

ONTARIO PROVINCIAL POLICE DISCIPLINE HEARING

**IN THE MATTER OF ONTARIO REGULATION 268/10
MADE UNDER THE *POLICE SERVICES ACT*, RSO 1990,
AND AMENDMENTS THERETO;**

IN THE MATTER OF

THE ONTARIO PROVINCIAL POLICE

AND

PROVINCIAL CONSTABLE MARK HARRIS # 13290

NEGLECT OF DUTY

AND

UNLAWFUL OR UNNECESSARY EXERCISE OF AUTHORITY

DECISION WITH REASONS

Before: Superintendent Greg Walton
Ontario Provincial Police

Counsel for the Prosecution: Ms. Jordana Joseph
Ministry Of Community Safety & Correctional
Services

Counsel for the Defence: James Girvin
Ontario Provincial Police Association

Public Complainant: Christina Thompson

Hearing Date: April 12, October 25, 26 and 27, 2016

Allegation of Misconduct

Provincial Constable (PC) Mark Harris # 13290 stands charged with neglect of duty in that without lawful excuse, he neglected or omitted to promptly and diligently perform a duty as a member of the Ontario Provincial Police (OPP), contrary to Section 2(1)(c)(i) of the Code of Conduct contained in the Schedule to Ontario Regulation 268/10, as amended.

The edited particulars of allegations for PC Harris are as follows:

- On or about July 15, 2014, while on duty, PC Harris entered a private residence unlawfully in order to arrest a person known to be inside the residence.
- PC Harris was denied access to the residence by the lawful occupant who tried to block his entry but PC Harris proceeded to enter the residence despite this.
- PC Harris failed to obtain proper judicial authorization to enter the residence to affect the arrest.
- PC Harris knew or reasonably ought to have known that his actions were neglectful.

And further,

PC Harris # 13290 stands charged with unlawful or unnecessary exercise of authority in that he did use any unnecessary force against a prisoner or other person contacted in the execution of duty, contrary to Section 2(1)(g)(ii) of the Code of Conduct contained in the Schedule to Ontario Regulation 268/10, as amended.

The edited particulars of allegations for PC Harris are as follows:

- On or about July 15, 2014, while on duty, while unlawfully in a private residence PC Harris applied force upon an occupant, Christina Thompson, taking physical control of and handcuffing Christina Thompson.
- PC Harris removed Christina Thompson from the residence, and detained Christina Thompson in the police cruiser for a short period of time.

Plea

On June 2, 2016, PC Harris, represented by Mr. James Girvin, pleaded not guilty. The Hearing commenced on that date and continued on October 25, 26 and 27, 2016. Ms. Jordana Joseph represented the OPP and the public complainant Christina Thompson was unrepresented.

Background

The OPP Professional Standards Bureau (PSB) authored an investigative report which concluded PC Harris lawfully entered the residence situated at [REDACTED] in Leamington. The PSB also concluded there was no evidence to support the allegation of neglect of duty related to the unlawful entry. The PSB report states:

According to the Supreme Court of Canada [Macooh] – “It is well settled common law that police officers have the power to enter a private premise to make an arrest in hot pursuit.” Where “the suspect has gone into hiding in a home while fleeing solely to escape arrest.” Further in [Eccles vs Bourque, Supreme Court of Canada] “Entry can be made against the will of the holder only if (a) there are reasonable grounds for the belief the person sought is within the premises (b) proper announcement is made prior to entry.” As such, on the 15th of July 2014, PC Harris lawfully entered Thompson’s dwelling and therefore, there is no evidence to support the allegation of Discreditable Conduct for an unlawful entry.

The PSB investigative report also determined:

PC Harris did not use unnecessary force against a prisoner or other person contacted in the execution of duty. Ms. Thompson was assaultive and actively resistant toward PC Harris while he was in the lawful execution of his duties. The empty hand techniques used by PC Harris to control Ms. Thompson were necessary and were not excessive.

The Office of the Independent Police Review Director (OIPRD) took a different perspective. Their report concluded:

Constable Harris advised he was in hot pursuit of Ms. Thompson’s daughter, because she ran into the house when she saw him. The Commissioner agreed with this analysis and this conclusion. With respect, the Panel disagrees. This was not a case of hot pursuit or exigent circumstances. Hot pursuit or exigent circumstances applies to circumstances in which an officer sees an indicatable offence being committed, and the person flees and seeks refuge in a residence. The officer must believe that the person is going to commit a further offence, or dispose of evidence of the offence just committed, in order to be justified in entering the home in ‘hot pursuit’...This did not occur in this case. This case was no different than a situation in which the police know that a wanted person is inside the home. It does not matter in such circumstances whether the police see the person through the window or watch them walk or run into the house. A Feeney warrant is required in such circumstances in order to authorize entry into the home for the purposes of effecting an arrest. Since no such warrant was obtained, the entry into the home was unlawful and unauthorized. Accordingly,

there is sufficient evidence to believe, on reasonable grounds, that the misconduct of Discreditable Conduct – Unlawful Entry was committed.

It should be noted that the OIPRD modified their original position and directed that the misconduct on the Notice of Hearing read neglect of duty rather than discreditable conduct as had been originally directed.

The OIPRD report further stated:

As the entry into the home was unlawful and unauthorized, Ms. Thompson was permitted to use a degree of force in trying to have Constable Harris leave her home. Constable Harris' use of force on Ms. Thompson, including putting handcuffs on her, was unlawful because given the unauthorized entry into Ms. Thompson's home, he was no longer acting in the lawful execution of his duties.

