

**IN THE MATTER OF THE *POLICE ACT*, R.S.B.C. 1996, c. 367
AND
IN THE MATTER OF A REVIEW UNDER SECTION 117
AND
IN THE MATTER OF ALLEGATIONS OF MISCONDUCT
AGAINST
CONSTABLE [REDACTED] [REDACTED] [REDACTED]
OF THE VANCOUVER POLICE DEPARTMENT**

**NOTIFICATION OF MISCONDUCT AND NEXT STEPS PURSUANT TO
SECTION 117(7)**

TO: Mr. [REDACTED] (Complainant)

AND TO: Constable [REDACTED] [REDACTED] [REDACTED] (# [REDACTED]) (Member)
c/o Vancouver Police Department
Professional Standards Section

AND TO: Mr. Clayton Pecknold (Commissioner)

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

AND TO: Inspector [REDACTED] [REDACTED] (Discipline Authority)
c/o Vancouver Police Department
Professional Standards Section

AND TO: Sergeant [REDACTED] [REDACTED] (Investigator)

1. Overview

[1] This is a review under Section 117 of the *Police Act* ordered by the Police Complaint Commissioner in a Notice of Appointment of Retired Judge issued on

April 21, 2021. It involves a complaint about the conduct of Constable [REDACTED] of the Vancouver Police Department during a street stop of the complainant, [REDACTED] [REDACTED] in the downtown east side of Vancouver on May 4, 2020. The complaint was investigated and a final investigation report was issued on March 8, 2021.

[2] Section 117 mandates an independent decision by a retired judge as to whether the final investigation report and the evidence and records referenced in it appear to substantiate misconduct and to require the taking of disciplinary or corrective measures. The steps I am required to take are set out in Section 117(8), and I address them sequentially below under the applicable headings.

[3] I have determined that the evidence appears sufficient to substantiate three allegations of abuse of authority under Section 77(3)(a). The allegations are set out in Part 4.

2. The Complaint and Conduct of Concern [Section 117(8)(a)]

[4] Constable [REDACTED] stopped Mr. [REDACTED] while he was walking on [REDACTED] [REDACTED] near [REDACTED] shortly after 6 p.m. on the incident date. Constable [REDACTED] detained Mr. [REDACTED] for investigation of a drug offence and handcuffed him. Constable [REDACTED] searched Mr. [REDACTED] by patting him down, looking into a pant pocket, and removing his wallet. Constable [REDACTED] took Mr. [REDACTED] identification out of his wallet and queried him on the police computer in his car. Another officer who was present, Sergeant [REDACTED] took two photographs of Mr. [REDACTED]. Mr. [REDACTED] had no drugs or weapons on him and was allowed to proceed after about 15 minutes.

[5] Mr. [REDACTED] filed a complaint online with the OPCC within an hour of the incident. The Commissioner found an admissible complaint of abuse of authority under Section 77(3)(a), and an investigation proceeded. The investigator, Sergeant [REDACTED] [REDACTED] of the Vancouver Police Department, filed a final investigation report on March 8, 2021. The discipline authority, Inspector [REDACTED]

█████ issued a notification under Section 112 on March 22, 2021, finding that Constable █████ conduct did not constitute misconduct.

[6] The Commissioner reviewed the discipline authority's decision and concluded that there was a reasonable basis to believe that it was incorrect. In his Notice, the Commissioner expressed the view that the detention and search of Mr. █████ violated his *Charter* rights, that the discipline authority erred in finding that the search of the wallet was justified by officer safety concerns, and that the discipline authority applied the wrong standard in assessing whether there was oppressive conduct.

[7] Under Section 117(1)(b) I am required to review the final investigation report and the evidence referred to in it to reach an independent decision. Accordingly, this is not a review of the Commissioner's decision or that of the discipline authority. It is a full review of the report and evidence to determine whether it "appears sufficient to substantiate" misconduct.

3. Complainant's Right to Make Submissions [Section 117(8)(b)]

[8] At any time after receiving a copy of the final investigation report in this matter but at least 10 business days before the date of any discipline proceeding, or, if a prehearing conference is to be held, within 10 business days after receiving notice under Section 120(6), the complainant may make written or oral submissions, or both, to the discipline authority or the prehearing conference authority, as the case may be, in relation to one or more of the following matters:

- (a) the complaint;
- (b) the adequacy of the investigation;
- (c) the disciplinary or corrective measures that would be appropriate.

[9] The complainant should be aware that copies of any submissions he makes will be provided to Constable █████ the Police Complaint Commissioner, the investigating officer, the prehearing conference authority, and/or myself as the discipline authority pursuant to Section 117(9).

4. Allegations Considered [Section 117(8)(c)]

[10] My identification of the allegations at this stage is not a finding of misconduct; rather it provides a framework for considering whether the evidence appears sufficient to substantiate any particular misconduct specified in Section 77 of the Police Act.

[11] Based on the facts disclosed by the final investigation report and related materials, I have identified and considered the following allegations.

1. Abuse of Authority, pursuant to section 77(3)(a)(ii)(B) of the Police Act, in the performance, or purported performance, of duties, by intentionally or recklessly detaining ██████████ without good and sufficient cause.
2. Abuse of Authority, pursuant to section 77(3)(a)(ii)(A) of the Police Act, in the performance, or purported performance, of duties, by intentionally or recklessly using unnecessary force on ██████████
3. Abuse of Authority, pursuant to section 77(3)(a)(ii)(B) of the Police Act, in the performance, or purported performance, of duties, by intentionally or recklessly searching ██████████ without good and sufficient cause.

