



POLICE DEPARTMENT

August 26, 2024

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In the Matter of the Charges and Specifications :

- against - :

Detective Edward Barrett :

Tax Registry No. 956415 :

Warrant Section :

Case No.

2022-26877

-----X
At: Police Headquarters
One Police Plaza
New York, NY 10038

Before: Honorable Anne E. Stone
Assistant Deputy Commissioner Trials

APPEARANCES:

For the CCRB:

Dwayne Bentley, Esq.
Civilian Complaint Review Board
100 Church Street, 10th Floor
New York, NY 10007

For the Respondent:

Marissa Gillespie, Esq.
Karasyk & Moschella, LLP
233 Broadway, Suite 2340
New York, NY 10279

To:

HONORABLE EDWARD A. CABAN
POLICE COMMISSIONER
ONE POLICE PLAZA
NEW YORK, NY 10038

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CHARGES AND SPECIFICATIONS

1. Detective Edward Barrett, on or about March 20, 2021, at approximately 0815 hours, while assigned to WARRSEC and on duty, in the vicinity of [REDACTED] Bronx County, abused his authority as a member of the New York City Police Department, in that he entered [REDACTED] in the Bronx without sufficient legal authority.

P.G. 203-10, Page 1, Paragraph 5

(now encompassed by A.G. 304-06, Page 1, Paragraph 1)

PUBLIC CONTACT–

PROHIBITED CONDUCT

2. Detective Edward Barrett, on or about March 20, 2021, at approximately 0815 hours, while assigned to WARRSEC and on duty, in the vicinity of [REDACTED] Bronx County, abused his authority as a member of the New York City Police Department, in that he searched [REDACTED] in the Bronx without sufficient legal authority.

P.G. 203-10, Page 1, Paragraph 5

(now encompassed by A.G. 304-06, Page 1, Paragraph 1)

PUBLIC CONTACT–

PROHIBITED CONDUCT

REPORT AND RECOMMENDATION

The above-named member of the Department appeared before me on July 18, 2024.

Respondent, through his counsel, entered a plea of Not Guilty to the charged misconduct. The CCRB presented a hearsay case, entering the audio and written transcript of the CCRB interview of the minor involved, as well as surveillance video footage into evidence. Respondent testified on his own behalf. A stenographic transcript of the trial record has been prepared and is available for the Police Commissioner's review. Having evaluated all of the evidence in this matter, I find Respondent Not Guilty of both specifications.

ANALYSIS

This case arises from a complaint made to the Civilian Complaint Review Board on behalf of [REDACTED] ("L.R.G."), by his mother, [REDACTED]. The following facts are undisputed. On March 20, 2021, at approximately 0815 hours Respondent, along with three other officers and a sergeant, went to L.R.G.'s apartment looking for his older brother for whom they possessed a probable cause investigation card ("I-card").¹ The I-card was in relation to a homicide, as well as possession of a weapon. Respondent and his team did not have an arrest or search warrant. (Tr. 18-20, 27) Respondent began to knock on the door to the apartment, pausing intermittently, and announcing that they were police officers. This continued for approximately seven minutes until L.R.G., who was 13 years old and home alone at the time, opened the door. (Tr. 21-21; CCRB Ex.1 at 08:30-08:37; CCRB Ex. 2 at 9-10) There is a dispute as to whether L.R.G. indicated to Respondent and his colleagues that they had his consent to come in; however, the parties agree that L.R.G. did not verbally consent. The officers entered the apartment, and upon discovering that L.R.G.'s older brother was not present, left a few minutes later. Respondent gave L.R.G. a business card containing his information, including his Department cell phone number, and asked L.R.G. to have his parents call him. (Tr. 22-23; CCRB Ex 2 at 10, 12)

CCRB Exhibit 1: Hallway Video Surveillance

CCRB entered into evidence surveillance video from a security camera located in the hallway outside of L.R.G.'s apartment. At 08:30:44, the elevator door opens and a female officer

¹ I-card stands for Investigation Card and is an internal document generated by investigators that is used to disseminate information to members of the service. It can be labeled "Perpetrator – Probable Cause To Arrest," "Suspect Only – No Probable Cause To Arrest," or "Witness."

