

Public Report

Sept. 27, 2018: Use of Force Complaint



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INCIDENT

On September 27, 2018, at approximately 9:15 p.m., two officers from the Fairfax County Police Department (hereinafter “FCPD”) were dispatched to the Walmart located at 7910 Richmond Highway in the Alexandria section of Fairfax County to respond to a larceny in progress. Upon their arrival, Police Officer First Class #1 (hereinafter “PFC#1”) contacted the store manager who explained that an individual, later identified as an individual with the initials L.B. (hereinafter “LB”), had left the store without paying for all of his items. LB was still in the parking lot standing next to a Chevy Tahoe. PFC#1 approached LB and advised that he was being detained while the officers could investigate.¹ While being detained, LB contested that he had a receipt for all of his items.

While PFC#1 detained and questioned LB, an individual later identified as having the initials J.L. (hereinafter “JL”), approached and got keys from LB, and then walked into the Walmart. Prior to handing the keys to JL, PFC#1 observed LB use the same key fob to lock the Chevy Tahoe. At this time, Police Officer First Class #2 (hereinafter “PFC#2”) arrived, saw LB speaking to JL, and watched JL walk inside the Walmart. PFC#2 began asking LB questions. LB indicated that he did not know who owned the Chevy Tahoe, and that he was waiting for an Uber to pick him up. However, PFC#1 conducted an inquiry of the Virginia Department of Motor Vehicles and determined that LB was the vehicle’s registered owner. He then admitted to owning the vehicle and stated that JL now had the keys for it.

PFC#2 went inside the Walmart and located JL, accompanied by another individual later identified as having the initials B.R. (hereinafter “BR”). PFC#1 also went inside the Walmart to assist PFC#2, leaving LB in the custody of other officers who had arrived on the scene. PFC#2 explained to JL and BR that the Chevy Tahoe was part of an ongoing larceny investigation and that he had been told the keys for it were now in JL’s possession. PFC#2 then saw BR take the keys from JL. After taking the keys, BR refused to cooperate with PFC#2 and walked out of the store and in the direction where LB was being detained. PFC#2 told BR to not approach LB as

¹ In Terry v. Ohio, 392 U.S. 1 (1968), at p. 30, the United States Supreme Court first recognized a police officer’s right to detain an individual, without probable cause, when that officer “observes unusual conduct which leads him reasonably to conclude in light of his experience that criminal activity may be afoot.” This police tactic has since been known as a Terry stop.

he was being detained and questioned. BR disregarded PFC#2's commands and stated several times that she does not deal with police. PFC#2 then saw BR pull the Tahoe keys from her pocket in an apparent attempt to get into the vehicle. PFC#2 grabbed BR's left hand to detain her and keep her from entering the Tahoe. He advised that she was being detained and explained why, but she began to physically resist by pulling away. PFC#2 then took hold of BR's right hand; and when he did, he felt BR try to bite his right wrist near his thumb. He was able to move his hand away before BR bit down. PFC#2 told PFC#1 that BR had tried to bite him; and, at that point, the officers each got on one side of BR and took her to the ground to gain control over her. After getting her to the ground, the officers placed BR in handcuffs, at which point BR kicked PFC#2 in his leg. No additional force was used.

After being handcuffed, BR complained that she had been injured during the scuffle and requested a supervisor to respond. Fairfax County Fire and Rescue personnel were summoned to examine BR, and an FCPD supervisor responded to the scene. Her complaint prompted this review of the FCPD's investigation into the officers' use of force.

In an FCPD interview of her, BR stated that she did not try to bite PFC#2; that any kick by her was unintentional; and that one of the officers put his knee on her back after she was taken to the ground. However, recorded audio footage of the incident captured PFC#2 reacting to an attempted bite; and, medical personnel who examined BR after the incident noted no injury to her back.

CRIMINAL INVESTIGATION/ PROSECUTIVE DECISION

The FCPD conducted only an administrative investigation into the FCPD officers' use of force during this incident. No referral was made to the Office of the Commonwealth's Attorney. BR was charged with multiple violations.²

² Code of Virginia § 18.2-57. C. - Assault on a Law-Enforcement Officer; Code of Virginia § 18.2-460 - Obstruction of Justice; Code of Virginia § 19.2-82.1 - Giving False Identity to Law-Enforcement Officer.

