IN THE PROVINCIAL COURT OF NOVA SCOTIA
Citation: R. v. Baker 2008 NSPC 64

Date: October 14, 2008
Docket: 1663634; 1663635
Registry: Digby, N.S.

Between:

Her Majesty The Queen

v.

Daniel Harold Baker

Revised Decision:	The text of the original decision has been corrected. The erratum is appended to this document.
Judge:	The Honourable Judge Jean-Louis Batiot
Heard:	October 14th, 2008 Annapolis Royal, Nova Scotia
Written Decision:	October 31st , 2008
Counsel:	W.W. (Bill) Watts, for the Crown Darren MacLeod, for the Defence

By the Court:

[1] THE COURT [orally]: On the 17th of May, 2006 the accused, at or near Middleton, Nova Scotia, was charged with using a wooden plank for a purpose dangerous to the public peace, contrary to section 88(2)(b) of the **Criminal Code**. As well he was charged with resisting arrest by Constable Joel Falkingham, a peace officer, engaged in the execution of his duties, the lawful arrest of Daniel Harold Baker, contrary to section 129.

[2] There are no issues as to identity.

[3] The evidence shows a short, tense confrontation of only a few seconds, which nearly cost the accused his life. There were only two witnesses in this trial: Constable Falkingham from Yarmouth, involved in a drug take-down on that day as a result of a search warrant, and Mr. Baker, in his defense.

[4] Constable Falkingham met, very early that morning, at the Bridgetown RCMP Detachment with four other officers of his own team and other team members as well, all involved in a general take-down. His team was assigned the task of searching the premises of the accused in Middleton. They were aware of Mr. Baker's lengthy violent criminal record. They decided they had to use the element of surprise to prevent the accused from getting to weapons.

[5] Constable Falkingham's team arrived at Mr. Baker's premises on Main Street in Middleton very early in the morning, broke down the street door, climbed a narrow stair leading to a landing somewhat encumbered with items, by the door of the apartment, all the while screaming "police, search warrant". They had difficulties to get through the second door, a glass door of the apartment. After several attempts they broke the door down. Constable Falkingham got in second and turned to his right. He tried to open a bedroom door, he could not; tried to kick it, it resisted; it flew open on the third attempt, or second kick, opening into a lit bedroom. The T.V. was on. Mr. Baker, the accused, stood in the middle of the room holding a two by four at eye level, jabbing towards the officer, shuffling forward on his feet, in a face-off situation. Constable Falkingham wore a dark uniform with the word POLICE highlighted.

[6] On Mr. Baker's second shuffle toward him Constable Falkingham, having told the accused repeatedly to lay down, took his police handgun out of his holster, aimed it at Mr. Baker, flagging his finger, i.e. the trigger finger extended towards Mr. Baker, and was near but not on the trigger. Upon the latter's third shuffle towards him, of about a foot, foot and a half, Constable Falkingham put his finger on the trigger and was about to pull - apply pressure to fire his pistol aimed at the accused - when he heard a command to his left, to the police dog, and felt along his left leg the police dog pass him. At all times the officer was screaming the commands "drop the board, get down". The police dog grabbed Mr. Baker's right arm and caused Mr. Baker to go down to the floor, letting go of the board. A struggle ensued to get the dog off Mr. Baker. Indeed the dog, with titanium capped canines, tore the upper part of the lower right arm of Mr. Baker by the elbow so

much so that he had to be hospitalized not only for that injury but others to the abdomen and to the leg.

[7] Mr. Baker denies he resisted. He says he was quite surprised, awakened from a deep sleep, somewhat induced by medically prescribed drugs. He woke up thinking that he was being attacked. He opened his bedroom door and looked at the glass entrance door next to it. The glass flew in his face and he retreated to his bedroom. He used the two by four, there from repairs being done on his bathroom, to secure the door and was about to put it down when the dog came at him. There was certainly yelling and screaming and he felt scared to death. He simply was not using the two by four as a weapon but as a brace. He recognized Constable Peters with a gun, drawn at his head, coming through the door. Mr. Baker denies using the board as a weapon as he was not offering any resistance. He admits his criminal record but says he has never resisted police and he did not have the two by four for a dangerous purpose, only as a self defense. Further, he did not hear any words of arrest, only that of a search warrant. He was scared for his boys who come to see him from time to time.

[8] Having heard both witnesses and having seen their demeanor on the stand I can say, and do accept, that there were five police men who were executing a search warrant. It took them some time to go up the narrow stairs and to break down the upstairs door, all the while announcing loudly their presence as police officers. I realize that there was some concern about Mr. Baker and weapons but they had decided to use that element of surprise. Part of it was the yelling.

[9] That the apartment door opened after several attempts is consistent with it being braced by the accused or just being blocked and the accused, however, desisted in the face of glass flying.

[10] The accused says that he was being awakened from a very deep sleep induced by a medically prescribed drug. If he heard the noise of the police officers coming up and breaking the door he had to hear them scream the words “police, search warrant”. I do not accept he was mistaken on that point.

[11] There is no evidence that he was told he was under arrest before or at the time of the confrontation until he was taken down by the police dog. I do not accept Mr. Baker’s evidence that he was in such stupor he did not know these were police officers in the lawful execution of their duties, executing a search warrant. He resisted and nearly got shot in the process. Luckily Constable Falkingham’s presence of mind avoided a dreadful outcome for all.

