

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

AND

IN THE MATTER OF CONSTABLE ██████████

NOTICE OF DISCIPLINE AUTHORITY'S DECISION

TO: Constable ██████████ Member
AND TO: Mr. ██████████ Complainant
AND TO: Sergeant Chris Spargo Investigator
AND TO: Mr. Stan Lowe Police Complaint Commissioner

Circumstances Giving Rise to the Complaint

Shortly after noon on the 17th of November, 2009 Sergeant ██████████ noticed a cyclist riding on the sidewalk on the west side of the Johnson Street Bridge. The cyclist was not wearing a helmet. Sergeant ██████████ activated his emergency lights. The cyclist did not respond. Since Sergeant ██████████ was going in the opposite direction and had to make a turn before pursuing, he lost sight of the suspect and radioed to other officers in the area to be on the alert

Constable ██████████ and Constable ██████████ heard that dispatch and in the course of their patrols located Mr. ██████████ who matched the description given by Sergeant ██████████. Mr. ██████████ was on the sidewalk in front of Peacock's Billiards chatting with ██████████. The officers approached him and explained the information they had. They said he was not free to leave, that he must wait till Sergeant ██████████ could attend to confirm identity. The officers asked Mr. ██████████ his name and asked him to produce photo ID. Mr. ██████████ initially refused to comply with these requests; his responses were liberally sprinkled with obscenities. He was told that if he would not provide the information the officers would have to take him back to the

detachment to try to establish his identity. Hearing this, Mr. [REDACTED] told them his name. He did not have any documentary identification.

Constable [REDACTED] tried to confirm the name Mr. [REDACTED] had provided by communicating with the police dispatcher via radio. As a result of information received, he had more questions. Mr. [REDACTED] became defensive. He refused to answer; his refusal was expressed in colourful language. Sergeant [REDACTED] arrived on the scene and confirmed that Mr. [REDACTED] was the individual that he had observed earlier. He too asked [REDACTED] to identify himself. This incensed [REDACTED] further since he had already provided the particulars of his identity to the other officers. Sergeant [REDACTED] asked why [REDACTED] had not stopped when signalled to do so. Discussions continued as the sergeant began writing up a traffic violation report. Mr. [REDACTED] was frustrated and upset because he felt that everyone was talking to him at once. Because of this he was loud, confrontational and continued to use a lot of profanity.

Throughout these interchanges, Mr. [REDACTED] remained astride his bicycle. There was some discussion between him and Constable [REDACTED] about the fact that the bike did not appear to have any brakes. Constable [REDACTED] told [REDACTED] to get off the bike; he intended to seize it because it was unsafe. Mr. [REDACTED] asked where in the book it said he could do that. The officer said obviously he did not have the Motor Vehicle Act with him. Mr. [REDACTED] suggested that he'd come with the officer while he looked it up. When Mr. [REDACTED] continued to refuse to relinquish the bicycle, Constable [REDACTED] arrested him for obstruction of justice. He grabbed Mr. [REDACTED]'s arm; Mr. [REDACTED] reacted defensively. Mr. [REDACTED] fell or was pushed to the ground. He says he landed face up; the officer went to his knees beside him. Mr. [REDACTED] raised his hands in a way that the officer interpreted as being preparatory to an attack. Constable [REDACTED] punched Mr. [REDACTED] once in the forehead. This stunned him and allowed time for Constables [REDACTED] and [REDACTED] to turn him onto his stomach. There was another brief struggle before the officers were able to secure Mr. [REDACTED]'s hands. During the time the parties were on the ground Constable [REDACTED] struck Mr. [REDACTED] with his knee on at least one occasion. There

is conflicting evidence about the number of knee strikes, the areas where they were aimed or landed and the position Mr. [REDACTED] was in when they occurred. Once he was handcuffed, Mr. [REDACTED] was pulled to his feet and lodged in the back of the police van without further incident.

The Complaint

On January 22nd, 2010 the Professional Standards Section of the Victoria Police Department received a Police Act Form 1 Record of complaint from Mr. [REDACTED]. Mr. [REDACTED] provided a summary of the events that had transpired. He did not know the names of the officers who had dealt with him.

The file was assigned to Sergeant Chris Spargo who determined that the complaint was against Constable [REDACTED] and that the allegation was that he had:

1. Intentionally or recklessly arrested Mr. [REDACTED] without good or sufficient cause, and
2. In the performance, or purported performance, of his duties, intentionally or recklessly used unnecessary force on Mr. [REDACTED].

