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Recommended Citation
Available at: https://uknowledge.uky.edu/klj/vol38/iss4/6

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KILLING A SUSPECTED FELON FLEEING TO ESCAPE ARREST*

There is little dispute that at common law a peace officer has no power to arrest for a misdemeanor, without a warrant, except for a misdemeanor amounting to a breach of the peace committed in his presence or when there are reasonable grounds for supposing that a breach of the peace is about to be committed or renewed in his presence. Likewise, it is just as uniformly settled at common law that an officer may arrest, without a warrant, a person whom he sees on the point of committing or attempting to commit a felony, or for a felony not committed in his presence, if he has reasonable cause to believe that a felony has been committed, even though none, in fact, has been committed. And, of course, with a valid warrant, an officer may legally arrest the person named therein regardless of the nature or degree of the offense.

The amount of force that can be used in effecting an authorized arrest gives rise to considerably more dispute. There is general accord in the various jurisdictions that an officer may use force against force in effecting an authorized arrest, whether of a misdemeanant or felon. Moreover, the law is uniformly settled that an officer is justified in killing a fleeing felon, provided he has utilized every means within his power to effect his arrest, and the killing is absolutely necessary to prevent his escape. On the other hand, it is just as uniformly established that an officer is not justified in killing a mere misdemeanant or

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* This is a companion, but contra, note to the one by Mr. Griffin, pp. 618.


5 Head v. Martin, 85 Ky. 480, 3 S. W. 622 (1887); Carr v. State, 43 Ark. 99 (1884); Conraddy v. People, 5 Parker Cr., Rep. 234 (N. Y. 1863); 2 Bishop’s New Crim. Law, secs. 617 and 618 (9 ed. 1923); 1 Hale, Pleas of the Crown 489 (1778).
an innocent person who is fleeing, at least where the officer has no reason to believe him to be more than a mere misdemeanor.\(^6\)

There remains an area of some doubt, however. Suppose an officer has every reason to believe, based on reasonable grounds, that a felony has been committed, and committed by a particular person, and after resorting to all possible means and remedies to effect the arrest of that person, and failing in his efforts, fires and kills the fleeing suspected felon, only to learn later that no felony had been committed and thus that the person killed was not a felon at all, but only a misdemeanor, or perhaps, an innocent person. Or, suppose that a felony has in fact been committed and the officer has reasonable grounds for believing that a particular person is the felon, and in order to prevent his escape kills that particular person, only to learn that his victim was innocent. Should the officer’s reasonable belief that the person was a felon, in either instance, justify the killing? It is the purpose of this note to answer that limited question, with particular reference to the Kentucky view\(^7\)

To appreciate the problem fully, it is desirable to take a brief historical look at the applicable law. Even with the coming of the modern police system during the eighteenth century, police officers were restricted to the powers of private individuals in making arrests without warrants;\(^8\) hence it is not surprising that as late as 1765 neither a private person nor police officer could arrest, without a warrant unless a felony had in fact been committed.\(^9\) The officer’s power to arrest, without a warrant, one who he had reasonable cause to believe had committed a felony, even though no felony had been committed, stems from the English case of 1780, Samuel v Payne,\(^10\) which seems to have been the first case so to hold.\(^11\) But the resulting enlargement of the peace officer’s right to arrest need not in theory, and did not in fact, further result in an enlargement of the right to kill, although the right to arrest a suspected felon on reasonable suspicion has been loosely treated by some writers on the subject as a basis for the right to kill a suspected felon on reasonable suspicion. Actually, the amount of force which might legally be used in making arrests was from early

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\(^6\) Head v. Martin, 85 Ky. 483, 3 S. W. 622 (1887); 2 BishoP’s New Crim. Law, sec. 649 (9 ed. 1923).
\(^7\) Arrests under warrants not separately discussed herein.
\(^9\) Hall, Legal and Social Aspects of Arrest Without a Warrant, 49 Harv. L. Rev. 566, 570 (1936).
\(^11\) Hall, Legal and Social Aspects of Arrest Without a Warrant, 49 Harv. L. Rev. 566, 570 (1936).
times based upon the gravity of the offense involved. Thus, since at old common law every felony was punishable by death, peace officers were given the right to kill a fleeing felon, if in no other way the felon's escape could be prevented. This rule was explained on the simple ground that the felon had contracted for his own death by committing the felony in the first place.

