

Brett Freeman pleads guilty to assaulting a police officer in the due execution of his duty contrary to the Criminal Code, s 114(1). Although the Code refers to the crime as assaulting a police officer, the crime in this case is constituted by resisting police rather than assault. Although he pleaded guilty, I am required to make findings about disputed facts for sentencing purposes. For the purpose of determining the factual issues between the Crown and the accused, I may only make findings adverse to him if satisfied beyond reasonable doubt they have been proved, and I may only make findings of fact in his favour if they are proved on the balance of probabilities.

In February 2015 the defendant was separated from his wife. A family violence order was in place preventing him from going to her residence in Newnham. In breach of the order, the defendant went to the house in the early hours of the morning of Monday 9 February 2015. He was due to appear in court that morning and was also subject to a warrant for having failed to appear four days earlier. His wife let him in. He brought a bag with him which his wife looked in while he was in the shower. She found a handgun. Without the defendant's knowledge she put the bag outside. They argued, in part because she also found text messages on his phone which suggested he was involved with another woman. He refused to leave but, eventually and for reasons which are not entirely clear, called the police himself. An officer attended and spoke to the defendant. The defendant was agitated and claimed to the police officer to have guns and explosives in the house. He said he was not leaving and wanted to be shot by the police. The police became concerned about the potential for a violent situation to develop and escalate. Members of the police special operations group were notified and deployed. The police not only knew about the family violence order but also knew that the defendant had, only six months earlier, refused to leave the same house for three hours until after police negotiators and a police cordon were required.

The house was again cordoned off by the police. The defendant's wife and her two children aged 5 and 12 decided to remove themselves at 11.40 am. She claims not to have been concerned for her safety and was not held against her will. However, the defendant still refused to leave. As events occurred, he did not leave until the police entered the house almost forty hours later and forcibly removed him. In the interim period a siege situation developed. The house was surrounded by police and police vehicles, including specially armed vehicles brought from Hobart. The police decided to use force only after extensive but unsuccessful attempts were made by police negotiators to persuade him to surrender himself. In the course of the negotiations the defendant again made threats to harm himself and police and said he had a gun in the house. It is the circumstances of his removal which give rise to the crime. The particulars of the indictment allege that he resisted six police officers by attempting to arm himself with a firearm, by thrashing his body about, by attempting to arm himself with shards of glass and by arming himself with a hockey stick. He admits thrashing his body about does not admit the other alleged conduct.

The following narrative sets out my findings about the essential facts, many of which are not contentious. I will identify the particular areas of dispute as I proceed. At 1.50am on 11 February 2015 six members of the special operations group, Constables Bennett, Ortuso, Legg, Howell, Reynolds and Fawdry, entered the house. After some time spent cautiously making their way towards the bedroom in which they believed the defendant to be asleep, they burst through a locked internal door and then entered through another door into the

bedroom. They found the defendant lying on his back on a single bed, apparently having been asleep. He was partially covered by a doona and his head was on a pillow. The room is a small one. The bed was positioned lengthways against the wall to the left as the police entered. The head of the bed was in the far corner of the room under an external window which the defendant had broken earlier. The defendant was lying with his feet near the window and his head at what was the foot of the bed, closer to but to the left of the door. Thus, the wall was, when the defendant was lying face up, to his left.

It took more than a minute for the six police to restrain and subdue the defendant. The events while they did so were noisy and frantic. The defendant violently resisted the police's efforts to restrain him by thrashing around with his head, upper body, torso and legs. He refused to place his hands behind him so he could be handcuffed when repeatedly asked to do so and resisted the police's efforts to achieve that result. It took all of the efforts of six officers to eventually bring him under control. What I am required to determine is whether the State has proved that he resisted in the manner he disputes.

As the police entered, the first officer, Constable Ortuso, shouted "Police, show us your hands" and discharged eight gas propelled pepper balls from a launcher at the defendant. The second officer, Constable Legg, discharged a sound and flash grenade. These are non-lethal devices designed to distract and incapacitate a person to be restrained. Constable Howell followed Constable Legg, and he was followed by Constable Fawdry. Constables Ortuso, Legg and Howell all gave evidence which I accept that, as they entered the room, the defendant partially sat up and moved his right hand across his body towards the wall. Believing that the defendant was reaching for something, Constable Legg jumped on his torso. Constable Ortuso went to the defendant's head area, followed by Constable Fawdry. Constable Howell attempted to restrain the defendant's legs. The effect of these actions with the defendant turning to the wall, possibly combined with the defendant's efforts to shield himself from the actions of the police officers, resulted in the defendant being face down on the bed with the doona pulled up towards his head and his hands drawn under his body, at least to some extent.

