

**FINAL REPORT OF THE DEPARTMENT OF JUSTICE
USE OF DEADLY FORCE BY DELAWARE STATE POLICE**

SUBJECT: JULIUN PITCHER

OFFICER: ANDREW OSGOOD

DATE OF INCIDENT: December 9, 2017

Dated: November 1, 2018

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 Trooper Andrew Osgood (hereinafter referred to as “Trooper Osgood”) from the Delaware State Police against Juliun Pitcher¹ (referred to hereinafter as “Mr. Pitcher”). Investigators from the Office of Civil Rights and Public Trust examined the crime scene, reviewed video, reports from officers who responded to the scene, reports from the Division of Forensic Science, witness interviews, physical evidence, and reports of various experts who analyzed physical evidence. Attorneys with the Office of Civil Rights and Public Trust reviewed this use of force incident for the Department of Justice.

Purpose of the Department of Justice Report

The Department of Justice determines whether a law enforcement officer’s use of deadly force constitutes a criminal act. The Department of Justice 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 involved officer’s actions complied with departmental policies or procedures.

Facts

Mr. Pitcher was the front-seat passenger in a black Saturn Ion, which was stopped by Trooper Osgood at approximately 3:11 a.m. on December 9, 2017, for traffic infractions. The Saturn Ion was driven by W1. A third occupant, W2, was laying down in the backseat prior to the vehicle stop, but sat up behind W1 (the driver) as Trooper Osgood approached.

Trooper Osgood’s departmentally issued Chevy Tahoe was equipped with a motor vehicle recording device (hereinafter “MVR”). The MVR supplied a static viewpoint from the parked police vehicle. The Saturn Ion stopped on Fieldstone Court. The position of the Tahoe behind the Saturn caused the MVR to capture the driver’s side of the Saturn Ion, but did not provide a view of the passenger-side. The MVR includes a microphone, placed on Trooper Osgood’s lapel, which recorded audio of the entirety of the motor vehicle stop.

Interviews of Vehicle Occupants²

W1 was interviewed twice. The first interview with W1 took place the morning of the shooting. W1 stated Mr. Pitcher, who he referred to as “Jewels,” was his front seat passenger and that the car belonged to an acquaintance. W1 was driving Mr. Pitcher and W2 home when the officer initiated a traffic stop. W1 stated that Trooper Osgood advised that he initiated the traffic stop because the Saturn had moved into the lane occupied by the police vehicle.

W1 recalled that the officer approached from the back of the car and that Mr. Pitcher rolled down the window. During this interview, W1 denied ever seeing Mr. Pitcher with a weapon. Further, W1 stated there were no firearms in the car. W1 told investigators that people

¹ Mr. Pitcher was a juvenile at the time of the incident, but has been previously publicly identified.

² Investigators interviewed area residents but none witnessed the shooting. Several were awakened by gunshots.

started moving within the car, then the Trooper pulled his gun out and started yelling at Mr. Pitcher. According to W1, Mr. Pitcher “barely moved” before Trooper Osgood began firing. W1 was adamant that Mr. Pitcher had not shot at Trooper Osgood. He reiterated that he never saw a gun. W1 stated Mr. Pitcher was “scooting up,” when he was shot. W1 also advised that he was unable to see everything that was happening. W1 was grazed by a bullet in the right upper thigh during the incident.

On December 21, 2017, investigators re-interviewed W1. A key issue was a posting shared on social media on December 15, 2017. During this interview, W1 began by denying he authored the initial post. The posting stated as follows:

I was driving and then the cop pull me over jewels and [redacted] was sleep I had woke jewels up because I knew he had the pole on him he try to run at first but the cop was already out his car and then that's when jewels try to put it under the seat and that when the cop had the flash light on and start yelling at jewels jewels nvr tru to shoot or anything he drop the gun and that's when the cop start shooting and then the cop shot me and me and [redacted] go out of the cat laid on the ground bro the cop was on some other shit he didn't resist or anything the cop wanted to do that shit bro....

