

Jonathan Grossman 154452
Staff Attorney
Sixth District Appellate Program
100 N. Winchester Blvd., Suite 310
Santa Clara, CA 95050
(408) 241-6171

Attorney for Reginald Dewayne Ferguson

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
SIXTH APPELLATE DISTRICT

<p>PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff and Respondent, v. REGINALD DEWAYNE FERGUSON, Defendant and Appellant.</p>	<p>No. H912345 (Santa Clara County Superior Court No. AA912345)</p>
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**APPLICATION TO AUGMENT THE RECORD ON APPEAL
AND REQUEST FOR EXTENSION OF TIME**

Appellant Reginald Dewayne Ferguson applies, through counsel, pursuant to rules 8.155(a) and 8.340(c) of the California Rules of Court, to augment the record on appeal with the following item(s):

1. The reporter's transcript of the voir dire of juror number 4 on February 24, 2003 before the Hon. Robert Ambrose in department 58, Tina White, C.S.R.

2. The minute orders of the arraignment on the complaint on February 25, 2000, the waiver of counsel on March 20, 2000, and entry of plea of not guilty on April 17, 2000, attached as exhibit A.

3. Any financial statement submitted to the court in application for bail or own recognizance (Pen. Code, § 1318.1), or in application for appointed counsel (Pen. Code, § 987, subd. (c)).

4. Any signed waiver of the right to counsel filed in court.

5. The reporter's transcripts from the hearings on August 17, 2000 and September 28, 2000 (M. Sugino, C.S.R. in Department 63 for each date) of the court's denial of appellant's motion for discovery of a peace officer's records pursuant to *Pitchess v. Superior Court* (1974) 11 Cal.3d 531, 534.

This motion is based on this notice, the accompanying declaration of counsel and the Memorandum of Points and Authorities which follows.

MEMORANDUM OF POINTS AND AUTHORITIES

Rule 8.155, California Rules of Court, states that on suggestion of any party a judge of the reviewing court may order that portions of the oral proceedings be transcribed. The rule is designed to supplement an incomplete but existing record. (*People v. Brooks* (1980) 26 Cal.3d 471, 484.) It should be liberally construed. (*People v. Gaston* (1978) 20 Cal.3d 476, 483.) The reviewing court should not resolve the underlying substantive issues in ruling on a motion to augment. (*People v. Silva* (1978) 20 Cal.3d 489, 493, fn. 4.)

Augmentation of material necessary for appellate review is required to protect an indigent client's right to equal protection and due process on appeal under the Fourteenth Amendment to the United States Constitution and to protect the right to effective assistance of counsel on appeal under the Sixth and Fourteenth Amendments. (*Draper v. Washington* (1963) 372 U.S. 487, 496-497.) "[A]n appellate record that will permit a meaningful, effective presentation of the indigent's claims" is "constitutionally necessary for a 'complete and adequate' appeal by an indigent . . ." (*People v. Barton* (1978) 21 Cal.3d 513, 518; accord, *Draper, supra*, 372 U.S. at pp. 496-497.) As a component of due process, the United States Supreme Court has repeatedly identified an appellate record that permits a meaningful, effective presentation of an indigent's claims as a "basic tool" that is constitutionally necessary.

(Britt v. North Carolina (1971) 404 U.S. 226, 227; *Griffin v. Illinois* (1956) 351 U.S. 12; see also *Barton, supra*, at pp. 519-520.)

On February 25, 2001, appellant was arraigned on a felony complaint. (Exh. A, p. 1.) The complaint alleged against appellant two counts of selling cocaine (Health & Saf. Code, § 11352). (CT 48-51.) Appellant was referred to the public defender's office, and the matter continued for identification of counsel. (Exh. A, p. 1.) On March 20, 2001, appellant waived the right to counsel. (Exh. A, p. 2.) On April 17, 2001, appellant appeared without counsel and entered a plea of not guilty; the court set the matter for a preliminary hearing to be held on May 8, 2001. (Exh. A, p. 3.)

Appellant represented himself at the preliminary hearing. (CT 47.) Because of his questions, Officer Kurt Clarke of the Santa Clara Police Department testified to a third incident in which appellant allegedly offered to sell drugs. (CT 33, 36.) Appellant was held to answer. (CT 47.) At arraignment on the information, the prosecution added a third charge of offering to sale cocaine. (CT 52-54.) Counsel was appointed to represent appellant. (CT 56.)

