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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA  
FIRST APPELLATE DISTRICT  
DIVISION THREE

THE PEOPLE,

Plaintiff and Respondent,

v.

DANIEL MICHAEL MORIARTY,

Defendant and Appellant.

A129719

(Solano County  
Super. Ct. No. FCR262937)

Defendant Daniel Michael Moriarty appeals from a judgment of conviction entered upon a jury's verdict finding him guilty of cultivating marijuana and possession of marijuana. Defendant contends the trial court erred in denying his motion to quash a warrant and suppress evidence, and requests this court to conduct an independent review of the in camera hearing on his *Pitchess*<sup>1</sup> motion to determine whether the correct procedure was followed. We agree that the motion to quash was properly denied but shall conditionally reverse the judgment so that the trial court may conduct a proper *Pitchess* hearing.

**Factual and Procedural History**

On January 15, 2009, Vacaville Police Detective Stuart Tan obtained a warrant to search defendant's home, person, and vehicles for marijuana, evidence related to the cultivation, possession, and sale of marijuana, and evidence related to money laundering. In the affidavit supporting issuance of the search warrant, Tan set forth his training and experience in investigating drug related crimes and related the following facts:

<sup>1</sup> *Pitchess v. Superior Court* (1974) 11 Cal.3d 531.

On May 23, 2008, Tan received a phone call from a representative of Travis Credit Union indicating that a new customer, defendant, had made a deposit of \$3,200 in cash that smelled strongly of fresh marijuana. After speaking with the bank representative and several other employees who had noticed the marijuana smell, Tan arranged for a K-9 trained in the detection of narcotics to smell the money deposited by defendant and the dog alerted for a controlled substance.

Over the course of the next eight months, representatives of Travis Credit Union contacted Tan approximately 11 more times to report similar incidents.<sup>2</sup> Each time the representative notified Tan that defendant had made a large deposit of cash smelling strongly of fresh marijuana. After each notification but one, a K-9 inspected the money and alerted that the money smelled of a controlled substance.

During the course of further investigation, Tan learned additional facts that led him to believe defendant was illegally cultivating marijuana, selling marijuana, and engaging in money laundering. He spoke with Detective Donaldson, who had previously investigated defendant, and learned that Donaldson had received information from an anonymous tip line “within the past year” that defendant and his associate, Eric Beelard, were cultivating marijuana for profit and storing the marijuana in a store they co-owned.

Donaldson also told Tan that two confidential informants had provided information that defendant was engaged in the cultivation of marijuana. The first believed that defendant had an indoor grow at his house. The second saw defendant packing indoor marijuana cultivation equipment and marijuana plants and saw defendant

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<sup>2</sup> On June 18, 2008, defendant deposited \$4,000. On September 4 defendant deposited \$400. On September 19 defendant deposited \$900. On September 26 defendant deposited \$500. On September 29 defendant deposited \$4,900. On October 7 defendant deposited \$1,800. On October 21 defendant deposited \$2,900. On November 14 defendant deposited \$800. On November 18 defendant deposited \$731. On December 18 defendant deposited \$500. On January 6, 2009, defendant deposited \$185. Over the course of the eight months, defendant deposited approximately \$21,316. All deposits were made in cash.

suspiciously load garbage bags into his vehicle and speed away from his house. This informant believed defendant knew the police were investigating him.

Tan also discovered via the Internet, private databases, and contact with the Franchise Tax Board that defendant had made numerous high value purchases without any apparent legal source of income. He purchased his residence in August 2005 for \$650,000 with a \$30,000 down payment and “during the same time frame” defendant purchased a GMC pickup truck, two Harley Davidson motorcycles, and a Kawasaki motorcycle. When Tan contacted the Franchise Tax Board he learned that defendant was unemployed and had not worked regularly in several years.

Finally, on January 2, 2009, Officer Hayes stopped defendant for a traffic violation. Hayes told Tan that she and her cadet ride-along could smell the odor of marijuana emanating from defendant’s car before it came to a complete stop. As she approached the window and spoke with defendant, she continued to smell the odor of marijuana. However, no marijuana or other contraband was found in a search of the vehicle.

Tan opined that based on the above information and his training and experience defendant was engaged in the illegal sale of marijuana and money laundering and it was likely that evidence of these crimes would be found at defendant’s home.

