

**NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS**

California Rules of Court, rule 8.1115(a), prohibits courts and parties from citing or relying on opinions not certified for publication or ordered published, except as specified by rule 8.1115(b). This opinion has not been certified for publication or ordered published for purposes of rule 8.1115.

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION EIGHT

THE PEOPLE,

Plaintiff and Respondent,

v.

GILBERT TAPIA,

Defendant and Appellant.

B270876

(Los Angeles County  
Super. Ct. No. NA102241)

APPEAL from a judgment of the Superior Court of Los Angeles County. Jesse I. Rodriguez, Judge. Conditionally reversed and remanded.

Miriam K. Billington, 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, Scott A. Taryle and Rene Judkiewicz, Deputy Attorneys General, for Plaintiff and Respondent.

---

## **PROCEDURAL BACKGROUND**

The jury convicted appellant of transportation of heroin (Health & Saf. Code, § 11352, subd. (a)), transportation of methamphetamine (Health & Saf. Code, § 11379, subd. (a)), possession of heroin for sale (Health & Saf. Code, § 11351), and possession of methamphetamine for sale (Health & Saf. Code, § 11378). After conviction appellant admitted two prior drug sales convictions pursuant to Health and Safety Code sections 11370.2, subdivision (a) and 11370.2, subdivision (c).

At sentencing, the trial court denied probation and imposed the high term of five years on count 1 (transportation of heroin), and added a three-year consecutive term for the Health and Safety Code section 11370.2, subdivision (a) prior conviction allegation admitted and found true, for a total term of eight years. On count 2 (transportation of methamphetamine), the court imposed one-third the mid-term of three years (one year), but ran that sentence “concurrent” with the sentence on count 1. On count 3 (possession of heroin for sale), the court sentenced appellant to one-third the mid-term of three years (one year), but ordered the sentence “not imposed” pursuant to Penal Code section 654. On count 4 (possession of methamphetamine for sale), the court again sentenced appellant to one-third the mid-term of two years (eight months), but ordered the sentence “not imposed” pursuant to Penal Code section 654. The People struck the second Health and Safety Code section 11370.2 prior conviction allegation on their own motion.

Appellant raises two issues on appeal: he asks us to (1) review the transcript of the *in camera* review of law enforcement personnel records conducted by the trial court pursuant to *Pitchess v. Superior Court of Los Angeles County* (1974) 11 Cal.3d

531 (*Pitchess*); and (2) correct the abstract of judgment on count 2 to reflect a concurrent term of one year (one-third the mid-term of three years) as imposed orally by the trial court rather than the concurrent two-year low term reflected in both the minutes and the abstract.

In its brief, the Attorney General recognizes, correctly, that one-third the mid-term imposed concurrently is an unlawful sentence and asks us to remand for legal resentencing. What neither side notes is that one-third the mid-term “not imposed” pursuant to Penal Code section 654, rather than a full term stayed pursuant to Penal Code section 654, is also an illegal sentence.

Thus, we reverse and remand this case to the trial court to impose a legal sentence consistent with this opinion. Further, because we find error in the conduct of the *in camera Pitchess* hearing, we also conditionally reverse the judgment and remand this case so that the trial court can conduct additional *in camera* proceedings to verify the absence of discoverable personnel records as to the deputy sheriff involved.

### **STATEMENT OF FACTS**

Because the facts established at trial are not relevant to any issue raised on appeal, we will not provide a statement of facts underlying the convictions.

