IN THE INVESTIGATION INTO THE CIRCUMSTANCES SURROUNDING THE DEATH OF A 23-YEAR-OLD MAN, HAVING GONE INTO MEDICAL DISTRESS ON NOVEMBER 30, 2018 WHILE IN THE CUSTODY OF THE EDMONTON POLICE SERVICE – DETAINEE MANAGEMENT UNIT

DECISION OF THE EXECUTIVE DIRECTOR OF THE ALBERTA SERIOUS INCIDENT RESPONSE TEAM

Executive Director:	**Susan D. Hughson, Q.C.**
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Introduction

On November 30, 2018, the Alberta Serious Incident Response Team (ASIRT) was directed to investigate the circumstances surrounding the death of a 23-year-old man, hereinafter referred to as the affected person (AP), after he went into medical distress while being held in a cell in the Edmonton Police Service (EPS) Detainee Management Unit (DMU). No officers were designated as subject officers. ASIRT's investigation is now complete.

The Investigation

ASIRT's investigation was comprehensive and thorough, conducted using current investigative protocols, and in accordance with the principles of Major Case Management (MCM). ASIRT interviewed all relevant police and civilian witnesses, directed a scene examination, and obtained all relevant dispatch and communications data. Additionally, all available cellblock video was seized and reviewed. The data from the Automated External Defibrillator (AED) was downloaded and assessed. ASIRT attended the autopsy and later obtained an autopsy report from the Office of the Chief Medical Examiner (OCME). Exhibits seized were sent for forensic examination.

The Evidence

It should be noted that the entirety of the AP's detention in a cellblock was effectively captured by CCTV, with very short, minor exceptions (for example, the interior of the phone rooms). The evidence gathered, including the CCTV video and witness interviews, provide a reasonably comprehensive picture of the AP's time in custody. This evidence would appear to establish that over the period of detention, the AP engaged in surreptitious conduct that could be consistent with the ingestion of drugs that had been secreted somewhere on his person. While the CCTV video provided constant observation within the various locations, one must be mindful that the cameras are a fixed view and, as such, throughout the videos there are points where the AP was turned away, his hands not visible. As such, while specific suspicious activity of the AP where one might infer drugs were ingested might be referenced, it is fair to state that as he moved around the cells he had been placed in, it would be impossible to state with certainty that any drug ingestion might not have occurred at other points.

a) Initial Contact with EPS and Arrest

On November 29, 2018, police were called to respond to a residence to remove the AP from the home of a family member. Arrangements were made to transport the AP to the Royal Lodge where a family member rented a room for two nights. Later that same day, at approximately 4:24 p.m., police received an additional complaint that the AP and another man, hereinafter referred to as EB, had returned to the residence in a confrontation where it had been alleged that a firearm was brandished and threats had been made.

At approximately 6:02 p.m., police located and arrested the AP for uttering threats and unlawfully in a dwelling house in relation to the events that had occurred that day, as well as three outstanding Form 7 warrants for uttering threats. The AP's companion, EB, was also arrested. It was noted that at the time of the arrest, the AP appeared to be intoxicated by an unknown substance. He admitted previous cocaine use and it was noted by one officer that he advised of stomach pain as well as slurred speech, slow thought process as well as stumbling around.

At the time of arrest, another officer indicated that she had a conversation with him and felt the AP displayed minor signs of being high, including slurred speech, and closed eyes. At that time, he apparently showed no signs of distress.

Both the AP and his companion were first transported to Southeast Division holding cells then eventually transferred to the DMU holding cells. No illnesses, injuries or health problems were noted but in a prepared report under the section "State of Detained Person", "Intoxicated – Drugs" had been noted. As part of the Show Cause Package Summary, it was noted:

> The AC has utilized drugs inside the residence around the CO's children at times and has (sic) becoming very aggressive and the CO fears for her safety.
>
> The AC is believed to be addicted to drugs and police located fresh drug residue and two straws beside the dining room table.

