

Date: 20020221

IN THE PROVINCIAL COURT OF NOVA SCOTIA
(Cite as: R. v. Borden, 2002 NSPC 003)

HER MAJESTY THE QUEEN

versus

JOHN ARTHUR BORDEN

DECISION ON CHARTER APPLICATION

BEFORE: His Honour Judge Stanley D. Campbell, JPC

COUNSEL: Ronald J. MacDonald, for the Crown
Lawrence I. O'Neil, for the Defence

- [1] This matter was originally scheduled to be heard in Antigonish Court on the 4th of February, 2002. By conference call and counsel agreement therefrom the Court reviewed a transcript of the evidence taken before the Court in Antigonish by Judge White on July 14, 2000. The matter was subsequently argued before this Court on February 13th, 2002 in Antigonish. Decision was reserved and is filed on the date below.
- [2] The defendant in bringing this application seeks relief under s. 24 of the Charter. A broad outline of the facts are as follows.
- [3] On Friday, July 14, 2000, the Court heard evidence in the matter of John Arthur Borden. Counsel agreed that this is also the evidence before this Court. Mr. Borden is charged with resisting arrest, contrary to s. 129(1) of the Criminal Code; uttering threats contrary to s. 264.1(1) of the Criminal Code; and with breach of probation contrary to s. 733.1(1)(a) of the Criminal Code.
- [4] The evidence is that Officer Poswiata at approximately 5:00 p.m. on Tuesday, May 23, 2000 received information that John Arthur Borden was at a trailer or mobile home at Beaverbrook Trailer Court in Antigonish, Nova Scotia. Officer Poswiata retrieved a Warrant of Arrest which was held on RCMP premises. He called Officer Caughey who, at that time, was on patrol and asked for Officer Caughey's assistance in effecting the arrest of John Arthur Borden. Officer Poswiata also gave evidence that he advised Officer Perry of his plans to arrest John Arthur Borden.
- [5] Officer Caughey subsequently picked up Officer Perry at the RCMP station for the purpose of driving him home. The two officers, however, travelled together to the Beaverbrook Trailer Court where they met Officer Poswiata.
- [6] The Officers attended at one trailer and were directed to the adjacent trailer as being the residence of John Arthur Borden. The Officers indicated that they then approached the residence of John Arthur Borden.
- [7] Officer Poswiata attended at the entrance to the Borden/Byard trailer. An conversation between Juanita Byard, the common-law spouse of John Arthur Borden and Officer Poswiata occurred. Officer Poswiata knew Juanita Byard from his work in the community of Guysborough, the community where Ms. Byard and Mr. Borden were raised. Officer Poswiata and Ms. Byard discussed whether Mr. Borden was in the trailer. Ms. Byard denied that he was there, and Ms. Byard's evidence was that Officer Poswiata insisted that Mr. Borden was in the home. Subsequent to this conversation, the Officers entered the trailer led by Constable Perry, who testified that he

heard running footsteps within the trailer. Mr. Borden was arrested in his bedroom or in the area of the hallway outside his bedroom.

- [8] I have been referred to and have applied the principles outlined in the case of R. v. Feeney 115 C.C.C. (3d) p. 129 as well as the case of Edward v. The Queen, 104 C.C.C. (3d) p. 136, along with the relevant sections of the Criminal Code.
- [9] I find that Constable Poswiata knew or should have known that John Arthur Borden had, what I would describe as "a limited expectation of privacy" while resident in the trailer of Ms. Byard. "Limited" expectation but one which in the circumstances would trigger the need to apply for the appropriate warrant when entering a dwelling house to effect an arrest. Constable Perry was not as clear on the circumstances and made no effort to acquaint himself with the need for a "Feeney" warrant. Constable Caughey simply didn't know what they were facing.
- [10] Constable Poswiata at p. 4 of the transcripts says

"He was staying at his girlfriend's trailer." "My understanding was that he was living there."

He was aware of a long standing relationship between the two.

- [11] The matter at hand was at the lower end of the offence scale, a failure to attend court as required. The operation came about at the end of the day, as a result of a telephone tip. It was thrown together in haste and little thought given to procedure. There was no exigency in the circumstance in that there had been no complaint from the household, no threats, no reason to believe the accused would flee, or that there was evidence which would be destroyed. There was no effort to inform the accused, once in custody, of his right to counsel. I cannot agree that his behaviour was responsible.
- [12] The result will be that the count of resisting Constable A. A. Perry under s. 129(a) will be stayed as being unsustainable on the basis of an unlawful arrest. The count of breaching a Probation Order under s. 733.1(1)(b) of the Criminal Code will remain. The count of uttering a threat to Constable A. A. Perry and Constable H. A. Poswiata will remain against the accused. There was no evidence obtained as a result of the breach of Mr. John Arthur Borden's Charter rights nor was a nexus between the breach of a Charter right and the charges established. The latter charges resulted from Mr. Borden's own words and actions, as heard and observed by the officers. They cannot be used or justified as a reason for relief under the Charter.

- [13] Mr. Borden will be granted his application as to Count # 1, the charge under s. 129(a) alleged to have occurred on May 22nd, 2000.
- [14] The application as to Counts 2 and 3 is dismissed, that is as to the charges of breach of a probation order and uttering a threat to Constable Perry and Constable Poswiata on May 22nd, 2000.

Dated at Sydney, Nova Scotia, this 21st day of February, 2002.

Stanley D. Campbell, JPC