

ONTARIO COURT OF JUSTICE

B E T W E E N :

HER MAJESTY THE QUEEN

— AND —

Kyle DAVIDSON

Before Justice Lesley M. Baldwin
Heard on June 8, 2010, August 4, 2010, May 3, 2011
Reasons for Judgment released on August 19, 2011

Harutyun Apel **for the Crown**
Asgar Manek **for the accused Kyle Davidson**

BALDWIN, J.:

[1] Kyle Douglas Davidson is charged, on or about June 20, 2009, in Burlington, with wilfully obstructing a peace officer, to wit: Provincial Constable Ryan Cox, with the Ontario Provincial Police, engaged in the execution of his duty, by resisting arrest by shoving Provincial Constable Ryan Cox, contrary to Section 129(a) of the *Criminal Code* of Canada; AND FURTHER THAT he did assault Ryan Cox, a peace officer, engaged in the execution of his duty, contrary to Section 270(1)(a) of the *Criminal Code* of Canada.

[2] On a separate Information, Kyle Davidson is charged with being intoxicated in a public place, contrary to Section 31(4) of the *Liquor Licence Act* of Ontario.

[3] The Crown conceded that during the struggle to arrest the accused, Kyle Davidson sustained a fracture to his left arm (non-displaced fracture involving the posterior aspect of the olecranon process – i.e., the elbow) and a bloody nose.

THE ISSUES IN THIS CASE ARE AS FOLLOWS:

[4] Was OPP Officer Cox in the lawful execution of his duty when he placed Mr. Davidson under arrest?

[5] If the Officer was in the lawful execution of his duty, Kyle Davidson is guilty of resisting arrest based on his own evidence.

[6] If the Officer was not in the lawful execution of his duty, did Kyle Davidson use reasonable force in resisting the unlawful arrest?

[7] Did the police use excessive force in the arrest of Kyle Davidson?

[8] If the police used excessive force in the arrest of Kyle Davidson, is there a *Charter* remedy that should apply in this matter?

(Note: No Charter Application was filed)

[9] The case requires a *W.D.* analysis and application of legal principles.

CROWN'S EVIDENCE:

Testimony of Ryan Cox:

[10] Officer Ryan Cox has been an officer with the OPP for seven (7) years at the time of trial.

[11] He was on uniformed patrol on June 20, 2009 in Burlington.

[12] This evening, the annual Sound of Music Festival had played in Burlington and the streets were crowded.

[13] At approximately 2:16 a.m., he was travelling in his marked SUV cruiser, southbound on Brant Street.

[14] He noted garbage cans in the street. He stopped to remove them. Someone told him “that a guy with short shaved brown hair wearing brown shorts and a bluish button-up shirt...was knocking them into the roadway.” *(Transcript June 8, 2010 p. 3)*

[15] He got back into his cruiser and continued patrolling down Brant Street.

[16] As he approached Lakeshore Road, he saw two people cross from the west side of Brant Street, to the east side side-walk.

[17] He observed a male wearing shorts and a blue-greenish shirt, with short brown hair.

[18] This male ran toward his cruiser and made a kicking motion towards the rear of his cruiser as he passed. He is not sure if this person kicked the cruiser. There were a lot of people about.

[19] He stopped his cruiser in the lane on Brant Street and exited his cruiser. *(Transcript p. 5)*

[20] He approached Mr. Davidson.

[21] He asked Mr. Davidson to approach him to discuss him trying to kick his cruiser.

[22] Mr. Davidson continued to walk away from him toward the sidewalk.

