

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

FINDINGS OF FACT AND MERITS DETERMINATION

Complaint No.:	18-0421
Complainant:	COMPLAINANT
Subject Officer(s), Badge No., District:	SUBJECT OFFICER #1 SUBJECT OFFICER #2
Allegation 1:	Harassment by Unlawful Search of Vehicle
Complaint Examiner:	Meaghan H. Davant
Merits Determination Date:	June 12, 2019

Pursuant to D.C. Official Code § 5-1107(a), the Office of Police Complaints (OPC) has the 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 that section. 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 filed a complaint with the Office of Police Complaints (OPC) on April 14, 2018 alleging that, on April 13, 2018, Metropolitan Police Department (MPD) SUBJECT OFFICER #1, and SUBJECT OFFICER #2, harassed him by unlawfully searching his vehicle.¹

Specifically, COMPLAINANT stated that on April 13, 2018, SUBJECT OFFICER #1 and SUBJECT OFFICER #2 initiated a traffic stop, based on the officers' belief that complainant's vehicle had windows that were tinted above the legal limit. A window tint test was conducted on the scene and found that complainant's window tint was 16 percent—above the legal limit—and the vehicle was impounded. During the stop, the subject officers sought

¹ Complainant also alleged that on April 13, 2018, he was also harassed by SUBJECT OFFICER #1 and SUBJECT OFFICER #2 when they unlawfully stopped him, and that he was further harassed by SUBJECT OFFICER #2 when he unlawfully frisked him as part of the traffic stop. In addition, complainant alleged that SUBJECT OFFICER #1 discriminated against him based on his race, African American, and source of income. Pursuant to D.C. Code § 5-1108(1) on March 31, 2019, a member of the Police Complaints Board dismissed these allegations, concurring with the determination made by OPC's Executive Director.

consent from complainant to search his vehicle, which COMPLAINANT repeatedly denied. The officers nonetheless called in a K-9 unit, which swept the exterior of the vehicle and found no hit, or evidence of contraband. Not to be dissuaded, the subject officers nevertheless proceeded to conduct an exhaustive search of complainant's vehicle, first at the site of the traffic stop and then again at the police station.

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 the subject officers on April 25, 2019, 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 the subject officers on April 25, 2019, and OPC's response to the objections, the Complaint Examiner finds the material facts regarding this complaint to be:

1. On April 13, 2018, complainant was pulled over in his vehicle by MPD Officers SUBJECT OFFICER #1 and SUBJECT OFFICER Number #2 in the vicinity of AN ADDRESS IN SE, WASHINGTON, DC.
2. SUBJECT OFFICER #1 approached complainant's vehicle and asked him to roll down his window. Complainant complied and the officer told COMPLAINANT that he had been pulled over because his vehicle's windows were overly tinted.
3. SUBJECT OFFICER #1 immediately questioned complainant as to whether he had any guns or drugs in the car. Complainant replied, "no," going on to explain that he had just gotten off work and was running late to pick up his son from school.
4. SUBJECT OFFICER #1 pointed to a plastic bag in the center console of the vehicle and asked complainant what was in it. Complainant told him that it was toothpaste and then showed the item to SUBJECT OFFICER #1.
5. SUBJECT OFFICER #1 then asked complainant to roll down his back windows. COMPLAINANT asked, "for what?" to which SUBJECT OFFICER #1 responded that he needed to see if there was anyone else in the car. COMPLAINANT rolled the

windows down to show the officer that there was no one else in the car, and then rolled them back up.

