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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION ONE

WESLEY LIN et al., Plaintiffs and Appellants, v. CITY OF LOS ANGELES et al., Defendants and Respondents.	B281865 (Los Angeles County Super. Ct. No. BS161631)

APPEAL from a judgment of the Superior Court of Los Angeles County, Amy D. Hogue, Judge. Affirmed.

Gregory G. Yacoubian for Petitioners and Appellants.

Michael N. Feuer, City Attorney, Blithe S. Bock, Assistant City Attorney, and Michael M. Walsh, Deputy City Attorney for Defendants and Respondents.

" '[S]earches conducted outside the judicial process, without prior approval by judge or magistrate, are *per se* unreasonable under the Fourth Amendment—subject only to a few specifically established and well-delineated exceptions.' " (*Arizona v. Gant* (2009) 556 U.S. 332, 338.) A search incident to a lawful arrest to ensure officer safety or to preserve evidence are such exceptions. (*Ibid.*)

Petitioners and appellants are two police officers and one police sergeant employed by the Los Angeles Police Department (Department). The Department cited petitioners for misconduct in connection with the illegal search of an engine compartment and trunk of a vehicle. Although the hearing officer on the administrative appeal "chose not to substitute his probable cause evaluation for that of those on-scene," the Department's chief of police concluded that the search was unconstitutional. The trial court denied petitioners' petition for peremptory writ of mandate seeking "to remove the record of the misconduct charges." Petitioners also sought to remove "the proposed disciplinary penalty," but no penalty had been imposed and therefore no penalty could be removed. The trial court entered judgment in favor of respondent City of Los Angeles.

Petitioners' advance no viable challenge to the judgment. They offer no theory justifying the search of the engine compartment and trunk. Instead, they seek application of a facially inapplicable statute. Because petitioners advance no viable challenge, we affirm.

FACTUAL BACKGROUND

Petitioners are Officer Andrew Jenkins, Officer Roland Cruz, and Sergeant Wesley Lin.[1] Respondent is the City of Los Angeles, which seeks to uphold a decision made by Charlie Beck, the city's chief of police (the Chief). According to petitioners, they were all "involved in the search of a vehicle in January 2014. Based on the Department's investigation, the Chief decided the search of the interior of the vehicle was constitutional, but the search of the trunk and engine compartment was unconstitutional."

1. Sustained Counts Against Cruz, Jenkins, and Lin

The following count was sustained against Officers Cruz and Jenkins: "On January 26, 2014, you . . . while on duty, searched the vehicle of [L.R.], without probable cause."

The following count was sustained against Sergeant Lin: "On January 26, 2014, you Detective Lin, while on duty, failed to provide supervisory oversight during a search of [L.R.]'s vehicle."

No penalty was imposed as to any sustained count.

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[1] After the events challenged in this case, Lin was promoted from sergeant to detective. We refer to him as sergeant because that was his title at the relevant time.

Another sergeant was cited for the events described in this case, but he was not a party to the petition for writ of peremptory mandate.

2. Undisputed Facts Underlying the Chief's Misconduct Findings

The following facts are undisputed and based largely on the findings of the hearing officer and the trial court.

On January 26, 2014 at approximately 8:00 p.m., Officer Salvador Cervantes and his partner (nonparties) effectuated a traffic stop after observing a vehicle speed past them. The driver, L.R., pulled over onto the left side of the road. The passenger attempted to exit, but was told to remain in the car. L.R. initially was uncooperative and refused to exit the vehicle. L.R. was told numerous times to keep his hands on the dashboard. Eventually, after repeated instructions by Cervantes, L.R. exited the car.

In response to a call for additional units, Jenkins, Cruz, and Lin arrived at the scene. Jenkins was aware that L.R. had been uncooperative and observed that the passenger also was uncooperative. Ultimately, the passenger exited the car. Jenkins was told that the driver and passenger were members of a gang.

L.R. was detained about 15 feet from his vehicle. With some difficulty, the officers placed handcuffs on L.R. Officers put the passenger in handcuffs also.

After both the passenger and driver were detained, Cruz "clear[ed] the vehicle" to ensure no other persons were in the vehicle. Cruz also searched the trunk. Cruz testified that he believed there was something the occupants did not want the officers to find. He was looking for narcotics or firearms. Jenkins searched the engine compartment. He testified that he believed the occupants were gang members and were engaging in criminal activities and may have had contraband.

Sergeant Lin concluded that Officers Cruz and Jenkins had probable cause for the search. Lin noted the driver's excessive speed and his " 'twisting' within the car once stopped." Lin did not instruct the officers that the search of the engine compartment and trunk was unconstitutional. He was focused on the driver, who was being uncooperative.

No contraband or weapon was found in the vehicle. "None of the officers at the scene indicated to Jenkins that they saw either the driver or passenger with a firearm." The driver was cited for speeding, and the driver and passenger were released.

