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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE,

Plaintiff and Respondent,

v.

ROBERT MICHAEL BATISTE,

Defendant and Appellant.

G044410

(Super. Ct. No. 10WF0460)

O P I N I O N

Appeal from a judgment of the Superior Court of Orange County, Patrick Donahue and Carla Singer, Judges. Reversed in part and remanded with directions.

Jean Matulis, 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, Barry Carlton and Scott C. Taylor, Deputy Attorneys General, for Plaintiff and Respondent.

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Defendant Robert Michael Batiste was convicted of the unlawful taking or driving of a vehicle (Veh. Code, § 10851, subd. (a) and possession of drug paraphernalia (Health & Saf. Code, § 11364, subd. (a)) but acquitted of receiving stolen property (Pen. Code, § 496, subd. (a)). He then admitted two prison priors (Pen. Code, § 667.5, subd. (b)), a previous conviction for violating Vehicle Code section 10851, and a prior serious conviction for arson (Pen. Code, § 451, subd. (d)) within the meaning of Penal Code sections 667, subdivisions (d) and (e)(1) and 1170.12, subdivisions (b) and (c)(1). The court sentenced him to double the three-year midterm on the Vehicle Code violation and struck the prior prison terms.

Defendant asserts the court erred by failing to review the arresting officer's personnel files pursuant to his *Pitchess* (*Pitchess v. Superior Court* (1974) 11 Cal.3d 531) motion, a claim with which the Attorney General agrees, and excluding one of his categories of documents from consideration of the *Pitchess* motion. We agree both of these arguments have merit. Defendant also maintains the conviction under the Vehicle Code was not supported by substantial evidence and the court abused its discretion in sentencing.

We conditionally reverse the judgment so the court may conduct the proper in camera review, including the documents as to illegal detentions, searches, seizures, and make orders based thereon. We affirm the remainder of the judgment.

FACTS

One afternoon defendant drove to the parking lot of an adult bookstore in a Scion, parked the car, and began walking away from the store. Officer Nathan Morton had been watching the store for illegal activity. Morton approached defendant and, after defendant agreed to speak to him, asked defendant if he was on probation or parole. Defendant acted nervous and began to sweat heavily, looking over his shoulder. When

defendant permitted Morton to pat him down, Morton found a glass pipe typically used to smoke methamphetamine and a key to the Scion. A check on the license plate of the Scion revealed the plate was stolen and the Scion's vehicle identification number did not match the plate. The license plate belonged to a car owned by Nancy Valenzo, who had reported the theft of the plate a few days earlier.

When Morton transported defendant to the police station he learned the Scion was owned by Renita Oliver and driven by Morissa Wentworth, who had reported it stolen. Two days before the car was stolen Wentworth discovered the key to her car was missing. Defendant did not have permission to drive the car or use the license plate.

After he read defendant his rights, Morton asked defendant about the Scion. Defendant first denied driving it, saying he had walked to the parking lot. On further questioning, which he requested be kept "off the record," defendant admitted he had been driving the car, that his friend Jimmy had given it to him, and knew Jimmy did not rightfully possess it.

DISCUSSION

1. Pitchess Motion

a. Introduction

A criminal defendant has the right to discover certain personnel records of a police officer in support of the right of a fair trial and defense. (*Pitchess v. Superior Court, supra*, 11 Cal.3d at p. 535; *City of San Jose v. Superior Court* (1998) 67 Cal.App.4th 1135, 1141-1142; Pen. Code, §§ 832.7, 832.8; Evid. Code, §§ 1043 through 1045.) Defendant must show good cause for the discovery by detailing the records sought. The elements necessary to show good cause are the materiality of the information, defendant's reasonable belief the agency from whom the records are sought possesses them, and an explanation of how defendant will use the information in

defending the action. (*Warrick v. Superior Court* (2005) 35 Cal.4th 1011, 1016, 1021.) Defendant must “establish a plausible factual foundation for the claim of officer misconduct.” (*Id.* at p. 1025.) “[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. [Citation.]” (*Garcia v. Superior Court* (2007) 42 Cal.4th 63, 71.)

If the court finds good cause it is then required to conduct an in camera review of the records to decide which records, if any, should be disclosed. (*People v. Gaines* (2009) 46 Cal.4th 172, 179; Evid. Code, § 1045, subd. (b).) The custodian of the records must produce “all ‘potentially relevant’ documents.” (*People v. Mooc* (2001) 26 Cal.4th 1216, 1228-1229.) The custodian need not bring records it believes are not responsive or irrelevant to the motion. (*Ibid.*) But the court must inquire, on the record, as to the basis for that determination and the custodian must disclose which documents were produced and why. (*Ibid.*)

The court is also required to examine the documents produced and to disclose those relevant to the subject matter of the action and not excluded by statute. (*People v. Mooc, supra*, 26 Cal.4th at pp. 1226-1227; Evid. Code, § 1045, subd. (b).) The court must make a record of the documents it examined for appellate review. (*People v. Mooc, supra*, 26 Cal.4th at pp. 1227-1228.)

