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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE,

Plaintiff and Respondent,

v.

KIRK DAVID MYOTT,

Defendant and Appellant.

E057005

(Super.Ct.No. FVI110740)

OPINION

APPEAL from the Superior Court of San Bernardino County. Eric M. Nakata, Judge. Affirmed.

Marta I. Stanton, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Julie L. Garland, Assistant Attorney General, Teresa Torreblanca and Heather M. Clark, Deputy Attorneys General, for Plaintiff and Respondent.

A jury found defendant and appellant Kirk David Myott guilty of two felony counts of resisting an executive officer. (Pen. Code, § 69, counts 1 & 2.)¹ A trial court found that defendant had served one prior prison term. (§ 667.5, subd. (b).) The court sentenced him to a total term of three years eight months in county jail. (§ 1170, subd. (h)(5)(a).)

On appeal, defendant contends that the court abused its discretion in denying his motion to reduce counts 1 and 2 to misdemeanors pursuant to section 17, subdivision (b). He also contends that the court abused its discretion in ruling on his *Pitchess*² motion, and that this court should independently review the documents examined by the trial court. We reviewed the records, as well as the sealed transcript of the in camera *Pitchess* motion hearing. We conclude that the trial court followed the proper procedures when conducting the *Pitchess* motion hearing, and it did not abuse its discretion in ruling that none of the records were discoverable. We further conclude that the court properly denied the section 17, subdivision (b) motion. We affirm the judgment.

FACTUAL BACKGROUND

On March 31, 2011, Officer Justin Snyder responded to a call that defendant was causing a disturbance at Desert Valley Hospital in Victorville. At the hospital, Officer Snyder observed defendant being belligerent with the hospital staff and noted that he was

¹ All further statutory references will be to the Penal Code, unless otherwise noted.

² *Pitchess v. Superior Court* (1974) 11 Cal.3d 531 (*Pitchess*).

intoxicated. Hospital security escorted defendant out of the emergency room to the parking lot and advised him to leave the premises. Defendant fell down a flight of stairs, and Officer Snyder went over to defendant, helped him up, and put him in his patrol car. Officer Chris Hensman then arrived at the scene and helped defendant out of the patrol car to talk to him. Officer Hensman determined that defendant was drunk. Defendant was not able to give any information about where he lived or a person to contact, so Officer Hensman told him he was going to be arrested for being drunk in public.

Officer Robert Johnston arrived shortly thereafter to transport defendant to the West Valley Detention Center (detention center). Officer Johnston identified himself to defendant and noticed that defendant had a bandage on his wrist. So, Officer Johnston told defendant that if he was cooperative, he would handcuff his hands in front instead of behind his back. Officer Johnston put the handcuffs on, placed defendant in the back of his patrol car, and proceeded to drive. When Officer Johnston told defendant they were going to the detention center, defendant started banging on the rear passenger window with his fists and head. Officer Johnston told him to stop, pulled off the freeway, and opened the back door. Defendant was cussing and yelling obscenities at Officer Johnston and would not stop hitting the window. Officer Johnston told defendant he was going to handcuff him with his hands in back. When Officer Johnston reached in to take the handcuffs off, defendant rolled over on his left side and started kicking him. Defendant kicked Officer Johnston for several seconds, until Johnston was able to trap defendant's feet against the seat. Officer Johnston removed one of the cuffs, and defendant continued

trying to kick him. Defendant kept trying to move away from Officer Johnston, and he pulled his hand away every time Officer Johnston tried to grab it. Officer Johnston had to use his taser gun to subdue defendant. He was then able to handcuff defendant behind his back.

Officer Johnston drove defendant to Arrowhead Medical Center and took him to the emergency room, where defendant was placed on a gurney. The officer apprised the medical staff of the situation and took defendant's handcuffs off, so that he could be treated. Defendant became verbally abusive to the hospital staff. One of the doctors handcuffed defendant's hand to the gurney and ordered that he be restrained with leather wrist and ankle restraints. At some point, the restraints were removed so the doctors could treat him. Officer Johnston was standing at the foot of the gurney and helped to take the ankle restraints off. When he did so, defendant looked right at Officer Johnston and tried to kick him in the head. The officer was able to move over just enough to avoid the kick. The hospital staff placed defendant back in restraints. The doctor informed Officer Johnston that defendant's blood-alcohol level was 0.37 percent.

At trial, the defense called a witness named Hanoun Hanoun to testify. Hanoun had known defendant for approximately 15 years. He saw defendant on the day he was arrested, in front of the store where Hanoun was working. Hanoun could smell alcohol on defendant and knew he was drunk. Hanoun said it was common for defendant to be drunk.

ANALYSIS

I. The Trial Court Properly Denied Defendant's Motion to Reduce His Convictions to Misdemeanors

Defendant contends that the trial court abused its discretion when it denied his motion to reduce his convictions for resisting an executive officer to misdemeanors. He asserts that his actions did not involve any weapons, he was extremely intoxicated, Officer Johnston was not injured, and the two acts at issue involved the same deputy during one continuous course of action. Defendant points out that the prosecutor acknowledged that his conduct was de minimus, and that the probation officer recommended concurrent sentencing. We see no abuse of discretion.

