

PREAMBLE

I was hired by Solano County as a Special Prosecutor to conduct an independent legal analysis of a fatal Officer involved shooting by Officers from the Vallejo Police Department. The shooting was investigated by the Vallejo Police Department and the Solano County District Attorney's Investigators Department. This factual summary is based on a thorough review of all the investigative reports, photographs, audio and video recordings, which include the Officer's body worn cameras, submitted by the Vallejo Police Department, DR# 19-1676. I also reviewed the use of force expert report submitted by Blake Consulting Firm.

PRINCIPAL INVOLVED PARTIES
OFFICERS

Officer Anthony Cano – Vallejo Police Department

Officer Collin Eaton – Vallejo Police Department

Officer Bryan Glick – Vallejo Police Department

Officer Ryan McMahon – Vallejo Police Department

Officer Jordan Patzer – Vallejo Police Department

Officer Mark Thompson – Vallejo Police Department

INVOLVED SUBJECT

Willie James McCoy – (Deceased) DOB: 3/23/1998

FACTUAL SUMMARY

On February 9, 2019, Vallejo Police Department Dispatch received a 9-1-1 call from Mathew Garcia, who was the Assistant Manager of Taco Bell located at 974 Admiral Callaghan Lane, Vallejo. Mr. Garcia reported a silver Mercedes stopped in the drive-thru lane, he couldn't see anyone in the vehicle as the windows were heavily tinted. He then called the Police Department.

Officer Cano stated he was dispatched to a call involving an unconscious individual in the Taco Bell drive-thru. He arrived at the scene at approximately 10:45 p.m. The individual in the vehicle was later determined to be Willie McCoy. He approached McCoy's driver's side door and describes him as unconscious or asleep, possibly on drugs or drunk. He shined his flashlight into the vehicle and saw a pistol in McCoy's lap. Officer Cano said the firearm was on McCoy's left thigh with the barrel facing the suspect's right knee cap. He indicated the way it was lying on his lap, he could have grabbed it with either hand. Officer Cano then said this heightened his concern for safety because the weapon was easily accessible by McCoy.

Officer Thompson then arrived and he [Officer Cano] and Officer Thompson discussed the fact that McCoy's foot was on the brake and the Mercedes was in drive. They then formulated a plan to block the vehicle with other patrol units.

Officer Cano stated that Officer Patzer was at the scene as well and they thought about trying to open the door and remove the person from the car. They then decided to wait for more cover.

Officers Eaton, Glick and McMahon arrived at the scene shortly thereafter.

As indicated, Officer Cano observed the weapon on McCoy's lap. Officer Cano stated that McCoy's left hand was down near the firearm and his right hand was down also. McCoy then began to scratch his chest with his right hand. Cano and the other Officers gave loud verbal commands, "Let me see your hands, put your hands up." McCoy then opened his eyes, made eye contact with the Officers, and lunged forward while dropping his right hand toward the firearm at which point, Officer Cano fired his weapon. He fired eleven [11] rounds from his weapon that contained eighteen [18] rounds.

Officer Cano fired because he believed McCoy was going for his firearm on his lap and he feared for his life and the lives of the Officers on the scene. He said he was scared when the suspect was waking up, and that is when he was giving clear and concise demands. He was hoping McCoy would comply, however, his hand dropped to the gun. He said the Officers had no cover and felt McCoy would not miss hitting an Officer as they were only two [2] feet away. He said there were no other alternatives to deadly force. The Mercedes doors were locked and the windows were up.

Officer Patzer arrived and parked his vehicle behind the Mercedes in the drive-thru. Officers Patzer and Cano both saw that McCoy was either asleep or unconscious with a firearm on his lap. Officer Patzer, initially thought to wake McCoy up, but then changed his mind due to the severity of the situation, which was the gun on his lap. He assumed the gun was loaded. He stated the gun was on McCoy's left thigh with the barrel oriented toward the driver door with the

grip facing the suspect's waistband.

Officer Thompson arrived and noticed the Mercedes was in drive. They decided to block the Mercedes with patrol units. The plan was to have Officer Thompson attempt to open the driver's door but it was locked. McCoy then began to wake up. Officers gave loud verbal commands to show his hands, and put his hands up. McCoy looked left, looked at Patzer, and then looked to his lap. He believed he was looking for his gun. McCoy then dropped both hands down suddenly, like a flinch. McCoy's shoulder rose and his elbows came up, followed by his hands starting to come up over the dash. Officer Patzer said due to the orientation of the gun, the muzzle towards the door, all McCoy would have to do is pull the trigger to strike an Officer, through the door.

