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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(Plumas)

THE PEOPLE, Plaintiff and Respondent, v. MATTHEW ETHAN BURDYSHAW, Defendant and Appellant.	C043592 (Super. Ct. No. 02-28877)

Matthew Ethan Burdyshaw (defendant) was convicted of resisting the actions of an executive officer (Pen. Code, § 69 -- count III)[1] following denial of his suppression motion and his subsequent plea of no contest. As part of a negotiated plea involving the dismissal of new offenses, defendant was sentenced to 16 months in state prison. Defendant appeals, and argues the trial court erred in denying his suppression motion since the sheriff's deputies had no authority to enter his residence to

[1] Undesignated statutory references are to the Penal Code.

arrest him. For the reasons stated below, we shall conclude the motion was properly denied and affirm the judgment because defendant's wife had authorized the arrest as well as consented to the arresting deputies' entry into the marital residence to effect it.

FACTUAL AND PROCEDURAL BACKGROUND

At the preliminary examination, Jeremy Beatley, a deputy sheriff with the Plumas County Sheriff's Department, testified he was in uniform and on duty on June 21, 2002, shortly after 9:00 p.m., when he received a call from dispatch concerning a domestic dispute in Quincy. Defendant's wife, Cheryl (wife), had called the sheriff's department from a neighbor's residence and claimed to have been involved in a domestic dispute with defendant, who had locked her out of the residence she shared with defendant (the marital residence). Beatley, who was assisted by two other deputies, met wife as she exited the trailer home that was directly adjacent to the marital residence, which also was a trailer home. Wife, who was dressed in what appeared to be pajamas, told Deputy Beatley that she and defendant had been arguing, that defendant shoved her several times, pushed her out the door of the marital residence, and locked it. Beatley did not see any bruises on wife, but he did establish that defendant and wife were married and lived together at the marital residence. Wife asked Beatley to assist her in regaining entry into the marital residence. Wife handed Beatley a set of "old keys" and asked Beatley to try them, but

stated that they might not work. Beatley tried without success to open the door to the marital residence with the keys. The victim then requested that the deputies take "whatever means necessary" to effect entry to the residence, and to arrest defendant for battery.

Deputy Beatley knocked on the front door for several minutes, announced who he was and that he worked for the sheriff's department. In the absence of a response, the deputies knocked down the front door and entered the marital residence. Beatley walked down the hallway and approached the master bedroom. According to Beatley, just before reaching the master bedroom, defendant "threatened to shoot the first cop that walked through the doorway." Defendant brandished a rifle, but eventually relented and put it down, whereupon he was arrested.

In addition to the foregoing testimony, the People submitted into evidence a form, signed by wife, authorizing the deputies to arrest defendant for battery. (§ 243, subd. (e)(1).)

Defendant was held to answer and charged by information with exhibition of a firearm with the intent to resist a peace officer (§ 417.8 -- count I), exhibition of a firearm in a threatening manner in the presence of a peace officer engaged in official duties (§ 417, subd. (c) -- count II), resistance to the actions of an executive officer (§ 69 -- count III), and

misdemeanor use of force or violence on a cohabitant (§ 243, subd. (e)(1) -- count IV).

Defendant filed a motion to suppress as a result of the allegedly unlawful entry into his residence. The court conducted an evidentiary hearing, at which defendant called wife, their next-door neighbor, defendant's mother (whom wife had telephoned during the lockout), and the sheriff's department dispatcher who had responded to wife's telephone calls. Aside from the dispatcher, the witnesses downplayed the severity of the incident and tended to support defendant's position that wife had neither authorized defendant's arrest nor entry into the marital residence.

DISCUSSION

Defendant argues that his motion to suppress should have been granted because the deputies had no authority to enter the marital residence to arrest him.

The standard of review on appeal following denial of a motion to suppress such as the one before us is well settled. We defer to the trial court's findings of fact if supported by substantial evidence, but employ our independent judgment as to the constitutional reasonableness of the search. (*People v. Miranda* (1993) 17 Cal.App.4th 917, 922, citing *People v. Williams* (1988) 45 Cal.3d 1268, 1301.)

In California, the validity of a search incident to arrest is determined by federal law. (*People v. Gutierrez* (1984) 163

Cal.App.3d 332, 334.) A search incident to a lawful arrest is an exception to the Fourth Amendment's warrant requirement, and is presumed reasonable. (*United States v. Robinson* (1973) 414 U.S. 218, 235 [38 L.Ed.2d 427, 440-441]; *Gustafson v. Florida* (1973) 414 U.S. 260, 263-264 [38 L.Ed.2d 456, 460].) On the other hand, a search conducted following an illegal arrest is "'inextricably bound up with the illegal conduct and cannot be segregated therefrom.'" (*People v. Lawler* (1973) 9 Cal.3d 156, 163, quoting *People v. Haven* (1963) 59 Cal.2d 713, 719.) The legality of an arrest depends on the existence of probable cause to make the arrest. "Probable cause" requires only a "substantial basis" or "fair probability" of criminal conduct, based on the totality of the circumstances. (*Illinois v. Gates* (1983) 462 U.S. 213, 238-239, 243, fn. 13 [76 L.Ed.2d 527, 548, 552].)

A private person may make an arrest for a misdemeanor committed in his or her presence (§§ 834, 837),[2] and may summon as many persons as necessary to assist with the arrest (§ 839).[3]

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[2] Section 834 provides: "An arrest is taking a person into custody, in a case and in the manner authorized by law. An arrest may be made by a peace officer or by a private person."

