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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

GERARDO DELGADO, Plaintiff and Appellant, v. CITY OF RIVERSIDE et al., Defendants and Respondents.	E049898 (Super.Ct.No. RIC461445) **OPINION**

APPEAL from the Superior Court of Riverside County. Mac R. Fisher, Judge. Affirmed.

Law Offices of Gregory A. Yates, Gregory A. Yates and Michael P. Shubeck for Plaintiff and Appellant.

Lewis Brisbois Bisgaard & Smith, John M. Porter; Gregory P. Priamos, City Attorney, James E. Brown, Supervising Deputy City Attorney; Greines, Martin, Stein & Richland, Timothy T. Coates and Alana H. Rotter for Defendants and Respondents.

Plaintiff Gerardo Delgado was shot by police officers who were attempting to arrest him. Allegedly, he was left a paraplegic. According to the officers, Delgado was holding a gun; according to Delgado himself, however, he was holding only a cell phone.

In a criminal trial, a jury found Delgado guilty of — among other things — resisting an officer. (Pen. Code, § 148, subd. (a)(1).) Delgado then filed this action for violation of his civil rights (42 U.S.C. § 1983), claiming that the officers used excessive force. The trial court granted the defendants' motion for summary judgment. It ruled that, because one of the elements of the crime of resisting an officer is that the officer must have been acting lawfully, the criminal conviction barred this action.

Delgado appeals. He argues that a criminal conviction for resisting an officer does not bar a federal civil rights action that is based on the use of *deadly* force. He further argues that the criminal jury was not instructed on the specific constitutional standard for determining whether the use of *deadly* force is reasonable, and hence its verdict cannot bar this action. We disagree on both points. Thus, we will affirm.

I

FACTUAL BACKGROUND

A. *The Officers' Testimony*.

The following facts are stated in accordance with the officers' testimony at Delgado's criminal trial.

In December 2004, Delgado got into an argument with his ex-girlfriend. As a result, seven Riverside police officers went to his house to arrest him. Four of the

officers (William McCoy, Denny Corbett, Mark Ellis, and Bruce Blomdahl) went up to the front door. The other three (Philip Neglia, Kenneth Madsen, and Marc Dehdashtian) went around to the back of the house.

McCoy knocked on the door and announced, "[I]t's Riverside police." He asked Delgado to come to the door. Delgado did not comply. McCoy therefore used the ex-girlfriend's key to open the door.

The three officers at the front door saw Delgado standing across the room. He was pointing a handgun at them. Corbett told him, "Drop the gun." Instead, he moved behind a wall, while continuing to point the gun at the officers. McCoy and Corbett then fired roughly eight to ten shots at him.

Delgado moved toward the back door; the gun was still in his hand. McCoy and Ellis fired about five more shots.

Delgado went out to the backyard for a moment, but he stumbled, then ran back inside, still holding the gun. McCoy, Corbett, and Ellis fired at least five more shots. Delgado was hit; he fell to the ground. The officers then entered the house and handcuffed him.

Blomdahl (at the front door) and Neglia, Madsen, and Dehdashtian (in the back yard) never fired.

B. *Delgado's Testimony*.

Delgado did not testify in the criminal trial. In opposition to the motion for summary judgment, however, he testified as follows.

Delgado heard the officers knock on the door and yell, "[P]olice." He wanted to let his daughter know what was happening, so he said, "[H]old on," and started to call her on his cell phone. The officers, however, did not wait for him to come to the door. Instead, they "immediately knocked down the door and charged into the room."

Delgado was not holding a gun. The only object in his hands was the cell phone. There was an unloaded BB gun in the room, but it was on a living room chair, out of his reach. Nevertheless, the officers immediately began shooting at him. Delgado ran and hid behind the refrigerator. As they kept shooting, he ran to the backyard. There were several officers there; he yelled to them, "I don't have a gun!" He then ran back in the house, where he was shot.

The officers found the cell phone in the backyard. The only gun they found was the BB gun.

