



OFFICE OF THE SAINT LOUIS COUNTY ATTORNEY

MARK S. RUBIN COUNTY ATTORNEY

December 9, 2014

Special Agent Jerry Koneczny
Special Agent Paul Gherardi
Minnesota Bureau of Criminal Apprehension

Chief Gordon Ramsay
Duluth Police Department

Re: Officer Involved Shooting Investigation of Incident of August 11, 2014
in Duluth, Minnesota

Gentlemen:

Thank you for submitting your investigative reports of the above matter to my office for review.

To assure and enhance an expert objective analysis of the matter, I retained the services of Vern Swanum, retired Assistant St. Louis County Attorney prosecutor. Of the officers directly involved in the incident, Mr. Swanum is familiar only with Sergeant Pete Nielsen and Officer Jill Kettleson in a minimal professional capacity. Mr. Swanum was able to approach the review and analysis with total objectivity using the same standards he used in reviewing literally thousands of cases during his 30-year career as a prosecutor. I have reviewed his report and conclusions and concur in his assessment that the use of deadly force by Officer Johnson was justified under the law and particular facts of this matter.

Thank you also Agents Koneczny and Gherardi for discussing these findings and meeting with the Zontelli family representative last week.

Mr. Swanum's report and recommendation, which I adopt, is as follows:

Incident Synopsis

During the early morning hours of August 11, 2014, (3:49 a.m.) officers of the Duluth Police Department were dispatched to 3202 Piedmont Avenue to investigate a domestic disturbance of undetermined nature. There had been Duluth Police Department responses to this residence in recent weeks and days involving suicide threats as well as concerns that violence could develop between the married, but separated, husband and wife. Upon arrival the officers learned that the husband had intentionally harmed himself with a knife and was now

DULUTH COURTHOUSE
100 N. FIFTH AVE. W., #501
DULUTH, MINNESOTA 55802
218-726-2323

GOVERNMENT SERVICES CENTER
320 W. SECOND ST., #403
DULUTH, MINNESOTA 55802
218-726-2034

VIRGINIA COURTHOUSE
300 S. FIFTH AVE., #222
VIRGINIA, MINNESOTA 55792
218-749-7101

HIBBING COURTHOUSE
1810 TWELFTH AVE. E., #107
HIBBING, MINNESOTA 55746
218-262-0158

somewhere in the garage/basement area of the split entry home. The officers made contact with the husband who had essentially barricaded himself in a section of the garage that had entry by a single "man door." There was evidence of much blood coming from under the doorway, it was obvious the man was seriously injured, the man was insisting he intended to die, and he implored the officers not to enter the room. A determination was made that there was no time to spare or negotiate with the man. Any delay would likely result in his own self-inflicted wounds causing death. A decision was made to make forced entry into the room, with the K-9 present making first entry to distract the man, hopefully allowing the officers time to subdue him before he could cause further harm to himself or the officers. Upon forced entry, the man was still armed with a large knife. Officer Marc Johnson, after twice ordering the man to drop the knife, made the decision to use deadly force to protect himself and other officers. While suffering critical wounds, the man did survive.

Material Reviewed

1. Investigative reports of BCA agents Gherardi and Koneczny
2. Incident reports of all DPD officers on scene
3. Body cam videos of officers on scene
4. Frame by frame photos of the body cam videos of officers Marc Johnson and Jill Kettleison.
5. Reports of BCA crime scene investigators
6. Recorded interviews conducted by BCA officers of Marc Johnson, Jill Kettleison, Joseph Zontelli
7. Photographs of the shooting scene
8. Medical reports of Joseph Zontelli
9. Related ICRs and other documentation from Duluth Police Department relevant to this review.

Legal Issue

Did Officer Marc Johnson use reasonable and justified deadly force on August 11, 2014, during his encounter with Joseph Zontelli who was armed with a dangerous weapon, in an obvious mentally unstable condition, and threatening bodily harm to himself?

Legal Standard Applied to Analysis

--Applicable Case Law--

- Tennessee v. Garner*, 471 U.S. 1 (1985)
- Graham v. Connor*, 490 U.S. 386 (1989)
- Mumm v. Mornson*, 708 NW2d 475 (Minn. 2006)
- Ohio v. White*, 988 N.E.2d 595 (Ohio 2013)

These are the seminal cases on the issue of use of deadly force by a law enforcement officer. *Garner* and *Graham* are U.S. Supreme Court cases that establish the analytical guidelines and outline factors to be considered when evaluating alleged unlawful use of force by a peace officer. The reasoning of these cases was specifically adopted by the Minnesota Supreme court in *Mumm v. Mornson*.

