



STATE OF RHODE ISLAND
OFFICE OF THE ATTORNEY GENERAL

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March 30, 2022

VIA EMAIL

Steven M. Paré, Commissioner
Providence Office of Public Safety
Providence Public Safety Complex
325 Washington Street
Providence, RI 02903

Hugh T. Clements, Jr., Colonel
Providence Police Department
Providence Public Safety Complex
325 Washington Street
Providence, RI 02903

Re: Officer Mitchel Voyer's Use of Force in the Apprehension of a Juvenile on July 9, 2021 at King and Salmon Streets, Providence

Dear Commissioner Paré and Colonel Clements:

Pursuant to the Attorney General's Use of Force Protocol, this Office, together with the Providence Police Department Office of Professional Responsibility and the Rhode Island State Police, has reviewed the use of force by Providence Police Officers during the arrest of three juveniles on weapons and other charges on July 9, 2021.

Following an initial assessment of the conduct of all officers present at the scene of the arrests, our review focused on the conduct of two particular officers, Officer Domingo Diaz and Officer Mitchel Voyer. We evaluated each officer's conduct separately, to determine whether either or both officers used excessive force during the arrest of one of the juvenile suspects, as that term has been defined by the United States Supreme Court, and, if so, whether either or both officers acted with the criminal intent necessary to sustain a criminal charge.

The evidence involving each officer's conduct differed, and so the approach taken by this Office with respect to each officer differed as well. After a full and complete review of all the evidence, including the reports of two separate use of force experts, we determined that with respect to Officer Diaz, an evaluation of the evidence by a grand jury was warranted. Following

a three-day presentation of the evidence to the Providence County grand jury, the grand jury returned a “no true bill,” declining to charge Officer Diaz with a criminal offense. With respect to Officer Voyer, we determined that a grand jury presentation was not warranted. The reasons for the latter decision are set forth below.

Pursuant to United States Supreme Court precedent, a two-part test determines whether a police officer used excessive force in effectuating an arrest, and, if so, whether his or her conduct warrants a criminal charge. First, prosecutors must prove that the officer’s use of force was objectively unreasonable and unnecessary. If prosecutors cannot meet this burden, the inquiry ends there. If, however, prosecutors establish that the officer’s use of force was objectively unreasonable and unnecessary, then prosecutors must satisfy the second part of the test. That is, prosecutors must prove that the conduct at issue meets the elements of the applicable criminal offense – in this case simple assault under R.I. Gen. Laws §11-5-3. A criminal charge is appropriate only where the force used was unreasonable or unnecessary and the conduct meets the elements of §11-5-3. The applicable law is discussed in more detail below.

Applicable Law

1. Was the Officer’s Use of Force Objectively Reasonable?

The Supreme Court has made plain that an allegation that an officer has used excessive force in the course of a “seizure,” such as an arrest of a suspect, must be analyzed under the Fourth Amendment’s “objective reasonableness” standard. Tennessee v. Garner, 471 U.S. 1 (1985). An arrest carries with it the right for police officers to use some degree of force. Graham v. Connor, 490 U.S. 386, 396 (1989). The degree of force that is permissible depends upon the totality of the circumstances of the actual seizure. Garner, 471 U.S. at 8-9. Relevant facts include “the severity of the crime at issue, whether the suspect poses an immediate threat to the safety of the officers or others, and whether he is actively resisting or attempting to evade arrest by flight.” Graham, 490 U.S. at 396. The severity of any injury, or the lack of injury, can also be considered in this analysis. Bastien v. Goddard, 279 F.3d 10, 14 (1st Cir. 2002).

The reasonableness of an officer’s use of force “must be judged from the perspective of a reasonable officer on the scene, rather than with the 20/20 vision of hindsight.” Graham, 480 U.S. at 396. The Supreme Court has held that the determination of reasonableness must allow “for the fact that police officers are often forced to make split-second judgements – in circumstances that are tense, uncertain, and rapidly evolving – about the amount of force that is necessary in a particular situation.” Graham, 480 U.S. at 396-97. Critically, the reasonableness inquiry is an objective, not a subjective one. The “question is whether the officers’ actions are “objectively reasonable” in light of the facts and circumstances confronting them, without regard to their underlying intent or motivation.” Id. (emphasis added). The Supreme Court could not have made this more clear: “An officer’s evil intentions will not make a Fourth Amendment violation out of an objectively reasonable use of force; nor will an officer’s good intentions make an objectively unreasonable use of force constitutional.” Id. at 397. In other words, in an excessive force case, for purposes of the first part of the test, it does not matter what is in a particular officer’s mind at the time of the use of force. What matters – indeed the only thing that matters – is what the reasonable officer would have done if faced with the situation at hand.

