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Crimes--The Right of an Officer to Arrest Without a Warrant

John A. Evans
University of Kentucky

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It is to be appreciated that a jury must indeed find itself in a predicament in applying the subjective test in order to reach a decision after having heard all the evidence. The reason is obvious. Under the foregoing test as it is stated an infant is required to use only that degree of care which would ordinarily be used by a child of its age, capacity and experience under similar circumstances. This indefinite test places the burden on the jury to determine whether it acted as such. Query, assuming the facts of the case to be clear, how is a jury with nothing definite on which to work (unless one would say that the psychological aspect of an infant toward a certain set of facts is definite) to go about determining whether or not a particular infant acted as an ordinary child of its age, capacity and experience would have acted under similar circumstances?

William S. Jett, Jr.

CRIMES—THE RIGHT OF AN OFFICER TO ARREST WITHOUT A WARRANT.

In a recent Texas case the court held that an arrest by an officer without a warrant was illegal where the evidence did not show that the defendant was about to escape or would escape if time were taken to secure a warrant, even though the officer had reasonable grounds to believe the defendant was guilty of the felony committed. A brief statement of the facts will show that the arrest would have been legal had not the Texas statute, which governed this case, included the clause, "it must appear that the accused was about to escape." The deceased was found dead at his filling station about six o'clock A. M. with a shotgun wound in his body. The defendant had been seen at the filling station carrying a shotgun late that same afternoon. Fresh tracks in the snow led from the filling station to the defendant's home where he was arrested less than an hour after the killing. According to the arresting officer's testimony, he told the defendant that he was making an investigation and thought that he (the defendant) might be able to give him some information. When asked if he had heard any shots the defendant answered in the negative and, after hesitating a moment, said, "That old man was a kind old man; I was down there at two o'clock but haven't been back since." The defendant apparently made these statements without being advised of the killing. The officer immediately arrested the defendant without a warrant as he was then seven miles from the county seat, the only place where he could have secured a warrant.

Various situations arise in which an officer in the pursuance of his duty may arrest a person without a warrant and the arrest will be legal.

I. Felonies:

(a) An officer may arrest a person who is in the act of committing a felony, upon view, or when he is apprised by any of his senses that such is being committed in his presence.²

(b) At common law and by statutes in almost all states an officer may arrest a person for a felony which was committed or attempted in his presence.³ Furthermore, an officer is justified and should arrest on a reasonable charge by another (though the informer is not an officer) that a felony has been committed, and that the person to be arrested committed it. It has been said that it is not only a right but it is the officer's duty to arrest under such circumstances, and if he refuses to do so he is guilty of a misdemeanor.⁴

(c) If a felony has in fact been committed by some one, an officer may arrest a suspect, if he has reasonable grounds to believe him guilty. It is not necessary that the officer is certain that the party to be arrested is guilty.⁵ The officer is justified in making the arrest although it turns out that the person arrested did not commit the crime.⁶

(d) The rule with which we are most concerned is the one which grants an officer the right to arrest without a warrant on suspicion of a felony in case he has reasonable grounds to believe that a felony has been committed and the person to be arrested committed it. The American Law Institute suggests this rule in their model Code of Criminal Procedure.⁷ There are many state and federal decisions which decide this rule to be law in those particular jurisdictions.

Though an officer may arrest without a warrant if he has reasonable grounds or cause to suspect that a felony has been committed, he may not do so arbitrarily, and it is indispensable to justify the arrest of one actually innocent that the circumstances were such that an ordinary person would have believed the party to be guilty;⁸ so an officer may not effect a legal arrest on mere suspicion.⁹ However, it is not necessary that the officer absolutely know that a felony has

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² Partin v. Com., 197 Ky. 840, 248 S. W. 489 (1923); Collins v. Com., 192 Ky. 412, 233 S. W. 896 (1921).
³ Clark's Criminal Pro., 2nd Ed., p. 45.
⁵ Com. v. Carey, 12 Cush. 246 (1853).
⁶ Com. v. Cheney, 141 Mass. 102, 6 N. E. 724 (1886).
⁸ Castle v. Lewis, supra, note 7.
been committed, but he may govern himself by the credible evidence
given by others.20 Carroll's Kentucky Code of Criminal Procedure pro-
vides that an officer may arrest when "he has reasonable grounds to
believe that a felony has been committed."21 However, the facts must
be such that a reasonably prudent man would believe that the person
to be arrested had committed the felony.22 Reasonable grounds have
been said to require both reasonable belief and probable grounds so
well founded as would actuate a reasonable man acting in good faith
to that belief,23 or such a state of facts as would lead a man of ordi-
nary care and prudence to believe or entertain an honest and strong
suspicion that the person about to be arrested is guilty of the offense
charged.

