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SUPERIOR COURT OF CALIFORNIA
COUNTY OF ORANGE
CENTRAL JUSTICE CENTER
DEC 31 2012
ALAN CARLSON, Clerk of the Court
BY L. HOYLE, DEPUTY

Attorneys for JAY CICINELLI

IN THE SUPERIOR COURT OF CALIFORNIA

COUNTY OF ORANGE

PEOPLE OF THE STATE OF CALIFORNIA,	**CASE NO. 11CF2575**
Plaintiff,	**REPLY TO PEOPLE'S PC 995 RESPONSE ON BEHALF OF DEFENDANT JAY CICINELLI; DECLARATION OF MICHAEL D. SCHWARTZ**
vs.	
MANUEL RAMOS & JAY CICINELLI,	**Dept: C-40,**
Defendants.	**Hon. Judge Froeberg**
	Time: 8:30 a.m.
	Date: January 18, 2013

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TO THE ABOVE-ENTITLED COURT AND TO THE DISTRICT ATTORNEY OF ORANGE COUNTY, STATE OF CALIFORNIA:

Speculative connections are the basis of the People's prosecution of Cicinelli. Although the prosecution is certainly able to argue that the court can draw inferences from the evidence presented, as the court is well aware, any inferences drawn from the evidence must be reasonable, not speculative. If they are speculative, it is the superior court judge's duty to discard those inferences that derive their substance from guesswork, speculation, or conjecture. *Birt v. Superior Court* (1973) 34 Cal.App.3d 934, 938, emphasis added. While the standard for the prosecution at this stage is low, the prosecution has not met their required burden of proof.

The evidence is insufficient as to Counts 2 and 3 for Defendant Cicinelli, and the Information as it pertains to Defendant Cicinelli should be set aside.

I. ARGUMENT

A. THERE IS INSUFFICIENT EVIDENCE FOR A HOLDING ORDER AS TO DEFENDANT CICINELLI FOR (PEN. CODE SECTION 149)

During the Preliminary Hearing, the People were unable to show that Cicinelli acted contrary to the tenets of Penal Code section 835(a), which states that, "Any peace officer who has reasonable cause to believe that the person to be arrested has committed a public offense may use reasonable force to effect the arrest, to prevent escape or to overcome resistance." The video evidence is clear---Cicinelli arrived on scene, observed his fellow officers struggling to overcome the resistance of a suspect, and went to their aid. (Defense Exhibit A). During the course of that aid, Kelly Thomas reached for Cicinelli's taser, presenting Cicinelli with a singular option--- preventing Thomas from obtaining it.(Defense Exhibit A, at 19:56, 19:58, 19:59) "A peace officer who makes or attempts to make an arrest need not retreat or desist from his efforts by reason of the resistance or threatened resistance of the person being arrested; nor shall such officer be deemed an aggressor or lose his right to self-defense by the use of reasonable force to effect the arrest or to prevent escape or to overcome resistance." Pen. Code section 835(a). Officers, therefore, can use force necessary to accomplish arrest, defend themselves or to simply overcome resistance. *People v. Almarez* (App. 2 Dist. 1961) 12 Cal.Rptr. 111, 190 Cal.App.2d 380.

The holding in *Graham v. Connor* (1989) 490 U.S. 386 is the standard to be applied. It is an objective standard, based on the experience of a reasonable officer at the scene of the event. No evidence was presented by the prosecution at the preliminary hearing that Cicinelli failed to act as a reasonable officer on the scene would have acted, given his experience, training, and what he observed and knew of the event as it was unfolding in front of him. The later death of Thomas cannot simply be a string used to tie events together to create the needed nexus to establish the prosecution burden of proof. Simply put, the fact that Kelly Thomas later expired is not proof that Corporal Cicinelli acted outside the scope of his department's policies or the law.

