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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION ONE

STEVE LAUNER,

Petitioner,

v.

THE SUPERIOR COURT OF
LOS ANGELES COUNTY,

Respondent;

THE PEOPLE et al.,

Real Parties in Interest.

B243372

(L.A.S.C. No. GA082960)

OPINION AND ORDER
GRANTING PEREMPTORY
WRIT OF MANDATE

ORIGINAL PROCEEDING; petition for writ of mandate/prohibition.

Candace J. Beason, Judge. Petition granted.

Kenneth H. Lewis and Stephen G. Rodriguez for Petitioner.

No appearance for Respondent.

Carmen A. Trutanich, City Attorney, Carlos De La Guerra, Managing Assistant City Attorney, Jess. J. Gonzalez, Supervising Assistant City Attorney and Annette Y. Lee, Deputy City Attorney for Real Party in Interest Los Angeles Police Department.

The trial court abused its discretion in denying defendant Steve Launer's (Launer) *Pitchess*¹ motion, because Launer showed good cause for an in camera inspection of Los Angeles Police Department Detective Daniel Wise's (Wise) confidential personnel records.² Accordingly, the petition is granted.

FACTUAL AND PROCEDURAL BACKGROUND

This matter arises out of the failed domestic relationship between Launer and the victim, Wise.

According to the police reports of two alleged incidents, Launer committed crimes against ex-boyfriend Wise, as follows:

January 29, 2011 (Domestic Violence at the Wise Residence): Launer and victim Wise had been in a dating relationship and living together for about a year. But since November 2010, Launer had been physically and verbally abusive to Wise. On January 29, 2011, an argument over their relationship escalated to the point that Launer slapped Wise and punched Wise in the face. This incident was recorded, at least in part on audio. On January 30, 2011, Launer poured hot coffee on Wise's lap. On February 6, 2011, another argument escalated to the point where Launer threw a bag of coins at Wise, missing him. (As a result Launer was charged with violation of Penal Code section 243(e)(1) (domestic violence).)

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

² As there is not a plain, speedy and adequate remedy at law, and in view of the fact that the issuance of an alternative writ would add nothing to the presentation already made, we deem this to be a proper case for the issuance of a peremptory writ of mandate "in the first instance." (Code Civ. Proc., § 1088; *Brown, Winfield & Canzoneri, Inc. v. Superior Court* (2010) 47 Cal.4th 1233, 1237–1238; *Lewis v. Superior Court* (1999) 19 Cal.4th 1232, 1240–1241; *Ng v. Superior Court* (1992) 4 Cal.4th 29, 35.) Opposition was requested and the parties were notified of the court's intention to issue a peremptory writ. (*Palma v. U.S. Industrial Fasteners, Inc.* (1984) 36 Cal.3d 171, 180.)

March 1, 2011 (Burglary of Wise Residence): On February 15, 2011, Wise had successfully obtained a temporary Domestic Violence Restraining Order against Launer. But it had not been served on Launer by the time of this incident. On February 28, 2011, Wise came home and noticed Launer's computer use name on Wise's computer screen, evidence that Launer had recently been inside the Wise residence. On March 1, 2011, Wise returned from work around lunchtime and saw Launer's Mazda pickup truck parked in front of his residence. Wise saw Launer standing on the grass in front of his residence. He saw Launer push the Mazda away from the residence, but it collided with a parked car. Launer ran away and could not be located. Deputies found several items of Wise's property in the Mazda's bed, including credit cards, a bag, papers and clothing. A point of entry appeared to be a rear window to the Wise residence. (As a result, Launer was charged with violation of Penal Code sections 459 (burglary) and 496 (receiving stolen property).)

A preliminary hearing was held on March 21, 2012, and Launer was held to answer on all counts.

Launer was arraigned on April 4, 2012 and entered a plea of not guilty to all counts.

On May 9, 2012, Launer filed a *Pitchess* motion seeking Wise's personnel records pertaining to fabricating charges, untruthfulness and violence. The attached declaration of attorney Kenneth H. Lewis states, in relevant part:

"Defendant Launer's first contention and defense is that he never committed any battery against detective Wise whatsoever, at any time or place. It is defendant Launer's contention and defense that it was detective Wise, not he, who was violent and aggressive throughout their relationship. The acts of violence and aggression included tackling defendant to the ground, making numerous threats of physical harm, throwing household items at him, brandishing his service weapon and ammunition in front of defendant (to prove he could carry out his threats) and pointing a [BB] gun at his face. Detective

Wise'[s] personnel records in connection with his propensity to commit violence and act aggressively are vital and necessary to proving this defense.

“On several instances detective Wise even used police resources to keep tabs on defendant, showing defendant pictures of himself and his car on various streets throughout Los Angeles.

