Public Report

June 7, 2019: Use of Force Complaint
IPA-21-01

Richard G. Schott
Fairfax County
Independent Police Auditor

June 7, 2019:
Use of Force Complaint

IPA-21-01

A Public Report by the
Fairfax County Independent Police Auditor

Publication Date: January 10, 2022

A Fairfax County, Va., Publication

Office of the Independent Police Auditor
12000 Government Center Parkway, Suite 233A
Fairfax, VA 22035
www.fairfaxcounty.gov/policeauditor

Contact Us: IPAPoliceAuditor@fairfaxcounty.gov

To request this information in an alternate format, call 703-324-3459, TTY 711.

INCIDENT

At approximately 4:20 a.m. on June 7, 2019, Fairfax County Police Department (hereinafter "FCPD") officers from the Reston District Station responded to a stabbing near the intersection of Leesburg Pike and Dranesville Road. Additionally, officers assigned to the department's aviation unit responded in an aviation unit helicopter (hereinafter "FFX1"). The stabbing victim provided no information to interviewing officers about the individual who stabbed him. At approximately 4:29 a.m., FFX1 relayed to responding officers that a car with an open door and its taillights on was in front of a home approximately 1,000 feet away from where officers were interviewing the stabbing victim. FFX1 could not determine whether anyone was in the vehicle. Within minutes, FCPD Police Officer First Class #1 (hereinafter "PFC#1") and Police Officer First Class #2 (hereinafter "PFC#2") arrived at the location of the vehicle.

PFC#1 determined that an individual was lying down inside of the car and relayed this information over his police radio. The person in the car immediately closed the door. PFC#1 and PFC#2 unholstered their firearms, pointed them at the vehicle, and called for the occupant to get out of the car. The individual (hereinafter identified by his initials, "AM") complied. He also complied when told to walk backwards in the direction of the two officers and to get down into a kneeling position. PFC#2 approached AM, handcuffed and frisked him, and escorted him to the rear seat of PFC#1's police cruiser. The officers then called for anyone else in the vehicle to also get out. When nobody responded, PFC#1 and PFC#2 approached the car—with their weapons still drawn—and confirmed that nobody else was in the car or the trunk. Neither weapons nor evidence of a stabbing were found in the car.

After eliminating their suspicion that AM was involved in the stabbing, PFC#1 explained to AM that they were investigating a nearby stabbing which had occurred minutes earlier. PFC#1 also asked AM for his name,[1] but AM refused to provide it, saying he would only divulge it if PFC#1 arrested him. Even after PFC#1 explained that he merely wanted to document the encounter, AM refused to identify himself. At this point, AM's parents had come out of the house in front of which AM had been in the car and began speaking to PFC#2. The parents confirmed to PFC#2 that AM was their son and that he lived in the house with them. The

[1] At the time of this incident, FCPD General Order (hereinafter G.O.) 603.4 VI. A. 2. instructed "[o]fficers conducting an investigative stop . . . [to] record pertinent data and [to] complete the Field Contact Module."

officers then ended the encounter and AM went to the home with his parents. The entire incident lasted approximately seven and one-half minutes.

INTERNAL ADMINISTRATIVE INVESTIGATION

Initially, the brandishing of firearms by PFC#1 and PFC#2 was documented and a supervisory review was conducted of that action.[2] On June 15, 2020, after AM watched video footage of the incident—captured by FFX1 and in-car video camera equipment in PFC#1's patrol cruiser—AM complained that the pointed weapons constituted excessive force, that his car had been illegally searched, and that the officers had treated him in a rude manner. The FCPD then opened a separate internal investigation, which was conducted by the department's Internal Affairs Bureau (hereinafter "IAB").

The inquiry and subsequent IAB investigation included interviews of AM, PFC#1, and PFC#2; a review of FFX1 video and ICV audio and video footage; a review of the incident report and supplemental reports prepared following the incident; and an analysis of relevant caselaw, departmental policy and training, and Virginia Department of Criminal Justice training requirements. In my opinion, the internal investigation into this incident was complete, thorough, objective, impartial, and accurate.

CONCLUSIONS

The FCPD concluded that PFC#1 and PFC#2 acted legally and complied with departmental policy and training during this incident. I agree with that conclusion.

