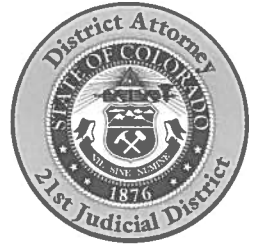


DANIEL P. RUBINSTEIN
DISTRICT ATTORNEY



TWENTY-FIRST JUDICIAL DISTRICT ATTORNEY'S OFFICE
Mesa County Justice Center ~ P.O.Box 20,000 - Dept. 5031 Grand Junction, CO 81502-5001 (970) 244-1730

November 1, 2016

Pete Burg
Lead Investigator
Mesa County Sheriff's Office
215 Rice Street
Grand Junction, CO 81501

This letter is notification to the Critical Incident Response Team, Chief John Camper, and Corporal Cody Kennedy of the decision not to file charges in the matter of the officer involved shooting on September 4, 2016.

On Monday 10/12/2016, Grand Junction police officers were dispatched to room 218 of the Monument Inn located at 1600 North Ave. They were provided information that a male possibly had a gunshot wound to the chest, that he had a history of making suicidal statements, and that he had a pistol in his hand. There was further information that the gunshot wound may have been the result of his doing something with a bullet that caused it to explode. Officers L. Smith, M. Smith, Baldozier, Evans, Conrads, Smock, Corporal Kennedy, Sgt. Newton and others arrived on scene.

When Cpl. Kennedy arrived, he participated in a discussion in which he was advised that the subject had a gun and had gone into the apartment. He was aware that it had been discharged, but was unaware if it was an accidental discharge. Some of the officers set up a perimeter.

Officer Conrads obtained information that the male subject, later identified as Michael Comacho (DOB 05/06/1996), had accidentally shot himself in the chest, but that it was not bleeding very badly.

Cpl. Kennedy took a position to the south of the involved, second floor room with his patrol rifle. Officer Smock described that he observed Mr. Comacho come to the door of subject room 218 on two occasions concealing something behind his back, and then retreat back into the room. During these times, he heard Cpl. Kennedy giving loud repetitive verbal commands to show his hands. Cpl. Kennedy described that Officer Baldozier and he were yelling at Mr. Comacho, "show us your hands." During that time, he described Mr. Comacho as looking upset and being non-compliant with the commands. At this point, Cpl. Kennedy described that he decided that he should have his rifle, and retrieved it. As he returned from his vehicle with the

rifle, he could see Mr. Comacho through the window with the gun pointed at his own head. Officer Conrads reported that had a conversation with Cpl. Kennedy where Cpl. Kennedy told Officer Conrads that he had observed Mr. Comacho with a gun in his hand, pointed at his head. Officer Conrads remained on the west side of the building.

At this point, Cpl. Kennedy, who had extensive SWAT training, directed the group for the following roles in the apprehension team: Officer M. Smith was directed to provide lethal cover; Officer L. Smith was directed to be "hands on" to do the handcuffing; and, Officer Cox was directed to handle "less lethal," specifically a taser.

Mr. Comacho stepped out of the doorway onto the landing. His hand was behind his back. Cpl. Kennedy described that he looked agitated, excited and his muscles were bunched. He pulled what appeared to him to be a large, black-framed, semi-automatic handgun from behind his back and point it at Cpl. Kennedy. Cpl. Kennedy relayed that he yelled "show your hands" somewhere between three and nine times. Officer Smock described that Mr. Comacho canted the weapon to the side so that the top of the weapon was facing Officer Smock, at which time Officer Conrads yelled "drop the gun." Cpl. Kennedy relayed that Mr. Comacho yelled "How 'bout this bitch?" At that time, Officer Smock, who was pointing his pistol at Mr. Comacho, began to apply pressure to the trigger and heard a pop.¹ Cpl. Kennedy put the red dot from his rifle's sight on the upper thoracic or chest area of Mr. Comacho and depressed the trigger one time. Officer Smock described that he saw the subject's gun and hand jump. Officer Smock described seeing the subject look at the gun with a confused look and then saw the subject drop the gun on the landing. Cpl. Kennedy also described the gun as going down to Mr. Comacho's feet at that point. Cpl. Kennedy described that he could see that one or two of his fingers were just hanging by the skin.

Based upon a review of the physical evidence, Mr. Comacho had the gun in front of him pointing it in the direction of Cpl. Kennedy. Cpl. Kennedy shot Mr. Comacho in the hands. The round went through his fingers and hit the weapon, breaking it apart and rendering it non-functional. The weapon was an UMBREX 40 XP, .177 caliber BB gun which is fashioned to look like a firearm. The visible barrel is made to look like a .40 caliber barrel with the BB barrel deep inside the slide, which has the practical effect of concealing that is a BB gun and not a firearm. (See attached photo of an unbroken UMBREX 40 XP, .177 caliber BB gun)

Mr. Comacho was given commands to come down the stairs, but retreated back into the room again. Officer L. Smith described that Mr. Comacho then exited the room, indicating he was injured. Officer Smith could see that his hands were bloody. He again retreated back into the room, but did not close the door. A few minutes later he came out and started walking down the stairs. He was ordered to put his hands where the officers could see them, but again refused. Officer Evans fired several 40mm less lethal rounds. Mr. Comacho appeared unphased by the less lethal rounds and retreated back up the stairs and again into the apartment. Mr. Comacho came back out of the apartment and was kicking something on the ground, stating he wanted a

¹ Officer Smock's gun did not discharge, but from his statement, it appears that he was initially unsure if he gun was the one that discharged.

cigarette, but ultimately complied with the orders to come down the stairs. He was placed in handcuffs without further incident.

