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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FOUR

THE PEOPLE,

Plaintiff and Respondent,

v.

BENITO ACUNA,

Defendant and Appellant.

B279515

(Los Angeles County
Super. Ct. No. VA104941)

APPEAL from a judgment of the Superior Court of Los Angeles County, Philip Hickok, Judge. Conditionally reversed and remanded to the trial court with instructions.

Tracy J. Dressner, under appointment by the Court of Appeal, for Defendant and Appellant.

Xavier Becerra, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Lance E. Winters, Assistant Attorney General, Michael C. Keller and Scott A. Taryle, Deputy Attorneys General, for Plaintiff and Respondent.

Benito Acuna appealed from a judgment entered upon his jury conviction of gang-related first-degree murder in *People v. Acuna* (June 15, 2011, B223744) [nonpub.opn.]. This court remanded the matter for a new *Pitchess*¹ hearing to determine whether material information had been omitted in the initial *Pitchess* review conducted by the trial court. Following remand, a second *Pitchess* hearing was held and the trial court made no new disclosures. Appellant asks that we independently review the sealed transcript of the second *Pitchess* hearing to determine whether material information was omitted. We conclude that material, discoverable information was omitted and remand for its disclosure and further proceedings in accordance with this opinion.

Appellant also argues we must remand for the trial court to exercise its discretion, recently conferred by the passage of Senate Bill No. 620 (2017-2018 Reg. Sess.), to strike firearm use enhancements under Penal Code section 12022.53.² We agree and remand the case for that purpose.

FACTUAL AND PROCEDURAL SUMMARY

In February 2008, a car wash to raise money for the funeral of a slain member of the Varrio Hawaiian Gardens (VHG) gang was held in the parking lot of Jim's Burgers in Hawaiian Gardens. Jeffrey Martinez, who had no gang affiliation, had driven his father, a Dog Patch gang member, to Jim's Burgers to eat. On their way out, they got into a fight with members of the VHG gang

¹ *Pitchess v. Superior Court* (1974) 11 Cal.3d 531 (*Pitchess*).

² All further citations are to the Penal Code, unless otherwise indicated.

who were at the car wash, and Martinez was fatally shot. Six shots were fired from the same gun.

Appellant and his son Benito (referred to as Junior) were arrested on March 19, 2008 in connection with the shooting. In interrogations conducted by Detectives Gary Sloan and Jonas Shipe in March 2008, Junior initially denied being at the car wash at the time of the shooting. He later admitted to being at the car wash, hearing shots, and seeing appellant running toward him with a gun. He stated that, at his father's behest, he hid a gun at their apartment building. He later stated that his grandmother drove he and appellant to a ditch, where, unbeknownst to her, appellant disposed of the gun.³ At appellant's jury trial in December 2009, Junior's recorded statements to the detectives were played to the jury, but he recanted them on the stand, claiming they were prompted by psychological coercion because the detectives had threatened to jail his entire family.

Appellant made a *Pitchess* motion, premised on the theory that Detectives Sloan and Shipe had elicited false statements from Junior through psychological manipulation or coercion. The trial court (Judge Margaret M. Bernal) granted this motion "only as to fabrication." After in camera review of Detectives Sloan's and Shipe's records, the court ordered one item released to the defense.

The jury convicted appellant of first-degree murder and possession of a firearm by a felon and found true various allegations, including the allegation that the crimes were gang related and that appellant used a firearm in commission of the offense. Appellant was sentenced to 50 years to life in prison,

³ In June 2009, Junior pled guilty to being an accessory to murder.

including a consecutive 25 years to life sentence under section 12022.53, subdivision (d) for personal use of a firearm.

He appealed from his conviction, requesting, among other things, that this court conduct an independent review of the sealed transcript of the in camera proceeding on his motion for pretrial discovery under *Pitchess*. We did so, and in *People v. Acuna* (June 15, 2011, B223744) [nonpub.opn.], we concluded that that trial court “may have unduly restricted disclosure of material information” and conditionally reversed and remanded for further proceedings. We made clear the trial court was to disclose any personnel records involving coercion of witnesses.

On remand in September 2011, the trial court (Judge Philip Hickok) conducted an in camera review and concluded “[t]here are no founded incidents involving any coercion or excessive force or intimidation.” Appellant did not file a timely appeal of this decision, but was granted permission to file a late notice of appeal in a January 6, 2017 order of this court.

