

*Case Name:*

**R. v.** [REDACTED]

**Between  
Her Majesty the Queen, and**

[REDACTED]  
[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.

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**REASONS FOR JUDGMENT**

**1** D.I. OLESKIW J. (orally):-- Mr. [REDACTED] stands charged that on June the 8th of 2011 he assaulted Christopher Ferko, a peace officer engaged in the execution of his duty, and that he uttered a threat to cause death to both Officers Ferko and McCabe. The charges arise out of an incident in which the police attended at Mr. [REDACTED] home on the morning of June the 8th because 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. [REDACTED] home to effect an arrest. It is common ground that there was a warrant for Mr. [REDACTED] arrest, but no warrant authorizing entry into his dwelling house to effect that purpose.

**3** The Crown called the two police officers and the Defence called one witness, Mr. Ogundipe's mother. The evidence was primarily P.C. Ferko testified that shortly after 7:00 a.m. on June the 8th of 2011, he and his partner, P.C. McCabe, attended at [REDACTED] to see if Mr. [REDACTED] still lived there, as he was wanted on a bench warrant for failing to comply with probation.

**4** A female who identified herself as Mr. [REDACTED] mother confirmed that he still resided there, and that he was expected home in half an hour. The officers left the house, but stayed in the area of [REDACTED] to check the area for the accused.

**5** At 7:41 a.m., they were driving east along [REDACTED], when they saw a male carrying a bag, walking westbound on [REDACTED] towards [REDACTED]. However, the officers were not sure it was the accused at the time, because he had a piece of clothing covering his face, and when they turned around, pulled beside him, and tried to talk to him, he refused to speak to them.

**6** The officers continued to observe the male walking toward [REDACTED]. P.C. Ferko noted that the male was making strange body movements, including snapping his head back and flailing his arms. He looked back at the officers. As they watched, the male approached [REDACTED].

**7** Officer Ferko became increasingly confident that he was the person they were looking for. P.C. Ferko drove the scout car up to the house, stood in front, and watched the accused enter the west 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."

**13** 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.

**15** 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.

**16** The Defence called ██████████, the accused's mother. Ms. ██████████ testified 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 ██████████. We have a warrant."

**18** 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."

**20** She asked for the warrant, but the police did not show her one. She described [REDACTED] behaviour in response to this as, "He just kept watching the cops, and didn't say anything to them." She said that [REDACTED] was standing behind her when he was doing this, because he thought they wanted to take him to the hospital. He stood behind her for approximately five minutes.

**21** The officers told him they wanted to take him to court. Then they put him on the floor and started to punch and kick him. They took the chairs from around the kitchen table and put them on the top of the table. She described the police as very aggressive. Five additional officers came into the house, after the first two called for backup. She heard absolutely no threats by her son towards the officers. She adamantly denied that the accused told the officers he would kill them. She also was adamant that her son was not brought up like that, and that he would never say the words, "I'll cut you down, I'll kill you," because her children are not rude. Ms. [REDACTED] was clear that the accused could not have hit one of the officers in the doorway, because he was in the kitchen with her at the time.

**22** My findings of fact are as follows. I have instructed myself in accordance with *R. v. W.D.* In particular, I've considered whether I believe the Defence evidence of Ms. [REDACTED]. I do not. Nor does her evidence raise a reasonable doubt in the context of all of the other evidence as to what happened factually that morning. I cannot accept Ms. [REDACTED] version of events. Especially when she says that the accused said absolutely nothing in response to police officers entering the house and staying in the house for some time, allegedly putting all of the chairs on top of the table in an attempt to get at the accused who was behind her.

**23** She admitted that there was a commotion in the house, but on her version, the only people involved in the commotion she described would be the police themselves. On her version, it also does not ring true that the police would be polite in their first interaction, but then suddenly storm into the house some five or 15 minutes after her son had entered with groceries.

