



POLICE DEPARTMENT

March 27, 2024

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In the Matter of the Charges and Specifications	:	Case No.
- against -	:	2022-26489
Police Officer Matthew McCurry	:	
Tax Registry No. 958897	:	
75 Precinct	:	

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

Before: Honorable Vanessa Facio-Lince  
Assistant Deputy Commissioner Trials

APPEARANCES:

For the CCRB-APU: Kenneth Crouch, Esq.  
Civilian Complaint Review Board  
100 Church Street, 10<sup>th</sup> Floor  
New York, NY 10007

For the Respondent: John Tynan, Esq.  
Worth, Longworth & London, LLP  
111 John Street, Suite 640  
New York, NY 10038

To:

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

## CHARGES AND SPECIFICATIONS

1. Police Officer Matthew McCurry, on or about January 16, 2021, at approximately 2150 hours, while assigned to the 75 Precinct and on duty, in the vicinity of the intersection of New Lots Avenue and Warwick Street, Kings County, abused his authority as a member of the New York City Police Department, in that he stopped **Complainant** without sufficient legal authority.

P.G. 212-11, Page 6, Paragraph 20

### INVESTIGATIVE ENCOUNTERS

2. Police Officer Matthew McCurry, on or about January 16, 2021, at approximately 2150 hours, while assigned to the 75 Precinct and on duty, in the vicinity of the intersection of New Lots Avenue and Warwick Street, Kings County, wrongfully used force, in that he used physical force by pushing **Complainant** to the hood of the police vehicle without police necessity.

P.G. 221-01, Page 2, Prohibition 11

### USE OF FORCE

3. Police Officer Matthew McCurry, on or about January 16, 2021, at approximately 2150 hours, while assigned to the 75 Precinct and on duty, in the vicinity of the intersection of New Lots Avenue and Warwick Street, Kings County, abused his authority as a member of the New York City Police Department, in that he frisked **Complainant** without sufficient legal authority.

P.G. 212-11, Page 8, Paragraph 36

### INVESTIGATIVE ENCOUNTERS

4. Police Officer Matthew McCurry, on or about January 16, 2021, at approximately 2150 hours, while assigned to the 75 Precinct and on duty, in the vicinity of the intersection of New Lots Avenue and Warwick Street, Kings County, abused his authority as a member of the New York City Police Department, in that he searched **Complainant**'s coat and person without sufficient legal authority.

P.G. 212-11, Page 8, Paragraph 40

### INVESTIGATIVE ENCOUNTERS

## REPORT AND RECOMMENDATION

The above-named member of the Department appeared before me on February 2, 2024.

Respondent, through his counsel, entered a plea of Not Guilty to the subject charges. The

Complainant did not appear as a witness and no reason or explanation was offered for his absence from the hearing. Instead, the Civilian Complaint Review Board (CCRB) moved the recording and transcript of Complainant's CCRB interview into evidence as CCRB's Exhibit 1 and 1A respectively. The CCRB also entered Body-Worn Camera (BWC) footage from the night in question as CCRB's Exhibits 2A-D and security camera footage as CCRB's Exhibits 3A and 3B. 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, the Tribunal finds Respondent Not Guilty.

### FINDINGS AND ANALYSIS

On January 16, 2021 at about 2150 hours, Respondent along with his partner, Officer Vigiano were on routine patrol in an unmarked RMP, in the vicinity of New Lots Avenue and Warwick Street. Respondent observed Complainant, who at the time was 12-years-old, on the street with a group of other young kids who had just left a party venue. Respondent believed he observed Complainant in possession of a firearm inside of his jacket pocket. When Respondent exited his car to further investigate, Complainant ran away from him. A brief chase ensued and Respondent apprehended Complainant. At issue is whether Respondent stopped, frisked and searched Complainant without sufficient legal authority and whether he wrongfully used force, by pushing Complainant.

