

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

IN THE MATTER OF CONSTABLE [REDACTED]

NOTICE OF ADJUDICATOR'S DECISION

TO: Constable [REDACTED], Abbotsford Police Department (Member)

AND TO: [REDACTED] (Complainant)

AND TO: Chief Constable Bob Rich, Abbotsford Police Department

AND TO: Mr. Stan T. Lowe, Police Complaint Commissioner

OVERVIEW

This matter arises from a complaint that resulted from a traffic stop of the complainant's motor vehicle. The vehicle was stopped, searched and the complainant was detained and strip searched by Constable [REDACTED] of the Abbotsford Police Department. This occurred on August 15, 2009 on South Fraser Highway, Abbotsford.

The complainant, [REDACTED] filed a complaint regarding this matter on February 3, 2011, almost 18 months after the event and outside the 12 month limitation period in the Police Act. The Office of the Police Complaint Commissioner extended the time limit under section 79(2) of the Police Act.

The matter was turned over to Sergeant Drebit of the Abbotsford Police Force for investigation. His report concluded that the evidence did not substantiate any misconduct of abuse of authority in relation to Constables _____ or _____, all of whom attended at the scene of this occurrence.

Sergeant Debit's Report was forwarded to Chief Constable Rich who determined, inter alia, that the evidence did not substantiate an allegation of misconduct relating to the strip search of the complainant.

Upon receiving the Final Investigation Report and Chief Rich's decision the Police Complaint Commission decided there was a reasonable basis to believe the Discipline Authority was incorrect in determining that the conduct of Constable _____, in relation to the strip search of _____, did not constitute misconduct.

Consequently, the matter was referred to the writer pursuant to Section 117(4) of the Police Act, as Adjudicator to review the matter and based on the evidence decide if there was misconduct by _____ in relation to the strip search of _____.

The allegation specifically is:

Count 1: Abuse of Authority

That on August 15, 2009, it is alleged that Constable _____ acted in a manner to wit: with oppressive conduct towards _____, including, without limitation, in the performance, or purported performance, of her duties, intentionally or recklessly strip searching _____. This act if proved would constitute misconduct pursuant to section 77(3)(a)(ii)(B) of the Police Act.

The materials arrived to me late December 6, 2011 and I was able to commence perusal of same the following day. Therefor the Act requires my response and decision by December 22, 2011.

MATERIAL VIEWED FOR PURPOSES OF DECISION

Complaint of [REDACTED] dated February 3, 2011.

Notice of Admissibility dated February 21, 2011.

Notice of Complaint and Initiation of Investigation dated February 28, 2011.

Progress reports (7).

Notice of Extension.

Final Report of Sergeant Drebit dated October 27, 2011.

Notice of Appointment of New Discipline Authority dated December 6, 2011.

Interview statements of [REDACTED], Constables [REDACTED], [REDACTED], and [REDACTED] (2).

Police Reports dated April 23, 2007, August 5, 2008, January 17, 2009, February 9, 2009, August 13, 2009, and May 4, 2011.

CIRCUMSTANCES LEADING TO THE COMPLAINT

This complaint arose from a traffic stop of the [REDACTED] vehicle by Constables [REDACTED] and [REDACTED] who were joined at the scene by Constable [REDACTED] in another police vehicle. The stop occurred near a gas station in the 32500 block of South Fraser Way, Abbotsford at approximately 22:06 hours on August 15, 2009.

Constables [REDACTED] and [REDACTED] were transporting a prisoner from hospital to police cells when the prisoner advised the officers that he recognized the complainant, driving in another vehicle, to be a drug dealer, someone from whom he had purchased drugs, and further if the police stopped her vehicle they would probably find drugs as she was known as one who has transported drugs in the past.

The complainant's vehicle was stopped as aforesaid and while checking the police computer observed the complainant to be wiggling around quite a bit inside the car. Constable [REDACTED] also described the movement as moving up and down in her seat. Constable [REDACTED] said from her past experience that this

movement could indicate someone hiding something in their car or on their person.

Upon proceeding to the complainant's vehicle all three officers noticed the smell of burnt marijuana emanating from the vehicle.

[REDACTED] was removed from her car and appeared somewhat nervous. Additionally she was "lippy and mouthy" and was not following police directions. Police dispatch advised that the registered owner was [REDACTED] with a notation "Caution "victor" (violence)" and that she was awaiting disposition of outstanding charges of traffickingX2 and breachX2". She was told by Constable [REDACTED] that she was under investigation for drugs.

The complainant's vehicle was a lowered older model car with dual mufflers and displayed a temporary operating permit due to expire at midnight, in other words, within 2 hours.

