

**IN THE MATTER OF
ONTARIO REGULATION 123/98
MADE UNDER THE POLICE SERVICES ACT, R.S.O. 1990, C.P.15
AND AMENDMENTS THERETO;**

AND IN THE MATTER OF

**POLICE CONSTABLE DARCY LUNN
and
POLICE CONSTABLE MEREDITH ROTA**

**OFFICE OF THE INDEPENDENT
POLICE REVIEW DIRECTOR**

JUN 1 0 2015

RECEIVED

AND THE

CHATHAM-KENT POLICE SERVICE

APPEARANCES

Mr. Brian Farmer
Legal Counsel - for the Chatham-Kent Police Service

Mr. Glen Donald
Legal Counsel - for Constable Lunn & Constable Rota

BEFORE:

Superintendent (retired) Robert J. Fitches

Reasons read into the Record: May 12th, 2015

REASONS FOR DECISION

Background

These proceedings were commenced by two (2) Notices of Hearing dated October 27th, 2014 and duly served upon Constables Rota and Lunn. The Allegations within the two Notices of Hearing are identical for each officer. The allegations are:

- Neglect of Duty – by neglecting or omitting promptly and diligently to perform a duty as a member of the Chatham-Kent Police Service, contrary to Section 2 (1) (c) (i) of the Code of Conduct; and
- Unlawful Exercise of Authority by using unnecessary force against a prisoner contacted in the execution of duty, contrary to Section 2 (1) (g) (ii) of the Code of Conduct.

A short time after the events that form the basis for these allegations occurred, a female person who had been strip searched filed a complaint with the O.I.P.R.D. After it conducted an investigation of these matters, the O.I.P.R.D. ordered that a hearing be convened.

Hearing

A hearing was convened on April 30th, 2015 in Chatham Ontario. At that time, both officers entered not guilty pleas to the allegations contained in the Notices of Hearing.

An Agreed to Statement of Facts was entered as an exhibit (exhibit #1). That statement of fact was not read into the record but the details are as follows¹:

- *Constable Darcy Lunn has been a member of the Chatham Kent Police Service since 1999. He has been a sworn member since 2004 and at the time of the incident was a first class constable.*
- *He was a member of the Drug Enforcement Unit for three and a half years. In that unit he headed a variety of large and small scale drug investigations, organized undercover operations and was the affiant of search warrants issued pursuant the CDSA.*
- *On November 13, 2013, Darcy Lunn was working in a uniform capacity as part of the Community Patrol Division. He was patrolling and responding to calls in District One. District One is a large geographic area with the former town of Wallaceburg at its centre.*
- *At 11:25 p.m. Constable Lunn had his attention drawn to ██████████ Street. Constable Lunn knew that this was the address of M ██████████ L ██████████ Mr. L ██████████ is well known to both the Chatham Kent Police Service at large and to Constable Lunn specifically. Mr. L ██████████ has a history of involvement in the use and distribution of methamphetamine.*

¹ Minor changes have been made to the wording of the exhibit for grammatical or factual reasons.