This Tribunal is not bound by any of these conclusions and must take an independent approach to determine whether or not the actions of PC Harris constitute misconduct.

Decision

After reviewing and considering all of the evidence and the submissions presented, I find PC Harris not guilty of neglect of duty and not guilty of unlawful or unnecessary exercise of authority.

Summary of Misconduct

The allegations in this matter are easily understood. It is alleged PC Harris unlawfully entered a private residence. Despite being denied access into the residence PC Harris continued with his entry. It is alleged PC Harris was obligated to obtain proper judicial authorization prior to entering the residence to affect the arrest of an individual within. PC Harris knew or reasonably ought to have known that his actions were neglectful. Once inside, PC Harris applied force upon an occupant, Christina Thompson, took physical control of her and handcuffed her. PC Harris removed Ms. Thompson from the residence, and detained her in the police cruiser. The actions of PC Harris relating to Ms. Thompson allegedly amount to unlawful or unnecessary exercise of authority.

The Hearing

Six witnesses testified before this Tribunal:

- Elysia Brandie was participating in a “civilian ride along program” and accompanied PC Harris for the duration of his shift on July 15, 2014. Ms. Brandie witnessed PC Harris enter the residence and arrest Ms. Thompson.
- Christina Thompson is the public complainant and the mother of Karysa Montgomery. At the time of this incident, Ms. Thompson resided at her boyfriend’s residence at [REDACTED] in Leamington. Ms. Thompson denied PC Harris entry into the residence and was subsequently arrested by him for obstructing police. (Chris Tavares is the boyfriend of Ms. Thompson and the home owner of [REDACTED])
- Karysa Montgomery had an outstanding warrant for her arrest at the time of this incident. She was in attendance at her mother’s boyfriend’s residence. Upon seeing the approaching cruiser of PC Harris, she fled inside the residence to avoid arrest. Ms. Montgomery was eventually arrested for her outstanding warrant.
- Detective Constable Joan Wilson attended [REDACTED] in a “back-up” capacity to PC Harris. She assisted with processing Karysa Montgomery at the residence.
- PC Jodylyn Fedak attended [REDACTED] in a “back-up” capacity to PC Harris. She assisted with processing Karysa Montgomery at the residence.
- PC Harris is the subject officer. PC Harris has had frequent and regular contact since 2011 with Ms. Montgomery, Ms. Thompson and Chris Tavares.

A credibility assessment of the witnesses is not required to know with absolute certainty that PC Harris was aware Ms. Montgomery had an outstanding warrant for her arrest and that PC Harris saw Ms. Montgomery enter the residence at [REDACTED]. The witnesses agreed PC Harris approached the residence, announced his presence, and his purpose before entering. Following a minor confrontation, PC Harris arrested Ms. Thompson, handcuffed her and placed her in the rear of the cruiser. After a short period of time they re-entered the residence together to safely affect the arrest of Ms. Montgomery.

At issue is the lawfulness of PC Harris’ entry into the residence; if the entry is deemed lawful, the subsequent behaviour of PC Harris does not amount to misconduct. If the entry is deemed to be unlawful, greater scrutiny of PC Harris’ behaviour will be required.

CRITICAL ISSUE #1:

Was PC Harris' entry into the residence lawful? Did PC Harris require judicial authorization before entering the residence to arrest Ms. Montgomery?

Finding PC Harris required informed consent from a lawful resident to enter the residence. In lieu of that consent, he required judicial authorization before entering the residence to affect the arrest of Ms. Montgomery. PC Harris did not acquire either and therefore, his entry into the residence is deemed to be unlawful.

Evidence and Submissions

This is not meant to be an exhaustive overview of the testimony of witnesses and submissions of counsel. I will make reference to what I consider to be the most relevant evidence specific to the issues at hand.

It is imperative not only to explore, but to fully appreciate and understand how the law views police entering a private residence to affect the arrest of an individual based on "hot pursuit" if indeed hot pursuit existed in this instance.

Ms. Joseph stated exigent circumstances and hot pursuit can exist as the general exceptions of entering a dwelling house but neither is applicable in this particular case. Ms. Joseph stated exigent circumstances are set out in section 529.3 of the Criminal Code and in the doctrine of common law.

Ms. Joseph tendered a number of cases to support her position. She submitted, based on the Supreme Court of Canada decision of *R. v. Feeney*, more than an arrest warrant is required to permit police to enter a dwelling-house. Ms. Joseph submitted the Supreme Court of Canada decision of *R. v. Macooh* and the Alberta Divisional Court decision of the Queen v. *Ballegeer* to assist in the determination of whether the doctrine of hot pursuit is applicable to a situation such as this. Ms. Joseph said there is no reason PC Harris couldn't have waited to affect the arrest at another time or couldn't have obtained judicial authorization. PC Harris' entry into the residence was unlawful as was his subsequent use of force on Ms. Thompson.

Ms. Joseph stated this Tribunal ought to recognize that the rights of citizens should not have the privacy of a dwelling-house unreasonably infringed when there are other options available to an officer. Ms. Joseph stated there was no reason for PC Harris not to disengage and seek judicial authorization.

Mr. Girvin stated there is no case law specific to this situation; PC Harris attended the residence to serve a subpoena, not to affect the arrest of Ms. Montgomery. That is a factor unique to this situation compared to the other cases where police attended specifically to make an arrest and/or conduct a search. PC Harris was aware of Ms. Montgomery's outstanding arrest warrant. PC Harris yelled at Ms. Montgomery advising she was under arrest as he engaged in the fresh pursuit of a wanted individual who fled into the residence of another person. PC Harris had conversed with the homeowner the previous day who said Ms. Montgomery was not welcome in his home. PC Harris was aware Ms. Montgomery had threatened to cause harm to herself at a previous call for service and became concerned for her safety. Mr. Girvin submitted, for all these reasons, the circumstances did not call for a judicial authorization and PC Harris acted lawfully and in accordance with OPP policy.