With the right to kill once established in the law, it was only natural that some controversial issues would arise. Some have felt that the rule should be extended so as to permit an officer to kill even fleeing misdemeanants on the theory that submission to known officers is essential to the safety of the community; while others felt that the rule should be restricted to felonies committed with violence, and should not include arrests for, e.g., grand larceny. It seems now generally recognized that an officer is justified in killing a fleeing person only when the person fleeing has in fact committed a felony, and there is no other way his escape can be prevented. However, there is some authority for the view that an officer may justify killing a fleeing misdemeanor or innocent person by showing that he had reasonable cause to believe that the person had committed a felony, and the killing was absolutely necessary to prevent his escape. In the Washington case of Coldeen v. Reid, an officer, believing that two boys were fleeing in a stolen automobile, shot and killed one of the occupants, they having failed to stop upon the officer's command to halt. The trial court sustained an objection to the admission of testimony of the police officer that the conduct of the boys was such as to lead him to believe that the car had been stolen. In granting the officer a new trial, the appellate court said:

"When, therefore, an officer is called upon to answer for a claimed unlawful arrest, or for excessive use of force in making a lawful arrest, he has the right to show the circumstances surrounding the transaction, and the impression these circumstances make on his

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15 Union Indemnity Co. v. Webster, 218 Ala. 468, 118 So. 794 (1928) semble; Coldeen v. Reid, 107 Wash. 508, 182 Pac. 599 (1919).
16 107 Wash. 508, 182 Pac. 599 (1919).
mind, and to have the jury charged on his theory of the case, unless, of course, the circumstances were such that there could be no two opinions concerning it. Here there were sufficient facts to make it a question for the jury whether or not the officer had reasonable ground to believe the deceased and his companion were in the act of committing a felony, and in consequence was entitled to show what impression these facts made upon his mind."

In Union Indemnity Company v Webster, an Alabama case, the suspected felon was shot by officers when they saw him running from a still which was in operation. It was held that, on the evidence, the jury was warranted in finding that the suspect was not in fact guilty of having committed a felony. The appellate court stated that "It was for the jury to say, from all evidence, whether or not the officers used more force than was necessary to arrest plaintiff. While the jury, under the court's theory of the law, could have found that the officers exercised only that force necessary to effect the arrest, it apparently found that they had used more force than was necessary because the officer was held liable on his official bond. It is interesting to note the dissenting opinion of one of the judges, who said in part:

"I am not in agreement with so much of the opinion as holds that an officer attempting to make an arrest of one not resisting, but fleeing, may shoot to kill or maim on mere well-grounded suspicion that the person so fleeing is a felon. The law which gives an officer the right to kill an escaping felon limits the right to cases in which the officer has a warrant, or actually knows the person whom he is seeking to arrest is a felon, at the time he fires."

The great majority of cases deny the officer protection if he mistakenly kills a fleeing misdemeanant or innocent person, however reasonable may be his belief that the fleeing person is a felon. The two leading cases are Conraddy v People, a New York case, and Petrie v Cartwright, a famous Kentucky case. In Conraddy v People, an officer had arrested, without a warrant, the deceased for assault and battery upon his wife, constituting a misdemeanor, and while on the way to the station house, deceased escaped from the officer, whereupon the officer, in order to prevent his escape, shot and killed him. In affirming conviction of the officer the New York Supreme Court said:

"It will be seen from the authorities that the rule is clear and definite; that in no case where a simple misdemeanor only has been committed, must an officer take life to prevent escape. The

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18 Id. at 182 Pac. at 601.
19 218 Ala. 468, 118 So. 794 (1928).
20 Id. at 118 So. at 895.
21 Ibid.
22 5 Parker Cr. Rep. 284 (N. Y. 1862).
23 114 Ky. 103, 70 S. W. 297 (1902).
rule is unqualified. It matters not what may have been the belief of the officer or the grounds of his belief. If he takes life, he does it at his peril. If it turns out that the party killed was guilty of misdemeanor only, the officer must answer.

"The law is tenderly regardful of the sacredness of human life, and even in cases of felony, will not permit it to be sacrificed except in cases of impenious necessity."\(^\text{23}\)

In Petrie v Cartwright, the case which established the Kentucky rule, two men, apparently drunk, had rudely and shamefully insulted deceased's wife and her companion. The deceased, upon being informed of the conduct of the two men, inquired of them as to why they had insulted his wife. A scuffle followed. One of the men pulled a knife, and knowing that he must flee for his life, deceased started to run. An officer, having arrived on the scene, thinking that deceased had committed a felony and was escaping, fired upon and killed deceased. Evidence showed that the officer had reasonable cause to believe a felony had been committed by deceased, although deceased had not, in fact, committed a felony

The trial court instructed the jury that if the officer believed in good faith, and had reasonable grounds to believe that deceased had committed a felony, and, after using all other available means to arrest him, it was necessary to kill deceased to prevent his escape, they should find for the defendant.

The jury found for the defendant under these instructions and the case was appealed. The Kentucky Court of Appeals, in reversing the judgment, said:

"The jury were warranted in concluding from all the evidence that Petrie had in fact committed no felony.

