[J-154-2000]
IN THE SUPREME COURT OF PENNSYLVANIA
EASTERN DISTRICT

	:	No. 11 EAP 2000
COMMONWEALTH OF PENNSYLVANIA,	:	No. 12 EAP 2000
	:	
Appellee	:	
	:	Appeals from the Orders of the Superior
	:	Court entered September 13, 1999, at
v.	:	Nos. 1313 PHL 1998 and 1314 PHL 1998,
	:	reversing the Order of the Court of
	:	Common Pleas of Philadelphia County,
SHAWNEY PERRY,	:	Criminal Division, entered March 11, 1998
	:	at No. 9606-1016
Appellant	:	
	:	
* * * * *	:	740 A.2d 712 (Pa. Super. 1999)
	:	
COMMONWEALTH OF PENNSYLVANIA,	:	
	:	ARGUED: October 18, 2000
Appellee	:	
v.	:	
	:	
	:	
BRETT STEWART,	:	
	:	
Appellant	:	
	:	

DISSENTING OPINION

MR. JUSTICE NIGRO **DECIDED: June 3, 2002**

I disagree with the conclusion of the Opinion Announcing the Judgment of the Court ("Opinion Announcing the Judgment") that exigent circumstances excused the Commonwealth's warrantless search of the car in the instant case. Here, despite the fact that Appellants had already been removed from the car and taken into police custody

before the search occurred, the lead opinion nonetheless finds that the circumstances surrounding the arrest of Appellants created such an exigency as to justify an immediate warrantless search of the car. I cannot agree and therefore, respectfully dissent.

I believe that the interpretation of Article I, Section 8 of the Pennsylvania Constitution that the lead opinion proffers today differs from the settled jurisprudence of this Commonwealth. Article I, Section 8 generally prohibits the police from searching a person or his property and seizing personal property without a search warrant. Commonwealth v. Petroll, 738 A.2d 993, 998 (Pa. 1999). "A search warrant indicates that the police have convinced a neutral magistrate upon a showing of probable cause, which is a reasonable belief, based on the surrounding facts and the totality of the circumstances, that an illegal activity is occurring or evidence of a crime is present." Id. at 998-99 (citing Commonwealth v. Jones, 668 A.2d 114, 116-17 (Pa. 1995)). A search without a warrant may be proper where the police have probable cause to believe that a crime had been or is being committed and an exception to the warrant requirement applies. See Commonwealth v. Riedel, 651 A.2d 135, 139 (Pa. 1994)(warrant exceptions include actual consent, implied consent, search incident to arrest, and exigent circumstances).

Under federal law, a search of a vehicle is not unreasonable if it is based on probable cause, even though a warrant has not been actually obtained. See Maryland v. Dyson, 527 U.S. 465, 466-67 (1999). The federal automobile exception to the warrant requirement is based upon the premise that there is a diminished expectation of privacy in a vehicle and its contents. WAYNE R. LAFAVE, 3 SEARCH AND SEIZURE, § 7.2(a) at 458, § 7.2(b) at 481 (3d ed. 1996). However, Article I, Section 8 of the Pennsylvania Constitution has an identity and vitality that is separate and distinct from that of the Fourth Amendment

to the United States Constitution, and the decisions of the United States Supreme Court are not dispositive of questions regarding the rights guaranteed to citizens of this Commonwealth under the state constitution. See Commonwealth v. Kohl, 615 A.2d 308, 314 (Pa. 1992). When considering the relative importance of privacy as against securing criminal convictions, this Court has struck a different balance than has the United States Supreme Court. Commonwealth v. Mason, 637 A.2d 251, 257 n.3 (Pa. 1993). Under this Commonwealth's balance, an individual's privacy interests are given greater deference than under federal law. Id.

Accordingly, the jurisprudence of this Commonwealth requires both the existence of probable cause and the presence of exigent circumstances to justify a warrantless search of a vehicle. See Commonwealth v. Luv, 735 A.2d 87, 93 (Pa. 1999); Commonwealth v. White, 669 A.2d 896, 900-02 (Pa. 1995); Commonwealth v. Gelineau, 696 A.2d 188, 191 (Pa. Super. 1997). "One without the other is insufficient to justify a warrantless search." Luv, 735 A.2d at 93. Exigent circumstances exist where the police have obtained the information supplying them with probable cause "in such a way that they could not have secured a warrant for the search." White, 669 A.2d at 900. See BLACK'S LAW DICTIONARY 574 (6th ed. 1990)(exigent circumstances refers to those situations in which the police will be unable to effectuate a search for which probable cause exists unless they act swiftly and without seeking prior judicial approval).

