

to the score achieved on the test for "each 6-month period of continuous, consecutive active service." Thus, two persons with identical experience are treated differently if one of them has had an interruption in his service. Although, in view of changing techniques, there may be a rational basis for giving greater weight to service and experience recently performed than to earlier service, there is no rational basis for disallowing all experience acquired prior to a break in service solely on the ground that there has been an interruption in the service.

Therefore, in answer to your second question, it is my opinion that an Act 78 Police and Fire Civil Service Commission, which includes experience in an examination for promotion, may not discriminate against an applicant for promotion solely on the ground that there has been a break in his service.

FRANK J. KELLEY,
Attorney General.

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PEACE OFFICERS: Use of firearms to control fleeing vehicle.

PEACE OFFICERS: Use of deadly force to arrest a person who has committed a crime.

WORDS AND PHRASES: "Deadly force" is that force which could result in the loss of human life.

A peace officer may not use deadly force when attempting to stop or arrest a person who has committed a misdemeanor.

A peace officer may use deadly force to effect the arrest of a felon unless a safe and speedy capture can be made without using deadly force.

A peace officer may use deadly force to arrest the occupants of a fleeing vehicle only where:

- (1) he knows or has probable cause to believe that a felony is involved;
- (2) he seeks only to control or stop the vehicle without intentionally harming the occupants;
- (3) a safer alternative would be useless or unreasonably dangerous to persons other than the occupants of the vehicle.

Opinion No. 5068

September 3, 1976.

The Honorable DeForrest Strang
State Representative
The Capitol
Lansing, Michigan

You have asked the following questions:

- (1) Do police officers have the authority to use firearms to control a fleeing vehicle?
- (2) Do our statutes presently clarify a police officer's authority in this situation?
- (3) Should the Legislature enact such a statute?

The term "deadly force" has been referred to in opinions and statutes as force which could result in the loss of human life. *United States v Peterson*, 483 F2d 1222, 1232; 157 US App DC 219 (CA DC, 1973) *cert den*, 419 US 1007, 94 S Ct 367, 38 L Ed 2d 244 (1973); *Sauls v Hutto*, 304 F Supp 124 (D LA, 1969); *Clark v Ziedonis*, 513 F2d 79, 83 (CA 7, 1975), NY Penal Law 35.30; Model Penal Code § 3.07(2)(b) p 56. Because the use of firearms, even by police officers, to halt a fleeing vehicle has a potential for the loss of human life, the use of firearms for this purpose will be deemed to be the use of deadly force.

Michigan law makes it a one year misdemeanor to refuse to stop a motor vehicle upon the lawful command of a police officer, MCLA 750.479a; MSA 28.747(1). Many jurisdictions have said that a police officer may not use deadly force when attempting to stop or arrest a person who has committed a misdemeanor. *Brown v State*, 1 Tenn Cr App 294, 441 SW2d 485, 488 (1969); *State v Elder*, 120 NE2d 508, 509 (Ohio, 1953); *People v Klein*, 305 Ill 141, 146; 137 NE 145, 148 (1922); *People v Piorowski*, 41 Cal App 34d 324, 328, ... P2d ..., 115 Cal Rptr 830, 833 (1974); *United States v Peterson*, *supra*, 38 L Ed 2d 244 (1973).

Michigan has long recognized that in a situation where a police officer seeks to arrest a felon, he may use deadly force to effect such an arrest. *People v Gonsler*, 251 Mich 443, 446 (1930). However, if a safe and speedy capture can be made without using deadly force, and such force is used, the arresting officers may be subject to criminal liability if the arrestee is harmed. *People v McCord*, 76 Mich 200, 206 (1889).

Another early decision of the court that comes into play states that "... no one can be justified in threatening or taking life in attempting to arrest on suspicion, without incurring serious responsibilities and where the life of an actual felon is taken by one who does not know or believe his guilt, such slaying is murder . . ." *People v Burt*, 51 Mich 199, 202 (1883).

