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The Kentucky Felony Willful Murder

By ROY MORELAND*

The 1960 Kentucky Legislature directed the Kentucky Legislative Research Commission to make a study of the homicide law of Kentucky. The writer participated in that study. As a result of the study, a statute was offered to the 1962 Legislature defining involuntary manslaughter in the first and in the second degree.¹ One of the purposes of this statute was to do away with the technically impossible Kentucky crime, the negligent voluntary manslaughter. This statute has been incorporated in Kentucky homicide law as Ky. Rev. Stat. 435.022 [hereinafter abbreviated KRS], and it is to be hoped that the courts will interpret the statute so as to accomplish that purpose.

However, another purpose of the new involuntary manslaughter statute is to do away with another impossible Kentucky crime, the felony willful murder. This offense, like the negligent voluntary manslaughter, is on its face a contradiction in terms, since the felony willful murder is an *unintentional* homicide, but it is fast becoming embedded in Kentucky decision law. The writer prepared a long paper on the development of the law of homicide at common law and in Kentucky which appeared as an article, "Kentucky Homicide Law with Recommendations," 51 *Kentucky Law Journal* 59 (1962). While that article pointed out the legal inconsistency in the felony willful murder as well as in the voluntary negligent manslaughter, the general discussion in the article is phrased largely in terms of negligence. The new statute itself, KRS 435.022, which was recommended to cure the situation in both instances, is phrased in terms of wantonness

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¹ As is well known, the Kentucky Legislative Research Commission does not engage in legislation, and so did not participate in the introduction or passage of the bill which resulted in this new involuntary manslaughter statute. It was introduced in the House by the Hon. Richard Frymire at the request of the writer.

and recklessness, negligence words. This is because most modern legal thinking no longer determines liability for unintentional homicide according to the lawfulness or unlawfulness of the act out of which the death occurred, but upon the degree of danger in it. That being so, the felony-murder, misdemeanor-manslaughter doctrines have merged, and one rule (statute), stated in terms of negligence, suffices. That one rule in Kentucky is now KRS 435.022 and it should apply to homicides occurring both in the commission of unlawful acts and those arising out of criminal negligence other than in the operation of motor vehicles on the ordinary negligence level.²

And yet a fear remains in the writer that this is not wholly clear as to the felony willful murder. KRS 435.022 is itself phrased in terms of *negligence*. There have been repeated attacks on the negligent voluntary manslaughter in the periodicals, in addition to the long article in the 1962 fall issue of the *Kentucky Law Journal*, so there should be no doubt that a purpose of the new statute is to do away with this unfortunate crime. But there has been little attack, as yet, upon the equally unfortunate felony willful murder, other than the one in the above issue of the *Law Journal*, and it, perhaps, does not urge the use of KRS 435.022 to eliminate this impossible Kentucky crime with sufficient forcefulness and directness to make the matter wholly clear.³ For that reason this short article specifically urging that the new KRS 435.022 be used to eliminate the Kentucky felony willful murder is written. The article will trace briefly the development of the felony murder at common law and in Kentucky, limitations upon the application of the doctrine in this state, the introduction of the hybrid offense, the felony willful murder, into Kentucky decision law and, finally, show specifically how the new involuntary manslaughter statute, KRS 435.022, should be interpreted so as to eliminate the offense. Since this paper is intended as supplemental to the one in the 1962 fall issue of the

² Death Occurring As A Result Of Negligent Operation Of A Motor Vehicle, Ky. Rev. Stat. 435.025 [hereinafter cited as KRS].

³ Only two pages are devoted in that article to a specific suggestion that KRS 435.022 should cause the elimination of the willful felony murder in Kentucky. See Moreland, *Kentucky Homicide Law With Recommendations*, 51 Ky. L.J. 59, 83-85 (1963); *id.* at 123-124.

Kentucky Law Journal, that article should be read for a more extended discussion of many of these matters.

