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# Criminal Procedure: Killing of a Misdemeanant Who Is Forcibly Resisting Arrest

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## CRIMINAL PROCEDURE: KILLING OF A MISDEMEANANT WHO IS FORCIBLY RESISTING ARREST.

In the situations which this note comprehends, there is almost always the element of self-defense. An officer's right to self-defense is not questioned and it is not the purpose of this note to raise any discussion of that right. Any cases relying solely upon the officer's right of self-defense will not be considered and are not cited. Numerous cases which primarily are of the self-defense type are considered where the court partially supported its decision on aspects of the case which relate to the problem under discussion.

Another related topic with which we are a little more concerned, but which is still subordinate to the principal subject is the homicide of a fleeing misdemeanant. Mere avoidance of arrest by the misdemeanant or what could be termed non-forcible resistance is a point upon which there is little dissension. Generally an officer cannot kill a fleeing misdemeanant with impunity.[1]

The homicide of a forcibly resisting misdemeanant is not an uncommon situation, and quite a number of cases may be found attempting to justify such a killing. A search of the cases on the subject indicates at least two distinct justifications for a homicide committed in this manner.

The first of these represents a carry over of the old common law viewpoint of the majesty of the law and the protecting aura it throws around the officer. Perhaps the classic of this type is *State v. Dierberger*.[2] The following extract is characteristic of the general theme of the case: "When, as a general proposition, one refuses to submit to an arrest after he has been touched by the officer, or endeavors to break away after the arrest is effected, he may lawfully be killed, provided this extreme measure is necessary. In misdemeanors and breaches of the peace, as in cases of felony, if the officer meets with resistance, and the offender is killed in the struggle, the killing will be justified . . . The officer, when making an arrest may, of course, defend himself, as may any other person who is assaulted; but the law does not stop here. The officer must of necessity be the aggressor. His mission is not accomplished when he wards off the assault. He must press forward and accomplish his object. He is not bound to put off the arrest until a more favorable time. Because of these duties devolved upon him the law

[1] Cobb v. State, 19 Ala. App. 345, 97 So. 779 (1923); Deatherage v. State, 194 Ark. 513, 108 S.W. 2d 904 (1937); Vaughn v. State, 54 Okla. Cr. 59, 14 P. 2d 239 (1932); *see* Siler v. Commonwealth, 280 Ky. 830, 834-835, 134 S.W. 2d 945, 947 (1939).

[2] 96 Mo. 666, 10 S.W. 168 (1888).

throws around him a special protection."[3] There is something to be said for this point of view, but it has an inherent weakness, too much depends upon the officer, and the books contain numerous illustrations where his judgment in making an arrest was so poor that he was convicted of murder or manslaughter.[4] If for no other reason than to protect the officer from himself, there should be some stopping point in the amount of force the officer can use.

In Kentucky the courts apparently take cognizance, albeit tacit and unofficial, of the difficulty of an officer in the enforcement of his duties. One might say that they lean over backwards to safeguard the officer when he has acted not too wisely, but too well.

The only guide given by statute or code is a short section in the Kentucky Criminal Code. Section 43 reads: "No unnecessary force or violence shall be used in making the arrest." From this broad statement the courts cannot be wholly blamed for their broad interpretation. Consequently no surprise is occasioned by the holding in some of the latest cases that where a misdemeanant resists arrest by force or violence, the officer may use such force as is necessary, or appears necessary, to overcome such forcible resistance, even to the taking of life, and the officer's right is not limited to the single ground of self-defense.[5]

The question, reduced to its barest essentials, becomes one of what amount of force is necessary, or appears necessary, and the difficulty one has in answering that question is indicative of the ambiguity of the law.

The second group of cases seems to turn on the point that a misdemeanant by his very act of resisting arrest becomes a felon, and the officer is permitted to use all measures he could lawfully take to ensure the arrest of a felon.

The kinds of resistance a misdemeanant uses may be stated as (1) armed and (2) physical.

