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COUNTY OF SAN DIEGO

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DISTRICT ATTORNEY

DAVID P. GREENBERG
ASSISTANT DISTRICT ATTORNEY

July 16, 2020

Chief of Police David Nisleit
San Diego Police Department
1401 Broadway
San Diego, CA 92101

Re: Fatal shooting of Mr. Toby Diller by San Diego Police Officer Devion Johnson on January 24, 2020; SDPD Case No. 20-601270; DA Special Operations Case No. 20-012PS; Deputy District Attorney assigned: John B. Dunlap

Dear Chief Nisleit,

We have reviewed the reports and other materials compiled by the San Diego Police Department Homicide Unit concerning the shooting of Toby Diller and his subsequent death. A District Attorney Investigator responded to the scene and was briefed by your detectives. This case was submitted to the District Attorney's Office for review on April 7, 2020. Additional information was provided on June 21, 2020.

Summary

On January 24, 2020, Officer Devion Johnson and his partner were in full police uniform patrolling in a marked patrol vehicle on 54th Street when they observed Toby Diller holding an open container of alcohol in violation of the San Diego Municipal Code. Johnson stopped the patrol vehicle and Diller immediately began running away. The officers chased Diller on foot. Diller tripped while running through a planter, got back up and was tackled in the middle of the frontage road by Johnson. Both officers were positioned over Diller as a struggle ensued. During the struggle, Diller grabbed onto the holstered gun of Johnson's partner which was attached to the officer's duty belt. Diller managed to break the holstered gun from the duty belt. Johnson's partner yelled, "he has my gun, shoot him." Johnson fired one shot striking Diller on the left side of his cheek. Diller was pronounced deceased at the scene by medics.

Persons Involved

Toby Diller was a 31-year-old resident of San Diego. Officer Devion Johnson had been employed by the San Diego Police Department for approximately one year at the time of this incident.

Civilian Witnesses

The responding officers and investigators canvassed the neighborhood and spoke to seven civilians. Four of the people interviewed by police only heard the gunshots and/or sirens of officers responding to the scene. Three of the witnesses said they had seen at least some of the pursuit and/or interaction between the officers and Diller.

54th Street when the police car pulled over. Two officers got out of the police car and chased the man. The man ran between cars across 54th Street. After running between two parked cars the man tripped on something and fell in the frontage road. CW1 heard the officers saying something such as “stop” and/or “keep your hands behind your back.”

One of the officers appeared to have the man in chokehold and the second officer had the man by the legs. CW1 heard one of the officers say “stop moving” and/or “get your hands behind your back.” CW1 saw the shorter of the two officers place the man in a chokehold while the second officer was holding down the man’s legs and torso. The man began waving something with his left hand towards the officer that was holding down the man’s legs. The officer holding the man’s legs backed up, shook his head, and fired one shot. CW1 could not tell where the man was shot. CW1 believed the man may have been holding a small knife in his hand just before the shot was fired. More officers and paramedics arrived after the shot was fired. CW1 said he saw the entire incident and was about 20 to 25 feet from where the incident occurred.

Civilian Witness #2 (CW2)

CW2 stated she was standing near the entrance to the frontage road when the incident occurred. CW2 said she saw a man in between a white van and black car parked on the frontage road drinking beer, listening to music and dancing. CW2 stated police officers ran up to the man and said, “freeze, get down now.” An officer then fired a shot without giving the man a chance to comply with commands. CW2 said the police never chased the man. CW2 described both officers as running northbound on the frontage road to where the man was standing before shooting him.

Civilian Witness #3 (CW3)

CW3 was working on the southwest corner of the intersection when he saw two police officers and a man running north in the street on 54th Street. The police officers were in uniform and were running after the man. The man ran behind a red truck and CW3 lost the man and the officers. CW3 heard a “bam.” CW3 said the “bam” was a single gunshot but he could not see what occurred. CW3 had been operating a “Bobcat” when he saw the police officers and the man running. A lot of police officers arrived on scene after the gunshot.

