

Public Report

Nov. 6, 2018: Use of Force Complaint



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INCIDENT

On November 6, 2018, at approximately 6:30 a.m. Fairfax County Police Department (hereinafter “FCPD”) officers responded to a suspected domestic dispute at an apartment in the Falls Church area of Fairfax County. Police Officer First Class #1 (hereinafter “PFC#1”), Police Officer First Class #2 (hereinafter “PFC#2”), and Police Officer #1 (hereinafter “OFFICER#1”) encountered an individual with a name bearing the initials Z.D. (hereinafter “ZD”) and three others – an adult with the initials C.W. (hereinafter “CW”) and the two minor children of ZD and CW. The four were leaving the residence when the officers arrived. When the officers asked CW who she was, ZD instructed her to not identify herself. He also refused to identify himself initially but would later identify himself using an alias.

The officers separated ZD from CW, with OFFICER#1 escorting CW away from the apartment. Unbeknownst to ZD, PFC#1 was advised via his police radio that ZD was likely the subject of an active Emergency Protective Order¹ based on a prior incident with CW. When ZD hurriedly stepped back into the apartment while holding his young child in his arms, PFC#1 and PFC#2 followed him inside. ZD then started to approach the kitchen while saying he needed to wash his child’s face. PFC#1 told him to stop and that he was being detained based on the domestic disturbance investigation. When ZD disregarded him, PFC#1 grabbed ZD by his left wrist and escorted him into the living room. ZD tried to approach the kitchen a second time, but PFC#1 applied pressure into his back and again guided him into the living room. ZD refused to identify himself to the officers and demanded to see a supervisor. PFC#1 requested that a supervisor respond to the location.

Based on ZD’s request for a supervisor to respond, FCPD Sergeant #1 (hereinafter “SGT#1”) arrived at the location and spoke with ZD. ZD stated that PFC#1 had assaulted him. When asked to describe the assault, ZD advised that PFC#1 rushed him, pushed him, tried to put his arm behind his back, grabbed him with both hands, and "forcibly force[d] his will upon me."

SGT#1 explained to ZD that he was being detained while the existence of a protective order against him could be confirmed. While SGT#1 spoke to ZD, a computer inquiry did, in fact, confirm an active Emergency Protective Order for ZD. Although ZD still did not

¹ Emergency Protective Orders are authorized in § 16.1-253.4 of the Code of Virginia to “protect the health or safety of any person.”

acknowledge his identity and provided a different name to the officers, CW confirmed to OFFICER#1 that ZD was the subject of the active Emergency Protective Order which had previously been personally served on him by the Fairfax County Sheriff's Department.

ZD was then informed that he was under arrest. He passively resisted² by continuing to hold his young child in his arms, thereby not allowing the officers to handcuff him. He moved away from the officers and indicated that they were mistaken. The officers removed ZD's child from him and handed the child to CW. ZD then actively resisted³ by stiffening his arms and refusing to place them behind his back. He repeatedly stated that the officers were making a mistake and he pulled his arms away from the officers when they tried to handcuff him. Despite his resistance, the officers were able to secure his arms and place him in handcuffs by forcing him into a modified kneeling position and then by pulling his arms away from his body while applying the handcuffs.

During a search incident to his arrest,⁴ officers discovered a loaded handgun inside a duffel bag which was within ZD's wingspan at the time of his arrest. ZD was then transported to the Fairfax County Adult Detention Center and charged with violating the provisions of a protective order,⁵ obstruction of justice,⁶ and illegally transporting a firearm while subject to a protective order.⁷ None of the officers saw or heard ZD complain of any injuries during or following the incident.

CRIMINAL INVESTIGATION/ PROSECUTIVE DECISION

The FCPD conducted only an administrative investigation into PFC#1's actions during this incident. No referral was made to the Office of the Commonwealth's Attorney.

² See GLOSSARY for definition of passive resistance.

³ See GLOSSARY for definition of active resistance.

⁴ In Chimel v. California, 395 U.S. 752 (1969), the Supreme Court pronounced that an arresting officer may search an arrestee's person to discover and remove weapons and to seize evidence to prevent its concealment or destruction, and may search the area "within the immediate control" of the person arrested.

⁵ Code of Virginia § 16.1-253.2.

⁶ Code of Virginia § 18.2-460.

⁷ Code of Virginia § 18.2-308.1:4.

ZD was charged with violations of § 16.1-253.2 (Violation of Provisions of Protective Orders), § 18.2-460 (Obstruction of Justice), and § 18.2-308.1:4 B. (Purchase or Transportation of Firearm by Persons Subject to Protective Orders) of the Code of Virginia.

