

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

FINDINGS OF FACT AND MERITS DETERMINATION

Complaint No.:	18-0413
Complainant:	COMPLAINANT
Subject Officer(s), Badge No., District:	SUBJECT OFFICER #1 SUBJECT OFFICER #2
Allegation 1:	Harassment- Stop and Search (SUBJECT OFFICER #1 and SUBJECT OFFICER #2)
Allegation 2:	Harassment- Threat (Officer SUBJECT OFFICER #2)
Complaint Examiner:	Peter W. Tague
Merits Determination Date:	February 21, 2019

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 alleges that on April 11, 2018, the subject officers, Metropolitan Police Department (MPD) SUBJECT OFFICER #2, and SUBJECT OFFICER #1, harassed WITNESS/SUSPECT by stopping and searching him; and that SUBJECT OFFICER #2 further harassed WITNESS/SUSPECT by threatening to call his probation officer about the incident.

II. EVIDENTIARY HEARING

No evidentiary hearing was conducted regarding this complaint because, based on a review of OPC's Report of Investigation, the objections submitted by both officers on December 14, 2018, and OPC's response to the objections, 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, the objections submitted by SUBJECT OFFICER #1 and SUBJECT OFFICER #2 on December 14, 2018, and OPC's response to the objections, the Complaint Examiner finds the material facts regarding this complaint to be:

1. The complainant in this case was not the person stopped by SUBJECT OFFICER #2, and SUBJECT OFFICER #1. The man stopped was WITNESS/SUSPECT. COMPLAINANT watched the incident unfold, and provided a detailed description of it, from beginning to end. See OPC, Report of Investigation [hereafter ROI], Exhibit 1 (COMPLAINANT). COMPLAINANT contends that the officers harassed WITNESS/SUSPECT by stopping and searching him, and that SUBJECT OFFICER #2 also harassed WITNESS/SUSPECT by threatening to report the incident to his probation officer.
2. With SUBJECT OFFICER #2 driving a scout car, and SUBJECT OFFICER #1 a passenger, SUBJECT OFFICER #2 turned the car right (east) onto A STREET IN NE, WASHINGTON, DC, driving slowly.
3. Both officers have a BWC. Before SUBJECT OFFICER #2 turns on his BWC, its prerecording shows that he is texting as he drives. If either officer said to the other why they decided to stop WITNESS/SUSPECT, it is not recorded (and neither, in their statements, did either say they had exchanged that information).
4. Neither officer wrote a report (PD Form 251) explaining why they intercepted WITNESS/SUSPECT and what happened when they did.
5. Seconds after turning onto A STREET IN NE, WASHINGTON, DC, SUBJECT OFFICER #2 pulls the car to the opposite of the street, and parks. He turns on his BWC.
6. SUBJECT OFFICER #2 says he saw WITNESS/SUSPECT sitting on the steps of a private home, a few feet behind a low fence that fronted the property. From SUBJECT OFFICER #2's BWC, it appears the steps are approximately forty-five or fifty feet from the officers as SUBJECT OFFICER #2 decides to park the car and inquire. (WITNESS/SUSPECT is not in sight when SUBJECT OFFICER #2's BWC briefly records the house.)
7. SUBJECT OFFICER #2's interest in WITNESS/SUSPECT was piqued, he says, when WITNESS/SUSPECT, upon seeing the scout car, put a plastic bag into the right pocket of his outer garment, what will be called his sweatshirt. SUBJECT OFFICER #2 says the bag appeared to contain matter he suspected was synthetic marijuana. SUBJECT OFFICER #2 did not explain the basis of that suspicion. He admitted that, with their

