



Police use of force against Mark Smillie during arrest

INDEPENDENT POLICE CONDUCT AUTHORITY

INTRODUCTION

1. On 25 December 2011 Mark Smillie was arrested by Police at his home in Whakatane. During the arrest, the legitimacy of which Mr Smillie had challenged, the arresting officer used OC spray, baton strikes and a Taser to gain Mr Smillie's compliance. Mr Smillie suffered bruising and swelling as a result of the incident.
2. On 28 December 2011 Mr Smillie complained to the Authority about the arresting officer's conduct. At the time the Authority declined to take further action because the incident was the subject of court proceedings, but invited Mr Smillie to renew his complaint following the conclusion of the court proceedings if there were any matters that could not be addressed by the Court. On 30 July 2012, following the court proceedings, Mr Smillie renewed his complaint.
3. The Authority conducted an independent investigation. This report sets out the results of that investigation and the Authority's findings.

BACKGROUND

Summary of events

4. At about 1.30pm on Sunday 25 December 2011, Officer A was driving an unmarked Patrol car in Whakatane. After entering Arawa Road, Officer A saw a Holden Vectra turn right from the Churchill Street intersection toward his Police vehicle. Officer A said that at the time he thought Mr Smillie's vehicle was travelling *"too fast"*. He activated his vehicle's lights and sirens to signal to the driver to pull over.
5. Mark Smillie, the driver of the Holden, failed to stop and turned left from Arawa Road into Cutler Crescent. Officer A said that Mr Smillie then accelerated to about 65kph and swerved across the centre line before turning left onto his property at high speed.
6. Officer A pulled into the driveway, got out of his patrol car and ran in front of Mr Smillie, who was trying to enter his house. In a later Police interview, Officer A said that Mr

Smillie was “*in an unusual heightened state of anger*” and was swearing with his fists clenched as he tried to push past Officer A into the house. Officer A told Mr Smillie that he was under arrest for “*failing to stop*” and required him to take a breath screening test. Officer A said that Mr Smillie would not respond to his attempts to communicate and continued to swear, swing his arms around while attempting to shove his way into the house.

7. Mr Smillie has disputed Officer A’s account of this stage of the incident. In a Police interview, Mr Smillie said that after Officer A stated he was required to take a breath test, he told Officer A that he wanted to get his painkillers. When Officer A stood in front of him, Mr Smillie queried Officer A’s authority to prevent him entering the house and tried to push past. Mr Smillie said that he resisted Officer A’s attempts to restrain his wrists and apply handcuffs by pulling his hands away. Mr Smillie denied throwing any punches or striking Officer A.

Use of OC Spray

8. Mr Smillie continued struggling with Officer A, who warned Mr Smillie that he would use his OC spray if Mr Smillie kept failing to comply. When Officer A took his handcuffs out of his implement belt Mr Smillie stepped away from him toward the fence bordering his driveway. Officer A stated that Mr Smillie was swearing, punching and shoving him as he resisted arrest. In a Police interview Mr Smillie said that he only resisted Officer A by stepping away towards the fence.
9. Officer A said that he then tried to restrain Mr Smillie against the fence, but that Mr Smillie swung his elbow behind him, striking Officer A in the jaw. In an interview with Police, Mr Smillie accepted that he pulled away from Officer A and held onto the fence. However, he denied striking Officer A at that time.
10. Officer A then drew his OC spray and used it against Mr Smillie. Officer A said he held Mr Smillie against the fence and waited for the OC spray to take effect, but Mr Smillie continued to lash out. Officer A then called for backup on his portable radio.

Use of a Baton

11. Officer A said that when Mr Smillie failed to calm down he drew his baton in order to protect himself from Mr Smillie’s “*swinging punches.*” Officer A recorded in his Tactical Options Report (TOR) that he warned Mr Smillie that he would be struck if he continued to resist arrest. In Police interview Officer A said that Mr Smillie ignored these warnings and continued to lash out.
12. Officer A then struck Mr Smillie with the baton. As Officer A pushed Mr Smillie against the fence to try and apply handcuffs, Mr Smillie fell to the ground.