emerges from the elevator followed by four male officers, including Respondent. One of the male officers, wearing a black cap, points at the apartment door nearest the camera and the rest of the officers surround the door. Respondent can be seen placing his ear against the door and knocking, occasionally using the butt of his radio, for approximately five minutes. (CCRB Ex. 1 at 08:30:44-08:35:22)

Eventually, Respondent stops and one of the other officers knocks on the door. A third officer begins motioning to the floor and pointing. The apartment door is opened by a person who cannot be seen. The officer wearing the black cap peers in, appears to speak, and then proceeds to cross the threshold. Respondent places his hand up and he follows the officer with the black cap into the apartment. (*Id.* at 08:35:22-08:37:47) Respondent and his team remained inside of the apartment for approximately four minutes. (*Id.* at 08:37:47-08:40:55)

L.R.G. was interviewed by CCRB, via telephone, approximately two weeks later, on April 2, 2021.² He recalled being home alone, asleep, and hearing banging, detailing “. . . I look at my door and my door is shaking, and I hear open up or else we’re gonna break in.” (CCRB Ex. 2 at 9) Upon realizing that it was the police at the door, L.R.G. recounted that he called his father. L.R.G. explained that his cellphone battery was running out, but before the call cut off, his father instructed him to open the door. He remembered there were between four and five officers at the door who “rushed” into the apartment. (*Id.* at 22) L.R.G. recounted that once inside, the officers repeatedly asked him if he knew where his older brother was. L.R.G. remembered interacting with a female police officer, who talked to him while some of the other officers looked around. L.R.G. described Respondent as white, with brown hair and a beard, wearing a brown winter coat with his shield around his neck, “like something off of Law and

² At the beginning of the call, L.R.G.’s mother told the investigator that she would be out of the apartment during the interview. (CCRB Ex. 2 at 2-3)

Order.” (CCRB Ex. 2 at 18-19) He recalled Respondent asking him about a photograph of his brother. A few minutes later, Respondent gave L.R.G. a business card and the officers left, “without saying goodbye.” (*Id.* at 10-12)

Respondent took the stand and recalled that during this time period, on a regular basis, he and his team were, “taken away from our normal tasks [to] go out and do attempted apprehensions for individuals wanted for shootings and homicides.” (Tr. 18) On the day of the incident, he and his team were assigned an active probable cause I-card for a person wanted in regards to a homicide and gun possession. They went to the address of the wanted individual, later determined to be L.R.G.’s older brother. Respondent contended that while he was knocking on L.R.G.’s apartment door, he and the other members of his team saw shadows, like feet moving, underneath the door. (Tr. 18-22)

After knocking for a few minutes, Respondent recalled the door was opened by L.R.G., whom he described as a teenager. In Respondent’s opinion, L.R.G. “definitely looked old enough to make a responsible decision for that apartment.” He asserted that L.R.G. opened the door and “brief[ly] pause[d],” then “stepped back and gestured with his arm to come in.” Respondent explained that it is not unusual for people to invite the police into their home non-verbally, offering that often people do not want either their neighbors, or a person who might be hiding in the home, to be alerted that they cooperated with the police. Respondent interpreted L.R.G.’s actions of stepping back and gesturing with his arm to indicate that L.R.G. was “absolutely” consenting to their entry into the apartment. (Tr. 20-23)

Respondent purported that upon entering the apartment, in order to keep the situation calm, he stayed with L.R.G., talking about video games while the other officers searched the apartment. After a minute or two, the team concluded that the suspect was not in the apartment.

Respondent recalled handing L.R.G. his business card and informing him that his parents should call him if they wanted to speak with him. (Tr. 22-24)

Respondent returned to work, after his regular days off, and charged his Department-issued cellphone. There were several missed calls and voice messages from L.R.G.'s mother. He described the messages as angry. (Tr. 24-26)

On cross-examination, Respondent acknowledged L.R.G. did not verbally give permission for the officers to enter the apartment. He continued, "A lot of times, they don't specifically verbalize to us. They use the gesture. Stepping back, opened the door wider, putting your hands out." (Tr. 28-29) Respondent maintained that he did not search the apartment and insisted that he remained with L.R.G. in the kitchen, discussing video games, the entire time he was in the home. When asked whether he searched L.R.G.'s kitchen, Respondent asserted that he looked where he was going, "but did not open cabinets or anything," reiterating that the purpose of the entry was to look for L.R.G.'s older brother, not contraband. (Tr. 31-32)

