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Judgment: approved by the Court for handing down | *Delivered:* **12/11/09**

*(subject to editorial corrections)**

In the Petty Sessions District of Craigavon

Chief Constable of the PSNI — Complainant

Arthur McDonagh — Defendant

Introduction.

1. The defendant is prosecuted for five offences of assaulting police officers in the due execution of their duty, and one offence of resisting a police officer in the due execution of his duty, all contrary to section 66(1) of the Police (Northern Ireland) Act 1998. He is also prosecuted for one offence of disorderly behaviour, contrary to Article 18(1)(a) of the Public Order (Northern Ireland) Order 1987.

2. The offences arise from the arrest of the defendant on 25 May 2008, on foot of a warrant for his arrest for non-payment of a fine. In regard to the offences contrary to section 66(1) of the 1998 Act, in the light of my findings of fact, set out below, the issue is whether police were acting in the due execution of their duty when executing the warrant.

3. Resolution of that issue involves consideration of two, what are agreed by the parties to be conflicting, decisions, namely the decision of the Court of Appeal, delivered by Carswell LCJ (as he then was), in Re McKenna's Application for Judicial Review [1998] NI 287, and the decision of the Divisional Court, delivered by Kerr LCJ (as he then was) in In the matter of an application by Liam Tierney for Judicial Review [2008] NIQB 55.

4. In the light of the conflict in the above decisions, it seems likely that, whatever the decision of this court, it will be appealed by way of case stated. With that in mind, in addition to setting out my decision in the matter, I hope to be able to highlight some of the practical consequences of a decision one way or the other, which may not have been in the minds of the judges delivering the previous decisions.

5. For completeness, the charge of disorderly behaviour raised slightly different issues, which I will deal with separately.

The Facts.

6. Having regard, as I have said, to the fact that my decision is likely to be appealed by way of case stated, I propose to set out only those facts of which I am satisfied beyond reasonable doubt. There was a conflict of evidence between the police officers who gave evidence for the prosecution and the defendant and, indeed, some inconsistencies in the evidence of the police officers, which may lead to some gaps in the narrative as a result of the omission of matters of which I am not satisfied.

7. On 25 May 2008, Inspector Bernard O'Connor and Constable Kenneth O'Hare attended at the defendant's home at 38 Bell's Row, Lurgan, to execute a warrant for the defendant's arrest for non-payment of a fine. The history of the warrant will be dealt with separately at paragraphs 15 to 26 below.

8. The defendant was intoxicated, having consumed some alcohol that day. After some discussion about the warrant, the defendant said that he did not have the money to pay the fine, and Constable O'Hare then arrested him on foot of the warrant. The defendant was taken to the police car and placed in the back seat. He was calm at this time.

9. At that stage, the defendant's wife came out and tried to hand him some tablets which he took for a medical condition. While this act was done, no doubt, with the best of intentions, Inspector O'Connor told her that he would have to take the tablets until the defendant was seen by the police doctor. An argument ensued, which had the effect of, in the words of Constable O'Hare, "sparking off" the defendant.

10. The defendant opened the door of the police car with a view to getting out. Inspector O'Connor told Constable O'Hare to apply the safety locks. As he went to do so, the defendant kicked the door of the police car open, causing it to strike Constable O'Hare, knocking him backwards. As he stumbled, he dropped the keys of the police car.

11. The defendant managed to get out of the car, and when Constable O'Hare tried to put him back in, he resisted, and began punching at both Constable O'Hare and Inspector O'Connor. After, a melee, during which the defendant feigned a heart attack, and an unsuccessful attempt was made to handcuff him, Constable O'Hare warned him that if he did not cease being violent, CS spray would be used. When the defendant did not heed the warning, the spray was used.

12. At some stage after this, the defendant managed to run back into his house. By this stage, other police, in particular Constable Mairead Smith, had arrived in response to a radio transmission from Inspector O'Connor. Constable Smith, Constable O'Hare and Inspector O'Connor followed the defendant into the house. In the kitchen, the defendant lifted a ceramic cookie jar. After threatening to throw it at Constable Smith, he did throw it at Constable O'Hare. It hit the constable on his flak jacket before smashing on the floor. The defendant then picked up a kitchen chair. While holding the chair, he lunged at Constable Smith, and his hand made contact with her neck, knocking her off balance. He then swung the chair at Constable O'Hare. Constable Smith warned him that if he did not desist, CS spray would be used. When the defendant continued swinging the chair, Constable Smith discharged CS spray in his direction.