The Investigator's Findings

Sergeant Spargo examined and relied on the following evidence:

- 1) PRIME reports written by Constables [REDACTED] and [REDACTED] and by Sergeant [REDACTED].
- 2) The Form 1 – Record of Complaint submitted by Mr. [REDACTED], including a narrative from Ms. [REDACTED] and a doctor's note from [REDACTED] Health Centre.
- 3) Interviews with the following persons:
 - Mr. [REDACTED]
 - Constable [REDACTED]
 - Constable [REDACTED]
 - Ms. [REDACTED]
 - Sergeant [REDACTED]

The Arrest

Sergeant Spargo found that Constable ██████ arrested Mr. ██████ for obstructing a police officer in the execution of his duty because Mr. ██████ refused to allow him to seize his bicycle. In fact, there was no statutory authority to permit him to do that so Mr. ██████ was within his rights when he would not relinquish it. The resulting arrest was not lawful. Sergeant Spargo went on to consider Constable ██████'s background and his reason for making this sort of mistake. Constable ██████ was formerly a member of the Edmonton Police Force. The Alberta Traffic Safety Act contains a provision that allows the police to remove a bicycle from the highway if the bike or its equipment is unsafe.

Sergeant Spargo made inquiries about the training received by officers who have worked policing in other cities or provinces when they apply for a position with the Victoria Police Department. These officers are exempt from completing the basic Police Academy training that would normally be required. They must, however, complete a written test that ensures they have a good understanding of federal laws as well as the various statute laws specific to BC. Prior to writing the test they are given the 'Exemption Manual', which is produced by the Justice Institute of BC. It is the exempt members' responsibility to read and understand the information in the manual and receive a pass mark on a test based on that information.

Sergeant Spargo says he reviewed the Exemption Manual and discovered that only three aspects of the MVA were covered – out of province driver's license exemptions, out of province registration and 24 hours suspensions. He concluded that in these circumstances it was not surprising that Constable ██████ would not

know that the Motor Vehicle Act of BC did not authorize the seizure of unsafe bicycles or motor vehicles.

He went on to consider whether an honest but mistaken belief in the legality of the arrest that he was making could constitute a defence to a charge of misconduct. He concluded that it could and found the allegation that Constable [REDACTED] had intentionally or recklessly made an arrest without good or sufficient cause was unsubstantiated.

The Use of Force

If Sergeant Spargo had found that Constable [REDACTED] had not acted in good faith in arresting Mr. [REDACTED] then any use of force would have been deemed unnecessary. Having found, however, that the arrest was done in good faith, Sergeant Spargo moved on to a consideration of the National Use of Force Model. That provides that:

...an acceptable response to an actively resistant or assaultive person

includes the following:

- ◆ Communication (verbal and non-verbal)
- ◆ soft physical control (wrist and arm locks)
- ◆ hard physical control (strikes – such as open and closed hand, knee, elbow and kicks)
- ◆ intermediate weapons (baton, conducted energy weapons, less lethal projectiles)
- ◆ de-escalation.

Sergeant Spargo examined the various witness statements and concluded that Constable [REDACTED] had, throughout the process, continued to make verbal demands and issue instructions to Mr. [REDACTED]. Those were ignored or defied. Sergeant Spargo found that Constable [REDACTED]'s soft physical control as he grabbed Mr. [REDACTED]'s arm and then tried to force him to the ground, turn him over, and secure

his hands was in accordance with accepted procedures. He concluded that Mr. [REDACTED] had, in fact, brought his fists up in a pre-assaultive gesture and given those circumstances he found that the stun blow to Mr. [REDACTED]'s head was not inappropriate. The multiple knee blows that Mr. [REDACTED] complained of posed an evidentiary problem. Sergeant Spargo examined the witness statements and conducted further interviews with Constable [REDACTED], Mr [REDACTED], and Ms [REDACTED] in an effort to reconcile their different stories. He also considered the medical evidence, such as it was. Constable [REDACTED] had admitted kneeling Mr. [REDACTED] in the arm at a point when the complainant was face down and had "turtled" with his arms beneath his body. He said he did this to startle Mr. [REDACTED] into allowing him access to his arms and wrists so he could handcuff him. Mr. [REDACTED] alleged three or four knee blows to the side of his head while he was still face up on the ground. Ms. [REDACTED] saw three or four knee hits too but says they occurred when Mr. [REDACTED] was face down; she says that they were side movements like the kind of move one would make on a thigh-master: a pivoting type of motion using the muscle portion of the inner thigh/knee. She conceded that they did not seem to involve a lot of force. She also said some of these knee-to-head contacts might have resulted from Mr. [REDACTED] hitting his head against the officer's knee as he struggled.

