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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SIXTH APPELLATE DISTRICT

THE PEOPLE, Plaintiff and Respondent, v. WILLIAM OFFICER, Defendant and Appellant.	H033645 (Monterey County Super. Ct. No. SS071631)

I. STATEMENT OF THE CASE

After a court trial, the court found defendant William Officer guilty of battery by a prisoner upon a correctional officer and further found that he had a strike prior conviction for forcible sodomy. (Pen. Code, §§ 4501.5; 286, subd. (c)(2), 1170.12.) The court imposed a mitigated two-year term for battery, doubled under the "Three Strikes" law, for a total sentence of four years in prison.

On appeal from the judgment, defendant claims the court abused its discretion in partially denying his *Pitchess* motion.[1] We disagree and affirm the judgment.[2]

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[1] *Pitchess v. Superior Court* (1974) 11 Cal.3d 531.

[2] In addition to this appeal, defendant filed a petition for a writ of habeas corpus (H034696), in which he claims that he did not freely and voluntarily waive his right to a jury trial.

We ordered the petition to be considered with the appeal and by separate order, we deny the petition for a writ of habeas corpus.

II. FACTS

On April 18, 2007, Officer Sergio Hernandez, a correctional officer at Soledad prison, was walking the corridor outside the dining hall after breakfast, when he saw defendant in a doorway of F-Wing yelling to another inmate. Defendant was holding a bag of pills. He told Officer Hernandez that he was trying to give them to another inmate. Officer Hernandez could see that the pills were unlabeled, and there was a handwritten note in the bag, so he asked if he could inspect the bag. Defendant handed it to him.

Officer Hernandez told defendant that he was going to keep the bag until the pills could be identified and asked defendant for his identification card. Defendant, who had been cooperative until then, changed his tone and said, "No, you're not." He assumed what Officer Hernandez described as an aggressive, "bladed" "fighting" stance and began moving his hands in and out of his pockets. Officer Hernandez felt that the situation was escalating; and, when it became clear that defendant would not provide identification, he ordered defendant to put his hands against the wall. Although defendant started toward the wall, he then said, "This is bullshit," again took an aggressive stance, and fumbled inside his pockets. Concerned for his safety, Officer Hernandez reached for defendant's elbow to turn him toward the wall. However, defendant pushed his hand away and struck him in the stomach with his elbow. Officer Hernandez yelled "Don't push me," ordered defendant to the floor, grabbed him by the shoulders, and brought him to the floor.

At trial, Officer Hernandez, who was the only prosecution witness, was impeached with evidence that he had been reprimanded for an unauthorized use of sick leave.

The Defense

Defendant testified that on April 18, he was 28 days from being released on parole. He said he was delivering a bag of vitamins to another inmate, and Officer Hernandez asked what he was doing. He explained about the vitamins and handed over the bag. When Officer Hernandez said he was going to keep them, defendant thought it

was a joke and said, "come on, you're not going to do that." Officer Hernandez asked for identification. He denied refusing to provide it. Rather, he tried to get it from a shirt pocket underneath his denim jacket, but Officer Hernandez told him to forget about it and ordered him to the wall. Defendant started toward the wall but bent down to put things he was carrying on the floor. As he bent, he felt Officer Hernandez holding onto his jacket, so he pulled away from him. Officer Hernandez told him not to pull away, and defendant said he was only trying to put stuff on the floor. Officer Hernandez then grabbed him around the neck, yoking him, yanked him backward, and slammed him to the floor.

Defendant denied that he resisted any orders or assumed an aggressive or fighting or bladed stance. He denied saying "this is bullshit." And he denied trying to push Officer Hernandez's hand away.

Adam Vasquez, an inmate serving time for murder, testified that that day, he first saw defendant facing a wall about two feet away. He said that it looked like defendant was trying to put something down on the floor when Officer Hernandez grabbed him around the neck and tried to pick him up and slam him to the floor. However, he never saw what, if anything, defendant may have had in his hand, and he did not hear anything that was being said.

