

**GOVERNMENT OF THE DISTRICT OF COLUMBIA
OFFICE OF POLICE COMPLAINTS**

FINDINGS OF FACT AND MERITS DETERMINATION

Complaint No.:	21-0823
Complainant:	COMPLAINANT
Subject Officer(s), Badge No., District:	SUBJECT OFFICER
Allegation	Harassment
Complaint Examiner:	Jennifer A. Fischer, Esq.
Merits Determination Date:	September 24, 2022

Pursuant to D.C. Official Code § 5-1107(b-1), the Office of Police Complaints (OPC) has the sole authority to adjudicate citizen complaints against members of the Metropolitan Police Department (MPD) that allege abuse or misuse of police powers by such members, as provided by § 5-1107(a). This complaint was timely filed in the proper form as required by § 5-1107, and the complaint has been referred to this Complaint Examiner to determine the merits of the complaint as provided by § 5-1111(e).

I. SUMMARY OF COMPLAINT ALLEGATIONS

The complainant, COMPLAINANT (Complainant), filed a complaint with the Office of Police Complaints (OPC) on September 30, 2021. Complainant alleged that on August 16, 2021, Metropolitan Police Department (MPD) SUBJECT OFFICER (Subject Officer), harassed him by unlawfully searching his car.¹

Specifically, Complainant stated that on August 16, 2021, while he drove home near the intersection IN NE, WASHINGTON, DC, Subject Officer stopped him for failing to display a front tag on his vehicle. During the traffic stop, Subject Officer repeatedly requested to search Complainant's vehicle. Complainant said, "No," and asked why the officer wanted to search his vehicle since he had not done anything illegal. Shortly thereafter, Subject Officer proceeded to search Complainant's vehicle without consent or a warrant. Complainant said that he was pulled over for a simple traffic stop and Subject Officer was adamant about searching his vehicle, even after he told him, "No."

¹ In addition, the complainant alleged that on August 16, 2021, WITNESS OFFICER #2 harassed him by threatening to arrest him if he moved forward with a formal complaint. Pursuant to D.C. Code § 5-1108 (1), on July 17, 2022, a member of the Police Complaints Board dismissed these allegations, concurring with the determination made by OPC's executive director.

II. EVIDENTIARY HEARING

No evidentiary hearing was conducted regarding this complaint because, based on a review of OPC's Report of Investigation, Body Worn Camera Footage recorded by Subject Officer and WITNESS OFFICER on August 16, 2021, objections submitted by Subject Officer on August 17, 2022 (Subject Officers' Objections), and OPC's response to the objections dated August 29, 2022, the Complaint Examiner determined that the Report of Investigation presented no genuine issues of material fact in dispute that required a hearing. *See* D.C. Mun. Regs. Tit. 6A, § 2116.3.

III. FINDINGS OF FACT

Based on a review of OPC's Report of Investigation, Body Worn Camera Footage recorded by Subject Officer and WITNESS OFFICER (Witness Officer) on August 16, 2021, objections submitted by Subject Officer on August 17, 2022 (Subject Officer's Objections), and OPC's response to the objections dated August 29, 2022, the Complaint Examiner finds the material facts regarding this complaint to be:

1. Complainant filed a complaint with OPC on September 30, 2021.
2. At approximately 5:59 pm on August 16, 2021, Subject Officer and his partner, Witness Officer, were dispatched in response to a 911 call regarding a reported drug sale/purchase observed at ADDRESS IN NE, WASHINGTON, DC. The report included the sale of marijuana and the involvement of a blue van with unknown tags.
3. Upon responding to the call, Officers observed a blue minivan turning from ROAD IN NE, WASHINGTON DC onto STREET IN NE, WASHINGTON, DC and initiated a traffic stop by activating their emergency lights.
4. The Complainant pulled his vehicle over to the left partially blocking the intersection of AN INTERSECTION IN NE, WASHINGTON DC. After stopping, he opened his car door and exited his vehicle.
5. Witness Officer, approaching the vehicle on the passenger side ordered Complainant back into his vehicle while Subject Officer crouched behind his open driver side door. Complainant complied and got back into his vehicle. His door remained open, however. Witness Officer asked him to shut the door, but he said that the windows didn't work.
6. Subject Officer then approached Complainant's driver's side door and informed him that he was being stopped for having no front license plate. Complainant pulled the license plate from his dashboard and presented it to Subject Officer explaining that he hadn't yet attached it to his vehicle. Subject Officer then asked for his license and registration, which Complainant produced. Complainant also told Subject Officer that he wasn't feeling well because a member of his family had just died.
7. Subject Officer then asked Complainant to step out of the vehicle. Complainant complied. Subject Officer patted him down in a weapon's search explaining that it was based on the manner in which he pulled over and his stepping out of the vehicle immediately after stopping.

