression of Evidence - Pa. R.C.P. 130 - Warrantless Search

1. Where the Commonwealth presents no testimony that the person at the defense table was the party apprehended by police, a demurrer would be sustained if the defendant were being tried by a jury.

2. At a non-jury trial, where the Commonwealth presents no testimony specifically identifying the defendant, but the defendant appeared before the trial judge on three separate occasions and identified himself by name and as the defendant, the identity of the defendant was established beyond a reasonable doubt.

3. Where the defendant was taken to a district justice's office for arraignment within six hours after arrest and the district justice, for unknown reasons, did not appear until after the six hour period elapsed, statements secured prior to arraignment will not be suppressed because the delay was attributable to judicial delay and was not the fault of the Commonwealth.

4. A police officer's act of shining a flashlight into the cab of a truck to aid the driver in finding the owner's card and thereafter seizing drug paraphenalia which was in plain view was lawful.

David W. Rahauser, Assistant District Attorney, Counsel for Commonwealth

William C. Cramer, Esq., Counsel for Defendant

OPINION AND ORDER

KELLER, J., October 1, 1981:

Thomas Paul Portmann was arrested and charged with possession with intent to deliver on December 20, 1981. He appeared and waived arraignment on February 18, 1981. His Omnibus Pre-Trial Motion for Suppression was presented on March 6, 1981, and an order entered the same date setting a hearing for April 16, 1981 at 9:30 o'clock a.m. On May 6, 1981 trial of the case was continued to the July Term of Court. On June 15, 1981 the Honorable George C. Eppinger filed his Findings of Fact, Conclusions of Law, and denied the prayer of the Omnibus Pre-Trial Motion. On July 13, 1981 the defendant, with the approval of his counsel and the District Attorney, waived trial set for July 17, 1981. Trial without jury was held as scheduled and the defendant was found guilty as charged. Timely motions for new trial and in arrest of judgment were filed. Arguments have been held and the matter is ripe for disposition.

The only issues briefed and argued by the defendant in support of the post trial motions are:

> I. Did the Court err in denying defendant's pre-trial motions to suppress the drugs and other evidence seized from Subaru and statements made by defendant on grounds that defendant's constitutional rights had been violated?
>
> II. Did the Court err in denying defendant's pre-trial motions to suppress the drugs and other evidence seized from the Subaru and statements made by defendant on grounds that defendant was not arraigned within a reasonable time after his arrest?
>
> III. Did the Court err in denying defendant's demurrer to the evidence on grounds that the Commonwealth failed to prove beyond a reasonable doubt the identity of the operator of the Subaru?

We will consider all other post trial motions as having been abandoned by the defendant.

At about 2:50 a.m. on December 20, 1980 Greencastle Chief of Police, Harold J. Benchoff, and Officer Terry Sanders observed a vehicle proceeding east on Route 16 and approach-

ing the intersection of U. S. Route 11 with only its flasher lights on. The vehicle made a left turn on Route 11 and proceeded a short distance north before the officers pulled the vehicle over. The operator who was alone in the vehicle got out and walked back toward the police cruiser. Chief Benchoff requested the operator produce his owner's card and operator's card. He walked back to the vehicle to get the owner's card. Chief Benchoff accompanied him and put his flashlight into the vehicle to assist him in locating the card in the glove compartment area, which was an open shelf. The Chief observed on the shelf a brass pipe of the type used to smoke marijuana.

The operator located his owner's card and stepped back from the open passenger door so that he was behind the Chief and in front of Officer Sanders. The Chief then leaned into the cab of the vehicle, a Subaru Brat, and seized the pipe. He then shined his flashlight around the interior of the vehicle and observed between the bucket seats and slightly to the rear an open bag containing a plastic bag, which appeared to contain grassy matter which he believed to be marijuana. He confiscated the bag and then advised the defendant of his Miranda rights.

The two officers took the defendant to police headquarters. After lighting system problems were straightened out, the defendant was again advised of his Miranda rights, and he was told his vehicle was going to be impounded. The Chief asked him if he would give written consent to search the vehicle and advised him that if he did not, they would get a search warrant. The defendant did consent to the search. The vehicle was searched and the officers found a large set of scales in a paper bag alongside the seat, a small set of scales in a styrofoam case under the seat, a small quantity of hashish and a jar containing burnt marijuana cigarette butts in the rear of the vehicle.

While at police headquarters the defendant was very cooperative, and after having been advised of his Miranda rights volunteered the information that he had made a sale at Sunnyway, how much he had paid for the marijuana, and discussed its street value.

The Subaru Brat which the defendant was driving is a small pickup truck type vehicle with two bucket seats in the front, and a small truck bed section in the rear. There was no partition or divider between the cab section of the vehicle and the truck bed section of the vehicle, and there was a cap over the truck bed section. All of the windows of the cab and cap

appear according to defendant's photographs (defendant's Exhibits 1-4) to be of tinted glass so that it would not have been possible to observe the interior of the cab or the truck bed except through an open window or open door.

