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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.

GILBERT TAPIA,

Defendant and Appellant.

B286021

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

APPEAL from a judgment of the Superior Court of Los Angeles County. Jesse I. Rodriguez, Judge. Affirmed as modified.

Miriam K. Billington, under appointment by the Court of Appeal, for Defendant and Appellant.

Xavier Becerra, 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.

INTRODUCTION

A jury convicted defendant and appellant Gilbert Tapia of four counts of transportation and possession for sale of heroin and methamphetamine. In connection with a prior appeal, we conditionally reversed the judgment in order for the trial court to conduct a supplemental *in camera* review of law enforcement personnel records pursuant to *Pitchess v. Superior Court of Los Angeles County* (1974) 11 Cal.3d 531 (*Pitchess*). In addition, we ordered Tapia resentenced if the court were to reinstate the judgment, due to several sentencing errors.

On remand, the court conducted a supplemental *in camera Pitchess* review, after which it determined no disclosures were required. The court reinstated the judgment and resentenced Tapia to an aggregate term of eight years, which included a three-year enhancement for a prior drug conviction, pursuant to former Health and Safety Code section 11370.2.¹ The court also awarded Tapia custody credits for time served prior to the original sentencing.

In the present appeal, Tapia asks us to (1) review the sealed transcript of the supplemental *in camera Pitchess* review; (2) strike the three-year enhancement per Senate Bill No. 180 (2017–2018 Reg. Sess.) (SB 180); and (3) award additional custody credits for the actual time served between the original sentencing and resentencing.

¹ All further unspecified section references are to the Health and Safety Code.

We find the trial court conducted a sufficient *Pitchess* review and properly ordered no records disclosed to Tapia. However, we agree with Tapia that the enhancement should be stricken and he is entitled to additional custody credits, and modify the judgment accordingly. We affirm the judgment in all other respects.

FACTUAL AND PROCEDURAL BACKGROUND²

Prior to trial, Tapia filed a motion for disclosure of peace officer personnel records for Los Angeles County Sheriff's Deputy Bao Dang pursuant to *Pitchess* and Evidence Code sections 1043 *et seq.*³ The court ordered an *in camera* hearing to review any such records. Based upon the information provided at that hearing, the trial court advised Tapia that "there is nothing to disclose."

The case proceeded to trial,⁴ and a jury convicted Tapia of transportation of heroin (§ 11352, subd. (a); count 1), transportation of methamphetamine (§ 11379, subd. (a); count 2), possession of heroin for sale (§ 11351; count 3), and possession of methamphetamine for sale (§ 11378; count 4). Tapia also

² By order dated January 8, 2018, we granted Tapia's unopposed motion to take judicial notice of the record of his prior appeal, Case No. B270876.

³ The motion also sought disclosure of records for a Deputy Valadez. The court found insufficient cause to warrant *in camera* review of Deputy Valadez's personnel records, which Tapia did not challenge on appeal.

⁴ Because the facts established at trial are not relevant to the issues raised on appeal, we do not provide a statement of facts underlying the convictions.

admitted a prior drug sales conviction under section 11352.⁵

The court imposed an aggregate term of eight years.⁶

On appeal, we found numerous errors related to the trial court's *Pitchess* review, including: (1) the witness purporting to be the Sheriff's Department's custodian of records did not identify himself as such under oath; (2) the purported custodian of records did not specifically indicate he had searched all databases that might contain complaints responsive to the *Pitchess* inquiry; and (3) an attorney for the Sheriff's Department made an unsworn representation related to a search of files belonging to the "Internal Criminal Investigating Unit." We also concluded the trial court imposed an unlawful sentence.⁷ Accordingly, we conditionally reversed the judgment and remanded the case for a supplemental *Pitchess* hearing to address our concerns.

⁵ Tapia admitted a second prior drug conviction under section 11351.5, but the People struck that conviction allegation on their own motion.

⁶ The court imposed the high term of five years on count 1, and added a three-year consecutive term for the prior drug sales conviction, pursuant to former section 11370.2, subdivision (a). On count 2, the court imposed one-third the mid-term of three years, but ran the sentence "concurrent" with the sentence on count 1. On counts 3 and 4, the court imposed one-third the respective mid-terms, but ordered the sentences "not imposed" pursuant to Penal Code section 654. The court also awarded Tapia 77 custody credits, consisting of 39 credits for actual days served and 38 credits for good time/work time.

