

Windsor Police Discipline Hearing

In the Matter of Ontario Regulation 268/10

Made Under the Police Services Act, R.S.O. 1990,

And Amendments thereto:

And

In The Matter Of

The Windsor Police Service

With Allegations of Misconduct

Against

Sergeant Christian Gannon, Constable Jeff Coccimiglio, Constable Adam Langlois

Charge: Unlawful or Unnecessary Exercise of Authority

Neglect of Duty

Before:

**Superintendent (Retired) M.P.B. Elbers
Ontario Provincial Police Adjudicator**

Appearances:

**Counsel for the Prosecution: Ms. Allison Johnstone
Mr. Ian Johnstone
Windsor Police Service**

**Counsel for the Defence: Ms. Joanne Mulcahy
Counsel for the Sergeant Gannon, Constables
Coccimiglio and Langlois**

Public Complainant: Mr. Oluwaloba Afolabi (self- represented)

Background

On December 20, 2019 the Windsor Police Service was conducting surveillance on a residence in the City of Windsor. A male party of colour exited the residence and drove to a Shoppers Drug Mart in the City of Windsor. The lone male party exited his vehicle and entered the Shoppers Drug Mart and subsequently met his brother who was present in the Shoppers Drug Mart store filling a prescription. They decided to exit the store and return to Mr. Oluwaloba Afolabi's vehicle while the prescription was being filled and as they approached his vehicle they were arrested via gunpoint, ordered to the ground, handcuffed and placed under arrest.

Within a very short time it was acknowledged by the police officers that the wrong person was placed under arrest by the Emergency Task Force Unit and this was conveyed via radio transmission to the investigating officers. The subject officers arrived approximately one minute after the information was received and they continued the arrest for approximately another ten (10) minutes while they engaged in discussion with the brothers and not removing their handcuffs.

Evidence:

This Hearing commenced on Monday August 08, 2022 in Windsor, Ontario and concluded on Tuesday December 13, 2022. Eleven (11) days of testimony was heard by this Tribunal. One day of Submissions by Counsel was heard on December 13, 2022. Five (5) witnesses testified at this Hearing with twenty one (21) exhibits being tendered.

On Thursday August 11, 2022, the Prosecutor Mr. Ian Johnstone requested the charges of Unlawful or Unnecessary Exercise of Authority and Neglect of Duty against Constable Adam Langlois #17245 be withdrawn. Ms. Mulcahy and the Public Complainant supported this request and as a result the Tribunal withdrew the charges against this officer and proceeded with the charges against the two remaining officers, Sergeant Gannon and Constable Coccimiglio.

Mr. Oluwaloba Afolabi, the Public Complainant was the first witness called by the Prosecution. He testified that he is a thirty (30) year old law student attending the University of Windsor. On December 20, 2019 he departed his residence to meet his brother at the Shoppers Drug Mart who was getting a prescription filled. He arrived at the Shoppers and entered the store. He met his brother and they decided to go out to his vehicle and wait for the prescription to be filled. He testified as they approached his vehicle and were about to enter they were arrested by tactical officers who were wearing masks to cover their faces. They were forced to the ground and issued commands. They were both handcuffed behind their backs.

Afolabi knew there was video cameras at the location and after the incident he spoke to the owner saw the video and received a copy of the interaction in the parking lot with the police. He testified they complied with the officer's directions and identified themselves. He testified that the officers asked about firearms. He was advised that the police had a search warrant for his residence for firearms. He testified that more officers arrived not in tactical gear and they were asking questions. He learned he was mistaken for a person called Sheldon Bayliss. He advised that Sergeant Gannon explained the mistaken identity to him. He testified that a confidential informant had been involved in the investigation for firearms. He testified during his entire time with the police officers from Windsor he was never Cautioned or given his Rights to Counsel nor was his brother. He was also questioned by the DIGS team if he was harbouring Bayliss at his home. He testified that the officers acknowledged they had made a mistake and they apologized to him and his brother. He testified in the latter stages with the DIGSteam they were more cordial however all the questioning was done while he and his brother were in handcuffs.