INTERNAL ADMINISTRATIVE INVESTIGATION

The internal administrative investigation into this incident included: interviews of BR and the two officers involved in the use of force; the review of medical records documenting the examination of BR following the incident; and, the review of in-car camera audio footage.³ Based on my review of this investigation, my opinion is that it was complete, thorough, objective, impartial, and accurate.

The FCPD concluded that the officers' use of force to control and ultimately arrest BR complied with departmental policy, specifically FCPD General Order (hereinafter "G.O.") 603.4 V. E., and G.O. 540, *et seq.* The FCPD finding was that the officers complied with G.O. 540 when detaining and arresting BR because they used an objectively reasonable amount of force when doing so.

CONCLUSIONS

In its Terry v. Ohio opinion,⁴ the United States Supreme Court made clear that although a Terry stop (or investigative detention) requires only reasonable suspicion (rather than the requisite probable cause needed for an arrest) to be reasonable, the detention is still a seizure under the Fourth Amendment to the United States Constitution.⁵ Furthermore, the Supreme Court in Graham v. Connor⁶ pronounced 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."⁷ In that case, the Court also pronounced that such uses of force by law enforcement officers in this country are to be analyzed under the Fourth Amendment. Finally, to be lawful under that Fourth Amendment standard, an officer's use of force must be objectively reasonable.

³ Because of the positioning of the police cruiser in relation to where the incident occurred, audio of the entire incident was recorded, but no video of the use of force was captured.

⁴ *Supra*, note 1.

⁵ 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.

⁶ 490 U.S. 386 (1989).

⁷ *Id.* at 396 (emphasis added).

Similarly, FCPD policy provides that an FCPD 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.”⁸ FCPD G.O. 603.4 V. E. allows for a reasonably necessary amount of force to be used during an investigative detention. The question thus becomes, under both the relevant legal standard and departmental policy, whether the amount of force used on BR was objectively reasonable.

FCPD G.O. 540.0 on USE OF FORCE states, in relevant 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. Force should be based upon the totality of the circumstances known by the officer at the time force is applied, without regard to the officer's underlying intent or motivation, and weighs the actions of the officer against their responsibility to protect public safety as well as the individual's civil liberties. Force shall not be used unless it is reasonably necessary in view of the circumstances confronting the officer.” Additionally, 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 clear that the force used on BR was objectively reasonable, making it both legal and compliant with departmental policy. The FCPD officers possessed reasonable suspicion that a crime had occurred, giving them the authority to detain individuals so that their investigation could continue. When BR tried to interfere with their efforts, the officers took hold of her. When BR resisted and attempted to bite PFC#2, he and PFC#1 methodically took her to the ground to be handcuffed. Once the handcuffs were secured, no additional force was deployed. This amount of force satisfies the standard of objective reasonableness.

⁸ FCPD General Order (hereinafter “G.O.”) 603.4 V.

RECOMMENDATIONS

FCPD policy thoroughly addresses the possibility of its officers using force, to include during lawful investigative detentions. The policy also provides its officers with extensive guidance on the types of force that will typically be considered objectively reasonable in different situations.⁹ These FCPD policy provisions align closely with the constitutional standards on the use of force. After this incident, the FCPD analyzed the actions of PFC#1 and PFC#2 by examining their actions against the policies in place, and I agree with the conclusions reached. Therefore, I have no recommendations to make in relation to the officers' use of force based on this incident review.

⁹ For example, FCPD G.O. 540.6 I. A. provides that less-lethal force "may be effective . . . to [e]ffect an investigative stop." Additionally, FCPD G.O. 540.4 II. A. 2. explicitly identifies "[e]mpty-hand tactics, such as strikes, kicks, or takedowns" as less-lethal force. See Glossary for additional information.

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

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 – Oleoresin Capsicum; considered less-lethal force; often referred to as “pepper spray.”

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.