13. The number of times that Officer A struck Mr Smillie with the baton is disputed. In his Police statement following the incident, Officer A said that he struck Mr Smillie once in the upper right arm. Officer A reaffirmed this in interview with the Authority, but conceded that he could have struck Mr Smillie a second time. He also stated that neither blow was aimed for Mr Smillie's head. He denied that Mr Smillie lost consciousness.
14. In a Police interview following the incident Mr Smillie recalled being struck several times and at least once in the elbow and abdomen. He also stated that when he tried to deflect the blows and push Officer A away, Officer A stated, "*that's assault.*"
15. In a January 2013 Police interview, Mr Smillie said that he was hit twice on the torso and deflected another blow. He could not recall being struck in the head.
16. In a March 2013 interview with the Authority, Mr Smillie could not recall further detail regarding the number of times he was struck with the baton. He said that he assumed that Officer A had struck his temples based on bruising to his head and information from his neighbour.
17. Witness A, Mr Smillie's next-door neighbour, stated in a Police interview that he had heard "*two sickly thuds*" from his property. Witness A said that after looking over the fence he saw Officer A standing over Mr Smillie with his baton raised. When interviewed by the Authority, Witness A reaffirmed hearing the two baton strikes.
18. A second neighbour, Witness B, stated in interview with the Authority that she saw "*two decent hits actually get Mark*", one each to his head and abdomen. A further witness stated that Mr Smillie was struck multiple times while lying on the ground. However, this witness could not see this part of the incident and based their account largely on what they heard.

Use of a Taser

19. Officer A retrieved a Taser from his Police vehicle after Mr Smillie fell to the ground. In his Tactical Options Report (TOR) completed following the incident, Officer A recorded that he warned Mr Smillie that he would be Tasered if he continued to refuse arrest. Officer A told the Authority's investigator that Mr Smillie disregarded these warnings, continued yelling and swung his right fist out at Officer A.
20. Officer A stood up and stepped away before deploying the Taser at Mr Smillie. Officer A said in his Police statement following the incident that he did so because he could not safely handcuff Mr Smillie, who was aggressive and had "*continued to thrash about*" on the ground. In an interview with the Authority, Officer A said that had thought "*I'm gonna get whacked again*" because Mr Smillie had continued "*flicking out at me*".

21. In a January 2013 Police interview, Mr Smillie said that he was lying on the ground semi-conscious, and thought his left hand was under his body and his right above his head, before Officer A deployed the Taser the first time.
22. Officer A discharged the Taser for thirteen seconds during its first use. A Taser is programmed to discharge for five seconds unless the trigger remains depressed. Officer A told the Authority's investigator that he discharged the Taser for thirteen seconds because officers are trained to deploy the Taser until they are able to handcuff the offender, and Mr Smillie had remained non-compliant and *"was still thrashing around."*
23. After Officer A finished discharging the Taser, he placed it on the ground and tried handcuffing Mr Smillie before picking the Taser up and discharging it a second time. In his TOR, Officer A recorded that he discharged the Taser a second time because Mr Smillie refused a second warning and order to comply. In interview with the Authority, Officer A reaffirmed his inability to restrain Mr Smillie.
24. In Police interview, Witness A stated that when Mr Smillie was on the ground Officer A had drawn his Taser, warned Mr Smillie against failing to comply and then discharged the Taser twice. Witness A said that Mr Smillie was screaming at Officer A to stop the Taser and that he *"didn't see anything where I thought [Officer A] was in any danger."*
25. Witness B stated in Police interview that during both uses of the Taser Mr Smillie was lying on the ground, asking *"what have I done?"* Witness B said that Mr Smillie did not appear to be resisting Officer A while on the ground. In interview with the Authority, Witness B confirmed that this account was based on what she saw through gaps in the fence paling.

