FILED
SUPERIOR COURT OF CALIFORNIA
COUNTY OF ORANGE
CENTRAL JUSTICE CENTER
JAN 04 2013
ALAN CARLSON, Clerk of the Court
BY L. HOYLE, DEPUTY

SUPERIOR COURT OF THE STATE OF CALIFORNIA

COUNTY OF ORANGE - CENTRAL JUSTICE CENTER

PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff, v. MANUEL RAMOS AND JAY CICINELLI, Defendants.	11CF2575 TENTATIVE RULING ON MOTION TO DISMISS UNDER PENAL CODE SECTION 995 Hon. WILLIAM R. FROEBERG Dept. C40

The question of the guilt or innocence of the defendants is not before this Court nor is the issue of whether the amount of evidence produced at the preliminary hearing is sufficient to sustain a conviction. The reviewing Court in a 995 motion is to only determine if there is a lack of competent evidence to show the commission of a crime or the defendant's connection with it.

Homicide is the killing of one human being by another. Homicide can be murder or manslaughter. Defendant Ramos has been charged with 2nd degree murder. Both defendants have been charged with involuntary manslaughter.

Defendant Cicinelli has been charged with Assault and Battery Under Color of Authority.

1. Justifiable Homicide. A police officer is justified in killing a suspect who resists arrest if the officer had probable cause to believe either that the victim posed a threat of serious physical harm to the officer or to others or that the victim had committed a forcible and atrocious crime. CALCRIM 507. However, the use of deadly force to prevent the escape of all felony suspects, whatever the circumstances, is constitutionally unreasonable. Where the officer has probable cause to believe the suspect poses a threat of serious physical harm, either to the officers or others, it is not constitutionally unreasonable to prevent escape by using deadly force. Thus, if the suspect threatens the officer with a weapon or there is probable cause to believe that he has committed a crime involving the infliction or threatened infliction of serious physical harm, deadly force may be used if necessary to prevent escape and if, where feasible, some warning had been given. Tennessee v Garner 471 U.S. 1.

A review of People's Exhibit 4, the video recording of the incident, reveals that Mr. Thomas was not armed with a weapon, that he was reasonably cooperative and non-combative up to the point of his attempt to flee and that Officer Ramos intended to arrest Mr. Thomas for the non-violent felony/misdemeanor of receiving stolen property. For the first 16 minutes of the encounter Mr. Thomas was passive and compliant; he made no threats to any officer. 14 minutes into the encounter Officer Ramos became aggressive. He ultimately said to Mr. Thomas, "Now you see my fists? They're getting ready to fuck you up." Within a few seconds Mr. Thomas stood up, causing Officer Ramos and Officer Wolfe to strike him with their batons. In response, Mr. Thomas began to run but did not get far; he was taken to the ground by

Officer Ramos and Officer Wolfe. It does not appear from the recording that there was any justification for the use of deadly force.

2. Reasonable Force. A peace officer may legally detain someone if specific facts known or apparent to the officer lead him or her to believe the person detained had been involved in criminal activity and a reasonable officer who knew the facts would have the same suspicion. A peace officer may use reasonable force to arrest or detain someone, to prevent escape, to overcome resistance or in self–defense. If a peace officer uses unreasonable or excessive force while arresting or attempting to arrest or detain a person that person may use reasonable force to defend himself. CALCRIM 2670 and Penal Code Section 835(a). A peace officer who uses unreasonable or excessive force in making a lawful arrest or detention commits a battery upon the person being arrested or detained as to such excessive force. Edson v City of Anaheim. 63 C.A. 4th 1269 @ 1273. "The question of the exercise of reasonable force and the right to self-defense, which we emphasize is distinct from that of the lawfulness of the arrest, is for the trier of fact to determine." People v Curtis 70 C 2d 347 @ 359.

Based on all of the evidence presented at the preliminary hearing, this Court cannot, as a matter of law, find that the officers used reasonable or unreasonable force to detain or arrest Mr. Thomas; the resolution of that issue properly belongs to the trier of fact.

