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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(Sacramento)

THE PEOPLE, Plaintiff and Respondent, v. MICHAEL LOUIS PACHECO, Defendant and Appellant.	C068678 (Super. Ct. No. 09F08583)

A jury convicted defendant Michael Louis Pacheco of possessing unauthorized drugs (heroin and/or marijuana) in Folsom State Prison. (Pen. Code, § 4573.6.)[1] The trial court thereafter found that defendant had been convicted of a prior strike. The court sentenced defendant to a total prison term of four years, to run consecutively to his current sentence.

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[1] Undesignated statutory references are to the Penal Code.

Defendant contends the trial court erred by denying his pretrial *Pitchess* motion. (*Pitchess v. Superior Court* (1974) 11 Cal.3d 531.) Finding any error harmless, we shall affirm.

FACTUAL AND PROCEDURAL BACKGROUND

Since defendant does not attack the verdict, we focus on the evidence before the trial court at the time of the *Pitchess* motion.

The documentation attached to the motion shows that at around 11:45 a.m. on September 13, 2009,[2] Officer Russell Snyder of the prison's Investigative Services Unit (ISU), monitoring the visiting area on surveillance cameras, observed defendant apparently receiving contraband from a female visitor. The visitor was observed to "suspiciously drink from a coffee cup by placing it to her mouth and dropping suspected contraband into the cup by utilizing her mouth." She handed defendant the cup. He took several drinks from it until it was empty, then asked the visitor to pour Snapple juice into it. He moved an object inside his mouth, forming a bulge on the left side of his cheek. After drinking the Snapple, he was apparently able to swallow the object.[3]

Officer Snyder detained defendant. An unclothed body search of defendant detected no contraband. At around 12:15 p.m., Officer Snyder processed defendant for "Body Cavity Surveillance" (BCS) placement and put him on contraband watch.

At 6:32 p.m. on September 13, defendant was admitted to Mercy Hospital Folsom because he seemed confused and lethargic. A chest X–ray, a CT scan of defendant's head, and a gross physical examination of his abdomen detected nothing unusual.

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[2] Further dates are in 2009 unless otherwise stated.

[3] In Officer Snyder's opinion, based on his training and experience, the method used by defendant and his visitor was a common one for passing contraband from visitors to inmates.

Around 9:30 p.m., he produced a small stool sample. By 10:00 p.m., he appeared to have returned to normal. He was discharged at 11:15 p.m. and transported back to the prison.

While defendant was on contraband watch, his activities were observed and recorded at least every half-hour. The records showed that he ate, drank, and urinated regularly. However, nothing else happened until 10:10 p.m. on September 27. At that time, Officer Craig Weston recorded that defendant had a "large bowel movement positive for contraband."[4]

Officer Weston's report stated that after defendant said he needed to have a bowel movement, Officer Weston and Sergeant Ramon Solorzano removed defendant from his cell and provided him a portable toilet and a bucket to defecate into. Officer Weston observed defendant doing so. Searching the feces, Officer Weston discovered nine balloons (four red and five green), which weighed approximately 22.6 grams including packaging. The red balloons contained a black tar substance, weighing approximately 8.6 grams without packaging, which tested presumptive positive for heroin; the green balloons contained a green leafy substance, weighing approximately 9.7 grams without packaging, which tested presumptive positive for marijuana.[5] Officer Weston placed the evidence into an evidence envelope, sealed the envelope, and placed the sealed envelope into a custody evidence locker.

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[4] Defendant was kept on contraband watch until around noon on September 30. During that time, he had three more large bowel movements, all negative for contraband.

[5] Officer Snyder's warrant request as to the female visitor, submitted before the contraband had been tested in the laboratory, stated that Sergeant Solorzano field-tested it. However, as noted, Officer Weston's report stated that he did the field testing, and Sergeant Solorzano's report does not state otherwise. Thus it appears that Officer Snyder was in error on this point.

Sergeant Solorzano's report stated that he ordered Officer Weston to search defendant's feces, then took photographs of the contraband discovered by Officer Weston and placed the photographs into the custody evidence locker.

The evidence was delivered to Sacramento County District Attorney Laboratory of Forensic Sciences, where criminalist Bradley Johnson tested two samples and confirmed that they consisted of heroin and marijuana.

Defendant's *Pitchess* motion sought discovery as to the personnel records of Officer Weston and Sergeant Solorzano.[6] In support of this request, counsel's declaration recited the facts allegedly shown by the attached records, then asserted, "It is the lay[ ]opinion of this writer that a 15[-]day delay from ingestion to defecation defies medical explanation. Especially so when, as here, [defendant's] BCS log reflects several bowel movements from the time he was placed in BCS to the time the contraband was allegedly passed.[7] Moreover, when aligned with the evidence that no foreign bodies were seen on [X]-ray, the only conclusion is that something is amiss in [defendant's] handling and treatment by the correctional officers [who] are the subject of this motion."[8]

The declaration further asserted, (1) the officers as to whom discovery was sought were material percipient witnesses; (2) if the trier of fact found one or more of them not credible, it could lead to an acquittal of defendant; and (3) "[o]n occasions people have made complaints to this agency [the public defender's office] concerning [Officer

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[6] Defendant's supporting declaration alleged that "all three officers," including Officer Snyder, misrepresented the facts in their reports. However, defendant did not seek discovery of Officer Snyder's personnel records.

