FOURTH JUDICIAL STATUTORY GRAND JURY

REPORT

Investigation of the shooting death of De'Von Bailey by Officer Evenson and Sgt Van't Land

Scope of the Investigation

The 2019 Fourth Judicial District Statutory Grand Jury investigated the officer-involved shooting death of Mr. De'Von Bailey that occurred August 3, 2019 in the 2100 block of Preuss Rd, Colorado Springs, Colorado. The investigation focused on whether Officer Blake Evenson and Sergeant (Sgt) Alan Van't Land were justified in using deadly physical force against Mr. Bailey.

The Process

The El Paso County Grand Jury was selected from a random community jury pool in January 2019 and is comprised of local citizens with diverse backgrounds and experiences. The Grand Jury accepted this case for investigation on October 15, 2019. The evidence was presented by the Fourth Judicial District Attorney's Office. The Grand Jury utilized their authority to subpoena witnesses and request items deemed critical to gathering facts pertinent to the case. All witnesses testified under oath, and were questioned by District Attorney lawyers as well as Grand Jury members. All witnesses who were placed on the stand, cooperated with the investigation and answered questions asked of them. This included Officer Blake Evenson and Sgt Alan Van't Land, who agreed to testify voluntarily before the Grand Jury, even though it is their Constitutional right not to do so.

The Grand Jury moved to deliberate only after each member was satisfied that the vast set of evidence presented and the holistic set of witnesses had provided the needed details to adjudicate the case. The District Attorney's Office presented the evidence making sure that state and county employees were held to facts, refrained from expressing opinion, and did not press to sway a particular outcome. The Grand Jury made several requests for additional documents, evidence, and the ability to talk with additional witnesses. Each request was provided by the District Attorney's Office prior to deliberation. The role of the Grand Jury is to decide whether criminal charges or an indictment will be brought against a potential defendant. The Grand Jury unanimously decided to issue a No True Bill as well as issue a public report. A No True Bill is a legal procedure to decline to file charges against a target when the grand jury does not find enough evidence to charge the target with violating a law. This public report represents the independent conclusions of all members of the Grand Jury, and was drafted with the support of the District Attorney's Office.

The Evidence

This case was presented during three Grand Jury sessions. The Grand Jury heard the testimony of Officer Blake Evenson, Sgt Alan Van't Land, various Colorado Springs Police Department and El Paso County Sheriff's Office patrol officers and detectives, forensic experts, ballistics laboratory personnel from the Colorado Bureau of Investigation and the Metro Crime Lab, and several lay and expert witnesses. They also heard testimony from an independent use-of-force expert from outside the state of Colorado and not associated with any law enforcement agency. The Grand Jury also requested to get a better understanding of Colorado's use-of-force policy and specific subject training that is mandated and provided to all CSPD officers. A senior officer with extensive use-of-force training experience was subpoenaed, testified and questioned. The officer provided the Grand Jury with a detailed understanding of use-of-force training materials, methods, and techniques to include classroom, simulator as well as field training. The officer detailed all initial as well as periodic/annual refresher training that is required of each member of the CSPD police force. It was also identified how use-of-force training materials and methods are reviewed and updated using real-world case studies and post-event analysis. In addition to the testimony, the Grand Jury reviewed numerous photographs, diagrams, police body camera videos, witness interview videos, audio tapes, lab results and written documents. The Grand Jury was also provided the Colorado Springs Police Department's use-of-force policy (General Order 705).

Report in the Public Interest

The Grand Jury finds that it is in the public interest that this report be released. This report is permitted pursuant to two statutory provisions found at C.R.S. 16-5-205.5 (5)(b) & (d), because this investigation addresses "allegations of abuse of authority by a public servant or commission of a class 1, class 2, or class 3 felony."

Findings of Fact

As part of this report, the Grand Jury has agreed to release the body worn camera videos of Sgt Van't Land and Officer Evenson, along with the responding police team's radio communication tape and the 911 call. The 911 call and police team radio communication tape depict what officers knew at the time leading up to and immediately preceding the use-of-force incident. The police body cameras are operating throughout the entire engagement without any missing segments and provide a visual and audible record of the encounter. The Grand Jury makes the following findings of fact based on a review of all evidence presented:

In the early evening of August 3, 2019, an individual called the Colorado Springs Communication Center to report they were a victim of a robbery involving a firearm. Dispatch relayed this information to patrol officers.

