November 2020

POLICE ADVISORY COMMISSION

Executive Review of the Philadelphia Police Department's Pedestrian Investigations

Encounter--**Stop & Frisk**--Search

PHILADELPHIA POLICE DEPARTMENT **DIRECTIVE 12.8**

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SUBJECT: VEHICLE OR PEDESTRIAN INVESTIGATIONS
PLEAC (2.4.1)

POLICE ADVISORY COMMISSION
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December 8, 2020

Danielle Outlaw
Police Commissioner
Philadelphia Police Department
750 Race Street
Philadelphia, Pennsylvania 19106

Dear Commissioner Outlaw:

Enclosed please find the Police Advisory Commission's Executive Review of the Philadelphia Police Department's Pedestrian Investigation Policies and Procedures.

Anthony Erace
Executive Director
Police Advisory Commission

In response to a 2010 lawsuit alleging unconstitutional stops, frisks, and searches conducted by the Philadelphia Police Department ("PPD"), on June 21, 2011, the City of Philadelphia entered into a consent decree ("Agreement") with Plaintiffs represented by the American Civil Liberties Union ("ACLU"). As part of the Agreement, the PPD agreed to (1) collect data on all stop and frisks and store this information in an electronic database, (2) provide officers with necessary training and supervision with respect to stop and frisk practices, and (3) participate in a monitoring system to review and analyze the data. [1]

Since the Agreement, the ACLU has released an analysis on the data with accompanying recommendations and proposals. In the first report released on February 6, 2012, the audit showed that over 50% of stops and frisks were undertaken without reasonable suspicion. [2] In their Tenth Report on 14th Amendment issues and another report on 4th Amendment issues, both released on April 27, 2020, the audit found that 16% of stops were made without reasonable suspicion, and 32% of frisks were made without reasonable suspicion. [3]

Most alarmingly, the ACLU continues to identify racial disparities among PPD stops and frisks; African Americans comprising 41.55% of Philadelphia but accounting for 70.42% of stops and 80.21% of frisks. [4] In response to these data, the ACLU made several recommendations to PPD to heighten compliance with the Agreement which include additional officer training on "recurrent issues-both with respect to the quality of stops themselves and racial disparities-in the area of pedestrian stops".[5] In the City's response to these proposals it was announced that (1) Patrol officers will be updated on repeated errors found in 75-48As, with examples, at roll call, (2) the PPD will be "creating a pocket checklist, to be updated annually with pertinent case law, to aid supervisors in reviewing 75-48A forms".[6] And, stop and frisk issues will (3) be addressed in a "detailed training module conducted by Inspector Robin Hill, in which Inspector Hill specifically addresses the same recurrent errors and the appropriate ways to cure them". [7]

Subsequent to the release of the City's response to the ACLU concerns, the Police Advisory Commission (PAC) conducted a review of existing PPD directives to ascertain compliance with up-to-date legal standards on the issues that were not addressed within the Plaintiffs' Proposals or the City's Response. In addition to the Agreement, on November 3rd Philadelphians voiced their concern regarding stop and frisk by voting yes on a relevant ballot question. The question asked if Philadelphians will call upon the PPD to "eliminate the practice of unconstitutional stop and frisk, consistent with judicial precedent".[8]

Before this amendment to the Philadelphia Home Rule Charter, existing police powers were described as:

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[1] https://www.aclupa.org/en/cases/bailey-et-al-v-city-philadelphia-et-al

[2] https://www.aclupa.org/sites/default/files/field_documents/104_plaintiffs_tenth_report_on_4th_amendment_issues.pdf

[3] Id.

[4] https://www.aclupa.org/sites/default/files/field_documents/104_plaintiffs_tenth_report_on_4th_amendment_issues.pdf

[5] Id.

[6] Id.

[7] Id.

