

ATTORNEY GENERAL'S PRELIMINARY REPORT REGARDING THE MAY 19, 2017 OFFICER INVOLVED SHOOTING INCIDENT IN HOPKINTON, NEW HAMPSHIRE

I. INTRODUCTION

New Hampshire Attorney General Gordon J. MacDonald announces the completion of a preliminary report into the officer involved shooting incident that occurred in Hopkinton, New Hampshire on May 19, 2017. That incident resulted in the nonfatal shooting of Bryan G. Evans (age 31). The purpose of this report is to summarize the Attorney General's findings and conclusions with regard to this officer involved shooting incident. The findings and conclusions in this report are based on information gathered during the investigation including photographs, videos, physical evidence and witness interviews.¹

As provided in RSA 7:6, the Attorney General is the State's Chief Law Enforcement Officer. The Attorney General has the responsibility to ensure that whenever a law enforcement officer uses deadly force it is done in conformity with the law. Based on the investigation of this deadly force incident, the Attorney General finds that New Hampshire State Police Trooper Michael Arteaga's and New London Police Officer James MacKenna's use of deadly force on May 19, 2017 was legally justified.

¹ The findings and conclusions contained in this report focus solely on whether the involved officers acted in accordance with the law. This report is neither intended, nor should be construed, as a comment on the merits of the criminal charges against Bryan Evans.

II. SUMMARY OF THE FACTS

At approximately 6:51 p.m. on May 19, 2017, Trooper Michael Arteaga of the New Hampshire State Police spotted a vehicle driving south on I-89 that had been reported stolen from Vermont. The adult male driver of that vehicle was Bryan G. Evans of Quechee, Vermont. Evans was alone in the vehicle.

Trooper Arteaga followed the stolen vehicle southbound on I-89 and requested other officers to assist him in order to take Evans into custody. Eventually, New Hampshire State Trooper Daniel Livingstone, Trooper Brandon Stubbs and Officer MacKenna joined Trooper Arteaga in following Evans driving the stolen vehicle southbound.² At the same time, New Hampshire State Police Troopers were stationed further south on I-89 setting up spike mats in order to try to stop Evans in the event he did not pull over for the police.

Trooper Arteaga and the other officers following Evans activated their blue lights and sirens.³ Evans did not immediately stop but was followed a short distance before he finally pulled over in the breakdown lane near Exit 6 on I-89 in Hopkinton. Following the stop, Evans refused the officers' repeated commands to show his hands and instead kept his right hand concealed in his jacket. During this confrontation, the officers had their guns drawn and pointed at Evans.⁴ Despite that, Evans then escalated the situation by telling Trooper Livingstone that if he released his dog the Trooper was a dead man or words to that effect. Evans continued to refuse the officers' orders to show his hands. Instead, Evans quickly pulled his hand out of his jacket and pointed his hands in a two-handed gun-style fashion at

² Trooper Livingstone was not in his own, separate cruiser. He was riding with Trooper Stubbs.

³ This was done to affect a felony motor vehicle stop, which means that the suspect was considered a high-risk arrest. Generally, under those circumstances, officers involved in a felony-stop would draw their weapons at the outset of the stop.

⁴ At this point, the officers on scene had been joined by Sutton Police Sergeant Valerie Crone, and Warner Police Officer Justin Crotty. State Police Sergeant William Graham also arrived shortly thereafter.

the officers. These actions on the part of Evans led officers to reasonably believe that he had a gun pointed at them and therefore prompted three officers to fire or attempt to fire their weapons at him.⁵

Officer MacKenna fired one shot from his department issued rifle at Evans and missed. Trooper Livingstone attempted to shoot at Evans with his department issued handgun ,however, his gun malfunctioned and did not fire. New Hampshire State Police Trooper Arteaga fired two shots at Evans with his department issued handgun and hit Evans once in the left leg.

After being shot, Evans got back into the stolen car and drove away. He drove a short distance before stopping in the breakdown lane again. Officers approached Evans, took him into custody and rendered first aid to him at the scene. Evans was subsequently taken to a hospital where he is being treated for a serious but non-life-threatening injury to his leg. No law enforcement officers were physically injured during the incident.

