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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION THREE

In re ANDERSON S., a Person Coming
Under the Juvenile Court Law.

THE PEOPLE,

Plaintiff and Respondent,

v.

ANDERSON S.,

Defendant and Appellant.

A142431

(Contra Costa County
Super. Ct. No. J1400601)

Anderson S. appeals from jurisdictional and dispositional orders of the juvenile court sustaining allegations of first degree residential burglary of an occupied residence and resisting arrest. He contends the true finding on the resisting arrest allegation must be reversed because the People failed to prove the arresting officer did not use excessive force. The contention is meritless, so we affirm.

BACKGROUND

Geovanny Perez was at home with his father around 11:00 p.m. when he looked out of his bedroom window to see an individual later identified as Anderson unsuccessfully trying to open a neighbor's exterior doors. Anderson then crossed to the Perezes' home, tried their back and front doors, and entered their unlocked garage. Geovanny called police, who arrived within five or ten minutes. As the police arrived, Anderson took off running.

Antioch Police Officer Matthew Harger approached the Perezes' house with his trained service dog. Anderson sprinted out from near the garage and ran across the front yard. Officer Harger yelled "Police. Stop running," but Anderson continued his flight. Harger pursued Anderson with his police dog on her leash and called out "Police K-9. Stop running or you will be [bitten] by the dog. Stop now and you will not be injured." Anderson kept running "extraordinarily fast." A second pursuing officer, Officer Mendez, slowed down to avoid getting between Anderson and the dog.

Realizing that he could not overtake the fleeing suspect, Harger released the dog and commanded it to apprehend him. Anderson ran around a corner with the dog in pursuit. When Officer Harger rounded the corner, Anderson was at least 50 yards away and the dog was biting him in the left leg or arm. Anderson broke free and fled for another 50 yards or so before the dog secured his right leg and brought him down into some bushes. Officer Harger quickly caught up. He described the situation as follows:

"Q. [¶] Did you feel at this point you had control of the situation and were able to apprehend the subject? [¶] A. At this point I still did not because I didn't have the defendant in handcuffs. I didn't really have custody of him. He was stopped and being held in place by the dog but he wasn't in custody at this point. [¶] Q. In fact, did you need another officer to help you to get control of the area besides [the dog]? [¶] A. Yes. [¶] Q. Who was that officer? [¶] A. Officer Mendez. [¶] Did Officer Mendez—tell us what you and Officer Mendez had to do to gain control of the subject. [¶] A. I was continually yelling at the defendant to show me his hands, stop resisting, and he wasn't. He was holding his hands almost tightly clinched underneath him. He was almost kind of laying on his side or on his stomach. And I couldn't see his hands. When I tried to grab a hold of him he tightened his grasp and I couldn't pull his hand behind his back. [¶] Q. How were you able to finally—or were you able to finally get his hands behind his back? [¶] A. I gave him what I call a distraction-type strike with my flashlight. I was holding it—and it did have the desired effect which caused him to loosen up his grip or tightness that he had in his muscles, and I was able to get one hand behind his back. [¶] Officer Mendez got there. He was able to grab the other arm. And as he grabbed both arms for

handcuffing, I grabbed a hold of [the police dog]. Seeing that this guy was now essentially in custody, no longer a [threat], I did remove her from the bite.”

Officer Harger struck Anderson with his flashlight because “I could not see his hands. They were tucked under his body. They were essentially in the area of his waist band. And I know that it’s very commonplace for people to have weapons hidden in their waist bands, in their pockets, whether it be a gun, a knife. I couldn’t see what his hands were doing which is why it was so critical to detain those hands so I can see them.” In officer Harger’s experience, suspects fleeing from residential burglaries pose particular safety threats to officers because the perpetrators often steal weapons such as guns, shotguns, rifles and knife collections from victims’ homes. Harger also testified that he needed Officer Mendez’s assistance to get Anderson under control.

Anderson was arrested and transported to a hospital with scratches on his arms and legs and an open two to three-inch bite wound on his leg. After waiving his *Miranda* rights, he told Antioch Police Officer Daniel Fachner that he entered the yards of two houses to look for a bicycle to ride home because his own bicycle had a bent rim.

At the jurisdictional hearing, Anderson denied burglarizing the Perezes’ house. He testified that he was riding his bike home when police officers told him to stop. He jumped off his bike and ran, but when he heard the officer command the dog to get him he hopped on top of a car, put his hands up and said “I surrender.” He jumped off the car as one of the officers approached. The dog jumped on him and pushed him into the bushes. The police officers “started like tumbling with [his] hands” trying to arrest him; then one of them hit him with a flashlight three or four times.

