In the Provincial Court of Alberta

Citation: R. v. Zheng, 2012 ABPC 72

Date: 20120322
Docket: 101203453P1
Registry: Edmonton

Between:

Her Majesty the Queen

- and -

Haoyin Zheng

Accused

Reasons for Sentence of the Honourable Judge J.L. Dixon

INTRODUCTION

[1] Mr. Zheng (the Offender) was charged with two counts of assault against the same complainant arising while on duty as a police officer with the Edmonton Police Service ("EPS").

[2] The trial in this matter was held on October 17 and 18, 2011. On November 14, 2011 this Court found the Offender guilty of both counts of assault.

[3] This Court reconvened to hear submissions on sentence on February 10, 2012.

CIRCUMSTANCES OF THE OFFENCES

[4] The following is a summary of salient facts found by the Court at the time of conviction.

[5] The complainant was the victim of the two assaults and is therefore characterized as the complainant. The incident was brought to the attention of the EPS by the police partner on duty with the Offender that evening.

[6] The 34 year old complainant owned a condominium in the building in which these offences occurred. On the night of June 5, 2010 he was out with friends to celebrate a birthday.

He had a significant amount to drink and a sketchy recollection of the events of the evening. He left his car at the bar where the party was held and got a ride home with a friend. Upon being dropped off at home he discovered he was locked out as his building key was on his car key ring, which he had left behind at the bar.

[7] Upon reaching the entry area of his condominium complex the complainant broke the door glass to get into the building by throwing a set of new phone books sitting in the entry way through the door. The phone panel was also dislodged in the entry way. The state of the entry way made it clear the building had been entered by force.

[8] Police were called to the scene by a taxi driver. Upon arriving at the scene the Offender and his partner noticed the damage in the entry way and started a search of the building to locate the perpetrator and conduct an investigation.

First Assault

[9] Upon arriving at the third floor the Offender was the lead officer of the two. Both observed a male who was later identified as the complainant down the third floor hallway.

[10] The complainant appeared drunk and disoriented. When the officers called out to the complainant he began moving towards them as they had requested. On the second request to show his hands the complainant did so, holding his arms in a "hands up" position as he continued towards the officers. When he reached the officers he leaned in towards them. In response both put their hand on the complainant's chest to keep him back a bit from their position and to keep him from leaning over too far.

[11] The complainant asked the officers what was going on and was told by the partner of the Offender that he was being detained for mischief. The complainant was in no way resistant or combative when he first approached the officers. His manner was inquisitive and did not cause the partner of the Offender to have concerns about the risk he posed.

[12] The officers then proceeded to handcuff the complainant. The partner of the Offender took the complainant's left hand to begin handcuffing him. At that point the complainant turned towards the officer asking what was going on. The partner of the Offender told the complainant to cooperate and put his hands behind his back.

[13] As the complainant turned towards the partner of the Offender he pulled his arm away from the Offender. The response of the Offender was described by his partner as being like a tornado. The Offender struck the complainant two to four times, administering head stuns with the base of his palm against the right side of the head. The complainant raised his right arm to protect his head and asked the Offender to stop hitting him. The Offender then grabbed the right arm of the complainant and used his left hand to apply a straight arm take down. Once the

complainant was on the ground the Offender delivered two to three more stuns to the back and ribs of the complainant and knelt on his head. The Offender then handcuffed the complainant. No further blows were struck in this initial incident after the complainant's hands were secured by handcuffs behind his back.

[14] As a result of the blows struck by the Offender his partner observed the complainant to have a red face and bleeding nose. The mood of the complainant changed from inquisitive to angry, swearing, yelling and agitated.

[15] This Court found the force used in the first assault to be excessive and therefore not protected by s. 25 of the *Criminal Code*.

Second Assault

[16] At the conclusion of the initial assault the complainant was lying face down with his hands secured behind his back in handcuffs. At some point he was brought up to a sitting position and was placed with his hands and back against the wall.

[17] The partner of the Offender was standing beside the complainant. On three occasions the complainant made an effort to stand which was managed by the partner by placing his hand on the complainant's shoulder and holding him in a sitting position.

[18] By this time the police officers had established through identification taken from the complainant that he lived in a suite down the hall from their location. The Offender left the complainant and his partner to make inquiries at the suite. When the Offender returned the complainant was still angry, swearing and complaining about how he had been treated and was directing his anger towards the Offender.

[19] Upon arriving back at the location where the complainant was sitting the Offender told the complainant to shut up, pushed him down to a lying position on the ground, lifted his foot and stepped on the neck and head of the complainant.