Evans was later arrested and charged with a number of crimes in connection with the incident. The pending criminal charges are:

- Receiving stolen property (Class A Felony);
- Unauthorized use of a propelled vehicle (Class A Misdemeanor);
- Criminal threatening - three counts (Class A Misdemeanors with enhanced penalties); and
- Disobeying an officer (Class A Misdemeanor).

The charges have been filed in the Merrimack County Superior Court and are being handled by the Merrimack County Attorney's Office.

⁵ Although Evans spoke and acted as if he had a gun, he did not have a gun.

III. THE INVESTIGATION

Since the initial police response on May 19, 2017, the Attorney General's Office and the New Hampshire State Police Major Crime Unit have been investigating the circumstances that led to the confrontation and the shooting. That investigation has entailed numerous witness interviews, an examination of physical evidence recovered from the scene and the review of available digital evidence to include audio and video recordings of portions of the incident.⁶ All of the police officers involved in the incident have also been fully cooperative with the investigation and agreed to be interviewed.⁷

There were no police issued video recording devices that recorded the incident. The New Hampshire State Police do not have body cameras and the officers involved in this incident did not have cruiser cameras. The other officers from the towns that responded to this incident and that were equipped with either cruiser or body cameras did not have those cameras activated at the time of the shooting. There were also private citizens in close proximity to the shooting scene some of whom captured the incident or portions thereof on video or through still images on their cell phones.⁸ Those videos and photos have been reviewed and support the officers' accounts of the shooting incident.

IV. APPLICABLE LAW AND LEGAL STANDARDS

New Hampshire's laws regarding self defense, defense of others and the use of physical force by law enforcement are set forth in RSA Chapter 627. Under RSA 627:5, II (a), a law enforcement officer, like a private citizen, is justified in using deadly force when he reasonably believes that such force is necessary to defend himself or a third person from

⁶ The forensic testing on physical evidence, such as the officers' guns, has not been completed yet.

⁷ The last officer was interviewed earlier today.

⁸ Those private citizens allowed the investigators to recover the videos and still images from their phones.

what he reasonably believes is the imminent use of deadly force. Under RSA 627:9, II, “deadly force” is defined as any assault, which the actor commits with the purpose of causing or, which he knows to create a substantial risk of causing death or serious bodily injury. Purposely firing a weapon capable of causing serious bodily injury or death in the direction of another person constitutes deadly force.

The phrase “reasonably believes” means that the actor “need not have been confronted with actual deadly peril as long as he could reasonably believe the danger to be real”. State v. Gorham, 120 N.H. 162, 163-64 (1980). The term “reasonable” is determined by an objective standard. State v. Leaf, 137 N.H. 97, 99 (1993). Further, all the circumstances surrounding the incident should be considered in determining whether the actor had a reasonable belief that deadly force was necessary to defend himself or another. When reviewing a deadly force incident, the actor’s conduct should be viewed considering “the circumstances as they were presented to him at the time and not necessarily as they appear upon detached reflection”. N.H. Criminal Jury Instructions, 3.10. In other words, when analyzing the reasonableness of an actor’s use of deadly force, the inquiry must focus on the situation from the standpoint of a reasonable person facing the same situation. That examination cannot be made with the benefit of hindsight which is afforded by one viewing the circumstances after the fact.

The reasonableness standard also applies in a situation where a person who uses deadly force is mistaken about the situation or the necessity of using deadly force. Thus, either a private citizen or a police officer may still be justified in using deadly force if he reasonably believed that he was in imminent danger from the use of deadly force by another even if, in fact he was not, so long as the actor’s belief was objectively reasonable.

In Graham v. Connor, 490 U.S. 386 (1989), the United States Supreme Court discussed the standards by which a police officer's conduct would be judged when excessive force claims were brought against him. The Court confirmed that "[t]he 'reasonableness' of a particular use of force must be judged from the perspective of a reasonable officer on the scene, rather than with the 20/20 vision of hindsight". Id. at 396. The Court went on to explain how to determine what is reasonable in situations where police officers use force:

The calculus of reasonableness must embody allowance for the fact that police officers are often forced to make split-second judgments - - in circumstances that are tense, uncertain and rapidly evolving - - about the amount of force that is necessary in a particular situation.

