Filed 6/30/08

CERTIFIED FOR PARTIAL PUBLICATION*

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SIX

THE PEOPLE, Plaintiff and Respondent, v. DAVY WYCOFF, Defendant and Appellant.	2d Crim. No. B198572 (Super. Ct. No. NA071834) (Los Angeles County)

Davy Wycoff appeals the judgment entered after a jury convicted him of selling, transporting, or offering to sell cocaine base (Health & Saf. Code,[1] § 11352, subd. (a)) and possession of a controlled substance (cocaine) (§ 11350, subd. (a)). The trial court also found true the allegations that Wycoff had suffered a prior strike conviction (Pen. Code, §§ 667, subds. (b) – (i), 1170.12, subds. (a) – (d)), and had suffered a prior narcotics conviction and served a prior prison term (§§ 11351, 11370.2, subd. (a); Pen. Code, § 667.5, subd. (b)). He was sentenced to eight years in state prison. In addition to contentions challenging the sufficiency and exclusion of evidence, he asks us to independently review the record of the in camera hearing on his *Pitchess* motion. (*Pitchess v. Superior Court* (1974) 11 Cal.3d 531.) While we reject Wycoff's claims of

* Pursuant to rules 8.1105 and 8.1110 of the California Rules of Court, this opinion is certified for partial publication. The portions of this opinion to be deleted from publication are identified as those portions between double brackets, e.g., [[/]].

1 All further undesignated statutory references are to the Health and Safety Code.

error, we conditionally reverse the judgment and remand for a new *Pitchess* hearing in which the proper procedure is followed, in accordance with *People v. Guevara* (2007) 148 Cal.App.4th 62, 69 (*Guevara*). We publish this case to clarify that the defendant has the right to appeal the judgment entered on remand following a conditional reversal.

FACTS

At 3:30 a.m. on September 30, 2006, Los Angeles Police Officer Michael Barrios and his partner were patrolling in Wilmington when they saw Wycoff and Josselle Hernandez standing on a street corner. As they drove closer, Officer Barrios observed Wycoff hand Hernandez something after both of them had been looking down at the open palm of Wycoff's right hand. When Hernandez saw the patrol car, she brought her hand up to her mouth and put something inside. Wycoff turned his back away from the officers, appeared to manipulate his rear waistband, and then dropped a plastic baggy he was holding in his right hand. Officer Barrios recovered the baggy, which contained an off-white substance that resembled rock cocaine. The officer also recovered an off-white substance resembling rock cocaine from Hernandez's mouth. Wycoff had $9 in cash in his pocket, all in one-dollar bills, while Hernandez had a total of $7.

Based on his training and experience, Officer Barrios opined that he and his partner had observed Wycoff and Hernandez engaging in a drug transaction. Although he did not observe money being exchanged, the rocks in the baggy and the lack of a smoking device led the officer to conclude that Wycoff possessed the drugs for sale. The officer estimated that the rock in Hernandez's mouth would have cost between $2 and $5, while the rocks in the baggy would have brought from $2 to $10 each. He also opined that the rock in Hernandez's mouth was large enough to smoke. A Los Angeles Police Department criminalist who conducted color screening and microcrystal tests on the rocks recovered from Hernandez's mouth and the baggy testified that both items were "cocaine in the form of cocaine base."

Hernandez testified on Wycoff's behalf. Hernandez pled guilty to simple possession of a controlled substance (§ 11350, subd. (a)) as a result of the drugs she had in her mouth when she and Wycoff were arrested. She also pled guilty and was sentenced to prison for the sale of a controlled substance based on a different incident in January 2007. She also admitted that she had a prior conviction for simple possession in Texas, along with numerous convictions for prostitution. Hernandez told the jury that she and Wycoff were merely talking when Officer Barrios approached her, and claimed that Wycoff had not given her the rock she had in her mouth. She had never seen Wycoff sell or use "dope," and claimed that the baggy Officer Barrios attributed to him was found approximately 10 feet away from him after a 45-minute search.

DISCUSSION

[[I.

Sufficiency of the Evidence – Simple Possession

Wycoff was charged in count 1 with the sale of cocaine base under section 11352, subdivision (a), and in count 2 with possession of cocaine base for sale under section 11351.5. Count 1 was predicated on the drugs recovered from Hernandez's mouth, while count 2 was based on the contents of the baggy Wycoff discarded. At trial, the prosecution's criminalist testified that the substance in the baggy was "cocaine in the form of cocaine base" and that the substance recovered from Hernandez was "the same, cocaine base." Wycoff did not challenge this testimony. Instead, he argued that the evidence was otherwise insufficient to prove that he sold Hernandez any drugs, and that the cocaine in the baggy was for his personal use.

In light of counsel's argument, the court instructed the jury on simple possession (§ 11350, subd. (a)) as a lesser included offense to the charge of possession for sale of cocaine base under section 11351.5. In preparing the instruction, however, the court wrote "cocaine" as the controlled substance Wycoff was charged with possessing, not "cocaine base." The jury found Wycoff guilty of selling cocaine base as charged in count 1 of the information. On count 2, however, the jury found him guilty of the lesser

included offense of simple possession. The verdict form also refers to cocaine and not cocaine base.

