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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SIXTH APPELLATE DISTRICT

THE PEOPLE,

Plaintiff and Respondent,

v.

PETER SIMON GUTIERREZ,

Defendant and Appellant.

H037632

(Santa Clara County  
Super. Ct. No. CC950540)

In the court below, defendant Peter Simon Gutierrez unsuccessfully moved to suppress evidence. He thereafter entered a negotiated no contest plea to possession of methamphetamine for sale. On appeal, defendant challenges the ruling on his suppression motion. He contends that the evidence implicating him was the product of an unlawful detention. He also contends that the trial court abused its discretion by denying his *Pitchess*<sup>1</sup> motion without conducting an in camera review of police personnel records. We affirm the judgment.

BACKGROUND

The parties developed undisputed historical facts at the suppression hearing through the testimony of San Jose Police Officer Jonathan Shaheen and Deputy Probation Officer Adam Noto.

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<sup>1</sup> *Pitchess v. Superior Court* (1974) 11 Cal.3d 531 (in camera review of peace officer personnel records for relevance).

On an August afternoon, Officers Shaheen and Noto went to a home on Rollingwood Court in San Jose to conduct a probation search of Brandylynn Montoya. When they arrived, three or four people were in the front yard of the home. Montoya was not among them. The officers watched the home for about a half hour from a distance of a hundred yards. During this time, they saw defendant drive a white van into the driveway of the home. At some point, Officers Shaheen, Noto, and three other police officers--all dressed in jeans and bullet-proof vests imprinted with a badge and the word "police" or "Santa Clara County Probation" on the front and the words "San Jose Police" or "Probation" on the back--walked toward the home. As they approached, they asked the group whether anyone knew Montoya. The group denied knowing her. Officer Shaheen then asked whether anyone was on probation or parole, and defendant affirmed that he was on parole. Officer Shaheen asked defendant where he was living, and defendant stated that he lived on Murdoch Street. Officer Shaheen asked the group "if they wouldn't mind staying out front with [his] other officers while Officer Noto, Sergeant Yazzolino and [him] approached the residence looking still for [Montoya]." He then approached the front door and spoke to Octavia Gonzalez, who rented the home from the owner and sublet rooms to others. Gonzalez affirmed that she knew Montoya and believed that she was presently in custody. Officer Shaheen asked Gonzalez for permission to enter the home, and Gonzalez granted permission. The officers then entered the home and walked through it with Gonzalez. Gonzalez pointed out the rooms and identified the occupants "proving that [Montoya] did not live there." When Officer Shaheen questioned whether Montoya lived in one of the rooms that was locked, Gonzalez replied that defendant had been living there for about two weeks. Officer Shaheen then went back to the front yard and asked defendant whether he had house and car keys on him. Defendant then handed his keys to Officer Shaheen who went back inside to defendant's room and unlocked the door. Officer Shaheen searched defendant's room and found a glass pipe with residue in it and mail addressed to defendant. He

returned to the front yard and told defendant that he was not going to arrest him but, instead, send a report about the pipe to his parole officer. He then advised defendant that he intended to search the white van and asked whether there was anything illegal inside. Defendant affirmed that methamphetamine was inside. Officer Shaheen searched the van, found methamphetamine inside, and arrested defendant.

Officer Noto recalled believing that Montoya was on probation and watching Rollingwood Court prefatory to a “knock and talk,” a procedure designed toward knocking on the door in an attempt to interview Montoya. He also recalled being told by the person who answered the door that Montoya had stayed there in the past but was living at a sober living environment.

Defendant and the People agreed that, at the time of the encounter, Montoya was in custody out of county and not on “searchable probation.”

#### MOTION TO SUPPRESS

“ ‘ “An appellate court’s review of a trial court’s ruling on a motion to suppress is governed by well-settled principles. [Citations.] [¶] In ruling on such a motion, the trial court (1) finds the historical facts, (2) selects the applicable rule of law, and (3) applies the latter to the former to determine whether the rule of law as applied to the established facts is or is not violated. [Citations.] ‘The [trial] court’s resolution of each of these inquiries is, of course, subject to appellate review.’ [Citations.] [¶] The court’s resolution of the first inquiry, which involves questions of fact, is reviewed under the deferential substantial-evidence standard. [Citations.] Its decision on the second, which is a pure question of law, is scrutinized under the standard of independent review. [Citations.] Finally, its ruling on the third, which is a mixed fact-law question that is however predominantly one of law, . . . is also subject to independent review.” ’ ” (*People v. Ayala* (2000) 23 Cal.4th 225, 255.)

