

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

FINDINGS OF FACT AND MERITS DETERMINATION

Complaint No.:	22-0022
Complainant:	COMPLAINANT
Subject Officer(s), Badge No., District:	SUBJECT OFFICER #1 SUBJECT OFFICER #2
Allegation 1:	Harassment: Unlawful Stop (SUBJECT OFFICER #1 and SUBJECT OFFICER #2)
Allegation 2:	Harassment: Unlawful Arrest (SUBJECT OFFICER #1 and SUBJECT OFFICER #2)
Allegation 3:	Harassment: Unlawful Stop (SUBJECT OFFICER #1 and SUBJECT OFFICER #2)
Complaint Examiner:	Laurie S. Kohn
Merits Determination Date:	June 8, 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 filed a complaint with the Office of Police Complaints (OPC) on October 14, 2021. Complainant alleged that on October 5, 2021, the subject officers, Metropolitan Police Department (MPD) SUBJECT OFFICER #1, and SUBJECT OFFICER #2, harassed him when they unlawfully stopped him; unlawfully searched his person, belongings, and vehicle; and unlawfully subjected him to arrest.

Specifically, Complainant alleged that on October 5, 2021, around 11:00 pm he was parked in his silver 2021 CAR in front of his uncle's apartment IN SE, WASHINGTON, DC. When he arrived at his uncle's, he called to him on his cell phone and waited for approximately five minutes for him to come outside. While waiting, Complainant alleged that an MPD cruiser pulled up and that the officers approached his car on foot. Complainant stated that the cruiser was parked in a way that blocked his car from leaving its parking space by sitting diagonally in front of his car.

Complainant alleged that SUBJECT OFFICER #1 asked why he was there. He alleged that while he was reaching for the gearshift to put his car in park, SUBJECT OFFICER #1 asked him what he was

reaching for and then directed him to get out of the car. He alleged the officers searched him and that he was wearing a fanny pack across chest, which they also searched without his permission. In the fanny pack, the officers found a gun. In his pockets, the officers found and took his keys. Complainant alleged that the officers searched his car without permission and arrested him. Complainant alleged he was not informed why he was being arrested or why he was stopped in the first place. Complainant noted that the officers informed him he was illegally parked in an alley, which Complainant denied, noting he was parked legally in front of his uncle's and was idling for no more than five minutes.

Complainant was arrested for possession of an unlicensed gun. Complainant alleged that the subject officers had no legal reason to stop or search him since he was not engaged in any unlawful or suspicious activity; and instead, was legally parked in front of a residence merely waiting to pick up his uncle.

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 SUBJECT OFFICER #1 and SUBJECT OFFICER #2 on April 15, 2022, 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 officers on April 11, 2022, and OPC's response to the objections, the Complaint Examiner finds the material facts regarding this complaint to be:

1. Around 11 p.m. on October 5, 2021, Complainant was lawfully parked in front of AN ADDRESS IN SE, WASHINGTON, DC waiting for his uncle to come downstairs. His car was located about a car-length from the alleyway at the end of the block. When his uncle did not come to the car immediately, he called him and asked him to come down. He was driving a 2021 CAR and sat in the driver's seat as he waited.
2. SUBJECT OFFICER #1 and SUBJECT OFFICER #2, leaving another call, proceeded down A STREET IN SE, WASHINGTON, DC and saw Complainant's car. As they pulled past him, they were able to see that Complainant was alert and talking on a cell phone.
3. SUBJECT OFFICER #1 exited the police vehicle and approached the driver's side of Complainant's car. SUBJECT OFFICER #2 turned the police cruiser around and parked it in front of Complainant's car at a diagonal angle with the cruiser's front bumper about one or two feet from the front bumper of Complainant's car, blocking Complainant's car in

its parking spot. He then exited the cruiser and proceeded to the passenger side of Complainant's vehicle and stood up close to the window.

