

**IN THE MATTER OF  
ONTARIO REGULATION 123/89  
MADE UNDER THE POLICE SERVICES ACT R.S.O. 1990, C.P. 15  
AND AMENDMENTS THERETO:**

**AND IN THE MATTER OF**

**POLICE CONSTABLES DARREN SIRIE & WILLIAM FREEMAN**

**AND THE**

**SAULT STE. MARIE POLICE SERVICE**

**JUDGMENT**

**APPEARANCES:**

<b>MR. IAN JOHNSTONE</b>	<b>for the Sault Ste. Marie Police Service</b>
<b>MR. JEFF BROADBENT</b>	<b>for Constables Sirie and Freeman</b>
<b>MR. SUNIL MATHAI</b>	<b>for the Complainant Ms. Pat Nesbit</b>

**BEFORE:**

**DEPUTY CHIEF TERENCE KELLY (RET.)  
YORK REGIONAL POLICE SERVICE  
HEARING OFFICER  
AUGUST 22, 2013**

## **JUDGMENT**

**POLICE CONSTABLE DARREN SIRIE, BADGE NUMBER 216**

**AND**

**POLICE CONSTABLE WILLIAM FREEMAN, BADGE NUMBER 255**

**SAULT STE. MARIE POLICE SERVICE**

**AUGUST 22, 2013**

**DEPUTY CHIEF TERENCE KELLY (RET.)** Before commencing with Judgment in this matter I wish to thank Mr. Jeff Broadbent, Defence counsel, Mr. Ian Johnstone, the Service prosecutor, and Mr. Sunil Mathai, counsel for the Complainant, for their able arguments and exhibits tendered, all of which have assisted me in reaching my decision.

On September 26, 2011, a Police Services Act Hearing commenced against Inspector Art Pluss, Sergeant Joseph Trudeau, Police Constable Darren Sirie and Police Constable William Freeman regarding their investigation and supervision at a tragic accident which occurred on February 28, 2010.

On December 21, 2011, a Decision was released with regard to the alleged misconduct of the officers. The charges were dismissed against the respondent officers.

On September 19, 2012, an Appeal against the dismissal of the charges was commenced before the Ontario Civilian Police Commission.

On October 12, 2012, the Ontario Civilian Police Commission handed down its decision on the Appeal.

In its decision members of the Ontario Civilian Police Commission stated, and I quote the following paragraphs from Page 21:

- 106: We believe that this is an appropriate case in which to exercise our power to confirm the decision of the Hearing Officer with respect to the charges against Inspector Pluss and Sergeant Trudeau.
- 107: Accordingly, we confirm the Hearing Officer's decision to dismiss all charges against Inspector Pluss and Sergeant Trudeau.
- 108: There is some evidence on record which may place Constable Freeman's contact with Mr. Biocchi outside of the "forthwith" period. However, we believe that determination should be made by the Hearing Officer.
- 109: Constable Sirie made first contact with Mr. Biocchi and therefore had an opportunity to make an ASD demand within the "forthwith" period.

- 110: We order that the Hearing Officer should continue the hearing with respect to Constables Sirie and Freeman. He should receive such additional evidence as the parties determine relevant and he should consider such issues as may be relevant to the charges.
- 111: Accordingly, we revoke the decision of the Hearing Officer to dismiss the charges against Constables Freeman and Sirie and remit the matter to the Hearing Officer for a continuation of the hearing. Unquote.

On May 23rd of 2013 a continuation of the Police Services Act Hearing was commenced against Police Constables Darren Sirie, Badge Number 276, and William Freeman, Badge Number 255.

The Service prosecutor advised the Tribunal that he would not be calling any further witnesses in this matter, stating that neither Constable Sirie nor Constable Freeman testified in the original hearing. So what they are left with are their notes and their statements to the O.I.R.P.D. and suggest that these can be counted against them.

The Service prosecutor further states that he is also adopting the submissions of Mr. Sunil Mathai, counsel for the complainant, Mrs. Nesbit.

In his submissions, Mr. Mathai stated that police officers' investigations are

heightened when dealing with the loss of a member of the public; that they must engage in adequate investigations aimed at assisting prosecutions and assisting victims.

