



Second Judicial District
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Decision Letter

Contact: Lynn Kimbrough, 720-913-9025

April 27,
2001

Gerald Whitman
Chief of Police
Denver Police Department
1331 Cherokee Street
Denver, CO 80204

RE:
Investigation
of the
shooting of
Abran V.
Lovato,
DOB
9/28/68,
DPD
#380022, by
Officer
Moses
Rodriquez,
96-29, on
February
3, 2001, in
the 1300
block of
South
Umatilla,
Denver,
Colorado.

Dear Chief Whitman:

The investigation and legal analysis of the shooting death of Abran Lovato have been completed, and I conclude that under applicable Colorado law no criminal charges are fileable

against Officer Rodriguez. My decision, based on criminal-law standards, does not limit administrative action by the Denver Police Department where non-criminal issues can be reviewed and redressed, or civil actions where less-stringent laws, rules and legal levels of proof apply. A description of the procedure used in the investigation of this shooting by a peace officer and the applicable Colorado law is attached to this letter. The complete file of the investigation will be open to the public at our office and any interested party is welcome to review the investigation and my decision in greater detail.

SYNOPSIS

At approximately 6:15 p.m. on Saturday, February 3, 2001, uniformed Denver police officers Charles "Rick" Kyle, 96-27, and Moses Rodriguez, 96-29, were sitting in their marked patrol car in the 1500 block of South Tejon Street, Denver, Colorado. The officers were completing work on a traffic stop when they heard the sound of gunshots coming from somewhere north of their position. Kyle was behind the wheel and Rodriguez in the passenger's seat. The officers drove slowly north on Tejon. As they approached West Arkansas, both officers saw a male figure, later identified as Abran V. Lovato ("Lovato") running west on West Arkansas. Rodriguez saw that Lovato was carrying a handgun in his right hand. Through the passenger window of the patrol car, Rodriguez yelled at Lovato to stop. Lovato ignored this command and Rodriguez got out of the police car, drew his service pistol, and began to chase Lovato on foot. Kyle continued to follow Lovato in the patrol car. When Lovato approached South Umatilla, he turned and ran north up the east side of the street. Rodriguez followed, but veered into the middle of the street so as to place some distance between himself and the gunman, while continuing to yell commands to stop and drop the gun to Lovato. After he proceeded a short distance north on Umatilla, Lovato stopped abruptly and turned toward Rodriguez. Lovato was still holding the pistol in his right hand, with the muzzle pointed toward the ground. When he started to bring the gun up, Rodriguez fired his service pistol three times. Lovato fell to the ground and the officers immediately requested medical attention. Lovato was transported by Denver paramedics to Denver Health Medical Center but, despite the efforts of the medical team, he succumbed to his wounds and was pronounced dead at approximately 6:45 p.m.

STATEMENT OF INVESTIGATION

This investigation involves the shooting death of Abran Lovato by uniformed Denver Police Officer Moses Rodriguez, 96-29. Officers were responding to an area where they had heard the sound of gunshots when they saw Lovato running from that area. Rodriguez saw Lovato carrying a gun and he got out of the police car and began chasing Lovato on foot, while Kyle covered Rodriguez from the patrol car. Rodriguez issued numerous commands to Lovato, ordering him to stop and to drop the gun. The officers advised the police dispatcher when they heard the initial gunshots. Radio calls were also made when the foot chase began. Immediately after Rodriguez fired his weapon, the dispatcher was advised of the fact of the shooting and an ambulance was requested. Covering officers arrived almost immediately after the shots were fired. Lovato was taken into custody and, upon the arrival of the ambulance, taken to Denver Health Medical Center and treated for gunshot wounds to his chest and right hip.

Rodriguez, and his partner, Charles "Rick" Kyle, 96-27, were dressed in a full blue Denver

Police Department Uniform and wearing black DPD uniform winter jackets, with a cloth badge emblem on the chest. The officers were driving a marked Denver police patrol car. Rodriquez was armed with a Sig Sauer model P220, .45 caliber semi-automatic pistol. This weapon has a magazine capacity of seven rounds and may be carried with an additional round in the chamber. At the time of the incident, Rodriquez's weapon was fully loaded with DPD-issued ammunition. Following the incident and in compliance with the protocols established for officer-involved shootings, Rodriquez's weapon was given to Denver police crime lab personnel for appropriate testing.

