

IN THE MATTER OF: *The Law Enforcement Review Act*
Complaint No. 2011-137
Court File No. 009-99252

AND IN THE MATTER OF: **An Application pursuant to s. 17 of *The Law Enforcement Review Act, C.C.S.M., c.L75.***

BETWEEN

B. C.,)	Tim Valgardson,
)	for the Complainant
Complainant)	
)	
- and -)	
)	
CONSTABLE S. B.,)	Paul McKenna,
Respondent)	for the Respondent
)	
)	
)	Decision delivered:
)	February 13, 2015

Restriction on Publication This Decision is subject to a ban on publication of the Respondent's names pursuant to s. 13(4.1).
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HEINRICHS, P.J.

Introduction

[1] It was around 8:00 a.m. on June 17, 2011, when B.C., a 43 year old black man, wearing a helmet and carrying a backpack, was riding his bicycle, on his way to the school where taught. In the area of Isabel and Notre Dame, he chose to ride on the sidewalk, as he did not feel safe joining the rush hour traffic on the street. Constable S.B., a uniformed Winnipeg Police Officer on bike patrol saw him, pedaled past him and blocked his path. A confrontation - the substance of which is

in dispute - took place; within a couple of minutes, B.C. had been forced to the ground and handcuffed by the officer.

[2] As provided for in *The Law Enforcement Review Act* (or *LERA*), B.C. filed a complaint, alleging that the officer abused his authority by using unnecessary violence or excessive force. This allegation, if true, would mean that the officer committed a disciplinary default, pursuant to section 29(a)(ii) of *LERA*, and be subject to a penalty, pursuant to section 30 of *LERA*. A second – and somewhat interconnected - allegation, though not specifically raised in B.C.’s complaint filed on July 19, 2011, was raised by his counsel, through written and oral submissions. His counsel argued that the officer wrongfully arrested B.C., thereby committing the disciplinary default of making an arrest without reasonable or probable grounds, pursuant to section 29(a)(i) of *LERA*.

[3] As *Highway Traffic Act* (*HTA*) charges were laid as a result of this confrontation, the *LERA* Commissioner did not give his decision with respect to this complaint until those matters were concluded. That delay resulted in the Commissioner only providing his decision on this complaint on June 6, 2013. The Commissioner declined to take further action, finding that there was insufficient evidence supporting the complaint to justify a public hearing.

[4] B.C. then applied to this Court for a review of the Commissioner’s decision, pursuant to section 13(2) of *LERA*. This is the Court’s decision on whether the Commissioner erred in declining to take further action on the complaint.

THE TEST TO BE APPLIED

[5] According to *LERA*, section 13(4), the burden of proof, on a balance of probabilities, is on the Complainant (or Appellant) to show that the Commissioner erred in declining to take further action. A Complainant can establish this in one of two ways:

1. By satisfying the Reviewing Judge that the Commissioner committed an identifiable jurisdictional error. The standard of correctness applies in these circumstances. Joyal, P.C.J., as he then was, identified three ways that this can be shown:
 - a.) the Commissioner has failed to act as required by his jurisdiction;

- b.) the Commissioner has failed to act within the limits of his jurisdiction; or
- c.) the Commissioner has reached his decision by applying the wrong test or misapplying the right test (either of which may involve an error of mixed fact and law).

(M.S. v. Constable P. B. and Constable G. D., LERA Complaint #2004/172)

2. By satisfying the reviewing judge that the Commissioner's conclusion was not based on a reasonable assessment of the evidence. The standard of reasonableness applies in these circumstances. Judge Preston framed the test by asking two questions, "Did the Commissioner assess the evidence reasonably? In other words, have the Commissioner's reasons been transparently, intelligibly and rationally articulated?"

(B.J.P. v. Constable G. H., Constable B. Z. and Sergeant G. M., LERA complaint #2005/186)

DID CONSTABLE S.B. USE UNNECESSARY VIOLENCE OR EXCESSIVE FORCE - SUCH THAT THE COMMISSIONER SHOULD HAVE TAKEN FURTHER ACTION?

