

HALL OF JUSTICE
330 WEST BROADWAY
SAN DIEGO, CA 92101
(619) 531-4040
SanDiegoDA.com

OFFICE OF
THE DISTRICT ATTORNEY
COUNTY OF SAN DIEGO

DWAIN D. WOODLEY
ASSISTANT DISTRICT ATTORNEY

SUMMER STEPHAN
DISTRICT ATTORNEY

October 4, 2021

Chief of Police David Nisleit
San Diego Police Department
1401 Broadway
San Diego, CA 92101

Re: Non-Fatal shooting of Stephen Wilson on February 25, 2021 by San Diego Police Department Officer Kelly Besker; SDPD Case No. 21-009646; DA Special Operations Case No. 21-022PS; Deputy District Attorney assigned: Samira Seidu

Dear Chief Nisleit:

We have reviewed the reports and materials compiled by the San Diego Police Department concerning the circumstances leading to the non-fatal shooting of Stephen Wilson by Officer Kelly Besker on February 25, 2021. A District Attorney Investigator responded to the scene and was briefed by your detectives. This case was submitted to the District Attorney's Office for review on June 17, 2021.

Summary

On February 25, 2021 at about 7:08 pm, a pedestrian flagged down Officer Besker regarding a male armed with a knife at Third Avenue and G Street. The male was creating a disturbance and causing pedestrians to walk in the street. The subject, described as an older White male and possibly homeless, was later identified as Stephen Wilson. Besker arrived on scene and saw Wilson speaking to occupants of a red vehicle. There was a shopping cart nearby with trash scattered around it. As Besker exited his patrol vehicle, Wilson walked away from the red vehicle. Besker identified himself and informed Wilson he was there because someone reported a person with a knife acting strangely. Wilson denied having a knife and Besker did not see a knife on him at that time. Wilson told Besker the knife was possibly in the shopping cart.

LE1 and LE2 arrived to provide cover. Besker planned to detain and handcuff Wilson in order to investigate whether he had a knife. As Besker stepped towards him, Wilson said, "back off" and moved away towards the shopping cart. Wilson turned to his right and Besker saw a knife sticking out of Wilson's left rear shorts pocket. Besker told Wilson not to reach for the knife. Wilson removed the knife from his pocket as Besker simultaneously drew his weapon from his holster. Wilson dropped the knife to the ground as Besker fired three rounds at him. Wilson was struck by the rounds and fell to the ground. LE1 and LE2 provided first aid and Wilson was transported to UCSD Hospital.

Persons Involved

Wilson is a 69-year-old resident of San Diego. Besker has been employed by the San Diego Police Department for 26 years.

Law Enforcement Witness One (LE1)

LE1 was partnered with LE2. They responded to the area of Third Avenue and G Street to cover Besker after he was flagged down regarding an individual with a knife. When they arrived, Besker was out of his vehicle standing on the southeast corner of the intersection and had just relayed the individual was not holding a knife, but was holding food. Besker was six to ten feet away from Wilson when LE1 and LE2 approached Wilson. There was a lot of property, trash, and a shopping cart in the area. Wilson was yelling something at Besker. Besker was giving Wilson commands but LE1 does not remember what the commands were. Wilson kept backing away from Besker.

LE1 was going to go hands-on with Wilson because Besker said Wilson was only holding food. LE1 believes he was approximately three or four feet away from Wilson when he heard Besker yell, "don't grab the knife." He saw Wilson reach behind his left side with his left hand. LE1 did not see the knife. He could not see Wilson's left rear pocket from his position. Within seconds of giving the command, Besker shot Wilson. Wilson went down to the ground. LE1 heard three shots LE1 broadcast shots were fired. LE1 assessed Wilson's injuries, grabbed his first aid kit from his patrol car and applied gauze to the wounds he found. During the incident, LE1's body worn camera fell off. From the time Besker said "drop the knife," until he fired his gun was no longer than one second. The shooting happened about five seconds after they arrived on scene. LE1 said it all happened very quick.

Law Enforcement Witness Two (LE2)

LE2 was partnered with LE1. They heard Besker had been flagged down while on a stop. The call was of a White male brandishing a knife and people had to go into the street to get around him. When they arrived on scene, Besker was talking to an older White male (Wilson) who was eating food while standing alongside a wrought iron fence. There was trash and a shopping cart laying on the ground. LE2 asked Wilson, "who made this mess?" Wilson said, "it's not me," and immediately started backing away from Besker and LE2. LE2 was standing behind Besker and was coming around to his left side. Wilson was about six feet ahead and to the left. Besker blocked his view of Wilson.

