

# Public Report

May 26, 2018: Use of Force Complaint



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## **INCIDENT**

The in-car video (hereinafter “ICV”) camera in the arresting officer’s patrol cruiser recorded much of this incident. That in-car camera was synchronized with the officer’s police radio worn on his uniform, and therefore most of the verbal exchange that occurred during the incident was also captured. In keeping with Supreme Court precedent which states that uses of force must be judged based on what the officer(s) knew (or reasonably believed) at the time force was used, and not with the benefit of 20/20 hindsight,<sup>1</sup> I have endeavored to describe the incident based on an interview describing the officer’s state of mind during the incident, as well as interviews of the individual who was the subject of force during the incident. However, I have reviewed the camera footage and will refer to it where appropriate, including in this INCIDENT section.

### **Summary of undisputed facts:**

On May 26th, 2018, Fairfax County Police Department (hereinafter “FCPD”) Police Officer First Class #1 (hereinafter “PFC#1”) was assigned to the Driving While Intoxicated (hereinafter “DWI”) Enforcement Squad. At approximately 2:00 a.m., he stopped a vehicle on Interstate 95 in Fairfax County after observing it traveling over 80 miles per hour. When PFC#1 first made contact with the driver, an individual later identified as having the initials K.B. (hereinafter “KB”), he smelled alcohol on her breath. She got out of the car and engaged in a series of “field sobriety tests.”<sup>2</sup> PFC#1 then asked whether she would submit to a preliminary breath test. She agreed to the test; however, none of her breaths produced a measurable result indicating her blood alcohol content even though she attempted it several times. Based on his interaction with KB, PFC#1 felt that he had probable cause to arrest KB for DWI. After successfully securing one handcuff on her left wrist while her hands were both behind her back, KB pulled her right hand away and turned to face PFC#1.

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<sup>1</sup> Graham v. Connor, 490 U.S. 386 (1989).

<sup>2</sup> These consisted of the Horizontal Gaze and Nystagmus test, the Walk and Turn test, and the One-Leg Stand test. Additionally, PFC#1 requested that KB recite a portion of the alphabet and count backward from 38 to 21.

**KB's description of the encounter:**

KB was interviewed shortly after the incident, while she awaited medical treatment. After PFC#1 stopped her, KB submitted to field sobriety testing. She indicated that she had consented to a preliminary breath test and had taken it seven times. PFC#1 placed her under arrest and put one handcuff on her. After advising PFC#1 that she was a police officer,<sup>3</sup> he tightened the handcuff. PFC#1 pushed her against a concrete barrier and was able to place the second handcuff on her other wrist. KB advised that as a result of the arrest, she had pain and bruising on her wrists, pain in her shoulder, and pain in her abdomen.

KB provided additional details during a subsequent interview. Before her arrest on May 26, 2018, KB drank two glasses of wine. After PFC#1 stopped her, KB performed several field sobriety tests. After completing a "walk and turn" test, PFC#1 grabbed her right arm, and put a handcuff on her wrist. She immediately turned to ask PFC#1 what was happening, to which he replied she was being arrested. PFC#1 then bent her over a concrete barrier to finish handcuffing her. She recalled that no other law enforcement officer was involved in cuffing her, or in leaning her over the barrier to do so. She did recall a state trooper arriving on the scene after she had been arrested and handcuffed. KB believed that PFC#1 either pushed her or used his knee against her back to get her bent over the concrete barrier to complete the handcuffing.

**PFC#1's description of the encounter:**

On May 26, 2018, PFC#1 stopped KB for Reckless Driving after observing her travelling in excess of 80 miles per hour on Interstate 95. When he first made contact with KB, he smelled alcohol on her breath and initiated a DWI investigation. KB identified herself to PFC#1 as a police officer multiple times during the incident, beginning with their first interaction. She was also argumentative with PFC#1. However, KB did agree to get out of the car, and submitted to field sobriety tests. PFC#1 noted several signs of impairment during the tests, and then offered to conduct a preliminary breath test. KB agreed to the breath test, but although several attempts were made, no measurable result was obtained. PFC#1 believed that KB went through the motions of complying, but deliberately failed to perform it so that a measurable result would be obtained. He then decided to arrest KB for DWI.

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<sup>3</sup> KB was not an FCPD officer.

