

Public Report

March 5, 2019: Use of Force - OC Spray



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INCIDENT

The in-car video (hereinafter “ICV”) camera in the arresting officer’s patrol cruiser, along with cell phone video recorded by the community member involved, captured the entirety of this incident. The in-car camera was synchronized with the officer’s police radio worn on his uniform, and therefore most of the verbal exchange that occurred during the incident was also captured. In keeping with Supreme Court precedent which states that uses of force must be judged based on what the officer(s) knew (or reasonably believed) at the time force was used, and not with the benefit of 20/20 hindsight,¹ I describe the incident based on an interview with the officer, as well as an interview conducted with the individual who was the subject of force during the incident. I also reviewed the ICV and cellphone footage and will refer to it where appropriate.

Summary of Undisputed Facts

On March 5, 2019, Fairfax County Police Department (hereinafter “FCPD”) Police Officer First Class #1 (hereinafter “PFC#1”), assigned to the Mason District Police Station, conducted a traffic stop at approximately 8:00 p.m. near 4021 Gallows Road in Annandale. PFC #1 informed the driver, later identified by name and having the initials A.O. (hereinafter “AO”) that she was pulled over for disregarding a red traffic signal before making a right turn² at the intersection of Columbia Pike and Gallows Road. PFC#1 requested AO’s driver’s license and vehicle’s registration several times, but she did not provide either. When she did not produce the requested documents, PFC#1 determined that he had probable cause to arrest³ AO and instructed her to get out of the car. When she disregarded that instruction, PFC#1 tried to pull her out of the car through the driver’s door. To avoid being pulled out, AO moved her body toward the passenger side of the vehicle. Eventually, PFC #1 used oleoresin capsicum spray (hereinafter

¹ Graham v. Connor, 490 U.S. 386 (1989).

² Va. Code § 46.2-835, Right Turn on Steady Red Light After Stopping.

³ Va. Code § 46.2-104, Possession of Registration Cards; Exhibiting Registration Card and Licenses; Failure to Carry License or Registration Card, states in part that:

The owner or operator of any motor vehicle shall stop on the signal of any law-enforcement officer who is in uniform or shows his badge or other sign of authority and shall, on the officer's request, exhibit his registration card, driver's license, learner's permit, or temporary driver's permit and write his name in the presence of the officer, if so required, for the purpose of establishing his identity.

“OC spray”⁴) to gain AO’s compliance. After using the OC spray, PFC#1 extracted AO from the car and placed her under arrest. AO was searched incident to her arrest by a female second lieutenant (hereinafter “2LT#1”), who had responded to the location. Warrants were obtained charging AO with violating Virginia Code § 18.2-460, Obstructing Justice, and § 46.2-835, Right Turn on Steady Red Light After Stopping.

On March 14, 2019, investigators from the FCPD’s Internal Affairs Bureau (hereinafter “IAB”) interviewed AO in the presence of her attorney. All direct quotes in the following account of the incident were made during that interview. Prior to the interview, AO requested and was allowed to view the ICV footage of the incident. After viewing the ICV footage and before any questioning, AO commented that she did not believe the video accurately depicted what happened in the car while PFC#1 attempted to arrest her.

The following is how AO described the encounter:

AO initially thought that PFC#1 was pulling over another driver, but quickly realized he was pulling her over. Realizing she would be late for an appointment because of the traffic stop, AO immediately texted an acquaintance to inform them she would be late. AO could not recall specifically what PFC#1 said to her when he first approached her car but did recall that he accused her of texting while driving. She also remembered PFC#1 as being accusatory and asking her to acknowledge that she committed a traffic infraction. AO did not admit any wrongdoing and felt like PFC#1 had been at the intersection waiting to pull someone over. When PFC#1 asked AO to provide her driver’s license, she asked PFC#1 “what [her] options were,” but she felt that he was very dismissive of her question. She wanted PFC#1 to tell her whether she would be getting a ticket and, if so, what that process would entail. Specifically, AO wanted the officer to explain that she was merely being accused, and that she would eventually have the option of going to court. PFC#1 continued to request her license. She felt that his presence at her door was “aggressive,” and when he ordered her out of her car, she felt that she had no room to get out because of him being at the door. PFC#1 then quickly tried to grab her while continuing to tell her to get out of the car. At this point, she offered to produce her license. However, AO saw that PFC#1 now had OC spray in his hand, and she “freaked out”

⁴ See GLOSSARY.

and “started to back away” while still seated in the car. She turned her face, expecting that PFC#1 was going to use the OC spray on her. Although admitting that she may have “jumped too quickly” and was “panicked,” AO felt the entire ordeal was not necessary and constituted unwanted escalation. She explained that she ultimately offered to produce her license, but PFC#1 grabbed her and used the OC spray on her; and, she reiterated that she felt there was no opportunity for her to get out of the car before this occurred.