[20] This Court found the Offender applied the force to the complainant in this incident to stop his behaviour and therefore was not protected by s. 25 of the *Criminal Code*. In addition this Court found the force used by the Offender in this second assault to be gratuitous and excessive in the circumstances and therefore not protected by s. 25 of the *Criminal Code*.

Injuries to the Complainant

[21] As a result of the assaults the complainant had pain and stiffness to the right side of his head and jaw and soreness to his ribs. His nose was bleeding and had a lump. He was

incapacitated for three days and experienced rib soreness for at least a month. He did not seek medical attention for his injuries.

CIRCUMSTANCES OF THE OFFENDER

[22] The Offender was born in 1979 in China. His family moved to British Columbia when he was young. The Offender went to high school in Richmond and completed his Batchelor of Science from 1997 to 2002 at the University of British Columbia. Subsequently he worked as a supervisor at a retail textile firm. The Offender is married with a young child.

[23] The Offender joined the EPS, commencing recruit school in February 2006 and completing his training in August 2006. Since completing his training, the Offender's period of service on the street has been interrupted due to restrictions placed on his duties. At the time of this incident the Offender had patrol experience from August 2006 to December 2008 and October 2009 to the date of the incident in June 2010, totalling a period of approximately 3 years and 2 months. The Offender was suspended without pay in January 2012.

[24] In January 2011 the Offender was found guilty of an earlier assault (referred to as the Viau assault) which occurred on December 15, 2008, for which he received a conditional discharge. The relevant findings of fact are set out in the reported decision of *R. v. Zheng,* [2011] A.J. No. 101 at paras. 181 and 205:

> **181** I conclude that the Accused assaulted Viau while he was in the back seat of the police vehicle and while Viau was handcuffed with his hands behind his back. The assault did not involve 15 to 20 punches as alleged by Viau. Instead, the assault consisted of the application of force by the Accused when he attempted to force Viau into a seated position, leaned over top of Viau, jostled him. While Viau was being assaulted, the Accused demanded, in a loud and forceful way, information regarding the whereabouts of the keys. I am satisfied that this use of force was intimidating and resulted in Viau admitting that he had been in possession of the key to the Truck and had thrown the key away.
> ....
>
> **205** There are many situations in which force is used by police to control the movement of suspects. Usually criminal liability does not arise because police have reasonable grounds to use the force either to complete the arrest, or to reduce the risk of potential escape or to reduce the risk of potential injury. In the present case the situation is much different. The Accused was not trying to prevent escape or to prevent injury or to assist Viau in some fashion. Instead, he was taking active steps to purse (sic) his own agenda. That agenda was to create a situation which would improve the chance that he could obtain information from Viau regarding the location of the keys to the Truck. While seeking additional information

> regarding the keys was entirely appropriate and taking steps to improve the likelihood of success was also appropriate, the use of force to achieve that goal was not objectively reasonable.

[25] The Offender tendered six letters of reference to the court. Four of the letters were from fellow EPS members, all of whom expressed praise for the Offender's work ethic, strong sense of friendship and dedication to the job. The referees all confirmed they were aware of the current assault convictions. None of the referees indicated knowledge of or discussed the Viau assault, although in oral submissions counsel for the Offender confirmed the four referees had provided reference letters in the prior sentencing.

[26] Two of the reference letters arose from a restricted duties assignment. The Offender was assigned as the police liaison for a multi-partnered community policing and rehabilitation initiative. One of these letters was written by the direct supervisor of the Offender from April 2011 until November 2011. The supervisor indicated he was aware of the outstanding charges at the outset of the assignment and that throughout the period the Offender demonstrated he could be trusted to complete his duties professionally and with minimal supervision. The community partners also signed a joint letter of reference confirming they had knowledge of the outstanding charges faced by the Offender. These partners felt the Offender showed an active and appreciative interest for the work of the program and that his input and assistance was extremely valuable. The Offender worked directly with participants in the program who were facing outstanding charges and participating in rehabilitation programs prior to disposition of the charges. It was noted that several positive comments about the helpfulness of the Offender were made by participants.

[27] While all of these letters demonstrate the Offender has developed positive relations with some police and other professional colleagues in his work the letters offer little insight into his behaviour at the time of these offences.

[28] The Offender has been under the care of a psychologist since August 2011. The information tendered regarding these consultations is limited. This Court has been advised the Offender attended five sessions. The focus of these sessions was stress and burnout suffered by the Offender in relation to his duties as a police officer and the outstanding court matters. The evidence led regarding the involvement of the psychologist offers no insight into the behaviour of the Offender at the time of these offences.