8. Subject Officer then asked Complainant to step over to the sidewalk, approximately 15 feet from the vehicle with Witness Officer. Complainant complied and stood on the sidewalk with Witness Officer while his car door remained open. Subject Officer advised Complainant that in the future, he should pull to the right side of the street during a traffic stop. It was a one-way street with cars parked on both sides, but ample parking available.
9. Complainant stated that he wasn't doing anything to which Subject Officer asked, "Are you going to be cooperative?" Complainant stated that he was being cooperative and Subject Officer responded, "When you jump out of a car like that it makes you seem nervous." Complainant acknowledged that he was nervous being pulled over by an officer. Subject Officer then went to run Complainant's license information while Complainant waited on the sidewalk with Witness Officer.
10. When Subject Officer returned to Complainant's vehicle, he used his flashlight and looked through the open driver side door panel compartment where a prescription pill bottle was visible, then leaned into the car and flashed the light on the center console and under the driver's seat. He then walked around the vehicle and shined his flashlight into all of the car windows and walked back to the driver's door.
11. While Subject Officer was looking through the car with his flashlight, Complainant complained to Witness Officer about Subject Officer looking through his car and told her several times that there was nothing in there and that he should not be searching his vehicle.
12. Subject Officer emerged from the vehicle and, while standing next to the open driver door, asked Complainant what was in the pill bottle. Complainant responded that it was medication. He reiterated that he had just suffered a death in his family and that he was not feeling well.
13. Subject Officer again leaned into the car through the driver door and shined his flashlight onto the center console and the compartment in the passenger side door.
14. When Subject Officer emerged, he approached Witness Officer and told her "I got PDP" but he did not specify what he had seen to justify that conclusion. Witness Officer asked, "do you want that?" and Subject Officer replied, "We could search for it." Witness Officer didn't respond.
15. Subject Officer then asked Complainant if he had any narcotics in the car. Complainant told him that he did not authorize a search of his vehicle and that he had only been stopped for a traffic stop. Subject Officer then asked if there was anything in the car that he should know about. Complainant said no and reiterated that he was not giving permission for him to search his car.
16. Subject Officer said okay and that he'd get Complainant's ticket. Subject Officer returned to his vehicle and gave Complainant a warning ticket, which he gave to Complainant.

IV. DISCUSSION

Pursuant to D.C. Code § 5-1107(a), (b-1), OPC has the sole authority to adjudicate “a citizen complaint against a member or members of the MPD . . . that alleges abuse or misuse of police powers by such member or members, including (1) harassment...”

Harassment is defined in MPD General Order 120.25, Part III, Section B, No. 2 and in the regulations governing OPC as “words, conduct, gestures, or other actions directed at a person that are purposefully, knowingly, or recklessly in violation of the law, or internal guidelines of the MPD, so as to: (a) subject the person to arrest, detention, search, seizure, mistreatment, dispossession, assessment, lien, or other infringement of personal or property rights; or (b) deny or impede the person in the exercise or enjoyment of any right, privilege, power, or immunity.”

“In determining whether conduct constitutes harassment, [OPC] will look to the totality of the circumstances surrounding the alleged incident, including, where appropriate, whether the officer adhered to applicable orders, policies, procedures, practices, and training of the MPD ... the frequency of the alleged conduct, its severity, and whether it is physically threatening or humiliating.” D.C. Mun. Regs. tit. 6A, § 2199.1.

The conduct in question here is Subject Officer’s leaning into Complainant’s vehicle and, while leaning in, shining a flashlight around to get a better look at various compartments of the car, which is observed in his BWC footage. SUBJECT OFFICER 6:25, 8:35. Whether this conduct constitutes harassment depends on whether the law and/or MPD policy defines it as a search, and, if so, if Subject Officer had the requisite legal basis to conduct such a search. If Subject Officer did not, then the question is whether he violated the law and/or MPD policy intentionally, knowingly, or recklessly. As will be discussed below, Subject Officer did conduct a search without requisite legal basis and did so recklessly.

First, leaning into Complainant’s vehicle constitutes a Fourth Amendment search requiring consent, a warrant, or some other exigent circumstance. *New York v. Class*, 475 U.S. 106, 112 (1986). Subject Officer stated in his interview with OPC that he is aware that an intrusion into the vehicle would constitute a search, but he claimed that he stayed outside the vehicle and only made “plain-view” observations. Exh. 5 at 4:40, 11:50, 15:00. Because the BWC evidence shows that he leaned into the vehicle and Subject Officer acknowledges this is beyond a “plain-view” observation, the “plain view” doctrine does not apply here. Subject Officer also acknowledged during his interview that Complainant did not consent to the search. Exh. 5 at 16:46. It is also undisputed that Subject Officer had no warrant.