In addition to other conditions to be applied to any form of release, EPS requested that the man "be prohibited from the possession of drugs except for those drugs that he/she has a valid and recent prescription for and is following the directions regarding the use of those drugs".

b) Detention at Southeast Division

Upon arrival at SE Division, an officer described the AP as being slow in processing what was being said to him and that he had admitted cannabis use. The officer asked the AP to remove his top layer of clothing. The officer indicated that he checked the AP's pockets and hems for pills. He followed his usual practice which included checking the waistband area of the pants and underwear, running his fingers along the inside of the waistband, without touching the person, as best as he can. He ran his hands over and on the chest area, both arms and both legs trying to be minimally invasive. The search revealed nothing. The officer was clear that he felt there were insufficient grounds to justify a strip search. This officer did not recall the AP complaining of any injury or illness. The search was captured on CCTV video. On it, the AP appeared reasonably compliant and appeared to move around his cell with no observable significant difficulty with his balance or mobility. He was placed in an available phone room between 6:48 p.m. and 7:32 p.m. A review of the video confirmed that regular checks occurred during the AP's detention.

Shortly thereafter, having been returned to the cell, he was then observed covering the toilet seat with toilet paper. He sat on the toilet after lowering his slacks but his position on the toilet was not in-line with a normal seated position. He angled his knees directly away from the camera position, effectively blocking the camera view of the front of his body. On the video, his hands could be seen moving, while seated, and he would have had direct access to his underwear, which is where drugs would later be discovered. After a period of time, he tilted his head backwards, possibly trying to swallow or inhale something. At about 7:45 p.m., he appeared to awkwardly lean his face back towards the water faucet and drink directly from the faucet while still partially sitting on the toilet. After standing up, he appeared to take a lengthy drink of water from the faucet and spent the next three minutes blowing his nose and touching it with toilet paper. In the next few minutes, the AP could be seen moving and knocking on the cell door. His balance appeared less steady at this time as he moved around the cell, wavering slightly. He repeatedly knocked on the cell door. Between 8:32 p.m. and 8:38 p.m., the AP can be seen interacting with officers.

At approximately 8:25 p.m., the AP asked for a cup and also to be released on a PTA so he could see a doctor, advising he had stomach pain. EMS was called and at approximately 8:46 p.m. they arrived to assess the AP. The AP was polite and did not

appear to be in physical distress. He was, however, less than cooperative and removed heart rate monitor stickers from his person and stuck them on the wall. EMS advised that they could not definitively state that the AP was alright but that the AP had the authority and capacity to refuse treatment. The affected person refused to accept any additional treatment and signed a waiver, waiving his right to go with EMS. At that point, the officer dealing with him indicated that he did not look ill, he wasn't sweating, and his colour was good. These events were reflected in the available CCTV video.

At approximately 9:22 p.m., the AP again sat on the toilet in a similar position as before, with his back facing the camera. He bent forward while seated, his face nearing his knees at one point. Upon standing, his balance appeared to have become less coordinated. Between 9:47 p.m. and 10:10 p.m., the AP had repeated contact with an officer, and could be seen laying on the bench, then moving around the cell and drinking water.

When an officer went to speak with him later, he found the AP to be belligerent and aggressive. At this point, the AP denied recent drug use but indicated that he had used cocaine a few days earlier. He did not complain of any injury, illness or pain. The officer specifically noted this because he was aware that the AP had earlier complained of stomach pains and had been seen by EMS.

On that particular day, the cellblock was particularly busy, with a number of obviously intoxicated people. The AP was described as making a considerable amount of noise, banging on the door, yelling and screaming. When officers approached to try and calm him down, the AP was described as obstinate and verbally confrontational.

At 11:03 p.m., the AP was escorted out of the cell area towards the vehicle bay area for transfer to DMU. Prior to being transported to DMU, as part of the "sign out process" for transfer, the affected person was asked whether he had any health concerns. The affected person remained silent and did not provide an answer.

c) the Detainee Management Unit (DMU)

At approximately 11:35 p.m., the AP arrived at EPS Headquarters DMU. It should be noted that in addition to other staff, EPS staffs the DMU with an EMS paramedic.

Upon his arrival at 11:37 p.m., the AP met with the on duty paramedic. The paramedic advised that the AP had been complaining about hitting his head on the way to DMU and that he was injured. The paramedic indicated that she did not see

evidence of any injury and advised the AP of this fact. The AP began swearing, and became angry and aggressive. The AP advised that in terms of injuries, he only had bumps and bruises. He emphatically denied doing any drugs, admitting only the consumption of alcohol. By observation, she felt he had been consuming alcohol and was intoxicated but he was not slurring his speech. She indicated that she started vital stats but stated she somehow missed his temperature and respirations. She saw nothing about the AP's condition that, in her professional opinion, indicated that the AP should be taken to a hospital for further assessment or treatment. He was very agitated and less than cooperative. He denied any mental health issues.

