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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION THREE

J. HADLEY LOUDEN,

Plaintiff and Appellant,

v.

CITY OF BERKELEY,

Defendant and Respondent.

A133678

(Alameda County  
Super. Ct. No. RG 10 497164)

Plaintiff J. Hadley Louden appeals a grant of summary judgment dismissing his civil rights claims against the City of Berkeley (the City) based on the actions of three police officers who detained him for smoking a marijuana cigarette and arrested him for delaying a police investigation in contravention of Penal Code section 148(a). Louden claims that the trial court erroneously granted the City's motion for summary judgment and summary adjudication of issues because it ignored several triable issues of material fact.

We conclude that in most respects the trial court was correct, and affirm the court's summary adjudication of issues with one exception. Our de novo review leads us to conclude that there is a dispute of material fact over whether Louden was injured because Berkeley Police ignored his complaints or he was too tightly handcuffed. Accordingly, we reverse summary judgment and remand for further proceedings on Louden's claim that he suffered injury when he was left in handcuffs for an excessive period of time. The judgment is affirmed in part and reversed in part.

## I. BACKGROUND

On February 24, 2009, Louden was marching and playing drums in an unpermitted Mardi Gras parade on Telegraph Avenue in Berkeley. After two hours of marching in the parade, Louden stopped walking and began smoking a marijuana cigarette. Louden claims he has a doctor's recommendation for marijuana to alleviate chronic shoulder pain stemming from a high school injury and related stress.

As he was smoking, Louden was approached by Officer Kelly, who asked him if the substance was marijuana. Louden confirmed that it was and asserted that he had a lawful medical permit to smoke it. He did not display a government-issued identification card to verify his doctor's recommendation. Louden claims that Kelly then demanded that he give her the joint. Kelly, on the other hand, asserts that she told Louden to put the marijuana away. Both parties agree that Louden refused to stop smoking after Kelly's order, asserted his legal right to smoke as a medical marijuana patient, turned away, and continued to walk in the parade. Louden did not hear Kelly say anything else to him. In his declaration, Louden claims Kelly was near enough that he would have heard her if she said anything, but in his deposition, he admits that because he turned and walked away, it was possible Kelly was saying something and he didn't hear it.

After taking two or three more puffs and walking 10 to 15 more feet, Louden realized that Kelly was still nearby and handed her the cigarette. At the same time, Officer Cummings stopped his bicycle front of Louden at an oblique angle "in a way where [Louden] wasn't going anywhere," hitting Louden's drums. Louden was knocked back by the force of his drums hitting the bicycle. Cummings grabbed Louden's arm, while Kelly grabbed his other arm, and Louden went down on one knee to relieve the pressure on his shoulders. He was rolled onto his stomach. In his declaration, Louden claims that the officers "ignored" his requests to be careful with his injured shoulder and "kept twisting his arms" when they arrested him. But in his deposition, Louden admits that at least one officer heard him mention a left shoulder injury and took care not to injure his left arm. He also mentions that Cummings touched him gently. Cummings says he heard Louden notify him of the shoulder injury, so he took care to minimize the

risk of injuring him. In order to apply handcuffs to Louden, Cummings linked two sets of handcuffs together to minimize pressure on Louden's left shoulder. The officers needed to remove the drums and drum harness in order to handcuff him, so Cummings cut through the harness strap with a knife. Kelly handcuffed him, and led Louden to a patrol car. Louden claims the officers put the handcuffs on too tightly and that the officer driving the patrol car, Officer White, did not respond to his requests to loosen the cuffs. A video of the arrest was admitted into evidence by the City.

Louden claims that the officers used excessive force when they arrested him. He alleges that this incident caused "several bruises and scrapes on his face, wrists, arms and body," as well as "torn and ripped clothing." He claims his injuries caused him pain for six to eight weeks and he lost work as a result.

## **II. STANDARD OF REVIEW**

Our review of a grant of summary judgment is de novo. (*Wiener v. Southcoast Childcare Centers, Inc.* (2004) 32 Cal.4th 1138, 1142.) We strictly construe the moving party's papers and liberally construe those of the opposing party in determining whether a triable issue of material fact exists. (*Ibid.*)

A defendant can move for summary judgment if it can show that a cause of action has no merit by showing that the plaintiff cannot establish one or more elements of the cause of action. (Code Civ. Proc., § 437c, subd. (o)(2).) To show that the plaintiff cannot establish one or more elements, a defendant must produce evidence that, if uncontroverted, would require a jury to find in favor of the defendant under the preponderance of the evidence standard. (*Aguilar v. Atlantic Richfield Co.* (2001) 25 Cal.4th 826, 850.) A plaintiff can rebut summary judgment by producing evidence that controverts the defendant's showing, but if the plaintiff fails to do so, no triable issue of material fact exists and the defendant is entitled to judgment as a matter of law. (*Ibid.*) The plaintiff's evidence controverts "if, and only if, the evidence would allow a reasonable trier of fact to find the underlying fact in favor of the party opposing the motion." (*Ibid.*)

