herself in a contempt proceeding raised by the court's own motion was not required because any penalty would be for her failure to comply with a court order of which she was fully cognizant. *Brocker v. Brocker*, 429 Pa. 498, 524, 241 A.2d 336, 341 (1968).

The *Brocker* case also instructs us:

> ". . . [a] Court can for present or past acts of misbehavior amounting to civil contempt impose an unconditional compensatory fine and/or a conditional fine and imprisonment, and such fine may be payable to the United States or to the Commonwealth or to the county or to the individual who was injured."

429 Pa. at 519, 520; 241 A.2d at 339.

For her contempt we assess against the mother the costs of these proceedings, $60.00 to be paid by her for the services of the Court Child Custody Mediation Officer and the father's reasonable counsel fees which shall be submitted to the Court for approval. Act of 1976, July 9, P.L. 586, No. 142, as amended Sec. 2503(7), 42 CPSA Sec. 2503(7); Act of 1978, April 28, P. L. 108, No. 47, Sec. 2416(b), 11 P.S. Sec. 2416 (b). As to the latter citation, the father did not have to travel from one court to another to enforce the order, but it is clear from this legislative statement that counsel fees are an item of injury as mentioned in *Brocker*.

ORDER OF COURT

January 27, 1981, it is ordered that custody of Heath and Matthew Talhelm shall remain as heretofore provided.

It is further ordered that for her contempt Edna Jane Talhelm shall pay the costs of these proceedings, the fee required to be paid to the Child Custody Mediation Officer and Robert E. Talhelm's reasonable counsel fees in this proceedings which shall be submitted to Edna Jane Talhelm and her counsel for comment and then approval by the Court.

COMMONWEALTH v. McCARTNEY, C.P. Franklin County Branch, No. 119-1980

Criminal Law - Game Laws - Search and Seizure - Plain View Doctrine

1. Specific restrictions on a game protector's ability to make warrantless

arrests are imposed by statute.

2. Where game protectors went to defendant's home to wait for him to appear after being informed by other game protectors of defendant's action, they had not caught the defendant in the act of violating the law or in pursuit immediately following such violation as required by the Game Law for an arrest without a warrant.

3. Where an entry onto someone's property is made illegally, the plain view doctrine no longer applies.

4. Where a game protector's entry onto the defendant's property was not authorized, the evidence they seized must be suppressed.

John N. Keller, Esq., Assistant District Attorney

William C. Cramer, Esq., Attorney for the Defendant

OPINION AND ORDER

EPPINGER, P.J., February 10, 1981:

John Dean McCartney was observed by Pennsylvania Game Commission officers spotlighting deer from a vehicle in Huntingdon County. He was chased, but after abandoning his car and fleeing on foot through the woods, he lost his pursuers.

Another group of Game Commission officers who had been alerted went to McCartney's home in Franklin County intending to apprehend him for some summary game law violations. These officers had probable cause to believe that McCartney committed the offenses. But the officers had neither an arrest nor a search warrant.

Among the latter group was Game Protector Foreman who went to the defendant's trailer, knocked on the door, received no answer and heard no movement inside. While there he noticed deer fur and blood spots on the porch. Meanwhile two other officers who were with him were making a search of the outbuildings. They came to a shed. The opening was partially covered by a leaning door. The bottom of the door was far enough from the shed that Officer Kline could shine a flashlight through the opening into the shed. When he did this he saw some deer hides. At that time he did not know that Foreman had seen the fur and blood.

The game protectors left McCartney's place to obtain a search warrant. When they returned, he was there and signed a consent form authorizing a search on his premises. Found were

fifteen deer hides and ninety pounds of deer meat. McCartney was not arrested, not taken into custody. The District Game Protector did file a citation alleging that defendant violated the Pennsylvania Game Laws (Act of 1937, June 3, P.L. 1225, Sec. 701, 34 P. S., Sec. 1311.701) by unlawfully possessing parts of five deer. Two other summary citations were filed by another officer in Huntingdon County.