"We have been unable to find any common-law authority justifying an officer in killing a person sought to be arrested, who fled from him, where the officer acted upon suspicion, and no felony had in fact been committed. The common law rule allowing an officer to kill a felon in order to arrest him rests upon the idea that felons ought not to be at large, and that the life of a felon has been forfeited; for felonies at common law were punishable with death. But where no felony has been committed the reason of the rule does not apply, and it seems to us that the sacredness of human life and the danger of abuse do not permit an extension of the common-law rule to cases of suspected felones.

The notion that a peace officer may in all cases shoot one who flees from him when about to be arrested is unfounded. Officers have no such power, except in cases of felony, and there as a last resort, after all other means have failed. It is never allowed where the offense is only a misdemeanor, and where there is only a suspicion of felony the officer is not warranted in treating the fugitive as a felon. If he does this, he does so at his peril, and is liable if it turns out that he is mistaken. He may

\(^{23}\) 5 Parker Cr. Rep. 234, 239 (N. Y. 1862).
lawfully arrest upon a suspicion of felony, but he is only warranted in using such force in making the arrest as is allowable in other cases not felonious, unless the offense was in fact a felony."

This Kentucky case is an excellent example of the evil that would result from a rule which would allow an officer to justify killing on the grounds that he had reasonable cause to believe that his victim had committed a felony. The evidence showed that when the officer arrived on the scene, one of the men was lying motionless upon the ground, and the officer probably thought he was either killed or seriously wounded. Thus, connected with the fact that deceased was fleeing, afforded the officer every reason to believe that the deceased had committed a felony. Yet, the deceased was merely trying to save his own life, and, as the court pointed out, he had apparently failed to hear the officer's command to stop. It behooves everyone to justify the taking of life on grounds more solid than "reasonable mistake."

From the preceding cases, it is amply clear that an officer cannot justify the killing of a misdemeanant or innocent person on the grounds that he had reasonable cause for believing that a felony had been committed, and that killing was necessary to prevent escape, unless a felony had in fact been committed.

The question which immediately presents itself now is: should an officer be justified in killing a fleeing person if a felony, in fact, has been committed, but the officer mistakes the identity of an innocent person for the felon? That question was squarely presented in the Kentucky case of Johnson v. Williams' Adm'r. In that case the officers had a warrant for the arrest of Dave Browder for murder. The officers, being informed that Browder was on his way to see his father, waited at a road crossing for his arrival. Moments later two men were seen approaching in a buggy, leading a gray horse. The officers had been informed that Browder was riding a gray horse. They heard what they thought was the voice of Browder in the buggy. It was dark. The officers claimed that they attempted to halt the two men, but instead of stopping, they increased their speed, and in order to prevent Browder's escape fired and killed the deceased. It turned out that it was not Browder in the buggy, but two innocent young men.

The whole defense was based upon the theory that since the officers had a warrant for the felon's arrest, and since they had probable cause for believing that Browder was one of the occupants of the buggy, they had the right to kill if it was necessary to prevent the suspect's escape.

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24 114 Ky. 103, 109, 110, 70 S. W. 297, 298, 299 (1902).
25 111 Ky. 289, 69 S. W. 759 (1901).
Undoubtedly, the officers had every right to believe that Browder was in the buggy, considering the fact that Browder normally traveled on a gray horse, that he had been riding a gray horse on this particular night, that they thought they recognized his voice, and the fact that the buggy, instead of stopping, increased its speed. But the court said that it was unnecessary for it to decide on the question of reasonableness, and went on to point out that if an officer has a warrant against one, and under it arrests another, he is liable for the tort thus committed, and that he cannot justify the wrongful arrest by showing that he believed, and had reasonable grounds for believing, that he was arresting the proper party. Therefore, the court pointed out, that if an officer cannot in that way justify a wrongful arrest, much less should he be permitted to justify the killing of another by showing that he had probable cause for believing that he was shooting at the party whom he was authorized to arrest. The Court concluded by saying:

"The law which gives an officer the right to kill an escaping felon certainly requires him to know that he is the felon, not an innocent party, whose life he is attempting to take."

Therefore, if an officer with a warrant for the arrest of a felon cannot justify the killing of an innocent person, however reasonable his grounds are for believing his victim was the felon, a fortiori, an officer without a warrant cannot justify the killing of an innocent person on like reasonable grounds.