Before trial defendant filed a *Pitchess* motion seeking disclosure of the personnel records of Morton pertaining to the following categories: 1) Lack of credibility and falsification of police reports; 2) Acts of moral turpitude; 3) Illegal detentions and searches and seizures; 4) Material covered by *Brady v. Maryland* (1963) 373 U.S. 83 [83 S.Ct. 1194, 10 L.Ed.2d 215]; 5) Prior law enforcement employment; 6) Whether any law enforcement agency was investigating his actions in this case; and 7) Whether, in the current case, he had been disciplined and if so, its nature. The declaration of defendant’s counsel stated that his “entire motion to suppress/and or trial will rest on the credibility and

actions” of Morton, who “will be the primary witness for the prosecution at the motion to suppress.” In a supporting declaration and at argument on the motion defense counsel stated that defendant denied making many of the statements Morton claimed and had included in his police report.

The court found defendant had shown good cause for an in camera review for certain of the documents requested; this did not include the documents as to any discipline resulting from an investigation of Morton’s conduct in this case or as to illegal detentions, searches, and seizures.

In chambers, the court asked the custodian if any of the documents concerned dishonesty; the custodian answered no. It also asked if there were complaints as to “dishonesty, lack of credibility, [or] falsifying police reports,” to which the custodian replied, “[n]othing along those lines.” To which the court said, “That’s the only thing that’s relevant . . . based on my review” After the custodian stated there were no documents dealing with dishonesty, the court asked if there was “[a]nything else that you think might be relevant to anything,” and the custodian again answered no. The court then ruled that as a result of its questions, there were no documents to produce.

b. In Camera Hearing

As defendant argues and the Attorney General concedes, the court erred with respect to the motion. First, the record does not show it reviewed any documents; in fact it appears more likely it did not. Indeed, it is not even certain the custodian produced documents. There are no documents in the clerk’s transcript and a clerk’s affidavit stated everything dealing with the *Pitchess* motion had been included in the transcript. Further, the court did not inquire as to the basis for the custodian’s determination documents were not relevant.

Where there is such a failure, the proper remedy is to provisionally reverse the judgment and remand the case back to the trial court to conduct the in camera review

and to obtain a summary from the custodian as to documents not presented to the court. (*People v. Gaines, supra*, 46 Cal.4th at pp. 180-181; *People v. Wycoff* (2008) 164 Cal.App.4th 410, 415.) If none of the documents are discoverable, the judgment should be reinstated.

If the files contain relevant documents, defendant must then have the opportunity to show he was prejudiced by denial of discovery, that is, that it is reasonably probable “the outcome of the case would have been different” (*People v. Gaines, supra*, 46 Cal.4th at p. 181.) If he meets this threshold a new trial must be ordered. (*Ibid.*)

c. Documents Regarding Illegal Detentions, Searches, and Seizures

Defendant also asserts the court erred when it excluded the documents involving illegal detentions, searches, and seizures from the scope of the *Pitchess* motion. He claims his purported confession, presumably as to his knowledge the car was stolen, occurred after he was detained, searched and arrested. He concludes from this that the credibility of the officer and whether the detention and arrest were lawful “will be the main factors in determining the validity of [his] suppression motion.”

Defendant correctly notes that the showing of good cause to grant a *Pitchess* motion has a ““a relatively low threshold.”” (*Warrick v. Superior Court, supra*, 35 Cal.4th at p. 1019.) We agree he has met the threshold with regard to these documents. If complaints against Morton had been made on this basis it would obviously affect his credibility, which would be relevant to determining the motion to suppress. (See *Brant v. Superior Court* (2003) 108 Cal.App.4th 100, 108-109 [*Pitchess* discovery is appropriate when a defendant seeks information to assist in a motion to suppress”].)

Defendant has additional evidence as to Morton that he did not use the available recording device when he spoke to defendant at the bookstore nor did he preserve the video of the interview at the jail. Further, he shredded his notes of the latter

interview. And, based on the court's discussion with the custodian, there may be a complaint in Morton's file, although the subject of it is unknown. When the court inquired whether there were any internal citizen complaints, the custodian asked for a clarification of the subject, to which the court replied "dishonesty." The custodian advised there were no documents on that topic.

When the court conducts the in camera review on remand it should include documents within this topic in the scope of the review. As stated above, if there are any relevant documents in the file, defendant shall have the chance to show prejudice.

2. *Substantial Evidence*

Defendant maintains there was insufficient evidence supporting his conviction for the unlawful taking or driving of a vehicle. He claims there is no evidence he knew the car was stolen.