CCRB interviewed Complainant on January 26, 2021. According to Complainant's statement, on the date and time in question, he and his little sister were walking home from a party when the police pulled up alongside them. Complainant claimed that one officer exited the car and "flinched" at him like he was about to run after him. Complainant stated that he ran and the officer chased him across the street. When Complainant stopped running, he stated that he

“put [his] hands up.” At that time, according to Complainant, the officer (later identified as Respondent) “slammed him” onto the police car and searched him. Respondent asked Complainant questions about who had a gun and then let him go. (CCRB Ex. 1A at 7)

When asked by the CCRB interviewer to describe his vestment that evening, Complainant stated that he was wearing white pants, a white shirt, a black coat and a blue Dodgers baseball cap. He further indicated that he had his phone and glasses in his right jacket pocket. (CCRB Ex. 1A at 12-15) Complainant added that he started running away from Respondent after he “flinched” at him. The reason Complainant stopped running was because he was blocked by an RMP that was also following him. Complainant recalled that at that point, he was picked up and “slammed” onto the hood of the car by Respondent. He further stated that his chest and stomach hit the car and as a result, his left arm and neck were in pain. (CCRB Ex. 1A at 24-25)

Complainant asserted that Respondent did not say anything to him before he began searching him. According to Complainant, Respondent patted him down on his “upper body and legs” and then checked his pockets. The CCRB interviewer asked the following clarifying question: “When you say checking your pockets, do you mean like physically put his hands inside of your pockets?” and Complainant responded in the affirmative. (CCRB Ex. 1A at 27) Complainant further indicated that when checking his pockets, Respondent did not remove the glasses or phone that he had in his pocket. After he was searched, Complainant recalled that he was asked about a gun and then let go. He stated he was not provided with the officers’ names or business cards nor did he ask them for this information. (CCRB Ex. 1A at 28-30)<sup>1</sup>

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<sup>1</sup> It is worth noting that at the time of the incident Complainant was a minor. Moreover, during the CCRB interview Complainant’s father was present and interjected a few times to supplement facts that his son did not offer in his responses to the interviewer. While this does not affect the Complainant’s credibility per se, it does affect the reliability of his narrative.

Respondent and Complainant corroborate each other on many details. Where they differ is in their individual perceptions of the use of force employed during the stop. Respondent testified that on the date in question, he and Officer Vigiano were working in their capacity as members of the public safety team in the 75 precinct. They were in uniform in an unmarked RMP parked in the vicinity of New Lots Avenue and Warwick Street. Respondent stated that he is very familiar with that area because it is a routine area that they patrol and he has "made multiple firearm arrests in that general vicinity where this incident occurred." (Tr. 24)

Respondent further testified that he and his partner were there because a party had just let out at a hall at that location, and in his experience, "there [are] a lot of young kids [so] it is prone to have group fights." (Tr. 26)

According to Respondent, from a distance of approximately three to five car lengths, he observed a group of teenagers congregating near the party venue, being loud and boisterous, and blocking the sidewalk. It was at this time that Respondent first noticed Complainant because he was part of this group. What drew Respondent's attention to Complainant was that the right side of his jacket was significantly lower than the left side. Respondent testified that his view of the Complainant was unobstructed and that the area was "well-lit" with ambient lighting from a deli/bodega, a train station and street lights. (Tr. 26-27)

Uncertain of what was contained in Complainant's jacket pocket, Respondent continued surveilling the group. Respondent testified that he observed Complainant engaged in conversation with an individual in an orange jacket. Complainant then looked in the direction of Respondent's RMP and according to Respondent, Complainant's demeanor completely changed. Respondent elaborated that Complainant's eyes "opened wide and it seemed like he was nervous." Based upon Complainant's sudden shift in demeanor, this raised Respondent's



suspicion about what might be in his pocket, so he and his partner drove closer to Complainant. (Tr. 28)

