

Citation: *R. v. Kolasch*, 2017 YKTC 64

Date: 20171208
Docket: 16-00624
16-00624A
Registry: Whitehorse

IN THE TERRITORIAL COURT OF YUKON
Before Her Honour Judge Orr

REGINA

v.

HARRY KEVIN KOLASCH

Appearances:
Kevin W. MacGillivray
Amy Steele

Counsel for the Crown
Counsel for the Defence

REASONS FOR JUDGMENT

[1] ORR J. (Oral): On Information 16-00624, Harry Kevin Kolasch faces three charges, namely:

1) that HARRY KEVIN KOLASCH on the 31st day of December in the year 2016 at Whitehorse, Yukon Territory, did resist Cst Chris BARR, a peace officer of the Royal Canadian Mounted Police, engaged in the execution of his duty - arrest by struggling and grabbing weapons on Cst BARR's duty belt, contrary to Section 129(a) of the *Criminal Code*;

2) that HARRY KEVIN KOLASCH on or about the 31st day of December in the year 2016 at Whitehorse, Yukon Territory, did have in his possession property-- hat and DVD of a value not exceeding five thousand dollars knowing that all or part of the property was obtained by the commission in

Canada of an offence, contrary to Section 354(1)(a) of the *Criminal Code*; and

3) that HARRY KEVIN KOLASCH on or about the 31st day of December in the year 2016 at Whitehorse, Yukon Territory did, while being bound by a probation order made by Judge CHISHOLM on June 24th, 2016, fail without reasonable excuse to comply with such order, to wit: Keep the Peace and be of good behaviour, contrary to Section 733.1(1) of the *Criminal Code*

[2] On January 25, 2017, the Crown elected to proceed by summary conviction. A not guilty plea was entered on June 30, 2017, and the trial was heard before me on December 7, 2017. As the trial took most of the day, I reserved my decision until today.

[3] At the outset of the trial, counsel indicated that the date of the incident, jurisdiction, and the identity of the accused were admitted without further proof. Mr. MacGillivray, as counsel for the Crown, indicated at the outset that no evidence would be called regarding the allegation of possession of stolen property. There was not any evidence of any sort to suggest any basis for that charge. As such, that charge, Count #2, is dismissed.

[4] Tyler Schwalm testified that, on the night in question, he was providing security at the Superstore in Whitehorse. He and his partner were asked to ensure that a person who he referred to throughout his testimony as "the suspect" did not leave the store, as the police were en route and wanted to speak to him. Mr. Schwalm was at the exit door when he saw the suspect coming out of the store. He spoke with him and asked him to go with him to the McDonald's restaurant, which was a short distance away. He was not clear why he asked him to go there. Mr. Schwalm indicated that the

suspect was visibly intoxicated, unsteady on his feet, very agitated, and he could smell alcohol on him. He said the suspect had a raised voice and a sharpness to his voice as if he was upset over something. Mr. Schwalm thought he had persuaded Mr. Kolasch to go with him to McDonald's. As they went out the exit door at the Superstore, he indicated that the RCMP officer was standing off to the left and the suspect immediately turned right and walked away in a brisk manner, saying nothing.

[5] Mr. Schwalm testified that the police officer tried to put the suspect under arrest and there was a brief struggle before they both fell to the ground between two parked cars. He testified he was about 10 metres away at the time of the struggle. He indicated that he saw the police officer deliver several subduing blows to the suspect but did not know where he hit him. He indicated that the subject was motionless on the ground and the officer tossed him the suspect's wallet to check his identification. The officer then put the suspect in handcuffs and radioed for EMS and for backup. He indicated that at least three other police cars attended and the suspect was taken away in an ambulance.

[6] On cross-examination, Mr. Schwalm testified that he did not see the suspect do anything to the police officer. He indicated he did not hear the police officer saying anything specific and, although there were some words spoken, he could not recall what they were. Mr. Schwalm indicated that there were others in the parking lot and there would have been background noise. He saw the officer grab the subject by the shirt when they were face to face and then they had gone down between the cars with a little bit of pushing and shoving.

[7] Mr. Schwalm testified that the subduing blows by the officer were not punches but that the officer's right forearm was to the back of the subject, who was laying face down at the time while the officer was kneeling over him, and it was a couple of blows. He did not know where the blows were on the back. The suspect was motionless for a couple of minutes and was still motionless when the officer patted him down and put him in handcuffs. He noted the suspect had a cut on his forehead but he could not recall if it was bleeding.

[8] Cst. Christopher Barr testified that he was on duty and received a dispatch call at 5:36 p.m. on December 31, 2016, that a person was causing issues at the local McDonald's restaurant. En route, he was advised that the manager of the restaurant was following the suspect, who had tried to kick him.

[9] When Cst. Barr arrived on scene, he spoke briefly to the McDonald's manager and was advised the suspect had gone into the nearby Superstore. The manager then advised that the suspect was coming out of the Superstore and pointed an individual out to Cst. Barr.

[10] Cst. Barr testified that he started walking toward the suspect, who was walking along the sidewalk away from Superstore. He indicated he called out in his police voice, "Stop. Police." Then he called, "Police. Sir, stop. You're under arrest." There was no response or reaction from the suspect.

