



POLICE DEPARTMENT

March 13, 2015

MEMORANDUM FOR: Police Commissioner

Re: Sergeant Kelvin Perez
Tax Registry No. 940565
20 Precinct
Disciplinary Case No. 2013-9847

Police Officer Derek Almeida
Tax Registry No. 946426
83 Precinct
Disciplinary Case No. 2013-9846

Lieutenant Nicholas Van Dyke
Tax Registry No. 927819
113 Precinct
Disciplinary Case No. 2013-9845

The above-named members of the Department appeared before me on June 18 and November 7, 2014, charged with the following:

Disciplinary Case No. 2013-9847

1. Said Sergeant Kelvin Perez, while assigned to the 83 Precinct, on or about December 28, 2011, at approximately 1340 hours, in the vicinity of Central Avenue and Woodbine Street, Kings County, abused his authority as a member of the New York City Police Department, in that he participated in the unlawful stop of Troy Jones. (*As amended*)

P.G. 212-11, Page 1, Paragraph 1 – STOP & FRISK

Disciplinary Case No. 2013-9846

1. Said Police Officer Derek Almeida, while assigned to the 83 Precinct, on or about December 28, 2011, at approximately 1340 hours, in the vicinity of Central Avenue and Woodbine Street, Kings County, abused his authority as a member of the New York City Police Department, in that he stopped Troy Jones without sufficient legal authority.

P.G. 212-11, Page 1, Paragraph 1 – STOP & FRISK

Disciplinary Case No. 2013-9845

1. Said Lieutenant Nicholas Van Dyke, while assigned to the 83 Precinct, on or about December 28, 2011, at approximately 1340 hours, in the vicinity of Central Avenue and Woodbine Street, Kings County, abused his authority as a member of the New York City Police Department, in that he participated in the unlawful stop of Troy Jones. (*As amended*)

P.G. 212-11, Page 1, Paragraph 1 – STOP & FRISK

The Civilian Complaint Review Board (CCRB) was represented by Gretchen Robinson, Esq. Respondent Perez was represented by John D'Alessandro, Esq. Respondent Almeida was represented by John Tynan, Esq. Respondent Van Dyke was represented by James Moschella, Esq.

Respondents, through their counsel, entered pleas of Not Guilty to the subject charges. A stenographic transcript of the trial record has been prepared and is available for the Police Commissioner's review.

DECISION

Disciplinary Case No. 2013-9847

Respondent Perez is found Not Guilty.

Disciplinary Case No. 2013-9846

Respondent Almeida is found Not Guilty.

Disciplinary Case No. 2013-9845

Respondent Van Dyke is found Not Guilty.

SUMMARY OF EVIDENCE PRESENTED

Introduction

It is not disputed that on December 28, 2011, Respondent Van Dyke (who then held the rank of sergeant), Respondent Perez (who then held the rank of police officer), and Respondent Almeida were all assigned to the 83 Precinct.

It is further not disputed that during December 2011 uniformed members of the service (UMOS) assigned to patrol duties at the 83 Precinct, not UMOS assigned to the Housing Bureau, were responsible for policing the New York City Housing Authority (NYCHA) buildings known as the Bushwick Houses, which includes the building at 170 Palmetto Street, Brooklyn (170 Palmetto) [CCRB Exhibit 1 consists of 11 photographs of the exterior of 170 Palmetto Street and surrounding area].

Respondents Perez and Almeida were on duty serving on a Street Narcotics Enforcement (SNEU) team supervised by Respondent Van Dyke conducting an operation in the area of 170 Palmetto Street. Respondent Perez was assigned as the spotter and he established a street observation post inside an unmarked vehicle parked across from 170 Palmetto. Respondents Van Dyke and Almeida and Police Officer Herbst, who were in uniform, were the apprehension team. They waited out of sight inside their parked, unmarked vehicle.

At about 1:40 p.m., the apprehension team received a radio transmission from Perez regarding a male whose name they later learned was Troy Jones. The apprehension team exited their vehicle and Respondent Almeida stopped Jones.

The CCRB's Case

The CCRB called Police Officer Shane Maynard and Troy Jones as witnesses.