“While he was walking away from me, I had made observations that he appeared to be slightly unsteady on his feet. At that time we were on solid level ground. He was still on the roadway when these observations were made and then walked onto the sidewalk...I was asking him to come towards me...He said, ‘Fuck you’...he sounded excited and was loud. When this conversation, observations were made, I was approximately five to six feet behind him... At that time, I detected an odour of an alcohol beverage coming from the male party.” (*Transcript pp. 5, 6, 7*)

“Based on my observations of his erratic behaviour, his unsteadiness on his feet and the odour of an alcoholic beverage, I formed the opinion that the male was impaired by alcohol at that time...At that time, I informed the male party that he was under arrest for being intoxicated in a public place...he’s still trying to walk away from me (at the time). (*Transcript p. 7*)

“...as I advised him he was under arrest, he turned around and faced me. I remember – all I remember is an arm coming towards me. I don’t know if it was a shove or attempted punch, **but I grabbed** – I remember it being **his left arm**, and tried to gain control of the male party. And he managed to push me away at that point in time...just like a shove. **Like I had his left arm**. He’s more trying to like push, like lean towards me and then pull away. Not really – he wasn’t like striking me with his right arm or anything like – there was nothing like that. It was just more of a kind of trying to push and pull to get away...**I managed to get a hold of his left arm again with both of... my hands and I proceeded to grab his left wrist with my left hand and I placed my right hand on the back of his left elbow...trying to gain control of him...it’s just a matter of using leverage and pushing on the back of his elbow to gain control...(it’s called) an arm-bar.**” (*Transcript pp. 7, 8*)

“He was spinning away from (me) so that there was not any pressure on the back of his arm, so we started spinning in a counter-clockwise motion. At this point, we’re...on the sidewalk close to the edge of the roadway. I don’t know if he tripped over one of his own feet or if he slipped off of the curb as we were spinning around, **he eventually went down onto his stomach and I still had a hold of his left arm.**” (*Transcript p. 9*)

[23] Officer Cox testified that he constantly told Mr. Davidson to stop resisting.

[24] Once Mr. Davidson was on the ground, Officer Cox grabbed his right arm and had that against his back.

[25] **A security officer tried to assist in getting Mr. Davidson’s left arm behind his back.** The security officer was only there for approximately 30 seconds. He was unable to get the left arm behind Mr. Davidson’s back. Then the Halton officer, Erich Paroshy, arrived.

“(Officer Paroshy and I) were continuing the struggle to try to get both of his arms behind his back. Again, constantly saying stop resisting...And he wasn’t stopping. Eventually...I got a handcuff on his right arm and was trying to get it towards the **left wrist that Constable Paroshy was holding**, but we were unable

to get them close either due to (the accused's) size or him resisting. So I grabbed the second set of handcuffs out of my pouch and attached the two together and finally got the handcuffs on him." (*Transcript pp. 10, 11*)

[26] Officer Cox estimated Mr. Davidson's height to be 5 foot 9 inches and his weight to be 240 pounds.

[27] He estimated that the struggle took a minute to a minute and a half.

[28] Mr. Davidson was helped to his feet and placed in Officer Paroshy's cruiser.

[29] Officer Cox was present when Mr. Davidson complained of a sore arm at the Halton Regional Police station.

[30] Officer Cox was present when Mr. Davidson was later taken to Joseph Brant Hospital.

[31] The SIU became involved in the matter.

[32] Officer Cox testified that he eventually spoke to them.

"I was designated as a subject officer and that changed to witness officer, back to subject officer, and then back to a witness officer. So it wasn't until they made their mind up that I provided my information, my statement." (*Transcript p. 12*)

[33] In cross-examination, Officer Cox agreed that he stopped his cruiser suddenly because he thought there had been a "possible mischief" to his cruiser. (*Transcript p. 14*)

[34] He agreed that the garbage can problem had occurred approximately one kilometre from where he first saw Mr. Davidson.

[35] He agreed that the garbage can problem had nothing to do with his stopping Mr. Davidson.

[36] Officer Cox testified that he did not know if Mr. Davidson had kicked his cruiser or not. (*Transcript pp. 18, 19, 20*) He was travelling at a speed of approximately 40 km/hour before he stopped.