While the court must consider reasonable inferences in favor of the party opposing the motion, a plaintiff may not offer speculation or alternative possibilities that do not rise to the level of an inference as evidence for the purposes of defeating a motion for summary judgment. (Code Civ. Proc., § 437c, subd. (c); *Mann v. Cracchiolo* (1985) 38 Cal.3d 18, 36; *Binder v. Aetna Life Ins. Co.* (1999) 75 Cal.App.4th 832, 839.) Furthermore, “a party cannot create an issue of fact by a declaration which contradicts his prior pleadings.” (*Preach v. Monter Rainbow* (1993) 12 Cal.App.4th 1441, 1451.) “In determining whether any triable issue of material fact exists, the trial court may, in its discretion, give great weight to admissions made in deposition and disregard contradictory and self-serving affidavits of the party.” (*Ibid.*, citing *D’Amico v. Board of Medical Examiners* (1974) 11 Cal.3d 1, 21–22.)

### **III. DISCUSSION**

#### **A. There Is No Triable Issue of Material Fact to Dispute that Officer Kelly’s Contact with Louden Was Proper, Lawful and Unresolved**

We agree with the trial court that Louden’s civil rights claims for unreasonable seizure, freedom of speech, association and privacy hinge on the determination of whether Officer Kelly’s contact with Louden was proper, lawful, and unresolved. If so, Louden’s claims fail because his arrest was lawful.

##### **i. Officer Kelly Was Authorized to Investigate Louden’s Use of Marijuana**

Louden disputes that Kelly had probable cause to investigate and detain him based on the fact that he was smoking a marijuana cigarette. However, there is no doubt that Kelly was authorized to stop and investigate Louden’s smoking. A police officer may detain a subject to investigate possible criminal conduct if the officer has an “ ‘objective manifestation’ ” that some criminal activity is underway. (*People v. Souza* (1994) 9 Cal.4th 224, 230.) “A detention is reasonable under the Fourth Amendment when the detaining officer can point to specific articulable facts that, considered in light of the totality of the circumstances, provide some objective manifestation that the person detained may be involved in criminal activity.” (*People v. Souza, supra*, 9 Cal.4th 224,

231.) The usual test for a detention is whether a reasonable person would have felt free to leave. (*People v. Fisher* (1995) 38 Cal.App.4th 338, 343.)

It is undisputed that Louden was smoking marijuana when Kelly encountered him. Marijuana is a federally controlled substance per title 21 United States Code section 812. In California, consumption of marijuana is illegal without a doctor's recommendation under Health and Safety Code section 11357. Louden was smoking marijuana in a public place in the middle of a parade, thus, Kelly had at least reasonable suspicion that Louden was involved in the criminal activity of using an illegal substance, even though Louden asserted otherwise. An investigating officer may continue to detain, frisk, or search a subject to investigate a marijuana offense even after a subject produces a doctor's recommendation for marijuana. (*People v. Strasburg* (2007) 148 Cal.App.4th 1052, 1057.)

Louden argues that Kelly was required to take his status as a medical marijuana patient into consideration before detaining him, citing *County of Butte v. Superior Court* (2009) 175 Cal.App.4th 729 (*County of Butte*). In *County of Butte*, a deputy unlawfully forced a licensed medical marijuana patient to destroy a large number of marijuana plants although the patient presented officers with necessary paperwork. Because the deputy did not have a warrant, the analysis turned on whether he had probable cause: “ ‘ ‘ ‘ facts as would lead a man of ordinary caution or prudence to believe, and conscientiously entertain a strong suspicion of the guilt of the accused.’ ” ’ ’ ’ ” (*County of Butte, supra*, 175 Cal.App.4th 729, 737, citing *People v. Mower* (2002) 28 Cal.4th. 457, 473.) Given that marijuana is legal for medical purposes, “[a]ny consideration of probable cause must include the officer’s consideration of the individual’s status as a qualified medical marijuana patient.” (*County of Butte, supra*, 175 Cal.App.4th 729, 737.)