The paramedic explained the forms that she used. One was a consent form that the patient would sign. The next was where she would record her findings. The third form was an alert shared with the police. In her dealings with the AP, the only thing that stood out was that he was agitated, abusive, swearing and she thought intoxicated. The affected person was walking unaided. Based on the information provided by the AP and her professional assessment, nothing was identified that required or justified attendance at hospital.

Prior to placement in the holding cell at DMU, the affected person was searched in accordance with policy and standard procedure. The affected person was able to stand unaided although he appeared unsteady. It appeared that he was following directions, as he stood with his arms outstretched while the CPO appeared to use a metal detector wand. The affected person placed his hands on the wall while the CPO conducted a pat-down search. The AP's coat and shoes were searched then returned to him. While all this occurred, the AP appeared to be in conversation with the CPO and/or nearby officers. He was walked, unaided, and was placed in cell 120 and provided with a paper cup. Once again, it was apparent that conversations took place.

At approximately 11:52 p.m., with his back to the door, the AP removed his left hand from his jacket pocket and moved it to an area out of view in front of his midsection, possibly into the front of his pants. Seconds later, a small white unidentifiable item appeared visible in his hand. On video, he appeared to have manipulated the item which appeared to be a flexible material such as paper or plastic. He then stepped toward the sink and picked up a paper cup in one hand, while his other hand appeared to be moving around the top surface of the sink. His precise actions were partially blocked by the camera angle and the AP's placement of his body. He reached both hands to the sink area, presumably to put water into the paper cup. The AP's right hand

moved to his mouth area where it appeared he may have placed something in his mouth, followed by lifting the cup to his mouth. Following this, as the AP moved around the cell, his balance appeared less steady. He can be seen to have his hands in the back and sides of his pants.

At one point, the AP looked directly at the camera, suggesting awareness of the presence and placement of the camera in the cell. He continued to move around, at times appearing to deliberately turn away from the camera so that his hands and/or front of his body were out of view.

Between approximately 12:02 a.m. and 12:06 a.m., the AP engaged in actions near the sink/toilet where his back was to the camera and his hands appeared to be, again, manipulating something on the surface of the sink. When he stood up fully from the sink area, he lifted his right hand index finger to his nose area. While somewhat speculative, the actions could have been consistent with the AP having crushed street drugs on the surface of the sink and then snorted the drugs. Shortly thereafter, the man's movements became less coordinated and he continued to be somewhat unsteady on his feet.

Between 12:06 a.m. and 12:32 a.m., the AP was provided a sandwich which he consumed. Between 12:32 a.m. and 12:39 a.m., the AP began banging on the cell door and appeared to be speaking with the other person in the cell. He was then removed by a police officer from the cell (120) and moved into the next cell (119). The AP complained about not feeling well.

At approximately 12:57 a.m., the on-duty paramedic, who had initially dealt with the AP upon his arrival at DMU, went to the AP's cell accompanied by a CPO (community peace officer) and spoke with the AP. This interaction appeared to last approximately two minutes. Again, the paramedic did not observe anything that, in her opinion, required additional medical intervention. At approximately 1:01 a.m., the police officer who had moved the AP from his original cell walked into the hall to the AP's cell and stood at the door appearing to have a conversation with the AP for approximately 4 minutes.

From approximately 1:05 a.m. to 4:20 a.m. the AP sat down on the floor of the cell, with his back to the wall, facing the door of the cell. He appeared to fall asleep in the seated position. He remained seated and sleeping, occasionally waking and then nodding off again. His movements were consistent with someone sleeping in a seated position with his head either bent forward or shifted from one side to the other with minor

movements indicating regaining his seated balance. He then woke and stood. His balance was unsteady and he could be seen swaying slightly on his feet.

At approximately 4:58 a.m., the AP stood at the door, repeatedly striking it with his open palm. At 5:03 a.m., the AP was standing with his back to the wall when he was recorded on video to lower his pants to his knees, bending over with his hand in his pants. His hands were visible inside his pant legs around his ankles and he then pulled the pants up near his waist. He moved over towards the center of the cell near the drain with his back towards the south wall. Less than a minute later, the AP removed his shoes and pants, leaving his underwear on. He turned his pants inside out and gave them a shake then put them back on.

