

Judgment (Ehrcke PCJ)

20 November 2000
Victoria, B.C.

(EXCERPT FROM PROCEEDINGS)

THE CLERK: Recalling Gerald Turko.

THE COURT: You can sit down, sir.

All right. Mr. Turko has been charged in count one with wilful obstruction of a peace officer, Janie M. Thomas, in the execution of her duty on October 19th, 1999, contrary to section 129(a) of the Criminal Code.

In count two, he has been charged that on the same occasion he assaulted a peace officer engaged in the execution of his duty contrary to section 270(2) of the Criminal Code.

The case involves an alleged obstruction of a bylaw enforcement officer and an assault of another bylaw enforcement officer while they were enforcing the clean air bylaw which prohibits smoking in public buildings. The Crown must prove all the elements of the offences beyond a reasonable doubt and my findings of fact are made on that basis.

The defence submitted that the accused did not understand who the bylaw enforcement officers were and that an assault has not been proven. The defence made other submissions which I will address after reviewing the evidence and making findings of fact.

Facts

One: The period in the bar.

On the evening of October 19th, Mr. Turko was in a bar called Big Bad John's, in Victoria, having some beer and smoking. The bar is in the Strathcona Hotel. Smoking is prohibited by bylaw.

Four bylaw enforcement officers came to the premises to enforce the bylaw. They were in uniforms which identified them as bylaw enforcement peace officers for the Capital Regional District. Their names are Janie Thomas, Miles Drew, Ian Fraser and Stefan Drouin.

The bar was noisy. Ms. Thomas was the officer designated to speak to any offenders. She saw Mr. Turko smoke. Her evidence was that she approached the table and spoke to Mr. Turko. She

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bent over so that her face was fairly close to him so he could hear. She identified herself as a Capital Regional District bylaw enforcement officer. She said she had seen him smoking. He said, "Yeah, you caught me." She said he would be issued a municipal ticket information carrying a fifty dollar fine. She asked him to produce a driver's licence. He said he did not have one. She asked him for his name and address. He refused to provide it.

She repeated herself and told him that if he did not provide the information, he was obstructing a peace officer, a criminal offence. Turko said, "You're not peace officers. I don't have to tell you anything." He asked her a number of times what her authority was to require information and she explained she was a bylaw enforcement officer enforcing the bylaw and that the bylaw officers were peace officers.

Chief Bylaw Enforcement Officer Miles Drew, who was nearby, heard Ms. Thomas identify herself and try to convince Mr. Turko to identify himself. He heard Mr. Turko say, "No way." That is at volume one, page 48, of the evidence.

Officer Drouin also heard her identify herself and some other parts of the conversation, although he was close to ten feet away, and that is at page 60 of his evidence.

Officer Fraser was in the vicinity, but did not hear much of the initial interaction between the accused and Ms. Thomas because his attention was elsewhere.

Early in his testimony, at page 3 of the transcript of his evidence, Mr. Turko said he asked Ms. Thomas what was expected of him, whether she had authority to require identification and whether he was being detained. This was evidence in the context of what occurred in the bar. Later in his testimony, Mr. Turko both denied hearing what Ms. Thomas said and also testified that he wasn't sure if he heard anything.

Under cross-examination, he said that he did not recall whether Officer Thomas said she was a Capital Regional District bylaw officer enforcing the clean air bylaw. He testified that prior to being approached, he was having a conversation with some Japanese students. This is relevant to

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whether he could hear in the bar. He qualified it by saying the conversation was very brief. Generally, his evidence was evasive and inconsistent. On cross-examination, he said he had no idea of who Officer Thomas was or that she was there enforcing the clean air bylaw.

I find that Ms. Thomas spoke to Mr. Turko after seeing him smoking, identified herself and her function, and asked for information so she could issue a ticket and that Mr. Turko refused to supply his name or address. I find that Mr. Turko heard and understood Officer Thomas. They were quite close and his answers and queries accorded with what she was saying. The -- this is the essence of the obstruction charge and I find it has been made out.

Following this, Mr. Turko indicated he was leaving and went into the lobby.

Two: Outside the bar.

The officers followed the accused into the lobby. At this point I find that although there was some variation in the evidence on exactly where everyone was standing, Mr. Turko was surrounded, or very close to surrounded, by the officers. The evidence varies as to what happened next. I note that the Crown concedes that Mr. Turko was detained in the hallway. This would have been prior to the alleged assault, after which he was physically restrained.

Officer Thomas testified as follows. She told Mr. Turko he could not leave, that he had not supplied the information. Mr. Turko asked a number of times if he was detained. Officer Thomas did not answer this question, but said she required the information she had asked for. Officer Fraser told Mr. Turko they were peace officers and he could be arrested for obstruction.

