

REPORT ON USE OF FORCE



Legal Analysis Surrounding the Death of Justin Hoey November 7, 2012

Introduction

The District Attorney's Office has completed its review of the November 7, 2012, death of Justin Hoey ("Decedent"). It was determined that, based on the evidence currently available and subject to the discovery of any new or additional evidence, the actions of the officers were not criminal in nature.

This report explains why criminal charges will not be forthcoming against the officers involved. It is not intended to recount every detail, answer every question or resolve every factual conflict regarding this police encounter. This letter is intended solely for the purpose of explaining why, based upon the facts known at this time, the conduct of the officers was not criminal. Further, this decision is made in conjunction with the Police Fatality Public Fact-Finding Review held on June 14, 2013.

The conclusions expressed in this report, premised upon criminal law standards, are not meant to limit any administrative action by the Henderson Police Department or to suggest the existence or non-existence of civil actions by any person where less stringent laws and burdens of proof apply.

Factual Summary

On November 6, 2012, at 11:35 p.m., Henderson police dispatch received a 9-1-1 call from a female who identified herself as A. K. She stated that a male, later identified as Decedent, had stolen her Trailblazer and was currently in another stolen vehicle, a red

Jeep. She further advised that Decedent pulled a gun on her at a Lowe's parking lot and had battered her. As A.K. was on the phone with dispatch, another citizen called 9-1-1 to report a red Jeep and a white Trailblazer driving recklessly near the Lowe's at 2990 St. Rose Parkway.

Officer Timothy Donnelly arrived and located a red Jeep (bearing Nevada license plate 401YBB) which was unoccupied and running in the parking lot of the Lowe's. Moments later, Officer Michael Fuentes arrived at that location. Officer Fuentes ran the license plate on the Jeep and found that it had been stolen the day before from a local valley residence. (The Las Vegas Metropolitan Police Department took the stolen vehicle report under Event Number 121106-4178.)

Officer Donnelly made contact with A.K. at the scene. A.K. told Officer Donnelly that her ex-boyfriend, Decedent, had been driving the red Jeep and that he battered her and pointed a gun at her. She said that Decedent fled west through the Lowe's parking lot to an unknown destination. A.K. further said Decedent was armed with a handgun, had made comments that he was going to die that night, and was going to shoot at the police so they would shoot him. Officer Donnelly broadcast this information to the other officers attempting to locate Decedent before continuing to interview A.K. in order to learn any additional information he could.

During this interview, A.K. stated that on November 6, 2012, she left her house with a friend to go shopping. Upon returning home, A.K. saw a box of ammunition on the table along with a McDonald's bag. When she saw this, A.K. immediately suspected Decedent had broken into her home. A.K. began looking around the house and noticed that some money and all of her keys were missing. A.K. then went into the garage and saw that her car (the Trailblazer) was gone.

Suspecting Decedent in the theft, A.K. called him on his cellular phone and asked him if he had her car. Decedent admitted to taking her vehicle and told her that he had parked it near her house. Decedent then stated he still had her keys and, if she ever wanted to see them again, she needed to meet him.

Decedent directed A.K. to drive to the Terrible Herbst located at 9345 South Eastern Avenue. Once there, she saw Decedent sitting inside a red Jeep. Wanting to know where her car and keys were, she immediately backed out of her spot and parked behind the Jeep attempting to block his escape. As she did this, Decedent got out of the Jeep and approached the driver's side of her truck. Decedent opened her car door and immediately punched her in the face. He continued to hit her and then reached over her into her purse, stealing her coin wallet and cigarettes. Decedent also attempted to take her cell phone but A.K. managed to hold on to it. While being battered, A.K. was able to get her feet on the horn of the car and she sounded the horn. When people began to look, Decedent left her vehicle and re-entered the Jeep.