[8] Question 1: Stop & Frisk, https://seventy.org/publications/elections-voting/build-your-ballot

> "The members of the Philadelphia Police shall have the powers conferred by statute and ordinance upon members of the police force of cities of the first class and upon constables of the Commonwealth of Pennsylvania. They shall have the power to make lawful searches, seizures and arrests for violations of any statutes or ordinances in force in the City, to serve subpoenas when ordered so to do by their superior officers, and to do such other acts as may be required of them by statute or ordinance".[9]

When this section of the Home Rule Charter was drafted in 1919, it did not anticipate an era in which police officers stopped, questioned, and searched individuals before any crime was committed. This practice was made legitimate with the 1968 United States Supreme Court ruling of *Terry v. Ohio* [10] which was the first time the Supreme Court held that it was lawful for police to stop someone without probable cause of a crime, giving us a reasonable suspicion standard. The Amendment to the Home Rule Charter would state the existing legal standard and provide an opportunity for residents to express that police officers should not abuse this power.

Anticipating an overwhelming agreement to that call, the PAC undertook this review to determine if PPD Directive 12.8 "Vehicle and Pedestrian Investigations", last updated May 2019, is currently in compliance with judicial precedent.

This review is divided into four sections which cover the types of interactions between law enforcement and civilians as defined by our judiciary: (a) non-custodial mere encounters, (b) detentions/pedestrian investigations based on reasonable suspicion of criminal activity, (c) frisks based on reasonable suspicion that an individual is armed and dangerous, and (d) searches based on probable cause of criminal activity.

A. Updates on Non-Custodial Mere Encounters

Mere encounters carry no official compulsion to stop or to respond to an officer's request for information. In deciding what creates a mere encounter, Pennsylvania courts have stated:

> "To decide whether a seizure has occurred, a court must consider all the circumstances surrounding the encounter to determine whether the demeanor and conduct of the police would have communicated to a reasonable person that he or she was not free to decline the officer's request or otherwise terminate the encounter. Thus, the focal point of our inquiry must be whether, considering the circumstances surrounding the incident, a reasonable person innocent of any crime, would have thought he was being restrained had he been in the defendant's shoes".[11]

Currently, the PPD does not record or document mere encounters. PPD Directive 12.8 instructs officers that "a 75-48A shall not be used to document mere encounters".[12] PPD defines mere encounters as:

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[9] Philadelphia Home Rule Charter §5-201. Powers of Policemen.
[10] See *Terry v. Ohio*, 392 U.S. 1 (1968).
[11] *Commonwealth v. Reppert*, 814 A.2d 1196, 1201-1202 (Pa. Super. 2002).
[12] http://www.phillypolice.com/assets/directives/D12.8-VehicleOrPedestrianInvestigations.pdf

> "A consensual interaction where the officer may ask the citizen questions and generally engage the citizen in conversation. In this interaction, the police officer may ask for identification from the citizen, but the citizen is under no obligation to engage the officer or provide identification. Refusal to comply with requests and conversations DOES NOT provide the officer with any additional suspicion".[13]

Due to a recent Pennsylvania Supreme Court ruling in *Commonwealth v. Cost*, PA courts have now held that **a request for identification and an officer's possession of the individual's identification for more than a moment, is a detention and not a mere encounter**. *Cost* held that "the retention by police of an identification card to conduct a warrant check will generally be a material and substantial escalating factor within the totality assessment". [14] The court was persuaded by a similar analysis rendered by the District of Columbia Court of Appeals which stated that "an officer's decision to run a check for outstanding warrants can be a pivotal event in an otherwise consensual street encounter; it sends a strong signal to a reasonable person that the officer will not allow him to leave while the inquiry is in progress precisely because the outcome of the inquiry may necessitate the person's detention". [15]

In addition to judicial precedent, the Center for Policing Equity and the NYU Policing Project's recent guidebook for recording stop data, recommends that a stop has occurred, and data should be recorded, when an "officer asks for the person's ID".[16] As such, the PAC makes the following recommendations to amend "mere encounters":

Recommendations

1. Directive 12.8 should be amended to direct officers that requesting an identification and conducting a National Crime Information Center (NCIC) check, a Philadelphia Crime Information Center (PCIC) check, or any other inquiry, is generally considered a detention that must be based on reasonable suspicion of criminal activity.
2. In documenting 75-48As for these detentions, officers should document the reason for the detention and elaborate on the reasonable suspicion that warranted a warrant check.
3. PPD should seek an external agency to develop and implement an audit of NCIC/PCIC name searches conducted to ensure searches being made are done pursuant to reasonable suspicion of criminal activity.

