

IN THE MATTER OF: *The Law Enforcement Review Act, Complaint #6447*

AND IN THE MATTER OF: *A hearing pursuant to s.17 of The Law Enforcement Review Act R.S.M. 1987, c.L75*

BETWEEN:

F. D.,)	Ms G. D.,
Complainant)	Agent for the Complainant
)	
)	
- and -)	
)	
Constable V. D.)	Mr. Rocky Pollack, Q.C. and
Constable R. C. R.)	Mr. Paul McKenna,
Constable J. J. Z.)	Counsel for the Respondents
Constable J. M.)	
Constable B. K. A.)	
)	
)	June 7, 2006
)	

NOTE: These Reasons are subject to a ban on publication of the Respondents' names pursuant to s. 25 of *The Law Enforcement Review Act*.

Preston, P.J.

The Complaint

[1] On January 20th, 2005, the Law Enforcement Review Commission referred this matter to a Provincial Judge for a hearing on the merits of a complaint by the Complainant, F. D., against the Respondent officers.

[2] The complaint of alleged disciplinary default was that on or about the 29th day of November, 2003 the Respondent police officers abused their authority by damaging property during the execution of a search warrant at XXX, Winnipeg, Manitoba, contrary to section 29(e) of *The Law Enforcement Review Act*.

NOTE: For the purposes of distribution, personal information has been removed by the commissioner

[3] There really is no dispute that property was damaged at the D. residence in the course of the execution of a search warrant. Mr. D.'s complaint, in a nutshell, is that the police were heavy-handed during the course of their search. Mr. D. contends that the search for a handgun turned into a search for stolen property which turned into a search for drugs. He contends that the police were not really looking for anything in particular. It was Mr. D's impression that the police were there to "destroy" his home.

[4] During the course of the five-day hearing, I heard evidence from the Complainant, F. D., members of his family and friends, and two police sergeants. At the conclusion of the hearing, I dismissed the complaint, as I was not satisfied that any of the Respondents committed the alleged disciplinary default. I now, as I am mandated to by legislation, deliver my decision in writing.

The Search

[5] On the morning of November 29th, 2003, a briefing took place amongst a number of Winnipeg Police Service members. A search warrant had been obtained for the D. residence at XXX, in Winnipeg. The subject matter of the search warrant was a handgun and ammunition for same. An action plan was developed. The police were, in fact, planning to search for a .45 calibre semi-automatic handgun and ammunition. The police attended to XXX at approximately 10:15 a.m.

[6] The Respondent officers were among the police in attendance at that time. I heard police evidence that the attending officers knocked on the front door at XXX, announced their presence, received no response, and used a battering ram to force open the front door and enter the premises.

[7] Mr. D. was in his bedroom on the main floor of the house when the police encountered him. He was ordered to the ground, handcuffed, led out of his bedroom, and seated on the living room couch. His son, R. D., was brought up from the basement of the house and also handcuffed and seated in the living room. A search warrant was provided to the D's and the police explained that they were searching for a handgun and ammunition.

[8] During the course of the search, some damage was occasioned. Suspended ceiling tiles were removed from two of the rooms, and a locked door was broken off its hinge in the basement. The front door frame was damaged by the use of the battering ram. A built-in stair leading to the attic was pried up. The contents of a container of protein powder were spilled on the basement carpet. A drawer came

off its track and screws were popped out of a couple of door hinges. Locked cabinet doors were, in fact, damaged.

[9] Mr. D. also alleges other damage, including an allegation that the police flushed a make-up compact down the toilet. I will deal with those allegations later in my decision.

[10] In the course of the search, a stolen T.V. and videotape recorder were located, as was a suspicious vial of liquid thought to be a drug. F. D. was arrested for possession of stolen property and was escorted to the Public Safety Building. He was released later in the day. Eventually the charge was stayed.

[11] No handgun of any description or any ammunition was found during the course of the search of the subject residence.

Credibility of the Complainant

[12] Mr. D. testified on his own behalf.

[13] Unfortunately for Mr. D., I find him not to be a credible witness. His hesitancy to answer even the simplest question often resulted in evasiveness. He often gave wholly different and sometimes contradictory answers to the exact same question posed by counsel for the Respondents.

[14] I will cite a few examples. It was suggested to Mr. D. by counsel for the Respondents that he was already intending to file a "LERA" (*Law Enforcement Review Act*) complaint during the time his residence was being searched. He initially denied that he formulated such a plan. He then testified that he did not recall making such a plan. He then testified that he "might have said a lot of things". He then testified "I might have said something, but I just don't recall." He then finally agreed that, in fact, he did say something to the officers at the time of the search that he planned to file a LERA complaint.

