1950

Killing a Suspected Felon Fleeing to Escape Arrest

Gerald Robin Griffin

University of Kentucky

Follow this and additional works at: https://uknowledge.uky.edu/klj

Part of the Criminal Law Commons, and the Law Enforcement and Corrections Commons

Right click to open a feedback form in a new tab to let us know how this document benefits you.

Recommended Citation

Griffin, Gerald Robin (1950) "Killing a Suspected Felon Fleeing to Escape Arrest," Kentucky Law Journal: Vol. 38 : Iss. 4 , Article 7. Available at: https://uknowledge.uky.edu/klj/vol38/iss4/7
KILLING A SUSPECTED FELON FLEEING TO ESCAPE ARREST

The authority of a peace officer to kill in effecting an arrest has been a problem in courts of law since law enforcing agencies were given the power to make arrests. The law is variegated and many peace officers are not correctly informed of their privileges and duties until they are being tried for manslaughter or sued for wrongful death. This note will consider one limited phase of the power of a peace officer, discuss the conflicting law, and suggest what the law should be. Whether or not it is justifiable homicide for a peace officer to kill one who is fleeing and, who the officer has reasonable grounds to believe, has committed a felony, though in fact no felony has been committed, is the problem to be discussed. Whether or not the peace officer is in a better position if there were in fact a felony committed, though by some other person, will necessarily be mentioned in conjunction with the above problem. This note is not an attempt to determine when a peace officer can make a legal arrest, nor is its purpose to determine what force an officer may use to defend himself or to overcome resistance to a lawful arrest. It shall be presumed for the purpose of this note that the peace officer did not have a warrant. Also there will be no attempt to differentiate between one who has been arrested and then flees, and one who is fleeing to avert arrest, as the same rules govern both cases.1

The law is clear in refusing a peace officer the right to kill one whom he knows to be a fleeing misdemeanant even though there is no other way to make the arrest.2 It is better that one charged with a petty offense punishable by fine, or a short term in jail, escape than that his life be taken. "Human life is too sacred to admit of a more severe rule."3 However, even this simple proposition has not always been accepted. Hale in his Pleas of the Crown indicates that it would have been justifiable to kill persons who are pursued "for breach of the peace or just suspicion thereof, as night walkers, persons unduly armed, [and who either flee or resist] for by their resistance against the authority of the king in his officers they draw their own blood upon themselves."4

The killing of a known felon has presented a problem that the courts have easily solved. Since all early common law felonies were punishable by death, the use of a deadly force to capture a felon was not looked upon with disfavor. Hale says,

"And here is the difference between civil actions and felonies.

"If a man be in danger of arrest by a Capias in debt or trespass, and he flies, and the bailiff kills him, it is murder; but if a felon flies and he cannot be otherwise taken, if he be killed, it is no felony, and in that case the officer so killing forfeits nothing, but the person so assaulted and killed forfeits his goods."5

---

* This is a companion, but contra, note to the one by Mr. Ison, infra, pp. 609.
1 2 BISHOP, CRIMINAL LAW sec. 648 (9th ed. 1923).
2 Mullis v. State, 196 Ga. 509, 27 S. E. 2d 91 (1943); Head v. Martin, 85 Ky. 480, 3 S. W. 622 (1887); 1 EAST, CROWN LAW 302 (1806); 1 WHARTON, CRIMINAL LAW sec. 532 (12th ed. 1932). (Might kill in case of riots).
3 Head v. Martin, 85 Ky. 480, 3 S. W. 622 (1887).
4 2 Hale, PLEAS OF THE CROWN 85, 86 (1778); This is not the law today and it is not clear that it was so in early English law except when the officer reasonably believed him to be a felon, see note 2, supra.
5 I Hale, PLEAS OF THE CROWN 481 (1778).
The law today generally allows a police officer to kill a fleeing felon if he cannot be taken otherwise. However, due to the fact that some felonies are punished by short prison terms, there is a tendency of some courts to hold that it is only for "dangerous" felonies that deadly force may be used in an attempt to arrest.

The liability of a police officer for killing a person whom he reasonably believes to have committed a felony is not uniform in this country. There are three views as to when the officer is justified:

First: The officer is justified if he has reasonable grounds to believe that a felony has been committed and that the person fleeing is guilty of committing this felony whether a felony has in fact been committed.

Second: The officer is justified if a felony in fact has been committed and if the officer had reasonable grounds to believe that the person killed committed the felony, whether he committed it or not.

