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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION TWO

BORIS WASHINGTON,

Plaintiff and Appellant,

v.

CITY OF LOS ANGELES et al.,

Defendants and Respondents.

B279340

(Los Angeles County
Super. Ct. No. BS159499)

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

Seki, Nishimura, & Watase, Bill H. Seki and Kari C.
Kadomatsu for Plaintiff and Appellant.

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

Boris Washington, a Sergeant with the Los Angeles Police Department (LAPD), appeals from a judgment denying his Petition for Writ of Mandate seeking to overturn the decision of an LAPD Board of Rights (the Board) to suspend him for 10 days without pay. The Board found that Washington violated an LAPD policy requiring officers to call for emergency medical care whenever a detainee requests it. Washington contends that: (1) the trial court applied the wrong legal standard in reviewing the Board's decision; (2) the evidence is not sufficient to support that decision; and (3) the LAPD policy in question violates due process by failing to provide fair notice about what constitutes an "emergency" and how much time an officer has to call for emergency medical care after receiving a request for such care. We disagree with all three contentions and therefore affirm.

BACKGROUND

1. *The Incident*

Close to midnight on August 15, 2013, LAPD Officers Serrano and Sinkovits were driving north on Vermont Avenue in Los Angeles. They observed a man on a bicycle riding south on Vermont without a bicycle light. The officers made a u-turn so that they could cite the bicyclist for a violation.

The officers activated their lights and ordered the bicyclist (later identified as Phraz Famoso) to stop. Rather than stopping, Famoso sped up and turned onto a side street. The officers pursued in their car until they caught up with Famoso riding his bicycle west on 24th Street on the sidewalk. When Famoso still did not follow directions to stop, Officer Serrano turned the patrol car into a driveway in front of Famoso, blocking his path. Famoso either fell or jumped off of his bicycle and began to run away.

The officers pursued Famoso and apprehended him. A later inspection of the patrol car showed that Famoso had collided with the car while on his bicycle, damaging a headlight on the car.

The officers' pursuit and subsequent conversations with Famoso were captured on the patrol car's video cameras. While the officers checked Famoso's identification and pockets and conversed with him about what had happened, Famoso repeatedly said "you almost ran me over." The officers placed Famoso in the rear seat of the patrol car. The in-car video recording shows Famoso slumped over in the seat, apparently asleep or unconscious, for about 20 minutes while the officers looked for something in the alley that they had observed Famoso drop while they were pursuing him.

When he woke up, Famoso began to berate the officers. Among other things, he began repeating that the officers "just ran me over," and "[y]ou don't wanna ask me if I wanna go to the hospital?" The officers asked if Famoso wanted an ambulance or to go to the hospital. Famoso did not give a clear answer, responding several times by saying "you gon ask me now?" Famoso eventually responded to the officers' questions about whether he wanted an ambulance by saying "[h]ell yeah, dude! I'm in pain!" Famoso continued to accuse the officers of running him over, and the officers eventually decided to call for a supervisor.

Washington arrived in response to the call at about 12:37 a.m. After he arrived, he began to discuss the events leading to the detention with Serrano and Sinkovits. During that discussion, Famoso said loudly from the vehicle, "Sir! They just chased me down and ran me over! Sir! I need an ambulance!

Sir! They just chased me down and ran me over! Sir! I need an ambulance! Sir! I need an ambulance! They just chased me down and ran me over! Sir! They just chased me down and ran me over!” Washington responded, “Hey! You need to be quiet in there. I’ll talk to you in a minute, ok?”

Famoso continued to say that he wanted an ambulance; that his back and leg were “fucked up;” and that the officers “chased me down and ran me over.” Washington told Famoso that the officers are “gonna go to the station right now.” After some further colloquy, Washington said “[y]ou’ll see me at the station, alright? Right now you’re going to the station.” Famoso responded: “Whatever you say, but I need to see the ambulance. Chase me down and ran me over, and it’s okay. It’s okay, huh? It’s okay?”

