

LEGAL NOTICES, cont.

child and your failure to appear may affect the court's decision on whether to end your rights to Katina Marie Wetzel. You are warned that even if you fail to appear at the scheduled hearing, the hearing will go on without you and your rights to Katina Marie Wetzel may be ended by the Court without your being present.

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MARTIN AND KORNFIELD
Donald L. Kornfield
Attorney for Plaintiff
17 North Church Street
Waynesboro, PA 17268
(717) 762-3188

2-15, 2-22, 3-1

NOTICE IS HEREBY GIVEN TO ALL persons interested or who may be affected, by Joy's House of Beauty, Inc., 120 West Second Street, Waynesboro, Pennsylvania, a business corporation, that it filed with the Department of State of the Commonwealth of Pennsylvania, at Harrisburg, Pennsylvania, on the 29th day of November, 1984, a certificate of election by its shareholders to dissolve the said corporation, and that the board of directors is now engaged in winding up and settling the affairs of said corporation.

ULLMAN, PAINTER AND MISNER
Attorneys at Law
10 East Main Street
Waynesboro, Penna.

2-8, 2-15

LEGAL NOTICES, cont.

began to run when the chilling unit failed and ceased to function on July 7, 1981. See *Twp. of Marple v. Kelly*, 52 Del. 225, 228 (1964); *A.J. Aberman, Inc. v. Funk Bldg. Corp.*, 278 Pa. Super. 385, 395-6, 420 A.2d 594, 599 (1980); *Thorpe v. Schoenbrun*, 202 Pa. Super. 375, 377, 195 A.2d 870, 872 (1963). The statute was tolled on June 21, 1983, when plaintiff filed a Praecipe for issuance of Writs of Summons in Trespass and Assumpsit against the defendants with the Prothonotary of Franklin County. Pa. R.C.P. 1007; *Benn v. Linden Crane Corp.*, 370 F. Supp. 1269, 1278 (E.D.Pa. 1973).

Neither is it of significance whether the cause is raised in negligence or assumpsit. While the essence of the additional count involves the negligence of Borg-Warner, the real question is whether the defendant performed the contract in a workmanlike manner; therefore the count is properly brought in assumpsit. *Spanard v. Duquesne Light Co.*, 118 P.L.J. 354, 355 (1970).¹

¹ *Spanard* is factually similar to our case. Plaintiffs hired a general contractor to prepare specifications for and supervise the installation of an electrical heating system consisting of electric ceiling cable within a dwelling to be constructed for plaintiffs. The cable failed due to improper design and supervision of the installation. When defendant improperly corrected the defects and damage, plaintiffs brought their action in assumpsit to recover the costs incurred in repairs and installation of a new heating system. Defendants moved to strike the assumpsit claim because the action sounded in tort rather than assumpsit. The court held that "while the burden of the plaintiffs' action is the negligence of the defendant, the real question is whether the defendant properly performed its contract. Therefore, plaintiffs' action, while sounding in tort, was properly brought in assumpsit. See *Seigel v. Struble Brothers, Inc.*, 150 Pa. Super. 343." *Spanard*, at 355.

ORDER OF COURT

August 30, 1984, the application of the plaintiff for leave to amend its complaint against the defendant, York Division of Borg-Warner Corporation to add Count VI is granted.

COMMONWEALTH V. RIDEOUT, C.P., Franklin County Branch,
No. 50 of 1983

Criminal Law - Sentencing Guidelines

1. The only requirement imposed upon a court when it deviates from the sentencing guidelines is that it identifies in writing its reasons for so doing.

2. The sentencing guidelines do not require the existence of extraordinary or aggravating circumstances before a sentencing court may deviate from guidelines.

