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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

JOHN B. KENNEY,

Plaintiff and Appellant,

v.

D. S. LUC et al.,

Defendants and Respondents.

D057823

(Super. Ct. No.  
37-2009-00082924-CU-CR-CTL)

APPEALS from judgments of the Superior Court of San Diego County, Jay M. Bloom, Judge. Affirmed.

John B. Kenney appeals judgments entered after motions for summary judgment and summary adjudication were granted in part and a jury verdict was returned against him on his title 42 United States Code section 1983 (hereafter section 1983) and other claims against defendants D.S. Luc, Mark Becker, Steve Thomas, Thomas Zoll, Ronald R. Ball, the City of Carlsbad (City), and City's Police Department (together Defendants).

On appeal, Kenney contends: (1) the trial court erred by rejecting his *Pitchess*<sup>1</sup> motion and motions to compel discovery and by allowing Defendants' discovery abuse; and (2) the trial court erred by granting in part Defendants' motions for summary judgment and summary adjudication. Because Kenney has not carried his burden on appeal to present comprehensible, substantive legal arguments showing the trial court erred as contended, we conclude he has waived those contentions and, in any event, has not persuaded us the trial court erred.

#### FACTUAL AND PROCEDURAL BACKGROUND

At about 8:25 p.m. on January 21, 2008, City Police Officer Luc saw Kenney riding his bicycle, without lights, through red traffic signals at the intersection of El Camino Real and La Costa Avenue. Luc drove his patrol car past Kenney and stopped in the driveway of a shopping center. At about 8:27 p.m., Luc reported to the police radio dispatcher that he was on a traffic stop. As Kenney approached Luc, he (Kenney) was walking while pushing his bicycle. Luc casually conversed with Kenney and explained he had seen him ride through the intersection against a red light. Shortly thereafter, City Police Officer Becker arrived to act as Luc's cover officer and observed the traffic stop to ensure Luc's and Kenney's safety.

Although Kenney was initially pleasant and cooperative, he soon became hostile, argumentative, and generally uncooperative. Planning to issue Kenney a traffic citation, Luc requested Kenney's identification. Kenney refused to provide identification and

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<sup>1</sup> *Pitchess v. Superior Court* (1974) 11 Cal.3d 531.

would not state his full name. Luc explained to him that continued refusal to provide identification could result in his custodial detention for the purpose of ascertaining his identity. When Luc asked Kenney whether he could look inside his backpack for identification, Kenney replied by substantially stating, "go ahead, do whatever you want to do because you're going to do it anyway." After Luc began looking inside Kenney's backpack, Kenney identified himself and stated his date of birth. Luc then stopped searching the backpack.

At about 8:33 p.m., Luc asked the dispatcher to run Kenney's name and date of birth to confirm his identity and determine whether he had any outstanding warrants. At some point, Luc felt threatened by Kenney and performed a pat down search of Kenney, handcuffed him, and sat him down on the curb. After the dispatcher confirmed Kenney's identity and absence of outstanding warrants, Luc issued Kenney a traffic citation for riding his bicycle at night without the required light (Veh. Code, § 21201, subd. (d)).<sup>2</sup> Kenney signed the citation and left the scene. City Police Officer Thomas then arrived at the scene and spoke with Luc and Becker. By 9:00 p.m., all officers had left the scene. Prior to January 28, 2008, Luc, Becker, Thomas, Zoll, and Ball had not had any contact with, or known anything about, Kenney.

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<sup>2</sup> Vehicle Code section 21201, subdivision (d)(1), provides: "A bicycle operated during darkness . . . shall be equipped with . . . [a] lamp emitting a white light that, while the bicycle is in motion, illuminates the highway, sidewalk, or bikeway in front of the bicyclist and is visible from a distance of 300 feet in front and from the sides of the bicycle."

In August 2009, Kenney filed his operative second amended complaint against Defendants, alleging causes of action for: (1) violation of his civil rights under section 1983; (2) unlawful policies, customs or habits under section 1983; (3) negligence; (4) assault; (5) battery; (6) false arrest; (7) negligent and/or intentional infliction of emotional distress; and (8) violation of civil rights under Civil Code sections 51 and 52. Kenney alleged Luc, Becker and Thomas harassed him and, without stating any probable cause, proceeded with their premeditated plan to unlawfully search, interrogate, and detain him "in retaliation for [him] exercising his First Amendment right to free speech."