W1 read the post during his second interview and, eventually, admitted writing it. This witness explained that he lied to investigators initially because he thought Mr. Pitcher was still alive at the time of his prior statement. He went on to explain that he did not want to get Mr. Pitcher in trouble for possessing the handgun.³ W1 clarified that the term “pole” used in the social media posting indicated a gun. W1 told investigators during his second interview that Mr. Pitcher told him he did not like going anywhere without a gun. W1 stated that on the morning of the fatal shooting, Mr. Pitcher appeared to be placing his firearm under the seat. W1 continued to maintain that Mr. Pitcher did not fire his weapon at Trooper Osgood.

W2 was also in the car during the incident and was interviewed by investigators. W2 was asleep when the car was initially stopped. He stated the events unfolded very quickly. W2 recalled moving within the vehicle, to locate his cell phone. W2 stated Trooper Osgood asked him why he was moving. W2 stated that he explained to Trooper Osgood that he was searching for his cell phone and then he stopped moving. W2 then recalled Trooper Osgood asked Mr. Pitcher, “what are you doing?” W2 recalled hearing “gun, gun, gun,” just prior to the shooting. W2 stated no one told him there was a gun in the car.

Interview of Trooper Osgood

Trooper Osgood was interviewed. When asked about the initial stop of the vehicle, Trooper Osgood relayed his belief that this driver of the Saturn Ion might be driving under the influence, based on the traffic violations he observed. He initially planned to approach the driver's side of the vehicle. However, once he noticed there were multiple occupants, he decided to go to the passenger side instead. Trooper Osgood described W1, the driver, as making eye

³ During the time of this incident, Mr. Pitcher was prohibited by Delaware law from possessing a firearm pursuant to 11 *Del. C.* § 1448a(4), as well as 11 *Del. C.* § 1448a(5), either of which may constitute a felony.

contact with him. In contrast, Trooper Osgood felt that Mr. Pitcher was avoiding eye contact. He also recalled noticing movement from the backseat passenger.

Trooper Osgood told investigators that he next noticed a movement that he described as “furtive” from Mr. Pitcher. He also described Mr. Pitcher as hunched forward in his seat. Trooper Osgood stated he saw Mr. Pitcher’s right hand creeping along his thigh. Next he described Mr. Pitcher as reaching into his waistband, and thinking Mr. Pitcher might be going for a weapon. Next, Trooper Osgood recalled Mr. Pitcher pulling out a small handgun from his waistband with his thumb and forefinger. Trooper Osgood stated Mr. Pitcher initially fumbled the gun, then picked it back up and raised it with his right hand. According to Trooper Osgood, Mr. Pitcher said nothing as he made these movements. Trooper Osgood stated he could not be sure, but he believed Mr. Pitcher fired one round during this incident. Trooper Osgood described shooting his weapon and then retreating to the right of the car and continuing to fire. During his interview, Trooper Osgood stated he feared for his safety because he felt Mr. Pitcher disobeyed his commands, pulled out a weapon and pointed it at him.

Physical Evidence

MVR

The MVR recording began at 3:07 a.m. It captured the initial traffic infractions before the vehicle was ultimately stopped on Fieldstone Court. The MVR’s viewpoint was from the front of the Tahoe. From that viewpoint, it initially appeared as though there was only one occupant of the Saturn Ion—the driver. Trooper Osgood called out the stop at 3:11 a.m. and advised his belief that the car had one occupant.

The MVR shows that Trooper Osgood walked in front of his Tahoe and crossed over out of view of the recording, presumably to the passenger-side of the car. He then spoke to the occupants of the car and asked how they were doing. He asked them to roll the window down. Trooper Osgood advised the occupants he pulled the Saturn Ion over for coming into his lane. After asking about the ownership of the car and whether or not the occupants of the Saturn had identification, he asked if the occupants are smoking marijuana. Trooper Osgood next asked, in the same tone of voice, if there are any weapons in the car. Trooper Osgood was told by one of the occupants that there were no weapons. Trooper Osgood next asked, “my man, what are you reaching for back there?” The response is inaudible, but based upon witness interviews detailed above, Trooper Osgood was speaking with W2.

Next, there was an immediate shift in Trooper Osgood’s tone of voice from conversational to serious. Trooper Osgood began to address Mr. Pitcher. Trooper Osgood asked what Mr. Pitcher was reaching for, and directed him to get his hands out—twice. He then shouted, twice, to Mr. Pitcher to drop it. Thereafter, gunshots were heard. W1 and W2 could be seen as they jumped out of the car on the driver’s side. The time elapsed between Trooper Osgood asking if there were any weapons in the car and shots fired is approximately six seconds.