Law Enforcement Witness #1 (LE1)

LE1 said he was partnered on patrol with Johnson. LE1 and Johnson had been partnered together several times. Johnson was driving. The officers drove to the area of 54th Street and College Grove Drive when LE1 stated that he observed Toby Diller on the east corner carrying an open container of alcohol. LE1 described the container as a half full “40-ounce malt liquor bottle with a brown liquid and white froth.” LE1 stated that he and Johnson made the decision to contact Diller for possession of the open alcohol container. LE1 said that he activated his body worn camera as he exited the patrol vehicle. Diller began walking quickly westbound through traffic. LE1 said he told Diller several times to stop. Diller responded by running. LE1 yelled “police, stop” as LE1 and Johnson chased Diller.

LE1 chased Diller westbound through the northbound lanes and into the southbound lanes of 54th Street through traffic. LE1 stated that he chased Diller for about twenty-five yards before chasing Diller east towards the 54th Street frontage road. LE1 stated that at some point during the chase Diller discarded the bottle of alcohol.

During the foot pursuit, Diller ran through some bushes and tripped landing face down on the ground. LE1 and Johnson attempted to take him into custody. LE1 stated Diller held his hands out refusing to put them behind his back. Diller was “violently” resisting by kicking and throwing elbows. LE1 felt like Diller was

attempting to assault the officers and trying to get away. LE1 stated he used his body weight and knee strikes to Diller's ribs in an attempt to gain compliance and place Diller into handcuffs. LE1 said that during the struggle, Diller was yelling but LE1 could not make out what Diller was saying.

At one point during the struggle, LE1 stated Diller turned onto his side and was facing LE1. LE1 felt Diller grab onto LE1's gun and at the same time heard Johnson tell Diller to let go of the gun. LE1 stated Diller pulled hard on the holstered gun and managed to rip the holster off LE1's duty belt. LE1 saw Diller place his other hand on the holster and it appeared to LE1 that Diller was attempting to remove the firearm from the holster. LE1 believed that the officers' lives were in "extreme danger" and thought Diller was attempting to obtain LE1's gun to use it against the officers. LE1 said that he pushed himself off Diller and told Johnson, "he has my gun, shoot him."

LE1 stated that Johnson shot Diller in the head and Diller fell to the ground. LE1 recovered his gun and holster which had been torn from the duty belt. LE1 said Diller then stood back up and it looked like Diller wanted to take off again. LE1 felt Diller may be going for another weapon so LE1 drew his firearm and dropped the holster on the ground. LE1 and Johnson then jumped back on Diller. LE1 stated that he placed his firearm in his pocket while struggling to get Diller into handcuffs. LE1 estimated that the struggle after the shot being fired lasted "45 seconds to a minute." LE1 called for medics via police radio once LE1 and Johnson handcuffed Diller. LE1 and Johnson were unable to provide medical assistance after the shooting because Diller struggled and responding officers arrived so quickly.

LE1 described the purpose for the initial contact with Diller was for the open container violation. Violations of Penal Code section 148 (Resisting an Officer) and Penal Code 69 (Resisting an Officer by Force/Threat of Force) were additional reasons as a result of Diller fleeing and resisting.

LE1 had red marks and abrasions to his knees and a scratch on his forehead a result of the incident.

Officer Devion Johnson's Statement

Johnson and LE1 were in a marked patrol vehicle on 54th Street when Johnson observed Toby Diller walking. Johnson saw Diller holding an open 40-ounce alcoholic beverage. Johnson further described the container of alcohol as being about three quarters full. Johnson said that he and LE1 decided to contact Diller for the open alcohol container violation. Johnson said he made a right turn from 54th Street. When Johnson stopped his patrol vehicle, Diller ran across the northbound lanes of 54th Street. Johnson and LE1 chased Diller, giving Diller orders to stop running. Diller ran over the center island in the roadway into the southbound lanes of 54th Street. Diller then ran northbound against southbound traffic before turning back east into the northbound lanes.

As Johnson was chasing Diller, Johnson noticed Diller discarded the 40-ounce beverage by throwing it in Johnson's direction. Johnson said that he believed Diller was throwing the bottle at him to throw Johnson off course or hit Johnson with it. Diller continued running east into a planter area where Diller stumbled and lost his balance. Johnson stated that he tackled Diller to the ground. Johnson stated LE1 arrived to assist Johnson within a second or two.

