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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION ONE

THE PEOPLE, Plaintiff and Respondent, v. VICTOR WAYNE WEBB, Defendant and Appellant.	B267363 (Los Angeles County Super. Ct. No. BA423868)

APPEAL from a judgment of the Superior Court of Los Angeles County. Bernie LaForteza, Judge. Affirmed.

Lynette Gladd Moore, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Lance E. Winters, Senior Assistant Attorney General, Marc A. Kohm and Abtin Amir, Deputy Attorneys General, for Plaintiff and Respondent.

Victor Wayne Webb appeals from the judgment entered following a jury trial in which he was convicted of one count of selling, transporting, or offering to sell cocaine, a controlled substance, in violation of Health and Safety Code section 11352, subdivision (a). Appellant contends that law enforcement's failure to preserve field identification cards pertaining to other suspects detained with appellant violated due process and constituted prejudicial error under *California v. Trombetta* (1984) 467 U.S. 479 (*Trombetta*). Appellant further maintains that the trial court abused its discretion in denying appellant's posttrial *Pitchess*[1] motion, and thereby violated his confrontation and due process rights. We disagree and affirm.

FACTUAL BACKGROUND

B.P. was a paid informant for the Los Angeles Police Department, assisting in the identification and arrest of illegal drug sellers. On April 18, 2014, his assignment was to purchase illegal narcotics in South Park, a public park in Los Angeles. At the police station before the operation, police searched B.P. to ensure he had no contraband prior to the drug purchase. He received a marked $10 and a marked $20 bill with which to make a drug purchase. Police also equipped B.P. with a video camera and audio device on a key chain, which police could control to monitor the drug buy.

Sometime in the afternoon police dropped B.P. off in an alley near the park. B.P. entered the park and walked to a particular picnic table within eyesight of police officers

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

surveilling the operation. Officers Fuentes and Leverich followed B.P. until Detective Phillips, who was observing the scene through binoculars, told them he had B.P. in sight.

A woman named "Apple" was standing near the table that B.P. approached. B.P. asked Apple if she could get him a "dub," or $20 worth of rock cocaine. Apple agreed, whereupon B.P. handed her the marked $20 bill police had given him. With the marked bill in her hand, Apple walked to a picnic table 20 to 25 yards away, where appellant and five other men were gathered. Appellant was looking toward 51st Street to the south with his back to B.P., who was facing southwest. B.P. could not see appellant's face. But Detective Phillips, who was facing west and had his binoculars trained on appellant and the men at the picnic table, could see appellant's face as well as his gestures and facial expressions.

B.P. and Detective Phillips watched Apple approach appellant. Both saw appellant reach out and take the marked bill from Apple, stand up, pull something out of his right pocket, and hand it over to Apple. Without interacting with anyone else, Apple returned immediately to B.P. and handed him a rock of cocaine. B.P. then got up and walked back toward the alley where the police van was waiting for him. When he reached the van, B.P. immediately handed the cocaine over to his handlers.

After B.P. returned to the police van, Detective Phillips described appellant to the arresting officers and directed them specifically to detain appellant and Apple. Four other men in the vicinity were also detained to determine whether they had any involvement in the transaction. Detective Phillips left his observation post and joined the officers who had detained appellant. Based on his personal observation of the drug

transaction, Detective Phillips had no difficulty identifying appellant as the person who had handed the cocaine to Apple. All of the detainees were searched, with police recovering $191 in currency from appellant, including the marked $20 bill B.P. had used to make the drug buy.

After appellant, Apple, and the other men had been detained, police drove B.P. to the park to conduct a field show-up. Although he had not seen appellant's face, B.P. was able to identify appellant by his clothing as the man who had handed Apple the cocaine.[2]

DISCUSSION

1. Appellant's Trombetta *Claim Is Unsupported by the Evidence*

Appellant asserts that when police detained the other four men present during the drug transaction, they prepared field

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[2] Descriptions of the person from whom Apple obtained the drugs varied slightly among the witnesses. B.P. described the drug dealer to his police handler immediately after the encounter as "male Black, bald-headed, blue shirt, black pants," and at trial referred to him as a "young man." But appellant was neither particularly young nor was he bald, and his booking photo showed he was wearing brown shorts and a black or very dark-colored T-shirt over a white undershirt. Officer Fuentes, who was with B.P. when he identified appellant in the field show-up, described appellant's clothing as a "black or very dark-colored tee shirt over a white undershirt," and "dark-colored pants, shorts, long shorts." And Detective Phillips described the dealer as shorter than the other men around the picnic table, wearing "a dark black or blue shirt with a white [barely visible] undershirt underneath, and . . . brown shorts."

