



COPY

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District Attorney

OFFICE OF THE DISTRICT ATTORNEY
TENTH JUDICIAL DISTRICT, COLORADO

September 13, 2012

Capt. Brian C. Lyons
Colorado State Patrol
902 Erie Avenue
Pueblo, CO 81001

Re: Decision Letter
Officer-Involved Incidents Concerning
Trooper Rooks and
Troopers Belisle, Betts and Gumke

Dear Captain Lyons:

The investigation and legal analysis regarding the above matters have been completed. My decisions, based on criminal law standards, do not limit administrative action by the Colorado State Patrol where non-criminal issues can be reviewed, or a civil action where less stringent laws, rules, and legal levels of proof apply.

I. Background

Effective January 1, 2006,¹ several law enforcement agencies in Pueblo County entered into a revised "Officer-Involved Incident Protocol of The Tenth Judicial District" (CIT agreement). Among those who are signatories to the CIT agreement include the Colorado State Patrol, the Pueblo Police Department, the Pueblo County Sheriff's Office and the Colorado Bureau of Investigation (CBI). The CIT agreement establishes a team approach to the investigation of certain critical incidents involving peace officers. Such a team provides any participating law enforcement agency requesting assistance proficient

¹ Prior to its effective date of January 1, 2006, the original CIT agreement was revised on December 21, 2005. The revisions are not material or relevant to this inquiry.



investigators to assist in the investigation of a critical incident to enable a “thorough, unbiased investigation of any critical incident involving a law enforcement officer.” Notably, the protocol adopted in the CIT agreement recognizes that “[A]long with an open investigation for public evaluation, the incident investigators and agency managers must understand the legal rights, obligations and authority of the agencies and individuals involved.” *Officer-Involved Incident Protocol of the Tenth Judicial District, Statement of Pueblo County Law Enforcement Agencies.*

II. Statement of Investigation and Facts

A. Triggering the CIT Agreement and Consolidation of Incidents

The Colorado State Patrol invoked the agreement’s investigative protocols for two separate incidents. The investigations for the incidents were conducted by teams of investigators from the Colorado State Patrol, the Pueblo Police Department, the Pueblo County Sheriff’s Department, CBI and the District Attorney’s Office.² Reports were received from agencies involved in the investigations as well as diagrams and photographs of the accident scenes and accident reconstruction data.³

The critical incidents in question have similar fact patterns and are consolidated for the purposes of this decision letter.

B. Facts

1. Trooper David Rooks

On May 28, 2012, at approximately 1:49 a.m., Colorado State Patrol Trooper David Rooks (Rooks) was on patrol in Pueblo County driving a marked patrol cruiser on Highway 50 traveling east toward the intersections of Highway 50 and Highway 45.⁴ Of course, it was dark but road conditions were dry and clear. Pueblo Police dispatched a call, relayed to Colorado State Patrol dispatch and then to state troopers, that a vehicle was traveling over 100 m.p.h. northbound on Pueblo Boulevard (Highway 45) toward the intersection of Highway 50 and Highway 45.

² These were the tenth and eleventh investigations involving the CIT agreement.

³ The CIT agreement provides that “Vehicular collisions ... shall be investigated with the assistance of accident investigation specialists from any of the participating agencies.” *Officer-Involved Incident Protocol of the Tenth Judicial District, Venue Determination*, at page 11.

⁴ Attached is an aerial view of Highway 50 as it intersects Highway 45 and Wildhorse Road. Near the crash location Highway 50 is a four-lane highway divided by a median, with two eastbound lanes for traffic and two westbound lanes for traffic.

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Based on the dispatch, upon arriving at the intersection of Highway 50 and Highway 45, Rooks proceeded southbound on Highway 45. He observed one vehicle northbound on Highway 45 and clocked the vehicle with radar at 94 m.p.h. in a posted 55 m.p.h. zone.

The vehicle, a white SUV, passed Rooks traveling in the opposite direction and appeared to stop at the intersection of Spaulding and Highway 45 (just south of the intersection of Highways 50 and 45). At about that time Rooks turned around his patrol cruiser just south of Spaulding, and activated his visual signals, so that he was heading northbound on Highway 45 with the intent of pulling over the SUV. At the time he turned around the headlights from his patrol cruiser shined on the SUV in such a manner as he observed the driver of the SUV. Rooks then positioned his patrol cruiser directly behind the SUV (at that moment the SUV and Rooks' patrol cruiser were facing northbound on Highway 45 in the right lane).

