

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] AND [REDACTED]
OF THE VANCOUVER POLICE DEPARTMENT

NOTICE OF AJUDICATOR'S DECISION

TO: [REDACTED]
c/o Vancouver Police Department
Professional Standards Section

AND TO: [REDACTED]

AND TO: Chief Constable Adam Palmer
c/o Vancouver Police Department
Professional Standards Section

AND TO: Mr. Stan Lowe
Police Complaint Commissioner

INTRODUCTION

[1] The circumstances which give rise to these proceedings took place in Vancouver, British Columbia on [REDACTED]. On that date at approximately [REDACTED] the complainant, [REDACTED] was walking to a friend's house when [REDACTED] and [REDACTED] of the Vancouver police pulled their marked police vehicle beside [REDACTED]. In doing so, it is alleged that [REDACTED] and [REDACTED] committed an act of misconduct pursuant to section 77 of the *Police Act*, R.S.B.C., 1996, c. 367, (as amended). The specific allegation is of "intentionally or recklessly detaining or searching [REDACTED] without good and sufficient cause".

The officers were responding to a complaint of a theft in progress. [REDACTED] said that he tried to explain to [REDACTED] the reason for his apprehension but [REDACTED] walked away. Thereafter, matters got worse. It is not in dispute that the officers detained [REDACTED] for theft. They asked him for his identification. He refused. The officers then conducted a search of him. [REDACTED] asked the officers to identify themselves. They may verbally have given them their badge numbers. Eventually, [REDACTED] identified himself and was released.

[2] This review considers whether on the material before me, [REDACTED] and [REDACTED] [REDACTED] conduct appears to constitute misconduct on the on the sole ground identified.

FACTS

[3] I will now provide a more detailed review of the facts. Not unlike many incidents involving the police and the public, the interaction between the officers and [REDACTED] [REDACTED] lasted approximately five to six minutes. [REDACTED] was walking home from a gas station. It was just before [REDACTED] on [REDACTED] in the area of [REDACTED] and [REDACTED] in Vancouver. [REDACTED] and [REDACTED] were on duty, in uniform, driving a marked police vehicle, when they were dispatched to theft in progress in the [REDACTED] block of [REDACTED]. A local resident called 911 reporting a male stealing from mailboxes. The unknown male was described as wearing a grey hoodie, hood pulled up, dark jeans and carrying an Adidas bag. The unknown male was reported to be alone and on foot.

[4] Perhaps unsurprisingly, there are some discrepancies in the accounts given by the officers and [REDACTED] as to dealings between the parties that occurred when no one else was present. I do not have the benefit of any video or audio recordings of the incident. In a paper-based review such as this, I may be able to resolve some discrepancies based on other independent evidence. I have reviewed the videotaped interview of the [REDACTED] as well as the audio recorded interviews of [REDACTED] and [REDACTED]. But I cannot purport to make findings of credibility and reliability based solely on the recoded interviews. I acknowledge that there are clearly inconsistent descriptions of the events that occurred, but in my respectful view they do not favour

one party over the other. I do not proceed on a presumption that either the officers or [REDACTED] are truthful or should have their evidence preferred. On the facts of this case, in many respects the information provided by all three parties is similar. I am satisfied that the record before me permits me to make a determination under s. 117 as to whether [REDACTED] and [REDACTED] conduct appears to constitute misconduct, based on the record available to me.

[5] The Final Investigation Report states that on [REDACTED], [REDACTED] and [REDACTED] stopped [REDACTED] in relation to a complaint of a mail theft in progress in the [REDACTED] block of [REDACTED]. Pursuant to the instructions given to them, the officers were looking for a suspect wearing a grey hoodie, with the hood pulled up, wearing dark jeans, and carrying an Adidas bag. The suspect was reported to be on foot, alone, walking North on [REDACTED]

[6] [REDACTED] was driving the marked police vehicle and [REDACTED] was the passenger. Both officers were in uniform. The officers were driving east in the [REDACTED] block of [REDACTED]. [REDACTED] was walking west on [REDACTED] alone. [REDACTED] turned the vehicle around and approached [REDACTED] from behind. The officers observed [REDACTED] "shoulder checking" or as they refer to it "heat checking", and as such he was perceived to be acting suspiciously. The officers believed [REDACTED] looked similar to the description of the mail theft suspect they were looking for. [REDACTED] was wearing a black hoodie underneath a black leather jacket, and was not carrying a bag. [REDACTED] pulled the vehicle over and [REDACTED] attempted to engage with [REDACTED]. [REDACTED] explained that they were looking for a male suspect wearing a grey hoodie. [REDACTED] stated that he did not match the description and began to walk away.

[7] [REDACTED] stated that he positioned the vehicle in front of [REDACTED] as a tactic to stop [REDACTED] from fleeing. However, [REDACTED] states that the vehicle contacted his leg, which forced him to place his hands on the hood of the car and jump up, to avoid being run over. The police officers both say that the vehicle did not contact [REDACTED] at any time. [REDACTED] became hostile and was swearing. The

officers got out of the vehicle and [REDACTED] handcuffed [REDACTED] and advised him he was being detained for theft. [REDACTED] conducted a search of [REDACTED]. He did not find any weapons, nor any evidence relating to the mail theft. [REDACTED] refused to identify himself and asked the police officers for their identification, business cards and badge numbers.