The fact that defendant had a medical marijuana identification card was not included in the affidavit, although evidence was presented at the hearing on defendant’s motion to quash that Tan was aware of this fact.

When defendant’s house was searched pursuant to the warrant, officers located a substantial indoor marijuana grow operation, indicia of drug sales, as well as other contraband. Defendant was charged with cultivation of marijuana (Health & Saf. Code, § 11358),<sup>3</sup> possession of marijuana for sale (§ 11359), possession of concentrated cannabis (§ 11357, subd. (a)), allowing a place for preparing or storing a controlled substance (§ 11366.5, subd. (a)), and possession of a deadly weapon (§ 12020, subd.

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<sup>3</sup> All statutory references are to the Health and Safety Code unless otherwise noted.

(a)(1)). It was further alleged that defendant was armed with a firearm during the commission of these crimes (Pen. Code, § 12022, subd. (a)(1)).

Defendant filed a motion to quash the search warrant and suppress evidence and a *Pitchess* motion seeking “(1) records or information regarding citizen complaints made against Vacaville Detective Stuart Tan . . . alleging dishonesty . . . by Detective Tan; [¶] (2) personnel records or information regarding Vacaville Detective Stuart Tan . . . which pertain to dishonesty . . . by detective Tan; and [¶] (3) reports of internal investigations of citizen complaints regarding dishonesty . . . by detective Tan.” The court granted the *Pitchess* motion, conducted an in camera hearing, and found there were no documents which required disclosure. The court subsequently denied defendant’s motion to quash the search warrant, finding that even after excising information that defendant contended should not have been considered and taking into account omitted information that he contended should have been considered, there was probable cause to issue the warrant. Defendant’s renewed motion to quash under Penal Code section 1538.5 was also denied.

A jury found defendant guilty of cultivating marijuana, not guilty of possession of marijuana for sale but guilty of the lesser included offense of simple possession of marijuana (§ 11357, subd. (c)), and not guilty of the other offenses and the enhancement not true. The court suspended imposition of sentence and placed defendant on probation for three years. Defendant filed a timely notice of appeal.

## **Discussion**

### *A. Motion to Quash Warrant and Suppress Evidence*

Defendant contends that Tan intentionally and, at the very least recklessly, included false information in the affidavit relating to defendant’s association with Eric Beelard and the purchase of his home and vehicles, intentionally omitted the material fact that defendant was authorized to use medical marijuana, improperly included defendant’s employment status, which was wrongly obtained from the Franchise Tax Board without a warrant, and inappropriately included stale and unreliable statements of the two

confidential informants. Defendant contends that after the improper material is excised and the omitted material included, Tan's affidavit is insufficient to support a finding of probable cause to search his home. We disagree.

“The standard of appellate review of a trial court's ruling on a motion to suppress is well established. We defer to the trial court's factual findings, express or implied, where supported by substantial evidence. In determining whether, on the facts so found, the search or seizure was reasonable under the Fourth Amendment, we exercise our independent judgment.” (*People v. Glaser* (1995) 11 Cal.4th 354, 362.) When reviewing a search warrant affidavit which allegedly contains intentionally false statements or statements made in reckless disregard of the truth, information obtained unconstitutionally and stale facts, and which intentionally omits material facts, we excise the improperly included statements, add the material omitted facts, and retest the affidavit for probable cause. (*People v. Mayer* (1987) 188 Cal.App.3d 1101, 1120 [when an affidavit contains intentionally or recklessly false statements, or intentionally or recklessly omits material facts, a reviewing court excises intentional or reckless misstatements, adds material information which was omitted, and retests the affidavit for probable cause]; *People v. De Caro* (1981) 123 Cal.App.3d 454 [when an affidavit contains unconstitutionally obtained information, a reviewing court excises that information from the affidavit and retests it for probable cause]; *People v. Hulland* (2003) 110 Cal.App.4th 1646, 1652 [“Information that is remote in time may be deemed stale and thus unworthy of consideration in determining whether an affidavit for a search warrant is supported by probable cause.”].) “In determining whether an affidavit is supported by probable cause, the magistrate must make a ‘practical, common-sense decision whether, given all the circumstances set forth in the affidavit . . . there is a fair probability that contraband or evidence of a crime will be found in a particular place.’ ” (*Fenwick & West v. Superior Court* (1996) 43 Cal.App.4th 1272, 1278.)