A. DEVELOPMENT OF THE FELONY MURDER DOCTRINE

There were four kinds of murder at common law.⁴ One of these was the willful (intentional) murder which has been codified in Kentucky law as KRS 435.010. The three unintentional murders were (1) the negligent murder, (2) the felony murder, and (3) the unintentional killing of a police officer while in the execution of his official duties. None of the unintentional common law murders have been codified in Kentucky. The third category of unintentional murder has finally passed out of existence,⁵ absorbed by the negligent murder, the test now being whether the act causing the homicide was criminally negligent, not whether the victim was an officer. Consequently such a homicide would now be prosecuted in Kentucky under KRS 435.022.

The felony murder, the particular subject of this discussion, was often very harsh in its application. While originally it was necessary that the felony out of which the homicide arose be dangerous to life and limb, this early rule was later disregarded and any felony,⁶ regardless of its danger, was sufficient to serve as a basis for a conviction of murder. But such a harsh rule was bound to yield in time to social pressure and the historic break came in 1887 in an open, vitriolic attack upon the doctrine by Judge Fitzjames Stephen in his *History of the Criminal Law of England*,⁷ in which he called the rule "cruel and, indeed, monstrous." Four years later he incorporated his view in an opinion. This memorable decision, *Regina v. Serné*,⁸ is the basis of the modern felony murder rule. Judge Stephen held that if a homicide occurred in the commission of a felony it would not be murder, *unless the felony in itself was one dangerous to life and likely in itself to cause death.*

⁴ Stephen, *History of the Criminal Law of England* 80-81 (1883).

⁵ Hall, *The Substantive Law of Crimes—1887-1936*, 50 Harv. L. Rev. 616, 642 (1937).

⁶ At one time a killing occurring in the commission of *any* unlawful act, a misdemeanor or even a civil wrong, was murder. Moreland, *The Law of Homicide* 42 (1952).

⁷ 3 Stephen, *History of the Criminal Law of England* 57-75 (1883).

⁸ 16 Cox C. C. 311 (1887).

When the felony murder rule is stated in this manner the question naturally arises as to how dangerous in itself the felony out of which the homicide arose has to be. The law after a great deal of searching has gradually adopted the rule that it must be "extremely dangerous," or to state it in another way "so dangerous as to indicate a wanton disregard for human life and safety."⁹ However, when the test for the requisite amount of danger required for the felony is stated in this language it becomes identical with (parallel to) the test applied today as to the amount of danger required in a negligent murder case.¹⁰ This conception of the felony murder doctrine—that it now requires such an extremely dangerous felony as to indicate a wanton disregard for human life and safety—is now being incorporated in quite a number of modern statutes, which make one who kills while committing a felony guilty under the felony murder rule only when the felony is arson, rape, robbery, or burglary—all felonies ordinarily extremely dangerous in themselves to human life and safety.¹¹ Such statutes serve a useful purpose as transitional devices. When the felony element should ultimately be removed from the rule, these specific, named, usually extremely dangerous felonies would no longer be named and the wording of the negligent murder alone would be used. Then the affirmative burden would be on the prosecution in each and every case to show such extreme danger in the act which caused death as to indicate a wanton disregard for human life and safety and some cases have taken this ultimate position,¹² as has the new English Homicide Act which abolishes the felony murder completely¹³ and permits the showing of the "requisite implied malice" to be satisfied by an "extremely dangerous act."

The net result of the discussion up to this point indicates the complete elimination of the felony murder under the new

⁹ *People v. Goldvarg*, 346 Ill. 398, 178 N.E. 892 (1931) (arson); *Williams v. Commonwealth*, 258 Ky. 830, 81 S.W.2d 891 (1935) (robbery); *People v. Pavlic*, 227 Mich. 562, 199 N.W. 373 (1924) (selling liquor, a statutory felony) (defendant was not convicted).

¹⁰ Moreland, *A Suggested Homicide Statute For Kentucky*, 41 Ky. L.J. 146 (1953).

¹¹ These are the four felonies incorporated in the statutes of some thirteen states. Moreland, *The Law of Homicide* 217 (1952).

¹² See the cases cited in note 9, *supra*.