[8] [REDACTED] became increasingly hostile and was swearing at the officers. [REDACTED] stated that he believed [REDACTED] could have been arrested for obstruction of justice, but he did not formally arrest him. The officers informed him that they would not release him unless he identified himself. [REDACTED] then provided the officers with his name and date of birth. [REDACTED] was queried on the CPIC and PRIME police databases, and then he was released. [REDACTED] stated that the officers at that point became polite and thanked him for his patience. This angered [REDACTED] more and he again asked for the officers' badge numbers. Both officers state that they verbally gave their badge numbers and pointed to the numbers attached to their uniforms. [REDACTED] states that the officers refused to provide their badge numbers and drove away.

[9] On [REDACTED], [REDACTED] made a complaint to the Office of the Police Complaint Commissioner. [REDACTED] complaint was determined to be admissible and was the subject of an investigation undertaken by the Professional Standards Section of the Vancouver Police Department. On [REDACTED], [REDACTED] provided a video recorded interview conducted by [REDACTED]. On [REDACTED] the Discipline Authority, [REDACTED] made a decision pursuant to s. 112 of the *Police Act*, determining that all the allegations against the two officers did not appear to be substantiated. On April 26th, 2017, the Police Complaint Commissioner announced my appointment under s. 117 of the Act, directing that I undertake a s. 117 review in relation to the single allegation involving the detention and search of [REDACTED].

APPLICABLE LAW

[10] It is important to note that the law is not in dispute. The governing section is s. 117 of the *Police Act*. This section provides that I am to assess whether "the conduct of

the member appears to constitute misconduct, pursuant to s. 117(9), based on a review of the report, evidence and records supplied to me. In this context, I merely conduct a paper-based review. I do not hear live witnesses, nor do I consider additional evidence or submissions from the parties involved.

[11] Section 117 is clear. The matter before me is not an appeal from any previous finding about misconduct. 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. Section 117(1)(b) provides that the retired judge conducting the review is to “make her or his own decision in the matter”.

ANALYSIS AND DISCUSSION

[12] Section 77 of the *Police Act* defines misconduct. The specific allegations relating to [REDACTED] and [REDACTED] are, as put in the Notice of Appointment of Retired Judge:

1. That on [REDACTED], [REDACTED] and [REDACTED] [REDACTED] committed Abuse of Authority pursuant to section 77(3)(a)(ii)(B) of the *Police Act* which is oppressive conduct towards a member of the public, including, without limitation, in the performance, or purported performance of duties, intentionally or recklessly detaining or searching any person without good or sufficient cause. Specifically, detaining and searching [REDACTED] when he refused to talk with police.

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,

(ii) in the performance, or purported performance, of duties, intentionally or recklessly

(B) detaining or searching any person without good and sufficient cause ...

[13] It is the last breach (constituting misconduct under s. 77(1)(b)(ii)) that is alleged in this case.

[14] Section 77 of the *Police Act* further states:

(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] At the outset I must note that the context of 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 Canadian Charter of Rights and Freedoms. I must assess whether the record before me suggests that [REDACTED] and [REDACTED] detained and searched [REDACTED] without good and sufficient cause.

[16] [REDACTED] stated in his interview, conducted [REDACTED] that the officers informed him he was being detained for theft. [REDACTED] and [REDACTED] informed [REDACTED] that the description of the male suspect they were looking for could be wrong. The description the police provided was different in a number of respects from how [REDACTED] presented. He was wearing a black leather jacket over a black hoody, as opposed to a grey hoody and he was not carrying a bag. As well, it is

important to note that [REDACTED] was walking in a direction different from that contained in the information given by the 911 caller. The suspect was reported to be walking North on [REDACTED]. [REDACTED] had informed the officers that he had just attended the [REDACTED] on [REDACTED], which is consistent with where the officers first encountered [REDACTED]. [REDACTED] stated that due to [REDACTED] animated behaviour he decided to handcuff him for officer safety incident to his lawful detention. With respect, the basis for investigative detention in these circumstances appears to be most problematic. The officer's notes are generally silent in regard to whether [REDACTED] was made of his rights under the charter before the officers made any inquiries. [REDACTED] only recorded one page of notes, with very little detail, although he was the officer that detained and handcuffed [REDACTED].

[17] The officers appear to have varying accounts of whether [REDACTED] was arrested for obstruction of justice or not. [REDACTED] stated that he believed [REDACTED] could have been arrested for obstruction, but was not. [REDACTED] stated he could not recall if he formally arrested [REDACTED] other than giving him an obstruction warning.

[18] In the context of this review of materials, it appears that the officers erred in concluding that they had the authority to compel [REDACTED] to identify himself, and the record before me does not establish that at the time of the detention they had a basis for that demand. The detention of [REDACTED] was more akin to a belief that the police could stop anyone, as opposed to having an objectively reasonable basis to do so. [REDACTED] and [REDACTED] reasons for detention appear to be based on a subjective hunch, rather than on a reasonably objective basis.