Mr. Girvin submitted the arrest warrant in existence was for hybrid offences. All hybrid offences are presumed to be proceeding by way of indictment until the crown attorney makes an election to proceed summarily. He noted there is no evidence before this Tribunal suggesting PC Harris contravened OPP Policy. It is clear in the investigative report; the PSB believed PC Harris' conduct was consistent with case law applications.

Analysis

The terms "fresh pursuit" and "hot pursuit" were used synonymously during the Hearing and they will be referred to here in the same manner.

The Manitoba case of *R. v. Knelsen* ([2010] MBPC 50) stated:

As the officers in the case at bar entered Knelsen's semi without a warrant, there is a presumption that the entry was unreasonable unless the Crown shows on a balance of probabilities that the entry was permitted by law, that law is reasonable, and the manner in which the entry was conducted is reasonable.

That same presumption applies in this instance. Section 529.3 of the Criminal Code provides the authority to enter a dwelling-house without warrant:

(1) Without limiting or restricting any power a peace officer may have to enter a dwelling-house under this or any other Act or law, the peace officer may enter the dwelling-house for the purpose of arresting or apprehending a person, without a warrant referred to in section 529 or 529.1 authorizing the entry, if the peace officer has reasonable grounds to believe that the person is present in the dwelling-house, and the conditions for obtaining a warrant under section 529.1 exist but by reason of exigent circumstances it would be impracticable to obtain a warrant.

(2) For the purposes of subsection (1), exigent circumstances include circumstances in which the peace officer:

(a) has reasonable grounds to suspect that entry into the dwelling-house is necessary to prevent imminent bodily harm or death to any person; or

(b) has reasonable grounds to believe that evidence relating to the commission of an indictable offence is present in the dwelling-house and that entry into the dwelling-house is necessary to prevent the imminent loss or imminent destruction of the evidence.

The court in *R. v. Knight* ([2010] ONCJ 400) stated:

The case law is clear that police officers have limited powers and are only entitled to interfere with the liberty or property of citizens to the extent authorized by law. Police officers have a general duty to prevent crime and protect life and property, however this does not mean that they can use any and all means for achieving these ends.

Knight dealt with the arrest of an individual at the defendant's residence for an indictable offence, not an outstanding warrant. The court stated:

The Court cannot find any basis on which to conclude that there were exigent circumstances. First, there was no requirement to act in an effort to have to preserve evidence. Second, officer safety or public safety was not put at risk by delaying a search. Third, this is not a situation where, for example, a 911 call was placed, in which case such a distress call or a cry for help would necessitate a forcible entry without a warrant to respond to same. Fourth, this is not a situation which can be described as the police being in "hot pursuit" of a suspect. The rationale for this exception is that it would be unacceptable for police officers who are about to make a completely lawful arrest to be prevented from doing so merely because the offender has taken refuge in his home. The offender is then clearly not being bothered by the police unexpectedly while in domestic tranquillity. Rather, he has gone to his home while fleeing solely to escape arrest. In such circumstances, the police should not be obliged to end the pursuit on the offender's doorstep, so to speak, without making his residence a sanctuary. The flight of the offender, an act contrary to public order, would then effectively be rewarded. Also, in a case of hot pursuit, the police likely have personal knowledge of the facts justifying the arrest, which greatly reduces the risk of error. Flight by a suspect also usually indicates some awareness of guilt on his part. Therefore society's interest in effective law enforcement in such circumstances, takes precedence over the privacy interest.

Similarly, the first three points listed in *Knight* are not applicable in this instance; there was no need to preserve evidence, no safety concerns initially and no call for distress. The fourth issue of hot pursuit requires further scrutiny.

R. v. Feeney ([1997] S.C.J. No. 49) was the leading authority on the issue of arrest and search at a defendant's residence. It did not involve fresh pursuit or the execution of an outstanding arrest warrant but is still a very relevant case to provide guidance in these circumstances. The court said:

While I have decided that a warrant is required prior to entering a dwelling house to make an arrest, I have not yet set out the type of warrant that is required. In my view, an arrest warrant alone is insufficient protection of the privacy rights of the suspect. ...In my view, then, warrantless arrests in dwelling houses are in general prohibited. Prior to such an arrest, it is incumbent on the police officer to obtain judicial authorization for the arrest by obtaining a warrant to enter the dwelling house for the purpose of arrest...

It is well understood currently in the policing community that generally, a "Feeney Warrant" is required in order to arrest an individual within a residence. Each situation is different and factors must be considered such as the circumstances which brought the police therein and exigent circumstances or hot pursuit. I find the evidence of PC Harris trustworthy when he said he was in "fresh pursuit" of Ms. Montgomery. His testimony was supported by the Provincial Communication Centre (PCC) logger tape where he reported such and by the testimony of Ms. Brandie. However, does PC Harris' understanding of fresh pursuit constitute exigent circumstances so that the entry then becomes lawful?

PC Harris certainly would have had sufficient grounds to obtain a "Feeney Warrant" provided he was able to maintain observation of the residence to ensure Ms. Montgomery remained within. Based on his testimony, PC Harris believed two exigent circumstances existed. He relied upon the fresh pursuit of Ms. Montgomery to justify his initial entry and then he relied upon his concern for the safety of Ms. Montgomery to re-enter the residence a second time.