[29] The Offender has offered no apology or expression of concern for the complainant in this matter nor given any indication that he has any remorse for his conduct or insight into the triggers for his behaviour at the time of these offences. His conduct remains unexplained.

SUBMISSIONS OF THE CROWN RESPECTING SENTENCE

[30] The Crown sought a short, sharp period of custody followed by a period of probation. The Crown argued that in the circumstances the Offender was in a position of trust or authority in relation to the complainant. Section 718.2 (a)(iii) characterizes these circumstances as statutorily aggravating. The Crown also argued the primary focus of this Court should be denunciation and deterrence. Given section 718.02 directs a court to focus on those sentence objectives where the victim of criminal conduct is a police officer, the corollary should also be true: that the principles of denunciation and deterrence should be the focus of sentences given to police officers for charges of this nature.

[31] The Crown argued that this Court is entitled to take into consideration the prior finding of guilt in the Viau assault, not as a prior conviction, but for the limited purpose of assessing the character of the Offender and his suitability for certain types of sentences. Considering the Viau assault in that context, the Crown specifically noted the similarity in the nature of the assault: both Viau and the complainant in this offence were arrested and detained with their hands handcuffed behind their back at the time of an assault by the Offender.

[32] In addition the Crown argued that the circumstances of the prior finding of guilt may be considered to assess the overall character of the offender, especially in light of the letters of reference tendered by the Offender.

[33] The Crown relied on this inference to argue that a conditional sentence is inappropriate in this matter as the Offender has demonstrated a behavioural pattern and a particular method in dealing with a category of people. The Crown acknowledged that the prior finding of guilt cannot be used to establish general criminal propensity of the offender, but argued that the pattern of the three assaults and the category of the two victims is sufficient evidence to support a finding by this Court of a behavioural pattern and method which puts a section of the public at risk, thereby disqualifying the Offender from a conditional sentence.

[34] The Crown acknowledged there was a huge range of sentencing outcomes for assaults committed by police officers. These decisions were described as “fingerprints”, driven by the unique facts of each offence and each offender. It is the unique facts of these assaults and this Offender which the Crown argued justified the sentence sought.

SUBMISSION ON BEHALF OF THE OFFENDER RESPECTING SENTENCE

[35] Counsel for the Offender argued that the appropriate sentence in this matter was a fine, together with a period of probation. Alternatively, counsel submitted that if this Court was inclined to impose a period of incarceration, it ought to be served conditionally in the community.

[36] Counsel provided this Court with several decisions canvassing sentences imposed for criminal conduct by police officers in the course of their duties. The object of this review was to

assist this Court in meeting the principle articulated in s. 718.2(b) that a similar sentence ought to be imposed on this Offender as was imposed for similar offences by similar offenders in similar circumstances.

[37] Counsel noted the distinctions and similarities in aspects of the cases as compared to the offences currently before this Court arguing the conduct in the first assault was more similar to a spur of the moment type offence involving misjudgment of force during the course of an arrest. Counsel acknowledged the second assault was more serious due to the restraint of the complainant. While the review was helpful, it supported the ultimate conclusion that each case turns on its own unique facts and circumstances of the offender and the offence.

ANALYSIS

Implication of Prior Finding of Guilt on Assault

[38] Counsel for the Crown and Offender agreed that in certain circumstances a court may consider a prior finding of guilt against an offender, but differed on the circumstances and relevance of the finding in these proceedings.

[39] In *R v. Panagiotou,* [1989] M.J. No. 29 Justice Morse of the Manitoba Court of Queen's Bench considered the proper use of a prior discharge in a subsequent sentencing for a similar offence. This decision was upheld by the Manitoba Court of Appeal and noted with approval by the Ontario Court of Appeal in *R v. Naraindeen* (1990), 40 O.A.C. 291. Justice Morse in *Panagiotou* (oral decision) held that the prior finding of guilt was relevant and admissible as previous bad conduct of the offender, noting:

> There is no doubt that the accused must be considered not to have been convicted of the previous offence. This s. 736(3) makes clear. But I think the intention of Parliament in enacting this section was that an accused granted an absolute or conditional discharge would not have a criminal record with all that that entails. I do not think it was the intention of Parliament that previous offences should not be taken into consideration in determining a fit and proper sentence for a subsequent offence - otherwise Parliament could have said so directly.
>
> It is, as I have said, clear that an accused granted a discharge is deemed not to have been convicted of the offence in connection with which the discharge was granted, but this does not mean that the offence was not committed. ...

