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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.

GARVEIA BRANDON FREENY, et al.,

Defendants and Appellants.

B289514

(Los Angeles County  
Super. Ct. No. VA120231)

APPEAL from a judgment of the Superior Court of Los Angeles County, Olivia Rosales, Judge. Affirmed as to both appellants, remanded in part as to appellant Freeny.

Robert Bryzman, under appointment by the Court of Appeal, for Defendant and Appellant Garveia B. Freeny.

Melanie K. Dorian, under appointment by the Court of Appeal, for Defendant and Appellant Tyshaun A. Jackson.

Xavier Becerra, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Lance E. Winters, Assistant Attorney General, Steven D. Matthews and Analee J. Brodie, Deputy Attorneys General, for Plaintiff and Respondent.

## INTRODUCTION

Appellants Tyshaun Jackson and Garveia Freeny were convicted of murder and related crimes in 2012. We affirmed their convictions in a previous case, *People v. Jackson* (May 26, 2016, No. B256011 [nonpub. opn.]), but remanded for the limited purpose of a new in camera hearing on appellants' *Pitchess* motions.<sup>1</sup> Following the hearing, appellants appealed. We find that the trial court's *Pitchess* procedure was appropriate.

Freeny also asserts that he is entitled to reconsideration of sentencing on a firearm enhancement under the recently amended Penal Code section 12022.53.<sup>2</sup> We agree, and remand as to Freeny for that limited purpose.

Jackson asks that we independently review the record pursuant to *People v. Wende* (1979) 25 Cal.3d 436 (*Wende*). We conclude that no arguable issues exist, and therefore affirm the judgment as to Jackson.

## FACTUAL AND PROCEDURAL BACKGROUND

### A. Previous appeal

The underlying facts of the case are set forth in our previous opinion, *People v. Jackson* (May 26, 2016, No. B256011 [nonpub. opn.]). In short, appellants were charged with murder (§ 187; "count 1"), carrying a loaded firearm (former § 12031, subd. (a)(1), now § 25850, subd. (a)), carrying a concealed firearm (former § 12025, subd. (a)(1), now § 25400, subd. (a)(1)), possession of a firearm by a felon (former § 12021, subd. (a)(1), now § 29800, subd. (a)), and shooting at an occupied vehicle

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<sup>1</sup> *Pitchess v. Superior Court* (1974) 11 Cal.3d 531 (*Pitchess*).

<sup>2</sup> All further statutory references are to the Penal Code unless otherwise indicated.

(§ 246; “count 9”). As to count 1, it was alleged that a principal was armed with a firearm. (§ 12022, subd. (a)(1).) Additional firearm enhancements were alleged on counts 1 and 9 as to Freeny. (§ 12022.53, subd. (b)-(d).) A prior felony conviction was alleged as to each appellant.

In June 2012, a jury convicted appellants as charged and found all firearm allegations to be true. Each appellant was sentenced to five years on count 9, which was selected as the base count. On count 1, Jackson was sentenced to 25 years to life, plus a consecutive one-year term for the firearm enhancement under section 12022.53, subdivision (d). Freeny was sentenced to 25 years to life, plus a consecutive term of 25 years to life on the firearm enhancement under section 12022, section (a)(1). Sentence was imposed and stayed on the remaining counts. (*People v. Jackson* (May 26, 2016, No. B256011 [nonpub. opn.] ).)

In the previous appeal, we agreed with appellants that their sentences for shooting at an occupied vehicle (count 9) should have been stayed under section 654, and we modified the judgments accordingly. We also remanded the case for a new in camera hearing on appellants’ *Pitchess* motions relating to Los Angeles County Sheriff’s Department (LASD) Deputy Corina, who was involved in the investigation of the case. We found that at the previous *Pitchess* hearing, “[t]he court limited the review to records relevant to fabrication. Our review of the sealed portion of the record indicates that, in camera, the court asked the custodian of records whether there were discoverable files as to fabrication, and the custodian responded under oath that the officer had ‘no complaints in the last five years.’ The court did not review any records or ask any other questions. This

procedure was inadequate.” (*People v. Jackson* (May 26, 2016, No. B256011 [nonpub. opn.])).

We remanded, stating, “[T]he matter is remanded to the trial court for a new in camera hearing on appellants’ *Pitchess* motions. If the trial court finds there are discoverable records, they shall be produced and the court shall conduct further proceedings as necessary. If the court again finds there are no discoverable records, or finds that appellants cannot establish they were prejudiced by the denial of discovery, the judgments shall be reinstated as of that date.” (*People v. Jackson* (May 26, 2016, No. B256011 [nonpub. opn.])).

## **B. Proceedings following remand**

Upon remand, the court held an in camera *Pitchess* hearing on December 20, 2017. The court ordered LASD to produce information regarding a single incident in 1991 “pursuant to *Brady*.”<sup>3</sup> The court ordered LASD to comply by December 28, 2017.

