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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.

JOSE TORRES,

Defendant and Appellant.

B239371

(Los Angeles County
Super. Ct. No. BA389644)

APPEAL from a judgment of the Superior Court of Los Angeles County.
Ann H. Egerton, Judge. Affirmed.

James M. Crawford, 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, Linda C. Johnson, and Robert M. Snider, Deputy Attorneys General, for Plaintiff and Respondent.

Jose Torres appeals from a judgment which sentences him to 35 years to life in state prison for shooting at an occupied motor vehicle. His sole contention on appeal is that the trial court improperly denied his motion to discover the personnel files of the police officers who drafted the police report of the incident. We affirm the judgment.

FACTS

Felipe Cardona and Walter Arcia are security guards in a large apartment complex known as Wyvernwood Gardens. A criminal street gang called Calle Ocho claims Wyvernwood Gardens as part of its territory. Torres is a member of Calle Ocho and has a Calle Ocho tattoo on his abdomen. Cardona had worked at Wyvernwood Gardens for 13 years and had known Torres since 2009. Torres had previously lived in Wyvernwood Gardens but had been banned from the premises. As a result, Cardona had to confront him several times and ask him to leave the complex. Cardona also once observed Torres serving as a lookout while his friend tagged one of the walls in the apartment complex. On August 26, 2010, Torres lifted his shirt to show a chrome pistol tucked in his waistband when Cardona and Arcia again approached Torres in the complex to warn him about trespassing. Torres fled when Cardona and Arcia took out their own handguns.

On October 15, 2010, at 11:50 p.m., Cardona and Arcia responded to a complaint that several gang members were destroying a vacant apartment in the complex. As Cardona and Arcia approached the apartment with their flashlight, they observed a group of 15 to 20 individuals standing outside drinking and talking. Both Cardona and Arcia recognized them as members of Calle Ocho. Torres was among the group and challenged them to a fight. He motioned Cardona and Arcia to come closer and said, “Calle ocho putos” which meant, “Eighth Street gang members, mother fuckers.” When they refused his challenge, the gang members dispersed and ran westward. Cardona and Arcia followed them in their patrol car. When they stopped the car nearby, Torres approached them, yelling “calle ocho putos” and firing four times at them with a chrome handgun. As he fired, Torres said, “Fuck you, mother fucker, Calle Ocho.” Arcia sped off as soon as the shooting began and he heard two other shots fired.

Cardona called the police. The recording of his call was played to the jury. In it, Cardona reported the shooting and Arcia was heard in the background screaming, “they shot at us, they shot at us.” Officers Vazquez and Zaragoza responded to the call. When they arrived, both Cardona and Arcia were still frightened and gasping for air. Both identified Torres as the shooter. Cardona and Arcia also identified Torres as the shooter when they met with Detective Jorge Alfaro several days later.

Torres was arrested on November 18, 2010, after trying to flee. He was charged with two counts of assault with a firearm (Pen. Code, § 245 subd. (a)(2)),¹ and shooting at an occupied motor vehicle (§ 246) along with firearm enhancements (§§ 12022.5, subd. (a), 12022.53, subd. (c)). It was further alleged that the crimes were committed for the benefit of a criminal street gang. (§ 186.22, subd. (b)(1)(C).)

Prior to trial, Torres filed a *Pitchess*² motion to discover personnel records for Vazquez and Zaragoza, the officers who took Cardona and Arcia’s statements after the assault. Torres argued that the police reports prepared by Zaragoza and Vazquez failed to detail the true events of the shooting and the identification process of the defendant. The motion was denied. At trial, testimony was elicited from Cardona and Arcia regarding the events as described above. Both identified Torres as the shooter at trial. The prosecution also presented testimony from a gang expert. The defense presented expert testimony regarding eyewitness identification, perception and memory.

A jury found Torres guilty on all three counts and also found the enhancement allegations to be true. Torres was sentenced to 15 years to life in state prison for the base count of shooting at an occupied motor vehicle plus 20 years on the sentencing enhancement for a total of 35 years to life. Imposition of the sentences for the remaining two counts were stayed pursuant to section 654. Additionally, various fines and fees were assessed. Torres timely appealed.