13. The defendant ran to the front room and barricaded himself in. At this stage, aware that a crowd was gathering outside the house, Inspector O'Connor ordered police out of the house. It required some negotiation to recover the keys of the police car which had been dropped earlier, and which police had been unable to find. As police drove away, the defendant came to the door of his house. He had a tin of beer in his hand and held his arms out, revealing deep, and presumably self-inflicted, gashes on both arms.

14. On the basis of the above facts, I am satisfied that the defendant assaulted Constable O'Hare on three separate occasions, firstly by kicking the door of the police car against him, secondly by aiming a flurry of punches at him, and thirdly by throwing the jar at him and swinging the chair at him in the kitchen. I am further satisfied that the defendant assaulted Inspector O'Connor by aiming a flurry of punches at him. I am satisfied that the defendant assaulted Constable Smith when he made contact with her in the kitchen. Finally, I am satisfied that the defendant, by his conduct throughout, was resisting Constable O'Hare. The issue is whether I am further satisfied that the officers, at the time of the said assaults and resisting, were acting in the due execution of their duty. To decide that issue, I require to examine the history of the warrant.

The Warrant.

15. While the defendant took issue in evidence as to whether the warrant related to him at all, I am satisfied that it did. His record reveals that, on 4th August 2005, he was convicted at Craigavon Magistrates' Court of an offence of using a motor vehicle without insurance, for which he was disqualified for twelve months and fined £300. It appears that he was given 28 days to pay, a period which suggests to me that he was not present, since I am in no doubt that more time would have been given if it

had been requested. On 21 September 2005, a warrant was issued for the arrest of the defendant for non-payment of the fine. I am satisfied that it was that warrant which was executed on 25 May 2008. A copy of it was exhibited in evidence.

16. The history of the warrant thereafter is unclear, because police have lost the action sheet which they would normally attach to the warrant, and on which any attempts to execute it should have been recorded. I pause to observe that the same fate befell the action sheet in the case of Tierney, one of the cases I consider below. While police believe that the warrant in this case was sent to Londonderry, because the defendant was recorded on the warrant as living there at that time, and that attempts were made to execute it there, the loss of the action sheet meant that the prosecution were unable to call any evidence in that regard.

17. At some stage, the warrant was returned to police in Lurgan, presumably because police had obtained information that the defendant was now living there. What happened thereafter gives me cause for considerable concern. I am aware, as I have said, that no evidence was called about the matter, and I am not making formal findings of fact, but the information placed before me requires comment.

18. In the skeleton argument lodged by the prosecution, it is stated that, in the winter of 2007, that is more than two years after the warrant was issued, the defendant was made aware of the warrant and given a "period of grace" in which to pay it. Since the warrant was not executed until 25 May 2008, it appears to have been a considerable "period of grace".

19. I questioned Inspector O'Connor about this, and he frankly stated that it is common practice for police on the ground to allow defendants time, and often considerable time, as much as up to a year, to pay outstanding fines. The practice is so common that solicitors often ring police directly asking for such time.

20. In the prosecution's skeleton argument, it is suggested that this practice may well have a basis in law, and a passage from the judgment of Lord Woolf CJ in the case of Henderson v Chief Constable of Cleveland Police [2001] 1 WLR 1103, at p1107, paragraph 17, is quoted as such support. I do not accept that submission. It is common sense that police should be able to exercise some limited flexibility, and allow a short time to pay where they have reason to believe that the money to pay the fine can quickly be made available. However, it is clear to me that Lord Woolf was envisaging only a short delay in the execution of a warrant. Indeed, he specifically refers to a situation where a defendant may need "only a short period" to pay a fine.

21. The Magistrates' Courts (NI) Order 1981 provides, at Article 91, a statutory regime for allowing time to pay fines. Adherence to that regime allows decisions to be taken judicially and consistently, and those decisions to be recorded accurately so that there is no doubt as to the date on which the defendant will become liable for arrest for non-payment of the fine.

22. Contrast that with the non-statutory ad hoc system which appears to be in operation by police, and under which defendants are being allowed lengthy periods to pay. How can anyone be sure that it is being operated fairly or consistently? Are the decisions being properly recorded? What happens if there is a dispute as to how much time has been given? What happens when the action sheet is lost, as in this case and the Tierney case? The opportunities for confusion and error are considerable and clearly all the greater the more time has been given to pay.

23. It must be borne in mind that we are dealing with deprivation of liberty, an action which requires particular attention to proper and lawful procedure. Although it was not cited in this case, it may be that, in a case where there is a dispute about any of the above matters, Article 5(1) of the European Convention on Human Rights will come into play. Indeed, it appears, from the Irish authorities referred to by Kerr LCJ in Tierney, that Article 40.4 of the Irish Constitution, which is worded similarly to Article 5, was the basis for a number of decisions quashing old warrants in that jurisdiction.