Police Officer Shane Maynard

Maynard, an eight-year member of the Department, testified that he was assigned to the 83 Precinct SNEU team between December 2008 and June 2012 and that the focus of a SNEU team is narcotics-related crimes. He worked with Respondents on a daily basis for about two years. He testified that complaints were made to the community board that people were selling drugs at 170 Palmetto Street. He was on duty on December 28, 2011, but he had no recollection of Jones. Maynard confirmed that NYCHA buildings have signs posted stating that only tenants and their guests are permitted on the premises and that any person who police observe inside a NYCHA building who is not a tenant or the guest of a tenant is arrested for trespassing.

On cross-examination, Maynard agreed that Respondent Van Dyke was an experienced and professional supervisor and that the SNEU team had made numerous arrests in the area of 170 Palmetto Street prior to December 2011. He agreed that if an officer observed an individual stand alone at the back door of a NYCHA building, enter the building, then exit alone several minutes later, the officer would have a right to approach and inquire as to whether the individual was there lawfully. He agreed that NYCHA tenants generally enter and exit through the building front door with a key. Maynard recalled that in December 2011 there were signs on a fence at 170 Palmetto Street stating that trespassing was not permitted. He agreed that it was necessary to pass through two fences in order to get to the back door of the building.

Troy Jones

Jones, who is 36 years old and currently unemployed, confirmed that he was convicted of disorderly conduct in 2001, assault in the second degree in 2003, and assault in the third degree in 2012. On the afternoon of December 28, 2011, he left his residence to buy cigarettes and then went to 170 Palmetto to see his friend "Person A" who lived there and who owed him money for a music CD. From the street, Jones yelled up to Person A's third-floor window. He heard no reply. The back door of the building was kept open, so Jones went inside to see if Person A was in the hallway. No one was there, so Jones exited the building and started walking home. He was inside the building for 20 or 30 seconds.

When he reached the corner of Central Avenue and Woodbine Street, three uniformed officers approached him, all with their guns drawn, and told him "Freeze." Jones identified Respondent Almeida as being one of the officers. One of the other officers was a female and the third was a "tall, heavy-set Caucasian." One of the officers said, "You are the Bushwick robber, the murderer." Jones raised his hands in the air and replied that he was from the Lower East Side, that he had identification, and it was a violation of his Fourth Amendment rights for the police to search him. Jones took out his identification and emptied his pockets. He remained calm and cooperative. The officers placed him on the hood of their car and Respondent Almeida patted him down. Respondent Almeida asked him what was going on. Upon request, Jones removed his jacket and gave it to the tall, Caucasian officer. The officer took the strings out of the hood and searched the jacket pockets. Jones was told to remove his sweater, sneakers, and socks, and his pants were pulled down. He did not know why he had been stopped.

The officers asked him where he was coming from and what he was doing. He told them that he had gone to 170 Palmetto Street to get money from a friend and was on his way home. Respondent Almeida conducted a cavity search. Respondent Almeida did not use gloves. Jones asked him why he would do a cavity search in front of a female officer. The officers found no contraband but they handcuffed Jones, placed him in their car, and drove him to the station house where Jones learned that he had been arrested for trespass. His criminal case was ultimately adjourned in contemplation of dismissal. Jones has never previously filed a CCRB complaint.

On cross-examination, Jones confirmed that the officers stopped him within 30 seconds after he had exited 170 Palmetto. He agreed that it was his idea to show the officers his identification and to empty his pockets. The identification he showed listed his address as somewhere other than 170 Palmetto. Jones agreed that he did not know Person A's last name or his apartment number. Jones asserted that on the street Respondent Almeida had pulled down Jones' pants and underwear below his buttocks and had then placed his bare hand between Jones' buttocks.

Jones was confronted with the fact that at his February 23, 2012 CCRB interview, he had stated that Respondent Almeida "went inside my butt hole for no reason" but that during an IAB interview that was conducted at his residence, when he was asked whether any of the officers had stuck a "finger inside your anus?" he answered, "No." Jones was also confronted with the fact that during a CCRB telephone interview, he had stated that only one of the officers drew a gun on him and that the other two officers had placed their hands on their guns but had not drawn their guns. Jones confirmed that he has filed a

lawsuit against Respondents and the City of New York. [Respondent's Exhibit (RX) C is the original complaint. RX D is an amended complaint.]

Respondents' Case

Each Respondent testified in his own behalf.