Diller initially landed on his back and Johnson was able to get Diller onto his side. Johnson tried grabbing Diller's right hand in order to place it behind Diller's back. Johnson stated that he was giving Diller verbal commands to lay on his belly and to get his hands behind his back. During the struggle, Johnson recalled Diller grabbing Johnson by the back of his neck and pulling Johnson down. Johnson managed to push away from Diller and use his hand to pin Diller's head to the ground. Johnson recalled Diller telling Johnson

numerous times to get off of him. Johnson said that Diller kept his hands in front of his body near his sternum to keep Johnson from placing his hands behind his back. Johnson stated that he was not able to see Diller's hands and described Diller as attempting to "shimmy" out from under Johnson's body weight in order to get away. Johnson said he used his hand to strike Diller once on the back in an attempt to get a hold of Diller's right hand.

At one point during the struggle, Johnson noticed Diller grab onto the butt of LE1's handgun. Johnson described Diller as trying to shake the handgun from LE1. Johnson believed Diller was attempting to take LE1's handgun and use it against them. Johnson said that he used his hand to further push Diller's head into the ground to keep Diller from taking LE1's handgun. Johnson described that during the struggle Johnson's body was located more towards the upper half of Diller's body. Johnson wanted to end the threat immediately. Johnson said he heard LE1 say "he's got my gun, shoot him." At that point, Johnson said that he did not feel any less lethal force could be used and that he was afraid for both of their lives. Johnson drew his weapon and fired one shot at Diller.

Johnson could not see LE1's gun when he fired but Johnson had worked with his partner for a while and by the tone of LE1's voice he believed LE1 when LE1 said Diller had his gun. Johnson explained, "we don't play with gun talk." Johnson said that he pointed the firearm towards Diller's head because Diller grabbed LE1's gun. Johnson said, Diller was "...gonna kill me and my partner."

After being shot, Johnson said Diller stood back up and attempted to flee. Johnson got back on top of Diller and used his body weight to hold Diller down and handcuff Diller. Diller continued to resist by grabbing the handcuffs preventing Johnson and LE1 from handcuffing Diller. Ultimately Johnson was able to use his physical strength to handcuff Diller. Johnson stated that both officers continued holding Diller down until other police units arrived. Johnson stated he had no opportunity to provide first aid because Diller was still struggling with them. Johnson said that he did not recognize Diller from any previous contacts.

Johnson had red abrasions to his left and right forearms, a scratch on the left thumb, abrasions to the right and left knees and redness to the back of his neck.

Investigation

The audio recordings from 911 dispatchers, witness interviews, officer interviews, crime scene reports, crime lab reports and forensic testing, surveillance video, streetlight cameras, the Medical Examiner's Report as well as the Body Worn Camera (BWC) footage were reviewed.

City of San Diego streetlight cameras captured the moments before officers attempted to contact Diller. The streetlight cameras face downward onto the intersection of College Grove Drive and 54th Street. Diller is seen walking east on the north curb of College Grove Drive. Diller goes out of camera view for a few seconds before walking back westbound and into camera view. Diller appears to be carrying a bottle in his right hand. Diller appears animated throughout the video and seems to be talking to himself, singing and/or gesturing towards vehicles. The video shows Diller walking to the northeast corner of the intersection. He then begins to walk north on the east curb of 54th Street. Diller walks a short distance before walking south on 54th Street. As Diller is walking south, he raises the bottle up to his mouth. Diller walks to the corner and remains there for approximately 10 seconds before walking northbound on 54th Street. Up to this point on the video, Diller is on the sidewalk the entire time. As Diller approaches the entrance to the 54th Street frontage road, a marked patrol vehicle is seen traveling westbound on College Grove Drive and makes a northbound turn onto 54th Street. The patrol vehicle then makes an immediate right turn into the frontage

road entrance and stops directly in front of Diller. Both officers are seen exiting the patrol vehicle and Diller runs away westbound across 54th Street.

