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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS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 THREE

THE PEOPLE, Plaintiff and Respondent, v. DERRICK WAYNE THOMAS, Defendant and Appellant.	B231174 (Los Angeles County Super. Ct. No. BA368831)

APPEAL from a judgment of the Superior Court of Los Angeles County, Carol H. Rehm, Jr., Judge. Reversed and remanded with directions.

Jeanine G. Strong, 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, Paul M. Roadarmel, Jr. and Margaret E. Maxwell, Deputy Attorneys General, for Plaintiff and Respondent.

Derrick Thomas appeals the judgment entered following his conviction by jury of sale of a controlled substance and possession of a controlled substance. (Health & Saf. Code, §§ 11352, subd. (a); 11350, subd. (a).) Thomas contends the trial court erred in finding he failed to demonstrate good cause for discovery of police personnel records pursuant to *Pitchess v. Superior Court* (1974) 11 Cal.3d 531 (*Pitchess*). We agree and conditionally reverse the judgment. (See *People v. Gaines* (2009) 46 Cal.4th 172, 180-182.)

FACTS AND PROCEDURAL BACKGROUND

Prior to trial, Thomas filed a motion seeking discovery of the personnel records of Los Angeles Police Detectives Miller and Kitzmiller. The police report attached to the motion indicated that on March 8, 2010, the detectives were "conducting an observation post in the area of Stanford Street [south of] Sixth Street, an area plagued by blatant narcotics us[]e and sales." Detective Miller observed one Kenneth Brown approach Thomas and extend his hand holding paper currency. Thomas accepted the currency and placed it in his right side pocket. Thomas then appeared to select a small item from his hand which he dropped into Brown's open hand. Brown tilted his hand and appeared to examine an off-white solid consistent with cocaine base. Brown closed his hand and walked away. Police officers stopped Brown at the direction of Detective Miller and recovered an off-white solid consistent with cocaine base from his left hand. While Brown was being detained, Thomas looked in Brown's direction, tossed a white tissue bindle onto the lap of one Walter Williams, who was seated in a wheelchair, and then walked slowly southbound.

Police officers who arrested Thomas recovered a glass cocaine pipe and $87 from his person (1x$50 in his right sock; 5x$5 and 12x$1 in his right front pants pocket). Detective Baley recovered a white tissue bindle containing six to 10 off-white solids consistent with cocaine base from the lap of Williams who stated, "I don't know what that is, that dude just threw it at me." Williams was

questioned and released. In a booking search, officers found $400 (2x$100; 10x$20) in Thomas's right jacket pocket.

The *Pitchess* motion sought citizen complaints relating to acts of violence, excessive force, fabrication of charges, fabrication of evidence, false arrest, perjury, dishonesty, writing of false police reports "and any other evidence of misconduct amounting to moral turpitude . . . ." Defense counsel's declaration in support of the discovery request was redacted to exclude defense counsel's averments with respect to the materiality of the requested discovery. Defense counsel filed an unredacted motion under seal.[1]

The Los Angeles City Attorney, appearing on behalf of the real party in interest, filed opposition which stated Thomas "avers he was in the area to purchase narcotics. He denies tossing off white solids onto the lap of a man seated in a

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[1] *Garcia v. Superior Court* (2007) 42 Cal.4th 63, held a trial court may permit a defendant to file a *Pitchess* motion under seal and outlined the procedure to be followed. (*Garcia*, *supra*, at pp. 72-73.) If defense counsel believes a filing under seal is necessary to protect a claim of privilege, the defense must give timely notice of the claim of privilege and "provide the trial court with the affidavit the defense seeks to file under seal, along with a proposed redacted version. The proposed redacted version should be served on opposing counsel. The trial court must then conduct an in camera hearing on the request to file under seal. At that hearing, counsel should explain how the information proposed for redaction would risk disclosure of privileged material if revealed, and demonstrate why that information is required to support the motion. . . . If the court concludes that parts of the affidavit do pose a risk of revealing privileged information, and that filing under seal is the only feasible way to protect that required information, the court may allow the affidavit to be so filed." (*Id.* at p. 73.)

