Filed 9/10/07 P. v. MacManus CA4/3

**NOT TO BE PUBLISHED IN OFFICIAL REPORTS**



IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

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| THE PEOPLE,<br>Plaintiff and Respondent,<br>v.<br>THOMAS A. MacMANUS,<br>Defendant and Appellant. | G035944<br>(Super. Ct. No. 04SF1121)<br>O P I N I O N |

Appeal from a judgment of the Superior Court of Orange County, Patrick H. Donahue, Judge. Affirmed.

David Blair-Loy, under appointment by the Court of Appeal, for Defendant and Appellant.

Bill Lockyer and Edmund G. Brown, Jr., Attorneys General, Robert R. Anderson, Chief Assistant Attorney General, Gary W. Schons, Assistant Attorney General, Jeffrey J. Koch and James D. Dutton, Deputy Attorneys General, for Plaintiff and Respondent.

Thomas A. MacManus appeals from his conviction for stalking and making criminal threats against his estranged wife, Anne MacManus. (Pen. Code, §§ 422 & 646.9, subd. (b).) The prosecution introduced evidence of prior incidents of domestic violence by MacManus to establish Anne was reasonably in fear for her safety. During trial, the defense learned for the first time a police officer involved in investigating one of those prior incidents may have made false statements in an application for an emergency protective order he obtained on Anne's behalf two years earlier. Although that officer was not called as a witness, MacManus sought a continuance of the trial to pursue *Pitchess*[1] discovery of the personnel files of the officer in question and another officer who did testify about the prior incident. On appeal, MacManus contends the trial court erred by denying the continuance. We find no error and affirm the conviction.

In our original opinion in this case filed on January 17, 2007, applying the controlling authority of *People v. Black* (2005) 35 Cal.4th 1238, 1261-1264 (*Black I*), we rejected McManus's second contention concerning the constitutionality of his upper term sentence, affirming the sentence as well. We granted rehearing to address this issue anew in light of the United States Supreme Court's subsequent decision in *Cunningham v. California* (Jan. 22, 2007) 549 U.S. ___ [127 S.Ct. 856] (*Cunningham*).[2] In *People v. Black* (2007) 41 Cal.4th 799 (*Black II*), the California Supreme Court has since reexamined the imposition of an upper term sentence under the state determinate sentencing law in light of *Cunningham*. In view of *Black II*, our original disposition was correct and we again affirm the sentence.

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

[2] In this opinion on rehearing, we reiterate the following from our original opinion filed on January 17, 2007: the entire "FACTS" discussion contained at pages 2 through 7 of the original opinion (omitting the original fn. 2 and modifying the original fn. 3); and the "DISCUSSION" part 1 "Denial of Motion to Continue/Pitchess Discovery" contained at pages 7 through 11 of the original opinion.

## FACTS

MacManus and Anne were married for 18 years and had a history of domestic violence. In March 2003, in Orange County Superior Court case No. 02SF0660, MacManus pled guilty to felony stalking, felony domestic violence, violating a protective order, and attempting to dissuade a witness, and was placed on probation. MacManus continued to contact Anne despite the restraining order, and in April 2003, she let him move back in with her because she believed she was safer from him if he was living with her. The restraining order was modified from "no contact" to "no violent contact." Anne made MacManus move out again in August 2004. Between August and October 2004, MacManus had several contacts with Anne that resulted in the current charges of stalking and making criminal threats.

*Prior Incidents*

At trial, Anne testified that throughout her marriage to MacManus, she was always "walking on eggshells." In 1999, after a violent incident in which MacManus pushed Anne into the kitchen causing bruising on her legs, Anne moved to Orange County to escape him. MacManus pestered her to reconcile, sometimes hiding in her carport late at night. Eventually, Anne relented and MacManus moved in with her and their children in Orange County.

In 2000, the couple fought over MacManus's infidelity. During the fight, MacManus grabbed Anne's thumbs, pulling them back. Anne struck MacManus with a scooter. Anne later pled guilty to disturbing the peace as a result of the incident.