3. Appeal to the Hearing Officer

The Department held an administrative appeal hearing before Hearing Officer David Shapiro. According to petitioners, "Lin, Jenkins and Cruz exercised their right to appeal. On September 24, 2015, an evidentiary hearing was held." Also according to petitioners: "The Hearing lasted about six hours and fifteen minutes. Seven (7) witnesses testified in person, and ten (10) exhibits were introduced. The officers' Digital In-Car Video System . . . captured the incident, including the entire vehicle search. At the Hearing the video was first played in full . . . , and then portions were replayed during testimony."

The hearing officer recited the following evidence in support of the conclusion that petitioners had probable cause to search L.R.'s engine compartment and trunk: The driver's high speed before the stop; the driver and passenger were uncooperative and ignored orders to exit the car; the driver and passenger could have been gang members; the stop occurred in a possible gang area; the driver stopped on the "wrong" side of the road; and the driver may have been (but was not) armed.

The hearing officer indicated that the defense "does not bear a burden." With respect to probable cause, the hearing officer concluded: "There having been no dispute at 'trial' about the preliminary facts, which included [the driver's] speed, maneuvers, actions, statements, and demeanor, as well as the 'state of play' among the gangs in that place and at that time, your Hearing Examiner chooses not to substitute his 'probable cause' evaluation for that of those on-scene. While any of the appellant's actions arguably 'could have been different,' and even were a reasonable assessor to conclude—which your Hearing Examiner does not—that probable cause here was 'thin', nevertheless the Department has not met its burden of proof as to the existence of misconduct." The hearing officer "recommend[ed] that the . . . administrative appeals be sustained, and that no discipline be imposed."

4. Decision of the Chief

The Chief accepted the factual findings of the hearing officer but rejected the hearing officer's legal conclusion that the officers had probable cause for the search of L.R.'s engine compartment and trunk. The Chief explained: "It is true that this was a fluid and dynamic scene where the suspect was initially uncooperative with the officers. But, once the suspect was detained and handcuffed, the exigency and need to search in the scope that the officers did, was gone. The Officers had the right to conduct the warrantless search of the interior of the vehicle within the wingspan of the suspect, but not the trunk and engine compartment."

The Chief explained his decision not to impose a penalty as follows: "It is my belief that there was no malice or bad intentions on the part of the officers or supervisors involved.

However, that does not mitigate the finding of misconduct in this case." The Chief further observed, "[t]he supervisors on the scene should have been more engaged with the officers, watching what they were doing relative to his search and ask[ing] why they were going to search in the manner that they did. The Sergeants offered little to no advice or guidance to the Officers to ensure the scope of the search was appropriate."

5. Petition for Peremptory Writ of Mandate

Petitioners sought a writ of mandate commanding the Chief to set aside his decision and instead enter a decision exonerating petitioners of any misconduct. Petitioners also sought removal of the disciplinary penalty, although we observe no such penalty was imposed. Petitioners argued that the weight of the evidence supported the hearing officer's conclusion and undermined the Chief 's conflicting conclusion. Petitioners argued that Code of Civil Procedure section 1085 and section 1094.5 were both applicable.[2]

6. Trial Court Judgment

The trial court applied section 1094.5, the statute governing judicial review of adjudicatory decisions rendered by administrative agencies. The trial court explained that a disciplinary action affects an employee's fundamental vested right, and the trial court must exercise its independent judgment of the evidence. The trial court noted that petitioners identified no evidence supporting their claim that they acted with probable cause in searching the engine compartment and trunk.

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[2] Undesignated statutory citations are to the Code of Civil Procedure.

The trial court then thoroughly reviewed the evidence and, relying on *People v. Evans* (2011) 200 Cal.App.4th 735 (*Evans*), concluded that petitioners lacked probable cause for the search of the engine compartment and trunk. Finally, the trial court concluded that the Chief considered the evidence and that petitioners were not denied due process, a conclusion petitioners do not contest on appeal.

DISCUSSION

On appeal, petitioners argue that (1) the trial court should have applied Code of Civil Procedure section 1085; and (2) the trial court applied the incorrect burden of proof. We discuss the arguments in reverse order, and as we shall explain, petitioners have demonstrated no error on appeal. We review the trial court's decision for substantial evidence. (*Ogundare v. Department of Industrial Relations* (2013) 214 Cal.App.4th 822, 828 [" 'Regardless of the nature of the right involved or the standard of judicial review applied in the trial court, an appellate court reviewing the superior court's administrative mandamus decision always applies a substantial evidence standard' "].)

A. Regardless Of Which Party Bore The Burden Of Proof, The Trial Court Correctly Concluded That The Evidence Supported The Misconduct Finding

Petitioners assert that the trial court improperly shifted the burden of proof to them to show error in the Chief 's decision. The trial court, however, based its decision on undisputed facts under the controlling case law. (Cf. *Fullerton Union High School Dist. v. Riles* (1983) 139 Cal.App.3d 369, 383 ["what is 'reasonable' on undisputed facts is a question of law"].)

Petitioners demonstrate no error in the trial court's application of the law to the undisputed facts. Nor do they offer any legal theory justifying their search of the engine compartment and trunk after both the driver and passenger had been placed in handcuffs. Similarly, they do not identify any prejudice from any purported misapplication of the burden of proof.

