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Unintentional Homicide in Resistance to Unlawful Arrest - State v. Harris

Comments and Casenotes

UNINTENTIONAL HOMICIDE IN RESISTANCE TO UNLAWFUL ARREST

State v. Harris[1]

Defendant allegedly made threats to inflict violence on a boy. The boy's mother later complained to a policeman and demanded the arrest of defendant. The policeman took defendant into custody on the street, without procuring a warrant and without having heard the threats. A struggle ensued, caused by the policeman's refusal to release his grip on defendant's belt, defendant struck policeman with his fist, the policeman used his nightstick and both fell to the ground, the policeman's head striking the pavement with force. There was conflicting evidence whether defendant used the stick on the policeman during the struggle and whether that, or the impact with the pavement caused the injuries to the policeman's skull which shortly proved fatal to him. Defendant was indicted for murder.[2] On trial before the court, without a jury, a verdict of not guilty was rendered.

The acquittal was based upon a finding, as a matter of both fact and law, that the arrest attempted by the officer was an illegal one, and further that the force used by the defendant, which accidentally proved fatal, was not unreasonable, but was justified to be used in resisting an illegal arrest.[3] The court's opinion was principally devoted to a consideration of the law of arrest, as it bore on the legality vel non of the particular arrest attempted to be made in this instance by the victim policeman. In

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[1] Indictment No. 2750, Criminal Court of Baltimore City, Part II, opinion by O'Dunne, J., Baltimore Daily Record, October 6, 1943.

[2] The indictment was merely for murder, without specifying the degree, as is permitted in the Maryland practice. It was decided in Weighorst v. State, 7 Md. 442 (1855), and Davis v. State, 39 Md. 355, 370 (1874), that first and second degree murder are different degrees of the same crime, although murder and manslaughter are different crimes. See also a dictum in Hanon v. State, 63 Md. 123, 126 (1885). However, a single indictment for murder, in the common law form or in the alternative statutory short form under Md. Code (1939) Art. 27, Sec. 665, will permit of four alternative verdicts of guilty of some form of homicide, viz., first degree murder, first degree murder without capital punishment, second degree murder, and manslaughter.

[3] The court's opinion relied on Sugarman v. State, 173 Md. 52, 195 A. 324 (1937), as to the right to resist an illegal arrest with reasonable force.

view of the thoroughness of the treatment in the opinion, and of the exhaustive analysis of the whole field in Mr. Kauffman's recent article in the REVIEW,[4] this note about the case proposes to give minimum emphasis to the law of arrest angle, and to devote attention principally to the criminal homicide law relevant in the picture, as that might apply depending on a finding one way or the other as to the legality of the arrest and the amount of the force used respectively by the officer in arresting and the defendant in resisting.

Suffice it to say, with reference to the legality of the arrest, that the finding of its illegality was amply supported by general common law authority. Defendant had not committed a misdemeanor in the presence of the officer, nor was he immediately threatening to commit a crime of violence necessitating his arrest to prevent him.[5] Lacking these, and there being no charge of felony, the arrest without a warrant was illegal and, the force used to resist being reasonable, the resulting homicide was neither murder nor manslaughter. However, as we shall see, had the arrest been legal and/or had the force been greater, defendant might have been guilty of the one or the other. We shall now turn to the homicide angle of the case.[6]

The factual element of the defendant's having been engaged in resistance to arrest or other lawful detention at the time he killed another is but one of the several different types of human conduct which the criminal law of homicide has recognized as significant. The broad problem is that of determining the degree of the criminal intent (if any) on the part of one who has admittedly caused the violent death of a human being and who, therefore, will be held guilty of some level of criminal homicide

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[4] Kauffman, *The Law of Arrest in Maryland* (1941) 5 Md. L. Rev. 125.

[5] The State had contended that the arrest was lawful under the doctrine of the right to arrest where serious assault is threatened with probability of execution, and also had relied on the case of B. & O. R. Co. v. Cain, 81 Md. 87, 31 A. 801, 28 L. R. A. 688 (1895), where the Court treated the situation as a lawful arrest where the railroad conductor (who had telegraphed ahead) procured officers at the end of the run to arrest a passenger who had been committing a continuous breach of the peace all during the run. The Court put the legality of that arrest on the ground that the conductor could have himself immediately arrested the parties, and later have turned them over to the officers at the end of the run, and it found that having them arrested by the officers was substantially equivalent.

