

Use of Force – Non-Fatality

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Valley Independent Investigative Team
Federal Way Police Department, #2021-5202



King County Prosecuting Attorney

Public Integrity Team

June 7, 2022



DECLINE MEMORANDUM

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I. INTRODUCTION

a. Purpose of Memorandum

The King County Prosecuting Attorney's Office (KCPAO) is mandated by law to analyze certain incidents regarding police use of force and to determine if the action was justified or if there was a criminal action such that criminal charges should be filed. Because the investigation and analysis are mandatory if specific criteria are met, the KCPAO's review of an incident does not implicitly signal that the use of force was either justified or that criminal charges are appropriate. Instead, the KCPAO is required to assist independent investigations involving police use of deadly force to enhance accountability and increase trust to improve the legitimacy of policing for an increase in safety for everyone.

Pursuant to the Law Enforcement Training and Community Safety Act, an independent investigation must be completed when the use of deadly force by a peace officers results in the death, substantial bodily harm, or great bodily harm. The independent investigation is conducted in the same manner as a criminal investigation.

b. Status of the Independent Investigation

After a thorough review of the independent investigation and applicable laws, the Special Operations Unit Public Integrity Team (the Team) has determined the investigation into this matter is complete.

c. Scope of Memorandum

The KCPAO's determination if the police action was justified or if there was a criminal action such that criminal charges should be filed is based entirely on the investigation materials provided to the KCPAO, relevant criminal laws, rules of evidence governing criminal proceedings, the applicable

burden of proof, and the KCPAO's Filing and Disposition Standards. This determination is not intended to address matters outside the scope of this memorandum including, but not limited to, administrative action by the involved agency or any other civil action. The Team expresses no opinion regarding the propriety or likely outcome of any such actions.

II. SUMMARY:

On May 9, 2021, a tow truck was stolen outside the Seattle residence of its registered owners ("R/O") Civilian 1 and Civilian 2.¹ They filed a police report. SPD made an entry in the Washington Crime Information Center database advising law enforcement of the stolen vehicle with a "Caution – Armed – Dangerous" designation noting that a small pocketknife was located inside the vehicle.

The following day, by chance, Civilian 3 a friend of R/Os spotted the stolen tow truck in the city of Kent and followed it back to the Homestead Apartment complex in Kent. Civilian 3 called 911 to report seeing the stolen truck. Involved Officer 1 of Kent PD followed the tow truck but the driver proved evasive driving into oncoming traffic before Involved Officer 1 ended the pursuit.² Later that same day, Civilian 3 again spotted the tow truck and notified the police that the stolen vehicle was again at the Homestead Apts.

When Involved Officer 1 arrived, the truck was already gone. As Civilian 3 was driving away from the location he spotted the truck a third time driving back towards the apartment complex and informed the police who were still near the location. Involved Officer 1 and Officer 1 arrived at the location. Shortly thereafter, Officer 2 and Officer 3 arrived as backup. Officer 2 parked his squad car with its lights on and in a manner that blocked the apartment complex exit. Dispatch informed the officers of the armed-dangerous warning and that a small pocketknife was reported to be inside the vehicle.

The complex has a north and a south parking lot. They connect at the sole ingress and egress to the location on the east side of the property at 108th Ave SE. Officer 2 and Officer 3 were tasked with looking for the truck by walking westbound through the breezeway which bisects the complex and its two parking lots. Officer 2 and Officer 3 spotted the tow truck in the back of the southern lot, notified the other officers, drew their handguns, and approached the tow truck. Involved Officer 1 and Officer

¹ Surveillance footage of this theft exists, but the identity of the perpetrator is unclear.

² Coinciding with the attempt to elude Involved Officer 1, at approx. 4 pm, surveillance footage from a resident a Homestead Apt. captures the subject driving the tow truck into the apartment parking lot. No one else is seen driving the tow truck in surveillance the footage provided to police.

1 approached westbound through the south parking lot. Officer 1 had his handgun drawn and Involved Officer 1 had his assault rifle at the ready.