[11] He testified it was his intention to arrest the suspect for assault, as he did not know the identity of the suspect. He indicated the suspect continued to walk away from the store and there was no change in his pace. The officer started to jog towards the

suspect to make up the distance between them. It was only when he indicated for the third time to "Stop. Police. You're under arrest." that the suspect, later identified as Mr. Kolasch, the accused in this matter, then turned around and stopped. He acknowledged that there were others in the parking lot with vehicles coming and going, and there was no indication that Mr. Kolasch had heard him prior to the third time he had called out.

[12] Cst. Barr testified that Mr. Kolasch was face to face with him and about two to three metres away when he turned towards the officer. He did not know who Mr. Kolasch was and he testified that he had never dealt with him before. He testified he did not take any steps to identify Mr. Kolasch, as he did not have enough time to do so.

[13] Cst. Barr testified his reasons for arresting Mr. Kolasch was to identify the suspect; that he might have been intoxicated; and that, after the issues at McDonald's, he had now moved to another retail operation. However, his primary purpose was to identify the suspect.

[14] Cst. Barr testified that he approached the suspect with caution with his hands out in front and facing upwards to protect what he referred to throughout his evidence as his "tools", which he indicated were the OC spray, the baton, the police radio, and the firearm that was on his duty belt.

[15] Cst. Barr testified that he grabbed the suspect by the arm and advised him that he was under arrest. The word that he used throughout his testimony was that he had "grabbed" the suspect by the arm. When he grabbed the suspect's arm, the suspect

pulled back and Cst. Barr testified that, at that sign of resistance, he grabbed the suspect by both arms and spun him around and then pinned him to the hood of a nearby car, telling him to put his hands behind his back and not resist. Mr. Kolasch did not say anything throughout the interaction, according to the officer. Cst. Barr got control of both of his arms but he was not able to apply the handcuffs and indicated that was why he had pinned him to the car. While he testified that there was no indication that Mr. Kolasch had any weapons, he was not willing to let go of Mr. Kolasch's arms.

[16] Cst. Barr radioed for police assistance while Mr. Kolasch was facing the car and pinned to the hood. Cst. Barr used his weight and arm to keep control of Mr. Kolasch.

[17] Mr. Kolasch was trying to pull his arms away and Cst. Barr decided to take Mr. Kolasch to the ground, which he did he said by grabbing his neck area. Cst. Barr took Mr. Kolasch to the ground between two parked cars. Mr. Kolasch was then lying on his left side with one arm pinned underneath himself and the other was out in front of him.

[18] Cst. Barr was on his knees and testified he was pinning Mr. Kolasch to the passenger tire of the vehicle. Mr. Kolasch was squirming. Cst. Barr was trying to keep control of him but Mr. Kolasch then turned onto his back and was facing the officer, who was still on his knees. Cst. Barr testified that Mr. Kolasch grabbed and squeezed the pouch that contained the OC spray and then with his left hand grabbed the officer's magazine pouch. The officer on each occasion moved Mr. Kolasch's hand away as he tried to gain control of him. Cst. Barr testified that Mr. Kolasch's hand then went towards his handgun, which had been under his jacket, although the jacket was open.

[19] According to Cst. Barr, he had been analyzing the situation as it developed and he felt that Mr. Kolasch was trying to disarm him and could potentially kill him. He testified, as a result, he applied "a significant strike" on the left side of Mr. Kolasch's face with his right hand. He testified that he was continuing to analyze the situation and, in his words, "Did it hit?", "Did it work?", "Do I need to deliver another strike?"

[20] Cst. Barr believed he had felt contact and he knew a connection had been made and he drew back for another punch. He did know then that Mr. Kolasch had gone unconscious and so midway through the second strike he indicated he did not deliver any significant blow but actually opened his hand. Since Mr. Kolasch was then unconscious, he turned him over and "grabbed both of his arms and handcuffed Mr. Kolasch's hands behind his back."

[21] Given Mr. Kolasch's obvious state, he then put him in a medical recovery position and checked that he was breathing.

[22] Cst. Barr testified that whole incident had occurred quickly and he had a lot to think about during that time. He noted that how he felt at the time, and how he had felt in the past, was that he did not want anyone to have access to his "tools".

[23] Cst. Barr then did a pat-down search on the unconscious Mr. Kolasch to search for weapons. When he found his wallet, he threw it to the security guard, who was standing nearby, asking him to check for Mr. Kolasch's ID.

[24] As Mr. Kolasch was now in custody and he "considered the risk considerably less", he radioed that the backup officers he had called no longer needed to respond

with lights and sirens. He acknowledged that Mr. Kolasch had a two-inch gash on his left forehead, above his eye, which had significant bleeding.

[25] Cst. Barr testified he could smell alcohol on Mr. Kolasch's breath but he did not recall how strong it was, despite having been in a physical struggle and being face to face with him throughout this whole incident.

[26] The blow or blows delivered by Cst. Barr to Mr. Kolasch were sufficient that the officer's right hand was quite swollen and he went immediately to the hospital for x-rays, only to find that nothing was broken.

[27] Cst. Barr testified that he had watched the surveillance video shortly after the incident.

[28] The video was played in Court. The majority of Cst. Barr's direct testimony was given before he was asked to watch the video and answer questions in respect to it.