The case of *Reed v. Commonwealth*[6] is a good example of the armed resistance type. There the officer was attempting to arrest the deceased for the commission of a misdemeanor. In doing so, the misdemeanant shot at the officer, which is a felony in Kentucky,[7] and the court held that this constituted a felony committed in the presence of the officer and authorized him to arrest the deceased

[3] 96 Mo. 666, ——, 10 S.W. 168, 171 (1888); These cases follow the same theory: State of North Carolina v. Gosnell, 74 Fed. 734, 738 (W. D. N. C. 1896); State v. Dunning, 177 N. C. 559, 98 S. E. 530 (1919); State v. Garrett, 60 N. C. 144, 84 Am. Dec. 359 (1863).

[4] State v. Coleman, 186 Mo. 151, 84 S.W. 978 (1905); Roe v. State, 55 Tex. Cr. R. 128, 115 S.W. 593 (1909); Carter v. State, 30 Tex. App. 551, 17 S.W. 1102 (1891).

[5] Woods v. Commonwealth, 282 Ky. 596, 139 S.W. 2d 439 (1940); Siler v. Commonwealth, 280 Ky. 830, 134 S.W. 2d 945 (1939); Mays v. Commonwealth, 266 Ky. 691, 99 S.W. 2d 801 (1936); Hatfield v. Commonwealth, 248 Ky. 573, 59 S.W. 2d 540 (1933).

[6] 125 Ky. 126, 100 S. W. 856 (1907).

[7] Ky. R. S. 435.170.

upon a felony charge, with the consequent protection, aside from self defense, which is given by the law to an officer in making arrests for offenses of that character. It seems clear that an officer faced with making an arrest in the face of armed resistance is justified in taking even the most extreme measures if necessary to assure the arrest. The view that a felony has been committed in his presence is a logical and sound rationalization, and is supported in several other cases.[8]

The recent case of *Scott v. Commonwealth*[9] apparently goes much farther than such cases as *Reed v. Commonwealth*. The court in its decision does not clearly distinguish the situations where the misdemeanant has used mere physical force from those in which armed force was used.

The facts of the case were that the appellant, a city police officer, had encountered one Wiley Ball for the fourth time in one night, having previously broken up a disturbance caused by Ball and his companions, having tried to arrest him, but Ball had fled. Later the appellant and a fellow officer found Ball in an automobile apparently in a drunken stupor. They failed to arouse him and were starting the car preparatory to taking him to jail, when he raised up and said he wasn't going anywhere. The officers got out and ordered Ball to come with them, and as the second officer walked around the front of the car to the opposite side, he heard the appellant shout to Ball to "drop that knife" and he heard the three or four shots that followed this command. On going around the car he saw the appellant pick up the knife and saw that Ball was dead.

The opinion of the court contains this statement: "But where the misdemeanant forcibly resists arrest, he becomes a felon, and the law not only endows the officer with the right of self-defense, but imposes upon him the duty to prevent the escape by employing such means as may be necessary so to do, even to the extent of taking the life of the prisoner."[10]

The case, of course, involves the element of self-defense. However, with that element removed from consideration, the case becomes one of homicide in the course of the arrest of a resisting misdemeanant. The only saving feature about the court's language is not made clear. If the court meant that by offering armed resistance, as in this case the drawing of a knife, the misdemeanant became a felon, then the decision is no different than the one in *Reed v. Commonwealth.*

[8] Cornett v. Commonwealth, 198 Ky. 236, 248 S.W. 540 (1923); Partin and Allen v. Commonwealth, 197 Ky. 840, 248 S.W. 489 (1923); Collins v. Commonwealth, 192 Ky. 412, 233 S.W. 896 (1921); Rawlings and Spivey v. Commonwealth, 191 Ky. 401, 230 S.W. 529 (1921); Hickey v. Commonwealth, 185 Ky. 570, 215 S.W. 431 (1919).

[9] 301 Ky. 127, 190 S.W. 2d 345 (1945).

[10] Scott v. Com., 301 Ky. 127, 131-132, 190 S.W. 2d 345, 347.

