

County of Santa Clara

Office of the Sheriff

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Laurie Smith
Sheriff

MEMORANDUM

To: Undersheriff John Hirokawa

From: Sgt. William Oberst #1622
Internal Affairs Unit

Date: July 14, 2011

Subject: Internal Affairs Case IA 10-014
Review of Officer Involved Shooting

Involved Employees: Deputy Michael Damigo #1690
Deputy Cregg Dibert #1694
Deputy Devin Fontana #1807

Sheriff's Office Event Number: 10-202-0038E

This report is an administrative review, conducted by Internal Affairs, of an officer-involved shooting involving Deputy Michael Damigo #1690, Deputy Cregg Dibert #1694, and Deputy Devin Fontana #1807. The incident occurred on 07/21/10 on the N3 Ranch property.

The complete case file, containing the Sheriff's Office investigative report and supplemental reports, 28 CD-ROM disks containing the interviews, scene photos, and autopsy photos, is contained in a binder in Internal Affairs, filed in the "O.I.S." cabinet. There is no radio traffic associated with the actual incident since the remote location did not allow the Deputies to communicate with dispatch via radio. The Sheriff's Office report, including all supplemental reports, totals 248 pages. Also contained in the case file are a recordings log, a photos log, the operations plan prepared by the Marijuana Eradication Team prior to the event, the suspect's phone log, the suspect's information, and a sketch prepared by Deputy Allen.

Scene Description:

The N3 Ranch consists of approximately 52,000 acres located in the North West portion of Santa Clara County and the South West portion of Alameda County. Most of the ranch consists of rugged terrain only accessible by four-wheel drive vehicles. The location of the incident is about 15 miles from the closest vehicle access gate, which is located at the Del Valle recreational area. The vehicles driven by the Marijuana Eradication Team were located about a mile from the incident site. The incident occurred in a steep ravine with a dry creek bed running along the bottom. The vegetation in the area varied from heavily wooded with lots of shrubs, to shale hillsides with sparse vegetation. Deputy Allen marked the center of the scene at the GPS location of N. 37 28.264 and W 121 37.661.

Background Information:

At the time of the event the Marijuana Eradication Team (MET) was staffed by Deputy Dibert and Deputy Damigo. Their primary function was to locate and eradicate illegal marijuana grows on public and private land within Santa Clara County. To accomplish this goal the MET unit utilizes Deputies from other divisions, who are specially trained to operate in the remote locations where the marijuana grows are usually located. When marijuana grows are located near county lines, the team will often operate jointly with the adjacent department.

Workers on the N3 ranch located some irrigation pipes on their property. From past experiences they suspected the pipes were being used by illegal marijuana growers to cultivate marijuana on the N3 land. Since a portion of the ranch is located in Alameda County, the ranch notified the Alameda County Sheriff's Office. The Alameda County Sheriff's Office notified the Santa Clara County MET unit, since the pipes were near the county land and the actual grow could be located in either county.

A scouting operation was planned to locate the garden. Six members of the Santa Clara County Sheriff's Office, and six members of the Alameda County Sheriff's Office, participated in the operation.

Santa Clara County Sheriff's Personnel:

Deputy Dibert #1694
Deputy Damigo #1690
Deputy Fontana #1807
Deputy Moore #1908
Sergeant Spagnola #1642
Reserve Deputy Amaro #9288

Alameda County Sheriff's Personnel:

Sergeant Peterson
Deputy Ortiz
Deputy Mora
Sergeant Farruggia
Deputy Lydon
Deputy Pope

Executive Summary:

This executive summary is based on a compilation of the interviews conducted by the Investigative Services Division of Santa Clara County Sheriff's Office and on the evidence gathered by the Criminal Scene Investigators. The interviews were conducted on the evening of the event and the days following the event. Sergeant Oberst and Lieutenant Peterson, from the Internal Affairs Unit, were present for several of the interviews, monitoring via the investigations Division closed circuit camera system. Since several interviews were being conducted simultaneously, the Internal Affairs unit was not able to monitor every interview.

On 07/21/10 at about 0500 hours, the six members of the Santa Clara County Sheriff's Office met at the headquarters building. They drove to Livermore, where they met the Alameda County Sheriff's Office team. The two teams exchanged information, and developed an operations plan to conduct the scout. Once the plan was developed the 12-man team drove to the N3 ranch and met with the ranch hands. Based on the information gathered from the ranch hands, the team staged their vehicle and began their scout.

The team soon located the black pipe that the ranch hands had reported. The pipe had running water in it, indicating that it was currently being utilized. They began following the pipe along the dry creek bed of the Sycamore Creek. The terrain slowly dropped and the pipe remained at a level elevation, causing the pipe to now run higher up on the hill.