Respondent testified that as his partner drove the unmarked RMP closer to the group, he observed Complainant walking away and trying to hide within the crowd, causing his suspicion to heighten. As he got closer to Complainant, Respondent testified that he saw what he believed to be a firearm in Complainant's pocket. He described it as follows:

I saw something come to a point in the corner of his pocket, as well as a slight imprint where that corner pocket was, a rectangle shape, which I believe was the firearm pressed -- the barrel of the firearm pressing on the inseam of his pocket and a slight indentation of the rectangle was the barrel extenuating (sic) outwards. (Tr. 29)

According to Respondent, at this point he had reasonable suspicion to believe that Complainant was in possession of a firearm. Respondent recalled that he then rolled down his window and identified himself as a police officer at which point Complainant took off running and a chase ensued. Respondent testified that it was a short pursuit and he was able to grab Complainant's jacket, at which point he "basically gave himself up." (Tr. 30-31) Officer Vigiano followed them in the RMP and pulled up next to Respondent and Complainant. Respondent asserted that he "merely guided" Complainant to the hood of the RMP so that he could have a more secure area to frisk him; however he recalled that Complainant "jumped or somehow leaped onto the hood of the car within his own volition... like belly-flopped onto the hood of the car and went, like, spread eagle." (Tr. 32-33)

When asked if he then patted down Complainant, Respondent testified that he grabbed on to his legs and felt a heavy object in his pocket, but could not make out what it was. Respondent stated that he wanted to be sure that he had a "solid feel of what was in that pocket," so he proceeded to unzip Complainant's jacket and use both his hands to compress both the interior and exterior of the jacket. Although he was not certain of what exactly was inside the jacket

pocket, he was able to dispel his concern that it was a firearm. Respondent then asked Complainant, "who had the gun?" Complainant informed him that "it was the kid with the orange jacket." According to Respondent, upon receiving that information and confirming that Complainant did not appear injured, he immediately let Complainant go. He and his partner attempted, albeit unsuccessfully, to locate the individual in the orange jacket. (Tr. 34-36)

Respondent concluded his direct examination by stating that he has had no further contact with Complainant except when he was informed that Complainant filed a civil lawsuit against him. Respondent testified that the lawsuit alleged false arrest, abuse of authority, excessive force and related allegations. At the time of this hearing, the lawsuit was still pending as per Respondent's testimony. (Tr. 37)

On cross examination, Respondent was confronted about omissions and perceived inaccuracies in the Stop Report (CCRB Ex. 4) that he prepared related to this incident. Specifically, in the section that requires officers to state the basis for a frisk, Respondent wrote "statement by suspect." Respondent testified that this was an administrative error and that he did in fact frisk Complainant before he made the statement about the gun. (Tr. 44-46) Respondent was also questioned about the fact that he never actually saw the outline of a gun to which he reiterated that he saw what he believed to be the impression of a part of a gun. (Tr. 49) Respondent maintained that the narrative section in the Stop Report contains an accurate description of his observations and the circumstances that led to the stop, frisk and search on the date of the incident.

CCRB submitted Officer Vigiano's BWC (CCRB Ex. 2) and security camera footage (CCRB Ex. 3) from the date, time and location of the incident. The BWC footage is 2:38 (two minutes and thirty-eight seconds) in total and begins shortly before the officers approach

Complainant. It captures the moment when Complainant begins to run away from officers, but because it is attached to the operator of the RMP, it does not depict the foot pursuit. At approximately 00:49, Respondent can be seen grabbing Complainant and moving him toward the hood of the RMP. Respondent's frisk and search of Complainant is also captured and corroborates Respondent's testimony. CCRB's Exhibit 3 is footage taken from a security camera at 712 New Lots Avenue. The video is 1:53 (one minute and fifty-three seconds) and is split into four different angles. It captures Respondent's pursuit and apprehension of Complainant but from a distance. The footage depicted in CCRB's Exhibit 3 is less clear than the footage in CCRB's Exhibit 2.

