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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION EIGHT

THE PEOPLE,

Plaintiff and Respondent,

v.

LARRY DAY,

Defendant and Appellant.

B237768

(Los Angeles County
Super. Ct. No. BA 386358)

APPEAL from a judgment of the Superior Court of Los Angeles County, Robert J. Schuit, Judge. Conditionally reversed and remanded.

Michele A. Douglass, 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, Assistant Attorney General, Paul M. Roadarmel, Jr., and Rama R. Maline, Deputy Attorneys General, for Plaintiff and Respondent.

* * * * *

Larry Day appeals from the judgment entered following a jury trial that resulted in his conviction of possession for sale of a controlled substance and his admission to having suffered a strike under the “Three Strikes” law.¹ The trial court sentenced him to prison to six years, or double the three-year midterm under the Three Strikes law; and ordered him to pay a \$200 restitution fine; a \$200 parole revocation fine, which was suspended; a \$40 court security assessment; and a \$30 criminal conviction assessment.²

On appeal, appellant contends the trial court committed reversible error failing to hold an in camera hearing and, instead, summarily denying his discovery motion pursuant to *Pitchess v. Superior Court* (1974) 11 Cal.3d 531 (*Pitchess*). He contends the court further erred by failing to grant his motion to dismiss his strike pursuant to *People v. Superior Court (Romero)* (1996) 13 Cal.4th 497 (*Romero*).

We conclude appellant’s *Pitchess* contention has merit. The record reflects he has sustained his burden to set forth the threshold showing of a specific scenario establishing a plausible factual foundation to support allegations of dishonesty, improper tactics, false arrest, illegal search and seizure, or generic dishonesty on the part of the officer that would entitle him to the discovery sought and trigger an in camera hearing. The record reveals the trial court did not rule on appellant’s *Romero* motion and that appellant did not prompt the trial court to do so. In the absence of the requisite ruling, no review is

¹ Appellant also admitted the four drug-related prior conviction allegations but the trial court later struck these allegations in the interests of justice.

² We note that during sentencing, the trial court orally indicated it was imposing “the usual fees associated with a conviction like this” but did not specifically impose either the \$40 court security or the \$30 criminal conviction assessment set forth in the clerk’s transcript of sentencing. This omission on the part of the trial court was inconsequential. “In Los Angeles County, trial courts frequently orally impose the penalties . . . by a shorthand reference to ‘penalty assessments.’ The responsibility then falls to the trial court clerk to specify the penalties and surcharge in appropriate amounts in the minutes and, more importantly, the abstract of judgment. This is an acceptable practice.” (*People v. Sharret* (2011) 191 Cal.App.4th 859, 864.)

available, and thus, his claim the trial court improperly refused to grant his motion must be rejected.

BACKGROUND

We review the evidence, both direct and circumstantial, in light of the entire record and must indulge in favor of the judgment all presumptions as well as every logical inference that the jury could have drawn from the evidence. (*People v. Maury* (2003) 30 Cal.4th 342, 396; see also *People v. Carter* (2005) 36 Cal.4th 1114, 1156; *People v. Ochoa* (1993) 6 Cal.4th 1199, 1206.)

On July 7, 2011, during an undercover surveillance operation in the vicinity of 7th and San Julian Streets in Los Angeles, Los Angeles Police Officer Ernesto Munoz observed what appeared to be a drug transaction between appellant and Brian Tierney.³ Through binoculars, Munoz saw appellant and Tierney walking southbound on San Julian Street towards 7th Street. The two appeared to be conversing and, as they talked, appellant pulled out of his pocket a black plastic grocery bag and opened it. Munoz noticed the bag contained numerous small multicolored balloons. After appellant displayed the bag's contents, Tierney handed him an unknown amount of green paper currency. Appellant tucked the money into his right front pants pocket; removed a white balloon from the bag; and handed the balloon to Tierney, who put it in his mouth. Upon reaching 7th Street, the two separated. Tierney proceeded east and appellant headed west on 7th Street.

Munoz notified chase officers over the radio of the description and location of Tierney and appellant. Officer Lopez and his partner detained Tierney, who was then searched. No balloons were found. Tierney denied he had anything in his mouth or he had swallowed anything. Lopez did not observe him swallowing anything. Tierney was then released.

Officers Paterson and Cho detained appellant. During a search, Paterson found cash in appellant's right front pocket. Cho found a black plastic bag that contained

³ The police report identified the man with appellant as Brian Tierney.

numerous multicolored balloons in his front left pants pocket. The officers gave the cash and bag to Munoz.

