

Public Report

April 16, 2017: Use of Force
(Choke) Complaint



Richard G. Schott
Fairfax County
Independent Police Auditor

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A Public Report by the
Fairfax County Independent Police Auditor

Publication Date: April 17, 2018



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

The only two individuals present when this incident occurred were the involved officer and D.B. - the alleged victim of excessive force. The recitation of the INCIDENT is based on information provided to investigators by those two individuals.¹

On Sunday, April 16, 2017 (Easter Sunday), Police Office First Class #1 (hereinafter “PFC#1”) of the Fairfax County Police Department (hereinafter “FCPD”) was beginning an off-duty assignment at Saint Bernadette’s Catholic Church, located at 7600 Old Keene Mill Road in Springfield. The assignment was for a single officer to assist with traffic control before and after church services. PFC#1 worked the morning assignment without incident, and he returned to the church at approximately 3:20 pm to begin the afternoon assignment.

The following is how PFC#1 described the encounter:

Upon entering the church, PFC#1 observed D.B. in the front foyer. D.B. was browsing fliers available from the church. After PFC#1 said hello to D.B., D.B. asked PFC#1 who he was and why he was there. PFC#1 informed D.B. that he was a police officer and was there to provide traffic control for the church. D.B. also asked whether PFC#1 was armed, to which PFC#1 replied in the affirmative. At the time, PFC#1 was in his issued uniform but was not wearing his external ballistic vest. He was wearing his duty belt with his issued firearm, radio, and badge of authority displayed on a clip on the belt. He did not have handcuffs with him. It should be noted, however, that when PFC#1 had this exchange with D.B. he had entered the church only to sign in for the off-duty assignment, which was to begin at 3:30 pm. The log book for PFC#1 to sign was in the ushers’ room off the church foyer.

D.B. began to raise his voice and told PFC#1 he could not have a gun in church and that he had to leave. PFC#1 explained that he was working for the church and that any issue D.B.

¹ D.B. refused to be interviewed by Internal Affairs Bureau (IAB) detectives. However, he mailed several letters to the Fairfax County Police Department and one letter directly to the Office of the Independent Police Auditor expressing his recollection of the incident. Additionally, both of D.B.’s parents were interviewed by IAB detectives. The information provided by them reflects what they were told by D.B.

had should be addressed to church staff. D.B. became increasingly upset, loudly telling PFC#1 that he (D.B.) worked for the church and repeated that PFC#1 had to leave. PFC#1 doubted that D.B. worked for the church, and suspected that D.B. was emotionally disturbed.

To avoid escalating the situation, PFC#1 walked away from D.B. and entered the ushers' room. As he began to complete the log book, he realized that D.B. had followed him and was standing in the one doorway of the room. He was shouting about separation of church and state. PFC#1 noticed that D.B.'s arm was raised and that his feet were bladed. Based on D.B.'s stance, the shouting, his position blocking the exit to the room, and his choice to follow PFC#1 to the room, PFC#1 perceived D.B. to be a threat. He suggested that D.B. leave, but D.B. refused. When PFC#1 moved toward the door to get out of the small ushers' room, D.B. closed the door with PFC#1 still inside.

PFC#1 tried to open the door to the ushers' room, but was unable. Through a small window in the door to the room, PFC#1 saw D.B. holding the door handle with both hands and using his body weight to keep the door closed. PFC#1 recognized that these actions constituted a violation of the Virginia criminal statute for Abduction (§18.2-47).² PFC#1 was able to forcefully pull the door open. When D.B. released the door handle and stepped away from the door, PFC#1 stepped out into the church foyer. At this point, PFC#1 observed both of D.B.'s hands clenched into fists at chest level and his feet bladed. PFC#1 recognized this as a fighting stance and that D.B. was now a potential assailant. PFC#1 advised D.B. that he was under arrest³ and instructed him to get on the ground. D.B. disregarded those commands and maintained his aggressive stance. PFC#1 then grabbed D.B.'s left arm and placed him in an "arm bar" position.⁴ While PFC#1 executed the "arm bar," D.B. attempted to strike PFC#1 with his right hand. At this point, PFC#1 performed an "arm-bar takedown" to get D.B. to the ground. After landing on his side, D.B. continued to struggle with PFC#1, trying to hit him one more time but missing with his attempt.

² §18.2-47 reads as follows: Any person who, by force, intimidation or deception, and without legal justification or excuse, seizes, takes, transports, detains or secretes another person with the intent to deprive such other person of his personal liberty or to withhold or conceal him from any person, authority or institution lawfully entitled to his charge, shall be deemed guilty of "abduction."

³ At this point, PFC#1's intent was to arrest D.B. for Abduction based on probable cause to believe he had committed that violation.

⁴ The "arm bar" technique is taught at the Fairfax County Police Department Criminal Justice Academy, and is part of the general "Empty-Hands Tactics" section of the Use of Force General Order 540 covered in G.O. 540.13 I.