¹³ Homicide Act, 1957, 5 & 6 Eliz. 2, c. 11, see 202 H.L. Deb. 726 (5th ser. 1957).

English Homicide Act and that decisions and statutes in the United States have also gone most of the way toward eliminating the doctrine in this country, merging the felony murder with the negligent murder and making the test of liability in such cases depend upon whether the act which caused the death was so extremely dangerous as to indicate a wanton disregard for human life and safety.

B. THE SITUATION AS TO THE FELONY MURDER RULE IN KENTUCKY

It will now be necessary to go back and trace briefly the development of the felony murder doctrine in Kentucky in order to show the opportunity now available to use KRS 435.022 to eliminate the Kentucky felony willful murder.

While there is no statute embodying the felony murder in Kentucky, the crime survives as a common law offense in this state.¹⁴ In *Commonwealth v. Reddick*,¹⁵ decided in 1895, the accused burglarized and burned a hotel, where he knew people were living, causing the deaths of three people. The court pointed out the natural danger in his acts and held that he was guilty of murder *although he may not have intended the killings*. Two later decisions, *Williams v. Commonwealth*¹⁶ and *Marion v. Commonwealth*¹⁷ subscribe to the felony murder doctrine but neither opinion is clear as to the requisite degree of danger in the felony out of which the homicide arose, although in each case the homicide arose out of a robbery, a felony extremely dangerous under most circumstances. Two other cases complete the series, *Whitfield v. Commonwealth*¹⁸ and *Simpson v. Commonwealth*,¹⁹ which was decided in 1943.

The series of Kentucky cases which involve the common law felony murder is confusing and uncertain.²⁰ There is some doubt whether proximate cause is needed to be satisfied and whether in some cases a felony extremely dangerous to human life and safety is required. With the situation in this condition, the Ken-

¹⁴ Moreland, *A Suggested Homicide Statute For Kentucky*, 41 Ky. L.J. 139, 150 (1953).

¹⁵ 17 Ky. L. Rep. 1020, 33 S.W. 416 (1895).

¹⁶ 258 Ky. 830, 81 S.W.2d 891 (1937).

¹⁷ 269 Ky. 729, 108 S.W.2d 721 (1937).

¹⁸ 278 Ky. 111, 128 S.W.2d 208 (1939).

¹⁹ 293 Ky. 831, 170 S.W.2d 869 (1943).

²⁰ See the discussion and authorities cited, Moreland, *A Suggested Homicide Statute For Kentucky*, 41 Ky. L.J. 139, 150-152 (1952).

tucky Legislature in 1950 passed a statute, KRS 431.075, which limits the punishment for all common law crimes, the punishment for which is not provided by statute, to a maximum of confinement in the county jail for twelve months or a 5,000 dollar fine, or both. It would appear that after this 1950 statute, the only felony murder in Kentucky is common law felony murder, for which the only punishment is the one provided for by this statute. But the problem is not as simple as that; Kentucky has the decision-created felony willful murder, punished under KRS 435.010, which is a willful murder statute.

C. THE KENTUCKY FELONY WILLFUL MURDER

A felony willful murder is, of course, a contradiction in terms, since the felony murder historically and today in other jurisdictions where its remnants hang on is an unintentional killing, *never* a willful homicide. With a principle as firmly established as that one wonders how—by what means—the Kentucky hybrid offense wormed its way into Kentucky decision law.

It would be somewhat logical to pick up the offense shortly after the 1950 statute and argue that the courts were unwilling to accept the somewhat minor punishment provided by the 1950 statute for homicide arising out of occasional heinous felonies, such, as rape and armed robbery, and so created the felony willful murder, which though wrong in theory, reached a good social result, since it is punishable by death or life imprisonment. A short answer to that argument would appear to be that the legislature has determined that the *only* punishment for unintentional felony murder after 1950 is that provided by KRS 431.075.