The record before us does not include a motion to seal defense counsel's declaration or an order permitting the unredacted motion be filed under seal. (See *Garcia v. Superior Court*, *supra*, 42 Cal.4th at p. 72; Cal. Rules of Court, rule 8.46(c).) Nonetheless, for the purpose of this appeal, we presume the necessary procedural steps were taken. We have reviewed the sealed declaration in connection with the resolution of Thomas's appeal. (*Garcia v. Superior Court*, *supra*, at p. 77.)

wheelchair. He avers that the substantial sum of money he possessed was from tips he received in his trade as a barber." The opposition asserted Thomas's "mere denial" of the charges was insufficient "because the declaration does not describe how close [Thomas] was to the man in the wheel chair or describe the nature of the contact [Thomas had with Brown]."

At the hearing on the motion, defense counsel indicated the basis for the motion was Thomas's assertion "he was not involved with the gentleman in the wheelchair. He was not aware . . . what the gentleman in the wheelchair was doing as [Thomas's] attention was not diverted in that direction. He's basically denying all the allegations." In response to a question from the trial court, defense counsel admitted Thomas saw the man in the wheelchair selling narcotics earlier in the day but noted Thomas "never contended that he had any type of interaction with the man in the wheelchair . . . ." When the trial court indicated Thomas was "saying he bought drugs there earlier in the day but we don't know who he bought them from . . . ," defense counsel agreed.

Counsel for real party in interest argued there were a number of people in the area and "[w]e could have an issue of mistaken identity here because there just are not enough facts to show that the officers committed intentional misconduct." Further, defense counsel's "declaration lacks any explanation or facts involving [Brown] and what their interaction was and the nature and extent of their conduct."

Defense counsel responded Thomas was "not indicating he had contact with" Brown or that he was aware Brown had been arrested.

The trial court indicated it saw the matter "pretty much as a mere denial. I don't have any facts regarding the man in the wheelchair and I don't have any proof other than the defendant's statement that he's working [as to how he came to be in possession of] all this money, all these $1 bills. [¶] I think it very well could be . . . a case of mistaken identity rather than police misconduct. [¶] Also, the defendant doesn't really tell us a whole lot about when he arrives, who he buys

from, what he's doing []lingering there. I just see it as a mere denial." The trial court denied the motion without conducting an in camera hearing.

DISCUSSION

"[O]n a showing of good cause, a criminal defendant is entitled to discovery of relevant documents or information in the confidential personnel records of a peace officer accused of misconduct against the defendant. (Evid. Code, § 1043, subd. (b).) Good cause for discovery exists when the defendant shows both " ' "materiality" to the subject matter of the pending litigation and a "reasonable belief" that the agency has the type of information sought.' [Citation.] A showing of good cause is measured by 'relatively relaxed standards' that serve to 'insure the production' for trial court review of 'all potentially relevant documents.' [Citation.]" (*People v. Gaines, supra,* 46 Cal.4th at p. 179.)

The threshold for establishing good cause is "relatively low." (*Warrick v. Superior Court* (2005) 35 Cal.4th 1011, 1019.) In order to satisfy the good cause requirement, "the defendant must present . . . a specific factual scenario of officer misconduct that is plausible when read in light of the pertinent documents." (*Id.* at p. 1025.)

The inquiry does not involve "an assessment or weighing of the persuasive value of the evidence . . . presented [or] which should have been presented. [Citations.] Indeed, a defendant is entitled to discover relevant information under *Pitchess* even in the absence of any judicial determination that the potential defense is credible or persuasive." (*People v. Gaines, supra,* 46 Cal.4th at p. 182.) "If the defendant establishes good cause, the court must review the requested records in camera to determine what information, if any, should be disclosed. [Citation.]" (*Id.* at p. 179.)

