



Sacramento County District Attorney's Office

ANNE MARIE SCHUBERT
District Attorney

Stephen J. Grippi
Chief Deputy

Michael A. Neves
Assistant District Attorney

MEMORANDUM

DATE: June 29, 2017

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. SSD-2016-177497
Shooting Officer: Andrew Cater #444
Person Shot: Sergey Makarenko (DOB 7/24/98)

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 Sergey Makarenko. 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: Sacramento Sheriff Department report number 2016-177497 and related dispatch logs and recordings; witness interview recordings; 9-1-1 audio recordings; in-car camera, helicopter, and surveillance video recordings; photographs, diagrams, and other videos; Sacramento County District Attorney Laboratory of Forensic Services Toxicology, Blood Alcohol, Controlled Substances Analysis, and Physical Evidence Examination reports; and the Sacramento County Coroner's Final Report of Investigation.

FACTUAL SUMMARY

On June 18, 2016, at approximately 11:01 p.m., Sacramento County Sheriff Deputy James Libonati observed a gray Honda Civic speeding eastbound on El Camino Avenue near Butano Drive. Deputy Libonati noticed that the car was also striking safety cones in the middle of the street. The driver of the car was later identified as Sergey Makarenko. Deputy Libonati pursued Makarenko and eventually caught up to his car near Mission Avenue. Makarenko made erratic lane changes and abruptly stopped to avoid colliding with another vehicle already stopped at the intersection of El Camino Avenue and Walnut Avenue. Deputy Libonati activated the overhead lights and siren on his marked patrol vehicle and continued to follow Makarenko, who eventually

accelerated away. When Makarenko drove past Garfield Avenue and approached Fair Oaks Boulevard, Deputy Libonati reported to dispatchers that he was in a pursuit, which continued towards Ancil Hoffman Park.¹ Makarenko eventually left that area, proceeded northbound on California Avenue, increased his speed to approximately 60 miles per hour while racing through several stop signs,² turned left at Sutter Avenue, and drove westbound at approximately 65 miles per hour.³

Deputies Andrew Cater and Jeremy Workman were working together and riding in the same marked patrol vehicle. After hearing the dispatcher announce the vehicle pursuit, Deputy Cater activated his emergency lights and siren and drove towards the area to assist Deputy Libonati. As they reached Sutter Avenue, Deputy Cater pulled over on the eastbound shoulder to wait. He soon observed Makarenko speeding westbound with Deputy Libonati close behind. Deputy Cater made a U-turn and followed them. Although there was traffic, Makarenko proceeded through a red stop light, drove straight across Fair Oaks Boulevard, and narrowly missed colliding with a vehicle traveling southbound. He then turned left and travelled southbound on Horton Lane, which became a dead end. Makarenko parked his car facing east next to a van in the driveway of a residence. Deputy Libonati followed, stopped his patrol vehicle approximately 10 feet behind Makarenko's car, and exited.

A Sacramento Police Department helicopter followed the pursuit. When Makarenko stopped his vehicle in the driveway, he opened his driver's door. Personnel in the helicopter indicated on the radio that the driver was exiting the vehicle. Deputy Cater stopped on the west side of Horton Lane. Believing that Makarenko was attempting to flee on foot, Deputy Cater exited his patrol vehicle and ran southbound toward Makarenko's vehicle. He approached the van in the driveway, which partially obstructed his view, and observed Deputy Libonati's patrol vehicle directly behind Makarenko's car. Helicopter personnel then announced on the radio that the driver was still inside. Sergeant Kevin Steed entered the area, drove his patrol vehicle around the passenger side of Deputy Libonati's vehicle, and parked directly next to it facing east. Sergeant Steed's vehicle was approximately 10-15 feet behind Makarenko's rear passenger side. There was little room for Makarenko to move his car without striking the patrol vehicles.

Deputy Cater came around the corner of the van and observed Makarenko in the driver seat with one hand on the lower portion of the steering wheel and the other hand on the stick shift. Deputies Cater, Workman, and Libonati were lined up on Makarenko's driver side with their guns drawn and they repeatedly instructed him to turn off the car and open the window. Deputy Cater was standing approximately 6-10 feet away from Makarenko's door. He stated, "Let me see your hands" and "Stop." Makarenko did not comply. Deputy Cater then heard the car "grinding" its gears. He became concerned because Makarenko had driven recklessly with disregard for others on the roadway. Deputy Cater was also concerned because Makarenko could not move forward and there was a deputy behind his car. He heard the car accelerate, so

¹ Makarenko drove on El Camino Avenue, which turned into Van Alstine Avenue. He then made an abrupt left turn onto California Avenue, a right turn onto Tarshes Drive, an immediate left turn onto Willow Way, and almost came to a complete stop at the corner of Kenneth Avenue. He then headed westbound and made a right turn northbound onto California Avenue.

