

REPORT OF THE DEPARTMENT OF JUSTICE
SMYRNA POLICE DEPARTMENT USE OF DEADLY FORCE

SUBJECT: Kenneth S. Mathena
OFFICER: Cpl. David Walton

DATE OF INCIDENT: May 2, 2015

By: Allison E. Reardon
Director
Office of Civil Rights and Public Trust

September 8, 2015

Scope of the Investigation

This is the final report of the Delaware Department of Justice, Office of Civil Rights and Public Trust, on the investigation of the use of force by Corporal David Walton (Cpl. Walton) of the Smyrna Police Department against Kenneth S. Mathena (Mr. Mathena). Chief Investigator Jean Rothenburger conducted the investigation. Deputy Attorney General Allison E. Reardon reviewed the use of force for the Department of Justice. Investigators examined the crime scene and also reviewed evidence, reports written by officers who responded to the scene and witness interviews.

Purpose of the Department of Justice Report

The Department of Justice's investigation of law enforcement officer shootings serves a specific but limited purpose. The Department determines whether a law enforcement officer's use of deadly force constitutes a criminal act. The Department does not establish or enforce internal police policies concerning the proper use of deadly force by law enforcement officers. Law Enforcement Agencies are responsible for establishing and enforcing guidelines for the use of force by their officers and for determining whether an officer's actions were consistent with such guidelines in a given case.

This report expresses no opinion whether the officer's actions complied with departmental policies or procedures concerning the use of force set by the Smyrna Police Department or whether, with the benefit of hindsight, the officer could have proceeded differently. That is a matter of a separate internal investigation to be undertaken by the Smyrna Police Department. The sole purpose of this Department of Justice investigation is to determine whether the involved officer committed a crime when he used deadly force against Mr. Mathena. One of the issues that must be considered in any law enforcement officer-involved shooting is whether the use of deadly force by the officer was justified under all the circumstances.

Facts

On May 1, 2015, at approximately 11:22 p.m., officers from the Smyrna Police Department (Smyrna, PD) responded to a complaint of a domestic disturbance on Malvern Place in the Sunnyside Apartments in Smyrna. The call was placed by Mr. Mathena's girlfriend, who told police that she and Mr. Mathena had been arguing, that he was intoxicated and having a breakdown and that he was armed with a shotgun. Earlier that evening she and Mr. Mathena had gone out for dinner and drinks, and she believed that Mr. Mathena had also been drinking at home that day. When they returned to their apartment, an argument ensued stemming from multiple issues. Mr. Mathena knocked over a television, threw his drink at his girlfriend and threw his glass on the floor. The girlfriend's adult son, who also lived in the apartment, arrived home during the argument, observed Mr. Mathena crying and saw the overturned television and asked Mr. Mathena and his mother if everything was okay. They said it was and the son went to his room, but he heard the argument continue.

When the girlfriend asked Mr. Mathena to leave the apartment, he retrieved a shotgun from their bedroom. When the son heard the "pump of a shotgun" and his mother trying to

convince Mr. Mathena to put the gun down, the son emerged from his room into the hallway to see if everything was alright, and he asked where the shotgun was. At that point, Mr. Mathena said "it is right here" and started walking toward mother and son with the shotgun in hand. Mr. Mathena's girlfriend and her son placed the call to the police after locking themselves in the bedroom. Mother and son could hear Mr. Mathena throwing things in the apartment.

By the time the police arrived, Mr. Mathena had already left the scene in his vehicle and had taken the shotgun with him. Police talked to Mr. Mathena's girlfriend and son and searched the area but did not find Mr. Mathena. Mr. Mathena's girlfriend told the police that she did not want Mr. Mathena arrested and did not believe he would come back. Police put out a general broadcast and a radio communication to be on the lookout for Mr. Mathena and provided the make, model and tag number for the vehicle he was believed to be driving.

Shortly after the police left, Mr. Mathena returned to the apartment and knocked repeatedly on the door, asking to be let in and saying he needed to get his things. When his girlfriend told him to go away, he used a key and entered the apartment with the shotgun in his hand. By this time the adult son had armed himself with a handgun, and Mr. Mathena yelled to the son to shoot him. He also told his girlfriend and her son to go ahead and call the police and said he did not care. Mr. Mathena's girlfriend and her son retreated to the bedroom for the second time, locked the door, pushed a dresser in front of it and called the police. They could hear Mr. Mathena moving around in the apartment and yelling. His girlfriend reported hearing him saying either "kill him" or "killing himself." Mr. Mathena kicked the locked door to the bedroom at one point.