In concluding that exigent circumstances excused the warrantless search of Appellants' car in the instant case, the Opinion Announcing the Judgment relies upon a footnote in this Court's decision in Commonwealth v. White, 669 A.2d 896 (Pa. 1995), to create what amounts to an overarching warrant exception based on potential danger to the

police. In White, this Court stated that "a police officer may search an arrestee's person and the area in which the person is detained in order to prevent the arrestee from obtaining weapons or destroying evidence," but absent exigent circumstances, "the arrestee's privacy interests remain intact as against a warrantless search." Id. at 902. In a footnote to the discussion rejecting the Commonwealth's argument that the defendant's vehicle was permissibly searched incident to his arrest, the Court in White stated:

> We do not propose to invalidate warrantless searches of vehicles where the police must search in order to avoid danger to themselves or others, as might occur in the case where police had reason to believe that explosives were present in the vehicle. Emergencies such as this, however, are not part of this case.

Id. at 902 n.5 (emphasis added). In contrast to the Opinion Announcing the Judgment, I do not believe that this single footnote in White supplies the basis for a separate and distinct exception to the warrant requirement. Instead, in my view, this footnote merely recognizes that danger to police or others might, under certain circumstances, create a situation in which the police will be unable to effectuate a search for which probable cause exists unless they act immediately and without seeking prior judicial approval.

It is clear to me, however, that such a situation simply did not exist in the instant case. Here, at the time of the search, Appellants were already in custody and the car was already under the control of the police. Given these circumstances, the police clearly could have secured the scene and waited with the car while a search warrant was obtained.[1]

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[1] Appellants do not contest that the police had probable cause to believe that the car contained evidence regarding the shooting. Thus, it appears that the police would have been able to legally secure the evidence they sought if they had simply followed the warrant requirement. However, as even the police acknowledge, they did not even attempt to secure a warrant before searching the car. N.T., 3/10/98, at 234-36, 263-64. In fact, Lieutenant McDevitt testified that he never even considered obtaining a warrant. N.T., 3/10/98, at 264. As the trial court noted at the suppression (continued…)

There was simply no danger to the police that required them to act immediately to search Appellants' car without a warrant.

In concluding otherwise, the Opinion Announcing the Judgment states that it was critical that the car was in the middle of a lane of traffic with its engine running. According to the lead opinion, the police were "required" to remove the car from the right of way and to turn off the car's engine. I disagree. First, the record reveals that the car was stopped on a four-lane road, with two lanes running in each direction plus angle parking on both sides of the street. N.T., 3/10/98, at 265. The car was stopped in the right hand lane of southbound traffic, leaving three lanes open to traffic. N.T., 3/10/98, at 204-06, 265. Clearly, the car was not totally obstructing traffic, especially in the early morning hours on a Sunday.[2] Second, the police did not need to enter the car in order to turn off the ignition and remove the keys. According to police testimony, the car doors were left open when Appellants were removed from the car and taken into custody. N.T., 3/10/98, at 273. If there was any danger created by the car running while parked in the road, an officer could have easily reached into the car and turned the ignition off and removed the keys. Thus, I cannot accept the lead opinion's assumption that it was necessary for the police to

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hearing, there are magistrates and emergency judges on duty twenty-four hours a day for the express purpose of issuing warrants. N.T., 3/11/98, at 333. Thus, securing the car and waiting while a neutral magistrate considered a request for a search warrant was a reasonable, and constitutional, alternative to an immediate warrantless search of the car.

[2] Moreover, one would think that proper police procedure would mandate leaving the arrest scene as undisturbed as possible in order to properly collect evidence. The preservation of evidence would seem to be particularly important in a case such as this, where Appellants were alleged to have discharged their weapons from inside of the car.

immediately move Appellants' car, and therefore enter and search the car, prior to obtaining a warrant.

I also disagree with the lead opinion's conclusion that the possible presence of a weapon in Appellants' car posed a threat to any officer who attempted to move the car. In my view, the reasoning of the Opinion Announcing the Judgment is faulty for two reasons. First, the only basis for the leading opinion's conclusion that the police were in danger was the bald assertion by Lieutenant McDevitt that one of the weapons alleged to have been used in the shooting, a 9mm automatic handgun, was fragile and could easily go off if bumped or stepped on. N.T., 3/10/98, at 257, 261. Lieutenant McDevitt was not qualified as a firearms expert and there was absolutely no evidence to support his assertion that the gun could somehow discharge on its own. Second, police officers may not create exigent circumstances, which they then use as justification for failing to follow the warrant requirement. See Commonwealth v. Melendez, 676 A.2d 226, 230 (Pa. 1996). In the instant case, there was no evidence of an emergency that required the police to move the car before procuring a search warrant. Thus, by moving the car immediately, the police created a perceived exigency that they used as justification for failing to obtain a warrant. Furthermore, the police created exigent circumstances by claiming that a gun, which could possibly be in the car, might go off all by itself. Thus, in my view, the leading opinion's unfounded reliance on danger to the police does not justify the warrantless search of Appellants' car.[3]

[3] In Commonwealth v. Gelineau, 696 A.2d 188 (Pa. Super. 1997), the Superior Court rejected arguments similar to the ones adopted by the lead opinion today. Although the defendants in Gelineau were handcuffed and taken away from their car following a traffic stop, the Commonwealth argued that the dangerous circumstances surrounding the location of the traffic stop and the possibility that weapons might have been in the vehicle constituted exigent circumstances. In (continued…)

