



POLICE DEPARTMENT

November 5, 2008

MEMORANDUM FOR: Police Commissioner

Re: Police Officer David Barker
Tax Registry 926545
69 Precinct
Disciplinary Case No. 83731/08

The above-named member of the Department appeared before me on July 29, 2008, charged with the following:

1. Said Police Officer David Barker, assigned to the 69 Precinct, while on duty, at about 1641 hours on September 2, 2006, at 274 Stanley Avenue, Kings County, did abuse his authority as a member of the New York City Police Department in that he wrongfully and without just cause searched the vehicle of an individual known to this Department: to wit, said Police Officer took a wheelchair out of the back seat of said individual's car.

PG 203-10 – PAGE 1 – PARA 4 ABUSE OF AUTHORITY

2. Said Police Officer David Barker, assigned to the 69 Precinct, while on duty, at the date, time and location in Specification #1, did abuse his authority as a member of the New York City Police Department in that he damaged the property of an individual known to this Department: to wit, said Police Officer threw said individual's wheelchair on the ground causing it to break.

PG 203-10 – PAGE 1 – PARA 4 ABUSE OF AUTHORITY

3. Said Police Officer David Barker, assigned to the 69 Precinct, while on duty, at the date, time and location in Specification #1, did abuse his authority as a member of the New York City Police Department in that he wrongfully and without just cause searched an individual known to this Department: to wit, said Police Officer put his hands inside said individual's pockets.

PG 203-10 – PAGE 1 – PARA 4 ABUSE OF AUTHORITY

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4. Said Police Officer David Barker, assigned to the 69 Precinct, while on duty, at the date, time and location in Specification #1, did abuse his authority as a member of the New York City Police Department in that he refused to provide his name and shield number to an individual known to this Department.

PG 203-09 – PAGE 1 – PARA 4 ABUSE OF AUTHORITY

5. Said Police Officer David Barker, assigned to the 69 Precinct, while on duty, at the date, time and location in Specification #1, was discourteous to an individual known to this Department: to wit, said Police Officer told said individual to, “Shut the hell up and get your ass back in the car.”

PG 203-09 – PAGE 1 – PARA 4 PUBLIC CONTACT

The Department was represented by Nancy Lichtenstein, Esq., Department Advocate’s Office, and the Respondent was represented by John Tynan, Esq.

The Respondent, through his counsel, entered a plea 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

The Respondent is found Guilty of Specification No. 4, and Not Guilty of Specification Nos. 1, 2, 3 and 5.

SUMMARY OF EVIDENCE PRESENTED

The Department’s Case

The Department called Leonard Lovitt as a witness and offered the out-of-court statements made by Jeffrey St. Cloux to the Civilian Complaint Review Board (CCRB)

investigator, on September 22, 2006; the tape and transcript were admitted into evidence under Department's Exhibit (DX) 1 and 1A, respectively.

Leonard Lovitt

Leonard Lovitt, the complainant in this case, is employed by the W Hotel. He has worked there for the past eight years in the accounting and customer service departments.

At 1:00 p.m. on September 2, 2006, Lovitt was at his residence with some friends planning to go to Stanley Avenue in East New York in order to pick up cologne before going to a barbeque that day. At approximately 1:10 p.m., Lovitt left his residence with his friends and got into a car driven by Dante McClellan (McClellan). Lovitt sat in the front passenger seat next to McClellan. Also riding in the vehicle were Keith Jones and Jeffrey St. Cloux.

The group pulled into a parking lot at Stanley Avenue in Brooklyn and Lovitt noticed a black car behind them which he later learned was the police. At one point, two police officers got out of the unmarked black car and approached the vehicle that the group was in. Lovitt stated, "There was one heavyset officer, bald head, then there was a thinner officer, also bald head, both of them African American." The officers knocked on the window of the vehicle and instructed St. Cloux and Jones to "get out of the vehicle."

Lovitt described McClellan's car as a small, white, old, two-door LeBaron. He stated that Jones and St. Cloux were in the back seat of the vehicle, with Jones seated behind the driver. The officers ordered Jones out of the vehicle, and Lovitt noted that "the seat had to pull up" to allow the passengers in the back seat to exit the vehicle.

McClellan exited the vehicle first and spoke with the "thinner African American officer," as he was the one who asked for her license. Then the "heavier African American officer with the bald head ordered the two guys out of the back."

Jones exited first, and the officer "led him to the back, searched him, put his hands in his pockets, gave him a pat down, finished with him." At this time, Lovitt and his friends asked the officers "Why are you messing with us; why are you stopping us; what are you doing?" Lovitt also explained that his wheelchair was a collapsible model "the wheels come off, the back folds down, it comes down." He stated that it was in the back seat between Jones and St. Cloux.

The officer, who was on the driver's side with his body in the vehicle, then asked St. Cloux who was sitting behind Lovitt, to exit the vehicle. The officer, however, "couldn't get to Jeffrey [St. Cloux]," and he began "pulling on my wheelchair, real hard pulling on it." Lovitt then asked the officer to "please stop pulling on my wheelchair," specifying that he was speaking to the heavyset African American bald officer. He stated that the officer was yelling at St. Cloux, instructing him to exit the vehicle. "He got the wheelchair out of the car, tossed it to the side on the floor, grabbed [St. Cloux] by his shirt and pulled him around the vehicle to give him his pat down."

