

IN RE: : CITY OF PHILADELPHIA  
NICHOLAS HARDY : POLICE ADVISORY COMMISSION  
: No. 94-0034

PANEL REPORT AND RECOMMENDATION

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Before: Uyehara, Ray and Savitt, Commissioners

I. PROCEDURAL HISTORY

On September 30, 1994, Nicholas Hardy filed a citizen complaint with the Police Advisory Commission in connection with an incident involving Philadelphia police officers which occurred on September 21, 1994. Commission investigators interviewed the complainant and witnesses in November, 1994 and January, 1995 and obtained medical reports. The police officers could not be interviewed until August, 1996<sup>1</sup>. After the investigation was completed, the Commission assigned the case to a hearing panel for disposition.

The panel heard testimony from nine witnesses during the evenings of April 7, April 8 and April 29, 1997. Following the conclusion of the testimony, the panel met in closed session to deliberate. The report of the panel was presented to the Commission on May 8, 1997 and approved.

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<sup>1</sup>Litigation challenging the Commission's powers and the need to await review of the case by the District Attorney and the Internal Affairs Division contributed to this delay.

## II. FACTS

### A. EVIDENCE

The witnesses who testified, in addition to the complainant and the two officers directly involved in the incident, included Mr. Hardy's doctor, Linda Good, M.D.; his former attorney, Beverly Perry, Esquire; his mother, Burhedita Gonzalez-Bass; and Police Officers Mark Mastropietro, badge #1596, Eric White, badge #4914 and Gena Quarles, badge #6879, all of whom played minor roles in the incident. The panel acted without the benefit of hearing the testimony of Alexander Branch, who had been present and had observed the incident but did not appear in response to our subpoenas.

In addition to hearing the testimony of the nine witnesses, the panel reviewed Dr. Good's medical records and the notes of testimony of Officer Kobierowski, Det. Bradley, Mr. Hardy and his friend, Alexander Branch, before the Philadelphia Municipal Court<sup>2</sup>. The panel also had available the transcripts of interviews of the police officers conducted by Commission investigators and the Internal Affairs Division. Not surprisingly, there were inconsistencies and contradictions between the testimony of different witnesses. Likewise, some witnesses recalled the events differently when questioned at different times.

### B. UNDISPUTED FACTS

Most of what transpired on the evening of September 21, 1994 is beyond dispute. Nicholas Hardy, then 20 years old, was operating his grandmother's automobile

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<sup>2</sup>Although the Commission is not permitted to base a finding solely upon unsworn complaints or statements, there is nothing to bar it from entering into evidence the transcript of relevant sworn testimony before a court of law.

shortly after 10:00 P.M. He was accompanied by his friend, Alexander Branch, then about 23 years old. Both are African American. At some point, Hardy had stopped for a red light and observed Police Officer Richard Kobierowski, Badge No.3167, in a marked police patrol car, stopped next to him at the light. Hardy proceeded on his drive, eventually travelling in a northbound direction on Clarrissa Avenue approaching Wayne Junction. Hardy acknowledged that he may have been travelling 40 to 50 MPH although the speed limit in the area is 35 MPH.

Hardy pulled his car over and stopped at a former service station located at the intersection of Wayne Avenue and Berkeley Street in southwest Germantown. He stepped out of his car and began to walk to a pay telephone at the corner. As he did so, Officer Kobierowski pulled up, parked his patrol car next to Hardy's car and ordered Hardy to come back to him. Hardy stopped walking away and demanded to know what he had done wrong. Kobierowski refused to answer and again ordered Hardy to approach him. Again, Hardy failed to comply with the officer's orders and asked why there was a problem.

Kobierowski stepped out of his car, approached Hardy, took hold of his arm and escorted him back to the car. With Hardy still demanding to know what he had done wrong and Kobierowski refusing to tell, the officer forced Hardy into his patrol car. Kobierowski then approached Hardy's car, where Branch remained seated. He ordered Branch out of the car, patted him down and placed him back in Hardy's car in the rear seat.

At this point, Officer (now Detective) Kurt Bradley, Badge # 2894, arrived

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at the scene in response to Kobierowski's radio call regarding the stop. Bradley immediately asked if Hardy had been patted down and Kobierowski replied that he had not. Bradley then opened the rear door of Kobierowski's patrol car and ordered Hardy to get out. Having just been forced into the car moments earlier, Hardy now refused to get out and again demanded to know why he was being detained. Officer Bradley refused to reply and again demanded that he get out. Hardy then physically braced himself in the car, using his hands and legs, and the officers began to pull him out by his legs. When Hardy was outside of the car, the officers turned him around to face the car in order to frisk him. As the officers started to frisk him, Hardy turned around again to face the officers. At that time, Kobierowski punched Hardy in the face and knocked him to the ground. Both officers then handcuffed him. Neither officer suffered any injury in the incident.