Taser Cam Footage

26. During its investigation the Authority has analysed video footage of the incident provided by the camera in Officer A's Taser (Taser Cam footage). The Taser Cam began recording when Officer A activated the Taser. When the footage begins Mr Smillie is lying on the ground. When Officer A states that Mr Smillie hit him, Mr Smillie replies, *"No I didn't, you hit me fucken' heaps of times."*
27. Officer A then discharges the Taser for thirteen seconds, stating almost simultaneously, *"Get on the ground buddy, no I fucking didn't."* As the Taser is discharged Mr Smillie can be heard clearly saying *"help, help"*, to which Officer A responds, *"I'm sorry mate, you bloody hit me."* Officer A can then be heard instructing Mr Smillie to put his hands out, who stated that he could not.
28. After Officer A stops the Taser Mr Smillie repeats *"I didn't hit you, you hit me."* Officer A then places the Taser on the ground and appears to try to handcuff Mr Smillie, before picking the Taser up and discharging it again. At this point the siren of an approaching

Police unit can be heard in the background. After Officer A releases the Taser Mr Smillie screams and then yells “*stop ... don’t fucking Taser me.*” Officer A then handcuffs Mr Smillie before returning to his Police vehicle to use the radio.

29. The Taser Cam footage shows that Mr Smillie was kneeling and then lying on the ground immediately before and during Officer A’s use of the Taser. Though Mr Smillie resisted Officer A, he was not aggressive or assaultive toward Officer A.
30. Officer A then returned to his patrol car and advised NorthComms of his location and that he had been assaulted. Other Police officers arrived at the scene shortly after Officer A made this communication. Mr Smillie was then taken to Whakatane Police station.

Mark Smillie

31. Following the incident Mr Smillie was charged with assaulting Police, possession of an offensive weapon, refusing to accompany and failing to stop.
32. On 19 July 2012, at the Whakatane District Court, Police withdrew the charges of assault and possession of an offensive weapon and Mr Smillie pleaded guilty to the charges of refusing to accompany and failing to stop.
33. In interview with the Authority in March 2013, Mr Smillie advised that his recall of the incident was incomplete, due in part to a brain injury suffered in a separate incident in February 2012.

Officer A

34. At the time of the incident Officer A had served about 20 years in the Police, including ten years at the rank of Sergeant.
35. Officer A recorded in his TOR that he had bruising to his jaw, a loose tooth and scabbing inside his mouth as a result of Mr Smillie’s alleged assault.

Police investigation and subsequent action

36. On 1 November 2013 the Police investigation into Officer A’s conduct during the incident concluded that any concerns regarding Officer A’s use of the Taser could be addressed through training.
37. In December 2013, following the conclusion of the Authority’s investigation, the Authority expressed concerns to Police regarding Officer A’s use of the Taser and asked Police to reconsider the matter.
38. On 20 December 2013, Police informed the Authority that the decision would not be changed. The Authority has also been informed that since this incident Officer A has been

recertified in the use of the Taser. This year Officer A also received extra individual Taser training.

LAWS ON THE USE OF FORCE

39. Section 39 of the Crimes Act 1961 provides for law enforcement officers to use reasonable force in the execution of their duties such as arrests and enforcement of warrants. Specifically, it provides that officers may use *“such force as may be necessary”* to overcome any force used in resisting the law enforcement process unless the process *“can be carried out by reasonable means in a less violent manner”*.
40. Section 48 of the Crimes Act 1961 states: *“Everyone is justified in using, in defence of himself or herself or another, such force as, in the circumstances as he or she believes them to be, it is reasonable to use.”*
41. Section 62 of the Crimes Act 1961 renders officers criminally responsible for any excessive use of force.

THE AUTHORITY’S FINDINGS

Was Officer A justified in entering the property to arrest Mr Smillie?

42. The Land Transport Act 1998 empowers an officer to arrest any person the officer has good cause to suspect has failed to comply with a signal to stop their vehicle. Officers may enter private property when in fresh pursuit of any person they reasonably suspect has failed to comply with a direction to stop and is under the influence of alcohol.
43. Officer A followed Mr Smillie onto his property when Mr Smillie failed to comply with Officer A’s signal to stop his vehicle. Officer A decided to arrest Mr Smillie when he refused to comply with Officer A’s directions to undergo a breath alcohol test and continued trying to enter his home.

FINDING

Officer A was lawfully entitled to enter private property in order to arrest Mr Smillie.

