

Public Report

March 15, 2018: Officer-Involved
Shooting; Use of Kinetic Energy Systems;
Deployment of Electronic Control Weapon



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INCIDENT

On March 14, 2018, Fairfax County Police Department (hereinafter “FCPD”) patrol officers from the McLean District Station were dispatched to a residence on Hunter Road in Fairfax for a potential barricaded subject. The initial caller to the Fairfax County Department of Public Safety Communications (hereinafter “DPSC”) advised that an individual identified as having the initials R.M. (hereinafter “RM”) had discharged a firearm within the home and was threatening to commit suicide. The caller also advised that RM was likely alone in the residence; that he had three handguns; had prior military experience; had a history of depression; and that he may be under the influence of alcohol and pain medication. Finally, the caller advised that while he was on the phone with RM just before calling 9-1-1, he had heard gun fire. This information was relayed to the first responding officers, who arrived at the location at 11:03 p.m. They established a perimeter around the home, and attempted to communicate with RM from outside the residence. Because of the nature of the initial information, as well as additional information that was transmitted over the computer-aided dispatch system (hereinafter “CAD”), several other officers responded to the residence. Included in the information transmitted via the CAD was that RM had sent a picture to his wife of himself with a large caliber handgun to his head; his physical description was provided as being a white male, 5' 11” tall, 200 pounds; and that he had been wearing a camouflage jacket and dark sweater with a hood when he texted the picture to his wife.

As the responding officers were establishing the perimeter around the residence, RM’s wife arrived at the location. She provided additional background information about her husband, to include details about his recent behavior. At the same time, numerous phone calls were made by DPSC in an effort to make contact with RM. Additionally, officers attempted to contact RM by using a patrol vehicle’s public address system. None of these attempts at communicating with RM were successful. At approximately 11:35 p.m., Captain #1 (hereinafter “CAPT#1”) initiated the protocols for dealing with a barricaded subject, to include establishing a command post and notifying personnel who needed to respond to the scene.

At approximately 11:37 p.m., RM opened the garage door and came outside of the residence. Ignoring verbal commands being given to him, RM walked directly to a sport utility vehicle parked in the driveway. RM then opened the vehicle’s door, got in, and started the

engine. Officers placed “stop sticks”¹ at the end of the driveway to proactively eliminate any potential flight attempt and the need for a vehicle pursuit. Moments later, RM turned off the ignition, got out of the vehicle, and returned to the inside of the residence through the garage. He closed the garage door and turned the garage lights off before re-entering the house. He again ignored multiple verbal commands as he walked from the vehicle to the garage and back inside.

Members of the FCPD’s Mobile Crisis Response Team responded to the incident. At approximately 12:45 a.m. (March 15, 2018), a member of that team obtained an “emergency custody order” (hereinafter “ECO”) from a magistrate which allowed for RM to be taken into custody.² Members of the FCPD Special Weapons and Tactics unit (hereinafter “SWAT”) also responded to the incident and established various positions around the residence. SWAT marksmen and observers were placed in positions to monitor any activity at the location. Other SWAT members were transported to the scene in armored vehicles and stationed both in front of and behind the house.

Master Police Officer #1 (hereinafter “MPO#1) and Police Officer First Class #1 (hereinafter “PFC#1), both members of the SWAT team, saw RM come out of a back door and go down stairs to the back patio of the house; he then sat at the bottom of the stairs. Utilizing night vision enhancement equipment, MPO#1 clearly observed a cell phone in one of RM’s hands and a firearm in the other. This information was relayed to everyone at the scene. RM was then observed using military-style tactics in an apparent effort to determine where officers were located. After concealing himself from view of the observing officers by lying on the

¹ Stop sticks are used as a “vehicle stopping technique, designed to create a controlled release of air from a target vehicle’s tires, usually within 20-30 seconds after impact.” FCPD General Order 505.5 I. A. and C.

