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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SIX

THE PEOPLE, Plaintiff and Respondent, v. RAUL HENRIQUEZ, Defendant and Appellant.	2d Crim. No. B264925 (Super. Ct. No. BA419161) (Los Angeles County)

Raul Henriquez appeals his conviction by jury for criminal threats (count 1; Pen. Code, § 422, subd. (a))[1], battery on a peace officer (count 2; § 243, subd. (b)), and resisting a peace officer (count 3; § 148, subd. (a)(1)). The trial court sentenced appellant to two years state prison on count 1 (criminal threats) plus one year state prison on count 3 (resisting a peace officer), suspended execution of sentence, and granted 36 months probation with 337 days county jail. We modify the judgment to reflect that a consecutive, one-year jail term was imposed on

[1] All statutory references are to the Penal Code unless otherwise stated.

count 3 which is a misdemeanor. (*People v. Hartsfield* (1981) 117 Cal.App.3d 504, 509 [misdemeanor terms, unless imposed concurrently with a felony term, are served in local detention facilities].) The judgment, as modified, is affirmed.

Facts and Procedural History

Jovita Garcia met her husband, Alberto Beltran, at restaurant for breakfast. Garcia's 18-month old daughter, Hailey, followed Beltran down the restroom hallway as Beltran went to wash his hands. Garcia got up to retrieve the little girl.

Appellant was seated at a table mumbling to himself and shouted at Garcia to leave the girl right there. Appellant said he had a knife and a handgun, and "I'm going to kill all of you." Appellant became frantic, grabbed a broom, and started swinging it. Then he ran to the kitchen and grabbed a knife threatening to kill everyone, including the little girl.

Garcia grabbed Hailey and started to run away. Appellant said, "That girl is not leaving this place. She's not leaving until my men and my helicopter get here." Beltran exited the restroom and said, "The girl is mine and I'm taking her out of here."

Los Angeles Police Officer Joe Flores responded to a 911 call that a man was running around with a knife, possibly under the influence. Flores saw appellant who matched the description of the suspect. He was trying to take a side mirror off a van parked outside the restaurant. He appeared angry and was holding a dark colored object. Citizens pointed at appellant and shouted, "Him, that's Him!"

Officer Flores ordered appellant to drop the object and get down on the ground and spread his hands out like an airplane. Appellant started to comply but was agitated and

restless. Officer Flores tried to calm him down and touched appellant's wrist and bicep. Appellant quickly pulled his hands underneath his body, towards his chest. Concerned that appellant was reaching for a weapon, Officer Flores placed his body weight on appellant's shoulder. Appellant bit the officer's hand and kicked and struggled.

Officer Flores ordered appellant to stop resisting 10 or 15 times as four backup officers tried to restrain appellant and pry his hands away from his body. Appellant kicked Officer Flores in the groin and struggled even after he was handcuffed and placed in a leg restraint. Three officers transported appellant to the jail dispensary where he was treated for abrasions on his chin, hands, and knees.

Before trial, appellant sought to discover the personnel files of Officer Flores and five officers (Officers Kim, Figueroa, Oh, Yi, and Castellar) who assisted in the arrest. (Evid. Code, § 1043; *Pitchess v. Superior Court* (1974) 11 Cal.3d 531.) Appellant's trial attorney submitted a declaration stating, under information and belief, that the officers were "the initial aggressors" and falsified the arrest report.[2] Appellant sought the discovery of citizen complaints and evidence of "misconduct amounting to moral turpitude."

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[2] The declaration states that appellant "was seated in his automobile using his mobile phone. He heard the sounds of screeching tires which seemed very close nearby. As he exited his automobile, he saw and heard a police officer yelling at him to turn around and to stand still. Mr. Henriquez raised both hands and complied. Mr. Henriquez was instructed to kneel to the ground and as he complied I am informed and believe and thereon allege that one or more officers pushed him to the ground and climbed over him."

Denying the motion, the trial court found that the scenario posited in the defense declaration was not plausible. "Mr. Henriquez was acting in an extremely bizarre manner, threatening individuals within that restaurant, enter[ed] the kitchen area at some point to acquire a knife from one of the cooks, asserting that he was . . . going to kill or apprehend a young girl."

