



**Weld County
District Attorney's Office
Nineteenth Judicial District**

Kenneth R. Buck – District Attorney

October 12, 2009

Chief Jerry Garner
Greeley Police Department
2875 W. 10th Street
Greeley, CO 80634

**RE: Investigation of the shooting of
Justin Berry at 603 13th Ave, Greeley,
Colorado**

Dear Chief Garner:

The investigation and legal analysis of the Justin Berry shooting is complete, and pursuant to applicable Colorado law, I will not file criminal charges against the officer who fired his weapon in this incident. I have included a summary of the facts in this case and the relevant Colorado law in this letter.

SUMMARY OF INVESTIGATION

On September 12, 2009, at approximately 0324 hours, officers from the Greeley Police Department responded to the 600 block of 13th Avenue on a report of a man shooting a firearm in the middle of the street. Officer One, dressed in his standard issue Greeley Police Department patrol officer uniform, arrived in that vicinity, parked his marked patrol car in that same block, and armed himself with his AR-15 rifle. He began walking north on 13th Avenue, at which time he saw an adult male sitting on the front porch of 603 13th Avenue. Officer One identified himself as a police officer, and ordered the male to show the officer his hands. Officer One stated that he repeated his commands of "show me your hands" approximately five times. The male responded to Officer One's commands by looking at him, yelling "I don't give a fuck," and standing up on the front porch of the residence. Officer One saw the male take his right hand, place it on a rifle or shotgun, previously not seen by Officer One, and began to raise the rifle or shotgun towards Officer One. Officer One, believing he was going to be shot, fired four rounds from his AR-15 at the male while still moving in a northerly direction up 13th Avenue. Officer One stated that he believed he had shot the male, and observed the male enter into the residence at 603 13th Avenue.

At this same time, other officers from the Greeley Police Department were arriving at this location. Officers set up a perimeter around the residence located at 603 13th Avenue. Two

other adult males were contacted and removed from the residence by Greeley Officers. These individuals were identified as Robert Oder and Brandon Scaggs.

Robert Oder was interviewed by detectives from the Greeley Police Department. Mr. Oder stated that he was sleeping inside the residence when his roommate, Mr. Scaggs, pounded on his door and stated that "Justin has been shot." Mr. Oder stated that he got out of bed and could see blood on the floor and walls, but could not find his second roommate, whom he identified as Justin Berry. Mr. Oder stated that he was on the phone with Justin Berry's father when police ordered him to drop the phone and to exit the residence.

Brandon Scaggs was also interviewed by Greeley Police Detectives. Mr. Scaggs stated that he and Justin Berry, his roommate, had been out drinking the previous evening, September 11-12, 2009. He stated that they began drinking at the Rio Grande Restaurant, where they had each consumed two margaritas. They left the Rio Grande Restaurant when it closed and went across the street to the Penalty Box bar where they knew one of the bartenders. They remained at the Penalty Box Bar where they consumed numerous shots and beers and played "beer pong" until the bar closed.

According to Mr. Scaggs, when they arrived back at their residence, he and Mr. Berry began fighting. Mr. Scaggs described this fighting as "wrestling and head butting," and what he referred to as "testosterone." Mr. Scaggs stated that Mr. Berry grabbed what he believed to be two shotguns and went outside the residence and began firing them, stating "I don't give a fuck." Mr. Scaggs described these shotguns as a 410 shotgun and a .12 gauge, five shot, sawed off shotgun. Mr. Berry came back into the home, at which time Mr. Scaggs told Mr. Berry to "knock it off because the cops would come." Mr. Scaggs stated that he and Mr. Berry argued some more, at which time Mr. Berry went outside the front door again with his guns when Mr. Berry was shot. Mr. Berry re-entered the home, and Mr. Scaggs asked him who had shot him. Mr. Berry replied that "the police" had shot him. During the interview with Mr. Scaggs, detectives noted a strong odor of alcohol on his breath, and he appeared to be intoxicated. Mr. Scaggs also stated that he could not remember much about the events surrounding Mr. Berry being shot because the bullets "scared the shit out of me."

Believing that Mr. Berry may still be inside the residence, the Greeley Police Department SWAT team was activated and proceeded to set up an additional perimeter around the residence at 603 13th Avenue. SWAT Officers approached the home to insert a cell phone into the home in an effort to establish communications with the suspect and as they did so they noted a blood trail leading from a window on the north side of the residence towards the back alley on the east side of the residence. SWAT Officers entered the home to determine whether the suspect was inside and determined that the residence was vacant.

At 0737 hours, Greeley Police Officers located Justin Berry hiding in an alley shed located in the 1300 block of 7th Street. Berry was bleeding from his left ankle and hip and appeared to have suffered several gunshot wounds. Berry was transported to the North Colorado Medical Center. Upon contact with Mr. Berry by Greeley Police Department Investigators, they noted that he exhibited signs of intoxication, including slurred speech and a strong odor of an alcoholic beverage coming from his person.

Detectives secured a search warrant for the residence located at 603 13th Avenue. During the search of the scene, crime scene technicians located two fired shotgun shell casings in the front yard of the residence. Technicians located five shotgun waddings and an additional fired shotgun shell in the street in front of Mr. Berry's residence. Inside the residence, officers located an additional three fired shotgun shell casings in the kitchen next to the refrigerator, a .12 gauge,

five shot shotgun with the barrel length under 18 inches on top of the box springs in one of the bedrooms, and another 410 single shot rifle under the box springs. Technicians noted blood drops and smears throughout the house leading to a broken window on the north side of the home and east towards the alley at the back of the house. There were four bullet holes in the front of 603 13th Avenue: two in the aluminum storm door and two in the window just to the north of the door. Located across the street from 603 13th Avenue, in the rocks next to the sidewalk, were four .223 spent shell casings consistent with departmental issued ammunition for an AR-15 rifle.