A. Relevant Background

At the conclusion of the People's case, defendant moved under section 17, subdivision (b), to reduce the two counts of resisting an executive officer to misdemeanors. The court found the motion premature because the defense had not presented its witnesses yet. Nonetheless, the court noted that, given the evidence presented thus far, defendant's conduct constituted felony conduct. The court denied the motion.

Defendant renewed the motion at the sentencing hearing. He argued that his conduct was de minimus and he was extremely intoxicated. The prosecutor responded that there were two separate instances of misconduct, and the only reason there were no injuries was that the officer was able to swiftly move out of the way, particularly when

defendant tried to kick him in the head. The prosecutor also argued that it would not be appropriate to reduce the convictions to misdemeanors, in light of defendant's prior conviction for assault with a deadly weapon (§ 245, subd. (a)(1)), for which he served two years in state prison. The court concluded that, although defendant "wasn't successful in hitting the deputy, it was felony conduct." The court denied the motion.

B. Relevant Law

Section 17, subdivision (b)(3), provides that "[w]hen a crime is punishable, in the discretion of the court, either by imprisonment in the state prison or imprisonment in a county jail under the provisions of subdivision (h) of Section 1170, or by fine or imprisonment in the county jail, it is a misdemeanor for all purposes [¶] When the court grants probation to a defendant without imposition of sentence and at the time of granting probation, *or* on application of the defendant or probation officer thereafter, the court declares the offense to be a misdemeanor." (Italics added.) In other words, section 17, subdivision (b)(3), empowers the trial court to declare a wobbler offense a misdemeanor, in that situation, upon application of the defendant. (§ 17, subd. (b)(3).) The decision to reduce a wobbler offense rests with the trial court's discretion. (*People v. Superior Court (Alvarez)* (1997) 14 Cal.4th 968, 977 (*Alvarez*)). The burden falls upon the defendant to demonstrate that the trial court's decision was irrational or arbitrary. (*Ibid.*) We presume the trial court acts to implement legitimate sentencing objectives. (*Ibid.*) The reviewing court may not substitute its views for those of the trial court. (*Id.* at p. 978.)

Factors that the court should consider in its exercise of discretion regarding section 17, subdivision (b) offenses include “the nature and circumstances of the offense, the defendant’s appreciation of and attitude toward the offense, or his traits of character as evidenced by his behavior and demeanor at the trial.’ [Citations.]” (*Alvarez, supra*, 14 Cal.4th at p. 978.)

Defendant has failed to show that the court abused its discretion in denying his motion to reduce his convictions to misdemeanors. The court heard the evidence presented and read and considered the probation officer’s report. The probation officer’s report stated that defendant believed he was assaulted and treated badly by the officers, and that he was “not remorseful for his own conduct whatsoever.” Furthermore, despite the evidence that defendant was intoxicated at the time of the incident, defendant did not believe his drinking presented a problem.³

Defendant claims that he poses no risk to society and, thus, the offenses should be considered misdemeanors. However, he ignores the severity of his conduct. First, he repeatedly kicked Officer Johnston when the officer was simply trying to take the handcuffs off of him. Defendant kicked for several seconds, and Officer Johnston had to step back to avoid him. Then, at Arrowhead Medical Center, when Officer Johnston removed defendant’s restraints so that he could be treated, defendant took advantage of the situation. He looked straight at Officer Johnston and immediately tried to kick him in

³ We note that the jury was instructed that voluntary intoxication is not a defense to resisting an executive officer.

the head. If not for Officer Johnston's quick reflexes, he could have been seriously injured.

On this record, we cannot say that the court's decision not to reduce defendant's convictions to misdemeanors was irrational or arbitrary. The court did not abuse its discretion.

II. Defendant's Pitchess Motion

On September 6, 2011, defendant moved for discovery of the police personnel records of Officer Johnston regarding any complaints of excessive force, aggressive conduct, unnecessary violence or force, false arrest, dishonesty, or false statements in reports. The trial court granted the motion and conducted an in camera review of Officer Johnston's personnel records. It concluded that there were no discoverable items.

Defendant now requests that we independently review the personnel records and determine whether the trial court abused its discretion in finding no discoverable items among the records. (See *People v. Jackson* (1996) 13 Cal.4th 1164, 1220 (*Jackson*), abrogated on other grounds as stated in *McGee v. Kirkland* (2009) 726 F.Supp.2d 1073, 1080.) Because the record does not include copies of the documents produced, we ordered augmentation of the record for the purpose of creating a record from which this court could determine whether the documents reviewed by the trial court are discoverable. (*People v. Mooc* (2001) 26 Cal.4th 1216, 1231.)

The subject records of the in camera hearing have been provided to us under seal. Our review of the materials reveals no discoverable information pertaining to issues of

excessive or unnecessary force, aggressive conduct, or dishonesty. We thus conclude that the trial court's decision was not an abuse of discretion. (See *Jackson, supra*, 13 Cal.4th at p. 1221.)

DISPOSITION

The judgment is affirmed.

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HOLLENHORST
Acting P. J.

We concur:

McKINSTER
J.

CODRINGTON
J.