

**ONTARIO CIVILIAN
POLICE COMMISSION**

**COMMISSION CIVILE DE
L'ONTARIO SUR LA POLICE**



**Safety, Licensing Appeals and
Standards Tribunals Ontario**

**Tribunaux de la sécurité, des appels en
matière de permis et des normes Ontario**

Citation: Kraljevic and Svidran. Plomp, Wilson and Ottawa Police Service

2017 ONCPC 21

Date: December 29, 2017

File Number: 16-ADJ-015

Appeal under section 87(1) of the *Police Services Act*, R.S.O. 1990, c. P. 15, as
amended

Bruno Kraljevic

Public Complainant/Appellant

and

Cst. Emmanuel Svidran, Cst. Katherine Plomp
and Acting Sgt. Wayne Wilson

Respondents

and

Ottawa Police Service

Respondent

and

Independent Police Review Director

Statutory Intervenor

DECISION

Panel: D. Stephen Jovanovic, Associate Chair
Karen Restoule, Member
John Kromkamp, Member

Appearances: Bruno Kraljevic, the appellant
Mark Wallace, counsel for Cst. Svidran, respondent
Pamela Machado, counsel for the Cst. Plomp and Acting
Sergeant Wilson, respondents

Christiane Huneault, counsel for the Ottawa Police Service,
respondent

Miriam Saksznajder, counsel for the Independent Police Review
Director, Statutory Intervenor

Place and date of hearing:

Toronto, Ontario

June 15, 2017

INTRODUCTION

- [1] On July 6, 2013 the appellant and his wife were involved in a physical altercation at their home with three members of the Paquette family who were visiting friends in the neighbourhood.
- [2] Cst. Svidran was one of the officers with the Ottawa Police Service (the OPS) who was involved in the investigation, which led to criminal charges being filed against the appellant and his wife. Following an investigation by the Independent Police Review Director (the Director), Cst. Svidran was charged with two counts of neglect of duty under section 2(1)(c)(i)(a) of the Code of Conduct, Ontario Regulation 268/10 (the Code) under the *Police Services Act* (the *PSA*). As explained below, the charges related to Cst. Svidran's failure to follow certain policies and procedures during his investigation of the altercation.
- [3] Superintendent Don Sweet, the Hearing Officer, in his decision dated July 11, 2016, determined that the allegations of neglect of duty had not been proven on clear and convincing evidence and dismissed the charges.
- [4] Cst. Plomp and A/Sgt. Wilson were also involved in the investigation of the same incident and they too were charged with Neglect of Duty under the Code. Their charges were heard by the same Hearing Officer. The prosecutor closed his case after two witnesses were called at which point the defence brought a motion for non-suit.
- [5] The prosecutor agreed that the evidence presented was insufficient to support a conviction, as did the Director. The Hearing Officer, in a decision dated July 11, 2016 granted the motion and dismissed the charges.
- [6] The appellant has requested that the Commission revoke both decisions and order a new hearing before a different Hearing Officer.

DISPOSITION

- [7] For the reasons that follow the decisions of the Hearing Officer are confirmed and the appeals dismissed.

BACKGROUND

- [8] On the date of the incident, three members of the Paquette family approached the appellant who was on his own driveway using a leaf blower. One of the Paquettes objected to the appellant using the leaf blower while they were attending an outdoor party nearby. As the altercation became physical, the appellant phoned 911. The appellant's wife, carrying a knife, ran out of their house to assist him. She stabbed one of the Paquettes and was arrested shortly afterwards when the OPS officers arrived.
- [9] The appellant was taken to the hospital for the treatment of his injuries which included a broken ankle and lacerations to his face.
- [10] Mrs. Kraljevic, the appellant's spouse, had taken some pictures of the Paquettes before the altercation and some of the appellant immediately after showing that he had a bloodied face.
- [11] A/Sgt. Wilson and Cst. Plomp, two of the several officers called to the disturbance, took possession of Mrs. Kraljevic's camera and cell phone as she was arrested. The following morning, Cst. Svidran became the lead investigator, returned the camera and cell phone to Mrs. Kraljevic and charged her with aggravated assault. On July 13, 2013 Cst. Svidran returned to the appellant's home and charged him with assault. Cst. Svidran noticed some of the appellant's injuries but chose not to photograph them.
- [12] The appellant was subsequently acquitted on the charge of assault, but Mrs. Kraljevic was convicted on the charge of aggravated assault.
- [13] The first count of neglect of duty against Cst. Svidran alleged that he failed to review the contents of the camera and that he failed to have the appellant's injuries photographed contrary to O.P.S policy 5.39. The second count alleged that he failed to complete a "return to justice" form in accordance with section 498.1(1) of the *Criminal Code* for the items seized during his investigation.
- [14] A/Sgt. Wilson and Cst. Plomp were charged with neglect of duty for failing to ensure the chain of continuity of the camera and cell phone and not preserving,

storing or reporting in a detailed and methodical manner the seizure of the items in accordance with O.P.S. policy 5.25.