PFC#1 and PFC#2 responded to an unresolved stabbing shortly after it occurred at 4:20 a.m. Approximately 1,000 feet from where the stabbing victim was located, the officers found a warm car (as determined by FFX1) with its taillights on and a door open. PFC#1 saw a person lying in the car who closed his car door when PFC#1 got out of his police cruiser. Addressing

[2] FCPD G.O. 540.7 III. A. provides that "[p]ointing a firearm at a person in response to their actions in order to gain control and compliance shall be investigated and documented as follows: 1. Investigative Authority: The on-duty supervisor or above. 2. Investigative Format: Current Internal Affairs Records Management System documentation describing the incident. 3. Documentation Review: The on-duty supervisor shall review and forward all investigative reports to their commander for appropriate review and dissemination to division and bureau commanders."

the occupant of the car with weapons drawn and in the "ready gun"[3] position was appropriate; and the detention of AM to investigate, as well as the search of the vehicle he was in, were also lawful and appropriate.

In its 1968 Terry v. Ohio decision,[4] the United States Supreme Court first recognized a law enforcement officer's right to detain a person even if the officer does not have probable cause to believe—the legal standard required for an arrest—that the person has committed or is committing a crime. Instead, the Court in Terry deemed it lawful for officers to briefly detain an individual based on reasonable suspicion that the person has committed, is committing, or is about to commit a crime.[5] The purpose of the detention is to allow officers to investigate further in an effort to resolve their suspicion. While reasonable suspicion must be based on specific and articulable information, it is clearly lower than the probable cause standard required to make an arrest. The facts and circumstances known to PFC#1 and PFC#2 gave them ample suspicion to detain AM. Initiating the detention with their firearms in the ready gun position was not only lawful, but also prudent. Even in the initial Terry opinion, the Supreme Court stated that "[w]hen an officer is justified in believing that the individual whose suspicious behavior he is investigating at close range is armed and presently dangerous to the officer or to others, it would appear to be clearly unreasonable to deny the officer the power to take necessary measures to determine whether the person is in fact carrying a weapon and to neutralize the threat of physical harm."[6] After AM complied with commands to come out of the car, and the officers were satisfied that no other potential assailants were in the car, PFC#1 and PFC#2 lowered and holstered their weapons.

However, not every lawful investigative detention allows for a search of the detained individual. The Supreme Court was clear in Terry that the authority to "frisk"[7] that individual is separate from the authority to detain him. Like the authority to detain, the legal requisite for a frisk is mere reasonable suspicion—that the detained person is armed with a weapon and thereby

---

[3] FCPD G.O. 540.1 I. Q. defines the ready gun position as "[a] firearm presented toward a threat area with the muzzle lowered from the officer's eye level sufficient to see the threat area clearly."

[4] 392 U.S. 1 (1968).

[5] The Supreme Court described the situation in Terry as the officer having reasonable suspicion that "criminal activity was afoot."

[6] *Supra*, note 4 at 24.

[7] While a frisk is a Fourth Amendment search, it was originally restricted to a limited pat-down of the outer clothing to discover weapons. The scope of a lawful frisk has been expanded (see, e.g., Michigan v. Long, 463 U.S. 1032 (1983)).

poses a danger—rather than the probable cause standard. The officers involved in this incident detained AM based on their reasonable suspicion he had just stabbed someone and was hiding in his car. It was reasonable for them to suspect that the knife used in the stabbing was within AM's possession. Therefore, the frisk of AM after getting out of his car was legal.

PFC#1 and PFC#2 also conducted a limited search, or frisk, of AM's car. Fifteen years after Terry v. Ohio, the Supreme Court extended the scope of a Terry frisk when it decided Michigan v. Long.[8] The majority opinion in Long recognized that "roadside encounters between police and suspects are especially hazardous, and that *danger may arise from the possible presence of weapons in the area surrounding a suspect*."[9] Because of this recognition, the Court went on to conclude that "the search of the passenger compartment of an automobile, limited to those areas in which a weapon may be placed or hidden, is permissible if the police officer possesses a reasonable belief based on 'specific and articulable facts which, taken together with the rational inferences from those facts, reasonably warrant' the officer in believing that the suspect is dangerous and the suspect may gain immediate control of weapons."[10] The Court explained that "[t]he sole justification of the search . . . is the protection of the police officer and others nearby" and that "officers who conduct area searches during investigative detentions must do so only when they have the level of suspicion identified in Terry."[11] Because PFC#1 and PFC#2 had the requisite reasonable suspicion that there was a knife in AM's car, the limited search of the passenger compartment was lawful.