In Commonwealth v Duerr, the officer had every reasonable cause to believe that his victims were felons. There, the officer had been informed of the stealing and burning of automobiles in a nearby neighborhood. A young man, who had been arrested for stealing automobiles, informed the officer that he had an engagement to meet two other young men at a certain time and place to discuss plans for stealing more automobiles. The officer, accompanied by other officers, proceeded to the designated place to await the arrival of the two designated criminals. Moments later, two men approached in a car, and upon seeing the officers, reversed their direction and attempted to escape, despite the fact that the officers were yelling "Stop." After a considerable race, the men abandoned the car and escaped into a dairy barn. The officers were in hot pursuit, and when it seemed as if the men would not stop under any circumstances, the defendant officer fired several shots, killing both men. It turned out that both were innocent.

The defendant strongly asserted that he knew a felony had been committed and that, therefore, he brought himself within the rule that

\[^{26}\text{Id. at 297, 63 S. W. at 761.}\]
\[^{27}\text{158 Pa. Super. 484, 45 A. 2d 235 (1946).}\]
where a felony has been committed the killing by an officer of one who has attempted to flee arrest is justified homicide. But to this, the court said:

"The fallacy of that argument is quite apparent. The felony in question must have been committed by the person whom the officer is presently seeking to arrest. Otherwise, if a felony has been committed in the community an officer could shoot and kill an entirely innocent person, whom he might suspect of being a felon as in this case."

Another defense in the same case was that since an officer could arrest one upon the reasonable suspicion of a felony, even though he was not guilty of a felony, he thus had the right to use such force in arresting a suspect felon as if the person had in fact committed a felony. To this, the court aptly replied:

"An officer may lawfully arrest upon a suspicion of felony, but he is only warranted in using such force in making the arrest as is allowable in other cases not felonious, unless the offense was, in fact, a felony."

Thus, it is very clear, the mere fact that a felony has been committed does not justify the taking of the life of an innocent person, even though the officer may have acted upon the most reasonable suspicion. When it comes to killing, the "suspicion under which he acted must prove to have been correct."

CONCLUSION

To give an officer the discretion to act on his reasonable belief would be to bring many misdemeanor cases within the rule, for in a large per cent of the cases the officer could show that he had reasonable grounds to suspect the commission of a felony, and it would in effect be left entirely to him to say whether he was proceeding against a misdemeanor or a felon. Such a principle would not only be in derogation of the common law rule of permitting an officer to kill a fleeing felon only, but would virtually give an officer the right to fire upon anyone who flees in the course of an attempted arrest. A law that will permit of such abuse in its enforcement would result in more evil than good, and must necessarily be rejected in any society.

It is important not to lose sight of the basis for the old common law rule which based the right of an officer to kill a felon on the theory that since all felonies were punishable by death, then if only the life of a felon had been forfeited, no net harm had been done. With the coming of statutory provisions doing away with the death penalty for felonies, the tendency should logically be to restrict officers to the right to kill in cases of felonies punishable capitally. The Restatement
of Torts subscribes to this view, in that it would restrict the right to cases of felonies committed with great violence. The State of Texas, in recognition of the modern development of the law, passed a statute providing that an officer executing an order of arrest shall not in any case kill one who attempts to escape, unless in making or attempting such escape the life of the officer is endangered, or he is threatened with grave bodily harm. In applying the statute to a case where a police officer had killed a horse thief who was escaping after having been arrested, the Texas court said.

"The law places too high an estimate upon a man's life though he be a prisoner, to permit an officer to kill him, while unresisting, simply to prevent an escape."

The average criminal has little knowledge of the law with all of its ramifications. Consequently, the precise provisions of the law have little effect on the criminal's submission to the law enforcement officials. On the other hand, if the law were extended to permit an officer to kill on reasonable suspicion, it would definitely open wider the avenues to abuse by officers, while having practically no effect as a deterrent for preventing criminals from fleeing.

The sacredness of human life is so great that an officer should resort to killing only when to let the felon escape would potentially cause grave harm to society. With this limitation, an officer would not have occasion to kill for any crime less than felony. In the event there is doubt as to whether or not a felony has been committed, it is submitted that the crime will not have been committed with such violence as to warrant the taking of life under the above rule. Where a felony has been committed and there is the slightest doubt as to the guilt of the suspected felon, it is submitted that society will suffer less by the temporary escape of the suspect, even if guilty, than it would by killing him and thereby incurring the risk of killing an innocent person. The placing of these restrictions on an officer would not do violence to the generally recognized rule that an officer, in order to justify killing one fleeing in the course of arrest, must prove that the person killed was a felon, but it would have the important effect of discouraging the taking of life in the absence of absolute necessity.

Delmer Ison

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31 Restatement, Torts, "Sec. 131. The use of force against another for the purpose of effecting an arrest of the other by means intended or likely to cause death is privileged, if (a) the arrest is made for treason or for a felony which normally causes or threatens death or serious bodily harm and (b) the actor reasonably believes that the arrest cannot otherwise be effected."


34 Caldwell v. The State, 41 Tex. 86 (1874).

34 Id. at 98.