

IN THE MATTER OF THE POLICE ACT, R.S.B.C. 1996, C. 367

AND

IN THE MATTER OF A REVIEW OF AN ALLEGATION
OF MISCONDUCT AGAINST

[REDACTED]
OF THE SAANICH POLICE DEPARTMENT

NOTICE OF ADJUDICATOR'S DECISION

TO:

[REDACTED]
c/o Saanich Police Department
Professional Standards Section

AND TO:

[REDACTED]

AND TO:

Chief Constable Bob Downie
c/o Saanich Police Department
Professional Standards Section

AND TO:

Mr. Stan Lowe
Police Complaint Commissioner

AND TO:

[REDACTED]
c/o Saanich Police Department
Professional Standards Section

INTRODUCTION

1. The circumstances which give rise to these proceedings took place in [REDACTED] British Columbia on [REDACTED]. On that date at approximately [REDACTED], the complainant [REDACTED] was riding his bicycle when he was stopped by officer [REDACTED] of the Saanich Police Department. In so doing, it is alleged that [REDACTED] committed two acts of misconduct pursuant to section 77 of the *Police Act*, R.S.B.C., 1996, C. 367. The specific allegations relate to the manner in which [REDACTED] used force on [REDACTED] as well as his detention and search. After [REDACTED] brought [REDACTED] to a stop, he demanded his identification. [REDACTED] refused to comply with the demand on the grounds that he had done nothing wrong. At the time, [REDACTED] was responding to an arson call and indicated he was stopping all persons. The interaction that followed saw the officer insist on identification and, when his demand was refused, arresting [REDACTED] for obstruction of justice. In the course of his arrest, [REDACTED] used force to take [REDACTED] to the ground. This review considers whether, on the material before me, [REDACTED]'s conduct appears to constitute misconduct on the two bases identified.

FACTS

2. I have reviewed the report and records supplied to me in this matter: the 76-page Final Investigation Report dated 28 October 2016, prepared by [REDACTED] transcripts of witness interviews (including the complainant [REDACTED], the respondent member [REDACTED] and other police witnesses); case law; and other materials and documents. A critical piece of evidence is the cell-phone video recording taken by [REDACTED] which records most of the key dealings with [REDACTED] that night.

3. I will review the facts in more details. At the outset, it should be noted that the interaction between the police officer and [REDACTED] lasted a few minutes. [REDACTED] was cycling home after work in the [REDACTED] suburb of [REDACTED]. It was shortly before [REDACTED] on [REDACTED] [REDACTED] was on duty, in uniform and alone in a patrol car, when he heard a radio dispatch relating to a potential arson at [REDACTED]. [REDACTED] was asked to set up containment to the east of the [REDACTED] and he observed [REDACTED] near the interception of [REDACTED] and [REDACTED].

4. I pause to note that there are some discrepancies in the accounts given by [REDACTED] and that given by [REDACTED], in relation to dealings between the two when nobody else was present. In a paper-based review such as this, I may be able to resolve some discrepancies based on other independent evidence. Indeed, in this case the video recording is of use because it allows me to see some, and hear much, of what transpired. But on some issues, I cannot purport to make findings of credibility or reliability based on interview transcripts alone. I appreciate that there are inconsistencies in the description of events, but in my respectful view they do not count “for” or “against” one party only. I do not proceed from a presumption that either the police officer or the complainant is truthful or should have his evidence preferred. I would add that in many respects the accounts given by the officer and the cyclist are similar. I am satisfied that the record before me permits me to make a determination under s. 117 as to whether the officer’s conduct appears to constitute misconduct (emphasis added).

5. On [REDACTED] the Final Investigation Report describes that [REDACTED] stopped [REDACTED] on his bicycle, and sought his identification. The officer was stopping [REDACTED] in relation to the arson investigation, rather than for any traffic-related reason. The officer took a plastic bottle, containing clear liquid, from [REDACTED]. [REDACTED] had been on a phone call but ended the call and soon began filming his interaction with [REDACTED]. It is useful to make reference to the video recording of the interaction. It was transcribed and reads as follows:

[REDACTED]Grab your ID for me.

Sir, I don't....

I'm not going to ask you again. The next time I ask you, I will put cuffs on you and arrest you for obstruction. Do you understand that?

Why do you feel,

Do you understand that?

.....this is obstruction of justice?

Yes you do?

