

Public Report

July 6, 2018: Use of Force Complaint



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INCIDENT

A complaint was made alleging both an illegal stop and excessive force. The allegation of an illegal stop constitutes an allegation of “serious misconduct” or “abuse of authority” by the officer conducting the stop. That aspect of the complaint will be addressed separately by the Fairfax County Police Civilian Review Panel (hereinafter “Panel”).¹ This report will address only the use of force which occurred during the incident.²

Much of this incident was recorded by an ALDI store security camera and on bystanders’ personal devices. In-car video from Fairfax County police vehicles captured video and audio after the arrest. In keeping with Supreme Court precedent which states that uses of force must be judged based on what the officers knew (or reasonably believed) at the time force was used, and not with the benefit of 20/20 hindsight,³ I have endeavored to describe the incident based on interviews of the involved officers, as well as an interview conducted of the alleged victim of excessive force. I have reviewed the store security camera footage and footage from other devices, and it is consistent with the involved individuals’ accounts of what transpired.

On July 6, 2018, Fairfax County Police Department (hereinafter “FCPD”) Police Officer First Class #1 (hereinafter “PFC#1”) was on routine patrol in the 8200 block of Russell Road in the Alexandria section of Fairfax County. PFC#1 observed an individual, later identified as an individual with the initials D.J. (hereinafter “DJ”), participate in what PFC#1 suspected as a drug

¹ 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 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.” 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/>.

² In County of Los Angeles v. Mendez, 137 S.Ct. 1539, 1547 (2017), the United States Supreme Court recognized that “the objective reasonableness analysis must be conducted separately for each search or seizure that is alleged to be unconstitutional.” Likewise, in Greenidge v. Ruffin, 927 F.2d 789, 792 (4th Cir. 1991), the Fourth Circuit Court of Appeals held that an alleged violation of standard police procedure preceding a use of force was “not probative of the reasonableness” of the force used.

³ Graham v. Connor, 490 U.S. 386 (1989).

transaction at the Mount Vernon apartment complex. PFC#1 initiated an investigative detention⁴ of DJ in front of the ALDI supermarket at 8256 Richmond Highway. PFC#1 and DJ had divergent recollections of the physical struggle which ensued and ended with DJ being arrested and handcuffed.

The following is how DJ described the encounter:

When PFC#1 approached DJ and got to approximately ten feet from him, PFC#1 called to DJ and asked to speak with him. When DJ replied, “No,” PFC#1 advised DJ that he was trespassing. Because DJ felt that he was not trespassing, he turned to walk away from PFC#1. PFC#1 then converged on DJ, grabbed DJ’s arm, and stated that he was under arrest. DJ pulled his arm away and asked why he was being arrested; PFC#1 advised he would explain the basis for the arrest later.

Because he did not want to be placed in handcuffs, and because he did not know why he was being handcuffed, DJ attempted to break away from PFC#1. PFC#1 then grabbed DJ’s leg and took him to the ground. DJ denied striking PFC#1 during the ensuing struggle, but did acknowledge using a “stiff arm” against PFC#1. DJ recalled being advised to “stop resisting” by PFC#1 after they were both on the ground. DJ repeatedly asked why he was being arrested during the struggle. DJ stated that PFC#1 held him in a head lock for approximately ten seconds, but at no time was he unable to breathe. He also remembered PFC#1 struggling to get his [DJ’s] arm behind his back. Shortly after a second officer arrived, DJ was secured in handcuffs and the physical confrontation ended.

DJ insisted that he had done nothing wrong, and that, therefore, PFC#1 had no right to stop him. He also stated that during prior arrests, the arresting officers had advised him of the reason(s) for his arrest before arresting him. Conversely, in this incident, PFC#1 did not explain any basis for DJ being arrested until after the struggle and the arrest.

⁴ In its landmark Terry v. Ohio, 392 U.S. 1 (1968) decision, the United States Supreme Court first recognized a law enforcement officer’s authority to detain an individual, without probable cause, if the officer could articulate reasonable suspicion that the individual was engaged in criminal activity.