INTERNAL ADMINISTRATIVE INVESTIGATION

The FCPD administrative investigation included the review of the officers' incident and supplemental reports documenting the incident and the force used during the detention and arrest of ZD; and, interviews of ZD, PFC#1, and the other two officers present during the incident.

The FCPD investigation concluded that PFC#1 used force in compliance with departmental policy, specifically FCPD General Order (hereinafter "G.O.") 540, *et seq.* The FCPD finding was that PFC#1 complied with G.O. 540.0, Use of Force, when detaining and then arresting ZD because he used an objectively reasonable amount of force to effect the detention and arrest. I agree with the FCPD's conclusion.

Based on my review of this investigation, my opinion is that it was complete, thorough, objective, impartial, and accurate.

CONCLUSIONS

FCPD G.O. 540.0 on USE OF FORCE states, in part: "Force is to be used only to the extent it is objectively reasonable to defend oneself or another, *to control an individual during an investigative or mental detention, or to lawfully effect an arrest.*"⁸ The FCPD concluded that the amount of force used on ZD in this incident was objectively reasonable. I agree with that conclusion.

FCPD G.O. 540.1 defines "Objectively Reasonable" as follows: "The level of force that is appropriate when analyzed from the perspective of a reasonable officer possessing the same information and faced with the same set of circumstances. Objective reasonableness is not analyzed with the benefit of hindsight, but rather takes into account the fact that officers must make rapid and necessary decisions regarding the amount of force to use in tense, uncertain, and rapidly evolving situations." Applying these provisions to the incident under review makes it

⁸ Emphasis added.

clear that PFC#1's minimal use of force on ZD was permitted by departmental policy. PFC#1 responded to a suspected domestic dispute involving a person suspected of being the subject of an active protective order. ZD told CW to not cooperate and he refused to identify himself. Although ZD told SGT#1 that PFC#1 rushed him, pushed him, tried to put his arm behind his back, grabbed him with both hands, and "forcibly force[d] his will upon me," the officers involved in ZD's initial detention and his arrest articulated only minimal force being used. ZD did not complain of any injuries during or after the incident. When ZD disregarded the officers and returned to the inside of the apartment, the officers had the legal authority to detain ZD while they investigated the current domestic dispute and confirmed that the earlier protective order was still active.⁹ PFC#1 only used force when ZD tried to venture into other areas within the apartment. In its Graham v. Connor decision,¹⁰ the United States Supreme Court recognized "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."¹¹ That is what PFC#1 did in this situation. The amount of force used was minimal and objectively reasonable when ZD disregarded PFC#1 during the initial detention. The force used during his subsequent arrest was also commensurate with ZD's resistance. FCPD policy authorizes the use of "less-lethal" force "to gain compliance by individuals offering resistance,"¹² and it specifically allows for the use of "empty-hand tactics" to effect an arrest when "it is objectively reasonable to overcome a passive resisting person."¹³

These FCPD policies on the use of force by its officers closely track the language provided by the Supreme Court in the aforementioned Graham v. Connor decision¹⁴ in which it pronounced that uses of force by law enforcement officers in this country must be analyzed under the Fourth Amendment to the United States Constitution.¹⁵ The Court in Graham further instructed that to be lawful under the Fourth Amendment, an officer's use of force must be

⁹ In its landmark Terry v. Ohio, 392 U.S. 1 (1968) decision, the United States Supreme Court first recognized a law enforcement officer's authority to detain an individual, without probable cause, if the officer could articulate reasonable suspicion that the individual was engaged in criminal activity.

¹⁰ 490 U.S. 386 (1989).

¹¹ *Id.* at 396.

¹² FCPD G.O. 540.4 II. A. 2.

¹³ FCPD G.O. 540.13 I. B. 1.

¹⁴ *Supra*, note 10.

¹⁵ See GLOSSARY for text of the Fourth Amendment.

“objectively reasonable” under the circumstances confronting that officer. Consequently, PFC#1’s actions in the incident under review comported with the legal as well as his own departmental standards governing his use of force.

RECOMMENDATIONS

FCPD policy thoroughly addresses the use of force and aligns with constitutional standards. Furthermore, FCPD policy provides its officers extensive guidance on the types of force that are typically considered objectively reasonable in different situations. The FCPD analyzed the actions of PFC#1 during this incident by examining his actions against the policies in place, and I believe the conclusions are sound. Therefore, I have no recommendations to make in relation to PFC#1’s use of force based on this incident review.

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.

