Case Name: **R. v.**

Between Her Majesty the Queen, and

[2011] O.J. No. 6681

Ontario Court of Justice Toronto, Ontario

D.I. Oleskiw J.

Heard: October 24, 2011. Oral judgment: October 24, 2011.

(49 paras.)

Counsel:

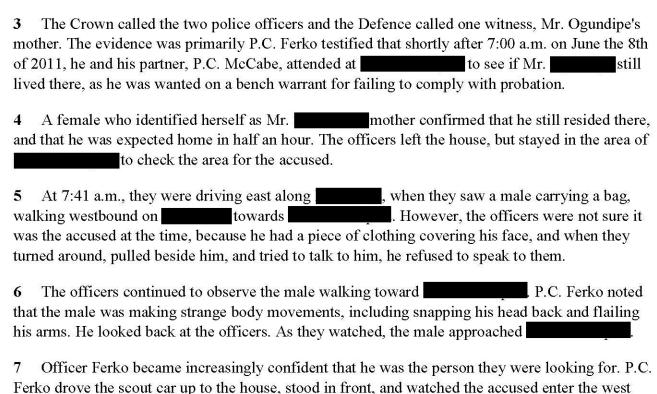
D. Scott, Ms., Counsel for the Crown.

A. Stastny, Esq., Counsel for the accused.

REASONS FOR JUDGMENT

1	D.I. OLESKIW J. (orally): Mr.	stands charged that on June the 8th of 2011 he
ass	aulted Christopher Ferko, a peace officer en	gaged in the execution of his duty, and that he
utte	ered a threat to cause death to both Officers	Ferko and McCabe. The charges arise out of ar
inc	ident in which the police attended at Mr.	home on the morning of June the 8th
bec	ause he was wanted on a bench warrant for	failing to comply with probation.

2	The main issue in this trial is whether the police officers had lawful authority to enter Mr.
	home to effect an arrest. It is common ground that there was a warrant for Mr.
	arrest, but no warrant authorizing entry into his dwelling house to effect that purpose

