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 circumstances 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.

using the spelling, punctuation and vocabulary of the copy as submitted. The Journal also reserves the right to reject illegible or other inappropriate copy.

IN THE COURT OF COMMON PLEAS OF THE 39TH JUDICIAL DISTRICT OF FRANKLIN COUNTY, PENNSYLVANIA ORPHANS' COURT DIVISION

The following list of Executors, Administrator and Guardian Accounts, Proposed Schedules of Distribution and Notice to Creditors and Reasons Why Distribution cannot be Proposed will be presented to the Court of Common Pleas of Franklin County, Pennsylvania, Orphans' Court Division for CONFIRMATION: June 4, 1981.

COPENHAVER First and final account, statement of proposed distribution and notice to the creditors of Olive M. Jones and Joseph Copenhaver, executors of the estate of Mary C. Copenhaver late of Greencastle, Franklin County, Pennsylvania, deceased.

GREENEWALT First and final account, statement of proposed distribution and notice to the creditors of the Chambersburg Trust Company, executors of the last Will and testamant of Nora B. Greenewalt late of Greene Township, Franklin County, Pennsylvania, deceased.

GUYER First and final account, statement of proposed distribution and notice to the creditors of Daisy Etter and Lucy Grace Yeager, executrices of the Estate of Blanche M. Guyer late of the Borough of Chambersburg, Franklin County, Pennsylvania, deceased.

HARTMAN First and final account, statement of proposed distribution and notice to the creditors of C. Burnell Rice, executor of the Last Will and Testament of Catherine A. Hartman late of Washington Township, Franklin County, Pennsylvania, deceased.

OLIVER First and final account, statement of proposed distribution and notice to the creditors of Arthur G. Oliver, executor of the Last Will and Testament of Floyd Chalmers Oliver late of the Borough of Chambersburg, Franklin County, Pennsylvania, deceased.

SCHULL First and final account, statement of proposed distribution and notice to the creditors of James E. Schull and Mary E. Thomas, executors of the Estate of Ruth S. Schull late of Washington Township, Franklin County, Pennsylvania, deceased.

SHEARER First and final account, statement of proposed distribution and notice to the creditors of Lois A. Keefer, Administratrix of the Estate of Frank A. Shearer late of Letterkenny Township, Franklin County, Pennsylvania, deceased.

Glenn E. Shadle
Clerk of Orphans' Court of
Franklin County, PA.

(5-8-81, 5-15-81. 5-22-81, 5-29-81)

NOTICE

NOTICE IS HEREBY GIVEN that an application will be made to the Department of State of the Commonwealth of Pennsylvania at Harrisburg, Pennsylvania, on May 22, 1981, by Ronald G. Toothman, D.M.D., P.A., a foreign corporation, formed under the laws of the State of Maryland where its principal office is located at 1190 Mt. Aetna Road, Hagerstown, Maryland, for a Certificate of Authority to do business within the Commonwealth of Pennsylvania under the provisions of the Business Corporation Law of the Commonwealth of Pennsylvania, approved May 5, 1933, as amended. The business said corporation proposes to transact in the Commonwealth of Pennsylvania under the said Certificate of Authority is the practice of dentistry and orthodontia. The proposed registered office of said corporation in the Commonwealth of Pennsylvania will be located at 17 North Church Street, Waynesboro, Franklin County, Pennsylvania.

MARTIN AND KORNFIELD
17 North Church Street
Waynesboro, Pennsylvania 17268

(5-8-81)

2. Trooper Crittendon brought his unmarked police cruiser to a full stop in the medial strip, facing north with the motor turned off as the defendant crossed the state line.

3. The officer pointed his Model 100 Ray Gun Decatur Electronics, SN127935, out the open passenger window at the defendant's approaching vehicle and "beamed" him when he was approximately 50 yards from the officer's position.

4. The speed limit on I-70 was 55 miles per hour. The officer's radar device registered the speed of defendant's vehicle at 73 miles per hour.

5. Trooper Crittendon pursued the defendant's vehicle and stopped it one-quarter mile west of the state line. A citation for speeding was issued to the defendant.