When Washington returned to the station, he reviewed the patrol car video and determined that Famoso’s bicycle had probably made some contact with the patrol car. After reaching that conclusion and consulting with the watch commander, Sergeant Ellerson, Washington reported the incident as a traffic collision and called for an ambulance for Washington. Washington followed the ambulance to the hospital and was present when Famoso was released. The doctor did not report any injury to Famoso that would prohibit him from being booked.

2. *The Administrative Proceedings*

A formal complaint charged that Washington, while on duty, “failed to request a rescue ambulance to P. Famoso after he stated to you at the scene of his arrest he needed an ambulance.” The charge was based on an LAPD policy governing officers’ responsibility to call for emergency medical care upon request. The policy, numbered 4/210.75 in the LAPD manual

(section 210.75), states that: “Suspects, arrestees, or others requiring emergency medical attention shall **only** be transported via a Rescue Ambulance (RA). It shall be the responsibility of all Department employees to request a Rescue Ambulance for a suspect, arrestee, or any other person requesting emergency medical treatment or when it is apparent that they are in need of such assistance and are unable to request.”

The Board conducted a two day hearing on the charge on August 17 and 18, 2015. The Board heard testimony from Serrano, Sinkovits, Ellerson, Washington, and others, and considered various exhibits, including the patrol car video recordings and a transcribed interview of Washington.

Washington testified at the Board hearing that, while at the scene of the collision, he was “aware that an impact may have occurred or a grazed impact may have occurred between Famoso and the black and white.” He also acknowledged that Famoso had requested an ambulance. In response to a question from a Board member, Washington further acknowledged that he can be heard on the patrol car recording stating that “ ‘we will getting [sic] you medically treated.’ ” Washington testified that, although he was unsure, he thought he made that statement to both Famoso and the officers.

Washington explained his decision not to call for immediate medical assistance by testifying that Famoso’s requests for medical assistance were inconsistent. Washington explained that “we’re going to get you medically treated, but if you’re going to say at one point I need an ambulance, but at the next point, you know, I really don’t give a damn, then you have to make an assessment as a supervisor, is this really an immediate medical need right now[?]”

At the conclusion of the hearing, the three-person Board found unanimously that Washington had violated LAPD policy. The Board explained that, “[b]ased on his knowledge gained from years of experience working with medical personnel from other agencies, he made an assessment of the situation at the scene and determined that the arrestee did not need emergency medical treatment and did not request an ambulance at the scene, even though the arrestee made several requests for an ambulance. Sergeant Washington heard at least one of these requests because the audio portion of the D.I.C.V. [video recording], we could hear Sergeant Washington state to the arrestee that he would get him medical treatment. Washington corroborated this statement in his testimony.” The Board concluded that “Washington failed to follow Department policy when he did not immediately request a rescue ambulance for Famoso while at the scene. The Board recognizes that a rescue ambulance was ultimately requested for Famoso at Southwest Station substantially later.”

After considering Washington’s performance history, which the Board characterized as “exemplary,” and hearing from several character witnesses, the Board concluded that Washington should be suspended without pay. The Board took into account Washington’s successful 19-year career and his “subsequent actions to ensure that Mr. Famoso eventually received medical treatment on the night of the incident” in imposing a 10-day suspension rather than the 15-day suspension that had been recommended.

3. *The Petition for Writ of Mandate*

Washington filed his writ petition with the Los Angeles Superior Court on December 2, 2015. The trial court held a

hearing on the petition on September 21, 2016. The court issued a 10-page tentative decision prior to the hearing, which the court ultimately adopted as its final ruling (the Order).

After summarizing the evidence in the administrative record, the trial court's Order stated the applicable standard of review. The court explained that, because discipline of public employees involves a fundamental right, the court is " 'required to exercise its independent judgment on the evidence.' " Applying that standard, the court denied the petition.

The court stated that "Section 210.75 does not permit an officer to consider the surrounding circumstances in situations such as this one where an individual makes a clear request for emergency medical treatment." The court found that Famoso "repeatedly" told Washington that he needed an ambulance. The court therefore concluded that "the weight of the evidence supports the Board's decision finding that [Washington] violated Section 210.75."

