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Recent Developments in Pennsylvania Criminal Law

Patrick Carothers* & Christopher M. Turak**

Criminal Law — Searches and Seizures — Thermal Imaging Device
— The Pennsylvania Supreme Court held that the warrantless use of an infrared thermal imaging device to scan a private residence for evidence of criminal activity violates the Fourth Amendment.


In early 1994, Erie resident Gregory Gindlesperger was using artificial light to grow marijuana plants in his basement. Acting on a tip from a confidential informant but without a search warrant, police scanned Gindlesperger's house using an infrared thermal imaging device and detected "an unexplainable source of heat coming from the basement area." "[T]his heat source would be consistent with the heat source coming from the artificial lighting used in the growing of marijuana." Pursuant to a search warrant, on April 9, 1994, police officers entered Gindlesperger's basement and seized twenty-one marijuana plants. The search warrant was issued based on the results of the infrared thermal imaging surveillance and on the information provided by the confidential informant. Gindlesperger was arrested and charged with a violation of the Controlled Substance, Drug, Device and Cosmetic Act.

Gindlesperger filed a pre-trial motion to suppress the evidence seized during the search of his residence, asserting that the scanning of his residence with the thermal imaging device; without

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3. Id. at 899.
4. See id.
5. See id.
first obtaining a search warrant, was a violation of the Fourth Amendment to the United States Constitution.\textsuperscript{7} After denial of the pre-trial motion, a bench trial was conducted, and Gindlesperger was found guilty of all charges.\textsuperscript{8} Gindlesperger then appealed to the Pennsylvania Superior Court, which reversed the trial court's decision, holding that the warrantless use of the thermal imaging device was not a proper basis for the subsequent search warrant.\textsuperscript{9}

The Pennsylvania Supreme Court, stating that this is a case of first impression, granted allocatur.\textsuperscript{10}

Justice Stephen A. Zappala wrote the opinion for the majority, which initially pointed out that the fundamental interest protected by the Fourth Amendment, the right to be free from unreasonable searches and seizures, is protected by the requirement that searches be conducted pursuant to a warrant issued by an independent judicial officer based upon probable cause.\textsuperscript{11} The court continued by describing the test enunciated by the United States Supreme Court in \textit{Katz v. United States}\textsuperscript{12} for what constitutes an unreasonable search: “one asserting that an unlawful search has occurred [must] demonstrate, first, an actual, subjective expectation of privacy in that which is searched and second, that this expectation is one our society recognizes to be reasonable.”\textsuperscript{13}

\textbf{7.} Gindlesperger, 743 A.2d at 899. The Fourth Amendment to the United States Constitution states:

\begin{quote}
The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or Affirmation, and particularly describing the place to be searched, and the persons or things to be seized.
\end{quote}

\textbf{8.} Gindlesperger, 743 A.2d at 899. Gindlesperger was convicted by Judge Connelly in the Erie County Court of Common Pleas, Criminal Division, No. 01515-1994. See id. at 898.

\textbf{9.} See id. at 899.

\textbf{10.} Id. at 898. At the supreme court, attorney Garrett A. Taylor, the Assistant District Attorney for Erie County, represented the Commonwealth, and attorney Elliot J. Segel from Erie represented Gindlesperger. \textit{Id.}


\textbf{11.} Id. at 900. The court noted that Gindlesperger also asserted a state constitutional challenge under Article 1, Section 8 of the Pennsylvania Constitution. \textit{Id.} at 899 n.3. The court concluded that the use of a thermal imaging device was also a violation of the Pennsylvania Constitution, because the Pennsylvania Constitution provides a notion of privacy stronger than that of the Fourth Amendment to the United States Constitution. \textit{Id.}


\textbf{13.} Gindlesperger, 743 A.2d at 900 (citing \textit{Katz}, 389 U.S. at 361 (Harlan, J.,
While pointing out that the Supreme Court has never decided the constitutionality of the warrantless use of thermal imaging devices, the Gindlesperger court reviewed several differing opinions of federal circuit courts, federal district courts, and state courts. The Commonwealth’s argument relied upon cases upholding the use of thermal imaging devices, which analogize the “heat waste” emanating from a home to that of discarded trash or the odor that escapes a compartment or building that is detected by a drug sniffing canine.

Courts holding that the warrantless use of a thermal imaging device is constitutional have stated that the thermal imaging device is passive in nature, and does not intrude upon the interior of the property revealing any intimacy of detail. Such courts stress that thermal imaging only indicates “hot spots” on the roof and walls of the building under surveillance.

In contrast, courts finding the warrantless use of a thermal imaging device to be unconstitutional have asserted that thermal imaging reveals intimate details regarding the activities occurring within the home. The Pennsylvania Supreme Court, in adopting this analysis, found the United States Supreme Court’s decision in United States v. Karo informative.

concurring).

14. Id. at 901. The Seventh, Eighth, Ninth and Eleventh Circuits as well as one district court in the Ninth Circuit have upheld the warrantless use of thermal imaging devices by law enforcement, while the Tenth Circuit, one district court in the Seventh Circuit, and the State Supreme Courts of Montana and Washington and the Court of Appeal of California have held such warrantless use to be unconstitutional. Id.

15. Id. The Supreme Court has held that there is no reasonable expectation of privacy in an individual’s discarded trash. See California v. Greenwood, 486 U.S. 35 (1988). The Pennsylvania Supreme Court distinguished this case, stating that the Supreme Court, in the Greenwood analysis, focused on the voluntary nature of Greenwood’s relinquishment of his trash into the hands of third parties, which is significantly different than that of the involuntary emanation of heat from one’s home. Gindlesperger, 743 A.2d at 901.