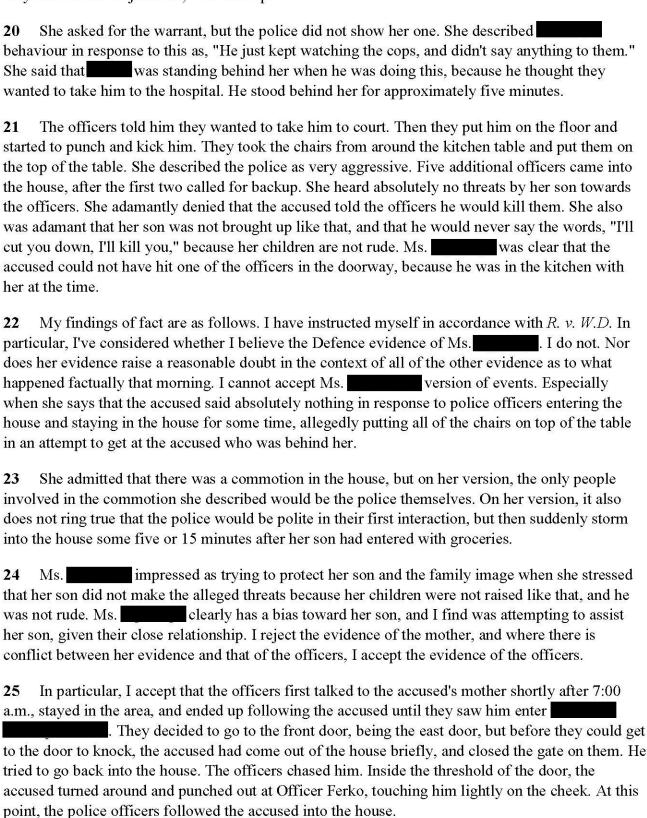


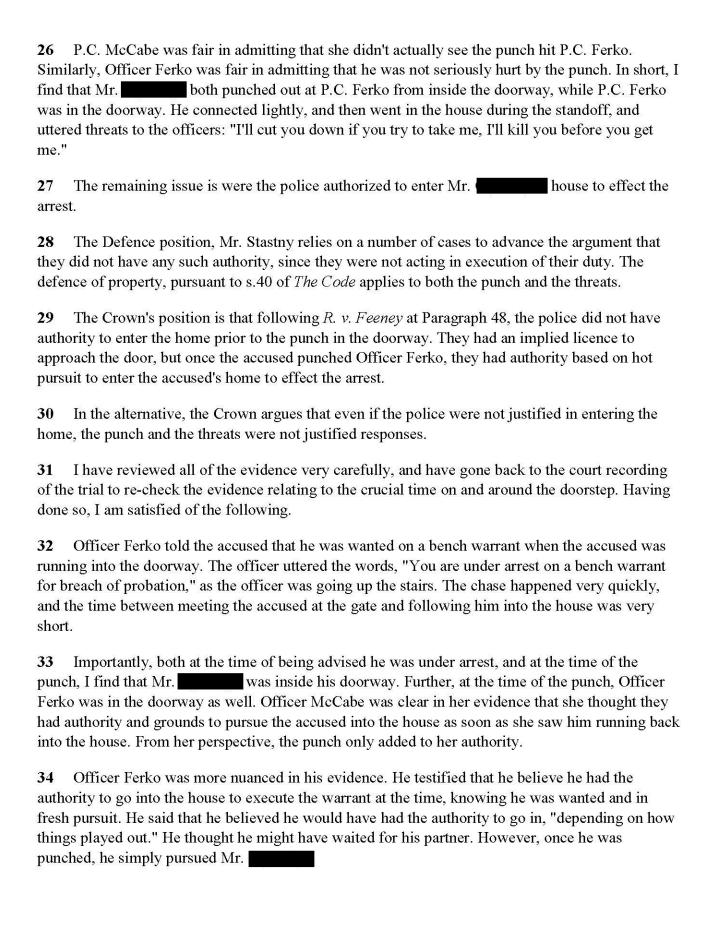
- door of the house. The officers described this west door as the back door, whereas the east door was the front door at which the officers has knocked and talked to the mother earlier.
- 8 Ferko travelled on foot to the east side of the building, and as he was doing this, he saw the accused on the east side of the building. This time, his face was not covered, and Officer Ferko was now confident that this was the accused wanted on the bench warrant.
- 9 P.C. Ferko testified that it was a matter of five seconds between the time the accused entered the west door of the house to the time he came back out the east door. As P.C. Ferko came around the corner of the house, the accused was coming up to the gate towards him. The fencing was flush with the side of the house. The accused had opened the gate as if he was leaving the premises. He was still carrying the grocery bag with him.
- 10 At this point, P.C. Ferko told him to stop. In response, the accused started to walk, and then run, back into the house through the east door. As the accused was going a few steps into the doorway, P.C. Ferko told him he was under arrest on a bench warrant.
- 11 When the accused was inside his doorway, he turned around, faced P.C. Ferko, and punched out at him with his left hand. Ferko was in the doorway when the accused's punch landed on his cheek. At the time, P.C. Ferko was standing in the doorway. The accused then continued into the kitchen of the house. Ferko testified that this chase happened very quickly. P.C. Ferko followed the accused into the house, and into the kitchen, where he told him that he was now under arrest for assaulting police.

- 12 In the house, the accused stood behind his mother, and held her. Officer Ferko told him a number of times that he was under arrest, and repeatedly explained the warrant. The accused was irate, and got increasingly agitated. He repeatedly asked why they were arresting him, and he said a number of times, "I'll cut you down if you try to take me. I'll kill you before you get me."
- Other family members came on the scene, and the accused became increasingly upset. The accused's brother was encouraging him to relax and go with the police. Meanwhile, the officers called for assistance. The accused told his brother to lock the doors, presumably to prevent other officers from entering. Officer Ferko unlocked the doors, however, when he heard other officers outside.
- 14 After backup arrived, Sergeant Bradbury was able to effect an arrest. A violent struggle occurred when the accused refused to be cuffed. Several officers were required to get the accused cuffed.
- P.C. McCabe testified to essentially the same series of events as Officer Ferko. As the events unfolded at the gate and in front of the house, she was behind P.C. Ferko. She fairly noted that she was downstairs at the front of the door, and only saw the accused's fist punch out. She did not see P.C. Ferko being hit. She only saw his head move back. She admitted that at the point when Mr. Ogundipe slammed the gate and ran toward the front door, she had made the decision to pursue him into the house.
- The Defence called that on the morning of June 8, 2011, police officers came to her door and said they were looking for her son,

