

MEMORANDUM OF LAW
BY Stanley Cohen, ATTORNEY AT LAW
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QUESTION RECEIVED FROM A PENNSYLVANIA POLICE

OFFICER: (I received this type of question with the same of similar facts from numerous police officers over the past year)

I made a traffic stop and upon approaching the vehicle the odor of Marijuana was detected coming from the vehicle; I asked the occupant about the odor in the vehicle, and he told me he smoked some marijuana in the car.

The occupant was asked to exit the vehicle. I asked the driver if he would consent to a search. The search of the vehicle resulted in the discovery of evidence of drug use in the car.

I was wondering if you could find case law as to whether the search of the car was illegal and whether the odor of Marijuana is sufficient justification to search the vehicle without a warrant.

Thanks for any help you can give.

STAN'S ANSWER TO THE OFFICER:

Your search was lawful, even without the consent, and without a dog alerting on the car. Some instructors tell police that if, in the circumstances described above, no consent is given and no dog alerts on the car, police officers should get a search warrant before searching the car. Such advice is incorrect under Pennsylvania appellate court decisions.

Pennsylvania appellate court decisions rule that if the three requirements of a search under the Automobile Emergency Exception (AEE) are satisfied, then the officer is not required to get a search warrant and he/she may lawfully search the vehicle without a search warrant. If the appellate courts do not require a search warrant, in the circumstances described in the officer's question, and most police departments are short on man power and that most chiefs want their officers on the street available to

take calls as much as possible, does it not defeat the goal of efficient police work to require a police officer to take himself on the beat and out of service during the time it takes to get a search warrant that the appellate courts do not require him to get?

Some instructors justify their advice to get a search warrant even if one is not required by this thinking: Just in case the officer is wrong about having probable cause and just in case he is wrong about the requirements of the Automobile Emergency Exception being satisfied, by going to a judge with his facts, the judge will tell him either he does or does not have probable cause . Let us analyze this advice. If the judge says probable cause is not present, he will not issue a warrant and there will be no search. If the judge says that probable cause is present, he will issue a search warrant and the vehicle will be searched under the warrant. If the officer searched the car under the AEE when no probable cause was present, the search will be invalidated and the evidence suppressed. This is what will happen anyway if the judge does not issue a warrant. There will be no search and there will be no evidence to suppress.

If the judge would say probable cause is present, then he would issue the search warrant and the evidence would be admissible. But, if the officer did not go for a search warrant and he searched the vehicle without a search warrant under the AEE and he was right about the three requirements of the AEE being satisfied, and the search was valid, the evidence will be held admissible. By not going for a search warrant when none was required, the search was expedited and the officers are more immediately available to remain in service on the beat to take calls and give assistance to citizens, without risking loss of any evidence.

It is time to cite the court decisions that would support the legality of the officer's search.

First, the following decisions establish that when a police officer smells marijuana and the officer is qualified by training and experience to recognize the odor of marijuana, in a car this is enough to give the officer probable cause to believe marijuana is in the car: **Commonwealth v Van Winkle**, 880 A.2d 1280 (2005) - Marijuana

Commonwealth v Rogers, 741 A.2d 813 (1999) - Marijuana
Commonwealth v Stainbrook, 471 A.2d 1223.- Marijuana

The following decisions support the legality of a police officer searching a vehicle under the AEE (Automobile Emergency Exception) when the three requirements of the AEE are established.

Commonwealth v Baker, 541 A.2d 1381 (1988) and in October 1988 Bulletin

Commonwealth v. Rodriguez, 585 A.2d 988 (1981) and in January 1981 Bulletin

Commonwealth v Luv, 735 A.2d 87 (1999) and in the November 1999 Bulletin

The AEE is applied in each of these three decisions to uphold the warrantless search under the AEE and establish the following three requirements for a lawful search under the AEE: The first requirement is this: The officer must know facts and circumstances which he/she feels give him/her probable cause to believe that evidence of crime is in the vehicle. The smell of marijuana is enough to create probable cause to believe marijuana is in the car. Some persons feel, incorrectly, that in order for a search to be justified under the AEE, the occupants must be under arrest and not allowed to re-entry the car. An arrest is not necessary. Even if the person, who is out of the car, is not under arrest, a warrantless search under the AEE is permitted if the three requirements are satisfied. Also, some persons say, incorrectly, that after the occupants are out of the car, and there is time to get a search warrant, a warrant must be obtained. A warrant is not required if the three requirements of AEE are satisfied.