16. Gindlesperger, 743 A.2d at 901. The Supreme Court has held that a warrantless search by a drug sniffing canine is not a violation of the Fourth Amendment. See United States v. Place, 462 U.S. 696 (1983). The Pennsylvania Supreme Court distinguished this case, stating that the Supreme Court, in the Place analysis, focused on the dog’s ability to detect the particular smells of illegal contraband, while the thermal imager cannot distinguish between legal and illegal activities within the home. Gindlesperger, 743 A.2d at 901.

17. Gindlesperger, 743 A.2d at 902.

18. Id.

19. Id. These courts have held that the issue is not whether an individual has an expectation of privacy in the heat emanating from the home, but rather, whether the individual has an expectation of privacy in the activities occurring within his home. Id. at 903.


In *Karo*, government agents, acting without a warrant, installed a beeper into a can of ether used for cocaine processing, and then tracked the movements of the can into a private residence.\(^2^2\) Based partially on the information derived from the beeper, the agents obtained a search warrant for the residence.\(^2^3\) The Supreme Court ruled that the monitoring of a beeper in a private residence was a violation of the Fourth Amendment because it revealed critical facts that would not otherwise be available without a warrant.\(^2^4\) The Pennsylvania Supreme Court likened the beeper in *Karo* to that of the thermal imaging device in the present case, and held that the warrantless use of a thermal imaging device violates the Fourth Amendment.\(^2^5\)

Justice Ronald D. Castille filed a dissenting opinion, in which he argued that there is no reasonable expectation of privacy in the heat vented from one's home.\(^2^6\) Unlike the majority, he concluded that thermal imaging does not reveal intimate details regarding the activities within a home, but rather, measures only “heat waste” emanating from a home and is no different than using binoculars to enhance what can be lawfully observed.\(^2^7\) Justice Castille concluded by emphasizing that the police here were not using the thermal imaging device in a random sweep of the neighborhood, but instead were using it as an investigative tool to confirm information provided by a confidential informant.

In this significant case, Pennsylvania has departed from the holdings in many federal cases by prohibiting the warrantless use of thermal imaging devices to conduct surveillance. The United States Supreme Court has granted certiorari in a case involving substantially the same issue.\(^2^8\)

**Criminal Law — Evidence — Scope of Cross-Examination of a Criminal Defendant's Character Witness** — The Pennsylvania Supreme Court held that a criminal defendant's character witness, called to testify about the good character of the accused, may not

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\(^{22}\) *Id.*

\(^{23}\) *Id.*

\(^{24}\) *Id.*

\(^{25}\) *Id.* at 906.

\(^{26}\) *Gindlesperger*, 743 A.2d at 906 (Castille, J., dissenting).

\(^{27}\) *Id.* (Castille, J., dissenting). Justice Castille would have adopted the approach enunciated by the Eleventh Circuit in United States v. Ford, 34 F.3d 992 (11th Cir. 1994) (likening the absence of an individual's privacy right in the "waste heat" emanating from their home to that of an individual's trash, as held in California v. Greenwood, 486 U.S. 35 (1988)).

be questioned on cross-examination about knowledge of allegations of specific prior instances of misconduct that did not result in arrest.


In March of 1994, Wesley Morgan was charged with deviate sexual intercourse, indecent assault, indecent exposure, and related offenses stemming from his alleged sexual attacks against a young girl that he was babysitting. 29 The Commonwealth's witness list for the trial included two people who planned to testify that Morgan had sexually molested them twenty years earlier. 30 No charges had ever been filed against Morgan based on these incidents, nor had any arrests been effectuated. 31 Morgan's attorney feared that the Commonwealth would use this information to also impeach the good character witnesses called by Morgan during the course of the trial. 32 Based on this information, Morgan filed a motion in limine seeking to prevent the Commonwealth from cross-examining his good character witnesses about these alleged prior acts that did not result in arrest or conviction. 33 The trial court denied the motion. 34 As a result, Morgan did not call any character witnesses at trial to testify as to his good moral character and chastity. 35 On March 17, 1994, a jury convicted Morgan of all charges. 36

Morgan then appealed the denial of the motion in limine to the Pennsylvania Superior Court. 37 The superior court, in an unpublished opinion, affirmed the ruling of the trial court. 38 Upon the filing of a petition for allowance of appeal, the Pennsylvania Supreme Court granted allocatur. 39

The sole issue on appeal was whether the prosecution, on cross-examination of the defendant's character witnesses, may pose questions dealing with mere allegations of the defendant's past criminal conduct in order to impeach the character witnesses' credibility. 40

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30. *See Morgan*, 739 A.2d at 1034.
31. *See id.*
32. *See id. at 1035.
33. *See id.*
34. *See id.*
35. *See Morgan*, 739 A.2d at 1035.
36. *See id.*
37. *See id.*
38. *See id.*
39. *See id.*
40. *Morgan*, 739 A.2d at 1035. At the supreme court, attorney Timothy Paul Dawson
In a majority opinion by Justice Russell M. Nigro, the supreme court held that such queries, based solely on allegations made against the defendant, could not be asked of that defendant’s character witnesses on cross examination.\textsuperscript{41} The court set forth the general rule that a character witness who takes the stand and testifies about a party’s good character may be impeached by questions regarding the party’s bad character.\textsuperscript{42} However, the court was quick to point out that the impeaching questions may not be overly prejudicial to the defendant.\textsuperscript{43}

In this matter, Morgan wanted to prevent the Commonwealth from cross-examining Morgan’s character witnesses about their knowledge of past allegations of Morgan’s sexual misconduct made by two people in the community.\textsuperscript{44} While no charges were ever filed against Morgan, the alleged victims had stated publicly that Morgan had abused them.\textsuperscript{45} In deciding this case, the court relied heavily upon its holding in \textit{Commonwealth v. Scott}.\textsuperscript{46} The \textit{Scott} court held that it is unfairly prejudicial to allow the prosecution to cross-examine the criminal defendant’s character witnesses regarding the defendant’s previous \textit{arrests} that never resulted in convictions, because such arrests are equally consistent with innocence as with guilt.\textsuperscript{47} Similarly, in this case, the court held that questions regarding the defendant’s past that dealt with mere \textit{allegations} would subject Morgan to the same unfair prejudice.\textsuperscript{48}

