ONTARIO CIVILIAN POLICE COMMISSION

DATE: 2016-02-02

FILE: 2016 ONCPC-02

CASE NAME: SEGUIN AND WALLACE AND TORONTO POLICE SERVICE

IN THE MATTER OF THE *POLICE SERVICES ACT*, R.S.O. 1990, C.P.15, AS AMENDED

BETWEEN:

Eloi-Gourde Bureau
APPELLANT

-and-

Constable Dominic Seguin#8423 and
Constable Alexander Wallace #9300
RESPONDENTS

-and-

Toronto Police Service
RESPONDENT

DECISION

Panel: D. Stephen Jovanovic, Associate Chair

Zahra Dhanani, Member

Hearing Location: Ontario Civilian Police Commission
250 Dundas Street West, Suite 605
Toronto, ON M7A 2T3

Appearances:

Soloman Lam, Counsel for the Appellant

Harry G. Black, Q.C., Counsel for the Respondents, Seguin and Wallace

Sharon Wilmot, Counsel for the Respondent, Toronto Police Service

Miriam Saksznajder, Counsel for the Statutory Intervener, The Independent Police Review Director

I. Introduction

1. Eloi-Gourde Bureau (the Appellant or Complainant) has appealed the decision of retired Justice Walter Gonet (the Hearing Officer) dated November 7, 2014, whereby he dismissed charges of misconduct against Constables Dominic Seguin and Alexander Wallace (also referred to as the Respondent Officers). The charges were instituted following a public complaint by the Appellant to the Office of the Independent Police Review Director and were set out in a Notice of Hearing as follows:

> You are alleged to have committed misconduct in that you did without good and sufficient cause, make an unlawful or unnecessary arrest, contrary to section 2(1)(g)(i) of the Schedule Code of Conduct of Ontario Regulation 123/98 and therefore, contrary to section 80(1)(a) of the

> Police Services Act, R.S.O. 1990, as amended
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> Statement of Particulars
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> Being a member of the Toronto Police Service attached to Number 51 Division, you were assigned to uniform duties.
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> On Sunday, June 27, 2010, you were on duty and assigned to the G20 Summit detail.
>
> You assisted in the arrest of E.G.B. for wearing a disguise with the intent to commit a criminal offence without having the requisite grounds to do so.
>
> In doing so, you have committed misconduct in that you did without good and sufficient cause, make an unlawful or unnecessary arrest.

2. The Hearing Officer, as part of the same proceeding, also dismissed a charge of misconduct arising from the same incident against Sergeant Nancy McLean, who was alleged to have "encouraged or incited officers under your command to insult E.G.B. during their interaction with him." No Appeal has been brought from the dismissal of that charge.

II. Decision

3. Pursuant to section 87(8) (c) of the Police Services Act (the Act) the Commission orders a new hearing of the charges against Constables Seguin and Wallace before a new Hearing Officer.

III. Background

4. The Respondent Officers were part of a bicycle team of approximately fifteen police officers, under the command of Sergeant McLean, during the morning of June 27, 2010, the final day of the now infamous G-20 Summit in Toronto. At approximately 10:00 a.m. that morning they arrested the Appellant, his wife Jennifer Vales, and a friend, David Clement, for the offence of wearing a disguise with the intent to commit an indictable offence contrary to the *Criminal Code**.

5. The Hearing Officer's decision referred to the widespread rioting, damage to property, including the burning of police vehicles and injuries to police officers that occurred the previous day, despite the extensive police presence in downtown Toronto. Police intelligence expected similar, if not increased, violence and rioting on that Sunday.

6. It was against this backdrop that the Respondent Officers approached the Appellant and his two companions as they were walking northbound on University Avenue near College Street.

*section 351(2) of the *Criminal Code* provides as follows:

Everyone who, with intent to commit an indictable offence, has his face masked or coloured or is otherwise disguised, is guilty of an indictable offence and liable to imprisonment for a term not exceeding ten years.

7. Constable Wallace testified that as he approached the Appellant, he noticed that he was wearing a neon orange coloured bandana covering the lower portion of his face from the nose down. He further testified once he got beside the Appellant:

> It was at that time that I made the decision that I – believed that that one, specific male was committing an offence under the Criminal Code of wearing a disguise with a – with intent to commit a further indictable offence. I immediately got off my bicycle and I approached the male as other officers within my group approached the other two parties.