In August 2002, Anne admitted to MacManus she was having an affair. MacManus hit her and threatened to kill her if she ever did it again. Anne filed for divorce, and MacManus moved out of the house.

Anne testified that in November 2002, there were several disturbing incidents. On November 3, 2002, MacManus went to Anne's house, threw plates at her, pulled her off the couch, and tried to physically drag her from the house. The police

obtained an emergency five-day protective order keeping MacManus out of her house. On November 8, 2002, MacManus went to Anne's house in the middle of the night, pried open her bedroom window while she slept, and entered the house.

On the night of November 10, 2002, MacManus went to Anne's house wanting to talk about their pending divorce and refused to leave. Anne agreed to go with him to a restaurant to talk, but she left the restaurant when MacManus began to ask if he could move back in. MacManus followed Anne home and refused to leave until the couple's daughter called the police.

Around 4:25 the next morning, November 11, Anne awoke to the sound of breaking glass. She tried to use her telephone to call the police, but the line was dead. Anne saw MacManus in her backyard, pumping his hand up and down as if he was masturbating. Anne used her cellphone to call the police. MacManus told Anne the police would not take him alive and fled when the police arrived. The police obtained an emergency protective order and took Anne and her children to a hotel.

Irvine Police Officer Gerald Head also testified about the November 2002 incidents. He was dispatched to Anne's house around 5:30 a.m. on November 11 to assist in a bloodhound search of the neighborhood for MacManus. When he and other officers returned to the house around 8:00 a.m., they saw signs that someone had been there in the interim—there were footprints going through a window and a blanket/shade had been pulled down from one of the children's windows. The next day, November 12, Head was again sent to Anne's house, responding to a call that a suspicious looking man was peering over fences. Head saw MacManus inside the house. MacManus fled and, after a foot pursuit, was arrested. At the time, he was carrying a restraining order prohibiting him from being near the house.

MacManus told Head that he and Anne were having marital problems and he went to the house on November 10 to talk to her. They argued, and Anne would not let him into the house. MacManus said he went back to Anne's house about 4:00 a.m., to

get some of his things, disabled the phone lines, and entered through the bedroom window. He fled when the police arrived.

Anne testified that on November 13, MacManus told Anne "'You are dead and I am dead, too[.]'" On November 18, Anne came home to find footprints on her bed. On another night, she saw MacManus hiding behind a tree in her yard. Anne then served MacManus with divorce papers, after which he kept calling her and leaving messages on her answering machine.

In December 2002, MacManus broke into Anne's house one night and grabbed her by the arm to stop her from calling the police. He ran off with paperwork before police arrived. He was arrested a few days later. As a result of the November 2002 incidents, in Orange County Superior Court case No. 02SF0660, MacManus pled guilty to stalking and domestic violence. A no contact restraining order was imposed.

After MacManus was released from jail in March 2003, and when he was still subject to a restraining order, he broke into Anne's house. The police saw MacManus's truck outside and came to investigate. MacManus had told Anne if the police found him there, they would shoot him. Anne lied to the police and said MacManus was not there because she feared a violent incident that could involve her children.

MacManus continued to press Anne to reconcile and in April 2003 sent her a diamond ring. Anne felt MacManus would never give up, and "it is almost safer to have him there than it is to keep fighting it and fighting it . . . ." Anne relented and let MacManus move back in. She had the restraining order modified from no contact to no violent contact.

*The Current Offenses*

In August 2004, Anne discovered MacManus was having an affair and told him to move out. She again filed for divorce. She then received numerous faxes from

MacManus with statements like "'she hates me'" "'he is bad news/mental,'" and "'you drive me insane.'"

Between August and October 2004, MacManus went to Anne's house numerous times, uninvited, and she had great difficulty getting him to leave. Anne would sometimes catch him looking into the windows of the house. She believed MacManus was following her on her walks. One time, MacManus called Anne and said he was going to kill himself and suggested he would kill himself by having the police shoot him.

In October 2004, while Anne was driving to Texas, MacManus called and said he was going to kill himself. On October 5, when Anne returned, she found several documents and a tape recorder were missing from her house. There were also several upsetting messages left by MacManus on Anne's answering machine.