Insofar as review of the *Pitchess in camera* hearing is concerned, the following facts are relevant. In the court below, appellant filed a motion for disclosure of peace officer personnel records pursuant to *Pitchess* and Evidence Code sections 1043 *et seq.* The motion sought disclosure of records pertaining to two Los Angeles County Sheriff’s Deputies, Dang and Valadez. After argument on the motion, the court ordered an *in camera* hearing

to review any records pertaining to Deputy Dang. The court found insufficient cause to warrant *in camera* review of Deputy Valadez's personnel records.<sup>1</sup>

During the *in camera* hearing, the trial court took sworn testimony from Jesus Romero, who identified himself prior to being sworn only as the custodian of records for the "L.A. County Sheriff's Department." Ani Tolmoyan, a private attorney apparently retained by the Sheriff's Department to represent it during *Pitchess* proceedings, provided the court with unsworn representations regarding a search of the Sheriff's Internal Criminal Investigation Bureau for records pertaining to Deputy Dang. Based upon the information provided to it, the court advised appellant in open court that "there is nothing to disclose."

### **DISCUSSION**

#### **A. Structural Errors During the Trial Court's *In Camera* Review Require Remand and a Further *In Camera* Hearing**

In *People v. Mooc* (2001) 26 Cal.4th 1216 (*Mooc*), the California Supreme Court discussed the procedure to be used by trial courts during *in camera Pitchess* reviews and the type of record the trial court must make. When a trial court finds good cause to conduct the *in camera* review, the custodian of records for the law enforcement personnel files at issue should bring all " 'potentially relevant' " documents to court. (*Mooc, supra*, at p. 1226.) The trial court then reviews the documents in chambers outside the presence of all but the custodian and such other persons the custodian agrees to have present. (*Ibid.*) Subject to

---

<sup>1</sup> On appeal, appellant does not challenge the court's refusal to conduct an *in camera* review of Deputy Valadez's personnel records.

various limitations not at issue in this case, the reviewing court discloses to the defendant “ ‘such information [that] is relevant to the subject matter involved in the pending litigation.’ ” (*Ibid.*) In order to ensure meaningful appellate review, the trial court is obligated to make a complete record of the documents presented to it by the custodian, as well as any documents in the officer’s file that were not brought to court by the custodian. (*Id.* at pp. 1227-1228, 1229-1230.)

We have reviewed the sealed transcript of the trial court’s *in camera* review, and it reveals a number of errors, some structural. First, although Jesus Romero identified himself as the custodian of records for the “L.A. County Sheriff’s Department,” he only did so *prior* to be placed under oath and, further, he never specifically identified himself as the custodian of records for the law enforcement personnel files that are the particular object of motions pursuant to *Pitchess* and its progeny. Additionally, although he provided a very general description of the files he searched in preparation for the motion, the description is fairly general and does not specifically indicate that he searched all databases that might contain complaints responsive to a *Pitchess* motion. These defects, though, are minor. Had they been the only issue in connection with the *in camera* record, we might have been tempted to fill in the gaps by drawing what are arguably reasonable inferences.

There is, however, a larger issue that compels remand. Near the end of the *in camera* hearing, attorney Tolmoyan, who is not a custodian of records for the Sheriff’s Department, made an unsworn representation related to the search of files belonging to the Sheriff’s “Internal Criminal Investigating Unit.” The problem, then, is twofold: attorney Tolmoyan’s representation,

since she is not a custodian of records for the files in question, is based on inadmissible hearsay and, in any event, she was never sworn to give testimony as a witness at the hearing. (See *Mooc, supra*, 26 Cal.4th at p. 1230, fn. 4 [a defendant's right to obtain judicial review of all potentially discoverable records under *Pitchess* is protected by the custodian or his representative being placed under oath during the *in camera* hearing].)

We, therefore, conditionally reverse the judgment in this case and remand it so the trial court can conduct a supplemental *in camera* hearing to establish, through competent testimony (1) that Jesus Romero, or any other competent custodian called as a witness, is the custodian of records for Sheriff's files which are the object of motions pursuant to *Pitchess* and its progeny; (2) the specific files or databases searched and whether, within those files, there are any complaints against Deputy Dang involving falsehood, dishonesty, or fabrication within the five year period prior to the incidents charged; (3) whether files of the Sheriff's Internal Criminal Investigation Unit were searched and by who; (4) whether that search revealed any relevant complaints; and (5) whether there exist any other files or databases within the Sheriff's Department that might contain complaints relevant to a *Pitchess* inquiry.

