



POLICE DEPARTMENT

October 27, 2011

MEMORANDUM FOR: Police Commissioner

Re: Police Officer Lars Frantzen
Tax Registry No. 936615
Midtown South Precinct
Disciplinary Case No. 85007/09 (2009-0679)

The above-named member of the Department appeared before the Court on August 10, 2011, charged with the following:

1. Said Police Officer Lars Frantzen, assigned to Midtown South Precinct, while on-duty on September 2, 2007, while in the vicinity of 169 West 33rd Street, New York County, did wrongfully abuse his authority as a member of the New York City Police Department, in that said Police Officer Frantzen stopped a person without sufficient legal authority.

P.G. 203-10, Page 1, Paragraph 5 – ABUSE OF AUTHORITY

The Department was represented by Mary Lynne Frey, Esq., Department Advocate's Office. Respondent was represented by Craig Hayes, Esq., Worth, Longworth & London LLP.

Respondent, through his counsel, entered a plea of Not Guilty to the subject charge. A stenographic transcript of the trial record has been prepared and is available for the Police Commissioner's review.

DECISION

Respondent is found Not Guilty.

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SUMMARY OF EVIDENCE PRESENTEDThe Department's Case

The Department called Valerie Krioski as a witness.

Valerie Krioski

Krioski was 49 years old and was employed at the time of trial as a sales director for Bernardo Fashions. She lived in Rockville Centre, Long Island.

On the evening of September 2, 2007 (the Sunday of Labor Day weekend), Krioski was leaving dinner with friends in Manhattan to return to her home. At that time, she was a vice president at Jones Apparel Group (now known as The Jones Group, Inc.), located in the Garment Center. She took a taxicab to Pennsylvania Station slightly before 11:00 p.m. in order to catch a train that was leaving at approximately 11:30 p.m. She got out of the taxi at the corner at 33rd Street and Seventh Avenue and leaned into the passenger window to pay her fare and receive her change. While she was waiting for the cab driver to hand her the change, the driver told her, "[Y]ou better go it looks like I might be in trouble." At that moment, three police officers approached the cab from the rear.

According to Krioski, Respondent came up along the passenger side of the vehicle "very aggressively" and told her to get back in the car. Krioski responded that she was not going to get back into the car, at which point Respondent got "very aggressive" with her. According to Krioski, Respondent screamed at her to get back into the cab without explaining why she was being held. Respondent's gun was unholstered and in his hand.

Krioski stated that Respondent grabbed her arm. Krioski told Respondent, "[P]lease get your hands off of me you can't touch me," to which Respondent replied that she "could be a

terrorist.” Respondent then “almost picked [her] up off the ground and threw [her] in the passenger side of the cab.” Krioski left her feet outside of the cab because she did not want to stay in the car. Respondent then closed the door of the cab, causing it to hit Krioski’s ankle. In response, Krioski began crying “hysterical[ly]” in the backseat of the car and called her father.

After a few minutes, another police officer with Respondent opened the cab door, helped Krioski out, and told her to “run, go, just get out of here.”

After getting out of the cab, Krioski entered Penn Station and reported the incident to an officer there. The officer gave her the telephone number of the precinct where Respondent had come from, which Krioski called to register a complaint. Later on, she was contacted by the Civilian Complaint Review Board (CCRB) with regard to the incident and gave them a statement.

On cross-examination, Krioski acknowledged that she told CCRB on the telephone, “I’m a little white girl I am not a terrorist.” She also responded affirmatively when asked, “Did you feel that you were less of a threat on the street just because you were white?”

Respondent’s Case

Respondent testified on his own behalf.

Respondent

Respondent was a six-year member of the Department assigned to the Midtown South Precinct. He had received training in car stops. He explained that he was trained to “keep all passengers in the vehicle when possible maintaining your own safety and the safety of your partner until . . . you ascertain the situation and realize it’s just a traffic infraction.” During an

auto crime training class, he was further instructed that all passengers must remain in the car when making a traffic stop and that there was no exception for taxicabs versus other vehicles. He explained that the reason passengers must stay in the car during a traffic stop was that these stops had the potential to be very dangerous, and keeping everyone inside the vehicle was a way of minimizing that danger.

Respondent testified that the Department's Car Stop Best Practices Manual was available on the Department's intranet. His supervisors encouraged him to use this intranet for guidance. (see Respondent's Exhibit A, manual, dated January 2009).

Respondent testified that when a cab driver was threatened or otherwise endangered by a passenger, the driver sometimes created a traffic infraction in order to signal the police. He had, therefore, been trained not to let passengers out of the car until it was clear that the situation was not something more serious than a traffic infraction.