At any rate, it is the opinion of the writer that the Kentucky felony willful murder is not the result of a conscious attempt by the court to evade what was considered to be too mild a punishment for common law felony murder under KRS 431.075 but that the decision-created crime was occasioned by errors in indictment framing, in the use of an improper application of “implied malice,” and in loose language generally in certain opinions.

An attempt will be made to determine just how the word “felony” became linked with the word “willful” to constitute

the present "felony willful" murder. The first Kentucky case in the Kentucky felony murder series, *Reddick v. Commonwealth*²¹ perhaps contains the roots of the present unfortunate hybrid crime. In that case the accused burned a hotel, where he knew people were living, causing the deaths of three persons. The court pointed out the natural danger in his act and held that he was guilty of murder although he may not have intended the killings. This is a typical case of felony murder. The indictment, however, charged that the accused took the life of the deceased "willfully" by setting fire to the hotel. The court by strained reasoning satisfied the element of willfulness in the indictment by saying that a death was a "natural consequence of the act of setting the hotel on fire." This is over-statement and not in accord with the reasoning in other jurisdictions. The death was not "practically certain" to occur,²² which is what is required to satisfy willfulness. Perhaps here is the seed of the felony willful murder. The defendant should have been guilty of a felony murder, but not of willful murder.

The next case in the felony willful murder series, *Whitfield v. Commonwealth*,²³ was almost on all fours with the *Reddick* case except that the defendant was convicted of *willful* murder (not felony willful murder). Once more the defendant killed the deceased by burning a house. The court held he was properly held guilty of willful murder "although he may not have intended or calculated the death of an inmate as a result of burning the house." And yet the court, relying upon the *Reddick* case, *supra*, held he could be convicted of willful murder because "the death of an inmate was the natural consequence of the fire." This case, it is submitted, is clearly in error in holding the defendant guilty of a willful murder. If the indictment had not been framed in *willful* murder, then a common law felony murder conviction would have been a possibility as in the *Reddick* case since the *Whitfield* case was decided prior to the 1950 statute. The unfortunate language in the *Reddick* case was seized upon by the court to justify a conviction of willful murder in *Whitfield*. If one burns a house, it is not substantially or practically certain that

²¹ 17 Ky. L. Rep. 1020, 33 S.W. 416 (1895).

²² Moreland, Law of Homicide 18, and authorities cited (1952).

²³ 278 Ky. 111, 128 S.W.2d 208 (1939).

someone will be burned to death²⁴—although it is a very dangerous act.²⁵

A somewhat different technical approach in holding a defendant who had committed a felony murder guilty under the Kentucky willful murder statute was employed in 1943 in the case of *Simpson v. Commonwealth*.²⁶ In that case the accused conspired to commit a felony and during its commission a person was killed. The court held that the intent to perpetrate the felony supplied the element of willfulness requisite for murder under the statute. The court said, "The intent to perpetrate a different felony during the commission of which a person is killed, *supplies* the elements of malice and intent to murder *although the death is actually against the original intention of the party*. Responsibility for the consequence rests on the initial or contemplated purpose." (Emphasis added.)²⁷

Such reasoning is not only wholly fictional but fallacious. This was a case of felony murder, the killing was unintentional *not* willful, and a statement that the intent to commit the felony *supplied* the willfulness requisite to satisfy the willful murder statute is irrational and wholly out of line with the thinking as to the felony murder in other jurisdictions.

A leading case in the felony willful murder series, and one particularly illustrative of the kind of errors that have occasioned the unfortunate crime in Kentucky, is the recent decision in *Tarrence v. Commonwealth*,²⁸ decided in 1953. In that case a father and son killed a Louisville lawyer, while in the course of his abduction, a felony. They were tried and convicted in separate trials under KRS 435.010. In attempting to show how the requisite factor of willfulness in that statute was satisfied, the court said:

Although the accused may not have had the intention of taking a life, *malice* in respect to such homicide may be *implied* or

²⁴ See authorities cited in note 22, *supra*.

²⁵ This act is sufficient to satisfy the extreme danger required for the negligent murder or the felony murder but not the substantial certainty of a death required for an intentional (willful) murder.