Officer Patzer believed McCoy's action presented an immediate threat and he feared for himself and the other Officers on the scene. Officer Patzer felt it was necessary to fire his handgun at McCoy to stop McCoy from killing him or the other Officers. Officer Patzer said he stopped firing when he felt there was no longer a threat. Officer Patzer fired twelve [12] rounds from his weapon that contained eighteen [18] rounds.

Officer Thompson responded to the scene after hearing McCoy was unconscious with a gun in his lap. When he arrived, he went to the driver's side of the Mercedes and stood next to Officer Cano. He did see the gun in McCoy's lap. He described McCoy as passed out and described the gun as black and possibly a Glock. He also saw that the Mercedes was in drive with McCoy's foot on the brake. Officers Thompson and Cano attempted to coordinate a plan. The plan was to block the Mercedes, front and back. After the police vehicles were in place, the plan was to open the door to secure the handgun before McCoy woke up.

During the implementation of the plan, Officer Thompson found the door was locked. He backed away and requested the on-duty Supervisor. While awaiting the Supervisor, McCoy woke up. The Officers then gave commands to show his hands and put his hands up. McCoy looked at the Officers and then quickly reached toward the handgun. Officer Thompson described McCoy's hands as moving up and then back down toward the handgun. He believed he was going to use the weapon against him and the other Officers. Thompson said he began to move backward. When McCoy reached for his gun, he was fearful of being shot by McCoy. He felt McCoy was acting in a manner which could cause him death or great bodily injury. Officer Thompson fired seven [7] rounds from his Glock firearm that contained eighteen [18] rounds. Post shooting, Thompson saw McCoy's handgun on the driver's floorboard.

Officer Eaton arrived at the scene to see Officers Cano, Patzer and Thompson with their weapons drawn on the window of the Mercedes. As he approached, he heard an Officer state the Mercedes was still in drive. Officer Eaton said he looked over Thompson's shoulder and saw a portion of the handgun in McCoy's lap. Officer Eaton said that Officers were discussing how to resolve the situation safely. Part of the plan was to have two patrol vehicles block the Mercedes from the front and rear in the drive-thru.

Officer Eaton said that he saw McCoy begin to wake up. The first movement he saw from

McCoy was to reach across and scratch his left chest area with his right hand. McCoy then looked around and ultimately looked directly at Officer Eaton. McCoy then looked down towards his lap and made a sudden "jerky movement down" with both hands towards his lap. McCoy then moved his whole body forward at which point Officer Eaton saw the suspect's hand drop suddenly towards where the handgun was located. This occurred as Officers were giving him commands that he ignored. Officer Eaton said he believed McCoy's actions to be a deadly threat towards himself and other Officers. Officer Eaton said he was scared and that his fear was that McCoy could grab the gun in his lap and start shooting. Officer Eaton said he believed McCoy was going to shoot at Officers, and due to the number of Officers around the Mercedes, it was likely he would have struck an Officer with a bullet. Because the doors were locked and the windows were up, there were no other force options that could have been used. Officer Eaton fired thirteen [13] rounds from his weapon that contained twenty-one [21] rounds. He stopped firing when he no longer perceived a threat.

Officer Glick responded to the scene after hearing over the radio that McCoy was passed out with a handgun in his lap. In response to Officer Thompson's request he drove his vehicle to the front of the Mercedes to block it. Officer Glick exited his vehicle and saw McCoy who appeared to be asleep. McCoy then opened his eyes, looked around, looked forward and side to side as Officers were giving commands to show his hands and put his hands up. Officer Glick said he was not complying and would not put his hands up. He said McCoy's hands looked to be in his lap and saw McCoy's shoulders and upper arms moving as McCoy was looking around at all the Officers. Officer Glick could not see the gun but his movements were consistent with someone manipulating a firearm. Officer Glick said he feared McCoy was preparing to shoot at Officers. He was aware how fast McCoy could bring the gun up and shoot the Officers. The totality of the facts and McCoy's actions caused Officer Glick to open fire. Glick indicated he wanted his co-workers to go home safely and he was concerned an Officer could have been grievously injured or killed. Officer Glick fired eleven [11] rounds from his firearm that contained twenty-one [21] rounds.