[6] The statements in the text following depicting the Maryland rules of criminal homicide are based on specific Maryland statutes cited, and, for the part of the local homicide law which subsists in common law form, on CLARK AND MARSHALL, LAW OF CRIMES (4th Ed., 1940) Secs. 229-91.

(first degree murder,[7] second degree murder,[8] manslaughter[9]) if sufficient criminal intent can be spelled out to classify him at some one of the criminal levels.

Most dramatic, of course, of the human conduct factors which have been isolated as significant in the homicide picture, is the execution of an actually formed intent to kill. Depending on the circumstances surrounding the formation and execution of an intent to kill, one is guilty of first degree murder (if premeditated),[10] second degree

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[7] Md. Code (1939) Art. 27, Secs. 475-478 specifies what type of murder shall be first degree. The details of this are set out herein *infra*, ns. 10, 16, 17, 22. Under Md. Code (1939) Art. 27, Sec. 481, the punishment for first degree murder is death, or life imprisonment, in the discretion of the court, save where the jury returns a verdict stipulating against capital punishment, in which case life imprisonment is the only possible penalty. Under Md. Code (1939) Art. 27, Sec. 480, the court determines the degree of guilt where the traverser pleads guilty ("be convicted by confession") to a murder charge.

[8] Md. Code (1939) Art. 27, Sec. 479: "All other kinds of murder shall be deemed murder in the second degree." This statute makes second degree murder in Maryland comprise the residue of the situations which were merely murder at common law, aside from those aggravated types declared to be first degree murder. The rules of the common law of "malice aforethought", therefore, determine what is second degree murder in Maryland. See *infra*, n. 12 for mention of two other Maryland statutes declaratory of the common law as to certain situations there provided to be (second degree) murder. Under Md. Code (1939) Art. 27, Sec. 482, the maximum punishment for second degree murder is eighteen years imprisonment. For a statement of the common law test of "malice aforethought", which is now the Maryland standard for second degree murder, see CLARK AND MARSHALL, LAW OF CRIMES (4th Ed., 1940) Sec. 236: "There is express malice [lacking justification, excuse, or mitigation to manslaughter]: (1) When there is an actual intent to cause the death of the person killed; (2) when there is an actual intent to cause the death of any other person. Malice is implied, with the same exceptions: (1) When there is an actual intent to inflict great bodily harm; (2) when an act is wilfully done or a duty wilfully omitted, and the natural tendency of the act or omission is to cause death or great bodily harm; (3) subject, perhaps, to some limitations, when a homicide is committed, though unintentionally, in an attempt to commit, or the commission of, some other felony; (4) when a homicide is committed, though unintentionally, in resisting a lawful arrest, or in obstructing an officer in his attempt to suppress a riot or affray."

[9] Save for the statute set out *infra*, n. 14, concerning manslaughter by vehicle, the Maryland substantive law of manslaughter is the common law thereof, and recourse must be had to the common law rules for determining what constitutes manslaughter. Md. Code (1939) Art. 27, Sec. 436, fixes the maximum punishment for manslaughter (other than by vehicle) at a Five Hundred Dollars fine and/or either ten years in the penitentiary or two years in jail. These same punishments apply to all manslaughter (other than by vehicle) whether it be voluntary (intentional killing or fatal harm upon provocation), or involuntary (unintentional killings from non-grave harm, gross negligence, in the course of a misdemeanor, or by non-wilful omission of duty).

[10] Md. Code (1939) Art. 27, Sec. 475, provides: "All murder which shall be perpetrated by means of poison, or lying in wait, or by any kind of wilful, deliberate and premeditated killing shall be murder in the first degree." In substance this amounts to a legislative recognition that the use of poison, or killing from ambush indicates premeditation, etc., as a

murder (if non-premeditated and unprovoked), or voluntary manslaughter (upon legally recognized provocations), or is acquitted on the basis of justifiable or excusable homicide (in self-defense, and in other[11] defensive situations). But, one can be guilty of homicide, even of the most serious first degree murder, without necessarily intending to kill. The law has recognized five other separable human conduct factors as possibly being equally significant with actual intent to kill in supplying the criminal intent necessary to make one guilty of criminal homicide. Thus, the intentional infliction of bodily harm, the doing of an act dangerous to life, the commission of an extrinsic crime,[11a] the resistance to detention by officers of the law, and the omission of a legal duty have all been recognized as equal to actual intent to kill under proper subsidiary circumstances.