At 5:07 a.m., the AP moved to the door and was given a paper cup of water. He subsequently placed his hands into the front waistband of his pants, and it appeared that when he removed his hands he had a small white item in his hands. He looked directly at the camera. He then appeared, again, to put his hands back down the front of his pants and appeared to bend over retrieve something from the area of the left ankle. When he stood up, again, a small white item appeared in his hand.

The AP could be seen on video throwing the white item towards the floor drain. His balance remained unsteady and he continued to sway. Another white item appeared to still be in his hands. When the cell was later searched, after the AP went into medical distress, ten small pieces of foil were seized from the floor. These were believed to potentially contain possible drug residue and were sent for testing. Forensic examination found residue of heroin and fentanyl on these exhibits. Over the next several minutes, the AP moved around his cell, occasionally he banged on the door and appeared agitated. While moving around, his balance was still poor.

At approximately 5:37 a.m., the AP again appeared to reach into his pants. He once again appeared to have something in his hands. At 5:56 a.m., the AP again possibly ingested something. His balance seemed to decline, and he swayed consistently. He then moved around his cell, sitting on the floor at one point with his back to the wall, then standing and moving around, occasionally banging on the door. At approximately 6:23 a.m., the AP retrieved a sandwich that had been slipped under the door by a CPO, and opened and ate the sandwich. He remained at the door and appeared to be talking to or at someone outside the cell. (As will be referenced later in this report, at one point the AP was calling out for a lawyer, which might be what is

reflected at this point in the video) He still appeared to be slightly unbalanced or unsteady. At approximately 6:28 a.m., the AP again reached into the front of his pants. It is not possible to tell if he retrieved anything. At approximately 6:31 a.m., the AP picked up a paper cup from the floor, tore it up then placed it into the floor drain. He appeared unsteady on his feet. He returned to the cell bars and remains focused on the corridors outside the cell. By approximately 6:45 a.m., it appeared to investigators that the AP's balance had further declined. He appeared to be almost be falling asleep, leaning against a wall.

At approximately 6:47 a.m., the AP slid down to a seated position, similar to earlier when he slept, with his legs out in front of him and his head moving up and down slightly.

At approximately 7:41 a.m., the AP's cell was entered after the AP appeared to be unresponsive during a cell check. Staff commenced CPR and also used an AED (Automated External Defibrillators) to attempt to resuscitate the AP until an ambulance arrived and he was transported to hospital where he was placed on life support. That same day, at approximately 2:05 p.m., the AP was ultimately removed from life support and died. On autopsy, it was determined that the AP died as a result of drug toxicity, including: fentanyl, cocaine, alprazolam and etizolam, the latter two being drugs used for the treatment of anxiety disorders and sleeplessness amongst other things. No physical injuries were noted that would have contributed to the death.

d) Other Witness Evidence

Upon arrival at DMU, the AP was placed in cell 120 with another person, "KD". This individual indicated that he did not really like the AP and did not really speak to him. He recalled the AP standing by the door a lot. He did not see the AP with any drugs while he was in the cell and did not hear him complain about any stomach pains. He described the AP as "normal". Eventually, the AP was moved to the cell next door to him.

EB, who was initially arrested with the AP, confirmed that when they were first arrested they were taken to Southeast Division before being transferred to the cells downtown. He advised that the AP did not have any health issues when he was arrested and denied any knowledge of the AP's drug use. Once at DMU, when they got into their cells, the AP started complaining that he needed to go to the hospital.

According to EB, the AP was screaming and fighting about going to the hospital. He reported that the AP told guards to "guards take me to the hospital, I feel sick, and I feel something is wrong with my body." Other people were screaming at him to shut up and to (expletive) off and the AP responded telling others to (expletive) off. He heard the guards move the AP to another cell. EB said he eventually fell asleep.

According to EB, the guards could have made a difference but they failed to do so because they ignored the AP's medical issues. EB maintained that the AP was screaming at the top of his lungs that he needed to go to the hospital and they didn't take him to the hospital and he died. EB also advised, however, that he initially thought the AP's screaming was "a ploy".

In addition to EPS staff working within DMU, two Justice and Solicitor General correctional officers have been seconded to the John Howard Society to work in DMU as "bail navigators" to assist prisoners in navigating the bail process. On this particular date, a bail navigator was on shift, working the day shift which runs from 6:00 a.m. to 2 p.m. He advised he has a set process where he starts at cell 123 and works his way around the remaining adult cells in order.