Defendant contends that he was illegally detained “Because no reasonable person would have felt free to leave following the manner in which the officers approached the

residence . . . .” The People counter that the encounter was consensual and therefore did not implicate Fourth Amendment principles. We agree with the People.

“For purposes of Fourth Amendment analysis, there are basically three different categories or levels of police ‘contacts’ or ‘interactions’ with individuals, ranging from the least to the most intrusive. First, there are what Justice White termed ‘consensual encounters’ [citation], which are those police-individual interactions which result in no restraint of an individual’s liberty whatsoever--i.e., no ‘seizure,’ however minimal--and which may properly be initiated by police officers even if they lack any ‘objective justification.’ [Citation.] Second, there are what are commonly termed ‘detentions,’ seizures of an individual which are strictly limited in duration, scope and purpose, and which may be undertaken by the police ‘if there is an articulable suspicion that a person has committed or is about to commit a crime.’ [Citation.] Third, and finally, there are those seizures of an individual which exceed the permissible limits of a detention, seizures which include formal arrests and restraints on an individual’s liberty which are comparable to an arrest, and which are constitutionally permissible only if the police have probable cause to arrest the individual for a crime.” (*Wilson v. Superior Court* (1983) 34 Cal.3d 777, 784.)

Thus, not every encounter between a law enforcement officer and a citizen constitutes a detention for Fourth Amendment purposes. “[S]eizure does not occur simply because a police officer approaches an individual and asks a few questions.” (*Florida v. Bostick* (1991) 501 U.S. 429, 434.) Rather, “a person is ‘seized’ only when, by means of physical force or a show of authority, his freedom of movement is restrained.” (*United States v. Mendenhall* (1980) 446 U.S. 544, 553.) “[T]o determine whether a particular encounter constitutes a seizure, a court must consider all the circumstances surrounding the encounter to determine whether the police conduct would have communicated to a reasonable person that the person was not free to decline the officers’ requests or otherwise terminate the encounter.” (*Florida v. Bostick, supra*, at p.

439; accord, *People v. Valenzuela* (1994) 28 Cal.App.4th 817, 823.) “The test is necessarily imprecise, because it is designed to assess the coercive effect of police conduct, taken as a whole, rather than to focus on particular details of that conduct in isolation. Moreover, what constitutes a restraint on liberty prompting a person to conclude that he is not free to ‘leave’ will vary, not only with the particular police conduct at issue, but also with the setting in which the conduct occurs.” (*Michigan v. Chesternut* (1988) 486 U.S. 567, 573.)

“Circumstances establishing a seizure might include any of the following: the presence of several officers, an officer’s display of a weapon, some physical touching of the person, or the use of language or of a tone of voice indicating that compliance with the officer’s request might be compelled.” (*In re Manuel G.* (1997) 16 Cal.4th 805, 821; see also *In re Christopher B.* (1990) 219 Cal.App.3d 455, 460.) All of the circumstances involved in the encounter must be evaluated to decide whether a reasonable person would have concluded from the police conduct that he or she was not free to leave or decline the requests of the police. (*Florida v. Bostick, supra*, 501 U.S. at p. 439.) And “[t]he officer’s uncommunicated state of mind and the individual citizen’s subjective belief are irrelevant in assessing whether a seizure triggering Fourth Amendment scrutiny has occurred.” (*In re Manuel G., supra*, at p. 821.)

Here, there is no suggestion in the record that the officers coerced defendant to submit to questioning “by means of physical force or a show of authority.” (*United States v. Mendenhall, supra*, 446 U.S. at p. 553.) The officers walked and approached a group standing outside in public view. There was no display of weapons, physical touching, or aggressive tone of voice. Officer Shaheen made clear to the group that he was seeking Montoya, not defendant or anyone else in the group. He then asked whether anyone in the group was on probation or parole. Defendant replied that he was on parole. At that point, defendant was subject to search pursuant to standard search conditions

imposed on parolees. (See *People v. Reyes* (1998) 19 Cal.4th 743, 753.) This scenario shows a consensual encounter that does not implicate Fourth Amendment principles.

Defendant disagrees and relies on *People v. Garry* (2007) 156 Cal.App.4th 1100 (*Garry*), in support of his position. Defendant's reliance is erroneous.

