

Public Report

June 11, 2019: Use of Force Complaint-
Brandished Weapons



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INCIDENT

On June 11, 2019, officers assigned to the Street Crimes Unit (hereinafter “SCU”) of the Fairfax County Police Department (hereinafter “FCPD”) arrested an individual bearing the initials M.M. (hereinafter “MM”) following a pre-arranged drug transaction. Because the agreement called for MM to trade a quantity of illegal narcotics for another type of illegal narcotic, the SCU officers used a sensitive tactical technique to arrest MM so as to not afford him the opportunity to become violent or to escape the location of the pre-arranged transaction before being arrested. The technique included having several officers quickly approach MM when the drug transaction was completed, two with their firearms unholstered and brandished, and two with their electronic control weapons (hereinafter “ECW”)¹ unholstered and brandished. Following his arrest, MM’s vehicle was seized by the FCPD.²

On November 7, 2019, MM made a complaint to the FCPD based on his June 11, 2019 arrest. MM made this complaint to an FCPD Internal Affairs Bureau (hereinafter “IAB”) investigator who was already investigating a prior complaint made by MM stemming from an earlier incident involving himself and the FCPD. In his new complaint, MM alleged that several FCPD officers committed numerous infractions of law and of FCPD policies. Specific to the use of force during his arrest, MM alleged that “twelve guys with guns” pointed at him threw him out of his car, causing an injury to his knee. His other allegations did not involve the use of any force.

After establishing both the Independent Police Auditor and the Fairfax County Police Civilian Review Panel (hereinafter “Panel”), the Fairfax County Board of Supervisors approved the Panel’s by-laws on July 11, 2017. In Article VI. at A. 3., those by-laws provide that “[w]here a Complaint alleges misconduct within both the Panel’s scope of authority and the Auditor’s scope of authority, the Panel and the Auditor shall each conduct a review of the Investigation

¹ See GLOSSARY.

² Va. Code § 19.2-386.22 A provides that “[t]he following property shall be subject to lawful seizure by any officer charged with enforcing the provisions of Article 1 (§ 18.2-247 et seq.) of Chapter 7 of Title 18.2: (i) all money, medical equipment, office equipment, laboratory equipment, *motor vehicles*, and all other personal and real property of any kind or character, *used in substantial connection* with (a) the illegal manufacture, sale or distribution of controlled substances or possession with intent to sell or distribute controlled substances in violation of § 18.2-248, (b) the sale or distribution of marijuana or possession with intent to distribute marijuana in violation of subdivisions (a)(2), (a)(3) and (c) of § 18.2-248.1, or (c) a drug-related offense in violation of § 18.2-474.1, (*italics added*).

within their requisite scope of authority. The Auditor and Chair shall coordinate the work of the Panel and Auditor to ensure efficient use of resources and avoid duplication of effort.”³ On October 22, 2020, the Panel voted to undertake a review of the FCPD investigation into MM’s other (non-use of force) allegations.⁴ Therefore, this report will discuss only my review of the FCPD’s investigation into MM’s claim of excessive force being used during his arrest.

CRIMINAL INVESTIGATION/ PROSECUTIVE DECISION

The FCPD conducted only an administrative investigation into MM’s allegations of excessive force during his June 11, 2019, arrest.⁵

Based on this incident, MM was charged with Distribution/Possession with Intent to Distribute Marijuana,⁶ Possession with Intent to Distribute,⁷ and Possession of Schedule I or Schedule II Drugs.⁸

INTERNAL ADMINISTRATIVE INVESTIGATION

The internal investigation into the use of force employed during MM’s arrest was, in my opinion, complete, thorough, objective, impartial, and accurate. All appropriate interviews were conducted, and all potential evidence was pursued. MM refused to provide a release so that the FCPD could review the full extent of medical treatment provided to him after arriving at the Fairfax County Adult Detention Center (hereinafter “ADC”) following his arrest, but the nurse who treated him there did confirm limited information regarding the treatment provided.

³ For a full discussion of the respective scopes of authority of the Auditor and the Panel, visit <https://www.fairfaxcounty.gov/policeauditor/> and <https://www.fairfaxcounty.gov/policecivilianreviewpanel/>.

⁴ When completed, the Panel’s report on CRP-20-27 will be available at:

<https://www.fairfaxcounty.gov/policecivilianreviewpanel/reports>.

⁵ MM’s previous complaint did result in a criminal investigation of an FCPD officer’s use of force on MM. A review of that investigation can be found at

<https://www.fairfaxcounty.gov/policeauditor/sites/policeauditor/files/assets/reports/oipa%20incident%20report%204-28-19.pdf>.

⁶ Va. Code § 18.2-248.1 (a) (1).

⁷ Va. Code § 18.2-248 (C).

