Dep't of Correction v. Perry

OATH Index No. 265/14 (Nov. 22, 2013)

Petitioner did not prove that respondent engaged in conduct unbecoming an officer or of a nature to discredit the Department. Dismissal of charge recommended.

NEW YORK CITY OFFICE OF ADMINISTRATIVE TRIALS AND HEARINGS

In the Matter of
DEPARTMENT OF CORRECTION
Petitioner
- against -
JERMAINE PERRY
Respondent

REPORT AND RECOMMENDATION

KEVIN F. CASEY, *Administrative Law Judge*

The Department of Correction (DOC) brought this disciplinary proceeding against respondent, Correction Officer Jermaine Perry, under section 75 of the Civil Service Law. The petition alleged that respondent engaged in conduct unbecoming an officer and of a nature to bring discredit upon the Department, when he drove to a location where a passenger in his car purchased cocaine from an undercover officer and cocaine was later found in the car (ALJ Ex. 1). Respondent denied any wrongdoing. He said that he was unaware of any drug deal and he did not possess cocaine.

At a hearing on September 24, 2013, petitioner relied on documentary evidence and the testimony of New York City Police Department Detective Joseph Fernandez. Respondent testified in his own behalf, offered documentary evidence, and presented testimony from his supervisor, Captain James Moses, and a family friend, Raheem Wells. After receipt of post-hearing memoranda, the record was closed on October 9, 2013. For the reasons that follow, I find that petitioner failed to prove the charge and recommend it be dismissed.

ANALYSIS

Introduction

Respondent, described by his supervisor as a dependable correction officer, has worked for the Department since 2001 (Tr. 91, 157). On January 18, 2013, the police arrested respondent following a street-level drug deal. Though the criminal charges were dismissed, petitioner seeks termination of respondent's employment based on the events that led to his arrest.

Petitioner relied primarily on the testimony of the arresting officer, Detective Fernandez, and a report prepared by Department investigators. Detective Fernandez described the arrest of drug dealer Andre Keene, the stop of respondent's car, the arrest of respondent and his passenger Wells, and the recovery of five small glassines or plastic twists of cocaine from respondent's car. Two of the five glassines or twists were hidden inside a hand pump used for asthma medication.

Respondent testified that he gave Wells a ride to Well's mother's home. On the way, Wells asked respondent to pull over. As Wells spoke to Keene, who was standing on the sidewalk, respondent checked his cell phone. Shortly afterwards, respondent and Wells continued on their way and were stopped by the police. Respondent denied seeing any transaction and denied seeing any drugs.

Wells testified that he asked respondent for a ride and he surreptitiously purchased cocaine from Keene when respondent stopped the car. According to Wells, respondent knew nothing about the transaction.

Preliminary Issue

Petitioner argued that respondent's criminal records should have been unsealed. This contention lacked merit.

Once the criminal charges were dismissed, police and court records were sealed. *See* Crim. Proc. Law. § 160.50 (Lexis 2013). At the hearing, petitioner argued that the criminal court records should be unsealed because respondent questioned Detective Fernandez about the location where drugs were found (Tr. 83). Noting that "Detective Fernandez is responsible for hundreds of narcotics arrests," petitioner argued that a decision in this case must be based "in large part on a factual determination that can only be made by reviewing documents in the sealed criminal record" (Pet. Mem. at 2).

Acknowledging that this tribunal lacks authority to unseal records of a dismissed criminal case, petitioner asked respondent to sign a release to unseal the records. Referring to case law holding that certain privileges are waived when an acquitted defendant commences a civil action or affirmatively places confidential information at issue, petitioner argued that respondent's "use of the sealed record" ran afoul of the principle that such information, designed to protect the accused, "may not be used as a sword to gain advantage in a civil action" (Pet. Mem. at 2).

Respondent maintained that he never had access to the documents at issue prior to the sealing, he did not use anything from the sealed records, and this tribunal lacked authority to grant the relief requested by petitioner (Resp. Mem. at 1-2).

