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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SEVEN

BRADLEY BRODY, Plaintiff and Appellant, v. LOS ANGELES COUNTY CIVIL SERVICE COMMISSION et al., Defendants and Respondents; COUNTY OF LOS ANGELES, Real Party in Interest.	B267848 (Los Angeles County Super. Ct. No. BS145037)

APPEAL from a judgment of the Superior Court of Los Angeles County, James C. Chalfant, Judge. Affirmed.

Silver, Hadden, Silver & Levine and Ken Yuwiler for Plaintiff and Appellant.

No appearance for Defendants and Respondents.

Peterson • Bradford • Burkwitz, Avi Burkwitz and Jessica Y. Lee for Real Party in Interest.

INTRODUCTION

Los Angeles County Sheriff's Department Sergeant Bradley Brody appeals from the judgment entered after the trial court denied his petition for writ of mandate and writ of administrative mandamus. Brody's petition challenged the Los Angeles County Civil Service Commission's decision to suspend him for 30 days, without back pay, for his conduct during a meeting with fellow officers. Brody argues the trial court erred in ruling that the statute of limitations in the Public Safety Officers Procedural Bill of Rights Act (Gov. Code, § 3300 et seq.) did not bar the Commission's disciplinary action. We affirm.

FACTUAL AND PROCEDURAL BACKGROUND

A. *The Criminal Investigation of Brody's Conduct*

On August 16, 2009 Brody became upset during a meeting with several subordinate officers and berated them with profanity and threats while pointing and waving his service pistol. On August 20, 2009, having received reports of the incident, the Internal Criminal Investigations Bureau of the Sheriff's Department began to investigate Brody's conduct during the meeting. In December 2009 the Department submitted the results of its investigation to the Los Angeles County District Attorney's Office for review and a decision on whether the District Attorney would initiate criminal proceedings against Brody.

On May 24, 2010 the District Attorney's Office mailed the Sheriff's Department a charge evaluation worksheet stating the District Attorney's Office had completed its review of the

allegations against Brody and was "declin[ing] to initiate criminal proceedings against" him. After summarizing the District Attorney's analysis, the worksheet concluded, "We are closing our file and will take no further action in this matter." Sheriff's Department records indicate the Department received this document on May 27, 2010, and on that day the Department's Internal Criminal Investigations Bureau closed its criminal investigation of Brody.

B. *The Administrative Disciplinary Proceeding*

Upon closing its criminal investigation, the Sheriff's Department began an administrative investigation for possible disciplinary action against Brody. In a letter dated April 27, 2011, the Department eventually informed Brody it intended to discharge him as a result of his conduct on August 16, 2009, and it advised him of his right to respond.

Brody did respond, and the matter proceeded to an eight-day hearing before a Civil Service Commission hearing officer. At the conclusion of the hearing, the hearing officer issued a written decision recommending the Sheriff's Department reduce Brody's discipline to a 60-day suspension. Brody filed objections to that decision with the Commission, arguing, among other things, that testimony during the hearing showed the Sheriff's Department missed the statutory deadline for taking disciplinary action against him. At a hearing in April 2013 the Commission overruled Brody's objections, and in July 2013 the Commission

issued a final decision suspending Brody for 30 days with no back pay.[1]

C. *This Case*

In October 2013 Brody filed a petition for writ of mandate (Code Civ. Proc., § 1085) and for writ of administrative mandamus (*id.*, § 1094.5) against the Commission and the Sheriff's Department, challenging the Commission's decision. The trial court heard Brody's motion for writ of mandate and writ of administrative mandamus in July 2015, with real party in interest County of Los Angeles (the County) opposing.

Brody challenged the Commission's decision on several grounds, but the only one relevant to this appeal is his contention the Sheriff's Department violated the statute of limitations for taking disciplinary action against him. The governing limitations period is set forth in Government Code section 3304,[2] which provides that, before a public agency may discipline a public safety officer for misconduct, the agency must complete its investigation of the misconduct and notify the officer of the proposed discipline within one year of the agency's discovery of the misconduct. (§ 3304, subd. (d)(1); see *Pedro v. City of Los Angeles* (2014) 229 Cal.App.4th 87, 101 [section 3304 "establishes a one-year limitation on investigations of officer misconduct"].) However, section 3304 further provides that, if the misconduct is

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[1] Brody's discharge had become effective July 15, 2011. The "no back pay" provision in the Commission's decision referred to the period during which Brody was discharged.

[2] Undesignated statutory references are to the Government Code.

also the subject of a criminal investigation, "the time during which the criminal investigation . . . is pending shall toll the one-year time period." (§ 3304, subd. (d)(2)(A).)

