



POLICE DEPARTMENT CITY OF NEW YORK

June 13, 2016

MEMORANDUM FOR: Police Commissioner

Re: Police Officer Ross Garner
Tax Registry No. 949007
81 Precinct
Disciplinary Case No. 2014-12375

Police Officer Ryan Galvin
Tax Registry No. 948997
81 Precinct
Disciplinary Case No. 2014-12376

Charges and Specifications:

Disciplinary Case No. 2014-12375

1. Said Police Officer Ross Garner, on or about July 17, 2013, at approximately 2000 hours, while assigned to the 81st Precinct and on duty, in the vicinity of Ralph Avenue and Bainbridge Street, Kings County, engaged in conduct prejudicial to the good order, efficiency or discipline of the New York City Police Department, in that he searched Joshua Banks' vehicle without sufficient legal authority.
P.G. 203-10, Page 1, Paragraph 5 - PUBLIC CONTACT - PROHIBITED CONDUCT

Disciplinary Case No. 2014-12376

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Appearances:

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

For Respondents: Craig Hayes, Esq.
Worth, Longworth & London, LLP
111 John Street – Suite 640
New York, NY 10038

Hearing Date:
March 2, 2016

Decision:
Respondents are found Not Guilty.

Trial Commissioner:
Robert W. Vinal

REPORT AND RECOMMENDATION

The above-named members of the Department appeared before me on March 2, 2016. Respondents, through their counsel, entered pleas of Not Guilty to the subject charges. CCRB called Leighann Loftus, Bridget Loftus, and Joshua Banks as witnesses. Respondents testified on their 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, I find Respondents Not Guilty.

FINDINGS AND ANALYSIS

It is not disputed that on July 17, 2013, at about 8:00 pm, Joshua Banks was driving his Jeep Cherokee ("the Jeep") in the vicinity of Ralph Avenue and Bainbridge Street in Brooklyn. Leighann Loftus was seated in the front passenger seat and Bridget Loftus, Person A and Person B were seated on the rear passenger seat. The Jeep was pulled over by Respondents and Police Officer Mark Xylas who were dressed in

plainclothes, assigned to the 81 Precinct, performing anti-crime duties in an unmarked Department vehicle. Everyone was removed from the Jeep. Respondents then thoroughly searched the front and rear seating areas and also reached into the storage area behind the rear seating area.

Banks testified that two of the three plainclothes officers who approached the Jeep approached the driver's side. Banks was removed from the Jeep and one of the officers asked him for his identification card. Banks told the officer that his ID card was inside his book bag which was in the trunk of his Jeep. When the officer requested his permission to go inside the Jeep to retrieve his ID card, Banks told him "No." The officer then "went and got it" by entering the rear seating area and reaching behind the seats into the trunk's storage area which was only accessible from the back seat of the Jeep because the trunk lock was broken and the trunk could not be opened. The officer retrieved his ID card which was inside a wallet which was inside his book bag. The officer wrote down the information that was on his ID card and then put the ID card back inside his wallet.

The officers told him that they had pulled over his Jeep because a foot was sticking outside of a rear window and because someone had flicked a cigarette butt out of the rear window. At "around" the time that they told him this, they also mentioned marijuana to him. Banks recalled that he was smoking a cigar for about five minutes before the Jeep was pulled over. He could not recall what he did with the cigar after he was pulled over. Respondents went inside his Jeep and searched for "like an hour or so."

All the occupants of the jeep were standing outside while Respondents searched the jeep. Banks observed one of the Respondents go into the “backseat on the left-hand side,” and then in the trunk to remove his book bag and ID. He testified there were about four officers and they went inside of the jeep one at a time. One officer searched the back seat and trunk, another officer searched the passenger side and center console, and “at different times they went back in and searched again.” After searching his jeep, Respondents removed Banks’ handcuffs and issued him two summonses.

Banks identified Respondent Galvin in the Trial Room as one of the officers who searched his vehicle. Civilian Complaint Review Board Exhibit (CCRBX) 1 is a photograph which depicts Banks standing outside the Jeep in handcuffs and officers searching his jeep.