Smyrna PD received the second call at approximately 12:18 a.m. and dispatched officers to the scene. Cpl. Walton and Corporal Ramon Armstrong (Cpl. Armstrong) arrived and approached the parking area on foot from the west, while Patrolman William Davis (Ptlm. Davis) approached from the north, between buildings.¹ As Cpl. Walton and Cpl. Armstrong neared the residence, they took cover behind parked vehicles. Mr. Mathena was standing on the front porch of the apartment with the shotgun in his hands. Cpl. Walton repeatedly commanded the suspect to step out and to drop the weapon. Cpl. Armstrong also ordered Mr. Mathena to drop the gun. Mr. Mathena refused to comply with the officers' commands and said "f*** you" in response to the commands. Cpl. Walton initially fired 10 shots from his department issued patrol rifle. He repeated his command for Mr. Mathena to drop the weapon two additional times and then fired one additional shot, striking Mr. Mathena. Officers on the scene rendered aid until medical personnel arrived and transported Mr. Mathena to the Bayhealth Emergency Center in Smyrna, where he was pronounced dead at 12:56 a.m. from a gunshot wound to the chest.

Police processing the scene recovered Mr. Mathena's gun. The gun was a Mossberg 12 gauge shotgun and was not loaded. One (1) live 12 gauge shotgun round was found on the front seat of Mr. Mathena's vehicle.

¹ Cpl. Walton and Ptlm. Davis were wearing activated body cameras. The incident occurred in the early morning hours just after midnight, and the video of the approach and shooting is too dark to see. However, the cameras did record the audio.

Mr. Mathena's girlfriend and son were still inside the apartment when police arrived and reported hearing shouts of "police department" and shots being fired, but they did not witness the shooting and did not know who had fired the shots.

A neighbor directly across the street was interviewed and stated that he observed the incident from his window. He was up because his son called after the first police response, saying he could not get home because the police were blocking access. When the police arrived the second time, the neighbor saw Mr. Mathena on the porch with what appeared to be a shotgun. He could hear the police yelling commands for Mr. Mathena to drop the gun, but Mr. Mathena was not complying. He saw Mr. Mathena appearing to point the gun at the officers and then heard the shots. He also observed the officers giving first aid to Mr. Mathena.

Conclusion

After a thorough investigation and review of all statements and reports, it is the conclusion of the Department of Justice that, as a matter of Delaware law, the use of force by Smyrna Police Department Cpl. David Walton was not a criminal act because the use of such force was justified. Section 464 of Title 11 of the Delaware Code generally defines the legal use of force in self protection. It provides, in pertinent part, that "[t]he use of force upon or toward another person is justifiable when the [officer] believes that such force is immediately necessary for the purpose of protecting the [officer] against the use of unlawful force by the other person on the present occasion." Additionally, Section 465 of Title 11 of the Delaware Code defines the use of force for the protection of other persons. It provides that, "[t]he use of force upon or toward another person is justifiable to protect a third person when the [officer] would have been justified under § 464 of this title in using force to protect the [officer] against the injury the [officer] believes to be threatened to the person whom the [officer] seeks to protect."

Under Delaware law, it is Cpl. Walton's subjective state of mind that is of critical importance in determining whether his use of force was justifiable. The specific factual issue is whether Cpl. Walton actually believed at the time that he intentionally fired his weapon that such action was necessary to protect himself or others from death or serious physical injury, so long as the officer was not reckless or negligent in having such belief or in acquiring or failing to acquire any knowledge or belief which is material to the justifiability of the use of force.

Mr. Mathena stood on his front porch with a shotgun in his hands and refused repeated commands to drop his weapon. A witness to the incident confirmed that Mr. Mathena had his shotgun raised and pointed at the officers, ignoring their commands to drop the gun. Cpl. Walton discharged his weapon in response to the threat of death or bodily injury to himself and others, including the other police officers on the scene and Mr. Mathena's girlfriend and son, who were still inside the apartment.

The investigation of the facts and circumstances fully supports the reasonableness of Cpl. Walton's belief that his life and the lives of other officers and bystanders were in danger. That belief was not formed recklessly or negligently. As a result, the use of deadly force by Cpl. Walton was justified and is not subject to criminal prosecution.