24. I am well aware of the pressure on prison places, and the particular desire of government to reduce the number of persons in prison for fine default. It may be that the practice described above assists in that regard, but that does not justify it. If the government wishes to change the law on punishment for fine default (and there are statutory reforms in that regard waiting to come into force) then it can do so.

25. There is a final reason why the police practice is, in my view, unlawful in Northern Ireland, namely the provisions of Article 115(2) of the 1981 Order, which I consider in more detail below.

26. In conclusion, the warrant was issued on 21 September 2005 and not executed until 25 May 2008. No admissible evidence has been led by the prosecution to explain the delay. Indeed, the defence point out that the defendant's criminal record reveals that he was sentenced at Craigavon Magistrates' Court on three separate occasions between those dates, namely 7.12.07, 31.1.08 and 20.3.08, and at Armagh Magistrates' Court on one occasion, namely 12.2.08. The nature of the sentence imposed on

20.3.08 was such that the defendant must have been present. The warrant could have been executed at that time.

The Law

27. Article 115 of the Magistrates' Courts (NI) Order 1981 provides, inter alia:-

"115. - (1) The provisions of any enactments regulating the duties of the [Police Service of NI] with respect to warrants and the execution of warrants shall apply in relation to warrants issued under this Order to members of the [Police Service of NI].

(2) Without prejudice to paragraph (1), where for any reason the person to whom a warrant is addressed is unable to execute it within the time fixed by the warrant (or if no time has been so fixed, within a reasonable time), he shall return the warrant to the resident magistrate or other justice of the peace [now lay magistrate] who issued it or who made the conviction or order upon which it was issued together with a certificate in the prescribed form of the reasons why the warrant has not been executed."

Article 158(1) of the Order provides as follows:-

"158. - (1) A warrant issued in connection with proceedings before a magistrates' court by a resident magistrate or lay magistrate shall remain in force until it is executed or until it is withdrawn by the person who issued it, or if he is unable to act, by any resident magistrate."

28. It is the relationship between the requirement to return the warrant if it has not been executed within a reasonable time, contained in Article 115(2), and the provision that the warrant remains in force until executed or withdrawn, contained in Article 158(1), that lies at heart of this case.

29. Mr. McDowell B.L. for the prosecution conceded, correctly in my view, that I was bound to conclude that the warrant had not been executed within a reasonable time, and police had therefore fallen foul of the requirement in Article 115(2). However, he argued that Article 115(2) is directory rather than mandatory. In particular, he relied on the decision of the Court of Appeal in Re McKenna's Application [1998] NI 287. In that case, the court was considering a warrant issued under Article 114 of the 1981 Order for the immediate arrest and committal to prison of a person sentenced to imprisonment by a court. As in this case, the prosecution conceded that it had not been executed within a reasonable time. It is clear that the court recognised that Article 115(2) applied to the warrant. Nevertheless, Carswell LCJ stated, at page 291:-

" In our opinion the basic premise of the argument advanced by Mr McCloskey is correct, that the governor of the prison must strictly observe the terms of the warrant, from which his authority to receive and hold a prisoner is derived. This is the principle underlying the decision in *Re Tarr's Application* [1994] NIJB 163, to which the judge referred in his judgment. Although the warrant may not have been executed forthwith, which is contemplated by the terms of art 114(1) of the 1981 Order, it was by virtue of art 158(1) still valid when it was eventually executed nearly two months later, and it cannot in our view be said that it had become invalid even if not executed within a reasonable time."

It is clear from the above passage that Carswell LCJ was drawing no distinction between the validity of the warrant and the validity of the execution of the warrant.

30. In response to the prosecution argument, Mr. Brady B.L. for the defendant relied on the decision of the Divisional Court in In the matter of an application by Liam Tierney for Judicial Review [2008] NIQB 55. In that case, the court was considering the execution of a warrant for non-payment of an estreated recognizance, analogous to the situation in this case. The warrant had been issued on 19 November 2004 and was executed on 10 January 2008, a very lengthy period which is also similar to the period in this case. Kerr LCJ considered Articles 158(1) and 115(2). The decision in McKenna is not referred to in his judgment. He stated, at paragraph 15 onwards:-

"[15] The modern approach to the consequences of procedural failures is no longer preoccupied with the question whether the provision is directory or mandatory. It is now well settled that one should seek to ascertain what the legislature intended should be the effect of a failure to comply with a procedural requirement… In this case we have a clear procedural failure and the question must be whether Parliament intended that warrants could be validly executed after such a lengthy period."

