Filed 9/20/17 In re Lambert CA2/2

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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION TWO

In re JOHN LAMBERT on Habeas Corpus.	B280211 (Los Angeles County Super. Ct. No. BA166118)

ORIGINAL PROCEEDINGS; petition for writ of habeas corpus. Lance A. Ito and Steven A. Marcus, Judges. Petition granted.

Marilee Marshall & Associates and Marilee Marshall, under appointment by the Court of Appeal, for Petitioner.

Xavier Becerra, Attorney General of California, Gerald A. Engler, Chief Assistant Attorney General, Lance E. Winters, Senior Assistant Attorney General, Paul M. Roadarmel, Jr., Supervising Deputy Attorney General and Allison H. Chung, Deputy Attorney General, for respondent.

Petitioner John Lambert was convicted of first degree murder with a special circumstance finding. He is currently serving a prison sentence of life without the possibility of parole. Lambert filed a petition for a writ of habeas corpus in the California Supreme Court, seeking relief from the special circumstance finding that supports his sentence under the authority of *People v. Banks* (2015) 61 Cal.4th 788 (*Banks*). The Supreme Court directed that the Secretary of the Department of Corrections and Rehabilitation show cause before this court why Lambert is not entitled to such relief. Having considered the petition, the Secretary's Return, and Lambert's Traverse, we now grant the petition insofar as it seeks relief under *Banks*, *supra*, 61 Cal.4th 788.

FACTUAL HISTORY

On September 28, 2000, this court affirmed Lambert's conviction and sentence. The facts of the case were set forth in the appellate opinion. We reiterate these facts as relevant to the petition.

"Viewed in the light most favorable to the judgment (*People v. Rodriguez* (1999) 20 Cal.4th 1, 11), the evidence established that appellant [Markeith] Braxton met appellant Lambert through a mutual friend, Cherrell Sharp, and that appellant Lambert introduced appellant Braxton to appellant [Alvin] Dulaney. Appellant Lambert asked appellant Braxton whether he wanted to make some 'money quick' and when appellant Braxton responded affirmatively, appellant Lambert indicated 'he was gonna . . . take . . . [appellants Braxton] and [Dulaney] . . . to places where [they] were gonna . . . [¶] . . . [¶] . . . rob stores.' Appellants thereafter met to plan the robbery of a pawnshop located at Martin Luther King Jr.

Boulevard and Western Avenue, and appellant Lambert drove appellants Braxton and Dulaney 'around there' to show them the pawnshop.

"Approximately one week later, on the morning of January 11, 1997, the three of them met at the house where Sharp resided with her cousin Shawnda Smith and her uncle Stevie Washington, and traveled to the pawnshop in appellant Lambert's distinctive Cadillac. Although it was a warm day, both appellants Braxton and Dulaney wore large, dark, hooded jackets, and appellant Braxton also wore a beanie and gloves. Appellant Braxton was in possession of a loaded nine-millimeter semiautomatic Glock pistol which he had received from appellant Lambert. Before appellants Braxton and Dulaney disembarked from the Cadillac, appellant Lambert instructed them 'after everything happened, just -- just walk out calm and get back up in the car.'

"Appellants Braxton and Dulaney were 'buzzed in' the pawnshop by the lone employee on the premises at the time of their arrival, Igor Rasilov. Rasilov was situated behind the counter of a booth partitioned off from the remainder of the shop with bullet-proof glass and a security door. Appellant Dulaney twice induced Rasilov to leave the booth by pretending that he wanted a television. As Rasilov walked back toward the booth on the second occasion, appellants Braxton and Dulaney followed. They grabbed him as he entered the security door. Appellant Braxton ordered Rasilov to 'get down.' As appellant Braxton and Rasilov struggled, appellant Dulaney entered the booth. While inside, appellant Dulaney took two revolvers, a .357 magnum and a .38 special, from the counter.

"When appellant Braxton failed to gain control of Rasilov, he removed the Glock pistol from his pocket and pointed it at Rasilov. The gun discharged. Rasilov was struck in the forehead and mortally wounded. He

also suffered a graze wound to the thigh. Appellant Braxton then said, "'Man, we gotta go. We gotta go. I shot him. We gotta go.'" He 'buzzed the door' leading to the street and appellant Dulaney held the door open so they could both make their escape.

