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Burgess v. State, 313 So. 2d 479 (Fla. 2d Dist. Ct. App. 1975), cert. denied, 326 So. 2d 441 (Fla. 1976)

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have refused to find automobile manufacturers liable until the legislature establishes definitive safety standards to apply.[94] Nonetheless, jury decisions reached under strict judicial supervision can indicate to the industry what the community regards as unreasonably dangerous design features. The inability of the courts to fully police the industry does not justify a failure to provide a forum for the injured plaintiff. The Supreme Court of Florida made it clear in *Hoffman* that the most pressing task of the courts is not to regulate manufacturers but to secure just and adequate compensation to accident victims who have a good cause of action.[95] The *Evancho* decision is a substantial step in that direction.

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Criminal Law—ARREST—COURT UPHOLDS THE RIGHT TO RESIST AN UNLAWFUL ARREST, BUT ISSUE SHOULD BE REVISITED UNDER NEW STATUTE—*Burgess v. State*, 313 So. 2d 479 (Fla. 2d Dist. Ct. App. 1975), *cert. denied*, 326 So. 2d 441 (Fla. 1976).

While on a routine midmorning patrol, Officer Gary Hitchcox observed two men walking down a street in St. Petersburg. One man left the other and cut through a yard, thereby arousing the officer's suspicion. Officer Hitchcox circled the block twice and again came upon the same two men walking together. One of the two split off and started to cross a field. When the remaining man, Leon Norman Burgess, spotted the officer's police cruiser, he yelled something to

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94. *E.g.*, Schemel v. General Motors Corp., 384 F.2d 802 (7th Cir. 1967); Evans v. General Motors Corp., 359 F.2d 822 (7th Cir. 1966); Alexander v. Seaboard Air Line R.R., 346 F. Supp. 320 (W.D.N.C. 1971).

In 1966 the United States Congress enacted the Traffic and Motor Vehicle Safety Act, 15 U.S.C. §§ 1381–1431 (1970), authorizing the Secretary of Transportation to establish mandatory federal motor vehicle safety standards. Since then seatbelts, padded interiors, collapsible steering columns, and other safety devices have become commonplace. In the Safety Act, Congress specifically provided that "[c]ompliance with any Federal motor vehicle safety standard issued under this subchapter does not exempt any person from any liability under common law." 15 U.S.C. § 1397(c) (1970).

Apparently no court has yet considered whether a private remedy exists under the Traffic and Motor Vehicle Safety Act. Doak v. City of Claxton, Ga. 390 F. Supp. 753, 761 (S.D. Ga. 1975). Federal courts have inferred the existence of a civil remedy under some federal safety statutes, however, if certain enumerated conditions are met. *Id.* at 759–61.

95. 280 So. 2d 431, 436–37 (Fla. 1973). *See* text accompanying notes 44–45 *supra*.

the other, who then began to run. Leaving the cruiser, Officer Hitchcox pursued the man but could not catch him. After the chase, Officer Hitchcox tried unsuccessfully to question Burgess regarding the other man and his own identity. Officer Hitchcox then attempted to place Burgess under arrest for obstructing a police officer without violence. A fight ensued, and two back-up officers called to the scene by Officer Hitchcox were injured.[1]

Burgess was charged with resisting arrest with violence contrary to section 843.01, Florida Statutes,[2] and was tried by jury. After the State rested its case, Burgess moved for a judgment of acquittal.[3] Upon denial of the motion, Burgess submitted a nolo contendere plea to the lesser offense of resisting arrest without violence, reserving the right to appeal the trial court's denial of his motion for judgment of acquittal.[4]

On appeal, the Second District Court of Appeal reversed, holding that Burgess could not be found guilty of resisting arrest because the evidence failed to show any lawful basis for the arrest.[5] At the same time, the court expressed great dissatisfaction with the Florida common-law rule that a person may not be found guilty of resisting arrest if the arrest is unlawful.[6] But, as district appeal courts may not enunciate a rule of law inconsistent with precedent established by the Supreme Court of Florida,[7] the *Burgess* court certified the following question to the Supreme Court of Florida: "May one forcefully resist an unlawful

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1. Burgess v. State, 313 So. 2d 479 (Fla. 2d Dist. Ct. App. 1975).