[29] Perhaps the most interesting aspect of Cst. Barr's testimony was in cross-examination, when he indicated that Mr. Kolasch's behaviour was violent and resistant as well. He testified this was a violent interaction and that, while his knees were never on Mr. Kolasch's back, he used his thigh on Mr. Kolasch's lower back and mid-back to control him and to pin him to the passenger car tire. Cst. Barr indicated that when he had his thighs on Mr. Kolasch's back, Mr. Kolasch was squirming. He testified that, at times, Mr. Kolasch pushed him and his hands away.

[30] Cst. Barr then testified, "My actions did not become aggressive until I hit him" and then said he gave Mr. Kolasch one significant blow on the left side of his head. He

stated that he did not hit Mr. Kolasch again with a closed fist, as he was in the midst of the next hit, when he realized Mr. Kolasch was unconscious and was no longer resisting. Although he admitted there was another swing of his hand, he indicated he did not make any contact.

[31] Cst. Barr confirmed that Mr. Kolasch was a smaller and older man than he was. Certainly, their appearance in court would indicate a significant difference in age, height, and weight that would have put Mr. Kolasch at an apparent disadvantage in the matter.

[32] Mr. Kolasch testified for the defence in this matter. He acknowledged that he had some personal issues at the time of the incident at the Superstore and that he had been drinking for several days prior to the incident, after a period of sobriety. Mr. Kolasch acknowledged he has had a long-standing issue with alcohol, and he described the successes and challenges he has had dealing with that issue.

[33] Mr. Kolasch did not recall much of the incident. He recalled being at McDonald's and that there had been a problem there. He did not know why he had gone into the Superstore or where he was going when he left there. He did not recall talking to the security guard just before he exited the store. Watching the video did not assist him in his recall.

[34] Mr. Kolasch indicated he heard someone running after him and heard something being said and turned to see who it was. He did not recognize the person. Mr. Kolasch testified he did not realize the person in question was a police officer until he was on the ground and saw the yellow stripe on his pants and, at that time, he stopped resisting.

He testified that everything happened so fast that he did not have time to realize the person was a police officer.

[35] Mr. Kolasch noted that his eyesight is not as good as it once was. When watching the video, he indicated that he was not wearing his glasses when he left the Superstore. He wore glasses all day yesterday throughout the trial, as he is today.

[36] Despite being in court when two witnesses had indicated what had happened to him and how he had been struck by the police officer, Mr. Kolasch indicated that he had lost consciousness but he did not know why. He said, on several occasions during his testimony, that perhaps he had hit his head on the pavement when he was down between the cars. He did not seem to have any appreciation that it was the officer who had delivered a significant blow to his face, with a closed fist, with sufficient force to cause the officer's hand to swell and for him to seek immediate medical assessment or treatment for it. Mr. Kolasch had no recollection of grabbing for the officer's gun or OC spray.

[37] Mr. Kolasch's criminal record was entered into evidence by consent. It is fair to say that he is no stranger to the courts and he acknowledged he was on probation at the time of the incident at the Superstore, but indicated that the probation order did not have a condition on it not to drink.

[38] The first issue in this case is whether Cst. Barr was in the execution of his duty at the time of this matter. In order to determine that, I must first determine if the arrest of Mr. Kolasch was lawful. If the arrest of Mr. Kolasch was lawful, did Cst. Barr use excessive force in making it?

[39] Finally, if the arrest of Mr. Kolasch was lawful, did the Crown prove beyond a reasonable doubt that Mr. Kolasch resisted arrest by struggling and grabbing at Cst. Barr's duty belt?

[40] As in many criminal trials, the foregoing issues will also require me to assess the credibility and reliability of each of the witnesses in this matter and, as applicable, to apply the Supreme Court of Canada's decision in *R. v. W.(D.)*, [1991] 1 S.C.R. 742 in doing so.

[41] Section 129 of the *Criminal Code* provides as follows:

Every one who

(a) resists or wilfully obstructs a public officer or peace officer in the execution of his duty or any person lawfully acting in aid of such an officer,

...

is guilty of

...

(e) an offence punishable on summary conviction.

The Crown proceeded by summary conviction in this matter.

[42] In this case, the specific charge against Mr. Kolasch is that he resisted a peace officer in the execution of his duty. The duty is specified in the Information to be "arrest". The means of resisting is set out specifically in the Information to be "by struggling and grabbing weapons on Cst. Barr's duty belt", so that is what the Crown has to establish.

[43] As in any criminal case, the Crown bears the burden of establishing the guilt of Mr. Kolasch beyond a reasonable doubt. Mr. Kolasch has nothing to prove and should he testify, as he did in this matter, then his evidence is subject to the same review as to credibility and reliability as that of any other witness.

[44] Section 495(2) of the *Criminal Code* provides as follows:

A peace officer shall not arrest a person without warrant for

- (a) an indictable offence mentioned in section 553,
- (b) an offence for which the person may be prosecuted by indictment or for which he is punishable on summary conviction, or

- (c) an offence punishable on summary conviction,

in any case where

- (d) he believes on reasonable grounds that the public interest, having regard to all the circumstances including the need to

- (i) establish the identity of the person,
- (ii) secure or preserve evidence of or relating to the offence, or
- (iii) prevent the continuation or repetition of the offence or the commission of another offence,

may be satisfied without so arresting the person, and

- (e) he has no reasonable grounds to believe that, if he does not so arrest the person, the person will fail to attend court in order to be dealt with according to law.

[45] In this case, Cst. Barr testified that he was arresting Mr. Kolasch to identify him.