"He(Davidson) may not have (struck the cruiser). At this point in time that was the furthest thing from my mind. Once I had conversation with him and determined that he was under the influence of alcohol, my attention shifted solely towards his personal safety at that point and public safety." (*Transcript pp. 20, 21*)

Q. All right, now when you asked Mr. Davidson to stop...what offence had he committed at that point as far as you're concerned?

A. At that point in time was him trying to kick my cruiser...it's safety for himself. He's running into live lanes of traffic. (*Transcript p. 23*)

[37] Officer Cox agreed that Mr. Davidson was walking away from him. He did not smell alcohol on his breath until Mr. Davidson turned around and faced him.

Q. So at what point (did) your focus change from mischief to the cruiser to his being intoxicated in a public place? At what point did the focus of your inquiry change?

A. With my observations of him running in towards the cruiser trying to kick it, he's unsteady on his feet. I do get close to him and try to have a conversation with him. The response wasn't positive. Detected an odour of alcohol. At this point in time, my focus is now, okay, he's a threat to himself and he's a threat to other people in public because he's intoxicated in a very crowded public place."
(*Transcript p. 27*)

[38] Officer Cox testified that Mr. Davidson first caught his attention because he was wearing shorts and a shirt and had short, really short brown hair. (*Transcript p. 37*)

[39] When he shouted out to Mr. Davidson to stop and come over to him, he had no idea whether or not Mr. Davidson had kicked the cruiser. (*Transcript pp. 38, 39*)

"...before I had ever put my hand on him, he was advised he was under arrest...and then I tried to grab him." (*Transcript p. 54*)

"Like he presented a left arm to me so I wasn't sure if he was trying to punch me or trying to push me away." (*Transcript pp. 53, 54*)

[40] After the arm-bar hold, he and Mr. Davidson were spinning around and Mr. Davidson fell to the ground.

"I fell on top of him and transitioned from his left arm, which I was holding when we went down. His right arm was right there for me, so I grabbed his right wrist." (*Transcript p. 50*)

[41] Officer Cox denied the suggestion that he threw Mr. Davidson to the ground.

[42] Officer Cox denied "smashing" Mr. Davidson's face into the ground.

"...when he went down to the ground, he landed on his stomach and his face..."

[43] Officer Cox assumed the bloody nose injury happened when Mr. Davidson fell to the ground. (*Transcript p. 46*)

[44] Officer Cox testified that Mr. Davidson was screaming on the ground because he was resisting and not because he was in pain.

Testimony of Erich Paroshy:

[45] Officer Paroshy has been employed as a police officer with HRPS for almost four (4) years at the time of trial.

[46] He was on uniformed duty on June 20, 2009, driving a marked cruiser southbound on Brant Street.

[47] At 2:08 a.m., he observed the stopped OPP SUV in the middle of the street facing

north.

[48] He looked to his left and noticed the OPP officer, and two security officers/bouncers in a struggle with the accused on the sidewalk. Mr. Davidson was face-down.

“When I got there, I noticed that Constable Cox was just over top trying to hold down and restrain the accused on the ground, on the sidewalk, and I believe one security or the bouncer was trying to assist the officer. And when I showed up, I told the security or the bouncers to back off and then I assisted with the completion of the arrest.” (*Transcript p. 58*)

“(Officer Cox) had his right arm...and I took his free left arm and as a result...actually we couldn’t cuff them together because he was struggling so much. We actually placed handcuffs on each hand and then cuffed the handcuffs once we had enough control together as a result.” (*Transcript p. 58*)

[49] Mr. Davidson had been kicking, screaming, tugging his arms out, and swinging his arms. He was told to stop resisting.

Q. Did you see any injuries happen to the accused?

A. I know that when I was arresting him, I did hear his one arm pop. And at that time, it didn’t affect him. I don’t know the big issue, but it didn’t affect him. Later on at the 30 Division in Burlington, he complained of having pain in his – I forget which arm, but he had pain in his arm. He was brought to the hospital.” (*Transcript pp. 58, 59*)

“...there was no sign of injury at the time. When he was getting booked at the police station, he did say that his shoulder or his arm, he couldn’t move it.” (*Transcript p. 61*)

Q. And what exactly were you doing when you heard that popping noise?

A. I was – I had his – trying like an arm restraint to place his arm behind his back and he was pulling in the opposite way and I was pulling this way and he’s pulling that way and pop...Finally he started to comply. His arm was a little less – didn’t have as much power in his arm.