Respondent Perez

Respondent Perez testified that he has been trained that if an officer observes a person loitering in a NYCHA building, the officer is permitted to approach the person and ask why the person is in the building. He recalled that from his observation post he saw Jones enter 170 Palmetto Street through the rear door; loiter on the first floor for three to five minutes; step outside the front door; look up and down the block; re-enter the building, and finally exit through the back door after another minute or two. He then radioed the apprehension team and provided a description of Jones' physical appearance and actions. After the apprehension team stopped Jones, Respondent Perez confirmed that the correct person had been stopped.

On cross-examination, he testified that he observed Jones from a vehicle that was parked across the street from the front of 170 Palmetto and that he was able to see into the building through windows on the building. When he radioed the apprehension team, he told them to stop Jones for loitering inside a NYCHA building. He agreed that when he saw Jones enter the rear door of the building, he did not know whether or not Jones resided there.

Respondent Almeida

Respondent Almeida recalled that on the day of this incident he was in the apprehension auto with Respondent Van Dyke and another UMOS but he could not recall who the third UMOS was. Within seconds of Respondent Perez's radio transmission he spotted Jones. Since Jones matched the description provided by Respondent Perez, Respondent Almeida exited his vehicle and approached Jones. Respondent Almeida did not have anything in his hands and his firearm was holstered. Respondent Almeida asked Jones if he lived in the building. Jones had no response. He also asked Jones if he had any friends or family in the building or any business in the building. Jones was hostile toward the officers. Jones was frisked and arrested. No strip search or cavity search of Jones was conducted on the street that day.

On cross-examination, Respondent Almeida was confronted with a statement he made during a September 2012 CCRB interview that he could not recall what happened or who he was working with on day of this incident. On redirect examination, he clarified that although he could not recall anything at the beginning of his CCRB interview, his memory was refreshed after investigators showed him the arrest paperwork for Jones.

Respondent Van Dyke

Respondent Van Dyke recalled that numerous narcotics and trespass complaints had been received regarding the Bushwick Houses and that after Respondent Perez radioed the description of a male who Respondent Perez said he had observed loitering inside the lobby of a NYCHA building, he, Respondent Almeida and Herbst approached

Jones for the purpose of interviewing him to determine why he had been inside the building. Respondent Van Dyke did not recall that anyone drew a firearm. He explained that there would be no reason to draw a firearm in a possible criminal trespass case unless there appears to be a threat. He did not recall feeling threatened by Jones nor did he recall anything unusual about the interaction with Jones.

Respondent Almeida asked Jones questions about what he was doing in the building but Respondent Van Dyke could not specifically recall their conversation. He confirmed that had Jones produced identification showing that he lived at 170 Palmetto, the encounter would have immediately ended. The only physical contact that Respondent Van Dyke recalled was that Jones was eventually placed in handcuffs and searched incident to this arrest, which would have occurred before the officers placed Jones in a Department vehicle. Respondent Van Dyke did not recall that he ever personally addressed Jones.

On cross-examination, Respondent Van Dyke confirmed that Jones was stopped for suspected criminal trespass, not for suspected drug activity. He did not recall Jones being combative. He and Respondent Almeida stood one to three arm lengths from Jones. He had no recollection of Jones telling them that he had entered the building to look for an associate named Person A. He agreed that if Jones had provided that sort of information, the officers could have gone into the building to verify his story. He was confronted with a statement he made during his February 2013 CCRB interview that he did not really recall this incident. He explained that he did not prepare for that CCRB interview and that the incident itself was not memorable. His memory of what took place

during the incident has since been refreshed by reviewing the discovery material that had been provided to his attorney.

FINDINGS AND ANALYSIS

It is charged that Respondent Almeida stopped Jones without sufficient legal authority and that Respondent Van Dyke and Respondent Perez participated in unlawfully stopping Jones.

It is not disputed that since 170 Palmetto is a NYCHA building, only residents and guests of residents are permitted to be present inside the building. Jones testified that even though when he called up to the third floor window of his friend's apartment he received no response, he, nonetheless, entered 170 Palmetto through the rear door of the building. Thus, Jones acknowledged that even though he had received no invitation from a resident to enter the building on December 28, 2011, he entered the building anyway.

Respondent Perez testified that he determined that Jones should be stopped and questioned because he had seen Jones enter 170 Palmetto through the back door of the building; loiter on the first floor for at least three minutes; step outside the front door; look up and down the block; re-enter the building; and then exit through the back door a minute later. Jones corroborated Respondent Perez' testimony that Jones had entered 170 Palmetto through the back door of the building, remained inside the building for a short time and then exited through the back door.