He testified that he did not have time to identify Mr. Kolasch, as the incident occurred

quickly. At no point in his testimony did Cst. Barr indicate that he asked Mr. Kolasch who he was, nor did he ask him to produce any identification at any time.

[46] What is also noteworthy in this matter is that the security guard, Mr. Schwalm, testified that he was asked to keep the subject from leaving the Superstore, as the police were on their way. Given the number of people who are shown in the video to be coming and going from the Superstore at the time, it is clear that the security guard knew Mr. Kolasch, as he walked directly over to him as Mr. Kolasch approached the exit, and he engaged in conversation with him. Although the security guard was following Mr. Kolasch when he exited the Superstore and they were both ahead of Cst. Barr, it does not appear that Cst. Barr made any effort to ask the security guard who Mr. Kolasch was.

[47] Cst. Barr later testified he was arresting Mr. Kolasch because he might be intoxicated. However, he testified the indication he gave to Mr. Kolasch was that he was being arrested for assault, not for being intoxicated.

[48] Cst. Barr further testified he was arresting Mr. Kolasch for assault because there had been the incident at a McDonald's restaurant, where he had thrown a cheeseburger at an employee; had allegedly tried to kick the store manager as he had followed Mr. Kolasch; and that he was now at another retail premise, and so he had to prevent the continuation of the offence or the commission of another offence.

[49] However, that proposition ignores the fact that Cst. Barr received the call about a problem at McDonald's at 5:36 p.m., according to his testimony. According to the timestamp on the video at 5:39:04 p.m., Mr. Kolasch exited the Superstore and was

walking away from McDonald's and away from the Superstore. There is no indication that any further complaints had been received about him during that time, only the ones with respect to McDonald's and the manager there.

[50] Section 495(1) of the *Criminal Code* does not apply to this case, as there is no evidence before this Court that Cst. Barr considered that Mr. Kolasch had committed an indictable offence or was about to commit an indictable offence. He did not find him committing a criminal offence, as anything that might have constituted a criminal offence at McDonald's had already occurred before Cst. Barr arrived at the scene.

[51] Section 495(2) of the *Criminal Code*, then, is the applicable section. The wording is mandatory. It says that an:

... officer shall not arrest a person without warrant for

...

in any case where

(d) he believes on reasonable grounds that
the public interest

...

may be satisfied without so arresting the person,
and

(e) he has no reasonable grounds to believe
that, if he does not so arrest the person, the
person will fail to attend court in order to be
dealt with according to law.

[52] In this case, it is clear from the testimony of Cst. Barr that he did not turn his mind to this provision in the *Criminal Code*. He did not consider at any point whether the public interest could be satisfied without arresting Mr. Kolasch. For him to believe on reasonable grounds that the public interest could be met by not arresting Mr. Kolasch, he had to consider the need to establish the identity of the accused. Here, he made no effort to determine Mr. Kolasch's identity, but, in fact, testified he was arresting him in order to establish his identity.

[53] Nothing during the trial would indicate that there was any evidence that Cst. Barr needed to secure or preserve, unlike the cases where an accused has drugs or stolen property on his person and the concern is that the accused will try to get rid of the property before the police can recover it.

[54] Given that Mr. Kolasch had left the Superstore and was in a large parking lot moving away from the McDonald's, there was no basis to consider that he was going back there to cause further trouble or moving on to commit a further offence.

[55] Finally, as Cst. Barr had no prior dealings with Mr. Kolasch and did not know anything about him, including whether he had a criminal record or not, as such, he had no reasonable ground to believe that Mr. Kolasch would not attend court to be dealt with.

[56] On the evidence that is before me, I find that the Crown has not established that Cst. Barr was entitled to arrest Mr. Kolasch without a warrant in the circumstances that Cst. Barr testified to.

[57] It was quite clear from Cst. Barr's testimony that he did not consider at any point whether he was able to arrest Mr. Kolasch without a warrant in this matter and it is quite clear he did not have a warrant in this matter. As soon as he saw him leave the Superstore, he told him he was under arrest. He then proceeded to follow him and jog after him, when there was no indication that Mr. Kolasch had heard him.

[58] It is noteworthy, as well, that when Mr. Kolasch did turn and face Cst. Barr and Cst. Barr told him he was under arrest, it is clear from the video that Mr. Kolasch did not turn away or try to run away at that point, and he did have a few feet of distance initially where he could have attempted to get away, if that was his plan. He did not do so.

[59] For Cst. Barr to be in the execution of his duty, namely an arrest, the arrest must be a lawful one. From the evidence in this case, I am not satisfied that the Crown has established beyond a reasonable doubt that Cst. Barr was lawfully entitled to arrest Mr. Kolasch without a warrant in this matter and, as such, the officer was not in the execution of his duties. As such, any actions by Mr. Kolasch that could be considered to be in resistance to such an arrest would not constitute criminal conduct.

[60] While there may not be any need to go further in this matter, given the length of the trial that I heard and the seriousness of this matter, in the event that my interpretation of s. 495 is not correct and that the arrest by Cst. Barr of Mr. Kolasch is a valid arrest and he therefore was in the execution of his duties, the following matters must be considered.

[61] The incident occurred on December 31, 2016. The trial was heard on December 7, 2017.