[50] The struggle lasted approximately one minute. The arrest was completed at 2:12 a.m. (*Transcript p. 62*)

[51] Officer Paroshy testified that “arrest” meant “us getting our breath, advising him he’s under arrest.” (*Transcript p. 63*)

[52] Mr. Davidson continued to struggle as he was being put into the cruiser. He was placed in the cruiser at 2:16 a.m.

[53] In the cruiser, Mr. Davidson was kicking at the door and spitting at the glass. He was yelling and swearing.

[54] Officer Paroshy testified that given Mr. Davidson’s odd behaviour, together with the smell of alcohol, he believed Mr. Davidson was impaired but not intoxicated. (*Transcript p. 60*)

[55] He did not note the smell of alcohol in his notebook. He did not observe any unsteadiness.

[56] In cross-examination, Officer Paroshy was asked about the popping noise in Mr. Davidson's left arm.

Q. ...you heard the pop in his arm?

A. Yes.

A. Okay. Sounded like a fracture?

A. I don't know – I'm not a doctor.

Q...Did he complain of any pain, ow, ow, kind of stuff?

A. Zero. (*Transcript p. 70*)

The popping sound came from the mid-arm. (*Transcript p. 82*)

Q. Did that cause you any concern at that time as to what's going on?

A. My concern at that time was to effect the arrest and get control of the accused...it wasn't an issue for me until after.

Q. ...When you heard that popping sound, did you back off from grabbing his arm?

A. No....I just saw an officer that needed assistance and I assisted. (*Transcript pp. 83 & 85*)

[57] Officer Paroshy testified that he was also investigated by the SIU in this case.

DEFENCE EVIDENCE:

Testimony of Jacklyn Ellis:

[58] Ms. Ellis testified that her recollection of the events in question was best captured during her interview with SIU investigators on June 20, 2009 at 3:07 p.m.

[59] A transcript of that interview was filed at trial as Exhibit #1.

[60] Ms. Ellis made her observations while standing on the outside patio of the Queen's Head Pub located on Brant Street and Elgin Street in downtown Burlington.

[61] She had been working in the pub that evening. She believes the incident in question happened at approximately 2:00 a.m. in the morning.

"...saw the police lights of...the SUV...OPP vehicle...an officer was putting a garbage can that had been kicked into the middle of the road back onto the side of the road. And a...larger man went up to the cruiser...I didn't see what he did...The officer ran after him got a hold of him. The man was resistant...thrashing around quite a bit and it took awhile to get him down. The officer did get him down...one of the security guards that was working the Sound of Music also went over...the man was still thrashing around while he was on the ground and it took a good I would say ten minutes to get him into the cruiser... (*Transcript p. 4*)

...I remember like he (police officer) grabbed him (Davidson) on the back cause he was behind the man, grabbed him on the back and the man got free. Um well not totally free but he had him by one arm and then you know there was a lot of thrashing and the police officer...it was some sort of karate move and he tripped him and got him down..." (*Transcript p. 10*) "...he did land fairly hard on pavement..." (*Transcript p. 21*)

A second cruiser, white sedan, showed up. That officer helped get the man up and into a cruiser.

...they were quite rough with him." (*Transcript p. 23*)

Testimony of Matt Ducak:

[62] Matt is 24 years of age and has known Kyle Davidson for 10 years. They are friends.

[63] Matt is employed, lives in Waterloo and has no criminal record. He went to the Sound of Music Festival with Kyle and another friend named Maciej Bialas on June 20, 2009.

[64] They arrived at the concert at approximately 7:30 p.m. and stayed until the concert closed at 11:00 p.m. after Kim Mitchell performed.