- From his years in the drug unit, and based on police intelligence, Constable Lunn believed that drugs are sold from [REDACTED] Street. This information was not sufficiently current to act as grounds for a search warrant or grounds for the arrest of any persons.
- As Constable Lunn approached [REDACTED] Street he observed a grey GMC pick-up leave [REDACTED]. Instantly, Constable Lunn recognized this vehicle as one belonging to M [REDACTED] A [REDACTED]. Police intelligence was such that Constable Lunn believed that Mr. A [REDACTED] was involved in Mr. L [REDACTED]'s drug operation as a runner.
- Constable Lunn used his authority under the Highway Traffic Act to stop the vehicle.
- Constable Lunn approached the driver's side of the truck. The driver was M [REDACTED] A [REDACTED]. The front seat passenger was Amanda Altman. Ms. Altman was not someone whom Constable Lunn knew or had any information about. The rear passenger, seated on the passenger side of the vehicle was C [REDACTED] K [REDACTED].
- Constable Lunn had a brief conversation with M [REDACTED] A [REDACTED] in which A [REDACTED] told Constable Lunn that he was coming from "[REDACTED]'s place", a fact that Constable Lunn knew to be untrue.
- While speaking with M [REDACTED] A [REDACTED] Constable Lunn observed a glass pipe the type which is commonly used to smoke methamphetamine. The pipe was itself coated with a white substance. Constable Lunn believed that the pipe contained a controlled substance. When asked if he had anything illegal in the vehicle A [REDACTED] responded: "No, just my pipe".
- Given their collective proximity to the pipe (and thus the controlled substance) Constable Lunn formed reasonable grounds to believe that all three motor vehicle occupants were in possession of a controlled substance.
- In the interests of safety, in order to affect an arrest of the occupants, Constable Lunn had Constable St. Denis attend to assist. Constable Lunn arrested Mr. A [REDACTED]. Constable St. Denis arrested Ms. Altman and Mr. K [REDACTED].
- The two men were arrested without incident and placed into Constable Lunn's cruiser. Ms. Altman, who was also cooperative during the course of her arrest, was placed into the rear of Constable St. Denis' cruiser.
- While being arrested Mr. A [REDACTED] told Constable Lunn that he would find \$4,000.00 behind Ms. Altman's seat. Constable Lunn attended to the truck and located two "bricks" of money. Constable Lunn believed that the money was bundled in a manner consistent with having being the result of drug transactions.
- Constable Lunn advised Mr. A [REDACTED] that the police would be conducting a proceeds of crime investigation relative to the \$4,000.00. Mr. A [REDACTED] then offered that only about \$800.00 of the money belonged to him and that the rest of the money belonged to his mother.
- A search of the incredibly unkempt truck was completed incident to arrest. The contaminated pipe was seized by Constable Lunn. Nothing else of significance was located.

- *Because of the deception by Mr. A [REDACTED] the presence of the pipe, the presence of a large sum of money Constable Lunn was suspicious that his search of the truck had failed to reveal a more significant quantity of drugs. He was suspicious that one of the other persons arrested was concealing drugs on their person.*
- *All of the arrestees were transported to the Wallaceburg station and had arrived there by 12:17 a.m.*
- *Based on Constable Lunn's experience and training he believed that a useable amount of methamphetamine could be as small as a person's pinky fingernail. He has previously been involved in searches of a person that have revealed drugs hidden in a person's anus, vagina or breast area.*
- *Constable Lunn's experience and training is such that he believes that females are often specifically recruited by drug dealers because, normally, police officers are only likely to conduct a cursory search of a female arrestee.*
- *Constable Lunn personally conducted a strip search of Mr. A [REDACTED] and Mr. K [REDACTED] in a private room and in a dignified manner.*
- *Constable Lunn arranged for Constable Meredith Rota, a female police officer, to conduct the strip search of Ms. Altiman.*
- *Constable Rota attended the Wallaceburg detachment. Constable Rota listened to Constable Lunn while he advised her of the grounds for the strip search relative to Ms. Altiman. Upon receiving those grounds, Constable Rota herself believed that the search of Ms. Altiman was both appropriate and necessary.*
- *After explaining the reasons for the search to Ms. Altiman, Constable Rota then conducted a search of Ms. Altiman in a private room. Constable Rota had Ms. Altiman remove her clothing a piece at a time. After a visual inspection, that piece of clothing would be put back. The entire search was conducted in this manner thus ensuring that it was done in such a way as to best ensure the dignity of Ms. Altiman.*
- *During the course of Constable Rota's search, an empty hydromorphone capsule was located.*
- *Upon completion of the strip search, Constable Rota advised Constable Lunn as to the results of her search.*
- *Constable Lunn directed Constable Rota to dispose of the located capsule as it no longer contained a controlled substance.*
- *At no point in time before, during, or immediately after the conduct of any of the strip searches did anyone complain to police. At no point in time did Ms. Altiman nor anyone else ever exhibit signs of apprehension, fear or concern.*
- *The seized pipe was sent to Health Canada for analysis after being sealed in an envelope. The seized currency was lodged in property pending further investigation by the Asset Forfeiture Unit.*
- *All parties were released unconditionally pending the result of the further investigation set out above.*
- *On November 18th, Constable Lunn sought and obtained a detention order from a Justice of the Peace relative to the seized currency.*