Was Officer A’s use of OC Spray justified?

44. Sections 39 and 48 of the Crimes Act 1961 provide legal justification for Police to use reasonable force to arrest an offender and in defence of themselves or another. Police policy states that an officer may only draw and deploy OC spray against a person that is actively resisting an officer (defined as physical actions such as pulling, pushing or running

away – that is, “*more than verbal defiance*”), and where the situation may not be resolved by less forceful means. The officer must also verbally warn an offender that the OC spray will be used.

45. In Police interview, Mr Smillie accepted that he resisted Officer A’s attempts to handcuff him and instead held onto the fence. The Authority accepts that Mr Smillie’s behaviour amounted to active resistance by Mr Smillie. Officer A was accordingly entitled to use the OC spray against Mr Smillie in order to effect his arrest. As required by Police policy, Officer A warned Mr Smillie that he would be sprayed if he continued to resist.

FINDING

Officer A was justified in using OC spray on Mr Smillie when he actively resisted arrest.

Was Officer A’s use of his Police baton justified?

46. Sections 39 and 48 of the Crimes Act 1961 authorised Officer A to use reasonable force to arrest Mr Smillie, and to use a degree of force in self-defence that was reasonable to avert the threat Officer A believed Mr Smillie presented. Police policy states that batons are provided primarily as a defensive implement and should generally “*be used on the bony parts of the body such as the shoulder, elbow, back of hand, knee, shin or ankle.*”
47. Officer A said that Mr Smillie assaulted him by elbowing him in the jaw and repeatedly throwing punches when the two were near the fence. In Police interview, Officer A said that he then used his baton in self-defence, striking Mr Smillie once in the upper right arm. He said that there may have been a second blow but neither was aimed at or hit Mr Smillie’s head.
48. Mr Smillie has denied assaulting Officer A. Witnesses did not see this aspect of the incident.
49. In Police interview, Mr Smillie recalled being struck a number of times in the torso and elbow. He later told the Authority that he assumed he had been hit around his temples. This was based on his neighbour’s account of the incident and bruises on his head.
50. There is insufficient evidence for the Authority to conclusively determine whether or not Officer A was struck by Mr Smillie prior to his using the baton. Conversely, and based on the accounts provided by Mr Smillie, Officer A and Witnesses A and B, the Authority considers that, on the balance of probabilities, Officer A struck Mr Smillie twice with the baton. However, the Authority cannot determine whether any of the baton strikes were to the head.
51. Due to the conflicts in evidence regarding both whether Mr Smillie struck Officer A with his elbow, and whether Officer A struck Mr Smillie in the head with the baton, the

Authority is unable to determine whether Officer A used a degree of force in self-defence that was a proportionate and justified response to the alleged conduct of Mr Smillie.

FINDING

The Authority is satisfied on the balance of probabilities that Officer A struck Mr Smillie twice with the baton. However, due to the conflict in evidence regarding whether or not Mr Smillie first struck Officer A, the Authority is unable to determine whether Officer A's use of force in this regard was in self-defence and therefore justified.

Was Officer A's first use of the Taser justified?

52. As discussed above, sections 39 and 48 of the Crimes Act 1961 authorised Officer A to use reasonable force necessary to effect Mr Smillie's arrest and in defence of himself. Police policy states that a Taser may only be used to arrest an offender if the officer believes the offender poses a risk of physical injury and the arrest cannot be effected less forcefully. A Taser must only be used on a person who is assaultive (defined as "*actively hostile behaviour accompanied by physical actions or intent, expressed either verbally and/or through body language, to cause physical harm*") and cannot be used on a person who uses passive resistance in relation to Police. Police policy expressly states that a Taser should never be used against an uncooperative but non-aggressive person to induce compliance.
53. Police policy also states that subsequent applications and extended cycles of the Taser should be avoided, but where they are unavoidable must be reasonable, necessary and proportionate in the circumstances.
54. Before using the Taser Officer A had already used OC spray and a baton and not managed to arrest Mr Smillie. As discussed above, Officer A stated that he first deployed the Taser because he could not safely handcuff Mr Smillie, who had attempted to swing out at Officer A with his right fist and "*continued to thrash about*" on the ground (see paragraph 20). Mr Smillie said that he was on the ground and only semi-conscious at this point.
55. The Authority does not accept that Mr Smillie was assaultive when Officer A deployed the Taser. Officer A was able to leave Mr Smillie and retrieve the Taser from his Police vehicle. When he did this Mr Smillie remained where he was. The Taser Cam footage shows that before Officer A subsequently deployed the Taser, Mr Smillie was kneeling and verbally abusing and resisting Officer A by not releasing his hands from between his legs. This does not constitute assaultive behaviour.
56. The Authority finds that Officer A's first use of the Taser was not in self-defence, as claimed by Officer A. There were options open to Officer A short of using the Taser. The Authority considers that Mr Smillie's arrest could have been effected less forcefully after