[65] Matt drank two (2) beers at the concert and drank some rum and pop. Kyle had brought some rum with him.

[66] After the concert, they all ate sausages at Spencer Smith Park. They then went to the Poacher Bar and ordered a beer. It took awhile to get served because it was busy.

[67] Then they walked to the Prime Steak House on Brant Street.

[68] They stayed there for maybe an hour. They had another beer there.

[69] They all decided to call a taxi to go home. It was a long wait for a taxi so they decided to walk home.

[70] Kyle did not seem drunk. Kyle was not stumbling around. Kyle was having fun and was his regular "jovial self."

[71] For some reason, Maciej decided to cross the street. A car was approaching, driving southbound, and Maciej ran to avoid it.

[72] Kyle started to cross the street. Kyle had his two arms straight out as the car passed. Kyle walked close to the cruiser, then the cruiser slammed on its brakes and an officer got out. Kyle was behind the SUV. The officer told Kyle to "come back."

[73] There was some swearing back and forth between the officer and Kyle.

[74] Kyle asked what he did.

- [75] The officer said, “When you kicked the cruiser it was an assault.” Kyle walked away.
- [76] The officer caught up to Kyle, grabbed his arm and extended it. The officer was trying to get Kyle to the ground by twisting his arm.
- [77] The officer took Kyle to the ground and landed on Kyle.
- [78] A second officer arrived on scene.
- [79] The first officer was trying to cuff Kyle and said “stop resisting.”
- [80] Kyle said, “I’m not resisting.”
- [81] Kyle was shouting that he had a brain or head injury.
- [82] The second officer “helped subdue” Kyle on the ground.
- [83] A security guard or one or two bouncers were trying to help the officers.
“I heard a high pitched scream (from Kyle) when the officers took his arm to cuff him.”
- [84] Kyle seemed “really agitated.”
- [85] The whole incident lasted approximately five (5) minutes.
- [86] Matt testified that he watched the whole incident from a distance of approximately 40 feet away. He had not yet crossed Brant Street. He was not drunk at the time.
- [87] Matt agreed that he was “slightly intoxicated.” Matt agreed that he cannot be precise about the amount of alcohol each of them consumed. Matt agreed that his perception of the events could have been affected by his consumption of alcohol.

Testimony of Kyle Davidson:

- [88] Kyle testified that he is 26 years of age. He finished Grade 10 in High School and then worked as a cook.
- [89] In December of 2005, he was T-boned in a car accident and sustained numerous fractures, lacerations and a head injury. He was in a coma for 13 days. He was not charged in that accident. He is presently on income replacement benefits due to the accident.
- [90] He plans to attend school in September.
- [91] He has a two year old son that lives with the child’s mother. He exercises access to his son regularly.
- [92] On June 20, 2009, he went to the Sound of Music Festival with his friends Matt

and Maciej. They arrived at approximately 7:00 p.m. He had nothing to drink before the concert.

[93] He brought some whiskey to the concert and shared it with his friends. He had approximately three (3) ounces of the whiskey.

[94] They left the concert at approximately 10:00 p.m. and got some food from one of the food stands.

[95] They tried to get into Joe Dog's bar on Brant Street but it was too busy.

[96] They then walked to the Poacher bar on John Street. It was about 10:45 p.m. They stayed for approximately one hour. He consumed one Coors Light beer and had two bottles of water there.

[97] They walked to the Prime Steak House and waited in line to get in. They stayed there for approximately two (2) hours. He consumed another bottle of Coors Light and drank three (3) glasses of water.

[98] Shortly before 2:00 a.m., he called for a taxi to go home.

[99] There was a long wait for a taxi, so the three of them decided to walk home.

[100] When they were outside on Brant Street, Maciej ran across the street.

[101] A motor vehicle was travelling south bound and Maciej ran to avoid it.

[102] Kyle then started to cross the street. He heard brakes screeching.

"I was standing between two parked cars – I extended both my arms out at shoulder level – as in what are you doing?"