- On November 19, 2013 Ms. Altman complained to the OIPRD. Her specific complaint was: "I am degraded and feel ashamed to be put through such horrible illegal acts by Darcy Lunn and the Chatham Kent Police".
- The OIPRD then conducted an investigation into the lawfulness of both the arrest and the subsequent strip search. The OIPRD took no issue with the lawfulness of Ms. Altman (nor anyone else's) arrest.
- The Chatham Kent Police Service has a policy which deals with "[The] Search of Persons". The policy states that an Officer in Charge [hereinafter referred to as "OIC"] must first be notified of and then authorize a strip search prior to it being conducted.
- Constable Lunn did not obtain the specific permission from his OIC prior to the conduct of the strip search of Ms. Altman (or of the two males that he strip searched). He was unaware of the policy which required him to do so. He did however announce over the police radio that he had three persons in custody and that he would be transporting them to the Wallaceburg detachment for the purposes of "conducting a search". He believed that an OIC would have known that the search done at a detachment would have been a strip search.
- Constable Lunn has conducted a number of strip searches without the authorization of an OIC.
- Constable Rota did not notify an OIC of the strip search prior to conducting one on Ms. Altman. She had conducted approximately twenty-five (25) strip searches prior to this one during her career and was unaware of the Service's policy with respect to a requirement that strip searches be first authorized by an NCO.
- The OIC on November 13, 2013 was Staff Sergeant Gibson. He does not ever recall being called by an officer at a detachment in order to authorize a strip search.

Submissions by Counsel

By the Prosecutor

Mr. Brian Farmer opened his submissions by presenting a statement of facts that had been agreed upon by the parties. This statement of facts was created utilizing the reports prepared by the O.I.P.R.D. Mr. Farmer also referred to a statement of the law (exhibit #2) and an excerpt from the Police & Criminal Evidence Act (U.K.), referred to as *P.A.C.E.* *P.A.C.E.* had been referred to in Golden², which is the state of the law relating to strip searches in Canada.

Mr. Farmer indicated that he had examined the statement of facts, paying particular attention to the officers' responsibilities and the current law relating to arrest and

² R v. Golden, [2001] 3 S.C.R. 679; 159 C.C.C. (3d) 449 (S.C.C.)

searches incident to arrest. He also indicated that he considered objective and subjective grounds for affecting an arrest as reviewed by criminal courts generally.

Mr. Farmer assessed the statement of facts to be a fair and accurate accounting of what occurred. Having given significant weight to Constable Lunn's experience and the indicia of drug activity as recounted in the statement of fact, there were subjective and objective grounds for him to have taken the actions that he did. Once he provided Constable Rota with grounds for his beliefs, there were also subjective and objective grounds for her to have conducted the search she conducted.

Mr. Farmer pointed out that it was the position of the O.I.P.R.D. that the *Golden Guidelines* had not been followed. When assessing these officers' actions against the guidelines emanating from *R v. Golden*, it is Mr. Farmer's view that all points within the guidelines – save for one – had been followed. In explaining his views on this point, Mr. Farmer went through the eleven points in *Golden* one by one. Mr. Farmer also pointed out that during his lengthy his career, he had rarely seen a case where all points were followed with absolute precision.

Mr. Farmer's submissions relative to the strip search in relation to the *Golden Guidelines* were as follows:

1. The search was conducted in a police station, as required.
2. The search was conducted in a manner that was safe.
3. The search was not authorized by a supervisor (as it ought to have been).
4. The search was conducted by a member of the same gender as the suspect.
5. The search involved no more officers than necessary.
6. Constable Rota used no more force than necessary.
7. The search was conducted in a private area.
8. The search was completed as quickly as possible – ensuring the suspect was not completely undressed at any time.
9. Only visual inspections were performed – no intrusive searches were conducted
10. Nothing found so item 10 does not apply (proper removal of found item(s))
11. Proper records were kept – as evidenced by O.I.P.R.D.'s apparent satisfaction with records.

