[J-27-2007]
IN THE SUPREME COURT OF PENNSYLVANIA
MIDDLE DISTRICT

COMMONWEALTH OF PENNSYLVANIA,	:	No. 99 MAP 2006
	:	
Appellant	:	Appeal from the Order of the Superior
	:	Court entered January 23, 2006 at No.
	:	669 EDA 2005, vacating and remanding
v.	:	the judgment of sentence of the Court of
	:	Common Pleas of Bucks County entered
	:	March 10, 2005 at No. 56/2005.
JOSE HERNANDEZ,	:	
	:	892 A.2d 11 (Pa. Super. 2006)
Appellee	:	
	:	ARGUED: April 16, 2007

CONCURRING OPINION

MR. JUSTICE CASTILLE **DECIDED: November 21, 2007**

I concur in the result only, as I believe the warrantless search of the vehicle in this case was justified under the automobile exception to the warrant requirement. The Majority begins its analysis of the automobile exception under the Pennsylvania Constitution by declaring that "[t]his dual requirement of probable cause plus exigency is an established part of our state constitutional jurisprudence." Majority Slip Op. at 7. In support, the Majority cites the recent three-Justice Opinion Announcing the Judgment of the Court ("OAJC") in Commonwealth v. McCree, 924 A.2d 621, 629-30 (Pa. 2007),[1] and three Superior Court decisions. Four Justices in McCree, however, acknowledged that it is difficult to view anything in this Court's Article I, Section 8 automobile exception

[1] The McCree OAJC was a majority opinion in some respects, but a plurality with respect to the automobile search issue.

jurisprudence as established. Mr. Chief Justice Cappy, joined by Mr. Justice Baer and Madame Justice Baldwin, filed a Concurring Opinion, noting that, "the automobile exception in Pennsylvania is the subject of continued controversy in our Commonwealth and in its discussion of the 'limited automobile exception' under Pennsylvania law, the lead opinion fails to acknowledge or critically discuss the differing viewpoints concerning the existence or parameters of such an exception to the warrant requirement." See McCree, 924 A.2d at 633 (Cappy, C.J., concurring). In support of this point, the Chief Justice cited the various positions set forth in Commonwealth v. Perry, 798 A.2d 697 (Pa. 2002) (Single-Justice OAJC by Cappy, J.; Concurring Opinion by Castille, J., joined by Newman, J.; Concurring Opinion by Saylor, J.; Dissenting Opinion by Nigro, J., joined by Zappala, C.J.).[2] Ultimately, the Chief Justice deemed it unnecessary to consider the contours of the automobile exception to resolve the appeal in McCree because, in his view, another exception to the warrant requirement applied. McCree, 924 A.2d at 634.

In a separate concurrence in McCree, I noted my agreement with the Chief Justice's assessment that "the status of the automobile exception under Article I, Section 8 is uncertain." McCree, 924 A.2d at 634 (Castille, J., concurring). I then noted that my Concurring Opinion in Perry had:

> engaged in an extensive analysis of this Court's precedent concerning the automobile exception, distinguishing what was clear and binding authority and what was not binding or persuasive, and I set forth my own views on the proper approach under Article I, Section 8. There is no need to repeat that analysis here. It is enough to state, for present purposes, that: (1) if this Court were to squarely face the question of what is demanded by Article I, Section 8 respecting automobile searches, I remain inclined to hold that our approach should be coextensive with the federal approach under the Fourth Amendment; and (2) failing that square joinder of the issue, it is my view that this Court's existing Article I, Section 8 **holdings** in this area (which do not include a state constitutional analysis under Commonwealth v. Edmunds,

[2] The OAJC in McCree never cited or discussed the Perry case.

> 526 Pa. 374, 586 A.2d 887 (1991)), at most suggest that, if Article I, Section 8 requires an exigency to justify a probable cause-based warrantless entry of a vehicle (probable cause is the only federal requirement), all that is required is that the probable cause "arose unexpectedly, *i.e.*, in circumstances that prevented police from securing a warrant before probable cause to search the vehicle arose." Perry, 798 A.2d at 717 (Castille, J., concurring).[2]
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> [2] In his separate concurrence in Perry, Justice Saylor articulated his view of the exigency requirement emerging from the cases in slightly broader terms: "this Court has indicated, in the automobile paradigm, that sufficient exigency is present where, because of the attending circumstances, it was not reasonably practicable for the police to obtain a warrant." 798 A.2d at 720 (Saylor, J., concurring).

McCree, 924 A.2d at 635 (Castille, J., concurring).

