

Beth McCann
District Attorney

Second Judicial District



201 W. Colfax Ave. Dept. 801
Denver, CO 80202

720-913-9000

Beth.McCann@denverda.org

September 29, 2017

Robert White
Chief of Police
Denver Police Department
1331 Cherokee St.
Denver, Co 80204

Re: Investigation of the shooting of Brendan Gerwing, 10-1-93, by Denver Police Sergeant Chad Kendall, Badge 06-142, on May 20, 2017, at 2873 S. Quitman, Denver, Colorado.

Dear Chief White:

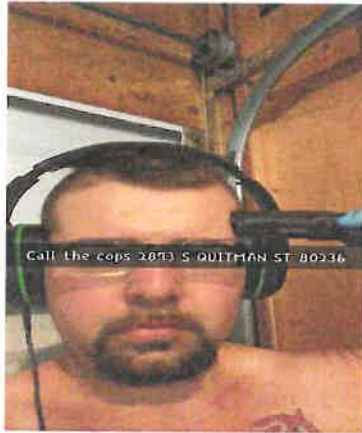
The investigation and legal analysis of the shooting and wounding of Brendan Gerwing, in which shots were fired by Denver Police Department Sergeant Chad Kendall, has been completed. I conclude that under applicable Colorado law no criminal charges are warranted against Sergeant Kendall. My decision, based on Colorado criminal law, does not limit potential administrative action by the Denver Police Department (DPD), where non-criminal issues can be reviewed, or potential civil actions where less-stringent laws, rules, and legal levels of proof apply.

SUMMARY of FACTS

On Saturday May 20, 2017, the Denver Police Department received multiple 911 emergency calls concerning an on-going crisis at 2873 S. Quitman involving Brendan Gerwing. The first 911 call was from Sabrina Deleon at 4:25 a.m. Ms. Deleon is a close friend of Brandon Gerwing, with whom he had been visiting earlier on Friday night. In the early morning hours of May 20, 2017, Mr. Gerwing had been calling and sending text messages to Ms. Deleon, telling her that he was going to kill himself. Mr. Gerwing called Ms. Deleon crying and told her that if she did not call the police he would kill himself. Mr. Gerwing sent her a photo of himself holding a gun to his head. He also sent Ms. Deleon a photo of what appeared to be self-inflicted injuries of bleeding cuts. At Mr. Gerwing's request, Ms. Deleon called the Denver Police Department seeking help for the suicidal Mr. Gerwing.

Denver 911 also received multiple calls from Kendra Chadwick in the early morning hours of May 20, 2017. Her first call was at 4:30 a.m. Ms. Chadwick is Mr. Gerwing's

girlfriend who resides in Wyoming. Ms. Chadwick reported to the 911 operator that she and Mr. Gerwing had been exchanging multiple text messages throughout that early morning. Mr. Gerwing informed Ms. Chadwick that he had been drinking alcohol that night.¹ Mr. Gerwing told Ms. Chadwick, “he wanted to put a bullet into his head” and that he was “being bipolar tonight.” Earlier, at 4:02 a.m., by text message Mr. Gerwing informed Ms. Chadwick that he wanted to “go out in a gangster way”, which Ms. Chadwick said she understood to mean that Mr. Gerwing was planning to have a “suicide by a cop”. Mr. Gerwing also sent Ms. Chadwick the following photo:



Ms. Chadwick informed the 911 operator that Mr. Gerwing was known to own a Glock 17 handgun.² At Mr. Gerwing’s request, Ms. Chadwick called Denver 911 and relayed this information and her concerns (*id.*).

Based on the calls from Ms. Chadwick and Ms. Deleon, at approximately 4:29 a.m., DPD dispatched officers to 2873 S. Quitman to do a welfare check on Mr. Gerwing. DPD dispatch provided the following information to officers as they responded to 2873 S. Quitman:

- The subject of the reports was Brendan Gerwing, and a physical description was provided;
- Mr. Gerwing had been drinking that night;
- He had sent photos of self-inflicted cuts, but the weapon he used was unknown;
- Mr. Gerwing had informed the 911 reporting parties (Ms. Chadwick and Ms. Deleon), “he is making his final decision and he is sorry;”
- Mr. Gerwing had sent the reporting parties a photo of himself with a gun, possibly a semi-automatic, pressed to his head;
- That there had been a similar call to this address in October 2016, and at that time Mr. Gerwing had a knife and what turned-out to be a pellet gun.

