



Sacramento County District Attorney's Office

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MEMORANDUM

DATE: March 22, 2019

TO: Chief Ronald A. Lawrence
Citrus Heights Police Department
6315 Fountain Square Drive
Citrus Heights, CA 95621

FROM: Sacramento County District Attorney's Office

RE: Officer-Involved Shooting Case No. CH-17-09215
Shooting Officer: Shaun Gualco #270
Person Shot: Nickolas Russo (DOB 1/25/93)

The District Attorney's Office has completed an independent review of the above-referenced officer-involved shooting. Issues of civil liability, tactics, and departmental policies and procedures were not considered. We only address whether there is sufficient evidence to support the filing of a criminal action in connection with the shooting of Nickolas Russo. For the reasons set forth, we conclude that the shooting was lawful.

The District Attorney's Office received and reviewed written reports and other items, including: Citrus Heights Police Department report number 17-09215 and its related dispatch logs and recordings, witness interview recordings, and supplemental reports; surveillance videos; Sacramento Sheriff's Department report number 17-386618 and in-car camera footage; Sacramento County District Attorney's Office Laboratory of Forensic Services Physical Evidence Examination, Crime Scene, Blood Alcohol, and Toxicology Reports.

FACTUAL SUMMARY

On November 19, 2017, at approximately 2:40 a.m., Citrus Heights Police Sergeant Shaun Gualco was on patrol in full uniform and in a fully marked patrol vehicle. He was on Auburn Boulevard near the Ranch Motel when he noticed a two-door Mercedes Benz parked in the motel parking lot in front of a room. Sergeant Gualco was familiar with the Ranch Motel and knew it to be a location where both prostitution and drug use took place. As Sergeant Gualco pulled into the parking lot, he observed Nickolas Russo in the driver's seat of the Mercedes and a female in the front passenger seat. The female was leaning over towards Russo. The passenger door was open. Sergeant Gualco saw Russo and the female focusing on a plastic bag in Russo's lap.

Sergeant Gualco parked perpendicular to the Mercedes approximately one parking stall away. The female passenger and Russo were the only occupants of the vehicle.

As Sergeant Gualco exited his vehicle and walked towards the Mercedes, Russo and the female also exited their vehicle. Sergeant Gualco noticed Russo was wearing a big black jacket and had tattoos on his face and neck. Sergeant Gualco believed one tattoo could have been affiliated with a prison gang. It appeared to Sergeant Gualco that Russo was trying to shield his left side. At this point, Russo's left hand was not visible.

Sergeant Gualco asked Russo if the car was his. Russo said it was not. Sergeant Gualco inquired if they had a room at the motel. They said they did not. Based on those answers, Sergeant Gualco asked them what they were doing there. Russo then stated they were going to their room. This response was inconsistent with the previous answer, so Sergeant Gualco asked Russo if he had any identification. Russo immediately stated he did not have identification. While this conversation took place, Russo still appeared to be purposefully concealing his left side as he did not face Sergeant Gualco. Russo then verbally identified himself as "Michael Smith" with a birthdate of January 20, 1993. Russo denied being on probation or parole. Russo's eyes appeared to be red and "glossy" and he was acting nervously. Based on his training and experience, Sergeant Gualco believed Russo was under the influence of one or more drugs. Sergeant Gualco believed Russo was giving a false name and felt his overall behavior was suspicious.

While standing outside the vehicle, Sergeant Gualco could see cash folded in half stacked on the ashtray inside the Mercedes. Sergeant Gualco believed this was consistent with drug dealers separating denominations when selling drugs. Sergeant Gualco asked Russo to show him his left hand. Russo complied and produced a cell phone, a bag of marijuana, and other miscellaneous items. Believing a drug transaction might be taking place, Sergeant Gualco was concerned Russo might be armed. Sergeant Gualco asked Russo if he had any weapons and he said he did not. However, based on his observations, Sergeant Gualco decided to pat search Russo to confirm he did not have any weapons.

Sergeant Gualco instructed Russo to place his hands behind his head, interlock his fingers, and spread his feet. Russo was tense as Sergeant Gualco grasped his hands to restrain his movement. Initially, Sergeant Gualco patted down Russo's right side and did not find any weapons. As Sergeant Gualco transitioned to the left side, he felt a gun in the area of the jacket's pocket. Sergeant Gualco asked why Russo did not mention he had a gun. Russo said he did not know. Sergeant Gualco instructed Russo to not do anything "stupid," then communicated with dispatch for assistance.