²⁶ 293 Ky. 831, 170 S.W.2d 869 (1943).

²⁷ 170 S.W.2d at 869.

²⁸ 265 S.W.2d 40 (1953). See also, generally, *Centers v. Commonwealth*, 318 S.W.2d 57 (1958). *Centers* was convicted of murder—apparently of felony willful murder.

inferred on the ground that the killing was done while the person who did the act was engaged in the commission of some other felony or in an attempt to perpetrate some offense of that grade. . . . In this jurisdiction the usual form is an instruction that if the accused committed or attempted to commit another felony and in doing so killed a person, the jury should find him guilty of murder. (Emphasis added.)²⁹

It is unfortunate that the court phrased its reasoning in terms of "malice." KRS 435.010 is a statutory crime and it is phrased in terms of "willfulness," not "malice." It is true that all four kinds of common law murder were phrased in terms of "malice," and even of "malice aforethought." But that was common law murder. This is statutory murder, and the statute uses the term "willful." It is also true that the "intentional" (willful) murder was one of the four common law murders by "malice,"³⁰ but that word of art, ambiguous as it is, has about passed out of existence, and this should be particularly true in Kentucky where there is but one kind of statutory murder—and that is "willful" murder.

At any rate, there are two distinct errors in the court's reasoning in the *Tarrence* case. For the court to say that "malice" (willfulness) can be *inferred*, to satisfy the Kentucky statute, is an inaccurate use of the word "inferred."³¹ One does not *infer* a willful killing from an intention to commit a felony. It is impossible to *infer* a willful murder from the commission of another felony. A felony murder is an *unintentional* murder.

It is also error for the court to *imply* a willful killing from the commission of the felony. It is true that a common law *malice* was implied from the commission of the felony and the accused became guilty of a *felony* murder, which was an unintentional killing. It is quite another thing to imply the *willfulness* requisite under KRS 435.010. This is not only a fiction, it is an error.

²⁹ 265 S.W.2d. 50 (1953).

³⁰ For Stephen's classic classification of the states of mind requisite for murder at common law into four categories, see Moreland, Law of Homicide 17n (1952).

³¹ To *infer* the express malice requisite for intended murder from certain circumstances is well known at common law and continues today under intentional murder statutes. See Moreland, Law of Homicide 20 (1952). The deadly weapon doctrine is an example.

However, it is quite a different thing to *infer* a willful killing from an intent to commit a felony. Where a killing occurs in the commission of a felony and it is unintentional, it is a *felony* murder, and it is error to infer the intent requisite for a *willful* murder under KRS 435.010.

It may be concluded that the felony willful murder, which on its face is a contradiction in terms, has some support in Kentucky cases. Its roots, perhaps, reach back as far as 1895 but there are only a few cases applying the doctrine. However, the *Simpson* and *Tarrance* cases are recent decisions and this points up the fact that the unfortunate crime should be eliminated quickly in order that it not become entrenched in Kentucky decision law.

D. SOLUTION OF KENTUCKY FELONY WILLFUL MURDER PROBLEM

It is submitted that the solution to the elimination of the felony willful murder lies in a proper interpretation and application of the recent involuntary manslaughter statute, KRS 435.022. Part of the purpose of that statute, drawn after a long study of Kentucky homicide law, was the elimination of this crime and the substitution in its place of the statutory offense of "homicide arising out of such an extremely dangerous act as to show a wanton indifference to human life and safety."

As pointed out earlier in this paper, the historic felony murder, as such, is rapidly passing out of the law. The new English Homicide Act abolishes it completely and permits the "requisite implied malice" to be satisfied by an "extremely dangerous act."³² The American courts are moving rapidly in the same direction. Following the leadership of Judge Stephens in his decision in *Regina v. Serné*,³³ courts in the United States have gradually adopted the rule that to make the actor guilty of murder the felony out of which the homicide arose must have been "extremely dangerous," or to state it in another way "so dangerous as to indicate a wanton disregard for human life and safety." However, when the felony murder rule is stated in this modern manner it is apparent that the test for the amount of danger requisite for liability for a felony murder is identical with (parallel to) the amount of danger required for liability for a negligent murder. It therefore becomes clear that the felony murder and the negligent murder have merged for all practical purposes today, the law requiring for liability in each case an act so extremely dan-

³² Homicide Act, 1957, 5 & 6 Eliz. 2, c. 11, see 202 H.L. Deb. 726 (5th ser. 1957).

