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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE,

Plaintiff and Respondent,

v.

ELBA JANETH JIMENEZ,

Defendant and Appellant.

B253000

(Los Angeles County
Super. Ct. No. BA398854)

APPEAL from a judgment of the Superior Court of Los Angeles County,
Dennis J. Landin, Judge. Affirmed with directions.

David Y. Stanley, under appointment by the Court of Appeal, for Defendant and
Appellant.

Kamala D. Harris, Attorney General, Lance E. Winters, Senior Assistant
Attorney General, Mary Sanchez and David Zarmi, Deputy Attorneys General, for
Plaintiff and Respondent.

The defendant Elba Jimenez drove under the influence, killed two pedestrians, and injured two others. She was convicted by a jury of two counts of second-degree murder (Pen. Code, § 187, subd. (a)), one count of evading an officer, causing injury (Veh. Code, § 2800.3, subd. (a)), one count of driving under the influence of alcohol, causing injury (Veh. Code, § 23153, subd. (a)), and one count of driving with a blood alcohol level of .08% or more, causing injury (Veh. Code, § 23153, subd. (b)). On appeal, the defendant requests that we independently review the in camera hearing on her pre-trial motion for discovery of officers' personnel files. In addition, the defendant contends the trial court erred under Penal Code section 654 (section 654) in not staying either her sentence for driving under the influence or that for driving with an elevated blood-alcohol level. The defendant also contends that section 654 requires that her sentence for evading an officer be stayed because that count arose from the same criminal act as the murder counts. We agree that the defendant's sentence under subdivision (a) or (b) of Vehicle Code section 23153 should have been stayed under section 654. In all other respects, we affirm.

FACTUAL AND PROCEDURAL BACKGROUND

On June 16, 2012, at approximately 11:20 p.m., the defendant was driving on the I-10 freeway when California Highway Patrol Officers Mario Chavez and Brent Leatherman observed her car weaving back and forth and "brak[ing] unnecessarily." Leatherman turned on the patrol car's lights and siren, and instructed the defendant over the loudspeaker to pull over at the next exit. The defendant did not comply. Instead, she accelerated, reaching speeds of approximately 100 miles per hour as she continued on the freeway.

After passing multiple exits, the defendant got off the freeway at the Cesar Chavez exit traveling 75 miles per hour. She then drove through a red light and into a parking lot. The defendant's car was traveling at approximately 62 miles per hour when it struck two pedestrians, a taco stand, a parked truck, and a retaining wall. Both pedestrians were pronounced dead shortly after the crash. Three individuals were working in the taco stand when it was hit, and two were injured in the crash. The

defendant's car came to a stop after it struck the retaining wall. The defendant then got out of the vehicle and was arrested by the officers. The defendant's blood alcohol content was tested one hour later and determined to be at .28 percent.

On June 17, 2012, at 1:00 p.m., Deputy Sheriff Luis Fernandez and Sergeant Workman¹ interviewed the defendant. Walter Martinez, Custody Assistant for the Sheriff's Department, acted as a Spanish translator during the interview. The defendant stated that, the evening prior, she had drunk twelve 12-ounce cans of beer prior to driving. She further said that, when she noticed the highway patrol vehicle attempting to stop her car, she tried to "evade the patrol vehicle" because she was "scared she would get caught driving under the influence of an alcoholic beverage."

The defendant was charged with two counts of second-degree murder (counts one and two), evading an officer, causing injury (count three), driving under the influence of alcohol, causing injury (count four), and driving with a blood alcohol level of .08% or more, causing injury (count five). The murder charges were based on the deaths of the two pedestrians, and the other three counts were based both on those deaths as well as the injuries caused to the individuals in the taco truck.

At trial, the prosecution presented evidence that the defendant had previously been arrested for driving under the influence in 2006, and had completed four months of classes on driving under the influence as a condition of her probation. A jury convicted the defendant on all counts.