Here, the facts of *County of Butte* are distinguishable. Kelly initially investigated Louden because he was smoking marijuana on a major public road in traffic in an unpermitted parade. *County of Butte* does not prohibit an officer from investigating whether a marijuana smoker has a legal right to use the substance for medicinal purposes. *County of Butte* does not take issue with the deputy’s initial investigation, but rather his

refusal to consider objective evidence that the marijuana possessor had a right to cultivate plants for use as medicine before forcing the possessor to destroy some of the plants on threat of arrest. In contrast, Louden was arrested for knowingly walking away from Kelly while she was investigating him, violating Penal Code section 148, subd. (a)(1). Louden's arrest for delaying Kelly's investigation was unrelated to whether his use of marijuana was legally permitted.

Furthermore, Louden would not have been immune from arrest even had he displayed a doctor's recommendation for medical marijuana. Health and Safety Code section 11362.5 (the "Compassionate Use Act") does not grant immunity from arrest but rather provides a defendant with "a limited immunity from prosecution, which not only allows a defense at trial, but also permits a motion to set aside an indictment or information prior to trial." (*People v. Mower, supra*, 28 Cal.4th 457, 470.) Health and Safety Code section 11362.7 provides limited immunity from arrest for qualified persons possessing a valid identification card issued by the Department of Health Services. Participation in the identification card program is not mandatory, but valid cardholders are not subject to arrest for violating California's marijuana possession, transportation, or cultivation laws. (*County of San Diego v. San Diego NORML* (2008) 165 Cal.App.4th 798, 811.)

Louden also argues that Kelly was not authorized to investigate his use of marijuana because the Compassionate Use Act ensures that patients "are not subject to criminal prosecution or sanction" for their use of medicinal marijuana. He claims that the Berkeley Police Code authorizing investigation impermissibly amends the Act. (See *People v. Kelly* (2010) 47 Cal.4th 1008 (denying state legislature the authority to amend the statute).) To the contrary, the Compassionate Use Act does not restrict the authority of officers to investigate possible marijuana violations, because the Act does not grant immunity from arrest. (*People v. Mower, supra*, 28 Cal.4th 457, 474.) If the Act prohibited officers from investigating marijuana violations, it would have the practical effect of universally legalizing marijuana in California.

## **ii. The Trial Court's Reference to Disputed Facts Is Harmless Error**

Louden correctly points out that some of the undisputed facts referred to by the trial judge in granting summary judgment are, in fact, disputed. However, resolving all factual disputes in favor of Loudon still leads us to affirm on Loudon's claims for unreasonable seizure, freedom of speech, association and privacy. The disputed facts are not material to summary judgment. "If independent review establishes the validity of the judgment, then the error is harmless." (*Byars v. SCME Mortgage Bankers, Inc.* (2003) 109 Cal.App.4th 1134, 1146.) Loudon disputes Kelly's declaration that after he turned away she caught up with him and told him "I need you to stop." Whether Kelly said anything after Loudon asserted his right to smoke marijuana is irrelevant to the fact that the detention was not over when Loudon walked away. It was lawful for her to detain Loudon and arrest him for delaying her investigation. He also disputes the trial court's statement that "[i]t is undisputed that Officer Kelly stopped [Louden] while he was still walking, inquired about what he was smoking and told him to stop moving, but he kept walking." Loudon says this is inaccurate because he had already stopped walking and the officer did not tell him to stop moving. Whether Loudon was walking when he was approached by officer Kelly is not relevant to the circumstances that transpired after Kelly made the initial contact. This fact is not material to the disposition.

## **B. There Is No Triable Issue of Material Fact over Whether the Officers Had Probable Cause to Arrest Loudon**

Louden disputes the trial court's determination that his arrest was lawful, because he claims that he was not attempting to flee from the police. However, whether an arrest is lawful does not depend on the arrestee's subjective awareness of criminal behavior or appearance. Rather, an officer may arrest a person if the officer has probable cause to believe a subject has committed a misdemeanor in the officer's presence. (Pen. Code, § 836, subd. (a)(1).) The probable cause standard requires that an officer have facts that would lead "a person of ordinary care and prudence" to have "an honest and strong suspicion" that a person committed a crime. (*People v. Price* (1991) 1 Cal.4th 324, 410.) It is an objective standard based on what a hypothetical reasonable officer would believe

given the circumstances; the arresting officer's subjective intent is irrelevant. (*People v. Letner and Tobin* (2010) 50 Cal.4th 99, 145.)