As both sides recognize, this tribunal cannot unseal criminal records. *See Dep't of Correction v. Blanc*, OATH Index No. 2571/11 at 3 (Feb. 2, 2012), *aff'd*, NYC Civ. Serv. Comm'n Item No. CD 12-40-SA (Aug. 10, 2012) (precluding use of sealed documents, but allowing witnesses to testify about their independent recollection of statements and events). Nor should respondent be compelled to sign a release of his rights. Every court case cited by petitioner involved plaintiffs who waived the protection of a privilege by commencing a civil action or placing their health in issue. *See, e.g., Wright v. Snow*, 175 A.D.2d 451, 452 (3d Dep't 1991) (sealing privilege waived where individual commences a civil action and affirmatively places protected information at issue); *cf. Koump v. Smith*, 25 N.Y.2d 287, 294 (1969) (doctor-patient privilege is waived in a personal injury action, where defendant affirmatively places physical or mental condition in issue as a counterclaim or a defense; but privilege should be recognized where defendant merely denies allegations).

Respondent did not initiate this action and he did not waive his right to have records sealed simply because he denied the charges and challenged petitioner's lone witness about his inability to recall details. Moreover, as respondent notes, the record was not sealed until six months until after his arrest. The detective had plenty of time to review the records before they were sealed and petitioner had ample opportunity to investigate and ask a court of competent jurisdiction to unseal the records.

Evidence at the Hearing

Detective Fernandez, assigned to a Brooklyn narcotics unit, testified that he had participated in over one hundred buy and bust operations, where undercover officers attempt to

purchase narcotics and back-up teams arrest the culprits (Tr. 12, 29-30). On January 18, 2013, respondent was arrested during a buy and bust operation in the vicinity of Georgia and Livonia Avenues (Tr. 34). Detective Fernandez was part of a back-up team, parked a block away, and he did not see any drug deal (Tr. 14, 20, 34-35, 44). He arrested respondent based on information provided by an undercover officer who purchased narcotics or a "ghost" officer who protected the undercover by watching from nearby (Tr. 18-19, 45-46).

According to Detective Fernandez, he was told that the undercover approached a man later identified as Andre Keene, and engaged in a narcotics-related conversation (Tr. 24). Keene said, "Let me call my guys" or "these are my guys" and he made a phone call (Tr. 17, 23, 73-74). Sometime later, Detective Fernandez could not recall how long, respondent drove to the scene with Wells as a passenger in his car (Tr. 21, 24). Someone in the car spoke to Keene and gave him something (Tr. 24). Keene then walked with the undercover to a doorway where they exchanged money for drugs (Tr. 25).

Following the transaction, Detective Fernandez and other officers stopped respondent's car and arrested respondent and Wells (Tr. 25). When the police ordered them out of the car, respondent was "very professional," identifying himself as a correction officer and alerting the officers that he was carrying a firearm (Tr. 20). After respondent and Wells were handcuffed, Detective Fernandez took a "pretty quick look in the front" of the car and found "plastic twists" containing narcotics "in" the center console by the emergency brake (Tr. 27-28). Detective Fernandez also found plastic twists, containing narcotics, sticking out of an asthma pump (Tr. 27). Because Detective Fernandez had a child with asthma, he knew that plastic should not have been sticking out of the pump (Tr. 27).

Later that day, DOC investigators interviewed Detective Fernandez (Pet. Ex. 2). According to a report that the investigators prepared more than six weeks later, Detective Fernandez told them that the undercover officer purchased marijuana from Keene and asked him for narcotics. Keene said "I'll call my guys" and made a phone call. "A little while later," respondent drove to the location with Wells and the undercover "conducted a hand to hand transaction of cocaine with Wells" (Pet. Ex. 2). During a subsequent search of the car, the police found five "small glassine bags of cocaine" (Pet. Ex. 2). Two glassines were "by the" emergency brake "center console," two were inside an asthma pump "in the" center console, and one was "on the passenger seat" (Pet. Ex. 2). In the Criminal Court Complaint, Detective

Fernandez stated that he recovered "a quantity of cocaine . . . in open view from on the center console" of the car (Resp. Ex. A).

The investigator's report also noted that Keene and Wells were former inmates with criminal records. As a result of this incident, Wells pleaded guilty to criminal possession of a controlled substance in the seventh degree (Pet. Ex. 2). Keene was charged with criminal sale of a controlled substance in the third degree and lesser drug related offenses, but no disposition was reported (Pet. Ex. 2). The day after his arrest, respondent tested negative for drug use. His criminal case was adjourned in contemplation of dismissal on February 20, 2013, and all charges against him were dismissed six months later (Pet. Ex. 1).