Wycoff contends that his conviction for possessing a controlled substance under section 11350, subdivision (a), must be reversed for insufficient evidence because the instruction and verdict form refer to cocaine, while the evidence uncontrovertibly proves that the substance he possessed was cocaine base. We disagree. Wycoff was convicted of possessing "a controlled substance, to wit, cocaine," in violation of section 11350, subdivision (a). That section prohibits possession of various controlled substances, including cocaine base (§ 11054, subd. (f)(1)) and cocaine other than cocaine base (§ 11055, subd. (b)). These substances are treated identically for all purposes, including punishment. (§ 11350, subd. (a).) No specification of the particular substance controlled by the statute was necessary to his conviction. (*People v. Howington* (1991) 233 Cal.App.3d 1052, 1057-1059.)

Wycoff's reliance on *People v. Adams* (1990) 220 Cal.App.3d 680, is misplaced. In *Adams*, the court reversed a conviction for violating section 11351.5—possession of cocaine base for sale—because the evidence showed only that the substance defendant possessed was cocaine, not cocaine base. (*Id.*, at pp. 685-688.) The *Adams* court also held that while possession of cocaine under section 11350 is a lesser included offense of possession of cocaine for sale under section 11351, and possession of cocaine base under section 11350 is a lesser included offense of possession of cocaine base for sale under section 11351.5, possession of cocaine under section 11350 and possession of cocaine for sale under section 11351 are not lesser included offenses of possession of cocaine base for sale under section 11351.5. (*Adams, supra*, at pp. 689-691.)

Neither of these conclusions supports Wycoff's claim. In this case, the prosecution's expert testified that both of the substances were "cocaine in the form of cocaine base." The jury found Wycoff guilty of selling cocaine base in count 1. While the instructions and verdict form on simple possession on count 2 refer to "cocaine" and

not "cocaine base," there was no evidence or instructions regarding the legal distinctions between "cocaine," which refers to cocaine hydrochloride, and cocaine base. "Despite the difference between cocaine base, crack, or rock on one hand and cocaine hydrochloride on the other hand, both substances are still cocaine." (*People v. Howell* (1990) 226 Cal.App.3d 254, 261.) Moreover, the reference in section 11055, subdivision (b)(6) to "Cocaine, except as specified in Section 11054" [referring to the listing of "Cocaine base" in § 11054, subd. (f)(1)] demonstrates the Legislature's recognition that cocaine base is also cocaine under section 11350. The evidence that Wycoff possessed cocaine base is therefore sufficient to establish that he possessed cocaine in violation of the statute.

II.

Exclusion of Evidence

At trial, Wycoff sought to call the undercover police officer who arrested Hernandez for selling cocaine base in January 2007 to testify regarding the circumstances of that crime. According to counsel, the officer would testify that he solicited rock cocaine from Hernandez, who got in his car and directed him to the same street where she and Wycoff were arrested. After the officer gave her $40, she disappeared down the street and returned with $40 worth of cocaine. Wycoff offered that this evidence was relevant to prove he did not sell any drugs to Hernandez and had bought the drugs in the baggy from her. The court excluded the evidence under Evidence Code section 352, reasoning as follows: "I don't think the actions of her three or four months later demonstrate what she was, in fact, doing on this date, let alone demonstrate what the defendant was doing on this particular date. It's very, very remote. It is bringing up a whole new incident under 352 of the Evidence Code. I just don't think the probative value outweighs the prejudicial effect in this case, and I just don't see the relevancy. It may have to do with her activity, but it has very little to do with the defendant's activities." The court also ruled, however, that the fact of Hernandez's conviction was admissible to impeach her credibility.

Wycoff contends the court abused its discretion in excluding the proffered evidence. He also argues that the court's ruling violated his constitutional right to a fair trial and his right to present relevant evidence establishing his innocence of the charged crimes. According to Wycoff, had the evidence been admitted the jury might have believed that he was buying drugs from Hernandez, as opposed to selling drugs to her. We discern no error.

Evidence Code section 352 grants the trial court broad discretion to exclude evidence if its probative value is substantially outweighed by the probability that its admission will necessitate undue consumption of time or create substantial danger of undue prejudice, confuse the issues, or mislead the jury. (*People v. Mincey* (1992) 2 Cal.4th 408, 440.) We review the trial court's ruling pursuant to Evidence Code section 352 for an abuse of discretion. (*People v. Rodrigues* (1994) 8 Cal.4th 1060, 1124-1125.)

The court did not abuse its discretion in precluding testimony regarding the circumstances of Hernandez's subsequent arrest and conviction for selling cocaine base. While Wycoff characterizes the incidents as similar, Hernandez's purported conduct in selling cocaine to the undercover officer in January 2007 is not inconsistent with the circumstances surrounding the instant offenses. In any event, the court correctly recognized that Hernandez's conduct on a subsequent occasion had little if anything to do with *Wycoff*'s conduct in connection with the charged crimes. The arresting officer testified that he saw Hernandez put a rock of cocaine into her mouth after Wycoff handed her something. The officer also saw Wycoff discard a baggy containing at least $20 worth of cocaine, yet Hernandez had only $7 in her possession when she was arrested and Wycoff had only $9. None of this evidence had any tendency to prove that Wycoff was the buyer and Hernandez was the seller. Because the circumstances surrounding Hernandez's subsequent arrest and conviction for selling cocaine base did not tend to establish that Wycoff was innocent of the charged crimes, the court did not abuse its discretion in excluding the evidence under Evidence Code section 352.]]