Rebuttal

Officer Hernandez testified that he saw the nurse after the incident because of injuries to his stomach, elbow, and knee from a "resistive" inmate. He did not recall whether defendant was holding anything other than the bag of pills; he said that defendant did not bend over to put something on the floor; and he denied yoking defendant with his arm.

III. THE *PITCHESS* MOTION[3]

[3] In 1974, the California Supreme Court ruled in *Pitchess v. Superior Court, supra*, 11 Cal.3d 531, that a criminal defendant may discover evidence of citizen

Prior to trial, defendant made a *Pitchess* motion to have the personnel files of correctional Officers Hernandez, Holguin, Hill, and Yearby, and Sergeant Garcia made available for in camera inspection. He sought documents relating to misconduct, complaints, investigations, reputation, and disciplinary actions. (Evid. Code, § 1043.) In support of the motion, defense counsel submitted written reports by these officers. In his report, Sergeant Garcia said that he heard a scuffle, turned and saw Officer Hernandez on the floor with defendant. He went to assist and told defendant to stop resisting. In his report, Officer Holguin said that he arrived after the incident. Defendant was in handcuffs, and he escorted defendant to have a medical examination. In their reports, Officers Hill and Yearby said that they arrived after the incident and took photographs of Officer Hernandez and defendant.

Defense counsel also submitted his own declaration, in which he noted that defendant was charged with assaulting Officer Hernandez. He asserted that (1) Officer Hernandez attacked defendant without provocation and later falsely accused defendant of assaulting him; (2) defendant never struck Officer Hernandez; and (3) Sergeant Garcia omitted facts about the incident in order to falsely cover up for Officer Hernandez. Counsel opined that discovery was necessary to determine whether the officers have previously assaulted or harassed inmates without justification and to assist in finding witnesses who would provide such testimony. Counsel declared that, according to defendant, Officer Hernandez used excessive force without cause or reasonable justification, and then all of the officers fabricated their reports about the incident to cover for Officer Hernandez. Counsel believed that there may be other complaints of false reports and false testimony that may have been filed and investigated by prison

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complaints alleging misconduct by law enforcement officers if that misconduct assists in the defense. In 1978, the California Legislature codified procedures governing *Pitchess* discovery Evidence Code sections 1043 to 1045. (See also Pen.Code, §§ 832.7, 832.8 [defining officer's personnel records subject to *Pitchess* discovery].)

authorities, which would reflect that the officers had a tendency to commit unprovoked assaults on inmates and fabricate reports to cover them up.

The Attorney General opposed the motion. He argued that the motion should be denied as to Officers Hill, Holguin, and Yearby because neither counsel's declaration nor their incident reports establish that they were present during the arrest, that they used excessive force, or that they made any false statements in their reports. The Attorney General argued that the motion should be denied as to Sergeant Garcia because defendant had not shown good cause to discover records regarding his use of excessive force or his veracity. However, the Attorney General conceded that because defendant disputed Officer Hernandez's version of events, he had shown good cause to justify the disclosure of Officer Hernandez's personnel records.

The trial court granted the motion as to Officer Hernandez and denied it as to the others. After an in camera review of Officer Hernandez's records, the court disclosed that in June 2002, a determination was made that Officer Hernandez was dishonest in that he had made an unauthorized use of sick leave. He was reprimanded by letter. There were no available witness names or contact information. As noted, defense counsel used the information at trial to impeach Officer Hernandez.

IV. DENIAL OF *PITCHESS* MOTION

Defendant contends that the court erred in denying his motion as to Officers Holguin, Yearby, and Hill and Sergeant Garcia.