District Attorney, Counsel for the Commonwealth
Public Defender, Counsel for the Defendant

SUPPLEMENTAL OPINION

KELLER, J., August 31, 1984:

The defendant, John Leon Rideout, was charged on February 3, 1983, with possession with intent to deliver methamphetamine, criminal conspiracy, possession with intent to deliver marihuana and possession with intent to deliver valium. An Omnibus Pre-Trial Motion to suppress all physical evidence seized as a result of a search conducted at 680 Heintzelman Avenue, Chambersburg, Penna. and to suppress any inculpatory statements made or taken from the defendant was filed. On August 26, 1983, the Honorable Carson V. Brown, Specially Presiding, denied the suppression motions after hearing. On September 21, 1983, the defendant was tried by a jury and found guilty of possession with intent to deliver valium and methamphetamine and possession of a small quantity of marihuana. Post-trial motions for a new trial and in arrest of judgment were filed on October 11, 1983. A supplemental motion for a new trial was filed on December 9, 1983. The case was listed for the March Argument Court and was briefed and argued on March 1, 1984. In an Opinion and Order filed April 6, 1984, this Court considered, addressed and dismissed the issues and contentions raised by the defendant as grounds for a new trial and/or arrest of judgment. Additionally, that opinion considered, addressed and dismissed all issues and arguments presented by defendant in support of his Omnibus Pre-Trial Motion. A presentence investigation was ordered and a report filed by the Probation Department.

On June 6, 1984, the defendant appeared for sentencing on the call of the District Attorney. After hearing arguments of counsel



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and engaging in a colloquy with the defendant, the following sentences were imposed:

Count 1 - June 6, 1984, the Court sentenced the defendant to pay the costs of prosecution, pay a fine of \$5,000.00 and undergo imprisonment in a STATE CORRECTIONAL INSTITUTION for a period of not less than 60 months nor more than 240 months, to be computed from expiration of 524, 1979, and stand committed to the appropriate STATE CORRECTIONAL DIAGNOSTIC AND CLASSIFICATION CENTER for compliance with the within sentence.

June 6, 1984, it was further ordered that this sentence shall be served at the expiration of the sentence imposed in Criminal Action No. 524, 1979; that restitution shall be made in the amount of \$50.00 to Bureau of Narcotics, Attorney General's Office; that the defendant is given 48 days credit for time previously served.

Count 4 - June 6, 1984, the imposition of sentence is suspended and the defendant is placed on probation for a period of 6 years, upon the conditions that the defendant shall pay the costs of prosecution, pay the sum of \$2500.00 to the use of Franklin County Law Library. The defendant is placed under the supervision of the Franklin County Probation Department and subject to the rules and special conditions for probation-parole approved by the Court and authorized to be completed by the Probation Department. The Court recommends intense supervision.

June 6, 1984, it is further ordered that this suspension of sentence shall be served at the expiration of the sentence imposed in Criminal Action No. 50, 1983, Count No.1.

Count 3 - June 6, 1984, the imposition of sentence is suspended and the defendant is placed on probation for a period of 30 days, upon the conditions that the defendant shall pay the costs of prosecution, pay the sum of \$500.00 to the use of the County of Franklin. The defendant is placed under the supervision of the Franklin County Probation Department and subject to the rules and special conditions for probation-parole approved by the Court and authorized to be completed by the Probation Department. The Court recommends intense supervision.

June 6, 1984, it is further ordered that this suspension of sentence shall be served at the expiration of the suspension of sentence imposed in Criminal Action No. 50, 1983, Count No. 4.



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LEGAL NOTICES, cont.

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Donald L. Kornfield
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17 North Church Street
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2-15, 2-22, 3-1

NOTICE IS HEREBY GIVEN that Articles of Incorporation were filed with the Department of State of the Commonwealth of Pennsylvania at Harrisburg, Pennsylvania, on the 28th day of January, 1985, for the purpose of obtaining a Certificate of Incorporation. The name of the proposed corporation organized under the Commonwealth of Pennsylvania Business Corporation Law, approved May 5, 1933, P.L. 364, as amended, is Wynbrier Associates, Inc. The purpose or purposes of the corporation are that it shall have unlimited power to engage in and do any lawful acts concerning any and all lawful business for which corporations may be formed under the Pennsylvania Business Corporation Law of 1933, as amended.

WYNBRIER ASSOCIATES, INC.
1809 East Main Street
Waynesboro, PA 17268

MAXWELL, MAXWELL, DICK & WALSH
92 West Main Street
Wayne Building
Waynesboro, PA 17268-1591
3-1-85

LEGAL NOTICES, cont.

