



POLICE DEPARTMENT

May 30, 2014

MEMORANDUM FOR: Police Commissioner

Re: Lieutenant Aaron Klein
Tax Registry No. 935119
Transit Bureau District 34
Disciplinary Case No. 2013 9627

The above-named member of the Department appeared before me on February 4, 2014, charged with the following:

1. Said Lieutenant Aaron Klein, on or about March 12, 2012, at approximately 1150 hours, while assigned to the 113th Precinct and on duty, in the vicinity of 128th Avenue and Guy R. Brewer Boulevard, Queens County, engaged in conduct prejudicial to the good order, efficiency or discipline of the New York City Police Department, in that he participated in the stop of David Modeste's vehicle without sufficient legal authority. (*As amended*)

P.G. 203-10, Page 1, Paragraph 5 – PUBLIC CONTACT PROHIBITED
CONDUCT

The Civilian Complaint Review Board was represented by Alan Alvarez, Esq., and Respondent was represented by James Moschella, Esq.

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.

SUMMARY OF EVIDENCE PRESENTEDThe Civilian Complaint Review Board's Case

The attorney for the Civilian Complaint Review Board (CCRB) called David Modeste as CCRB's only witness.

David Modeste

Modeste, who is 31-years-old, resides in [REDACTED] and is employed as a records associate for an outsource company, confirmed that he was once convicted of a misdemeanor for possessing an illegal pocket knife.

Modeste testified that he is the owner of a black, four-door, 2001 Lexus GS 430 sedan (the Lexus) and that while he was driving the Lexus on February 26, 2012 he was pulled over by a police officer because he was driving while he was speaking on his cell phone. Modeste was issued a summons for using a cell phone while driving. On March 7, 2012, Modeste was again pulled over by a police officer. This time, Modeste was issued a summons because the Lexus had excessively tinted windows.

On March 8, 2012, Modeste brought the Lexus into an auto repair shop and paid to have tinting film removed from the Lexus' "front four" windows [A copy of a receipt was admitted into evidence as Civilian Complaint Review Board Exhibit (CCRBX) 2] No tinting film was removed from the Lexus' rear window or from the two fixed side panel windows located on either side next to the back seat of the Lexus [A photograph of the side windows of the Lexus taken by Modeste on March 8, 2012 was admitted into evidence as CCRBX 3.]

On March 12, 2012, Modeste was driving the Lexus on Guy R. Brewer Boulevard in Queens. As he was approaching a red light at the intersection of Guy R. Brewer Boulevard and Baisley Boulevard, he glanced in his rear-view mirror and saw the brake lights of a vehicle that had just passed by him in the opposite lane. He testified that as the vehicle made a u-turn, he realized that it was “an undercover” police vehicle because he is “quite familiar” with the cars that “most officers drive” in his neighborhood and the vehicle he spotted “happened to be one.” The police vehicle pulled up behind him and soon thereafter “the undercover lights” came on and the police vehicle immediately pulled the Lexus over. [An enlarged photograph of the intersection of Guy R. Brewer Boulevard and Baisley Boulevard, Queens was admitted into evidence as CCRBX 1.]

After Modeste brought the Lexus to a full stop at the side of the road, the police vehicle pulled up behind him and stopped. Three “cops” exited the vehicle and approached the Lexus on both sides. The officer who walked over to the driver’s window asked him to produce his license and registration. Modeste complied. Then the officer “asked have I been smoking or is there any weed in the car.” Modeste replied that he did not smoke. Then the officer “asked me have I ever been arrested before.” He answered, “Yes, I have in the past.” He was then asked to step out of the Lexus. As Modeste complied, he saw officers looking inside the Lexus.

Modeste testified that he asked the officer who had walked over to the driver’s window, “What was I pulled over for?” The officer initially did not reply. Modeste was asked to walk to the rear of the car and he again asked, “Why was I pulled over?” The officer responded, “For tints.” He asked the officer to point out which window he was referring to. The officer tapped on the glass of “the driver’s side rear back window” and

stated that it had tint. Modeste testified that the window “did not have tint.” Modeste told the officer that he had just paid to have tinting removed from the windows of the Lexus and that he had the receipt inside the car. The officer did not reply. When the officer returned his license and registration, Modeste tried to show him the receipt but the officer said, “Don’t worry about it, I believe you.” The officers walked back to their vehicle and Modeste was free to leave.

