Filed 1/8/13 In re Peter K. CA2/2

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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION TWO

In re PETER K., a Person Coming Under the Juvenile Court Law.	B237211 (Los Angeles County Super. Ct. No. FJ48796)
THE PEOPLE, Plaintiff and Respondent, v. PETER K., Defendant and Appellant.	

APPEAL from a judgment of the Superior Court of Los Angeles County. Robin Miller Sloan, Judge. Affirmed.

Lisa Holder, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Lance E. Winters, Assistant Attorney General, Steven D. Matthews and Timothy M. Weiner, Deputy Attorneys General, for Plaintiff and Respondent.

* * * * *

Appellant Peter K. appeals from the judgment declaring him a ward of the juvenile court under Welfare and Institutions Code section 602. The juvenile court sustained a petition alleging that appellant committed the crime of obstructing a peace officer in the performance of his duties. (Pen. Code, § 148, subd. (a)(1).) The court declared the offense to be a misdemeanor, and ordered appellant home on probation for six months.

Appellant contends (1) the juvenile court erred by denying in part his pretrial motion for discovery of police personnel records under *Pitchess v. Superior Court* (1974) 11 Cal.3d 531 (*Pitchess* motion); (2) there was insufficient evidence to support the juvenile court's finding that he violated Penal Code section 148; and (3) the court erred by setting a maximum term of confinement. We strike the maximum term of confinement and affirm.

FACTS

Prosecution Case

On February 4, 2010, at about 8:00 p.m., Sergeant Asatur Mkrtchyan of the Los Angeles Police Department (LAPD) responded to a call from the fire department requesting backup assistance. He saw a fire pit made of a large circular metal pan in the front yard of a house. Approximately six people were congregated around the fire pit, consisting of five minors and an elderly man in a wheelchair named John.

After speaking with some firefighters, Sergeant Mkrtchyan approached the group and spoke to John, who said he was renting the house. Sergeant Mkrtchyan advised John that the firefighters had stated the fire was illegal and needed to be extinguished. At that point, appellant's older brother B. started interrupting by saying, "Fuck you. You guys can't be here. You can't tell us what to do. You have no right." B. "continued nonstop" until two other police officers arrived and removed him from the scene.

After Sergeant Mkrtchyan returned his attention to John, appellant, who was standing eight to ten feet away, "continued the same kind of attitude," saying "Fuck you. You guys can't be here. You can't tell me what to do. You guys don't have the right." Sergeant Mkrtchyan told appellant, "I'm not talking to you. Step to the side." Instead,

appellant approached Sergeant Mkrtchyan and continued saying, "Fuck you guys. Just leave. You guys can't tell us what to do." Appellant then lifted up his arms and shoulders "in an aggressive manner" as though he was going to "attack" or "strike" Sergeant Mkrtchyan. LAPD Sergeant Gomez, who was standing nearby, grabbed appellant and pushed him against a car parked on the lawn. Sergeants Mkrtchyan and Gomez guided appellant to the ground and Sergeant Gomez handcuffed him.

Defense Case

Wilson M. was present when appellant was arrested. Appellant was standing near the hood of the car with his arms crossed when an officer grabbed him by the neck and slammed him down onto the hood of the car. When another minor had previously asked why B. was being taken away, appellant said the officer was a "racist."

S.S., who was also present, testified that appellant was leaning on the hood of the car with his arms crossed when an officer approached and "pretty much choked him," then put him down on the hood of the car.

Appellant testified that he was "pretty much" leaning against the car parked on the lawn the whole time. After Sergeant Mkrtchyan spoke to the firefighters he approached the group around the fire pit and asked why they were giving the firefighters a hard time. Appellant testified that his brother B. started "acting like a smart ass." Sergeant Mkrtchyan called for backup and B. was arrested after other officers arrived. After appellant said the arresting officer was a racist, Sergeant Gomez approached appellant without saying a word, grabbed appellant's neck, slammed him against the car, and choked him. Appellant denied taking steps towards any officers.

DISCUSSION

I. *Pitchess* Motion.

Appellant filed a pretrial motion for discovery of the police personnel records of four LAPD officers. The juvenile court conducted an in camera hearing and ordered that information pertaining to Sergeant Mkrtchyan regarding acts of dishonesty be turned over

to appellant's counsel. Appellant now contends the juvenile court erred by denying the motion as to Sergeant Gomez. "A trial court's decision on the discoverability of material in police personnel files is reviewable under an abuse of discretion standard." (*People v. Jackson* (1996) 13 Cal.4th 1164, 1220.)

