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CRIMINAL PROCEDURE—RESISTING ARREST UNDER A DEFECTIVE WARRANT

The purpose of this note is to examine the effect that an arrest under a defective warrant¹ has upon the rights of the accused party upon whom it is being served. Preliminary to such an examination it is necessary to enter upon a brief discussion concerning the fundamental principles of law which are basic to a discussion of the problem.

The prevailing rule seems to be that one may resist an illegal arrest just as he can resist any other assault on his person.² But in offering such resistance he may utilize only such force as is commensurate with the injury threatened to him.³ The person attempting the illegal arrest is a wrongdoer and may be resisted in self defense.⁴ This rule is grounded on the theory that the right to personal liberty is one of the fundamental rights guaranteed every citizen, and that a citizen of a certainty should have the privilege of jealously protecting a right so basic to the American way of life.

Though one may resist an illegal arrest using no more force than is necessary, no one has a right to kill an officer or individual attempting an illegal arrest unless the arrester by his actions puts the arrestee in fear of death or great bodily harm. In short, the law will not sanction a principle that would justify taking a human life simply to prevent an unlawful imprisonment.⁵ The general rule was stated as follows in *Wilkinson v. State*:⁶

¹ RESTATEMENT, CRIMINAL PROCEDURE, sec. 8 (1931); U.S. CONST. AMEND. IV; CLARK, CRIMINAL PROCEDURE 32, 33 (2d ed. 1918).

² 6 C.J.S. 613 (1937); 4 AM. JUR. 63 (1936); *But see* State v. Gupton, 166 N.C. 257, 80 S.E. 989 (1914), where it was in effect said that though a warrant of arrest may be defective in form, if it issued for a crime in the justice's jurisdiction, the officer to whom it is directed, if a regular officer, is protected thereby against assault by the person to be arrested. The arrestee should in such case submit to the arrest and assert his right to better warrant at the hearing instead of defying the officer and assuming a hostile attitude towards him.

³ Roberson v. State, 53 Ark. 515, 14 S.W. 902 (1890); Neely v. Comm., 123 Ky. 1, 93 S.W. 596 (1906); State v. Gum, 68 W. Va. 105, 69 S.E. 463 (1910); 4 AM. JUR. 63 (1936).

⁴ Wilkinson v. State, 143 Miss. 324, 108 So. 711, 46 A.L.R. 895 (1926); Meirs v. State, 34 Tex. Cr. Rep. 47, 29 S.W. 1074 (1895).

⁵ Williams v. State, 44 Ala. 41 (1870); State v. Clark, 64 W. Va. 625, 63 S.E. 402 (1908); see also Creighton v. Commonwealth, 84 Ky. 103, 108, 4 Am. St. Rep. 193, 196 (1886), where it was said: "At first impression it would seem that in the attempt to deprive one wrongfully of his personal liberty, the party assaulted should be permitted to use all the force necessary to release himself from the unlawful arrest, or to prevent the imprisonment; for life being valueless without liberty, the modes of defense for the preservation of human life should be allowed for the maintenance of human liberty . . . but liberty can be secured by a resort to laws."

⁶ *Id.* at 335, 108 So. at 712.

The courts generally hold that the right to resist an unlawful arrest is a phase of the right of self-defense; that as in other cases of self-defense the person sought to be arrested is justified in taking life only when he has reasonable ground to apprehend that he is in imminent danger of death or great bodily harm; that he is not justified in killing merely for the purpose of resisting an unlawful arrest or other restraint upon his liberty, where the only injury which could be reasonably apprehended is an unlawful detention for a short time or other injury short of death or great bodily harm; that, the officer attempting to make an unlawful arrest is simply the aggressor in the difficulty, and stands in the shoes of any other aggressor in a like difficulty.⁷

When a homicide is committed by one resisting an unlawful arrest, though the courts are generally agreed that the homicide is not justified unless the resisting party is threatened with death or great bodily harm, they are not in agreement as to the degree of homicide of which the killer is guilty.