3. Causation. An act causes death if the death is a direct, natural, and probable consequence of the act and the death would not have happened without the act. CALCRIM 520. The criminal law is clear that for liability to be found, the cause of the harm not only must be direct, but not so remote as to fail to constitute the natural and probable consequence of the defendant's act. People v Roberts 2 C 4th 271 @ 319. There is no bright line demarcating a

legally sufficient proximate cause that is too remote. Ordinarily the question will be one for the jury, though in some instances undisputed evidence may reveal a cause so remote that a Court may properly decide that no rational trier of fact could find the needed nexus. Roberts @ page 320 footnote 11. Indeed it has long been recognized that there may be multiple proximate causes of homicide, even where there is only one known actual or direct cause of death. When the conduct of two or more persons contributes concurrently as the proximate cause of death, the conduct of each is a proximate cause of the death if that conduct was also a substantial factor contributing to the result. A cause is concurrent if it was operative at the time of the death and acted with another cause to produce the death. People v Sanchez 26 C 4th 834 @ 846. When there are multiple concurrent causes of death, the jury need not decide whether the defendant's conduct was the primary cause of death but, need only decide whether the defendant's conduct was a substantial factor in causing the death. People v Butler 187 C.A. 4th 998 @ 1009.

Michael Lekawa, the Chief of Trauma Surgery at U.C. Irvine Medical Center, testified that he was the attending physician when Mr. Thomas was treated at the medical center from July 5, 2011 to July 10, 2011. Mr. Thomas presented at the trauma center in critical condition; a breathing tube had been inserted in his throat, his blood pressure was low, his heart rate fast and he was being assisted in his breathing by a bagged valve. On July 10th it was determined that Mr. Thomas was brain dead, that is, there was no blood flow to his brain. Dr. Lekawa opined that Mr. Thomas suffered an anoxic brain injury caused by either a lack of oxygen or lack of blood flow to his brain. Lack of oxygen to the brain can be caused by a compression of the chest which prevents the lungs from ventilating properly. Without a proper oxygen supply, the heart cannot pump properly thereby depriving the brain of blood and

oxygen which ultimately caused the anoxic brain injury. The injuries to Mr. Thomas' head and face caused him to aspirate blood into his lungs which was a contributing factor in diminishing his neurologic capacity to breathe. The doctor's ultimate opinion was that during the events depicted on the video, Mr. Thomas did not breathe properly and went unconscious. During his period of unconsciousness there was inadequate blood flow to his heart which resulted in heart arrhythmia; the heart arrhythmia ultimately led to inadequate blood flow to the brain which caused irreversible brain damage.

Dr. Aruna Singhania performed an autopsy on Mr. Thomas. Her findings were that the cause of death was anoxic encephalopathy with acute bronchopneumonia due to mechanical chest compression with blunt facial cranial injury during physical altercation with law enforcement. She could not determine if there was one single cause of death as both worked together.

After Officer Ramos and Officer Wolfe drew their batons, Mr. Thomas ran. Although the participants were out of view of the camera for approximately a minute to a minute and a half, it appears from the audio that Officers Ramos and Wolfe took Mr. Thomas to the ground. When video coverage resumes it appears that Officer Ramos is on top of Mr. Thomas and Officer Wolfe is assisting in attempting to restrain Mr. Thomas. After a struggle with several officers lasting a minute or two, and with Officer Ramos still on top of Mr. Thomas, Officer Cicinelli is seen striking Mr. Thomas in the face with the butt of his Taser gun. The Taser gun caused some lacerations to the face and fractures of the zygoma and maxillary sinus and the nose. Within a few minutes Mr. Thomas was comatose and never regained consciousness.

It can be reasonably inferred from that evidence that by pinning Mr. Thomas to the ground for a substantial period of time, Officer Ramos contributed to the death of Kelly Thomas by cutting off the oxygen supply to his

brain. It is also reasonable to infer that Officer Cicinelli's use of the Taser gun also contributed to the death of Kelly Thomas by inflicting the injuries to Mr. Thomas' face that led to aspiration of blood thereby inhibiting oxygen flow to the heart and brain. Both officers' use of force could be determined to be proximate causes of the death of Kelly Thomas.