2. FLA. STAT. § 843.01 (1975) provides in part: "Whoever knowingly and willfully resists, obstructs or opposes any . . . municipal police officer . . . in the lawful execution of any legal duty, by offering or doing violence to the person of such officer or legally authorized person, shall be guilty of a felony of the third degree . . . ."

3. 313 So. 2d at 480.

4. Ordinarily a plea of guilty or nolo contendere waives the right to appeal. In Florida, however, a criminal defendant may plead nolo contendere conditioned on a reservation for appellate review, if the question to be reviewed is one of law. *See* Cheseborough v. State, 255 So. 2d 675 (Fla. 1971), *cert. denied*, 406 U.S. 976 (1972); State v. Ashby, 245 So. 2d 225 (Fla. 1971).

5. Under Florida's Stop and Frisk Law, FLA. STAT. § 901.151 (1975), it is permissible for a police officer to briefly detain an individual for the purpose of making a reasonable inquiry into a suspicious situation. But failure to disclose identity or other information forms no separate basis for an arrest. *See* Terry v. Ohio, 392 U.S. 1 (1968).

6. The *Burgess* court, quoting the Supreme Court of Alaska in Miller v. Alaska, 462 P.2d 421, 427 (Alas. 1969), stated:

> We feel that the legality of a peaceful arrest should be determined by courts of law and not through a trial by battle in the streets. It is not too much to ask that one believing himself unlawfully arrested thereafter seek his legal remedies in court . . . . [T]he old common law rule has little utility to recommend it under our conditions of life today.

313 So. 2d at 483.

7. Hoffman v. Jones, 280 So. 2d 431, 433 (Fla. 1973).

arrest by a person whom he knows or has reason to know to be an authorized peace officer?"[8]

In a brief opinion, the supreme court refused to answer this question. Since Burgess, charged with resisting arrest with violence, had pleaded nolo contendere to a lesser offense of resisting arrest without violence, the court deemed it inappropriate to consider the certified question.[9] Nonetheless, the court must surely face this issue in the future.[10] The purpose of this comment is to suggest that the answer to this question should be in the negative: the right to resist an unlawful arrest should be abolished.

The common-law right to resist an unlawful arrest was recognized in England as early as 1710.[11] The doctrine "developed when long imprisonment, often without the opportunity of bail, 'gaol fever,' physical torture, and other great dangers were to be apprehended from arrest, whether legal or illegal."[12] Resistance to an unlawful arrest by an eighteenth-century peace officer did not involve the serious dangers which it involves today.[13] Prison conditions at that time were so deplorable that one can easily understand why a citizen would want to resist an unlawful arrest. One writer had these comments to make about his observations of the eighteenth-century English prisons:

> There are prisons, into which whoever looks will, at first sight of the people confined, be convinced that there is some great error in

8. Rather than ruling contrary to precedent established by the Supreme Court of Florida, district courts of appeal may certify a matter to be a question of great public interest, which the Florida Supreme Court may consider, if it chooses, by writ of certiorari. FLA. CONST. art. V, § 3(b)(3).

9. State v. Burgess, 326 So. 2d 441 (Fla. 1976).

10. Florida's new resisting arrest statute, which became effective July 1, 1975, was not controlling in this case. FLA. STAT. § 776.051(1) (1975) provides: "A person is not justified in the use of force to resist an arrest by a law enforcement officer who is known or reasonably appears to be a law enforcement officer."

This statute is unclear in that it does not specify whether it prohibits resistance to unlawful as well as lawful arrests. A survey of the materials contained in the Florida Legislative Library Service regarding the passage of H.R. 2179 (1975), which later became FLA. STAT. § 776.051, revealed no significant legislative history relating to this aspect of the bill.

California has a similar statute, and the courts there have consistently held the statute to prohibit forceful resistance to unlawful as well as lawful arrests. People v. Curtiss, 450 P.2d 33 (Cal. 1968). *But see* State v. Mobley, 83 S.E.2d 100 (N.C. 1954), where the North Carolina Supreme Court has held that the offense of resisting arrest presupposes a *lawful* arrest.