C. *The Criminal Trial*.

Delgado was charged with several criminal offenses, including three counts of resisting an executive officer (Pen. Code, § 69) — one each as to McCoy, Corbett, and Ellis. On these counts, the jury was also instructed on resisting an officer (Pen. Code, § 148, subd. (a)(1)), as a lesser included offense.

Delgado's defense counsel argued that Delgado was not guilty of the greater offense of resisting an executive officer, which required force or violence, because he was not holding a gun and because he did not fire a gun. He also argued that the officers used unreasonable or excessive force — "[Y]ou have to decide whether or not they

should have shot 22 times . . . . [Y]ou have to decide whether or not 22 shots at this point, at this guy holding a cell phone or a gun, is reasonable."

The jury was instructed that it could not find Delgado guilty of the greater or the lesser offense unless Ellis, Corbett, and McCoy were lawfully performing their duties. (Judicial Council of Cal. Crim. Jury Instns., CALCRIM No. 2652 [re: Pen. Code, § 69], No. 2656 [re: Pen. Code, § 148].) It was further instructed that an officer is not lawfully performing his or her duties if he or she is "using unreasonable or excessive force . . . ."

The jury was not specifically instructed that an officer can use *deadly* force only against a suspect who poses an immediate threat of death or serious physical harm to others.

The jury acquitted Delgado of the greater offense but found him guilty of the lesser offense. He did not appeal.

II

PROCEDURAL BACKGROUND

Delgado filed this action in December 2006. The complaint, as subsequently amended, named as defendants the City of Riverside (the City), Chief Russ Leach (the Chief), and the seven individual officers. It asserted a single cause of action for violation of federal civil rights under title 42 United States Code section 1983 (section 1983). With respect to the officers, it alleged that they used deadly force, which was excessive and unreasonable. With respect to the City and the Chief, it alleged that they inadequately trained and supervised officers in their employ.

Defendants brought a motion for summary judgment, arguing that, under *Heck v. Humphrey* (1994) 512 U.S. 477 [114 S.Ct. 2364, 129 L.Ed.2d 383], Delgado's criminal convictions for resisting an officer barred his section 1983 action. The trial court granted the motion. Accordingly, it entered judgment against Delgado and in favor of defendants.

III

DISCUSSION

Our analysis must begin with the leading United States Supreme Court case, *Heck v. Humphrey*, *supra*, 512 U.S. 477, and the leading California Supreme Court case applying *Heck*, *Yount v. City of Sacramento* (2008) 43 Cal.4th 885.

A. *Heck v. Humphrey*.

In *Heck*, the United States Supreme Court held that "in order to recover damages for allegedly unconstitutional conviction or imprisonment, or for other harm caused by actions whose unlawfulness would render a conviction or sentence invalid, a § 1983 plaintiff must prove that the conviction or sentence has been reversed on direct appeal, expunged by executive order, declared invalid by a state tribunal authorized to make such determination, or called into question by a federal court's issuance of a writ of habeas corpus [citation]. A claim for damages bearing that relationship to a conviction or sentence that has *not* been so invalidated is not cognizable under § 1983." (*Heck v. Humphrey*, *supra*, 512 U.S. at pp. 486-487, fn. omitted.)

The test is "whether a judgment in favor of the plaintiff would necessarily imply the invalidity of his conviction or sentence; if it would, the complaint must be dismissed

. . . . But if . . . the plaintiff's action, even if successful, will *not* demonstrate the invalidity of any outstanding criminal judgment against the plaintiff, the action should be allowed to proceed . . . ." (*Heck v. Humphrey*, *supra*, 512 U.S. at p. 487, fn. omitted.)

The court explained that, due to "concerns for finality and consistency" (*Heck v. Humphrey*, *supra*, 512 U.S. at p. 485), "civil tort actions are not appropriate vehicles for challenging the validity of outstanding criminal judgments . . . ." (*Id*. at p. 486.)

