POLICE DEPARTMENT CITY OF NEW YORK

July 27, 2017

MEMORANDUM FOR: Police Commissioner

Re: Detective Julio LaSalle
Tax Registry No. 936912
Gun Violence Suppression Division Zone 2
Disciplinary Case No. 2015-14549

Charge and Specification:

1. Said Detective Julio LaSalle, on or about January 27, 2015, at approximately 2000 hours, while on duty and assigned to Gang Squad Manhattan, in the vicinity of 26 Madison Street, New York County, engaged in conduct prejudicial to the good order, efficiency, or discipline of the Department, in that he stopped Person A without sufficient legal authority.

P.G. 212-11 – INVESTIGATIVE ENCOUNTERS/STOP

Appearances:

For the Department: Ji Jahng, Esq.
Assistant Department Advocate
Department Advocates' Office
One Police Plaza, 4th floor
New York, NY 10038

For the Respondent: Marissa B. Gillespie, Esq.
Karasyk & Moschella, LLP
233 Broadway-Suite 2340
New York, NY 10279

Hearing Date:
June 6, 2017

Decision:
Not Guilty

Trial Commissioner:
ADCT Robert W. Vinal

REPORT AND RECOMMENDATION

The above-named member of the Department appeared before me on June 6, 2017. Respondent, through his counsel, entered a plea of Not Guilty to the subject charge. The Assistant Department Advocate (the Advocate) called Detective James Cleary as a witness and offered the out-of-court statement of Person A. Respondent offered the out-of-court statement of Person B and 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 reviewing the evidence presented at the hearing, and assessing the credibility of the witnesses, Respondent is found Not Guilty.

FINDINGS AND ANALYSIS

Many of the facts regarding the incident that is the subject of this charge are not in dispute. It is uncontested that on January 27, 2015, Respondent was on duty, assigned to Gang Squad Manhattan, partnered with Detective James Cleary. They were dressed in plainclothes patrolling in an unmarked black Honda. Respondent was the operator. They were patrolling an area on the lower east side of Manhattan, within the confines of the 7th Precinct, where a stabbing incident had taken place the week before. At about 2000 hours, Respondent and Cleary exited their vehicle on Madison Street and engaged in an encounter on the street with Person A and Person B. At the end of this encounter, Person B was permitted to walk away and Person A was arrested for illegally possessing a box cutter.

Detective Cleary testified that as they were driving on Madison Street, two men who were walking together crossed the street in front of their vehicle. One was carrying a black plastic bag. Cleary did not recognize either of the men. Respondent directed Cleary's attention

to the two men and told him, "We're going to stop those two individuals." He could not recall whether or not Respondent had told him that he recognized one of the men. Respondent stopped their vehicle. As they were getting out of their vehicle, the two men picked up their pace, split up and began walking away from each other in opposite directions. The man who was carrying the plastic bag began walking in a northward direction and the other man began walking in a southerly direction. Cleary testified that either he or Respondent yelled "Stop!" Cleary followed one of the men and Respondent followed the other man. The two men were 20 to 30 feet apart when Cleary stopped the man he had followed. He frisked the man, but when he did not recover any weapon or contraband, he allowed the man to walk away. Cleary could not recall the man's name. Cleary testified that Respondent arrested the man he had followed, whose name Cleary learned was Person A.

Cleary confirmed that as a result of this incident he was issued a Schedule A Command Discipline (CD) [Department Exhibit (Dept. Ex.) 1]. He testified that it was his recollection that this CD only cited him for failing to make memo book entries regarding this incident. He signed this CD and accepted the offered penalty which was that he be warned and admonished.

On cross-examination, Cleary confirmed that Respondent was not his regular partner and that although he knew that Respondent was working on a gang investigation, he did not know the details regarding what Respondent was working on. Cleary acknowledged that he did not memorize what Respondent said to him when the two men crossed in front of their vehicle; that he does not presently recall the specific words Respondent used; and that Respondent may well have told him, "We're going to talk to those two individuals." Cleary confirmed that he did not see Respondent withdraw his firearm.