Decedent placed the Jeep in reverse and rammed the side of A.K.'s truck. He then went forward through a planter at the east end of the business and continued onto southbound Eastern Avenue. A.K. pursued Decedent as she still wanted information on the stolen items. She followed Decedent into the Lowe's parking lot at 9995 South Eastern Avenue and saw him stop near the south side of the lot. When A.K. approached, Decedent exited the Jeep and stood in front of her truck holding a handgun. Decedent told A.K., "I'm going to die tonight and I will take you with me." Upon seeing the gun and hearing his statement, A.K. reversed her vehicle to distance herself from him. Decedent ran west through the parking lot and A.K. called 9-1-1.

Officers Troy McDermed and David Woolman arrived on scene and began searching for Decedent. They located a person they believed to be Decedent (it was Decedent) in the westbound lanes of St. Rose Parkway, walking east near the center median. Officer McDermed illuminated Decedent with his spotlight, exited his vehicle and commanded Decedent to stop. Decedent continued south across St. Rose Parkway toward the hospital. Officer McDermed pursued Decedent on foot, and Officer Woolman drove his patrol vehicle over the center median and used his vehicle to cut Decedent off near the entrance to the hospital parking lot. Decedent then changed directions and ran south back across St. Rose Parkway in the direction of Officer McDermed's open and running patrol vehicle. Officer McDermed drew his weapon and commanded Decedent to stop. Prior to Decedent reaching Officer McDermed's vehicle, Officer Woolman again crossed the center median with his patrol vehicle and cut off Decedent's path to the open patrol vehicle. Decedent again changed directions and ran west along the south side of The Inn Zone Bar at 2990 St. Rose Parkway. Officer Woolman exited his vehicle and pursued Decedent on foot. Officer McDermed continued his foot pursuit behind Officer Woolman.



This is the path taken by Decedent as he fled by officers before he ultimately ended up at the location of his final confrontation with law enforcement.

Decedent continued to flee west and into the desert area to the southwest of The Inn Zone Bar. As Decedent was approaching the wash, west of the The Inn Zone Bar, Officer Woolman lost sight of Decedent. Officer Woolman could see there was a steep embankment ending at a concrete wall securing the wash area. On top of the wall was a chain-link fence further securing the wash. Officer Woolman saw Decedent lying on his back at the bottom of this embankment next to the concrete wall. Decedent appeared uninjured and had his hands in the front waistband of his pants. Officer Woolman pointed his handgun at Decedent and began giving commands for Decedent to show his hands. Decedent did not comply with the commands and instead retrieved a black semi-automatic handgun from the waistband of his pants. (This weapon was later determined to be a 9mm H&K handgun bearing serial number 24-12759.) Decedent did not point the gun at Officer Woolman, but did place his finger on the trigger and then pointed the gun at his own head. At this time, Officer McDermed joined Officer Woolman at the top of the embankment.



These two photographs show the scene. The photo on the left is an overview of the scene. The photo on the right is a close-up where Decedent's firearm can be seen in the foreground.

Officer McDermed updated other units on the radio as to the suicidal actions of Decedent. Both officers continued to give commands to drop the weapon. Decedent continued to disregard all commands and point his gun at his own head and chest. Officer McDermed and Woolman were eventually joined by Officer Michael Fuentes and Officer Miles Costolo. Officer Woolman continued to give commands and attempted to engage Decedent in a dialogue. Decedent told Officer Woolman that this was not going to end with him alive, and he would either take his own life or make the officers shoot him.

Officer Michael Coleman, a trained crisis negotiator, arrived on scene. Officer Coleman initiated contact with Decedent. Officer Coleman introduced himself and Decedent identified himself as Justin Hoey. Decedent continued to refuse to drop his gun and never took his finger off the trigger. The Henderson SWAT Team arrived and began relieving the Henderson patrol officers.

Decedent told Officer Coleman several times he was either going to shoot himself or force officers to shoot him. He also made the comment that he was not going to return

to prison. Decedent continually attempted to block the officers' lights with his hands, presumably so he could get an idea of where officers were standing.

