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April 18, 2017

Detective Eric Gunderson
Washington State Patrol
Criminal Investigations Division
2502 112th St. E.
Tacoma, WA 98445

Re: Investigation of Kevin Harper
WSP 16-031428

Detective Gunderson:

Thank you for your thorough investigation into the potential criminal conduct of former Clark County Sheriff's Office Detective Kevin Harper. The Attorney General's Office (AGO) has reviewed the investigation and additional information provided by Clark County. The AGO declines to file criminal charges for the reasons set forth below.

Facts from Investigation

Kevin Harper was a 28-year veteran of the Clark County Sheriff's Office (CCSO). From approximately late-August 2015 through March 2016, Harper engaged in a romantic and sexual relationship with a known heroin addict named T.W. Harper met T.W. on many occasions during this period of time and had sex with her in his work vehicle and in motel rooms. On at least three occasions, Harper observed T.W. use heroin. Harper sometimes gave money to T.W. when T.W. lamented that she would need to commit crimes in order to buy heroin. Harper never arrested T.W. for possession of heroin or unlawful use of drug paraphernalia.

There were outstanding warrants during some of the period of time when Harper and T.W. were together. Harper never arrested T.W. for the warrants, but there is also no evidence that Harper ever confirmed that there were outstanding warrants for T.W.'s arrest.

Harper's relationship with T.W. ended in early April 2016 when T.W. was arrested and jailed for shoplifting. Harper met T.W. a few times after that, but the two never resumed a sexual relationship. Harper confessed an extramarital affair to his supervisor in April 2016, but told his

supervisor that he used vacation hours on those days when he left work early to meet with her. Harper's supervisor did not inquire further and took no disciplinary action.

Harper's relationship with T.W. became known to CCSO command staff in September 2016. Harper was placed on administrative leave while CCSO conducted an internal affairs investigation. CCSO eventually asked the Washington State Patrol (WSP) to conduct a criminal investigation. Both CCSO and WSP interviewed T.W. as part of their prospective investigations. T.W. described her relationship with Harper in these interviews. Harper declined to be interviewed by investigators.

Digital media used by Harper was searched as part of the investigation. Photographs and text messages confirmed the relationship as described by T.W. The photographs also corroborated that Harper had witnessed T.W. use drug paraphernalia to inject heroin.

Harper has resigned his position as a peace officer for Clark County.

Charging Review

Under the filing standards enumerated in RCW 9.94A.411, the applicable charging standard is:

> Crimes against property/other crimes will be filed if the admissible evidence is of such convincing force as to make it probable that a reasonable and objective fact-finder would convict after hearing all the admissible evidence and the most plausible defense that could be raised.

RCW 9.94A.411(2). The legal standard by which the State must prove any criminal charge is proof beyond a reasonable doubt. RCW 10.58.020.

The most plausible charges to consider in this case are: official misconduct, failure of duty, making a false or misleading statement to a public servant, and accomplice to a violation of the Uniform Controlled Substances Act (VUCSA).

Official Misconduct

A public servant commits official misconduct if, with intent to obtain a benefit, he intentionally refrains from performing a *duty imposed upon him by law.* RCW 9A.80.010(1)(b) (emphasis added). The crime of official misconduct is a gross misdemeanor. RCW 9A.80.010(2).

Here, the State would have no difficulty proving (a) Harper was a public servant, (b) Harper intended to obtain a benefit (sex with T.W.), and (c) Harper intentionally refrained from arresting

T.W. The question is whether Harper had "a duty imposed upon him by law" to arrest T.W. for drug offenses and/or outstanding warrants.[1]

Failure to Arrest for Drug Offenses

Heroin is a Schedule I controlled substance. RCW 69.50.204(b)(11). It is a class C felony to possess a controlled substance without a valid prescription. RCW 69.50.4013(1), (2).

It is a misdemeanor offense for any person to use drug paraphernalia to inject a controlled substance into the human body. RCW 69.50.412(1).

Peace officers have authority to arrest a person without a warrant if there is probable cause to believe that the person committed a felony offense. RCW 10.31.100. Peace officers may arrest a person for a misdemeanor offense without a warrant only if the person commits the misdemeanor in the presence of the officer. RCW 10.31.100.

Here, there is persuasive evidence that Harper watched T.W. use drug paraphernalia to inject a substance that Harper knew to be heroin. Harper had probable cause to arrest T.W. for possession of heroin and unlawful use of drug paraphernalia but declined to do so. The question is whether Harper had "a duty imposed upon him by law" to arrest T.W.; or whether the law simply gave him authority and discretion to arrest T.W.

RCW 10.31.100 gives peace officers authority and discretion to arrest for a witnessed drug offense, but arrest is not mandatory. The same statute provides that police officers "shall" arrest for violations of protections orders, domestic violence offenses, and DUI with a prior offense. Police officers have "a duty imposed by law" to arrest for those offenses, but the Legislature did not use "shall" in reference to drug offenses. It used the words "authority" and "may." There is a clear distinction and the logical conclusion is that the Legislature intended mandatory arrest for only a limited class of listed offenses, but discretion to arrest for all others, to include drug offenses.

