Filed 1/25/23 P. v. Clark CA4/2

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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE, Plaintiff and Respondent, v. ROBERT EARL CLARK, Defendant and Appellant.	E077822 (Super.Ct.No. FBA03887) OPINION

APPEAL from the Superior Court of San Bernardino County. Christopher S. Pallone, Judge. Affirmed.

Stephen M. Lathrop, 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 A. Natasha Cortina, Deputy Attorneys General, for Plaintiff and Respondent.

In 1998, a jury convicted defendant Robert Earl Clark of second degree murder (Pen. Code,[1] § 187, subd. (a)) and assault on a child under eight years of age causing death (§ 273ab), and the trial court sentenced him to state prison for 25 years to life. On direct appeal, this court held, inter alia, that substantial evidence supported defendant's conviction for second degree murder under the theory of implied malice. (*People v. Clark et al.* (Apr. 20, 2000, E023822) [nonpub opn.].)

After the enactment of Senate Bill No. 1437 (2017-2018 Reg. Sess.), which eliminated the crimes of second degree felony murder and murder under the natural and probable consequences doctrine, defendant filed a petition pursuant to former section 1170.95[2] (current § 1172.6) alleging he was convicted of second degree murder under those now-invalid theories, and he was entitled to resentencing. During that proceeding, defendant submitted excerpts of the prosecutor's closing argument at trial and of the oral jury instructions, and the trial court reviewed all the written jury instructions. Because it concluded the jury had not been instructed on those now-invalid murder theories, the trial court found defendant had not made a prima facie showing of entitlement to relief and denied the petition.

On appeal, defendant argues the trial court erred by not issuing an order to show cause (OSC) and setting an evidentiary hearing on his petition because the partial record

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[1] All undesignated statutory references are to the Penal Code.

[2] Effective June 30, 2022, Assembly Bill No. 200 (2021-2022 Reg. Sess.) amended and renumbered Penal Code section 1170.95 as section 1172.6. (Stats. 2022, ch. 58, § 10.)

presented to the trial court did not eliminate the possibility that his jury had been given supplemental instructions on second degree felony murder and/or murder under the natural and probable consequences doctrine. Defendant had the burden of establishing a prima facie case for relief, and, consequently, he should have provided a fuller record to the trial court. In any event, the entire record from defendant's direct appeal, which we judicially notice on our own motion, demonstrates the jury *was not* instructed on those now-invalid theories and the prosecutor simply did not present them during closing arguments. Because defendant is not entitled to resentencing as a matter of law, we must affirm.

I.

PROCEDURAL BACKGROUND

Defendant does not argue the evidence introduced at his trial is insufficient to support his conviction for second degree murder as that crime is now defined, so we need not repeat the facts here. The reader may find a summary of the facts in our prior opinion. (*People v. Clark et al.*, *supra*, E023822.)

As noted, in 1998, a jury found defendant guilty of second degree murder and assault on a child under the age of eight that resulted in the child's death, and he was sentenced to 25 years to life. We affirmed the judgment on direct appeal and directed the clerk of the superior court to prepare an amended abstract of judgment. (*People v. Clark et al.*, *supra*, E023822.)

On January 16, 2019, defendant filed a form petition for resentencing under former section 1170.95. In support of his petition, defendant alleged he had been

convicted of second degree murder "pursuant to the felony-murder rule or the natural and probable consequences doctrine," and, after the amendments made to sections 188 and 189 by Senate Bill No. 1437 (Stats. 2018, ch. 1015, §§ 2, 3), he could no longer be convicted of second degree murder.[3] The prosecutor filed a request to dismiss the petition arguing, inter alia, that defendant had not made a prima facie showing of entitlement to relief. The trial court appointed counsel for defendant, who promptly opposed the prosecutor's request to dismiss the petition.

Defendant filed a request for permission to amend his petition. In support of this request for leave to amend, he submitted excerpts of the prosecutor's closing argument and of the oral jury instructions from his trial. The matter was continued numerous times. At a hearing held March 19, 2019, the trial court indicated it would "take a little bit of time to look at the file, see whether or not there's any basis to grant an OSC," and it ordered that the jury instructions from the trial be submitted.