Mr. Turko said he was leaving and turned to face Miles Drew, who was behind him.

Officer Drew had put his hands up and said, "Hey, hold on. Wait a minute," trying to calm the situation. Mr. Turko stepped towards Officer Drew, put his hands on his chest and shoved him. Officer Drew stumbled back. Mr. Turko continued forward, striking Drew with his shoulder. Then Officer Fraser put his hands on Turko's shoulders and told him he was under arrest.

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Officer Thomas did not hear a reason stated. When Mr. Turko struggled, Officers Drouin and Fraser took him to the ground. Officer Thomas put her hands on Mr. Turko's back to assist at some point. A crowd had gathered and was getting out of control. Officer Thomas called the police on her cell phone. Officers Drew and Fraser handcuffed Mr. Turko and walked him outside. Officer Fraser then advised Mr. Turko of his rights, including his right to counsel.

Mr. Turko threatened to kick Fraser, and did kick his foot back to demonstrate, but did not make contact.

Miles Drew, the Chief Bylaw Enforcement Officer, testified as follows, starting at page 49 of the transcript that contains his evidence:

When I came out, Officer Thomas was talking to him and he was refusing to cooperate, and so he -- and he said, "And what if I don't tell you who I am?" And Officer Fraser said -- Officer Thomas had already explained to him that he was committing an obstruction by not telling us who he was, and that he should tell us who he was because it's a fifty dollar ticket for smoking in a building.

And he said, "Well, what if I don't tell you who I am?" And Officer Fraser was just telling him, "You can be arrested." And he said, "Who by, you?" And Officer Fraser said, "Yes, by us," and he was -- he was in mid sentence, and he said -- the accused said, "No way," and he quickly turned towards me.

I was very close to him at that point, and he was right in front of me as he turned. So it was a bit surprising, and I put my hands up in the air like this, and said, "Just a minute." And he said, "You can't detain me."

Q You're indicating with your hands?

A Yeah.

Q At shoulder height, open palmed?

A Yeah. They were in front of me like this, and I hadn't touched him. And he said, "You can't detain me." And I said, "I can if you

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obstruct me."

And, a few lines later:

A And he seemed to think about it for a second, and then he pushed into me and I had to fall back against the wall. And at that point, I grasped his shoulders as I was moving backwards and I heard Officer Fraser said -- say, "Now you're under arrest," and he was pulled away from me. And I was still off balance so I fell down against the wall. My glasses came off and one of the lenses popped out of them.

The accused pushed Officer Drew out of the way with his body, not his hands.

This evidence was repeated more briefly in cross-examination at page 8 of volume two:

Q So he didn't ask if he was being detained, that's your evidence?

A He said, as he turned towards me abruptly, "You cannot detain me." I said, "I can if you obstruct me." Then he stepped forward and shouldered me into the wall, then my fellow bylaw officers arrested him.

Following this, the accused was taken to the ground by other officers. Officer Drew assisted in handcuffing the accused. A large crowd had gathered and when Officer Thomas had some problem with her phone, Officer Drew called the police. A short while later outside, the accused threatened "to kick us in the balls", and that's at page 53, but did not do so. He did kick backwards, but Drew was not sure when.

Officer Fraser advised the accused of his rights. In response to questions from the accused, Officer Fraser told them they were peace officers and that he had been committing an obstruction and was arrested. Then Constable Tolmie arrived and again advised the accused of his rights.

Officer Ian Fraser testified as follows. In the lobby, Fraser told the accused they were peace officers, not to obstruct them, and that he was

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obliged to provide his name, address and birth date. He saw the accused bang into Miles Drew as he left. He did not say exactly what Turko did to Drew, but he assumed he pushed him because Drew is falling backwards. He described Turko as scrambling to get through.

Then Fraser told Turko he was under arrest, pulled him back from the collar and Fraser and Drouin forced the accused to the ground. After the accused was taken outside, Fraser informed him that he was a bylaw enforcement officer from the Capital Regional District and that he was under arrest for obstructing a peace officer. He also cautioned him about speaking. He did not advise him of his right to contact counsel. He anticipated that the police would do so. Mr. Turko threatened to kick Fraser, but didn't follow through.

Officer Fraser swore the information in this case on December 1st, 1999. He was aware prior to Christmas that Mr. Turko had instituted a civil suit concerning this incident. I note that formal notice was, in fact, given by Mr. Turko in November. When asked if he had talked to Crown counsel about the civil suit, he said that about two weeks before he gave evidence, he asked Crown counsel if the Crown was aware of the civil suit.

