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Homicide--The Kentucky Negligent Voluntary Manslaughter

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social policy since (1) it gives police officers a much needed power in combating the increasing use of automobiles in the perpetration of crime, and (2) it permits officers to search a person's car, without subjecting him to the humiliation of being arrested, if the search discloses that no crime has been committed. The writer's main criticism of the rule is its lack of notoriety and use among those who enforce the law, especially on the state and local levels. Many officers, in fact, do not know that a search may be made on reasonable belief; they consider that one may only be made in connection with a lawful arrest—the situation found in the first category in this discussion. Such officers are limited to one-half of the grounds for lawful searches and seizures because of their lack of knowledge of the full possibilities of the law.

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HOMICIDE—THE KENTUCKY NEGLIGENT VOLUNTARY MANSLAUGHTER

In the recent case of *Long* v. *Commonwealth*[1] the Kentucky Court of Appeals again had before it for consideration the Kentucky negligent voluntary manslaughter doctrine. In this case the defendant was convicted of voluntary manslaughter and appealed, urging: (1) that the verdict was not sustained by the evidence, and (2) that the instructions were erroneous. It appeared that on the evening before the killing the deceased Collins, one Perdue, and defendant Long had a drinking party at the home of Perdue. Collins was killed the next morning by a shot at close range. Defendant Long denied that there was any fight and testified that he had brought along his shot gun for the purpose of going hunting the next day; that having decided to leave, he reached under the bed for the gun, where he had put it previously, and as he pulled it out, it accidentally discharged. The Commonwealth failed to produce a single witness who actually saw the shot fired. The trial court gave an instruction on voluntary manslaughter for grossly careless or reckless use of a firearm. The Court of Appeals affirmed, saying that there was evidence to indicate that the defendant was reckless in handling the gun, and in the course of the opinion further added:

> This case . . . seems to fall within the rule that when the accused admits the killing the burden is upon him to show to the satisfaction of the jury that he is blameless.[2]

[1] 262 S. W. 2d 809 (Ky. 1953).
[2] *Id.* at 811.

No instruction was given on this latter point in the trial court.

Thus, the court in affirming the conviction, (1) reaffirmed the Kentucky doctrine of negligent voluntary manslaughter, and (2) interjected the rule that, if the defendant admits the killing the burden is on him to justify, excuse or alleviate the presumption of intentional killing.[3] The interjection of this latter rule into the negligence field seemingly places a *burden* on the accused in a prosecution for criminal negligence to show that he was not negligent. It is believed that by this opinion the court not only lost a golden opportunity to clear up a segment of Kentucky criminal law, but, if the opinion is to have any literal meaning, further confused it.

In Kentucky a long line of cases has held that, where one kills another by the wanton, reckless or grossly careless use of a firearm, if without malice aforethought, it is voluntary manslaughter, although there was no intent to kill;[4] all other negligent manslaughter being involuntary. This distinction as well as being illogical is contradictory by its very definition. No matter how great the degree, "negligence" is never "intent." If a manslaughter is voluntary, it surely is not negligent. This preposterous doctrine is accepted in no other jurisdiction, and has been criticized by legal writers.[5] It might be argued that fundamentally it boils down to a matter of definition and merely provides a method by which you can impose a heavier penalty for negligence in the use of a firearm than in other criminal negligence cases. But to avoid confusion, it would be better if the court repudiated the doctrine and faced the issue of negligence honestly and frankly as is done in other states. More important, it is also hoped that the next time the opportunity arises, the court will face the incongruity of the negligent voluntary manslaughter, and repudiate that impossible crime once and for all, finding, as have other states, an orderly, logical classification for the various grades of criminal negligence.

The court not only kept the negligent voluntary manslaughter doctrine alive in Kentucky, but further confused the law by introducing into the field of negligence the "presumption of intent from the act of killing" doctrine.[6] Assuming there was sufficient negligence

[3] This rule was first used in this state in Moore v. Commonwealth, 7 Ky. Opin. 218 (1873), and has been affirmed in many subsequent case: Simmons v. Commonwealth, 207 Ky. 570, 269 S. W. 732 (1924); Mason v. Commonwealth, 291 Ky. 538, 165 S.W. 2d 24 (1942); Fields v. Commonwealth, 310 Ky. 162, 219 S. W. 2d 911 (1949).

[4] Lucas v. Commonwealth, 231 Ky. 76, 21 S. W. 2d 113 (1929); Speaks v. Commonwealth, 149 Ky. 393, 149 S. W. 850 (1912); Ewing v. Commonwealth, 129 Ky. 237, 111 S. W. 352 (1908).

[5] See Moreland, *A Suggested Homicide Statute for Kentucky*, 41 KY. L. J. 139, 148 (1953); see earlier note, 39 KY. L. J. 351, 352 (1951).

