

Case: 21007

Investigator: Morgan Givens

Complaint Received: January 14, 2021

Complainant: Daryle Hayes

Complaint Summary:

Mr. Daryle Hayes alleged that on January 14, 2021, he was subjected to a traffic stop due to his race. He further alleged Specialist Kevin Newman and Officer Michael Smith were discourteous and did not have a valid a reason to search his vehicle.

Of the entire interaction, Mr. Hayes' complained: "What I experienced was not service in good faith. The officers were rude, judgmental, prejudice [sic] and this was clearly racial profiling. I would like these officers to be reprimanded. They lack social skills and the ability to effectively communicate with people."

Persons Involved:

Specialist Kevin Newman, #PS074, M/W/51 (CPD, Involved)
Officer Michael B. Smith, #P0071 M/W/31(CPD, Involved)
Complainant, Daryle Hayes, M/B/23 (Citizen, Complainant)
Witness A, (Citizen, Witness) – did not wish to be interviewed by CCA.

Evidence Reviewed:

Hamilton County Clerk of Courts

- Daryle Hayes was charged with Ohio Revised Code (ORC) §4513.241 Using Tinted Glass and Other Vision Obscuring Materials
- Witness A was charged with ORC §2925.14 Illegal use or Possession of Drug Paraphernalia

CPD Records Management System (RMS)

CPD Criminal Investigation Section (CIS) documents

CPD Internal Investigation Section (IIS) Report

CPD Computer Aided Dispatch (CAD)

Body-Worn Camera (BWC) for Officer Smith and Specialist Newman

Statements by officers and complainant

Authorities:

CPD Manual of Rules and Regulations §1.06 and §1.23

CPD Procedure § 12.205 Traffic Enforcement

CPD Procedure § 15.100 Citizen Complaints and Reports of Favorable Police Conduct

CPD Investigations Manual 12.1.6

City of Cincinnati Administrative Regulation No. 25

Analysis:

Allegation: Improper Stop

Mr. Hayes alleged Officer Smith and Specialist Newman stopped him without cause.

On January 14, 2021, at approximately 1:30 PM, Officer Smith and Specialist Newman initiated a traffic stop on Mr. Hayes and passenger, Witness A, at 2371 Kipling Avenue. Officer Smith and Specialist Newman articulated they initiated a traffic stop on Mr. Hayes due to what they perceived to be a window tint violation. Mr. Hayes was charged with Ohio Revised Code (ORC) 4513.241 Using Tinted Glass and Other Vision Obstructing Materials. Per BWC upon approaching Mr. Hayes' vehicle, Mr. Hayes asked, "Why am I being pulled over", to which Specialist Newman replied, "Well, your tint is a little excessive." CPD Procedure § 12.205 Traffic Enforcement directs officers to take the appropriate enforcement action(s) whenever a traffic violation is detected. According to the ORC §4513.241, car windows should not be tinted to the extent that a person of normal vision could not identify persons or objects inside the car. It is up to the discretion of the officers in each jurisdiction to judge if the windows are too dark. CPD policy permits citations for tint violations based on an officer's observations alone, without the need for a tint meter reading. The suspected window tint violation afforded the officers cause to initiate the traffic stop on Mr. Hayes; therefore, they did not violate CPD policies, procedures, or training.

Allegation: Improper Search

Mr. Hayes alleged that his vehicle was searched without reason despite his verbal objection.

Per BWC, when Specialist Newman approached Mr. Hayes' window, he asked, "You guys smoke a little weed?" Mr. Hayes replied, "Yeah, I do." Specialist Newman replied, "Okay, I can smell it in here" and thanked Mr. Hayes for being honest before asking him to exit the vehicle. Mr. Hayes questioned why he needed to step out of the vehicle and Officer Smith removed his Taser and threatened to use it if he did not exit the vehicle as ordered. Mr. Hayes complied and exited the vehicle. Witness A was also removed from the vehicle. Specialist Newman asked if he had "anything" on him. Mr. Hayes told Specialist Newman that he had marijuana on his person, but no marijuana was recovered from his person by Specialist Newman. Officer Smith searched and recovered the small bag of marijuana from the vehicle. Witness A was charged with ORC 2925.14 Possession of Drug Paraphernalia for a scale that was recovered from his person. Both charges were later dismissed.