In cross examination by Ms. Mulcahy, Afolabi testified that it was the Tactical officers which made the arrest of his brother and himself in the parking lot. They did not caution or give his rights to Counsel. Ms. Mulcahy walked Afolabi through the entire Shoppers video (Exhibit #7). She highlighted to Afolabi the officers who he was in contact and how they as the arresting team did not give the brothers their Right to Counsel. She also questioned Afolabi as the DIGS officers entered into the scene that the tactical officers did not communicate that they had not given the brothers their Rights to Counsel. Ms. Mulcahy also indicated to Afolabi that a search warrant was in existence on that day for a firearm at his residence located at 1861 St. Luke Street in Windsor, Ont. At 10.33.58 the handcuffs were removed by the DIGS officer, Constable Langlois. Afolabi was questioned about Bayliss and advised that Bayliss was seen at his residence and also driving his car. Afolabi testified that Sergeant Gannon answered most of his questions.

The second witness to testify was Sergeant Campbell, the investigating officer for this complaint to the OIPRD. He is a seventeen year veteran of the Service. He testified that Mr. Afolabi in his written complaint to the OIPRD that he was a subject of arrest by the Windsor Police Service when he was wrongfully identified and was held in custody by the officers on December 20, 2019. He investigated the complaint and subsequently submitted an Investigative Report which is found in Exhibit 10 at Tab 7. He testified he received the Shoppers video from Mr. Afolabi. He testified that he reviewed the video and after the viewing he recommended charges against Sergeant Gannon, Constable Coccimiglio and Constable Langlois. He testified to the Windsor Police service Directive 730-01 contained in Exhibit 10 at Tab 8(B) which is the Arrest procedures for members of the Service. He testified that the tactical team was utilized in the arrest of the brothers. They were utilized due to the High Risk arrest where a firearm may be in the possession of the accused. He described it as a dynamic situation. Tactical officers present for safety of the Public, officers and the arrested individuals. He agreed that the tactical officers did not read the Rights to Counsel to the Afolabi brothers, nor did the DIGS officers as they kept them in handcuffs after they were aware it was not Sheldon Bayliss who was arrested. Campbell testified he received notes, duty statements, radio transmissions, video, including supplementary reports from all officers involved in the incident.

Campbell testified that the duty reports and notes were not received until late October 2020 due to the complaint being filed in mid-2020.

Ms. Mulcahy began her cross examination of Sergeant Campbell by eliciting from him that he allowed the Afolabi brothers to review the Shoppers tape prior to their interview. Campbell did not allow this before interviewing the subject officers. Mulcahy was critical of Campbell's investigation. She was critical of Campbell not seizing any other video footage from other buildings where she stated it shows Afolabi conducting heat checks, driving quickly and performing Power plays. She was critical of the lack of notes from the Tactical officers which was not revealed until after the disclosure request of March 31, 2021.

Mulcahy systematically went through Exhibit 7 and stopped the video of each frame that a tactical officer's was involved and whether Campbell had received notes or duty reports from those officers. She questioned Campbell as to the complaint lodged by the Afolabi brothers did not speak about the Charter issues. It was also clear she stated that the arrest of the Afolabi brothers was completed by the Tactical officers. She was also critical that Campbell did not ask Afolabi about being detained after the handcuffs were removed.

Mulcahy also questioned Campbell about being in the same promotional competition as Gannon as he was investigating this complaint. Campbell testified he was and brought that to the attention of his superiors who advised him to continue the investigation.

The third witness to testify was Constable Spinarsky #16621 who is a first Class Constable with the Windsor Police Service with ten (10) years police experience presently assigned to Emergency Services Unit. He testified on December 20, 2019 he was assigned to a mobile arrest team along with other tactical officers. They were assigned to arrest Sheldon Bayliss who was believed to be in possession of a firearm. The information they received came from the DIGS unit. He testified they were a support unit for the Service. He testified there was a search warrant to be executed and a High Risk takedown to conduct by his team. Mr. Johnstone referred Spinarsky to Exhibit 7 Tab H which was the Duty report of Sergeant Carbone which outlined the arrest and search to be conducted per the information received from the DIGS unit.

Spinarsky testified that at 1021 they (Breault and himself) exited the ESU vehicle and Breault arrested the driver Mr. Oluwaloba Afolabi and Spinarsky arrested his brother. They had received a photo of the intended target and the officer testified that almost immediately they were aware they did not have the intended target under arrest. Both individuals were handcuffed. DIGS unit apprised of this revelation. No rights to Counsel were given by any tactical officer on scene. Afolabi brothers were taken under control by DIGS Unit at 1027.