ISSUES

- [15] The appellant submitted the following five issues in support of his position that a new hearing should be ordered:
- I) The Hearing Officer did not correctly apply the law.
 - II) The Hearing Officer breached natural justice and procedural fairness by exhibiting bias towards the appellant.
 - III) The Hearing Officer failed to provide a minimum level of assistance, to ensure meaningful participation by him as the unrepresented public complainant.
 - IV) The prosecutor was incompetent and did not act in the public interest by failing to effectively cross-examine the respondent officer on inconsistent statements and to call credible witnesses.
 - V) The Hearing Officer erred in failing to conduct a thorough analysis of the credibility of Cst. Svidran's credibility.

ANALYSIS

- [16] The standards of review to be applied by the Commission in an appeal from the decision of a Hearing Officer are now well settled. The standard of review is reasonableness on questions of fact and correctness on questions of law: *Ontario Provincial Police v. Purbrick*, 2013 ONSC 2276, at paras. 14-16 (Div. Ct.); *Ottawa Police Service v. Diafwila*, 2016 ONCA 627, at paras. 53-63. Questions of whether the facts satisfy a legal test are questions of mixed fact and law, which are also to be reviewed on the standard of reasonableness unless there is an extricable question of law involved: *Dunsmuir v. New Brunswick*, 2008 SCC 9, at para. 53.
- [17] In assessing the reasonableness of a decision the question to be asked is whether there is "justification, transparency and intelligibility within the decision-making process" and whether "the decision fall[s] within a range of

possible, acceptable outcomes which are defensible in respect of the facts and law?" See *Dunsmuir*, at para. 47.

[18] The appellant's factum and oral argument focussed on the dismissal of the charges against Cst. Svidran and accordingly our analysis of the issues will relate primarily with that part of the Hearing Officer's decision.

I) The Hearing Officer did not correctly apply the law

[19] The appellant submitted that the Hearing Officer erred in law in concluding that Cst. Svidran was not guilty of neglect of duty by importing the element of intent as necessary for a conviction.

[20] The Hearing Officer considered the following passage from the Commission's decision in *Mousseau v. Metropolitan Toronto Police Force*, 1981 CanLII (ONCPC):

The reasonableness of an officer's conduct must be examined in light of the circumstances as they exist at a particular time. An officer is expected to use discretion and judgment in the course of his duties on many occasions. The police officer's discretion or judgment ought not to be examined scrupulously by the benefit of hindsight, but it is essential to examine the circumstances under which the officer exercised discretion or independent judgement to see to what extent discretion was warranted.

[21] He then referred to the following extract from *Pollock v. Hill, Board of Inquiry*, (November 19, 1992):

A finding of a breach of the Code is a serious finding against an individual officer which may result in major penalties under the police complaints legislation. Therefore, we will not find the officers guilty of neglect of duty to supervise unless there was some element of wilfulness in their neglect or unless there was a degree of neglect which would make the matter cross the line from a mere performance consideration to a matter of misconduct.

[22] The Hearing Officer was in fact critical of Cst. Svidran's conduct in some respects. Cst. Svidran believed that he would need a warrant to access Mrs. Kraljevic's camera because she was a suspect. At the same time, Cst. Svidran doubted that there would be useful images of the altercation on the camera so he could not swear to having the necessary belief to obtain a warrant. The

Hearing Officer found that Cst. Svidran had information that there could have been relevant pictures on the camera and that he should have at least attempted to obtain Mrs. Kraljevic's consent to view them.

[23] The Hearing Officer wrote that while Cst. Svidran should have put more "consideration to accessing the photos....I do not feel his inaction extended into neglect."

[24] The second component to the first count of Neglect of Duty was the allegation of the failure by Cst. Svidran to photograph the appellant's injuries contrary to O.P.S. policy. The Hearing Officer reviewed the evidence of A/S/Sergeant Gilligan who testified for the defence on the application of the policy, which he wrote, and the failure of Cst. Svidran to document the injuries he observed on the appellant. He testified that the policy did not require Cst. Svidran to photograph the appellant as the appellant was not in the lock-up when he was approached at his home by Cst. Svidran. Nor was he a "victim" at the time as he was instead going to be charged with assault. The Hearing Officer accepted that evidence.