With his visual signals still activated and his patrol vehicle behind the SUV Rooks "called out the stop" anticipating that the SUV would pull over past the island that is situated north of the Spaulding-Highway 45 intersection. Instead, the SUV "pulled away" past the Spaulding intersection (and the island north of that intersection as noted on the aerial diagram) and began to accelerate and pick up speed. Rooks, realizing that the driver of the vehicle was not going to stop, activated his audible signals and notified dispatch of a pursuit.

The driver of the SUV proceeded through both red light signals at the intersections of Highway 45/Highway 50 eastbound, and Highway 45/ Highway 50 westbound continuing on to Wildhorse Road, travelling northbound on that road at a high rate of speed. Rooks "cleared" the intersections of Highway 45 and Highway 50 (eastbound and westbound) before proceeding through the intersections and on to Wildhorse Road in pursuit. The SUV was ahead of the pursuing patrol cruiser driven by Rooks. Even though Rooks was quite a distance behind the SUV he was within visual contact as he observed that the SUV lost control and rolled multiple times (Rooks saw the headlights of the SUV as it rolled).

In fact, the driver of the SUV made an erratic left turn on Wildhorse Road where the road curves to the left/west, which caused the vehicle to rotate counter-clockwise. The SUV continued northbound and rolled two and one-quarter times, coming to rest on its right side facing south. During the rolling sequence several of the occupants were ejected from the vehicle. Again, the roadway was dry and clear of any noted debris. At the crash location it is evident that the roadway is absent of any hazards or defective portions. And there was no other traffic present.

One of the occupants died at the scene. The driver died later at Parkview Medical Center. The other occupants sustained injuries.

2. Troopers Belisle, Betts, and Gumke

A pursuit by Colorado State Patrol troopers on July 17, 2012, began during an aircraft operation in which a fixed-wing aircraft unit of the Colorado State Patrol with "State Patrol" inscribed on its wings was being utilized to spot traffic violations from the air, including speeding. The aircraft had two pilots on board, Troopers Mark Butaud and Ryan Carlson, who spotted a motorcycle speeding at about 100 m.p.h. in a posted 75 m.p.h. zone on north bound I-25 at mile marker 112.

At approximately 9:35 a.m., the aircraft indicated that the motorcycle was on E. McCulloch Boulevard in Pueblo West and attempting to pass a dump truck, but instead collided with the dump truck at a speed of 97-107 m.p.h. in a posted 45 m.p.h. zone resulting in the driver's death at the scene. The roadway was dry and clear of any noted debris. At the crash location it is evident that the roadway is absent of any hazards or defective portions. And there was no other traffic present.

Trooper Randy Belisle, one of several pursuing troopers on the ground in a marked patrol cruiser, was quite a distance from the motorcycle but within visual contact as he could physically observe the collision. He stated that at one point during the pursuit he was almost successful in stopping the fleeing motorcycle when it was behind his cruiser on I-25 but that the operator of the motorcycle maneuvered the motorcycle in such a manner so as to avoid the boxing technique that Trooper Belisle employed which was designed to slow it down and stop it (the trooper was going back and forth from the outside shoulder to the inside shoulder ahead of the motorcycle trying to slow it down).

According to Trooper Belisle, the aircraft made circling and swooping motions in an attempt to alert the motorcycle driver of its presence. Notably, the motorcycle driver looked up at the aircraft but did not stop.

In fact, Trooper Kevin Betts, another pursuing Trooper on northbound I-25, stated that at about 9:27 a.m. the motorcycle operator originally slowed down significantly as if he was going to stop for him at mile marker 114. Trooper Betts had activated the rear visual signals of his marked patrol cruiser and motioned for the operator of the motorcycle to pull over to the shoulder of the highway. Instead, the motorcycle operator turned left and went through the center dirt median and accelerated traveling southbound on I-25. Trooper Betts activated his visual and audible signals and began pursuing the motorcycle but at times lost visual contact. The motorcycle operator took exit 108, made a series of turns through residential neighborhoods in the Pueblo West area, then turned onto McCulloch Boulevard.

