

ONTARIO CIVILIAN COMMISSION ON POLICE SERVICES

REASONS FOR DECISION

MR. DAVID CANTON

Appellant

POLICE CONSTABLE KENNETH KAIJA
(HAMILTON POLICE SERVICE)

Respondent

Presiding Members:

Noëlle Caloren, Member
Tammy Landau, Member

Appearances:

Mr. David Canton, Appellant
Mr. Tom Andrew, Agent for the Respondent

Hearing Date: January 16, 2008

David Canton appeals the January 9, 2007 decision of Superintendent Michael P. Shea (the Hearing Officer) finding Constable Kenneth Kaija not guilty of one count of misconduct contrary to section 74(1)(a) of the Police Services Act, R.S.O. 1990, c.P.15, as amended (the "Act") and more particularly described in section 2(1)(g)(i) of the Code of Conduct, Reg. 123/98 (the "Code").

Background:

On July 18, 2006, Constable Kenneth Kaija was charged with one count of misconduct relating to his actions on July 26, 2005 toward David Canton, a member of the public. The Notice of Hearing issued to Constable Kaija read: "On or about July 26, 2005, while a sworn member of the Hamilton Police Service, did, without good and sufficient cause, make an unlawful or unnecessary arrest of David Canton, contrary to section 2(1)(g)(i) of the Schedule, Code of Conduct ..."

The circumstances leading to this charge were as follows:

On July 26, 2005, at approximately 6:25 a.m., while in uniform and operating a marked cruiser, Constable Kaija effected a traffic stop of Mr. Canton for driving with an expired license plate (validation sticker). The stop occurred in the parking lot of the Center Mall in Hamilton where Mr. Canton had pulled in to have breakfast following an early morning drive from Buffalo on his return from a vacation in Mexico.

To effect the stop of Mr. Canton's vehicle, Constable Kaija, who had been following Mr. Canton's vehicle some distance, activated his roof lights once Mr. Canton turned in to the mall parking lot. When Mr. Canton's vehicle came to a stop, Constable Kaija's vehicle stopped behind his.

At issue in this appeal, are the controverted facts which ensued following the traffic stop. While it is clear that after he stopped his vehicle, Mr. Canton got out of his vehicle and walked toward Constable Kaija's vehicle, the form and nature of the exchange between Mr. Canton and Constable Kaija is controverted. What ensued from the officer and Mr. Canton's brief exchange however is that Constable Kaija requested that Mr. Canton place his hands on the police cruiser and subsequently proceeded to arrest Mr. Canton, handcuffing him and placing him into the back of the cruiser.

As a result of a call placed by Constable Kaija at the time of the arrest, two backup officers, Constable Archer and Constable Smith, arrived on the scene and Mr. Canton's vehicle was searched.

While Mr. Canton was sitting, handcuffed in the police cruiser, he was asked by Constable Smith about the tools in his car. Mr. Canton explained that the tools were used in the context of his work as an instructor in the Tool & Die program at Sheridan College. During that exchange, it was suggested by Constable Smith that the police officers thought they may be B & E tools (Break and Enter tools).

Following the search, Constable Kaija returned to his police cruiser and then released Mr. Canton from custody after issuing him a ticket for not having a validated plate.

Upset at the manner in which he had been dealt with, Mr. Canton attended the East End Station of the Hamilton Police Service after having breakfast to lodge a complaint against Constable Kaija.

The Disciplinary Hearing:

Constable Kaija's disciplinary hearing was held before the Hearing Officer over several days in November and December 2006. Evidence was heard from Mr. Canton, Constable Kaija, the back-up officers who attended the scene, Constables Smith and Archer, and an expert witness in regard to Use of Force (U/F) Training, Sergeant Bower, and others. Detailed evidence was presented by both the prosecution and the defence regarding the allegations and relevant events.

The charge of misconduct in this case relates to an allegation of unlawful or unnecessary arrest, in that having stopped Mr. Canton for driving with an invalid license plate sticker, Constable Kaija proceeded to his arrest several minutes later for what he perceived to be aggressive and threatening behaviour. Constable Kaija testified at the disciplinary hearing that he placed Mr. Canton under arrest for "about to assault".