- appearances similar, one had to look closely to decide whether the material was synthetic or actual marijuana. See ROI, Exhibit 7 (SUBJECT OFFICER #2 interview).
8. SUBJECT OFFICER #2 added that the police have received complaints about loitering and drug sales in the area. He did not, however, know where WITNESS/SUSPECT lived—at that address or elsewhere.
 9. WITNESS/SUSPECT then stood, again according to SUBJECT OFFICER #2, and began to walk—towards the officers.
 10. SUBJECT OFFICER #2 left the car, to stand on the sidewalk, awaiting WITNESS/SUSPECT's arrival. When SUBJECT OFFICER #2's BWC first shows WITNESS/SUSPECT, less than thirty feet separates them. In the meantime, SUBJECT OFFICER #1 has left the car and approaches the two on the sidewalk.
 11. One man walks across the street, and another stands on the curb, between SUBJECT OFFICER #2 and WITNESS/SUSPECT.
 12. WITNESS/SUSPECT wears sunglasses, and holds a cellphone in his left hand.
 13. SUBJECT OFFICER #2 and WITNESS/SUSPECT meet at the end of the fence marking the north side of the property at AN ADDRESS IN NE, WASHINGTON, DC.
 14. SUBJECT OFFICER #2 says he stopped WITNESS/SUSPECT to confirm or dispel what the bag contained. SUBJECT OFFICER #2's BWC shows that the bag WITNESS/SUSPECT carried was partially out of his pocket.
 15. SUBJECT OFFICER #2 asks WITNESS/SUSPECT "What did you just put underneath? Just your weed?" WITNESS/SUSPECT says nothing as he hands the bag to SUBJECT OFFICER #2. SUBJECT OFFICER #2 immediately sees that the substance in the bag is marijuana, not synthetic marijuana, and of an amount legal to possess.
 16. As he asks WITNESS/SUSPECT why he tried to hide the bag from the officers, SUBJECT OFFICER #2 reaches into the left pocket of WITNESS/SUSPECT's sweatshirt, pulls out part of what appears to be a white paper, and returns it. WITNESS/SUSPECT remains silent.
 17. SUBJECT OFFICER #2 defends that act by saying he saw what appeared to be another bag, similar to the one that initially caused him to stop WITNESS/SUSPECT. A review of the BWCs, frame-by-frame, does not confirm the existence of what might be considered a second bag.
 18. SUBJECT OFFICER #2 puts his left hand into WITNESS/SUSPECT's right pocket a second time, as WITNESS/SUSPECT says nothing when SUBJECT OFFICER #2 asks if

- he has anything of interest (“guns, drugs, bombs or weapons of mass destruction”).
19. When WITNESS/SUSPECT, who has raised his arms, begins to lower his left arm, SUBJECT OFFICER #2 touches his left elbow and tells him to keep his arms raised. SUBJECT OFFICER #2 puts his fingers into the left pocket of WITNESS/SUSPECT’s sweatshirt, and, finding nothing, says “If that’s all it is then it ain’t no big deal.”
 20. When then asked by SUBJECT OFFICER #2 if he has anything else (“Nothing else right?”), WITNESS/SUSPECT replies “I ain’t got shit man.”
 21. SUBJECT OFFICER #2 nonetheless tells WITNESS/SUSPECT “I’m going to check. That’s cool with you?” WITNESS/SUSPECT’s response is inaudible
 22. SUBJECT OFFICER #2 repeats his inquiry (“You’ve got nothing else on you, right?”). WITNESS/SUSPECT then authorizes a search (“Check my pockets man”).
 23. SUBJECT OFFICER #2 runs his hands over the top of WITNESS/SUSPECT’s sweatshirt, belt and the right front pocket of his pants. SUBJECT OFFICER #1 lifts WITNESS/SUSPECT’s sweatshirt. WITNESS/SUSPECT objects for the first time (“Why are you harassing people?”). SUBJECT OFFICER #2 removes a pocket knife from WITNESS/SUSPECT’s belt, and places it on the ground, out of reach.
 24. WITNESS/SUSPECT then volunteers that if the officers intend to check his pockets they should do so.
 25. SUBJECT OFFICER #2 removes WITNESS/SUSPECT’s wallet from the right rear pocket of his pants, opens it, finds and looks at WITNESS/SUSPECT’s driver’s license, returns the wallet, and then repeats those steps.
 26. SUBJECT OFFICER #2 returns to the scout car to determine whether WITNESS/SUSPECT has outstanding warrants.
 27. WITNESS/SUSPECT’s acquiescence turns to irritation. Speaking to SUBJECT OFFICER #1, WITNESS/SUSPECT accuses the officers of “jumping him” for no reason. Rather than justifying their actions, SUBJECT OFFICER #1 tells WITNESS/SUSPECT to “relax.” WITNESS/SUSPECT continues to accuse the officers of harassing him, and, rather than offering a reason for the incident, SUBJECT OFFICER #1 tells him he will answer questions “[w]hen you are done talking.” In the end neither officer explains their conduct to WITNESS/SUSPECT.
 28. In the scout car SUBJECT OFFICER #2 waits for the results for around thirty seconds. He confirms that there is no reason to apprehend WITNESS/SUSPECT. SUBJECT OFFICER #2 turns off his BWC.

