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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS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 SIX

THE PEOPLE, Plaintiff and Respondent, v. JUAN VALENCIA NUNEZ, Defendant and Appellant.	2d Crim. No. B234554 (Super. Ct. No. BA359091-01) (Los Angeles County)

Juan Valencia Nunez appeals a judgment following conviction of transportation of methamphetamine, and possession of methamphetamine. (Health & Saf. Code, §§ 11379, subd. (a), 11377.) We order the trial court to amend the abstract of judgment regarding penalty assessments, but otherwise affirm.

FACTS AND PROCEDURAL HISTORY

On July 15, 2009, Los Angeles police officers were investigating Nunez, a parolee, as a suspect in an assault crime. Two undercover officers parked outside his home saw Nunez enter the front passenger seat of a Chevrolet Tahoe automobile driven by Leticia Tamayo and owned by her father. The officers followed the automobile and called for nearby patrol officers to conduct a traffic stop.

Police officers stopped and detained Leticia and Nunez. They searched the automobile and discovered a blue pouch containing Nunez's California identification card and social security card, methamphetamine, a scale, and a glass pipe inside the console.

They also found "pay-and-owe" sheets inside the console. Nunez carried a cellular telephone and $240 in currency.

Following Nunez's arrest, police officers searched his residence but did not find illegal drugs or drug paraphernalia.

The jury convicted Nunez of transportation of methamphetamine (count 1), and possession of methamphetamine (count 2). (Health & Saf. Code, §§ 11379, subd. (a), 11377.) In a separate proceeding, Nunez admitted and the trial court found that he suffered a prior serious felony strike conviction and that he served three prior prison terms. (Pen. Code, §§ 667, subds. (b)-(i), 1170.12, subds. (a)-(d), 667.5, subd. (b).)[1] On June 7, 2011, the court sentenced him to a low term of two years for count 1, which it then doubled as a second strike conviction. It imposed and stayed a 16-month term for count 2 pursuant to section 654, imposed various fines and fees, and later awarded Nunez 1,039 days of presentence custody credit (693 actual custody days plus 346 conduct credit days). Pursuant to section 1385, the court struck the three prior prison term allegations of section 667.5, subdivision (b).

Nunez appeals and contends that: 1) the trial court abused its discretion by denying discovery of police personnel files pursuant to *Pitchess v. Superior Court* (1974) 11 Cal.3d 531, and 2) constitutional principles of equal protection of the law require that he receive increased conduct credit consistent with newly amended sections 2933 and 4019. The Attorney General responds and also argues that the abstract of judgment does not reflect the imposition of additional penalty assessments on the laboratory analysis fees.

DISCUSSION

I.

Nunez argues that the trial court abused its discretion by denying his motion to discover the personnel records of eight police officers involved in his arrest and search. (*Pitchess v. Superior Court, supra*, 11 Cal.3d 531.) He points out that the

[1] All further statutory references are to the Penal Code unless stated otherwise.

Pitchess motion requested complaints of officer misconduct, including false arrest, planting of evidence, fabrication of police reports, and dishonesty. Nunez adds that the motion explained the defense theory that during the parole search of his residence, police officers found his identification and "subsequently planted the identification in the blue nylon bag where all the drugs and items were located in order to connect him with the drugs." Nunez asserts that he established that the discovery was necessary to his defense that he did not possess the methamphetamine and drug paraphernalia found in the Tahoe automobile. (*Warrick v. Superior Court* (2005) 35 Cal.4th 1011, 1024 [defendant must describe a factual scenario supporting the claimed officer misconduct].)

A defendant must establish good cause for discovery of a police officer's confidential personnel records that contain information relevant to the defense. (*Pitchess v. Superior Court, supra*, 11 Cal.3d at pp. 537-538.) Good cause is a "'relatively low threshold'" and requires a showing that 1) the personnel records are material to the defense, and 2) a stated reasonable belief that the records contain the type of information sought. (*People v. Thompson* (2006) 141 Cal.App.4th 1312, 1316.) Good cause contemplates "a logical link between the defense proposed and the pending charge." (*Warrick v. Superior Court, supra*, 35 Cal.4th 1011, 1021.)

Defendant must also establish a plausible factual foundation for his defense. (*Warrick v. Superior Court, supra*, 35 Cal.4th 1011, 1025.) To do so, the defendant "must present . . . a specific factual scenario of officer misconduct that is plausible when read in light of the pertinent documents." (*Ibid.*) A scenario sufficient to establish a plausible factual foundation "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.)

Depending on the circumstances of the case, the denial of facts described in the police report may establish a plausible factual foundation. (*Warrick v. Superior Court, supra*, 35 Cal.4th 1011, 1024-1025.) The factual scenario need not be reasonably

likely, persuasive, or even credible. (*Id.* at pp. 1025-1026; *People v. Thompson*, *supra*, 141 Cal.App.4th 1312, 1318.)

