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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION THREE

ADOLFO DAVIS

Petitioner,

v.

THE SUPERIOR COURT OF
LOS ANGELES COUNTY,

Respondent;

THE PEOPLE,

Real Party in Interest.

B233356

(Los Angeles County
Super. Ct. No. VA106301)

ORIGINAL PROCEEDINGS in mandate. Margaret Miller Bernal, Judge.

Petition granted.

Ronald L. Brown, Public Defender, Albert J. Menaster, Karen Nash and Nga Tumendoza, Deputy Public Defenders, for Petitioner.

Steve Cooley, District Attorney, Irene Wakabayashi, Head Deputy, Patrick D. Moran and Shirley S. N. Sun, Deputy District Attorneys, for Real Party in Interest.

INTRODUCTION

In *Davis v. Superior Court* (2010) 186 Cal.App.4th 1272 (*Davis I*), we held that petitioner and defendant Adolfo Davis was entitled to an in camera hearing to establish a reasonable possibility that the confidential informant who identified him as the person who shot David Ochoa could give evidence on the issue of guilt that might exonerate him. To that end, we ordered the trial court to hold an in camera hearing prior to disclosure, if any, of the confidential informant's identity. On remand, the trial court held in camera hearings at which the confidential informant was not present. Davis then filed this petition for writ of mandate, claiming that the in camera hearings were inadequate. We agree. The in camera hearings failed to comply with *Davis I*, and we therefore grant the petition.

FACTUAL AND PROCEDURAL BACKGROUND

I. Factual background.¹

On June 18, 2008, David Ochoa, Farid Moran, Shearid Moran, Anthony Mendoza, and Cynthia Bravo were walking to a store in South Gate when they saw a group of male Hispanics. Ochoa knew one of the men from school—Alan, who was a member of the Bad Ass Youngsters (BAY) gang known as Flaco. One of the men approached Ochoa and asked where he was from. Ochoa indicated he wasn't a gang member,² but the man said "BAY" and shot Ochoa multiple times.

Ochoa described the shooter as having a mustache, goatee, and a black tattoo on the right side of his neck like a bar going down with spots. Ochoa's companions, however, did not see or could not remember seeing a tattoo. But another witness, Lisette Ramirez, said that the shooter had a tattoo on his neck.

¹ The factual background is from the preliminary hearing and police reports.

² Ochoa was not a gang member, but he associated with SNR gang members at school.

According to Farid, the shooter was light and bald with a mustache, and he ran towards the railroad tracks, while his companions got into a black car. Neither Farid nor Shearid or Mendoza saw a scooter. Bravo saw a man with a scooter, although she couldn't remember if it was the shooter or one of his friends. Ramirez saw the shooter on a scooter before the shooting. Officers recovered a scooter from the scene, and a latent fingerprint was lifted from it. The fingerprint did not match defendant's prints.

On June 24, 2008, six days after Ochoa was shot, a confidential informant told the police he or she witnessed the shooting and that defendant, who was known as Hit Man from BAY, was the shooter. The informant said that defendant had tattoos, although the informant did not describe any tattoos on defendant's neck. The informant took police officers to the area where defendant lived, and identified defendant, who denied involvement in BAY and in shooting Ochoa. Defendant did not have a tattoo on his neck, but he did have hickies. Officers searched defendant's home but found no gang paraphernalia or a gun.

From photographic lineups, Ochoa, Farid, Shearid, Mendoza, and Bravo identified defendant as the shooter. But at the preliminary hearing, Farid and Shearid could not identify defendant as being there the day of the shooting. Bravo initially identified him but then said she didn't know if she saw the shooter in court. Mendoza and Ochoa identified defendant at the hearing.

II. Procedural background.

An information alleged against defendant one count of attempted murder (Pen. Code, §§ 187, subd. (a), 664).³ In February 2009, the defense moved for disclosure of the confidential informant's identity. After the trial court denied the motion without conducting an in camera hearing, defendant filed a petition for writ of mandate, which we ultimately granted in *Davis I*. *Davis I* ordered the trial court to hold an in camera hearing to determine whether the informant's identity should be disclosed, although we declined to order the confidential informant to be present at that hearing.

³ All further undesignated statutory references are to the Penal Code.

On remand in the trial court, defendant filed another motion, this one requesting that the informant be present at the in camera hearing and submitting questions to be asked at the hearing. The trial court, on January 21 and on April 15, 2011, held in camera hearings.⁴ At the January 21 hearing, Detective Derek O'Malley, a former investigating officer, testified. At the April 15 hearing, Detective Robert Pellerin, the original investigating officer, testified. The confidential informant was not present at either hearing.⁵ After those hearings, the trial court again denied defendant's motion for disclosure of the confidential informant's identity.