Apparently in support of his conspiracy theory, Kenney alleged:

"On the same day that the incident in Carlsbad was committed as detailed above, 1/21/08, in fact just several hours before, [Kenney] was in Los Angeles attending the Martin Luther King parade there. The night before he had visited an Obama Precinct meeting in Los Angeles, and the Day before that he was in Las Vegas in support of the Democratic [P]arty, meeting up with both Obama and Clinton supporters, even shaking hands with both President Clinton and Hillary. At said locations, [Kenney] was stalked and maliciously surveilled with the intent to interfere, and maliciously oppress[,] his Constitutional rights by various fictitiously named DOEs, some of whom were almost certainly other law enforcement officers or agents of law enforcement or security apparatuses or agencies."

Kenney also alleged that Defendants had "at least since 2004" placed him on a "watch [list]," network, or database, targeting him for "constant 24/7/365" surveillance and warrantless search and seizure of his body and possessions. He further alleged: "All Defendants . . . continue to" commit "psychological terrorism and spiritual torture which have caused [him] extreme emotional distress, anguish and mind numbing, nearly physically paralyzing mental suffering, through illegal means such as stalking, myriad

invasions of privacy, illegal surveillance of communications and movements and" staking out Kenney.

In September 2009, Kenney filed a *Pitchess* motion, seeking discovery of records from the personnel files of City Police Officers Luc, Becker, Thomas and Zoll. The trial court denied the motion, finding Kenney had not met the applicable burden of proof.

In November 2009, Defendants filed a motion for summary judgment or, in the alternative, summary adjudication. Kenney opposed the motion and submitted declarations and other documents in support of his opposition. Defendants replied and objected to Kenney's evidence. The trial court granted summary judgment for Zoll, Ball and Thomas, but denied it as to Luc, Becker and City. On Defendants' alternative motion for summary adjudication, the court granted summary adjudication in favor of Becker and Luc as to the constitutional violation claims (except for the U.S. Const., 4th Amend. excessive force claim on the question of whether Kenney was handcuffed). It also granted them summary adjudication on the causes of action for false arrest, infliction of emotional distress, and violation of Civil Code sections 52.1 and 51.7 (except to the extent the claim was based on excessive force in violation of the Fourth Amendment). However, the trial court denied summary adjudication of Kenney's causes of action for negligence, assault, and battery. Likewise, the court granted summary adjudication in City's favor on the causes of action alleged against it (except for negligence, assault, battery, violation of Civ. Code, §§ 52.1 & 51.7 to the extent based on excessive force in violation of the U.S. Const., 4th Amend.), and punitive damages.

A jury trial was conducted on the remaining causes of action against Luc, Becker, and City. The jury returned a special verdict in their favor on those causes of action.<sup>3</sup> On April 29, 2010, the trial court entered two separate judgments. The first judgment was entered based on its prior order granting in part Defendants' motions for summary judgment and summary adjudication. The second judgment was entered based on the jury's special verdict. The court subsequently denied Kenney's motions for new trial and judgment notwithstanding the verdict. Kenney timely filed a notice of appeal.

## DISCUSSION

### I

#### *Presumption of Correctness and Appellant's Burden on Appeal*

A trial court's judgment or order is presumed to be correct. In *Denham v. Superior Court* (1970) 2 Cal.3d 557, the court stated:

"[I]t is settled that: 'A judgment or order of the lower court is *presumed correct*. All intendments and presumptions are indulged to support it on matters as to which the record is silent, and error must be affirmatively shown [by the appellant]. This is not only a general principle of appellate practice but an ingredient of the constitutional doctrine of reversible error.' " (*Id.* at p. 564.)

"The burden of affirmatively demonstrating error is on the appellant." (*Fundamental Investment etc. Realty Fund v. Gradow* (1994) 28 Cal.App.4th 966, 971.) "An appellant must provide an argument and legal authority to support his contentions. This burden

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<sup>3</sup> Although the trial court had previously granted summary adjudication in favor of Luc, Becker, and City on Kenney's false arrest cause of action, that cause of action was nevertheless submitted to the jury for its determination and the jury decided the issue in their favor.

requires more than a mere assertion that the judgment is wrong. 'Issues do not have a life of their own: If they are not raised or supported by argument or citation to authority, [they are] . . . waived.' [Citation.] It is not our place to construct theories or arguments to undermine the judgment and defeat the presumption of correctness. When an appellant fails to raise a point, or asserts it but fails to support it with reasoned argument and citations to authority, we treat the point as waived." (*Benach v. County of Los Angeles* (2007) 149 Cal.App.4th 836, 852.)