² VA Code § 37.2-808 states that:

A. Any magistrate shall issue, upon the sworn petition of any responsible person, treating physician, or upon his own motion, an emergency custody order when he has probable cause to believe that any person (i) has a mental illness and that there exists a substantial likelihood that, as a result of mental illness, the person will, in the near future, (a) cause serious physical harm to himself or others as evidenced by recent behavior causing, attempting, or threatening harm and other relevant information, if any, or (b) suffer serious harm due to his lack of capacity to protect himself from harm or to provide for his basic human needs, (ii) is in need of hospitalization or treatment, and (iii) is unwilling to volunteer or incapable of volunteering for hospitalization or treatment.

B. Any person for whom an emergency custody order is issued shall be taken into custody and transported to a convenient location to be evaluated to determine whether the person meets the criteria for temporary detention pursuant to § 37.2-809 and to assess the need for hospitalization or treatment. The evaluation shall be made by a person designated by the community services board who is skilled in the diagnosis and treatment of mental illness and who has completed a certification program approved by the Department.

ground, RM managed to crawl away from the patio. When lights were shone in this area, RM stood up, ran, and climbed over the backyard fence into the adjoining residence's backyard. Again able to see RM, MPO#1 and PFC#1 immediately chased after him. This development was also reported to all those present. During the foot chase, RM dropped his cell phone and headed toward the front of the residence. MPO#1 and PFC#1 discontinued their pursuit of him because they knew other SWAT members were in front of the residence. As RM ran across the front yard of the house adjoining his, he displayed the firearm in his hand and was heading in the direction of the SWAT members positioned in front of the house. As RM continued toward the driveway of his own home, Police Officer First Class #2 (hereinafter "PFC#2") raised his weapon and issued a command for RM to stop. However, RM continued to run and made it to his driveway, where two vehicles were parked. From a crouched position behind one of those vehicles, RM elevated his body enough to point his firearm in the direction of PFC#2. PFC#2 recalled that RM pointed the firearm using a two-handed grip and bent knee stance.³ In response, PFC#2 discharged one round from his weapon at RM, but missed his target as RM had begun to crouch back down by the time the shot was fired.

After the shot was fired and RM was again crouching down, SWAT team members observed him manipulating the slide of his weapon. At this point RM put the weapon down on the driveway and moved to the front of the vehicle he had been behind. He sat with his back against the front bumper and his legs extended. He also produced a second firearm. Other members of the SWAT team, utilizing an armored vehicle for protection, approached RM's location. They saw him point his second weapon in the air and then place it down on the driveway, but still within his reaching distance.

Still using the armored vehicle for protection, officers gave more verbal commands to RM which went unheeded. When RM reached his arm toward the firearm he had placed on the driveway, Master Police Officer #2 (hereinafter "MPO#2") fired one round of a less-lethal kinetic energy impact system.⁴ The bean sock round struck RM's arm, causing him to discontinue reaching in the direction of his firearm. He then stood up and verbally indicated that he had been shot. Nevertheless, he remained standing at the front of the vehicle and disregarded

³ FCPD Major Crimes Bureau interview of PFC#2 conducted on March 16, 2018.

⁴ The system deployed in this situation is commonly referred to as "bean sock," FCPD General Order 540.19 B. 1.

additional commands for him to surrender. Rather than surrendering, RM walked along the front of the vehicle and opened his shirt.

In response to RM's non-compliance, Master Police Officer #3 (hereinafter "MPO#3") announced to his fellow SWAT officers that he would be firing a less lethal weapon at RM. After making the announcement, MPO#3 discharged two foam baton rounds from his .40 mm foam baton launcher.⁵ Neither had any effect on RM. When he moved in the direction of the weapons he had previously put down on the driveway, MPO#2 fired two more rounds of bean sock in rapid succession. RM ceased moving toward the weapons, raised his hands and slowly walked out into an open space in the driveway. However, he still refused verbal commands being given, remained belligerent, and appeared as though he wanted to fight officers.⁶ Master Police Officer #4 (hereinafter "MPO#4") deployed his electronic control weapon (hereinafter "ECW"),⁷ but the probes did not strike RM. Regardless, he then submitted to the officers' authority and was taken into custody. Medical care was provided to RM after a search of him had been completed.