Glancing at these hastily, we see that, in Maryland, unintentional deaths growing out of intended harm or dangerous acts are, as such and at worst, second degree murder. This is so where (under the subsisting common law standards) the unintentional death results from either intentional grave bodily harm or the wilful doing of an act very likely to cause death or harm.[12] Such killings are

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matter of law, and that killing in either of these fashions or in any other fashion also showing premeditation makes one guilty of first degree murder.

[11] The other defensive situations completely excusing an intentional killing would include the authority in the public executioner to hang a condemned felon, obedience to orders of a military superior, and the use of necessary fatal force to prevent a felony by force or surprise, to accomplish the arrest of a felon, or to prevent the escape of a felon. The limited doctrine of "defense of another" who bears a close family relationship would also belong here. Compulsion or duress is usually held not defensive to murder, and Maryland's acceptance of this latter rule is implicit in Md. Code (1939) Art. 35, Sec. 6. A bona fide and reasonable but mistaken belief in the existence of a defensive situation will excuse, as will also such infancy or insanity as would acquit of any crime.

[11a] Contrast the doctrine of constructive intent in homicide through having been engaged in an extrinsic crime, with the similar problem whether one can be guilty of arson (or some other criminal burning) who unintentionally sets fire to premises while committing another crime. On this, see Md. Code Supp. (1943) Art. 27, Sec. 10A, providing a maximum three year penalty for anyone who shall set fire to a building while perpetrating or attempting a crime. The statute does not make it clear whether it applies as well to unintentional burnings as to intentional ones.

[12] See Md. Code (1939) Art. 27, Sec. 134, providing an eighteen year maximum penalty (the same as for second degree murder) whenever one kills another in a duel "the probable consequence of which may be the death of either party"; and Md. Code (1939) Art. 27, Sec. 536, making it (second degree) murder whenever the death of any person results from the overthrow or obstruction of any railroad car or vehicle in violation of the preceding section. These two statutes merely specifically apply the common law rule that one is guilty of murder who unintentionally kills in

only manslaughter if the intended harm be less than grave,[13] or if grave harm be provoked, or if the dangerous act be at worst merely gross negligence.[14] The Maryland legislature has provided no first degree murder factors in these two basic categories of homicidal conduct.[15] But it has done so in the next two (extrinsic crime and resistance to detention), by statutes providing that killings in the course of certain stated crimes,[16] and in the course of

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the course of intended grave bodily harm or the wilful doing of an act very likely to cause death or bodily harm.

[13] See Wellar v. People, 30 Mich. 16 (1874), recognizing that if the intended harm be not too serious, and the death relatively accidental, the jury should be charged on manslaughter. This case, in effect, recognizes a manslaughter level of the category of homicidal conduct involving intended bodily harm, and requires that the intended harm be grave and very dangerous before a second degree murder conviction is appropriate. To be sure, a manslaughter conviction where the harm is non-grave can also be rationalized under the misdemeanor-manslaughter doctrine, as the unjustified infliction of non-grave harm would also be the misdemeanor of battery, itself supporting a manslaughter conviction.

[14] The common law standard of "gross negligence" as the minimum requirement for conviction of manslaughter when one unintentionally kills in the course of doing a dangerous act is carried over into the recent Maryland statute setting up the separate crime of manslaughter by automobile or other vehicle, Md. Code Supp. (1943) Art. 27, Sec. 436A. While preserving the same standard of guilt, the statute reduces the maximum punishment for such killings from ten years to three, changes the grade from felony to misdemeanor, and provides a short form of indictment which may be used. The possible monetary fine is increased from $500 to $1,000.

[15] Statutes of some other states have specified first degree aggravations of the intentional harm and dangerous act kinds of conduct, usually referring to the use of cruelty or torture, or to circumstances showing a malignant heart or a depraved mind. While the Maryland statute contains no reference to such aggravating factors, yet it must be remembered that killings in the course of mayhem are stipulated to be first degree murder, inter alia, in the part of the statute referring to killings in the course of extrinsic crimes.