So according to *Golden*, the only point that was not adequately covered was the authorization of a supervisor. In statements made by subject officers, there were no indications of any improper purpose for their failure to notify a supervisor.

Because the Supreme Court referred to P.A.C.E. in its analysis of *Golden*, Mr. Farmer included P.A.C.E. within his statement of the law. In the United Kingdom, procedures for sensitive police activities such as strip searches have been codified in P.A.C.E. Although the Chatham-Kent Police Service does not have detailed protocols to use as a checklist for officers to ensure that they are in compliance with what the courts expect of them in situations such as these, there is a requirement within the Chatham-Kent Police Service policies that a supervisor be consulted when contemplating activities such as

strip searches. This policy requirement would be entirely in keeping with the guidelines created by the Supreme Court.

Mr. Farmer submitted that when assessing the appropriateness of the allegations of Neglect of Duty within the Notices of Hearing, it would really come down to an interpretation of Neglect of Duty versus Work Performance. It was pointed out that in his *Case Book*, Mr. Donald included cases dealing with just such comparisons.

Mr. Farmer concluded by suggesting that in his opinion, Clear and Convincing Evidence is a high standard; falling somewhere between the Civil Standard and the Criminal Standard. No matter what the standard is in any proceeding, that standard must be considered when determining whether or not a case is made out. It was suggested that because Neglect of Duty is not an absolute offence, the state of mind of the officer must be determined or at least inferred by the evidence. There is nothing whatsoever to infer that either officers' state of mind was such that misconduct can be found. Furthermore, if the searches were found to be justified, the allegation of Unlawful Exercise of Authority cannot stand.

By Defense Counsel

Mr. Glen Donald opened his submissions by discussing the breadth and scope of a police officer's duties and the amount of information and knowledge that he or she is required to know and apply when performing these duties; often in trying and difficult circumstances. No matter what the situation, police officers are expected to access all of this information and make appropriate decisions within the context of that specific fact situation.

In the matters now before this tribunal, we have an experienced officer who has had specialized training in and exposure to drug investigation and enforcement. When he was on patrol that night, he saw things that made him take specific actions. He used his authority to pull the vehicle over. He knew two of the occupants of the vehicle. He knew that the driver was lying to him and he saw, within plain view, drug paraphernalia.

His knowledge base and his powers of observation and deduction combined to raise a strong belief that the vehicle and its occupants were somehow involved in drug-related activities at the time that he pulled them over. It would seem obvious to most observers that by anyone's measure, this was good police work.

When Constable Lunn saw the 'meth' pipe in the vehicle, he felt that all occupants were in possession of that pipe. Such a conclusion would surely be common sense.

During the course of his investigation, Constable Lunn received information that there was a quantity of cash in the vehicle. He discovered two 'bricks' of cash, totaling \$4,000.00. Given the facts and context of this case, it would be reasonable to conclude that Constable Lunn was required to make further endeavours to ascertain whether or not there were drugs in the vehicle and/or on one or more of the occupants of the vehicle. That is precisely what he set about to do.

Constable Lunn's experience and training suggested very strongly to him that searches of all occupants of this vehicle were required to be undertaken. Since one of the occupants was a female, Constable Lunn quite rightly asked for the assistance of a female officer in the person of Constable Meredith Rota.

Based on his observations and the context of the vehicle stop, Constable Lunn searched the two male occupants. He gave Constable Rota the grounds upon which he based his decision to search the occupants of the vehicle. As a consequence, Constable Rota too now had grounds to search the female and did so. During the search Constable Rota discovered an empty hydromorphone capsule. When no actual drugs were discovered through the searches, the suspects were released.

Hindsight being what it is, it was notable, in Mr. Donald's view, that at the time of these events, nobody complained about having been searched. It seemed that the subjects of the searches understood that they were being policed as they would have expected to be policed. Mr. Donald suggested that at all times, these officers' actions could accurately be described as good police work.

