

In the Matter of
Ottawa Police Service
And
Acting Sergeant Wayne Wilson, # 1210
And
Constable Katherine Plomp, # 1079

Charge: Neglect of Duty
Motion: Motion for Non-Suit
Before: Superintendent Don Sweet
Ottawa Police Service

Appearances:

Counsel for the prosecution: A/Supt. Steve Bell
Ottawa Police Service

Counsel for the Defense: Mr. Mark Wallace
And
Ms. Pam Machado

Date: 11 July 2016

PREAMBLE

This decision pertains to a motion of a directed verdict (motion for non-suit) put forth by Mr. Mark Wallace on behalf of Cst. Katherine Plomp and by Ms. Pam Machado on behalf of A/Sergeant Wayne Wilson.

A/Sgt. Wilson and Constable Plomp were charged with one count of neglect of duty. A hearing was held on December 1st, 2nd, 3rd and 4th 2015. The matter was set over for further time reconvening on April 25th. Following the completion of the Prosecutor's case, Defence presented a motion for non-suit on the premise that Prosecution had failed to present a *prima facie* case.

Following the submissions of Defence and the agreement of the motion on both the Prosecutor as well as the Office of the Independent Police Review Director (OIPRD) the Hearing Officer granted the motion and, in a verbal decision, dismissed the charges against Officers Wilson and Plomp.

REASONS FOR DECISION

Before commencing, I wish to thank Mr. Wallace and Ms. Machado, counsel for Officers Plomp and Wilson as well as OPS Prosecutor A/Supt. Steve Bell and Mr. Bruno Kraljevic, the Public Complainant, for the manner in which they presented their evidence. I heard from two witnesses and received 16 exhibits, all of which collectively assisted me in reaching my decision.

CHARGES

Officers Plomp and Wilson were each charged with one count of Neglect of Duty, contrary to section 2(1)(c)(i)(a) of the Code of Conduct contained in Ontario Regulation 268/10, as amended, and therefore contrary to section 80(1) of the *Police Services Act*.

The particulars of the allegations are:

On or about July 6th, 2013, they failed to ensure the chain of continuity was maintained for the camera and cell phone seized at the scene of an incident involving B.K. and that the said seized items were not preserved, stored or reported in a detailed and methodical manner as per OPS Policy No. 5.25: Property-Recovered, Seized, and found.

PLEA

Officers Plomp and Wilson pleaded not guilty to the allegation of misconduct on December 1st 2015.

EXHIBITS

Exhibit #	Date Received	Description
------------------	----------------------	--------------------

1	12-Mar-15	My designation
2	12-Mar-15	Designation of Christiane Huneault
3	12-Mar-15	Notice of Hearing; Wilson
4	12-Mar-15	Notice of Hearing; Svidran
5	12-Mar-15	Notice of Hearing; Plomp
6	1-Dec-15	Designation of Bell
7	1-Dec-15	Designation of Beaton
8	1-Dec-15	Book of documents tendered by Bell
9a	1-Dec-15	group of 7 photos
9b	1-Dec-15	group of 5 photos
9c	1-Dec-15	group of 4 photos
10	1-Dec-15	Resume of Hema Nagar
11	1-Dec-15	copy of policy 6.03 - Court prep and proceedings
12	2-Dec-15	Copy of witness statement of Caitlin Armstrong
13a	2-Dec-15	photo of one male at end of driveway
13b	2-Dec-15	photo of three males at end of driveway
13c	2-Dec-15	Photo of two males at the end of the driveway
14	3-Dec-15	IA of Cst. Sebastien Lemay
15	3-Dec-15	case law exerpt Timms-Fryer
16	3-Dec-15	OIPRD Log notes

PROSECUTION'S EVIDENCE

A/Supt. Bell began his case by informing the Hearing Officer that the matter that gave rise to the Tribunal flowed from an OIPRD Directed Hearing. He further indicated that the investigation began in a broad scope but ended up with a very narrow focus and the very specific charge the Officers find themselves present for.

Prosecution called its first witness, being Ms. Branka Kraljevic.

Ms. Kraljevic provided testimony surrounding the events that occurred on July 6th, 2013. The testimony I will be referencing will be relevant to the charge related to the continuity of the camera.