8. Constable Wallace also testified that in so effecting the arrest, he took into account, in a short span of time, the weather conditions, the lack of any reason for the disguise, the violent events and the damage of the previous day (by people concealing their faces), and the intelligence he received during that morning's briefing.

9. The evidence of Constable Seguin was largely consistent with that of Constable Wallace and with that of the other police officers involved. As he approached the Appellant from behind, he could see him wearing what has been described as an orange bandana-type sleeve, pulled up covering the bottom half of his face, from the bridge of his nose down to his chin, so that only his eyes were visible. Constable Seguin

testified to essentially taking the same factors into account, as did Constable Wallace and he, too, formed the belief that the Appellant was wearing a disguise to conceal his identity and some time that day, would commit a criminal offence, such as mischief. Constable Seguin stated that it was Constable Wallace who placed the Appellant under arrest and denied, as did the other police officers involved, that there was any verbal or physical intimidation of the Appellant or his companions.

10. Sergeant McLean testified that she was in charge of the group of bicycle officers that approached the Appellant and his companions. She too saw the Appellant wearing the orange sleeve from his nose down and observed his arrest. She believed that reasonable grounds existed to arrest the Appellant considering the events of the previous day, the police intelligence briefing that a demonstration was to take place at Queen's Park and that the only purpose of the mask worn by the Appellant could have been to disguise his identity.

11. The Appellant's evidence was that as he and his two companions were walking north on University Avenue, he was wearing part of a sleeve that had been cut from an orange T-shirt around his neck, that it was not covering his face and that he intended to use it if police utilized tear gas as they had the previous day. He testified that various officers pushed him into a wire construction fence, while Sergeant McLean started to swear at him in English and French, called his friends "fucking anarchists" and told him that he should return to Quebec.

12. During his cross-examination, the Appellant was confronted with an article written by a journalist, Patrick Duquette,

which was published in Le Droit, on June 29 and June 30, 2015, a newspaper circulated in Gatineau and Ottawa and online. The article was based on an interview Duquette had with the Appellant and contained statements or quotations from the Appellant that were inconsistent with the evidence which he gave in chief. The Appellant, in cross-examination, denied that he had ever spoken to Duquette and offered no explanation as to why Duquette would have printed quotations from him if they had not, in fact, spoken to one another.

13. The Respondent officers called Duquette as a witness before the Hearing Officer. Duquette testified that his article "Mayor's Son Arrested at G-20 Summit" was, in fact, based on his telephone interview with the Appellant and that the quotations attributable to him were accurate and had been recorded on his computer at the time of their conversation. Duquette testified that the Appellant did not make any reference to a woman Sergeant or any other police officer making any anti-French comments and that if the Appellant had done so, then these comments would have been the lead in his article.

The Issues

14. The Appellant submitted that the broad issues to be decided on this Appeal are:

    i) Did the Hearing Officer fail to consider the totality of the evidence in concluding that there was not clear and convincing evidence of the charge against the Respondents?

    2) Did the Hearing Officer err in giving inadequate reasons for dismissing the charges against the Respondents?

15. The decision to dismiss the charges appears to have been based entirely on the finding that the Appellant was not a credible witness, a finding that the Hearing Officer was entitled to make on the evidence. The reasons of the Hearing Officer make it difficult, if not impossible to determine if he did "consider" the totality of the evidence even though he did recite some of it.

16. However, in our view, this Appeal can be decided based on our finding on the second issue. Before examining the adequacy of the reasons given by the Hearing Officer, it would be useful to refer to some of the well-known authorities on the issue of adequacy of reasons.

17. In *Newfoundland and Labrador Nurses' Union v. Newfoundland and Labrador (Treasury Board)* [2011] 3 S.C.R. 768, the Supreme Court of Canada wrote of the restraint that must be shown by Appellate Tribunals in reviewing the reasons of administrative tribunals where a party has alleged inadequacy of the reasons. At paragraph 16, the Court wrote the following:

> Reasons may not include all arguments, statutory provisions, jurisprudence or other details the reviewing judge would have preferred, but that does not impugn the validity of either the reasons or the result under a reasonableness analysis. A decision-maker is not required to make an explicit finding on each constituent element, however subordinate, leading to its final conclusion…In other words if the reasons allow the reviewing

> court to understand why the tribunal made its decision and permit it to determine whether the conclusion is within the range of reasonable outcomes, the Dunsmuir criteria are met.