"As appellants Braxton and Dulaney ran eastbound along Martin Luther King Jr. Boulevard and approached the waiting Cadillac, one of them signalled with his hand and appellant Lambert drove off. [1] Appellants Braxton and Dulaney continued on foot through a park and into a nearby residential neighborhood. Appellant Braxton left his beanie and jacket in the park. At the rear of one of the residences, appellants Braxton and Dulaney hid the Glock and stolen handguns inside a barbecue pit, where the weapons were soon discovered by the homeowner. The homeowner also found a jacket and a pair of pants with gloves in the pocket lying on the ground. She called 911, and the firearms and clothing were seized by police.

"Appellants Braxton and Dulaney, in the meantime, had telephoned Smith and arranged for her to pick them up. When she arrived in the company of appellant Lambert, appellant Braxton told appellant Lambert 'it didn't go [¶] . . . [¶] how he planned it,' and disclosed that he had shot a man. Appellant Lambert repeatedly asked, "'What happened? What happened? I didn't tell you to do it like that. What happened?"'[2]

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1 In their Return, the People further point to testimony by two witnesses that they heard gunfire as they crossed the street near the pawnshop, suggesting Lambert also heard it.

2 In his Traverse, Lambert further points to a recorded statement that his codefendant made to police, which was played for the jury, indicating the plan was that no one would be shot or hurt during the robbery.

"Subsequently, appellants returned to Sharp's residence, where appellant Braxton took steps to dispose of a pair of stained pants, and appellant Lambert arranged for Washington's cousin, Patrick Phinisee, who lived next door, to drive appellant Dulaney back to the residential area near Martin Luther King Jr. Boulevard in appellant Lambert's Cadillac. There, appellant Dulaney was asked by a man on a bicycle whether he 'g[o]t his shit,' and warned that detectives were in the area and appellant Dulaney 'better get out of here.' Later that afternoon, appellant Lambert drove the Cadillac to an auto pawnshop and pawned it."

PROCEDURAL HISTORY

On March 15, 1999, a jury found Lambert guilty of first degree murder. It further found that the murder was committed by a principal armed with a firearm, and that it was committed while Lambert was engaged in the commission of a robbery within the meaning of Penal Code section 190.2, subdivision (a)(17).[3] Lambert's conviction and sentence were affirmed on appeal. In the appellate Opinion, this court specifically rejected a claim that the evidence was insufficient to support the special circumstance finding under section 190.2. A petition for review filed in the Supreme Court was denied.

Beginning in 2015, just after *Banks*, *supra*, 61 Cal.4th 788 was decided, Lambert petitioned for writs of habeas corpus in the superior court and in this court on the grounds that the new decision required a reevaluation of his special circumstance finding. His petitions were denied. Lambert then filed a petition for writ of habeas corpus in the Supreme Court. The Supreme Court issued an order directing the Secretary of the Department of

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[3] All further statutory references are to the Penal Code.

Corrections and Rehabilitation to show cause in this court why the petition should not be granted, citing to *Banks* and *People v. Clark* (2016) 63 Cal.4th 522, 609-623 (*Clark*).[4]

DISCUSSION

Section 190.2, subdivision (a), provides that when special circumstances are present the penalty for a defendant found guilty of first degree murder is either death or imprisonment for life without the possibility of parole. One such special circumstance is that the murder was carried out while the defendant was engaged in, or was an accomplice in, commission of a felony, including robbery. (§ 190.2, subd. (a)(17)(A).) When the defendant in a robbery-murder was not the actual killer, section 190.2 requires a further showing that he or she was a major participant in the crime and acted with reckless indifference to human life. (§ 190.2, subd. (d).) In *Banks*, *supra*, 61 Cal.4th 788, the Supreme Court considered the degree to which an accomplice had to be involved in a robbery-murder in order to support such a showing.