The court also noted that asking a character witness if they had ever “heard” of any allegations of the defendant’s misconduct has historically been a favorite way for trial attorneys to get around the general prohibition on introducing extrinsic evidence of a

\textsuperscript{41} Morgan, 739 A.2d at 1035.
\textsuperscript{42} Id. (quoting Commonwealth v. Nolen, 535 Pa. 77 (1993)).
\textsuperscript{43} Id.
\textsuperscript{44} Id.
\textsuperscript{45} Morgan, 739 A.2d at 1033.
\textsuperscript{46} Id at 1034. See Commonwealth v. Scott, 436 A.2d 607 (Pa. 1981). The court did not rely on, or even cite, the recently enacted Pennsylvania Rules of Evidence, probably because those rules were not adopted at the time of Morgan’s trial.
\textsuperscript{47} Morgan, 739 A.2d at 1034 (citing Scott, 435 A.2d at 608).
\textsuperscript{48} Id.
defendant’s specific acts of misconduct.\textsuperscript{49} The court condemned the practice of attempting to bring in testimony through the back door that is not allowed in the front.\textsuperscript{50} Such questions of a character witness present an abundance of injustice: facts do not have to be established regarding the incidents, and hearsay testimony is permitted when such questions are allowed.\textsuperscript{51} Additionally, and perhaps most importantly to the court, a person who is asked if they ever heard of such rumors are not afforded the opportunity to discuss their views as to the truth of the rumors as they have heard them.\textsuperscript{52}

In a dissenting opinion, Justice Thomas G. Saylor noted that Rule 405(a) of the recently-enacted Pennsylvania Rules of Evidence reflect the ability to cross-examine a character witness as to knowledge of specific instances of prior misconduct, if such instances are probative of the character trait at issue.\textsuperscript{53} Justice Saylor pointed out that under the rule announced by the majority, Pennsylvania Rules of Evidence would depart from the Federal Rules of Evidence, which have been interpreted to permit cross-examination of a character witness as to knowledge of specific prior bad acts relevant to the character trait at issue.\textsuperscript{54}

The supreme court clearly announced in this case that a criminal defendant’s character witness may not be impeached on cross-examination through questions about allegations made against the defendant that never led to criminal charges. Unfortunately, the court did not expressly state that this would be its interpretation of Rule 405(a) of the Pennsylvania Rules of Evidence. Assuming that the Morgan holding applies to Rule 405(a),\textsuperscript{55} it appears that Pennsylvania now limits the cross-examination of a criminal

\textsuperscript{49} Id. at 1037.
\textsuperscript{50} Id.
\textsuperscript{51} Id.
\textsuperscript{52} Morgan, 739 A.2d at 1037.
\textsuperscript{53} Id. at 1038 (Saylor, J., dissenting). Rule 405(a) states in its entirety as follows: On cross-examination of a reputation witness, inquiry is allowable into specific instances of conduct probative of the character trait in question, except that in criminal cases inquiry into arrests of the accused not resulting in convictions is not permissible.
\textsuperscript{54} PA. R. EVID. 405(a).
\textsuperscript{55} Morgan, 739 A.2d at 1038 (Saylor, J., dissenting) (citing United States v. Glass, 709 F.2d 669, 673 (11th Cir. 1983) and United States v. Apfelbaum, 621 F.2d 62, 65 (3d Cir. 1980)).
defendant's character witness to personal knowledge of a prior conviction of a crime that is relevant to the character trait at issue.

**CRIMINAL LAW — SEARCHES AND SEIZURES — INVESTIGATIVE DETENTIONS** — An evenly divided Pennsylvania Supreme Court affirmed a Pennsylvania Superior Court decision holding that a police officer's continued questioning of a driver following the issuance of a traffic citation constitutes an investigative detention, and if such detention is not supported by a reasonable suspicion of criminal activity, any consent obtained by the officer to conduct a search is tainted by the illegality of the detention.


Kevin Sierra was the passenger in a vehicle that was stopped by West Manchester Township Police Officer Keith Roehm for speeding on November 21, 1993. Upon pulling over the vehicle, Roehm approached the car and asked the driver for his license and registration. Roehm later testified that he was suspicious of the occupants in the car, which had dealer plates, because they appeared unusually nervous. Additionally, Roehm noted that the driver's license was expired, the driver had a gang tattoo under his left eye, and the car contained numerous motorcycle parts that Roehm believed to be stolen. When asked, the driver stated that he had just bought the motorcycle parts and that the two were "coming from a friend's house." These facts made Roehm inquire of the occupants as to whether there was anything illegal in the vehicle. The driver replied that there was not. Roehm went back to his patrol car and returned a few minutes later with a written warning for speeding.

By this time, another officer had arrived and stationed himself next to the passenger side door. Officer Jeffrey Oberdorff was the officer who stationed himself by the passenger door. See *id.* Oberdorff initially spotted the vehicle speeding, and radioed Roehm to investigate because Oberdorff was traveling in the opposite direction. See *id.*

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57. See *Sierra*, 723 A.2d at 645.
58. See *id*.
59. See *id*.
60. See *id.* at 647 n.5.
61. See *id.* at 645.
62. See *Sierra*, 723 A.2d at 645.
63. See *id*.
64. See *id.*
citation, which the driver signed. After issuing the written warning, Roehm again asked if the vehicle contained anything illegal; the driver replied, "No, would you like to look?"65 Roehm accepted this invitation and ordered the occupants out of the car.66 The officer standing by the passenger door asked Sierra if he had any weapons, and although Sierra replied that he did not, he was acting suspiciously.67 The officer then performed a pat down search of Sierra.68 The search revealed that Sierra had a loaded and cocked semi-automatic handgun in the waistband of his pants.69 It was later determined that the appellee did not have a license to carry the gun; he was arrested and charged with illegally carrying a firearm.70