6. SUBJECT OFFICER #1 then took complainant's license back to his squad car to run it through the police records system while SUBJECT OFFICER #2 stayed beside complainant's car.
7. After running COMPLAINANT's information and confirming that it was a valid license, SUBJECT OFFICER #1 asked complainant if he would step out of his car, to which COMPLAINANT responded, "I mind, I'm in a rush..." again referring to the fact that he was late to pick up his 7-year-old-son from school.
8. SUBJECT OFFICER #1 then stated that he had only asked as a courtesy and ordered COMPLAINANT to step out of his vehicle. COMPLAINANT rolled up his driver's side window and exited the vehicle, leaving the driver's side door open.
9. SUBJECT OFFICER #1 asked COMPLAINANT twice more if he had a weapon, to which complainant responded he did not.
10. COMPLAINANT asked SUBJECT OFFICER #1 if he could close his driver's side door. SUBJECT OFFICER #1 responded by ordering complainant to step farther away from the vehicle. COMPLAINANT complied.
11. SUBJECT OFFICER #2 told COMPLAINANT that he was going to pat him down to make sure he doesn't have anything on him and asked complainant to put his hands on the top of the vehicle. COMPLAINANT complied and SUBJECT OFFICER #2 frisked complainant.
12. During the frisk ,SUBJECT OFFICER #1 asked COMPLAINANT why he was so nervous and complainant reiterated that he was late to pick up his son from school. Complainant further explained that he was supposed to pick up his son at 3:00 p.m. but had not even gotten off work until 3:30 p.m.
13. Although the subject officers had not yet searched complainant's vehicle, COMPLAINANT proactively stated, "I didn't give you authority to search my car, either." A few moments later COMPLAINANT again stated that he was going to close the driver's side door of his vehicle and then, without moving to do so, subsequently asked the subject officers to close the door for him. Neither officer responded to

complainant's requests. Instead SUBJECT OFFICER #2 led complainant to stand behind his vehicle.

14. SUBJECT OFFICER #1 called for an officer to come with a tint meter and informed COMPLAINANT that, if his windows were tinted below 25 percent, they could impound the vehicle.
15. Complainant asked the officers if he could call his son's school while they waited to let them know that he was running late. SUBJECT OFFICER #1 denied this request stating, "Bro you're the only one making things difficult."
16. As they waited, SUBJECT OFFICER #1 again asked COMPLAINANT whether there were weapons or guns in the car, to which complainant responded that he had already answered twice that there were not. SUBJECT OFFICER #1 continued to insist that COMPLAINANT was acting nervous and accused him of being "hostile for no reason." SUBJECT OFFICER #1 attempted to provoke COMPLAINANT, asking "You just don't like the police?" to which complainant responded, "I never said that."
17. Based on a review of the body worn camera ("BWC") footage of the interaction, COMPLAINANT was not acting in an unusual or agitated manner during his interactions with the subject officers, nor did he at any time appear to pose any threat to himself or others.
18. WITNESS OFFICER #1 arrived on the scene with another officer to test complainant's window tint and determined the windows had a 16% tint.
19. SUBJECT OFFICER #1 relayed to WITNESS OFFICER #1 that, although he had never asked complainant if he could search his car, COMPLAINANT had immediately told him that he did not consent to a search, which he found suspicious. During this conversation SUBJECT OFFICER #2 told complainant, "You let us search his car, or we're going to tow your car." COMPLAINANT again declined to grant consent for the search.
20. SUBJECT OFFICER #1 and WITNESS OFFICER #1 agreed to impound complainant's car and to call in a K-9 unit to sweep the car for guns and "hazardous materials," despite the fact that the officers had already looked into the back and front seats of the car through the rolled down windows and found no evidence of weapons or dangerous materials. SUBJECT OFFICER #2 claimed that when they had asked complainant about

guns he had seemed “super nervous.” The BWC footage from the incident does not support this claim.

21. SUBJECT OFFICER #1 issued complainant a ticket for the window tint, informed him that the car would be impounded, and told COMPLAINANT that he was free to go. Complainant asked for a “white shirt” officer to come to the scene and remained to witness the rest of the traffic stop and all of the events described herein.
22. WITNESS OFFICER #2 arrived on the scene and immediately asked SUBJECT OFFICER #1 if he intended to do an inventory search after the K-9 sweep, to which SUBJECT OFFICER #1 responded that the scope of any inventory search would be “only for valuables.” WITNESS OFFICER #2 seemed very reluctant to perform the K-9 sweep and cautioned SUBJECT OFFICER #1 that, “the big thing is, plain sight, and that’s it.” SUBJECT OFFICER #1 and WITNESS OFFICER #2 began to argue about the order and scope of the K-9 sweep and inventory search and WITNESS OFFICER #2 again stated that any search could not include anything that wasn’t in plain sight. He tells SUBJECT OFFICER #1, “We had an issue with this before. I don’t want to create a whole bunch of bad blood between K-9 and your unit. Because we were pissed last time, I’ll tell you right now.”
23. SUBJECT OFFICER #1 asked WITNESS OFFICER #1 if they could do an inventory search before the vehicle was towed and WITNESS OFFICER #1 responded that they could not—a search could only be performed once the vehicle had been towed to the police station. WITNESS OFFICER #2 asked SUBJECT OFFICER #1 what the purpose of the K-9 sweep would be and SUBJECT OFFICER #1 responded that it would be limited to a search for “hazardous materials.”
24. SUBJECT OFFICER #1 and WITNESS OFFICER #2 continued to argue about the scope of the search and what the law would permit. Eventually, WITNESS OFFICER #2 told SUBJECT OFFICER #1 that he needed a Sergeant to authorize the sweep. SUBJECT OFFICER #1 called a Sergeant, who authorized the K-9 sweep for hazardous materials.
25. WITNESS OFFICER #2 walked the police dog around the car, searching for scents or “hits” that might lead to hazardous materials while the other officers watched. WITNESS OFFICER #2 confirmed that there was no hit on the vehicle, stating, “[n]othing, nothing. Not getting any interest.” WITNESS OFFICER #2 did remark that it was difficult to perform a K-9 sweep “with so much wind.” WITNESS OFFICER #2 left the scene.