Third: The officer is justified only if a felony has been committed and the person killed did in fact commit this felony.

Despite the fact that the Kentucky Court of Appeals in the often cited case of Petrie v. Cartwright was "unable to find any common law authority" for the first view, there is eminent authority to support this view. East in his Pleas of the Crown seems reasonably clear that the first view was the early common law view. There it is stated that:

"If a private person suspect another of a felony and lay such ground of suspicion before a constable, and require his assistance to take him, the constable may justify killing the party if he fly, though in truth he were innocent and it was formerly supposed to be necessary that there should have been a felony committed in fact, of which the constable must have been ascertained at his peril. But in Samuel v. Payne and others, it was determined that a peace officer might justify an arrest on a charge of a felony on reasonable suspicion, without a warrant, although it should afterwards appear that no felony had been committed; but that a private individual in such case could not. The reason for this is apparent; for if, as Lord Hale observes in one place, the constable cannot judge whether the party he guilty or not until he come to his trial, which cannot be until he be apprehended; (which he thinks a sufficient reason in justifying him in killing the party accused, if he fly from the arrest and cannot otherwise be overtaken, however innocent he may afterwards appear to be)"


9 State v. Bryant, 65 N. C. 300 (1871); Reneau v. State, 2 Lea 720 (Tenn. 1879);


Viccaro v. Collier, 38 F. 2d 862 (Md. 1930); Union Indemnity Co. v. Webster, 218 Ala. 468, 118 S. 794 (1928); Coldeen v. Reid, 107 Wash. 508, 182 P 599 (1919);

Rest, Torts sec. 131, Ill. 4.

"Mylett's Adm'r v. Burnley, 163 Ky. 277 280, 173 S. W 759, 760 (1915), Officer "acts at his peril, and can justify only on the ground that a felony had been committed." State v. Roane, 15 N. C. 38, 42 (1828): "When an individual commits a homicide upon the ground of making an arrest, he must show a felony committed, if not by the person killed, at least by someone,"


11 114 Ky. 103, 70 S. W 279, 59 LRA 720 (1902).
have been; so it must be equally impossible for the constable to ascertain whether a felony were actually committed or not; but in most cases he must take both the one and the other upon the credit of the party who lays the charge before him. Therefore all that can in reason be required of him is that he should inform himself as well as he can of the circumstances; and that the relation of the party should appear creditable."

One of the leading cases holding that a police officer may kill one who he has reasonable grounds to suspect has committed a felony is *People v. Kilvington*.

Here one Howard, who had seen the deceased come out of a backyard, began chasing him and calling "Stop thief!" In fact the deceased had committed no crime. The defendant, a police officer, heard this and saw Howard chasing the deceased. The defendant ordered him to stop and then shot and killed him. The upper court held that the trial court was in error for allowing the jury to determine if the defendant had reasonable grounds to believe that a felony had been committed. The court said that this was for the judge to determine and that in fact the defendant did have cause to believe a felony had been committed. The court stated:

"An officer who would refuse to arrest a person fleeing and pursued under the circumstances disclosed in this case, because the charge was not more direct and specific as to the commission of a felony, would be justly censurable for neglect of official duty."

The only question for the jury should have been whether the officer used more force than necessary to arrest the deceased.

In *Coldeen v. Reid*,

... two boys either borrowed or stole an automobile. While driving at a fast rate of speed they passed a car with several sheriffs in it. The sheriffs pulled along side and the boys, believing that the persons in the other car wanted to race, increased their speed. Several shots were fired by the officers and one of the boys was killed. In an action to recover for the wrongful death the trial court held that since the boys were guilty of a mere misdemeanor the killing was not justified and therefore the plaintiff was given a verdict. The appellate court reversed this on the ground that there was sufficient evidence to make it a question for the jury whether or not the officer had reasonable grounds to believe that a felony had been committed. If there had been reasonable grounds to so believe then the plaintiff could not have recovered.

An Alabama case,

... decided in 1928, also takes the position that an officer may shoot to kill one fleeing, when necessary, if he has reasonable grounds to believe that a felony has been committed. The court took this position because in Alabama an officer can arrest on reasonable grounds of belief that a felony has been committed. The only problem that faced the court was to determine whether the force used was necessary. If it were necessary, then the shooting was justified.

It is submitted that this first view has the merit of being both logical and easily understood. In supporting it, one need have no quarrel with the desirable and general rule that the amount of force used to effect an arrest must not exceed

---

1 1 East, *Plea of the Crown* 301, 302 (1803).

