Public Report

Aug. 22, 2022: Use of Force Complaint
IPA-23-16

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Independent Police Auditor

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NOTE TO THE READER: The Fairfax County Police Department revised its policy addressing the use of force on April 29, 2024. The actions of the officers involved in this incident will be analyzed using the policy provisions that were in effect on August 22, 2022 (i.e., General Order 540, effective August 12, 2022).

INCIDENT

On August 22, 2022, Fairfax County Police Department (hereinafter "FCPD") officers assigned to its Street Crimes Unit (hereinafter "SCU") engaged in an operation in which an undercover officer (hereinafter identified as "UCO") planned to buy illegal narcotics from an individual (hereinafter identified by his initials "A.S."). A person known to and cooperating with (hereinafter identified as "C.W.") an SCU detective arranged for the deal between A.S. and UCO to occur at a hotel in the Alexandria section of Fairfax County.

When A.S. arrived at the hotel, he got into the backseat of a car occupied by C.W. and UCO. After a brief conversation in the parking lot, A.S. did not feel comfortable with the situation and suggested they go inside. C.W. and UCO objected to going inside, and after a few more minutes of conversation in the car, during which A.S. was asked if he had the drugs on his person and whether he would stay after the transaction, A.S. decided to get out of the car without completing any deal. By this point, SCU detectives in two vehicles quickly approached.

A.S. got out of the car, closed the door, and turned around. Almost immediately, he was tackled by SCU Detective #1 (hereinafter "DET#1) and handcuffed. The bag A.S. had at the time of his arrest was seized and searched, and A.S. was put back into a police vehicle and transported by Detective #2 (hereinafter "DET#2") and Detective #3 (hereinafter "DET#3") to the Mount Vernon District Police Station where he was interviewed and brought before a magistrate.

On August 15, 2023, A.S. submitted a complaint to both the Office of the Independent Police Auditor (hereinafter "OIPA") and the Police Civilian Review Panel (hereinafter "PCRP"), alleging numerous violations of his rights.[1] Among the allegations was that the

[1] The Fairfax County Police Civilian Review Panel's by-laws in Article VI. at A. 3. 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. For more information visit Department Homepage | Independent Police Auditor and Police Civilian Review Panel | Police Civilian Review Panel.

"tackle"/takedown of him at the time of his arrest constituted excessive force.[2] This report will address the investigation into A.S.'s use of force allegation and his related allegation that he was injured and denied medical treatment after the force itself.[3]

CRIMINAL INVESTIGATION/ PROSECUTIVE DECISION

The FCPD conducted only an administrative investigation into the use of force by DET#1.

A.S. was charged with possession of methamphetamine with the intent to distribute[4] and with possession of another illegal drug[5] following the incident under review. The criminal charges against him were ultimately dropped (formally known as "nolle prosequi") by the Fairfax County Commonwealth's Attorney (hereinafter "CWA").

INTERNAL ADMINISTRATIVE INVESTIGATION

The internal administrative investigation into A.S.'s allegations was conducted by the FCPD Internal Affairs Bureau. Following its internal/administrative investigation into this incident, the FCPD determined that DET#1's use of force during the arrest of A.S. was objectively reasonable and, therefore, complied with departmental policy. Specifically, the FCPD concluded that DET#1's takedown complied with FCPD General Order (hereinafter "G.O.") 540, specifically G.O. 540 IV. A.[6] The investigation also determined that medical treatment was offered to A.S., but that he declined treatment at that time.[7] I agree with the FCPD's conclusions and that they were based on an investigation that was complete, thorough, objective, impartial, and accurate.

[2] The complaint states: "I am tackled by a police officer who is running at me full sprint. I posed no threat. I was not fleeing the scene. He did not announce himself as a cop before tackling me."
[3] The OIPA automatically conducts a review of FCPD investigations into use of force allegations following a complaint. The other non-use of force allegations in his complaint falls under the authority of the PCRP. However, A.S. has not requested a review by the PCRP to date.
[4] Va. Code § 18.2-248.
[5] Va. Code § 18.2-250.
[6] G.O. 540 IV. A., effective August 12, 2022.
[7] A.S. did go to a hospital to be evaluated on August 26, 2022, at which time he was diagnosed with a bruised rib.