[16] Under Md. Code (1939) Art. 27, Secs. 476-478, these are the felonies of rape, sodomy, mayhem, robbery, burglary, and arson; and the statutory misdemeanor of burning certain premises not parcel of any dwelling house, if the premises have therein certain described articles. While the last described section (477) of the first degree murder statute does not specifically refer to Md. Code (1939) Art. 27, Sec. 7, punishing as such the burning of premises not parcel of a dwelling house, yet this is the only statute in the Code to which it could refer and, as it reads, the particular crime itself is neither arson nor a felony, but a statutory misdemeanor. Prior to 1904, this crime was a misdemeanor, Gibson v. State, 54 Md. 447 (1880), and from 1904 to 1929 it was a felony, Md. Laws 1904, Ch. 267. In 1929 the arson and burning sub-title was completely revised and re-enacted into its present form, Md. Code (1939) Art. 27, Secs. 6-10, 10A, and the section (7) governing non-dwelling premises now apparently again makes it a misdemeanor. The first degree murder statute (Section 477) may visualize the common law felony of burning a barn containing corn, under 23 Hen. VIII, C. 1, S. 3 (on which see CURTIS, ARSON (1936) 34), but this statute is not listed in Alexander's British Statutes as in force in Maryland, and even if it were once so in force, it probably would have been superseded by the complete revision of the arson and burning laws in 1929, which supplanted all of the preceding Maryland legislation on the subject.

escape from a penal institution[17] shall be first degree murder. Killings in the course of the remaining[18] felonies (under the common law felony-murder doctrine), and in the course of resistance to other lawful arrest (the doctrine under discussion here) are second degree murder; and killings in the course of the remaining[19] misdemeanors (the misdemeanor-manslaughter doctrine),[20] and in resistance (by unreasonable force or intended fatal violence) to an unlawful arrest are manslaughter as at common law. Finally, killings by omission of duty, depending on whether there be premeditation, mere wilfulness, or mere negligence, are first degree murder, second degree murder, or involuntary manslaughter by non-feasance.

The common theme of the whole picture of making distinctions as to the criminality of homicides is that of punishing more or less severely (or not at all) one who has admittedly caused the death of a fellow human being, according to the extent to which the seriousness of his particular conduct shows he has a tendency to kill. But, of course, this is merely a specific application in the homicide field of the basic philosophy of the whole requirement of criminal intent, i. e., to punish only those who have caused harm who sufficiently show a tendency to repeat or to continue committing that or similar harm if no steps of state punishment be taken to cope with their dangerousness. But where for most other crimes the purpose of the intent detail is to provide a single choice, to convict or acquit, based on a prediction of defendant's probable tendency to repeat, homicide presents the picture of a choice among several grades of guilt, involving relative

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Thus the conclusion remains that the type of burning described in Section 477 of the first degree murder statute is a misdemeanor, distinct from the felony of arson, described in a separate section (476) of that statute.

[17] Md. Code (1939) Art. 27, Sec. 478, discussed in the text *infra, circa* ns. 21-22.

[18] I. e., those other than the six common law felonies enumerated in the first degree murder statute. Of the nine common law felonies, this would leave only larceny, inasmuch as the other two are murder and manslaughter, themselves homicide crimes. There would be included any Maryland crimes which are felonies because made so by Maryland statute or applicable British statute.

[19] I. e., all the misdemeanors save the one of statutory burning set out in the first degree murder statute, mentioned *supra*, n. 16.

[20] In view of the fact that the crime of abortion is only a misdemeanor in Maryland, an unintended death resulting from a criminal abortion is only manslaughter, unless the abortion be performed in such a dangerous and careless fashion that it can be characterized as the wilful doing of an act very likely to cause death or harm, in which case the death is second degree murder because of that quality, entirely aside from the question of its occurring in the course of an extrinsic crime. On this, see Worthington v. State, 92 Md. 222, 48 A. 355, 84 A. S. R. 506, 56 L. R. A. 353 (1901).

degrees of tendency to repeat, calling for more or less punishment depending on the extent of the tendency.

Specifically within the particular field of homicide we are now concerned with it might be said that the reason it is first degree murder to kill in an escape from jail and only second degree in resistance to lawful arrest is that the former sort of killer is more dangerous because it is more likely that he planned ahead of time the situation out of which grows his (perhaps) unintentional[21] killing. On the other hand, an attempt to accomplish a lawful arrest presents more of a "provocation" to the killer, and an attempt to arrest unlawfully still more provocation, and that last a legally recognized one, so that, in a relative way, we can say that the respective killers have variant tendencies to kill because of variations in the frequency of the stimuli inducing their actually killing. Let us now survey the entire law of homicides committed in resistance to detention, by means of speculating about such variations in the factual set-up in the principal case as might have happened.

