



Sacramento County District Attorney's Office

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MEMORANDUM

DATE: October 16, 2019

TO: Police Chief Timothy Albright
Elk Grove Police Department
8400 Laguna Palms Way
Elk Grove, CA 95758

FROM: Sacramento County District Attorney's Office

RE: Officer-Involved Shooting Case No. 2018-002733
Shooting Officer: Gregory Moore #153
Person Shot: Nolberto Hernandez Leon (DOB 8/4/91)

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 Nolberto Leon. For the reasons set forth, we conclude the shooting was lawful.

The District Attorney's Office received and reviewed written reports and other items, including: Elk Grove Police Department report number 2018-002733 and its related dispatch logs and audio recordings, 9-1-1 call recordings, witness interview recordings, crime scene photographs, surveillance videos, and body-worn camera videos; Sacramento County District Attorney's Office Laboratory of Forensic Services Physical Evidence Examination, Gun Shot Residue, Blood Alcohol, and Toxicology reports; and Sacramento County Coroner's Final Report of Investigation.

FACTUAL SUMMARY

On April 27, 2018, at approximately 9:00 p.m., Bobby Moore and Kira Wagoner checked into room 306 at the Extended Stay America hotel at 2201 Longport Court in Elk Grove. They hosted a party in their room later that evening. Nolberto Leon came to the party. While he was there, he socialized, drank alcohol, and used cocaine. At the end of the party, everyone left the room except Moore, Wagoner, and Leon. While still in the room, Leon was focused on his phone. He became increasingly agitated and went into the bathroom. When he emerged from the bathroom, Leon was very upset. He walked to a night stand, grabbed a gun that Moore had

brought to the hotel room, and pointed it at his head. Wagoner panicked and tried to grab the gun out of his hand. Moore also tried to wrestle the gun away from Leon. They separated after a brief struggle and Leon continued to point the gun at himself. Moore and Wagoner quickly exited the room. As the door slammed behind them, they heard a sound consistent with a gunshot. Moore and Wagoner hurried to their vehicle and left the scene. Leon remained in the hotel.

At approximately 2:29 a.m., the Elk Grove Police Department received a 9-1-1 call from a hotel guest who heard “two pops.” The caller stated he looked through the peep hole and observed an individual enter the hallway with his shirt off and slump to the ground. The caller also observed a gun on the floor. Officer Benjamin Aguirre along with other officers responded to the hotel and proceeded to the third floor via the stairway. The officers exited the stairwell with their service weapons drawn and searched for the individual. The officers approached the end of the hallway and looked around the corner. They saw Leon seated in the perpendicular hallway approximately 60 feet away. Leon was immediately ordered to show his hands and to drop whatever he was holding. Leon responded, “Fuck you.” He did not comply with any of their instructions. The officers believed Leon was bleeding, but they could not confirm if he had a gunshot wound. Shortly after the initial contact, Leon fired one gunshot in an unknown direction. The officers asked Leon if he shot himself, but he did not answer. They encouraged Leon to relinquish the gun and show his hands. Approximately one minute after firing the first gunshot, Leon fired another gunshot. Leon then yelled at the officers to kill him. While this occurred, additional officers arrived at the hotel.

Sergeant Gregory Moore monitored this incident on his radio and heard that a gunshot was fired at the hotel. He responded to the scene and he heard an additional gunshot coming from inside the hotel. Sergeant Moore went to the third floor armed with his service rifle. Officer Daniel Coleman, who arrived prior to Sergeant Moore, pointed his service rifle at Leon while kneeling at the corner of the hallway where the officers were monitoring Leon. Officer Coleman was partially behind the wall and partially behind a ballistic shield. Sergeant Moore positioned himself behind and above Officer Coleman with his service rifle pointed at Leon. Sergeant Moore watched Leon move around the hallway. Leon crawled to his feet and had a gun in his hand. Leon stated he did not want the officers to send a K9 dog on him. Leon appeared to be intoxicated because he was stumbling around the hallway. Leon approached a room door but was unable to open it. The officers were concerned because they did not know which rooms were occupied by guests. Leon then walked away from the officers and briefly entered another room. When Leon re-emerged, he continued meandering around the hallway waving the gun. He also periodically held the gun to his head. Leon walked over to a wall and slid down to a seated position.

