

Public Report

Nov. 23, 2020: Use of Force Complaint
IPA-21-02



Richard G. Schott
Fairfax County
Independent Police Auditor

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Office of the Independent Police Auditor
12000 Government Center Parkway, Suite 233A
Fairfax, VA 22035

www.fairfaxcounty.gov/policeauditor

Contact Us: IPAPoliceAuditor@fairfaxcounty.gov

To request this information in an alternate format, call 703-324-3459, TTY 711.

INCIDENT

On November 23, 2020, at approximately 7:55 p.m., Fairfax County Police Department (hereinafter “FCPD”) officers from the Reston District police station responded to a suspicious person call. The caller reported that a person was lying outside of an apartment complex on Stone Wheel Drive in Reston. Because the caller stated that the person was possibly unconscious, Fairfax County Fire and Rescue Department (hereinafter “FCFRD”) personnel were also dispatched to the location. FCFRD personnel arrived first and were engaged in conversation with the individual—later identified as having the initials D.M. (hereinafter “DM”) when Police Officer First Class #1 (hereinafter “PFC#1”) and Police Officer First Class #2 (hereinafter “PFC#2”) arrived.

Initially, the FCPD officers merely stood by while the medical professionals from FCFRD tried to determine DM’s identity and the reason for his being passed out outside of the building. DM did not provide them with any information, and he appeared to be under the influence of drugs and/or alcohol or in a mental crisis. After several minutes, PFC#1 tried to engage DM in conversation and learn his identity. DM was non-responsive to PFC#1’s attempts as well. PFC#1 repeatedly explained to DM that the paramedics on the scene merely wanted to evaluate him so that they could provide whatever medical treatment was warranted. They offered to evaluate DM in the ambulance on the scene (partly to get out of the cold air), but DM refused. A review of PFC#1’s body-worn camera (hereinafter “BWC”) footage revealed that PFC#1 made the following statements to DM: “We just want to make sure you are not undergoing a medical emergency right now. Because if that’s the case, then these fellas just want to check you out. And if you’re good to go, you know, we want to try to make sure you have a warm place tonight because it’s very cold. And your behavior is a little strange to us, so either you’re having a medical emergency, or you took something. In either case, I think it would be beneficial if you at least let these guys check you out.” Getting no reaction from DM, PFC#1 asked DM several times if there was anyone (family member or friend) they could call to come help DM and get him to a warm place for the night. DM provided no information.

When the paramedics closest to DM became concerned that DM was assuming an aggressive posture, they walked away and PFC#1 took over as the primary person engaging with DM. PFC#1 continued trying to get information from DM, but he continued to be unresponsive.

PFC#1 requested additional officers respond to the location. In addition to three other officers, a sergeant (hereinafter SGT#1”) from the Reston District station soon arrived.

A captain from the FCFRD approached the scene and requested to speak with DM. DM did, for the first time, respond to some of her questions. However, he soon accused the captain of harassing him and of having backed him into the corner of the apartment complex where he was now standing. He also expressed surprise when he was reminded that he had been passed out moments earlier. The FCFRD captain gave up trying to rationalize with DM and walked away from him. When the FCPD officers resumed engaging with DM, he yelled loudly, “Why are the police bothering me? What have I done? I’m walking!”

At approximately 8:25 p.m., PFC#1 consulted with SGT#1 to explain what had transpired since he arrived at 7:55 p.m. He stated that DM would not provide the name of anyone to contact, did not appear to know anyone in the apartment complex, had exhibited signs of intoxication, and would likely remain outside in extremely cold temperatures if they simply left DM at the location. PFC#1 suggested arresting DM for Public Intoxication¹ so that he could be transported to the Fairfax County Adult Detention Center (hereinafter “ADC”) for his safety and wellbeing. SGT#1 concurred and authorized PFC#1 to arrest DM. While PFC#1 and SGT#1 were conferring, PFC#2 continued to offer medical services to DM, to no avail.

Initially, only PFC#1 and PFC#2 approached DM, with PFC#1 explaining to DM that he was being arrested for public intoxication, and further explaining that the arrest was primarily to ensure DM’s safety overnight. When PFC#1 reached for DM’s right arm, DM resisted by grabbing the apartment’s door handle with his left hand and squeezing it tightly.² At this point, Police Officer First Class #3 (hereinafter “PFC#3”) recognized DM’s resistance and approached to assist with the arrest. The officers repeatedly ask DM to stop resisting, but he tried to push himself further into the corner of the doorway. At this point, PFC#3 grabbed hold of DM’s shirt

¹ Va. Code § 18.2-388 provides: If any person is intoxicated in public, whether such intoxication results from alcohol, narcotic drug, or other intoxicant or drug of whatever nature, he is guilty of a Class 4 misdemeanor. In any area in which there is located a court-approved detoxification center, a law-enforcement officer may authorize the transportation, by police or otherwise, of public inebriates to such detoxification center in lieu of arrest; however, no person shall be involuntarily detained in such center.

