

TO JUSTIFY A LAWFUL TRAFFIC STOP IN PENNSYLVANIA, LAW ENFORCEMENT OFFICIALS MUST POSSESS A REASONABLE SUSPICION THAT THE DRIVER IS IN VIOLATION OF THE VEHICLE CODE:

*Commonwealth v. Anthony*

PENNSYLVANIA CRIMINAL LAW – REASONABLE SUSPICION – DUI – UNLAWFUL TRAFFIC STOP – The Pennsylvania Superior Court held that evidence seized pursuant to a traffic stop conducted by a police officer, who failed to establish a reasonable suspicion that an accessory hanging from defendant’s rearview mirror materially obstructed his vision, must be suppressed.

*Commonwealth v. Anthony*, 1 A.3d 914 (Pa. Super. Ct. 2010).

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I. THE *ANTHONY* DECISION

When defendant Harry A. Anthony, Sr. (“Anthony”) approached the intersection of State Route 28/66 and 85 in his Ford Escort on the evening of November 29, 2009, he was observed by Pennsylvania State Trooper Jeremy Bowser (“Bowser”).<sup>1</sup> Bowser noticed that Anthony had objects hanging from his rearview mirror in apparent violation of PA. CONS. STAT. ANN. § 4107(b)(2),<sup>2</sup> and proceeded to follow Anthony.<sup>3</sup> Bowser initiated a traffic stop of Anthony at

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1. *Commonwealth v. Anthony*, 1 A.3d 914, 916 (Pa. Super. Ct. 2010).

2. *Anthony*, 1 A.3d at 916. 75 Pa. C.S.A. § 4107(b)(2) provides:

It is unlawful for any person to do any of the following: (2) Operate, or cause or permit another person to operate, on any highway in this Commonwealth any vehicle or combination which is not equipped as required under this part or under department regulations or when the driver is in violation of department regulations or the vehicle or combination is otherwise in an unsafe condition or in violation of department regulations.

75 Pa. C.S.A. § 4107(b)(2) (2010). Section 4107(b)(2) of the Vehicle Code is implemented at 67 Pa. Code § 175.68(c)(4), which reads: “[n]o object or material may be hung from the rearview mirror and no object or material may be hung, placed or attached in a position so as to materially obstruct, obscure or impair the driver's vision through the windshield or constitute a safety hazard.” 67 Pa. Code § 175.68(c)(4) (2010).

3. *Id.*

approximately 8:10 P.M. due to this alleged violation.<sup>4</sup> As he approached Anthony's vehicle, Bowser detected a strong smell of alcohol and observed an open case of beer in the back seat of Anthony's car.<sup>5</sup> After discovering that Anthony's license was under a DUI-related suspension, Bowser placed Anthony under arrest and transported him back to the state police barracks.<sup>6</sup>

Approximately an hour after initiating the traffic stop, Bowser gave Anthony a portable breath test for alcohol, which resulted in a .000% reading.<sup>7</sup> Thereafter, Bowser performed a Miranda reading and continued questioning Anthony about his possible drug use.<sup>8</sup> Anthony admitted to smoking marijuana earlier that day, which prompted Bowser to contact Trooper Ronald Vetovich, Jr. ("Vetovich"), the state police's certified drug recognition expert, to perform a drug recognition evaluation ("DRE") of Anthony.<sup>9</sup> At the completion of the DRE, Vetovich concluded that Anthony was under the influence of drugs to the extent that he was unable to safely operate a vehicle.<sup>10</sup> Ultimately, Bowser placed Anthony under arrest for DUI based upon Vetovich's findings and Anthony's incriminating statements.<sup>11</sup>

Anthony filed an omnibus pre-trial motion in an effort to suppress the evidence gathered pursuant to the traffic stop.<sup>12</sup> This motion was premised upon the assertion that Bowser failed to

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4. *Id.* Bowser did not observe any other traffic violations or notice that Anthony was not driving safely. *Id.*

5. *Id.* Bowser also discovered that Anthony's passenger had an outstanding warrant on a felony charge. *Id.* After calling for backup, the passenger was taken into custody. *Id.*

6. *Id.* When Anthony exited the vehicle, Bowser noticed two open containers of beer in the car. *Id.* Furthermore, after being read his *Miranda* warnings and signing a written waiver, Anthony admitted to drinking while driving and taking a 500 milligram Vicodin pill, which was not prescribed. *Id.*

7. *Anthony*, 1 A.3d at 917.