Person A,[1] at a recorded interview conducted at the Civilian Complaint Review Board (CCRB) on September 16, 2014 (Dept. Ex. 2) stated that on January 27, 2015, at about 2000 hours, he and his friend Person B were crossing the street after leaving a store when they saw a car make a U-turn and then come to a halt. A man "hopped out" of the car and told them, "Hey, stop, freeze!" Because this man "pulled out a gun" and "pointed the gun" at Person B, Person A began running away. When Respondent then "started coming after me," Person A continued running. He did not know that Respondent was "a cop" until after he stopped running and Respondent caught up to him and "finally says he's a cop."

Person A stated that he had forgotten that he was carrying a box cutter inside his pants pocket. He remembered that he had it in his pocket when Respondent asked him "You got any weapons in your pocket?" Respondent reached into his pocket, found the box cutter and arrested him. Person A explained to his interviewer that he always carries a box cutter with him when he goes outside because he has been "traumatized" ever since he was shot in the leg while outside. Respondent asked him whether he knew "anything about a kid named Person C that got shot in his hand off Fourth Street?" Person A told his interviewer that although he had answered Respondent's question by saying, "No," since Person C was a friend of his, he actually "kind of did know" about the incident in which Person C was shot in the hand. When Person A was asked by his interviewer whether he had any involvement or affiliation with any gangs, he answered "No."

Person B,[2] at a recorded interview conducted at CCRB on September 16, 2014 (Resp. Ex. A), stated that on January 27, 2015, at about 2000 hours, he and Person A were crossing the

[1] A transcript of Person A's CCRB interview was offered by the Advocate as hearsay evidence after he did not appear to testify at this trial.
[2] A transcript of Person B's CCRB interview was offered by Respondent as hearsay evidence after he did not appear to testify at this trial.

street when they saw a car make a U-turn and "come back around;" that two male officers "just hopped out the car and said stop right there." Person B stood still but Person A "chose to walk off." Person B asked why he had been stopped but he received no response. The shorter of the two officers searched Person B. Person A was brought back by the taller officer. Person B "wasn't clearly paying attention to what he was doing with Person A," but Person B saw him "put his hand in Person A's front pockets." Person B was allowed to leave but Person A was arrested because he had a box cutter in his pocket. Person B admitted that he "was a little high" during the encounter because he had smoked marijuana about a half hour before. Both officers asked if they had any weapons or any "weed." Person B did not see either officer take his gun out or point it.

Respondent testified that prior to commencing his assignment at Gang Squad Manhattan, he attended training courses regarding gang activity and how to recognize street behavior by a person that is indicative of being in possession of a weapon. As a result, on about a half dozen occasions, judges in New York County and Kings County have deemed him an expert regarding gang activity when he has testified at criminal trials. During April, 2014, he was the lead detective on an investigation into gang violence taking place on the grounds of Housing Developments located on the lower east side of Manhattan. His investigation revealed that the "Young Gunners" (YG) gang which operated out of the Smith Houses was engaging in "back and forth" acts of violence against their rivals, the "Everything Killa" (EK) gang which operated out of the Rutger Houses. He first heard of Person A on April 4, 2014, when Person A was the victim of a nonfatal shooting. While assisting the detective who was assigned to investigate this shooting, Respondent learned that Person A was a YG gang member. On November 7, 2014, Person C, another YG gang member, was the victim of a nonfatal shooting. By monitoring social media sites, Respondent discovered that Person A

and Person C were friends. On November 8, 2014, Person A sent a message to Person C on Facebook in which Person A indicated that the shooter was going to get what is coming to him, which Respondent interpreted to mean that the YG gang would retaliate against the shooter.

Respondent testified that although he never had any personal contact with Person A prior to January 27, 2015, when he saw him crossing the street in front of his car he recognized him from his photo in the Gang Unit's YG file. He did not recognize Person B. Respondent testified that he saw Person A nudge Person B and mouth the words, "It's the police" to Person B, and that he then saw that Person A "placed something in his front jacket pocket with his right hand." Respondent told Cleary, "I would like to take another look at this guy." As Respondent made a U-turn, he saw that Person A was continually looking over his shoulder at the car. Respondent pulled the car up next to Person A and Person B, got out, and stated, "Police. Can I talk to you for a second?"