Defendant then filed a petition for writ of mandate in this court asking that the confidential informant be ordered to appear at an in camera hearing. We summarily denied that petition. The California Supreme Court, however, granted defendant's petition for review and ordered us to set an order to show cause why the relief sought in the petition should not be granted.

DISCUSSION

III. The in camera hearings did not comply with *Davis I*.

Davis I held that a confidential informant who is a percipient witness is not necessarily a material witness whose identity must automatically be disclosed to the defense. But we also found that the defense is entitled to an in camera hearing to determine whether there is a reasonable possibility the confidential informant can give information on the issue of guilt that might exonerate defendant. (*Davis I*, *supra*, 186 Cal.App.4th at pp. 1276-1277; see also *People v. Lawley* (2002) 27 Cal.4th 102, 159 ["An informant is a material witness if there appears, from the evidence presented, a reasonable possibility that he or she could give evidence on the issue of guilt that might exonerate the defendant"]; Evid. Code, § 1042, subd. (d) ["At the in camera hearing, the

⁴ We have reviewed the sealed transcripts from those hearings, and we denied the district attorney's request to review them.

⁵ The deputy district attorney was present at the hearings, but neither defendant nor defense counsel were present.

prosecution may offer evidence which would tend to disclose or which discloses the identity of the informant to aid the court in its determination whether there is a reasonable possibility that nondisclosure might deprive the defendant of a fair trial”]; see also *People v. Oppel* (1990) 222 Cal.App.3d 1146, 1153 [an attorney’s affidavit, on information and belief, cannot constitute the requisite factual foundation for the prima facie showing].) Although we left the manner in which the in camera hearing was to be conducted to the trial court, we said that the confidential informant need not be present at the hearing and cautioned the court to take all precautions to protect the informant’s identity. (See generally, *People v. Alderrou* (1987) 191 Cal.App.3d 1074.) *Davis I* therefore tried to balance the public’s interest in the flow of information to law enforcement and the defendant’s right to prepare a defense by finding that an in camera hearing should be held to determine if disclosure is required. (186 Cal.App.4th at p. 1277.)

That balance is disrupted where, as here, the trial court’s inquiry at the in camera hearing is merely “conclusionary” and “superficial.” (*People v. Lawley, supra*, 27 Cal.4th at p. 160.) To be meaningful, the court must make a “sufficiently searching inquiry” into whether the witness can provide “any evidence that, to a reasonable possibility, might have exonerated defendant.” (*Ibid.*) In other words, to be meaningful, information must be made available to the court so it can determine the materiality of the witness, namely, whether the witness can give any information on the issue of guilt that might exonerate the defendant.

The in camera hearings held below were not meaningful. The two officers who testified at the hearings either failed to answer relevant questions or did not know the answers to them. We did not, however, suggest in *Davis I* that the informant’s identity and any information that might reveal his identity should remain a secret *from the trial court* at an in camera hearing held outside the presence of the defense and transcribed under seal. Such secrecy defeated the purpose of the in camera hearing, which was to give to the trial court information from which it could determine whether the confidential informant had evidence on the issue of guilt that might exonerate the defendant.

To make that determination, sufficient information about the informant's relationship to the defendant and the criminal transaction certainly must be disclosed. That information should include, for example, what the confidential informant saw (there were discrepancies about whether the shooter was on a scooter); what the confidential informant heard (the shooter and Ochoa might have spoken before Ochoa was shot; did the informant hear what was said?); was the confidential informant a gang member (if the informant was a member of a rival gang, then he might have a motive to implicate defendant); and what, if any, was the confidential informant's relationship to the defendant and to the victim. Yet, this information was withheld from the trial court at the January 21 and April 15, 2011 in camera hearings.

We therefore now order the trial court to hold another, meaningful, in camera hearing at which the confidential informant shall be present. We again caution the court to take all precautions to protect the witness's identity, until such time as disclosure may be found to be proper. The date and time of the in camera hearing shall not be disclosed to the defense. At the hearing, the court shall conduct a sufficiently searching inquiry and ascertain whether the informant can offer exculpatory information on the issue of guilt. (*People v. Oppel, supra*, 222 Cal.App.3d at p. 1152 [disclosure is mandated only when the defendant produces "some evidence" showing a reasonable possibility that the confidential informant can give evidence on the issue of guilt which might result in the defendant's exoneration].)

DISPOSITION

The petition for writ of mandate is granted.

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ALDRICH, J.

We concur:

CROSKEY, Acting P. J.

KITCHING, J.