8. *Id.*

9. *Id.*

10. *Id.* In the one-leg stand test, Anthony swayed while balancing and had to be told to look at his foot while counting. *Id.* Anthony was also somewhat impaired in his concurrent counting of time. *Id.* In the finger-to-nose test, Anthony twice failed to touch the tip of his nose. *Id.*

11. *Id.* Thereafter, Anthony agreed to have his blood drawn and was then taken to the hospital. *Id.* The toxicology report indicated that his blood tested positive for benzoylecgonine (a metabolite of cocaine and a DEA Schedule II controlled drug) and "cocaine cross-reactives." *Id.* There was no positive identification in his blood for marijuana, opiates, amphetamines, barbiturates, or alcohol at the time the sample was taken. *Id.*

12. *Anthony*, 1 A.3d at 918.

possess a reasonable suspicion that Anthony was in violation of section 4107(b)(2) prior to conducting the stop.<sup>13</sup> After an evidentiary hearing, Anthony's motion was denied and the matter advanced to a non-jury trial, where Judge James J. Panchik found Anthony guilty of three counts of DUI-Controlled Substances based on the metabolites present in his bloodstream and his impaired driving condition.<sup>14</sup> The trial court also found Anthony guilty of a summary offense under section 4107(b)(2) due to the objects hanging from his mirror.<sup>15</sup>

After sentencing Anthony to a prison term ranging from ninety days to five years in the Armstrong County Jail,<sup>16</sup> the court released him on his own recognizance and stayed execution on the sentence pending appeal.<sup>17</sup> The issues before the Superior Court of Pennsylvania were as follows: (1) whether the trial court committed error when it denied Anthony's pretrial motion alleging a lack of probable cause or reasonable suspicion necessary for an officer to perform a traffic stop; and (2) whether the evidence was insufficient to convict Anthony of DUI-Impairment when the record did not show that Anthony was under the influence of drugs.<sup>18</sup>

On appeal, the superior court held that the traffic stop was unlawful, thus requiring the suppression of the evidence seized therefrom.<sup>19</sup> In doing so, the court recognized that the Pennsylvania Vehicle Code sets forth "reasonable suspicion," rather than "probable cause," as

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13. *Id.*

14. *Id.*

15. *Id.* The objects in question were three air fresheners hanging from Anthony's interior rearview mirror. *Id.* at 920.

16. *Id.* The court imposed sentence on the DUI-Impairment conviction under 75 Pa. C.S.A. § 3802(d)(2), which reads:

An individual may not drive, operate or be in actual physical control of the movement of a vehicle under any of the following circumstances: (2) The individual is under the influence of a drug or combination of drugs to a degree which impairs the individual's ability to safely drive, operate or be in actual physical control of the movement of the vehicle.

75 Pa. C.S.A. § 3802(d)(2) (2010).

17. *Anthony*, 1 A.3d at 918.

18. *Id.* (citing Brief for the Appellant, at 2).

19. *Id.* at 921.

the threshold standard for determining the legality of a traffic stop.<sup>20</sup> The court indicated that grounds for reasonable suspicion are established by articulating specific observations which would lead a reasonable person to conclude that criminal activity is occurring.<sup>21</sup>

The court proceeded to address Anthony's reliance on two earlier superior court decisions, *Commonwealth v. Benton*<sup>22</sup> and *Commonwealth v. Felty*,<sup>23</sup> which determined under what conditions an officer may stop a motorist for suspected violation of section 4524(c) of the Pennsylvania Vehicle Code.<sup>24</sup> In *Felty* and *Benton*, the superior court held that the presence of objects hanging from a motorist's rearview mirror constitute reasonable suspicion if the objects appear to materially obstruct the driver's vision.<sup>25</sup> Although Bowser stopped Anthony for an alleged violation of section 4107(b)(2), the court agreed with Anthony's contention that the language of section 4107(b)(2) tracks that of section 4524(c),<sup>26</sup> the section applied in both *Felty*

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20. *Id.* at 919 (citing 75 Pa. C.S.A. § 6308(b) (2010)).

