

Public Report

Oct. 6, 2022: Officer-Involved
Shooting
IPA-22-11



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NOTE TO THE READER: The Fairfax County Police Department revised its comprehensive policy addressing the use of force on April 29, 2024. The force used during this incident will be analyzed using the policy provisions that were in effect on October 6, 2022 (i.e., General Order 540, et. seq., effective August 12, 2022).

INCIDENT

On October 6, 2022, at approximately 8:45 a.m., an individual (hereinafter identified by his initials “R.S.”) was seen by Arlington County (Virginia) sheriff’s deputies brandishing a firearm in front of the Arlington County Courthouse. Nine minutes later, deputies approached a car R.S. had entered. As the deputies approached, R.S. stated “I need help,” and drove away.

Arlington County Police Department (hereinafter “ACPD”) officers obtained arrest warrants charging R.S. with felony speed to elude¹ and with brandishing a firearm.² At approximately 8:13 p.m., he was located when he drove into his apartment complex. Apparently recognizing the presence of officers, R.S. sped away from the complex and fired several shots at the officers who began to pursue him.

Within minutes Fairfax County Police Department (hereinafter “FCPD”) officers responded to a request from ACPD to assist them in stopping R.S., who had fled into Fairfax County. After FCPD officers got involved in the pursuit of R.S., he struck multiple vehicles before his own car became inoperable on Arlington Boulevard near Graham Road in Fairfax County. R.S. then got out of his car at approximately 8:19 p.m. and fired numerous shots at FCPD officers who were close to his disabled car. One shot struck the police cruiser being operated by Police Officer First Class #1 (hereinafter “PFC#1”), the closest officer to R.S. PFC#1 moved to the back of his cruiser and fired five rounds at R.S. None of the shots hit R.S., and he fled on foot until he was behind a nearby gas station and store.

A pursuing officer discovered a black handgun that had been discarded by R.S. The handgun had mis-fired, as a shell casing was jammed in the breach of the weapon. At approximately 8:34 p.m., R.S. was located and taken into custody when he complied with officers’ commands.

¹ Va. Code § 46.2-817 B.

² Va. Code § 18.2-282.

R.S. was taken to the Fairfax County Adult Detention Center (hereinafter “ADC”), where the Arlington County warrants were served on him. Additionally, Fairfax County warrants were obtained charging R.S. with felony eluding,³ the use of a firearm in the commission of a felony,⁴ felony willful discharge of a firearm in a public place,⁵ and three counts of attempted malicious wounding of a law enforcement officer.⁶

RELEASE OF INVOLVED OFFICER’S IDENTITY

FCPD Chief Kevin Davis complied with departmental policy directive—to release the name(s) of officers involved in an officer involved shooting within 10 days of the incident—by releasing a statement and PFC#1’s identity on October 16, 2022.

He also released the body-worn camera (hereinafter “BWC”) footage within thirty days of the incident, announcing the release and discussing portions of the footage during a press conference on November 2, 2022.

CRIMINAL INVESTIGATION/ PROSECUTIVE DECISION

The FCPD conducted both a criminal and an administrative investigation into PFC#1’s actions during this incident. The criminal investigation into the use of force was conducted by the Major Crimes Bureau (hereinafter “MCB”). The results of the criminal investigation were provided to the Office of the Commonwealth’s Attorney. In an April 28, 2023, letter from Fairfax Commonwealth Attorney (hereinafter “CWA”) Steve Descano to FCPD Chief Kevin Davis, CWA Descano advised that he had “concluded that [PFC#1] did not commit any violations of criminal law” and “[t]herefore, [his] office will not be pursuing charges against him in connection with this incident.” It should be noted that the criminal investigation included a voluntary statement provided by PFC#1 on October 10, 2022, prior to him reviewing any BWC footage of the incident.

³ Note 1, *supra*.

⁴ Va. Code § 18.2-53.1.

⁵ Va. Code § 18.2-280 A.

⁶ Va. Code § 18.2-51.1.

INTERNAL ADMINISTRATIVE INVESTIGATION

Because this incident involved an officer-involved shooting, an internal administrative investigation was conducted by the FCPD Internal Affairs Bureau (hereinafter “IAB”). Between the administrative investigation and the criminal investigation—which was shared with and incorporated into IAB’s administrative investigation, the following investigative steps were taken: 1) evidence gathering and photos taken at the location of the shooting; 2) a canvass for witnesses; 3) a search (authorized by a search warrant) of R.S.’s car; 4) multiple (conducted by MCB and IAB) interviews of R.S., PFC#1,⁷ and all other officers involved in the incident; and, 5) review of BWC and in-car video footage captured during the incident. Following its internal administrative investigation into the incident, the FCPD determined that PFC#1’s use of deadly force was objectively reasonable and, therefore, that use of deadly force complied with departmental policy. Specifically, the FCPD concluded that PFC#1’s use of deadly force complied with FCPD General Order (hereinafter “G.O.”) 540 VII. I agree with this conclusion and that it was based on an investigation that was complete, thorough, objective, impartial, and accurate.

