



Sacramento County District Attorney's Office

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MEMORANDUM

DATE: August 27, 2018

TO: Sheriff Scott Jones
Sacramento County Sheriff's Department
711 G Street
Sacramento, CA 95814

FROM: Sacramento County District Attorney's Office

RE: Officer-Involved Shooting: Case No. 2017-194378
Shooting Officer: Nicholas Russell #1258
Person Shot: Kenard Thomas (DOB 5/12/1979)

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 Kenard Thomas. For the reasons set forth, we conclude that there is no reasonable likelihood a jury would find the shooting by Deputy Russell was criminal.

The District Attorney's Office received and reviewed written reports and other items, including: Sacramento Sheriff Department report numbers 2017-194378, 2017-80423, 2017-142927; dispatch logs/audio; 9-1-1 audio recordings; witness interview recordings; in-car camera video; crime scene video and photos; and Restraining Order 17DV01203.

FACTUAL SUMMARY

Kenard Thomas and Erika Doe¹ were in a dating relationship in 2017. On March 12, 2017, Doe reported that Thomas punched her in the face with a closed fist four to five times while they were at a convenience store. The left side of her face was swollen and red underneath her eye and she sustained a contusion on her left forehead. The incident was captured on the store's video surveillance. Thomas left the store before police arrived. Doe reported the incident to officers, but she stayed in the relationship with Thomas.

¹ For confidentiality purposes, Erika Doe's actual last name is not used.

On May 2, 2017, Doe reported to police that Thomas slapped her multiple times in the face. She told officers that she defended herself by swinging a pocket knife at Thomas and she stabbed him. Thomas fled when Doe asked neighbors to call officers.

Doe then broke off the relationship. On May 8, 2017, Doe petitioned the Sacramento Superior Court for a Domestic Violence Restraining Order prohibiting Thomas from being within one hundred yards of her or her residence. Doe's request for a Domestic Violence Restraining Order was granted on the same day. She did not communicate with Thomas, but she would see him frequently at the end of her street or by the nearby park. Thomas did not know anyone besides Doe in that neighborhood.

On June 13, 2017, at approximately 7:20 p.m., Doe had been out with her mother and her new boyfriend. As they drove up to her house, Doe saw Thomas walking by. Doe's mother exited the car, but Doe and her new boyfriend followed Thomas and saw him enter a home at 5208 53rd Avenue. She knew Thomas had spent time at that location in the past. Doe and her new boyfriend returned to her house and she called 9-1-1.

Sacramento Sheriff Deputies Kionna Rowe and Nicholas Russell responded to the call. They were in uniform and driving marked patrol vehicles. She told the deputies that she had a Domestic Violence Restraining Order against Thomas and that she had observed a gun in his waistband as he entered 5208 53rd Avenue. She also told the deputies Thomas is known to carry knives, run and hide from police officers, and he is a violent person. She cried while communicating her fear of Thomas. Deputies Rowe and Russell reviewed her Domestic Violence Restraining Order and determined it had not been served on Thomas. Deputies Rowe and Russell confirmed Thomas' identity by showing Doe and her new boyfriend a photo of Thomas. Deputies Rowe and Russell drove to 5208 53rd Avenue.

Deputy Russell was familiar with this address because he recently responded there to investigate a transient who was trespassing. He knew that house to be vacant. It was a small, single story residence. Deputy Russell requested further deputies to assist with the search for Thomas at the home. Deputies Brian Frizzie and Jeb Trummel arrived to help. They were also in uniform and driving marked patrol vehicles. All four deputies entered the attached garage and called out "Sheriff's Department" as they entered the house. Deputy Trummel said, "Sheriff's Department, come out with your hands up!" Deputy Trummel and Deputy Frizzie had a quick glimpse of someone running from the front of the interior of the house towards the back of the house. This person matched Thomas' description.

The four deputies began to search every room in the dark, vacant house. There were no interior lights on. Some light filtered through the blinds. Deputy Trummel used the light attached to his gun to illuminate the house during the search. All four deputies started at the front of the house and worked their way to the back. They continued to announce themselves by calling, "Sheriff's Department. Come out with your hands up." They searched the entire house and did not locate Thomas. Knowing Thomas could not have exited the house due to bars on the windows and not hearing any sounds consistent with someone leaving the house, the deputies searched again.

Deputy Russell and Deputy Trummel returned to the back bedroom. One wall of this bedroom had a built-in dresser and closet. The closet was narrow and did not reach the height of the ceiling. It had two sliding doors. Both doors covered the left side of the closet, leaving the right side of the closet open to view. Deputy Russell approached the closet and held his gun out with the attached light on. As Deputy Russell slid open the closet door, he saw Thomas' face coming at him. Deputy Russell was approximately 1 – 1 ½ feet away from Thomas' face. Deputy Russell backed up and fired one shot. Deputy Russell later explained to investigators, "I thought he had a knife, he had a gun, I thought he was coming to harm me." Thomas was hit in the right shoulder/arm area and he dropped. His upper body was still inside the closet, while his legs and lower body were outside the closet.

