



Office of the New York State Attorney General Letitia James

Office of Special Investigation

September 28, 2022

Report on the Investigation into the Death of Wesley Soper

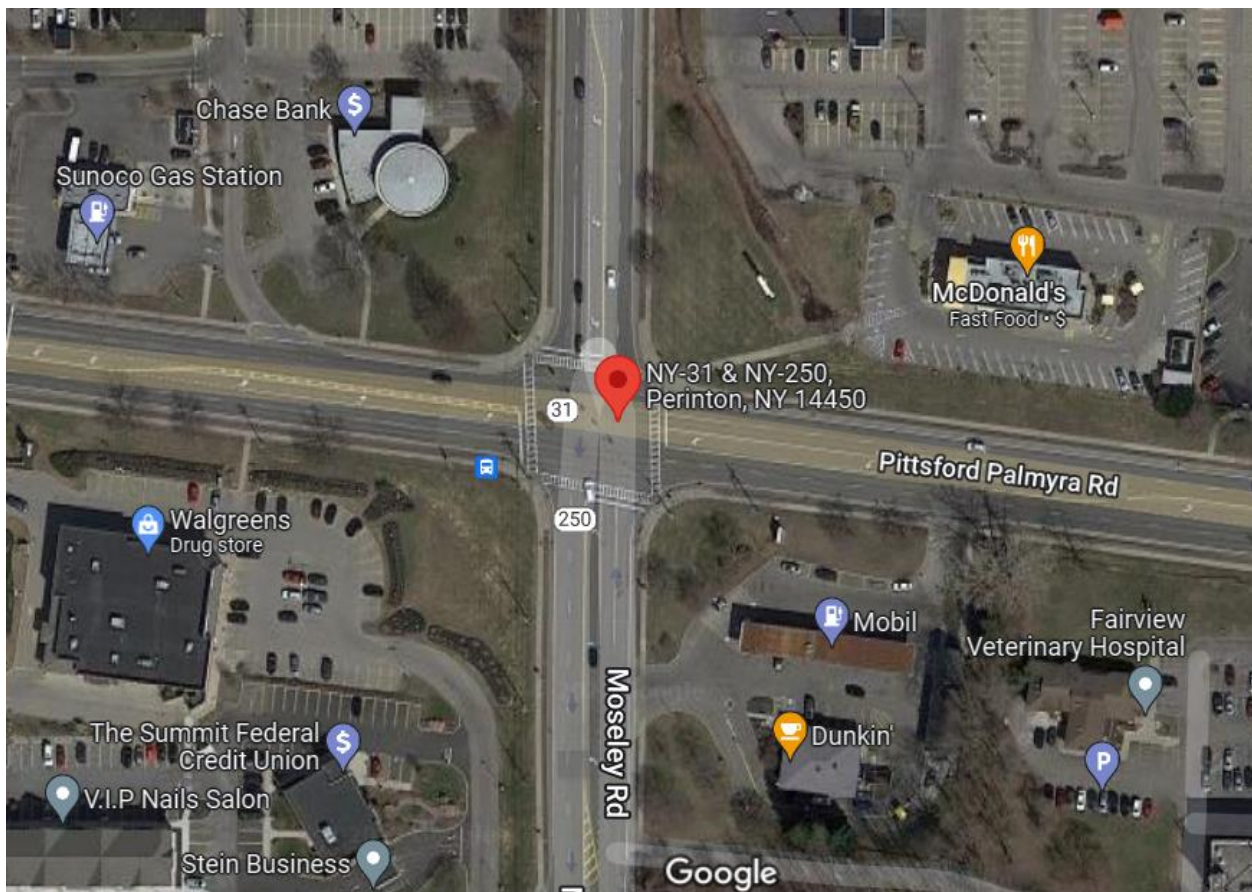
SUMMARY

New York Executive Law Section 70-b (“Section 70-b”) authorizes the Office of the Attorney General (“OAG”), acting through its Office of Special Investigation (“OSI”), to investigate, and if warranted, prosecute offenses arising from any incident in which the death of a person is caused by police officer. When the OAG does not seek charges, Section 70-b requires the issuance of a public report. This is the public report regarding the death of Wesley Soper.