Officers arrived at the location of the reporting party and conducted an in-person interview. The reporting party indicated they had been assaulted by two men, robbed at gunpoint, and was concerned that the assailants were still in the vicinity. The individual indicated that he was familiar with the assailants and provided names, physical characteristics, and very detailed specifics regarding the firearm used in the reported robbery.

The reporting party, an African American male, described suspect number one as a black male, skinny with a light afro hairstyle and facial hair. Suspect number two was described as a black male who was shorter and heavier set.

The officer interviewing the reporting party took several breaks to relay information and detailed updates to patrol officers that had simultaneously spread out to canvas the local area. Near the reported location, Sgt. Van't Land saw two people matching the suspects' descriptions. Since initial and updated police communication highlighted that both suspects may possess a firearm, but that the taller suspect had just recently brandished and was likely still in possession of a firearm, Sgt. Van't Land took precautions when engaging the suspects in line with his training. Sgt. Van't Land parked his vehicle and approached both individuals on foot. He was joined by other officers and they took non-threatening positions and provided both suspects with calm and specific reasons why they were being approached and questioned.

As the officers approached, the suspects stopped and turned. Suspect number two stepped in front of suspect number one (later identified as Mr. Bailey), blocking Sgt. Van't Land's view of Mr. Bailey's hands. Since the police officers had received information that Mr. Bailey was in possession of a firearm, they took precautions to keep both suspects hands in sight. During the first moments of the encounter, Sgt. Van't Land saw Mr. Bailey put his hand in his pocket and instructed both suspects to "keep your hands out of your pockets" and "put your hands up for me". Both suspects were also specifically told, "Don't reach for your waists." Several times after being instructed to raise his hands, Mr. Bailey continued to fidget and move his hands towards his shorts pocket. At this point, Sgt Van't Land said, "We're gonna just check and make sure you don't have a weapon, alright." Officer Evenson was present and overheard the interactions between Sgt. Van't Land and the two suspects. As another officer approached to search suspect number two, Officer Evenson approached to search Mr. Bailey. As Officer Evenson got close to him, Mr. Bailey turned, disobeyed the officer's direct orders and attempted to escape. Both Sergeant Van't Land and Officer Evenson drew their weapons, gave chase and provided audible warnings.

After his initial steps Mr. Bailey's hands started to reach to the front of his waistband and were not swinging as one would expect from someone attempting to run quickly. Both officers shouted commands to Mr. Bailey. Sgt Van't Land shouted three times "Hands up!" Officer Evenson shouted, "Let me see your hands!" Mr. Bailey chose not to comply with these commands and continued to run while reaching in front near his waistband. Officer Evenson could clearly see that Mr. Bailey's hand was by his waistband. Pursuant to their training and experience, both officers perceived these

actions to be consistent with Mr. Bailey's reaching for a gun in his waistband. When Mr. Bailey failed to comply with their commands to show them his hands, both officers believed he was reaching for a firearm and believed themselves and others were in danger. During his twelve years of police service, Sgt Van't Land has experience with suspects that flee. These fleeing suspects were either pumping their arms or holding up baggy pants by the side(s) of their waistband. His experience and police training indicate when someone runs with their hands at the front of their waist area they could be reaching for a firearm. In response to what they were seeing and consistent with police training, both officers discharged their firearms. When Mr. Bailey started to stumble, both officers stopped shooting. Only after Mr. Bailey was on the ground, did he comply and put his right hand in the air.

After securing the scene, Sgt Van't Land, Officer Evenson, and a third officer on scene began providing first aid to Mr. Bailey, including providing direct pressure and application of bandages designed to stop bleeding as well as cardiopulmonary resuscitation (CPR). Other officers worked to help expedite ambulatory services and hospital transportation. First aid was performed until medical teams arrived and took over treating Mr. Bailey and transported him to the hospital. Mr. Bailey was pronounced dead at the hospital from the gunshot wounds he sustained during this incident.

