Filed 11/14/24 P. v. Garcia CA4/2

NOT TO BE PUBLISHED IN OFFICIAL REPORTS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 This opinion has not been certified for publication or ordered published for purposes of rule 8.1115.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,	E082075
v.	(Super.Ct.No. FWV18001545)
STEVEN GARCIA,	OPINION
Defendant and Appellant.	

APPEAL from the Superior Court of San Bernardino County. Kyle S. Brodie, Judge. Reversed and remanded with directions.

Daniel J. Kessler, 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, Christopher P. Beesley, Felicity Senoski, and Michael D. Butera, Deputy Attorneys General, for Plaintiff and Respondent.

Defendant and appellant Steven Garcia appeals from the trial court's order denying his petition for resentencing under former Penal Code[1] section 1170.95 (now section 1172.6[2]). For the reasons set forth *post*, we hold that the trial court erred in finding that the record established that defendant was ineligible for section 1172.6 relief as a matter of law.

FACTUAL AND PROCEDURAL HISTORY

On May 1, 2019, the People filed an information charging defendant with willful, deliberate, and premediated attempted murder under sections 664 and 187, subdivision (a) (count 1). The information "further alleged that the aforesaid attempted murder was committed willfully, deliberately and with premeditation." Moreover, the information alleged that defendant personally used a firearm within the meanings of sections 12022.5, subdivision (a), 12022.53, subdivision (b), and 12022.53, subdivision (c).

On January 24, 2020, defendant pled no contest to count 1, attempted murder, under sections 664 and 187, subdivision (a). Defendant also admitted using a firearm within the meaning of section 12022.53, subdivision (b). Defense counsel stipulated that the preliminary hearing transcript provided a factual basis for his plea.

---

[1] All further statutory references are to the Penal Code unless otherwise indicated.

[2] The Legislature amended and renumbered former section 1170.95 as section 1172.6. (Stats. 2022, ch. 58, § 10.) We refer to section 1172.6 in this opinion, even though former section 1170.95 was the operative designation at the time of the underlying proceedings.

On February 28, 2020, the trial court sentenced defendant to 15 years in state prison as follows: five years for attempted murder plus 10 years for the firearm use enhancement.

On January 26, 2022, defendant filed a petition for resentencing under section 1172.6. In a minute order dated February 1, 2022, the trial court summarily denied defendant's petition.

On February 28, 2022, defendant refiled his petition. Defendant included a letter asking the court to reconsider his petition and to appoint counsel for him "since I was not appointed counsel on 2/1/22 when the court first looked at my petition." (All caps omitted.) On March 4, 2022, the trial court denied defendant's petition as a "reconsideration request." The court neither held a hearing nor appointed counsel.

On April 14, 2023, defendant filed another petition for resentencing under section 1172.6 with exhibits and briefing. Defendant attached numerous exhibits to his petition including a police "incident supplement report."

In a minute order dated May 23, 2023, the trial court appointed counsel to represent defendant "[i]n an abundance of caution," even though defendant "has not stated new grounds for relief, and did not apparently appeal the denial of his prior petitions."

On August 11, 2023, defendant filed a request for ruling on his resentencing petition.

On August 18, 2023, the People filed its points and authorities for the prima facie hearing on defendant's petition. The People requested that the court deny the resentencing petition because the "prosecution did not allege any theories of vicarious culpability and the defendant admitted to personally using a firearm in attempting to murder his victim. Furthermore, the Defendant was the sole actor in the attempted murder."

On September 5, 2023, the trial court held a prima facie hearing on defendant's petition. Defense counsel waived defendant's presence at the hearing. After defense counsel and the prosecutor made their arguments, the trial court denied the petition. The court found that defendant did not satisfy the criteria under section 1172.6, and hence, was ineligible for resentencing.

On September 6, 2023, defendant filed his timely notice of appeal.

B. FACTUAL BACKGROUND[3]

F.T. worked at a nightclub and had interacted with defendant numerous times as a customer. Initially, F.T. was friendly with defendant and gave him her telephone number.[4] About one year later, F.T. ended the friendship between the two of them. Defendant became obsessive and sent constant and unwanted communications to F.T.

---

[3] The factual background is taken from the preliminary hearing transcript. Defense counsel stipulated that the preliminary hearing transcript provided the factual basis for his no contest plea.

[4] The accounts of the victim and a percipient witness were offered through officer testimony under section 872, subdivision (b).

Despite F.T.'s efforts to avoid defendant, he continued following the victim at her workplace and home.