At a pretrial suppression hearing, the judge denied Sierra's motion to suppress the physical evidence obtained; Sierra was convicted and sentenced to a term of imprisonment.71

Sierra appealed his conviction to the Pennsylvania Superior Court, which reversed the suppression decision.72 It held that "Officer Roehm lacked a reasonable suspicion of criminal activity at the time of his second inquiry regarding the presence of illegal items in the automobile and thus had no legitimate basis to continue his investigation."73 The continued detention of the vehicle was therefore illegal, and tainted the subsequent consent to search the car and the pat-down performed by the officers.74 As a result, according to the superior court, the evidence gathered during that period was illegally obtained.75

The Commonwealth appealed, making three arguments for reversal.76 First, the Commonwealth argued that the superior court erred in holding that an investigative detention had occurred.77 Second, the Commonwealth asserted that even if a detention had occurred, there were reasonable grounds present to justify such

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65. Id.
66. Id.
67. See Sierra, 723 A.2d at 649 (opinion of Castille, J., in support of reversal). When Sierra said that he had no weapons, "he continued to back away from the officer, patting the pockets of a loose flannel shirt that he was wearing." See id.
68. See id.
69. See id.
70. See id. at 645 (opinion of Nigro, J., in support of affirmance).
71. See id.
72. See Sierra, 723 A.2d at 645 (opinion of Nigro, J., in support of affirmance).
73. Id.
74. See id.
75. See id.
76. See id.
77. See Sierra, 723 A.2d at 645 (opinion of Nigro, J., in support of affirmance).
Third, the Commonwealth contended that even if the detention was improper, the evidence should not be suppressed because the driver of the vehicle consented to the search. 79

After a review of the case, the justices of the Pennsylvania Supreme Court were evenly divided, with three supporting affirmance and three supporting reversal. 80 Therefore, the superior court’s decision to reverse Sierra’s conviction was affirmed. 81

Justice Russell M. Nigro wrote an opinion in support of affirmance, joined by Chief Justice John P. Flaherty, Jr., and Justice Stephen A. Zappala. 82 This opinion began by determining that an investigative detention did occur when Officer Roehm asked the occupants of the vehicle an additional question after issuing the warning for speeding. 83 Relying on Pennsylvania precedent, Justice Nigro explained that an investigative detention takes place when a law enforcement officer detains a person by some means that would communicate to a reasonable person that they are not free to exit the situation. 84 When such a message is communicated to a person, the rights and protections enumerated under the Fourth Amendment of the United States Constitution are triggered. 85

Justice Nigro reasoned that the occupants could not have been expected to know that they were free to leave after the written warning was issued. 86 The two officers were still standing at either front door of the vehicle. 87 The second officer had come onto the scene in the middle of the stop and enhanced the feeling of containment. 88 Additionally, Officer Roehm continued to question the driver in such a manner that made it seem unlikely that the driver had permission to leave. 89 Therefore, according to Justice Nigro, the officer’s continued questioning constituted an

78. See id.
79. See id. at 645-46. At the supreme court, attorneys Joseph C. Adams and H. Stanley Rebert from York represented the Commonwealth, and attorneys Michael F. Fenton and Michael Baldauf represented Sierra. Id. at 644.
80. Id. at 644.
81. Id.
82. Sierra, 723 A.2d at 645-48 (opinion of Nigro, J., in support of affirmance).
83. Id. at 646.
84. Id. (citing Commonwealth v. Lewis, 636 A.2d 619 (Pa. 1994)).
85. Id. Under United States Supreme Court jurisprudence, the Fourth Amendment requires that an “investigative detention” be supported by reasonable suspicion. See Berkemer v. McCarty, 468 U.S. 420 (1984).
86. Sierra, 723 A.2d at 646 (opinion of Nigro, J., in support of affirmance).
87. Id.
88. Id.
89. Id.
investigative detention.\(^90\)

Upon determining that the occupants were detained, Justice Nigro examined the reasonableness of the stop to determine if the detention was justified.\(^91\) Justice Nigro cited superior court cases that make it illegal for an officer to detain a person stopped for a traffic violation after the initial traffic violation has been resolved, unless the officer can articulate a reasonable basis for believing that further crime is afoot.\(^92\) Justice Nigro wrote that the reasons Officer Roehm recited for the stop were not sufficient to form the appropriate reasonable basis.\(^93\)

Finally, Justice Nigro dismissed the argument that the driver's consent to search the car made the subsequent discovery of the firearm proper, notwithstanding the fact that an illegal investigative detention had occurred.\(^94\) Justice Nigro wrote that if a close causal relationship exists between the consent to search the vehicle and an illegal detention, the consent is tainted.\(^95\) In this case, the necessary break in the causal relationship was not found, because consent was induced from the same question that triggered the detention.\(^96\) Therefore, Justice Nigro found that such consent was tainted.\(^97\)

Justice Ronald D. Castille wrote an opinion in support of reversal, joined by Justice Sandra Schultz Newman and joined in part by Justice Ralph J. Cappy.\(^98\) This opinion, which harshly

\(^{90}\) Id. at 646.

\(^{91}\) \textit{Sierra}, 723 A.2d at 647 (opinion of Nigro, J., in support of affirmance).


\(^{93}\) \textit{Id.} Of particular importance was the fact that "Roehm himself testified at the suppression hearing that he had no indication of any on-going crime at the time he returned the driver's documentation and questioned him about the contents of the car." \textit{Id.}

\(^{94}\) \textit{Id.}

\(^{95}\) \textit{Id.} at 648 (citing United States v. Melendez-Garcia, 28 F.3d 1046, 1053 (10th Cir. 1994)).

\(^{96}\) \textit{Sierra}, 723 A.2d at 648 (opinion of Nigro, J., in support of affirmance).

