



POLICE DEPARTMENT CITY OF NEW YORK

May 6, 2016

MEMORANDUM FOR: Police Commissioner

Re: Police Officer Robert Cruz
Tax Registry No. 941602
Emergency Service Squad
Disciplinary Case No. 2013-10524

Charges and Specifications:

1. Said Police Officer Robert Cruz, on or about April 27, 2013, at approximately 1830 hours while assigned to the 75th Precinct and on duty, in the vicinity of [REDACTED] Jerome Avenue, Kings County, abused his authority as a member of the New York City Police Department in that he searched Person A without sufficient legal authority.

P.G. 212-11, Page 1, Paragraph 3 -STOP & FRISK

Appearances:

For CCRB-APU: Cindy Horowitz, Esq.
Civilian Complaint Review Board
100 Church Street, 10th floor
New York, New York 10007

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

Hearing Date:

March 28, 2016

Decision: Not Guilty

Trial Commissioner:

DCT Rosemarie Maldonado

REPORT AND RECOMMENDATION

The above-named member of the Department appeared before me on March 28, 2016. Respondent, through his counsel, entered a plea of Not Guilty to the subject charge. 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.

DECISION

After evaluating the evidence presented at the hearing, and assessing the credibility of the witnesses, I find Respondent Not Guilty of the charged misconduct.

FINDINGS AND ANALYSIS

On April 27, 2013, Respondent was assigned to the Conditions Unit of PSA 2 in East New York, Brooklyn. (Tr. 11-13, CCRB Exhibit "CCRBX" 1A at 17) At approximately 1830 hours, Respondent and Officer Burrell were driving an unmarked van down [REDACTED] Avenue, in the vicinity of [REDACTED], when Respondent observed a lone male in a black leather jacket. The subject was later identified as Person A. The details of exactly what transpired next are disputed, but the parties agree that Respondent engaged Person A and recovered a gravity knife from his pants pocket. He was handcuffed, transported by van to PSA 2 and released with a desk appearance ticket. In dispute is whether Respondent was justified in conducting the search which uncovered the gravity knife.

Person A did not appear to testify at trial. Instead, APU relied on the transcript and recording of a May 9, 2013, telephone interview conducted by a CCRB investigator. (CCRBX 1A) Person A told the investigator that it had been warm earlier that day but he had left his house wearing an open leather jacket with at-shirt underneath because by 1830 hours it had cooled down. He was walking from his house at a normal pace for about three minutes when a police vehicle pulled up in front of him. Respondent exited the van, got "right in [his] face" and asked

why he was wearing a leather jacket. Before he could answer, Respondent mentioned something about seeing a gun and began "checking him" by placing his hands in Person A's pockets.

(CCRBX at 5, 8-20, 27-31)

According to Person A, it was at this point that a second officer exited the van. Over Person A's objections, Respondent continued to "check" his pockets. (*Id.* at 5, 31) Respondent first removed his phone and wallet. He then removed a "small pocketknife," gave it to his partner and told Person A to place his hands behind his back. (*Id.* at 32-33) According to Wright, the pocketknife had a three inch blade and a two inch handle. He acknowledged that you needed to "flip" the knife to open it, but insisted that at the time of this police encounter the blade was not visible because it was folded inside his pocket. (*Id.* at 11-12)

Respondent presented a different account at trial. He explained that the sight of Person A in a black leather jacket caught his attention because it was too warm to be wearing that type of outer garment. This raised his suspicion because, given the pattern of violence in the area, the jacket could provide the "perfect opportunity to conceal anything." (Tr. 14-15) As Person A crossed the street and walked beside the police van, Respondent also noticed him repeatedly adjusting his pants. Respondent asserted that based on his experience apprehending individuals with weapons, persons often "adjust their attire because there's something there or there's an uncomfortable presence at that location." (Tr. 17)

Respondent recounted that from the police vehicle he told Person A, "It's pretty hot outside to be wearing a leather jacket." Person A did not respond and turned his head away. (Tr. 19) Respondent recalled telling his partner that Person A might have a gun, though he acknowledged on cross-examination that he did not see a gun, a bulge or any other weapons, and that he planned to chase him if he ran. (Tr. 21-22, 27-28) Respondent then asked, "What's wrong with you? Why are you holding your waistband? What's wrong with your pants?" (Tr. 19-20) In

response, Person A lifted his clothing to show that he did not "have anything" and that he was not wearing a belt. (Tr. 20) When Person A exposed his waistband, however, Respondent observed a metallic clip on his left-side pocket in the same area where he had been adjusting his pants. (Tr. 20-21, 3 7) Respondent testified that "through experience . . . when I saw the clip, that gave me a reason to believe that there was a knife there." (Tr. 21) Respondent then warned his partner and exited the vehicle. (Tr. 22)