At a hearing conducted April 2, 2021, the trial court indicated it had reviewed the written jury instructions and stated its tentative decision was to deny the petition and not issue an OSC because the jury had not been instructed on felony murder or murder under the natural and probable consequences doctrine. The court ordered that the parties be given copies of the instructions and continued the hearing.

The matter was again continued numerous times. Finally, at a hearing conducted September 21, 2021, the parties submitted on the written arguments and the record

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[3] Defendant also checked the boxes on the form petition for persons convicted of first degree murder, which were clearly inapplicable to him.

presented, and the trial court denied defendant's petition. The trial court indicated it had read and considered the jury instructions, and it found that, "based on the jury's verdict and the instructions[, defendant] was not convicted on a theory of natural and probable consequences" and was, instead, convicted under a "viable theory of murder."

Defendant timely appealed

II.

DISCUSSION

Effective January 1, 2019, the Legislature passed Senate Bill No. 1437 "'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.'" (*People v. Gentile* (2020) 10 Cal.5th 830, 846-847 (*Gentile*); see Stats. 2018, ch. 1015, § 1, subd. (f).) It did so by amending sections 188 and 189. And, relevant here, effective January 1, 2022, Senate Bill No. 775 (2021-2022 Reg. Sess.) expanded those reforms to eliminate the crime of 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." (§ 1172.6, subd. (a), as amended by Stats. 2021, ch. 551, § 2.)

Senate Bill No. 1437 also enacted former section 1170.95 to permit defendants previously convicted of felony murder or murder under the natural and probable consequences doctrine to seek retroactive relief if they could no longer be convicted of murder under the new law. (§ 1172.6, subd. (a); *Gentile*, *supra*, 10 Cal.5th at p. 843;

People v. Lewis (2021) 11 Cal.5th 952, 959 (*Lewis*); *People v. Strong* (2022) 13 Cal.5th 698, 708 (*Strong*).) "[T]he process begins with the filing of a petition containing a declaration that all requirements for eligibility are met [citation], including that '[t]he petitioner could not presently be convicted of murder or attempted murder because of changes to [s]ection 188 or 189 made effective January 1, 2019 . . . .'" (*Strong*, at p. 708.) "When the trial court receives a petition containing the necessary declaration and other required information, the court must evaluate the petition 'to determine whether the petitioner has made a prima facie case for relief.' [Citations.] If the petition and record in the case establish conclusively that the defendant is ineligible for relief, the trial court may dismiss the petition." (*Ibid*.)

When determining whether a defendant who files a resentencing petition under section 1172.6 has made a prima facie showing of entitlement to relief, the trial court's initial inquiry is rather limited. "'"'[T]he 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*, *supra*, 11 Cal.5th 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*.)

If the defendant has made a prima facie showing of entitlement to relief, "'the court shall issue an order to show cause.'" (*Strong*, *supra*, 13 Cal.5th at p. 708.) The trial court "must hold an evidentiary hearing at which the prosecution bears the burden of proving, 'beyond a reasonable doubt, that the petitioner is guilty of murder or attempted murder' under state law as amended by Senate Bill [No.] 1437. [Citation.] 'A finding that there is substantial evidence to support a conviction for murder, attempted murder, or manslaughter is insufficient to prove, beyond a reasonable doubt, that the petitioner is ineligible for resentencing.' [Citation.] 'If the prosecution fails to sustain its burden of proof, the prior conviction, and any allegations and enhancements attached to the conviction, shall be vacated and the petitioner shall be resentenced on the remaining charges.'" (*Id.* at p. 709.) "[R]elief is unavailable if the defendant was either the actual killer, acted with the intent to kill, or 'was a major participant in the underlying felony and acted with reckless indifference to human life . . . .'" (*Id.* at p. 710.)

"We independently review a trial court's determination on whether a petitioner has made a prima facie showing." (*People v. Harden* (2022) 81 Cal.App.5th 45, 52.)