Harper's most plausible defense to a charge of official misconduct based upon failure to arrest for drug offenses would be that he had no "duty imposed upon him by law" to arrest T.W. for drug offenses. Based upon the plain language of RCW 10.31.100, the AGO does not find a "duty imposed by law" to arrest for misdemeanor or felony drug offenses. This conclusion is separate and apart from whether the terms of Harper's employment with CCSO required him to make an arrest. The AGO reviewed this case for criminal charges, not violation of CCSO policy.

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[1] The fact that Harper may have engaged in sexual relations with T.W. in his patrol vehicle has no impact on the ultimate question of whether Harper refrained from performing a duty imposed upon him by law. It is unclear whether this conduct took place during paid work hours, and regardless, such activity is not a crime itself.

Failure to arrest for warrants

Harper had authority to arrest T.W. for the bench warrant that was outstanding from December 9, 2015 to April 2, 2016. However, there is no evidence that Harper *knew* that T.W. had an outstanding warrant. There are text messages from T.W. to Harper where she expressed her fear that there were outstanding warrants for her arrest, but no evidence that Harper investigated her fears and confirmed a warrant. Harper would have to confirm that T.W. had a warrant in order to arrest her for a warrant.

Harper's most plausible defenses to a charge of official misconduct based on failure to arrest for warrants would be (1) he did not know T.W. had warrants, and (2) even if he did know, he had no legal duty to arrest. There is no evidence that Harper ever confirmed that T.W. had an outstanding arrest warrant during the course of their affair. What little evidence there is suggests that Harper told T.W. he did not want to know about any warrants.

Even if the AGO could convince a jury that Harper had reason to check T.W. for warrants, the question arises again whether Harper had a "duty" to check T.W.'s warrant status and arrest her once he had reason to believe she might have outstanding arrest warrants. For the same reasons set forth above, the AGO could not find "a duty imposed upon him by law" that required Harper to search criminal record databases for outstanding warrants once T.W. suggested that she might have warrants. Again, this case was reviewed for criminal violations, not violation of CCSO policy.

Making a False or Misleading Statement to a Public Servant

A person commits the crime of making a false or misleading statement to a public servant if he knowingly makes a false or misleading material statement to a public servant. RCW 9A.76.175. A "material statement" is a written or oral statement reasonably likely to be relied upon by a public servant in the discharge of his or her official duties. RCW 9A.76.175. Making a false or misleading statement to a public servant is a gross misdemeanor. RCW 9A.76.175.

In April 2016, Harper told his sergeant that he submitted leave slips for vacation hours on those days during the affair when he left work early to meet with T.W. This was arguably a "material statement" because part of the sergeant's duties could include referring employees for internal investigation. The sergeant might have relied on Harper's statements to refer Harper for internal investigation had he suspected that Harper was visiting T.W. during work hours when Harper was being paid to work.

The evidence to support this charge is lacking. Investigation showed that Harper took vacation leave for partial days on 14 occasions during the relevant time period. T.W.'s description of the affair appears to indicate meetings in excess of 14 occasions (she estimated at one point that she met Harper 30 times). However, her memory is vague on this issue and there is no solid evidence—proof beyond a reasonable doubt—to show that Harper met T.W. on a particular day during work

hours and did not submit vacation leave. That Harper left work to meet T.W. is also difficult to prove because detectives are often out and about for various reasons while on duty. It would be difficult to show that Harper was not in the office on a particular day because he was visiting T.W. The AGO finds insufficient evidence to support this charge.

Accomplice to Drug Offenses

"A person is guilty of a crime if it is committed by the conduct of another person for which he or she is legally accountable." RCW 9A.08.020(1). A person is legally accountable for the conduct of another person if he is an accomplice of such other person in the commission of a crime. RCW 9A.08.020(2)(c).

A person is an accomplice of another in the commission of a crime if the person, with knowledge that his conduct will promote or facilitate the commission of the crime (i) solicits, commands, encourages, or requests the other person to commit the crime, or (ii) aids or agrees to aid the other person in planning or committing the crime. RCW 9A.08.020(3).

A person who is present at the scene and ready to assist by his or her presence is aiding in the commission of the crime. Washington Pattern Jury Instruction – Criminal (WPIC) 10.51. However, "more than mere presence and knowledge of the criminal activity of another" must be shown to establish that a person present is an accomplice. WPIC 10.51.

Here, Harper was present and had knowledge of T.W.'s criminal activity, but accomplice liability requires that Harper was "ready to assist" T.W. in committing her crimes. There is no evidence that Harper solicited, commanded, encouraged, or requested T.W. to commit her drug crimes. While Harper gave T.W. money during periods of time when she said she was fearful of becoming drug-sick due to her poverty, there is no evidence that Harper knew for certain how she would spend the money or that he wanted her to spend the money on drugs. To the contrary, the evidence from T.W.'s interviews and text messages from Harper's phone shows that Harper consistently discouraged T.W. from possessing heroin or using drug paraphernalia to inject heroin.

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Conclusion

The AGO finds insufficient evidence to charge a crime. If you have any questions or concerns, please do not hesitate to contact me.

Sincerely,

John Hillman
Assistant Attorney General
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cc: Clark County Sheriff Chuck Atkins
Clark County Commander John Horch
Clark County Prosecuting Attorney Tony Golick