

**Automobiles, search of is not permitted unless an emergency exists and no emergency exists once the occupants are removed from the vehicle (Editor's Note: This decision is in error for the reasons I cite below and should and will be reversed on appeal. In its place police may rely on the still valid decision of *Commonwealth v Baker*, 541 A.2d 1381 (1988) and in the October 1988 Bulletin, and search a vehicle under the Automobile Emergency Exception, even if occupants are removed, provided the three requirements of a valid search under the AEE are satisfied)**

**Commonwealth v Gary  
Superior Court of Pennsylvania (9/27/2011)  
No. 2011 Pa Super 206**

**Facts**

Two police officers made a stop of a vehicle for heavily tinted windows. While approaching the vehicle, they smelled strong odor of unburned marijuana from the vehicle. The officer asked defendant if there was anything we need to be worried about. Defendant said there was some weed in the car. The officers then removed defendant from the car and put him into a police car. While another police officer and his K-9 dog walked around the car, defendant left the police car and ran away but he was stopped and placed back into the police car. Officers then searched the vehicle and found two pounds of marijuana in the car.

Defendant moved to suppress the evidence but the motion was denied and defendant has appealed.

**Issue**

Where a police officer stops a car lawfully for a traffic stop and then smells marijuana in the car which creates probable cause to believe marijuana is in the car and the driver tells the officer there was marijuana in the car, and the officer puts the driver in a police car, but he leaves the car and runs away and is caught and returned and he is in custody, may police lawfully search the vehicle without a search warrant under the automobile emergency exception?

**Decision**

No. Reversed.

**Reasoning**

Defendant claims the search was illegal. One exception is where police have probable cause to search a car under the automobile exception. In Pennsylvania, we have not adopted the same rule as the federal automobile exception. The Pennsylvania rule requires that the vehicle not only be inherently mobile, but that there must be a need for prompt police action because evidence is likely to be destroyed.

In **Commonwealth v Luv**, 735 A.2d 87 (1999), the Pennsylvania Supreme Court found exigent circumstances to validate a warrantless search of a vehicle for narcotics where the police were faced with a choice between a warrantless search and the loss of evidence. (*Editor's Note: Luv is in the November 1999 Bulletin.*)

In contrast, in **Commonwealth v Hernandez**, 935 A.2d 1275 (2007), the Supreme Court held that there was no emergency based on potential danger to police officers because the only suspect taken from the vehicle was already in custody. (*Editor's Note: In my opinion, by citing Hernandez, to show why there was no emergency in the present case, the Court is demonstrating the reason for its confusion about the true meaning of the automobile emergency exception under still valid appellate court decisions. In Hernandez, the exception the Supreme Court was discussing was the danger to police officers presented by weapons in a car: It was not discussing the Automobile Emergency Exception (AEE), which is the exception that is being discussed and applied in the present case. It is like comparing apples with broccoli. True, the defendant in this case was in custody at the time police searched the vehicle and the vehicle and no one could have entered the car to get a weapon to use on police. But, this is different from the AEE. Under Pennsylvania Supreme prior court decisions which still remain valid and binding, even if a suspect is in custody and cannot reach a vehicle, the vehicle may still be lawfully search without a warrant under the AEE, if the three requirements of the AEE are satisfied. One such decision which has never been reversed supporting this, and which shows why the Court's decision in the present case is in error and should be reversed on appeal, is Commonwealth v Baker, 541 A.2d 1381 (1988) and in the October 1988 Bulletin. The Supreme Court recently re-affirmed and approved of the current validity of Baker by citing it favorably in the decision of Luv cited above. In Baker, Baker was out of the car when police searched it and the Supreme Court, unlike the Court in the present case, ruled that the warrantless search was valid under the AEE. Luv too was out of the car at the time when the police searched it without a warrant, just like in the present case, and the Supreme Court upheld the search of Luv's car under the AEE. The Superior Court erred in not following the rule in Baker and Luv and should be reversed on appeal. The rationale give by the Supreme Court for permitting the search under the AEE, even though Baker was out of the car when it was searched and police had time to get a search warrant, is this and I will put it in bold face type for emphasis: The Court in Baker held "an alternative to an immediate search in the present case would have been to immobilize the vehicle until a warrant could be obtained. As noted, however, in Commonwealth v. Milyak, 508 Pa. at 9-10, 493 A.2d at 1349, it is not clear that the intrusion arising from immobilization of an automobile is less than the intrusion of searching it. Thus, immobilization has been held to be an alternative, not a requirement. This case presents a typical scenario where exigent circumstances made it not reasonably practicable to obtain a warrant prior to stopping a vehicle that contained evidence of crime. Since probable cause to search the vehicle was present, a search warrant was not required," My emphasis. What the Court is saying, and which the present Superior Court does not understand or apparently even know, is that while police have time to immobilize the car once occupants are out of it and to get a search warrant, the Court felt that to immobilize a car while a warrant is sought is as much of an intrusion on the privacy rights of the person as searching the car without a search warrant. So, the Supreme Court did not then in 1988, (and since the decision has not been overruled or reversed it is still valid and binding law and should have been followed by the Superior Court in this case) contrary to the holding by the Court in the present case, require police to get a search warrant when the occupants are out of the car and there is time to get a search warrant,*