That was the extent of the discussion. He gave his evidence on June 12th of this year.

I will touch only briefly on the evidence of Officer Drouin. As noted earlier, he heard Officer Thomas identify herself to the accused in the bar and something to the effect that he had to provide information. He did not hear the whole conversation. In the lobby, a waitress said, "They can't do this. They can't arrest you." Turko said he was going back in and turned to face Drew. Drew had his hands up and said, "Wait a minute. Can we talk about this?" At this point, Fraser put his hand on Turko's collar and told him he was under arrest for obstruction. It was clear at that point that Mr. Turko was not going to cooperate.

After this, Turko grabbed Miles Drew and pushed him backwards. Drouin's evidence differs from that of the other officers regarding the timing of the push and the arrest. Drouin then

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pulled Turko back from his collar and said, "Get down. Get down." Turko fell forward onto his chest. He was physically restrained and handcuffed. Outside, he heard Officer Fraser tell Turko he had the right to remain silent and that he was under arrest for obstruction. He also heard Mr. Turko threaten to kick Officer Fraser and saw him move his feet.

Joanne Bartman, a witness for the defence, was working in the Strathcona Hotel that night. She saw the officers go into Big Bad John's, but did not see what transpired there. She conceded that the hotel had been permitting smoking in certain areas contrary to the bylaw. She saw Mr. Turko in the lobby with the four officers, two in front of him, two behind him. He was asking about their authority to detain him and why he was being detained. Ms. Bartman was not satisfied with the answers and remembers them as vague. She may have told the accused that he did not have to identify himself and she said something to the officers questioning their authority.

When Mr. Turko took a step or two forward to leave, all four officers grabbed him and piled on top of him. She did not see Mr. Turko being aggressive. She said he was calm. She did not see Mr. Turko push any officer or see any officer get pushed against the wall. She was shocked by the behaviour of the officers and offered to be a witness. She said there were only a few people watching and did not recall them hollering at the officers as described in other evidence.

Mr. Turko's evidence was that in the lobby, the officers surrounded him. He asked the officers for their authority to identify themselves and what they expected of him, whether he was being detained and whether he had to produce identification. Mr. Turko said that he felt a hand on the back of his neck grabbing his hair. Then he was taken down and handcuffed. He denied doing anything to the officers, but may have seen Officer Drew lose his balance. That is at page 26 of his evidence.

He asked if he was under arrest and was told he was for obstruction. He was not advised of his right to contact counsel. He did not recall anyone saying he had committed an assault. He was

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told the officers were peace officers. That is at page 24 of his evidence.

He was dragged out of the building by his arms. He recalled telling one of the officers he would kick him in the balls. That is at page 26.

The appearance notice on which he was released alleged obstruction. When he first appeared in court on November 25th, there were no charges. He gave notice to the Capital Regional District of a civil suit on November 24th. In December, he received a summons for these charges.

Generally, Mr. Turko denied any assault and said he did not give his name because he wanted to understand what was expected of him before he provided information. He said he was never clear on who the officers were.

Based on all the evidence, I find that Mr. Turko physically assaulted Miles Drew by pushing him. This occurred before the other officers acted to restrain Mr. Turko. I find that, as conceded by the Crown, Mr. Turko was detained just prior to this in the hallway, but was not told that he was detained. He was told -- he was told the officers were bylaw enforcement officers and peace officers.

I also find that it was clearly explained to him what information was required and that if he did not comply he would be obstructing. When he said to Officer Drew, "You cannot detain me," Drew informed him that he could be detained for obstruction. Then the assault occurred.

Officer Fraser told him he was under arrest for obstruction after the assault had commenced. Mr. Turko was not fully advised of his rights until the police attended, although he was cautioned.

There was a threatening situation in the hallway. A hostile crowd had gathered and was taunting the officers.

I note that I found the evidence of Miles Drew concerning the assault detailed and convincing. He was the person assaulted and his memory of events impressed me as accurate. Many aspects of his testimony were confirmed by other witnesses.

Other issues. The other issues raised by the

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defence or arising from the context are as follows:

One: Did the officers have the power to serve or issue the ticket?

The defence points to Capital Regional District bylaw number 2681, which establishes bylaw enforcement officer positions and grants authority to officers. Section 5 says bylaw enforcement officers have authority to serve a summons in the manner prescribed in section 23 of the *Offence Act*. That provision does not relate to the service of a summons. Thus, the defence says the officers did not have the power to serve or issue the ticket.

I find those powers are given to the officers by other statutory and regulatory provisions. The bylaw enforcement officer positions were established pursuant to section 196 of the *Municipal Act*. The clean air bylaw is a designated bylaw under section 272(1)(a) of that Act because it is a health bylaw made under section 523(1) of the Act.