Officer Jared Weeks told investigators that he was one of the original officers dispatched to a shots fired call in the 600 block of 13th Avenue. When he arrived in the area, he parked his patrol car 30 yards north of the intersection of 6th Street and 13th Avenue. He took his rifle and began approaching the house from the north. As he was 15 yards north of the intersection, he saw a male wearing a white and red striped shirt sitting on the front porch of the residence at 603 13th Avenue. He heard Officer One begin challenging the male, yelling “show me your hands,” and saw that the male was holding a long gun, either a rifle or a shotgun. The male was not responding to the verbal challenges issued by Officer One. Officer Weeks also began issuing verbal challenges to the male, stating “drop the gun! Show me your hands!” Officer Weeks saw the suspect stand up and in one fluid action take a step and turn to his left at which time Officer One fired between three and five shots.

Sgt. Roy Smith was interviewed by investigators. Sgt. Smith stated that at approximately 0325 he and other officers were dispatched to a call of shots fired across the street from 604 13th Avenue. Sgt. Smith arrived at that location at 0327 hours and parked in the 1200 block of 6th Street. As he was approaching the intersection of 6th Street and 13th Avenue, he heard Officer One yelling loud verbal commands to an unknown person. Sgt. Smith heard Officer One yell “Police! Put your hands up! Drop your weapon!” Sgt. Smith heard these same commands yelled at least three times. Sgt. Smith then heard four shots fired, one right after the other. Sgt. Smith took a position of cover across the street from 603 13th Avenue, at which time he heard two male voices talking to each other. Sgt. Smith gave verbal commands for the males to exit the residence. Each of the males complied with Sgt. Smith’s commands and were detained by Greeley Police Officers. These two males were identified as Mr. Oder and Mr. Scaggs.

Investigators also interviewed Ronald Sturtevant, who lives across the street from Berry’s house at 604 13th Avenue. Mr. Sturtevant told investigators that at approximately 0300 hours, he heard the neighbors across the street arguing and being very loud. He asked his girlfriend for the non-emergency number for the Greeley Police Department and, while he was talking to her, he saw a male come outside of 603 13th Avenue with what he thought was a rifle and saw this male fire one round from the rifle into the ground.

Mr. Sturtevant stated that at this point he called 911 and, while talking with the dispatcher, the same male came back outside of the residence across the street and fired three or four rounds into the air from what appeared to be a rifle. He also heard another person yell from inside of the home across the street “someone’s going to call the police,” to which the male responded “go ahead.” Dispatch advised Mr. Sturtevant that officers were in the area, and Mr. Sturtevant heard a police officer yelling “let me see your hands, show me your hands.” Mr. Sturtevant saw the male on the front porch stand up, and as the male did so, he picked up the gun with his right hand and began moving towards his (the male’s) left. At this same time a police officer was shooting towards the male while moving behind a gold colored Honda parked in front of Mr. Sturtevant’s residence. Mr. Sturtevant stated he could clearly see that the male had a gun in his hand when officers arrived and stated he “could not believe the male was ignoring the police and would not drop the rifle.”

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 attempted homicide in Colorado, the Criminal Code specifies certain circumstances in which the use of physical force is justified. As the evidence establishes that Mr. Berry was shot by Officer One, the determination whether his conduct was criminal is primarily a question of legal justification.

C.R.S. 18-1-707(1)(b) establishes when a peace officer can use physical force to defend himself or others. The statute reads, in pertinent part, as follows:

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...to defend himself or a third person from what he reasonably believes to be the use or imminent use of physical force.

Also pertinent to the facts and circumstances of this case is Section 18-3-206 (1)(a), Menacing, of the Colorado Revised Statutes, which reads as follows:

- (1) A person commits the crime of menacing if, by any threat or physical action, he or she knowingly places or attempts to place another person in fear of imminent serious bodily injury:
 - (a) By the use of a deadly weapon or any article used or fashioned in a manner to cause a person to reasonably believe that the article is 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.

In this case, the Greeley Police Officers approached Mr. Berry for purposes of conducting an investigation into the citizen report of shots fired in the early morning hours of September 12, 2009. It was unknown to them at the time whether there were any individuals who had been injured or killed as a result of this shooting. Mr. Berry, in possession of a firearm and subsequently determined to be intoxicated, refused to comply with the commands of police officers to show them his hands and to drop the weapon. Rather, he responded by stating “I don’t give a fuck,” and by standing up and beginning to raise the firearm in the direction of Officer One. Officer One reasonably believed at that time, based on all of the surrounding facts and circumstances known to him, that he or other officers were in imminent danger of death or serious bodily injury.

There is no doubt Mr. Berry knew that the individuals approaching his house were police officers because they clearly identified themselves, and following the shooting, Mr. Berry stated to his roommate that it was “the police” who had shot him.

Based on the facts gathered during this investigation and the legal analysis outlined above, I find that Officer One was justified in using force against Mr. Berry because he reasonably believed that it was necessary to defend himself and others from Mr. Berry’s threatened use of deadly physical force.

CONCLUSION

Under C.R.S. 18-1-707(1)(b), the officer’s actions in this situation were justified and authorized by law in order to defend and protect himself and others from the potentially volatile and dangerous circumstances they faced. As a result, the Weld County District Attorney’s Office will not file any charges against Officer One for the use of physical force in this event. If you have any questions, please feel free to contact me.

Sincerely,

Kenneth R. Buck
District Attorney

cc:
Ed Clark, Mayor, City of Greeley
Roy Otto, Greeley City Manager
Rick Brady, Greeley City Attorney