

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

California Rules of Court, rule 8.1115(a), prohibits courts and parties from citing or relying on opinions not certified for publication or ordered published, except as specified by rule 8.1115(b). This opinion has not been certified for publication or ordered published for purposes of rule 8.1115.

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION ONE

THE PEOPLE,

Plaintiff and Respondent,

v.

JOHN HENRY GREEN,

Defendant and Appellant.

B258184

(Los Angeles County
Super. Ct. No. TA118150)

APPEAL from an order of the Superior Court of Los Angeles County, Eleanor J. Hunter, Judge. Affirmed.

Robert Bryzman, under appointment by the Court of Appeal and Adrian K. Panton, 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, Steven D. Matthews, Supervising Deputy Attorney General, and Robert C. Schneider, Deputy Attorney General, for Plaintiff and Respondent.

John Henry Green (Green) appeals the trial court’s denial of his motion for new trial and reinstatement of the judgment against him, after the court held a second hearing under *Pitchess v. Superior Court* (1974) 11 Cal.3d 531 (*Pitchess*) on remand from this court. The trial court did not abuse its discretion in denying the motion for new trial, and we affirm.

BACKGROUND

A jury convicted Green of one count of unlawful possession of a firearm by a felon in violation of former Penal Code section 12021, subdivision (a)(1).¹ Before sentencing, Green pleaded no contest to one count of possession of cocaine base for sale in violation of Health and Safety Code section 11351.5 (the jury had deadlocked 11-1 for guilt on that count, on which the trial court declared a mistrial) and admitted a prior felony conviction. The trial court sentenced Green to four years on the possession for sale count, plus one year for the prior felony enhancement under section 667.5, and a two-year concurrent sentence on the felon in possession count. Green appealed. We conditionally reversed the judgment and remanded with directions to the trial court to conduct another *Pitchess* hearing under the standards in *People v. Mooc* (2001) 26 Cal.4th 1216 (*Mooc*), with specific instructions to disclose to the defense a complaint against two deputies, Edward Retamoza and Tony Franklin. We directed the trial court to determine whether Green was able to demonstrate prejudice by the denial of discovery and the exclusion of the testimony of James Jones (James), to order a new trial if Green showed prejudice, and to reinstate the conviction and judgment if Green did not show prejudice. (*People v. Green* (Jan. 7, 2014, B240421) [nonpub. opn.].)²

The trial court conducted the second *Pitchess* hearing. On August 12, 2014, finding no prejudice, the court denied Green’s motion for new trial and reinstated the conviction and judgment. Green filed a timely appeal. We have reviewed the transcript

¹ All further statutory references are to the Penal Code unless otherwise indicated.

² The facts of Green’s offense are drawn from our prior unpublished opinion.

of the *Pitchess* hearing, and conclude the trial court did not abuse its discretion in denying the motion for new trial.

A. Evidence at Green's trial

On April 28, 2011, in preparation for serving a search warrant, Los Angeles County Deputy Sheriff Regan Fitzgerald was surveilling an apartment complex at 409 North Culver Avenue in Compton. A red Toyota Corolla described in the warrant turned into the driveway and left five minutes later, with Green driving and two female passengers. Deputy Fitzgerald had seen Green driving the Toyota twice in the last two weeks, and he had seen Green enter and leave the residence twice on other occasions. Deputy Fitzgerald, who led the investigation, directed Deputies Edward Retamoza and Tony Franklin to stop the Toyota and detain Green, and the two deputies (with no other deputies present) put Green in their patrol car. Deputy Fitzgerald and his team suited up in protective gear in preparation for entering the residence, as did Sergeant Shawn Jones.

A deputy gave Deputy Fitzgerald keys to the residence Deputy Franklin had obtained from the Toyota. Deputy Fitzgerald went to the residence, made sure no one was inside, and then sent for Deputies Retamoza and Franklin to bring Green and the Toyota to the residence. A canine searching the Toyota alerted at both the driver's side and passenger side doors, and deputies found baggies containing cocaine base inside the driver's side interior speaker casing, and 22 baggies containing cocaine base inside the right side speaker area.