AO recalled telling PFC#1, "Sir, I'm going to have to record this." Because she was shaking, she had difficulty entering the password into her cell phone so she could use it to record the encounter. She admitted being disoriented at this point and was unable to recall how she got out of the car. However, after viewing the ICV footage, she felt that the officer “dragged” her out. After being pulled out of the car, PFC#1 took her cell phone and placed it inside of the vehicle with her jacket. Realizing that she was now under arrest, AO could not comprehend how the situation had escalated from her simply asking questions about what options she had to being under arrest. At this point, AO said she “freaked out” and “started screaming.” AO recalled that, because she no longer had her cell phone, she screamed so that someone else could see or record the “police brutality” that was occurring.

AO recalled hitting her head at some point during the incident but was unsure when that had occurred. She speculated that it may have been when PFC#1 "dragged" her or when he handcuffed her. She stated that she had "bruising on her head and a concussion," which made it difficult to process things after the incident.

AO recounted being searched by 2LT#1 following her arrest. AO described the search as more intrusive than any airport search to which she has been subjected. It was her opinion that she was “straight-up sexually violated” during the search. AO was so upset by the search that, after the ordeal, she researched FCPD policy on searches and concluded that the search of her was not “normal” and was overly “aggressive.” She further described the search conducted by 2LT#1 as her “pushing against me,” and "making me sufficiently uncomfortable, for no purpose.” She described the search as “incredibly humiliating” and she stated that she had been “treated like an animal.” Following the search, PFC#1 told AO that she would be “decontaminated” because of his earlier use of OC spray on her. She was then placed in PFC#1’s patrol cruiser for transport to the Fairfax County Adult Detention Center (hereinafter “ADC”).

AO remembers sobbing in the back of the police car and feeling that the entire incident was due to PFC#1's unwarranted escalation. When they arrived at the ADC, AO felt like the mistreatment of her continued. First, she had to accompany PFC#1 to an available magistrate at the ADC so warrants could be obtained.⁵ Then, her religious hijab was removed, which she felt was degrading and done to further humiliate her. By the time she had been through the entire admission process at the ADC, AO felt as though all of her "human dignity had been taken."

The following is how PFC#1 described the encounter:

After observing the driver of a vehicle, later identified as AO, disregard a red traffic signal and turn onto Gallows Road, PFC#1 conducted a traffic stop of the driver. Before approaching the car, he made a computer inquiry of the license plate to determine the registered owner of the vehicle. When he approached the car and the driver, he noticed a cell phone in AO's hand and noted that two texts had recently been sent. He asked whether AO had been texting while driving. PFC#1 explained the reason for the stop and requested her driver's license. She stated that the traffic offense "didn't happen," and did not produce her license. PFC#1 asked AO to step out of her car, while giving her the choice of identifying herself or being arrested. When he again gave her these options, AO replied that "it's not fair," and that she would "report this." PFC#1 then displayed his handcuffs to AO, indicating his intention to arrest her. He also verbally told her that she would be arrested if she did not produce the requested license or identification.

Following these unheeded requests, PFC#1 asked AO several times to get out of the car, but she did not get out. Recognizing that he now had the legal authority to arrest her not only for failing to provide her license but also for obstruction of justice, PFC#1 decided to pull AO out of her vehicle. His rationale for arresting her, based on his experience as a police officer, was that it is common for people who are hesitant to identify themselves to either have outstanding arrest warrants or to not have a valid driver's license. When PFC#1 first attempted to pull AO from the car, she moved away from him in the front seat, but did finally offer to produce her license. However, PFC#1 decided to follow through on his arrest of AO. He felt that her offer to now

⁵ Obtaining warrants from a magistrate at the ADC is required whenever a warrantless arrest is made. After securing the warrants from the magistrate, Fairfax County Sheriff's Office deputies assumed custody of AO. Her criticism of what transpired after that transfer was brought to the attention of the Fairfax County Sheriff's Office.

produce her license was irrelevant to his determination of probable cause; and, he indicated that he had never been trained to negotiate with a resisting individual about the decision to arrest or not.

