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When Can a Policeman Use His Gun

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When Can a Policeman Use His Gun?

A police car receives a radio message that a robbery has been committed at a certain address by three men who fled in a bright green Ford. The officers in the car which has been cruising in that vicinity observe a speeding car fitting the above description and containing three men. The officers give chase and use the siren as they pursue the Ford for several miles. It appears that the Ford will outdistance them and the occupants will escape. May the officers shoot at the car and its occupants?

In this type of case situation, as well as in many others, it is vitally important to a police officer to know when he may lawfully use his gun. If he kills without proper justification he may be prosecuted for murder or manslaughter[1] as well as be sued by the family of the deceased.[2] This risk not only faces the officer in the "escape" type of situation just described, but in every other instance when he may feel the need to use his gun.

Resisting Arrest

One common type of situation which may face an officer is where a person resists arrest. Under the present law it is important that the officer know whether the arrestee has committed a misdemeanor or a felony. When the officer seeks to arrest a misdemeanant he is prohibited in most states from using deadly force.[3] The reason for this limitation upon the officer is the fact that a misdemeanor is a minor crime, and resistance which does not threaten the arresting officer with death or serious bodily harm is not sufficient to warrant the taking of the misdemeanant's life.[4]

There are a few states, however, in which the courts have upheld the officer's right to use deadly force in making the arrest of a resisting misdemeanant.[5] The reasoning behind these decisions seems to be that it is the duty of the officer to be the aggressor, and hence he must put forth sufficient force to make the arrest.[6] However, since the great majority of states have forbidden the use of deadly force in making the arrest of a misdemeanant the officer would be best advised not to use his gun in such a situation unless he is certain that his state is one in which such is authorized.

Where the person who is resisting arrest has committed a felony and the arrest is a proper one, the officer may use deadly force if its use is

1 Stinnet v. Commonwealth, 55 F. (2d) 644 (C.C.A. 4th 1932); People v. Klein, 305 Ill. 141, 137 N.E. 145 (1922).

2 Johnson v. Williams Adm'r, 111 Ky. 289, 63 S.W. 759 (1901).

3 People v. Klein, 305 Ill. 141, 137 N.E. 145 (1922); Thomas v. Kinkead, 55 Ark. 502, 18 S.W. 854 (1892); 4 American Jurisprudence 54.

4 Holloway v. Moser, 193 N.C. 185, 136 S.E. 375 (1927).

5 State v. Ford, 130 S.W. (2d) 635 (1939); State v. Dunning, 177 N.C. 559, 98 S.E. 530 (1919); State v. Dierberger, 96 Mo. 666, 10 S.W. 168 (1888).

6 State v. Fuller, 96 Mo. 165 (1888).

necessary to subdue the arrestee.[7] In using such force, however, it is important to remember two things: *first,* make sure that the arrestee is aware of the fact that he is being arrested by an officer of the law,[8] and *second,* that there is no other way to make the arrest or subdue the criminal but to use such force. An officer is not justified in killing a felon if the arrest could have been made without the use of such extreme force.[9]

When a person resists arrest the question of self-defense on the part of the officer often arises. Whenever the actions of the arrestee (regardless of whether he is a misdemeanant or a felon) are of such a nature as to create an honest belief in the mind of the officer that he is in danger of death or great bodily harm he is justified in killing the arrestee in self-defense.[10] There are two requirements for the exercise of this privilege: that the circumstances be such as to reasonably warrant the belief that the officer's life is threatened, and that he honestly believes that such danger exists.[11]

Fleeing Arrest

A different problem exists when a person flees from an officer who seeks to arrest him. Here again it is important for the officer to know whether the arrestee has committed a felony or a misdemeanor. When the person being questioned or arrested has been guilty of a misdemeanor the officer is never justified in using deadly force to stop his flight.[12] Even if the officer fires at the fugitive merely to frighten him into halting he will not be excused if one of the bullets accidently hits him.[13] In a situation of this type the officer would be well advised to keep his revolver in his holster.

