



Second Judicial District

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Decision Letter

December 31, 2002

Contact: Lynn Kimbrough, 720-913-9025

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

RE: Investigation of the shooting death of Leon Wikoff, dob 02-14-76, DPD#485526, by Officer Joseph A. Engelbert, #01053, on October 7, 2002, at the Motel 6 at 3050 West 49th Avenue, Denver, Colorado. (Officer Engelbert wounded Wikoff who then committed suicide.)

Dear Chief Whitman:

The investigation and legal analysis of the shooting death of Leon Wikoff have been completed, and I conclude that under applicable Colorado law no criminal charges are fileable against Officer Joseph A. Engelbert. 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

On October 7, 2002, at approximately 1:33 a.m., Denver Police Officers were dispatched to the vicinity of West 46th Avenue and Perry Street on a report of “shots fired.” Officer Joseph Engelbert (“Officer Engelbert”), car 112A, responded to check the area. Officers Greg Peoples, 98015, car 116, and Ken Starbuck, 01068, car 115, joined in the search. The officers were all driving marked Denver Police vehicles and were in full Denver Police uniforms. After searching the area and finding nothing suspicious, they went back into service. A few minutes later, while completing their log sheets and talking at West 46th Avenue and Quitman Street, Officers Engelbert and Peoples saw a green, Ford Explorer, traveling eastbound from Lowell Boulevard on West 49th Avenue at a high rate of speed. Officer Engelbert followed the vehicle and noted that it had no rear license plate. The windows were tinted black and were dirty. He could not see the driver, how many individuals were in the car, or if there was a temporary permit in the back window. At West 49th Avenue and Lowell Boulevard, Officer Engelbert activated his overhead lights in an attempt to stop the vehicle. The vehicle turned right and went eastbound on 49th Avenue. The vehicle speed was only about 25 miles per hour and Officer Engelbert thought the driver was going to pull over to the right side of the street. He gave his siren a short burst in an effort to gain compliance. Instead of stopping, the driver fired a shot at Officer Engelbert as he sped away. With Officer Engelbert traveling eastbound in pursuit on West 49th Avenue, the suspect, later identified as Leon Wikoff (“Wikoff”), fired additional shots at Officer Engelbert at King Street, Knox Court, and between Julian and Hooker Streets. Officer Engelbert ducked down and peered over the dashboard as he pursued Wikoff. Wikoff then turned into the parking lot of the Motel 6 at 3050 West 49th Avenue with Officer Engelbert fifty to one-hundred feet behind him. Wikoff fired at least one additional shot at Officer Engelbert as he drove to the south side of the motel where he stopped his vehicle.

Wikoff ran from his vehicle while the engine was still running. Officer Engelbert saw the gun for the first time. Wikoff had the gun in his right hand. He pointed the gun directly at Officer Engelbert who was still in his police vehicle. Officer Engelbert believes Wikoff fired two shots at him. Wikoff then ran to the breeze-way of the motel and went up the outside staircase leading to the second-floor exterior walkway of the motel. As he ran down the walkway toward room 231, he continued to fire at Officer Engelbert, who sought cover behind the rear-tire area on the driver’s side of his police vehicle. The police vehicle was in the parking lot below the walkway. One of Wikoff’s shots penetrated the right-front quarter panel of the

vehicle in line with Officer Engelbert's position of cover. Officer Engelbert had his weapon trained on Wikoff, but had delayed returning fire until Wikoff cleared the windows of the motel rooms. With Wikoff continuing to aim his weapon at him, Officer Engelbert returned fire. Wikoff stated, "Ah fuck" and fell wounded on his back on the walkway. Officer Engelbert then saw Wikoff put his gun to his head and shoot himself.

Officers Greg Peoples, Ken Starbuck, and Jay Estrada who had been responding from the other side of the motel, appeared almost immediately after the shooting. They observed Wikoff lying on his back with the gun in his left hand. Officers Peoples and Starbuck approached Wikoff, with their weapons trained on him. Officer Peoples removed the weapon from his hand, and insured he presented no further threat. The Officers immediately radioed for an ambulance "CODE 10" and notified the police dispatcher that there had been an "officer-involved shooting." Officers Starbuck and Estrada immediately ran to secure the green-Ford Explorer and insure no other suspects were present. The vehicle was still running, but no other parties were present. Wikoff was transported to Denver Health Medical Center where he was pronounced dead at 2:25 a.m. by Dr. Andrew Knaut.

STATEMENT OF INVESTIGATION

This investigation involves the shooting of Leon Wikoff by Officer Joseph Engelbert on October 7, 2002, at the Motel 6 at 3050 West 49th Avenue, Denver, Colorado. Immediately after the shooting, Officer Engelbert remained at the location of his police vehicle. Officer Greg Peoples and other officers covered in on the location. Sergeant Daren Ciempa responded to the scene and secured the crime scene area at the motel. He then took Officer Engelbert in his police vehicle to retrace the route of the pursuit so that investigators could follow up with evidence collection. Then, in compliance with the protocol for officer-involved shootings, Officer Engelbert was transported to Denver Police Department headquarters. He remained separated from other involved parties, until he gave a voluntary, video-taped statement to investigators. Because Officer Engelbert is the only witness to the entire episode, his statement provides the facts for the above "Synopsis." The statements of the other witnesses to various aspects of the incident and the physical evidence are consistent with Officer Engelbert's account of the pursuit and shooting. All of the statements taken in the course of the investigation and the results of the testing of the physical evidence are contained in the investigative file and can be reviewed in detail by any interested person.

