



Second Judicial District

303 West Colfax Avenue, Suite 1300, Denver, Colorado 80204

Phone (720) 913-9000 Email: Info@denverda.org

Decision Letter

October 25, 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 of Gregory Lee Smith, Jr., DOB 2/27/83, DPD# 562893, by Sgt. Robert Silvas, 77022, and Officer Jim Turney, 98056, on January 30, 2002, at 3615 Garfield Street, Denver, Colorado.

Dear Chief Whitman:

The investigation and legal analysis of the shooting death of Gregory Lee Smith, Jr. have been completed, and I conclude that under applicable Colorado law no criminal charges are fileable against Sergeant Robert Silvas or Officer Jim Turney. 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 8 p.m. on the evening of January 29, 2002, uniformed officers assigned to the Denver Police Department's District Two were called to the address of 3615 Garfield Street on a family disturbance. Upon arrival, officers were met by Ms. Regina Keith, 11-17-59, and her daughter, Joann Smith, 4-9-82. The women told officers that Keith's son, Gregory Smith ("Smith"), had gotten upset with his mother and threatened to move out. He then went downstairs to his basement bedroom and knocked several items about and onto the floor. He came back up the stairs and left out a back door, knocking the door off its hinges. Ms. Keith's car was parked in a driveway alongside the house. Smith punched at one of the car

windows several times and then took a brick or concrete block and broke out one of the windows. He then left the area. The officers completed a report for "criminal mischief" (Offense #20020505268) which Ms. Keith signed. The officers also advised her to call the police if Smith returned.

Shortly after midnight on January 30, 2002, Smith returned to the home. He had another confrontation with his mother, during which he armed himself with a knife and then implored her to kill him. He ultimately relinquished the knife and went downstairs to his bedroom. Keith had called the police when Smith returned. Sgt. Robert Silvas and Officer Jim Turney were the first officers to arrive. Ms. Keith and her daughter directed the officers to the basement stairs at the back of the house. Silvas and Turney began trying to make contact with Smith, who opened the door to the basement living area, closed it and then re-opened it. He started up the stairs and, as he neared the officers, reached down to the side of his leg and came up with a small folding knife with the blade exposed. The officers immediately began ordering him to drop the weapon. Smith did not do so and continued to move toward the officers. Both Silvas and Turney began firing at almost the same instant. Smith fell back down the stairs and came to rest at the base of the stairs. The officers immediately requested an ambulance and Smith was transported by Denver paramedics to University Hospital. Despite the efforts of the medical team, he succumbed to his wounds and was pronounced dead at approximately 1:05 a.m.

STATEMENT OF INVESTIGATION

This investigation involves the shooting of Gregory Smith by uniformed Denver Police Officers Robert Silvas, 77022 ("Silvas"), and Jim Turney, 98056 ("Turney"). Both officers were

responding to the scene of a family home where Smith—who had been involved in an earlier disturbance—had returned and was causing problems. The officers contacted the complainant, Ms. Regina Keith, who is Smith’s mother, and were directed toward the basement where Smith had retreated. Turney saw movement at the base of the stairs and drew his pistol. He began ordering Smith to show his hands. Smith, instead, retreated into the basement area and closed the door at the base of the stairs. Turney tried the door and then returned to the top of the stairs. Silvas was at the top of the stairs and Turney re-holstered his pistol and briefed Silvas. Other officers began to arrive.

As the officers stood at the landing, the door to the basement re-opened. Turney and Silvas saw Smith at the bottom of the stairs. Turney drew his weapon and began commanding Smith to show his hands. Smith, instead, began advancing up the stairs. As Smith moved toward the officers, Silvas drew his weapon. Both officers were shouting commands that Smith did not appear to heed. Instead, Smith reached into either a pocket or a pant leg and came up with a knife in his right hand. The officers continued to shout commands, but when Smith ignored them, both officers fired several shots. Smith fell backward and came to rest at the bottom of the stairs. Officers advised the police dispatcher that shots had been fired and that an ambulance was needed “Code 10.” This call was made a 12:29 a.m. Smith was taken into custody. He was taken to University Hospital by ambulance where he died of his wounds.

Silvas and Turney were dressed in full blue Denver Police Department uniforms and were wearing dark DPD uniform winter jackets with cloth badge emblems on the chest. (Other officers who had responded and were standing at the back door at the time of the shooting were similarly dressed.) Silvas 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, Silvas’s weapon was fully loaded with DPD-issued ammunition. Turney was carrying a .45-caliber Glock semi-automatic handgun. This weapon has a 13 round magazine capacity and may be carried with an additional round in the chamber. At the time of the incident, Turney’s weapon was fully loaded with DPD-issued ammunition. Following the incident, and in compliance with the protocols established for officer-involved shootings, both weapons were given to Denver Police crime lab personnel for appropriate testing.