² FCPD General Order (hereinafter “G.O.”) 540.4 I. A. 1. and 2. describe “passive resistance” as “[w]here 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,” and “active resistance” as “[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.”

to pull him away from the door. DM dropped his weight and went to the ground. DM grabbed one of PFC#3's legs and reached for and grabbed his holstered electronic control weapon (hereinafter "ECW," commonly referred to as a Taser). Upon seeing this, PFC#1 used a hand strike to get DM's hands away from the ECW. PFC#1 then got a handcuff on DM's right wrist before the officers tried to lift him off the ground. He again dropped his weight and went to the ground.

Once back on the ground, DM began to resist more aggressively, extending and kicking his legs while saying, "hold up, hold up, hold the fuck up, no, no, no, timeout." After getting DM into a more stable seated position, with additional help from Master Police Officer #1 (hereinafter "MPO#1"), the officers were able to pull him away from the confined space of the doorway and get him onto his right side. DM continued to resist by reaching for a railing in the entranceway he was now in, and squirming with his arms to prevent from being handcuffed. With limited assistance from a second Master Police Officer (hereinafter "MPO#2"), DM's left wrist was secured in a second set of handcuffs. The set of handcuffs secured on DM's right wrist was then cuffed to the set on his left wrist. The struggle to get DM handcuffed lasted for four minutes. As the officers were still securing the two sets of handcuffs together—by double-locking them—PFC#1 requested for paramedics to return to examine DM, and he asked DM if he was alright. PFC#1 and PFC#2 immediately began to search DM so that the paramedics could safely examine DM.

During the search, DM continued to squirm and not cooperate, even trying to throw himself backwards. The officers prevented him from injuring himself and were able to lift him onto a stretcher which allowed the FCFRD to secure him using straps. The FCFRD placed him in an ambulance and advised the FCPD officers that they would sedate him with ketamine. PFC#1 and PFC#2 rode in the ambulance during the transport of DM to Reston Hospital. The decision to transport DM to Reston Hospital for evaluation was made by FCPD and FCFRD personnel on the scene of his arrest. During the transport in the ambulance, DM indicated that the earlier actions of the arresting officers had aggravated pre-existing medical conditions he had with his left ankle and both shoulders (rotator cuff issues). At the hospital, DM refused most of the tests offered by the medical staff there, but an x-ray of his previously injured ankle was obtained.

At approximately 12:30 a.m. (November 24, 2020), PFC#1, PFC#2, and PFC#3 escorted DM out of the hospital and to a police cruiser for transport to the ADC. Before placing him in the cruiser, PFC#1 asked DM if he had any contraband on him. PFC#1 explained that if he did and it was brought into the ADC, additional criminal charges would be lodged against him. PFC#1 and PFC#2 transported DM to the ADC. While in route, they were notified by dispatch that a bag containing suspected narcotics had been discovered in the bed DM had occupied while at Reston Hospital. A second bag of suspected narcotics was discovered on DM by Fairfax County Sheriff's Office (hereinafter "FCSO") deputies when they searched him upon arrival and during intake at the ADC. While being fingerprinted at the ADC, DM attempted to discard fourteen additional bags containing suspected narcotics,³ but those bags were also recovered by FCSO deputies.

DM lodged a complaint with the Office of the Independent Police Auditor and the Police Civilian Review Panel (hereinafter "PCRCP") on July 7, 2021. He alleged that he was "unlawfully arrested" and "assaulted" by FCPD officers during his arrest in November, 2020. This review of the FCPD's investigation will focus primarily on DM's use of force allegation; the PCRCP will conduct a separate review of the FCPD's investigation into DM's other allegation.⁴

CRIMINAL INVESTIGATION/ PROSECUTIVE DECISION

DM was charged with Public Intoxication,⁵ Possession of Controlled Substances,⁶ Assault of a Law Enforcement Officer,⁷ Obstruction of Justice,⁸ Possession with Intent to Distribute (cocaine),⁹ and Being a Prisoner in Possession of a Chemical Compound.¹⁰

³ The suspected narcotics were later certified by the Virginia Department of Forensic Science as being cocaine.

⁴ Article VI. A. 3 of the PCRCP Bylaws 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." DM requested a review by the Panel on August 23, 2021; however, the PCRCP deferred its review due to pending litigation in the matter.

⁵ Note 1, *supra*.

⁶ Va. Code § 18.2-250.