Another pursuing trooper on I-25, Trooper Art Gumke, related that he was near mile marker 110 working in conjunction with the aircraft unit. Traveling southbound on I-25 the motorcycle operator drove by him at a very high rate of speed. Trooper Gumke activated his visual signals on his marked patrol cruiser and began pursuit. His radar indicated that the motorcycle was traveling 134 m.p.h.

Trooper Ray Zupancic was part of the aircraft operation. During the pursuit of the motorcycle operator Zupancic was well behind the motorcycle and mainly assisted the pursuit from a distance by relaying radio traffic from the troopers to the dispatcher as two different types of radios were in use until the dispatcher patched the radio channels together.

III. Procedural Considerations

A. Administrative Actions

An administrative review is controlled by less stringent legal levels of proof and rules than a *criminal review* and can provide both positive remedial options and punitive sanctions. This process can be said to result from an agency's "internal affairs" investigation and provides significantly broader latitude in accessing and using information concerning the background, history and job performance (prior conduct) of the involved officer(s). Issues related to the strategical decisions made by the involved officer(s) leading up to the critical incident are most effectively addressed by the department's administrative review. This type of information may have limited or no applicability to *criminal reviews*, but is very important in making administrative decisions.

There are a variety of actions that can be taken administratively by the department in response to its review. On one hand, the department's review may reveal that no action is required. On the other hand, the department may determine that rules were violated and that formal discipline may be appropriate. Or, the department may make findings that support additional training for all officers on the force, or the need for changes in departmental policies, procedures and rules. In summary, departmental action can be taken for the benefit of the community, department, its' officers or the involved officer(s) .

B. Civil Law versus Criminal Law

The civil law provides remedies for essentially private wrongs — actions in which the state may not have an interest. Monetary damages can be sought under a civil suit for a wrongful act that violates a legal right of an injured party. Plaintiffs in civil litigation are required to prove their case by a preponderance of the evidence or some lesser standard of proof; although some cases have indicated that "clear and convincing evidence" may be the required standard of proof.

A crime normally involves a wrongful act specifically prohibited by the criminal law. In most cases the law requires the wrongful act be accompanied by criminal intent. In other words, a person intentionally commits a prohibited act. Of course, a criminal action requires that the prosecution prove its case “beyond a reasonable doubt” — the highest standard of proof.

Notably, the criminal law and civil law can overlap. Conduct by a person that constitutes a crime can also involve a tort (a wrongful act that violates a legal right of an injured party). For example, a person who kills another person can be guilty of a crime and have a verdict of guilty rendered against him or her in a civil suit for damages.

It is the general responsibility of a district attorney to review cases prior to placing them into the judicial branch’s court system. Put simply, a district attorney has a criminal “charging” responsibility. Charging may be through the complaint/information process or the grand jury presentment process. The charging “discretion” reposed in a district attorney is an awesome power to be used judiciously. If ever justice is to be established in a community, it will first come from a local district attorney’s charging practices. This is the area of discretionary power that best defines a prosecutor’s personal criminal justice philosophy. Accordingly, if there is reasonable likelihood or probability of conviction, a district attorney may conclude that one has committed a chargeable offense. Among other things, this standard takes into account the quantity, quality, admissibility and credibility of available evidence.

IV. Legal Analysis – Criminal Law

A. Pursuit Law & Pursuit Policy

1. Statutory Law, Privileges and Conditions

Subject to the provisions of section 18-1-707, C.R.S., a peace officer who uses excessive force in pursuance of such officer’s law enforcement duties is subject to the criminal laws of Colorado, including the laws relating to homicide, to the same degree as any other citizen. Section 18-8-803, C.R.S.⁵

Criminal liability is established in Colorado only if it is proved beyond a reasonable doubt that someone has committed all of the elements of an offense defined by Colorado law, and

⁵ Section 18-8-803 C.R.S. “is consistent with national norms of acceptable force. Colorado officers may be charged with: 1) manslaughter, where they recklessly cause the death of another;” (18-3-104) “and 2) criminally negligent homicide, where they cause death by conduct constituting criminal negligence” (18-3-105). McGuinness, *Constitutional Issues in the Criminal Prosecution of Law Enforcement Officers*, 33 Colo. Law. 55 (2004).