On January 30, 2002, Dr. Amy Martin, a forensic pathologist with the Denver Medical Examiner’s office, performed an autopsy on Smith’s body. The cause of death was determined to be multiple gun-shot wounds. Dr. Martin noted evidence of six gun-shot wounds. The first wound entered the left upper chest, caused extensive damage to the heart, then passed through the diaphragm and struck the liver and the stomach. The path of the bullet was determined to be from front to back and “up to down.” This bullet was recovered at autopsy. The next bullet entered the side of the right shoulder (wound #2), exited near the right armpit (wound #3) and re-entered the body on the right side of the chest (wound #4). Upon entering the chest, this bullet perforated the right lung and then passed through the diaphragm and damaged the liver and the left kidney. The general track of the bullet was described as “right to left, up to down, and front to back.” This bullet was recovered at autopsy. The next bullet (wounds #5 and #6) documented at autopsy entered the body at the groin “at the root of the penis” and exited the body beneath the

scrotum. The bullet passed through the skin and “subcutaneous tissue” and caused little damage. The wound track was noted to be “front to back, and perhaps slightly up to down.” This bullet exited the body and was not recovered during the autopsy. Another bullet struck Smith on the side of the left leg just above the knee. This bullet fractured the femur and came to rest just under the skin on the inside of the left thigh. (The coroner noted wounds at both the points of entrance and final rest and numbered them as wounds #7 and #8.) Dr. Martin described the path of this bullet as “left to right, slightly down to up, and slightly back to front.” This bullet was recovered from the wound at the inside of the left thigh. The next bullet documented caused a “through and through” injury (wounds #9 and #10). This bullet struck the left arm near the left elbow and exited at the inside of the left arm just below the elbow. This bullet was not recovered at autopsy. The last bullet wound noted was a wound to the left side of the back that entered 2.5 inches left of the midline near the lumbar vertebrae. This bullet damaged the aorta and also passed through the stomach, part of the colon and part of the liver. The general wound track was described as “back to front, slightly left to right, and somewhat down to up.” This bullet was recovered from the “anterior abdominal wall.”

The primary scene centers about the steps leading from the back door of the house to the basement living space. Investigators located three spent shell casings on the ground just outside of the back door. The back door opens onto a small landing. Three steps lead up from the landing to the main floor of the house. Investigators located two shell casings on those steps and two shell casings on the main floor near the top of those three steps. There are seven steps which lead down from the landing at the back door to the basement floor. This staircase is three-feet wide. Another shell casing was found at the base of the steps. Investigators located two bullet fragments at the scene, one on the rear landing and another about midway down the basement steps. Also found at the scene, near the base of the steps, was a folding knife and tool set with the knife blade extended. The knife had an over-all length of 9 inches and a blade length of 3 inches. A bullet strike was noted to the basement door.

The spent shell casings and bullet fragments recovered at the scene and the spent bullets recovered from Smith’s body at autopsy were submitted to the Denver Police Department’s crime lab for analysis and comparison with the officers’ weapons. Inspection of Silvas’s weapon disclosed that he had fired three times. Inspection of Turney’s weapon showed that he had fired five times. The three shell casings found at the back door were identified to Silvas’s weapon; the other five shell casings found on and around the basement stairs was identified to Turney’s firearm. The four bullets recovered from Smith’s body at autopsy were examined, as was a fifth bullet that was found in Smith’s clothing when Dr. Martin was beginning the autopsy. Three of the bullets recovered from Smith’s body were “consistent in class characteristics” with a test bullet fired from Turney’s Glock. The other bullet recovered from Smith’s body, the spent slug found in his clothing, and the spent slug found midway down the stairs at the house, were identified to Silvas’s firearm. The other bullet fragment, found at the top of the stairs, was consistent with a .45 caliber bullet but was “too damaged for further comparison purposes.”

Present in the house at the time of the shooting were Ms. Keith and Joann Smith. Both women provided written and video-taped statements. Several neighbors heard sounds relating to either the first incident or the shooting incident but were not eye-witnesses to either event. Written statements were obtained from those individuals. At the time of the shooting,

Denver police officers Jeffrey Cook, 99-10, Trista Herrick, 00-10, Patrick Mulhern, 99-07, Randy Wagner, 00-121, Greg Zimmerman, 00-14, and Denver deputy sheriff Daniel Diaz Deleon, 00078, were present as covering officers (Diaz Deleon was doing a "ride-along" with Officer Wagner). These officers saw or heard at least part of the events surrounding the shooting. Each provided a written statement, and thereafter, a video-taped statement.

