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MEMORANDUM

TO: Death Investigation, DA 2369367-1

FROM: NICOLE JERGOVIC, DEPUTY DISTRICT ATTORNEY

cc:

DATE: October 26, 2017

SUBJECT: Memorandum declining prosecution

Date and time: August 21, 2017 at approximately 1:50 am
Location: SE Water Ave. & SE Taylor St.
Lead Investigator: Phillip Maynard (PPB Major Crash Team)
Victim: Tamar Monhait DOB 11/25/1975
Truck Driver: Paul Thompson DOB 9/15/1962

Summary:

On August 21, 2017 victim Tamar Monhait was riding her bicycle northbound on SE Water Avenue at approximately 1:50 am. At the same time, Paul Thompson was driving a garbage truck, heading southbound, also on SE Water Avenue. Paul Thompson attempted to turn eastbound onto SE Taylor Avenue, crossing over the path of travel for Tamar Monhait as she rode on her bicycle. Paul Thompson did not see Tamar Monhait until he had already initiated the turn. Tamar Monhait crashed into the side of the garbage truck and suffered catastrophic injuries to her head and her arm. She was transported to the hospital where she died. Driver Paul Thompson remained at the scene and was cooperative.

Facts:

On August 21, 2017 at 1:50 am a 911 call was received reporting that a bicyclist had just been struck by a garbage truck at SE Water and SE Taylor. Victim Tamar Monhait was in the roadway suffering from catastrophic head trauma and arm trauma. She was taken to the hospital as a trauma patient. At 3:50 am the trauma surgeon informed Officer Balzer that Tamar Monhait was brain dead and that she would die. The hospital was beginning inquiries about organ donation.

The location where this crash occurred is in the Central Eastside Industrial District of Portland. The speed limit is 25 mph. The area is lit by several sources including overhead street lights as well as flood lights from buildings in the area.

Items recovered from the scene included dark-colored clothing, a purse, a tan and white shirt, a cell phone with a shattered screen with attached headphones.

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Tamar Monhait was riding a light blue road-style bicycle that appeared to be in working order prior to the crash. There was a rear-mounted light that was not on at the scene. Officer Maynard later recharged the light and found it to be operable. Tamar Monhait had a BAC of .128 and was not wearing a bicycle helmet. She was an experience bicyclist, having worked as a bike messenger when she lived in Chicago and was very familiar with riding in urban environments.

The garbage truck driver, Paul Thompson, has been a garbage truck driver since the 1980's and has worked for the same company for that past 8 years. He has worked this same night shift, working the same route for the past 4 years. On this night, his shift began 30 minutes early due to potential traffic related to the solar eclipse. Paul Thompson said he was driving south along SE Water Avenue and was initially intending to turn east onto SE Yamhill when he heard a train going south so he then decided to continue south on SE Water to turn on SE Taylor so he could try to avoid the train. His statements to Officer Sandler were that he was "trying to beat the train" and using his two-way radio. He said that he did not see the bicyclist until she was right in front of him, and he stopped as soon as he saw her. He clarified that he had used his radio before the crash when another driver told him that he did not have to pick up his next load near the Lloyd Center because he (Edgar) had already picked it up. Paul Thompson notes that he was not in a rush, as he knew he could skip his next stop. He explained that this radio transmission was short and completed before he started his left turn onto SE Taylor Street. Paul Thompson reports that he suddenly noticed Tamar Monhait coming northbound after he had already initiated his turn and he stopped as quickly as he could and jumped out of his truck to check on her. He did not remember seeing any form of light or reflective gear or anything that contrasted on the bicyclist. He saw that her injuries were significant. Paul Thompson said that Tamar Monhait was wearing lighter colored clothing and did not appear to be wearing a helmet. He said that he saw her only moments before they collided and he had no time to avoid the collision. He said that he had initiated his turn signal before turning onto SE Taylor. Paul Thompson was cooperative, showed no signs of intoxication and was not under the influence of intoxicants at the time of the crash.