Notes were made later at the office by Tactical officers. Search warrant was not executed.

In cross examination by Ms. Mulcahy questioned Spinarsky on the arrest, the search warrant which was in effect and of guns in the Windsor area. She also got Spinarsky to confirm that they had made the arrest on the Afolabi brothers and No rights to Counsel were afforded to the brothers by him or any other tactical officers.

Constable Coccimiglio #20646 was the first member to testify for the Defense. He testified he is a member of the Windsor Police Service recently assigned as a shadow officer in the DIGS Unit. It was a period of time from November 04, 2019 to December 19, 2019 he testified and this position was to observe and learn if he would fit into the Unit.

He testified that on December 19, 2019 he and Sergeant Gannon took up surveillance of 1861 St. Luke Street the last known address of the target Bayliss. Coccimiglio took up a position at 1133AM. At 1157 he testified that a male exited the residence and entered a vehicle in the driveway. The vehicle exited out of driveway.

Sergeant Gannon got beside the vehicle and confirmed the driver to be the target Bayliss, Surveillance terminated at this time. It was 1204PM.

Coccimiglio completed the surveillance report and it was given to Constable Nicholson who was attempting to get a search warrant for the following day.

The target in the surveillance report was reported as a Black male, large build, approximately 6.0 feet tall, wearing a grey sweater, black pants, black beard, white earphones, and sunglasses on his head.

The following day Coccimiglio attended a briefing. Surveillance on the address was to continue. If target exited the residence the surveillance team would follow and the ESU members would affect the arrest. Coccimiglio testified that Bayliss exited the residence. They followed him in the Volkswagen. He did some heat checks. (Bayliss) Bayliss went to the Shoppers Drug mart and eventually parked beside Coccimiglio. Male party believed to be Bayliss entered the Shoppers and Coccimiglio confirmed his identity as he also went into the Shoppers. Information was relayed to Gannon and Gannon advised the ESU members. The plan was to make the arrest in parking lot as they approached their vehicle.

Coccimiglio observed the arrest by the tactical officers. He was advised by Constable Lauzon that the parties arrested were not the target. He exited his vehicle and approached the handcuffed males and also confirmed they were not the targets. He stated Gannon approaches the scene and he had to confirm that Afolabi was who he stated he was. He took control of Afolabi's brother and did not give him his Right to Counsel as he relieved Constable Spinarsky. He testified that Gannon was in charge and that Gannon made the decision to release the brothers. He testified that Afolabi was misidentified however they had to ensure that the gun was not at residence as they had a search warrant and did not want to compromise officer safety.

At 1036 he was advised by Sergeant Gannon that he could leave the scene.

In cross examination by Mr. Johnstone, Coccimiglio agreed that in dynamic situations the Arresting officers (Tactical members) do not always read the rights to Counsel.

Coccimiglio testifies he arrived on scene approximately 90 seconds after the Afolabi brothers were arrested by the ESU team.

Coccimiglio testified that the arresting officers always read the Rights to Counsel.

Coccimiglio testified he asked no questions and upon seeing the brothers he knew they were misidentified. He testified that Sergeant Gannon was conducting the investigation and after he was satisfied the brothers were released from the handcuffs.

He testified that the brothers were cooperative. Coccimiglio testified that there were confidential informants involved in the Bayliss investigation.

Johnstone referred Coccimiglio to Exhibits 14 and 16 which the briefing noted for the events on December 19 and 20, 2019 where Unit One was added to the briefing note. He learned from questioning that Bayliss lived at one point in the rear unit of 1861 St. Luke Street.

Sergeant Gannon # 8769 testified he was a twenty four (24) year member of the Service at the time of the incident and he was in charge of the DIGS Unit as the Sergeant. He also testified he was an eight (8) year member of the Tactical Unit during his career with the Service and in his sixth year with the team he was elected the Team Leader. He also testified he was seconded to the ROPE Unit and worked there for four (4) years.

Sergeant Gannon testified he made notes and they are contained in Exhibit 10 at Tab 9. He also testified he had an independent recollection of the events of December 19 and December 20, 2019.