CONCLUSIONS

I. Legal Compliance

A. Federal Law

In its landmark Graham v. Connor opinion,⁸ the United States Supreme Court analyzed the use of force—including deadly force—by law enforcement officers in this country and recognized that “police officers 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.”⁹ In the same opinion, Chief Justice William Rehnquist firmly stated that the Fourth Amendment to the United States Constitution¹⁰ is the standard by

⁷ PFC#1 was interviewed by IAB investigators on October 27, 2022, again before viewing any BWC footage of the incident.

⁸ 490 U.S. 386 (1989).

⁹ *Id.* at 397.

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

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 force¹¹ 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."¹² Finally, probable cause is based on the "totality of the circumstances,"¹³ known to the officer at the time, and the probable cause [to believe] standard is met when there is a "fair probability"¹⁴ that the belief is accurate.

The situation under review was certainly tense, uncertain, and rapidly evolving. Within minutes of PFC#1 getting involved in a pursuit of R.S., R.S. struck multiple vehicles, got out of his own vehicle, and fired a gun in the direction of FCPD officers several times. He clearly posed a significant threat of death or serious injury to the officers when he did so. PFC#1 was the closest officer to R.S., and his police car was struck by one of the bullets fired by R.S. PFC#1's own use of deadly force in response was objectively reasonable and, therefore, lawful under the Fourth Amendment.

B. State Law

Virginia state law provides guidance similar to the federal law to determine whether force (to include deadly force) complied with the state law. First, Virginia Code § 19.2-83.3 defines "excessive force" as "any force that is objectively unreasonable given the totality of the circumstances, including the severity of the crime at issue, whether the suspect poses an immediate threat to the safety of the officers or others, and whether the suspect is actively resisting arrest or attempting to evade arrest by flight."¹⁵

Specific to the use of deadly force, Virginia law provides specific guidance by expressly prohibiting the use of "deadly force against a person unless:

probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

¹¹ See GLOSSARY.

¹² Tennessee v. Garner, 471 U.S. 1, at p. 4 (1985).

¹³ Illinois v. Gates, 462 U.S. 213 (1983).

¹⁴ *Id.*

¹⁵ These three factors were articulated in Graham v. Connor, *supra*, note 8, and are often referred to as the Graham factors.

1. The law-enforcement officer reasonably believes that deadly force is immediately necessary to protect the law-enforcement officer or another person, other than the subject of the use of deadly force, from the threat of serious bodily injury or death;
2. If feasible, the law-enforcement officer has provided a warning to the subject of the deadly force that he will use deadly force;
3. The law-enforcement officer's actions are reasonable, given the totality of the circumstances; and
4. All other options have been exhausted or do not reasonably lend themselves to the circumstances.”¹⁶

Additionally, state law provides more specific guidance by dictating that “[i]n determining if a law-enforcement officer's use of deadly force is proper, the following factors shall be considered:

1. The reasonableness of the law-enforcement officer's belief and actions from the perspective of a reasonable law-enforcement officer on the scene at the time of the incident; and
2. The totality of the circumstances, including (i) the amount of time available to the law enforcement officer to make a decision; (ii) whether the subject of the use of deadly force (a) possessed or appeared to possess a deadly weapon and (b) refused to comply with the law-enforcement officer's lawful order to surrender an object believed to be a deadly weapon prior to the law-enforcement officer using deadly force; (iii) whether the law enforcement officer engaged in de-escalation measures prior to the use of deadly force, including taking cover, waiting for backup, trying to calm the subject prior to the use of force, or using non-deadly force prior to the use of deadly force; (iv) whether any conduct by the law-enforcement officer prior to the use of deadly force intentionally increased the risk of a confrontation resulting in deadly force being used; and (v) the seriousness of the suspected crime.”¹⁷

Based on the law in the Commonwealth—and the specific guidance provided therein—PFC#1’s use of deadly force was legal under state law just as it was under federal law. It was certainly reasonable for PFC#1 to believe that deadly force was immediately necessary to protect himself and his fellow officers after being fired upon by R.S. Furthermore, he had no time to either provide a warning that he would deploy deadly force, or to attempt to use any other force options.

