



KATHLEEN JENNINGS
ATTORNEY GENERAL

DEPARTMENT OF JUSTICE
KENT COUNTY
102 WEST WATER STREET
DOVER, DELAWARE 19904

CIVIL DIVISION (302) 577-8400
FAX (302) 739-7652
CRIMINAL DIVISION (302) 739-4211
FAX (302) 739-6727

August 29, 2019

Christofer Johnson, Esquire
1205 N. Orange Street, Suite 501
Wilmington, DE 19801
Via email at: ccjohnsonphillylaw@gmail.com

Re: New Castle County Police Department matter

Dear Mr. Johnson,

The Office of Civil Rights and Public Trust (“Office”) conducted an independent investigation into criminal allegations raised as a result of the arrest of your client¹ by the New Castle County Police on February 15, 2019. This Office reviewed the police reports drafted in connection with the arrest,² medical records, photographs, various forms of surveillance video documenting the scene, and conducted interviews of both civilian and police witnesses. Additionally, this Office reviewed the video posted on social media of the event—and our trial management analyst was able to slow down this video frame by frame for analysis.

The Delaware Code defines the legal use of force in self-protection.³ This statutory defense is not specific to law enforcement officers, and applies to all members of the public. The law 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.”⁴ [11 Del. C. §464] (emphasis added).

The legal test to determine whether the use of force was legally justifiable is the subjective state of mind of the individual using force. The specific factual inquiry is two-pronged. The first question is whether the person actually believed, at the time he intentionally used force, that such action was necessary to protect himself or others from physical injury. The second question is whether the person 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).

¹ Given the public interest in this matter, a copy of this letter will be made publicly available. This Office has elected not to release the name of your client, instead referring to him herein as “your client.”

² As you know, your client was arrested on drug-related charges. This Office has not inquired as to the status of those charges, beyond an initial understanding of why police were taking your client into custody.

³ 11 Del. C. §464

⁴ *Id.* See also, 11 Del. C. § 467, which governs the use of force in law enforcement.

The video supplied by Witness 1 provides helpful evidence for assessment of the situation and the necessary legal analysis. As you can see in the photos below, taken from that video, your client was wearing a gold watch on his left hand. Your client's hand moves toward the right-side waistband, then appears to get stuck in the blue sweatshirt worn by the officer. This is the same side where the officer was wearing his departmentally-issued firearm. As your client's hand moves, the video shows the officer move his right leg with his firearm away from your client, and the officer uses his left arm to turn your client away.



This Office does not reach a conclusion as to whether your client intended to reach for the officer's weapon. However, that line of inquiry is not legally determinative for the purposes of our review. The legally relevant fact is whether, at the time he struck your client, the officer subjectively thought your client was reaching for his gun. In his police report after the incident, the officer wrote that your client:

reached his left arm up and grabbed my shirt in the area of my chest.... I felt [your client] attempting to push me off of him and sit up in an attempt to get up to his feet. [Your client's] left hand then slid to my right hip in close proximity to my firearm and I could feel [your client] pulling the bottom of my sweatshirt with his left hand in the area of my firearm. ... I became worried about my weapon retention.

The second portion of the inquiry regarding the actions of the officer requires a legal assessment as to whether he was reckless or negligent in forming such belief. Video surveillance demonstrates that the officer paused for a moment upon arrival. In that moment, he saw another officer struggling with your client on the ground, attempting to take him into custody. At the moment the officer engaged with your client, the purpose was to assist in gaining control of your client to effectuate his arrest.

Under Delaware law, a subject is required to comply with the orders of law enforcement, even if the subject believes the arrest is improper or illegal. Just prior to the specific act of striking your client in the video, the slowed version of Witness 1's video recording shows your client's hand appear to reach up and toward the officer's firearm. Firearms can be discharged in a fraction of a second; as such, the officer was not under a duty to ascertain the intent of your client at the moment he felt your client's hand near his firearm.

Based upon a totality of the evidence,⁵ assessed under the applicable law, this Office has concluded that the use of force upon your client does not constitute a criminal offense, with the requisite ability to prove all of the elements beyond a reasonable doubt, under the laws of the State of Delaware.

Best regards,



Sonia Augusthy

⁵ While the social media video provides a significant basis of this finding, it is notable that this Office also found inconsistencies in your client's formal statement to DDOJ investigators and his statements on-scene.