As a result the complainant was handcuffed behind her back and she sat on the curb. She claims she sat smoking a cigarette.

Her vehicle was searched and no drugs were discovered. At this point Constable [REDACTED] advised [REDACTED] that she would be required to be strip searched. Constable [REDACTED] indicated that [REDACTED] said "Go ahead, you won't find anything." The Constable further said that if any drugs were found she would be charged with drug possession. [REDACTED] advised that she did not consent to such a search or that of her car.

Constable [REDACTED] at this point advised [REDACTED] that the search could be conducted at the Abbotsford Detachment or be done in private in the washroom of the PetroCan service station nearby. The constable indicated that this option was given to [REDACTED] because if she were to go to the detachment, the delay in completing the search and returning would probably result in her car being towed because of the expiration of her temporary operating permit at midnight and the resulting expenses related thereto. [REDACTED] obviously chose the second option and as she said in her statement "I just turned around and started walking to the bathroom."

The strip search did occur in the washroom with only [redacted] and Constable [redacted] present. [redacted] clothes were removed, first above the waist and then below the waist and her clothes were examined by the constable. [redacted] was required to spread her "butt cheeks" to show that nothing was hanging from her anus or vagina.

No drugs were found with the result that [redacted] was released without any charges and allowed to leave. She was however given a Motor Vehicle ticket to have her car inspected. Without going into details of the issuance and service of the ticket suffice it to say the inspection did not occur and the vehicle was seized and has since been destroyed. Regrettably this occurred before [redacted] registered her complaint and the investigation was unable to check details of her car that surfaced on the night of August 15, 2009, such as the problems with her door handles, the opening of her trunk and the complaint of pop being spilled on her car seats.

ANANYSIS AND DECISION

The issue for purposes of this review is confined to Section 77(3)(a)(ii)B of the Police Act. Thus from all the circumstances of August 15, 2009 it is only the conduct of Constable [redacted] in relation to the strip search of [redacted] that I must consider in coming to a decision. In doing so I must consider all the circumstances of the occurrence and consider all the evidence concerning the event in coming to my decision.

There are some difficulties with this case that should be mentioned at this time. The complaint that gives rise to these proceedings was made almost 18 months following the event. First, this passage of time, as usual, causes some failing of the memory and recall of witnesses. In this case none of the officers at the scene have any notes of this occurrence. I should note that one would expect at least Constable [redacted] to have made some note of this occurrence given the seriousness with which the courts have held that strip searches are such a serious infringement of privacy and personal dignity. Consequently the officers' recall of the day is strictly from memory. The only indication of any notations by [redacted] is in her statement at lines 628-630 where she states "...like it happened

a long time and I have...I have written it out just like for (indecipherable) like that so I can remember.”

The second problem is the destruction of _____ vehicle, which it seems, according to her statement, to have occurred at least a month after the incident in question. As indicated earlier had this complaint been made forthwith, evidence concerning this vehicle could have assisted in the investigation, for example, as mentioned earlier, the condition of the car doors, the opening of the trunk and the spillage of pop on the car seats and could have assisted the complainant’s allegations if the conditions were found as she says they were.

The delay aforesaid could account for some variations in the recall of all the witnesses. However _____ explanation for delay, trying to ascertain the officers’ names who were involved, rings somewhat hollow. She was no stranger to some police practices as she was already facing 2 trafficking charges and 2 breach charges presumably related to breaches of her bail conditions. One would expect that given her allegations of the night in question and her differing views of her car’s condition and facing a vehicle inspection concerning said vehicle that she would act with some dispatch concerning her complaint.

Constable _____ was on maternity leave when her interview occurred with Sergeant Drebit on October 5, 2011. I do not know when her baby was born or the duration of her maternity leave but clearly she had other pressing matters on her mind as well as her police duties since the event date which is the subject of this matter.

I now turn to the issue of credibility. _____, when stopped, seemed agitated, kept moving around, was “lippy and mouthy”, and showed a reluctance to follow police instructions. It would seem reasonable to conclude that she would be and was handcuffed behind her and began sitting on the curb. She claims to have been smoking a cigarette while sitting on the curb. Clearly that would have been impossible, at least without help from someone. Her attitude and actions as described by the three attending officers would suggest that her attention to detail was probably adversely affected and thus her accurate recall of events. She had much difficulty recalling the descriptions of any officers who caused her difficulties on the night in question, could not recall how many officers

were actually at the scene, was exhibiting some hostility towards the police and seemed somewhat unfocused throughout parts of her statement to Sergeant Drebit. In that statement she advised that a month before August 15, 2009 that her landlord had sexually assaulted her, that she had called the police but they did not come or do anything. The police have no record of such a call.

