Criminal Procedure--Right to Arrest Without a Warrant--Felonies

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protect itself against the multiplication of their kind, and must this
be so even though a simple surgical operation not appreciably danger-
sous and involving the removal of no sound organs from the body,
might be discharged from custody and become self supporting to the
great advantage of society? May not one liberty be thus restored
through the deprivation of another liberty?"

The police power is held by the great weight of authority and the
Supreme Court of the nation (while only denied by one state) to be
broad enough to embrace sterilization of the mentally defective. " The
proposed statute meets no objection from this angle.

As we have seen, the proposed statute provides for the due process
of law; it does not violate the equal protection clause; it meets the
constitutional objection to cruel and unusual punishment; it is a valid
exercise of the police power. If the proposed statute would be adopted
in Kentucky its constitutionality could not be questioned.

JAY F. ARNOLD.

CRIMINAL PROCEDURE—RIGHT TO ARREST WITHOUT A
WARRANT—FELONIES

Five factual situations present themselves in which there is a
right to arrest without a warrant in the case of felonies: (1) Where
it would seem that a felony is about to be committed by the person ar-
rested, (2) where the person arrested is in the act of committing a
felony, (3) where the person arrested has committed a felony, (4)
where a felony has been committed and the person arrested is reason-
ably suspected of having committed it, and (5) where no felony has
been committed, but the person arrested is reasonably suspected of
having committed one. The aim of this note is to show what are the
rules as to arrest without a warrant applicable to each situation, both
at the common law and in Kentucky. The common law rule will be
taken up first, and then the rule in Kentucky.

At common law, an officer may arrest without a warrant to pre-
vent the commission of a felony. An officer must always interfere to
prevent an attempted felony; he may arrest the offender if necessary,
even though the attempt to commit the felony be only a misdemeanor.1
This statement represents the weight of authority in this country. In
Geroux v. The State,2 it was held that an officer may arrest to prevent
an injury where an injury is about to be inflicted or parties are then
in the act of preparation for its immediate infliction, but not where

11 Va. L. Rev. 296 (1925).
2 State ex rel. Smith v. Schaffer, supra, note 10; State v. Trout-
man, supra, note 9; Brewer v. Bulk, supra, note 1. Other decisions
never questioning that sterilization of the mentally deficient is a valid
exercise of the police power.
1 Clark's Crim. Pro., Secs. 10–12; 9 Halsbury's Laws of England
286.
2 40 Tex. 97 (1874).

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the threat indicates an intention of some future indefinite injury contemplated, not being then prepared for by any act then done or spoken. It might be argued that this rule is too broad since an attempt to commit certain felonies is only a misdemeanor. However, most attempted felonies involve breach of the peace, and it is settled law in most jurisdictions that an officer may arrest to prevent breach of the peace if necessary. Even where the attempt is only a misdemeanor, it is submitted that the same rule should apply. It is certainly better to stop a crime before it is committed than to allow the injurious result to be attained. The right to arrest here arises from the necessity of preventing crime and preserving the peace and good order of society.

An officer may arrest a person without a warrant who is in the act of committing a felony. It is to be noticed that in this situation, at least part of the criminal act is committed in the presence of the officer. Further, the crime is in fact accomplished at least in part. The arrest must be made. It is too great an incumbrance on the officer to require that he wait until a warrant is issued before he can make the arrest.

An officer may arrest a person without a warrant after he has committed a felony. Another statement of the rule is to the effect that a peace officer may, without a warrant, arrest a person when the person to be arrested has committed a felony, although not in the presence of the officer. This rule seems to be too clear and of too general application to need much explanation. Many criminals would escape if the officer were forced to run to a magistrate every time he saw a criminal before he could arrest him. The court in Holley v. Mie says, "My understanding of the law is, that if a felony has in fact been committed by the person arrested, the arrest may be justified by any person without a warrant, whether there is time to obtain one or not." This statement would seem to apply as well to officers as to private individuals.