On February 4, 2001, Dr. James Wahe, a forensic pathologist with the Denver Medical Examiner's office, performed an autopsy on Lovato's body. The cause of death was determined to be multiple gunshot wounds. Dr. Wahe noted evidence of three gunshot wounds. The first wound was to Lovato's upper right chest, entering the body three inches to the right of the midline. This bullet caused extensive damage to the right lung and heart and transected the spinal cord. It was recovered near one of the vertebra. The second bullet also entered the right chest about three inches below the other chest wound¹. This bullet caused damage to the right lung and the liver, exiting the back at the "right mid-back." The third gunshot wound was to the "posterolateral right leg." The medical examiner noted that "the wound of entrance #3 and the wound of exit #3 are similar in morphology, and it is not clear whether bullet #3 travels from back to front or from front to back." This wound may be described as a "flesh" wound as it "perforates the skin and subcutaneous tissue of the right posterior thigh." Toxicological analyses of blood and urine samples obtained from Lovato's body were positive for the presence of ethanol. The blood alcohol level was determined to be .274%. We note that this is almost three times the level at which Colorado law presumes that one is driving under the influence of alcohol.

Investigators found three spent .45 caliber shell casings on Umatilla Street in areas consistent with the location of the incident as described by Rodriquez and the other witnesses. These shell casings were identified to Rodriquez's pistol by Denver police crime laboratory firearms examiners. One bullet was recovered from Lovato's body at autopsy. This slug was tested by the Denver Police Crime Laboratory firearms examiners and identified to Rodriquez's pistol. A spent bullet was located in the ground in an area behind the location where Rodriquez told investigators Lovato was standing. This bullet was determined by firearms examiners as being "consistent with the test fired bullets [from Rodriquez's pistol] [but] the bullet lack[ed] sufficient identifying characteristics for identification purposes and [could not] be identified or eliminated as having been fired from [Rodriquez's] firearm.

Investigators located a small caliber, semi-automatic handgun near where Lovato fell. This firearm was taken to the Denver Police Department Crime Laboratory where it was examined and tested by firearms examiners. It was determined to be a Davis Industries model P380, .380 caliber, semi-automatic pistol that was in good mechanical condition and would operate as designed. Investigators were able to locate the area where the first shots were fired which was the home of Gilbert Chavez, 8-2-33, at 1955 W. Arkansas. In separate statements, both Mr. Chavez and his son Jeffrey Chavez, 2-24-68, told investigators that at about 6:15 p.m. each heard a loud report and then saw a bullet hole in the front window of their house. They went outside of the house and saw a police car turn westbound on Arkansas from Tejon and an unknown party

running west on Arkansas. Each saw the party turn north at Umatilla. Near the Chavez home, investigators located two spent .380 shell casings. These were compared to test fires from the Davis .380; however "the recovered casings as well as the test fired casings lack[ed] sufficient individual characteristics and [could not] be identified or eliminated as having been fired [by the Davis .380] firearm." A bullet was recovered at the Chavez home. That projectile "was identified as having been fired from [the Davis .380] firearm."

Investigators located three individuals who claimed to have seen at least part of the actual shooting, Catherine Muro, 3/29/56, Raylene Robles, 6/11/81, and Monica Martinez, 2/18/81. Each witness agreed to provide video-taped statements at police headquarters. Officer Kyle also provided a video-taped statement. In addition to these video-taped statements, written statements were obtained from neighborhood residents who advised investigators that they had heard either the initial gunshots or the gunshots fired by Rodriquez, or both, but had not been eyewitnesses to the shooting by Officer Rodriquez.

Following the shooting, and in accordance with protocol, Officer Rodriquez was separated from the other witnesses and was separately transported downtown by an uninvolved supervisor. Rodriquez was given an opportunity to speak to his attorney and a psychological services representative. Officer Rodriquez gave a voluntary video-taped statement to investigators.