On the ground and struggling to gain control of D.B., PFC#1 utilized his portable radio to call a “Signal One” (meaning “officer-in-distress”), at 3:28 pm. PFC#1 used his body and hands to pin D.B. to the ground until D.B. became fatigued. PFC#1 was then able to get D.B. onto his stomach with both hands behind his back. He had to hold D.B. in this position until other officers arrived because PFC#1 did not have handcuffs.

Within minutes of the “officer in distress” call, eight FCPD officers arrived, including a sergeant and a second lieutenant. D.B. was then handcuffed. D.B. repeatedly stated that he was sorry in the presence of the officers. When D.B. was asked if he was hurt and/or needed medical treatment, he replied that he was not hurt, did not need medical treatment, but that he needed mental health care.

After PFC#1 briefed the responding second lieutenant on what had occurred in the church, the decision was made that D.B. would be transported to the Fairfax County Adult Detention Center (hereinafter “ADC”) and charged with Assault on a Law Enforcement Officer.⁵

The following is how D.B. described the encounter:

D.B.’s version of what occurred prior to PFC#1 entering the ushers’ room is consistent with PFC#1’s description. The two accounts differ from that point.

D.B. felt unsafe with PFC#1 in the church, so when PFC#1 went into the ushers’ room, D.B. started to close the door of the room and leave. But, PFC#1 grabbed the door and shouted for D.B. to get down. D.B. then stopped and stood still, but PFC#1 grabbed and took D.B. to the ground, and then started choking him. D.B. managed to pull PFC#1’s hands off of his neck and began to shout, “sorry, sorry!” for having tried to close the door on him. PFC#1 then handcuffed D.B. and advised over his police radio that D.B. had either attempted to or had actually assaulted him.

In his initial letter to investigators describing the incident, D.B. wrote, “He tried to kill me.” He also opined that PFC#1’s actions constituted a violation of the Virginia code section on Strangulation.⁶ In a follow-up letter dated May 17, 2017, sent from D.B. to the FCPD, he

⁵ VA Code § 18.2-57 (2016).

⁶ VA Code § 18.2-51.6 reads as follows: Any person who, without consent, impedes the blood circulation or respiration of another person by knowingly, intentionally, and unlawfully applying pressure to the neck of such person resulting in the wounding or bodily injury of such person is guilty of strangulation, a Class 6 felony.

alleged the Assault on a Law Enforcement Officer charge against him was a lie and constituted Perjury.

Consistent with PFC#1's account, D.B. does not mention ever requesting or receiving medical treatment for any injuries.

CRIMINAL INVESTIGATION

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

As indicated previously, D.B. was charged with Assault of a Law Enforcement Officer in violation of Virginia Code § 18.2-57.

INTERNAL ADMINISTRATIVE INVESTIGATION

Initially, the FCPD opened a station-level internal inquiry into PFC#1's self-reported use of force (the "arm bar" and subsequent "arm-bar takedown") on D.B. When letters were received from D.B. and his mother alleging that the force used included D.B. being choked, the investigation was reassigned to the FCPD Internal Affairs Bureau (hereinafter "IAB").

It is my opinion that the FCPD IAB administrative investigation into this matter was complete, thorough, objective, impartial, and accurate.

All appropriate interviews were conducted, and all potential evidence was pursued. No videotape of the confrontation was captured, although the church did have security cameras pointed elsewhere on the premises. In-car video/audio recordings that were captured and reviewed revealed no indication of D.B. being choked, or of him complaining about being choked or being injured. None of the responding officers observed or heard about any indication of choking or injury. The arrest booking photograph of D.B. had no indication of D.B. being choked.

CONCLUSIONS

As unfortunate as this incident was, there were no legal or FCPD policy violations. PFC#1 encountered an unexpected and volatile situation on Easter Sunday inside of a church.

PFC#1 recognized almost immediately that D.B. may have been emotionally disturbed. He tried to de-escalate the situation by entering the ushers' room and getting out of D.B.'s presence. Unfortunately, the situation quickly escalated when D.B. closed the door of the room and PFC#1 felt trapped inside. When the struggle between the two men escalated into an assault by D.B., the possibility of diversion (Diversion First) as opposed to an arrest was no longer an option. Because D.B. allegedly committed both a felony and a violent crime, he was not eligible for mental health diversion under current departmental policy.⁷ Of course, the arrest did not preclude D.B. from receiving mental health care while in custody.

In a highly critical letter sent from D.B.'s mother to the FCPD, she stated that she understood that her son was not "diverted" because of the policy, but she criticized the department for putting "policy and procedure over people." While it is understandable for D.B.'s mother to be dissatisfied with the decision to arrest her son, PFC#1 violated no policy by doing so. Again, FCPD does not allow "diversion" for the violent crime (Assault of a Law Enforcement Officer) for which D.B. was arrested.