A couple of weeks prior to the shooting, defendant called F.T., and her boyfriend, A.R., answered the call on speakerphone. A.R. had never met defendant. F.T. referred to defendant as her stalker; defendant then threated to kill A.R.

A few days before the shooting, defendant sent a message to F.T. threatening to "'do what I got to do.'" Defendant stated that pursuing F.T. was worth "'being in jail the rest of my life or six feet in the ground.'"

On April 24, 2018, F.T. was at her home with A.R. When F.T. was leaving to go to work, she noticed a white Mustang parked nearby. She recognized the car as she had seen it several times at her work; F.T. believed it was following her. F.T. pointed out the Mustang to A.R. and identified it as the car that had been stalking her.

When F.T. drove closely past the parked Mustang, she saw defendant in the driver's seat. F.T. did not see anyone else inside the car. A.R., who was driving in a separate vehicle, stopped next to the Mustang. When the driver's side window of the Mustang rolled down; A.R. saw two occupants. The passenger was turned towards his own window, looking away from A.R. The driver, however, brandished a silver firearm, and raised and pointed the gun toward A.R. from three feet away.

A.R. immediately ducked for cover behind his door and heard four to five gunshots; A.R. fled in his car. Four bullets hit the driver's side door of A.R.'s car, and

one went through his open driver's side window. The front passenger window shattered. During the shooting, A.R. observed only the driver of the Mustang holding a gun.

Police connected defendant to the white Mustang and took him into custody. During defendant's interview, defendant brought up the shooting unprompted; the police had not told defendant that a shooting had occurred. Defendant denied any involvement; he claimed he overheard another person, whom defendant failed to identify, take credit for the shooting.

DISCUSSION

On appeal, defendant contends that "the trial court erred by denying [defendant's] petition at the prima facie case stage of the proceedings. [Defendant] was entitled to an evidentiary hearing." (All caps omitted.) The People claim that the court properly "evaluated the record of conviction to determine that [defendant's] guilty plea to attempted murder was based on his conduct as the shooter and direct perpetrator of the attempted killing."

A. LEGAL BACKGROUND

Senate Bill No. 1437 (2017-2018 Reg. Sess.) (Stats 2018, ch. 1015) made "significant changes to the scope of murder liability for those who were neither the actual killers nor intended to kill anyone, including certain individuals formerly subject to punishment on a felony-murder theory." (*People v. Strong* (2022) 13 Cal.5th 698, 707 (*Strong*).) Senate Bill No. 1437 was enacted 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.'" (*Strong*, at p. 708.) Senate Bill No. 1437 eliminated murder convictions premised on any theory of imputed malice, i.e., any theory by which a person could be convicted of murder for a killing committed by someone else, such as felony murder or the natural and probable consequences doctrine, unless it was proven that the defendant personally acted with the intent to kill or was a major participant who acted with reckless disregard to human life. (§§ 188, subd. (a)(3), 189, subd. (e); see *Strong*, at pp. 707-708.)

Senate Bill No. 775 (2021-2022 Reg. Sess.) (Stats 2021, ch. 558) expanded its coverage to individuals convicted of "attempted murder under the natural and probable consequences doctrine." (§ 1172.6, subd. (a); *People v. Saibu* (2022) 81 Cal.App.5th 709, 747.)

Section 1172.6 now provides: "(a) A person convicted of felony murder or 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, *attempted murder under the natural and probable consequences doctrine*, or manslaughter may file a petition with the court that sentenced the petitioner to have the petitioner's murder, attempted murder, or manslaughter conviction vacated and to be resentenced on any remaining counts when all of the following conditions apply:

"(1) A complaint, information, or indictment was filed against the petitioner 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.*

"(2) The petitioner was convicted of murder, attempted murder, or manslaughter following a trial or accepted a plea offer in lieu of a trial at which the petitioner could have been convicted of murder or attempted murder.

"(3) The petitioner could not presently be convicted of murder or attempted murder because of changes to Section 188 or 189 made effective January 1, 2019." (§1172.6, subd. (a), italics added.)

When evaluating a section 1172.6 petition, the trial court considers whether the defendant has made a prima facie case for relief. "If the petition and record in the case establish conclusively that the defendant is ineligible for relief, the trial court may dismiss the petition." (*Strong*, *supra*, 13 Cal.5th at p. 708.) If the defendant makes a prima facie showing of entitlement to relief, the court must issue an order to show cause and hold an evidentiary hearing. (§ 1172.6, subds. (c), (d)(3).) During the prima facie stage of review, 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 section [1172.6] relief." (*People v. Lewis* (2021) 11 Cal.5th 952, 971 (*Lewis*).) 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.'" (*Ibid.*) "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.*)

Denial of a petition based on the failure to make a prima facie showing as a matter of law under section 1172.6 is a "'purely legal conclusion, which we review de novo.'" (*People v. Ervin* (2021) 72 Cal.App.5th 90, 101.)