⁷ Specifically, we determined that, because count 2 was to be served concurrent with count 1, and counts 3 and 4 were stayed, the court was required to impose full sentences for those counts.

We further ordered that if the trial court reinstated the judgment, it must resentence Tapia.

On remand, the trial court conducted a supplemental *in camera Pitchess* hearing and again determined there were no required disclosures. The court then reinstated the judgment of conviction.

At resentencing, the trial court denied probation and imposed an aggregate term of eight years. On count 1, the court imposed the high term of five years, and added a three-year consecutive term for the prior drug sales conviction, pursuant to former section 11370.2, subdivision (a). On count 2, the court imposed the high-term of four years, to be served concurrent with count 1. On count 3, the court imposed the high-term of four years, but ordered the sentence stayed pursuant to Penal Code section 654. On count 4, the court imposed the high term of three years, but ordered the sentence stayed pursuant to Penal Code section 654.

The trial court awarded Tapia 77 custody credits, consisting of 39 credits for time actually served prior to the original sentencing, and 38 credits for good time/work time.

Tapia timely appealed.

DISCUSSION

I. The Trial Court Conducted a Sufficient *Pitchess* Review and Properly Determined No Disclosures were Required

On appeal, Tapia asks that we review the sealed transcript of the *in camera Pitchess* hearing to ensure the trial court properly ordered that none of Deputy Dang's personnel records be disclosed. We find the court conducted a proper *Pitchess* review and did not abuse its discretion.

A defendant requesting confidential personnel records and complaints must make a good cause showing by affidavit setting forth the materiality of the requested information to the pending litigation. (Evid. Code, § 1043, subd. (b)(3).) If a defendant shows good cause, the court must conduct an *in camera* hearing to determine what information sought, if any, must be disclosed. (*People v. Gaines* (2009) 46 Cal.4th 172, 179.) A criminal defendant is entitled to discovery of all relevant documents or information in the confidential records of the peace officers accused of misconduct against the defendant, provided the information does not concern officer conduct occurring more than five years before the incident, the results of internal police investigations, or facts with no practical benefit to the defense. (*Id.* at pp. 179, 182; see Evid. Code, § 1045, subd. (b).) This encompasses not only evidence that would be admissible at trial, but also evidence that may lead to admissible evidence or evidence that is pertinent to the defense. (*Richardson v. Superior Court* (2008) 43 Cal.4th 1040, 1048–1049.) We review the trial court’s determination regarding the discoverability of material in peace officer personnel files for an abuse of discretion. (*People v. Mooc* (2001) 26 Cal.4th 1216, 1228 (*Mooc*).)

As we discussed in our prior opinion, when a trial court finds good cause to conduct an *in camera Pitchess* hearing, the custodian of records of the relevant personnel file should bring to court all documents “‘potentially relevant’” to the defendant’s motion. (*Mooc, supra*, 26 Cal.4th 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 various limitations not at issue in this case, the reviewing court must disclose 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. 1227–1230.)

Our review of the sealed reporter’s transcript of the supplemental *in camera* Pitchess hearing reveals the trial court complied with these procedures and addressed the concerns expressed in our prior opinion. Moreover, we conclude the trial court did not abuse its discretion in ruling there was no discoverable evidence to disclose. (*People v. Myles* (2012) 53 Cal.4th 1181, 1209; *Mooc, supra*, 26 Cal.4th at pp. 1228, 1232.)

II. The Three-Year Enhancement Must be Stricken

Tapia contends, and the Attorney General concedes, that the three-year enhancement under former section 11370.2, subdivision (a), should be stricken. We agree.

At resentencing, the trial court imposed, per former section 11370.2, subdivision (a), a three-year enhancement for Tapia’s prior drug sales conviction under section 11352. Former section 11370.2 provided that “[a]ny person convicted of a violation of [Section 11352] . . . shall receive, in addition to any other punishment authorized by law, . . . a full, separate, and consecutive three-year term for each prior felony conviction of . . . [Section] 11352” (*Id.*, subd. (a).) While this appeal was pending, SB 180 went into effect, which amended former section 11370.2 to remove enhancements for most prior drug convictions, including convictions under section 11352.⁸ Tapia contends that

⁸ SB 180 maintained the enhancement for prior drug convictions involving minors, pursuant to section 11380.

we should apply SB 180 to his case per the *Estrada*⁹ rule and strike the three-year enhancement.