The same day as the hearing, December 20, Freeny filed a 27-page motion for new trial, arguing that the verdict was based on false evidence. The evidentiary issues in Freeny’s motion are not relevant to this appeal, so they are summarized only very briefly here. In short, Freeny argued that witnesses in the case made numerous inconsistent statements about the vehicle involved in the crime, its license plate, and the direction it was driving. Freeny also argued that “the new *Pitchess/Brady* evidence sheds an insidious light on [Deputy] Corina’s late ‘discovery’ of critical ‘new’ evidence discovered six days after the incident.” He contended that Corina and other LASD employees

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<sup>3</sup> *Brady v. Maryland* (1963) 373 U.S. 83 (*Brady*).

were “derelict in their duty, and did not conduct a fair and impartial investigation.” The People opposed the motion.

At the hearing on the motion, counsel for both appellants presented extensive arguments about whether the witnesses’ statements were false or simply inconsistent. The trial court noted that these arguments concerned evidence that had been provided to the defense before trial, and “[t]hat’s different from discovery [or] *Brady*.” The trial court denied the motion for a new trial. Freeny and Jackson each appealed.

### **DISCUSSION**

Freeny asserts two contentions on appeal. First, he asks that we independently review the *Pitchess* procedure employed by the trial court. Second, he contends he is entitled to remand for resentencing on the firearm enhancements in count 1 under the recently revised section 12022.53. Jackson asks that we review the record pursuant to *Wende*, including the *Pitchess* procedure. We consider each argument below.

#### **A. The *Pitchess* hearing**

The court conducted an in camera hearing “as to any allegations of misconduct involving fabrication, perjury, false claims, planting of evidence, fabricating probable cause for detention or seizure for five years prior to the time of trial” regarding Deputy Corina. After being sworn, the LASD custodian of records testified about the search he conducted and the documents he uncovered. The court asked questions, reviewed a document that was outside the relevant time period, and reviewed another document that was remote in time but potentially relevant under *Brady*. The court also reviewed documents demonstrating the scope of the searches.

“When a defendant shows good cause for the discovery of information in an officer’s personnel records, the trial court must examine the records in camera to determine if any information should be disclosed.” (*People v. Winbush* (2017) 2 Cal.5th 492, 424.) At the in camera hearing, “[t]he trial court should . . . make a record of what documents it examined before ruling on the *Pitchess* motion. . . . [T]he court can . . . state for the record what documents it examined.” (*People v. Mooc* (2001) 26 Cal.4th 1216, 1229.) An appellate court independently examines the record made by the trial court “to determine whether the trial court abused its discretion in denying a defendant’s motion for disclosure of police personnel records.” (*People v. Prince* (2007) 40 Cal.4th 1179, 1285.)

We have reviewed the sealed transcript of the in camera hearing. We conclude that the court complied with the procedural requirements of a *Pitchess* hearing, including providing an adequate description of the documents reviewed. We therefore find no error.

**B. Freeny’s sentence under section 12022.53**

Freeny asserts that because he was sentenced for a firearm enhancement under section 12022.53, subdivision (d), he is entitled to resentencing under the revised version of section 12022.53, which went into effect on January 1, 2018. The Attorney General agrees.

“When [Freeny] was originally sentenced . . . the trial court had no discretion to strike or dismiss a firearm use enhancement. [Citation.] However, Senate Bill No. 620 amended [section 12022.53], effective January 1, 2018, to give the trial court discretion, in limited circumstances, pursuant to section 1385, to strike a firearm enhancement in the interest of justice.

[Citation.] Subdivision (h) of section 12022.53 now 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.’” (*People v. Johnson* (2019) 32 Cal.App.5th 938, 941.) The amendment applies to cases that are not yet final as of January 1, 2018. (*People v. Woods* (2018) 19 Cal.App.5th 1080, 1091.)

We therefore remand the matter as to Freeny only for the limited purpose of conducting a new sentencing hearing regarding the firearm enhancement under section 12022.53.

**C. *Wende* review**

On appeal, Jackson’s appointed counsel filed a brief requesting that we independently review the record for error. (*Wende, supra*, 25 Cal.3d at p. 441.) We directed counsel to send the record and a copy of the brief to Jackson, and notified Jackson of his right to respond within 30 days. We have received no response.

We have examined the entire record, and are satisfied no arguable issues exist in the appeal before us. (*Smith v. Robbins* (2000) 528 U.S. 259, 278; *People v. Kelly* (2006) 40 Cal.4th 106, 110; *Wende, supra*, 25 Cal.3d at p. 443.)

### **DISPOSITION**

The judgment as to Jackson is affirmed. For Freeny only, the matter is remanded for the superior court to consider whether the section 12022.53 firearm enhancements should be dismissed or stricken pursuant to section 12022.53, subdivision (h). The judgment as to Freeny is affirmed in all other respects.

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COLLINS, J.

We concur:

MANELLA, P. J.

WILLHITE, J.