B. PRIMA FACIE HEARING

The court started the prima facie hearing on defendant's petition by stating:

"I read the preliminary hearing transcript. I did the preliminary hearing as well but it was useful to read it again. [¶] . . . [Defendant] was in a car. He personally used a firearm. Shot at people. [¶] I mean, it doesn't seem like a felony[-]murder case or an aiding and abetting case. I don't see any kind of vicarious or derivative liability issues that were presented by anything in the case at all . . . ."

In response, defense counsel stated: "Well, it would depend [on] what your Honor—what type of evidence your Honor is using to consider from the preliminary hearing. So with regards to the requirement of what he's required to show at this stage, I think he's done enough which is essentially make the request to the Court and he's done that.

"With evidence that was educed at the preliminary hearing, it may or may not be enough. It would depend if—it would depend if it would be admissible under the rules—under the Rules of Evidence. Sometimes there's evidence at a preliminary hearing that can be used by the Court to make these determinations and sometimes there's evidence that is not. Sometimes the statements are hearsay and those Prop 115 statements are sometimes not appropriate to use in a request like this and should not be used by the Court.

"So even despite what evidence may have been produced, I still don't think that is necessarily enough because we do not know—I'm not clear what your—what evidence your Honor is using to suggest that it was still made. So, I would still think that he had made—he has made, at this point, the satisfactory showing for the relief he's seeking."

When the trial court asked, "How so?" Defense counsel replied:

"[Defendant's] made a request and there is nothing that is clearly denying him this relief as to the plea, regardless to the plead [*sic*] to the firearm is insufficient to deny under [*People v. Flores* (2022) 76 Cal.5th 974]. So, I think he's—I think he's made the requisite showing for this stage. [¶] I—there may very well be problems for an OSC hearing but at least at this case for the prima facie showing he is entitled to this relief."

Thereafter, the prosecutor argued the "defendant's petition was already denied twice. It should be barred under res judicata." The prosecutor then argued that because the complaint charged defendant "with willful, deliberate and premeditated attempted

murder in addition to the fact that he did admit to personal use of a firearm," defendant failed to make a prima facie case for relief.

The court then ruled:

"Having looked at everything available and not engaging in any fact-finding, certainly not finding some evidence more credible than others, not weighing any of those sorts of question [*sic*] just accepting the allegations as true, there nevertheless is a requirement that Courts should review the record of conviction to screen out meritless petitions which this is. [¶] There is no felony[-]murder allegation in anything in the court file. He admitted personally using the firearm. The facts of the preliminary hearing don't give rise to any suggestion that it could have been a felony murder, for example, or a natural and probable consequence theory. He shot at somebody. That's just—that's just plain old attempted murder. It was then. It is now. Nothing in Section 1172.6 changes that. [¶] So, he has not—the Court finds he has not established a prima facie case for relief."

C. NO MALICE ADMISSION

Defendant contends that "[t]he facts that the attempted murder charge included the malice aforethought allegation and that [defendant] pled no-contest to attempted murder do not, in and of themselves, foreclose the possibility that [defendant] could have been convicted of attempted murder under the natural and probable consequences doctrine, and therefore could be eligible for relief under section 1172.6." We agree.

In this case, defendant did not plead no contest as charged. Instead, defendant pled no contest to attempted murder "w/o premeditation language." At the hearing wherein defendant pled no contest, his counsel stated: "Your Honor, that's without the premeditation and deliberation language." The court responded: "Correct. [Defendant] is not admitting that it was a premeditated attempted murder. That's correct." Moreover, defense counsel stipulated that the preliminary hearing transcript would provide the factual basis for defendant's plea. There is nothing in the preliminary hearing transcript that defendant admitted that he acted with malice. Hence, any such determination would require a finding of fact, which is prohibited at the prima facie stage. (*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.'"].)

D. <u>RELIANCE ON THE PRELIMINARY HEARING TRANSCRIPT</u>

Defendant contends that "[t]he preliminary hearing testimony does not prove that [defendant's] petition is meritless as a matter of law. It is hearsay."

