

OCCPS Decision # 09-07

CONSTABLE BOGUMIL BRYL
Appellant

AND

TORONTO POLICE SERVICE
Respondent

Presiding OCCPS Members :

Roy Conacher, Member
Garth Goodhew, Member

Appearances :

Peter Thorning, for the Appellant
Zoya Trofimenko, for the Respondent

Heard :

December 5, 2008

Date of Decision :

May 27, 2009

DISCREDITABLE CONDUCT - Criminal offences - Impaired driving - Appellant arrested for impaired driving while operating his motorcycle on U.S. interstate highway - Appellant entered no-contest plea in Ohio court and was fined \$100 - In disciplinary proceeding Hearing Officer found Appellant guilty of discreditable conduct and imposed demotion - No manifest errors in Hearing Officer's conduct of disciplinary hearing - Conviction upheld - Appeal dismissed.

DISCREDITABLE CONDUCT - Off-duty conduct - Drinking and driving - Appellant arrested for impaired driving while operating his motorcycle on U.S. interstate highway - Hearing Officer properly accepted into evidence and acted upon undisputed fact of Appellant's no-contest plea in Ohio court - Hearing Officer applied Canadian law to factual events which occurred in State of Ohio - No manifest error and no reason to disturb Hearing Officer's findings of credibility and reliability - Conviction on charge of discreditable conduct upheld - Appeal dismissed.

SENTENCING - Penalties - Demotion - Appellant convicted on one count of discreditable conduct - Appellant drove his motorcycle on U.S. interstate after consuming over nine beers - Previous conviction for impaired driving considered as well as issues of remorse, rehabilitation and seriousness of the offence - Hearing Officer took

into account all relevant sentencing factors - No manifest errors in principle - Penalty of demotion not unreasonable - Appeal dismissed.

Summary of Reasons for Decision

Constable Bryl appealed the decision of the Hearing Officer, finding him guilty on two counts of misconduct. A single conviction was registered for Cst. Bryl's violation of s. 2(1)(a)(xi) of the Code of Conduct. Constable Bryl also appealed the penalty imposed for this conviction, demotion from first class constable to third class constable for a period of two years, with reinstatement to his original rank contingent upon evaluation by his unit commander.

The disciplinary conviction arose as a result of an off-duty road trip which Cst. Bryl undertook on September 5, 2004. He left in the evening and drove his motorcycle across the U.S. border. En route he stopped at several rest stops on interstate 75, and consumed a total of nine plus beers during these stops, within the space of approximately 3 hours. While he was stopped on the side of the highway, an Ohio State trooper approached him and asked him whether he had been drinking, which Cst. Bryl denied. During discussions with the state trooper Cst. Bryl identified himself as a police officer.

The state trooper asked Cst. Bryl to perform some field sobriety tests. Based on Cst. Bryl's performance, the state trooper placed Cst. Bryl under arrest. At the local Sheriff's office, a demand was made to submit to a breath test. A single reading was taken, which resulted in a reading of .116. Constable Bryl was charged and allowed to post a bond.

When he appeared in Ohio court on January 26, 2005 Cst. Bryl entered a plea of no-contest to the charge of having physical control of a motor vehicle while impaired. A finding of guilt was entered. Constable Bryl was fined \$100 plus costs and placed on probation for a short period.

On February 18, 2005 Cst. Bryl was served with notices of hearing relating to two charges of misconduct under s. 2(1)(a)(xi) of the Code. The first count alleged that the arrest and charge in Ohio constituted discreditable conduct. The second count referred to the breathalyzer result and the no-contest plea; this, too, was alleged to constitute discreditable conduct.

At his disciplinary hearing Cst. Bryl pled not guilty to both counts. The Hearing Officer dismissed a motion to quash count one on the grounds that the notice of hearing disclosed no offence under the *Police Services Act* and that to proceed would amount to an abuse of process. The Hearing Officer also dismissed a motion stay both charges on the ground that the prosecution failed to preserve and produce audio and video tape evidence made at the time of the Appellant's arrest. These tapes had been destroyed by the Ohio state police and were not available for the disciplinary hearing.

A number of witnesses testified at the disciplinary hearing, including a recognized expert on the operation of breathalyzer machines, who cited problems with the methodology used in this case.