"In reviewing the sufficiency of the evidence, we must determine "whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." [Citation.] We must presume in support of the judgment the existence of every fact that the trier of fact could reasonably deduce from the evidence. [Citation.]" (*People v. Medina* (2009) 46 Cal.4th 913, 919, italics omitted.) The "same standard [applies] to convictions based largely on circumstantial evidence. [Citation.]" (*People v. Martinez* (2008) 158 Cal.App.4th 1324, 1329.) Circumstantial evidence is often required to prove a defendant's state of mind, including knowledge. (*People v. Lewis* (2001) 26 Cal.4th 334, 379.)

The elements of a violation of Vehicle Code section 10851 are defendant taking or driving a vehicle that does not belong to him without consent of the owner and with a "specific intent to permanently or temporarily deprive the owner of title or

possession. [Citation.]” (*People v. O’Dell* (2007) 153 Cal.App.4th 1569, 1574, fn. omitted.)

“Possession of recently stolen property itself raises a strong inference that the possessor knew the property was stolen; only slight corroboration is required to allow for a finding of guilt. [Citation.] This principle . . . applies . . . to the unlawful driving of a vehicle. [Citation.]” (*People v. O’Dell, supra*, 153 Cal.App.4th at p. 1574.) A defendant who, although he did not take a vehicle, drives it knowing he is “depriving the owner of possession,” demonstrates knowledge under the statute. (*People v. Green* (1995) 34 Cal.App.4th 165, 179-180.)

Here the evidence supporting the conviction is strong. He admitted he knew the car was stolen. He made inconsistent statements about his possession of the car, first telling Morton he was not driving it, then explaining his friend Jimmy had loaned him the car, and finally at trial testifying his friend Brian was the one who had given it to him. (*People v. Clifton* (1985) 171 Cal.App.3d 195, 200 [guilt may be inferred where a defendant’s explanation of possession is untrue].)

Defendant points to contrary evidence, including his testimony he did not know the car was stolen until he heard it on the police radio when he was being transported to jail and that was the basis for his statement of knowledge to Morton. He claims Morton’s testimony, even if true, does not prove his knowledge. Not so. Morton testified defendant told him “he knew the car was stolen.” That alone is sufficient to establish knowledge. (*People v. Young* (2005) 34 Cal.4th 1149, 1181 [testimony of one witness sufficient to sustain a conviction].) The fact that he also testified defendant was in the car when the information came through on his radio does not prove that was defendant’s first knowledge.

Defendant also argues Morton’s testimony was unreliable because he did not use his recorder during the interview, shredded his notes, and failed to safeguard the

video of the interview, claiming his testimony “was not ‘credible[] and of solid value’” as required. (*People v. Medina, supra*, 46 Cal.4th at p. 919.) Although *Reeves v. MV Transportation, Inc.* (2010) 186 Cal.App.4th 666, 681, which he cites, does state that “[d]estruction of ‘relevant evidence’ . . . can support an inference that the evidence would have been unfavorable,” this was in the context of a spoliation claim, and in any event the destruction is merely a fact for the jury to consider in evaluating Morton’s testimony. We do not reweigh credibility. (*People v. Ochoa* (1993) 6 Cal.4th 1199, 1206.)

3. Sentencing

Defendant argues his six-year sentence of double the midterm was an abuse of discretion because the prosecutor recommended a lower sentence and the court erroneously believed the Rules of Court did not include a mitigating factor on which the prosecution relied. We are not persuaded.

First the prosecution recommended a six-year sentence based on double the two-year low term plus one year each for the two prison priors. It believed defendant had not stolen the car, although he knew it was stolen, and had used the car to buy drugs. The prosecution also expressed sympathy for defendant’s upbringing.

The court stated these were not mitigating factors and pointed to defendant’s past criminal history. It also noted that it been considering a 10-year sentence but was reducing it based on the prosecution’s argument and recommendation by striking the priors. It found no mitigating circumstances.

The court has broad discretion in sentencing and we uphold its decision unless it is irrational or arbitrary. (*People v. Carmony* (2004) 33 Cal.4th 367, 376-377.) When a statute provides for three possible terms the court has discretion to choose and the midterm is presumptively correct. (*People v. Weaver* (2007) 149 Cal.App.4th 1301, 1324; Pen. Code, § 1170, subd. (b); Cal. Rules of Court, rule 4.420(a).)

Second, defendant has not shown any alleged error was prejudicial. (*People v. Weaver, supra*, 149 Cal.App.4th at p. 1325.) We may not reverse without a showing it is reasonably likely defendant would have received a lesser sentence. (*Ibid.*)

DISPOSITION

The judgment is conditionally reversed. Upon remand, if the defendant requests, the court shall conduct an in camera review of the discoverable material, including documents dealing with unlawful detentions, searches, and seizures. If the court finds any discoverable documents they shall be produced and it shall conduct any necessary or appropriate hearings. If the court finds there are no relevant documents or, after discoverable documents are produced, defendant cannot show prejudice by denial of production, the judgment shall be reinstated as of that date. If defendant shows prejudice, a new trial should be ordered. The judgment is affirmed in all other respects.

RYLAARSDAM, ACTING P. J.

WE CONCUR:

BEDSWORTH, J.

MOORE, J.