[40] Similarly in *R v. Tan* 22 C.C.C. (2d) 184 (1974) the British Columbia Court of Appeal confirmed it was appropriate for the sentencing Court to be made aware of a prior discharge given "the primary duty of the Court is and would be to inquire into whether or not the applicant was a person of good character; his mode of life and other antecedents germane to the question of

sentence...” [at para. 18]. In *Tan* the court was reviewing a sentencing decision imposing a second conditional discharge without being advised of the first discharge. It is the view of this Court that this principled analysis in *Tan* applies equally to the Offender’s circumstances.

[41] In contrast counsel for the Offender has provided decisions which appear to expressly limit the use of a prior discharge to considering whether a further discharge would be in the best interest of the offender and not contrary to the public interest. *(R. v. Nickerson,* [1975] P.E.I.J. No. 65 (P.E.I. C.A.); *R. v. Hillier*, [1986] Y.J. No 82 (Y.T. S.C.); *R. v.. Elsharawy*, [1997] N.J. No. 249 (Nfld, C.A.); *R. v. Herchuk*, [2011] A.J. No. 1383, (Alta. P.C.)) This Court has carefully reviewed those decisions and concludes in each case the court was conducting a limited review of the use of a prior discharge. The breadth of the question before this Court was not raised by the circumstances in those decisions. Accordingly this Court does not agree that the decisions relied upon by counsel for the Offender limit the use of a prior discharge to exclude the proposed use by the Crown, but rather finds the decisions make it clear that a prior discharge cannot be used as a prior conviction for sentencing purposes.

[42] This Court is satisfied that the prior finding of guilt in these circumstances is relevant and admissible to assist this Court in crafting a just sanction for this conduct.

[43] The Crown further argues that the findings of fact in the prior assault charge resulting in a finding of guilt are relevant and ought to be considered by this Court to determine the sentence in this matter.

[44] In *R. v. Angelillo,* [2006] 2 S.C.R. 728 the Supreme Court of Canada specifically found that it is appropriate for a court to consider evidence of facts tending to establish the commission of another offence in respect of which the offender has been charged but not convicted in determining the terms of a sentence.

[45] In *R. v. Roberts* (2006), A.B.C.A. 113 the Court of Appeal also found that evidence of untried prior acts can properly be considered to show character and background, which is essential information for crafting a sentence suitable for the particular offender.

[46] This Court is satisfied that the evidence of a prior finding of guilt, for which an offender has received a discharge, may be used for the same purpose. It would be nonsensical to permit a court to consider untried prior acts but to prohibit a court from considering the proven or agreed facts which resulted in a discharge. Accordingly, this Court will consider the findings of fact in the prior assault to the extent those facts inform this Court of the character of the Offender and antecedents germane to the question of a just sanction.

[47] This Court is mindful of the caution expressed by counsel for the Crown and the Offender that it is improper to treat the prior finding of guilt as a record of conviction or to draw inferences of any general criminal propensity of the offender.

Aggravating Factors

Abuse of Trust or Authority

[48] The parties agree that the circumstances of this offence fall within the purview of section 718.2(iii) of the *Criminal Code*, that in committing these assaults the Offender abused a position of trust or authority in relation to the complainant. The *Criminal Code* expressly deems this factor to be aggravating.

[49] Even before s. 718.2 was proclaimed the courts had identified an unjustified assault by a policeman on a member of the public during the course of his duties to be an aggravating factor in sentencing. Section 25 of the *Criminal Code* gives special permission to police officers to use as much force as is necessary in the circumstances to discharge their duties. This permission is grounded in the confidence of society that police officers will not abuse this power. It is a trust which is essential to the maintenance of democracy and the administration of justice. And it is a trust that is very rarely breached. Everyday police officers deal with countless difficult situations safely and professionally without exceeding the special permission they have to use force.

[50] It follows that in the rare occasions where this trust is breached it is essential that the courts consider the breach to be an aggravating factor. To do otherwise would compromise the fundamental purpose of sentencing to contribute to respect for the law and administration of justice.

On a Form of Release at Time of Offence

[51] A further aggravating factor is that at the time of these offences the Offender was under a form of release for two allegations of assault and one allegation for assault with a weapon arising from an incident when he was on duty as a police officer.

[52] It is well settled that the commission of an offence while on release for other offences is an aggravating factor. In *R v. Lau*, [2004] A.J. No. 1348, the Alberta Court of Appeal explained the premise for this characterization is the demonstrated disregard by an offender for the law.

Police Officer Offender

[53] The Crown argued that the position of the Offender as a police officer who committed the offence in the course of his duties was an aggravating factor distinct from the abuse of trust and authority.

[54] The Crown noted that some provisions of the *Criminal Code* expressly provide for greater punishment if the victim is a police officer. It is argued that this Court should adopt a corollary analysis and increase any sentence to the Offender because he committed the offence while on duty as a police officer.