B. Updates on investigatory stops based on reasonable suspicion of criminal activity.

The United States Court of Appeals, Third Circuit, recently declared that reasonable suspicion for a stop can dissipate.[17] In *United States v. Bey*, relying on a description of a fleeing suspect,

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[13] Id.
[14] *Commonwealth v. Cost*, 224 A.3d 641 (Pa. 2020).
[15] *Jones v. U.S.*, 154 A.3d 591, 597 (D.C. 2017).
[16] Collecting, Analyzing, and Responding to Stop Data: A Guidebook for Law Enforcement Agencies, Government, and Communities. https://policingequity.org/images/pdfs-doc/COPS-Guidebook_Final_Release_Version_2-compressed.pdf
[17] *United States v Bey*, 911 F.3d 139 (3d Cir. 2018).

Philadelphia Police Officers observed Defendant Bey exiting a café shop and ordered him to stop believing he matched the description of another individual, Amir Robinson. The description of Robinson was "a 21 year old, light-skinned African American man with very little hair under his chin and a tattoo on his neck, he weighed 160-170 pounds and was wearing dark blue pants and a red hoodie when he fled from the police".[18] Bey, on the other hand, "was a 32 year-old, dark-skinned African American man with a long beard, he weighed about 200 pounds and was wearing black sweatpants and a red puffer jacket with a hood".[19] Even though the stopped suspect did not match the description, officers asked Bey if he had a weapon and "Bey told him that he had a gun on his waist".[20] A gun was subsequently recovered.

Even though the court ruled that the original seizure was based on reasonable suspicion, the court held that the reasonable suspicion dissipated once officers saw Bey's face, "once Bey turned around, officers should have noticed the clear differences in appearance and age between the two men".[21] When these officers were informed by other officers that Bey was not Robinson, "Bey was transported back to the police station and charged with being a felon in possession of a firearm".[22] The appeals court vacated Bey's conviction and reversed the suppression opinion, originally denying the suppression.

Existing PPD directives on pedestrian investigations, however, do not address stops where the original reasonable suspicion for the stop has dissipated. Regarding suspect confrontations, Directive 5.16 directs officers to complete a 75-48A for identified and non-identified persons. The directive is devoid of protocols for releasing the suspect and ceasing the investigatory stop once a negative identification has taken place or if officers are made aware by other means that they have stopped the wrong individual.

A second update to Pennsylvania precedent on reasonable suspicion to stop is the holding of *Commonwealth v. Hicks*. *Hicks* held that police officers may not infer criminal activity, of kind supporting a Terry stop, merely from an individual's possession of a concealed firearm in public.[23]

The City's most recent response to the Agreement referenced the *Hicks* decision and how PPD has begun training officers on the new law. It stated the PPD has "disseminated a message to all PPD members on the holding of *Hicks*, and the distinction between a mere encounter and investigatory stop in situations where a person is carrying a firearm without particular suspicion of wrongdoing".[24] Even though new training has begun and officers have been informed in the new holding, relevant directives should also be amended to solidify proper procedures. As such, the PAC recommends:

Recommendations

[18] Id.
[19] Id.
[20] Id.
[21] Id.
[22] Id.
[23] *Commonwealth v. Hicks*, 208 A.3d 916 (Pa. 2019).
[24] Defendant City of Philadelphia's Response to Plaintiff's Proposals Regarding 14th Amendment Issues.