5. Does the Evidence Appear Sufficient to Substantiate the Allegations? [Section 117(8)(d)(i)]

A. Review of the Evidence and Materials

i. Sergeant ██████████

[12] Sergeant ██████████ was interviewed by Sergeant ██████████ on December 15, 2020. He indicated at the outset of his interview that he had reviewed and brought with him the “Incident Investigations Police Authority” section on taking photographs. He later provided two photographs which show Constable ██████████

appearing to pat Mr. ██████ back left pant pocket, and opening and looking into his left front pant pocket.¹

[13] Sergeant ██████ had been working as a Gang Crime Unit [“GCU”] member since May 2019. Historically the unit had not been present in the downtown east side, but due to a recent increase in shootings and violence they had been maintaining a visible presence to ensure safety in the area. This included officers walking and patrolling in the area, one of whom was Constable ██████

[14] On the incident date, Sergeant ██████ ██████ called Sergeant ██████ to advise him about a “meet” of “██████ drug traffickers” in front of th ██████ ████████████████████, an area that he knew to be controlled by “██████ drug dealers. Sergeant ██████ asked for assistance in identifying who was involved in the meet. Sergeant ██████ announced this information over a closed radio channel used by GCU members.

[15] Sergeant ██████ then attended an unrelated stop during which he did not access the GCU channel. Once back in his vehicle he heard there had been a “meet” in or near ████████████████████ a couple of blocks south of the ██████ ██████ He knew this ██████ to be frequented by traffickers for drug-related transactions. He understood that the GCU members were focused on an unidentified male who had met with a known drug trafficker in ██████. Sergeant ██████ proceeded to the area with the intent “to stop this male and identify him.”

[16] Sergeant ██████ was present for Constable ██████ stop of Mr. ██████ He described Mr. ██████ as “...immediately confrontational, belligerent, ... verbally aggressive and somewhat physically aggressive.” Sergeant ██████ noted that his experience is that most people are compliant when dealt with by police, who maintain professionalism especially when dealing with people who are anti-police.

¹ FIR, Attachment I.

[17] Constable ██████ handcuffed Mr. ██████ for officer safety. Mr. ██████ said he was walking to the bus stop on ██████ and had nothing to do with any drug trafficking. After “a minute or two” Constable ██████ searched Mr. ██████ and confirmed his identification. Mr. ██████ had no weapons or drugs on him.

[18] Sergeant ██████ took two photographs of Mr. ██████ with a police issue Blackberry. This was for the sole purpose of aiding in identifying Mr. ██████ if they were unable to identify him, by showing the photo to other police members in the area. He kept the photos but did not share them with anyone. After Mr. ██████ identification was confirmed, the handcuffs were removed, and he left in the opposite direction from his bus stop.

[19] In questioning by Sergeant ██████ Sergeant ██████ said he did not recall receiving the names of the drug dealers in front of the ██████. He confirmed it was Constable ██████ who derived the grounds to detain Mr. ██████ and he was not aware of what Constable ██████ saw before he arrived. He believed Mr. ██████ was handcuffed because of how confrontational and belligerent he was.

[20] Sgt. ██████ said that the observations he made would not have given him grounds to detain Mr. ██████. He did not recall Constable ██████ providing Mr. ██████ his *Charter* rights, and he himself did not provide any. He did not recall Mr. ██████ making any specific comments about a lawyer. He recalled Constable ██████ looking in Mr. ██████ pockets, conducting a pat-down, and checking his waistband, for officer safety.

ii. Sergeant ██████

[21] Sergeant ██████ ██████ is a Sergeant in the beat enforcement team, which has a focus on being present in the downtown east side to gain a working knowledge of the things that are going on there. She was aware of the prevalence of drugs and trafficking in the streets. At the time this incident occurred, there had been a large influx of cash from COVID relief coming into the area, resulting in an increase in drug transactions. Sergeant ██████ confirmed

that [REDACTED] was on the border of the downtown east side, had lots of little “nooks and crannies,” and was “highly used” for drug-related transactions.

[22] On the incident date, she was driving a marked SUV, and saw a group of what appeared to be “high level” drug dealers who did not really fit in the area, compared with the regular occupants. She noted only that they were dressed differently from most downtown east side residents. It was her experience that at times such as benefit payment dates when the residents had ready cash, drug and gang activity would increase.

[23] Sergeant [REDACTED] called Sergeant [REDACTED] and advised him that she had seen this group of people in the area. What she recalled telling Sergeant [REDACTED] was that there were guys there that did not fit in and might be of interest to the GCU. She said she had no other direct involvement after that. She did not recall seeing Sergeant [REDACTED] or Constable [REDACTED] interacting with anyone.

iii. Constable [REDACTED]

[24] Sergeant [REDACTED] interviewed Constable [REDACTED] on January 7, 2021. He is a 15-year member with considerable experience in the downtown east side. He has identified many people in the area who are actively engaged in the drug trade and has been assigned to the GCU for 3 years. He described [REDACTED] [REDACTED] as a typical meet point for drug dealers and mid-level bosses to collect money or exchange larger packages out of view of the police. [REDACTED]

[25] On the incident date, Constable [REDACTED] received information from Sergeant [REDACTED] that there were “well-known drug traffickers” hanging out in front of the [REDACTED]. While driving on [REDACTED] to [REDACTED] he observed a person he knew, [REDACTED] [REDACTED] [REDACTED] walking east on [REDACTED]. Shortly after that he saw another individual he recognized as [REDACTED] [REDACTED] [REDACTED] standing with Mr. [REDACTED] who was not known to him, on the corner of [REDACTED] and

██████████ [It appears from Constable ██████████ other evidence that this was the corner of ██████████ and ██████████

[26] Constable ██████████ said he recognized Mr. ██████████ and Mr. ██████████ from prior dealings in which he had observed them trafficking and been involved in arresting them. He said, in his statement, that he saw them both go with Mr. ██████████ into ██████████ and that for him it was very suspicious that two guys he considered to be mid-level bosses were meeting with an unknown person. He concluded that Mr. ██████████ was most likely a “street level” trafficker working for the other two and they had gone into ██████████ to do a drug transaction.

