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**NOT TO BE PUBLISHED IN OFFICIAL REPORTS**



IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION FOUR

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| THE PEOPLE,<br>Plaintiff and Respondent,<br>v.<br>DANNY RAY HACKETT, JR.,<br>Defendant and Appellant. | A128411<br><br>(Contra Costa County<br>Super. Ct. No. 05-081522-5) |

Following conviction by a jury of possession of cocaine base for sale with findings that appellant Danny Ray Hackett, Jr. had a prior narcotics-related conviction, two prior strike convictions, and four prior prison terms, the court struck one strike conviction and one prior prison term enhancement and sentenced appellant to 14 years in state prison. Appellant charges on appeal that the trial court improperly denied his motion under *Pitchess v. Superior Court* (1974) 11 Cal.3d 531 (*Pitchess*). There was no error and hence we affirm the judgment.

## I. BACKGROUND

A. *Procedural Highlights*

Appellant moved to suppress evidence and also filed a *Pitchess* motion to discover information in the personnel files of the police officers involved in his arrest. The trial court denied the *Pitchess* motion and thereafter denied the suppression motion, stating: "[T]his is probably the most casual consensual contact that I have ever seen."

B. *Factual Background*

On the evening of July 16, 2008, around 9:15 p.m., Pittsburg Police Sergeant Semas and Officer Reddoch, patrolling in a marked vehicle, drove through the parking lot of a Motel 6 on Loveridge Road. Sergeant Semas characterized the location as a high crime area. He was familiar with the motel, a known venue for drug exchanges and prostitution.

Proceeding through the parking lot, the officers saw appellant walking about 20 feet away. He seemed "somewhat jovial" and put his arms in front of the police car as if to say, "Stop for a second." Officer Reddoch stopped the vehicle and exited to make contact with a female in a parked car. Standing by the open door of the police car, Semas engaged in conversation with appellant and his companion, James Wyatt. Appellant said he was staying with his wife in the motel; Wyatt was "visiting a girl" there. Reddoch returned and asked both men for identification. Appellant said he did not have any identification but gave his name and date of birth. The officer checked for outstanding "wants or warrants."

Semas continued conversing casually with appellant and Wyatt. It appeared to Semas that Wyatt was under the influence "of alcohol." Semas learned that Wyatt was on parole for robbery and was going to be discharged in about nine days. Semas was concerned about a possible parole violation and conveyed this information to Reddoch when he returned; Reddoch took Wyatt aside to investigate.

Meanwhile, Semas asked appellant directly "if he had anything on him." Appellant's face went blank and he dropped his head. Semas repeated his question; appellant continued to stare at the ground. Semas called him by name: "Danny, what do you have on you?" Appellant responded that he had "a little something on him" and began to reach into his front pocket. Not sure what appellant would retrieve, Semas told him to remove his hand. Semas approached appellant, and had him turn around and place his hands on his head in order to search him. Prior to searching appellant, Semas asked him again what he had on him. Appellant said he had "a 20-piece," which the officer knew was a $20 piece of rock cocaine. Semas retrieved a small off-white rock substance

wrapped in a knotted, clear cellophane bag from appellant's front pocket. He recognized the substance as being consistent with cocaine base. In another pocket was a clear sandwich bag with 17 individually wrapped pieces of what also appeared to be cocaine base. At that point appellant said, " 'Man, I spent my life savings on that. I was just trying to make a little extra to put some food in my kids' mouth and pay for the hotel.' " In that same pocket was $298 in mixed denominations.

Test results confirmed that the substance from appellant's front pocket was cocaine, weighing 0.35 grams; the substance from his other pocket was also cocaine, weighing 3.91 grams. Semas opined that appellant possessed the cocaine for sale and that it had a street value of around $360.

## II. DISCUSSION

Appellant challenges the trial court's denial of his *Pitchess* motion and maintains he presented a plausible factual scenario entitling him to discovery. He suggests a conditional reversal,[1] pursuant to the procedures set forth in *People v. Gaines* (2009) 46 Cal.4th 172, 180. The trial court has broad discretion to rule on a motion to discover police records (*People v. Memro* (1995) 11 Cal.4th 786, 832), and accordingly we review the ruling under the abuse of discretion standard (*Alford v. Superior Court* (2003) 29 Cal.4th 1033, 1039).

A. *Background*

In the motion to compel discovery information from the personnel files of the Sergeant Semas and Officer Reddoch, appellant's counsel stated: "Sergeant Semas and

[1] Where the trial court has erroneously rejected a good cause showing for *Pitchess* discovery, the *Gaines* procedure calls for conditional reversal with directions on remand to review the requested records in chambers and issue a discovery order, if warranted. (*People v. Gaines*, *supra*, 46 Cal.4th at pp. 180-181.) Upon such review the lower court may determine that the requested personnel records contain no relevant information, in which case the judgment would be reinstated. If the trial court determines that relevant information exists and should be disclosed, it must order disclosure, allow the defendant the opportunity to show prejudice, and direct a new trial if there is a reasonable probability that the outcome would have been different had the information been disclosed. (*Id*. at p. 181.)