In *Garry*, an officer was patrolling a high-crime neighborhood at 11:23 p.m. when he noticed the defendant standing on a street corner next to a parked car. The officer parked his vehicle approximately 35 feet away and observed the suspect for approximately five to eight seconds. He then illuminated the defendant with the patrol car spotlight, exited his vehicle, and walked “ ‘briskly’ ” toward the defendant. By the officer's own testimony, he reached the defendant “ ‘two and a half, three seconds’ after leaving his patrol car, during which time defendant referred to living ‘right there’ and took three or four steps back.” The officer then asked if the defendant was on probation, and the defendant affirmed that he was. At that point the officer grabbed the defendant who actively resisted. The officer then restrained and arrested the defendant. (*Garry, supra*, 156 Cal.App.4th at pp. 1103-1104.)

The *Garry* defendant unsuccessfully moved to suppress the evidence seized during a search incident to the arrest. The trial court found that a consensual contact occurred when the officer “ ‘simply approached’ ” the defendant and started to speak with him and that the officer had a legal basis to detain the defendant once he admitted that he was on probation. (*Garry, supra*, 156 Cal.App.4th at p. 1105.) On appeal, the court reversed, finding that the only conclusion to be drawn from the undisputed evidence was that the officer's actions “constituted a show of authority so intimidating as to communicate to any reasonable person that he or she was “not free to decline [his] requests or otherwise terminate the encounter.” ’ ” (*Id.* at p. 1112.)

The court pointed out that the officer's own testimony established that his conduct was both aggressive and intimidating. (*Garry, supra*, 156 Cal.App.4th at p. 1111.) That conduct included (1) bathing the defendant in a spotlight after observing him for only five

to eight seconds; (2) walking so “ ‘briskly’ ” that he traveled 35 feet in “ ‘two and one-half to three seconds’ ”; (3) disregarding the defendant’s statement that he was standing outside his own home; and (4) immediately questioning the defendant’s legal status. (*Id.* at pp. 1111-1112.) In light of the officer’s own testimony, the court was compelled to reject the trial court’s finding that the officer “ ‘simply approached’ ” the defendant and “ ‘started to speak’ ” because that finding was not supported by substantial evidence. (*Id.* at p. 1112.) The officer’s own testimony established that he “all but ran directly at [the suspect], covering 35 feet in just two and one-half to three seconds, asking defendant about his legal status as he did so.” (*Ibid.*)

Thus, in *Garry*, undisputed evidence of police intimidation overrode the trial court’s finding that a detention did not occur. Here, there is no evidence of police intimidation or command.

Defendant alternatively argues that, if he was not already unlawfully detained when Officer Shaheen learned of his parole status, he was detained “when Officer Shaheen told him to wait outside with two armed officers” and the detention became unreasonably prolonged because the officers “toured the entire house” before searching defendant’s room and car. According to defendant, “The search of [his] room was only possible because [he] was not free to leave as a result of his unlawful detention . . . . But for the unlawful detention, [he] would have departed the scene in his vehicle before being asked to hand over his keys.”

But the trial court was not required to make defendant’s implicit inference that Officer Shaheen commanded him to wait outside with the officers. (See *People v. Roth* (1990) 219 Cal.App.3d 211, 215, fn. 3 [court accepted trial court’s finding that there was a command and then agreed with trial court’s conclusion that there was a detention].) Officer Shaheen testified that he asked the group whether they would mind staying out front with the other officers. He did not make a command or single out defendant for scrutiny. The officers drew no guns. In this scenario, the trial court could reasonably

interpret Officer Shaheen's discourse as a request to the group that no one follow him into the home rather than a show of authority restraining defendant's freedom of movement.

In short, the evidence in this case is undisputed that Officer Shaheen's demeanor at the time of the encounter was not of the demanding or threatening variety. Officer Shaheen did not physically or orally restrain defendant. His questions were just that-- questions rather than commands. And the one arguable command was, at most, a command not to follow rather than a command that constrained general freedom. The evidence does not demonstrate a show of authority other than what is implicit when a uniformed police officer publicly engages a citizen. It therefore fails to support that the officers coerced defendant to submit to questioning by means of physical force or a show of authority such that a reasonable person in defendant's situation would not have felt free to leave.

### PITCHESS

Defendant contends that the trial court erred by denying his *Pitchess* motion without first conducting an in camera review of Officer Shaheen's personnel records, which he contends may have affected the disposition of his subsequent suppression motion.

