



# Sacramento County District Attorney's Office

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**DATE:** December 22, 2020

**TO:** Chief Daniel Hahn  
Sacramento Police Department  
5770 Freeport Boulevard  
Sacramento, CA 95822

**FROM:** Sacramento County District Attorney's Office

**SUBJECT:** Officer-Involved Shooting Case No. SPD-19-406493  
Shooting Officer: SPD Officer George Martinez #400  
Person Shot: Kevin Cole (DOB: 4/13/1967)  
Person Shot: Donald Thomas (DOB: 1/30/1980)

The District Attorney's Office, as an independent agency, has completed its investigation and 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 by Sacramento Police Department Officer George Martinez that resulted in minor injuries to Kevin Cole, Donald Thomas and a canine. For the reasons set forth, we conclude that the shooting was lawful.

The District Attorney's Office received and reviewed written reports and other documentary items. These items include Sacramento Police Department Report 19-406493, video and audio recordings, dispatch calls, witness interviews, photographs, diagrams, evidence logs, and records from Animal Control.

## **FACTUAL SUMMARY**

On December 18, 2019, Sacramento Police Department Officer Justin Shepard was working supplemental employment providing security in the Safeway shopping center located at 1814 19<sup>th</sup> Street in Sacramento. The shopping center contracted with the Sacramento Police Department for officers to provide security in the complex.

At approximately 6:44 p.m., Officer Shepard was notified by Safeway security that there was a subject causing a disturbance and refusing to leave the premises.

Officer Shepard responded to the west side of the Panda Express building in the Safeway complex. A security officer directed Officer Shepard to a white male adult later identified as Kevin Cole. Cole appeared disheveled, and had a shopping cart with a pit bull dog on a leash attached to the shopping cart.

Officer Shepard advised Cole he needed to leave the property because he had been causing a disturbance. Officer Shepard noticed that Cole was upset and appeared highly intoxicated and under the influence of narcotics.

Officer Shepard made multiple requests for Cole to leave the property. Cole refused to leave. Officer Shepard noticed that Cole's responses rambled and that he used foul language. Officer Shepard then called dispatch to request an additional officer be sent to assist him.

After several minutes of Cole refusing to leave the shopping center, Officer Shepard noted that Cole stumbled and appeared to have trouble standing. Shepard believed that Cole might not be able to properly care for himself. He decided that he needed to identify Cole and assess Cole's condition.

Officer Shepard directed Cole to sit down and asked for his name. Cole responded with an expletive.

Officer Shepard told Cole that he was not free to leave. During this conversation, Officer Shepard noticed that Cole's dog was extremely close to him. He observed that the dog was a pit bull and believed that pit bulls tend to be protective and aggressive.

Officer Shepard saw that Cole was tugging on the dog's leash and appeared to be choking the dog. He asked Cole, "Hey, man, is your dog going to be cool? 'Cause I don't want to have to hurt your dog." Cole did not respond.

Cole attempted to walk away. Officer Shepard told him to turn around and put his hands behind his back. Cole refused. Officer Shepard attempted to handcuff Cole, but Cole resisted.

Officer Shepard noticed that the dog was getting more agitated as he attempted to gain control of Cole. He attempted to call dispatch to request that they send cover officers more urgently, but he noticed his radio and body-worn camera had shut off during the physical struggle with Cole. He turned the radio and body-worn camera back on and contacted dispatch.

Officer Shepard was able to lower Cole to the ground on his back and use his body weight to maintain control. As Officer Shepard took Cole to the ground, Cole pulled the dog close. The dog put its mouth around Officer Shepard's hand but did not bite. Officer Shepard broadcast over the radio there was an aggressive pit bull on scene and requested animal control respond to assist.

Because the dog was so close as he tried to maintain control of Cole, Officer Shepard reached over and released the dog from its leash, hoping the dog would run away. The dog moved towards the street, but quickly returned. Officer Shepard believed the dog was barking and growling as if it intended to defend its owner.

As this was occurring, Sacramento Police Department Officer George Martinez was working supplemental employment providing security at Ace of Spades, a nightclub at 14<sup>th</sup> and R Streets in Sacramento. He was dressed in uniform and was driving a marked patrol vehicle.

At approximately 6:51 p.m., Officer Martinez received the call over the radio requesting Code 3 cover for Officer Shepard at the Safeway.<sup>1</sup> Officer Martinez responded to the call and drove west to the Safeway. He heard that another officer was trying to make an arrest and there was an aggressive dog. As he continued driving, he learned the scene was by the Panda Express restaurant.

