

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

AND

**IN THE MATTER OF A REVIEW OF AN
ALLEGATION OF MISCONDUCT AGAINST
CONSTABLE ██████████
OF THE VANCOUVER POLICE DEPARTMENT**

NOTICE OF DECISION

To: Constable ██████████ (Member)
c/o Vancouver Police Department
Professional Standards Section

And to: Sergeant ██████████ (External Investigator)
c/o Vancouver Police Department
Professional Standards Section

And to: Inspector ██████████ (External Discipline Authority)
c/o Vancouver Police Department
Professional Standards Section

And to: Chief Constable Adam Palmer
c/o Vancouver Police Department
Professional Standards Section

And to: His Worship Mayor Kennedy Stewart
Chair, c/o Vancouver Police Board

INTRODUCTION

1. This is a review pursuant to s. 117 of the *Police Act*, R.S.B.C. 1996, c. 367, as am. (the "Act"). Constable ██████████ of the Vancouver Police Department (VPD) is accused of Misconduct under s. 77(3)(a)(ii)(A) of the Act. That section relates to "Abuse of Authority", "which is oppressive conduct towards a member of the public, including, without limitation, in the performance, or purported performance, of duties, intentionally or recklessly using unnecessary force on any person". The specific allegation against Constable ██████████ is that he recklessly used unnecessary force against a person by discharging a shotgun containing beanbags.

BACKGROUND

2. I will review the evidence. On the afternoon of August 24, 2019, an employee of a liquor store at [REDACTED] in the City of Vancouver called the VPD in order to report a physical altercation that was taking place in front of the store. The fight involved two men. One later identified as [REDACTED] and a second was a panhandler named [REDACTED]. Not surprisingly as is often the case the whole of the incident was captured by a cell phone video and partially by surveillance video from the liquor store. According to [REDACTED], [REDACTED] was randomly screaming at people in front of the liquor store. The screaming affected [REDACTED] ability to panhandle. He told [REDACTED] to stop the screaming. That led to the fight. According to witnesses, [REDACTED] approached [REDACTED] aggressively while holding a knife whereupon [REDACTED] picked up skateboard and struck [REDACTED] on the head. Two more knives reportedly fell from [REDACTED] pocket during the altercation. A bystander and a witness to the altercation picked the two knives up and moved them away.

3. The first two officers to arrive at the scene were Constables [REDACTED] and [REDACTED]. Constable [REDACTED] immediately recognised [REDACTED] from an earlier encounter at approximately 9 a.m. that morning. At that time, he saw that [REDACTED] had three knives in his possession. Constable [REDACTED] had no legal basis for seizing the knives. However, what caught the attention of both officers, was that [REDACTED] appeared to be speaking to himself. They concluded that he was apparently suffering from a mental disorder. They quickly determined that there was a Form 21 warrant outstanding under the Mental Health Act for his arrest. Accordingly the officers had Emergency Health Services transport [REDACTED] to [REDACTED] Hospital.

4. When they arrived at the scene of the incident, Constable [REDACTED] said he saw a knife in [REDACTED] hand and immediately gave him a loud clear command to "drop the knife and to get on the ground". He did drop the knife. However, he had his hands clenched. Constable [REDACTED] also told [REDACTED] to drop the knife. Both officers were aware from their earlier dealings with [REDACTED] that he had two other knives. Constable [REDACTED] stated that he became concerned that [REDACTED] was "reaching for another knife"

and that [REDACTED] had "displayed violent behaviour" in the altercation with [REDACTED]. He said he believed there was a "a significant risk to the public". When Constable [REDACTED] alighted from his vehicle he had a shotgun containing beanbag rounds in his possession. When [REDACTED] failed to immediately get on the ground, the officer deployed 9 beanbag rounds that struck [REDACTED] body. There was a gap between the first 5 rounds and the subsequent 4. The issue in this case is whether in deploying 9 rounds the officer used more force than was necessary. I will deal with this in more detail in due course.

5. [REDACTED] was then taken to [REDACTED] Hospital for an assessment due to the injury suffered by the impact. He was diagnosed with a bruising to the left side of the body from the navel to the knee, a cut to his thigh which required stitches and an injury to the groin area.

OPCC

6. On October 10, 2019, the Vancouver Police Department (VPD) reported the incident to the Office of Public Complaint Commissioner (OPCC) pursuant to s. 89 of the *Act*. The Police Complaint Commissioner ordered an investigation. Sergeant [REDACTED] was appointed to conduct the investigation. There was considerable delay in the investigation by virtue of the fact that [REDACTED] was charged with a number of criminal offences. Thus it was deemed proper to delay the investigation pending the completion of the criminal proceedings.