Mr. Canton gave evidence about his exit from his vehicle following the stop, contending that he asked Constable Kaija what the problem was, to which Constable Kaija responded that he had an expired license plate sticker. Shortly after this exchange, in

which Mr. Canton was non-confrontational, Constable Kaija told Mr. Canton he appeared nervous, placed his hand on his gun and requested that Mr. Canton place his hands on the cruiser. Mr. Canton testified that he did so, did not at any point remove his hands from the vehicle, and was then handcuffed by Constable Kaija. Mr. Canton stated that Constable Kaija then made a call from his police radio and searched him. Mr. Canton claimed that he was not told why he was being arrested and that he was simply put in the back of Constable Kaija's cruiser, where he sat until he was eventually released and given an offence notice under the Highway Traffic Act for the expired license plate sticker.

Constable Kaija's evidence regarding Mr. Canton's approach toward his cruiser differs from the Appellant's. He testified that as he walked toward the cruiser, Mr. Canton's fists were clenched, he had a furrowed brow and a scowl on his face. He claimed Mr. Canton was aggressive and "bladed" his legs in a fighting stance. It looked to Constable Kaija that Mr. Canton was getting ready for a fight and as a result, after Mr. Canton looked him up and down, he asked Mr. Canton to place his hands on the cruiser. When Mr. Canton removed his hands from the vehicle and turned towards Constable Kaija, he was placed under arrest for "about to assault". Constable Kaija also called for back-up after ordering Mr. Canton to place his hands on the cruiser. In response, Constables Archer and Smith attended the scene. They arrived a few minutes later, after Mr. Canton had been handcuffed, searched and placed in Constable Kaija's cruiser.

Constable Smith described Mr. Canton's demeanour while seated in the cruiser as upset, agitated and hostile. He stated that when he asked Mr. Canton for his name and address, he did not get any answers. He also spoke to Mr. Canton about tools that had been found in his vehicle during the post-arrest search of Mr. Canton's car and was told by Mr. Canton that they were for his work as an instructor in a "Tool & Die" program at Sheridan College.

Constable Archer explained that as he arrived on the scene, Constable Kaija was placing Mr. Canton in the cruiser. He observed that Mr. Canton was uncooperative and agitated. He did not speak to Mr. Canton and assisted by looking into Mr. Canton's driver and vehicle information.

Mr. Canton admitted in cross-examination that he was agitated by the time the back-up officers arrived on the scene, although he had not been when he initially approached Constable Kaija to find out why he had been stopped. He maintained that when he was arrested, he was not given the reason (Constable Kaija's evidence is to the contrary). There was, however, no controversy at the hearing about Constable Kaija's omission to read Mr. Canton his right to counsel.

The focus of the misconduct charge being Mr. Canton's arrest for "about to assault", expert evidence was presented on Use of Force training of police officers, and in particular the training they receive to deal with potentially confrontational and violent encounters with suspects. The expert witness, Sergeant Bower, gave evidence to the effect that it is not common for drivers to exit their vehicles when stopped by the police, and that this behaviour would cause a heightened level of concern for a police officer. He explained that police officers are trained to look for cues based on a suspect's size,

actions, demeanour, use of a “bladed” stance by a suspect, and to balance these with the officer’s experience, size, the circumstances and other factors. While he suggested that in a situation such as the one involving Mr. Canton and Constable Kaija, he would normally recommend asking the stopped individual to return to his vehicle as a first step, he explained that the officer also has to feel comfortable and that an assault does not have to occur before a more drastic response is effected. His evidence was to the effect that a bladed stance observed in a suspect would not be a normal type of situation where verbal communication would necessarily be the only required response.

The Hearing Officer identified five issues to address, being:

1. Was the arrest lawful?
2. Even if the arrest was lawful, was it necessary? This particular issue needed to be addressed given the wording of Section 2(1)(g)(i) of the Code, which extends beyond the question of whether an arrest is lawful under the Criminal Code;
3. Assuming the arrest was lawful, did it at some point become unlawful and unreasonable?
4. Is a Section 10(b) Charter violation sufficient to cause the arrest to be deemed unlawful?
5. Was there clear and convincing evidence regarding the charge of misconduct against Constable Kaija?

On the basis of the evidence heard and his assessment of the credibility of the witnesses, the Hearing Officer found that “a reasonable person placed in the position of the officer would have come to the same conclusion (being that he was going to be assaulted by Mr. Canton)”. On that basis, the Hearing Officer found that the arrest was lawful and necessary and accordingly found Constable Kaija not guilty, after finding there did not exist clear and convincing evidence of misconduct. He articulated his reasons in a written decision dated January 9, 2007. As for Question 3, he concluded, as conceded by the parties to the hearing, that he did not have the authority to rule on the issue given the wording and scope of the Notice of Hearing, which focused on the decision to effect the arrest. He decided, in respect of issue 4 that Constable Kaija’s admitted violation of Mr. Canton’s Section 10(b) Charter rights did not negate the original grounds to make the arrest.