Johnson and LE1 were equipped with BWC. Johnson's BWC fell off his uniform when he tackled Diller on the ground. Johnson's BWC footage begins as Johnson is chasing Diller eastbound across the northbound traveling lanes of 54th Street. Johnson's BWC shows Diller discard a bottle as Diller runs into the planter, which contains bushes. Diller runs through the planter area and stumbles, falling onto the frontage road. Johnson gets on top of Diller and the BWC falls off of Johnson. The BWC lands on the ground with the camera lens facing upward. Johnson's BWC only captures a small portion of the initial struggle. The shot fired is not captured on video, however, the shot is audible on the BWC.

From the point that Johnson went hands on with Diller to the shot being fired is an approximately 40 second duration. During the struggle, officers can be heard telling Diller to "get on the ground" and "put your fucking hands behind your back." Diller can be heard twice saying, "get off of me."

LE1 says, "let go of my gun," and "he's got my gun, shoot him." Immediately after LE1 says "he's got my gun, shoot him" a single gunshot is heard on the BWC. After the shot is fired, it sounds as if a very brief struggle continues, lasting a few seconds. After the shot is fired, an officer can be heard saying, "get on the ground." Immediately after the shot was fired, one of the officers radioed, "shots fired."

A broken 40-ounce glass bottle of King Cobra malt liquor was found on the east curb line of 54th Street where Diller was seen on BWC discarding his bottle.

The first two minutes of LE1's BWC consists of the officers driving in the patrol vehicle. The audio is not activated. The patrol vehicle makes a right turn onto 54th Street from College Grove Drive then an immediate right turn onto the frontage road. The direction of travel is confirmed through the City of San Diego streetlight cameras. The patrol vehicle stops and LE1 gets out of the passenger seat and activates audio on his BWC. Diller is seen running away westbound across 54th Street. Diller is carrying what appears to be a bottle in his right hand. LE1 runs after Diller yelling, "stop" twice and then followed by, "stop police." LE1 chased Diller across the northbound lanes into the southbound traffic lanes. The chase briefly continues northbound on 54th Street between vehicles traveling southbound.

Diller turns right and begins running eastbound back towards the northbound lanes of 54th Street. Johnson and Diller run through the planter that separates 54th Street and the frontage road. LE1 also runs through the planter, onto the frontage road and assists Johnson who is now on the ground struggling with Diller. During the struggle Johnson and LE1 are heard telling Diller several times to get on the ground and to get his hands behind his back. Diller is heard twice telling the officers, "get off me." LE1's BWC footage briefly shows Diller grab onto the back of Johnson's neck during the struggle. During the struggle, officers can be heard saying, "get on the ground," "get on your back," and "get on your fucking belly."

Approximately 35 seconds into the struggle, Johnson is heard saying, "let go of the gun." Diller is on his right side facing towards LE1. Within two seconds, LE1 is heard saying, "he's got my gun, shoot him." Johnson immediately unholsters his handgun and fires one downward shot striking Diller on the left side of his face. The butt of LE1's handgun and holster guard can be seen in the video. The handgun and holster are no longer attached to LE1's duty belt.

Diller fell on his back immediately following the shooting. Diller then appears to try to get up. Johnson gets back on top of Diller and both officers use their body weight to keep Diller on the ground. LE1 unholsters his handgun, places the holster onto the ground and assists Johnson in holding Diller down. LE1 is heard radioing a request for medics. LE1 and Johnson place handcuffs on Diller as responding officers arrive to assist. From the moment that LE1 got out of the patrol vehicle and began pursuit to the shot being fired was 55 seconds.

LE1 said that his firearm was fully loaded with a round in the chamber at the time. After the incident, LE1 unloaded his firearm and placed the gun in a brown paper bag along with the fully loaded magazine (eight rounds) and the round that was in the chamber. A sergeant was given the paper bag containing the firearm, magazine and rounds. The bag was provided to a crime scene technician and placed into evidence.

Witness interviews conducted by officers and detectives were also reviewed. Much of CW1's statement was corroborated by the BWC footage and officer statements regarding a foot pursuit and the struggle that ensued. CW1 said that Diller appeared to have a knife in his hand just before the officer backed up and fired his weapon. CW1 believed the item could have been a small knife.

There is no evidence a knife was involved in the incident. Diller was wearing several layers of clothing, including a blue long sleeve t-shirt over a black sweater. A search of Diller's person revealed that he had a large sod cutter style knife concealed in the front pouch pocket of his black sweater. There is no evidence that the knife was ever displayed. There is no indication based on the officer's statements and BWC footage that Diller used or even displayed the sod cutter knife against the officers at any time.