There is no dispute regarding the fact that shots were fired that attracted the attention of officers Kyle and Rodriquez. As noted above, someone fired gunshots at the home of Gilbert and Jeffrey Chavez.² (The gun used in this shooting was found next to Lovato when he was shot and taken into custody.) These shots were heard by several area residents, including Ms. Destiny Hicks, 2/19/85, Mr. Gary B. Salerio, 8/22/83, and Mr. Chris Duran, 3/15/87, all of whom were at 1400 South Tejon Street. The shots were also heard by some of the Chavez's next-door neighbors, the Archuletas, who reside at 2858 South Depew Street. Joe Archuleta, Jr., 4/11/69, heard the initial gunshots and alerted other members of his family. He told investigators that he

"heard three to four gunshots around 6:15 p.m. [and] went into house from back room, asked if anyone else heard the gunshots. [He then] went to the front door to look out and heard four to five gunshots. Then saw a small red car with black on hood—looked like a [Mitsubishi] Eclipse coming east on Arkansas very slowly, tuned south on Tejon. Drove south to Florida very slowly. Turned east on Florida. Came back a few minutes north bound on Tejon and didn't see again.³ [Mr. Archuleta and other family members] walked to neighbor's house - they told us that their window was shot and we looked for bullet. [We] found bullet, told police and they asked us to leave."

Kyle and Rodriquez heard the shots as they were completing the paperwork on their traffic stop. Witnesses saw the police car proceed north on Tejon to Arkansas and turn westbound on Arkansas. Ms. Mura told investigators that she, members of her family, and friends were at her home at 1393 Umatilla watching a sporting event on television. She was looking out her front window and, to the south east, she saw a police car in the 1400 block of S. Tejon Street with its

lights on. Gilbert Chavez told investigators that, after his front window was shot, he went outside and "saw a police car going west on Arkansas and someone running up the street. He turned north at the corner. The police car went the same way. Then I heard some gunshots." Chris Duran made a similar statement.

Ms. Juanita Loera, 5/27/52, a resident at 1400 S. Tejon Street, told investigators that

"I heard about four or five shots. Then I looked out my front window when I saw a guy running west on Arkansas, shouting "stop you motherfucker or I'll shoot." Just then a cop car pull(ed) up [and] one cop got out [and] started to chase him around the corner. Then more shots were heard."

Although it is unclear who Ms. Loera heard yelling commands, Ms. Loera's account is similar to statements by Jeffrey Chavez. Chavez told investigators that, after his window was shot, he

"went outside to investigate and [saw] a police cruiser northbound on Tejon turning west bound onto Arkansas Ave. I then noticed an unknown person running west bound between Tejon & Umatilla on Arkansas Ave. The police cruiser turned northbound on to Umatilla. I heard someone yell some unintelligible words. Then, a few seconds later, I heard 3 or 4 gunshots from a large caliber weapon. About one minute to one and one-half minutes later, I called 911 to report an apparent officer-involved shooting."

Kyle and Rodriguez each told investigators that, when they approached Arkansas, they saw a man running westbound on Arkansas. Both officers recalled that they had the right and left door spot lights on and the "take down" lights on (bright white lights that illuminate forward from the overhead light bar), but that the red and blue "overhead" lights were not illuminated). From his position, Kyle was unable to see the party's right side and he thus could not tell whether the individual had anything in his hand. Rodriguez told investigators that he saw the suspect carrying a "gun in his right hand." From his seat in the patrol car, Rodriguez yelled at the party to "Stop! Stop!" He then got out of the patrol car and began to chase the individual on foot. Rodriguez estimated that he was between ten and fifteen yards behind Lovato when Lovato turned north on Umatilla. As the suspect approached Umatilla, he slowed near a white car. Rodriguez thought that he was going to get in the car, but then he sped up. In follow-up questions by investigators, Rodriguez stated that the white car was "blacked out" (that is, the headlights were off), but that the motor was running. He saw one person behind the wheel. This vehicle took off at a high rate of speed at about the time the shots were fired.⁴ Muro was looking out her front window when Lovato rounded the corner onto Umatilla.