“The impetus for filing the specious battery charge was that on February 11, 2011, detective Wise left a suicide note for defendant Launer to find, and he texted him that he was ‘never coming home.’ Defendant Launer was so concerned about the suicide note (especially since detective Wise had access to three firearms at home) that he called the LAPD Behavioral Unit for help, exposing not only the suicide attempt but their relationship as well. Detective Wise’s personnel file may well contain information on his psychological state that will reflect upon the suicide threat that he made on February 11th.

“Detective Wise had tried to hide his gay relationship with defendant Launer from his employer and he became enraged that he had been outed to the L.A.P.D. Detective Wise, upon learning about what the defendant had done, immediately sent threatening text messages to defendant and an email stating, ‘I’ll kill you if I have too.’ . . . [*Sic.*] It is the defendant’s contention and defense that detective Wise was angry and looking for revenge, and began a plan to fabricate evidence against the defendant and have him arrested for as many criminal violations as he possibly could. In fact, the day after his suicide note was revealed to the LAPD and he threatened ‘to kill’ the defendant, he had the defendant arrested on fabricated charges of battery, . . . (where there were no indications of injuries from that alleged event). The personnel files are uniquely situated to establish whether or not detective Wise had previously been accused of fabricating charges against innocent people, was untruthful and violent.

“Detective Wise also obtained a Temporary Restraining Order against defendant Launer, by means of a perjured Declaration, but it was not served until after March 1, 2012. In fact, it was later dismissed for lack of prosecution.

“It is also the defendant’s contention and defense that not only did detective Wise fabricate charges of battery, but that detective Wise also fabricated charges of residential burglary and receiving stolen property against him.

“On the date of the alleged residential break-in, March 1, 2011, detective Wise knew that defendant Launer still had most of his personal items in the house . . . that they had shared for over 15 months. He knew that defendant Launer needed, and would undoubtedly retrieve, his personal belongings and detective Wise did not . . . change any of the locks. He knew that defendant Launer still had his key to the house. . . .

“On March 1, 2011, detective Wise made a point of driving by his home during his lunch hour, undoubtedly to see if defendant Launer would be coming into the house to retrieve his personal items. Detective Wise has given inconsistent accounts of what he saw on that day, both in the police reports and at the preliminary hearing. He called the local Temple City Sheriff’s Station (instead of 911) and gave a report that ‘someone’ was in his house (he did not identify that person as defendant Launer). He did not seem excited or nervous during that call and requested that[] the deputies come to his house. Later he stated that he saw defendant Launer on his lawn . . . and that he, Launer, later started pushing his (Launer’s) truck across the street. . . .

“Deputy Dana of the Temple City Sheriff’s Substation responded to the call and met with detective Wise outside of the house. They eventually moved next to defendant Launer’s truck (which was parked across, and down the street). Detective Dana found ‘paperwork’ in the truck with detective Wise’s name on it, and without identifying or inventorying it, she handed them to detective Wise and gave him a ‘Supplemental Loss Report’ to fill out and return to the substation at a later time.

“[¶] . . . [¶]

“Moreover, on March 25, 2011, detective Wise brought back the Supplemental Loss Report and he listed numerous items that were never mentioned in the original report of Deputy Dana, including: a credit card in his name, a debit card, and 44 one hundred dollar savings bonds, which he alleged were found in defendant’s truck at the

scene. These are the items that tie defendant to a burglary. It is the contention of defendant that had there been credit cards, debit cards, and \$4,400 in savings bonds responding officers would have made an inventory of these items on the day of the incident or at least mentioned them in their report. It is defendant's contention that detective Wise falsified this Supplemental Loss Statement. In fact, it was not until May 10, 2011, over three months later, and having received the above information from detective Wise, that responding Deputy Dana suddenly remembered seeing blood at the point of entry and 'several identification cards belonging to Wise' in defendant's truck. Even in this supplemental report Deputy Dana made no mention of the savings bonds, credit cards or bloody screwdriver Wise alleged was either found in defendant's truck or left at the scene by defendant. Detective Wise was clearly exacting revenge on defendant Launer for 'outing' him and reporting his suicide attempt to his LAPD supervisors, and fabricated the theft of his credit cards and savings bonds in order to try to get defendant Launer convicted of the serious charge of residential burglary. Detective Wise's personnel records are key to establishing his propensity to lie and fabricate evidence. Defendant Launer must have these records reviewed in order to adequately defend himself."

On July 11, 2012, after oral argument, the trial court denied the motion.