Sergeant Gualco decided to retrieve the gun before placing Russo in handcuffs. Sergeant Gualco reached into Russo's exterior pocket and quickly realized the gun was not there. He then reached into the interior pocket but the gun was also not there. Sergeant Gualco believed there was a third pocket, but he was not sure how to access it. At this point, Sergeant Gualco noticed the female appeared to be leaning inside the car. He instructed her to show her hands and to sit on the curb. Since he could not immediately access the gun, Sergeant Gualco intended to handcuff Russo and then grab the weapon. Because Russo was wearing gloves and the jacket, it

was difficult for Sergeant Gualco to apply the handcuffs. As Sergeant Gualco attempted to manipulate the clothing to get the handcuffs on, Russo broke free from his grasp and ran towards Auburn Boulevard.

As he ran off, Russo placed his hands near the area where Sergeant Gualco felt the gun. Sergeant Gualco pursued him and believed Russo was trying to put distance between them to retrieve the gun and shoot him. Sergeant Gualco concluded he had a very short amount of time to retrieve his service weapon and fire at Russo before Russo fired at him. Sergeant Gualco drew his service weapon and fired multiple shots. Sergeant Gualco could not see if Russo was struck by the gunshots. As he continued to run, Russo's hands were still positioned on or near the gun. Sergeant Gualco ceased firing, reassessed the situation, and determined Russo was still trying to get the gun as his hands had not moved. Sergeant Gualco fired an additional shot and Russo fell to the ground in the restaurant parking lot next to the motel. Sergeant Gualco concealed himself behind a bush, stopped shooting, and ordered Russo to show his hands. Russo complied. Sergeant Gualco requested an ambulance. Additional officers responded, retrieved Russo's gun, and provided medical assistance. Sacramento Metropolitan Fire and Medic personnel arrived and transported Russo to Mercy San Juan Hospital for treatment of his injuries.

Investigators determined Sergeant Gualco fired eight rounds from his .40 caliber Glock service weapon. Russo was shot four times - twice in his left arm, once in his back, and once in the left leg. A .38 caliber revolver was recovered in the interior lining of Russo's jacket. The revolver's cylinder had six chambers. Four of the chambers contained expended casings. The remaining two chambers were empty.

Additionally, pursuant to a search warrant, investigators examined Russo's cell phone and discovered numerous text messages relating to drug sales. The Sacramento County District Attorney's Office Laboratory of Forensic Services analyzed Russo's blood which revealed the presence of methamphetamine, amphetamine, delta-9-THC, and 11-nor-9-carboxy-THC.

A motel surveillance video captured Russo entering the office and securing a room the previous evening. Later, Russo enters the motel parking lot in the black Mercedes and parks. The passenger door then opens. Approximately two minutes later, Sergeant Gualco enters the parking lot and stops his patrol vehicle perpendicular to the passenger side of the black Mercedes approximately one parking space away. Sergeant Gualco approaches Russo and the passenger, who are now out of the vehicle. Sergeant Gualco uses a flashlight to illuminate the area, which is already well-lit from the parking lot lights. Russo is standing sideways, between the driver side of the Mercedes and the vehicle next to it. Russo stands with his right side closer to Sergeant Gualco, not directly facing him. After a brief conversation, Russo places some items on the vehicle. Russo then places his hands behind his head and Sergeant Gualco approaches and places his hand over Russo's hands and pats down Russo's right side. Sergeant Gualco transitions over to Russo's left side. He then brings Russo's left hand down and his attention is directed toward the passenger who is leaning against the closed passenger door. As Sergeant Gualco's attention is on the passenger, Russo breaks free from his grasp and runs toward Auburn Boulevard. Sergeant Gualco immediately follows, draws his service weapon, and fires. Both Russo and Sergeant Gualco quickly exit the frame and the remaining gunshots are not captured on camera.

On May 23, 2018, in Sacramento Superior Court case number 18FE001334, Russo pleaded no contest to a felony violation of Penal Code Section 29800(a)(1) (felon in possession of a firearm) and to a misdemeanor violation of Penal Code Section 148(a)(1) (resisting a peace officer). Russo was sentenced to four years in state prison.