Specification 1: Unlawful Entry

Respondent stands charged with unlawfully entering L.R.G.'s apartment, in violation of Patrol Guide section 203-10, in effect at the time. The parties agree that L.R.G. did not give verbal consent for Respondent to enter. The issue for the Tribunal is whether CCRB has proven by a preponderance of the evidence that L.R.G. did not give consent for Respondent and his team to enter the apartment. I find that they have not.

A central principle in American jurisprudence is that entry into a home without a warrant is presumptively unreasonable. The Supreme Court in *U.S. v. Allen* held that, "at a minimum, law enforcement officers violate *Payton* when, in the absence of exigent circumstances or

consent, they physically enter protected premises to effect a warrantless search or arrest.” 813 F.3d 76 (2016), citing *U.S. v. Stokes*, 733 F.3d 438, 444 (2d. Cir. 2013). The parties agree that Respondent had no warrant and that no exigent circumstances existed which would have justified his entry into L.R.G.’s home without consent.

CCRB presented a hearsay case based on surveillance video and L.R.G.’s CCRB interview. Although L.R.G.’s statement to CCRB regarding the incident was quite similar to Respondent’s version of events, there was a significant difference. L.R.G. described following his father’s instructions to open the door. During his interview, L.R.G. first recalled that upon opening it, “[the officers] came in, and they said, ‘where’s [your brother], do you know where [your brother] may be?’” (CCRB Ex. 2 at 10) Later on in the interview, L.R.G. described the officers “rushing in” when he opened the door. (*Id.* at 22)

L.R.G. did not appear at trial and he was not subjected to questioning and cross-examination about the entry. Moreover, although L.R.G. was interviewed by CCRB, they did not specifically ask him whether he gave consent, verbal or non-verbal, to the officers to enter his home. It is difficult here to rely on hearsay to prove whether implicit consent, which is a nuanced issue, was given. “This tribunal has held many times that while hearsay is admissible in administrative proceedings, and may be the sole basis for a finding of fact, it must be carefully evaluated before it is relied upon. The more central the hearsay is to the case, the more critically it should be assessed.” See *Disciplinary Case No. 2018-19274* (Aug. 19, 2019); *Disciplinary Case No. 2018-19483* (April 29, 2021) Without direct testimony from L.R.G. on the entry issue, CCRB did not meet its burden of proof.

Respondent, on the other hand, credibly testified at trial that after L.R.G. opened the door, there was a “pause” before he and the other officers entered the apartment and they did not

immediately “rush in.” (Tr. 29) I credit this description of the timing of events. Indeed, the video footage shows the apartment door opening and one member of Respondent’s team speaking to someone at the door for a moment before he and the other officers entered.

Respondent maintains that L.R.G. gave the officers permission to enter through his actions. A person may give implied, non-verbal consent through conduct. However, such consent must be voluntary. New York courts have held that a reasonable officer may conclude that consent has been given voluntarily when an individual waves an officer in, steps aside from the door, opens and leaves the door wide open, and/or walks away. Consent may be in the form of words, gestures, or conduct. *See People v. Smith*, 239 A.D.2d 219 (1st Dept. 1997). In *United States v. Carreno-Arias*, implicit consent was found where an individual did not respond in the affirmative to an officer’s request to enter, but opened the door fully and moved aside without protest. 2002 U.S. Dist. LEXIS 24792 (S.D.N.Y. 2002). In each of these scenarios, the person giving consent to enter the premises must have actual authority to do so— for example, a person with common authority over the premises or a sufficient relationship to the premises.³

At trial, Respondent admitted that he entered L.R.G.’s apartment, but contended that he only did so after obtaining implied consent from L.R.G. Respondent testified that L.R.G. opened the apartment door, and asserted that L.R.G. “definitely looked old enough to make a responsible decision for that apartment.” He recounted that the officers informed L.R.G. that they were there to see his brother and asked to come in. Respondent stated that after that interaction, L.R.G. gestured with his arms for the officers to come in, which Respondent interpreted to be voluntary consent. (Tr. 22-24) The evidence presented by CCRB lacked the probative value to disprove this testimony.