Ohio v White is an opinion of the Ohio Supreme Court, but it is a rather exhaustive examination of the issue of use of force by law enforcement; specifically adopts the reasoning and principles of *Garner* and *Graham*; and provides an excellent summary of the issue and helpful outline in analyzing the issue.

Principles established

1. Deadly force may be used by a police officer when responding to a serious and imminent threat to officer safety.
2. The perceived threat must be assessed objectively, focusing specifically on the moment the officer used deadly force and the moments directly preceding it.
3. Earlier errors in judgment by the officer do not make the use of deadly force unreasonable if at the moment the action was taken was reasonable.
4. The officer need not wait until they are absolutely sure of the suspect's intent before responding with lethal force.
5. Each incident must be independently examined using a totality of the circumstances test using the standard of the "reasonable peace officer" rather than the "reasonable person" test.

6. In assessing the officer's decision to use force, deadly or otherwise, the finder of fact is "strictly forbidden from using the 20/20 vision of hindsight."

Also reviewed:

Minnesota Statute §609. 066

Duluth Police Department Policies and Procedures; use of force

Detailed Account of Incident

The following account of the incident that occurred at Piedmont Avenue at approximately 4:00 a.m. on August 11, 2014, will be told in narrative form. The reader can assume that all facts set forth can be supported by legally admissible evidence in a court of law.

Joe and Amy Zontelli are married, with two school aged children. The family home is located at 3202 Piedmont Avenue in the City of Duluth. On the date of this incident, and for a period of time prior, Joe and Amy were experiencing substantial marital discord, and Joe was not living at the family home. In the three weeks prior to August 11, 2014, there had been several domestic type reports to Duluth Police Department involving Joe and Amy. Primarily these involved suicide threats and gestures by Joe. These calls escalated in the week immediately preceding the incident under consideration. This history was known to the responding officers on August 11, 2014.

On the afternoon of August 10, Amy began receiving text messages from Joe indicated he was about to kill himself. Concerned, she asked a male friend to stay at her house in case Joe showed up there. At approximately 3:00 a.m. on August 11, Joe arrived at the house. Amy described his behavior as being "out of it" and she thought he might be under the influence of drugs. She asked her friend to leave to avoid further trouble. Her friend left, but he only retreated down the street to wait in his car in case Amy needed his help.

After the friend left, Joe began drinking beer and smoking "weed," (presumably marijuana). He then produced a knife and started cutting himself. He told Amy that if she called the police that he, Joe, would get shot. Amy then texted her friend about what was happening. Her friend in turn called 911 to report what was happening.

This history of events was later confirmed by the friend.

Within minutes, Duluth Police officers began arriving at the scene. These included Jill Kettleison, Ethan Roe, Marc Johnson and his K-9 partner, Sgt. Pete Nielsen and others. Most of the officers were equipped with body cameras, although all officers did not activate their cameras. All cameras were later collected, downloaded and reviewed by investigating officers and also by myself.

As officers Kettleison and Roe approach the front door of the house, they are met by Amy Zontelli. As she is talking to responding officers, Joe realizing that police are now there, runs down the split-entry stairs by the front door, past the officers, into the basement and yells something that the officers do not understand. They do see something in his hand, but are unsure what it is.

Amy briefly explains to the officers what has been happening in the last hour. She also tells them she was not harmed, assaulted or threatened by Joe, but that he has cut himself and is in possession of at least one knife. The officers did observe blood on the stairs leading to the basement/garage area of the home, confirming that Joe was indeed injured. Amy was then permitted to leave the home with the children and went to sit in her friend's car.

Marc Johnson was by this time at the front door with his K-9. There was a discussion amongst the officers at the door to determine what the situation was and the best course of action. It was clear that no crime had been committed by Joe at this point and it was primarily a welfare check situation with an obviously injured person seemingly intent on committing suicide.

At this point the officers yelled into the downstairs telling Joe to come out. There is a response by Joe but it is unintelligible. Again the officers yell down to Joe and warn that the dog will be released unless he shows himself. Joe does not come out, and the K-9 is released. The dog goes into the basement area, but does not find Joe. The officers then follow and enter the basement area.

Joe is not immediately located by the officers or the K-9, but they clearly hear him yelling that they should leave him alone, that he just wants to die, that he has only 30 minutes of blood left in his body, he wants to die in peace, and he wants to die in his own home. The basement leads to the garage area. The officers find that Joe has taken refuge in some kind of room separated from the normal area to park a car. The room is secured by a doorway. The door is closed. They do not know the layout or the size of the room. The officers do notice there is a substantial amount of blood coming from the beneath the door, leaking out into the garage area, signaling to them that Joe is apparently suffering from a significant self-inflicted

injury. (This is confirmed by photographs of the scene by investigators from the BCA. A large quantity of pooled blood can be observed right at the entry to the door flowing out under the door frame and into the garage where the officers were standing.)

