

# Public Report

July 28, 2018: Use of Force Complaint



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## INCIDENT

On July 28, 2018, two Fairfax County Police Department (hereinafter “FCPD) officers from the West Springfield District Station were on patrol in the Hillside Road area of Fairfax County, and were aware of recent complaints of reported drug sales and use in the area. Shortly before midnight Police Officer First Class #1 (hereinafter “PFC#1”) noticed two men sitting in a parked car. PFC #1 and Police Officer First Class #2 (hereinafter “PFC#2”) approached the car and began a conversation with the two men. PFC#1 identified the driver as an individual with the initials H.S. (hereinafter “HS”). PFC#1 observed that HS appeared visibly nervous, and that there was an open beer bottle at his feet. PFC#1 also smelled burnt marijuana coming from the vehicle. Based on these circumstances, PFC#1 requested that HS exit the car. He complied, and PFC#1 conducted a “frisk” for weapons.<sup>1</sup> PFC#1 then instructed HS and his passenger to sit on the curb so that the vehicle could be searched.<sup>2</sup>

During the search the officers found and seized marijuana from the front seats, a smoking device containing THC hash oil from the center console, and a small jar of marijuana from a purse found on the back seat. PFC#1 then conducted a thorough search of HS and found a razor blade in the right front pocket of HS’s pants. He noticed that HS became more visibly nervous and was shaking. PFC#1 then tried to handcuff HS while stating, “put your hands behind your back.” HS pulled his hand away and began to rotate to his right. PFC#2 and a third police officer first class (hereinafter “PFC#3), who had arrived after PFC#1 and PFC#2, tried to help control HS. However, HS was now yelling at and struggling with the officers. The struggle took the officers and HS into the street and potentially into the path of oncoming traffic. The three officers were able to get HS and themselves out of the street and used their body weight to take HS down onto a nearby median. PFC#1 gave numerous verbal commands during the arrest, which was completed after nearly three minutes of struggling with HS. No strikes, kicks, or instruments were utilized during the struggle. Fairfax County Fire and Rescue personnel were

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<sup>1</sup> In Terry v. Ohio, 392 U.S. 1, at p. 30 (1968), the United States Supreme Court held that “where a police officer observes unusual conduct which leads him reasonably to conclude in light of his experience . . . that the person with whom he is dealing may be armed and presently dangerous, . . . he is entitled for the protection of himself and others in the area to conduct a carefully limited search of the outer clothing of such persons in an attempt to discover weapons which might be used to assault him.”

<sup>2</sup> In Carroll v. United States, 267 U.S. 132 (1925), the United States Supreme Court first recognized a law enforcement officer’s legal authority to search a motor vehicle without a search warrant if the officer has probable cause to believe the vehicle contains evidence of a crime or contraband.

summoned and examined HS at the scene. He declined medical treatment after speaking with the rescue personnel, indicating that he was not injured.

During a second search of the now handcuffed HS, a small bag of suspected cocaine was discovered. HS was then transported to the Fairfax County Adult Detention Center (hereinafter “ADC”), where warrants charging him with Possession of Controlled Substances,<sup>3</sup> Possession of Marijuana,<sup>4</sup> Obstruction of Justice,<sup>5</sup> and Drunk in Public<sup>6</sup> were obtained. After being released from the ADC on July 29, 2018, HS went to INOVA Fairfax Hospital for examination because he was experiencing pain and thought he had been injured during his arrest.

## **CRIMINAL INVESTIGATION/ PROSECUTIVE DECISION**

The FCPD conducted only an administrative investigation into FCPD officers’ actions during this incident. No referral was made to the Office of the Commonwealth’s Attorney. HS was charged with multiple violations.<sup>7</sup>

## **INTERNAL ADMINISTRATIVE INVESTIGATION**

The internal administrative investigation of this incident included the review of in-car camera footage, which captured the audio of the arrest but did not capture video of it because it occurred out of view of the camera; the review of several Incident Reports completed by officers after the arrest; interviews of the officers involved in the arrest; two separate interviews of HS; and a review of medical records detailing the examination of HS at INOVA Hospital on July 29, 2018. The passenger in the car with HS on the night of the incident did not agree to be interviewed.

Based on my review of this investigation, which was prompted by a complaint made by HS to the FCPD, my opinion is that it was complete, thorough, objective, impartial, and accurate.

The FCPD concluded that the officers’ use of force to arrest HS complied with departmental policy, specifically FCPD General Order (hereinafter “G.O.”) 540, *et seq.* The

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<sup>3</sup> Code of Virginia § 18.2-250 A. (a).

