

In re:

ANTHONY BEY : **City of Philadelphia**
: **Police Advisory Commission**
: **Complaint No. 102461-64**

Before:

Commissioners

Rachel Branson, Esquire

Edward James, and

Charles Volz, Esquire

Counsel

Virginia Chentis, Esquire

OPINION

I. INTRODUCTION

This matter is before the Police Advisory Commission (the “**PAC**”) based on a complaint filed with the PAC on Wednesday, April 28, 2010 by Anthony Bey and Hike Bey (individually referred to herein sometimes as the “**Complainant**” or collectively as the “**Complainants**”), along with Barton Bey and Christopher Myers, alleging physical abuse and abuse of authority by several police officers. The Complainants allege that on April 27, 2010, police officers wrongfully entered their residence located at 2XXX Granite Street (the “**Residence**”). Two neighbors made several calls to 9-1-1 after an altercation ensued between Mr. Anthony Bey and two neighbors. The police officers arrived promptly after one of the neighbors alleged during a 9-1-1 call that there was a “man with a gun.” Police officers Robert Bakos (Badge No. 2277) and John Descher (Badge No.6699) arrived after the altercation and pushed or kicked open the door to the Residence causing damage to the door. The Complainants further allege that once

inside, police officers physically assaulted Mr. Barton Bey after he was handcuffed and subdued on the floor. Lastly, after the men were handcuffed, unidentified police officers proceeded to search the Residence.

On March 4, 2011, PAC Commissioners Branson, James, and Volz (the “**Panel**”) heard the sworn testimony of Anthony Bey, Heike Bey, and Barton Bey.¹ On March 5, 2011, the Panel heard the sworn testimony of Officers Robert Bakos and John Descher (collectively referred to herein as the “**Officers**”), and Thomas Ohm (Badge No. #9952)². The Officers were represented by legal counsel provided by the Fraternal Order of Police. In addition to the sworn testimony of all witnesses, the Panel was provided the Citizen’s Complaint Report filed by Anthony Bey on April 28, 2010, an investigative memorandum prepared by the Internal Affairs Division (“**IAD**”) report dated November 2, 2010 (the “**IAD Report**”), Police Advisory Commission report dated November 3, 2010 (the “**PAC Report**”), transcripts from testimony provided to the PAC and IAD of ten responding police officers, and the Combined IAD/PAC Photos of Complainants’ Doorway and Injuries.

II. FACTS

On April 27, 2010, Anthony Bey had an altercation with his neighbors. After the altercation subsided, his brother, Barton Bey, and cousin, Chris Meyers came to the Residence (collectively referred to herein sometimes as the “men”). The men were outside on the Complainant’s porch, when Officers Descher and Bakos were the first to arrive on the 2000 block of Granite St. in response to a radio call alleging – “man with a gun.” From the IAD Report, the Panel learned that neighbors made several calls to the police that went unanswered.

¹ According to the PAC Report (defined herein), “Mr. Barton Bey’s complaint, PAC file no. #102263 was closed because of his failure to finish the administrative process required for a complaint to move forward to investigation.”

² Officer Thomas Ohm lives on the 2000 block of Granite St. and was off duty and at home during the incident.

It was not until a neighbor called alleging that there was a “man with a gun” that the police arrived.³ When the men saw the police car, the men began to go into the Residence. When the Officers arrived, they encountered a neighbor, Mrs. Edith Salles⁴ who pointed in the direction of the men on the porch and made her hands to look like a gun.

The Officers saw the men on the porch, but did not see a gun or any shiny metal object. According to the IAD Report and testimony given by the Officers, they gave verbal commands to the men to stop, but at that time the men were already on their way into the Residence. Mrs. Salles alleged that the Officers called out “‘excuse me, let’s talk’ in the direction of the men.” The men entered the Residence and closed the door behind them. Mrs. Salles told the PAC investigator that she could see the screen door closed, but was not sure whether the entry door was closed. According to the Officers’ testimony and the PAC Report, the Officers ran up the porch after the men and “opened a screen door and pushed open an entry door causing damage to the [Complainants’] door.” Once inside, the Officers ordered the men to the ground at gunpoint and handcuffed them.⁵ According to all of the testimony, none of the men resisted arrest. While the men were handcuffed and face down on the floor, the Officers confirmed that the men were unarmed. During this time, Barton Bey alleges that at least one of the Officers used excessive force to subdue him. Although Barton Bey did not bring evidence of abuse with him to the hearing, the PAC Report provides that “[m]edical records show Mr. Barton Bey was treated for

³ During the second day of the Panel hearing, the Panel learned that gun calls are only second in priority to “officer shot.” When a “gun call” is made, all available officers are required to respond to the call.