At a hearing before a District Justice of the Peace the defendant was found guilty of the Franklin County charge and appealed. He then filed an Omnibus Pretrial Motion which we agreed to consider at the time of the hearing on the appeal. In his motion McCartney asks us to suppress all evidence of deer meat and hides and any statements that he might have made.

We will suppress evidence of the finding of the hides and meat and find the defendant not guilty because without that evidence a prima facie case has not been established, let alone proof beyond a reasonable doubt.

In presenting his contention of an illegal search, the defendant argues that under the circumstances the game protectors were not authorized to enter his property, in the nighttime, for the purpose of arresting him without a warrant and that the search of his premises was unconstitutional. We accept both of these arguments.

The Franklin County game protectors entered McCartney's property to apprehend him for summary violations of the game law. Generally persons charged with summary violations are not arrested; instead, citations issue as they were in this case. There are certain exceptions. One is found in Pa. R. Crim. P. 51 A(3) (c) where it is said a defendant may be arrested without a warrant in a summary case by a *police officer* (italics ours), but only when such arrest is necessary in the judgment of the officer, and the officer is in uniform or displays a badge or other sign of authority and such arrest is authorized by law.

Defendant contends that the three requirements of the rule were not met. The Commonwealth responds, whether met or not, the game protectors' entry was authorized by Section 1204 of the Pennsylvania Game Law, Act of 1937, June 3, P.L. 1225, 34 P.S., Sec. 1311.1204. This section authorizes a game law enforcement officer to arrest, without a warrant, any person caught in the act of violating the law, or in pursuit immediately following such violation, and to seize anything used in violating the law which he finds in the execution of a search warrant and all birds or animals found either in the possession or under the

control of the suspected person.

It is the Commonwealth's position that the entry onto defendant's premises was authorized by the game protectors' right to arrest the defendant in these circumstances. We conclude that their authority to arrest is limited to that granted them in the Game Law, for as is pointed out in *Commonwealth v. Mayhugh and Wedge*, 32 Som. L.J. 247 (C.P., 1976), game protectors are not police officers and their authority to arrest without a warrant is no greater than that of any other citizen, except in game law cases.

Specific restrictions on a game protector's ability to make warrantless arrests are imposed by statute. Game protectors are empowered to arrest without warrant any person found in the act of violating the game laws or in pursuit immediately following such violation. Act of 1937, June 3, P.L. 1225, Sec. 214(f), 34 P.S. Sec. 1311.214(f). This "caught-in-the-act" and "pursuit immediately following" language is basically the same as that found in Sec. 1204, supra, cited by the Commonwealth.

The game protectors who entered the defendant's property without a warrant to apprehend him did not catch him in the act nor were they in immediate pursuit following a violation. What they did was go to his home after it developed that he was the owner of the vehicle chased and abandoned in Huntingdon County to await his coming. They had not witnessed the violation and, so far as it appears from the evidence, his trail had grown cold. Therefore the initial entry was not sanctioned by either Sec. 214(f) or Sec. 1204 of the game laws, supra.

Since the game protectors' entry onto McCartney's property was not authorized, the evidence they seized must be suppressed. See *Commonwealth v. Wurst*, 23 Bucks, 168 (1972), citing *Commonwealth v. Dorsey*, 212 Pa. Super. 339, 243 A.2d 176 (1968) (searches and seizures made without proper warrant or not incident to lawful arrest violate Fourth Amendment guarantee of reasonableness) and *Commonwealth v. Macek*, 218 Pa. Super. 124, 279 A.2d 772 (1971) (where arrest is excuse for making search, arrest and search are illegal); *Commonwealth v. Shillingford*, 231 Pa. Super. 407, 332 A.2d 824 (1975).