[7] This allegation was inaccurate. As noted above, defendant had only one bowel movement (at the hospital on September 13) before the one that allegedly yielded the contraband.

[8] The allegation that "no foreign bodies were seen on [X]-ray," though accurate, was based in part on the misstatement that hospital staff X-rayed defendant's "abdomen and torso." As noted, they did not X-ray his abdomen.

Weston and Sergeant Solorzano]. These complaints allege [the officers] committed acts of moral turpitude, including but not limited to: illegal arrests; forced confessions; acts of unnecessary or excessive force; falsification of evidence or testimony; discrimination on the basis of race, national origin, religion, gender or sexual orientation; unlawful search and seizure."

Real party in interest California Department of Corrections and Rehabilitation (CDCR) opposed the motion, asserting that it did not establish good cause for *Pitchess* discovery because it misrepresented the records it cited, offered no specific facts to show falsification by the officers, did not identify any proposed defense to the charges against defendant, and did not offer a specific factual scenario to establish a plausible factual foundation for "defense counsel's 'something is amiss' defense" (based only on counsel's personal opinion).

The trial court heard argument on the motion in limine. After summarizing the argument of the motion, the court stated, "The Attorney General argues that the showing made is insufficient to establish a specific factual scenario showing a plausible factual allegation. I'm inclined to agree with the Attorney General." Both counsel submitted the matter.

The court ruled, "I just think the only assertion that causes me any concern at all is the delay of 15 days, but I don't know that that's medically impossible, especially, for example, if [defendant] had defecated immediately before or shortly before he was placed in the cell and if he abstained from eating or ate very little during the following 15 days. The evidence about the [X]-rays is just inconclusive. As the Attorney General points out [they] were of the lungs and there is . . . nothing to convince me that the [X]-rays picked up any contraband, necessarily could be contraband [*sic*]. [¶] So I find as to each of the officers . . . a requisite showing has not been made, in other words, I'm not going to conduct an in camera hearing. Motion is denied."

DISCUSSION

Defendant contends (1) the trial court abused its discretion by denying the *Pitchess* motion; and (2) if the court had granted the motion, there is a reasonable probability the outcome of the proceeding would have differed. We conclude that even if the court erred by denying the motion, the error is harmless.

The *Pitchess* procedures (codified after *Pitchess* by the Legislature in Penal Code sections 832.7 and 832.8 and Evidence Code sections 1043 through 1045) "balance[] the accused's need for the disclosure of relevant information with the law enforcement officer's legitimate expectation of privacy in his or her personnel records" (*People v. Mooc* (2001) 26 Cal.4th 1216, 1220 (*Mooc*)) by providing for in camera review of the defendant's discovery request.

"To obtain *Pitchess* information, the defendant must file a written motion. ([Evid. Code,] § 1043, subd. (a).) It must describe 'the type of records or information sought' and include '[a]ffidavits 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.' [Fn. omitted.] ([Evid. Code,] § 1043, subd. (b)(2), (3).) This good cause showing is a 'relatively low threshold for discovery.' ([*City of Santa Cruz v. Municipal Court*] [(1989)] 49 Cal.3d [74,] 83.) Assertions in 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.' (*Mooc, supra*, 26 Cal.4th at p. 1226.) If the defendant establishes good cause, the court must review the records in camera to determine what, if any, information should be released. (*Ibid*.; [Evid. Code,] § 1045, subd. (b).)" (*Garcia v. Superior Court* (2007) 42 Cal.4th 63, 70-71 (*Garcia*).)

"We discussed what constitutes a good cause showing of materiality in *Warrick v. Superior Court* (2005) 35 Cal.4th 1011 (*Warrick*). The supporting affidavit 'must propose a defense or defense to the pending charges.' (*Id.* at p. 1024.) To show the requested information is material, a defendant is required 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 sought must be described with some specificity to ensure that the defendant's request is 'limited to instances of officer misconduct related to the misconduct asserted by the defendant.' (*Ibid.*)" (*Garcia, supra*, 42 Cal.4th at p. 71.)

