

September 14, 2018

Sheriff Manuel Gonzales III
Bernalillo County Sheriff
400 Roma Ave. NW
Albuquerque, NM 87102

RE: Prosecutorial review of the September 15, 2015 attempted arrest of Fidencio Duran by members of the Bernalillo County Sheriff's Office and his subsequent death.

BCSO case # 15-70417; DA case # 2016-00364-1

Dear Sheriff Gonzales:

I have been appointed as a Special Prosecutor by Raul Torrez, the Second Judicial District Attorney, to review, for potential prosecution, the incident in which Bernalillo County Deputies took Fidencio Duran into custody on September 15, 2015, causing injuries that contributed to his death a month later.. After a review of all available evidence, including police reports, witness statements, depositions, expert's reports, laboratory reports, videos, and photographs, I conclude that there is not sufficient evidence to prove, beyond a reasonable doubt, that the deputies involved committed any crime for which they can be successfully prosecuted. No charges will be filed: the case will be closed. My decision does not limit administrative or criminal action by other agencies, or civil actions by other parties.

STATEMENT OF FACTS

On the morning of September 15, 2015, sheriff's deputies were sent to 320 Camino Siete SW in response to calls that an old man, covered in blood and carrying a knife, was pounding on neighborhood doors and screaming. At about 7:55 a.m., Deputy David Booth found Fidencio Duran, a shirtless elderly man, wearing only one shoe, standing in a neighbor's driveway bleeding from a self-inflicted wound to his wrist, waving a knife and demanding that the deputy kill him, "shoot me, shoot me." Duran was also shouting in Spanish, so Spanish speaking

officers were called to the scene, as well as members of the Crisis Intervention Team and the Crisis Negotiation Team.

The deputies spoke with Fidencio Duran's son, Robert Duran, and his daughter Sally Duran, who told them that their father was grief stricken because his wife of 69 years, Mabel, had died the day before. Robert also told them that Fidencio was 88 years old and suffered from Alzheimer's disease. Sally added that her father appeared to be seeing people who were not there. With the children's help, the deputies contacted Duran's doctor's office; a nurse there told them that Fidencio suffered from high blood pressure, as well as thyroid and kidney problems.

The negotiators from the Crisis Intervention Team and the Crisis Negotiation Team urged Duran to drop the knife, trying to reach him in both English and Spanish. He seemed concerned about his lack of shirt and shoes, so they obtained shirt and shoes from his family, but he ignored them. He was offered water and breakfast, which he also ignored. The possibility of speaking with his son was raised but did not seem to interest him. They told him that they wanted to help him and that they had an ambulance waiting to take him to the hospital. At times he seemed to hear and understand them, but at other times he appeared to have trouble tracking what was being said to him, and many of his responses were unintelligible. Throughout the morning, he continually demanded that they shoot and kill him. He told them, "You have the pistols, shoot me." Despite their best efforts, the negotiators were unable to build rapport with Duran, or engage him in any meaningful dialogue. Late in the second hour of the standoff, still in the neighbor's driveway, he told the officers that the only way he would drop the knife was if they shot and killed him.

This statement concerned the on-scene supervisor, Captain Justin Dunlap, who feared that Duran would, at some point, advance on the officers to force them to shoot him. Rather than wait for such a possibility, Captain Dunlap formulated a plan to use less lethal options to disarm Duran and take him in to custody. Both bean bag rounds and taser were ruled out due to Duran's age and medical issues. Captain Dunlap decided to use instead, pepper ball rounds, which are essentially paintballs fired from a paintball gun, but filled with pepper powder rather than paint. On impact the balls burst, creating a cloud of pepper powder which is disorienting and incapacitating. The deputies knew from training and experience that the pepper balls caused little injury: minor bruises at the point of impact; but they had never used them on an elderly

individual and therefore planned to start by firing at the ground at Duran's feet, hoping to avoid any impact damage, and if that didn't work, they'd work up his legs, which were clothed, avoiding his naked arms and torso.

The plan called for pepper balls to be fired from two different directions, hoping that Duran, confused and disoriented, would drop the knife. As a backup, Deputy Greg Martinez, a K-9 officer was positioned nearby with his dog, Orbit; if necessary, Orbit could be sent in to push Duran off his feet, allowing the officers to approach him, but the dog was muzzled to minimize the risk of injuring Duran. Dogs are seldom muzzled because it deprives them of their most useful tool and renders them unable to defend themselves, but it was decided it was a necessary risk in these unusual circumstances.