Respondent testified that Person B stood still but that Person A "began to blade his body away from me" in that he "turned his back to me" and concealed the right side of his body where Respondent had seen him place something in his right front jacket pocket. When Person A moved a few steps away, Respondent repeated, "Police. Can I talk to you for a second?" Person A then stood still. Respondent approached him and asked, "Did you just put something in your pocket?" Person A replied, " It's a razor. I carry it for my protection." Respondent placed his hand on Person A right front jacket pocket, felt a hard object, put his hand into the pocket and removed a razor blade. He then handcuffed Person A and arrested him for the misdemeanor crime of possession of a dangerous instrument.

which Person A pleaded guilty to when he appeared in Criminal Court. Respondent confirmed that he had not seen a bulge in the pocket from which he removed the razor blade.

Analysis

Respondent is charged with having stopped Person A on January 27, 2015, without sufficient legal authority. The charge cites to "Patrol Guide Procedure No. 212-11, Investigative Encounters/Stop." However, no Patrol Guide Procedure entitled "Investigative Encounters/Stop" existed on January 27, 2015. The version of Patrol Guide Procedure No. 212-11 that was in effect on January 27, 2015 was entitled "Stop and Frisk."[3] Thus, Respondent's actions on January 27, 2015 must be evaluated in light of the definitions and information contained in that now-replaced Patrol Guide Procedure.[4] Under Patrol Guide Procedure No. 212-11 "Stop and Frisk," the term "Stop" was defined as "(t)o temporarily detain a person for questioning."[5]

I find that based on the record here, the Advocate did not meet his burden of presenting credible evidence which proved by a preponderance of the credible evidence that Respondent engaged in actions on January 27, 2015, which violated Patrol Guide Procedure No. 212-11 "Stop and Frisk."

Since Person A and Respondent have offered different versions of their encounter on January 27, 2015, a determination must be made as to whether the statements made by Person A

[3] Patrol Guide Procedure No. 212-11 "Stop and Frisk" was not suspended and replaced until September 21, 2015. See Interim Order No. 62 which was issued on Sept. 16, 2015. The present Patrol Guide Procedure No. 212-11 entitled "Investigative Encounters: Requests for Information, Common Law Right of Inquiry and Level 3 Stops" went into effect on April 25, 2017.

[4] The Definitions section of the present "Investigative Encounters" Procedure provides uniformed members with far more information and guidance regarding what actions constitute a stop under the New York Court of Appeals' decision in *People v. DeBour* and the United States Supreme Court's decision in *Terry v. Ohio*.

[5] Patrol Guide Procedure No. 212-11 "Stop and Frisk" (effective Aug. 1, 2013) – DEFINITIONS.

at his CCRB interview, which were offered by the Advocate as hearsay at this trial, are more credible than the trial testimony offered by Respondent. With regard to the statements made by Person A at his CCRB interview, although hearsay is admissible at Department disciplinary trials and may form the sole basis for making findings of fact,[6] even where hearsay testimony is supported by circumstantial evidence it may be insufficient to support a finding of guilt in a disciplinary trial.[7] I find that Person A's hearsay does not constitute sufficiently reliable evidence for the following reasons.

Person A made statements during his CCRB interview that were internally inconsistent and were inconsistent with what his friend Person B told CCRB. At the beginning of his interview, Person A told his CCRB interviewer that it was as soon as he saw Respondent's partner Cleary "hop out" of their vehicle alone and "pulled out the gun" and "pointed that gun at" Person B, Person A immediately "started running." (Dept. Ex. 2 p. 4-5). However, later during his interview, Person A asserted that it was not until he saw "the other one (Respondent)" exit the vehicle and "come up" that he first "started running." (Dept. Ex. 2 p. 27-28). As a result of Person A's inconsistent descriptions regarding at what point he began to run, his CCRB interviewer told him, "I'm a little confused." (Dept. Ex. 2 p. 27).

Also, Person A's consistent claim that he "started running" away is inconsistent with Person B's statement to CCRB that Person A did not run away but rather "chose to walk off" (Resp. Ex. A p. 3), and Person A's claim that Cleary "pulled out the gun" and "pointed that gun at" Person B is inconsistent with Person B's statement to CCRB that he did not see either officer with a gun out or pointing a gun. (Resp. Ex. A p. 23-24).