The balloons contained heroin, and the net weight of the heroin was 17.18 grams. The cash recovered from appellant was \$124. Detective James Miller, the prosecution's drug expert, opined the heroin was possessed with the intent to sell.

Appellant testified that he was an extreme heroin addict and that he possessed the heroin in question for his personal use. He denied that he ever sold heroin to support his habit or that he passed any drugs to Tierney, whom he did not know.

DISCUSSION

1. Denial of Pitchess Motion Without In Camera Hearing Error

Appellant contends the trial court erred by summarily denying his *Pitchess* motion and the appropriate remedy is to remand for an in camera hearing. We agree.

a. Procedural background

In his *Pitchess* motion,⁴ appellant sought disclosure of information concerning Munoz relating to complaints of fabrication charges, reasonable suspicion and/or probable cause, and evidence; perjury; dishonesty; writing of false police reports; and any other evidence of misconduct amounting to moral turpitude, such as excessive force.

In her supporting declaration, Lisa Strassner, appellant's appointed counsel, stated: "It is upon information and belief that some of the observations written in the arrest report as written by Officer Munoz are false. Specifically, [appellant] denies reaching into a bag and handing any balloons or narcotics to any person. This observation made in the arrest report by Officer Munoz is a fabrication and is one of the 'facts' he relies upon in coming to his opinion that any narcotics were possessed with the intent to sell." She stated the discovery sought was necessary to impeach the credibility of Munoz and to demonstrate a pattern of fabrication on his part, and thus, this information pertained to the

⁴ The motion was also made under *Brady v. Maryland* (1963) 373 U.S. 83. We need not and therefore do not address the trial court's ruling on the motion in this regard, because appellant does not raise any *Brady* violation.

ultimate issue of appellant's guilt or innocence of the charge of possession of heroin for sale.

The People filed opposition.

At the hearing, defense counsel represented she sought Munoz's records only because he "is the one [who] made the observations allegedly of [appellant] and some unknown male White with this hand-to-hand transaction." She argued Munoz did not in fact see such a hand-to-hand transaction and noted the "unknown male White" did not have any narcotics or currency when he was detained. The prosecutor countered that no "alternative factual scenario [was] stated" by the defense and added that the declaration simply denied appellant reached into a bag and handed narcotics to anyone. Defense counsel responded that appellant did not deny he possessed the narcotics.

The trial court noted appellant did not deny he possessed the bag containing the narcotics; he was in a high narcotics area; or he possessed \$124. The court inquired how Munoz was able to see the balloons if they were in appellant's pocket. Defense counsel clarified that she did not dispute that Munoz saw the bag; rather, she disputed whether a narcotics transaction had occurred. She also did not dispute that Munoz saw a white balloon inside the bag and that this was enough to detain appellant but argued no drug transaction had taken place, because when detained by police, the other man did not have drugs or money in his possession. The court noted that according to the police report, appellant pulled out the bag and showed it to the other man, which recital appellant did not deny. Finding there was no plausible factual foundation for appellant's version of the incident, the court denied the *Pitchess* motion.

b. Applicable Legal Principles

Pitchess "established that a criminal defendant could 'compel discovery' of certain relevant information in the personnel files of police officers by making 'general allegations which establish some cause for discovery' of that information and by showing how it would support a defense to the charge against him." (*Warrick v. Superior Court* (2005) 35 Cal.4th 1011, 1018-1019 (*Warrick*).) "If the trial court finds good cause for the discovery, it reviews the pertinent documents in chambers and discloses only that

information falling within the statutorily defined standards of relevance.” (*Id.* at p. 1019.)

A determination of good cause generally begins with the declaration of defense counsel, which must “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, supra*, 35 Cal.4th at pp. 1024-1025.) The trial court then determines “whether defendant’s averments, ‘[v]iewed in conjunction with the police reports’ and any other documents, suffice to ‘establish a plausible factual foundation’ for the alleged officer misconduct and . . . ‘articulate a valid theory as to how the information sought might be admissible’ at trial.” (*Id.* at p. 1025.)

The requisite “‘plausible’ factual foundation for the *Pitchess* discovery requested” necessitates “a plausible scenario of officer misconduct . . . 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. A defendant must also show how the information sought could lead to or be evidence potentially admissible at trial. Such a showing ‘put[s] the court on notice’ that the specified officer misconduct ‘will likely be an issue at trial.’ [Citation.]” (*Warrick, supra*, 35 Cal.4th at p. 1026, italics added.)