The question then is whether Subject Officer had an exigent circumstance justifying his search of Complainant’s vehicle. Subject Officer claimed during his interview with OPC that the drug paraphernalia observed in the vehicle would have given him the probable cause needed to place Complainant under arrest and complete a search that way, but instead, he and Witness Officer used their discretion and did not arrest Complainant. Exh. 5 at 19:20.

Subject Officer’s statement suggests an argument for search incident to arrest (and this argument was also elaborated in his Objections). Search incident to arrest, however, does not apply here because it requires Complainant to have a) actually been put under arrest; and b) for

the arrest to occur prior to the search. *See Knowles v. Iowa*, 525 U.S. 113 (1998); *Katz v. United States*, 389 U.S. 347 (1967). Thus, search incident to arrest does not apply here.

In Subject Officer's Objections, his representative claims that Subject Officer had the requisite probable cause that the vehicle contained contraband or evidence of a crime allowing him to conduct the search, as set out in *Carroll v U.S.*, 267 U.S. 132 (1925). The problem with that argument is that Subject Officer could not articulate during his interview what specifically he had seen prior to leaning into the vehicle that established probable cause for his decision to lean into the vehicle. Exh. 5 at 26:00.

Watching the BWC footage, prior to Subject Officer leaning into the vehicle, at best he could see the medicine container in the passenger door that he claimed contained a glove with something inside it and three cups – two in the center cupholder in front of the console and one in the passenger door compartment. SUBJECT OFFICER BWC 6:25, 8:02, 8:35; Exh. 5 at 4:45, 18:12, 26:00. He does not explain in his interview with OPC, however, how these innocuous looking items gave him probable cause to look further into the vehicle. The closest he comes is in stating that the pill bottle with the latex glove was "odd," but he also acknowledged that it could have been prescription medication as Complainant claimed when Subject Officer asked him about it. Exh. 5 at 18:20, 22:19. Such an observation does not provide probable cause. Although the stop was allegedly at least partially in response to a report of an observed drug sale from a blue van, Exh. 5 at 1:40; Exh. 10, the drug allegedly observed in that report was marijuana and Subject Officer did not even try to tie the observed items to that report.

Rather, what he claims would have given him probable cause is a straw with white powdery residue that he allegedly saw in the center console. Exh. 5 at 15:46, 17:45. He does not state whether he sees this, however, before or after he leaned into the vehicle. Exh. 5 at 5:00, 15:46, 20:00, 26:00. In the BWC footage, the contents of the center console are not visible until Subject Officer leans into the vehicle the first time and shines his flashlight on it. SUBJECT OFFICER BWC 6:25. The center console is visible from the exterior of the car when Subject Officer looks through the passenger window. SUBJECT OFFICER BWC 7:49. This happens, however, after he has already leaned into the car the first time. SUBJECT OFFICER BWC 6:25. Therefore, there is no evidence to suggest that the alleged straw provided the basis for his leaning into the car. Subject Officer thus did not have probable cause to lean into Complainant's car to conduct even a limited search.

Subject Officer in his Objections also raises the argument that it was a protective search of a vehicle in which "there is a reasonable articulable suspicion to believe the vehicle, or a container therein, might contain a weapon" citing *Michigan v. Long*, 463 U.S. 1032, 1051 (1983). Notably, Subject Officer did not raise this basis in his interview with OPC, which is a problem for concluding that he held an "articulable" belief of a weapon in the vehicle.

During his interview Subject Officer did, however, raise a concern for safety when he explained the justification for the pat down of Complainant and the "plain-view" search of the vehicle. Exh. 5 at 4:30, 11:50. Subject Officer explained that it was based on Complainant pulling over to the left, immediately exiting his vehicle, and walking toward the officer's vehicle. Exh. 5 at 2:45, 4:25, 9:11. He also asserted Complainant clutched his waistband as he walked.

Exh. 5 at 2:45, 10:20. All of which may have provided articulable suspicion sufficient to justify a pat down of Complainant's person.

This explanation does not, however, indicate any additional factors as to why he believed that a weapon might be easily accessible to Complainant if he were allowed to reenter his vehicle. For example, in *Michigan v. Long*, the basis for conducting a protective sweep of the vehicle was seeing a knife in plain view on the floor of the defendant's car in addition to Defendant's erratic behavior prior to and after he was pulled over. 463 U.S. 1032, 1051. Other cases that have found an articulable basis for conducting a protective sweep noted a furtive movement in the car. *See e.g., McGee v. United States*, 270 A.2d 348, 349 (D.C.1970) (reaching down and appearing to place something under the seat), *United States v. Green*, 465 F.2d 620, 623 (D.C.Cir.1972) (pulling something out of his belt and placing it under his seat), *James v. United States*, 829 A.2d 963, 964, 966–67 (D.C.2003) (lifting his body up, then bending way down as if putting something underneath the driver's seat).