4. Second Degree Murder. Second Degree Murder is the commission of an act that caused the death of another human being with implied malice. A person acts with implied malice if he or she intentionally committed an act, the natural and probable consequences of which were dangerous to human life, the person knew his or her act was dangerous to human life and he or she deliberately acted with conscious disregard for human life. CALCRIM 520.

A murder committed with implied malice requires the prosecution to demonstrate the defendant in fact acted with malice. The concept of implied malice has both a physical and a mental component. The physical component is satisfied by the performance of an act, the natural consequences of which are dangerous to life. The mental component involves an act deliberately performed by a person who knows that his conduct endangers the life of another and who acts with conscious disregard for life. Whether a defendant's underlying acts are inherently dangerous in the abstract is not dispositive in the jury's determination as to whether the defendant acted with malice. The classification of the underlying offense as a misdemeanor does not in itself preclude a resulting death from constituting murder. The circumstance that an act may be punishable as a misdemeanor does not render it incapable of being performed in a manner that, under the circumstances, is sufficiently dangerous to human life to support a jury's finding of implied malice. Even if the act results in a death that is accidental the circumstances surrounding the act may

evince implied malice. People v Nieto Benitez 4 C 4th 91. Courts have long recognized that an assault with the fist may be made in such manner and under such circumstances as to make the killing murder (People v Munn 1884, 65 C 211). However, if the blows causing death are inflicted with the fist, and there are no aggravating circumstances, the law will not raise the implication of malice aforethought, which must exist to make the crime murder.

> "Based on our review of the record, we find sufficient evidence that the manner of the assault and the circumstances under which it was made rendered the natural consequences of defendant's conduct dangerous to life. Of course, the jury was entitled to infer defendant's subjective awareness that his conduct endangered Kauanui's life from the circumstances of the attack alone, the natural consequences of which were dangerous to human life... then, having knocked Kauanui unconscious with his head split open on the ground, defendant took no steps to ascertain Kauanui's condition or to secure emergency assistance." People v Cravens 53 C 4th 500.

Malice may be implied when a person, knowing that his conduct endangers the life of another, nonetheless acts deliberately with conscious disregard for life. Implied malice contemplates a subjective awareness of a higher degree of risk than does gross negligence and involves an element of wantonness which is absent in gross negligence. A finding of implied malice depends upon a determination that the defendant actually appreciated the risk involved. People v Watson 30 C 3d 290 @ 296. Implied malice is determined by examining the defendant's subjective mental state to determine if he or she actually appreciated the risk of his actions. In reviewing the evidence in a motion under Penal Code Section 995, the Court must find some showing of each element of the crime; such showing may be made by means of circumstantial evidence supportive of reasonable inferences. P v Superior Court (Costa) 183 C.A. 4th 690.

It is reasonable to conclude that Officer Ramos committed an assault on Mr. Thomas when he extended his hands toward Mr. Thomas and said, "Now you see my fists? They're getting ready to fuck you up", and then swung his baton at him. It is also reasonable to conclude that he committed a battery on Mr. Thomas in an attempt to arrest him. Whether the battery and the assault were reasonably justified is a question for the trier of fact. The following evidence presented at the preliminary hearing supports a finding of implied malice: A) For no readily apparent or logical reason, Officer Ramos threatened to "fuck up" Mr. Thomas. B) Officer Ramos, with no apparent reasonable cause to believe Mr. Thomas was a danger to himself or to anyone else began striking Mr. Thomas with his baton. C) Officer Ramos continued to compress Mr. Thomas' chest even though Mr. Thomas stated 9 times that he could not breathe. D) Officer Ramos failed to render aid to his arrestee, an obviously unconscious person whom he had helped render unconscious.

A medical degree is not required to know that suffocating someone will kill them. A reasonable person could infer that the use of force was excessive and unreasonable and that the extended chest compression of Mr. Thomas and the failure to aid an unconscious arrestee constituted implied malice.