With regards to hot pursuit, the court in *Knelsen* quoted *R. v. Maccooh*:

For hot pursuit to exist, there "must be continuous pursuit conducted with reasonable diligence, so that pursuit and capture along with the commission of the offence may be considered as forming part of a single transaction".

PC Harris was not permitted to enter the residence without consent unless he had judicial authorization or exigent circumstances existed. I find the circumstances PC Harris was confronted with contributed to his mindset that he was in the fresh pursuit of Ms. Montgomery. I do not doubt he was acting in good faith but I do not find his decision is supported in law. *Macooh*, states the commission of the offence must be part of the single transaction. A case where a person is sought and pursued for an outstanding arrest warrant is not consistent with being a single transaction of the offence.

R. v. Ballegeer ([2013] ABPC 1280) is an Alberta case, not exactly on point but the comments about fresh pursuit for an outstanding arrest warrant are noteworthy and most applicable to the facts in issue concerning this matter. The court here also cited the case of *R. v. Macooh*:

R. v. Macooh does as the crown notes, confirm not only that the doctrine of “hot pursuit” is effective in Canada, but also that it relates to provincial offences, as well as Criminal Code offences: “In summary, I conclude that even where there is no arrest warrant, there is in a case of hot pursuit a right to enter residential premises to make an arrest both for provincial offences and for indictable offences, provided the circumstances justify an arrest without a warrant.”

Ballegeer goes on to make the following statements:

- However, *Macooh* presupposes not that there is an outstanding warrant, but that an offence has just occurred, and that a peace officer is actively and closely pursuing the alleged perpetrator in relation to that offence. Under those circumstances, the court concludes that the alleged perpetrator cannot evade arrest by taking shelter in a dwelling house.
- *R. v. Feeney* and the subsequent amendments to the Criminal Code, have made it clear that searches of dwellings, even with an arrest warrant, are not lawful, unless a special warrant, a “Feeney warrant,” is obtained, or exigent circumstances exist: those exigent circumstances are set out in section 529.3 and in the common law doctrine of “hot pursuit.” Accordingly, both the case law and the legislation confirm the special status accorded a dwelling in Canadian law, and the restrictions placed on peace officers in order to respect that special status.
- The essential question becomes whether the doctrine of “hot pursuit” is applicable to a situation like this where police are in pursuit of an individual not in relation to an alleged offence just committed, but in relation to an outstanding warrant.

- The doctrine of “hot pursuit” is founded on the exigent circumstances existing immediately after an alleged offence has taken place; the comments by the court in *Macooh* regarding the unreasonableness of allowing a suspect to avoid arrest simply by taking refuge in a home are directed specifically at that situation, and not at a situation in which there is no allegation of a recent offence, but simply an outstanding warrant.
- The policy problem with allowing the application of the “hot pursuit” doctrine to the execution of any warrant is that there may well be no truly exigent circumstances to justify such a serious infringement of the sanctity of a dwelling house. Unless the warrant is outstanding for some serious or violent crime, and immediate arrest is necessary for the protection of the public, the fact that an individual has taken refuge in a home is simply an inconvenience for the police.

Of course no two cases are identical. In that matter, Mr. Ballegeer was deemed to be in his residence when he was told he was under arrest. It was determined by the court that he was not aware police were there to arrest him on a warrant until he was in his residence. Therefore, the court deemed the circumstances did not constitute hot pursuit.

In this case, the testimony from PC Harris and from his ride-along, Elysia Brandie, suggests they observed Ms. Montgomery on the front yard of the residence (fully clothed). PC Harris stopped his cruiser, yelled that she was under arrest for the outstanding warrant and gave chase on foot. Ms. Montgomery’s testimony was that she was on or near the front porch but she admitted she ran into the residence to flee PC Harris and in fact told her mother the police were there to arrest her. Ms. Montgomery testified she was naked at the time. I accept the testimony of PC Harris. I did not find the testimony of Ms. Montgomery credible when she said she was naked out in the front porch area of the home. It is a nonsensical statement which was contradicted by her own mother who described her wearing a black dress she was certain her daughter was wearing at the time. PC Harris’ testimony is supported by Elysia Brandie. However, the fact Ms. Montgomery was chased across the yard into the home, knowing she was to be arrested, does not change the dynamics. Ms. Montgomery had entered the home to avoid PC Harris’ execution of the arrest warrants but *Ballegeer* makes it clear; “hot pursuit does not apply in the case of an outstanding arrest warrant.

Ballegeer also states:

I find that there is not an unfettered right of peace officers to follow a suspect into a residence to execute an outstanding warrant, notwithstanding that the suspect appears to be taking refuge to avoid arrest, unless the nature of the warrant justifies that serious intrusion into the sanctity of the home.

The testimony of the witnesses was consistent on the next turn of events: PC Harris stopped at the front door of the residence, announced himself and his purpose. When Ms. Montgomery failed to produce herself, he advised he was entering to arrest Ms. Montgomery. It was after he was inside the residence that he was confronted by Ms. Thompson who advised him he was not permitted to be in the home.

I recognize that the outstanding warrants were for dual procedure offences, meaning they were considered indictable offences for the purpose of arrest procedures but in the context of severity, I consider them to be at the lower end of the threshold. In early June, PC Harris knew there was a warrant issued for the arrest of Ms. Montgomery for breach of undertaking and three counts of breach of recognizance. PC Harris had been actively searching for Ms. Montgomery in relation to the outstanding warrants and had attended locations he knew her to frequent. PC Harris was aware that her home address as per the court order was on [REDACTED]. He was also of the opinion she was not welcome at [REDACTED].