Witness Brian Sanford reported that he was standing on the NE corner of SE Water Ave. and SE Taylor and that he had witnessed the crash. He saw Tamar Monhait riding northbound and he saw the garbage truck turn left onto SE Taylor and strike the bicyclist as she continued straight in the bike lane. He said that the garbage truck appeared to be driving the speed limit but that it did turn fast. This witness was not sure if the bicyclist had a light on but he thought she did not. He didn't think either the truck or the bike were travelling too fast for the roadway.

Officer Maynard and the Major Crash Team located video from Water Avenue Coffee nearby which captured the collision from SE Taylor street. The video clip shows Tamar Monhait riding northbound in the appropriate roadway position on SE Water Avenue as she was approaching the intersection on SE Taylor. A flashing white light can be seen on the rear of her bicycle from the side view of this camera angle. She appears to be peddling at a steady cadence in the bike lane. She is briefly illuminated by the headlights from the garbage truck as Paul Thompson turns onto SE Water. The video does not show the moment of impact, as Tamar crashed into the opposite side of the garbage truck (the passenger side), thus the truck itself is blocking the view of the actual impact. The truck comes to a stop and Tamar Monhait is then lying on the roadway. Paul Thompson quickly exits and runs back to check on her and the video continues until emergency responders arrive.

Officer Maynard noted several things after watching the video from Water Avenue Coffee. While Tamar Monhait had a flashing rear light, there was no front headlight visible. She was wearing dark colored pants and a tan and white plaid shirt and a black purse. None of her clothing was reflective or high-contrast. Officer Maynard notes that he knows from experience that pedestrians and bicyclists often overestimate their visibility and believe they are visible to drivers when they actually are not. This is particularly true at night. Officer Maynard also points out that Paul Thompson had apparently not activated the turn signal before or during the turn onto SE Taylor, thereby not making any conspicuous indication of his intended change in direction to other road users. He also noted that, while the moment of impact was not visible, there was no indication of evasive action by Tamar Monhait prior to collision. Tamar Monhait

onto SE Taylor, thereby not making any conspicuous indication of his intended change in direction to other road users. He also noted that, while the moment of impact was not visible, there was no indication of evasive action by Tamar Monhait prior to collision. Tamar Monhait was apparently riding in the proper position on the road, and would have had the right of way when this collision occurred.

Officer Maynard and the Major Crash Team worked on video reconstruction, paying particular attention to lighting conditions and visibility. Officer Maynard recorded video from a driver's perspective in conditions that closely resemble those on the morning of the crash. The area is relatively well lit with much of the lighting in the form of overhead street lights and lighting from surrounding buildings. The lighting appears more abundant on the west side of SE Water Avenue, opposite of the side where Tamar Monhait was riding. Officer Maynard recorded video from his bicycle along the same path as Tamar Monhait's path while Officer Enz recorded video from the perspective of a driver going south on SE Water. Officer Maynard noted that while riding with no front headlight, he felt as though he would easily be visible to vehicles as they passed despite the fact that he did not have a front light. When he later viewed the video, he noted that it was actually much more difficult to observe him (a cyclist) than he had thought or expected.

Tamar Monhait's blood alcohol content was .128. Officer Maynard notes that alcohol is a depressant and that it can delay normal brain functions such as concentration, hand-eye coordination and reaction time. Based on the available evidence, Officer Maynard acknowledges that alcohol impairment would be a factor in this collision.

Officer Maynard also considered possible distracted driving issues. Paul Thompson indicated that he had used his radio before the crash to communicate with another driver. There was no evidence that he was using the radio at the time of the crash. And although Tamar Monhait's cell phone with headphones attached were found at the scene near her purse, Officer Maynard could not determine whether she had been wearing the headphones at the time of the crash or not. Thus, it did not seem that distraction was a factor for either the driver Paul Thompson or the bicyclist Tamar Monhait.