\(^{97}\) \textit{Id.}

\(^{98}\) \textit{Sierra}, 723 A.2d at 648-55 (opinion of Castille, J., in support of reversal). \textit{Id.} Part One of the opinion in support of reversal determined that the officer's continued questioning did not constitute an investigative detention. \textit{Id.} at 652 (stating that because "the actions of the officers did not communicate the requisite coercion, this particular encounter did not amount to an 'investigative detention' "). Part Two of the opinion in support of reversal determined that even if there was an investigative detention, the trial court properly found that there was sufficient evidence to establish that the officers had a reasonable suspicion to detain the suspects. \textit{Id.} at 654 (stating that "in light of the extremely limited nature of the putative 'investigative detention,' the trial court properly determined that the evidence in the record was more than sufficient to establish a reasonable belief that criminal activity was afoot"). It was this determination in Part Two that Justice Cappy refused to join. \textit{Id.} at 655.
criticized the other, found that Justice Nigro's basis for determining the stop to be an investigative detention was flawed.\textsuperscript{99} Justice Castille believed the facts did not give rise to a showing of coercive conduct on the part of the police officers following the issuance of the written warning for speeding.\textsuperscript{100} In fact, according to Justice Castille, if the tactics used are deemed coercive, police would be severely disadvantaged in attempting to execute any stop.\textsuperscript{101}

The justices writing for reversal believed that the additional question asked by Officer Roehm to the driver was not interrogatory in nature, even though he had previously asked the same question.\textsuperscript{102} The questions were not asked in a "rapid-fire" manner, and a substantial amount of time had elapsed after the time the officer asked the first question and when he later repeated his query.\textsuperscript{103} These justices found that the question was reasonable and not coercive because Officer Roehm had gone back to his squad car and wrote out a warning after he asked the question the first time.\textsuperscript{104} This single additional question did not convince the dissenting justices that an investigative detention had occurred.\textsuperscript{105}

In addition, Justice Castille did not find the presence of an additional officer at the passenger door to have added to a coercive atmosphere.\textsuperscript{106} The justices relied on \textit{Florida v. Bostick},\textsuperscript{107} a Supreme Court decision that held that it is lawful and permissible for an officer to stand by the passenger door during a stop and such conduct does not make the stop an investigative detention.\textsuperscript{108} They believed that allowing this conduct to be considered coercive would encourage officers to refrain from taking the precautions legally afforded to them by these prior holdings.\textsuperscript{109} The basis of the prior holdings was to ensure police safety.\textsuperscript{110} Holding that such conduct is coercive, the justices opined, will make such stops less safe for officers.\textsuperscript{111}

\textsuperscript{99} \textit{Id.} at 648-49.
\textsuperscript{100} \textit{Id.} at 649.
\textsuperscript{101} \textit{Id.} at 651-52.
\textsuperscript{102} \textit{Id.} at 652.
\textsuperscript{103} \textit{Sierra}, 723 A.2d at 651-52 (opinion of Castille, J., in support of reversal).
\textsuperscript{104} \textit{Id.} at 652.
\textsuperscript{105} \textit{Id.} at 651.
\textsuperscript{106} \textit{Id.}
\textsuperscript{108} \textit{Sierra}, 723 A.2d at 651 (opinion of Castille, J., in support of reversal) (citing \textit{Florida v. Bostick}, 501 U.S. 429, 439 (1991)).
\textsuperscript{109} \textit{Id.} at 652.
\textsuperscript{110} \textit{Id.}
\textsuperscript{111} \textit{Id.} at 651-52.
The split of opinion by the Pennsylvania Supreme Court allowed
the decision of the superior court to stand as precedent. The
superior court’s ruling clarified Pennsylvania law regarding
searches and seizures. An investigative detention may occur if the
police twice pose the same question to a suspect, if such
questioning communicates to a reasonable person that they are not
free to leave the current scene. Therefore, police must be able to
articulate a reasonable basis for detaining the suspect or risk
having such a detention considered illegal. Further, even if a
suspect consents to a search during the course of this illegal
detainment, the consent will be tainted if no break has occurred
between the illegality and the consent.

CRIMINAL LAW — SEARCHES AND SEIZURES — SEIZURE OF WEAPONS IN
CASES INVOLVING DOMESTIC VIOLENCE — The Pennsylvania Supreme
Court held that the seizure of a weapon pursuant to a Pennsylvania
statute that requires the police to seize weapons in certain cases
involving domestic violence is subject to the limits of existing
Fourth Amendment jurisprudence.


At about 11:00 p.m. on September 21, 1995, Randolph W. Wright
came home to his trailer, where he lived with his wife and their
nine-year-old son.\textsuperscript{112} Wright found his wife sleeping in their son’s
bedroom, whereupon he produced a nine-millimeter handgun and
fired a shot over her head and forcibly removed her to the living
room.\textsuperscript{113} Wright argued with his wife in the living room, placing
the gun against his chin and telling her to pull the trigger.\textsuperscript{114} Wright
then shot his wife, causing a glazing injury to her head; their son
called 911 and reported the shooting.\textsuperscript{115}

Two state troopers arrived at the scene, observed a spent
nine-millimeter shell casing near a screen door, announced
themselves, and subsequently placed Wright under arrest.\textsuperscript{116} After
emergency personnel arrived at the scene and Wright’s son was
taken to a neighbor’s home, the troopers “secured the scene.”\textsuperscript{117}
Wright admitted firing a nine-millimeter handgun and the police

\begin{footnotes}
\item[112.] See Commonwealth v. Wright, 742 A.2d 661, 662 (Pa. 1999).
\item[113.] See Wright, 742 A.2d at 662.
\item[114.] See id.
\item[115.] See id.
\item[116.] See id.
\item[117.] See id.
\end{footnotes}
maintained the security of the home. Upon the arrival of a third trooper and without the consent of Wright or his wife, the troopers searched appellant's home and found the handgun, loaded and cocked, under Wright's mattress. At that time, Wright was charged with criminal attempt-homicide, two counts of aggravated assault, and two counts of reckless endangerment.