It should also be noted that before any of the above principles can be applied, the arrestee must have knowledge that the warrant under which the arrest is being effected is invalid and thus that the arrest is illegal. Because of this fact the courts have generally recognized that there may be two types of defects rendering a warrant defective—those which are apparent on the face of the process itself, and those which, though present, are not apparent on the face of the warrant. In discussing the rights of an arrestee under a defective warrant it thus becomes clear that some distinction must be made between these two types of defects. For the want of a better classification it is proposed that the terms "patent" and "latent" be adopted to describe these two types of defects. Those warrants in which the defect is apparent on the face of the process will hereafter be designated patently defective warrants and those warrants which, though valid and fair on their face, are burdened with some unseen defect will be called latently defective warrants.

Applying these general principles to the specific problem under discussion, then, it would seem that a party who is

⁷ 143 Miss. 324, 108 So. 711 (1926).

threatened with an arrest under a warrant which to his knowledge is defective has an inherent right to resist the arrest using such force as is necessary to prevent the injury threatened, short of killing the officer. Thus the basic problem posed resolves itself into the following question: If an arrestee who is *not threatened with death or great bodily harm* kills the arresting officer in resisting an arrest under a defective warrant, should he be guilty of murder, or should the fact that the arrest was illegal reduce the crime to manslaughter? Apparently there are three views on this question. The first holds that such a party is never guilty of more than manslaughter unless actual malice is shown; the second holds that he is always guilty of murder; and the third holds that if the illegality of the arrest in fact raised heat of passion within the breast of the arrestee, his offense should be reduced from murder to manslaughter. For a complete understanding of the problem it is necessary that these three views be treated separately.

(A) *The View that the Offense is Always Manslaughter.* In reality there are two separate and distinct rationalizations behind this view.

The first rationalization ignores the fact that a warrant of arrest may be either patently or latently defective and simply makes the test the legality or illegality of the arrest. In short this rationalization holds that if the arrest is illegal and the arrestee in resisting it kills the officer, the illegality of the arrest without more will reduce the crime to manslaughter. Utilizing this test it is obvious that whether the warrant be patently or latently defective would be of no significance, because in either situation the arrest would be illegal and therefore the homicide could be of no greater degree than manslaughter unless express malice is affirmatively proved. In *Rafferty v. People*⁸ the magistrate issued warrants in blank to be filled in by the police sergeant when occasion arose; the sergeant, who had no authority to do so, filled in one of the warrants directing officer X to arrest the accused. X was killed by the accused while attempting to execute this defective warrant, which on its face appeared valid in all respects.

⁸ 69 Ill. 111 (1873); but in *Rafferty v. People*, 72 Ill. 37 (1874); the defendant was convicted of murder on the grounds that express malice was proved.

The court held that the accused could be guilty of no more than manslaughter because the arrest was in fact illegal.⁹

The second rationalization under which it is held that a homicide effected while resisting an illegal arrest can only be manslaughter unless actual malice is shown is based on the presumption that an illegal arrest *always* raises heat of passion in the party to be arrested. In *Briggs v. Commonwealth*¹⁰ it was said:

The true view of the law, in reason, is that when the mere fact of an illegal arrest, attempted or consummated, appears, if the one suffering it kills the officer or other arresting person, whether with a deadly weapon or by other means, he may rely on the presumption that his mind was beclouded by passion, but if actual malice is affirmatively proved, the homicide will be murder.¹¹

(B) *The View that the Offense is Always Murder.* Some courts take the view that the illegality of an arrest should never in and of itself be enough provocation to render a homicide committed in resisting the arrest manslaughter instead of murder. These courts almost invariably fall back on the classical old English decision of *Mackalley's Case*¹² where on an indictment for killing a sergeant of the mace who was attempting to execute a process defective in form, it was resolved:

. . . that if any sheriff, under-sheriff, serjeant of officer, who hath execution of process, be slain in doing his duty, it is murder in him who kills him, although there were not any former malice betwixt them; for the executing of process is the life of the law: and therefore he who kills him shall lose his life; for that offense is *contra potestatem regis et legis*; and therefore in such case there needs not any inquiry of malice.¹³

While in exceptional situations this view might lead to a just result, it is believed that in a vastly greater number of cases it is

⁹ However a majority of the jurisdictions in this country do not allow a latent defect in a warrant of arrest to reduce the killing of an officer to manslaughter, but instead follow the reasoning set forth in *Bullock v. State*, 65 N.J.L. 557, 47 Atl. 62, 67 (1900).