If, after conducting this supplemental *in camera* hearing, the trial court determines there are no disclosures, it must reinstate the judgment against appellant. (*People v. Gaines* (2009) 46 Cal.4th 172, 178, 180-181.) If the trial court determines that there are disclosures, it should order them, give appellant an opportunity to demonstrate prejudice, and order a new trial if there is a reasonable probability the outcome would have been different had the information been disclosed. (*Id.* at

p. 181.) If the appellant cannot make such a showing, the judgment must likewise be reinstated.

**B. The Case is Remanded for Resentencing so that the Trial Court Can Correct the Unauthorized Sentence**

A sentence of one-third the mid-term may only be imposed for a consecutive, subordinate term. (*People v. Thompson* (2009) 177 Cal.App.4th 1424, 1432; *People v. Quintero* (2006) 135 Cal.App.4th 1152, 1156, fn. 3.) Similarly, the one-third the mid-term rule applicable to consecutive sentencing does not apply to sentences that are stayed pursuant to Penal Code section 654. (*People v. Cantrell* (2009) 175 Cal.App.4th 1161, 1164.) The appropriate sentence on offenses where Penal Code section 654 prohibits multiple punishment is to impose the full term, but stay that term, with the stay to become permanent upon completion of the balance of the sentence. (*People v. Alford* (2010) 180 Cal.App.4th 1463, 1472-1473; *People v. Wein* (1977) 69 Cal.App.3d 79, 94.)

The sentences imposed on counts 2, 3, and 4 are therefore sentences unauthorized by law. As such, they are reviewable on appeal whether or not raised below and whether or not raised on appeal. (See *People v. Menius* (1994) 25 Cal.App.4th 1290, 1294-1295; accord *People v. Quintero, supra*, 135 Cal.App.3d at p. 1156, fn. 3.) Although we could simply order the sentences corrected to impose full terms on counts 2, 3, and 4 either concurrently or stayed pursuant to section Penal Code section 654. (See *People v. Alford, supra*, 180 Cal.App.4th at p. 1473 and *People v. Menius*, at p. 1295), because this case must be remanded anyway for a supplemental *in camera Pitchess* hearing, we likewise remand it for resentencing.

Finally, the Attorney General raises in her brief that the trial court failed to impose the fees mandated by Penal Code section 1465.8, subd. (a)(1), and Government Code section 70373, subd. (a)(1), on all appropriate counts, and that the orally pronounced crime lab fee pursuant to Health and Safety Code section 11372.5 is not reflected in the abstract of judgment. The Attorney General is correct. Penal Code section 1465.8, subdivision (a)(1) and Government Code section 70373, subdivision (a)(1), require that their assessments be imposed on every conviction for a criminal offense. (*People v. Sencion* (2012) 211 Cal.App.4th 480, 484-485; *People v. Calles* (2012) 209 Cal.App.4th 1200, 1226.) On remand, the trial court should review the fee sections involved and ensure that all mandatory fees are correctly imposed and properly reflected in the abstract of judgment.

#### **DISPOSITION**

The judgment is conditionally reversed and the case remanded to the trial court. On remand, the trial court is to conduct a further *in camera Pitchess* hearing consistent with this opinion. If there are no disclosures, the trial court must reinstate the judgment of conviction and resentence appellant consistent with this opinion. If there are disclosures, the trial court must order them and give appellant an opportunity to establish that had such disclosures been made prior to trial, there is a reasonable probability the outcome at trial would have been different. If he makes such a showing, the court must grant a



new trial. If not, the court must reinstate the judgment and resentence appellant in a manner consistent with this opinion.

SORTINO, J.\*

WE CONCUR:

FLIER, ACTING P. J.

GRIMES, J.

---

\* Judge of the Los Angeles Superior Court, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.