Hardy was transported from the scene in a wagon and taken first to the 39th District and then to the North Detective Division. While at the detective division, Hardy's attorney, Beverly Perry, interviewed him. She observed facial bruises and dried blood on Hardy. Ms. Perry had been retained by Hardy's mother, who had been frustrated in her attempts to visit her son and determine why he was being held.

Later, Hardy was charged with aggravated assault, simple assault, recklessly endangering another person, and resisting arrest. All charges were dismissed or resulted in an adjudication of not guilty following trial in the Municipal Court.

Dr. Linda Good examined Hardy in the early morning on September 23, perhaps 36 hours after the incident and a few hours after Hardy reported having been

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released from police custody. Dr. Good observed facial contusions, swelling in the right eye, pain over the nasal bridge and dried blood. She testified that her observations were consistent with traumatic injury of the type and at the time claimed by her patient. On September 30, another doctor took an X-Ray of Hardy's nose and confirmed that there were non-displaced fractures of both nasal bones. Dr. Good also testified that in her opinion, such injury would likely have resulted in substantial bleeding and visible swelling shortly after the trauma.

### C. DISPUTED FACTS

1. Why and how did the stop of Mr. Hardy's car occur? Officer Kobierowski testified that he decided to stop Hardy's car because of vague suspicion that its occupants were criminals leaving the scene of a robbery or operating a stolen car and because he had decided to issue a traffic ticket for reckless driving or speeding. He testified in Municipal Court that the car was travelling at about 60-65 MPH but told the panel that Hardy was travelling over 40. He stated that he activated both his lights and siren, and that Hardy did not respond. According to Hardy, he was oblivious to any attempt to pull him over and did not hear a siren or see any police lights flashing<sup>3</sup>; he stopped only to make a phone call.

2. Did Mr. Hardy kick Officer Bradley while seated in Officer Kobierowski's patrol car? Det. Bradley testified that he ordered Hardy to step out of Kobierowski's car and Hardy again asked what he had done wrong. The officer stated

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<sup>3</sup>Mr. Branch testified before the Municipal Court that Kobierowski had not turned on his dome lights. Det. Bradley could not recall if the lights were flashing when he arrived at the scene.

that Hardy then swung around and moved his leg as if he was going to kick Bradley, but that Bradley grabbed hold of Hardy's leg and began to pull him out of the car. The testimony was not particularly clear as to whether Hardy actually attempted to kick Bradley, did kick him or was simply struggling, as all witnesses agree, to physically keep himself in the car by bracing his legs and hands on the seat and side of the car. The panel concluded that any contact between the two was incidental.

3. After coming out of the patrol car, did Hardy strike the officers and resist their effort to frisk him? Both officers had begun pulling Hardy out of the car by his legs. However, the panel finds that Hardy relented, the officers let go of his legs, and he stepped out of the car on his own. Hardy and the officers agree that they physically turned Hardy around after he stepped out, so that he was facing the car, in order to pat him down. Hardy said he turned around again to face the officers, at which time Bradley put him in a headlock and Kobierowski punched him in the face and knocked him to the ground. The officers testified that before he was punched, Hardy pushed off the car towards them and was swinging his elbows and fists backward at the officers who were behind him, and that he struck both of them in the process with his elbows. Bradley indicated that the contact at that point may have been incidental on Hardy's part. There is no dispute that Officer Kobierowski punched Mr. Hardy in the face and that both officers secured him in handcuffs.

4. Did the officers make comments to Hardy threatening further harm? Hardy testified that, after he was handcuffed and placed back in Kobierowski's car, Bradley came over and asked him a few questions, which he answered, and that Bradley

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then said something to the effect of "this all could have been avoided" and "it's a good thing you didn't kick me or it would've been a lot worse." Hardy further testified that Kobierowski sat in his patrol car after Hardy had been handcuffed and requested information from Hardy regarding his identification and papers. After Hardy failed to answer, Hardy said that Kobierowski made a remark akin to "do you want the other eye to look like that?" Kobierowski denied making or hearing anyone make any such remarks, while Bradley said he had no recall of any such remarks. Kobierowski's Municipal Court testimony made it clear that he believed that the incident was in fact the result of Hardy's failure to cooperate. The panel concluded that the evidence was insufficient to support a finding that Kobierowski verbally threatened further injury to Hardy after he was handcuffed.