Defendant's second argument, where he contends the search of his property was unconstitutional because done without a warrant, leads to the same result. Game protectors are given rather broad powers to conduct searches, but the law must be read to be consistent with constitutional restrictions against unreasonable searches and seizures. The game laws

enumerate many items which game protectors may search "at any time, without warrant." See 34 P.S. Sec. 1311.214(h), (i), (j). Absent from this list are dwelling houses and enclosures. With regard to them, the statute provides that game protectors have the power "to secure and execute search warrants, and, in pursuance thereof, to enter any building, dwelling house, ... (or) enclosure ..." Obviously this language means that game protectors may enter a dwelling house, etc., while executing a search warrant but not to get information to secure one. Even police officers may not gain evidence to establish probable cause for the issuance of a search warrant by an unconstitutional intrusion upon defendant's privacy. *Commonwealth v. Hernley*, 216 Pa. Super, 177, 263 A.2d 904 (1970). We conclude that game protectors must have a search warrant to do what they did in this case. One game protector testified that they went to the defendant's home to find him and other evidence, though denying he meant physical evidence by "other evidence."

Despite the circumstances, the Commonwealth argued that the seizure of the evidence was permitted under the plain view doctrine. Contraband in plain view of an officer may be seized without a warrant, but the officer must have the right to be in the position to have the view. *Commonwealth v. Clelland*, 227 Pa. Super. 384, 323 A.2d 60 (1974). We have concluded the game protectors had no right to be where they saw the contraband so the "plain view" seizure was impermissible. Where an entry onto someone's property is made illegally, the plain view doctrine no longer applies. *Commonwealth v. Watkins*, 217 Pa. Super. 332, 272 A.2d 212 (1970).

When the defendant was asked to sign the consent to the search of his property, the game protectors already had a warrant in their hands. This warrant was supprted by an allegation that the officers had seen hides in plain view. The defendant knew they had the warrant. We conclude that under the circumstanćes his consent was involuntary and invalid. *See Commonwealth v. Poteete*, Pa. Super. , 418 A.2d 513 (1980); *cf. Commonwealth v. Wright*, 411 Pa. 81, 190 A.2d 709 (1963) (consent to search may not be gained through deception or misrepresentation).

Having suppressed all evidence of wrongdoing in this case, we need not discuss the defendant's remaining arguments dealing with the elements of the offense, the burden that rests upon the Commonwealth to establish these elements and the fine to be imposed upon conviction.

ORDER OF COURT

February 10, 1981, the Defendant's Motion to Suppress evidence discovered at his home and in the outbuildings around his home is granted and the Defendant is found not guilty. The costs shall be paid by the County of Franklin.

COMMONWEALTH v. BEATTY, C.P. Fulton County Branch, No. 59 of 1980

Vehicle Code - Speeding - Radar - Approved Radar Device - Burden of Proof

1. In speeding prosecutions where radar is used, the Commonwealth must prove that the radar device was approved by the Department of Transportation.

2. The Commonwealth may prove Department of Transportation approval of a radar device by requesting the trial court to take judicial notice of such approval in the Pennsylvania Bulletin.

3. Where two panels of the Superior Court are in total disagreement, the trial court must accept the most recent decison as the law on the subject.

Merrill W. Kerlin, District Attorney, Attorney for the Commonwealth

Philip S. Cosentino, Esq., Attorney for Defendant

OPINION AND ORDER

KELLER, J., February 19, 1981:

This trial de novo on an appeal from a summary conviction for speeding was heard on November 25, 1980.

FINDINGS OF FACT

1. Trooper Kaiser P. Crittendon of the Pennsylvania State Police, the arresting officer, was coming to a stop in the medial strip of I-70 approximately 100 yards west of the Maryland line in Bethel Township, Fulton County, Pennsylvania at 11:23 A.M. on August 9, 1980, when he observed the defendant approaching the Maryland-Pennsylvania line from Maryland traveling in a westerly direction at a high rate of speed.