³³ 16 Cox C.C. 311 (1887).

gerous as to indicate a wanton disregard for human life and safety.³⁴

However, to make the point that the felony murder, as such, is passing out of the law—the trend today being to punish such homicides as negligent killings if the degree of danger inherent in the felonious act is sufficiently great—is only a partial solution of the problem. The question still remains: If these homicides are not to be punished as felony murders, should they nevertheless be punished as negligent murders? KRS 435.022 (1) answers that question in the negative; that statute provides that such killings are not murder but involuntary manslaughter in the first degree with a punishment of from one to fifteen years.

Those who participated in the group study of Kentucky homicide law gave a great deal of thought as to whether the common law negligent and felony murders should be re-activated in a new merged negligent murder statute. But, while both the negligent and felony murders and also the unintentional killing of an officer in the course of an arrest were all murder historically, the fact must be faced that the *unintentional* murder is becoming increasingly unpopular. In Kentucky the only statutory murder is the *willful* murder. It seems that the Kentucky Legislature made its current position clear when in 1950 it promulgated KRS 431.075, which makes a prosecution for *any* of the unintentional common law murders highly improbable because of the small punishment it provides. That statute indicates that the Kentucky Legislature considers the *unintentional* murder to be an unwise public policy concept today.

It is true that the unintentional murder lingers on in the statute books of other states. But it is found rarely in the decisions. An examination of the Sixth Decennial Digest of the American Digest System for the ten-year period, 1946-1956, verifies this conclusion. Compilers of casebooks are still able to find cases where the accused was convicted of murder in some degree for an unintentional killing but these decisions are becoming scarcer and scarcer. Of the five persons who worked upon the Kentucky homicide study group only one was in favor of incorporating an

³⁴ The new Model Penal Code of the American Law Institute has gone almost the whole way in merging the felony and negligent murders, requiring the same type of act for liability in each instance. Model Penal Code Sec. 201.2(b) (Tent. Draft No. 9, 1959).

unintended murder provision in the suggested act. The other four favored punishing such offenders under an involuntary manslaughter in the first degree provision with a maximum punishment of fifteen years. Those guilty of a lesser degree of negligence causing death were to be punished as guilty of involuntary manslaughter in the second degree.

This increasing unwillingness to punish unintentional negligent killings as murder is occasioning discussion in legal literature and in the legal periodicals. One of the most exhaustive and thought-provoking of the recent writings on the matter is an article by Professor Rex Collings of the University of California Law School at Berkeley.³⁵ Professor Collings takes a most negative view of the negligent murder, stating that a number of distinguished English and American writers have rejected the offense, citing among others Professors Jerome Hall of the University of Indiana and Herbert Wechsler of Columbia.³⁶ It is increasingly apparent that scholars, jurists, and juries are of the opinion that the punishment of murder is too severe for these unintentional homicides.

And that was the conclusion of those who drew KRS 435.022(1). In the reduction of this unintended homicide to involuntary manslaughter in the first degree, while a reduction in severity the offense is still punished by from one to fifteen years in the penitentiary, a very substantial penalty. The selective spread given to the jury of from one to fifteen years is wide, giving them great discretion in adjusting the punishment to the circumstances of the case. It is to be hoped that the felony willful murder, an impossible crime since a contradiction in terms, will now be dropped from Kentucky decision law and that instead of it the courts will use the new statute to punish for these unintentional homicides.

³⁵ Collings, *Negligent Murder—Some Stateside Footnotes to Director of Public Prosecutions v. Smith*, 49 Cal. L. Rev. 254 (1961).

³⁶ *Id.*, at 268.