



POLICE DEPARTMENT CITY OF NEW YORK

April 20, 2016

MEMORANDUM FOR: Police Commissioner

Re: Sergeant Joseph Durante
Tax Registry No. 923791
Emergency Service Squad
Disciplinary Case No. 2014-11128

Police Officer Ricardo Cuenca
Tax Registry No. 945632
122 Precinct
Disciplinary Case No. 2014-11127

Charges and Specifications:

Disciplinary Case No. 2014-11128

1. Said Sergeant Joseph Durante, on or about April 17, 2013, at approximately 1530 hours, while assigned to 122nd PCT and on duty, in the vicinity of Father Capodanno Boulevard and Hunter Avenue, Richmond County, engaged in conduct prejudicial to the good order, efficiency or discipline of the New York City Police Department, in that he searched a vehicle driven by Person A, without sufficient legal authority.

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

Disciplinary Case No. 2014-11127

2. Said Police Officer Ricardo Cuenca, on or about April 17, 2013, at approximately 1530 hours, while assigned to 122nd on duty, in the vicinity of Father Capodanno Boulevard and Hunter Avenue, Richmond County, engaged in conduct prejudicial to the good order, efficiency or discipline of the New York City Police Department, in that he searched a vehicle driven by Person A, without sufficient legal authority.

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

Appearances:

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

For Respondent Durante: Matthew Schieffer, Esq.
The Quinn Law Firm
Crosswest Officer Center
399 Knollwood Road-Suite 220
White Plains, NY 10603

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

Hearing Date:

February 19, 2016

Decision:

Respondents Durante and Cuenca are Not Guilty.

Trial Commissioner:

ADCT Nancy R. Ryan

REPORT AND RECOMMENDATION

The above-named member of the Department appeared before me on February 19, 2016.

Respondent, through their counsel, entered a plea of Not Guilty to the subject charges. CCRB called Jeremy Devito as a witness. 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 Durante and Cuenca Not Guilty of the charged misconduct.¹

FINDINGS AND ANALYSIS

It is undisputed that on April 17, 2013, at approximately 1530 hours, Respondents and Police Officer Fernsmith were on duty driving in an unmarked car in the vicinity of Father Capodanno Boulevard in the 122 Precinct in Staten Island. They stopped a minivan with a broken tail light and cracked windshield. The driver of the minivan was Person A and the front passenger was Jeremy Devito.

The Respondents testified that Respondent Cuenca went to the passenger side and Officer Fernsmith went to the driver's side of the minivan. (Tr. 49, 72) Respondent Durante initially stayed in the rear of the minivan but testified that when he did approach the vehicle he saw the front passenger making a lot of movements including moving his left side and reaching down. (Tr. 72) While Respondent Cuenca and Officer Fernsmith were speaking to the men in the minivan, Mr. Devito went into his pocket and a cork screw bottle opener came out of his pocket. Respondent Cuenca then told Mr. Devito to put his hands on the dashboard. (Tr. 50)

Respondent Cuenca testified that Mr. Devito continued to fidget and tried to go back into his pocket. Mr. Devito told him he had another corkscrew and he pulled that out of his pocket. Respondent Cuenca further testified that when Mr. Devito pulled out this second corkscrew he saw a white pill fall from his pocket to the floor of the car between the passenger and driver's

¹ Note that the Specifications are written to cover the search of the vehicle. The CCRB, however, narrowed the Specifications to apply only to the search of the glove compartment of the vehicle. The CCRB consented on the record prior to the openings in the case that as to both Respondents the focus of the trial was only on the search of the glove compartment. (Tr. 2-3)

seat. (Tr. 50) Respondent Cuenca had Mr. Devito get out of the car, handcuffed him and brought him to the back of the minivan. Person A was also removed from the minivan, brought to its rear and handcuffed. They were both told to sit on the minivan's bumper with their backs to it. (Tr. 22, 50)

Mr. Devito testified that he heard Respondent Cuenca and a shorter officer searching the car, but admitted that he did not see them searching the vehicle because he was facing away from it. (Tr. 23-24) Respondent Cuenca testified that he went inside the minivan to where he had seen the pill drop and recovered the pill from the center space between the two front seats. (Tr. 51, 62) He further testified that he then went back to Mr. Devito and Person A and asked whose pill it was. Mr. Devito said it was his pill. (Tr. 24, 52) Mr. Devito also testified at trial that while it was his pill, it was in the car from a prior time and had not fallen from his pocket that day. (Tr. 33) Mr. Devito acknowledged at trial that the pill was Percocet. (36-37, 43)

Respondent Cuenca testified that he used his phone to check what kind of pill it was and learned that it was a controlled substance. (Tr. 52) Respondent Durante testified that the pill was identified "instantaneously". (Tr. 83) Mr. Devito testified that he had a prescription for the pill but didn't have it with him that day because he didn't carry the entire pill bottle with him to work. (Tr. 25) Mr. Devito was arrested for possession of a controlled substance. (Tr. 71)

The facts in controversy in this case concern a search of the glove compartment of the car. Respondent Cuenca testified that he did not search the glove compartment of the car. (Tr. 53) Respondent Durante testified that after Respondent Cuenca showed him the pill he recovered from the minivan, he went to the front of the minivan and conducted a search of the grabbable and lungeable and area which included opening the glove compartment. (Tr. 79, 83)