Deputies to Duran's north ordered him to drop the knife, which he ignored. Deputy Louis Melherbe fired pepper balls at the ground around Duran's feet, but they had no apparent effect. Deputy Tyler Rahn, positioned at the east, also fired pepper balls at Duran, first at his feet and lower legs, still with no effect. The dog was released but ran past Duran without engaging and ran to the deputies on the opposite side. Duran then turned toward Deputy Rahn and Deputy Greg Martinez and began advancing toward them, knife in hand. As Duran drew closer, Deputy Rahn, afraid he would be stabbed, fired more pepper balls into Duran's bare chest and arms, but Duran ignored them and continued to advance. Rahn backpedaled, still firing pepper balls, until Deputy Greg Martinez sent the dog toward Duran. The dog pushed Duran in the stomach with its paws and nose, causing him to stumble backwards and fall down, but he still held onto the knife and brandished it toward the deputies as they approached. Deputy Rahn fired at Duran as he lay on the ground, hoping to cause him to drop the knife, but without success. Finally, Sergeant A.J. Rodriguez was able to pin Duran's wrist to the ground with his foot while another deputy pried the knife from Duran's hand. Several of the deputies who rushed into the scene were forced to leave when overcome by the effects of the cloud of the pepper ball powder. Duran, however, continued to struggle with the deputies as they moved him into the shade, and with the paramedics, who had been standing by. He fought in the ambulance ride to the hospital and had to be restrained. Captain Dunlap would later say, "Mr. Duran fought more than I ever thought or imagined he would."

At the emergency room, doctors found multiple extensive abrasions and lacerations on Duran's arms and chest and arms, caused by the impact of the pepper balls, one of which had become embedded in the skin on his arm. In addition, his right femur had been fractured when the dog knocked him to the ground. By September 20th he had developed pulmonary embolism and pneumonia. On September 21st, his fracture was surgically repaired. When his condition improved, he was sent to a skilled nursing facility on October 7, 2015, only to return to the hospital the next day so he could be placed on a ventilator. An evaluation conducted on October 13 found his hip healing but he had become unresponsive. On October 15, 2015, one month after the incident in the driveway, he went into cardiac arrest and died. The autopsy found that he had died of "complications of his hip fracture and the setting of his hip fracture in the setting of severe generalized arteriosclerosis and emphysema. The wounds of the arms from the pepper gun were also contributing factors." The autopsy concluded "Since the injuries (the fractured hip and pepper gunshot wounds) were at the hands of another party, the manner of death is best certified as homicide."

LEGAL ANALYSIS

Charges of intentional homicide or aggravated battery would require proof of intent to kill or injure, which are not present in this case: all of the evidence indicates that the deputies sought to avoid death or injury to Duran. Therefore, the only potential charge would be Involuntary Manslaughter (NMSA 30-2-3(B)). To convict for this charge, the jury would have to find, beyond a reasonable doubt, that the deputies knew or should have known of the dangers involved in their effort to disarm Duran and acted with willful disregard for his safety, (UJI 14-231). The jury would also be required to find, beyond a reasonable doubt, that Duran's death was a foreseeable result of the deputies' actions, (UJI 14-251). Homicide; "proximate cause": defined.

CONCLUSION

To convict the deputies of involuntary manslaughter, the prosecution would need sufficient evidence to prove to a jury that the deputies could foresee that their plan to disarm

Duran would lead to his death and acted with willful disregard for his safety. A jury would therefore need to find that the deputies could have or should have foreseen the following series of events:

- That the pepper balls, which usually incapacitate health young men, would be completely ineffective on a frail, 88-year-old man;
- That Duran would react to the pepper balls and the dog, not by dropping the knife or surrendering, but by aggressively approaching the deputies firing the pepper balls;
- That Deputy Rahn would find himself in a position where he was forced to fire pepper balls into Duran's bare chest and arms at close range;
- That the dog would push down Duran in such a way that he fractured his femur;
- That during all of it, Duran would have the strength and determination to refuse to relinquish the knife;
- That the pepper ball injuries and the broken femur would interact with Duran's heart and lung diseases to contribute to his death weeks later.

There is certainly not enough evidence to prove, beyond a reasonable doubt, to a unanimous jury, that the deputies could or should have foreseen that their least lethal options, pepper balls and a muzzled dog would prove to be deadly.

Nor would a jury be likely to find that the officers acted with willful disregard of Duran's safety when presented with the evidence demonstrating the steps they took to reduce any chance of injury to Duran:

- The use of certified Spanish speakers to bridge any potential language barrier;
- The reliance on deputies from the Crisis Intervention Team and the Crisis Negotiation Team;
- Reaching out to and relying on information from both Duran's family and his nurse in attempt to resolve the standoff;
- Efforts to achieve rapport with Duran by offering of water, breakfast, clothing, medical help, and a meeting with his son;

- Engaging in two hours of fruitless and unsuccessful negotiations before taking action;
- Using the least lethal options in their arsenal, pepper balls and a muzzled dog;
- Risking the safety of the deputies and the dog by approaching Duran when he was still armed with and threatening them with the knife.

Trying to convince a jury that these actions somehow prove, beyond a reasonable doubt, that the deputies acted with willful disregard for Duran's safety is clearly not possible. As expressed by Deputy Malherbe, "What we had was purely good intentions to get him medical help and it didn't work out." Based on all available evidence, a jury is likely to agree.

While the death of Fidencio Duran was tragic, no provable crimes were committed during the incident in which he was disarmed and taken into custody on September 15, 2015- no charges will be filed; the case will be closed.

Very truly yours,



Michael D. Cox

Special Prosecutor

Cc: Raul Torrez, District Attorney, Second Judicial District
Deputy David Booth, Bernalillo County Sheriff's Department
Luis Robles, Attorney for the Bernalillo County Defendants
Joseph Kennedy, Attorney for Sally Duran