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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.

DENNIS PATRICK MALAVASI,

Defendant and Appellant.

G045802

(Super. Ct. No. 10WF1505)

O P I N I O N

Appeal from a judgment of the Superior Court of Orange County, Thomas M. Goethals and Lance Jensen, Judges. Affirmed.

William D. Farber, 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, A. Natasha Cortina and Heather M. Clark, Deputy Attorneys General, for Plaintiff and Respondent.

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A jury convicted Dennis Patrick Malavasi of driving under the influence (DUI) of alcohol (Veh. Code, § 23152, subd. (a)) and driving with a blood-alcohol concentration (BAC) of .08 percent or higher (§ 23152, subd. (b)). Malavasi admitted he had suffered a prior conviction for driving under the influence within 10 years (Veh. Code, § 23550.5, subd. (a)) and the trial court found he had served five prior prison terms (Pen. Code, § 667.5, subd. (b); all statutory citations are to the Penal Code unless noted). Malavasi contends police officers illegally arrested him (§ 836), and trial court erred in denying his motion to suppress evidence (§ 1538.5). Malavasi also seeks review of the trial court's denial of his motion to disclose police officer personnel records. (*Pitchess v. Superior Court* (1974) 11 Cal.3d 531 (*Pitchess*)). For the reasons expressed below, we affirm.

I

FACTUAL AND PROCEDURAL HISTORY

On the afternoon of July 4, 2010, Bruce Hall heard the sound of a “popping clutch” and saw a man, who he identified at the scene as Malavasi, make a U-turn and park his black truck across the street from Hall's house along the west curb of Clubhouse Lane in Huntington Beach. Hall watched as Malavasi made several trips carrying items between the truck and a house on the corner of Clubhouse Lane and Heil Avenue. Malavasi staggered and appeared to be intoxicated. When Hall saw Malavasi get into the truck again, he decided to call the police to report a drunk driver.

Officers received the dispatch at 7:10 p.m. and arrived about 14 minutes later. They found Malavasi seated in the driver's seat of the truck with the engine running. The officers found a half-empty, 40-ounce bottle of King Cobra malt liquor on the seat next to Malavasi, and a partially consumed bottle of vodka elsewhere in the

truck. Malavasi displayed signs of intoxication, and failed field sobriety tests. He told an officer he had a bad back, neck, and shoulders, and took Vicodin and Soma. He claimed he “wasn’t driving.” He admitted consuming two beers and that he started drinking around 11:00 a.m. A blood sample drawn at 8:32 p.m. registered .24 percent BAC. A man Malavasi’s size (220 pounds) would require 16 standard-size drinks to achieve a .24 percent BAC.

A helicopter officer saw Malavasi’s truck parked and unoccupied on Clubhouse Lane at 7:13 p.m. Malavasi’s brother, Bill, arrived around 5:30 p.m. to help his brother move. Bill saw the pickup parked when he arrived, and never saw anyone, including his brother, drive it. An orthopedist treating Malavasi since 2009 stated Malavasi had a limited range of motion, walked slowly bent forward and limped.

Following a trial in June 2011, a jury convicted Malavasi as noted above. In August 2011, the trial court imposed and suspended execution of a five-year prison term, and placed Malavasi on probation on various terms and conditions, including service of a 360-day jail term, and completion of a one-year residential alcohol treatment program.

II

DISCUSSION

A. *The Court Did Not Abuse Its Discretion in Denying Pitchess Discovery*

Before trial, Malavasi moved to discover information from the personnel files of Huntington Beach Police Officers Michael J. Dexter, Jason K. Burton, and Philip Scott. (Evid. Code, §§ 1043-1046; §§ 832.5, 832.8; *Pitchess*, *supra*, 11 Cal.3d 531.) He sought information related to credibility, including falsification of police reports, planting evidence, and other acts involving moral turpitude. Defense counsel asserted Malavasi

“dispute[d] the truth of the officers’ claim [in police reports] that he was passed out behind the wheel of a motor vehicle while the engine was running”

In November 2010, the trial court found good cause to review the records of Dexter and Burton and reviewed their files in camera with the custodian of records, Officer Chad Nichols. The trial court found nothing discoverable in either officer’s file.