One day after the \$4,000 was ordered detained, however, the female suspect complained to O.I.P.R.D. that she had felt degraded and ashamed by the 'horrible, illegal acts' of Constable Lunn. Mr. Donald asked the rhetorical question, 'if the degradation and shame of the strip search was the issue, why wouldn't this woman have complained about the female officer who had performed the strip search? The fact is, she did not.

Mr. Donald also referred to Golden wherein the court stated;

In light of the serious infringement of privacy and personal dignity that is an inevitable consequence of a strip search, such searches are only constitutionally valid at common law where they are conducted as an incident to a lawful arrest for the purpose of discovering weapons in the detainee's possession or evidence related to the reason for the arrest. In addition, the police must establish reasonable and probable grounds justifying the strip search in addition to reasonable and probable grounds justifying the arrest.³

³ Golden, supra, para 99

It was Mr. Donald's contention that the search was constitutionally valid, in that it was directly connected to the reasons for the arrest. Constable Lunn's subjective grounds are sustainable objectively and there is no clear and convincing evidence that the arrest or the search were either unlawful or unnecessary. There is simply no evidence of either officer exceeding their authority in relation to the arrests or the searches. As a consequence, the allegations of Unlawful Exercise of Authority are not made out.

It was conceded that the strip search was not done with perfection, in that a supervisor was not consulted as required by the *Guidelines* and policies. But according to the Statement of Fact at paragraphs 35 and 37, neither officer knew they were to notify a supervisor and Constable Lunn assumed his radio transmission would suffice. The officers do not quarrel with the allegation that they failed to follow policy, however. When assessing the known facts, they take the position that their imperfect performance of their duties in relation to the search were neither intentional nor reckless and therefore their conduct does not rise to the level of misconduct.

In support of the contention that these officers' conduct is simply a work performance issue, I was provided with cases dealing with the issue. The over-arching principles within these cases instruct me that when an officer performs a duty imperfectly, with no intention or wanton disregard for the rules, such conduct does not possess the necessary attributes to be characterized as misconduct.

I was provided with *P.G. v. Ontario* in which the Divisional Court (Ontario) found;

Accepting the Board's findings of 'inadvertence', on this record, the only logical conclusion is that the appellant made an honest mistake – he did what he undertook to do but he did it imperfectly.⁴

Within *P.G.*, the Court referred to *Pollock v. Hill*⁵, wherein the supervisory officers were charged with neglect of duty. In its decision, the Board of Inquiry wrote;

... we will not find the Officers guilty of neglect of a duty to supervise unless there was some element of wilfulness in their neglect or unless there is a degree of neglect which would make the matter cross the line from a mere performance consideration to a matter of misconduct.⁶

In *Gottschalk and Toronto Police*⁷, the Commission observed as follows:

It is also worth noting that neglect of duty is not an absolute offence. The law is clear that there must be either 'wilfulness' or 'a degree of neglect

⁴ *P.G. v. Ontario* (Attorney General) [1996], Div.Crt., 90 O.A.C. 103, para 84

⁵ *Pollock v. Hill* – Board of Inquiry – November 19, 1992)

⁶ *Ibid.*, para 83

⁷ *Gottschalk and Toronto Police Service* (O.C.C.P.S.), January 2003

which would make the matter cross the line from a mere performance consideration to a matter of misconduct (citing P.G. and Pollock v. Hill).⁸

I was also referred to *Brown and Ontario Provincial Police* in which the Commission also refers to *P.G. v. Attorney General of Ontario*, stating that;

... mere failure to comply is not enough. There must be some evidence of deliberateness or recklessness.⁹

After consideration of *P.G. v. Ontario, Gottschalk and Toronto Police Service* and *Brown and Ontario Provincial Police*, I was asked to conclude that given the complete and total lack of clear and convincing evidence pointing to any degree of wilfulness, recklessness or deliberateness by either officer, the allegations of Neglect of Duty are not made out.

Discussion

Before entering into my discussion of these matters, let me acknowledge my gratitude to Mr. Farmer and Mr. Donald for the completely professional manner in which they have both conducted themselves throughout these proceedings. Their reasonable and common sense approach to this disciplinary matter have been entirely refreshing.

