

Memorandum-Officer involved Shooting, July 5, 2018

To: Special Agent Craig Zachmeier, ND Bureau of Criminal Investigation, Chief Joe Knowski, Devils Lake Police Department

From: Kari Agotness, State's Attorney

Date: 11/16/2018

An officer involved shooting occurred July 5, 2018 in the city of Devils Lake involving Detective Brandon Potts and Daniel Fuller. A thorough investigation into the shooting was done by the ND Bureau of Criminal Investigation. In addition to the investigation this report is based on consultations with the Attorney General's office and reports from experts.

Summary of the Incident:

On the afternoon of July 5, 2018, in Devils Lake, North Dakota, the 911 dispatch center received calls regarding a reckless driver in a pickup on Hwy 2 East. One caller described an individual getting out of the vehicle, coming towards the caller, holding something behind his back, which the caller thought might be a gun. Another call was received indicating a man, now identified as Daniel Fuller, attempting to break into a trailer home. Officers, including Detective Potts, responded. As officers first arrived in the area of the trailer park, they spotted Daniel Fuller. The officer that first observed Daniel Fuller commanded him to stop. Daniel Fuller ignored the command and fled on foot. He climbed over a chain link fence to the north of the trailer park and crossed over a railroad track, moving into a grassy area.

Detective Potts and another officer spotted Daniel Fuller in the grassy area. Detective Potts with his duty weapon drawn, approached Daniel Fuller, giving him a verbal command to show his hands. Daniel Fuller showed his hands, sat down and put his hands behind his back. Detective Potts was still unable to see if Daniel Fuller had any type of weapon behind his back. As Detective Potts moved forward; Daniel Fuller started to get up on one knee. Detective Potts commanded Daniel Fuller to lay on the ground. Daniel Fuller ignored the order. Detective Potts began to reach for Daniel Fuller's arm. Daniel Fuller reached for Detective Pott's leg, knocking them both to the ground. While this was occurring, Detective Potts struck Daniel Fuller in the head with his duty weapon 3 to 4 times. During this struggle, Detective Pott's duty weapon discharged, striking and killing Daniel Fuller. Another officer with the Devils Lake police department was approaching the area as this incident was unfolding. This officer's dashcam video captured a portion of the incident. Ultimately, no weapon was found on or near Daniel Fuller.

Issue:

The issue presented for review by this office is whether Detective Potts should be criminally charged for the death of Daniel Fuller. More specifically, did Detective Potts use reasonable force in the incident resulting in Daniel Fuller's death. After consideration of all the evidence, I have determined no criminal charge is warranted against Detective Potts.

Material Reviewed:

The investigative materials that were delivered for review consisted of (1) dash cam video; (31) Investigative Reports prepared by the Bureau of Criminal Investigation consisting of

approximately 328 pages; Autopsy Report, ND Crime Lab report; SD Crime Lab Ballistics Report; (14) Audio Disc interviews; various other audio/visual discs. Additional materials reviewed consisted of expert analysis reports, caselaw, statutes, analytical memorandums and defensive tactics training manual.

I reviewed all the investigative material. Additionally, I met several times with an Assistant Attorney General to discuss and review the material. Following these meetings, a joint decision was made to obtain an independent expert review of the incident and the use of force by Detective Potts. This report was received on November 9th, 2018. Select material is available for viewing on the State's Attorney website. <https://www.co.ramsey.nd.us/166/States-Attorney>

Legal Analysis:

Generally, in making an arrest, an officer is under no obligation to retreat but has the legal right to press forward to accomplish the arrest. *State v. Washington*, 2007 ND 138 ¶ 16, 737 N.W.2d 382, 389. However, the amount of force an officer uses to effect the arrest must be reasonable. *Graham v. Connor*, 490 U.S. 386, 396 (1989). A law enforcement officer is justified in using deadly force to effect an arrest or prevent the escape from custody of an individual who has committed or attempted to commit a felony involving violence, or is attempting to escape by the use of a deadly weapon, or has otherwise indicated that the individual is likely to endanger human life or to inflict serious bodily injury unless apprehended. N.D.C.C. § 12.1-05-07(2)(d); *Tennessee v. Garner*, 471 U.S. 1, 11-12, 105 S.Ct. 1694, 1701, 85 L.Ed.2d 1 (1985).

In North Dakota, everyone has the right to defend against imminent unlawful bodily injury. N.D.C.C. § 12.1-05-03. Detective Potts legitimately exercised this right.

Use of the Handgun by Detective Potts as an Impact Weapon:

Police officers are not trained to use their handguns as impact weapons, however, in exigent circumstances an officer may be legally justified, and authorized by the use of force policy in their department, to use so-called "weapons of opportunity" or "weapon of necessity" that comes to hand. Thus, officers have sometimes justifiably used their radios, flashlights, handcuffs, knives, items of furniture, and even police cars to strike suspects. Officers in North Dakota are trained on defensive tactics, and as noted in the PPCT training manual, there is a section on "Intermediate Weapons" which states that such weapons can include "emergency/improvised impact weapons (flashlight, radio, broom stick)..." (Section 2, p. 6), and goes on to state in Section 2, p. 7:

Situations may occur where certain, immediate, and drastic measures must be undertaken by an officer to protect human life. In situations where the life of the officer or another is in immediate danger, events happen that cannot be predicted in the static environment of the training academy. The use of force in such circumstances may involve the use of techniques or weapons not specifically authorized by police (e.g. neck restraint, striking with flashlight, etc.). But just because a technique or tool is not

addressed in the department policy or the training academy, does not make the application of that force unreasonable or excessive.

