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CERTIFIED FOR PUBLICATION

COURT OF APPEAL - FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

KRISTOPHER EBBERT, Petitioner, v. THE SUPERIOR COURT OF SAN DIEGO COUNTY, Respondent;	D042600 (San Diego County Super. Ct. No. M875068)
CITY OF SAN DIEGO, Real Party in Interest.	

Petition for Writ of Mandate from an order of the Superior Court of San Diego County, Janet I. Kintner, Judge. Petition granted.

Steven J. Carroll, Public Defender, Matthew Braner and Myra Garcia, Deputy Public Defenders, for Petitioner.

No appearance for Respondent.

Casey Gwinn, City Attorney, and Simon Silva, Deputy City Attorney, for Real Party in Interest.

When a *Pitchess*[1] motion is granted under Evidence Code section 1045,[2] the use of information received by the moving party is subject to a mandatory protective order. (§ 1045, subd. (e).) In *Alford v. Superior Court* (2003) 29 Cal.4th 1033 (*Alford*), the Supreme Court held that the scope of the section 1045, subdivision (e) protective order precludes the recipient from using the disclosed information for any purpose other than in connection with the court proceeding in which the *Pitchess* motion was granted. (*Alford,* at pp. 1039-1043.)

However, the majority in *Alford* expressly limited its holding to "the information disclosed pursuant to a *Pitchess* motion . . . [and] express[ed] no views [concerning] the treatment of information developed as a result of the receipt of information disclosed pursuant to a *Pitchess* motion." (*Id*. at p. 1037, fn. 2.) Justice Moreno, in his concurring and dissenting opinion in *Alford*, pointed out that the *Alford* holding left open:

> "whether a section 1045(e) protective order (a) may only restrict the use of the actual information disclosed by the trial court—i.e., the complainant's and witness's name, address, telephone number and the date of the incident; or (b) may also encompass the direct fruits of the information developed during this independent investigation—e.g., a complainant's or disclosed witness's statement; or (c) may encompass other information obtained during this independent investigation—e.g., physical evidence (such as a photograph of injuries), or a statement obtained from a newly discovered witness. Until the threshold question of what constitutes *Pitchess* information is answered, the majority's decision leaves trial courts, city attorneys, and defense attorneys, with little guidance." (*Id*. at p. 1063.)

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

2 All further statutory references are to the Evidence Code unless otherwise specified.

This writ proceeding requires us to address Justice Moreno's query because this case does not involve the status of the information within Justice Moreno's category (a)--information actually disclosed by the trial court--but instead involves the status of information within Justice Moreno's category (b)--witness statements derived from the information disclosed by the trial court. Petitioner Kristopher Ebbert contends the section 1045, subdivision (e) protective order encompasses only the former, and when an independent investigation results in a statement from the disclosed witness, that statement is outside the ambit of the protective order even though the source of the statement was the disclosed information subject to the protective order. Ebbert alternately contends that once a trial court granted his *Pitchess* motion and disclosed to him the identifying information of witnesses, a prior *Pitchess* protective order does not prevent the prior successful *Pitchess* movant from disclosing to him, or prevent him from examining, statements of the same witnesses previously obtained by the prior *Pitchess* movant's investigative efforts.

We conclude the protective order envisioned by section 1045, subdivision (e), limiting use of the information disclosed on grant of the *Pitchess* motion to the proceeding in which the motion was granted, does not encompass the derivative information obtained from use of the *Pitchess* motion information. We further conclude that when a trial court in an unrelated subsequent proceeding grants a second litigant's independent *Pitchess* motion as to the same peace officer who was the subject of a prior litigant's successful *Pitchess* motion, and orders disclosure to that second litigant of *Pitchess* information duplicative of that disclosed to the first litigant, the section 1045,

subdivision (e) protective order in the prior proceeding does not prohibit the second litigant from obtaining from the prior litigant the duplicative *Pitchess* information previously given to the prior litigant.

