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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE,	
Plaintiff and Respondent,	E079752
v.	(Super.Ct.No. RIF104050)
TRAYVON RENE HAYNES,	OPINION
Defendant and Appellant.	

APPEAL from the Superior Court of Riverside County. John D. Molloy, Judge. Affirmed.

Richard Schwartzberg, 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, Senior Assistant Attorney General, and Lynne G. McGinnis and Stephanie A. Mitchell, Deputy Attorneys General, for Plaintiff and Respondent.

In 2003, petitioner Trayvon Rene Haynes was convicted of attempted murder of a peace officer, among other crimes. In 2022, he filed a petition to vacate the attempted

murder conviction. In it, he stated, under penalty of perjury, that due to recent changes in the law, he could no longer be convicted of attempted murder. Those changes, as relevant here, provide that a person cannot be convicted of attempted murder as an aider and abettor unless the person acted with malice.

At a status conference, the prosecutor and defense counsel both represented to the trial court that, based on an examination of the record, petitioner had been convicted as a direct perpetrator, not as an aider and abettor. The trial court therefore summarily denied the petition.

Petitioner appeals. He contends that the trial court erred by denying the petition without first holding a prima facie hearing. We will hold that the trial court properly denied the petition based on what was essentially a stipulation that petitioner was statutorily ineligible for relief.

I

STATEMENT OF THE CASE

In 2003, petitioner was convicted of multiple crimes and enhancements, including one count of attempted murder of a peace officer (Pen. Code, §§ 187, subd. (a), 664, subd. (e)).[1] He was sentenced to a total of 46 years 4 months to life in prison.

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[1] All further statutory citations are to the Penal Code.

In 2022, he filed a petition, in pro. per., for resentencing pursuant to section 1172.6.[2] The trial court appointed counsel for him.

At a status conference, the prosecutor moved to deny the petition. He said: "The 2005 [a]ppellate opinion is in imaging. The Attorney General file was received and forwarded to [c]ounsel on 8/24 of this year. We examined the jury instructions. There's nothing for this defendant regarding aiding and abetting, natural and probable consequences []or felony murder . . . . The defendant is statutorily ineligible . . . ."

Petitioner was represented at the hearing by an attorney who was making a special appearance for his appointed counsel. Defense counsel responded, "[Appointed counsel] has confirmed that she has looked at everything [c]ounsel just referred to, and we're going to submit on that."

The trial court denied the petition. It ruled that petitioner was statutorily ineligible for relief.

II

DISCUSSION

Petitioner contends that the trial court erred by denying the petition without holding a prima facie hearing.

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[2] The petition was actually filed under former section 1170.95. (Stats. 2018, ch. 1015, § 4, amended by Stats. 2021, ch. 551, § 2.) Effective June 30, 2022, however, former section 1170.95 was renumbered as section 1172.6, with no change in text. (Stats. 2022, ch. 58, § 10.) We will use section 1172.6, somewhat anachronistically, to refer to whichever one of the two statutes was in effect at the relevant time.

In 2018, the Legislature abrogated the natural and probable consequences doctrine as applied to murder. (§ 188, subd. (a)(3), Stats. 2018, ch. 1015, § 2; see also *People v. Gentile* (2020) 10 Cal.5th 830, 849-851.) As a result, an aider and abettor cannot be guilty of attempted murder unless he or she personally acted with malice. (*People v. Cortes* (2022) 75 Cal.App.5th 198, 205.) This legislative change did not affect the liability of a direct perpetrator of attempted murder.

Under section 1172.6, the trial court must vacate an attempted murder conviction if the petitioner was convicted as an aider and abettor based on a natural and probable consequences theory (see generally *People v. Prettyman* (1996) 14 Cal.4th 248, 260-263), unless the trial court finds, beyond a reasonable doubt, that the petitioner acted with malice aforethought. (§ 1172.6, subd. (d)(3), incorporating § 188, subd. (a)(3).)[3]

A petition to vacate an attempted murder conviction under section 1172.6 must allege that the petitioner:

(1) Was charged with attempted murder on a natural and probable consequences theory;

(2) Either:

(a) "was convicted of . . . attempted murder . . . following a trial," or

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[3] Section 1172.6, read literally, also provides for the vacation of an attempted murder conviction that was based on a felony-murder theory, at least under certain circumstances. (§ 1172.6, subds. (a)(3), (d)(3), incorporating section 189, subd. (e).) However, there is no such crime as attempted felony murder. (*People v. Wein* (1977) 69 Cal.App.3d 79, 92.)

(b) "accepted a plea offer in lieu of a trial at which the petitioner could have been convicted of . . . attempted murder"; and

(3) "[C]ould not presently be convicted of . . . attempted murder." (§ 1172.6, subd. (a).)

As long as the petition alleges each of these three prerequisites, the trial court must appoint counsel, on request. (§ 1172.6, subd. (b)(3); *People v. Lewis* (2021) 11 Cal.5th 952, 961-970 (*Lewis*).) It must require the prosecution to file a response within 60 days. The petitioner may file a reply within another 30 days. Then the trial court must hold a hearing to determine whether the petition states a prima facie claim for relief. (§ 1172.6, subd. (c).)