The issue of probable cause is a question of law when the facts are not in conflict. (*Hamilton v. City of San Diego* (1990) 217 Cal.App.3d 838, 844.) It is undisputed that Kelly gave Loudon an order while attempting to investigate a possible violation, and that he disregarded her order by walking away and continuing to smoke. Penal Code section 148 provides that “[e]very person who willfully resists, delays, or obstructs, any . . . peace officer . . . in the discharge or attempt to discharge any duty of his or her office or employment” violates the law and may be punished. A person’s failure to comply with an order given by an officer investigating a possible offense gives the officer probable cause to arrest the person for a violation of section 148. (*Smith v. City of Hemet* (9th Cir. 2005) 394 F.3d 689, 696–697.) Furthermore, an officer has probable cause to arrest a subject for a violation of section 148 if it appears that the subject is intentionally delaying a police investigation. (See *People v. Allen* (1980) 109 Cal.App.3d 981, 985.) Accordingly, we conclude the officers had probable cause to arrest Loudon when he ignored Kelly’s order to hand her the joint and instead walked away.

### **C. There Is No Dispute of Material Fact over Whether Officers Used Unreasonable Force in Effectuating Loudon’s Arrest**

Loudon claims the court erred in dismissing his claims of wrongful use of force. To succeed on a claim of battery against a police officer undertaking a lawful arrest, a plaintiff must prove that the amount of force used by the officer was unreasonable given the circumstances. (*Brown v. Ransweiler* (2009) 171 Cal.App.4th 516, 527.) Although “it is a pure question of fact whether a police officer used reasonable force in detaining [someone],” (*In re Joseph F.* (2000) 85 Cal.App.4th 975, 989.) the court may reject a plaintiff’s battery claim through a grant of summary judgment in favor of the defendant if the undisputed facts demonstrate that the act in question was an objectively reasonable use of force as a matter of law. (*Brown v. Ransweiler, supra*, 171 Cal.App.4th 516, 526.)

Here, Loudon does not dispute that most of the alleged abuse happened within the timeframe recorded on the video submitted as evidence by the City. Loudon argues that

it is “ludicrous and grimly ominous” that the trial court summarily adjudicated the battery claim in favor of the officers. But the undisputed events in the video depict an arrest that was apparently conducted without any unreasonable use of force. The events in the video are further substantiated by the undisputed facts that Officer Cummings heard Louden’s warning about his shoulder injury, took care of the injured arm by touching it “gently,” and linked two handcuff sets together to minimize pressure on Louden’s shoulders. These facts are supported by Cummings’ declaration and Louden’s deposition. We disregard Louden’s contrary assertions in his declaration, because Louden may not create a triable issue of fact by stating facts that differ from those admitted in his deposition. (See *Preach v. Monter Rainbow*, *supra*, 12 Cal.App.4th 1441, 1445.)

Louden fails to establish a dispute of material fact that would permit a jury to conclude that officers used unreasonable force in effectuating his arrest.

**D. There Is a Material Dispute of Fact Regarding Louden’s Retention in Handcuffs That Is Not Apparent on the Video of Louden’s Arrest**

Louden also alleges two instances of abuse that are not captured on the video. He says that Officer Cummings hit him with his bicycle before grabbing his arm to arrest him. He also says that Officer White failed to adjust his handcuffs after he complained to White that the handcuffs were hurting him. Summary adjudication was proper on the allegations concerning Officer Cummings, but the claim that Louden was left in handcuffs that were applied too tightly for one to two hours presents a genuine dispute of material fact.

When he is first seen on the video, Louden is on his feet and the officers are beginning to take hold of him. He says that before this, Officer Cummings, “riding a bicycle, rammed into [him] from the side, without warning, injuring him and damaging his instruments.” There is nothing in this record that suggests any contact between Officer Cummings’ bicycle and Louden was intentional or that the officer used his bicycle as an instrument to ram Louden or impede or block his path. Nor does the video suggest that the officers were riding their bicycles at an excessive or unreasonable speed. On this record, there is no evidence from which a jury could conclude that the contact

between Louden and Officer Cummings' bicycle was anything other than unintentional and incidental to the officer's attempt to get close enough to grab Louden by the arm. The contact between Officer Cummings' bicycle and Louden did not implicate assault and battery.

But Louden's claim that he was left in handcuffs that were causing him excessive pain for a prolonged period of time raises a genuine issue of fact. "It is well-established that overly tight handcuffing can constitute excessive force." (*Wall v. County of Orange* (9th Cir. 2004) 364 F.3d 1107, 1112 (*Wall*); also see e.g., *LaLonde v. County of Riverside* (9th Cir. 2000) 204 F.3d 947, 960 (*LaLonde*); *Palmer v. Sanderson* (9th Cir. 1993), 9 F.3d 1433, 1436 (*Palmer*); *Hansen v. Black* (9th Cir. 1989) 885 F.2d 642, 645 (*Hansen*).) Liability may arise in such circumstances when a plaintiff either suffers physical injury as a result of the handcuffs or complains to an officer about them and is ignored. (See *Wall, supra*, 364 F.3d at pp. 1109–1110; *LaLonde, supra*, 204 F.3d at p. 952, 960; *Palmer, supra*, 9 F.3d at pp. 1434–1436; *Hansen, supra*, 885 F.2d at p. 645.)