On December 17, 2021, Monroe County Sheriff’s Office (“MCSO”) Deputy Michael Houlihan, struck Wesley Soper with his marked patrol car, killing him. OAG will not seek charges against Dep. Houlihan because the evidence does not show that Dep. Houlihan committed a crime.

STATEMENT OF FACTS

Route 31 (also known as Pittsford-Palmyra Road) and Moseley Road intersect in the Town of Perinton. Pittsford-Palmyra Rd. runs east/west, and Moseley Rd. runs north/south. This incident occurred on Pittsford-Palmyra Rd., in or near the west crosswalk of the Moseley Road intersection. A map of the general area is below.



A. The Collison

Deputy Michael Houlihan, a three-year member of the Monroe County Sheriff's Office ("MCSO"), spoke to OSI and MCSO about this incident on January 20, 2022. According to Deputy Houlihan, on December 16, 2021, he worked the 10:00 p.m. to 6:00 a.m. shift. At about 2:30 a.m., on December 17, 2021, Deputy Houlihan was westbound on Pittsford-Palmyra Road, on routine patrol. As he entered the intersection of Moseley Rd. and Pittsford-Palmyra Rd., Deputy Houlihan said he noticed a dark colored truck parked near the drive-up ATM of the Chase Bank located northwest of the intersection. Deputy Houlihan briefly diverted his attention to the truck as he entered the intersection and then, in his words, felt his car strike something. Deputy Houlihan immediately stopped his car and turned it around. From inside, Deputy Houlihan saw damage to the driver's side of his car and the windshield. When he got out, he saw that he had hit a pedestrian.

There are no overhead surveillance cameras at the intersection of Pittsford-Palmyra Rd. and Moseley Rd., and the MCSO does not equip its police fleet with dashboard cameras. Therefore, there is no video footage of the collision itself. However, at 2:37:28 a.m., after he got out of his car, Deputy Houlihan activated his Body Worn Camera ("BWC"). There is, therefore, video of the incident's aftermath, which OSI reviewed.

Although there is no overhead surveillance video at the intersection, a camera mounted on the northern wall of a Walgreens store captured Dep. Houlihan's car approaching the intersection and Mr. Soper (faintly and from a distance) walking, without stopping or pausing, into the road. That footage, made for and kept by Walgreens, contained irremovable date and time stamps that obscured the collision. Close-up still photos taken from that video, are below.



Image taken from close-up of surveillance footage captured from the north wall of Walgreens showing Mr. Soper and the headlights from Dep. Houlihan's patrol car.



Image taken from close-up of surveillance footage captured from the north wall of Walgreens showing Mr. Soper and the headlights from Dep. Houlihan's patrol car captured less than one second after the preceding image.

B. Post-Collision

According to Deputy Houlihan, and as captured on his BWC, he approached the person in the roadway, later determined to be Wesley Soper, whom he did not know. According to recorded dispatch communications kept by the Monroe County/City of Rochester Emergency Communications Department ("ECD"), at 2:33 a.m., Deputy Houlihan radioed, "*Just struck a pedestrian on 31 at Moseley Road. Need EMS now.*" According to Deputy Houlihan, Mr. Soper was struggling to breathe, and Deputy Houlihan began administering cardiopulmonary resuscitation ("CPR").¹ About one minute later, after the dispatcher acknowledged the call, Deputy Houlihan added, "*Have them step it up. Agonal breathing.*"² At 2:32 a.m., according to the ECD records, Fairport Police Department Officer Ryan Schrom arrived on scene and took over CPR from Deputy Houlihan.

At about 2:39 a.m., according to ambulance records, a Perinton Ambulance crew arrived on scene, assumed care of Mr. Soper, and transferred him to Strong Memorial Hospital. Mr. Soper arrived at the hospital at 2:48 a.m., where personnel intubated³ him and continued

¹ Cardiopulmonary Resuscitation is an emergency lifesaving procedure performed when the heart stops beating. See, <https://cpr.heart.org/en/resources/what-is-cpr>.

² Agonal Breathing is the medical term used to describe struggling to breathe or gasping. See, <https://www.webmd.com/heart-disease/what-to-know-agonal-breathing>.