6. At the trial the Commonwealth introduced into evidence as Commonwealth's Exhibits 1 and 2 documents establishing Wilbur D. Files, State College, Penna. as an authorized testing station and a certificate of the testing station that Model 100 Ray Gun Dictator Electronics SN127935 was tested July 2, 1980 respectively.

7. The radar device was tested for accuracy by an approved testing station within sixty (60) days of the issuance of the citation to defendant.

8. Trooper Crittendon tested his radar device with a tuning fork at 10:00 A.M. at a speed monitoring location in Brush Creek Township, Fulton County, Penna. approximately six miles from the point where he observed the defendant.

9. Trooper Crittendon next tested his radar device with the tuning fork at 11:45 A.M. He did not test the device after he moved from his surveillance location in Brush Creek Township to the location in Bethel Township where he observed the defendant.

10. On cross-examination Trooper Crittendon testified that he was familiar with the Pennsylvania State Police manual dealing with radar and its use; and that regulations require Model TR6 radar to be tested after each move, but require testing of Model 100 only after each arrest, and not after each move. He made no arrests from 10:00 A.M. until he apprehended the defendant.

11. After the Commonwealth rested counsel for the defendant demurred to the evidence on the grounds that the

Commonwealth failed to introduce evidence that Model 100 is a radar device approved by the Pennsylvania Department of Transportation. In response the District Attorney stated that the Court may take judicial notice of the Department's approval. He did not specifically request the Court to take judicial notice at any time during the presentation of its case.

In the defendant's case-in-chief Trooper Crittendon was called as on cross-examination, and the defendant testified that he was aware of the presence of the officer, that he saw the officer pointing the radar gun at him, and that he was driving at 55 miles per hour.

In defendant's closing argument he contended:

1. That the Commonwealth had the burden of establishing that the Model 100 ray gun detector was approved by the Department of Transportation.

2. That the Department of Transportation's approval of such device must be established by the Commonwealth either by presenting a certificate of approval as evidence or requesting the Court to take judicial notice of official action indicating such approval.

3. That the Pennsylvania State Police have a regulation which requires the field testing of all radar devices approved by the Department of Transportation after each change of location.

4. That a speeding prosecution based on the reading of a radar device must be dismissed if Pennsylvania State Police regulations requiring field testing of the device after each move were not complied with.

To the contrary the District Attorney contended that the Commonwealth did not have to prove the Model 100 was approved by the Department of Transportation because the Court could take judicial notice of the fact. He also argued that no evidence had been introduced supporting defendant's theory that State Police regulations required the retesting of the Model 100 each time there was a move.

By agreement of counsel the Court deferred rendering a decision in the case until counsel had had an opportunity to research and brief the legal issues raised. Briefs of counsel have been submitted, and the matter is ripe for disposition.

Counsel for the defendant was denied the opportunity to

personally examine the Pennsylvania State Police regulations concerning radar, but he was advised that the radar device must be tested "after each session but not after each change of location." Counsel did not brief the defendant's issues 3 and 4, and we will consider them abandoned.

The issue before the Court is whether Department of Transportation approval of the radar device used in the case at bar is an essential element in the crime of speeding which the Commonwealth must prove beyond a reasonable doubt either by documentary evidence or by requesting the Court to take judicial notice of the approval to secure a conviction.

The Act of 1976, July 9, P.L. 877, No. 160 Sec. 1, 45 Pa. C.S.A. 506 provides: "The contents of the code, of the permanent supplements thereof, and of the bulletin, shall be judicially noticed."

Vol. 10, No. 31 Pennsylvania Bulletin 3199 provides inter alia:

> Title 67. Transportation
> Department of Transportation
>
> Chapter 337. Mechanical, Electrial and Electronic Speed-Timing Devices
>
> Subchapter A. General Provisions
>
> Sec. 337.1. Purpose.
>
> This chapter designates types of devices, mechanical, electrical and electronic, approved by the Department for use by police in timing the rate of speed of vehicles; provides for the appointments of stations for calibrating and testing such devices and regulates the manner in which calibrations and tests shall be made.
>
> Subchapter B. Electronic Devices
>
> Sec. 337.10. Approved electronic equipment.
>
> The following types of electronic devices are approved by the Department for use in timing the rate of speed of vehicles.
>
> (4) Model 100, Decatur Ray Gun, Manufactured by Decatur Electronics, 725 Bright Street, Decatur, Illinois.