4. Directive 5.16 should be amended to address stops and suspect confrontations where the underlying reason for the stop has dissipated.
5. Directive 5.16 should be amended to document a specific process for releasing individuals not positively identified.
6. Directive 12.8 should be amended to reflect the holding of *Hicks*; observation of a firearm, without any additional factors, is insufficient reasonable suspicion to conduct a stop.

C. Updates on frisks based on reasonable suspicion an individual is armed and dangerous.

The PAC conducted a thorough review of the judicial requirements to conduct a frisk and have determined that existing PPD directives, requiring a reasonable suspicion that an individual is armed and dangerous to conduct a frisk, aligns with judicial standards.

D. Updates on searches based on probable cause of criminal activity.

One year ago, the Philadelphia Inquirer reported that in the first quarter of 2019, searches related to the smell of marijuana surged to the highest level since 2014.[25] The corresponding low 9.7% "hit rate" for contraband during these searches led the Defender Association to argue that the odor of marijuana is not a reliable indication that contraband will be discovered.[26] Recently, the Pennsylvania Superior Court has held that the odor of marijuana, with no indication of criminal activity, may be insufficient for probable cause to search. The Superior court stated that "there is no preexisting, per se rule that the odor of marijuana is always sufficient to establish probable cause to believe a crime is being committed".[27]

Acknowledging that Pennsylvania citizens may now possess and consume marijuana legally, the court further stated that "the strength of the inference of illegality stemming from the odor of marijuana has necessarily been diminished".[28] Overall, "the MMA (Medical Marijuana Act) has altered the fact of marijuana's previously universal illegality, and probable cause is a fact-driven standard not readily, or even usefully, reduced to neat set of legal rules". [29] Finding relevancy in the holding of *Commonwealth v. Hicks*, which stated an observation of a concealed firearm alone is insufficient for reasonable suspicion of criminal activity, the *Barr* court concluded that "police cannot distinguish between contraband marijuana and medical marijuana legally consumed by a substantial number of Pennsylvanians based on odor alone, just as police cannot determine from a person's possession of a concealed firearm that he or she is unlicensed to carry it concealed". [30]

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[25] https://www.inquirer.com/news/philadelphia/philadelphia-police-racial-profiling-marijuana-vehicle-stops-20191031.html
[26] Id.
[27] *Commonwealth v. Barr*, 2020 PA Super 236 (Sept. 25, 2020).
[28] Id.
[29] Id.
[30] Id.

Due to the holding of *Barr*, the PAC believes current PPD directives should be amended to align with existing judicial precedent which include:

Recommendations:

7. Directive 12.8 should be amended to reflect the holding of Barr; officers may only use the odor of marijuana as a factor in the totality of circumstances for probable cause to search, the relation between the odor of marijuana and criminal activity has been diminished.
8. While documenting searches on 75-48As and other departmental paperwork, officers should be informed that "odor of marijuana" is an insufficient description and reason to search a vehicle.

Conclusion

The PAC will continue to monitor updates to these areas and will ensure that existing directives are aligned with legal standards. The PAC looks forward to discussing these recommendations and assisting PPD in drafting its new directive on Pedestrian Investigations.

Prepared by Anjelica Hendricks, Esq. PAC Policy Analyst. Date of Preparation: November 2020.

CITY OF PHILADELPHIA

Police Department
HEADQUARTERS, FRANKLIN SQUARE
PHILADELPHIA, PENNSYLVANIA

DANIELLE M. OUTLAW
Commissioner

1-20-2021

Anthony Erace
Executive Director
Police Advisory Commission
1515 Arch Street, 11th Floor
Philadelphia, PA 19107

Re: PAC Pedestrian Investigations Report – PPD Response Letter

Dear Director Erace:

First, on behalf of Commissioner Outlaw, thank you for the work invested into the above mentioned report. As you know, the Philadelphia Police Department voluntarily entered a settlement agreement in the *Bailey, et al v. City of Philadelphia* case and has been collaboratively working with the Plaintiff's attorneys, Philadelphia Law Department, the Court-assigned monitor and the Courts in this matter for many years. As part of this process, all Police Department policies and practices have been reviewed regularly and amended when necessary. In fact, it is fair to say that as a result of the *Bailey* case, the pedestrian stops made by the PPD are the most reviewed and scrutinized stops of any police department in the country.