[55] This Court rejects that analysis. Parliament clearly intended to capture the aggravating aspect of this Offender's conduct under s. 718.2. Had Parliament intended to encourage courts to treat this type of conduct as calling for some enhanced sentence beyond the implications of s. 718.2 it ought to have expressly introduced provisions in the *Criminal Code*.

Victim Under Restraint

[56] The Crown argues that it is a highly aggravating factor that the Offender assaulted the complainant while he was restrained with his hands handcuffed behind his back in the second assault. He argues the complainant became more vulnerable upon being restrained in that fashion, and that the Offender's actions were even more aggravating in the second assault than the first assault.

[57] This Court agrees. The Offender had the lawful authority to detain and restrain the complainant due to his status as a police officer. Having restrained the complainant with handcuffs the second assault is an even more egregious abuse of trust.

[58] The circumstances of the second assault adds to the aggravating circumstances of the breach of trust.

Possible Mitigating Factors

Potential Disciplinary Proceedings

[59] The Offender has been suspended without pay since January 2012 and may be terminated in future potential disciplinary proceedings. How is this Court to factor these consequences in crafting a just sanction?

[60] In *R. v. Lepine*, [2010] ABPC 374 Judge Rosborough carefully considered judicial analysis in this area and determined it was improper to "mitigate what would otherwise be a fit and proper sentence on the basis of potential disciplinary action yet to be taken by his employer as a result of this conviction and sentencing" given the offence was committed during the course of the offender's duties as a police officer. This Court concurs.

[61] The consequences to the Offender in any potential disciplinary proceedings arise from his failure to comply with his contract of employment, including expectations for his professional conduct. The Offender is a police officer who is expected to maintain high professional standards. It may be that he will face some adverse consequences as a result of his behaviour in these assaults, but the potential of that event is not a mitigating factor in sentencing.

[62] If potential disciplinary action to a police officer who abused his position of trust or authority over a member of the public was properly characterized as a mitigating factor in cases of this nature, it would contradict the intention of s. 718.2(iii), which requires a court to treat the conduct as an aggravating factor. Clearly the direction of Parliament must prevail in these circumstances.

[63] While this Court does not view the potential disciplinary action against the Offender to be mitigating, neither does it consider the potential to be aggravating. It is simply an observation that the Offender may face a potential future consequence in a different forum for the same behaviour.

Evidence of Good Character or Conduct

[64] Counsel for the Offender has tendered letters of reference which vouch for the good character and conduct of the Offender.

[65] The Crown has properly urged this Court to be cautious in treating this evidence as a mitigating factor.

[66] Five referees expressed a high level of trust and confidence in the Offender as a work colleague or subordinate. Four of these referees tendered similar letters during the sentencing hearing on the Viau assault.

[67] It is not surprising that the Offender is able to tender reference letters of this nature. It is the objective of any policing agency to build a force of police officers who are held in high regard by the community and their colleagues. It is this collective and individual reputation of police officers which entitles them to be trusted by the community, including being trusted not to abuse the special permission to use force under s. 25 of the *Criminal Code*.

[68] In *R v. Langlois*, [2004] BCPC 195 the court explained why prior good character may not be entitled to significant weight as a mitigating factor:

> **22** There is a parallel, in my view, between cases involving police officers charged with criminal offences and charges against employees for theft from their employers. In respect of the latter category of offences and offenders, it is often said the previous good character of the offender is a factor which should not be given as great weight as usual by the sentencing judge because it was precisely that aspect of the offender's background that encouraged his or her employer to trust him or her. The sentencing judge is by this logic encouraged to focus not so much on the antecedents of the offence but on the fact that the offender gave in to temptation and breached the trust placed on him or her.

> **23** For the same reasons, where a police officer assaults a member of the public while on duty, the previous good conduct of the offender ought to be given somewhat less weight than in other sorts of cases. The officer holds the trust of his community every time he goes to work. Primary in that trust is that the officer will not himself break the law.

[69] From a substantive analysis, these reference letters must be considered in light of the other evidence before this Court regarding the past conduct of the offender. This Court notes that the conduct of the Offender in relation to the second assault is similar to his conduct in the Viau assault. So while there is evidence before this Court of the admirable conduct of the Offender observed by his referees in certain circumstances, so is there evidence of similar bad conduct on one occasion. As a result the Court attaches little weight to the reference letters. In coming to this conclusion this Court is not treating the Viau assault as an aggravating factor, but rather reconciling all of the evidence regarding prior conduct which is before this Court.