Gannon testified to the surveillance conducted on December 19, 2019 by himself and Coccimiglio. He outlined the procedures for December 20, 2019, surveillance conducted and the use of the Emergency Services Unit.

He testified that the Search Warrant was granted for the residence. Constable Pope advised on December 20, 2019 that the target had exited the residence and was in the same vehicle as the day before. Surveillance was conducted to the Shoppers Drug Mart. Target exited vehicle and entered the Shoppers. Gannon directed Coccimiglio to enter the Shoppers and confirm the identification of the target. Coccimiglio did this and confirmed the target as Bayliss and the info was communicated to the Tactical team.

When the two males exited the Shoppers and were getting ready to enter the vehicle they were both arrested and handcuffed. Information was communicated to the DIGS unit that the arrested parties were not the intended target. Sergeant Gannon proceeded to the location and arrived approximately two and a half minutes after the information was received from the tactical officers. He testified he believed the rights to counsel were given to the Afolabi brothers.

Gannon testified he spoke to Constable Nicholson and advised him that Bayliss was not arrested. He testified he did not have access to the Nicholson information. Gannon testified he had a number of concerns after the discussion he had with Afolabi. He testified that Afolabi was cooperative, Bayliss did live there at some point, and there was a possibility of a joint possession and control of this investigation regarding the firearm. He wanted more credibility. Gannon believed if the brothers were released it could jeopardize the investigation. He testified as soon as he made the determination that they were not affiliated to Bayliss he advised his officers to release them from custody, no charges and free to go.

He advised the ESU that a search warrant would not be executed. He testified that after he returned from speaking with the ESU team the handcuffs had been removed. He testified that Jordan Afolabi had valid concerns in regards to the arrest and he assured them that the report would reflect this and it would not hinder the careers of either brother. He testified the conversation was cordial. He testified he felt horrible of the mistaken identity.

In cross examination by Mr. Johnstone he had Gannon confirm that the case was a Mistaken Identity. Both brothers were arrested for joint possession of a firearm. He confirmed with Gannon that Gannon confirmed via a side profile on December 19, 2019 that the driver was the target, Bayliss.

On December 19, 2019 Coccimiglio misidentified the target and Gannon did it a second time on the same date. This misidentified information was given to Nicholson for confirmation that Bayliss resided at the address on St. Luke Street. Johnstone continued the cross in relation to the surveillance conducted on both days, info relayed to the ESU team and the fact that the ESU did not give the Rights to Counsel to the brothers. He questioned Gannon in relation to the picture of Bayliss provided at the Briefing on both days. He referred to the notes and duty report of Gannon where the handcuffs were removed however this information was not correct. He had Gannon confirm that Unit One on the address of 1861 St. Luke Street was added on the December 20th briefing sheet as result of the surveillance conducted on the 19th.

He testified that there was no information of Bayliss residing at one point in the rear unit of 1861 St. Luke Street. He testified that after he was satisfied the brothers were not involved they were released.

He testified the Afolabi brothers were in handcuffs when they were making their enquiries and that he made his notes at the office. At no point were the brothers given their Rights to Counsel when in the custody of the ESU or when in the custody of the DIGS Unit.

Gannon testified when questioned by Johnstone that the warrant was still valid after the target was misidentified. He agreed the investigation and detention changed however they were released after he was satisfied that the brothers were not involved.

He testified that Afolabi was being investigated by him through his investigation and that the jeopardy had changed. He testified that Afolabi would have been charged at Police Headquarters if he concluded that Afolabi was involved.

In re-examination by Mulcahy, Gannon testified about side profile shots. He testified there were no side profile shots of Bayliss. He had expressed this via email to the Service prior to this investigation and nothing was changed.

He testified to the arrest procedures for the Service and that the obligation was on the ESU officers who made the arrest. He testified that the ESU was in charge with gun calls. He testified had he known that the Rights were not given he would have directed someone to do this. He testified that Afolabi had similar characteristics to Bayliss.

Afolabi exited the residence that the search warrant was granted.

Findings:

Sergeant Christian Gannon #8769 and, Constable Jeffrey Coccimiglio #20646 are before the Tribunal charged with one count each of Unlawful or Unnecessary Exercise of Authority and one count each of Neglect of Duty.

