



OFFICE OF THE DISTRICT ATTORNEY

Jefferson and Gilpin Counties

Peter A. Weir, District Attorney

October 28, 2016

Chief Dan McCaskey
Lakewood Police Department
Lakewood, CO

RE: Officer Involved Shooting incident involving West Metro Regional SWAT/LPD Agent Sean Radke on August 13, 2016, CIRT # 2016-04.

Dear Chief McCaskey,

On August 13, 2016, the Jefferson County Critical Incident Response Team was called to respond to an officer involved shooting at 95 Sheridan Blvd in Lakewood, Colorado. My office has now reviewed the 1st Judicial District Critical Incident Response Team's submitted reports regarding this incident. Senior Chief Deputy District Attorney Eva Wilson responded to the scene and observed interviews of the involved officers and other witnesses. Members of my staff and I were present for a briefing presented by CIRT members on September 6, 2016 at the District Attorney's office. At that time, my office was presented with all reports regarding this particular incident. Senior Chief Deputy District Attorney Eva Wilson has been involved in the CIRT file review.

APPLICABLE LAW

The legal framework for our analysis in this case is found in the following sections of the Colorado Revised Statutes.

§ 18-1-407, C.R.S. Affirmative defense

(1) "Affirmative defense" means that unless the state's evidence raises the issue involving the alleged defense, the defendant, to raise the issue, shall present some credible evidence on that issue.

(2) If the issue involved in an affirmative defense is raised, then the guilt of the defendant must be established beyond a reasonable doubt as to that issue as well as all other elements of the offense.

§ 18-1-710, C.R.S. Affirmative defense

The issues of justification or exemption from criminal liability under sections 18-1-701 to 18-1-709 are affirmative defenses.

§ 18-1-704, C.R.S. Use of physical force in defense of a person

(1) Except as provided in subsections (2) and (3) of this section, a person is justified in using physical force upon another person in order to defend himself or a third person from what he reasonably believes to be the use or imminent use of unlawful physical force by that other person, and he may use a degree of force which he reasonably believes to be necessary for that purpose

(2) Deadly force may be used only if a person reasonably believes a lesser degree of force is inadequate and:

- (a) The actor has reasonable grounds to believe, and does believe, that he or another person is in imminent danger of being killed or of receiving great bodily injury.

§18-1-707, C.R.S. Use of physical force in making an arrest or in preventing an escape

(1) ...A peace officer is justified in using reasonable and appropriate physical force upon another person when and to the extent that he reasonably believes it necessary:

- (a) To effect an arrest or to prevent the escape from custody of an arrested person unless he knows the arrest is unauthorized; or
- (b) To defend himself or a third person from what he reasonably believes to be the use or imminent use of physical force while effecting or attempting to effect such an arrest or while preventing or attempting to prevent such an escape.

(2) A peace officer is justified in using deadly physical force upon another person for a purpose specified in subsection (1) of this section only when he reasonably believes that it is necessary:

- (a) To defend himself or a third person from what he reasonably believes to be the use or imminent use of deadly physical force; or
- (b) To effect the arrest or to prevent the escape from custody of a person whom he reasonably believes:
 - (I) Has committed or attempted to commit a felony involving the use or threatened use of a deadly weapon; or
 - (II) Is attempting to escape by the use of a deadly weapon; or

- (III) Otherwise indicates that he is likely to endanger human life or to inflict serious bodily injury to another unless apprehended without delay.

SUMMARY OF OPINION

Applying these legal standards to the facts presented through this investigation, I find that Agent Sean Radke was justified in his use of deadly physical force upon Perry Heitman.

The following is a brief factual summary of the relevant events of that evening compiled from a review of the reports and interviews done by the CIRT, observations of the scene and the CIRT presentation.

RELEVANT FACTS

On August 13, 2016 at 4:16am, the Lakewood Police Department received a call from a named individual reporting that a wanted party by the name of Perry Heitman was currently parked in his older model, red truck in the 7-Eleven parking lot at 95 Sheridan Blvd in Lakewood. The caller had made other calls to LPD and DPD previously about Heitman and his active warrants. Additionally, the caller had also indicated that Heitman was known to have weapons in his possession. LPD agents had attempted to locate Heitman to arrest him on the warrants the previous evening but had not found him at his listed residence. Lakewood PD had previous contacts with Heitman and he had been contacted with a large number of knives in his vehicle.