The trial court also rejected Washington's argument that section 210.75 is void for vagueness. The court's Order reasoned that the section "clearly explains when a Department employee must request a Rescue Ambulance." The court also concluded that the section "clearly applies to [Washington's] conduct." The court found that Famoso's repeated requests for an ambulance were "clear requests for emergency medical treatment."

Finally, the court upheld the Board's decision to impose a 10-day suspension, finding that the penalty was within the Board's discretion.¹

DISCUSSION

1. *The Trial Court Applied the Correct Legal Standard.*

We apply the de novo standard of review to determine whether the trial court applied the correct legal standard in its review of the Board's decision. (*Rodriguez v. City of Santa Cruz* (2014) 227 Cal.App.4th 1443, 1452 (*Rodriguez*).)

Both parties agree that, because the Board's decision involved a fundamental vested right, in reviewing that decision the trial court was required to use its independent judgment. Under the correct standard, the trial court was to "exercise its independent judgment on the evidence and find an abuse of discretion if the findings are not supported by the *weight* of the evidence." (*Strumsky v. San Diego County Employees Retirement Assn.* (1974) 11 Cal.3d 28, 32, italics added; Code Civ. Proc., § 1094.5, subd. (c).) In exercising its independent judgment, the trial court "must afford a strong presumption of correctness concerning the administrative findings, and the party challenging the administrative decision bears the burden of convincing the court that the administrative findings are contrary to the weight of the evidence." (*Fukuda v. City of Angels* (1999) 20 Cal.4th 805, 817.) However, the presumption may be overcome. "Because the

¹ Washington does not challenge the penalty decision on appeal.

trial court ultimately must exercise its own independent judgment, that court is free to substitute its own findings after first giving due respect to the agency's findings." (*Id.* at p. 818.)

Such an independent review is different from the substantial evidence standard that generally governs the review of factual findings by a lower court. Under the substantial evidence standard, the reviewing court does not make credibility judgments or reweigh the evidence. Rather, the reviewing court's task is limited to determining whether any rational finder of fact could have reached the decision below based upon the evidence presented. (*Alberda v. Board of Retirement of Fresno County Employees' Retirement Assn.* (2013) 214 Cal.App.4th 426, 435 (*Alberda*).) In contrast, in applying its independent judgment to an administrative ruling, a trial court may reweigh the evidence. (*Id.* at p. 433.)

The trial court's Order here correctly described the standard of review. Citing *Wences v. City of Los Angeles* (2009) 177 Cal.App.4th 305 (*Wences*), the trial court noted that discipline of public employees affects their vested right in employment, and that a trial court reviewing such discipline in a mandamus proceeding must therefore "exercise its independent judgment on the evidence." (*Id.* at p. 314.) The trial court explained that, "pursuant to [Code of Civil Procedure] section 1094.5(c), the court decides whether the weight of the evidence supports the administrative findings (rather than whether substantial evidence supports the findings)." Thus, the trial court's Order clearly shows that the court understood the difference between the substantial evidence standard and the independent judgment standard that it was required to apply to Washington's petition.

Washington does not argue that the trial court misstated the applicable legal standard in its Order. Rather, Washington claims that several oral statements the trial court made during the hearing on his petition show that the court had a “mistaken belief of the scope of its review.” We disagree. Considered in the context of the hearing as a whole and the trial court’s Order, the statements that Washington cites do not show that the trial court applied the wrong standard.

Early in the hearing, the court stated: “it seems to me that the record is very clear that, whether credible or not, whether really needed or not, Mr. Famoso said, ‘I want an ambulance.’ He said it to a supervisor. And so it seems to me there is substantial evidence, indeed, the weight of the evidence, in favor of the City here.” That statement does not show that the trial court applied a substantial evidence standard. To the contrary: the trial court’s mention of the “weight of the evidence” shows that it was aware of and applied that standard in making its ruling. The trial court’s explanation of its reasoning also reveals the trial court’s independent assessment of the evidence and its own conclusion that the evidence weighed heavily in favor of the respondent City of Los Angeles (City).