We have now dealt with our first three factual situations. The next one is where a felony has in fact been committed, and the person arrested may reasonably be suspected of having done so. In such a situation an officer may arrest without a warrant, and he will be justified even though the person arrested is innocent of the crime. "It has been said that this rule goes back to the Year Books." The statements in the English cases are to the same effect. "If a felony has actually been committed, any man, upon reasonable grounds of suspicion, may justify apprehending the suspected person to carry him

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3 A. L. I. Code Crim. Pro., Sec. 21(a); Sheets v. Atherton, 62 Vt. 229, 19 Atl. 926 (1890); People v. Wolven, 7 N. Y. Leg. Obs. 89 (1848).
4 A. L. I. Code Crim. Pro., Sec. 21 (b).
6 See also dictum in Com. v. Cary, 12 Cush. (Mass.) 246 (1852).
7 See A. L. I. Code Crim. Pro., Sec. 21(c); Clark's Crim. Pro., Secs. 10-12.
before a magistrate."' "Under the common law, if a felony were actually committed, a person might be arrested without a warrant by any one, if he were reasonably suspected of having committed the felony."' The matter of the reasonableness of the suspicion is for the jury to determine.21

An officer may arrest a person whom he reasonably suspects of having committed a felony, although, in fact, no felony may have been committed. This rule, of necessity, includes a reasonable suspicion that a felony has been committed. The early English rule was that an officer was justified in making an arrest on probable suspicion only, where a felony had actually been committed or a dangerous wounding whereby a felony was likely to result.22 This rule was followed in Ledwith v. Catchpole.23 However a breaking away was soon evident. Certain exceptions were first allowed. In Hobbs v. Brarscomb,24 the court recognized the early rule above, but allowed an officer to justify the arrest if he took the person into custody on a charge preferred by another, though in fact no felony had been done. This same rule is followed in White v. Taylor,25 where the court said, "If a regular charge is made before him (the officer), he is warranted by law in committing the party charged."26 In Lawrence v. Hedger,27 it was said that certain officers could arrest at night without warrant on suspicion of a felony, although there was no proof of a felony having been committed. It was here recognized that the old rule placed too great a limitation on the officer, and that a broader power had to be placed in his hands. The requirement of actual commission of a felony was repudiated in Samuel v. Payne.28 The court in this case considered this requirement as inconvenient and narrow, and said that the officer did his duty in carrying the suspect before a magistrate.

Apparently what is the latest and more generally accepted view is the rule as was first stated. The statement as laid down by Lord Tenterden in Beckwith v. Philby29 is: "A constable having reasonable grounds to suspect that a felony has been committed is authorized to detain the party suspected until inquiry can be made by the proper authorities."30 This rule as stated is substantially in accord with the

9 Samuel v. Payne, 1 Doug. 359 (1780).
10 Hadley v. Perks (1866), 1 Q. B. 444. See also Lawrence v. Hedger, 3 Taunt. 14 (1810); Nicholson v. Hardwick, 5 Car. & P. 495 (1833).
13 Ibid. 291 (1783).
14 3 Camp. 420 (1813).
15 4 Esp. 80 (1801).
16 See also M'Cloughan v. Clayton, 1 Holt N. P. 478 (1816).
17 Supra, note 10.
18 Supra, note 9.
19 6 B. & C. 635 (1827).
20 This statement is quite in accord with the statement in Samuel v. Payne, supra, note 9. See also Nicholson v. Hardwick, supra, note 10, and Davis v. Russel, 5 Bing. 255 (1829), where this ruling is cited with approval, and Hadley v. Perks, supra, note 10.
American authorities. The statement in the A. L. I. Code of Criminal Procedure is, "A peace officer may, without a warrant, arrest a person where he has reasonable grounds to believe that a felony has been or is being committed, and reasonable ground to believe that the person to be arrested has committed or is committing it." In Kocielesky v. The State, defendant was found guilty of violating a state statute which made it a felony to transport intoxicating liquors. The sheriff was informed that defendant was transporting such. The sheriff stopped defendant's car to ask him about his tail-light which was not burning, and saw a keg in the car. He then arrested defendant without a warrant. Held: That a peace officer may arrest without a warrant when he has reasonable and probable cause for believing that a felony is being, or has been, committed by the person arrested. In People v. Bressler, an arrest without a warrant was justified where the officer had information which would justify a reasonable man in believing that a felony had been committed.

We have now briefly discussed the rules which govern the right of an officer to arrest without a warrant in each of the five situations listed above. It must now be our purpose to discuss the corresponding rights of private persons, and to see how they differ, if at all, from the rights of the officer.