She saw the police car stop in front of her house and she saw two officers standing at the car. She believed that both officers had their guns drawn. She saw a man, across the street from her house, turn toward the officers and, almost immediately, she heard the gunshots. Ms. Mura stated that, because of the dim light across the street, she was not able to see the position of the man's hands, nor could she determine whether he was armed. She did state that after the shots were fired, the officers approached the fallen man in a cautious manner as if they were "still watching themselves."

Robles and Martinez were at Martinez's car which was parked, facing southbound, on the

west side of the street in front of 1393 S. Umatilla. They were engaged in putting Martinez's small child in the back seat when Kyle drove onto Umatilla and stopped in the street just north and east of Martinez's car. Robles noted that the police car did not have its overheads on; however, the light was fairly good and Robles remembers that the porch lights to the Muro house were illuminated. Ms. Robles saw both officers in the street in front of the police car, guns drawn. She believed that the officers were focused on the house directly across the street from 1393 Umatilla, but she was unable to see upon what or whom they were focused. She heard the officers shouting "sharp" commands at someone, but she could not distinguish what was being said, stating, "They were telling somebody to do something." She stated that she heard more than one command and believed that both officers were issuing the commands.

Martinez told investigators that she had just finished putting her daughter in the car when she heard the first gunshots. She had gotten behind the wheel, started the car, and had the "radio up," when she heard the first group of gunshots. She told investigators that she assumed the shots "were a little bit far" but her windows were down and the shots "sounded loud." She indicated that she believed those shots emanated from either "around the corner" or "down the block." She told investigators that when she heard the shots, she ducked down and then "peeked up." When she looked up, she saw a police car turn the corner from West Arkansas to South Umatilla. She noted that the police car had numerous bright lights on. Martinez also saw a police officer running on foot. She stated that she heard the first group of shots "seconds" before she saw the officers.

Martinez noted a person running northbound on Umatilla just before she saw the police car and police officer on foot. In response to an investigator's question regarding what the officers were doing, she stated that they were "screaming and yelling." Ms. Martinez did not see the actual shooting. She told investigators that the person running stopped and she assumed that something or someone had blocked his path. She saw him stop and turn around at a point across the street from her car. Ms. Martinez claimed that she only glimpsed this party and was unable to see the individual's hands. She was, thus, unable to see whether he was holding a weapon. Ms. Martinez stated that the officer on foot had his gun out and when the other man turned in her direction she ducked down. She stated that she heard "a lot of yelling . . . 'get down!'" She then heard more "pops."

Kyle told investigators that as he stopped the patrol car on Umatilla, he heard Rodriguez yelling "drop the gun! Drop the gun!" He was getting out of the patrol car and was trying to get his weapon clear of his holster, when Rodriguez fired. Kyle saw Lovato start to fall and, at this time, saw a gun fall from Lovato's right hand. Kyle noted that he had not seen the gun before that moment. After Lovato fell, Kyle approached him, placed him in custody, and made the appropriate radio calls.

Rodriguez described the initial pursuit in a manner corroborated by the other witnesses, advising the investigators that whenever lost sight of the suspect from the time he first saw him to the time he fired his pistol. He had drawn his firearm when he first got out of the patrol car and, as he chased Lovato, he was yelling "Police! Stop!" When Lovato turned north on Umatilla, Rodriguez veered out into the middle of the street so that he could put a little more distance between himself and Lovato as he had neither cover nor concealment. Rodriguez stated that

Lovato ran a short distance up the street and then stopped and turned toward Rodriguez. At this point there were approximately fifteen feet separating the two men. Rodriguez issued several commands at Lovato, ordering him to drop the gun, indicating that he gave that command before and after Lovato stopped and turned toward him. Lovato ignored his repeated commands and instead started to raise his gun hand. In his interview, Rodriguez said that when Lovato's arm raised about 45 degrees from a downward position, he fired because he believed he was about to be shot. He stopped firing when the suspect fell to the ground.