Section 837 provides: "A private person may arrest another: [¶] 1. For a public offense committed or attempted in his presence. [¶] 2. When the person arrested has committed a felony, although not in his presence. [¶] 3. When a felony has been in fact committed, and he has reasonable cause for believing the person arrested to have committed it."

[3] Section 839 provides: "Any person making an arrest may orally summon as many persons as he deems necessary to aid him therein."

"Common sense and the case law both agree that the private citizen effecting an arrest may summon the police to his aid. [Citations.] There is no requirement that the citizen keep the offender within view throughout the time intervening between observation of the offense and arrest." (*Green v. Department of Motor Vehicles* (1977) 68 Cal.App.3d 536, 541.)

"[I]n order to validate a police officer's arrest as a citizen's arrest, there must be some evidence to the effect that the citizen requested the police officer to perform the physical act of taking the suspect into custody. [Citation.] The citizen's request need not, however, be express, but may be implied by the citizen's conduct in summoning police, reporting the offense and pointing out the offender." (*People v. Johnson* (1981) 123 Cal.App.3d 495, 499.)

In the present case, wife summoned the deputies to assist her with the arrest of defendant, whom she alleged had committed a battery upon her. Defendant does not dispute that the circumstances provided probable cause to believe that defendant had committed a battery upon the wife. Therefore, wife could properly delegate to the deputies the authority to arrest defendant for battery, even though it was a misdemeanor.

While conceding the deputies' authority to arrest defendant, defendant argues that they did not have authority to enter the marital residence to effect the misdemeanor arrest, nor did exigent circumstances permit the deputies, acting on their own authority, to enter the marital residence. We need

reach these issues only in the absence of another basis for entry into the marital residence. As we shall explain, such a basis existed by virtue of wife's consent to the deputies' entry therein to effect the arrest.

"The question whether consent was given by the victim is one of fact. . . . However, whether such consent was effective to authorize entry to arrest is a question of law on which we exercise independent judgment. [Citation.] [¶] '[W]here premises are occupied by more than one person, a search of the portion of the premises jointly possessed is reasonable if consent has been granted by one of the joint occupants who is present at the time of the search. . . . The joint occupant who is present may consent to an entry and search although the person whose property is seized and who also has joint control of the premises is not asked for his consent . . . or is not present.'" (*People v. Wilkins* (1993) 14 Cal.App.4th 761, 772-773.)

According to Deputy Beatley, wife told him to take "whatever means necessary" to enter the marital residence to arrest defendant. In defendant's view, wife's consent was ineffectual because the deputies were aware of no facts from which they could reasonably conclude that wife had any authority to consent to entry of the residence. Although she claimed to have such authority, the keys she handed to Beatley did not work, and the deputies had not undertaken any independent investigation (such as contacting the trailer park manager or

examining the contents of wife's purse) to see if she had a right to enter the marital residence. Defendant proposes that if the situation were reversed, and defendant had called for assistance to regain entry, and handed the deputies inoperable keys, no reasonable peace officer would have knocked down the door to the marital residence.

This argument fails to account for all of the circumstances upon which the deputies concluded that wife had authority to consent to entry into the marital residence. The deputies were dispatched to the marital residence in response to wife's call to the sheriff's department, in which she claimed to have been struck by defendant and locked out of the marital residence. Wife stated she was calling from a neighbor's residence, from which she emerged when Deputy Beatley arrived. It was after 9:00 p.m., and wife was wearing what appeared to be pajamas. The circumstances were consistent with the information communicated to the dispatcher, and which in turn had been communicated to Beatley. When the deputies informed wife they would kick down the front door, she asked that they first try a set of old keys, even though they might not work. Her response was consistent with that of a property owner or tenant seeking to avoid damages to her residence. When the keys didn't work, the deputies knocked repeatedly on the front door, without response, which was consistent with an occupant who wished to avoid direct confrontation with authority. When the deputies asked wife what she wanted to do, she requested that they take

whatever means necessary to effect entry. At that point, Deputy Beatley had to make a determination regarding wife's authority to consent to entry. On the one hand, the circumstances presented were consistent with wife's version of the facts, and with the conclusion that she had authority to authorize entry. For Deputy Beatley to have concluded that wife did *not* have authority to consent, he would have had to assume that wife was either estranged from defendant, defendant's neighbor, or a friend of defendant's neighbor (since wife walked out of the neighbor's residence), who had dressed in pajamas and waited until darkness to submit a false report of domestic violence (via the telephone calls to the sheriff's department), in order to gain entry into the marital residence, for some unknown purpose, while being observed by sheriff's deputies. Merely to describe the alternative scenario reveals its improbability. (*People v. Bishop* (1996) 44 Cal.App.4th 220, 237 [wife's consent to search marital residence upheld even though she had moved out and husband had changed the locks].) In these circumstances, the deputies could reasonably conclude that wife had authorized the arrest of defendant and entry into the marital residence to effect the same. Once probable cause existed, the deputies were under no duty to conduct a further investigation. (*Hamilton v. City of San Diego* (1990) 217 Cal.App.3d 838, 845 ["Where, as here, probable cause to arrest has been established we are not aware of any authority which suggests police officers must conduct some additional investigation before incarcerating a

suspect”].) It follows that defendant’s motion to suppress was properly denied.

DISPOSITION

The judgment is affirmed.

BUTZ, J.

We concur:

DAVIS, Acting P. J.

ROBIE, J.