

IN THE SUPERIOR COURT OF THE STATE OF DELAWARE

STATE OF DELAWARE,)
)
 v.) ID. No. 1902001014
)
 YAHIM HARRIS,)
)
 Defendant.)

STATE’S NOTICE OF ENTRY OF NOLLE PROSEQUI

COMES NOW, the State of Delaware, by and through its attorney, Timothy Maguire, Deputy Attorney General, and submits a *nolle prosequi* (Reason Code 11 – Police Problem) for the following reasons:

FACTS AND BACKGROUND

A. The Carjacking and Departmental Shooting

On February 2, 2019, at approximately 6:28 a.m., a 911 caller reported an armed carjacking. The caller described warming up her white Toyota Camry when two masked perpetrators wearing black hoods pushed her as she exited and stole her car. The caller said one of the carjackers had a gun. The caller followed the carjackers in a separate vehicle and provided real-time updates to the 911 operator for the location of the Camry; Wilmington Police Department (“WPD”) officers quickly located the Camry using this information. The driver of the Camry pulled over to the curb on West 27th Street and stopped the vehicle.

Corporal James MacColl (“Corporal MacColl”) of WPD pulled his patrol car behind the Camry and activated his emergency lights. The 911 caller parked her car behind Corporal MacColl’s patrol car. Corporal MacColl exited his patrol vehicle and commanded the occupants to stay inside the vehicle. Yahim Harris (“Harris”) exited the driver’s side of the Camry and ran northbound across West 27th Street. As Harris ran, he looked back at Corporal MacColl and extended his arm towards Corporal MacColl while holding an object in his hand. Corporal MacColl discharged his service weapon at Harris, striking Harris twice in the upper left torso. Harris continued to run, eventually falling to the ground in an alleyway adjacent to West 27th Street.

Police immediately responded to Harris in the alleyway. Police observed a cell phone and two spent projectiles on the ground next to Harris. According to Corporal MacColl, Harris asked Corporal MacColl why Corporal MacColl had shot him because he was no longer in possession of the gun. Members of the Forensic Services Unit (“FSU”) responded to the alleyway and collected three spent projectiles – two in the area where police located Harris and another on the sidewalk of West 27th Street – and four spent shell casings on West 27th Street near Corporal MacColl’s patrol vehicle.

Meanwhile, as Harris fled, the second perpetrator (a juvenile) exited the vehicle and crouched down next to the Camry. Police took the juvenile into

custody and located a loaded .38 caliber Ruger LCR revolver under the vehicle next to the juvenile perpetrator.¹

Later in a recorded interview, while being treated for his injuries, Harris correctly described the .38 caliber revolver recovered next to the juvenile perpetrator.

B. The Ballistics Evidence

On February 2, 2019, Master Corporal Gerald Nagowski of WPD collected Corporal MacColl's departmental issued firearm and packaged it for transfer to the Delaware State Police Forensic Firearm Services Unit ("DSP FFSU"). On February 8, 2019, WPD transported the firearm, a .40 caliber Smith and Wesson semiautomatic pistol, to the DSP FFSU for examination. WPD also transported to DSP FFSU the three projectiles and four casings collected by WPD FSU at the scene, believed to have been fired from Corporal MacColl's weapon.²

On February 18, 2019, DSP FFSU completed ballistics testing and authored a report. The report concluded the three projectiles had been fired from the same firearm. However, the three projectiles were not consistent with having been fired

¹ A Family Court Judge adjudicated the juvenile perpetrator delinquent of Possession of a Firearm by a Prohibited Juvenile.

² While there was a second firearm on scene, located on the ground outside the passenger's side door of the vehicle driven by the defendant, there has been no allegation in this case that the defendant or anyone other than Corporal MacColl fired any rounds on February 2, 2019.

from the .40 Caliber Smith and Wesson Corporal MacColl presented to WPD as the firearm he had used to shoot Yahim Harris. Specifically, the duty weapon presented by Corporal MacColl had a barrel with five lands and five grooves at the time of testing.³ In examining the projectiles recovered in this case, DSP FFSU determined the projectiles recovered from the scene were fired from a barrel with six lands and six grooves and thus could not have been fired from the weapon MacColl turned over to WPD following the shooting.⁴

Additionally, on February 19, 2019, WPD Detective and Chief Investigating Officer Thomas Curley returned to the scene of the shooting and located a projectile WPD FSU missed during its initial examination of the scene.⁵ WPD turned over this projectile to DSP FFSU on February 22, 2019 for examination. Again, this projectile was compared to the .40 caliber Smith and Wesson Corporal MacColl relinquished to WPD. Examiners determined this projectile was fired

³ This five lands and five grooves barrel is consistent with WPD's standard issue barrel.

⁴ While three projectiles were examined, only two were in a condition for the examiner to determine the specifics of the lands and grooves. The third projectile was examined, and it was determined this projectile was not fired from this .40 caliber barrel yet examiners could not determine the number of the lands and grooves on the projectile.

⁵ Detective Thomas Curley is the lead investigator of the initial carjacking and subsequent related crimes of Harris. Detective Curley played no part in the WPD Office of Professional Standards investigation of Corporal MacColl.

from the same firearm as the other two six lands and six grooves projectiles previously examined. Like the other two projectiles, DSP FFSU determined the projectile was not fired from the .40 caliber Smith and Wesson barrel Corporal MacColl presented to WPD.