A trial court's ruling on a *Pitchess* motion is reviewed for abuse of discretion. (*People v. Cruz* (2008) 44 Cal.4th 636, 670; *Alford v. Superior Court* (2003) 29 Cal.4th 1033, 1039; *People v. Hughes* (2002) 27 Cal.4th 287, 330.)

The People argue defense counsel's declaration failed to offer an alternate version of the facts regarding Thomas' presence at the scene or suggest specific police misconduct in that it did not explain the observed interaction with Brown, the cocaine base found in Brown's possession, the bindle found in Williams's lap or the money found in Thomas's possession. The People further assert Thomas did not provide a non-culpable explanation for his presence at the scene, or contradict or explain the claim he walked from the scene after he saw Brown being detained. The People conclude the trial court properly denied the motion.

We find the facts presented in this case similar to those under consideration in *Warrick*, a leading case in the area. In *Warrick*, the defendant was charged with possessing cocaine base for sale. According to the police report, police officers noticed the defendant standing next to a wall looking at a clear plastic baggie containing off-white solids. When the officers approached, the defendant fled and discarded what appeared to be numerous lumps of rock cocaine. One officer retrieved the lumps while others pursued and arrested the defendant who possessed an empty baggie and a small amount of cash. (*Warrick v. Superior Court, supra,* 35 Cal.4th at p. 1016.)

Defense counsel's declaration in support of a *Pitchess* motion "denied that defendant had 'possess[ed] any narcotics for the purpose of sale on the date of his arrest' and denied that defendant had discarded any rocks of cocaine." (*Warrick v. Superior Court, supra,* 35 Cal.4th at p. 1022.) The declaration stated the "defendant was at the scene to buy cocaine" but fled when officers arrived because he had an outstanding parole warrant and feared arrest. (*Id.* at pp. 1022-1023.) As he fled, people pushed and fought as they collected cocaine from the ground. Two officers retrieved some of the cocaine and one officer told the defendant he must have thrown the cocaine. The defendant claimed "either the officers did not know who had discarded the rocks of cocaine and they falsely accused defendant of having done so, or they knew who had discarded the cocaine but falsely accused defendant." (*Id.* at p. 1023.)

Warrick determined that "[b]y denying the factual assertions made in the police report – that he possessed and discarded the cocaine – defendant established 'a reasonable inference that the [reporting] officer may not have been truthful.' [Citation.]" (*Warrick v. Superior Court, supra,* 35 Cal.4th at p. 1023.) *Warrick* rejected the notion the defendant was required to establish a factual scenario that is "reasonably probable or apparently credible and not merely possible." (*Id.* at pp. 1025-1026.) "What the defendant must present is a specific factual scenario of officer misconduct that is plausible when read in light of the pertinent documents. [Citations.]" (*Id.* at p. 1025.) "[A] plausible scenario of officer misconduct is one that might or could have occurred. Such a scenario is plausible because it presents an assertion of specific police misconduct that is both internally consistent and supports the defense proposed to the charges." (*Id.* at p. 1026.)

Warrick held that, in some cases, that factual scenario "may consist of a denial of the facts asserted in the police report." (*Warrick v. Superior Court, supra,* 35 Cal.4th at pp. 1024-1025.) As an example of a case in which the defense declaration adequately had alleged officer misconduct, *Warrick* cited *People v. Hustead* (1999) 74 Cal.App.4th 410. In *Hustead*, the defendant was charged with felony evasion. (Veh. Code, § 2800.2.) The defendant's counsel asserted "the officer made material misstatements [in the police report] with respect to his observations, including fabricating [the defendant's] alleged dangerous driving maneuvers." (*People v. Hustead, supra,* at p. 416.) Counsel also stated the defendant asserted he did not drive in the manner described in the police report and the route he actually drove was different than the route described in the report. (*Id.* at pp. 416-417.)