For the foregoing reasons and a careful reading of the materials, I have some difficulty giving too much weight to her allegations generally and to the circumstances surrounding the strip search in particular. The statements of Constable [REDACTED] were more focused and more supported by the statements of other officers. In the result, I am satisfied that the recollection of Constable [REDACTED] considering all the evidence in this matter is preferred to that of [REDACTED].

There were some discrepancies in the statements of Constables [REDACTED] and [REDACTED]. However there was much consistency on the salient points for purposes of the complaint. For example, they were relatively consistent about the information from the prisoner in their police vehicle, and their observation of the complainant inside and outside her vehicle, and smelling the odour of burnt marijuana coming from inside her vehicle. Regrettably, as mentioned earlier, this was accomplished without any notes from the day in question and only from memory, almost 18 months after the event.

For purposes of the review of the strip search itself, the evidence really comes from only the complainant and Constable [REDACTED].

In analyzing Constable [REDACTED] actions on August 15, 2009 in relation to the aforesaid allegation I am required to look at all the circumstances surrounding the event to determine if she had reasonable and probable grounds to make the strip search of [REDACTED]. (R v Perjalian 2011 BCCA #323)

Constable [REDACTED] had received information from the prisoner (source) in the police vehicle that he recognized [REDACTED] as a drug dealer, that he had purchased drugs from her in the past, and if they stopped her vehicle they would probably find drugs as she was known to transport same. Additionally, the detachment provided CPIC information that the registered owner of the vehicle was [REDACTED] and she was noted as "RO-Caution (violence) and awaiting

disposition of traffickingX2 and breachX2". To this extent the reliability of the source information was confirmed. Accordingly there was reasonable suspicion to perform the traffic stop on the [redacted] vehicle for drugs.

While awaiting information from headquarters, Constable [redacted] noticed the complainant wiggling around in her vehicle and later described this as moving up and down in her seat which movements by her experience indicated a person trying to hide something in their car or on their person. She then noticed the complainant was agitated, was being "mouthy and lippy" and had difficulty following police instructions. Additionally she smelled burnt marijuana emanating from inside [redacted] vehicle. Further, Constable [redacted] had a conversation with the complainant on the road outside her vehicle at which time they discussed the complainant's drug history and [redacted] advised Constable [redacted] that she had cleaned up her act and was not dealing drugs any more. Constable [redacted], in her May 20, 2011 statement, indicated that Constable [redacted] had advised her of a long record of drug dealing by the complainant before the search of the [redacted] vehicle.

At this point no drugs had been located in the [redacted] vehicle although there was difficulty accessing the trunk. Constable [redacted] then advised the complainant that that she would be strip searched.

The standard of proof for reasonable grounds to make such a search is reasonable probability, in other words something more than mere suspicion but less than the standard of proof required in a civil case. (R v Perjalian supra)

There must be reasonable and probable grounds for an arrest and reasonable and probable grounds to justify the strip search. (R v Golden (2001) SCR 679).

The case of R v Mann [2004] 3 S.C.R. 59 states:

Although there is no general power of detention for investigative purposes, police officers may detain an individual if there are reasonable grounds to suspect in all the circumstances that the individual is connected to a particular crime and that the detention is reasonably necessary on an objective view of the circumstances.

The case of R v Webster 2008 BCCA 458 (CanLII) states:

In my view, the odour of freshly-smoked marijuana emanating from a vehicle objectively supports, at a minimum a reasonable suspicion that the driver and/or passenger are engaged in criminal activity, namely possession of marijuana.

The aforementioned authorities satisfy me that with the prisoner's information supported in part from that from police dispatch, the odour of burnt marijuana, the complainant's wiggling around inside her car, her actions outside the car, the fact that no drugs were found in her vehicle, and the information she received from Constable [REDACTED], that Constable [REDACTED] had reasonable and probable grounds to perform a strip search on the complainant's person. It should be noted that at this particular stage the trunk of the complainant's vehicle had not yet been accessed but there is nothing to indicate that the complainant had any access to the trunk from the time the police started to observe her to the time Constable [REDACTED] decided to perform the strip search.