The Opinion Announcing the Judgment further justifies the warrantless search by explaining that the police engaged in a search limited solely to establishing the safety of the passenger compartment of Appellants' car. According to the testimony of the police, two police officers simultaneously searched the floor on both the driver and passenger sides of the vehicle after observing that the driver's side floor mat was "askew." N.T., 3/10/98, at 212-13. However, if the safety of the officer moving the car was a basis for exigent circumstances, I fail to see why the passenger side of the vehicle was part of this exigency. Under the lead opinion's reasoning, Appellants' entire car would have been subject to a warrantless search because a weapon or other device contained anywhere in the car could have potentially injured an officer moving the car. In effect, the Opinion Announcing the Judgment automatically subjects entire vehicles to warrantless searches if the police invoke police danger as an exigency, regardless of the object of their search.

By its decision today, the Opinion Announcing the Judgment has authorized warrantless searches based merely on the potential for danger to the police, and in doing so, essentially abandons the requirement of exigency. The lead opinion has, in effect, created an exception that swallows the rule. Although truly exigent circumstances demand immediate action, there was, as noted above, no exigency in the instant case and

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rejecting the Commonwealth's arguments, the court stated that the circumstances surrounding the stop of the vehicle "did not create such an exigency as to justify an immediate warrantless search" of the defendants' car. Id. at 192. The court explained that there was nothing in the record to indicate that there were any exigent circumstances, including danger to the police or the public, which would justify a warrantless search. Id. at 194. The court also noted that nothing occurred to give the officers reason to fear for their safety since both defendants were handcuffed and under the control of the police. Id. Thus, even though the court concluded that probable cause existed for the search, the search was rendered unreasonable because the police failed to get a warrant when they clearly had the opportunity to obtain one prior to searching the car. Id.

therefore, no need for an immediate search of Appellants' car. Common sense dictates that the police would have been in no greater danger had they simply secured the scene and procured a warrant before searching the car.[4]

At the same time, by upholding the warrantless search of Appellants' car, the Opinion Announcing the Judgment allows police virtually unfettered discretion to invoke the mantra of "police danger" as a pretext to searching vehicles without a warrant. There can be no question that the police officers of this Commonwealth often face dangerous situations. However, bestowing police with unfettered discretion to conduct warrantless searches upon the mere assertion of danger simply does not reconcile with either the protections afforded by our state constitution or this Court's precedent.[5] I dissent.[6]

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[4] In Commonwealth v. Stroud, 699 A.2d 1305, 1311 (Pa. Super. 1997), the Superior Court found that the police were required to secure the scene and obtain a search warrant for a vehicle before conducting a search. As in the instant case, the police in Stroud conducted a warrantless search of the defendant's vehicle even though the defendant was in custody and his car was under the control of the police. Id. at 1307, 1311. The Superior Court rejected the Commonwealth's argument of exigent circumstances and concluded that the warrantless search was unconstitutional. Id. at 1310-11. While the court stated that it was aware of the limited resources should the police be required to stand guard over a vehicle while a warrant is secured, it interpreted case law as compelling such actions in the interest of protecting the privacy interests of the individual. Id. at 1311.

[5] Although the Opinion Announcing the Judgment attempts to limit its decision to the "unique facts of the case," in reality, it unjustifiably expands the scope of exigent circumstances. The result is an increase of enforcement powers at the expense of fundamental rights and personal freedoms.

[6] By affirming the Superior Court while expressing no opinion as to the "public safety" exception to the warrant requirement as analyzed by the Superior Court, the Opinion Announcing the Judgment lets that part of the decision stand as precedent at the intermediate appellate level. Although the lead opinion states that the public safety exception was an "alternative" theory of the Commonwealth, the Superior Court's opinion was actually based in large part on its conclusion that danger to the public created exigent circumstances justifying the warrantless search of Appellants' car. See Commonwealth v. Stewart, 740 A.2d 712, 718-19 (Pa. Super. 1999).
(continued…)

Mr. Chief Justice Zappala joins in this dissenting opinion.

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The Commonwealth justified the warrantless search of Appellants' car in part by claiming that Appellants may have thrown a gun out of the car and, to protect the public, the police needed to determine the location of the gun. By not responding to this proffer, the Opinion Announcing the Judgment allows the Commonwealth to have it both ways – exigent circumstances existed because the gun might have been in the car and exigent circumstances existed because the gun might not have been in the car. In ordering the search, Lieutenant McDevitt testified that "public safety was the most important factor for me." N.T., 3/10/98, at 264. He also testified that "[t]he only thing that prevented me [from staying with the vehicle while a search warrant was obtained] was my fear that someone would wander on that gun, if it was laying in the street." Id. Thus, in rendering its decision today, the lead opinion fails to address the testimony upon which the trial court relied in granting Appellants' suppression motion and upon which the Superior Court below based a significant portion of its opinion.