4. Both officers used their flashlights to illuminate the inside of Complainant's car. Complainant was on his cell phone saying, "I'm outside." Complainant wore a satchel across his chest. SUBJECT OFFICER #2, while standing very close to the driver's side car window, calmly stated, "What is up brother, you fine, I'm just talk...I'm just coming to talk to you. Yeah, you're good, don't worry about it. What's up with you? Hey, don't reach for anything..." Complainant's window was partially rolled down and SUBJECT OFFICER #1 asked him to roll it down further.
5. SUBJECT OFFICER #1 stated, "You [sic] good, why you [sic] so nervous? It's fine. It's fine. Whoever you're talking to, it's fine. Just step out for me real fast." SUBJECT OFFICER #1 told Complainant, "Hold on. Relax, you're making me nervous as hell. That's fine. That's fine."
6. Throughout the conversation, SUBJECT OFFICER #1 was standing extremely close to Complainant's window and both officers continued to shine their lights into Complainant's car.
7. Complainant started to get out of the vehicle, prompting SUBJECT OFFICER #1 to yell at him to put his car in park¹ in order to avoid hitting the MPD cruiser, which was parked directly in front of him.
8. Complainant exited his vehicle, telling the officers, "I'm not doing nothing [sic]. I'm not reaching for nothing." Complainant was very agitated and informed officers that someone was stalking him. SUBJECT OFFICER #1 said, "Alright, so I'm going to help you."
9. SUBJECT OFFICER #1 repeatedly informed Complainant he was not under arrest; but was merely being detained.
10. SUBJECT OFFICER #1 directed SUBJECT OFFICER #2 to put the handcuffs on, which he did. Referring to Complainant's satchel worn across his chest, SUBJECT OFFICER #1 commented to Complainant that he saw him reaching for his bag. Complainant replied, "it's in there."
11. SUBJECT OFFICER #1 unzipped the satchel, which was fully closed, and removed a pistol. At this point, SUBJECT OFFICER #1 radioed transport to tell them Complainant was in custody.
12. Another officer arrived and helped walk Complainant to the police cruiser. SUBJECT OFFICER #2 briefly searched Complainant's pockets and removed his keys and a tube of Chapstick. SUBJECT OFFICER #2 searched the front seat of Complainant's car and then the trunk.

¹ The body worn camera (BWC) footage shows SUBJECT OFFICER #1 yelling to put his car in "drive," but contextually, it is clear he misspoke and intended to tell him to put his car in park.

SUBJECT OFFICER #1 searched the front seat, glovebox, and backseat. WITNESS OFFICER searched Complainant at SUBJECT OFFICER #1's direction.

13. Complainant asked what he is going to jail for, and an officer responded: "For possession of a firearm."
14. After speaking with Complainant's uncle and giving him Complainant's keys, the officers transported 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; (2) use of unnecessary or excessive force; (3) use of language or conduct that is insulting, demeaning, or humiliating; (4) discriminatory treatment based upon a person's race, color, religion, national origin, sex, age, marital status, personal appearance, sexual orientation, family responsibilities, physical handicap, matriculation, political affiliation, source of income, or place of residence or business; (5) retaliation against a person for filing a complaint pursuant to [the Act]; or (6) failure to wear or display required identification or to identify oneself by name and badge number when requested to do so by a member of the public."

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.

The relevant law, regulations, and rules regarding the harassment at issue here pose the question: did the actions of the subject officers, in stopping, searching, and arresting Complainant amount to conduct that was purposefully, knowingly, or recklessly in violation of the law or internal guidelines? This decision will consider each allegation in turn.

Initial Stop.

MPD General Order 304.10 governs field contacts, stops, and protective pat downs. “Field contacts may be initiated at any time by members. No evidence of a crime is needed to initiate a field contact, and the encounter may be terminated at any time by either party.” Further, the Order specifies that the contact involves “voluntary cooperativeness of an individual who is free not to respond and to leave.” No probable cause nor reasonable suspicion is needed for a field contact.

Once a field contact has been initiated, officers are admonished to “constantly keep in mind that the distinction between a field contact and a stop depends on whether, under the particular circumstances, an individual could reasonably perceive that he or she is not free to leave the member’s presence. Therefore, members shall take special care to act in as restrained and courteous a manner as possible. Members should avoid short responses that could be misunderstood or requests that sound like commands. Members should phrase verbal requests, whenever possible, with optional words and phrases such as ‘may’ or ‘would you mind.’”

According to *United States v. Mendenhall*, “a person has been ‘seized’ within the meaning of the Fourth Amendment only if, in view of all of the circumstances surrounding the incident, a reasonable person would have believed that he was not free to leave.” The Supreme Court provided examples that could lead an individual to perceive that they are not free to leave that included the “threatening presence of several officers,” or the use of a “tone of voice indicating that compliance with the officer’s request might be compelled.” 446 U.S. 544 (1980).