B. *Yount v. City of Sacramento*.

In California, the crime of resisting an officer is committed by "willfully resist[ing], delay[ing], or obstruct[ing] any public officer, peace officer, or an emergency medical technician . . . *in the discharge or attempt to discharge any duty of his or her office or employment* . . . ." (Pen. Code, § 148, subd. (a)(1), italics added.)

"[I]t is . . . a 'well-established rule that when a statute makes it a crime to commit any act against a peace officer engaged in the performance of his or her duties, part of the corpus delicti of the offense is that the officer was acting lawfully at the time the offense was committed.' [Citations.]" (*People v. Cruz* (2008) 44 Cal.4th 636, 673.) Hence, "the lawfulness of an arrest is an essential element of the offense of resisting or obstructing a peace officer. [Citation.] . . . '[E]xcessive force by a police officer . . . is not within the performance of the officer's duty.' [Citations.]" (*Susag v. City of Lake Forest* (2002) 94 Cal.App.4th 1401, 1409.)

In *Yount*, our Supreme Court therefore considered whether, under *Heck*, a conviction for resisting an officer barred a subsequent section 1983 claim based on excessive force.

Plaintiff Steven Yount was arrested, handcuffed, and placed in a patrol car. He resisted; initially, he refused to get into the car, and then he banged and kicked it. (*Yount v. City of Sacramento*, *supra*, 43 Cal.4th at pp. 889-890.) Other officers arrived to assist, including Officer Thomas Shrum. They removed Yount from the car so they could apply an ankle restraint. (*Id*. at p. 890.) His resistance not only continued, but escalated. (*Id*. at pp. 890-891.) He was trying to bite, kick, and spit at the officers. Officer Shrum therefore decided to taser him. By mistake, however, Officer Shrum pulled his gun instead of his taser and shot Yount. Later, Yount pleaded guilty to one count of resisting an officer. (*Id*. at p. 891.) He then sued Officer Shrum under section 1983, alleging excessive force. (*Yount,* at pp. 891-892.)

The Supreme Court held: " . . . Yount's claims are barred to the extent they allege that Officer Shrum was not entitled to use force *at all* in this incident. Yount's resistance justified the officers' use of reasonable force in response. [Citation.] However, as defendants concede, the use of *deadly* force was not reasonable in this instance. Yount's conviction for violating Penal Code section 148, subdivision (a)(1) did not in itself justify the use of deadly force, either. Accordingly, Yount's civil claims are not barred to the extent they challenge Officer Shrum's use of deadly force." (*Yount v. City of Sacramento*, *supra*, 43 Cal.4th at p. 889.)

Yount noted that he had engaged in multiple acts of resistance. He argued that, because his conviction for resisting an officer could have been based on one of the acts that occurred well before he was shot, a judgment under section 1983 that the shooting constituted excessive force would not necessarily be inconsistent with his conviction for resisting an officer. (*Yount v. City of Sacramento*, *supra*, 43 Cal.4th at p. 896.) Our Supreme Court disagreed: ". . . Yount's conviction established his culpability during the entire episode with the four officers, and any civil rights claim that is inconsistent with even a portion of that conviction is barred because it would necessarily imply the invalidity of that part of the conviction. [Citation.] Otherwise, a section 1983 plaintiff could routinely circumvent the *Heck* bar through artful pleading — e.g., by filing suit against fewer than all of the potential defendants or by defining the civil cause of action to encompass fewer than all of the criminal acts of resistance . . . ." (*Ibid.*)

". . . Yount was kicking, spitting, and refusing to cooperate with the officers just prior to the shooting. Under those circumstances, Officer Shrum was justified in responding with reasonable force. [Citations.] Hence, to the extent that Yount's section 1983 claim alleges that he offered no resistance, that he posed no reasonable threat of obstruction to the officers, and that the officers had no justification to employ *any* force against him at the time he was shot, the claim is inconsistent with his conviction for resisting the officers and is barred under *Heck*. [Citations.]" (*Yount v. City of Sacramento*, *supra*, 43 Cal.4th at p. 898.)