21. *Id.* See *Commonwealth v. Reppert*, 814 A.2d 1196 (Pa. Super. Ct. 2002) (citing *Commonwealth v. Cook*, 735 A.2d 673 (Pa. 1999)). Specifically, the court stated:

[T]o establish grounds for reasonable suspicion, the officer must articulate specific observations which, in conjunction with reasonable inferences derived from those observations, led him reasonably to conclude, in light of his experience, that criminal activity was afoot and that the person he stopped was involved in that activity.

*Id.* (quoting *Reppert*, 814 A.2d at 1203).

22. 655 A.2d 1030 (Pa. Super. Ct. 1995).

23. 662 A.2d 1102 (Pa. Super. Ct. 1995). In *Benton* and *Felty*, incriminating evidence produced during a post-traffic stop search of the defendants' vehicles was suppressed on appeal. *Benton*, 655 A.2d 1030; *Felty*, 662 A.2d 1102. In both cases, the Superior Court determined that the arresting officers failed to possess "reasonable and articulable grounds" to believe that certain objects hanging from the defendants' rearview mirrors "materially obstructed, obscured or impaired" their vision pursuant to 75 Pa.C.S.A. § 4524(c) and 75 Pa.C.S. § 6308(b). *Benton*, 655 A.2d at 1034; *Felty*, 662 A.2d at 1106.

24. *Anthony*, 1 A.3d at 920. Although both 75 Pa. C.S.A. § 4524(c) and 75 Pa. C.S.A. § 4107(b)(2) are both found in the Vehicle Code, the former specifically addresses "Windshield obstruction and wipers" whereas the latter, the statute at issue in *Anthony*, concerns "Unlawful activities" generally and is implemented at 67 Pa. Code § 175.68(c)(4) of the administrative code. *Id.*

25. *Id.* (quoting 75 Pa. C.S.A. § 4524(c)).

26. 75 Pa. C.S.A. § 4524(c) provides:

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.

75 Pa. C.S.A. § 4524(c) (2010) (emphasis added).

and *Benton*.<sup>27</sup> Consequently, the court concluded that to sustain a stop under section 4107(b)(2), the arresting officer's observations must raise a reasonable suspicion that the object materially obstructs the driver's vision through the front windshield.<sup>28</sup>

The court applied the foregoing standard and determined that Bowser did not possess a reasonable suspicion based on articulable facts that the perceived objects hanging from Anthony's rearview window materially obstructed his vision.<sup>29</sup> In reaching this conclusion, the court scrutinized the testimony of Bowser at Anthony's suppression hearing.<sup>30</sup> After admitting that he made his observations after dark with only the aid of a street light, Bowser stated that he merely observed an object hanging from Anthony's rearview mirror.<sup>31</sup> Furthermore, when asked to give a description of the nature and size of the object, Bowser answered that it was probably six to eight inches tall and maybe three, four inches wide.<sup>32</sup>

Upon review of this testimony, the court maintained that Bowser was unable to perceive the nature of the object—three standard pine-tree shaped air fresheners—and reasoned that his observations were merely a product of the stop itself.<sup>33</sup> The court concluded that Bowser failed to convey specific observations in support of a reasonable suspicion that Anthony's air fresheners materially impaired his vision.<sup>34</sup> Thus, it held the stop unlawful and reversed Anthony's sentence accordingly.<sup>35</sup>

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27. *Id.*

28. *Id.*

29. *Id.*

30. *Anthony*, 1 A.3d at 920-21.

31. *Id.* at 21 (citing Def.'s Omnibus Pretrial Mot. 17). Bowser testified that he made his observations after dark only with the aid of street lighting. *Id.*

32. *Id.* (quoting Def.'s Omnibus Pretrial Mot. 18).

33. *Id.* (citing Def.'s Omnibus Pretrial Mot. 18). Hanging in no particular sequence from Anthony's rearview mirror were three pine-tree shaped air fresheners. *Id.*

34. *Anthony*, 1 A.3d at 921.