The court began by noting that section 190.2 was designed to codify U.S. Supreme Court authority defining the constitutional limits on executing murderers who were not actual killers. (*Banks*, *supra*, 61 Cal.4th at p. 794.) Those authorities established a spectrum of behavior that demonstrated

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[4] In addition to seeking relief under *Banks, supra,* 61 Cal.4th 788, Lambert's petition to the Supreme Court asserted that his conviction was unsupported by substantial evidence and that his earlier petition to the Superior Court had been timely. The Supreme Court did not address those claims in its order, and the parties did not further brief the issues in this court. Therefore, it appears such claims were not the subject of the Supreme Court's order. Even if they were, such claims would be misplaced here because substantial evidence claims are generally issues for appeal and the timeliness of Lambert's prior petition is moot. (*In re Harris* (1993) 5 Cal.4th 813, 826; *In re Waltreus* (1965) 62 Cal.2d 218, 225.)

when a capital sentence could be supported for such accomplices. (*Ibid.*) At the low end of the spectrum was the conduct described in *Enmund v. Florida* (1982) 458 U.S. 782 (*Enmund*). In that case, Enmund sat in a getaway car as two armed robbers, with whom he may have planned the robbery, approached the farmhouse of an elderly couple to steal cash. When the couple tried to resist the robbers, they were shot to death. (*Id.* at p. 784; see also *Enmund*, at pp. 803, 824 (O'Connor, J, dissenting); *Banks*, *supra*, at p. 799.) Enmund was found guilty of murdering the victims as an accomplice to the underlying felony, but *Enmund* court held that it would be cruel and unusual punishment to subject him to the death penalty. (*Enmund*, *supra*, 458 U.S. at p. 799.) That was because there was no evidence he had killed, had been present at the killing, had intended that the victims be killed, or had anticipated that lethal force might be used. (*Id.* at pp. 788, 797.) He simply participated in an ordinary plan to rob the victims, what *Banks*, *supra*, 61 Cal.4th at page 802 would later dub a "garden-variety armed robbery." (*Id.* at pp. 797-798.)

The authorities placed at the other end of the behavioral spectrum an accomplice who actually killed, or attempted or intended to kill, making capital punishment permissible. (*Tison v. Arizona* (1987) 481 U.S. 137, 150 (*Tison*); *Banks*, *supra*, 61 Cal.4th at p. 800.) Close to that pole was conduct like that of the defendants in *Tison*. In that case, brothers masterminded the prison escape of their father and his cellmate, both of whom had been convicted of murder. (*Tison,* at p. 139.) Once the father and his cellmate were free, the brothers armed them, listened to them debate whether a family of witnesses should be killed, and then stood by as the father and his cellmate shot the witnesses. According to the *Tison* court, although the brothers did not actually kill the witnesses and claimed to be surprised by the

shooting, they had been major participants in the escape plan that resulted in the murders, including arming known killers and failing to intervene on behalf of the victims. (*Id*. at pp. 140-141, 151-152, 157-158.) Having thus exhibited a reckless disregard for the grave risk of death posed by their actions, the brothers remained eligible for capital punishment. (*Id*. at p. 158.)

From those authorities, *Banks*, *supra*, 61 Cal.4th 788 discerned several factors to be considered in determining whether a felony-murder accomplice was sufficiently culpable to warrant a special circumstance finding. Courts should consider the accomplice's role in planning the criminal enterprise that led to death, the role he or she had in supplying or using lethal weapons, and his or her awareness of the particular dangers posed by the nature of the crime, the weapons used, or the past conduct of other participants. (*Id*. at p. 803.) Courts should additionally consider whether the defendant was present at the scene of the killing, was in a position to facilitate or prevent the actual murder, and whether the defendant's actions or inaction played a role in the death. (*Ibid*.) What the defendant did after lethal force was used was another factor. *Banks* cautioned that no single consideration was dispositive, but should be weighed in the totality of the circumstances. (*Id*. at pp. 802, 803.)