[27] After they were in ██████████ a few minutes, Constable ██████████ saw Mr. ██████████ leave using a ██████████ rather than the regular paths. He said he did not see Mr. ██████████ after that. He queried them both and found no conditions or wants. Being satisfied with their identity, he said, he had no reason to stop or detain them for investigation.

[28] When Constable ██████████ saw Mr. ██████████ on ██████████ he appeared to be very aware that police were in the area, “acting suspiciously, looking at [Constable ██████████ car], checking over his shoulder,” which made Constable ██████████ suspect Mr. ██████████ had engaged in a drug transaction in ██████████

[29] Constable ██████████ also said he observed that Mr. ██████████ had a large bulge in his front hoody pocket, which gave him “reasonable suspicion he was carrying money or drugs or both,” based on the interaction he had seen with Mr. ██████████

[30] When he stopped Mr. ██████████ Constable ██████████ identified himself as a police officer and told Mr. ██████████ he was being detained for a drug investigation. Right away Mr. ██████████ complained of harassment, saying he would call his lawyer. Constable ██████████ said he gave Mr. ██████████ his rights in “layman terms.” Mr. ██████████ said he would contact a lawyer.

[31] In his statement, Constable [REDACTED] did not describe Mr. [REDACTED] as confrontative or belligerent, but in his notebook he wrote “uncooperative” and “confrontational.”

[32] There was nothing in Constable [REDACTED] notes about a bulge in Mr. [REDACTED] pocket.

[33] Constable [REDACTED] placed Mr. [REDACTED] in handcuffs, searched Mr. [REDACTED] front hoody and conducted a pat-down search, finding no money or drugs. Constable [REDACTED] added, “I did get Mr. [REDACTED] ID.” He did a query to make sure Mr. [REDACTED] was not wanted, released him from the handcuffs, and gave him his badge number. Mr. [REDACTED] left on foot.

[34] In questioning by Sgt. [REDACTED] Constable [REDACTED] said he was in uniform and driving a Dodge Charger with push bars that made it readily identifiable as a police vehicle. He heard Sergeant [REDACTED] over the GCU channel saying there was “a big drug meet in front of the [REDACTED] [REDACTED].” He recalled a description of clothing. He went to the area and saw Mr. [REDACTED] and Mr. [REDACTED]. Based on the clothing descriptions, he formed grounds that they were the subject individuals.

[35] Constable [REDACTED] intended to detain Mr. [REDACTED] when he stopped him. He gave him his *Charter* rights in layman terms. Mr. [REDACTED] said he wanted to call a lawyer. Before he searched Mr. [REDACTED] Constable [REDACTED] wanted to make sure he was aware of his rights and he told him he would be given the opportunity to call a lawyer.

[36] Sergeant [REDACTED] asked Constable [REDACTED] how he searched Mr. [REDACTED]. Constable [REDACTED] said the large bulge in his hoody pocket was the first area he searched. He patted that and located a package of cigarettes and a pen. He then did a pat-down of his jeans pockets, which he described as an officer safety search. The area of concern was where he could reach; the front bulge of his

hoody and his pants pockets. He did not search any further than the areas of immediate concern.

[37] Sergeant ██████ asked Constable ██████ how he located Mr. ██████ ID. Constable ██████ hesitated in his response and said he could not remember where he found the wallet. He said he “saw” that it had some sort of ID card in it with Mr. ██████ name on it. He could not remember if it had a photo.

[38] In relation to his understanding of his lawful authority to search Mr. ██████ Constable ██████ said he believed he could do a quick search. After some hesitation, he said, “A person does not have to identify themselves to me, I know that.” He added that he understood the scope of the search on detention was not “super intrusive,” that he could not search for evidence, and he knew he could not strip search. He could search for weapons. Sergeant ██████ said, “for officer safety,” and Constable ██████ agreed.

[39] Sergeant ██████ asked Constable ██████ how long Mr. ██████ was in custody and after a pause, he estimated it was between 10 and 15 minutes. He agreed that after he obtained Mr. ██████ ID, he would have conducted a query and made some notes.

[40] In Constable ██████ narrative in the PRIME report, written after the incident, he described the incident as follows:

On May 4th, 2020 at 1820 Hours, D/Cst. ██████ ██████ while on duty with the Vancouver Police Gang Crime Unit in full uniform and driving an unmarked police vehicle was advised by Sgt. ██████ ██████ that there were several well known drug traffickers hanging out in front of the ██████ located at ██████

Sgt. ██████ ██████ parked across from the contacted GCU members to assist with coming into the area.

D/Cst. ██████ ██████ drove west bound on ██████ up to ██████ into the area and observed ██████ ██████ ██████ a well known drug trafficker leave the area and walk East bound on ██████

At the same time, D/Cst. [REDACTED] [REDACTED] observed [REDACTED] Said in the company of [REDACTED] [REDACTED] [REDACTED] standing at the corner of [REDACTED] and [REDACTED].

[REDACTED] was wearing a black and white winter jacket with the hood up despite the fact that the weather was warm.

[REDACTED] is known to D/Cst. [REDACTED] [REDACTED] from previous dealings and is known drug trafficker from the downtown eastside. [REDACTED] was unknown to D/Cst. [REDACTED] [REDACTED] at the time of the observations...

D/Cst. [REDACTED] [REDACTED] advised the other GCU Units that he had observed [REDACTED] and [REDACTED] go into [REDACTED] from [REDACTED] D/Cst. [REDACTED] [REDACTED] is aware that [REDACTED] is an area where drug traffickers will do meet ups for large quantity drug "drops" or money drops due to its proximity to the downtown eastside and that it is not patrolled by police on a regular basis. [REDACTED]

D/Cst. [REDACTED] [REDACTED] could no longer see [REDACTED] or [REDACTED] in [REDACTED]

After approx. 5 minutes, D/Cst. [REDACTED] [REDACTED] observed as [REDACTED] exited [REDACTED] onto [REDACTED] and was walking down one of [REDACTED] to get to the side walk.