III.

Pitchess

Prior to trial, Wycoff filed a motion pursuant to *Pitchess v. Superior Court*, *supra*, 11 Cal.3d 531, seeking discovery of complaints against Officer Barrios regarding the filing of false police reports. The trial court held an in camera hearing regarding the officer's personnel file, and concluded that the files contained no such information. Wycoff requests that we independently examine the sealed transcript and records produced in response to his discovery motion. (*People v. Samuels* (2005) 36 Cal.4th 96, 110 [standard of review].)

The sealed transcript of the in camera *Pitchess* hearing is part of the appellate record. We have reviewed the transcript, and conclude that the record is insufficient for us to determine whether the trial court properly exercised its discretion in denying discovery. "Although the custodian of records was required to submit for review only those documents that were potentially responsive to the discovery request, our Supreme Court has directed that '[t]he custodian should be prepared to state in chambers and for the record what other documents (or category of documents) not presented to the court were included in the complete personnel record, and why those were deemed irrelevant or otherwise nonresponsive to the defendant's *Pitchess* motion.' [Citation.] Moreover, 'if the custodian has any doubt whether a particular document is relevant, he or she should present it to the trial court.' [Citation.] [¶] Accordingly, in cases such as this where the custodian of records does not produce the entire personnel file for the court's review, he or she must establish on the record what documents or category of documents were included in the complete personnel file. In addition, if it is not readily apparent from the nature of the documents that they are nonresponsive or irrelevant to the discovery request, the custodian must explain his or her decision to withhold them. Absent this information, the court cannot adequately assess the completeness of the custodian's review of the personnel files, nor can it establish the legitimacy of the custodian's decision to withhold documents contained therein. Such a procedure is

necessary to satisfy the Supreme Court's pronouncement that 'the locus of decisionmaking' at a *Pitchess* hearing 'is to be the trial court, not the prosecution or the custodian of records.' [Citation.] It is for the court to make not only the final evaluation but to make a record that can be reviewed on appeal." (*Guevara, supra,* 148 Cal.App.4th at pp. 68-69.)

Here, the custodian of records who testified at the *Pitchess* hearing did not provide the officer's personnel file for the court's review. While he brought certain documents and prepared a summary of them, neither those documents nor the summary is included in the sealed record on appeal. Moreover, the custodian did not provide a summary of the documents in the personnel file that were not presented for the court's review. Accordingly, the record is insufficient for our review. "We therefore conditionally reverse the judgment and remand for a new *Pitchess* hearing in which the proper procedure is followed." (*Guevara*, *supra*, 148 Cal.App.4th at p. 69.)

In conditionally reversing the judgment for a new *Pitchess* hearing in *Guevara*, we essentially adopted the disposition employed for the same purpose in *People v. Hustead* (1999) 74 Cal.App.4th 410, 423. That disposition provides that "[i]f the court [on remand] again finds there are no discoverable records, or that there is discoverable information but Guevara cannot establish that he was prejudiced by the denial of discovery, *the judgment shall be affirmed as of that date*. [Citation.]" (*Guevara, supra*, 148 Cal.App.4th at pp. 69-70, italics added.) The italicized language, however, could be construed to preclude the defendant from seeking appellate review of the trial court's rulings on the *Pitchess* motion following remand. That was not our intention. While the doctrines of law of the case, res judicata, and collateral estoppel will effectively preclude the relitigation of issues that were or could have been decided in the first appeal, the defendant retains the right to appeal from the judgment for the limited purpose of challenging the *Pitchess* findings. The *Guevara* disposition therefore should have provided that the judgment would be *reinstated* in the event the court again denied discovery. So states the disposition that follows.

DISPOSITION

The judgment is conditionally reversed. The cause is remanded to the trial court with directions to hold a new hearing on Wycoff's *Pitchess* motion in conformance with the procedures described in this opinion. If the trial court finds there are discoverable records, they shall be produced and the court shall conduct such further proceedings as are necessary and appropriate. If the court finds there are no discoverable records, or that there is discoverable information but Wycoff cannot establish that he was prejudiced by the denial of discovery, the judgment shall be reinstated as of that date.

CERTIFIED FOR PARTIAL PUBLICATION.

PERREN, J.

We concur:

GILBERT, P.J.

YEGAN, J.

James B. Pierce, Judge

Superior Court County of Los Angeles

Jeffrey Lewis, under appointment by the Court of Appeal, for Defendant and Appellant.

Edmund G. Brown, Jr., Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Pamela C. Hamanaka, Senior Assistant Attorney General, Linda C. Johnson, Susan D. Martynec, Supervising Deputy Attorneys General, Robert M. Snider, Deputy Attorney General, for Plaintiff and Respondent.