



Sacramento County District Attorney's Office

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MEMORANDUM

DATE: July 23, 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. SSD-17-13931
Shooting Officer: Nathan Burnette #910
Person Shot: Michael Marcum (DOB 5/14/87)

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 Michael Marcum. 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 County Sheriff's Department report number 17-13931 and its related dispatch logs and recordings, scene photographs and video recordings, in-car camera video, witness interview recordings, and supplemental reports; surveillance videos; and Sacramento County District Attorney's Office Laboratory of Forensic Services firearm, blood alcohol, and toxicology reports.

FACTUAL SUMMARY

On January 13, 2017, Sacramento Sheriff's Detective Nathan Burnette was investigating the whereabouts of Michael Marcum, who had two outstanding warrants for residential burglary and for violating the terms of his post release community supervision. During a case briefing, Detective Burnette was shown photographs of Marcum and learned his criminal history.¹ Detective Burnette also became aware that numerous firearms and body armor were stolen during the burglary, and Marcum should be considered armed with a weapon.

¹ Marcum has prior convictions for shooting an inhabited dwelling, receiving stolen property, and evading police officers.

Later that day, detectives received information Marcum was in the area near 2656 Sunrise Boulevard. Detectives went to the address, which was a Public Storage facility. At approximately 2:30 p.m., Sergeant Scott Puffer contacted an employee and showed her a picture of Marcum. The employee confirmed Marcum was present at the facility. The employee provided Sergeant Puffer a map of the facility and the location of Marcum's storage unit.

From his location inside the office at the facility, Sergeant Puffer observed a light-colored Lexus sport utility vehicle approximately 200 yards away facing west.² Investigators later learned the vehicle was stolen. Sergeant Puffer observed Marcum and a female walking between the vehicle and a doorway, the exterior access point to the hallway which led to Marcum's storage unit. Sergeant Puffer notified other detectives who had responded to the facility.

Detective Burnette was the passenger in Detective Paul Pfeifer's vehicle, an unmarked van. Detective Burnette was wearing a black vest with "SHERIFF" printed in yellow on the front and back, a duty belt with his badge affixed, and tan cargo pants. While en route to the facility, Detective Burnette confirmed Marcum's criminal history and reviewed his photograph in a law enforcement database.

As Detectives Burnette and Pfeifer approached the front gate, they observed the Lexus approximately "midway down the storage unit stall." Detectives Pfeifer and Burnette eventually drove westbound down the lane where the Lexus was parked. As they approached, Detective Pfeifer accelerated. Detective Burnette observed the Lexus facing west and both the driver side and front passenger doors were open. Detective Burnette noticed Marcum standing toward the front of the vehicle. Marcum saw the detectives approaching, quickly went to the passenger side, and dove into the vehicle. Detective Burnette also observed Marcum with a bag over his shoulder. When Detective Burnette clearly saw Marcum emerge from the vehicle with a semi-automatic handgun in his hand, he stated, "He's got a gun, he's got a gun." As Detective Pfeifer slowed down his van, he had not yet drawn his weapon and the windshield was the only barrier between himself and Marcum. Detective Burnette was very concerned for his partner, who could not protect himself. Marcum then ran around the front of his vehicle to the driver's side door so that his vehicle was in between himself and the approaching detectives. Detective Burnette observed the gun in Marcum's hand rising. While the van slowed, Detective Burnette opened his door and began firing his weapon at Marcum over the roof of the van. Detective Burnette stood on the floorboard of the decelerating van while he fired at Marcum. Detective Burnette could not determine if Marcum was discharging his gun because he could not distinguish the sound of other potential gunshots from his own shots. As Detective Burnette was firing, he saw Marcum run for the hallway where the storage unit was located. Marcum made it to the hallway and fell down right inside the door.

After the van stopped, Detective Burnette exited and entered the hallway. He observed Marcum's semi-automatic gun on the ground. He then saw the female down the hallway. Detective Burnette ordered her to the ground; she complied with his commands and was detained

² The storage facility is comprised of 11 long rectangular buildings, which are positioned east to west and parallel to one another. The buildings are separated by a driving lane wherein vehicles can be in closer proximity to the storage units. Certain storage units, like Marcum's, are accessed by a common hallway.

without incident. Detective Pfeifer detained Marcum and rendered first aid until fire and ambulance personnel responded.

Marcum suffered gunshot wounds to his right shin, right elbow, top of his right shoulder, and right corner of his scalp. He was transported to UC Davis Medical Center and received treatment for non-life-threatening injuries. Investigators recovered 10 shell casings at the scene, which were discharged from Detective Burnette's weapon. Investigators also recovered a loaded Ruger P89 semi-automatic handgun with dried blood in the hallway where Marcum had fallen, as well as an AR-15 style gun in Marcum's duffle bag. There was no evidence which indicated Marcum fired either of the weapons during this incident. The Sacramento District Attorney's Laboratory of Forensic Services determined the presence of methamphetamine and amphetamine in Marcum's system.

Marcum spoke to deputies in the hospital and stated, "I don't blame the deputies for shooting me, I had a gun in my hand. I would have done the same thing myself if I was them. I wouldn't shoot you guys, it was just stupid."

Marcum is currently pending charges in Sacramento Superior Court case number 17FE000605 related to this incident of two counts of violating Penal Code section 245(d)(2) (assault on a peace officer with a semi-automatic firearm), two counts of violating Penal Code section 29800(a)(1) (felon in possession of a firearm), and one count of violating Penal Code section 496d(a) (receiving stolen vehicle). The matter is scheduled for further proceedings on July 30, 2018.

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, Detective Burnette was aware of Marcum's criminal history as well as the active warrants for his arrest. Shortly after arriving on scene, Detective Burnette saw Marcum, a known felon who is prohibited by law from possessing firearms. He appeared to identify the detectives as law enforcement, dove into a vehicle, and came out with a semi-automatic gun. Marcum then ran around his vehicle to create a barrier in between himself and the approaching detectives. Marcum had a duty to submit himself to their custody and he failed to do so. Marcum's actions gave detectives every indication he was going to resist any attempt to arrest him. Detective Burnette had reasonable cause to arrest Marcum and was also justified in using reasonable force to effectuate the arrest

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, Detective Burnette clearly observed a fleeing felon who was armed and may have possessed body armor. Based on his observation of Marcum raising the gun and moving to a defensive position behind his vehicle, Detective Burnette was fearful that Marcum would fire at him and Detective Pfeifer. He was also aware Marcum may have been in possession of other stolen firearms and had violent tendencies based on his criminal record of shooting an inhabited dwelling and evading law enforcement. There was also the female with Marcum at the storage facility who was capable of assisting Marcum's efforts to elude capture. This initial situation presented imminent danger and was amplified when Marcum attempted to flee to an area where he could have concealed or barricaded himself in the storage unit with his firearm. Moreover, the officers were not required by law to retreat from their positions. These factors, along with Detective Burnette's inability to conclude that Marcum was not firing his weapon, support the reasonableness of his actions.

CONCLUSION

Detective Burnette was justified in shooting Marcum to defend himself and Detective Pfeifer and to prevent the escape of a suspected felon who posed a significant threat to others. His conduct under these circumstances was lawful. Accordingly, we will take no further action in this matter.

cc: Sacramento Sheriff's Detective Nathan Burnette #910
Sacramento Sheriff's Detective Nathan Traxler #1236
Sacramento Sheriff's Lieutenant Dan Donelli #86
Rick Braziel, Office of the Inspector General