Peace officer personnel records are confidential. (Pen. Code, §§ 832.7, 832.8.) Nevertheless, criminal defendants have a limited right to discovery of such records. (*California Highway Patrol v. Superior Court* (2000) 84 Cal.App.4th 1010, 1019.) A defendant must file a written motion for discovery, which must include a description of the type of records or information sought and a supporting affidavit that shows good cause for the discovery. The affidavit must establish the materiality of the discovery and state upon reasonable belief that the identified governmental agency has the records or information sought. (Evid. Code, § 1043; *California Highway Patrol v. Superior Court, supra*, at pp. 1019–1020.)

To establish good cause for discovery, a defendant must demonstrate the relevance of the requested information by providing a "specific factual scenario of officer misconduct that is plausible when read in light of the pertinent documents." (*Warrick v. Superior Court* (2005) 35 Cal.4th 1011, 1025.) "[A] plausible scenario of officer misconduct is one that might or could have occurred." (*Id*. at p. 1026.) Furthermore, it has long been the rule that a discovery request must be narrowly tailored to seek only documentation relating to past officer misconduct that is related to the misconduct alleged by the defendant in the pending litigation. (*Id*. at p. 1021 ["This specificity requirement excludes requests for officer information that are irrelevant to the pending charges"]; *People v. Mooc* (2001) 26 Cal.4th 1216, 1226 ["information sought must be requested with sufficient specificity to preclude the possibility of a defendant's simply casting about for any helpful information"]; see also *People v. Jackson, supra*, 13 Cal.4th at p. 1220 ["when a defendant asserts that his confession was coerced, a discovery request that seeks all excessive force complaints against the arresting officers is overly broad"]; *People v. Memro* (1985) 38 Cal.3d 658, 685 [request for all complaints of excessive force overly broad since factual allegation was solely that officers used

coercive interrogation techniques; thus "only complaints by persons who alleged coercive techniques in questioning were relevant"]; *California Highway Patrol v. Superior Court, supra*, 84 Cal.App.4th at p. 1023 ["there is insufficient similarity between an allegation of officer misconduct consisting of filing a false police report and prior officer misconduct consisting of time card irregularities"]; *City of San Jose v. Superior Court* (1998) 67 Cal.App.4th 1135, 1147–1150 [defense counsel's supporting declaration failed to set forth sufficient information for trial court to assess whether records sought were material to the subject matter of the pending litigation].)

Appellant's *Pitchess* motion requested the following items: "All complaints from any and all sources relating to acts of racial bias, gender bias, ethnic bias, sexual orientation bias, coercive conduct, violation of constitutional rights, fabrication of charges, fabrication of evidence, fabrication of reasonable suspicion and/or probable cause, illegal search/seizure; false arrest, perjury, dishonesty, writing of false police reports, writing of false police reports to cover up the use of excessive force, planting of evidence, false or misleading internal reports including but not limited to false overtime or medical reports, and any other evidence of misconduct amounting to moral turpitude . . . ." With respect to the above-described misconduct, the motion also sought the discovery of "any discipline" imposed upon the named officers as a result of any citizen complaint, virtually anything presented at any Board of Rights hearings, and the statements of all police officers who were either witnesses or complainants to the above.

In support of the *Pitchess* motion, defense counsel declared upon information and belief that Sergeants Mkrtchyan and Gomez "were dishonest in their report" because appellant "did not step" towards the officers or raise his arms and shoulders, but "was only leaning against a car when [Sergeant] Gomez grabbed him by the throat."

We agree with the People that appellant's *Pitchess* motion appears to be a boilerplate motion. It seeks an overly expansive list of confidential records, nearly all of which are unrelated to the alleged officer "dishonesty" in the police report. (*City of Santa Cruz v. Municipal Court* (1989) 49 Cal.3d 74, 85 [information sought must be requested with adequate specificity to preclude the possibility that defendant is engaging in a

fishing expedition].) We note that defense counsel declared that the police report was authored by Sergeant Mkrtchyan and that she did not point to any place in the report indicating that Sergeant Gomez participated in its preparation. Accordingly, we are satisfied that the juvenile court did not abuse its discretion in denying the motion with respect to the discovery of Sergeant Gomez's confidential personnel records.[1]

II. Sufficiency of the Evidence.

Appellant contends there was insufficient evidence to support the juvenile court's finding that he violated Penal Code section 148. We disagree.