Expressions of Concern or Remorse

[70] Counsel for both the Crown and the Offender tendered cases to this Court recognizing that expressions of concern for the victim of an offence, remorse or other indications of insight may be considered as mitigating factors in sentencing.

[71] It is not necessary to review these authorities as the Offender has offered no apology to or expression of concern for the complainant in this matter, nor given any indication that he has any remorse for his conduct.

[72] In noting there is no evidence of mitigation arising form an expression of remorse or similar statement, the Court is mindful that the absence of such a mitigating factor ought not to be treated as an aggravating factor.

Stigmatization in the Media

[73] Counsel for the Offender noted that there was some limited media coverage after the conviction in November 2011. He urges that this media coverage ought to be considered as a mitigating factor.

[74] There is no evidence before this Court of any significant media coverage in this matter. It was clear during submissions that the media continued to have an interest in the outcome of this matter and it is foreseeable that further media coverage will result upon the sentencing in this matter. Certainly there is no evidence that the media coverage has escalated to a point of ruin and humiliation, as discussed in some authorities considering this factor.

Objective of Sentencing

[75] The *Criminal Code* provides guidance to the Court; the challenge is in striking a proper balance of these considerations to reach a just sanction. As described in s. 718, the purpose of sentencing is to contribute to respect for the law and maintenance of a just, peaceful and safe society. The sanctions to be imposed by a court are to have one or more of the following objectives:

> (a) to denounce unlawful conduct;
>
> (b) to deter the offender and other persons from committing offences;
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> (c) to separate offenders from society, where necessary;
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> (d) to assist in rehabilitating offenders;
>
> (e) to provide reparations for harm done to victims or to the community; and
>
> (f) to promote a sense of responsibility in offenders, and acknowledgment of the harm done to victims and to the community.

[76] The *Criminal Code* identifies the fundamental principle that a sentence must be proportionate to the gravity of the offence and the degree of responsibility of the offender. The court is then instructed to take into account relevant aggravating or mitigating circumstances relating to the offence or the offender together with the following principles:

- abuse of trust or authority is aggravating
- a similar sentence ought to be imposed on an offender as was imposed for similar offences by similar offenders in similar circumstances
- the offender ought not to be imprisoned if less restrictive sanctions are appropriate

[77] A helpful starting point in this case is to consider the appropriate objectives of the sentence. In the view of this Court the primary objective for sentencing police officers who commit criminal offences is the denunciation of the conduct. It is only through this clear denunciation that the community is assured that the legal system is intact and thereby maintain a just, peaceful and safe society.

[78] The Alberta Court of Appeal articulated the impact of police misconduct on society in *R. v. Koopman*, [1999] ABCA 269:

> **25** Third, police officers enjoy a special status in our community. To the extent they are people on the front lines with whom the public has contact, they represent the justice system. For a police officer to breach that trust and engage in a violent

> criminal act, even though off duty, has consequences for the administration of justice which go beyond the actions of the officer on the one night. Put simply, it undermines public confidence in the police and in the end, in the rule of law.

[79] The Crown urges that the primary objective of sentencing in this matter ought to be general deterrence, to discourage police from future misconduct. The Court does not agree with that characterization. Undoubtedly the vast majority of police officers fully understand the special status they enjoy in our society, to use reasonable force where necessary in the course of their duties in order to serve the public interest. That special status is based on the trust society has in police officers. It goes to the core of their role within the administration of justice and is respected by the vast majority of police officers as a core value of their service. Whatever sentence is imposed by this Court may reinforce and validate that core value, but is unlikely to be effective as a future deterrent to someone who does not already share the core value.

[80] As noted by the Court of Appeal in *Koopman*, conduct of the nature before this Court undermines public confidence in the police and the rule of law. Accordingly the primary objective of sentencing is to restore that public confidence by clearly denouncing the conduct.

[81] A sentence may be crafted to meet multiple objectives. In the evidence before this Court there is nothing to suggest the Offender has taken responsibility for his misconduct or acknowledged the consequences of his actions upon the complainant and the community. This is another important objective to consider in coming to a just sanction.

[82] Having identified the objects of the sentence, this Court must then weigh the mitigating and aggravating factors, seeking to impose a sentence proportionate to the gravity of the offence while maintaining some similarity to other equivalent sentences.

[83] None of the authorities were similar in every respect to the circumstances currently before the Court. The circumstances in *R v. Williams*, [2004] ONCJ 261 bear the closest similarity to the offences committed by the Offender and the circumstances of the offence. In *Williams* the offender was found guilty of one count of assault, committed against a man who had been handcuffed and subdued. The assault was found to be retaliatory, in response to resistance by the victim to an earlier violent arrest. Court found that an appropriate sentence was a conditional sentence of 45 days. It is notable that *Williams* established mitigating factors, upon which the court placed emphasis, that are not similar to the circumstances of the Offender in this case.