³ Legal Bureau Bulletin, Vol. 44, No. 2, p. 3 (Jan. 2014)

Counsel for CCRB made the additional argument that L.R.G. was unable to consent to Respondent's entry because he was only thirteen years old on the date in question. However, precedent has established that "there is no per-se rule that all minors lack the authority to consent to a search. Typically, the minority of the consenting party will be merely one of many factors considered when a fact-finder decides the voluntariness of the consent." *Abdella v. O'Toole*, 343 F. Supp. 2d 129 (D. Conn. 2004).

It is undisputed that L.R.G. was a minor at the time of this incident, and that particular caution should be used when officers are confronted with young people. However, L.R.G.'s youth is just one factor of many to be considered when determining the validity of consent. Respondent testified that, in his opinion, although L.R.G. was a teenager, he appeared old enough to make decisions about the home. I found his testimony on this point to be frank and unembellished. In addition, it is undisputed that L.R.G. called his father and followed his instruction to open the door. Ultimately, the tribunal did not have an opportunity to observe L.R.G., in order to make its own determination regarding his ability to give consent. However, CCRB did not provide evidence that L.R.G.'s youth prevented him from having the authority and understanding to consent to Respondent's entry into the apartment. Based on the foregoing, I find that CCRB has failed to prove by a preponderance of the credible evidence that Respondent entered L.R.G.'s apartment without sufficient legal authority. Accordingly, I find Respondent Not Guilty of Specification 1.

Specification 2: Unlawful Search

Respondent stands charged with unlawfully searching L.R.G.'s apartment in violation of Patrol Guide section 203-10. Respondent denied searching L.R.G.'s apartment, and averred that

he was standing in the kitchen area with L.R.G. the entire time his fellow officers were inside the apartment. The resolution of this specification turns on the credibility of the witnesses as there are conflicting accounts as to what happened after Respondent's entry into L.R.G.'s apartment. Based upon the record before the Tribunal, I find that the CCRB failed to establish by a preponderance of the credible, relevant evidence that Respondent searched L.R.G.'s apartment.

It is a long established, fundamental principle of the Fourth Amendment to the U.S. Constitution that searches inside a home without a warrant are presumptively unreasonable. *People v. Scott*, 133 A.D.3d 794 (2d Dept. 2015), citing *Brigham City v. Stuart*, 547 U.S. 398 (2006); *Payton v. New York*, 445 U.S. 573 (1980). Although Respondent has been found not guilty of unlawfully entering L.R.G.'s apartment, any subsequent search of the premises must be analyzed on its own.

L.R.G. identified Respondent as "the one with the coat" with his shield around his neck, and acknowledged having a conversation with Respondent inside the apartment. He stated that Respondent posed questions about his older brother. In particular, L.R.G. recalled that Respondent asked about a picture of L.R.G.'s older brother, and that Respondent was the officer who gave him a business card. L.R.G. recalled two officers going into the room he shared with his older brother; however, he did not identify Respondent as one of those officers. (CCRB Ex. 2 at 24-25)

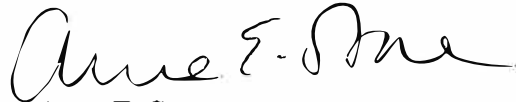
On the other hand, Respondent denied searching the apartment, maintaining that he stayed in the kitchen with L.R.G. He testified in detail that he talked about video games with L.R.G., while members of his team searched the apartment for L.R.G.'s older brother.

No video footage or other evidence was presented to support CCRB's allegation that Respondent searched the apartment. Therefore, the Tribunal finds that CCRB has failed to

establish by a preponderance of the credible, relevant evidence that Respondent searched L.R.G.'s apartment.

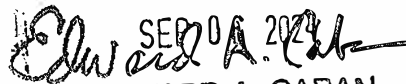
Accordingly, Respondent is found Not Guilty of Specification 2.

Respectfully submitted,



Anne E. Stone
Assistant Deputy Commissioner Trials

APPROVED



SEP 06 2024
EDWARD A. CABAN
POLICE COMMISSIONER