Had, of course, the defendant been already lawfully arrested and incarcerated in the "Maryland Penitentiary, the House of Correction, the Baltimore City Jail, or . . . any jail or penal institution in any of the counties of this State . . ."[22] and had he killed in the course of an attempted or successful escape therefrom, such killing would have been first degree murder under the statute, as it was thus amended in 1931,[23] after a Penitentiary guard had been killed by an inmate in an attempt to escape.[24] Prior to that, such killings (unless premeditated) were merely second degree murder, as at common law,

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[21] Whether one is to be held guilty of first degree murder who accidentally kills from the use of slight force in the course of an attempted escape is part and parcel of the broad problem of how much force must have been used to bring into play the doctrine of murder in resistance to lawful arrest, discussed *infra*, *circa* ns. 25-31.

[22] Md. Code (1939) Art. 27, Sec. 478.

[23] *Ibid.*, as amended Md. Laws 1931, Ch. 400.

[24] The case in question was Carey v. State, 155 Md. 474, 142 A. 497 (1928), where the Court of Appeals affirmed a conviction of first degree murder with capital sentence. The case, in the Court of Appeals, did not involve any law of homicide in escape or resistance to arrest, but concerned only certain rulings on the evidence. Under the peculiar Maryland criminal procedure, it would have been little likely that the detail of the law of homicide in question could have reached the Court of Appeals. The first degree murder conviction can be explained on the basis that the jury must have found premeditation, as the law then stood. The subsequent amendment makes that now unnecessary in order to convict of first degree murder in the course of an escape.

as merely being a species of killing in resistance to lawful arrest.

No doubt, despite lack of specific mention, escapes from the State Prison Farm in Western Maryland, or from the Women's Prison in Anne Arundel County, would come within the last part of the quoted phrase above. It would also seem clear that a killing in escape from a station house cell, prior to removal to the City or County jail, would not come within the above provisions of the first degree murder statute, and would merely be second degree murder as in resistance to lawful arrest under the pre-1931 common law doctrine principally now under discussion.

Turning now to the second degree murder level of this field, suppose that the attempted arrest in the principal case had been a lawful one, but the defendant (with unintended fatal consequences) had used exactly the same force, no more no less, as was used in the actual case, i. e., such force as would have been reasonable had the arrest been unlawful. Would the case be appropriate for the application of the theory of second degree (formerly common law) murder in resistance to lawful arrest, regardless of actual intent? The problem is, how much actual violence must be used in resisting, or how much causal connection must there be between the resistance and the death, to bring into play the doctrine of "constructive" second-degree murder in resistance to lawful arrest.[25]

It might be said that there was, implicit in the court's emphasis on the legality of the arrest vel non in determining whether to convict or acquit of (second degree) murder, an assumption that, had the arrest been lawful, such a conviction would have been indicated. This implies that there was sufficient actual force and causal connection for the doctrine to apply in the face of a *lawful* arrest, had that been so.[26] This view, i. e., that the combination

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[25] See MILLER, CRIMINAL LAW (1934) 270, pointing out that the doctrine as well applies to killings of officers (or private persons) who are at the time engaged in suppressing a riot or affray. This latter may be regarded, of course, as a prelude to making a lawful arrest of the guilty persons.

[26] The following quotation from the court's opinion, Baltimore Daily Record, October 6, 1943, raises the implication asserted: "Was the arrest, on the facts and under the law, legal? If so, resistance to legal arrest was unlawful, and death resulting from resistance—though not intended, would be murder in the second degree . . ."

The remaining part of the paragraph quoted must here be queried: ". . . and if intended, murder in the first degree." The writer has been unable to find any authority for such an assertion as to the law of (purely) statutory first degree murder. Did, perhaps, the court mean "premeditated" when it said "intended"? If so, then the statement would be cor-

of resisting lawful arrest and the unjustified use of slight force (itself *alone* not adequate for more than manslaughter if death results) should equal an intent to kill or to inflict grave bodily harm or to do a very dangerous act or to commit any felony or to omit a duty wilfully, (all of which make for murder guilt) seems the proper one. It is to be hoped that it can be stated that the implications of the opinion's emphasis on the legality of the arrest reflect the above detail as the Maryland law of killing in resistance to lawful arrest, lacking any ruling by the Court of Appeals.[27]

