Kentucky Law Journal

Volume 29 | Issue 1 Article 14

1940

Criminal Law--Conspiracy and the Felony Murder Doctrine in Kentucky

J. Wirt Turner Jr.
University of Kentucky

In conclusion, it is submitted that the felony murder doctrine in Kentucky is based on the same principles as the negligent murder doctrine, since to convict a defendant of murder for a death occuring during the commission of a felony there must first be a felony dangerous to life and, secondly, the death of the victim must be the necessary or natural consequence of the felony.

J. GRANVILLE CLARK

CRIMINAL LAW—CONSPIRACY AND THE FELONY MURDER DOCTRINE IN KENTUCKY*

Defendant was indicted jointly with two others for the crime of wilful murder by setting fire to a house and burning a child to death. The evidence showed that defendant was not near enough to aid and abet in the crime. Conviction was accordingly obtained under an instruction on conspiracy. Defendant appealed contending, *inter alia*, that the court erred in not submitting to the jury the question of whether the killing of the child was the natural and probable consequence of the burning of the house and therefore within the purpose of the conspiracy. The appellate court affirmed the conviction, holding that there was no doubt that the death of the child was the natural consequence of burning the house; and that therefore it was not necessary for the conspiracy instruction to submit this question for the determination of the jury. *Whitfield* v. *Commonwealth*, 278 Ky. 111, 128 S.W. (2d) 208 (1939).

According to the modern conception of the felony murder doctrine, a conviction of murder will be sustained when a homicide occurs at the hands of the felon during the perpetration of a felony such as arson, robbery, rape, burglary, or other felony which involves a substantial risk to human life.[1] Whether the homicide was a natural and probable consequence of the commission of the felony is seldom considered by the courts.[2]

A summary investigation of the instant case might lead one to conclude that Kentucky has modified the felony murder doctrine and now permits a conviction of murder only when the homicide is the natural and probable consequence of the perpetration of the particular felony.[3] In order to ascertain the truth or falsity of that conclusion it will be necessary to review briefly the Kentucky decisions relating to felony murder.

---

* This comment is written in conjunction with the one immediately preceding. The same case is considered in both. The writers reach different conclusions.—Ed.

[1] See Arent & MacDonald, *The Felony Murder Doctrine and Its Application Under the New York Statutes* (1935) 20 Cornell L. Q. 288, 291; Note (1940) 28 Ky. L. J. 218.

[2] Notes (1940) 28 Ky. L. J. 215, 216; 28 Ky. L. J. 218, 221 n. 11. See also Arent & MacDonald, *supra* n. 1, at 309.

[3] See Companion Note (1940) 29 Ky. L. J. 197.

In *Commonwealth* v. *Reddick*,[4] the first reported Kentucky case dealing directly with homicide in the commission of a felony, no mention was made of a requirement that the homicide be a natural and probable consequence of the commission of the felony. On the contrary, the court indicated that the consequences of the commission of the felony are held, as a matter of law, to be natural and probable.[5]

Williams v. *Commonwealth*,[6] a recent Kentucky decision, reiterated the holding of the *Reddick* case, and again no mention was made of a necessity for the presence of natural and probable causation. In answer to a request for a voluntary manslaughter instruction, the court very aptly observed:

> "We are not aware of having approved a . . . voluntary manslaughter instruction where the homicide was committed while the accused was attempting to commit or was committing a felony, such as robbery, which tends to the injury of another . . . Where the killing is under those circumstances, it is murder."[7]

Judge Roberson,[8] a noted authority on Kentucky criminal law, accords with this view, and suggests that it is murder even though the felon *accidentally* kills his victim. He brings no element of natural and probable causation into the crime. The great majority of American jurisdictions are in accord with the Kentucky view as expressed by Judge Roberson.[9]

The opinion in the instant case is, therefore, apparently in conflict with both Kentucky and general American precedent insofar as it suggests that natural and probable causation is a factor to be considered in felony murder. However, since the court does not expressly repudiate such precedent, an approach from a different standpoint might reconcile the case with past precedent. This different

---

[4] 17 Ky. Law Rep. 1020, 33 S.W. 416 (1895).

[5] "The felonious intent and purpose of accused in doing which, if guilty, the law certainly transfers to a consequence and result of same so natural as that the inmates of the house might by such fire lose their lives. Upon such a state of case we think there has never been any doubt as to the law." *Id.* at 417.

[6] 258 Ky. 830, 81 S.W. (2d) 891 (1935).