[84] The aggravating factors before this Court are:

- abuse of trust and authority
- Offender on release at time of offence
- victim under restraint during second assault

[85] Having reviewed the potential mitigating factors this Court concludes those factors are weak. Notably:

- the weight of the reference letters offered to establish good character is undermined by the prior bad conduct of the offender; the existence of the prior bad conduct is not present in any of the authorities reviewed
- the Offender does not have a long period of service
- the Offender has demonstrated no remorse or concern for the impact of his conduct on the complainant
- the Court has determined little or no weight should be attached to the potential of future disciplinary action
- there has been limited media coverage, and no evidence of the consequence of that coverage on the Offender has been adduced

[86] Considering the presence of significant aggravating factors and the nominal mitigating factors this Court concludes that a just sanction in this case requires a period of incarceration in the range of 30 to 60 days. Any lesser sentence, such as a fine or suspended sentence with probation, will not achieve the identified objective of denouncing this conduct.

Conditional Sentence Order Analysis

[87] Counsel for the Offender submitted that if this Court concluded a period of incarceration was the appropriate disposition, the Offender should be entitled to serve his sentence in the community as permitted by s. 742.1 of the *Criminal Code.*

[88] Given the mandatory pre-conditions of s. 742.1 are met, this Court must assess whether a conditional sentence is appropriate, considering whether:

(1) the safety of the community would be endangered by the offender serving the sentence in the community; and

(2) a conditional sentence would be consistent with the fundamental purpose and principles of sentencing as set out in ss. 718 to 718.2 of the *Criminal Code.*

Safety of the Community

[89] The evidentiary burden is on the Offender to satisfy this Court on a balance of probabilities that a conditional sentence would not endanger the safety of the community.

[90] The Crown submitted a conditional sentence is not appropriate in this matter as the Offender poses a risk to a sector of the community. The Crown argues that the Offender has demonstrated a behavioural pattern which puts a specific category of people at risk.

[91] Counsel for the Offender disputes the conclusion urged by the Crown in two respects arguing that the Viau assault and these convictions viewed together do not demonstrate a behavioural pattern and the evidence before this Court does not suggest the Offender poses a danger to the community.

[92] The evidence of bad conduct of the Offender is limited to three assaults committed at two different times while the Offender was on duty as a police officer. These incidents occurred during the 3 year and 2 month period of active street duty of the Offender. While these incidents may raise questions about the suitability of the Offender to be involved in street duty, this Court is not prepared to characterize the incidents as a behavioural pattern. To do so would unfairly disregard the numerous calls to which this Offender was dispatched without incident.

[93] Other evidence of conduct by the Offender does not raise concerns regarding risk to the community. This Court notes the favourable reference letters received regarding the Offender's restricted duties assignment. During that eight month assignment the Offender worked directly with participants who were facing outstanding charges and participating in rehabilitation programs. All of the community partners expressed strong support for the work of the Offender.

[94] This Court concludes that the safety of the community would not be endangered by a conditional sentence.

Consistency with Principles of Sentencing

[95] This Court has identified the primary objectives of this sentence to denounce the conduct of the Offender and to ensure the Offender takes responsibility for his misconduct.

[96] Having concluded that the desired outcome of a sentence is to restore public confidence in the police and the rule of law, is it possible to achieve that outcome with a conditional sentence?

[97] Counsel for the Offender has argued that the impact of a custodial sentence of any length on this Offender would be severe, given he is a police officer. This Court takes judicial notice that the Offender would be exposed to significant risk in a correctional facility.

[98] In *R v. Brady*, [1998] A.J. No. 39 the Court of Appeal discussed the importance and challenge of balancing the objectives of sentencing in all aspects of sentencing, including the consideration of a conditional sentence at para. 24:

> **24** Of course, depending on the crime, one objective or principle may assume more importance than another. But all must form part of the sentence balancing. The rationale for ensuring that all objectives are considered was explained in a government paper published before Part XXIII was re-enacted. But those comments are equally applicable today:
>
> > Punishment or denunciation, isolation from society, deterrence, and rehabilitation must all be part of a criminal justice system which truly protects society. Fairness, balance and proportion must be blended in. The loss of any of these elements, or worst still, unwillingness to pursue them, will leave us further from the true security Canadians want.
> >
> > A Framework for Sentencing, Corrections and Conditional Release (Ottawa: Minister of Supply and Services, 1990 at p. 29)

[99] This Court concluded that neither a fine nor suspended sentence was appropriate in these circumstances. General denunciation is necessary to ensure continued public confidence in the justice system.