*Specifications 1 and 3: Stop and Frisk of Complainant*

It is alleged that Respondent abused his authority as a member of the Department by stopping and frisking Complainant without sufficient legal authority, in violation of Patrol Guide section 212-11. The Patrol Guide places officers on notice as to their responsibilities during a street encounter with an individual. Section 212-11 outlines that an officer may stop and detain a person when the officer "reasonably suspects a person has committed, is committing, or is about to commit a felony or a Penal Law misdemeanor." Furthermore, section 212-11 provides that "the officer may frisk the person, if the officer has reasonable suspicion that the person is armed and dangerous." Reasonable suspicion is defined in the Patrol Guide as:

Information known to the member of the service that would make an ordinarily prudent and cautious police officer under the circumstances believe that a felony or Penal Law misdemeanor has been, is being or is about to be committed. The officer must have a particularized and objective basis for suspecting the person stopped of the criminal conduct. The officer must be able to articulate specific facts establishing justification for the stop; hunches or gut feelings are not sufficient.



Ultimately, the touchstone in any evaluation of a street encounter between police and an individual is reasonableness. The question to be answered here is whether a reasonable officer would have acted as Respondent did, in light of the established standards of conduct, and the circumstances actually confronted by the officer in this case. "It is well established that, in evaluating the legality of police conduct, we 'must determine whether the action taken was justified in its inception and at every subsequent stage of the encounter.'" *People v. Howard*, 129 A.D.3d 1654, 1655 (4th Dept. 2015); quoting *People v. Nicodemus*, 247 A.D.2d 833 (4th Dept. 1998), citing *People v. DeBour*, 40 N.Y.2d 210, 215 (1976). Here, contrary to CCRB's contention, this Tribunal concluded that Respondent did act reasonably in this encounter when he stopped and frisked Complainant.

Respondent's credible testimony at the hearing established that he believed he saw a part of a gun in Complainant's pocket. This observation coupled with Complainant's demeanor, evasive behavior and subsequent flight reasonably caused Respondent to suspect that he was in possession of a firearm. While Respondent's initial observations of Complainant may not, alone, have risen to the level of grounds for a stop and frisk, they justified a founded suspicion that Complainant may have been engaged in criminal activity, giving rise to a common law right of inquiry under *People v. DeBour, supra*. As a result of defendant's flight upon the approach of the officers, and the additional suspicion engendered by it, the evidence met the level of reasonable suspicion, justifying pursuit. *See People v. Atkins*, 273 A.D.2d 12 (1st Dept. 2000) Respondent then had the right to pursue Complainant. *See People v. Sierra*, 83 N.Y.2d 928 (1994)

A "frisk" is defined in section 212-11 of the Patrol Guide as:

A carefully limited running of the hands over the outside of a person's clothing feeling for a deadly weapon or any instrument, article or substance readily capable of causing serious physical injury and of a sort not ordinarily carried in public places by law-abiding persons. A frisk is authorized when the member of the service reasonably suspects the

person is armed and dangerous. This includes situations in which the officer reasonably suspects that the person has committed, is committing, or is about to commit a violent crime or when the officer observes something on the person that she/he reasonably suspects is a weapon.

In order to justify a frisk or "pat-down" of a suspect's outer clothing, a police officer must have "knowledge of some fact or circumstance that supports a reasonable suspicion that the suspect is armed or poses a threat to safety." *People v. Batista*, 88 N.Y.2d 650, 654 (1996) "In determining whether an individual's actions rise to the level of reasonable suspicion, police officers are permitted to interpret the behavior in light of their training and experience." *People v. Solano*, 46 A.D.3d 1223, 1224 (3d Dept. 2007)

Here, Respondent observed a heavy weighted object that resembled the imprint of a gun in Complainant's pocket. Complainant's hearsay statement confirmed that he had two items in his pocket: an iPhone and a pair of glasses. This Tribunal believes that the positioning of these items in a pocket could reasonably be mistaken for a firearm. Based upon Respondent's reasonable belief that Complainant was carrying a firearm, coupled with his training and experience, and the other attendant circumstances, this Tribunal concludes that he had reasonable suspicion to stop and subsequently frisk the Complainant. Accordingly, Respondent is found Not Guilty of Specifications 1 and 3.