While Michigan v. Long clearly allowed for the search of the passenger compartment of AM's car in this incident, it did not extend to the trunk.[12] However, the search of AM's trunk was permitted based on an earlier case coming from the Fourth Circuit Court of Appeals. In United States v. Muhammad,[13] the Fourth Circuit allowed F.B.I. agents to open a car's trunk—without a search warrant—to ensure that a second bank robber was not hiding there. While recognizing that the agents were justified in conducting the warrantless search of the trunk based

[8] 463 U.S. 1032 (1983).
[9] *Id*. at 1049 (*emphasis* added).
[10] *Id*. at 1049-1050.
[11] Michigan v. Long, 463 U.S. 1032 (1983), fn. 14 (citations omitted).
[12] The officers involved in Michigan v. Long did, in fact, conduct a later inventory of the trunk. However, that search was not based on a reasonable suspicion that there was a weapon in the trunk but rather on the inventory principle.
[13] 658 F.2d 249 (4th Cir. 1981).

on separate legal grounds, the Fourth Circuit noted that the "officers' *suspicion* regarding the presence of an accomplice in the trunk *also* justified the warrantless search."[14] PFC#1 and PFC#2 both expressed concern that either a second suspect or a second victim of the stabbing may have been in the trunk when they opened it. Notably, the ICV footage reveals that when the officers opened the trunk, they did a quick look inside and closed it within four seconds after opening it. They did not do a more complete search to locate weapons or other evidence.

FCPD policy parallels and cites to established law in providing guidance to its officers when conducting investigative detentions and accompanying frisks. At the time of the incident under review,[15] FCPD General Order (hereinafter "G.O.") 603.4 V., in relevant part, instructed that "[a] law enforcement officer may temporarily detain a person in a public place if reasonable

> suspicion exists that a crime has been committed, is being committed, or is about to be committed; or the officer reasonably suspects that a person is illegally carrying a concealed weapon in violation of Code of Va. Code Ann. § 18.2-308. The United States Supreme Court ruled in the 1968 case of Terry v. Ohio, 392 U. S. 1 (1968), that a temporary detention is a seizure under the Fourth Amendment. The Court recognized that police officers must be able to take action when probable cause to arrest does not exist.
>
> The Virginia Supreme Court supported the necessity of an investigative stop in a 1977 case, Simmons v. Commonwealth, 231 S. E. 2D, 218, when it stated:
>
> > "The Fourth Amendment does not require police officers who lack the precise level of information necessary for probable cause to arrest to simply shrug their shoulders and allow a crime to occur or a criminal to escape. On the contrary, Terry recognizes that it may be the essence of good police work to adopt an intermediate response. A brief stop of a suspicious individual in order to determine identity or to maintain the status quo momentarily while obtaining more information may be reasonable in light of the facts.
>
> C. Search Beyond The Person - The United States Supreme Court held in Michigan v. Long, 463 U.S. 1032 (1983), that although Terry v. Ohio involved the stop and subsequent pat-down search for weapons of a person suspected of criminal activity, it did not restrict the protective search to the person of the detained suspect. The Court recognized that protection of police and others can justify protective searches when there exists reasonable suspicion that the suspect poses a danger. Thus, an officer can search an area within the person's reach where a weapon may be found. A lawful protective search for weapons, which extends to an area beyond the person in the absence of probable cause to arrest, must have all of the following elements present:
>
> 1. A lawful investigative stop of a person or vehicle.

[14] *Id*. at 251 (*emphasis* added).
[15] As of July 9, 2021, FCPD G.O. 603.4 is included in G.O. 002 HUMAN RELATIONS.

2. Reasonable suspicion that the suspect poses a danger, as defined by the Court in Michigan v. Long:

   "... specific and articulable facts, which taken together with the rational inferences from those facts, reasonably warrant the officer to believe that the suspect is dangerous and the suspect may gain immediate control of weapons."

3. The search must be limited to those areas in which a weapon may be placed or hidden.

4. The search must be limited to an area which would ensure that there are not weapons within the subject's immediate grasp.

   The Court added in Michigan v. Long that although the subject was under the control of two officers during the investigative stop, it did not render unreasonable a belief that the subject could injure them."

