

5. Pending the private auction of the real estate, defendant shall maintain all real estate taxes on the Bikle Road residence in a current status so as to avoid the possibility of the parties' former marital residence being sold for delinquent real estate taxes;

6. Defendant shall pay to plaintiff one-half the fair rental value of the former marital residence from March 23, 1992 through the date of closing on the disposition of the real estate pursuant to the private auction as hereinafter described. The fair rental value shall be reduced by one-half of all mortgage payments, insurance, and real estate taxes actually paid by defendant;

7. Defendant is granted reimbursement for one-half the expenses incurred in connecting the marital assets as hereinafter set forth. Reimbursement for other repair and maintenance costs is DENIED;

8. Defendant's request for attorney's fees incurred for the preparation of a comprehensive marital settlement agreement is DENIED;

9. Within thirty (30) days of the date of this order, defendant shall include plaintiff as a named insured on the insurance policy covering the marital residence which the parties own as tenants-by-the-entireties;

10. Within thirty (30) days of the date of this order, defendant shall designate plaintiff as the beneficiary of a thirty-two (32%) percent share of the survivor annuity of his pension. The designation of the plaintiff as a beneficiary of the survivor annuity shall be irrevocable during her lifetime. The cost of the survivor annuity shall be deducted from plaintiff's share of the pension as it is distributed;

11. The distribution of the parties' marital property as set forth in subparagraphs 2(A)-(D) of our order of July 11, 1991, is hereby reaffirmed with the following exceptions:

A. Plaintiff shall receive sixty-five (65%) of the coverage portion of defendant's Federal Civil Service Retirement pension by a deferred distribution to be determined upon defendant's actual receipt of pension benefits;

B. Any reference to distribution of defendant's retirement pension by the immediate offset method in our order of July 11, 1991 is hereby deleted;

C. Defendant is entitled to a cash credit for one-half of sewer connection expenses in the amount of \$1,125.00;

D. The foregoing changes to the distribution schedule set forth in our order of July 11, 1991 will result in the following net asset valuations:

Net asset value to defendant: \$10,576.00

Net asset value to plaintiff: \$14,685.00

E. A calculation of the cash distribution award requires payment by defendant of \$1,970.00. In the event that plaintiff is the successful bidder at the private auction of the marital residence, she may set off defendant's cash obligation to her from the purchase price for the marital residence;

12. Provisions for distribution of the marital residence as set forth in subparagraph 2(E) of our order of July 11, 1991 is hereby reaffirmed;

13. All transfers to effect the foregoing distribution (other than cash or residence) shall be made by the responsible spouse within thirty (30) days of this order;

14. Cost of the proceedings to date are to be paid equally by the parties. To the extent not deposited, remaining costs shall be paid within ten (10) days of this order;

15. The terms of this order shall survive the death of either party; and

16. The Court will retain jurisdiction of the subject matter set forth herein for the purposes of implementing a deferred distribution of the defendant's Federal Civil Service Retirement pension.

COMMONWEALTH OF PENNSYLVANIA V. DAVID KENNETH COOL, C.P. Franklin County Branch, No. 1993-418

Criminal Action--Motion to suppress evidence obtained pursuant to a stop of a motor vehicle--Pennsylvania Motor Vehicle Code 75 Pa.C.S. § 6308 pertaining to a police officer's reasonable belief that a provision of the Code is being violated as grounds for stopping a vehicle--75 Pa.C.S. § 4524(c) governing the hanging of objects from the inside rearview mirror so as to materially obstruct the driver's vision.

1. Under 75 Pa.C.S. § 6308, a police officer may stop a motorist if he reasonably believes that a provision of the Motor Vehicle Code is being violated.
2. Under 75 Pa.C.S. § 4524(c), a driver is prohibited from hanging any object from the inside rearview mirror which materially obstructs his vision through the front windshield so as to create a safety hazard.
3. The mere hanging of an object from the inside rearview mirror does not in itself constitute a violation of § 4524(c) absent a showing that the police officer reasonably believed that the object was materially obstructing the driver's view of the road.
4. The stop of the defendant's vehicle was improper where the police officer was unable to articulate specific facts in support of a belief that a pair of fuzzy dice hanging approximately 3-4" from the inside rearview mirror was materially obstructing the defendant's vision through the front windshield.