Appellant argued that "[t]he whole thrust of the *Pitchess* motion deals with count 2 and count 3" and the criminal threats count "has got nothing to do with it. The police were not in the restaurant at the time the 422 occurred." Overruling the objection, the trial court stated that it was considering the larger context of what happened, "namely, an absolutely bizarre incident moments earlier in a restaurant that postures [appellant] in a violent assaultive posture towards members of the community that is absolutely incongruous with the [*Pitchess*] declaration." The trial court found that the alternative scenario set forth in the motion, i.e., that appellant "was simply in his car responding to a noise that he hear[d] outside of the car, and then acts in a way that is completely passive and non-violent towards the police officers simply does not comport with the larger picture that I have acquainted myself with."

Pitchess Motion

Appellant argues that the trial court erred in not conducting an in camera review of the police personnel records when it denied the *Pitchess* motion. (Evid. Code, § 1045, subd. (b); *People v. Mooc* (2001) 26 Cal.4th 1216, 1226.) We review for abuse of discretion. (*Id.*, at p. 1228.) "A defendant's motion to discover is addressed solely to the sound discretion of the trial court, which has inherent power to order discovery when the

interests of justice so demand. [Citations.]" (*People v. Pitchess*, *supra*, 11 Cal.3d at p. 535.)

"Peace officer . . . personnel records . . . are confidential and shall not be disclosed in any criminal or civil proceeding except by discovery pursuant to Sections 1043 and 1046 of the Evidence Code." (Pen. Code, § 832.7, subd. (a).) "In enacting [Evidence Code] sections 1043 and [1046] the Legislature clearly intended to place specific limitations and procedural safeguards on the disclosure of peace officer personnel files which had not previously been found in judicial decisions." (*City of Santa Cruz v. Municipal Court* (1989) 49 Cal.3d 74, 93-94.) "The procedure requires a showing of good cause for the discovery, an in camera review of the records if good cause is shown, and disclosure of information 'relevant to the subject matter involved in the pending litigation.' (Evid. Code, § 1045, subd. (a).)" (*People v. Thompson* (2006) 141 Cal.App.4th 1312, 1316.)

The trial court carefully reviewed the moving papers, the police report, and the preliminary hearing transcript before ruling on the motion. "I read it over and over again. But you cannot separate the emotional/mental posture of [appellant] from the large context of what [was] happening at that point in time." Appellant threatened to kill restaurant patrons with a knife, was detained outside the restaurant with an unknown object in his hand, and was ordered to drop the object and get down on the ground. The moving papers failed to explain why appellant hid his hands, refused to lie still, or kneed Officer Flores in the groin. The trial court made a realistic assessment of the facts and allegations (*People v. Sanderson* (2010) 181 Cal.App.4th 1334, 1341) and reasonably concluded that appellant did not present "a

specific factual scenario that [was] plausible when read in light of the pertinent documents and undisputed circumstances. [Citation.]" (*People v. Thompson*, *supra*, 141 Cal.App.4th at p. 1316.)

Citing *Warrick v. Superior Court* (2005) 35 Cal.4th 1011, appellant argues that a *Pitchess* motion need not present a factual scenario that is credible. *Warrick,* however, does not require an in camera review based on a showing that is merely imaginable or conceivable. (*People v. Thompson*, *supra*, 141 Cal.App.4th at p. 1318.) It defies common sense that Officer Flores conspired with five officers to falsely accuse appellant of resisting arrest and battery, and then photographed appellant's injuries. (See, e.g., *People v. Lewis and Oliver* (2006) 39 Cal.4th 970, 992 [moving papers alleged grandiose police conspiracy to frame and murder defendant].) The arrest report states that Officer Flores' supervisor, Sergeant Rodriguez, was at the scene and present during the use of force. The sergeant repeatedly told appellant to stop resisting, monitored the use of force, interviewed witnesses and appellant, conducted a use-of-force investigation, and reviewed the arrest report and found it to be consistent with his investigation. The *Pitchess* motion did not seek the discovery of Sergeant Rodriguez's personnel records.

The arrest report further indicates that a restaurant waitress Glenda Ramos, saw appellant resist arrest as did two other officers, Bonilla and Celebertti, two officers in an airship, Krieg and Vidriezca, and two police detectives, Kim and Franco. After appellant was put in a patrol car, he said "I don't know what's wrong with me, I took some salt powder and I wanted to kill everybody." This statement is, of course, at variance with his attorney's declaration.