¹ All further section references are to the Penal Code unless otherwise specified.

² *Pitchess v. Superior Court* (1974) 11 Cal.3d 531, 535.

DISCUSSION

On appeal, Torres contends that a conditional reversal of the judgment is warranted because the trial court abused its discretion in failing to conduct an in camera hearing and review of the officers' personnel files pursuant to the *Pitchess* motion. We disagree.

A criminal defendant may compel discovery of 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. (*Pitchess, supra*, 11 Cal.3d at pp. 536–537; §§ 832.7, 832.8; Evid. Code, §§ 1043-1045.) Evidence Code section 1043, subdivision (b)(3) provides that to obtain *Pitchess*-type discovery, a defendant must file a motion supported by “[a]ffidavits showing good cause for the discovery or disclosure sought, setting forth the materiality thereof to the subject matter involved in the pending litigation and stating upon reasonable belief that the governmental agency identified has the records or information from the records.” As to the first required showing of materiality, “the question is this: What must the defendant show to warrant the court’s in-chambers review of documents or information in the officer’s personnel file that is potentially relevant to the claimed misconduct?” (*Warrick v. Superior Court* (2005) 35 Cal.4th 1011, 1016 (*Warrick*)). The Supreme Court has held “that to obtain in-chambers review a defendant need only demonstrate that the scenario of alleged officer misconduct could or might have occurred.” (*Ibid.*) 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.) We review a trial court’s ruling on a *Pitchess* motion for abuse of discretion. (*People v. Samayoa* (1997) 15 Cal.4th 795, 827.)

Here, Torres requested the personnel and administrative records for Officers Zaragoza and Vazquez “concerning any acts involving falsification of testimony, fabrication of evidence, false police reports, perjury, aggressive behavior, racial or gender bias, violence, excessive force, or attempted violence or excessive force . . . and any

additional acts involving dishonesty, criminal conduct and/or moral turpitude.” Torres’s declaration in support of the *Pitchess* motion alleged that “[t]he police reports in this case failed to detail the true events of the alleged shooting, the lighting and the identification process of this defendant. The signature of officers Zaragoza and Vazquez does not appear on the evidence and this amounts to a false statement by each of the officers. Officers Zaragoza and Vazquez wrote the police report and failed to state the true events of the shooting and the security guards inability to make a reliable identification from over 150 feet in the dark.”

Torres contends on appeal the trial court erred when it denied the *Pitchess* motion. Torres argues the declaration supporting his motion established that Torres was misidentified and the police failed to properly investigate the case to determine the actual identity of the shooter.³ “In other words, counsel was asserting that appellant did not shoot at security officers Hernandez and Cardona, as charged. In so doing, counsel ‘show[ed] a logical connection between the charges and the proposed defense[s].’ (*Warrick, supra*, 35 Cal.4th at p. 1027.)” While it may have been a viable defense strategy at trial, that theory fails to establish good cause to warrant in-chambers review of the personnel files for Zaragoza and Vazquez.

As to the issue of the police report’s veracity, *People v. Hill* (2005) 131 Cal.App.4th 1089 (*Hill*),⁴ is directly on point. There, two undercover officers were investigating a series of car thefts when shots were fired at them. Neither officer was able to identify the shooters, but the police report identified two witnesses who were with

³ Torres further argues that Vazquez committed perjury at the preliminary hearing by testifying to the false version of the police report, Torres’ gang affiliation and the misidentification of Torres as the shooter. As a result, it was “clearly” established that the credibility of Vazquez and Zaragoza were critical to the case. We disagree. At trial, both Arcia and Cardona testified about the shooting and identified Torres as the shooter. Moreover, Cardona and the gang expert both testified to Torres’ gang affiliation. Further, Vazquez’s testimony at the *preliminary hearing* was irrelevant to Torres’ conviction after *trial*. (*People v. Becerra* (2008) 165 Cal.App.4th 1064, 1072.)