But, there is authority contra on this particular point. In *State v. Weisengoff*,[28] from West Virginia, a second degree murder conviction of one who accidentally killed a sheriff who was attempting lawfully to arrest him was set aside, for lack of sufficient dangerousness in the manner in which defendant resisted the arrest. It can be stated that the case involved a more dangerous manner than that used by defendant in the *Harris* case. In the

rect. A "wilful, deliberate, and premeditated killing" is first degree murder with or without the factor of resistance to lawful arrest. Or does the statement reflect the court's belief that all "intended" killings are *ipso facto* "wilful, deliberate, and premeditated," a point on which the Maryland Court of Appeals has never ruled. While there is some extra-State authority to the effect that one can "premeditate" in a split second, if the jury wishes so to find, yet even these jurisdictions preserve the nominal element of premeditation. The better view, that purely impulsive intentional killings are only second degree murder, is reflected in cases from two important jurisdictions, People v. Caruso, 246 N. Y. 437, 159 N. E. 390 (1927), and State v. Clayton, 83 N. J. L. 673, 85 A. 173 (1912). The former case reversed a first degree murder conviction on the facts, the latter on the abstract statement of law. The latter case pointed out that "wilful, deliberate and premeditated" requires an interval of time and a conscious mental process both between the stimulus inducing desire to kill and the formation of the decision, and between that formation and its execution. The appellate court specifically rejected the idea that merely forming the intention and carrying it out satisfied the first degree murder statute. As the court there pointed out, any other interpretation would have frustrated the legislative intent to have degrees of murder, including intended murder.

[27] There is little likelihood of ever getting a ruling out of the Maryland Court of Appeals on the point of what is the Maryland law as to how much force has to be used in resisting a lawful arrest in order to justify a second degree murder conviction. The question cannot arise by way of demurrer to a murder indictment. There is no appellate jurisdiction to review the sufficiency of the evidence to support a conviction. The problem can hardly arise by way of the relevancy of evidence offered for the defense and rejected, or incidentally in a civil case. Only in the highly unlikely eventuality of a trial court granting a voluntary instruction applying the stricter rule that slight force will suffice, followed by conviction and defendant's appeal, will the problem reach the Court of Appeals. The problem is but one of the many of the substantive criminal law that have little chance of appellate solution because of the local rule that the jurors are judges of the law. On this, see Note, *Difficulty of Obtaining Appellate Rulings on Substantive Criminal Law* (1937) 1 Md. L. Rev. 175.

[28] 85 W. Va. 271, 101 S. E. 450 (1919).

Weisengoff case, defendant was at liberty under a forfeited bail bond and his victim was a sheriff who was attempting lawfully to retake him into custody. Defendant was driving his car, the sheriff ordered him to stop, and when defendant did not, the sheriff jumped on the running board and attempted to stop the car, and defendant speeded up and steered towards a bridge which would take him into another state, out of the officer's jurisdiction. The car collided with the bridge, causing fatal injuries to the sheriff on the running board. The West Virginia Court reversed a conviction of second degree murder arrived at under trial court instructions which authorized a conviction thereof regardless whether defendant had intended to kill the sheriff, or to inflict grave bodily harm upon him, or intentionally drove the car against the bridge. The Court ruled that the doctrine of second degree murder in resistance to lawful arrest would apply only where the resistance was carried out in one of the alternative manners set out just above and that, lacking one of these, a conviction of murder would be improper.

Were such a doctrine in force in Maryland, the acquittal of Harris of the murder charge could have been arrived at even had the arrest attempted been lawful (as in the *Weisengoff* case), for surely it is even less dangerous merely to struggle with an officer and hit him with fists, than to speed up a car and head for a narrow bridge, knowing that the officer is standing on the running board.

This West Virginia ruling practically negates entirely the whole doctrine of second degree murder in resistance to lawful arrest, for it requires, as a condition precedent, the presence of something else, which something else, by itself and regardless of any resistance to arrest, would support a conviction of second degree murder. And yet general authority[29] has it that resistance to lawful arrest (under proper circumstances) is a way of being guilty of second degree murder alternative to intentional killing, intentional grave bodily harm, and intentional very dangerous act, inter alia.

But there is also doctrinal authority to support the West Virginia position. One writer[30] points out that, his-

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[29] CLARK AND MARSHALL, LAW OF CRIMES (4th Ed., 1940) Sec. 246; MILLER, CRIMINAL LAW (1934) 270, both state the doctrine without any such limitation as the Weisengoff case suggests, and seem to regard the resistance to lawful arrest as alternative to other forms of actual and constructive "malice aforethought" as making for common law murder.