A defendant must show the trial was prejudiced from an error in the preliminary hearing. (*People v. Pompa-Ortiz* (1980) 27 Cal.3d 519, 527-530.) The preliminary hearing, consisting of an evidentiary hearing to determine

which charges may be filed, is a “critical stage” in which a criminal defendant is entitled to counsel under the Sixth Amendment to the United States Constitution and article I, sections 14 and 15 of the California Constitution. (*Coleman v. Alabama* (1972) 399 U.S. 1; *Hale v. Superior Court* (1975) 15 Cal.3d 221, 228; cf. *Gerstein v. Pugh* (1975) 420 U.S. 103, 122-123.) The prosecutor stated, the only reason why appellant was charged with a third count of violating Health and Safety Code section 11352 was because appellant asked about it at the preliminary hearing. (RT 144.) There was no crime report of the event, and the prosecutor was unaware of the incident. (RT 59, 73.) A reporter’s transcript of the hearings on March 20 and April 17, 2000, and the signed waiver of the right to attorney, if any, are necessary to determine whether appellant properly waived the right to counsel during a critical stage of the proceeding. The Financial statement submitted to the court in application for bail or own recognizance (Pen. Code, § 1318.1), and the application for appointed counsel (Pen. Code, § 987, subd. (c)), if any, are necessary to determine if appellant qualified for appointed counsel.

Before trial, appellant moved twice for discovery of information in Officer Clarke’s personnel file pursuant to *Pitchess v. Superior Court* (1974) 11 Cal.3d 531, 534. (CT 66-138.) The motion was denied on August 17, 2000. (CT 156). Appellant again moved for discovery (CT 162-240), and the

motion was denied for most items requested on September 28, 2000 (CT 252). As to the items requested which was not denied, there is no information in the clerk's transcript whether any material was disclosed. (CT 252.)

The sole prosecution witness at trial was Officer Clarke. He testified that appellant sold him cocaine twice and offered to sell him cocaine on a third occasion. (RT 34, 39, 47-49, 55.) Appellant testified and denied the allegations. (RT 86-88.) Because the credibility of Officer Clarke was a key issue at trial, the trial court's ruling on the *Pitchess* motion is potentially a viable issue on appeal. Without a reporter's transcript, there is no record of the court's reasons for denying the motions and why certain information ordered disclosed never was.

In this case, appellant is seeking to supplement an incomplete but existing record. He has shown how the requested transcripts may prove helpful on appeal. Accordingly, his request for augmentation should be granted.

DATED: May 2, 2001

Respectfully submitted,

By:

Jonathan Grossman
Attorney for Appellant
Reginald Dewayne Ferguson

DECLARATION OF COUNSEL

I, Jonathan Grossman, am counsel for appellant, and I respectfully request that the record be augmented to include the above listed items.

I am a staff attorney with the Sixth District Appellate Program which has been appointed to represent Reginald Dewayne Ferguson.

Appellant was convicted of three counts of selling or offering to sell cocaine. (Health & Saf. Code, § 11352.) On December 11, 2000, the court placed him on probation for 3 years and ordered he serve ten months in county jail.

In preparation of this motion, I sought and obtained copies of the matter contained in the superior court file. Attached as exhibit A are true and correct copies of the minute orders of the arraignment on the complaint on February 25, 2000 (p. 1), the waiver of counsel on March 20, 2000 (p. 2), and setting of the preliminary hearing on April 17, 2000 (p. 3).

As reflected in the attached motion, it is my professional opinion that appellant cannot receive a full and fair review of the trial court proceedings unless the motion to augment is granted. It is also my good faith belief that the items requested are essential for appellate review.

I request that the time for filing the opening brief be extended to a date 30 days after the filing of the requested augmented record. The original record

was filed on February 23, 2001. One extension of time was previously granted to May 4, 2001.

The original record consists of 329 pages of clerk's transcript (excluding a 46 page transcript of the preliminary hearing) and 179 pages of reporter's transcript. I have read the clerk's transcript and reporter's transcript and learned material is missing from the original record which is necessary for adequate review.

I need the additional time to assimilate the information requested in this application to augment in order to fully develop the issues and draft the opening brief.

I declare under penalty of perjury under the laws of the state of California that the foregoing is true and correct. Executed at Santa Clara, California, on May 2, 2001.

Jonathan Grossman