CW2's statement was inconsistent with the BWC footage and streetlight camera footage. CW2 claimed to have witnessed the entire incident and said that the officers never chased Diller. BWC and streetlight camera footage showed that the officers were in fact involved in a foot chase with Diller through vehicle traffic on 54th Street onto the frontage road.

CW2 further stated that she saw one of the officers point his gun at Diller and told Diller to freeze and get down on the ground just before shooting him. This was not consistent with the BWC footage that showed LE1 and Johnson struggling with Diller for approximately 40 seconds before the shooting. Furthermore, BWC footage showed neither officer unholstered their firearm until the struggle.

LE1's holster and gun were forensically processed for DNA and latent prints. DNA results showed "very strong support" for inclusion of Diller's DNA on the handgun grip, bottom base plate of the magazine situated in the handgun, the front portion of the holster beltloop paddle and on the exterior surface of the gun belt where the holster paddle was situated. Results showed "moderate support" for Diller's DNA on the back portion of the tourniquet wrapped around LE1's holster.

LE1 was carrying a loaded 45 caliber Nighthawk Custom GRP handgun and a Safariland holster model 6390 with a hood guard. LE1 had a tourniquet wrapped around the base of the holster. The Safariland holster is a "level 1" retention holster with an automatic locking system that locks the gun in place once it is fully holstered. The weapon is unholstered by a single press of a button located on the inner side of the holster that sits closest to the body. Naturally, the thumb lands on the button when the gun is gripped and ready to be unholstered.

Attached to the Safariland holster was a G-Code brand RTI (Rapid Transition Interface) wheel holster system. The system is mounted in between the holster paddle and gun holster. The quick release wheel system allows the user to unlock and remove the holster from the duty belt using its quick release button system. This allows the user to quickly transition various holsters or rigs onto the duty belt.

LE1's gun and holster were examined and photographed. The quick release wheel system was attached to the holster paddle using three metal screws. Inspection and photographs of the exterior portion of the holster paddle showed two of the screw gromets were pulled out and protruding from the holster paddle. Examination of the wheel system showed stress marks around all three corresponding screw holes. One of the screw holes was completely broken. Evidence and the examination of LE1's holster showed that it had been forcefully broken off the holster paddle.

The weapon used by Johnson was a department-issued 9-millimeter semi-automatic pistol. Investigators recovered one 9-millimeter cartridge casing, which was consistent with the number of rounds fired by Johnson according to BWC. A missile fragment was recovered during autopsy.

Autopsy

On January 24, 2020, Deputy Medical Examiner Eric Hirsch conducted the autopsy of Toby Diller. Dr. Hirsch determined that Diller sustained a gunshot entrance wound to the left cheek and that the cause of Diller's death was a "perforating gunshot wound of head/neck." Dr. Hirsch also noted the presence of stippling to the left side of the cheek. The projectile perforated the skin, left side of the mandible and right common carotid artery. Toxicological testing from Diller detected methamphetamine (0.02 mg/L) and metabolite amphetamine (0.01 mg/L), and ethanol (0.02%).

Legal Standards of Criminal Liability

The analysis of use of force and deadly force by peace officers in California has changed as a result of Legislative amendments to Penal Code section 835a, which became effective on January 1, 2020.

Penal Code section 835a(b) provides that "any peace officer who has reasonable cause to believe that a person they intend to arrest has committed a public offense, may use objectively reasonable force to effect the arrest, to prevent escape, or to overcome resistance."

Penal Code section 835a(c) sets forth the standard to evaluate a peace officer's use of deadly force. The law provides that "a peace officer is justified in using deadly force upon another person only when the officer reasonably believes, based on the totality of circumstances, that such force is necessary, for either of the following reasons:

(A) To defend against an imminent threat of death or serious bodily injury to the officer or to another person." Penal Code section 835a(c)(1)(A).

The statute provides definitions for "deadly force," "imminent" and the "totality of circumstances" in Penal Code section 835a(e)(1) – (3).

" "Deadly force" means any use of force that creates a substantial risk of causing death or serious bodily injury, including, but not limited to, the discharge of a firearm." Penal Code section 835a(e)(1).