The court found the officers’ testimony was credible and that Anderson’s was not. “When Anderson testified, quite frankly, I did not find Anderson to be very credible, and in fact, his story seemed to evolve as he was testifying. And I simply didn’t find much of his testimony to be credible. In fact, much of it didn’t really make sense to the Court. And it’s undermined by his statements that he gave when he was interviewed by the police and I did find the officer’s testimony regarding Anderson’s admissions to be credible.” The court found that Officer Harger used reasonable force, particularly

because “the officer could not see Anderson’s hands. And it is those hands and what can be in those hands that poses quite frankly lethal risk to a police officer in the middle of the night after a burglary has been committed.” The court also found Officer Harger’s deployment of the police dog was reasonable under the circumstances.

The court sustained the allegations of first degree residential burglary of an occupied residence and resisting arrest. Anderson was adjudged a ward of the court and committed to the Orin Allen Youth Facility for a 9-month program. This timely appeal followed.

DISCUSSION

Anderson contends the evidence was insufficient to support the allegation of resisting arrest under Penal Code section 148, subdivision (a).¹ Specifically, he alleges the People did not meet their burden of proof because they failed to prove that the police did not use excessive force to effect his arrest. We disagree.

Section 148, subdivision (a)(1) makes it a misdemeanor to “willfully resist . . . any . . . peace officer . . . in the discharge or attempt to discharge any duty of his or her office or employment” The offense is subject to the longstanding rule that “although one is not immune from criminal liability for his resistance to an invalid police action, he cannot be convicted of an offense against a peace officer ‘engaged in . . . the performance of . . . duties’ unless the officer was acting lawfully at the time. [Citations.] The rule flows from the premise that because an officer has no duty to take illegal action, he or she is not engaged in ‘duties,’ for purposes of an offense defined in such terms, if the officer’s conduct is unlawful.” (*People v. Gonzalez* (1990) 51 Cal. 3d 1179, 1217, superseded by statute on other grounds in *In re Steele* (2004) 32 Cal.4th 682, 691.) Thus, the People must prove beyond a reasonable doubt that an officer acted lawfully in effecting arrest to prove a violation of section 148, subdivision (a). (*In re Joseph F.* (2000) 85 Cal.App.4th 975, 982; *People v. Olguin* (1981) 119 Cal.App.3d 39, 45.)

¹Further statutory citations are to the Penal Code.

Claims that law enforcement officers used excessive force in effecting an arrest are analyzed under the Fourth Amendment's objective reasonableness standard. "The reasonableness test requires careful attention to the facts and circumstances of each particular case, including: (1) the severity of the crime at issue; (2) whether the suspect poses an immediate threat to the safety of the officers or others; and (3) whether the suspect is actively resisting arrest or attempting to evade arrest by flight." (*Thompson v. County of Los Angeles* (2006) 142 Cal.App.4th 154, 164.) " 'Not every push or shove, even if it may later seem unnecessary in the peace of a judge's chambers,' " . . . violates the Fourth Amendment. The calculus of reasonableness must embody allowance for the fact that police officers are often forced to make split-second judgments—in circumstances that are tense, uncertain, and rapidly evolving—about the amount of force that is necessary in a particular situation." (*Graham v. Connor* (1989) 490 U.S. 386, 397, quoting *Johnson v. Glick* (1973) 481 F.2d 1028, 1033.) We review the juvenile court's finding " 'to determine whether the record contains any substantial evidence tending to support the finding of the trier of fact, and in considering this question we must view this evidence in the light most favorable to the finding.' [Citation.] Substantial evidence is evidence that is reasonable, credible, and of solid value such that a reasonable trier of fact could find the appellant guilty beyond a reasonable doubt.' " (*In re Muhammed C.* (2002) 95 Cal.App.4th 1325, 1328.)

Anderson asserts Harger employed excessive force by striking him with a flashlight as Officer Mendez stood by and the police dog held him by the leg. This is so, he maintains, because there was no indication that he posed an immediate threat to the officers' safety or had the ability to flee, and Harger had not seen him display or attempt to secure a weapon. The trial court reasonably concluded otherwise. Officer Harger was faced with a fleeing felony suspect who had apparently just burglarized a residence where weapons could have been taken. He testified that the blow was necessary because Anderson resisted when Harger tried to pull his hands out from beneath his body, and that suspects commonly have weapons hidden in their waistbands or pockets. His testimony also established that Officer Mendez did not arrive to assist him until after Harger struck

Anderson with the flashlight to release his hands. Then, once Mendez caught up to them and was able to secure Anderson's arms, Harger "called [the dog] off with the bite." The juvenile court reasonably credited Harger's testimony, which amply supports its finding that the officer did not use excessive force to effect the arrest.

DISPOSITION

The judgment is affirmed.

Siggins, J.

We concur:

Pollak, Acting P.J.

Jenkins, J.