The most recent guidelines of the Michigan Supreme Court on what force a police officer may use in arresting a misdemeanant were set forth in *Delude v Raasakka*, 391 Mich 296 (1974) where the court said that police officers may pursue a known misdemeanant across city limits in order to arrest and detain him. The court concluded:

"The police may pursue a violator outside the city limits in order to make an arrest and in doing so are clothed with the authority of a sheriff. The police have the right to use that force reasonable under the circumstances to effect such an arrest. The police also may take what action is reasonable to protect themselves in the course of an arrest of an attempted arrest. So much is clear." *Delude, supra*, at 303

In summary, it is clear that where the officer seeks to stop or arrest a known misdemeanant, deadly force may not be used. While the law allows police officers to use deadly force in attempting to arrest a felon, this course may only be taken when other methods have either failed or cannot succeed without endangering the lives of innocent citizens or the officers involved.

However, when an officer seeks to arrest the driver or the occupants of

a fleeing vehicle for a felony he knows, or has *probable cause*, to believe to have been committed, the situation changes.

The officer would be authorized to use deadly force:

- (1) Only to control or stop the fleeing vehicle but not to intentionally harm the occupants therein.
- (2) Only when safer alternative measures prove to be useless, or unreasonably dangerous to the officers and bystanders.

Your second question asks whether Michigan's statutes clarify the amount of force a police officer may use to stop a fleeing vehicle. Presently they do not.

Your third question asks for recommendations for new legislation. Three of the nation's largest states have already passed such legislation, New York (NY Penal Law § 35.30), California (Cal Penal Code § 196), Illinois (Ill Ann Stat 38 § 7-5). I am enclosing copies of these statutes for your consideration.

FRANK J. KELLEY,
Attorney General.

JUSTIFICATION

§ 35.30 Justification; use of physical force in making an arrest or in preventing an escape

1. A peace officer, in the course of effecting or attempting to effect an arrest, or of preventing or attempting to prevent the escape from custody, of a person whom he reasonably believes to have committed an offense, may use physical force when and to the extent he reasonably believes such to be necessary to effect the arrest, or to prevent the escape from custody, or to defend himself or a third person from what he reasonably believes to be the use or imminent use of physical force; except that he may use deadly physical force for such purposes only when he reasonably believes that:

- (a) The offense committed by such person was:
 - (i) a felony or an attempt to commit a felony involving the use or attempted use or threatened imminent use of physical force against a person; or
 - (ii) kidnapping, arson, escape in the first degree, burglary in the first degree or any attempt to commit such a crime; or
- (b) The offense committed or attempted by such person was a felony and that, in the course of resisting arrest therefor or attempting to escape from custody, such person is armed with a firearm or deadly weapon; or
- (c) Regardless of the particular offense which is the subject of the arrest or attempted escape, the use of deadly physical force is necessary to defend the peace officer or another person from what the officer reasonably believes to be the use or imminent use of deadly physical force.

2. The fact that a peace officer is justified in using deadly physical force

under circumstances prescribed in paragraphs (a) and (b) of subdivision one does not constitute justification for reckless conduct by such peace officer amounting to an offense against or with respect to innocent persons whom he is not seeking to arrest or retain in custody.

3. A person who has been directed by a peace officer to assist such peace officer to effect an arrest or to prevent an escape from custody may use physical force, other than deadly physical force, when and to the extent that he reasonably believes such to be necessary to carry out such peace officer's direction, unless he knows that the arrest or prospect arrest is not or was not authorized and he may use deadly physical force under such circumstances when:

(a) He reasonably believes such to be necessary to defend himself or a third person from what he reasonably believes to be the use or imminent use of deadly physical force; or

(b) He is directed or authorized by such peace officer to use deadly physical force unless he knows that the peace officer himself is not authorized to use deadly physical force under the circumstances.