Anne went to her and MacManus's joint business office and found her missing documents. As she took them, MacManus grabbed her by the arm. She drove home. When she got there, MacManus was already parked and walking towards the house. Anne ran inside and tried to prevent MacManus from entering, but he forced his way in. Anne's daughter called the police, but MacManus grabbed the telephone from her and told the dispatcher he lived there and nothing was happening. He then started to leave, but warned Anne if she called the police he would shoot himself.

On October 7, 2004, Anne obtained a modified restraining order. On October 8, MacManus called Anne and told her "to go stand in a graveyard and think about what it is like to be dead." Anne asked if that was a threat, but MacManus just repeated the statement several more times. The next day he called and told her, "'You need to think about what it is like to die.'"

Anne testified the calls from MacManus terrified her. She moved and changed her home telephone number. She then discovered MacManus had changed the password on her cellphone account denying her access.

*Defense*

MacManus presented evidence concerning the incident that led to Anne's arrest in 2000 for disturbing the peace. As to the current incidents, one of MacManus's daughters disputed some of Anne's testimony about the events. MacManus's brother testified when he visited Anne and MacManus in July 2004, Anne did not suggest she was afraid of MacManus. MacManus was upset because Anne had taken money from the business account and on a few occasions MacManus mentioned suicide.

MacManus denied ever threatening Anne or causing her to be fearful of him. MacManus confirmed that on November 11, 2002, he had cut Anne's telephone lines so she could not call the police and entered Anne's house around 4:25 a.m., after breaking a window. He knew at the time he was subject to an emergency protective order. MacManus also admitted breaking into Anne's house in December 2002 and again in March 2003. He denied his statements to Anne on October 8 and 9, 2004, were intended as threats, rather he was simply trying to get Anne to consider the value of life.

*Procedure*

MacManus was charged with one count of stalking (Pen. Code, § 646.9, subd. (b)), and two counts of making criminal threats (Pen. Code, § 422). Following a court trial, MacManus was convicted on all three counts and was sentenced to a total term of four years.[3]

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[3] MacManus's probation in Orange County Superior Court case No. 02SF0660 was revoked, and he was also sentenced to a consecutive term of one year and eight months. McManus separately appealed that judgment and we affirmed. (*People v. MacManus* (Jan. 17, 2007, G036183) [nonpub. opn.].)

## DISCUSSION

*1. Denial of Motion to Continue/Pitchess Discovery*

MacManus contends the trial court abused its discretion when it denied his request to continue the trial so he could prepare a *Pitchess* motion to obtain personnel records of Head and Officer J. Eppstein.[4] We find no error.

*A. Facts*

At the beginning of trial, a letter surfaced that had been written by Anne to Judge Pamela Iles, the judge who handled the charges against MacManus stemming from the November 2002 incidents (i.e., the charges in Orange County Superior Court case No. 02SF0660). The letter was undated and bore no marks indicating it had been filed. The prosecutor believed the letter was written sometime in 2003, because it concerned a violation of a restraining order reported on January 14, 2003. The prosecutor had only just discovered the letter "tucked away in my misdemeanor file." In the letter, Anne advised Judge Iles that, over her objections, the police officer who had obtained the emergency protective order on November 11, 2002, falsely told the judge that MacManus physically assaulted Anne during the incident. The officer told Anne "he had to lie" in order to get an emergency protective order. Anne denied that MacManus had physically assaulted her during the November 2002 incident. During a break in the proceedings, the prosecutor learned the officer who obtained that protective order was Eppstein. Although Eppstein had been listed as a potential witness, because his name was on one of the police reports, the prosecutor advised the court she had never intended to call him as a

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[4] *Pitchess, supra*, 11 Cal.3d 531, established a criminal defendant's right to "'compel discovery' of certain relevant information in the personnel files of police officers by making 'general allegations which establish some cause for discovery' of that information and by showing how it would support a defense to the charge against him." (*Warrick v. Superior Court* (2005) 35 Cal.4th 1011, 1018-1019 (*Warrick*).) The Legislature has since codified *Pitchess* in Penal Code sections 832.7 and 832.8 and in Evidence Code sections 1043 through 1045. (*Id.* at p. 1019.)

witness. MacManus moved for a continuance to prepare a *Pitchess* motion as to Eppstein. The trial court denied the motion for a continuance, noting Eppstein had at most a very limited connection to the current case and was not being called as a witness.