Submissions were heard on day twelve of the Hearing on the merits of the case by Ms. Johnstone, representing the Windsor Police Service and Ms. Mulcahy, representing Sergeant Gannon and Constable Coccimiglio. The Hearing generated eleven days of evidence and the twelfth day was utilized for submissions by Counsel. Exhibit # 21A, B, C, D, E, F and G were case books of authorities containing forty four (44) cases that were tendered at the Tribunal by the Prosecutor, Ms. Johnstone. Exhibit #20 A and B were case books of authorities containing thirty three (33) cases that were tendered by Defense Counsel, Ms. Mulcahy.

I have considered the cases supplied to me by Counsel. I have read the cases supplied to the Tribunal and while not always on point, have found them to be instructive in my deliberation.

At page 6-138, Legal Aspects of Policing, the discipline offence of abuse of authority is referred to as “unlawful or unnecessary exercise of authority” in some jurisdictions. It consists principally of two issues: unlawful or unnecessary arrest, and unnecessary force.

The Code of Conduct provisions governing unlawful or unnecessary exercise of authority governs situations where a police officer without good and sufficient cause makes an unlawful or unnecessary arrest or uses any unnecessary force against a prisoner or other person contacted in the execution of duty.

The Prosecution and Defense teams have submitted a great deal of cases for the Tribunal to consider and they have for the most part dealt with detention and arrest cases. Some were similar to this incident however, not exactly on point.

I find the most logical conclusion the Tribunal can arrive at in this case is to piece the evidence together which was received in all facets, Documentary and Oral testimony.

We know from testimony that Constable Nicholson was the primary investigator. He had received information from two confidential informants that Sheldon Bayliss was in possession of a firearm. We were also apprised via testimony that guns were prevalent in the Windsor area and this was a mandate of the DIGS Unit which Sergeant Gannon is in charge.

Constable Nicholson outlined in his duty report that the confidential informant advised him in December of 2019 that Bayliss was in possession of a firearm and ammunition. The informant observed this firearm within days of advising the police. Constable Johns another member of the DIGS Unit also received information that Bayliss was in possession of a firearm however, the information was not as recent as that of Nicholson.

Neither source was able to provide an address for Bayliss. One source believed he lived in the St. Luke Road. A Windsor Police check revealed the police attended a residence at 1861 St. Luke in August of 2019 in regards to Bayliss. A check on the residence revealed it was owned by Abiola Afolabi. This led Constable Nicholson to believe it was a rental property.

As a result Nicholson briefed the DIGS unit officers on his information and requested surveillance be conducted on the address at 1861 St. Luke. Sergeant Gannon and Constable Coccimiglio after a briefing on December 19, 2019 and a photograph of Bayliss was supplied by Nicholson took up surveillance on the residence at 1133 hours. The photograph and details are shown on Exhibit 16.

Constable Coccimiglio has the direct eye on the residence. At 1157 hours a male party exited the residence at 1861 St. Luke Unit 1 and got into a grey Volkswagen. Coccimiglio believed it to be the target. The vehicle exited the residence and proceeded to Tecumseth Street. Sergeant Gannon followed the vehicle and got beside the vehicle and positively identified the driver as Bayliss as he was combing his hair. Surveillance was discontinued at 1204 hours.

A surveillance report was submitted to Nicholson.

As a result of the information received from the surveillance, police data bases and confidential informant information Nicholson applied for a search warrant.

Nicholson outlined in his duty report that a second briefing was conducted on December 20, 2019 which included the same photograph of Bayliss and that Unit one was added to the address at 1861 St. Luke Street.

A warrant was subsequently authorized for the residence of Sheldon Bayliss for the firearm situated at Unit One at 1861 St. Luke Street.

Due to the High Risk situation which involved firearms the Emergency Services Unit was requested to assist in the arrest of Bayliss and for the execution of the Search Warrant.

DIGS Unit officers were again tasked with surveilling the Bayliss residence. Constable Pope at 1003 hours reported the target Bayliss as leaving the residence and wearing the same attire as the day before. DIGS officers conducted surveillance and eventually placed him at the Shoppers Drug Mart.

The target believed to be Bayliss entered the Shoppers. Sergeant Gannon instructed Constable Coccimiglio to enter the Shoppers to confirm the identity of the party.

Coccimiglio confirmed to Gannon via telephone that the individual in the Shoppers was Bayliss.