INVESTIGATION

7. I will review the circumstances in more detail. A witness, [REDACTED] told the police that the man "later identified as [REDACTED] had a knife and was trying to stab the man with the skateboard ([REDACTED] who was defending himself from the knife". He described the weapon as a folding knife with a shiny blade. He said "[REDACTED] was very scared". Police interviewed a number of eyewitnesses whose accounts were not materially different. [REDACTED] called 911 from the liquor store in order to report

the altercation. He told the police that he witnessed a heated confrontation between [REDACTED] and the panhandler. He saw [REDACTED] pull a knife where upon the man with the skateboard backed up in order to "protect himself" and then struck [REDACTED] on the head with the skateboard.

Constable [REDACTED] statement

8. On December 5, 2019, Sergeant [REDACTED] interviewed Constable [REDACTED]. He said that when he arrived he was told by witnesses that the man with the knife was acting aggressively. He knew from his earlier encounter that morning that [REDACTED] had three knives in his possession. He felt [REDACTED] was a danger to the public. He said he gave [REDACTED] a command to throw down the items that he had in his possession. [REDACTED] did that but according to Constable [REDACTED] he did so in an aggressive manner and the officer believed that he was in a "fighting stance". He said he considered his options. He felt empty hand tactics would place him and his partner in jeopardy. He had weapons in his possession. They included OC spray (Oleoresin Capsicum) which has a limited range and has a distracting effect. He also had a baton but that would not have been effective because of its limited length. Thus he felt he had no alternative but to use a shotgun with beanbags. It was a lowest level of force that was appropriate in the circumstances.

9. Constable [REDACTED] said that the shotgun with the beanbags creates temporary motor dysfunction. As well there is a psychological effect in that when someone is shot with a beanbag they often react as though they have been shot with a real firearm and will over react and fall down. In his statement, Constable [REDACTED] said that when [REDACTED] did not comply immediately with the verbal commands, he realized that he needed to take him into custody. He was concerned that there were approximately 20 people in the area. He believed there was a significant risk to not only the police but to the members of the public. Constable [REDACTED] said that he deployed 1 round 5 times in the first volley of rounds. [REDACTED] was moving from a kneeling position to a demonstrated "active resistance by walking away from Constable [REDACTED] towards the traffic". At this point the officer felt that he had no control over the person. [REDACTED] then walked

towards the officer. He said he knew that he had possession of more knives so he deployed a sixth round at which point [REDACTED] slowly got down on one knee and held that position. when [REDACTED] was in running-kneeling position, Constable [REDACTED] deployed a 7th and 8th round. According to the officer, [REDACTED] was showing pre-assaultive cues by staring through and turning his shoulders. Accordingly he deployed a ninth round which hit [REDACTED] in the left buttocks. He then shouted at [REDACTED] to "stay on the ground". [REDACTED] was then taken into custody.

10. On November 27, 2019, Constable [REDACTED] was interviewed. At the time she was a recruit and was being trained by Constable [REDACTED]. She said that she told [REDACTED] to drop what was in his hands. [REDACTED] did drop the knife and bag but "was aggressively staring at them" she said [REDACTED] had clenched his hands and had 2 other knives with him. She said that "[REDACTED] started to blade his right shoulder away from them and his left shoulder towards them. She could not see [REDACTED] right hand. At that point, Constable [REDACTED] deployed 5 rounds. Around the third or fourth round, Constable [REDACTED] tried to go under radio to say the beanbag had been deployed. She went to say that as the 5 rounds were deployed, [REDACTED] kept at staring at her and had his body bladed. She went on to state that "he did not seem to be phased at all the impact of the beanbags". And "it did not seem like he was going to get on the ground". She said that he "slowly took a knee when the sixth round was shot.

DISCIPLINE AUTHORITY

11. On May 12, 2020, Sergeant [REDACTED] completed her investigation and submitted her final investigation report (FIR) to the Discipline Authority (DA) and the OPCC. Pursuant to s. 112(1) of the Act the Discipline Authority has a duty to review the FIR. Inspector [REDACTED] was the DA. She concluded that while she had the benefit of observing the incident on video, the video was incomplete in that it did not take into consideration the subjective perspective of the officers or the citizens. The video did not take into consideration Constable [REDACTED] "subjective perceptions". She also concluded that there was insufficient evidence relating to pre-assaultive evidence.

Accordingly she concluded that evidence did not appear to substantiate the allegation of misconduct against either officer.

POLICE COMPLAINT COMMISSION

12. Pursuant to s. 112(5)(b) a Discipline Authority's decision is subject to review by the Public Complaint Commissioner. The Commissioner concluded that the Discipline Authority (DA) did not "sufficiently assess the reasonableness of Constable [REDACTED] actions in a response to [REDACTED] diminishing threat" after the initial 5 rounds had been deployed. In other words he concluded that the decision of the Discipline Authority (DA) was incorrect and therefore is subject to review under s. 117 of the Act.

