

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

California Rules of Court, rule 8.1115(a), prohibits courts and parties from citing or relying on opinions not certified for publication or ordered published, except as specified by rule 8.1115(b). This opinion has not been certified for publication or ordered published for purposes of rule 8.1115.

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE,

Plaintiff and Respondent,

v.

MICHAEL ANDREW PINEDA,

Defendant and Appellant.

E080666

(Super.Ct.No. FVA1201409)

OPINION

APPEAL from the Superior Court of San Bernardino County. Katrina West,
Judge. Reversed.

Marta I. Stanton, under appointment by the Court of Appeal, for Defendant and
Appellant.

Rob Bonta, Attorney General, Lance E. Winters, Chief Assistant Attorney
General, Charles C. Ragland, Assistant Attorney General, Lynne G. McGinnis and Alan
L. Amann, Deputy Attorneys General, for Plaintiff and Respondent.

INTRODUCTION

Defendant Michael Andrew Pineda appeals the trial court's denial of his petition for resentencing made pursuant to Penal Code section 1172.6 (former section 1170.95).¹ He contends the court improperly denied his petition at the prima facie stage because the record of conviction did not establish as a matter of law that he was ineligible for resentencing, and the court could not have denied his petition without improperly engaging in factfinding. We agree and reverse.

FACTUAL AND PROCEDURAL BACKGROUND²

Officer Jones testified that he was on duty on September 20, 2012, when he received a call concerning a shooting at a location in San Bernardino County. He went there and found the victim's body in the street, with multiple gunshot wounds to his head and body. There was a single spent bullet next to the body but no cartridge cases, indicating that the firearm used was most likely a revolver.

Officer Betty testified that he was on duty at about 10:00 p.m.³, and a white sedan caught his attention by its erratic driving. Officer Betty conducted a traffic stop of the

¹ All further statutory references will be to the Penal Code unless otherwise noted. Effective June 30, 2022, the Legislature renumbered section 1170.95 as section 1172.6, with no substantive change in text. (Stats. 2022, ch. 58, § 10.) We will cite to section 1172.6 for ease of reference.

² Facts taken from the preliminary hearing transcript are provided for background purposes only and to provide context for the parties' arguments.

³ We note the prosecutor questioning Officer Betty asked if he was on duty on September 21, and Officer Betty said, "Yes." However, it appears the prosecutor misspoke when she referred to September 21, since the other officers testified that the incident occurred on September 20, 2012.

sedan, which was carrying three people—T.G., L.G., and defendant. Another officer found a partially loaded revolver under the center console.

Officer Farmer, the primary officer investigating the victim's murder, testified that he interviewed T.G. and L.G. T.G. told him she was driving her white sedan with L.G. in the front seat, and defendant, R.R. (defendant's half-brother), and the victim in the back seat. The three men in the back seat began arguing. The fight became so violent that T.G. pulled the car over to the side of the road. The three men got out of the car and continued fighting. T.G. said defendant had a gun and shot the victim. She heard two shots, saw the flame come out of the gun, and saw the victim fall to the ground. Then, the others got back into the car and left. T.G. said defendant told the others they should not tell anyone what happened, otherwise he "wouldn't hesitate" to shoot them. Officer Farmer testified that when he interviewed L.G., she gave a similar story.

Officer Farmer also interviewed defendant's girlfriend, J.C., at whose house defendant and the others stayed the night following the murder. Officer Farmer testified that J.C. said T.G., L.G., and R.R. slept in the same room that night because defendant "wanted to keep the two girls and [R.R.] together." J.C. said defendant asked if he could keep his handgun at her house, and when she said no, he took it back to T.G.'s car. Officer Farmer testified that J.C. said defendant told her that "when they went to take care of the business with somebody that he had to deal with, it didn't go the way he wanted it, and he had to shoot the guy." J.C. did not know the name of the victim.

Officer Farmer also testified about his interview with R.R. R.R. told him he was picked up by defendant and an unknown female in a white car. They also picked up the victim and then drove to a house to buy methamphetamine. R.R. was sitting in the back seat. He said defendant and the victim got into an argument, which escalated into a physical fight. R.R. further said T.G. pulled over, and he, defendant, and the victim got out of the car. Defendant and the victim continued fighting, and defendant shot the victim. R.R. believed he heard three shots. Officer Farmer testified that R.R. told him he (R.R.) did not shoot the victim.

