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Defense Available in Kentucky to Peace Officer Who Kills Misdemeanant

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DEFENSE AVAILABLE IN KENTUCKY TO PEACE OFFICER WHO KILLS MISDEMEANANT

There have been many killings of misdemeanants by peace officers which undoubtedly would not have occurred had the officer known under what circumstances he would be entitled to take the misdemeanant's life. This note will discuss those circumstances and consider the defenses which have been set up on behalf of the officer, to the end that peace officers may know the limit of their authority in using force to effect arrests of misdemeanants and thus may avoid indictment as well as the unhappy results thereof which often result from not knowing the defenses available to them. (It must be understood initially, however, that the peace officer has no authority whatsoever to arrest a misdemeanant unless he has a warrant for his arrest or the offense is actually committed in the officer's presence.[1] The arrest of one who has committed a misdemeanor under any other circumstances is unlawful and subjects the officer to an action for false arrest. It is not proposed to consider illegal arrests or arrests made under mistake.)

Four defenses have been used. They are listed in order of value, the least valuable being first.

1) Felony rule.
2) Necessary in order to make the arrest.
3) Necessary in order to prevent the escape.
4) Self-defense.

(1) In 1920 a statute[2] was passed making it a felony to disturb, hinder, obstruct, or intimidate an officer while negaged in the discharge of his duties as such, by violence, force, or threats. This was a valid defense from then until 1931[3] when the Court of Appeals held the statute unconstitutional.[4] The defense was good in that it converted resistance to arrest into a felony, and thus automatically brought the felony rule into play in most cases. (Of course, even under the felony rule, a peace officer may not kill wantonly. However, it is not the purpose here to examine the rules relating to arrests of felons.) But since 1931 this has not been a valid defense for killing a misdemeanant.[5]

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[1] WHARTON, CRIMINAL LAW (12th ed. 1912) sec. 136; KENTUCKY CODES (Carroll, 1938), Cr. C. sec. 36; see Wright v. Commonwealth, 85 Ky. 123, 130, 25 S.W 904 (1887) and ORFIELD, CRIMINAL PROCEDURE FROM ARREST TO APPEAL (1947) pp. 18-23. As to meaning of "in his presence," see Dilger v. Commonwealth, 88 Ky 550, 555, 11 S.W 651 (1889) and cases cited in A.L.I. CODE OF CR. PROCEDURE (1930) sec. 21, and commentaries, pp. 233-234.

[2] KY. STAT. (Carroll, 1920) sec. 1148 a7.

[3] Bentley v. Commonwealth, 234 Ky 37, 27 S.W 2d 397 (1930) Maggard v Commonwealth, 232 Ky. 10, 22 S.W 2d 298 (1929).

[4] Loveless v Commonwealth, 241 Ky. 82, 43 S.W 2d 348 (1931).

[5] Layne v Commonwealth, 271 Ky 418, 426, 112 S.W 2d 61, 65 (1937)

(2) There is some conflict among the text-writers and also among the courts as to whether a peace officer may kill to effect the arrest. On the one hand May says:

> "If a person guilty of misdemeanor forcibly resists arrest, however, the officer clearly has the right of self-defense, and in most States may take his assailant's life not only to protect his own, but also whenever such act is reasonably necessary to overcome the resistance."[8]

He cites Kentucky as one of the states so holding. However, an examination of the Kentucky cases which apparently hold that a peace officer may kill a misdemeanant in order to effect the arrest indicates that the statements in those cases to that effect were dicta and that the cases either were or could have been decided on the ground of self-defense without changing the result.

On the other hand there is much authority contra to May and the Kentucky dicta. In *United States* v. *Kaplan*[9] the court expressed the Federal rule and probably the view in the majority of the states when it said, " and, in the case of a misdemeanor, the general rule [is] that an officer has no right, except in self-defense, to kill the offender to effect his arrest "[9]

Roberson's New Kentucky Criminal Law, quoted and referred to with favor by the Court of Appeals in several cases, says, "An officer is never justified in killing merely to effect an arrest where the offense is a misdemeanor."[10]

The Kentucky Court of Appeals itself has handed down conflicting opinions on this question. One line of decisions holds that the killing to effect arrest is not justified,[11] while the other line states just the opposite.[12] In view of the fact that one line of cases decided in Kentucky on this point holds the killing not justified, and taking into consideration the fact that the majority of the courts seem to

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[8] MAY, CRIMES (4th ed. 1938) p. 285.