[62] The security guard, Mr. Schwalm, had some difficulties recalling the specific details of the matter and, in particular, why he was asked to keep the suspect in the Superstore but he was trying to persuade him to go back to McDonald's. He was also uncertain, until he reviewed the incident report, about the blows by the police officer to the accused, but then clarified that several subduing blows had been inflicted by the officer with his forearm to the accused's back area. He was adamant that he did not see any punches.

[63] Cst. Barr testified with amazing detail and recall of the incident. Not only did he recall each and every move by both himself and Mr. Kolasch, but he testified to the analysis that he was making of the situation at the time. He acknowledged that he had viewed the video, although he did not indicate how many times that had occurred.

[64] Cst. Barr appeared before the Court as a physically fit 30-year-old who is much taller and heavier than Mr. Kolasch. Mr. Kolasch appeared before the Court as a small and frail man, whose physical appearance is much older than his actual age and would be reflective of the challenges he indicated he has encountered in his work and personal life.

[65] While I found that Mr. Kolasch was a credible witness, in the sense that he appeared to be telling the truth and recounting the incident as best as he could recall, I do not find that I can rely on the evidence of Mr. Kolasch. It was clear that his consumption of alcohol had affected his ability to recall much of the incident. He did not recall many of the details of the incident. Most telling was that he did not appreciate

that he had lost consciousness as a result of a significant blow delivered by Cst. Barr to his face.

[66] The most concerning aspect of Mr. Kolasch's testimony was that it was difficult to determine which parts of his testimony were actual recollection of the incident and which parts were simply his agreement that the proposed scenario that was put to him by counsel was the way that things might have been. This applied to his testimony in direct but more particularly to his testimony on cross-examination, where his answers were such as to raise questions as to whether his answer was what he had actually intended to do or did, or whether it was what he might have done in the situation. As such, it is not possible to rely on Mr. Kolasch's evidence in any significant manner. It is too uncertain as to what he really remembered and what answers were just what he thought he might have done at that time.

[67] The key evidence in this case is the surveillance video from the Superstore. While there were several cameras, the most relevant ones show the vestibule area just prior to the glass exit doors that clearly showed Mr. Kolasch speaking to the security guard; the camera at the exterior of the exit doors that show Mr. Kolasch leaving the store, the officer approaching the exit doors, and then pursuing Mr. Kolasch; and the camera that shows the area near the smoke shop where the officer arrested Mr. Kolasch and the incident occurred. Those videos were played in court, stopped, and replayed on a number of occasions, and finally played in their entirety.

[68] Both Cst. Barr and Mr. Kolasch were asked to watch various portions of the video surveillance and were questioned on various aspects. The video was not shown to the security guard.

[69] The surveillance video is date and time stamped. The incident occurred between 5:38 p.m. and 5:41 p.m. on New Year's Eve, December 31, 2016. There is no audio on the tape.

[70] The following are the key times and related activity.

[71] At 5:30:17, Mr. Schwalm, the security guard, dressed clearly as such, entered the glass exit doors of the Superstore as the person, identified as Mr. Kolasch, can be seen coming from the store and heading towards the exit. Mr. Schwalm can be seen approaching Mr. Kolasch and speaking to him. At no time did Mr. Kolasch make any gestures of a threatening or intimidating nature or make any efforts to avoid Mr. Schwalm, nor did Mr. Schwalm make any threatening gestures to Mr. Kolasch.

[72] When watching the video, Mr. Kolasch noted that he was not wearing his glasses when he was in the Superstore. He had previously testified his eyesight was not what it used to be and that his hearing had been affected by 27 years of work in a mine.

[73] Near the end of the conversation, Mr. Kolasch nodded his head to something that Mr. Schwalm had said. The automatic glass doors opened. Mr. Schwalm went out first and Mr. Kolasch immediately followed and immediately turned to the right and walked in that direction along the sidewalk. At no point did Mr. Kolasch look to the left.

[74] At 5:39:04, Mr. Kolasch walked out the door of the Superstore. Mr. Schwalm then walked behind him, going to the right of the store.

[75] Eleven seconds later, at 5:39:15, Cst. Barr first appeared on the camera, as he was to the left of the exit door. He can be seen as he walked past the exit door heading in the same direction as Mr. Kolasch and Mr. Schwalm.

[76] Nine seconds later, at 5:39:24, Cst. Barr started to jog or run in the direction of Mr. Kolasch.

[77] Seven seconds later, at 5:39:31, switching to the camera where the incident occurred near the smoke shop, Cst. Barr is seen coming towards the camera and when approximately five to 10 feet away from Mr. Kolasch, Mr. Kolasch turned around and looked in Cst. Barr's direction for the first time. Mr. Kolasch's hands were by his side and he stopped. Cst. Barr continued to approach him.

[78] Three seconds later, at 5:39:34, Cst. Barr grabbed Mr. Kolasch by the arm. There was no obvious or apparent reaction by Mr. Kolasch.

[79] Three seconds later, at 5:39:37, Cst. Barr physically twisted Mr. Kolasch around twice.

[80] Four seconds later, at 5:39:41, Cst. Barr had Mr. Kolasch bent over the hood of a car that they were beside.

[81] Fourteen seconds later, at 5:39:51, Cst. Barr threw Mr. Kolasch to the ground and went down with him, but can be seen above Mr. Kolasch. At that time,

Mr. Kolasch's face cannot be seen, but his feet can be seen to move as he goes from his side and then to his back. There is nothing that his feet are seen to make contact with. Their motion, as seen in the video, is consistent with him turning over and simply kicking in the air, as opposed to kicking or striking at anything.