The following is how PFC#1 described the encounter:

After observing DJ engage in what PFC#1 suspected may have been a brief drug transaction, he approached DJ and requested to speak with him. After a quick look back at PFC#1, DJ continued walking. PFC#1 then stated, “Sir, stop. I need to talk to you about trespassing.” DJ stopped, and asked, “How am I trespassing?” PFC#1 approached DJ, and smelled an odor he recognized as fresh marijuana which got more pronounced as he got closer to DJ. DJ bladed his body (as opposed to facing directly at PFC#1) and clenched his right hand. PFC#1 thought he was either holding something in his hand, or contemplating whether to try to punch PFC#1.

When PFC#1 was within reach of DJ, he grabbed ahold of DJ’s left hand near the wrist and his upper arm. He advised DJ to put his hands behind his back. DJ tensed up and attempted to jerk away. PFC#1 reacted by using a leg sweep, and both individuals went to the ground. PFC#1 struggled to gain control of DJ, and tried to get him on his stomach to achieve control. PFC#1 was able to get DJ’s left arm behind his back. When several people came over to the location, many were shouting and videotaping the altercation. Fearing that others may get involved, PFC#1 radioed a “Signal 1”⁵ to get other officers to respond to his location immediately.

DJ was able to break free from PFC#1’s hold, and got on top of him briefly. DJ pushed off and got up, but PFC#1 continued to hold onto DJ’s shirt, and got up from the ground to prevent DJ from fleeing. When they were both back on their feet, DJ swung a closed fist at PFC#1 but did not make contact. PFC#1 acquired control of DJ’s left arm by using an arm bar defensive tactic and brought him back to the ground. He then spread DJ’s legs to prevent him from running, and knelt on his mid-section to keep him down. He accessed his “OC” spray⁶ and was preparing to use it when Police Officer First Class #2 (hereinafter “PFC#2”) arrived on the scene. PFC#2 obtained control of DJ’s right arm, and the two officers were then able to handcuff DJ.

It should be noted that in her interview conducted by the FCPD Internal Affairs Bureau (hereinafter “IAB”) after the event, PFC#2 acknowledged utilizing knee strikes to DJ’s thigh in

⁵ Radio call indicating that an officer is in immediate danger.

⁶ Oleoresin Capsicum spray, commonly referred to as “pepper spray.”

an effort to gain compliance from and control over him. She stated that the knee strikes were administered only after she gave several verbal commands to DJ for him to comply with the officers. Neither DJ nor PFC#1 mentioned PFC#2's knee strikes when interviewed. No additional force was used.

CRIMINAL INVESTIGATION/ PROSECUTIVE DECISION

The FCPD conducted only an administrative investigation into the officers' use of force on DJ during his arrest. No referral was made to the Office of the Commonwealth's Attorney. DJ was charged with Possession of Marijuana with Intent to Distribute⁷ and with Assault on a Law Enforcement Officer.⁸

INTERNAL ADMINISTRATIVE INVESTIGATION

The FCPD's IAB commenced an administrative investigation into the actions of the involved officers immediately after the incident.⁹ There was no public complaint made regarding this incident until December 10, 2018; that public complaint initiated this review of the FCPD investigation.

The internal administrative investigation of this incident included interviews of all involved officers and a review of their written use of force documentation; an interview of DJ; a review of audio and video footage recorded by the ALDI security camera, police cruisers' in-car video systems, and a bystander's personal device; an interview of a witness to the incident; and, a review of Department of Public Safety Communications Records. In my opinion the FCPD investigation into this matter was complete, thorough, objective, impartial, and accurate as it relates to the officers' uses of force.¹⁰

⁷ VA Code § 18.2-248 makes it "unlawful for any person to manufacture, sell, give, distribute, or possess with intent to manufacture, sell, give or distribute a controlled substance or an imitation controlled substance.

⁸ VA Code § 18.2-57 makes it unlawful for a person to commit "an assault or an assault and battery against another knowing or having reason to know that such other person is a judge, a magistrate, a law-enforcement officer, . . ."