Officer McMahan responded to the scene after hearing Officer Cano or Officer Patzer advise over the radio that McCoy was unconscious with a firearm in his lap. When he arrived, he parked his vehicle behind Glick's Police vehicle. Officer McMahan commented that he had concerns over these types of calls as they are often tense and rapidly unfolding. He heard Officers yelling commands, to show his hands, as he moved to their location. As he arrived, shots were fired, he knew McCoy was armed, and felt it was a mutual combative shooting. He believed himself, nearby civilians, and other Officers were in imminent danger. Officer McMahan saw McCoy in the driver's seat moving in a back and forth, side-to-side motion. He believed gunshots appearing in the Mercedes windows were projecting outward, towards Officers. McMahan discharged one [1] round toward McCoy as he feared for Officers' lives. He stopped firing as Officer Glick crossed in front of the muzzle of his weapon.

It should be noted that all Officers were in Police uniforms, with their badges on their chest. The Officers responding were "Code 3" meaning their Police vehicle light bars were on and activated. There was lighting surrounding the Taco Bell building.

All Officers took immediate action after the shooting to call for and render emergency aid to the

suspect McCoy, which included chest compressions and attempts to stop the bleeding.

It should also be noted that all of the above Officers did not know McCoy and had never encountered him before. The decedents name "McCoy" was used in this summary just for clarification purposes.

OTHER OFFICER'S STATEMENTS

Vallejo Police Officer Jones indicated he was securing the scene when he heard Officers providing commands to McCoy. He then heard multiple gunshots being fired in the area of the Mercedes.

Vallejo Police Officer Sloan stated he was moving a police vehicle to the rear of McCoy's vehicle when he heard the shots fired. He did not see McCoy's actions.

CIVILIAN WITNESSES

Civilian Witness #1

Arrived at the Taco Bell and attempted to pull into the drive-thru but was prevented from doing so due to a silver luxury sedan stopped in the entrance of the drive-thru. At the time, she was "Face timing" her boyfriend. While parked there, another car pulled behind her. She flashed her lights trying to get the driver's attention. She could not see inside the vehicle because of the darkly tinted windows. She then saw a Taco Bell employee who told her the driver was possibly drunk and that the Police had been called. She backed up and parked with her window down. She then saw two Police Officers, fully uniformed and in marked patrol cars. They stood near with their guns out and the flashlights on their guns turned on. She heard several verbal commands towards the driver. She saw additional Police vehicles arriving from the freeway with lights flashing and sirens sounding. She heard more verbal commands and then saw shots fired. After the shooting stopped, she saw the Officers remove the occupant and perform C.P.R.

Civilian Witness #2

She saw a Taco Bell employee advise the car in front of her that the Mercedes was blocking the drive-thru. The Police arrived and she saw Police pull their weapons and positioned Police vehicles in front and back of the Mercedes. She heard Officers loudly state, "Show us your hands" and "Put your hands up" prior to the shooting.

Civilian Witness #3

He saw the Mercedes stopped in the drive-thru. He saw Police Officers yelling at McCoy to show his hands and then he heard gunshots.

Civilian Witness #4

Civilian Witness #4 was the Assistant Manager at the Taco Bell. Other employees in the kitchen area indicated they heard horns honking in front of the restaurant. He looked out a window, east, toward the drive-thru and saw a car sitting at the entrance to the drive-thru. He then walked out and walked toward a silver Mercedes. He said he could not see anybody in the car due to the heavily tinted windows. He got no closer than six feet from the car. He then went back into the store and called 9-1-1 and told the Police Department that there was a car idling in the drive-thru, was not moving, and he could not see how many people were in the vehicle due to the tinted windows. He saw Police arrive and then saw three Police Officers on the driver's side door with their guns drawn. He went back inside where the other employees were. He went toward the back door where he heard the shots fired.

Civilian Witnesses #4, #5, #6

All three witnesses were employees and working at Taco Bell the night of the incident. All three said they did not see anything. They were taking the trash out on the east side of the restaurant. Their view was blocked by the large big screen menu at the entrance to the drive-thru. They saw a Police car drive through the drive-thru, the wrong way. The Officer exited his vehicle and told them to go back inside. As they walked around the restaurant, they heard gunshots and then ran back into the restaurant.