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it is proved beyond a reasonable doubt that the offense was committed without any statutorily-recognized justification or excuse. *See* Sections 18-1-407, 18-1-502, 18-1-701 and 18-1-710, C.R.S.

While knowingly or intentionally causing the death of another person is generally prohibited as homicide in Colorado, section 18-3-101(1), C.R.S., the Colorado Criminal Code specifies certain circumstances in which the use of deadly physical force is justified. *See* Sections 18-1-701 and 18-1-707, C.R.S.

Colorado law is clear that the driver of an authorized emergency vehicle, when in pursuit of an actual or suspected violator of the law, and when making use of audible or visual signals: 1) may exceed the lawful speeds or exceed the maximum lawful speed limits so long as he does not endanger life or property, or 2) may disregard regulations governing directions of movement. Section 42-4-108 (2)(c) and (d), C.R.S.⁶ The statute goes on to clearly state that a driver of an authorized emergency vehicle is not relieved from the duty to drive with due regard for the safety of all persons. Section 42-4-108 (4), C.R.S.

2. Case Law Inquiries

Corsentino v. Cordova, Colo., 4 P.3d 1082 (2000), dealt with a circumstance where a Pueblo County deputy sheriff received a dispatch to a home burglary alarm. The deputy responded to the dispatch as an emergency call, activating the sirens and lights of his sheriff cruiser. In route to the home burglary alarm, the deputy was driving at a speed of 50-60 m.p.h. in a 35 m.p.h. speed zone. While driving at this speed, the deputy approached an intersection at the same time as another person was making a left turn in her car. The two cars collided. Notably, before the impact, the deputy still had his emergency sirens and lights activated, but did not slow down as he approached the intersection. The resulting collision caused the death of the person making the left turn.

Among other things, *Corsentino* addressed 1) the legal standard under the Colorado Governmental Immunity Act (GIA) for determining when an emergency vehicle operator faces an exigency that calls for immediate action; and 2) whether an emergency vehicle operator exceeding the legal speed limit must comply with the condition of section 42-4-108(2), C.R.S., which allows an emergency vehicle operator to speed “so long as said operator does not endanger life or property,” in order to fall within the provisions of the GIA that grant immunity to emergency vehicle operators.

⁶ Under very narrow instances an authorized emergency vehicle being operated as a police vehicle while in actual pursuit of a suspected violator may not need to display or make use of audible or visual signals so long as such pursuit is being made to obtain verification of or evidence of the guilt of the suspected violator. Section 42-4-108 (3), C.R.S. *But cf. Tidwell v. City & County of Denver*, Colo., 83 P.3d 75 (2003).

In establishing the proper standard for determining whether an emergency vehicle operator was responding to an emergency call⁷ under section 42-4-108(2), C.R.S., the court reasoned that: "... it is an objective standard from the perspective of a reasonable emergency vehicle operator." *Corsentino*, at p. 1088. And the court further reasoned in *Corsentino* that "... whether an emergency vehicle operator endangered life or property while speeding ..." can be answered by an "... inquiry to the relationship between the conduct of the emergency operator prior to the accident and the circumstances surrounding the conduct." *Corsentino*, at pp. 1092 and 1093.

The *Corsentino* case is instructive in analyzing this critical incident. Even though the case dealt with a civil action and the interplay between the conduct of a deputy sheriff and the GIA, its reasoning gives clarity to the standards imposed upon authorized emergency vehicle operators who are facing the possibility of criminal culpability for their conduct.

3. Pursuit Policy Requirements

Moreover, courts give substantial weight to a department's pursuit policy governing the proper response action for certain circumstances. *Corsentino, supra*. The Colorado State Patrol had an individual department pursuit policy in force at the time of the incident. *Vehicle Pursuits, Policy 303.01* (January 3, 2012).

The purpose, definitions and policy are attached to this decision letter.

