



CLOSED CASE SUMMARY

ISSUED DATE: SEPTEMBER 13, 2021

FROM: DIRECTOR ANDREW MYERBERG
OFFICE OF POLICE ACCOUNTABILITY

CASE NUMBER: 2018OPA-0058

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 (Unfounded)
# 2	5.001 - Standards and Duties 10. Employees Shall Strive to be Professional	Not Sustained (Unfounded)
# 3	6.010 - Arrests 1. Officers Must Have Probable Cause That a Suspect Committed a Crime in Order to Effect an Arrest	Not Sustained (Lawful and Proper)
# 4	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)
# 5	6.220 - Voluntary Contacts, Terry Stops & Detentions 4. During a Terry Stop, Officers Will Limit the Seizure to a Reasonable Time	Not Sustained (Lawful and Proper)

Named Employee #2

Allegation(s):		Director's Findings
# 1	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 (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 lacked probable cause for a Terry stop, and that they used excessive force in arresting him.

ADMINISTRATIVE NOTE:

On March 22, 2018, this case was referred to the OPA Auditor (the precursor of the OIG) for certification as an Expedited Investigation. It appears that this certification request was made in error and that OPA should have sent this for certification as a full investigation. On April 27, 2018, the OPA Auditor returned the case and requested additional investigation (namely, interviews). OPA conducted interviews with the Named Employees, which were completed on June 26, 2018. OPA attempted to contact the Complainant at multiple phone numbers on July 12, 2018, however none of the numbers were in service. The case was then re-submitted to the OPA Auditor for re-review. On



July 16, 2018 (two days after the expiration 180-day deadline), the OPA Auditor returned this investigation requesting additional follow-up interviews. Due to high caseloads at the time and the fact that the 180-day timeline had already expired, OPA did not take additional action on this case. During review of its outstanding cases, OPA again assessed the investigation, believed it to be sufficiently complete, and submitted it for certification, now by the OIG. On May 20, 2020, the OIG certified this case as thorough and objective, although not timely. OPA thus issues this DCM outside the 180-day timeline.

SUMMARY OF INVESTIGATION:

On January 15, 2018, at 9:30 a.m., Named Employees #1 (NE#1), Named Employee #2 (NE#2), and a third officer responded to a call from neighborhood residence about an unknown individual (the Complainant in this case) who was reported to have parked his vehicle in a driveway and was identified as walking around asking for money and looking over fences. The entire incident was recorded on Body Worn Video (BWV). NE#2, the first officer to arrive on scene, observed a vehicle matching the description parked in a driveway. The vehicle was held up by a small car jack and a tire iron was visible beside it. The Complainant was seated next to the vehicle.

NE#2 spoke to the Complainant and asked if the vehicle belonged to him and if he knew the owner of the driveway in which he was parked. The Complainant was slow to answer, but eventually stated that the home belonged to "one of the neighbors." He also stated that the car was his grandmother's. NE#1 observed that the Complainant placed his hands in the pockets of his jacket and directed him to keep his hands in view, which the Complainant did. During the time the Complainant and NE#2 were speaking (approximately three minutes after NE#2 first made contact), the other officers arrived on the scene.

NE#2 requested the Complainant's driver's license. He ran the license and determined that there was a misdemeanor warrant associated with the Complainant. Approximately nine minutes after the Complainant was first contacted by police, NE#1 informed the Complainant that he was under arrest for the misdemeanor warrant. NE#1 and NE#2 handcuffed the Complainant without incident. After NE#1 and NE#2 handcuffed the Complainant and double-locked the cuffs, NE#2 went to his patrol vehicle to verify the warrant.

The officers searched the Complainant incident to arrest and located a set of keys for the car and personal effects. After searching him, the officers placed the Complainant in NE#1's patrol vehicle for transport. They also obtained contact information for the Complainant's grandmother (the vehicle's registered owner) and called her to facilitate her picking up the vehicle, which was parked in a private driveway. The grandmother and another relative arrived and spoke to NE#1 and the Complainant. The grandmother and relative took the vehicle keys from officers and moved the vehicle. The officers also requested a supervisor screen the arrest.