On January 13, 2013, defendant and R.R. were charged by information with murder. (§ 187, subd. (a), counts 1 & 5.) The information also charged defendant with dissuading a witness from reporting a crime (§ 136.1, subd. (b)(1), count 2 & 3) and possession of a firearm by a felon (§ 29800, subd. (a), count 4). As to count 1, the information alleged that defendant personally discharged a firearm causing great bodily injury or death (§ 12022.53, subd. (d)), personally discharged a firearm (§ 12022.53, subd. (c)), and personally used a firearm (§ 12022.53, subd. (b)). As to count 5, the information alleged that a principal was armed with a firearm. (§ 12022, subd. (a)(1).) The information further alleged that defendant had served four prior prison terms. (§ 667.5, subd. (b).)

On July 30, 2014, defendant pled guilty to the lesser included offense of second degree murder and admitted the section 12022.53, subdivision (b) personal firearm use allegation. In exchange, the court sentenced him to a total term of 15 years to life in state

prison, plus 10 years on the firearm enhancement, and it dismissed the remaining counts and allegations. Both counsel stipulated that the court could consider the preliminary hearing to establish a factual basis for the plea.

On May 18, 2022, defendant filed a petition for resentencing pursuant to section 1172.6. He checked several boxes on the petition. One box stated that an information was filed against him that allowed the prosecution to proceed under a “theory of felony murder, murder under the natural and probable consequences doctrine or other theory under which malice is imputed to a person based solely on that person’s participation in a crime, or attempted murder under the natural and probable consequences doctrine.” One box stated that he “accepted a plea offer in lieu of a trial at which [he] could have been convicted of murder or attempted murder.” The third box stated he “could not presently be convicted of murder or attempted murder because of the changes made to sections 188 and 189.”

On July 18, 2022, the prosecutor filed an opposition to defendant’s petition, alleging that defendant was not eligible for relief since he was the actual killer and personally used a firearm in the commission of the killing.

On January 27, 2023, the court held a hearing on the petition. At the hearing, the prosecutor asked the court to deny the petition based on the plea and the preliminary hearing transcript, which showed defendant was the actual shooter. Defense counsel argued that the court could not consider the facts from the preliminary hearing transcript. The prosecutor replied that the parties stipulated to the use of the preliminary hearing as a

factual basis for the plea, and he pointed to defendant's plea to second degree murder and the firearm enhancement. The court noted that both counsel submitted that the preliminary hearing would suffice as a factual basis for the taking of the plea, multiple witnesses identified defendant as the shooter, and there were no other suspects with regard to the shooting. The court thereby concluded that the record contradicted defendant's statement in his petition that he could not be found guilty of second degree murder, and it was impossible for him to make a prima facie showing. The court denied his petition.

Defendant filed a notice of appeal on February 9, 2023.

DISCUSSION

The Trial Court Erred in Denying Defendant's Petition Without Issuing an Order to Show

Cause

Defendant argues the court erred in denying his petition at the prima facie stage because the record of conviction did not establish as a matter of law that he was ineligible for resentencing. He specifically contends that the record of conviction does not contain facts refuting the allegations in his petition since his plea was generic and did not specify any theory of liability. He also argues the court engaged in impermissible factfinding by relying on facts taken from the preliminary hearing transcript, which contained hearsay testimony by police officers who did not personally observe the incident. Defendant further asserts that he did not admit the truth of the testimony given at the preliminary hearing, and the stipulation to the preliminary hearing transcript as a factual basis was not

a binding admission for all purposes. Finally, he contends that the firearm use allegation does not prove he personally discharged a firearm, was the direct perpetrator, or acted with malice aforethought. The People argue that the record of conviction, specifically the preliminary hearing transcript, establishes that defendant was the direct perpetrator and, therefore, ineligible for relief. We conclude the court erred in summarily denying defendant's petition.

A. Relevant Law

Senate Bill No. 1437 (2017-2018 Reg. Sess.) (Senate Bill 1437), effective January 1, 2019, was enacted “to amend the felony murder rule and the natural and probable consequences doctrine, as it relates to murder, to ensure that murder liability is not imposed on a person who is not the actual killer, did not act with the intent to kill, or was not a major participant in the underlying felony who acted with reckless indifference to human life.” (Stats. 2018, ch. 1015, § 1, subd. (f); see *People v. Lewis* (2021) 11 Cal.5th 952, 959 (*Lewis*)). Senate Bill 1437 also created a procedural mechanism for those convicted under the former law to seek retroactive relief under the law as amended. (Stats. 2018, ch. 1015; *Lewis*, at p. 957.)