Mr. Mathai further submits that Constable Freeman, who arrived on the scene at 3:10 a.m. according to his notes, spoke to Mr. Biocchi at 3:40 a.m. However, what is unclear upon his arrival is what information did he receive from Constable Sirie. Mr. Mathai states that if Acting Sergeant Freeman arrives at 3:10 a.m. and speaks to Constable Sirie he is getting the grounds for reasonable suspicion. If, in fact, Constable Sirie relays the information to Acting Sergeant Freeman that he received from Mr. Biocchi, reasonable suspicion is established at that moment and Acting Sergeant Freeman, who is there to supervise Constable Sirie, should have directed him or himself to request an approved alcohol screening device (ASD) test.

Mr. Mathai then spoke to recent cases that deal with forming reasonable suspicion vs. reasonable probable grounds. Further, that an officer does not have to note an odour of alcohol on a person's breath to administer an ASD. Reasonable suspicion is a less demanding standard than probable cause not only in the sense that reasonable suspicion can be established with information that is different in quantity or content.

Mr. Mathai speaks to the comments made by Constable Sirie that he initially speaks to the driver, Mr. Biocchi, then speaks to the deceased's girlfriend, Ms. Seibt, after which he goes back and talks to Mr. Biocchi, stating the reason he

does this is because he now has a suspicion about Mr. Biocchi. However, Mr. Mathai agrees that it would be quite natural for an officer, after speaking to a witness, to go back and ask further questions whether or not he was suspicious about something or needs to ask some further questions about the incident.

Counsel further argues that simply relying on the absence of physical signs is not sufficient, neither does the absence of the odour of alcohol prevent the officer from having reasonable suspicion that the driver has alcohol in his body; that the odour of alcohol is not a necessary pre-condition to the making of a screening demand.

Counsel submits that this case falls to the issue of whether or not there was other evidence that provides an objective basis for the suspicion or grounds.

Counsel then spoke to the statement made by Constable Sirie to O.I.P.R.D. investigators where he states that Mr. Biocchi had mentioned that he had consumed alcohol, one or two beers, about two or three hours ago, however, there is no notation of this in the officer's memorandum book that officers' notes are supposed to be complete and accurate, reliable and contemporaneous.

Mr. Mathai then spoke to the time Acting Sergeant Freeman spoke to Mr. Biocchi, 3:40 a.m., some thirty minutes after he had arrived on the scene, stating that he had spoken to Constable Sirie prior to that and one can make the inference that Constable Sirie advised him of the conversation he had with Mr. Biocchi. Counsel states that there is not enough information before the Tribunal

to determine the exact time the conversation took place between Constables Sirie and Freeman, but using the starting point of 3:40 a.m. for that analysis is not accurate. Constable Freeman can't rely on 'I'm out of time' because that wasn't on his mind and this, the issue of neglect, is not decided on whether or not there was an actual demand; it's decided on whether or not he had to do what he was supposed to do at the time, upon hearing from Constable Sirie, was to either direct Constable Sirie to issue the demand or issue it himself.

Mr. Mathai further states in his submissions, at the end of the day this was an investigation into a death; that discretion when being exercised in the course of an investigation into the death of an individual, must be held to account, that caution must be taken to ensure that the officers are living up to their duties under Section 42 of the Police Services Act to assist victims who, in his respectful submission, includes ensuring a complete investigation and to ensure the laying of charges. Mr. Mathai submits there was no competent investigation because these officers asked themselves the wrong questions; applied the wrong tests and put undue influence on a factor that they ought not to have.

In his submissions defence counsel, Mr. Broadbent, spoke to a number of cases that dealt with reasonable suspicion. He then spoke to the use of an approved alcohol screening device (ASD) and its purpose to assist officers conducting an investigation for possible impairment; that the use of this device is at the discretion of the police officer administering it and that the law clearly states that the officer **may** use the ASD, not **shall**, which clearly gives the officer

discretion in its application. Defence also spoke to the importance of allowing officers to have discretion.

Mr. Broadbent stated there is no evidence before this Tribunal with respect to the officers acting in bad faith, or that they deliberately turned away from using the ASD. Further, the contents of the officers' notes show they were exercising good judgment, that their decision was made in good faith in accordance with the law.

With regard to Acting Sergeant Freeman, counsel submits there is no evidence of neglect of duty, that he had no duty to administer a roadside alcohol-screening device (ASD). The officer's conclusion was the accident was not alcohol-related.