35. *Id.*

## II. THE HISTORY BEHIND THE *ANTHONY* DECISION

Under the Fourth Amendment and Article I, Section 8 of the Pennsylvania Constitution, citizens are protected against unreasonable searches and seizures conducted by federal and state governments.<sup>36</sup> Although the Fourth Amendment has commonly been interpreted as requiring a warrant supported by probable cause to effectuate a lawful search and seizure, the Supreme Court's decision in *Terry v. Ohio* carved out a narrow exception to this requirement.<sup>37</sup> In *Terry*, the Court concluded that police may briefly detain an individual for purposes of investigation in circumstances where specific and articulable grounds exist to reasonably suspect that criminal activity is in progress.<sup>38</sup>

Since *Terry*, the Pennsylvania legislature has expanded this limited probable cause exception beyond situations involving a “stop and frisk.”<sup>39</sup> Traditionally, however, probable cause was the standard applied by Pennsylvania courts in the context of traffic stops.<sup>40</sup> In *Commonwealth v. Swanger*, the Pennsylvania Supreme Court addressed the issue of whether a “routine” traffic stop, without any cause, was in contravention of the Fourth Amendment and Article I, Section 8.<sup>41</sup> Upon recognizing that a vehicle and its occupants are, in effect, “seized”

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36. U.S. CONST. amend. IV. “The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated [...]” *Id.*; PA. CONST. art. I, § 8. “The people shall be secure in their persons, houses, papers and possessions from unreasonable searches and seizures [...]” *Id.*

37. 88 S.Ct. 1868 (1968).

38. *Terry*, 88 S.Ct. at 1883. “[T]here must be a narrowly drawn authority to permit a reasonable search for weapons for the protection of the police officer, where he has reason to believe that he is dealing with an armed and dangerous individual, regardless of whether he has probable cause to arrest the individual for a crime.” *Id.* The Court then went on to state, “in determining whether the officer acted reasonably in such circumstances, due weight must be given, not to his inchoate and unparticularized suspicion or ‘hunch,’ but to the specific reasonable inferences which he is entitled to draw from the facts in light of his experience.” *Id.*

39. See 75 Pa.C.S.A. § 6308 (2010).

40. *Commonwealth v. Swanger*, 307 A.2d 875 (Pa. 1973).

41. *Swanger*, 307 A.2d at 876-77 (citing *Terry*, 88 S.Ct. 1868; *Sibron v. New York*, 392 U.S. 40 (1968); *Commonwealth v. Pollard*, 299 A.2d 233 (1973)). After two Pennsylvania state police officers stopped the car in which the defendant was a passenger for a “routine” check, they discovered burglary tools on the floor. *Swanger*, 307 A.2d at 876. A subsequent investigation then connected the defendant with a recent burglary and he was thereafter charged with such. *Id.*

during a traffic stop, the court concluded that the “routine” stop in question did violate the constitutional protection against unreasonable searches and seizures.<sup>42</sup> The court then held that police must have probable cause based on specific facts to believe that a vehicle or its driver has violated the Vehicle Code before conducting a traffic stop.<sup>43</sup>

The Pennsylvania Supreme Court issued a similar holding several years later in *Commonwealth v. Murray*.<sup>44</sup> This case is factually similar to *Swanger*, as the police stopped the defendant’s car in connection with a nearby burglary, despite the fact that the defendant had not violated any traffic laws.<sup>45</sup> The court applied the probable cause standard set forth in *Swanger*<sup>46</sup> and determined that there were no facts from which the officers could have reasonably concluded that criminal activity was occurring.<sup>47</sup> In light of this determination, the court ultimately held that the stop was unlawful due to the officers’ lack of probable cause, and it suppressed the evidence produced therefrom.<sup>48</sup>

In response to the holdings in both *Swanger* and *Murray*, the legislature enacted 75 Pa.C.S.A. § 6308,<sup>49</sup> which prescribed “articulable and reasonable grounds” as the threshold for a lawful traffic stop in Pennsylvania.<sup>50</sup> Through section 6308, the legislature attempted to lower

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42. *Id.* at 878. At the time of this decision, the Vehicle Code, 75 Pa. C.S.A. § 1221(b), permitted police officers to stop a motor vehicle without any indication that the vehicle or its driver was in violation of the Code. *Commonwealth v. McElroy*, 630 A.2d 35, 38 (Pa. Super. Ct. 1993).