As to situation one, a private individual may arrest without a warrant to prevent the commission of a felony. The case of Handcock v. Baker, was an action for false imprisonment. Defendants were passing in the street, and heard plaintiff feloniously assaulting his wife. They entered and arrested plaintiff without a warrant. Held: That it is lawful for a private person to do anything to prevent the perpetration of a felony. This would seem, perhaps, to be a little broad. The better rule is that a person may use the necessary force and no more, and, if necessary, arrest to prevent the commission of the felony. It is to be noted that this rule necessarily implies that at least part of the criminal act has been done in the presence of the person making the arrest.

A private person may arrest without a warrant, a person who is in the act of committing a felony. The statement of the Federal Court as to this rule is, "A private person has the same right as an officer to arrest without a warrant if a felony is being committed in his presence." This rule has been upheld in various state courts.

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22 Sec. 21(d)
23 158 N. E. (Ind.) 902 (1927).
25 This rule is followed in State v. Moore, 225 S. W. 1056 (1921); Diers v. Mallon, 46 Neb. 121, 64 N. W. 722 (1895); and in McCarthy v. DeArmit, 39 Pa. St. 63 (1881).
26 3 B. & P. 260 (1880).
27 Ruloff v. People, 45 N. Y. 213 (1871); see also Clark's Crim. Pro. at p. 54 and cases there cited in the footnote.
A private individual may arrest, without a warrant, a person who has committed a felony. This statement seems to be too well established to be seriously questioned. The rule, as stated, includes cases where the offense was committed both in the presence and out of the presence of the person making the arrest. Texas, however, refuses to permit a private person to arrest for a felony without a warrant when the offense is not committed in the presence of the person making the arrest. However, this decision is based on a Texas statute and is directly contra to the majority common law view. The rule as first stated is the prevailing one.

We have now discussed the rules applicable to our first three situations. The rules which govern in the last two must now be taken up. A private person may arrest without a warrant, a person who is reasonably to be suspected of having committed a felony, though in fact he may not have done so, if in fact a felony has been committed. A private person will be liable for false arrest and imprisonment if he arrests a person on reasonable suspicion of having committed a felony, and the person is not guilty, and no felony has in fact been committed. In these two rules we find the essence of the distinction between the right to arrest by an officer and by a private person. It is to be noted that the right to arrest by a private person goes practically as far as the right of the officer. But the difference is this: a private person acts at his peril when he does not know whether a felony has been committed or not. If one has not, he will be liable for false arrest even though he have reasonable grounds for suspicion.

The rules as to these situations as we have stated them appear to cover the majority view of the matter. The statements of the English courts are substantially in accord: "There is this distinction between a private individual and a constable: in order to justify the former in causing the imprisonment of a person, he must not only make out a reasonable ground of suspicion, but he must prove that a felony has actually been committed; whereas, a constable, having reasonable grounds to suspect that a felony has been committed, is authorized to detain the party suspected until inquiry can be made by the proper authorities."

On this matter American jurisdictions are divided into four groups:

1. The states in this group follow the rules which we have laid down as to the first three situations, but refuse to allow a person who arrests on reasonable suspicion without a warrant, to justify the arrest even if a felony has been committed where the person arrested is not guilty of the offense charged. In Rowan v. Sawin, it was held that the

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31 Lord Tenterden in Beckwith v. Philby, supra, note 19.
32 5 Cush. (Mass.) 281 (1850).
arrest by a private person without a warrant can only be justified by proving such guilt.\textsuperscript{36}

(2) The next rule is the one which is stated above as the general rule. This is the majority view and is followed in twenty-nine jurisdictions.\textsuperscript{4} The court in \textit{Imler v. Yeager}\textsuperscript{6} says, “When a felony has been committed, any private person may, without a warrant arrest one whom he has reasonable grounds to suspect of having committed it, but such an arrest is illegal if no felony has in fact been committed by anyone.” A similar statement is found in \textit{Reuch v. McGregor}:\textsuperscript{6} “A private person is justified in arresting, when a felony has actually been committed, and there is probable ground to fairly suspect the person guilty.”\textsuperscript{7}

(3) “When the person arrested has committed a felony although not in his presence.” This provision is found in the codes of two states, Arizona and Louisiana.

(4) Some four states allow private persons to go as far as the officer in making arrests without a warrant on reasonable suspicion. This expansion is found in the codes of all four states, and is not the common law rule. Kentucky is one of these states, but this matter will be taken up more in detail later.\textsuperscript{8}

In the discussion above, we have laid down certain general rules. Now let us examine the decisions in this state and see how the Kentucky rules line up with those above. The method followed is to restate the general rule and then to follow with a brief discussion of the Kentucky law. The rule in Kentucky as to officers is governed by Section 36 of the Kentucky Criminal Code: “A peace officer may make an arrest without a warrant when a public offense is committed in his presence, or when he has reasonable grounds for believing that the person arrested has committed a felony.”