The bail navigator described it as a normal day and indicated that he started talking to prisoners in 123. He recalled that someone in a cell to his left was yelling aggressively, asking if he was an "effing" lawyer and to get the "eff" down here. Initially, he didn't know which cell the yelling was coming from but it became apparent shortly after that it was coming from 119, which housed the AP. He worked his way down to the corner to 119 and he looked down and saw that the prisoner appeared to be sleeping. In his experience, it was not uncommon for people to sleep in cells and as it was some minutes after, he noted no concerns. It was his general practice not to disturb someone who had previously been aggressive and who was now sleeping. People being detained are often coming down from the influence of drugs or alcohol, and aggressiveness is an occasional reaction to them coming down.

While it was not his role to be "checking", per se, on the prisoners, he would and has alerted staff if he suspected someone may require aid. Indeed, on that very date, he asked that staff check on another prisoner in a cell because she was wearing a winter coat and he couldn't see whether she was breathing. While it turned out the person was not in distress, it is evidence that this witness tended to carefully observe detainees for evidence of possible distress and would alert someone if he

had concerns. When he looked into cell 119, nothing stood out to this witness that he might be in distress.

e) Cell Scene and Forensic Evidence

Ten small pieces of foil were found on the floor of the AP's cell. The AP's clothing was ultimately seized and the pieces later examined at the CSIU Laboratory. A syringe cap fell out of the AP's right shoe. A piece of what appeared to be a plastic baggy was found in the AP's front left pants pocket.

A Kleenex with two (2) pieces of foil and a plastic baggy of suspected drugs of unknown origin were located in the inner front crotch of the AP's underwear. An additional two pieces of foil were found in the inner front crotch fly/pouch.

A request for analysis of the suspected drugs was sought. Both heroin and fentanyl were identified on the exhibits.

The data from the AED, which is secure and cannot be tampered with prior to download, was analyzed and supported an interpretation that the device had been functioning properly, was utilized correctly and that the AP had been in a non-shockable heart rhythm.

Analysis

Cases involving in-custody deaths as a result of medical distress or overdose focus on the duty of care owed to individuals who are in the custody or care at the time of the event. Failure to exercise reasonable care can potentially give rise to criminal offences including criminal negligence causing death or failure to provide the necessaries of life. At its core, the focus of an ASIRT investigation can be described as the collection of evidence to determine as much as possible, factually, what occurred during an incident, and to allow for a reasoned and principled analysis of whether those actions were lawful.

The Law

A good summary of the law relating to the offences of failing to provide the necessaries and criminal negligence causing death in similar circumstances, particularly as it might

relate to the care of a person in the custody of police, can be found in two recent cases, *R v Doering*[1] and *R v Garner and Fraser*[2].

To give some factual context to these two cases, in *R v Doering*, the involved officer arrested an intoxicated indigenous woman on an outstanding warrant. The officer decided, early on in the encounter with the woman, that a medical assessment was unnecessary, believing that the use of methamphetamine, standing alone, did not provide a sufficient reason to require any medical assessment or intervention. As such, he took no steps to have the woman medically assessed, even when paramedics offered their assistance on scene.

Initially, the woman had been yelling and aggressively moving about but her condition deteriorated significantly during a period of about 45 minutes in the officer's custody. It was always the officer's plan was to transfer custody of the woman to the OPP. As such, not only did he not request a medical assessment or assistance, he advised the OPP that He did not share the significant deterioration in the woman's condition. By the time of transfer, the woman was unable to speak, sit up, respond to commands and was lying down moaning and shaking. Perhaps most damning, the officer advised the OPP at the time of transfer that the deceased had been "medically cleared", knowing that she had not be formally assessed.

The Court held that relevant police policy, common sense, and knowledge of the risks of severe intoxication would lead a reasonably prudent police officer to seek medical attention and there were no operational contingencies to counterbalance the officer's duty to seek medical help. The evidence established that the failure to get medical attention for the deceased was a marked departure from the standard of care of the reasonably prudent officer and the Court found that the offence of failing to provide the necessaries had been made out. The Court found that the "only rational interpretation of evidence was that accused knowingly misled OPP about deceased's condition, by intimating that she had been assessed by EMS and that her condition had not deteriorated ". These statements created the risk that the OPP would not appreciate the gravity of the woman's condition such that any medical attention was further delayed, increasing the risk to the woman's life. This deliberate misrepresentation established the

[1] *R v Doering* 2019 CarswellOnt 18185, 2019 ONSC 6360, 160 W.C.B. (2d) 64 (ONSC)
[2] *R v. Gardner and Fraser* 2021 NSCA 52, 2021 CarswellNS 450 (NSCA)

wanton or reckless disregard necessary to ground a conviction for criminal negligence causing death.