At the outset of the appeal hearing, counsel for Cst. Bryl brought a motion to allow the introduction of fresh evidence: letters of commendation, an awards recommendation, and a uniform performance appraisal and development plan. All of these documents post-dated the imposition of penalty.

Counsel's position on the appeal was that the Hearing Officer made several errors in law:

- 1) in failing to quash the first count;
- 2) by relying on the facts and findings underlying the no-contest plea;
- 3) by considering the results of sobriety testing without any expert evidence and by taking judicial notice of foreign law;
- 4) by failing to provide a remedy for the destruction of the audio and video tapes; and
- 5) by imposing an unduly harsh penalty.

Counsel for the Respondent submitted that:

- 1) the validity of count one was moot;
- 2) the Hearing Officer did not err with respect to the admissibility and use of the no-contest plea;
- 3) there was no evidence that the breathalyzer sample or methodology was substandard relative to Canadian standards;
- 4) there was no failure to disclose evidence, and the Hearing Officer did not err by refusing to grant a stay of proceedings; and
- 5) the penalty fell within the acceptable range.

Held, motion to admit fresh evidence granted; conviction and penalty upheld; appeal dismissed.

The fresh evidence met the criteria for admission set forth in **Palmer v. the Queen** [1980] 1 S.C.R. 759 (S.C.C.). The evidence came into existence following the disciplinary hearing and thus with due diligence it could not have been made available at the hearing. The evidence appeared to be credible, and it appeared to be relevant to the issue of penalty. Therefore it was appropriate to admit the fresh evidence.

With respect to the first ground of appeal, the Appellant's position was that the notice of hearing did not relate to a disciplinable offence, since the mere fact of being charged did not amount to misconduct. The Hearing Officer considered this argument but rejected it, and found that the notice referred to the behaviour underlying the arrest, not the arrest itself. On a purposive and grammatical reading of the language of the charge, this was a reasonable interpretation. Moreover, the Hearing Officer found the Appellant guilty on both counts, but convicted him only on count two because there was a single

transgression. Thus the validity of count one was moot, and no useful purpose would be served if the Commission were to exercise its discretion to consider the issue further.

With respect to the second ground of appeal, the Hearing Officer concluded that the no-contest plea and its underlying facts were admissible pursuant to s. 15(2) of the *Statutory Powers Procedure Act*. That conclusion was not erroneous. The no-contest plea amounted to an admission by the Appellant of the truth of the underlying facts. Section 15 conferred upon tribunals the power to admit into evidence any testimony or document relevant to the proceeding and to act upon the evidence. Nevertheless, the Hearing Officer considered whether this evidence should be excluded on the grounds of abuse of process and natural justice/procedural fairness. After carefully reviewing the evidence, submissions, authorities and relevant statutory provisions, he concluded that there was no prejudice or unfairness to the Appellant and the admission of the evidence did not amount to an abuse of process. Taking the reasons as a whole, there was no manifest error in law. The evidence was properly admitted and the Hearing Officer was entitled to act on that evidence in reaching his decision.

The third ground of appeal concerned the quality of the breathalyzer test. The Appellant argued that the sample was not collected or verified in accordance with Canadian standards, and that the Hearing Officer erred in rejecting the evidence of the only expert called by the Appellant. However, evidence of impairment also included the observations of two state troopers, such as the Appellant's slurred speech and an odor of alcohol. The Hearing Officer accepted the evidence of the expert witness as it related to scientific protocols and Canadian standards. He found that it affected the weight to be given to the breathalyzer evidence, but not its reliability or admissibility. The Hearing Officer did not accept the expert's evidence as it related to the specific sample in this case, because that evidence rested upon certain unproved assumptions, such as the assertion that the Appellant was an alcoholic, which would affect his tolerance level and elimination rate. Such assumptions and assertions were not verified by any medical assessment. Thus the Hearing Officer made no manifest error in considering the results of sobriety testing.

With respect to the fourth ground of appeal, the Appellant submitted that failure to disclose the audio/video tape evidence should have resulted in a stay of proceedings. Alternatively, the evidence of the state troopers concerning events leading up to the arrest and charging should have been excluded. In the further alternative, the Hearing Officer ought to have preferred the evidence of the Appellant over that of the state troopers. The Hearing Officer found that the threshold test for a stay of proceedings was not met in this case. He found the Appellant had prior knowledge of the existence of the tapes; his evidence and that of the state troopers did not diverge significantly on the events; and there was no malice or unfairness on the part of the prosecutor in failing to obtain and disclose the tapes. He concluded that there was no prejudice requiring exclusion of the state troopers' evidence. These findings as they related to the issue of disclosure were not without evidentiary foundation.