2 Id. at 37 Pac. at 801.


4 Union Indemnity Co. v. Webster, 218 Ala. 168, 118 S. 794 (1928).
what is reasonably necessary. The point is that, if the arrest itself is justified, a peace officer should not be kept in enforced ignorance of the amount of force he may justifiably use until he is able to determine with certainty whether the facts which he has reasonable ground to believe are actually true or not. Such deter- mination cannot possibly be made with certainty until the opportunity to arrest has passed, even in many cases of unquestionable guilt.

Clearly there are cases sustaining the first view; but what of the second view that a felony must be committed by someone though not necessarily the person killed? The American Law Institute took this latter view in a tentative code of Criminal Law. An officer is not justified unless "(e) the person killed or wounded is the person named in the warrant if the arrest is by virtue of a warrant or, if the arrest is without a warrant the offense was committed by some one and the officer reasonably believes it was committed by the person killed or wounded."17

The cases are not clear when it comes to determining whether they take the second or third view. The courts do not expressly say that the arrestee need not be guilty, but rather that it is necessary that the officers show that a "felony had been committed."18 The leading case of Petrie v. Cartwright19 is typical in that it is not easily determined whether the person killed must be the felon before the officer is justified or whether the officer will be justified if a felony in fact has been committed by someone though not the person killed.

In this case, Joe Petrie hit one of the two men who had earlier in the night made indecent remarks to his wife. After a brief fight Petrie ran away. In his attempt to run Petrie knocked down one of the men who had been drinking. The defendant, who was city marshal, was in sight a few yards away, and seeing the man fall when Petrie ran past, called to Petrie to halt, and when he did not stop, fired into the ground. His second shot killed Petrie. This was an action for wrongful death brought by deceased’s wife. The Kentucky Court of Appeals first stated that Petrie had committed no felony. It went on to say:

"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 been in fact 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 by 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 felons. It is never allowed [shooting by officer] 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 own peril, and is liable if it turns out that he is mistaken."20

Obviously a peace officer in a jurisdiction following either of the first two views would be justified if the felony had in fact been committed by the person killed. However, in several jurisdictions, adhering to the third view, he is justified.

18 See note 9, supra.
19 See note 11, supra.
20 Id. at 109, 70 S. W at 299.
only if the felony had in fact been committed by the person killed. In accepting this view these jurisdictions seem to tie the hands of the law enforcing agency. A mistaken belief by the officer, no matter how reasonable, may result in a conviction of homicide.

A fairly recent case taking the rigid view that the person killed must have in fact committed the felony is *Commonwealth v. Duerr*.

In this case the police arrested a car thief who told the police of a supposed rendezvous with his accomplices. The police laid a trap but caught the wrong men. These men fled and were killed. The court held that no matter how reasonable the grounds of suspicion may be an officer making an arrest without a warrant on suspicion of a felony was not justified in killing the suspect in order to effect the arrest, unless a felony has in fact been committed by him.

What is the law in Kentucky today? It is clear that *Petrie v. Cartwright*, which clearly takes the position that a felony must in fact have been committed by someone, and almost as clearly that the person fired upon must be the felon, should be our starting point. An attempt has been made to distinguish this case on the basis that the court says that mere "suspicion" is not justification. One writer in the *Michigan Law Review* discussing the *Petrie* case said, that admitting one cannot kill on mere suspicion is it not desirable to kill as a last resort to effectuate arrest in the case of one who, he has reasonable ground to suppose, is an actual felon? This attempt to differentiate between "mere suspicion" and "reasonable grounds" is not tenable since the trial court instructed that if the defendant had "reasonable ground to believe a felony had been committed, the jury should find for the defendant." The higher court reversed the trial court on this point.

Robinson's *New Kentucky Criminal Law and Procedure* states that *Petrie v. Cartwright* is the law in Kentucky. It seems, however, that two recent cases may indicate that Kentucky is abandoning this view. In *Martin v. Commonwealth*, there was a fight in which one of the participants was using steel knucks (a deadly weapon). The deceased, by use of a pistol, prevented bystanders from giving aid to the one who did not have steel knucks. The court held that if the fighter was using the knucks with malicious intent to kill or wound, then he was committing a felony, and the deceased by protecting him, shared in the commission of that felony. The defendant saw the deceased and another run away and later he followed. When it seemed that the deceased was getting away the defendant fired at and killed him. The court went on to say:

"Martin had seen the fight and he certainly had reasonable grounds to believe a felony had been committed; then it became his duty, even without a warrant, to arrest the suspected felon. It then became the duty of Martin and the officers with him to use such force as was necessary to effect his arrest, and it was their duty not to allow him to escape, and when, his escape appeared prob-

---

24 Sec. 286 (2d ed. 1927).
25 257 Ky. 591, 78 S. W. 2d 786 (1935).
able, these officers were authorized to kill him rather than let him escape, and the killing was justifiable; "26 (Italics Writers.)