Generally, we do not apply statutes retroactively unless there is an express retroactivity provision or it is very clear from extrinsic sources that the Legislature intended retroactive application. (*Myers v. Philip Morris Companies, Inc.* (2002) 28 Cal.4th 828, 841.) The *Estrada* rule is a “specific qualification to the ordinary presumption,” and provides that “[w]hen the Legislature has amended a statute to reduce the punishment for a particular criminal offense, we will assume, absent evidence to the contrary, that the Legislature intended the amended statute to apply to all defendants whose judgments are not yet final on the statute’s operative date.” (*People v. Brown* (2012) 54 Cal.4th 314, 323; see *Estrada, supra*, 63 Cal.2d at pp. 742–748.) “The rule in *Estrada* has been applied to statutes governing penalty enhancements, as well as to statutes governing substantive offenses.” (*People v. Nasalga* (1996) 12 Cal.4th 784, 792.)

We find the *Estrada* rule is applicable here. SB 180 reduces the punishment for persons, like Tapia, convicted of violating section 11352, by eliminating the three-year enhancement for each prior conviction for certain drug offenses. Further, we have found no evidence to suggest the Legislature intended that SB 180 not apply to defendants whose judgments were not yet final when it became effective.

Here, Tapia’s judgment was not final when SB 180 went into effect on January 1, 2018. (See *People v. Smith* (2015) 234 Cal.App.4th 1460, 1465 “[a] judgment becomes final when the availability of an appeal and the time for filing a petition for

⁹ *In re Estrada* (1965) 63 Cal.2d 740 (*Estrada*).

certiorari have expired”]; *People v. Vieira* (2005) 35 Cal.4th 264, 305–306 [“a defendant generally is entitled to benefit from amendments that become effective while his case is on appeal”].) Moreover, per SB 180, Tapia’s prior conviction under section 11352 does not qualify for a section 11370.2 enhancement. Accordingly, we vacate the three-year enhancement imposed under former section 11370.2, subdivision (a). (See *People v. Millan* (2018) 20 Cal.App.5th 450, 455–456 [applying SB 180 on appeal and vacating section 11370.2 enhancement]; *People v. Zabala* (2018) 19 Cal.App.5th 335, 344 [same].)

III. Tapia is Entitled to Additional Custody Credits

At resentencing, the trial court awarded Tapia 77 days of custody credits, consisting of 39 days for actual time served prior to the original sentencing, and 38 days for good time/work time. Tapia contends, and the Attorney General concedes, that the trial court should have awarded him additional credits for the time actually served between the initial sentencing and resentencing. We agree that the trial court made yet another sentencing error by failing to do so.

The trial court should have calculated both the pre-and post-sentence actual time spent in county jail prior to sentencing, the actual time in state prison, and the actual time the defendant served in county jail awaiting the resentencing. In addition, pursuant to section 4019, the trial court was required to include any pre-sentence conduct credits, but not post-sentence conduct credits, which are determined by the Department of Corrections and Rehabilitation. (*People v. Buckhalter* (2001) 26 Cal.4th 20, 29.) It failed to do so. Here, it is undisputed that Tapia spent 554 days in custody between the original sentencing and resentencing, for which the trial court awarded him no credits.

Therefore, Tapia is entitled to 554 credits for actual time served after the initial sentencing, in addition to the 77 credits previously awarded, representing 39 days of actual time served prior to the original sentencing and 38 days conduct credit awarded by the trial court at resentencing. In total, he is entitled to 631 days of credit, consisting of 593 days actual time served and 38 days of conduct credit.

DISPOSITION

The judgment is modified to strike the former section 11370.2, subdivision (a), three-year enhancement. The judgment is further modified to award Tapia a total of 631 custody credits, consisting of 593 credits for days actually served, and 38 credits for good time/work time. The trial court is directed to prepare an amended abstract of judgment consistent with these modifications, and forward a certified copy of the amended abstract of judgment to the California Department of Corrections. In all other respects, the judgment is affirmed.

BIGELOW, P.J.

We concur:

GRIMES, J.

ROGAN, J.*

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