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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SEVEN

MONIQUE LUCERO,

Petitioner,

v.

THE SUPERIOR COURT OF LOS
ANGELES COUNTY,

Respondent;

CITY OF LOS ANGELES et al.,

Real Parties in Interest.

B238799

(Los Angeles County
Super. Ct. No. BA384483)

PETITION for writ of mandate after denial of a discovery motion by the Superior Court of Los Angeles County, Lisa B. Lench, Judge. Petition granted.

Janice Fukai, Alternate Public Defender, Thomas J. Burns and Gary S. Wigodsky for Defendant and Petitioner.

Carmen A. Trutanich, City Attorney, Carlos de la Guerra, Managing Assistant City Attorney and Jess J. Gonzalez, Assistant City Attorney for Plaintiff and Real Parties in Interest.

INTRODUCTION

Monique Lucero petitions for a writ of mandate compelling the trial court to grant her *Pitchess*¹ motion on the basis that she demonstrated good cause for the discovery. The Los Angeles Police Department (LAPD) asserts that there is no good cause for discovery and that discovery of the requested records is barred by Evidence Code² section 1047 because the officer who is the subject of the motion was not involved in Lucero's arrest or detention. We find section 1047 inapplicable to this case because the alleged officer misconduct does not involve Lucero's arrest or detention.

FACTUAL AND PROCEDURAL BACKGROUND

The following facts are based on evidence presented at the preliminary hearing. On May 12, 2011, Arizona resident Monique Lucero was in Los Angeles visiting her boyfriend, Uriel Mercado, when Mercado was pepper-sprayed in the face by an unknown assailant. Lucero drove Mercado around the neighborhood after the altercation in search of the assailant. At some point during this drive, Lucero slowed down when she approached two men standing on a corner. Mercado then fired four to five shots in the men's direction, but no one was injured. Lucero was charged with attempted murder (Pen. Code, § 664/187(a)) and shooting at an occupied structure (Pen. Code, § 246). She was also alleged to have committed the offenses "for the benefit of, at the direction of, and in association with" a criminal street gang (Pen. Code, § 186.22, subd. (b)).

At the preliminary hearing, LAPD Officer Rick Huerta testified as a gang expert. Huerta testified that, according to a 2006 Field Identification (FI) card that he personally reviewed, Mercado had admitted to being a member of a graffiti "tagging" crew with the acronym "FUA" in 2006. Huerta also testified that the FUA tagging crew had been completely subsumed into the local Lincoln Heights gang in 2006. Based on this

¹ *Pitchess v. Superior Court* (1974) 11 Cal.3d 531 (*Pitchess*).

² Unless otherwise indicated, all further statutory references are to the Evidence Code.

information and his expertise, Huerta opined that Mercado was a Lincoln Heights gang member. Huerta also opined that Lucero was a Lincoln Heights gang member because she was given membership by virtue of being Mercado's girlfriend and had a tattoo of Mercado's nickname, which represented her alignment with his gang. Finally, Huerta testified that Lucero acted for the benefit of the gang by following Mercado's driving instructions and driving Mercado around in search of a rival gang member at the time of the shooting.

After the preliminary hearing, Lucero's attorney filed a *Pitchess* motion supported by a declaration seeking discovery of Huerta's personnel records for any evidence of "fabricating evidence, of suppressing exculpatory information and of lying to cover up such misconduct." In support of the motion, Lucero's attorney declared that Huerta committed perjury when he testified that Mercado admitted to being a FUA member in 2006, because there was in fact no evidence documenting any admission of FUA membership from Mercado. The declaration also set forth that, contrary to Huerta's testimony, neither Lucero nor Mercado were driving in search of a rival gang member at the time of the shooting. Lucero's attorney declared that, because there was no evidence of Mercado's alleged gang membership, Huerta also perjured himself when he testified that Lucero was a gang member by association and that she committed the charged crimes for the benefit of a gang.

The LAPD opposed Lucero's *Pitchess* motion, arguing that she did not set forth good cause for discovery, but rather simply disagreed with Huerta's testimony. The LAPD further contended that discovery of Huerta's personnel records was barred by section 1047, which exempts from *Pitchess* discovery the records of any officers "who either were not present during the arrest or had no contact with the party seeking disclosure from the time of the arrest until the time of booking." The trial court denied Lucero's request for an in camera review of Huerta's personnel records, finding insufficient showing of good cause for the discovery.

