

OCCPS Decision # 09-05

DAVID CANTON
Appellant

AND

CONSTABLE KENNETH KAIJA
(HAMILTON POLICE SERVICE)
Respondent

Presiding OCCPS Members:

Noëlle Caloren, Member
Tammy Landau, Member

Appearances:

David Canton, Appellant
Tom Andrew, for the Respondent

Heard:

January 16, 2008

Date of Decision:

April 20, 2009

UNLAWFUL OR UNNECESSARY ARREST - Hearing Officer found Respondent not guilty of making unlawful or unnecessary arrest - Arrest followed initial traffic stop when officer discovered Appellant was driving with expired license plate - Respondent placed Appellant under arrest for “about to assault” - Hearing Officer found Respondent had reasonable belief that he was about to be assaulted - Nothing in Hearing Officer’s decision amounting to a manifest error - Appeal dismissed.

EVIDENCE - Credibility of witnesses - No other persons present when Respondent placed Appellant under arrest - Hearing Officer’s decision with respect to lawfulness of arrest hinged on credibility - Hearing Officer noted areas of controversy in the evidence and reconciled these in a reasonable, logical manner - Reasonableness of Respondent’s perception of “about to assault” grounds properly assessed on the basis of both objective and subjective elements - Reasonable conclusion that arrest was lawful and necessary - Appeal dismissed.

CHARTER - Legal rights - Appellant contested lawfulness of his arrest - Respondent admitted that he failed to read Appellant his rights when he arrested him - Breach of s. 10(b) of *Charter* not set out in notice of hearing - Hearing Officer lacked jurisdiction to consider allegation - Appeal dismissed.

Summary of Reasons for Decision

Mr. Canton appealed the decision of the Hearing Officer, dismissing a charge of misconduct against the Respondent, Constable Kaija. The Hearing Officer found that the Respondent's arrest of the Appellant was not unlawful or unnecessary pursuant to s. 2(1)(g)(i) of the Code of Conduct.

On the morning of July 26, 2005 Cst. Kaija stopped Mr. Canton for driving with an expired license plate. After Cst. Kaija stopped his cruiser behind Mr. Canton's vehicle, Mr. Canton got out of his vehicle and walked towards Cst. Kaija's vehicle. The form and nature of the exchange which followed was in dispute. Constable Kaija maintained that Mr. Canton assumed an aggressive stance, while Mr. Canton maintained that he was non-confrontational. Constable Kaija requested that Mr. Canton place his hands on the cruiser. He then arrested Mr. Canton, handcuffed him and placed him in the back of the cruiser. It was not disputed that Cst. Kaija failed to inform Mr. Canton of his right to counsel, contrary to s. 10(b) of the *Charter of Rights and Freedoms*.

Constable Kaija had called for back-up during the arrest. Two officers arrived at the scene after the arrest and searched Mr. Canton's vehicle. They found tools in his car, which Mr. Canton said he used in his work as an instructor in the Tool & Die program at Sheridan College. Following the search Cst. Kaija issued Mr. Canton a ticket for driving without a validated plate and released him from custody. Upset about the manner in which he had been dealt with, Mr. Canton then attended the Hamilton Police Service to lodge a complaint against Cst. Kaija.

At the disciplinary hearing Mr. Canton stated that he was non-confrontational during the exchange leading up to his arrest. He also claimed that he was not told why he was being arrested. Constable Kaija disputed that claim. He testified that Mr. Canton was aggressive and threatening; among other aspects of his demeanour suggesting this were Mr. Canton's "bladed" stance. It was Cst. Kaija's perception that he was about to be assaulted.

The two back-up officers testified that Mr. Canton appeared upset, agitated, hostile and uncooperative. Expert evidence was led on Use of Force training of police officers. The expert witness testified that a bladed stance in a suspect could prompt an officer to bypass the normal recommended response of verbal communication, i.e. asking the stopped individual to return to his vehicle as a first step.

The Hearing Officer identified five issues: 1) whether the arrest was lawful; 2) whether the arrest, if lawful, was necessary; 3) whether the arrest became unlawful at some point; 4) whether a breach of s. 10(b) of the *Charter* was sufficient to cause the arrest to be deemed unlawful; and 5) whether there was clear and convincing evidence of misconduct.

The Hearing Officer found that a reasonable person in the position of Cst. Kaija would have come to the same conclusion, namely that he was about to be assaulted.

Consequently the arrest was both lawful and necessary, and misconduct was not established on clear and convincing evidence. Issue three was determined to be outside his authority, given the wording and scope of the notice of hearing. In relation to the fourth issue the Hearing Officer decided that Cst. Kaija's admitted breach of Mr. Canton's *Charter* rights did not negate the original grounds for making the arrest.

The Appellant argued that the Hearing Officer's decision was unreasonable. He also contended that his arrest was unlawful in light of the violation of his s. 10(b) *Charter* rights. The Respondent argued that the Hearing Officer's decision was supported on the evidence, which he assessed fairly and reasonably. The Respondent submitted that the Hearing Officer had no jurisdiction to consider the *Charter* allegation since it was not included in the notice of hearing.

Held, appeal dismissed.

The Hearing Officer's summary of the evidence revealed that he was very aware of the conflicts in the evidence, which required him to engage in an assessment of the credibility of Mr. Canton and Cst. Kaija. The Hearing Officer reconciled these conflicts in a reasonable and logical manner. Without discounting either of the witnesses' recollection of events, he concluded that Cst. Kaija, who was trained to identify threat cues, reasonably perceived that Mr. Canton was about to assault him. Further, that belief was a reasonable one under the circumstances. It was reasonable for the Hearing Officer to reach that conclusion; and the process by which he arrived at his conclusion - weighing both objective evidence as well as the officer's subjective belief - was likewise reasonable.

On the essential question of the grounds for arrest, there was nothing in the Hearing Officer's decision that amounted to a manifest error. On the issue of the failure to read the Appellant his rights and the impact of that failure, the Panel agreed with the Respondent that the Hearing Officer did not have jurisdiction to consider this allegation, since it was not set out in the notice of hearing.

Statutes cited

Police Services Act, R.S.O. 1990, c.P.15, as amended, s. 74(1)(a)
O. Reg. 123/98, s. 2(1)(g)(i)
Charter of Rights and Freedoms, s. 10(b)

Authorities cited

Williams and Ontario Provincial Police (1995), 2 O.P.R. 1047 (OCCPS)
Deviney and Toronto Police Service (Feb. 10, 1999, OCCPS #99-01)