Defendant's claim of error on appeal is entirely dependent on whether the jury in his trial was instructed on the now-invalid murder theories of second degree felony murder and/or murder under the natural and probable consequences doctrine. He does not repeat the assertion from his petition that he was, in fact, convicted under those theories. Instead, he argues he *might* have been. Specifically, he argues that, although the record in the proceeding on his resentencing petition contained no jury instructions on second degree felony murder or murder under the natural and probable consequences

doctrine, because the trial court did not have before it the entire reporter's transcript of the oral instructions read to the jury, it "cannot be determined with certainty whether additional, supplemental instructions were given permitting conviction" under those now-invalid theories. Therefore, he argues the trial court engaged in improper factfinding when it summarily denied his petition without issuing an OSC.

The People respond that defendant obviously had access to the entire record in the first appeal, yet he only supplied the trial court with excerpts. Consequently, the People contend defendant failed to meet his burden of making a prima facie showing of entitlement to relief and the trial court correctly denied the petition without issuing an OSC.

The simplest solution to the conundrum posed by this appeal would have been for one or both of the parties to request that this court take judicial notice of the record from defendant's direct appeal, which included all written and oral jury instructions and the entirety of the closing arguments. (Cal. Rules of Court, rule 8.252(a); see *id.*, rule 8.320(b)(4), (c)(4), (c)(9)(B).) Inexplicably, neither party has done so. We do so now on our own motion. (Evid. Code, §§ 452, subd. (d), 459, subd. (a).)

Relevant here, for purposes of murder as alleged in count 1, defendant's jury was instructed with a modified CALJIC Nos. 8.10 (defining murder),[4] 8.11 (defining implied

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[4] As read to the jury, CALJIC No. 8.10 stated: "The defendants are accused in Count I of having committed the crime of murder, a violation of Penal Code Section 187. Every person who unlawfully kills a human being with malice aforethought is guilty of the crime of murder in violation of Section 187 of the Penal Code. [¶] In order to prove this crime each of the following elements must be proved: 1, a human being was killed; 2, the killing was unlawful; and 3, the killing was done with malice aforethought."

malice),[5] and 8.31 (defining second degree murder).[6] The record contains no written or oral instructions whatsoever on felony murder or second degree murder under the natural and probable consequences doctrine and no instructions defining natural and probable consequences. Moreover, the trial court and the attorneys simply did not address those theories during their discussions of the jury instructions, and the prosecutor did not argue them during closing either.

Because the record of defendant's conviction demonstrates his jury was not instructed on the now-invalid theories of second degree felony murder and murder under the natural and probable consequences, we must conclude he was convicted under a still valid theory, and he was not entitled to relief under section 1172.6. Therefore, the trial court properly denied his petition without issuing an OSC.

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[5] As read to the jury, CALJIC No. 8.11 stated: "Malice may be implied. Malice is implied when: 1, the killing resulted from an intentional act; 2, the natural and probable consequences of the act are dangerous to human life; and 3, the act was deliberately performed with the specific mental state of knowledge of the danger to, and with conscious disregard for, human life. [¶] When it is shown that a killing resulted from the intentional doing of act with implied malice, no other mental state need be shown to establish the mental state of malice aforethought. The mental state constituting malice aforethought does not necessarily require any ill will or hatred of the person killed. The word 'aforethought' does not imply deliberation or the lapse of considerable time. It only means that the required mental state must precede rather than follow the act."

[6] As read to the jury, CALJIC No. 8.31 stated: "Murder of the second degree is the unlawful killing of a human being when: 1, the killing resulted from an intentional act; . . . 2, the natural consequences of the act are dangerous to human life; and 3, the act was deliberately performed with the specific mental state of knowledge of the danger to, and with conscious disregard for, human life. [¶] When the killing is the direct result of such an act it is not necessary to prove that the defendant intended that the act would result in the death of a human being."

III.

DISPOSITION

The order denying defendant's petition is affirmed.

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McKINSTER
Acting P. J.

We concur:

CODRINGTON
J.

SLOUGH
J.