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[6] RCNY Title 38. 15-04 (e) (1).
[7] Eppler v. Van Alstyne, 93 AD2d 930, 462 NYS2d 320, 1983 NY App Div LEXIS 17824.

Person A's veracity must also be examined in light of the fact that he admitted to his CCRB interviewer that he had lied to Respondent. He stated that Respondent had asked him, "You know anything about a kid named Person C that got shot in his hand off Fourth Street?" Person A admitted to his interviewer that he had replied to Respondent's question by merely saying, "No," even though the truth was that Person C was his "friend, so like, I kind of do" know about the incident Respondent was asking him about. (Dept. Ex. 2 p. 8).

Most significantly, when the interviewer asked Person A, "And do you have any involvement with any gangs, any affiliations of gangs?" he replied, "No." (Dept. Ex. 2 p. 41). Respondent offered extensive testimony citing information he had accumulated that showed that Person A was a member of the YG gang. Since the Advocate offered no evidence to refute Respondent's claim, his testimony was unchallenged. Since Person A did not appear to testify at this trial, Respondent's attorney did not have the chance to cross-examine him using the information Respondent had collected, specifically the promise-of-retaliation Facebook message that Person A sent to Person C after he was shot.

That Respondent's attorney was denied this opportunity is not insignificant because the United States Supreme Court has noted that, "In almost every setting where important decisions turn on questions of fact, due process requires an opportunity to confront and cross-examine adverse witnesses."[8] Here, Respondent's attorney did not have the opportunity to attempt to impeach Person A, and thereby establish that he was not worthy of belief. by testing his claim that he was not involved with or affiliated with YG or any other gang.

Moreover, the believability of Person A's claim that he was not carrying the box cutter in his hand must also be questioned based on his claim that he had completely forgotten

[8] Goldberg v. Kelly, 397 US 254, 269.

that he was carrying a box cutter inside his pants pocket and that he only remembered that it was in his pocket after Respondent asked him "You got any weapons in your pockets?" Person A's claim that he had forgotten that he was carrying a box cutter inside his pants pocket is inconsistent with his assertion to his interviewer that "I always walk with that (the box cutter)" because "I'm traumatized" as a result of having previously been shot in his leg.

Based on the above, I find that Person A's hearsay statements do not constitute evidence which is sufficiently reliable to support a finding of guilt.

The only other evidence offered by the Advocate was Cleary's testimony and the CD that Cleary signed (DX 1). Although on direct examination, Cleary recalled that Respondent told him, "We're going to stop those two individuals," on cross-examination Cleary acknowledged that he does not recall the specific words Respondent used and that Respondent may have said, "We're going to talk to those two individuals." Moreover, Cleary did not assert that it was Respondent who had yelled at the two men to "Stop!" Cleary testified that he may have been the one who yelled "Stop!"

As to the Schedule A CD that Cleary signed (DX 1), the Details section alleges that Cleary violated "Patrol Guide Procedure No. 212-11 Investigative Encounters" by questioning, frisking and searching Person B; failing to prepare a UF 250 report; and failing to make a memo book entry regarding Person B. However, Cleary testified that when he signed this CD, he did not believe that he was conceding that he had improperly questioned, frisked and searched Person B because he was told that the CD was only for improper memo book entries (Tr. p. 32-33). Nonetheless, even if Cleary committed all of the violations listed in the CD, these violations do not include a charge that he illegally stopped Person B and Cleary's admissions regarding what he

did to Person B do that prove that Respondent violated Patrol Guide Procedure No. 212-11 "Stop and Frisk" by improperly stopping Person A.

Based on the above analysis, I find that the evidence presented by the Advocate on his direct case was insufficient to support a finding of guilt.

However, the Advocate argued that Respondent's own testimony regarding this incident establishes that he illegally stopped Person A. The Advocate asserted that Respondent forcibly stopped Person A before Respondent even got out of his car and before Respondent said anything to Person A. The Advocate argued that Respondent's action of making a U-turn, after he and Person A had made eye contact with each other, and then parking his car "right next to" Person A by itself constituted "a forcible stop" and detention. The Advocate opined that Respondent' s vehicular maneuvering alone "would make a person reasonably believe that he is the focus of the investigation" and that "under these circumstances a person would reasonably believe that he was not free to disregard the police officer and walk away ... " (Tr. p.111-112).