In his opening brief, Malavasi asked this court to review the *Pitchess* ruling. We ascertained our record did not contain a copy of the records the trial court reviewed, nor did the trial court describe the content of the documents reviewed on the record to allow this court to provide meaningful appellate review. (See *People v. Mooc* (2001) 26 Cal.4th 1216.) We directed the trial court to transmit the records if it retained a copy, or to hold a hearing to augment the record with the documents the trial court previously had considered.

At an in camera hearing on September 5, 2012, Nichols provided, with three exceptions, a copy of the records the court had reviewed in November 2010. We have reviewed those records, and conclude they contain no discoverable information related to the officers’ credibility, falsification of police reports, planting evidence, or other acts involving moral turpitude.

Nichols advised the trial court three records reviewed by the court in November 2010 had been “purged” pursuant to department policy. (See § 832.5, subd. (b) [complaints and any reports or findings relating to these complaints shall be retained at least five years].) The department purged one record involving Dexter, and two records involving Burton. Nichols supplied the trial court with the written synopses of the incidents he had provided to the court in November 2010. We have reviewed Nichols’s synopses. The incidents, as summarized by Nichols, reflect the purged records

did not contain discoverable material. Because Nichols's synopses accurately summarize the other incidents for which records still exist, and the trial court previously found nothing discoverable after reviewing the complete file (see Evid. Code, § 664 [presumed that official duty has been regularly performed]), we conclude Malavasi did not suffer prejudice from the department's purging of records without the opportunity for appellate review.¹ The trial court did not abuse its discretion in denying discovery of information from the officers' personnel files.

B. *The Trial Court Did Not Err in Denying Malavasi's Motion to Suppress Evidence*

Malavasi contends his arrest was unlawful because the officers did not perceive his act of driving under the influence. (See § 836.) For the reasons expressed below, we disagree.

Dexter and his partner, Burton, testified at the suppression hearing they received a dispatch on the evening of July 4, 2010, concerning a drunk driver. A neighbor, Bruce Hall, had called the police at 7:09 p.m. and reported seeing a man outside of a vehicle looking around the street. Hall stated the truck had been moving earlier. The officers arrived at 7:24 p.m. and found Malavasi passed out in the driver's seat of a black pickup truck, with his head down. The engine was running with the transmission in park. Dexter spoke to Malavasi through the open window. He appeared confused and disoriented. Malavasi slurred his speech, his eyes were watery and bloodshot, and he emitted a strong odor of alcohol. Malavasi stated he was okay. Dexter

¹ Nichols acknowledged there was no process in place to prevent purging of records in criminal cases where the defendant has appealed a *Pitchess* ruling. We suggest that in future criminal cases involving *Pitchess* motions, at least where the trial court does not retain a copy of the records it reviews, the trial court should notify the city attorney's office the defendant has appealed, and direct the city not to purge records potentially involved in the appeal. The city can track the progress of the defendant's appeal and purge the records after the appellate process has run its course.

asked Malavasi to step out of the vehicle. He performed a patsearch and found a marijuana pipe in Malavasi's left hand. Burton removed a half-full, 40-ounce bottle of King Cobra malt liquor from the passenger seat.

Scott continued the DUI investigation with Malavasi. He administered field sobriety tests and concluded Malavasi was under the influence of an alcoholic beverage.

Dexter spoke with Malavasi's girlfriend, Carol Moore, who had flagged him to come over. Moore explained they had been in the process of moving into a nearby house on Heil Avenue and Clubhouse Lane. Malavasi and his son returned to a motel or storage unit to get another load. At the time he departed, Malavasi was not intoxicated, but he returned inebriated. Malavasi and Moore decided to attend a Fourth of July fireworks show at the pier. Moore went to the bathroom to put on makeup and brush her teeth. When she came outside, the truck was parked in a different location than where she last saw it about 10 or 15 minutes earlier. Malavasi previously told her he needed to move the truck before they left for the fireworks show.