Clearly [REDACTED] was detained for purposes of investigation by Constable [REDACTED] who did not provide a Charter warning to [REDACTED] and thus a Charter breach did occur and had any evidence been obtained, the admissibility of same would obviously be questioned and argued. Constable [REDACTED] was of the view that she did not have enough grounds to charge [REDACTED] with trafficking and thus did not arrest her but detained her for purposes of investigation. Constable [REDACTED] was wrong to not have read an appropriate Charter warning to [REDACTED] upon her detention and it appears she did not put her mind at that time to the reasonable grounds for arrest for simple possession of marijuana. If she did so there was no indication of this in her statements, except prior to the strip search, she did advise [REDACTED] that if drugs were found she would be charged with drug possession.

The case of R v Dubois 2004 BCCA 589 supports the position that an actual arrest is not a prerequisite to a search if both objective and subjective grounds exist for an arrest.

The case of R v Debot [1989] 2 S.C.R. 1140 says:

As long as the officer has reasonable cause to arrest the suspect, the fact that he or she postpones the decision until after the search is not fatal. This is so because the reasonable belief that the suspect has committed the offence of being in possession of a prohibited drug may turn out to be erroneous.

The leading case regarding strip searches is the case of R v Golden (Supra), wherein it states:

“Strip searches are inherently humiliating and degrading for detainees regardless of the manner in which they are carried out and for this reason they cannot be carried out simply as a matter of routine policy... such searches are only constitutionally valid at common law where they are conducted as an incident to a lawful arrest for the purpose of...discovering evidence related to the reason for the arrest, in order to preserve it and prevent its disposal by the detainee. In addition to reasonable and probable grounds justifying the arrest, the police must establish reasonable and probable grounds justifying the strip search...Strip searches should generally only be conducted at the police station except where there are exigent circumstances requiring that the detainee be searched prior to being transported there.

“Exigency” usually means when circumstances are urgent and requiring immediate attention. These were not exigent circumstances. There were reasonable grounds for Constable [REDACTED] to believe that [REDACTED] had drugs on her person for all the reasons mentioned aforesaid. The constable’s decision to allow for a search option other than at the police station was motivated, in my view, by fairness to the complainant considering the fact that a police station search would undoubtedly have resulted in her car being towed as a result of the imminent expiration of her temporary operating permit, and any costs related thereto.

Accordingly, I am satisfied that Constable [REDACTED] was acting in good faith in giving [REDACTED] an option for the location of the search. Good faith is defined by Chamber’s English Dictionary as “with honesty and sincerity; acting honestly”. Clearly Constable [REDACTED] was directing her mind to the

consequences facing [redacted] if the search was delayed and performed at the police station. In my view, Constable [redacted] was acting with honesty and sincerity with regard to the needs and interests of the claimant at least to the consequences of any delay that could put the seizure of her vehicle at risk.

I am further satisfied that when [redacted] was first told by Constable [redacted] that she would be strip searched the complainant said “Go ahead, you won’t find anything.” When presented with the option of a police station search or the service station washroom, she thus chose the washroom option saying in her statement “So my car, it would have to be towed and impounded and it would...that’d cost me so much more, or I can go in the...in the bathroom with her and get searched. I just turned around and started walking to the bathroom.”

There did not appear to be any complaint regarding the strip search itself, in other words, in the manner in how it was conducted, that appears to be in question. The evidence which I accept convinces me that the search was conducted in an appropriate and acceptable manner. For reasons referred to aforesaid concerning credibility, I do not accept [redacted] assertion that she was required to squat and cough. Rather, I am satisfied that the process of the search occurred in the manner described by Constable [redacted], in particular that [redacted] was required, as mentioned earlier, to spread her “butt cheeks” to ensure that there was nothing in her anus or vagina. The search was conducted in private, by an officer of the same gender, the complainant’s clothes were removed in two sections, first the top portion and then the bottom portion. As mentioned earlier, no drugs were found and the complainant was released, obviously with her vehicle.

At this point I make mention of the comment from the decision of the Supreme Court of Canada in R v Golden (supra) where it says “Clear legislative prescription as to when and how strip searches should be conducted would be of assistance to the police and to the courts.” Such, if it existed, would presumably have been of assistance to Constable [redacted] in this case and of course to the writer.

I concur with Sergeant Drebit in his very carefully prepared report that the failure of Constable [redacted] to provide [redacted] with a proper Charter

warning may be a performance issue but does not give rise to a finding of police misconduct.

Accordingly, I am satisfied upon the foregoing, a careful review of all the documentation forwarded to me, and the relevant law, that the allegation that the actions of Constable [REDACTED] against [REDACTED] on August 15, 2009 constitute misconduct has not been substantiated by proof on a balance of probabilities, the standard of proof required in this case and in all civil cases.

William J. Diebolt,
Adjudicator,
December 20, 2011.