Afolabi (believed to be Bayliss) and his brother exited the Shoppers Drug Mart and proceeded to his vehicle the grey Volkswagen and upon reaching the vehicle the brothers were arrested at gunpoint by the ESU.

Gannon receives information from the ESU team that the bodies arrested were not the target Bayliss.

Gannon proceeds to the location where the parties were handcuffed. He also confirms that the parties arrested were not the target Bayliss. It is unknown if this determination was due to the photographs or due to prior incidents with ESU with Bayliss.

The arrest took place by the ESU at 1021 and the identities of the brothers were confirmed at 1025 from information taken from their vehicle or on their person. At 1035 the ESU leave the scene. Gannon still speaking with the handcuffed brothers and at 1034 the brothers are released from their handcuffs and continue with dialogue with Sergeant Gannon. Nicholson arrives at 1038 and meets with the brothers. The DIGS officers advise of mistaken identity and at 1041 the brothers leave and return to Shoppers after shaking hands with the DIGS officers.

This would be a summarization of what transpired on December 19 and 20, 2019 received from the evidence of the officers, notes and duty reports

One of the points that were made by Ms. Mulcahy in her submissions to the Tribunal was that the officers were not granted an opportunity to view the video from the Shoppers on December 20, 2019 prior to their duty report being submitted to Sergeant Campbell. The Afolabi brothers were given that opportunity prior to their interview.

I find this to be an interesting comment to make about the investigation of Sergeant Campbell. The officers certainly had their notes about the incident which were apparently made at the time or soon thereafter. This is the expected duty of police personnel when they engage in an occurrence.

When addressing the issue of admissibility, I am guided by the Statutory Powers and Procedures Act, section 15 (1):

15(1) Subject to subsections (2) and (3), a tribunal may admit as evidence at a hearing, whether or not given or proven under oath or affirmation or admissible in a court,

- (a) Any oral testimony; and*
- (b) Any document or other thing,*

relevant to the subject matter of the proceeding and may act upon such evidence, but the tribunal may exclude anything unduly repetitious.

The only exceptions to these rules are those things that would be deemed inadmissible in court by reason of privilege. There is no privilege attached to this the duty report or notes of the officers. Therefore relevance is the only remaining test to which I must turn my mind.

It would be inconceivable to think that the notes and duty reports of the officers would not be relevant in proceedings that resulted from that investigation.

The arrest of the Afolabi brothers is the focal issue to deal with on this occurrence.

Counsel have both discussed and also contained in their Brief of Authorities the Storrey case. It offers guidance to the trier of fact. You must understand that the belief for an arrest has to be subjectively held. That is, you need to be convinced that the officer honestly held the belief that they say they held on the day that they made the arrest.

Secondly, that belief has to be objectively reasonable and that means, is whether a reasonable person placed in the feet of the officer, would come to the same belief.

This was also stated in many of the cases brought forth by Counsel for me to review.

On the information that officers had on December 20, 2019 this was reasonable. A search warrant had been signed judicially based on the information supplied by Constable Nicholson. The identification was confirmed by Constable Coccimiglio minutes prior to the arrest and relayed to the ESU officers to act upon. This was their job according to the mission as outlined by Sergeant Carbone for that day.

The arrest was made however within minutes it was determined that the parties arrested were not the target Sheldon Bayliss and the information was communicated to the DIGS team who were responsible for the information. Sergeant Gannon attended the area and also confirmed that the parties in handcuffs were not the intended target.

I find at this immediate time the handcuffs should have been removed from the Afolabi brothers.

When reviewing the notes and duty reports of the officers involved it would appear that is what transpired. In reviewing Gannon's duty report and notes he wrote that the Rights to Counsel was not given to the brothers because it was a mistaken identity and the ESU were operating on his information. He also wrote the cuffs were removed and that the search warrant would not take place. A reasonable person would believe that was what took place.

This is not what Gannon testified to under oath. He testified that the ESU ought to have given the Rights to Counsel as they were the arresting team. That is what the policy of the Windsor Police Service is in regards to this issue. I can state from my experience as a police officer working in various capacities with the Ontario Provincial Police involving operations with ESU members from various Services across Ontario that they are there for the protection of the public and the police officers involved in the specific operation. They are trained for these High Risk takedowns or arrests because of their expertise. They do not know the complexities of the investigation. That is why once it is safe to enter the area of the arrest the investigative team who the ESU is working for makes the "Formal Arrest" as they are aware of the investigation in its entirety not the limited information ESU operates within. Sergeant Gannon was an eight year member of this team, the last two being the Team leader. Sergeant Gannon testified it was the ESU responsibility.