Position of the Appellant:

At the Hearing, Mr. Canton clarified that his appeal was based on the premise that the Hearing Officer’s decision was unreasonable and could not be supported by the evidence. He argued that because the main issue was the unlawfulness of his arrest, for which only he and Constable Kaija were present, the crux of the appeal was his and Constable Kaija’s credibility.

The Panel wishes to commend Mr. Canton for his thorough review and analysis of the evidence, and of the Hearing Officer's findings as set out in his written decision. We appreciate Mr. Canton's efforts and his attention to detail.

The Panel also understands from Mr. Canton's oral submissions that he was also taking issue with the lawfulness of his arrest given the uncontroverted fact that Constable Kaija failed to advise Mr. Canton of his 10(b) Charter rights to counsel at the time of arrest.

We note, before addressing the Respondent's position, that we do not have the jurisdiction, on a disciplinary appeal to order the laying of charges that were not laid initially, and were accordingly not considered at the Disciplinary Hearing. The only matter which can be considered by this Panel therefore, in light of the initial charge laid against Constable Kaija and the issues considered by the Hearing Officer, is whether the Hearing Officer erred when he found Constable Kaija not guilty of performing an unlawful or unnecessary arrest.

Position of the Respondent:

On behalf of Constable Kaija, Mr. Andrew argued that this Panel needed to consider two issues;

- (a) Was the arrest lawful?
- (b) If the arrest is deemed lawful, what effect does the subsequent search and the failure to give subsection 10(b) rights have on the lawfulness of the arrest?

Not surprisingly, Mr. Andrew submitted that the lawfulness of the arrest hinges on the credibility of Constable Kaija and Mr. Canton. In this regard, it was Mr. Andrew's contention that the Hearing Officer based his decision on the evidence tendered at the Hearing appropriately, and that he was in the best position to make a determination about the weight to place on the evidence of these two important witnesses.

Mr. Andrew referred us to the Commission's decision in Williams and Ontario Provincial Police (1995), 2 O.P.R. 1047 (O.C.C.P.S), and its subsequent decision in Deviney and Toronto Police Service (10 February 1999, O.C.C.P.S.) in his submission that the test for assessing a Hearing Officer's conclusion on the facts of a case is whether there is weighty, cogent and reliable evidence to support his or her findings, having considered and assessed the evidence fairly and reasonably.

It is the Respondent's position in this Appeal that the Hearing Officer correctly assessed the evidence when he determined that Constable Kaija was not guilty of misconduct.

Regarding the credibility issue, Mr. Andrew submitted that the issue for the Panel should in fact be whether the arrest could stand as lawful in light of the subsequent search of Mr. Canton's vehicle, and not the failure of Officer Kaija to give him his Section 10(b) Charter rights. Despite this distinction, it is the Respondent's position that

the Hearing Officer had no jurisdiction to consider the matter of the search or the Charter rights because they were not itemized or addressed in the Notice of Hearing.

Based on the above arguments, Mr. Andrew argued that the Hearing Officer's decision ought to stand.

Decision:

Section 2(1)(g)(i) of the Code makes it a disciplinary offense for a police officer to unlawfully or unnecessarily exercise his or her authority by making an arrest without good and sufficient cause.

From a factual perspective, a determination as to the existence of misconduct involving an unlawful or unnecessary arrest requires an examination of the events leading to that arrest, which as assessed, then would, or alternatively would not, provide sufficient grounds for arrest.

This was the core finding which the Hearing Officer was required to make in this case, and this is the exercise which the Panel must engage in to decide the appeal brought by Mr. Canton.

As was rightly pointed out by Mr. Andrew on the basis of Williams, supra., it is accepted that the Hearing Officer is in the best position to make findings of fact when those findings require an assessment as to the credibility of witnesses. In an appeal of a Hearing Officer's decision, the Panel must not second guess the initial decision, but rather consider whether the decision can be reasonably supported by the evidence, as assessed on the basis of the "clear and convincing" standard. As stated in the Respondent's factum, at page 3, "There must be weighty, cogent and reliable evidence upon which a trier of fact, acting with care and caution, can come to the fair and reasonable conclusion that the officer is guilty of misconduct."

We have carefully read and listened to the submissions made by Mr. Canton and considered whether this case is one of the cases which warrants intervention by this Commission.