#### *Specification 2: Use of Force*

Specification 2 alleges that Respondent wrongfully used force, in that he pushed the Complainant onto the hood of the police vehicle without necessity. Patrol Guide Section 221-01 provides guidelines for the use of force and states that: "Force may be used when it is reasonable to ensure the safety of a member of the service or a third person, or otherwise protect life, or

when it is reasonable to place a person in custody or to prevent escape from custody. In all circumstances, any application or use of force must be reasonable under the circumstances.” Moreover, P.G. 212-11, page 3, provides additional guidance on the use of force during a level 3 encounter, stating: “Reasonable force may be used to stop a person. The type and amount of force used must be objectively reasonable under the circumstances.” It is uncontested that Respondent’s actions caused Complainant to end up on the hood of the RMP. The question before this Tribunal is whether Respondent’s pushing the Complainant onto the hood of his police vehicle was objectively reasonable under the circumstances.

In this case, the primary evidence presented by CCRB that Respondent used excessive force was Complainant’s hearsay statement. Complainant, in his CCRB interview, characterized this interaction differently than Respondent did. He stated that Respondent chased him, took him off his feet and slammed him onto the car. (CCRB Ex. 1 at 7) He was then asked what part of his body hit the car and Complainant replied his chest and stomach. (CCRB Ex. 1 at 24). The BWC footage (CCRB Ex. 2 at 00:48-00:55) captures the moment described above. However, Complainant does not sufficiently articulate or expand upon the amount of the force allegedly used by Respondent.

Hearsay evidence is admissible in an administrative tribunal, and a case may be proven with such evidence provided it is found to be sufficiently reliable and probative on the issues to be determined. *See Ayala v. Ward*, 170 A.D.2d 235 (1st Dept. 1991); *125 Bar Corp. v. State Liquor Auth. of N.Y.*, 24 N.Y.2d 174 (1969) It is preferable to have testimony from a live witness, where the court can observe the demeanor of the witness and opposing counsel has the opportunity to cross-examine. This is especially important in cases like this one where the hearsay is more significant to the CCRB’s case. “The more central the hearsay is to the agency’s

case, the more serious the question of basic fairness and the more critical the question of reliability may become.” *Disciplinary Case No. 2018-19483* (April 29, 2021); *Human Res. Admin. v. Green*, OATH Index No. 3347/09 at 9 (Nov. 18, 2009), quoting *Calhoun v. Bailar*, 626 F.2d 145, 150 (9th Cir. 1980) In cases where a charge is based primarily on hearsay, hearsay has been deemed sufficiently reliable only if the statement is detailed and corroborated. *Dept. of Envtl. Prot. v. Ginty*, OATH Index No. 1627/07 (Aug. 10, 2007)

Here, the record fails to include independent, credible evidence to corroborate Complainant’s hearsay statement that the force used was excessive or that he was injured by Respondent’s actions. For example, the video evidence does not support the contention that Complainant was injured, as there are no visible injuries and he does not complain of pain or discomfort after he was allegedly “slammed” on the hood of the RMP. Moreover, the footage is consistent with Respondent’s testimony that he grabbed hold of Complainant and placed him on the hood of the vehicle. What is not clear is whether Complainant “jumped” onto the hood of his own volition or whether he was forcibly pushed onto the car by Respondent. In the absence of live testimony for Complainant to elaborate on this subject, the Tribunal cannot credit his characterization of this encounter. The CCRB has, therefore, failed to meet its burden to prove that Respondent’s actions constituted excessive force.