DISCUSSION

Launer contends that the trial court abused its discretion in denying the *Pitchess* motion because the motion and counsel's declaration met all the requirements of *Pitchess*, its progeny, the Evidence Code, and that of materiality and good cause. The City Attorney argues that the victim was an off duty police officer and not subject to a *Pitchess* motion. We agree with Launer.

"A defendant has a limited right of discovery of a peace officer's confidential personnel records if those files contain information that is potentially relevant to the defense. [Citations.] . . .

“To initiate discovery, a defendant must file a motion seeking such records, containing affidavits ‘showing good cause for the discovery or disclosure sought, setting forth the materiality thereof to the subject matter involved in the pending litigation’ [Citation.] Good cause requires the defendant to establish a logical link between the proposed defense and the pending charge and to articulate how the discovery would support such a defense or how it would impeach the officer’s version of events. [Citation.]

“The threshold for establishing good cause is “‘relatively low.’” [Citations.] The proposed defense must have a ‘plausible factual foundation’ support by the defendant’s counsel’s declaration and other documents supporting the motion. [Citation.] A plausible scenario ‘is one that might or could have occurred.’ [Citation.] The ‘defendant must also show how the information sought could lead to or be evidence potentially admissible at trial Once that burden is met, the defendant has shown materiality under [Evidence Code] section 1043.’ [Citation.]

“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.] Subject to certain statutory exceptions and limitations [citation], “the trial court should then disclose to the defendant ‘such information [that] is relevant to the subject matter involved in the pending litigation.’” [Citations.]’ [Citation.]

“We review the denial of a *Pitchess* motion for abuse of discretion. [Citations.]” (*People v. Moreno* (2011) 192 Cal.App.4th 692, 700–701.)

And “[a]lthough cases involving the discovery of peace officer personnel records will usually involve alleged ‘misconduct’ of officers *qua* officers, there is nothing in Evidence Code section 1043 or case law that limits the procedure in this way. (See *People v. Superior Court (Gremminger)* (1997) 58 Cal.App.4th 397, 407 . . . [People must comply with Evid. Code, § 1043 et seq. to obtain personnel records of former police officer].) Nor would such a limitation make sense. Material in a peace officer’s personnel file that is relevant and potentially exculpatory does not become less so merely

because the officer is no longer in the employ of a law enforcement agency. (Cf. *People v. Superior Court (McKunes)* (1976) 62 Cal.App.3d 853, 857 . . . [personnel file of police officer who was victim of assault was discoverable even though the officer was off duty at the time of the assault].)” (*People v. Moreno, supra*, 192 Cal.App.4th at pp. 702–703.)

In this case, we do not have the typical situation where the officer whose records are attempted to be reviewed was an officer actually involved, while on duty, in an arrest or circumstances surrounding an arrest. Here, Wise was the alleged victim of a crime while off duty. But it does not matter whether the officer was on duty or not, or if he was even still employed as a peace officer for *Pitchess* to come into effect. (*People v. Moreno, supra*, 192 Cal.App.4th at p. 703; *People v. Superior Court (McKines), supra*, 62 Cal.App.3d at p. 857.)

Although Wise may have been off duty, he is still subject to a *Pitchess* motion. Counsel’s declaration was a sufficient showing of good cause. “Counsel’s affidavit must also describe a factual scenario supporting the claimed officer misconduct. That factual scenario, depending on the circumstances of the case, may consist of a denial of the facts asserted in the police report.” (*Warrick v. Superior Court* (2005) 35 Cal.4th 1011, 1024–1025; see also p. 1027.) In this case, Launer denied he was the aggressor as to the domestic violence. He explained how he did not batter Wise, but that Wise battered him and fabricated the battery charges. Launer went to Wise’s house, where he had lived and to which he had a key, to pick up his belongings. The initial police report did not report as missing the items Wise later claimed was found in Launer’s truck. Launer denied he took any bonds or credit cards. He claims that Wise falsified the report. This was a plausible factual foundation. According to our Supreme Court in *Warrick v. Superior Court, supra*, 35 Cal.4th at p. 1026, “What standard must a moving party meet to show a ‘plausible’ factual foundation for the *Pitchess* discovery requested? We conclude that 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.”

Since Launer has established good cause, the trial court must review Wise's confidential personnel records in camera for any information pertaining to fabricating charges, untruthfulness and violence and disclose any such information to Launer.

DISPOSITION

THEREFORE, let a peremptory writ issue, commanding respondent superior court to vacate its order of July 11, 2012, denying Launer's *Pitchess* motion, and to issue a new and different order granting same, in Los Angeles Superior Court case No. GA082960, entitled The People of the State of California v. Steve Launer.

NOT TO BE PUBLISHED

THE COURT*:

*MALLANO, P. J.

ROTHSCHILD, J.

JOHNSON, J.