[30] Dickey, *Culpable Homicides in Resisting Arrest* (1933) 18 Corn. L. Q. 373; accord, MAY, LAW OF CRIMES (4th Ed., 1938) 267, citing the Dickey

torically, there never was a doctrine that resistance to lawful arrest by itself amounted to "malice aforethought" to make for common law murder. Rather, he argues, it was but an exception to the rule mitigating to manslaughter for intentional death or intentional fatal bodily harm under provocation, limiting the provocation to unlawful arrest but excepting therefrom lawful arrest. As is involved in the next point to be discussed, the doctrine of manslaughter in resisting unlawful arrest merely mitigates the guilt of what would otherwise be murder in its own right, viz., intentional killing, or intentional fatal bodily harm. So, the above writer argues, the lawful arrest cases are merely excepted from those provoked intentional killings or fatal harms which must meet the murder test in the first place before the application of the provocation rule arises.[31]

Granting the acceptance of the West Virginia view as to the amount of force necessary to permit a second degree murder conviction in resisting lawful arrest, the question arises then, is one who thus fatally resists with less than that much force guilty of anything? The answer would be that, granting the force at least amounted to non-grave bodily harm, gross negligence, or a misdemeanor, a conviction of involuntary manslaughter would be appropriate, as it similarly would be for an unintended death resulting from the same type unjustified harm, negligence or crime, in situations not having any element of resistance to arrest at all. But it is necessary to go into this only in jurisdictions specifically agreeing with the stricter West Virginia rule about second degree murder.

Be that as it may, it seems that the generally accepted view, implicit in the court's opinion in the *Harris* case, is the better one, viz., that the combination of lawful arrest and the unjustified use of less force than, by itself, would suffice for a murder conviction, should bring into play the doctrine of second degree murder. This would

article. Both authors cite the Weisengoff case, and assert that no case can be found recognizing resistance to lawful arrest as itself sufficient to make guilty of murder where the amount of force used itself would not do so. See also, Kean, *Homicide in Resisting Arrest* (1938) 26 Ky. L. J. 50, going deeply into the historical origins of the rule in the light of the Dickey thesis.

[31] Contrast the similar problem which arises in connection with applying the doctrine of homicide guilt through having been engaged in an extrinsic crime at the time of (perhaps unintentionally) killing the victim. There, too, the questions of the causal relation between the crime and the death, and of the amount of actual force which defendant must have used, arise. On this, see Wilner, *Unintentional Homicide in the Commission of an Unlawful Act* (1939) 87 U. Pa. L. Rev. 811.

usually leave the only question to be, as it apparently was in the *Harris* case, whether the arrest was lawful.

We come now to the manslaughter level of this problem, where the question arises: Granting the Harris arrest to have been unlawful, why was he not convicted of voluntary manslaughter in resistance to an unlawful arrest? The answer is given both in the third paragraph above and in the implications of the court's opinion. The doctrine of voluntary manslaughter in resistance to an unlawful arrest only applies when the force used indicates an intentional killing or an intent to inflict grave bodily harm, either being more than is necessary to defend against the battery which an unlawful arrest, as such, amounts to. The voluntary manslaughter doctrine would have been appropriate only if the court had found that Harris intended to kill or to inflict grave harm, neither of which was he in fact shown to have intended.

As shown above, the manslaughter-unlawful arrest doctrine merely mitigates to a lower grade what would be murder if there were no arrest factor in the picture at all, i. e., intentional killing or intentional grave and fatal bodily harm. But Harris at worst merely intended to inflict reasonable harm by the use of his fists, and even had this been unjustified, a resultant death (uncomplicated by any arrest factor) would have been manslaughter at most, and, the use of the force being justified, the death legally was not even that. The distinction between manslaughter guilt and no guilt in fatal resistance to an unlawful arrest lies in the fact that a man who unnecessarily but intentionally kills when an officer unlawfully puts his hand on his shoulder shows more homicidal tendency than one who accidentally kills from resisting an unlawful arrester with his fists. Harris was in the latter class in the principal case.