[6] The first question to answer is whether the Commissioner committed an identifiable jurisdictional error. There is no suggestion that the Commissioner failed to act as required by his jurisdiction or that he failed to act within the limits of his jurisdiction. As well, in dealing with the question whether Constable S.B. used unnecessary violence or excessive force – without considering the related question of the arrest – it is agreed that the Commissioner did not apply the wrong test or misapply the right test.

[7] The second question is whether the Commissioner's conclusion was – or was not - based on a reasonable assessment of the evidence. The Commissioner's decision included a lengthy summary of the evidence he had received. It is eight pages in length. He then provided one and one half pages of analysis and conclusion, which started with an explanation of his role pursuant to section 13(1) of LERA and then noted that the Commissioner is not to make his decision by assessing credibility or making any definitive finding of fact or law.

[8] The Commissioner, in the three paragraphs that follow, summarized the circumstances leading up to B.C. being stopped by Constable S.B., the officer's request for identification, the refusal by B.C., and the reason Constable S.B. gave for arresting B.C. During the course of this summary, the Commissioner quoted from and interpreted what he considers to be the relevant sections of the *HTA*, as well as his understanding of the applicability of the *Charter* to this situation. It is clear that the Commissioner was satisfied that B.C. wilfully obstructed the officer in the execution of his duties and that the officer was justified in arresting B.C.

[9] It is only after the Commissioner has articulated these conclusions that he dealt with the actual question of whether Constable S.B. used unnecessary violence or excessive force. Here is his entire paragraph:

While you allege the officer used excessive force, the officer denies this. He states that the force used was necessary to detain you until such time that assisting officers arrived to search you for your identification. The independent witness stated that you both appeared to be hanging on to each other and struggling. She did not witness any excessive force by the officer and there is no medical evidence with respect to any injuries.

[10] There is no medical evidence because B.C. never provided any. Although B.C. described being taken down to the ground hard and having enough pressure put on him that it hurt, he did not complain about any injuries and did not seek any medical attention. His complaint of excessive force was that his cell phone had been smashed out of his hand and that he was then tackled by the officer.

[11] It appears from the statement given by the independent witness L.F. that she first noticed the officer and another gentleman while they were talking – but already holding on to each other and struggling. She ran over to assist and when she came close to them she noticed that “they were almost getting on the ground”. She then helped the officer out by calling 911. She told the *LERA* investigator that in her view the officer did nothing wrong. This minimal description of what she saw and the opinion she provided to the *LERA* investigator, does not assist much in helping to determine what was said, what happened with the cell phone, how the struggle started, how the two ended up on the ground and if there was any resistance by the gentleman when the officer had him on the ground.

[12] This then leaves the Commissioner's first two sentences: B.C. says it was excessive force. Constable S.B. denies it was excessive force, as he only used the

force necessary to detain B.C. until assisting officers arrived to search him for his identification.

WHAT DID B.C. SAY ABOUT EXCESSIVE FORCE BEING USED?

[13] In his complaint, dated July 18, 2011, B.C. provided a detailed chronology of being stopped on the sidewalk, the discussion which took place and the officer's request for his ID. He pointed out that he did not swear, call the officer names or do anything threatening. Once he had refused to provide his identification, the following occurred (as he recorded it):

He (the officer) said, "This goes easier for you if you give me your ID." I said, "Arrest me." He said, "I will put you up against that tree and search you." I said, "I do not give you permission to search me. Arrest me." He said, "Technically the moment I stopped you were under arrest."

At this point I am more concerned with my job than anything else. I say, "OK." I take out my phone to call work to get a sub. He says, "You can't use that." I say, "I am a teacher just down the street (I gestured.) I need to call them to tell them I am being arrested so they can get a sub." I figured I was going to be taken downtown and processed. He say, "Put that away and grabs at my phone." I was not looking at him. I was trying to bring up the number for the school that I teach grade five at. When he reached for the phone I instinctively moved it. I then feel a blow against my hand and the phone is being driven to the ground. I am wondering what is going on and try and hang onto the phone and lean in the direction it has been spiked. I am then turned around and push forward (I still had one leg clipped into a pedal. I am now in an arm bar and being driven to the ground as I am being pushed forward to clear the bike. As he is doing this he says, "You are resisting."