[103] An officer jumped out of the car and said, "Hey you – you're under arrest."

[104] At first Kyle did not think that the officer was talking to him. The officer repeated what he said, and Kyle just kept walking. He did not think he had done anything wrong.

[105] The officer sprinted up to him from behind.

[106] The officer grabbed his right arm and said "you're under arrest."

[107] Kyle asked what for. The officer said for assaulting a police officer. Kyle pulled free and continued walking away.

[108] The officer grabbed his left arm and "we were spinning." Kyle fell on his stomach.

[109] Kyle stated that he was probably swearing and being "lippy." He was belligerent.

[110] After he was down on the ground, his right arm was grabbed.

- [111] The officer kept telling him to stop resisting.
- [112] The officer was on his back trying to get his left arm.
- [113] A Burlington officer pulled his cruiser up onto the curb.
- [114] This officer grabbed his left wrist.
- [115] Kyle testified that he put his left arm behind him and said “just fuckin’ arrest me.”
- [116] The (Burlington) officer said, “I’ll fuckin’ arrest you alright.” **Then the officer grabbed his left arm and it popped. Kyle testified that he was screaming in pain as he was being cuffed.**
- [117] Kyle testified that he said that he had a head injury.
- [118] The officers grabbed his head and “smashed it into the curb” resulting in facial injuries.
- [119] He was taken to the Burlington police station.
- [120] He complained the whole time that his arm was either broken or dislocated.
- [121] He was at the station for approximately two (2) hours before he was taken to Joseph Brant Hospital.
- [122] He was X-rayed at the hospital and given a card to attend the fracture clinic.
- [123] His elbow was operated on in August 2009. He has 11 titanium screws half way up his arm. (*Medical Exhibits #2 through to #5*)
- [124] Kyle denies being intoxicated that evening. He denies assaulting the police officer, kicking a cruiser, or kicking garbage cans.
- [125] In cross-examination, Kyle testified that the cruiser was going too fast when it travelled southbound on Brant Street. He estimates approximately 80 kilometres an hour. He put his arms out because the cruiser was going too fast.
- [126] When the officer caught up to him, he originally told him that he was under arrest for assaulting a police officer. Kyle asked when? The officer said it was for kicking his cruiser.
- [127] Kyle said he was laughing – he didn’t assault an officer or kick a cruiser.
- [128] Kyle denies shoving Officer Cox. He testified that he flailed his arms in order to get away from him.
- [129] Kyle denies that the officer told him he was under arrest for public intoxication.

[130] Kyle testified that he did not injure his face when he fell to the ground on his stomach. His face was injured when it was “smashed into the ground” and blood ran from his nose.

[131] Kyle agreed that he was resisting arrest. Kyle repeated that there was no reason for him to be put under arrest.

[132] **Kyle testified that (Officer Paroshy) hyper-extended his arm and kept pulling on it. He was screaming before his arm “popped” and went “limp.”**

ANALYSIS:

[133] I conclude that Kyle Davidson, Matt Ducak and Jacklyn Ellis were credible and reliable witnesses. These three civilian witnesses presented as sincere, consistent and not prone to excess in their testimony.

[134] There were problems with the testimony of the two officers that I will discuss below.

(Note: Bolded and highlighted portions of the evidence summarized above is to assist the reader with ultimate conclusions reached in this case.)

WAS OFFICER COX IN THE LAWFUL EXECUTION OF HIS DUTY WHEN HE ARRESTED KYLE DAVIDSON?

[135] The first question to answer is, what offence was Kyle Davidson arrested for?

[136] Three alternatives were offered in the evidence: kicking over garbage cans; an attempted kick to the OPP cruiser; being intoxicated in a public place.

The Garbage Can Evidence:

[137] After talking about a problem with a man kicking garbage cans onto Brant Street approximately one kilometre north of the location where he stopped Mr. Davidson, Officer Cox testified that the garbage can problem had nothing to do with his stopping Mr. Davidson.

