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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION ONE

THE PEOPLE, Plaintiff and Respondent, v. GARY ELLISON, Defendant and Appellant.	B232527 (Los Angeles County Super. Ct. No. BA364161)

APPEAL from a judgment of the Superior Court of Los Angeles County. Monica Bachner, Judge. The judgment is conditionally reversed and remanded with directions.

Jennifer M. Hansen, 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, Sarah J. Farhat and Idan Ivri, Deputy Attorneys General, for Plaintiff and Respondent.

SUMMARY

Defendant and Appellant Gary Ellison appeals from a judgment entered after a jury convicted him of one count of selling a controlled substance, cocaine base, in violation of Health and Safety Code section 11352, subdivision (a). Defendant contends that the court erred in denying his *Pitchess*[1] motion as to certain officers. As to the officers for whom his *Pitchess* motion was granted, he requests that we conduct an independent review of the trial court's in camera hearing. Also on appeal, the prosecution contends that the trial court erred in imposing and staying four one-year Penal Code section 667.5, subdivision (b), enhancements, arguing that the court was required either to impose without stay or to strike those enhancements.

We conclude that the trial court abused its discretion in denying the *Pitchess* motion as to three officers. Therefore, we conditionally reverse the judgment and remand the matter for a new *Pitchess* hearing. We also remand with directions to strike or impose the four one-year enhancements.

FACTS AND PROCEEDINGS BELOW

1. Prosecution Evidence

On November 3, 2009, at approximately 4:45 p.m., Detective James Miller was in an unmarked vehicle with his partner, Officer Reyes, observing the intersection of Gladys and 6th Streets, when he saw a woman later identified as Gertrude Brown walking with what appeared to be cash in her right hand. Detective Miller saw Brown speak with defendant, defendant spit an item from his mouth into his hand to show Brown, defendant place the item in Brown's hand, Brown examine the item, and Brown close her hand around the item and give defendant cash. While it was in Brown's hand, Detective Miller saw that the item was off-white in color and wrapped in clear plastic. Brown and defendant then walked away and Detective Miller contacted the chase units, directing them to Brown and defendant.

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

Officer George Mejia and his partner, Officer Alvarado, detained defendant and Detective Ronald Kitzmiller and his partner, Detective Gamboa, detained Brown. Officer Mejia searched defendant and found $39 (consisting of one $20 bill, three $5 bills and four $1 bills). Detective Kitzmiller searched Brown and found an off-white solid in her pocket which was later tested and determined to be cocaine base.

2. Defense Evidence

A court-appointed investigator for the defense read from a transcript of his interview with Brown.[2] According to the transcript, the officers asked Brown what she was doing and she responded that she came to see a friend. The officers then asked if she had weapons or drugs and she said she had a "rock" in her pocket. Brown stated that she did not tell the officers that she bought it from someone because she "already had it." When asked if she bought the rock that day, Brown responded no, she already had it and had bought it before she got to the corner.

3. Prosecution Rebuttal

Detective Kitzmiller testified that prior to searching Brown, he asked her if she had any contraband and Brown responded that she had a rock she just bought from "'that guy,'" gesturing with her head toward where defendant was being detained, but that she did not know if the rock was soap.

4. Conviction and Sentence

The jury convicted defendant of one count of sale of a controlled substance, cocaine base, in violation of Health and Safety Code section 11352, subdivision (a).

In a bifurcated trial on prior convictions, the court found defendant had one conviction within the meaning of Health and Safety Code section 11370.2, subdivision (a), for his conviction under Health and Safety Code section 11352; had two prior convictions for serious or violent felonies within the meaning of Penal Code sections 667, subdivisions (b)-(i), and 1170.12, subdivisions (a)-(d), for his conviction under Penal

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[2] After Brown asserted her Fifth Amendment right and declined to testify, the court found her to be unavailable as a witness.

Code section 422 and his conviction under Penal Code sections 211and 664; and had four prior convictions within the meaning of Penal Code section 667.5, subdivision (b), for the three previously listed convictions and for a fourth conviction under Health and Safety Code section 11350. Based on the prosecution's stipulation, one of the strikes under Penal Code sections 667 and 1170.12 was stricken.

