

SiRT

SERIOUS INCIDENT
RESPONSE TEAM

Summary of Investigation

SiRT File # 2017-006

Referral from

Cape Breton Regional Police

February 4, 2017

Ronald J. MacDonald, QC

Director

August 16, 2017

Facts:

On February 3, 2017, three members of the Cape Breton Regional Police (CBRP) arrived at an address on Millview Drive in Sydney shortly before 11 p.m. in response to several noise complaints relating to a house party. Officer 1 and 2 arrived first, and at the request of the young female resident of the home they began to clear the home of people, mostly youths. They had an interaction with a 37-year-old male, the Affected Person (AP), that led to a struggle in the driveway. After AP was arrested and taken to police cells he complained of pain in his abdomen. He was taken to hospital and diagnosed with a broken rib.

As a result of the injury, the CBRP contacted SiRT the following day. SiRT assumed responsibility for the investigation into AP's arrest at that time. The investigation was completed on August 1, 2017. The conclusion of the file was delayed due to questions about the extent of AP's injuries.

The investigation included the following:

- 1) statements were taken from nine civilian witnesses, including AP;
- 2) the neighbourhood was canvassed for witnesses;
- 3) SiRT asked for other witnesses through the media;
- 4) a statement was taken from one witness police officer;
- 5) photographs of the scene were obtained;
- 6) copies of relevant radio communications were received and reviewed;
- 7) AP's medical records were obtained;
- 8) video recordings of AP's time in custody at CBRP cells were collected;
- 9) photos of the CBRP vehicle used to transport AP were received; and
- 10) copies of the CBRP file were received.

The Serious Incident Response Team Regulations made under the *Police Act* state that a subject officer is not required to provide SiRT with a statement, or notes or reports. In this case Officer 1 and Officer 2, both subject officers, provided copies of their file reports.

The investigation revealed that on February 3, 2017, several calls were placed to 911 to complain about a party on Millview Drive. It was very loud with a large number of young persons in attendance.

AP lived across the street at the time. In his statement to SiRT he said he went over to the party to see a friend of his. He acknowledged he did not realize how drunk he was at the time. When he arrived, the female resident was crying and asked him to help clear the home. He took off his coat, and shortly after that the police arrived. AP says he then tried to get down to the basement

to get his coat. This was AP's last memory, until he recalls being in pain in a cell at the CBRP headquarters.

The young female resident of the home told SiRT that when police arrived she asked them to help clear out the house as her party had gotten out of hand. She said they were successfully doing that when AP directed the word "cocksucker" at the police. As they attempted to remove AP from the home, the female saw AP take a swing at one of the officers and believed it landed. AP and Officers 1 and 2 moved out onto the driveway. She described Officer 1 as "attacking" AP, including kneeling AP over and over, which she observed from inside her home looking out the front window. She said Officer 2 just stood there, and did not see Officer 3 involved.

A woman who lives next door, and also knows AP, saw Officers 1 and 2 come out of the house with AP. They all lost their balance and AP fell to the ground. She heard the police yell at AP to "stop". She says she saw Officer 2, not Officer 1, knee AP in the side and the head, between 10 to 20 times. An officer threatened to use a "Taser", or Conducted Energy Weapon (CEW), and soon after that the police had AP under control. She also said there were about 150 – 200 people in the area at the time.

A male who lives nearby also observed the police exit the home with AP and heard AP use the word "cocksucker". He described AP as "black out drunk". He believed an officer threw AP into the "green bin". He said AP got up and grabbed an officer, and described the officers slamming AP against the side of a car. The male said the police were kneeling and punching AP, including in the head. He noted there were two officers at first but then two more officers joined in (although there were only three officers present.) The incident lasted about seven minutes.

A second adult male saw what he thought was two or three officers come out of the home with AP, yelling at him to "stop resisting". He said one officer was on top of AP, a second was grabbing his hands, and a third was punching the male in the face. AP was actively resisting and trying to get officers off of him. He said his view was partially obstructed by a vehicle. He felt the police were aggressive. He did not describe any officer kneeling AP while on the ground.

A female friend of the resident of the home saw police come up the stairs with AP. She said AP was angry. She heard AP yell an obscenity. Officer 1 was trying to restrain AP but he resisted. Police were repeatedly telling him to stop resisting. AP was down on the ground and was trying to get up with an officer on top of him. He would not let officers handcuff him. She recorded a nine second video on her phone, but was pulled back into the home by a friend before AP was brought under control. She described herself as "buzzed" from alcohol consumption.