He wrote down the license plate number of the police vehicle and went to the 113 Precinct to file a complaint. He then called CCRB from his car to file a complaint. He then drove back to Guy R. Brewer Boulevard and made a video recording of himself purchasing that day’s newspaper from a grocery store, to make a record of what the date was, and made a video recording of the windows of the Lexus to show that they were not tinted. [This video was admitted into evidence as CCRBX 4.]

On cross-examination, Modeste testified that he believed that the real reason that he had been pulled over by the police was because he was a young, black male who was driving a Lexus. Modeste testified that he ascertained that the legal transparency level for car windows in New York is 70%. Modeste acknowledged that he does not know what the transparency level is on the windows on his Lexus which had no tint removed from them. Modeste confirmed that his conviction for possessing an illegal knife was the result of having been arrested by officers from this Department.

Respondent’s Case

Respondent testified in his own behalf.

Respondent

Respondent recalled that in March, 2012, he held the rank of sergeant and that on March 12, 2012, he was on duty assigned to the 113 Precinct supervising Police Officers Weibert and Tiernan. Respondent, Weibert and Tiernan were out on patrol as the Crime Unit attempting to apprehend perpetrators committing violent crimes and other crimes. Weibert was driving their unmarked Department vehicle and Respondent was seated in the rear seat. At about 1150 hours, in the vicinity of Guy R. Brewer Boulevard and Baisley Boulevard, a car passed by their vehicle and Respondent heard Weibert say that the car's windows were tinted and that he was going to pull the car over. Respondent turned and saw that the rear window of the car that had just passed by them was tinted. Respondent testified that since he had seen with his own eyes that the rear window was tinted, he had no reason to doubt or question Weibert's claim that the windows appeared to be excessively tinted. Respondent testified that after they stopped the car, he saw that the rear windows on the passenger and driver side doors were tinted. Respondent confirmed that they did not have a "tint meter" in their vehicle to measure the level of tinting on these windows. Respondent testified that Weibert decided not to issue Modeste a VTL summons for excessive tinting and that he concurred with Weibert's decision.

On cross-examination, Respondent confirmed that a Stop, Question and Frisk Report (UF 250) was prepared regarding this encounter (CCRBX 5). Respondent agreed that this report does not state that Modeste was stopped while he was driving a car. Respondent explained that the UF 250 was not prepared because of the vehicle stop. Rather, it was prepared regarding what happened after the car was stopped.

FINDINGS AND ANALYSIS

It is charged that on March 12, 2012 in the vicinity of 128th Avenue and Guy R. Brewer Boulevard, Queens, Respondent engaged in conduct prejudicial to the good order, efficiency or discipline of the Department in that he participated in the stop of Modeste's Lexus without sufficient legal authority.

Most of the facts presented here are not in dispute. Respondent, who was then a sergeant, does not dispute that he was Weibert's supervisor and that he permitted Weibert to conduct a vehicle stop of Modeste's Lexus. The question presented is whether CCRB met its burden of proving by a preponderance of the credible evidence that Respondent did not have sufficient legal authority to stop Modeste's Lexus.

Modeste contended that the real reason that his car was stopped was because he was a young, black male who was driving a Lexus. The CCRB attorney took the position that Respondent should not have allowed Weibert to stop Modeste's Lexus until Respondent had personally been "able to determine whether the windows were illegally tinted." (Transcript p. 123) The CCRB attorney's position is not supported by applicable case law.

The New York Court of Appeals has held that a police officer may lawfully stop a car based on probable cause that a traffic violation has occurred¹ and that the officer who performs the stop may do so by relying on information conveyed by a fellow officer who has personal knowledge of the conduct which justifies the stop² because the officer who

¹ People v. Robinson, 97 NY2d 341, 741 NYS2d 147 (2001).