I

FACTS

A. The Prior Unrelated Case

In early 2003 defense counsel in an unrelated criminal proceeding (the Cruz matter) invoked the *Pitchess* statutes to obtain information concerning three peace officers, including Officer Michael T. The Cruz court entered a "Disclosure and Protective Order" pursuant to which certain "information [was] ordered disclosed from the officers' personnel files," and various limitations were placed on use of the information ordered disclosed.[3] An investigator for Cruz apparently interviewed several witnesses connected to complaints lodged against Officer Michael T., and obtained some form of statement from these witnesses.

B. The Ebbert Case

Also in early 2003, defense counsel in this criminal proceeding sought information concerning three peace officers, one of whom was Officer Michael T., by a *Pitchess*

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[3] The order provided that the information disclosed could not be copied or distributed except to the parties and attorneys in the Cruz matter; the information could only be used to defend in the Cruz criminal proceeding and could not be used in any other criminal or civil proceeding; and the information could only be disclosed to persons involved in the defense of the Cruz criminal proceeding. The order did not refer to the derivative information developed by using the disclosed information, including witness statements.

motion. The court granted Ebbert's *Pitchess* motion and entered a "Disclosure and Protective Order" that was, as to Officer Michael T., essentially the same as the order entered in the Cruz matter.

In June 2003 Ebbert's attorney learned that some of the witnesses whose identities had been disclosed to Ebbert in response to his *Pitchess* motion had also been disclosed to Cruz, Cruz's investigator had interviewed some of these witnesses, and there existed some form of reports by Cruz's investigator concerning those interviews (the Cruz reports). Ebbert's attorney moved for an order clarifying whether Ebbert could inspect and use the Cruz reports without violating the Cruz protective order. The court ruled the Cruz protective order barred Ebbert from any inspection or use of the Cruz reports, and held Ebbert was required to reinterview the witnesses. Ebbert then filed this petition for writ of mandate seeking review of the trial court order. We issued an order to show cause, received a response from real party in interest The City of San Diego (City) and held oral argument.

Ebbert's petition contends that the products of a defense investigation are not within the ambit of the automatic protective order required by section 1045, subdivision (e), or the protective order entered in the Cruz matter. He alternately contends that because he complied with *Pitchess* and successfully obtained the same witness identifying information given to Cruz, he should not be barred from examining the Cruz reports derived from that information. City argues the trial court correctly ruled that the Cruz reports are covered by the automatic protective order and Ebbert may not have access to them.

II

ANALYSIS

A. City's Procedural Objections

We preliminarily address City's procedural objections to Ebbert's petition. City asserts writ relief should be denied if a petitioner has a plain, speedy and adequate remedy at law (Code Civ. Proc., § 1086), and Ebbert has two adequate legal remedies: he could reinterview the witnesses or he could move to modify the prior protective order in the Cruz matter to permit him to use the Cruz reports. However, neither suggested legal remedy presents an adequate remedy because both *presume* the validity of the trial court's order barring him from examining the Cruz reports, which is the order Ebbert challenges as invalid.

City also asserts Ebbert should be denied relief under the doctrine of unclean hands because he learned of the Cruz reports in violation of the Cruz protective order. This contention assumes the issue to be decided--whether the Cruz protective order was violated when Ebbert learned Cruz had interviewed specific witnesses. Moreover, we are convinced that Ebbert's counsel, caught between the Scylla of his obligation to provide effective assistance to his client and the Charybdis of a statutory scheme whose ambiguities perplexed even Justice Moreno, properly sought guidance from the trial court and therefore was not guilty of unclean hands.

City finally asserts Ebbert did not preserve the issue raised in this writ petition because the arguments he now raises were not articulated to the trial court at the time of his request for clarification. However, the issue of whether Ebbert could use the Cruz

reports, considering *Alford* and the scope of protective orders entered in the Cruz matter pursuant to the *Pitchess* statutes, was the precise issue raised before the trial court, and therefore the issue was preserved.