No. I don't understand why you feel this is obstruction of justice.

Okay.

And I see your using your flashlight to obscure the video.

Put your phone down. Otherwise, it will go down hard when I put cuffs on you. Take your backpack off right now, you're under arrest. Put your phone down.

I'm under arrest for what?

...Obstruction. I just told you.

But I'm not obstructing anything.

You're not giving me your ID.

I'm guilty of nothing.

You're not presenting yourself. So let's go. Put the phone down.

I'm not guilty of anything, officer.

Sir, put the phone down.

You're trying to take my phone now?.....Okay.

Okay. You touch me again, that's assault. Do you understand?

I didn't.....touch you.

Okay?

You were trying to grab my phone.

I asked you to put your phone down.

....You were trying to grab my phone.

[REDACTED] ..(speaking on radio)

My ID is in my wallet if you must have it then.I've been assaulted this night, officer. I know my rights.

Okay.

If you want my ID,

I'm going to ask you again,

.....my wallet is in my back pocket.

Oh. Now you have your ID.

After you assault me.

Don't move.

I have not threatened you.

Do not move.

I have not threatened you, officer.I have not threatened you.

Okay. Get flat on the ground for me.

Okay.

Get flat on the ground.

It's hard to do that when you're on my back.

Get flat on the ground.

Officer....uhh.....I am trying to follow your instructions, officer.I'm trying to follow....you're taking my phone?Why are you taking my phone?

I don't want...have anything in your hands. I asked you for ID, now you're under arrest for obstruction. Do you understand that?

.....You gotta be,

Several times I asked you for ID, right?

....You gotta be kidding me.

It's on your phone, you can watch it again.You recorded the whole thing. You should know.

.....Can you please let go of my arm, officer.

No.

I'm not threatening you.

....Where are you coming from?Where are you coming from?

I'm coming from work, okay?

Where do you work?

I'm just trying to get home to my family.

Where do you work?

....I work at [REDACTED]

(speaking on police radio)....

I'm completely innocent and I have been assaulted.What is your badge number please?

(speaking on police radio)Do you understand that you're under arrest for obstruction right now?

Understand that I'm under arrest for committing no crime.

[indecipherable]take your pack off.

With all due respect, officer....this is completely unwarranted.

No. I told you several times...there's a fire down the road.....

Okay. And I didn't dispute that.

...I asked you for your ID.....you became extremely difficult.

I did not threaten you.

You have a bunch of bottles in here....okay? And you don't want to give me your ID? You, you have everything on your phone recorded so you can watch it again. I asked you several times for your ID. I told you if you did not provide ID, you would be under arrest for obstruction. Did you not hear that? Several times,

I'm more than willing to answer any questions,

....watch your phone because it's on the phone.

Okay. I am more than willing to answer any questions you have about the fire.I asked you, why do you need my ID to question me about that?I have done nothing wrong. I know my rights.This is an illegal act.

You should, you're wanted in [REDACTED] You should know your rights.

....What you are doing is illegal. You have assaulted me.....and I have not obstructed your investigation. You don't need to know my name to ask questions regarding....a fire.

6. The cell-phone recording is most helpful with respect to words said; the audio recording is good quality. It is less helpful visually because the officer was shining a flashlight at [REDACTED]. It is apparent that partway through the clip, [REDACTED] uses force to take [REDACTED] into custody, and his phone ends up on the grass although still recording. After taking [REDACTED]'s identification from his wallet, [REDACTED] ran his name on the police radio and received information that he had a criminal record and an outstanding warrant from [REDACTED]. That information was erroneous. A second officer attended and handcuffed [REDACTED] and

he was placed in the rear of a police car and held for a period, but then released once [REDACTED] [REDACTED] checked his information and confirmed he had no record or police history.

7. [REDACTED] described the force used to take him to the ground. He said the officer grabbed his arm, twisted him around, and used his knee or something to apply force to the back of [REDACTED]'s knees, and then forced him to the ground. [REDACTED] said it felt like someone putting their entire weight on his back. [REDACTED] described grabbing [REDACTED]'s left wrist, placing him in a wrist lock, then grabbing his left forearm and placing it behind his back, before pushing him to his knees. He said he did not use a sweep of [REDACTED]'s knees. [REDACTED] said he placed one of his knees on [REDACTED]'s back area when he was on the ground, but he did not place his entire weight on him and had his other foot planted on the ground.