In *Pitchess*, our Supreme Court held that a criminal defendant may, in some circumstances, compel the discovery of evidence in the arresting officer's personnel file that is relevant to the defendant's ability to defend against a criminal charge. (*People v. Mooc* (2001) 26 Cal.4th 1216, 1219.) While this decision has been superseded by statute, motions for discovery of law enforcement officer personnel files are still referred to as *Pitchess* motions. (*Id.* at p. 1225; *City of Santa Cruz v. Municipal Court* (1989) 49 Cal.3d 74, 81; *Zanone v. City of Whittier* (2008) 162 Cal.App.4th 174, 186, fn. 13.)

Generally, the procedure by which a criminal defendant may obtain access to confidential peace officer personnel records through a *Pitchess* motion is governed by

Penal Code sections 832.7 and 832.8 and Evidence Code sections 1043 through 1045. Under these provisions, “on a showing of good cause, a criminal defendant is entitled to discovery of relevant documents or information in the confidential personnel records of a peace officer accused of misconduct against the defendant. . . . If the defendant establishes good cause, the court must review the requested records in camera to determine what information, if any, should be disclosed. [Citation.] Subject to certain statutory exceptions and limitations [citations], ‘the trial court should then disclose to the defendant “such information [as] is relevant to the subject matter involved in the pending litigation.” ’ ” (*People v. Gaines* (2009) 46 Cal.4th 172, 179.)

A trial court’s ruling on a *Pitchess* motion is reviewed for abuse of discretion. (*People v. Lewis and Oliver* (2006) 39 Cal.4th 970, 992.) A trial court abuses its discretion when it renders a decision that is arbitrary, capricious or beyond the bounds of reason under the circumstances. (*People v. Ledesma* (2006) 39 Cal.4th 641, 705.)

The key issue before the trial court was whether defendant established good cause for his requested discovery. The standards governing this requirement are stated in *Warrick v. Superior Court* (2005) 35 Cal.4th 1011. *Warrick* explained that to show good cause, “defense counsel’s declaration in support of a *Pitchess* motion must propose a defense or defenses to the pending charges.” (*Id.* at p. 1024.) “The declaration must articulate how the discovery sought may lead to relevant evidence or may itself be admissible direct or impeachment evidence [citations] that would support those proposed defenses.” In addition, the declaration “must also describe a factual scenario supporting the claimed officer misconduct.” In some circumstances, the scenario may consist of a denial of the facts asserted in the police report. In other circumstances, more is required. (*Ibid.*) When the trial court receives the police report or other documents in addition to the attorney declaration, “the defendant must present . . . a specific factual scenario of officer misconduct that is plausible when read in light of the pertinent documents.” (*Id.* at p. 1025.) Generally, “a scenario is plausible [when] it presents an assertion of specific

police misconduct that is both internally consistent and supports the defense proposed to the charges.” (*Id.* at p. 1026.)

Under *Warrick*, a plausible factual scenario must be more than merely possible. In *People v. Thompson* (2006) 141 Cal.App.4th 1312, 1314 (*Thompson*), the defendant was charged with the sale of cocaine base. According to the police report, an undercover officer working with a “ ‘buy team’ ” approached the defendant and bought cocaine with pre-recorded bills. (*Id.* at pp. 1315, 1317.) The defendant’s *Pitchess* motion sought discovery of citizen complaints regarding fabrication of evidence and falsification of police reports. (*Id.* at p. 1317.) The attorney declaration supporting the motion asserted that the officers had fabricated the entire transaction. (*Ibid.*)

The appellate court concluded that the defendant had not shown good cause, reasoning that the defendant’s scenario explained neither his own conduct nor the officers’ behavior. (*Thompson, supra*, 141 Cal.App.4th at pp. 1318-1319.) It stated: “[The defendant] is not asserting that officers planted evidence and falsified a police report. He is asserting that, because he was standing at a particular location, 11 police officers conspired to plant narcotics and recorded money in his possession, and to fabricate virtually all the events preceding and following his arrest. . . . [¶] . . . [His] denials ‘might or could have occurred’ in the sense that virtually anything is possible. *Warrick* did not redefine the word ‘plausible’ as synonymous with ‘possible,’ and does not require an in camera review based on a showing that is merely imaginable or conceivable and, therefore, not patently impossible. *Warrick* permits courts to apply common sense in determining what is plausible, and to make determinations based on a reasonable and realistic assessment of the facts and allegations.” (*Ibid.*)