As to our first situation, our general rule is that an officer may arrest without a warrant to prevent the commission of a felony. As near as the writer has been able to find, there are no Kentucky cases exactly in point. However, some help may be derived from the case of \textit{Riggs v. Commonwealth}.\textsuperscript{3} This was an indictment for assault with intent to murder. The officer had a reasonable belief that defendant was about to commit a felony. The officer then attempted to stop defendant, who grievously wounded the officer. The officer then attempted to arrest defendant. \textit{Held:} That it was the duty of the officer to prevent

\textsuperscript{36} This rule is followed in Palmer v. Maine Cent. R. Co., 99 Me. 399, 42 Atl. 800 (1899), and in Jacques v. Child’s Dining Hall Co., 244 Mass. 438, 138 N. E. 843 (1923). There are seven American jurisdictions which follow this rule. See comm. to Sec. 22, A. L. I. Code Crim. Pro., pp. 240–242.


\textsuperscript{6} 245 S. W. (Mo. App.) 200 (1922).

\textsuperscript{8} 32 N. J. L. 70 (1866).

\textsuperscript{7} See also dictum in McCarthy v. DeArmit, \textit{supra}, note 24.


\textsuperscript{3} 17 K. L. R. 1015, 32 S. W. 413 (1895).
the commission of the offense, and that after defendant had struck him (the officer), then a public offense had been committed in his presence, and that he might make the arrest without a warrant. The court, in effect, says that an officer must intervene to prevent the commission of a felony. But in his intervention, to what extent is it permissible for him to go? If the officer is able to restrain the personal liberty of the would-be criminal, it would seem that he in effect arrests him. An arrest "implies that a person is thereby restrained of his liberty by some officer or agent of the law," serving "the end of bringing the person arrested personally within the custody and control of the law." This being so, the officer must have the right of arrest in such cases, since not to grant him the right to restrain the personal liberty of the person suspected, would make it practically impossible for him to carry out the duty which the court says is imposed on him. True this right is not expressly given by the code provision here applicable, but it would seem that the legislature could never have intended that a contrary result should be reached, and that in this state the general rule stated above should be followed.

In this state, the rule which allows an officer to arrest without a warrant a person who is in the act of committing a felony seems very clear. As has been said above, this rule necessarily implies that at least part of the offense is committed in the presence of the officer. This being so, it would seem to be covered exactly by the code provision above. In the case of Dilger v. Commonwealth, the officers heard defendant beating his wife. This was held by the court to be sufficient grounds for making the arrest without a warrant, as an offense committed in the presence of the officer. This same view is followed in Elswick v. Commonwealth. These cases represent the majority American view on the matter.

The general rule as to our third situation is that an officer may arrest a felon without a warrant after he has committed a felony. As has been said above, this rule, of necessity, includes offenses committed both in and out of the presence of the arresting officer. As to offenses committed in the presence of the officer, these are directly covered by the code provision above. There is no need to go into any discussion of this point except to give a partial list of cases.

Now suppose that an officer arrests a felon without a warrant for an offense not committed in the presence of the officer. As to offenses committed out of the presence of the officer, the Kentucky Code says that an officer may arrest without a warrant "when he has reasonable grounds for believing that the person arrested has committed a felony."

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1 Lawrence v. Buxton, 102 N. C. 129, 8 S. E. 774 (1889).
3 202 Ky. 703, 261 S. W. 249 (1924).
4 See also Weaver v. Com., 211 Ky. 723, 277 S. W. 1012 (1925), and Cawood v. Com., 229 Ky. 662, 17 S. W. (2nd) 453 (1929).
5 Royce v. Com., 194 Ky. 480, 239 S. W. 795 (1922); Lewis v. Com., 197 Ky. 449, 247 S. W. 749 (1923); Partin v. Com., 197 Ky. 480, 248 S. W. 489 (1923); and Elswick v. Com., supra, note 42.
The Kentucky courts apparently construe this rule strictly. In the case of *Grau v. Forge*, the court lays down the following rule: "When the facts are such as reasonably prudent men would have believed plaintiff guilty and would have acted upon them, we think that the officer is entitled to make the arrest." This statement fairly represents the rule in Kentucky. But it must be noted that there may be a case where the officer arrests on mere suspicion one who has in fact committed a felony, not in the presence of the officer. It would seem that such an arrest cannot be justified. We must come to the conclusion that under the Kentucky code and cases, the general rule as to this situation is not applicable where the offense is committed out of the officer's presence, and that under such a state of facts only the rules applicable in situations four and five may be applied. This is apparently the result reached in *Simmons v. Commonwealth*.4