Officer Martinez and Officer Mason McCann both arrived at approximately 6:53 p.m. Officer Martinez could see an officer trying to make an arrest on the sidewalk, against the side of the building. Cole was laying on the ground, on his back, and Officer Shepard was kneeling beside Cole attempting to place handcuffs on him. Martinez noted there was a security guard, later identified as Donald Thomas, observing but not participating in Cole's detention. He also saw the dog, which appeared to him to be a pit bull mix. Officer Martinez was not initially concerned about the dog as the dog was not barking or growling when he arrived. Officer Martinez then approached the scene and asked Officer Shepard how he could help.

Officer Martinez noted that Cole was argumentative, non-compliant, yelling, and not responding to commands.

Officer Martinez tried to grab Cole's arm to assist in placing the handcuffs on him. As he did so, Officer Shepard told him to watch out for the dog. The dog was unleashed, and within approximately five feet of the officers.

At this point, both Officer Martinez and Officer Shepard noticed that the dog's behavior changed. Officer Shepard noted the dog became more aggressive and he thought the dog was going to bite someone. Officer Martinez thought something must have happened to the dog to cause this change. The dog made an aggressive growl and moved threateningly towards the security officer.

Officer Martinez was aware of the potential danger of dog bites. He had a past partner who had been bitten by a pit bull. He was aware of a SWAT officer that had to medically retire due to a dog bite and was aware that a dog with strong jaws can bite all the way down to the bone.

After barking at the security guard, the dog turned towards Officer Martinez. Officer Martinez believed the dog appeared both scared and angry, and believed the dog was capable of inflicting

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<sup>1</sup> Code 3 indicates to consider the call an emergency response and proceed immediately, including utilizing emergency lights and siren as reasonably necessary.

serious injury to himself or his partner. This danger was heightened by the fact that both officers were bent over as they attempted to place handcuffs on Cole, placing them in closer proximity to the dog's mouth.

The dog barked and growled at Officer Martinez from just a few feet away and began moving towards him. Officer Martinez attempted to back up but was unable to create separation between himself and the dog. He believed that the dog was an immediate danger due to its proximity and behavior. He reached for his firearm and fired one round at the dog.

Officer Martinez did not believe his shot directly struck the dog, as the dog ran off around the corner. Officer Martinez re-holstered his gun and helped place handcuffs on Cole. Cole yelled that he had been shot in the eye and had visible blood on his face.

Officer Shepard was struggling with Cole as he heard the one gunshot extremely close behind him. He noticed that the shot appeared to hit the ground to his left. Officer Shepard saw the dog run away, and heard Thomas, the security guard, yell and run off limping across the street. Thomas said that he was hit by the bullet.

After Cole was handcuffed, Officer Shepard went across the street to check on Thomas. Thomas indicated he was struck on his knee. It appeared to Officer Shepard the round had lodged in Thomas' knee. Officer Shepard applied a tourniquet and advised dispatch that medical assistance was needed.

According to witnesses, the dog ran around the corner and into the Safeway. The dog was shaking and had some blood on its right rear paw. Veterinary records from this incident do not indicate significant injury to the dog (Nikki, determined to be a 53-pound pit bull mix). The records indicate swelling and a puncture to the right hind leg and an abrasion to the dog's paw.

Animal control records involving Nikki were reviewed. These include prior acts of aggression by Nikki, including jumping up on the back of a shelter staff member and nipping the staff member on the back of the shoulder, pinching but not breaking the skin.

Kevin Cole and Donald Thomas were transported to the University of California at Davis Medical Center for evaluation. It was observed that Cole had a minor laceration just above his nose. Thomas received a minor injury to the front of his left knee where the bullet had initially lodged. No stitches were necessary.

A round count was conducted on Officer Martinez's firearm, a Sig Sauer .40 caliber pistol. It was determined that Officer Martinez fired one round.

Body-worn camera video for the responding officers was reviewed. The body worn camera video for Officer Shepard captures the entirety of his contact with Kevin Cole, with the exception of approximately 32 seconds where his camera and radio shut off during his initial efforts to place Cole in handcuffs. The video documents the extent of Cole's intoxication, and the proximity of the dog to the officers during the incident. As Officer Shepard was struggling with Cole at the moment the shot was fired, the video does not directly capture the shooting.

The body-worn camera video of Officer Martinez does capture the shooting. There is no sound as audio does not record for approximately the first 30 seconds from the camera being activated. As Officer Martinez arrives on scene, the video shows him approaching Officer Shepard as Kevin Cole is on the ground on his back. The dog is standing to the immediate right of Cole. Security Officer Donald Thomas is standing to the right of the dog. Officer Martinez grabs Cole's right leg to assist Shepard in gaining control of Cole. The dog exits and enters the frame to the left as the officers are struggling with Cole. Approximately 15 seconds after Officer Martinez's arrival, the dog moves suddenly and aggressively towards Officer Martinez, who draws his weapon and fires one round in a downward direction at the dog. The dog turns and runs away around the corner of the building. The audio then turns on as handcuffs are being placed on Cole, who states that he has been shot in the eye.