PC Harris testified he had attended this residence at [REDACTED] the previous morning of July 14, 2014. As PC Harris approached the home that day, he saw the homeowner, Chris Tavares, leaving in a vehicle. PC Harris conducted a traffic stop of that vehicle for the sole purpose of serving Mr. Tavares with a subpoena. PC Harris also had a subpoena for Ms. Thompson and during his conversation with Mr. Tavares, PC Harris learned Ms. Thompson was still sleeping inside the residence. At the request of Mr. Tavares, PC Harris did not re-attend his residence immediately to affect service of the subpoena but returned later that afternoon. He was met with negative results, hence his attendance again on July 15. Mr. Tavares also advised PC Harris he had not recently seen Ms. Montgomery. Mr. Tavares indicated that when next he saw Ms. Montgomery, he would notify police immediately because she was not welcome in his home.

PC Harris testified that he took that conversation into account when he made the decision to enter the residence. It was fresh pursuit but additionally the home owner just the previous day had told him Ms. Montgomery was not welcome in his house.

Feeney states:

In cases of hot pursuit, society's interest in effective law enforcement takes precedence over the privacy interest and the police may enter a dwelling to make an arrest without a warrant. However, the additional burden on the police to obtain a warrant before forcibly entering a private dwelling to arrest, while not justified in a case of hot pursuit, is, in general, well worth the additional protection to the privacy interest in dwelling houses that it brings.

PC Harris mistakenly believed he could lawfully rely upon the doctrine of hot pursuit but I must ask the question, what was the rush? What was the public interest in affecting the arrest immediately? There was no imminent threat or harm to members of the public that necessitated the immediate arrest of Ms. Montgomery. The arrest warrants were for breaches, not acts of violence or of a nature which required urgent execution.

Ballegeer goes on to state:

While it is dangerous to speculate, and perhaps unfair to the peace officers, who had to make rapid judgement calls on the spot, one cannot help but suspect that an arrest might have been far less dramatic at a later time, when perhaps a team was present to execute a search warrant ...The notion that the scenario might have played out quite differently if the arrest had not been attempted with such immediacy supports the contention that this was not a situation in which the doctrine of “hot pursuit” was properly applicable. The negative consequences of a failure to immediately arrest Mr. Ballegeer on the warrant seem likely to have been minimal.

Based on the cases presented for my consideration, it is clear PC Harris required judicial authorization to enter the residence. As stated in *Ballegeer*, there is not an unfettered right of peace officers to follow a suspect into a residence to execute an outstanding warrant. The nature of the warrant and the exigent circumstances did not justify the serious intrusion into the sanctity of the Tavares residence. PC Harris required judicial authorization in the form of a “Feeney Warrant” to enter the residence to arrest Ms. Montgomery for her outstanding warrants.

PC Harris’ understanding and subsequent reliance of fresh pursuit does not apply in the case of executing an arrest warrant for such minor infractions. I appreciate PC Harris took the position Ms. Montgomery was not welcome in the home of Mr. Tavares but it is also the residence of Ms. Montgomery’s mother. Ms. Thompson met him just inside the residence and told him he was not welcome suggesting Ms. Montgomery was permitted to be there. I do not find that fact Mr. Tavares mentioned she was not welcome in his home to be significant enough to justify PC Harris’ entry into the residence considering his familiarity with the family.

I find PC Harris’ entry into the residence to be unlawful. PC Harris did not have consent and exigent circumstances were not applicable. PC Harris therefore required judicial authorization before entering the residence to affect the arrest of Ms. Montgomery.

CRITICAL ISSUE #2:

Now that the entry has been determined to be unlawful, does that entry and the subsequent actions of PC Harris equate to misconduct?

Finding Although PC Harris required judicial authorization to lawfully enter the residence to affect the arrest of Ms. Montgomery, I do not find his actions amount to a breach of the code of conduct.

Evidence and Submissions

Once again, this is not meant to be an exhaustive overview of witness testimony and counsel submissions. I will speak to what I consider to be the most relevant evidence addressing the issues at hand.

PC Harris testified he attended the residence to serve a subpoena on Ms. Thompson. Upon arrival, he saw Ms. Montgomery, knew she was wanted for outstanding arrest warrants and took up foot pursuit as she fled inside. He notified the PCC that he was in fresh pursuit. At the door, he stopped, identified himself, stated he was there to arrest Karysa Montgomery and that he would enter if she did not present herself. Once there was no response, he entered the residence.

Once PC Harris was inside the residence, there was a confrontation between him and Ms. Thompson. This resulted in her arrest for obstructing police. PC Harris testified that when he walked past Ms. Thompson, she grabbed him from behind, not in an attempt to commit an assault but rather to prevent him from searching for her daughter. She was handcuffed and placed in the rear of his cruiser. He stated that the only time he had his Taser out of its holster was upon re-entering the residence on the second occasion. He did so because Ms. Thompson had indicated Mr. Tavares was inside the house and would “kick his ass.” The Taser was never activated.

Ms. Thompson and Ms. Montgomery testified about the rude and unprofessional behaviour of all members of the OPP in attendance. They also testified there were copious numbers of OPP members in attendance, at least eight and as many as 15.

Ms. Thompson testified she was sleeping and awoke to her daughter saying the police were there to arrest her. Ms. Thompson heard knocking at the front door and a male voice identified himself as being from the Leamington police; he was coming in to arrest Karysa for missing her court date. She advised the officer he could not come in without a warrant. Ms. Thompson testified PC Harris entered with a Taser in his hand.