The trial court sentenced the defendant to state prison for 35 years to life. The sentence was imposed as follows: two sentences of 15 years to life for counts 1 and 2; five years for count 3; and two years each for counts 4 and 5. The sentences on counts one, two and three were to be served consecutively, and the sentences for counts four and five, concurrently. The defendant timely appealed.

¹ Sergeant Workman's first name is not contained in the record.

CONTENTIONS

The defendant requests that we independently review the in camera hearing on her pre-trial motion for disclosure of information contained in Fernandez's and Martinez's personnel files. In addition, the defendant argues that either the sentence for count four or count five should be stayed because section 654 precludes concurrent sentencing for violations of Vehicle Code section 23153, subdivisions (a) and (b). Lastly, the defendant contends that the trial court erred in not staying the sentence for count three because counts 1, 2 and 3 all arose from an indivisible course of conduct.

DISCUSSION

1. The Court Did Not Abuse Its Discretion in Declining to Disclose Information in Martinez's and Fernandez's Personnel Files

Prior to trial, the defendant filed motions pursuant to *Pitchess v. Superior Court* (1974) 11 Cal.3d 531 seeking disclosure of information contained in the personnel files of Fernandez and Martinez concerning their "propensity for dishonesty."² The trial court conducted an in camera hearing regarding the personnel files and concluded that no information should be disclosed to the defendant. The defendant now requests that we independently review the sealed transcript of the hearing and determine if the trial court properly exercised its discretion. (See *People v. Jackson* (1996) 13 Cal.4th 1164, 1220-1221, abrogated in part on another point as stated in *McGee v. Kirkland* (C.D. Cal. 2009) 726 F.Supp.2d 1073, 1080 ["A trial court's decision on the discoverability of material in police personnel files is reviewable under an abuse of discretion standard."])

The procedural requirements for a *Pitchess* hearing are set forth in *People v. Mooc* (2001) 26 Cal.4th 1216 (*Mooc*). "When a trial court concludes a defendant's *Pitchess* motion shows good cause for discovery of relevant evidence contained in a law enforcement officer's personnel files, the custodian of the records is obligated to bring to the trial court all 'potentially relevant' documents to permit the trial court to examine

² The defendant also sought disclosure of such records in Sergeant Workman's personnel file, however, she later withdrew that motion.

them for itself. [Citation.] . . . A court reporter should be present to document the custodian's statements, as well as any questions the trial court may wish to ask the custodian regarding the completeness of the record. [Citation.] [¶] The trial court should then make a record of what documents it examined before ruling on the *Pitchess* motion. . . . If the documents produced by the custodian are not voluminous, the court can photocopy them and place them in a confidential file. Alternatively, the court can prepare a list of the documents it considered, or simply state for the record what documents it examined.” (*Id.* at pp. 1228-1229.)

Here, the trial court complied with the procedural requirements set forth by *Mooc*. The custodian of records for the Sheriff's Department testified under oath that there were no responsive documents in Martinez's file. The custodian of records for the California Highway Patrol also testified under oath and stated there was only one responsive document in Fernandez's file. That document was produced and the court properly stated for the record what the document was and why the document was not, in fact, responsive to the defendant's motion. We have conducted an independent review of the transcript and of the in camera hearing and find no abuse of discretion.

2. *The Court Should Have Stayed the Sentence for Count 4 or Count 5 under Penal Code Section 654*

The defendant contends, and the People concede, that the trial court erred when it failed to stay either the sentence for count 4 or 5 (violations of Vehicle Code section 23153, subdivisions (a) and (b)). Section 654, subdivision (a) provides: “An act or omission that is punishable in different ways by different provisions of law shall be punished under the provision that provides for the longest potential term of imprisonment, but in no case shall the act or omission be punished under more than one provision.” “Section 654 prohibits multiple punishment for an indivisible course of conduct even though it violates more than one statute. [Citation.] Whether a course of conduct is indivisible depends on the intent and objective of the actor. [Citation.]” (*People v. Chacon* (1995) 37 Cal.App.4th 52, 65.)