The Supreme Court revisited the issue in *Clark*, *supra*, 63 Cal.4th 522. In that case, the court emphasized that it was not enough for a felony-murder accomplice to have acted as a major participant in the crime. The true key to supporting a special circumstance finding was evidence exhibiting a state of mind encompassing a willingness to kill, even if that was not the specific objective of the crime. (*Id*. at pp. 611, 616-618.) The *Clark* court therefore looked for evidence that the accomplice used a gun himself, was on

the scene when a killing took place but did nothing to interfere or assist the victims, knew his associates had a propensity for violence, or initiated a situation in which there was no effort to minimize potential harm to victims. (*Id*. at pp. 618-622.) Accordingly, the *Clark* court accepted that the defendant before it had masterminded a robbery, had assembled a team of robbers, and was an active participant in the robbery. (*Id*. at pp. 536-539, 612-613.) But because he had instructed that unloaded weapons be used, that the victims be removed from the area in which the robbers were operating, was in a remote area of the property when the shooting occurred, had no knowledge that the shooter had violent tendencies, and fled knowing that police were on their way to potentially help the shooting victim, the court concluded he did not exhibit a reckless indifference to human life sufficient to support a special circumstance finding. (*Id*. at pp. 618-623.)

As applied here, the reasoning of *Banks*, *supra*, 61 Cal.4th 788 and *Clark*, *supra*, 63 Cal.4th 522 reveals that the special circumstance finding against Lambert was not supported by the evidence. It is true that Lambert masterminded the robbery at issue, took his associates to the pawnshop in order to case the area, instructed them on how to behave during their getaway, supplied the loaded Glock that was used, and assisted in disposing of evidence after the shooting. That is enough to make him a major participant in the crime. However, the evidence does not suggest that Lambert harbored a reckless indifference to human life in implementing his plan. While it is arguable that Lambert was aware the clerk of the pawnshop was in a protective cage and would have to be lured out—into contact with the robbers—in order to carry out the robbery, the fact was that Lambert remained in the getaway car and so was not in a position to interfere once the fatal struggle with the pawnshop clerk began. After the shooting, Lambert

fled and assisted in covering up the incident, but expressed surprise that a killing had taken place. The People point out that Lambert may have heard the gunshot, as did witnesses passing by the scene, but that does not support an inference that Lambert understood a killing had occurred and a victim might need assistance. Moreover, no single factor will support a special circumstance finding. Considering the totality of the circumstances, it appears that Lambert did not anticipate the potential for loss of human life beyond that which usually accompanies an armed felony. Our Supreme Court has indicated that is not reckless enough to support a special circumstance finding. (*Clark*, *supra*, 63 Cal.4th at pp. 617-618; *Banks*, *supra*, 61 Cal.4th at p. 802.)

The People argue that the decisions in *Banks*, *supra*, 61 Cal.4th 788 and *Clark*, *supra*, 63 Cal.4th 522 should not be applied retroactively to the final decision in Lambert's case. They further object that Lambert's petition questions the substantiality of the evidence, which is not a cognizable claim on habeas corpus. However, the Supreme Court did not view such considerations to be an impediment to issuance of an order to show cause on the petition. We must conclude that the Supreme Court was satisfied the petition was not procedurally barred. That is consistent with the reasoning stated in *People v. Mutch* (1971) 4 Cal.3d 389, 396, in which the court explained that when it elucidated a legal standard that was previously misunderstood, habeas relief was appropriate to correct any sentences that were revealed to have been improper. (See *In re Miller* (Aug. 25, 2017, B278902) __ Cal.App.5th __ [2017 Cal.App.LEXIS 741, *31-*32].) *Banks* and *Clark* established that a special circumstance finding could not be supported on less than evidence of a major participant's reckless indifference to human life during a felony-murder. Such reckless indifference had to involve more

than simply participating in an armed felony; some knowing disregard of the risk to human life was necessary. (*Clark*, *supra*, 63 Cal.4th at pp. 617-618; *Banks*, *supra*, 61 Cal.4th at pp. 801-802.) Because the evidence underlying Lambert's special circumstance finding does not demonstrate more than that, it must be abandoned.

DISPOSITION

The petition is granted to the extent it seeks relief under *Banks*, *supra*, 61 Cal.4th 788, and a writ of habeas corpus hereby issues. The special circumstance finding against Lambert is stricken, and the matter is remanded to the superior court for resentencing in accordance with this opinion.

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_____, Acting P.J.

ASHMANN-GERST

We concur:

_____, J.

CHAVEZ

_____, J.

HOFFSTADT