⁴ Mrs. Edith Salles later refused to cooperate with IAD and subsequently moved out of the state; therefore, she was not available to testify before the Panel.

⁵ Complainant’s wife, Heike Bay (co-Complainant) was in the Residence, but the police determined based on their experience that she was not a threat and was not restrained. According to her testimony, she went upstairs to tend to their six year old son.

injuries at Aria Frankford Campus Hospital Emergency on the date of the incident for a shoulder injury and bruises.”⁶ Eventually, additional police officers and a supervisor, also responding to the call, arrived at the Residence. The men were taken out of the Residence and placed on the porch. Officer Descher went back into the Residence, and conducted a search of at least the living room/dining room area. No gun was ever found by any of the police officers. Some police officers stayed in the Residence, while Officer Descher went back across the street to interview Mrs. Salles. The Officers assert that entry into the Residence was justified because they believed the men had a gun and the men ignored the verbal commands. Internal Affairs exonerated the Officers, stating that they were in hot pursuit when they entered the doorway of the Residence.

Questions Presented to the Panel

- A. Whether one or more Officers physically abused Barton Bey?
- B. Whether the Officers properly enter the Residence?
- C. Whether the Officers properly searched the Residence?

⁶ According to the PAC Report, “Mr. Barton Bey was interviewed on April 28, 2010 and at that time his arm was in a sling, and photographs of his injuries were taken. Mr. Barton Bey provided the PAC with an Aria Hospital Frankford Campus emergency room medical document that showed the exact treatment and medication prescribed for his shoulder injury. The emergency room treatment was on the same date as this incident and at a time consistent with the approximate time of his release by police.”

III. ANALYSIS

A. Whether the Officers Physically Abused Barton Bey?

Yes. The Panel finds that the Officers physically abused Barton Bey. However, because the police officer(s) that caused the abuse could not be identified by Barton Bey, the Panel can make no recommendation for disciplinary action.

The primary duty of all police officers is to preserve human life. Only the minimal amount of force necessary to protect life or to affect an arrest should be used by an officer. Excessive force will not be tolerated. Officers should exercise all safe and reasonable means of control and containment, using only the amount of force necessary to overcome resistance. *Philadelphia Police Department Directive 22(II)(A)*.

Once the Officers entered the Residence, all of the testimony indicated that the men fully cooperated with the Police, and offered no resistance whatsoever. Under these circumstances, there was no need for the use of force. According to *Philadelphia Police Department Directive 22, Use of Force*, “[o]nly the minimal amount of force necessary to protect life or to affect an arrest should be used by an officer...Officers should exercise all safe and reasonable means of control and containment, using only the amount of force necessary to overcome resistance.” However, medical records shown to the PAC show that Mr. Barton Bey was treated for injuries and bruises at a local hospital. The bruises and injuries were consistent with his statement that he was kicked in the face and the shoulder, and with the date and time of the incident. Unfortunately, the Panel did not find sufficient evidence to link any particular police officer with the injuries. Additionally, when asked, both Complainant and Barton Bey said that they could not look up to see how many police officers were in the Residence or what they looked like because they were handcuffed and face down. Because the police officer(s) that caused the abuse could not be identified by Barton Bey, the Panel can make no recommendation for disciplinary action.

B. Whether the Police Properly Entered the Residence?

No. The Panel finds that the Police did not properly enter the Residence. The Officers entered the Residence without consent and without an arrest or search warrant. *Philadelphia Police Department Directive 7(XI)(A)(3)* provides, “[b]oth an arrest AND a search warrant are needed to enter a residence, whether owned by the defendant or not, if the purpose of the police entry is to arrest a suspect and search for evidence.” (emphasis added) According to the testimony of Officers Descher and Bakos, the IAD Report, and the PAC Report, neither an arrest nor search warrant was obtained to enter the Residence. The Officers “pushed” their way into the Residence and did not wait to receive consent to enter the Residence. Although all of the testimony was not consistent, the Panel believes that the men were on the porch, saw the police car when it arrived on the block, and went into the Residence. The Officers both testified that one or both shouted to the men to get their attention, but the Panel does not find their testimony credible. If the Officers tried to get their attention, we do not believe that the men heard those instructions. We believe that the men went into the Residence and closed the door behind them. The testimony of all of the parties and the Combined IAD/PAC Photos of Complainants’ Doorway and Injuries indicate that the Police forced entry into the Residence.

