BAR NEWS ITEM

On March 20, 1995, the Court of Common Pleas of the 39th Judicial District, Pennsylvania, per the Hon. John R. Walker, President Judge, entered an Order of Court, establishing a temporary change, effective April 1, 1995, for a trial period of six (6) months, in local procedure, in the two (2) Branches (Franklin and Fulton Counties) of the District, in child custody actions. Rather than for us to publish the Proposed Rules involved, in this Journal, at this time, Judge Walker has suggested that an announcement of this change simply be made, here. Copies of the Proposed Rules may be obtained from the Court Administrator of the 39th Judicial District. It should also be noted that, according to this same Order, beginning April 1, 1995, David W. Rahauser, Esq., will serve as the Court's Child Custody Conciliation Officer and perform all those duties described in Local Rule 39-1915.3(b). Courtney J. Graham, Esq., has been appointed by the Court, as an alternate Child Custody Conciliation Officer.

COMMONWEALTH OF PENNSYLVANIA V. CHARLES H. ARO, JR., C.P. Cr.D., Franklin County Branch, No. 909-1994

Criminal Action-Possession and Possession of Paraphernalia- Vehicle Search-Consensual Search

1. Where actual, voluntary consent to a search is given, there is no need for a search warrant or for probable cause to conduct the search.

2. A valid consent excuses not only a warrant requirement for a search, but also the requirement that probable cause for the search exists.

John F. Nelson, District Attorney, Attorney for Commonwealth
Deborah K. Hoff, Assistant Public Defender, Attorney for Defendant

OPINION AND ORDER

KAYE, J., March 8, 1995:

OPINION

Charles H. Aro, Jr. ("defendant"), is charged with unlawful possession of a controlled substance ("marijuana") and unlawful possession of drug paraphernalia, i.e. a pipe. On January 16, 1995, defendant filed an Omnibus Pre-trial Motion and hearing thereon was scheduled for February 13, 1995. On that date a hearing was held and counsel were directed to provide the Court with memoranda of law in support of their respective positions. Those memoranda have been received by the Court, and the matter is now before the Court for disposition. In his motion, defendant seeks to suppress the evidence obtained from the search of defendant's vehicle and his person. Pursuant to Pa.R.Crim.P. 323(i), the Court makes the following:

I. FINDINGS OF FACT

At a hearing held on February 13, 1995 the parties appeared before this Court and stipulated to the facts as those set forth in paragraph five of defendant's omnibus Pre-trial Motion with the further provision that the nature of the contraband found in the defendant's vehicle was marijuana and a pipe used in the smoking of marijuana. The facts stipulated to by the parties are as follows:

1. Officer Fleagle stopped a vehicle on Old Forge Road, Washington Township, on October 21, 1994 at 10:30 o'clock p.m.

2. Two other vehicles then stopped in front of Officer Fleagle's cruiser.

3. Officer Fleagle asked the operator of the stopped vehicle, Brian Lambert, who was in the other two cars.

4. Mr. Lambert indicated to the officer that he was travelling with the other two vehicles, and that they were all going camping.

5. Officer Fleagle went to the second and third vehicle to identify the occupants and confirm Mr. Lambert's statement.

6. Defendant was the operator of the third vehicle.

7. Officer Chappell arrived to assist and asked defendant if he had any weapons in the vehicle. Defendant replied that he had no weapons in the car, and Officer Chappell asked if he could search the car.

8. Defendant permitted Officer Chappell to search the vehicle.

9. Officer Chappell opened the ashtray and found contraband.

10. Officer Chappell then arrested defendant, and searched his person and contraband was found.

II. CONCLUSIONS OF LAW

1. Defendant voluntarily stopped his vehicle, and not because of any action directed against him by the police.

2. The initial contact by the police with defendant was not an arrest, but a mere brief encounter between them.

3. The police had no basis whatever to search defendant's vehicle under the circumstances stipulated to.

4. Although the police lacked probable cause to conduct the search of defendant's vehicle, the latter consented to the search, and there is nothing to suggest that the consent was not voluntarily given.

5. As defendant consented to the police search, there is no basis to suppress the evidence obtained as a result of the search of defendant's vehicle.

III. DISCUSSION

The posture that this case is in will be amplified in an effort to explain the result. Neither the defendant nor the Commonwealth set forth a single word of testimony in the hearing on defendant's Omnibus Pre-trial Motion. Rather, we are asked to make a decision on the slender "facts" averred in defendant's Omnibus Pre-trial Motion, and which are set forth verbatim in the findings of fact contained in this opinion. From that exceedingly brief recitation of the facts that led to the observation and seizure of the evidence in the instant case, all we know is that a car, other than defendant's, was stopped by a police Officer (officer Fleagle) for reasons not set forth in the Omnibus Pre-trial Motion. Two other vehicles then stopped in front of the police cruiser, of which the first in line was defendant's. A second police officer (Officer Chappell) arrived at the scene to assist the officer who had made the initial stop, and he asked defendant if he possessed any weapons. Upon receiving a negative reply to the question, Officer Chappell asked defendant if he could search his car, and was told that he could. The officer looked into the vehicle's ashtray, and found the evidence which forms the basis for the instant prosecution.