DISCUSSION

I

Appellant and respondent request this court to conduct an independent review of the sealed transcript of the second *Pitchess* hearing. When an appellate court has conditionally reversed and remanded a case for a new *Pitchess* hearing, an appeal may be taken from the judgment following remand to challenge the new *Pitchess* findings. (*People v. Wycoff* (2008) 164 Cal.App.4th 410, 415.) Because “[a] motion for discovery of peace officer personnel records is addressed to the sound discretion of the trial court,” it is reviewed for abuse of discretion. (*Brown v. Valverde* (2010) 183 Cal.App.4th 1531, 1545.)

Evidence Code section 1045, subdivision (a) allows disclosure of “records of complaints, or investigations of complaints, or discipline imposed as a result of those investigations . . . relevant to the subject matter involved in the pending litigation.” In *People v. Acuna* (June 15, 2011, B223744) [nonpub.opn.], we found that, because the factual scenario on which appellant’s *Pitchess* motion was premised involved alleged coercion of a witness, personnel records related to coercion were discoverable. On remand, the trial court declined to disclose any further records, concluding that there were no “founded” incidents involving coercion. But, as both parties agree, records of complaints ultimately determined to be unfounded are discoverable under *Pitchess*. (Evid Code, § 1045, subd. (a) [authorizing disclosure of “records of complaints” without reference to their ultimate veracity]; *People v. Zamora* (1980) 28 Cal.3d 88, 93, fn.1 [unsustained complaints are discoverable].) Because the trial court declined to disclose a complaint of coercion which was later determined to be unfounded or unsustained, believing that only founded complaints were discoverable, it abused its discretion. (See *Conservatorship of Bower* (2016) 247 Cal.App.4th 495, 506 [decision made under incorrect standard is abuse of discretion].)

Having reviewed the sealed transcript of the second *Pitchess* hearing, we conclude the trial court unduly restricted the disclosure of material information. The trial court shall direct the Los Angeles County Sheriff’s Department to disclose any relevant record of complaint of coercion, founded or unfounded, to defense counsel, who shall then be given the opportunity to demonstrate prejudice. (*People v. Gaines* (2009) 46 Cal.4th 172, 180-182.) A new trial shall be granted if there is a reasonable probability the

outcome would have been different had the information been disclosed; otherwise the judgment will be reinstated. (*Ibid.*)

II

Appellant was sentenced to 25 years to life for personal use of a firearm under section 12022.53, subdivision (d). At the time of appellant's sentencing, that section afforded no discretion to strike a firearm use enhancement. Following the enactment of Senate Bill No. 620, section 12022.53 was modified to allow the trial court to strike firearm use enhancements. The amended statute provides: "The court may, in the interest of justice pursuant to Section 1385 and at the time of sentencing, strike or dismiss an enhancement otherwise required to be imposed by this section. The authority provided by this subdivision applies to any resentencing that may occur pursuant to any other law." (§ 12022.53, subd. (h).)

When a criminal statute is amended to lessen the severity of punishment for an offense, it applies to all cases in which judgment "is not final." (*In re Estrada* (1965) 63 Cal.2d 740, 745.) Appellant's case was pending judgment on appeal when Senate Bill No. 620 went into effect on January 1, 2018. Since there had not yet been a final judgment in appellant's case on the bill's effective date, the amended statute applies.

Criminal defendants are entitled to "sentencing decisions made in the exercise of the "informed discretion" of the sentencing court.'" (*People v. Brown* (2007) 147 Cal.App.4th 1213, 1228.) When the trial court erroneously assumes it lacks sentencing discretion, the proper remedy is remand so that the trial court may exercise its discretion. (*People v. Superior Court (Romero)* (1996) 13 Cal.4th 497, 530, fn. 13.) Although the trial court did not misunderstand its powers in this case, correctly assuming it

lacked discretion under prevailing law at the time, this situation is analogous to that discussed in *Romero*. In this case, the trial court sentenced appellant under section 12022.53, which, at the time, did not allow the court to strike a firearm use enhancement. Remand is necessary to allow the court to exercise its discretion under the new statute in the first instance.

Respondent argues that no reasonable court would strike the firearm enhancement in this case. It is not for this court to judge how the trial court would exercise its discretion following the opportunity to hear appellant's arguments in favor of striking the firearm enhancement. We cannot say that no reasonable court would exercise discretion in appellant's favor in this case.

DISPOSITION

The matter is remanded for the trial court to direct the Los Angeles County Sheriff's Department to disclose to defense counsel any records of complaints of coercion against the officers named in appellant's *Pitchess* motion and to conduct further proceedings in accordance with this opinion. On remand, the trial court is further directed to exercise its discretion under section 12022.53 to strike or refrain from striking appellant's personal use enhancement.

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EPSTEIN, P. J.

We concur:

WILLHITE, J.

COLLINS, J.