Consequently, PFC#1 and PFC#2 complied not only with the law but also their departmental policy when detaining and frisking AM, and when searching the passenger compartment and trunk of his car.

Neither the fact that PFC#1 and PFC#2 brandished their firearms to initiate the detention of AM, nor the handcuffing of him during the detention, changes the legal and policy analysis. The Supreme Court has made clear that even a brief investigative detention is a Fourth Amendment seizure.[16] As such, the detention and any use of force during the detention must be reasonable. In its Graham v. Connor decision, the Supreme Court made clear "that the right to make an arrest or investigatory stop necessarily carries with it the right to use some degree of physical coercion or threat thereof to effect it."[17] Likewise, the Court allows the use of handcuffs during detentions so long as their use is reasonable under the circumstances.[18]

FCPD policy also squarely addressed these two related issues in G.O. 603.4 V. E. by allowing "officers [to] use the force reasonably necessary . . . during an investigative detention."[19] The same G.O. pointed out that among the types of force courts have deemed reasonable—depending on the circumstances—have been the "[p]ointing of the service weapon

[16] Amendment IV to the U.S. Constitution: The right of the people to be free in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.
[17] 490 U.S. 386 at 396 (1989).
[18] Muehler v. Mena, 544 U.S. 93 (2005).
[19] Current G.O. 002 VII. E. reads the same.

at a suspect for the officer's protection"[20] and "[h]andcuffing a suspect for the officer's protection."[21]

Finally, AM's last complaint about the interaction he experienced with PFC#1 and PFC#2 was that they treated him in a rude manner.[22] Other than having weapons brandished at him during the encounter, AM appeared most upset by PFC#1's requests for identification so that the encounter could be properly documented. Based on Virginia law, AM was not under a legal obligation to produce identification or even to verbally provide his name because Virginia has no "stop and identify" statute. Such state statutes require a person to identify himself or herself to a law enforcement officer when that officer has legally detained the individual based on reasonable suspicion that they are engaged in criminal activity. Failure to do so typically allows for the person's arrest—separate from the initial activity giving rise to the investigative detention.[23]

It is worth noting that in 2019 FCPD G.O. 603.4 dictated that "[o]fficers conducting an investigative stop . . . shall record pertinent data and complete the Field Contact Module." PFC#1 was trying to obtain data that he felt was needed to complete an accurate incident report of this event. As of July 2021, FCPD's revised G.O. 002 (which subsumed G.O. 603.4) re-states that "[o]fficers conducting an investigative stop . . . shall record pertinent data and complete the Field Contact Module." However, the new G.O. now goes on to state that "[a]bsent probable cause that the person is committing a crime or driving a motor vehicle that is subject to a traffic stop, officers cannot require a person to provide identification."[24] PFC#1 did not violate any departmental policy or law because ultimately he did not require AM to identify himself.[25] The

[20] Current G.O. 002 VII. E. 2. (previously G.O. 603.4 V. E. 2.). The pointing of a firearm at a human to gain control and compliance is considered a reportable action under FCPD policy (FCPD G.O. 540.20 III. A.).
[21] Current G.O. 002 VII. E. 5. (previously G.O. 603.4 V. E. 5.).
[22] An investigation into an allegation of rudeness is typically reviewed by the Fairfax County Police Civilian Review Panel. However, AM requested no such review and the FCPD investigation into the rudeness allegation was examined during the investigation into the use of force.
[23] See, Hiibel v. Sixth Jud. Dist. Ct. of Nev., Humboldt Cty, 542 U.S. 177 (2004).
[24] FCPD G.O. 002 VIII. A. 2.
[25] PFC#1 stated that he had probable cause to arrest AM for being drunk in public (if not driving while intoxicated) and when AM refused to identify himself, he considered arresting him—which would then have allowed him to require identification from AM. Ironically, then, the lack of an available "stop and identify" statute nearly resulted in AM's arrest anyway. Whether the Virginia General Assembly should pass a "stop and identify" law (which allows for an arrest simply for refusing to identify oneself during a lawful investigative detention) will not be addressed in this report; however, incidents like this would be worth evaluating should the General Assembly consider such legislation.

stipulation added to G.O. 002 in 2021 should continue to prevent FCPD officers from demanding identification when Virginia law does not allow it.