Photo 1: The red X marks the dead-end in the south parking lot where the subject was seen parked inside the stolen tow truck. The blue lines denote the direction that Officer 1 and Involved Officer 1 approached the truck. The light green line denotes the direction Officer 2 and Officer 3 walked before making contact with the tow truck.

Officer 2 identified himself as police and ordered the subject to put his hands up. The subject instead started up the vehicle and drove towards the parking lot entrance in reverse at a high rate of speed. Officer 3 successfully threw spike strips down, which deflated the front driver side tire but did not immediately slow the truck down. The subject continued driving in reverse, passing Involved Officer 1 and Officer 1 as he unsafely maneuvered the L-shape curve of the road.

The subject then tried to exit the parking lot, which was blocked by Officer 2's squad car, by ramming into it so hard that it pushed Officer 2's car 6' backward. The impact caused the tow truck to shake. The officers followed the truck through the parking lot on foot. Officer 2 is heard on BWV warning the other officers that the subject may choose to drive forward towards them.

The subject then rapidly accelerated forward towards the officers. As the tow truck sped towards them, narrowly avoiding the trees that lined the curb, Officer 2 yelled at the other officers to get out of the way. Officer 1 and Officer 3 were the closest officers to the tow truck. They both were able to dodge the tow truck. Involved Officer 1 was in the middle of the roadway. He took a few steps to the side to avoid the truck and shot his rifle into the tow truck five (5) times, hitting the subject multiple times.



Photo 2: The red X is where the truck began driving in reverse away from police. The green X is the location of Officer 2's squad car that the subject rammed into. The yellow lines show the truck's direction of travel after hitting Officer 2's car and the yellow X marks the spot of the officer involved shooting.



Photo 3: Damage the subject caused to Officer 2's patrol car.



Photo 4: Still shot from Involved Officer 1's BWV seconds before the OIS as the subject speeds toward him narrowly missing trees.

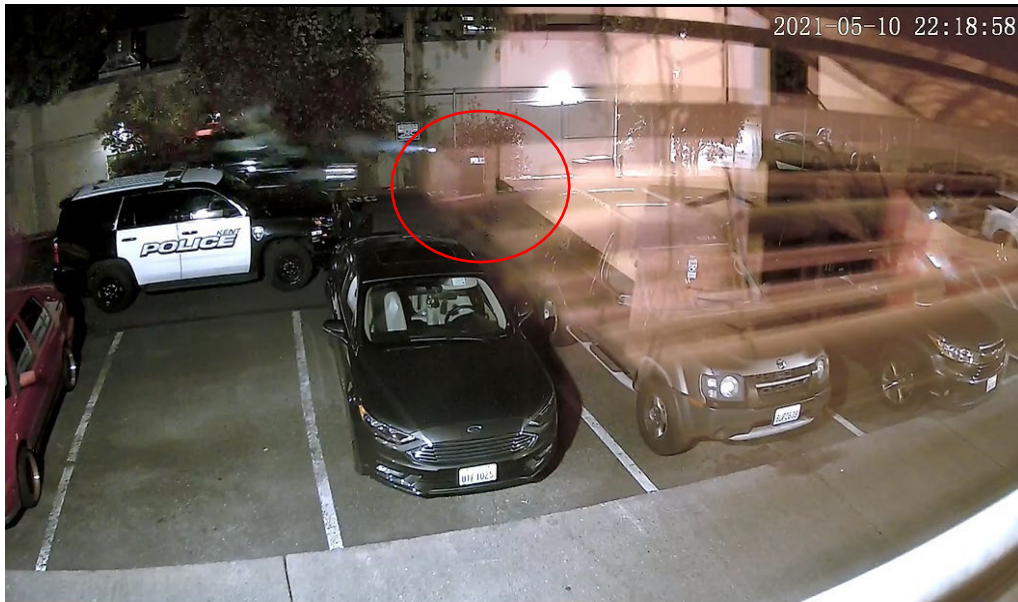


Photo 5: Still shot from Civilian 4's surveillance footage of Involved Officer 1 shooting at the tow truck. The flashlight attached to the firearm's barrel appears to be turned on as he shoots.