At this point I am in a bit of shock. It has been less than three minutes since he shouted Hey! I am now on the ground and trying to turn my head to look for my phone. He has me in an arm bar and is putting enough pressure on me that it hurts. The knee that I had scoped on November the 10th is up against my chest. My right hand is out against the stone and dirt ground. I move my right hand inches to get better leverage so he cannot hurt me as much. He increased the pressure on my arm and lets up after a couple of seconds.

[14] During the interview B.C. had with the investigating officer from *LERA*, on July 19, 2011, he is asked how the phone was smashed out of his hand. B.C. gave an answer which is essentially a summary of what he described in more detail in

his statement. In his decision, the Commissioner summarized all of the details of the complaint and interview in a bullet point format.

[15] The following can be noted from B.C.'s complaint and interview with the *LERA* investigator:

1. B.C. was not prepared to give the officer his identification, but was cooperative and respectful the entire time they were talking.
2. At no time did B.C. say or do anything which suggested that he was going to continue biking on the sidewalk or walk away from the officer. He was standing there, waiting to be arrested by the officer.
3. B.C. made it clear that he needed to phone the school where he worked. That was why he was trying to make a call with his cell phone.
4. The only thing that B.C. did once down on the ground was to position one hand so as to lessen the pressure on him. He was not resisting in any way.

WHAT DID CONSTABLE S.B. SAY IN DENYING THAT HE USED EXCESSIVE FORCE?

[16] Constable S.B. wrote the following (verbatim) in the officer's comments section of the Common Offence Notices he issued that day, June 17, 2011:

Advised Acc can't ride on sidewalk, and requested I.D. Acc stated, No you are going to have to arrest me. Cautioned accused on HTA requirement. "Forget it, Arrest me. Advised Acc he was under arrest Acc immediately reached into his pocket pulling a black object out bringing his hand up towards me. – Cell Phone. I am going to call my Work. Told no, not yet. I reach for the cell. Acc resists. I grab both shoulders, pull him to the ground, arm bar and handcuff. Bystander calls for my back-up. 2 units arrive and we search for ID. Obtain D.L. Release from scene.

[17] Constable S.B. completed a Use of Force Summary on November 16, 2011. In it he stated the following:

I rode in front of the offender to stop him, and he got off my bike. The offender remained straddled on his bike. I advised the offender that I stopped him as he was riding on the sidewalk, which was illegal. The offender immediately advised that he did not feel safe to ride on the road, and would continue to ride on the sidewalk. I requested Identification and the accused advised that I would have to

arrest him and take him to the station. I advised the offender that he was required under the HTA to provide identification (sic), and that I would arrest him, handcuff him, and search him for identification (sic), if required if he didn't cooperate. He was advised that he would be getting PON's, and would be released from the scene either way. The accused stated, "No you are going to have to arrest me", and was tensing up. I stated, "Ok, you are under arrest", and the offender reach with his right hand, to his waist area, pulling what appeared to be a cell phone, stating, "I am going to call my work" I stated no not yet, and reached for the cell phone. The offender resists, pulling back, and I take hold of both his shoulders with my hands, pulling him to the ground, grabbing his right arm and putting it in a straight arm bar to hold him in place on the ground, in a sitting position, while telling him to stop resisting. A bystander approaches, and asks me if I need help, and if she can call 911 for me. I ask her to do so, and handcuff the offender, who is still trying to pull away. The accused continues to try to pulling away until back-up arrives, and I continue to hold him in place. Back up units arrive, one man unit and a two man unit. and the accused is searched for identification. The PON's are completed. The handcuffs are remove (sic) and the accused refuses to get up. I place the PONs at his head, and advised him that he is now free to go.