But the court does not say this. It says, "Where the misdemeanant forcibly resists arrest he becomes a felon,"[11] without any differentiation between bodily resistance and armed resistance.

It does not take a great deal of thought to see the dangerous consequences of this language. The possibilities of its abuse are of far greater significance than the likelihood that a misdemeanant might go unpunished. Critics of this last statement will say that it is based upon sentimentalism, and will speak of the fear of anarchy reigning supreme and that brute force will obstruct the wheels of justice. All of these are persuasive but in reality they merely becloud the issue. It is not proposed that the arrest be left undone, or, as has been said in a fashion more picturesque than logical, that the strong arm of the law be paralyzed.

Let it be said, rather, that the law recognizes the sanctity of human life, and aside from any sentimentality or fear of the triumph of brute force, it should be remembered that it is only extreme necessity that will justify the taking of life. Such a view will do more to preserve the majesty of the law than will the wanton destruction of human life.

Let the officer summon assistance in order to take the resister and only in self-defense exact the final extremity. Would that not preserve the dignity of the law and yet temper it with the modern concept of the value of human life? What if the misdemeanant does escape in the meantime and is never taken? If he were taken, he would only be subjected to a trifling fine or a short imprisonment. Can it be said that the state gains more by exterminating him than it would lose by permitting his continued existence? Why not confine the officer's right to kill to effect arrest to the most serious crimes, crimes known to be seriously harmful to the state and whose perpetrators must be taken at all costs.

Mute testimony that the law does not favor the taking of life except as a measure of last resort is the presence of a club hanging at the officer's side. If it had been expected that every offender be killed if he resisted arrest there would have been no need to furnish the officer with anything other than a pistol.

We have said that in the case of resisting with armed force the offender does become a felon. As to mere bodily resistance the same conclusion cannot so readily be made, if at all. The law is not clear on this subject. The problem is so inextricably interwoven with self-defense, that it is difficult to see where one ends and the other begins. As is pointed out by Clark, " . . . Though in theory the distinction between killing to effect the arrest and killing only in self-defense may be important, the result in the actual case is the same. . . . It will never be apparently necessary to kill to effect the arrest until the officer's life is in apparent danger, for until that time it does

[11] *Id.*

not appear but that a little more force than is being used will be sufficient to effect the arrest without killing."[12]

In the cases read in preparing this note, aside from armed resistance, a misdemeanant resisting arrest became a felon only by the aid of statute. If legislation is enacted to make this particular offense a felony,[13] it is a good indication that generally such an offense is not, of itself, a felony. Two Vermont cases[14] held that resistance to lawful arrest amounts to a breach of the peace, the court saying in effect that if the circumstances justify an officer in arresting without a warrant, it is the duty of the arrested person to submit and his resistance constitutes a breach of the peace.

It would seem to follow from the above discussion that, removing the element of self-defense from discussion, a misdemeanant who resists arrest with armed force becomes a major felon who has committed an atrocious felony in the presence of the officer. If the officer is forced to kill him to effect the arrest under such circumstances he will not be criminally liable. If, however, the resisting misdemeanant does not use armed force, but merely physical force in resisting the arrest, he remains guilty of no more than a misdemeanor and if the officer kills him to effect the arrest, he is criminally liable. It is not sound social policy to permit an officer to take the life of a misdemeanant in order to effect his arrest.

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[12] CLARK, CRIMINAL PROCEDURE (2d ed. 1918) sec. 17, n. 50.

[13] KY. STAT. (CARROLL, 1936), Sec. 1148a7, was interpreted to make forcible resistance to lawful arrest a felony. In Loveless v. Commonwealth, 241 Ky. 82, 43 S. W. 2d 348 (1931) this was held to be a violation of Sec. 51 of the Constitution of Kentucky.

[14] State v. Jasmin, 105 Vt. 531, 168 Atl. 545 (1933); State v. Mancini, 91 Vt. 507, 101 Atl. 581 (1917).