11. The Queen v. Tooley, 92 Eng. Rep. 349 (K.B. 1710).

12. Warner, *The Uniform Arrest Act*, 28 VA. L. REV. 315, 330 (1942).

13. "Constables and watchmen were armed with staves and swords, and the person to be arrested might successfully hold them off with his own weapon and thus escape." *Id.* at 330.

> the management of them: their sallow, meagre countenances declare, without words, that they are miserable. Many who went in healthy, are in a few months changed into emaciated objects. Some are seen pining under diseases, "Sick, and in prison"; expiring on the floors, in loathsome cells, of pestilential fevers, and the confluent small-pox . . . .[14]

In the United States today, the weight of precedent falls with the common-law rule.[15] As early as 1900, the Supreme Court of the United States reversed a murder conviction, stating that the defendant had the right to use such force as was absolutely necessary to resist an unlawful arrest.[16]

Florida courts have generally agreed with those authorities which hold that an unlawful arrest even by a known peace officer may be resisted.[17] The Florida rule, however, has its limitations. An arrestee

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14. J. HOWARD, THE STATE OF PRISONS 1 (1929). The following account of a contemporary American prison suggests that prison conditions today are not entirely unlike those of eighteenth century England:

> Robert Jordan had been sitting there in the darkness for some time. The isolation cell was small, only six feet by eight. But the lack of ventilation and light was what bothered him first. He sat as close as he could to the inner cell door, a sliding row of bars, because the rear and side walls of the cell were flecked with the urine and excrement of former occupants. . . . Three feet away, a steel flap covered the only window. The window could let in some light but guards kept it closed.
>
> Twice a day, a guard opened the steel outer door, crossed the short vestibule and slid some food and a small white styrofoam cup of water through a slot in the inner cell door. Twice a day, another guard flushed Jordan's toilet, a circular hole in the concrete floor, from outside the cell. Sometimes they left the outer door open while he ate. The guards never forgot to serve the food, but they sometimes forgot to flush the toilet or to leave the outer cell door open. He ate with his hands but he had trouble keeping them clean because sometimes he ran out of his daily ration of toilet paper and there was no wash basin in the cell. Sometimes he couldn't eat because the smell was so bad.

M. YEE, THE MELANCHOLY HISTORY OF SOLEDAD PRISON 11 (1970). *See* Jordan v. Fitzharris, 257 F. Supp. 674, 680 (N.D. Calif. 1966), where Soledad prisoner Robert Charles Jordan was granted injunctive relief from what the court described as "conditions . . . of a shocking and debased nature."

15. *See, e.g.*, United States v. Di Re, 332 U.S. 581 (1948); United States v. Heliczer, 373 F.2d 241 (2d Cir. 1967).

16. Bad Elk v. United States, 117 U.S. 529 (1900). In Wainwright v. New Orleans, 392 U.S. 598 (1968), the Supreme Court was confronted with the question of whether a person has a constitutional right to resist an unlawful arrest. The court did not reach the issue and dismissed the writ as improvidently granted. Justice Douglas and Justice Warren, both dissenting, intimated that the right may be basic to the fourth amendment.

17. *See, e.g.*, Licata v. State, 24 So. 2d 98 (Fla. 1945); Gay v. State, 3 So. 2d 514 (Fla. 1941); Roberson v. State, 29 So. 535 (Fla. 1901); E.A.S. Juvenile v. State, 291 So. 2d 61 (Fla. 1st Dist. Ct. App. 1974); Kirby v. State, 217 So. 2d 619 (Fla. 4th Dist. Ct. App. 1969).

may not resist an arrest for the violation of an unconstitutional statute if the statute has not yet been so declared,[18] and a person being unlawfully arrested may not use unreasonable force in resisting the arrest.[19]

Two principles support the common-law doctrine: (1) an illegal arrest is an assault upon the person arrested, and (2) any unlawful interference with the fundamental right of personal liberty may be resisted.[20] One commentator endorsing the common-law doctrine eloquently stated:

> [I]t is certainly consistent with fundamental fairness to excuse persons who are provoked to reasonable resistance by oppressive and unlawful state action. The purpose of the right is not to encourage violent attacks on policemen, but to preserve the sense of personal liberty inherent in the right to reject arbitrary orders. To permit the police to provoke individuals into committing the crime of resisting arrest, creates a trap for citizens which must, in the long run, injure the integrity of the legal system.[21]

The abrogation of the common-law doctrine could resurrect an instrument of oppression. A mendacious policeman could attempt to make a patently false arrest and thereby infuriate the average citizen into some form of resistance. Thereupon the arrestee would face the

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18. Canney v. State, 298 So. 2d 495 (Fla. 2d Dist. Ct. App. 1973), *cert. denied*, 423 U.S. 892 (1975).

19. The law in Florida on the subject is most clearly summarized in Roberson v. State, 29 So. 535, 538–39 (Fla. 1901). Quoting Briggs v. Commonwealth, 82 Va. 554 (1886), the Supreme Court of Florida set forth the following principles:

> "'If one, even an officer, undertakes to arrest another unlawfully, the latter may resist him. . . . But the doctrine * * * that nothing short of an endeavor to destroy life will justify the taking of life prevails in this case.' . . . [W]hen the mere fact of an illegal arrest, attempted or consummated, appears, if the one suffering it kills the officer or other arresting person, whether with a deadly weapon or other means, he may rely on the presumption that his mind was beclouded by passion; but, if actual malice is affirmatively proved, the homicide will be murder."

See also Alday v. State, 57 So. 2d 333 (Fla. 1952).

20. Curtiss v. United States, 222 A.2d 840, 842 (D.C. Ct. App. 1966). The *Curtiss* court stated that "an illegal arrest is an assault and battery, and one so arrested may either turn and walk away or match force with force to effect his escape." *See also* People v. Cherry, 121 N.E.2d 238 (N.Y. 1954).

21. Chevigny, *The Right To Resist an Unlawful Arrest*, 78 YALE L.J. 1128, 1150 (1969). Chevigny suggests the following rationale for allowing the provoked citizen to be acquitted of charges stemming from his alleged obstruction of justice: "The policeman has initiated the situation, has confronted the citizen with an utterly arbitrary order, and has enforced it by an act of coercion intended primarily to maintain his authority. Such an arrest makes it difficult for any person who values his liberty to submit." *Id.* at 1146.

charge of resisting arrest, which would stand regardless of the illegality of the initial arrest.[22] The Court of Appeals of New York has aptly described the offensive nature of an unlawful arrest: "For most people, an illegal arrest is an outrageous affront—the more offensive because under color of law—to be resisted as energetically as a violent assault."[23]

The common-law doctrine of the right to resist arrest has come under extensive criticism, however.[24] At least four states have abolished it by judicial decision,[25] and another five by statute.[26] Both the Model Penal Code of the American Law Institute and the Uniform Arrest Act oppose the right of a citizen to forcefully resist an unlawful arrest.[27]

The original bases of the right to resist an unlawful arrest are almost nonexistent now. In the first place, police weaponry today is so powerful that a citizen is unlikely to escape an arrest, in contrast to his eighteenth-century English counterpart.[28] Resisting arrest today is a temporary evasion, merely prolonging a potentially violent confrontation with attendant risks of injury to arrestee, police officers, and innocent bystanders. Furthermore, as the *Burgess* court recognized, the resisting citizen has no reliable method for assessing the legality of his arrest. The legal criterion for a lawful arrest is not the absolute guilt of the arrestee, and a person innocent of crime or wrongdoing may be lawfully arrested—a fact unknown to most laymen.[29] In addi-

22. *Id.* at 1150.

23. People v. Cherry, 121 N.E.2d at 240.

24. *See, e.g.*, Warner, *The Uniform Arrest Act*, 28 VA. L. REV. 315, 330–31 (1942); Comment, *Criminal Law: The Right To Resist an Unlawful Arrest: An Out-dated Concept?*, 3 TULSA L.J. 40 (1966).