A defendant violates Penal Code section 148, subdivision (a)(1) if "(1) the defendant willfully resisted, delayed, or obstructed a peace officer, (2) when the officer was engaged in the performance of his or her duties, and (3) the defendant knew or reasonably should have known that the other person was a peace officer engaged in the performance of his or her duties. (*Yount v. City of Sacramento* (2008) 43 Cal.4th 885, 894–895, citing *In re Muhammed C.* (2002) 95 Cal.App.4th 1325, 1329.)

Appellant argues that the first element cannot be met because he merely exercised his First Amendment protected right to criticize the police. "[T]he First Amendment protects a significant amount of verbal criticism and challenge directed at police officers." (*Houston v. Hill* (1987) 482 U.S. 451, 461.) Thus, Penal Code section 148 must be applied with great caution as to a suspect's speech. (*Houston v. Hill*, *supra*, at p. 461; see also *People v. Quiroga* (1993) 16 Cal.App.4th 961, 968.) But fighting words and disorderly conduct "may lie outside the protection of the First Amendment." (*People v. Quiroga*, *supra*, at p. 968.)

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[1] Appellant requests this Court to "conduct an independent review of the reporter's transcript of the in camera hearing that was conducted by the juvenile court in order to determine for itself whether any police personnel record documents pertaining to [Sergeant] Mkrtchyan's dishonesty were incorrectly withheld." We cannot undertake this task because the reporter's transcript of the *Pitchess* hearing is not included in the record on appeal.

Appellant cites the following testimony of Sergeant Mkrtchyan to support his position that he was arrested for his speech and not his conduct: "[COUNSEL] Q. So the reason you arrested [appellant] is because he walked towards you; is that correct? [SERGEANT MKRTCHYAN] A. No. Q. What was the reason you arrested him? A. The reason why is because he kept on continuing to interrupt my investigation with the gentleman that says he lives at the house . . . . [Appellant] had no standing to say anything." But appellant fails to cite the remainder of Sergeant Mkrtchyan's testimony that during the investigation, appellant "came and approached us in a threatening manner, lifting up his arms and shoulders trying to intimidate—I don't know what he was trying to do. To me he was trying to intimidate us and stop us from what we were doing."

In any event, the juvenile court made clear that it did not base its finding on appellant's speech, but on his conduct, saying: "The court will sustain and find true the petition, *not the words,* [*counsel*], *but the behavior.* I believe it's enough to meet the elements of [Penal Code section] 148," italics added. While appellant argues that any conduct in which he engaged was insufficient to constitute obstruction, delay or resistance, Sergeant Mkrtchyan testified that appellant approached him in an "aggressive" manner as if he was going to "attack" or "strike" him. We are satisfied this evidence is sufficient to support the juvenile court's finding that appellant violated Penal Code section 148.

III. Term of Confinement.

The disposition imposed by the juvenile court was that appellant would continue in the home of his parents and be placed on probation for a term of six months. In announcing the disposition, the juvenile court stated that the maximum term of confinement was one year, and this designation appears on the disposition minute order. Appellant asserts, and the People concede, that a juvenile court is not required to set a maximum term of physical confinement when the court commits a minor to the custody of his parents subject to probationary supervision. (*In re Ali A.* (2006) 139 Cal.App.4th 569, 573; Welf. & Inst. Code, § 726, subd. (c).) The parties agree that the maximum term

of confinement has no legal effect in such a case. While the People argue that appellant cannot be prejudiced by a term that has no legal effect, we agree with appellant that the better practice is to strike the reference from the minute order so that the record of punishment is clear. (See *In re Matthew A.* (2008) 165 Cal.App.4th 537, 541.)

DISPOSITION

We strike the maximum term of confinement set forth in the disposition minute order. In all other respects, the judgment is affirmed.

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_____, J.

DOI TODD

We concur:

_____, P. J.

BOREN

_____, J.

ASHMANN-GERST