LE2 heard Besker say, "Don't touch the knife," or "put the knife down." LE2 saw Besker draw his firearm and give another command. Wilson mumbled something and Besker shot Wilson three times. LE1 notified dispatch shots were fired. The officers immediately addressed where the knife was and put Wilson in the recovery position. LE2 saw the knife after the shooting. It was a large kitchen knife with a black handle and a seven-inch stainless-steel blade. The incident happened very fast.

Statement of Civilian Witness One (CWI)

CW1 was standing on the sidewalk of the 300 block of G Street across the street from where the incident occurred. He described seeing the transient male (Wilson) turn towards the officers and

take one, one and-a-half, or maybe two steps, then the officer opened fire. CW1 did not see anything in Wilson's hand. CW1 estimated he heard three shots. CW1 did not hear a verbal exchange between the officers and Wilson. CW1 estimated the officers were about six feet away from Wilson. CW1 saw an earlier incident involving Wilson where his shopping cart tipped over twice. He picked it up but after the second time, Wilson got agitated and started throwing trash around.

Statement of Civilian Witness Two (CW2)

CW2 was in the area during the shooting. He initially told a patrol officer he was on the phone and did not see anything. He heard the gunshots and ducked down. During a follow up interview with detectives, CW2 clarified and confirmed he knew Wilson. CW2 said "You guys should have whooped his ass; he didn't have to die." CW2 further stated Wilson is "insane." CW2 was informed Wilson survived the shooting. CW2 responded, "Thank God. People like him need help." CW2 referred to Wilson as a "crazy little brother," and he needs to be in a facility. CW2 claimed he has beaten up Wilson on numerous occasions. CW2 broke a finger when he knocked Wilson out a few months ago. Wilson took a lit cigarette out of CW2's mouth and they got into a physical fight over it. CW2 said Wilson is always on the corner of Third Avenue and G Street. CW2 has seen Wilson threaten people every single day and referred to him as an "asshole." He does not believe Wilson is okay in the head, he's crazy and always starts problems with everybody. Wilson makes weapons, "He'll break a beer bottle and stab you with it..." CW2 feels bad for Wilson because he doesn't have any medication or anyone to take care of him and believes Wilson is a victim. Wilson has been in the area for a few months. CW2 didn't believe Wilson deserved to be shot. He did not see what happened because he was on his phone with his girlfriend. CW2 said the officers were threatened and "if you didn't shoot him, that [expletive] would've stabbed you." CW2 also stated the officers have to learn how to fight and "should have just whooped his ass."

Statement of Civilian Witness Three (CW3)

CW3 had just come out of the "Smokinn Lounge" and was standing on the northeast corner of Third Avenue and G Street smoking a cigarette and looking directly at the scene. He saw the trash on the sidewalk. Next thing he knew he saw a cop with a weapon which he first thought was a Taser. He then heard three "pops." He saw the officer that was shooting and then two other officers. When asked follow-up questions, CW3 elaborated that he first saw the male walking away from the officer. He walked east about five or seven steps away from the officer. Wilson turned around and started to face the officer again. He started to approach the officer and was about four steps from the officer when another officer came around the side of Wilson. CW3 saw an officer with a weapon and that's when he heard three shots. CW3 didn't hear any voices or any verbal commands, he just saw movement. There were a lot of other noises going on as well which were distracting. CW3 said he suffers from hearing loss.

Statement of Civilian Witness Four (CW4)

CW4 was walking from the parking structure located north and across from the scene. CW4 saw a "transient" (Wilson) standing in the middle of trash. CW4 was wondering what was going on. He saw the transient "do this" (demonstrated to the officer but not explained on audio interview) while standing by a grocery cart. He then saw an officer come in with a gun. He heard three

shots. He could, "smell the sulfur," after the shooting. He saw blood on the left side of Wilson. CW4 did not see anything in Wilson's hands at the time. He did not hear the officer give any commands prior to the shooting. He heard Wilson speaking what he described as gibberish, but he could not tell what he was saying. Additional officers responded.

