

THE COURT'S RULING AFTER THE IN CAMERA REVIEW AND THE SUMMARY DENIAL OF THE *PITCHESS* MOTION AS TO DETECTIVE LEWIS DENIED APPELLANT A FULL AND FAIR HEARING ON HIS MOTION TO SUPPRESS.

A. *Procedural History.*

Appellant filed a discovery request for disclosure of information concerning deputies James Byers and Jeremy Garrison, Detective Lewis, and Sergeant Phillips of the El Dorado Sheriff's Department.¹ (*Pitchess, supra*, 11 Cal.3d 531.) The motion sought to discover information contained in their personnel files related to:

Illegal or false arrests, planting evidence, fabrication of probable cause, false testimony, fabricating of police reports, or perjury . . . ;

Intentional or negligent omission, false statement or misstatement of relevant facts by any or all of the above named deputies relating to the circumstances of any official duty performed or required to be performed by them or others during the preceding five years;

Intentional or negligent omission, false statement or misstatement of relevant facts by any or all of the above named deputies relating to the use of an informant in the investigation of any case or in the detention and/or arrest of any person during the preceding five years;

The obtaining of a statement, admission, or confession of any person suspected of criminal activity who was not informed or advised of his rights including the rights under the Miranda decision;

Any evidence of opinion or reputation of dishonesty, false statement, or inaccuracy relating to any or all of the above named deputies during the preceding five years. (CT 69.)

The court granted the discovery motion as to Byers and Garrison and conducted an in camera review in the presence of County Counsel, representing the Sheriff's Department. (CT 192; ART 6.) After an in camera hearing (ART pp. 7-21, sealed), the court found no discoverable relevant information to disclose to the defense here. (ART 22.)

As to Detective Lewis and Sergeant Phillips, the court found the showing to be insufficient. (ART 4.) Counsel for appellant asked to provide an additional offer of proof out of the hearing of the people in the courtroom. (ART 22.)² An additional hearing was held in camera for this purpose. (ART 25.) Counsel for appellant represented that after appellant was arrested, he was taken to see Detective Lewis, whose first comment was, "Well, you were really set up,

¹ The ruling related to Sergeant Phillips is not at issue in this appeal.

² Counsel for respondent might not have a copy of the sealed transcript, pp. 25-36. As the prosecutor was present for the hearing, and it was held in camera merely to prevent the public from having access, appellant has no objection to counsel for respondent being provided with a copy of sealed transcript pp. 25-36. Neither appellant nor respondent is entitled to pp. 7-21.)

Briefbank sample source: *People v. Fowler*, C046555, 6/16/2005, panel attorney Marcia Levine

weren't you?" (ART 26.) He sought a review of Detective Lewis's personnel file to determine whether he was previously involved in similar activity, such as working with another officer or officers to set up someone using an informant or using a pretext to arrest the person. (ART 33.) This information bears on the credibility of the prosecution witnesses. (ART 34.) The court denied the motion as to Detective Lewis without prejudice to appellant developing more facts later on. (ART 34.) The court found an insufficient showing had been made at this point. (ART 35.)

*B. Penal Code section 1538.5 Compels Review
of the Superior Courts Errors Regarding Discovery.*

Fundamental errors in a ruling on a motion to suppress are properly raised on appeal. Penal Code section 1538.5, subdivision (m) expressly preserves search and seizure issues for appellate review:

A defendant may seek further review of the validity of a search or seizure on appeal from a conviction in a criminal case notwithstanding the fact that the judgment of conviction is predicated upon a plea of guilty.

Further, California Rules of Court, rule 31(d) authorizes an appeal from the judgment of conviction entered upon a plea of guilty or nolo contendere if it challenges a search or seizure, the validity of which was contested pursuant to section 1538.5 of the Penal Code In this case, appellant challenged the validity of the search and seizure in a 1538.5 motion that was heard by the superior court.

