



CIVILIAN OFFICE OF POLICE ACCOUNTABILITY

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May 3, 2019

Max A. Caproni
Executive Director, Chicago Police Board
30 North LaSalle Street, Suite 1220
Chicago, Illinois 60602

VIA Email and U.S. mail

RE: Request for Review, Log No. 1090066

Dear Executive Director Caproni:

Pursuant to Municipal Code of Chicago Section 2-78-130 and Police Board Rules of Procedures Section VI, please consider this letter a Request for Review of a non-concurrence between the Civilian Office of Police Accountability (COPA) and the Superintendent in the above captioned investigation.¹

The factual dispute and legal analysis are set forth below. The Department bears the affirmative burden of proof in overcoming COPA's recommendation. In this case, the Department fails to meet its burden. COPA therefore respectfully requests the Chicago Police Board reject the Department's non-concurrence and accept COPA's recommendation.

As explained in more detail below, the crux of the dispute between COPA and the Department is, stated simply, when is an officer permitted to conduct a full "search incident to arrest." COPA contends, and the case law supports that a "search incident to arrest" is *only* permitted when there has been an actual arrest that places the individual in the custody of the police. The Department, on the other hand, wishes to *vastly expand* that authority and suggests that a "search incident to arrest" is permitted when an officer merely has the *authority* to arrest, but never actually effectuates an arrest. The Department is incorrect; Illinois (and federal) law is clear that a "search incident to arrest" is *only* permitted when the officer has *arrested* the individual. This is an issue of paramount importance, as expanding this authority in the way the Department proposes has wide-ranging, and troubling implications for citizens of Chicago.

¹ As required by the Police Board Rules of Procedure, enclosed are copies of COPA's Final Summary Report, the Department's non-concurrence letter, and a certificate that the parties met and conferred.

I. BACKGROUND

A. Factual Background

On July 2, 2019 Officer Andrew Gorlewski conducted a street stop of [REDACTED] after observing Ms. [REDACTED] drinking beer while at a CTA bus stop. Officer Gorlewski subsequently grabbed [REDACTED] bag, searched it, and then threw it out of the police window onto the ground. Officer Gorlewski wrote Ms. [REDACTED] an ANOV (Administrative Notice of Violation) citation for drinking on the public way and then left the area. Officer Gorlewski did not arrest Ms. [REDACTED]

B. Disputed Findings & Recommendation

COPA sustained four allegations against Officer Gorlewski: (a) took [REDACTED] bag without justification, in violation of Rules 1 and 6 (Allegation #3); (b) searched [REDACTED] bag without justification, in violation of Rule 1 and 6 (Allegation #4); (c) was rude and unprofessional when he threw [REDACTED] bag out of the squad car window and onto the ground, in violation of Rule 2 (Allegation #5); and (d) failed to document his contact with [REDACTED] in violation of Rule 6. COPA recommended 15-day suspensions for Allegations #3 and #4, a 5-day concurrent suspension for Allegation #5, and a 3-day concurrent suspension for Allegation #6.²

The Department does not concur with COPA's sustained findings for Allegations #3 and #4 and believes Allegations #3 and #4 should be classified as Unfounded. The Department does not concur with COPA's recommended penalty of a 15-day suspension and believes a Reprimand is more appropriate.

C. Legal Background

1. Applicable Rules and Directives

Rule 1: Violation of any law or ordinance

Rule 2: Any action or conduct which impedes the Department's efforts to achieve its policy and goals or brings discredit upon the Department

Rule 6: Disobedience of an order or directive, whether written or oral.

The Fourth Amendment of the United States Constitution and Article 1, Section 6 of the Illinois Constitution of 1970 guarantee the right of individuals to be free from unreasonable searches and seizures. U.S. Const., amend. IV; Ill. Const. 1970, art. I, § 6. "No right is held more sacred, or is more carefully guarded, by the common law, than the right of every individual to the possession and control of his own person, free from all restraint or interference of others, unless by clear and unquestionable authority of law." *Terry v. Ohio*, 392 U.S. 1, 9 (1968) (internal citations and quotations omitted).

² The suspensions would be served concurrently.