Photo 6: Google Maps photo looking westbound depicting the narrow road the subject navigated. The ladder is roughly where Officer 2's car was blocking the road. Just beyond the ladder is where the OIS occurred.

The tow truck then crashed into a building at the end of the parking lot coming to rest. BWV footage from Involved Officer 1 shows him upset about shooting the subject. He can be heard on his BWV yelling:

- “He tried to hit me. What the f**k?”
- “God dammit.”
- “F***ing stupid ass.”
- “F***ing idiot.”
- “What the f**k did he have to do that for? F**king retard.”
- “What the f**k did he have to do that for? Why didn’t you just give up? Stupid f**k.”
- “Why dude? Why?”

Officer 1 pulled the subject out of the car. Medical aid was immediately given to the subject. Officer 3 was able to turn off the car’s ignition despite no key being in the ignition. A shaved key fitting the truck’s ignition was later observed on the driver’s floorboard. The subject was transported to the Harborview Medical Center emergency room. He sustained gunshot wounds to his left shoulder, left chest and left face, the latter which caused him to be intubated. He was treated for his injuries, which were determined to be non-life threatening whereupon he was transferred to the ICU. The subject told hospital personnel that he consumes methamphetamine daily and his urine tested positive for the drug. He tested negative for other narcotics and alcohol.

VIIT responded to the shooting. Federal Way PD was the lead agency for the officer involved shooting investigation.

Officer 1, Officer 2 and Officer 3 each gave voluntary written statements. Significantly, each witnessing officer expressed that after the subject rammed into Officer 2’s patrol car and drove towards them in the small parking lot, they were in fear for their safety because of the size of the tow truck, the subject’s reckless driving, and the fact that they were all on foot. Each witnessing officer chose to hide because they were concerned for their safety. Officer 1 initially believed that Involved Officer 1 and Officer 3 were hit by the tow truck. He estimated that the subject’s truck hit Officer 2’s squad car at 25 mph.

A search warrant on the tow truck was executed and a methamphetamine pipe was found on the driver’s seat, as well as sunglasses.

The subject’s estranged wife Civilian 5 was notified of the shooting. She later contacted lead

investigator Officer 4 and requested the return of the subject's sunglasses, which were left in the tow truck. Officer 4 interviewed her further. She told Officer 4 that the subject has not been doing well since their separation. She said that he has no family nearby. He was formerly a landscaper and auto mechanic but is now unemployed and is using methamphetamine. She also believed that he has quite a few recent contacts with law enforcement. She saw him driving the tow truck on the day of the incident, which stood out to her because she had never seen him drive it before.

Subject Rojo-Melendrez also gave a voluntary statement. In the recorded telephone interview, he stated that he did not steal the tow truck. He said his friend Civilian 6 let him borrow the tow truck in order to tow another vehicle and that he'd just gotten into the vehicle for the first time when he heard someone yelling at him. He said that he did not know the men yelling at him were police. He said that he fled because he was scared. He realized they were police when he passed the police cars in the parking lot. He did not recall ramming into Officer 2's squad car. When he was shot, he claimed that he was driving forward in order to comply with officers' orders. He denied trying to hit the officers with the tow truck and said that he could not see them standing in the road. He denied being under the influence stating that he last used methamphetamine 1 week prior.



Photo 7: Earlier in the day at the Homestead Apt., an individual matching the subject wearing similar clothing and sunglasses enters the stolen tow truck multiple times and ultimately drives it away.

Law enforcement canvassed the location for witnesses. The only eyewitness they discovered was Civilian 7. She is the babysitter of a resident at the complex and was sitting in her parked car next to where Involved Officer 1 fired his weapon. She recalled seeing the tow truck going in reverse, then accelerated forward. She did not see but heard the tow truck crash and then she heard 4 gunshots.