Civilian Witnesses #7, #8

Civilian Witness #7 was with his friend Civilian Witness #8 who recorded part of the incident and posted it on social media. He stated they were 30 to 40 yards away. He only heard Officers yelling and then the shots.

BODY WORN CAMERAS

Officer Cano's camera was activated and corroborates his statement. His weapon and his mounted light pointed at McCoy. The light penetrates the window tint and provided a view inside the vehicle. The camera shows McCoy bring his right hand up to his left shoulder area and begins scratching [you can see his fingers]. McCoy's left arm comes down from his head towards his lap. McCoy leans forward and continues until he is bent significantly at the waist. You can hear Police commands throughout the video. Shots are then fired from his weapon.

Officer Patzer's camera was activated. Movement inside the Mercedes and Officers' commands are heard. His camera shows an area down inside the vehicle.

Officer Thompson's camera was activated while he is holding McCoy at gun point. His weapon mounted light illuminates the interior of the vehicle. McCoy's right hand can be seen at his left chest. McCoy's left hand and arm can be seen moving down. McCoy begins to sit up in his seat, moving forward. His right hand moves from his shoulder downward towards his lap. As Officers are verbalizing commands, McCoy appears to be facing forward and leans forward rapidly.

Officer Eaton's camera was activated. It depicts McCoy has his right hand near his left shoulder and his head can be seen. Officers' commands began. McCoy leans forward. The Officers continue their commands and become increasingly elevated. It appears McCoy's left arm moves downward. Officer Eaton begins to back away before he fires.

Officer Glick's camera was activated and McCoy is visible and he and others are giving multiple verbal commands. McCoy is seated erect in the driver's seat. He moves forward and his head moves toward the steering wheel. Multiple verbal commands are still being given during this time. The movement appears simultaneous to the Officers gunfire.

Officer McMahon's camera was activated. McCoy can be seen moving quickly forward and you can hear the Officers giving loud commands. Officer McMahon approaches the vehicle and Officer Glick can be seen. The first shots are heard. Officer McMahon reaches out and places his hand on Officer Glick's back. Officer Glick then moves in front and to the right of Officer McMahon. Officer McMahon repositions to the left of Officer Glick as he indicated in his interview.

Postmortem Examination

Dr. Arnold Josselsan, Forensic Pathologist, for Solano County, conducted the autopsy of Willie McCoy over two days, February 11 and February 12, 2019. There were thirty-eight [38] gunshot wounds. Thirteen [13] fatal gunshot wounds on the right and left chest area. The cause of death was the gunshot wounds to the chest.

Toxicology

A blood sample taken from Willie McCoy was submitted by the Solano County Sheriff's Department to the Aleve Forensics at Redwood Toxicology Laboratory. Toxicology results indicate McCoy had the presence of Cocaine, metabolite of 81 ng/ml and Marijuana metabolite of 52 ng/ml.

APPLICABLE LEGAL STANDARDS

Laws of Arrest

California Penal Code section 834a

If a person has knowledge, or by the exercise of reasonable care should have knowledge, that he is being arrested by a peace officer, it is the duty of such a person to refrain from using force or any weapon to resist such arrest.

California Penal Code section 835

An arrest is made by an actual restraint of the person, or by submission to the custody of an officer. The person arrested may be subject to such restraint as is reasonable for his arrest and detention.

California Penal Code section 835a

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.

Laws of Self-Defense

The legal doctrine of self-defense is codified in Penal Code Sections 197 through 199. Those sections state in pertinent part: Where from the nature of an attack a person, as a reasonable person, is justified in believing that his assailant intends to commit a felony upon him, he has a right in defense of his person to use all force necessary to repel the assault; he is not bound to retreat but may stand his ground; and he has a right in defense of his person to repel the assault upon him even to taking the life of his adversary. (People v. Collins (1961) 189 CA 2d 575, 1 Cal Repr. 504)

Justification does not depend on the existence of actual danger but rather depends upon appearances; it is sufficient that the circumstances be such that a reasonable person would be placed in fear for his safety and the person act out of that fear (Penal Code Sec. 19; People v. Clark (1982) 130 CA 3d 371, 277, 181 Cal. Repr. 682)

California Penal Code section 197 (Summarized in pertinent part)

Homicide is also justifiable when committed by any person in any of the following cases:

1. When resisting any attempt to murder any person, or to commit a felony, or to do some great bodily injury upon any person.