In *R v Gardner and Fraser*, the involved officers were charged for criminal negligence causing death in relation to the death of an intoxicated man. It was alleged that when the man had been taken into custody, officers had failed to get an appropriate medical assessment given his level of intoxication, had placed the man in a spit hood and failed to remove the hood once placed in a holding cell and that officers had failed to make appropriate checks. Ultimately, while lying in a cell in the spit hood, the man suffocated to death on his own vomit. While initially convicted after trial by jury, the Court of Appeal overturned the conviction based on flaws in the jury charge, and remitted the matter back for retrial. In doing so, however, the Court reviewed the complexities related to the law of criminal negligence.

Failing to Provide the Necessaries of Life

Failing to provide the necessaries of life imposes liability on an objective basis in circumstances where the conduct constitutes a marked departure from the conduct of the reasonably prudent person having the charge of another in circumstances where it would be objectively foreseeable that failure to provide the necessaries of life would risk danger to the life or permanent endangerment of the health of the person. The standard is not one of perfection. Errors in judgment will not give rise to liability unless they reflect a marked departure from the relevant standard. Necessaries of life include medical attention.[3]

Criminal Negligence Causing Death

For the purposes of criminal negligence causing death, the appropriate analytical framework would require the consideration of the following questions:

- Is there evidence that the acts or omissions of the involved officers showed a wanton or reckless disregard for the life or safety of the deceased?
- Is there evidence that the acts or omissions caused the death?

-and-

[3] *R. v. Doering, supra*, at paras. 85-89

- Were the acts or omissions that caused the death a marked and *substantial* departure from the standard of care of the reasonably prudent officer in similar circumstances including what they knew or ought to have known?

There being a clear duty of care, the standard of care applicable to a police officer would be that of the reasonable officer in similar circumstances. An officer must live up to the accepted standards of professional conduct to the extent that it is reasonable to do so in the circumstances. The factors relevant to determining the reasonable officer standard include: the likelihood of known or foreseeable harm, the gravity of harm, the burden or cost which would be incurred to prevent the injury, external indicators of reasonable conduct and statutory standards.[4]

It is beyond dispute that officers owe a duty of care to people taken into their custody. The issue becomes whether acts or omissions failed to meet that duty of care and whether those acts or omissions constituted either, for the offence of failing to provide the necessaries, a marked departure from the conduct of the reasonably prudent person in circumstances where it would be objectively foreseeable that failure to provide the necessaries of life would risk danger to the life or, for criminal negligence, whether the acts or omissions constituted a marked and *substantial* departure from the standard of care of the reasonably prudent officer in similar circumstances including what they knew or ought to have known.

The conduct of officers is to be measured against the standard of how a reasonable officer would act in similar circumstances, but the standard must be applied while giving the appropriate recognition to the discretion that is inherent in police investigations and law enforcement. The law does not require perfection or nor does liability flow solely because matters could be done differently or better with different consequences. What is required is that police act *reasonably*.[5]

In this case, it is evident that the AP's death was caused by a drug overdose. If the ingestion of those drugs occurred during his detention, there are several areas that should be examined to determine whether police exercised a reasonable standard of

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[4] *Hill v. Hamilton-Wentworth (Regional Municipality) Police Services Board*, 2007 SCC 41, 2007 CarswellOnt 6265 at para. 70; *Meady v. Greyhound Canada Transportation Corp.*, 2015 ONCA 6, 2015 CarswellOnt 46 at para. 67.

[5] *Hill v Hamilton-Wentworth (Regional Municipality) Police Services Board*, 2007 CarswellOnt 665 (SCC) at para. 3

care. Those areas would be whether reasonable steps were taken to limit the AP's access to drugs while detained, and whether there was reasonable supervision and access to medical attention to ensure the safety of the person.

a) Physical Searches

There is often a public perception that, when a person has been arrested and taken into custody, police have the authority to conduct a search of the person, including a strip search, before the person is lodged. That is incorrect.