Relevant Law

Police officers are chartered with providing for the safety and security of the general population and members of our community. To best provide these protective services, police officers have the unique responsibility and ability to use appropriate force. The progression of use-of-force culminates with CSPD officers having the authority and permission to use lethal force when authorized by the situation, Colorado and Federal law, policy, training, and experience.

The United States Supreme Court in *Graham v. Conner*, 490 U.S. 386 (1989) found that any use of force by a law enforcement officer must be "objectively reasonable" given the "totality of the circumstances." Factors to consider are summarized to include:

1. The level or severity of the crime that was committed or suspected to be committed.
2. The information that was known to the officer when the shooting occurred.
3. Whether the individual was resisting arrest or trying to escape.
4. Whether the situation was a fast moving, dynamic incident that placed the officer and/or others in a position of being the victim of deadly force or suffering great bodily harm.
5. Whether other options were available to the officers to employ or to effect an arrest.

Colorado Revised Statute 18-1-707 states that a police officer is justified in using deadly physical force upon another person when he reasonably believes that it is necessary:

1. To defend himself or a third person from what he reasonably believes to be the use or imminent use of deadly physical force, or
2. To effect an arrest or to prevent the escape from custody of a person whom he reasonably believes has committed a felony involving the use of a deadly weapon or is attempting to escape by the use of a deadly weapon or otherwise indicates that he is likely to endanger human life or inflict serious bodily injury to another unless apprehended without delay.

CSPD Use of Force Policy

Colorado Springs Police Department General Order 705 provides guidelines for the lawful use of deadly as well as less than lethal force. The policy includes a non-exhaustive list of seventeen factors to consider in determining when the use of force by an officer is reasonable. Some factors include:

1. Seriousness of the suspected offense or reason for contact with the individual.
2. Immediacy and severity of the threat to officers or others.
3. The conduct of the individual being confronted, as reasonably perceived by the officer at the time.
4. Whether the person appears to be resisting, attempting to evade arrest by flight, or is attacking the officer.
5. The risk and reasonably foreseeable consequences of escape.
6. The apparent need for immediate control of the subject or a prompt resolution of the situation.
7. Whether the conduct of the individual being confronted no longer reasonably appears to pose an imminent threat to the officer or others.
8. Proximity of weapons or dangerous improvised devices.
9. The availability of other options and their effectiveness.
10. Potential for injury to officers, suspects, and others.

Expert witnesses testified that the Colorado Springs Police Department policy is to aim for center mass when deadly force is appropriate. Officers are never allowed to shoot in the air and are not instructed to aim for an appendage. It is embedded in training that targets other than center of mass are too difficult to hit and do not prevent a fleeing suspect from using his own firearm against officers or others. Officer use-of-force training does not recommend the use of less than lethal force, such as a taser, club or hand-to-hand combat when a suspect has in their possession the means to use deadly force.

Conclusions

The Colorado State Legislature enacted a statue 16-2.5-301 in 2015 setting out the requirements for how officer involved shootings must be investigated. The purpose was to ensure that law enforcement agencies would not investigate their own officers, but rather that a multi-agency deadly force investigation team (referred to as the D.F.I.T. team) would conduct all investigations. Pursuant to that statute and in compliance with that statute, the Fourth Judicial District's law enforcement agencies entered into an agreement to form a deadly force investigation team. This investigation was conducted by that team. The Grand Jury found this investigation was all-encompassing, thorough, methodical and included forensic testing of the evidence collected. The team interviewed every witness who would speak to them who either witnessed the alleged robbery or the shooting. The team did not work toward a pre-determined conclusion but followed all investigative leads to determine and assess facts. The Grand Jury maintains its own investigative powers and conducted its own investigation. Ultimately, it is solely the Grand Jury which decided whether this shooting was in the line-of-duty, followed policy and training and whether the use-of-force was justified.

The Fourth Judicial District Attorney's Office sought review by an independent expert in use-of-force. That expert testified before the Grand Jury. This individual has been involved in numerous cases. Over the course of his career, he has made determinations in several cases where officer involved shootings were not justified. He has no connection to Colorado Springs nor the State of Colorado. He concluded that the officers acted reasonably when they used lethal force to subdue Mr. Bailey. The officers' discernment that Mr. Bailey posed a high-risk of imminent use of deadly force was objectively reasonable because he had his hands at his waist and refused commands to show his hands to officers. The officers had received credible information that Mr. Bailey had committed an armed robbery and was in possession of a firearm. In fact, after the shooting, officers located a firearm in Mr. Bailey's shorts that matched the detailed description provided to officers prior to the engagement. The firearm was fully loaded with one round in the chamber.

