



**OFFICE OF THE COUNTY ATTORNEY
McPHERSON COUNTY, KANSAS**

122 W. Marlin, Suite 201, McPherson, KS 67460

P: 620-241-1027 F: 620-241-0001

E-mail: Administrator@McPhersonCountyAttorney.org

GREGORY T. BENEFIEL, County Attorney

For Immediate Release

December 12, 2017

County Attorney Greg Benefiel announces completion of the review of the law enforcement use of deadly force resulting in the death of William Matthew Holmes, a 24 year old black male. The incident occurred on August 28, 2017, beginning in Newton, Kansas, and ending in the median of I-135 at approximately mile marker 51 in McPherson County, Kansas.

The Office of the County Attorney has reviewed the results of the investigation conducted by the Kansas Bureau of Investigation, including personal recording device and in-car videos collected by the KBI from the law enforcement agencies involved.

Scope and Limitations of Report

This report details the findings and conclusions related solely to the criminal investigation into the death of William Holmes. The only question addressed by this report is whether sufficient evidence exists to establish beyond a reasonable doubt that the criminal laws of the State of Kansas were violated.

The Office of the County Attorney has no administrative or civil authority regarding use of force investigations. Therefore, this report does not address any administrative review that may be conducted by the McPherson County Sheriff's Office, Newton Police Department, or Harvey County Sheriff's Office, provide any assessment of policy considerations, or address questions of possible civil actions where a lesser burden of proof would apply.

Questions as to whether the use of force in any particular case could have been avoided or de-escalated if the officer(s) or citizen had behaved differently in the moments leading up to the fatal use of force are not properly addressed in a criminal investigation.

Summary of the Incident

This incident began in Newton, Harvey County, Kansas, with a 911 call for service regarding a vehicle burglary in progress. Officers with the Newton Police Department located the suspect vehicle, a dark colored 1998 Chevrolet Monte Carlo, and attempted to effectuate a traffic stop. The suspect vehicle refused to yield and began to flee northbound on I-135. The suspect vehicle reached speeds in excess of 100 miles per hour at times during the pursuit. Officers deployed "stop sticks" twice during the incident. The first deployment compromised the suspect vehicle's front tires. The vehicle exited I-135 at Exit 40 and lost control driving over the grassy shoulder/ditch area before returning to I-135 northbound. After the pursuit entered into McPherson County, officers from Moundridge Police Department deployed "stop sticks" a second time just north of Exit 46. It is not clear if the second deployment of "stop sticks" resulted in further damage to the vehicle or if the vehicle's front tires simply continued to disintegrate from the first deployment of "stop sticks" and any damage caused by the loss of control through the grassy shoulder/ditch area at Exit 40. The vehicle lost the front driver's wheel and came to a stop in the median of I-135 at approximately mile marker 51 at 23:01:19 (times listed in this report are taken from times stamps of video from the Newton Police Department).

Newton Police Department Sgt. Thompson directed the pursuit and gave direction to units involved as the pursuit continued and approached termination. Sgt. Thompson directed that Newton PD Cpl. Anthony Hawpe take the lead in taking the driver of the suspect vehicle into custody with McPherson County Sheriff's Office Deputy Chris Somers to assist. Other officers were directed to focus on the arrest of the passenger of the suspect vehicle.

Cpl. Hawpe exited his patrol vehicle with his K-9, Bella, and took a position adjacent to his patrol vehicle's front driver-side fender. Deputy Somers exited his patrol vehicle without his K-9 and initially took position on the opposite side of Cpl. Hawpe's patrol vehicle. When directed by Sgt. Thompson to assist Cpl. Hawpe, Deputy Somers relocated to the front driver's fender of Cpl. Hawpe's patrol vehicle in a position behind and to the east of Cpl. Hawpe. Deputy Somers gave verbal commands to the driver of the suspect vehicle to show his hands and exit his vehicle. The driver and passenger yelled obscenities towards officers while the driver also yelled "shoot me."