1. *Applicable Principles*

"To obtain *Pitchess* information, the defendant must file a written motion. [Citation.] It must describe 'the type of records or information sought' and include '[a]ffidavits showing good cause for the discovery or disclosure sought, setting forth the materiality thereof to the subject matter involved in the pending litigation and stating upon reasonable belief that the governmental agency identified has the records or information from the records.' [Citation.] This good cause showing is a 'relatively low

threshold for discovery.' [Citation.] Assertions in the affidavits 'may be on information and belief and need not be based on personal knowledge [citation], but the information sought must be requested with sufficient specificity to preclude the possibility of a defendant's simply casting about for any helpful information.' [Citation.] If the defendant establishes good cause, the court must review the records in camera to determine what, if any, information should be disclosed. [Citations.]" (*Garcia v. Superior Court* (2007) 42 Cal.4th 63, 70-71, fn. omitted.)

Concerning what constitutes a good cause showing of materiality, the Supreme Court has explained that "[t]he supporting affidavit 'must propose a defense or defenses to the pending charges.' [Citation.] To show the requested information is material, a defendant is required to 'establish not only a logical link between the defense proposed and the pending charge, but also to articulate how the discovery being sought would support such a defense or how it would impeach the officer's version of events.' [Citation.] The information sought must be described with some specificity to ensure that the defendant's request is 'limited to instances of officer misconduct related to the misconduct asserted by the defendant.' [Citation.] [¶] Counsel's affidavit must also describe a factual scenario that would support a defense claim of officer misconduct. [Citation.] 'That factual scenario, depending on the circumstances of the case, may consist of a denial of the facts asserted in the police report.' [Citation.] 'In other cases, the trial court hearing a *Pitchess* motion will have before it defense counsel's affidavit, and in addition a police report, witness statements, or other pertinent documents. The court then determines whether defendant's averments, "[v]iewed in conjunction with the police reports" and any other documents, suffice to "establish a plausible factual foundation" for the alleged officer misconduct and to "articulate a valid theory as to how the information sought might be admissible" at trial.' [Ciation.] Corroboration of or motivation for alleged officer misconduct is not required. [Ciation.] Rather, 'a plausible scenario of officer misconduct is one that might or could have occurred.' [Citation.] A

scenario is plausible when it asserts specific misconduct that is both internally consistent and supports the proposed defense. [Citation.] 'A defendant must also show how the information sought could lead to or be evidence potentially admissible at trial.' [Citation.] A defendant who meets this burden has demonstrated the materiality requirement of section 1043." (*Garcia v. Superior Court, supra,* 42 Cal.4th at p. 71, quoting *Warrick v. Superior Court* (2005) 35 Cal.4th 1011, 1024-1026.)

We review a trial court's ruling on a *Pitchess* motion for abuse of discretion. (*People v. Lewis and Oliver* (2006) 39 Cal.4th 970, 992; *People v. Samayoa* (1997) 15 Cal.4th 795, 827.) If the trial court erred in failing to order an in camera review, the appropriate remedy is to remand the matter for such a review. (*People v. Gaines* (2009) 46 Cal.4th 172, 180.)

2. *Discussion*

In claiming that he established good cause for discovery, defendant first asserts that he proposed a plausible defense to the charge of resisting arrest: Officer Hernandez confiscated the bag of vitamins that defendant was attempting to deliver to an inmate and then, without provocation or resistance, grabbed defendant around the neck and slammed him to the floor. After doing so, Officer Hernandez fabricated the story that defendant had assumed an aggressive fighting stance, verbally and physically refused to comply with Officer Hernandez's orders, and struck the officer.

Clearly, there is a logical link between the type of information about Officer Hernandez that defendant sought and his defense, and it is easy to see how such information could support the defense and/or impeach Officer Hernandez. For example, evidence that the officer had been investigated and reprimanded for using excessive force against an unresisting prisoner, for falsely accusing prisoners of resisting, or for fabricating police reports as well as other evidence tending to show that he was dishonest or lacked veracity would help defendant undermine Officer Hernandez, the victim and only prosecution witness. Accordingly, the trial court properly and appropriately found

that defendant had established good cause to discover his records. Indeed, good cause to discover the records of arresting officers is often found in cases where the defendant disputes their version of what they and the defendant did. (See, e.g., *People v. Gaines*, *supra*, 46 Cal.4th 172 [*Warrick v. Superior Court*, *supra*, 35 Cal.4th 1011; *Uybungco v. Superior Court* (2008) 163 Cal.App.4th 1043 [same]; *People v. Hustead* (1999) 74 Cal.App.4th 410; cf. *Brant v. Superior Court* (2003) 108 Cal.App.4th 100 [arresting officers in drug-possession case].)