[7] *Id.* at 834, S.W. at 893.

[8] Roberson, *New Kentucky Criminal Law and Procedure*, (2d ed. 1927) sec. 357: "It follows therefore, that all homicide committed or caused by one engaged in the perpetration of or attempt to perpetrate rape, arson, burglary, or robbery, or other felony, is murder . . . It is therefore murder if a robber accidentally kills his victim, or if a person commits arson by setting fire to a dwelling house, and accidentally burns the occupant."

[9] *Supra*, n. 2. In a few American jurisdictions the perpetration of the felony must be the natural and probable cause of the death before a murder conviction will be sustained. Turk v. State, 48 Ohio App. 489, 194 N.E. 425 (1934); Pleimling v. State, 46 Wis. 516, 1 N.W. 278 (1879). Other jurisdictions merely repeat their statutory provisions, and no reference is made to any requirement of natural and probable causation. See Arent & MacDonald, *supra*, n. 1 at 294 for a summary of the various statutory provisions.

approach must proceed from the conspiracy factor in the instant case.

The common law crime of conspiracy has been held to be completed in a bare unexecuted agreement to do evil.[10] And the co-conspirators are held responsible for all acts which are the natural and probable result of the original unlawful purpose of the conspiracy.[11] The acts for which the co-conspirators may be responsible may occur when the co-conspirator is not present at the scene of the occurrence. Thus it is no more than reasonable that liability should attach to the co-conspirator only where the act is the natural and probable consequence of the purpose of the conspiracy. Otherwise, the conspiracy rule would permit one person to be held accountable for an accident, wholly unrelated to the conspiracy, where this accident occurred at the hands of another individual.

No exception to the rule requiring natural and probable causation is found where the purpose of the conspiracy was to commit a dangerous felony. In *Commonwealth* v. *Walters*,[12] a Kentucky case, the court held that where a felony is conspired, the co-conspirators are guilty of murder only where the killing is the natural and probable consequence of the conspiracy. Although the felony was statutory (conspiracy to effect a break from prison) it was a felony involving substantial risk to human life and should be subject to the same rules which apply to similarly dangerous common law felonies.[13]

Again, in *Tincher* v. *Commonwealth*,[14] the Kentucky court, in effect, concluded that in cases involving death in a conspiracy to commit a felony the death must have been the natural and probable consequence of an act within the purpose of the conspiracy before a conspirator may be convicted of murder. In that case, G and defendant, with others, conspired to rob a bank. During the course of the robbery, G pointed a gun toward deceased to "hold him up". The gun was discharged. The court made the following observation:

> ". . . it is argued that the court should have instructed the jury on accidental shooting, and upon the reckless handling of firearms by (G), resulting in the shooting . . . We concede that it would

[10] Com. v. Fuller, 132 Mass. 563 (1882); Com. v. Bartilson, 85 Pa. St. 482 (1877); Rex. v. Gill, 2 B. & Ald. 204, 106 Eng. Rep. 341 (1818).

[11] Kentucky has held, in accordance with that rule, that where a homicide is committed by one conspirator in the course of the conspiracy all of the co-conspirators are equally liable provided the killing is a natural and probable consequence of the conspiracy. Powers v. Com., 110 Ky. 386, 61 S.W. 735 (1901). The court gives a thorough analysis of the law of conspiracy with relation to resulting homicides. S.W. at 743. See also Roberson, *supra* n. 7 at sec. 224.

[12] 206 Ky. 162, 266 S.W. 1066 (1924).

[13] Judge Roberson states that Kentucky does not recognize a distinction between statutory and common law felonies in the application of the felony murder doctrine. Roberson, *supra* n. 7 at sec. 357. See also Powers v. Com., 110 Ky. 386, 61 S.W. 735, 742 (1901) (Kentucky would apply the doctrine only to those statutory and common law felonies which involve a substantial risk to human life).

[14] 253 Ky. 623, 69 S.W. (2d) 750 (1934).