An ammunition count of Involved Officer 1's rifle was performed. Consistent with the video, his rifle was missing 5 rounds.

The subject pled guilty to Possession of a Stolen Vehicle and Hit and Run in cause no. 22-1-

04996-7 KNT for the underlying conduct.

III. LEGAL STANDARD AND ANALYSIS:

RCW 9A.16.040(4) states that a peace officer shall not be held criminally liable when using deadly force in good faith. Good faith is an objective standard. The pertinent question is whether a reasonable officer, similarly situated, considering all the facts and circumstances and the information known to the officer at the time, would believe that using deadly force was necessary to prevent death or serious physical harm to the officer or another individual.

The legislature outlined the limited circumstances when deadly force in good faith can be used. RCW 9A.16.040(1)(a)-(c).

For instance, using deadly force is justified when, acting in good faith, it is used to apprehend an individual who the officer believes has committed a felony. RCW 9A.16.040(1)(c)(i). However, the officer must also have probable cause to believe that the suspect, if not apprehended, poses a threat of serious physical harm to the officer or another individual. RCW 9A.16.040(2). Among the non-exhaustive list of circumstances to consider in determining whether a threat of serious physical harm exists is whether the suspect displays a weapon in a manner that could reasonably be construed as threatening. Before using deadly force to prevent escape, if feasible, the officer should provide a warning. *Id.*

In this instance, it appears that Involved Officer 1 acted in good faith under the narrow circumstances outlined by the legislature and was thus legally justified in using deadly force. Before using deadly force, Involved Officer 1 had probable cause to believe the subject committed a felony - possession of a stolen vehicle. Involved Officer 1 also had probable cause to believe that the subject, if he was not apprehended, posed a threat of serious physical harm to himself and others. For example, when officers attempted to arrest the subject, they had reason to believe the subject would attempt to escape given his attempt to elude Involved Officer 1 earlier in the day. Additionally, when the subject sped toward Involved Officer 1 and his colleagues in the parking lot, the subject was driving erratically in a confined space. He had just reversed a large rig – a Ford F-450 with doublewide wheels - through a narrow space in order to escape apprehension without regard for the officers' safety or that of residents that may have been in the parking lot. He then smashed into Officer 2's illuminated squad car that was blocking the exit to the apartment complex before accelerating forward at the officers who were in a vulnerable position because they were on foot. As the truck accelerated towards the officers

it nearly struck the trees that lined the side of the road. In short, there was no predicting what the driver might do next in order to avoid apprehension. Had Involved Officer 1 not shot at the subject his driving could reasonably have injured Involved Officer 1, another officer or a civilian like Civilian 7 who was parked. Finally, because the subject was driving at high rate of speed towards Involved Officer 1 it was not feasible for Involved Officer 1 to warn the subject before firing his weapon. RCW 9A.16.040(2)(b). Considering all of the abovementioned facts and circumstances, a similarly situated reasonable officer would have believed that the use of deadly force was necessary to prevent death or serious physical harm to him and others.

Additionally, it appears from the evidence that Involved Officer 1 acted in self-defense/defense of others. From the officer's perspective, it reasonably appeared that they were the victims of an assault in the second degree when Mr. Rojo-Melendrez drove rapidly at them in the tow truck. While a tow truck is not a deadly weapon *per se*, RCW 9A.04.110(6) states that a vehicle is a deadly weapon when under the circumstances it is used in a manner capable of causing death or substantial bodily harm. The reckless manner in which Mr. Rojo-Melendrez was driving this heavy-duty truck in a confined space is such an example. Additionally, Mr. Rojo-Melendrez's reasonably appeared to put the safety of the officers in danger. It cannot be shown beyond a reasonable doubt that Involved Officer 1 did not act in lawful self-defense because a person is entitled to act on appearance in defending himself even if afterward the person was mistaken in their belief about the extent of the danger. State v. Miller (1926) 141 Wash. 104, 105-106; WPIC 17.04.

IV. CONCLUSION

As a result, there is no basis for filing criminal charges against Involved Officer 1.