CAL CRIM 3470 (REVISED 2012)
RIGHT TO SELF DEFENSE OR DEFENSE OF ANOTHER

Self-defense is a defense to the unlawful killing of a Human Being. A person is not guilty of that/those crimes if he/she used force against the other person in lawful self-defense or defense of another. A person acts in lawful self-defense or defense of another if:

1. The person reasonably believed that he/she or someone else was in imminent danger of suffering bodily injury or was in imminent danger of being touched unlawfully;
2. The person reasonably believed that the immediate use of force was necessary to defend against that danger; AND
3. The person used no more force than was reasonably necessary to defend against that danger.

When deciding whether a person's beliefs were reasonable, consider all the circumstances as they were known to and appeared to the person and consider what a reasonable person in a similar situation with similar knowledge would have believed. If the person's beliefs were reasonable, the danger does not need to have actually existed.

The person's belief that he/she or someone else was threatened may be reasonable even if he/she relied on information that was not true. However, the person must actually and reasonably have believed that the information was true.

A defendant is not required to retreat. He or she is entitled to stand his or her ground and defend himself or herself and, if reasonably necessary, to pursue an assailant until the danger of death/bodily injury has passed. This is so even if safety could have been achieved by retreating.

USE OF DEADLY FORCE BY A PEACE OFFICER

Authorization of the use of Deadly Force is analyzed under the Fourth Amendment's "*objective reasonableness*" standard. **Brosseau v. Haugen**, 543 U.S. 194. This question "is governed by the principles enunciated in **Tennessee v. Garner**, (1985) 471 U.S. 1 and **Graham v. Connor** (1989) 490 U.S. 386.

In these decisions, the US Supreme Court explained "it is unreasonable for an officer to seize an unarmed, non-dangerous suspect by shooting him dead However, where the officer has

probable cause to believe that the suspect poses a threat of serious physical harm, either to the officer or others, it is not constitutionally unreasonable to prevent escape by using deadly force.” (**Tennessee v. Garner supra**)

Reasonableness is an objective analysis and must be judged from the perspective of a reasonable officer on the scene, rather than with the 20/20 vision of hindsight. It is also highly deferential to the police officer’s need to protect himself and others. 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. **Graham, 490 U.S. at 396**. The question is whether the officer’s actions are “objectively reasonable” in light of the facts and circumstances confronting them, without regard to their underlying intent or motivation.” *Id.* at 397.

The US Supreme Court in **Graham** set forth factors that should be considered in determining reasonableness: (1) the severity of the crime at issue, (2) whether the suspect poses an immediate threat to the safety of the officers or others, and (3) whether he is actively resisting arrest or attempting to evade arrest by flight. The question is whether the totality of the circumstances justifies a particular sort of ... seizure. (See also **Billington v. Smith**, (2002 9th Cir) 292 F.3d 1177, 1184.) The most important of these factors is the threat posed by the suspect. **Smith v. City of Hemet, (9th Cir. 2005) 394 F.3d 689**.

Thus, under **Graham**, the high court advised we must avoid substituting our personal notions of proper police procedure for the instantaneous decision of the officer at the scene. “We must never allow the theoretical, sanitized world of our imagination to replace the dangerous and complex world that policemen face every day. What constitutes ‘reasonable’ action may seem quite different to someone facing a possible assailant than to someone analyzing the question at leisure.” **Smith v. Freland (6th Cir. 1992) 954 F.2d 343, 347**.

Reasonableness: The Two Prongs

Section 197(3) requires that one who employs lethal force have a “reasonable ground to apprehend” great bodily injury. Further, section 198 requires that such fear be “sufficient to excite the fears of a reasonable man,” clearly an objective standard. In shorthand, perfect self-defense requires both subjective honesty and objective reasonableness.

When specific conduct is examined under the analytical standard of reasonableness the concepts of apparent necessity and mistake are invariably, and necessarily, discussed, for they are part of the same equation. “Reasonableness,” after all, implies potential human fallibility. The law recognizes, as to self-defense, that what is being put to the test is human reaction to emotionally charged, highly stressful events, not mathematical axioms, scientifically provable and capable of exact duplication.

Justification does not depend upon the existence of actual danger but rather depends on

appearances; it is sufficient that the circumstances be such that a reasonable person would be placed in fear for his safety and that the defendant act out of that fear. [Citation.] ‘He 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, although the facts were in truth otherwise, and though he was mistaken in his judgement as to such actual necessity at such time and really had no occasion for the use of extreme measures.’ *People v. Clark* (1982) 130 Cal.App.3d 371, 377, 181 CalRptr. 682.