[15] In a similar vein, in his direct evidence, he alleged that the front door of the residence could no longer be locked after it was rammed. In cross-examination, he finally agreed with counsel for the Respondents that the deadbolt, in fact, could be locked even though the door had been rammed and damaged.

[16] As another example, counsel for the Respondents questioned Mr. D. about whether there was any prior damage to the ceiling tile in his son's bedroom. After initially claiming that the tiles were not damaged, Mr. D. conceded that there may have been some prior damage. He then told the Court he specifically recalled a

crack in one of the tiles. He then specifically recalled that a tile was cracked long ago by a young fellow jumping on the bed in that room.

[17] A stark example of his lack of credibility occurred during the testimony of police witness Sergeant P. B. Sergeant B. pointed out to the Court that Mr. D. had called him “a f___ing liar”. Mr. D.’s immediate and first response was to deny to me that he said it. I had the court clerk play back the tape and, in fact, he had sworn at the officer. When it was pointed out to him that he had sworn, he apologized and said “I mumbled it.”

[18] I find that Mr. D. exaggerated his claims of police misconduct. When questioned by counsel for the Respondents about a letter to the Chief of Police accusing the police of “destroying his toilet”, he conceded that, in fact, he broke the toilet while trying to fix it, but the police had plugged the toilet. When it was suggested to him that it was an exaggeration to tell the Chief of Police in writing that the police destroyed the toilet, his response was “I don’t know. Maybe it’s a means of getting his attention, I don’t know.”

[19] In his testimony, he initially referred to the police breaking “glasses”. He was questioned about this claim. He then told the Court that, in fact, it was one broken glass.

[20] F. D. was not a credible witness.

[21] Much was made of various, differing claims of damage made at various times by Mr. D. to various parties alleging damage to various items and varying costs. I am dubious of a few of Mr. D.’s claims of damage or loss. Suffice it to say that I am satisfied that during the course of the search, the police did, in fact, damage some of his property, as I have outlined.

[22] On his behalf, Mr. D. called his daughter, E., his daughter’s friend, E. S., his sister-in-law, W. M., and his friend, D. J. Each of these lay witnesses testified that the D. residence was ordinarily kept in a neat and orderly fashion. I have no reason to doubt them.

[23] However, the question for the Court is the state of the subject premises on the date of the search. I heard evidence that F. D.’s wife, G. D., was in Florida and therefore out of the jurisdiction on the day in question. None of the lay witnesses was in attendance on the morning that the search warrant was executed. None would be able to say in what state the subject premises were on the morning of the search.

[24] I heard police evidence as to the state of the premises when they arrived on the morning of the search. Two officers were called as witnesses by Mr. D.

[25] Staff Sergeant R. I., the senior officer in charge of the search, noted a vacant bedroom on the main floor which was completely littered in papers. He noted another room on the main floor with a computer monitor set up, receiving images from cameras located outside the residence. He noted the kitchen area was extremely cluttered, with a number of containers all over the kitchen and a lot of papers and “general clutter”. The living room was not messy. His adjective for the upstairs in general was “messy”, not dirty. However, when asked by Ms D. on behalf of F. D. whether the upstairs was “a pigsty”, he told the Court that the basement was a pigsty. The bedroom and the laundry room area were above the level of being messy and he was comfortable with calling them a pigsty. Sergeant P. B., the firearms specialist who was in attendance in the event that a firearm was found, recalled the house being in a “state of disarray”. He described it as quite messy in the kitchen, the downstairs and the bedroom.

[26] I have no hesitation in accepting the officers’ description of the subject premises on the day in question.

Argument

[27] Ms D., on her husband’s behalf, should be commended for her competent presentation of the evidence and her thoughtful submissions. She alleged that the police did not act in a reasonable manner. She argued that the search warrant did not give the officers carte blanche to do whatever they wanted and they abused their authority by the manner in which they searched the house. She argued that there ought to be a policy of the Winnipeg Police Service for process and protocol during search warrants.

[28] Counsel for the Respondents argued that a search for a handgun and ammunition makes it prudent to search in an invasive manner. In fact, the argument was made that the search could have been, and maybe should have been, more invasive. Counsel for the Respondents contended that there was nothing out of the ordinary in the damage that was caused. There was no abuse of authority in that there was no bad faith on the part of the police. They argued the officers were acting in good faith throughout the search.