Ms. Thompson said she put her hands in the air and that she was not truthful with the officer initially. For that reason, he hit her off the wall, threw her down, handcuffed her and placed her in the police car. She added that once she was truthful with him, PC Harris brought her back inside to assist in the apprehension of Ms. Montgomery. Ms. Thompson stated they located Ms. Montgomery in the laundry room. For some reason unknown to her, her daughter was now in a naked state and behaving hysterical. Female police officers assisted in helping her daughter calm down and to find clothes to wear.

Ms. Montgomery testified she was naked out in front of the house on the steps near the porch. She observed the cruiser coming down the road and once she determined it was stopping, she ran inside the home and told her mother the cops were coming for her. She hid in the laundry room. From there, she heard the confrontation between her mother and PC Harris. Ms. Montgomery stated she heard her mother say he was not allowed in the house and the officer said something to the effect of “freeze” and “stop resisting.” Eventually two female officers came in, arrested her and helped her find clothes to wear.

Following the arrest of Ms. Thompson, PC Harris testified he was intent on re-entering the residence to arrest of Ms. Montgomery. By then, PC Harris was concerned for her safety which he said added to his grounds to enter the home on that occasion. PC Harris was armed with the knowledge that Ms. Montgomery had threatened to cause harm to herself during a previous OPP call for service. On that occasion Ms. Montgomery was located inside the clothes dryer in possession of a knife because she did not want to be arrested. She threatened to stab herself in the stomach and it was her mother who talked to her and calmed her down to de-escalate that situation. PC Harris testified he was now worried that a similar situation could have been unfolding, hence the need to affect the arrest as soon as practicable.

Ms. Brandie testified that when they were driving up to the residence, PC Harris said “that was her.” The “she” (Ms. Montgomery) he was referring to was in the front yard. Ms. Brandie stated they pulled into the driveway of the residence and PC Harris called for back-up officers to attend for assistance.

Ms. Brandie testified PC Harris went inside and she stood in the doorway where she could make observations of PC Harris. The mother (Ms. Thompson) was yelling at PC Harris and blocked his way from getting further inside the house, while he was in the doorway. She was yelling, telling him to get out and reaching at him. Ms. Thompson went to grab PC Harris so he handcuffed her and put her on the couch. Ms. Brandie stated she stayed in the doorway of the porch, holding the screen door open.

PC Harris then asked Ms. Brandie to go around to the back of the property to make sure no one came out the back way so she walked to the backyard and waited there. Ms. Brandie stated she did not know the names of the other officers who attended but there were two or three male officers and a female officer.

The 2000 *Turpin v. Durham Regional Police* decision by the Ontario Civilian Commission on Police Services (OCCPS) speaks to the issue of unnecessary exercise of authority. Ms. Joseph stated although the facts are not on point, the concept remains the same; PC Harris had many options available to him. Police officers are given extraordinary powers under the criminal code but these powers are not unlimited. Ms. Joseph submitted police officers must be expected to operate within the limits of the law or be subject to discipline if they abuse their authority. *Turpin* states:

We can find no pressing requirement that should have caused him to use force against Mr. Tamney. He had other options. He could have disengaged, stepped back outside, called a superior officer for advice, or returned later with a warrant if necessary.

With regards to the issue of neglect, Mr. Girvin stated there must be willfulness or a degree of neglect which crosses the line from a mere performance consideration to a matter of misconduct. That is not the case concerning PC Harris.

Mr. Girvin submitted two cases for consideration regarding this issue. The decision of the Board of Inquiry regarding *Shockness and Peel Regional Police Force* (PC006/94) was submitted in the event this Tribunal concluded there was a neglect of duty:

In particular, the Board must look to whether the subject officer acted in bad faith or knew or ought to have known that his or her actions were improper.

Mr. Girvin submitted the Board of Inquiry case of *Austin and the Toronto Police Service* (PC007/97). He stated it is a similar situation in that the officers were acting in good faith. The Board stated:

In the case before this Board, we find no bad faith, police officer negligence or recklessness...In the case before us, the police officers had an honest belief that they had a right to enter the apartment without a warrant in order to preserve evidence.

Mr. Girvin submitted the OPP has not said PC Harris acted in bad faith, knew or ought to have known his actions were not proper. There is no allegation that he breached OPP policy. The only evidence in this regard came from PC Harris himself who said this is how he was trained at the Ontario Police College and in his annual "block training."

Analysis

Much of this analysis hinges on the interpretation of the law pertaining to lawful entry into a residence. As such, I do not see the need to delve too deeply into the issue of witness credibility but I will note that I did not accept the testimony of Ms. Montgomery or Ms. Thompson regarding the number of OPP officers in attendance. I accept the evidence of Ms. Brandie and the testimony of the officers were able to name the police officers in attendance the officers . There were five officers in total. I do not accept the testimony of Ms. Montgomery when she said she was outside in a naked state. Her mother said she was wearing a black dress while PC Harris stated she was wearing shorts and a t-shirt. Ms. Brandie could not recall her attire but knew she was wearing clothes. That said I was not at all impacted by these inconsistent statements.

I do not accept the testimony of Ms. Thompson when she said she was assaulted and arrested by PC Harris “for no reason.” Ms. Brandie does not have a vested interest in these proceedings. I accept her testimony when she said she observed Ms. Thompson grabbing PC Harris. That is consistent with PC Harris’ testimony. Ms. Brandie was privy to the conversations which unfolded inside the home even when she was standing at the back of the residence. The descriptions she provided were consistent with the evidence of the officers who testified. My conclusion is that the officers in attendance conducted themselves in a very professional manner.