29. The next incident is recorded on SUBJECT OFFICER #1's BWC. He asks SUBJECT OFFICER #2 whether WITNESS/SUSPECT is "good" (translated, he has no warrants), and SUBJECT OFFICER #2 confirms that none exist.
30. As WITNESS/SUSPECT walks away, out of sight of the BWCs, SUBJECT OFFICER #2, still in the car, says loudly "Hey, WITNESS/SUSPECT, I'm going to call your probation officer." He offers no reason. With WITNESS/SUSPECT out of sight, it is not clear he heard what SUBJECT OFFICER #2 said. But in interview he said he did, and interpreted the comment as a threat. See ROI, Exhibit 5. COMPLAINANT also heard what SUBJECT OFFICER #2 said, as perhaps did other men whose voices are heard on a BWC.
31. The WALES report SUBJECT OFFICER #2 received about WITNESS/SUSPECT indicated that WITNESS/SUSPECT was on probation in A TOWN IN MARYLAND. It also indicated, in capital letters: "PROBATION OR SUPERVISED RELEASE STATUS RECORD – DO NOT ARREST BASED ON THIS INFORMATION – PLEASE CONTACT SUPERVISING AGENCY VIA NLETS, TELEPHONE OR EMAIL TO ADVISE OF CONTACT WITH SUPERVISED INDIVIDUAL." See DC Police Union, Objections to Report of Investigation from the OPC Complaint Number 18-0413, Exhibit 1 [hereafter Police Union Objections].
32. Neither officer attempted to contact WITNESS/SUSPECT's probation officer. Neither explained why he did not.
33. After SUBJECT OFFICER #2 mentions WITNESS/SUSPECT's probation status, SUBJECT OFFICER #1 adds, as WITNESS/SUSPECT apparently walks away, "Have a nice day," and "make sure you cross at the cross-walk."
34. The incident lasts less than three minutes.
35. Both officers contend that the area is known as a "high-crime area."
36. Neither officer said he believed that WITNESS/OFFICER was armed or dangerous.
37. Officers must make a record of "all stops." Metropolitan Police, General Order 304.10, Part II(D)(2). Neither officer prepared a report about the incident. SUBJECT OFFICER #2 defends not doing so because the incident did not involve a stop-and-frisk. See ROI Exhibit 7 (SUBJECT OFFICER #2 Interview). He justifies reaching into SUSPECT/WITNESS's left pocket because of the "plain view" doctrine, and his other intrusions because WITNESS/SUSPECT had given consent. See id.

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; (2) use of unnecessary or excessive force

Harassment is defined in MPD General Order 120.25, Part III, Section B, No. 2 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.”

The regulations governing OPC define harassment as “[w]ords, 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 (1) subject the person to arrest, detention, search, seizure, mistreatment, dispossession, assessment, lien, or other infringement of personal or property rights; or (2) 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.

A. Stop and search

1. Introduction.

This brief encounter between police officers and a person is emblematic in many ways: they occur frequently, they are (thought) needed to reduce crime, they defy easy resolution, and, intrusive, they can rile the person stopped and those who watch.

They also test the objective viewer’s assessment, for, as here, the participants offer their descriptions and justifications long after the event itself. Not surprisingly, then, they differ among themselves and their descriptions are sometimes refuted by the BWCs. Even after reviewing the recordings by the BWCs, it is difficult to see what an officer says he saw, and thus to assess the credibility of his defenses to his actions.

Let us begin with the law.

In General Order 304.10 [hereafter GO 304.10], the MPD accurately and comprehensively describes what officers may do in an encounter like that with WITNESS/SUSPECT to comply with constitutional limits on searching and seizing under the

Fourth Amendment to the United States Constitution. Because the General Order mirrors constitutional law, it will be used as a source.

In ascending order of intrusion, an officer may approach anyone to inquire about any matter. This is called a “field contact.” *Id.* at Part III(A). Officers may ask pointed questions to quell any suspicion. SUBJECT OFFICER #2 did this (“What did you just put underneath? Just your weed?”). In turn, WITNESS/SUSPECT could have ignored the request, and walked on.

Instead, SUBJECT OFFICER #2 says he stopped WITNESS/SUSPECT, the next step in the escalation. Officers may detain—or stop—a person whom they believe is committing a crime, so long as their suspicion is reasonable. *Id.* at Part II(B)(1). Whether SUBJECT OFFICER #2’s reasons for stopping WITNESS/SUSPECT were sufficient is considered below.