2. Provided that the Officer's Use of Force Was Objectively Unreasonable, Did He/She Act with the Requisite Criminal Intent – That Is, Did He/She Intend to Cause Harm?

If the first part of the test is satisfied – proof that the force used was objectively unreasonable given the circumstances – prosecutors must then establish that officer used that unreasonable force with the requisite *mens rea*, or criminal intent, required to prove a specific criminal offense.

Given the circumstances of this matter, the potential criminal charge is simple assault. Simple assault is an “unlawful attempt or offer, with force or violence, to do a corporal hurt to another, whether from malice or wantonness.” State v. Lomba, 37 A.3d 615, 620 (R.I. 2012) (quoting State v. Pope, 414 A.2d 781, 788 (R.I. 1980)). In the context of this charge, malice means “wrongful intention,” “[t]he intent, without justification or excuse, to commit a wrongful act,” or “ill will or wickedness of the heart.” Lomba, 37 A.3d at 620 (internal quotations omitted). Wanton means “[u]nreasonably or maliciously risking harm while being utterly indifferent to the consequences.” Manning v. Bellafiore, 139 A.3d 505, 525 (R.I. 2016) (quoting Black's Law Dictionary 1815 (10th ed. 2014)).

Analysis of the Facts

After carefully reviewing all the material gathered through the joint investigation by this Office, the Providence Police Office of Professional Responsibility and the Rhode Island State Police and weighing that material against the applicable law described above, we have determined that there is insufficient evidence to bring a criminal charge of simple assault against Officer Voyer. It is our determination that no reasonable juror could find that Officer Voyer's actions during the arrest of the juvenile in question on July 9, 2021, constituted criminal misconduct.

In reaching this determination, we considered the following facts, which are undisputed:

- (1) the juvenile and his two associates were involved in a series of felony assaults, spanning several hours, involving the use of multiple BB guns during which numerous civilian witnesses were struck in the head and body and injured, and property was damaged;
- (2) the juvenile and his two associates were actively pursued by officers from multiple police departments during a vehicle chase that lasted approximately 40 minutes;
- (3) during the police pursuit of the juveniles, officers, including Officer Voyer, were warned by police supervisors that they should not assume the firearms involved were merely BB guns, but rather that the juveniles could be in possession of actual firearms;
- (4) during the police pursuit, one of the three juveniles in the vehicle pointed what appeared to be a rifle at a pursuing officer;

- (5) immediately following the vehicle crash which ended the pursuit, the juvenile in question, the front seat passenger, was the only occupant of the vehicle who did not comply with police commands to raise his hands;
- (6) the body worn camera footage of several officers shows that officers were unsuccessful in securing this juvenile's hands behind his back and handcuffing him for a little over a minute;
- (7) the body worn camera footage showed that the officers told the juvenile to "stop resisting" multiple times;
- (8) the body worn camera footage showed multiple officers attempting to gain control of the juvenile, including by sitting on his legs, grabbing his arms, striking his body and face with closed fists and with several knee strikes;
- (9) the juvenile had a fanny pack across the front of his torso which the officers involved, including Officer Voyer, knew from their experience and training are sometimes used by criminal suspects to conceal a firearm; and
- (10) the body worn camera footage showed that while at various times officers had a hold on one or both of the juvenile's hands, at other times during the struggle to place him under arrest, he was able to free his hands and put them underneath his body, near the fanny pack.

It is evident from Officer Voyer's body worn camera video, and the body worn camera video of other officers on the scene, that Officer Voyer's initial interaction with the juvenile lasted only about six seconds. During that time, Officer Voyer applied what appears from the body worn camera footage to be a mandibular pressure-point technique that is consistent with pressure point techniques taught at the municipal and Providence Police training academies. This application of pressure under the juvenile's chin lasted one to two seconds and was ineffective. Officer Voyer's body worn camera then shows him striking the juvenile approximately five times in quick succession to either the upper shoulder, neck, or side of the head/face. These strikes were delivered in quick succession. Immediately prior to these strikes, the juvenile's hands appeared to be held back behind his body by another officer for about one to two seconds; whether a reasonable officer in Officer Voyer's position would and/or should have been able to recognize this is questionable. In any event, the other officer lost the juvenile's hands, resulting in a continued struggle with the officers while they attempted to constrain him and place him under arrest.