[18] On June 28, 2012, Constable S.B. was interviewed by the LERA investigator. His response to the question of excessive force being used was summarized by the investigator as follows:

Advised under arrest when he refused to provide ID required under HTA. Reached into pocket – not now – told him he was under arrest Unknown to me what object was (cell phone) The force used was as outline within the Use of Force Summary Report

Male was larger than I – very fit – Very muscular. I got control of him – handcuffed – he's resisting pretty much the whole time pushing back

[19] The investigator then asked him to comment on the allegation that he had struck B.C.'s hand, causing his cell phone to fall to the ground. The investigator summarized his answer as follows:

I had no idea what he was holding

I am aware of officer safety material which cautions on numerous weapons, appearing to be cell phones.

[20] When Constable S.B. is asked if he has any further comments, the investigator records the following:

The complainant indicated that he was going to keep riding on the sidewalk as it was unsafe to ride on the road

Officer not given opportunity to issue caution or warning because of his attitude

[21] Constable S.B. testified at B.C.'s trial on the *HTA* charges on January 11, 2013. The following are some of the answers he gave:

I had the sense that he was going to continue to ride his bicycle on the sidewalk, and at this time, I decided that I would ask for some identification.

(Transcript, p. 8)

I approached Mr. C. closer, who was straddled across his bicycle at this time, and reached across to make contact to state – and state that he was under arrest, at which time Mr. C. reached into, with his right hand into his right pocket, I think it was his pants, and pulled out what appeared to be a cell phone. And I remember him stating he had to make a call and I said: No, not at this time. As, one, I didn't feel safe as numerous reports about cell phone being zip guns. My experience over the, at that point, 25 years was that I was going to affect that arrest and continue to make the situation safe for him and I. He pulled back, at which point, I took firm hold of him, pulled him forward and downwards to my left, putting him into an arm bar, and then down into a seated position on the ground, pushing his body forward so I could restrain any movement. . . . I continued to leave Mr. C. in the position I had as it was a safe position to be in for all of us. And when the officers arrive I gave them control . . .

(Transcript pp. 9-10)

Q. You stopped Mr. C. I'm going to suggest to you that it was evident to you that he was on his way to work, he had his backpack with him; isn't that right?

A. Yes.

Q. I understand in the conversation, although you don't have the exact record of it, that Mr. C. told you that he was a teacher working at the school which was just to the south and east of Cumberland and Notre Dame, between – near Sargent; isn't that what he told you?

A. I seem to recollect him making some comment, that he, not necessarily that he was a teacher, but that he teaches near the University of Winnipeg.

(Transcript, pp. 37 – 38)

Q. . . . And when Mr. C. removed, which what was evident to you to be his cell phone, he told you that, as you wrote in your report here, that he wanted to call his work; isn't that it?

A. He had made some comment, as I've indicated, in relation, as he was reaching, reached down and pulling out his cell phone, something to the effect that: I have to call my work.

(Transcript, p. 38)

Q. . . . So you catch up with Mr. C., stop him, tell him to stop, and he stops, right? He complied with your request?

A. Yes.

(Transcript, p. 38)

Q. . . . So this was a civil conversation?

A. Yes.

Q. There was not any indication to you at all that Mr. C. was upset with you or he wasn't enraged or threatening you in any way during this conversation; correct?

A. Not at this point, no.

Q. All very civil?

A. Yes.

(Transcript, p. 39)

. . . there was some indication that he still wanted to continue riding on the sidewalk is the impression that I was getting, and as, and at that point, I had asked for some identification, which I was outright refused.

(Transcript, p. 40)

Q Now, in your traffic offence notice, there's no mention at all, if you take a look at it, that you formed the impression, after this conversation, that he was going to continue to ride his bike on the sidewalk; do you agree with me on that?

A. Yeah.

Q. Okay. So what did Mr. C. say to you that left you with this impression, after having a conversation with him that he was going to continue to ride on the sidewalk?

A. Just the simple fact of the matter that he, he indicated he was not going to ride on the road.

Q. But your report doesn't say that he said that.

A. No it doesn't.

(Transcript, pp. 40 – 41)

And as I, in fact, in my testimony, I didn't state that he specifically stated that he wasn't going to ride on the sidewalk. I stated it was the impression of which I got.