[11] Layne v Commonwealth, 271 Ky. 418, 112 S.W 2d 61 (1937), Fugate v. Commonwealth, 187 Ky. 564, 219 S.W 1069 (1920) Hickey v. Commonwealth, 185 Ky 570, 215 S.W 431 (1919), Kammerer v. Commonwealth, 137 Ky 315, 125 S.W 723 (1910) Commonwealth v. Marcum, 135 Ky 1, 122 S.W 215 (1909) Bowman v. Commonwealth, 96 Ky. 8, 27 S.W 870 (1894).

[9] 286 Fed. 963 (Dist. Ct., S.D., Ga. 1923).

[9] *Id.* at 975. This question is discussed in 42 A.L.R. 1200 where the general rule is stated in these words, "Except in self-defense, an officer has no right to shed blood in arresting, or in preventing the escape of one whom he has arrested for an offense less than felony."

[10] ROBERSON, NEW KENTUCKY CRIMINAL LAW AND PROCEDURE (2d ed. 1927) sec. 285 quoted in, e.g., Siler v Commonwealth, 280 Ky. 830, 834, 134 S.W 2d 945, 947 (1939)

[11] Siler v Commonwealth, 280 Ky 830, 134 S.W 2d 945 (1939) Layne v. Commonwealth, 271 Ky. 418, 112 S.W 2d 61 (1937), Reed v. Commonwealth, 125 Ky. 126, 100 S.W 856 (1907)

[12] Mays v Commonwealth, 260 Ky 235, 84 S.W 2d 20 (1935), Hatfield v Commonwealth, 248 Ky. 573, 59 S.W 2d 540 (1933), Donely v Commonwealth, 170 Ky. 474, 186 S.W 161 (1916).

take the same stand, the conclusion is that this is not a real defense. It is worth repeating that under any rule self-defense will justify killing.

(3) The same conflict is found among the text-writers and also among the courts on the question of whether an officer can justifiably kill to prevent the escape of a misdemeanant he has arrested. Of course, the law in every jurisdiction is that the officer cannot justifiably kill a misdemeanant who is fleeing whether he be fleeing to prevent arrest or to complete his escape. And an officer who kills under such circumstances is guilty of murder.[13]

The Kentucky Court of Appeals has frequently stated that a peace officer may kill to prevent the forcible escape of his prisoner from custody.[14] The Court in *Mays* v. *Commonwealth*[15] expresses that view thusly:

> "While a peace officer has limitations placed upon his activities in discharging his duties, he is often confronted with grave danger. The law gives him the right of self-defense. It also makes it his duty to prevent the escape of his prisoner by the use of such means as may be necessary or reasonably appears to him at the time to be necessary even to the extent of taking his life, if such extreme act appeared to be necessary in the exercise of a reasonable judgment."[16]

In the last case decided on this point by the Court, however, the Court, quoting from *Roberson's New Kentucky Criminal Law,* held:

> " An officer is never justified in killing merely to effect an arrest or prevent an escape after arrest where the offense is a misdemeanor. The law is the same whether the offender be fleeing to avoid arrest or to escape from custody. To kill him in either case is, generally speaking, murder, but, under some circumstances, it may amount only to manslaughter, if it appear that death was not intended.' "[17]

The more recent case of *Scott* v. *Commonwealth*[18] quotes the *Mays* case, *supra,* and uses the same language regarding the right to kill to prevent the escape from custody, but it is to be noted that the statement on this point is pure dictum, for the case was decided on

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[13] 2 HALE, PLEAS OF THE CROWN (1778) 117, "If there be a warrant against *A* for a trespass or breach of the peace, and *A* flees and will not yield to the arrest, or being taken makes his escape, the minister kills him, this is murder." See also 1 EAST, PLEAS OF THE CROWN (1803) 302.

[14] Mays v Commonwealth, 266 Ky. 691, 99 S.W 2d 801 (1936), Smith v Commonwealth, 176 Ky. 466, 195 S.W 811 (1917) Ayers v. Commonwealth, 32 Ky. L. Rep. 1234, 108 S.W 320 (1908), Stevens v. Commonwealth, 30 Ky. L. Rep. 98, 27 S.W 284 (1906).

[15] 266 Ky 691, 99 S.W 2d 801 (1936)

[16] *Id.* at 694, 99 S.W 2d at 803 (1936)

[17] Siler v Commonwealth, 280 Ky. 830, 834, 134 S.W 2d 945, 947 (1939).