The situation is different where the fugitive is a felon. When the officer knows that the person whom he seeks to arrest has been guilty of a felony the officer may use his gun in order to stop the flight.[14] But even the life of a felon is not to be treated lightly, and the law will not excuse the use of deadly force against him unless the arrest could not be made without it.[15] Thus, before shooting at the fugitive the officer should make every effort to let him know that he is being sought by an

7 In Stinnet v. Commonwealth, 55 F. (2d) 644 (C.C.A. 4th 1932), the officer had seen the deceased working at an illegal still. In stating the rule regarding the use of force in arresting a felon the court said: "The officer has the right to use such force as under the circumstances appears reasonably necessary to effect the arrest or prevent the escape of the felon, and if the reasonable use of such force results in the death of the felon, the officer is not to be held criminally accountable therefor."

8 Love v. Bass, 145 Tenn. 522, 238 S.W. 94 (1921).

9 "The right to shoot in making an arrest as well as the right to shoot in self defense rests upon necessity," Collet v. Commonwealth, 296 Ky. 267, 176 S.W. (2d) 893 (1943).

10 State v. Smith, 59 Ark. 132, 26 S.W. 712 (1894).

11 Clark and Marshall, A Treatise on the Law of Crimes (4th ed., Kearney, 1940) §278.

12 Sharp v. United States, 118 P. 675 (Okla. 1911); People v. Klein, 305 Ill. 141, 137 N.E. 145 (1922). In the latter case the court said: ". . . except in self defense an officer may not use a deadly weapon or take life to effect an arrest for a misdemeanor, whether his purpose is to kill or merely to stop the other's flight."

13 Sharp v. U.S., 118 P. 675 (Okla. 1911).

14 Stinnet v. Commonwealth, 55 F. (2d) 644 (C.C.A. 4th 1932).

15 Head v. Martin, 85 Ky. 480, 3 S.W. 622 (1887); Collet v. Commonwealth, 296 Ky. 267, 176 S.W. (2d) 893 (1943).

officer of the law.[16] This means that he should use his voice, blow his whistle, or if possible, sound a siren before resorting to the use of the revolver. It is important for the officer's security that he use his gun only as a last resort. The felon should not be killed if there is any other way to make the arrest.

A case may arise where the officer attempts to arrest a misdemeanant who assaults the officer and flees. If such an assault is a felony, the person may be treated the same as any other felon.[17]

Suspicion

The most difficult problem dealing with an officer's right to use deadly force arises when the officer suspects that a person has committed a felony and seeks to arrest him. Up until now the types of situation considered were those in which the officer knew that the person whom he wished to arrest had committed some sort of felony or misdemeanor. When the officer acts only on suspicion, however, the majority of the courts have held that he acts at his peril, and have refused to justify the use of deadly force if the suspect turns out to be an innocent person.[18] The reason for this rule is that human life is too sacred to be placed in danger without sufficient reason.[19]

In one leading case the police officer was seeking a felon and had been informed that the fugitive was riding a gray horse. The officer stationed himself along a road which he had reason to believe the felon would travel, and after a while saw a buggy approaching to which was tethered a gray mare. The officer shouted for the occupants to halt, but his command was ignored. He fired, and killed one of the passengers. It turned out that the people riding in the buggy were not the fugitives whom the officer was seeking. When the administrator of the deceased's estate sued the police officer the court held that he could recover, saying: "The law which gives an officer the right to kill an escaping felon certainly requires him to know that it is the felon, not an innocent party, whose life he is attempting to take."[20]

In another case the officer had seen the deceased scuffling with another person. As the officer approached the deceased fled, ignoring the command to halt. After firing a warning shot the officer killed him. It turned out that the person killed had not committed any crime and the officer was held liable even though he claimed that he had reason to believe that a crime had been committed.[21]

Not all states agree with the strict rule illustrated by the foregoing case situations.[22] For example, in one case the officer had mortally wounded a misdemeanant, believing that he had been guilty of a felony. The court held that the defendant was entitled to a charge to the jury

16 Love v. Bass, 145 Tenn. 522, 238 S.W. 94 (1921).

17 State v. Smith, 127 Iowa 534, 103 N.W. 944 (1905); Collins v. Commonwealth, 192 Ky. 412, 233 S.W. 896 (1921), in which a misdemeanant fired at arresting officer.