Wright filed a pretrial motion attempting to suppress the seized firearms, asserting that the warrantless search of his home was illegal. The suppression court denied the motion, finding that under the Pennsylvania Crimes Code, the police were authorized to conduct a warrantless search of Wright's house following his assault against his wife and son, and to seize any weapons discovered during that search. Before a jury trial, Wright was found guilty of all charges with the exception of the aggravated assault charge related to his son. In a memorandum opinion, a divided panel of the superior court affirmed the decision of the trial court. The Pennsylvania Supreme Court allowed appeal to "consider the propriety of the search and seizure."

118. See Wright, 742 A.2d at 662.
119. See id. The police also discovered under the mattress a .380-caliber pistol. See id.
120. See id. at 663.
121. See id.
122. See id.; 18 PA. CONS. STAT. § 2711 (1994). This section of the Pennsylvania Crimes Code requires the police to seize any weapons used in the commission of certain enumerated offenses, including domestic violence. Id. at § 2711(b).
123. See Wright, 742 A.2d at 663.
125. Wright, 742 A.2d at 663. In the superior court's lead opinion, Judge Michael T. Joyce held that the search was justified pursuant to title 18, section 2711(b) of the Pennsylvania Crimes Code, which requires the seizure of weapons used in domestic violence offenses, and that this power conferred upon the troopers the power to search. See id. In addition, Judge Joyce found exigent circumstances, namely the safety of the mother and son that lived there, that required the troopers to remove the weapons. See id. Judge Olszewski concurred, holding that the search was a violation of the appellant's protection against unreasonable searches and seizures guaranteed by the Fourth Amendment to the United States Constitution, but that exigent circumstances existed to justify the search. Judge John T. J. Kelly, Jr., also concurred, holding that the search was proper as incident to a lawful arrest. See id.
126. Id. At the supreme court, attorneys Sidney Sokolsky and Norma Chase from the Pittsburgh law firm of Ecker, Ecker, & Ecker, and David Crowley from the Centre County Public Defender's Office represented Wright; attorney Gregory Defloria, the Assistant District Attorney for Centre County, represented the Commonwealth. Id. at 662.

Justice Thomas G. Saylor wrote the opinion for the majority of the court, which included Chief Justice John P. Flaherty, Jr., and Justices Stephen A. Zappala and Ralph J. Cappy. Id. at 662-66. Justice Ronald D. Castille wrote a separate opinion concurring in part and dissenting in part, and was joined by Justice Sandra Schultz Newman. Id. at 666-69 (Castille, J., concurring and dissenting). Justice Russell M. Nigro also wrote a separate opinion, concurring in part and dissenting in part. Id. at 669 (Nigro, J., concurring and dissenting).
Initially, the court asserted that a tension exists between the government's interest in protecting the victims of abuse and a criminal suspect's right under the United States Constitution's Fourth Amendment to be free from unreasonable searches and seizures. The court stated that a plain reading of Section 2711 of the Pennsylvania Crimes Code requires police officers to seize weapons used in domestic violence offenses, but does not specify the methods by which the seizures are to be conducted. Rejecting the Commonwealth's argument that Section 2711 authorizes warrantless searches, the court held that Section 2711 is subject to the limits of existing Fourth Amendment jurisprudence.

As an alternative argument, the Commonwealth asserted that the search was proper under the exigent circumstances exception to the warrant requirements of the Fourth Amendment. The court rejected this argument, holding that the facts here did not present a situation in which the delay in obtaining a warrant would have subjected Wright's wife and son to further risk of physical harm and, therefore, the exigent circumstances exception to the Fourth Amendment did not apply.

Justice Ronald D. Castille filed a concurring and dissenting opinion in which Justice Sandra Schultz Newman joined. Justice Castille agreed with the majority that Section 2711(b) must be interpreted in accordance with the Fourth Amendment, but differed in his belief that exigent circumstances existed that justified the search of appellant's home. In addition, Justice Castille believed

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127. Id.
128. Id. at 664.
129. Id. The court thus agreed with Judge Olszewski of the superior court and stated that "to construe Section 2711(b) as authorizing warrantless searches whenever a weapon is implicated in domestic violence case . . . would create a new categorical exception to the Fourth Amendment's warrant requirement." Id. The court went on to say that "[b]ecause we are obliged to construe the enactments of the General Assembly in harmony with constitutional requirements . . . a more tenable reading . . . requires the police to seize a weapon when the intrusion is otherwise permissible." Id.
130. Wright, 742 A.2d at 664. The exigent circumstances exception to the warrant requirement of the Fourth Amendment allows police to conduct a limited search in domestic violence situations involving imminent physical harm in order to remove an item of potential harm. Id.
131. Id. at 666. The court stated that at the time of the search and seizure, the risk of potential harm was nonexistent because Wright was in custody, the wife was in the hospital, the son was at his grandparents, and the area had been secured by the police. Id.
132. Id. at 666 (Castille, J., concurring and dissenting).
133. Id. (Castille, J., concurring and dissenting). Justice Castille argued that the existence of loaded weapons in a home where a nine-year-old child lived and was likely to soon return constituted exigent circumstances. Id. (Castille, J., concurring and dissenting).
that, given all of the other evidence, the admission of the firearms was harmless error.\textsuperscript{134}

Justice Nigro filed a brief concurring and dissenting opinion in which he stated his agreement with the majority on the constitutional issues involved in the case, but dissented because he felt that the admission of the seized firearm was harmless error.\textsuperscript{135}

\textbf{Criminal Law — Searches and Seizures — Consent to be Searched} — \textit{The Pennsylvania Supreme Court held that the federal voluntariness standard for consensual, warrantless searches satisfies the privacy requirements of the Pennsylvania Constitution. Commonwealth v. Cleckley, 738 A.2d 427 (Pa. 1999).}