A supervising sergeant arrived on scene and, after being briefed by NE#1, the sergeant spoke to the Complainant. The Complainant informed the sergeant that he was experiencing handcuff discomfort due to an old shoulder injury. NE#1 told the sergeant that this was the first time he had heard the Complainant make that statement (the BWV did not capture any prior statements by the Complainant about discomfort). NE#1 and the third officer added a second set of handcuffs.

NE#1 subsequently transported the Complainant to King County Jail (KCJ). During the drive, the Complainant stated that he continued to experience handcuff pain. He also stated during the transport that he wanted to tell a judge that his treatment constituted police harassment and brutality. On arrival at the KCJ, NE#1 parked in the sally port and



again contacted the sergeant to report the Complainant's new allegations. The sergeant said he would come to the KCJ to re-screen the incident with the Complainant. NE#1 informed the Complainant, who told NE#1 that he continued to experience handcuff pain and wanted to go into the jail. NE#1 contacted his supervisor, received approval to bring the Complainant inside, and deactivated his BWV.

During the sergeant's subsequent screening at the KCJ, he photographed the Complainant's complained-of injury. The photographs showed an abnormality to the Complainant's right shoulder consistent with an old injury. No other injuries were documented. The Complainant told the sergeant that he was aware of the existence of his warrant, and he said that he had been attempting to "take care of it" by seeking legal counsel. He noted that both of his shoulders had been broken 10 years ago. He also stated that, because of his injury, he objected to being handcuffed and believed it to be unnecessary. He claimed that he did not believe two sets of handcuffs were used but that he could not visually verify whether this was the case.

NE#1 completed a Use of Force statement in which he stated that he used Type I force because policy required him to handcuff the Complainant's hands behind his back prior to transport. Given the Complainant's shoulder injury, the handcuffing caused pain which met the Type I force threshold per policy. The sergeant also referred the Complainant's allegations to OPA, and this investigation ensued.

OPA interviewed both Named Employees. NE#1 stated that, by the time he arrived on the scene, NE#2 was already in contact with the Complainant, but that he would have also stopped the Complainant to investigate a possible vehicle prowl. He noted that the Complainant was observed with a vehicle on private property. He noted that the only force he used was handcuffing the Complainant.

NE#2 confirmed that he stopped the Complainant to investigate a potential car prowl. He also stated that, per the 911 callers reporting the Complainant looking over fences, he had reasonable suspicion for a possible imminent burglary. He told OPA that he initially contacted the Complainant to question him regarding his presence on property that belonged to another. NE#2 noted that, had the check of the Complainant's name not returned any warrants, the Complainant would have been free to go.

ANALYSIS AND CONCLUSIONS:

Named Employee #1 - Allegation #1

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

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.*)

OPA finds that NE#1's use of force when handcuffing the Complainant was consistent with policy. As noted above, he had probable cause to arrest the Complainant based on the existence of a verified misdemeanor warrant. Given this, he had the right to use no more force than necessary to arrest the Complainant.



Here, the force was reasonable because NE#1 used the least force possible to effect his lawful purpose. OPA finds that the force would have been *de minimis* but-for the Complainant's previously existing shoulder injury, which caused him pain short of lasting injury and thus met the criteria for Type I force.

The force was also necessary because NE#1 was required by policy to handcuff the Complainant. See SPD Policy 11.020-POL-4. This policy requires that detainees be handcuffed behind their back for transport to the KCJ. NE#1 therefore lacked discretion to take any other action.

The force was also proportional to the resistance offered because, as noted, NE#1 did not use any force beyond that needed to guide and control the Complainant's hands for cuffing. Immediately upon learning that the cuffs caused the Complainant pain, NE#1 and other officers added a second set of cuffs for greater freedom of movement.

For these reasons, OPA recommends that this allegation be Not Sustained – Unfounded.