² The posted speed limit on northbound California Avenue at Landis Way is 30 mph.

³ The posted speed limit on westbound Sutter Avenue is 30 mph.

Deputy Cater stated, “Stop, Sheriff’s Department, stop” and “Let me see your hands.” Makarenko disregarded these instructions and began backing up his car. As Deputy Cater pointed his gun at the front driver’s area, he observed Sergeant Steed sitting in the front seat of his patrol vehicle. Sergeant Steed began to open his door and had a look of shock on his face. Deputy Cater believed that Sergeant Steed was getting out of his vehicle. Makarenko placed the car in reverse, turned his wheels sharply to the right, and accelerated back directly towards Sergeant Steed’s open door. Deputy Cater fired 9 shots at Makarenko to prevent his car from striking Sergeant Steed and other deputies in attempting to escape. Makarenko’s car stopped approximately 5 feet away from Sergeant Steed’s patrol vehicle.

Deputy Libonati stepped forward and opened Makarenko’s door. Deputy Workman went around the car and opened the passenger door. Other deputies reached in, pulled the emergency brake, confirmed the car was in neutral, and pulled the keys out of the ignition. Makarenko was removed from his car and deputies rendered medical assistance. Sacramento Metropolitan Fire personnel and paramedics arrived at the scene and pronounced Makarenko deceased at 11:16 p.m.

The helicopter and deputies’ in-car camera videos captured the pursuit and the shooting incident. Footage from the helicopter and Deputy Libonati’s vehicle depict Makarenko reversing his vehicle rapidly towards the open driver’s door of Sergeant Steed’s patrol vehicle. Makarenko’s vehicle was in close proximity to and headed directly towards where Sergeant Steed appeared to be exiting from his vehicle. Distances noted above are consistent with best estimates from the video footage.

According to the Sacramento County Coroner, Makarenko died from multiple gunshot wounds. The report noted that he had gunshot wounds to the left back, left forearm, chest, left chest/axilla, left shoulder (superior and lateral), and right chest. Investigators discovered an apparent smoking instrument containing residue, as well as .82 grams of cannabis, in Makarenko’s right front pocket. A Tres Diablos Tequila bottle was also recovered inside Makarenko’s car. The Sacramento County District Attorney’s Office Laboratory of Forensic Services confirmed the presence of cannabinoids⁴ in Makarenko’s blood, as well as a blood alcohol level of .22%.

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.)

⁴ Cannabinoids consisted of delta-9-THC, 11-hydroxy-THC, and 11-nor-9-carboxy-THC.

In the present matter, the deputies first had reasonable cause to detain Makarenko on suspicion of driving under the influence. Deputy Libonati initially observed Makarenko speeding, striking traffic cones in the street, making erratic lane changes, and abruptly stopping at an intersection to avoid a collision with a stopped car. Thereafter, they had probable cause to arrest him for felony reckless evasion. After pursuing Makarenko with his patrol vehicle's lights and siren activated, Deputy Libonati observed Makarenko continue to speed, drive through several stop signs, and race through a stop light while narrowly avoiding a collision with another moving vehicle. When Deputy Libonati attempted to apprehend him, Makarenko had a duty to submit himself to arrest. He failed to do so and evaded the deputy.

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.)

After stopping his vehicle in the driveway of a residence on Horton Lane, Makarenko was seeking to avoid apprehension and did not comply with the deputies' commands to stop and show his hands. He continued to place his hands on the steering wheel and stick shift, put his car in reverse, turned the wheels sharply, and accelerated back towards Sergeant Steed as he opened his door and prepared to exit the patrol vehicle. Deputy Cater was aware that Makarenko's driving pattern had been erratic and dangerous and almost caused a traffic collision. Neither Sergeant Steed nor Deputy Cater were required by law to retreat from their positions. Given these circumstances, it was reasonable for Deputy Cater to believe that Makarenko was going to strike Sergeant Steed with the rear of his car. Makarenko posed a significant and immediate threat of death or serious physical injury to Sergeant Steed. Deputy Cater feared for Sergeant Steed's safety when he discharged his duty weapon at Makarenko.

CONCLUSION

Deputy Cater was justified in shooting Makarenko to defend Sergeant Steed. Under the circumstances, his conduct was reasonable. Accordingly, we find the shooting to be lawful and will take no further action in this matter.

cc: Sacramento Sheriff Detective Robert Peters #701
Sacramento Sheriff Deputy Andrew Cater #444
Sacramento Sheriff Lieutenant Lisa Gayman #21
Rick Braziel, Office of the Inspector General
Kimberly Gin, Sacramento County Coroner's Office