DPD also dispatched paramedics to stand-by near 2873 S. Quitman.

¹ A later blood alcohol content test showed Mr. Gerwing to have a B.A.C. of 0.171 (6-209).

² On March 11, 2017, Mr. Gerwing purchased a Glock Model 17 9mm handgun and Ms. Chadwick had seen this gun (6-52).

At approximately 4:40 a.m. Denver Police Officers Rueban Garduno, John Allred, and William Moore arrived and all met down the street from 2873 S. Quitman. Sergeants Chad Kendall and Keith Cruz had been monitoring the call while at DPD District 4 station. Given the nature of the call, Sergeants Kendall and Cruz determined they needed to respond and assist on this crisis call.³

Sergeant Kendall would later say in his interview that he was aware that Mr. Gerwing's girlfriend had called dispatch and advised that Mr. Gerwing was harming himself and he had sent his girlfriend a photo of himself with a gun pointed to his head.

Officers Garduno, Allred, and Moore, met with Sergeants Kendall and Cruz at West Bates Street and South Quitman Street (3 homes to the south), where the officers formulated a plan on how to handle this volatile situation with Mr. Gerwing. Officer Garduno advised the other officers about the previous October 19, 2016 intoxicated suicide attempt by Mr. Gerwing.⁴ Ultimately, it was decided that Sergeant Cruz and Officers Garduno and Moore would take cover behind a tree across the street from 2873 S. Quitman, and attempt to contact and talk to Mr. Gerwing.

³ Significantly, Officer Garduno and Officer Moore were certified in Crisis Intervention Training, which includes training to interact with mentally unstable or distraught individuals.

⁴ On October 19, 2016, at approximately 6:00 a.m. the DPD received a 911 call of an intoxicated and suicidal party at 2873 S. Quitman, Denver, Colorado. Denver Police Officers, including Officer Rueban Garduno, responded to this call. This is the home of Abie and Mercy Vasquez, who live there with their grandchildren, M.T., O.T. E.V, and Brendan Gerwing. This 911 call was made by Mr. Gerwing, who informed the DPD 911 operator that he had been cutting himself, he was suicidal, and had a pellet gun to his head. Mr. Gerwing also told the 911 operator that "it was ok for the police to shoot him." When officers responded and made contact with Mr. Gerwing, they saw Mr. Gerwing put the pellet gun to his head and repeatedly pull the trigger of the weapon, but there was no discharge of the weapon. Thereafter, Mr. Gerwing was taken into custody and he was transported to Swedish Medical Center where a mental -health hold was placed on Mr. Gerwing.

After his release from Swedish, Mr. Gerwing failed to maintain his treatment and did not take his prescribed medication (M. Vasquez interview of 5-20-17, p. 15). Further, his alcohol abuse did not abate; (B. Gerwing interview of 5-25-17).



This is a daylight view facing west from the position behind the tree taken by Sergeant Cruz and Officers Garduno and Moore during the stand-off with Mr. Gerwing. The distance from the garage to the tree is 107 feet.

Also, it was determined that Officer Allred would attempt to intervene with Mr. Gerwing using his less-lethal option of a Taser and that Sergeant Kendall would assist and cover Officer Allred.

As the officers moved into position, they could see that one of the two garage doors at 2873 S. Quitman was open. Soon thereafter, from across the street Sergeant Cruz was able to make verbal contact with Mr. Gerwing. Mr. Gerwing was uncooperative and appeared to have been drinking. Primarily, it was Sergeant Cruz who gave Mr. Gerwing multiple requests to come out of the garage and/or show his hands and that officers were there to make sure he was safe (BWC of Officer Garduno and Moore). Officers could at times see Mr. Gerwing in the garage, and at some point he had what appeared to be a beer can in one hand and he was drinking from it.⁵ It was apparent to all the officers present that Mr. Gerwing was not compliant and he was very combative.