⁹ FCPD G.O. 540.7 II. A. 4. provides that the on-duty supervisor or above has investigative authority in incidents involving "less-lethal force that does not involve the complaint of injury or medical treatment."

¹⁰ *Supra*, note 1. The investigation of the alleged illegal nature of the initial stop of DJ will be addressed separately by the Panel.

The FCPD investigation concluded that PFC#1 and PFC#2 used force in compliance with departmental policy, specifically FCPD General Order (hereinafter “G.O.”) 540, *et seq.* The FCPD finding was that the officers complied with G.O. 540.4 when arresting DJ because they used an objectively reasonable amount of force to overcome a resisting individual. I agree with the FCPD’s conclusions and will articulate my reasons in the following section.

CONCLUSIONS

In its Graham v. Connor decision, 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.”¹¹ 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.¹² To be lawful under that Fourth Amendment standard, an officer’s use of force must be objectively reasonable. Likewise, FCPD G.O. 540.0 on USE OF FORCE mandates, 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.”

Additionally, FCPD G.O. 540.1 defines “Objectively Reasonable,” much like the Supreme Court did in its Graham opinion, 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 both PFC#1 and

¹¹ *Supra*, note 3, 490 U.S. at 396.

¹² 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.

PFC#2 used force that was permitted by both the law and departmental policy.

At the outset of the encounter, DJ was being detained by PFC#1.¹³ When approached by PFC#1, DJ immediately questioned why he was being detained and resisted PFC#1's effort to keep him detained. His initial actions constituted "active resistance," described in FCPD G.O. 540.4 I. A. 2. as being "[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." FCPD policy not only authorizes the use of "less-lethal" force "to gain compliance by individuals offering resistance,"¹⁴ it specifically allows for the use of "[e]mpty-hand tactics, such as strikes, kicks, or takedowns"¹⁵ to effect an arrest or investigative stop.¹⁶ The initial leg sweep used by PFC#1, therefore, was lawful and allowed by departmental policy.

While DJ admitted to using a "stiff arm" against PFC#1, PFC#1 recalled DJ taking a swing with a closed fist at him.¹⁷ Either of these would again constitute active resistance at a minimum, and a punch directed at the officer would raise the level of resistance to "aggressive resistance," defined 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."¹⁸ At this point in the continuing struggle, PFC#1 used an arm bar defensive tactic and brought DJ back to the ground. He then spread DJ's legs to prevent him from running, and knelt on his mid-section to keep him down. He accessed his "OC" spray but did not use it. At this point, PFC#2 arrived, gave DJ several verbal commands, and then delivered knee strikes to DJ's thigh to gain compliance.

These techniques were also authorized by departmental policy and by the Fourth Amendment under the same analysis used for the initial takedown. The officers were still trying to "[e]ffect an investigative stop or arrest," and were using "less-lethal" force to overcome DJ's increased level of resistance to their efforts.¹⁹ Because DJ was "actively resisting or attempting

¹³ *Supra*, note 1 and note 10. The investigation into the propriety of the stop will be examined by the Panel.

¹⁴ FCPD G.O. 540.4 II. A. 2.

¹⁵ FCPD G.O. 540.6 I. D. 1.

¹⁶ FCPD G.O. 540.6 I. A. 1.

¹⁷ In reviewing the ALDI security camera footage, the attempted closed fist punch appears to be the more accurate recollection of the event.

¹⁸ FCPD G.O. 540.4 I. A. 3.

¹⁹ FCPD G.O. 540.6 I. A. 1. and D. 1., and FCPD G.O. 540.4 II. A. 2.

to evade arrest,”²⁰ and because he “pose[d] an immediate safety threat to the officers or others,”²¹ the force used satisfied the objective reasonableness standard required by both the Constitution and the FCPD.

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 and PFC#2 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 the officers’ uses of force based on this incident review.

²⁰ FCPD G.O. 540.5 I. 3.

²¹ FCPD G.O. 540.5 I. 1.