Once Respondent was out of the van he asked Person A "what is this?" in reference "to his knife." (Tr. 22-23) Person A responded, "this," before moving to pull the knife out of his pocket. (Tr. 23-24, 33-35) Respondent saw the knife and for his safety told Person A to "wait." He then put one hand on Person A's waist and one hand on the back of his waistband. (Tr. 23, 34) According to Respondent, as soon as he put his hands on Person A's waist, he felt the knife and was "pretty sure . . . it was illegal" because the blade was over four inches in length. (Tr. 23, 34) Respondent also testified at trial that because he was also in the military, and collected knives, he could identify the position of the blade " . . . in comparison to the handle and . . . know exactly how to open it with a flick of the wrist." (Tr. 44-45)

Respondent testified that Person A "was placed under arrest for the gravity knife and I also showed him why it's a gravity knife . . . I took the knife and I was able to open it with centrifugal force, thus making it a gravity knife . . . I also placed the blade of the knife over the palm of my hand indicating to him that it was over three inches and he's not allowed to have that." (Tr. 24) Respondent asserted he "knew [the knife] was a gravity knife the minute I saw it. I didn't have to test it. Testing it was for [Person A]." (Tr. 43) Because Person A was young and "[did not] seem like a bad kid," Respondent opted to give him a desk appearance ticket. (Tr. 25) The arrest report did not state the length of the knife blade. (Tr. 41-42)

Resolution of this particular case turns on questions of credibility. Thus, it is left to this tribunal to sort out which version of events was closest to the truth. After carefully considering the conflicting accounts in evidence, this tribunal concludes that Respondent's version of the disputed portion of the incident was substantiated by the record and find him not guilty of the charged misconduct.

Disciplinary charges relying on hearsay are difficult to prove unless the out-of-court statement is detailed, persuasive and unencumbered with credibility problems. The main evidence in support of APU's case is Person A's CCRB interview. Although the hearsay was admissible at trial, the nature and reliability of that statement warrants careful scrutiny because it was both controverted and outcome-dispositive. *Ayala v. Ward*, 170 A.D.2d 235 (1st Dep't 1991), *lv. to app. den.*, 78 N.Y.2d 851 (1991); *In re Matter of 125 Bar Corp. v. State Liquor Auth. of the State of N.Y.*, 24 N.Y.2d 174 (1969)

Without the benefit of sworn testimony, cross-examination and an assessment of Person A's demeanor, I could not rely on his description of events. It is important to note that Person A's hearsay statement was made via telephone. Thus, even the CCRB investigator conducting the interview was deprived of the opportunity to properly evaluate his demeanor, credibility and possible motives for fabrication. For example, Person A's answers became equivocal, and his recollection vague, when asked why he was carrying a knife and why he had purchased it. This tribunal was skeptical of his response that he did not know the knife was in his pocket and that he had "no purpose" in purchasing it. In short, it gave this tribunal pause to rely on an out-of-court statement which warranted further inquiry. (CCRBX 1A at 12-13)

Within this context, it was problematic that the record contained little to corroborate Person A's assertion that his knife was not visible and that Respondent "check[ed]" his pockets without any

justification. For these reasons, I find that Person A's hearsay statement was not sufficiently reliable to sustain the charge.

Respondent's own account must also be scrutinized to determine whether there was sufficient justification to remove Person A's knife. The pivotal issue concerning the allegedly wrongful search is whether Respondent complied with the provisions of the Patrol Guide. Specifically, Patrol Guide Section 212-11, Page 1, Paragraph 3, which was in effect in 2013, provides that:

When a member of the service reasonably suspects a person has committed, is committing or is about to commit a felony or a Penal Law misdemeanor... search, if frisk reveals object which may be a weapon.

Reasonable suspicion is defined as "the quantum of knowledge to induce an ordinarily prudent and cautious man under the circumstances to believe criminal activity is at hand." *People v. Cantor*, 36 N.Y.2d 106 (1975); *People v. DeBour*, 40 N.Y.2d 210, 223 (1976) To this end, Respondent had an obligation to act reasonably and exercise good judgment.