Throughout the criminal justice process, a person has certain *Charter* rights that must be respected. Those rights are balanced against reasonable societal limits and, as such, what is permissible at some stages may not be permissible at other stages. For example, the authority to search a person shifts, as does the degree of search that might be permissible. What is clear is that the greater the degree of intrusion into the bodily integrity of a person, the greater restraint that must be exercised and the greater justification required to permit a search. A search will be reasonable within the meaning of the *Charter* where it is authorized by law, the law itself is reasonable, and the search is conducted in a reasonable manner.

There are a variety of levels of personal search, ranging from the less intrusive common "frisk" or "pat down" search, to a strip search, to the much more intrusive body cavity search. A strip search is defined as the removal or rearrangement of some or all of a person's clothing to permit a visual inspection of their private physical areas and/or undergarments.

It is recognized that strip searches involve a significant and very direct interference with personal privacy and are considered to be inherently humiliating and degrading. While there are circumstances where a strip search may be necessary, it is in this context that there are strict limitations as to when such a search will be permissible.

It is established law that reasonable grounds to make an arrest do not automatically convey the authority to carry out a strip search. Additional grounds relating to the purpose of the search are required. To meet the constitutional standard of reasonableness, the police must have reasonable and probable grounds justifying the strip search, in addition to having reasonable and probable grounds justifying the arrest. The mere possibility that a person under arrest may be concealing evidence or weapons

upon his person is not sufficient justification for a strip search incidental to arrest. Strip searches cannot be carried out as a matter of routine policy applicable to all arrestees.

While a cursory frisk or pat down search is permissible, police may not conduct a strip search as a matter of practice or routine. The more intrusive the manner of search, the more restraint must be used. As such, in the absence of articulable grounds, police are not entitled to conduct a strip search. Sadly, this means that, on occasion, a person may be able to successfully maintain possession of controlled substances on their person when they are detained in custody.

In this case, officers maintained that they did not have reasonable grounds to perform a strip search. That position, based on an examination of the whole of the evidence, is not unreasonable. Evidence of intoxication or impairment alone is not sufficient. It would not be uncommon for most detainees, if not potentially all at times, to be under the influence of drugs or alcohol or a combination of the two. Conducting strip searches on anyone who evidenced impairment would become a matter of a routine practice, which is impermissible. Officers must be able to articulate reasonable grounds to believe that the specific individual has drugs, evidence or weapons secreted somewhere on his person in that moment that would not be discoverable by a frisk or pat down search.

b) Reasonable Supervision

Reasonable supervision in these types of cases often includes two areas, the first being access to medical attention and/or assessment and the second being reasonably regular checks on a person's well-being so that any potential significant change in wellbeing is caught in a reasonably timely fashion.

Police officers are not medical professionals. While they may have more training in first aid and emergency medical responses than the average person, with the exception of a limited number of officers who may have paramedic backgrounds or act as tactical EMS, it must be remembered that regardless of the heavy reliance often placed on them, they are police officers, not doctors or paramedics. As such, they must be alive to situations where it may be important to have a person in their custody medically assessed to ensure that they may be safely taken into custody. Again, the standard is reasonableness and not perfection. Failure to recognize circumstances that might objectively give rise to a need to have a person examined could result in liability. More importantly, even before one gets to the question of potential liability, however, is the fact that police do not want people to die, nor do they generally want to do anything that might put a

person's health or wellbeing at risk unless it is necessary to do so to save the life of another person or themselves.

To that end, EPS has incorporated a number of safeguards to ensure the safety and wellbeing of those detained in custody. To ensure the wellbeing of those taken into custody, EPS has developed policies regarding when a person should be seen by a medical professional. These policies include having those who may be grossly intoxicated medically cleared for custodial detention or having EMS called to assess individuals complaining of physical issues. Again being mindful that that a person's need to be assessed can be subjective, EPS has taken the additional step of employing a paramedic to be on duty in the DMU to assess incoming detainees. Being an emergency care professional capable of assessing patients and making determinations of whether they should be taken to hospital, police are entitled to rely on these assessments.