As they entered the room, some of the police officers noticed pieces of broken glass on the bed near the defendant's head and upper body. The presence of the glass is confirmed by the photos taken later. The glass is from the broken window to which I earlier referred, although at the opposite end of the bed. There are many pieces, some being quite large. The State alleges that from the position in which he was face down on the bed with police officers over him, the defendant attempted to, with his left hand, take hold of broken glass to use as a weapon in his efforts to resist the police. Constable Ortuso said that he and other officers were attempting to gain control of the defendant's arms so he could be handcuffed behind his back. He saw the defendant push his left hand up the mattress by about a hand length towards the glass, which he said was "under the pillow". He shouted to the other officers and Constable Fawdry prevented this from happening by "taking control of his hand" before the defendant took hold of any glass. Constable Bennett, who was last into the room, said he saw the defendant's hand move towards the glass and thought he was trying to take hold of it. Constable Howell heard Constable Ortuso say "he's trying to get glass", but did not see any movement. Constable Legg did not see any movement of the defendant's hand towards glass. When Constable Fawdry entered he moved to help restrain the defendant's left shoulder and left arm. He heard Constable Ortuso shout that there was glass on the bed. Constable Fawdry grabbed the defendant's left arm because, he said, it appeared to him that the defendant was reaching for the glass with his fingers opening and closing as his hand was moving towards it.

The defendant gave evidence. He said that he was invited to the house by his wife and only refused to leave when she told him that she would not withdraw allegations he claims are false. I doubt the truth of his evidence but it makes no difference for sentencing purposes. He admits telling the police negotiators that would not leave and that the police would have to come and get him.

The defendant denies that he tried to grab the glass. He said that he removed a large pointed piece of glass from the bedroom window when it was accidentally broken, so he did not cut himself when he was talking to the negotiators. He said he put it on the bed because there were other things on the floor in the room and nowhere else suitable to put it. He said he went to sleep further down the bed not thinking about the glass and his head must have moved over it while he slept. I reject his evidence. There other obvious places for the defendant to put the glass either when it was first removed or later on. There was already broken glass outside the window and it would have been simple to put it there, completely out of the room. The circumstances tend to prove the defendant's intention. It is fanciful to suggest that he went to sleep with that amount of glass on the bed unless it was left there intentionally. I am satisfied beyond reasonable doubt that, when woken, he did try to grab the glass with the intention of using it to resist the police. I was impressed by the evidence of each of the police officers. I accept the evidence of Constables Ortuso and Fawdry in particular on this point. I find that the defendant moved his hand toward the glass while, as Constable Fawdry said, opening and closing his hand in a grabbing motion. I find the defendant intended to arm himself with a piece of it but did not succeed because he was prevented by Constable Fawdry from doing so. This particular of the indictment is proved.

The next aspect of the dispute concerns the hockey stick. All of the police gave evidence, not seriously challenged, that while the defendant was face down under the doona, he took hold of a hockey stick in his right hand. The police saw the stick in his hand. None of the officers saw the hockey stick before it was in the defendant's hand. It could only have come from somewhere on or near the bed either under the defendant or between him and the wall. The defendant had no opportunity to grab it from anywhere else. When he saw what the defendant was holding, Constable Howell lunged at the defendant's right arm and attempted to remove the hockey stick, including at one point by trying to lever the defendant's fingers from it. Constable Legg also tried to remove the stick from the defendant's grasp, without success. The defendant said he looked down, observed that he had been struck with a Taser cartridge, grabbed the hockey stick for a reason he did not explain, and could not let go of it because of the effects of the electric shock he received. Again, I reject his evidence. I am satisfied of the police evidence that the Taser was deployed only after the police saw the defendant holding a hockey stick and were unable to remove it from his grasp. I find that a Taser was deployed three times, twice by Constable Bennett and once by Constable Reynolds. The first discharge was not immediately effective. Constable Bennett's second discharge was effective, and the defendant became incapacitated and was restrained. I am left in no doubt that the defendant's resistance included grabbing a hockey stick intending it as a weapon.

After the defendant was restrained, a small firearm was found by the forensic's officer on the floor near the skirting board between the bed and the wall. It is a .22 calibre Liege revolver and was loaded with five cartridges. The defendant admits that he took the gun into the room. He was aware of the existence of the gun in the house, retrieved it while his wife and children were still there and took it into the bedroom. He said that he considered killing himself with it but eventually, after a few hours, put the gun down beside the bed against the wall, did not