[82] Nine seconds later, at 5:40:10, Cst. Barr drew back his right arm and clearly delivered a significant blow. It is not possible to see where the blow lands. Immediately after, he made a similar gesture, but it cannot be seen where that blow goes.

[83] Fifty-one seconds later, at 5:41:01, Cst. Barr threw an item towards the security guard, Mr. Schwalm, who picked it up.

[84] Two minutes later, at 5:43, three police cars arrived at the scene with their lights flashing.

[85] As was noted during the course of the trial, Cst. Barr testified first and it was only at the end of his direct examination that the video from the Superstore parking lot was played. He had an opportunity to watch it and was asked some questions with respect to what was shown on the video and what was going on at that time.

[86] When I heard the evidence in direct from Cst. Barr and he indicated that Mr. Kolasch did not respond to him yelling "Police. Stop. You're under arrest." and he had indicated he did not know who the person was, my first thought was: how do you know this person is not deaf; how do you know that this person does not have any cognitive difficulties; how would a person know who it was that was being called after? Those were my first thoughts.

[87] When I watched the video, I saw the number of people who were coming and going at the Superstore. There were people who were coming out of the Superstore with full carts, with families, young and old. People were coming and people were going. Cars were coming and cars were leaving. There were individuals who were obviously employees of the Superstore who were moving shopping carts, a considerable number of shopping carts. There were two of them at one stage going across the parking lot with probably 15 or 20 shopping carts that they were pushing. There was obviously considerable noise. There was considerable activity going on to the exterior of the Superstore on New Year's Eve 2016. It would be quite reasonable to think that someone who was out on the sidewalk some distance from the officer when they first started would not hear or pay any attention to someone yelling, "Police. You're under arrest. Stop."

[88] The officer's testimony before the video was played was that he told Mr. Kolasch he was under arrest. He then "grabbed his arm". Those were his words, that he "grabbed his arm".

[89] When you watch the video, it is quite obvious that is exactly what he did. He grabbed Mr. Kolasch's arm. This was not a laying on of hands in order to effect an arrest. He grabbed him in a sudden manner. There is almost no time from when he first grabbed him to when he spun him around twice and then threw him up against the hood of a car that is right there. I have already given the times. He grabbed his arm. Three seconds later, he spun him around twice. Four seconds later, he had Mr. Kolasch bent over the hood of a car. They struggled. They went to the ground.

[90] When I heard the officer's testimony and before I saw the video, my first thoughts were: Well, what would you expect? You come up to somebody quickly. You grab them. The next thing you know, you are saying you are spinning them around.

[91] When you see the video, it is hard to believe that the officer acted as he did. He gave Mr. Kolasch no opportunity to react or to respond. If he sensed some hesitation and that Mr. Kolasch was trying to pull his arm away from him, there would be little wonder, from the manner in which he had approached him in the first place. This was an individual he did not know.

[92] There was an indication that Mr. Kolasch was under the influence of alcohol from the report from McDonald's. Certainly when dealing with a person who is under the influence of alcohol, their faculties may well be affected. Their reaction time and their ability to appreciate what is being said to them may well be affected. There was absolutely, positively, no consideration by the officer of that scenario in this matter.

[93] It was not indicated whether the officer's actions and the haste with which he conducted this matter were explained by the comment he made that he had started his shift at 7:00 a.m. and when asked whether it was likely that help would be coming, when he had radioed for backup, he indicated there was a shift change at 6:00 p.m. and he knew there were officers at the nearby detachment who would be able to attend. So whether his intention was that this was the end of his shift, which he never indicated, and that he was in a hurry to get home or to do other things or to assist in other matters was not clear, but he certainly acted with incredible speed and haste in the scenario that was being presented to him.

[94] Cst. Barr did not give Mr. Kolasch any opportunity to say anything. He grabbed him and then he immediately swung him around twice and threw him up against the hood of a car. If there was any struggling at that point in time, one would anticipate that it may well have been because Mr. Kolasch may have been off-balance, which may have been affected by his consumption of alcohol, such that he might not have been all that steady on his feet in the first place, and any reaction or struggling at that point in time could certainly be explained by the abruptness and the suddenness of Cst. Barr's actions.

[95] Throughout his testimony, and although I did not count it, it would be worth going back to count how many times Cst. Barr indicated that he had to get control of Mr. Kolasch. If he said it once, he probably said it 30 times in the course of his direct and cross-examination. His whole purpose, his whole intention, was to get control of Mr. Kolasch.

[96] This is an individual he did not know. He had never dealt with him previously. If Mr. Kolasch was someone who was known to him, who was known to be a violent offender, who was known to have a violent temper, who was known to be very belligerent and abusive and physically violent, it might well be that an officer would not give anybody in that scenario an opportunity to act, and the officer would jump them, which is what we have here.

[97] However, Cst. Barr did not know Mr. Kolasch. He had never dealt with him. He had no idea who he was. There was nothing, other than the fact that he was alleged to have thrown a cheeseburger at somebody in McDonald's, while in an intoxicated state,

and that he may have attempted to try and kick the manager who was following him, to indicate that some degree of care might well be needed to be taken with respect to Mr. Kolasch at that time.