In *Commonwealth v. McLaughlin*, 31 Beaver Co. L.J. 84 (1971), a speeding case, the Commonwealth failed to prove that the radar device had been approved by Department of Transportation. Relying on language in the Commonwealth Documents

Law, identical to the language above quoted from the Act of 1976, Judge Salmon held:

> In accordance with the Pennsylvania Documents Law, this court takes judicial notice of the Secretary's approval of the Model 55 Electronic Speed Meter device. The Court finds from the testimony that the defendant did violate the Motor Vehicle Code by traveling at a rate of 66 miles per hour in a zone properly posted for a speed limit of 45 miles per hour. The Court therefore finds the defendant guilty.

In *Commonwealth v. Gernsheimer*, Pa. Super. , 419 A. 2d 528, 530 (March 21, 1980), a three judge panel of the Superior Court consisting of Cercone, P.J., and Watkins and Lipez, JJ., in an appeal from a speeding conviction involving radar, held:

> We hold that in prosecuting speeding cases where a radar or other electronic device is used to calibrate a defendant's speed that in order to introduce the results of such into evidence the Commonwealth must offer a Certificate, certified by the Secretary of Transportation or his designee certifying the agency which performs the tests on the devices as an official testing station, and must introduce a Certificate of Electronic Device (radar) Accuracy into evidence. The Certificate of Electronic Device (radar) Accuracy must be signed by the person who performed the tests and the engineer in charge of the testing station, must show that the device was accurate when tested by stating the various speeds at which it was tested and the results thereof, and must show, on its face, that the particular device was tested within sixty (60) days of the date it was used to calibrate the particular defendant's speed. See *Commonwealth v. Druschel*, 36 D.&C. 2d 398 (1966).

In *Roskwotalski v. Reiss*, Pa. Super. , 402 A. 2d 1061 (1979), the Superior Court held referring to the Act of 1976, supra:

> "The Commission's rules are promulgated in the Pennsylvania Code, and *courts must take judicial notice thereof.* 45 Pa. C.S. Sec. 506." (Italics ours)

Based upon the foregoing, the Commonwealth's argument that it should not be necessary to request the Court to do what the law directs that the Court shall do, viz., judicially notice that the Model 100 radar device was approved by the Department, not only in the August 2, 1980 Pennsylvania Bulletin (Vol. 10, No. 31, P. 3199), but also on August 27, 1977 in 7 Pennsylvania Bulletin 2422, is highly persuasive.

The defendant, however, contends in *Commonwealth v. Nardei*, Pa. Super. , 420 A. 2d 612 (6-6-81) the Superior Court reversed its decision in *Gernsheimer*, supra, and made proof of the Department approval of the specific type of radar device used an essential element of the Commonwealth's case-in-chief. In *Nardei*, a three judge panel of the Superior Court consisting of Judges Price, Brosky and Montgomery held with Judge Price dissenting:

> Thus, though the evidence supports the finding that the unit had been tested for accuracy by an official radar speed meter testing station, the record is without the necessary, and proper evidence to prove that the type of device, itself, had been approved by the Department of Transportation. The officer's testimony that the TR-6 would not have been certified by the testing station had it not been approved by the Commonwealth merely presupposes the existence of such approval. At p. 613.

In *Commonwealth v. Todd*, 477 Pa. 529, 533, 384 A. 2d 1215 (1978), the Supreme Court of Pennsylvania held:

> "Penal statutes must be strictly construed, 1 Pa. C.S.A. Sec. 1928 (b) (1) (Supp. 1977-78) . . . , and it is fundamental that the Commonwealth must prove every essential element of a crime beyond a reasonable doubt. *Commonwealth v. Cropper*, 463 Pa. 529, 535, 345 A. 2d 645, 648 (1975), quoting *Commonwealth v. Rose*, 457 Pa. 380, 389, 321 A. 2d 880, 884 (1974).