In this case, unlike other cases, the deceased was seen on multiple occasions by EMS professionals, both at the Southeast Division and DMU. It cannot be said that police were not responsive to the AP's medical complaints or failed to get him medical attention. It is unfortunate that, at times, the AP was less than cooperative or honest with EMS and the on duty paramedic but in no way can it be said that he did not have the opportunity for medical assessment. During those assessments, nothing was identified by medical professionals that required the AP's transfer to hospital. If an error was made, which is not clearly evident, it was in these assessments but, again, police are entitled to rely on the opinion of the professionals.

In addition to access to medical attention, EPS policies require and available systems provide continuous video monitoring and recording, a data protected electronic cell check system that not only prompts but requires physical checks to be made and includes the secure maintenance of data that documents those checks. Again, what is required is reasonably diligent supervision, not supervision to a standard of perfection.

With respect to the supervision, it must be noted that ASIRT's investigation, which in addition to the collection of witness evidence, included detailed and repeated reviews of the CCTV recordings, identified actions of the AP consistent with the surreptitious ingestion of controlled substances hidden on his person. It is very easy to find and isolate those moments, in videos spanning hours, where things happened having the luxury of time, undivided attention, and an opportunity to repeatedly focus, view, and rewind to watch again. That is not the reality that those staffing a holding area work in. They are monitoring CCTV video of many prisoners in many cells at any given time,

while focusing on their overall responsibilities. Indeed, the conduct of the AP was specifically done to avoid discovery, including his turning away and limiting the camera view. All that is to say that even if there had been one person assigned to watch only the CCTV view of AP, with no other responsibilities, it would be naïve to believe that the actions isolated by ASIRT, detailed after repeated viewings and moment by moment assessments, would necessarily have been spotted.

While a form of negligence based liability would apply in this case, it must be remembered that there is a significant difference between civil negligence and what we would be considering in this case, criminal negligence causing death or bodily harm.[6] Indeed, most of the cases that address negligence of police are addressing a standard of civil negligence. Both the gravity of the offences of criminal negligence causing bodily harm or death and the high level of moral blameworthiness make the criminal standard a high hurdle to cross.

Conclusion

Having reviewed the investigation in its entirety, there are no reasonable grounds, nor reasonable suspicion, to believe any officers committed any offences in relation to the death of the AP. The AP entered the custodial facility with controlled substances secreted on his person that were not discovered during the permissible cursory frisk search. It is possible that the items may have been discoverable had a strip search been conducted, however, grounds to permit such a search were very likely not present. In any event, it was reasonable for the involved officers to subjectively conclude that they did not have such grounds. The AP appeared to have voluntarily ingested the controlled substances that resulted in his death. The AP actively took steps to hide the ingestion, including doing so while seated on the toilet and turned away from the front of the cell and cameras. He accomplished exactly what he tried to do, ingesting the substances without getting caught.

In terms of the duty of care, the AP was seen by medical professionals and regular checks were done during his detention. Officers and staff had multiple dealings with the AP throughout his detention. He was conscious and functioning for the overwhelming majority of time until shortly before he was found under medical distress. As such, it is not a situation where he languished for a considerable period of time before his condition was recognized. It is not unusual for those detained in custody to sleep at

[6] *R v. Morrisey*, 2000 CarswellNS 255, 2000 CarswellNS 256, 2000 SCC 39(SCC) at para. 19.

various times, and in this case, shortly before the AP was found in medical distress, his body was positioned much the same as when he had earlier fallen asleep. The conduct of the officers did not constitute a marked departure (failing to provide the necessaries) or a marked and substantial departure (criminal negligence) from the standard of care reasonably expected. As such, there are no reasonable grounds, nor reasonable suspicion, to believe that the involved officers committed any offences and, accordingly, no police officer will be charged with any offences arising out of this incident.

These findings do not diminish the tragedy that is the loss of another life to drugs, particularly fentanyl. For the family and friends of the AP, it was, without question, devastating. It must be exceptionally hard to reconcile that there existed the possibility that the AP's death might have been prevented had the situation unfolded differently, for example, had he been strip searched prior to being placed in the cell or had he been caught in the act of ingesting the drugs. That compounds the tragedy of the AP's death. That having been said, the AP had certain rights and protections, including the ability to refuse additional medical care or assessment and the right to be protected from unreasonable search. The fact that the death might have been prevented by more aggressive measures, including a strip search, does not negate the fact that officers must act within the law and that what is expected is reasonable care, not perfection.

Original Signed by Executive Director

Susan D. Hughson, Q.C.
Executive Director

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