She indicated that an altercation occurred on that date involving her husband, Bruno, and neighbors from another residence. She further indicated she could hear the argument and the associated abusive language. She then heard her husband ask her to come out with a camera to take pictures of the event while he called 911. She further indicated she took pictures afterwards of injuries allegedly received by Bruno from these men during the assault.

A series of photos were presented as Exhibit 9 - 9A being those taken by the son at the hospital of injuries, 9B, photos taken by Branka on July 6th 2013 and 9C further photos of injuries

sustained to Bruno. As well were photos of those involved in the incident from Exhibit 13. These aforementioned photos are the photos that were central to the discussion of the camera and the continuity needs, if any, of it.

Branka further indicated that she was given the camera after being charged and released by Det. Svidran and that he indicated it could be used for her defense purposes to the charges she was facing if necessary.

There is no doubt and it was agreed that photos existed that showed the involved persons and injuries of Mr. Kraljevic. This led into the events that transpired post the arrest of Branka and the continuity of the camera. This was brought out in the evidence of Ms. Hema NAGAR.

A/Supt Bell began his evidence as to the credentials of Ms. NAGAR that was challenged by defence. Evidence was heard as to the process of her investigation and to the way that the camera was received into the custody of the OPS. It should be noted that there was conflicting evidence as to who between Officer Smith and Plomp actually seized the camera. What is agreed to is that camera did end up on the desk of Det. Riddell and Det. Svidran took custody of it once he was determined to be the lead investigator. The camera was ultimately returned to Branka upon her release from custody

It was the prosecution's position that via the evidence of the investigation of Ms. Nager that Officers Plomp and Wilson were neglectful in their handling and preservation of this camera that led to this charge of neglect of duty.

SUBMISSIONS – Motion for non-suit

PROSECUTOR

The Prosecutor made no formal submissions and agreed that they had not established evidence to support a conviction; as well he also indicated that via conversations with OIPRD they too agreed the case had not met the needed threshold and agreed to allow it to be put to a directed verdict.

PUBLIC COMPLAINANT

Mr. Kraljevic was permitted to consult a lawyer and made submissions the following day. However, his submissions had little if anything to deal with the charge before the Tribunal and as was with the evidence of Ms. Nager reaffirmed the confusion that existed as to who had seized the camera in the first instance.

DEFENCE

Defence focused on the testimony of Ms. Nager and her conclusions that she was unable to determine who made the seizure of the camera. That as a result of this testimony all other duties

that fall from this conclusion are not pertinent and I am unable to make a finding based on this evidence.

FINDINGS

Officers Plomp and Wilson are each charged with one count of neglect of duty contrary to section 2(1)(c)(i)(a) of the Code of Conduct contained in Ontario Regulation 268/10, as amended, and therefore contrary to section 80(1) of the *Police Services Act*.

The particulars of the allegations are:

On or about July 6th, 2013, they failed to ensure the chain of continuity was maintained for the camera and cell phone seized at the scene of an incident involving B.K. and that the said seized items were not preserved, stored or reported in a detailed and methodical manner as per OPS Policy No. 5.25: Property-Recovered, Seized, and found.

The allegation flows from a public complaint made by Mr. Bruno Kraljevic. Mr. Kraljevic had been arrested and charged by Det. Svidran in relation to an altercation that occurred on July 6th, 2013. Ms. Branka Kraljevic was also charged and convicted of aggravated assault in relation to this incident.

This event was originally investigated by OPS Professional Standards Section and no evidence of wrong doing was determined. The decision was further appealed by Mr. Kraljevic and OIPRD did request a directed hearing and a further investigation was conducted by their office, with the charges and this hearing a result of that investigation. It should be noted that Allegation 1 – Unlawful Exercise of Authority, Allegation 3, 4 and 6 – Discreditable Conduct, and Allegation 7 – deceit, were all unsubstantiated. Allegation 8 – neglect of duty involving another officer – was deemed to be less serious in nature. It is allegations 2 and 5 that made up the charges and allegations of this hearing.

WITNESS EVIDENCE

As earlier indicated I heard from two witnesses; Branka Kraljevic and Hema Nager.

Branka provided some context as to the events surrounding the taking of the photographs and the resulting photos. She could not comment on the circumstances surrounding the seizure of the camera but did indicate it was returned to her, as well as her cell phone, upon her release from jail.