³ Intubation is a process where a tube is inserted through a person's mouth or nose, then down into their trachea (airway/windpipe). The tube keeps the trachea open so that air can get through. The tube can connect to a machine that delivers air or oxygen. See, <https://my.clevelandclinic.org/health/articles/22160-intubation>.

CPR. Their efforts were unsuccessful, and at 3:10 a.m. Dr. Ayodele Sangosanya pronounced Mr. Soper deceased.

C. Analysis of Deputy Houlihan's cellular phone and breath

In his interview, Deputy Houlihan said he had not consumed alcohol and was not using his phone when this incident happened; evidence corroborates his statement. While members of the MCSO investigated the scene, other members took Deputy Houlihan to MCSO headquarters. Once there, Sergeant Stephen Murphy administered an alcohol test with a preliminary alcohol screening device,⁴ which was negative for the presence of alcohol. Deputy Houlihan also permitted review of his cellphone, and MCSO Investigator Sergeant Dave Bolton examined and photographed his incoming and outgoing phone calls and text messages and found that Deputy Houlihan was not talking or texting at the time of the incident.

D. Medical Examiner Report

Dr. Nadia Granger, the Monroe County Medical Examiner, performed a post-mortem examination of Mr. Soper on December 18, 2021. Dr. Granger noted that Mr. Soper's outermost layer of clothing consisted of a gray and black speckled sweater, black pants, and a green graphic t-shirt; he stood 5 feet 3 inches tall and weighed 180 pounds. Toxicological analysis of Mr. Soper's blood revealed that his blood alcohol content was 0.14. Although Mr. Soper was walking, not driving, for comparison we note that for drivers in New York the legal limit of blood alcohol content is 0.08.

Dr. Granger found evidence of blunt force injuries to Mr. Soper's head, neck, thorax, and abdomen, as well as a fracture of the left knee. She determined the cause of death to be "Multiple blunt force injuries," and the manner of death to be "Accident."

⁴ Preliminary alcohol screening devices are portable handheld screening instruments used by law enforcement to test for the presence of alcohol in a person's system. If the preliminary screen indicates there is any alcohol present, the blood alcohol content is measured, most commonly, by a separate, scientific breath testing instrument. Here, Sgt. Murphy administered the Alco-Sensor FST®, which measured .000.

E. MCSO Collision Reconstruction Report



The intersection of Pittsford-Palmyra Rd. and Moseley Rd. showing the approximate point of impact and the place where Mr. Soper's body came to rest.

Pittsford-Palmyra Rd. was closed to traffic while MCSO Investigator Gregory Prokop and others responded to and processed the scene. Inv. Prokop, a collision reconstructionist⁵ certified by the Institute of Police Technology and Management, performed a Motor Vehicle Collision Investigation and Analysis and issued a report ("Reconstruction Report") on May 3, 2022.

Based on the physical evidence, Inv. Prokop concluded that when the collision occurred Mr. Soper, who was wearing a black hat, dark gray sweater, black pants, and headphones, crossed Pittsford-Palmyra Rd. from south to north, either in the crosswalk or just west of it. As Deputy Houlihan entered the intersection of Pittsford-Palmyra Rd. and Moseley Rd., he crossed into a semi-lit area in or near the crosswalk on the west side of the intersection and struck Mr. Soper.

According to the Reconstruction Report, evidence showed that the front left edge of Deputy Houlihan's patrol car made initial contact with Mr. Soper's rear, outer right knee. Mr. Soper's

⁵ A reconstructionist is an expert who has been specially trained and qualified to recreate the scene of a motor vehicle incident after examining all aspects of a collision.

body then made continuous contact with the patrol car, causing Mr. Soper's upper torso to slap onto the hood of the car and causing his head to strike the windshield. Mr. Soper's body then travelled in a southwest direction for approximately 88 feet before coming to rest in the eastbound lane of Pittsford-Palmyra Rd.