Deputy Dibert, Deputy Fontana, and Sergeant Spagnola followed the pipe uphill, while the remaining team members remained in the creek bed. Due to the vegetation, the teams were not able to see each other all the time, but Deputy Dibert could hear the team in the creek bed moving through the brush. They moved slowly in this manner for about fifteen minutes, keeping alert for any suspects in the area. The team in the creek bed separated slightly, with the three Santa Clara County Deputies moving out in front of the Alameda County Deputies.

As they were moving on the hillside Deputy Dibert, Deputy Fontana, and Sergeant Spagnola heard what they believed to be at least one person running away from them. They notified the team in the creek bed and all 12 members of the team remained still, visually searching for suspects in the area. Deputy Fontana saw a male on the hillside, across the ravine from them. Deputy Fontana did not have a good visual of the suspect at this time, but he knew he was not a member of their team. The scene sketch, which was prepared later, listed this distance at approximately 141 feet. Deputy Fontana radioed to the other team members that he had a visual on a suspect. Due to the vegetation, Deputy Dibert and Sergeant Spagnola had to adjust their position before they were able to see the subject.

Just prior to hearing the radio transmission from Deputy Fontana, Deputy Moore and Deputy Amaro, located in the creek bed, had also spotted the suspect on the hillside, in front and above their location. Deputy Damigo, who was with them, could not see the suspect at first because of the vegetation. After he adjusted his position he was able to see the suspect. The Alameda County Deputies were unable to see the suspect because of their location.

Deputies Dibert, Fontana, Damigo, Moore, and Amaro, reported that they saw, what they believed to be a rifle, slung over the shoulder of the suspect. Sergeant Spagnola stated that from his location he could only see the upper chest area of the suspect, and he did not see the rifle the other Deputies saw. At this time Deputy Amaro thought the suspect had spotted the team in the creek bed, but then the subject moved and Deputy Amaro lost sight of him. Each team member reported that, from their individual positions, they were unable to maintain a constant visual on the suspect because he was moving and the vegetation would sometimes block their view.

Deputy Dibert was tracking the subject with the scope of his rifle when he saw the suspect point the rifle towards the team in the creek bed. Fearing for the safety of the team in the creek bed, and believing the suspect was about to fire on the team, Deputy Dibert fired one round from his department issued AR15 A3. Deputy Dibert does not remember giving any verbal commands prior to firing. Of the other members present, some reported hearing Deputy Dibert give a verbal command prior to the shot; others reported they heard the verbal commands after the shot. The team in the creek bed was unsure who fired the shot. Verbal commands, identifying the team as the police, ordering the suspect to raise his hands, and telling the suspect that they could see the rifle and not to touch it, were being given in English and Spanish.

The suspect was still standing after Deputy Dibert fired the shot. The suspect complied with the verbal orders being given and raised his hands above his head. The team in the creek bed began to move towards the suspect to affect the arrest. The suspect was holding an unknown object in his hands. The suspect refused to drop the object, despite several orders that he do so. Each time the suspect lowered his hands the Deputies ordered him to raise them up again. They had to do this a few times.

Deputy Dibert and Deputy Fontana saw the suspect then reach down and grasp the rifle that was slung across his body. The suspect moved the barrel of the rifle in the direction of the team in the creek bed. Sergeant Spagnola could not see the suspect's hands at this time because, despite repeated verbal orders, the suspect lowered his hands and Sergeant Spagnola only had a visual of the suspect from the chest up. The team in the creek bed did not have a visual of the suspect at this time.

Deputy Dibert and Deputy Fontana both reported that they believed the suspect was in the process of bringing the rifle up to shoot at the team in the creek bed. Deputy Dibert and Deputy Fontana both fired their department issued AR15 A3 rifles at the suspect. Deputy Dibert fired two rounds. Deputy Fontana fired eight rounds. The suspect fell behind some tall grass and they lost sight of him. They could see the grass moving in the area where the suspect went down. They maintained a visual of the area while they notified the team in the creek bed on the situation and directed them to move up the hillside, above where the suspect went down.

Deputy Damigo and Deputy Amaro moved up the hillside until they were above the suspect's location and then they moved down to the suspect. They were about 10-15 feet from the suspect when they were able to see him. The suspect was on his back, with his feet towards them and his head on the downward side of the hill. The slope was about 45 degrees and made of loose shale. Deputy Damigo saw the rifle about 18 inches from the suspect. The suspect was searching for the rifle with his hand. Deputy Damigo was given verbal orders, both in English and Spanish,

for the suspect to stop moving. All Deputies on scene reported hearing Deputy Damigo give several verbal commands to the suspect. Deputy Amaro could see the suspect reaching for something, but he could not see the rifle from his position.

Despite the verbal warnings, the suspect grabbed the rifle butt and pulled it towards him. Deputy Damigo fired four rounds from his department issued AR15 A3 rifle. The suspect stopped moving. Deputy Amaro, a paramedic with the San Jose Fire Department, moved up to provide medical aid after he secured the suspect in flex cuffs. Deputy Lydon, the medic assigned to the Alameda County team, also reached the suspect and assisted. Deputy Amaro and Deputy Lydon determined the suspect was dead. No other suspects were encountered.