4. A private person acting on his own account may use physical force, other than deadly physical force, upon another person when and to the extent that he reasonably believes such to be necessary to effect an arrest or to prevent the escape from custody of a person whom he reasonably believes to have committed an offense and who in fact has committed such offense; and he may use deadly physical force for such purpose when he reasonably believes such to be necessary to:

(a) Defend himself or a third person from what he reasonably believes to be the use or imminent use of deadly physical force; or

(b) Effect the arrest of a person who has committed murder, manslaughter in the first degree, robbery, forcible rape or forcible sodomy and who is in immediate flight therefrom.

§ 35.30 Justification; use of physical force in making an arrest or in preventing an escape

[See main volume for text of 1 to 4]

5. A guard or peace officer who is charged with the duty of guarding prisoners or an employee of the office of drug abuse services who is charged with the duty of securing the custody of a certified drug dependent person or a narcotic addict required to undergo a period of inpatient treatment as a condition of probation or a detained alleged drug dependent person in a detention facility, as that term is defined in section 205.00, or while in transit to or from a detention facility, may use physical force when and to the extent that he reasonably believes such to be necessary to prevent the escape of a prisoner or a certified drug dependent person or a narcotic addict required to undergo a period of inpatient treatment as a condition of probation or a detained alleged drug dependent person from a detention facility or from custody while in transit thereto or therefrom.

As amended L.1975, c. 667, § 32.

HOMICIDE

§ 196. Justifiable homicide; public officers

JUSTIFIABLE HOMICIDE BY PUBLIC OFFICERS. Homicide is justifiable when committed by public officers and those acting by their command in their aid and assistance, either—

1. In obedience to any judgment of a competent Court; or
2. When necessarily committed in overcoming actual resistance to the execution of some legal process, or in the discharge of any other legal duty; or,
3. When necessarily committed in retaking felons who have been rescued or have escaped, or when necessarily committed in arresting persons charged with felony, and who are fleeing from justice or resisting such arrest.

(Enacted 1872.)

Derivation: Stats. 1850, c. 99, p. 232, §§ 32, 33.

Cross References

Arrest,

Assistance, see § 839.

Force permitted where person flees or forcibly resists, see § 843.

Method of making arrest, amount of restraint, see § 835.

Refusing to aid officers, see § 150.

Burden of proof, see § 1105.

Escape from state prison, see §§ 107, 109, 4530, 4531.

Felony, defined, see § 17.

Justification of persons aiding officers, see § 698.

Overcoming resistance to process, sheriff or other officer, see § 723.

Rescue of prisoner from prison or prison road camp, see § 4550.

Retaking after escape or rescue, see § 854.

Law Review Commentaries

Proposed improvements in law of arrest.
(1951) 39 C.L.R. 96.

Library References

Homicide ← 103-106.

C.J.S. Homicide § 100.

Notes of Decisions

In general	1	Not justifiable	3
Admissibility of evidence	5	Questions	9, 10
Court, questions for	9	Court	9
Evidence	5, 6	Jury	10
Admissibility	5	Weight and sufficiency of evidence	6
Weight and sufficiency	6		
Examination of witnesses	7		
Instructions	8		
Jury questions	10	1. In general	
Offer of proof	4	Homicide necessarily or inadvertently	
Particular homicides	2, 3	committed by a public officer, or one	
Justifiable	2	acting under his authority, while in the	

exercise of his authority or duty, is generally justifiable or excusable. *People v. Mason* (1946) 165 P. 2d 481, 72 C.A.2d 699.

Officers may not beat a prisoner to death because they fear his unruly conduct may perhaps incite other prisoners to attempt to escape from jail. *People v. Peirce* (1941) 116 P.2d 797, 46 C.A. 2d 731.

While a peace officer when attempting an arrest may use all necessary

force to effect it, or may take the life of the supposed offender if necessary to save his own, there must be a real or apparent necessity to justify resort to such measure for his own safety or protection. *People v. Newsome* (1921) 195 P. 938, 51 C.A. 42.