[138] Why Officer Cox even mentioned this unrelated problem up the street is baffling to me.

[139] Further confusion on this garbage can issue is the testimony of Ms. Ellis that she saw an OPP officer putting a garbage can that had been kicked into the middle of the road, back onto the side of the road, just before this officer ran after Mr. Davidson.

[140] Mr. Davidson denies kicking any garbage cans. Mr. Ducak did not mention any garbage cans.

[141] Therefore, there was nothing about the garbage cans that would connect to the

lawful arrest of Mr. Davidson. Quite simply, this evidence was “garbage.”

Attempt to Kick the OPP SUV Cruiser Evidence:

[142] Officer Cox testified that as he was travelling southbound on Brant Street, a male ran toward his cruiser and made a kicking motion toward the rear of his cruiser. He was not sure if the male kicked his cruiser. He exited his cruiser and approached Mr. Davidson to discuss him having kicked his cruiser.

[143] Later in his testimony, Officer Cox stated that the possible kick to his cruiser was not the reason for the arrest of Kyle Davidson.

“At this point in time that was the furthest thing from my mind.” (*Transcript pp. 20, 21*)

[144] Kyle Davidson denied trying to kick the back of the cruiser. Matt Ducak did not testify about a gesture that could be perceived as a kick to the cruiser. Ms. Ellis did not see a kick to the cruiser.

[145] Since this was not the ultimate basis for the arrest of Mr. Davidson, I am left mystified as to why testimony was heard about this phantom attempted kick to the back of a moving cruiser.

[146] I conclude that it did not happen.

Being Intoxicated in a Public Place Testimony:

[147] Officer Cox testified that once he had conversation with Kyle Davidson and determined that he was under the influence of alcohol, his attention shifted solely towards Mr. Davidson’s personal safety and public safety.

[148] Officer Cox testified that this was based on Mr. Davidson trying to kick his cruiser and running into live lanes of traffic.

[149] I have dealt with the phantom attempted kick to the cruiser above.

[150] There was no evidence at all that Mr. Davidson had run into a live lane of traffic.

[151] There was no evidence at all that Mr. Davidson had caused problems for anyone that evening.

[152] Officer Paroshy testified that Mr. Davidson was impaired but not intoxicated.

[153] Mr. Davidson denied being impaired. Mr. Ducak testified that Mr. Davidson was not drunk.

[154] Officer Cox was already chasing Mr. Davidson down before Mr. Davidson had turned to face him, which is when Officer Cox stated that he smelled the alcohol on Mr. Davidson’s breath from a distance of five (5) or six (6) feet away.

[155] Section 31(4) and (5) of the *Liquor Licence Act of Ontario* reads as follows:

Intoxication

(4) No person shall be in an intoxicated condition,

(a) in a place to which the general public is invited or permitted access; or

(b) in any residence that is used in common by persons occupying more than one dwelling in the residence.

(5) A police officer may arrest without warrant any person whom he or she finds contravening subsection (4) if, in the opinion of the officer, to do so is necessary for the safety of any person.

[156] Accordingly, I conclude that Mr. Davidson was not intoxicated and there was no basis for concern that he was a safety concern for himself or any other person.

[157] I conclude that this was not the reason for the arrest of Kyle Davidson on June 20, 2009. This POA charge was an after-the-fact add-on after this violent arrest had already taken place. It is noteworthy that this Information was sworn to on July 21, 2009 – one month after the incident.

[158] This POA charge was an attempt to justify police actions with respect to Mr. Davidson on the night in question. It does not.

CONCLUSION:

[159] Officer Cox was not acting within the lawful execution of his duties as a police officer when he arrested Mr. Davidson.

[160] I conclude that the true reason for the arrest of Mr. Davidson was for conduct that I will call “contempt of cop.”

[161] There is no issue that Mr. Davidson was belligerent and swearing when Officer Cox first told him to stop and then pursued him.