A neighbor, M.P., reported he could hear Mr. Gerwing stating “get the fuck away from me” and “get away from my grandpa’s truck.” This neighbor also reported he “could hear the officers speaking to [Mr. Gerwing] in a tone that sounded like they were trying to calm the situation down....”

Much of the stand-off is captured on the Body Worn Cameras (BWC) of Officers Garduno and Moore. The interactions by the Denver Police Officers with Mr. Gerwing were described by Officer Allred: “And they’re still just trying to do everything they can to get him to come out, ‘Just come out. Come talk to us. We’re going to get you help.’”

During the stand-off, Officers Garduno and Moore remained across the street with Sergeant Cruz. Eventually, because Mr. Gerwing had been noncompliant, it was decided that

⁵ Multiple open beer cans were later recovered inside the garage.

Officer Allred and Sergeant Kendall, as the arrest team, would circle through the backyard of 2873 S. Quitman and take a position on the north side of the garage. Sergeant Kendall and Officer Allred moved to this position in the event that Gerwing appeared from the garage and the officers could effectuate a peaceful arrest of Mr. Gerwing.

Officer Allred eventually took a position on the concrete walkway, north of the garage, approximately four feet from the corner of the garage. Officer Allred had his taser drawn. Sergeant Kendall reported that he was to the north and west of Officer Allred, approximately five feet away and standing above him on a short retaining wall.⁶ Sergeant Kendall had his handgun drawn. Officer Allred reported that he could hear Mr. Gerwing inside the garage speaking to an “old man” and that person was telling Mr. Gerwing, “‘don’t do this.’ ‘Please don’t do this.’ ‘Please stop.’ ‘You don’t have to do this.’”

Officer Allred and Sergeant Kendall waited in this position as Sergeant Cruz continued unsuccessfully to communicate with Mr. Gerwing from across the street. After several minutes with no response from Mr. Gerwing, Sergeant Kendall then heard multiple commands from the officers across the street directing Mr. Gerwing to “show his hands.” Sergeant Kendall and Officer Allred understood these commands to mean that Mr. Gerwing was exiting the garage at that time. From the BWC, for approximately 26 minutes⁷ the officers attempted to have Mr. Gerwing come from the garage and comply with the officers.

As captured by the BWC of Officers Garduno and Moore and dispatch records, at approximately 5:16 a.m., Mr. Gerwing eventually did come out of the garage, but he immediately and without warning jumped over a downspout and quickly turned the corner on the north side of the garage. When Mr. Gerwing turned the corner, he came face-to-face with Officer Allred. Officer Allred reported, “Since he turned that corner, I had my taser on, I’m hitting him with the light, and I didn’t even see his face. I was just looking at his hands and I see a gun in his hand point at me and we both fired.” Officer Allred said he thought he was able to first deploy his taser, before Mr. Gerwing shot.⁸ Nearly simultaneously, Mr. Gerwing shot Officer Allred.

⁶ This partially enclosed concrete walkway, from the brick garage wall to the concrete retaining wall, is 3 feet and 7 inches wide. Given the construction and size of the scene of the shooting, and that Denver emergency personnel moved evidence when attending to Mr. Gerwing and Officer Allred, and that both Officers were moving before and after the shooting, positions for Officer Allred and Sergeant Kendall are approximated.

⁷ Officer Moore’s BWC shows an approximately 26 minute stand-off. Dispatch records indicate officers arrived on-scene at approximately 4:40 a.m., and that the shooting occurred at approximately 5:16 a.m..

⁸ When the crime scene was processed there was additional evidence of Officer Allred’s taser being deployed at marker #12.



Scene of the shooting: north of the garage at 2875 S. Quitman, facing west, with evidence markers

Sergeant Kendall described the surprise encounter and the following shootings:

And then almost instantaneously, I turn around and Brendan came around the corner extremely fast – just very fast, quick-paced – and he was at the corner of the residence right off the garage...