On appeal, defendant admits that "a trial court may consider the petitioner's record of conviction to determine whether a petitioner has made a prima facie case under section 1172.6. (*Lewis*, *supra*, 11 Cal.5th at pp. 952, 970-971.)" Defendant further agrees that "[a] preliminary hearing transcript may be considered part of a record of conviction. (*People v. Reed* (1996) 13 Cal.4th 217, 223.)" Defendant, however, challenges whether the trial court properly considered hearsay evidence in the preliminary hearing. Defendant contends that the preliminary hearing transcript "is entirely made up of Rialto Detective Travon Ricks' hearsay testimony about what F.T. and A.R. told him about the shooting."

"Hearsay evidence that was admitted in a preliminary hearing pursuant to subdivision (b) of section 872 is inadmissible at the evidentiary hearing, unless made admissible by another exception to the hearsay rule. [Citation.]" (*People v. Flores* (2022) 76 Cal.App.5th 974, 986 (*Flores*).) "If such evidence may not be considered at an evidentiary hearing to determine a petitioner's ultimate eligibility for resentencing, we fail to see how such evidence could establish, as a matter of law, a petitioner's ineligibility for resentencing at the prima facie stage." (*Id.* at p. 988, fn. omitted [preliminary hearing transcript relied upon by the People did not establish the defendant's ineligibility for resentencing as a matter of law].)

Since a "'defendant is not required to personally admit the truth of the factual basis of the plea, which may be established by defense counsel's stipulation to a particular document,'" "absent an indication that a defendant admitted the truth of particular facts, the stipulation to a factual basis for the plea does not 'constitute[] a binding admission for all purposes.'" (*People v. Rivera* (2021) 62 Cal.App.5th 217, 235 (*Rivera*) [concluding that defense counsel's stipulation to the grand jury testimony did not correspond to an admission by the defendant to any of the evidence presented therein, such that the defendant was not per se ineligible for relief at the prima facie stage], quoting *People v. French* (2008) 43 Cal.4th 36, 50-51.)

In this case, defendant did not admit the truth of the evidence adduced at the preliminary hearing; rather, defense counsel merely stipulated that the preliminary hearing transcript would provide the factual basis for the plea. The preliminary hearing transcript consists of the testimony of Detective Ricks about what F.T. and A.R. told the detective about the shooting. It was admissible as an exception to the hearsay rule at the preliminary hearing for the purposes of establishing probable cause. (§ 872, subd. (b).) Detective Ricks's testimony constitutes at least one layer of hearsay when he testified about information that F.T. and A.R. told him. Moreover, we note that A.R. told the detective that there were two people in the Mustang, and he did not know the identity of the person who shot at him. Hence, there was no undisputed evidence that defendant was the only person who shot at A.R. The evidence from the preliminary hearing does

not exclude the possibility that defendant could have been convicted pursuant to a theory of imputed malice. (*People v. Davenport* (2021) 71 Cal.App.5th 476, 485.)

Thus, the evidence is inadmissible to prove that defendant is per se ineligible for relief at the prima facie hearing stage. "To find petitioner ineligible for resentencing on this record would require judicial factfinding, which is impermissible at the prima facie stage. [Citation.]" (*Flores*, *supra*, 76 Cal.App.5th at pp. 991-992.)

Moreover, even if the trial court correctly considered hearsay testimony in making its ruling, the court would have had to make credibility determinations because the facts were disputed. In his section 1172.6 petition, defendant attached an incident supplement report as exhibit 5. In the report, Officer Lutz, the officer who initially interviewed A.R. after the shooting, reported that A.R. told the officer that there were two people in the Mustang when the shooting occurred, and A.R. "was unsure if the driver or the passenger was the one shooting at him." Later, when the officer asked A.R. to identify the shooter in a photo lineup, A.R. told the officer "it was either [defendant] or another subject." A.R., however, "was not confident enough to decide on one of the two."

At the preliminary hearing, defense counsel repeatedly attempted to cross-examine Detective Ricks about what A.R. had told Officer Lutz, as provided *ante*. Defense counsel asked Detective Ricks: "In fact, the alleged victim [A.R.] told Officer Lutz that he was unsure if the driver or the passenger was the one shooting at him; isn't that true?" The prosecutor objected for lack of foundation, and the trial court sustained the objection. Later, defense counsel asked Detective Ricks, "In fact, isn't it true that the alleged victim

never told Officer Lutz that he saw [defendant] holding a gun." The prosecutor objected for lack of foundation again, and the trial court sustained the objection.