*provided that these three requirements are satisfied: (1) probable cause to search existed, (2) the police had no advance knowledge of the probable cause and no opportunity to have gotten a search warrant; and when the police found the car, it was then immediately mobile, even if after the occupants are removed it is no longer immediately mobile. In the present case, these three requirements were met. On appeal, the Pennsylvania Supreme Court will reverse the Superior Court's decision in the present case, unless the Supreme Court overrules its decision in the **Baker** case).*

In the present case, defendant was stopped by police officers for suspicion of possessing illegally tainted windows. Defendant agrees that probable cause to search it for marijuana was present. (**Editor's Note:** *Note that the defendant is agreeing that probable cause was present when the officers smelled unburned marijuana and the Superior Court impliedly agrees to that).*

The trial court ruled that an emergency was present because the police officers did not have advance knowledge of marijuana being in the car. This conclusion is erroneous. (**Editor's Note;** *the Superior Court conclusion that the trial court is in error is erroneous for the above reasons and because of the still valid **Baker** decision).*

Defendant was in police custody prior to the search. (**Editor's Note:** *Baker was in police custody prior to the officer in that case searching his car).* At that point, defendant had admitted to possessing marijuana. The circumstances in this case did not show an imperative need for prompt police action. Neither the lack of advance warning of criminal activity nor any other fact resulted in a threat of danger or loss of evidence. Thus, where no exigent circumstances were present, the warrantless search was unlawful and the evidence should have been suppressed.

(**Editor's Note:** *The whole basis of the Superior Court decision is that Gary was in custody, out of the car, and there was thus no need to conduct a search before obtaining a search warrant. The proof that this reasoning is in error and the decision should be reversed and why Pennsylvania police should not feel bound by it is this: The Superior Court itself cites the **Luv** decision, and in the **Luv** decision the Supreme Court favorably cites with approval the decision of **Baker**. This means the **Baker** decision is still valid law. And, in **Baker**, as I pointed out above, the Supreme Court ruled that it does not matter if a suspect is out of the car at the time of the search: If the three requirements of a valid search under the AEE are satisfied, the vehicle may lawfully be searched without a search warrant. This directly contradicts what the Superior Court ruled in the present case when it stated that the search was not valid because Gary was in custody at the time of the search, which is exactly what the Supreme Court in **Baker** said is permissible for police to do without violating the Constitutional rights of the defendant. It appears that the Superior Court ignored this when it cited the **Luv** decision. It appears that the Superior Court did not read and understand what the Supreme Court ruled in **Baker**. Had it done so, the Superior Court would have been bound by that rule and could not have suppressed the evidence. I encourage police to bring this to the attention of their respective District Attorneys. Since **Baker** is still valid law in Pennsylvania and is supreme and takes precedence over the Superior Court decision in the present case, I encourage police to continue to rely on **Baker** and search vehicles without a search warrant under the AEE which is approved of by the Court in **Baker**.)*