DISCUSSION

1. *Pitchess* Motion

Before trial, defendant filed a *Pitchess* motion for discovery of complaints related to "acts of racial bias, ethnic bias, violation of constitutional rights, fabrication of charges, fabrication of evidence, fabrication of reasonable suspicion and/or probable cause, false arrest, perjury, dishonesty, writing of false police reports, planting of evidence, illegal search and seizure, and any other evidence of misconduct amounting to moral turpitude" against Miller, Reyes, and Kitzmiller as well as Mejia, Alvarado, and Gamboa.[3] Defendant alleged in his declaration that he did not have any drugs in his possession and did not enter into any transaction with Brown. Rather, he alleged that he was standing in a food line when he was approached by officers and asked to step out of line. The officers then asked if he was on parole and, after he answered in the affirmative, handcuffed and searched defendant and told him he was being detained for a drug investigation. In his motion, defendant claimed that Detective Miller falsified the arrest report, fabricating charges and evidence, and argued that the other officers would testify to the same falsehoods at trial since they would use the arrest report to refresh their recollections at trial. According to the arrest report, when Detective Kitzmiller asked Brown if she had any illegal contraband in her possession, Brown responded "'Just a rock I bought for ten dollars in my pocket. I bought it off that guy but I don't know if it's soap.'"[4]

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[3] Defendant's *Pitchess* motion also sought discovery for three other officers but on appeal he does not contest the denial of his motion as to those additional officers.

[4] Defendant, through counsel, had filed a prior *Pitchess* motion seeking the records of Officers Miller and Reyes and alleging, upon information and belief, that defendant did

Although there was some uncertainty in the record as to which officers the trial court granted in camera review, the sealed transcript of the *Pitchess* hearing shows that the court granted in camera review of the records of Officer Miller, Officer Reyes and Detective Kitzmiller for complaints of dishonesty, false reports and planting evidence. The motion was denied as to all other grounds and as to the other officers—Officer Mejia, Officer Alvarado, and Detective Gamboa.

On appeal, defendant contends that the trial court erred in denying his *Pitchess* motion as to the remaining three officers. Also on appeal, defendant requests that we independently review the in camera proceedings to determine whether the trial court properly exercised its discretion as to the officers for whom the *Pitchess* motion was granted.

A. Denial of *Pitchess* Motion

The trial court's decision regarding the discoverability of material in police personnel files is reviewed under the abuse of discretion standard. (*People v. Cruz* (2008) 44 Cal.4th 636, 670.) "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.'" (*Warrick v. Superior Court* (2005) 35 Cal.4th 1011, 1016.) The defendant need only present a factual scenario of officer misconduct that "might or could have occurred." (*Id.* at p. 1026.) That is because "a credibility or persuasiveness standard at the *Pitchess* discovery stage would be inconsistent with the statutory language . . . ." (*Ibid.*) The defendant, however,

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not have any drugs on him and did not enter into any transactions with Brown, but was in the area to buy drugs and asked Brown where to find a dealer before walking toward the area she indicated and being arrested. The court denied this earlier motion reasoning that it was not plausible that Brown—which the court described as an independent, civilian witness— would state that defendant sold her the drugs if defendant's version were true. In granting defendant's second *Pitchess* motion, the court stated "now he's done more in his declaration."

must request information with sufficient specificity to preclude the possibility that he or she is "simply casting about for any helpful information." (*People v. Mooc* (2001) 26 Cal.4th 1216, 1226 (*Mooc*).)

Here, the court granted defendant's *Pitchess* motion as to three officers: two who witnessed the transaction (Officers Miller and Reyes) and one who arrested Brown (Detective Fitzmiller); however, the court denied the motion as to the other officer that arrested Brown (Detective Gamboa) and the two officers who arrested defendant (Officers Alvarado and Mejia). We find the court abused its discretion in denying defendant's *Pitchess* motion as to these three additional officers. Defendant satisfied the good cause requirement for discovery of information in the officers' personnel file. (Evid. Code, § 1043.) He provided a sufficient description of the information sought. He specifically claimed that he did not have any drugs in his possession and did not enter into a transaction with Brown. He also provided a reason for his presence at the intersection, stating that he was standing in a food line when officers approached and asked him to step out of line.