Under section 1172.6, the relief process begins with the filing of a petition containing a declaration that all requirements for eligibility are met (§ 1172.6, subd. (b)(1)(A)), “including that “[t]he petitioner could not presently be convicted of murder or attempted murder because of changes to [Penal Code] Section 188 or 189

made effective January 1, 2019,' the effective date of Senate Bill 1437 (§ 1172.6, subd. (a)(3)).” (*People v. Strong* (2022) 13 Cal.5th 698, 708 (*Strong*).

If the petition complies with the requirements of section 1172.6, subdivision (b)(1), “the court shall hold a hearing to determine whether the petitioner has made a prima facie case for relief.” (§ 1172.6, subd. (c).) Where a petitioner has made the requisite prima facie showing that he is entitled to relief, the court must issue an order to show cause and hold an evidentiary hearing to determine whether to vacate the murder conviction and resentence the petitioner on any remaining counts. (§ 1172.6, subds. (c) & (d)(1).)

At the prima facie stage, the court may deny a petition only if the petitioner is ineligible for relief as a matter of law. (*Lewis, supra*, 11 Cal.5th at p. 966.) In other words, the petition and the record of conviction must “establish conclusively that the defendant is ineligible for relief.” (*Strong, supra*, 13 Cal.5th at p. 708.) This is a pure question of law that we review de novo. (*People v. Lopez* (2022) 78 Cal.App.5th 1, 14.) “While the trial court may look at the record of conviction after the appointment of counsel to determine whether a petitioner has made a prima facie case for . . . relief, the prima facie inquiry . . . is limited. Like the analogous prima facie inquiry in habeas corpus proceedings, “the court takes petitioner’s factual allegations as true and makes a preliminary assessment regarding whether the petitioner would be entitled to relief if his or her factual allegations were proved. If so, the court must issue an order to show cause.” [Citation.] “[A] court should not reject the petitioner’s factual allegations on

credibility grounds without first conducting an evidentiary hearing.’” (*Lewis*, at p. 971.)

“In reviewing any part of the record of conviction at this preliminary juncture, a trial court should not engage in ‘factfinding involving the weighing of evidence or the exercise of discretion.’” (*Id.* at p. 972.) “[T]he ‘prima facie bar was intentionally and correctly set very low.’” (*Ibid.*)

B. The Court Improperly Relied Upon the Preliminary Hearing Transcript

Defendant contends the court improperly relied on the preliminary hearing transcript in determining he was ineligible for relief as a matter of law. The People argue that the preliminary hearing transcript conclusively established that defendant was the direct perpetrator, and the court properly relied on it since defendant stipulated to it as a factual basis for the plea. We conclude the court’s reliance on the preliminary hearing transcript was improper.

Even where a defendant stipulated to the preliminary hearing transcript as the factual basis for a plea, reliance on the transcript has been held improper at the prima facie stage of a resentencing proceeding. (See *People v. Flores* (2022) 76 Cal.App.5th 974, 991-992 (*Flores*).)⁴ Thus, although defendant’s counsel stipulated to the preliminary hearing transcript as a factual basis for the plea, “absent an indication that a defendant admitted the truth of particular facts, the stipulation to a factual basis for the

⁴ We acknowledge that the Courts of Appeal are split on the issue, which is pending before the California Supreme Court. (Compare *People v. Patton* (2023) 89 Cal.App.5th 649, 657, review granted, June 28, 2023, S279670 [preliminary hearing transcript conclusively demonstrated ineligibility for relief under section 1172.6], with *Flores*, *supra*, 76 Cal.App.5th at pp. 988-992 [concluding that preliminary hearing transcript does not establish ineligibility for resentencing].)