Officer Reddoch made material misstatements in their police reports. In particular, the defendant denies having consented to the search performed by Sergeant Semas and denies telling him that he had 'a little something' or 'a twenty piece.' Furthermore, he denies that the initial conversation between himself and the officers was consensual. He also contends that the officers misstated the substance of his comments. The requested information is therefore necessary to impeach the credibility of the prosecution witnesses at trial. As such, good cause for discovery of the requested information has been shown."

In the accompanying declaration, defense counsel asserted his belief that the two officers "materially misstated the substance of their investigation into the incident underlying the charge in this complaint. I believe Sergeant Semas misstated his own observations with respect to the demeanor and appearance of Mr. Hackett, the statements he made, and his actions, by characterizing this as a friendly conversation. Mr. Hackett never told Sergeant Semas that he had a 'twenty piece' on him. I believe the encounter was not consensual; Mr. Hackett submitted to a show of authority. I believe Officer Reddoch misstated his observations of Mr. Hackett and mischaracterized the statements allegedly made by Ms. Odom[2] (which implicate Mr. Hackett) on the night in question."

Denying the motion, and acknowledging the moving party's "relatively low threshold," the trial court explained: "[T]he major thrust of the contentions are to allege . . . material misstatement of the subject of the investigation, observations, conclusion that the encounter was not consensual, . . . mischaracterizing statements, his client's stated version differs in material respects. [¶] I find nothing here that presents to me a plausible factual scenario, but nothing more than conclusionary allegations and general denials. I don't think it rises to the level of sufficient showing."

B. *Legal Framework*

Nearly 40 years ago our Supreme Court established the doctrine that a criminal defendant has a limited right to discovery of peace officer personnel records to ensure "a

[2] Apparently Odom is the woman in the parked car whom Officer Reddoch contacted. According to the opposition papers, she eventually admitted Wyatt contacted appellant by phone and arranged to meet him at the motel to purchase cocaine.

fair trial and an intelligent defense in light of all relevant and reasonably accessible information." (*Pitchess, supra,* 11 Cal.3d at p. 535.) With the enactment of Penal Code sections 832.7 and 832.8, as well as Evidence Code sections 1043 through 1045, our Legislature codified the *Pitchess* holding. (Added by Stats. 1978, ch. 630, §§ 1-3 & 5-6, pp. 2082-2083; see *Warrick v. Superior Court* (2005) 35 Cal.4th 1011, 1019 (*Warrick*).)

To obtain discovery, the defendant must file a written motion with affidavits "showing good cause for the discovery or disclosure sought, setting forth the materiality thereof . . . and stating upon reasonable belief" that the agency has the records or information sought. (Evid. Code, § 1043, subd. (b)(3).) "This two-part showing of good cause is a 'relatively low threshold for discovery.' [Citation.]" (*Warrick, supra*, 35 Cal.4th at p. 1019.) The *Warrick* court further explained that the affidavit "must propose a defense or defenses to the pending charges." (*Id*. at p. 1024.) The good cause showing "requires a defendant . . . 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." (*Id*. at p. 1021.) The information which the defendant seeks must be described with some specificity to ensure that the request is "limited to instances of officer misconduct related to the misconduct asserted by the defendant." (*Ibid*.)

Moreover, the affidavit must "describe a factual scenario supporting the claimed officer misconduct. That factual scenario, depending on the circumstances of the case, may consist of a denial of the facts asserted in the police report." (*Warrick, supra*, 35 Cal.4th at pp. 1024-1025.) However, the factual scenario must be a "plausible scenario of officer misconduct," a scenario that "might or could have occurred. Such a scenario is plausible because it presents an assertion of specific police misconduct that is both internally consistent and supports the defense proposed to the charges." (*Id*. at p. 1026.)

When the defendant establishes good cause for *Pitchess* discovery, he or she is entitled to the trial court's in-chambers review of the arresting officers' personnel records relating to the plausible scenario of officer misconduct. (*Warrick, supra,* 35 Cal.4th at p. 1027.) The purpose of the in-chambers review is to determine relevance under the

provisions of Evidence Code section 1045. This review allows the court to issue orders protecting the officer or agency from "unnecessary annoyance, embarrassment or oppression." (*Id*., subd. (d).) These provisions strike a balance between the legitimate privacy interests of the officer and the defendant's right to a fair trial. (*Warrick, supra,* 35 Cal.4th at p. 1028.)