[25] The second count of Neglect of Duty was based on the allegation that Cst. Svidran failed to complete the return to justice form as required by the *Criminal Code*. Cst. Svidran admitted that he did not immediately fill out the form but did so after it was brought to his attention. The Hearing Officer accepted that Cst. Svidran made a mistake but found that it did not "extend into the realm of misconduct".

[26] The Hearing Officer concluded his findings that Cst. Svidran was not guilty of Neglect of Duty by quoting from the Commission decision in *Ontario Provincial Police and Sgt. Dalton Brown*, OCCPS #06-09 (31 October 2006). The Commission wrote:

On the latter question, it is worth noting that neglect of duty is not an absolute liability offence. There must be either "wilfulness" or a "degree of neglect which would make the matter cross the line from a mere performance consideration to a matter of misconduct"....In other words, mere failure to comply is not enough. There must be some evidence of deliberateness or recklessness.

[27] In our view, the Hearing Officer correctly applied the law and his findings of fact were reasonable. We see no basis to set aside his decision on this is ground of appeal.

II) The Hearing Officer breached natural justice and procedural fairness by exhibiting bias towards the appellant.

[28] The appellant submitted that the Hearing Officer exhibited bias toward him by interrupting his cross-examinations of witnesses; not allowing him to ask Cst. Svidran two questions and; not allowing him to pose certain questions to the Director's investigator, Ms. Nagar.

[29] The test for considering whether there was a reasonable apprehension of bias in a hearing was set out in *Committee for Justice and Liberty v. National Energy Board*, [1978] 1 S.C.R. 369 at page 394:

...the apprehension of bias must be a reasonable one, held by reasonable and right minded persons, applying themselves to the question and obtaining thereon the required information....[That] test is "what would an informed person, viewing the matter realistically and practically – and having thought the matter through – conclude. Would he think that it is more likely than not that [the decision-maker] whether consciously or unconsciously would not decide fairly."

[30] A Hearing Officer, like a trial judge, has the right and the obligation to exercise a reasonable amount of control over the proceedings and make rulings on the scope of questioning. We do not find that any of the examples given by the appellant of interventions or rulings by the Hearing Officer to be indicative of bias. **Even if the Hearing Officer may have erred on a particular ruling, and we are not satisfied that he did, an examination of the entirety of the proceeding would indicate to a reasonable person that the impartiality required of the Hearing Officer was not compromised.**

III) The Hearing Officer failed to provide a minimum level of assistance, to ensure meaningful participation by the appellant.

[31] The Commission, in *Timms-Fryer and Amherstburg Police Service and Challans*, 2015 CanLII 69340 (ONCPC), affirmed on judicial review found at 2017 ONSC 1300 (Div. Ct.), wrote the following:

A minimum level of assistance, to ensure meaningful participation by the unrepresented public complainant, would have required the Hearing Officer to do the following on the record:

- Confirm whether the public complainant was aware that he was

entitled to be represented by legal counsel at the proceeding and whether he was waiving the right to legal representation.

- Explain the roles of the parties at the proceeding and the process that would be followed. This would include the right of each party, including the right of the public complainant, to call witnesses, introduce evidence, object to evidence adduced, cross-examine witnesses, and make submissions on all motions and at the end of the hearing.
- Explain the role of the adjudicator in the proceedings, including his role in relation to the unrepresented public complainant.
- Confirm that the public complainant understands the process and his role in it.
- Ask the public complainant, at the appropriate time, if he would like to question each of the witnesses of the prosecution and the defence.
- Ask the public complainant if he would like to make submissions on all motions and at the end of the hearing.

[32] The appellant submitted that the Hearing Officer failed to advise him that he was entitled to legal representation, whether he was waiving that right, and that he failed to ask him if he would like to question the witnesses.

[33] The Hearing Officer explained generally the hearing process on its first day stating, in part:

As far as these proceedings, each side will have an opportunity to present evidence including our public complainant. Each party will also have the opportunity to ask questions of the other party's witnesses. At the end of the hearing each party then can make a brief final submission.

[34] The Commission's decision in *Timms-Fryer* was released on October 30, 2015. The hearing in this matter began on December 1, 2015. On December 3, 2015 the prosecutor brought the decision to the attention of the Hearing Officer. The prosecutor advised that he would review all of the requirements with the appellant but then asked that the Hearing Officer do so as well, on the record to ensure that the appellant was aware of his rights. The appellant was also given a copy of the decision.