31. Having referred to authorities from Scotland and the Republic of Ireland, he continued, at paragraph 21:-

"[21] It appears to us that article 115 (2) provides an important protection against the tardy execution of warrants in requiring the persons to whom they are addressed to return the warrants to the magistrate who issued them or who made the convictions or orders upon which they were issued. If a failure to execute a warrant could simply be overlooked, this would represent, in our opinion, a considerable inroad in the efficacy of the safeguard that is provided for in the article. In this

context, the fact that the duty is cast on the police officer does not sound on the question whether non-compliance should have the consequence of making the unreasonably delayed execution of a warrant invalid and we must reject as misplaced Mr Dunlop's emphasis on this aspect.

Conclusions

[22] We have concluded that where there has been a delay in the execution of a warrant, article 115 (2) requires the police officer to whom the warrant was issued to return it to the magistrate who authorised its issue. An explanation – if any is available – for the failure to execute the warrant should be provided. Provided he or she is satisfied that there is a reasonable explanation for the failure to execute the warrant, the magistrate may authorise its re-issue.

[23] For the reasons that we have given, the effluxion of time does not affect the validity of the warrant but it will invalidate the execution of the warrant unless the period of time that has elapsed is not unreasonable….. The execution of the warrant must therefore be quashed and we will issue an order of certiorari to that effect."

32. Mr. McDowell conceded that, if the decision in Tierney is correct then police in this case were not acting in the due execution of their duty when arresting the defendant on foot of the warrant. However, he attacked the judgment in Tierney on a number of grounds. Firstly, he argued that the distinction drawn by the court between the validity of the warrant and the validity of the execution of the warrant makes no sense. He asked what purpose there was for a warrant being regarded as valid if it cannot be executed; for what purpose is it valid?

33. I must confess to having had a problem in answering this question during the oral argument. However, on reflection, the answer may be that, if the warrant is not valid, there is nothing to return to the magistrate (now District Judge (MC)) for re-issue. Further, some warrants have pre-conditions for their issue. For example, a warrant for the arrest of a person charged with an offence can only be issued if the complaint has been substantiated on oath. Provided the warrant remains valid, the District Judge (MC) can re-issue it without requiring fresh evidence to substantiate the complaint on oath. If I am correct, the distinction drawn by Kerr LCJ does have meaning.

34. Secondly, Mr. McDowell argued that the decision in Tierney imposes an impossible task on police, namely to decide the point at which it becomes impermissible to execute a warrant because of the passing of a reasonable time. He went on to suggest that police are now unable to execute many

warrants, and, if I understood him correctly, are almost inviting defendants to give themselves up, rather than arresting them on foot of old warrants.

35. This submission initially surprised me. Mr. McDowell conceded, on the basis of the authorities from other jurisdictions cited by Kerr LCJ, that police in those jurisdictions have to make similar decisions. Further, where police are unsure about whether a reasonable time has passed, why do they not simply comply with paragraph 22 of Kerr LCJ's judgment, and return the warrant with an explanation for the failure to execute it within a reasonable time?

36. Sadly, my strong suspicion is that, for a variety of reasons, no adequate explanation is available for the failure to execute many warrants. It may be that proper records are not kept of attempts to execute warrants, or that any such records have been lost, as happened in both this case and Tierney.

37. As regards what constitutes a reasonable time, it may be that the Court of Appeal will be able to provide some further guidance to police. I would tentatively suggest, however, that it will depend on the nature of the warrant and the facts of the particular case. In McKenna, counsel for the police conceded that a delay of less than two months was unreasonable. However, that was clearly because the warrant was for the immediate committal of a person who was already in prison serving another sentence.

38. A much longer period may be reasonable for a warrant for the arrest of a person charged with a serious offence whose whereabouts are not known, but whom police can be shown to have been actively seeking. However, I do not believe that anyone could argue that the periods of time which had elapsed in this case or the Tierney case were reasonable, given that the warrants were money warrants and that there was no admissible evidence in either case of any attempt to execute the warrants.

39. Returning to my observation at paragraph 25 above, it may also be that the failure to execute some money warrants within a reasonable time has been caused, or contributed to, by a police practice of allowing long periods of time to pay the fine, as appears to have happened in this case. It seems to me that such a practice runs completely contrary to Article 115(2), and is therefore unlawful.