C. *Analysis*

Appellant characterizes his defense as one based on his "challenge to the search and suppression of the seized evidence forming the basis for the charges." He argues that the allegations that he did not consent to the search, and denied telling Semas he had "a little something," satisfy the relatively low threshold for *Pitchess* in camera review. *People v. Thompson* (2006) 141 Cal.App.4th 1312 (*Thompson*), discussed by both parties, is instructive.

*Thompson* also involved a challenge to the denial of the defendant's *Pitchess* motion. The defendant had sold cocaine to an undercover police officer. Uniformed officers who were not part of the undercover operation searched and arrested him upon retrieving two $5 bills which an undercover officer had given the defendant for the cocaine. Defense counsel's *Pitchess* declaration asserted that the police did not recover any buy money from the defendant, he did not order or sell drugs to the undercover officer, and the officers arrested the defendant because he was in an area where the police were making arrests. Upon the stopping of the defendant and realizing he had a prior criminal record, the officers fabricated the events and used narcotics in their possession, attributing those drugs to the defendant. (*Thompson, supra,* 141 Cal.App.4th at p. 1317.)

Affirming the denial of the *Pitchess* motion, the reviewing court held that the defendant's showing was "insufficient because it is not internally consistent or complete. We do not reject Thompson's explanation because it lacked credibility, but because it does not present a factual account of the scope of the alleged police misconduct, and does not explain his own actions in a manner that adequately supports his defense. Thompson, through counsel, denied he was in possession of cocaine or received $10 from [the police]. But he does not state a nonculpable explanation for his presence in an area

where drugs were being sold, sufficiently present a factual basis for being singled out by the police, or assert any 'mishandling of the situation' prior to his detention and arrest. Counsel's declaration simply denied the elements of the offense charged." (*Thompson, supra,* 141 Cal.App.4th at p. 1317.) And finally, acknowledging that the *Warrick* court defined " 'plausible' " as what might or could have occurred, the *Thompson* court indicated it did not view *Warrick* as *redefining* the term "as synonymous with 'possible' . . . ." (*Thompson, supra,* at p. 1318.) Moreover, *Warrick* "does not require an in camera review based on a showing that is merely imaginable or conceivable and, therefore, not patently impossible. *Warrick* permits [trial] courts to apply common sense in determining what is plausible, and to make . . . [a] realistic assessment of the facts and allegations." (*Thompson, supra,* at pp. 1318-1319.)

Appellant tries to distinguish *Thompson,* arguing that by asserting he did not consent to the search, and denying he said he had a "twenty piece," he presented an adequate factual scenario relevant to his defense. We do not agree.

Similar to *Thompson*, defense counsel's declaration consists of nothing more than general denials and allegations that the police officers lied, and fails to delineate a specific fact-based scenario accounting for the scope of the purported police misconduct. For example, no facts were offered to counter the assertion that the encounter was not consensual. As the People pointed out in their opposition to the motion, "If the situation was not consensual and the Defendant submitted to a show of authority, what authority did either Officer demonstrate?" Did the officers threaten to arrest appellant if he did not speak to them, make threats of violence against appellant or others, order him to stop and not walk away, or what? This situation is akin to that in *City of San Jose v. Superior Court* (1998) 67 Cal.App.4th 1135, wherein the declaration was deficient in part because it asserted that consent to enter the premises was not obtained, but did not specify whether the officers coerced the defendant (and by what means), or simply failed to obtain consent. The reviewing court held that the declaration failed to provide a specific factual scenario establishing a plausible factual foundation for the allegations of police misconduct, and therefore did not demonstrate the materiality of the discovery sought to

the subject matter of the pending litigation, as required by Evidence Code section 1043, subdivision (b)(3).) (*City of San Jose v. Superior Court, supra,* 67 Cal.App.4th at p. 1147.)

In the same vein, defense counsel asserted that Officer Reddoch mischaracterized statements allegedly made by Odom, but we must ask, how does appellant know this, what did she say, and in what manner was the characterization incorrect? What is the specific factual scenario establishing a plausible foundation for the assertion? The same can be said for defense counsel's averment that Sergeant Semas mischaracterized statements that appellant made, without setting forth what he did say. If he did not admit to having a "twenty piece," what did he say that was then mischaracterized, or did he keep quiet the whole time? We conclude on this record that the trial court did not abuse its discretion in denying appellant's motion for discovery, but rather exercised common sense and made a realistic assessment of the facts and allegations. (See *Thompson, supra,* 141 Cal.App.4th at p. 1319.)

## III. DISPOSITION

The judgment is affirmed.

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Reardon, J.

We concur:

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Ruvolo, P.J.

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Rivera, J.