8. The next day, [REDACTED] made a formal complaint to the Office of the Police Complaint Commissioner, and published his video recording on YouTube. In the following days he gave a few interviews to media about the incident. [REDACTED]'s Police Act complaint was deemed "admissible" and was the subject of an investigation undertaken by the Professional Standards Section of the Saanich Police Department. Ultimately on 7 December 2016, the Police Complaint Commissioner announced my appointment under s. 117 of the Act, and I received the record and materials on this matter on 11 January 2017.

APPLICABLE LAW

9. The law is not in dispute. The governing section is s.117 of the *Police Act (supra)*. That section sets out my duty under the *Act*. The section provides that I am to assess whether "the conduct of the member appears to constitute misconduct" (per s. 117(9)), based on a review of the report, evidence and records supplied to me. In this context I do not to hear live witnesses nor consider additional evidence or submissions from the participants. Instead, I merely conduct a paper-based review. (Emphasis added)

10. As I read s. 117 and more generally Part 11, Division 3 of the *Police Act*, is clear. This is not on appeal from any previous finding that a misconduct conduct allegation was not substantiated. My focus is not on the correctness of an earlier finding, but rather I am to reach my own conclusion about whether the materials support a finding of apparent misconduct. I note that s. 117(1)(b) says that the retired judge conducting the review is to "make her or his own decision on the matter".

ANALYSIS AND DISCUSSION

11. Under the *Police Act*, misconduct is defined in s. 77. The specific allegations relating to [REDACTED] are, as put in the Notice of Appointment of Retired Judge:

1. That on [REDACTED], [REDACTED] committed *Abuse of Authority* pursuant to section 77(3)(a)(ii)(A) of the *Police Act* by intentionally or recklessly using unnecessary force on [REDACTED]. Specifically, grabbing, pushing to the ground and handcuffing [REDACTED].
2. That on [REDACTED], [REDACTED] committed *Abuse of Authority* pursuant to section 77(3)(a)(ii)(B) of the *Police Act* by intentionally or recklessly detaining and searching [REDACTED] without good and sufficient cause.

12. Section 77 of the *Police Act* reads, in relevant part:

77(1) In this Part, "misconduct" means

- (a) conduct that constitutes a public trust offence described in subsection (2), or
- (b) conduct that constitutes
 - (i) an offence under section 86 [*offence to harass, coerce or intimidate anyone questioning or reporting police conduct or making complaint*] or 106 [*offence to hinder, delay, obstruct or interfere with investigating officer*], or
 - (ii) a disciplinary breach of public trust described in subsection (3) of this section.

...

- (3) Subject to subsection (4), any of the conduct described in the following paragraphs constitutes a disciplinary breach of public trust, when committed by a member:
 - (a) "abuse of authority", which is oppressive conduct towards a member of the public, including, without limitation,
 - (i) intentionally or recklessly making an arrest without good and sufficient cause,
 - (ii) in the performance, or purported performance, of duties, intentionally or recklessly
 - (A) using unnecessary force on any person, or
 - (B) detaining or searching any person without good and sufficient cause ...

13. It is these last two breaches that are alleged in this case.

14. Section 77 of the Act goes on to state, in subs. (4): "It is not a disciplinary breach of public trust for a member to engage in conduct that is necessary in the proper performance of authorized police work."

15. In my view, there is some logic to asking first whether [REDACTED] appears to have "intentionally or recklessly" detained and searched [REDACTED] "without good and sufficient cause". If the officer improperly detained and searched [REDACTED], this finding will influence the analysis of whether unnecessary force was used (again, "intentionally or recklessly"). In other words, it is necessary first to determine whether the records suggest an improper detention. If the detention was improper, it is more likely the force used was not "necessary". (While I can conceive of situations in which an officer could use force although lacking a basis to detain, they seem to me hypothetical and unlikely).

16. I turn first to the question of the detention here. The context for my analysis, of course, is an allegation of misconduct under the *Police Act*. I am not adjudicating a claim made in a criminal trial, relying on the *Charter of Rights and Freedoms*. I must assess whether the record before me suggests that [REDACTED] detained and searched [REDACTED] without good and sufficient cause.