Todd R. Williams, Esquire, Attorney for the Commonwealth
David R. Breschi, Esquire, Attorney for the Defendant

OPINION AND ORDER

Herman, J., September 14, 1993:

INTRODUCTION

The defendant, David Kenneth Cool, was charged by way of Criminal Complaint filed by Corporal Richard Swartz of the Chambersburg Borough Police Department with one count of possession of drug paraphernalia. This charge arose out of a motor vehicle stop which occurred in the Borough of Chambersburg on January 30, 1993. The defendant waived his Preliminary Hearing on June 3, 1993, and on July 14, 1993, he appeared for Mandatory Arraignment and entered a plea of not guilty. The defendant filed an Omnibus PreTrial Motion on

August 24, 1993, containing a Motion to Suppress the evidence recovered pursuant to a search of his vehicle and his person during the January 30, 1993, motor vehicle stop. This Court held a hearing on the Omnibus PreTrial Motion on August 31, 1993, and counsel for the defendant and Commonwealth have submitted briefs to the Court. The matter is now ready for decision and the Court makes the following findings of fact:

FINDINGS OF FACT

(1) Corporal Richard Swartz testified that he observed the defendant driving his vehicle in the Borough of Chambersburg on Third Street between Catherine Street and Liberty Street at approximately 6:30 A.M. on January 30, 1993.

(2) Corporal Swartz observed two fuzzy dice hanging from the defendant's rear view mirror, and after radioing for backup, stopped the vehicle at 6:34 A.M. for an equipment violation pursuant to Section 4524(c) of the Pennsylvania Motor Vehicle Code which governs the hanging of objects from rear view mirrors and other obstructions.

(3) Corporal Swartz testified that the dice hung down approximately 3-4 inches, that the defendant's vehicle had not swerved and there was no indication that his vision was obstructed.

(4) Corporal Swartz parked his police car directly in back of the defendant's vehicle; he testified that he informed the driver why he had been stopped, moved him to the rear of his vehicle and in front of Swartz's patrol car.

(5) Corporal Swartz asked the defendant what he was doing in the area because that part of Chambersburg was known as a high-drug area. Swartz asked the defendant if he could search the vehicle and the defendant consented.

(6) On the back floor behind the driver's seat, Corporal Swartz found a 12-ounce beer can with several holes punched in it and a brown residue adhering to the holes.

(7) Two additional police vehicles arrived at the scene. A van driven by Officer Ralph North parked directly across the street from where Corporal Swartz and the defendant were located, and Officer Dennick parked directly behind Corporal Swartz's vehicle.

(8) At the request of Corporal Swartz, Officer North conducted the search of the defendant's person. Officer North patted the defendant down and felt a bulky object in the front breast pocket. Officer North asked the defendant to empty his pockets, and the defendant produced a small stone pipe.

(9) The two other occupants of the defendant's vehicle were searched, but no incriminating objects were discovered.

DISCUSSION

The defendant raises two issues in his motion. The first, that the initial stop of his vehicle was illegal because a pair of fuzzy dice hanging from his rear view mirror did not constitute a violation of the Motor Vehicle Code. The second issue, that the subsequent request by Corporal Swartz to search the defendant's vehicle, and the search itself, was illegal because Corporal Swartz had no reasonable and articulable grounds to suspect that criminal activity had occurred or that contraband was in the vehicle.

The defendant's first issue pertains to the interpretation of 75 P.S. 4524(c) of the Motor Vehicle Code, which provides:

(c) Other obstruction - No person shall drive any motor vehicle with any object or material hung from the inside rearview mirror or otherwise hung, placed or attached in such a position as to materially obstruct, obscure or impair the driver's vision through the front windshield or any manner as to constitute a safety hazard...

The Commonwealth contends that the language in the first part of subsection (c) prohibits a driver from hanging any object whatsoever from the rear view mirror regardless of whether or not it materially obstructs his vision. This position is based on an argument that subsection (c) of Section 4524 should not be read conjunctively.

In addition the Commonwealth argues rather convincingly that subsection (c)'s requirement for a material obstruction is implicit in the prohibition against hanging any objects from the rear view mirror. This is so, the Commonwealth argues, because of the strategic location of the rear view mirror in the front

windshield of all motor vehicles. However, the Court would be rewriting the statute if it were to accept this interpretation. There is no language to support that interpretation and it is contrary to the existing scheme of Section 4524 which contains five subsections each of which contains language prohibiting the positioning of obstructions which "materially" obstruct or obscure a driver's clear view. Further we decline to accept the Commonwealth's position that subsection (c) prohibits the hanging or positioning of any object or material from the inside rear view mirror without any showing of a material obstruction of the driver's vision.

A careful examination of the wording of subsection (c) reveals that, when read as a whole, no disjunctive meaning actually exists, despite the use of the word "or". The phrase "No person shall drive any motor vehicle with any object or material hung from the inside rearview mirror" and the phrase "otherwise hung, placed or attached in such a position," both refer to the phrase "so as to materially obstruct, obscure or impair the driver's vision through the front windshield..." (Emphasis added). Taken as a whole, this language does not require an either-or finding.

