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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
SECOND APPELLATE DISTRICT
DIVISION THREE

THE PEOPLE,

Plaintiff and Respondent,

v.

DERRICK FLUCAS,

Defendant and Appellant.

B267511

Los Angeles County
Super. Ct. No. BA428460

APPEAL from a judgment of the Superior Court of
Los Angeles County, Henry J. Hall and Lisa B. Lench, Judges.
Affirmed.

Cynthia L. Barnes, under appointment by the Court of
Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Gerald A. Engler,
Chief Assistant Attorney General, Lance E. Winters, Senior
Assistant Attorney General, Stacy S. Schwartz and Rene
Judkiewicz, Deputy Attorneys General, for Plaintiff and
Respondent.

INTRODUCTION

A jury convicted defendant Derrick Flucas of one count of possession of a firearm by a felon (Pen. Code, § 29800, subd. (a)(1)).¹ On appeal, defendant contends the trial court abused its discretion by limiting the scope of its *Pitchess*² review of the arresting officers' personnel files to complaints involving falsification of police reports. Defendant requests that we review the sealed record of the court's *Pitchess* examination to determine whether it failed to order disclosure of any discoverable materials contained in those files. Defendant also argues the court abused its discretion in denying his request to appoint new trial counsel under *People v. Marsden* (1970) 2 Cal.3d 118 (*Marsden*). Finding no error, we affirm.

FACTS AND PROCEDURAL BACKGROUND

On the evening of August 16, 2014, Officers Martin Beck and Alvaro Governale from the Los Angeles Police Department (LAPD) were on patrol in South Central Los Angeles. As the officers drove through a residential neighborhood, they saw a group of people congregated in front of a house, having a small party. Defendant was standing on the sidewalk in front of the driveway and appeared to be drinking alcohol.

When defendant saw the officers, he became nervous and immediately began to move up the driveway and grab at his waistband. The officers parked in front of the driveway and got out of their patrol vehicle. As defendant continued to move away

¹ All undesignated section references are to the Penal Code.

² *Pitchess v. Superior Court* (1974) 11 Cal.3d 531 (*Pitchess*).

from the officers, he removed a fully loaded revolver from his waistband and dropped it into the rear bed of a pickup truck parked in the driveway. As soon as Beck saw defendant's weapon, he ordered defendant to step away from the truck; Beck then approached the truck, picked up the gun, and placed it in his pocket. Both Beck and Governale repeatedly instructed defendant to put his hands in the air, and to stop moving. However, defendant continued to move away from the officers and eventually ran from them. As the officers pursued defendant on foot, he continued to grab at his waistband, which led Beck to believe defendant might have another weapon in his possession. The officers caught up with defendant on the lawn of a nearby house and arrested him.

The People filed an information charging defendant with one count of possession of a firearm by a felon (§ 29800, subd. (a)(1)) with four prior felony convictions (former § 12025 [recodified at § 25400 without substantive change], Health & Safety Code section 11360, and two convictions under Vehicle Code section 23152).³ Trial was by jury, and resulted in defendant's conviction. The court sentenced defendant to the middle term of two years, to be served in state prison. Defendant appeals.

³ The People and defendant stipulated at trial that defendant had suffered prior felony convictions as set forth in the information to prove his status as a felon, which is an element of the charged offense.

CONTENTIONS

Defendant contends the court abused its discretion by limiting the scope of its *Pitchess* review to complaints regarding falsification of police reports, and requests that we review the sealed transcript of the court's in camera review of the arresting officers' personnel files to determine whether the court failed to order the disclosure of any properly discoverable information. In addition, defendant contends the court abused its discretion by denying his request for the appointment of new trial counsel under *Marsden*.

DISCUSSION

1. The court did not err by limiting the scope of its *Pitchess* review.

1.1. Applicable law

A criminal defendant has a limited right to discovery of a peace officer's personnel records. Under *Pitchess*, as codified in sections 832.5, 832.7, and 832.8 and Evidence Code sections 1043 to 1047, a trial court may order disclosure of portions of a peace officer's personnel records which may be relevant to a defendant's defense. (*People v. Mooc* (2001) 26 Cal.4th 1216, 1225-1226 (*Mooc*)). In order to obtain such discovery, a defendant must demonstrate good cause in a written motion. (*Id.* at p. 1226.) A showing of good cause requires a defendant to demonstrate the materiality of the requested information by providing a specific factual scenario which establishes a plausible factual foundation for the officer misconduct alleged by the defendant. (*City of Santa Cruz v. Municipal Court* (1989) 49 Cal.3d 74, 85-86.)

When a defendant demonstrates that good cause for discovery exists, the court is obligated to conduct a confidential,

in camera, review of the officers' personnel files. (*Mooc, supra*, 26 Cal.4th at p. 1226.) "Subject to statutory exceptions and limitations, . . . the trial court should then disclose to the defendant 'such information [that] is relevant to the subject matter involved in the pending litigation. [Citation.]' " (*Ibid.*) Our courts have repeatedly recognized that this "statutory scheme carefully balances two directly conflicting interests: the peace officer's just claim to confidentiality, and the criminal defendant's equally compelling interest in all information pertinent to the defense." (*City of San Jose v. Superior Court* (1993) 5 Cal.4th 47, 53.) The Court has also emphasized that the Legislature's intent in adopting the statutory scheme governing discovery of peace officer personnel records "manifestly was to protect such records against 'fishing expeditions.'" (*Id.* at p. 54.)