Given that before the search, Specialist Newman articulated a perceived odor of marijuana coming from the vehicle and Mr. Hayes confirmation of concealing marijuana on his person, the officers had probable cause to search the vehicle and seize the drugs under Section 12.1.6 of the Investigations Manual and the motor vehicle exception which allows an officer to search a vehicle without a search warrant as long as he or she has probable cause to believe that evidence or contraband is located in the vehicle. The exception is based on the idea that there is a lower expectation of privacy in motor vehicles due to the regulations under which they operate. Additionally, the ease of mobility creates an inherent exigency to prevent the removal of evidence and contraband. The scope of the search is limited to only what area the officer has probable cause to search. This area can encompass the entire vehicle including the trunk. The motor vehicle exception, in addition to allowing officers to search the vehicle, also allows officers to search any containers found inside the vehicle that could contain evidence or contraband; the objects searched do not need to belong to the owner of the vehicle. CCA determined that the actions of Officer Smith and Specialist Newman, were within CPD policy, procedure, and training.

Allegation: Discourtesy

Mr. Hayes alleged that the officers were discourteous in during the traffic stop.

After Mr. Hayes was placed in the back of the cruiser a dialog transpired between Specialist Newman, Officer Smith, and Mr. Hayes. Excerpts from said conversation which lend to the discourtesy allegation are outlined below:

Specialist Newman:

- “You need to work on your record too, isn’t that right, young man? That’s why you’re arguing, because you’re not being a good person”
- Change your life and be a good person and maybe you won’t be berated in the car.
- “I’m not going to listen to anymore [expletive] from you”
- “You’re such a [expletive] you’re not listening”
- “Maybe your parents needed to tell you this. If you would have acted appropriately, you would have gotten a warning and a handshake, and your friend might not go to jail”
- “People get shot and people get tickets because they act miserably and misbehave”
- “I don’t normally get mad at people, but you pissed me off so much”
- “I may take him to jail because this guy is such a [expletive] and pissed me off”
- “You would have gotten your weed back and kept your scale. [Expletive] you made me so mad today
- “We’re in a gun unit. We deal with violent murders and felons. You know how many guns we got off the street? Over 400. So you’re a very rare person. You actually have a good record, but when an officer or any adult tells you what to do, you need to listen.”
- “Well, you’re acting terribly. You’re twenty. You have a lot to learn.”
- “Maybe later tonight when you’re sitting alone and reading a book or hanging out with your friends. If you had just said, ‘Yeah I’ll step out,’ you would’ve gotten a warning, got your weed back and gone home”
- “Goodluck, we’ll be pulling you over again”

Officer Smith:

- “How hard is to [expletive] listen? We’ve already told you three times why we’re getting you out of the car. Listen to us. It’s not hard.”
- “This is probably the first time in your life your actions have had consequences”
- “Quit crying like a little girl”
- “I look forward to our next encounter, have a great day”

CPD Manual of Rules and Regulations §1.06 requires that officers shall always be civil, orderly, and courteous in dealing with the public, subordinates, superiors, and associates. While Mr. Hayes was also engaged in banter, he was articulating his belief that the stop was unjust and that he was racially profiled. As demonstrated above, the statements made by Officer Smith and Specialist Newman were objectively discourteous in nature. For the foregoing reasons the officers violated CPD policies, procedures, and training.

Allegation: Discrimination

Mr. Hayes alleged he was pulled over because of his race; specifically, he told the officers, “This is racial profiling.”

CPD’s Manual of Rules and Regulations § 1.23 C. provides that members “shall not express, verbally or in writing, any prejudice or offensive comments concerning... race, color, and ethnicity ... or similar personal characteristics.” Furthermore, City of Cincinnati Administrative Regulation No. 25 prohibits discriminatory harassment based on race.

In their interviews, Officer Smith and Specialist Newman refuted Mr. Hayes’s discrimination allegation and stated the reason for the traffic stop on Mr. Hayes related to a perceived window tint violation. Specialist Newman also told Mr. Hayes that at the time of the stop, he could not see inside of Mr. Hayes’s vehicle to know Mr. Hayes’s race because of the dark window tint. Despite Specialist Newman’s statement, the evidence does not conclusively prove that Specialist Newman was unaware of Mr. Hayes’s race at the time of the stop. For instance, the stop occurred during the day, not under cover of darkness, and CCA has seen no evidence establishing that the police were unable to see Mr. Hayes’s race through the windshield. Nonetheless, while the evidence does not prove Specialist Newman’s claim, it is also insufficient to disprove it. CCA does not have enough evidence to determine that Officer Smith and Specialist Newman initiated the traffic stop due to Mr. Hayes’ race.