⁴ *Hill* was disapproved on another ground in *People v. French* (2008) 43 Cal.4th 36, 43.

the shooters at the time of the shooting. (*Id.* at p. 1097.) The defendant filed a *Pitchess* motion seeking the personnel records of the two undercover officers and the officer who arrested him. Defense counsel's declaration stated that the police report was false and denied the defendant was involved in the shooting. (*Hill*, at pp. 1096-1097.)

The *Hill* court held that the supporting declaration was insufficient to establish good cause for the discovery of the personnel records. (*Hill, supra*, at p. 1098.) First, there was no indication in the declaration that the arresting officer made any false statements or improperly conducted the arrest. Second, the undercover officers did not identify the shooters, civilian eyewitnesses did. There was no allegation the shooting did not occur or that the description of it by the undercover officers was false. As a result, the court held that "allegations by a defendant which merely contradict the statements of civilian witnesses are not sufficient to establish good cause for discovery of information relevant to dishonesty in officers' personnel files." (*Id.* at p. 1094.)

As in *Hill*, Torres alleges here that the police report filed by Zaragoza and Vazquez was false and that the two officers are dishonest. This matter presents an even clearer case than *Hill* that good cause has not been established to discover the officers' personnel files. Unlike in *Hill*, the police report here does not reflect any firsthand knowledge by Zaragoza and Vazquez. Instead, it was merely a recitation of Arcia's and Cardona's statements regarding the shooting. There is no allegation the shooting did not occur or that the police report did not accurately relay Arcia's and Cardona's statements to police.

As to Torres' argument that the police did not properly investigate the case to identify the real shooter, Torres has also failed to establish good cause on that basis to discover Zaragoza's and Vazquez's personnel files. This is because Detective Alfaro was tasked with investigating the shooting. Zaragoza and Vazquez merely responded to the call on the night of the shooting and filed the police report.

Torres next argues that the denial of the *Pitchess* motion also deprived him of his federal constitutional rights to due process, confrontation, compulsory process, a fair trial and a meaningful opportunity to present a complete defense under the Sixth and

Fourteenth Amendments. Torres concedes in his opening brief that “this constitutional claim was not raised before the trial court.” Torres later contends in his reply brief that this issue was raised, relying on a citation to *Brady v. Maryland* (1963) 373 U.S. 83 (*Brady*) in his *Pitchess* motion below. Torres relied on *Brady* for the proposition that he was not limited by Evidence Code section 1045 to discovery of conduct occurring more than five years before the shooting. Nowhere in the motion did Torres rest his discovery of the officers’ personnel records on federal constitutional grounds. Accordingly, Torres has forfeited his constitutional claim by failing to raise it below. (*In re Seaton* (2004) 34 Cal.4th 193, 198.)

In any case, Torres has failed to state a *Brady* violation. “ ‘Our state statutory scheme allowing defense discovery of certain officer personnel records creates both a broader and lower threshold for disclosure than does the high court’s decision in *Brady*, *supra*, 373 U.S. 83. Unlike *Brady*, California’s *Pitchess* discovery scheme entitles a defendant to information that will “facilitate the ascertainment of the facts” at trial [citation], that is, “all information pertinent to the defense.” ’ [Citation.] Consequently, a finding that material evidence was wrongfully withheld under *Pitchess* does not invariably mean that a defendant’s right to due process was denied, ‘since “the Constitution is not violated every time the government fails or chooses not to disclose evidence that might prove helpful to the defense.” ’ [Citation.] To establish a due process violation, a defendant must do more than show that ‘helpful’ evidence was withheld [citation]; a defendant must go on to show that ‘ “there is a reasonable probability that, had [the evidence] been disclosed to the defense, the result . . . would have been different.” ’ ” (*People v. Gaines* (2009) 46 Cal.4th 172, 183.) As discussed above, it was Arcia’s and Cardona’s testimony which led to Torres’ conviction, not Vazquez’s. Moreover, Zaragoza did not testify at trial. Torres has failed to show any reasonable probability that the result would have been different had Vazquez’s and Zaragoza’s personnel files been disclosed.

DISPOSITION

The judgment is affirmed.

BIGELOW, P. J.

We concur:

FLIER, J.

GRIMES, J.