18. The Dunsmuir "criteria" refers to the existence of justification, transparency and intelligibility within the decision-making process that makes a decision reasonable, i.e. whether the decision falls within a range of possible, acceptable outcomes that are defensible in respect of the facts and law. The Court in *Newfoundland* accepted "perfection is not the standard" for reasons and that a reviewing court should ask whether "when read in light of the evidence before it and the nature of its statutory tasks, the Tribunal's reasons adequately explain the bases of its decision."

19. The Court also adopted the following statement:

> When reviewing a decision of an administrative body on the reasonableness standard, the guiding principle is deference. Reasons are not to be reviewed in a vacuum – the result is to be looked at in the content of the evidence, the parties' submissions and the process. Reasons do not have to be perfect. They do not have to be comprehensive.

20. *In Barrington v. The Institute of Chartered Accountants of Ontario*, 2011 ONCA 409 (CanLII), the Court wrote:

> The reasons for decision in professional discipline cases must address the major points in issue in the case. A failure to deal with material evidence or a failure to provide an adequate explanation for rejecting material evidence precludes effective appellate review: *Gray v. Ontario* (2002), 59 O.R. (3d) 364 (C.A.), at paragraphs 22-24; *Law Society of Upper Canada v. Neinstein* (2010), 99 O.R. (3d), (C.A.) at paragraphs 61 and 92.
>
> A tribunal is not required to refer to all the evidence or to answer every submission. In the words of this Court, in *Clifford v. Ontario Municipal Employees Retirement System* (2009), 98 O.R. (3d) (C.A.), leave to appeal refused [2009] S.C.C.A. at No. 416, the [tribunal] was required to identify the "path" taken to reach its decision. It was not necessary to describe every landmark along the way.

21. Finally, in *Canadian Civil Liberties Assn. v. Ontario (Civilian Commission on Police Services)*(2002), 61 O.R. (3d) 649 (C.A.) the Court dealt with the approach to be taken in dealing with an argument as to inadequacy of reasons as follows:

> [87] Even in the criminal context the inadequacy of reasons has been

> rejected as a freestanding ground of appeal: *R. v. Braich,* 2002 SCC 27, 210 D.L.R. (4th) 635. Instead, the Supreme Court has adopted a functional approach that requires an appellant to show that deficiency in the reasons caused prejudice as to the exercise of the right of appeal. This functional approach is reflected in the administrative context in the Supreme Court's comments in *Baker [v. Canada (Minister of Citizenship and Immigration),* [1999] 2 S.C.R. 817, 174 D.L.R. (4th) 193] that a statutory body's duty to give a rationale for its reasons, which is based on a duty of fairness, is flexible and variable, and is defined by the context of the particular statute, the decision being rendered, and the rights affected.
>
> [88] For right of review to be meaningful the reviewing body, in this case the Divisional Court, must be able to perform its task.

22. In turning to the Hearing Officer's decision, at pages 3 to 9, he reviewed the evidence of the nine witnesses called, including the parties. At the bottom of the ninth page, he recited the burden of proof as being on the prosecution to prove the allegations of misconduct as against the Respondent Officers, by way of clear and convincing evidence that must be weighty, cogent and reliable. The Hearing Officer wrote that the evidence has to withstand the test of credibility and reliability. He then, in two paragraphs on page 10 of the decision, asked himself "Was the evidence of the complainant and witnesses clear and convincing?"

23. Other than referring to no evidence of physical violence in the photographs that were exhibits before him, the rest of the Hearing Officer's brief analysis dealt solely with the Appellant's denial of his conversation with Duquette. The Hearing Officer then concluded "the denials and contradictions by Bureau of Duquette's evidence and Bureau's insistence that he did not discuss his evidence with anyone taints the complainant's other evidence of the incident. I am left in doubt and find that the prosecution has failed to satisfy its onus of presenting 'clear and convincing' evidence of the guilt of the accused on these charges." The Hearing Officer, as he was entitled to do, rejected the totality of the Appellant's evidence.

24. It appears that the Hearing Officer rejected the totality of that evidence because of the Appellant's denial of his conversation with Duquette. The Hearing Officer, in his analysis, did not comment on the evidence of Vales, the Respondent Officers, nor of the other witnesses in reaching his conclusion to dismiss the charges.

25. At the outset of the hearing of this Appeal, the Appellant's counsel indicated that he was content with a finding that the "sleeve" was, in fact, on the Appellant's face, notwithstanding the Appellant's evidence before the Hearing Officer. However, he submitted that the charges against the Respondent Officers did not turn on his credibility, but rather on the evidence of the Respondent officers. The submission was that the simple wearing of the sleeve be it called a mask or a disguise, was not sufficient to justify the Appellant's arrest.