[6] *Supra*, note 3.

for the court to affirm the conviction in *Long* v. *Commonwealth*,[7] without benefit of the presumption, then it can be regarded as surplusage. It is hoped that this is the situation. The opinion is far from clear, but it would be approaching the limits of reason to put the burden on the defendant in a prosecution for criminal negligence to exonerate himself. It is believed that the doctrine is unsound when used in a prosecution for intentional homicide and even more so in a prosecution for negligence. Though this rule as it relates to intentional homicide is firmly established in American law,[8] and in some states made a part of the criminal law by statute,[9] it was rejected in the English case of *Woolmington* v. *The Director of Public Prosecutions*.[10] In that case, Woolmington was charged with the murder of his estranged wife. The prosecution proved that she had been killed by a gun which the defendant had taken into her house when he went there to attempt a reconciliation. Woolmington, who was the only eyewitness, claimed that the gun had been unintentionally discharged while showing it to his wife to back up a threat to commit suicide if she did not come back to him. The trial court charged the jury that if they were satisfied beyond a reasonable doubt that the deceased died at the defendant's hands, then the defendant had the burden of showing circumstances which alleviated the crime so as to reduce it to manslaughter, or which excused it by showing it was a pure accident. The House of Lords quashed the conviction emphasizing that the principle that the prosecution must prove the guilt of the prisoner is a part of the common law of England, and no attempt to whittle it down could be entertained. If, said the Lords, at the end of and on the whole of the case, there is reasonable doubt, *created by the evidence* given by either the prosecution or the prisoner, as to whether the prisoner killed the deceased with a malicious intent, the prosecution has not made out the case and the prisoner is entitled to acquittal. The result of this decision is that:

> . . . if it be shown that an act of the defendant killed the deceased and nothing more is shown, the jury may, not must, find him guilty of murder. If he introduces no evidence then the jury must be satisfied beyond a reasonable doubt as to his guilt from the mere fact of killing. If he introduces evidence the same rule applies; the jury, in

[7] *Supra*, note 1.

[8] As to the amount of proof required by a defendant who thus assumes the burden of going forward with the evidence, it is held in the majority of jurisdictions that the defendant has discharged this duty when he has raised a *reasonable doubt* whether or not the killing was done in self defense or accidental. Other courts go further and hold that a reasonable doubt is not sufficient, but that the defendant must establish his defense by a *fair preponderance* of the evidence. See 21 J. CRIM. L. & CRIMINOLOGY 609 (1931).

[9] For example, CALIFORNIA PENAL CODE sec. 1105 (Deering 1941); IDAHO CODE sec. 19-2012 (1932).

[10] A. C. 462 (1935).

> order to convict, must believe him guilty beyond a reasonable doubt. In neither instance is the onus on him to satisfy the jury of his innocence.[11]

Some American courts have also rejected the rule.[12] An excellent discussion as to the unsoundness of the rule may be found in Moreland's *Law of Homicide.* It is stated there that:

> Considered as an inference of fact, the principle is unsound, it is submitted, since it is not a reasonable inference of fact. No proposition should be accepted as an inference of fact which is not so generally true as to make the probability of error slight. . . . The rule is even more objectionable when considered as a presumption of law. It conflicts with the presumption of the defendant's innocence. . . . Not only does such a presumption interfere with the prosecution's burden to prove the defendant guilty, it also interferes with the function of the jury. The prosecution must satisfy the jury that the accused is guilty beyond a reasonable doubt. If at any time in the trial it were permissable for the judge to rule that the prosecution had established its case because of a presumption of law and that thus the burden was shifted to the prisoner to prove that he was not guilty and that unless he discharged that onus the prosecution would be entitled to succeed, it would enable the judge in such a case to say to the jury that they must in law find the prisoner guilty. This would make the judge and not the jury decide the case, and this he cannot do. It is impossible to take a criminal case from the jury by a presumption of law.[13]

It can be argued that since the defendant has the better means of information the burden can reasonably be put on him. In every criminal case the defendant has at least an equal familiarity with the facts, and in most, a greater familiarity with them than the prosecution. It might, therefore, be argued that to place upon all defendants in criminal cases the burden of going forward with the evidence would be proper. This alone, cannot justify the creation of such a presumption. The argument for convenience should only control in a case where the presumption of fact created is so generally true as to make the probability of error slight, and it is submitted that in many cases the presumption is so weak from the facts as not to raise a sufficient probability of actual intent.

It seems to the writer that the unsoundness of the doctrine is becoming generally recognized. The *Woolmington* case has set the pace. It is hoped that the Kentucky court, if this question comes up in the future, will see fit to repudiate the doctrine as it applies to intentional homicides, and will also repudiate *Long* v. *Commonwealth* insofar as it introduces the doctrine into the negligence field.

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[11] See MORELAND, LAW OF HOMICIDE 22 (1952).

[12] Kent v. People, 8 Colo. 563, 9 Pac. 852 (1886); Stokes v. People, 53 N. Y. 164 (1873); State v. Porter, 34 Iowa 131 (1871); Maher v. People, 10 Mich. 212 (1862).

[13] *Supra,* note 10 at 23.