Generally, police officers must have a warrant to search a person or place. One exception to the warrant requirement is the search incident to arrest doctrine. The United States Supreme Court set the bounds of searches incident to arrest in *Chimel v. California* 395 U.S. 752, 754 (1969). *Chimel* set forth the general rule that arresting officers, in order to prevent the arrestee from obtaining a weapon or destroying evidence, could search both “the person arrested” and “the area within his immediate control.” *Id.* at 763. In *United States v. Robinson*, the Court held the mere fact of a lawful arrest justifies a search of the arrestee and area within his immediate control; probable cause that weapons or evidence will be found is not required. 414 U.S. 218, 235 (1973).

2. Legal Standard

The applicable legal standard for sustaining an allegation of misconduct is a preponderance of the evidence. A preponderance of evidence can be described as evidence indicating that it is more likely than not that the conduct reviewed violated Department policy. *See Avery v. State Farm Mutual Automobile Insurance Co.*, 216 Ill. 2d 100, 191 (2005), (a proposition is proved by a preponderance of the evidence when it has found to be more probably true than not). If the evidence gathered in an investigation establishes that it is more likely that the conduct complied with Department policy than that it did not, even if by a narrow margin, then the preponderance of the evidence standard is met.

II. ANALYSIS

Officer Gorelwski’s seizure and search of Ms. [REDACTED] purse was not a lawful “search incident to arrest” because he did not arrest Ms. [REDACTED]. That is COPA’s view, and that is the view of Illinois and federal courts; for a “search incident to arrest” to be lawful, the officer must arrest the person. The Department’s position would *vastly* expand when officers are permitted to conduct full searches incident to arrest. The Department asserts that because Officer Gorelwski merely had the *authority* to arrest Ms. [REDACTED] (but elected not to), his “search incident to arrest” was lawful.

The Department’s position not only expands the entire purpose for the “search incident arrest” exception to the warrant requirement (officer safety in transporting arrestees) but would have incredible constitutional implications for the citizens of Chicago. The only probable cause Officer Gorelwski had to arrest Ms. [REDACTED] related to her drinking alcohol on a public way (an arrestable offense). Department Members have the *authority* to arrest citizens who violate a Chicago ordinance, such as jaywalking, riding a bike on the sidewalk, or failing to have a dog on a leash. Under the Department’s view of the “search incident to arrest” doctrine, any citizen of Chicago who lets his or her dog off leash could be lawfully subjected to a full search incident to arrest. Because, under the Department’s view, that Member would have the *authority* to arrest the dog walker, and so a full search would be permitted.

Illinois law does not support the Department’s view, and this Police Board should clarify for the Department that a “search incident to arrest” is what it says it is: when an officer arrests a person, that officer is permitted to conduct a full search incident to arrest. If an officer, in his or her discretion, elects to not arrest (as officers routinely do), he or she has no lawful reason to conduct a full search.

1. The Search Incident to Arrest Exception Requires a Custodial Arrest

The Department misconstrues the case-law cited by COPA in its Summary Report. COPA agrees with the Department that a search incident to arrest may *precede* an actual custodial arrest (*i.e.* when an individual is taken into formal police custody versus merely being seized) so long as probable cause to arrest existed at the time of the search. *People v. Hall*, 90 Ill. App. 3d 1073, 1077 (1st Dist. 1980). COPA also agrees that the *subjective intent* of the officer at the time of the search is not controlling. However, under Illinois law a search incident to arrest is only permitted when there is an actual custodial arrest at some point during the encounter.

The controlling Illinois precedent is *People v. Taylor*, 210 Ill. App. 3d 833, 840 (5th Dist. 1991). In *Taylor*, an officer responded to the scene to investigate a single-car accident and discovered a bag that he believed contained cannabis in the vehicle. *Id.* 835. The officer proceeded to a local hospital to identify the driver. *Id.* The officer reached into the driver's jean pockets to obtain the driver's license. *Id.* The officer subsequently discovered methamphetamine but did not arrest the driver that day. *Id.* The State asserted that because the officer had probable cause to arrest the driver at the time of the search, the search was lawful as a search incident to arrest. The *Taylor*, the court rejected the State's argument and held "in order for a search made incident to a lawful arrest, and which precedes an arrest, to be valid, the search must be made immediately prior to the arrest" and suppressed the evidence noting that the driver was not arrested on the date of the search. *Id.* at 839. The holding of *Taylor* is clear and unambiguous: a valid search incident to arrest requires a custodial arrest.³ An officer having probable cause to arrest is insufficient to justify a search incident to arrest.