When Respondent Perez' observations of Jones' actions are combined with the undisputed fact that the area surrounding 170 Palmetto is a high-crime area where drug activity takes place, and CCRB witness Maynard's testimony that complaints had been

made to the local community board that drugs were being sold out of 170 Palmetto, the record sufficiently establishes that Respondent Perez' determination that Jones should be stopped and questioned was not based on mere whim, caprice or idle curiosity.¹

Respondent Almeida and Respondent Van Dyke stopped Jones based on a description of Jones conveyed in a radio transmission that they received from Respondent Perez. The New York Court of Appeals has held that a police officer may lawfully conduct a stop by relying on information conveyed by a fellow officer who has personal knowledge of the conduct which justifies the stop² because the officer who performs the stop has the right to assume that the information conveyed by the fellow officer is reliable until proven otherwise.³

This "fellow officer rule" has been applied in Departmental disciplinary decisions. In *Case No. 2002-78173* (May 10, 2004), an officer who was charged with having wrongfully stopped a suspect was found not guilty because the stop was based on a description that had been provided to the officer by an undercover officer (UC) of a male who had sold drugs to the UC, and because the suspect was only detained until he was brought to the UC who then informed the officer that the suspect was not the male who had sold him drugs. Also, in *Case No. 2007-82894* (March 15, 2010), a sergeant who was charged with having stopped two civilians without sufficient legal authority was found not guilty because the sergeant, who was supervising a narcotics operation, had relied on a description communicated to him by an officer he was supervising. Most

¹ See *People v. Simone*, 39 NY2d 818, 385 NYS2d 765 (1976).

² *People v. Petralia*, 62 NY2d 47, 474 NYS2d 441 (1984).

³ *People v. Dodt*, 61 NY2d 408, 369 NYS2d 67 (1984).

recently, in *Case No. 2013-9627* (June 17, 2014), a lieutenant was found not guilty of participating in an unjustified car stop because he had the right to rely on a fellow officer's claim that he observed excessive tinting on the windows of the car.

Thus, I find that Respondent Almeida and Respondent Van Dyke had the right to rely on the information contained in Respondent Perez's radio transmission.

Although the CCRB prosecutor conceded that Respondents had the right to approach and question Jones, the CCRB prosecutor argued that Respondents did not have the right to forcibly stop him and that Jones' testimony at this trial that he was stopped at gunpoint should be credited.

Jones' claim must be examined in light of the inconsistencies between his trial testimony and the statements he made at his IAB and CCRB interviews. At this trial, Jones testified that Respondent Almeida had approached him along with two other officers and that all three officers had their guns drawn. However, during a pre-trial CCRB telephone interview, Jones had stated that only one of the officers drew a gun and that the other two officers had merely placed their hands on, but had not drawn, their firearms. This inconsistency leads to the conclusion that Jones knowingly and falsely embellished his trial testimony and, as a result, I cannot credit his trial testimony or his pre-trial statement that one of the officers drew a gun on him.

Most significantly, Jones testified at this trial that Respondent Almeida had stuck his bare hand "between" Jones' "cheeks," and at a CCRB interview Jones stated that "he went inside my butt hole for no reason." That a police officer would place his bare hand in the anal cavity of a suspect while they are standing on the street in broad daylight in public view is difficult to credit. I do not credit Jones' claim since during the IAB

interview that was conducted at his residence when he was asked whether any of the officers had stuck "a finger inside your anus?" he answered, "No," and since neither Jones' original complaint nor his amended complaint in his civil action allege that a strip or cavity search took place outside on the street.

Finally, although the original complaint that was filed to initiate Jones' civil action included a statement that he went inside 170 Palmetto (RX C), the amended complaint omits any mention that Jones had entered or exited 170 Palmetto (RX D). Although the CCRB prosecutor asserted that this omission in the amended complaint was the work of Jones' attorney, not Jones, the amended complaint's omission of any mention that Jones was inside 170 Palmetto leads to the suspicion that Jones did not want to admit in his complaint that he had entered 170 Palmetto on December 28, 2011 without having received permission from a resident.

In conclusion, since CCRB did not meet its burden of proving these charges by a preponderance of the credible evidence, Respondents are found Not Guilty.


Respectfully submitted,



Robert W. Vinal

Assistant Deputy Commissioner - Trials

APPROVED

MAY 29 2015

WILLIAM J. BRATTON
POLICE COMMISSIONER