Respondent testified that he has been a correction officer for 13 years and he has known Wells, who is a close friend of his cousin, for about 10 years (Tr. 92, 99). They have attended various family functions together and saw each other about four or five times a year (Tr. 100, 114). They do not "hang out" together, but they occasionally speak on the phone, especially when respondent is trying to find his cousin (Tr. 100).

On the day at issue, respondent spoke to Wells on the phone. Wells had recently been in a car accident and his car had been totaled. Respondent asked him if he needed any help (Tr. 102). Later that day, respondent was driving to get something to eat and he spotted Wells walking on the sidewalk (Tr. 105). Wells asked for a ride to his mother's house and respondent agreed to give him a ride (Tr. 107). They drove for about ten minutes when Wells spotted Keene and asked respondent to pull over (Tr. 92-93, 123).

Keene approached respondent's car (Tr. 93). After talking to Wells, Keene walked away, returned, and shook hands with Wells (Tr. 93-94). Respondent, who was checking his cell phone, did not pay attention to Wells or Keene (Tr. 93).

After respondent drove away, the police stopped the car and ordered Wells and respondent to get out (Tr. 94). When respondent and Wells got out of the car, respondent identified himself as a correction officer and told the officers that he was carrying a firearm (Tr. 94, 116). Respondent recalled that "everything" stopped and an officer who had been searching Wells's pockets tossed something back in the car (Tr. 94-95, 116). As one officer stayed with Wells, others helped secure respondent's gun (Tr. 94-95).

The police arrested respondent and Wells (Tr. 94-95). Respondent was later told that he had been arrested for drug possession because the police had recovered narcotics from an asthma

medicine container (Tr. 97-98). Respondent was unaware of any drug transaction and he did not see any drugs in his car (Tr. 98, 123).

The next day, the criminal case was adjourned in contemplation of dismissal and respondent was released. He was promptly tested for drug use and those test results were negative (Tr. 96-97). The criminal charges were later dismissed (Tr. 96-97). Respondent, who had no disciplinary record, did not know that Wells was a former inmate or that he had been involved in narcotics (Tr. 97, 109-10).

Raheem Wells, who had a lengthy record of arrests and incarceration, testified that he worked for a plumbing company (Tr. 124; Pet. Ex. 2). He was friends with respondent's cousin and he had known respondent for about a decade (Tr. 124, 126, 149). According to Wells, he spoke with respondent every few months (Tr. 149-50, 152). Once or twice Wells called respondent to get in touch with the respondent's cousin (Tr. 153).

On the day of this incident, Wells spoke to respondent on the phone (Tr. 145). Wells, who had recently wrecked his own car in an accident, asked for a ride to his mother's home (Tr. 127, 144). Later that afternoon, Wells called Keene, a local drug dealer, and arranged to buy cocaine (Tr. 131).

As he walked to meet Keene and purchase the drugs, Wells saw respondent driving his car (Tr. 128). Wells asked if he could still get a ride to his mother's home (Tr. 128). Respondent said yes and Wells got in the car (Tr. 128).

On the way, Wells asked respondent to pull over on Livonia Street, where Keene was standing (Tr. 130, 147). Wells spoke to Keene and pretended that Keene owed him money (Tr. 129). From the passenger seat, Wells handed an asthma pump to Keene (Tr. 134). Wells had secreted a $100 bill inside the pump (Tr. 134, 136). According to Wells, Keene went to the corner and returned with two men (Tr. 134). As they shook hands, Keene passed Wells the asthma pump containing four or five $10 packets of cocaine and change from the $100 bill (Tr. 133). Wells estimated that the exchange took about ten minutes and he testified that respondent was on his cell phone the whole time (Tr. 148). Respondent did not see or know anything about any drug transaction (Tr. 148).

After respondent and Wells drove away, the police stopped the car and ordered them out (Tr. 138). Respondent did not know what was going on (Tr. 139). At first, the police did not find any drugs (Tr. 139). During the search, they tossed Wells's belongings, including his cell

phone, loose money, and his asthma pump, back into the car (Tr. 139-40). When the police looked further, they shook the asthma pump and found the drugs (Tr. 142). Wells later told the police that the drugs belonged to him and that respondent had nothing to do with it (Tr. 142).