"A threat of death or serious bodily injury is "imminent" when based on the totality of the circumstances, a reasonable officer in the same situation would believe that a person has the present ability, opportunity, and

apparent intent to immediately cause death or serious bodily injury to the peace officer or another person.” Penal Code section 835a(e)(2).

“An imminent harm is not merely a fear of future harm, no matter how great the fear and no matter how great the likelihood of the harm, but is one that, from appearances, must be instantly confronted and addressed.” Penal Code section 835a(e)(2).

“ “Totality of the circumstances” means all facts known to the peace officer at the time, including the conduct of the officer and the subject leading up to the use of deadly force.” Penal Code section 835a(e)(3).

“In determining whether deadly force is necessary, officers shall evaluate each situation in light of the particular circumstances of each case, and shall use other available resources and techniques, if reasonably safe and feasible to an objectively reasonable officer.” Penal Code section 835a(2).

“[T]he decision by a peace officer to use force shall be evaluated from the perspective of a reasonable officer in the same situation, based on the totality of the circumstances known to or perceived by the officer at the time, rather than with the benefit of hindsight. The totality of circumstances shall account for occasions when officers may be forced to make quick judgments about using force.” Penal Code section 835a(4).

“A peace officer who makes or attempts to make an arrest need not retreat or desist from their efforts because of resistance or threatened resistance of the person being arrested. A peace officer shall not be deemed an aggressor or lose the right of self-defense by the use of objectively reasonable force in compliance with subdivisions (b) and (c) to effect the arrest or prevent escape or overcome resistance. For purposes of this section “retreat” does not mean tactical repositioning or other de-escalation tactics.” Penal Code section 835a(d).

Penal Code section 196 was also amended. The statute provides that homicide is justified when committed by peace officers and those acting by their command in their aid and assistance when the homicide results from a peace officer’s use of force that is in compliance with Section 835a.

Conclusion

In this matter, the officers attempted to contact Diller for possessing an open alcohol container in public. Diller fled on foot through vehicle traffic refusing to comply with the officers’ multiple commands to stop. Diller fell during the foot chase and a violent struggle ensued as Diller resisted officers. During the struggle, Diller grabbed onto LE1’s holstered handgun. Diller forcefully broke the holster from LE1’s duty belt and was in possession of the loaded handgun.

LE1 and Johnson said that they feared Diller would unholster the handgun and use it against them. The officer’s statements regarding Diller forcibly removing the holster from the duty belt and taking the handgun is corroborated by BWC footage that shows the holster broken from the duty belt, the examination of LE1’s holster which showed that it had been forcefully broken off the holster paddle and forensic testing that indicated “very strong support” for inclusion of Diller’s DNA on the handgun grip, bottom base plate of the magazine situated in the handgun, the front portion of the holster beltloop paddle and on the exterior surface of the gun belt where the holster paddle was situated.

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By forcibly taking the handgun and arming himself with LE1's loaded handgun, Johnson felt compelled to take immediate, decisive action to end the threat posed by Diller. Review of the totality of the circumstances reveal the following. Diller refused to abide by repeated commands to stop. Diller resisted the officers by force. He ripped the holster, with the loaded firearm from the duty belt. Viewing the situation in light of an objectively reasonable officer, and based on the totality of the circumstances known to or perceived by the officer at the time, it is reasonable in light of all the circumstances, that an objectively reasonable officer would have reason to believe that there was an imminent threat of death or serious bodily harm, not only to himself, but to his partner.

Due to the imminent nature of the threat, Johnson observing Diller grab onto the butt of LE1's handgun as well as trying to shake the handgun from LE1, and LE1's yelling, "he has my gun, shoot him," it is objectively reasonable that an officer in the same situation would believe that Diller had the present ability, opportunity, and apparent intent to cause death or serious bodily injury to the officer and his partner.

Based on these circumstances, Officer Johnson acted reasonably and bears no state criminal liability for his actions. A copy of this letter, along with the materials submitted for our review, will be retained in our files.

Sincerely,


SUMMER STEPHAN
District Attorney

SS:gm

cc: Captain Richard Freedman
San Diego Police Department
Homicide Division