17. The recording of the interaction between these two men suggests that the officer did not undertake any analysis of his basis to detain, at the time. The officer was asked by [REDACTED] whether he was under suspicion of anything. The question put to him by [REDACTED] ought to have been a prompt for the officer to consider that question: is the person a suspect, and on what basis? What facts give rise to a reasonable suspicion connecting him to the arson? But the officer indicated a few times that he was "stopping everybody now". This suggests that rather than employing any individualized analysis of the objective basis for detention in law (a point I return to shortly), the officer was engaged in a "standardless sweep" — a process that had him checking everyone's identification and detaining for that purpose, without any assessment of whether this was justified in each individual case. The reasons given by [REDACTED] months afterward in support of the basis for investigative detention are, with respect, problematic, as some were not identified at the time nor were they set out in any contemporaneous reports or notes. It is clear that the officer was simply wrong in his belief he had a legal authority to compel the cyclist to supply his identification, and the record does not suggest any analysis, at the time, of the basis for that demand.

18. Before the 2004 case of *R. v. Mann*, 2004 SCC 52, there had been some uncertainty as to the doctrine of “investigative detention”, which is to say, stopping a suspect but not arresting them. The *Mann* decision made it clear that police officers could detain a person, but only if they met a standard sometimes referred to as an “articulable cause” standard. It requires that the officer have reasonable grounds to suspect in all the circumstances that the individual is connected to a particular crime, and that his or her detention is necessary on an objective view of the circumstances. The facts in *Mann* are well worth noting. Two police officers responded to a complaint of breaking and entering. They saw a young man who fit the general description that was given. The officers stopped the man, searched him and found 27 grams of marijuana. He was charged with possession for the purposes of trafficking under section 5(2) of the *Controlled Drugs and Substances Act*. The Court held that there is no general power of detention for investigative purposes. The police may detain an individual if there are reasonable grounds to suspect in all the circumstances that the person is connected to a particular crime and that the detention is reasonably necessary. The standard is an objective one. I have italicized the word “reasonable” to emphasize it. This word signals that it is not just the individual police officer’s subjective opinion that matters: courts will ask whether the officer’s conclusion was grounded on a reasonable basis, meaning a basis that can be objectively confirmed.

19. In articulating the nature of investigative detention in Canadian law, the *Mann* Court held that at a minimum, the person being detained must be advised, in clear and simple language, of the reasons for the detention. The Court also noted that investigative detentions should be brief, that the suspect need not answer questions posed by police, and that the police ability to search in such a context would be much more limited than post-arrest.

20. More than a dozen years have passed since the *Mann* decision. The law has long been clear that police may not detain unless they can meet the articulable cause standard. It is untenable to employ an arbitrary “detain everyone” approach in light of *Mann*. The law is likewise well-settled that a person in [REDACTED]’s position, stopped in relation to an arson investigation as opposed to a driving infraction, is not required to provide his identification to the police. This flows from the right to silence which is protected under the *Charter of Rights*, as well as the common law.

21. In considering [REDACTED]’s conduct that night, based on a review of the material before me, it appears the officer was reckless as to the detention that he undertook. It appears he did not employ any standard and was determined to stop [REDACTED]. (“I am stopping everybody right now.”) [REDACTED] did not supply his identification, but he was not required to do so. While

the police will often elicit cooperation from people when they ask to check identification, such cooperation is distinct from any legal duty. It is a mistake to confuse somebody's non-cooperation with violation of a legal obligation. The record before me supports the view that [REDACTED] was incorrect in the circumstances to demand identification and treat [REDACTED]'s refusal as an obstruction of justice. It cannot be an obstruction of justice to decline to do something you are not required to do.

22. Only shortly into his dealings with [REDACTED], [REDACTED] was using the word "arrest". He did not engage in a series of questions about an arson or take other steps that perhaps may have supported a reasonable suspicion (as described in *Mann*) justifying detention, and in turn potentially justifying the need to identify a suspect. Instead, really from the outset, he focused on obtaining identification and treated [REDACTED]'s refusal as a criminal offence.

23. I accept from his interview and police report that [REDACTED] did not intentionally "wrongfully detain" the cyclist. He seems legitimately to have personally believed he could detain the man in relation to the arson, demand identification, and arrest and charge him if he refused to give his identification. But the record suggests that the officer was reckless in his approach, in failing to slow down and analyze the basis for his detention and for his demand. The officer's search of [REDACTED] really followed on the heels of his arrest, and to the extent that the arrest appears to have been undertaken recklessly, so too was the consequent search.