According to New York State Department of Transportation ("NYDOT") Timing Tables, at this intersection, between 8:00 p.m. and 6:00 a.m., Pittsford-Palmyra Rd. is prioritized over Moseley Rd. In other words, between those hours, unless triggered, the traffic light remains green to east/west travelers on Pittsford-Palmyra Rd., and red to north/south travelers on Moseley Rd. The two triggering events that shift the green light to Moseley Rd. are when the light senses traffic stopped at the red light on Moseley Road, or if a person manually activates the crosswalk traffic control signal by pressing the button.

In addition to obtaining and reviewing the NYDOT Timing Tables, Investigator Prokop recorded and reviewed light cycles at the intersection, near the time of the incident. He determined that once a person presses the crosswalk control button, the time it takes for the light on Pittsford Palmyra Rd. to change from green to yellow to red and for the pedestrian signal at the northwest corner of the intersection to activate is about twelve seconds.⁶

Inv. Prokop concluded, based on review of the available surveillance footage⁷ there was no north/south vehicular traffic during the relevant timeframe that would have shifted the right of way to Moseley Rd., meaning that the east/west vehicular traffic on Pittsford Palmyra Rd. had priority over the intersection - unless Mr. Soper had activated the crosswalk signal.⁸ However, as noted above, the enhanced video footage shows that Mr. Soper entered the intersection without stopping at the crosswalk, and therefore it does not appear that Mr. Soper stopped to press the pedestrian button;⁹ even if he had pressed the button, he did not wait for the signal to change before proceeding.

The marked speed limit where Deputy Houlihan struck Mr. Soper was 45 mph. Although there was an event data recorder (EDR), commonly known as a black box, in Deputy Houlihan's car, the collision with Mr. Soper did not trigger its activation. The impact involved in this incident was at the front left side of Deputy Houlihan's car. To activate EDR sensors, more centrally located impact is generally required. Inv. Prokop therefore estimated Deputy Houlihan's speed using empirical data from the scene and formulas specific to pedestrian motor vehicle collisions. Using the available physical evidence,¹⁰ Inv. Prokop determined that at the time of

⁶ OSI reviewed Inv. Prokop's body-worn camera footage from his inspection of the incident scene and confirmed this finding.

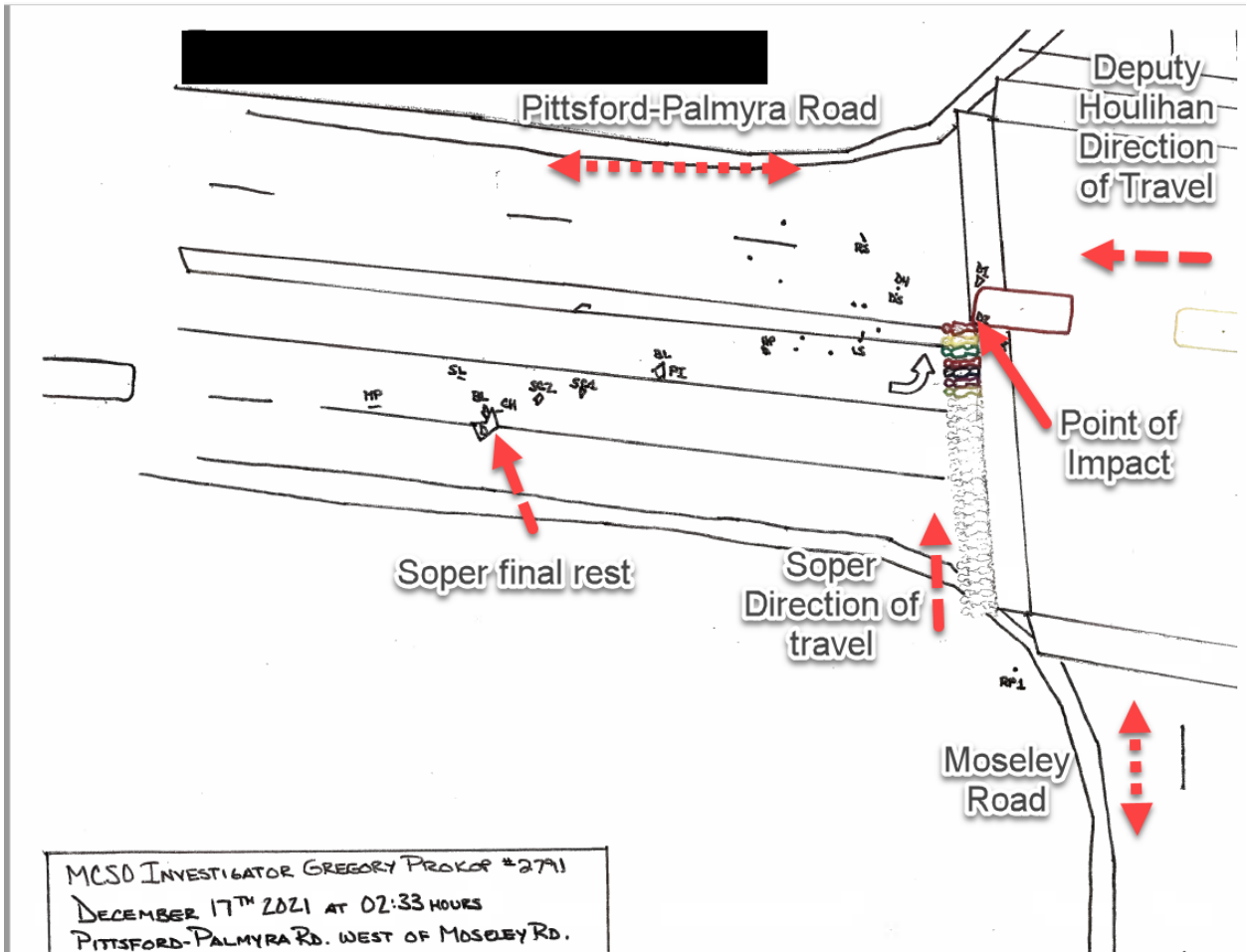
⁷ Although the unenhanced video taken from the camera mounted on the Walgreens store (shown above in close-up still photographs), does not show the traffic light, OSI confirmed that the footage does show that no cars were traveling north or south on Moseley Rd. at or near the time Mr. Soper entered the intersection.