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

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. For example, 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 the UC arrived at the detention site and informed the officer that the suspect was not the male who had sold him drugs. More recently, in Case No. 2007-82894 (March 15, 2010), a sergeant who was charged with having stopped a civilian without sufficient legal authority was found not guilty because the sergeant, who was supervising a narcotics operation, had made the stop relying on a description that one of the officers he was supervising had provided.

Based on the above, I find that Respondent had the right to rely on Weibert’s claim that he observed tint on the windows of Modeste’s Lexus as it passed by their vehicle, a claim which was partly corroborated by Respondent’s own observation that the rear window of the Lexus was tinted. Thus, Respondent’s concurrence with Weibert’s determination to stop Modeste’s Lexus was not based on mere whim, caprice or idle curiosity.⁴

As to the photo Modeste took of the passenger side of the Lexus (CCRBX 3) and the video of the Lexus that Modeste made (CCRBX 4), even though the windows depicted in the photo and on the video appear to lack tint, this evidence does not establish

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

⁴ See People v. Simone, 39 NY2d 818, 385 NYS2d 765 (1976).

that Respondent did not have sufficient legal authority to stop the Lexus because Modeste admitted that he did not have tinting removed from every tinted window on his Lexus on March 8, 2012. On the contrary, Modeste confirmed that when he was pulled over by Respondent on March 12, 2012, the Lexus' rear window and the fixed panel windows on the rear passenger sides of the Lexus had the same tinting on them that was there when he was issued a summons for excessive tinting on March 7, 2012. Moreover, CCRB did not prove that these windows were not excessively tinted because Modeste admitted that he does not know the transparency level of these tinted windows.

Respondent's contention that the stop of the Lexus was performed in good faith based on Weibert's observations and his own observation of the rear window of the Lexus and that he had nothing to hide about the stop of the Lexus is supported by the fact that the encounter was documented in a Stop, Question and Frisk Report that was prepared by Weibert and reviewed and signed by Respondent (CCRBX 5). Also, Modeste corroborated Respondent's testimony that Modeste was told at the scene that his car had been stopped for tinted windows. Thus, Modeste's own testimony establishes that the tinted windows rationale for the stop was not invented by Respondent after Modeste filed a complaint with CCRB in order to justify the stop.

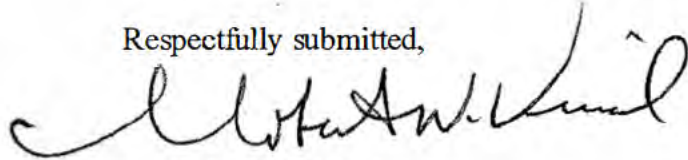
Finally, the fact that Respondent was assigned to the Crime Unit and was seeking to apprehend perpetrators of violent crimes not perform VTL enforcement,⁵ is irrelevant to this vehicle stop since the Court of Appeals has held that the validity of a traffic stop is evaluated based on whether the stopping officer had reason to believe that the driver had

⁵ Although the CCRB attorney argued that the fact that Modeste was not issued a summons for excessive tinting shows that Respondent knew that the stop of the Lexus was improper, it is not disputed that Respondent and Weibert were tasked with apprehending perpetrators of crimes, not serving VTL summonses. Respondent's testimony that he gave Weibert the discretion to decide whether he wanted to issue a summons is consistent with their assigned duties that day.

committed a traffic violation without regard to the primary motivation of the officer or an assessment that a reasonable traffic officer would have made the same stop. Thus, where the police have stopped a vehicle for a valid reason, the stop will be upheld without regard to the reason for the stop.⁶

In conclusion, since CCRB did not meet its burden of proving by a preponderance of the credible evidence that Respondent did not have sufficient legal authority to stop Modeste's Lexus, Respondent is found Not Guilty.

Respectfully submitted,



Robert W. Vinal
Assistant Deputy Commissioner - Trials

APPROVED

JUN 17 2014

WILLIAM J. BRATTON
POLICE COMMISSIONER

⁶ People v. Robinson, supra