A detention may last only for the time needed to obtain the information needed for the investigation. *Id.* at Part III(B)(4)(a)(2). Once their suspicion has been quieted, officers must let the person go.

Next, officers may frisk (or pat down) a person detained, but only so long as they reasonably believe the person is armed. *Id.* at Part III(C)(1).

Last, they may search if they see something in plain view that is obviously criminal in nature, or if the person consents to the intrusion.

Here, SUBJECT OFFICER #2 agrees that he stopped WITNESS/SUSPECT and that he searched him. But he defends his intrusions as authorized by either the plain view or consent doctrines, both of which eliminate the need otherwise to defend an intrusion.

2. *Analysis.*

SUBJECT OFFICER #2 intended to stop WITNESS/SUSPECT. He believed he was justified in doing so.

To stop, an officer must have reasonable suspicion that the person is committing a crime. A detention’s purpose is to learn whether probable cause exists to arrest. See GO 304.10(II)(B)(1).

Whether a stop is justified is an issue viewed objectively. SUBJECT OFFICER #2 contends that WITNESS/SUSPECT put the bag into his pocket upon seeing the scout car. Even with raptor-like vision, his claims to have seen the contents of the bag, and to believe the substance might be synthetic marijuana, are dubious.

The area is a “high-crime” area. Between January 1, 2015 and December 31, 2018, the police received 462 calls complaining about “disorderly and drug” behavior on A BLOCK OF NE, WASHINGTON, DC. See Police Union Objections, Exhibit 6.

Flight by a person in a “high-crime” area justifies a detention. See *Illinois v. Wardlow*, 528 U.S. 119 (2000). Yet, WITNESS/SUSPECT was not fleeing. Instead, he walked on the sidewalk toward the officers in the scout car.

With this conflicting information, SUBJECT OFFICER #2 was warranted in making a field contact, to confirm or dispel his suspicion about the contents of the bag.

As WITNESS/SUSPECT approached, SUBJECT OFFICER #2 saw the bag protruding from the front right pocket of WITNESS/SUSPECT’s pants. Asked (appropriately) by SUBJECT OFFICER #2 about the bag, WITNESS/SUSPECT handed it to SUBJECT OFFICER #2. SUBJECT OFFICER #2 immediately realized its contents were marijuana, not synthetic marijuana, and in an amount less than that required to justify further intrusion. See MPD, Special Order, SO-15-07, *Legalization of Possession of Minimal Amounts of Marijuana* (“[t]he possession of...marijuana without evidence of quantity in excess of two ounces...[does not] constitute reasonable articulable suspicion of a crime”).

With that discovery, SUBJECT OFFICER #2 lacked a reasonable basis to detain WITNESS/SUSPECT. He nonetheless continued their interaction. It should have ended. Instead, SUBJECT OFFICER #2 twice and SUBJECT OFFICER #1 once reached into one of WITNESS/SUSPECT’s pockets. (It is of no matter whether they placed their fingertips inside the pocket, as SUBJECT OFFICER #2 contends, or a hand, as the BWCs indicate. The officers’ description is itself a search, and therefore improper, unless an exception applies.)

Subject to an exception, discussed below, the detention was now unconstitutional, and constituted harassment.

Although SUBJECT OFFICER #1 reached the other two after SUBJECT OFFICER #2 had learned the bag’s contents, he did not refrain from participating in WITNESS/SUSPECT’s detention. As a result, his behavior also constituted harassment.

The officers seek to justify reaching into WITNESS/SUSPECT’s pocket in two ways: plain view and consent. Neither works.

If an incriminating object is in “plain view,” officers may seize it. Neither BWC supports SUBJECT OFFICER #2’s claim that another, similar bag might be in the left pocket of WITNESS/SUSPECT’s sweatshirt. As support that the officers saw nothing, SUBJECT OFFICER #2, before reaching into WITNESS/SUSPECT’s pocket, asked WITNESS/SUSPECT, “[y]ou got nothing else, right?” Moreover, this exception applies only if the criminal nature of the object is obvious. Here, assuming something might have been in WITNESS/SUSPECT’s left

pocket, its nature, hidden within the pocket, was not immediately—plainly—incriminating. See *Arizona v. Hicks*, 480 U.S. 321 (1987).

Consent fails, too, for two reasons. WITNESS/SUSPECT had not given consent to any sort of search before the officers reached into his pocket. Second, WITNESS/SUSPECT had no effective choice, for SUBJECT OFFICER #2 received that consent through an assertion: “I’m going to check. That’s cool with you?”