As I noted in Perry, although there have been state constitutional **holdings** rendered under Article I, Section 8 which advert to some exigency beyond the federal requirement, there has yet to be a candid and responsible Edmunds-style state constitutional analysis or explanation for that departure from perfectly reasonable federal authority. The reason for this lacuna is that the Court, in cases such as Commonwealth v. White, 669 A.2d 896 (Pa. 1995), proceeded from a misapprehension of the contours of the federal authority; *i.e.*, the Court wrongly believed that the U.S. Supreme Court required an exigency beyond the mobility of the vehicle. Thus, this Court's approach to automobile search cases employed a single, coterminous Fourth Amendment/Article I, Section 8 test, premised upon misapprehending federal law. This circumstance -- our misapprehension of the federal rule -- led the U.S. Supreme Court to summarily correct the two companion decisions to White. See Pennsylvania v. Labron, 518 U.S. 938, 116 S.Ct. 2485 (1996); see generally Perry, 798 A.2d at 709-14 (Castille, J., concurring) (detailing history).

This area of the law has not represented this Court's finest jurisprudential hour. Unless and until this Court tackles the state constitutional question head-on via a thorough Edmunds analysis, I do not view the notion that the Pennsylvania Constitution requires

more than the Fourth Amendment in this area as "settled" or "established." We have holdings, without explanation, invoking cases which rely upon, and misapprehend, the Fourth Amendment. As I said in Perry, "Pennsylvania constitutional jurisprudence should be made of sterner stuff." Id. at 714.

The McCree OAJC could safely ignore Perry because no majority expression emerged in that case. But the same is true of McCree, with respect to the contours of the Pennsylvania automobile exception. Because no majority expression emerged from McCree on this point, that OAJC is certainly not support for "establishing" some distinct state constitutional view of the Pennsylvania automobile exception.

In holding that police acted unlawfully in conducting the automobile search in the case *sub judice*, the Majority focuses exclusively upon the police danger exception which the Perry OAJC invoked to authorize the search in that case. It is notable, however, and wise, that today's Majority does not purport to approve the legislative-type contours of the police danger exception as expressed in the Perry OAJC. As I noted in my Perry concurrence, the Perry OAJC "extrapolate[d] from White a quasi-legislative construct governing automobile searches that sets forth various multi-part tests depending upon the type of exigency that is perceived." Perry, 798 A.2d at 708 (Castille, J., concurring). The language from White so relied upon, I noted, was "both *dicta* and constitutionally suspect." Id. In a footnote, the White Court described the police safety exigency in the following hypothetical, but modest, terms: "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." White, 669 A.2d at 902 n.5. The Perry OAJC, however, would have modified the rule, as it labeled the police danger exception a "limited" one, and then stressed that it was only "the unique facts of the case" which would justify its application in Perry. Perry, 798 A.2d at 702, 703 (OAJC). The OAJC characterized White as "teach[ing]" that the police danger exception was confined to "**extreme** situation[s]" only,

where "there is a **great potential for deadly harm**," and justified only a "**limited**" search of the vehicle to ensure police safety. Id. at 703 (emphasis added). The Perry OAJC would have added the further restriction that, for the exception to apply, police cannot have "**create[d]**" the situation. Id. (emphasis added).

Today's Majority sensibly declines to follow a legislative-type approach to constitutional explication. The contours of a police danger "exception" obviously have to arise from actual cases. The police danger exigency (to the extent one is needed with an automobile search) must allow sufficient flexibility to forward the sole constitutional value at issue, which is that police act reasonably and not arbitrarily. Police obviously must be able to negate danger to themselves and the public even if the danger is short of deadly. Moreover, there need not be a "great" potential of deadly danger, but a reasonable potential, or a colorable potential. Also, we should not adopt a rule under which police must suffer the deadly consequences if their actions somehow "created" the exigency.

Although today's Majority wisely avoids legislating an *ad hoc* police danger exception, I cannot agree with its exclusive focus upon that exception under the facts *sub judice*. In its transition after explaining why it finds no **police** danger in this case, the Majority refers to its conclusion as being "that there were no exigent circumstances here." Majority Slip Op. at 13. But that conclusion is overstated since the Majority does not discuss other exigencies, despite recognizing that police danger is but one type of exigency. I read the Majority Opinion's disconnect in this regard as resulting from the fact that the Commonwealth confines itself to arguing the "police danger" exigency.

In my view, decisions from this Court such as Commonwealth v. Baker, 541 A.2d 1381, 1383 (Pa. 1988) (unanimous decision), Commonwealth v. Luv, 735 A.2d 87 (Pa. 1999), Commonwealth v. Rodriguez, 585 A.2d 988 (Pa. 1991), and even Commonwealth v. White, 669 A.2d 896 (Pa. 1995) would require affirmance here. I carefully summarized this controlling authority in my Perry concurrence, as follows:

This Court has approved warrantless vehicle searches so long as: (1) police had probable cause, and (2) the probable cause arose unexpectedly, *i.e.*, in circumstances that prevented police from securing a warrant before probable cause to search the vehicle arose. . . . The actual holding in White obviously fits this construct -- as do numerous cases decided before or contemporaneously with White.