25. The right to resist an unlawful arrest has been abolished by judicial decision in Alaska, Idaho, New Jersey and Ohio. Miller v. State, 462 P.2d 421 (Alas. 1969) (no right to resist peaceful arrest); State v. Richardson, 511 P.2d 263 (Idaho 1973), *cert. denied*, 414 U.S. 1163 (1974) (no right to resist with force or weapon); State v. Koonce, 214 A.2d 428 (N.J. 1965) (no right to resist with force); City of Columbus v. Fraley, 324 N.E.2d 735 (Ohio 1975), *cert. denied*, 423 U.S. 872 (1975) (no right to resist in absence of excessive or unnecessary force by arresting officer).

26. The common-law doctrine has been abolished by statute in California, Delaware, Illinois, New Hampshire, and Rhode Island. CAL. PENAL CODE § 834a (West 1970); DEL. CODE ANN. tit. 11, § 1257 (1975); ILL. ANN. STAT. ch. 38, § 7–7 (Smith-Hurd 1972); N.H. REV. STAT. ANN. § 594:5 (1974); R.I. GEN. LAWS 12–7–10 (1956).

27. MODEL PENAL CODE art. 3, § 3.04(2)(a)(i) (Proposed Official Draft 1962); UNIFORM ARREST ACT § 5.

28. People v. Curtis, 450 P.2d 33, 36 (Cal. 1969). The Supreme Court of California noted that "in a day when police are armed with lethal and chemical weapons, and possess scientific communication and detection devices readily available for use, it has become unlikely that a suspect . . . can escape from or effectively deter an arrest . . . ."

29. The constitutional standard for a valid arrest is "probable cause." Beck v. Ohio, 379 U.S. 89, 91 (1964). The Supreme Court of Florida has defined "probable cause" as follows:

> The facts constituting probable cause need not meet the standard of conclusiveness and probability required of the circumstantial facts upon which conviction

tion, the legality of an arrest is often a matter of such close debate that reasonable persons may differ.[30] Finally, a person arrested today has the right to bail and an opportunity to appear before a magistrate for immediate arraignment and preliminary hearing, in contrast to the eighteenth-century arrestee's long wait in prison for the royal judges to arrive. These contemporary facts, coupled with the civil remedies available for those unlawfully arrested,[31] lend credence to the view that a citizen, believing himself to be unlawfully arrested, need not use the forum of the public streets for the vindication of his rights.

It appears, therefore, that the modern rule as advocated by the Second District Court of Appeal, which prohibits resistance to an arrest whether lawful or unlawful, is more conducive to a safe and orderly society. Citizens should not have the dangerous option to flee and hide whenever a peace officer attempts an arguably unlawful arrest. Thus, while the common-law doctrine encourages violence, the modern rule inhibits violence. The Florida Supreme Court should adopt the modern view.[32]

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must be based. The sufficiency of the officer's knowledge is not to be judged by an analysis of the effect of each isolated circumstance. Rather, it is to be measured by the test of what a reasonable man would have believed had he known all of the facts known by the officer.

State v. Outten, 206 So. 2d 392, 397 (Fla. 1968) (citations omitted).

30. The Supreme Court of Florida has held that in a suit for false imprisonment where there are conflicting facts on which reasonable persons could differ, the jury and not the court makes the determination of whether probable cause for arrest existed. Spicy v. City of Miami, 280 So. 2d 419, 421 (1974), *cert. denied*, 414 U.S. 1131 (1974).

31. In Florida, the civil remedies available are damages for false arrest, false imprisonment, and malicious prosecution. *See* Sanchez v. Buchanan, 175 So. 2d 50 (Fla. 3d Dist. Ct. App. 1965). Illustrating the difficulty of prevailing in an action for false arrest are Carter v. City of St. Petersburg, 319 So. 2d 602 (Fla. 2d Dist. Ct. App. 1975), and City of Jacksonville v. Walton, 318 So. 2d 546 (Fla. 1st Dist. Ct. App. 1975).

32. The legal maxim, *cessante ratione legis, cessat et ipsa lex*, should apply: "The reason of the law ceasing, the law itself also ceases." BLACK'S LAW DICTIONARY 288 (4th ed. 1968). The common-law doctrine which allows a citizen to resist an unlawful arrest should not survive the expired reasons upon which it was founded.