Decedent asked Officer Coleman if he had ever shot anybody. When Officer Coleman answered "no," Decedent asked if any other officer on scene had. No one answered Decedent's question. Decedent said not to worry, that everyone would be going home to their families that evening. At one point, Decedent had his gun to his left temple, held it with his left hand and flinched. Decedent then said, "That was close; I almost did it, but I am not left handed." Officer Coleman told Decedent that the flinch was a sign that he did not really intend on taking his own life. Officer Coleman then tried several different techniques to get Decedent to put the gun down. He offered to have a cigarette and beer with Decedent and even gave him a bottle of water. Decedent continued pointing the gun at himself with his finger on the trigger.



Decedent's firearm was recovered at the scene. This photograph, taken where the firearm was recovered, illustrates the damage caused by rounds fired by SWAT officers.

After approximately one hour, Decedent placed his hood over his head and slouched down with his upper back leaning against the cement wall. He pulled his legs up to his chest and placed the gun under his chin. Decedent lowered the gun from his chin with his right hand and pointed it at the SWAT officers. Fearing for their lives, Officers Jessie Lujan, Justin Dera and Tyler Bailey fired at Decedent. At the same time these officers were firing weapons, Officers Daniel Boskovic and Joshua Nilson fired less-than-lethal rounds at Decedent.

Decedent fell forward when he was shot. Officers could not see if he remained in possession of his gun. He was still moving and appeared capable of firing his weapon.

Officer Lujan fired two more rounds at Decedent. Decedent did not react or move. The order was then given to fire less-than-lethal rounds at Decedent in an attempt to move his body to see his hands and gun. Officer Michael Corad fired two less-than-lethal rounds at Decedent and there was no reaction by Decedent.

When it was determined Decedent was no longer a threat, SWAT officers descended the embankment to render aid. Upon moving Decedent, Officer Ritch Melchert saw the black handgun on Decedent's chest. Officer Melchert removed the gun and placed it north of the scene. Officers carried Decedent up the embankment and summoned paramedics to the scene. Medical personnel had been brought close to the area since the beginning of the event. Paramedics rendered medical assistance to Decedent but these attempts were unsuccessful. Officers on scene secured the area with crime scene tape. Officers involved were taken to the Command Post and detectives were notified of the shooting.

Countdown of the Weapons

A countdown was later conducted of the officers' at the scene. The following officers were determined to have fired lethal and less-than-lethal rounds:

SWAT Officer Tyler Bailey: Colt M4 Commando 5.56mm (#A0193980). Ammo: Winchester .223 REM. Magazine holds 30 rounds and was loaded with 28 rounds. 25 rounds were counted in the magazine indicating that 3 rounds were fired.

SWAT Officer Justin Dera: Colt M4 Commando 5.56mm (#A0192234). Ammo: Winchester .223 REM. Magazine holds 30 rounds and was loaded with 28 rounds. 27 rounds were counted in the magazine indicating 1 round was fired.

SWAT Officer Jessie Lujan: Colt M4 Commando 5.56mm (#A0194010). Ammo: Winchester .223 REM. Magazine holds 30 rounds and was loaded with 28 rounds. 23 rounds were counted in the magazine indicating 5 rounds were fired.

SWAT Officer Joshua Nilson: Defense Technology of America L8 37mm Launcher (#DT2329): 6 round capacity and was loaded with six sock rounds. Countdown showed five live rounds indicating 1 round was fired.

SWAT Officer Daniel Boskovic: Penn Arms L6 40mm Launcher (#G1720). 6 round capacity and was loaded with 6 Exact Impact less than lethal rounds. Countdown showed all 6 rounds were fired.

SWAT Officer Michael Corad: Penn Arms L6 40mm Launcher (#G1721). 6 round capacity and was loaded with 6 Exact Impact less than lethal rounds. Countdown showed 4 live rounds indicating 2 rounds were fired.

