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**IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
FIFTH APPELLATE DISTRICT**

THE PEOPLE,

Plaintiff and Respondent,

v.

FRED DALE BECK,

Defendant and Appellant.

F064570

(Super. Ct. No. 10CM8957)

OPINION

THE COURT*

APPEAL from a judgment of the Superior Court of Kings County. Thomas DeSantos, Judge.

Woodrow Edgar Nichols, Jr., for Defendant and Appellant.

Kamala D. Harris, Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Michael P. Farrell, Assistant Attorney General, Louis M. Vasquez, Leanne Le Mon, and Lewis A. Martinez, Deputy Attorneys General, for Plaintiff and Respondent.

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* Before Kane, Acting P.J., Franson, J., and Peña, J.

Appellant Fred Dale Beck was convicted by jury on September 15, 2011, of one count of unlawfully and knowingly possessing marijuana while in Avenal State Prison (Pen. Code, § 4573.6),¹ and the jury found true the allegation that he had three prior strike convictions (§§ 667, subd. (b)-(i); 1170.12, subds. (a)-(d)). After the trial court struck two of Beck's previous strikes, he was sentenced to the upper term of four years in prison, doubled to eight years due to a remaining prior strike. His sentence was to run consecutively to his current prison stay.

On appeal, Beck contends that the trial court abused its discretion when it denied his posttrial motion for disclosure of personnel records pursuant to *Pitchess v. Superior Court* (1974) 11 Cal.3d 531 (*Pitchess*), in support of a new trial motion based on ineffective assistance of his trial counsel. The People concede that the trial court did not make an informed exercise of discretion in denying the motion as to two of the three officers at issue, and that a conditional reversal is necessary for the court to hold a new hearing on the motion. We accept the concession and remand for such a hearing.

STATEMENT OF THE FACTS

On September 26, 2010, Officers Jason Robles and Annette Raygoza were working in Facility 6, a visiting area for inmates' families and friends at Avenal State Prison. Robles had approximately nine years' experience in the job, Raygoza had approximately eight and one-half years' experience. Beck and Kenneth Lane, another inmate, were working as porters with Officers Robles and Raygoza. Porters clean Facility 6 and help visitors with using the vending machines and taking pictures, etc.

All inmates leaving the visiting facility are strip-searched before being taken back to their respective housing units in the prison to ensure that no contraband or weapons are on their person. At approximately 3:45 p.m., after Beck and Lane completed their shift,

¹ All statutory references are to the Penal Code.

they were searched by Officer Robles. Officer Raygoza, who was a few feet away around a corner, searched Beck and Lane's personal and work effects.

Officer Robles, who had worked with Beck for at least two years, thought Beck's behavior was unusual compared to previous strip searches; he was talkative and appeared nervous. Officer Robles noticed a lump in each of Beck's socks and, when he asked him what it was, Beck replied, "I think it's tobacco, boss." Upon Officer Robles's request, Beck removed two small bindles wrapped in latex glove tips, one from each sock. Beck then said he "really messed up." Officer Robles called to Officer Raygoza, who entered the room in time to see Beck remove the items from his socks and hand them over to Officer Robles. Both officers recognized that the two bindles appeared to be marijuana.

Officer Raygoza handcuffed Beck and placed him in a holding cell and escorted Lane to a separate visiting room. She then placed the two bindles into an evidence bag, sealed it, and placed it in the evidence room. The two bindles were later transported by correctional officer Alejandro Cortez to the Department of Justice for testing and found to be marijuana.

Beck testified in his own behalf that he and Officer Robles initially had a good working relationship which eventually soured when Beck would no longer provide the officer with information about illegal activity he witnessed or heard in the prison. Officer Robles then began to engage in acts that effectively amounted to harassment. On one occasion, Officer Robles locked Beck in a closet after he asked him to retrieve a floor buffer. According to Beck, he was in the closet for over an hour and fell asleep. Officer Robles took a Polaroid picture of Beck while he was sleeping and showed it to Officer Raygoza and Beck's mother. Officer Raygoza testified that she never saw the alleged photo; Beck's mother said she was shown a regular photo, not a Polaroid; and Officer Robles denied the incident ever occurred.

Beck also claimed that Officer Robles pepper sprayed him on about four separate occasions, while he defecated when at work. Beck did not report any of the harassment to prison officials, because doing so would only have made matters worse.

Officer Robles did admit to drawing a cartoon caricature of Beck, depicting the scenario resulting in the loss of one of Beck's fingers as a child, because Beck suggested that Officer Robles make the drawing. Officer Raygoza, Beck, and Beck's parents all laughed when shown the drawing.

Beck claimed he saw Officers Robles and Raygoza watching pornography on a cell phone while they were working. Officer Robles testified that it is against prison policy for officers to bring personal cell phones to work.

