

## Tribune-Review

# Gun expert: Shooting death may be 'tragic error'

By Richard Gazarik and Matthew Junker

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Based on a scenario described by the family of a 12-year-old shot by police on Christmas Eve, an expert in the use of deadly force says the death may have been an understandable accident rather than a criminal misjudgment.

An attorney hired by the family of shooting victim Michael Ellerbe said an officer may have fallen while running after the boy with a drawn gun, causing him to misfire his weapon.

Attorney Joel Sansone said anonymous "but credible" sources told him the second officer saw his partner down on the ground and fired at Ellerbe, killing the boy. An autopsy showed Ellerbe was shot in the back; the bullet passed through his heart.

Sansone has been adamant that Ellerbe was unarmed. The boy allegedly was running from a stolen SUV in the city of Uniontown.

"Obviously, (the officer) felt his life was in jeopardy and he felt he had to use a piece of lead to defend himself. It's just a tragic error. It turns out he was wrong, but it doesn't sound like he's criminally liable," Ken Cooper said.

Cooper is the director of Tactical Handgun Training, a business that trains law enforcement officers in New York state in the use of force.

He also testified for police officers who were defendants in the noted Amadou Diallo homicide trial. Diallo was shot and killed on Feb. 4, 1999, when police fired 41 times, striking him with 19 bullets.

Police said they believed Diallo, an African immigrant, was a suspect in a rape investigation, and they fired when they believed he was pulling a weapon. In fact, Diallo was unarmed. Four officers were tried — and acquitted — in connection with the shooting.

Sansone and his clients have not excluded the possibility that the Uniontown shooting was an accident, he said.

"Since we don't know all the facts, we are being very tentative before committing. We are not on a witch

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[Joel Sansone, an attorney hired by the family of shooting victim Michael Ellerbe](#)

Associated Press



**Michael Ellerbe:**  
12-year-old fatally shot by state police in Uniontown on Christmas Eve.

hunt against any police officer," he said.

"Obviously, you have an unarmed child shot in the back, and some questions have to be answered."

Cooper and fellow use-of-force expert Richard Isaacs of the Lubrinco Group, a New York City bodyguard and risk-management firm, referred to a 1985 Supreme Court decision.

The court in *Tennessee vs. Garner* held that it is improper to fire at a fleeing suspect unless officers believe they or others are facing "significant threat of death or serious physical injury."

"A police officer may not seize a nondangerous suspect by shooting him dead," the decision states.

But danger can mean as little as a furtive or "targeting" glance, Cooper said.

"It's not enough that a police officer is down or someone is running away. (But) It doesn't take much (movement) to turn and fire. If he feels his life is threatened, he has a right to shoot his weapon," he said.

State police have put troopers Samuel Nassan and Juan Curry on administrative duty while a investigation is completed.

Jack Lewis, a spokesman for the Pennsylvania State Police in Harrisburg, said Curry graduated from the State Police Academy in Hershey in January 1995. After serving with Troop A in Greensburg and Troop B in Findlay, he was transferred in June 2001 to Troop B in Uniontown.

Nassan graduated from the academy in July 2002 and was assigned to Troop B in Uniontown, Lewis said.

Because of officer safety concerns, regulations regarding the use of force by state troopers are not regarded as public information, Lewis said. However, he indicated that the regulations conform to the Pennsylvania Crimes Code.

According to Title 18 of the Pennsylvania Crimes Code, an officer is justified in using deadly force to make an arrest to defend himself or another person from harm. Nevertheless, the crimes code states that deadly force can be used "only when he believes that such force is necessary to prevent death or serious bodily injury to himself or such other person."

An officer also can use deadly force to stop a person from resisting or escaping if a suspect has committed a felony and is attempting to escape and possesses a deadly weapon or is likely to "endanger human life or inflict serious bodily injury unless arrested without delay."

State troopers are taught to shoot to kill and never to fire warning shots, according to a retired trooper who served for three decades.

The retiree, who asked not to be identified, said cadets are taught to fire two shots, known in police parlance as a "double tap," in case the first bullet does not stop a criminal suspect. Trainees are taught never to fire warning shots and to aim for the center of the body.

Neither police nor Sansone specifically named either trooper as the shooter. But Sansone has been told that a white officer fired the fatal shot, he said.

Nassan is white; Curry is black.

Both Cooper and Isaacs said it would have been a mistake for the first officer to be running with his gun drawn.

"I remind you that we tell children not to run with scissors in their hands," Isaacs said.

"It's usually not advisable to run with a gun because of just what happened here. It's a case in point," Cooper said.

Both Isaacs and a Pennsylvania Bar Association consultant lawyer raised the issue of proper training for police officers. Gerald C. Grimaud, a Tunkhannock attorney, said police often receive inadequate training.

"We can't always unload on the guy who has to make that decision on the spot," he said. "I'm not saying their feet should not be held to the fire — they should — but there's a lot more to it than that."

The state police academy program devotes 12 hours to training potential troopers in the appropriate use of force, Lewis said. Troopers also are asked to complete about four hours of training annually in the use of force and when it is justified. Once a trooper has graduated from the academy, he or she is required to meet firearms qualifications twice a year, Lewis said.

Attorney Victor Pribanic, of McKeesport, said he reviewed state police policy and training in connection with a 1994 shooting in Hempfield Township. Pribanic represented Sally Bennett, a mother whose 25-year-old son, David, was shot by a state trooper during a confrontation outside the Greengate Garden Apartments.

David Bennett was killed by a shotgun blast fired by Trooper Francis Murphy III, who said the man approached him and other troopers with a loaded rifle that Bennett had pointed at himself.

A federal judge ordered a new trial in the case because the state withheld documents during pretrial discovery about Murphy's ability to use firearms, Pribanic said. Specifically, Pribanic had demanded to see any documents relating to firearms incidents involving Murphy prior to the shooting.

The state said no such documents existed and a jury later ruled in Murphy's favor. However, the U.S. Third Circuit Court of Appeals upheld the lower court decision for a new trial. It has not been held yet.

"There were incidents related to Murphy's conduct with handguns which they didn't want us to see," Pribanic said. "The case was reversed because of the apparent withholding of certain discovery material. That shows the state police like to play it close to the vest."

It's a matter of judgment, Pribanic said.

"It comes down to an exercise of good judgment basically," he said. "It boils down to an officer's use of professional judgment."

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