On December 23, 1995, Officer John Deluca of the Borough of Koppel Police Department received information that Joseph Cleckley was selling drugs inside a local bar.\textsuperscript{136} Locating Cleckley inside the bar, the officer informed him of the accusations against him and requested that he follow him outside.\textsuperscript{137} Once outside, Cleckley consented to the officer's request to "pat him down," whereupon the officer discovered some crack cocaine and cash.\textsuperscript{138}

Cleckley was charged with possession and possession with intent to deliver.\textsuperscript{139} The trial court denied Cleckley's pretrial motion to suppress the evidence; Cleckley argued that it was obtained in violation of his right against unreasonable searches under Article I, Section 8 of the Pennsylvania Constitution.\textsuperscript{140} Cleckley was found guilty after a trial by jury and, on appeal, the Pennsylvania Superior Court affirmed.\textsuperscript{141} The Pennsylvania Supreme Court granted Cleckley's petition for allowance for appeal in order to determine whether, under the privacy rights guaranteed by the Pennsylvania Constitution, the subject of a consensual search must knowingly and intelligently waive his right to refuse consent.\textsuperscript{142}

\begin{itemize}
\item \textsuperscript{134} \textit{Id.} at 667-68 (Castille, J., concurring and dissenting).
\item \textsuperscript{135} \textit{Id.} at 669 (Nigro, J., concurring and dissenting).
\item \textsuperscript{137} See \textit{Cleckley}, 738 A.2d at 428.
\item \textsuperscript{138} See \textit{id.}
\item \textsuperscript{139} See \textit{id.} Appellant was charged with possession and possession with intent to deliver under title 35, section 780-113(a)(16) and title 35, section 780-113(a)(30) of the Pennsylvania Crimes Code. See \textit{id} at 429.
\item \textsuperscript{140} See \textit{id.} at 429. Article I, Section 8 is Pennsylvania's counterpart to the United States Constitution's prohibition, under the Fourth Amendment, of unreasonable searches and seizures. See \textit{id.}
\item \textsuperscript{141} See \textit{id.}
\item \textsuperscript{142} \textit{Cleckley}, 738 A.2d at 429. At the supreme court, attorney John J. Petrush, Jr., from San Francisco, California represented Cleckley, and attorneys Theresa Ferris-Dukovich and
\end{itemize}
Writing for the majority, Justice Ralph J. Cappy began by stating that under both the United States Constitution and the Pennsylvania Constitution, a warrantless search is per se unreasonable unless certain specific exceptions apply, one of which is valid consent. Consent is deemed valid only when given voluntarily; Cleckley argued that the test for such voluntariness should include a knowing and intelligent waiver. In other words, Cleckley argued that when asking a criminal suspect for consent to do a pat-down search, police in Pennsylvania should be required to tell the suspect that he has the right to refuse to consent to the search. The court noted that the United States Supreme Court's decision in *Schneckloth v. Bustamonte* had already rejected this precise argument in the federal realm. In *Schneckloth*, the United States Supreme Court enunciated the voluntariness standard and held that, for a search to be voluntary and, therefore, valid under the Fourth Amendment, an individual does not have to knowingly and intelligently waive his consent.

Cleckley argued that despite the fact that a knowing and intelligent waiver is not required under the Fourth Amendment, Pennsylvania should adopt such a standard under the Pennsylvania Constitution because of the enhanced privacy protections under Article 1, Section 8 of the Pennsylvania Constitution and Pennsylvania case law interpreting that section. The court rejected Cleckley's argument by distinguishing the cases that Cleckley cited and holding that the privacy rights protected by the Pennsylvania Constitution regarding consent to a search are sufficiently protected under the federal standard for voluntariness set out in *Schneckloth*.

Ahmed Aziz from Beaver represented the Commonwealth. *Id.* at 428.

Justice Ralph J. Cappy wrote the opinion for the majority of the court, which included Chief Justice John P. Flaherty, Jr., and Justices Stephen A. Zappala, Ronald D. Castille, Sandra Schultz Newman, and Thomas G. Saylor. *Id.* at 428-33. Justice Russell M. Nigro filed a dissenting opinion. *Id.* at 433-35 (Nigro, J., dissenting).

143. *Id.*
144. *Id.*
146. *Cleckley*, 738 A.2d at 429.
147. *Id.* at 430.
The court concluded by stating that, while actual knowledge of the ability to waive consent to search is not required, it is an important factor in determining the validity of consent, but "is not a determinative factor since other evidence is oftentimes adequate to prove the voluntariness of a consent." 150 In the instant case, based upon the Court's reasoning and appellant's consent to the "pat down," the holding of the superior court was affirmed. 151

In his dissenting opinion, Justice Russell M. Nigro argued that the court's reliance upon Schneckloth was misplaced because Article 1, Section 8 of the Pennsylvania Constitution has always afforded broader privacy rights than those available under the Fourth Amendment to the United States Constitution. 152 In addition, Justice Nigro stated that in order for consent to be voluntarily given, the individual being searched must know that he has the right to refuse consent. 153 Furthermore, Justice Nigro, disagreeing with the majority, argued that requiring the police to advise an individual of his right to refuse consent would not hamper police activities nor prejudice the Commonwealth. 154

While it is generally agreed that Article 1, Section 8 of the Pennsylvania Constitution provides a criminal suspect with greater protections than the Fourth Amendment to the United States Constitution, Cleckley demonstrates the Pennsylvania Supreme Court's reluctance to extend that protection beyond the federal standard in cases involving consent to a pat-down search.

CRIMINAL LAW — VEHICULAR HOMICIDE WHILE DRIVING UNDER THE INFLUENCE — DEATH OF AN UNBORN CHILD — The Pennsylvania Superior Court held that a fetus that has reached the stage of viability will be considered a "person" as that term is used in the Pennsylvania criminal statute punishing homicide by vehicle while driving under the influence.