DISCUSSION

Pitchess motions “afford[] criminal defendants a judicially created right to discovery of prior citizen complaints alleging [officer] misconduct” when the complaints are material to the proceedings. (*Galindo v. Superior Court* (2010) 50 Cal.4th 1, 5 (*Galindo*).) A party seeking *Pitchess* discovery from an officer’s personnel files must comply with sections 1043 through 1047. (See *People v. Mooc* (2001) 26 Cal.4th 1216, 1226 (*Mooc*).) Section 1043 requires, in pertinent part, a written motion supported by an affidavit “demonstrating good cause for the” discovery and its “materiality [] to the subject matter involved in the pending litigation.” (§ 1043, subd. (b)(3); see also *Mooc, supra*, 26 Cal.4th at p. 1225.) “A showing of good cause is measured by ‘relatively relaxed standards’ that serve to ‘insure the production’ for trial court review of ‘all potentially relevant documents.’” (*Warrick v. Superior Court* (2005) 35 Cal.4th 1011, 1016 (*Warrick*).) As a result, a party seeking *Pitchess* discovery is not required to corroborate or show motivation for the alleged officer misconduct, but instead must provide by affidavit a plausible factual scenario “that might or could have occurred.” (*Id.* at p. 1026.) A scenario is plausible when it asserts “specific police misconduct that is both internally consistent and supports the defense proposed to the charges.” (*Ibid.*) The affidavit may make assertions on information and belief, and need not be based on personal knowledge. (*City of Santa Cruz v. Municipal Court* (1989) 49 Cal.3d 74, 86.)

If the court finds good cause for the discovery, the custodian of records must provide the court with all potentially relevant files from the officer’s personnel records for review “in chambers, that is, in a nonpublic proceeding designed to protect the officer’s privacy.” (*Galindo, supra*, 50 Cal.4th at p. 7.) After an in camera review of the officer’s files, the court will then disclose only that information that it finds both relevant to the party’s defense and in compliance with statutory limitations. (§ 1045, subd. (b); *Mooc, supra*, 26 Cal.4th at p. 1227.) We review a trial court’s decision concerning the discovery of material contained in officer personnel records for an abuse of discretion. (*People v. Hughes* (2002) 27 Cal.4th 287, 330.)

I. Lucero Demonstrated Good Cause for *Pitchess* Discovery of Huerta's Records.

Lucero requested an in camera review of Huerta's personnel records for prior complaints of "fabricating evidence," "suppressing exculpatory information" and "lying to cover up such misconduct[,] strengthen weak cases[,] and frame defendants." To the extent Lucero's *Pitchess* motion sought discovery of evidence related to "suppressing exculpatory information[,] it was properly denied because the "specificity requirement" for *Pitchess* discovery "excludes requests for officer information that are irrelevant to the pending charges." (*Warrick, supra*, 35 Cal.4th at p. 1021.) As to the allegations of fabricating evidence or falsifying testimony, however, Lucero demonstrated good cause for discovery.

The supporting declaration submitted by Lucero's counsel presented a plausible factual scenario of police misconduct: Lucero specifically alleged that Huerta was lying when he testified that an FI card documented Mercado's admission of FUA membership in 2006, because the FI card contained no such admission. She also alleged that Huerta was lying when he testified that she and Mercado were searching for a rival gang member at the time of the shooting. These allegations were internally consistent and consistent with evidence that was presented at the preliminary hearing. They provided an explanation of Lucero's conduct that was free from any gang motivation: Lucero asserted that she drove Mercado around in search of the person who pepper-sprayed him, not a rival gang member, on the day of the shooting. This showing meets the standard of plausibility that is required under *Warrick* by presenting a specific factual scenario that "might or could have" occurred. (*Warrick, supra*, 35 Cal.4th at p. 1026.)

Evidence of complaints that Huerta falsified testimony or fabricated evidence in other cases, if found, would have buttressed Lucero's defense that Huerta falsified his expert testimony at her preliminary hearing. It would have supported her defense that she is not a gang member and never acted in association with any gang by undermining the credibility of Huerta's testimony. Huerta's credibility is material to Lucero's defense because his testimony serves as the only link between Lucero's actions on the day of the

shooting and the gang enhancement allegation. Accordingly, Lucero's supporting declaration was sufficient "to establish not only a logical link between the defense proposed and the pending charge, but also to articulate how the discovery being sought would support such a defense or how it would impeach the officer[s'] version of events." (*Warrick, supra*, 35 Cal.4th at p. 1021.) This was sufficient to demonstrate good cause for the discovery.

II. Section 1047 Does Not Bar Discovery of Huerta's Personnel Records.

The LAPD contends that regardless of Lucero's showing of good cause for the discovery, the trial court properly denied the discovery request because section 1047 precludes discovery of Huerta's records. Section 1047, in pertinent part, exempts from discovery "[r]ecords of peace officers . . . who either were not present during the arrest or had no contact with the party seeking disclosure from the time of the arrest until the time of booking." The LAPD reads section 1047 as a provision of general applicability that restricts *Pitchess* discovery only to records of officers who had contact with the defendant from the time of the arrest to the booking. Because Huerta was an expert witness, and not an arresting or booking officer, the LAPD argues that Huerta's records do not fall under the purview of *Pitchess* discovery. Our review of this question of law is de novo. (*County of Los Angeles v. Superior Court* (1993) 18 Cal.App.4th 588, 594.)