Captain James Moses testified that he had worked with respondent for approximately five years and he was a good, dependable officer, who should continue with the Department (Tr. 157-59). According to Captain Moses, respondent's duties included escorting inmates and supervising the distribution of their medications (Tr. 163). Captain Moses never had any problem with respondent (Tr. 157).

Discussion of the Charges

The petition alleged that respondent drove to a location where the police were conducting an undercover narcotics operation and a passenger in respondent's car "engaged in a hand to hand exchange with an undercover officer during which *the passenger purchased cocaine from the undercover officer"* (ALJ Ex. 1) (emphasis added). The petition also alleged that, following a search of respondent's car, "several glassine bags of a narcotics substance were discovered," and respondent was charged with criminal facilitation, criminal possession of a controlled substance, and criminal sale of a controlled substance (ALJ Ex. 1). *See* Pen. Law §§ 115.00; 220.03; 220.39.

An arrest is not proof of wrongdoing. *Dep't of Correction v. McDermott,* OATH Index No. 280/96 at 11-12 (June 26, 1996), *aff'd,* 250 A.D.2d 538 (1st Dep't 1998). To establish that respondent committed misconduct, petitioner must prove its case "by a fair preponderance of credible evidence." *Dep't of Correction v. Hall*, OATH Index No. 400/08 at 2 (Oct. 18, 2007), *aff'd,* NYC Civ. Serv. Comm'n Item No. CD 08-33-SA (May 30, 2008). When analyzing credibility, relevant factors include demeanor, consistency of a witness's testimony, supporting or corroborating evidence, witness motivation, bias or prejudice, and the degree to which a witness's testimony comports with common sense and human experience. *Dep't of Sanitation v. Menzies*, OATH Index No. 678/98 at 2-3 (Feb. 5, 1998), *aff'd*, NYC Civ. Serv. Comm'n Item No. CD 98-101-A (Sept. 9, 1998). Here, there were significant gaps in proof.

Detective Fernandez was a credible witness who testified in a dispassionate, professional manner. But he did not see the alleged transaction and he had participated in hundreds of buy operations. Thus, his ability to perceive and recall events was limited. *Compare Fire Dep't v.*

Murray, OATH Index No. 2316/13 (Sept. 25, 2013) (illegal drug possession proved, despite dismissal of criminal charges, where police witnesses testified that they saw a drug transaction and they recovered cocaine from the respondent's pocket). At best, Detective Fernandez recalled a few unusual details – respondent promptly identified himself as a correction officer and that some drugs were recovered in or on the center console and other drugs were found hidden inside an asthma pump.

Though respondent was an interested witness, objective evidence supported much of his account. He has thirteen years of experience as a correction officer and there was no evidence of any prior involvement in illegal drug activity. No drugs were found on his person. There was no credible evidence to show that respondent knew about Wells's criminal past or that respondent had any advance knowledge that Wells was using him to facilitate a drug transaction. And petitioner did not charge respondent with engaging in undue familiarity with Wells. *See, e.g.,* Dep't of Correction Rule 3.25.041 (Unless required to do so for work or with the approval of the commanding officer, an officer may not contact or associate with a former inmate). Instead, the evidence showed that Wells was a casual acquaintance and respondent offered him a ride.

Wells was less trustworthy than Detective Fernandez or respondent. He had a lengthy criminal record, he had engaged in numerous drug transactions with Keene, and he deceived respondent into giving him a ride. Though I credited Wells' claim the drugs belonged to him, I was not entirely convinced that he was a buyer rather than a seller, that the transaction with Keene and two others took ten minutes, or that Keene made change from a $100 bill. As Detective Fernandez put it, "I have never seen a drug dealer give change; this ain't a bank" (Tr. 79).

Based on these credibility findings, I reached the following conclusions:

Petitioner failed to prove its allegation that Wells "purchased" cocaine from an undercover officer (ALJ Ex. 1). There was no evidence to support this theory. As Detective Fernandez testified, and the name of the tactic implies, undercover officers buy drugs from dealers during buy and bust operations.

The evidence also failed to prove that respondent knowingly witnessed a drug transaction. As noted, Detective Fernandez did not see the exchange. His testimony and statements to Department investigators were based on what the undercover or ghost officer told

him. Furthermore, he offered two fundamentally different versions of the transaction. At the hearing, Detective Fernandez testified that Keene interacted with Wells in a doorway and then Keene gave cocaine to the undercover (Tr. 25). However, according to the report prepared by DOC investigators, Detective Fernandez told them that the undercover purchased cocaine directly from Wells (Pet. Ex. 2).