B. The Merits

Ebbert argues that witness statements obtained by defense investigators are outside the scope of the protective order mandated by section 1045, subdivision (e), and therefore he may examine the statements obtained by the Cruz investigators without transgressing the Cruz protective order.[4] Ebbert alternately asserts it would be illogical to construe the legislatively mandated section 1045, subdivision (e) protective order to prevent a different *Pitchess* litigant, who has separately and independently satisfied the threshold determinations under the *Pitchess* statutes and has received the same identifying information about the same complaining witness, from examining statements from the complaining witness obtained by a prior successful *Pitchess* litigant.[5] Ebbert argues that construction is unreasonable because it would require each new litigant to expend scarce

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4 We note that section 1045, subdivision (d) provides a court with discretion to "make any order which justice requires to protect the officer or agency from unnecessary annoyance, embarrassment or oppression." However, there is no suggestion that the Cruz court's order was intended to invoke its *discretionary* authority to order that subsequently gathered witness statements be sealed, or that there was any particularized showing in the Cruz matter to support a discretionary protective order. We therefore proceed on the assumption that the Cruz order was based solely on section 1045, subdivision (e).

5 Here we examine a case in which the defense that gathered the statements was apparently willing to share the statements with another *Pitchess* litigant but was barred from doing so by the trial court's construction of the scope of the Cruz protective order. We do not address a situation in which the defense that gathered the derivative statements is *unwilling*, for whatever reasons, to share the statements.

resources to reinvent the wheel by reinterviewing the same witness; it would unnecessarily burden the complaining witness with repetitive intrusions into his or her privacy; and the added burden thus placed on litigants and witnesses is unaccompanied by any corresponding enhancement of the peace officer's privacy interests. Because Ebbert's arguments arise in the context of the *Pitchess* statutes as construed by *Alford*, we examine the statutory scheme and the holding in *Alford*.

Legal Framework

Penal Code section 832.7, subdivision (a) provides: "Peace officer . . . personnel records and records maintained by any state or local agency pursuant to [Penal Code] Section 832.5, or information obtained from these records, are confidential and shall not be disclosed in any criminal or civil proceeding except by discovery pursuant to Sections 1043 and 1046 of the Evidence Code." Sections 1043 and 1045 prescribe the procedures for discovery and require the moving party file a written motion that includes an affidavit showing "good cause" for the disclosure sought and the "materiality [of the records] to the subject matter involved in the pending litigation." (§ 1043, subd. (b).)

If the court finds good cause for disclosure, section 1045 requires the court to examine the information in camera in conformity with section 915.[6] If the court rules in favor of disclosing confidential information, which ordinarily involves revealing only the name, address and telephone number of any prior complainants and witnesses and the

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6 The in camera inspection aids in determining whether certain enumerated categories of information will remain confidential, including (1) complaints more than five years old, (2) the "conclusions of any officer investigating a complaint," and (3) facts "so remote as to make disclosure of little or no practical benefit." (§ 1045, subd. (b).)

dates of the incidents in question (*City of Santa Cruz v. Municipal Court* (1989) 49 Cal.3d 74, 84), section 1045 mandates entry of a protective order providing that the information "disclosed or discovered may not be used for any purpose other than a court proceeding pursuant to applicable law." (§ 1045, subd. (e); *Alford, supra,* 29 Cal.4th at pp. 1037-1039.)

In *Alford*, the appellate court ordered the *Pitchess* information be disclosed on condition the defense not disseminate the information disclosed beyond the criminal proceeding in which the *Pitchess* motion was granted. The defendant argued this condition was not authorized by section 1045, subdivision (e) because that subdivision allowed use of the disclosed information in *any* court proceeding. (*Alford, supra,* 29 Cal.4th at pp. 1037, 1040.) The Supreme Court, rejecting this argument, reasoned that section 1045, subdivision (e) must be construed in the context of the statutory scheme of which it is a part. The statutory scheme is designed to protect the peace officer's privacy interests, and allows those interests to be traversed only when the information is shown to be material to a particular defendant's case, and therefore *Alford* concluded the statute was intended to limit use of the disclosed information to the case in which disclosure was ordered. *Alford* held the defendant's contrary interpretation, which would allow him to use the information in any proceeding, would conflict both with the confidentiality accorded peace officer records under Penal Code section 832.7 and with the procedural requirements for disclosure of that information under sections 1043 and 1045, subdivisions (a) through (c). (*Alford,* at pp. 1042-1043.)