"Counsel's affidavit must also describe a factual scenario that would support a defense claim of officer misconduct. (*Warrick, supra*, 35 Cal.4th at pp. 1024-1025.) 'That factual scenario, depending on the circumstances of the case, may consist of a denial of the facts asserted in the police report.' (*Ibid.*) 'In other cases, the trial court hearing a *Pitchess* motion will have before it defense counsel's affidavit, and in addition a police report, witness statements, or other pertinent documents. The court then determines whether defendant's averments, "[v]iewed in conjunction with the police reports" and any other documents, suffice to "establish a plausible factual foundation" for the alleged officer misconduct and to "articulate a valid theory as to how the information sought might be admissible" at trial.' (*Id.* at p. 1025.) Corroboration of or motivation for alleged officer misconduct is not required. (*Ibid.*) Rather, 'a plausible scenario of officer misconduct is one that might or could have occurred.' (*Id.* at p. 1026.) A scenario is plausible when it asserts specific misconduct that is both internally consistent and supports the proposed defense. (*Ibid.*)" (*Garcia, supra*, 42 Cal.4th at p. 71.)

We review the trial court's denial of a *Pitchess* motion for abuse of discretion. (*People v. Jackson* (1996) 13 Cal.4th 1164, 1220-1221.) But even if the court abused its discretion by denying the motion, the error may be harmless under the standard of *People*

v. Watson (1956) 46 Cal.2d 818, 836 (*Watson*), if extensive evidence links the defendant to the crime. (*People v. Samuels* (2005) 36 Cal.4th 96, 110 (*Samuels*).)

Defendant asserts that his motion presented much evidence to support counsel's theory that "something was amiss." Defendant failed to defecate for the extraordinary time of 15 days on contraband watch (a fact which the trial court noted as cause for concern). The medical records from defendant's hospitalization a few hours after he was placed on contraband watch showed nothing to suggest that he had ingested any improper substances on that date. The urine he produced while on contraband watch tested negative for drugs. Furthermore, the BCS logs showed that he ate and urinated frequently during that entire period, refuting the court's speculation as to how he could have gone so long without defecating.[9] Thus, in defendant's view, if the *Pitchess* motion had been granted and had yielded information that could have impeached the officers' credibility, such evidence would have made it almost impossible for the jury to accept the officers' facially implausible story.

But, according to defendant, the court applied the wrong standard to his motion: Instead of deciding whether the motion showed a "factual foundation" which was *possible*, the court improperly weighed the evidence and denied defendant's motion on the ground that its factual foundation was not credible or that defendant's version of events was not persuasive—a test rejected by our Supreme Court in *Warrick*. (*Warrick*, *supra*, 35 Cal.4th at p. 1026.)

The Attorney General replies, (1) the claim that a 15-day gap between bowel movements proved "something was amiss" was unsupported by evidence or authority and amounted to mere speculation; (2) the failure of a chest X-ray to disclose contraband on

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[9] As to both abuse of discretion and prejudice, defendant also cites trial testimony that supposedly undermined the officers' credibility. Since that evidence was not before the trial court on the Pitchess motion, it may not be used to attack the court's ruling on the motion.

defendant's person did not tend to establish that he could not have had it elsewhere on his person, such as in his abdomen; and (3) defendant thus failed to establish a factual foundation for his claim of officer misconduct.

Defendant replies in turn, (1) no "evidence or authority" was needed to support his claim that a 15-day gap was inherently suspicious, because allegations in a *Pitchess* motion may be made on information and belief; (2) the gross physical examination of his abdomen at the hospital also failed to disclose any sign he had ingested contraband; and (3) the hospital's failure to X-ray defendant's abdomen could in itself suggest "impropriety."[10]

We do not find either party's arguments entirely persuasive. On the one hand, we agree with defendant that he could properly rely on the 15-day delay in defecation as part of the factual foundation for a *Pitchess* motion even without supporting evidence or medical authority, since (1) *Pitchess* allegations may be made on information and belief; (2) it is common knowledge that such a delay does not normally occur; and (3) such a delay could conceivably suggest officer misconduct. On the other hand, we are not convinced that to assert "something was amiss" is sufficient to meet the *Warrick* standard of alleging *specific* officer misconduct. (*Warrick, supra,* 35 Cal.4th at p. 1026; accord, *Garcia, supra*, 42 Cal.4th at p. 71.) Assuming defendant meant to assert that Officer Weston and/or Sergeant Solorzano planted the contraband (the only plausible scenario that could exonerate defendant), we fail to see why the motion did not plainly say so.

Ultimately, however, we need not decide whether the trial court erred by denying the motion. Assuming arguendo the court should have granted the motion, the error was harmless under the standard of *Watson, supra,* 46 Cal.2d at page 836.

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10 Since defendant did not make this last point below, it is not properly before us now. In any event, it does not even hint at any particular misconduct by the officers named in the motion.

As the documents in support of the motion revealed, defendant was not only observed in the apparent act of receiving the contraband from his visitor, but was videotaped doing so. The videotape was played for the jury at trial, with step-by-step commentary by Officer Snyder. Furthermore, both officers named in the *Pitchess* motion testified, as did defendant. Under all the circumstances, we conclude that extensive evidence linked defendant to the crime at both ends of the process. (*Samuels, supra,* 36 Cal.4th at p. 110.)

DISPOSITION

The judgment is affirmed.

BLEASE, Acting P. J.

We concur:

NICHOLSON, J.

BUTZ, J.