Leighann Loftus testified that one of the Respondents asked Banks if he had anything illegal in the car and if they had permission to search the car. Although Banks answered “no” to both questions, Respondents proceeded to search the interior of the Jeep. Uniformed police officers later arrived at the scene and assisted Respondents in searching the interior of the Jeep. She saw them searching underneath the driver’s seat and the front passenger seat and underneath the rear seats. They also searched bags that were on the rear seat and inside the trunk area which they accessed by reaching behind the rear passenger seating area. An officer removed a bottle of alcohol from one of the bags in the trunk. She saw her sister, Bridget, talking to police officers. Bridget later told her that the officers had mentioned marijuana.

Bridget Loftus testified that when Respondents requested Banks' permission to search his car, Banks refused to give them permission. Banks and his passengers stood outside of the vehicle as Respondents leaned into the Jeep, looked underneath all the seats, and looked into the area behind the rear passenger seating area. When a nearly empty bottle of rum was discovered inside a paper bag which was inside a plastic bag in her tote bag, she told Respondents that the bottle was hers. Respondents initially did not respond to her and her sister's repeated questions as to why the Jeep had been pulled over. Eventually, they stated that they had pulled over the Jeep because someone's foot was sticking outside of a window and because someone had thrown a cigarette butt out of the window. Fifteen to 20 minutes later, she heard Respondents say that they had reason to search the Jeep because they had smelled marijuana. They then searched the Jeep three or four times for over an hour.

Respondent Galvin testified that, in addition to observing someone's foot hanging outside of the rear passenger seat window and someone throwing out a cigarette butt from the window, he noticed that the Jeep did not have a rearview mirror. When their unmarked Department vehicle was directly behind the jeep, he smelled a "little bit of an odor of marijuana." He approached the passenger side of the Jeep. Even though he heard either Garner or Xylas tell Banks to put the car in park and remove the key from the ignition, the Jeep "actually pulled off" and a tire almost ran over his foot. Respondent Galvin immediately reached inside the Jeep and pulled the key out of the ignition because he was in fear of his personal safety and the safety of his partners. His shield was around his neck on a lanyard. As he reached inside the jeep, the lanyard got "stuck on

something” and “ripped off” the lanyard which fell into the car. Respondent Galvin asserted that Banks’ “action of attempting to drive away” raised his level of suspicion as to “what was going on with the car.”

After the passengers exited the Jeep, he searched the Jeep’s interior including the front seat, the backseat, the glove compartment, and the center console, because he smelled marijuana and because the fact that Banks had tried to drive off had raised his level of suspicion. He did not search the trunk. As a result of his training and experience, he believed that based on the totality of the circumstances he had probable cause to search the Jeep.

On cross examination, he testified that he first smelled the odor of marijuana three blocks away from the location of the car stop. When he was talking to Banks, he did not notice Banks’ eyes to be bloodshot nor did he smell the odor of marijuana or alcohol on his breath or clothing. He did not notice the odor of marijuana emanating from any of the passengers either. He did not go back to look for the cigarette butt that was thrown out of the window to see if it was a marijuana cigarette.

Respondent Garner testified that he and Xylas approached the driver’s side of the Jeep. He smelled a “strong” odor of marijuana as he approached. After identifying himself as a police officer, he said Banks “gave like a dismissive look to us, and then he looked back at the road and proceeded to drive his car away from us.” The car moved about ten feet and stopped again. He had his shield around his neck. He ordered Banks to put the car in park. When he ordered Banks to exit the Jeep, Banks refused. He then grabbed Banks’ arm, pulled him out of the driver’s seat, placed him in handcuffs and

walked him to the rear of the jeep. He explained that based on the smell of marijuana and the driver's actions, they searched the vehicle.

On cross examination he conceded that neither he, Respondent Galvin nor officer Xylas went back to try to find the cigarette butt that had been thrown out a window. He testified that since Person A threw the cigarette butt out of the window, he issued her a summons for littering. Banks' eyes were not bloodshot or glassy, nor did he smell the odor of marijuana on his breath or clothes. He did not write in his Activity Log that he had smelled the odor of marijuana and that he had searched the Jeep.

