Kentucky Law Journal

Volume 40 | Issue 2 Article 12

1951

Negligent Manslaughter in Kentucky--The Rule in Marye v. Commonwealth

Robert C. Moffit
University of Kentucky

perhaps the time has come for the legislature to amend the criminal code to provide, like the Federal Rules of Criminal Procedure, that:

> "If the defendant appears in court without counsel, the court shall advise him of his right to counsel and assign counsel to represent him at every stage of the proceedings unless he elects to proceed without counsel or is able to obtain counsel."[21]

GEORGE R. CREEDLE

NEGLIGENT MANSLAUGHTER IN KENTUCKY THE RULE IN MARYE v COMMONWEALTH[1]

What degree of negligence is required in Kentucky for a conviction of manslaughter? This question is of particular importance in Kentucky since the statutes set out the punishment for voluntary manslaughter but do not attempt to define the elements of the crime.[2] Involuntary manslaughter remains a common law crime[3] with the punishment being fixed by a general statute.[4]

In a case decided in 1919,[5] where the homicide resulted from the negligent operation of an automobile, the tort standard of care was applied and on a finding of ordinary negligence the defendant was convicted of involuntary manslaughter. Seven years later in a similar case involving a homicide resulting from the negligent operation of an automobile,[6] the court said that failure to exercise ordinary care in the driving of an automobile was sufficient negligence to constitute the crime of involuntary manslaughter. These cases were followed in Kentucky, and the law seemed to be settled that ordinary negligence in the operation of an automobile was sufficient to authorize a conviction of involuntary manslaughter.[7]

As one might expect, since the court had resorted to the rule that ordinary negligence was sufficient to constitute involuntary manslaughter, when it was later confronted with a case involving a greater degree of negligence and consequently deserving a greater degree of punishment, the natural solution was to convict the guilty party of

---

[21] FED. R. CRIM. P. 44.

[1] 240 S.W 2d 852 (Ky. 1951).

[2] KY. REV. STAT. sec. 435.020 (1948).

[3] Sikes v. Com., 304 Ky. 429, 200 S.W 2d 956 (1947).

[4] KY. REV. STAT. sec. 431.075 (1950).

[5] Held v. Com., 183 Ky. 209, 208 S.W 772 (1919).

[6] Jones v. Com., 213 Ky. 356, 281 S.W 164 (1926).

[7] Lewis v. Com., 301 Ky. 268, 191 S.W 2d 416 (1945); Lowe v. Com., 298 Ky. 7, 181 S.W 2d 409 (1944); Com. v. Mullins, 296 Ky. 190, 176 S.W 2d 403 (1943).

voluntary manslaughter. That is exactly what was done. Various phrases were used to describe this higher degree of negligence required for a conviction of voluntary manslaughter,—such phrases as "reckless conduct",[8] "reckless or gross" [9] "reckless disregard",[10] "reckless and wanton",[11] "grossly careless",[12] and "gross negligence" [13] Even though various phrases were used, it appears that involuntary manslaughter could be committed by ordinary civil negligence while any negligence of a higher degree would authorize a conviction of voluntary manslaughter.

In the recent case of *Marye* v *Commonwealth*[14] the court was confronted with the extreme harshness of the rule as it applies to involuntary manslaughter. In that case two homicides resulted from the negligent driving of an automobile by the defendant who was convicted of involuntary manslaughter on a finding of ordinary civil negligence. On appeal the Kentucky Court of Appeals in a well written opinion by Judge Combs, although recognizing the rule established by prior decisions, expressly overruled these cases and held that ordinary negligence, though sufficient in a civil suit, was not sufficient for a criminal prosecution; that in order to convict one of involuntary manslaughter there must be a finding of "gross negligence."