In the absence of a warrant to search or arrest, the *Police Department Directive* offers an exception for warrantless searches:

Warrantless arrests and searches are permitted where exigent circumstances exist. However, courts generally review the reasonableness of police actions based upon exigent circumstances on a case-by-case basis and these issues are closely scrutinized. As a basic rule of procedure where time and circumstances permit, an arrest and/or search warrant must be obtained. *Philadelphia Police Department Directive 7-12 (XI)(B)*

The question before the Panel becomes whether “exigent circumstances existed” that permitted the Police to enter the Residence without a warrant. Article 1, Section 8 of the

Pennsylvania constitution and the Fourth Amendment of the United States Constitution protect people and the home from unreasonable searches and seizures, and this expectation of privacy has been held to be greatest in one's home. *Comm. v Gutierrez*, 750 A.2d 906 (Pa Super 2000).

A warrantless search of a residence is ***per se unreasonable*** unless justified by exigent circumstances. Some of the relevant factors, which courts and the panel will consider in determining whether such circumstances existed, include:

- the reasonable belief that a threat of physical harm to police or others exists unless an arrest is made immediately; and
- “hot pursuit” of a suspect who flees into a building. *Philadelphia Police Department Directive (7)(XI)(B)(I)*

Applying the facts of this matter to these factors, the Panel does not find that any exigent circumstances existed for the warrantless search of the Residence. Other than a verbal confrontation with a neighbor and a claim that there was a gun, there was no crime. The Officers were operating on unconfirmed information and never saw any of the men with a gun. The Officers were acting on a radio call alleging that there was a man with a gun.

Case law provides that “[a] search may be justified based on exigent circumstances by ‘hot pursuit of a fleeing felon.’” *United States v. Coles*, 437 F.3d 361, 366 (3d Cir. 2006) (quoting *Minnesota v. Olson*, 495 U.S. 91, 100 (1990)). In judging whether exigent circumstances existed, the Panel must decide only whether the officer's determination was “objectively reasonable at the time in question, based on the reasonably discoverable information available to the officer at the time,” not whether the officer's determination was reasonable in hindsight. *United States v. Sculco*, 82 F. Supp. 2d 410, 417 (E.D. Pa. Feb. 4, 2000) (citing *United States v. Rubin*, 474 F.2d 262, 268 (3d Cir. 1973)).

There was no objectionably reasonable belief that a threat of physical harm to the Officers or others existed. The Panel believes that it was the Officers that escalated the situation

by “pushing” their way into the Residence. When the Officers arrived, the dispute between the neighbors ended and most of the neighbors, except for one, were back in their homes. The men were on the porch, but there is also no evidence or testimony that the Officers saw a metallic object (gun), heard any gunfire, or witnessed that a crime had been committed. When the Officers arrived, the men went inside the Residence and closed the door. Once the door was closed, and the suspected armed persons were inside, the reasonable belief that a threat of physical harm to the Officers or others was no longer an issue. At that point, any belief held by the Officers that anyone’s safety was in danger was objectively unreasonable.

There was no “hot pursuit” of a suspect fleeing into a building. The “hot pursuit” exception requires some sort of a chase. *United States v. Santana*, 427 U.S. 38, 42-43 (1976). This Panel did not hear any testimony that indicated that there was a chase. In the PAC Report, Mrs. Salles alleged that the Officers called out “excuse me, let’s talk” in the direction of the men,’ but her account did not provide any details of a chase. However, even if the men had been given verbal commands by the Officers, they were not obligated under the law to respond.