...he has something in his hands, couldn't really tell what it was at that point, but then there was a pop and then it was a two pop – two very consecutive pops. One was definitely a gunshot, and the other one was the – the Taser cycling.

I can't tell you exactly which one went first because they were so very quick and they sounded very similar just in the area we were at, but there's two quick pops and heard Officer Allred make a sound like "ow" or, you know, like "ouch I've been hit," or something like that. And he staggers back and kind of fails down. He probably staggers back about three or four steps.

And I see Brendan, at this point, with the gun up and he's moving towards Officer Allred, and that's when I brought my gun up and I fired at – at Brendan. And after I fired – I fired five rounds at him is what I recall – he – he appeared to me as though he was going after [Officer Allred], and so my biggest concern was I need to stop this guy from going after my officer.

Officer John Allred was shot by Brendan Gerwing with Mr. Gerwing's Glock Model 17 9mm handgun. Officer Allred was shot in the upper right quadriceps of his leg, and his femur was fractured. He suffered "serious bodily injury," and Dr. Michael White

of Denver Health Medical Center concluded that Officer Allred was in “substantial risk of death” from the gunshot wound and injuries.



Brendan Gerwing's Glock Model 17 9mm handgun recovered at the crime scene.

A knife was also located in this crime scene. It did not belong to either Officer.

Brendan Gerwing was tased by Officer Allred and there were two related injuries to Mr. Gerwing's chest. Mr. Gerwing was then shot five times by Sergeant Chad Kendall with his Smith and Wesson 9mm handgun. Mr. Gerwing “sustained abdominal and right flank trauma as well as transverse process fractures of L1 through L5 on the right side” and he suffered “serious bodily injury” from the gunshots. Sergeant Kendall shot Mr. Gerwing twice in his right buttocks, twice in his right side near his hip, and once in the back.

As shown on the BWC of Officers Garduno and Moore, Mr. Gerwing quickly came from the garage and jumped over the downspout and moved west to Officer Allred. After he rounded the garage corner, Mr. Gerwing was then immediately tased by Officer Allred. Given Mr. Gerwing's movements and his probable reaction to the taser, coupled with Sergeant Kendall's relative positioning, Mr. Gerwing was shot in the side and rear.

On May 25, 2017, after waiving his Miranda rights, Brendan Gerwing was interviewed. He told Detective Marty Smith that he recalled texting his girlfriend, Kendra Chadwick and his friend Sabrina Deleon before the police arrived. Mr. Gerwing said he drank a case and half of beer that night and that he was “really intoxicated” and he “was just really drunk and depressed.” Mr. Gerwing said he knew he was dealing with the police and they were there to assist him, but he “didn't want to comply.” Mr. Gerwing would later admit that he realized the police were there and trying to assist him. He admitted he ignored the police commands and that he was intoxicated and suicidal. He said he was armed with his handgun “just to have leverage.” He admitted that he “ran around that corner,” but he claimed did not know why he did so. Although Mr. Gerwing said “everything is so hazy from that night,” he said he “had no intention” to shoot the officer. He concluded by stating, “I know I already done screwed up and I will go away for a while.”

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 another human being is generally prohibited as assault or homicide in Colorado, the Criminal Code specifies certain circumstances in which the use of physical force or deadly physical force by a peace officer is justified. As the evidence establishes that Brendan Gerwing's injuries resulted from shots fired by Sergeant Kendall, the determination of whether Sergeant Kendall's conduct was criminal is primarily a question of legal justification.

Section 18-1-707, C.R.S. defines the circumstances under which a peace officer can justifiably use physical force and deadly physical force in Colorado. In pertinent part, the statute provides:

- (1) Except as provided in subsection (2) of this section, 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 that 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 ... 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, except through a motor vehicle violation, that he is likely to endanger human life or to inflict serious bodily injury to another unless apprehended without delay.

In addition, an officer may rely on the Colorado law regarding self-defense which is applicable to all citizens.

Section 18-1-704, C.R.S. sets forth the law which allows a citizen to use force in defense of himself or another citizen. It provides, in pertinent part:

- (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.**

Section 18-1-901(2)(d) and (e), C.R.S. define the terms “Deadly weapon” and “Deadly physical force” as follows:

“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; (II) A knife; (III) A bludgeon; or (IV) Any other weapon, device, instrument, material, or substance, whether animate or inanimate.