"federal voluntariness standard enunciated in Schneckloth adequately protects the privacy rights obtained under Article 1, Section 8 of the Pennsylvania Constitution." Id. at 433.

150. Id. at 433.
151. Cleckley, 738 A.2d at 433.
152. Id. at 434 (Nigro, J., dissenting).
153. Id. at 434 (Nigro, J., dissenting). Justice Nigro argued that many individuals, confronted by a police officer, do not realize that they may refuse the search or may be too intimidated to deny consent and, therefore, permit a search to occur when they would not otherwise have consented to it. Id. (Nigro, J., dissenting).
154. Id. at 435 (Nigro, J., dissenting). Disagreeing with the majority, Justice Nigro does not believe that the requirement of informed consent will decrease the number of searches that police will be able to legally perform and points to the Fifth Amendment requirements in the wake of Miranda. Id. (Nigro, J., dissenting).
An allegedly intoxicated Jeffery Booth was driving his car in North Huntington Township on June 29, 1997, when he collided with a car driven by Nancy Boehm.\textsuperscript{155} Boehm was thirty-three weeks pregnant at the time of the accident, and the unborn child died as a result of injuries sustained in the collision.\textsuperscript{156}

As a result of the accident, Booth was charged, among other things, with one count of homicide by vehicle while driving under the influence.\textsuperscript{167} Through a pre-trial motion, Booth moved that this charge be dismissed, arguing that an unborn child cannot qualify as a “person,” thereby preventing Booth from being charged with any type of homicide.\textsuperscript{158} The trial judge granted the motion on June 2, 1998, and the charge was dismissed.\textsuperscript{169}

The Commonwealth appealed to the Pennsylvania Superior Court, challenging the lower court’s holding that a viable fetus is not a person for the purposes of Pennsylvania’s homicide by vehicle while driving under the influence statute.\textsuperscript{160}

In an opinion by Judge Olszewski, a three-judge panel of the superior court reversed the trial court decision and held that a viable fetus is in fact a person under the statute.\textsuperscript{161} The court cited to the past holdings of the Pennsylvania Supreme Court in civil cases involving this issue and found it appropriate to extend those holdings to this criminal matter.\textsuperscript{162}

In the 1985 case of \textit{Amadio v. Levin},\textsuperscript{163} the Pennsylvania Supreme Court held that the estate of a viable fetus would have standing to bring a cause of action for wrongful death.\textsuperscript{164} In making this decision, the court established that the common law “born

\textsuperscript{156} See Booth, 729 A.2d at 1187.
\textsuperscript{157} See id. The appellee was also charged with seven other counts including homicide by vehicle. See id. However, these charges were not relevant to this appeal.
\textsuperscript{158} See id. at 1188.
\textsuperscript{159} See id.
\textsuperscript{160} See Booth, 729 A.2d at 1188.
\textsuperscript{161} Id. At the superior court, attorney Wayne B. Gongaware, the Greensburg Assistant District Attorney, represented the Commonwealth, and attorney Patrick J. Thomassey from Monroeville represented Booth. Id. Judge Olszewski wrote the majority opinion, joined by Judge Correale F. Stevens. Id. at 1188-90. Judge Joseph A. Del Sole filed a dissenting opinion. Id. at 1190-91 (Del Sole, J., dissenting).
\textsuperscript{162} Id. at 1188-89 (citing Amadio v. Levin, 501 A.2d 1089 (Pa. 1985)).
\textsuperscript{163} 501 A.2d 1089 (Pa. 1985).
\textsuperscript{164} Booth, 729 A.2d at 1189 (citing Amadio, 501 A.2d at 1089).
alive" rule would no longer apply in Pennsylvania civil cases. The Amadio court did not specifically address the issue of whether such a holding should also extend to criminal cases. However, the superior court in Booth rationalized that such an extension was logical.

Borrowing from the supreme court's rationale in Amadio, the superior court reasoned that medical science has advanced to a point where proof of cause of death can be established even if the child is not "born alive." In the past, courts did not consider a fetus a "person" until the fetus was born alive because only at that point could it be determined with accuracy by medical technology how such a person subsequently died. The superior court stated that "[i]t is time for the courts of this Commonwealth to react to advances in medical science rather than ignore such progress."

Furthermore, the Booth court purported to extend its rationale beyond just the Pennsylvania statute punishing homicides by vehicle while driving under the influence to "the meaning of the criminal laws of general application in this Commonwealth." Judge Joseph A. Del Sole dissented, asserting that the court was strictly bound by the text of the Pennsylvania Crimes Code to reach an opposite conclusion in this case. The Pennsylvania Crimes Code expressly enumerates certain crimes "in which an unborn child is the victim." Judge Del Sole noted that homicide by vehicle while driving under the influence is not one of these enumerated crimes, and that criminal law in Pennsylvania is governed entirely by statutory law and strict judicial interpretations of those statutes. As a result, Judge Del Sole would have held that only those provisions of the Pennsylvania Crimes Code that expressly include unborn children as potential victims can be used to prosecute on behalf of an unborn fetus.

The superior court, by ruling that a viable fetus is a person under

165. Id. at 1189-90.
166. Id. at 1190.
167. Id. at 1191 (Del Sole, J., dissenting).
168. Booth, 729 A.2d at 1190.
169. Id.
170. Id.
171. Id.
172. Id. at 1191 (Del Sole, J., dissenting).
174. Booth, 729 A.2d at 1191.
175. Id.
Pennsylvania criminal statutes, has essentially established that a viable fetus will be considered a person for all purposes under Pennsylvania law. The Pennsylvania Supreme Court has already concluded that this is the law in civil cases. As Judge Del Sole pointed out in his dissent, this is a broad reading of the Pennsylvania Crimes Code when considered in light of the fact that the Pennsylvania legislature has already spoken as to certain crimes involving unborn children.