NOTICE IS HEREBY GIVEN THAT Articles of Incorporation have been filed with the Department of State of the Commonwealth of Pennsylvania at Harrisburg, Pennsylvania on the 16th day of January, 1985, for the purpose of obtaining a Certificate of Incorporation of a proposed nonprofit corporation to be organized under the Non-profit Corporation Law of the Commonwealth of Pennsylvania. The name of the proposed corporation is Helping Hands for the Spinal Cord Disabled of Franklin County. The purposes for which it has been organized are to provide a support system for the spinal cord disabled and their families; to provide financial assistance for transportation, supplies, equipment and medication; to promote public awareness of the needs of the spinal cord disabled; to support the program of the Spinal Cord Society; and to serve as a resource organization in Franklin County, Pennsylvania.

Paul F. Mower of
Mower, Hoskinson and Nelson
232 Lincoln Way East
Chambersburg, PA 17201

3-1-85

The defendant filed timely post-sentencing motions and they were denied by this Court without opinion on June 20, 1984.

On July 5, 1984, the defendant served upon this Court his Notice of Appeal to the Superior Court of Pennsylvania from the judgment of sentence. On July 9, 1984, we directed him to file a concise statement of matters complained of on appeal with citations of any authorities relied upon.

Pursuant to said order the defendant filed his statement identifying the following as matters he intended to raise on appeal:

1. All issues raised and presented in defendant's Omnibus Pre-Trial Motions to Suppress Evidence.
2. All issues raised and presented in defendant's Motion for a New Trial and in Arrest of Judgment.
3. All issues raised and presented in defendant's Motion to Modify Sentence.

Our Opinion and Order of April 6, 1984, considered and discussed at length all issues raised by the defendant in his Omnibus Pre-Trial Motion, and in his post-trial motions. No useful purpose would be served by reiterating that which is already a matter of record, so we incorporate herein by reference thereto our Opinion of April 6, 1984.

All of the issues raised by the defendant in his motion to modify sentence were considered before and during the sentencing proceeding on June 6, 1984, and the rationale for the sentences imposed was enunciated and appears in the transcript of those proceedings. However, we will consider them again for the purpose of clarifying the record.

The defendant contends that his sentence is excessive, illegal and unconstitutional and should be modified for the following reasons:

1. The Court went far outside the sentencing guidelines established by the Pennsylvania Commission on Sentencing and the reasons given by the Court for rendering a sentence outside

the guidelines were not legally sufficient to justify our action because there were no aggravating or extraordinary circumstances involved in the case.

2. The Court failed to state any reasons on the record or the basis for the amount of fines imposed upon the defendant in Count 1 and Count 4 of this case.

3. The Court misapplied Section 303.7(f) of the Sentencing Guidelines regarding computation of the prior record score for the reasons, grounds and arguments of defendant and his counsel and evidence presented on behalf of defendant at his sentencing generally set forth on pages 4-15 of the sentencing transcript.

We shall address the defendant's contentions in the order they were presented.

1. Section 303.1(h) of the Sentencing Guidelines provides:

In every case in which the court imposes a sentence for a felony or misdemeanor, the court shall make as a part of the record and disclose in open court at the time of sentencing a statement of the reason for the sentence imposed. In every case where the court imposes a sentence outside the sentencing guidelines the court shall provide a contemporaneous written statement of the reasons for the deviation from this chapter. Id.

The only requirement imposed upon a court when it deviates from the sentencing guidelines is that it identify in writing its reasons for so doing. This requirement was met when we completed Section 8 on the reverse side of the guidelines sentence form which provide the space necessary for supplying those written reasons.

Neither the guidelines, the statute, nor the case law require the existence of extraordinary or aggravating circumstances before a sentencing court may deviate from the guidelines. However, in the case at bar it is our judgment that extraordinary and aggravating circumstances justifying our departure from the guidelines certainly did exist. They included:

- a. Defendant was on probation at the time he committed the offenses.



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- b. Defendant had a prior record including previous convictions for the delivery of controlled substances.
- c. Defendant had been given an opportunity to reform his life and become a law-abiding citizen when a negotiated plea was accepted in 1979-80 and a suspended sentence conditioned on serving a short sentence in the county prison imposed.