Notably, a pursuit is an event involving a trooper attempting to apprehend a violator while the violator is trying to avoid capture using high speed driving. Sections 18-9-116.5 and 42-4-1413, C.R.S. and *Vehicle Pursuits, Policy 303.01*. The act of pursuing constitutes a use-of-force. *Id.*

V. Conclusions

A. Trooper Rooks

The facts clearly disclose that Trooper Rooks was in pursuit of an actual or suspected violator of the law and made use of audible or visual signals while in pursuit. The driver of the SUV was exceeding the speed limit and attempted to elude Trooper Rooks. Moreover, Trooper Rooks pursued the suspect by driving his cruiser with due regard for the safety of all persons consistent with the *Vehicle Pursuits, Policy 303.01*.

⁷ Presumably the objective standard established in *Corsentino* applies "... when in pursuit of an actual or suspected violator of the law ..." Section 42-4-108(2), C.R.S.; and *Corsentino, supra.*, citing with approval *Fiser v. City of Ann Arbor*, 417 Mich. 461, 339 N. W.2d 413 (1983): objective standard proper for determining whether a law enforcement officer properly responded to a car chase as an emergency.

B. Troopers Belisle, Betts and Gumke⁸

The facts clearly disclose that Troopers Belisle, Betts and Gumke, were in pursuit of an actual or suspected violator of the law and made use of audible or visual signals while in pursuit. The operator of the motorcycle was exceeding the speed limit and attempted to elude these and other troopers, including Troopers Butaud and Carlson. Moreover, Troopers Belisle, Betts and Gumke pursued the suspect by driving their cruisers with due regard for the safety of all persons consistent with the agency's *Vehicle Pursuits, Policy* 303.01.

In an attempt to apprehend the suspect, at least one safe, less intrusive alternative method to terminate the pursuit was undertaken by Trooper Belisle — the boxing technique designed to slow down and stop the operator of the motorcycle. The motorcycle operator was a danger to the public and this attempt was an effort to apprehend the suspect on the Interstate in as safe a manner as possible under all the attendant circumstances. Trooper Belisle followed appropriate pursuit policy in employing the maneuver. The speed and actions taken by Trooper Belisle were reasonable under the conditions as he had to weigh the risk to the public and others involved in the pursuit should the pursuit not be terminated by the technique.

VI. Decisions⁹

Taking in to consideration the quantity, quality, admissibility and credibility of available evidence I conclude that Trooper Rooks drove his cruiser during the pursuit of the suspect in as careful and prudent manner as he could considering all other attendant circumstances. He complied with statutory law, case law, and pursuit policy guidelines. Therefore, there is not a reasonable likelihood or probability that Trooper Rooks committed a chargeable offense that can be proven beyond a reasonable doubt, unanimously, to a jury. Accordingly, no charges will be filed against him.

Taking in to consideration the quantity, quality, admissibility and credibility of available evidence I conclude that Troopers Belisle, Betts and Gumke drove their cruisers during the pursuit of the suspect in as careful and prudent manner as they could considering all other attendant circumstances. They complied with statutory law, case law, and pursuit policy

⁸ Trooper Zupancic was well behind the motorcycle. The operators of the aircraft, Troopers Butaud and Carlson, were tracking the motorcycle for the pursuing troopers.

⁹ According to the CIT agreement, as soon as practical after the critical incident and receipt of the investigative report, the District Attorney "... shall determine whether anyone committed a crime. The District Attorney shall communicate his findings, conclusions of law and decision via a decision letter to the chief law enforcement officer of the venue and employer agencies involved. ." *Officer-Involved Incident Protocol of the Tenth Judicial District, District Attorney Responsibilities*, at page 37.

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guidelines. Therefore, there is not a reasonable likelihood or probability that Troopers Belisle, Betts and Gumke committed a chargeable offense that can be proven beyond a reasonable doubt, unanimously, to a jury. Accordingly, no charges will be filed against them.

Sincerely,

A handwritten signature in black ink that reads "Bill Thiebaut". The signature is written in a cursive style with a large initial "B".

Bill Thiebaut
District Attorney

Cc: Sheriff Kirk Taylor, Pueblo County Sheriff's Office
Chief Luis Velez, Pueblo Police Department
Agent-in-Charge Marc Micciche, Colorado Bureau of Investigation
Enclosures: Aerial view of accident scene (Trooper Rooks)
CSP Pursuit Policy