waiting for the arrival of the other Police officers. Officer A exceeded his lawful authority to use force pursuant to sections 39 and 48 of the Crimes Act 1961 and his deployment of the Taser constituted an excessive use of force.

57. The Authority considers that Officer A's extended discharge of the Taser, for thirteen seconds, is of particular concern. In interview with the Authority, Officer A said this was because Mr Smillie remained non-compliant. The use of the Taser in this way is directly contrary to Police policy. The Taser Cam footage shows that Mr Smillie was lying on the ground, only slightly moving his head, and saying "help, help" when the Taser discharged.

FINDINGS

Officer A's use of the Taser was excessive and contrary to law.

The unlawfulness of Officer A's actions was aggravated by his prolonged use of the Taser.

Was Officer A's second use of the Taser justified?

58. Officer A stated that he deployed the Taser a second time after Mr Smillie disregarded a warning and failed to comply with arrest following the first use of the Taser (see paragraph 23).
59. The Authority is satisfied that Officer A's second use of the Taser was not justified. In particular, the Taser Cam footage demonstrates that Mr Smillie remained on the ground and was not assaultive before Officer A used the Taser a second time.

FINDING

Officer A's second use of the Taser was a disproportionate and unjustified use of force.

CONCLUSIONS

60. The Authority has concluded on the balance of probabilities that Officer A's deployment of the Taser on two occasions amounted to the use of excessive force and was contrary to law. This was aggravated by the fact that on the first occasion Officer A used the Taser for an extended period of time.
61. The Authority has previously expressed its concern to Police regarding Officer A's use of the Taser in this incident. Police reviewed and reaffirmed their decision that Officer A's conduct regarding his use of the Taser did not warrant an employment enquiry and could be addressed through extra individual Taser training.

The Authority recommends that Police take disciplinary action against the officer in light of its findings detailed in this report.



JUDGE SIR DAVID CARRUTHERS

CHAIR

INDEPENDENT POLICE CONDUCT AUTHORITY

12 June 2014

About the Authority

WHO IS THE INDEPENDENT POLICE CONDUCT AUTHORITY?

The Independent Police Conduct Authority is an independent body set up by Parliament to provide civilian oversight of Police conduct.

It is not part of the Police – the law requires it to be fully independent. The Authority is overseen by a Board, which is chaired by Judge Sir David J. Carruthers.

Being independent means that the Authority makes its own findings based on the facts and the law. It does not answer to the Police, the Government or anyone else over those findings. In this way, its independence is similar to that of a Court.

The Authority employ highly experienced staff who have worked in a range of law enforcement and related roles in New Zealand and overseas.

WHAT ARE THE AUTHORITY'S FUNCTIONS?

Under the Independent Police Conduct Authority Act 1988, the Authority:

- receives complaints alleging misconduct or neglect of duty by Police, or complaints about Police practices, policies and procedures affecting the complainant in a personal capacity;
- investigates, where there are reasonable grounds in the public interest, incidents in which Police actions have caused or appear to have caused death or serious bodily harm.

On completion of an investigation, the Authority must form an opinion on whether any Police conduct, policy, practice or procedure (which was the subject of the complaint) was contrary to law, unreasonable, unjustified, unfair, or undesirable. The Authority can make recommendations to the Commissioner.



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