Lovitt further explained that both officers "were African American, both were bald. One was thinner than the other. The thinner one was with [McClellan]...[who] presented him the driving license, and the other heavier bald-headed officer was in the vehicle." Lovitt was then asked by the Court if he saw the officer in question in the courtroom and he replied, "Well I can't say 100 percent that is the officer that's sitting

right here, [indicating the Respondent] but he looked very familiar from what I remember. I cannot say 100 percent.”

Lovitt was further asked by the Court, “I want to make it clear. Is it true that you cannot identify anyone in this courtroom with any degree of certainty as the officer who was doing these acts, pulling the wheelchair out, searching your friend, all those things, with any degree of certainty; you cannot identify any person in this courtroom as that officer; is that right?” Lovitt responded, “Right, right.”

Lovitt during questioning was again referred to the “heavy set officer” and he testified that the officer pulled St. Cloux out of the car with one hand on St. Cloux’s shirt and the other hand on his gun. Lovitt stated that the officer was more violent with St. Cloux because St. Cloux “wouldn’t shut up. Since [St. Cloux] wouldn’t shut up, the officer raised his voice.” Lovitt added that “Once they [St. Cloux and the officer] got to the back, I heard a banging on the trunk. I am looking back, I see Jeffrey’s chest hits the car. The officer is going through his pockets yelling at him, telling him to ‘shut up, shut up.’” Lovitt further explained what the officer was doing by stating that he was “putting his hands in Jeffrey’s pockets to see if there in anything in there. He was putting his hands in Jeffrey’s pockets.” Lovitt further clarified that he could only see St. Croux’s jacket pockets “because Jeffrey is kind of short. From the back trunk, I can see him putting his hands in Jeffrey’s upper jacket pocket.”

At that point Jones returned to the vehicle, as he had left to enter the building in order to retrieve Lovitt’s PBA card. Jones took Lovitt’s wheelchair and attempted to help him reassemble it, but Lovitt noticed that the back of the wheelchair was broken. Lovitt still presently has this wheelchair but has since replaced the back. He indicated which

part of the wheelchair had fallen off. He stated that "There are pegs on my wheelchair....It keeps it in place so it can rest on the two bars when I take it apart....There is no screws or anything to hold it. It's some kind of -I don't know. It wasn't there anymore. When we got in the vehicle, it was on there. Once he tossed it to the side, and me and Keith [Jones] was putting it back together, I noticed that I couldn't put it back in the slots no more because it wasn't there, it wouldn't hold anymore." Lovitt stated that he was still able to sit in the wheelchair on the day of the incident, but "without the back being the way it is right now."

Lovitt explained that he was angry with what had transpired, and so he "threw [his] hands up out of frustration, [and stated] 'Okay, just give me your badge number and your name.'" At this point the thin officer had finished with McClellan and the "heavier set officer that searched Keith and Jeffrey and threw my wheelchair to the ground, they were finished, they were finished with us, so they started walking back to the car. I said 'Excuse me, can I have your name and badge number?' He told me to shut up. The heavy set officer, bald headed African American told me to shut up, 'Shut up and get back in your car.'"

Lovitt testified he then dialed 911 on his cell phone in order to speak to the officer's supervisor. During the incident, nobody was arrested or issued a summons, and Lovitt did not file a civil lawsuit regarding the incident. Lovitt had never filed a complaint with CCRB prior to this incident.

On cross-examination, Lovitt testified that the entire encounter lasted ten minutes at most. Lovitt affirmed that the passenger side door was open, and denied that there was any damage to the doors of the car. Lovitt explained that he got into the car by opening

the door, putting his legs inside and jumping into the car. He then stated he could not recall if there was any damage to the lock on the door, adding that his friends opened the door for him. Lovitt could not remember if there was any damage to the steering column of the vehicle.

Lovitt met McClellan a year ago, and stated that she was "very short." He specified that she was "5'5" maybe," and small in stature with short hair. Lovitt acknowledged that it was raining that day, but could not recall if McClellan was wearing a jacket. He explained that his family lived in the Brookline housing development for thirty years and he was parking in "the family's courtyard parking lot" off of Stanley Avenue.

Lovitt described the parking lot, stating that there were twenty spaces in two rows. The lot was almost empty with approximately two other cars in the lot. He had been in the car with the other passengers before, and stated that they have since driven back to the parking lot many times.

Lovitt testified the officers were in uniform when they approached their vehicle and that one of the officers had his hand on his firearm the entire time. He explained that the officers never opened the passenger side door, and added that both Jones and St. Cloux got out on the driver's side. Lovitt stated that the officers never searched him, touched him, or asked for his identification. He indicated that St. Cloux was behind him, and acknowledged that St. Cloux would have had to "squeeze out" in order to exit through the passenger side door. Lovitt also explained that McClellan got out of the vehicle and stepped aside to give the thin bald-headed African American officer her license, registration, and insurance.

Lovitt further acknowledged that Jones and St. Cloux were taken to the back of the car after exiting through the driver's side door. Lovitt had turned around and was watching the officers and the other passengers through the rear window. He indicated that it was raining "on and off," but that it was not raining when Jones and St. Cloux exited the vehicle.