plea does not ‘constitute[] a binding admission for all purposes.’” (*People v. Rivera* (2021) 62 Cal.App.5th 217, 235 (*Rivera*)). Defendant did not admit the truth of the evidence adduced at the preliminary hearing. Instead, his attorney only stipulated that the preliminary hearing transcript would provide the factual basis for the plea. This stipulation did not permit the court to rely on the preliminary hearing transcript as truthful and binding on defendant. (See *Flores*, at p. 991 [stipulation that preliminary hearing transcript provided factual basis for plea was not binding and thus did not conclusively establish defendant was ineligible for section 1172.6 relief]; *Rivera*, at p. 235 [stipulation to grand jury transcript as factual basis is not admission of truth of evidence in the transcript]; *People v. Thoma* (2007) 150 Cal.App.4th 1096, 1104 [a general stipulation to a factual basis for a plea does not amount to an admission of particular facts].) Instead, a stipulation to the factual basis for a plea “is an admission only of the facts necessary to the charged offense itself.” (*People v. Banda* (2018) 26 Cal.App.5th 349, 359.)

We note defendant’s argument that the court erred in relying on facts taken from the preliminary hearing transcript since the testimony at the preliminary hearing was hearsay given by police officers, who did not personally observe the incident. He contends that since the hearsay testimony would be inadmissible at an evidentiary hearing (§ 1172.6, subd. (d)(3)), it also could not be considered to determine eligibility at the prima facie stage. The People contend that although section 1172.6, subdivision (d)(3) bars the use of hearsay evidence admitted in a preliminary hearing pursuant to section 872, subdivision (b), at a section 1172.6 evidentiary hearing, it does not bar the use of

such evidence at the prima facie stage of a section 1172.6 proceeding. Putting aside the hearsay issue with the officers' testimonies that defendant raises, Officer Farmer's testimony, based upon what was told to him by others, could only prove defendant was the actual killer and thus ineligible for relief if it was found to be credible and true. That, in turn, would also require finding that the witnesses' statements to Officer Farmer were true. Thus, to find defendant was the actual shooter based on the preliminary hearing transcript, the court had to find that Officer Farmer was truthfully relaying the witnesses' statements and that those statements were truthful. In other words, "[t]o find [defendant] ineligible for resentencing on this record would require judicial factfinding, which is impermissible at the prima facie stage." (*Flores, supra*, 76 Cal.App.5th at pp. 991-992; see *Lewis, supra*, 11 Cal.5th at p. 972 ["In reviewing any part of the record of conviction at this preliminary juncture, a trial court should not engage in 'factfinding involving the weighing of evidence or the exercise of discretion.'"]) The preliminary hearing transcript therefore does not conclusively establish that defendant is ineligible for section 1172.6 relief as a matter of law.

As a result, we conclude that the court erred by finding that defendant was the actual killer and thus ineligible for relief. The court in turn erred by summarily denying his petition without issuing an order to show cause and holding an evidentiary hearing.

C. Defendant's Guilty Plea Does Not Establish That Defendant Was the Actual Shooter

The People additionally point to defendant's plea to second degree murder and argue that the record of conviction conclusively showed only one factual basis upon which he could have entered his plea; thus, defendant must have pled guilty as a direct perpetrator. Defendant pled no contest to second degree murder. However, the information charged him generically with murder and did not specify or exclude any particular theory of murder (e.g., murder under the natural and probable consequences doctrine). (See *Flores, supra*, 76 Cal.App.5th at p. 987; see also *Rivera, supra*, 62 Cal.App.5th at p. 233 [generically charging murder did not preclude prosecution based on any particular theory of murder]; *People v. Eynon* (2021) 68 Cal.App.5th 967, 977-978 [same].) In entering his plea, defendant did not admit to any particular theory of murder or admit that he was the actual shooter. Neither the charge nor the plea excludes defendant from resentencing eligibility as a matter of law. (See *Flores*, at p. 987.)

In sum, defendant adequately alleged a prima facie claim for relief, and the record does not rebut his allegations as a matter of law. The court was required to issue an order to show cause (§ 1172.6, subd. (c)), and to hold a hearing at which the prosecution bears the burden of proving defendant's ineligibility for resentencing beyond a reasonable doubt, unless such hearing is waived (§ 1172.6, subd. (d)). In failing to do so, the court erred. Accordingly, we must reverse and remand for further proceedings. We express no opinion on the merits of the petition.

DISPOSITION

The order summarily denying defendant's petition is reversed. The matter is remanded with directions to issue an order to show cause under section 1172.6, subdivision (c), and to hold a hearing under section 1172.6, subdivision (d)(1).

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

FIELDS
_____ J.

We concur:

MILLER
_____ Acting P. J.

MENETREZ
_____ J.