LPD dispatched agents to the 7-Eleven Parking lot and they arrived on scene at 5:01am. They located the vehicle on the north side of the business parked facing south next to a fence. They also noted that there was a male party sleeping inside the truck which was very cluttered and full of trash within the driver's compartment. The back of the truck bed contained a very large covered metal box with unknown contents.

It was confirmed that the truck was registered to Perry Lee Heitman, DOB 8-8-1963, and that Heitman had seven active misdemeanor warrants for his arrest.

LPD Sgt. Alesch and three other LPD officers, all wearing patrol uniforms, formulated a plan to take Heitman into custody directly from the truck. The plan was to approach from the rear and to quickly open the driver's side door which would give them the tactical advantage of surprise. Some of the agents had weapons drawn to provide lethal cover for the other officers as they attempted entry. However, as the officers attempted to execute their plan, they found that the driver's door would not open and that while the window was down, they could not quickly locate a mechanism to unlock the door. During their efforts, Heitman awoke from his sleep and the officers announced themselves as police and told him to keep his hands where they could see them. They attempted to get hands on him but Heitman started to reach down to the lower part of the driver's side interior door. The officers could not see what he was doing and they again ordered him to stop and to show his hands. Instead, Heitman reached toward his right side into a large pile of personal items toward what appeared to be a small propane container.

Sgt. Alesch started to order the officers to back away from the vehicle just as Heitman pulled out an item that appeared to be a red handgun and, with his right hand, Heitman put the gun to his own temple. Sgt. Alesch described the gun as odd because of the color and because it appeared to have a metal hook on the back of it. Another agent described it as having a large barrel and that it was possibly a flare gun. The officers knew that the suspect had been described as being armed in the past plus the manner in which he held it to his head gave strong indications that it was a gun of some sort. Due to this very unsafe situation, the agents completely backed away from the immediate area of the truck and called for assistance. Area roads were shut down so that the scene could be contained and to prevent citizens from coming into harm's way.

Additional Lakewood agents arrived to assist and a command center was established to the south of the area. Police continued to shout verbal commands at Heitman to come out of the truck with his hands up. Heitman then put a silver sun shade over the driver's side window, which he had rolled up from the inside, and this shielded him from view by the officers. The officers then shifted to giving him commands via a P.A. system in a patrol car. Heitman just honked his car horn in response to the verbal commands.

Eventually, a cell phone number was located for Heitman and phone contact was established with him. Lakewood Agent Hagerman negotiated with him over the phone during numerous phone calls. Heitman would answer approximately every tenth call and would frequently hang up on the police. During these many calls, Heitman started out sounding very angry and threatening. His various statements included threats that he had propane in his truck and would use that propane to blow up the 7-Eleven, threats that he would run over the gas tanks at the 7-eleven, threats that he had a loaded gun and that he would not be taken alive and threats that the police had better bring out their department's best marksman.

Eventually, Heitman's demeanor changed to being depressed and crying. He told Agent Hagerman that they should just shoot him and he wanted to know what they were waiting for. He told the police to quit calling so that he could call his girlfriend. Agent Hagerman told Heitman that they could go across the street to a donut shop and talk it over. The police agent also told him that since Heitman only had misdemeanor warrants, they could work it out so no one would get hurt. Heitman then said that he did not wish to work it out and he hung up the phone.

Based on the repeated threats by Heitman that he had explosive devices in his truck and that he was prepared to use them, a request was made for the West Metro Regional SWAT team to respond to the scene to provide tactical assistance. The Jefferson County Bomb Squad was also notified of the threats and that group staged at another location to wait for further instructions.

Prior to SWAT arriving, LPD agents again called Heitman and told him that he had a very short time in which to come out of the vehicle and that, if he did not, they could not assure his safety. Again, Heitman refused to comply and he remained in the vehicle.