At the time Respondent Durante conducted the search, both Mr. Devito and Person A were handcuffed and at the rear of the vehicle. (Tr. 80)

Respondent Durante testified that he searched the vehicle because, "there was drugs on the floor. At that point we had the nexus to search the vehicle. I was looking for additional contraband." He elaborated that they didn't know if either of the occupants was a drug dealer and since drugs are very small, a pill could have been hidden anywhere. (Tr. 73)

Respondent Durante testified on direct examination that he did not observe anyone else go into the glove compartment. (Tr. 74) He stated that Respondent Cuenca was at the back of the vehicle with the prisoners at the time of the glove compartment search. (Tr. 84) On cross-examination, however, he acknowledged that at his GO-15 interview which took place on June 18, 2003 (sic), he was asked who specifically looked inside the glove compartment and he responded, "Both of us." (Tr. 81) He explained this answer by saying he may have made a mistake or made an assumption that Respondent Cuenca looked inside but he reasserted that he never actually saw him go inside the glove compartment. (Tr. 82)

CCRB has charged both Respondents with an unlawful search of the vehicle. CCRB agreed that while the charge could be read broadly, it only refers to the search of the vehicle's glove compartment. As CCRB stated that the recovery of the pill between the seats was reasonable, this tribunal is not ruling on that portion of the search but is limiting its review to the search of the glove compartment. (Tr. 3, 93)

With regard to Respondent Cuenca, I find him Not Guilty of the Specification that he searched the vehicle of Person A without sufficient legal authority since CCRB failed to prove by a preponderance of the credible evidence that he even searched the glove compartment of the vehicle at all. Mr. Devito did not testify that he saw Respondent Cuenca search the glove

compartment. Respondent Cuenca testified that he did not search the glove compartment. I found Respondent Cuenca to be a credible witness based on his demeanor while testifying as well as the consistency of his answers to questions on both direct and cross-examination.

While Respondent Durante did acknowledge that in his GO-15 he stated that both of them looked inside the glove compartment, at trial he explained that this was perhaps an assumption and he specifically stated that he did not see Respondent Cuenca go inside the glove compartment. The phrase "looked inside the glove compartment" is somewhat vague and does not necessarily equal a search in that someone can possibly look inside an open glove compartment from outside a vehicle.

Respondent Durante admitted he actually did go inside the vehicle and opened the glove compartment and searched it. It seems more likely than not that only one person, Respondent Durante, searched the glove compartment and that, as the two Respondents testified, Respondent Cuenca and the other officer remained at the rear of the vehicle to secure the two people they had removed from the car.

As Respondent Durante admitted to searching the glove compartment, the question in this case becomes whether that search was lawful or not. I find that it was lawful and that Respondent Durante is Not Guilty of unlawfully searching the glove compartment of the vehicle of Person A.

Under *Arizona v. Gant*, 556 U.S. 332, (2009), the Supreme Court ruled that the police may search the passenger compartment of a vehicle incident to an arrest only when they have a reasonable belief either that an arrestee might access the vehicle at the time of the search or that the vehicle contains evidence of the offense for which the occupant was arrested. In this case, both passengers of the vehicle were secured at the rear of the vehicle at the time of the search of

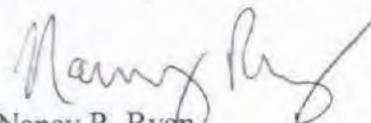
the glove compartment so the Respondent could not have had a reasonable belief that they would have had access to the vehicle at the time of the search. Respondent Durante, however, did have legal authority to search the vehicle for evidence of drugs, which is what he indicated he did.

Respondent Durante had sufficient legal authority to search the passenger compartment and any containers therein for drugs since Mr. Devito was arrested for criminal possession of a controlled substance. The Court in *Gant* cited the case of *Thornton v. United States*, 561 U.S. 615 (2004) in reaching its conclusion that, "circumstances unique to the vehicle context justify a search incident to a lawful arrest when it is 'reasonable to believe evidence relevant to the crime of arrest might be found in the vehicle.'" The Court noted that in many cases where the occupant is arrested for a traffic violation, there would be no reasonable basis to believe the vehicle contained relevant evidence, but contrasted cases such as *Thornton*, where the offense of arrest supplies a basis for searching the passenger compartment of an arrestee's vehicle and any containers therein. The fact situation in *Thornton* was that drugs were found on the person of someone who had just parked and exited a vehicle. The person was arrested for the drug offense and the Court found that the offense of arrest made it reasonable for the police officer to search the entire passenger compartment.

In this case Respondent Durante searched the glove compartment for evidence similar to the crime for which Mr. Devito was arrested. Given the circumstances, Respondent Durante's actions were reasonable. There was no evidence that he acted in bad faith.

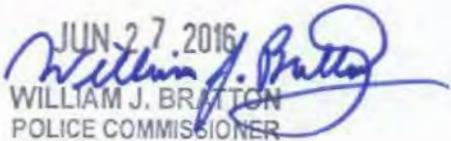
I therefore find Respondent Durante Not Guilty.

Respectfully submitted,



Nancy R. Ryan
Assistant Deputy Commissioner Trials

APPROVED

JUN 27 2016

WILLIAM J. BRATTON
POLICE COMMISSIONER