While she was standing with her hands behind her back, PFC#1 tried to place handcuffs on her. After getting one handcuff on KB's left wrist, she pulled her right hand away and turned to face him. While maintaining control of her left wrist, PFC#1 was unable to get her right hand back behind her. Because he realized he would not be able to complete the handcuffing of KB without increasing the force against her, he opted to wait for another officer to assist. A Virginia State Trooper (hereinafter "TROOPER#1") arrived shortly thereafter. With TROOPER#1's assistance, PFC#1 regained control of KB, but she continued to pull away from him. He pushed her torso over a concrete barrier to allow him to get KB cuffed. However, KB continued resisting by keeping her right arm below her torso. PFC#1 and TROOPER#1 were eventually able to pull her right arm behind her back and secure it in the second handcuff. After being placed in handcuffs, KB stopped resisting, and no additional force was used. She did not complain of any injuries while on the scene. PFC#1 then transported KB to the Fairfax County Adult Detention Center (hereinafter "ADC"). There, she complained of pain in her shoulder and in her wrist. He then transported her from the ADC to a medical facility for treatment, before returning with her to the ADC. After obtaining arrest warrants from a magistrate at the ADC, PFC#1 released KB to the custody of the Fairfax County Sheriff's Office.

#### **Review of ICV footage:**

A review of the audio and video footage captured by PFC#1's ICV revealed that immediately after PFC#1 identified himself to KB after pulling her over, she identified herself as a police officer. She also acknowledged that she had been speeding; and, in response to PFC#1's question, that she had been drinking.

After agreeing to get out of the car, KB attempted the preliminary breath test nine times, but none of the attempts produced a measurable blood-alcohol result. After the ninth failed attempt, PFC#1 can be heard saying, "let's make it simple, keep your hands right there." After PFC#1 placed one handcuff on her, KB asked what he was doing. He told KB eight times to turn around. PFC#1 then requested other responding officers to "expedite" to his location. Shortly thereafter, TROOPER#1 arrived and began to assist PFC#1. TROOPER#1 grabbed KB's uncuffed hand and pulled it behind her back. The ICV camera did not capture the use of the concrete barrier to aid in their cuffing of KB. The camera did capture PFC#1 performing a

search of KB incident to her arrest, and also captured him placing her in the back of his patrol cruiser to be transported.

## **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.

PFC#1 obtained arrest warrants charging KB with violating §18.2-266 (DWI), §46.2-862 (Reckless Driving), and §18.2-460 (Obstructing Justice) of the Code of Virginia.

## **INTERNAL ADMINISTRATIVE INVESTIGATION**

The FCPD administrative investigation into this incident included the review of PFC#1's incident report documenting the incident and the force used during the arrest of KB; the review of in-car video and audio footage which captured much of the incident; an interview of PFC#1; an interview of TROOPER#1; two interviews of KB; and an interview of one of the two passengers in the car driven by KB. The FCPD investigator conducting the administrative investigation tried to interview the second passenger, and registered owner of the vehicle KB was driving, but she did not agree to an interview.

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. 540.13 when arresting KB because he used an objectively reasonable amount of force to effect a lawful 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. 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 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 PFC#1’s minimal use of force on KB was permitted by departmental policy. PFC#1 engaged in a lawful traffic stop, then developed probable cause to believe KB was driving while intoxicated and, therefore, was subject to arrest. The amount of force he used was minimal and objectively reasonable, as it was in response to KB’s resistance to being handcuffed and arrested. FCPD policy authorizes the use of “less-lethal” force “to gain compliance by individuals offering resistance,”<sup>4</sup> 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.”<sup>5</sup>

The FCPD policies on the use of force by its officers closely track the language provided by the United States Supreme Court to analyze a law enforcement officer’s use of force. In its Graham v. Connor decision,<sup>6</sup> 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.”<sup>7</sup> 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 to the United States Constitution.<sup>8</sup> To be lawful under that Fourth

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<sup>4</sup> FCPD G.O. 540.4 II. A. 2.

<sup>5</sup> FCPD G.O. 540.13 I. B. 1.

<sup>6</sup> *Supra*, note 1.

<sup>7</sup> *Id.* at 396.

<sup>8</sup> 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.



Amendment standard, an officer's use of force must be objectively reasonable. Consequently, PFC#1's actions satisfied both departmental and legal standards governing his use of force.

## **RECOMMENDATIONS**

FCPD policy thoroughly addresses the use of force, aligns with constitutional standards on the use of force, and 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 those 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.