McPherson County Sheriff's Deputy Jason Achilles responded to the scene after the suspect vehicle had come to a stop, and advised Deputy Somers as he arrived that he had 'less lethal.' Deputy Somers advised Deputy Achilles to bring it with him and then advised other officers on scene that he had less lethal available on scene. It should be noted that Harvey County Sheriff's Office also had a 'less lethal' shotgun on scene but did not fire it.

The suspect driver's window was approximately one-third open, and officers had a discussion of using a bean bag from the 'less lethal' shotgun to break the window out. At about that time, the driver reached out the window and opened the driver's door from the outside door handle. He then opened the door and exited the vehicle, standing only a couple feet from the suspect vehicle with his hands raised while continuing to yell at officers.

Almost immediately officers deployed less lethal options including two bean bag rounds and a Taser. The driver showed no compliance reaction to these efforts, and Cpl. Hawpe released K-9 Bella to engage the driver. The driver kicked at K-9 Bella and may or may not have struck the dog's head. Cpl. Hawpe had moved closer to the driver to released K-9 Bella and found himself only a few feet away from the driver when K-9 Bella disengaged after being kicked or kicked at. Cpl. Hawpe engaged the driver physically and took him to the ground.

Almost immediately the driver flipped Cpl. Hawpe onto his back and gained the tactical advantage in the physical confrontation. Cpl. Hawpe called out to K-9 Bella to disengage by calling out, "Off, off, off." Cpl. Hawpe perceived the driver to be reaching for his duty weapon and called out to other officers, "Watch my gun. Watch my gun."

Deputy Somers heard this and perceived the driver to be trying to gain control of Cpl. Hawpe's duty weapon. Almost immediately after Cpl. Hawpe called out to "Watch my gun," another person called out, "I have it. I have it." Video and audio recordings by the officers on scene do not make it clear who said this. Deputy Somers heard it, but he does not know who said it. Based on the statement being most clear on Cpl. Hawpe's body camera recording, it is likely the driver of the suspect vehicle made the statement, as Cpl. Hawpe was the closest to the driver.

Deputy Somers, perceiving the driver to be attempting to gain access of Cpl. Hawpe's duty weapon, drew his duty weapon and called out, "He's going for your gun" at almost the same time a Harvey County Sheriff's deputy struck the driver with the butt-end of a shotgun. Deputy Somers then fires a single round into the back of the driver.

After the shot, which Cpl. Hawpe believed to be a Taser due to the muffled sound of the gunshot, Cpl. Hawpe continued to fight the driver striking him in the face area six to seven times. From Cpl. Hawpe's body camera recording, Newton PD Ofc. Hinton watched this and then utilized his asp to strike the driver several times to gain control. As Ofc. Hinton struck the driver, Deputy Somers called out that he has been hit and is incapacitated. Ofc. Hinton then stopped and turned his attention to the passenger.

Cpl. Hawpe extricated himself from under the driver, and Deputy Somers holstered his duty weapon. Deputy Somers handcuffed the driver while Cpl. Hawpe

kennels K-9 Bella. Cpl. Hawpe is asked if he is okay, and Deputy Somers asked Cpl. Hawpe, 'Did he get your gun?'

The entire incident from the time the vehicle stopped in the median to the time Deputy Somers fired the single shot took 3 minutes and 11 seconds. From the time the driver exited the vehicle to the time Deputy Somers fired the single shot is 21 seconds, and only 12 seconds after Cpl. Hawpe physically engages the driver.

Timeline from Cpl. Hawpe's Videos

23:01:13 Vehicle enters the median

23:01:19 Vehicle comes to a stop

COMMANDS TO DRIVER

23:04:03 Driver reaches out of vehicle to open door from outside handle

23:04:07 Somers: 'I'm going less lethal.'