Similarly, at the conclusion of the hearing on Washington’s petition the trial court said to counsel that “I appreciate the arguments. I think they are all fair arguments. It’s not the most egregious thing an officer can do. I think the weight of the evidence, substantial evidence, supports the suspension.” Again, the trial court referred to “substantial evidence” along with the “weight of the evidence.” The statement on its face shows that the trial court concluded that the weight of the evidence supported the City, as the applicable standard required. Nothing

in the comment suggests that the court failed to apply its own independent judgment.

The final comment that Washington cites is more ambiguous. In response to the argument that Washington eventually called for emergency medical assistance once he returned to the station, the trial court stated: “Absolutely. Reasonable minds could differ. And the difficulty you have is that my level of review is simply to look for some evidence or the weight of the evidence. And while you might persuade the initial decision maker that that was good enough or fair enough under the circumstances, given the policy, I don’t think I can substitute my judgment on that score.”

Reading that comment in isolation, one could conclude that the trial court believed it could not substitute its judgment for the Board’s in evaluating the evidence. However, in the context of the hearing as a whole, it appears that the trial court simply concluded— properly—that its discretion was constrained *by the policy*.

In rejecting Washington’s argument at the hearing that section 210.75 is too vague to enforce, the trial court explained that the policy establishes a bright line rule requiring officers to call for emergency medical assistance whenever a detainee requests it, without any room for the exercise of individual judgment about whether, or when, such assistance might really be necessary. The court noted that it was not “a hard call in this case.” The court reasoned that, “honestly, I don’t think the police officer wants to get into the medical profession business of diagnosing someone’s condition, and it would seem to me sensible for the City to have a policy which is, if they ask for one [i.e., an ambulance], we’re going to give them one.” The court later

mentioned again that “it seems to me the regulation is clear enough that they ask, you provide.”

In light of these findings, the trial court’s comment that it could not substitute its judgment for that of the Board appears directed to the Board’s decision to *punish* Washington for a violation of the policy rather than the decision whether Washington actually *violated* the policy. The LAPD might conclude that an officer’s conduct in waiting to call for emergency medical care in a particular case “was good enough or fair enough under the circumstances,” despite the clear requirements of the policy to call for emergency care upon request. However, the trial court did not have that discretion. If an independent review of the evidence showed that Washington actually violated the policy described in section 210.75, the trial court did not have the authority to reverse the Board’s decision to enforce that policy. Such reasoning reflects an appropriate view of the trial court’s role under the governing standard.

Such an interpretation is also consistent with the trial judge’s statement immediately after the comment at issue. The court explained that “[t]he same goes with, of course, punishment imposed. I would really be looking at some extreme abuse of discretion, which I can’t say a 10-day suspension would rise to that.” Thus, in context, the court’s comment that “I don’t think I can substitute my judgment” appears directed to whether and how much Washington could be punished for violating the policy, not whether the evidence showed that he did violate it.

In any event, we need not reach a definitive conclusion about the meaning of the trial court’s comments at the hearing. The trial court’s oral comments must be viewed in the context of the court’s written ruling. While in some circumstances a trial

court's comments during oral argument may be "valuable to illustrate the court's theory," such comments "may never be used to impeach the final order." (*Jespersen v. Zubiate-Beauchamp* (2003) 114 Cal.App.4th 624, 633 (*Jespersen*).)² The trial court's