⁷ Va. Code § 18.2-57. C.

⁸ Va. Code § 18.2-460.

⁹ Va. Code § 18.2-248.

¹⁰ Va. Code § 53.1-203. 5.

INTERNAL ADMINISTRATIVE INVESTIGATION

Supervisors from the Reston District station conducted the FCPD's administrative investigation of this incident, examining the officers' use of force and other actions taken during the incident. Their investigation included a review of Incident Reports prepared by the involved officers to document the incident; a review of computer-aided dispatch records; a review of medical records pertaining to the medical treatment administered to DM at Reston Hospital as well as treatment he received at the ADC between November 24 and December 1, 2020; multiple interviews of DM; interviews with each of the officers involved; and the review of extensive BWC and in-car video (hereinafter "ICV") footage.

Based on the comprehensive investigation into this incident, the FCPD determined that the force used on DM to arrest him complied with departmental policy. I agree with this conclusion; and, in my opinion the investigation upon which the conclusion was based was complete, thorough, objective, impartial, and accurate. Unrelated to the use of force, however, the failure to discover illegal narcotics during post-arrest search(es) of DM should have been part of the department's administrative investigation and I will address this in the Recommendations section of this report.

CONCLUSIONS

The FCPD administrative investigation noted that the FCPD officers engaged in conversation with DM for approximately thirty minutes before making the decision to arrest him. This followed efforts by FCFRD personnel to convince DM to be evaluated by them so that he could be afforded services.¹¹ The decision to arrest was made only after DM continually refused to be evaluated, or even to provide his name or the name of someone to contact who might care for him. Furthermore, by the time the decision to arrest was made, SGT#1 was on the scene and approved the arrest. The primary motivation for the arrest was to get DM off the street overnight because of expected cold temperatures and rain. These efforts comported with FCPD policy on de-escalation.

¹¹ These efforts constituted an effort to avoid an arrest and to de-escalate the situation. The PCRIP will review the FCPD investigation of DM's allegation that he was unlawfully arrested.

In its entirety, FCPD General Order (hereinafter “G.O.”) 540.2 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 officers who responded to this incident, most notably PFC#1, clearly engaged in de-escalation efforts before arresting DM.

Consistent with the principle of de-escalation, when the decision was made to arrest DM, only PFC#1 and PFC#2 initially approached him. They did so calmly while explaining to him what they were doing as well as the basis and reasons for his arrest. Unfortunately, they did not succeed in their de-escalation efforts. DM immediately resisted and his resistance increased during a prolonged struggle to secure DM in handcuffs. Other officers only assisted—and force was only used—to overcome DM’s resistance. The use of force also complied with departmental policy.

FCPD G.O. 540.4 II. A. 2. defines “less-lethal force” as “[a]ny level of force not designed to cause death or serious injury that is reasonably necessary to gain compliance by individuals offering resistance.” None of the officers involved in DM’s arrest used any force beyond empty-hand tactics (i.e., control holds and a strike), which are considered “less-lethal.”¹² Furthermore, FCPD G.O. 540.6 I. A. 1. and 3 specifically recognize that “less-lethal force may be effective . . . to [e]ffect an investigatory stop or arrest . . . or [t]o defend oneself or another individual from injury or assault. In doing just that, the officers complied with departmental policy.

Both legal precedent and FCPD policy still require that all uses of force by law enforcement officers must be “objectively reasonable.”¹³ The FCPD administrative investigation

¹² FCPD G.O. 540.4 II A. 2. a.

¹³ Graham v. Connor, 490 U.S. 386 (1989) and FCPD G.O. 540.0 II.

into the use of force during this incident concluded that the minimal force used on DM to overcome his resistance¹⁴ was objectively reasonable. I concur with that conclusion.

RECOMMENDATIONS

While I agree with the conclusions reached by the FCPD administrative investigation as they relate to the de-escalation tactics and the force used in this incident, I recommend that the issue of the narcotics that were not discovered on DM following his arrest be addressed. When a person is lawfully arrested, he is subject to a search incident to that arrest (hereinafter “SIA”). And while there are limits as to how far the search may extend beyond the person, the search of the person himself is virtually unlimited.