Hustead found: "These allegations were sufficient to establish a plausible factual foundation for an allegation that the officer made false accusations in his report. It demonstrated that appellant's defense would be that he did not drive in the manner suggested by the police report and therefore the charges against him

were not justified." (*People v. Hustead, supra,* 74 Cal.App.4th at p. 417.) *Warrick* approved the determination in *Hustead* stating*:* "[D]efense counsel's declaration in *Hustead* made allegations sufficient to 'establish a plausible factual foundation' for a defense that the defendant did not drive in the fashion described in the police report and that the officer's report was untrue. [Citation.]" (*Warrick v. Superior Court, supra,* 35 Cal.4th at p. 1025.)

Applying these principles to the facts before it, *Warrick* concluded the defendant's version of the events was plausible and internally consistent. The denials that the defendant possessed or discarded cocaine "form the basis of a defense to the charge of possessing cocaine for sale. Thus, defendant has outlined a defense raising the issue of the practice of the arresting officers to make false arrests, plant evidence, commit perjury, and falsify police reports or probable cause. [Citations.] Defendant has established the relevance of such information to his pending trial [citation], and having advanced a basis for admitting it into evidence at trial, he has shown its materiality." (*Warrick v. Superior Court, supra,* 35 Cal.4th at p. 1027.)

We conclude *Warrick* is controlling here. The declaration submitted by Thomas's counsel denied that Thomas tossed a bindle into the lap of Williams and asserted Williams, not Thomas, had been selling narcotics. Counsel indicated Thomas was loitering in the area and explained he was present in the area to purchase narcotics, which was consistent with his possession of a glass cocaine pipe. Thomas further claimed the money in his possession had been earned at the barbershop where he worked. The People assert Thomas failed to explain his interaction with Brown or the cocaine found in Brown's possession or Williams's lap. However, at the hearing on the motion, defense counsel represented Thomas had no contact with Brown or Williams. Finally, unlike the defendant in *Warrick*, Thomas did not flee the scene but, according to the police report, walked slowly from Williams. As this conduct is consistent with loitering, no explanation was required.

Thus, counsel's declaration proposed an alternate factual scenario and suggested the detectives falsely had stated they observed Thomas sell cocaine base to Brown and discard a bindle of cocaine base in Williams's lap. Thomas was not required to eliminate the possibility the arrest had been based on misidentification. Rather, his burden, which is relatively low, was to demonstrate a plausible factual scenario in which the honesty of the detectives was material to his defense. Thomas satisfied this burden by suggesting a scenario of officer misconduct "that might or could have occurred," and, thereby, established a "plausible factual foundation" establishing good cause for discovery under the "relatively relaxed standards" applicable in the *Pitchess* context. (*Warrick v. Superior Court, supra,* 35 Cal.4th at pp. 1023, 1026.)

People v. Thompson (2006) 141 Cal.App.4th 1312, relied upon by the People, involved a street drug "buy" operation. In *Thompson,* an undercover officer purchased cocaine base from the defendant with two pre-recorded $5 bills. Two detectives monitored the transaction via a wire worn by the undercover officer and six police officers witnessed the purchase. Uniformed officers arrested the defendant and found the pre-recorded $5 bills on his person. The defendant sought *Pitchess* discovery against the 11 officers involved in his arrest, asserting they planted evidence, acted dishonestly and committed other misconduct. (*Id.* at p. 1317.) Defense counsel's declaration stated the officers did not recover any buy money from the defendant and the defendant did not offer or sell drugs to the undercover officer. Instead, the defendant was arrested in an area where officers were making arrests and, when the officer realized the defendant had a criminal history, they fabricated the account of the transaction and attributed to him drugs already in their possession. (*Id.* at p. 1317.)