23:04:09 Driver out of the vehicle

23:04:12 Bean bag deployed

23:04:14 Bean bag & Taser deployed

23:04:16 K-9 Bella deployed

23:04:16 Driver kicks (at) dog

Hawpe: "Here. Here." (Commands to K-9 Bella.)

23:04:18 Ofc. Hawpe hands-on with driver

23:04:20 Ofc. Hawpe and driver go to the ground

23:04:24 *Hawpe*: "Off. Off. Off. Off." (Commands to K-9 Bella.)

23:04:28 *Hawpe*: "Watch my gun. Watch my gun."

23:04:29 Deputy Somers draws his duty weapon

23:04:29 Unknown officer strikes driver with butt of shotgun

23:04:30 *Unknown voice*: "I got it. I got it."

23:04:30 *Hawpe*: "Off. Off." (Commands to K-9 Bella.)

23:04:30 *Somers*: "He's going for your gun."

23:04:32 SHOT FIRED

23:04:32-42 Cpl. Hawpe striking driver in face (approximately 6-7 times)

23:04:41 Ofc. Hinton strikes driver with asp

23:04:49 *Unknown officer:* “Put your hands behind your back.” Deputy Somers responds he is hit and cannot respond

23:04:53 Cpl. Hawpe extricated from under driver and Deputy Somers holsters weapon

23:05:07 Deputy Somers handcuffs driver

23:05:45 Three officers donning personal protective equipment (gloves) and begin providing first aid to driver

Evidence Reviewed

The Kansas Bureau of Investigation investigated the shooting, including processing the crime scene. Deputy Somers weapon and the ‘less lethal’ shotgun fired by Deputy Achilles were collected and tested. Interviews were conducted of all witnesses, including the passenger, Kenneth Herrod, and Deputy Somers who voluntarily submitted to an interview.

Some of the evidence collected by the KBI and provided to this office include videos and/or audios of interviews, summary narratives of those interviews, collected law enforcement reports from Moundridge Police Department, and the autopsy report of William Holmes by the Sedgwick County Regional Forensic Center.

Touch DNA evidence from Cpl. Hawpe’s duty weapon and duty belt has not been completed at this time.

Forensic Results

William Holmes died from a single gunshot wound to the back that perforated his spinal cord, aorta, and esophagus. The toxicological examination showed that Holmes had .136 gm% alcohol in his system, positive at greater than .05 mg/L for benzoylecgonine (the “inactive” metabolite of recent cocaine ingestion), and 7.2 ng/mL tetrahydrocannabinol. The manner of death is homicide.

Kansas Law

In Kansas all persons, including law enforcement officers, are entitled to defend themselves and others against the use of unlawful force. Kansas Statutes Annotated 21-5220 states:

- (a) A person is justified in the use of force against another when and to the extent it appears to such person and such person reasonably believes that such force is necessary to defend such person or a third person against such other's imminent use of unlawful force.
- (b) A person is justified in the use of deadly force under circumstances described in subsection (a) if such person reasonably believes deadly force is necessary to prevent imminent death or great bodily harm to such person or a third person.
- (c) Nothing in this section shall require a person to retreat if such person is using force to protect such person or a third person.

The term “use of force” includes words or actions directed at or upon another person or thing that reasonably convey the threat of force, the presentation or display of the means of force or the application of physical force, including by a weapon. “Use of deadly force” means the application of any physical force which is likely to cause death or great bodily harm to a person.

The Kansas Supreme Court has made clear that the analysis of a self-defense claim presents a “two prong test”:

“The first is subjective and requires a showing that McCullough sincerely and honestly believed it was necessary to kill to defend herself or others. The second prong is an objective standard and requires a showing that a reasonable person in [the same] circumstances would have perceived the use of deadly force in self-defense as necessary.” State v. McCullough, 293 Kan. 970, 975, 270 P.3d 1142 (2012) (emphasis added).

Immunity vs. Self Defense

Kansas Statutes Annotated 21-5231, enacted in 2006, states that a person who is justified in the use of force in self-defense “is immune from criminal prosecution.”