"However, to the extent Yount's section 1983 claim alleges simply that Officer Shrum's use of *deadly* force was an unjustified and excessive response to Yount's resistance, the claim is not barred. As defendants have conceded, the record . . . did not support the use of deadly force against Yount, nor did the criminal conviction in itself establish a justification for the use of deadly force. [Citations.] A claim alleging that Officer Shrum's use of deadly force was not a reasonable response to Yount's criminal acts of resistance does not 'implicitly question the validity of [his] conviction' for resisting the officers in this instance [citation] and thus is not barred by *Heck*. [Citations.]" (*Yount v. City of Sacramento*, *supra*, 43 Cal.4th at pp. 898-899, fn. omitted.)

"The use of deadly force in this situation . . . requires a separate analysis. 'For example, a defendant might resist a lawful arrest, to which the arresting officers might respond with excessive force to subdue him. The subsequent use of excessive force would not negate the lawfulness of the initial arrest attempt, or negate the unlawfulness of the criminal defendant's attempt to resist it. Though occurring in one continuous chain of events, two isolated factual contexts would exist, the first giving rise to criminal liability on the part of the criminal defendant, and the second giving rise to civil liability on the part of the arresting officer.' [Citations.]" (*Yount v. City of Sacramento*, *supra*, 43 Cal.4th at p. 899.)

C. *Application to These Facts.*

As the United States Supreme Court has famously observed, "'[D]eath is different.'" (*Ring v. Arizona* (2002) 536 U.S. 584, 606 [122 S.Ct. 2428, 153 L.Ed.2d

556].) Delgado's argument, basically, is that *deadly force* is different. In other words, he argues that what was critical in *Yount* was that the officer there used deadly force; thus, because the officers here likewise used deadly force, his convictions for resisting an officer likewise do not bar a section 1983 action. We disagree.

As Delgado reads *Yount*, a conviction for resisting an officer necessarily includes a determination that any force the officer used was reasonable; however, it does not necessarily include a determination that any *deadly* force the officer used was reasonable. As he concedes, however, this reading is "anomalous" (at least "at first glance"). How can an officer simultaneously be using force reasonably, yet using deadly force unreasonably? Delgado argues that this follows from the fact that nondeadly force need only be reasonable, whereas deadly force specifically may not be used unless "the officer has probable cause to believe that the suspect poses a significant threat of death or serious physical injury to . . . others." (*Tennessee v. Garner* (1985) 471 U.S. 1, 3 [105 S.Ct. 1694, 85 L.Ed.2d 1].) This specific standard for deadly force, however, "was simply an application of the Fourth Amendment's 'reasonableness' test, [citation], to the use of a particular type of force in a particular situation." (*Scott v. Harris* (2007) 550 U.S. 372, 382 [127 S.Ct. 1769, 167 L.Ed.2d 686]; see also *Garner*, at p. 11.) Thus, an officer who is using deadly force unreasonably cannot possibly be lawfully exercising his or her duties within the meaning of Penal Code section 148, subdivision (a)(1).

What was *actually* critical in *Yount* was that there, the officers used less than deadly force *before* they used deadly force. For this reason, the court held that the overall

event had to be split into "'two isolated factual contexts . . . , the first giving rise to criminal liability on the part of the criminal defendant, and the second giving rise to civil liability on the part of the arresting officer.' [Citations.]" (*Yount v. City of Sacramento*, *supra*, 43 Cal.4th at p. 899.) Here, by contrast, the *only* force that the officers used was deadly force. Thus, unlike in *Yount*, the criminal conviction *necessarily* determined that the officers' use of *deadly* force was reasonable.

We can be sure that *Yount* turned on timing because it gave an example that emphasized the sequence of events: "'[A] defendant might resist a lawful arrest, to which the arresting officers might respond with excessive force to subdue him. The *subsequent* use of excessive force would not negate the lawfulness of the *initial* arrest attempt, or negate the unlawfulness of the criminal defendant's attempt to resist it.'" (*Yount v. City of Sacramento*, *supra*, 43 Cal.4th at p. 899, italics added.) Significantly, this example did not involve *deadly* force at all.

