



Sacramento County District Attorney's Office

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MEMORANDUM

DATE: July 23, 2018

TO: Chief Bryan Noblett
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. EGPD 17-000180
Shooting Officer: Jason Miller #157
Persons Shot: Luther Foster (DOB 2/14/71)
Clifton Doe (Juvenile)

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 Luther Foster and Clifton Doe.¹ 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: Elk Grove Police Department report number 2017-000180 and related dispatch recordings; witness interview recordings, 9-1-1 audio recordings; in-car camera and surveillance video recordings; photographs, diagrams, and other videos; and veterinary records.

FACTUAL SUMMARY

On January 7, 2017, at approximately 8:36 p.m., Luther Foster and Clifton Doe entered Jamba Juice located at 9160 West Stockton Boulevard, Suite 160, in the City of Elk Grove. Doe jumped over the front counter, pointed a gun at an employee, and told him to go over to the cash register and give him the money. Foster walked around the counter, approached another employee, pointed a gun at him, and ordered the employee to get on his knees. Doe took the money from the cash register and put it in a bag. Doe and Foster then left the store and walked north.

¹ Clifton Doe was a minor at the time of this incident. For confidentiality purposes, his actual last name will not be used.

Immediately after the robbery, one of the employees called 9-1-1 and described the incident, the robbers, and their clothing and guns. The employee said both robbers ran toward TJ Maxx or Home Depot after taking the money from the cash register.

Elk Grove Police Department dispatchers immediately announced this information and Officer Jason Miller responded to the scene with his K9 partner, a Belgian Malinois named Blu. Officer Miller was driving a marked patrol car and wearing an Elk Grove Police Department standard uniform.

Officer Miller arrived and began driving slowly northbound on West Stockton Boulevard. Looking to his left, he saw two people walking in a northerly direction on the west side of West Stockton Boulevard several feet in front of him. Their clothing matched the description of the robbers. Officer Miller pulled his patrol car into the left-turn lane and parked his car.

Officer Miller opened his driver's side door and exited his patrol car. Officer Miller saw Foster and Doe look at his vehicle as they continued to walk north. He saw Foster holding a handgun. Officer Miller then yelled, "Drop the gun!" and "Stop, you're going to get bit by the dog!" He saw Foster and Doe communicate with each other as they were walking, although he could not hear what they were saying. Foster and Doe started walking faster.

Officer Miller opened the driver's side rear door to release K9 Blu from the vehicle. He saw Foster and Doe run north toward Dunisch Road. Officer Miller pursued them and called for K9 Blu. K9 Blu exited the patrol car and chased Foster and Doe. Officer Miller gave K9 Blu the command to bite several times. Officer Miller withdrew his handgun from its holster and continued to pursue Foster and Doe.

Foster and Doe ran westbound on Dunisch Road. K9 Blu continued to chase. As K9 Blu leaped toward Foster, Officer Miller saw Foster turn toward K9 Blu and extend his right hand. Officer Miller heard several gunshots in quick succession and saw several muzzle flashes coming from Foster. Officer Miller believed that both Foster and Doe fired handguns because of the quick sequence of the gunshots. K9 Blu dropped to the ground, and Officer Miller believed the dog had been seriously injured or killed.

Officer Miller saw Foster turn and point his right hand at him, as well as two muzzle flashes. Officer Miller pointed his handgun at Foster and fired multiple shots. Foster and Doe turned and continued running westbound on Dunisch Road.

Officer Miller pursued them. He saw them run to a car parked on the south side of Dunisch Road, and they approached the driver's side rear passenger door. An individual was sitting in the driver's seat. Foster and Doe stopped briefly, but they continued running west past the parked car.

While running away, Foster and Doe turned their upper bodies and raised their right arms back towards Officer Miller's direction. At this point, he believed Foster and Doe fired their guns at him. Officer Miller's hearing was temporarily impaired from the previous gunfire, so he could

not hear anything. He fired multiple rounds at Foster, as well as at Doe. Foster again raised his arm in Officer Miller's direction and Officer Miller fired more rounds.

Sergeant Greg Moore responded to the scene in a marked sports utility vehicle. As Sergeant Moore approached Dunisch Road from northbound West Stockton Boulevard, he saw Foster and Doe running westbound on Dunisch Road. Doe kept running straight and turned the corner northbound on Ducks Pond Way into the nearby residential neighborhood. Foster ran toward the drainage ditch and adjoining field on the south side of Dunisch Road.

Foster jumped down into the drainage ditch to hide. Officer Miller yelled at Foster, "Hey, I'm going to shoot you! Drop the gun!" While in the drainage ditch, Foster raised his upper body and exposed it to Officer Miller. Believing Foster was going to fire from the ditch, Officer Miller fired additional rounds at Foster.