D/Cst. [REDACTED] [REDACTED] drove North on Columbia St. and observed as [REDACTED] was walking Eastbound on the Northside of [REDACTED]

[REDACTED] looked over D/Cst. [REDACTED] [REDACTED] and put his head down and began to avoid eye contact. D/Cst. [REDACTED] [REDACTED] believed that [REDACTED] was attempting to avoid eye contact and did not want to interact with police.

D/Cst. [REDACTED] [REDACTED] observed as [REDACTED] had a large bulge in his front hoody pocket and advised Sgt. [REDACTED] [REDACTED] that he was going to stop [REDACTED] for a drug investigation. D/Cst. [REDACTED] [REDACTED] had reasonable suspicion that [REDACTED] could be carrying drugs/money based on his interaction with [REDACTED]

D/Cst. [REDACTED] [REDACTED] pulled up to [REDACTED] and identified himself as Vancouver Police and advised [REDACTED] he was being detained for a drug investigation.

[REDACTED] was immediately confrontational and said it was harrassment and was going to call a lawyer. D/Cst. [REDACTED] [REDACTED] advised [REDACTED] of his right and laymen terms. [REDACTED] agreed that he would tell his lawyer he was being harrassed and said he had no drugs on his person.

D/Cst. [REDACTED] [REDACTED] obtained [REDACTED] ID and conducted a query of [REDACTED] and observed he had no current charges but has been identified as an associate of [REDACTED] and [REDACTED] in the past.

[REDACTED] was released at the scene after a patdown search revealed the bulge in his front pocket was cigarettes and a pen.

[REDACTED] requested our badge numbers which were provided.

[As written.]

[41] In a follow-up email after the interview, Sergeant [REDACTED] asked Constable [REDACTED] to articulate his grounds for applying handcuffs to Mr. [REDACTED]. He replied,

I applied handcuffs to Mr. [REDACTED] because of officer safety reasons. Mr. [REDACTED] was confrontational from the initial contact, and due to his behavior I believe that for my safety and his safety that he should be placed in handcuffs during the investigation.”

iv. [REDACTED] [REDACTED]

[42] Mr. [REDACTED] complaint submitted to the OPCC website reads as follows:

[REDACTED]. I got pull over by officer # [REDACTED] at [REDACTED] and [REDACTED] he handcuff me and ask me for my name and i told him my name is [REDACTED] he then ask for my last name and i didnt want to give it to him so he unlawfullh search me while searching he and his partner (while recording me) accuse me of being a drug dealer and then he told me to get out of here ([REDACTED] after he realise there was no drugs on me or any criminal history. They didnt listen to me but just unlawfully handcuff me. [As written.]

[43] Sergeant [REDACTED] interviewed Mr. [REDACTED] on November 20, 2020. Mr. [REDACTED] said that he went downtown to talk to his friend [REDACTED] because he was looking for a job. He has been hanging out downtown since 1992 and knows a lot of people there. [REDACTED] whom he had known since [REDACTED], said he would give him a job at his store. He went for a walk, saw people he knew; and he was socializing. He knew [REDACTED] [REDACTED] through his uncle, who worked at [REDACTED] [REDACTED] in [REDACTED]. On the incident date he bumped into [REDACTED] [REDACTED], and they hung around for an hour or an hour and a half. He noticed that he was being observed by three police cars, an SUV and two black cars.

[44] Mr. [REDACTED] decided to go home, and he shook [REDACTED] hand. As he was leaving, while still walking with [REDACTED] he saw Constable [REDACTED] driving slowly behind him. He and Constable [REDACTED] looked at each other. Constable [REDACTED] turned right onto [REDACTED] near [REDACTED] and Mr. [REDACTED] saw that he was watching him from the rear view mirror. Mr. [REDACTED] turned toward [REDACTED]. Constable [REDACTED] then came up behind him, parked, and watched him.

[45] Mr. [REDACTED] was going to go straight on [REDACTED] but he saw the one car [presumably Constable [REDACTED] parked with lights on and then another police car, an SUV. He turned to avoid them, because he did not want conflict, and had done nothing wrong. They saw he was trying to avoid them and sped at him.

[46] The SUV came quickly and drove over the sidewalk, blocking him. He stopped and pulled his hands out of his pocket. The officer, presumably Sergeant [REDACTED] came out toward him, "like he was in the movies". Mr. [REDACTED] asked why he blocked him and what did he do wrong. Then Constable [REDACTED] pulled his car onto the sidewalk and blocked him. He got out and came toward him.

[47] Mr. [REDACTED] spoke nicely and said hello, that they must want to talk to him. He asked what was going on. Sergeant [REDACTED] pulled out his camera and asked what his name was. He gave them his first name and said he did not need to tell them his last name. Sergeant [REDACTED] was smiling with the camera.

[48] Constable ██████ told Mr. ██████ he was under arrest, but Mr. ██████ did not understand what he said. Mr. ██████ put his hands forward and Constable ██████ said, “no, put them behind your back.” He believed that Sergeant ██████ was taking a video. Constable ██████ handcuffed him behind his back. Mr. ██████ asked the officers to take him to the police station instead doing this in public. They started searching him. No one was wearing masks. A ██████ ██████ officer [presumably Sergeant ██████] came up in an SUV, and observed.

[49] When Constable ██████ started to search him, Mr. ██████ said he did not consent to a search. He said he would give his name, but he did not consent to Constable ██████ taking his ID. He asked to be taken to jail, and to speak to their sergeant, but Constable ██████ said, “No, I am in charge.” Constable ██████ searched him and took out everything. He took out Mr. ██████ wallet and looked into his backpack.