Sergeant Sprago, after a respectful consideration of Mr. [REDACTED]'s evidence as it related to the knee blows, preferred the evidence of Ms [REDACTED]. In other words he found that all of the 3 or 4 knee blows occurred after Mr. [REDACTED] was face down, that they were sideways swipes with little force and that they may have occurred

accidentally because of the way Mr. [REDACTED] was struggling. He went on to conclude that:

The manner in which Constable [REDACTED] progressed through his use of force options, then deescalated once Mr. [REDACTED] was handcuffed is consistent with typical police officer use of force training and it is congruent with the Canadian police officers Use of Force Model.

He found that the allegation that Constable [REDACTED] had used unnecessary force was unsubstantiated.

Responses

On November 12th, 2010, Sergeant Spargo submitted his final report to Inspector Steve Ing, the Disciplinary Authority for the Victoria Police Department. On November 26th, 2010 Inspector Ing issued his decision and “unsubstantiated” both of the misconduct allegations against Constable [REDACTED].

Upon receiving this decision the Police Complaints Commissioner concluded that there was a reasonable basis to believe that the delegated Disciplinary Authority’s decision was incorrect. On December 15th, 2010 the writer was appointed as the new Disciplinary Authority pursuant to s117 (4) of the Police Act. The contents of the file were received on December 17th, 2010.

Analysis and Findings

Allegation one-Abuse of Authority

It is alleged that on the 17th of November, 2009 Constable [REDACTED] exhibited oppressive conduct toward [REDACTED] by intentionally or recklessly making an arrest without good or sufficient cause.

The introductory section of this decision sets forth those particulars of this event which were not disputed. It is evident that Mr. [REDACTED] was right when he challenged Constable [REDACTED]’s right to seize his bike. Since the officer purported to

arrest Mr. [REDACTED] for obstructing an officer in the lawful execution of his duty, when in fact Mr. [REDACTED] had every right to resist a wrongful seizure of his property, the arrest was without lawful authority.

The issue then becomes one of an analysis of the officer's good faith. Sergeant Spargo based his decision on his conviction that the demand Constable [REDACTED] made for Mr. [REDACTED] to relinquish his bike arose from the officer's honest belief that the Motor Vehicle Act of British Columbia mirrored the Traffic Safety Act of Alberta where such seizures are authorized. (I take judicial note of the fact that the two acts are in most respects, alike.)

When I began reading this file, I was not convinced. In Constable [REDACTED]'s PRIME report he described his thoughts leading up to the arrest as follows:

He (Mr. [REDACTED]) had stayed on his bicycle throughout our interaction and had clearly given the impression to police that he was going to continue on riding without a helmet (as this is one of the infractions he was witnessed doing) with his numerous 'I don't fucking care's' and I was going to seize the bike to stop the continuation of the offence.

Constable [REDACTED] does not mention his concern about Mr. [REDACTED]'s brakes until his interview with Sergeant Spargo on April 12th, 2010. Then he was responding to an open ended invitation to tell what had happened. When he got to the relevant time in the narrative, he said that Sergeant [REDACTED] had issued his violation notice but that Mr. [REDACTED] had expressed his intention of heading off to the City Hall. He talked about the fact that Mr. [REDACTED]'s bike had no brakes. He said he was concerned since this was such a high traffic area. It was at that point that he expressed his intention to seize the bike and Mr. [REDACTED] challenged his right to do so. The officer could not provide statutory authority at the site but told Mr. [REDACTED] to comply; he said they could check it out at the station.

Can I conclude that because it was not raised in the PRIME report, the officer's recourse to a disparity in the British Columbia legislation and that of the similar statute in Alberta was intended to provide after-the- fact justification for making an unlawful arrest?

I looked at other first statements. Ms [REDACTED] in the written statement attached to Mr [REDACTED]'s initial complaint said that the officers were looking for "any reason to harass us." She goes on to say that "they" noticed that the bike had no brakes and said that was illegal. "They" told [REDACTED] to get off his bike because they were seizing it.

