

[J-56-2007]
IN THE SUPREME COURT OF PENNSYLVANIA
EASTERN DISTRICT

COMMONWEALTH OF PENNSYLVANIA,	:	No. 22 EAP 2005
	:	
Appellee	:	Appeal from the Judgment of the Superior
	:	Court entered on August 12, 2004 at 907
	:	EDA 2003, affirming the Judgment of
v.	:	Sentence of the Court of Common Pleas
	:	of Philadelphia County, Criminal Division,
	:	entered on February 20, 2003 at 0211-
HENRY MCCREE,	:	1121 2/2.
	:	
Appellant	:	
	:	
	:	RESUBMITTED: April 13, 2007

CONCURRING OPINION

MR. JUSTICE CASTILLE

DECIDED: May 31, 2007

I join the learned Majority Opinion with the exception of its discussion of Commonwealth v. Holzer, 389 A.2d 101 (Pa. 1978) and the status and contours of the “automobile exception” to the warrant requirement under Article I, Section 8 of the Pennsylvania Constitution. Respecting the explication and application of the automobile exception in this case, I concur in the result.

As the Chief Justice notes in his Concurring Opinion, the status of the automobile exception under Article I, Section 8 is uncertain, and that uncertainty was the subject of a number of separate opinions in Commonwealth v. Perry, 798 A.2d 697 (Pa. 2002), a case which did not produce a majority opinion.¹ My Concurring Opinion in Perry engaged in an

¹ In Perry, Mr. Justice Cappy (now Chief Justice) filed the Opinion Announcing the Judgment of the Court, which was joined by no other Justice; this author filed a Concurring (continued...)

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, 586 A.2d 887 (Pa. 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

In this case, probable cause respecting the vehicle did arise unexpectedly as police were engaged in an investigation of an unfolding retail illegal drug operation. Moreover, in such circumstances, it was not reasonably practicable to expect police to secure a warrant

(...continued)

Opinion, which was joined by Madame Justice Newman; Mr. Justice Saylor filed a separate Concurring Opinion; and Mr. Justice Nigro filed a Dissenting Opinion, which was joined by Mr. Justice Zappala. Former Chief Justice Flaherty did not participate in the decision.

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).

prior to searching the vehicle. And, moreover, there is no reason to believe that police manipulated the circumstances in order to subvert the warrant requirement. In my view, then, even under the most expansive reading of this Court's Article I, Section 8 precedent, the automobile search here, which was supported by probable cause and an exigency beyond the mobility of the vehicle, was lawful.

In its ultimate resolution of this case, the Majority applies an automobile exception approach which I believe is consistent with my understanding of the most that can be gleaned from the holdings in our precedents, as discussed in my Concurring Opinion in Perry. Thus, I concur in the Majority Opinion respecting the automobile exception, and I join it in all other respects.