In support of the Motion to Suppress, defendant cites a Lycoming County Court of Common Pleas case in which a motorist had been stopped for hanging a 2-1/2" x 4-1/2" air freshener from his rear view mirror. In *Commonwealth v. Thomas*, 19 Lyc. 76 (1992), the Commonwealth argued that the mere hanging of the object from the mirror was sufficient grounds for the officer to stop the vehicle, regardless of whether or not the officer believed that it was materially obstructing the driver's view of the road.

The defendant also cites *Commonwealth v. Elliot*, 376 Pa. Super. 536, 546 A.2d 654 (1988) as support for the interpretation that a material obstruction of the driver's view is a prerequisite to violation of that section. While *Elliot* may provide some support, we are more convinced by the fact that the legislature included this prerequisite in the other subsections of Section 4524 as we mentioned earlier.

Finally, we note that it is well-established that a police officer

may stop a motor vehicle if he reasonably believes that a provision of the Motor Vehicle Code is being violated. 75 P.S. 6308; *Commonwealth v. Fisher*, 294 Pa. Super. 486, 440 A.2d 570 (1982). However, in the instant case, Corporal Swartz gave no indication in his testimony that the dice, which hung down approximately 3-4" from the mirror, materially obstructed the defendant's vision or that he had stopped the defendant based on a reasonable belief that a clear view of the road was being impaired. Corporal Swartz stated that he did not observe the defendant's vehicle swerving or otherwise being driven erratically.

Based on the foregoing, we conclude that simply hanging an object from the rearview mirror does not in itself constitute grounds for stopping a vehicle under 75 P.S. 4524. the officer must have reasonable grounds to believe that the object materially obstructs the driver's vision. As there is no indication that the stop was made based on such a belief, the stop was invalid and the resulting evidence must be suppressed. Consequently, there is no need to address the defendant's second issue.

ORDER OF COURT

NOW this 14th day of September 1993, the defendant's Motion to Suppress the evidence obtained from the stop of his vehicle on January 30, 1993, is granted.

SUSQUEHANNA BANCSHARES, INC. AND THE CITIZENS NATIONAL BANK OF GREENCASTLE V. NATIONAL UNION FIRE INSURANCE COMPANY OF PITTSBURGH, PENNSYLVANIA, C.P. Franklin County Branch, No. A.D. 1989-302

Post trial motions -- Fidelity bond -- Indemnification -- Manifest intent analysis -- External indicia of subjective intent -- Insurance risks -- Moral hazard

1. The court has inherent authority to change or modify its decision or to order a new trial. The court's decision will not later be reversed on appeal absent clear abuse of discretion or error of law.

2. The court rejects an objective standard which would allow it to infer manifest intent from the fact of injury, if such injury was the natural and

probable result of the employee's voluntary acts. Such a standard could subject the insurer to liability for a broad spectrum of employee misconduct, ranging from incompetence to embezzlement and could result in coverage more comprehensive than intended by the parties.

3. The court distinguishes between the risks inherent in poor business judgment and the risks inherent in fraudulent acts such as embezzlement. The moral hazard created by insurance covering imprudent acts seems much greater than the moral hazard created by insurance covering embezzlement.

4. A fidelity bond insuring against dishonest and fraudulent acts of an employee who acts with manifest intent to harm his employer and benefit himself and others is intended to provide relatively narrow coverage for employee acts more egregious than poor business judgment.

5. Manifest intent analysis relies on external indicia of subjective intent. Manifest intent means apparent or obvious and requires more than mere probability. Manifest intent exists when a particular result is substantially certain to follow from conduct.

6. A bank employee does not act with manifest intent to harm his employer and benefit himself or others when he attempts to avoid a loss on troubled loans by granting extensions without charging a fee or refinancing delinquent loans.

7. In determining whether a bank employee acts with manifest intent to harm the bank and benefit himself or others, it is appropriate to examine the employee's actions in the context of the bank's general operations and lending guidelines, or lack thereof.

*M. Duncan Grant, Esquire, Attorney for Plaintiff
Timothy B. Anderson, Esquire, Attorney for Plaintiff
J. Dennis Guyer, Esquire, Attorney for Plaintiff
Melvin R. Shuster, Esquire, Attorney for Defendant
Kimberly Rushton, Esquire, Attorney for Defendant
Edward I. Steckel, Esquire, Attorney for Defendant*

OPINION AND ORDER

WALKER, P.J., February 11, 1994:

By opinion and order dated June 8, 1993, and after a fifteen day