Statement of Civilian Witness Five (CW5)

CW5 could hear a gentleman (Wilson) screaming crude things on the corner of Sixth and G. CW5 believed Wilson must have been fighting with someone who walked by and assumed it was another homeless person because that happens a lot in this area. Wilson kept saying, "Get out of my spot! This is my space!" Wilson began throwing bottles and glass. CW5 looked out from her balcony and saw him dropping the bottles "straight up from the ground." She went back in but then saw police lights. She went to look out of her window.

A police truck pulled up at the corner, lowered the passenger window and said something similar to, "Hey, what's going on? What are you doing?" Wilson was really loud and was screaming, dropping bottles, and had pushed his cart over. A police car pulled up behind the police truck. There were three or four officers there. Wilson was standing in trash, holding what looked like a white bowl of noodles and a spoon and was eating. The officer told him, "put that down." Wilson was taking a couple steps back while he was eating. The officer in front of him was talking to him and was probably a foot or two away. There was another officer right behind him. There was another officer to Wilson's left. Right after Wilson did not drop his food and took a few steps back, CW5 heard three gunshots. All CW5 heard was "put that down." There was nothing about drawing a weapon or saying, "I have a gun." CW5 continued, "he just shot him in his own trash, while he was backing up."

CW5 stated, "the guy obviously was probably on drugs." Wilson was screaming and she knew it was a noise complaint. Wilson was not being aggressive and was walking away from the officer, facing him. The officer was walking forward, took one step, and shot him three times. The officer was four or five feet from Wilson. Wilson did not have anything in his hands besides his food and utensil. Besides "put that down," CW5 did not hear any "talking down," or trying to calm Wilson down. The incident went from, "drop that" which did not happen, to Wilson being shot three times.

Statement of Civilian Witness Six (CW6)

CW6 was with CW5 in the same residence. CW6 only saw the events leading up to the shooting. He first saw Wilson when he got home around 4:30-5:00 pm. Wilson was yelling and being disruptive. He later heard a loud noise and went out to his balcony to see what happened and saw that Wilson had flipped over his cart. Every once in a while, he would hear something and go back out to see what happened. Everyone walking by avoided Wilson and tried to walk a circle around him. CW6 said he could tell that people did not feel safe because people were walking "like 10 feet around him." There was another person sitting out there with Wilson and it did not seem like they had any problems. CW6 has seen Wilson in the past but has never seen him as "belligerent" or as bad as he was on this day. CW6 was back inside the apartment with CW5 when they saw the patrol car lights. He and CW5 went back outside to look and heard the officer ask, "hey how are you doing? Is this all your stuff?" Wilson responded, "fuck you, fuck you."

CW6 went back inside the home. After 20 to 30 seconds later he heard shots. He did not see a weapon on Wilson.

Statement of Civilian Witness Seven (CW7)

CW7 is a security officer. During his initial statement, CW7 told officers that he was doing his regular guard patrol when he saw two police officers contacting a homeless person (Wilson). CW7 believed Wilson was the same person the Downtown Partnership bike patrol asked to leave earlier in the day. CW7 heard yelling but could not understand what was being said. CW7 saw Wilson reach towards his waistband and take “something” out but he was not sure what it was. CW7 then heard two or three gunshots. CW7 did not recall if he heard the police officers say anything to Wilson.

During a follow up interview with investigating detectives, CW7 stated he was monitoring surveillance cameras when he saw red and blue flashing police lights. He went to check it out. He heard yelling and shouting between the police and Wilson. He could not hear what was being said. Wilson and the officers were five or six feet away from each other. He thinks Wilson had a knife but is not sure. He believes it was a knife because he could see a reflection from Wilson’s hand area. There was a pick-up truck blocking his view so he could not see how Wilson was holding the knife in his hand. The next thing he heard was two or three gunshots. CW7 said before the shots, he saw Wilson with both of his fists clenched at his chest like he was about to charge the officer.

Statement of Civilian Witness Eight (CW8)

CW8 did not see the shooting. She called police earlier in the day regarding Wilson. CW8 was looking for a place to park when she saw Wilson surrounded by a large amount of property at Third Avenue and G Street. She noticed Wilson because he was very angry. He had a red suitcase and was hitting it with a tool she believed was a tire iron. People were trying to walk around Wilson. CW8 saw Wilson cursing at a transient female. She also saw him hit the rear window of an older red car with his hand. CW8 decided to call 911 at 1846 hours because she believed Wilson was angry and could be dangerous because people had to walk around all of his property. CW8 took a video of this and later provided it to SDPD.