Accordingly, neither exception—the plain view doctrine or consent—justifies the officers’ intrusion after SUBJECT OFFICER #2 eliminated his initial suspicion (questionable as it was).

B. SUBJECT OFFICER #2’s statement of intent to contact WITNESS/SUSPECT’s Probation Officer (Threat)

It is difficult to assess the significance of SUBJECT OFFICER #2’s indication he would notify WITNESS/SUSPECT’s probation officer.

From the driver’s seat of the car, SUBJECT OFFICER #2 spoke loudly, but not in a sneering or sarcastic fashion. (Later, SUBJECT OFFICER #1’s comments as WITNESS/SUSPECT departed do seem sarcastic.) SUBJECT OFFICER #2 did not explain his reason (the probation office’s request).

Against a finding of harassment, the probation department in Maryland, per the WALES report, did ask that officers inform it about contacts with a probationer like WITNESS/SUSPECT.

The MPD provides no direction for officers indicating how they are to respond to a request by a probation department to advise it of an exchange with a person on probation. See *Police Union Objections* at 16. And yet, in his interview with OPC, SUBJECT OFFICER #2 said it was common for officers to inform one on probation that his or her probation officer would be notified. See ROI, Exhibit 7 (SUBJECT OFFICER #2 Interview).

In an e-mail exchange with the Police Union, SUBJECT OFFICER #2 was asked to explain his conduct.

He answered:

I realized at the end of the stop that it would be courteous to advise WITNESS/SUSPECT of my intention at the time to contact his probation officer to advise the P.O. of MPD’s interaction with him. ... Being that WITNESS/SUSPECT appeared to have been agitated and that there were a number of people now gathering around the scene thus

outnumbering myself and my partner, the best and safest course of action was to advise him from the vehicle, and leave the scene, rather than prolonging the scene further.

See Police Union Objections, Exhibit 10 (e-mail exchange with UNION REPRESENTATIVE).

SUBJECT OFFICER #2 thereby seems to imply his purpose was to enable WITNESS/SUSPECT to prepare to describe the incident in case his probation officer inquired.

In support of a finding of harassment, SUBJECT OFFICER #2 did not notify the probation department. We have no reason for his decision. Nor do we learn how often he had honored such a request, and why he did or did not. What could therefore be an offer of factual information might instead be viewed as a threat—a parting shot, so to speak, after having found nothing to incriminate WITNESS/SUSPECT during the stop. Not surprisingly, given the heated exchange between WITNESS/SUSPECT and SUBJECT OFFICER #1 as SUBJECT OFFICER #2 was using WALES, WITNESS/SUSPECT interpreted SUBJECT OFFICER #2’s statement as a threat. So did COMPLAINANT.

Whatever SUBJECT OFFICER #2’s motive, and however one characterizes his tone of voice, his statement is troubling for a different reason. He gratuitously revealed publicly that WITNESS/SUSPECT had been convicted of an unspecified crime or crimes. COMPLAINANT did not know WITNESS/SUSPECT, but thus learned that he had a criminal record. COMPLAINANT was upset: “to inform bystanders [like himself] of a person’s private business is very violating” (of that person’s privacy, one infers). See ROI, Exhibit 1 (COMPLAINANT Statement). From SUBJECT OFFICER #1’s BWC one hears unidentified male voices. One or more people in addition to COMPLAINANT could have heard SUBJECT OFFICER #2’s statement and thus of WITNESS/SUSPECT’s probation status.

As quoted above, SUBJECT OFFICER #2 justifies disclosing the information publicly to ensure his and others’ safety. That reason is unpersuasive, for SUBJECT OFFICER #1 remained on the street and WITNESS/SUSPECT was departing.

Though a close question, in the context SUBJECT OFFICER #2 harassed WITNESS/SUSPECT by revealing his probation status. If he had told WITNESS/SUSPECT privately—by leaving the car and approaching him, for example—the statement would not itself have been inappropriate.

V. SUMMARY OF MERITS DETERMINATION

SUBJECT OFFICER #1

Allegation 1: Harassment-	Sustained
----------------------------------	-----------

Stop and Search	
------------------------	--

SUBJECT OFFICER #2

Allegation 1: Harassment- Stop and Search	Sustained
Allegation 2: Harassment- Threat	Sustained

Submitted on February 21, 2019.

Peter W. Tague
Complaint Examiner