



## **CLOSED CASE SUMMARY**

ISSUED DATE: JULY 20, 2018

CASE NUMBER: 2018OPA-0170

### **Allegations of Misconduct & Director’s Findings**

**Named Employee #1**

<b>Allegation(s):</b>		<b>Director’s Findings</b>
# 1	5.140 - Bias-Free Policing 2. Officers Will Not Engage in Bias-Based Policing	Not Sustained (Unfounded)
# 2	6.220 - Voluntary Contacts, Terry Stops & Detentions 1. Terry Stops are Seizures and Must Be Based on Reasonable Suspicion in Order to be Lawful	Not Sustained (Training Referral)

***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 Employee stopped him because of his race. It was further alleged that the stop, itself, may not have been supported by reasonable suspicion.

**STATEMENT OF FACTS:**

Named Employee #1 (NE#1) responded to a call of a foot pursuit that had resulted in an arrest. He was there to see if he could provide any assistance to the officers handling that call. NE#1 told OPA that, when he was in the vicinity of the call, he observed the Complainant running across the street. NE#1 stated the Complainant had what appeared to be a box under a sweater that was wrapped up. NE#1 recounted that the Complainant “was looking around to see if he was being followed, as though he was trying to evade someone.” NE#1 also explained that the Complainant was “furtive and suspicious, like, you know, looked kind of scared when he saw me.” The Complainant stopped at a bus stop and then began walking away again.

NE#1 stopped and detained the Complainant. NE#1 stated that he ran the Complainant’s personal identifying information through his MDT system in his patrol vehicle. He explained that he did so in order to “make some checks for my safety, for everybody’s safety, to see who I was talking to, and to verify that that was him.” NE#1 told OPA that he was then informed by another officer that the Complainant had alleged that the stop was premised on his race. NE#1 notified a supervisor of the bias allegation and screened the allegation with the supervisor at the scene.

NE#1 said that the supervisor discussed the stop with the Complainant, who articulated his belief that he had been detained due to the fact that he was Hispanic. NE#1 recalled that the Complainant stated that he suffered from PTSD. NE#1 believed that the supervisor offered to call for medical assistance for the Complainant, but that the Complainant denied that assistance. NE#1 gave the Complainant a business card with his name and serial number. NE#1 was unable to verify the ownership of the box and to determine whether or not it was stolen. The Complainant was released from the scene and he left with the box.



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NE#1 told OPA that the Complainant's race has nothing to do with the stop and that the stop was, instead, premised on NE#1's perceived belief that there was reasonable suspicion based on the Complainant's behavior and demeanor.

With regard to the basis for his reasonable suspicion for the stop and detention, NE#1 provided the following summary at his OPA interview:

My reasonable suspicion was, probably was, un – unreported, a burglary or a theft. You know, on a daily basis I deal with people, that they call us and say, somebody just, I realized that my whatever item is missing, in the area, so I thought that maybe something just occurred and that's why I was, I put all the – his demeanor, everything, together, and I decided to make contact with him.

The Street Check Form that he completed for this incident set forth the following additional information concerning NE#1's reasonable suspicion:

The entire time the male was trying to conceal what appeared to be a box wrapped in a sweater. Through my training and experience, I recognized that the male was exhibiting signs of being uncomfortable with my presence in the area. I had reasonable belief that this circumstances were suspicious, and I had a legal and lawful purpose to make contact with the male, since we were in a public area

While NE#1 stated that the location the Complainant was in was a "high crime" area, at the time of the stop, there were no calls of stolen property in the vicinity. Moreover, as established by NE#1's report and OPA interview, he had no knowledge of what the box was or what it contained at the time of the stop.

The detention was recorded on multiple officers' Body Worn Video (BWV). However, the conduct that preceded the stop and which formed, in NE#1's opinion, the basis for the stop, was not recorded on BWV.

**ANALYSIS AND CONCLUSIONS:**

**Named Employee #1 - Allegation #1**

***5.140 - Bias-Free Policing 2. Officers Will Not Engage in Bias-Based Policing***

SPD policy prohibits biased policing, which it defines as "the different treatment of any person by officers motivated by any characteristic of protected classes under state, federal, and local laws as well other discernible personal characteristics of an individual." (SPD Policy 5.140.) This includes different treatment based on the race of the subject. (*See id.*)

As discussed above, the Complainant alleged that he was stopped and detained based on his race. NE#1 denied that this was the basis for the stop and, instead, contended that the stop was made because he had reasonable suspicion to believe that the Complainant was involved or had been involved in criminal activity.



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While I have concerns with the lawful basis for the stop in this case, my concerns surround the fact that I do not think that there was sufficient reasonable suspicion. I do not believe that the stop was premised on bias and I see no evidence in record proving that biased policing occurred in this case.

As such, and applying a preponderance of the evidence standard, I recommend that this allegation be Not Sustained – Unfounded.

