Filed 7/29/16 P. v. Egal CA2/1

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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. ALI OSMAN EGAL, Defendant and Appellant.	B265743 (Los Angeles County Super. Ct. No. BA417163)

APPEAL from an order of the Superior Court of Los Angeles County, Craig E. Veals, Judge. Reversed.

Rachel Varnell, 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, Assistant Attorney General, Victoria B. Wilson and Jessica C. Owen, Deputy Attorneys General, for Plaintiff and Respondent.

We hold that appellant Ali Osman Egal carried his burden to demonstrate good cause for disclosure of juror identifying information. Accordingly, we reverse the judgment and order the trial court to release the juror identifying information to appellate counsel.

BACKGROUND

On January 27, 2014, the jury found Egal guilty of one count of driving while intoxicated and one count of driving while intoxicated with a blood alcohol level of 0.08 percent or more, both having been committed within 10 years of previous vehicular felony convictions under Vehicle Code section 23152. (Veh. Code, §§ 23550.5, subds. (a), (b).) Egal admitted three prior prison terms and one prior strike. (Pen. Code, §§ 667.5, subd. (b); 1170.12, subds. (a)-(d).)

On January 28, 2014, Deputy Public Defender Daniel Titkin filed a new trial motion, alleging juror misconduct.[1] In his declaration,[2] Titkin stated:

"1. I am the attorney of record for the defendant in this case, Ali Egal.

"2. On January 27, 2014, immediately following the guilty verdict, DA Herring and I met with four jurors and one alternate juror in the hallway outside the courtroom. The jury foreperson was among this group of jurors that agreed to speak with us.

"3. During our conversation with the jurors, the foreperson said the fact that Mr. Egal did not testify was detrimental to his case, because 'we never got to hear his side of the story.'

"4. I then asked the foreperson whether the jury discussed the fact that the defendant did not testify during deliberations. The foreperson responded, 'No. A little bit, but not really.'

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[1] On our own motion, we augmented the record to include the new trial motion and Titkin's declaration in support of the new trial motion. (Cal. Rules of Court, rule 8.155(a)(1)(A).)

[2] Titkin did not provide the declaration of any of the jurors or of Deputy District Attorney Herring.

"5. DA Herring was present in the hallway when the foreperson made the aforementioned comments."

On February 19, 2014, the trial court denied Egal's motion for a new trial.[3]

Subsequently, Egal, now represented by appellate counsel Rachel Varnell, sought to unseal juror identifying information. In support of the petition to unseal the information, Varnell referred to Titkin's declaration, summarizing it as follows: "Immediately following the jurors' verdict, defense counsel moved for a new trial on the ground of juror misconduct. The alleged juror misconduct was discussion in deliberations and consideration of the fact that defendant did not testify at trial. Attached to the motion for new trial was a declaration from defense counsel that stated immediately following the guilty verdict, defense counsel and the prosecutor met with four jurors, one of whom was the foreperson. The foreperson said the fact that defendant did not testify was 'detrimental to his case, because "we never got to hear his side of the story."' When asked whether the jury discussed the fact that defendant did not testify during deliberations, the foreperson responded, 'No. A little bit, but not really.'"

The trial court denied the petition to unseal juror identifying information on January 28, 2015.

On April 21, 2015, Egal filed a revised petition to unseal juror identifying information on the basis that the jurors had committed misconduct by disregarding the trial court's instruction of CALJIC No. 2.60[4] "not to draw any inference from the fact that [Egal] did not testify, not to discuss this matter, and not to permit it to enter into its deliberations in any way." Again, Varnell summarized Titkin's declaration appended to this motion for a new trial.

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[3] On that same day, the trial court imposed a prison term of eight years.

[4] In full, CALJIC No. 2.60 reads: "A defendant in a criminal trial has a constitutional right not to be compelled to testify. You must not draw any inference from the fact that a defendant does not testify. Further, you must neither discuss this matter nor permit it to enter into your deliberations in any way."

On June 30, 2015, the trial court denied the revised petition, commenting that it had already ruled on the issue when it considered, and denied, the new trial motion and the first petition to unseal. The trial court further commented: "I see a statement where someone is saying in tantamount terms that the case was one that compellingly showed that the defendant was guilty. [¶] He did, after all, enter a plea of not guilty, and by implication saying that that story isn't true, the compelling force of the evidence was somehow misleading. And if he didn't rebut it with actual evidence testimony on his part, what are we left with but what the evidence in the case showed.

"I don't see it—I can't read that reasonably any other way. And it was a very strong case. I mean I don't think that there were any factual deficiencies as far as proving the defendant's guilt was concerned. So the jurors are left with wondering what could he possibly say in order to rebut all of this? Well, he didn't say anything. It's basically a kind of benign comment acknowledging that set of facts.

"So as the People just pointed out, nothing was said, and there is no implication that the defendant was harmed directly by his failure to testify. In other words, he wasn't being punished in any way for refusing to take the witness stand. There's nothing to suggest that."