THE LAW

13. A review under s.117 is a review on the record. That is to say that my decision as the reviewing judge is based upon the FIR, the statements of the witnesses, the written material before me and a viewing of two videos of the circumstances of the events. This review is not an appeal from any earlier finding or decision. A review under s.117 does not contemplate the calling of or hearing witnesses. These proceedings are referred to as paper based reviews .

THE ANALYSIS

14. The issue in this review is whether the conduct of Constable [REDACTED] appears to constitute misconduct within s. 77(3)(a)(ii)(A) of the Act. The operative words of the sections reads as follows:

"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 (A) using unnecessary force on any person"

15. This case is about the use of force or to put it another way, intentionally or recklessly using unnecessary force. The law on the police use of force is not in dispute.

The starting point in any discussion is s.25(1) of the Criminal Code, R.S.C. 1985, c.C-46
The relevant words of that section read as follows:

["Everyone whose authorised by law to do anything in the administration or enforcement of the law.....is, if he acts on a reasonable grounds, justified in doing what is required or authorised to do and is using as much force as is necessary for that purpose"](emphasis added).

16. A peace officer's honest belief in the legality of his conduct must be founded on reasonable grounds. See R v. Devereaux (1996), 112.C.C.C.(3d)(243)(Nfld, C.A.) Essentially any assessment of the use of force must be considered on a subjective-objective basis. Thus an officer's subjective perceptions must be objectively based. As well it has long been held that police conduct ought not to be judged against a standard of perfection. The whole of the circumstances which are often evolving must be considered in an assessment of an officer's conduct. See R v. Nasagaluak (2010), 1 S.C.R. 206.

17. It is useful to make reference to the VPD policy on use of force:

1.2 Use of Force

1.2.1 Use of Force – Justification

POLICY

When using force in the course of their duties, members shall comply with the provisions of the Criminal Code of Canada (CCC) and the BC Provincial Policing Standards (BCPPS). Members shall also be guided by the National Use of Force Framework (NUFF) which provides the following force options:

- a. Officer presence;
- b. Communication, supplemented to include crisis intervention and de-escalation techniques;
- c. Physical control;
- d. Intermediate weapons; and
- e. Lethal Force.

18. The use of force network (NUFF) was developed by the Canadian Associations of Chief of Police (CACP) as a training tool to assist officers in making informed decisions. It has been referred to as a "assess – plan – act". Since no two situations are identical the Framework requires a subjective analysis on the part of an officer. The process requires officers to assess situations and act accordingly. The Framework sets forth 6 basic principles:

1. The primary responsibility of a peace officer is to preserve and protect life;
2. The primary objective of any use of force is to ensure public safety;
3. Police officer's safety is essential to public safety;
4. The National Use of Force Framework does not replace or augment the law, the law speaks for itself;
5. The National Use of Force Framework was constructed in consideration of Federal and (statue law and current case law);
6. The National Use of Force Framework is not intended to dictate policy to any agency

CONCLUSION

19. As mentioned above, the specific allegations of misconduct relate to Constable [REDACTED] deploying more rounds than were necessary in the circumstances. It is not in dispute that the final 3 rounds from the shotgun were deployed as [REDACTED] was on the ground and appeared to be complying with the officer's verbal command. Constable [REDACTED] position is that while [REDACTED] did throw the knife on the ground, he did not initially comply with command to get on the ground. He was not able to fully see [REDACTED] right hand. He was particularly concerned that he may have been reaching for another knife. For these reasons he fired the final 3 rounds. There were said to be approximately 20 people in the immediate area. The officer had a subjective belief that it was reasonable to deploy 9 rounds given the reaction or non-reaction of [REDACTED]. That explanation that he has given is objectively reasonable.

20. There are some aspects of the circumstances that are troublesome. The immediate use of an intermediate weapon is of considerable concern. I must however consider Constable [REDACTED] explanation as to why each of the options from empty hand tactics, OC spray and a baton would not have been effective. Each has its limitations. I accept Constable [REDACTED] statement that he was concerned that [REDACTED] was "reaching for another knife" and that there was significant risk to the police and to the members of the public. There is one other matter that is of concern and that is [REDACTED] [REDACTED] was suffering from mental illness, a fact know to both officers. In the circumstances the initial approach to [REDACTED] could well have been different. However, having said that I must keep in mind that police conduct particularly in evolving dynamic circumstances ought not to be judged against a standard of perfection. It is for these reasons after a review of the whole of the circumstances including the FIR, both videos and all related material I have concluded that Constable [REDACTED] conduct does not constitute misconduct. See s.117(10).



The Honourable Wally Oppal, OBC, Q.C.,
Retired Justice of the Court of Appeal for
British Columbia,

Dated at Vancouver, British Columbia, this
24th day of July, 2020.