The brothers remained in handcuffs for a significant period of time before Gannon authorized his officers to remove the handcuffs. He also testified that after he learned the brothers were not the target he had to continue the investigation to make sure the brothers were not associated with Bayliss and he was still considering executing the search warrant.

I believe and I find that his notes and duty report do not reflect what he testified to in the Tribunal.

I find that once the Afolabi brothers were arrested by the ESU and they communicated their belief that the intended target was not the parties arrested and Sergeant Gannon attended the area to confirm. The handcuffs should have been immediately removed as indicated by notes and duty report of Sergeant Gannon.

When I look for guidance in Legal Aspects of Policing at page 3-238 under the heading of **...If Reasonable Grounds No Longer Exists...** it states the following:

Police officers may be liable for false imprisonment for failure to release a person lawfully arrested. The law requires police to release the arrestee as soon as practicable, absent justification, but if further investigation leads a police officer to believe that reasonable and probable grounds no longer exists, any continued detention becomes unlawful and police must release the person immediately and any charge should be withdrawn accordingly.

The question is...*Does this situation apply to this case?*

I find that it does. The investigating officer Constable Nicholson had confidential information that Bayliss had a firearm. The information was also dated information. The informants were not in a residence when they observed the firearm, or at least not at the Bayliss residence. They gave an area of Windsor where he once resided. Windsor police files had an occurrence that he resided at 1861 St. Luke in August of 2019. It was not revealed whether it was the rear unit. Nicholson requested surveillance. On December 19, 2019 two officers conduct surveillance. Constable Coccimiglio testified he saw a male exiting Unit one from a distance. He entered a grey Volkswagen. The male was later identified by Sergeant Gannon as he got beside the Volkswagen and observed the male combing his hair and identified him as Bayliss. Again this observation is not in his duty report or notes.

The male party exiting the house was Oluwaluba Afolabi a male person of colour. There is a seven year age difference between Afolabi and Bayliss. Afolabi is Nigerian and Bayliss is African-Canadian. The distinction from the photographs supplied by Nicholson is striking. The only similarity is they are both men of Colour.

Based on the surveillance report submitted by Coccimiglio and the other information Nicholson had in his possession he requested and got the warrant to Search the residence.

A significant point the search warrant was granted I believe is that the officers placed Bayliss whom we now know to be Afolabi exiting from 1861 St. Luke Street. The surveillance on the 19th was a total of five (5) minutes. This certainly should have continued. The identification was primary for obtaining the warrant.

It was Mr. Afolabi who obtained the video relevant to these proceedings from the store manager of the Shoppers Drug Mart. This was an intelligent decision made by this man. Without the video the notes and duty reports of the officers could not be contradicted and it showed in real life what transpired in the parking lot on December 20, 2019.

Both Counsels used it to great lengths to proceed with their evidence and their submissions.

Mr. Afolabi and his brother were arrested. I believe that the arrest was necessary considering the facts that the members had at the time of the arrest. It is my belief that a reasonable person standing in the shoes of these officers on December 20, 2019 would arrive at the same conclusion that I have.

At the point where it was known that the parties arrested were misidentified the handcuffs should have been removed under the direction of Sergeant Gannon.

I find at that point the arrest became unnecessary considering the new information the investigators had at this time. The search warrant could not be executed as the grounds were no longer in existence. The wrong party was misidentified twice coming from the residence that a search warrant had been authorized. Sergeant Gannon could have continued his questions but not while the parties was handcuffed. This I believe is what a reasonable person faced with this information and misidentification would do in this situation.

When an arrest becomes unnecessary and an individual's right to freedom has been removed, however briefly, that matter is serious. The arrest of the Afolabi brothers was necessary and then became unnecessary. Their personal freedom was removed. They were assaulted and handcuffed. Their injuries were minor, but unnecessary. They could not leave voluntarily until they were released unconditionally by Sergeant Gannon. This was a significant action against them by the DIGS Unit of the Windsor Police Service.