It is unquestionably true that the police had no basis whatever, under the facts as stipulated, to search defendant's vehicle, and the Commonwealth has not suggested that the defendant had acted in any manner that might have warranted a search for the police officer's protection, or for any other purpose whatever. Neither do the stipulated facts suggest that the police did anything to coerce the defendant's giving of consent to the search of his vehicle. Thus the question to be decided is whether a consensual search is rendered illegal because the police had no reason to believe that a crime had been committed.

In support of a finding that an illegality exists in this type of encounter, defendant has cited *inter al., Commonwealth v. Germann,* 423 Pa.Super. 393, 621 A.2d 589 (1993);

Commonwealth v. Bailey, 376 Pa.Super. 291, 545 A.2d 942 (1988), alloc. den. 557 A.2d 341; *Commonwealth v. Tally,* 430 Pa.Super. 351, 634 A.2d 640 (1993); and *Commonwealth v. Lopez,* 415 Pa.Super. 252, 609 A.2d 177 (1992), app. den. 533 Pa. 598, 617 A.2d 1273. However, each of these cases is readily distinguishable from the instant matter. The *Germann* case involved a vehicle search conducted without a warrant and, unlike the instant case, without consent. *Lopez* also involved a warrantless vehicle search which proceeded from a traffic stop arising out of a violation of the Vehicle Code. The police ordered Lopez out of his vehicle and to walk toward the rear of the vehicle, after which he questioned Lopez, and asked him if he minded if he looked into the back of the truck. No response was recorded, but the officer nonetheless conducted a search, which disclosed some children's toys, blankets, and two suitcases. Lopez was then ordered to return to the truck and to remain there. Thereafter, apparently at least three state police troopers arrived at the scene, and defendant was asked to sign a "voluntary" consent to search, to which he assented. Lopez and his wife were asked to get out of the car, and to stand behind a guardrail for their protection. A canine search was then conducted, which disclosed a large quantity of marijuana behind the vehicle's rear seat. Superior Court found that the continued detention and questioning of defendant after the valid traffic stop processing had been completed tainted the subsequent consent to search, and thus mandated suppression of the evidence.

In *Bailey,* the defendant was stopped by the police for a speeding violation, and produced a clear plastic bag containing a smaller plastic bag filled with a white substance from his shirt pocket. The officer seized the packet, arrested defendant, and conducted a warrantless and non-consensual search of the vehicle's trunk, finding additional controlled substances and paraphernalia. That search was found to be supported by probable cause due to the observations already noted, the police officer's experience, and the smell of chemicals detected by the officer as emanating from the trunk. The search was found to be permitted as being a search incident to defendant's arrest. Consent to the search was not an issue in that case.

In *Tally,* the police stopped a vehicle for speeding, and then conducted a warrantless, non-consensual search of the glove box after the officer grabbed the keys from the ignition. A handgun was found in the glove box, and defendant was arrested. Superior Court held that the police lacked probable cause to conduct the search, and ordered that the evidence seized be suppressed. However, that case did not involve the issue of consent.

Where actual, voluntary consent to a search is given, there is no need for a search warrant or for probable cause to conduct the search. *Commonwealth v. Danforth.,* 395 Pa.Super. 1, 18-19, 576 A.2d 1013, 1022 (1990), affirmed 532 Pa. 152, 615 A.2d 308, citing *inter al., Schneckloth v. Bustamonte,* 412 U.S. 218, 93 S.Ct. 2041, 36 L.Ed.2d 854 (1973), and *Commonwealth v. Walsh,* 314 Pa.Super 65, 460 A.2d 767 (1983). Thus, a valid consent excuses not only a warrant requirement for a search, but also the requirement that probable cause for the search exists.

In the case *sub judice*, the police did not initiate a stop of defendant's vehicle. Defendant halted it when a vehicle that was accompanying his to a camp site was stopped by police, and the police merely approached defendant after he had voluntarily stopped. The police then asked for, and received, permission to search defendant's car. Defendant has not raised any question whatever that the consent was voluntarily given. Thus, we conclude that the resultant search was the product of defendant's consent, voluntarily given, and that there is no basis to suppress the evidence obtained thereby. [See *In Interest of Jermaine,* 399 Pa.Super. 503, 582 A.2d 1058 (1990) alloc. denied 607 A.2d 253, in which a warrantless search of an individual was upheld on grounds that a valid consent was given wherein the police lacked probable cause for the search, and could only articulate a drug courier-type profile as the basis for approaching the juvenile suspect].

ORDER OF COURT

NOW, March 8, 1995, defendant's Omnibus Pre-trial Motion to suppress evidence seized in the search of defendant's vehicle is hereby DENIED.