CRIMINAL INVESTIGATION/ PROSECUTIVE DECISION

Both a criminal and an administrative investigation were commenced immediately after the incident had been resolved by the arrest of RM. The criminal and administrative investigations were conducted separately but simultaneously (parallel) by FCPD's Major Crimes Bureau (hereinafter "MCB") and its Internal Affairs Bureau (hereinafter "IAB") respectively. I reviewed both investigations to gain a complete understanding of the FCPD's overall response to this matter. I believe that the FCPD criminal investigation was complete, thorough, objective, impartial, and accurate.

⁵ Another kinetic energy impact system "designed to provide a less-lethal force alternative" listed in FCPD General Order 540.19 I. B. 2. a.

⁶ FCPD Major Crimes Bureau interviews of MPO#2 (conducted on March 16, 2018) and MPO#3 (conducted on March 19, 2018).

⁷ FCPD General Order 540.1 I. C. defines an electronic control weapon 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." They are often referred to as tasers.

The results of that criminal investigation were presented to the Fairfax County Commonwealth's Attorney's Office to determine whether criminal charges would be brought against any of the FCPD officers involved in the incident. It was determined that no officers had committed a criminal violation.

RM was charged with Assault on a Law Enforcement Officer;⁸ with Pointing or Brandishing a Firearm;⁹ and with the Reckless Handling of a Firearm.¹⁰

INTERNAL ADMINISTRATIVE INVESTIGATION

Because this incident involved an officer-involved-shooting, an internal administrative investigation commenced immediately. The administrative investigation was conducted by IAB and was a parallel investigation to the criminal investigation conducted by MCB. The administrative investigation, which incorporated the entire criminal investigation, included: the review of incident reports generated from the incident, in-car camera and cell phone video footage, police radio messages, 9-1-1 call recordings, and computer-aided dispatch information; interviews of all involved FCPD personnel and other witnesses; a court-authorized search of the residence where the incident occurred; a forensic examination at the scene of the incident; and a review of the training provided by the Fairfax County Criminal Justice Academy and the associated lesson plans for the deployment of less-lethal force (to include kinetic energy impact systems and electronic control weapons), as well as the training records of the individual officers who deployed force.

The FCPD concluded that all officers complied with departmental policy in their actions during this incident. My opinion is that the comprehensive investigation into this matter was complete, thorough, objective, impartial, and accurate.

CONCLUSIONS

In its landmark Graham v. Connor¹¹ opinion, the United States Supreme Court analyzed the use of force by law enforcement officers in this country and recognized that “police officers

⁸ VA Code § 18.2-57 C.

⁹ VA Code § 18.2-282.

¹⁰ VA Code § 18.2-56.1.

¹¹ 490 U.S. 386 (1989).

are often forced to make split-second judgments – in circumstances that are tense, uncertain, and rapidly evolving – about the amount of force that is necessary in a particular situation.”¹² In the same opinion, Chief Justice William Rehnquist firmly stated that the Fourth Amendment to the United States Constitution¹³ is the standard by which an officer’s actions in these situations must be judged. Because it is the Fourth Amendment standard, an officer’s use of force must be objectively reasonable to be lawful. The use of deadly force is objectively reasonable when an “officer has probable cause to believe that the suspect poses a significant threat of death or serious injury to the officer or others.”¹⁴ Finally, probable cause is based on the “totality of the circumstances,”¹⁵ known to the officer at the time, and the probable cause [to believe] standard is met when there is a “fair probability”¹⁶ that the belief is accurate.