At the prima facie hearing, the trial court can consider the record of conviction. (*Lewis*, *supra*, 11 Cal.5th at pp. 970-972.) "'[I]f the record, including the court's own documents, "contain[s] facts refuting the allegations made in the petition," then "the court is justified in making a credibility determination adverse to the petitioner."' [Citation.]" (*Id*. at p. 971.) However, "a trial court should not engage in 'factfinding involving the weighing of evidence or the exercise of discretion.' [Citation.]" (*Id*. at p. 972.)

If the petition does state a prima facie claim, the trial court must issue an order to show cause. (§ 1172.6, subd. (c).) It must then hold an evidentiary hearing, at which the prosecution has the burden to prove, beyond a reasonable doubt, that the petitioner is guilty of attempted murder even under current law. (*Id*., subds. (d)(1), (d)(3).)

Here, the petition contained all of the required allegations. Thus, ordinarily, the trial court would have had to require the prosecution to file a written response, and it would have had to hold a prima facie hearing.

Both counsel *stipulated*, however, that petitioner's jury had not been instructed on aiding and abetting and, in particular, had not been instructed on the natural and probable consequences doctrine. This meant that petitioner was categorically ineligible for relief, so it was unnecessary to hold a prima facie hearing.

Petitioner argues that the stipulation was invalid on its face because it was entered into in reliance on our opinion in petitioner's direct appeal. At a prima facie hearing, a trial court can consider a prior appellate opinion only as evidence of the procedural history of the case, not as evidence of the underlying facts. (§ 1172.6, subd. (d)(3); *People v. Clements* (2022) 75 Cal.App.5th 276, 292.)

The prosecutor did begin by saying, "The 2005 [a]ppellate opinion is in imaging." However, he went on to say that he had examined the appellate *record* and had found that there were no jury instructions on aiding and abetting. Defense counsel agreed that appointed counsel "has looked at everything [c]ounsel just referred to . . . ." The parties could not possibly have gotten any information about the jury instructions from our prior opinion, because it did not mention the jury instructions. (See *People v. Haynes* (Jan. 14, 2005, E034960) 2005 Cal. App. Unpub. LEXIS 406 [nonpub. opn.].)

Petitioner also argues that the trial court erred by ruling without taking evidence. Not so. "[C]ounsel may stipulate to the existence or nonexistence of essential facts.

[Citation.] . . . Stipulations obviate the need for proof and are independently sufficient to resolve the matter at issue in the stipulation. [Citation.]" (*People v. Palmer* (2013) 58 Cal.4th 110, 118, fn. omitted.)

The People argue that defense counsel invited and/or forfeited the asserted error. In reply, petitioner argues that "submit" is a term of art that merely means to forgo argument, not to agree, concede, or acquiesce. Both sides misconceive what really happened. The prosecutor stated, as a fact, that there were no jury instructions on aiding and abetting. Defense counsel agreed. That was sufficient to form a stipulation. Defense counsel then submitted; thus, he did not stipulate, agree, or concede that the stipulated fact required the trial court to deny the petition. But, of course, it did.

If that ruling had been error, then we might have to consider whether defense counsel invited or forfeited the error. But it was not. It was an entirely correct ruling based on a stipulation of the parties.

Petitioner also notes that "appellant's actual counsel was not present and . . . only a stand-in attorney was appearing . . . ." He does not explain what difference this makes. It makes none. "[A]n attorney making a special appearance is associated with the attorney of record. 'That the association is limited to a single appearance is a distinction only of degree, not of kind.' [Citation.] Both the attorney of record and associated attorney 'have an attorney-client relationship with the litigant they represent until that association is terminated.' [Citation.]" (*Blue Water Sunset, LLC v. Markowitz* (2011) 192 Cal.App.4th 477, 487.)

Similarly, petitioner notes that he was not present. Again, he does not explain what difference this makes. He had no right to be present. "A criminal defendant has the right under the state and federal Constitutions to be personally present and represented by counsel at all critical stages of the trial. For purposes of the right to be present, a critical stage is 'one in which a defendant's "'absence might frustrate the fairness of the proceedings' [citation], or 'whenever his presence has a relation, reasonably substantial, to the fullness of his opportunity to defend against the charge.'"'" (*People v. Bryant, Smith and Wheeler* (2014) 60 Cal.4th 335, 465.) A prima facie hearing is not a critical stage because it involves only questions of law. (See *People v. Perry* (2006) 38 Cal.4th 302, 312 ["[A] defendant may ordinarily be excluded from conferences on questions of law, even if those questions are critical to the outcome of the case, because the defendant's presence would not contribute to the fairness of the proceeding."].) Indeed, as mentioned earlier, at the prima facie hearing, the trial court is *prohibited* from weighing the evidence. (*Lewis*, *supra*, 11 Cal.5th at p. 972.)

Last but not least, at the People's request (which petitioner did not oppose), we have taken judicial notice of the appellate record on which counsel relied below. It conclusively demonstrates that petitioner *was* convicted as a direct perpetrator. During a pursuit, he pointed a gun directly at the pursuing police officer, who was only eight feet away from him; the officer shot him first. His jury was not instructed on aiding and abetting nor on the natural and probable consequences doctrine. Hence, the error or

errors asserted were harmless under any standard. Petitioner is simply ineligible for relief under section 1172.6.

III

DISPOSITION

The order appealed from is affirmed.

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RAMIREZ
P. J.

We concur:

SLOUGH
J.

RAPHAEL
J.