The latest Kentucky case, Bailey v. Commonwealth,27 seems to have taken this jurisdiction entirely away from the view as expressed in Petrie v. Cartwright. The deceased in this case requested the defendants, who were peace officers, to arrest a certain person with whom he had been fighting. The officers refused and told deceased to get a warrant. He returned with a shotgun and demanded that the officers go with him. The officers asked him to lower his gun and went toward him. He did lower his gun, but it discharged, striking one of the defendants in the foot. He unbreached his gun and ran. The defendants killed him while he was running away. In reversing a conviction, the court said:

"He fired first. The shot may or may not have been fired accidentally. He unbreached the gun and started running towards some parked cars. Under the circumstances it was not only their right but the duty of the officers to shoot Trusty if it became necessary to do so to take him into custody. They had every right to believe that Trusty intended to continue the affray from behind the parked cars. The officers had not only the right to protect themselves, but the shooting having been committed in their presence it was their duty as peace officers to use whatever force they deemed necessary to take Trusty in custody." (Italics Writers)

Plainly, jurisdictions differ considerably in their views on justifiable killing by officers. What can be said as to what the law should be? Should a peace officer be justified in killing a person who is fleeing if the officer has reasonable grounds to believe that a felony has been committed by that person, and there is no other means of effecting the arrest? The answer to this must be based on whether society will benefit or lose by giving its law enforcement agency this protection. To the innocent citizen the requirement to stop for a lawful arrest is no great bar on his freedom of movement. To the murderer or robber it would be a great advantage to know that the police officer will not kill him if he runs for fear that a felony has not been in fact committed, or that this may not be the felon in any case, and he will be tried for homicide. The officer is in the middle. If a felony has in fact been committed and he doesn't make the arrest, he may be held responsible for neglect of his duty.

An article by Waite28 supports the view that a felony need not in fact have been committed.

"Certainly," he says, "if he [the peace officer] had reasonable ground to believe the fugitive guilty he could not be held criminally liable for killing him, consistently with the accepted common law rule that reasonable mistake of facts negatives liability if the facts, had they been as believed, would have negatived it."29

It is necessary for the law enforcement of a community that all persons submit to lawful arrest. If they choose not to do so, then they are the ones who take the risk. This does not mean that a peace officer is made the sole judge and jury of whether to kill or not. The arrest must be a lawful one to begin with, and the

26 Id. at 593, 78 S. W. 2d 786, 787.
27 310 Ky., 731, 221 S. W. 2d 693 (1949).
28 Id. at 733, 221 S. W. 2d 693.
30 Id. at 465, n. 41.
officer must have reasonable grounds to believe that a felony has been committed by the person before he may shoot to effect his arrest. Whether his grounds were reasonable or not will be determined by a jury and if they were not reasonable, no protection would be afforded the officer by the suggested rule.

Another limitation could reasonably be imposed by requiring that the officer have reasonable grounds to believe that the person to be arrested is aware that an arrest by a police officer is being attempted and therefore could avoid injury by submission.

Statutes have been suggested which would further limit the power of the officer by only allowing him to kill one who he reasonably believes has committed a major felony or is attempting to commit one. Included in this category are the following offenses: criminal homicide, rape, arson, burglary, robbery, kidnaping, and mayhem. There are many statutory felonies today that prescribe but one or two years in the penitentiary, and it does seem harsh that a life should be taken in the case of a minor felon, but the utility of arrest of a major felon still outweighs the taking of his life.

It is worth mentioning again that the burden should always be upon the officer to prove that it was impossible to effect the arrest by means short of those employed.

It seems, therefore, that a police officer should be allowed to kill a person fleeing from lawful arrest or attempted arrest when he has reasonable grounds to believe that a major felony has been committed or attempted by the person he is seeking to arrest, and reasonable grounds to believe that this person is aware of the attempted arrest, provided the arrest cannot be effected by less forceful means.

Gerald Robin Griffin

---

31 Id. at 467, 468, n. 42.
32 24 Iowa L. Rev. 154, 162 (1938).