¹⁶ Va. Code § 19.2-83.5 A.

¹⁷ Va. Code § 19.2-83.5 B.

II. Policy Compliance

Lastly, for the same reasons that PFC#1's use of deadly force was objectively reasonable and legal under federal and state law, his use of deadly force also comported with FCPD policy.

The FCPD policy regarding the use of force—up to and including deadly force—mirrors the aforementioned pronouncements provided by the Supreme Court in its Graham and Garner opinions. FCPD G.O. 540 on USE OF FORCE states, in part: “The use of all force options by officers shall never be performed in a reckless manner and shall only be used to the extent it is objectively reasonable to defend oneself or another, maintain control over an individual during an investigative or mental health detention, or overcome resistance to a lawful detention or arrest. All officers shall refrain from the unwarranted infliction of pain and/or suffering to another and shall never engage in cruel, degrading, or inhumane treatment of any individual.”¹⁸ FCPD G.O. 540 III. 18. goes on to define “Objectively Reasonable” as follows: A 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 accounts for the fact that officers must make rapid and necessary decisions regarding the amount of force to use in tense, uncertain, and rapidly evolving situations.”

Finally, FCPD policy provides that “[t]he use of deadly force is only permissible where an officer reasonably believes, based upon the totality of the circumstances known at the time, that deadly force is immediately necessary in order to protect the officer or another person (other than the subject of the use of deadly force), from the threat of serious bodily injury or death, and that all other options have been exhausted, do not reasonably lend themselves to the circumstances, are not feasible, or have already proven to be ineffective. If feasible, officers shall provide a verbal warning to the subject of deadly force that they will use deadly force.”¹⁹

PFC#1 did not have time to provide a verbal warning nor was there another feasible option after R.S. got out of his car and immediately started firing his weapon at FCPD officers. PFC#1 reasonably believed that R.S. posed an immediate threat of serious injury or death to himself and his fellow officers when he used deadly force. Because that threat was immediate,

¹⁸ FCPD G.O. 540 II.

¹⁹ FCPD G.O. 540 VII. A.

no other force options were feasible. Therefore, PFC#1 use of deadly force met the policy standards required by the FCPD.

RECOMMENDATIONS

FCPD policy thoroughly addresses the use of both deadly and “less-lethal” force, aligns with constitutional standards, and provides FCPD officers extensive guidance on resolving incidents with the concept that the sanctity of life is always paramount.²⁰ PFC#1 reacted to an immediate threat of death or serious injury to himself and his fellow officers when he shot back after R.S. shot at them. He acted in accordance with federal and state law, as well as FCPD policy guidance and training. I have no recommendations to make based on this incident review.

²⁰ FCPD G.O. 540 II. states that “[i]t is the policy of the Department that all members hold the *highest regard for the sanctity of human life* and respect the dignity and liberties of all individuals.” (*emphasis added*).

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.III.10. as any physical strike or instrumental contact with an individual, or any significant physical contact that restricts a person's movement. Reportable uses of force do 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 reportable uses of force.

Less-Lethal Force – Defined in Fairfax County Police Department General Order 540.III.13. as any level of force not designed to cause death or serious injury.

Deadly Force – Defined in Fairfax County Police Department General Order 540.III.2. as any level of force that is likely or intended to cause death or serious injury.

Serious Injury – Defined in Fairfax County Police Department General Order 540.III.26. as any injury which creates a substantial risk of death, 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; Defined in Fairfax County Police Department General Order 540.III.5. 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. Considered less-lethal force. Often referred to as a Taser.

Empty-Hand Tactics – Described in Fairfax County Police Department General Order 540.VI.A. as including strikes, kicks, pressure points, and takedowns in an objectively reasonable manner to overcome resistance. Considered less-lethal force.

OC Spray – Oleoresin Capsicum; Defined in Fairfax County Police Department General Order 540.III.19. as a less-lethal force instrument that contains a projectile lachrymatory agent spray designed to irritate an individual’s eyes and temporarily take away their vision in order to effectuate lawful control. Often referred to as “pepper spray.”

PepperBall System – Defined in Fairfax County Police Department General Order 540.III.21. 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.III.25. as where an individual poses no immediate threat to an officer and exhibits no resistive movements 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.III.25. as where an individual’s verbal and/or physical actions are intended to prevent an officer from taking lawful action but not intended to harm the officer.

Aggressive Resistance – Defined in Fairfax County Police Department General Order 540.III.25. as where an individual displays the intent to cause injury, serious injury, or death to an officer, themselves, or another person and to prevent the officer from taking lawful action.