Petitioners' failure to proffer any theory justifying the search of the engine compartment and trunk is dispositive. Without identifying a legal basis justifying the search of the engine compartment and trunk, petitioners have demonstrated no error in the judgment upholding the Chief 's conclusion that the search was unconstitutional. Additionally, without identifying a theory justifying the search of the engine compartment and trunk, petitioners cannot demonstrate any prejudice from their claimed misapplication of the burden of proof.

We conclude, as did the trial court, that under *Evans*, *supra*, 200 Cal.App.4th 735, petitioners lacked probable cause to search the engine compartment and trunk. In *Evans,* the court held that a vehicle search violated the Fourth Amendment. (*Id*. at p. 739.) Officers observed Evans driving erratically, failing to signal, veering into various lanes, and almost hitting the curb. (*Id*. at p. 739.) When he stopped, the driver appeared " 'very nervous,' " his "hands were shaking," and his voice " 'shuddered' and cracked." (*Id*. at p. 740.) The officer asked Evans to exit the car at least 10 times and Evans refused. (*Ibid*.) The driver was in "territory" claimed by the Rolling 60's criminal street gang. (*Ibid*.) After additional officers arrived at the scene, officers used pepper spray and a taser to remove Evans from his car. (*Ibid*.) After Evans was removed from the car, an officer

searched it. (*Ibid.*) The officer reported that Evans " 'appeared more nervous than most people I've ever come in contact with on a traffic stop.' " (*Ibid.*)

The appellate court held there was no probable cause to search Evans's vehicle. "The facts known to the officers were that Evans had swerved back and forth after he made two turns, was extremely nervous, refused to exit the car when ordered to do so, and instead kept asking to speak to a police supervisor. Additionally, the stop occurred at night, in an area claimed as the territory of a criminal street gang. Based on the totality of the circumstances, a reasonably prudent person would not have believed contraband or evidence of a crime would be found in the car." (*Evans*, *supra*, 200 Cal.App.4th at pp. 753-754.) The appellate court emphasized that "[n]ervousness by itself . . . does not establish probable cause." (*Id.* at p. 754.)

Although *Evans* discussed the search of an entire vehicle, and the issue in this case concerns the search only of the engine compartment and trunk, petitioners relied on the factors found insufficient in *Evans* to justify the warrantless search of the engine compartment and trunk. For example, just as the driver in *Evans* was uncooperative, L.R. was uncooperative. Both the stop in *Evans* and the stop in this case occurred in an area claimed by a criminal street gang. L.R. "twisted" in the car and the driver in *Evans* appeared very nervous. Because the factors found insufficient in *Evans* were substantially the same as the factors identified by petitioners as the basis for their search of the engine compartment and trunk, the trial court correctly concluded that the undisputed evidence was insufficient to demonstrate probable cause to search the engine compartment

and trunk. As previously noted, petitioners do not argue otherwise.

B. Petitioners Mistakenly Claim That They Were Entitled To The Benefit Of The Hearing Officer's Determination

Based on section 1085, petitioners argue that they "should enjoy the benefit of the hearing officer's decision" in their favor. Petitioners ignore both the language of the statute and the relevant legal authority.

Section 1085 "permits judicial review of ministerial duties as well as quasi-legislative and legislative acts." (*County of Los Angeles v. City of Los Angeles* (2013) 214 Cal.App.4th 643, 653.) "A ministerial duty is one which is required by statute." (*Ibid*.) The trial court correctly applied section 1094.5, and not section 1085, because this case involved review of an adjudicatory not a legislative decision. (*Estes v. City of Grover City* (1978) 82 Cal.App.3d 509, 514.) It cannot reasonably be disputed that here, the agency acted in an adjudicatory capacity, i.e., it applied the facts of the case to determine the rights of specific persons. (*Ibid*.) The agency did not set forth a rule to be applied to future actions. (*Tielsch v. City of Anaheim* (1984) 160 Cal.App.3d 570, 574.) Petitioners' reliance on section 1085 is thus misplaced.

C. Petitioners Forfeited Their Argument Concerning Procedural Deficiencies

Petitioners assert that they were not afforded an appeal as required by the Public Safety Officers Procedural Bill of Rights Act (Gov. Code, § 3300 et seq.). Petitioners forfeited this issue by not raising it in the trial court; they cannot raise it for the first time on appeal. (*Los Angeles Police Protective League v. City of*

Los Angeles (2002) 102 Cal.App.4th 85, 93.) As petitioners concede, they raised only three issues in the trial court: "First, the Chief of Police erred by not reviewing the entire administrative record before overruling the Hearing Officer's findings. Appellants do not pursue this issue here [on appeal]. Second, the Chief 's Decision was not supported by the weight of the evidence (Code of Civil Procedure Section 1094.5); and third, the officers were entitled to have the Hearing Officer's Decision enforced (Code of Civil Procedure Section 1085)." We decline to address petitioners' argument raised for the first time on appeal.

DISPOSITION

The judgment is affirmed. The City of Los Angeles is awarded its costs on appeal.

NOT TO BE PUBLISHED.

BENDIX, J.

We concur:

ROTHSCHILD, P. J.

JOHNSON, J.