The allegations of misconduct being dealt with within these proceedings are serious indeed. The allegation of unnecessary exercise of authority suggests that the officers took some sort of action affecting the rights of one or more members of the public unlawfully or unnecessarily. The allegation of neglect of duty suggests that they did what they did contrary to their sworn duties with some degree of recklessness or wanton disregard for what is appropriate.

Let me begin by stating as clearly as I possibly can that in my view, there is absolutely no evidence whatsoever to support either of the allegations against either of these officers.

My function in these matters is to make findings and support such findings through an analysis of the evidence and facts surrounding the event(s) in question. Consequently, I will discuss the arrests as well as the searches in an effort to explain my views in regarding the complete lack of evidence.

⁸ Ibid., p. 9

⁹ *Sergeant Dalton Brown and Ontario Provincial Police* (O.C.C.P.S.) October 2006, p. 10

The Arrests

The Agreed Statement of Fact clearly shows that Constable Darcy Lunn saw certain activities by certain individuals on the night in question that raised his level of suspicion regarding the lawfulness of their activities. Shortly after having stopped the vehicle and while speaking with the occupants, Constable Lunn saw and heard things that continued to raise his level of suspicion to that of reasonable and probable grounds, whereby some sort of meaningful investigative action was called for.

He saw a known criminal leaving the home of a known drug dealer late at night. When he stopped the vehicle and questioned the driver, the driver lied to him about where he had been. When looking in the car, he observed a 'methamphetamine pipe'. Upon further probing, he was informed there was a large amount of cash in the vehicle.

Being an experienced drug officer, he knew that in all likelihood, there was residue in the pipe, which would place all vehicle occupants in possession of the residue. Prior to his arresting the occupants and well prior to his decision to search one or more of them, the sum total of his observations created a situation wherein the subjects would have to be arrested in order that further investigation might be undertaken.

In determining whether or not Constable Lunn had reasonable ground to arrest the individuals in the vehicle, one must assess all aspects of the context of what occurred on the night in question. When performing such an assessment, Constable Lunn's training and experience must be included in the 'context', since he is the individual who either did or did not develop reasonable grounds for the arrests.

The governing test for this the issue of arrest is found in R v. Storrey¹⁰. That test is as follows:

.the Criminal Code requires that an arresting officer must subjectively have reasonable and probable grounds on which to base the arrest. Those grounds must, in addition, be justifiable from an objective point of view. That is to say, a reasonable person placed in the position of the officer must be able to conclude that there were indeed, reasonable and probable grounds for the arrest. On the other hand, the police need not demonstrate anything more than reasonable and probable grounds. Specifically they are not required to establish a prima facie case for conviction before making the arrest.¹¹

It is plainly stated in Storrey that the office need not have developed a prima facie case; he or she need only believe that it is more likely than not – that it is probable – that the suspect has committed or is committing an indictable offence.

¹⁰ R. v. Storrey, [1990] 1 S.C.R. 241

¹¹ Ibid., p. 250-1

So when assessing the total context of the situation, the following known facts emerge:

1. Constable Lunn is an officer who has experience and training in drug investigations
2. Constable Lunn possessed certain knowledge of the drug activities of certain individuals within the municipality of Chatham-Kent
3. Late at night, Constable Lunn observed a known criminal leaving the home of a known drug dealer.
4. When questioned about his whereabouts, the driver of the vehicle lied to Constable Lunn.
5. When Constable Lunn looked in the vehicle, he saw three people as well as a pipe that is usually used for smoking methamphetamine cocaine
6. When Constable Lunn asked if there was anything illegal in the vehicle, he was told – only the pipe.
7. Upon further questioning, Constable Lunn became aware that there was a large amount of cash in the vehicle.
8. When the cash was discovered, it was in two 'bricks', which is the usual way in which the money related to drug deals is kept or stored.