They announce to Joe that if he does not come out of the room voluntarily they will force the door open and send in the dog. Joe's response is that he is standing by the door with the knife pointed at his chest and should the door be forced open it will then force the knife into his lungs. He continues to demand the officers leave him alone to die in peace in his own house.

The garage is somewhat disorganized and filled with various items making it difficult for the officers to navigate the area. They begin clearing a path to the doorway, talking amongst themselves, and telling Joe to come out of the room voluntarily, but without success. Approximately 3 minutes after entering the downstairs area of the home, Officer Marc Johnson indicates to the other five officers downstairs with him, including Sgt. Nielsen, that he is going to force open the door and release his dog. No other officer voices disagreement with that decision.

At this point, the officers deployed around the door to the room in which Joe is hiding. Officer DeJesus then administered two rapid foot kicks to the door causing it to open. The K-9 immediately entered and engaged Joe by the right leg. Officer Johnson enters the room followed directly by Officer Kettleon. There was no light in the room except that provided by the officer's flashlights. As Officer Johnson entered the room he observed Joe Zontelli, down and in a partial sitting position, holding a knife in what Johnson believed to be his right hand. At least twice, he ordered Joe to drop the knife. As Johnson advanced upon Joe, he observed Joe take what Officer Johnson believed to be a movement with the knife as if to stab either him or another officer. Officer Johnson would later explain to the investigating BCA agents that he believed that Joe Zontelli intended to cause potentially fatal injury to himself or other officers. He reached to secure the knife held by Zontelli. Officer Johnson then fired two shots from his service pistol into what he believed what was center mass of Joe Zontelli. The time elapsed from forcing open of the door to the firing of the first shot was approximately 6-7 seconds.

Emergency medical treatment was begun immediately, Mr. Zontelli was transported to a medical facility for treatment. The only entry wounds were determined to be in the area of his left back/shoulder area. Mr. Zontelli survived the injuries.

I have carefully reviewed the body cam videos of each officer on scene. I have painstakingly reviewed the body cam videos of Officer Johnson and Officer Kettleon several times. The Johnson and Kettleon videos show that when officers entered the room, Joe Zontelli is on

his backside on the floor, but partially propped up. It is apparent that the K-9 is engaged at his foot or leg, but is out of the camera view. You can plainly hear Officer Johnson repeatedly order Zontelli to drop the knife. Then each video shows briefly, but very clearly in my opinion, that Zontelli has a very large knife in his left hand and appears to begin a lifting or slashing motion with the knife. Johnson then lunges at Zontelli and his camera view becomes blurred, and Kettleston's camera view is obscured by Johnson's body. Two rapid shots are heard. It is dark in the room, there is much noise and confusion, but in my personal opinion I can understand how Officer Johnson legitimately believed the movement of Zontelli's hand with the large knife was an attempt to slash at Officer Johnson or that it constituted a threat to himself or other officers and Zontelli refused to drop the knife on command.

When interviewed by the BCA agents approximately 36 hours after the incident, Officer Johnson told the officers he believed the knife was in Zontelli's right hand. I found this of some importance in my analysis for two reasons. 1. He had reviewed his body cam video prior to the interview. Had he been trying to fashion his responses to correspond to the video he could have. To me, that added credibility rather than detracted. 2. I had to look closely at the body cam videos several times to actually comprehend what I was seeing. The view of the knife in Zontelli's hand is brief, and his hands are close together. I can see why such a mistake to the eye of the beholder could be made in that fast moving and stressful situation. I believe it also explains the location of the bullet strikes. Johnson was reaching out to control the arm with the knife in it, in his mind the right arm. That would have exposed Zontelli's front torso area. As Johnson pushed the arm he fired at what he thought was center mass, i.e. the front torso. In fact he was engaging the left arm of Zontelli, forcing it to Zontelli's right, exposing his back and neck. At that point Johnson would not have the benefit of light from his flashlight, and he would have naturally assumed he was aiming center mass.

During the interview of Officer Johnson, he provided his thinking and reasons for his actions. He explained that as he first entered the garage area he was listening to not only the things that Zontelli was saying, but the timbre and tempo of the voice. He concluded, based on his training and experience on many suicide calls, that Zontelli was serious about causing his own death. When asked if he considered further negotiations to convince Joe to come out of the room voluntarily he said he did, but concluded that negotiations would be of little use because of the obvious commitment of Joe to die. Furthermore, because of the large quantity of blood leaking from underneath the door, it was obvious that Joe was seriously injured and in danger of bleeding out. Johnson concluded that there simply was insufficient time before Joe was beyond help.