Sergeant Jones filmed a presearch video inside the residence, and moved in and out of the house during the search of the car and the residence. Deputy Fitzgerald and other deputies entered the residence to search. Deputies found a small plastic shopping bag in the kitchen containing unused plastic baggies. In the northeast bedroom, deputies found a plastic baggie containing a large chunk of suspected rock cocaine on a shelf in the closet. In the top drawer of a clothing dresser, the deputies found a .45-caliber firearm with bullets in the clip, four notebooks with names and numbers which in Deputy Fitzgerald's opinion were "pay and owes" sheets recording narcotics sales, and two electronic scales. Deputies also recovered from the dresser a California driver's license,

a personal identification card, a photocopy of a Social Security card, a pink slip for the Toyota, and other paperwork, all addressed to Green at the 409 Culver address. On top of the dresser was a man's wallet, which contained several identification cards in Green's name, and around \$1500 in cash.

Green's defense was that his father owned the 409 Culver residence and had asked four other people who were living there to move. Green, who was homeless in April 2011, was transferring his mail to 409 Culver and taking care of his father's dog at the residence. The Toyota also belonged to Green's father, and Green had agreed to put brakes on it. The two deputies who stopped Green searched his car and took his wallet, which contained \$1500 that he had won at a casino. Other officers were at the scene. Green claimed that nobody was staying in the bedroom, and he did not know the gun was in the dresser.

Before trial, Green made *Pitchess* motions to discover the personnel files of a number of deputies involved in his arrest and the search of his house, including Deputy Fitzgerald and Sergeant Jones. After an in camera *Pitchess* hearing, the trial court released some personnel records to Green. The defense moved to call James, who would testify that Sergeant Jones (no relation) had stopped James, taken him to the station, and returned from a door across the parking lot with drugs that Sergeant Jones claimed he found in James's car. Defense counsel argued that Sergeant Jones was inside the residence, where significant evidence was found. The court excluded James's testimony, because Sergeant Jones did not perform the initial search, but was in and out and merely supervising.

B. *Pitchess* hearing and new trial motion

On remand from this court, the trial court in camera conducted an additional *Pitchess* hearing on May 14, 2014, and ordered the release of additional complaints against Deputy Retamoza and Deputy Franklin, as well as other deputies, and one additional complaint against Deputy Fitzgerald. Green filed a motion for new trial after his counsel conducted investigation based on the disclosed discovery and located five witnesses who the defense would have called to testify had it had the discovery in

advance of trial. Green argued that Deputy Jones had the opportunity to plant evidence in the residence, and that he had the wallet in his possession when he was arrested, contrary to Deputy Fitzgerald's testimony that the wallet was found on the dresser in the bedroom.

On August 12, 2014, the trial court heard arguments regarding the new trial motion. The court made clear that the sole count in issue was the felon in possession charge on which the jury convicted Green. The court considered each potential witness to determine whether if all testified, there was a reasonable probability Green would have obtained a more favorable result.

The court listed the additional disclosures: E.E. complained that in 2008, Deputy Fitzgerald falsely arrested him for selling marijuana to someone who did not have a card, and E.E. claimed the buyer did have a card. J.S. complained that Deputy Franklin was boorish and rude in 2009. E.W. claimed that Deputy Saavedra used excessive force during arrest. R.M. claimed that Deputy Saavedra was discourteous when he went to complain about a dispute regarding payment to a car repair shop, and Deputy Saavedra informed him that the shop owner had already complained. D.S. complained that Deputy Saavedra detained and handcuffed him for no registration, and "there was something about pulling his pants down."