26. In order to establish misconduct under section 2(1) (g)(i) of the *Code of Conduct,* two criteria must be satisfied by the prosecution. First, that the arrest was unlawful or unnecessary, and second, that it was without good and sufficient cause. The decision of the Hearing Officer contained no analysis of the requisite elements of the charge.

27. Section 495(1) (a) of the *Criminal Code* was the basis for the arrest of the Appellant. It reads as follows:

> 495(1) A Peace Officer may arrest without warrant
> (a) a person who has committed an indictable offence or who, on reasonable grounds, he believes has committed or is about to commit an indictable offence.

The Hearing Officer's decision contains no mention, let alone an analysis of this section of the *Code*. There is also no mention or analysis of section 351(2) of the *Code*, the offence for which the Appellant was arrested.

28. An arresting officer must subjectively have reasonable and probable grounds on which to base an arrest. These grounds must also be justifiable from an objective point of view i.e. a reasonable person placed in the position of the officer must be able to conclude that there were indeed reasonable and probable grounds for the arrest: *R.V. Storrey*, [1990] 1 S.C.R. 241.

29. There was ample evidence before the Hearing Officer to allow him to conclude that the Appellant was wearing the sleeve on his face. However, he did not make any such finding. Had he done so, he would have been required to then consider if the Respondent Officers had reasonable and probable

grounds, considering all of the circumstances, to make a lawful arrest. His reasons do not display that he engaged in this analysis. In our view, the reasons given by the Hearing Officer were inadequate or insufficient to satisfy the purpose required of reasons. The reasons, in our respectful view, when read in the context of the record, do not show that he "grappled" with the substance of the issues before him.

30. Counsel for the Respondent Officers made the following submissions in his factum on the adequacy of the Hearing Officer's reasons:

> 81. The structure and the content of the reasons are a mirror reflection of the manner in which the issues developed by counsel at the hearing. There is such a thing as judicial economy, relevance and materiality: judges and hearing officers tailor their reasons to issues at the hearing, and need not state the obvious nor repeat the inconsequential.

31. We acknowledge that the Hearing Officer was an experienced, former jurist who had conducted other hearings into similar allegations of misconduct against police officers, arising from the mass arrests of individuals during the G-20 Summit. In at least one other decision, the Hearing Officer dealt with what constituted an unlawful arrest: *Wong and Toronto Police Service*, 2015 ONCPC 15 (CanLII)

32. At first instance, it is tempting to conclude that given his experience, the Hearing Officer did address his mind to the issue of whether the Respondent Officers "did without good and sufficient cause, make an unlawful or unnecessary

arrest." As counsel for the Respondent Officers submitted, the Hearing Officer "need not state the obvious nor repeat the inconsequential."

33. However, in our respectful view, the Appellant had a sufficient interest in the proceedings, (his credibility notwithstanding) having been arrested and detained, then released without charges to entitle him to adequate reasons to explain the dismissal of the charges, reasons that could allow for meaningful appellate review.

34. The Appellant's counsel submitted that the appropriate Order would be for us to "revoke" the acquittal, substitute findings of guilt, and then consider further submissions on penalty. Counsel for the Responding Officers submitted that if we were to accept that the Hearing Officer's decision could not stand, the only acceptable disposition would be to order a new Hearing. Counsel for the Independent Police Review Director took no position with respect to the Orders requested nor did counsel for the Toronto Police Service.

35. In our view, it would not be appropriate to make findings of guilt in this matter without having had the benefit of hearing the evidence of the witnesses. While the *Act* does allow the Commission to substitute its decision for that of the Hearing Officer, this power should be used sparingly when asked to turn an acquittal into a conviction.

IV. Disposition

36. Pursuant to section 87(8) (c) of the *Act* the Commission orders a new hearing of the charges against Constables Seguin and Wallace before a new Hearing Officer.

37. We note, however, the time and resources that have already been devoted to this matter, arising from events, which occurred more than five years ago. A new hearing would likely not even commence until more than six years after the G-20 Summit. While our decision is to refer the matter back for a new hearing, the ultimate decision whether to proceed will be up to the prosecution, which retains discretion, after considering the best utilization of its resources and most importantly whether there is any reasonable prospect of obtaining convictions given what transpired at the original hearing.

DATED AT TORONTO THIS 2nd DAY OF FEBRUARY, 2016

D. Stephen Jovanovic
Associate Chair

Zahra Dhanani
Member