LEGAL ANALYSIS

A police officer has the right to stop and temporarily detain someone for investigation whenever the officer has a reasonable suspicion some criminal activity is occurring or is about to occur and that the person was, is, or is about to be involved in that criminal activity. (*Terry v. Ohio* (1968) 392 U.S. 1, 28-30; *People v. Parrott* (2017) 10 Cal.App.5th 485, 492, 494-495; *People v. Walker* (2012) 210 Cal.App.4th 1372, 1381.) A pat down for weapons is constitutionally permissible during a lawful investigatory stop when the officer reasonably suspects, based on the totality of the circumstances, that the person stopped is armed and dangerous. (*Terry v. Ohio, supra*, 392 U.S. at p. 27; *People v. Parrott, supra*, 10 Cal.App.5th at pp. 495-496.)

During a lawful investigatory stop, pat down for weapons, or arrest, the officer may use reasonable force to affect arrest or detention, to prevent escape, or to overcome resistance. (*Tennessee v. Garner* (1985) 471 U.S. 1, 11; *Graham v. Connor* (1989) 490 U.S. 386, 396; *Kortum v. Alkire* (1977) 69 Cal.App.3d 325; California Penal Code Section 835a; CALCRIM 2670.) The person being detained or arrested may be subjected to such restraint as is reasonably necessary for his arrest and detention and has a concomitant duty to permit himself to be detained. (*People v. Allen* (1980) 109 Cal.App.3d 981, 985; CALCRIM 2670, 2671, 2672.) Officers do not need to retreat or desist their efforts if the person they are arresting or detaining resists or threatens resistance; nor shall the officer be deemed an aggressor or lose the right to self-defense by use of reasonable force. (California Penal Code section 835a.)

In the present matter, Russo's vehicle was in a location associated with drug activity and prostitution. Russo was evasive towards Sergeant Gualco when he provided inconsistent responses and a false name. Russo appeared to be under the influence of one or more drugs. Russo also appeared to be purposefully concealing his left side, as if he was concealing something that he did not want a law enforcement officer to find. The folded cash placed in the ashtray was consistent with someone engaged in drug sales. Based on these circumstances, Sergeant Gualco had reasonable suspicion to detain Russo to investigate whether Russo was involved in criminal activity. Furthermore, those circumstances coupled with the purposeful manner in which Russo concealed his left side gave Sergeant Gualco reasonable cause to pat Russo down for weapons. Upon feeling the handgun hidden in Russo's jacket, Sergeant Gualco had probable cause to arrest Russo for carrying a concealed firearm on his person. By running away from Sergeant Gualco, Russo provided further probable cause to arrest him for resisting a peace officer. Russo had a duty to submit to detention and arrest; however, he failed to do so and fled with his gun. His actions gave Sergeant Gualco every indication he was going to resist any attempt to detain or arrest him.

A peace officer may use deadly force under circumstances where it is reasonably necessary for self-defense or defense of another. California law permits the use of deadly force if the officer actually and reasonably believed he was in imminent danger of death or great bodily injury. (CALCRIM 505, 507, 3470.) An officer who uses deadly force must actually believe that force is necessary. The appearance of danger is all that is necessary; actual danger is not. (*People v. Toledo* (1948) 85 Cal.App.2d 577; *People v. Jackson* (1965) 233 Cal.App.2d 639.) Thus, the officer may employ all force reasonably believed necessary. (CALCRIM 3470.) The reasonableness of a particular use of force must be judged from the perspective of a reasonable officer on the scene, rather than with 20/20 hindsight. The calculus of reasonableness must embody allowance for the fact that police officers are often forced to make split-second judgments—in circumstances that are tense, uncertain, and rapidly evolving—about the amount of force that is necessary in a particular situation. (*Graham v. Connor* (1989) 490 U.S. 386.)

As Russo began to run, Sergeant Gualco believed Russo was reaching for the gun based on the location of his hands. It appeared Russo was trying to create some distance between them, so he could shoot Sergeant Gualco. Fearing for his life, Sergeant Gualco made a split-second decision to use deadly force because Russo continued to run with his hands positioned on his left side where the gun was located. Sergeant Gualco reasonably believed Russo could immediately access the gun and begin firing at him. Russo only complied with Sergeant Gualco's commands after he fell to the ground. Given the rapidly evolving circumstances, and inherent danger that existed in this situation, Sergeant Gualco used reasonable force to defend himself and apprehend Russo.

CONCLUSION

Sergeant Gualco was justified in shooting Russo to defend himself. His conduct under these circumstances was lawful. Accordingly, we will take no further action in this matter.

cc: Citrus Heights Police Department Sergeant Jeremy Garrison #262
Citrus Heights Police Department Detective Nathan Hutson #378
Citrus Heights Police Department Detective Deborah Bayer-Evans #303
Citrus Heights Police Department Sergeant Shaun Gualco #270