Immediately after Mr. [REDACTED] was detained, Constable [REDACTED] was involved in trying to confirm his identity. During the initial phases of the investigation he was back and forth to the radio in the police cruiser. He did not hear all the conversation between the parties but recalls some discussion of safety issues involving the brakes on the bike.

From these two independent reports I conclude that Constable [REDACTED] did have the state of the bike's brakes in mind when he demanded that Mr. [REDACTED] get off the bike and allow him to take it.

Given what I find to be Constable [REDACTED]'s honest but mistaken belief that he was authorized to seize a bicycle if it was in unsafe condition and the owner expressed an intention to keep riding it, I must turn my mind to any justification he might have for making such an error. He received his initial training as a police officer in the province of Alberta. When he applied to the Victoria Police Department he was given "exempt" status and did not have to take the normal training that would be required

of a recruit. He had to review an "Exemption Manual" that is produced by the Justice Institute of BC. He then wrote and passed a test on these materials. Sergeant Spargo reviewed the Exemption Manual and found that it contained almost no information about provincial legislation. There was nothing to alert a recruit from Alberta to the fact that the seizure provisions that the legislation provided there were not available in BC.

I am indebted to Sergeant Spargo for his careful review and analysis of the issue of good faith. I adopt his reasoning but will not repeat it here. I conclude that Constable [REDACTED] arrested Mr. [REDACTED] illegally. He did this because he thought he had the right to seize Mr. [REDACTED]'s bike so he viewed Mr. [REDACTED] resistance as obstruction. He was wrong. Still, his mistake is understandable if his background and training are taken into account. I find that Constable [REDACTED] acted in good faith. Because of this though Mr. [REDACTED] was wrongly arrested, there was no punishable misconduct on the part of Constable [REDACTED].

Allegation two- Use of unreasonable force

In arresting Mr. [REDACTED], Constable [REDACTED] used force. He grabbed Mr. [REDACTED]'s arm. Mr. [REDACTED] reacted. The officer thought he was showing aggression. He pushed Mr. [REDACTED] hoping to take him to the ground. Since Mr. [REDACTED] was still astride his bike when this happened it was all a bit confusing. Mr. [REDACTED] probably landed on his back on the sidewalk. The officer ended up on his knees above him. Constable [REDACTED] says that Mr. [REDACTED] brought his fists up before him. The officer interpreted that as pre-assaultive behaviour and delivered a stun blow to Mr.

██████████'s forehead. In his first interview with Sergeant Spargo Mr. ██████████ agreed with this part of Constable ██████████'s statement. Several months later he evaded the question about whether he was intending to fight back. This is understandable because even in the statement where he admitted taking on a fighting stance he said he reconsidered that position and had decided against it. The punch that Constable ██████████ delivered caused no injury. According to Constable ██████████, it achieved its desired effect. Mr. ██████████ quieted and Constable ██████████ assisted by Constable ██████████ was able to turn him over. After Mr. ██████████ was on his stomach the officers say he "turtled." He held his arms beneath his body so that they were not able to place him in handcuffs. Constable ██████████ says he administered a knee blow to Mr. ██████████'s upper right arm to get him to relax his position and allow them to secure his arms behind his back so they could apply hand cuffs.

Mr. ██████████ has a different recollection. He says that when he was pushed or pulled from his bicycle his head bounced off the pavement when he fell; things went black. Still, in his first statement, he acknowledges that he came up ready to fight at least until he reconsidered that position. He agrees that he was punched in the face but complains that he was also kneed in the head three or four times before he was turned over to his stomach.

Officers ██████████ and ██████████ were present during the course of these events but as witnesses they were not of much help. Constable ██████████ had stepped in to assist on the arrest but he was concerned with Mr. ██████████'s flailing legs. Constable ██████████'s body was between him and Mr. ██████████. He could not see much. Mr.

██████████'s friend, Ms ██████████, had been upset by interaction between Mr. ██████████ and the police. The officers thought she might try to intervene. As the scene between Constable ██████████ and Mr. ██████████ began to develop, Sergeant ██████████ placed himself in front of and facing Ms ██████████. He wanted to prevent her from becoming involved in the altercation.