Trial courts are vested with broad discretion when ruling on motions to discover peace officer records. (*People v. Samayoa* (1997) 15 Cal.4th 795, 827; *People v. Memro* (1995) 11 Cal.4th 786, 832.) Accordingly, we review a trial court's ruling on a *Pitchess* motion for an abuse of discretion. (*Mooc, supra*, 26 Cal.4th at p. 1228).

1.2. Additional facts regarding the *Pitchess* motion

Defendant filed a *Pitchess* motion asserting that the arresting officers falsely accused him of taking a firearm out of his waistband and placing it in the open bed of the pickup truck. He denied being in possession of a firearm, and contended the officers fabricated the police report indicating otherwise. By his motion, defendant sought discovery of "a broad range of police records evidencing excessive force, dishonesty, medacity [*sic*] or moral turpitude." Specifically, defendant sought to discover from the officers' personnel files, "[a]ll complaints from any and all

sources relating to aggressive behavior, violence, excessive force, or attempted violence or excessive [sic], violation of constitutional rights, fabrication of charges, fabrication of evidence, fabrication of reasonable suspicion and/or probable cause, illegal search/seizure[,] false arrest, perjury, dishonesty, writing of false police reports, writing of false police reports to cover up the use of excessive force, planting of evidence, false or misleading internal reports including but not limited to false overtime or medical reports, and any other evidence of misconduct amounting to moral turpitude within the meaning of *People v. Wheeler* (1992) 4 Cal.4th 284.” The LAPD opposed the *Pitchess* motion, asserting defendant had not shown good cause for discovery, and that even if good cause existed to allow the review of some materials from the officers’ personnel files, defendant’s discovery request was overbroad.

The court heard the motion on August 18, 2015. The court conferred briefly with counsel on the record, and confirmed with defense counsel that the focus of defendant’s motion was his claim that he never had a firearm, and his further contention that the police officers fabricated their report. The court then granted the motion and stated it would review the officers’ records for complaints of falsification of police reports within the five years preceding defendant’s arrest.

The court conducted an in camera review of the officers’ files and concluded no discoverable material existed.

1.3. The court did not abuse its discretion by limiting the scope of its *Pitchess* review to claims of falsification of police reports.

Defendant contends the court improperly limited the scope of its in camera review of the arresting officers’ personnel files to

citizen complaints relating to falsification of police reports. Instead, defendant claims, the court should have also ordered discovery of citizen complaints relating to myriad forms of misconduct, e.g., any aggressive behavior, violent conduct, use of excessive force, as well as making false or misleading internal reports such as false overtime or medical reports. In other words, defendant seeks to discover any information in the officers' personnel files which could be used to undermine their credibility and character.

This type of discovery request—the quintessential fishing expedition—has been firmly rejected by our courts as overbroad. (See, e.g., *People v. Jackson* (1996) 13 Cal.4th 1164, 1220 [stating that “when a defendant asserts that his confession was coerced, a discovery request that seeks all excessive force complaints against the arresting officers is overly broad . . . [instead] ‘only complaints by persons who alleged coercive techniques in questioning [are] relevant,’ ” citation omitted]; *California Highway Patrol v. Superior Court* (2000) 84 Cal.App.4th 1010, 1024 (*California Highway Patrol*) [to grant discovery of peace officer records reflecting officer misconduct involving moral turpitude, without requiring a good cause showing, would undercut the statutory scheme set forth in Evidence Code section 1043]; see also *People v. Gill* (1997) 60 Cal.App.4th 743, 749-750.) It is well settled that discovery of material in an officer's personnel files is limited to instances of officer misconduct similar to the misconduct asserted by the defendant. (*Warrick v. Superior Court* (2005) 35 Cal.4th 1011, 1021; *California Highway Patrol, supra*, at p. 1021.)

Here, defendant's *Pitchess* motion claimed defendant was not in possession of a firearm at the time the officers arrived, and

he therefore did not discard a firearm into the bed of a pickup truck, as stated in the officers' report. As the court recognized when it granted defendant's *Pitchess* motion, those allegations set forth a specific factual scenario which established a plausible factual foundation for the allegations of officer misconduct asserted by defendant. Accordingly, good cause existed to examine the officers' personnel files in camera. However, as defense counsel acknowledged during the argument on the motion, the focus of the defense theory was the officers' falsification of the police report. Therefore, the court did not abuse its discretion by restricting the scope of its in camera review to citizen complaints involving falsification of police reports. To the extent defendant sought to discover additional categories of information unrelated to falsification of police reports, his request was overbroad.

1.4. The court did not withhold properly discoverable information from defendant.

At defendant's request, we reviewed the reporter's transcript of the court's in camera review of the officers' personnel files in order to determine whether the court failed to disclose any properly discoverable information. The August 18, 2015 transcript constitutes an adequate record of the court's review of any documents provided to it, and reveals no abuse of discretion. (*People v. Myles* (2012) 53 Cal.4th 1181, 1209.)