As previously noted, immediately after the shots were fired, Kyle requested an ambulance. Other officers had heard the radio calls regarding the initial shots fired and several police cars arrived almost immediately after Rodriguez fired his pistol. The scene was quickly secured and attempts were made to locate all possible witnesses.

LEGAL ANALYSIS

Criminal liability is established in Colorado only if it is proved beyond a reasonable doubt that someone has committed all of the elements of an offense defined by Colorado statute, and it is proved beyond a reasonable doubt that the offense was committed without any statutorily-recognized justification or excuse. While knowingly or intentionally shooting and killing another human being is generally prohibited as homicide in Colorado, the Criminal Code specifies certain circumstances in which the use of deadly physical force is justified. As the evidence establishes that Officer Rodriguez shot Lovato, the determination whether his conduct was criminal is primarily a question of legal justification.

Section 18-1-707(2) of the Colorado Revised Statutes reads as follows:

(2) A peace officer is **justified** in using deadly physical force upon another person... 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.

Therefore, the question presented in this case is whether, at the instant Officer Rodriguez fired the shots that caused Lovato's death, he reasonably believed either that Lovato was about to direct deadly physical force toward him, or that Lovato had just committed or attempted to commit a felony involving the use or threatened use of a deadly weapon or that Lovato was attempting to escape by the use of a deadly weapon. In order to establish criminal responsibility for knowingly or intentionally causing the death or bodily injury to another, the state must prove

beyond a reasonable doubt that the person doing the shooting either did not really believe in the existence of these requisite circumstances, or, if he did hold such belief, that belief was, in light of all available facts, unreasonable.

CONCLUSION

Based on the totality of the facts developed in this investigation, as summarized in this letter, there is no reasonable likelihood of proving beyond a reasonable doubt that Officer Rodriguez committed any criminal act. In fact, there are three distinct affirmative defenses available to Officer Rodriguez to justify his actions. Therefore, I conclude that under applicable Colorado law no criminal charges are fileable against Officer Rodriguez. As in every case we handle, any interested party may seek judicial review of our decision under C.R. S. 16-5-209.

Very truly yours,

Bill Ritter, Jr.
District Attorney

cc: Officer Moses Rodriguez
David Bruno, Attorney at Law
Wellington Webb, Mayor
All City Council Members
Aristedes Zavaras, Manager of Safety
Dave Abrams, Deputy Chief
Mary Beth Klee, Deputy Chief
Dan O'Hayre, Division Chief
Armedia Gordon, Division Chief
Steve Cooper, Division Chief
Juan Maldonado, Division Chief
Tim Leary, Captain, Crimes Against Persons Bureau
Jon Priest, Lieutenant, Homicide
Martin Vigil, Detective, Homicide
John Weber, Captain
Chuck Lepley, First Assistant District Attorney
Lamar Sims, Chief Deputy District Attorney
Mitch Morrissey, Chief Deputy District Attorney
Justice William Erickson, Erickson Commission
Phil Hernandez, Executive Director, Agency for Human Rights
and Community Relations

1. The autopsy report notes that during the attempts to save Lovato at the hospital, a surgical incision was in the area of the bullet wound and therefore the wound path is described as "the possible wound path."
2. Colorado law prohibits a person from knowingly or recklessly discharging a firearm into the dwelling of another. See, C.R.S. § 18-12-107.5. Commission of this offense is a class 5 felony.
3. Although other witnesses saw this car, variously describing it as red or black, there is no evidence to suggest that the occupants of this vehicle were involved in the initial shooting at the Chavez household.
4. Officer Kyle, Catherine Muro, and Raylene Robles also took note of this car. Robles, outside of 1393 S. Umatilla, heard the first shots then saw a small car come around the corner onto Umatilla, turn its headlights off and on, and then speed off. Muro saw the car, which was stopped, northbound at the corner of West Arkansas and Umatilla, pull a U-turn and speed off after the police car stopped in front of her house. Although these facts may give rise to an inference that the occupant of this car had some relation to Lovato, neither the vehicle nor the driver has been identified.