26. As soon as WITNESS OFFICER #2 left the scene, SUBJECT OFFICER #1 approached the other officers and told them that WITNESS OFFICER #2 had told him that the K-9 search had been difficult due to the wind, omitting the fact that WITNESS OFFICER #2 had nonetheless concluded that the search resulted in “nothing,” or no hits on the vehicle. “[S]o we all know,” SUBJECT OFFICER #1 told the other officers, “we’re going to have to do an inventory search to make sure there’s no—'cause the dog was useless.” WITNESS OFFICER #1 joined in, stating that he had a “strong feeling” there was a gun in the vehicle, and that COMPLAINANT had a previous gun charge from 2012.
27. SUBJECT OFFICER #1 and SUBJECT OFFICER #2 then proceeded to search the complainant’s vehicle. The officers opened the driver and front passenger doors, retrieved items from the seat, opened the side compartments in the doors and looked into the glove compartment with a flashlight. On the BWC footage COMPLAINANT can be heard to again state that he had not given the officers permission for the search. SUBJECT OFFICER #1 replied that they were just doing an “inventory search.”
28. The officers continued to search the car, opening the center console and an overhead compartment and attempting to open a third compartment under the car radio. The officers then pulled the front seats forward to look behind them before opening the rear passenger doors and searching around the back seat area, in the back seat pockets, and even under and between the cushions.
29. SUBJECT OFFICER #1 next asked SUBJECT OFFICER #2 to open the trunk and SUBJECT OFFICER #1 searched that area, rifling through a bag that complainant had stored in the trunk and even searching the spare tire compartment. COMPLAINANT again loudly and clearly stated that he did not give the officers permission to search the vehicle, as captured on BWC footage.
30. COMPLAINANT was never handcuffed or arrested during the stop.
31. The car was towed to AN MPD DISTRICT STATION. At the station COMPLAINANT saw SUBJECT OFFICER #1 and SUBJECT OFFICER #2 search his vehicle for a second time, as also captured on BWC footage.
32. The subject officers did not find any hazardous items, contraband or items of significant value in either of their two searches of complainant’s vehicle.

IV. DISCUSSION

Pursuant to D.C. Code § 5-1107(a), “The Office [of Police Complaints] shall have the authority to receive and 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 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.

1. The Subject Officers Lawfully Stopped COMPLAINANT’s Vehicle.

The Fourth Amendment prohibits law enforcement from conducting “unreasonable searches and seizures,” and “this protection extends to a brief investigatory stop of persons or vehicles.” *U.S. v. Williams*, 878 F. Supp. 2d 190, 196-197 (D.D.C. 2012) (quoting *U.S. v. Bailey*, 622 F.3d 1, 5, 393 U.S. App. D.C. 131 (D.C. Cir. 2010)). Searches that are conducted without prior approval by a judge are per se unreasonable under the Fourth Amendment - subject only to a few specifically established and well-delineated exceptions. *Id.*

Police officers may stop a vehicle and its occupants without a warrant when they have probable cause to believe a traffic violation has occurred. *Watson v. United States*, 43 A.3d 276, 282 (D.C. 2012) (citing *Whren v. United States*, 517 U.S. 806, 810 (1996)). Police officers may also briefly detain a person without a warrant in a *Terry* stop if they have a “reasonable, articulable suspicion that ‘criminal activity may be afoot.’” *United States v. Edmonds*, 240 F.3d 55, 59 (D.C. Cir. 2001) (quoting *Terry v. Ohio*, 392 U.S. 1, 21 (U.S. 1968)). It is credible that

the subject officers had a “reasonable suspicion” that COMPLAINANT was violating a traffic law at the time of the stop, namely that his vehicle windows were tinted beyond the legal limit.