Following the shooting, and in accordance with protocol, Sergeant Silvas and Officer Turney were separated from the other witnesses. Each was separately transported downtown to DPD Headquarters by an un-involved supervisor. At headquarters, each officer gave a voluntary, video-taped statement concerning his role in the incident.

There is no dispute regarding the facts which resulted in the police being called to 3615 Garfield Street in the evening hours of January 29, 2002, and, again, shortly after midnight on January 30, 2002. Denver police computer-aided dispatch ("CAD") records show that at 7:43 p.m., on January 29, 2002, Ms. Keith made a 911 call in which she told police that her son was "busting up her house." The call taker noted that "loud noises" were heard in the background. Denver Police uniformed officers responded. They determined that Smith had thrown the victim's VCR on the floor, damaging that item, slammed the back door with sufficient force to break it off of the hinges, and then broke a window on the victim's car. Smith left before the police arrived. After the officers completed an offense report for Criminal Mischief, they left, advising Keith to call the police, again, if Smith returned.

Keith made the next 911 call at 12:21 a.m., on January 30, 2002. The CAD notes reflect that Keith told the call-taker that her 18-year-old son was "breaking into back door." The CAD notes then state: "no weapons known/[suspect was] now inside." The call-taker also noted that the caller was "hysterical." Turney heard the dispatcher air the call and volunteered to cover as he was closer than the car dispatched to the call. Several other officers monitored the call and volunteered to provide cover. These officers included Silvas, Cook, and Mulhern (car 2227), Herrick & Zimmerman (car 2218), and car 221—Wagner and his rider, Diaz Deleon. All of these officers arrived either as Turney reached the house or shortly thereafter.

Turney told investigators that he parked at the front of the block and approached on foot. As he walked up, he heard cruiser 260 (Silvas) tell the dispatcher that he was "code 6." Turney saw a woman on the front porch. Turney told investigators that the woman seemed excited and said "hurry up, hurry up! Go to the back of the residence, he's going to run out." Turney moved quickly around the side of the house and approached the rear door. A female opened the back door and told him, "hurry up, get in here, he's downstairs." Turney went in the small entry way, asked her what was going on and she told him that "her son came home, handed her a knife, and said 'you're going to have to kill me.'" Turney asked her if her son had any other weapons downstairs, and she told him she did not know. Turney moved to a position at the top of the basement steps and heard movement in the basement. At first he did not see anything, but then he saw the suspect move toward the opening at the bottom of the stairs. Turney drew his weapon at this point and said, "Police, let me see your hands. Stop!" The individual continued to advance toward the bottom of the steps and said something to the effect of "who the fuck are you?" and slammed the basement door.

Silvas had arrived as Turney was walking along the side of the house. He followed Turney along the side of the house, noting, as he passed Keith's car, that the left-side window had been shattered. Silvas told investigators that when he got to the door, he saw Turney standing at the doorway. Turney told Silvas that "the suspect had run down the stairs and shut the door on him." Silvas also recalled that Turney had told him that "Mom [Ms. Keith] had said that [Smith] had a knife, but he no longer had the knife with him, anymore." Officers Mulhern and Cook had arrived and parked in the alley. Silvas turned, told them to approach the back door and then focused his attention on the basement stairs. As he did so, he saw the two women standing on the upper landing. Ms. Keith walked back into the interior of the house, but Joann Smith remained on the upper landing. She told Silvas that Smith was angry with her mother and then leaned over the railing to the basement stairs and called her brother's name "a couple of times." Shortly after she did so, the basement door opened.

At about the same time as Silvas arrived, Mulhern and Cook drove down the alley and stopped behind the house. Within moment, Herrick and Zimmerman also arrived. The latter two officers approached the front of the house and heard someone yelling inside. They entered through the front door and were met by a female. Wagner arrived and saw Herrick and Zimmerman enter the house. He and Diaz Deleon followed them. Wagner told investigators: "A black female directed us toward the back of the house in a kitchen area. I entered the area and saw Officer Turney standing by some stairs. I heard Officer Turney say, 'let me see you hands!' I think he said that two times."

When Smith re-opened the basement door, Turney and Silvas were on the landing or in the doorway, Mulhern and Cook were standing just outside the back door and Herrick, Wagner, and Zimmerman were standing on the upper landing. Standing with the last three officers was Joann Smith. (Diaz Deleon remained in a front room.) In Joan Smith's written statement, she described Smith's return to the house:

Before I come out of my room my mother is already on the phone with [police] dispatch. He went directly downstairs. He overhears her on the phone [and] he comes upstairs, gets a knife out of the kitchen and tells her to kill him. He sees me and gives her the knife and goes back downstairs. Police show up [and] my mother told one to go to the back. . .the male cop attempts to go downstairs and my brother approached his door before the cop could get close and slammed the door. The cop sees he's very hostile [and] ask[s] me and my mother does he have any weapons. We say we're not sure.