[18] *See* 305 Ky. 365, 368, 204 S.W 2d 432, 434 (1947).

the ground of self-defense.[19] As a matter of fact, an examination of all the Kentucky cases in which the court has said that a peace officer could kill the misdemeanant to prevent his escape from custody indicates that that statement is merely dictum in all but a few cases, for each case could have been decided solely on the grounds of self-defense.[20]

Thus there seems to be some justification in Kentucky for contending that a peace officer may legally kill a misdemeanant who resists in an effort to forcibly escape from custody provided it is shown that such killing was necessary in order to prevent the escape. However, it may well be that the Court of Appeals is attempting to get away from that view and take the opposite one which seems the better of the two. In any event, there is no doubt that once the misdemeanant has escaped from custody and is merely fleeing, the peace officer cannot kill.[21]

The first reason for the view which denies an officer the right to kill to prevent the escape of a misdemeanant from his custody is expressed by the Court of Appeals in this language, "The reason for this distinction is obvious. The security of person and property is not endangered by a petty offender being at large, as in the case of a felon "[22] The Arkansas Court expressed it thus:

> "It has been said that the officers of the law are 'clothed with its sanctity,' and 'represent its majesty.' Head v. Martin (Ky.) 3 S.W Rep. 623. And the Criminal Code has provided for the punishment of those who resist or assault them when engaged in the discharge of their duties. Manuf. Dig. secs. 1765–1767 And it would ill become the 'majesty' of the law to sacrifice a human life to avoid a failure of justice in the case of a petty offender who is often brought into court without arrest, and dismissed with a nominal fine."[23]

This is particularly true since the arrest can be made later without the necessity of killing, as the Court of Appeals went at length to explain in *Head* v. *Martin, supra.*

The second reason is that in the felony rule the peace officer can use only the same amount of force to effect the arrest or prevent the escape from custody as he can to stop the felon who is merely fleeing. And as is pointed out in *Thomas* v. *Kinkead,*[24] an Arkansas case, the original rule as to the amount of force that could be used to apprehend a misdemeanant was similar to the rule in the case of a felon,

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[19] Scott v. Commonwealth, 305 Ky 365, 368, 204 S.W 2d 432, 434 (1947).

[20] Mays v. Commonwealth, 266 Ky. 691, 99 S.W 2d 801 (1936) Stevens v. Commonwealth, 30 Ky. L. Rep. 290, 98 S.W 284 (1906).

[21] Siler v. Commonwealth, 280 Ky. 830, 134 S.W 2d 945 (1939), Head v. Martin, 85 Ky. 480, 3 S.W 622 (1887), 42 A.L.R. 1202; 1 WHARTON, CRIMINAL LAW (12th ed. 1912) sec. 532.

[22] Head v. Martin. 85 Ky. 480, 484, 3 S.W 622, 623 (1887)

[23] Thomas v. Kinkead, 55 Ark. 502, —, 18 S.W 854, 856 (1892).

[24] 55 Ark. 502, — 18 S.W 854, 856 (1892).

namely, that no more force could be used to effect the arrest of a misdemeanant or prevent escape from custody than could be used to stop him if he were fleeing. As has already been seen this amount of force is certainly less than killing.

A third reason is that in nearly every case in Kentucky where a peace officer has been acquitted for killing a misdemeanant who was trying to escape from custody the plea of self-defense alone would have been sufficient. If the same result can be reached by this means without the necessity of straining the law it would seem to be more desirable to rely solely on self-defense. A peace officer who does not kill merely to prevent the escape from custody but kills only in self-defense is certainly better off than if he killed to prevent the escape.

(4) The defense of self-defense is, of course, always available to the peace officer, as it is to anyone else.

In conclusion it can be said that adherence to the defense of self-defense and no other will avoid unpleasant trials and unfriendly public sentiment towards the peace officer who kills merely to effect arrest or prevent escape, even though, under the law, he *might* be set free. And if peace officers kill misdemeanants only under this rule they will always be safe from conviction for murder, for a perusal of the cases will show that whatever the courts may say about the right of a peace officer to kill a misdemeanant when he resists arrest or attempts to escape, there have been few, if any, cases successfully defended on the sole ground that the killing was necessary to effect the arrest or prevent the escape. However, under the circumstances as they are today, both the plea of self-defense and the plea that the killing was necessary to prevent the forcible escape of the misdemeanant from custody should be used where they both can be used under the facts.

J. PELHAM JOHNSTON