The Devils Lake Police Department Use of Force Policy provides, in Section 300.3:

It is also recognized that circumstances may arise in which officers reasonably believe that it would be impractical or ineffective to use any of the tools, weapons or methods provided by the Department. Officers may find it more effective or reasonable to improvise their response to rapidly unfolding conditions they are confronting. In such circumstances, the use of any improvised device or method must nonetheless be reasonable and utilized only to the degree that reasonably appears necessary to accomplish a legitimate law enforcement purpose.

As Detective Potts was being taken to the ground by Daniel Fuller, Detective Pott's right hand was already occupied by holding his Glock pistol. He could neither holster the pistol (due to time constraints, and due to Daniel Fuller's head being against Detective Pott's right hip), nor could he effectively strike or use other defensive techniques against Daniel Fuller with his left hand. Nor did Detective Potts, in plainclothes, have a baton, pepper spray, or a Taser. He could not safely drop his Glock, where it would be available to Daniel Fuller. Nor could he hand his pistol off to the other officer because he was out of reach.

The Officer's 'Reasonable Belief' is the applicable legal standard and that is the standard in which police are trained:

It is essential to understand that in analyzing police use of force, the "reasonable belief" of the law enforcement officer on the scene who uses force is the applicable legal standard. The standard is based on the officer's reasonable belief, rather than on the absolute truth of whether the officer's life is or is not actually in deadly danger, because in many situations the officer cannot know the absolute truth of whether or not an actual deadly threat does or does not exist.

In many, perhaps most instances, a police officer has no way of knowing a suspect's actual intentions, or whether the life of the officer is or is not actually in danger. Instead, the situation often requires the officer to act immediately, based on his reasonable perceptions, often formed on the basis of incomplete information which is the only information available to him at that moment. Or, as the United State Supreme Court noted in *Graham v. Connor*, 490 U.S. 386.

...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 situation.

Detective Potts had no ability to determine whether Daniel Fuller's intention was just to take him to the ground, or to also disarm him and use his handgun against him or others. In this situation, it was reasonable for Detective Potts to perceive this as a deadly threat situation.

Expert Analysis:

An expert analysis report was provided for consideration to the State's Attorney office. A second independent expert recommended by the Attorney General office was retained by the State's Attorney office and this expert also submitted an analysis for review. Both expert reports concluded that Detective Pott's use of the Glock pistol as an impact weapon was reasonable in light of the circumstances depicted in the dashcam video in conjunction with the statements of the witnesses to the incident.

SD Crime Lab analysis of Detective Pott's weapon showed no malfunction. Pott's gun discharged by Potts pulling the trigger. Detective Pott's own statement indicates he wasn't aware that he pulled the trigger, however indicated it was possible when he was falling or trying to move out from under Daniel Fuller, that he inadvertently pulled the trigger. The independent expert analysis referenced a phenomenon known as Involuntary Muscular Contraction in considering the discharge of the Detective Pott's duty weapon. It is widely researched and well documented that certain physical stimuli can cause the muscles of an individual's hand and fingers to contract, resulting in the unintentional discharge of a firearm that is held in the hand. The most commonly noted stimuli are (1) being startled, (2) postural disturbance or loss of one's balance, (3) interlimb interaction or "sympathetic grip", or (4) something contacting or impacting the gun, or the hand or arm holding the gun. *See e.g.,* Enoka, R., "involuntary Muscular Contraction and the Unintentional Discharge of a Firearm," Law Enforcement Executive Forum, 3(2), 27-3. Because the contraction of the trigger finger is involuntary, not only does the user of the handgun not will it to happen, but conversely, he cannot will it not to happen. Phrased another way, he didn't intend for it to happen, and he cannot keep it from happening. Under the criminal laws of the State of North Dakota, this would negate the requirement of the intent needed for a criminal act. *See* N.D.C.C. § 12.1-02-02.

Conclusion:

For all the foregoing reasons, the decision to not criminally charge Detective Pott's is supported by the conclusion that he had probable cause to believe the use of deadly force was necessary. Detective Potts was responding to multiple 911 calls including one reporting a potentially armed person, and one reporting an attempted burglary. Additionally, officers first responding reported that the suspect, identified as Daniel Fuller, was fleeing. When Detective Potts approached Daniel Fuller with his duty weapon drawn, Daniel Fuller at first complied with orders but quickly disregarded them and engaged Detective Potts in a takedown lunge, while Detective Pott's duty gun was exposed. During this struggle, Detective Pott's used his duty gun which was the only weapon available to defend himself. There is nothing to indicate the shot was intentional. Detective Pott's use of force occurred during a defense from a deadly threat assault.