An appeal based on search and seizure issues does not require a certificate of probable cause. (Cal. Rules of Court, rule 31(d).) Instead, the notice of appeal must state that the appeal is based on issues contested in a motion made pursuant to Penal Code section 1538.5. In this case, the notice of appeal clearly stated that the appeal challenged the denial of appellant's motion to suppress evidence. (CT 216.)

The California Supreme Court has held that an appellant may challenge a denial of a discovery request even if made separately from the motion to suppress if the information sought to be discovered goes to the existence of probable cause. (*People v. Hobbs* (1994) 7 Cal.4th 948, 957.) Appellant's motion to discover sought information in order to impeach the arresting officers and the detectives' credibility and to show a pattern of fabrication and Fourth Amendment violations. (See CT 108.) Had appellant been allowed discovery, the information sought would have directly addressed Fourth Amendment violations, but not the ultimate issue of guilt or innocence. Here, as in *Hobbs*, appellant sought access to the material facts on which the prosecution relied to establish probable cause in order to challenge the sufficiency of that finding (*Id.*, at p. 957.) The California courts have consistently noted that section 1538.5 is addressed to rights protected by the Fourth Amendment and seeks to protect an individual against unreasonable searches and seizures. (*People v. Aguilar* (1985) 165 Cal.App.3d 221, 224, quoting *People v. Ahern* (1984) 157 Cal.App.3d 27, 32.) Furthermore, the failure to afford a proper suppression hearing is reviewable. (*People v. Cella* (1981) 114 Cal.App.3d 905.) Here the Superior Court's refusal to disclose information in the officers' personnel files deprived appellant

of the ability to confront and cross-examine and his ability to present a defense, thereby depriving him of a full and fair motion to suppress. As a consequence, the denial of disclosure must be reviewed and redressed by this court.

*C. This Court Must Examine the Materials Disclosed
at the In Camera Hearing as to Deputies Byers and Garrison.*

When the lower court reviews an officer's file in camera and then denies disclosure of information, the reviewing court must examine the materials to determine whether the lower court abused its discretion. (*People v. Mooc* (2000) 26 Cal.4th 1216, 1232 [hereafter *Mooc*]; see also, *People v. Castain* (1981) 122 Cal.App.3d 138, 144.)

The procedure to follow once a court grants a *Pitchess* motion was set out in detail in *Mooc*. The custodian of the personnel records is obligated to bring all potentially relevant materials to the court. (*Mooc*, at pp. 1228-1229.) The court then reviews the file in camera, with a court reporter present. (*Ibid.*) The custodian should state for the record what other documents contained in the file were not presented to the court and why those were deemed irrelevant or otherwise nonresponsive to the defendant's *Pitchess* motion. (*Id.*, at p. 1229.) The court should then make a record of what it has reviewed:

Such a record will permit future appellate review. If the documents produced by the custodian are not voluminous, the court can photocopy them and place them in a confidential file. Alternatively, the court can prepare a list of the documents it considered, or simply state for the record what documents it examined. Without some record of the documents examined by the trial court, a party's ability to obtain appellate review of the trial court's decision, whether to disclose or not to disclose, would be nonexistent. (*Ibid.*)

Appellant has no way of knowing whether the Superior Court in this case complied with the proper procedures set forth in *Mooc*. Therefore, appellant must request that this court review the sealed transcript of the in camera proceedings which was filed with this court as part of the Augmented Record on Appeal. Appellant requests that this court determine whether the Superior Court abused its discretion in refusing to disclose information in the deputies' personnel files.

If the Superior Court did not comply with the requirement of including or summarizing the information reviewed, *Mooc* also provided the procedure to follow: The matter should be remanded to the Superior Court with directions to hold a hearing to augment the record with the evidence the trial court had considered in chambers when it ruled on the *Pitchess* motion.³ (*Id.*, at p. 1231.) Because the trial court should know what it reviewed in camera, we are confident an augmentation of the appellate record prepared by the trial court itself would result in an accurate record on appeal. (*Ibid.*)

Appellant is entitled to this in camera review as his only remedy for assuring that the lower court correctly exercised its discretion. If the record does not comply with the dictates of *Mooc*, then this court's sole course of action is to remand the matter to the Superior Court so that