The situation under review was tense, uncertain, and rapidly evolving. And, PFC#2 had probable cause to believe that RM posed a significant threat of death or serious injury to himself (and to his fellow officers) when he deployed deadly force by firing his weapon. It was objectively reasonable for PFC#2 to believe that RM, an individual who had threatened to commit suicide earlier in the evening, was intent on using his weapon against PFC#2 when he rose from his crouched position and pointed the gun in PFC#2’s direction. Therefore, PFC#2’s use of deadly force was lawful under the Fourth Amendment.

The FCPD policy regarding the use of deadly force mirrors the aforementioned pronouncements from the Supreme Court. FCPD General Order (hereinafter “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

¹² *Id.* at 397.

¹³ 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.

¹⁴ *Tennessee v. Garner*, 471 U.S. 1, at p. 4 (1985).

¹⁵ *Illinois v. Gates*, 462 U.S. 213 (1983).

¹⁶ *Id.*

is reasonably necessary in view of the circumstances confronting the officer.”¹⁷ FCPD G.O. 540.1, Use of Force- Definitions, goes on to define “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.”¹⁸ Finally, FCPD policy provides that “[d]eadly force shall not be used unless it is objectively reasonable. The officer must believe, based on the totality of the circumstances known at the time, that imminent death or serious injury to any individual(s) exists and that all other force options to control the individual(s) are not feasible, or have already proven to be ineffective.”¹⁹ For the same reasons that PFC#2’s use of deadly force satisfied the legal requirements for using such force, he also met the policy standards required by the FCPD. PFC#2 utilized deadly force based on an objectively reasonable belief that RM posed a significant, or imminent, threat of death or serious injury to him (PFC#2) and to others.

Although non-deadly uses of force are typically subject to less public scrutiny than are uses of deadly force, non-deadly force is analyzed through the same lens as deadly force from a legal and policy standpoint. In his Graham v. Connor opinion, in fact, Chief Justice Rehnquist stated that “[t]oday we make explicit . . . and hold that *all* claims that law enforcement officers have used excessive force – deadly or not – in the course of an arrest, investigatory stop, or other ‘seizure’ of a free citizen should be analyzed under the Fourth Amendment and its ‘reasonableness’ standard”²⁰ Therefore, the uses of non-deadly force during this incident will be examined accordingly.

When MPO#2 fired the three rounds of bean sock ammunition from the kinetic energy impact weapon, it was objectively reasonable. By the time this “less-lethal”²¹ force was used on RM, several verbal commands had been issued to him. However, RM disregarded the

¹⁷ FCPD G.O. 540.0 II.

¹⁸ FCPD G.O. 540.1 I. L.

¹⁹ FCPD G.O. 540.8 I. A.

²⁰ 490 U.S. at 395 (emphasis in original).

²¹ While this same level of force was characterized as “non-deadly” force in the preceding paragraph based on language in the Graham v. Connor opinion, because FCPD policy uses the term “less-lethal” to characterize it, I will use “less-lethal” whenever referring to FCPD policy language for the remainder of this report.

commands to surrender and instead reached toward a firearm. While the first round of bean sock caused RM to stop reaching for that particular weapon, at the time the other two rounds of bean sock were discharged, RM was again moving toward the two weapons he had previously put down on the driveway. RM's actions made MPO#2's use of less-lethal force objectively reasonable because RM continued to pose a danger to the officers on the scene of the incident when that force was used.

Although MPO#2's first shot of bean sock discouraged RM from continuing to reach for his firearm, it did not resolve the situation. In fact, RM remained standing and began to walk along the front of the vehicle and opened his shirt. He did not surrender and could not yet be safely approached and taken into custody. At this point, MPO#3 fired the two foam baton rounds at RM in an effort to gain compliance from him. This use of less-lethal force was also objectively reasonable under the law.

When MPO#4 deployed his ECW, but did not strike RM,²² RM was still not complying with commands and appeared combative. Shortly thereafter, however, he did comply, and officers took him into custody without any additional force. Because the ECW was used when RM was still resisting, the use of that device was also objectively reasonable.