While the test, as mandated by section 198, is objective, “reasonableness is determined from the point of view of a reasonable person in the defendant’s position. “[A] defendant is entitled to have a jury take into consideration all the elements in the case which might be expected to operate on his mind” What is reasonable under the circumstances is judged “from the point of view of a reasonable person in the position of defendant.” “Reasonableness is judged by how the situation appeared to the defendant, not the victim.”

Imminence of Perceived Danger

“Imminence is a critical component of both prongs of self-defense.” Response with deadly force must be predicated on a danger that portends imminent death or great bodily injury. Reasonableness and immediacy of threat are intertwined. Self-defense “is based on the reasonable appearance of imminent peril of death of, or serious bodily injury to the party assailed”

In *Aris*, trial court’s clarifying instruction to the jury on the subject was to the point and later cited with approval by the California Supreme Court: “An imminent peril is one that, from appearances, must be instantly dealt with.” [*People v. In re Christian S.* (1994) 7 Cal. 4th 768, 783]

The question is whether action was instantly required to avoid death or great bodily injury. In this regard, there is no duty to wait until an injury has been inflicted to be sure that deadly force is indeed appropriate.

Retreat and Avoidance

Under California law one who is faced with an assault that conveys death or great bodily injury may stand his ground and employ lethal force in self-defense. There is no duty to retreat “even though the assailed person might more easily have gained safety by flight or by withdrawing from the scene.” Indeed, in California the retreat rule has been expanded to encompass a reasonably perceived necessity to pursue an assailant to secure oneself from danger. [See *People v. Holt* (1944) 25 Cal.2d 59, 63 and *People v. Collins* (1961) 189 Cal. App.2d 575, 588]

Nature and Level of Force

“[A]ny right of self-defense is limited to the use of such force as is reasonable under the circumstances.” [See *People v. Gleghorn* (1987) 193 Cal.App.3d 196, 200, *People v. Minifie* (1996) 13 Cal.4th 1055, 1065, *People v. Moody* (1943) 62 Cal.App.2d 476, 482 and *People v.*

Moody (1943) 62 Cal.App.2d 18, 22]

Case law does not impose a duty to use less lethal options. “Where the peril is swift and imminent and the necessity for action immediate, the law does not weight into nice scales the conduct of the assailed and say he shall not be justified in killing because he might have resorted to other means to secure his safety.” [People v. Collins (1961) 189 Cal.App.2d 575, 589]

The rationale for vesting the police officer with such discretion was explained:

Requiring officers to find and choose the least intrusive alternative would require them to exercise superhuman judgment. In the heat of battle with lives potentially in the balance, an officer would not be able to rely on training and common sense to decide what would best accomplish his mission. Instead, he would need to ascertain the least intrusive alternative (an inherently subjective determination) and choose that option and that option only. Imposing such a requirement would inevitably induce tentativeness by officers, and thus deter police from protecting the public and themselves. It would also entangle the courts in endless second-guessing of police decisions made under stress and subject to the exigencies of the moment.” [Scott v. Henrich (1944) 39 F.3d 912, 915]

In summary, an honest and objectively reasonable belief that lethal force is necessary to avoid what appears to be an imminent threat of death or great bodily injury will justify the use of deadly force. This is true even if the person acting in self-defense could have safety withdrawn or had available to him a less lethal means of defense.

ANALYSIS

In this case, Officers from the Vallejo Police Department responded to a Taco Bell after a 9-1-1 call to the Police Department regarding a possible unconscious individual in a vehicle, blocking the drive-thru.

Officer Cano arrived with his back-up Officer Patzer. Officer Cano was driving his fully marked black and white Police car. It has badges on both doors and a light bar. He was wearing a Police uniform. The uniform had Vallejo Police Department patches on each arm and a badge on the chest.

Officer Cano approaches the driver’s side door of the silver Mercedes and observes McCoy unconscious or asleep. The car motor is running. He shines his flashlight into the vehicle and saw a pistol on McCoy’s lap. The position of the firearm on his lap heightened his concern for safety because the weapon was easily accessible by McCoy. Officer Thompson arrived and

discussed another concern regarding the vehicle being in “drive” with McCoy’s foot on the brake. They then began to formulate a plan.