As set forth in more detail above, Respondent's testimony was that Person A caught his attention because he was wearing a leather jacket on a relatively warm day. This raised his level of suspicion because there had been violent crimes in this neighborhood and, given the relatively mild temperatures, the coat could have been used to conceal a weapon. Respondent approached Person A to ask questions. During the investigatory encounter Person A pulled up his clothing revealing a metal clip on his pants. When he inquired about the clip, Person A attempted to remove the item to show Respondent, allowing him to see that it was a knife.

In New York State, the mere possession, not simply the use, of a gravity knife is criminalized by statute. Penal Law § 265.01. Fourth Amendment cases addressing the suppression of gravity knives in criminal cases have established standards for searches. Although not dispositive in a disciplinary hearing, these cases are instructive on the issue of

misconduct. The Court of Appeals has acknowledged that typically, one cannot tell if a knife is in fact a gravity knife until it is opened but has held that reasonable suspicion does not require "absolute certainty" that the knife an individual is carrying is an illegal gravity knife. *People v. Brannon*, 16 N.Y.3d 596, 602 (2011). Rather, the issue is whether the officer possessed articulable facts from which he inferred the knife was a gravity knife. In *People v. Fernandez*, a gravity knife was not suppressed where the officer saw a "head" of a knife sticking out of the suspect's pocket and clipped to his pants. The officer testified, based on his experience, that gravity knives are commonly carried in a pocket, attached by a clip, with the head protruding and that the suspect's knife "bearing this combination of characteristics is at least likely to be a gravity knife." 60 A.D.3d 549 (1st Dep't 2009), *aff'd* 16 N.Y.3d 596 (2011). This, the court determined, supported a finding of reasonable suspicion. *See id.*; *see also People v. Herrera*, 76 A.D.3d 891 (1st Dep't 2010) (declining to suppress illegal gravity knife where arresting detective testified based on his training and experience that he believed the knife to be illegal and refusing to find that the only way to determine whether a partially obscured folding knife is "most likely" to be an illegal gravity knife is by opening and testing it).

Here, Respondent explained at trial that based on his professional experience, gravity knives are commonly carried with a clip and that he believed the knife to be illegal by looking not only at the clip, but at the knife itself when Person A pulled it out of his pocket. (Tr. 21, 38-39, 43) The information available to Respondent at that point supports a finding that he had a legitimate reason to remove the knife and investigate whether he was committing a crime. Respondent also had a rational basis to believe that his safety might be in jeopardy.

Under these circumstances, even if a determination was made that Respondent had less than the required reasonable suspicion to search Person A, that finding alone would not automatically render the officer's conduct sanctionable. It is well established that improper

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police action is punishable only if an officer acted with knowledge that he was acting improperly, acted without concern for the propriety of his actions, or acted without due and reasonable care that his actions be proper. Proof of mere mistake is not sufficient. *See Reisig v. Kirby*, 299 N.Y.S.2d 398 (2d Dep't 1969); *McGinige v. Town of Greenburgh*, 48 N.Y.2d 949 (1979); *Ryan v. New York State Liquor Auth.*, 79 N.Y.S.2d 827 (3d Dep't 1948) For the reasons already stated above, APU did not prove that Respondent's conduct was so flawed that a reasonable police officer would not have acted similarly under these circumstances.

In making these conclusions, I acknowledge that Respondent's testimony was not impeccable and that there were inconsistencies between his trial testimony and his CCRB interview nearly three years earlier.¹ These deficiencies, however, did not relieve APU of its burden of proof particularly since Respondent consistently stated that he saw not only a clip, but the knife itself when Person A attempted to show it to him.

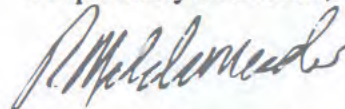
Given the lack of corroborating evidence to support Person A's version of events, the proof presented was insufficient to sustain the charge. Accordingly, I find that the record does not support a finding of guilt.

APPROVED

JUN 23 2016

WILLIAM J. BRATTON
POLICE COMMISSIONER

Respectfully submitted,



Rosemarie Maldonado
Deputy Commissioner Trials

¹ This tribunal notes that Respondent's CCRB interview was entered into evidence only for the limited purpose of determining whether or not Respondent had a conversation with [REDACTED] from within the vehicle. (Tr. 33) Therefore, the potential inconsistencies taken into account herein are those specifically raised by CCRB at trial. (See Tr. 30, 42).