The reasoning of *Taylor* is directly supported by unanimous United States Supreme Court precedent, *Knowles v. Iowa*, 525 U.S. 113 (1998). In *Knowles*, an officer stopped a person for speeding. *Id.* at 114. The officer issued the person a citation but could have arrested him under Iowa law. *Id.* The officer subsequently searched the vehicle and discovered cannabis. *Id.* The Court held that the search was not justified by the search incident to arrest doctrine because the "two historical rationales for the search incident to arrest exception: (1) the need to disarm the suspect in order to take him into custody, and (2) the need to preserve evidence for later use at trial were not present." *Id.* at 116-19 (internal citations and quotations omitted).

The Department attempts to distinguish *Knowles* by noting that *Knowles* involved the search of the vehicle and not a search of a person and her belongings incident to arrest. However, this only makes the reasoning of *Knowles* more persuasive because individuals have a reduced expectation of privacy while driving. *Fink v. Ryan*, 174 Ill. 2d 302, 310 (1996) (noting that "the regulation of automobiles in Illinois reduces a driver's expectation of privacy."). The two

³ *Menotti v. City of Seattle*, 409 F.3d 1113, 1153 (9th Cir. 2005) ("We decline to extend the exception to warrant requirements for seizures incident to arrest to instances in which a police officer seizes evidence of a crime but makes no arrest."); *Bennett v. City of Eastpointe*, 410 F.3d 810, 824 (6th Cir. 2005) ("The mere fact that an officer has the authority to arrest an individual does not, and never has, automatically permitted the officer to conduct a pat-down search should he choose not to effectuate the arrest. For an officer to conduct a search incident to arrest, there must be an actual arrest.")

historical rationales for the search incident to arrest are equally inapplicable in cases involving the search of a person and/or her belongings when no custodial arrest occurs.⁴

The Department cites *People v. Kolichman*, 218 Ill.App.3d 132 (1991) in support of its position. In *Kolichman*, the court upheld a search as valid under the search incident to arrest doctrine. The court reasoned the officers had probable cause to arrest the defendant for disorderly conduct, and the fact the officer did not intend to arrest the defendant at the time of the search was irrelevant. *Id.* at 139. The holding of *Kolichman* does support the proposition that the search incident to arrest may precede the custodial arrest (which COPA does not dispute) and that the officer's subjective intent at the time of the search is not controlling (which COPA also does not dispute). *Id.* However, *Kolichman* is entirely distinguishable from this investigation because a custodial arrest occurred after the officers discovered narcotics on the defendant.⁵

In the instant case, it is undisputed that Ms. [REDACTED] was not subjected to a custodial arrest on the date of the incident. Therefore, the search incident to arrest exception to the warrant requirement did not justify Officer Gorlewski seizing and searching Ms. [REDACTED] purse. No other exception to the warrant requirement is applicable. Therefore, Officer Gorlewski seized and searched Ms. [REDACTED] search without justification.

2. The Department's Position Would Permit Custodial Searches During Almost Every Lawful Detention

The Department's position has extremely troubling implications. Officers are legally permitted to arrest individuals for minor traffic violations and ordinance violations. *Atwater v. Lago Vista*, 532 U.S. 318 (upholding an arrest under Texas law for violating mandatory seat belt laws, a minor fine-only offense) (2001); *People v. Fitzpatrick*, 2013 IL 11344965 (holding that arrests for minor, fine-only offenses do not violate the Illinois Constitution); ILCS 5/11-1-2(a) (permitting police officers to arrest "all persons who break the peace or are found violating any municipal ordinance or any criminal law of the State."). The minor conduct prohibited either by Illinois state law or the Chicago Municipal Code that could justify a custodial arrest is staggering.⁶ See, e.g., Chicago Municipal Code, § 7-12-030 (leashes); Chicago Municipal Code, § 10-8-480 (littering); Chicago Municipal Code, 9-520-020 (riding bicycles on sidewalks and certain roadways); Chicago Municipal Code, 9-60-010 (jay walking); Chicago Municipal Code, 9-40-200 (failure to signal); Chicago Municipal Code, 9-40-240 (use of horn). Furthermore, the inquiry under the Fourth Amendment is objective reasonableness; the knowledge and subjective intent of the involved officers is irrelevant. Therefore, the Department's position would permit its officer to perform full custodial searches of individuals during almost every lawful detention,