[50] Sergeant ██████ was smiling and asking him where he worked and what he was doing here, and how he knew ██████ Mr. ██████ told him they worked together. Sergeant ██████ asked what he was doing here, and Mr. ██████ said, “I don’t need to talk to you anymore.” He told them it was wrong that they handcuffed and searched him, and humiliated him in public, and also approached him without a mask.

[51] Constable ██████ pulled out Mr. ██████ identification and went to his car with it. Mr. ██████ told Sergeant ██████ he came here to look for a job. Sergeant ██████ was smiling as if he knew he was doing something wrong. Mr. ██████ kept telling them it was wrong. They were the gang squad, but he was not a gang member or a drug dealer. He told them they were both behaving badly, and they should know how to treat citizens. The female officer continued to watch.

[52] Constable ██████ came back from the car and took off Mr. ██████ cuffs. He told him he knew he was not a drug dealer. Mr. ██████ asked Constable ██████ to put him in the car, not keep him handcuffed in the street. Constable

██████ told him to shut up and kept him handcuffed. He gave him a lecture and said, "I am doing my job." Mr. ██████ asked what he did wrong, and Constable ██████ told him if he hung out with ██████ he was going to get handcuffed.

[53] Mr. ██████ said, "Keep recording me, you are committing a crime, share it with your superiors." Sergeant ██████ stopped smiling and put his phone back into his pocket. Mr. ██████ thought it looked like he was trying to delete the video.

[54] He asked Constable ██████ four or five times to take off the handcuffs but Constable ██████ said he still wanted to talk to him. Mr. ██████ told him he was breaking the law, he did nothing wrong. They didn't find anything in his pocket; he had only his cigarettes, a mask and a napkin in it.

[55] Constable ██████ then told Mr. ██████ he was free to leave, that he could pick up his stuff. While he was doing that, he said, the police were saying things. He saw that the female officer was still there, watching. Mr. ██████ turned backward toward the ██████, and they were yelling at him, calling his name and saying, "you are going the wrong way," asking him why he would go back to Hastings, and telling him to stay away from the drug dealers.

[56] Mr. ██████ said there were a few people sitting on the sidewalk and he got mad and swore at the officers, saying, "You know you are wrong, calling my name, telling me I am going the wrong way." He doesn't give his name out to anyone. He crossed the street toward where the woman officer was. He left while the officers were still talking.

[57] When Mr. ██████ got home, his wrists were marked and uncomfortable, and he made his complaint.

[58] In questioning by Sergeant ██████ Mr. ██████ said he knew Constable ██████ vehicle was a police car because of the push bar in the front. He knew the downtown east side well and had worked there all his life. He was aware that drugs were sold there but they were also sold in Surrey.

[59] Mr. ██████ knew that ██████ last name was ██████ and that the police knew him. He did not believe he sold drugs and had never seen or heard of him doing so. On the incident date he had met with Mr. ██████ and a few other friends, to socialize. He only ever met them downtown and did not know where they lived. Mr. ██████ was aware that Mr. ██████ and Mr. ██████ were from ██████

[60] Mr. ██████ did not know the name of ██████. He did not hang around there. He had gone into ██████ on the incident date because he was going to go on the SkyTrain. He walked there with ██████ but they separated halfway into ██████ because Mr. ██████ decided to take the bus instead. He was in ██████ a maximum of three minutes, standing and talking. They did not stand close as ██████ had a ██████ so they were keeping distance. They shook hands, and he went to catch the bus.

[61] When the police stopped him, they asked his name, he said ██████ and they asked his full name and date of birth. He did not want to tell them and asked why they had stopped him. They said he was hanging around with ██████. He asked if there was any other reason, and they said no. When he put his hands in front, Constable ██████ said no, put them around your back. Mr. ██████ denied that he had been told he could call a lawyer or that he asked to do so. He only asked them to call their supervisor.

[62] Mr. ██████ told Sergeant ██████ to go ahead and record, he would report it to the Commissioner. He said he knew his rights and that walking on the sidewalk was not a crime. He asked to be released from his handcuffs but Constable ██████ wanted to give him a lecture first.

[63] Mr. ██████ started talking about a prior police complaint he had made. He believed that the officers knew he had a shoulder injury from the prior complaint and that Constable ██████ handcuffed him behind his back on purpose to hurt him. He believed they were following him and knew who he was, and that they

had seen the report on their computer. He expressed mistrust of the Vancouver Police, as he has seen them doing things over the years. He provided examples of officers doing lines of cocaine, spying through peepholes in café walls, and fabricating charges. He said that is why he doesn't like to give the police his name, because they will view him as a criminal.

[64] Mr. ██████ said he had never sold drugs, encouraged or directed anyone to buy them, nor held them for anyone. He believed Constable ██████ targeted him as a drug dealer because they had a file on him for hanging around the downtown east side.

[65] Mr. ██████ spent a considerable time during the interview telling stories about "dirty cops". He believed that these kinds of police made law-abiding people turn to crime and targeted them based on race. He often confronted them for abusing people and in some cases he believed the officers had been transferred out of the downtown east side because he had confronted them. He believed that the police were not happy with him, and that every time they saw him, they got excited, but he was just a citizen doing his part to keep the system clean.

[66] Mr. ██████ believed that as a fellow ██████ Constable ██████ should have refrained from abusing him. He expressed the opinion that Constable ██████ was a liability to the department. He believed that Sergeant ██████ played an equal role, but when he made his complaint, he did not include his badge number because he forgot it. He would like Constable ██████ to be suspended because he was showing the other officer how to abuse a fellow ██████

[67] Mr. ██████ also shared with Sergeant ██████ a lengthy personal history which included ██████ an ██████, almost dying from ██████ having ██████, and an incident ██████

██. Mr. ██████████ became very emotional and Sergeant ██████████ ended the interview.