[98] As serious as throwing a hamburger at someone at McDonald's may well be, it certainly was not an indication that there was a firearm or a knife that he was wielding at the time, which, again, would have been a matter to be quite cognizant of and to take appropriate action in respect of. In the context of the information that Cst. Barr had and the complaint that he was dealing with, it is hard to comprehend the actions that he took in respect of this matter.

[99] The most amazing comment out of the testimony of Cst. Barr, and I have already referred to it, but it certainly bears another repeating, is that he indicated that Mr. Kolasch was very violent, resisting, and that he feared for his life because he was scared that Mr. Kolasch was going to get his weapon. Mr. Kolasch's arms were moving around. In the circumstances of this particular matter, it would hardly be a surprise that Mr. Kolasch's arms might well be moving around.

[100] On the video, you can see that his legs were moving around but they were moving up and down, not in a manner that was kicking anybody, but they were moving. They were moving in a way that would be consistent with someone who was in a physical confrontation with someone else.

[101] From all appearances of the two of them before this Court, Cst. Barr, being an individual who is much larger, would be far more capable of being engaged in a physical confrontation than Mr. Kolasch. It does not mean Mr. Kolasch might not want to get into

a physical confrontation, but as far as who would be capable, certainly Cst. Barr gives every appearance that he would be quite capable of looking after himself, as he did in this particular matter.

[102] However, in all of this, Cst. Barr testified that the only time he was violent with Mr. Kolasch was when he slugged him. Those are my words, that he slugged him. Cst. Barr described it as delivering a significant blow with a closed fist to Mr. Kolasch's face with such force that his hand immediately swelled and he had to go to the hospital immediately to see whether or not he had broken it.

[103] In the Supreme Court of Canada case of *R. v. Nasogaluak*, 2010 SCC 6, LeBel, J. stated at para. 32:

32 The Crown emphasized the issue of excessive force in its submissions to this Court, arguing strenuously that the police officers had not abused their authority or inflicted unnecessary injuries on Mr. Nasogaluak. But police officers do not have an unlimited power to inflict harm on a person in the course of their duties. While, at times, the police may have to resort to force in order to complete an arrest or prevent an offender from escaping police custody, the allowable degree of force to be used remains constrained by the principles of proportionality, necessity and reasonableness. Courts must guard against the illegitimate use of power by the police against members of our society, given its grave consequences.

33 The legal constraints on a police officer's use of force are deeply rooted in our common law tradition and are enshrined in the *Criminal Code*. This case engages s. 25 of the *Code*, the relevant portions of which...

Justice LeBel then sets out the provisions of section 25 of the *Code*. At para. 34 he continues:

34 Section 25(1) essentially provides that a police officer is justified in using force to effect a lawful arrest, provided that he or she acted on reasonable and probable grounds and used only as much force as was necessary in the circumstances. That is not the end of the matter. Section 25(3) also prohibits a police officer from using a greater degree of force, i.e. that which is intended or likely to cause death or grievous bodily harm, unless he or she believes that it is necessary to protect him- or herself, or another person under his or her protection, from death or grievous bodily harm. The officer's belief must be objectively reasonable. This means that the use of force under s. 25(3) is to be judged on a subjective-objective basis (*Chartier v. Greaves*, [2001] O.J. No. 634 (QL) (S.C.J.), at para. 59). If force of that degree is used to prevent a suspect from fleeing to avoid a lawful arrest, then it is justified under s. 25(4), subject to the limitations described above and to the requirement that the flight could not reasonably have been prevented in a less violent manner.

35 Police actions should not be judged against a standard of perfection. It must be remembered that the police engage in dangerous and demanding work and often have to react quickly to emergencies. Their actions should be judged in light of these exigent circumstances. As Anderson J.A. explained in *R. v. Bottrell* (1981), 60 C.C.C. (2d) 211 (B.C.C.A.):

In determining whether the amount of force used by the officer was necessary the jury must have regard to the circumstances as they existed at the time the force was used. They should have been directed that the appellant could not be expected to measure the force used with exactitude. [p. 218]

[104] As noted by the Supreme Court of Canada and as I have noted on many occasions over the course of my years of sitting in trial courts, the police have a very difficult job. They deal with people who are not happy to deal with them. They deal with individuals who suffer from mental health issues and who are not acting in the best manner as a result. They deal with individuals who are under the influence of alcohol

and/or drugs and who are not operating in a proper manner. They also deal with situations that have the potential to be very dangerous, very dynamic. They have a difficult job, no question.

[105] However, they also have an obligation to act in a reasonable manner. It is noted by the Supreme Court of Canada, and as referenced in the *Criminal Code*, they have to use reasonable force. They do not have the ability to simply impose their will upon somebody because they have the authority to do so. The force that they use in a situation has to be appropriate and measured to the circumstances that are presented to them.

[106] In this particular case, Mr. Kolasch was walking away from the Superstore after there had been an incident at the local McDonald's. It was the kind of incident that you would not want to have at any business. There is no doubt the manager at McDonald's was not happy to have the incident occur in the manner alleged to the officer.

[107] Mr. Kolasch was walking away from McDonald's. He had been in the Superstore for two minutes and was walking away from there. He was not running. He was walking. He turned around. He faced the police officer, when he finally heard the officer calling, to see what it was about. He was not wearing his glasses. That is confirmed in the video. There was little, if any, opportunity for the officer to speak to him, to talk to him, to tell him what it was all about, to explain to him why he might be under arrest before the officer immediately grabbed his arm and within three seconds has spun him around twice and thrown him up against the hood of a car in order to effect the arrest.