Egal filed a notice of appeal from the June 30, 2015 denial order; in this appeal, Egal does not challenge his conviction or his sentence.

DISCUSSION

Egal contends that the trial court abused its discretion in denying his revised petition to unseal juror identifying information, thus denying his Sixth and Fourteenth Amendment right to trial by an impartial and unbiased jury. We agree and reverse the judgment. As Egal has requested, we will order the trial court to release the juror identifying information to appellate counsel.

We review the denial of the petition filed pursuant to Code of Civil Procedure[5] section 237 under the deferential abuse of discretion standard. (*People v. Jones* (1998) 17 Cal.4th 279, 317; *People v. Carrasco* (2008) 163 Cal.App.4th 978, 991.)

After a jury's verdict is recorded in a criminal jury proceeding, the court's record is sealed, with all "personal juror identifying information of trial jurors . . . consisting of names, addresses, and telephone numbers," removed from the court record. (§ 237, subd. (a)(2)-(3).) Subdivision (b) of section 237 allows for the unsealing of juror identifying information on a showing of good cause. Unless the defendant makes a "showing of good cause for the release of the information, the public interest in the integrity of the jury system and the jurors' right to privacy outweighs the defendant's interest in disclosure." (*People v. McNally* (2015) 236 Cal.App.4th 1419, 1430; *People v. Avila* (2006) 38 Cal.4th 491, 604; *Townsel v. Superior Court* (1999) 20 Cal.4th 1084, 1096.)

Titkin's declaration[6] shows, on its face, misconduct on the part of the jurors. Again, CALJIC No. 2.60 reads: "A defendant in a criminal trial has a constitutional right not to be compelled to testify. You must not draw any inference from the fact that a defendant does not testify. Further, you must neither discuss this matter nor permit it to enter into your deliberations in any way." Contrary to their instruction of CALJIC No. 2.60 to refrain from drawing any inference from the fact that Egal did not testify, the foreperson, apparently speaking for the group of four jurors,[7] told Titkin that the jurors did so, explaining to Titkin that Egal's not testifying was "'detrimental to his case, because "we never got to hear his side of the story."'" Contrary to their instruction of

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[5] Unless otherwise noted, further statutory references are to the Code of Civil Procedure.

[6] The trial court had previously reviewed Titkin's declaration when the new trial motion was before it.

[7] We note "the impropriety of a single juror may be sufficient to destroy the integrity of the verdict . . . ." (*Weathers v. Kaiser Foundation Hospitals* (1971) 5 Cal.3d 98, 111.)

CALJIC No. 2.60 not to "discuss this matter nor permit it to enter into your deliberations in any way," the foreperson told Titkin that the jurors did so, a "little bit." A "little bit" of discussion is discussion nonetheless and, especially where a juror reports that Egal's not testifying was "detrimental," it is sufficient to demonstrate the lack of regard for the instruction and supports good cause for release of the juror identifying information to appellate counsel.

We agree with Egal that hearsay evidence is sufficient to present a prima facie case to unseal juror information in the superior court. (§ 237; *People v. McNally*, *supra*, 236 Cal.App.4th at p. 1431.) Egal was required to set forth good cause in the trial court and, on this appeal, to show that the trial court abused its discretion. Egal satisfied this burden. When the group jurors was asked whether the jury discussed the fact that defendant did not testify during deliberations, the foreperson stated that they had done so.

Egal had a right to an impartial jury. The Sixth Amendment of the United States Constitution provides that "[i]n all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed . . . ." (U.S. Const., 6th Amend.) The Fourteenth Amendment provides: "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws." (U.S. Const., 14th Amend., § 1.)

People v. Johnson (2013) 222 Cal.App.4th 486 (*Johnson*) is instructive. In *Johnson*, no eyewitness was able to testify whether the defendant on trial for driving while intoxicated was the driver. (*Id.* at p. 489.) Some jurors believed that the defendant was "covering" for the actual driver and "at least half of the jurors" wanted to know why the defendant had not taken the stand to defend himself. (*Id.* at p. 491.) Although the prosecutor conceded good cause to disclose the juror information, the trial court denied disclosure. (*Ibid.*) The appellate court reversed and remanded the matter for a hearing. (*Id.* at p. 500.)

Similarly, the jurors in the case at bar speculated as to why Egal did not present a defense. The fact that four jurors appeared to have based their decision on Egal's failure to rebut the People's evidence establishes good cause for release of jury identifying information to appellate counsel.

DISPOSITION

Good cause having been shown, the judgment is conditionally reversed and the matter remanded to the trial court. The trial court is ordered to release the juror identifying information to appellate counsel. After a reasonable time to permit discovery, the trial court shall set a hearing to determine whether any juror misconduct occurred. If, after the hearing, the trial court finds no juror misconduct, the judgment shall be reinstated; if the trial court finds juror misconduct, then the trial court shall grant appellant's motion for a new trial.

NOT TO BE PUBLISHED.

CHANEY, J.

WE CONCUR:

ROTHSCHILD, P. J.

JOHNSON, J.