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Opinion following transfer from Supreme Court

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE, Plaintiff and Respondent, v. KEITH W. THOMAS, Defendant and Appellant.	E080674 (Super. Ct. No. FSB056656) OPINION

APPEAL from the Superior Court of San Bernardino County. Michael A. Smith, Judge. (Retired judge of the San Bernardino Super. Ct. assigned by the Chief Justice pursuant to art. VI, § 6 of the Cal. Const.) Conditionally affirmed and remanded with directions.

Steven S. Lubliner, 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.

I.

INTRODUCTION

In 2010, defendant and appellant Keith Thomas pled guilty to voluntary manslaughter (Pen. Code, § 192, subd. (a)[1]) and attempted murder (§ 664/187) with personal-use firearm enhancements (§§ 12022.5, subd. (a)(1), 12022.53, subd. (b)) and gang enhancements (§ 186.22, subd. (b)(1)).

In 2022, defendant petitioned for resentencing under section 1172.6. The trial court denied the petition at the prima facie stage, and we reversed. Our Supreme Court granted review, vacated our prior opinion, and transferred the matter back to us with directions to reconsider the matter in light of *People v. Patton* (2025) 17 Cal.5th 549 (*Patton*). After receiving supplemental briefing from the parties, we have done so. We conditionally affirm the trial court's order denying defendant's petition and remand the case to the trial court with directions to allow defendant to amend his petition within 30 days of remand. (See *id.* at pp. 569-570.)

II.

FACTUAL AND PROCEDURAL BACKGROUND

In 2006, defendant was charged with one count of murder. (§ 187, subd. (a).) The complaint alleged that defendant had personally used a firearm, discharged a firearm, and discharged a firearm causing great bodily injury and death (§ 12022.53, subds. (b)-(d)).

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

An amendment to the complaint alleged that defendant committed the offense to benefit a criminal street gang. (§ 186.22, subd. (b)(1)(C).)

The trial court held a preliminary hearing on the complaint in July 2007. The only witness to testify at the hearing was San Bernardino Police Department officer William Flesher. Officer Flesher testified that the victim's brother witnessed defendant shoot and kill the victim. The witness identified a picture of defendant as the shooter and explained what had happened in detail.[2] Officer Flesher then testified that another witness said he was at the scene with the victim and his brother and saw defendant shoot the victim. That witness also identified the defendant in a photograph for Officer Flesher. Officer Flesher also testified that he spoke with two males who witnessed the shooting, but could not identify the shooter, although they said the victim's brother told them that defendant was the shooter. On cross-examination, Officer Flesher admitted that the only proof he had that no one other than defendant was armed was from the two eyewitnesses' statements.

Based on Officer Flesher's preliminary hearing testimony, the trial court held defendant to answer on the murder charge and firearm use enhancement. (The prosecution did not seek an order holding defendant to answer on the street gang enhancement.)

Shortly after the preliminary hearing, the prosecution filed an information charging defendant with murder with firearm enhancement allegations under section

[2] The specifics of Officer Flesher's testimony are not relevant to resolve defendant's appeal, so we do not recount them.

12022.53. About three years later, the prosecution filed an amended information that added alternative firearm enhancement allegations under section 12022.5, subdivisions (a) and (d).

In June 2010, the parties entered into a plea agreement. Under that agreement, defendant would plead guilty to a new count charging voluntary manslaughter with a personal-use firearm enhancement allegation under section 12022.5, subdivision (a), and he would be sentenced to 36 years, eight months. Defendant pled guilty pursuant to the agreement later that day. A minute order from the hearing states that the information was amended by interlineation to include the charges defendant pled to and that there was a "[f]actual basis established." At the sentencing hearing, the trial court sentenced defendant to the agreed-on 36 years, eight months.

In May 2022, defendant petitioned for resentencing under section 1172.6. The petition was filed on a standardized form with "checkbox" allegations without any additional allegations.{CT 33-34} The prosecution filed an "Informal Response" opposing the petition. The prosecution argued defendant was ineligible for relief as a matter of law because the preliminary transcript conclusively established that defendant was the actual killer.