⁴ Officers are permitted to conduct a protective pat-down (*i.e.* a limited search) when they have reasonable, articulable that a person is armed and dangerous to ensure their safety during detentions. *Terry v. Ohio*, 392 U.S. 1 (1968). *Terry* balances the need to ensure officer safety with liberty interests.

⁵ COPA acknowledges that dicta in *Kolichman* suggests the court would have upheld the search even if the defendant had not been arrested. 218 Ill.App.3d at 140 ("The reason that the search may precede the arrest is that an innocent individual is saved from an unnecessary formal arrest where, with probable cause to arrest, the officer searches first.") (citing *People v. Simon*, (1955), 45 Cal. 2d 645 (1955)) In contrast, *Taylor* addressed a situation where no arrest occurred on the date of the search. The clear precedent of *Taylor*, a case where no arrest occurred on the date of the search, controls over the dicta of *Kolichman*.

⁶ To be clear, COPA recognizes the conduct the legitimate governmental in regulating this type of conduct.

particularly traffic stops, and minor ordinance/traffic violations could be used by the Department and Department members to justify otherwise unlawful custodial searches.

The Department's position significantly erodes the legitimate liberty interest of all Chicago citizens and likely has a disparate impact on minority groups. The Department's position should not be permitted and condoned unless clear, unambiguous, and binding legal authority supports the Department's position. As explained above, the legal authority supports COPA's position that the search incident to arrest doctrine only applies when a custodial arrest occurs.⁷

3. The Police Board Resolution of Log #108870 is Not Controlling

The Department asserts that the Chicago Police resolution of Log #1088870 in Police Board Request for Review 19-RR-01 supports its position. Log #1088870 is distinguishable from this case because in that case the officer handcuffed the involved citizen and the detention constituted a de facto arrest.⁸

Regardless, respectfully, Request for Review 19-RR-01 reflects the determination of the single designated member and not each member of the Chicago Police Board. The designated member's response did not provide any legal reasoning or explanation. COPA believes this is an issue of paramount importance to its ability to hold officers responsible for improper searches and seizures. If the Department's position is correct, COPA could be required to exonerate all allegations of an unlawful search in any instance in which the officer could articulate facts sufficient to establish probable cause to arrest an individual for a mere ordinance violation. If other members of the Police Board believe the Department's position is supported by the law and that custodial searches are permitted whenever the facts and circumstances would lead a reasonable officer to determine there is probable cause for the violation of any law, they should expressly state so and cite the controlling authority.

4. A 15-Day Suspension is Appropriate

The Department correctly notes that COPA's Summary Report did not include Officer Gorelowski's complimentary history. COPA has received and reviewed that information and maintains that a 15-day suspension is appropriate.

⁷ COPA recognizes that officers could simply arrest someone anytime they have probable cause for any violation to justify a custodial search pursuant to the search incident to arrest. However, a custodial arrest creates significant administrative obligations on arresting officers that makes it burdensome to custodially arrest someone for minor, fine-only offenses. Moreover, an officer who arrests someone for a minor offense at least has identified the violation and exercised his or her discretion. The Department's position will be used to justify, post-hoc, otherwise improper conduct.

⁸ COPA asserts that a custodial arrest is required to justify a search incident to arrest. However, in this case neither a custodial arrest nor de facto arrest occurred.

III. CONCLUSION

For the reasons stated, COPA concludes Officer Gorlewski seized and searched Ms. [REDACTED] purse without justification. Accordingly, COPA respectfully requests that the Police Board reject the Department's non-concurrence and accept COPA's recommendations.

Respectfully,

[REDACTED]

Sydney R. Roberts
Chief Administrator
Civilian Office of Police Accountability