² Similarly, a trial court's tentative ruling is not binding, and is superseded by a final order. (*Jespersen, supra*, 114 Cal.App.4th at p. 633.) Both rules are based in part on the recognition that a trial court " 'may change its ruling until such time as the ruling is reduced to writing and becomes the [final] order of the court.' " (*Silverado Modjeska Recreation & Park Dist. v. County of Orange* (2011) 197 Cal.App.4th 282, 300, quoting *In re Marcus* (2006) 138 Cal.App.4th 1009, 1015-1016.) As counsel for Washington pointed out during oral argument on appeal, the trial court's written order here actually *preceded* the trial court's comments at the hearing on Washington's petition, as the trial court adopted as its final order the tentative ruling that it had prepared before the hearing. Arguably there is less basis in this situation to assume that the trial court changed any views it expressed during oral argument than if the court had drafted the written order after the hearing. However, it is certainly possible that the trial court's ultimate findings differed from views it expressed during the hearing, as the trial court's written order was its final word on Washington's petition. In any event, the rule that a party may not use a court's oral comments to impeach a final, written order is also based on the principle that a "trial court's final order on a motion is 'made a matter of record in order to avoid any uncertainty as to what its action has been.' " (*Silverado Modjeska Recreation & Park Dist., supra*, at p. 300.) As the trial court's statements in this case illustrate, oral comments are often ambiguous. To avoid uncertainty, a trial court's oral comments may help to interpret or explain a written ruling, but they may not be used to argue that the court did not mean what it said in its written ruling. (See *Whitlow v. Board of*

Order correctly described the governing standard. We therefore may not reverse the trial court's ruling based on isolated ambiguous comments during the hearing. (*Ibid.*)

The cases that Washington cites do not support reversal here. The appellate decisions that have reversed trial court rulings for applying the wrong standard of review to administrative proceedings involved statements in the trial court's ruling that created at least a serious question as to whether the trial court applied the correct standard. For example, in *Alberda*, the trial court's written decision began by reciting the correct standard, but contained contradictory statements indicating that the trial court actually applied the substantial evidence standard. (*Alberda, supra*, 214 Cal.App.4th at pp. 432-433.) In *Barber v. Long Beach Civil Service Com.* (1996) 45 Cal.App.4th 652 the trial court expressly stated that "I don't believe I have the ability to reweigh credibility," and "we can't reweigh the evidence." (*Id.* at pp. 658-659, italics omitted.) And in *Rodriguez*, each time the trial court's statement of decision mentioned "independent judgment" it stated that the administrative decision was entitled to "deference." The trial court's decision also stated that the administrative tribunal's credibility finding was supported by "sufficient evidence." (*Rodriguez, supra*, 227 Cal.App.4th at pp. 1453-1454.) While there was some indication in the trial court's statement of

Medical Examiners (1967) 248 Cal.App.2d 478, 487
["[f]ortunately for the stability of judgments the findings of the court are those expressed in writing. What the judge said may be useful to explain the findings but it cannot overcome them, and if contradictory, must be disregarded"].)

decision in *Rodriguez* that the court reweighed the evidence, “the court’s discussion of Rodriguez’s credibility suggests that, in reweighing the evidence, it may have disregarded Rodriguez’s testimony based solely on the ALJ’s credibility finding.” (*Id.* at p. 1454.) There was no suggestion in the trial court’s written ruling in this case that the trial court deferred to the Board’s credibility findings.

Here, the trial court’s Order sets forth the correct standard of review. The trial court’s comments at the hearing do not show that it departed from that standard. Absent any serious question about whether the trial court applied the correct standard of review, we find no basis for reversal.

2. *Substantial Evidence Supports the Trial Court Ruling*

Washington argues that the trial court’s decision denying his writ petition is not supported by the evidence, because he complied with the LAPD policy by calling for emergency medical treatment once he returned to the station. We reject the argument.

In reviewing the trial court’s findings, we apply the substantial evidence standard. (*Rodriguez, supra*, 227 Cal.App.4th at p. 1452; *Wences, supra*, 177 Cal.App.4th at p. 318.) Under that standard, we “ ‘ “resolve all conflicts and indulge all reasonable inferences in favor of the party who prevailed in the trial court.” ’ ” (*Rodriguez*, at p. 1452, quoting *Worthington v. Davi* (2012) 208 Cal.App.4th 263, 277.)