Gernsheimer and *Nardei* are in our judgment in irreconcilable conflict. Since the dissent cites *Gernsheimer*, it cannot be assumed that that decision was not considered. We must conclude that the decision in *Nardei* establishes the rule that the Commonwealth must prove in speeding prosecutions where radar is used that the radar device was approved by the Department of Transportation. This, of course, would not preclude the Commonwealth from doing so by requesting the trial court to take judicial notice of such approval in the Pennsylvania Bulletin. By doing so the record would be complete, and it would provide the trial judge with the opportunity of calling upon the prosecuting attorney to aid him in obtaining such information. 14 P.L.E. Evidence Sec. 14.

It is the duty of the trial courts to follow the guidance of our appellate courts. We are not entirely certain how that rule should be applied where we find panels of the same court in total disagreement. However, until we receive more definitive guidance we believe we must accept the most recent decision as

the law on the subject.

ORDER OF COURT

NOW, this 19th day of February, 1981, we find the defendant not guilty by reason of the failure of the Commonwealth to prove beyond a reasonable doubt that the radar device here used was approved by the Department of Transportation.

Exceptions are granted the Commonwealth.

FREY v. FREY, C.P. Fulton County Branch, No. 363 of 1980-C

Non-Support - Parties Living Together

1. Where the parties live in the same house but in different sections, and the husband provides a home, food, clothing and reasonable medical attention, he cannot be directed to pay a given stipend to his wife.

2. The Divorce Code which provides that child support may be determined in divorce proceedings does not provide any substantive rights in non-support cases.

Gary D. Wilt, Esq., Attorney for Plaintiff

James M. Schall, Esq., Attorney for Defendant

OPINION AND ORDER

EPPINGER, P.J., February 27, 1981:

Pamela and Steven Frey were married in 1968. They are still living in the same house with their two minor children, Heather and Jennifer, but apparently the parents are living in separate sections. Pamela has filed a divorce complaint. Count IV alleges neglect and refusal by the defendant to provide proper support for herself and the children, based on the Pa. Civil Procedural Support Law of 1953, Act of July 13, 1953, P.L. 431, 62 P.S. Sec. 2043.31 et seq. What she claims is that she is receiving inadequate support from her husband, the defendant.

Both parties are employed by the Tuscarora Intermediate Unit, she part-time teaching preschool handicapped children and he on a full-time basis. She is paid by the hour, having a

reported average gross weekly income of $184 during the school year. With appropriate deducations, we conclude that over a year her net weekly income is $120. Steven has a net weekly take home pay of $242.00.

It was clear from the evidence that somewhere along the line the parties agreed that they would share the household expenses half and half and apparently that is what has happened. This arrangement covers the mortgage, utilities and other charges in connection with maintaining their fully-furnished residence. Medical coverage for the entire family is provided by Steven through his employment. He has contributed to the cost of caring for the children while both parents work, and recently paid $200 for braces for one daughter. He has offered to purchase other items and the offers have been refused by Pamela.

What this case comes down to is that Pamela apparently rues her bargain. However she did not show that Steven in any way imposed it upon her - or forced her into it. From an equitable point of view, it would have been better had they agreed for her to pay 33% of the expenses and for him to pay 67% of the expenses. She makes 33% of the total income, he 67%. But that did not happen. Pamela wants $120 each week from Steven and will agree to pay all of the expenses.

The matter could be resolved if the parties would renegotiate their agreement and come up with something approaching the ratio of their net earnings. Or, if the defendant gave the wife $61 a week, then each would have $181 and they could continue with their agreement and it would all balance out.

These are possible solutions to the problem. But the defendant contends that we have no right to make any order, citing *Commonwealth v. George*, 358 Pa. 118, 56 A.2d 228 (1948), in which the court said: "[W]here, as here, the husband provides a home, food, clothing and reasonable medical attention, he cannot be directed to pay a given stipend to the wife so that she may have it available for her own personal disposition." The court made it clear that there is an exception where the parties were living together and the husband neglects or refuses to provide food, clothing and reasonable medical attention.

In *Commonwealth ex rel. Glenn v. Glenn*, 208 Pa. Super. 206, 222 A.2d 465 (1966), we are told to look for evidence that the children are undernourished or poorly clothed or that they have been deprived of necessary medical and dental services. There was no evidence of this kind at all.