5. Involuntary Manslaughter. Involuntary manslaughter is the unlawful killing of a human being without malice where the defendant commits an unlawful act not amounting to a felony, or in the commission of a lawful act which might produce death in an unlawful manner or without due caution and circumspection, that is with criminal negligence. A person acts with criminal negligence when he or she acts in a reckless way that creates a high risk of death or great bodily injury and a reasonable person would have known that acting in that way would create such a risk. CALCRIM 580 and Penal Code Section 192(b). Involuntary manslaughter merely requires a showing that a

reasonable person would have been aware of the risk. Thus, even if a defendant had a subjective, good faith belief that his or her actions posed no risk, involuntary manslaughter culpability based on criminal negligence is warranted if the defendant's belief was subjectively unreasonable. P v Butler 187 C.A. 4th 998. Also, if a defendant has a duty to provide aid to a victim, his or her failure to do so resulting in the victim's death can give rise to a charge of involuntary manslaughter." People v Whisenhunt 44 C 4th 174 @ 217.

Fire Captain Ron Stancyk testified that he was one of the paramedics who arrived on scene. He made contact with a large number of police officers on the scene some of whom directed him to one of the officers who had some abrasions and lacerations on his arm (Officer Ramos). After about a minute Captain Stancyk turned and saw Mr. Thomas lying on the ground leaning up against a police officer's leg. Captain Stancyk did not hear anyone direct him to the man lying on the ground. Mr. Thomas was handcuffed in front. The Captain observed a large amount of blood on the ground and on Mr. Thomas' hair, face, moustache, and beard. He walked over to Mr. Thomas and observed that his skin was ashen and cyanotic and his breathing was agonal.

As to Officer Ramos, if his participation in the events either a) did not constitute implied malice as discussed above, or b) did not constitute an unreasonable use of force in an attempt to arrest or detain Mr. Thomas, his actions in failing to provide aid could amount to involuntary manslaughter under a criminal negligence theory. In the alternative, a reasonable inference could be drawn that his use of force was excessive and therefore he committed a battery, an unlawful act not amounting to a felony.

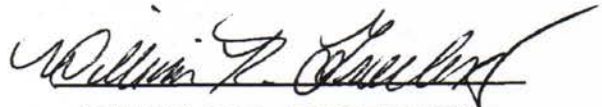
As to Officer Cicinelli, the fact that he can be seen striking Mr. Thomas in the face with his Taser gun while Mr. Thomas was being restrained on the ground by several officers and by his own statement that, "I ran out of options

so, I got the end of my Taser and I probably, I just start smashing his face to hell. He's on something dude", can reasonably be construed as an unlawful use of force and therefore an assault with a dangerous or deadly weapon. Whether the force used was reasonable under the circumstances is a question for the trier of fact. Failing to come to Mr. Thomas' assistance, as previously discussed, could be construed as criminal negligence. Either theory could support a finding of involuntary manslaughter.

6. Assault Under Color of Authority. Penal Code Section 149 makes it a misdemeanor for a public officer, acting under color of authority, to assault and or beat a person without lawful authority. As discussed previously, whether the force used by Officer Cicinelli was reasonable or unreasonable is a question for the trier of fact.

It is the Court's tentative decision to deny each defendant's motion to dismiss.

Dated: January 4, 2013



WILLIAM R. FROEBERG
Judge of the Superior Court

DECLARATION OF SERVICE

Re: People vs. Ramos and Cicinelli, Case Number 11CF2575

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Clerk's Certificate of Mailing (CCP 1013a)

I certify that I am not party to this cause, that I am over the age of 18, and that a certified copy of the Tentative Ruling on Motion to Dismiss Under Penal Code Section 995, was mailed first class postage-prepaid in a sealed envelope addressed as shown above. Mailing and execution of this certificate occurred on the date of January 04, 2013, in Santa Ana, California.

ALAN CARLSON, EXEC OFFICER/CLERK of the Superior Court in and for the County of Orange,

Dated: 1/4/13

By: Laura J. Hyde