Louden claims his handcuffs were "wrongly attached" in a manner that severely hurt his arms and wrists. He complained to Officer White about them while driving to the police station, and White told Louden that they were on sideways and that he would talk to someone about it. Louden also told others at the police station and jail once he arrived. However, no adjustments to the handcuffs were made until they were removed one to two hours after he complained. Louden says his wrists hurt for several weeks afterward.

To determine whether a particular use of force was reasonable, the court must balance " 'the nature and quality of the intrusion on the individual's Fourth Amendment interests' against the countervailing government interests at stake." (*Graham v. Connor* (1989) 490 U.S. 386, 396, quoting *Tennessee v. Garner* (1985) 471 U.S. 1, 8). This balancing "requires careful attention to the facts and circumstances of each particular case, 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 he is actively resisting arrest or attempting to evade arrest by flight." (*Graham, supra*, 490 U.S. at p. 396.)

The Ninth Circuit Court of Appeals has continually held that the reasonableness of a particular force is generally a question of fact for the jury. (*Liston v. County of Riverside* (9th Cir. 1997) 120 F.3d 965, 976 fn. 10 (as amended).) “Because [reasonableness] nearly always requires a jury to sift through disputed factual contentions, and to draw inferences therefrom, we have held on many occasions that summary judgment or judgment as a matter of law in excessive force cases should be granted sparingly.” (*Santos v. Gates* (9th Cir. 2002) 287 F.3d 846, 853.) “This is because such cases almost always turn on a jury’s credibility determinations.” (*Smith v. City of Hemet, supra*, 394 F.3d 689, 702.) Such is the case here.

While Louden admits he initially walked away, he stopped walking when Officer Kelly approached him the second time and he voluntarily handed her the joint. He did not kick, hit, or otherwise resist the officers. Louden did let himself fall to the ground, which may have made it more difficult for the officers to place handcuffs on him, but his movements never seriously threatened the officers’ safety. Moreover, the video depicts that Louden was submissive and compliant to the officers’ control, and that he was calmly placed in the patrol car to be transported to jail.

To be sure, the reasonableness analysis recognizes that an officer’s “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.” (*Graham v. Connor, supra*, 490 U.S. at p. 396, citing *Terry v. Ohio*, 392 U.S. 1, 22–27; see also *Munoz v. City of Union City* (2004) 120 Cal.App.4th 1077, 1109.) While we have no reason to question the initial placement of Louden in handcuffs to effectuate his arrest, on this record we cannot say that leaving him in painful restraints, under the totality of the circumstances, was reasonable as a matter of law. To be sure, it is Louden’s burden to show that the force used against him was unreasonable and unnecessary. (*Edson v. City of Anaheim* (1998) 63 Cal.App.4th 1269, 1272.) Whether or not he may meet his burden on this claim remains an open question. Louden’s complaint alleges that he was needlessly left in handcuffs for a prolonged period of time and injured as a result. There is nothing offered

by defendants in the current record that addresses these allegations. Accordingly, we must reverse and remand for further proceedings on this claim.

**E. Louden’s Civil Rights Claims Fail Because the Arrest Was Lawful**

Louden claims that the Bane Act (Civ. Code, § 52.1) provides him with a civil remedy against the City because the officers’ arrest violated his rights to free expression and association, privacy, and due process. “The essence of a Bane Act claim is that the defendant, by the specified improper means (i.e., ‘threats, intimidation or coercion’), tried to or did prevent the plaintiff from doing something he or she had the right to do under the law or to force the plaintiff to do something that he or she was not required to do under the law.” (*Austin B. v. Escondido Union School Dist.* (2007) 149 Cal.App.4th 860, 883.) Because we conclude that the arrest and detention were lawful, Louden did not have a right to refuse to follow Kelly’s order or to walk away from an active police investigation. A lawful arrest executed with reasonable force does not interfere with a person’s civil rights in contravention of the Bane Act.

**IV. DISPOSITION**

The summary adjudication in favor of defendants on Louden’s claim that he was injured when he was left in handcuffs for an extended period of time is reversed. Summary judgment in favor of the defendants on all of Louden’s remaining claims is affirmed. Each party will bear their own costs.

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Siggins, J.

We concur:

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McGuinness, P.J.

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Jenkins, J.