All eleven officers involved in the undercover operation were interviewed as part of the administrative investigation, and A.S. was interviewed after he lodged his complaint. Investigators were unable to locate C.W. to interview him, and there was neither in-car video nor body-worn camera footage because of the undercover nature of the pre-planned event.

CONCLUSIONS

In its landmark Graham v. Connor opinion,[8] the United States Supreme Court analyzed the use of 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 Constitution[10] 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.

Similar to the pronouncements in Graham v. Connor,[11] FCPD G.O. 540 II. on USE OF FORCE states, in part: "The use of all force options . . . 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." And, FCPD G.O. 540 III. 18. defines "Objectively Reasonable" force as "[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."

The situation under review was certainly fluid and uncertain. Although the drug transaction was never fully consummated, UCO determined that there was sufficient probable

[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 secure 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.
[11] *Supra*, note 8.

cause to arrest A.S. When A.S. got out of the car, DET#1 immediately tackled him. While this may seem overly aggressive, it is a tactic commonly used by SCU officers following undercover drug sales (often referred to as "buy-busts"). The supervisor for this operation (hereinafter "LT#1") was interviewed on October 4, 2023, as part of the administrative investigation into A.S.'s complaint. LT#1 explained that SCU officers typically arrest people following controlled drug purchases by using either a "step out and challenge" approach or by using an "open-air takedown." LT#1 considered the "open-air takedown" to be appropriate in this incident because DET#1 was very close to the car when A.S. got out of it, and because of the possibility that A.S. was armed with a weapon[12] with both UCO and C.W. sitting in the car next to A.S. Finally, LT#1 advised that when Fairfax County CWA Steve Descano first assumed his role, the "open-air takedown" technique was demonstrated to him, and Descano opined that it was legal and appropriate for arrests such as the one under review in this incident. I agree with the FCPD's conclusion that the force used in this incident was objectively reasonable.

A.S. also alleged that he was denied medical treatment following his arrest. While most of the officers involved in this incident did not know whether A.S. sought or received medical treatment, DET#2 and DET#3 both recalled A.S. complaining of pain, but rejecting treatment when asked specifically whether he wanted to be evaluated. DET#3 remembered A.S. stating that he just wanted to go home while they were together at the Mount Vernon District Station. And it is worth noting that A.S. went to a hospital on his own to be checked, but that was four days after the incident and A.S. being released from FCPD custody. I agree with the conclusion—based on a preponderance of the evidence[13]—that the officers complied with departmental policy by offering medical treatment to A.S.,[14] despite him declining any treatment at that time.

[12] See, e.g., U.S. v. Sakyi 160 F.3d 164 (4th Cir. 1998), Logan v. Commonwealth, 512 S.E.2d 160 (Va. Ct. App. 1999), and Harmon v. Commonwealth, 425 S.E. 2d 77 (Va. Ct. App. 1992), which each recognized that sellers of drugs are often (but not always) armed with weapons when conducting transactions.

[13] FCPD G.O. 301 XIII. A., effective May 4, 2022.

[14] FCPD G.O. 540 IV. B. requires that "[a]ccess to medical treatment shall be provided as quickly as reasonably possible to any individual who complains of injury, . . . ; *however, officers may not compel any person, whether in custody or not, to receive medical treatment except in known life-threatening circumstances.*" (*emphasis* added).

RECOMMENDATIONS

I previously recommended that the FCPD equip at least some officers and unmarked police vehicles with recording equipment for use in undercover operations such as the one under review. That recommendation was included in an incident report published in November 2024.[15] The FCPD has now fully outfitted its SCU[16] members with body-worn cameras and equipped some of that unit's vehicles with recording equipment with plans to outfit additional vehicles with recording equipment as they are purchased.

Separately, FCPD policies thoroughly address the use of "less-lethal" force, and the department provides training to its officers to ensure that they conform to those policies. In this incident, DET#1 reacted appropriately to a rapidly evolving situation and used objectively reasonable force in accordance with his training. Accordingly, I have no new recommendations to make based on my review of this incident.

[15] See OIPA Incident Report IPA-22-10.pdf.
[16] Recently re-named the Violent Crime Suppression Unit.

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 secure 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.