Statement of Civilian Witness Nine (CW9)

CW9 did not see the shooting. He had two contacts with Wilson earlier in the day. CW9 is the safety lead with the Downtown Partnership. They received a complaint from a local business that a White male (Wilson) entered the business and threatened employees. Wilson was “crazy” and CW9 did not know if he was drunk. Wilson had a bottle of alcohol with him. They were able to get rid of Wilson who stated, “get the fuck away from me. I’ll fuck you up.” That afternoon, CW9 received another call from the same business that Wilson had returned and was again threatening employees. CW9 and a security guard from another agency located Wilson. Wilson was acting erratically and screaming and yelling at them. CW9 called SDPD but the police never came, and Wilson left the area.

Statement of Civilian Witness Ten (CW10)

CW10 is Wilson's relative. Wilson's brother was a police officer for 19 years. CW10 said Wilson "knows the routine" and that he is not an idiot. He said Wilson is a good man. CW10 explained Wilson changed after the passing of his parents. His sister also died. Wilson blames himself for everything and takes it out on the world. CW10 had not spoken to Wilson in five years. CW10 said "you guys are justified on this." CW10 said, "they have every right to defend themselves, I believe you guys did no wrong here." CW10 hopes this life-threatening experience will straighten Wilson out and make him a humbler person so he can bring him to spend the rest of his life near his family. CW10 is glad to know where Wilson is now.

Statement of Stephen Wilson

Immediately after the shooting Wilson told officers that he didn't "pull" the knife on them, but he was giving it to them. Wilson was formally interviewed at UCSD Hospital on February 26, 2021. Wilson was difficult to understand and at times became agitated. He told officers he remembered the incident "vividly." Wilson said he was eating. Wilson said he didn't want the officer to know he had a knife because they always take his "tools" away. Wilson said the knife was not large; it was a paring knife. He put the knife in his back pocket when he saw the officers coming. He understood the officer asked him why he had a knife because "that's his job." Wilson was backing up when the officer saw the knife. He reached in to give it to the officer. He was going to give the knife to them because they asked for it. Wilson said, "I am innocent." He had the knife out to cut up his food. He received some lasagna from a lady in a beige car. When Wilson was asked about him yelling and hitting cars, he said people are trying to hurt him. Wilson admitted to owning a tire iron and said he swings it around because he is a martial artist. He swings it around to show he means business. Follow up attempts to interview Wilson further were unsuccessful due to his medical condition.

Statement of Officer Besker

Besker reviewed his BWC prior to the interview which took place on March 1, 2021. Besker is currently assigned to the Neighborhood Policing Division (NPD). Besker was conducting a pedestrian stop at Fourth Avenue and G Street when an unidentified male approached him to report a man with a knife (later identified as Wilson) acting strange at the corner of Third Avenue and G Street. The unidentified male stated the person was an older White male, had a knife and the public had to walk out into the street to avoid him. The unidentified male also pointed out a lady who was approaching the male with the knife.

Besker decided to end his contact with the pedestrian to address the possible armed subject and public safety. He notified dispatch. Besker drove to Third Avenue and G Street. He parked on Third Avenue just before G Street and saw Wilson speaking to people in a red vehicle pulled over to the curb. As Besker exited his vehicle, Wilson walked away from the red vehicle. Besker said that he did not see the knife in Wilson's hand at the time and did not see him put it in his shorts pocket. Besker identified himself as SDPD and informed the male he was there because of a report that someone was in possession of a knife and acting strange in the area. Wilson was eating pasta from a small bowl. Wilson informed Besker he did not have a knife, he was hungry and was going to eat his pasta. Besker asked Wilson to put the pasta down. Wilson responded he would not. Besker asked Wilson if he had a knife in his property. Wilson responded that maybe

it was somewhere over by his shopping cart. Besker saw a purple shopping cart on the sidewalk with trash and debris scattered around it. He directed Wilson to step away from the shopping cart. Wilson complied. Besker looked around the area but did not see a knife. He waited for his cover units to arrive before moving in to detain Wilson because it is safer with more officers. He did not want to approach someone who was possibly carrying a weapon by himself because that is not what officers are trained to do.