The trial court appointed counsel for defendant and received a "Prima Facie Brief" from him.{CT 77} In that brief, defendant argued he made a prima facie showing because he "made the required allegations that showed he was not the actual killer" in his petition.{CT 83} Defendant offered no additional facts or allegations.{CT 83-84}

The trial court held a hearing on the petition, and defendant submitted on his brief.{RT 4} The trial court then denied the petition. Based exclusively on the preliminary hearing transcript,{RT 5-6} the trial court found that defendant was not entitled to relief because he was "the actual killer/shooter and acted with intent to kill."{CT 86; RT 5-6}

III.

DISCUSSION

Defendant contends the trial court erroneously denied his petition at the prima facie stage because he sufficiently alleged he was entitled to relief and the record of conviction does not conclusively establish otherwise. Defendant argues that Officer Flesher's preliminary hearing testimony was inadmissible hearsay under section 1172.6, subdivision (d)(3) and, even if it were properly admitted, it does not conclusively refute defendant's allegations that he is entitled to relief.

Before the effective date of Senate Bill No. 1437 (2017-2018 Reg. Sess.) (Stats. 2018, ch. 1015), malice could be imputed to a person who did not personally harbor it under two theories: (1) the felony-murder rule, and (2) the natural and probable consequences doctrine. Under the felony-murder rule, a defendant could be liable for first or second degree murder if the defendant or an accomplice killed someone during the commission or attempted commission of an inherently dangerous felony. (*People v. Powell* (2018) 5 Cal.5th 921, 942.) Under the natural and probable consequences doctrine, an aider and abettor could be found "guilty not only of the intended, or target,

crime but also of any other crime a principal in the target crime actually commits (the nontarget crime) that is a natural and probable consequence of the target crime." (*People v. Smith* (2014) 60 Cal.4th 603, 611.)

Senate Bill No. 1437 amended the statutes defining malice (§ 188) and felony murder (§ 189, subd. (e)) to "eliminate[ ] natural and probable consequences liability for murder as it applies to aiding and abetting, and limit[ ] the scope of the felony-murder rule." (*People v. Lewis* (2021) 11 Cal.5th 952, 957 (*Lewis*).) It also added former section 1170.95, "which creates a procedure for convicted murderers who could not be convicted under the law as amended to retroactively seek relief." (*Lewis, supra,* at p. 957.) Effective January 1, 2022, Senate Bill No. 775 (2021-2022 Reg. Sess.) (Stats. 2021, ch. 551, § 2) amended section 1170.95 to extend the resentencing procedures to a person convicted under any "other theory under which malice is imputed to a person based solely on that person's participation in a crime." Former section 1170.95 has since been renumbered as section 1172.6, with no substantive changes. (Stats. 2022, ch. 58, § 10.)

If a section 1172.6 petition contains all required information (e.g., declaration of eligibility, case information, any request for appointed counsel), the trial court "must 'review the petition and determine if the petitioner has made a prima facie showing that the petitioner falls within the provisions of [section 1172.6].' [Citation.] If the petitioner has made this initial prima facie showing, he or she is entitled to appointed counsel, if requested, and the prosecutor must file a response, and the petitioner may file a reply. [Citation.] The court then reviews the petition a second time. If it concludes in light of

this briefing that the petitioner has made a prima facie showing of entitlement to relief, it must issue an order to show cause and hold an evidentiary hearing to determine whether to vacate the murder conviction and recall the sentence and resentence the petitioner on any remaining counts." (*People v. Roldan* (2020) 56 Cal.App.5th 997, 1003.)

When conducting the prima facie review, the trial court must assume the truth of the petition's allegations unless they are refuted by the record of conviction. (*Lewis, supra*, 11 Cal.5th at p. 971.) As relevant here, if a petition is supported only by "conclusory, checkbox allegations" and the preliminary hearing transcript contains "unchallenged, relief-foreclosing facts," then the trial court may deny the petition at the prima facie stage. (*Patton*, *supra*, 17 Cal.5th at p. 564.) This is because "a section 1172.6 petitioner who, despite having access to counsel upon submission of a facially sufficient petition, offers only conclusory allegations of entitlement to relief, in response to a record of conviction that demonstrates the petitioner's conviction was under a still-valid theory, has not, thereby, made a prima facie showing." (*Id*. at p. 565-566.)