Evidence Collected at the Scene

When investigators arrived at the scene, they located the Saturn Ion with the front passenger door open. The rear window of the vehicle was broken. There was damage to the

front windshield. Investigators recovered eight casings, all of which were determined to have been fired from Trooper Osgood's departmentally-issued .357 handgun. A magazine with three unfired .357 rounds was located on Fieldstone Court, inches from Trooper Osgood's Chevy Tahoe.

Investigators recovered a .25 caliber semi-automatic pistol discovered at a location between the Saturn Ion's open passenger-side door and the curb, partially covered by leaves. This .25 caliber pistol was loaded with Winchester-brand ammunition. Additionally, a single Winchester-brand .25 caliber spent shell casing was located on the cement sidewalk, which was on the passenger-side of the Saturn Ion.

Mr. Pitcher's cell phone was located by Kent General hospital personnel in his pocket. After obtaining a search warrant, the cell phone was examined by investigators. A video time-stamped 12:15 a.m., the same morning as the vehicle stop, was located. The 9-second video depicts a figure at close-range, pointing a gun at the camera, pulling it away and then exhaling smoke. The figure was wearing a dark-colored sweatshirt with a visible white Nike-brand symbol on the chest.

Autopsy

Mr. Pitcher was pronounced dead at Kent General Hospital at 3:49 a.m. The autopsy revealed four gunshot wounds. A gunshot wound was located to the right side of his head. The Medical Examiner also found gunshot wounds to the right side of Mr. Pitcher's chest, one to the back of his right arm, and one to his back. The Medical Examiner noted that the gunshot wound to Mr. Pitcher's back "may be a reentrant wound from the gunshot wound to the posterior right arm." Among Mr. Pitcher's belongings collected from the hospital, investigators located a black jacket with a Nike symbol on the front.

Ballistics Evidence⁴

There is no dispute that Trooper Osgood fired his departmentally-issued .357 handgun. The ballistics analysis confirms eight casings found at the scene were a match to Trooper Osgood's firearm. The same determination was made during a second analysis.

As for the .25 caliber Winchester pistol which was located between the passenger-side door of the Saturn Ion and the sidewalk, it was legally purchased in Smyrna, Delaware in 1995. The purchaser is now deceased. This weapon was not reported stolen.

The opinion of the initial analyst, after microscopic comparison, was inconclusive as to whether the .25 casing forensically matched the gun on-scene. This analyst noted the spent shell casing was the same brand ammunition as contained within the .25 caliber pistol. A second ballistics examiner compared the .25 caliber casing found on the sidewalk against the .25 caliber Winchester pistol found outside of the Saturn Ion and opined the bullet was fired from the gun.

⁴ The ballistics in this case were analyzed and a report was completed in January of 2018. However, due to the arrest of the State Forensic Firearms Examiner during the pendency of this investigation, the ballistics were re-analyzed at the request of the Delaware Department of Justice.

Gun-Shot Residue Analysis

Mr. Pitcher's hands were swabbed for gunshot residue. Gunshot residue, consisting of three component particles (lead, antimony, and barium) emits from a firearm at the time of discharge. The high temperature at the time of discharge causes the particles to have molten or rounded microscopic appearance. For all areas swabbed on Mr. Pitcher's hands, the resulting analysis was the same: "contained particles characteristic of GSR and two component particles." However, the analyst noted gunshot residue may be found where an individual is in close proximity to a discharging firearm.

DNA

The .25 caliber pistol located outside the passenger seat of the Saturn Ion was swabbed for DNA. Three of the swabs did not produce a DNA profile. An additional swab produced an insufficient amount of amplified DNA for analysis. The trigger swab sample produced a mixed sample of DNA, from two individuals, and cannot either include or exclude Mr. Pitcher's DNA. As such, the DNA is inconclusive.

Conclusion

After a thorough investigation and review of all statements, surveillance, and reports of investigators, experts and the Division of Forensic Science, it is the conclusion of the Department of Justice that, as a matter of Delaware law, the use of force by Delaware State Police Trooper Osgood was not a criminal act because the use of such force against Mr. Pitcher was justified. Title 11 Section 464 of the Delaware Code 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." Further, Title 11 Section 464 (c) provides, "[t]he use of deadly force is justifiable under this section if the defendant believes that such force is necessary to protect the [officer] against death, [or] serious physical injury..."