The subject officer’s suspicions were confirmed by a window tint test done on the scene, which found that COMPLAINANT’s windows were tinted to allow only 16 percent light transmittance. On this basis, the subject officers were acting within the bounds of the law when they impounded complainant’s vehicle. *See* MPD Special Order 95-14, Motor Vehicle Tinted Window Amendment Act of 1994 and D.C. Code § 50-220.

2. *The Subject Officers Lawfully Ordered a K-9 Search of COMPLAINANT’s Vehicle.*

Further, the subject officers were also within the bounds of the law when they requested a K-9 search of the vehicle. *See Illinois v. Caballes*, 543 US 405 (2005) (police not required to have reasonable suspicion to use a K-9 unit during a legitimate traffic stop). However, the Supreme Court in *Caballes* was careful to state that even a stop that is “lawful at its inception can violate the Fourth Amendment if its manner of execution unreasonably infringes interests protected by the Constitution.” *Id. citing United States v. Jacobsen*, 466 U. S. 109, 124 (1984). Specifically, the Court in *Caballes* noted that a “seizure that is justified solely by the interest in issuing a warning ticket to the driver can become unlawful if it is prolonged beyond the time reasonably required to complete that mission,” citing an earlier case in which the time it took to procure a K-9 unit and conduct the sniff search unreasonably prolonged the traffic stop, thereby violating the citizen’s rights. *People v. Cox*, 202 Ill. 2d 462 (2002). Here, COMPLAINANT—who repeatedly told officers that he was late to pick up his 7-year-old son from school and was even denied the courtesy of being able to call the school and inform them that he would be late—was stopped for his vehicle’s window tint and detained for a period of *nearly an hour* before the K-9 unit arrived and conducted the sweep, according to the timestamp of the BWC footage. For that reason alone, the subject officers subjected COMPLAINANT to needless harassment.

3. *The Subject Officers Lawfully Conducted a Plain View Search of COMPLAINANT’s Vehicle.*

Pursuant to a lawful stop, the officers were also legally allowed to conduct a “plain view” search of a vehicle. As was clear from the BWC footage of the stop, the subject officers conducted at least one if not multiple plain view searches of complainant’s vehicle. Their searches were not impeded by the overly dark window tint, since the officers could see through complainant’s open driver’s side door and ordered complainant to roll down his back windows to allow them to view the back seat of the car, and the complainant complied. However, the

officers did not find anything suspicious or potentially dangerous during their plain view searches that might constitute probable cause for further searches.

4. *The Subject Officers Lacked Probable Cause to Conduct a Search of COMPLAINANT's Vehicle for Weapons.*

SUBJECT OFFICER #1 and SUBJECT OFFICER #2' physical search of the interior of COMPLAINANT's vehicle for "weapons" clearly violated complainant's Fourth Amendment right to be free of unreasonable searches and seizures.

First, neither of the subject officers were able to point to any "specific" or "articulable" facts in support of their suspicion that COMPLAINANT possessed a weapon, particularly after the officers had already a frisked complainant and conducted a plain view search of his vehicle and found no evidence to that end. The only rationales that SUBJECT OFFICER #1 was able to put forward were that complainant had proactively informed the officers that he did not consent to a search and that COMPLAINANT was acting, "nervous." Nor could either of the subject officers reasonably rely on WITNESS OFFICER #1's "strong feeling," that COMPLAINANT had a weapon in the vehicle, or the fact that he had a gun charge from 6 years prior.