With the benefit of hindsight, one may argue that diversion should have occurred before the attempted arrest for Abduction and, therefore, before the assault against PFC#1 had even taken place. However, hindsight is inappropriate in this situation. The United States Supreme Court has ruled that law enforcement officers must be judged based on what officers knew (or reasonably believed) at the time they acted, and not with the benefit of 20/20 hindsight.⁸ Relevant language from that Supreme Court decision includes the recognition that what "may later seem unnecessary in the peace of a judge's chambers" does not necessarily violate the Fourth Amendment.⁹ In the midst of his struggle with D.B., PFC#1 remembered that D.B. had a backpack with him when he first noticed him in the church foyer and he began to question what D.B.'s real intent had been in the church. PFC#1 had the legal authority to arrest D.B., and the Fourth Amendment allows officers to use a reasonable amount of force to effect arrests.¹⁰ As

⁷ Fairfax County Police Department General Order 603.3 III. E. 1. limits the possibility of Jail Diversion to individuals who "have committed a non-violent misdemeanor offense."

⁸ Graham v. Connor, 490 U.S. 386 (1989).

⁹ *Id.*

¹⁰ 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.

tempting as it may be to judge PFC#1's actions based on what is now known, that is not the legal standard by which to judge them.

Nor were any FCPD policies violated. FCPD General Order 540.0 on USE OF FORCE states:

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.

General Order 540.1, Use of Force- Definitions, Section I, further 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.

In so doing, the FCPD departmental policy borrows directly from the aforementioned Graham v. Connor case which articulates what makes a law enforcement officer's use of force legal. For the same reasons that PFC#1's use of force was legal, therefore, it was also within FCPD policy.

FCPD policy differentiates between levels of force and when those levels may be appropriate. General Order 540.13, Use of Force- Empty-Hand Tactics, states that "[e]mpty-hand tactics, such as strikes, kicks or takedowns, are considered less-lethal force" and that such empty-hand tactics may be effective "[w]hen it is objectively reasonable to overcome a passive resisting person to effect a lawful arrest" or when "[d]efending oneself or another from injury or assault." Just as important, General Order 540.13 I.C. succinctly states that "[c]arotid artery restraints and chokeholds are not sanctioned force options by the Fairfax County Police Department." Because it was objectively reasonable to use the "arm bar takedown" to overcome D.B.'s passive (if not active) resistance to being arrested, PFC#1 followed FCPD policy. While a "chokehold" would clearly have violated FCPD policy if used against D.B., there is no verifiable indication that one was employed.

Finally, although it does not relate directly to PFC#1's use of force against D.B., I will address one last policy issue that was examined by IAB when conducting its investigation of this incident. The encounter between PFC#1 and D.B. occurred as PFC#1 was preparing for a "non-regular employment" assignment (often referred to as "secondary employment"). When he entered the church to sign the duty log, PFC#1 did not have his external ballistic vest on, nor did he have handcuffs with him. FCPD General Order 340, Non-Regular Employment, states that "[e]mployees scheduled to work secondary law enforcement or overtime shall wear their uniform and be equipped the same as they would be for a regular patrol duty assignment." Because this "non-regular assignment" did not start for approximately ten minutes, PFC#1 was not in violation of this departmental mandate despite not having his vest or handcuffs on when he entered the church.

RECOMMENDATIONS

As I stated earlier, this was an unfortunate situation. It is completely understandable that D.B. and his parents are unhappy with what transpired. Their allegation is that D.B. was choked by PFC#1, constituting excessive force. There is no independent evidence that D.B. was choked. In one letter from D.B.'s mother to the FCPD, she was critical of the department for allowing policy and procedure to take priority over people. Her criticism in that letter was that "diversion" (from jail) was not an option for her son, and instead he was arrested and taken to the ADC. Apparently, even if there was no allegation that D.B. was choked D.B.'s family would disagree with how this situation was handled. That is also understandable. However, there is no evidence of any policy violation; and, I make no recommendation in this report that any policy or procedure discussed herein be changed. Officer discretion is a part of law enforcement, and officers must be allowed to use their discretion when making quick decisions with limited information. Sometimes, their decisions will be unpopular, even when they are legal and within departmental policy.

Separate from my analysis of the specific incident under review in this report, I recognize that law enforcement agencies across the United States must be aware of the sensitivity involved when they deal with emotionally disturbed individuals or physically disabled persons. The

possibility that the federal Americans with Disabilities Act (ADA) may result in departments being found liable for not providing “reasonable accommodations” during arrests has recently been argued to the Supreme Court.¹¹ While there is no conclusive holding on this issue,¹² departments must be cognizant that the ADA may expose them to liability in future cases, regardless of any Fourth Amendment claim.

I previously set forth general policy recommendations for G.O. 540 (and 540.5 specifically) addressing this concern in the Independent Police Auditor’s Annual Report for 2017.

¹¹ City and County of San Francisco, et al. v. Sheehan, 575 U.S. ____ (2015).

¹² *Id.* The question whether §12132 of the ADA “requires law enforcement officers to provide accommodations to an armed, violent, and mentally ill suspect in the course of bringing the suspect into custody,” was dismissed by the Supreme Court because the grant of *cert.* on that question was “improvidently granted.”