Id. at 396-97; see also Ryburn v. Huff, 565 U.S. 469, 477 (2012).

The Eleventh Federal Circuit has noted that:

The Supreme Court has emphasized that there is no precise test or 'magical on/off switch' to determine when an officer is justified in using excessive or deadly force. Nor must every situation satisfy certain preconditions before deadly force can be used. Rather, the particular facts of each case must be analyzed to determine whether the force used was justified under the totality of the circumstances.

Garczynski v. Bradshaw, 573 F.3d 1158, 1166 (11th Cir. 2009) (citations omitted). That is because "the law does not require perfection – it requires objective reasonableness". Phillips v. Bradshaw, 2013 U.S. Dist. LEXIS 44646 *55-56 (S. Dist. Fl. 2013). Specifically, the law accounts for the often fast moving nature of dangerous situations and the necessity of making decisions in less than ideal circumstances. See Ryburn v. Huff, 565 U.S. at 477 (chastising the lower circuit court for not "heed[ing] the District Court's wise admonition that judges should be cautious about second guessing a police officer's assessment, made on the scene, of the danger presented by a particular situation.").

These are the legal standards that help guide the review in an officer involved use of deadly force case.

V. ANALYSIS AND CONCLUSION

Based on all the facts and circumstances of this case, the Attorney General has concluded that Bryan Evans created a dangerous situation that prompted the officer involved shooting incident on I-89 in Hopkinton on May 19, 2017.

Evans was driving a reported stolen vehicle and was being followed by the police. When Evans finally stopped for the police, he refused their repeated commands to show his hands and instead concealed his right hand and acted as if he had a gun. From the perspective of the officers on scene, Evans escalated the situation and bolstered the officers' reasonable belief that he had a gun by threatening to kill a Trooper (Evans said words to the effect of "you're a dead man.")⁹ Evans then quickly pulled his hand out of his jacket and pointed his hands in a two-handed, gun-like fashion at the officers as if he had a gun.

These actions and the speed at which they occurred, as well as the preceding conduct, led the officers on scene to reasonably conclude that they as well as others in the immediate vicinity to include nearby motorists, faced an imminent threat of deadly force from Evans.

Although it later turned out that Evans did not have a gun, the officers' belief that he did was objectively reasonable under the circumstances considering all of Evans's words and actions which strongly suggested that he had a gun.

Accordingly, Trooper Arteaga and Officer MacKenna were legally justified in using deadly force against Evans. Trooper Livingstone was likewise justified in attempting to use

⁹ At the time the threat was made, Evans was a distance from the officers on scene. The fact that he made such a threat from a distance contributed to the officers' conclusions that Evans was in fact armed with a gun and could make good on such a threat at that distance.

deadly force against Evans. Therefore, no criminal charges will be filed against Trooper Arteaga or any of the other police officers present during the incident that resulted of the wounding of Bryan Evans.

This report is limited and not fully detailed because there are pending criminal charges against Evans for his actions before, during and after the shooting incident. The New Hampshire Rules of Professional Conduct applicable in this case limit what attorneys may reveal about a pending matter. In particular, New Hampshire Rule of Professional Conduct 3.6, states that “(a) lawyer who is participating or has participated in the investigation or litigation of a matter shall not make an extrajudicial statement that the lawyer knows or reasonably should know will be disseminated by means of public communication and will have a substantial likelihood of materially prejudicing an adjudicative proceeding in the matter”. Since there are pending charges against Evans for his conduct before, during and after the incident, certain details are being withheld at this juncture in accordance with the dictates of the above rule. However, once Evans’s criminal charges have concluded, the Attorney General’s Office will issue a fully detailed final report on this officer involved shooting incident.¹⁰

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¹⁰ The Attorney General’s Office will also be consulting with the Merrimack County Attorney’s Office to determine what portions, if any, of the private citizens’ videos and photos may be released while criminal charges are pending against Evans.