While Graham v. Connor stands for the basic proposition that all law enforcement officers' uses of force during an arrest or investigatory stop must be objectively reasonable to be lawful,²³ FCPD imposes certain policy parameters which must be met when deploying "less-lethal" force. It should be noted that both the bean sock rounds and the foam baton rounds used in this incident fall under the department's category of "kinetic energy impact systems;" while the ECW is listed as a separate alternative. More important to recognize, however, is that all three of these devices are treated as different weapons that fall in the same category of "less-lethal force."²⁴ The uses of less-lethal force deployed against RM fell within the parameters set forth in FCPD policy. FCPD G.O. 540.6 I. A. specifically states that less-lethal force may be effective to "defend oneself or another individual from injury or assault" or to "[e]stablish custody for a temporary detention order," thereby contemplating its use in the context of this

²² The result of an apparent malfunction of the equipment.

²³ *Supra*, note 20.

²⁴ FCPD G.O. 540.4 II. A. 2. defines "Less-Lethal Force" as [a]ny level of force not designed to cause death or serious injury that is reasonably necessary to gain compliance by individuals offering resistance." It goes on to list both "Electronic Control Weapons" (FCPD G.O. 540.4 II. A. 2. d.) and "Kinetic Energy Impact Systems" (FCPD G.O. 540.4 II. A. 2. g.) as examples of less-lethal force.

incident. Furthermore, G.O. 540.4 II. A. 2. allows less-lethal force to be used to “gain compliance [from] individuals offering resistance.” At the time the less-lethal uses of force were deployed against RM, he was clearly demonstrating, at a minimum, “active resistance”²⁵ to the officers trying to “establish custody” of him. Moreover, it was reasonable to believe that he had been demonstrating “aggressive resistance”²⁶ just moments before the less-lethal force was used.

Even more specific to the weapons used by the three officers who deployed less-lethal force during this encounter with RM, FCPD G.O. 540.19 I. E. instructs that kinetic energy impact systems “may be used to resolve potentially violent situations, thereby reducing the likelihood of serious injury or death to any person,” and that they shall only be used when “[t]here is a reasonable belief it is unsafe for officers to approach a person who is committing criminal acts, and/or [t]he person is believed to have the ability to utilize force that is likely to cause death or serious injury to themselves or others, and this level of force can de-escalate the event safely.” And, FCPD G.O. 540.16 IV. B. recognizes that the use of an ECW may be effective: against “[p]ersons who have made active movements to avoid physical control;” during the “[s]ervice of Mental Detention Orders on an individual believed to be violent;” for the “[a]pprehension of violent individuals under the influence of drugs/alcohol; or for the “[d]etention of persons threatening suicide or injury to themselves.” Based on these specific provisions, therefore, MPO#2, MPO#3, and MPO#4 all complied with FCPD policy when they deployed force during this incident.

RECOMMENDATIONS

FCPD officers responded to a situation in this case that was “tense, uncertain, and rapidly evolving.”²⁷ The United States Supreme Court has recognized that it is in these types of circumstances that responding law enforcement officers are called upon to make “split-second” decisions.²⁸ FCPD policy thoroughly addresses the use of both deadly and “less-lethal” force, aligns with constitutional standards on the use of force, and provides its officers extensive

²⁵ FCPD G.O. 540.4 I. A. 2. defines “Active Resistance” as “[w]here 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.”

²⁶ FCPD G.O. 540.4 I. A. 3. defines “Aggressive Resistance” as “[w]here 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.”

²⁷ Graham v. Connor, *supra*, note 11.

²⁸ *Id.*

guidance on the types of force that are typically considered objectively reasonable in different situations. In this incident, multiple decisions were made in rapid succession by responding officers as to which force options to use. The FCPD analyzed each of those decisions and the resulting uses of force by examining them against the policies in place. The investigation determined that the actions of PFC#2, MPO#2, MPO#3, and MPO#4 during this incident were lawful and complied with departmental policy. I agree with those conclusions for the reasons stated in the preceding section of this report. Furthermore, I have no recommendations to make based on this incident review.