His plan was to send in the dog first to distract Joe, and to quickly follow the dog into the room and subdue and disarm Joe while he was distracted. He had no intention when entering the room to use deadly force. When asked why not kick the door open and then stand back, he explained that to do so would potentially be more dangerous. The garage was small, he knew that Joe was armed at least with a knife, and should Joe charge out of the room into the garage at officers that would be more dangerous to officers than quick entry and disarmament while Joe was distracted with the dog. When asked why not deploy the Taser first, Officer Johnson explained that he did not know the size of the room they were to make entry into, if the Taser did not disable Joe immediately as sometimes happens, then officers would again be placed in greater danger.

The other officers in the garage that night either wrote reports or gave statements that corroborates Officer Johnson's recollection of events, but obviously they could not corroborate his thought process. The various body cams also corroborate what happens right up to the point of entry. There is, however, no direct discussion between the officers about alternatives to forceful entry into the room. Things happened fast, Officer Johnson took control of the situation, and there was no one that seemed to disagree with the course of action or suggested outright a different tactic.

While Officer Kettleison's body cam captures Joe with the knife in his hand and raising it in an aggressive manner, she did not recall seeing the knife specifically. She was the next to enter after Officer Johnson, remembers a flash of something in the light from the flashlights, but could not identify for sure what it was. She was moving to the left, armed with a Taser, she tripped over something and was trying to find a light switch. She heard Johnson yell a command about a knife and then heard a shot. At that point she did not know if Zontelli was shooting at the officers or Johnson shooting at Zontelli.

None of the other officers were in a position to see the interaction between Zontelli and Officer Johnson until after the shots were fired.

Joe Zontelli was interviewed by Agents Gherardi and Koneczny on August 13, in his hospital room at St. Mary's Hospital. He confirmed all of the known facts up to the point the officers made entry into the room he had secreted himself. He stated it was indeed his intent and desire to end his life. He wanted to die in his own home and in his words, die in peace. He told the officers not to enter the room, just let him die. He had cut himself and was bleeding and believed he would bleed to death. He stated however that it was not his intention to hurt the officers or the dog. He did not believe he was even holding a knife when the officers

entered. He also recalled a female officer holding his leg prior to being shot. Those facts are not supported by the body cam videos or the officer testimony.

Legal Conclusion

The use of deadly force by peace officers in the line of duty is justified when employed to prevent death or great bodily harm to the officer or others. The use of deadly force must be reasonable under the circumstances using a "reasonable peace officer" standard.

On the early morning hours of August 11, 2014, Officer Marc Johnson was faced with a Hobson's choice: do nothing and allow Joe Zontelli to die; or act, placing himself and other officers in harm's way. After weighing his options in the short time available to him, his only real choice as a trained and dedicated officer was to make entry into the room with force. His intent was not to cause harm to Joe Zontelli, but to save his life. In the final analysis, that is what he did. Had he done nothing, Joe would be dead, and we would not be visiting this question as we are now.

In hindsight, some might question if the decision to enter the room in which Joe Zontelli had secreted himself was the best decision. But the case law makes it clear that the finder of fact is forbidden from engaging in the use of 20/20 hindsight. Furthermore, even if one were to conclude that there was a better course of action, or even that it was the wrong decision, again the case law is clear that earlier errors in judgment do not make the use of force wrongful as long as at the moment it was used it was reasonable. The reasons for these principles are obvious. We cannot expect peace officers to go into dangerous situations, where near instantaneous decisions must be made that will affect their safety or the safety of others if they must constantly be concerned with whether or not they will face legal repercussions for their conduct. If it was otherwise, it would only encourage peace officers not to act, or delay acting, which would conceivably put the welfare of more citizens and officers in jeopardy. Peace officers are asked to do an incredibly difficult and dangerous job. Nearly every week we read or hear of a peace officer somewhere around the country losing his or her life while responding to a seemingly non-threatening call. To handcuff them with second-guessing would only endanger those which we rely upon to protect the public each day.

Once entry was made into the room, Officer Johnson encountered an armed and unstable man who made what could reasonably be viewed by any peace officer as a life threatening gesture towards the officer. Johnson was forced to make an instantaneous decision. He didn't have the luxury of time to stop the action, consider his various options, and weigh them individually. His instincts, training and reactions took over. The decision he made to employ

Officer Involved Shooting Incident of August 11, 2014

Page 10

December 9, 2014

deadly force was, in my professional opinion, legally and factually justified. It was reasonable under the totality of the circumstances. I do not believe criminal charges would be proven beyond a reasonable doubt, nor should they be.

In short, the conduct and actions of Officer Marc Johnson on August 11, 2014, were reasonable and clearly do not justify consideration of criminal prosecution.

Sincerely,



MARK S. RUBIN

St. Louis County Attorney

MSR:ymk