43. *Id.* at 879. More specifically, the court stated, “before a police officer may stop a single vehicle to determine whether or not the vehicle is being operated in compliance with The Vehicle Code, he must have probable cause based on specific facts which indicate to him either the vehicle or driver is in violation of the code.” *Swanger*, 307 A.2d at 879.

44. 331 A.2d 414 (Pa. 1975).

45. *Murray*, 331 A.2d at 416. The defendant was subsequently arrested and charged on two counts of burglary, conspiracy, possession of burglary tools, receiving stolen goods and larceny. *Id.* at 415.

46. *Id.* at 414. From the outset, the court maintained, “it is incumbent upon the officer to articulate specific facts possessed by him, at the time of the questioned stop, which would provide *probable cause to believe* that the vehicle or the driver was in violation of some provision of the Code.” *Id.* (citing *Swanger*, 307 A.2d at 879) (emphasis in the original).

47. *Id.* at 419.

48. *Id.*

49. *McElroy*, 630 A.2d at 38.

50. 75 Pa. C.S.A. § 6308(b) (1983). As first enacted, § 6308 provided:

the requisite suspicion necessary to conduct a lawful traffic stop in Pennsylvania.<sup>51</sup> However, despite section 6308's departure from the previous "probable cause to believe" framework, the two standards were applied interchangeably by Pennsylvania courts.<sup>52</sup>

In *Commonwealth v. Lopez*, the superior court cited both *Swanger* and *Murray* in reaching its conclusion that the Fourth Amendment requires the police to possess "articulable and reasonable grounds to suspect," or "probable cause to believe," that criminal activity may be taking place.<sup>53</sup> In a similar manner, the superior court in *Commonwealth v. Whitmyer* rejected the Commonwealth's contention that "reasonable suspicion to believe" is the appropriate standard in the traffic stop arena and stated that "probable cause" or "articulable and reasonable grounds to suspect" were the proper standards.<sup>54</sup>

Notwithstanding these holdings, the superior court in *Commonwealth v. McElroy* rejected the notion that the two terms could be used interchangeably, and expressly adopted "articulable and reasonable grounds to suspect" as used in section 6308(b) as the preferred standard for traffic stops.<sup>55</sup> In 1995's *Commonwealth v. Benton*, the superior court considered the legality of a traffic stop premised upon air fresheners hanging from the defendant's rearview mirror in suspected violation of 75 Pa.C.S.A. § 4524(c).<sup>56</sup> The *Benton* court noted that a perceived

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Authority of Police Officer.--Whenever a police officer . . . has articulable and reasonable grounds to suspect a violation of this title, he may stop a vehicle, upon request or signal, for the purpose of checking the vehicle's registration, proof of financial responsibility, vehicle identification number or engine number or driver's license, or to secure such other information as the officer may reasonably believe to be necessary to enforce the provisions of this title.

*Id.*

51. *McElroy*, 630 A.2d at 38.

52. *Id.*

53. *Commonwealth v. Lopez*, 609 A.2d 177, 180 (Pa. Super. Ct. 1992) (citing *Swanger*, 307 A.2d 875; *Murray*, 331 A.2d 414).

54. 609 A.2d 809, 812-13 (Pa. Super. Ct. 1992).

55. *McElroy*, 630 A.2d at 39. In doing so, the court stated, "we seek to avoid any confusion which may be caused by the use of the term 'probable cause' to describe and assess those police encounters with citizens which do not rise to the level of an arrest or search." *Id.*

56. *Benton*, 655 A.2d 1030; 75 Pa. C.S.A. § 4524(c) (2010) (dealing with windshield obstructions and wipers).

violation of section 4524(c) must be supported by a reasonable belief that the objects materially obstruct the driver's vision through the front windshield.<sup>57</sup> The court relied heavily on the arresting officer's testimony, which reflected his inability to specifically identify or describe the objects he observed, and concluded that he failed to possess a reasonable belief that the objects materially obstructed the defendant's view in accordance with section 4524(c).<sup>58</sup>