My findings have been based on all submissions and cases spoken to by counsel for the complainant, counsel for the officers and the Service prosecutor.

The purpose of this Tribunal is to adjudicate between employer and employee and to punish and correct behaviour unacceptable to the Police Service and the public, with fairness being an essential ingredient.

In his submissions, Mr. Mathai speaks to the fact that if Acting Sergeant Freeman arrives on-scene at 3:10 a.m. and speaks to Constable Sirie, he is getting grounds for reasonable suspicion.



**Reasonable Suspicion:**

Reasonable Suspicion refers to a hunch, or suspicion, for which there is some rational basis to suspect that someone has been consuming alcohol. The odour of an alcoholic beverage on someone's breath is sufficient evidence to form Reasonable Suspicion.

Reasonable Suspicion need not be based on the accused's operation of a vehicle; it may be based on a police officer's observance of the condition of the accused, or on information supplied by third parties.

On October 13, 2010, during a taped interview with the lead investigator from the Office of the Independent Police Review Director, Kim MacDonald, Acting Sergeant Freeman was asked about his response to the accident.

Acting Sergeant Freeman stated that he received a call of a motor vehicle accident on Queen Street. While enroute to this location he observed an ambulance proceeding to the location. He arrived on-scene at the same time as the ambulance, at approximately 3:10 a.m. Upon his arrival he observed several other police vehicles and numerous civilians at the scene. He then spoke to two witnesses, a Geraldine Owens and a Mr. William Lee, and recorded the information they were supplying.

Sergeant Freeman stated he ascertained the location of Constables Sirie and Smith and received information that they were speaking to other witnesses. He

does not recall visually seeing them, however, he believed they were down at the other end of the road. He then started to concentrate on blocking down witnesses, shutting down the road and making sure the scene was protected, after which he recalls observing the paramedics working on the pedestrian involved in the accident and subsequently putting him on a gurney and removing him to the ambulance.

In his interview, Acting Sergeant Freeman stated that some time after that he spoke with Constable Sirie, receiving an update on the circumstances surrounding the accident.

Freeman then advised Kim MacDonald that he spoke to the driver, Mr. Joe Biocchi, at approximately 3:40 a.m.

From this interview it would appear that Acting Sergeant Freeman spent some time interviewing witnesses upon his arrival at the scene. He then started to concentrate on determining the location of other possible witnesses in an attempt to have them available to be interviewed later and also making sure the scene was secured. He then made inquiries about the location of Constables Sirie and Smith and was advised they also were interviewing witnesses at the other end of the road.

The actions of Acting Sergeant Freeman upon arriving at the scene would obviously take some time given the chaotic scene he was confronted with, which would clearly support his response in the taped interview that he did not speak to

Mr. Biocchi until approximately 3:40 a.m., some thirty (30) minutes after his initial arrival.

It is clear from this that Acting Sergeant Freeman does not speak to Constable Sirie upon his arrival at 3:10 a.m., and strongly suggests he is not getting the grounds to form a reasonable suspicion.

In the Commission's decision, Page 20, paragraph (20) they state, and I quote: "There is uncontradicted evidence that an ASD demand must be made within 15 minutes of the officer forming a reasonable suspicion to satisfy the "forthwith" aspect of Section 254 (2) of the Criminal Code. It is clear to us from the record that this time period begins with the first police officer's contact with the driver. The time period is not reset with subsequent contact with the driver by other police officers." Unquote.

There is no evidence placed before this trier-of-fact to support the charge against Acting Sergeant Freeman.

With regard to Police Constable Sirie, Mr. Mathai speaks to the comments made by the officer that he initially speaks to the driver, Mr. Biocchi, then speaks to the girlfriend of the deceased, Ms. Seibt, after which he goes back and talks to Mr. Biocchi, stating the reason he does this is because he now has reasonable suspicion about Mr. Biocchi.

However, Mr. Mathai agrees that it would be quite natural for an officer, after

speaking to a witness, to go back and ask further questions whether or not he was suspicious about something or needs to ask some further questions about the incident.

In the actual trial process there were several civilian witnesses and other police officers who corroborated the statements of Acting Sergeant Freeman and Constable Sirie with respect to the investigation of Mr. Biocchi; that there were no signs of alcohol emanating from him and/or his clothing. Neither did they observe any indicia of alcohol consumption.