The Kansas Supreme Court recognized in State v. Hardy, 305 Kan. 1001, 1009, 390 P.3d 30 (2017), that immunity granted by K.S.A. 21-5231 is distinct from self-defense, citing with approval the dissent in State v. Evans, 51 Kan.App.2d 1043 (2015):

“Self-defense and immunity are clearly distinct concepts. If immunity were the same as self-defense, there would have been no need to adopt a specific immunity statute because K.S.A. 2014 Supp. 21–5222 would have sufficed. Perhaps most importantly, because K.S.A. 2014 Supp. 21–5231 grants immunity from arrest and prosecution rather than a mere defense to liability, ‘it is effectively lost if a case is erroneously permitted to go to trial.’ *Mitchell v. Forsyth*, 472 U.S. 511, 526, 105 S.Ct. 2806, 86 L.Ed.2d 411 (1985).”

Kansas Statutes Annotated 21-5222, enacted in 2010, states:

- (a) A person is justified in the use of force against another when and to the extent it appears to such person and such person reasonably believes that such use of force is necessary to defend such person or a third person against such other's imminent use of unlawful force.
- (b) A person is justified in the use of deadly force under circumstances described in subsection (a) if such person reasonably believes that such use of deadly force is necessary to prevent imminent death or great bodily harm to such person or a third person.

Use of Force During Arrest

Kansas Statutes Annotated 21-5227, Use of Force; law enforcement officer making an arrest, states:

“A law enforcement officer, or any person whom such law enforcement officer has summoned or directed to assist in making a lawful arrest need not retreat or desist from efforts to make a lawful arrest because of resistance or threatened resistance to the arrest. Such officer is justified in the use of any force which such officer reasonably believes to be necessary to effect the arrest and the use of any force which such officer reasonably believes to be necessary to defend the officer's self or another from bodily harm while making the arrest. However, such officer is justified in using deadly force only when such officer reasonably believes that such force is necessary to prevent death or great bodily harm to such officer or another person, or when such officer reasonably believes that such force is necessary to prevent the arrest from being defeated by resistance or escape and such officer has probable cause to believe that the person to be arrested has committed or attempted to commit a felony involving death or great bodily harm or is attempting to escape by use of a deadly weapon, or otherwise indicates that such person will endanger human life or inflict great bodily harm unless arrested without delay.”

Application of Kansas Law

A person's use of deadly force in self-defense is judged on a “case by case” basis. Only such force reasonably needed to defend against another's imminent use of unlawful force is legally permissible under Kansas law.

Conclusion

Application of Kansas law to these facts requires a two-step process. The first is to determine if Deputy Somers had a subjective belief that he or another person was in imminent danger of death or great bodily harm. Deputy Somers reported during his interview that he had no concern for his own safety but feared

for Cpl. Tony Hawpe's life based on the danger of Holmes obtaining Cpl. Hawpe's duty weapon.

Deputy Somers' subjective belief that Cpl. Hawpe faced mortal danger is confirmed by Cpl. Hawpe's own belief that Holmes actively fought for Hawpe's duty weapon. Other officers present report the distress in Cpl. Hawpe's voice as he called out to other officers to "Watch my gun," although in the stress of the situation officers heard variations of 'He's got my gun' or 'He's going for my gun.'

Even with the benefit of reviewing the incident by video, it is not difficult to believe that Deputy Somers, or any other officer in his situation, would believe that Cpl. Hawpe faced the imminent danger of death or great bodily harm.

The second prong of the analysis is to determine if this subjective belief is reasonable. There is no evidence that Holmes actually gained control of Cpl. Hawpe's duty weapon. That does not end the inquiry, however, as officers on scene, including Deputy Somers, cannot see Holmes' hands as he struggles with Cpl. Hawpe who is pinned under Holmes. Deputy Somers recalled during his interview that he was concerned for Cpl. Hawpe because he did not know if Holmes had gained control of Cpl. Hawpe's duty weapon, but believed he was trying to if he had not already done so.