Even assuming *arguendo* that Respondent “pushed” Complainant onto the hood of the car, this action was not an excessive use of force under the circumstances. Respondent was actively pursuing an individual that he reasonably believed had a firearm and the force used was merely to gain control of him in order to frisk him. The entire interaction spans less than one minute from when the Complainant is apprehended and frisked to when he is ultimately let go. The amount of force used by Respondent was reasonably necessary and limited to achieve his

objective of stopping a subject he believed to be armed. I therefore find that Respondent's action did not constitute misconduct. Accordingly, he is Not Guilty of Specification 2.

*Specification 4: Unlawful Search*

Patrol Guide section 212-11 defines a "search after frisk" as "when the officer places her/his hands inside a pocket or other interior portions of a person's clothing or personal property to remove an object that the member felt during a frisk and reasonably suspects is a weapon or dangerous instrument." The standards of conduct in this area have also been set forth in the Department's Police Student Guide – Search and Seizure chapter – which is provided as a training tool to all recruits in the Police Academy. The Police Student's Guide states: "If an officer reasonably suspects that an object felt in a suspect's clothing during a frisk is a weapon, the officer may take appropriate and necessary action to examine the object and protect himself. This includes removing the object from the clothing of the stopped person." (Police Student's Guide, Ch. 5, *Search & Seizure*, p. 15 [Oct. 2019]) Based upon Respondent's credible testimony, corroborated by BWC footage, there is no doubt that Respondent searched Complainant at the time that he unzipped his jacket. The question is whether the search was justified under the circumstances.

Respondent testified that after he secured Complainant on the hood of the RMP, he patted down Complainant. He added that:

Because it was one of those light puffer jackets, I wanted to make sure I had a solid feel of what was in that pocket. I did then unzip his jacket, so I can use both hands to compress on both sides of the jacket, so I can have an accurate feeling of what I -- of my observations, so I finally, for a hundred percent sure, if this was indeed a firearm or something else. (*sic*) (Tr. 34)

Ultimately, Respondent concluded after searching Complainant that the item in his pocket was not, in fact, a firearm, but rather what he believed to be "the wooden handle of a brush and a heavy duty cell phone charger." (Tr. 35) Once Respondent completed the search and dispelled his belief that Complainant was in possession of a firearm, Respondent released the Complainant. Complainant did, however, inform Respondent during the search that he did not have a gun, but that the individual in the orange jacket had one.

In striking the proper balance between an individual's Fourth Amendment rights and maintaining public order and safety, this Tribunal concludes that there must be a narrowly drawn ability to permit a reasonable search for weapons for the protection of the police officer and the public, where he/she has reason to believe that he/she is dealing with an armed individual. "The officer need not be absolutely certain that the individual is armed; the issue is whether a reasonably prudent man in the circumstances would be warranted in the belief that his safety or that of others was in danger." *Terry v. Ohio*, 392 U.S. 1, 27 (1968).

The question of whether a minimally intrusive search of a person's pocket can be based on reasonable suspicion was specifically addressed by the Appellate Division in *People v. Whitehead*, which held: "Generally, a search must 'be confined in scope to an intrusion reasonably designed to discover' a concealed weapon, an objective best accomplished by a limited external pat down of the suspect." 135 A.D.2d 997, 998-99 (3d Dept. 1987), citing *Terry, supra* at 29; *Sibron v. New York*, 392 U.S. 40, 65 (1968) There are instances, however, where an immediate protective search is compelled by the events developing during an encounter. This was precisely the situation encountered by Respondent on the night in question. Therefore, under the totality of the circumstances here, Respondent was justified in searching Complainant, and I find him Not Guilty of Specification 4.

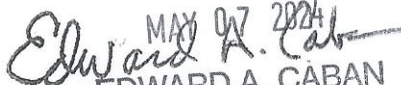


Respectfully submitted,



Vanessa Facio-Lince  
Assistant Deputy Commissioner Trials

**APPROVED**

MAY 07 2024  
  
EDWARD A. CABAN  
POLICE COMMISSIONER