The cell phone video only shows nine seconds of the police encounter with AP. It shows a significant struggle between AP and two officers. At one point AP moves and pushes an officer

with his body away from the encounter. At this point, AP is not under control. It does appear one officer throws a punch at AP as the officer is trying to rise to his feet.

A woman who lives nearby had called police twice that evening to complain about the noise of the party. She saw the police trying to arrest AP but he was resisting and trying to get away. She said one officer was trying to hold him, another was standing guard, and a third was kicking AP. She said police were “beating the crap out of a guy” to control him and was concerned that the police did not have the situation under control. She said the situation was scary given all the people around. She said there were a lot of kids and some were vocal against the police.

Another woman watched the interaction from the window of her nearby home. She described it as “crazy” given the number of kids and the cars pulling up. She described AP as fighting with the police, and saw his arms “flailing”. AP was handcuffed and placed into the car, but he was resisting throughout. She did not observe the police deliver any blows to AP.

A third woman who lived nearby watched the incident from the door of her house. She saw AP after he was handcuffed and the police were trying to place him into the police vehicle. He was pushing back against the police, and was intoxicated. She yelled at the male to stop resisting, and also yelled at the kids to leave the area. She saw the police counter AP’s efforts to resist but they did not do anything she was concerned about.

While in the police vehicle AP kicked at the car windows and caused damage to the vehicle. Video from the CBRP cell area demonstrates that on arrival at cells AP was very verbally aggressive and not cooperative.

When AP was taken to hospital he was accompanied by a jail guard. He was cooperative, and apologized several times for the way he behaved with the police.

Officer 3 described in his statement that he arrived on scene after Officers 1 and 2 were outside struggling with AP. At first, they were all standing but then because of slippery footing they went to the ground. He did not see any blows delivered by either Officer 1 or 2, and believes by the time he got to them AP had become more cooperative. However, AP did resist being put into the police vehicle. After AP was in the car Officer 3 could hear him kicking at the car.

In his reports, Officer 1 notes that he and Officer 2 responded to the complaints from Millview Street. When they arrived, there were about 20 people outside and over 100 inside, most in the basement. The young resident of the home asked for their help. The young people were compliant with the police demands to leave the house. As people were heading up the basement stairs to leave, AP was pushing people out of his way to get downstairs. He was yelling for his jacket. He walked past police, then came back upstairs, still pushing people out of his way,

including Officer 1. He failed to stop when directed by Officer 1. When Officer 1 tried to grab AP's arm, AP turned and swung his fist at Officer 1, missing. Officer 1 then grabbed at AP, and they went out the door fell to the ground off the steps due to the slippery conditions. Officer 1 and 2 then struggled with AP. He continued to swing at both officers. Throughout both officers were telling AP to stop resisting. Once Officer 2 pulled out the CEW and warned that it would be used, the Officers were able to handcuff AP behind his back. He was then placed in the police vehicle, where he then caused damage by kicking the rear windows.

Officer 2's reports describe the incident in a similar way, in particular that AP took a swing at Officer 1 near the door of the house. Officer 2 notes that at one point during the struggle he attempted to strike AP with his knee, but AP moved and he struck AP in the stomach area. Officer 2 also described warning to use his CEW.

An examination of police radio transmissions shows that Officers 1 and 2 were at the house about 10 minutes in total before AP was in the car. Taking into account the time speaking to the resident of the home, and clearing people from the home, it is likely their encounter with AP lasted only a few minutes.

While AP was in custody pictures were taken of his face, head, and front and back of his abdomen. Other than a superficial scratch on the left side of his torso, about 10 cm in length, there is no other sign of injury. When AP was interviewed by the SiRT primary investigator on February 8, 2017, there were no apparent injuries to his head or face.

AP was charged with assaulting a police officer, resisting arrest, and mischief for damaging the police vehicle. He failed to attend on his first court date. A warrant remains outstanding for his arrest.

Relevant Legal Issue:

The relevant legal issues in this matter are:

- 1) Did the Subject Officers have grounds to arrest AP?

A police officer, under the *Criminal Code*, has the power to arrest any person he or she finds committing an indictable offence, or where they have reasonable grounds to believe the person has committed an indictable offence.

- 2) Was the force used by the Subject Officers against AP was justified by law?

The law provides that the police are entitled to apply as much force as is necessary to arrest a person as long as it is not excessive. Police are also entitled to act in self-defence. If faced with a threat of force, they are lawfully entitled to defend themselves as long as their actions are reasonable.

Conclusions:

- 1) Did the Subject Officers have grounds to arrest AP?