Joann Smith stated that after this occurred, her mother walked back to the living room but she remained in the back with an officer. She wrote the following:

[the officer told] the other cops [to] come in for back up. They asked me who was he mad [at]. I said my mother. I called my brother from upstairs, saying "Tanker! Stop trippin' just get up here and stop going crazy." Then my brother swings open the basement door, starts cussing the cop saying with the "F" do you want. He took about 5 steps up the steps, reached in his lower left leg pants, pulled a little blade out. From here I'm saying "Tanker! No!" I heard one gunshot and I just went blind and don't remember

what I saw. I just started running through the kitchen because more shots came!

It is uncontroverted that Turney and others commanded Smith to put the weapon down before he and Silvas fired their weapons. Keith told investigators she heard an officer say “show me your hands” twice, and then heard “drop it!” or “put it down!” Mulhern, standing behind Silvas, told investigators that when Smith started coming up the stairs he and Silvas ordered the suspect to show his hands but he refused, stating, “fuck all that.” Herrick heard Turney twice say “let me see your hands!” Wagner believed that Turney ordered Smith to show his hands two times. He then heard Turney say, either “put it down!” or “drop it!” Zimmerman heard Turney order the person to show his hands “several times.” Cook, in his written statement, advised that when he arrived

Officers were telling someone, I could not see yet, to show his hands. As I reached the

the back doorway I observed a [black male] walking toward officers up the staircase, and his hands were not visible. The subject appeared to be trying to get something out of his pocket. The subject pulled a knife from his pocket and pointed it towards officers. Several officers yelled for the subject to drop the knife, but he did not.

It was after several warnings and commands were given that Silvas and Turney fired their weapons. The witness statements and evidence suggest that they fired almost simultaneously. Turney estimated that Smith had closed to within five feet of him when he began firing. He believed he fired between three and five times. He stopped firing when Smith fell “to the ground and started sliding down the stairs.” Silvas told investigators that when Smith advanced he believed that he, Turney and Mulhern were all in danger of being “killed or seriously hurt.” He estimated that Smith was about three feet from the officers when he pulled out the knife and that he believed he had fired three times. He stopped firing when Smith “began goin’ back,” and the threat had ended.

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. Because the evidence establishes in this case that the officers shot Smith, the determination whether their 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 the officers fired the shots that caused Smith’s death, they reasonably believed that Smith was directing or was about to direct deadly physical force against one or more of them 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 to 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 evidence is clear that Silvas and Turney were confronted in the very confined space of the basement staircase by the knife-wielding Smith. They and other officers ordered him repeatedly to cease advancing, to show his hands and to drop his weapon. For reasons known only to him, he did not do so. During this entire event, Smith never complied with any of the commands given by the officers. Whether he heard the commands is immaterial because his conduct was inherently aggressive and life-threatening. He pulled an open-blade, concealed knife from his pants while closing distance to less than five feet from the officers. Officers confronted by these circumstances do not need to retreat and retreat is often not a safe option. Under the facts of this case, retreat was not an option at all, based on their confinement on the staircase and the quickness of Smith's attack. In cases involving knives (edged weapons), a threat by the knife-wielding offender turns to an attack by the closing of distance. In this case, Smith's actions forced a deadly-force response from the officers. Both officers fired when the threat was imminent and stopped firing when the suspect's attack was neutralized.

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 the involved officers committed any criminal act. Therefore, I conclude that under applicable Colorado law no criminal charges are fileable against the officers in the shooting death of Gregory Lee Smith, Jr.

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,

Original Hard Copy is signed

Bill Ritter, Jr.
District Attorney

[1] The wounds are numbered according to the course of the examination. There is no relation to the order in which Smith might have received the injuries.

[2] A diagram of the stairs and the upper and lower landing is attached as Appendix 1.

[3] The report noted that the bullets lacked “sufficient individual characteristics for identification purposes” and thus “can neither be identified nor eliminated as having been fired from” Turney’s Glock.

[4] Written statements were also obtained from the paramedics who transported Smith and from maintenance technicians employed at the facility responsible for working on Denver Paramedic Division vehicles. After they transported Smith, the paramedics heard a high-pitched squeal in the back of the ambulance. The mechanic technicians found a hearing aid “with hair, wax and possible blood on it” in the patient compartment. It appears that this was Smith’s. There is no evidence that either Ms. Keith or Joann Smith told any officer that Smith was hearing impaired.

[5] A copy of this offense report is attached as Appendix 2.

[6] This kitchen-type knife was given to an officer by Ms. Keith. It was recovered by investigators in the front or living room. It is not the knife that Smith produced when he came up the stairs.

[7] “Tanker” or “Tank” is a family nickname for Smith.