When interviewed by investigators after the shooting, Frankie Wikoff stated in pertinent part that she was Wikoff's wife. They had two children and she was pregnant with their third child. She had been separated from Wikoff for a couple of months and was living with her two children at her sister's house during that time. She had left Wikoff because he was having affairs with other women and had gotten one of them pregnant. She said she had been back together with Wikoff for a week and they were living in room 231 of the Motel 6. She indicated that for most of the day Wikoff and she were arguing and he left in her Ford Explorer. When asked by investigators why she thought he would shoot at police officers, she said because he did not want to go back to prison. She said he was "looking at 10 to 12 years for violations." She stated that earlier in the day he told her that he'd rather be dead than living like they were or going to prison. She indicated that she had just gone to sleep when she heard a loud noise like a

firecracker outside her motel room. She heard a voice say, "Put it down." She heard approximately three or four gunshots. She said she did not see the shooting. She later looked out the window and saw police officers and some blood.

Officer Engelbert was armed with a Sig Saur P220, .45 caliber, semi-automatic pistol. This weapon has a magazine capacity of 8 rounds and may be carried with an additional round in the chamber. At the time of the incident, Officer Engelbert's weapon was fully loaded with nine rounds of DPD-issued ammunition. Following the incident and in compliance with the protocols established for officer-involved shootings, Officer Engelbert's weapon was given to Denver Police Crime Lab personnel for appropriate testing. Subsequent testing by Denver Police Crime Lab personnel found the weapon to be fully functional.

Wikoff was armed with a Ruger P-90, .45-caliber semi-automatic pistol. This weapon has a magazine capacity of 8 rounds. Testing confirmed the weapon will fire and chamber the next cartridge from the magazine. This weapon was recovered near where Wikoff shot himself. There was one bullet in the chamber of the gun and one bullet in the magazine. A spent .45-caliber shell casing was located near the weapon. A box of .45-caliber Winchester ammunition with 20-live rounds and a Ruger .45-caliber magazine were recovered in a subsequent search of Wikoff's Ford Explorer. The bullet hole in the right-front fender of Officer Engelbert's police car was of a size and at an angle consistent with having been fired from Wikoff's firearm. The car door was dismantled and a bullet was recovered from inside the door. Subsequent testing by Denver Police Department Crime Lab personnel confirmed that this bullet was fired from Wikoff's weapon. The ammunition and magazine recovered from the Ford Explorer was identical to the spent-shell casings recovered at the scene and the magazine in Wikoff's weapon.

A total of nine .45-caliber shell casings were recovered at the motel scene and on West 49th Avenue. Three of the casings were silver and the other six were brass. The three silver-shell casings were recovered behind the police car. The brass casings were recovered at West 49th Avenue and Knox Court, West 49th Avenue and Julian Street, in the parking lot of the Motel 6, and one was recovered near Wikoff's body on the second-floor walkway. Subsequent testing by Denver Police Crime Lab personnel identified the three silver shell casings to Officer Engelbert's weapon and the six brass shell casings to Wikoff's weapon.

Dr. Thomas Henry performed an autopsy on Wikoff on October 7, 2002, beginning at approximately 10:25 a.m. Wikoff suffered an intra-oral gunshot wound that exited the back of his head. Dr. Henry stated the cause of death was "due to a gunshot wound of the head." The self-inflicted gunshot caused a skull fracture, cerebral lacerations and contusions, and subdural and subarachnoid hemorrhage. Wikoff also sustained a through-and-through gun-shot wound to the right wrist, a gun-shot wound to the right side of the abdomen which perforated the liver and right kidney and lodged in his spine, and a gun-shot wound to the right leg. Other injuries appear to be the result of bullet fragments. The bullet recovered from Wikoff's spine was tested by Denver Police Crime Lab personnel and identified as having been fired from Officer Engelbert's weapon. The injuries sustained from the shots fired by Officer Engelbert were non-fatal. Wikoff took his own life. Toxicology testing revealed the presence of alcohol and cocaine in his system at the time of death. His blood alcohol level was .115%. He tested positive for urine cocaine

metabolite, THC. His blood cocaine was 199 ng/ml.

Wikoff has an extensive criminal arrest record including arrests for felony auto theft, felony possession of controlled substance (multiple), harassment, assault (multiple), obstructing police, felony child abuse, domestic violence assault, probation violation (multiple), felony vehicular eluding, failure to appear (multiple), and sexual assault on a child-position of trust-victim under 15 years old. In her statements to investigators, Frankie Wikoff stated that Wikoff was on the run because he was wanted for the sexual assault on a child and probation violation.