Respondent stated that on September 2, 2007, he was working with two other police officers in a marked police vehicle.¹ His vehicle was at the intersection of 33rd Street and Sixth Avenue. He was monitoring the intersection when he saw a yellow taxi run a red light. The operator of Respondent's vehicle turned on the siren and turret lights to signal a traffic stop. When the taxi stopped in front of Penn Station, Respondent approached the vehicle from the passenger side. He then saw a passenger, Krioski, exit the back seat. Respondent ordered her to remain inside the vehicle. When she refused, he explained to her that all passengers must remain inside the vehicle during a car stop and that once the police identified the driver, she would be free to go. Krioski said again that she was not staying, prompting Respondent to take her arm, repeat his order and physically place her in the car.

Once the officers had obtained all of the necessary information from the driver, he

¹ This part of the transcript reads that Respondent was asked about December 2, 2007.

instructed Krioski that she could leave, after which she opened the door and fled. Respondent estimated that she was held in the cab for between two and four minutes.

During cross-examination, Respondent conceded that Krioski was fully out of the vehicle when he reached it from the passenger side, and that she did not appear to have a weapon. He also explained that when she exited the car again, Krioski hit Respondent in the buttocks with her door.

Upon questioning by the Court, Respondent testified that when he grabbed Krioski's arm, she was standing completely outside of the car. At that point, he placed her back into the vehicle and closed the door.

FINDINGS AND ANALYSIS

It is charged that on September 2, 2007, Respondent "stopped a person without sufficient legal authority." The facts of this case are not in dispute. A citizen, Valerie Krioski, was a passenger in a yellow taxi heading for Penn Station on Avenue of the Americas (Sixth Avenue). She lived on Long Island and was catching a train home. Respondent and two other officers were stationed at the corner of 33rd Street and Sixth Avenue. As the cab turned left onto 33rd Street from Sixth Avenue, Respondent observed it run a red light. The officers pursued the taxi and pulled it over at the northeast corner of 33rd Street and Seventh Avenue.

Krioski testified that when she got out of the cab, Respondent told her she could not leave. Krioski refused to comply. Respondent "threw" Krioski into the cab, grabbing her arm to do so. Respondent agreed that he placed his hand on her arm but denied "throwing" her.

Either way, both sides agreed, a seizure occurred within the meaning of the specification and the Fourth Amendment when Krioski was told she could not leave. Cf. People v. Harrison,

57 N.Y.2d 470, 476 (1982); People v. Creary, 61 A.D.3d 887, 889 (2d Dept. 2009). Respondent is charged only with stopping Krioski without sufficient legal authority. He is not charged with excessive force, discourtesy, or anything else concerning this incident.

At trial, each side contended that the other was wrong on the law. Respondent also argued that Department policy and practice supported his position. The question is whether, for safety reasons, officers are constitutionally entitled, pursuant to a valid traffic stop of a vehicle, to require all occupants to remain in the vehicle.

It is well settled, as a matter of federal constitutional law, that upon a valid traffic stop, officers may order the passengers of a vehicle out of the car until the stop is concluded. See Maryland v. Wilson, 519 U.S. 408, 410, 415 (1997). It is even more set precedent that the driver may be ordered out, see Pennsylvania v. Mimms, 434 U.S. 106, 111 (1977). Less settled, under either federal or New York constitutional analysis, is whether passengers – who in a legal sense have not committed the traffic violation – may be ordered to remain in the vehicle.

Respondent presented People v. Forbes, 283 A.D.2d 92 (2d Dept. 2001) as controlling of the issue. There, a passenger tried to exit a vehicle during a valid stop. The officers told him to remain in the car and shut the passenger door. The Court held that it was within the officers' discretion to require both the driver and the passenger to remain in the vehicle until the stop was over. Forbes, 283 A.D.2d at 95. In fact, Forbes distinguished two of the cases cited by the Advocate, People v. Campbell, 245 A.D.2d 191 (1st Dept. 1997) and People v. Antelmi, 196 A.D.2d 658 (2d Dept. 1993). Forbes noted that in those cases, "it was the detention combined with a search of the defendant's person without any suspicion of wrongdoing that was found unconstitutional." Forbes, 283 A.D.2d at 96.

Forbes was cited with approval and followed in People v. Yates, 307 A.D.2d 593 (3d

Dept. 2003), also cited by Respondent. There, upon a valid traffic stop, the defendant, a passenger in a taxi, tried to exit from the rear. The officers told him to stay put until they spoke with the driver. The Third Department approved, noting that the same safety concerns that allow passengers to be ordered out should permit them to be ordered to remain. Yates, 307 A.D.3d at 594.

Upon further appeal, the Court of Appeals resolved the case upon testimony of the officers that they believed the defendant was leaving the taxi too quickly to have paid his fare, constituting the crime of theft of service (Penal Law § 165.15). The Court expressly declined to decide “whether a police officer may, as a matter of course, compel a passenger to remain inside a lawfully stopped vehicle.” People v. Yates, 3 N.Y.3d 625, 626 (2004).