Although PFC#1 was able to obtain control of AO's left arm while she was seated inside her car, she still tried to pull away from him. Her resistance level had therefore risen from passive to active.⁶ Because his use of "empty-hand tactics"⁷ proved unsuccessful in removing her from the car, and because he was becoming concerned about continuing the struggle with oncoming traffic near them, PFC#1 chose to deploy his OC spray in an approximate two-second burst. Another factor he considered before using OC spray, rather than continuing to physically struggle with AO using empty-hand tactics, was that he feared injuring AO due to the significant size discrepancy between them. He stated that he did not use the OC spray to humiliate or hurt AO; rather, he simply wanted to arrest her as quickly and efficiently as possible to minimize the likelihood that one or both of them would be injured.⁸

After using the OC spray, PFC#1 was able to pull AO out of the car. When pulling her out, PFC#1 saw AO hit her head on the top of the vehicle. Although AO was now out of the car, PFC#1 perceived that she was still trying to free herself from his grasp, and feared that if she did break free she would end up in oncoming traffic. He was able to secure handcuffs on her without using additional force. AO did not complain about being injured to PFC#1, and she advised that she did not want to go to a hospital because she did not want to pay for an ambulance. PFC#1 transported AO to the ADC and relinquished custody of her to Fairfax County Sheriff's Office deputies. He recalled that she became upset with deputies when told that she would have to remove her religious hijab for her booking photograph. He noted that the deputies tried to accommodate her privacy concerns by holding up blankets to conceal her during the process. Additionally, a female deputy fingerprinted AO. PFC#1 also heard AO question the need for her to sign the fingerprint card.⁹

⁶ See GLOSSARY.

⁷ See GLOSSARY.

⁸ This rationale is consistent with FCPD General Order 540.14 I. C. which provides that "[o]fficers may use OC [spray] to resolve potentially violent situations thereby reducing the likelihood of injury to oneself or to other individuals."

⁹ *Supra*, note 5. AO's complaints about her treatment at the ADC following her appearance before the magistrate were brought to the attention of the Fairfax County Sheriff's Office.

PFC#1 admitted that, with the benefit of hindsight, he would have awaited the arrival of a backup officer before arresting AO so that the second officer could have diverted oncoming traffic with the placement of their patrol cruiser. Although he had requested for a second officer to respond to his location, PFC#1 explained that he did not wait for them to arrive before initiating the arrest because he believed he would be able to quickly get AO controlled and arrested.

Review of ICV footage:

A review of the audio and video footage captured by PFC#1's ICV revealed that PFC#1 approached AO's vehicle, identified himself, and asked her if she knew why she had been stopped. When she responded that she did not, PFC#1 told her that she had not come to a stop before making a right-hand turn on a red light. Between 8:04:33 p.m. and 8:06:27 p.m. (a span of 1 minute and 54 seconds), as reflected on the ICV footage, PFC#1 requested AO's license and registration six times; and, asked her to exit the car thirteen times. She did not comply with these requests and stated that she had to get to a meeting. PFC#1 then opened the car door and stated that he would remove her from the car if she did not comply. AO replied that "there [was] no need to escalate this." At that point, PFC#1 reached into the car to get her out of it. AO then told PFC#1 that she would give him her license. Between 8:06:29 p.m. and 8:07:48 p.m. (a span of 1 minute and 19 seconds), PFC#1 instructed AO to get out of the vehicle fourteen times as he held her arm and tried to get her out of it. During this time, AO stated fifteen times that she would produce her license. At 8:07:47 p.m., PFC#1 deployed his OC spray. He got her out of the car at 8:08:09 p.m. She was handcuffed at 8:08:54 p.m., and PFC#1 requested that paramedics be directed to his location.

Other officers (to include 2LT#1) began to arrive at the location at 8:09:50 p.m., to whom AO stated, "This is straight-up police brutality." PFC#1 advised her that she was under arrest, and that 2LT#1 would search her. During the search, AO can be heard yelling for 2LT#1 to stop because it was a "sensitive area." 2LT#1 replied that AO would not "get a pass because [she is] a woman."

After the search, AO was treated by responding paramedics. An inventory of the car was conducted, and transport of AO to the ADC began at 8:32:10 p.m. They arrived at the ADC at 8:51:28 p.m.