While Cpl. Hawpe's personal beliefs are not determinative of the reasonableness analysis, it is critical to note both Cpl. Hawpe's personal belief that he was in danger from his own duty weapon, and the distress that officers present heard in Cpl. Hawpe's voice as he called out concerning his gun.

When considering the use of force, including deadly force, to counter a threat to another person, the person using force must make a determination if that person is in imminent danger of death or great bodily harm. It is important to remember in this case that Holmes had led officers on an approximately 20 mile pursuit, presumably stopped only because his vehicle had completely lost the front driver's tire, had initially refused to exit the vehicle, had refused to comply with officers' commands when he did exit the vehicle, had shown no response to 'less lethal' projectiles, and had actively fought off K-9 Bella. Further, he did not comply when Cpl. Hawpe attempted to take him into custody by taking him to the ground and actively fought Cpl. Hawpe flipping him onto his back where Holmes gained the tactical advantage.

Another question that should be answered is whether the other officers on scene could have assisted Cpl. Hawpe in gaining compliance of Holmes and taking him into custody without the use of deadly force. As the physical altercation began it is reasonable to believe that other officers would have come to Cpl. Hawpe's aid to gain physical control of Holmes and place him into custody. Deputy Somers' duty weapon is holstered at this time. Holmes, however, actively resisted, and the

nature of the physical altercation changed immediately when Cpl. Hawpe called out in distress, "Watch my gun. Watch my gun."

Had Holmes gained control of Cpl. Hawpe's duty weapon, there is no reason to believe that he would not have used it immediately on Cpl. Hawpe and then on other officers on scene to prevent his arrest. The totality of the circumstances of this incident would lead a reasonable person to believe that Cpl. Hawpe, and perhaps even others but at least Cpl. Hawpe, faced imminent death or great bodily harm at the hands of William Holmes. Further, it is reasonable to believe through the communication of the danger by Cpl. Hawpe and Deputy Somers' personal observation of the struggle that a person in Deputy Somers' situation would reasonably believe that Cpl. Hawpe faced imminent death or great bodily harm at the hands of William Holmes.

Deputy Somers heard Cpl. Hawpe's distressed warning to watch his gun and believed that Holmes was attempting to gain control of Cpl. Hawpe's duty weapon. Holmes held a tactical advantage over Cpl. Hawpe being on top of him, and Holmes' hands were not visible to Deputy Somers who believed the threat to Cpl. Hawpe required immediate action to prevent Cpl. Hawpe's immediate death or injury from his own weapon. Having used less lethal options without effect, Deputy Somers utilized that only force reasonably calculated to immediately end the threat to Cpl. Hawpe, by firing a single shot into Holmes as he lay on top of Cpl. Hawpe fighting with him. Deputy Somers shot placement took into consideration the need to end the threat to Cpl. Hawpe while also protecting Cpl. Hawpe from the possibility of the bullet exiting Holmes' body and striking Cpl. Hawpe. Deputy Somers calculated that if the shot passed through Holmes, it would strike Cpl. Hawpe's ballistic vest thus preventing injury to Cpl. Hawpe from Deputy Somers' own actions.

As Deputy Somers held a subjective belief that Cpl. Hawpe faced imminent death or great bodily harm at the hands of William Holmes, and I conclude that this subjective belief was and is reasonable, Deputy Somers is immune from prosecution pursuant to Kansas Statutes Annotated 21-5231. As such, no criminal charges will be filed.

While a formal analysis of the use of force by a law enforcement officer during an arrest, pursuant to Kansas Statutes Annotated 21-5227, has not been articulated above, the analysis of the use of deadly force in defense of another is identical to the analysis under Kansas Statutes Annotated 21-5231, requiring no separate analysis under the facts of this incident.

Gregory T. Benefiel
McPherson County Attorney
9th Judicial District of Kansas