Lovitt stated that the officers were still at the scene when he called 911 and that the officers never tried to prevent him from making the call. He explained that the officers were in a large black Chevy Impala with tinted windows and that they were seated in the vehicle when he called 911. The officers remained in the parking lot for five to ten minutes after the incident, but left before the patrol supervisor arrived.

Thereafter, a sergeant arrived with his driver, but Lovitt was unable to recall the sergeant's name. He showed the sergeant the damage to his wheelchair, and stated that he was not provided with any paperwork.

Interview of Jeffrey St. Cloux

Jeffrey St. Cloux was interviewed by CCRB investigators on September 22, 2006, but he did not appear to testify at trial. The Assistant Department Advocate (Advocate) informed this Court that she had called him and left a message on his voicemail but he did not return her call. The Advocate also sent him a letter informing him of the trial date, but she has not heard from him. In addition, Department investigators from the Litigation Support Unit personally served St. Cloux with a subpoena and sent a copy by mail. St. Cloux has not responded to any attempts to reach him and it is therefore

apparent that he did not wish to participate in this trial. His hearsay statement was admitted into evidence under DX 1 and 1A.

St. Cloux told CCRB investigators that at approximately 12:00 p.m. or 1:00 p.m. on September 2, 2006, the car he was riding as a passenger in pulled into a parking lot. A police vehicle was already present in the lot and McClellan, the driver, pulled into a parking spot "right behind them." He stated that the police officers approached their car from both sides with their hands on their guns. They told McClellan to get out of the car and indicated that the car "looked stolen." McClellan gave the officers her license and registration, who then ran a check on the vehicle.

The officers then asked Jones, who was seated next to St. Cloux, to get out of the vehicle. They searched Jones and proceeded to direct Lovitt to exit the vehicle. Lovitt indicated that he was handicapped and could not get out, so the officers asked St. Cloux to step outside instead. One of the officers began pulling on Lovitt's wheelchair in order to remove St. Cloux from the vehicle, and Lovitt told the officer that pulling on the chair would break it. "That's when [the officer] told Lovitt be quiet, shut up and stuff. So he grabbed the chair out and threw it on the floor on the driver's side."

St. Cloux then got out of the vehicle and the officer grabbed him and pushed him to the trunk of the car. St. Cloux stated, "[H]e slammed my face on the side, on the side of the trunk and he began to search me. So that's when I was talking to him is all this necessary. He's telling me to shut up, be quiet." After completing the search, the officer released St. Cloux who helped Lovitt fix his wheelchair. Lovitt then called "the precinct or Internal Affairs" and the officers got in their car and left. St. Cloux added that Lovitt

asked the officers for their badge numbers, but the officers "just said be quiet, get back in the car, shut up, being real disrespectful."

St. Cloux explained that he was in the backseat behind Lovitt, who was in the front passenger seat. He added McClellan was driving and Jones was in the rear seat next to him. They were going from Lovitt's house to Jones' house in McClellan's old white two-door Chevy or Ford car which did not have any tinted windows. They did not make any stops on the way.

He stated that the officers were in a black Impala which had tinted windows and their encounter with the officers began two to five minutes after they entered the parking lot. According to St. Cloux the officers approached after McClellan had parked and turned off her vehicle. One approached on the driver's side and the other was on the passenger's side. St. Cloux described the one on the driver's side, stating, "He was maybe about 6'2", almost 220, they both was bald headed...[with] a real caramel complexion." St. Cloux then described the officer on the passenger side, saying, "He's like about 6'4", about 240 maybe, he had a bald head and he was a little bit darker." St. Cloux acknowledged that the officers were both African American, and explained that the one on the driver's side initially told them that the car looked stolen.

St. Cloux further stated that the officer on the driver's side then asked McClellan to exit the vehicle while the officer on the passenger's side was just standing there. St. Cloux thought he was trying to ensure that nobody exited on the passenger side, but added "that door was messed up so no one could leave that door cause it was jammed." He also added that he believed that was why the officers thought the car was stolen, as somebody had previously tried to break into McClellan's car and like the door that you

pull open it was pulled, it did look like somebody stole the car.” St. Cloux stated that the officers never made any statements regarding why they thought the car was stolen and explained he was merely making assumptions as to why they were stopped.

St. Cloux further told investigators that McClellan’s window was closed, and the officer opened the door when he asked her to exit the vehicle. She got out on the driver’s side and gave her license to the officer on that side. Then the police officer on the passenger’s side walked to the driver’s side and asked Jones to step out of the vehicle. The officer took Jones to the back of the vehicle “to the trunk” but St. Cloux “couldn’t look back because the next cop came in and then...Lovitt was talking and telling him is this all necessary, this and that and then the cop was like ‘sit there be quiet, shut up.’”

During the course of the interview, the CCRB investigators referred to the officer who was originally on the driver’s side as “P.O. One.” The officer who was originally on the passenger’s side was referred to as “P.O. Two.” St. Cloux stated that P.O. Two was telling them to shut up, while P.O. One was searching Jones on the trunk of the car behind St. Cloux and he could not see what was happening because “they was behind me, so I didn’t get to look back...he came in, like he stuck his head in the car and was telling us to be quiet.”