"Where a point is merely asserted by [appellant] without any [substantive] argument of or authority for its proposition, it is deemed to be without foundation and requires no discussion." (*People v. Ham* (1970) 7 Cal.App.3d 768, 783, disapproved on another ground in *People v. Compton* (1971) 6 Cal.3d 55, 60, fn. 3.) "Issues do not have a life of their own: if they are not raised or supported by [substantive] argument or citation to authority, we consider the issues waived." (*Jones v. Superior Court* (1994) 26 Cal.App.4th 92, 99; see also *Landry v. Berryessa Union School Dist.* (1995) 39 Cal.App.4th 691, 699-700 ["[w]hen an issue is unsupported by pertinent or cognizable legal argument it may be deemed abandoned and discussion by the reviewing court is unnecessary"]; *Ochoa v. Pacific Gas & Electric Co.* (1998) 61 Cal.App.4th 1480, 1488, fn. 3 [contention was deemed waived because "[a]ppellant did not formulate a coherent legal argument nor did she cite any supporting authority"]; *Colores v. Board of Trustees* (2003) 105 Cal.App.4th 1293, 1301, fn. 2 ["[t]he dearth of true legal analysis in her appellate briefs amounts to a waiver of the [contention] and we treat it as such"]; *Bayside Auto & Truck Sales, Inc. v. Department of Transportation* (1993) 21 Cal.App.4th 561,

571.) Appellants acting in propria persona are held to the same standards as those represented by counsel. (See, e.g., *City of Los Angeles v. Glair* (2007) 153 Cal.App.4th 813, 819.)

## II

### *Waiver of Appellate Contentions*

Defendants assert, and we agree, that Kenney has waived his appellate contentions by failing to present any comprehensible, or coherent, substantive legal arguments supported by citations to the record and legal authorities. He has not presented any coherent, substantive arguments or analyses showing the trial court erred by rejecting his *Pitchess* motion and motions to compel discovery and allowing Defendants' discovery abuse. He likewise has not presented any coherent, substantive arguments or analyses showing the trial court erred by granting in part Defendants' motions for summary judgment and summary adjudication. Accordingly, we need not discuss the merits of each contention and conclude Kenney has waived his appellate contentions. (*Benach v. County of Los Angeles, supra*, 149 Cal.App.4th at p. 852; *People v. Ham, supra*, 7 Cal.App.3d at p. 783; *Jones v. Superior Court, supra*, 26 Cal.App.4th at p. 99; *Landry v. Berryessa Union School Dist., supra*, 39 Cal.App.4th at pp. 699-700; *Ochoa v. Pacific Gas & Electric Co., supra*, 61 Cal.App.4th at p. 1488, fn. 3; *Colores v. Board of Trustees, supra*, 105 Cal.App.4th at p. 1301, fn. 2; *Bayside Auto & Truck Sales, Inc. v. Department of Transportation, supra*, 21 Cal.App.4th at p. 571; *Berger v. Godden* (1985) 163 Cal.App.3d 1113, 1119-1120; cf. *In re Marriage of Green* (1989) 213 Cal.App.3d 14, 29 ["[f]rom the point of view of grammar and syntax as well as logic [appellant's] briefs are

almost impenetrable"].) In any event, assuming *arguendo* Kenney has not waived his appellate contentions, his appellate arguments are vague and conclusory and he has not carried his burden on appeal by his failure to present any persuasive substantive argument or analysis showing the trial court erred as he contends. (*Denham v. Superior Court*, *supra*, 2 Cal.3d at p. 564; *Fundamental Investment etc. Realty Fund v. Gradow*, *supra*, 28 Cal.App.4th at p. 971; *Paterno v. State of California* (1999) 74 Cal App.4th 68, 105 [conclusory claims did not persuade appellate court].)

#### DISPOSITION

The judgments are affirmed.

McDONALD, J.

WE CONCUR:

McCONNELL, P. J.

NARES, J.