24. I would add that the use in the *Police Act* of the word "reckless" (in both of the s. 77 subsections at issue here) is consistent with the fact that *Police Act* disciplinary matters involve an objective component. That is to say, the assessment of a misconduct allegation is not dictated by the individual officer's personal intention or "good faith"; rather it also involves an objective question as to the reasonableness of what the officer believed and did. While an officer's subjective belief will always be relevant, and may mitigate a misconduct allegation, the analysis does not start and end with the subjective component. It is necessary to assess objectively whether what the officer believed and did was reasonable.

25. I am mindful of the case of *Lowe v. Diebolt*, 2013 BCSC 1092 (aff'd, 2014 BCCA 280), in which the Chambers justice in a judicial review proceeding differentiated between (1) *Police Act* misconduct and (2) whether a *Charter* breach occurred and evidence from an illegal search should be excluded. I agree these two processes must be distinguished. That case involved a situation in which there were objective grounds for an arrest and for a strip search; the issue was the manner of search undertaken. As I read that decision, the suggestion is made that an

officer's ignorance of the law related to searches does not, by itself, establish intent or recklessness (para. 46). I take the point that an officer's inadvertent mistake as to the law cannot, standing alone, be taken as misconduct in every case (or "automatic misconduct"). But where a mistake as to the law is compounded by a failure to engage in the necessary analysis as to the grounds for detention or arrest, it may be taken into consideration. And of course each case falls to be assessed on its own facts. Unlike in *Lowe v. Diebolt*, here, the record supports a conclusion that there were no objective grounds for detention or arrest. In the matter before me, the record suggests that the officer was reckless in failing to analyze the basis for the steps he took; he simply pressed on.

26. I therefore conclude that the second allegation, involving the detention and search of [REDACTED] appears to be substantiated based on the materials before me. The record supports the conclusion that the arrest in this case was not undertaken with good and sufficient cause.

27. I turn to the first listed allegation, of employing unnecessary force on [REDACTED] by grabbing, pushing him to the ground, and handcuffing him. Given my conclusion that on this review of the record it appears the officer lacked a legal basis to detain or arrest [REDACTED], it follows that any use of force that followed would not be "necessary". The record supports the conclusion that no force ought to have been used in relation to [REDACTED]. The cyclist was entitled to refuse to give his identification, and it appears he was improperly detained and arrested. In this context, the use of force rests on a faulty premise and cannot be sustained. While there are express protections in the *Criminal Code* for a police officer's use of force, they apply only when the officer is proceeding lawfully and is acting on reasonable grounds. Where there is an absence of objectively reasonable grounds and the officer is not proceeding lawfully, those powers do not support the use of force.

28. As one watches the video recording of the interaction between these men, the situation escalates to a stand-off surprisingly quickly: the officer insists he must obtain the cyclist's identification, threatens to arrest for obstruction if the cyclist does not comply, and then follows through on that threat. While not in the "intentional" category — and potentially explained by virtue of his training and experience — the record does suggest misconduct, on a recklessness basis.

29. In reaching this conclusion, I appreciate that the nature of the apparent misconduct may be minor, involving a short interaction, no weapon, no lasting injury, and no larger impact on the


public. These matters, of course, fall to be considered in relation to the appropriate disciplinary or corrective measures.

CONCLUSION AND NEXT STEPS

30. Pursuant to s. 117(9) of the *Police Act*, [REDACTED]'s conduct appears to constitute misconduct, and specifically "abuse of authority" by using unnecessary force and by detaining and searching [REDACTED] without good and sufficient cause, contrary to ss. 77(3)(a)(ii)(A) and (B). I hereby notify the relevant parties of the next steps, pursuant to ss. 117(7) and (8).

31. I am prepared to offer a prehearing conference to [REDACTED] under s. 120 of the Act. The range of disciplinary or corrective measures I am considering includes "advice as to conduct"; a verbal or written reprimand; or requiring specified training (as set out under ss. 126(1)(k), (j), (i), and (f)). Pursuant to s. 113, the complainant [REDACTED] has the right to make submissions at a discipline hearing.

32. At the discipline hearing, [REDACTED] has the right pursuant to s. 119 to request permission to call and examine or cross-examine witnesses, provided such request is made in writing and is made within 10 days of receipt of this notice of decision.


The Honourable Wally T. Oppal, Q.C.
This 25th day of January, 2017