[108] I have watched the video closely. Mr. Kolasch's hands when he faced the officer were down by his side. They were not up in a threatening manner. There was no indication that they were in a fist, down at his side. He was simply standing on the sidewalk looking at the officer, who then came up, grabbed his arm, spun him around a couple of times, and threw him on the hood of a car. A struggle ensued and then they went to the ground, where the officer said he intended to put him, and then he alleged at that point in time, Mr. Kolasch was grabbing at his duty belt.

[109] In the circumstances of this particular matter, there is absolutely, positively, no justification whatsoever for how the officer dealt with Mr. Kolasch from the very beginning until the very end of this matter. He made no effort whatsoever to speak to Mr. Kolasch to explain to him that there was a problem, to explain to him that there would need to be something done about it, that he needed to go with him, or that he needed to identify himself, or anything of that sort. He just jumped him and it is extraordinarily clear from the video that is what he did.

[110] His purpose was to get control of Mr. Kolasch. He said that many, many, many times, and in order to do that, he used excessive force in respect of this matter. That force was not appropriate to the situation, to the danger or risk that Mr. Kolasch either could present or actually did present in this particular matter.

[111] In the circumstances, the officer's initial force that was used, and which simply was amplified and increased throughout the seconds that he dealt with Mr. Kolasch before he knocked him out, was excessive.

[112] Any struggling or attempts by Mr. Kolasch to move his hands and protect himself in respect of the matter were certainly understandable and justified in the particular circumstances. He had somebody that was basically attacking him. It turned out to be a police officer.

[113] The police officer certainly did not give Mr. Kolasch, in the circumstances that Mr. Kolasch was in, sufficient time to be able to appreciate that or explain to him why he might be under arrest, should it be determined to be a lawful arrest, which I have found it was not.

[114] In all of the circumstances of this particular matter, I am not satisfied that the Crown has established the offence, Count #1, and I enter an acquittal to the charge that Mr. Kolasch resisted Cst. Barr, a peace officer, engaged in the execution of his duty by struggling and grabbing weapons on Cst. Barr's duty belt.

[115] If there was any grabbing by Mr. Kolasch in the area of Cst. Barr's duty belt, from the evidence of Cst. Barr, it would be more the nature of flailing along trying to defend himself from this unexplained attack than it would be of any effort to get those weapons from Cst. Barr and doing him harm.

[116] The force in respect of this matter used by Cst. Barr, as I say, is clearly excessive to what had occurred. Anything that happened after his initial grabbing of the arm of Mr. Kolasch to effect the arrest certainly is not justified in any way, shape, or form in respect of this matter and I find that the accused, as I said, is not guilty of Count #1.

[117] I have already dismissed Count #2, since there was no evidence in respect of the matter.

[118] In the circumstances of this particular matter, Count #3, which was that Mr. Kolasch was on a probation order and failed without reasonable excuse to comply with the order to keep the peace and be of good behaviour, the evidence that is before me in respect of this is he was being attacked in a parking lot. At no point in time during the security guard's evidence did he see Mr. Kolasch do anything to the police officer in respect of this charge. That charge is dismissed, as well.

[119] There is a further Information before the Court, which is 16-00624A.

[120] There was another trial in respect to Mr. Kolasch for a charge that on January 11, 2017, he did:

... unlawfully being at large on his recognizance given to a justice without lawful excuse fail to attend Territorial Court in accordance therewith, contrary to Section 145(2)(a) of the *Criminal Code*.

[121] In respect of that matter, it was acknowledged that Mr. Kolasch did not attend court, as required on January 11, 2017. Mr. Kolasch testified in that trial. He was the only witness as it was admitted as a fact that he did not attend court on the date required. The only issue for the trial was whether he had failed or refused to do so without a lawful excuse. He indicated that he has never missed court. Certainly the criminal record that was filed in respect of the other Information would indicate there were no charges of that nature, I do not believe, as long as his record is. He indicated he was mixed up on the dates.

[122] Mr. Kolasch testified that, when he realized that he had missed court, it was the day after court, on Thursday and he called his probation officer. His probation officer told him to call the RCMP. Mr. Kolasch indicated he immediately called the RCMP and turned himself in. He went outside, cut some wood, made himself a sandwich, sat down and waited for the police to arrive, which they did. They arrested him and took him into custody, in respect of the matter.

[123] In many situations, the fact that a person does not pay sufficient attention to the date of their court appearance is not an excuse. It would appear here that there was not a wilful refusal to attend court. It is clear he did not attend court, but his reason for not doing so was he was mixed up on the dates.

[124] Mr. Kolasch indicated he was having some difficulties at that time. He was consuming alcohol for a period of time because of those difficulties, which then, of course, caused him more difficulties. He did not realize what day it was until it was the day after the day he was supposed to be in court. That was the reason why he was mixed up on his days. As soon as he was aware of the fact that he had missed court, he immediately made arrangements to have the matter dealt with.

[125] In the circumstances of this particular matter, it was not a wilful failure to attend court. It was clearly a mistake on his part.

[126] In the circumstances in which he made that mistake and given the efforts that he made to correct that mistake, I am not satisfied that a conviction in this matter would be appropriate, and I dismiss that charge against Mr. Kolasch as well.

ORR T.C.J.