The LAPD's proposed construction of section 1047 was evaluated and rejected in *Alt v. Superior Court* (1999) 74 Cal.App.4th 950 (*Alt*), where the defendant sought to discover the personnel records of an officer who had allegedly reported the defendant's fraudulent insurance claims to authorities. (*Id.* at p. 953.) Relying on section 1047, the trial court denied the defendant's *Pitchess* motion because the targeted police officer had no contact with the defendant from the time of the arrest to the time of booking. (*Id.* at p. 956.) The Court of Appeal, however, held that section 1047 applied only to *Pitchess* discovery requests that alleged officer misconduct during arrests or bookings. (*Id.* at p. 952-53.) Accordingly, as the defendant in *Alt* did not allege the specific kind of

misconduct that section 1047 was designed to address, the court issued the peremptory writ based on the general discovery provisions of sections 1043 and 1045. (*Ibid.*)

The LAPD instead relies on *Davis v. City of Sacramento* (1994) 24 Cal.App.4th 393 (*Davis*), an earlier case in the *Alt* court.³ There, the *Pitchess* discovery request concerned the files of a retired officer who, like Huerta, acted only as an expert witness. (*Id.* at p. 399.) It involved a wrongful death action arising from the fatal shooting of a man during an attempt to arrest him. (*Ibid.*) The retired officer's testimony concerned situations in which the police wield shotguns during an arrest. (*Id.* at p. 404.) In *Alt*, the court explicitly addressed *Davis*; in *Davis*, it "rejected only the argument that there had to be an actual arrest for the discovery prohibition of section 1047 to apply" and "concluded that the functional equivalent of an arrest would suffice." (*Alt, supra*, 74 Cal.App.4th at p. 958.) It "did not make any bold pronouncement in *Davis* that section 1047 establishes a general condition for obtaining discovery." (*Ibid.*) In the absence of alleged misconduct relating to the arrest or booking process, section 1047 does not apply. Here, there were no allegations of any officer misconduct related to Lucero's arrest. Her *Pitchess* motion specifically alleged that Huerta committed misconduct at her preliminary hearing, where he testified only to Lucero's alleged gang affiliation.

We find the *Alt* court's interpretation of section 1047 to be persuasive. When sections 1046 and 1047 are considered in the context of the *Pitchess* scheme of discovery, it is clear that they pertain to the limited class of cases in which discovery of personnel records are sought on the basis of alleged officer misconduct in an arrest or booking context. Allegations of officer misconduct that is material to a party's defense can arise beyond the limited scope that the LAPD's construction of section 1047 suggests.⁴ The *Pitchess* statutes, by their own terms, allow a defendant seeking *Pitchess*

³ At oral argument, the LAPD indicated it was no longer relying on *Davis*.

⁴ For example, see *People v. Gaines* (2009) 46 Cal.4th 172, 178 (falsifying police records and planting evidence); *People v. Jordan* (2003) 108 Cal.App.4th 349, 367 (falsifying police reports); and *Alt, supra*, 74 Cal.App.4th at page 953 (falsifying administrative complaints against other police officers).

discovery to allege police misconduct that does not arise directly out of an arrest or booking. For example, section 1045 provides for discovery of officer records where “the issue in litigation concerns the policies or pattern of conduct of the employing *agency*,” like in *Davis*, where the police department was alleged to have engaged in negligent hiring practices. (§ 1045, subd. (c) (emphasis added); *Davis, supra*, 24 Cal.App.4th at p. 399.) Moreover, the LAPD’s argument that *Pitchess* discovery is limited to only those records of officers directly involved with a party’s arrest or detention would insulate all other officers and agencies who commit material misconduct against a party from the reach of a statutory scheme that seeks to balance “the [party’s] right to a fair trial and the officer’s interest in privacy.” (*Mooc, supra*, 26 Cal.4th at p. 1227.) Accordingly, we conclude that section 1047 is a limited discovery prohibition that applies only in the context of an arrest or detention. As this case does not involve the specific kind of misconduct that section 1047 was designed to address, section 1047 is inapplicable here and does not bar discovery in this case.

DISPOSITION

The petition for writ of mandate is granted. The trial court is directed to conduct an in camera review of Huerta’s personnel files and disclose any information relevant to Lucero’s defense prior to trial.

ZELON, J.

We concur:

WOODS, Acting P.J.

JACKSON, J.