[12] I accept the accused was in possession of the two by four and that he was holding it at shoulder level towards Constable Falkingham since I do not accept that the accused was about to let it drop to the floor, as he said, when confronted in the bedroom. Indeed his recollection of the event is clouded by the surprise to which he was subjected by the forced entry of the police executing the search warrant and the drugs and drinks he had absorbed to fall asleep.

[13] He says he needs time to wake up on the best mornings, but his actions show amply that that was not the case that morning. He went first to the glass door and then retreated, readily, to his

bedroom holding its door closed until it was forced open, on the second try, readily opening. This was consistent with him holding it closed by bracing it with the two by four and then letting it go.

[14] The issue is whether the accused had possession of this two by four, at the time, for a purpose dangerous to the public.

[15] The two by four is not a weapon unless its owner intends it to be one (s. 2 of the **Criminal Code**).

[16] The Crown must prove, beyond a reasonable doubt, that the accused had the intent to so use it, not in self defense, but for a purpose dangerous to the public peace before it was in fact so used. In *R. v. Cassidy*, 1989, 2 S.C.R. 345, the police spoke with the accused in his mother's house; they were investigating her complaint of a missing car, at the accused's suggestion. The accused was drinking and got in an argument with the police. He ordered them to leave for trespassing or he would get them out, and reached for a shotgun to do so. The police arrested him a few minutes later outside the home. He did not have a gun there but the police had exited under the threat he had made and the observation of the gun and their inability to draw their own guns.

[17] The Court held that the offence was complete once the accused threatened the officers and took possession of the weapon (at para. 9).

[18] In the case at bar the issue is whether the accused changed his intent to use the two by four from a defensive weapon, a brace, to an offensive weapon, a spear. That intent must be clear and unequivocal. In *R. v. Proverbs,* 1983, O.J. 155, where the accused, faced with a search warrant, attempts to use a shot gun, loaded, which he had purchased years before for defensive purposes. The Ontario Court of Appeal, in ordering a new trial, states at para 43, and I quote;

> "*If the jury were satisfied or had a reasonable doubt that prior to the entry of the police into his premises Proverbs did not have the weapon for a purpose dangerous to the public peace and he only loaded it in the circumstances as outlined in his statement, unaware that it was the police seeking entry because he was in fear of harm for himself and only intended to use it, if necessary, to defend himself in the event that his premises were broken into, then the Crown would not have proved that he was in possession of it for a purpose dangerous to the public peace.*"

[19] This was never made clear to the jury.

[20] There can be changes in intent. What is important is the purpose the accused had at the time of the alleged offence.

[21] In *R v. Kerr*, 2004 S.C.R. 371, where an inmate in a federal institution controlled by gangs, expecting a fight with members of the controlling gang, armed himself with a "shank", made from a large spoon and an ice pick. The Supreme Court of Canada held, allowing the appeal from conviction on the section 88 charge:

a) The purpose may change over time ; (at para. 24)

b) A hybrid subjective-objective test must be applied to determine that purpose;

> i) The subjective determination of the accused's purpose;
>
> ii) An objective determination of whether that purpose was in all the circumstances dangerous to the public peace; (at para. 25)

[22] In the case at bar, not one taking place in a dangerous penitentiary, but in the accused's own home in a rather peaceful town in Nova Scotia, I accept that the accused used a two by four, there as a debris in a construction project as he described, to brace the door and secure it against intrusion. This was not a dangerous purpose. I find, however, that his purpose changed from a brace to a weapon as the police was closing in on him and cornered him in his bedroom. This was a very short but tense confrontation. The police announced its presence loudly and repeatedly over several seconds as the officers made their way noisily through the first door and up the stairs. It took them some time to break through the second glass door. The accused was then behind the bedroom door, bracing it. He was sufficiently awake to intend that defense. He had to realize who they were. I do not accept his evidence on that point.

[23] He had the necessary presence of mind to change the use of that two by four from a brace to a weapon. Standing on his bed facing several officers and particularly Constable Falkingham, he pointed it at the police officer and jabbed it several times at him, having adopted a fighting stance. He did so in a dangerous manner to the public peace prompting the officer, reasonably apprehensive for his own safety, to resort to the use of his side arm. But for the intervention of the police dog and his master, and the presence of mind of Constable Falkingham, the outcome of this

tense confrontation would likely have been very tragic. The Crown has established the charge contrary to section 88 beyond a reasonable doubt.

[24] As for the charge contrary to section 129, resisting a police officer in the exercise of his duties, I must conclude that there was no mention of a reason to arrest the accused, nor any notice that this was going to happen, clearly in contravention of section 29 of the **Code**.

[25] I note the police identified themselves and their purpose, verbally, repeatedly. "Search warrant, police" or ordered the accused to "drop the board, get down". They could have also mentioned the word "arrest" and the purpose. It was a very short time. The accused was injured once taken down by the dog and likely in pain. The whole confrontation only lasted seconds. I have a reasonable doubt as to the accused's guilt on that charge and I find him not guilty of it.

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Jean-Louis Batiot, J.P.C.

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(R. v. Daniel Harold Baker 2008 NSPC 64)

ADDENDUM

At para. 22, the eighth line, “The accused was behind it, bracing”, should read

“The accused was then behind the bedroom door, bracing it”.