If we follow the testimony of Sergeant Gannon that he testified he needed to confer with Nicholson to receive further information before releasing the brothers and also in his mind to execute the search warrant we have to address his testimony to Mr. Johnstone in cross examination.

Mr. Afolabi testified the questions put forth to him by Gannon were accusatory. He testified that Gannon told him they may have to kick his door in, give the keys to them, Bayliss was driving his car (Which at this point Gannon knew not to be true) protecting Bayliss, was the firearm at the residence. He testified they were accusations by Gannon.

Sergeant Gannon testified he asked open ended questions. Gannon testified that the investigation changed. Johnstone asked whether the jeopardy changed in relation to the Afolabi brothers while all the questions were being asked. Gannon said it had and if there were enough for charges this would have been completed at the station. Gannon ought to have known by continuing the arrest that he would have to give the brothers their Right to Counsel as they were misidentified originally and should have been released as there was absolutely no evidence to execute the warrant at the Afolabi residence. Bayliss was never at any point placed at Unit One. We learned in the past he had lived in the rear unit from answers given by Afolabi. As was stated in the EVANS case at TAB 39 in the Prosecutions Book of Authorities the Supreme Court of Canada states the police must give the Rights to Counsel. Gannon was pursuing the investigation and this became his responsibility.

Sergeant Gannon apologized to the Afolabi brothers for the mistaken identity. He testified at the Tribunal he was upset with arresting the wrong person. He felt terrible and I believe he was truly sorry. He stated that the brothers were cordial and cooperative throughout the ordeal.

Mr. Afolabi in his testimony and his submissions to the Tribunal stated as a person of colour he was raised to be cooperative and cordial as a coloured person in negative situations. He stated he was arrested by the police at gunpoint. His major concern for his brother and himself was that there would be no record of this incident to affect either brother's career.

He was assured by Sergeant Gannon and Constable Nicholson that the incident would not affect their positions if there were a query made on one of the brothers.

Afolabi testified they were traumatized by the event but left on good terms. I must state again without the video obtained by Mr. Afolabi a different outcome may have been realized. The officer's notes pertaining to this incident were to similar indicating the release was immediate. This we can see from the video was not true.

Constable Coccimiglio was a shadow officer for the DIGS Unit. He was being observed during his time at the Unit to determine if he would be a good candidate. The day of the incident was his last day. He took direction from Sergeant Gannon. He misidentified the target as well at long range and in close proximity in the Shoppers Drug Mart prior to the Arrest. As stated before in my decision the only common point between the intended target and Mr. Afolabi is that they are Men of Colour. The photograph was dated.

From his testimony he believed Afolabi to be Bayliss.

His most valuable lesson in working in the DIGS Unit would have been his last day. It would appear he at all times was taking direction from experienced officers. On December 20, 2019 it was from Sergeant Gannon.

The accepted quality of the evidence that is required to be met in the prosecution of matters such as these is *clear and convincing evidence*, which has been described as:

"weighty, cogent and reliable evidence upon which a trier of fact, acting with care and caution, can come to a reasonable conclusion that the officer is guilty of misconduct."

It is my finding that the prosecution has met this standard in the Tribunal of these allegations.

Decision Count One:

Based on all the evidence brought before me in this Hearing, it is the decision of this Tribunal that Sergeant Christian Gannon #8769 is GUILTY of Unlawful or Unnecessary Exercise of Authority as stated in the allegation contained in the Notice of Hearing.

Based on all the evidence brought before in this Hearing, it is the decision of this Tribunal that Constable Jeffrey Coccimiglio #20646 is NOT GUILTY of Unlawful or Unnecessary Exercise of Authority as stated in the allegation contained in the Notice of Hearing.

Decision on Count Two:

Based on all the evidence brought before me in this Hearing , it is the decision of this Tribunal that Sergeant Christian Gannon #8769 is Guilty of Neglect of Duty as stated in the allegation contained in the Notice of Hearing

Based on all the evidence brought before in this Hearing, it is the decision of this Tribunal that Constable Jeffrey Coccimiglio #20646 is NOT GUILTY of Neglect of Duty as stated in the allegation contained in the Notice of Hearing.

**M.P.B. Elbers, Superintendent
(Retired)**

**January 19, 2023
Date**