However, defendant's theory of materiality concerning the records of Officers Holguin, Yearby, and Hill is attenuated at best. In his motion, defendant asserted that these officers falsely reported that he assaulted and battered Officer Hernandez in order to cover up the officer's unjustified, unprovoked, unreasonable, and unlawful use of force against him.

We note that in each of the three reports, the officers refer to the incident as an assault and/or battery on Officer Hernandez. However, none of the officers state that they witnessed the incident; none purport to relate a description of it or any information concerning that incident; and none suggest that their reference to it as an assault and battery was meant to be a factual and substantive reflection of what happened. On the contrary, as the reports reveal, none of these officers were percipient witnesses, and thus none had any personal knowledge of what happened.

Under the circumstances, it is not plausible to suggest that their reference to the incident as an assault and battery constituted a knowing and purposeful fabrication of what happened or an intentional effort to conceal what really happened. Simply put, they did not know what happened, and, therefore, they could not know one way or the other whether calling the incident an assault and battery was true or false. Furthermore, because the officers lacked personal knowledge, their descriptions and any proposed similar testimony that defendant assaulted Officer Hernandez would have been inadmissible at trial for lack of a proper foundation. (See Evid. Code, § 702 [absent

personal knowledge, testimony about fact is inadmissible]; *People v. Montoya* (2007) 149 Cal.App.4th 1139, 1150.) Similarly, any testimony by these officers that someone told them that defendant assaulted Officer Hernandez or that they heard a broadcast to this effect would have been inadmissible hearsay. (Evid. Code, § 1200.) Indeed, at trial, none of these officers testified, presumably because their involvement was not particularly relevant. Finally, defendant does not claim that the officers fabricated or falsely reported anything that they did have personal knowledge about—i.e., the actions that they took in escorting defendant and taking photographs.

Under the circumstances, we do not find a sufficient link between the personnel information about these officers that defendant sought and the defense or the impeachment of Officer Hernandez to establish the materiality of their records. We also fail to see how the information could have resulted in admissible evidence to help the defense or such impeachment. In short, a reasonable and realistic assessment of the facts, allegations, and evidence supports that trial court's determination, and we find that the court had no reason to review these officers' record in camera and did not abuse its discretion in denying the motion as to them.

Concerning Sergeant Garcia, defendant notes that his report failed to state that defendant acted aggressively or took a fighting stance as stated in Officer Hernandez's written report. According to defendant, Sergeant Garcia's omission implies that he "was 'covering up' for Hernandez by not reporting what actually happened in order to conceal the fact that Hernandez used excessive force."

Sergeant Garcia's report states that he was standing in front of the D-Wing door when he heard a scuffle. He turned and then saw Officer Hernandez and defendant on the floor. Officer Hernandez was trying to subdue him. He immediately went over, told defendant to stop resisting and submit to handcuffs, and then helped Officer Hernandez handcuff him.

Defendant's materiality argument as to Sergeant Garcia is also implausible. If Sergeant Garcia's purpose was to cover up Officer Hernandez's alleged use of unprovoked and excessive force, then it would make no sense for him to purposefully omit from his report the fact that defendant had acted aggressively toward Officer Hernandez and assumed a fighting stance. If anything, including such information, if Sergeant Garcia had witnessed that conduct, would have strengthened Officer Hernandez's version of the incident.