The superior court's conclusion in *Benton* was then bolstered several months later by its holding in *Commonwealth v. Felty*.<sup>59</sup> The *Felty* court addressed the similar issue of whether the arresting officers possessed reasonable and articulable grounds to believe that an object hanging from the defendant's rearview mirror was in violation of section 4524(c).<sup>60</sup> As it did in *Benton*, the court ultimately determined that the officers' inability to convey a clear description of the object, and ascertain whether it obstructed the driver's vision, was insufficient to justify the stop of the defendant's car.<sup>61</sup> In accord with this determination, the court held the stop unlawful and remanded the case with instructions to suppress the illegally seized evidence.<sup>62</sup>

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57. *Benton*, 655 A.2d at 1034. The court noted that, “[t]he plain language of the statute [75 Pa.C.S.A. § 4524] [...] makes unlawful only those items which materially obstruct, obscure or impair a driver's vision.” *Id.* It then indicated that a traffic stop is only warranted when the police officer possesses “reasonable and articulable grounds for believing a Section 5424 violation occurred.” *Id.* This standard does not require that an actual violation be established. *Id.* at 1033 (citing *McElroy*, 630 A.2d 35). Furthermore, 75 Pa.C.S.A. § 4524(c) reads:

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.

75 Pa.C.S.A. § 4524(c) (2010).

58. *Id.* at 1033-34. When asked at the suppression hearing whether the object he saw was an air freshener, the arresting officer stated that he could not tell. *Id.* (citing Suppression Hearing Transcript at 27-31). Additionally, when asked numerous times to describe its size, shape, and color, the officer was unable to do so. *Id.* (citing Suppression Hearing Transcript at 27-31). The court emphasized the fact that section 4524(c) does not prohibit the hanging of objects from the rear view mirror; rather, it prohibits those objects which “materially obstruct, obscure or impair” the driver's vision. *Id.* at 1032 (citing 75 Pa.C.S.A. § 7524).

59. *Felty*, 662 A.2d 1102.

60. *Id.* at 1105. Also at issue in this case was whether the behavior of the passengers in the car supplied the officers with reasonable and articulable grounds to stop the defendant's car. *Id.*

61. *Id.* at 1105-06. The court further noted that the officer failed to mention or describe the object in his police report. *Id.*

62. *Id.* at 1106.

Ultimately, the Pennsylvania Supreme Court clarified the matter in *Commonwealth v. Whitmyer* when it declared that the language of section 6308 could be interpreted to mean *nothing less* than “probable cause.”<sup>63</sup> The court balanced the safety interest of the government against the privacy interest of the individual being searched, and concluded that there was no substantive difference between the two standards.<sup>64</sup>

On account of this decision, the Pennsylvania legislature amended section 6308(b) of the Vehicle Code in 2004.<sup>65</sup> The primary change involved the replacement of the phrase “articulable and reasonable ground to suspect” with “reasonable suspicion,” thereby lowering the statutory level of suspicion necessary for a police officer to execute a lawful traffic stop, as it attempted to do in 1977.<sup>66</sup> Since this amendment, however, the cases addressing constitutionality of section 6308(b) have primarily addressed DUI-related traffic stops.<sup>67</sup> In light of this fact, and the government’s compelling interest in detecting and removing intoxicated drivers from the roads, section 6308(b)’s lower standard has since been upheld at the superior court level.<sup>68</sup>

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63. 668 A.2d, 1113, 1116 (Pa. 1995) (emphasis added).

64. *Whitmyer*, 668 A.2d at 1116. “[W]hen we balance the underlying interests of the individual and the government, the two standards amount to *nothing more than a distinction without a difference.*” *Id.* (emphasis added).

65. 75 Pa.C.S.A. § 6308(b) (2010). Section 6308(b) now reads:

(b) Authority of police officer.--Whenever a police officer is engaged in a systematic program of checking vehicles or drivers or has *reasonable suspicion* that a violation of this title is occurring or has occurred, he may stop a vehicle, upon request or signal, for the purpose of checking the vehicle's registration, proof of financial responsibility, vehicle identification number or engine number or the driver's license, or to secure such other information as the officer may reasonably believe to be necessary to enforce the provisions of this title.

*Id.* (emphasis added).