Subsequently, when Head testified about the November 2002 incidents, MacManus renewed his motion to continue trial to conduct *Pitchess* discovery as to Eppstein and Head. Head had testified when he responded to Anne's house on the morning of November 11, 2002 (after MacManus had broken in), to conduct a bloodhound search for MacManus, Eppstein and other officers were there as well. Head was aware Eppstein had earlier obtained an emergency protective order, but had nothing to do with the application and was not present when it was obtained. On November 12, when Head again went to the residence, Eppstein and other officers also responded to the call. When MacManus was arrested, Head served him with the emergency protective order.

MacManus argued he should be given a continuance to file *Pitchess* motions on Eppstein and Head. MacManus reasoned if Eppstein had lied to the judge about the circumstances warranting an emergency protective order, Head might be lying about the November 11 and 12, 2002, events as well. The trial court denied the motion.

*B. Analysis*

MacManus contends the trial court erred by denying his request for a continuance to seek discovery under *Pitchess* thereby depriving him of due process and a fair trial. His contention is without merit.

Continuances in a criminal case may be granted only upon a showing of good cause. (Pen. Code, § 1050, subd. (e); *People v. Frye* (1998) 18 Cal.4th 894, 1012-1013 (*Frye*).) The trial court "has broad discretion to grant or deny the request." (*Ibid.*; *People v. Jenkins* (2000) 22 Cal.4th 900, 1037 (*Jenkins*).) "In determining whether a denial was so arbitrary as to deny due process, the appellate court looks to the circumstances of each case and to the reasons presented for the request. [Citations.]"

(*Frye, supra,* 18 Cal.4th at p. 1013; see also *People v. Froehlig* (1991) 1 Cal.App.4th 260, 265.) The trial court's decision is reviewed for clear abuse of discretion. (*Jenkins, supra,* 22 Cal.4th at p. 1037.)

In ruling on a motion to continue, the trial court must consider "whether a continuance would be useful." (*People v. Beeler* (1995) 9 Cal.4th 953, 1003 (*Beeler*).) The court considers "'"not only the benefit which the moving party anticipates but also the likelihood that such benefit will result . . . ."'" (*Jenkins, supra,* 22 Cal.4th at p. 1037.) Although it is proper to grant a continuance to permit a defendant to investigate exculpatory evidence, the speculative nature of what is to be gained by a continuance justifies its denial. (*People v. Gatlin* (1989) 209 Cal.App.3d 31, 40-41.)

MacManus failed to establish good cause for the continuance by showing it would have been useful. MacManus contends the trial court necessarily abused its discretion because it failed to view his request for a continuance through the prism of the relaxed standards for *Pitchess* motions. We disagree.

A criminal defendant is entitled to *Pitchess* discovery of relevant documents or information in the personnel records of a police officer upon a showing of good cause. (Evid. Code, § 1043, subd. (b)(3).) Good cause exists when the defendant shows both "'materiality' to the subject matter of the pending litigation and a 'reasonable belief' that the agency has the type of information sought[.]" (*City of Santa Cruz v. Municipal Court* (1989) 49 Cal.3d 74, 84.)

There was no showing any material evidence would be discovered if a *Pitchess* motion were allowed. In *Warrick, supra,* 35 Cal.4th 1011, the Supreme Court clarified the materiality showing required for discovery of peace officer personnel records at trial. Although the standard of good cause has a "'relatively low threshold'" (*id.* at p. 1019), the materiality element nonetheless requires a specific showing that there is "a logical link between the defense proposed and the pending charge," and must

"articulate how the discovery being sought would support such a defense or how it would impeach the officer's version of events." (*Id.* at p. 1021.)