Analysis

In their testimony at this trial, both Respondents claimed that they had smelled what they believed to be the odor of marijuana emanating from inside the Jeep. Respondent Garner asserted that he smelled a "strong" odor of marijuana as he approached the Jeep. Respondent Galvin asserted that he smelled a "little bit of an odor of marijuana." The CCRB administrative prosecutor conceded (consistent with well-settled New York case law¹) that if Respondents had actually smelled an odor of marijuana emanating from Banks' Jeep they would have had probable cause to search the vehicle (Tr. p. 210).² However, the administrative prosecutor asserted that Respondents' claims that they detected an odor of marijuana emanating from inside the Jeep was a completely false story that they fabricated after this incident.

¹ See *People v. Acevedo*, 118 AD3d 1103 (3rd Dep't 2014); *People v. Horge*, 80 AD3d 1074 (3rd Dep't 2011); *People v. Badger*, 52 AD3d 231 (1st Dep't 2008); *People v. Lightner*, 56 AD3d 1274 (4th Dep't 2008).

² As well as any compartments and containers inside the Jeep. See *Legal Bureau Bulletin*, Vol. 12, No. 3 (July 15, 1982) discussing the U.S. Supreme Court's decision in *U.S. v. Ross*, 456 U.S. 798 (1982).

In making this assertion, the administrative prosecutor relied heavily on the fact that in the Activity Log entry that Respondent Garner prepared regarding this incident (CCRB 2), he did not mention that he had smelled an odor of marijuana or that he had searched the Jeep. Although Respondent Garner testified that there was no need for him to make entries regarding factors he knew he would be able to recall, the administrative prosecutor argued that these omissions prove that Respondents' claims that they detected an odor of marijuana emanating from inside the Jeep was a fabrication they invented "two and a half years" after this incident to justify an illegal search. The administrative prosecutor argued that because Respondent Garner's Log entry was written "simultaneously" at the time the search was conducted, "he hadn't had the time to think of that lie (that he smelled marijuana) when he wrote that Activity Log" entry (Tr. p. 217).

However, the administrative prosecutor's argument that Respondents' claim at this trial that they smelled marijuana is a recent fabrication ignores the testimony of her own witnesses. Banks testified that at around the time that Respondents told him that they had pulled over his Jeep because a foot was sticking outside of a rear window and because someone had flicked a cigarette butt out of a rear window, they also mentioned marijuana to him (Tr. p. 59). Leighann Loftus testified that she saw her sister Bridget talking to the police and that her sister told her that the police had mentioned marijuana to her (Tr. p. 27). Most significantly, Bridget Loftus testified that she heard Respondents say that "they smelled marijuana, which gave them reason to search the car," and that they said this before they began searching the Jeep (Tr. p. 90).

Thus, the testimony of CCRB's own witnesses establishes that Respondents mentioned marijuana to the driver, and that before they began searching the Jeep one of the passengers heard them say that they had reason to search the Jeep because they had smelled marijuana. Based on this testimony, I find that Respondent Garner's failure to include in his Activity Log entry that he had smelled the odor of marijuana is not dispositive proof that he never actually smelled any odor of marijuana and neither is Respondents' testimony regarding whether or not they searched for the cigarette butt that was thrown out of the rear window of the Jeep.

In a recent disciplinary decision, *Case No. 2014-11553* (signed Feb. 18, 2016), where the facts are similar to the facts presented here, a police officer who credibly asserted that he had smelled the odor of marijuana emanating from a vehicle was found not guilty of the charge that he searched the vehicle without sufficient legal authority even though, as here, no marijuana was found in the car. As the Trial Commissioner in that case noted in her decision, just because no marijuana is recovered from inside a car does not necessarily mean that an odor of marijuana was not emanating from the vehicle.

I find that because the administrative prosecutor presented insufficient proof that Respondents' testimony that they smelled an odor of marijuana emanating from inside the Jeep was false testimony, CCRB did not meet its burden of proving that the search was unlawful. Therefore, Respondents are found Not Guilty.

Respectfully submitted,

APPROVED
JUL 28 2016

WILLIAM J. BRATTON
POLICE COMMISSIONER


Robert W. Vinal
Assistant Deputy Commissioner Trials