Collateral Allegation: Discrimination

Despite insufficient evidence to prove that the alleged racial profiling occurred, CCA found comments at the scene by Specialist Newman to be troubling in a manner that exceeded mere discourtesy. While both Officer Smith and Specialist Newman articulated their legally valid justification for initiating the traffic stop on Mr. Hayes, a statement made by Specialist Newman at the time of the stop caused CCA particular concern. Specifically, after Mr. Hayes articulated, “This is racial profiling”, Specialist Newman stated in a loud and forceful tone, “How is it racial if I could not see in the car? Explain that to me. You know what else, *quit making excuses for your race*. You hear what I’m saying? Don’t do that. You’re doing bad behavior. Whether you are Asian or White, your behavior is terrible. Don’t make fun of yourself. I’m not going to listen to anymore [expletive] from you” (emphasis added).

CPD’s Manual of Rules and Regulations § 1.23 C. provides that members “shall not express, verbally or in writing, any prejudice or *offensive comments concerning*... race, color, and ethnicity ... or similar personal characteristics” (emphasis added). Furthermore, City of Cincinnati Administrative Regulation No. 25 (AR 25) prohibits discriminatory harassment based on race, and specifically prohibits oral communications that contain “negative stereotyping” and “comments . . . that are distasteful or targeted at individuals based on . . . age . . . race, color, [or] ethnicity.”

While CCA did not determine that Specialist Newman and Officer Smith initiated the traffic stop due to Mr. Hayes’ race, Specialist Newman’s sentiment regarding race as outlined in the previous section was not appropriate. At a minimum, the comments, in particular the invocation of the phrase “your race,” represented a rebuke of Mr. Hayes using language that was racially offensive and distasteful. Viewed in another light, the attempt to berate Mr. Hayes by using the phrase “your race” evoked negative racial stereotypes by suggesting that citizens who complain of racial discrimination do not have a genuine belief that they face discrimination, but instead are “making excuses” for others who share that citizen’s race.

Irrespective of how one understands Specialist Newman's words, and his command "quit making excuses for your race," those statements speak for themselves. Under the plain terms of CPD's Manual of Rules and Regulations § 1.23 C, the words are "offensive comments concerning . . . race." Because Specialist Newman made the distasteful remarks invoking race in direct response to a complaint of racial profiling, they are also, by definition, "based on . . . race" under AR 25.

Moreover, berating comments that Specialist Newman made in response to Mr. Hayes's complaint of racial profiling (many of which were discourteous in the above-described manner) suggest behavior approximating retaliation. For example, in response Mr. Hayes's complaints of racial profiling, Specialist Newman stated at one point, "Maybe your parents needed to tell you this. If you would have acted appropriately, you would have gotten a warning and a handshake . . . You would have gotten your weed back and kept your scale. [expletive] you made me so mad today. . . . If you had just said, 'Yeah I'll step out,' you would've gotten a warning, got your weed back and gone home." Significantly, under law, courts have recognized that acts of retaliation in response to complaints of discrimination are themselves acts of discrimination. C.f. Jackson v. Birmingham Bd. of Educ., 544 U.S. 167, 173-74 (2005). The City's AR 25 policy also prohibits any such retaliation.

Finally, CCA notes that CPD and CPD have both previously Sustained violations of CPD's anti-discrimination policy in cases similar to this one where officers engage in speech that, on its face, is offensive "concerning race." See e.g., CCA Case No. 18158 DG (agreeing with CPD's Internal Investigation Section and Sustaining an officer for lecturing a shoplifter with comments such as "This is why there is no grocery stores in the black community because all of this is going on."). CCA's conclusion in this case is consistent with those precedents.