In his taped interview with Kim MacDonald and Robert Zufelt, Constable Sirie was asked several times about the condition of Mr. Biocchi. Constable Sirie described Mr. Biocchi as appearing panicked, however he did not observe any indicia of alcohol consumption and absolutely no odour of alcohol emanating from himself or his clothing.

When questioned further by Robert Zufelt about how he would define mere suspicion concerning a roadside screening device, where the line would be drawn for him, Constable Sirie stated that when he interacts with somebody he would be looking for visual signs, dilated pupils, any type of slurred speech or some odour of alcohol. Also poor driving skills if he was following him and if he is not being completely forthright in response to his questions.

Throughout his interview when questioned about administering an ASD (Approved Roadside Screening Device) Constable Sirie stated in his opinion he

had no grounds, no suspicion that alcohol, or the consumption of it by Mr. Biocchi, was responsible for the accident.

**Sault Ste. Marie Service Policy Order 15.01**

When an officer has “reasonable suspicion” that a person operating or having care and control of a vehicle has been consuming alcohol, but that person does not overt evidence of impairment, the officer **may** read that person an approved screening device (ASD) test demand. The individual is detained, but is not under arrest prior to, or during, the test-taking and does not have the right to counsel prior to the test being read, provided that an ASD sample is given forthwith.

In this instance, and based on his investigation of Mr. Biocchi, Police Constable Sirie honestly believed he had no reasonable suspicion that alcohol consumption was responsible for the accident.

Police officers are authorized to use discretion by a number of sources including common law, case law and statutes such as the Criminal Code, the Youth Criminal Justice Act and Provincial Police Services Acts. The words “**shall**” or “**may**” are used in procedural provisions of various statutes and are directly relevant to discretion. The use of “shall” imposes a mandatory obligation to do, or omit to do, something. No discretion can be used when the word “shall”

directs police officers. The word “may” authorizes discretion; it allows the police to decide, or choose, from a number of alternatives: “may” gives the police a choice; “shall” removes a choice.

How important is the use of discretion? For a police officer it will be one of many overwhelming responsibilities. First, there is the issue of social injustice; crime victims, the criminal justice system, and society in general, have certain expectations about the police. They expect the police to solve problems and protection is probably their highest expectation. The public will judge the police as a whole based on the collective decisions made by the officers.

### **Neglect of Duty**

In *Legal Aspects of Policing*, at pages 6-85, the author (Paul Ceysens) states the following in relation to guidance in Neglect of Duty counts:

The leading judicial decision concerning failure to promptly and diligently discharge duty is *PG v. Police Complaints Commissioner*. This case considered the provisions of the Ontario scheme which provides that police officers commit neglect of duty if he/she “without lawful excuse, neglects or omits promptly and diligently to perform a duty as a member of the police service.”

In PG the Divisional Court ruled that either of two situations is required in order to establish neglect of duty.

1. "there was some element of willfulness" in the police officer's neglect." or
2. "there was a degree of neglect which would make the matter cross the line from a mere performance consideration to a matter of misconduct."

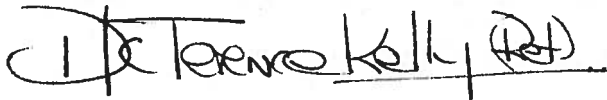
The Ontario Civilian Commission on Police Services, as it was known at this time, has ruled that the employer must establish that the police officer was required to perform a duty and that he/she failed to perform this duty because of neglect, or did not perform the duty in a prompt and diligent manner.

If these two burdens are established, the police officer bears the burden of establishing lawful excuse.

The evidence presented in this case clearly shows that officers Sirie and Freeman followed the proper procedures and were not found to have deviated from Service protocol.

In the circumstances they "handled a difficult and serious situation in a reasonable and professional manner."

Therefore, the charges of Neglect of Duty against Police Constable Darren Sirie, Badge Number 276 and Police Constable William Freeman, Badge Number 255, are hereby dismissed.

A handwritten signature in black ink that reads "DC Terence Kelly (Ret)". The signature is written in a cursive style with a horizontal line underneath the name.

Terence Kelly  
Deputy Chief (Retired)  
York Regional Police Service  
Hearing Officer