At the conclusion of the preliminary hearing, defense counsel stated: "Well, it's pretty difficult in a situation like a preliminary hearing to have one officer that wasn't even involved in the investigation off start [*sic*] and did not talk to other officers that were involved, in fact, and especially Officer Lutz that interviewed the alleged victims at the time and they were told otherwise. It's very difficult to come to the preliminary hearing and have an officer here that doesn't know anything except that he spoke to the alleged victim a year later. It's very hard for the defense to allege some misconduct or produce any evidence to the contrary. So that's what we have at this point so the only thing I can say is that we got nothing out of the officer except that you know a year later he speaks to the alleged victim and the alleged victim, I mean, I can't tell him anything or cross-examine him on anything regarding, you know, other statements that the victim made to the other officers. So that's what we have here. We only have the testimony of an officer that spoke to the alleged victim a year later."

"[W]hen a petitioner disputes that the evidence presented at a preplea proceeding demonstrates his or her guilt under a still-valid theory of murder, and no '"readily ascertainable facts"' definitively prove otherwise, a trial court cannot deny a petition at the prima facie stage without resorting to '"factfinding involving the weighing of evidence or the exercise of discretion."'" (*Rivera*, *supra*, 62 Cal.App.5th at p. 238.)

The People's reliance on *People v. Mares* (2024) 99 Cal.App.5th 1158, 1168 (*Mares*), review granted May 1, 2024, S284232, is misplaced. In *Mares*, this court held that the evidence contained in the preliminary hearing transcript foreclosed the possibility that the defendant was convicted under an invalid theory of liability.

Here, as provided in detail *ante*, A.R. initially told Officer Lutz that he was unsure if the driver or the passenger was the one shooting at him and could not correctly identify the shooter in the photographic lineup. Therefore, the preliminary hearing testimony, without factfinding by the trial court, "does not conclusively establish as a matter of law that [defendant] was the actual [shooter], acted with intent to kill or actual malice" without making factual findings and credibility determinations. (See *Flores*, *supra*, 87 Cal.App.5th at p. 991.)

E. <u>DEFENDANT'S ADMISSION TO A PERSONAL USE OF A FIREARM ENHANCEMENT</u>

Defendant contends the court erred to the extent it denied the petition, in part, on defendant's admission to a personal use of a firearm enhancement.

"[A]lthough in theory, a finding that a defendant personally used a firearm does not in itself prove a defendant is the actual killer [citation], the facts of a particular case may support [] that conclusion." (*People v. Garrison* (2021) 73 Cal.App.5th 735, 743.) "[W]hen the record shows only one person displayed and used a gun and '[a]ll evidence points to defendant . . . as the one with the gun,' the true finding on a personal use

enhancement demonstrates that the defendant was the actual killer. [Citation.]" (*Id.* at p. 744.)

"[A]n enhancement under section 12022.53, subdivision (d), does not require that the defendant acted either with the intent to kill or with conscious disregard to life, it does not establish that the defendant acted with malice aforethought." (*People v. Offley* (2020) 48 Cal.App.5th 588, 598; *Davenport*, *supra*, 71 Cal.App.5th at p. 485 [no contest plea to second degree murder and section 12022.5, subd. (a), personal use enhancement did not preclude eligibility for relief].) Under section 12022.53, subdivision (b), a person personally uses a firearm when he intentionally displays the weapon in a menacing manner, hits someone with the weapon, or fires it. (CALCRIM No. 3146.)

In this case, defendant's *bare admission* to a personal use of a firearm enhancement under section 12022.53, subdivision (b), even with his no contest plea to attempted murder, did not preclude him from relief as a matter of law because, *without resort to additional facts*, it does not reflect that defendant was the actual shooter and/or harbored a disqualifying mens rea. The People's contention that the personal use of a firearm enhancement, "made in the context of unrebutted testimony that only one of the vehicle's occupants pointed a gun at the victim just before he ducked from a barrage of gunshots [citation]—established that [defendant] was the lone shooter" rendered defendant ineligible for relief begs the question of whether the court could rely on the facts garnered from the preliminary hearing transcript at the prima facie stage. Thus, the

court erred in concluding that defendant's admission to the personal use enhancement alone rendered him ineligible for relief.

Based on the above, we find that the trial court erred in denying defendant's petition at the prima facie stage. We express no opinion on the merits of the petition at the evidentiary hearing.

DISPOSITION

The order 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

McKINSTER
J.

We concur:

RAMIREZ
P. J.

MENETREZ
J.