The Office of Civil Rights and Public Trust, a Division of the Delaware Office of the Attorney General tasked with investigating the legality of Corporal MacColl's departmental shooting, discussed the ballistics discrepancy in its November 4, 2019 Use of Force Report.⁶ Although the report concluded Corporal MacColl's use of deadly force was justified,⁷ it also noted:

While this expert report is inconsistent with the undisputed fact that Corporal MacColl fired his service weapon, the report speaks for itself. As there is no factual dispute that Corporal MacColl fired his weapon, this does not alter the legal conclusion.⁸

In "speaking for itself," it is reasonable to conclude the discrepancy between the projectiles and Corporal MacColl's WPD issued firearm is that the barrel was switched after the February 2, 2019 shooting and prior to the Delaware State Police examination. The DDOJ's OCRPT report was the first public document to reveal the ballistics discrepancy.

⁶ <https://attorneygeneral.delaware.gov/wp-content/uploads/sites/50/2019/11/Harris-Use-of-Force-Report-11-4-19.pdf>

⁷ *Id.* at 11.

⁸ *Id.* at 9.

C. Corporal MacColl's Statements

Corporal MacColl was interviewed multiple times about the shooting. Over the course of several months, Corporal MacColl contradicted himself about whether he ever changed the barrel of the service weapon he used when he fired at Harris.

On February 26, 2020, the Delaware Department of Justice (“DDOJ”) learned through a source that Corporal MacColl completed a recent interview. To that point, Detective Curley’s interviews had been disclosed, but two other interviews had not been disclosed to the prosecutors out of reasonable concerns related to the Law Enforcement Officers’ Bill of Rights.⁹ DDOJ immediately asked WPD whether an interview had occurred and inquired about its substance. Upon learning an interview had taken place at some point, DDOJ subpoenaed a copy of the interview. On February 28, 2020, WPD provided a copy of Corporal MacColl’s interviews—the last of which occurred on January 27, 2020. During the January 27, 2020 interview, Corporal MacColl also provided the interviewer with a barrel, which he claimed was his original WPD-issued barrel.¹⁰

⁹ DDOJ has Constitutional obligations to disclose exculpatory and impeachable statements; those duties trump the statutory confidentiality rights of internal investigations.

¹⁰ According to WPD, the Smith and Wesson firearm does not have a serial number on the barrel, thus the DDOJ is unable to determine if this is indeed the WPD-issued barrel.

During the January 27, 2020 interview, Corporal MacColl admitted to switching WPD's standard issue barrel with an aftermarket barrel in the summer of 2017, without WPD's permission, to improve his firing accuracy. When asked whether he replaced the aftermarket barrel on his gun *after* the shooting on February 2, 2019, Corporal MacColl stated he had not. Corporal MacColl presented the interviewer with what he claimed was the original WPD-issued barrel, which he claimed to have kept after replacing it in the summer of 2017. Corporal MacColl stated after the February 2, 2019 shooting he had not taken the barrel out or changed it.

When asked about his whereabouts on February 2, 2019 following the shooting Corporal MacColl described returning to WPD and recalled using the restroom two times, unsupervised, while still in possession of the firearm used in the shooting. On one occasion Corporal MacColl recalled putting the firearm and his duty belt in his locker while he used the restroom, then putting his belt and firearm back on when he finished. Corporal MacColl provided no explanation as to how the barrel could have been switched between when he fired it and when it was tested.¹¹

¹¹ The Criminal Division understands OCRPT has reopened its investigation into Corporal MacColl's conduct.

D. Corporal MacColl's lack of candor during this investigation prevents further prosecution of this matter.

The DDOJ does not know what happened to Corporal MacColl's firearm after the shooting on February 2, 2019 and prior to the DSP FFSU examination. Under normal circumstances, the shooting of Yahim Harris by Corporal MacColl would have little relevance, if any, at trial; Harris' alleged crimes were already complete. However, Corporal MacColl's recent disclosure that he had previously switched his gun barrel and his total lack of candor during the pendency of the investigation calls into question his credibility as a witness.

The DDOJ did not learn about Corporal MacColl's subsequent interviews and lack of candor until February 28, 2020. Since then, the DDOJ assessed merits of moving forward with prosecution without the testimony of Corporal MacColl because we cannot and will not present a witness with such a clear lack of credibility.

In a criminal matter, the "burden is on the State to present evidence that the defendant is guilty beyond a reasonable doubt."¹² "The highest standard, proof beyond a reasonable doubt, is primarily applied in criminal cases."¹³ As a result of

¹² *Benton v. State*, 711 A.2d 792, 797 (Del. 1998).

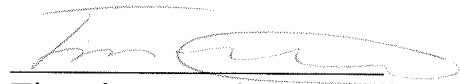
¹³ 32A C.J.S. Evidence § 1626.

Corporal MacColl's lack of credibility, the DDOJ cannot meet its high burden of proof at trial.

CONCLUSION

Based on the foregoing, the DDOJ is entering a *nolle prosequi*, Reason Code 11 – Police Problem on this case.

Respectfully submitted,



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Date: March 3, 2020