A check of Decedent's 9MM H&K handgun (serial # 24-12759) showed that it was neither stolen nor registered. The gun will be later checked through the ATF. Examination of the gun showed that it had been shot with a .223 live round during the shooting. The damage to the weapon made it impossible to determine if a live round was chambered. No evidence indicated a round was fired from this weapon.

Additional Investigation

Detective Michael McKay conducted a subsequent interview with A.K. on November 7, 2012, at 3:00 a.m. During his interview, he learned the following additional information:

Decedent began calling A.K. on November 6, 2012, at approximately 11:00 a.m. He was very upset. He stated that he was going to die and, if he came into contact with police, he was going to "open fire on them and have them shoot him until he was dead."

Decedent called A.K. at approximately 11:00 a.m. and kept calling her over and over all day long. Detective McKay asked A.K. if it was out of character for Decedent to make suicidal statements. She said he makes suicidal comments all the time. A.K. further stated that Decedent had done prison time in California and had just come back into contact with her in August (2012) after 17 years of being apart.

A.K. stated that approximately two weeks ago, she saw Decedent with a 9mm handgun. He talked about shooting it out with the police.

Scene Examination

The scene was processed by Henderson crime scene analysts. During their search, nine .223 cartridge cases were located. Crime scene analysts also located eight Exact Impact less-than-lethal rounds and one sock round in the area of Decedent. Other evidence collected from the scene included a wallet belonging to Decedent, a cellular phone, Marlboro cigarettes, matches, prescription pills (muscle relaxers and Morphine), 70 cents, a Cobra radar detector and a Garmin GPS. A black satchel was also located north of Decedent's location which contained toiletries, chargers, a garage door opener and two pocket knives.

Members of the Henderson Police Department attempted to contact citizens in the area who saw or heard anything of importance. Several people recalled hearing gunshots, yet none actually witnessed the incident.

Interviews were conducted of officers directly involved in the incident. It should be noted that only witnessing officers gave complete statements. At their attorney's advice, Officers Dera, Lujan and Bailey chose not to speak with detectives about the incident.

MAV¹ audio and video was received from several of the involved officers. The audio of several of these videos captured the negotiation between patrol officers and the crisis negotiator and Decedent. The MAV also captured the shooting on both audio and video. Viewing of the video is limited due to the lighting conditions; however, one can hear the gunshots and see the muzzle flashes. According to the MAV, the shooting took place on November 7, 2012, at 1:51 a.m.

Autopsy of Decedent

On November 8, 2012, Medical Examiner Lisa Gavin, M.D., conducted an autopsy of Decedent and determined the cause of death was multiple gunshot wounds. The manner of death was determined to be "homicide." A toxicology report indicated both alcohol and methamphetamine intoxication. The blood alcohol level was .11; Amphetamine level was .63 ng/ml and Methamphetamine was .320 ng/ml. The levels of Amphetamine and methamphetamine indicate chronic use and abuse of methamphetamine consistent with a chronic user of that drug.

Legal Analysis

The District Attorney's Office is tasked with assessing the conduct of an officer involved in any killing which occurred during the course of his or her duty. That assessment includes determining whether any criminality on the part of the officer existed at the time of the killing. As this case has been deemed a homicide by the medical examiner, the actions of these officers will be analyzed under the State's jurisprudence pertaining to homicides.

In Nevada, there are a variety of statutes that define the various types of justifiable homicide (NRS 200.120 – Justifiable homicide defined; NRS 200.140 – Justifiable homicide by a public officer; NRS 200.160 – Additional cases of justifiable homicide). The shooting of Decedent was justifiable under two theories: (1) The killing of a human being in self defense/defense of others; and (2) justifiable homicide by a public officer. Both of these theories will be discussed below.

¹ Dashboard mounted video cameras in Henderson patrol vehicles.

The Use of Force in Self-Defense or Defense of Another

The authority to kill another in self-defense or defense of others is contained in NRS 200.120 and NRS 200.160. “Justifiable homicide is the killing of a human being in necessary self-defense, or in defense of ... person, against one who manifestly intends or endeavors, by violence or surprise, to commit a felony ...” against the other person.