In this case, the subject officers made various assertions about the nature of their interaction with Complainant. They both claimed that they initially conducted a field contact that escalated to a stop only after they saw Complainant’s gun. SUBJECT OFFICER #1 asserted that they approached Complainant both because he was illegally parked and blocking an alley and to do a wellness check. SUBJECT OFFICER #1 pointed out that he could not see into Complainant’s car to verify that the driver was well because the front of the car was tinted.² SUBJECT OFFICER #1 waived in his testimony as to whether the encounter began as a stop, related to the parking infraction of blocking an alley, or as a wellness check field contact. Several times in his interview he affirmed that it began as both a field contact and as a stop.

² This strains credibility. Under § 50–2207.02, tinted windows will let in less than 70% of light, are prohibited in the District of Columbia. It is very unlikely the officers could not see that Complainant was alert and on the phone through his front windshield. The BWC footage clearly revealed that the driver’s side window was more than adequately translucent to have permitted the officers to clearly see Complainant through the closed window. Moreover, Complainant voluntarily lowered his window part way.

When asked if he thought Complainant perceived himself as free to leave when SUBJECT OFFICER #1 first approached the vehicle, SUBJECT OFFICER #1 said yes. SUBJECT OFFICER #1 correctly understood the distinction between a field contact and a stop – noting that officers may initiate a field contact with anyone at any time but that a stop requires reasonable suspicion or probable cause.

For his part, SUBJECT OFFICER #2 asserted that the officers initiated contact because Complainant's car was blocking an alley. Like SUBJECT OFFICER #1, he confirmed that no other car could have circumvented Complainant's car and passed through the alley. Also, like SUBJECT OFFICER #1, SUBJECT OFFICER #2 was non-committal about whether the contact began as a field contact or a stop. However, he asserted that Complainant would have felt free to leave after SUBJECT OFFICER #2 parked his cruiser and also when the officers approached his vehicle. He asserted, revealing an understanding of the protocols, that during field contacts, citizens are free to leave; during stops, which require reasonable suspicion, they are not.

On the other hand, according to MPD General Order 304.10, to conduct a stop, an officer must have reasonable suspicion that an individual “has committed, is committing, or is about to commit any crime.” Under the Order, “reasonable suspicion necessitates a minimal level of objective justification for making the stop. Although reasonable suspicion is not capable of precise definition, it is more than a hunch or mere speculation but less than the probable cause necessary to arrest.” As the Court of Appeals for the District of Columbia has recognized, “[u]nder the Fourth Amendment, a policeman whose observations lead him reasonably to suspect that a particular person has committed . . . a crime[] may detain that person briefly in order to investigate the circumstances that provoke suspicion.” *Jenkins v. United States*, 152 A.3d 585 (D.C. 2017) citing *Ramsey v. United States*, 73 A.3d 138, 144 (D.C. 2003).

Although both officers waived in their characterization of the initial interaction that they made with Complainant, the facts reveal that the interaction was a stop rather than a field contact. The way SUBJECT OFFICER #2 parked his car when he initially arrived on the scene restricted Complainant's ability to leave his parking space. The BWC footage clearly shows that Complainant was, in fact, unable to easily leave his parking spot due to the way SUBJECT OFFICER #2 parked his cruiser – head on, diagonally at an angle to the sidewalk, with the cruiser bumper a foot or two from the bumper of Complainant's car. SUBJECT OFFICER #1's aggressive command that Complainant put his car in the proper gear before he got out in order to avoid hitting the MPD cruiser confirms how close the cruiser was parked to the front bumper of Complainant's car and SUBJECT OFFICER #1's awareness of its proximity.

Further, the manner in which the officers questioned Complainant would have led him to reasonably perceive he was not free to leave. The officers flanked his car – standing on either side of the front doors – and shone their flashlights into his car. Complainant would not have been able to leave if he had wanted to. He was unable to drive forward and unable to open his car door because SUBJECT OFFICER #1 was positioned very close to Complainant's door.

Having established that Complainant would not have reasonably perceived that he was free to leave, one must next analyze whether the officers had reasonable suspicion such that they

would have had justification to stop Complainant, as required by MPD General Order 304.10. Both officers claimed at various moments that they had reasonable suspicion to stop Complainant because he was parked illegally. They also asserted, at times, that the field contact became a stop when they saw the gun in Complainant's satchel. Because the initial contact has been deemed a stop rather than a field contact, whether or not the officers later saw the gun and used that as a basis for a stop is irrelevant.