“To determine whether the defendant has established good cause for in-chambers review of an officer’s personnel records, the trial court looks to whether the defendant has established the materiality of the requested information to the pending litigation. The court does that through the following inquiry: Has the defense shown a logical connection between the charges and the proposed defense? Is the defense request for *Pitchess* discovery factually specific and tailored to support its claim of officer misconduct? Will the requested *Pitchess* discovery support the proposed defense, or is it likely to lead to information that would support the proposed defense? Under what theory would the requested information be admissible at trial? If defense counsel’s affidavit in support of the *Pitchess* motion adequately responds to these questions, and

states ‘upon reasonable belief that the governmental agency identified has the records or information from the records’ [citation], then the defendant has shown good cause for discovery and in-chambers review of potentially relevant personnel records of the police officer accused of misconduct against the defendant.” (*Warrick, supra*, 35 Cal.4th at pp. 1026-1027.)

c. Good Cause Shown for In Camera Review and *Pitchess* Discovery

Here, appellant’s version of events is plausible. The declaration of defense counsel asserted the recital in the arrest report by Munoz that appellant reached into a bag and handed a balloon, which are often used to package narcotics, to someone is false because appellant “denies reaching into a bag and handing any balloons or narcotics to any person.” The requisite “plausible factual foundation” for this asserted misconduct is established by the recital in the police report that shortly after the purported drug transaction, the police searched Tierney but found no balloon. In the report, Munoz stated Tierney “may have had it concealed in his mouth or may have swallowed it.” This is sheer speculation. (*People v. Morris* (1988) 46 Cal.3d 1, 21 [reasonable inference not “based on suspicion alone, or on imagination, speculation [as to probabilities], supposition, surmise, conjecture, or guess work”]), disapproved on a different point in *In re Sassounian* (1995) 9 Cal.4th 535, 543, fn. 5.) In the report, Tierney, was listed simply as a “witness.” He was not arrested, and there is no indication that any steps were taken by police to confirm or dispel the suspicion that Tierney had the balloon in his mouth or had swallowed it. In view of appellant’s adequate good cause showing, the trial court erred in summarily denying his *Pitchess* motion without conducting and in-camera inspection.

We therefore conditionally reverse the judgment and remand the matter for an in camera hearing to determine the existence of any records discoverable under *Pitchess*. If the trial court finds such record(s) exists, the court shall order the record(s) produced and conduct further appropriate proceedings. If the court determines no discoverable information, the court shall reinstate the judgment as of the date of such determination.

(See *People v. Mooc* (2001) 26 Cal.4th 1216, 1225-1230; *People v. Guevara* (2007) 148 Cal.App.4th 62, 69-70.)

2. No Review Available in Absence of Ruling on Romero Motion

Appellant contends the trial court abused its discretion in refusing to strike his 1989 robbery conviction, which he admitted constituted a strike under the Three Strikes law. His challenge to the propriety of use of his strike for sentencing is not cognizable on appeal.

In the amended information, appellant was alleged to have suffered three prior convictions that qualified as strikes under the Three Strikes law (Pen. Code, §§ 667, subds. (b)-(i), 1170.12, subd. (a)-(d)),⁵ namely, a 1989 robbery conviction (§ 211); a 1985 robbery conviction (§ 211); and a 1979 conviction for assault with a deadly weapon or force likely to produce great bodily injury (§ 245, subd. (a)).

Appellant filed a pretrial *Romero* motion to dismiss these prior convictions in the furtherance of justice (§ 1385). Following the jury guilty verdict, appellant admitted having suffered the 1989 robbery conviction and the People dismissed the remaining two strike allegations. Although at sentencing appellant argued for leniency, he did not alert the trial court to his pending *Romero* motion or otherwise request the court dismiss or strike his 1989 prior conviction. The record in fact fails to disclose appellant at any time had reminded the trial court to rule on his *Romero* motion or that the court actually ruled on the motion.

In the absence of a ruling, “‘no review can be conducted here.’ [Citations.]” (*People v. Samayoa* (1997) 15 Cal.4th 795, 827.) “Because [appellant] never sought a final ruling, we conclude the present claim was abandoned.” (*People v. Wilson* (2008) 44 Cal.4th 758, 798; see also *People v. Cunningham* (2001) 25 Cal.4th 926, 984; *People v. Brewer* (2000) 81 Cal.App.4th 442, 461-462.)

⁵ All further section references are to the Penal Code.

DISPOSITION

The judgment is conditionally reversed. The cause is remanded to the trial court with directions to hold an in camera hearing pursuant to *Pitchess*. If the court finds discoverable records, the court shall order these records produced and conduct further appropriate proceedings. If the court determines there are no discoverable records or that appellant cannot establish prejudice due to the denial of particular discoverable information, the court shall reinstate the judgment as of the date of this determination.

FLIER, J.

WE CONCUR:

RUBIN, Acting P. J.

GRIMES, J.