Under Delaware law, Trooper Osgood's subjective state of mind is of critical importance in determining whether his use of force was justifiable. The specific factual inquiry is two-pronged. The first question is whether Trooper Osgood actually believed, at the time he intentionally fired his weapon, that such action was necessary to protect himself or others from death or serious physical injury. The second question is whether Trooper Osgood was 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. 11 *Del. C.* § 470(a).

Despite the initial statement of W1 and the assertion of the vehicle occupants to Trooper Osgood during the fatal car stop, Mr. Pitcher was in possession of a firearm. This conclusion is based upon multiple factors. The gun was located outside of the passenger-side of the Saturn Ion where Mr. Pitcher was seated. W1's statement on social media revealed he was aware Mr. Pitcher had a gun. In that Facebook posting which was not intended to be seen by investigators, W1 asserted Mr. Pitcher considered fleeing the traffic stop or hiding the gun. Further, Mr.

Pitcher's cell phone video, recorded approximately three hours before the traffic stop, depicts a firearm. While it is difficult to see the face of the figure holding the gun, it is a close-range video on Mr. Pitcher's phone and the figure is wearing the same jacket Mr. Pitcher was wearing that night. These facts reasonably lead to the conclusion that Mr. Pitcher was armed with a firearm earlier that same evening and remained in possession of the firearm during the traffic stop preceding Trooper Osgood's use of deadly force. There is no suggestion that Mr. Pitcher or any other occupant advised Trooper Osgood of the presence of a deadly weapon or that any individual was in possession of a firearm. Instead, Trooper Osgood was told there were no deadly weapons in the car.

Listening to the audio of the stop, the shift in tone of voice by Trooper Osgood is telling. The initial conversational tone of the stop suggests that Trooper Osgood believed this was an ordinary traffic stop. The shift in tone as he directs his attention to Mr. Pitcher and the gun speaks directly to Trooper Osgood's subjective state of mind. The tone of Trooper Osgood's voice as he asks Mr. Pitcher what he is doing to commanding him to get his hands out (twice), then, (twice), screaming that he drop "it" establishes Trooper Osgood believed his life was in danger.

The next and final inquiry is whether Trooper Osgood was reckless or negligent in his belief. While the ballistics analysts are inconsistent in their conclusions, neither report states the .25 casing found on scene was not a match. In fact, the spent shell casing matches the weapon found at the scene both in caliber and in brand of ammunition. Without question, this interaction escalated quickly. Mr. Pitcher had a loaded firearm, despite being prohibited from possessing one under the law. Trooper Osgood issued four total commands to both get his hands out and drop the weapon.

Within mere seconds, Trooper Osgood went from calmly asking if the occupants had any weapons in the car to firing his gun. It is key that the short time period includes multiple shots fired by Trooper Osgood. This short-time frame reveals how quickly a shot can be fired from a handgun—in fact—fractions of a second. Mr. Pitcher had a gun and ignored multiple commands from Trooper Osgood. Trooper Osgood stated he observed a firearm being raised in his direction despite his repeated commands to drop the weapon.⁵ Based on these facts, we conclude that Trooper Osgood actually believed that deadly force was immediately necessary to protect himself from death or serious physical injury. We further conclude that Trooper Osgood was not reckless or negligent in forming his belief that deadly force was necessary to protect his life at the time he fired shots.

⁵ The legal determination does not hinge on whether or not the gun held by Mr. Pitcher was actually fired because the law does not require an individual wait to for the bullet to leave the firearm prior to utilizing force for self-protection, so long as the other attendant facts satisfy the statute. However, the evidence that one round may have been discharged from the .25 caliber further corroborates the belief of Trooper Osgood that the firearm was a threat to his life and not merely dormant or stored safely within the vehicle. 11 Del. C. § 464, "requires the defendant to produce 'some credible evidence' to support the defense, sufficient to create a reasonable doubt as to the defendant's guilt." *Hamilton v. State*, 343 A.2d 549, 595 (Del. 1975) (internal citations omitted).