P.O. One, the officer originally on the driver’s side, then asked St. Cloux to exit the vehicle. The wheelchair, however, was in between St. Cloux and the officer, “so that’s when he proceeded to grab the chair and shaking, like, trying to pull it out.” He stated that this officer was in the car up to his waist “trying to grab the chair.” He stated that Lovitt then told the officer “you’re going to break my chair, can you please stop doing that and then he proceeded to say ‘shut up’ again ‘sit there and be quiet.’” When

the officer got the chair out of the car he threw it on the ground. St. Cloux then stepped out of the car and P.O. One "slammed" St. Cloux on to the trunk. St. Cloux acknowledged that the officer did not have any contact with him prior to throwing him on the trunk.

St. Cloux explained that the wheelchair was between him and the driver's side door, and so the wheelchair had to be removed from the car before he could exit the vehicle. P.O. One grabbed St. Cloux by the shoulder, arm, and shirt while slamming him on the trunk. St. Cloux's face and chest hit the trunk first, and the officer then proceeded to search him. P.O. One patted him down, and St. Cloux indicated that the insides of all four pockets on his pants and both on his jacket were searched. St. Cloux stated he had nothing in his pockets.

While St. Cloux was being searched, Jones went into his residence. When he returned Lovitt asked him to help him assemble his wheelchair and then called Internal Affairs or the precinct. P.O. Two was still on the driver's side while St. Cloux was being searched. Just prior to calling the precinct or Internal Affairs, St. Cloux stated that Lovitt asked "both" officers for their badge numbers, but the officers only told him "No, shut up, go back in the car, sit down, be quiet...." According to St. Cloux, the officers waited for Lovitt to make the phone call "to see who he was talking to" and then left the parking lot while Lovitt was on the phone.

After the officers left, approximately two minutes later a sergeant arrived at the scene. St. Cloux did not know who the sergeant was, but knew he was a sergeant because Internal Affairs had told Lovitt a sergeant was responding to his location. The sergeant

never exited his blue and white van. He was on the passenger side, and St. Cloux stated that he never got a good look at the sergeant's face.

St. Cloux indicated that the two officers that searched them were in uniform. He also explained that the officers were touching their guns in their holsters, but specified they never drew their firearms.

St. Cloux could not positively identify the officers when investigators showed him two separate photo arrays during his interview.

The Respondent's Case

The Respondent called Police Officer Kevin Savary as a witness and testified in his own behalf.

The Respondent

The Respondent is an eight year member of the Department currently assigned to the 69 Precinct. In September 2006, the Respondent was working with Police Officer Savary as his partner. Prior to September 2, the Respondent had made "a lot" of arrests in the 69 Precinct, including arrests for grand larceny of an automobile. He also received training from the Police Academy regarding the detection of stolen vehicles.

On September 2, 2006, the Respondent stated that he was in uniform and driving a black unmarked Chevrolet Impala. On that day he observed a white Chrysler LeBaron in the parking lot of 274 Stanley Avenue, the Brookline housing development.

The Respondent had just finished conducting "verticals" in a housing development when he observed the LeBaron pull into the nearly empty parking lot. It

appeared to the Respondent that there was a "fourteen or fifteen-year old male driving the vehicle" due to the person's short stature and short hair. He added that there was a hooded sweatshirt or some kind of covering over the driver's head. The Respondent stated, "As the vehicle pulled in, the vehicle pulled into one parking spot, the vehicle backed out, went into another location, backed out, went into another location. Then finally it came and parked maybe two car parking stretches directly in front of our vehicle." The Respondent could not remember if the final parking spot the car chose was a handicapped space or not.

At that point the Respondent said to Savary, "GLA," indicating the grand larceny of an automobile. He made this determination based upon the seemingly inexperienced driver and the fact that the door handle on the passenger side was broken. The Respondent explained that it appeared as if somebody had tampered with the door using a screwdriver to create a hole, which indicated to him that the vehicle may be stolen.

The Respondent and Savary exited their vehicle and approached the LeBaron, with Savary on the driver's side and the Respondent on the passenger's side. The Respondent testified that his gun was not drawn. As they approached the vehicle, the Respondent stayed more toward the rear of the vehicle than Savary in order to prevent creating crossfire between the two in the event they needed to use their firearms.

The Respondent explained that a car stop is extremely dangerous for police officers, and added that as he approached the LeBaron looking at its occupants he noticed the ignition column was broken. He said, "The whole entire system was ripped out and it was basically shoved back in place because the vehicle was stolen before and that part of

the ignition was never completely replaced, it was pushed back in, broken and all.” The Respondent stated that the ignition column did have a key in it.

The Respondent signaled to his partner that he saw a damaged ignition. They began to have the occupants of the LeBaron exit the vehicle due to their increased suspicion that the vehicle was stolen. The Respondent did not open the passenger’s side door because he saw a wheelchair by the door. The Respondent clarified that the wheelchair was not between the two passengers in the back seat but directly behind the front passenger’s seat where Lovitt was seated.

The Respondent testified that he and Savary “moved to get the two individuals out of the back seat through the driver’s side.” At this point they felt they had a stolen vehicle, and the Respondent explained he did not wish to allow his partner to be overwhelmed by anyone exiting the vehicle. The Respondent determined that Lovitt needed the wheelchair through observation of the “men in the rear, they were able to move their legs and putting together the whole scene you could tell...he needed the wheelchair.” Neither the Respondent nor Savary needed to enter the back of the vehicle in order to remove the passengers in the back seat.