Ms. ██████████ however, continued to watch the interaction between her friend and Constable ██████████. She reported that when Mr. ██████████ was pulled from his bike, he landed on his side and immediately rolled to his stomach. She did not see him on his back; she did not see the stun punch both Mr. ██████████ and Constable ██████████ describe; she did not see the multiple knee blows that Mr. ██████████ says he received as he lay on his back. She did report, however, that she saw an officer who from his position must have been Constable ██████████, stand on Mr. ██████████'s back with enough pressure to cause Mr. ██████████ to cry out for relief. (Mr. ██████████ filed a written statement with his Form 1 Complaint and gave two interviews. He mentioned nothing about this. He simply said the second officer grabbed his legs.) Ms ██████████ also said that the officer closer to Mr. ██████████'s head (Constable ██████████) aimed three or four knee blows at Mr. ██████████'s head while he was lying face down. In a second interview she described these blows as short pivoting motions that caused the muscle portion of the inner knee to make contact with Mr. ██████████. She said that Mr. ██████████ was struggling and that some of the contacts may have been accidental.

If I were to accept Constable ██████████'s version of events, I would agree with Sergeant Spargo's view and find that his use of force was reasonable and did not

constitute misconduct. Though Mr. [REDACTED] was perhaps not paying much attention there is ample evidence from both the police witnesses and Ms [REDACTED] that he was given verbal instructions and demands were made throughout; he defied all of these. Officer [REDACTED] then resorted to the use of soft force by grabbing Mr. [REDACTED]'s arm, by attempting to turn him to a prone position and by trying to get his arms from beneath his body so he could handcuff him. When Mr. [REDACTED] resisted, he administered a single stun punch which caused no damage but secured cooperation; he says that he later kned Mr. [REDACTED]'s shoulder to get him to relax and allow his arms to be pulled back into a position where they could be secured in handcuffs. That too was effective. [REDACTED] ceased his resistance and allowed the officers to place the handcuffs on him.

If I were to accept Mr. [REDACTED]'s version of events, I would find that the repeated knee blows were excessive given the fact that Mr. [REDACTED] is a small man and there were three officers present who could have been called upon to assist in the arrest. It is significant that Mr. [REDACTED] felt that the blows were struck because the officer was frustrated, rather than because of any specific resistance he was offering. In my view, this would clearly constitute misconduct on the part of the officer.

Sergeant Spargo wrestled with this issue and relied on the evidence of Ms. [REDACTED] to resolve the conflict. She says that the knee blows were side hits without much force and that they might have been inadvertent or caused by Mr. [REDACTED] bumping into the officer's knee as he struggled. This may provide a partial explanation but I cannot overlook the fact that Ms [REDACTED] believes that Mr. [REDACTED] landed on his side and immediately rolled to his stomach. She says that one of the officers stood on Mr.

██████████'s back with enough force that Mr. ██████████ called out several times in pain. (Something ██████████ never mentions and the officer denies.) I do not find that her evidence resolves the differences in the stories told by Mr. ██████████ and Constable ██████████.

Sergeant Spargo also considered the brief medical note provided. This indicates that the complainant, when examined had two small bruises in the area of his left ear.

Sergeant Spargo opines that they may have resulted from the fall or may have been caused by some incident unrelated to this one. Both Constable ██████████ and Ms.

██████████ say that the knee blows were directed at the right side of Mr. ██████████'s body but the complainant says he was on his back at the time and they impacted the left

side of his head, I find that the medical evidence supports Mr. ██████████'s version of events. Notwithstanding the evidence to the contrary provided by both Constable

██████████ and Ms. ██████████ I suspect that Mr. ██████████ may be right when he alleges that he was struck by the officer's knee while he was still on his back.

This suspicion will be small solace to him since in deciding this matter suspicion is not enough. The test is whether, on the balance of probabilities, I can find that the allegation is true. Ms. ██████████, though she is Mr. ██████████'s friend and wanted to help him, actually provided evidence that in some ways contradicted his and corroborated that of Constable ██████████. At the end of the day, I find that I am undecided. If Mr.

██████████ were a defendant in this matter, I would dismiss any claim against him

because I am not convinced that his version of events is wrong. But it is Constable

██████████ I not Mr. ██████████ who finds himself accused. He too is entitled to have these allegations unsubstantiated in circumstances like this where the evidence against

him is equivocal and could be interpreted in a way that would support his belief that he acted appropriately.

For these reasons I find that both allegations of misconduct against Constable [REDACTED] are unsubstantiated. Given that finding, no further steps are required.

Dated this 22nd day of December, 2010.

Hon. Carole D Lazar, Discipline Authority