<sup>4</sup> Code of Virginia § 18.2-250.1.

<sup>5</sup> Code of Virginia § 18.2-460 B.

<sup>6</sup> Fairfax County Code § 5-1-1.

<sup>7</sup> *Supra*, notes 3-6.

FCPD finding was that the officers complied with G.O. 540 when arresting HS because they used an objectively reasonable amount of force to effect a lawful arrest.

## **CONCLUSIONS**

FCPD G.O. 540.0 on USE OF FORCE states, in relevant 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” 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 the force used on HS was permitted by departmental policy. Initially, HS was being detained during an investigative detention based upon reasonable suspicion that he was engaged in criminal activity.<sup>8</sup> During such investigative detentions, a reasonable amount of force, to include handcuffing, is permitted by both legal precedent<sup>9</sup> and by FCPD policy.<sup>10</sup> When HS resisted the officer's efforts to handcuff him, force was used to get him out of the street and to a safe area where he was taken down by the officers and arrested based on probable cause. No strikes or instruments were used to accomplish the handcuffing and arrest.

When PFC#1 first attempted to place handcuffs on HS, HS pulled his arm away. He then prevented three officers from controlling him for almost three minutes. FCPD policy identifies

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<sup>8</sup> In its Terry opinion, *supra*, note 1, at p 30, the Supreme Court first recognized a police officer's right to detain an individual, without probable cause, when that officer “observes unusual conduct which leads him reasonably to conclude in light of his experience that criminal activity may be afoot.”

<sup>9</sup> Muehler v. Mena, 544 U.S. 93 (2005).

<sup>10</sup> FCPD G.O. 603.4 V. E. 5.

this level of resistance as “active resistance.”<sup>11</sup> FCPD policy also authorizes the use of “less-lethal”<sup>12</sup> force “to gain compliance by individuals offering resistance,”<sup>13</sup> and specifically allows for the use of “empty-hand tactics, such as strikes, kicks, or takedowns”<sup>14</sup> to effect an arrest.<sup>15</sup>

The aforementioned 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 landmark Graham v. Connor decision,<sup>16</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>17</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>18</sup> To be lawful under that Fourth Amendment standard, an officer’s use of force must be objectively reasonable. Therefore, the officers’ use of force in this incident met not only departmental standards, but the legal standard governing the use of force as well.

## **RECOMMENDATIONS**

FCPD policy thoroughly addresses the possibility of its officers using force, and provides its officers with extensive guidance on the types of force that will typically be considered objectively reasonable in different situations. The specific FCPD policy provisions align closely with the constitutional standards on the use of force. After this incident, the FCPD analyzed the actions of PFC#1, PFC#2, and PFC#3 by examining their actions against the policies in place, and I agree with the conclusions reached. Therefore, I have no recommendations to make in relation to the officers’ use of force based on this incident review.

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<sup>11</sup> See Glossary for definition.

<sup>12</sup> See Glossary for definition.

<sup>13</sup> FCPD G.O. 540.4 II. A. 2.

<sup>14</sup> FCPD G.O. 540.6 I. D. 1.

<sup>15</sup> FCPD G.O. 540.6 I. A. 1.

<sup>16</sup> 490 U.S. 386 (1989).

<sup>17</sup> *Id.* at 396.

<sup>18</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.

## **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

**Force** – defined in Fairfax County Police Department General Order 540.1 I. G. as any physical strike or instrumental contact with an individual, or any significant physical contact that restricts an individual's movement. Force does 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 a reportable action.

**Less-Lethal Force** – defined in Fairfax County Police Department General Order 540.1 I. I. as any level of force not designed to cause death or serious injuries.

**Deadly Force** – defined in Fairfax County Police Department General Order 540.1 I. B. as any level of force that is likely to cause death or serious injury.

**Serious Injury** – defined in Fairfax County Police Department General Order 540.1 I. Q. as an injury which creates a substantial risk of death, disfigurement, 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; considered less-lethal force. Defined in defined in Fairfax County Police Department General Order 540.1 I. C. 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. Often referred to as a Taser.



**Empty-Hand Tactics** – considered less-lethal force. Described in Fairfax County Police Department General Order 540.4 II. A. 2. as including strikes, kicks, and takedowns.

**OC** – Oleoresin Capsicum; considered less-lethal force; often referred to as “pepper spray.”

**Passive Resistance** – defined in Fairfax County Police Department General Order 540.4 I. A. 1. as where an individual poses no immediate threat to an officer 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 540.4 I. A. 2. as where 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.

**Aggressive Resistance** – defined in Fairfax County Police Department General Order 540.4 I. A. 3. as where 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.