LE1 and LE2 arrived to provide cover. At that time, Besker decided they needed to take some type of policing action and directed Wilson to put his food down. In his mind, Besker believed they needed to detain and handcuff Wilson to continue to investigate whether there was a weapon involved and if there were witnesses to discuss what happened prior to Besker's arrival. When Besker stepped towards him, Wilson said "no, no, no," and was backing away from him. As Wilson was backing away towards where the shopping cart was located, LE1 moved to the left of Besker, possibly to prevent Wilson from perhaps fleeing. Besker continued walking towards Wilson. When Wilson got to his shopping cart, he turned right, possibly to see if he was going to bump into the shopping cart. At that point, Besker saw a kitchen butcher knife sticking out of Wilson's left rear shorts pocket. Besker had his flashlight in his left hand and was using it to illuminate Wilson. Besker announced Wilson had a knife and told Wilson not to grab it. LE1 was about a foot or one and a half feet away from Wilson, ready to possibly grab an arm to detain him. Wilson grabbed the knife and started to remove it from his shorts pocket. Besker feared for LE1's safety primarily, but also his own safety. Besker removed his weapon from its holster and fired three rounds at Wilson, who fell to the ground. Besker, LE1, and LE2 moved in to assess Wilson.

Wilson asked Besker if he shot him with his taser. Besker, LE1 and LE2 then saw blood coming from Wilson's buttocks area. Wilson asked Besker why he shot him. Besker responded that he told him not to grab the knife. Wilson replied he was going to give Besker the knife. Wilson also stated he was deaf and didn't hear Besker. LE1 told Wilson he was not deaf and had been answering their questions while they were there. As Wilson was being treated, Besker located the knife and took pictures of it with his department-issued cell phone. Medics arrived and took over first aid.

Besker stated he did not consider any other force option because the knife presented a deadly force situation. There was no time for a different option or less lethal options in a lethal situation. A Taser was not an option because of the distance between them. Besker said studies have shown that Tasers at four feet are less effective because the spread fire on the barbs is not great enough to cause a person's body to lock up. He did not give any thought to OC spray for the same reasons. He was in a deadly force situation and could not meet deadly force with less lethal force. Besker also did not back up and take cover because he did not want to leave LE1 in harm's way. There was also nothing to take cover behind except his patrol vehicle which was approximately 20 feet behind him. This created an open-air situation without room for them to take cover. Besker said they give up cover when they have to go hands on and detain someone which puts officers in close proximity with people and it creates a dangerous area and a danger zone. Besker stated there was no reason to go to a less lethal option when Wilson presented a knife and made it a lethal situation.

Investigation

The scene was secured, photographed, and investigated by San Diego Police Department homicide detectives. All detectives' reports, patrol officer reports, crime scene investigators' reports, audio-recorded witness interviews, photographic evidence, 911 calls, surveillance video and Body Worn Camera (BWC) video were reviewed.

Besker was armed with his personal Heckler & Koch Model USP45 .45 caliber semi-automatic pistol. Besker's pistol was received with one cartridge in the chamber and seven in the magazine. The capacity of the magazine is ten cartridges. The total capacity of the pistol with one in the chamber and a full magazine is eleven cartridges. The evidence indicates a maximum of three cartridges could have been fired by this pistol.

Wilson was armed with a Santoku-style knife (pictured below). The knife's blade was silver and approximately five inches with a five-inch black handle.



911 Calls

CW8 called SDPD at 6:46 pm and reported a homeless man was hitting car windows with his hand at Third Avenue and G Street. She described the man as a White male, about 60 years old with medium height and build. He was wearing a black shirt and had a tire iron in his hand. She described him as being really angry and he had a lot of stuff around him.

CW9 called SDPD at 2:06 pm and reported a very aggressive transient going inside a business and threatening people. Wilson can be heard yelling in the background.

Another security officer with the Downtown Partnership called SDPD at 2:42 pm to report a White male transient wearing a black shirt and grey shorts blocking the crosswalk at Third and G with his shopping carts. The caller confirmed it was the same male that CW9 called about earlier.

Video Evidence

Golden West Hotel

740 Fourth Avenue

There were three camera angles that covered the southeast corner of G Street and Third Avenue. The camera angles were a distance away from the scene and did not have a clear view of the incident.