There are a few states which have, by statute, limited the pre-
vailing rule. For instance, the Texas Code of Criminal Procedure pro-
vides, "Where it is shown by satisfactory proof to a peace officer,
upon representation by a credible person, that a felony has been com-
mited, and that the offender is about to escape, so that there is no
time to procure a warrant, such a peace officer may arrest without
a warrant."24 This rule is contrary to the great weight of authority.

II. MISDEMEANORS:

(a) An officer may, without a warrant, arrest a person to pre-
vent him from committing a misdemeanor which tends to be a breach
of the peace.25

(b) An officer may arrest a person who is at the time commit-
ing a misdemeanor in his presence which amounts to a breach of
the peace, and if given statutory authority he may arrest for those
misdemeanors not amounting to a breach of the peace.26

In the case, Myers v. State,27 the court held that an automobile
standing in the street without a license tag did not sufficiently show
that a misdemeanor was being committed, so that the arrest of the
owner, without a warrant, could be legally made. The question raised
in this case is whether the arrest is made on suspicion or probable
cause. The difficulty in laying down the rule consists in determining
"probable cause," and the court attempts to give a test for it. "One
of the safest tests, although we do not declare it to be under all cir-
cumstances an exclusive test of when a misdemeanor is committed in
the presence of an officer, is whether the officer as a witness could
at the time of the arrest of his own knowledge testify to sufficient
facts as having happened in his presence to make out a case for con-
viction if his evidence is undisputed; and of course an admission made

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21 Carroll, Kentucky Code of Criminal Pro., Sec. 36.
22 Gravo v. Forge, supra, note 7.
23 Com. v. Riley, supra, note 7.
26 Dilger v. Com., 88 Ky. 550, 11 S. W. 651 (1889).
27 Myers v. State, 158 Miss. 554, 130 So. 741 (1930).
to him or in his presence is sufficient to supply knowledge of those facts competent to be covered by admissions."

(c) Assuming that an officer has statutory authority to arrest for misdemeanors committed in his presence other than those which amount to a breach of the peace, the arrest must be made immediately or upon immediate and continuous pursuit.28

A crime is committed in an officer's presence if he is apprised of its commission by his sense of sight,29 or hearing,30 or smell.31 A Federal court in the case of McBride v. U. S., held that federal agents, who, having entered upon the premises where there was an unoccupied house, smelled fumes from a still, were authorized to arrest without a warrant after they had found a still in illegal operation.32 Another federal case held that when an officer is apprised by any of his senses that a crime is being committed it is committed in his presence.33 If the officer is able to detect it as the act of the accused it is in his presence.34 However, merely being in sight and hearing, without the power to detect or identify the accused, or what he is doing is not sufficient.35 Yet hearing has been held to be sufficient as where, in the night, an officer heard screams coming from an upstairs room, where he found a man beating a woman.36

(d) According to the common law rule an officer could not arrest without a warrant for a misdemeanor other than those amounting to a breach of the peace, except in a few cases such as "night walking" and "riding armed," for which authority to arrest without a warrant had been given by statutes so ancient that the statutory origin of the privilege had been forgotten and the privilege was regarded as substantially one existing at common law.37

JOHN A. EVANS.

TRUSTS—TRUSTS CREATED BY PRECATORY WORDS.

The testator made a will that was duly executed and contained the following provision: "I will, bequeath, and devise to my beloved wife Mary A. Williams, all of my property, real and personal, to be hers absolutely. It is my desire and I request that if I pre-decease her, then before her death, she will make a will giving to her people one-half (1/2) of my property, and to my people the other one-half

29 Smuck v. People, 72 Col. 97, 209 Pac. 636 (1922).
34 Reed v. Com., 125 Ky. 126, 100 S. W. 586 (1907).
37 75 University of Pa. L. Rev. 485.