Second, under *Terry*, the facts must "reasonably warrant the officer in believing that the suspect is dangerous and the suspect may gain immediate control of weapons." citing *Terry*, 392 U.S. at 21 (emphasis added). At no time did COMPLAINANT exhibit any behavior that could be reasonably classified as threatening. Had he exhibited such behavior, it would stand to reason that the officers would have arrested COMPLAINANT and placed him in handcuffs, which they never did. Nor could the subject officers claim that COMPLAINANT had any opportunity to "gain immediate control" of a (nonexistent) weapon. At the time of the search COMPLAINANT had already been removed from the vehicle, frisked for weapons, and placed at a considerable distance from the vehicle.

Third, even if it could be found that the subject officers had "reasonable suspicion" that the car contained a weapon, a physical search of the vehicle would have been constitutionally "limited to those areas in which a weapon may be placed or hidden" *Michigan v. Long*, 463 U.S. 1032, 1049-50 (1983), that might allow complainant to "gain immediate control" and thereby pose danger to himself or others. Here, the area of the vehicle searched by the subject officers—including in the back seats of the car, between the cushions, in the trunk and even in the spare tire compartment—far exceeded that which COMPLAINANT could have reasonably reached while operating the car or sitting in the driver's seat, much less once he was removed from the car.

5. The Subject Officers' Inventory Search of Complainant's Vehicle Knowingly Violated MPD Guidelines.

MPD General Order 602.01, Automobile Searches and Inventories, allow for an inventory search for vehicles impounded for traffic violations. The subject officers' two searches of complainant's vehicle nonetheless flagrantly violated both the letter and the spirit of the General Order's language.

First, the General Order is clear that “[i]f a vehicle is not placed on police department property or near a police facility, it is not a traffic impoundment and shall not be inventoried or searched in any way.” In this case, the subject officers performed a search of complainant's vehicle at the site of the stop, before the vehicle was towed to police property. When WITNESS OFFICER #2 initially arrived at the scene and asked SUBJECT OFFICER #1 if he planned to perform a search, SUBJECT OFFICER #1 stated that he would only perform an “inventory search.” Then, just prior to his search of complainant's vehicle SUBJECT OFFICER #1 specifically asked WITNESS OFFICER #1 if they could perform an inventory search before the vehicle was towed. WITNESS OFFICER #1 definitively responded that they could not—a search could only be performed once the vehicle had been towed to the police station. Only then did SUBJECT OFFICER #1 switch tactics, attempting to justify his search of the vehicle as one for weapons and hazardous materials, despite the fact that the K-9 sweep had returned no hits. SUBJECT OFFICER #1 actions lead to the conclusion that he conducted the vehicle search at the site of the traffic stop in full knowledge that he was violating MPD guidelines. This conclusion is strengthened by WITNESS OFFICER #2' repeated statements to SUBJECT OFFICER #1 that his search could not include any part of the vehicle that was not in plain sight (“the big thing is, plain sight, and that's it”) and his references to past problems with SUBJECT OFFICER #1' unit conducting improper searches.

Second, the General Order significantly limits the scope of an inventory search. Upon arrival at the station, officers are specifically instructed to “remove from the passenger compartment of the vehicle any personal property which can easily be seen from outside the vehicle and which reasonably has a value in excess of \$25,” after which point the vehicle must be secured. The General Order goes on to state that “[n]o other inventory or search of the vehicle shall be made at this time, and that an “inventory is not to be considered or used as a substitute for a search.” Far from limiting their search to objects within plain sight, the officers searched the door pockets, center console, glove compartment, overhead compartment, trunk, spare tire compartment, under the seats of the vehicle and even between the cushions in the back seat of the car. The subject officers conducted these far-reaching, constitutionally violative searches of COMPLAINANT's car not once *but twice* in clear violation of the General Order

Based on the totality of the circumstances, the subject officers' two searches of complainant's vehicle—whether premised on a search for weapons or as an inventory search—violated complainant's Fourth Amendment rights to unreasonable search and seizure and MPD Guidelines. The officers' conduct thereby harassed complainant in violation of § 5-1107(a) and MPD General Orders 120.25 and 304.1.

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V. SUMMARY OF MERITS DETERMINATION

SUBJECT OFFICER #1

Allegation 1: Harassment by Unlawful Search of Vehicle	Sustained
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SUBJECT OFFICER #2

Allegation 1: Harassment by Unlawful Search of Vehicle	Sustained
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Submitted on June 12, 2019.

Meaghan Hannan Davant
Complaint Examiner