We have found no authority and none has been presented to us which defines "legally sufficient reasons" for departing from the guidelines. In our judgment, the reasons given were legally sufficient.

Therefore, we conclude that there is no merit to defendant's argument that his sentence was illegal because it deviated from the sentencing guidelines.

2. Defendant contends that the Court failed to state any reasons on the record or the basis for the amount of fines which it imposed upon him in Count 1, possession with intent to deliver methamphetamine and Count 4, possession with intent to deliver valium.

We do not agree. Initially we repeat that the Court clearly identified the extraordinary circumstances which justified its departure from the guidelines. These factual circumstances were identified in writing in Section VIII of the Guideline Sentence Form.

Ample authority exists for the Court's decision to impose the amount of fines on Mr. Rideout. Under 35 Pa. C.S.A. 3780-113(f)(1.1), a defendant may be fined up to \$100,000 and imprisoned for up to 10 years or both. Section 780-115 provides that "... any person convicted of a second offense under the Act may be imprisoned for a term of up to twice the term otherwise authorized, fined an amount up to twice that otherwise authorized, or both." Since these are Mr. Rideout's third and fourth convictions under the Drug Act, ample authority and reason exists for imposing a \$5,000 fine on Count 1 and a \$2,500 fine on Count 4. The defendant will have 26 years to pay off these fines. We do not find the payment of less than \$300.00 per year unreasonable or impossible.



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LEGAL NOTICES, cont.

interested in said business are: Donald T. Forrest, 26 S. Potomac St., Waynesboro, PA 17268; and Brian Lee Knepper, R. D. #2, Box 202 F. Fayetteville, PA 17222.

D. L. Reichard, II
134 West Main Street
Waynesboro, PA 17268

3-15-85

NOTICE IS HEREBY GIVEN that Articles of Incorporation of a proposed nonprofit corporation to be called Soroptimist International of Chambersburg Inc. were filed on Tuesday, February 19, 1985, in the Office of the Department of State of the Commonwealth of Pennsylvania, Harrisburg.

The purpose or purposes for which the corporation is formed are as follows:

To promote the Soroptimist objectives of assisting and developing the highest concept of patriotism and love of country, interest in community, national, and international affairs, maintaining high ethical standards in business and professional life, advancing the status of women, developing a spirit of friendship and unity among Soroptimists of all countries, quickening the spirit of service and human understanding and contributing to international understanding and universal friendship.

Richard K. Hoskinson of
Mower, Hoskinson and Nelson
232 Lincoln Way East
Chambersburg, PA 17201
Attorney

3-15-85

NOTICE

Notice is hereby given that articles of incorporation were filed with the Department of State, Commonwealth of Pennsylvania, at Harrisburg, Pennsylvania, on January 31, 1985, for the purpose of incorporating a nonprofit corporation under the Non-Profit Corporation Law of 1972. The name of the corporation is Tuscarora Rockets Youth Football, Inc. The purposes for which it has been organized are to implant in the youth of the community the ideals of good sportsmanship, honesty, loyalty, courage and reverence through supervised athletic competition wherein the attainment of exceptional athletic skills or the winning of games shall be of secondary importance to the primary goal of

LEGAL NOTICES, cont.

molding the character of future adults.

Dennis A. Zeger, Esquire
32 E. Seminary St.
Mercersburg, PA 17236

3-15-85

We understand the legislative philosophy which gave rise to the large fines authorized in the Act was to take the profit out of drug trafficking. We wholeheartedly subscribe to that philosophy and trust the rather modest fines here imposed will serve as a deterrent to the defendant and those tempted to follow his path.

We conclude that there is no merit to defendant's contention that this Court failed to state any reasons on the record or authority for the amount of fines imposed upon him.

3. Finally, defendant contends that the Court misapplied Section 303.7(f) of the sentencing guidelines when it computed his prior record score.

Section 303.7(f) of the 1982 Sentencing Guidelines provides:

Past Convictions. When the grading of the current offense is dependent upon past convictions, those convictions shall not be used in computing the prior record score. For example: retail theft, some violations of the Controlled Substance, Drug, Device and Cosmetic Act (35 Pa. C.S.A. §780-101 et seq.) and some motor vehicle offenses take a higher statutory classification when the defendant has been previously convicted of the same offense.