Under § 835, an arresting officer or private citizen has the right to pursue an escaping prisoner and use whatever force may be necessary for his arrest, using whatever reasonable means are

CRIMINAL CODE OF 1961

Crim. Code § 7-4

available, if he acts from reasonable and honest convictions, he will not be held responsible, criminally, for a mistake as to the extent of the actual danger, where other judicious men would have been alike mistaken; at the same time, he has not the right to provoke a quarrel and take advantage of it, and then justify the killing of the party with whom he has provoked the quarrel. *Adams v. People*, 1868, 47 Ill. 376.

A man doing all within his power to take the life of another with a gun is not justified in so doing because the person assailed endeavors simply to dispossess the assailant of the weapon as a means of preserving his own life, although it may have contributed, unintentionally, to the discharge of the gun. *Murphy v. People*, 1865, 37 Ill. 447.

2. Sufficiency of evidence

Under evidence that defendant fought with deceased, left plant, armed himself with pistol, returned to plant at time deceased would be going home from work, that deceased was not armed and that defendant shot deceased twice after he had fallen, determination that defendant was aggressor and had not killed in self-defense was justified. *People v. Hill*, 1969, 116 Ill. App.2d 157, 253 N.E.2d 617.

Evidence that defendant charged with voluntary manslaughter was the aggressor verbally as well as physically, together with fact that decedent had no weapon and uttered no threat, was suf-

ficient to establish proof of defendant's guilt beyond a reasonable doubt, where no reasonable ground existed for defendant to believe that it was necessary for him to shoot decedent to prevent imminent death or great bodily harm to himself. *People v. Colson*, 1966, 70 Ill. App. 2d 447, 217 N.E.2d 348.

3. Instructions

Instruction, in murder prosecution, that defense of self-defense is not available to person who otherwise initially provokes use of force against himself except under certain circumstances was not error in view of question as to whether defendant or victim was initial aggressor. *People v. McBride*, App. 1970, 264 N.E.2d 446.

In prosecution for murder, wherein accused testified that he fired in self-defense, an instruction which disregarded the possibility of the accused, after the affray started, attempting to withdraw from the conflict, was misleading. *People v. Allen*, 1941, 378 Ill. 164, 37 N.E.2d 854.

Instruction that right of self-defense did not permit attack in first instance was proper, notwithstanding conflicting evidence as to whether accused was assailed. *People v. Hauke*, 1929, 335 Ill. 217, 167 N.E. 1.

Where, in a prosecution for homicide, the subject of self-defense was fully covered by other instructions, an instruction that, if defendant brought on

the difficulty, and was the first assailant, he could not avail himself of the right of self-defense in order to shield himself from the consequences of killing deceased, however imminent the danger in which he found himself dur-

ing the progress of the affray, unless it appeared that he in good faith had endeavored to decline any further struggle before the mortal shot was fired, was not error. *Mackin v. People*, 1905, 214 Ill. 232, 73 N.E. 344.

§ 7-5. Peace Officer's Use of Force in Making Arrest

(a) A peace officer, or any person whom he has summoned or directed to assist him, need not retreat or desist from efforts to make a lawful arrest, because of resistance or threatened resistance to the arrest. He is justified in the use of any force which he reasonably believes to be necessary to effect the arrest of any force which he reasonably believes to be necessary to defend himself or another from bodily harm while making the arrest. However, he is justified in using force likely to cause death or great bodily harm only when he reasonably believes that such force is necessary to prevent death or great bodily harm to himself or such other person, or when he reasonably believes both that:

- (1) Such force is necessary to prevent the arrest from being defeated by resistance or escape; and
- (2) The person to be arrested has committed or attempted a forcible felony or is attempting to escape by use of a deadly weapon, or otherwise indicates that he will endanger human life or inflict great bodily harm unless arrested without delay.

(b) A peace officer making an arrest pursuant to an invalid warrant is justified in the use of any force which he would be justified in using if the warrant were valid, unless he knows that the warrant is invalid.