Of the manslaughter provocations, while knowledge of spouse's adultery has its own special implications, yet the other three, i. e., unlawful arrest, sudden assault, and mutual combat, all can be explained as types of "quasi-self defense," compromising at manslaughter in borderline self-defense situations where the defendant is not quite as much entitled to full acquittal as in the perfect self-defense situations,[82] because the circumstances indicate

[82] All three of these last-named manslaughter provocations (unlawful arrest and sudden assault more clearly so than mutual combat) mitigate the guilt in favor of one who cannot claim full self-defense because he has used more force than necessary to defend himself. Furthermore, the mutual combat provocation also relates to another limitation on the plea

relatively more homicidal tendency on his part than is so in the perfect self-defense situations.

We now reach the bottom level of criminal homicide of this sort, that where one who has killed in resisting arrest is completely acquitted and is regarded as not guilty even of manslaughter. Most of these situations hinge on the arrests being unlawful, although, even in the lawful arrest situations, if the force used in resistance be too slight, or the death be entirely too accidental, complete acquittal would be indicated, whether under the West Virginia rule or the generally accepted doctrine. We shall now discuss the variations, granting that the arrest is unlawful.

If, in the course of attempting an unlawful arrest, the arresting officer makes an immediate threat of fatal violence to the arrestee, which puts his life in danger and makes it necessary to kill to save it, the latter is justified in retaliating with intentional fatal force, for the situation then becomes full self-defense and the arrest factor really fades from the picture.[33] The arrest being unlawful, the arrester's offer of fatal violence is as improper as any person's similar offer and may be resisted with full self-defense under exactly the same circumstances—i. e., with fatal violence if necessary to save the defender's life. Just as an unlawful arrest by means of simple battery may be resisted with reasonable force, appropriate for resisting any similar battery, so may one accompanied by danger to life be resisted with fatal self-defense.

Furthermore, had the officer attempted his unlawful arrest with mere simple battery and later, aroused by defendant's resistance with similar force, had then made an offer of fatal violence, the defendant similarly could then exercise full self-defense and kill if necessary to save his life, without any guilt.[34] Of course, neither of these last two variations was actually involved in the *Harris* case, for neither the officer nor Harris made any offer of fatal violence with a deadly weapon.

Rather, the *Harris* case involved the ultimate fact variation here to be discussed, i. e., attempting an unlawful arrest by no more force than simple battery, and its being

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of full self-defense, viz., that an aggressor cannot plead full self-defense even if his fatal force was necessary to save his own life. An aggressor (unless he provoked the combat as a means of carrying out a previously formed plan to kill—first degree murder by premeditation) can claim mitigation to manslaughter.

[33] CLARK AND MARSHALL, LAW OF CRIMES (4th Ed., 1940) 348, Sec. 278.

[34] *Ibid.*

resisted by no more force than reasonable to resist any unlawful simple battery, with ensuing accidental death to the arresting officer. The conclusion to acquit is inevitable, for such a killing can only possibly be second degree murder if the arrest be lawful (and even then not that much under the West Virginia doctrine), and can be voluntary manslaughter only if the death result from intentionally inflicted violence of greater force than that reasonably necessary to defend against the battery which an unlawful arrest basically involves.

The acquittal in the principal case created a minor public furore, principally manifested by letters to the newspapers criticising the decision. This is perhaps to be understood, in view of the facts that the victim was a policeman, killed in the course of doing what he mistakenly conceived to be his duty, and that the defendant had a lengthy criminal record, described in the court's opinion.

But, the decision was sound as a matter of law, whether conflicts in the testimony were resolved for or against the traverser. Furthermore, even had the actual facts been far less favorable to him than they were, it is doubtful that anything more than a manslaughter verdict would have been appropriate. Had the arrest been lawful instead of unlawful, and had the West Virginia doctrine[35] been followed, a manslaughter verdict would have been the greatest possible in view of the slight force used in resisting. Conversely, with the arrest still unlawful, had defendant "in hot blood" wilfully killed the victim with a deadly weapon, the crime would still have been no more than manslaughter.[36]

Public indignation should be weighed against these matters. It is well that the decision subordinated the ephemeral public whim to "equal justice under law."

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[35] Of course, as pointed out *supra*, n. 26, the implications of the court's opinion negatived the West Virginia doctrine, and indicated a readiness to convict of second degree murder had the arrest been lawful.

[36] For a discussion of the doctrine that an intentional killing in resistance to lawful arrest will not be mitigated to manslaughter if there be "express malice", see Dickey, *Culpable Homicide in Resisting Arrest* (1933) 18 Corn. L. Q. 373, 381, where the author points out that all of the "express malice" cases have involved the factor that the defendant's manner of killing showed he was not actually provoked, i. e., that the killing was not "in hot blood".