Once the passengers had exited the vehicle, the Respondent stated “We frisked their garments.” He explained that frisking involved placing his hands over a suspect’s clothing and searching for dangerous objects such as a firearm. The Respondent testified that he never placed his hands in either Jones’ or St. Cloux’s pockets. The Respondent also testified Savary spoke with McClellan most of the time and they determined that McClellan was a female after hearing her soft voice and seeing her identification.

After frisking Jones and St. Cloux, the Respondent and Savary moved them to the rear of the vehicle. "One of them wandered off," but the Respondent wanted to stay with his partner rather than chase the individual. McClellan indicated to the officers her vehicle had been stolen in the past, and also informed them that her mother was a police officer and showed him her PBA card. The Respondent and Savary explained to her the reasons why they stopped her vehicle.

Approximately six minutes had elapsed from the time the car pulled into the parking lot until the time they explained to McClellan the reason for the stop. The Respondent testified that the event was "cooling down" at that point as they had determined the car was not stolen, although experience and training taught him not to let his guard down. The Respondent spoke to McClellan's mother on the telephone and explained to her why they stopped her daughter's vehicle.

The only interaction the Respondent had with Lovitt occurred after Lovitt, helped by one of the male passengers, exited the vehicle. He stated that Lovitt "was nasty, 'What the F y'all stop me for? Y'all shouldn't have stopped us.' It was no need to have a conversation with him because he was nasty." He added that Lovitt "stepped out of the vehicle, put his wheelchair back together, sat in the wheelchair, sat back and got on the phone and began to dial someone. So at this point in time, we sat and we were sitting inside the car. We were trying to complete the vertical, do paperwork, do whatever else we were doing."

The Respondent also clarified the paperwork he was referring to was a UF-250 form, "Stop, Question and Frisk." The Respondent denied ever coming into contact with Lovitt's wheelchair, and explained he could not have pulled it out of the car because "if I

did reach inside the vehicle and pull the wheelchair out, I would have to reach back...I am on the driver's side. I would have to turn to pull the wheelchair out like this....I am right-handed officer. My gun is on this side. That puts me at a disadvantage where this person could take my firearm out and I would be shot in the back of the head....My firearm would be towards this person." He also stated that they never went in the trunk of the vehicle.

The Respondent testified they never used profane language toward Lovitt, St. Cloux, or Jones but explained he did remember instructing them to "'Get back in the vehicle, get back in the vehicle' because as you are pulling up, one of the persons, he walked away and went inside the building. I was not going to leave to go deal with him and leave my partner unattended."

The Respondent also testified that he was 5'7'' tall and the heaviest he has ever been in the past two years was 174 pounds.

On cross-examination, the Respondent reiterated that they approached the vehicle because it appeared to be operated by an unlicensed operator, and that it was subsequent to this that they made the observation with respect to it appearing stolen. He acknowledged that McClellan looked too young to be driving, and also cited her suspicious behavior in the parking lot of pulling in and out of various parking spots. The Respondent noted that the parking lot was an area of concern in the 69 Precinct because of drug activity and stolen cars that frequently are abandoned there.

The Respondent stated that in essence they were investigating the driver for a violent crime, stating that as they observed it was a felony car stop and they viewed it as a violent crime. The Respondent acknowledged that they initially investigated the car

because the driver looked inexperienced and then later investigated whether or not the car was stolen. The Respondent explained that grand larceny was “considered one of our seven majors. It’s a felony.”

Police Officer Kevin Savary

Savary is a six year member of the Department, assigned to the 69 Precinct. Savary stated that he is approximately 5’9” and weighs 152 pounds; he worked with the Respondent on September 2, 2006. He stated that on that date he was in the parking lot of 274 Stanley Avenue in Kings County. He testified that shortly after pulling into the parking lot, he and the Respondent observed a white two-door sedan enter the lot and pull into two or three different parking spaces before finally settling on a particular spot. The car “was driven by what seemed to be a very young person.” Savary was unable to determine the sex of the driver.

Savary and the Respondent decided to approach the vehicle. Savary approached on the driver’s side and observed four occupants and a wheelchair in the rear. Savary then requested “documentation for the vehicle” and McClellan’s drivers license. She then got out of the car. Savary testified that at some point the other occupants in the back seat also exited the vehicle. He stated that he could not see the steering column from the driver’s side to determine if there was any damage.

The Respondent, who was on the right side of the vehicle, indicated to him that there was damage to the steering column and passenger’s side door. They then used the computer in their police vehicle to run the sedan’s information and learned that “the insurance and everything for the vehicle was valid,” and so no tickets were issued.

Savary stated that he "didn't search anyone. I don't recall searching anyone." He also did not recall the Respondent removing the wheelchair or any other object from the car.

Savary testified that the wheelchair bound individual in the front passenger seat remained in the car for most of the incident. He stated that he did have some interaction with that individual, while speaking to the driver explaining that "there was someone in the vehicle who was making statements. They were very loud, verbally abusive. After looking into the car, I realized it was the front passenger and at that point I told him, 'Because of all the people in the car, I can't speak to everybody at the same time, so when I'm finished with the driver, then I will address whatever questions or anything that you want to ask.'"

Savary described Lovitt as, "He was very irate, didn't seem like he was too pleased. But there was a lot of obscene language, a lot of yelling." Savary said that he did not use foul language himself, but had to raise his voice to be heard over Lovitt's words. He indicated Lovitt never asked for his shield number or identification.

