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Utah County Attorney

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Chief Craig Geslison
Provo City Police Department
48 South 300 West
Provo, UT 84603

Re: Sergeant Don Weidinger, January 9, 2007 Traffic Accident

Dear Chief Geslison:

I have now received and reviewed all reports, statements and other evidence provided to my office by Sergeant Brett Christensen of the Utah Highway Patrol regarding this incident. I conclude there is not probable cause to believe Sergeant Weidinger violated any criminal or traffic laws.

FACTS

On January 9, 2007, at around 8:30 p.m., Sergeant Don Weidinger of the Provo Police Department, while on-duty in his patrol vehicle and at approximately 500 South University Avenue in Provo, struck and killed a pedestrian, Mr. Roy Taylor, .

On this date and at this time 500 South University Avenue was clear of obstructions and there were no adverse weather conditions. It appears that at night visibility in this area can be poor and confusing because of the lighting conditions and because of background shadows from structures located adjacent to University Avenue.

Mr. Taylor was dressed in dark clothing. Witnesses who saw Mr. Taylor prior to the accident state that he was "definitely not attentive." The only eyewitness who saw Mr. Taylor's position immediately prior to the accident states that he was past the crosswalk (not in the crosswalk). Mr. Taylor's ethanol level, taken at his autopsy, shows a blood level between .14 and .17 g/dl.

Sergeant Weidinger was driving at or below the speed limit, his vehicle was functioning properly, and he appears to have had no distractions to his attention or his ability to perceive. He specifically states that despite maintaining a normal lookout he did not see Mr. Taylor until immediately before impact.

LAW

The statutes most pertinent to this incident are Utah Code Section 76-5-206, Negligent Homicide, and Sections 41-6a-1002, 41-6a-1003 and 41-6a-1006, all part of Pedestrians' Rights and Duties in the Traffic Code. Section 76-5-206 states that "homicide constitutes negligent homicide if the actor, acting with criminal negligence, causes the death of another." Criminal negligence exists (Section 76-2-103(4)) when the actor "ought to be aware of a substantial and unjustifiable risk that the circumstances exist or the result will occur. . . . [and] [t]he risk must be of such a nature and degree that the failure to perceive it constitutes a gross deviation from the standard of care that an ordinary person would exercise in all the circumstances as viewed from the actor's standpoint." Section 41-6a-1002(1)(a) states, in pertinent part, that when traffic-control signals are not in place . . . the operator of a vehicle shall yield the right-of-way . . . to a pedestrian crossing the roadway within a crosswalk." Section 41-6a-1002(1)(c) states that "[a] pedestrian may not suddenly leave a curb or other place of safety and walk or run into the path of a vehicle which is so close as to constitute an immediate hazard." Section 41-6a-1003(1) states that "[a] pedestrian crossing a roadway at any point other than within a marked crosswalk or within an unmarked crosswalk shall yield the right-of-way to all vehicles on the roadway." And Section 41-6a-1006(1) states that "[t]he operator of a vehicle shall: (a) exercise care to avoid colliding with a pedestrian; (b) give an audible signal when necessary; and (c) exercise appropriate precaution if the operator of the vehicle observes . . . an obviously confused, incapacitated, or intoxicated person."

ANALYSIS

As mentioned above, it appears that when he was struck Mr. Taylor was most likely not in a crosswalk and was not clearly visible due to his dark clothing, the poor lighting conditions and the background shadows. Mr. Taylor was also intoxicated and most likely inattentive when he entered the intersection. Additionally, the evidence indicates Sergeant Weidinger's speed was at or below the posted limit, his attention was not impaired or diverted and his vehicle was functioning properly.

As to criminal negligence, I find that Sergeant Weidinger's failure to perceive the risk of striking a pedestrian under the conditions then existing was not "of such a nature and degree that the failure to perceive it constitutes a gross deviation from the standard of care that an ordinary person would exercise in all the circumstances as viewed from the actor's standpoint." To the contrary, it appears that Sergeant Weidinger drove using *at least* the standard care exercised by an ordinary person. In fact, I think it likely an ordinary person would not have perceived the risk of striking Mr. Taylor under identical conditions because of the lighting conditions, Mr. Taylor's dark clothing and his apparent location and lack of attention. I accordingly conclude that there is little or no evidence that Sergeant Weidinger was criminally negligent under Section 76-5-206.

As for possible traffic offenses, after evaluating the rights and duties codified in Sections 41-6a-1002, -1003 and -1006, I have determined that (notwithstanding Section 76-2-101 and -102 indicating that culpable mental standards are inapplicable to the Traffic Code) I must weigh and balance the conduct of Mr. Taylor and Sergeant Weidinger to determine if a charge under

Sections -1002, -1003 or -1006 is merited. I find that while it is hypothetically *possible* Sergeant Weidinger did not “exercise care to avoid colliding with a pedestrian” or did not yield the right-of-way to a pedestrian in a crosswalk, the evidence suggests the contrary: Mr. Taylor was not in a crosswalk and failed to yield the right-of-way to Sergeant Weidinger’s vehicle--or he left a curb or place of safety and walked into the path of Sergeant Weidinger’s vehicle which was so close “as to constitute an immediate hazard.” I accordingly conclude that there is little or no evidence to charge Sergeant Weidinger with a violation of the Traffic Code.

CONCLUSION

For these reasons, I find there is not probable cause to believe Sergeant Don Weidinger of the Provo Police Department violated any criminal or traffic laws.

Sincerely,

Jeffrey R. Buhman
Utah County Attorney