The trial court reasonably found that Washington failed to comply with LAPD policy by delaying in calling for emergency medical care until he had returned to the station and had determined from his own review of the patrol car video that

Famoso's bicycle had made contact with the car. The court correctly recognized that section 210.75 does not give LAPD officers any discretion to determine whether emergency medical treatment is actually necessary once a request is made. As the trial court explained, "because the individual and social costs are so high if an officer wrongly decides that emergency medical treatment is not needed, Department Policy is to err on the side of requesting emergency medical treatment."

By waiting to call for emergency treatment until Washington had made up his own mind that such a call was warranted, Washington substituted his own judgment for section 210.75's requirement that emergency treatment be summoned upon a detainee's request. Washington declined to call for emergency medical treatment when Famoso first requested it. Despite his ultimate decision to call for emergency help once he had returned to the station and reviewed the patrol car video, his initial refusal to do so resulted in a delay in obtaining emergency assistance.³ Such a delay is inconsistent with the clear requirement of section 210.75 that emergency help should be summoned upon request. Substantial evidence therefore supports the trial court's finding that Washington failed to comply with the LAPD policy contained in section 210.75.

³ Washington attempts to minimize the significance of this delay by arguing that significant time had already elapsed between the time of the collision and the time that Famoso requested an ambulance. The argument is illogical. The fact that some delay has already occurred before a detainee or victim requests emergency medical care does not mean that further delay will be harmless.

3. *Section 210.75 Provided Washington with Adequate Notice of its Requirements*

Washington argues that section 210.75 violates due process requirements by: (1) failing to provide adequate notice of what constitutes an emergency; and (2) failing to specify how much time may elapse before an officer calls for emergency assistance. We find no ambiguity in the requirements of the section as applied to the facts of this case.

As Washington acknowledges, a due process challenge to a statute or regulation on grounds of vagueness (other than challenges that raise First Amendment concerns) must be examined “‘in the light of the facts of the case.’” (*Cranston v. City of Richmond* (1985) 40 Cal.3d 755, 764, quoting *United States v. Mazurie* (1975) 419 U.S. 544, 550.) Thus, “‘[one] to whose conduct a statute clearly applies may not successfully challenge it for vagueness.’” (*Cranston*, at p. 764, quoting *Parker v. Levy* (1974) 417 U.S. 733, 756.)

Section 210.75 clearly applied to Washington’s conduct. There was no need for Washington to determine what constitutes an “emergency” under the section because Famoso’s request for an ambulance was clearly a request for “emergency medical treatment.” As the trial court correctly concluded, “Famoso repeatedly stated, ‘I need an ambulance!’ Those statements were clear requests for emergency medical treatment.”

We also reject Washington’s argument that a separate LAPD policy on medical treatment for arrestees creates an ambiguity about what situations constitute an “emergency” under section 210.75. LAPD policy 648.10 (section 648.10) applies to “[a]n officer having custody of an unbooked arrestee who is, or complains of being, ill, injured or in need of

medication.” The policy requires the officer to “[c]ause the arrestee to be examined at a Department Jail Dispensary, a Los Angeles County Medical Center, or a Department contract hospital.” However, section 648.10 states that “[w]hen emergency medical attention is necessary, officers shall be guided by [section 210.75].” Thus, section 648.10 by its terms is intended to apply only to non-emergency situations. It does not explain what constitutes an emergency, but neither does it create any doubt that a request for an ambulance is in fact a request for emergency medical treatment.

The facts of this case also clearly show *when* Washington should have called for emergency medical assistance under the LAPD policy. Section 210.75 requires that officers summon emergency help when *requested*, not when they judge that such help is necessary. Section 210.75 unambiguously states that it is “the responsibility of all Department employees to request a Rescue Ambulance for a suspect, arrestee, or any other person *requesting emergency medical treatment . . .*” (Italics added.) Famoso requested an ambulance. Washington failed to comply with the policy by waiting to reach his own conclusion that emergency medical treatment was necessary rather than calling immediately upon receiving Famoso’s request.

DISPOSITION

The judgment is affirmed. The City is entitled to its costs on appeal.

NOT TO BE PUBLISHED.

LUI, P. J.

We concur:

CHAVEZ, J.

HOFFSTADT, J.