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 wounding or killing another human being is generally prohibited as assault or homicide in Colorado, the Criminal Code specifies certain circumstances in which the use of deadly physical force is justified. Because the evidence establishes in this case that Officer Engelbert shot Wikoff, the determination whether his conduct was criminal is primarily a question of legal justification.

Section 18-1-707(2) of the Colorado Revised Statutes defines the circumstances under which a peace officer can use deadly physical force in Colorado. In pertinent part, the statute 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:

1. Has committed or attempted to commit a felony involving the use or threatened use of a deadly weapon; or
2. Is attempting to escape by the use of a deadly weapon.

Section 18-1-901(2)(e) of the Colorado Revised Statutes defines the term “Deadly weapon” as follows:

(2)(e) “**Deadly Weapon**” means any of the following which in the manner it is used or intended to be used is capable of producing death or serious bodily injury: (I) **A firearm**, whether loaded or unloaded; (II) A knife; (III) A bludgeon; or (IV) Any other weapon,

device, instrument, material, or substance, whether animate or inanimate.

Also pertinent to the facts and circumstances of this case is Section 18-3-202 (1)(e), Assault in the first degree, of the Colorado Revised Statutes, which reads as follows:

(1) A person commits the crime of assault in the first degree if:

(e) With intent to cause serious bodily injury upon the person of a peace officer or firefighter, he or she threatens with a deadly weapon a peace officer or firefighter engaged in the performance of his or her duties, and the offender knows or reasonably should know that the victim is a peace officer or firefighter acting in the performance of his or her duties.

In reference to the pertinent section of the “Assault in the first degree” statute in which the victim is a peace officer, in *People v. Prante*, 177 Colo. 243, 493 P.2d 1083 (1972), the Colorado Supreme Court stated:

“The General Assembly recognizes that peace officers are placed in a position of great risk and responsibility, so to invoke a special punishment for an assault upon a peace officer acting in the scope of his official duties is neither arbitrary, capricious, nor unreasonable.”

Therefore, the question presented in this case is whether, at the instant Officer Engelbert fired the shots that caused the injuries to Wikoff, he reasonably believed that Wikoff was directing or was about to direct deadly physical force against him or another person or was attempting to escape by the use of a deadly weapon. In order to establish criminal responsibility for an officer knowingly or intentionally causing injury or death of another, the state must prove beyond a reasonable doubt that the officer 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

The justification for the use of force against Wikoff by Officer Engelbert could not be clearer. Wikoff fired numerous shots at Officer Engelbert throughout the lengthy vehicular pursuit. Then, from a position above Officer Engelbert, Wikoff fired additional rounds—one of which penetrated the right-front quarter panel of his police vehicle, directly in line with Officer Engelbert’s position of cover behind the rear tire area of the driver’s side of the car. While under fire by Wikoff from his tactically superior position above the officer, Officer Engelbert returned fire, wounding Wikoff. Wikoff then placed his firearm in his mouth and killed himself. Under the facts of this case, it was clearly necessary, reasonable, and appropriate for Officer Engelbert to use the degree of force he used.

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 Engelbert committed any criminal act. In fact, Officer Engelbert’s conduct was exemplary throughout this life-threatening encounter. He pursued Wikoff even though he was being fired

upon. He did so in spite of the fact he could not return fire because he could not see who was firing at him from the vehicle or how many parties were in the vehicle. Again, at the Motel-6 scene where the event concluded, Officer Engelbert held his fire while being fired upon, until Wikoff cleared the motel windows in the background. Officer Engelbert did so for the specific purpose of reducing the potential threat to innocent parties. These are selfless acts that demonstrate the highest level of professionalism, clarity of thought under extreme stress, and unquestionable courage. It is fortunate that this confrontation ended without serious injury or death to Officer Engelbert or others who were in the area. Therefore, I conclude that under applicable Colorado law no criminal charges are fileable against Officer Engelbert.

As in every case we handle, any interested party may seek judicial review of our decision under C.R.S. 16-5-209.

[1] Wikoff was staying in room 231 with his wife and their two children. His wife was pregnant at the time of the shooting.

[2] Officer Greg Peoples had secured the weapon by removing it from Wikoff's left hand and placing it in the position near his body where it was recovered by Denver Police Crime Lab personnel.

[3] A person with a blood alcohol level of .100% and above is considered to be DUI (Driving Under the Influence) under Colorado law.

Very truly yours

Original Hard Copy is signed

Bill Ritter, Jr.
District Attorney

cc:

Officer Joseph Engelbert
David Bruno, Attorney at Law
Joe Van Horne, Attorney at Law
Wellington Webb, Mayor
All City Council Members
Tracy Howard, Manager of Safety
Dave Abrams, Deputy Chief
Mary Beth Klee, Deputy Chief
Dan O'Hayre, Division Chief
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Steve Cooper, Division Chief
Juan Maldonado, Division Chief
Tim Leary, Captain, Crimes Against Persons Bureau
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