Once Officers 1 and 2 were asked by the resident of a property to help clear her home, they were justified in asking people to leave. They were also required as peace officers to remain present and keep the peace. When they saw AP pushing people out of the way, they were right to approach him in an effort to prevent him from doing so. When AP tried to punch the officer, he committed an assault. At that point Officers 1 and 2 were justified in arresting AP.

- 2) Was the force used by the Subject Officers against AP justified by law?

There is no question that Officer 1 and 2 were entitled to use necessary force to both arrest AP and to protect themselves from his actions. The question is whether the degree of force used was excessive.

The evidence from the several witnesses is contradictory. Witnesses known to AP describe Officers 1 and 2 delivering several blows and knee strikes against AP. They also describe the officers as overly aggressive. Some of their evidence does not match other known evidence, in particular the suggestion that four officers were involved, the lack of corresponding injuries, and that the incident lasted seven minutes.

Other witnesses also described a significant struggle, but did not see the police strike as many blows as described, did not see knee strikes, or did not see any blows at all. One witness was concerned about the safety of the police. Another witness did not believe the police acted inappropriately at all.

The police themselves describe a significant struggle, and acknowledge delivering at least one knee strike. They justify their actions as necessary in order to arrest a very combative and difficult person.

A reality of eye witness observation is that it is expected that different witnesses will see different things. Even witnesses who see the same thing may interpret matters differently. There are many reasons for this, including the ability to see, the confusion of a situation, favouritism

for or against one of the parties, and other factors. The recollections of the persons may be honest and well intentioned, but may also be mistaken.

In this case, this incident occurred relatively quickly. There were many people milling about, the incident happened mostly on the ground, and it was late at night with poor lighting. There are many reasons to explain inconsistency between the witness statements.

In such situations evidence that is objective and independent is very important.

Here the objective and independent evidence includes the phone video, pictures and medical records of AP, physical observations made by the SiRT investigator, video recorded at CBRP cells, damage done to the police vehicle, and the timing inherent in the police radio transmissions. This evidence demonstrates the following:

- 1) Phone Video: While short, it shows a significant struggle. AP was clearly and strongly resisting attempts by police to control him.
- 2) Pictures and Medical records: AP had very little injury, other than the broken rib. He did not show any bruising as would be expected from several knee strikes and blows to the head and abdomen. There was no bruise associated with the broken rib.
- 3) SiRT Investigator: There were no injuries noted to the head or face area of AP when the statement was taken from AP five days later.
- 4) CBRP Cell Video: This shows AP being verbally aggressive upon his arrival at CBRP cells.
- 5) Damage to Police Vehicle: AP damaged the car after he was placed inside by kicking at the windows.
- 6) Radio Transmissions: The timing of the radio calls demonstrates that the encounter with AP could not have lasted for seven minutes as suggested by one witness.

In addition, it is clear from all witness accounts that AP began the encounter with police by trying to strike an officer, without cause. He continued to resist and struggle with police from start to finish. His lawful obligation was to comply with their demands.

Lastly, we know that AP was highly intoxicated, and does not recall any of the struggle. He does not dispute the police officer's position. While at the hospital, he was apologetic toward police.

Certainly, the comments by some witnesses are concerning as they suggest excessive and unnecessary force. However, those accounts are contradicted by other accounts that do not support excessive force. When deciding which evidence should be relied upon, preference should be given to witness evidence that is consistent with the objective, independent evidence. In this

case, the lack of bruising and injury other than the broken rib is inconsistent with the accounts that suggest excessive force.

On balance, the evidence portrays a situation where an admittedly highly intoxicated male was acting aggressively toward others. When the officers intervened, he attempted to strike one of them. He then fought with police as they attempted to arrest him. What force they did use was reasonable as it was necessary to overcome his resistance to the officer's actions. AP was aggressive from the beginning to the end of the arrest, and beyond. The evidence does not show the force used by the officers was excessive, despite the broken rib. Indeed, it is unclear how the broken rib was caused. It may have occurred when AP fell on the ground and officers fell on top of him. The absence of an associated bruise that would suggest a sharp strike by a knee or fist suggests the fall was more likely than not the cause of the injury. What is clear is that had AP been cooperative, Officer 1 and 2 would not have needed to use much if any force during the arrest.

The sections of the *Police Act* relevant to SiRT state that the Director of SiRT has the sole authority to determine whether charges should be laid in any matter investigated by SiRT. In this case, there are insufficient grounds to consider any charges against Officer 1 or Officer 2.