The Doubler provision, Section 780-115 provides, inter alia:

Second or Subsequent Offense. (a) Any person convicted of a second or subsequent offense under clause (30) of subsection (a) of Section 13 of this act or of a similar offense under any statute of the United States or any state, may be imprisoned for a term up to twice the term otherwise authorized, fined an amount up to twice that otherwise authorized, or both.

Defendant identifies this as his third conviction for the same offense. Therefore, he argues, the doubler provision of Section 780-115 is in effect. Since the grading of his current offense is dependent upon his past convictions, Section 303.7(f) prohibits this Court from using any of his past convictions when computing his prior record score.

Section 303.7(c) provides:

Prior Multiple Convictions. Prior multiple convictions for offenses arising out of the same criminal transaction for which concurrent or consecutive sentences were imposed are scored as a single conviction equal to the statutory classification of the most serious conviction offense. Prior multiple convictions arising out of separate criminal transactions are scored as separate convictions, and each is computed in the prior record score.

Defendant argues that both of his prior convictions for offenses under the Controlled Substance, Drug, Device and Cosmetic Act, 35 Pa. C.S.A. §780-101 et seq., arose out of the same transaction or occurrence and, therefore, merge into one conviction for the purposes of sentencing and grading the current offense under Section 303.7(c). Thus, he contends, this Court should have been prohibited from using this "single" conviction when it computed defendant's prior record score.

Again we disagree. In our judgment Section 303.7(f) only prohibits a sentencing court from considering one and only one conviction when it grades the current offense and when such grading is dependent upon past convictions. To take more than one prior conviction out of the offense gravity score would emasculate the doubler provision of the guidelines because it would require a sentencing court to give the same prior record score to individuals who have been convicted of their fifth or sixth offense of possession with intent to distribute a controlled substance as it would to those who have been convicted of the same offense only twice.

The defendant's interpretation of the statute flies in the face of an obvious legislative intent to double the penalties for repeat offenders. We will not accept it.

We find no errors committed in the pre-trial, trial or post-trial stages of the case at bar.

WALTER V. WALTER, C.P. Franklin County Branch, F.R. 1981 - 962

Divorce — Counsel Fees

1. In arriving at counsel fees, local standards as to fees are applied, especially where one party hires counsel from outside the area.
2. Counsel fees may only be awarded for counsel's time spent in conjunction with a divorce action and not for additional time spent on custody and support matters.
3. In an award of counsel fees, consideration should be made of necessity, income, separate estate and earning potential of both parties.

Courtney J. Graham, Esquire, Counsel for the plaintiff
Lenora M. Smith, Esquire, Counsel for the defendant
David C. Cleaver, Esquire, Master

MEMORANDUM AND ORDER

Eppinger, P.J., September 7, 1984:

On December 7, 1983, we filed an opinion and order in the above-captioned matter granting a divorce to the plaintiff, J. William Walter, on the grounds of indignities. We also denied the defendant, Judy S. Walter, an award of alimony pendente lite and expenses, but referred back to the Master for further hearing the issue of counsel fees in the divorce action.

Prior to the Master's hearing, defendant appealed our decision to the Superior Court. On May 9, 1984, because the appeal was premature, that Court remanded the cause back to this Court so the Master could hold further hearings as we directed as to counsel fees.

The Master scheduled the hearing for June 8, 1984, at which time plaintiff appeared with his attorney and defendant's attorney appeared, but defendant was not present. In his supplemental report, the Master found that the defendant should be awarded \$1,692.50 in counsel fees.

After making a complete and thorough review of all the evidence available to the Master, *Rorabaugh v. Rorabaugh*, 302 Pa. Super. 1, 11, 448 A.2d 64, 69 (1982), we find no error and accept the Master's recommendation. *Krupa v. Krupa*, 87 Dauphin R. 397, 400 (1967); *Beaver v. Beaver*, ___ Pa. Super. ___, 460 A.2d 305, 307 (1983).