Assuming, without deciding, that defendant is correct as to what information should have been deleted and included in the declaration, after disregarding the challenged statements and including the omitted information, probable cause remains.

There is no question that the court properly considered defendant's numerous deposits of significant amounts of cash which smelled so strongly of marijuana that bank representatives contacted the police. That the deposits were in cash is one factor prompting suspicion. (*U.S. v. Hoyland* (1990) 914 F.2d 1125, 1128, overruled on other grounds *Ratzlaf v. U.S.* (1994) 510 U.S. 135, 136-137 ["In today's America, a pattern of cash deposits and exchanges that have no obvious purpose except the avoidance of detection, plus the secreting of large amounts of cash in safe deposit boxes, all carried out by a man in modest circumstances, . . . gives rise to a reasonable belief that the man is engaged in criminal conduct."].) That the cash regularly smelled of marijuana is another. While neither factor conclusively establishes illegal conduct, particularly since defendant was authorized to use marijuana for medical purposes, the circumstances were nonetheless sufficient to arouse reasonable suspicion. As the trial court put it, "Anything, I think, in human affairs can be explained one way or another, but the most logical explanation is this money was from the sale of marijuana."

And there was more in the affidavit to create a reasonable belief that defendant likely was engaged in illegal activity. When Officer Hayes pulled defendant over, she could smell fresh marijuana wafting from his car before it stopped moving. However, when she searched the car she did not locate any marijuana, which indicated to her that defendant had recently transported a substantial amount of marijuana in the vehicle. According to the affidavit, the odor appeared far stronger than would be created by the supply a medical user would be expected to carry.

Defendant contends the odor on his cash deposits and in his car are "explained" by his medical marijuana prescription. But while an accused can raise medical authorization as an affirmative defense at trial (see, e.g., *People v. Mower* (2002) 28 Cal.4th 457, 481-483; *People v. Wright* (2006) 40 Cal.4th 81, 85, 93-94), a prescription for medical marijuana does not immunize one from being investigated or prosecuted for marijuana-related crimes (see *People v. Fisher* (2002) 96 Cal.App.4th 1147, 1152). While defendant's medical marijuana prescription may have provided an innocent explanation for the smell of marijuana on his cash deposits and in his car, "the fact that particular

conduct may be innocent is not the relevant inquiry. Rather, we must look to ‘the degree of suspicion that attaches to particular types of noncriminal acts.’ ” (*People v. Spears* (1991) 228 Cal.App.3d 1, 18-19.)

Defendant also appears to argue that even if the appropriately considered facts are sufficient to establish probable cause that he was selling marijuana, they are insufficient to create “ ‘a fair probability that contraband or evidence of a crime will be found in a particular place.’ ” (*Fenwick & West v. Superior Court, supra*, 43 Cal.App.4th at 1278.) However, our Supreme Court “noted in *People v. Gonzalez* (1990) 51 Cal.3d 1179, 1206, . . . that ‘ “[a] number of California cases have recognized that from the nature of the crimes and the items sought, a magistrate can reasonably conclude that a suspect’s residence is a logical place to look for specific incriminating items.” ’ ” (*People v. Carrington* (2009) 47 Cal.4th 145, 163.) Several California cases have held that an affidavit supporting a warrant to search the home of a suspected drug dealer must include evidence that the defendant was selling drugs combined with an officer’s expert opinion that additional drugs are likely to be found at the defendant’s residence. (See *People v. Pressey* (2002) 102 Cal.App.4th 1178, 1183 [“ ‘[M]any courts have been disinclined to require [additional facts concerning the residence] in [a] particular case to support th[e] inference [that evidence of drug sales will be found at a drug dealer’s residence]. Rather, it is commonly held that this gap can be filled merely on the basis of the affiant-officer’s experience that drug dealers ordinarily keep their supply, records and monetary profits at home.’ ”].) In this case, there was sufficient evidence that defendant was selling drugs and Tan gave his expert opinion that “individuals involved in the sales of a controlled substance maintain a quantity of the controlled substance so they can service actual and potential customers. These individuals often keep amounts of the controlled substance on their person, in their residence(s) and/or vehicle(s) as convenient places for storage for use during future trafficking.” Thus, after disregarding the information challenged by defendant and considering the information defendant contends was wrongfully omitted, there was probable cause to suspect that evidence of a crime would be found at

defendant's residence. The trial court properly denied defendant's motion to suppress evidence.