MacManus posits a *Pitchess* motion might have revealed information from Eppstein's and Head's personnel files that could be used to attack Head's credibility. (See *People v. Hustead* (1999) 74 Cal.App.4th 410, 417 [*Pitchess* motion proper for issue relating to officer credibility].) He argues if Eppstein lied in order to obtain an emergency protective order, then other officers involved in investigating the November 2002 incidents (e.g., Head) might also be lying about those events. And since Head's testimony was offered to corroborate Anne's testimony concerning the November 2002 incidents, impeachment of Head would have in turn cast doubt on Anne's testimony.

MacManus's assertion that if Eppstein lied to obtain an emergency protective order for Anne, it may reasonably be assumed Head was also untruthful in his reports and testimony about the November 2002 incidents, did not establish good cause to halt trial for *Pitchess* discovery. (See *California Highway Patrol v. Superior Court* (2000) 84 Cal.App.4th 1010, 1024.) That is particularly so where, as in this case, the officers and the incident have only a tangential connection with MacManus vis-à-vis *the current charged offenses*. (See, e.g., *People v. Collins* (2004) 115 Cal.App.4th 137, 149-150 [search after an anonymous tip revealed prison inmate was in possession of heroin; no good cause to obtain personnel records of the officer who received tip off note, but was not involved in the actual search].)

Eppstein and Head were involved in investigation of the November 2002 incidents, which resulted in criminal charges to which MacManus pleaded guilty. Head was not involved in obtaining the emergency protective order. Evidence of the 2002 incidents was introduced to establish Anne's reasonable fear from MacManus's conduct (i.e., stalking and threats) that resulted in the current charges. In her testimony about the 2002 incident, Anne never claimed MacManus physically assaulted her (the point on which Eppstein allegedly lied). Head never testified Anne was physically assaulted. And

MacManus himself testified to the same essential facts as Head—specifically, he admitted breaking into Anne's house on the morning on November 11, and cutting her telephone lines so she could not call the police. Thus, there was no showing by MacManus as to how the requested personnel records would aid his defense on the current charges "or how it would impeach the officer's version of events." (*Warrick, supra,* 35 Cal.4th at p. 1016.) Because there was no showing of materiality, what could be gained from a continuance was completely speculative. (See, e.g., *Beeler, supra,* 9 Cal.4th at pp. 1003-1004.)

*2. The Sentencing Issue*

MacManus contends the trial court violated the federal Constitution by sentencing him to the upper term absent "jury findings or proof beyond a reasonable doubt as to aggravating factors." (See *Blakely v. Washington* (2004) 542 U.S. 296 (*Blakely*).) We reject his contention.

MacManus was convicted of one count of stalking and two counts of making criminal threats. The court imposed the upper term of four years on the stalking count and stayed sentences on the two criminal threats counts pursuant to Penal Code section 654. At the same sentencing hearing, the court revoked MacManus's probation in Orange County Superior Court case No. 02SF0660, and sentenced him to additional consecutive middle terms totaling one year and eight months.[5] In selecting the upper term, the court relied upon the following aggravating factors: the victim's vulnerability (Cal. Rules of Court, rule 4.421(a)(3)), MacManus took advantage of a position of trust

[5] The parties agree that although MacManus has been released to parole, the sentencing issue is not moot as it could impact the date parole is terminated. We agree. (See *People v. Planavsky* (1995) 40 Cal.App.4th 1300, 1305, fn. 8; *People v. Goodson* (1990) 226 Cal.App.3d 277, 280, fn. 2.)

(Cal. Rules of Court, rule 4.421(a)(11)), and MacManus was on probation when the current offense was committed (Cal. Rules of Court, rule 4.421(b)(4)).[6]

In *Cunningham, supra*, 549 U.S. at page ___ [127 S.Ct. at p. 860], the United States Supreme Court held California's determinate sentencing scheme violates the Sixth Amendment, applying the rule it articulated in *Apprendi v. New Jersey* (2000) 530 U.S. 466 (*Apprendi*) and its progeny that "the [f]ederal Constitution's jury-trial guarantee proscribes a sentencing scheme that allows a judge to impose a sentence above the statutory maximum based on a fact, other than a prior conviction, not found by a jury or admitted by the defendant. [Citations.]"