This case is more like *U.S. v. Spinner* in which the U.S. Court of Appeals for the D.C. Circuit did not find reasonable suspicion to conduct a protective sweep following a pat down of Defendant despite the officers' observations that "he dipped his shoulder toward the center console while he was in the truck, left the door of the truck open when he got out, and, [acted nervous]." 475 F.3d 356, 359 (D.C. Cir. 2007). The court concluded that "the suspicion that someone is armed – or, in this case, might have a weapon in his vehicle – must be based on something more than his mere nervousness. A person stopped by the police is entitled to be nervous without thereby suggesting he is armed and dangerous or, indeed, has anything to hide. Were nervous behavior alone enough to justify the search of a vehicle, the distinction between a stop and a search would lose all practical significance, as the stop would routinely – perhaps invariably – be followed by a search." *Id.* at 360. Thus, Subject Officer's search does not meet the requirements for conducting a protective sweep of the vehicle.

Without consent, a warrant, or an exigent circumstance, Subject Officer's search of Complainant's vehicle was conducted in violation of Complainant's Fourth Amendment right to be free from unreasonable searches.² Because Subject Officer violated the law and MPD General Order 602.01 (Vehicle Searches and Inventories) when leaning into Complainant's vehicle, the question is whether this violation was intentional, knowing, or reckless. Subject Officer admitted in his interview to knowing that crossing the threshold of the vehicle's doorframe constitutes a "limited" search, although he did not recall doing so here. Exh. 5 at 24:00. When asked the basis for it, however, he stated that it would have been because he observed something illegal such that it was within his legal means as an officer. Exh. 5 at 25:00. He does not, however, ever articulate what that observation was. His statements do not suggest that he was acting intentionally or even

² Subject Officer's representative in his Objections suggests that the leaning in was *de minimis* and thus, not a violation. There is no such exception to the Fourth Amendment, however, when it comes to violating someone's private space. The argument that Complainant suffered no negative effects from Subject Officer's actions ignores that Complainant, at the time of the search and in his interview with OPC, repeatedly expressed frustration at Subject Officer entering his vehicle without his permission or any legal basis. Searching someone's car without proper legal basis is not *de minimis*, even if the person whose rights were violated is not arrested and the search is limited in scope. While this may be relevant to decisions as to what kind of repercussions there will be for a violation, it is not a relevant argument as to whether or not a violation occurred.

knowledgeably that he was violating the law. The casualness with which he leaned into the vehicle, however, combined with his knowledge of the law demonstrate reckless disregard for the law.

Subject Officer’s representative claims in the Objections that this casualness suggests not recklessness, but mere inadvertence. Notably, this claim that it was inadvertent is contrary to Subject Officer’s statements to OPC that if he leaned in that he had the legal basis to do so. Exh. 5 at 25:00. In his Objections, he cites to *Flores v. United States*, 37 A.3d 866, 869 (D.C. 2011) for the proposition that recklessness means “a state of mind in which a person does not care about the consequences of his or her actions.” That was not the holding of *Flores*, however, which specifically discussed recklessness in terms of “conduct without direction or target.” *Flores*, 37 A. 3d 869. Here, the question is not whether Subject Officer was intentionally targeting Complainant or not, but whether he acted recklessly when the evidence indicates that he didn’t contemplate whether he had the requisite reasonable belief regarding a weapon in the vehicle or probable cause of finding evidence of a crime.

Flores does cite to a definition similar to the one put forth by Subject Officer’s representative, among many others more aposite. Even if we chose to apply it here, Subject Officer’s conduct would be reckless. The concern here is whether Subject Officer gave any thought to how Complainant might experience an officer unlawfully searching his vehicle. Subject Officer’s casualness about the search is reflected in his statement that this search was “consistent with any traffic stop we conduct,” Exh. 5 at 12:35, and suggests that he didn’t particularly care if his search impacted Complainant. His statements indicate that he leaned into the car without giving the basis for doing so much thought at all, despite knowing the law, and despite knowing Complainant objected to it. Thus, Subject Officer’s search of Complainant’s vehicle in violation of the Fourth Amendment and MPD Policy was reckless.

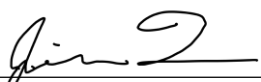
Therefore, Subject Officer’s leaning into Complainant’s vehicle was a search conducted recklessly in violation of the Fourth Amendment and MPD General Order SPT 602.01, Vehicle Searches and Inventories, June 20, 2019. It thus constituted harassment under D.C. Code §5-1107 and MPD General Order 120.25. Complainant’s harassment allegation is sustained.

V. SUMMARY OF MERITS DETERMINATION

SUBJECT OFFICER

Allegation	Harassment	Sustained
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Submitted on September 26, 2022.



Jennifer A. Fischer, Esq.
Complaint Examiner