NRS 200.120(1). Homicide is also lawful when committed:

[i]n the lawful defense of the slayer, ... or of any other person in his or her presence or company, when there is reasonable ground to apprehend a design on the part of the person slain to commit a felony or to do some great personal injury to the

slayer or to any such person, and there is imminent danger of such design being accomplished

NRS 200.160(1).

The Nevada Supreme Court has refined the analysis of self defense and, by implication, defense of others, in *Runion v. State*, 116 Nev. 1041 (2000). The relevant jury instructions as articulated in *Runion* and modified for defense of others are as follows:

The killing of [a] person in [defense of another] is justified and not unlawful when the person who does the killing actually and reasonably believes:

1. That there is imminent danger that the assailant will either kill [the other person] or cause [the other person] great bodily injury; and
2. That it is absolutely necessary under the circumstances for him to use in [defense of another] force or means that might cause the death of the other person, for the purpose of avoiding death or great bodily injury to [the person being defended].

A bare fear of death or great bodily injury is not sufficient to justify a killing. To justify taking the life of another in [defense of another], the circumstances must be sufficient to excite the fears of a reasonable person placed in a similar situation. The person killing must act under the influence of those fears alone and not in revenge.

....

Actual danger is not necessary to justify a killing in [defense of another]. A person has a right to defend from apparent danger to the same extent as he would from actual danger. The person killing is justified if:

1. He is confronted by the appearance of imminent danger which arouses in his mind an honest belief and fear that [the other person] is about to be killed or suffer great bodily injury; and
2. He acts solely upon these appearances and his fear and actual beliefs; and
3. A reasonable person in a similar situation would believe [the other person] to be in like danger.

The killing is justified even if it develops afterward that the person killing was mistaken about the extent of the danger.

If evidence [that a killing was in defense of another exists], the State must prove beyond a reasonable doubt that the defendant did not act in [defense of another].

Id. at 1051-52.

Immediately preceding the use of deadly force by Henderson police officers, Decedent turned his loaded firearm in the direction of officers. The officers had, at that moment, the legal justification to use deadly force under Nevada law. Decedent's conduct and use of a deadly weapon demonstrated an immediate threat of death or great bodily injury to officers at the scene. Decedent's behavior leading up to this incident evidences an intent to engage police in an armed conflict wherein he would be killed by officers. Decedent had made these statements repeatedly to A.K.

Justifiable Homicide by a Public Officer

"Homicide is justifiable when committed by a public officer ... [w]hen necessary to overcome actual resistance to the execution of the legal process, mandate or order of a court or officer, or in the discharge of a legal duty." NRS 200.140(2). This statutory provision has been interpreted as limiting a police officer's use of deadly force to situations when the officer has probable cause to believe that the suspect poses a threat of serious physical harm to either the officer or another. *See* 1985 Nev. Op. Att'y Gen. 47 (1985).

Once again, the conduct and expressed intentions made by Decedent to A.K. and officers at the scene indicate a desire, willingness and intention to use deadly force

against police officers. Decedent repeatedly expressed his desire to die and that he would be involved in a shootout with police. His conduct immediately prior to the shooting confirmed these earlier expressed intentions. The officers who fired lethal rounds were legally justified to do so under the facts and circumstances that existed at that time.

In light of all the evidence provided to date, the actions of the officers were “in the discharge of a legal duty.”

Conclusion

Based on the review of the available materials and application of Nevada law to the known facts and circumstances, it has been determined that the use of deadly force by Officers Bailey, Dera and Lujan was reasonable and legally justified. The law in Nevada clearly states that homicides which are justifiable or excusable are not punishable. NRS 200.190. A homicide which is determined to be justifiable *shall* be “fully acquitted and discharged.” NRS 200.190.

As there is no factual or legal basis upon which to charge the officers, and unless new circumstances come to light which contradict the factual foundation upon which this decision is made, no charges will be forthcoming.

Submitted October 11, 2013

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By

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