Market Street Square Apartments

606 Third Avenue

The videos provided were no longer available to view. Per the SDPD reports, the camera angle covered the intersection of Third Avenue and G Street, but the video footage was dark and pixelated, and further blocked by the positioning of the patrol cars and the flashing red and blue lights. One of the responding patrol officers also viewed the video at the apartment complex before it was downloaded. This was captured on his BWC. As they reviewed the surveillance video, the officer and the employee assisting him had a discussion about the incident not being captured.

Phone Video from CW8

CW8 provided video she took earlier in the day before she called 911 to report on Wilson's behavior. She was not present when the shooting occurred. The video is dark and blurry but shows what appears to be a male bending and sorting through items scattered on the ground.

Body Worn Camera (BWC)

Besker's BWC captured his interaction with the unidentified reporting party. The person directed Besker's attention to a "dude" on the corner with a kitchen knife acting crazy. The reporting party pointed to the area where the man with the knife was and alerted Besker to a woman walking in that direction. He described that male with the knife as an old White guy sitting on the corner.

Besker got back in his vehicle and notified dispatch he "just got flagged regarding an older White male at the corner of maybe Third Avenue and G acting a little crazy and in possession of a knife. Pedestrians are going out in the street to get past him. Will be going out in that direction and checking." Besker arrived at Third Avenue and G Street and found Wilson standing next to the front passenger window of a red car stopped in the street. Wilson was holding a kitchen knife in his left hand and a white bowl and a utensil in his right hand. The knife blade reflected from the lights on Besker's truck. Wilson put the knife in his back left shorts pocket as Besker exited his vehicle. The red car next to Wilson pulled away. Besker did not react as if he had seen the knife in Wilson's hand or him placing it in his left rear shorts pocket prior to contacting him.

Besker asked Wilson, "How you doing?" and identified himself as San Diego Police. Wilson began eating out of the white bowl he had in his right hand. Wilson did not respond to Besker's initial questions. Besker shined his flashlight on Wilson. He approached him and said, "Sir." Wilson responded, "What? What? I'm hungry." Wilson was slightly hunched over as he walked around. Besker informed him, "I got some reports of you acting a little strange over here and in

possession of a knife.” Wilson responded, “I am strange. I don’t have a knife.” Besker told him that it was good he didn’t. Wilson responded, “Do I look like I have a knife?” Wilson said he was hungry and continued to eat. Besker asked him to put the food down. Wilson replied, “No.” Besker asked Wilson if he had a knife in his property. Wilson responded, “maybe in the cart.” Besker asked him to stay away from the cart. Wilson walked over near a wrought iron fence and said he didn’t have a knife. Besker moved over towards Wilson’s property scattered on the sidewalk and looked at the property using his flashlight. Besker informed dispatch Wilson did not appear to be armed and had food in his hand.

Besker moved towards Wilson with his flashlight focused on him and told him to put the food down. Wilson told him, “back off, I’m eating.” Wilson backed along the wrought iron fence. LE1 and LE2 had arrived on scene and were to Besker’s left. They spoke to him about the property all over the ground. Wilson denied it was his mess. He continued to back up and turned to his right exposing his back left shorts pocket to Besker. Besker saw the knife and said, “you’ve got a knife in your back pocket.” Wilson reached with his left hand back and pulled the knife out as Besker was telling him “do not grab the knife.” Wilson dropped the knife to the ground while Besker simultaneously drew his firearm and fired three shots striking Wilson. There is no sound of the knife hitting the ground prior to shots being heard.

Wilson fell to the ground and yelled, “Jesus Christ, I didn’t...Holy fuck, oh my God!” LE1 was approximately a foot or two away from Wilson when the shots were fired. Wilson asked him if it was a Taser gun and said, “I didn’t pull it on you. I didn’t hear you, Jesus Christ. Did you shoot me?” LE2 and LE1 are seen putting on gloves. Besker continued to shine his flashlight on Wilson. Besker requested medics. LE1 and LE2 checked Wilson for the knife. Besker told them Wilson had thrown it on the ground. Blood can be seen on the buttocks area of Wilson’s shorts and on the ground beneath him. Besker asked Wilson his name. Wilson identified himself as “Stephen Oren Wilson.” Wilson asked Besker, “Why did you shoot me?” Besker replied, “Because I told you not to grab the knife out of the back pocket.” Wilson replied, “I was giving it to you, you fucking...” Besker stated, “I told you not to grab it.” Wilson replied, “I didn’t hear you. I’m deaf motherfucker.” LE1 told him, “You can hear us talking to you so you’re not deaf.” LE1, LE2 and another officer provided medical aid to Wilson. Besker provided a safety statement. Medics arrived on scene and provided aid.