Even if I credited one of the two versions offered by Detective Fernandez and found that Wells delivered or sold drugs to Keene or the undercover officer, petitioner failed to prove that respondent witnessed the exchange and knew that it was a drug deal. Petitioner did not prove that respondent saw anything more than a brief, hand-to-hand exchange. Moreover, the discovery of drugs hidden inside the asthma pump showed that Wells took steps to avoid detection.

Detective Fernandez inferred from respondent's possession of a weapon that he was providing "the protection" for drug traffickers (Tr. 15). The evidence did not support such speculation. All petitioner proved was that Wells gave something to someone and respondent may or may not have witnessed the exchange.

I credited Detective Fernandez's testimony that, after respondent was removed from his car, some drugs were found in plain view in the vicinity of the center console. Petitioner argued that such evidence was presumptive evidence of respondent's guilty knowledge, even though Wells claimed that the drugs were his (Tr. 184). *See* Crim. Proc. Law § 220.25(1) (presence of a controlled substance in a car is presumptive evidence of knowing possession by everyone in the car). But the presumption may be rebutted. *See People v. Leyva*, 38 N.Y.2d 160, 167 (1975).

Respondent rebutted the presumption. Besides respondent's credible testimony that he did not see any evidence of wrongdoing, petitioner's own evidence showed that the transaction between Wells and Keane involved a small quantity of drugs, Wells pleaded guilty to possessing the drugs, and the drugs were packaged in small glassines or plastic twists that were tiny enough to fit inside a hand pump used for asthma medication.

The use of the asthma pump also shows that Wells went to considerable effort to conceal the drugs. Hence, I found it unlikely that he rode around with the rest of his drugs in plain view. That would defeat the purpose of using the pump.

Respondent and Wells recalled that the police tossed some of Wells's belongings back into the car after they searched him. That may be so, but Detective Fernandez insisted that

officers would not throw drugs back into a car (Tr. 26). It is more likely that Wells, a seasoned criminal, attempted to dispose of evidence by emptying his hands or pockets and leaving the drugs behind after the police stopped the car and ordered him and respondent to get out. As a result, the police found drugs that respondent never saw in or on the center console, in the asthma pump, or on the passenger seat.

This case is much different than *Dep't of Sanitation v. Rivera,* OATH Index No. 1714/04 (Sept. 24, 2004), *aff'd*, NYC Civ. Serv. Comm'n Item No. CD 05-36-SA (Aug. 26, 2005), cited by petitioner (Tr. 190). There, a supervisor gave a civilian worker a ride in a city vehicle to a location where the civilian employee met a drug dealer, the civilian employee purchased drugs inside the car, and the supervisor gave the drug dealer and another person a ride to a different location, where the dealer was later arrested with a kilo of cocaine. The proof included credible evidence that the supervisor had admitted that he knew the civilian employee was a drug user, that the purpose of the trip was to buy drugs, and that he had heard conversations between the civilian worker and the dealer regarding drugs. *Id.* at 4-5.

Here, unlike *Rivera,* there was no evidence that respondent had any prior knowledge of his passenger's drug use or drug purchases. Nor was there any evidence that respondent overheard any drug-related conversations. And there was no evidence that respondent's car was used to transport a large quantity of drugs. Instead, the evidence showed that the police recovered a small quantity of partly concealed drugs.

It is conceivable that respondent knew all along what Wells was up to and that he drove his car while some drugs were in plain view and other drugs were hidden in an asthma pump. But petitioner failed to prove that theory by a preponderance of credible evidence. Thus, the charge should be dismissed. *See Dep't of Correction v. Sousa,* OATH Index No. 626/00 at 8 (Aug. 8, 2000) (dismissal of disciplinary charges arising from arrest where criminal charges were dismissed, record was sealed, and evidence offered failed to prove misconduct).

FINDING AND CONCLUSION

Petitioner did not prove by a preponderance of the credible evidence that respondent was aware of drug transaction or knew that there were illegal drugs in his car.

RECOMMENDATION

I recommend dismissal of the charges.

Kevin F. Casey
Administrative Law Judge

November 22, 2013

SUBMITTED TO:

DORA B. SCHRIRO
Commissioner

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