In the absence of any manifest errors in the Hearing Officer's reasons, there was no basis for overturning the conviction.

As to the fifth ground of appeal, the Hearing Officer considered all of the relevant sentencing factors. He characterized the offence in this case as being at the high end of the seriousness continuum. In the Hearing Officer's view, the Appellant's explanation for his behaviour and his rationalizing demonstrated that he did not accept full responsibility. The Appellant had lengthy service with the force and positive commendations, but he also had a disciplinary record, including a previous conviction for impaired driving which likewise resulted in disciplinary action. The public interest factored heavily into the penalty decision, as did general deterrence.

A demotion was not an unreasonable penalty. Considering the Commission's scope of review regarding penalty, there was no basis for varying the result.

Statutes cited

Police Services Act R.S.O. 1990, c.P.15 as amended, ss. 56(7), 69(1), 69(5), 70(5) and 74(1)

O. Reg. 123/98, s. 2(1)(a)(xi)

Evidence Act R.S.O. 1990, c.E.23

Criminal Code R.S.C. 1985, c. C-46, s. 258

Statutory Powers Procedure Act R.S.O. 1990, c.S.22, s. 8 and 15

Authorities cited

Palmer v. the Queen [1980] 1 S.C.R. 759 (S.C.C.)

R. v. Leveque [2000] S.C.J. No. 47

Williams and Ontario Provincial Police (1995), 2 O.P.R. 1047 (OCCPS)

Wilson and Ontario Provincial Police (Nov. 20, 2006, OCCPS #06-11)

Galassi v. Hamilton (City) Police Service [2005] O.J. No. 2301 (Ont. Div. Ct.) (OCCPS JR #03-20)

Ontario Provincial Police v. Favretto [2004] 191 O.P.C. No. 3, 72 O.R. (3d) 681 (Ont. C.A.) (OCCPS JR #02-03)

Toronto (City) Police Service v. Blowes-Aybar [2004] 185 O.E.C. 352 (Ont. Div. Ct.) (OCCPS JR #03-17)

Toronto (City) Police Service v. Kelly [2006] O.J. No. 1758 (Ont. Div. Ct.) (OCCPS JR #05-03)

Gottschalk and Toronto Police Service (Jan. 29, 2003, OCCPS #03-02)

Carson and Pembroke Police Service (March 9, 2006, OCCPS #06-02)

Burnham v. Metro Toronto Chief of Police [1987] 2 S.C.R. 572 (S.C.C.)

Godfrey v. Ontario Police Commission (1991), 5 O.R. (3d) 163 (Ont. Div. Ct.)

Milton and Toronto Police Service (April 7, 2004, OCCPS #04-06)

R. v. Kienapple [1975] 1 S.C.R. 729 (S.C.C.)

Borowski v. Attorney General of Canada et al. [1989] 1 S.C.R. 342 (S.C.C.)
Cuyahoga Falls v. Bowers (Feb. 15, 1984, Supreme Court of Ohio)
Regina v. Houghton (No. 2) (1983), 38 O.R. (2d) 496
Toronto (City) v. Canadian Union of Public Employees, Loc. 79 [2003] S.C.R. 3
(S.C.C.)
R. v. Hape [2007] S.C.J. No. 26
R. v. Greco (2001), 159 C.C.C. (3d) 146 (Ont. C.A.)
Marsden and Metropolitan Toronto Police Service (1994), 2 O.P.R. 974 (OCCPS)
R. v. Orbanski ; R. v. Elias [2005] 2 S.C.R. 3 (S.C.C.)
R. v. Stinchcombe [1991] 3 S.C.R. 326 (S.C.C.)
Cate and Peel Regional Police Service (July 17, 1998, OCCPS #98-10)
Wildeboer and Toronto Police Service (Nov. 7, 2006, OCCPS #06-10)
Blackburn and Niagara Regional Police Service (Sept. 17, 2003, OCCPS #03-22)

[Further authorities as submitted by the parties may be found at pp. 7-13 of the decision.]