"Where, as here, a defendant's undisputed extrajudicial statements are reasonably consistent with the officer's description of the crime, discovery of any complaint of prior fabrication is foreclosed. Why? Because, notwithstanding defense counsel's declaration to the contrary, his client has impliedly acknowledged that the officer has been truthful in his report of the circumstances of the crime. Were we to rule otherwise, imaginative defense counsel could ignore his client's extrajudicial statements and defeat the *Pitchess* scheme's purpose 'to protect the defendant's right to a fair trial and the officer's interest in privacy [in his personnel records] to the fullest extent possible . . . .' [Citation.]" (*People v. Galan* (2009) 178 Cal.App.4th 6, 8-9.)

Denial of the charges, in the absence of a plausible alternative version of the facts, does not establish good cause for an in camera review of confidential police personnel records. (*People v. Sanderson*, *supra*, 181 Cal.App.4th at p. 1341.) Rather than explain the facts set forth in the police report or the reason for the 911 call, appellant claimed it was all a conspiracy and that the officers "fabricated their observations and falsified their reports to have a basis for the present charges against [appellant] and to secure a conviction." If that was so, the conspiracy involved six arresting officers, a supervising sergeant, a restaurant waitress, two officers in a police airship, two police detectives, and citizens outside the restaurant who pointed appellant out to the police and yelled "Him, that's Him!"

The trial court made a common sense determination that appellant's version of the events was not plausible and failed to establish good cause for an in camera review of the police personnel records. (*People v. Thompson*, *supra*, 141 Cal.App.4th

at pp. 1318-1319.) Given appellant's inconsistent versions of what allegedly occurred at the time of his arrest, coupled with the absence of any explanation that would support his suggestion of a police conspiracy, we conclude that the trial court did not abuse its discretion in denying the *Pitchess* motion.

Appellant asserts that he was denied due process and that disclosure of police personnel files is similar to a defendant's right to exculpatory evidence as delineated in *Brady v. Maryland* (1963) 373 U.S. 83. We reject the argument because a defendant who fails to make a good cause showing for *Pitchess* discovery cannot meet the more taxing *Brady* materiality requirement for exculpatory evidence. (*People v. Gutierrez* (2003) 112 Cal.App.4th 1463, 1474; *People v. Thompson*, *supra*, 141 Cal.App.4th at pp. 1318–1319.) "To establish a due process violation, a defendant must do more than show that 'helpful' evidence was withheld [citation]; a defendant must go on to show that '"there is a reasonable probability that, had [the evidence] been disclosed to the defense, the result . . . would have been different . . . ."'" (*People v. Gaines* (2009) 46 Cal.4th 172, 183.) Appellant makes no showing that denial of the *Pitchess* motion violated his right to due process or a fair trial.

Sentencing Error

Selecting count 1, criminal threats, as the base term, the trial court imposed a two-year midterm on count 1 and a one-year consecutive term on count 3, resisting an officer. The trial court sentenced appellant to three years state prison, suspended execution of sentence, and granted probation.

Appellant contends, and the Attorney General agrees, that the trial court erred in imposing a consecutive one-year prison term on count 3. Resisting arrest is a misdemeanor and

punishable by a fine not exceeding $1,000 or by imprisonment in county jail not to exceed one year, or both. (§ 148, subd. (a)(1).) Although a misdemeanor sentence may be consecutive to a state prison sentence, the misdemeanor commitment must be served in county jail or a local detention facility. (*People v. Erdelen* (1996) 46 Cal.App.4th 86, 92-93; *People v. Hartsfield*, *supra*, 117 Cal.App.3d at p. 509.)

Disposition

The judgment (order granting probation) is modified to reflect that the one-year term imposed stayed on count 3 shall be served in county jail, consecutive to the two-year state prison sentence on count 1, criminal threats, should appellant violate probation. The superior court clerk is directed to amend the June 5, 2015 sentencing minute order to reflect the sentence modification. The judgment, as modified is affirmed.

NOT TO BE PUBLISHED.

YEGAN, Acting P. J.

We concur:

PERREN, J.

TANGEMAN, J.

William N. Sterling, Judge

Superior Court County of Los Angeles

Kyle D. Smith, under appointment by the Court of Appeals, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Susan Sullivan Pithey, Assistant Senior Assistant Attorney General, Mary Sanchez, Alene M. Games, Deputy Attorneys General, for Plaintiff and Respondent.