When SWAT arrived, a plan was formulated to contain Heitman's vehicle. Based upon the proximity of fuel pumps to Heitman's vehicle, his potential access to weapons including potential explosive devices and his numerous specific threats, SWAT commanders decided that no further negotiations would be attempted. It was determined that the safest course of action would be to pin the pickup in place and to remove Heitman from the vehicle in the most expedient fashion possible. The West Metro SWAT Team's armored vehicle (the Mamba) was chosen to be moved into a position blocking Heitman's vehicle from moving forward and another full-size police pick-up

truck would be driven up against the back of Heitman's vehicle simultaneously to prevent it from moving backwards. If Heitman refused to leave the vehicle despite the heavy police presence which removed his ability to drive away, the plan was to break out the front driver's window with less lethal rounds and to deploy a munition inside to convince him to exit the truck.

A contact team of SWAT officers commanded by Sgt. John Pickett was in charge of removing Heitman from the vehicle, if he refused to exit it. This team was transported inside the Mamba and they were equipped with less lethal weapons including 40mm sponge rounds to break out the side window on the pickup, sting-ball grenades to gain compliance and launchable CS or OC gas should that option be required. SWAT commanders had an operator positioned in the turret, which is an open hatch on the top of the Mamba, armed with a rifle to provide cover for the contact team as they left the Mamba and approached the truck. Agent Sean Radke was selected to be placed in the turret due to his experience and size. Agent Radke was armed with a Colt AR-15, semiautomatic rifle.

The two vehicles proceeded to the scene and both made contact with the pickup truck simultaneously. The driver's door opened a few inches and it was unclear if that occurred due to the impact or if Heitman opened the door. Agent Radke, from his position in the turret, could see into the passenger's side of the compartment through the western side of the windshield, which was not obscured by the silver sun shade. He saw the suspect hold up a yellow colored butane style container towards the windshield. Agent Radke recognized this as the type of device that methamphetamine users utilize to light a flame to smoke their drugs.

As the contact team came out of the Mamba to approach the pickup, verbal commands were given to Heitman ordering him to exit the vehicle. When he did not comply, a SWAT operator fired less lethal 40mm sponge rounds through the driver's side window. The window glass did not shatter but the rounds dislodged the silver sunshade that had been blocking the window area. As that occurred, Agent Radke, who was positioned in the turret of the Mamba above and to the east of the windshield of the pickup, immediately had an unobstructed view of Heitman in the cab of the vehicle. Agent Radke described Heitman as being on the bench seat with his feet towards the driver's side, his head closer to the passenger side and part of his back up against the back of the seat. He had his hands together on his chest and in his right hand was a silver colored handgun. He described it as having a possible chrome slide and it appeared larger than a .22 caliber handgun. He thought it might be an off brand similar to a Hi-Point handgun. Agent Radke observed Heitman to turn the gun and level it, pointing it towards the SWAT operators at the northeast corner of the armored vehicle and at the LPD officers in the street behind the SWAT. Agent Radke stated that he was in fear for the lives of those officers and also in fear for his own life, since the suspect could have moved the gun an inch which would have allowed him to shoot above him at Agent Radke.

Agent Radke immediately fired his rifle, what he believed to be two times, into the center-mass of the suspect. Through the cracked windshield, he could see that the suspect was bleeding and he could no longer see the gun. He shouted to the other officers that the suspect had a gun and said that he could not see the weapon any longer. However, he told them not to approach as the suspect was still moving and he could not see the weapon. The team cautiously made their way forward and pulled the suspect out of the truck. There were three combat lifesaver certified SWAT operators who immediately began rendering aid to the suspect. Additional emergency medical assistance was staging in the area and they were called to the scene where they attempted to administer life saving measures. The suspect was transported to St. Anthony's Hospital where he died from the injuries he sustained from the gunshots.

CIRT interviews revealed that Sgt. Pickett, a SWAT team leader, who had been at the northeast corner of the Mamba, was able to see somewhat into the cab of the truck through the front side curved driver's window of the vehicle. After the firing of the baton rounds which dislodged the silver sun shade, Sgt. Pickett saw Heitman raise up his right arm, holding a weapon and point it in the direction of himself and his fellow officers. Sgt. Pickett described this weapon as being an odd looking red and black pistol. Sgt. Pickett then immediately heard three gun shots being fired from the turret of the Mamba, which were Agent Radke's shots. Sgt. Pickett then led his officers as they assessed the situation and rendered aid to the suspect. Later, Sgt. Pickett told CIRT investigators that he felt threatened as soon as he saw Heitman bring the weapon up in his direction of him and his SWAT operators and that he would have instantly fired at Heitman but he did not have a clear shot due to the location of the other officers.