LE1’s BWC did not have audio for much of the video. The video showed him exiting his patrol car and walking around to where Besker and LE2 were. Wilson is standing slightly hunched over, holding a white bowl in his right hand and is looking at Besker. LE1 starts putting on a pair of gloves and approaches Wilson. Wilson then falls down onto his back in front of LE1. The angle of the camera is such that it does not capture Wilson pulling out the knife. It also does not have the audio of the events leading up to the shooting. The audio comes on as they are providing first aid to Wilson. The video is consistent with LE1’s statement.

LE2’s BWC showed him exiting the patrol car and walking over to Besker and Wilson. The audio starts at this point. Wilson is heard saying “back up.” LE2 asked Wilson why he made such a mess. Wilson responded, “it’s not my mess.” LE2 was standing behind Besker and slightly to the left. LE1 was in front and to the left of Besker. Besker stated “...knife in back

pocket.” LE1 was walking towards Wilson while putting gloves on. He does not react to Besker’s statement about the knife. Besker removed his handgun from his holster and said, “don’t grab that knife.” LE1 continues to walk towards Wilson while putting gloves on, again not reacting to Besker’s statement. Three gunshots follow. The sound of the knife hitting the pavement is not heard. LE1 puts his hand on his firearm at that point but does not draw his weapon. Wilson yelled, “Jesus Christ, I didn’t...Holy fuck...” Radio traffic of “shots fired” is heard. The remainder of the video is consistent with Besker and LE1’s BWC and LE2’s statement.

Injuries and Toxicology

Wilson was transported to UC San Diego Hospital. He sustained three gunshot wounds, one to the left lower groin area, one to the left buttock, and one to the left thigh. Wilson’s blood was drawn at the hospital. Wilson’s drug screen was negative with the exception of “Benzdiazcl” (benzodiazepines) which were “pending confirmation” and possibly alcohol. The records showed Wilson’s blood alcohol level at 79 mg/dl, but also stated “no results found” for alcohol. The discrepancy was not explained in the records.

Legal Standards of Criminal Liability

Penal Code section 835a(c) sets forth the standard to evaluate a peace officer’s use of deadly force and the circumstances upon which an officer may use such force. The law provides that “a peace officer is justified in using deadly force upon another person only when the officer reasonably believes, based on the totality of circumstances, that such force is necessary to defend against an imminent threat of death or serious bodily injury to the officer or to another person.” Penal Code section 835a(c)(1)(A).

The statute provides definitions for “deadly force,” “imminent” and the “totality of circumstances” in Penal Code section 835a(e)(1) – (3). “Deadly force” means any use of force that creates a substantial risk of causing death or serious bodily injury, including, but not limited to, the discharge of a firearm. Penal Code section 835a(e)(1).

“A threat of death or serious bodily injury is “imminent” when based on the totality of the circumstances, a reasonable officer in the same situation would believe that a person has the present ability, opportunity, and apparent intent to immediately cause death or serious bodily injury to the peace officer or another person.” Penal Code section 835a(e)(2). An imminent harm is not merely a fear of future harm, no matter how great the fear and no matter how great the likelihood of the harm, but is one that, from appearances, must be instantly confronted and addressed. Penal Code section 835a(e)(2).

“Totality of the circumstances” means all facts known to the peace officer at the time, including the conduct of the officer and the subject leading up to the use of deadly force.” Penal Code section 835a(e)(3). In determining whether deadly force is necessary, officers shall evaluate each situation in light of the particular circumstances of each case, and shall use other available resources and techniques, if reasonably safe and feasible to an objectively reasonable officer. Penal Code section 835a(2). The decision by a peace officer to use force shall be evaluated from the perspective of a reasonable officer in the same situation, based on the totality of the

circumstances known to or perceived by the officer at the time, rather than with the benefit of hindsight. The totality of circumstances shall account for occasions when officers may be forced to make quick judgments about using force. Penal Code section 835a(4).