B.C. regulation 352/89, section 2, designates all such bylaws under section 272(1)(a). Section 272(2) provides that a bylaw enforcement officer may lay a ticket information for the contravention of the designated bylaws. Section 273(2) requires service of the ticket by the bylaw enforcement officers. The ticket is in a prescribed form which requires the violator's name, address and date of birth. By this means, the officers were empowered to issue and serve an offence ticket respecting the contravention of the bylaw. They needed identification to issue the ticket.

Two: Could the officers detain the accused?

The defence conceded that if the officers have the above-noted powers and saw the accused smoking and identified themselves, they could detain the accused for the purpose of identification.

Three: Were the officers acting as peace officers?

The defence focused on the authority of the officers to issue and serve a ticket rather than this issue. Nonetheless, I was provided with a number of authorities and I think the issue is raised by the nature of the charges.

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Section 2 of the Criminal Code reads in part:

. . ."peace officer" includes. . .(c) a police officer, police constable, bailiff, constable, or other person employed for the preservation and maintenance of the public peace or for the service or execution of civil process. . .

In *Regina v. Moore* (1983), 5 W.W.R. 176 (Man. C.C.), the court held that a poundkeeper fell within this definition of peace officer as a person employed for the preservation and maintenance of the public peace.

In *Regina v. Smith* (1982), 2 C.C.C. (3d) 250 (B.C.C.A.), the court held that a member of the military police was a peace officer within this definition for the purpose of making a demand for a breath sample, under the Criminal Code, on a military base.

In *Regina v. Rutt* (1981), 59 C.C.C. (2d) 147 (Sask. C.A.), the court found that a wildlife officer was a peace officer when carrying out his functions. The *Wildlife Act* provided that wildlife officers had the power of peace officers to enforce the Act. The court followed *Regina v. Beaman*, a similar case involving the *Game Act* in New Brunswick. The court also stated that in addition to the statutory justification, the wildlife officers were engaged in preserving and maintaining the public peace.

I conclude, based on the duties the officers in this case were exercising, that they were peace officers engaged in their duties when they attempted to enforce the bylaw against the accused. They were maintaining and preserving the public peace.

Four: Was there an abusive process respecting the charge of assault?

The only evidence in support of this is that the charge for assault was sworn after the accused notified the municipality of a civil suit. There is no evidence that any of the bylaw officers were involved in the decision to bring this charge, aside from providing the usual information following the incident.

Although Officer Fraser swore the information

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in December and was aware of the civil suit, his evidence was that he did not discuss the civil suit with the Crown except when he asked the Crown counsel if she was aware of it about two weeks prior to giving evidence in this trial. Thus, I find there is no evidence of any connection between the civil suit and the pursuit of the charge of assault.

The defence provided the case of *Regina v. Lakak*, a 1995 decision of the Ontario Provincial Court reported in *Quicklaw*, in Ontario judgments, number 729, in which the accused was acquitted of obstructing a peace officer. At the time of the incident, the officer did not arrest the accused for obstruction. The officer decided the accused should be charged after learning that the accused had made a complaint against the officer. That case is distinguishable on the facts. So are the other cases on this issue provided by counsel. I am not satisfied that there was any abusive process in the case at bar.

Five: Charter breaches.

The first breach alleged is a breach of section 9 which prohibits arbitrary detention. There were two detentions in this matter. The first was in the hallway prior to the assault. I find it was not arbitrary. The officers had the authority to detain the accused for the purpose of obtaining identification.

The second detention occurred after the obstruction and assault. I find that that was not arbitrary. The accused had been arrested for an offence under the Criminal Code.

The defence also alleged a breach of section 10(a) and also of section 10(b) and submits that a judicial stay of proceedings would be appropriate.

I find that I need not examine whether there were contraventions of these sections of the Charter. The usual remedy for contravention of either of these sections is the exclusion of evidence. In this case, no evidence flowed from any breach of section 10(a) or (b).

I have read the case provided by defence counsel regarding the remedy of judicial stay and that is *Regina v. A.P.*, a 1995 decision of the Ontario Provincial Court reported in *Quicklaw* as Ontario judgment number 1637. That case concerned

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a very serious violation of the integrity of the person of the accused and involved an unwarranted, intrusive, personal search and is quite different from the case at bar. I find that even if there had been a contravention of section 10(a) or (b) in this case, a judicial stay would not be warranted.

I conclude, based on all of this, that the accused is guilty of the counts with which he is charged, that is, count one, the obstruction, and count two, the assault.

(EXCERPT CONCLUDED)