### III. DISCUSSION

The essence of Mr. Hardy's complaint was that police officers used excessive force in this incident. While there is no doubt that force was used and that it caused injury to Hardy, the question is whether the force used was reasonable under the circumstances.

In reviewing the evidence, the panel was required to determine the credibility of the witnesses and the relative weight to be afforded the different testimony. We observed that Kobierowski was sufficiently forthcoming to acknowledge throughout that he had punched Hardy. His candor, together with that of Hardy in describing the incident as he recalled it, made much of what happened fairly clear and allowed the panel to focus on the appropriateness of the officers' conduct during the incident itself as distinct from

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their candor during the investigation following the incident.

Mr. Hardy refused Officer Bradley's order to step out of Officer Kobierowski's car and then physically resisted their efforts to extract him from the car. He then relented and stepped out voluntarily, but when the officers turned him around to face the car in order to frisk him, Hardy testified that he turned around again so that he was facing the officers. The officers recalled this as Hardy's "pushing off" from the car towards them. The three struggled, and Kobierowski landed his punch.

We cannot conclude that Officer Kobierowski used excessive force in punching Mr. Hardy in the face under the circumstances. Hardy does not dispute that he physically resisted coming out of the car and being frisked. Even if Hardy did not intentionally elbow or attempt to punch the officers, and it appears that he did not, we are unable to say that the officer was not privileged to use some force to respond to Hardy's physical resistance to being frisked. We were hindered in this regard by the failure to Mr. Hardy's friend, Alexander Branch, to appear before us.

The panel was, nevertheless, quite concerned that any "incident" needed to result from an apparently routine investigative stop of a citizen. Mr. Hardy's persistent demands for a simple explanation as to why he was being stopped as he walked to the telephone and his determination to obtain an answer before he would cooperate set the stage for a confrontation. We cannot blame him for what ensued, as a citizen in a free society must be privileged to demand of a police officer a simple explanation for his decision to restrict a citizen's liberty. Such an inquiry, reasonably done, is fundamentally a matter of free speech. Nevertheless, we are concerned that even in hindsight, Mr.

Hardy had difficulty acknowledging that it may have been more prudent for him to choose another time or other means to express his dissatisfaction with Officer Kobierowski's actions.

Some citizens lack appreciation for a police officer's need to protect his or her safety first. Mr. Hardy was probably unaware of Kobierowski's concerns as he arrived, and why the officer wanted to secure Hardy in the patrol car when the officer was alone and faced a situation with one person inside a car and another outside. But it should be noted that Kobierowski failed, intentionally or not, to frisk Hardy before placing him in the car. This not only partially undercut the purpose of placing Hardy in the car, i.e. to protect the officer and secure the situation, but it triggered Bradley's commendable concern that Hardy had not been patted down. Hardy's apprehension and hostility was a foreseeable result of his having been physically forced into the car by one officer only to ordered out by another, without explanation, moments later.

Although we have concluded that the evidence is insufficient to support a finding of excessive force, the panel had serious concerns about the judgement and conduct of the officers. As a result of this incident, a person was injured; the criminal justice system was required to handle several charges (including a questionable felony charge); the City of Philadelphia paid a not insignificant sum to settle Mr. Hardy's civil suit<sup>4</sup>; and numerous hours were spent by a variety of individuals to review the event. The police officers seem to remain unaware of the possibility that either one of them might have been able to diffuse the situation with a few words or a different approach. For this

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<sup>4</sup>Hardy testified that he received a \$30,000 settlement from the City of Philadelphia in connection with the incident.

reason, we are compelled to note our view that the overall approach of the officers was overly aggressive, ill advised and helped to inflame the situation.

While the attitudes and actions of the officers, especially Officer Kobierowski, were worthy of critical comment, we do not find them outside the zone of discretion properly afforded an officer before misconduct can be found. Indeed, we would not be surprised if Officer Kobierowski's approach - to seize control of the situation through commands, physical intimidation and force - was faithful to his training. For that reason, we urge Commissioner Neal to consider the benefits of other approaches to resolving conflict on the street, and whether existing training and supervision could be improved in that respect. Less aggressive methods may reduce the likelihood that someone will be harmed from interaction between the police and the public and decrease the hostility between the two groups. Likewise, we feel that the department ought to consider ways to promote efforts to educate the public about police concerns during encounters with individuals.

#### **IV. CONCLUSION**

While not approving of the conduct of Officer Kobierowski and Detective Bradley, we conclude that the evidence did not support a finding of misconduct. We request that Commissioner Neal transmit this report to the two officers, together with their commanders, with instructions that the commanders review the report and the concerns of the Police Advisory Commission with the officers. We also request that the Commissioner consider the training, policy and public education issues raised by this incident.