Deputy Damigo was able to get out on the department's satellite phone and notify the Sheriff's Office of the situation. The team remained on scene until members of the SERT team arrived to set a perimeter and provide additional security. Deputy Dibert, Deputy Fontana, and Deputy Damigo marked their shooting positions with orange tape. All evidence, except for the suspect's rifle which was moved for safety reasons, was left in their original position for processing by the crime scene investigators. The rifle carried by the suspect was determined to be a pellet gun. The weapon was later compared to a .22 caliber rifle that was located at the campsite in one of the marijuana grows. The two weapons were basically indistinguishable from one another at first glance, and only a close inspection revealed the differences between the two.

The Sheriff's Office helicopter, STAR1, responded and located six marijuana gardens in the immediate area. 18,342 marijuana plants, worth approximately 55 million dollars, were eradicated from the six gardens.

On 07/23/11 Dr. Glenn V. Nazareno of the Santa Clara County Medical Examiner-Coroners Office, conducted an autopsy on the suspect, who was later identified as Mr. Penaloza-Soto. During the autopsy five gunshot wounds were located on Mr. Penaloza-Soto, two in the left chest area, two in the right thigh, and one in the upper left arm. The autopsy also noted some small (1 inch x .5 inch average) superficial abrasions on Mr. Penaloza-Soto's forehead, shoulder, and back. Dr. Nazareno determined the cause of death to be "multiple gunshot wounds," and ruled the manner of death to be "Homicide."

The autopsy does not address the superficial abrasions, other than describing their size and location. They seem to be consistent with someone who lived in rugged terrain, was shot at and fell to the ground, and was moved while being treated. There is no indication that any force was used to purposefully inflict any injury to Mr. Penaloza-Soto.

The case was submitted to the Santa Clara County District Attorney Office for review. The District Attorney's Office determined that all force used by Deputy Dibert, Deputy Fontana, and Deputy Damigo was legally justified.

On the evening of the event, at the request of Internal Affairs unit for administrative purposes, a certified phlebotomist drew blood from the three involved Deputies. The crime lab analyzed the blood and determined that none of the Deputies had any alcohol or illegal substances (cocaine, methamphetamine, opiates, PCP) in their system.

Conclusions:

Beginning the day of occurrence, and over the next several weeks, the Santa Clara County Sheriff's Office conducted what I find to be a thorough and detailed investigation of this shooting. The Detectives and Crime Scene Investigators, with the assistance of the SERT team:

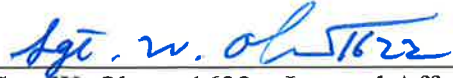
- contained and professionally processed the scene,
- identified the suspect as Penalzoza-Soto, Jose,
- conducted an extensive canvas of surrounding area, including locating evidence that linked the suspect to the surrounding illegal marijuana gardens,
- located .223 ammunition, a loaded .22 rifle, three additional pellet guns, .380 rifle ammunition, .38 handgun ammunition, shotgun shells, 9mm ammunition
- photographed and documented the crime scene,
- interviewed all the Deputies who were present at the scene,
- interviewed the relatives of the suspect, who confirmed that they suspected Mr. Penalzoza-Soto was involved in the illegal cultivation of marijuana,

Nothing in any interview conducted, nor any physical evidence found at the scene, in any way contradicted or called into question the official statements made by Deputy Dibert, Deputy Fontana, and Deputy Damigo. The seven other deputies who were on scene told the investigators that they either heard the deputies shouting several commands, or they were shouting commands themselves. The suspect failed to heed these commands, instead choosing to reach for an apparent weapon.

After monitoring numerous interviews conducted the evening of the incident, listening to the audio files of the interviews I was unable to monitor at the time, comparing all of those interviews with the written summaries and evaluations contained in the crime report, completing a thorough review of the Sheriff's Office Incident Report and completing a thorough review of the total investigation, it is my finding that:

While performing their lawful assigned duties, Deputy Dibert, Deputy Fontana, and Deputy Damigo attempted the arrest of a suspect who they had reasonable cause to believe was involved in the commission of a felony. The suspect resisted their verbal orders, twice attempted to aim an apparent rifle at the group of Deputies in the creek bed, causing the Deputies on the hillside to fear that he might harm the group. Deputy Dibert and Deputy Fontana, fearing for the safety of their fellow Deputies, lawfully discharged their weapons in their immediate defense. The suspect, ignoring verbal orders from Deputy Damigo, accessed a weapon. Deputy Damigo, fearing for his own safety and the safety of Deputy Amaro, lawfully discharged his weapon in their immediate defense.

I find no violation of any departmental policy or procedure by Deputy Dibert, Deputy Fontana, and Deputy Damigo, up to and including the use of their firearm in this incident.


Sgt. W. Oberst 1622 – Internal Affairs