Deputy Russell was unsure of the location of Deputy Trummel when he fired. Deputy Trummel had been standing at the bedroom doorway facing toward the hallway and away from Deputy Russell. He had heard what sounded like Deputy Russell kicking the closet door open and then a gunshot. When Deputy Trummel turned, he saw Thomas at the closet sitting and holding something in his right hand. Deputy Trummel heard Deputy Russell demand Thomas show him his hands. Thomas crawled out of the closet and dropped the object. It was a Bic lighter. Deputy Russell did not see Thomas holding the lighter before the shooting or dropping the lighter after the shooting.

Deputies immediately requested medical assistance. Sacramento Metropolitan Fire District paramedics arrived at the scene, provided treatment, and transported Thomas to Kaiser Permanente South Sacramento Medical Center for his non-life threatening injury. A search of the house revealed a knife among Thomas' possessions in another room, but no gun.

On August 29, 2017, Thomas pleaded no contest to resisting a peace officer, as well as inflicting injury on Doe for the March 12, 2017, incident. He was sentenced to one hundred and eighty days in county jail.

LEGAL ANALYSIS

An officer who has reasonable cause to believe a person has committed a public offense or is a danger to others 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, the deputies had reasonable cause to detain Thomas. Thomas walked by his ex-girlfriend's house while reportedly being in possession of a handgun. He may also have been trespassing at a vacant home. Deputies needed to investigate these issues, and serve Thomas with his ex-girlfriend's Domestic Violence Restraining Order. When the deputies

entered the residence and called out, “Sheriff’s Department. Come out with your hands up,” Thomas did not comply with these orders. He hid in a closet and remained silent instead of making his presence known. Thomas had a duty to submit himself to detention and had numerous opportunities to surrender to deputies. He failed to do so.

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.)

Was it reasonable for Deputy Russell to believe he was in imminent danger of death or great bodily injury? Thomas only had a Bic lighter in his hand. However, this analysis requires a review of all of the surrounding circumstances. Thomas showed his commitment to avoid apprehension by law enforcement. He ran from deputies that had just entered the residence and remained hidden while deputies searched the dark house twice. He repeatedly refused to comply with the deputies’ commands that he come out and put his hands up. Instead of remaining still or conducting himself in a non-threatening manner when Deputy Russell slid open the closet door, Thomas chose to suddenly move forward towards Deputy Russell. He exited the closet despite the circumstances of his prior refusal and being hidden, the darkness of the house, and the close proximity of Deputy Russell to Thomas where Deputy Russell could only see Thomas’ face. Deputy Russell could not see Thomas’ hands, or what he was doing with his hands, and he did not know the location of Deputy Trummel. Deputy Russell believed he was alone in the room when Thomas emerged from the closet. Deputy Russell was forced to make a split-second decision under extremely stressful circumstances.

The District Attorney’s Office does not review these types of shootings to determine whether the officer could have taken some other action, or used some other tactic, in addressing the situation, or whether his action was appropriate under his employing agency’s policies. Our review is strictly limited to an analysis of whether that action is a prosecutable crime under the law. A prosecutor should file criminal charges only when there is a reasonable likelihood of conviction by an objective jury hearing all of the admissible evidence and the most plausible defenses. In order for any person to be convicted of a crime the prosecution bears the burden of proving the charges beyond a reasonable doubt. Also, before a jury can rely on circumstantial evidence to find a person guilty, the jury must be convinced that the only reasonable conclusion supported by the circumstantial evidence is that the accused person is guilty. “If you can draw two or more reasonable conclusions from the circumstantial evidence, and one of those reasonable conclusions points to innocence and another to guilt, you must accept the one that points to innocence.” (CALCRIM 224.)

The circumstances here made it reasonable for Deputy Russell to believe that Thomas was going to assault him with a weapon from his hidden position in the closet. Thomas was literally backed into a corner with his refusal to submit to the deputies' commands to show himself. Deputy Russell had reason to believe Thomas had a handgun and was known to carry knives. Deputy Russell knew Thomas had been violent towards his ex-girlfriend in the past and she was fearful to the point of tears. Instead of Thomas identifying his position to the deputies or allowing the deputies to find him and detain him, immediately upon Deputy Russell opening the door Thomas rushed out of the closet directly towards Deputy Russell.

Deputy Russell perceived Thomas as an imminent threat to his safety at the time he discharged his firearm. Given the circumstances of this particular case, it is not reasonably likely a jury of twelve individuals would unanimously agree that Deputy Russell was unreasonable in his belief that he was in imminent danger of death or great bodily injury at the time of the shooting.

CONCLUSION

Based on the circumstances of this incident, there is no reasonable likelihood that a jury would convict Deputy Russell of criminal misconduct. Accordingly, we will take no further action in this matter.

cc: Sacramento Sheriff's Deputy Nicholas Russell #1258
Sacramento Sheriff's Detective Robert Peters #701
Sacramento Sheriff's Lieutenant Dan Donelli #86
Rick Braziel, Office of the Inspector General