



Office of the District Attorney Stanislaus County

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Bureau of Investigation
Lt. David Hutchinson
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PRESS RELEASE

For Immediate Release

Date: September 26, 2018

Re: Shooting incident by Officers Found to be Justified

For More Information Contact:

John Goold, Public Information Liaison

Phone: (209) 525-5550

Modesto, California - Stanislaus County District Attorney Birgit Fladager announced today that, after a thorough review of all the relevant evidence gathered during the investigation of the officers-involved shooting incident that occurred on May 31, 2015, the shooting has been determined to be justified.

A copy of the letter provided to the Modesto Police Department is attached to this press release.

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September 21, 2018

Chief Galen Carroll
Modesto Police Department
600 10th Street
Modesto, CA 95354

Re: Downey Ave. incident

Dear Chief Carroll:

In complaint #1488140, defendants Andrew HERNANDEZ (DOB 4/10/1990), Juan TINOCO (DOB 12/13/1989) and Steven VASQUEZ (DOB 12/30/1988) were charged with attempting to murder Sergeant Lance Nicolai, Officer Glenn Graves, Officer Michael Rokaitis and Officer Dan Starr. This case was submitted to us for prosecution (under MPD case #MP15-050424). The case against the defendants has now concluded. Based upon a review of the submitted reports, witness statements and audio and video evidence, it is our conclusion that the use of force by the involved officers was legally justified. This finding is also supported by the guilty pleas entered by two of the defendants. To explain our finding, I begin with a very brief summary of the known facts:

FACTS

On May 31, 2015 at approximately at 2301 hours (11:01p.m.), a disturbance was reported at the food trucks on 8th Street in the downtown area. Officers went to the location, but the people involved had left. At 2323, the original reporting party called back and advised that the individuals had returned and were brandishing handguns. A vehicle description and a description of the men involved was provided to the dispatcher and passed along to responding officers. Officer Dan Starr arrived in the area and within two minutes located the vehicle and suspects. The suspects were later identified as Andrew Hernandez, Juan Tinoco, and Steven Vasquez.

Additional marked police units joined Off. Starr and he attempted to pull the vehicle over. The car did not stop. Within seconds the car drove through a red light and accelerated at high speed. A PIT maneuver was utilized by Off. Scopesi to force the car to stop. As officers pulled up to face the stopped car Tinoco exited from the back seat and began to shoot at the officers. Off. Starr, Off. Graves and Sgt. Nicolai returned fire. Hernandez, who was in the passenger seat, held both hands up and stuck them out of the window. Vasquez the driver, after some initial movement inside the car, got out of the car and laid on the ground. Tinoco ran around the rear of the car and engaged in a gun battle with the officers until he was shot and fell to the ground. His gun, a Smith and Wesson Model 410, .40 caliber handgun, was recovered next to him.

A loaded .357 Ruger revolver was recovered from inside the car. Officer Graves's patrol car was struck by several bullets; Off. Starr's patrol car was struck by at least one bullet, and Sgt. Nicolai's patrol car was struck by a bullet that impacted the front air bag sensor bracket.

Pursuant to the county-wide officer involved incident protocol the scene was preserved. Most of the officers on scene had body worn cameras (BWC) which captured the shootout. At least one witness stated that two of the subjects fired guns. However, the video evidence was inconclusive for all but Tinoco who can be clearly seen shooting at the officers. Tinoco was injured, but survived his wounds. A comparison of Tinoco's DNA to DNA on the S&W handgun was a positive match. The DNA results were inconclusive on the Ruger. However, both Tinoco and Vasquez tested positive for gunshot residue (GSR).

On March 9, 2018, Tinoco pled guilty to three counts of attempted murder of a police officer and admitted using a gun. He was sentenced to eighteen years to life in prison. Vasquez pled guilty to assault with a deadly weapon on a peace officer and received six years in prison.

LAW

Any application of deadly force is unlawful unless it is either justified or excused. The use of force by a peace officer is governed by the Fourth Amendment. As the U.S. Supreme Court has said:

“The “reasonableness” of a particular use of force must be judged from the perspective of a reasonable officer on the scene, rather than with the 20/20 vision of hindsight. The Fourth Amendment is not violated by an arrest based on probable cause, even though the wrong person is arrested, nor by the mistaken execution of a valid search warrant on the wrong premises. With respect to a claim of excessive force, the same standard of reasonableness at the moment applies: “Not every push or shove, even if it may later seem unnecessary in the peace of a judge's chambers,” violates the Fourth Amendment. 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.” [Internal citations omitted.]
Graham v. Connor, (1989) 490 U.S. 386, at p. 396-397.

Peace officers are extended rights that differ from ordinary citizens due to their need to enforce the laws. Some of these rights are codified in Penal Code §835a which states:

“Any peace officer who has reasonable cause to believe that the person to be arrested has committed a public offense may use reasonable force to effect the arrest, to prevent escape or to overcome resistance. ¶ A peace officer who makes or attempts to make an arrest need not retreat or desist from his efforts by reason of the resistance or threatened resistance of the person being arrested; nor shall such officer be deemed an aggressor or lose his right to self-defense by the use of reasonable force to effect the arrest or to prevent escape or to overcome resistance.”

The standard of “reasonableness” is what is required for self-defense, and as said by the courts:

“Justification does not depend on the existence of actual danger but on appearances. [Citations.] ... He [defendant] may act upon such appearances with safety; and if without

fault or carelessness he is misled concerning them, and defends himself correctly according to what he supposes the facts to be, his act is justifiable, though the facts were in truth otherwise, and though he was mistaken in his judgment as to such actual necessity at such time and really had no occasion for the use of extreme measures.”

People v. Jackson, 233 Cal. App. 2d 639, 642.

Thus, “an officer may reasonably use deadly force when he or she confronts an armed suspect in close proximity whose actions indicate an intent to attack. In these circumstances, the Courts cannot ask an officer to hold fire in order to ascertain whether the suspect will, in fact, injure or murder the officer. The high numbers of officer mortalities in recent years illustrate the unreasonableness of such a notion.”

Martinez v. Cty. of Los Angeles, (1996) 47 Cal. App. 4th 334, 345.

CONCLUSION

Based on the law as set out above, Sgt. Lance Nicolai, Off. Glenn Graves and Off. Dan Starr were legally performing their jobs as peace officers cloaked with the protections of the law; they were in marked police vehicles and exhibiting the authority of the State. They had a lawful reason to contact the suspects and to stop the car the suspects were in. The suspects fled, resulting in a pursuit. The information about the reported call/crime would have led any reasonable officer to be placed in fear of armed suspects. The suspects’ flight from the officers only heightened the reasonableness of this fear. The PIT maneuver was appropriate to stop the suspects.

Once the suspects’ car was stopped and occupant(s) began shooting¹ at the officers, the officers returning fire was reasonable and legally justified in self-defense and in the course of their duties. Under these circumstances, the shooting of Tinoco is determined to be justified. More importantly, and conclusively, the fact that both Tinoco and Vasquez have admitted guilt establishes that the officers were justified in their actions.

Very truly yours,

BIRGIT FLADAGER
District Attorney


for David P. Harris
Assistant District Attorney

cc: Off. Glenn Graves
Off. Dan Starr
Sgt. Lance Nicolai

¹ The fact that a case against the third suspect could not be proven beyond a reasonable doubt or that Vasquez personally fired a weapon does not lessen the reasonableness of the officers’ conduct.