⁸ During his interview, Deputy Houlihan said he "remember[ed] all stop lights being green," down Pittsford-Palmyra Rd.

⁹ The crosswalk signal pole is located eleven feet to the left (west) of the crosswalk; Mr. Soper's direction of travel was north. The video surveillance footage does not show Mr. Soper in any way veering toward the crosswalk signal pole before entering the intersection.

¹⁰ To calculate the range of speed of travel of Deputy Houlihan's vehicle at the time of collision, Inv. Prokop used Searle's equation which included the calculated distance of travel by Mr. Soper from the point of impact to the final rest of Mr. Soper's body. See page 9 of the Accident Reconstruction Report, attached, for the calculations.

impact, Deputy Houlihan was traveling between 49.27 mph and 57.41 mph – at least four and as much as 12.4 mph above the speed limit. Inv. Prokop concluded that Deputy Houlihan had been traveling in the left, westbound lane with the green light, on Pittsford-Palmyra Rd. when he struck Mr. Soper who was crossing Pittsford-Palmyra Rd. from south to north as shown in the below diagram taken from his report.



Diagram, taken from Inv. Prokop's Reconstruction Report, edited to highlight Mr. Soper's and Dep. Houlihan's directions of travel, the point of impact, and the location where Mr. Soper came to rest.

LEGAL ANALYSIS

Under Penal Law Section 125.10, “a person is guilty of criminally negligent homicide when, with criminal negligence, he or she causes the death of another person.” A person acts with criminal negligence, pursuant to Penal Law Section 15.05(4), “with respect to a result or circumstance ... when [that person] fails to perceive a substantial and unjustifiable risk that such result will occur or that such circumstance exists. The 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 a reasonable person would observe in the situation.”