On cross-examination, Savary acknowledged that he previously indicated that he had no recollection of the Respondent removing the wheelchair from the car. He also acknowledged that one of the reasons they initially approached the car was because the driver looked young, and explained that as they approached they noticed indications that the car had been stolen. Savary further acknowledged they were not investigating a violent crime nor did they observe one in any fashion, and they did not have any information that would indicate somebody in the vehicle was about to commit a violent crime.

On re-direct examination, Savary indicated that grand larceny of an automobile is a felony.

FINDINGS AND ANALYSIS

Specification Nos. 1 and 2

The Respondent is charged with abusing his authority as a member of Department in that he wrongfully and without just cause searched the vehicle of an individual known to this Department: to wit, said Respondent took Lovitt's wheelchair out of the back seat of Dante McClellan's car. The Respondent is also charged with abusing his authority by throwing Lovitt's wheelchair on the ground causing it to break.

It is uncontroverted that the Respondent and his partner, Savary, were on patrol and in uniform and conducted a car stop of a vehicle operated by Dante McClellan, in which Lovitt was a passenger. The vehicle entered the parking lot of 274 Stanley Avenue in Brooklyn, where the Respondent and Savary proceeded to detain the driver and its occupants.

This Court deems the stop of McClellan's vehicle a lawful stop in that the Respondent observed her to appear to be an underage operator and conducted the stop for the purpose of ascertaining if McClellan was a licensed driver due to the undisputed fact that she was small in stature and appeared to be too young to possess a driver's license. The record also established that upon approach to the vehicle, the Respondent observed the vehicle to have indicia that it might be stolen. Namely, the passenger side door handle was broken in that it was "popped from underneath, someone punched a hole through it...it had no thing for the key to move the cylinder." The Respondent further

noticed that the ignition column had been "...ripped out and it was basically shoved back in place because the vehicle was stolen before and that part of the ignition was never completely replaced..." According to the Respondent, this particular parking lot was also an area prone for stolen automobiles.

The occupants of the vehicle were directed out of the vehicle by the Respondent and Savary. Lovitt claimed that the officer reached into McClellan's vehicle, "violently pulling on the wheelchair...got the wheelchair out of the car, tossed it to the side on the floor..." St. Cloux, during his CCRB interview stated that the officer "grabbed the chair and threw it on the floor on the driver's side."

The Respondent, in contrast, testified that he never had any contact with the wheelchair, and Savary testified that he did not recall him removing the wheelchair from the car.

An issue that must be addressed here is whether the conduct alleged by the Department would constitute a search under the law. While the exact location of Lovitt's wheelchair in the vehicle was not agreed upon, it is not in dispute that the wheelchair was in the vehicle and in the passenger cabin as opposed to a concealed, secured area such as the trunk. It is well settled that a search has occurred when "an expectation of privacy that society is prepared to consider reasonable is infringed" *Soldal v. Cook County*, 506 U.S. 56, 63 (1992). Additionally, it has been held that a Fourth Amendment search does not occur unless "the individual manifested a subjective expectation of privacy in the object of the challenged search" *Kyllo v. United States*, 533 U.S. 27, 33 (2001). Therefore, it appears that the mere action of removing a wheelchair, in plain sight, from the passenger compartment of a vehicle would not ordinarily

constitute a search. This is especially important where the record did not establish that Lovitt had a reasonable expectation of privacy in this instance as the vehicle did not belong to him, and he was merely a passenger in it. In fact McClellan, the vehicle's owner, was not interested in participating in this proceeding.

With regard to Lovitt's wheelchair being taken from the vehicle and thrown to the ground causing it to break this Court found Lovitt to be a credible witness. He was articulate, testified in a lucid fashion and was not motivated by a pending lawsuit. His testimony regarding the removal of the wheelchair is also corroborated, in part, by the hearsay statements made by St. Cloux during his CCRB interview. The concern this Court has, however, is that there was no discernable evidence that points directly to the Respondent as the one who had handled the wheelchair and removed it from the vehicle.

Lovitt testified that it was the officer who approached the vehicle on the driver's side who began "pulling on my wheelchair, real hard, pulling on it." He described him as the "heavysset African American bald officer." He went on to testify that was the officer who tossed the wheelchair to the floor. Lovitt further stated that both officers were African American and both were bald, but the officer who tossed the wheelchair to the floor was the "heavier bald headed officer." It should be noted that the Respondent stated that he approached the vehicle on the passenger side and Savary approached on the driver's side. Savary also stated that he approached on the driver's side.

Lovitt was asked if he saw the officer in question in the courtroom and he replied, "Well I can't say 100 percent that is the officer that's sitting right here [indicating the Respondent] but he looked very familiar from what I remember. I cannot say 100 percent." When Lovitt was further asked by the Court, "I want to make it clear. Is it true

that you cannot identify anyone in this courtroom with any degree of certainty as the officer who was doing these acts, pulling the wheelchair out, searching your friend, all those things, with any degree of certainty; you cannot identify any person in this courtroom as that officer; is that right?" Lovitt responded, "Right, right."