On cross-examination Chief Benchoff testified that he at no time felt the defendant was a threat to his life.

No analysis was made of the pipe or its contents. The Pennsylvania State Police Laboratory Division reported the plastic bag or bag inside the open bag seen and seized by Chief Benchoff during his first flashlight examination of the cab contained 914.6 grams of marijuana. The brown cake suspected to be hashish and the glass jar containing cigarette butts found and seized on the search of the bed subsequent to the defendant consenting to the vehicle search were determined by the laboratory division to be 68.3 grams of marijuana hashish, and the glass jar to contain marijuana cigarette butts.

The officers transported the defendant from the Borough of Greencastle to the Office of Justice of the Peace Stover in the Borough of Chambersburg, and arrived at approximately 8:00 a.m. The District Justice did not arrive at his office until approximately 9:00 a.m., and the defendant was not arraigned until 9:10 a.m. Therefore, more than six hours elapsed between the time of the arrest at 2:50 a.m. and the actual preliminary arraignment at 9:10 a.m.

During the trial Chief Benchoff at no time specifically identified the individual seated at the defense table as being the individual who was apprehended on December 20, 1980, and who supplied the officers with an owner's card and operator's license bearing the name Thomas P. Portmann, and signed the consent to search the vehicle as Thomas P. Portmann. On the call of the Assistant District Attorney of the case of Commonwealth of Pennsylvania v. Thomas Paul Portmann the individual who was seated at the defense table came from the audience section of the courtroom and took his seat. The same individual appeared before the undersigned Judge on February 18, 1981, and waived arraignment; on May 6, 1981 appeared and waived the application of Pa. R. Crim. P. 1100 from that date until July 13, 1981; and on July 13, 1981 waived trial by jury.

Taking the post trial motions in their reverse order, we first consider the defense contention that the Court erred in denying the demurrer to the evidence on the grounds that the Commonwealth failed to prove beyond a reasonable doubt the identity of the operator of the Subaru Brat.

There is no doubt in the Court's mind but that if this had been trial with jury, the Commonwealth would have a serious problem with the issue here raised; and the Court would have little choice but to have sustained the demurrer and now would have no choice but to grant the motion in arrest of judgement. However, in the case at bar the Court sat as the trier of facts as well as the trier of law. The defendant, Thomas P. Portmann, appeared with his counsel before the presiding judge on three separate occasions and identified himself not only by name, but in his capacity as defendant. When the Assistant District Attorney called the case for trial the defendant, recognized by the presiding judge, and his same counsel proceeded directly to the defense table to proceed with the trial. As the trier of fact the Court could not ignore its own knowledge which was a matter of record, and we, therefore, do not conclude that the identity of the operator of the Subaru Brat apprehended, arrested, and charged by Chief Harold J. Benchoff on December 20, 1980 was not established beyond a reasonable doubt.

The second post trial motion asserts the Court erred in failing to suppress the evidence seized from the vehicle, and the statements made by the defendant because approximately six hours and 20 minutes elapsed from the time of the arrest at 2:50 a.m. until the time of the arraignment at 9:10 a.m. *Commonwealth v. Davenport*, 471 Pa. 278, 370 A. 2d 301 (1977). To compel compliance with Pa. R. Crim. P. 130's mandate that a defendant arrested without a warrant in a court case be taken *without unnecessary delay* before the proper issuing authority, the Supreme Court of Pennsylvania in *Davenport* adopted the prophylactic rule that if such a defendant was not taken before the issuing authority within six hours all statements secured during the entire arrest-pre-arraignment period would be suppressed. The Court made it eminently clear that the reason for the prophylactic rule was to prevent unlawful detention and unnecessary delay while interrogation and investigation continued in an effort to secure incriminating statements and confessions.

In this case there appears to be no dispute but that the defendant was apprehended at 2:50 a.m., and he with the arresting officers were at the office of District Justice of the Peace Stover at 8:00 a.m. prepared to proceed with the filing of the criminal complaint and the preliminary arraignment. For reasons unknown to this Court the District Justice did not appear at his office until 9:10 a.m. The Honorable George C. Eppinger, P. J. concluded in dismissing the defendant's motion to suppress that the time from 8:00 a.m. to 9:10 a.m. was

atributable to judicial delay and could not be the fault of the Commonwealth.

The defendant contends that the Court erred in its "judicial delay" conclusion because it ignored the availability of the "on-call" district justice who would have been available to arraign the defendant sooner. The defendant did not, however, introduce any evidence as to the identity of the "on-call" district justice or location of his office. Therefore, the argument is totally speculative and not presuasive.