CRIMINAL INVESTIGATION/ PROSECUTIVE DECISION

The FCPD conducted only an administrative investigation into PFC#1's use of force (as well as of 2LT#1's search of AO) during the arrest of AO. No referral was made to the Office of the Commonwealth's Attorney.

AO was charged with violating § 18.2-460 (Obstructing Justice) and § 46.2-835 (Right Turn on Steady Red Light After Stopping) of the Code of Virginia.

INTERNAL ADMINISTRATIVE INVESTIGATION

The IAB investigation into this incident included the review of PFC#1's incident report and the citation issued to AO; the review of ICV and audio recording from the incident; the review of computer-aided dispatch records from the Department of Public Safety Communications; interviews of all FCPD officers involved in or who responded to the incident, as well as an officer assigned to the Fairfax County Criminal Justice Training Academy; the review of PFC#1's training history; an interview of AO; a review of video and audio footage of the incident captured by AO on her cell phone; a canvass of neighbors living in the vicinity of the incident in an effort to identify potential witness information or locate other camera footage; and, interviews of Fairfax County Sheriff's Office personnel assigned to the ADC and to its internal affairs unit.

Following its investigation, the FCPD concluded that PFC#1 violated its policy on de-escalation prior to his use of force. However, the FCPD determined that the actual use of force complied with departmental policy. I agree with the FCPD's conclusions; and based on my review of the investigation, my opinion is that it was complete, thorough, objective, impartial, and accurate.

CONCLUSIONS

In its entirety, FCPD General Order (hereinafter "G.O.") 540.2 on de-escalation reads:

I. **DE-ESCALATION**

- A. De-escalation is the result of a combination of communication, tact, empathy, instinct, and sound officer safety tactics. The ultimate goal is to help achieve a positive outcome by reducing the need for force.
- B. When possible, officers should seek to utilize de-escalation strategies to prevent situations from deteriorating to the point where they would need to use force. Officers should attempt to gain voluntary compliance and reduce the level of force required in a situation through verbal communication efforts. When force is applied, officers will adjust the amount of force used to overcome an individual's resistance and to gain control.

The FCPD internal investigation concluded that PFC#1 violated this policy by not attempting any de-escalation techniques before using force to effect AO's arrest. Specifically, the FCPD investigation found that when AO initially questioned the validity of the stop and asked about her options, PFC#1 should have employed empathy and tact by explaining his actions more fully rather than simply repeating his requests. Furthermore, when AO finally agreed to produce her license, two-and-a-half minutes into the traffic stop, PFC#1 should have engaged in de-escalation by simply allowing her to comply at that point.

While proper de-escalation tactics may have eliminated the need for the force used during this incident, the analysis into whether that force was permissible remains unchanged. In the recent County of Los Angeles v. Mendez decision,¹⁰ the United States Supreme Court pronounced that there is no basis for a so-called "provocation rule," which would turn an otherwise permissible use of force into an impermissible one if it were preceded by a separate Fourth Amendment violation committed by officers. Justice Samuel Alito, writing for the Court in Mendez, recognized that "[a]n excessive force claim is a claim that a law enforcement officer carried out an unreasonable seizure through a use of force that was not justified under the relevant circumstances. It is not a claim that an officer used reasonable force after committing a distinct Fourth Amendment violation such as an unreasonable entry."¹¹ While a violation of a department's de-escalation policy may not rise to the level of a Fourth Amendment violation, the principle remains the same. In fact, several years before the Mendez decision, the Fourth Circuit Court of Appeals recognized that an alleged violation of standard police procedure preceding a use of force was "not probative of the reasonableness" of the force used.¹² Therefore,

¹⁰ 137 S. Ct. 1539 (2017).

¹¹ *Id.* at 1547.

¹² Greenidge v. Ruffin, 927 F.2d 789, 792 (4th Cir. 1991).

determining whether the force used during this incident was reasonable or unreasonable is a separate inquiry from whether proper de-escalation tactics were attempted.

The failure to de-escalate in this incident preceded PFC#1's use of empty-hand tactics and OC spray to accomplish AO's arrest. These force tactics are governed by FCPD G.O. 540.13 and G.O. 540.14, respectively. G.O. 540.13 I. B. 1. specifically states that among the situations where empty-hand tactics "may be effective include, but are not limited to, [w]hen it is objectively reasonable to overcome a passive resisting person to effect a lawful arrest." Similarly, G.O. 540.14 I. C. 1. provides that among the situations where the use of OC spray "may be effective would include, but are not limited to, [w]hen it is objectively reasonable to accomplish or overcome resistance to a lawful arrest." Whether PFC#1's use of force comported with departmental policy, therefore, depends on whether the force used was objectively reasonable.