The Court of Appeals decision in Yates, therefore, demonstrates that the issue has not been absolutely settled. The remaining cases cited by the Advocate are inapposite. For example, People v. Leary, 255 A.D.2d 527 (2d Dept. 1998) involved a police officer opening the door of a livery cab passenger and picking up his bag. This supposedly was because the officer wanted to lean into the car and speak to the passenger, rather than stand outside and shout, as this would be “rude.” The officer also needed to move the bag to speak to the passenger, and upon picking up the bag, discovered a gun. Leary, 255 A.D.2d at 528. In People v. Perez, 149 A.D.2d 344 (1st Dept. 1989), a passenger got out of a vehicle carrying a black and gold plastic bag, looked at the officers, and walked quickly away. He got 30 feet away when he was apprehended. The Court held that the facts did “not constitute a basis for further inquiry by the police.” Perez, 149 A.D.2d at 345. The Court did not, however, address the central issue in Respondent’s case, which is whether the officers could have instructed Perez to remain inside the car once he got out.

That, in fact, is the problem with the cases cited by the Advocate: they are not on point with the facts of the instant matter, whereas Forbes and Yates are. Thus, statements like, “Without more, the stopping of a vehicle transporting passengers for hire for a traffic infraction does not justify the detention of a passenger” (Campbell, 245 A.D.2d at 193) and “[T]he police . . . forcibly detained and searched the [passenger] when he attempted to leave. We find that this conduct exceeded that which is permissible during a normal traffic stop, as there was no showing of a reasonable suspicion on the part of the police that the [passenger] was committing, had committed, or was about to commit a crime” (Antelmi, 196 A.D.2d at 659) are dicta and not dispositive of this matter. Those Courts never had the opportunity to rule on the issue presented here because the cases were decided on the basis of a search, or detention after fleeing, both of which are more intrusive than what Respondent did to Krioski. Cf. People v. Packer, 49 A.D.3d 184, 192 n.1 (1st Dept.) (Malone, J., dissenting) (in case involving unlawful frisk of passenger who was first directed to remain inside vehicle, then directed to exit, judge noted that either initial action was a de minimis intrusion on Fourth Amendment privacy concerns), aff’d, 10 N.Y.3d 915 (2008); see generally People v. McLaurin, 70 N.Y.2d 779, 781 (1987) (degree of intrusion must be balanced against conditions the officers are confronting); People v. Moore, 176 A.D.2d 297, 298 (2d Dept. 1991) (officer that saw suspect exit drug-prone location, walk away quickly from police, and adjust waistband with bulge had right to inquire, but not to conduct frisk, as latter was a “more significant intrusion” and required “more substantial predicate”).

In sum, it was at the very least an objectively reasonable application of the current state of the law for Respondent to require Krioski to remain in the cab. See Case No. 83153/07, signed Aug. 19, 2008 (objectively reasonable for officer to make forcible stop of robbery suspect). The Court does not see the fact that Krioski was observed exiting the cab and paying

her fare next to the window as distinguishing this case from Forbes and Yates, and the Department has pointed to no authority supporting that proposition.

Respondent also pointed to Department training programs as supporting his position. He testified that he had been trained that it was permissible for officers to require occupants in vehicles validly stopped for a traffic infraction to remain inside the vehicle. He also pointed to the Car Stop Best Practices Manual (RX A), which he found on the Department's intranet portal (it is still available there). This manual is a wide-ranging instructional guide that mainly discusses strategies and tactics for car stops, as well as legal issues. The manual, as cited by Respondent's counsel, states that once the driver hands over his paperwork, and the officer is "satisfied that all documents are in order," he may "[a]dvice driver and occupants to remain in the vehicle" (p. D-11). This is presented as tactical advice. Nonetheless, as counsel correctly argued, officers in this Department are instructed that they may direct both the driver and the passenger to remain inside the vehicle.

In sum, both the common law and Department training instruct that “the police, pursuant to a lawful traffic stop, may constitutionally require the driver of the vehicle and all passengers to remain in the vehicle until the traffic stop is concluded,” see Forbes, 283 A.D.2d at 93. Even if there is some different rule that exists for when a taxi passenger has stepped out of the vehicle and is paying her fare, Respondent acted reasonably in light of existing authority from both the courts and the Department itself. Accordingly, Respondent is found Not Guilty of stopping Krioski “without sufficient legal authority.”

Respectfully submitted,



David S. Weisel
Assistant Deputy Commissioner – Trials

APPROVED
JAN 24 2012

RAYMOND W. KELLY
POLICE COMMISSIONER