Search for a Handgun

[29] On the continuum of public safety and officer safety, a search for a handgun and ammunition can and usually does present both a higher risk and a more urgent

task than other searches. It was imperative for the officers to conduct a thorough and inevitably invasive search on the day in question.

[30] Sergeant I. clarified for the Court that a .45 calibre handgun can vary in size from approximately five inches to approximately nine inches. He was not aware at the time of the size of the gun they were looking for. A very detailed examination of the electronic equipment in the D. residence took place to ensure that the equipment had not been altered in any way to be able to have a hidden compartment to hold a handgun or ammunition. In his experience, this is, in fact, a mode of secreting such items.

[31] I can do no better than to quote from Sergeant I. who described the inherent danger of a search in a residence for a handgun:

...my expectation would be that there is no other search that we would put as great an effort into as that for a firearm. It is to me again an issue of public safety, officer safety, and it holds in my opinion the most significant of all searches, not to diminish the value or necessity of other search warrants whatsoever, but in my opinion, the search warrants for firearms require the more diligence in an attempt to find and retrieve and secure firearms that are named in warrants. The potential for public safety is huge.

[32] Sergeant P. B. confirmed the necessity for a diligent, sometimes invasive, search for a handgun:

Handguns generally are made to shoot with one hand but they come in a multitude of sizes and that's even if they are not modified by the person that has them. A .45 calibre handgun, although it's a big round, can fit in the palm of your hand or can be as big as having to hold it with two hands. Quite often people will cut them down even smaller by making the barrel shorter, cutting down the handle and I have personally seen guns hidden in a multitude of places in residences. I've seen them hidden in dryer vents. I've seen them hidden in jewellery boxes. I found machine guns in wall paneling, in ceiling paneling.

...I have recovered handguns that look like pens.

[33] Sergeant Irwin explained why it was not only prudent but necessary to examine a false ceiling in such a circumstance:

It would be in my opinion prudent practice to be able to look at a suspended ceiling to see what if anything may be underneath or on top of the tiles. And it looks like these were acoustic tiles that were fastened to a frame and were required to be pulled off to be able to get a member up there to have a look with a flashlight to see what if anything might have been put there.

It would in fact be negligence in my opinion on our members' part if they did not do that.

[34] Locked compartments were damaged when forced open. Sergeant I. explained the need to break open a locked compartment:

If in fact the door was not able to be opened without taking it off the hinge, then the door would have to be taken off the hinge.

I would never leave a locked compartment unsearched.

I might add that Sergeant I. told the Court that after being initially “verbally combative”, Mr. D., after approximately one-half hour, told the officers where his lockbox keys were. On that set of keys were also his house key and garage key. Thus, there was no need to force open his lockbox and cause any further damage.

[35] Sergeant I. explained why a two-kilogram container of protein powder would be spilled on the carpet:

I would certainly say that you could hide a handgun in there and absolutely ammunition. You could put ammunition into any small container and this is not a small container. This is, by the looks of it, it's my belief and I use protein powder so it is certainly it is one of the five and a half pounds by the looks of that...I would never put my hand into a container of anything...without having knowledge of what, in fact, it was a hundred percent.

[36] As for Mr. D.'s contention that the search turned into a search for stolen items and drugs, Sergeant I. testified:

At no time was there ever any conversation or decision to terminate searching for a firearm.

Decision

[37] In conclusion, I am not satisfied and there is any clear or convincing evidence that any of the Respondents committed a disciplinary default. There was no abuse of their authority during the search. Any damage that was occasioned was necessary and reasonable in the circumstances of a search for a handgun and ammunition.

[38] I heard evidence that any citizen of Winnipeg who feels aggrieved about damage done by police during a search has the option and ability to make a claim with the City Claims Department of the City of Winnipeg. Given the different circumstances that can accompany a search and given the myriad types of searches

that can occur for different items, be they weapons, drugs or stolen goods, damage may occur in citizens' residences. There is a remedy available to the citizens of Winnipeg.

[39] I find that at no time did any of these officers abuse their authority in the execution of this search warrant. The police did not act in bad faith, nor were their actions malicious, immoderate, excessive or reprehensible. Therefore, this complaint is dismissed.

[40] It is ordered that the ban on publication of the Respondents' names shall still be in full force and effect.

Original signed by Judge T. J. Preston

Timothy J. Preston, P.J.