“A peace officer who makes or attempts to make an arrest need not retreat or desist from their efforts because of resistance or threatened resistance of the person being arrested. A peace officer shall not be deemed an aggressor or lose the right of self-defense by the use of objectively reasonable force in compliance with subdivisions (b) and (c) to effect the arrest or prevent escape or overcome resistance. For purposes of this section “retreat” does not mean tactical repositioning or other de-escalation tactics.” Penal Code section 835a(d). Jurors are instructed in evaluating a claim of self-defense that where a person’s beliefs about imminent danger are reasonable, the danger does not need to have actually existed. CALCRIM 3470.

Conclusion

Besker had just been notified that Wilson was armed with a knife and was acting strangely. When Besker contacted him, Wilson was agitated. Besker explained why he was there and asked Wilson if he had a knife. Wilson denied possessing a knife. Besker did not see a knife on Wilson but had been advised by a concerned pedestrian that Wilson was armed, and people were having to walk into the street to avoid him. Besker looked around the area for the knife, including in Wilson’s shopping cart. He did not see a knife. Besker waited until his cover units, LE1 and LE2, arrived before attempting to detain Wilson to investigate the incident further. As the officers moved in to detain Wilson, he told them to “back off.” He then turned his body and Besker saw a large knife sticking out of Wilson’s left rear shorts pocket. When Besker saw the knife, he immediately alerted to it and told Wilson not to touch it. Instead, Wilson reached back and pulled the knife out. LE1 was walking towards Wilson at the time and was approximately a foot or foot and a half away from him. Besker was about four feet away from Wilson. Fearing for LE1’s and his own safety, Besker shot Wilson.

In reviewing the circumstances, Besker’s actions were reasonable based on the circumstances known and perceived by him at the time of the shooting. With the benefit of the BWC video and hindsight, we know Wilson dropped the knife to the ground after pulling it out of his shorts pocket at the same time Besker drew his firearm and shot. We do not hear the knife hitting the ground before shots are fired. Besker reacted quickly to what he perceived to be a threat at the time. Wilson reached for and removed the knife from his pocket while standing within feet of the officers. Wilson had multiple opportunities to tell Besker that he still had possession of the knife in his shorts pocket. Instead, Wilson denied having a knife and then suggested the knife was in his shopping cart.

LE1 had just arrived on scene after Besker put out on the radio that Wilson did not have a knife and was just eating food. LE1 was walking towards Wilson, putting his gloves on and did not react to Besker’s statement about the knife in Wilson’s shorts pocket. LE1 continued to move towards Wilson as Wilson reached back and pulled the knife out. LE1 did not reach for his weapon until after shots were fired indicating he was not prepared to defend himself if Wilson planned to use the knife to assault the officers.

When Wilson pulled the knife out of his shorts pocket, Besker was reasonable in his belief at that moment, that Wilson presented an imminent threat of death or serious bodily harm to LE1 and himself because Wilson was reaching for a lengthy kitchen knife which he had denied having on his person. Given all of these circumstances, Besker was reasonable in fearing for his safety and LE1's safety and reasonably believed he had to instantly confront what he perceived was an imminent threat.

Besker stated he believed it was a deadly force situation at that time. He stated he did not feel there was anything else he could have done as there was no time to revert to less lethal options in a lethal situation. Besker said there was no other option given the close proximity that everyone was in. He did not feel a taser would have been effective at four feet and it was not the appropriate force option in a deadly force situation. He did not believe he could use OC spray for the same reasons. When Wilson pulled the knife out of his shorts pocket after repeatedly denying that he had a weapon, Besker had to make a quick judgement regarding the use of force. In Besker's judgement, he had to use lethal force to confront the deadly threat presented by the knife.

We viewed the totality of the circumstances from the perspective of a reasonable officer in the same situation. Besker at that time, had a report of Wilson acting "crazy" while in possession of a knife. When contacted, Wilson was agitated, and denied having a knife. He then pulled the knife out when ordered not to touch it. LE1 was less than two feet away from Wilson. Besker's belief that Wilson presented an imminent threat of death or serious bodily harm was not unreasonable. Besker therefore bears no state criminal liability for his actions. A copy of this letter, along with the materials submitted for our review, will be retained for our files.

Sincerely,



SUMMER STEPHAN
District Attorney

SS:gm
cc: Captain Richard Freedman