Brody and the County agreed the Sheriff's Department discovered Brody's misconduct by August 19, 2009, which commenced the one-year limitations period. They also agreed the tolling period began the next day, August 20, when the Department initiated its internal criminal investigation. What Brody and the County disagreed on was when the tolling period ended.

The County argued the tolling period ended on May 27, 2010, the day Sheriff's Department records show the Department received the District Attorney's charge evaluation worksheet and, based on the worksheet's written statement that the District Attorney declined to initiate criminal proceedings, the Department closed its internal criminal investigation of Brody. Thus, according to the County, the Department's April 27, 2011 letter informing Brody of the proposed discipline was timely (i.e., within one year of May 27, 2010).

Brody argued the evidence before the Commission hearing officer established the Sheriff's Department learned of the District Attorney's decision not to file charges against Brody no later than April 5, 2010, and that the tolling of the one-year limitations period therefore ended by at least that date, making the Department's April 27, 2011 notification of proposed discipline untimely (i.e., more than one year after April 5, 2010). Brody relied on three undisputed facts. First, upon initiating its internal criminal investigation, the Department relieved Brody of duty and directed him to remain at home until further notice. Second, when Brody later asked Sheriff's Department Division

Chief Neal Tyler about returning to work in some capacity, Chief Tyler told him he (Tyler) "needed to check with the DA first before he could bring [Brody] back to work."[3] Third, Brody returned to work no later than April 5, 2010.

Brody also cited testimony by Chief Tyler before the hearing officer that, according to Brody, established Chief Tyler allowed Brody to return to work only after learning the District Attorney was not going to file criminal charges. For example, during testimony about Brody's return to work, Chief Tyler was asked whether "that was after the criminal investigation came back," and Chief Tyler responded, "Yes. When the DA documented the decision not to file [criminal] charges in their letter, I made the decision that it was appropriate to have him come back to work in a limited capacity." Chief Tyler gave several reasons for that decision, including the following: "It's better for the employee's morale if we can bring them back, typically. And I knew that we had work to do at any one of several stations that wouldn't necessarily involve carrying a gun and a badge and addressing people and all that sort of stuff. So I determined that, because there was not to be a criminal case, even though I knew there might be a discharge, that it was acceptable to bring him back in the limited capacity." Chief Tyler

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[3] Chief Tyler testified before the hearing officer that he told Brody he (Tyler) would call the District Attorney's Office to find out whether the District Attorney was "actually intently assessing the criminal investigation, so I could give [Brody] some feedback as to when he might be off the hook for criminal consideration." Chief Tyler also testified he and Brody "discussed the possibility of [Brody's] coming back to work . . . after the DA made the decision, if the decision were not to file."

further stated: "[A]t the time that I made the decision to allow him to work in a limited capacity, I did not have facts about the administrative investigation. I generally knew that the case about his possible criminal conduct was out the window, but without the facts that told me for sure that we were looking at a discharge case, I felt that there would be limited risk in bringing him back to work, even though we had the problem with the gun in the briefing."

The trial court ruled the Sheriff's Department's notice of proposed discipline was timely under section 3304. The court rejected Brody's contention that the criminal investigation of his conduct and the tolling period ended by April 5, 2010. Instead, the court found the criminal investigation and tolling period ended May 27, 2010, when the Sheriff's Department received the charge evaluation worksheet from the District Attorney's Office.[4] The court noted two problems with Brody's argument. First, although Brody's return to work on April 5, 2010 was circumstantial evidence that someone in the District Attorney's Office had told Chief Tyler the District Attorney would not be filing criminal charges, that did not mean the District Attorney had at that point decided not to file any charges. As the court put it, "'We're not going to file' is not the same thing as a declination [to file]." Second, the court noted that Chief Tyler's testimony was "inconsistent" in that he said he decided it was appropriate

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[4] Certain statements by the trial court suggest the court found the tolling period ended May 24, 2010, when the District Attorney's Office sent the charge evaluation worksheet to the Sheriff's Department, rather than May 27, 2010, when the Sheriff's Department received the worksheet. This three-day difference is not significant here.

to bring Brody back to work "[w]hen the DA documented the decision not to file [criminal] charges in their letter," but the only letter in the record from the District Attorney's Office was the May 24, 2010 charge evaluation worksheet, and no one disputed Brody returned to work by April 5, 2010. The court concluded the charge evaluation worksheet was the "best evidence" of when the District Attorney made the decision not to file charges.