We remand the matter of a new in camera hearing regarding Gamboa, Alvarado and Mejia, during which time the trial court can examine these records and disclose to defendant "'information [that] is relevant to the subject matter involved in the pending litigation,'" but does not fall within the statutory exceptions and limitations. (*Mooc*, *supra*, 26 Cal.4th at pp. 1226-1227; Evid. Code, § 1045, subd. (a).)

In the event the trial court discloses information to defendant, the court shall allow defendant an opportunity to demonstrate prejudice and shall order a new trial if there is a reasonable probability that the outcome would have been different had the information been disclosed. If, after a reasonable time, defendant has not moved for a new trial or the court finds no reasonable probability of a more favorable outcome if the information had been disclosed, the court shall reinstate the judgment. (*People v. Gaines* (2009) 46 Cal.4th 172, 180-181; *People v. Hustead* (1999) 74 Cal.App.4th 410, 419, 422, 423.)

B. In Camera *Pitchess* Hearing

As to Officer Miller, Officer Reyes and Detective Kitzmiller, the record indicates that the court complied with the procedural requirements of a *Pitchess* hearing. There was a court reporter present and the custodian of records was sworn prior to testifying. (*Mooc, supra*, 26 Cal.4th at pp. 1228, 1229, fn. 4; *People v. White* (2011) 191 Cal.App.4th 1333, 1339-1340.) The custodian of records complied with the requirement to bring all the relevant personnel records and submit them for the court to review and determine which documents were relevant. (*People v. Wycoff* (2008) 164 Cal.App.4th 410, 414-415.)

We have conducted an independent review of the transcript and the documents, and find no error occurred during the *Pitchess* hearing in chambers.[5]

2. Prior Prison Term Enhancements

After sentencing defendant to the low term doubled plus an additional three years for the Health and Safety Code section 352 conviction, the court imposed and stayed the one-year enhancements for the four Penal Code section 667.5, subdivision (b), prior convictions. The court explained its reasoning, saying "[a]lthough Mr. Ellison does have a lengthy criminal record, including prior crimes of violence, the instant crime is a nonviolent crime, it's a victimless crime, and it is a small amount of narcotics. However, I'm not striking the three years because it's a recent prior narcotics conviction." The court later reiterated that "each of those four one years are imposed and stayed. So there's not an additional time. They're imposed and stayed. So the total aggregate term of imprisonment for all counts and enhancements is nine years."

On appeal, the prosecution argues the trial court was not authorized to impose and stay the four one-year sentence enhancements under Penal Code section 667.5,

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[5] The *Pitchess* materials were given to defendant and his investigator on May 14, 2010.

subdivision (b); rather the court's only options were to strike the enhancements or impose them without stay.[6] Defendant concedes this point.

Because a trial court has the discretion to strike a prison prior enhancement but not to stay the punishment for the enhancement, we agree that the court must either impose or strike the enhancements for defendant's prior prison terms. (Pen. Code, § 1385; *People v. White Eagle* (1996) 48 Cal.App.4th 1511, 1521.)

DISPOSITION

The judgment is conditionally reversed and the case remanded with directions to the trial court to conduct an in camera hearing on defendant's discovery motion as to Gamboa, Alvarado and Mejia. If the hearing reveals no discoverable information, the trial court shall reinstate the original judgment. If the in camera hearing reveals discoverable information, the trial court shall grant discovery and allow defendant an opportunity to demonstrate prejudice. If prejudice is demonstrated, the court shall order a new trial. If prejudice is not demonstrated, the trial court shall reinstate the original judgment.

Upon reinstatement of the original judgment, the sentence is vacated and the cause remanded to the trial court with directions to strike or to impose without stay the four one-year prior prison term enhancements and, if necessary, to resentence defendant.

NOT TO BE PUBLISHED.

CHANEY, J.

We concur:

MALLANO, P. J. ROTHSCHILD, J.

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[6] Although the minute order cites to Penal Code section 654, at the sentencing hearing the court did not refer to section 654 as the basis for its decision and instead cited California Rules of Court, rule 4.423(a), in discussing mitigating factors. (*See People v. Sharret* (2011) 191 Cal.App.4th 859, 864 [trial court's oral pronouncement controls where there is a conflict between the pronouncement and the minute order or abstract of judgment].)