66. *Id.*

67. *Commonwealth v. Sands*, 887 A.2d 261 (Pa. Super. Ct. 2005); *Commonwealth v. Ulman*, 902 A.2d 514 (Pa. Super. Ct. 2006).

68. *Sands*, 887 A.2d 261, 271 (Pa. Super. Ct. 2005). More particularly, the *Sands* court noted, “[b]ecause of the severe consequences of drunken driving in terms of roadway deaths, injuries, and property damage,...the government has a compelling interest in detecting intoxicated drivers and removing them from the roads before they cause injury.” *Id.*

III. AN ANALYSIS OF THE *ANTHONY* DECISION

In consideration of the reasonable suspicion standard currently set forth in 75 Pa.C.S.A. § 6308(b), it is fair to conclude that the superior court's analysis in *Anthony* achieved a fair balance between the government's interest in detecting intoxicated drivers and the protection of Anthony's Fourth Amendment and Article I, Section 8 rights. Despite the theoretically lower standard embodied in the phrase "reasonable suspicion," the *Anthony* court's interpretation and application of section 6308(b) remained, in many ways, predicated upon the statute's previous standard of "articulable and reasonable grounds to suspect."<sup>69</sup>

The superior court indicated that a lawful traffic stop still requires the officer's capacity to articulate specific facts and observations which warrant a reasonable belief that criminal activity is afoot.<sup>70</sup> This standard was then aptly applied by the *Anthony* court in reaching its conclusion that Officer Bowser, prior to making the stop, failed to establish a reasonable suspicion that Anthony was in violation of the Vehicle Code.<sup>71</sup> As it did in both *Benton* and *Felty*, the court relied on the officer's inability to describe the nature and size of the objects hanging from Anthony's rearview mirror to support its decision.<sup>72</sup>

However, had the court not been persuaded by defense counsel's argument that the level of observation necessary to establish grounds for reasonable suspicion under section 4524(c) was controlling for section 4107(b)(2),<sup>73</sup> the same conclusion might not have been reached. In this regard, the court's incorporation of the administrative code somewhat offset section 6308(b)'s

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69. *Lopez*, 609 A.2d 177.

70. *Reppert*, 814 A.2d at 1204 (citing *Commonwealth v. Cooke*, 735 A.2d 673, 677 (Pa. 1999) (involving an officer's pursuit and subsequent search of a fleeing suspect). In *Reppert*, the search in question occurred after the officer executed a valid traffic stop due to expired inspection and registration stickers. *Id.* at 1199.

71. *Id.*

72. *Anthony*, 1 A.3d at 921.

73. *Id.* at 920. This is due to its implementation at 67 Pa. Code § 175.68 of the Administrative Code. *Id.*

lower statutory standard by prescribing a threshold level of observation; namely that objects hanging from a car's rearview mirror must appear to *materially* obstruct the driver's vision through the front windshield before a lawful stop may be executed.

The decision to incorporate the administrative code thus refuted the idea that ambivalent observations, such as those made by Bowser, may satisfy the requisite suspicion set forth in section 6308(b). By holding the stop unlawful, the *Anthony* court reaffirmed the notion that "reasonable suspicion" involves more than just an arbitrary belief. Rather, it entails pointing to specific facts and rationally concluding therefrom that it is more likely than not that a violation of the Vehicle Code has occurred, and that the person targeted is the subject of that violation.<sup>74</sup>

Although the court's extension of its holdings in both *Benton* and *Felty* blurred the distinction between "reasonable suspicion" and "articulable and reasonable grounds to suspect," it remains clear that the heightened standard of probable cause traditionally applied to traffic stops in Pennsylvania has, in effect, been eradicated. The constitutionality of this change has yet to be determined beyond the scope of DUI-related stops. But the government's compelling interest in making such stops, which was the catalyst for section 6308(b)'s amendment, will likely support its validity in the foreseeable future.<sup>75</sup> Moreover, if Pennsylvania courts continue to apply the statute as the superior court did in *Anthony*, the seemingly lower standard embodied in section 6308(b) should survive challenges to its constitutionality.

*Shane Sarver*

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74. *Id.* at 919 (citing *Reppert*, 887 A.2d at 271).

75. *Id.*