“Deadly physical force” means force, the intended, natural, and probable consequences of which is to produce death, and does, in fact, produce death.

As Brendan Gerwing survived his wounds, this is not a deadly physical force encounter. The issue in this case centers on the question whether the use of physical force by Sergeant Kendall was justified and whether the nature of the force used was appropriate. The test is whether the nature and degree of force used is objectively reasonable after considering the totality of the circumstances.

Officers are entitled to rely on the doctrine of “apparent necessity” so long as the conditions and circumstances are such that a person would reasonably believe, erroneously or not, that action was necessary. See, *People v. La Voie*, 155 Colo. 551, 395 P.2d 1001 (1964), *People v. Silva*, 987 P.2d 909 (Colo. App. 1999). It is legally immaterial whether the suspect was actually trying to injure the officers or another, so long as a reasonable person, under like conditions and circumstances, would believe the appearances were sufficient to require the action taken.

It is fundamental that the law of self-defense, which is emphatically a law of necessity, involves the question of one’s right to act upon appearances, even though such appearances may prove to have been deceptive; also the question of whether the danger is actual or only apparent, and as well the fact that danger is not necessary, in order to justify one in acting in self-defense. Apparent necessity, if well grounded and of such a character as to appeal to a reasonable person, under like conditions and circumstances, as being sufficient to require action, justifies the application of the doctrine of self-defense to the same extent as actual or real necessity.

Young v. People, 107 P. 274, 275-276 (Colo. 1910).

The issues are, therefore, whether at the time Sergeant Kendall discharged his firearm, did he reasonably believe that he and /or Officer Allred were about to be subjected to the imminent use of additional unlawful physical force, and furthermore, that his actions in defending against that force were objectively reasonable. Alternatively phrased, the question is

whether a reasonable officer, confronted with the same facts and circumstances, could have concluded that he was under fire and that it was necessary to discharge his firearm to defend himself or another and stop the threat that Brendan Gerwing presented. Sergeant Kendall's actions would also be justified if a reasonable police officer could have concluded that under the totality of the circumstances, it was necessary to discharge his firearm to take Brendan Gerwing into custody.

CONCLUSION

The facts of this case demonstrate that the actions of Sergeant Chad Kendall are legally justified under Sections 18-1-707(1)(a), and 18-1-707(1)(b) and 18-1-704(1), C.R.S. Sergeant Kendall and Officer Allred were confronted by an intoxicated and distraught individual whom they had reason to believe was armed. When Brendan Gerwing confronted Officer Allred, he in fact shot Officer Allred. After Brendan Gerwing shot Officer Allred, Sergeant Kendall then responded and immediately returned fire. Sergeant Kendall's response stopped the on-going threat to Officer Allred and may have saved Officer Allred's life and the lives of the other officers who were attempting to apprehend Brendan Gerwing. Under controlling Colorado law, Sergeant Kendall's actions of using a firearm to take Brendan Gerwing into custody were objectively reasonable. Further, given the facts of this case, including the fact that Officer Allred's use of a less lethal option was already unsuccessful and Officer Allred had been shot and injured, Sergeant Kendall's actions were legally justified.

The Denver Police Department is the custodian of records related to this case. All matters concerning the release of records related to administrative or civil actions are controlled by the Civil Liability Division of the Denver Police Department. The investigative file in the District Attorney's office is available for review upon request. As in every case we handle, any interested party may seek judicial review of my decision under C.R.S. § 16-5-209.

Sincerely,



Beth McCann
Denver District Attorney

cc: Sergeant Chad Kendall, Denver Police Department; Officer John Allred, Denver Police Department; David Quinones, Deputy Chief of Police Operations; Matt Murray, Deputy Chief of Police Administration; Barb Archer, Commander of Investigative Support; Lieutenant Matthew Clark, Major Crimes; Lieutenant Adam Hernandez, Major Crimes Division; Ryan Brackley Assistant District Attorney.