Laws 1961, p. 1983, § 7-5, eff. Jan. 1, 1962.

Committee Comments—1961

Revised by Charles H. Bowman

This section and the one which follows state the principles of justification, for criminal purposes, in the use of force to make arrests after offenses have been committed. The privilege necessarily includes the arrestor's right of self-defense if the offender resists by assaulting the arrestor. These two sections, which seem logically to belong here among the substantive provisions which justify the use of force, are not concerned with a delineation of the right to make arrests or the procedure in so doing (that is, the definition of "lawful arrest"): those matters appear in the Code of Criminal Procedure (see Ill.Rev.Stat. ch. 38, article 107 (1963)), as they did in the Illinois Code of 1874 (Ill.Rev.Stat.1961, ch. 38, §§ 654 to 665, 669 to 673. The Wisconsin Legislative Council recommended that the entire subject of arrest, including justification, be treated in the procedural portion of the Code: 1950 Report, p. 34.)

The authorities generally agree that, in making a lawful arrest, an officer or his deputy is entitled to use such non-deadly force as is necessary to accomplish that duty, and he is not obligated to retreat when resisted. (See 1 Wharton's Criminal Law (12th ed.). § 829 and cases noted: Pearson, "The Right to Kill in Making Arrests," 28 Mich.L.Rev. 957 at 962 to 964 (1930); and Annotations, 3 A.L.R. 1170 and 42 A.L.R. 1200.) In determining the necessity for the use of force and the proper amount of force which is necessary to make an arrest, the

common-law rule and the usual interpretation thereof which forbids the use of any more force than necessary to effect the arrest, recognizes the arrestor's reasonable, though mistaken, belief of necessity, as distinguished from actual necessity. (*E.g.*, *State v. Rose*, 142 Mo. 418, 44 S.W. 329 (1898). See Perkins, "The Law of Arrest," 25 Iowa L.Rev. 201 at 266, 276 (1940).)

The officer's right to use deadly force is, of course, much more limited. Two different situations must be considered: first, that in which the offender's forcible resistance threatens the officer with death or great bodily harm, thus raising the issue of self-defense; second, that in which the resistance takes the form of flight or other action which does not threaten the safety of the officer, but the circumstances are such that the safety of other persons is endangered if the offender is not immediately arrested. As to the first, the ordinary law of self-defense applies, whether the officer would or would not be justified in using deadly force to make the arrest. (See Pearson, "The Right to Kill in Making Arrests," 28 Mich.L.Rev. 957 (1930); Waite, "Some Inadequacies in the Law of Arrest," 29 Mich.L.Rev. 448

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TOWNSHIPS: Financing of police protection.

POLICE: Financing of township police protection.

MUNICIPAL FUNDS: Borrowing in an anticipation of receipt of revenue sharing funds.

A township board may maintain and operate its police department by:

1. purchasing police motor vehicles, apparatus, equipment and housing with available funds not to exceed 10 mills in any 1 year;
2. appropriating, without millage limitations, amounts necessary for maintenance and operation; and/or
3. levying a special assessment and appropriating general funds, above those raised by special assessment.

Where a determination has been made that there has been a population increase in a municipality, it may borrow in anticipation of receipt of state revenue sharing funds up to a maximum of 50% of the total payments received in the last preceding fiscal year.

Opinion No. 5106

September 7, 1976.

Honorable John T. Bowman
State Senator
The Capitol
Lansing, Michigan

You have asked for my opinion on matters relating to township finance. Essentially, your first question is: What is the limit on moneys that may be raised by a township for the support of the township police department?

1951 PA 181, § 1; MCLA 4.1851; MSA 5.2640(31), prior to enactment of 1974 PA 129, provided for a limitation of two and one-half mills on annual township appropriations for maintenance or operation of a police department. Similarly, 1951 PA 181, *supra*, § 2; MCLA 41.852; MSA