Thompson concluded the proffered explanation did "not present a factual account of the scope of the alleged police misconduct, and [did] not explain [the defendant's] own actions in a manner that adequately support[ed] his defense." (*People v. Thompson*, *supra*, 141 Cal.App.4th at p. 1317.) *Thompson* stated: "[The defendant] is not asserting that officers planted evidence and falsified a police report. He is asserting that, because he was standing at a particular location, 11 police officers conspired to plant narcotics and recorded money in his possession, and to fabricate virtually all the events preceding and following his arrest." (*Id.* at p. 1318.) *Thompson* concluded the defendant had failed to show it was plausible that 11 police officers had conspired to "completely misrepresent what they saw and heard as percipient witnesses." (*Id.* at p. 1318.)

Thus, in *Thompson*, the proposed factual scenario, that 11 police officers had conspired to arrest the defendant for drug sales because he had a criminal record, was not plausible. Here, given *Warrick*, it cannot be concluded the factual scenario suggested by defense counsel's declaration was implausible. Thomas denied the observations claimed by the officers and explained he was present in the area was to purchase drugs, as did the defendant in *Warrick*.

Further, the scope of the misconduct alleged by the defendant in *Thompson* was significantly broader than that alleged by Thomas or the defendant in *Warrick*. Neither this case nor *Warrick* involved undercover officers purchasing narcotics with pre-recorded bills from the defendant in a transaction monitored by detectives and witnessed by multiple officers, with two additional officers recovering key evidence. *Thompson* is therefore factually distinguishable.

The People also rely on *People v. Sanderson* (2010) 181 Cal.App.4th 1334, which held a defendant being prosecuted for making criminal threats had failed to show good cause for discovery of the personnel records of police officers who heard the defendant make threats over a speaker phone. Defense counsel's declaration stated the police report had been falsified and the defendant denied making the statements attributed to him. (*Id.* at p. 1338.) *Sanderson* affirmed the

trial court's denial of the motion, noting the defendant "did not deny making the phone call or engaging in a telephonic conversation with [the victims] at the time the police were present at the house." (*Id.* at pp. 1340-1341, fn. omitted.) *Sanderson* concluded the defendant failed "to present 'an alternate version of the facts' regarding the reason and nature of his telephonic exchange . . . ." (*Id.* at p. 1341.)

However, the factual scenario posited by Thomas was plausible and thus sufficient to meet the materiality requirement of Evidence Code section 1043, subdivision (b). (*Warrick v. Superior Court, supra,* 35 Cal. 4th at p. 1026.) As a result, the trial court was obliged to conduct an in-chambers review of the detectives' personnel records relating to making false arrests, fabricating police reports or probable cause, and committing perjury. In other words, Thomas " 'satisfied the criteria for discovery under section 1043, subdivision (b),' thus entitling him to a determination of relevance under the provisions of section 1045. [Citation.]" (*Warrick v. Superior Court, supra*, at p. 1027.)

We therefore conditionally reverse the judgment with directions to review the requested documents in chambers on remand. (*People v. Gaines, supra,* 46 Cal.4th at p. 180.) "After reviewing the confidential materials in chambers, the trial court may determine that the requested personnel records contain no relevant information." (*Id.* at p. 181.) If so, the trial court shall reinstate the judgment. (*Ibid.*) If the in camera review reveals relevant information, the defendant must then "demonstrate a reasonable probability of a different outcome had the evidence been disclosed." (*Id.* at p. 182.) If the defendant demonstrates such a probability, the trial court must order a new trial; if it does not, the judgment shall be reinstated. (*Id.* at pp. 181-182.)

DISPOSITION

The judgment is conditionally reversed and remanded with directions to review the relevant personnel records in chambers. If the in chambers review reveals no relevant information, the trial court shall reinstate the judgment. If the in chambers review reveals relevant information, the trial court shall determine whether Thomas can demonstrate a reasonable probability of a different outcome had the evidence been disclosed and, if so, order a new trial. Otherwise, the trial court shall reinstate the judgment.

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KLEIN, P. J.

We concur:

CROSKEY, J.

KITCHING J.