While he was sitting, Leon fired another gunshot in an unknown direction. He remained seated, continued to mumble, and fired another gunshot. Leon stopped moving momentarily and the officers were not sure if he shot himself. Leon then started crawling away from the officers. Sergeant Moore became increasingly concerned for the other hotel guests as no one could determine where Leon was pointing the gun. As Leon held the gun in his right hand, Sergeant Moore observed Leon trying to “almost turn the gun sideways to point toward us.” Officer Coleman observed Leon pointing the gun at them. Sergeant Moore focused on the gun and

watched Leon's wrist bend as if he was going to shoot at them. Since Leon had fired gunshots a few moments earlier, Sergeant Moore believed Leon was going to shoot at them. Sergeant Moore fired two gunshots in rapid succession, striking Leon both times. Leon fell to his side, began to crawl away, and ignored the commands to put his hands out to his side. Leon then came to rest in a prone position. The officers could not see his right hand or the gun. The officers were unsure if he was conscious and continued to intermittently give Leon commands to surrender.

The officers were concerned Leon still had possession of the gun and was feigning an injury to get them close and ambush them. For their safety, the officers utilized a remote-controlled device to travel to Leon and observe his face, fired non-lethal rubber bullets at Leon to gauge his response, and directed a K9 dog to contact Leon and check the area. This process took approximately one hour and twenty minutes. After confirming Leon did not pose a threat, an officer approached him. Leon did not have a pulse and was not breathing. Cosumnes Community Services District Fire Department personnel eventually arrived on scene to provide medical treatment. Leon was pronounced deceased at approximately 4:38 a.m.

Investigators located a 9mm Springfield Armory handgun under Leon's right hip. They also recovered four expended Luger 9mm shell casings in the hotel hallway and one expended shell casing inside room 306. A spent bullet was located under the bathroom counter in room 306, and four additional spent bullets were recovered in the third-floor hallway. A round count confirmed Sergeant Moore fired two shots from his department-issued service rifle.

According to the Sacramento County Coroner's Report, Leon died from multiple gunshot wounds. It could not be concluded which shot, or combination of shots, was fatal. One of the wounds was consistent with being self-inflicted.

The Sacramento County District Attorney's Office Laboratory of Forensic Services analyzed Leon's blood sample. The sample revealed a blood alcohol content of .19% and the presence of cocaine and cocaine metabolite.

Witnesses at the hotel were interviewed by investigators. They confirmed Leon was repeatedly ordered to surrender prior to Sergeant Moore shooting him.

The body-worn camera videos of Sergeant Moore, Officer Coleman, and Officer Aguirre were reviewed. The body worn cameras only catch glimpses of Leon down the hallway as the cameras are either obscured by barriers or other officers. When the initial officers respond to the third floor, Officer Aguirre's video intermittently shows Leon in the hallway at approximately 02:39:25. The officers repeatedly order Leon to show his hands and he can be heard saying, "Fuck you." The officers maintain a constant visual on Leon and update dispatchers regarding what is transpiring. The officers initially advise dispatch they cannot see what is in Leon's hands.

Officer Coleman's body worn camera was activated prior to his arrival on scene. The video shows Officer Coleman's position at the corner looking down the hallway. At approximately 02:41:38, Leon fires the gun. The officers discuss being unable to determine the direction of the

shot. At approximately 02:42:45, Leon fires another shot in an unknown direction. Shortly thereafter, at approximately 02:43:50, Leon is heard yelling, “Kill me.” The officers continue to instruct Leon to show his hands and get away from or relinquish the gun.

Sergeant Moore’s body-worn camera video shows him arriving and taking his position behind Officer Coleman at approximately 02:44:54. The officers continue to give Leon numerous commands to surrender. Leon eventually fires two shots within approximately four seconds in unknown directions. At approximately 02:58:30, Officer Coleman remarks that Leon is pointing the gun in their direction and states, “If he shoots that thing, it’s going right in my face.” Almost immediately thereafter, Sergeant Moore fires two shots in rapid succession.

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 this case, a hotel guest told a dispatcher he heard “two pops” and observed an individual enter the hallway and slump to the ground. The hotel guest also saw a gun on the floor. Shortly after the officers arrived at the hotel, Leon fired the gun in the hallway of the hotel. Officers had reasonable cause to detain Leon on suspicion of negligent discharge of a firearm. They repeatedly instructed him to show his hands, drop the gun, and surrender. However, Leon refused to comply with any instructions. He continued to fire more gunshots in unknown directions, as well as crawl and walk away from the officers. Leon had a duty to submit to the officers. 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.)

Here, Leon fired multiple gunshots in the hallway, attempted to enter other hotel rooms on the same floor, and waved his gun as he walked around. Leon's shooting was erratic and posed an imminent danger of death or great bodily injury to hotel guests in nearby rooms, as well as responding officers. As Leon pointed the gun in the officers' direction and moved his wrist as if to shoot the gun, Sergeant Moore feared for the safety of himself and other officers. Sergeant Moore used reasonable force to protect himself and others.

CONCLUSION

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

cc: Elk Grove Police Detective Mark Bearor
Elk Grove Police Sergeant Gregory Moore
Kimberly Gin, Sacramento County Coroner's Office