For example, in Baker, the police received a tip from a reliable informant that the defendant had waved a gun at an unknown individual in an alley. The informant stated that the defendant was driving an old, dilapidated red convertible with the top down. Police soon located the car with the defendant in it and set up surveillance. After approximately twenty to thirty minutes, the police approached, the defendant exited the car and, subsequently, the police searched the vehicle. In a unanimous opinion, this Court upheld the warrantless vehicle search, reasoning as follows:

> [C]ertain exigencies may render the obtaining of a warrant not reasonably practicable under the circumstances of a given case, and, when that occurs, vehicle searches conducted without warrants have been deemed proper where probable cause was present . . . . This is not a case where police knew hours in advance that a particular vehicle carrying evidence of crime would be parked in a particular locale, such that it would have been reasonably practicable to obtain a search warrant before encountering the vehicle to be searched. Rather the instant search was conducted when police stopped a moving vehicle just thirty minutes after a reported crime. **Inasmuch as the requirement of probable cause was satisfied, the exigencies of the mobility of the vehicle and of there having been inadequate time and opportunity to obtain a warrant rendered the search proper.**

Commonwealth v. Baker, 518 Pa. 145, 541 A.2d 1381, 1383 (1988) (emphasis supplied).

Baker was recently cited approvingly in Commonwealth v. Luv, 557 Pa. 570, 735 A.2d 87, 93 (1999) (applying Baker's two-fold "determining factors" of "the existence of probable cause and the presence of exigent circumstances" and noting that the exigency in Baker involved fact that "police did not know well in advance where the criminal evidence would be located and could not have reasonably obtained a search warrant"). In Luv, this Court found that exigent circumstances existed because, *inter alia*,

> "[t]here was no time to secure a . . . warrant" once probable cause unexpectedly arose to search his car. Id. at 94.
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> Moreover, Baker's approach has been embraced in numerous other cases decided by this Court. In those cases, whether the police had previous information that a particular vehicle would be involved in the commission of a crime has been the decisive factor in determining whether exigent circumstances justified a warrantless automobile search. See Commonwealth v. Labron, 543 Pa. 86, 669 A.2d 917 (1995) (Labron I) (no exigent circumstances where, prior to arranging surveillance of defendant, officer had specific information that defendant used his Lincoln automobile to transport drugs); Commonwealth v. Rodriguez, 526 Pa. 268, 585 A.2d 988 (1991) (exigent circumstances exist where police did not have advance notice that defendant and her husband would be traveling in York County in particular automobile); Commonwealth v. Ionata, 518 Pa. 472, 544 A.2d 917 (1988) (plurality) (no exigent circumstances where police had four hours' advance notice that defendant would be transporting drugs in particular automobile and had obtained search warrant for defendant's person and premises).

Perry, 798 A.2d at 717-18 (Castille, J., concurring) (footnote omitted).

The White *dicta* did not purport to overrule the Baker line of cases, a line which includes cases decided after White; and the Perry OAJC's misapplication of the Baker line (by engrafting the White *dicta* onto Baker), as a single-Justice expression, obviously could not diminish the precedential value of this series of majority expressions. The warrantless police search in this case was lawful under the Baker line and we should not give a contrary impression by overstating our holding.[3] Thus, I concur in the Court's mandate here for the same reason I concurred in Perry: the Baker line commands it. Appellee here took possession of the contraband within thirty minutes after police were notified by the

[3] The fact that the Commonwealth fails to argue the Baker line does not preclude us from realizing the propriety of the police conduct under another settled line of authority. The suppression court denied relief and we must affirm that determination if it is correct for any reason, even if the reason differs from that accepted by the court below. See Moorhead v. Crozer Chester Med. Ctr., 765 A.2d 786, 787 n.2 (Pa. 2001) (citing Pa. Game Comm'n v. State Civil Serv. Comm'n (Toth), 747 A.2d 887, 888 n.1 (Pa. 2000)).

shipping company manager that he suspected that the shipment appellee had attempted to retrieve contained marijuana. Until appellee actually returned for the contraband, police could not even be sure he would do so. In these exigent circumstances, it was not reasonably practicable for police to obtain a warrant in advance of the vehicle stop. That is enough to decide this case.

Finally, although I would not reach the second issue concerning the independent validity of the search warrant, I write to register a concern with the Majority's discussion of this Court's canine sniff cases, as that is another problematic area in this Court's search and seizure jurisprudence in need of reconsideration. Accurately citing Commonwealth v. Rogers, 849 A.2d 1185 (Pa. 2004), the Majority notes that this Court's existing jurisprudence takes a categorical approach to canine sniffs: probable cause is required to conduct a canine sniff of a person (a bizarre notion, given both the limited intrusion and the fact that there would be no reason to conduct such a sniff if police already have probable cause); but only reasonable suspicion is required to conduct a sniff of the exterior of a vehicle. Majority Slip Op. at 15. I filed a Concurring Opinion in Rogers, which was joined by Messrs. Justice Eakin and Baer, questioning this irrational, categorical approach. Notably, the Majority Opinion in Rogers did not dispute that the existing approach warranted revisiting in an appropriate case. Rogers, 849 A.2d at 1191 n.13.

I concur in the result.