In *Black II, supra*, 41 Cal.4th at page 805, the California Supreme Court responded to how *Cunningham* applies when an upper term is based on multiple factors and only some of them violate *Cunningham*. It explained that under our determinate sentencing system, the existence of a single aggravating circumstance is sufficient to make a defendant eligible for the upper term. "Therefore, if one aggravating circumstance has been established in accordance with the constitutional requirements set forth in *Blakely*, the defendant is not 'legally entitled' to the middle term sentence, and the upper term sentence is the 'statutory maximum.'" (*Id.* at p. 813, fn. omitted.) Furthermore, "so long as a defendant is *eligible* for the upper term by virtue of facts that have been established consistently with Sixth Amendment principles, the federal Constitution permits the trial court to rely upon any number of aggravating circumstances in exercising its discretion to select the appropriate term by balancing aggravating and mitigating circumstances, regardless of whether the facts underlying those circumstances have been found to be true by a jury." (*Ibid.*)

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[6] The sentencing issue has not been waived due to either McManus's assent to a court trial on the charges or his failure to object at his sentencing hearing to the lack of a jury trial on the aggravating factors. (*Black II, supra*, 41 Cal.4th at p. 810.)

Here, there was no *Cunningham* error because the trial court could properly rely upon the factor that MacManus was on probation when the current offenses were committed (Cal. Rules of Court, rule 4.421(b)(4)). The jury trial principles discussed in *Cunningham* apply to facts that increase the penalty, other than the fact of a prior conviction. (*Cunningham, supra,* 549 U.S. at pp. ___ [127 S.Ct. at pp. 860, 864, 868].) *Cunningham* did not overrule the *Almendarez-Torres*[7] exception to the *Apprendi* rule, i.e., a defendant does not have a federal constitutional right to a jury trial, for sentencing purposes, on whether the defendant has suffered a prior conviction. (See *Apprendi, supra,* 530 U.S. at pp. 487-488.)

MacManus argues probation does not fall into the *Almendarez-Torres* prior conviction exception to *Apprendi*. But in *Black II, supra,* 41 Cal.4th at page 799, our Supreme Court reaffirmed the conclusion it reached in *People v. McGee* (2006) 38 Cal.4th 682 (*McGee*), the prior conviction exception cannot be read narrowly. (*Black II, supra,* 41 Cal.4th at pp. 819-820.) The *Almendarez-Torres* exception extends beyond the mere fact of a prior conviction and applies more broadly to issues involving a defendant's recidivism. (*McGee, supra,* 38 Cal.4th at pp. 700-709.) It includes any "related issues that may be determined by examining the records of the prior convictions." (*Black II, supra,* 41 Cal.4th at p. 819.) Recidivism is "distinguishable from other matters employed to enhance punishment, because (1) recidivism traditionally has been used by sentencing courts to increase the length of an offender's sentence, (2) recidivism does not relate to the commission of the charged offense, and (3) prior convictions result from proceedings that include substantial protections. [Citations.]" (*McGee, supra,* 38 Cal.4th at pp. 698-699.)

The fact a "defendant was on probation or parole when the crime was committed[]" (Cal. Rules of Court, rule 4.421(b)(4)), pertains to his recidivism and thus

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[7] *Almendarez-Torres v. United States* (1998) 523 U.S. 224 (*Almendarez-Torres*).

comes within the *Almendarez-Torres* prior conviction exception. The defendant's status as a probationer arises out of his or her prior conviction in "proceedings with substantial procedural safeguards of their own . . . [,]" (*Apprendi*, *supra*, 530 U.S. at p. 488), and is objectively provable by a review of the court records relating to the prior offense. McManus's unsupported assertion that a defendant's current status as a probationer cannot always be conclusively established by examining the records of a prior conviction rings particularly hollow in this case given that his probation in Orange County Superior Court case No. 02SF0660, was revoked because of his current conviction concurrent with his sentencing in this case.

DISPOSITION

The judgment is affirmed.

O'LEARY, J.

WE CONCUR:

BEDSWORTH, ACTING P. J.

IKOLA, J.