Civilian witnesses were interviewed. Their statements are consistent with the officers' observations. Security officer Donald Thomas saw Cole sitting by the Panda Express with his dog and his cart. Thomas asked Cole to leave. Cole responded with profanity. Thomas contacted Officer Shepard and asked him to have Cole leave the property. Thomas stood by and observed the entire incident. Thomas stated he tried to help calm the dog down, but that he was unsuccessful. Thomas felt the ricochet of the bullet strike just above his left knee but did not require any stitches.

One civilian witness was a local television news reporter. The witness indicated that Cole appeared to be intoxicated, could barely stand and was refusing to leave. He stated that the officer spent several minutes calmly trying to get Cole to move along. He noted that when the officer went in to make the arrest, the officer told Cole to get the dog to back off, as the officer did not want to shoot the dog. The witness further stated that the dog became more aggressive towards the security guard and then towards the officers when the additional officers arrived, causing one officer to fire one round at the dog.

This witness also captured cell phone video of the incident. The video shows the events occurring as described above, with one significant addition. Prior to the arrival of Officers Martinez and McCann, the dog is sitting alongside Cole as Officer Shepard attempts to apply the handcuffs. As Officers Martinez and McCann arrive and start to assist Officer Shepard, the video shows Security Officer Thomas using his left leg to attempt to nudge or redirect the dog away from the officers. This appears to agitate the dog, who growls and barks menacingly at Thomas before then turning towards Officer Martinez, resulting in Officer Martinez firing the one round at the dog.

## **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.)

Officer Shepard was engaged in a consensual encounter with Cole when he first approached him in the Safeway complex. Officer Shepard had been informed by security that Cole had caused a disturbance and was refusing to leave. With this information, Officer Shepard was within his right to ask Cole to leave the premises. By refusing to leave, Cole was potentially trespassing. However, Officer Shepard observed Cole's condition and objective symptoms of intoxication, which made Officer Shepard concerned about Cole's ability to safely care for himself. Officer Shepard determined that he needed to evaluate whether Cole was in violation of Penal Code section 647(f) for disorderly conduct. When Cole began to attempt to walk away, Officer Shepard had sufficient cause to detain Cole for a violation of Penal Code section 148 for resisting a peace officer.

Cole was lawfully detained when Officer Martinez arrived and witnessed Officer Shepard with Cole against the side of the building where Cole was yelling and not responding to Officer Shepard's commands. Initially, Cole's dog did not appear to be a threat. However, as Officer Martinez bent over to attempt to assist Officer Shepard, the dog's behavior changed. The dog, a 53-pound pit bull mix, barked and growled menacingly at the security officer, Donald Thomas, then turned towards Officer Martinez. At that moment, Officer Martinez was in a vulnerable position because he was at the dog's level and was distracted with attempting to gain control of a resistant subject. The dog moved forward, growling and barking in a threatening manner.

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.)<sup>2</sup> 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.)

Here, Officer Martinez was reasonable in his belief that the dog posed an imminent danger. As Officer Martinez drove to the scene, he learned there was an aggressive dog present. When he arrived, Officer Shepard advised him to watch out for the dog. Then, when Officer Martinez bent forward to assist Officer Shepard in placing handcuffs on Cole, the dog's behavior became more menacing, threatening both Donald Thomas and then Officer Martinez from just a few feet away. Officer Martinez attempted to move backwards to create separation from the dog, but the

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<sup>2</sup> This incident occurred prior to California Assembly Bill 392's amendments to Penal Code sections 196 and 835a. Therefore, this incident is analyzed under the law as it existed at the time of the events.

dog moved aggressively forward. Further, Officer Martinez was aware of the potential serious injuries should he be bitten.

Under these facts, it cannot be said that Officer Martinez was unreasonable in his belief that the dog posed an imminent danger of death or great bodily injury to him and to others present in the immediate vicinity. Although the dog had not yet bitten anyone, under the law, the officer's actions are judged based on the reasonable perception of the threat. Given all of these circumstances, Officer Martinez's belief in the need to defend himself against the dog was reasonable.

### **CONCLUSION**

Based on the circumstances of this incident, Officer Martinez honestly and reasonably believed that the dog posed an imminent danger of death or great bodily injury. Therefore, he acted lawfully in firing one round at the dog. Accordingly, we will take no further action in this matter.

Cc: Officer George Martinez, Sacramento Police Department  
Detective Michael Severi, Sacramento Police Department  
Office of Public Safety Accountability