

MAN CONVICTED OF DISTURBING THE PEACE ALLOWED TO SUE OFFICERS FOR USING EXCESSIVE FORCE

Kon v. City of Los Angeles, B290929

Court of Appeal, Second Appellate District

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In this case, the Court of Appeal had to decide whether a person can sue police in civil court for excessive force *after* he had been convicted in criminal court. Specifically, after interacting with an officer, a man was convicted of an infraction: disturbing the peace. Notwithstanding this conviction, the Court held the man *could* then sue the officer for using excessive force, because the conviction *did not establish the officer had used only reasonable force* during the episode.

Facts:

A limousine driver (Kon) drove into a parking lot at the Los Angeles International Airport. Officer Andrews, on a motorcycle, pulled in behind him. Kon and Andrews disagree about what happened next.

Kon says he got out of his vehicle holding a phone and a sign with a customer's name when Andrews aggressively approached and accused him of speeding, which Kon denied. Andrews returned to his motorcycle. Kon answered a call from his customer, but Andrews ran back and tackled him. According to Kon, he was down on the ground when Andrews put his knee into Kon's back, then hit and handcuffed him. Paramedics took Kon to a hospital.

Andrews says he saw Kon speeding in the parking lot. He contacted Kon and asked for his driver's license, insurance

and registration several times, but Kon refused to provide those documents to him. Kon approached Andrews. Andrews told Kon to step back and to put his cell phone down so he could handcuff him. He took hold of Kon, who then pulled away and resisted. Andrews was eventually able to place Kon into handcuffs and subdue him.

Prosecutors charged Kon with a violation Penal Code §148 (a)(1), [resisting, delaying, or obstructing an officer in the performance of the officer's duties]. Kon pleaded not guilty. On the prosecutor's motion, the court changed the charge from misdemeanor resisting arrest, to the infraction of disturbing the peace. Kon then withdrew his plea of not guilty and pleaded no contest to disturbing the peace in violation of Penal Code §415. The court accepted the plea and imposed a \$100 fine.

Kon filed a civil complaint for excessive force against Andrews and the City of Los Angeles. The City (and Andrews) moved for summary judgment. Just before trial, the judge dismissed Kon's complaint and entered judgment in favor of the City (and Andrews). Although Kon's Penal Code §148 charge for resisting arrest had been dismissed, and had never been more than a mere allegation, the trial court ruled this allegation barred Kon's civil action.

The governing case is *Yount v. City of Sacramento* (2008) 43 Cal.4th 885. In that case, an inebriated Steven Yount was placed in a patrol car. The drunken Yount kicked out a window, cursed, spit and tried to bite a team of officers. One officer decided to deploy a Taser, but mistakenly grabbed his pistol and shot Yount, who survived. Yount pleaded no contest to resisting arrest in violation of Penal Code §148 (a)(1). He then sued the police for use of excessive force. On appeal, the California Supreme Court determined Yount's conviction for resisting arrest did not bar his civil claims alleging excessive force, even though the civil suit concerned the same episode as the criminal case.

The court in *Yount* fully acknowledged the importance of blocking relitigation of settled matters, for two important reasons. If past litigation settled a question, it is inefficient

to relitigate it. This concern is for finality. And relitigation can create conflicting answers to the same question. This concern is for consistency. Concerns for finality and consistency mean California courts bar repetitive lawsuits unless the second litigation is **not** repetitive. When the second case raises a question different from what the first litigation settled, courts permit the second suit because there is no inconsistency between the two. That was Yount's situation - Yount's criminal conviction for resisting arrest did not establish the police were right to use deadly force against him. Yount had struggled, but officers never feared for their lives.

The analysis in *Yount* applied in this case. The civil lawsuit brought by Kon is about whether Andrews used force that was reasonable or excessive, which is an issue the criminal case did not address or resolve. Kon's conviction for disturbing the peace did not establish Andrews used only reasonable force against him. How an individual acts and how police respond are two different issues. The criminal case was about the former. The civil case is about the latter. That is, fighting or challenging someone to fight does not entitle the officer to respond with excessive force. Whether the force used by Andrews was reasonable remained unresolved. Since that question is the one Kon's civil suit seeks to answer, the Court held it may proceed.

Two things come to mind when writing about this case. First, this case is an example of *why* it is important to activate a body camera when engaging a suspect. If Andrews had a body camera that captured his use of force against Kon, then it is likely his motion for summary judgment would have been granted. In *Scott v. Harris*, 550 U.S. 372 (2007), the Supreme Court granted summary judgment in an excessive-force case brought by a motorist injured when a pursuing officer terminated a high-speed pursuit by bumping the plaintiff's car. The Court relied almost exclusively on a video of the chase captured from the officer's dash-mounted camera and disregarded witness testimony that contradicted the video.

The second, is that prosecuting attorneys do not believe it is part of their role to protect officers from civil lawsuits, so they will not establish the necessary facts in a criminal case for the purpose of doing so. Therefore, it is a valuable benefit in instances where your Association offers insurance coverage for legal representation in civil actions arising from the course and scope of your employment. In today's climate, it is necessary to protect yourself from such claims and not rely solely upon the employing agency to do so.

Stay Safe and Healthy!

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