The officers' contention that the basis for the stop was a parking violation cannot justify the stop. It is plainly and factually inaccurate. Each officer asserted that Complainant's car was parked in front of an alley such that other cars could not enter or exit the alley. D.C. Parking Regulation 2405.2 provides in relevant part, "[n]o person shall stand or park a motor vehicle or trailer, whether occupied or not... in front of or within five feet (5 ft.) of an alley, public driveway, or private driveway." The body worn camera footage clearly demonstrates that Complainant's car was not blocking the alley and that it was more than five feet from the alley. In fact, SUBJECT OFFICER #2 parked the police cruiser between Complainant's car and the alley, illustrating there was approximately a car-length between Complainant's car and the alley. Further, even if Complainant had parked in violation of D.C. parking regulations, that infraction would not have, alone, appropriately given the officers the reasonable suspicion required to make a stop. In *Jones v. United States*, in which officers had observed more than merely a parking violation – including the defendants seeking to hide something under their seat as the officers approached - the court held that the facts did not provide reasonable grounds from a Constitutional perspective to believe that criminal activity was afoot. 391 A.2d 1188, 1189-91 (D.C. 1978).

The officers' actions in violation of law and of internal MPD guidelines were also purposeful, knowing, or reckless. Both officers displayed an understanding of the differences between a field contact and a stop. Further, both officers deliberately acted in such a way that Complainant reasonably perceived he was unable to leave by parking the police cruiser in front of his car at an angle that prohibited him from pulling out, by positioning themselves on both sides of the front doors of his car, and by standing up against the driver's door. Finally, the officers seemingly coordinated mis-recollection of the proximity of Complainant's car to the entrance to the alley and their failure to have reviewed their BWC footage prior to their interviews with OPC – which would have clearly shown that Complainant was parked more than 5 feet from the alley – suggest that they knew they had no legitimate basis for the initial stop.

The officers initial contact with Complainant was a stop not a field contact because he reasonably perceived he was not free to leave. Because Complainant's car was not parked illegally and because his behavior was not otherwise suspicious, the officers did not have reasonable suspicion that Complainant was involved in criminal activity. The officers harassed Complainant in violation of D.C. Code § 5-1107 and MPD General Order 120.25 when they unlawfully stopped Complainant.

Search.

There is insufficient evidence to determine if the officers violated law or MPD regulations when they subjected Complainant to a search of his person and vehicle. It is possible that the officers conducted what would have been a lawful search given the facts available to the officers at the time they searched Complainant's person. Or it is possible that they unlawfully searched Complainant because they did not have a lawful basis to conduct the search. However, that determination cannot be reached because the stop that gave rise to the search was, itself, unlawful, rendering analysis of the officers' conduct related to the search impossible.³

Arrest

Similarly, there is insufficient evidence to determine if the arrest was lawful; however, because the initial stop was, itself, unlawful, the lawfulness of the arrest cannot be analyzed given that it would require imagining a hypothetical situation in which the stop had been lawful.

V. SUMMARY OF MERITS DETERMINATION

SUBJECT OFFICER #1

Allegation 1: Harassment: Unlawful Stop	Sustained
Allegation 2: Harassment: Unlawful Search	Insufficient Facts
Allegation 3: Harassment: Unlawful Arrest	Insufficient Facts

SUBJECT OFFICER #2

Allegation 1: Harassment: Unlawful Stop	Sustained
Allegation 2: Harassment: Unlawful Search	Insufficient Facts

³ This decision does not embrace the Office of Police Complaint's analogy to the fruit of the poisonous tree evidentiary doctrine articulated in *Segura v. United States*, 468 U. S. 796 (1984). Because that doctrine relates to the suppression of evidence in a criminal trial, it is not applicable when considering if an officer necessarily must be disciplined for an unlawful search or arrest in the aftermath of an unlawful initial stop. Instead, the search and arrest cannot be assessed because the unlawfulness of the initial stop rendered insufficient facts to consider the officers' actions in conducting the search and arrest.

Allegation 3: Harassment: Unlawful Arrest	Insufficient Facts
--	--------------------

Submitted on June 8, 2022.

Laurie S. Kohn

Laurie S. Kohn
Complaint Examiner