*B. Pitchess Motion*

Defendant requests that this court independently review the transcript from the May 20, 2009, in camera hearing and any records produced by the custodian of records at the hearing, to determine if the hearing was properly conducted and whether all materials that should have been produced were in fact produced. (See *People v. Mooc* (2001) 26 Cal.4th 1216.)

“For approximately a quarter-century our trial courts have entertained what have become known as *Pitchess* motions, screening law enforcement personnel files in camera for evidence that may be relevant to a criminal defendant's defense.” (*People v. Mooc, supra*, 26 Cal.4th at p. 1225, fn. omitted.) Prior to a court conducting an in camera screening, a defendant must establish “good cause for the discovery or disclosure sought.”<sup>4</sup> (*Id.* at p. 1226.) “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 them for itself. [Citation.] . . . Documents clearly irrelevant to a defendant's *Pitchess* request need not be

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<sup>4</sup> The Legislature subsequently codified the procedures required by the Supreme Court in *Pitchess*. (See *People v. Mooc, supra*, 26 Cal. 4th at p. 1226, fn. 3.) To obtain an officer's personnel records, a defendant now must satisfy the prerequisites contained in Evidence Code section 1043. (*Id.* at p. 1226.) A defendant “must ‘file a written motion with the appropriate court’ [citation] and identify the proceeding, the party seeking disclosure, the peace officer, the governmental agency having custody of the records, and the time and place where the motion for disclosure will be heard [citation]. In addition, the *Pitchess* motion must describe ‘the type of records or information sought’ [citation] and include affidavits showing good cause for the discovery or disclosure sought, setting forth the materiality thereof to the subject matter involved in the pending litigation and stating upon reasonable belief that the governmental agency identified has the records or information from the records’ [citation]. The affidavits may be on information and belief and need not be based on personal knowledge [citation], but the information sought must be requested with sufficient specificity to preclude the possibility of a defendant's simply casting about for any helpful information.” (*Ibid.*)

presented to the trial court for in camera review. But if the custodian has any doubt whether a particular document is relevant, he or she should present it to the trial court. . . . The 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 defendant's *Pitchess* motion." (*Id.* at pp. 1228-1229.) "[I]n cases . . . 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. . . . [I]f 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." (*People v. Guevara* (2007) 148 Cal.App.4th 62, 69.)

The transcript of the May 20 hearing that has been provided to this court is but four pages in length and consists of little more than a custodian from the police department advising the court that "[u]pon review of Detective Tan's person[ne]l file, training file, and his personnel complaint file with the City of Vacaville, I didn't find any records in either of those files consistent with language in the motion with regard to his allegations of dishonesty." The custodian failed to explain to the court what documents or types of documents were in Tan's personnel file and why those documents were nonresponsive to defendant's request. Tan was a 14-year veteran of the Vacaville Police Department and the absence of any potentially relevant documents at a minimum should have prompted some explanation as to what records were reviewed and what criteria were used to evaluate potential relevance.

This perfunctory hearing did not satisfy the court's obligation to ensure that full production had occurred. Therefore, the judgment must be conditionally reversed and remanded with directions that the court conduct a further hearing to determine whether the custodian properly found that there were no documents required to be produced in response to the *Pitchess* motion. If it is determined that any responsive documents exist and were not produced, they shall be delivered to defendant's trial counsel, who shall be

permitted to move for a new trial if it is contended that the failure to produce the documents was prejudicial. If the court determines that no responsive documents exist, or if after production of any such documents a new trial motion is denied, the judgment shall be reinstated. (*People v. Guevara, supra*, 148 Cal.App.4th at pp. 69-70; *People v. Hustead* (1999) 74 Cal.App.4th 410, 423.)

### **Disposition**

The judgment is conditionally reversed. The matter is remanded with directions to conduct a further in camera hearing in accord with the procedure described in *People v. Mooc, supra*, 26 Cal.4th at pages 1228-1230. If the court again finds there are no discoverable records, the judgment shall be reinstated. If the trial court finds there are discoverable records, they shall be produced and the court shall permit defendant to move for a new trial upon a showing of prejudice. If such a motion is denied, the judgment shall be reinstated.

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Pollak, J.

We concur:

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McGuinness, P. J.

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Jenkins, J.