¹⁰ 82 Va. 554 (1886).

¹¹ *Id.* at 565; see also *Noles v. State*, 24 Ala. 672 (1854).

¹² Cro. Jac. 279, 79 Eng. Rep. 239 (1611).

¹³ *Id.* at 280, 79 Eng. Rep. at 240; see also *People v. Bradley*, 23 Cal. App. Rep. 44, 46, 136 Pac. 955, 956 (1915); *Boyd v. State*, 17 Ga. 194 (1855); *Alsop v. Commonwealth*, 4 Ky. Law Rep. 547 (1882).

far too harsh, and therefore will oft-times work an injustice on one who was truly provoked by heat of passion to kill the officer illegally attempting to arrest him.

(C) *The View that the Offense is Manslaughter—If and Only If the Illegality of the Arrest in Fact Raised Heat of Passion in the Killer.* The courts that follow this view go forward on the theory that even though the arrest was illegal it does not necessarily follow that a homicide committed while resisting it should be reduced to manslaughter. There remains still the question on the evidence whether the killing was without malice and arose solely from a sudden heat of passion provoked by the illegal arrest. The indulgence which the law shows in the case of manslaughter is to the weakness of human nature and not to its wickedness. In *Reg v. Allen and Others*¹⁴ K and D were arrested in England upon Irish warrants which were not valid in England. While these two prisoners were being transported in a police van, the defendants attacked the van for the purpose of rescuing them and in the ensuing fight an officer was killed. It was established that the illegality of the warrants was unknown to the defendants. The court held the defendants guilty of murder, not manslaughter, and in the course of the opinion it was said:

It was further manifest that they attempted the rescue in perfect ignorance of any defect in the warrant, and that they knew well that if there was any defect in the warrant, or illegality in the custody, that the courts of law were open to an application for their release from custody. We think it would be monstrous to suppose that under such circumstances, even if the justice did make an informal warrant, it could possibly justify the slaughter of an officer in charge of the prisoners, or reduce such slaughter to the crime of manslaughter.¹⁵

It would appear then, that under this theory in no case could one who killed an officer executing a latently defective warrant have the crime reduced from murder to manslaughter because of the illegality of the arrest where he had knowledge that the person executing the process was an officer, but was not on notice that the process was defective. This is true because the killer would have no grounds for the contention that he killed out of

¹⁴ 17 Law Times 222 (1867).

¹⁵ *Id.* at 226.

heat of passion raised by the illegality of the act since he would have no reason to know that the arrest was illegal.

Conclusion

As pointed out in the above discussion, three views as to the degree of guilt of an arrestee who kills an officer to prevent unlawful arrest have been recognized by the courts. As to the first view is it not rather irrational to say that if the arrest is illegal the arrestee's crime in killing the officer *can never be more than manslaughter* because there is a presumption that an illegal arrest always raises heat of passion in the party to be arrested? If the arrest is under a warrant valid on its face but latently defective, it is more than probable that neither the officer nor the arrestee will be on notice of the defect, and thus to all parties involved the arrest will appear legal. In such a situation the officer must be protected, and there are no grounds for the presumption of heat of passion if the arrestee is ignorant of the illegality of the officer's act. In such a case even a limited resistance is probably unjustified since the arrestee has recourse to the courts if the process should prove to be in fact illegal. On the other hand, it is unreasonably harsh to hold that if the arrestee, involved in an illegal arrest, kills the arresting officer he is *always guilty of murder*. If the warrant under which the arrest is made is patently defective is there not a strong possibility that heat of passion may be raised in the party whose liberty is illegally threatened? Should not the state be required to discredit such possibility and show instead that there was actual malice before the crime can be deemed murder?

Assuming the above reasoning to be correct the only view remaining is that if the victim of an illegal arrest kills the officer in resisting the arrest, his crime will be reduced from murder to manslaughter if, but only if, heat of passion is actually raised within him; if actual malice can be shown he is unquestionably guilty of murder. This it is submitted, is a statement of the better view and is the one followed in the majority of the jurisdictions.

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