“ ‘It has long been established that the imposition of concurrent sentences is precluded by section 654 [citations] because the defendant is deemed to be subjected to the term of *both* sentences although they are served simultaneously.’ [Citation.] Instead, the accepted ‘procedure is to sentence defendant for each count and stay execution of sentence on certain of the convictions to which section 654 is applicable.’ [Citations.]” (*People v. Jones* (2012) 54 Cal.4th 350, 353.)

In *People v. Duarte* (1984) 161 Cal.App.3d 438, the court found that section 654 precluded concurrent sentencing for violations of subdivisions (a) and (b) of Vehicle Code section 23153. (*Id.* at pp. 446-447.) “In [such a] case, for punishment purposes, [] section 654 require[s] the sentencing judge to select between two offenses carrying the same penal term.” (*Id.* at p. 447.) Section 654 “calls for imposing sentence on each count after first determining which count should be the principal one. . . . [E]xecution of the sentence on the other count or counts is [then] stayed pending the finality of the judgment; the stay becomes permanent when service of sentence is completed. [Citation.]” (*Id.* at p. 446.)

In this case, the defendant was also charged with violating subdivisions (a) and (b) of Vehicle Code section 23153 based on her driving her car on the evening of June 16, 2012. We conclude, as the court did in *People v. Duarte*, that the two-year sentence for driving under the influence punishes the defendant for the same criminal act as the two-year sentence for driving with a blood-alcohol content of .08 percent or higher; the two offenses arose from the same prohibited activity of driving after excessive drinking. As one of these sentences was unauthorized under section 654, we remand the matter so that the court can determine which sentence should be stayed.

3. *The Sentence for Count 3 Was Proper*

Finally, the defendant contends that the trial court erred by imposing an unstayed term of five years for count 3 (evading the police) in addition to the sentences imposed for counts 1 and 2 (murder). Specifically, she argues that section 654 requires that the sentence for evading the police be stayed because all three counts arose from an

indivisible course of conduct. The People argue that the multiple-victim exception to section 654 applies.

“[M]ultiple punishment is permissible where a *single act* of violence injures or kills multiple victims. [Citations.] . . . [W]hen a defendant ‘ “commits an act of violence with the intent to harm more than one person or by means likely to cause harm to several persons,” his greater culpability precludes application of section 654.’ [Citation.]” (*People v. McFarland* (1989) 47 Cal.3d 798, 803.) In *People v. McFarland*, the Supreme Court held that the multiple-victim exception applied to a defendant’s convictions for vehicular manslaughter for one victim and drunk driving resulting in injury to a separate victim. (*Ibid.* [“where, as here, a defendant commits vehicular manslaughter with gross negligence – an act of violence against the person - he may properly be punished for injury to a separate individual that results from the same incident.” (*Id.* at p. 804.)

Here, similarly, the defendant may also be punished both for the second-degree murder of two victims and evading the police resulting in injury to separate victims. Although the injuries resulted from a single criminal act, “where the act prohibited by the statute is centrally an ‘*act of violence* against the person,’ ” such as second-degree murder, the defendant “may properly be punished for injury to a separate individual that results from the same incident.” (*People v. McFarland, supra*, 47 Cal.3d at pp. 803-804 citing *Wilkoff v. Superior Court* (1985) 38 Cal.3d 345, 351.) Accordingly, the court properly imposed and did not stay the sentence for count 3.

DISPOSITION

The case is remanded for the trial court to stay either the sentence imposed for count 4 (driving under the influence of alcohol, causing injury) or that for count 5 (driving with a blood alcohol level of .08% or more, causing injury). The judgment is otherwise affirmed.

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LAVIN, J.*

WE CONCUR:

KITCHING, Acting P. J.

ALDRICH, J.

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