Body worn camera footage shows that immediately after delivering the strikes described above, Officer Voyer stepped away from the juvenile and directed his attention to other officers elsewhere on the scene. When he returned, about fifteen seconds later, Officer Voyer placed his hands on two other officers, including Officer Diaz, directing them away from the juvenile. He then proceeded to assist other officers in placing handcuffs on the juvenile.

The body worn camera footage is consistent with statements provided by other involved officers. For example, Officer Nicholas Croft of the Pawtucket Police Department stated in his

report, completed on the day of arrest (before any use of force investigation was announced) that:

“[the suspect] was taken to the ground by a Providence officer and was actively resisting arrest by flailing his arms and kicking his legs. I then straddled [the suspect’s] legs and grabbed a hold of his right arm in an attempt to secure it behind his back. I repeatedly told [the suspect] to stop resisting. [The suspect] then rolled over onto his back, exposing a fanny pack slung across his chest. [The suspect] was fighting my grip on his arm and it appeared as though he was reaching for the fanny pack. Through my experience and training, I know fanny packs are used to carry firearms . . . I was then able to turn [the suspect] back to his stomach, using his bodyweight to pin the fanny pack to the ground while I attempted to secure his right hand. [The suspect] continued to resist and I then delivered approximately four closed fist strikes to the right side of [his] back, with the desired effect. I secured [the suspect’s] right hand behind his back and another officer took control of [his] right arm and hand while I removed the fanny pack from [his] person”

Once the juvenile was in handcuffs, Officer Voyer sat him up against a patrol car and officers called for rescue. There was blood visible on the juvenile’s face, which appeared to come from his nose or mouth. Rescue personnel determined on the scene that the juvenile did not appear to have any significant injuries and they believed him to be conscious. Medical records indicate that the juvenile’s injuries consisted of superficial abrasions to the face and forearm and bruising to the forehead and swelling to the right cheek and jaw.¹

At the request of this Office, two experienced use of force experts evaluated Officer Voyer’s use of force in attempting to secure and arrest the juvenile suspect. They arrived at different conclusions.

The first expert, Lt. David F. Bissonnette,² concluded that the actions of Officer Voyer and the other involved officers (including Officer Diaz) were reasonable and consistent with Providence Police use of force policy and training. Lt. Bissonnette opined that the interaction between the police and the juvenile could be fairly characterized as a lethal force encounter – meaning that the officer was authorized to use lethal force – due to the fact that the juvenile had participated in multiple felony assaults with a firearm, had attempted to flee from police for about 40 minutes, did not raise his hands in response to police commands, had a fanny pack on his person which could conceal a firearm, and had resisted arrest by failing to put his hands behind his back. He noted that the force utilized by Officer Voyer in striking the juvenile with his hands constituted less than lethal force, and that such use of force is consistent with and

¹ Body worn camera footage showed multiple Providence police officers stating that the suspect was injured in the crash. It is not clear whether any of the injuries can be attributed to the crash, though it is notable that the juvenile was in the front passenger seat and the vehicle was not equipped with airbags. A partial image of the juvenile’s face immediately after he was removed from the vehicle by Officer Colicci does not show any injury to the face. While somewhat inconclusive, we believe it is more likely than not that the injuries, though relatively minor, were caused during the arrest of the suspect.

² Lt. Bissonnette is a use of force expert who has trained at the R.I. Municipal Police Academy for over 17 years.

permitted by Providence Police Department Use of Force Policy (300.01) to subdue suspects who are either actively or passively resisting arrest, to resolve an unsafe situation safely and effectively, and to protect officers from physical harm or the imminent use of force by an arrestee.

A second use of force expert, Professor Seth Stoughton,³ reached a different conclusion. Professor Stoughton opined that the force used by Officer Voyer (and Officer Diaz) was disproportionate to the threat presented by the juvenile suspect. Professor Stoughton based his opinion on the fact that, in the one to two seconds before Officer Voyer administered his compliance strikes, the juvenile's hands were held behind his back by another police officer.⁴ Professor Stoughton opined that the fact that Officer Voyer stepped away from the arrest of the suspect as well as the presence of multiple officers on the scene suggested that the suspect presented a minimal threat to officer safety.