identification cards (FI cards) containing physical descriptions of the men and their clothing. He argues that the information on those cards was critical to the defense theory that B.P.'s description of the dealer did not match appellant, but instead fit one of the other suspects detained along with him. Appellant contends that Detective Phillips tailored his description of the suspect to match appellant only because appellant was found in possession of the marked $20 bill. He further maintains that police destroyed the cards when they released the other suspects at the scene, knowing that the cards contained exculpatory evidence.

Appellant concludes that law enforcement's failure to preserve FI cards as to the four men detained with appellant violated due process and constituted prejudicial *Trombetta* error because the cards would have supported his theory that police arrested the wrong man. However, appellant's failure to present any evidence that FI cards ever existed, much less that they contained exculpatory information or were destroyed, is fatal to appellant's *Trombetta* claim.

"The federal constitutional guarantee of due process imposes a duty on the state to preserve 'evidence that might be expected to play a significant role in the suspect's defense.' (*Trombetta*, *supra*, 467 U.S. at p. 488.)" (*People v. Montes* (2014) 58 Cal.4th 809, 837 (*Montes*); *People v. Carrasco* (2014) 59 Cal.4th 924, 961 (*Carrasco*).) But that duty does not require police to "collect particular items of evidence" or " 'gather up everything which might eventually prove useful to the defense.' " (*Montes*, at p. 837.) Further, the constitutional mandate to preserve evidence does not apply to evidence that is merely "potentially useful," but extends only to evidence that possesses

"an exculpatory value that was apparent before the evidence was destroyed." (*Trombetta*, at p. 489; *Carrasco*, at p. 961.)

" 'The state's responsibility is further limited when the defendant's challenge is to "the failure of the State to preserve evidentiary material of which no more can be said than that it could have been subjected to tests, the results of which might have exonerated the defendant." [Citation.] In such case, "unless a criminal defendant can show bad faith on the part of the police, failure to preserve potentially useful evidence does not constitute a denial of due process of law." ' " (*People v. Chism* (2014) 58 Cal.4th 1266, 1299–1300; *Arizona v. Youngblood* (1988) 488 U.S. 51, 58.)

In arguing that law enforcement breached its duty to preserve exculpatory evidence here, appellant relies on the testimony of two officers that police "typically" prepare an FI card when they arrest a suspect, which would include a description of the suspect's clothing and physical characteristics. But the only people arrested in connection with this drug transaction were appellant and Apple. And there was no evidence that police broke with their practice of preparing FI cards only for people they arrest by creating FI cards for the men police detained but did not arrest in this case. In fact, no officer testified that any FI cards were prepared here, nor was there even a scintilla of evidence that any information pertaining to the suspects detained with appellant was destroyed.

The Constitution does not require law enforcement to gather any particular item of evidence during an investigation, and there is no support for appellant's supposition that police generated FI cards in this case. Appellant's failure to make any

showing that FI cards existed in the first instance is fatal to his *Trombetta* claim.

2. The Trial Court Did Not Abuse Its Discretion in Denying Appellant's Posttrial Pitchess *Motion*

Following appellant's trial and conviction, appellant filed a *Pitchess* motion to determine whether there was any evidence in Detective Phillips's personnel records of falsifying evidence that could be used to impeach the officer's trial testimony and thus form the basis for a new trial motion. Finding the factual scenario presented by the defense did not constitute sufficient good cause for the requested discovery, the trial court denied the motion. In so ruling, the court compared the allegations of misconduct to the overwhelming evidence of guilt presented at trial and found the allegations speculative and implausible. The court further observed that information in the personnel file would be discoverable only to the extent it supported a new trial motion, but evidence relevant only for impeachment is insufficient to support a new trial.

