UNC SCHOOL OF LAW

NORTH CAROLINA LAW REVIEW

Volume 34 | Number 1 Article 11

12-1-1955

Criminal Law -- Use of Deadly Force in Preventing Escape of Fleeing Minor Felon

I. B. Hudson Jr.

Criminal Law—Use of Deadly Force in Preventing Escape of Fleeing Minor Felon

Under a new statute[1] any misdemeanant confined in the North Carolina State Prison upon a second conviction of an escape or an attempt to escape is guilty of a felony. North Carolina prison directives provide that fleeing felons may be shot only if clearly necessary to prevent escape.[2]

Interpreting N. C. Gen Stat. § 148-46 (1952), which provides that when a convict shall attempt to escape, the prison guard shall use any means necessary to prevent the escape, the North Carolina Supreme Court has held that the legislature did not intend to change the common law rule that a prison guard is not justified in killing a fleeing misdemeanant merely to prevent escape.[3] However, in the case of the fleeing felon the common law authorities are unanimous in their opinion that deadly force may, if necessary, be used to prevent escape.[4]

There can be little criticism of the rule as it operated under the common law. In the first place, felonies were punishable by death.[5] Secondly, at a time when officers did not possess our deadly and accurate firearms, it would be difficult to imagine a situation where an officer would have an opportunity to kill a fleeing felon who was not resisting arrest on the spot.[6] Thirdly, it would be unusual for the arresting officer at common law to find it necessary to kill to prevent the escape of a felon, since the criminal did not have modern means of transportation, nor could he find concealment and anonymity so easily.

It would seem, however, that the common law rule can be justly criticized as it operates on fleeing felons who have committed some statutory felony, such as the escape offense set out in N. C. Gen. Stat. § 14-256, or some felony not dangerous to life. The question is what justification can there be for the use of deadly force in preventing the escape of the minor felon.[7] Is it punishment for the original offense or the offense of escaping, for neither of which the statutory penalty is death? Is it to uphold the lawful authority in the arresting person or the one preventing escape? If so, the rule should logically be the

[1] N. C. GEN. STAT. § 14-256 (1955).

[2] N. C. PRISON RULES AND REGULATIONS, c. 41, Directive 21 (Oct. 1953).

[3] Holloway v. Moser, 193 N. C. 185, 136 S. E. 375, 50 A. L. R. 262 (1927). The common law authorities made no distinction between a misdeanant fleeing from arrest and one breaking away after arrest.

[4] 1 EAST P. C. 298 (1806); 2 HALE P. C. 76-77 (1847); 1 HAWK. P. C. 106 (1788).

[5] 4 BLACKSTONE, COMMENTARIES 98 (1818).

[6] The case of an offender who is merely fleeing must, of course, be distinguished from the case where the offender is resisting (State v. Dunning, 177 N. C. 559, 98 S. E. 530 (1919)), or is both resisting and fleeing (State v. Garrett, 60 N. C. 144 (1863)).

[7] Arguments *pro* and *con* are contained in 9 ALI PROCEEDINGS 179 (1931).

same as regards both felon and misdemeanant. Is it to prevent a more probable danger to life? Statutory felonies include a multitude of non-violent crimes and some misdemeanors are much more dangerous to life; for example, contrast the fleeing drunken driver with the fleeing thief. Is it because the minor felon is considered more dangerous to property? The better reasoned cases hold that deadly force is not justified in preventing a felony where property loss alone is involved.[8]

> "The reason why the use of such means was allowed to prevent crimes of that kind in England was that they were there punishable by death. This being so, there was reason for the rule. If one was about to perpetrate a crime for which under the law his life would be forfeited there was reason in holding that his life might be taken if necessary to prevent his committing it. But in this country few crimes subject the ones who have committed them to the death penalty, and it is only as to those which do that the reason of the rule has any force. What were felonies at common law usually subject the offender here to comparatively light punishment, and upon principle it should be here held that one could only properly make use of means which might be expected to cause death to prevent the commission of a capital offense."[9]

It would seem, therefore, that the reason for the rule has changed also in the arresting or escaping situation;[10] for if one cannot kill to prevent a felony dangerous to property only, should he be permitted to kill in attempting an arrest after the offense has been completed?

Writers generally criticize the arbitrary distinctions made between the misdemeanant and the felon.[11]

> "To attach such importance to a term so loosely used is to make legal rights and duties dependent upon words, not upon facts or public policy. It is as vicious an exhibition of the jurisprudence of conceptions as can well be imagined. The word is the thing. It is of itself a magic quality which compels legal re-

[8] Storey v. State, 71 Ala. 329 (1881); Starkey v. Dameron, 92 Colo. 420, 21 P. 2d 1112 (1933); Grigsby v. Commonwealth, 151 Ky. 496, 152 S. W. 580 (1913); Commonwealth v. Emmons, 57 Pa. Super. 445, 43 A.2d 568 (1945); Pierce v. Commonwealth, 135 Va. 635, 115 S. E. 686 (1923).