40. It is clear from paragraph 22 of the judgment of Kerr LCJ in Tierney, that he envisaged police returning warrants to the District Judge (MC) with a view to their re-issue, because there is still a reasonable prospect of the subject of the warrant being located. Whatever the reason, I can say that,

prior to the decision in Tierney, no warrants were returned to me with a specific request for their re-issue, or even, to put the matter more neutrally, with a request that I consider whether to re-issue them. I, like most District Judges (MC), regularly had warrants returned by police, but the warrants were returned with specific requests that they be withdrawn, because police saw no prospect of them ever being executed, as the defendants could not be located. While I refused to withdraw some warrants, and re-issued them, that was because I considered that there was still a prospect of their execution, and not because police requested me to do so. Since the decision in Tierney, a small number of money warrants have been returned to me for re-issue, and I understand that larger numbers have been returned to other courts.

41. I should say, in passing, that I have had warrants returned for withdrawal on the grounds that there is no prospect of locating the defendant, when the defendant is actually before my court on other charges. This gives me little confidence that there are proper systems in place to ensure the prompt execution of warrants.

42. Mr. McDowell's final argument was that the decision in Tierney was per incuriam, because the court was bound by the decision in McKenna, and that I am likewise bound by the decision in McKenna.

Conclusion

43. I propose to follow the decision in Tierney, and I hold that police were not acting in the due execution of their duty when arresting the defendant. I do so for the following reasons.

44. It is not clear to me from the judgment in McKenna that the applicant ever argued that the execution of the warrant was invalid. The real issue in McKenna was the date from which the defendant's sentence should run. The court found a practical answer to that question. The period of delay in execution of the warrant was much shorter than in this case or Tierney.

45. Although the court in McKenna did not expressly say so, it seems implicit in their judgment that they regarded the requirement in Article 115(2) as being directory rather than mandatory. The authority for that proposition, namely R (Shields) v Justices of Tyrone [1907] KB 46, is actually cited by Kerr LCJ in his judgment in Tierney. He expressly rejected that approach to the consequences of procedural failure, stating that the modern approach is that one should seek to ascertain what the legislature intended should be the effect of a failure to comply with a procedural requirement. He therefore addressed the issue head on, pointing out that Article 115(2) provides an important protection against the tardy execution of warrants. If a failure to execute a warrant can

simply be overlooked, that would represent a considerable inroad into the efficacy of the safeguard.

46. Regrettably, it appears to me that the unintended consequence of the decision in McKenna was that, not only was there an inroad into the efficacy of the safeguard provided by Article 115(2), but that, prior to the decision in Tierney, the safeguard was completely ignored. Warrants were not returned for re-issue after a reasonable time had passed, but, instead, were only returned when police had given up hope of ever locating the defendant. To compound the problem, proper records of attempts to execute warrants were not kept, or were lost. Systems for identifying when warrants could be executed, for example when the subject of the warrant was appearing in court on other charges, were inadequate. And on top of those deficiencies, police actually developed a practice of allowing significant time to pay before money warrants are executed, which makes compliance with Article 115(2) impossible.

47. If the decision in Tierney has required police to address these problems, then it is to be welcomed. It cannot have been the intention of Parliament, when passing Article 115(2) into law, that it would be ignored. If there are problems with warrants already issued, those problems have been caused by the failure of police to pay any regard to Article 115(2). That cannot be a reason for permitting the situation to continue.

48. I therefore acquit the defendant of all the charges contrary to section 66(1) of the Police Act 1998. That leaves the charge of disorderly behaviour.

49. Mr. McDowell argued that, if the defendant accepted at the time that the warrant was valid, then he could not argue that he was acting lawfully when resisting arrest, because such a defence requires an honest and/or reasonable belief in the legality of one's actions. Therefore his actions in resisting arrest were unlawful and amounted to disorderly behaviour as well as assault. In evidence, the defendant said that he had never accepted that the warrant even applied to him. Having regard to the amount of alcohol that he had consumed on the day in question, I am not satisfied that he accepted that the warrant was valid. If the execution of the warrant was unlawful, then he was entitled to resist arrest. While his actions, as set out in my findings of fact above, may seem excessive, there was no evidence that any of the punches he aimed at police outside the house actually connected. None of his actions inside the house, or even on his doorstep, give rise to a charge of disorderly behaviour, as they were not committed in a public place. I do not consider that his actions outside the house went so far beyond the resistance of arrest that I have found to be lawful to justify conviction for a separate charge of disorderly behaviour. I therefore acquit him of that charge also.

A.T.G. White
District Judge (MC)
12 November 2009