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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION FIVE

THE PEOPLE,

Plaintiff and Respondent,

v.

JOSEPH ALEJANDRO ORTEGA,

Defendant and Appellant.

A131244

**ORDER MODIFYING
NONPUBLISHED OPINION
[NO CHANGE IN JUDGMENT]**

(San Mateo County
Super. Ct. No. SC071032A)

BY THE COURT:*

Appellant's request for leave to file a supplement to his petition for rehearing is GRANTED. IT IS ORDERED that the opinion filed on May 9, 2012, is modified as follows and the petition for rehearing is DENIED:

1. On page 14, in part II.B.1, a new footnote number 12 is added after the final sentence of the first partial paragraph (with all following footnotes renumbered accordingly):

¹² Ortega had also filed a separate motion seeking, under Evidence Code sections 1043 and 1045 and *Pitchess v. Superior Court* (1974) 11 Cal.3d 531 (*Pitchess*), discovery from the San Mateo Police Department regarding complaints that Sanchez, Reyna, Lethin, Rodenspiel, Joyce, Mefford, and Venikov had filed false police reports, testified falsely, or fabricated evidence. The motion also sought information regarding complaints of excessive force and violence during police encounters with respect to Mefford and Venikov only. The City of San

* Before Simons, Acting P.J., Needham, J., and Bruiniers, J.

Mateo opposed Ortega's motion for *Pitchess* discovery. Judge Mallach granted Ortega's *Pitchess* motion with respect to complaints as to the truthfulness and dishonesty of Rodenspiel and Joyce. The court conducted an in camera review of documents presented by the City's custodian of records, but concluded there was no discoverable material with respect to either Rodenspiel or Joyce. The motion was otherwise denied, without prejudice.

2. On page 16, in part II.B.1, the last sentence of the first (partial) paragraph is amended to read:

The court continued the matter, to December 3, 2010, to allow for further briefing.

3. On page 18, in part II.B.2., a new sentence is added in between the first and second sentences of the first full paragraph:

He also argues that the failure to disclose constituted a violation of *Brady v. Maryland* (1963) 373 U.S. 83 (*Brady*), and that the trial court erred by "upholding a privilege for [Rodenspiel] after ruling that the *Pitchess* procedure and pertinent law did not apply and then refusing to review the transcript of his statement *in camera* before ruling."

4. On page 18, in part II.B.2., two new paragraphs are added after the first full paragraph:

A defendant may file a *Pitchess* discovery motion to discover the statements of percipient witnesses contained in a peace officer's personnel file, as well as information regarding past incidents unconnected to the charged offense. (*Rezek v. Superior Court* (May 25, 2012, G044915) __ Cal.App.4th __ [2012 Cal.App. Lexis 630].) But, Ortega never filed a *Pitchess* motion seeking Rodenspiel's internal investigation statement. (See Evid. Code, § 1043.) Thus, Ortega has asserted only a violation of section 1054.1 or *Brady*. "The federal due process clause prohibits the prosecution from suppressing evidence materially favorable to the accused. The duty of disclosure exists regardless of good or bad faith, and regardless of whether the defense has requested the materials. [Citations.] The obligation is not limited to evidence the prosecutor's office itself actually knows of or possesses, but includes 'evidence known to the others acting on the government's behalf in the case, including the police.' [Citation.] [¶] For *Brady* purposes, evidence is favorable if it helps the defense or hurts the prosecution, as by impeaching a prosecution witness. (*United States v. Bagley* (1985) 473 U.S. 667, 676 . . . ; see *In re Sassounian* (1995) 9 Cal.4th 535, 544) Evidence is material if there is a reasonable probability its disclosure would have altered the trial result. [Citation.] Materiality includes consideration

of the effect of the nondisclosure on defense investigations and trial strategies. [Citations.] Because a constitutional violation occurs only if the suppressed evidence was material by these standards, a finding that *Brady* was not satisfied is reversible without need for further harmless-error review. [Citation.]” (*People v. Zambrano* (2007) 41 Cal.4th 1082, 1132–1133, parallel citations omitted (*Zambrano*), disapproved on other grounds in *People v. Doolin* (2009) 45 Cal.4th 390, 421, fn. 22.)

“There are three components of a true *Brady* violation: The evidence at issue must be favorable to the accused, either because it is exculpatory, or because it is impeaching; that evidence must have been suppressed by the State, either willfully or inadvertently; and prejudice must have ensued.” (*Strickler v. Greene* (1999) 527 U.S. 263, 281–282.) On appeal, the defendant has the burden to establish these elements. (*Id.* at pp. 289, 291.) We review the elements of a *Brady* claim de novo. (*People v. Salazar* (2005) 35 Cal.4th 1031, 1042.) Even if a *Brady* violation is not established, failure to disclose may constitute a violation of section 1054.1. (*Zambrano, supra*, 41 Cal.4th at p. 1133.)

5. On pages 18 and 19, in part II.B.2., the paragraph spanning the two pages is amended to read:

The question of whether a police officer’s compelled statement, made under the threat of discipline, is immune from discovery in a criminal proceeding involving a third party defendant is one we need not decide here. Because, even if we assume for the sake of argument, that Rodenspiel’s internal affairs statement was not privileged, was suppressed, and was favorable to Ortega in the manner asserted in his counsel’s affidavit and opening brief on appeal, Ortega has still failed to show prejudice or materiality. Ortega does not attack, in his opening brief, the trial court’s conclusion that Rodenspiel’s statement would be relevant only to impeach Rodenspiel’s proposed testimony, as a witness for the prosecution, regarding the chain of events leading up to the collision. “Failure to disclose relevant impeachment evidence requires reversal ‘ ‘only if the evidence is material in the sense that its suppression undermines confidence in the outcome of the trial.’ [Citation.] Otherwise stated, reversal is required ‘ ‘only if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different.’ [Citation.]’ [Citation.]” (*People v. Hayes* (1992) 3 Cal.App.4th 1238, 1245; accord, *Zambrano, supra*, 41 Cal.4th at p. 1135, fn. 13 [violation of California reciprocal-discovery statute “is a basis for reversal only where it is reasonably probable, by state-law standards, that the omission affected the trial result”].) Since Rodenspiel was never called to testify at trial, there was no testimony to impeach, and thus, the prosecution’s failure to disclose was immaterial, under *Brady*, and harmless statutory error.

6. On page 19, in part II.B.2., the footnote previously numbered 16 should remain at the end of the amended paragraph spanning pages 18 and 19, but the fourth sentence is amended to read:

And, even without the discovery, Ortega was able to present his defense—that, but for the left turn of the moving Explorer, there would have been no collision.

The modification effects no change in the judgment.

Date _____ Acting P.J.