I could subscribe to the Advocate's argument if Respondent had stopped his car directly in front of Person A thereby impeding his ability to continue walking in the direction he was moving. However, it is not disputed that Respondent did not do this and the Advocate offered no case law to support his claim that an officer who merely parks his car next to a person has thereby engaged in a forcible stop of the person. Therefore, I reject the Advocate's argument that Respondent engaged in a stop of Person A by parking his car next to Person A.

The Advocate also argued that even if Respondent's entire testimony is credited, he did not have a sufficient basis to lawfully ask Person A the question that Respondent admits

he asked him: "Did you just put something in your pocket? " (Tr. p. 112-115). However, I find that Respondent did have a sufficient basis to lawfully ask Person A this question based on a combination of: 1) What he knew about Person A and the area he was walking in; and 2) Respondent's interpretation of Person A's physical movements based on Respondent's training and experience.

With regard to the first factor, Respondent offered unrefuted testimony that on January 27, 2015, he was aware that: Person A was a member of the YG gang and had been the victim of a shooting; that on November 7, 2014, Person C, another YG gang member, was the victim of a shooting in the same area; that on November 8, 2014, Person A sent a promise-of-retaliation Facebook message to Person C; and that members of the YG gang were known to carry weapons in that area because they were involved in a street war with a rival gang.

With regard to the second factor, Respondent offered unrefuted testimony regarding his extensive training and his experience in recognizing physical movements that are consistent with a person attempting to hide that he is carrying a weapon and that Person A exhibited these furtive movements by: placing something in his front jacket pocket with his right hand; by continually looking over his shoulder at Respondent; and, most significantly, by blading his body away from Respondent and turning his back to Respondent thereby concealing the right side of his body where Respondent had seen him place something in his right front jacket pocket. Under these circumstances, I find that Respondent was justified in approaching Person A and asking him, "Did you just put something in your pocket?"

The Advocate cited to several appellate decisions where police stops were found to have been conducted in the absence of reasonable suspicion. However, in each of those cases the

court found that the pre-stop conduct of the person who had been stopped was either totally innocuous or readily susceptible of an innocent interpretation. (Tr. p. 117-119). Since I credit Respondent's testimony that Person A engaged in furtive movements consistent with trying to hide a weapon including blading his body away from Respondent and turning his back to Respondent to conceal the right side of his body where Respondent had just seen him place something in his right front jacket pocket, the facts presented here differ from the facts presented in the appellate decisions cited by the Advocate.

The facts presented here also differ from the facts presented in a prior disciplinary decision, *Case Nos. 2014-11787 & 2014-11788* (signed Oct. 13, 2015), where two police officers who stopped a person because they were concerned that he might be carrying an illegal gravity knife were found guilty of having failed to comply with the provisions of Patrol Guide Procedure No. 212-11 "Stop and Frisk," in that they performed the stop without sufficient legal authority. In those cases, unlike here, the person who was stopped testified at the trial and the Trial Commissioner found his testimony to be credible. Moreover, the Trial Commissioner in that case found that neither of the officers provided enough factual detail during their testimonies to establish reasonable cause for the stop.

In a recent appellate decision where the facts are similar to the facts presented here, the Appellate Division Fourth Department ruled that a police officer had properly demanded that a suspect the officer had approached on the street show his hands. In that case, the court found that the officer's personal observations of the man's furtive and suspicious movements; "the officer's training and his experience in investigating weapons possession crimes;" and his personal knowledge that the area was "a high crime area known for gang activity" where assaults

and shooting incidents had recently taken place; all combined to "provide the requisite founded suspicion for the officer to command defendant to show his hands." [9]

In conclusion, I find that based on the specific factual situation presented here, the Advocate did not meet his burden of proof. Therefore, Respondent is found not guilty.

Respectfully submitted,

Robert W. Vinal
Assistant Deputy Commissioner Trials

APPROVED

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JAMES P. O'NEILL
POLICE COMMISSIONER

[9] *People v. Simmons*, 2017 N.Y. App. Div. LEXIS 3262 (April 28, 2017) at pages 2-3.