³ In *Mooc*, the Supreme Court did not know exactly what the trial court had considered, but it had before it the *entire* personnel file in question. In the interest of time, it reviewed the file itself and determined that there was no abuse of discretion. (*Id.*, at p. 1232.)

it can reconstruct a proper record for appellant review, if it can be done. As *Mooc* pointed out, this reconstruction is the duty of the Superior Court; thus, appellant does not have the responsibility of settling the record for appellate review. Indeed, appellant was not a party to the in camera hearing, nor does he have any access to the matters disclosed in camera, so it is legally impossible for him provide the necessary record for appellate review.

*D. The Court Erred in Denying the Motion as to
Detective Lewis, Requiring a Remand for an In Camera Review.*

The Superior Court found an insufficient showing had been made to require the court to conduct an in camera review of Detective Lewis's personnel file. (ART 34.) The court erred.⁴

Evidence Code section 1043, subdivision (b) governs the form of the *Pitchess* motion. It requires that the defendant demonstrate good cause for the disclosure by merely showing (1) the personnel records are material to the subject matter in the pending litigation, (2) a reasonable belief the governmental agency has the type of information or records sought to be disclosed, and (3) the manner in which the proposed discovery will be used in litigating the matter. (Penal Code section 1043, subd. (b)(3); *City of Santa Cruz v. Municipal Court* (1989) 49 Cal.3d 74, 83; *People v. Memro* (1985) 38 Cal.3d 658, 680.)

Evidence Code section 1045 adds that the information sought must be relevant to the subject matter involved in the pending litigation. . . . Defense counsels declaration and memorandum of points and authorities (see CT 68-91, 107-112), coupled with his representations at the time of the hearing (see ART 1-4, 25-29, 31-34), satisfied each of the statutory requirements. The rationale for seeking the information about Detective Lewis was that a pattern of orchestrating pretext stops on the part of Detective Lewis would be probative as to the arresting deputies credibility regarding their testimony as to their probable cause for stopping appellants car.

Criminal courts have broad discretion to admit evidence tending to impeach the credibility of witnesses. (See, e.g. *People v. Harris* (1989) 47 Cal.3d 1047, 1081-1082; *People v. Rodrigues* (1994) 8 Cal.4th 1060, 1124-1125.) Moreover, admissibility is not the test of what is discoverable. The test is whether the information sought might lead to admissible evidence. (*People v. Memro* (1985) 38 Cal.3d 658, 681-682; *City of Santa Cruz v. Municipal Court* (1989) 49 Cal.3d 74, 85.)

As the *Pitchess* court itself declared, Allowing an accused the right to discover is based on the fundamental proposition that he is entitled to a fair trial and an intelligent defense in light of all relevant and reasonably accessible information. (*Pitchess, supra*, 11 Cal.3d at pp. 535-536.) The court further stated,

[I]n contrast to the formal requirements for civil discovery, an accused in a criminal prosecution may compel discovery by demonstrating that the requested information will facilitate the ascertainment of the facts and a fair trial.

[Citations.] The requisite showing may be satisfied by general allegations which

⁴ The court denied the motion without prejudice, allowing defense counsel to present additional information if it became available. (ART 34.) Because the initial showing was legally sufficient, the fact that the denial was without prejudice does not alleviate the error.

establish some cause for discovery other than a mere desire for the benefit of all information which has been obtained by the People in their investigation of the crime. (*Id.*, at pp. 536-537.)

The showing appellant made is similar to that held to be sufficient in *Brant v. Superior Court* (2003) 108 Cal.App.4th 100 and *People v. Johnson* (2004) 118 Cal.App.4th 292. In *Brant*, officers stopped the defendant for allegedly playing his stereo too loudly. In the course of the detention, the officers discovered the defendant's license was suspended. A subsequent search revealed a controlled substance, and the defendant was arrested for that as well. (*Id.*, at p. 103.) The defendant challenged the officer's account of the detention, search, and manner in which his confession was obtained by providing his own version of the events, thereby making the officers truthfulness material to the issues in the case. The Superior Court found the showing to be insufficient because the defendant failed to personally file a declaration or meet his high burden, and that the officers had discretion to stop him. (*Id.*, at p. 108.)