⁸ Va. Code § 18.2-250 (A) (a).

Based on MM's use of force complaint, the FCPD investigation examined the tactics used by the members of the SCU involved in this arrest rather than a particular officer's or officers' use of force. The internal investigation concluded that the tactics utilized in the incident complied with both the law and FCPD policy addressing police officers' use of force. Specifically, the FCPD investigation concluded that the techniques complied with FCPD General Order (hereinafter "G.O.") 540.1, which mirrors the United States Supreme Court's mandate on how to examine law enforcement's use of force first set forth in its Graham v. Connor decision.⁹ I agree with that conclusion and will articulate my reasons in the following section of this report.

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. 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." FCPD G.O. 540.1 I. L. goes on to define "Objectively Reasonable" as "[t]he 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."

Following the incident under review, MM complained about the amount of force used in effecting his arrest in that there were "twelve guys with guns and [he was] thrown out of the car" that he was in at the time. MM's arrest was the culmination of a pre-arranged trade of narcotics. The SCU officers involved in MM's arrest, as already recounted, admitted to using a sensitive tactical technique to arrest MM so as to not afford him the opportunity to become violent or to escape the location. The tactics employed called for two officers to approach with their firearms

⁹ 490 U.S. 386 (1989).

brandished and two officers to approach with their ECWs brandished. There is no indication that twelve officers approached MM, nor that more than two had their firearms brandished.

The mere brandishing of a firearm is considered to be a use of force in some jurisdictions, and the FCPD treats it as a “reportable action.” 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” The investigation into this incident determined that the brandishing of weapons upon approach of MM was reasonable.

The SCU is a highly trained tactical unit and it uses tactics that are designed to protect the safety of the community, its officers, and those being arrested. Admittedly, the tactics include an emphasis on a show of force, but they are meant to allow for immediate de-escalation when that show of force convinces an arrestee to comply. They are reserved for and used by the FCPD’s SCU when arresting narcotics suspects. While not all drug offenders are necessarily violent or armed with weapons,¹⁰ the propensity for drug offenders to turn violent or attempt to evade arrest has been and continues to be acknowledged. As recently as May 2020, in Holmes v. Commonwealth,¹¹ a state court of appeals in Virginia recognized that a “reasonable, articulable suspicion of the presence of drugs gave rise to a concern for the presence of guns”¹² Following the initial show of force, MM complied and the arresting officers did, in fact, de-escalate the situation appropriately.

Following the initial approach, the tactics utilized by the SCU include one officer putting the subject of the arrest on the ground for handcuffing and for a pat-down for weapons.¹³ The investigation revealed no indication that MM was “thrown” to the ground, nor that he sustained more than a scratch on his knee. The nurse at the ADC on the night of his arrest confirmed only that MM was provided with a band aid. She could not provide additional details due to MM’s

¹⁰ See, e.g., Richards v. Wisconsin, 520 U.S. 385 (1997), in which the Supreme Court ruled out a blanket exception for dispensing with the “knock and announce” requirement in all narcotics search warrants.

¹¹ Unpublished opinion accessed on December 18, 2020, at <https://law.justia.com/cases/virginia/court-of-appeals-unpublished/2020/1161-19-1.html>.

¹² *Id.* at page 4, citing its own precedent in Lowe v. Commonwealth, 33 Va. App. 656, 6601-62 (2000), and quoting United States v. Sakyj, 160 F.3d 164, 169 (4th Cir. 1998). See also, <https://patch.com/virginia/reston/street-crimes-unit-makes-major-drug-busts-fairfax-county>.

¹³ In Terry v. Ohio, 392 U.S. 1 (1968), the United States Supreme Court first recognized the lawful authority of a law enforcement officer to perform a limited pat-down of a person—for weapons—based on articulable facts which provide reasonable suspicion that the individual is armed and dangerous.

refusal to provide a waiver. Also, MM did not complain of any injury, or even the force used during his arrest in June 2019, until November 2019.

Based on the aforementioned considerations, I agree with the FCPD's determination that the tactics used by its SCU officers in situations like the one under review are objectively reasonable and comply with both legal precedent and departmental policy. Of course, any use of force beyond the initial show of authority and force—the brandishing of weapons and removal from vehicle—must continue to be analyzed on a case-by-case basis. In this case, there was no additional force used.

RECOMMENDATIONS

FCPD policies on the use of force provide thorough guidance to its officers regarding force techniques typically considered objectively reasonable in an array of situations. Additionally, certain tactics are trained on and utilized by specific units within the FCPD. These specialized tactics are reviewed periodically and modified when appropriate. Based on the analysis described in the preceding section of this report, I believe that the tactics described herein are sound. Consequently, I have no recommendations to make 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.