Given all of these facts, including the reputations of the occupants of the vehicle, the time of day, Constable Lunn's training and experience, the existence of a methamphetamine pipe and the existence of a large amount of cash in the vehicle, one must ask one's self whether or not Constable Lunn would have believed it more probable than not that one or more of the people in the vehicle were involved in drug activity at that time at that place.

I cannot conceive of any rational, reasonably well-informed individual – even without drug training and experience – who would not easily conclude that there was a strong likelihood that the occupants of the vehicle, at that time and at that place, were involved in some sort of illegal activity.

Given the likelihood of criminal activity, within the context of the duties and responsibilities of a police officer with that knowledge, it would have been negligent for Constable Lunn not to have pursued these issues further. He did what he was trained to do and, in my view, for the most part did it quite well.

I find that Constable Lunn had reasonable grounds to arrest these individuals for being involved in drug activity at that time at that place under those circumstances.

I next need to assess whether he had the grounds to search the vehicle's occupants.

Once an officer legally arrests someone, a right to search under certain conditions flows from the arrest itself. The right is based on the need for the authorities to gain control of the situation and to obtain information that might be important to the potentially illegal activity.

The most common purposes of a search incidental to arrest are:

- To ensure the safety of the police and the public
- To secure evidence, and
- To preserve evidence

While these purposes provide some significant leeway, the search must nonetheless be truly incidental to the arrest. If the justification for the search is to find evidence, there must be a reasonable prospect the evidence will relate to an offence for which the person has been arrested. The police undertaking a search incidental to arrest must subjectively have a valid purpose for the search and the reasonableness of that purpose must be objectively considered.

This issue was addressed by the Supreme Court in R. v. Caslake¹² as follows:

If the law on which the Crown is relying for authorization is the common law doctrine of search incidental to arrest, then the limits of this doctrine must be respected. The most important of these limits is that the search must be truly incidental to the arrest; the police must be able to explain, within the purposes recognized in the jurisprudence (protecting the police, protecting the evidence, discovering evidence) or by reference to some other valid purpose, why they conducted a search. They do not need reasonable and probable grounds. However, they must have subjectively had some reason related to the arrest for conducting the search at the time the search was carried out, and that reason must be objectively reasonable.

...

A police search of the car for the purpose of finding evidence which could be used at the accused's trial on the charge of possessing marijuana for purposes of trafficking would have been well within the scope of the search incidental to arrest power, as there was clearly sufficient circumstantial evidence to justify a search. However, the police cannot rely on the fact that, objectively, a legitimate purpose for the search existed when that is not the purpose for which they searched. Agents of the state must act in accordance with the rule of law. Hence, they must not only objectively search within the permissible scope but also turn their mind to this scope before searching, and satisfy themselves that there is a valid purpose for the search.¹³

In the matters before me, there were indicia of drug activity within the vehicle that Constable Lunn stopped. The driver of the vehicle was known to involve himself in drug activity and the location from which the vehicle had recently departed was a location that was known as one in which drug activity had occurred in the past or at least one in

¹² R. v. Caslake (1998), 1 S.C.R. 51

¹³ Ibid., p. 51

which resided an individual who was known or suspected to be involved in the drug trade.

When Constable Lunn observed the methamphetamine pipe in the vehicle, that became an additional basis for his reasonable grounds to believe that the occupants of the vehicle were involved in drug activity – i.e. possession of the drug residue in the methamphetamine pipe. When the driver's answers to his questions were untruthful, this raised his suspicions even further. When his additional inquiries resulted in his becoming aware that a large amount of cash was contained in the vehicle, this compounded his reasonable grounds for belief.

When a search of the vehicle revealed no drugs of any consequence, it became important that he search the occupants to see if one or more of them had drugs on their person. It was at this point that the constellation of known facts created a reasonable belief that one or more of the occupants might well have drugs or evidence of drug activity on their person, thereby justifying strip searches of the occupants.

When Constable Lunn decided that it was necessary to search the occupants of the vehicle, these searches were completely and clearly incidental to the arrests of these individuals. In all ways, Constable Lunn's decision to search the vehicle occupants falls entirely within the parameters as outlined several different ways by the Supreme Court. I find that all of the searches of the vehicle's occupants were authorized.