Ms. Nager provided context as to the events leading up to the seizure of the camera and its subsequent possession of Det. Svidran. What she was unable to do and admitted to was she was unsure of who actually seized the camera between Det. Plomp and Wilson.

In overview of the witness testimony of the two Prosecution witnesses, I concluded that I heard no evidence which suggested Officer Plomp or Wilson violated their responsibilities because

continuity was never proven at the onset, thus any further required actions on their part were equally unclear.

DOCUMENTARY EVIDENCE

Exhibit 9 – photos of persons involved in the event and afterwards of injuries to Bruno Kraljevic.

This exhibit did demonstrate that photos did exist that pertained to the moments before the altercation occurred and the alleged injuries sustained by Mr. Kraljevic. Had it been proven who had seized the camera the camera's relevance would have been noted and the required duties that would have flown from that.

Exhibit 8 – from the book of evidence provided by Prosecutor, specifically tab 16 – the OIPRD interview transcript of Detective Plomp

This did provide some information as to who had control of the camera as it related to Det. Plomp. However it was confusing at best and was of little value in establishing the identity of the sole officer seizing the items. Det. Plomp referenced an email she sent to Detectives Riddell and Svidran (Exhibit 8 – tab 8) which indicates Plomp and Wilson collectively seized the items, which added to the confusion.

Exhibit 8 – tab 17 – the OIPRD interview transcript of Det. Wilson

Similar to the interview of Det. Plomp it provided confusing and unclear evidence of who solely was responsible for the seizing of the camera and cell phone. I could not take this as evidence to support the charges before me.

A brief of authorities was also provided to the Tribunal as part of the submissions of Defence which I found helpful. In particular in *Pollock v. Hill* it states "...we will not find the Officers guilty of neglect of a duty to supervise unless there was some element of willfulness in their neglect or unless there was a degree of neglect which would make the matter cross the line from a mere performance issue to a matter of misconduct."

This was further reinforced from *Helbin, Misik and Myers* and the *Chatham-Kent Police Service* in which "... The only appropriate standard with which I need to be concerned is whether or not the conduct or behavior was malicious, reckless, intentionally bad or cavalier."

I do not find the Officers extended into this realm. This is not to say that had the seizing officer been identified they would not have faced some difficult questions, I do not find it my role to comment in relation to this area. I will comment that these Officers did face systemic challenges as it is associated with the preservation of temporary evidence and the conflict that arises from it. As well the inability of the OPS to maintain an overnight investigative presence added to the complexity of this file and those who dealt with it.

Thus in summary, it is my opinion that I feel I had sufficient evidence to provide a directed verdict.

I obviously did not take this decision lightly, I understand the impact this has caused the public complainant

In order to reach my decision I did look closely and re-read the following

- 562 pages of transcripts from the December hearing dates
- 55 pages of my own notes
- Re-examined the 16 exhibits, including the extensive material in book of documents, which included the interview of Det Plomp
- I have considered the opinion provided by the public complainant, while very detailed the information that was provided was largely irrelevant to the seizure and care and continuity of the camera and cell phone.
- I want to reiterate to the public complainant that the charges that are in front of me, and admitted by the prosecutor, are extremely narrow in scope and provide me with a very narrow landscape to work from.
- The fact that this motion by defense is supported by the prosecutor and OIPRD was a very telling fact in my opinion.
- The primary fact I considered is the inability to determine who seized the exhibit, all of the duties fall from that determination. The chain of continuity must have a clear starting point that was not proven in this matter. This came out very clearly in the testimony of the OIPRD investigator, Miss Nagar. I sympathize with the public complainant on this part as the seizing office should have been established on the night in question in a clear fashion and it was not.
- Having said that, even if officer who seized the exhibit could have been established there remained many other processes that needed to be proven in order to determine a finding of guilt in relation to the camera and cell phone.
- I also took into consideration that the public complainant and prosecution had made their case, I feel little would have been gained had we continued with what have been the defense position on this matter.

DISPOSITION

In totality of the evidence of the prosecution and public complainant, including the evidence of the two witnesses as well as the 16 exhibits, and in consideration of the charges against Officer Plomp and Wilson, I have not found, heard or seen any evidence, however weak that could be to favour the case of the Prosecution. I grant the motion for non-suit and dismiss the charge of discreditable misconduct against Cst. Plomp and Acting Sergeant Wilson.

11 July, 2016

Don Sweet

Superintendent

Ottawa Police Service