This case which places Kentucky in accord with the great weight of authority on this question[15] thus becomes one of the landmark decisions in the state. It not only changes the law as to the negligence required for involuntary manslaughter but will also have repercussions as to the negligence required for voluntary manslaughter. In discussing the relationship between voluntary and involuntary manslaughter Judge Combs said:

> "It is our view that instructions in voluntary manslaughter cases should require a finding of reckless and wanton conduct, and instructions in involuntary manslaughter cases should require a finding of gross negligence in order to authorize a conviction. We think that if the terms gross negligence and reckless and wanton conduct' are correctly defined in the instructions, the jury will have a practical working basis upon which to render an intelligent verdict."[16]

It is respectfully submitted that this paragraph is the weak spot

---

[8] Rains v. Com., 226 Ky. 173, 10 S.W 2d 643 (1928).
[9] Thacker v. Com., 263 Ky. 97, 91 S.W 2d 998 (1936).
[10] Boggs v. Com., 285 Ky. 558, 148 S.W 2d 703 (1941).
[11] Haupe v. Com., 234 Ky. 27, 27 S.W 2d 394 (1930).
[12] Hill v. Com., 239 Ky. 646, 40 S.W 2d 261 (1931).
[13] Newcomb v. Com., 276 Ky. 362, 124 S.W 2d 486 (1939).
[14] *Supra*, note 1.
[15] MILLER, CRIMINAL LAW 287 (1934); MORELAND, RATIONALE OF CRIMINAL NEGLIGENCE 16 (1944); 65 COR. JUR. SECUN. 1270 (1950); 61 COR. JUR. SECUN. 774 (1949); 40 COR. JUR. SECUN. 924 (1944).
[16] 240 S.W 2d 852, 855 (Ky. 1951).

in this important and well reasoned opinion. By way of dictum the court approved the cases holding voluntary manslaughter could be committed by a high degree of negligence. It may well be doubted whether negligence, however great, can ever amount to a voluntary act.[17] Ballentine defines voluntary manslaughter as an intentional killing of a human being in sudden heat and passion without malice and under reasonable provocation.[18] May in his work on criminal law states that it is voluntary manslaughter if it was committed with a *real* design to kill.[19] The Kentucky court in cases involving voluntary manslaughter by negligence[20] reasons that in such situations one must be held to intend the natural consequences of his act and by this method reaches the conclusion that such negligent acts are voluntary If the Kentucky courts are going to continue to use this fiction it is hard to see how they can make voluntary manslaughter out of "reckless and wanton conduct" and at the same time refuse to apply the same reasoning to "gross negligence" and thus make that voluntary manslaughter also. One can readily see the uncertain and precarious situation such a doctrine would lead to. The important question is, Is such a doctrine sound?

The court states in the paragraph above quoted that they believe that if the terms "gross negligence" and "reckless and wanton conduct" are correctly defined they will serve as a practical working basis to differentiate voluntary from involuntary manslaughter. Is this a reasonable ground for distinguishing them? It is submitted that it is not. Here are three words, "gross" "reckless", and "wanton." "Gross" and "reckless" have been so universally used as synonyms, even by the Kentucky court itself, that few citations are necessary to show their similarity of connotation,[21] yet the court says one denotes an act which is involuntary and the other an act which will be held to be voluntary The court, continuing its discussion, not only attempts to distinguish between "gross" and "reckless" but also uses the words "reckless" and "wanton" synonymously Professor Moreland in a recent extended study on methods which are useful in describing criminal negligence came to the conclusion that wantonness, defined as

---

[17] MORELAND, RATIONALE OF CRIMINAL NEGLIGENCE 37 (1944).

[18] BALLENTINE, LAW DICTIONARY WITH PRONUNCIATIONS 1347 (1930).

[19] MAY, CRIMINAL LAW 272 (4th ed. 1938).

[20] Largent v. Com., 265 Ky. 598, 97 S.W 2d 538 (1936); King v. Com., 253 Ky. 775, 70 S.W 2d 667 (1934); Embry v. Com., 236 Ky. 204, 32 S.W 2d 979 (1931).

[21] Jackson v. Edwards, 144 Fla. 187, 197 So. 833 (1940); Thacker v. Com., 263 Ky. 97, 91 S.W 2d 998 (1936); Pelfrey v. Com., 247 Ky. 484, 57 S.W 2d 474 (1933); La Plante v. Rousseau, 91 N.H. 330, 18 A. 2d 777 (1941); Thomas v. Southern Lumber Co., 181 S.W 2d 111 (Tex. 1944); PROSSER, TORTS 262 (1941).

arrogant recklessness,[22] was one of the most satisfactory descriptions of the state of mind required for the negligent *murder*[23] This is the rule which has been adopted in most jurisdictions.[24] It is apparent that "wanton conduct", which is generally defined as arrogant recklessness is a higher degree of negligence than "reckless conduct" and yet the court uses them as synonyms.