The trial court denied Brody's petition and entered judgment against him and in favor of the County.[5] Brody timely appealed.

DISCUSSION

Brody contends the trial court erred in ruling the Sheriff's Department issued the notice of discipline within the one-year statute of limitations in section 3304. Specifically, he argues the court erred in finding the criminal investigation of his conduct and tolling of the limitations period concluded on May 27, 2010, when the Department received written notification that the District Attorney declined to file criminal charges against him.

A. *Standard of Review*

"Legal issues involving the interpretation of Government Code section 3304 are reviewed de novo. [Citation.] As to factual

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[5] The trial court's July 21, 2015 minute order states that the court modified and adopted its tentative decision, and denied the petition for writ of mandate. At the end of the hearing, the court stated it was adopting its tentative decision. Neither the minute order nor the tentative decision, however, is in the record on appeal.

issues, 'we determine whether the record provides substantial evidence supporting the trial court's factual findings. [Citation.] Applying the substantial evidence test on appeal, we may not reweigh the evidence, but consider that evidence in the light most favorable to the trial court, indulging in every reasonable inference in favor of the trial court's findings and resolving all conflicts in its favor. [Citations.] The question on appeal is whether the evidence reveals substantial support—contradicted or uncontradicted—for the trial court's conclusion that the weight of the evidence supports the commission's findings of fact. [Citation.] We uphold the trial court's findings unless they so lack evidentiary support that they are unreasonable. We may not uphold a finding based on inherently improbable evidence or evidence that is irrelevant to the issues before us.'" (*Richardson v. City and County of San Francisco* (2013) 214 Cal.App.4th 671, 692 (*Richardson*); accord, *Breslin v. City and County of San Francisco* (2007) 146 Cal.App.4th 1064, 1076-1078 (*Breslin*).)

B. *The Trial Court Did Not Err in Ruling That the Sheriff's Department Complied with the Limitations Period in Section 3304*

Brody's principal contention on appeal, as it was in the trial court, is that Chief Tyler's testimony before the hearing officer established that Chief Tyler allowed Brody to return to work only after learning the District Attorney was not going to file criminal charges. Thus, according to Brody, the criminal investigation of his conduct must have concluded by the time he returned to work on April 5, 2010, and the tolling of the one-year limitations period ended by that date. He also contends the trial court erred in holding that a formal writing from the District Attorney's Office

was required to end the tolling for a criminal investigation. Finally, Brody contends the trial court improperly shifted the burden to him to prove the length of the tolling period.

As Brody acknowledges, a central premise of all his arguments is that the District Attorney's decision not to file criminal charges against him ended the tolling period under section 3304. That premise, however, rests on a misinterpretation of the statute. Section 3304, subdivision (d)(2)(A), provides: "If the act, omission, or other allegation of misconduct is also the subject of a criminal investigation or criminal prosecution, the time during which the criminal investigation or criminal prosecution is pending shall toll the one-year time period." As the court held in *Department of Corrections and Rehabilitation v. State Personnel Board* (2016) 247 Cal.App.4th 700 (*DOCR*), this language "imposes no restriction on who conducts the criminal investigation." (*Id.* at p. 709; see *id.* at pp. 709-711 [tolling under section 3304, subdivision (d)(2)(A), is not limited to investigations by outside, independent investigative entities, but includes the employing agency's internal criminal investigation].) Here, Sheriff's Department records reflect that the Department's Internal Criminal Investigations Bureau opened its criminal investigation of Brody's conduct on August 20, 2009 and did not close that investigation until May 27, 2010, after it received the District Attorney's charge evaluation worksheet. Although the Sheriff's Department cannot initiate a criminal prosecution, nothing in the record suggests that the District Attorney's decision in May 2010 not to prosecute Brody at that time automatically terminated the Sheriff's Department's internal investigation or precluded the Department from subsequently submitting additional evidence to

the District Attorney or other appropriate state or local prosecuting agency for its consideration. Thus, the tolling period under section 3304, subdivision (d)(2)(A), did not end until May 27, 2010, and the Department's April 27, 2011 notification of proposed discipline was timely.