[9] Hoyt, C. J., in State v. Barr, 11 Wash. 481, 487, 39 Pac. 1080, 1082 (1895).

[10] As in the case of a misdemeanant, the common law authorities made no distinction between a felon fleeing from arrest and one breaking away after arrest. Thomas v. Kinkead, 55 Ark. 502, 508, 18 S. W. 854, 855 (1892).

[11] Bohlen and Burns, *The Privilege to Protect Property by Dangerous Barriers and Mechanical Devices*, 35 YALE L. J. 525, 540 (1926); Pearson, *The Right to Kill in Making Arrests*, 28 MICH. L. REV. 957, 974 (1930); Rogers, *Right of Officer to Shoot and Kill Fleeing Felon*, 34 LAW NOTES 66, 70 (1930); *Contra*, Waite, *Some Inadequacies in the Law of Arrest*, 29 MICH. L. REV. 448, 466 (1931).

> sults regardless of the facts or of the interest at stake. Is it not ridiculous to make matters of life and death depend upon the mere whim of the legislative draftsman and to subject a man to the risk of death merely because the crime which he has committed is arbitrarily labelled a 'felony' rather than a misdemeanor?"[12]

It is significant that the *Restatement of Torts* has recognized that the proper distinction is between offenses which normally cause or threaten death and those which do not.[13]

Although criticized by many courts,[14] the applicability of the rule in regard to the minor felon seems to be largely untested by actual court holding.[15] In *Ex parte Warner*,[16] however, a federal revenue agent who claimed he shot a fleeing "moonshiner" by accident was discharged from state custody on writ of habeas corpus. From the evidence presented, the court, relying on the common law rule, said that the petitioner should be discharged "whether the view taken of the evidence be that the officer deliberately shot at the deceased while he was fleeing and escaping from arrest or that in the pursuit the pistol was accidentally discharged."[17] Although it would seem that the illegal manufacture of whiskey is not *per se* a felony dangerous to life, it cannot be denied that an aura of violence surrounds the profession.[18]

Since an arresting person can only kill if necessary to prevent the escape of a fleeing felon, many cases are decided on the ground that the killing was unnecessary. Consequently, if the killing is unnecessary, there is no need for the court to try to make any distinction between types of felonies. In justifying the use of deadly force, the burden is on defendant to the extent of showing authority and probable cause to overcome a prima facie presumption for the protection of life unless

[12] Bohlen and Burns, *The Privilege to Protect Property by Dangerous Barriers and Mechanical Devices*, 35 YALE L. J. 525, 540 (1926).

[13] RESTATEMENT, TORTS § 131 (1934).

[14] U. S. v. Clark, 31 Fed. 710, 713 (8th Cir. 1881); State v. Bryant, 65 N. C. 327, 328 (1871); Reneau v. State, 70 Tenn. 720 (1879); Hendricks v. Commonwealth, 163 Va. 1102, 1110, 178 S. E. 8, 11 (1935).

[15] In the following cases the court made no distinction between types of felonies in the escaping situation: Commonwealth v. Stinnet, 55 F. 2d 644 (4th Cir. 1932) (illegal manufacture of whiskey); U. S. v. Clark, 31 Fed. 710 (8th Cir. 1881) (attempted escape from military custody of soldier convicted of malicious falsehood which carried two year sentence in military prison); Johnson v. Chesapeake Ry., 259 Ky. 789, 83 S. W. 2d 521 (1935) (larceny); Thompson v. Norfolk and W. Ry. Co., 116 W. Va. 705, 182 S. E. 880 (1935) (illegal manufacture of whiskey).

[16] 21 F. 2d 542 (N. D. Okla. 1927).

[17] *Id.* at 542.

[18] "It is a matter of common knowledge that throughout the years men who secrete themselves in the fastness of the mountains for the purpose of illicit distillation of spiritous liquors have not been hesitant to take the lives of officers attempting to bring them to justice." Maxwell, J. in Thompson v. Norfolk and W. Ry. Co., 116 W. Va. 705, 712, 182 S. E. 880, 884 (1935).

the circumstances of the killing rebut the presumption.[19] Necessity is a question for the jury and it may be that both jury and appellate judge[20] take into account the character of the felony and perhaps the character of the felon himself.[21]

In *State v. Bryant*,[22] a hog was stolen from defendant's employer and the defendant, a private person, suspecting that Cogdell was the thief went to Cogdell's house, called him out and told him to give up the hog. Cogdell said that the hog was not there and fled. The defendant ordered him four times to stop and then shot him. The stolen hog was found in Cogdell's house cut up and cleaned. The defendant urged that he knew a felony had been committed and thus he had a right to arrest the felon without a warrant and to prevent the felon's escape. On these facts, the trial judge held that the defendant was guilty of assault and battery and so charged the jury. On appeal, in a per curiam opinion, the North Carolina Supreme Court said that it was the privilege of every private person to arrest the felon when a felony has been committed but held that here there was no necessity to kill. Justice Reade, speaking for the court, said: "It must be however, that the powers of arresting and the means used must be enlarged or modified by the characted of the felony. The importance to society of having felons arrested in cases of capital felonies such as murder and rape must be much greater than in cases of inferior felonies."[23]