On the day of the incident in question, before being processed to return to their cells, Beck testified that Officer Robles asked him to pick something off the floor and Beck said that the items were not his. Lane claimed the items looked like trash. Beck testified that he complied and handed the items from off the floor to Officer Robles, who then asked Lane to leave the room.

Beck testified that he did not know for certain where Officer Raygoza was at this point. He also testified that Officer Robles radioed Officer Raygoza to let Lane out of the room. After Lane left the room and Officer Raygoza entered, Officer Robles showed Beck two bindles and said, "Look what he have here" and " Look what our friend had on him." Beck said he told the officers, "You know that's not mine." Beck denied telling Officer Robles that he "screwed up," and he knew he would be searched before being sent back to his cell.

On rebuttal, Officer Robles testified that anyone in the visiting room would have felt the effects of pepper spray even if only a small amount was released in the room. He would never pepper spray Beck as a practical joke while Beck defecated in the restroom because he would feel the effects as well. There was one occasion when Officer Robles accidentally deployed pepper spray in the visiting room when the can caught a door

handle. Beck, Officer Raygoza and another porter were all working at the time. Officer Robles immediately exited the facility because of the spray's effect and when he returned, Officer Raygoza told him Beck was in the restroom.

Officer Robles liked the visiting area kept clean. On the day in question, Officer Robles made sure the area was clean of debris. Officer Robles would never have strip-searched Beck and Lane before their cleaning duties were completed because that would allow them to retrieve something after the fact.

Avenal State Prison discontinued use of Polaroid cameras in October or November of 2008.

DISCUSSION

Beck's only argument on appeal is that the trial court abused its discretion when it denied his posttrial *Pitchess* motion.

Background Proceedings

September 15, 2011

Immediately after the jury began deliberations, Beck's trial counsel informed the trial court that Officer Cortez, the court liaison officer, allegedly signaled witnesses Officer Robles and Officer Raygoza while on the witness stand. Although the trial court stated that it did not witness the alleged signaling during trial, it did grant the People's motion to preserve the courtroom video of the trial surrounding the alleged witness signaling to exonerate Officer Cortez (hereinafter referred to as the video).

Beck's trial counsel then moved for a mistrial based on witness misconduct, prosecutorial misconduct, and due process violation. After argument on the motion, the trial court denied the motion, but stated that it would request that the video be preserved. The trial court also informed Beck that it would entertain any future written motions and would reconsider its prior decisions. The jury subsequently found Beck guilty as charged.

October 14, 2011

Before sentencing, Beck retained Woodrow E. Nichols, Jr., to substitute in for the purpose of filing a motion for new trial.

November 29, 2011

Nichols filed a motion for new trial alleging witness interference by correctional officers and ineffective assistance of counsel for trial counsel's failure to make a timely *Pitchess* motion.

December 19, 2011

The trial court continued sentencing to determine whether or not a *Pitchess* motion could be made post-trial.

January 13, 2012

Nichols filed a posttrial *Pitchess* motion seeking review of Officers Cortez's, Robles's, and Raygoza's personnel files. The California Department of Corrections opposed the motion. In his motion, Beck noted that his defense at trial was that Officers Robles and Raygoza planted marijuana on him, resulting in his being falsely arrested. His *Pitchess* motion alleged that Officers Robles and Raygoza committed perjury at trial and that witness interference occurred when Officer Cortez, who was allowed to remain in the courtroom during trial, signaled Officers Robles and Raygoza during their testimonies so that their versions of the events coincided with each other. The motion requested a review of the three officers' personnel files to determine if they had previously engaged in similar acts, which would support the motion for new trial based on a claim on ineffective assistance of counsel.

March 16, 2012

At the hearing on the *Pitchess* motion, counsel argued that the first prong of a *Pitchess* motion was met because both Beck and his parents witnessed Officer Cortez signaling Officers Robles and Raygoza while they testified to ensure their testimonies coincided with each other. Beck's defense was that Officer Robles told him to pick the

items off the floor in the visiting area, which he claimed were never in his socks and were later determined to be bindles of marijuana. Officer Raygoza testified at trial that she witnessed Beck hand the bindles to Officer Robles, although Beck and Lane both testified that she was not in the room to witness the event.

The People opposed the motion, arguing that Beck and his parents' assertions that they witnessed the alleged signaling were insufficient. The People also argued that the motion failed to specify and explain which particular statements of the officers were misrepresented or incorrect.

Both parties then agreed that the trial court could make its ruling based on the video, Beck's declarations on his *Pitchess* motion, and argument at the hearing. The trial court then stated that it had already reviewed the video from September 14, 2011,² several times. The video was not continuous, but instead a frame-by-frame freeze of courtroom events. The trial court stated that it specifically focused on the testimonies of Officers Robles³ and Raygoza, and that it had pulled court transcripts to determine when the alleged signaling occurred. Based on its review, the trial court stated it did not notice anything abnormal because multiple parties' movements in the courtroom, such as leaning back and forth in their chairs, were similar to the movements of Officer Cortez. Determining that no signaling occurred, the trial court denied Beck's *Pitchess* motion.