The second requirement is this: Prior to searching the vehicle, the vehicle was moving or otherwise immediately mobile because persons were in a position to be able to immediately drive the car away. If this happens, then even if the occupants are removed and it can no longer be immediately driven away, and there is time to get a search warrant, the second requirement is still satisfied and the Supreme Court does not require police to get a search warrant.

The third requirement is that, **prior** to seeing the car moving or in an immediately mobile condition, the police either did not have sufficient

probable cause to get a search warrant or if they had probable cause there was not enough time to get a search warrant without risking the loss of the evidence in the car.

So, the rule concerning warrantless searches under the AEE in Pennsylvania is simple: If the above three requirements are satisfied, a police officer has two options: He may immediately search the car without a warrant for evidence, or, he may, but he is not mandated to, get a search warrant to search the vehicle. This is the rule established in the **Baker** decision. Some persons say get a search warrant even if the three requirements are satisfied. My opinion on this advice was stated above. If one is not required by the Courts, and taking an officer off the street to get a warrant takes him away from being able to provide services of crime prevention and other service to the public, police should take advantage of what the Supreme Court said in Baker: If the three requirements are satisfied, police are not required to get a search warrant.

Recently, the Superior Court rendered a decision in **Commonwealth v Gary**, 2022 Pa Super 206 (9/27/11). I have briefed this case and it can be found on my web page at www.papolicecriminallawbulletin.com In **Gary**, the Court suppressed the evidence and did not apply the AEE in a way to support the search of the car. I have criticized the Court's opinion in the following manner in discussing it with an Assistant District Attorney: The real problem, in my opinion, with the court's conclusion and reasoning is not, as you seem indicate: whether the defendant was or was not in custody, under arrest. In my opinion, the real error lies in the fact that the Court thinks (mistakenly) that prior appellate court decisions (**Luv and Baker**) provide that once a person (whether in custody or not) is taken or leaves a car and the vehicle is no longer in danger of being driven away, police have time to get a search warrant and one must be obtained, even through the vehicle when stopped(and before the occupant-s were removed from the car) was immediately mobile, probable cause existed and there was no advance notice of probable cause. This is mistaken thinking by the Superior Court and in error under **Baker**, which was favorably affirmed in Luv, thus Baker is still valid. In **Baker**, Baker was out of the car when it was searched. But, before he left the car, the officer saw it moving (thus it was immediately mobile), probable cause existed and there was no

advance notice. Yet, the Court ruled that it was ok for the officer to search the car, even though he had time to get a warrant after the defendant left the car and it was no longer immediately mobile. Since it had been immediately mobile before he left the vehicle and the other two requirements of the automobile emergency exception were satisfied, the Supreme Court stated, and this is what the Superior Court in **Gary** and other erroneously decided decisions do not know or understand, the Supreme Court of Pennsylvania did not see that there is much of a difference as far as the amount of intrusion on the privacy right of a privacy between, on the one hand, searching the vehicle immediately without a search warrant, or, on the other, holding (immobilizing) the car and preventing the citizen from leaving without his car until a warrant is obtained. Thus, the Supreme Court ruled, (which the Superior Court in **Gary** was not aware of and the DA arguing must not have been aware of it because it was not brought to the attention of the Court in **Gary**) we will not require police to get a search warrant. They may search it without a warrant, the Court added. Or, if they choose the Court continued (but the Court was careful not to mandate it), they could go get a search warrant. But if police chose not to get a warrant, even though there is time to get one, the search is not invalid. The Superior Court erred in Gary because it did not recognize and apply this still valid law under **Baker**. **Luv** favorably affirmed **Baker**, in its opinion, thus, **Baker**, and the part I referred to, is still valid and binding law in Pennsylvania. If this case goes to the Supreme Court, whoever argues for the Commonwealth, I sure hope and pray that they develop this argument to the fullest and make the Court aware of the meaning of **Baker** and clarify the automobile emergency exception in Pennsylvania once and for all. It is really clear, if the meaning of Baker which I focused on and magnified is clearly stated. It is easy for police and courts to understand and apply).