St. Cloux told CCRB investigators that the officer who approached the driver's side was the officer who removed the wheelchair from the car. He described that officer as being six feet two inches tall and weighing 220 pounds. He also described the second officer as being six feet four inches tall and weighing 240 pounds. While St. Cloux's hearsay statements supports Lovitt's testimony by pointing to the officer on the driver's side as the one who removed the wheelchair from the vehicle, he also contradicts Lovitt by stating that it was not the heavier officer who handled the chair. In addition, St. Cloux could not identify the officers who detained them from the photo-arrays that the CCRB investigator showed him.

It should be noted that Savary testified that he is five feet nine inches tall and weighs 152 pounds and the Respondent testified that he is five feet seven inches tall and weighs 174 pounds. It should also be noted that no evidence was presented to accurately indicate the physical appearance of Savary and the Respondent on the day of the incident.

This Court, as previously indicated, finds from the evidence that both Savary and the Respondent were the officers who detained Lovitt and the group he was with on the day of the incident. This Court also finds, however, that while it is convinced that the wheelchair was taken from the car, it cannot determine with any degree of certainty, that the Respondent was the officer who handled the wheelchair. Both officers are African American with similar body sizes and both have bald heads; but neither officer was

specifically identified by any of the occupants in the car as the one handling the wheelchair. Moreover, Lovitt could not honestly and specifically accuse the Respondent of the act while looking directly at him in court. Without a positive identification the “heavier African American officer” form of identification is not enough to find the Respondent guilty. In addition, since it cannot determine which officer handled the wheelchair, the issue of the damage to the wheelchair also cannot be attributed to the Respondent.

Accordingly, the Respondent is found Not Guilty of Specification Nos. 1 and 2.

Specification No. 3

The Respondent is charged with abusing his authority in that he wrongfully and without just cause searched Jeffrey St. Cloux by putting his hands in his pockets.

St. Cloux told CCRB investigators that after he exited the vehicle one of the officers, the one who approached the driver’s side, grabbed him and pushed him to the trunk of the car and “he began to search me.” St Cloux stated that the officer searched the insides of all four pockets on his pants and both pockets of his jacket.

Lovitt testified that the officer who was on the driver’s side “grabbed [St. Cloux] by his shirt and pulled him around the vehicle to give him his pat down.” He then saw the officer going through his pockets yelling at him, telling him to ‘shut up, shut up.’

St. Cloux also stated that the other officer, the one who approached the passenger side, took Jones to the back of the vehicle, “to the trunk” but he could not see what the officer was doing.

This Court is convinced by St. Cloux's statements and Lovitt's testimony that St. Cloux's pockets were searched, but once again this Court is faced with the same dilemma with regard to identification as it faced under Specification Nos. 1 and 2. Even here where the Respondent offered testimony as to what took place with regard to his participation in the frisk of St. Cloux, this Court is still left with uncertainties as to which officer searched him. The Respondent, in contrast to St. Cloux and Lovitt, maintained that he approached the passenger side of the vehicle while Savary approached the driver's side. When he was asked who removed the individuals from the rear seat he acknowledged that both he and Savary removed what turned out to be St. Cloux and Jones. The Respondent explained that he "moved more towards the rear so I can be nearer to my partner [because]...[y]ou have people coming out of the vehicle. You never want to have more of anyone who you are dealing with, more numbers in comparison to your partner. That's where more danger is located at that time." He then was asked "Once they got out, what did you do at that point?" He replied "We frisked their garments." He further explained that he was referring to placing his hands over their outer garments to determine if they were carrying weapons, but denied putting his hands in their pockets. When he was further asked, "Once you frisked the two people in the back where did you place them?" he replied "To the rear of the vehicle. We moved them to the back."

The Respondent, therefore, acknowledged that he and Savary had their hands on St. Cloux conducting a pat down or frisk of his person, but he maintained that he did not search him. These admissions, while adding one piece of evidence towards the

Respondent's search of St. Cloux, do not provide this Court with evidence showing that he, and not Savary, did in fact conduct a search of St. Cloux.

It should also be made clear that there is a significant difference between a "frisk" and a "search." A frisk, or limited search of the outer clothing is only authorized in instances where an officer has reasonable suspicion that a crime was being committed, was about to be committed or had been committed, and that the suspect may be armed or present a danger to the officer. See generally *Terry v. Ohio*, 392 U.S. 1 (1968), and New York State Criminal Procedure Law, §140.50. This Court credits the Respondent with the stop of the vehicle and the initial frisk of the passengers in that at the onset, he reasonably believed that McClellan's vehicle was stolen and that the occupants could have been a danger to him and Savary. In fact, even the Assistant Department Advocate in her closing argument indicated that the Respondent had the right to perform both the stop and the frisk. This should not be taken, however, to mean that the Respondent was free to go beyond this and conduct an unfettered search of the passenger's pockets. Such an intrusion would only be warranted where the Respondent would have had probable cause to arrest St. Cloux. But absent a positive, credible identification of the Respondent as the officer who searched St. Cloux, this Court cannot conclude that the Respondent put his hands inside of St. Cloux's pockets.

Accordingly, I find the Respondent Not Guilty of Specification No. 3.

Specification No. 4

The Respondent is charged with failing to provide his name and shield number after Lovitt asked him to do so. I find the Respondent Guilty as charged because it is clear from the evidence that Lovitt was asking both the Respondent and Savary for their

names and shield numbers and therefore a specific identification of the Respondent is not required for this specification.