(Transcript, p. 41)

Q. Did you feel fear for your safety and be concerned that he was going to drive away on the sidewalk in the middle of the conversation you were having with him?

A. I did not have any concern for my safety at that time. I had concerns that I needed to deal with the issue at hand, and part of being able to deal with that issue is identifying the party that I am dealing with.

(Transcript, p. 44)

Just the physical contact is required in order to conduct and effect arrest, which is the reason why I directly stood in front of the accused, as he straddled his bicycle, and reach to make that physical contact and state that you're under arrest. As I make that physical contact, he grabs his phone and pulls it out making a statement to the effect: I have to call work.

(Transcript, p. 49)

Q. So when I read this (the Use of Force Report), I don't see that you put any hand on him at all until he told you that he wanted to call his work.

A. Okay.

Q. Do you agree with that now? That you didn't touch him, physically in any way, until he told you he was going to call his work? That's when you reached out to touch him. Is that how it happened? That's how you state it in the use of force.

A. Okay. Then I'm going to have to say that that's going, that's going to have to be accurate.

(Transcript, p. 50)

Q. The traffic offence notice says after he was going to call his work or told you that, you said: Told not yet and you reached for the phone. So it seems to me that until that happened, you hadn't touched him at all on either reports.

A. Okay.

Q. Do you agree with this?

A. Sure. Yes.

(Transcript, p. 51)

Q. Well, he certainly wasn't resisting arrest. He wasn't physically engaged with you. All he did was said: I'm not telling you my name. You said to him: You're under arrest.

A. When I effected that arrest, he resisted.

Q. He, but when you told him he was under arrest, the first thing he did was tell you that he was taking his cell phone out, you say you saw that, and he was telling you he was going to call his work, how is this physically resisting being under arrest? What did he do other than tell you - -

A. When I took hold, when I took hold - -

Q. Can I ask the question, sir?

A. Okay.

Q. What did he tell you, what did he physically do in any way to resist arrest other than tell you: I've got to call my work because I'm going to be late. How is that resisting arrest?

A. When I put my hand upon him to effect the arrest he pulled back, and I'd stated to him directly: Not right now. And he resisted back, and I effected arrest and applied the force, as I have stated.

Q. Well, you say, in your use of force report, I stated: No, not yet. Reach for the phone. It doesn't say you reached out to touch him. It said you reached for the phone. He pulled the phone back, and then you took hold of his shoulders, with your hands, and pulled him to the ground. That's what it says.

A. Okay.

(Transcript pp. 53 – 54)

[22] The Commissioner's decision quoted the Use of Force Report verbatim and provided a bullet point summary of: what Constable S.B. wrote on the back of the ticket that day, his interview with the LERA investigator, and the Commissioner's summary of his review of the court transcript.

[23] The detailed quotes the Court has just recited from the various reports and court transcript reveal the following:

1. In his Use of Force Report and in his interview with the LERA investigator, Constable S.B. stated that B.C. told him that he would continue to ride on the sidewalk. In the only notes Constable S.B. prepared as part of the initial investigation – the "Officer's Comments" in traffic offence notices – there is no mention of B.C.

saying this. More significantly, under affirmation, in his testimony in court, Constable S.B. stated that he **was under the impression** that B.C. would continue riding his bike on the sidewalk, not that B.C. told him this. This is clearly not what he stated in the Use of Force Report and to the *LERA* investigator.

2. Constable S.B. first testified in court that he reached out and touched B.C. - making physical contact - in order to arrest B.C. It was only then that B.C. pulled his phone out. When confronted with his own previous reports, Constable S.B. had to admit that B.C. pulled his phone out and that the officer's first response was to reach out for the phone. When B.C. pulled his hand back, Constable S. B. laid hands on him and took him down. While all of this happened very quickly, the sequence of events may be very significant in determining if this was excessive force. Constable S.B., at the very least, is inconsistent in his evidence and statements on this point.

3. Constable S.B. claimed that his concern about B.C. pulling his cell phone out was that it could have been a weapon. However, he never answered the question put to him by the *LERA* investigator about the cell phone:

Q. The complainant alleges that you struck his hand, causing his cell phone to fall to the ground. Please comment on this.