Analysis

Under the *Pitchess* statutes as construed by *Alford*, a successful litigant is authorized to have access to certain information, but the information "may not be used for any purpose" (§ 1045, subd. (e)) beyond the court proceeding in which the information was ordered disclosed by the grant of the *Pitchess* motion. However, because of the limited information given to a litigant pursuant to a *Pitchess* disclosure, the litigant is given information to enable him to conduct further investigation in anticipation of developing evidence material to the pending litigation.[7] Although section 1045, subdivision (e) places limits on the litigant's use of the *disclosed* information, we conclude any evidence developed as the result of the use of the disclosed information is the work product of the successful *Pitchess* movant and section 1045, subdivision (e) does not limit use of the *developed* information to the case in which the *Pitchess* motion was granted. The simple basis of this conclusion is that the statements obtained by the litigant from the disclosed complainant or witness are not materials obtained from the peace officer's personnel records maintained by any state or local agency, although a statement of the witness may be included in those records. Rather, the statements obtained by investigation following a successful *Pitchess* motion are part of the information available to anyone should the complainant be willing to discuss the matter.

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7 The *Alford* majority implicitly acknowledged the limited information disclosed by a *Pitchess* motion (*Alford, supra*, 29 Cal.4th at p. 1039), and Justice Moreno was more explicit, stating that considering the bare-bones information given to a litigant, "a trial court's *Pitchess* disclosure necessarily presupposes an independent investigation by defense counsel." (*Alford, supra*, at pp. 1062-1063, conc. & dis. opn. of Moreno, J.)

Only the identity of the complainant is secreted in the personnel records and the substance of interviews that complainant gives to a litigant is not and does not become part of the peace officer's personnel record maintained by the employer. The contrary construction of subdivision (e) urged by City that all information derived from the information disclosed by the successful *Pitchess* motion is included within the section 1045, subdivision (e) protective order would make information not part of or taken from the peace officer's personnel records confidential. Although a court may have broad powers to prevent a litigant from disseminating information obtained by compelled discovery, its ability to prevent a litigant from disseminating information independently acquired is more constrained. (*In re Marriage of Candiotti* (1995) 34 Cal.App.4th 718, 723-726.) This principle is true even though the statements obtained by the Cruz defense were derivative of the *Pitchess* discovery.

Our conclusion is consistent with the overall purpose of the *Pitchess* statutory scheme, which is to preserve to the peace officer as much privacy as possible considering the competing need of a defendant to gather evidence relevant to his or her defense. (*Alford, supra*, 29 Cal.4th at p. 1042.) By deeming statements gathered as the result of the disclosed information outside the ambit of the protective order, the defendant's ability to prepare a defense is enhanced and the officer's privacy interest in the data contained in his personnel file suffers no additional denigration beyond that which inured when the *Pitchess* disclosure was ordered. Accordingly, we conclude section 1045, subdivision (e)'s protective order, which requires that the records disclosed to a litigant shall not be used for any purpose other than the court proceeding in which disclosure was ordered,

must be construed to exclude any statements gathered by the defense derived from witnesses whose names were disclosed by the court order granting the *Pitchess* motion.

Although we conclude that derivative information obtained from the use of disclosed *Pitchess* information is not confidential information subject to the section 1045, subdivision (e) protective order, an issue remains: the extent of the material a prior litigant may disclose to other persons, including later litigants, considering *Alford's* holding that the complainant's identifying information remains subject to nondisclosure except in the first litigation. This issue may arise in at least two situations: (1) When the person to whom disclosure is contemplated has not made a successful *Pitchess* motion in a subsequent case; and (2) When the person to whom disclosure is contemplated has made a successful *Pitchess* motion in a subsequent case and obtained *Pitchess* information from the personnel file of the same peace officer that duplicates the *Pitchess* information provided to the prior litigant.