In their analysis of section 8 of the *Charter*, the court in *Knight* stated:

It must often look to the police and perhaps other members of the public, that the courts in their “ivory tower,” have the luxury of adjudicating on such philosophical issues as the rule of law and a citizen’s right to privacy, even when the reality is that the citizen happens to be wanted for alleged criminal behaviour. However, the courts must constitute to be the vanguard and guardian of the rights of all citizens to have the benefit of *Charter* protection, where appropriate.

My determination that PC Harris’ behaviour does not constitute misconduct is not my attempt to circumvent or condone a breach of the *Charter*. *Knight*, also stated:

The standard of reasonable and probable grounds is a fairly amorphous concept, lacking a rigid formula for its determination. However, at a minimum, the police must have credibly-based probability, which replaces suspicion. What constitutes reasonable belief or reasonable grounds will vary with context. Accordingly, officers making decisions in the field, in the heat of the moment, will not be held to the same standard as a justice assessing reasonable grounds for a search warrant with lesser time constraints. Probability is merely an element of “reasonableness.”

I do not find PC Harris was acting maliciously or unreasonably considering the circumstances he was presented with. In my analysis, I have the luxury of time on my side to consider the circumstances and the law. PC Harris was literally in a lawful foot pursuit and then faced a rushed decision under pressure whether or not to continue his pursuit into the residence.

I find it significant that PC Harris attended the residence to serve a subpoena, not to execute an arrest warrant. In many of the cases submitted for consideration, the police attended a specific residential location conducting a criminal investigation. In many of those cases the police activity included a search of the premises for evidence. There was no evidence suggesting PC Harris or other members of the OPP conducted a search for evidentiary purposes.

In *Feeney*, the Court stated:

The protection of privacy does not end with a warrant; before forcibly entering a dwelling house to make an arrest with a warrant for an indictable offence, proper announcement must be made. An exception occurs where there is a case of hot pursuit.

PC Harris complied with this segment of *Feeney*. He stopped his pursuit at the front door, announced himself, stated his purpose and asked Ms. Montgomery to present herself. This is not a situation where he was blatantly abusing his authority, such as causing damage to gain entry or haphazardly arresting people.

I find PC Harris used the minimal amount of force necessary to address the situation concerning Ms. Thompson. During her testimony, Ms. Thompson provided photographs of her injuries to support her assertion the amount of force used was excessive. The photographs depicted nearly non-existent marks on her wrists; marks consistent with what could occur during virtually any application of handcuffs. The use of force used was appropriate including the brief incarceration in the rear of the police cruiser.

In *Shockness*, the Board stated:

Further, the Board finds that community standards (which are an element of the test of whether an officer's actions bring discredit upon his or her police force) require that there must be some element of subjective misconduct by an officer before making a finding against that officer. A technical breach of the law made in good faith would not be found by any reasonable person in the community to bring discredit upon that officer's force. At the same time, bad faith need not be proven in every case either, as in many cases recklessness or a high level of negligence may be sufficient.

I find the circumstances in this matter very similar. PC Harris was acting in good faith when he entered the residence to arrest Ms. Montgomery on her outstanding warrants. PC Harris had a young civilian ride along student with him. I find it extremely unlikely he would have knowingly breached the *Charter* in her presence and in so doing, place them both in a vulnerable position at risk of misconduct proceedings such as these.

In the *Austin* matter, the officers were deemed to have breached the *Charter* when they entered the residence in the manner in which they did. Once inside, they arrested an individual therein yet the Board did not find that arrest unlawful. The Board stated:

The onus to prove misconduct always rests on the complainant and the Police Complaints Commissioner, and the evidence must be clear and convincing. This standard of proof on these allegations has not been met. It follows from the findings of fact made by this Board, in coming to conclusions on the preceding allegations of misconduct, that we are satisfied that the officers had an honest belief that there were drugs in the apartment...In all of the circumstances the Board is satisfied that the subject officers did have reasonable and probable grounds to arrest the complainant...

PC Harris was confronted by Ms. Thompson. He was then acting in good faith when he arrested her for obstructing him. I found the force used by PC Harris to be appropriate considering the circumstances. He was not overzealous, or reckless. He used the least amount of force necessary to control the situation. Repeating the comment from *Shockness*, "a technical breach of the law made in good faith would not be found by any reasonable person in the community to bring discredit upon that officer's force". While the misconduct in this particular case is neglect of duty and unnecessary use of force, the concepts is applicable.

The circumstances which led to Ms. Montgomery taking refuge inside the residence were created by the response of PC Harris. Therefore it was his own actions which were ultimately responsible for his fear that Ms. Montgomery may harm herself. That said, I do not take issue with him re-entering the residence to arrest Ms. Montgomery. Based on her previous behaviour at a police call for service only months earlier, his concern for her safety was valid.

PC Harris testified he was accompanied back into the residence with Ms. Thompson because he felt her assistance created the best chance for a peaceful and successful conclusion. I took that as being indicative of his good faith approach to the situation at hand, similar to the good faith approach he exemplified in his initial entry into the home.

In the 1996 OCCPS decision of *Soley v. OPP* the Commission stated:

The charge of neglect of duty is a serious charge under the Code of Conduct. To be convicted of this charge, it must be shown that: The member was required to perform a duty, and the member failed to perform this duty because of neglect, or did not perform the duty in a prompt or diligent manner. Once proven, the member, to avoid discipline, must then show that: They had a lawful excuse for not performing the duty in the prescribed manner.