B. Analysis

[68] In order to be substantiated, each of these allegations requires a finding of intentional or reckless abuse of authority. The analysis entails more than simply finding a breach of the *Charter of Rights and Freedoms*.

[69] The law in BC relating to the mental element for a finding of misconduct under the *Police Act* comes primarily from the cases of *Lowe v. Diebolt*², and *Scott v. British Columbia (The Police Complaint Commissioner)*.³ In *Lowe*, Justice Myers found that ignorance of the law does not necessarily amount to recklessness, stating:

The question of misconduct is different from whether a *Charter* breach occurred, and also from whether evidence obtained from an illegal search should be excluded. That is clear from the definition of the charged misconduct, which requires recklessness or intent. The “intent” cannot refer to the physical act of the search, because it is virtually impossible to conduct a physical search non-intentionally. It must refer to the *mens rea*, or state of mind of the officer. Recklessness must be interpreted in the same manner. The fact that an officer is ignorant of the law related to searches does not, by itself, indicate intent or recklessness. It is more in line with negligence, or, for that matter, poor training.⁴

[70] In *Scott*, Justice Affleck considered the mental element for abuse of authority by oppressive conduct under Section 77(3)(a), and found that “the section should be read to apply to conduct which has a serious blameworthy element and not simply a mistake of legal authority alone.”

² 2013 BCSC 1092

³ 2016 BCSC 1970

⁴ Op cit., para. 46

[71] I take guidance from these views in considering whether the evidence in this matter appears sufficient to substantiate findings of misconduct. The analysis is first whether it appears that Constable ██████ breached the *Charter* in his interaction with Mr. ██████ and then whether it appears that he did so recklessly or intentionally.

i. Detention Without Cause

[72] Constable ██████ articulated grounds for detaining Mr. ██████ was a reasonable suspicion that he was involved in a drug transaction. This entails a consideration of whether those grounds were objectively supported, and whether Constable ██████ held a genuine subjective belief in the sufficiency of them.

[73] Constable ██████ had seen Mr. ██████ go into an area where drug exchanges took place, with a known drug trafficker. Constable ██████ also saw Mr. ██████ attempt to avoid the police, and that he had a bulge in his front hoody pocket.

[74] Sergeant ██████ referred to the following well-known passage from *R. v. Mann*⁵, which sets the standard for investigative detention:

45 ... police officers may detain an individual for investigative purposes if there are reasonable grounds to suspect in all the circumstances that the individual is connected to a particular crime and that such a detention is necessary.

[75] In *Mann*, the police knew there was a crime and the issue was whether there was a sufficient nexus between that and the suspect. In this case, Constable ██████ did not see a drug transaction. It was more a case of speculation that there may have been a crime; speculation that turned out to be wrong. However, the observations that Constable ██████ says he made before

⁵ 2004 SCC 52

he stopped Mr. [REDACTED] probably objectively meet the threshold of *Mann* grounds for investigative detention.

[76] Unfortunately, the question to my mind is less whether these articulated observations were objectively sufficient than whether Constable [REDACTED] genuinely relied on a subjective belief in those grounds when he stopped Mr. [REDACTED]. For a number of reasons I am concerned that he may have stopped him for an ulterior purpose.

[77] Firstly, Sergeant [REDACTED] said that he intended to stop Mr. [REDACTED] for the purpose of identifying him and said that Sergeant [REDACTED] had asked for assistance identifying people in the group. Sergeant [REDACTED] specifically stated that he did not have enough grounds for detention. Based on Mr. [REDACTED] statement, Sergeant [REDACTED] was the first vehicle to block him, which itself would have been a detention without grounds. Sergeant [REDACTED] use of the camera and explanation for it also suggest that the aim of the stop was to identify Mr. [REDACTED].

[78] Secondly, Sergeant [REDACTED] reason for calling the GCU was the presence of people from outside the area in front of the [REDACTED] whom she believed might be persons of interest to the GCU. She did not mention "[REDACTED] drug dealers in her statement, instead relying on out-of-place clothing, but it is clear that the message received by the GCU members was race-based. That kind of profiling would be problematic if the detention were merely based on skin colour. Although that does not appear to be the case, concern about the appearance of profiling, coupled with lack of grounds, may provide an explanation for Sergeant [REDACTED] leaving that detail out of her evidence.

[79] Whether or not this originated as a targeted focus on [REDACTED] individuals, what concerns me in relation to Mr. [REDACTED] is the suggestion that the stop was part of a policy of identifying unknown individuals who associate with drug dealers. The remarks Mr. [REDACTED] attributes to Constable [REDACTED] are

consistent with that, and it appears to be further supported by Constable [REDACTED] characterization of the stop in the CAD entry as “Intelligence Information”⁶ and in the PRIME entry as “Intelligence – Drugs – Completed.”⁷

[80] I take no issue with an officer who wishes to identify a person and legitimately elevates their grounds by making sufficient observations to justify a stop. My concern is whether Constable [REDACTED] genuinely did that.

[81] The investigating officer pointed out that Constable [REDACTED] statement, in which he said that he saw both Mr. [REDACTED] and Mr. [REDACTED] with Mr. [REDACTED] was inconsistent with his PRIME report, where he stated that Mr. [REDACTED] had left before he saw Mr. [REDACTED] with Mr. [REDACTED]. This at very least reflects on Constable [REDACTED] ability to recall a fairly crucial aspect of the events. It may also suggest a desire to enhance his grounds retrospectively.

[82] I am concerned as well that Constable [REDACTED] assertion of a belief that a crime had occurred is inconsistent with his decision not to stop Mr. [REDACTED] despite having seen him leave [REDACTED] “suspiciously”. He explained this decision by stating that he was satisfied with Mr. [REDACTED] and Mr. [REDACTED] *identification* and therefore had no reason to stop or detain them.