However, "petitioners need not, at the prima facie stage, meet an evidentiary burden of proof to establish entitlement to relief, such as the burden of proof applicable to the People if trying to defeat relief at the later [section 1172.6,] subdivision (d)(3) [evidentiary] hearing. Rather, petitioners confronting a record of conviction that demonstrates relief is unavailable have the burden of coming forward with nonconclusory allegations to alert the prosecution and the court to what issues an evidentiary hearing would entail." (*Patton*, *supra*, 17 Cal.5th at pp. 566-567.)

We review de novo whether the record of conviction establishes that the petitioner is ineligible for resentencing relief. (*People v. Lopez* (2022) 78 Cal.App.5th 1, 14.)

Patton confirms that defendant is not entitled to resentencing relief. To begin with, the fact that defendant admitted to a personal-use firearm enhancement "tend[s] to corroborate this view." (*Patton*, *supra*, 17 Cal.5th at p. 563.) And, under *Patton*, the trial court here properly considered the preliminary hearing transcript to make a prima facie determination that defendant was the actual killer and thus ineligible for resentencing.[3] As in *Patton*, defendant "submitted a preprinted form declaration with checked boxes indicating his belief that he met the statutory requirements for relief," and the People responded by "offer[ing] the preliminary hearing transcript." (*Id*. at p. 563.) The transcript showed that, according to Officer Flesher, two eyewitnesses identified defendant as the victim's shooter. Defendant did not even challenge, much less refute this testimony showing that he was the actual killer. Instead, defendant "offer[ed] only conclusory allegations of entitlement to relief, in response to a record of conviction that

[3] Defendant argues that the trial court erred in relying on the preliminary hearing transcript because it consisted almost entirely of Officer Flesher's hearsay. In support, defendant argues that because hearsay testimony is inadmissible at an *evidentiary* hearing (§ 1172.6, subdivision (d)(3)), it is likewise inadmissible at the prima facie stage. Defendant forfeited this argument by failing to assert it in the trial court. (*People v. Vance* (2023) 94 Cal.App.5th 706, 713-714{Fourth Dist., Div. 2}.) The People relied heavily on Officer Flesher's hearsay statements in the preliminary hearing transcript in their Informal Response, but defendant's responding "Prima Facie Brief" did not object on hearsay grounds. Nor did defendant object at the prima facie hearing. He instead submitted on his brief.

demonstrate[d] [his] conviction was under a still-valid theory." (*Id.* at p. 565.)[4] This was insufficient to meet his prima face burden. (See *People v. Glass* (2025) 110 Cal.App.5th 922, 929-930.)

On the record before it, the trial court properly found that defendant had not made a prima facie showing. We therefore affirm the trial court's order denying defendant's petition.

Defendant requests that, if we affirm, we should remand with directions to afford him 30 days to amend his petition to plead additional facts. (See *Patton*, *supra*, 17 Cal.5th at pp. 569-570.) The People do not address the request. Because defendant "did not have the benefit of *Patton*'s guidance during the prima facie stage before the trial court," we grant his request. (*People v. Glass*, *supra*, 110 Cal.App.5th at p. 930.)

IV.

DISPOSITION

The trial court's order denying defendant's petition is conditionally affirmed. The matter is remanded to the trial court with directions to consider any "additional facts" should defendant, within 30 days of that remand, seek to supplement his petition. (See *Patton, supra*, 17 Cal.5th at p. 570.) If defendant files an amended petition for resentencing within 30 days after remand that pleads additional facts, the court shall

[4] Defendant contends the probation report shows that he is entitled to relief. But that report is not part of the record of conviction that the trial court may consider at the prima facie stage. (*People v. Gaillard* (2024) 99 Cal.App.5th 1206, 1209, fn.3.)

vacate its order denying the original petition and consider the additional facts in determining whether defendant has made a prima facie case for relief under section 1172.6. If defendant does not file an amended petition, the order denying the resentencing petition shall be final.

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CODRINGTON
J.

We concur:

McKINSTER
Acting P. J.

MENETREZ
J.