The trial court denied discovery of the personnel records of the eight police officers because Nunez's request was overbroad and failed to suggest a conspiracy scenario. In ruling, the trial judge stated: "In the defendant's declaration eight officers are listed. I don't find that it is sufficient in light of the burden of providing a factual scenario to merely say they are all one unit. That is quite overbroad under case law."

We conclude that the trial court reasonably decided that Nunez did not present "a specific factual scenario that is plausible when read in light of the pertinent documents and undisputed circumstances." (*People v. Thompson*, *supra*, 141 Cal.App.4th 1312, 1316.) Nunez stated in his motion that the residence search was conducted after the search of the Tahoe automobile was completed. Officer Hurd discovered the blue pouch containing the methamphetamine and identification cards when he searched the automobile. Nunez also did not allege a conspiracy between the eight police officers named in the *Pitchess* motion. He thus did not demonstrate "a logical link between the defense proposed and the pending charge." (*Warrick v. Superior Court*, *supra*, 35 Cal.4th 1011, 1021.) The court did not abuse its discretion by denying discovery of the personnel files.

II.

Nunez asserts that former sections 4019, subdivision (f), and 2933, subdivision (e)(3), restricting an increased award of conduct credits to a defendant with a prior serious felony conviction, violate the constitutional commands of equal protection of the law. (U.S. Const., 14th Amend.; Cal. Const., art. 1, § 7, subd. (a).) He points out that the Legislature amended sections 2933 and 4019, effective October 1, 2011, to delete the prior serious felony conviction restriction. Nunez reasons therefore that he is entitled to an additional 346 days of conduct credit.

The Legislature has amended section 4019 several times, increasing or decreasing the rate at which prisoners can earn conduct credits, including restricting an increased award of credits to those defendants with prior serious felony convictions.

(Former § 2933, subd. (e)(3).) At the time Nunez committed his crimes (July 15, 2009), section 4019 permitted an award of six days deemed served for every four days in actual custody for those prisoners who followed the rules and regulations of confinement. On October 1, 2011, the Legislature amended section 4019 to increase the conduct rate to award four days deemed served for every four days in actual custody. (Stats. 2011, 1st Ex. Sess. 2011-2012, ch. 12, § 35, pp. 3945-3946, eff. Sept. 21, 2011, operative Oct. 1, 2011.) The Legislature also added subdivision (h) to section 4019, providing: "The changes to this section enacted by the act that added this subdivision shall apply prospectively and shall apply to prisoners who are confined . . . for a crime committed on or after October 1, 2011. Any days earned by a prisoner prior to October 1, 2011, shall be calculated at the rate required by the prior law."

People v. Brown (2012) 54 Cal.4th 314 recently decided that prospective application of a former version of section 4019 allowing increased credits does not violate the equal protection clauses of the federal and California Constitutions. "[T]he important correctional purposes of a statute authorizing incentives for good behavior [citation] are not served by rewarding prisoners who served time before the incentives took effect and thus could not have modified their behavior in response. That prisoners who served time before and after former section 4019 took effect are not similarly situated necessarily follows." (*Id.* at pp. 328-329.)

Here Nunez committed his crimes more than two years before the October 1, 2011 effective date of amended sections 4019 and 2933. Prior serious felony conviction aside, Nunez is not entitled to increased credits. Constitutional principles of equal protection of the law do not require retroactive application of the October 1, 2011 amendment. (*People v. Lara* (2012) 54 Cal.4th 896, 906, fn. 9 [declining to find equal protection violation with prospective application of October 1, 2011 amendment].)

III.

The Attorney General argues that the abstract of judgment does not reflect the penalty assessments added to the laboratory analysis fee of Health and Safety Code

section 11372.5. (§§ 1464, 1465.7, subd. (a); Gov. Code, §§ 76000, subd. (a)(1), 70372, subd. (a)(1), 76000.5, subd. (a)(1), 76104.6, subd. (a)(1), 76104.7, subd. (a).)

The abstract of judgment does not reflect the penalty assessments added to the laboratory analysis fee imposed for count 1. The laboratory analysis fee and any penalty assessments for count 2 must be stayed because the trial court imposed but stayed punishment for count 2 pursuant to section 654. (*People v. Sharret* (2011) 191 Cal.App.4th 859, 870.)

We order the trial court to amend the abstract of judgment to reflect the appropriate penalty assessments and to forward the amended abstract of judgment to the Department of Corrections and Rehabilitation. The judgment is otherwise affirmed.

NOT TO BE PUBLISHED.

GILBERT, P.J.

We concur:

YEGAN, J.

PERREN, J.

Barbara R. Johnson, Judge

Superior Court County of Los Angeles

Benjamin Owens, 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, Senior Assistant Attorney General, Victoria B. Wilson, Supervising Deputy Attorney General, Kim Aarons, Deputy Attorney General, for Plaintiff and Respondent.