Lovitt testified that after the encounter had ended, he was “very angry that now my wheelchair is broken. I’m angry; I want this cop’s badge number and name. I kept asking. I threw my hands up out of frustration, Okay, just give me your badge number and your name.” He further testified that “At this time, the thin officer was finished with Dante. The heavier set officer that searched Keith and Jeffrey and threw my wheelchair to the ground, they were finished, they were finished with us, so they started walking back to the car.” It is clear from Lovitt’s testimony that as the officers were in the process of walking to their car he said to them “Excuse me, can I have your name and badge number? He told me to shut up. The heavy set officer, bald headed African American told me to shut up, ‘shut up and get back in your car.’”¹

St. Cloux’s statements to investigators corroborates Lovitt’s testimony where he told investigators, “After he searched me and Keith came out, so they fixed his chair...and then he proceeded to ask for a badge, badge number, why is all this possible and then he told him to shut up and be quiet and that’s when Leonard got on the phone...to call, I guess to call Internal Affairs and then they proceeded back to their car and pulled off.” St. Cloux was then asked “which one did he ask for a name and badge number? and he replied “Both...They said no, shut up, go back in the car, sit down, be quiet and then that’s when he picked up his phone to call”

Lovitt proceeded to call 911 on his cellular phone in order to summon the patrol supervisor to register his complaint. Lovitt indicated that he furnished the 911 operator with the license plate number of the officer’s unmarked vehicle.

¹ The Respondent admitted to telling the group, “Get back in the vehicle, get back in the vehicle...”

In contrast, both the Respondent and Savary, deny that anyone ever asked for their names or shield numbers. This Court, however, does not find this to be credible. Lovitt's testimony and his trial demeanor conveyed that he was fuming that he had been stopped by the Respondent and Savary. Additionally, it was the testimony of both officers that Lovitt was combative and "nasty" at the scene of the stop. Believing that he was aggrieved, it is believable that Lovitt requested the names and shield numbers of the officers.

In addition, the fact that Lovitt elected to make a call to 911, a telephone number traditionally used to report crimes in progress and life threatening emergencies for the purpose of requesting a supervisor to make a civilian complaint against the Respondent and Savary supports the fact that he intended to identify the officers in his complaint. That Lovitt used a license plate number to identify the officers provides further indication that he did want their names and or shield numbers to identify them to the Department.

Based upon the foregoing, I find that Lovitt did request the Respondent's name and shield number and that the Respondent failed to provide it as required by the Patrol Guide.

Accordingly, I find the Respondent Guilty of Specification No. 4.

Specification No. 5

The Respondent is charged with being discourteous in that he told Lovitt to "shut the hell up and get your ass back in the car."

The evidence presented at this proceeding failed to establish that the statement as alleged in this specification was, in fact, uttered. In fact what was presented to the Court

was actually three different versions of what the Respondent said. At trial, Lovitt testified that when he asked for the Respondent's name and shield number, he was told to "shut up and get back in your car." In his CCRB interview, St. Cloux essentially confirmed this, stating that an officer told them to "...be quiet, get back in the car, shut up..." Similarly, the Respondent acknowledged that he said "get back in the vehicle, get back in the vehicle..." but denied using any profanities as charged in this specification. In addition, Savary testified that no profanities were used.

Since the evidence does not show that the Respondent actually uttered the words, "Shut the hell up and get your ass back in the car," he should not be held responsible for them.

Accordingly, I find the Respondent Not Guilty of Specification No. 5.

PENALTY

In order to determine an appropriate penalty, the Respondent's service record was examined. See *Matter of Pell v. Board of Education*, 34 N.Y.2d 222 (1974).

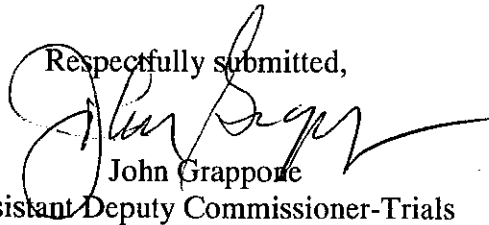
The Respondent was appointed to the Department on September 29, 2000. Information from his personnel folder that was considered in making this penalty recommendation is contained in an attached confidential memorandum.

The Respondent has been found guilty of failing to provide his name and shield number upon request. This charge may appear to be a minor infraction of the Patrol Guide, but when considered in the context of this particular case this Court finds that by the Respondent not identifying himself, in a case where identification is an important issue, he made a willful and intentional attempt to conceal his identity to avoid

responsibility for his actions. As this Court previously stated Lovitt credibility testified that one of the officers removed his wheelchair from the vehicle and threw it to the ground and wrongfully searched St. Cloux. While this Court is convinced that the Respondent and or Savary committed the charged misconduct there was no credible identification to support those allegations. As such the failure of the Respondent to identify himself to Lovitt carries a greater weight in this case because it resulted in one or both of the officers evading responsibility for the treatment of Lovitt and St. Cloux.

Based on the foregoing, I recommend that the Respondent forfeit a penalty of 5 vacation days.

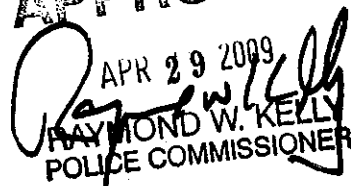
Respectfully submitted,



John Grappone

Assistant Deputy Commissioner-Trials

APPROVED



APR 29 2009
RAYMOND W. KELLY
POLICE COMMISSIONER