[19] In *R v. Mann*, 2004 SCC 52, the court once and for all ended the uncertainty surrounding the doctrine of "investigative detention". It made it clear that police officers could detain a person, but only if they met a standard referred to as "articulable cause" standard. This standard requires that the officers have reasonable grounds to suspect in all the circumstances that the individual is connected to a particular crime, and that their detention is necessary on an objective view of the circumstances.

[20] The Court in *Mann* held that at a minimum, the person being detained must be advised, in clear and simple language, of the reasons for her or his detention. The detention must be brief, and importantly, *the suspect need not answer the questions posed by the officers*. An officer's ability to search in such a context would be much more limited than post-arrest; it must be focused on safety of the police rather than searching for evidence.

[21] The *Mann* decision has been clear law now for over a dozen years. With respect, this decision should be required reading for all police officers. The police may not detain a person unless they can meet the articulate cause standard. Officers cannot employ an arbitrary "detain anyone" approach, in light of this decision. The law provides that a person in [REDACTED] position, stopped in relation to police responding to a complaint of mail theft, is not required to provide his identification to the police, unless the police have an objective basis to meet the *Mann* reasonable suspicion standard. [REDACTED] was seen walking in the opposite direction of the reported suspect, and the descriptions of the suspect were inconsistent with [REDACTED] appearance. [REDACTED] had a right to remain silent, which flows both from the Charter and the common law.

[22] In considering both [REDACTED] and [REDACTED] conduct that night, based on the review of the material before me, the record suggests that the officers were reckless as to their detention (and subsequent search) of [REDACTED]. From the materials I have reviewed, the officers did not adequately apply the standard; it appears they were determined to stop [REDACTED] despite the lack of connection vis-a-vis his location and appearance. [REDACTED] refused to supply his identification, which he was not required to do, although eventually he provided it as he was told it was the only way he would be released. [REDACTED] and [REDACTED] seemed to take [REDACTED] refusal to provide his identification as conducting that was obstructing the police. In the circumstances, the record suggests the officer did not have a proper basis to insist that [REDACTED] supply his identification.

[23] [REDACTED] and [REDACTED] appear not to have undertaken the analysis or the reasonable steps required to meet the standard of a reasonable suspicion, as set out in *Mann*, to justify detention. The facts at hand suggest the absence of a clear nexus between [REDACTED] and the specific descriptors of the theft in progress or the suspect. As such it appears [REDACTED] detention was not reasonable in the entirety of the circumstances. The officers seem to have incorrectly focused on obtaining [REDACTED] identification, and interpreted his refusal as a criminal offence.

[24] It is clear to me from the record available that [REDACTED] and [REDACTED] were not acting with malicious intent, and that they subjectively believed they *could* detain and demand identification from [REDACTED]. However, reviewing the entire record before me, it appears the officers were reckless in their failure to stop and assess whether they had a lawful basis for the detention and their demands. As the officer's search of [REDACTED] flowed from the reckless detention, the search must also be considered to have been conducted in a reckless and unreasonable manner. Police officers need to inform themselves of the effects of what the court said in *Mann*.

[25] I would add that an assessment of an apparent misconduct allegation is not determined based solely on an officer's personal intention or "good faith". It also involves an objective question as to the reasonableness of what the officers believed and did. An officer's subjective belief is always a consideration, and can certainly mitigate alleged misconduct, but the subjective component is not the sole consideration. I must assess objectively whether [REDACTED] and [REDACTED] beliefs and actions were reasonable. This is consistent with objective standard set out in s. 77 of the *Police Act*.

[26] Applying the test set out in s. 117, whether the record supports a conclusion that the officers' conduct "appears to constitute misconduct", I find that it does in this case.

CONCLUSION AND NEXT STEPS

[27] Pursuant to my authority under s. 117(9) of the *Police Act*, I am satisfied that on review of the record before me, that the conduct of [REDACTED] and [REDACTED] appears

to constitute misconduct. [REDACTED] and [REDACTED] committed abuse of authority by detaining and searching [REDACTED] without good and sufficient cause, contrary to s. 77(3)(a)(ii)(B). I hereby notify the relevant parties of the next steps, pursuant to ss. 117(7) and (8).

[28] I am willing to offer a prehearing conference to [REDACTED] and [REDACTED] pursuant to s. 120 of the Act. The range of disciplinary and corrective measures set out in the Act, which I would consider appropriate in the instant case, includes giving advice to the members as to their conduct; verbal or written reprimands; or requiring the members to engage with training or retraining, pursuant to ss. 126(1)(k), (j), and (f).

[29] [REDACTED] has the right to make submissions at a discipline hearing, pursuant to s. 113 of the Act.

[30] Under s. 119, [REDACTED] and [REDACTED] have the right to request permission to call and examine or cross-examine witnesses, provided that such a request is made in writing, within 10 days of receipt of this notice of decision.



The Honourable Wally Oppal, Q.C.

This 18th day of May, 2017