In this case, PC Harris failed to obtain judicial authorization necessary to enter the residence to arrest Ms. Montgomery. He was required to do so in order to perform his duty. Although PC Harris did not provide a lawful excuse for not performing this duty, he did afford a strong rationale for his belief that he was acting in good faith. I do not find this omission of failing to obtain judicial authorization constitutes neglect of duty in the totality of the circumstances. I do not find that a police officer acting diligently, honestly and in good faith, but makes an error in judgement, equates to neglect of duty under these circumstances.

The Crown in the *Knight* case, submitted a quote from the case of *R v. Dunn* [1992] O.J. No 685. It seems to be particularly appropriate in this matter:

“we ask a great deal of our police officers expecting them to maintain law and order with a firm but even hand. They regularly accept the risk of serious harm in order to execute their duties and fulfill our expectations. In assessing the conduct of a police officer in the field, we have to be careful not to impose an unrealistic standard. A police officer is often required to act precipitously to defend him or herself or others and to measure that conduct against some standard that requires the wisdom of quiet deliberation or hindsight would be grossly unfair and ultimately impede police officers in the conduct of their work.”

In *Knight*, the Court determined the officers were overzealous and were over-reaching in their belief in their authority. In this case;

- PC Harris attended the residence not to execute an arrest warrant, rather to serve a subpoena to Ms. Thompson.
- Ms. Thompson, Ms. Montgomery and Mr. Tavares are well known to PC Harris.
- PC Harris was well aware Ms. Montgomery had outstanding arrest warrants for breach of undertaking and three counts of breach of recognizance.
- The homeowner, Mr. Tavares advised PC Harris just one day prior that Ms. Montgomery was not welcome in his home.
- PC Harris saw Ms. Montgomery outside the residence. He stopped and advised her she was under arrest prior to her running inside the residence.
- PC Harris pursued Ms. Montgomery on foot to the front door of the home.

- PC Harris stopped at the door, identified himself as a police officer, stated his purpose and asked Ms. Montgomery to present herself for arrest before entering the residence.
- PC Harris used the least amount of force required to contain Ms. Thompson.
- PC Harris was concerned about the welfare of Ms. Montgomery.
- PC Harris re-entered the residence accompanied by Ms. Thompson in an effort to resolve the matter while creating the least amount of conflict.
- PC Harris turned the scene over to female police officers to minimize the stress from the encounter between police and Ms. Montgomery and Ms. Thompson.

I do not find these are the actions of an overzealous officer. Based on his perspective of fresh pursuit, I understand how he concluded he was authorized to enter the residence. His actions present as reasonable and are indicative of his good faith approach.

Ms. Joseph submitted PC Harris should have stepped back and considered the many options available to him rather than continue his pursuit. In the *Turpin* matter, the officer was investigating a missing 15 year old boy. The officer had conversed with a homeowner where the boy was last seen, became involved in a heated verbal exchange and then attended that residence. The Commission noted:

Constable Turpin in his words did not feel endangered. The police officer did not believe that the missing boy was in the house, in immediate danger or serious distress. There was no evidence that any crime had taken place or that any crime was taking place. The officer was not in hot pursuit of a suspect and there were no exigent circumstances.

The circumstances in the two matters are very different. Officer Turpin went beyond what could be considered a reasonable response. The extenuating circumstances in this instance cause me to conclude PC Harris' conduct was professional, but an error in judgement. By all accounts, it appears PC Harris believed he was doing the right thing for the right reasons.

In *Knight*, the Court conducted an analysis of the *Charter* breach in order to determine the appropriate remedy. It stated:

The inquiry is objective. It asks whether a reasonable person, informed of all relevant circumstances and the values underlying the *Charter*, would conclude that the admission of the evidence would bring the administration of justice into disrepute. The focus of this inquiry is not long-term, but prospective. The fact of the *Charter* breach means that damage has already been done to the administration of justice. Section 24(2) starts from that proposition and seeks to ensure that evidence obtained through that breach does not do further damage

to the repute of the system. Finally, section 24(2) has a focus that is societal. It is not aimed at punishing the police or providing compensation to the accused necessarily, but rather at systemic concerns.

There was no evidence seized by police in this instance which led to criminal proceedings. If there had been, it could have been argued in criminal court that a reasonable person, informed of all the relevant circumstances and the values underlying the *Charter*, would conclude that the admission of the evidence would not bring the administration of justice into disrepute. That argument may or may not have been successful, it is not my place to speculate but it would have been a reasonable position to take.

I find PC Harris acted in good faith when he entered the dwelling house to arrest Ms. Montgomery for her outstanding warrants. Although PC Harris required judicial authorization before entering the residence, I find his actions do not equate to neglect of duty. Furthermore, I find the subsequent actions of PC Harris concerning the use of force and detention of Ms. Thompson to be reasonable based on his good faith intent. His actions do not constitute unlawful or unnecessary exercise of authority.

Conclusion

PC Harris faced a split second, challenging decision of whether or not to continue his pursuit and enter the residence. PC Harris did not intentionally and knowingly neglect to perform his duty; he made an error in judgement. To find PC Harris guilty of misconduct for his good faith approach would be unreasonable; it would not be consistent with procedural fairness and natural justice.

Decision

I find PC Harris not guilty of neglect of duty and not guilty of unlawful or unnecessary exercise of authority.



Greg Walton
Superintendent
OPP Adjudicator

Date electronically delivered: November 16, 2016