As to James, the court noted that his testimony that Deputy Jones had planted drugs was taken into account by the trial judge who excluded it as not relevant. The evidence in this case was that after the deputies stopped the Toyota, keys from the car opened the front door of the residence, where Green had been seen coming and going. The search inside the house turned up baggies in the kitchen and a rock of cocaine in the closet (found by another deputy). The gun was found in the dresser drawer with notebooks (which Green acknowledged were his), scales, Green's identifications and some paperwork, and the Toyota's pink slip. "The wallet that counsel is bringing up, that . . . was planted or there was a dispute as to when the wallet was taken, either it was taken from the defendant while out in the car or it was found by the police officers on the dresser—I think that was kind of a discrepancy—that is kind of cumulative of what was already found in the drawer. [¶] . . . [E]ven if these witnesses would have testified to

everything that they say in here, the court finds that it is not reasonably probable the defendant would have gotten a better result. [¶] Based on what was found in the drawer, defendant's conduct before, by way of leaving the house, the possession of the keys to the car, and a jury, even if you have all of these other witnesses testifying for different conduct, the court's going to find there wasn't—there would not have been a reasonable probability defendant would have received a more favorable result" regarding the count of possession of a firearm by a felon. The court reinstated the judgment and conviction.

DISCUSSION

A trial court's conclusion that law enforcement personnel records should have been disclosed "is not equivalent to a finding that such information would have had any effect on the outcome" of the trial. (*People v. Gaines* (2009) 46 Cal.4th 172, 182.) The defendant who obtains discovery under *Pitchess* must then demonstrate a reasonable probability of a different outcome if the evidence had been disclosed, that is, that the evidence is helpful to the defense and of a nature 'to affect the outcome of his trial.' (*People v. Gill* (1997) 60 Cal.App.4th 743, 751.) We review the trial court's denial of the new trial motion for an abuse of discretion, even if (as here) the judge ruling on the new trial motion was not the judge at trial. (*People v. Mehserle* (2012) 206 Cal.App.4th 1125, 1151; *Perry v. Fowler* (1951) 102 Cal.App.2d 808, 812.)

Our independent review of the sealed reporter's transcript of the in-camera *Pitchess* hearing on May 14, 2014 shows the trial court properly exercised its discretion. (See *People v. Mooc, supra*, 26 Cal.4th at p. 1229.) The custodian of records testified the files of the Department of Personnel, the Department of Internal Affairs and the Citizen's Investigation files were reviewed for responsive documents. The on-the-record descriptions of those documents are sufficient to permit appellate review.

The trial court did not abuse its discretion in concluding that Green failed to show a reasonable probability that had the personnel records been disclosed to the defense and if the complainants and James had testified at trial, the result—the jury's conviction of Green on one count of felon in possession—would have been different. On appeal, Green does not explain how E.E.'s claim that Deputy Fitzgerald arrested someone for

selling marijuana to someone without a marijuana card, when in fact the buyer did have a card, is relevant to a showing that Green did not possess the gun found in the dresser drawer with his notebooks and other identifications, which (as Green states in his opening brief) Deputy Saavedra found during the search. Even if E.E.'s claim casts doubt on Deputy Fitzgerald's truthfulness, "a defendant must do more than show that 'helpful' evidence was withheld." (*People v. Gaines, supra*, 46 Cal.4th at p. 183.)

Deputy Fitzgerald did testify that he found the wallet on top of the dresser, and James would have testified that Deputy Jones planted drug evidence. But to the extent this evidence would support an inference that either or both deputies planted the wallet on top of the dresser, the independent evidence that the gun in the drawer was in Green's possession was strong enough without the wallet. Along with the gun, inside the dresser drawer were the four notebooks with names and numbers which Green admitted were his, a California driver's license, a personal identification card, a photocopy of a Social Security card, a pink slip for the Toyota, and other paperwork addressed to Green at the 409 Culver address. We see no reasonable probability that the jury would have reached a more favorable result on the felon in possession charge if E.E. and James had testified at trial.

DISPOSITION

The order is affirmed.

NOT TO BE PUBLISHED.

JOHNSON, J.

We concur:

ROTHSCHILD, P. J.

LUI, J.