> have been proper, if there had been any evidence establishing either of such theories, to have instructed the jury thereon, and *it would have been prejudicial error not to have done so.*"[15] (Italics added)

The court clearly indicates that natural and probable causation must exist before the conspirator may be convicted of murder. Obviously, an instruction requiring such causation would not have been proper if the conspirator is to be treated in the same manner as the ordinary felon of the *Reddick* and *Williams* cases. In those cases, as has been pointed out above, natural and probable causation was not a factor deemed worthy of consideration. However, the *Reddick* and *Williams* cases involved only the felony murder doctrine, and no conspiracy factor was present. Apparently the court makes a distinction between the felony murder doctrine and the conspiracy to commit a felony. The felon under application of the felony murder doctrine is guilty of murder without regard to natural and probable causation. However, the conspirator in the conspiracy to commit a felony is guilty of murder only when the resulting homicide is the natural and probable consequence of the conspiracy.[16] Thus the distinction between the felony murder doctrine and the conspiracy to commit a felony rests upon the conspicuous unimportance of natural and probable causation in the former in contrast to the obvious necessity for such causation in the latter.

In view of the fact that the instant case involves a conspiracy to commit a felony, and *not* the felony murder doctrine, we must conclude that the decision of the court was correct and not opposed to established precedent in Kentucky. Except for the fact that this homicide was without question the natural and probable consequence of the conspiracy to commit arson, the defendant would have been entitled to have the question of natural and probable causation submitted to the jury. Since the defendant was a conspirator absent from the scene of the crime, he cannot be held for murder unless the homicide was the natural and probable consequence of the conspiracy. If the defendant had committed the homicide himself while in the actual perpetration of the felony, the felony murder doctrine would be applicable and he could be held for murder without reference to natural and probable causation.

---

[15] *Id.* at 628, S.W. at 753.

[16] Kentucky is not alone in recognizing the distinction between the felony murder doctrine and the conspiracy to commit a felony. People v. Jones, — Cal. —, 29 P. (2d) 902 (1934) holds that natural and probable causation must be present in a conspiracy to commit a felony before a co-conspirator may be convicted of murder; while People v. Milton, 145 Cal. 169, 78 Pac. 549 (1904) indicates that the felony murder doctrine will be invoked without reference to natural and probable causation. See Arent & MacDonald, supra n. 1 at 305–10 for a discussion of the distinction as it exists in New York and other jurisdictions. Arent & MacDonald recognize that natural and probable causation must be present in a conspiracy to commit a felony, but doubt that it should be required in view of the fact that the felony murder doctrine does not require such causation.

The language and references of the court in the instant case clearly indicate that there was no intention to depart from the accepted conception of felony murder. Reference was made to Judge Roberson's treatise on criminal law, and a clear felony murder concept was quoted therefrom:

> "It is murder . . . if a person commits arson by setting fire to a dwelling house and *accidentally* burns the occupant."[17] (Italics added).

The court also referred to *Reddick* v. *Commonwealth*, which, as pointed out above, is in conformity with the accepted theory of felony murder.

In conclusion, it is submitted that the instant case is not a departure from the generally recognized felony murder doctrine. The conspiracy factor, and that alone, rendered it necessary for the court to include the theory of natural and probable causation before the conviction of murder could be sustained. Also, a reiteration of the long-standing Kentucky precedent makes it evident that a departure from this precedent was not intended.

J. WIRT TURNER, JR.

TRIAL PROCEDURE—DOES A MOTION FOR PEREMPTORY INSTRUCTION TEST THE SUFFICIENCY OF THE PLEADING?

In an action for injuries resulting from the alleged negligence of the defendant, defendant pleaded contributory negligence, and filed a counterclaim for his injuries. These allegations were not controverted by the plaintiff's reply. The defendant's motions for peremptory instructions, made at the close of the plaintiff's evidence, and again at the close of all the proof, were denied. The defendant asks reversal of the judgment for the plaintiff on the ground that his affirmative defense went undenied. The Court of Appeals said:

> "We have ruled in actions ex contractu and in suits of equity that a party waives the failure to traverse an affirmative allegation where the case was tried as if the issue had been joined in the pleading, but in tort actions the rule is otherwise."

The Court reversed the judgment but allowed the plaintiff to file a reply controverting the allegations if he desired to have a new trial. *Short* v. *Robinson*, — Ky. —, 134 S.W. (2d) 595 (1939).

The statement of the Court that there is a distinction between these three classes of actions, contract equity, and tort, must be considered in the light of the facts of the case before it. Should the court follow this dictum, it would necessarily hold that a motion for peremptory instruction in contract and equity actions will not raise the sufficiency of the pleadings, but in tort actions the rule is otherwise. Such a rule is not supported by law.

In a search for authority upon which the Kentucky Court could base such a holding the only case found is *Glens Falls Insurance Co.* v.

[17] Whitfield v. Com., 278 Ky. 111, 116, 128 S.W. (2d) 208, 210-11 (1939).