[35] The Hearing Officer, at pages 51 to 63 of the transcript explained the requirements and they were discussed with the parties. From a review of those pages, it appears that the appellant was fully aware of his rights of participation and understood them. He had earlier indicated that he could not afford a lawyer. There was an interpreter present for the appellant's benefit,

although it appears that that the interpreter was not required for most of the hearing.

[36] At page 116 of the transcript counsel for Cst. Svidran indicated that there were discussions ongoing with the appellant about a possible resolution of the charges. The appellant indicated that he would be reviewing that possibility with his lawyer that evening. He asked the Hearing Officer if he could have the evening to decide if he would be calling any witnesses.

[37] When the hearing resumed the following day, the appellant indicated that he would not be calling any witnesses. **The transcript does not indicate if he did consult with a lawyer, but he was certainly given the opportunity. This belies the appellant's submission that he was forced to proceed without counsel.**

[38] **In our view, the Hearing Officer did effectively comply with the requirements set out in *Timms-Fryer* to ensure that the appellant was fully apprised of his rights at the hearing and that those rights were honoured. In reviewing the transcripts it does appear that the appellant actively participated throughout the hearing and that his rights as an unrepresented public complainant were honoured.**

IV) The Prosecutor was incompetent and did not act in the public interest by failing to effectively cross-examine the respondent officer on inconsistent statements and to call credible witnesses.

[39] The appellant submitted that the prosecutor did not act in the public interest, arguing the following:

- The prosecutor did not effectively cross-examine Cst. Svidran and supported a defence objection to the appellant's cross-examination of Cst. Svidran.
- The prosecutor called Mrs. Kraljevic as a witness with the intention of publicly humiliating the appellant by exposing her to questions about her conviction.
- The prosecutor failed to call additional witnesses.
- The prosecutor presented black and white photographs of his injuries rather than ones in colour.
- The prosecutor had no questions for the appellant.

[40] In *Acton v. Cavanaugh*, 2013 CanLII 101395 (ONCPC) the Commission dealt with similar submissions by a public complainant alleging the prosecutor was incompetent in the manner in which he presented the case against the two officers charged with misconduct.

[41] The Commission adopted the following quotation from *R. v. G.D.B.*, [2001] 1 S.C.R. 250 as setting the standard for assessing counsel's competence:

Incompetence is determined by a reasonableness standard. The analysis proceeds upon a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance. The onus is on the appellant to establish the acts or omissions of counsel that are alleged not to have been the result of reasonable professional judgment. The wisdom of hindsight has no place in this assessment.

[42] While this decision dealt with an allegation of incompetence on the part of defence counsel, the Commission applied a similar standard to assess an allegation of incompetence on the part of the prosecutor. The Commission decided that the onus of establishing prosecutorial incompetence rested with the appellant and confirmed the "strong presumption" against such a finding.

[43] Prosecutors are afforded a fair degree of discretion in how they conduct the presentation of their cases. They interview witnesses and form a strategy as to how the case should be conducted. **Having reviewed the transcripts we see no basis to support the appellant's submission** that the prosecutor was incompetent.

V) The Hearing Officer erred in failing to conduct a thorough analysis of the credibility of Cst. Svidran.

[44] In **our view, the decision does show that the Hearing Officer assessed the evidence of Cst. Svidran properly and there is no basis upon which we could interfere with that assessment.** He began his analysis of the evidence by stating the following:

In analyzing the witness testimony I have considered both its reliability and credibility. Reliability relates to testimonial factors of perception, memory, and communication whereas credibility relates to sincerity or honesty.

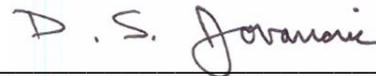
[45] The Hearing officer wrote "Svidran provided consistent and unwavering testimony in relation to these charges, he was forthright in conceding when he made a mistake and came across as a very reliable witness". As stated earlier in our decision, the Hearing Officer was nevertheless critical of some of the actions taken or not taken by Cst. Svidran which supports a conclusion that he took a balanced approach in assessing that evidence.

[46] The appellant did not make any direct submissions about the Hearing Officer's decision to grant the non-suit motion brought by counsel for A/Sgt. Wilson and Cst. Plomp. That motion was supported by the prosecution and the Director. We see no basis upon which we could interfere with that decision.

ORDER

[47] Pursuant to section 87(8) of the *PSA*, the Commission confirms the decision to dismiss the charges against the respondent officers.

Released: December 29, 2017



Stephen Jovanovic



Karen Restoule



John Kromkamp