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

Named Employee #1 - Allegation #2

5.001 - Standards and Duties 10. Employees Shall Strive to be Professional

SPD Policy 5.001-POL-10 requires that SPD employees "strive to be professional at all times." The policy further instructs that "employees may not engage in behavior that undermines public trust in the Department, the officer, or other officers." (SPD Policy 5.001-POL-10.) The policy further states the following: "Any time employees represent the Department or identify themselves as police officers or Department employees, they will not use profanity directed as an insult or any language that is derogatory, contemptuous, or disrespectful toward any person." (*Id.*) Lastly, the policy instructs Department employees to "avoid unnecessary escalation of events even if those events do not end in reportable uses of force." (*Id.*)

OPA finds insufficient evidence to suggest that NE#1 violated the professionalism policy. Based on a review of his BWV, NE#1 did not use profanity, demean, or disrespect the Complainant. Likewise, NE#1 did not escalate the incident or appear to grow frustrated with the Complainant. When the Complainant alleged discomfort, pain, and inappropriate treatment at the hands of SPD, NE#1 reported that allegation to a supervisor as soon as it was practical to do so and took steps to mitigate any discomfort as far as was permitted by policy.

For these reasons, OPA recommends that this allegation be Not Sustained – Unfounded.

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

Named Employee #1 - Allegation #3

6.010 - Arrests 1. Officers Must Have Probable Cause That a Suspect Committed a Crime in Order to Effect an Arrest

SPD Policy 6.010-POL-1 requires that officers have probable cause to believe that a suspect committed a crime when effectuating an arrest. Stated differently, where an arrest is not supported by probable cause, it violates law and Department policy. Probable cause exists when the facts and circumstances within an officer's knowledge are sufficient in themselves to support a reasonable belief that an offense has been or is being committed.



OPA finds that NE#1 had the legal authority to arrest the Complainant by virtue of the valid, signed warrant. In Washington, an arrest may be made only under “authority of law” which is satisfied by, among other things, a facially valid warrant signed by a judge and issued upon probable cause. *See State v. Chenoweth*, 160 Wn.2d 454, 465 (2007). Here, there has been no contention that the arrest warrant NE#1 found and verified was anything but facially valid.

As a result, OPA finds that NE#1 had legal authority to arrest the Complainant and therefore, recommends that this allegation be Not Sustained – Lawful and Proper.

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

Named Employee #1 - Allegation #4

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.)

There is no basis for OPA to find that the Terry stop of the Complainant exceeded the permissible scope and time permitted by *Terry v. Ohio* and its progeny.

Based on the 911 reports, NE#2 had reasonable suspicion to contact the Complainant and inquire into the reasons for his presence on property belonging to another. The resulting Terry stop lasted for approximately nine minutes, during which time the Complainant was being questioned and his identity verified. As soon as NE#1 became aware of the existence of a valid arrest warrant, he took the Complainant into custody. Neither NE#1 nor NE#2 unnecessarily prolonged the stop or excessively controlled the Complainant’s movements. Insofar as the Complainant was restrained from keeping his hands in his pockets, this was done for officer safety reasons since the Complainant had not yet been searched to determine he was unarmed.

For these reasons, OPA recommends that this allegation be Not Sustained – Lawful and Proper.

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

Named Employee #1 - Allegation #5

6.220 - Voluntary Contacts, Terry Stops & Detentions 4. During a Terry Stop, Officers Will Limit the Seizure to a Reasonable Time

SPD Policy 6.220-POL-4 requires that officers limit Terry stops to a reasonable amount of time. It instructs that “subjects may only be seized for that period of time necessary to effect the purpose of the stop” and further states that “officers may not extend a detention solely to await the arrival of a supervisor.”

For the same reasons as above (see Named Employee #1 – Allegation #4), OPA recommends that this allegation be Not Sustained – Lawful and Proper.

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



Named Employee #2 - Allegation #1

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-2 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-1.) 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.*)

OPA finds that NE#2’s Terry stop of the Complainant was based on reasonable, articulable suspicion and therefore complied with policy. Based on the 911 calls, NE#2 was aware that the Complainant was on property belonging to another and had reason to believe that the Complainant was looking over fences. This gave rise to a reasonable inference that a burglary could occur. When NE#2 contacted the Complainant, he was also aware that the Complainant had parked his car in another’s driveway and appeared to be doing something with the tires (ultimately, changing a flat).

Based on this information available to NE#2, OPA finds it reasonable that he decided to initiate a Terry stop to conduct additional investigation and OPA finds that this stop was supported by law. For these reasons, OPA recommends that this allegation be Not Sustained – Lawful and Proper.

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