[83] Given their known reputations, he arguably had more reason to stop them for a purported drug deal in [REDACTED] than he did the unknown Mr. [REDACTED]. Again, to my mind, this supports an inference that identification of Mr. [REDACTED] was the sole objective.

[84] I am mindful of the fact that Constable [REDACTED] cited two additional observations in support of his grounds. The first was that Mr. [REDACTED] made evasive maneuvers to try to avoid the police, which he admittedly did. Notably, however, so did Mr. [REDACTED].

⁶ FIR, Attachment F, 20200504-RPT-CAD [REDACTED]

⁷ FIR, Attachment F, 20200504-RPT-PRIME_20-79682

[85] The second was the bulge in Mr. ██████ front pocket, where he was admittedly carrying cigarettes and some other items. My concerns in relation to this observation are that: (1) there was no mention of it in Constable ██████ notes or the CAD entry; (2) Sergeant ██████ did not make the same observation; and (3) apparently Constable ██████ did not draw it to his attention. This further supports an inference that the discovery of the items in his pocket may have been used to retroactively justify the stop, when it became apparent that Mr. ██████ was going to complain.

[86] There are unfortunately enough discrepancies in Constable ██████ evidence to potentially substantiate a finding at this stage that the stop was made intentionally without grounds for the ulterior purpose of identifying Mr. ██████. This inference is additionally supported by the manner of the search, as discussed below in Part iii.

ii. Unnecessary Force

[87] This allegation relates to whether the use of handcuffs by Constable ██████ supports a finding that he intentionally or recklessly abused his authority by applying unnecessary force.

[88] If the detention was intentionally made without cause, there would clearly be no authority to apply handcuffs. I will consider here whether the use of handcuffs was justifiable if the detention were found to be justifiable.

[89] Sergeant ██████ included in his report the departmental policy relating to the use of handcuffs:

VPD policy 1.2.3 “Use of Force – Restraint Devices” states (in part): The safety of the prisoner and the safety of the officer are two lawful reasons why restraint devices (e.g. handcuffs) may be applied; however, an officer must articulate in each circumstance the reasons why they applied a particular restraint device(s) to the prisoner.

[90] It is clear that whatever might be said about the stop, Constable ██████ was aware his authority was limited to what he could do in a lawful investigative detention. He asserted that the handcuffs were applied for officer safety, and that is also what Sergeant ██████ believed.

[91] Departmental policy does not draw a stark line that permits handcuffing for arrest but not for investigative detention. The decision to handcuff is left to the officer who is making the decisions, and rightly so. It must be permissible that, in the event that a detention raises sufficient concerns about officer safety, a subject may be restrained.

[92] The departmental policy accords with case law regarding the use of handcuffs in investigative detention. In *Akintoye v White*,⁸ a civil suit against two police officers for excessive force, Justice Fleming held that there was no hard rule against the use of handcuffs in an investigative detention. As with any use of force, the issue is whether it was reasonably necessary. Justice Fleming held that the officers were required to have reasonable grounds to believe officer or public safety is at risk.

[93] Turning to the events at hand, Constable ██████ pulled his vehicle in front of Mr. ██████ got out, and told him he was being detained for a drug trafficking offence. The evidence supports a conclusion that Sergeant ██████ had already blocked Mr. ██████ on the other side.

[94] It also appears that Mr. ██████ fairly immediately challenged the officers' authority by being confrontative and questioning the justification for his detention. However, based on the various descriptions, Mr. ██████ reaction appears to have fallen short of aggression, either verbal or physical, as characterized by Sergeant ██████ Constable ██████ did not describe Mr. ██████ as aggressive. He wrote "confrontational" and "uncooperative" in his notes, but in his statement

⁸ 2017 BCSC 1094 (CanLII),

to Sergeant [REDACTED] he mentioned only that Mr. [REDACTED] asserted his intention to call a lawyer.

[95] If Mr. [REDACTED] did ask to call a lawyer, it may have implications for the search, but it must be noted that Mr. [REDACTED] denies that. Sergeant [REDACTED] did not recall Mr. [REDACTED] saying anything about a lawyer, but he also did not recall Constable [REDACTED] giving Mr. [REDACTED] his rights.

[96] Notably, however, Mr. [REDACTED] also said that he offered his hands for handcuffing. In addition, it appears that Mr. [REDACTED] was handcuffed very soon after being detained. The investigator found that the handcuffs were applied and Mr. [REDACTED] ID was run on the computer within a minute of the stop, so it would appear there was very little interaction of a type that would support officer safety concerns, before the handcuffs were applied.

[97] This timing and the various descriptions of Mr. [REDACTED] actions suggest that perhaps any officer safety concerns could have been dealt with verbally. There is no suggestion that Constable [REDACTED] gave Mr. [REDACTED] a choice between cooperating or being handcuffed.

[98] In OPCC case No. 2016-11505, that is what the officer did (although the matter escalated into significant force after that). Adjudicator Oppal observed, “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 noncooperation with violation of a legal obligation.”⁹ By the same token, it may be a mistake to confuse noncooperation with a threat to safety.

[99] If Constable [REDACTED] in fact believed he had grounds to investigate Mr. [REDACTED] he could have asked him if he would submit to a frisk search without being handcuffed. Given his innocence and the offer of his hands, Mr. [REDACTED]

⁹ In the Matter of OPCC File No. 2016-11505), unreported, Page 11.

may have chosen to cooperate. The evidence does not suggest that any verbal exchange of this kind occurred before the handcuffs were applied.

[100] Like the articulated basis for his detention, the evidence appears to substantiate a finding that Mr. ██████ noncooperation may have been used to retroactively justify the use of handcuffs. I note as well that based on Mr. ██████ evidence, Constable ██████ kept him in handcuffs longer than he had to, in order to “lecture him”. This is supported by the timing as found by the investigator, Constable ██████ own time estimate, and the CAD report. It is not explained, as suggested by the investigator, by the need to make notes. It must also be noted that very early in the interaction, Constable ██████ was aware that the bulge in Mr. ██████ pocket was neither weapons nor drugs.