**24** Ms. [REDACTED] impressed as trying to protect her son and the family image when she stressed that her son did not make the alleged threats because her children were not raised like that, and he was not rude. Ms. [REDACTED] clearly has a bias toward her son, and I find was attempting to assist her son, given their close relationship. I reject the evidence of the mother, and where there is conflict between her evidence and that of the officers, I accept the evidence of the officers.

**25** In particular, I accept that the officers first talked to the accused's mother shortly after 7:00 a.m., stayed in the area, and ended up following the accused until they saw him enter [REDACTED]. They decided to go to the front door, being the east door, but before they could get to the door to knock, the accused had come out of the house briefly, and closed the gate on them. He tried to go back into the house. The officers chased him. Inside the threshold of the door, the accused turned around and punched out at Officer Ferko, touching him lightly on the cheek. At this point, the police officers followed the accused into the house.

**26** P.C. McCabe was fair in admitting that she didn't actually see the punch hit P.C. Ferko. Similarly, Officer Ferko was fair in admitting that he was not seriously hurt by the punch. In short, I find that Mr. [REDACTED] both punched out at P.C. Ferko from inside the doorway, while P.C. Ferko was in the doorway. He connected lightly, and then went in the house during the standoff, and uttered threats to the officers: "I'll cut you down if you try to take me, I'll kill you before you get me."

**27** The remaining issue is were the police authorized to enter Mr. [REDACTED] house to effect the arrest.

**28** The Defence position, Mr. Stastny relies on a number of cases to advance the argument that they did not have any such authority, since they were not acting in execution of their duty. The defence of property, pursuant to s.40 of *The Code* applies to both the punch and the threats.

**29** The Crown's position is that following *R. v. Feeney* at Paragraph 48, the police did not have authority to enter the home prior to the punch in the doorway. They had an implied licence to approach the door, but once the accused punched Officer Ferko, they had authority based on hot pursuit to enter the accused's home to effect the arrest.

**30** In the alternative, the Crown argues that even if the police were not justified in entering the home, the punch and the threats were not justified responses.

**31** I have reviewed all of the evidence very carefully, and have gone back to the court recording of the trial to re-check the evidence relating to the crucial time on and around the doorstep. Having done so, I am satisfied of the following.

**32** Officer Ferko told the accused that he was wanted on a bench warrant when the accused was running into the doorway. The officer uttered the words, "You are under arrest on a bench warrant for breach of probation," as the officer was going up the stairs. The chase happened very quickly, and the time between meeting the accused at the gate and following him into the house was very short.

**33** Importantly, both at the time of being advised he was under arrest, and at the time of the punch, I find that Mr. [REDACTED] was inside his doorway. Further, at the time of the punch, Officer Ferko was in the doorway as well. Officer McCabe was clear in her evidence that she thought they had authority and grounds to pursue the accused into the house as soon as she saw him running back into the house. From her perspective, the punch only added to her authority.

**34** Officer Ferko was more nuanced in his evidence. He testified that he believe he had the authority to go into the house to execute the warrant at the time, knowing he was wanted and in fresh pursuit. He said that he believed he would have had the authority to go in, "depending on how things played out." He thought he might have waited for his partner. However, once he was punched, he simply pursued Mr. [REDACTED]

**Analysis:**

**35** It is incontrovertible that *R. v. Feeney* recalibrated the pre-*Charter* balance between an individual's privacy interest in the dwelling house, and society's interest in effective police protection when the Supreme Court of Canada held that privacy rights, under *The Charter*, demand that police, in general, obtain prior judicial authorization of entry into a dwelling house in order to arrest a person.

**36** Although the officers testified that they were going to [REDACTED] to check to see if Mr. [REDACTED] still lived there, and that most arrests of this nature occur without incident, on all of the evidence, I find that the police were going to the accused's last known place of residence to execute the bench warrant. The warrant did not include authorization to enter 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. Peoples 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. [REDACTED] 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.

**44** In the circumstances of this case, I am satisfied that the police did not have authority to enter Mr. [REDACTED] 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.