Officer Voyer was interviewed by this Office and the Providence Police Office of Professional Responsibility. Officer Voyer's account was consistent with the body worn camera footage and the account of other officers on the scene.

Officer Voyer detailed his prior knowledge of the alleged criminal behavior of the juveniles in the black BMW earlier in the evening, including their alleged use of BB guns and possibly real firearms.⁵ Consistent with his body worn camera footage, Officer Voyer stated that he noticed that the front passenger did not comply with repeated demands to put his hands up (unlike the driver and rear passenger) and, for that reason, Officer Voyer headed directly to assist in his apprehension.

Officer Voyer stated that he immediately noticed the suspect had a fanny pack strap slung across his back and chest, and he knew from his training and experience that fanny packs can be used to conceal firearms. Officer Voyer stated that he immediately began to administer a recognized pressure point maneuver under the suspect's chin and jaw as a means to get him to release his hands and surrender to police attempts to get him handcuffed. Officer Voyer stated that he was not successful in this effort so he resorted to "compliance strikes" to the suspect's upper shoulder area to temporarily deaden the juvenile's arm so he could handcuff him.⁶ Officer Voyer stated that the strikes were not full punches due to the awkward position he was in. These assertions are supported by the body-worn cameras of the officers as well as the absence of any visible injuries to the area in question.

Conclusion

The decision to proceed with any prosecution, particularly one which requires prosecutors to judge conduct based on fast moving and changing circumstances, requires careful

³ Seth Stoughton is a professor with the University of South Carolina School of Law who has testified as a use of force expert nationally and has published extensively on this subject.

⁴ Professor Stoughton also concluded that due to the fact that the suspect was able to free his hands from the officer's grip and were under his body (or not clearly visible) for the remainder of the encounter, he could not definitively opine as to whether Officer Diaz's subsequent strikes were objectively unreasonable.

⁵ BB guns are firearms under Rhode Island Law. R.I. Gen. Laws §11-47-2.

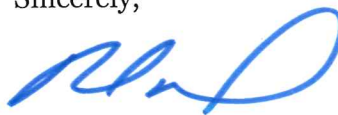
⁶ Officer Voyer insisted that he struck the upper arm/shoulder of the suspect but the body worn camera footage suggests that at least one of those strikes connected with the suspect's face.

deliberation. And indeed, as described above, the facts and circumstances here were fast moving and volatile. There is no question that the juvenile's conduct prior to encountering police warranted his arrest, and on serious charges involving weapons and assaults with those weapons. There is no question that after the lengthy police pursuit and car crash, the juvenile failed to comply with police demands to leave the car with his hands raised. There is no question that the juvenile resisted police efforts to take him into custody, including refusing to give them his hands. There is no question that the juvenile wore a fanny pack across his chest, which police knew from their training and experience could potentially contain a firearm. And there is no question that the juvenile's hands, while unsecured at various times during his arrest, were beneath his body in the vicinity of the fanny pack. Based on the totality of the circumstances of this case, the short duration of Officer Voyer's interaction with the juvenile – approximately 6 seconds - and the nature of the force used by Officer Voyer (soft and hard hand techniques that are permissible in appropriate circumstances under Providence Police use of force training and policy), we cannot conclude, in light of Supreme Court and other legal precedent, that his use of force was objectively unreasonable or unnecessary. For this Office, on these facts, to find that Officer Voyer's use of this degree of force to secure a resisting suspect wanted for multiple felony assaults was objectively unreasonable would require us to engage in the type of 20/20 hindsight the Supreme Court has warned against.

Moreover, even if one were to conclude that Officer Voyer's use of force was not objectively reasonable, the second part of the two-part legal test remains unsatisfied, as the evidence does not support a conclusion that Officer Voyer acted with the criminal intent necessary to sustain a charge of simple assault. There is no evidence that Officer Voyer's use of force was designed to accomplish anything other than to secure the juvenile and place him under arrest. A criminal charge requires this Office to prove that Officer Voyer acted with malice against the juvenile and intended to cause him physical harm. Such proof is simply not possible here.

If you have any questions, regarding this matter, please do not hesitate to contact me.

Sincerely,



Peter F. Neronha
Attorney General