Hall told Burton he was inside his home when he heard tires screeching. He looked out his window and saw Malavasi's truck make an unsafe U-turn from northbound to southbound Clubhouse Lane, and park along the west curb facing south. Malavasi exited the vehicle, and walked back and forth between the truck and a house at the corner of Heil Avenue and Clubhouse Lane several times. Malavasi staggered, and Hall described him as "obviously drunk." Malavasi returned to the truck and started the ignition. According to Hall, the officers arrived about 20 minutes after Malavasi drove the vehicle.

A police helicopter officer testified Malavasi's vehicle was unoccupied between 7:13 and 7:15 p.m. Malavasi's brother, Bill, testified Malavasi's car was parked on Clubhouse Lane facing south when he arrived at the house around 5:30 p.m. Malavasi walked between the house and truck a few times over the next two hours. Bill did not see his brother inside the truck.

Moore testified Malavasi left for a final load around 3:00 p.m. with his 22-year-old son and the son's friend. They drove "another vehicle," not the black truck. Moore had parked the black truck around 3:00 p.m., and she parked it "facing southbound on Clubhouse [where it remained] the entire time from 3:00 to 7:30 [p.m.]" When Malavasi and the boys returned around 5:00 p.m., Malavasi was sober. He entered the house, took pain medication, and drank beer and vodka. He stopped drinking around 7:00 p.m. when they left the house. Malavasi stood about six feet from the truck when the police officers arrived. Moore claimed she told Dexter she "wasn't sure" if the black truck had been parked facing northbound on Clubhouse Lane until 7:00 p.m.

The standard of appellate review of a trial court's ruling on a motion to suppress evidence is well established. In reviewing the denial of a suppression motion pursuant to section 1538.5, we evaluate the trial court's express or implied factual findings to determine whether they are supported by substantial evidence; but we exercise our independent judgment to determine whether, on the facts found, defendant's Fourth Amendment rights have been violated. (*People v. Glaser* (1995) 11 Cal.4th 354, 362.) "Cause to arrest exists when the facts known to the arresting officer would lead a person of ordinary care and prudence to entertain an honest and strong suspicion that the person arrested is guilty of a crime." (*People v. Price* (1991) 1 Cal.4th 324, 410; *People v. Kraft* (2000) 23 Cal.4th 978, 1037.) Finally, in assessing the reasonableness of searches

and seizures, we apply federal constitutional standards. (*People v. Rogers* (2009) 46 Cal.4th 1136, 1156, fn. 8.)

Malavasi contends the officers violated section 836, and his arrest was therefore unlawful, because the officers did not have probable cause to believe he committed a misdemeanor violation of Vehicle Code section 23152 by driving in their presence.² Section 836 provides in relevant part, “(a) A peace officer may arrest a person in obedience to a warrant, or, pursuant to the authority granted to him or her by Chapter 4.5 (commencing with Section 830) of Title 3 of Part 2, without a warrant, may arrest a person whenever any of the following circumstances occur: [¶] (1) The officer has probable cause to believe that the person to be arrested has committed a public offense *in the officer’s presence*. [¶] (2) The person arrested has committed a felony, although not in the officer’s presence. [¶] (3) The officer has probable cause to believe that the person to be arrested has committed a felony, whether or not a felony, in fact, has been committed.” (Italics added.) Vehicle Code section 23152 provides “(a) It is unlawful for any person who is under the influence of any alcoholic beverage or drug, or under the combined influence of any alcoholic beverage and drug, to drive a vehicle. [¶] (b) It is unlawful for any person who has 0.08 percent or more, by weight, of alcohol in his or her blood to drive a vehicle.”