Moreover, the evidence produced at hearing clearly demonstrated that the force Cicinelli employed was done in an attempt to gain compliance over a combative, non-compliant Thomas who twice grabbed either Corporal Cicinelli's hand or the taser itself. (Defense Exhibit A, at 19:56, 19:58 Defense Exhibit A, at 19:56, 19:58). The prosecution has failed to prove otherwise, even by the low burden/standard it is held to at this stage in the proceedings. Instead, the prosecution argues that *any* improvisation or use of the taser as a blunt force weapon is contrary to necessity, without offering any legal basis, expert testimony or any evidence as to why or what "legal" alternatives a reasonable officer in Corporal Cicinelli's position at that time, defending against a combative, non-compliant suspect now trying to seize his weapon, would have had to choose from in place of the tactics employed by Corporal Cicinelli. However, second-guessing and cavalier, self-righteous opinions about "necessity" run contrary to *Graham v. Connor*, California Penal Code section 835a, the Fullerton Police Department Use of Force Policy, fundamental fairness and common sense, *especially given the absence of any reasonable alternative or option* proffered by the prosecution. As a result, Count 3 as to Cicinelli should be dismissed.

B. THERE IS INSUFFICIENT EVIDENCE FOR A HOLDING ORDER AS TO DEFENDANT CICINELLI FOR (PEN. CODE 192 (b))

The evidence presented to the magistrate was insufficient to hold Defendant Cicinelli to answer for Count Two. At best, the prosecution presented only the speculative hypothesis of two doctors, both working under the false presumption that the evidence showed Kelly Thomas ceasing to breathe while the officers were securing him into custody. As such, this Defendant should not have been held to answer for Count Two.

1. Cause of Death was Not Credibly Articulated

The prosecution cannot recover from the testimony of Captain Stancyk who testified on both cross-examination and *then again* on re-direct examination that Thomas never ceased to breathe before being placed into the ambulance and having his breathing assisted with an ambu-bag. [RT, Stancyk, 54:11-26, 56:23-25, 95:21-24, 89:15]. According to Stancyk's chronology, it was *after* being "bagged" in the ambulance, without any cessation of breathing, that Thomas

went into cardiac arrest.[1] That being the case, there is then no evidence or even a reasonable inference that Defendant Cicinelli's actions had *any* causal connection to the death of Thomas.

Both doctors called by the People proffered that if Thomas never stopped breathing before cardiac arrest, then there was no possibility that mechanical compression/positional asphyxia led to respiratory arrest which led to Thomas' hypoxia and ultimately his death [RT, Lekawa, 265:4-17; Singhania, 351:4-11]. Without a proven cause of death, there is no evidence or provable causal connection between between Cicinelli's actions and Kelly Thomas' death. As its own witnesses' testimony contradicted the prosecution's theory of liability, not even a reasonable inference can bind Cicinelli's actions as contributory to any mechanical compression/positional asphyxia of Thomas. Thus, the prosecution simply has not met its burden, not even within the standards of proof necessary for a holding order at a preliminary hearing. Under this theory, the evidence presented to the magistrate was insufficient, and as such, Cicinelli should not have been held to answer for Count Two.

2. Criminal Negligence or Unlawful Act—No Evidence Presented

The prosecution has the burden of demonstrating that probable cause exists that Corporal Cicinelli violated the law or acted unlawfully in that he employed excessive and unreasonable force and that the force was a substantial contributing factor to the death of Thomas. No evidence has been presented that the conduct of Cicinelli was violative of any law or legal standard.

The objective disregard for life required for involuntary manslaughter requires a showing that a reasonable person would have been aware of the risk. *People v. Butler, supra.* No testimony was presented that Cicinelli should have or would have been aware, based on his training and experience and using the "reasonable police officer" standard pursuant to *Graham vs. Connor, supra,* that restraining a combative suspect would lead to mechanical compression or positional asphyxiation which in turn would lead to hypoxia which also, in turn, would lead to Thomas' death.

No testimony or evidence was presented that in the act of trying to restrain and secure a

[1] *See* [RT, Stancyk, 89:15]. Thomas was then given assistance with an ambu-bag [RT, Stancyk, 54:24-26; "*start* bagging him" is heard at 34:01" (EX. A)]; *then* CPR begins [RT, Stancyk, 55:5-11], *after* Thomas was already in the

combative suspect who, in the midst of the fight attempts at least twice to seize the officer's weapon, and as a result of trying to secure against that suspect seizing that officer's weapon the suspect sustains non-lethal facial injuries, that those non-lethal injuries would somehow foreseeably contribute to the above even more convoluted chain of events the prosecution is relying on to secure its holding order.