CCA is mindful of the fact that Specialist Newman has denied any improper motive or prejudicial intent for his communications. In his interview, Specialist Newman stated he was "stern" with Mr. Hayes, due to his behavior and reluctance to exit the vehicle. Regardless of Specialist Newman's articulated intention, CCA found that Specialist Newman's comments were an inappropriate response to a complaint of racial profiling, were racially offensive, and thus constituted discriminatory communication in violation of CPD policies, procedures, and training.

Collateral Allegation: Improper Procedure

CPD Policy §15.100 Citizen Complaints and Reports of Favorable Police Conduct states, "If a citizen objects to an officer's conduct, that officer will inform the citizen of their right to make a complaint. The officer will provide the citizen Form 648CCI, Citizen Complaint Information brochure and a Form 648, Citizen Complaint. Officers will not discourage any person from making a complaint." Given Mr. Hayes blatant racial profiling allegations, CPD Policy §15.100 required Specialist Newman and Officer Smith to inform Mr. Hayes of the citizen complaint process, rather than dismiss his grievance or criticize Mr. Hayes for believing himself the victim of racial profiling. Therefore, CCA found that Officer Smith and Specialist Newman violated CPD policies, procedure, and training.

Findings:

Specialist Kevin Newman
Officer Michael B. Smith

Improper Stop – The evidence shows that the alleged conduct did occur but did not violate CPD policies, procedures, or training. **EXONERATED**

Improper Search The evidence shows that the alleged conduct did occur but did not violate CPD policies, procedures, or training. **EXONERATED**

Discourtesy – The allegation is supported by sufficient evidence to determine that the incident occurred, and the actions of the officers were improper. **SUSTAINED**

Discrimination – There are insufficient facts to decide whether the alleged misconduct occurred. **NOT SUSTAINED**

Collateral Findings:

Specialist Kevin Newman
Officer Michael Smith

Improper Procedure – The allegation is supported by sufficient evidence to determine that the incident occurred, and the actions of the officers were improper. **SUSTAINED**

Specialist Kevin Newman

Discrimination – The allegation is supported by sufficient evidence to determine that the incident occurred, and the actions of the officers were improper. **SUSTAINED**



Morgan Givens, Investigator

March 31, 2022

Date



Gabriel Davis, Director

March 31, 2022

Date

Previous Contacts and Commendations:

Officer Michael B. Smith

Previous Contacts with CCA

Officer Smith had seven previous contacts with CCA in the past three years.

Case Number	Allegation	Finding
18070	Excessive Force	Exonerated
18070	Improper Stop	Exonerated
18070	Improper Search (Vehicle)	Exonerated
18070	Discourtesy	Sustained
18070	Improper Search (Vehicle)	Exonerated
18096	Excessive force	Not Sustained
18096	Improper Procedure (Taser-failure to warn	Sustained
18096	Improper Procedure (foot Pursuit)	Sustained
18096	Improper Stop (Person)	Exonerated
18096	Excessive force (Taser)	Sustained
19097	Improper Stop (Person)	Exonerated
19097	Harassment	Unfounded
19132	Discourtesy	Sustained
19132	Improper Search	Exonerated
19132	Improper Stop	Exonerated
20189	Excessive Force	Pending
20189	Discourtesy	Pending
20189	Lack of Service	Pending
20223	Improper Search	Pending
20227	Improper Search	Pending
20227	Improper Pointing of a Firearm	Pending
20227	Improper Stop	Pending
20227	Improper Procedure	Pending

Previous Contacts with IIS

CCA is unaware of any additional previous contact by Officer Smith with IIS.

Commendations

Officer Smith received one commendation in the past three years.

Date	Source of Commendation Received
1/5/2020	CPD

Specialist Kevin Newman

Previous Contacts with CCA

Specialist Newman had five previous contacts with CCA in the past three years.

Case Number	Allegation	Finding
19248	Discrimination	Unfounded
20116	Discrimination	Pending
20116	Discourtesy	Pending
20189	Excessive Force	Pending
20189	Discourtesy	Pending
20189	Lack of Service	Pending
20223	Improper Search	Pending
20227	Improper Search	Pending
20227	Improper Stop	Pending
20227	Improper Pointing of a Firearm	Pending

Previous Contacts with IIS

CCA is unaware of any additional previous contact by Specialist Newman with IIS.

Commendations

Specialist Newman received no commendations in the past three years.

Date	Source of Commendation Received
1/5/2020	CPD