



CLOSED CASE SUMMARY

ISSUED DATE: NOVEMBER 21, 2018

CASE NUMBER: 2018OPA-0417

Allegations of Misconduct & Director’s Findings

Named Employee #1

Allegation(s):		Director’s Findings
# 1	8.200 - Using Force 1. Use of Force: When Authorized	Not Sustained (Lawful and Proper)
# 2	6.180 - Searches-General 2. There are Specific Exceptions to the Search Warrant Requirement	Not Sustained (Lawful and Proper)
# 3	6.220 - Voluntary Contacts, Terry Stops & Detentions 3. During a Terry Stop, Officers Will Limit the Seizure to a Reasonable Scope	Not Sustained (Lawful and Proper)

Named Employee #2

Allegation(s):		Director’s Findings
# 1	8.200 - Using Force 1. Use of Force: When Authorized	Not Sustained (Lawful and Proper)

This Closed Case Summary (CCS) represents the opinion of the OPA Director regarding the misconduct alleged and therefore sections are written in the first person.

EXECUTIVE SUMMARY:

The Complainant alleged that the Named Employees subjected him to excessive force. It was further alleged that Named Employee #1 may have effectuated an unlawful search of the Complainant.

STATEMENT OF FACTS:

On May 10, 2018, Named Employee #1 (NE#1) and Named Employee #2 (NE#2) observed what they believed to be a narcotics transaction engaged in by the Complainant. The Named Employees detained the Complainant and, at that time, observed him put what appeared to be narcotics in his pocket. The Complainant ultimately withdrew the narcotics from his pocket and, thereafter, was placed under arrest. To effectuate the arrest, the Named Employees used low-level force to control the Complainant’s body and to take him down to the ground.

While on the ground, the Complainant appeared to lose consciousness. As a result, the force was screened with the Department’s Force Investigation Team (FIT). During his interview with a FIT Detective, the Complainant alleged that he had been subjected to excessive force. The FIT Captain referred the excessive force allegation to OPA and this investigation ensued. The force was also later reviewed by the Department’s Force Review Board (FRB). The FRB identified that NE#1’s search of the Complainant may have been contrary to policy and law. In its referral to OPA, the FRB cited to the prosecutor’s decline notice, which called the validity of the search into question. That referral was merged into this case.



ANALYSIS AND CONCLUSIONS:

Named Employee #1 - Allegations #1

8.200 - Using Force 1. Use of Force: When Authorized

As discussed above, the Complainant alleged that he was subjected to excessive force when the Named Employees “smacked” him into a wall or window and “slammed” him onto the ground.

The force used by the Named Employees was captured on Body Worn Video (BWV). NE#1 held onto the Complainant’s right arm and NE#2 took hold of the Complainant’s left hand. Both officers then took the Complainant down to his knees by pushing and pulling on his upper body and then pushing the Complainant forward onto his stomach. The BWV did not capture any conduct on the part of the officers that was consistent with the Complainant’s allegations.

SPD Policy 8.200(1) requires that force used by officers be reasonable, necessary and proportional. Whether force is reasonable depends “on the totality of the circumstances” known to the officers at the time of the force and must be balanced against “the rights of the subject, in light of the circumstances surrounding the event.” (SPD Policy 8.200(1).) The policy lists a number of factors that should be weighed when evaluating reasonableness. (*See id.*) Force is necessary where “no reasonably effective alternative appears to exist, and only then to the degree which is reasonable to effect a lawful purpose.” (*Id.*) Lastly, the force used must be proportional to the threat posed to the officer. (*Id.*)

Based on OPA’s review of the record, the force used by the Named Employees was not excessive and was consistent with policy. First, it was reasonable for the officers to use force to take the Complainant into custody once they determined that there was probable cause for his arrest. The force was further justified when the Complainant resisted the Named Employees’ attempts to arrest him. This force was necessary to effectuate the arrest of the Complainant and there did not appear to be any reasonable alternatives to using such force. Lastly, the force used was proportional to the threat facing the officers. The force appeared to have been minor and the officers modulated their force once the Complainant was under control.

For these reasons, I recommend that this allegation be Not Sustained – Lawful and Proper as against both NE#1 and NE#2.

Recommended Finding: **Not Sustained (Lawful and Proper)**

Named Employee #1 - Allegation #2

6.180 - Searches-General 2. There are Specific Exceptions to the Search Warrant Requirement

SPD Policy 6.180 concerns searches and, specifically, those types of searches that are justified by an exception to the general requirement of a search warrant. The question here is whether the search and seizure of the capsule from the Complainant was legally justified.

Immediately prior to the detention of the Complainant, NE#1 reported that he observed what appeared a capsule with a green top in the Complainant’s hand. The Complainant was engaged in a conversation with another individual



who had money in his hand. At that time, and based on the circumstances, NE#1 believed that he was observing a narcotics transaction. He thought, because of the green top, that there could be marijuana in the capsule, but he was not completely sure what drugs were inside. NE#1 approached the Complainant and told him to stop; however, the Complainant did not initially do so.