Moreover, under *Warrick*, a defendant fails to establish good cause when his factual scenario relies on police officer dishonesty unrelated to the evidence supporting the charges against him. In *People v. Hill* (2005) 131 Cal.App.4th 1089, 1095-1096, disapproved on another ground in *People v. French* (2008) 43 Cal.4th 36, 48, footnote 5,

the defendant fled from police officers in his car, obtained a gun, drove back to the officers' location, and fired at them. He was arrested on the basis of statements from two passengers in the defendant's car, who identified him as the shooter. (*People v. Hill, supra*, at pp. 1097, 1100.) The defendant's *Pitchess* motion sought citizen complaints attributing dishonesty to the officers who were involved in the shooting, asserting that the police report falsely stated that the defendant was the shooter. (*Id.* at pp. 1096-1097.) The appellate court held that the defendant had not shown good cause for discovery because he "was identified and implicated by civilian witnesses rather than [the police officers]." (*Id.* at p. 1096.)

Here, defendant's supporting declaration asserted that Officer Shaheen "made material misstatements in his police report," namely that (1) Montoya was on searchable probation, (2) he was conducting a probation search at Rollingwood Court, (3) he saw defendant arrive at Rollingwood Court in a white van 30 minutes before he contacted defendant, and (4) he saw defendant go inside Rollingwood Court before he contacted defendant. According to defendant, the *Pitchess* information was relevant for impeachment purposes in the sense that it might support that Officer Shaheen had a character trait for fabricating evidence. Defendant argued at the hearing, "I think we presented affirmative evidence that the probation search was in fact fabricated because the person that they went to search was not on searchable probation at the time. And therefore, I believe the defense has presented more than enough evidence to show that there was no basis for the initial search; and therefore, we would have more of a defense at [the suppression] hearing." The trial court denied the motion without comment.

On appeal, defendant reiterates that he "presented actual evidence . . . which demonstrated that Officer Shaheen's reason for going to 3047 Rollingwood Court--to conduct a probation search of . . . Montoya--was either falsified or erroneous." Defendant's analysis is erroneous.

It was not beyond reason for the trial court to conclude that defendant's *Pitchess* motion failed to establish good cause for the requested discovery. The supporting declaration described purported acts of police officer dishonesty (fabricated probation search of a third party; fabricated observation of defendant arriving and entering third party's home) unrelated to the undisputed evidence supporting the suppression motion (defendant's presence outside a home under police investigation and his later encounter with police officers). It fails to set forth any plausible factual scenario in defense to the search that impugns Officer Shaheen's honesty, such as, Officer Shaheen ran up to defendant with gun drawn demanding to know his probation or parole status. (See, e.g., *Brant v. Superior Court* (2003) 108 Cal.App.4th 100, 108 [charged with possession of a controlled substance, the defendant alleged a different version of the detention, search, and the manner of obtaining his confession]; *People v. Johnson* (2004) 118 Cal.App.4th 292, 303 [charged with possession of a controlled substance, the defendant averred the undercover officer falsely claimed defendant had asked to purchase drugs from him].) In short, defendant did not specify any police misconduct by Officer Shaheen that would have supported a defense to the search.

It is true that evidence tending to show that Officer Shaheen was not truthful in the police report may have helped defendant at the anticipated suppression hearing; and evidence from the personnel file suggesting that Officer Shaheen had prior acts of dishonesty may have helped bolster a truthfulness issue at the anticipated suppression hearing. But without asserting a different version of the search facts, as distinguished between a different interpretation of the undisputed search facts, defendant's *Pitchess* motion was not based on any specific claim of officer misconduct but rather on a more general allegation that Officer Shaheen lacked credibility. Even under the minimal standard enunciated in *Warrick*, this is insufficient to establish good cause for an in camera review.

We add that it strains credulity to believe that Officer Shaheen fabricated a probation search of Montoya. There is no apparent reason to commit four police officers and a probation officer to a surveillance operation aimed at conducting a probation search of a person who was neither subject to a probation search nor a resident of the home under surveillance. The officers were obviously mistaken in their belief that Montoya was subject to a probation search and lived at Rollingwood Court. Even if the officers knew that Montoya was not subject to a probation search or a resident of Rollingwood Court, they had every right to go to the home and attempt to talk to a resident about suspected drug commerce originating from the home. In any event, the salient point is that the supposed misconduct was unrelated to the search of defendant.

DISPOSITION

The judgment is affirmed.

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Premo, J.

WE CONCUR:

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Rushing, P.J.

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Márquez, J.