[100] In *Brady* the Court of Appeal considered the reconciliation of a conditional sentence with the objective of general deterrence at paragraph 56:

> **56** So we conclude that a conditional sentence would not ordinarily be available for those offences where the paramount consideration is denunciation and deterrence. (It might be otherwise in unusual cases, or with conditions of locked institutionalization, or where any jail term would hitherto have been brief.) See R. v. Ly (1997) 97 O.A.C. 393, 32 O.R. (3d) 392, 400, 114 C.C.C. (3d) 279 (C.A.) (drug trafficking) ; R. v. Creighton (Ont. C.A. 30 May 1997) ; R. v. Oliver (Ont. C.A. 14 March 1997).

[101] The imprisonment of a police officer is not an ordinary situation. It is the exceptional nature of this Offender's conduct and the circumstances of the offence which have resulted in this Court not imposing a fine or suspended sentence. This Court concludes it would be arbitrary to exclude the possibility of a conditional sentence in these circumstances, particularly given the unique risk incarceration poses to the Offender.

[102] The objective of the sentencing process in this case is to enhance public confidence. This Court is satisfied that the objectives of sentencing and the confidence of the public can be met by ordering a conditional sentence of an appropriate duration with sufficiently restrictive conditions.

Appropriate Conditions and Length of Conditional Sentence

[103] In *Brady* the Court of Appeal also discussed the relationship of the length of a custodial sentence to the length of a conditional sentence for the same offence at para. 111:

> In considering options, the sentencing judge could look at the possibility of jail v. the possibility of a conditional sentence. We see no reason to consider only the same duration for both. See R. v. Pierce, supra, at para. 59 (p. 336 O.R.). For example, consider an offender in his early 20s with a previous record who has not been to jail before. Then jail of a week or two might be a realistic option. But a conditional sentence that short would be useless and unworkable. A conditional sentence of some months would also be a realistic option. For example, suitable treatment might involve a four-month course. Parliament only says that the sentence ultimately imposed is the one which can be conditional. Parliament does not forbid the sentencing judge from thinking about, or discussing with counsel, possible jail of a different length, depending on where the sentence is to be served. We repeat that s. 742.1 says "imposes", not has imposed.

[104] A second objective of a just sanction in this matter is to ensure the Offender takes responsibility for his misconduct. How can that objective be achieved in these circumstances? The Offender is in the midst of a disciplinary process. The process may result in his dismissal and has already resulted in suspension without pay since January 2012. Presumably through the disciplinary process the Offender will gain insight into his conduct and take responsibility for it. On the other hand, the discipline process does not address the primary concern of this Court, which is the impact of the conduct of the Offender on the community.

[105] Whether it be characterized as a rehabilitative or restorative provision, s. 742.3 of the *Criminal Code* permits a court to impose community service. This Court is satisfied that the imposition of community service as a term of the conditional sentence order is an important component of a just sanction and consistent with the sentencing objectives in this matter.

Ancillary Orders

[106] The Crown is seeking discretionary orders from this Court to prohibit the Offender from possessing weapons and to provide a sample of DNA. Counsel for the Offender opposes these orders arguing they are inappropriate in the circumstances.

[107] The ancillary orders sought by the Crown are important tools available to courts to attempt to reduce the possession of weapons by those with a criminal propensity and to aid in identifying perpetrators in criminal investigations. However, orders of this nature also encroach on basic freedoms and entitlements of members of society.

[108] The focus of the sentence imposed by this Court is to restore public confidence. It is not premised on a theory that the Offender poses any general risk to the public. He has three times abused a special trust he was given as a police officer, but has shown no general criminal propensity. In these circumstances this Court declines to exercise its discretion to make any ancillary orders.

THE APPROPRIATE DISPOSITION

[109] The Offender shall serve a conditional sentence of imprisonment in the community for a period of four months. The conditions which will bind the Offender in the conditional sentence order will be settled in the final hearing of this matter, but will include the following:

a) for the first 45 days of the conditional sentence the Offender will remain within his residence unless he has written permission from his supervisor;

b) for the balance of the conditional sentence the Offender will be entitled to leave his residence to perform community service;

c) the Offender shall complete 100 hours of community service.

Heard on the 17th and 18th days of October, 2011 and the 10th day of February 2012.
Dated at the City of Edmonton, Alberta this 22nd day of March, 2012.

J.L. Dixon
A Judge of the Provincial Court of Alberta

Appearances:

M. Dalidowicz
for the Crown

K. MacDonald, Q.C.
for the Accused