Nonetheless, we appreciate your review and will respond to each of your recommendations as follows:

Recommendation 1

Directive 12.8 should be amended to direct officers that requesting an identification and conducting a National Crime Information Center (NCIC) check, a Philadelphia Crime Information Center (PCIC) check, or any other inquiry, is generally considered a detention that must be based on reasonable suspicion of criminal activity.

It appears that this recommendation is premised upon PAC's interpretation of the recent case of *Commonwealth v. Cost* and a misunderstanding regarding the use of the NCIC/PCIC systems by police officers.

First, a critical issue in this case was at what point a mere encounter evolved into an investigatory detention. The Court was very clear in this case that even without reasonable suspicion of criminal activity a police officer may request an individual's identification during a mere encounter. Further, this action alone does not automatically elevate this encounter into an investigatory detention. The issue here was the length of time the officers retained the identification cards and the longer the

identification is retained by an officer, the more likely the person would subjectively feel that they are not free to leave, thus, transitioning the mere encounter into an investigatory detention. This case also presented additional case specific factors indicating that this encounter was something more than a mere encounter.

While the PPD does not disagree with the holding in *Commonwealth v. Cost,* our interpretation of the holding does not warrant such a restrictive amendment to PPD policy. On the contrary, PAC's recommendation is essentially elevating many mere encounters to investigatory detentions and discounting the consideration of time that the officer retains the citizen's identification card, which was a key factor in the *Cost* decision. The holding in the *Cost* case was fact specific and to overly generalize the holding in this matter by implementing more restrictive guidelines for officers would be inappropriate. On a side note, the PPD was recently criticized by Plaintiff's counsel for incorrectly placing mere encounters on the 75-48A forms. When reviewed, these reports appear as if an investigatory stop was made without the requisite reasonable suspicion and these mere encounters were actually counted against the Department during these reviews.

Turning to the NCIC/PCIC issue and your recommendation that such runs should only be done when reasonable suspicion or probable cause exist. To be clear, there is no reasonable expectation of privacy in these databases. The NCIC and PCIC systems are computerized databases of criminal justice information available to law enforcement agencies nationwide. It was designed to help law enforcement locate fugitives and stolen property. It also contains information on missing persons, unidentified persons, Protection from Abuse Orders, firearm relinquishment orders and persons believed to be a threat.

It appears from PAC's recommendation that it believes the NCIC/PCIC systems are only accessed during investigatory stops. This is not the case. Rather, these systems are routinely utilized by officers outside the scope of investigatory detentions. Officers regularly run individuals during or after mere encounters, during calls for service and other encounters where the subject is not being detained. This is an officer safety tool and does not impact the constitutional rights of the persons run through the systems. While an individual may wish to conceal an outstanding warrant, a person has no reasonable expectation of privacy in the government databases that catalog warrants.

PAC's recommendation to restrict officers from accessing this public safety system to only those matters where reasonable suspicion or probable cause is present, is not feasible and will unnecessarily endanger officers. Equally important, officers will miss out on other valuable public safety information, such as missing people, property, and protective orders issued by the Court. So, for the reasons set forth above, the PPD must reject this recommendation.

2. In documenting 75-48As for these detentions, officers should document the reason for the detention and elaborate on the reasonable suspicion that warranted a warrant check.

As mentioned above, the PPD disagrees that a custodial detention report (75-48A) should be filed for every mere encounter, even those where identification is requested. The PPD also disagrees with implementing any restrictions on officer access to the NCIC/PCIC systems. Above all, this is an officer safety system. While it may not be intentioned, PAC's recommendation of requiring reasonable suspicion or probable cause to access these systems is inferring a constitutionally protected right. This is clearly not the case. As such, this recommendation must be rejected.

3. PPD should seek an external agency to develop and implement an audit of NCIC/PCIC name searches conducted to ensure searches being made are done pursuant to reasonable suspicion of criminal activity.