Application of the law

The law permits deadly physical force² to be used against a person as defined by statute. Colorado permits deadly physical force to be used only if a person reasonably believes that a lesser degree of force is inadequate, and the actor has reasonable grounds to believe, and does believe, that he or another person is in imminent danger of being killed or receiving great bodily injury. C.R.S. § 18-1-704(2). There is no special exception or permission for law enforcement officers to utilize deadly force, although the nature of the job puts them in situations more likely to present the decision process of using appropriate and justifiable use of force at varying levels.

Here, Corporal Kennedy attempted to use deadly force against Michael Comacho. Such force is authorized, as described above under the theory of self-defense. In Colorado, deadly physical force used in self-defense has two equally important components. The first is a subjective component requiring that the actor himself, Corporal Kennedy, actually believed that he was in imminent danger of death or great bodily injury, and that deadly force was required. The second component is an objective component; that the actor's actual belief was also a reasonable belief.

Here, it is clear from Cpl. Kennedy's own statement that he actually believed that Mr. Comacho was about to shoot him. He states:

I'm realizing, that's a gun. Here it comes. It's gonna be pointed at me. And even though I didn't press that shot until it – I was looking at that gun pointed at me, I didn't, ya know, say, "Oh, well here." ... If I had it to do over again, could I have shot him sooner? I guess I probably could have shot him sooner and been justified in my mind as far as, that still a threat. He's got a gun in his hand, this is imminent. But he was, it was absolutely pointed at me.

Given this recount by Cpl. Kennedy and the balance of his interview statements, Cpl. Kennedy was operating on the belief that using or attempting to used deadly physical force was his only option to defend against the force being used, or about to be used against him, and that no option of lesser force would be available or adequate to defend against that force.

Turning now to the objective reasonableness of this belief, it is clear that any jury would conclude that it is reasonable to believe that a person is in imminent danger of being killed by another who is reported to have a gun, has potentially already discharged it, is refusing to comply with repeated commands by law enforcement to show his hands, and then in an aggressive manner, points it at a person while yelling. "How 'bout this, bitch?" Additionally, Cpl. Kennedy

² "Deadly physical force" means force, the intended, natural, and probable consequence of which is to produce death, and which does, in fact, produce death. See C.R.S. § 18-1-901(3)(d). Here, deadly physical force was not used, but rather, was attempted as the result was not death. However, the analysis justifying the attempted use of deadly physical force is the same with respect to whether such use was justified resulting in a determination that no charges are appropriate.

previously saw Mr. Camacho place the gun to his head, which further supports a reasonable belief that he intended to engage law enforcement in a gun battle in order to have one or more of the officers shoot him.

Beyond those very clear and corroborated facts, I find it significant in assessing the reasonableness of Cpl. Kennedy's belief that Officer Smock under the same circumstances began depressing his own trigger, at which time he heard the pop sound. It appears from Officer Smock's report that he also perceived this situation as justifying deadly physical force.

It is appropriate to consider if an officer has specialized training that would allow him to make decisions more calmly, or otherwise be able to assess threats properly, without mental distortion due to stress. In this respect, Corporal Kennedy's own observations or opinions of the propriety of the actions can be useful in assessing the objective reasonableness of his actions.

Cpl. Kennedy has approximately 11 years of law enforcement experience which including collateral assignments as a Field Training Officer, Detective, Street Crimes Unit³, and SWAT team member.⁴ He has also been certified by the FBI in defensive tactics. Given his training, and the consistency of the various witness statements, it is believed that his recitation of the facts was accurate with respect to the pertinent issues of whether he had reasonable grounds to believe that he was in imminent danger of being killed.

For the reasons stated, I believe that the actions of Cpl. Kennedy fall squarely within the self-defense justification for use of deadly physical force. Accordingly this matter is inappropriate for any criminal prosecution of Cpl. Kennedy.

Respectfully,



Daniel P. Rubinstein
District Attorney

³ The Grand Junction Police Department's Street Crimes Unit is a unit that routinely engages subjects in higher risk situations. It is often used by the department as a training ground for drug task force officers and investigation of other high risk street level criminal activity. In this respect, Street Crime Unit officers tend to be trained at a higher level in high risk situations and are capable of assessing risk better due to the repetition of that level of risk analysis.

⁴ He is no longer on SWAT team, but spent approximately 9 years on it, ending around 7 months prior to this incident.