On the question of necessity, although the rule is not settled,[24] some courts follow the view that mere suspicion that a felony has been committed is not enough to justify the use of deadly force in preventing the escape of a suspected felon if in fact no felony has been committed.[25] Even where a felony has been committed, killing can only be justified as a last resort.[26] Although it has been said that the officer, in case of resistance, is not bound to put off the arrest until a more favorable time,[27] ordinarily there is not the same urgency in case of flght.[28] In *Castle v. Lewis*[29] the Eighth Circuit Court of Appeals affirmed the judgment of a district court in dismissing an application for habeas

[19] Union Indemnity Co. v. Webster, 218 Ala. 468, 477, 118 So. 794, 802 (1928).
[20] Hendricks v. Comonwealth, 163 Va. 1102, 1110, 78 S. E. 8, 11 (1935).
[21] Dredd v. State, 26 Ala. App. 594, 164 So. 309, 311 (1935).
[22] 65 N. C. 327 (1871).
[23] State v. Bryant, 65 N. C. 327, 328 (1871).
[24] See Notes, 38 Ky L. J. 609 and 618.
[25] Petrie v. Cartwright, 114 Ky. 103, 70 S. W. 297 (1902); People v. Conraddy, 5 Parker Cr. Rep. 234 (N. Y. 1860); Commonwealth v. Duerr, 158 Pa. Super. 484, 45 A. 2d 235 (1946).
[26] Castle v. Lewis, 254 Fed. 917 (8th Cir. 1918); Scarborough v. State, 168 Tenn. 106, 76 S. W. 2d 106 (1934); Love v. Bass, 145 Tenn. 522, 238 S. W. 94 (1921).
[27] Holloway v. Moser, 193 N. C. 185, 188, 136 S. E. 375, 377 (1927).
[28] State v. Bryant, 65 N. C. 328, 329 (1871).
[29] 254 Fed. 917 (8th Cir. 1918).

corpus by two petitioners in state custody who had tried to arrest certain persons whom they suspected were introducing liquor into Osage County, Oklahoma (a felony). The suspected ones had fled in an automobile and the petitioners had fired their guns at the automobile and killed one Mosier. The court felt that the fact that all the occupants of the car except one were known by the officers to be settled residents of a nearby town only five miles away and the fact that the suspected ones were heading toward their homes at the time rendered it difficult to conclude that a person of ordinary prudence could have believed that it was necessary to fire into the automobile to prevent escape.

Concluding, it seems that even if the North Carolina Supreme Court does not follow the strong dicta enounced in *State v. Bryant* which distinguished between types of felonies, an arresting or custodial officer may find it difficult to show necessity for the use of deadly force in preventing the escape of the minor felon.

I. B. HUDSON, JR.

Domestic Relations—Conflict of Laws—Uniform Reciprocal Enforcement of Support Act

In a suit brought in Arkansas under the Uniform Reciprocal Enforcement of Support Act[1] the petitioner filed the necessary papers,[2] which were certified and sent to the Superior Court of Edgecombe County[3] and which charged her husband with non-support of their children. After concluding that responsibility to support the children had "'. . . already been found to exist by a court of competent jurisdiction . . . in the State of Arkansas,'"[4] the superior court entered judgment, requiring the husband to pay into the Edgecombe County Welfare Department the money for support, which was to be forwarded to Arkansas, to be transmitted to petitioner, then residing in Virginia.[5]

On appeal the judgment of the lower court was reversed, the reason being the three-state nature of the proceedings in this case. In the opinion it was said:

> "We do not think the act should be interpreted so as to apply to a situation other than one where the obligee is present in the Initiating State.... To interpret the act so as to permit an

[1] 9A UNIFORM LAWS ANN. 58 (Supp. 1954); ARK. STAT. ANN. §§ 34-2401 to 34-2427 (Supp. 1953); N. C. GEN. STAT. §§ 52A-1 to 52A-19 (Supp. 1953). Arkansas had repealed the 1950 Uniform Act, 9A ULA 58, 66 (Supp. 1954), and adopted it as amended in 1952, 9A ULA 58, 92 (Supp. 1954). North Carolina had adopted substantially the Uniform Act of 1950. For a discussion of the North Carolina Act see Note, 29 N. C. L. REV. 351, 423 (1951).

[2] ARK. STAT. ANN. § 34-2410 (Supp. 1953).

[3] ARK. STAT. ANN. § 34-2413 (Supp. 1953).

[4] Mahan v. Read, 240 N. C. 641, 643, 83 S. E. 2d 706, 708 (1954).

[5] Mahan v. Read, 240 N. C. 641, 83 S. E. 2d 706 (1954).