We agree with the submissions of both parties that if a decision hinges on credibility, as this one does in relation to the arrest per se, then the Hearing Officer must set out cogent reasons for believing or disbelieving a witness' testimony. Nevertheless, we are not satisfied in this case, given the grounds of appeal raised by the Appellant, that the Hearing Officer's decision reveals a failure in this regard, and that we ought to set aside his finding of "not guilty".

The first part of the Hearing Officer's decision sets out, in detail, the evidence as it was presented by the witnesses and challenged through cross-examination. The summary of the evidence contained in the decision reveals, in our view, that the Hearing Officer was very aware of the critical controverted evidentiary elements, which would then require him to engage in an assessment of Constable Kaija's and Mr. Canton's

credibility. The Hearing Officer noted the following inconsistencies and areas of controversy:

- The discrepancy in each of the parties' evidence as to Mr. Canton's demeanour during his approach towards the police cruiser and his initial contact with Constable Kaija;
- The varying versions of each party as to what led to Constable Kaija's request that Mr. Canton place his hands on the cruiser: Mr. Canton's glances at the licence plate and his bladed stance vs. his look of disbelief at Constable Kaija's comments regarding the stop and his "nervousness";
- Constable Kaija's reaction prior to requesting that Mr. Canton put his hands on the cruiser: either putting his hand on his firearm or his baton;
- The removal, or not, by Mr. Canton of his hands from the cruiser;
- The controverted evidence as to the existence of a fanny pack, which, of all the discrepancies is, in this Panel's view, the most problematic, but, does not directly relate to Constable Kaija's decision to arrest Mr. Canton;
- The post-arrest comment made by Constable Kaija about issuing another ticket should Mr. Canton attend the police station and whether it constituted a threat against the filing of a complaint by Mr. Canton.

In this Panel's opinion, the Hearing Officer reconciled these aforementioned differences in the evidence in a reasonable, logical manner when he stated the following at p. 12 of his decision:

"This is an arrest that happened in a matter of seconds. The officer is suspicious of the actions of Mr. Canton, it is in the early morning hours [note: he did not state it was dark as suggested by Mr. Canton], the officer is by himself, and he has made a legitimate vehicle stop for a traffic violation and is faced by a large and aggressive man displaying assaultive behaviour. By Mr. Canton's own admissions, he was tired, agitated and "short" (refused to answer questions posed to him) when dealing with all officers.

The officer is trained to identify threat cues and I am convinced he honestly believed that in this case, Mr. Canton was going to assault him. From the evidence the officer provided, that is a reasonable belief and I find that a reasonable person placed in the position of the officer would come to the same conclusion."

While it is possible that in dealing with another more experienced police officer, Mr. Canton may not have been arrested, the fact is, as revealed by the evidence, that Constable Kaija was a “young” police officer who was, as this Panel had occasion to remark at the Appeal Hearing, outsized by Mr. Canton. On this basis, and the other factors taken into account by the Hearing Officer, it was reasonable for him to consider that the arrest was necessary, given that in the assessment of the grounds for an arrest, there is a need, in addition to the objective evidence, to consider the element of subjectivity (what is going through the officer’s mind).

Finally we note that the Hearing Officer assessed each of the parties’ respective demeanours at the disciplinary hearing as sure, certain and forthright, such that he does not seem to have unduly discounted either of their recollections of events.

Accordingly, as to the issue of the lawfulness and necessity of the arrest, there is nothing in the Hearing Officer’s decision that amounts to an error or is so manifestly inaccurate as to warrant our intervention.

To conclude, while we acknowledge that Mr. Canton undoubtedly feels that his arrest was uncalled for, we believe on the basis of the summary of the evidence which is contained in the lengthy Disciplinary Hearing decision, and the Hearing Officer’s awareness of the required burden of proof (clear and convincing evidence), that his decision was reasonable in light of the evidence, taken as a whole and as it related to the essential question of the grounds for arrest.

We find that the evidence before the Hearing Officer justified the finding of not guilty and therefore dismiss this appeal.

As for the issue of Constable Kaija’s failure to read the Appellant his rights and the impact of this failure on the lawfulness of the arrest, we agree with the Respondent’s submission to the effect that the Hearing Officer did not have jurisdiction to consider this allegation as it was not set out in the Notice of Hearing.

DATED AT TORONTO THIS 20TH DAY OF APRIL, 2009.

Noëlle Caloren
Member, OCCPS

Tammy Landau
Member, OCCPS