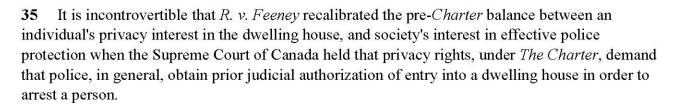
 She told them he was not at home, and they said they would be back. She said that the police did not tell her why they were looking for her son. She said came home only once, through the back door, with two large bottles of juice in his hands, while she was in the kitchen. He said, "The cops are out there. Are they looking for me to put me in hospital?" She said, "No," or "I don't know, and they said they have a warrant, they're looking for you."
- 17 She said that she was in clear view of both the front and back door from her position in the kitchen. While was still in the kitchen pouring some juice, the two police officers turned the doorknob and entered the home through the front door. They pushed the door hard, and were very rude. They said, "We are here for where the home through the front door."
- When asked in-Chief, she estimated that the police entered the house approximately 15 minutes after came in. When asked the same question in cross-examination, she said five minutes had elapsed. In any event, she was clear that did not leave the house during that time.
- 19 In-Chief, she said there was a commotion when the police entered, with other family members coming down to the kitchen. In cross, she said that when backup officers came, there was a struggle, and that she said, "My son, my son." However, while her adult daughter and son had come down,

they looked on and just said, "Go to the police."





Analysis:



36	Although the officers testified that they were going to	to check to see if
Mr.	still lived there, and that most arrests of this nature occur v	vithout incident, on all of
the e	evidence, I find that the police were going to the accused's last known	place of residence to
exec	tute the bench warrant. The warrant did not include authorization to e	nter the dwelling.

- 37 Here, the Crown did not claim that the police were authorized to enter the home because of exigent circumstances. Nor did Ms. Peoples argue that hot pursuit, absent the punch, would justify the entry. The Court did raise and consider that issue, and I find that, much like the very close factual situation in *R. v. Meier*, 2009 SKPC 30, the doctrine of hot pursuit does not apply to the arrest on the warrant. In other words, Ms. People was correct in her concession that the analysis in *R. v. Feeney* prohibited the police from entering the house before the punch.
- 38 On the particular facts of this case, however, the punch did not give the police hot pursuit authority to enter the house, because I find that the punch itself did not constitute a criminal assault by the accused. In my view, it is critical that the punch occurred while the accused was inside his house, and Officer Ferko was in the doorway. I also find that the accused was inside his house when P.C. Ferko told him he was under arrest. It is notable that Officer Ferko did not lay a hand on the accused in relation to that arrest. Further, the officers did not have proper grounds to arrest the accused until the accused went into his house.
- 39 I find that by chasing the accused as they did, right to the door, after Mr. Ogundipe had emerged from the house briefly, the officers at least objectively exhibited an intention to enter the dwelling house prior to the punch.
- 40 In these circumstances, I accept that s.40 provides a defence. Mr. was in peaceful possession of his dwelling house, and inside the doorway. Officer Ferko was a trespasser in the doorway. The force used, that is a light punch, in an attempt to prevent the police from entering, was justified in the circumstances, as were the threats once the police officer was in the house.
- 41 The Defence arises on the facts, and has an air of reality. The Crown thus had an onus to prove beyond a reasonable doubt why the accused did not act in defence of his dwelling, and the Crown has not met that burden.
- 42 The facts scenario in this case raises difficult issues for police and the Court. I am very sensitive to the fact that the police must make difficult choices quickly, while the Court has much

more time to grapple with those same issues, and even call for further submissions on the point, as I did in this case.

- 43 In this case, the officers could have stopped and waited at the front door and inquired whether the accused would voluntarily come out. If not, they could have had one or more officers stand watch and go and apply for a warrant authorizing entry. Or, they could have come back another day to execute the warrant. Instead, they chose to enter the accused's home, and as a result, caused an escalation that could have been avoided. The warrant was for a relatively minor charge.
- In the circumstances of this case, I am satisfied that the police did not have authority to enter Mr. dwelling house to effect an arrest without a warrant authorizing such entry.
- 45 After consideration of this matter, I find the accused not guilty of Assault, and not guilty of Threatening as charged.
- 46 MR. STASTNY: Thank you very much.
- 47 THE COURT: Thank you.
- 48 MS. SCOTT: Thank you.
- 49 THE COURT: You are free to go, sir. Thank you, Mr. Stastny, well done.