Malavasi relies primarily on *People v. Engleman* (1981) 116 Cal.App.3d Supp. 14 (*Engleman*). There, the officers found the defendant asleep at the wheel of his car parked with its engine running on the shoulder of a state highway. The defendant displayed symptoms of intoxication and the officers saw an open beer can on the

² Malavasi was ultimately charged with a felony after his prior convictions came to light. Our resolution of the issue does not turn on the distinction between felony and misdemeanor arrests.

dashboard of his car. The defendant failed field sobriety tests, and the officers arrested him. He moved to suppress the fruits of the arrest, including a breath alcohol test. The trial court denied the suppression motion, but the appellate department reversed. The appellate panel held the record did not support the defendant's arrest since it did not disclose defendant had driven in the presence of the officers. The court also noted there was no other basis to arrest the defendant and administer a breath test because there was no evidence defendant's car was illegally parked, there was no evidence the open beer can contained beer, and the record did not disclose the defendant was unable to care for his own or others' safety. The court held it was thus error to admit into evidence the breath test results. (*Id.* at p. Supp. 20; see *Mercer v. Department of Motor Vehicles* (1991) 53 Cal.3d 753 [warrantless arrest for misdemeanor drunk driving is invalid unless the police officer witnesses or perceives the act of driving under the influence].)

But as noted subsequently by the same court that decided *Engleman* (*People v. Wolterman* (1992) 11 Cal.App.4th Supp. 15), *Engleman* and similar cases are not good law in light of the "'Truth-in-Evidence' provision of the California Constitution [citation]. Since the passage of Proposition 8, decisions of the United States Supreme Court govern the application of the exclusionary rule in California criminal proceedings." (*Wolterman*, at p. Supp. 20.) The California Supreme Court has held that if the officer has probable cause to believe the individual has committed any criminal offense, a custodial arrest — even one effected in violation of state arrest procedures — does not violate the Fourth Amendment. (*People v. McKay* (2002) 27 Cal.4th 601, 618; see *People v. Thompson* (2006) 38 Cal.4th 811 (*Thompson*) [Fourth Amendment allows warrantless entry into the home to effect DUI arrest to prevent the destruction of blood-alcohol evidence; drunk driving did not occur in the officer's presence]; see also *People*

v. Redd (2010) 48 Cal.4th 691, 720, fn. 11.) Although the United States Supreme Court has not definitively resolved the issue (see *Atwater v. City of Lago Vista* (2001) 532 U.S. 318, 340 fn. 11 [“We need not, and thus do not, speculate whether the Fourth Amendment entails an ‘in the presence’ requirement for purposes of misdemeanor arrests”]), we conclude there is no federal constitutional “in the presence” requirement for warrantless misdemeanor driving under the influence arrests. (See *Barry v. Fowler* (9th Cir. 1990) 902 F.2d 770, 772 [“The requirement that a misdemeanor must have occurred in the officer’s presence to justify a warrantless arrest is not grounded in the Fourth Amendment”]; *Woods v. City of Chicago* (7th Cir. 2000) 234 F.3d 979, 995.)

Here, the officers had ample cause to arrest Malavasi for driving under the influence based on the evidence known to them, including Hall’s and Moore’s statements suggesting Malavasi drove shortly before the officers found him intoxicated and slumped over, seated in his truck with the engine running. No federal constitutional violation occurred. (*Thompson, supra*, 38 Cal.4th 811.) Absent a federal constitutional violation, the exclusionary rule does not apply. (Cal. Const., art. I, § 28; *In re Lance W.* (1985) 37 Cal.3d 873, 879, 890.) The trial court did not err in denying Malavasi’s suppression motion.³

³ Because no federal violation occurred, we need not resolve whether the arrest violated state law. But as noted above, Vehicle Code section 40300.5 provides an officer may also make an arrest without a warrant “when the officer has reasonable cause to believe that the person had been driving while under the influence of an alcoholic beverage or any drug, or under the combined influence of an alcoholic beverage and any drug” and “the person will not be apprehended unless immediately arrested[,] [¶] . . . [¶] [t]he person may cause injury to himself or herself or damage property unless immediately arrested [or] . . . [t]he person may destroy or conceal evidence of the crime unless immediately arrested.” Arguably, one or more of these provisions applied.

III

DISPOSITION

The judgment is affirmed.

ARONSON, J.

WE CONCUR:

RYLAARSDAM, ACTING P. J.

IKOLA, J.