An officer may arrest without a warrant when a felony has actually been committed and the person arrested may reasonably be suspected of having committed it, although, in fact, he may not have done so. An officer may arrest a person without a warrant whom he reasonably suspects of having committed a felony although in fact no felony has been committed. Both of these statements are directly covered by the Kentucky code. Under the statement there it is immaterial whether or not a felony has actually been committed and this is borne out in the cases. The court in *Klotz v. Cook*, says, "Peace officers may arrest any person whom they, upon reasonable ground, believe has committed a felony, although it afterwards appear that no felony has actually been perpetrated." It is to be noted that mere suspicion is not, in this state, sufficient justification for an arrest without a warrant. The officer must have some knowledge of facts which would lead a reasonable man to believe that the person arrested had committed a felony.4 However, the reasonable and probable grounds that will justify an officer in arresting without a warrant need only be such as would actuate a reasonable man acting in good faith.5

The Kentucky code provision applicable to the right of a private person to arrest without a warrant6 states: "A private person may make an arrest when he has reasonable grounds for believing that the person arrested has committed a felony." Let us see how the application of this section lines up with the rules which we have stated above.

Under this code provision it would appear that a private individual is not always entitled to arrest to prevent the commission of a felony. A private person is not entitled to make an arrest in this state except

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4 See also *Grau v. Forge*, supra, note 45, and *Lewis v. Com.*, supra, note 44.
5 *Catchings v. Com.*, 204 Ky. 439, 264 S. W. 1067 (1924).
7 Section 37.
when he has reasonable grounds to believe that the person arrested has committed a felony.\textsuperscript{14} It would seem to follow then that, where the attempt to commit the felony is only a misdemeanor (or where the offender has not yet gone so far as to have committed a criminal attempt), a private citizen is not justified in making the arrest without a warrant. However, if the attempt is in itself a felony, there would seem to be no good reason why a private citizen could not make the arrest without a warrant.

A private citizen may arrest without a warrant a person who is in the act of committing a felony. It would seem that the courts of this state must follow this rule. As has been said above, this rule necessarily comprehends that the crime be committed, at least partly, in the presence of the person arresting. If the felony is committed in the presence of any person, he would certainly have reasonable grounds for believing that that person had committed a felony.

It does not necessarily follow, in this state, that a private person may arrest anyone who has committed a felony. It would seem that, in any case, the person making the arrest would have to have a reasonable suspicion that the person arrested had committed a felony, and that, if the arresting person did not have such suspicion, the guilt of the accused would not make the arrest legal.\textsuperscript{15}

A private person may arrest without a warrant a person who is reasonably suspected of having committed a felony, though such person may not have done so, if a felony has in fact been committed. This statement seems to represent the law in Kentucky. In the few decided cases on the right of a private person to arrest without a warrant, we find reiterated over and over that all that is necessary is a reasonable suspicion that the person arrested has committed a felony.\textsuperscript{16} It is not the law in Kentucky that it is necessary that a felony actually have been committed before a private person may justify an arrest without a warrant. The rule in this state allows a reasonable suspicion to be all that is necessary. This rule has been upheld in the few Kentucky cases which could be found on this point.\textsuperscript{17}

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\textsuperscript{14} Wright v. Com., 35 Ky. 123, 8 K. L. R. 718, 2 S. W. 904 (1887). See also Begley v. Com., 22 K. L. R. 1546, 60 S. W. 847 (1901).

\textsuperscript{15} See Ky. Crim. Code, Sec. 37, and Wright v. Com., \textit{supra}, note 52.

\textsuperscript{16} See Wright v. Com., \textit{supra}, note 52; Salisbury v. Com., 79 Ky. 425, 3 K. L. R. 211 (1881); and Begley v. Com., \textit{supra}, note 52.

\textsuperscript{17} See cases cited in note 54, and Mann v. Com., 118 Ky. 800, 82 S. W. 433 (1904).