There is no evidence before me to indicate that either Constable Lunn or Constable Rota exerted any unreasonable or unauthorized physical force upon any of the individuals that were searched that night. There is a lack of evidence in this regard; especially in relation to the searches of the two male occupants of the vehicle. There is slightly more information available to me in relation to the strip search conducted by Constable Rota. The evidence relating to the searches does not in any way suggest inappropriate or unauthorized use of force by either officer.

The trajectory of the evidence leads me to conclude that the O.I.P.R.D. had concerns about the legality of the searches and that therefore physical force to *any* degree would be unauthorized and therefore contrary to the Code of Conduct.

As I have already found, the searches contemplated by Constable Lunn were authorized and justified. There was nothing illegal or improper since they were incidental to lawful arrests and the searches were based upon a reasonable expectation that such searches could yield further evidence of drug possession or drug activity. I find that the searches were entirely consistent with the guidance of the case law as cited previously. There are therefore no questions about the justification or legality of the searches of the occupants of the vehicle that night. Constable Lunn and Constable Rota were well within the bounds of their authority when they conducted the searches that are the subject of the allegations of Unlawful Exercise of Authority.

One remaining issue to which I need to turn my mind is the allegation of misconduct relating to Neglect of Duty.

Relative to the strip searches, the one and only issue that deviated from the *Golden Guidelines* and the policies of the Chatham-Kent Police Service was the officers' obligation to seek the approval of their supervisor. It is clear and uncontested that neither Constable Lunn nor Constable Rota contacted a supervisor as they were required to do.

Within the Agreed Statement of Fact, it is suggested that Constable Lunn radioed in that he was going to Wallaceburg Station to conduct searches and that this notification might have sufficed. Given that both the policies and the Guidelines stipulate that a supervisor must be notified, I cannot agree that a radio transmission could or would suffice. There is a positive obligation for both officers to be satisfied that a supervisor had been notified. In my view, it is insufficient that such a notification would somehow be the collateral result of a radio transmission.

It is clear that the intent of the police service's policy and the *Golden Guidelines* is to ensure that a 'second opinion' is available prior to taking the significant, intrusive step of conducting a strip search. It appears that the *Golden Guidelines* are intended to minimize or at least limit the psychological impact and/or potential embarrassment that can no doubt be suffered by an individual who might be placed in the awkward and uncomfortable situation of being strip searched.

There can be no doubt that consulting with a supervisor would be the right thing to do; from a couple of perspectives. If either Constable Lunn or Constable Rota was aware that the other had notified a supervisor, that would have sufficed for both officers. Neither officer seemed to know they were required to check. That lack of awareness is of no consequence in relation to their obligation to do so, however. The fact is that neither officer notified a supervisor as they were required to do. They were both careless in this aspect of their duties.

The question I need to address is whether or not these officers' failings rise to the level of misconduct. In other words, have the requirements of P.G.¹⁴, Gottschalk¹⁵ and others been met and if they have, does the evidence prove, on clear and convincing evidence that misconduct has occurred.

The evidence before me does not include any suggestion that either Constable Lunn or Constable Rota displayed animus, recklessness or willfulness in their actions. When assessing these allegations against P.G., Gottschalk and others, the only logical conclusion I can come to is that Constables Lunn and Rota made an honest mistake. They undertook to do what they did but did so imperfectly. There was no element of willfulness that would make the matter cross the line from a mere performance consideration to a matter of misconduct.

¹⁴ P.G., supra

¹⁵ Gottschalk, supra

Findings

I find **Constable Darcy Lunn** NOT GUILTY of
NEGLECT OF DUTY & UNLAWFUL EXERCISE OF AUTHORITY
Notice of Hearing dated October 27th, 2014

I find **Constable Meredith Rota** NOT GUILTY of
NEGLECT OF DUTY & UNLAWFUL EXERCISE OF AUTHORITY
Notice of Hearing dated October 27th, 2014



Robert J. Fitches
Supt. (ret'd.)
Hearing Officer

May 12th, 2015
Date