[162] It was based on Mr. Davidson’s belligerent response (fuck you) that he was arrested.

[163] Officer Cox testified to this as follows:

“I do get close to him and try to have a conversation with him. The response wasn’t positive. Detected an odour of alcohol. At this time, my focus is now, okay, he’s a threat to himself and he’s a threat to other people in public because he’s intoxicated in a very crowded public place.” (*Transcript p. 27*)

[164] Kyle Davidson had done nothing to justify being pursued and arrested by Officer Cox. It is not an offence to be rude to an officer. Unfortunately, in this case, that rudeness resulted in a violent take-down and injuries to Mr. Davidson.

DID KYLE DAVIDSON USE REASONABLE FORCE IN RESISTING HIS

ARREST?

[165] At the highest, Officer Cox testified that Kyle Davidson made a shoving motion or an attempted punching motion toward him after he was told that he was under arrest. Officer Cox testified that with respect to the gesture made “I don’t know...” (*Transcript pp. 7 & 8*)

[166] Thereafter, the struggle was on. Time estimates with respect to the duration of the struggle vary from 10 minutes to one minute in the evidence.

[167] The struggle took place as Kyle Davidson was face down on concrete. He was refusing to release his left arm to be handcuffed. When he gave it up, his elbow was broken by Officer Paroshy.

[168] I conclude that Kyle Davidson used reasonable force in resisting his unlawful arrest.

[169] It is not necessary to analyze matters further, given these findings.

[170] Should I be in error with respect to the above, I would have found that the police used excessive force in the arrest of Kyle Davidson such that a *Charter* remedy would be in order. I would have stayed the charges against Kyle Davidson in these circumstances. (Reference *R. v. Steele* [2010] A.J. No. 342 (Alta. Q.B.); *R. v. Mann* [2004] S.C.J. No. 49 (S.C.C.); *R. v. Tran et al* [2010] ONCA 471, 103 O.R. (3d) 131 (OCA).

POLICE CONDUCT IN THIS CASE:

[171] I conclude that the police conduct in this case was harsh and callous.

[172] It was most likely due to a pre-existing head injury that Kyle Davidson acted with disrespect to Officer Cox when he was told he was under arrest, for no reason, in this case.

[173] It is fortunate that Mr. Davidson’s head injury was not aggravated in this aggressive take-down face first to the pavement.

[174] I make no finding as to whether Mr. Davidson’s bloody nose was the result of a deliberate smashing of his face against the curb by Officer Paroshy or not. The evidence with respect to this aspect of the arrest was too sketchy to come to an ultimate conclusion.

[175] I do find, beyond a reasonable doubt, that Officer Paroshy used excessive force and broke Kyle Davidson’s arm in this case.

[176] Despite hearing Mr. Davidson’s arm “pop”, Officer Paroshy continued grabbing Mr. Davidson’s arm. Officer Paroshy’s rationale was “I just saw an officer that needed assistance and I assisted.” (*Transcript pp. 83 & 85*)

[177] Despite screaming out in pain, and complaining about his arm injury for some time at the station, it was not until later in the morning that Mr. Davidson was brought to Joseph

Brant Hospital for medical attention.

[178] I sensed no empathy on the part of either officer for the injuries Kyle Davidson sustained in this matter.

[179] Therefore, I recommend, at a minimum, that both officers be re-trained in the appropriate use of police force.

[180] I recommend that the Crown Attorney send a copy of these reasons to the Chief of Police of Halton for review and appropriate action.

[181] I recommend that the Crown Attorney send a copy of these reasons to the regional supervisor of the OPP for review and appropriate action.

[182] I recommend that the Crown Attorney send a copy of these reasons to the SIU for their review and appropriate action, given their very early involvement in the matter.

[183] I recommend that the Halton Crown Attorney's office carefully screen cases where an accused is brought before the Court on charges that arise from circumstances of suspected "contempt of cop" before they proceed to prosecute the matter.

Released: August 19, 2011

Signed: "Justice Lesley M. Baldwin"