The Grand Jury was not tasked to make findings regarding the reported armed robbery and assault that police officers were investigating prior to the incident. The reported assault did, however, provide detailed information to patrol teams and gave Sgt Van't Land and Officer Evenson critical information to perform their duties. Both police officers had a reasonable belief, based on information given by a citizen and relayed to them by fellow officers, that Mr. Bailey had just committed armed robbery and was in possession of a firearm.

As part of our investigative process, the Grand Jury inquired about the training program at the Colorado Springs Police Department. They learned that it is very intensive, performed by experts, requires periodic refresher training, includes national, state and local policy directives and has a built-in feedback mechanism to keep current and up to date with lessons learned throughout the nation. Officers receive training on the case law and statutes. They are given many tools to use in their interactions with

the public. They are taught a variety of de-escalation techniques. They are exposed to various scenarios, both on computer models and live action drills, in which they must make rapid judgments about proper use-of-force and escalation actions. They are continually critiqued and evaluated. Patrol officers are taught to always be aware of where a suspect's hands are. Training teaches officers a strong indicator that a suspect may be reaching for a weapon is when a suspect will not keep their hands in sight after being told repeatedly to do so. Officers are trained to evaluate and react to that indicator. The actions of Sgt Van't Land and Officer Evenson on August 3, 2019 were consistent with their use of force training and the Colorado Springs Police Department use of force policy.

In applying the law to the facts in this situation, there are two grounds upon which an officer is justified in using deadly physical force; one is commonly referred to as "fleeing felon", the other is self-defense and defense of others. The Grand Jury finds Sgt Van't Land and Officer Evenson were legally justified on both grounds.

With regard to the "fleeing felon" statute, officers must have a reasonable belief that the suspect is committing, has committed or is about to commit a felony and is in possession of a firearm. These officers had a reasonable belief that Mr. Bailey had committed the felony of aggravated robbery and was in possession of a firearm. The law requires that officers take necessary steps to protect innocent bystanders and themselves from a fleeing felon in possession of a firearm. The law does not require that a suspect point a firearm at officers or others before they may use deadly force. Their obligation to protect the public is heightened in situations such as the one they faced on August 3, 2019 when the suspect was fleeing toward a public park and elementary school during daylight hours.

Regarding self-defense and defense of others, police officers have the crucial and momentous responsibility to maintain the peace and protect the public at all times. They also have the right to protect themselves. They often must make real-time decisions in highly stressful situations about the level of force necessary to meet this responsibility. In this situation, officers had seconds to react. They were informed that Mr. Bailey had just committed an armed robbery and was still in possession of a firearm. When officers first approached him, the expert noted that Sgt Van't Land spoke to him in a calm, professional manner. He gave Mr. Bailey clear instructions not to put his hands at his waist. Mr. Bailey began to flee as soon as he was approached for a pat down search, which further indicated to officers that he was armed. He was in a residential neighborhood and running towards a public park and elementary school. He refused to show his hands and instead reached towards the front of his waistband, disobeying direct and repeated orders. The officers were understandably concerned that he intended to draw his firearm which would put innocent civilians or officers in danger of serious bodily injury or death. The actions of Sgt Van't Land and Officer Evenson in using deadly force against Mr. Bailey were determined by the Grand Jury to be reasonable and justified according to law.

The events of August 3, 2019 were tragic. The family and friends of Mr. Bailey have suffered an immeasurable loss. The community, witnesses and officers have all been deeply affected by this incident. None of this changes the fact that Mr. Bailey chose a course of action on August 3, 2019 that led Sgt Van't Land and Officer Evenson to make a real-time judgment to use deadly force to protect the community and law-abiding citizens they are sworn to protect.

Adopted this 25th day of October 2019
2019 Fourth Judicial District Statutory Grand Jury
(Signature Page of Foreperson and Other Grand Jurors Follows on Separate Page)

Dated 25 OCT, 2019

[redacted]

Foreperson