The NCIC system is managed by the Federal Bureau of Investigation and the PCIC system is managed by the Pennsylvania State Police. Each agency sets forth rules and regulation for officers and agencies using these systems. There is no reasonable expectation of privacy in these systems by any individual and, as such, access to these systems does not require the constitutional requirements of reasonable suspicion or probable cause to conduct any searches. Nonetheless, the PPD has no authority or control over these systems to implement any audits. This recommendation is well beyond the scope of the PPD.

4. Directive 5.16 should be amended to address stops and suspect confrontations where the underlying reason for the stop has dissipated.

The current training and practice in the PPD is to immediately release any individual where probable cause or reasonable suspicion no longer exists. This occurs even if an individual has been arrested but the probable cases used to make the arrest dissipates or changes. Individuals are often cleared by further investigation and immediately released. However, the PPD agrees that this matter should be clarified more in the actual directives. As such the PPD accepts this recommendations and will amend the appropriate directive to provide more clarification for officers.

5. Directive 5.16 should be amended to document a specific process for releasing individuals not positively identified.

While the PPD agrees in theory with this recommendation, we do not agree that a "process" per se is required. Once reasonable suspicion or probable cause dissipates a person should be released. Nonetheless, PPD will provide clear instructions and this recommendation will be incorporated into the amendments referred to above in Recommendation 4.

6. Directive 12.8 should be amended to reflect the holding of *Hicks*; observation of a firearm, without any additional factors, is insufficient reasonable suspicion to conduct a stop.

The same day that the *Hicks* decision was rendered, our Training and Education Bureau issued a Training Bulletin and has resent the Training Bulletin multiple times since the decision was rendered. We are confident that our officers and supervisors are aware of the decision and are acting accordingly. Additionally, our Standards and Accountability Unit, which reviews our Pedestrian Stop data, has implemented this ruling into their review protocols. As such, the PPD has no objections to this recommendations and will insert a note in the applicable directives as soon as possible.

7. Directive 12.8 should be amended to reflect the holding of Barr; officers may only use the odor of marijuana as a factor in the totality of circumstances for probable cause to search, the relation between the odor of marijuana and criminal activity has been diminished.

The ability to search vehicles without a warrant was expanded to mirror the federal vehicle exception to the warrant requirements in the case of *Commonwealth v. Gary* in 2014. Based upon this case, officers were lawfully permitted to search a vehicle if they developed probable cause of a crime. However, prior to the *Gary* decision, police officers in Pennsylvania were required to articulate not only probable cause, but also exigent circumstance to justify a warrantless search of a vehicle. On December 22, 2020, the Pennsylvania Supreme Court, in the case of *Commonwealth v. Alexander* overruled *Commonwealth v. Gary* holding that Article I, Section 8 of the Pennsylvania Constitution affords greater protection to Pennsylvania's citizens than the Fourth Amendment of the U.S. Constitution. The Court thereby reaffirmed the holding that the Pennsylvania Constitution requires both a showing of probable cause and exigent circumstances to justify a warrantless search of an automobile. Thus, the smell of marijuana, without more, is no longer sufficient to justify a warrantless search of a vehicle. The Training and Education Bureau has developed and implemented a Training Bulletin regarding the *Alexander* case to all police personnel. So, based upon the holding in the *Alexander* case, this recommendation is now moot.

8. While documenting searches on 75-48As and other departmental paperwork, officers should be informed that "odor of marijuana" is an insufficient description and reason to search a vehicle.

For the reasons cite in Recommendation 7, this recommendation is now moot. All officers in Pennsylvania must not only show probable cause, but also exigent circumstances prior to searching any vehicle without a warrant. As mentioned above, the Training and Education Bureau has developed and implemented a Training Bulletin regarding the *Alexander* case to all police personnel.

Again, thank you for the work put into this report. I am happy to discuss any recommendations further.

Sincerely,

Francis T. Healy
Special Advisor to the Commissioner