In *People v. Boutin*, 75 N.Y.2d 692, 696 (1990), the Court of Appeals interpreted the statutory definition of criminal negligence and made clear that the mere “failure to perceive a substantial and unjustifiable risk” is insufficient to establish culpability. Instead, “criminally negligent homicide requires not only a failure to perceive a risk of death, but also some serious blameworthiness in the conduct that caused it.” Therefore, unless a defendant has engaged in blameworthy conduct creating or contributing to the substantial and unjustifiable risk of death, there will be no criminal culpability. *Id.* Stated differently, “‘nonperception’ of a risk, even if death results, is not enough,” to establish criminal negligence. *Id.*¹¹

"In cases involving criminal negligence arising out of automobile [incidents] involving excess rates of speed, ... “it takes some additional affirmative act by the defendant to transform ‘speeding’ into [the] ‘dangerous speeding,’” necessary to give rise to criminal negligence. *People v. Palombi*, 204 A.D.3d 1481 (4th Dept 2022)(quoting *People v. Cabrera*, 10 N.Y.3d 370, 377 (2008)). In the case of Dep. Houlihan, therefore, OSI would need to prove that his act of speeding was so serious and so blameworthy that it created a substantial and unjustifiable risk that people would die because of it, and that he failed to perceive that risk; in addition, OSI would need to prove that Dep. Houlihan engaged in “some additional risk-creating behavior in addition to driving faster than the posted speed limit,” that transformed his speeding into ‘dangerous speeding’. *Cabrera*, 10 N.Y.3d at 377. The evidence is legally insufficient to do so.

The evidence shows that Dep. Houlihan was speeding – between four and 12.5 mph above the posted speed limit of 45 mph – when the collision took place. However, the collision reconstruction revealed no other culpable conduct on Dep. Houlihan’s part. He was driving in the correct lane, with the green light, and was neither texting nor talking on the phone. Based on the timing data, light cycle recordings, and the average pedestrian walking speed (2.5 - 3 mph), Inv. Prokop determined that the crosswalk traffic control was not activated at the time Mr. Soper was in the crosswalk and that Deputy Houlihan had the right of way.

Other than speeding, the only arguably “risk creating” conduct was Deputy Houlihan’s self-reported act of looking toward a “suspicious” vehicle in the Chase Bank parking lot that sits

¹¹ *Boutin* also emphasized just how negligent a defendant’s conduct must be to fall within the ambit of the statute.

“[C]riminal liability cannot be predicated on every act of carelessness resulting in death.... [T]he carelessness required for criminal negligence is appreciably more serious than that for ordinary civil negligence.” *Boutin*, 75 N.Y.2d at 695.

on the northwest corner of the intersection. As the aerial photos show, for Dep. Houlihan, driving westbound, to look toward the Chase Bank parking lot at the location of impact, did not require him to look behind him, or even perpendicular to his route of travel; looking toward the parking lot required him to look ahead and to the right. Glancing to the right while facing forward is something most drivers do daily and is not the type of conduct that elevates speeding into dangerous speeding. Moreover, for a deputy sheriff on patrol, observing possibly suspicious behavior would be a necessary part of his job, not a culpable distraction.

The OAG therefore concludes that criminal charges are not warranted in this case.

RECOMMENDATION

The Monroe County Sheriff's Office is the primary law enforcement agency for several suburban and rural areas of Monroe County. This means that at all times of the day and night, including 2:30 a.m. when this collision took place, deputies are potentially driving on sparsely populated roads. OAG routinely recommends that police agencies equip members with Body Worn Cameras,¹² and we recognize and credit the MCSO for doing so. But considering the rural nature of the MCSO's geographic patrol area, we recommend that the agency equip its patrol cars with dashboard cameras as well.

The largest comprehensive evaluation of in-car camera use, jointly published by the United States Department of Justice's Community Oriented Policing Services and the International Association of Chiefs of Police, found the benefits of dashboard cameras compelling.¹³ Those benefits included improved agency accountability, reduced agency liability, and improved community and media perceptions. If Dep. Houlihan's patrol car had contained a dashboard camera, the public could have seen, to the extent possible, what Dep. Houlihan could have seen at the moment of impact.

We therefore use the absence of dashboard camera evidence in this case as an opportunity to recommend that the MCSO implement a dashboard camera program.

Dated: September 28, 2022

¹² See for instance, First Report Pursuant to Executive Law Section 70-b (p. 16, "Recommendations"), published on October 1, 2021. <https://ag.ny.gov/sites/default/files/2021-osi-annual-report.pdf>

¹³ See <https://bja.ojp.gov/sites/g/files/xyckuh186/files/bwc/pdfs/iacpin-carcamerareport.pdf>