A. I had no idea what he was holding. I am aware of officer safety material which cautions on numerous weapons, appearing to be cell phones.

[24] There is no other time when Constable S.B. stated – or is asked – what happened to the cell phone during this scuffle. However, if B.C. is correct that it was knocked out of his hand before he was arrested by being taken down to the ground, did a safety concern for the officer still exist?

CONCLUSION

[25] Without even determining if there were lawful grounds for Constable S.B. to arrest B.C. at the time, it is evident that there are some significant questions with respect to whether or not Constable S.B. used excessive force on B.C.

[26] In light of all of these concerns, it is time to review the Commissioner's conclusion concerning the question of excessive force. He stated:

While you allege the officer used excessive force, the officer denies this. He states that the force used was necessary to detain you until such time that assisting officers arrived to search you for your identification.

[27] While the Court has not quoted everything Constable S.B. wrote, answered or testified to, the evidence is that Constable S.B. used force to either: prevent B.C. from using the cell phone, prevent B.C. from using a (possible) weapon on him and/or to effect an arrest on B.C. in order to get identification from him before releasing him. While it may have been understood, Constable S.B. never mentioned using force because it would be necessary to detain B.C. until other officers arrived. The Commissioner's conclusion, "He states that the force used was necessary to detain you until such time that assisting officers arrived to search you for your identification." is not an accurate summary of the evidence.

[28] This brief conclusion by the Commissioner is not transparent. On the question of excessive force he appears to accept certain portions of Constable S.B.'s evidence, but does not rationally articulate why other contradictory parts of his evidence are not accepted. As well, B.C.'s complaint is ignored entirely. This can only be described as an assessment of credibility in favour of the officer. Given the statements and testimony the Court has detailed at length, it is this Court's finding that the Commissioner did not assess the evidence reasonably. The Commissioner is therefore ordered, pursuant to section 13(3)(a) and 17(1)(a) of *LERA*, to refer this complaint to a provincial court judge for a hearing.

DID CONSTABLE S.B. ARREST B.C. WITHOUT REASONABLE AND PROBABLE GROUNDS?

[29] As this Court has made a determination that this matter will be referred to a provincial court judge for a hearing, it is not necessary to determine whether Constable S.B. arrested B.C. without reasonable and probable grounds. However, there are a number of interesting questions relating to statutory interpretation and applicability in the particular circumstances of this case. As they may become relevant in the upcoming hearing, those questions will be outlined.

1. How are Section 145(8) and section 145(1) to apply in this situation?
2. How does section 76.1(4) of the HTA apply in this situation?

3. Can a peace officer, pursuant to the *HTA*, require that the bicyclist identify himself or demand identification in these circumstances?
4. Is there any other legislation – such as *the Police Services Act* – that would require a bicyclist to identify himself in these circumstances?
5. Does the refusal to identify one’s self in these circumstances allow a police officer to arrest pursuant to the *HTA*?
6. Is there a common law power to arrest in these circumstances?
7. Do the arrest provisions in section 495 of the *Criminal Code* apply in light of section 3 of the *Summary Convictions Act* of Manitoba?

[30] Depending on the answers to these questions, the Commissioner’s interpretation of the *HTA* sections in his conclusion and his agreement with the officer that “your continued refusal to identify yourself and demanding to be arrested was sufficient justification to arrest you for obstruction” may be an identifiable jurisdictional error, that is, reaching his decision by applying the wrong test or misapplying the right test.

ADDITIONAL RECOMMENDATION

[31] Counsel for B.C., at the conclusion of oral submissions, suggested that his client was still interested seeing if there could be an informal resolution in this matter. This is something worth pursuing. If both parties are prepared to meet to see if an informal resolution can be reached, this Court directs, pursuant to section 13(3)(b) of *LERA*, that such meeting (s) take place prior to formal hearing being set in this Court.

Original signed by:
Heinrichs, P.J.

This matter is to be added to the LERA docket for April 22, 2015 in courtroom 401.