The objective reasonableness standard is referenced not only in G.O. 540.13 and G.O. 540.14, but it is prevalent throughout the various provisions of FCPD's general orders on the use of force (G.O. 540, *et seq.*). In fact, the entirety of G.O. 540.5 is dedicated to the determination of whether force used was objectively reasonable. Specifically, it reads:

I. OBJECTIVE REASONABLENESS

In determining whether force is objectively reasonable, an officer must give careful attention to the totality of circumstances in each particular case including:

1. Whether the individual poses an immediate safety threat to the officer or others
2. The severity of the crime
3. Whether the individual is actively resisting or attempting to evade arrest
4. Weapon(s) involved
5. Presence of other officers or individuals
6. Training, age, size and strength of the officer
7. Training, age, size and perceived strength of the individual
8. Environmental conditions.

While there were no weapons involved and the severity of the crime at issue in this incident would not typically warrant any force being used, AO was actively resisting and attempting to evade arrest when force was used on her. PFC#1 was alone, and vulnerable to passing traffic. Because he did not wait for a backup officer to arrive before initiating the arrest of AO, the environmental conditions (nighttime with passing traffic in close proximity) concerned PFC#1 enough that he felt he needed to quickly complete the arrest and get himself and AO out of danger. Even PFC#1 admitted that, with the benefit of hindsight, he would have waited for a backup officer before arresting AO so that the second officer could have diverted oncoming traffic with the placement of their patrol cruiser. As previously noted, however, a police officer's actions are not to be judged using the 20/20 vision of hindsight.¹³

In addition to dictating that officers not be judged using hindsight, the Supreme Court has mandated that they must be judged taking “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.”¹⁴ While traffic stops are often referred to as being “routine,” experts point out that every traffic stop includes the potential for danger. For example, representatives of two national law enforcement entities recently acknowledged that “[t]raffic stops remain among the most dangerous interactions that officers face, and that what makes them ‘inherently dangerous is the unknown.’ Unlike responding to a call where a dispatcher might provide information to officers before responding, traffic stops are a type of ‘officer-initiated activity’ that lacks the benefit of a dispatcher’s knowledge.”¹⁵ Although some of the tension and uncertainty surrounding this incident were caused by PFC#1’s failure to use de-escalation tactics earlier, that does not change the calculus of whether the actual force used was reasonable. Considering the totality of the circumstances with which he was dealing at the time he used force, PFC#1’s use of force on AO was objectively reasonable.

¹³ *Supra*, note 1.

¹⁴ *Id.* This same language is included in FCPD G.O. 540.1 I. L.

¹⁵ Guarino, Ben, “Texas Gunman Lost His Job on Day of Rampage,” *The Washington Post*, September 3, 2019, p. A14. The quotes were attributed to Robyn Small, public relations director for the National Law Enforcement Officers Memorial Fund, and Thor Eells, director of the National Tactical Officers Association.

My review of this investigation was initiated by a request from FCPD Chief Edwin C. Roessler Jr. and focused on the issue of force used during the incident. The FCPD's investigation also included the search conducted of AO following her arrest. The Fairfax County Police Civilian Review Panel could potentially review that aspect of the investigation into the incident.¹⁶

RECOMMENDATIONS

The FCPD provides recurrent training on the principles of de-escalation to complement the written G.O. mandating the use of de-escalation techniques. The departmental policy on de-escalation goes beyond the current legal requirements governing a law enforcement officer's use of force. Additionally, a review of PFC#1's training showed that in 2016, PFC#1 successfully completed in-service training specific to dealing with an individual who refuses to sign a summons during a traffic stop. He also successfully completed Crisis Intervention Training in 2016. Despite the written policy and the associated training on it, a violation of G.O. 540.2 occurred during this encounter. However, an isolated violation of policy does not invalidate the policy or the training. Accordingly, I have no recommendations to make based on my review of the investigation into this one incident without further indication that FCPD officers are violating the departmental policy on de-escalation.

¹⁶ 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. 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/>.

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

PepperBall System – defined in Fairfax County Police Department General Order 540.1 I. N. 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 540.4 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.