Although the Officers testify that they were in hot pursuit of the men, the Panel finds that testimony not credible. The Officers were not in hot pursuit of a fleeing felon or anyone suspected of having committed a crime. The Officers simply pushed their way into the Residence, absent a warrant and absent any exigent circumstances. The Officers’ actions are clearly outside the conduct permitted under *Philadelphia Police Department Directive (7)(XI)(B)(1)*. If only for the Officers’ safety alone, the Officers should have rethought pursuit and entry.⁷

⁷Even more problematic to the Panel was that IAD found that the call and a gesture amounted to probable cause for a warrantless arrest; particularly in a climate where citizens believe they have to say “gun” during a 911 call in order to get the police to arrive. It is one thing if the police on the scene violate constitutional safeguards, it is far more

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The Panel recommends that the Officers Descher and Bakos review the contents of *Philadelphia Police Department Directive 7*, and revisit and study the Constitutional requirements of warrantless searches. Given the environment in which false “man with a gun” reports are made in order to get a [faster] police response, police officers must understand that such calls cannot serve as the basis for a warrantless search. The overwhelming portion of Directive 7 speaks to warrant requirements. The section dealing with warrantless searches should be expanded or made a separate police directive.

In addition to disciplinary action recommended to the Officers involved, the Panel requests that the Complainants be compensated for the damage the Officers caused to their door.

C. Whether the Police Conducted a Warrantless Search of the Residence?

Yes. The Officers conducted a warrantless search of the Residence. *Philadelphia Police Department Directive 7(XI)(A)(3)* provides, “[b]oth an arrest AND a search warrant are needed to enter a residence, whether owned by the defendant or not, if the purpose of the police entry is to arrest a suspect and search for evidence.” As stated above, the Officers entered the Residence without a search warrant. According to the testimony of Mrs. Bey, she watched as the Officers pushed into the Residence, then she went upstairs to check on her son and keep him upstairs. According to Officer Descher’s testimony, he allowed her to go upstairs because he deemed that she was not a threat. While she was upstairs with her son, Mrs. Bey said an Officer came upstairs and walked through the rooms.

The Panel finds the testimony of Officers Descher and Bakos credible when they said that they did not go upstairs. However, the Panel believes that one of the other responding police

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egregious for IAD to then review the event and determine that constitutional standards were met. It is crucial for IAD to understand the constitutional requirements for a warrantless search so that they can serve as a more effective deterrent to the type of police conduct under review in this matter.

officers walked through the Residence, and others went into the basement and conducted a search of the Residence. Unfortunately, the men were outside on the porch so they did not see how many police officers were inside the Residence or their identities. Mrs. Bey was not able to describe or identify the police officer that came upstairs, so the Panel cannot make a recommendation for disciplinary action

IV. CONCLUSION

The Panel finds that Mr. Barton Bey was physically abused by the Officers, and that the Officers conducted a search of the Residence without a warrant. It should be noted that the IAD was not able to complete its investigation of abuse against Mr. Barton Bey because he did not cooperate with the IAD investigation. The IAD Report exonerated the Officers because it concluded that they were in “hot pursuit.” The Panel disagrees with that conclusion because there was no crime committed, and “hot pursuit” cannot be the pursuit of an individual who is not suspected of having committed a criminal offense. The circumstances before the Panel were unfortunate. Through this hearing and other community outreach, the Panel and the Commission have been made aware of the long response times to 911 calls made to the Philadelphia Police Department and the allocation of scarce resources to more important circumstances. The report of an “individual with a gun” may be made without any substantiation just to get officers to arrive or arrive faster, which is what appears to have happened here. However, a call, without any substantiation, cannot justify a warrantless search of a citizen’s home.

V. RECOMMENDATION

The Panel recommends that Officers Descher and Bakos review the contents of *Philadelphia Police Department Directive 7*, and revisit and study the Constitutional requirements of warrantless searches. Ideally, this additional training shall be incorporated into

the curriculum for police officer training for all officers. The Panel would like the Philadelphia Police Department to review its long response times to 911 calls. In addition to disciplinary action recommended to the Officers involved, the Panel requests that the Complainants be compensated for the damage the Officers caused to their door.

*This Opinion constitutes the final disposition of the complaint of Anthony Bey following the full Police Advisory Commission's review of the report and recommendations of the Panel.*⁸

⁸ The final draft of this Opinion was submitted to and approved by the Commission on 10/17/2011. Pursuant to Executive Order No. 8-93, this Opinion was personally delivered to the Mayor, the Managing Director and the Police Commissioner. The Opinion became a public document available for general release three business days after such delivery. A copy of this Opinion was mailed to Anthony Bey the same day that it was delivered to the Mayor, the Managing Director and the Police Commissioner.