Recommended Finding: **Not Sustained (Unfounded)**

**Named Employee #1 - Allegation #2**

**6.220 - Voluntary Contacts, Terry Stops & Detentions 1. Terry Stops are Seizures and Must Be Based on Reasonable Suspicion in Order to be Lawful**

SPD Policy 6.220-POL-1 governs Terry stops and stands for the proposition that Terry stops are seizures of an individual and, as such, must be based on reasonable suspicion in order to be lawful. SPD Policy defines a Terry stop as: “A brief, minimally invasive seizure of a suspect based upon articulable reasonable suspicion in order to investigate possible criminal activity.” (SPD Policy 6.220-POL-2(b).) SPD Policy further defines reasonable suspicion as: “Specific, objective, articulable facts, which, taken together with rational inferences, would create a well-founded suspicion that there is a substantial possibility that a subject has engaged, is engaging or is about to engage in criminal conduct.” (*Id.*) Whether a Terry stop is reasonable is determined by looking at “the totality of the circumstances, the officer’s training and experience, and what the officer knew before the stop.” (*Id.*) While “[i]nformation learned during the stop can lead to additional reasonable suspicion or probable cause that a crime has occurred, it “cannot provide the justification for the original stop.” (*Id.*)

The facts underlying NE#1’s reasonable suspicion can be summarized as follows: the Complainant was carrying a box wrapped in a sweater; he appeared furtive; he seemed nervous when he saw NE#1; and the Complainant was in a high crime area.

None of these behaviors serve to establish reasonable suspicion. With regard to furtive conduct, the Washington State Supreme Court recently instructed that “[r]eliance on ‘furtive movements’ as the basis for a Terry stop can be problematic.” *State v. Weyand*, 188 Wn.2d 804, 399 P.2d 530 (2017). Similarly, nervousness in the presence of the police is insufficient to establish reasonable suspicion. *See State v. Walker*, 66 Wn. App. 622, 629, 834 P.2d 41 (1992) (finding that an officer investigating a report of suspicious behavior in a neighborhood inappropriately stopped a man who appeared startled when he saw the officer and turned onto another street to avoid him); *see also State v. Henry*, 80 Wn. App. 544, 552, 910 P.2d 1290 (1995) (nervousness is not sufficient for a Terry stop). Moreover, with regard to NE#1’s knowledge of the crime rates in that area, the mere fact that a suspect is in a high-crime area does not provide justification for a Terry stop. *See Brown v. Texas*, 443 U.S. 47, 52 (1979); *see also State v. Seitz*, 86 Wn. App. 865, 867-70, 941 P.2d 5 (1997). Lastly, that the Complainant was carrying a box under a sweater is not evidence of any crime. Notably, there was no report of any stolen property or any stolen object that was a similar shape as the box carried by the Complainant. NE#1 admitted this when he stated that his reasonable suspicion was for an “unreported” burglary or theft. The box carried by the Complainant could literally have had anything in it. There was no evidence to suggest that it was stolen or associated in any way with a crime. Indeed, the Complainant was ultimately permitted to leave the scene with the box.



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Even when all of the above are combined, it still does not meet the standard for reasonable suspicion. The United States Supreme Court cautioned that Terry stops could not be based merely on a hunch. *See Terry v. Ohio*, 392 U.S. 1, 22 (1968) (“Anything less would invite intrusions upon constitutionally guaranteed rights based on nothing more substantial than inarticulate hunches, a result this Court has consistently refused to sanction.”) This is exactly what occurred here. I find that NE#1 merely had a hunch that there was criminal activity afoot, instead of the specific, objective, and articulable facts creating a “well-founded suspicion” that the Complainant was involved in criminal activity. As such, I find that the Terry stop effectuated in this case violated policy and was inconsistent with the Fourth Amendment.

That being said, based on NE#1’s OPA interview, I believe that he genuinely thought that he was doing the right thing when he stopped the Complainant. While I ultimately find that he was incorrect, I do so with the benefit of hindsight and with the time and resources to conduct legal research on the issues in this case. Those luxuries were not available to NE#1. This does not excuse NE#1’s conduct and does not remedy the wrong experienced by the Complainant, but it is, in my opinion, a mitigating factor. I believe that the most effective and impactful result of this case would be for NE#1 to receive additional training concerning Terry stops, to discuss this stop and its problems with his chain of command, and for NE#1 to develop a better understanding of the legal parameters concerning stops and detentions to ensure that the future stops that he conducts are valid and constitutional. For these reasons, I recommend that NE#1 receive a Training Referral rather than a Sustained finding.

- **Training Referral:** NE#1 should be retrained by the Training Unit on Terry stops and be given an overview of the caselaw concerning what facts support a finding of reasonable suspicion. NE#1 should further be counseled by his chain of command concerning the stop in this case and how it fell outside of policy and was inconsistent with Fourth Amendment. NE#1’s chain of command should ensure he understands how crucial it is that he complies with this policy and conducts lawful Terry stops in the future. This retraining and associated counseling should be documented and this documentation should be maintained in an appropriate database.

Recommended Finding: **Not Sustained (Training Referral)**