In *Pitchess*, *supra*, 11 Cal.3d at pages 536–537, our Supreme Court recognized a criminal defendant's limited right to compel discovery of certain information in a police officer's personnel file "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." (*Warrick v. Superior Court* (2005) 35 Cal.4th 1011, 1018–1019 (*Warrick*).) In support of a motion to obtain such discovery, the defendant must file an affidavit showing good cause for the discovery "by demonstrating the materiality of the information to the pending litigation." (*Id.* at p. 1019; Evid. Code, § 1043, subd. (b).) Although the good cause requirement presents a "relatively low threshold for

discovery" (*City of Santa Cruz v. Municipal Court* (1989) 49 Cal.3d 74, 83), it is not inconsequential. The high court has emphasized that the information sought must be "requested with adequate specificity to preclude the possibility that defendant is engaging in a 'fishing expedition.' " (*Pitchess*, at p. 538; *City of Santa Cruz*, at p. 85.) Thus, the defense affidavit must show materiality to the pending action by describing "a ' "specific factual scenario" ' that establishes 'a "plausible factual foundation" ' for the alleged officer misconduct." (*Warrick*, at p. 1019; *City of Santa Cruz*, at pp. 85–86.)

In ruling on a defendant's pretrial *Pitchess* motion, the trial court may consider the defendant's denial of the facts asserted in the police report, defense counsel's affidavit describing the factual scenario supporting the claim of officer misconduct, witness statements, and any other pertinent documents. (*Warrick*, *supra*, 35 Cal.4th at pp. 1024–1025.) The court must then determine whether defendant's averments and evidence " 'suffice to "establish a plausible factual foundation" for the alleged officer misconduct and to "articulate a valid theory as to how the information sought might be admissible" at trial.' (*Id.* at p. 1025.) Corroboration of or motivation for alleged officer misconduct is not required. (*Ibid.*) Rather, 'a plausible scenario of officer misconduct is one that might or could have occurred.' (*Id.* at p. 1026.) A scenario is plausible when it asserts specific misconduct that is both internally consistent and supports the proposed defense. (*Ibid.*)" (*Garcia v. Superior Court* (2007) 42 Cal.4th 63, 71.)

The issue of what constitutes the "pending litigation" to which an officer's personnel records must be material arises where, as here, a *Pitchess* motion is brought after a full trial and

conviction. In this context, courts have construed the phrase "pending litigation" to refer to the defendant's motion for a new trial and have concluded that the standard for evaluating a posttrial *Pitchess* motion is whether there exists a reasonable probability that disclosure of the requested records would lead to a different result in a new trial. (*People v. Nguyen* (2007) 151 Cal.App.4th 1473, 1478; see also *People v. Delgado* (1993) 5 Cal.4th 312, 328 [new trial not warranted where it is not "probable" that newly discovered evidence would have produced different result].) Here, the trial court properly reviewed appellant's *Pitchess* motion through the lens of a proposed new trial motion and correctly held appellant to the standard of showing that the evidence he hoped to find had some likelihood of producing a different result in a new trial.

" ' " 'The determination of a motion for a new trial rests so completely within the court's discretion that its action will not be disturbed unless a manifest and unmistakable abuse of discretion clearly appears.' " ' " (*People v. Howard* (2010) 51 Cal.4th 15, 42–43.) Not only is a new trial motion based on newly discovered evidence viewed with disfavor (*People v. Mehserle* (2012) 206 Cal.App.4th 1125, 1151), but as the trial court observed, it is well settled that a motion for a new trial on the ground of newly discovered evidence will not be granted where the only value of the testimony is to impeach or to contradict a witness's prior trial testimony. (*People v. Hall* (2010) 187 Cal.App.4th 282, 299; *People v. Green* (1982) 130 Cal.App.3d 1, 11; *People v. Moten* (1962) 207 Cal.App.2d 692, 698.)

Appellant bears the burden of showing the trial court abused its discretion by denying his posttrial *Pitchess* motion. (*People v. Nguyen*, *supra*, 151 Cal.App.4th at p. 1478.) Here,

appellant candidly acknowledged that his *Pitchess* motion was fundamentally a fishing expedition to gather impeachment evidence to support a motion for a new trial. On this record, we find no abuse of discretion in the trial court's denial of appellant's *Pitchess* motion on the basis of the court's conclusion that the information from Detective Phillips's personnel file would not support a motion for a new trial and would not have made a difference in the outcome of the trial resulting in appellant's conviction.

DISPOSITION

The judgment is affirmed.
NOT TO BE PUBLISHED.

LUI, J.

We concur:

ROTHSCHILD, P. J.

JOHNSON, J.