The United States Supreme Court first put parameters on the scope of the SIA in 1969 when it decided Chimel v. California (limiting the search to the arrestee and the area “within the immediate control” of the person arrested).¹⁵ More recently, the Court has further restricted the reach of the SIA in decisions such as Arizona v. Gant¹⁶ (prescribing limits on the search of the passenger compartment of a vehicle based on a recent occupant’s arrest) and Riley v. California¹⁷ (prohibiting the search of an arrestee’s personal electronic device (including a cell phone) pursuant to the search incident to arrest exception to the Fourth Amendment). The United States Court of Appeals for the Fourth Circuit (which includes all of Virginia) also chipped away at the extent of a lawful SIA when it decided United States v. Davis in 2021.¹⁸ That decision extended the limits of the search of the passenger compartment of a vehicle based on a recent occupant’s arrest beyond the automobile context. Specifically, the Fourth Circuit in the Davis case held that “non-vehicular containers [can be searched] incident to a lawful arrest ‘only when the arrestee is unsecured and within reaching distance of the [container] at the time of the search.’”¹⁹

¹⁴ Note 2, *supra*.

¹⁵ 395 U.S. 752 (1969).

¹⁶ 556 U.S. 332 (2009).

¹⁷ 134 S. Ct. 2473 (2014).

¹⁸ 997 F.3d 191 (4th Cir. 2021).

¹⁹ *Id.* at 197 (quoting Arizona v. Gant, 556 U.S. at 343).

None of these limitations apply to the search of a person upon arrest. In Chimel, the Supreme Court acknowledged that “[w]hen an arrest is made, it is reasonable for the arresting officer to search the person arrested in order to remove any weapons that the latter might seek to use in order to resist arrest or effect his escape. Otherwise, the officer’s safety might well be endangered, and the arrest itself frustrated. In addition, it is entirely reasonable for the arresting officer to search for and seize any evidence on the arrestee’s person in order to prevent its concealment or destruction.”²⁰ Indeed, in its landmark Terry v. Ohio opinion,²¹ which first recognized the legality of a limited pat-down (or frisk) for weapons when based on reasonable suspicion, the Supreme Court distinguished the SIA from such a frisk. The Court stated that “[t]he former, although justified in part by the acknowledged necessity to protect the arresting officer from assault with a concealed weapon, is also justified on other grounds, and can therefore involve a relatively extensive exploration of the person. A search for weapons in the absence of probable cause to arrest, however, must, like any other search, be strictly circumscribed by the exigencies which justify its initiation.”²²

Based on these principles, FCPD policy on conducting a search incident to a person’s arrest—as it pertains to the arrestee—is very broad. Specifically, the current FCPD G.O. 601²³ reads, in relevant part:

IX. SEARCHES OF INDIVIDUALS

- A. General Procedures: Officers shall search all individuals in their custody pursuant to arrest for evidence, contraband, and/or potential weapons that could be used to inflict harm upon themselves or others and/or facilitate escape. Prior to incarceration, all valuables and personal items shall be removed from prisoners and safeguarded by officers. Upon discovery of weapons or contraband, officers shall take appropriate action in seizing said items and obtaining applicable warrants. Officers shall assist FCSO personnel in visually observing searches of any prisoner brought to the ADC.

- B. Search Incident to Arrest: Officers shall perform a prompt and systematic search in accordance with their training of all individuals in their custody prior

²⁰ Note 15, *supra*, at 762-763.

²¹ 392 U.S. 1 (1968).

²² *Id.* at 25-26 (citations omitted).

²³ Although G.O. 601 ARREST PROCEDURES has been revised twice since this incident (the most recent version became effective on June 24, 2022), the wording in place at the time of this incident—relating to the search of the arrestee—has changed only slightly. The more substantive revisions to G.O. 601 (and specifically to the portion covering search incident to arrest beyond the arrestee) were made to reflect the changes in the law as described herein.

to transporting them in a police vehicle. Search incident to arrest includes a thorough search of the suspect's clothing and pockets, and removal of coats, jackets, or other outer garments. It also includes a search of the area within the arrestee's immediate control at the time of his arrest, to include any unlocked bags, purses, or containers within that area, but only if the arrestee is unsecured and within reaching distance of the container at the time of the search. This authority does not extend to locked items, as they are not accessible to the arrestee. Any officer accepting custody of a prisoner from another officer shall assume the individual has not been searched and shall take it upon themselves to conduct their own search prior to assuming custody.

The policy is well-written and includes all necessary revisions based on the recent caselaw developments discussed herein. Yet, sixteen small bags containing cocaine went undiscovered after DM's arrest. Part of the reason for this was that DM continued to squirm and struggle with officers even after the four-minute-long struggle to get handcuffs on him. DM was also wearing multiple layers of clothing and an ankle brace on his left ankle. Nonetheless, a more thorough SIA, or even multiple searches (e.g., upon arrival at Reston Hospital, again before entering the ADC) should have revealed some or all of the secreted narcotics.

I recommend no change to the written policy relating to searches of individuals after their arrest. I do recommend, however, an increased emphasis on the importance of and training on the proper conduct of such searches incident to a lawful arrest.

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 540.1 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.