Extensive documentation was done of the crime scene including overall and aerial photographs, utilization of FARO 3-D scanners and trajectory rods in the vehicle after the obtaining of a search warrant. Relevant items recovered from the suspect's vehicle included a yellow BernzoOmatic torch near the dashboard, a cell phone and a red and silver colored RAMSET D721 loaded with one live .22 caliber bullet from the area of the bench seat of the truck. Also in the truck cab were glass pipes with suspected marijuana residue, a bong used for inhaling drugs, a small bag containing a white crystalline substance, a partially full box of Thunderbolt brand .22LR caliber rounds, several loose .22 caliber rounds and one spent .22LR caliber round. The RAMSET has been submitted to the Colorado Bureau of Investigations for analysis. The results of that analysis are still pending at the time of this investigation.

Heitman's ex-girlfriend, Terri Williams, was interviewed by members of the CIRT on August 13, 2016 at approximately 3:30pm. By way of background, she described that Heitman had been abusing methamphetamine and marijuana for over twenty years and that he smoked methamphetamine on a daily basis. She said that he had been depressed and that the two of them had frequently discussed and had actually attempted to commit suicide together on a number of occasions. She said that Heitman knew that he had outstanding active warrants but that he had told her he was not going to jail and that he would not turn himself into police. Ms. Williams had seen Heitman approximately ten days prior to this incident and she suggested he call his probation officer. She stated that Heitman told her "I'm not going. I'm gonna die before I go to jail." On that same date, Heitman had shown her a weapon he had fashioned out of a "Ramset". She described this item as an 8 inch carpeting tool that was primarily orange in color and that it looked like a gun. He explained to her that he had modified it with a piece of wire and this modification allowed him to shoot a .9mm round from it. He then demonstrated shooting it for her by pulling the wire at the back of the ramset which shot a live round into the ground.

LEGAL ANALYSIS

We find in our review of this shooting that the conduct of Agent Radke was justified and was not criminal.

It is the conclusion of my office, based upon the applicable law and the facts and circumstances of this case, that law enforcement's actions during this incident clearly meet the legal requirements of the affirmative defenses as contained in §18-1-704 and §18-1-707.

Perry Heitman had seven misdemeanor warrants active for his arrest on August 13, 2016. When the Lakewood Police Department responded to the 7-Eleven to contact and arrest him for these outstanding warrants, Mr. Heitman refused to comply. By pulling an apparent handgun and putting it to his head, he elevated what should have been a quick and routine arrest on warrants to a stand-off with police. Lakewood police agents appropriately backed off in an effort to reason with him and to talk him into surrendering. They clearly identified themselves as police, explained that he had to be arrested for his outstanding warrants and gave him repeated commands to come out of his truck with his hands up. They repeatedly told Heitman that they would not and could not leave until he surrendered. Upon securing a phone number for him, they continued their efforts to persuade him to give himself up and to come out peacefully. Heitman's response was to make threats and to tell Agent Hagerman that he had enough propane to blow the whole place up. These statements and his earlier display of a weapon created grave concerns for officer and public safety. Yet the efforts to reason with Heitman lasted for over two hours with Heitman saying at various times that he would drive over the 7-Eleven gas tanks with his vehicle, that he had a loaded gun in the truck and that he was not going to be taken alive.

Appropriately, SWAT was called upon to provide tactical assistance to remove Heitman without greater risk to others. Heitman was then told he had thirty seconds before they could no longer ensure his safety. Heitman's response was that he wanted the police to kill him and that he was not coming out. Despite their numerous efforts to defuse the situation and handle it peacefully, law enforcement's plans were derailed by Heitman's fatal action of pointing his gun directly at the approaching SWAT officers. He gave them no choice but to defend themselves and their fellow officers by using deadly physical force. Unfortunately, Heitman's tragic choices resulted in the loss of his own life. He made the choice to die instead of going to jail.

Based upon the entire investigation of this incident, it is the final conclusion of my office that the legal requirements of the affirmative defenses were satisfied by Agent Radke's actions, that he was legally justified in his use of deadly physical force in this case and that his conduct did not violate any criminal statutes.

Sincerely,

Peter Weir
1st Judicial District Attorney

cc: CIRT Commander Michelle Moriarty, Arvada Police Department