RECOMMENDATIONS

I appreciate the gravity of having a weapon pointed at an individual[26]—especially an individual like AM who was not involved in the criminal activity being investigated in this case. I also respect AM's dissatisfaction with having those weapons brandished at him. However, the brandishing of those weapons in this particular incident was reasonable. The officers responded to a stabbing after 4:00 a.m. and the victim refused to provide details about the perpetrator(s) or additional victims. A police helicopter located a nearby vehicle with a person inside and the door open. When PFC#1 arrived at that location, an individual appeared to be trying to hide and immediately closed the car's door. Without approaching, PFC#1 and PFC#2 used verbal commands to call AM out of the vehicle, unsure whether he was involved in the stabbing. Having guns drawn and in the ready position was legal, within policy, and in my opinion, advisable.

As stated in footnote 25 in the previous section of this report, I refrain from recommending that the Virginia General Assembly pass a "stop and identify" statute for the Commonwealth of Virginia. If it considers doing so in the future, however, I do recommend that incidents such as the one under review should be considered by the legislators. Accordingly, and in light of the recently revised FCPD G.O. 002, I have no recommendations to make based on my review of this incident.

[26] See, e.g., the University of Texas at San Antonio researchers' discussion on the severity of force that a brandished firearm constitutes in its recent report, *An Investigation of the Use of Force by the Fairfax County Police Department* (in Section IX. Addendum) presented to the Fairfax County Board of Supervisors on June 29, 2021.

APPENDIX: GLOSSARY OF TERMS

FCPD – Fairfax County Police Department

FCSO – Fairfax County Sheriff's Office

G.O. – General Order

SOP – Standard Operating Procedure

UOF – Use of Force

BWC – Body-worn Camera

ICV – In-Car Video

ADC – Adult Detention Center

CWA – Commonwealth's Attorney

Fourth Amendment to the United States Constitution - The right of the people to be free in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

Force – defined in Fairfax County Police Department General Order 540.1 I. G. as any physical strike or instrumental contact with an individual, or any significant physical contact that restricts an individual's movement. Force does not include escorting or handcuffing an individual who is exhibiting minimal or no resistance. Merely placing an individual in handcuffs as a restraint in arrest or transport activities, simple presence of officers or patrol dogs, or police issuance of tactical commands does not constitute a reportable action.

Less-Lethal Force – defined in Fairfax County Police Department General Order 540.1 I. I. as any level of force not designed to cause death or serious injuries.

Deadly Force – defined in Fairfax County Police Department General Order 540.1 I. B. as any level of force that is likely to cause death or serious injury.

Serious Injury – defined in Fairfax County Police Department General Order 540.1 I. Q. as an injury which creates a substantial risk of death, disfigurement, prolonged hospitalization, impairment of the functions of any bodily organ or limb, or any injury that medical personnel deem to be potentially life-threatening.

ECW – Electronic Control Weapon; considered less-lethal force. Defined in defined in Fairfax County Police Department General Order 540.1 I. C. as a device which disrupts the sensory and motor nervous system of an individual by deploying battery-powered electrical energy sufficient to cause sensory and neuromuscular incapacitation. Often referred to as a Taser.

Empty-Hand Tactics – considered less-lethal force. Described in Fairfax County Police Department General Order 540.4 II. A. 2. as including strikes, kicks, and takedowns.

OC Spray – Oleoresin Capsicum; considered less-lethal force; often referred to as "pepper spray."

PepperBall System – defined in Fairfax County Police Department General Order 540.1 I. N. as a high-pressure air launcher that delivers projectiles from a distance. Typically, the projectile contains PAVA powder which has similar characteristics to Oleoresin Capsicum. Considered less-lethal force.

Passive Resistance – defined in Fairfax County Police Department General Order 540.4 I. A. 1. as where an individual poses no immediate threat to an officer but is not complying with lawful orders and is taking minimal physical action to prevent an officer from taking lawful action.

Active Resistance – defined in Fairfax County Police Department General Order 540.4 I. A. 2. as where an individual's verbal and/or physical actions are intended to prevent an officer from taking lawful action, but are not intended to harm the officer.

Aggressive Resistance – defined in Fairfax County Police Department General Order 540.4 I. A. 3. as where an individual displays the intent to cause injury, serious injury, or death to others, an officer, or themselves and prevents the officer from taking lawful action.