Sergeant Moore observed Foster grabbing and manipulating something near his waistband. Sergeant Moore saw Officer Miller fire two to three rounds at Foster. Sergeant Moore pulled his car over and exited. He saw Foster throw a black handgun into the weeds. Sergeant Moore communicated this information to Officer Miller. Foster placed both hands in the air and was detained and arrested by the officers.

Cosumnes Community Services District Fire Department arrived and provided Foster with medical assistance. He was transported to Kaiser Permanente South Sacramento Medical Center, where he was treated for non-life-threatening gunshot wounds to his right shoulder and left hip.

While Foster was being detained, other officers set up a perimeter around the surrounding residential neighborhood in an attempt to locate Doe. Approximately thirty minutes later, Doe surrendered to officers, and he was detained and arrested. Doe received medical treatment for a non-life-threatening gunshot wound to his left upper thigh.

K9 Blu was shot twice in his left front leg and taken to a veterinary hospital for treatment. His cephalic nerve was severed by the gunshot and K9 Blu was eventually retired from duty with the Elk Grove Police Department.

Officers recovered a .45 caliber handgun in the area where Sergeant Moore observed Foster throw the gun. Nearby, officers also located a loaded .380 caliber handgun. Doe later admitted that he used the .380 caliber handgun during the robbery and discarded it near the drainage ditch while fleeing from Officer Miller. A forensic examination determined that the shell casings recovered at the scene were from Officer Miller's 9mm handgun and Foster's .45 caliber handgun. There were no .380 caliber casings recovered.²

A witness driving south on West Stockton Boulevard stopped at the intersection of West Stockton Boulevard and Dunisch Road when Officer Miller was pursuing Foster and Doe. The witness saw Officer Miller release the dog, and Foster or Doe firing shots at Officer Miller and K9 Blu. The witness then observed Officer Miller return gunshots.

² There were seven shell casings from Foster's handgun. There were 41 shell casings from Officer Miller's handgun.

A review of Sergeant Moore's in-car camera showed Foster rolling toward the drainage ditch on Dunisch Road. As Foster rolled into the ditch, a gunshot hits the middle of the pavement on Dunisch Road. Foster's head then appears above the drainage ditch, and two gunshots ricochet off the ground in front of the ditch. Foster ducks down, but moved his upper body while horizontal in the drainage ditch. The recording captured Foster moving his hands in the air from his position in the drainage ditch, and Foster eventually being taken into custody by officers.

On February 22, 2018, Foster was convicted by jury of violating Penal Code sections 664/187 (attempted murder of Officer Miller) while personally using a firearm under Penal Code section 12022.53, two counts of Penal Code section 211 (robbery), as well as Penal Code section 600(a) (interfering with/harming a peace officer's dog), and Penal Code section 29800(a)(1) (felon in possession of a firearm). The court also found true that Foster had suffered two prior serious felony "strike" convictions. On March 23, 2018, Foster was sentenced to life in prison. Charges are still pending for Doe in juvenile court.

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 situation, Officer Miller had reasonable cause to arrest Foster and Doe for the armed robbery they committed at Jamba Juice. Officer Miller yelled at Foster to drop the gun and ordered them both to stop. Instead of complying, Foster and Doe hastened their pace in order to escape. Even the prospect of getting bit by K9 Blu did not result in getting Foster and Doe to submit to arrest for their crime. In fact, they started running from Officer Miller and K9 Blu. Foster and Doe had a duty to submit themselves to Officer Miller's custody. They 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.)

In this situation, Officer Miller knew Foster and Doe committed a robbery while using handguns. In fact, he observed Foster holding a gun as he initially contacted them. Officer Miller also observed Doe acting in a manner consistent with holding a firearm, and Doe later admitted possessing the second firearm located at the scene. After not complying with Officer Miller's commands to stop and drop their guns, Foster shot K9 Blu with his handgun and then fired at Officer Miller. Foster avoided apprehension by using deadly force. Doe could have surrendered to Officer Miller at this point, but he did not. Both Foster and Doe chose to continue to flee together while possessing their handguns. They lifted their arms in a manner that reasonably led Officer Miller to believe they intended to fire at him. While in the ditch, Foster continued to move his hands towards his waistband. Officer Miller reasonably believed Foster was continuing to reach for his handgun. Officer Miller also believed that Foster was using the ditch for cover so he could continue to fire his handgun at Officer Miller. Officer Miller was not required by law to retreat. Given the circumstances, it was reasonable to believe that Foster would continue to fire his handgun at Officer Miller, while Doe could also use his handgun. Foster and Doe posed a threat of death or serious physical injury to Officer Miller. Fearing for his safety, Officer Miller discharged his duty weapon at Foster and Doe.

CONCLUSION

Officer Miller was justified in shooting Foster and Doe to defend himself and to prevent the escape of these suspected felons who posed a significant threat to others. Officer Miller's conduct under the circumstances was lawful. Accordingly, we will take no further action in this matter.

cc: Elk Grove Police Department Officer Jason Miller
Elk Grove Police Department Detective Casey Robinson