However, there is a more obvious reason for Sergeant Garcia's alleged "omission." He did not become aware of any problem or see what was happening between Officer Hernandez and defendant until they were both on the floor, which was *after* defendant stopped cooperating, started being aggressive, assumed a fighting stance, resisted Officer Hernandez's efforts to turn him toward the wall, and struck him in the stomach. Thus, like Officers Holguin, Yearby, and Hill, Sergeant Garcia was not a percipient witness and had no personal knowledge about what happened before he saw Officer Hernandez and defendant on the floor. Therefore, he had no basis or reason to include facts about what had previously happened in his report.

In his motion, other than claiming that Sergeant Garcia had omitted to mention defendant's aggressive conduct, defendant did not argue, or even suggest, that any other statements in Sergeant Garcia's report were false. Under the circumstances, therefore, we do not find a plausible or sufficient link between Sergeant Garcia's personnel records and defendant's defense or the impeachment of Officer Hernandez to establish materiality and good cause to discover those records.

Defendant asserts that Vasquez's testimony was consistent with defendant's testimony and inconsistent with Sergeant Garcia's report. According to defendant, the inconsistency implies that the report was false, which, in turn, further suggests the possibility of a cover-up, which would make any records showing that Sergeant Garcia lacked veracity material.

However, Vasquez's trial testimony is irrelevant in determining whether the court's *pretrial* ruling was error. Moreover, Vasquez testified that when defendant appeared to be trying to put something on the floor, Officer Hernandez put his arm around defendant's neck and slammed him to the floor. As noted, Sergeant Garcia did not become aware of the incident until after Officer Hernandez and defendant were already on the floor. Thus, we do not see any inconsistency between Sergeant Garcia's report and Vasquez's testimony.

In his reply brief, defendant focuses on Sergeant Garcia's statement that he told defendant to stop "resisting" Officer Hernandez's effort to handcuff him. Defendant argues for the first time that this statement is inconsistent with his defense and thus he was entitled to discover information that might impeach that statement and undermine support for the prosecution's claim that defendant resisted Officer Hernandez.

" 'For sound policy reasons, we disregard claims raised for the first time in an appellate reply brief where the appellant makes no attempt to show good cause for failing to raise the issue in the opening brief. [Citation.]' [Citation.]" (*People v. Newton* (2007) 155 Cal.App.4th 1000, 1005, quoting *Authority for California Cities Excess Liability v. City of Los Altos* (2006) 136 Cal.App.4th 1207, 1216, fn. 2.)

Moreover, we note that the battery charge is based on defendant's conduct before defendant was handcuffed—i.e., his failure to cooperate with Officer Hernandez's request for identification, his resistance to and failure to comply with orders, his taking an aggressive fighting stance, his resisting Officer Hernandez's physical effort to turn him to the wall, and then his hitting Officer Hernandez in the stomach. That was the conduct that Officer Hernandez summarized in his report.

Furthermore, defendant's motion asserted only that Officer Hernandez "grabbed defendant and pushed him to the ground using the officer's entire body to slam defendant into the [floor] without provocation or resistance. Officer S. Hernandez accuses defendant, in his report, of resisting, taking a 'bladed' stance, and striking Officer

Hernandez in the stomach. Defendant denies that he ever struck the officer." Defendant further noted only that Sergeant Garcia's report does not mention the allegedly "bladed stance." The motion did not mention Sergeant Garcia's statement about resisting the efforts to handcuff him or argue that that statement was false or inconsistent with his defense to the battery charge.

We note that in his report, Officer Hernandez did not expressly or explicitly state that once defendant was on the floor, he resisted efforts to handcuff him. Nor did he testify that defendant did so. Conversely, defendant did not testify that once he was on the floor, he did not resist the effort to handcuff him.

Under the circumstances, defendant's belated argument does not convince us that the trial court abused its discretion or that, as a matter of law, Sergeant Garcia's personnel records were material and that defendant showed good cause to discover them.

V. DISPOSITION

The judgment is affirmed.

RUSHING, P.J.

WE CONCUR:

PREMO, J.

DUFFY, J.