[101] At this stage the evidence appears sufficient to substantiate an intentional use of unnecessary force by the application and prolonged use of the handcuffs.

iii. Search Without Cause

[102] As with the use of handcuffs, a finding that the stop was intentionally made without authority would remove any justification for the search. I will consider here whether the evidence appears to substantiate a conclusion that the scope of the search intentionally or recklessly exceeded what was reasonable for a lawful investigative detention.

[103] A search incidental to investigative detention is generally confined to a pat-down for the purpose of discovering weapons and ensuring officer safety. The removal of items from Mr. ██████ front pocket in my view raises no issue, if the detention was justifiable.

[104] It is clear from the photograph taken by Sergeant ██████ that Constable ██████ also looked into Mr. ██████ pockets. This may be somewhat outside the legitimate scope of a search for officer safety purposes, but not in my view to the point of misconduct, again, if the detention was lawful.

[105] However, as noted by the Commissioner in the Notice, the removal of Mr. ██████ wallet and of his identification from it is problematic. Removal of the wallet from a pocket might itself not be clearly outside the scope of a search for officer safety.¹⁰ However, Constable ██████ did not in fact suggest that his reason for removing the wallet was officer safety.

[106] This is not a case like *R. v. Crocker*¹¹, referred to by the discipline authority, in which the officer expressed a genuine belief in officer safety concerns based on surrounding circumstances. The Court in that case found that the trial judge applied too high a standard in rejecting the officer's subjective belief on the basis that it was vague and based on a hunch.

[107] In this case, Constable ██████ was vague about how he came into possession of the wallet and the identification. He did not assert a subjective belief at all. In addition, removing Mr. ██████ identification from his wallet to run him [and enter him] on the computer was clearly outside the permissible scope of a search for officer safety.¹²

[108] This action squarely thwarted Mr. ██████ objections to providing his identity, and Constable ██████ admitted that he knew he could not require Mr. ██████ to identify himself. It is significant as well that at the time the wallet and ID were obtained, Constable ██████ knew Mr. ██████ had no drugs or weapons.

[109] Sergeant ██████ did not consider Constable ██████ admission in his analysis. He found that while Constable ██████ had breached Mr. ██████ rights in obtaining his wallet and removing his identification, this was "an error in judgement, or at worst carelessness," and there was "no meaningful level of moral culpability." I do not have the discipline authority's reasons before me; however it appears he must have accepted that characterization.

¹⁰ See *R. v. Bassi*, 2019 BCSC 1224

¹¹ *R. v. Crocker*, 2009 BCSC 38

¹² *R. v. Bassi*, op cit, paragraphs 81 & 82

[110] While the *Lowe* and *Scott* cases have established that ignorance of the law or lack of training are not sufficient to establish the serious blameworthiness required for a finding of oppressive conduct, there is no evidence in this matter to support findings of either mistake or lack of training, nor is there evidence of a careless removal of the wallet and the ID from it.

[111] In my view, if an officer who breaches a well-known *Charter* right wishes to claim ignorance of the law or lack of training, he or she would need to provide an evidentiary foundation for that claim. Here, the evidence appears to show, at this stage, only that the officer knew the limits of his authority and deliberately exceeded them.

[112] On my analysis at this stage of the proceedings, these final actions on Constable ██████ part appear to reflect back on the whole sequence of events and substantiate, as discussed above, that the stop was made for an ulterior purpose. If that is the case, each successive interference with Mr. ██████ liberty and bodily integrity would fall within the *Police Act* definition of abuse of authority.

[113] In my view Sergeant ██████ involvement in the stop and taking of the photographs are also problematic, but I am not asked here to consider his actions. Mr. ██████ expressed a desire to pursue a complaint against him and if that is still the case, it is a matter for the Commissioner under Section 93.

[114] It is important to emphasize that the review at this stage is based entirely on the report and accompanying materials. My observations with respect to apparent credibility issues remain open to be refuted or explained by the member, should there be a discipline proceeding.

5. Notification of Misconduct and Next Steps [Sections 117(7) & (8)(d)]

[115] I have determined that the evidence referenced in the report appears sufficient to substantiate the allegations set out in Part 4 and to require the taking of disciplinary or corrective measures.

[116] Sergeant ██████ observed that Constable ██████ training records did not include any specific reference to investigative detentions and attendant powers of search. Assuming Constable ██████ has no service record of discipline, the range of penalties I am considering includes:

- (a) training or retraining in police authority relating to arrest, investigative detention, and incidental search and seizure, pursuant to Section 126(1)(f);
- (b) an apology to Mr. ██████ pursuant to Section 126(1)(h); and
- (c) a reprimand or advice as to conduct under Sections 126(1)(i), (j) or (k).

[117] Within 10 days of receipt of this Notification Constable ██████ may file a request under Section 119 to call witnesses at a discipline proceeding.

[118] Constable ██████ will be offered a prehearing conference under Section 120. If he declines a prehearing conference, a discipline proceeding must be convened within 40 business days from the date of this Notification, or by July 14, 2021. I ask that Constable ██████ advise me whether he will accept the offer of a prehearing conference within 5 business days of the later of:

1. the expiry of the time for making a request for witnesses under Section 119(1); or
2. the date of a decision pursuant to Section 119(3)(a) rejecting a request to call witnesses.

[119] If Constable ██████ does not accept the offer of a prehearing conference within the time frame set out in the paragraph above, the offer is withdrawn and a discipline proceeding will be convened on or before July 14, 2021.

DATED at Sechelt, British Columbia, this 18th day of May, 2021.



Carol Baird Ellan, Retired Judge