Legal overview:

Unintentional vehicular homicide, as defined by Oregon law, is codified as manslaughter and criminally negligent homicide. Manslaughter usually includes both intoxication and willfully reckless driving. Unintentional vehicular homicide, in some cases, includes other dangerous behaviors, such as fleeing the scene or eluding the police. In rare instances, unintentional vehicular homicide can include negligent driving so clearly criminal, yet not involving willful recklessness or intoxication, that charging the felony crime of "Criminally Negligent Homicide" is appropriate.

Criminally Negligent Homicide is defined at ORS 163.145. One commits this crime by causing the death of another "with criminal negligence," which is in turn defined at ORS 161.085(10):

"'Criminal negligence' or 'criminally negligent,' when used with respect to a result or to a circumstance described by a statute defining an offense, means that a person fails to be aware of a substantial and unjustifiable risk that the result will occur or that the circumstance exists. The risk must be of such nature and degree that the failure to be aware of it constitutes a gross deviation from the standard of care that a reasonable person would observe in the situation."

The crime of "criminally negligent homicide" includes more than situations where death results from driving. It includes any case in which a defendant causes the death of another by behavior that is "criminally negligent."

Under Oregon law, this mental state of "criminal negligence" requires more than inadvertence, inattentiveness, or, in driving cases, the added commission of traffic violations. The legislative commentary to the 1971 Criminal Code revision on the (then) new crime of Criminally Negligent Homicide stated that the purpose in defining this crime was to include conduct by a

commentary to the 1971 Criminal Code revision on the (then) new crime of Criminally Negligent Homicide stated that the purpose in defining this crime was to include conduct by a defendant who is unaware of great risk “only because [he] is insensitive to the interests and claims of other persons in society.” (emphasis added). This insensitivity to the safety and well-being of others must then produce a “gross deviation” from the standard of care that a reasonable person would use.

Historically, most vehicular homicides are charged as Manslaughter I or II because they involve intoxicated drivers who also speed, make unsafe passes, run stop signs or red lights, and engage in other aggravated, aggressive driving. Under Oregon case law, Criminally Negligent Homicide cases typically involve similarly bad driving, but usually without intoxication. “Criminally Negligent” vehicular homicides are fairly rare since the level of bad driving required by this crime is usually accompanied by intoxication, which then elevates the conduct into the “reckless” category, resulting in a charge of manslaughter.

In Oregon, not every fatal vehicle accident can or should result in felony homicide or other criminal charges, even when caused by a driver committing traffic violation(s) and/or being inattentive. The law requires substantially more egregious conduct to charge a driver with a criminally negligent homicide, with its presumptive prison sentence and many other serious consequences. Drivers who are not charged criminally do not, however, escape the law’s punishment; they are held responsible by a civil lawsuit using the standard of ordinary or “civil” negligence. This lesser form of negligence is generally defined as a failure to use “reasonable care” when acting in a given situation. “Reasonable care” is “what a reasonable person of ordinary prudence would, or would not, do in the same or similar circumstances.” Wollston v. Wells, 297 Or 548 (1984).

“Criminal negligence” is, therefore, more than a mere civil negligence. Criminal negligence is a significantly higher level of misconduct with the much higher criminal burden of proof. In a criminal case the burden of proof is “beyond a reasonable doubt,” while in a civil case the burden of proof is only “a preponderance of the evidence.” It is unusual to have negligent driving rise to such a high level that it becomes Criminally Negligent Homicide when death results.

Facts and Law

In the present case, the facts do not prove a criminal homicide. The driver was not intoxicated and he did not engage in reckless or criminally negligent driving behaviors. He was turning at an appropriate and lawful speed. He failed to signal his turn. But otherwise, the manner of his driving was unremarkable.

The driver may, however, be cited for the traffic violations relating to failure to properly signal his turn. The Portland Police Bureau is the responsible agency to issue this charge.

Conclusion:

After a complete and very thorough investigation by the Portland Police Bureau’s Major Crash Team, it is apparent that Tamar Monhait’s death was an accident and the facts do not support a criminal homicide.