In the first situation, the derivative *Pitchess* information is not subject to the protective order and may be disclosed because it is the work product of the successful *Pitchess* movant. However, to comply with *Alford* in this situation, the litigant must first redact from the derivative information any *Pitchess* information (the complainant's name, address, and phone number, the date of the incident, and any other information taken from the personnel files and disclosed to the litigant) before disclosing the balance of the derivative information.

However, we conclude that in the second circumstance listed above--e.g. disclosure to a litigant who has separately prevailed on a *Pitchess* motion and obtained

Pitchess information duplicative of that obtained by the first litigant--the first litigant may disclose the derivative information without redacting the duplicative *Pitchess* information. In our view the granting of the subsequent *Pitchess* motion that discloses *Pitchess* information duplicative of the prior *Pitchess* motion permits the sharing of the confidential *Pitchess* information between the successful *Pitchess* movants that otherwise would be limited to use only in the action in which the motion was granted.

The *Pitchess* statutes presume that specific information about peace officers will remain confidential. (Pen. Code, § 832.7.) However, when a trial court, acting as gatekeeper, makes a particularized determination that a specific defendant has a "need to know" this information, it in effect licenses that defendant to learn who has complained about an officer and to learn or investigate the underlying details and facts of that complaint from any available source. Because this license is rooted in the particularized need-to-know determination, the required protective order limits the information the trial court determines the licensee needs to know to use only in the court proceeding in which a need-to-know determination has been made.

However, when a later court independently exercises its gatekeeper role and concludes another defendant has shown the need to know the same information (the same complainants) about the same peace officer, it has effectively admitted a new member into the circle of licensees who are entitled to learn who has complained about the officer. The new licensee is endowed with the same authorization to learn or investigate the underlying details and facts of that complaint from any source available to the licensee, and is subject to the same limitations that constrain other licensees to use the information

learned only for the purpose of the court proceeding in which the license was issued. Section 1045, subdivision (e) is not designed to delimit the sources from which the information may be obtained but is instead designed to assure that use of the information so obtained is limited to the proceeding in which the need-to-know determination was entered. We conclude that a litigant who has independently satisfied the *Pitchess* need-to-know requirements as to specific complainants with respect to a peace officer is authorized to learn the identity of the complainants in the possession of other successful *Pitchess* litigants.

Our examination of the language and purpose of section 1045, subdivision (e) reveals no statutory inhibition barring the second *Pitchess* licensee from examining the results of the first *Pitchess* licensee's motion to the extent the disclosed information is duplicative. Permitting the second licensee to examine this information causes no offense to the purpose of the *Pitchess* statutes, because the second licensee obtains nothing beyond that which the statutory scheme contemplates the second licensee is entitled to obtain, and the first licensee has not permitted the information of his or her license to be used for any court proceeding lacking a *Pitchess* license with its accompanying restrictions.

We therefore conclude that when there is a successful *Pitchess* motion in a subsequent case that discloses duplicative *Pitchess* information from the personnel file of the same peace officer who was the subject of a prior successful *Pitchess* motion, the duplicative *Pitchess* information in the two cases (the identities, addresses and telephone

numbers of complainants) may be shared between the litigants in the two cases without violating the section 1045, subdivision (e) protective order in either case.

DISPOSITION

Let a writ of mandate issue directing the trial court to vacate its order of June 10, 2003, and to enter a new and different order (1) permitting Cruz to disclose to Ebbert the results of Cruz's investigation of witnesses derived from the identifying information disclosed to Cruz under the court's "Disclosure and Protective Order" in the Cruz matter, and (2) permitting Cruz to disclose to Ebbert the *Pitchess* information in the Cruz matter to the extent duplicative identifying information was disclosed to Ebbert under the court's "Disclosure and Protective Order" in the Ebbert matter. The stay of proceedings below issued by this court on August 21, 2003, is vacated on issue of the remittitur.

CERTIFIED FOR PUBLICATION

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McDONALD, J.

WE CONCUR:

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McCONNELL, P. J.

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HALLER, J.