Moreover, *Yount* gave a "cf." cite to *Susag v. City of Lake Forest, supra,* 94 Cal.App.4th 1401. It explained that *Susag* had "appl[ied] the *Heck* bar where the plaintiff 'alleged no claims of excessive force that took place *after* he was finally subdued and placed in the patrol car[.]'" (*Yount v. City of Sacramento*, *supra*, 43 Cal.4th at p. 899, italics added.) *Yount* did *not* distinguish *Susag* on the ground that *Susag* did not involve deadly force.

Finally, the court also explained: "Defendants' broad invocation of the *Heck* bar to eliminate Yount's claims in their entirety would also severely diminish the protections

available to those subject to arrest. '[I]t would imply that once a person resists law enforcement, he has invited the police to inflict any reaction or retribution they choose, while forfeiting the right to sue for damages. Put another way, police subduing a suspect could use as much force as they wanted — and be shielded from accountability under civil law — as long as the prosecutor could get the plaintiff convicted on a charge of resisting.' [Citation.]" (*Yount v. City of Sacramento*, *supra*, 43 Cal.4th at p. 900.) Yet again, this reasoning turns on the *timing* of the officer's use of force; it does not turn on whether an officer uses *deadly* force.

D. *Failure to Instruct the Jury on the Constitutional Standard for the Use of Deadly Force*.

As Delgado points out, in his criminal trial, the jury was not instructed on the "specific constitutional standard" for the use of deadly force — i.e., that the officer must have probable cause to believe that the suspect poses a significant threat of death or serious physical injury to others. (Italics omitted.) He concludes that his section 1983 action is not *necessarily* premised on the invalidity of the conviction.

In our view, this amounts to an impermissible collateral attack on the criminal conviction, on grounds of instructional error. Instructional error would have been a basis for reversal on a direct appeal. Under *Heck*, however, a criminal conviction has preclusive effect unless and until it is actually set aside, on direct appeal or otherwise. Delgado filed no such appeal.

Heck was intended to foster the finality and consistency of judgments. Regardless of whether the jury was properly instructed, Delgado's convictions necessarily determined that all of the elements of the crime of resisting an officer were present. This would include that the officers were acting lawfully in every respect, which in turn would include that they were not engaged in the unconstitutional use of deadly force. Any claim to the contrary — *especially* one based on the absence of a necessary jury instruction — calls into question the validity of the conviction. That is what *Heck* forbids.

Delgado also argues that, because the jury acquitted him of the greater offense of resisting an executive officer, it must have found that he was unarmed. This is not necessarily true. For example, the greater offense requires the specific intent to interfere with the officer's performance of his duties; the lesser does not. (*People v. MacKenzie* (1995) 34 Cal.App.4th 1256, 1280; compare *People v. Gutierrez* (2002) 28 Cal.4th 1083, 1153-1154 [resisting an executive officer is a specific intent crime] with *In re Muhammed C*. (2002) 95 Cal.App.4th 1325, 1329 [resisting an officer is a general intent crime].) The jury may simply have had a reasonable doubt as to whether Delgado acted with the necessary specific intent.

Even if the jury did find that Delgado was unarmed, it could still properly find that the officers were entitled to use deadly force. As already noted, the constitutional standard for an officer's use of deadly force turns on what the officer has probable cause to believe — not on what is actually true. Here, even if Delgado was actually holding a

cell phone, the officers could properly use deadly force, as long as they reasonably believed that he was holding a gun.

The bottom line, however, is that it simply does not matter what the jury actually found. Its verdicts declaring Delgado guilty of resisting the officers legally established that the officers were entitled to use deadly force. Therefore, Delgado cannot bring a section 1983 action claiming the opposite.

IV

DISPOSITION

The judgment is affirmed. Defendants are awarded costs on appeal against Delgado.

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RICHLI
J.

We concur:

RAMIREZ
P.J.

KING
J.