2. The court did not err by denying defendant's *Marsden* motion seeking the appointment of new trial counsel.

2.1. Applicable legal principles

As defendant observes, the constitutional right to assistance of counsel includes the right to discharge or substitute

appointed counsel, if the failure to do so would substantially impair the rights of the accused. (*Marsden, supra*, 2 Cal.3d at p. 123.) Accordingly, “[w]hen a defendant seeks substitution of appointed counsel pursuant to [*Marsden*], ‘the trial court must permit the defendant to explain the basis of his contention and to relate specific instances of inadequate performance. A defendant is entitled to relief if the record clearly shows that the appointed counsel is not providing adequate representation or that defendant and counsel have become embroiled in such an irreconcilable conflict that ineffective representation is likely to result.’” (*People v. Taylor* (2010) 48 Cal.4th 574, 599 (*Taylor*), quoting *People v. Smith* (2003) 30 Cal.4th 581, 604.)

Our Supreme Court has “explained that ‘the decision whether to permit a defendant to discharge his appointed counsel and substitute another attorney during the trial is within the discretion of the trial court,’ that ‘a defendant has no absolute right to more than one appointed attorney,’ and that a trial court is not bound to accede to a request for substitute counsel unless the defendant makes a ‘ “sufficient showing . . . that the right to the assistance of counsel would be substantially impaired’ ” ’ if the original attorney continued to represent the defendant.” (*People v. Sanchez* (2011) 53 Cal.4th 80, 87, quoting *Marsden, supra*, 2 Cal.3d at p. 123.) We review the trial court’s denial of a *Marsden* motion for an abuse of discretion. (*Taylor, supra*, 48 Cal.4th at p. 599.) Denial “ ‘is not an abuse of discretion unless the defendant has shown that a failure to replace the appointed attorney would “substantially impair” the defendant’s right to assistance of counsel. [Citations.]’ ” (*People v. Barnett* (1998) 17 Cal.4th 1044, 1085.)

2.2. Additional facts regarding the request for substitution of counsel

During the jury selection phase, defendant made an oral motion seeking the appointment of new trial counsel. Defendant explained that he had previously provided his counsel with a video taken by a bystander at the scene of his arrest. He complained that his attorney “has given [him] the run around from day one” concerning the video. Further, he disagreed with his attorney’s conclusion that the evidence was not relevant to the case. Defendant told the court that “[t]he evidence is showing the officers picking up a gun where they say they found the gun across the street and it was placed by me and then picked up by the officers.”

The court asked defense counsel to explain herself, and she advised the court that she initially had some difficulty viewing the video on her computer, which resulted in some delay before she could discuss the matter with defendant. However, after viewing the video, defense counsel concluded she did not want to give the video to the People for strategic reasons; she planned to use the video as impeachment evidence, if necessary. Further, counsel advised the court that she planned to question the officers about the events depicted on the video and, if their testimony was consistent with the video, she would not play it for the jury because the video also contained some footage that would not benefit defendant.

The court noted that defense counsel had a plan to use the video evidence,⁴ and concluded the disagreement over counsel’s

⁴ At trial, before Beck completed his testimony, defense counsel informed the court at sidebar that she had “a potential video” she

tactical approach did not rise to the level of constitutional deprivation of the right to counsel. Accordingly, the court denied defendant's *Marsden* motion.

2.3. The court did not abuse its discretion by denying the *Marsden* motion.

In light of the facts just summarized, we conclude the court did not err by denying defendant's request for substitution of counsel. The court provided defendant with the requisite opportunity to air his complaints. After considering counsel's responses to each of defendant's grievances, the court was entitled to credit counsel's explanations and conclude that defendant's complaints were unfounded. (*People v. Smith* (1993) 6 Cal.4th 684, 696.) Further, defendant failed to show, as is required to support a request for substitution of counsel, either that counsel was not providing adequate representation or that his relationship with counsel was plagued by irreconcilable conflict likely to result in ineffective representation. As the trial court observed, defendant simply disagreed with his trial counsel regarding the importance and use of the video evidence. But it is well established that a disagreement with counsel over a tactical decision is not sufficient grounds for substitution. (*People v. Lara* (2001) 86 Cal.App.4th 139, 151; see also *People v. Cole* (2004) 33 Cal.4th 1158, 1192 [disagreement as to tactics is insufficient to compel discharge of counsel].) Moreover, the "mere 'lack of trust in, or inability to get along with,' 'counsel is not sufficient grounds for substitution.'" (*Taylor, supra*, 48 Cal.4th at p. 600, quoting *People v. Berryman* (1993) 6 Cal.4th 1048, 1070.)

would like to play. However, the video was ultimately not played to the jury.

Accordingly, the court did not abuse its discretion by denying defendant's request for substitution of counsel.

DISPOSITION

The judgment is affirmed.

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LAVIN, J.

WE CONCUR:

EDMON, P. J.

ALDRICH, J.