The Court of Appeal disagreed. It said that based on counsels declaration, the defendant was challenging the officers account of the detention, search and manner in which his confession was obtained, thereby making the officers truthfulness material to the issues in the case. Consequently, the defendant demonstrated good cause for discovery of complaints against the officers. (*Id.*, at p. 108.)

In *Johnson*, the defense presented the defendants version of the events, which was at odds with the police version. Defense counsel made the following allegations in its *Pitchess* motion:

(1) Officer Carranza claimed defendant asked him for heroin and cocaine (using the common slang terms for each) (a copy of the investigative report was attached as an exhibit to the declaration); (2) defendant maintains that he never asked the officer for chiva or powder or negotiated for the purchase of either substance; (3) defendant never took possession of any packages of the purported narcotics; (4) it appeared Officer Carranza's statements regarding defendant's conduct were not truthful"; (5) evidence showing Officer Carranza had a pattern of dishonesty and filing false reports would be needed to formulate and prove the defense in this case; (6) the information sought by defendant's *Pitchess* motion appeared relevant "to prove character traits of [Officer Carranza], to refresh recollection, and to prove conduct, custody, propensity and habit in conformity with such traits; and (7) [t]he information regarding the propensities or traits reflected in or implied by the above acts [wa]s also needed to formulate and prove the defense in this case. (*Id.*, at p. 303.)

This was a sufficient showing, and the trial court erred in denying the defendants motion without an in camera hearing. (*Id.*, at p. 304.)

Similarly here, appellant made the same type of showing as to Detective Lewis. He alleged that Detective Lewis played a part in the pretext stop and that information in his personnel file could show that he acted in concert with patrol officers to contrive probable cause. Appellant met his burden, and the court erred in denying appellants motion without an in camera hearing.

However, because it is impossible to determine whether a defendant has been prejudiced when a *Pitchess* motion has been summarily denied, the *Johnson* court relied on the remedy fashioned in *People v. Hustead* (1999) 74 Cal.App.4th 410, 418-419:

[W]e will remand the case to the trial court to conduct an in camera hearing on the discovery motion. If there is no discoverable information in the file, then the trial court is ordered to reinstate the original judgment and sentence, and the judgment is ordered affirmed. [Citation.] If, however, there is relevant discoverable information in the officer's file, . . . appellant should be given an opportunity to determine if the information would have led to any relevant, admissible evidence that he could have presented at trial. [Citation.] If appellant is able to demonstrate that he was prejudiced by the denial of the discovery, the trial court should order a new trial. If appellant is unable to show any prejudice, then the conviction is ordered reinstated, and the judgment is ordered affirmed. (*Ibid*, quoted by *People v. Johnson*, *supra*, 118 Cal.App.4th at p. 305.)

That appears to be the remedy this court must impose here as well. Appellant made the proper showing as required under Penal Code sections 1043 and 1045. He established a plausible factual foundation for an allegation that Detective Lewis was involved in the manufacturing of probable cause to stop appellant and that his personnel files could contain materials relevant to his credibility and the credibility of the arresting officers. Therefore, the trial court should have held an in camera hearing. Because it did not, the trial court's ruling must be reversed and the matter remanded for an in camera hearing that meets *Mooc*'s requirements, thereby allowing for appellate review of that ruling as well.

In short, then, this court must review the sealed transcript of the in camera hearing regarding deputies Byers and Garrison for abuse of discretion in the ruling on disclosure. If the proceedings do not satisfy *Mooc*'s requirements, the case must be remanded to the Superior Court judge so that he can reconstruct the materials he considered, and the matter must then be returned to this court for review for abuse of discretion. In addition, the matter must be remanded to the Superior Court for an in camera review of Detective Lewis's personnel file; this in camera hearing must also comply with *Mooc*'s requirements.