touch it again and did not reach for it when the police came in. The revolver was photographed in the place it was found by the police. It appears to me to have been about two thirds of the way along the bed closest to the end where the defendant had his head when he slept. The State alleges that the defendant, as part of his resistance, attempted to grab the pistol. The State points to the comments made by the defendant before and during the siege as indicating an intention to use the gun against the police if they came into the house after him. It contends that this explains the initial movement seen by the special operations group officers when they entered the bedroom, when the defendant reached across his body with his right arm towards the wall. The evidence of the police is all to the effect that this initial movement took place before the defendant found himself face down on the bed. The police prevented continuation of the movement. I find that, at that time, the defendant had nothing in either hand. Constable Legg said that at some later point he saw the defendant's right hand reach down to the bed "between him and the wall", but then saw that the defendant had the hockey stick. I am not satisfied beyond reasonable doubt that the movement described by the police was an attempt by the defendant to grab the firearm. I reject his evidence and place no weight on his denial. I accept the evidence of the police. I think it possible, or even likely, that he made an initial movement towards the revolver. However I have a reasonable doubt about whether he did so. That is because there are explanations for what the police observed, other than an attempt to grab the revolver, which are reasonably open. Had it been his intention to immediately resort to use of the revolver against the police, there is no reason the defendant could not have left the gun on the bed within easy reach, like the glass and the hockey stick. As the police entered, the defendant was immediately struck by the pepper balls fired by Constable Ortuso. I cannot exclude, as a reasonable possibility, that the movement observed by the police was either part of the defendant's motion in turning away from their advance or an attempt to grab the hockey stick. The defendant says that the hockey stick was under the doona but I have no faith in his evidence about anything. The presence of the hockey stick near the wall could have been missed by the officers during the struggle. The hockey stick could only have been obtained from the part of the bed between the defendant and the wall. That was where the initial reaching motion seen by the police was directed. I do not find this particular of the indictment proved.

The defendant is 36. He has no serious prior convictions until 2006, by which time he was aged 27, but his record since then suggests a problem with illicit drugs. In 2006 he was fined for cultivating, possessing and supplying cannabis. On 23 June 2010, he was sentenced to two years' imprisonment for trafficking, a crime committed in 2007. He was released on parole in June 2011. On 7 September 2014 he committed a common assault. On 8 September 2014 he was found in possession of an unregistered pen pistol for which he had no licence. He was charged and bailed. On 11 December 2014, he drove with methylamphetamine and amphetamine in his blood, with a loaded shortened single shot .22 rifle for which he had no licence in the pocket in the driver's side door. His possession of the rifle was in breach of a family violence order made to protect his wife and in breach of bail for the earlier charges. It is an aggravating factor that this crime was committed while on bail for the September and December offences. That is a factor of some significance in this case because the similar but less serious siege situation to which I referred earlier on 8 September 2014 arose from the 7 September 2014 offence. He was subsequently sentenced to three months' imprisonment from 12 February 2015, the date of his arrest, for the September offences. He was due for release on 12 May 2015 but has been in custody since then. He is also subject to a two month wholly suspended sentence and a community service order for the December offences.

At the time of this crime the defendant was a frequent user of illicit drugs, principally Ice. There is no evidence that the use of the drug contributed to this crime, and it provides no mitigation in any event. He feels that he has been unjustly dealt with by his wife and the justice system. Even if true, which I doubt, it does not justify his conduct.

A difficult aspect of this sentencing is in determining the appropriate punishment for the charged acts. No person should be punished for crimes they have not been charged with or convicted of. They must be sentenced without regard to facts or circumstances which are ingredients of a more serious offence or a different offence, separately charged but not yet dealt with. He has been charged with summary offences arising from his possession of the firearm, and family violence offences arising from his presence at the house. He has pleaded guilty to, but not yet been sentenced for, at least some of those offences, and so I am not to sentence him for that criminal responsibility or treat those as aggravating factors. Thus, the criminal conduct for which the defendant is to be sentenced is confined to the resistance which he exhibited to the police after they entered the house. Mindful of those considerations I regard the defendant's conduct which led to the requirement to enter, including his threats concerning use of a firearm, as relevant to sentence. Those facts directly affected the manner and extent of the police entry into the house. The police were not to know whether he had a firearm or whether he intended to resort to use of a firearm. His resistance was a continued manifestation of the utter disregard and contempt the defendant displayed to the law, to authority, the community interest and the welfare of the police, whose duty it was to protect the community from the defendant and, indeed, to protect the defendant from himself. By his actions, he effectively invited what happened and prepared for it. Although I am not satisfied he attempted to resort to use of the firearm in the manner alleged, he used or attempted to use a hockey stick and pieces of broken glass in his resistance. I regard the resort to glass as particularly serious. Had it succeeded serious injury to one or more police could easily have been caused. It required the actions of a significant number of highly trained special operations officers with all the resources available to them to overcome the defendant's resistance. It is largely due to their training, skill and planning that no officers were hurt in the process, and the defendant suffered no serious long-term injury. My sentence must reflect the need to protect the police force and indicate the displeasure of the Court and the community about conduct of this nature directed towards the police. General deterrence is a weighty sentencing consideration.

A pre-sentence report assesses the defendant as requiring a high level of intervention on his release. I will make a probation order because the community will benefit if he can put his life in order and overcome illicit drug use.

Brett Freeman, you are convicted. You will pay the victims of crime compensation levy of \$50 within 28 days of your release. You are sentenced to imprisonment for 14 months. To take account of time already spent in custody, that sentence will commence on 12 May 2015. Having regard to your recent record, the seriousness of your crime, the length of the sentence and your possible eligibility for remissions I make no parole order. I make a probation order for a period of 18 months from your release with special conditions that you must attend educational and other programs, undergo assessment and treatment for alcohol or drug dependency, submit to testing for alcohol or drug use and submit to medical, psychological or psychiatric assessment or treatment as directed by a probation officer.