Brody asserts the Department's Internal Criminal Investigations Bureau "closed [its] investigation" when it referred the matter to the District Attorney for a decision. But he cites no evidence for that assertion, and there is none in the record. In fact, Brody's brief makes clear he is not really making a factual argument, but a legal argument that referring a matter to the District Attorney ends the Department's internal investigation. "Otherwise," Brody suggests, "the Department could indefinitely extend the tolling period and defeat the Legislature's intent merely by delaying the [Internal Criminal Investigations Bureau's] closure of an investigation after the District Attorney's decision not to file charges." Brody, however, cites no authority to support this argument, raised for the first time in his reply brief. (Cf. *DOCR*, *supra*, 247 Cal.App.4th at p. 711 [rejecting the argument that tolling under section 3304, subdivision (d)(2)(A), "applies only where the criminal investigation is conducted by an outside, independent investigative entity, because otherwise any agency employing peace officers could avoid the one-year limitations period by simply designating any investigation it conducts as a criminal investigation"].) Because the criminal investigation of Brody's conduct remained open until May 27, 2010, the April 27, 2011 letter informing Brody of the proposed discipline was timely.

Moreover, even assuming, contrary to the record, the District Attorney's decision not to file charges ended the criminal

investigation of Brody's conduct, the trial court found the District Attorney did not make that decision until May 24, 2010. Substantial evidence supports that finding. The May 24, 2010 charge evaluation worksheet states that the District Attorney "declines to initiate criminal proceedings" against Brody and "will take no further action in this matter." That Brody cites conflicting evidence suggesting the District Attorney made the decision not to charge him at a significantly earlier date does not warrant reversal under the substantial evidence standard. (See *Pope v. Babick* (2014) 229 Cal.App.4th 1238, 1245 ["[w]e do not review the evidence to see if there is substantial evidence to support the losing party's version of events, but only to see if substantial evidence exists to support the verdict in favor of the prevailing party"].)

Brody is also incorrect in asserting the trial court ruled that a formal writing from the District Attorney's Office is legally required to end the tolling period for a criminal investigation. It is true that, during the lengthy discussion of the tolling issue at the hearing on the petition, the trial court made some statements during counsel's argument on the petition suggesting that formal written notification from the District Attorney's Office was necessary to end the tolling. For example, at one point the trial court stated, "I really do think that the formal memorandum is required, that [Chief Tyler] can't rely on a conversation with Joe at the DA's office as the end of the criminal investigation."

In the context of the full hearing, this statement does not equate to a ruling that a formal writing from the District Attorney's Office was required to end the tolling period. The court was essentially stating that the formal memorandum from the District Attorney's Office was the strongest evidence of when

that Office decided not to file criminal charges. In fact, the trial court stated, "The case law talks about [what] formal notification [from the District Attorney's Office] is—doesn't say it's required. I agree with that." The court then cited *Richardson*, *supra*, 214 Cal.App.4th 671 to support the court's conclusion that the "best evidence" for determining when the District Attorney made the charging decision was "the decision-maker's memo." (See *id.* at pp. 694-695 [for the purpose of determining when the tolling period for a criminal investigation under section 3304 ended, a memorandum from a department within the public agency stating it was closing its criminal investigation controlled over a later memorandum from a different department stating when the investigation ended].) The trial court also stated the District Attorney's criminal investigation was not closed "in this case" until the District Attorney declined to file charges in May 2010. And, as noted, the trial court referred to the inconsistencies in the testimony by Chief Tyler on which Brody relied. In other words, the trial court weighed conflicting evidence regarding when the District Attorney decided not to file charges, and the court concluded the date of the charge evaluation worksheet was more reliable.[6] We may not reweigh that evidence.

Finally, Brody's contention the trial court improperly shifted the burden of proving tolling under section 3304 is meritless. While there may be some uncertainty in the case law

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[6] It is in this context that the trial court stated, "I don't think informal notice [from the District Attorney's Office to the Sheriff's Department regarding a charging decision] is good enough for the very reason that we have here. We have a dispute over when that informal notice occurred. That's why the charge evaluation worksheet is, in fact, the best evidence of declination."

about which party has that burden (see *Richardson*, *supra*, 214 Cal.App.4th at p. 698 ["[w]e . . . were unable to locate any case law specifically addressing the burden to prove tolling under the Public Safety Officers Procedural Bill of Rights Act"]), we do not need to resolve that uncertainty here. As noted, the court weighed Brody's evidence on the issue against the County's evidence and found the latter more reliable. Even assuming the County had the burden to prove when the tolling period ended, the County met its burden by presenting evidence the trial court found more credible. (See *ibid.* [it did not matter which party had the burden of proving tolling under section 3304 because, even assuming the agency had the burden, it presented substantial evidence to support the trial court's finding on when the criminal investigation ended].)

DISPOSITION

The judgment is affirmed. The County is to recover its costs on appeal.

SEGAL, J.

We concur:

PERLUSS, P. J. SMALL, J.*

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*Judge of the Los Angeles Superior Court, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.