18 Commonwealth v. Duerr, 45 A. (2d) 235 (Pa. Super. 1946); Young v. Amis, 220 Ky. 484, 295 S.W. 431 (1927); 6 Corpus Juris Secundum 614; 4 American Jurisprudence 57.

19 A leading case bearing on this point is Petrie v. Cartwright, 114 Ky. 103, 70 S.W. 297 (1902).

20 Johnson v. Williams Adm'r, 111 Ky. 289, 63 S.W. 759 (1901).

21 Petrie v. Cartwright, 114 Ky. 103, 70 S.W. 297 (1902).

22 People v. Kilvington, 104 Cal. 86, 37 P. 799 (1894); Wiley v. State, 19 Ariz. 346, 170 P. 869 (1918).

to the effect that any officer, when having reasonable grounds for believing that a felony had been committed, is justified in using "the force the law permits in making arrests for a felony."[23] A study of these cases would lead one to believe that where there is reasonable grounds for the officer's actions, as differentiated from a "mere suspicion," the officer would not be held liable if it happened that his victim was an innocent person.

Practically speaking, however, the safest thing for an officer to do would be never to use his gun unless he is certain that a felony has in fact been committed; and even in situations where he knows that a felony has been committed he would be wise not to resort to deadly force unless he can identify the felon. Thus, in the problem posed at the beginning of this comment, the answer in some state courts would be that the officers should not fire at the "bright green Ford"; for if they did, and it turned out that the occupants were not the felons they were seeking, the officers could be held liable in the great majority of jurisdictions. Yet the fact remains that our police officers are frequently faced with situations in which they are required to make instantaneous decisions regarding their right to fire at a person who is fleeing from arrest. Under the present law in most states they must act at their peril, for they must correctly decide whether the fugitive has committed a felony or a misdemeanor; and where they suspect that the fugitive is guilty of a felony they must correctly decide, under the most liberal views, whether or not the have reasonable grounds for believing that the suspect is guilty of committing it. Under the circumstances it is small wonder that the rule in one of our metropolitan police departments reads: "Inasmuch as an officer always exposes himself to criminal prosecution for murder or manslaughter in shooting a fugitive, and he is assured of vindication only if he is able to prove that the fugitive was unquestionably guilty of committing a felony and that he was effecting his escape, he shall not use his revolver except as before stated."

While there is merit in decisions which attempt to discourage the indiscriminate use of force by arresting officers, it must still be borne in mind that our officers must be given some tangible and realistic rules to govern their actions in an age of motorized and organized crime. The law should not place them in a position where they must hesitate to fire at a fleeing criminal because they are not certain whether he committed a felony or a misdemeanor. Nor should they be required to always decide on a moment's notice whether they have "reasonable grounds" for suspecting a person to be a felon, or whether they have only a "mere suspicion." Because of this unrealistic state of the law the only way in which an officer who guesses wrongly can be protected is for the state not to bring criminal charges against him. But this protection is at best flimsy.

The Need for Legislation

Much could be done to protect both the officer and the citizen who might be the object of the use of unjustified force if a statute were created which would set forth in clear language practical rules governing the use of deadly force in criminal apprehensions. Such a statute should eliminate the ancient and arbitrary common law distinction between

23 Coldeen v. Reid, 107 Wash. 508, 182 Pac. 599 (1919).