The prosecution has not shown that the tasing done by Cicinelli, or that use of the taser as an improvised tactic was a proximate cause of the death of Thomas. The prosecution has failed to show that the facial injuries sustained by Thomas *actually did* contribute to the cause of death, nor that they *actually* inhibited Thomas' breathing in any way. The prosecution has not met this burden of causal connection.

3. No Violations of Law or Unlawful Act

The evidence produced at the preliminary hearing clearly demonstrated that the force Cicinelli employed was done in an attempt to gain compliance over a combative, non-compliant Thomas. The prosecution has failed to show that the deployment of the taser or the use of the taser as an "improvised tactic" to stop a combative suspect from seizing his weapon was unreasonable under these, or any, circumstances presented. In an obvious attempt to fill a gaping chasm of lack of any nexus between Corporal Cicinelli's actions, the prevailing law and the prosecution theory of the case, the People seek to bootstrap the outcome, i.e., the death of Thomas, as somehow dispositive that the force employed by this officer must have been excessive and therefore in violation of the law. Such an argument by the government is not only disingenuous but again, would seek to overturn basic tenets of law clearly established by the holding of *Graham v. Connor, supra* and its progeny. No competent evidence or even reasonable inference has been articulated to draw such a connection. As a result, Defendant Cicinelli was improperly and unlawfully held to answer on Count Two of the Information and the charge should be dismissed.

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ambulance and *after* the bag was placed on Thomas, both long after Defendant Cicinelli had gotten up and walked away from where Thomas had finally been secured. (Defense Exhibit A)

II. CONCLUSION

Based on the foregoing, the defendant respectfully requests that its Penal Code section 995 motion be granted and all counts be dismissed against Cicinelli.

Date: December 28, 2012

Respectfully submitted,

Michael D. Schwartz, Esq.
Kasey A. Castillo, Esq.
Attorneys for JAY CICINELLI

PROOF OF SERVICE

I declare that I am over the age of eighteen (18) and not a party to this action. My business address is 367 North Second Ave., Upland, California 91786.

On **December 28, 2012,** I served the following document described as **REPLY TO PEOPLE'S PC 995 RESPONSE ON BEHALF OF DEFENDANT JAY CICINELLI; DECLARATION OF MICHAEL D. SCHWARTZ** on the interested parties in this action by placing a true and correct copy of each document thereof, enclosed in a sealed envelope addressed as follows:

For the People of the State of California, Orange County:

Tony Rackauckas, District Attorney
Keith Bogardus, Dep. District Attorney
Orange County District Attorney's Office
401 Civic Center Drive West
Santa Ana, CA 92701

(Via E-Mail & Personal Service)

For Co-Defendant Manual Ramos:

John D. Barnett, Esq.
Barnett & Barnett
1 City Boulevard, Suite 500
Orange, CA 92868

(Via US Mail and E-Mail)

[X] I am readily familiar with the business practice for collection and processing of correspondence for mailing with the United States Postal Service. I know that the correspondence was deposited with the United States Postal Service on the same day this declaration was executed in the ordinary course of business. I know that the envelope was sealed and, with postage thereon fully prepaid, placed for collection and mailing on this date in the United States mail at Upland, California.

[X] By Personal Service, I caused such envelope to be delivered by hand to the above addressee(s): by Bruce Morgan/Safari Express

[X] By Electronic Mail, I caused the above-referenced document(s) to be transmitted via Electronic Mail to the above-named person(s)

[ ] By facsimile machine, I caused the above-referenced document(s) to be transmitted to the above-named persons(s)

Executed on December 28, 2012 at Upland, California.

[ ] By Overnight Courier, I caused the above referenced document(s) to be delivered To an overnight courier (UPS) for delivery to the above addressee(s).

(State) I declare under penalty of perjury under the laws of the State of California that the above is true and correct.

Patricia Sawyer

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