The trial court then heard argument and denied Beck's new trial motion, which was based on the same arguments as those made at his *Pitchess* motion.

Applicable Law and Analysis

To compel discovery of confidential materials in police personnel files, a defendant must file a motion supported with affidavits that demonstrate good cause under

² The reporter's transcript incorrectly states that the trial court reviewed the video for September 14, 2012.

³ The reporter's transcript incorrectly refers to Officer Robles as Officer Rojas.

the criteria of materiality to the present litigation and the reasonable belief that these records are in the possession of the police agency; the showing needs to meet only a relatively low threshold to compel discovery. (Evid. Code, § 1043, subd. (b)(3); *Warrick v. Superior Court* (2005) 35 Cal.4th 1011, 1019.) Because Beck had already been convicted, the present litigation at issue was his new trial motion based on a claim of ineffective assistance of counsel. (*People v. Nguyen* (2007) 151 Cal.App.4th 1473, 1475, 1478.) Upon finding good cause, the trial court must then review the records in camera and disclose “only that information falling within the statutorily defined standards of relevance.” (*Warrick v. Superior Court, supra*, 35 Cal.4th at p. 1019.)

To determine what constitutes materiality, defense counsel must propose a defense logically linked to the pending charges that involves a plausible and specific scenario of police misconduct, and articulate with specificity the type of evidence of misconduct the motion seeks, as well as the manner in which it would support the defense with admissible evidence (or lead to admissible evidence supporting the defense), or impeach the accounts of any officers involved in the defendant’s arrest. (*Warrick v. Superior Court, supra*, 35 Cal.4th at pp. 1021, 1026-1027.)

A trial court’s decision on a *Pitchess* motion is reviewed under an abuse of discretion standard. (*People v. Jackson* (1996) 13 Cal.4th 1164, 1220-1221, citing *People v. Breaux* (1991) 1 Cal.4th 281, 311-312.) The exercise of such discretion “must not be disturbed on appeal *except* on a showing that the court exercised its discretion in an arbitrary, capricious or patently absurd manner that resulted in a manifest miscarriage of justice.” (*People v. Jordan* (1986) 42 Cal.3d 308, 316.)

Beck contends that the trial court abused its discretion in denying his *Pitchess* request for discovery regarding acts of dishonesty by Officers Cortez, Robles and Raygoza. We agree as to Officers Robles and Raygoza, and respondent concedes the issue.

Officers Robles and Raygoza testified that they were present at the time marijuana was found on Beck's person. Beck alleged in his *Pitchess* motion that the officers planted the evidence against him. This claim meets the "relatively low threshold for discovery" (*City of Santa Cruz v. Municipal Court* (1989) 49 Cal.3d 74, 83.) There is a logical link between Beck's defense, that the marijuana was planted on him, and the claim of ineffective assistance based on the claim that had trial counsel made the *Pitchess* motion during trial it would have resulted in discoverable information that would have helped support his defense of impeaching the officer's version of the events. (*Warrick v. Superior Court, supra*, 35 Cal.4th at p. 1021.) Respondent accordingly concedes that Beck established good cause to review *Pitchess* material relating to acts of dishonesty by Officers Robles and Raygoza.

"[T]he proper remedy when a trial court has erroneously rejected a showing of good cause for *Pitchess* discovery and has not reviewed the requested records in camera is not outright reversal, but a conditional reversal with directions to review the requested documents in chambers on remand" and grant any appropriate discovery. (*People v. Gaines* (2009) 46 Cal.4th 172, 180.) Here, that discovery would consist of any information that would lead to a different trial result. (*People v. Nguyen, supra*, 151 Cal.App.4th at p. 1478.)

But respondent disagrees, as do we, that the trial court erred when it refused to review Officer Cortez's personnel files. Beck did not claim Officer Cortez helped plant the marijuana on him or that he was present at the time of the incident. And although Beck claims he was entitled to discovery of Officer Cortez's personnel file because he allegedly signaled Officers Robles and Raygoza during trial, the trial court reviewed the video several times, focusing on Officers Robles's and Raygoza's testimonies, and specifically found that no signaling occurred. We cannot say that the trial court abused its discretion when it refused to review Officer Cortez's personnel records.

DISPOSITION

The judgment is conditionally reversed and remanded. The trial court is directed to conduct a new *Pitchess* hearing at which it shall conduct an in camera review of any records relating to alleged acts of dishonesty by Officers Robles and Raygoza and order discovery of any discoverable information that would lead to a different trial result. (*People v. Nguyen, supra*, 151 Cal.App.4th at p. 1478.) If there is no discoverable information or prejudice to Beck from the denial of the original motion, the judgment and order shall be reinstated as of the date of its ruling to that effect.