The first part of the plan was to block the vehicle in the drive-thru with patrol vehicles. The second part of the plan was to attempt to open the car door and remove the person, McCoy, and the gun from the car. At that time, they decided to wait for more cover.

As the other Officers arrived, they attempted to open the driver’s side door but found it was locked. Soon thereafter McCoy began to wake up, scratching his chest with his right hand. Officer Cano and the other Officers began to give loud verbal commands to have McCoy “show his hands” and “put your hands up”. At this time, McCoy lunged forward while dropping his right hand towards the firearm. Officer Cano then fired eleven [11] rounds from his weapon that contained eighteen [18] rounds. He ceased fire when he felt there was no longer a threat. Officer Cano had an objectively, reasonable belief that he and the other Officers would be seriously injured or killed.

In fact, Officer Cano indicated he was scared and he was giving McCoy clear and concise demands. He was hoping McCoy would comply. He felt there was no other option but to use deadly force. The Mercedes was in drive, the doors were locked, and the windows were up.

Officer Patzer arrived at the scene and parked his marked patrol vehicle behind the Mercedes, with the patrol vehicle light bar flashing. Officer Patzer was in Police uniform as well. Officer Patzer saw McCoy unconscious in the driver’s seat with a firearm in his lap. Officer Patzer initially thought to wake up McCoy but changed his mind due to the severity of the situation. When Officer Thompson arrived the plan was to have Officer Thompson attempt to open the door but it was locked.

McCoy then began to wake up. Officers then proceeded to give commands, to show his hands and put his hands up. McCoy then looked left, looked at Officer Patzer, then looked to his lap. Officer Patzer believed he was looking at his gun. McCoy then dropped both hands down suddenly, like a flinch. He said McCoy’s shoulders rose and his elbows came up, followed by his hands coming to the dash. Officer Patzer believed due to the location of the gun, McCoy’s action presented an immediate threat and he feared for himself and the other Officers on the scene. Officer Patzer found that it was necessary to fire his weapon to stop the threat. He stopped firing when he felt there was no longer a threat. He fired twelve [12] rounds from his weapon that had eighteen [18] rounds.

When considering the totality of the circumstances, Officer Patzer acted in a reasonable manner, to prevent himself and the other Officers from being killed.

Officer Thompson responds to the scene after hearing McCoy was unconscious with a gun in his lap. When he arrives he goes to the driver’s side of the Mercedes and stands next to Officer Cano. He sees the gun in McCoy’s lap and McCoy passed out. He also saw McCoy’s foot on the brake with the car in drive. He talked about the plan to block the vehicle, and attempt to open the driver’s side door to secure the weapon. At this time, he found the door locked. He

then backed away and requested the on-duty Supervisor. All of these steps were taken in minutes during which time the Officers were in fear for their lives.

McCoy then wakes up and the Officers are giving loud commands and he then reaches towards the handgun. Officer Thompson begins to step backwards as he believed the weapon was going to be used against them. He reasonably believed that McCoy was going to cause him death or great bodily injury. Officer Thompson then fired seven [7] rounds from his firearm that contained eighteen [18] rounds.

As indicated by the other Officers, Officer Thompson only had minutes to come up with a plan to mitigate the situation by the use of non-lethal force. Then when McCoy woke up, he posed a clear and immediate threat to the Officers, and the Officers faced with a life and death situation and had seconds to decide how to stop the threat.

Officer Eaton arrived and saw the above Officers surrounding the Mercedes with their weapons drawn. As he approached, he saw the gun on McCoy's lap. He heard the other Officers say the Mercedes was in drive. He heard the other Officers discussing how to resolve the situation, as indicated previously. McCoy then began to wake up. He said McCoy looked directly at him before reaching down for the gun. Again, it should be noted the Officers were in their uniforms and the Mercedes was surrounded by marked patrol units with their light bars activated. There should be no doubt that these were Police Officers.

Officer Eaton says Officers were giving commands when McCoy suddenly drops his hands to where the gun is located. Officer Eaton reasonably believed that McCoy's actions were a deadly threat towards himself and the other Officers. He was in fear for his life due to the location of the gun as McCoy could have shot Officers, who had surrounded the Mercedes. Because the doors were locked and the windows were up, there were no other options but to use lethal force. Officer Eaton fired thirteen [13] rounds from his weapon that contained twenty-one [21] rounds. He indicated he stopped firing when he no longer perceived a threat.

