



In the interest of O.J.
2008 Pa. Super. Lexis 3062
(Decided October 1, 2008)

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EDITOR'S NOTE:

We review most criminal law appeals as the case law for our Fourth Amendment civil liability cases is largely derived from these decisions. In this case, the Commonwealth appealed from an order suppressing drugs seized from a motor vehicle pursuant to a protective search for weapons conducted after a lawful traffic stop. A divided Superior Court reversed.

THE SUPPRESSION HEARING RECORD:

Philadelphia Police Officer Bernard Tucker was the sole witness. At approximately 8:00 p.m. on September 27, 2005, he and Officer Farr were patrolling in a residential area in Philadelphia. They noticed "O.J." traveling at a speed of at least 40 m.p.h. in a 25 m.p.h. zone and that he failed to stop at a stop light. A siren was activated in an attempt to stop the vehicle. The individual initially disregarded the police and traveled for some distance. They noticed him engaging "a lot of movement of the arms and the hands in the center area of the vehicle which would have been the console." After the stop the driver and his passenger were removed from the car and searched for weapons, but none were found. They were placed in the patrol car. Officer Tucker then conducted a protective weapon search of the console which was partially opened and where he had observed the hand movement. He explained that police "normally" conduct such a search when they observe the type of hand movement because that behavior creates a fear that a weapon may be located where the movements occurred. This brief search of the car was necessary because the driver and his passenger were not going to be placed under arrest for the Motor Vehicle Code violations but were going to be allowed to return to their car. Inside the compartment Officer Tucker discovered cocaine. Since the driver was a 16 year old juvenile, a petition for an adjudication of delinquency was filed. It alleged he possessed 14.32 grams of cocaine and 12.57 grams of cocaine base.

DISCUSSION:

The search of the passenger compartment of an automobile limited to those areas in which a weapon may be placed or hidden is permissible, if the police officer possesses a reasonable belief based on "specific and articulable facts which, taken together with the rational inferences from those facts, reasonably warrant" the officer in believing that the suspect is dangerous and the suspect may gain immediate control of weapons. Terry v. Ohio, 392 U.S. at 21 (1968).

The Superior Court found particularly instructive certain observations of the United States Supreme Court. That Court has observed that "roadside encounters between police and suspects are especially hazardous, and that danger may arise from the possible presence of weapons in the area surrounding a suspect." Michigan v. Long, 463 U.S. 1032, 1049 (1983).

The Court has specifically recognized the inordinate risk confronting an officer as he approaches a person seated in an automobile. "According to one study, approximately 30% of police shootings occurred when a police officer approached a suspect seated in an automobile. Bristow, Police Officer Shootings – A Tactical Evaluation, 54 J.Crim.L.C. & P.S. 93 (1963). The Court has specifically declined to accept the argument that traffic violations necessarily involve less danger to officers than other types of confrontations. Indeed, it appears "that a significant percentage of murders of police officers occurs when the officers are making traffic stops." United States v. Robinson, 414 U.S. 218, 234 N. 5 (1973); Pennsylvania v. Mimms, 434 U.S. 106 (1977).

In addition, the height and risk of danger to police officers during roadside encounters should be contrasted with a lessened expectation of privacy that a citizen possesses with respect to his vehicle. The facts in the instant matter the Court reasoned are similar to those examined in other Superior Court cases, and they found the reasoning employed in those decisions persuasive.

It is noteworthy that this matter was heard before the entire Superior Court consisting of nine Judges, three of whom dissented. The dissent argues that under the federal constitution, law enforcement personnel may conduct a warrantless search of an automobile as long as probable cause exists. This rule, known as the automobile exception to the warrant requirement, is based on the inherent nature of vehicles - - their mobility - - and applies even if a vehicle is "seized and immobilized." However, Pennsylvania has not adopted the full federal automobile exception and provides more protection to the accused than is available under the federal constitution. Warrantless vehicle searches in the Commonwealth must be accompanied not only by probable cause, but also exigent circumstances beyond mere mobility; "one without the other is insufficient."

At the time of Officer Tucker's search, O.J. and his passenger were secured, in handcuffs in the backseat of the police cruiser. But Officer Tucker failed to articulate specific and articulable facts which reasonably warranted him in believing that O.J. was dangerous and that he might gain immediate control of weapons. The dissent reasons that it would be unreasonable to conclude that the handcuffed secured O.J. could gain immediate control of a weapon. It is equally unreasonable to conclude that O.J. would pose a danger to Officer Tucker if he was not arrested, but released.

A FINAL COMMENT OR TWO:

It is quite possible that this matter will be reviewed by the Pennsylvania Supreme Court. Meanwhile, on October 7, 2008 the U.S. Supreme Court heard argument on a similar case, Arizona v. Gant. Gant was indicted on one count of possession of a narcotic for sale and one count of possession of drug paraphernalia based on evidence seized during a search of his car when he was arrested for driving with a suspended license. Gant had moved to suppress the evidence because he had exited his vehicle prior to his arrest making a search "not incident to his arrest." The trial court denied his motion, he was convicted, the Arizona Court of Appeals reversed and the U.S. Supreme Court granted a discretionary review. The state has argued that there is no requirement in the Fourth Amendment that the police demonstrate that the person arrested pose an actual threat to the safety of the police. Any state is free to impose greater protection to the individual than is available under the Federal Constitution. No state can provide less protection.