It may be argued that in using the phrases "gross negligence" and "reckless and wanton" to distinguish between involuntary and voluntary manslaughter the Kentucky court did not intend to use the words "reckless and wanton" as synonyms but rather as a phrase, which when read in its entirity denotes the conduct which will be held to be voluntary If this was the intention of the court, and such an interpretation seems reasonable, it is submitted that the use of the words "reckless" and "wanton" conjunctively may cause substantial uncertainty in the application of the rule. As has been shown above, "wanton" conduct is best defined as arrogant recklessness and thus is something much greater than "reckless" conduct. Joining the word "reckless" conjunctively to the word "wanton" can add nothing whatsoever to the connotation which the word "wanton" carries by itself, for "reckless" conduct is included within, and is something less than, "wanton" conduct. Therefore in order to avoid the unnecessary confusion it would seem reasonable to omit the word "reckless" from the phrase. The effect of the decision in the Marye case would then be to hold "gross negligence" sufficient to authorize a conviction of involuntary manslaughter, while "wanton" conduct would, in Kentucky, constitute voluntary manslaughter.

In summarizing what has been said with respect to the Marye case it will facilitate clarification to note briefly the main features of the above discussion: (1) The decision is fundamentally sound in that it requires a higher degree of negligence for a conviction of involuntary manslaughter than is required in a civil suit. (2) The use of the phrase "gross negligence" to describe the higher degree of negligence required was an unfortunate choice of language because of the vagueness of the term. Furthermore the statement by the court to the effect that "gross negligence" should be defined as the "failure to exercise slight care" is subject to strong criticism. Is not the failure to exercise slight care practically no care at all? It would seem that such a definition would be much too advantageous to the defendant. (3) The phrase "reckless and wanton" as describing the conduct which will

[22] WEBSTER'S NEW INTERNATIONAL DICTIONARY 2871 (2d ed. 1938).
[23] *Op. cit. supra*, note 17 at 68.
[24] *Op. cit. supra*, note 17, 62 *et. seq.*, and cases there cited.

authorize a conviction of voluntary manslaughter is ambiguous. If the words were intended to be used as synonyms, then the distinction between that conduct and "gross negligence" is very vague and uncertain for "reckless" and "gross" have similar connotations. Further, if the phrase was used to describe the highest degree of negligence, which is usually described as "wanton", the word "reckless" is superfluous and misleading. (4) The court by way of dictum approved the doc trine of the *wantonly negligent* voluntary manslaughter, which on its face is illogical and subject to vigorous criticism; however, much of such criticism of the doctrine should be directed at the state legislature rather than to the courts. The legislature has by statute limited the punishment for all common law crimes, the punishment for which is not provided for by statute, to a maximum imprisonment of one year.[25] This statute eliminates the possibility of punishing *wanton* homicides as negligent murders in this state because of the insufficient penalty As a result of this statute the courts are placed in the difficult position of providing a sufficient penalty for conduct which in most other jurisdictions would be murder.[26] Is it not reasonable that the court would resort to the use of fictions in order to find voluntary manslaughter so as to sufficiently punish the defendant where he is guilty of a high degree of negligence? The voluntary manslaughter statute carries a maximum imprisonment of twenty-one years.[27] It is obvious that the burden of clarifying the Kentucky homicide law rests largely with the state legislature. The need for statutory reform is imperative in order more successfully to execute this phase of the criminal law of the state.[28] This need is emphasized by several recent newspaper editorials vigorously criticizing various definitions in the Marye case.[29]

ROBERT C. MOFFIT

---

[25] KY. REV. STAT. sec. 431.075 (1950).

[26] *Supra*, note 24.

[27] KY. REV. STAT. sec. 435.020 (1948).

[28] It is interesting to note for the record that on the new trial ordered in the Marye case the defendant was acquitted due to a failure to find the required degree of negligence. Lexington Herald, October 12, 1951, 1.

[29] See for example, the following two editorials: Lexington Leader, Nov. 13, 1951, 4; Lexington Leader, Oct. 26, 1951, 4. In the latter it was said: "To obtain a conviction in an involuntary manslaughter case, the court has held, the commonwealth must prove that the defendant failed to exercise slight care in the operation of his automobile. Since it would be virtually impossible for anyone to drive a motor vehicle a half-block without exercising slight care, the legislature certainly owes it to the people of Kentucky to put some teeth in the law. Otherwise, traffic deaths will be legal killing."