Officer Glick responded to the scene after hearing over the radio that McCoy was passed out with a handgun on his lap. He responded as others "Code 3" with his patrol vehicle light bar on and he was in uniform. He drove his vehicle to the front of the Mercedes to block it, as part of the plan, upon Officer Thompson's request. Officer Glick then saw McCoy who appeared to be asleep, wake up. He opened his eyes and looked forward and side to side as Officers were giving commands. He said he was not complying with the demands to put his hands up. Officer Glick felt McCoy's next move was consistent with someone manipulating a handgun. Due to the totality of circumstances, he reasonably believed McCoy could bring up the handgun and shoot the Officers. He then fired eleven [11] rounds from his weapon that contained twenty-one [21] rounds.

Officer McMahon responded to the scene after hearing over the radio that McCoy was unconscious with a firearm in his lap. When he arrived, he heard Officers yelling commands to show his hands. As he moved to the location of the Mercedes, shots were being fired and he knew McCoy was armed. He believed at the time it was a mutual combative shooting and he

reasonably believed himself, near-by civilians and other Officers were in imminent danger. He saw McCoy move in a back and forth and side-to-side motion. He thought gunshots were projecting outward from the Mercedes windows, towards the Officers. Officer McMahon discharged one [1] round as he feared for his life and the life of others. His weapon contained fourteen [14] rounds. He stopped firing as Officer Glick crossed in front of his weapon. Considering the totality of the circumstances, starting with the radio call, Officers giving demands, and shots being fired, Officer McMahon had an objectively, reasonable belief that the use of force was necessary.

In summary, the Officers at the scene were faced with a dangerous and extremely volatile situation. Officers responded and observed an unconscious person with a gun in his lap. When they arrived, they found the Mercedes in drive with McCoy's foot on the brake pedal. They observed the gun on McCoy's lap which made them fear for their lives and the lives of others as he could use that weapon immediately and the location of the Officers would have been easy targets for the assault with the deadly weapon. They also considered the car in drive a possible threat. As noted, the Officers were attempting to mitigate the threat by coming up with a plan to block the Mercedes and to open the driver's door to secure the weapon and defuse the situation. However, the door was locked and that was no longer an option. The Officers also attempted to contact their supervisor, but McCoy woke up soon thereafter.

After McCoy starts to move, he was given commands to show his hands or to put his hands up. McCoy ignored those commands and moved towards his weapon. It should be noted this happened within seconds. The Officers had no other reasonable option but to fire their weapons. Six Officers fired a total of fifty-five [55] rounds in 3.5 seconds, with a total of ninety-two [92] rounds available. They ceased fire as soon as the threat was terminated. Overall, looking at the totality of the circumstances and applying California law, the Officers' decision to use deadly force was justified.

CONCLUSION

Based upon the facts presented in the reports and the applicable law, Officer Cano's use of deadly force was a proper exercise of his right of self-defense and defense of others, and therefore his actions were legally justified.

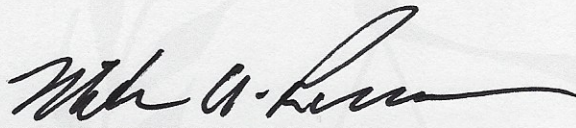
Based on the facts presented in the reports and the applicable law, Officer Eaton's use of lethal force was a proper exercise of his right of self-defense and the defense of others, and therefore his actions were legally justified.

Based on the facts presented in the reports and the applicable law, Officer Glick's use of lethal force was a proper exercise of his right of self-defense and defense of others, and therefore his actions were legally justified.

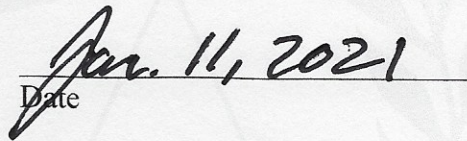
Based on the facts presented in the reports and the applicable law, Officer McMahon's use of lethal force was a proper exercise of his right of self-defense and defense of others, and therefore his actions were legally justified.

Based upon the facts presented in the reports and the applicable law, Officer Patzer's use of lethal force was a proper exercise of his right of self-defense and defense of others, and therefore his actions were legally justified.

Based upon the facts presented in the reports and the applicable law, Officer Thompson's use of lethal force was a proper exercise of his right of self-defense and defense of others, and therefore his actions were legally justified.



Michael A. Ramos
Consultant



Date