NE#1 ordered the Complainant to take the “little capsule” out of his pocket. The Complainant responded that he did not have any “weed.” NE#1 again asked him to remove the capsule and the Complainant again stated that he did not have any “weed.” This exchange continued for approximately 30 seconds and, during the interaction, NE#1 asked the Complainant whether he wanted to be arrested. The Complainant then withdrew the capsule out of his pocket and seemed from the video to try to unscrew the lid. NE#1 grabbed the Complainant’s arm in an apparent attempt to prevent him from doing so and, eventually, took the Complainant down to the ground and placed him under arrest. The capsule was recovered by another officer and was found to have white powder inside. The Complainant stated that the capsule, which he had previously contended contained his medicine, was actually not his. The white powder inside the capsule was determined to be narcotics.

Ultimately, however, the prosecution of the Complainant was later dismissed. This was the case even though the Complainant was actually in possession of narcotics and these narcotics were contained in the capsule that NE#1 seized. In the decline notice, the prosecutor opined that the seizure of the capsule after the Complainant initially refused to remove it from his pocket was a legally impermissible search. The prosecutor wrote that “once the defendant refused a search of his person for the pill bottle, there did not exist a basis to continue the *Terry* stop or to search the defendant.” As such, the prosecutor concluded that: “As a result, any evidence obtained after the [Complainant] refused to produce the pill bottle from his pocket is likely to be suppressed...”

Based on my review of the record, including my reading of relevant caselaw, I disagree with the prosecutor’s conclusion and find that the search was proper. In reaching this decision, I rely heavily on the Ninth Circuit’s decision in *United States v. Pope*, No. 11-10311, 2012 U.S. App. LEXIS 14612 (9th Cir. 2012).

In *Pope*, the Ninth Circuit evaluated a claim that two orders issued by an officer to a subject to empty his pockets constituted an unlawful search under the Fourth Amendment. The Court found that the search was legally justified. In reaching this finding, the Court reasoned that the first command to the subject to empty his pockets did not constitute a search because the subject did not comply. With regard to the second command, the Court found that it was a search because the subject admitted that he had marijuana on his person, took it out of his pocket, and placed it on the hood of a patrol vehicle. The Court held that such a warrantless search would be justified where: (1) there was probable cause to arrest the subject; (2) “there was a high risk that evidence would have been destroyed” – exigent circumstances; and (3) “the search was commensurate with the circumstances necessitating the intrusion.” The Court applied those elements to the case and deemed the search of the subject was constitutional.

In applying *Pope* to this case, I reach four conclusions that support the finding that the search effectuated by NE#1 was lawful. First, I find that NE#1, like the officer in *Pope*, had probable cause to arrest the Complainant for drug related crimes at the time he initially detained the Complainant. As such, I disagree with the prosecutor that NE#1 only had reasonable suspicion at that moment. At his OPA interview, NE#1 stated that he believed that he had probable cause to arrest the Complainant. He cited that he had probable cause for obstructing, drug traffic loitering, and VUCSA with intent to distribute. With regard to the drug loitering and intent to distribute, NE#1 pointed to the fact that the Complainant had the capsule in his hand, was interacting with an individual who was holding money,



and that the Complainant was in a high drug activity location at the time. The probable cause for obstruction was based on the Complainant's failure to comply with the officers' lawful orders that he stop. I find these assertions to be supported by the evidence.

Second, NE#1, like the officer in *Pope*, articulated that he believed that exigency supported the seizure of the capsule. He stated that he was concerned that the Complainant was going to attempt to destroy the evidence and he reported observing the Complainant trying to screw off the top from within his pocket. NE#1 recounted that the Complainant was not successful in that regard and then took the capsule out of his pocket and again attempted to remove the top. NE#1 asserted that he felt the Complainant was going to screw off the top of the capsule and dump the contents on the ground. Based on my review of the video, I agree that it appeared that, once the Complainant removed the capsule from his pocket, he was trying to unscrew the lid.

Third, NE#1, like the officer in *Pope*, simply directed the Complainant to remove the narcotics from his pocket. He did not physically compel him to do so. Moreover, the Complainant, like the subject in *Pope*, voluntarily did so and placed the narcotics into plain view.

Fourth, NE#1 contended that, once the Complainant removed the capsule from his pocket, it was in plain view and NE#1 had the right to seize it. Again, I agree with NE#1. Once the narcotics were out in the open, NE#1 was legally justified in seizing them based on the plain view exception to the warrant requirement.

For the above reasons, I find that the search effectuated by NE#1 was legally permissible. As such, I recommend that this allegation be Not Sustained – Lawful and Proper.

Recommended Finding: **Not Sustained (Lawful and Proper)**

Named Employee #1 - Allegation #3

6.220 - Voluntary Contacts, Terry Stops & Detentions 3. During a Terry Stop, Officers Will Limit the Seizure to a Reasonable Scope

SPD Policy 6.220-POL-3 requires that officers limit a seizure to a reasonable scope. The policy further states that: "Actions that would indicate to a reasonable person that they are being arrested or indefinitely detained may convert a Terry stop into an arrest requiring probable cause or an arrest warrant." (SPD Policy 6.200-POL-3.)

This allegation was classified based on the possibility that the search effectuated by NE#1 was unjustified under the circumstances. However, for the same reasons as stated above (see Named Employee #1, Allegation #2), I recommend that this allegation be Not Sustained – Lawful and Proper.

Recommended Finding: **Not Sustained (Lawful and Proper)**



Named Employee #2 - Allegations #1

8.200 - Using Force 1. Use of Force: When Authorized

For the same reasons as stated above (see Named Employee #1, Allegation #1), I recommend that this allegation be Not Sustained – Lawful and Proper.

Recommended Finding: **Not Sustained (Lawful and Proper)**