In *Commonwealth v. Ryles*, Pa. Super. , 418 A. 2d 542, the Superior Court concluded that the six-hour time limit was not an absolute and unbendable rule. In our judgment the non-appearance of the district justice for a period of one hour and 20 minutes after the officers had delivered the defendant to the office of the district justice simply cannot be charged to the Commonwealth. We also note that the *Davenport* rule, if applied in the case at bar, could not lead to the suppression of the physical evidence and at best would have led to the suppression of the defendant's volunteered statement that he had made a sale on the parking lot of the Sunnyway Food Store on his way to Mercersburg. In view of the quantity of controlled substance in the defendant's possession, coupled with the presence of the two sets of scales, we conclude that the suppression of the statement would have had no effect on the ultimate outcome of the trial.

The first post trial motion is predicated upon the defendant's contention that the Court erred in failing to suppress the drugs and other physical evidence seized from the vehicle and the statements made by the defendant, and the admission of the same at the trial of the case.

The defendant here contends correctly that the Commonwealth has the burden of establishing the propriety of its warrantless search and seizure of the bag of marijuana in the defendant's vehicle. He is also correct in his assertion that he was not under arrest as a result of the vehicle stop nor was he under arrest at the time he retrieved his owner's card from the glove compartment shelf or area of the vehicle. Therefore, the doctrine of *Chimel v. California*, 395 U.S. 752, 89 S.Ct. 2834, 23 L. Ed. 2d 685 was inapplicable and there was no justification for a contemporanious warrantless search of the defendant and the immediately surrounding area. From these correct conclusions the defendant springs to the ultimate conclusion that Chief Benchoff acted unlawfully in shining his flashlight into the cab of the vehicle; observing and seizing the brass pipe;

leaning further into the cab and shining his flashlight around the cab so that he could observe the open bag and the grassy substance in the plastic bag inside the open bag.

While we do understand fully the position taken by the defendant, we do not agree. Chief Benchoff's act of shining his flashlight into the cab of the vehicle was not only an exercise of kindness to assist the defendant in finding the owner's card, but was also a wise act of self protection to assure himself that the defendant was not reaching for a gun or other weapon. (The number of law-enforcement officers wounded or killed at seemingly harmless traffic stops is too widely known to require documentation.) Thus, the brass pipe was in plain view; and identifying it as the type of pipe used for smoking marijuana, the Chief properly flashed the light around the remaining interior of the cab and observed the bag and its contents, for it too was in plain view. In our judgment it is entirely reasonable and proper for the officer to expect to find the materials used in smoking the pipe within easy reaching distance. To have failed to look in the immediate cab area would have been a dereliction of duty on the part of the Chief. Considering the location of the bag between the seat and the cab rather than in the bed of the truck, we do not find that the defendant had any reasonable expectation of privacy as to that bag and just did not expect to be caught.

We note that the defendant has cited *Commonwealth v. Bentley*, Pa. Super. , 419 A. 2d 85 (1980) in support of his contention. A review of this case leads us to conclude that it is in part supportive of the position we here take and in part readily distinguishable. In *Bentley*, an officer arrived at the scene of an accident and upon shining his flashlight into the vehicle observed the barrel of a gun protruding from a speaker in front of the driver's seat. The seizure of the weapon was found to be lawful. However, the officer then proceeded to search "the entire vehicle," and discovered four bags of marijuana behind the driver's seat and after the vehicle was towed to the police station a further search uncovered another gun in the spare tire well. The Superior Court concluded that the marijuana and the second gun should have been suppressed holding:

> There were no exigent circumstances that would have prevented his obtaining a search warrant, if probable cause existed, to search the interior of appellant's vehicle. The vehicle had been rendered undriveable by the accident. It was later towed to police headquarters. There was no danger that it would be removed from the scene or that the contents of

the vehicle would be removed before a warrant could be obtained. (At page 88)

In the case at bar, there was no search of the entire vehicle only a cursory flashlight examination of the interior of the cab to which the defendant had opened the door.

With regard to the second search of the vehicle at police headquarters the defendant contends that the first search and seizure of the pipe and marijuana was unlawful and, therefore, the officers had no probable cause for the defendant's arrest or for the request for consent from defendant to search the vehicle. If the defendant is correct in his contention that the initial search and seizure and arrest was unlawful, then he is also correct in his contention that there was no probable cause for arrest or for the request for consent to search the vehicle. We have concluded to the contrary, and we further conclude that the defendant did voluntarily consent, for Chief Benchoff's statement that he would secure a search warrant if such consent was not given was not improper and was clearly justified. Therefore, the second search of the vehicle and the seizure of the contraband and scales was lawful and not in violation of defendant's constitutional right.

ORDER OF COURT

NOW, this 1st day of October, 1981, the defendant's post trial motions for a new trial and in arrest of judgment are dismissed.

The Probation Department of Franklin County shall prepare and file a Pre-Sentence Investigation Report. The defendant shall appear for sentencing upon the call of the District Attorney.

Exceptions are granted the defendant.

SMITH v. SMITH, C.P. Fulton County Branch, C.D., No. 179 of 1981-C

Child Custody - Precedent for Joint Custody - Elements to Consider for Joint Custody